No. 25-1199

In the Supreme Court of the United States

FRED DAVIS CLARK, JR., 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

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. 2255—which allows a motion by "a prisoner in custody * * * claiming the right to be released," 28 U.S.C. 2255(a)—permits petitioner's challenges to the noncustodial restitution and forfeiture portions of his sentence.

2. Whether petitioner was entitled to a certificate of appealability on that issue.

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. 8a, 9a) are not reported in the Federal Reporter but the first is available at 2025 WL 4693982. The order of the district court (Pet. App. 1a-7a) is not reported.

JURISDICTION

The order of the court of appeals denying reconsideration was entered on December 17, 2025. On January 20, 2026, Justice Thomas extended the time within which to file a petition for a writ of certiorari to April 16, 2026, and the petition was filed on that date. 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 Southern District of Florida, petitioner was convicted on three counts of bank fraud, in violation of 18 U.S.C. 1344; three counts of making a false statement in connection with a federally insured loan, in violation of 18 U.S.C. 1014; and one count of obstructing an official proceeding, in violation of 18 U.S.C. 1512(c)(2). 13-cr-10034 Am. Judgment 1 (June 27, 2016). The district court sentenced petitioner to 40 years of imprisonment, to be followed by five years of supervised release, and ordered approximately $179 million in restitution and $310 million in forfeitures. *Id.* at 2-3, 5-6; see Pet. App. 2a-3a. While petitioner's appeal was pending, petitioner received a commutation of his prison sentence to time served, but his term of supervised release and the financial penalties in his sentence were left intact. Pet. App. 3a-4a. Petitioner then moved to dismiss his own appeal and the court of appeals granted his request. 16-10811 C.A. Order (May 18, 2021).

One year later, petitioner filed a motion under 28 U.S.C. 2255, challenging the forfeiture and restitution penalties of his sentence. Pet. App. 4a. The district court denied the motion and denied a certificate of appealability. *Id.* at 1a-7a. The court of appeals denied a certificate of appealability, *id.* at 8a, and denied reconsideration, *id.* at 9a.

1. From 2004 to 2008, petitioner was the architect of a complex fraudulent real-estate investment scheme. 16-10811 Gov't C.A. Br. 2-7 (Nov. 1, 2017) (summarizing petitioner's scheme). The scheme generated $750 million in real-estate transactions and yielded $280 million for petitioners' businesses from which he diverted tens of millions of dollars to himself. *Id.* at 3-7. His scheme ultimately caused over $175 million in losses to financial institutions, investors, and others. *Id.* at 7. When the Securities and Exchange Commission later investigated

his scheme, petitioner gave false and misleading testimony under oath. *Id.* at 8.

A federal grand jury indicted petitioner on multiple counts. 16-10811 Gov't C.A. Br. 1. After petitioner's first trial ended in a hung jury, petitioner was retried on a second superseding indictment. *Ibid.* The jury found petitioner guilty of three counts of bank fraud, in violation of 18 U.S.C. 1344; three counts of making a false statement in connection with a federally insured loan, in violation of 18 U.S.C. 1014; and one count of obstructing an official proceeding, in violation of 18 U.S.C. 1512(c)(2). 13-cr-10034 Am. Judgment 1.

The district court sentenced petitioner to 40 years of imprisonment, to be followed by five years of supervised release. Am. Judgment 2-3. The court also ordered petitioner to pay \$179.08 million in restitution payments to his victims, *id.* at 5, as well as a total of \$308.88 million in forfeitures: \$303.8 million for the bank-fraud counts; \$646,800, \$565,900, and \$565,900 for the false-loan-statement counts; and \$3.3 million for the obstruction count. 13-cr-10034 D. Ct. Order of Forfeiture 1-3 (Feb. 25, 2016).[1]

2. On appeal, petitioner successfully moved without opposition to file an oversized appellate brief, based on his assertion that the additional words were necessary to address the issues in this "complex" case, which involved a "jury trial last[ing] four-and-a-half weeks [that] was followed by lengthy and contested sentencing and restitution hearings." 16-10811 C.A. Doc. 44, at 1 (Feb.

[1] The court also ordered petitioner to forfeit his interest in four identified assets, 13-cr-10034 D. Ct. Order of Forfeiture 3, but the government never took those assets into custody and the court subsequently vacated its forfeiture order regarding those assets. 13-cr-10034 Order 2 (July 2, 2026).

23, 2017); see 16-10811 C.A. Order (Feb. 27, 2017). Petitioner's expanded appellate brief then challenged all seven of his convictions, asserting various errors that purportedly warranted a new trial. 16-10811 Corrected Pet. C.A. Br. 23-65. Petitioner also challenged the district court's application of the Sentencing Guidelines. *Id.* at 65-68. Petitioner did not, however, challenge on appeal the restitution and forfeiture aspects of his sentence beyond challenging the convictions on which they rested.

On January 13, 2021—approximately one year after oral argument in petitioner's appeal—petitioner received a commutation of his prison sentence to time served, but the commutation left intact petitioner's five-year term of supervised release, "the remaining unpaid balances, if any of [his] restitution obligation," and "the entirety of the forfeiture obligation." Pet. App. 3a-4a; see 16-10811 C.A. Docket Entry No. 128 (Jan. 15, 2020) (oral argument). That same day, petitioner was released from Bureau of Prisons custody. Pet. App. 4a.

The court of appeals ordered the parties to address "what effect, if any, the commutation may have on th[e] appeal," 16-10811 C.A. Order (Jan. 15, 2021). But before the parties responded to that order, petitioner moved to file a supplemental brief to independently challenge the restitution and forfeiture components of his sentence. 16-10811 C.A. Doc. 141 (Apr. 19, 2021); cf. 16-10811 C.A. Order (Apr. 20, 2021) (extending the time to respond to order).

Petitioner acknowledged that none of the issues that he had presented on appeal "directly concerned the $179 million restitution award" or "the $309 million forfeiture money judgment." 16-10811 C.A. Doc. 141, at 3. But he asserted that "there wasn't any space for those arguments" in the oversize brief that he had been permitted.

Id. at 4; see *id.* at 10. And he represented that because "the restitution and forfeiture issues were subsumed under his challenges to the judgment itself," his counsel had deemed it "unnecessary to challenge restitution and forfeiture on appeal because, if [he] prevailed on appeal, the judgment (and its corresponding restitution and forfeiture obligations) would be vacated," *id.* at 5, 10.

The court denied the request for supplemental briefing. 16-10811 C.A. Order (Apr. 28, 2021). Petitioner then moved the court of appeals to dismiss his appeal entirely. 16-10811 C.A. Doc. 146 (May 17, 2021). Although petitioner had represented to the court of appeals that his appellate challenge to his convictions would, if successful, eliminate the restitution and forfeiture components of his sentence, see p. 5, *supra*, he represented to the court that he was "voluntarily and unequivocally abandoning his appeal" and argued that the court therefore "should dismiss [his] appeal." 16-10811 C.A. Doc. 146, at 3. The court of appeals granted petitioner's request, dismissing his appeal. 16-10811 C.A. Order (May 18, 2021).

3. One year later, petitioner moved the district court to vacate his sentence under 28 U.S.C. 2255. Pet. App. 4a. Section 2255 provides that a prisoner "in custody under sentence of [a federal court] claiming the right to be released" may move the court that imposed the sentence to vacate, set aside, or correct the sentence. 28 U.S.C. 2255(a).

Petitioner's Section 2255 motion did not challenge his custody or assert a right to be released from his then-remaining term of supervised release. See Pet. App. 1a-2a. Nor did petitioner challenge the underlying conviction itself. 13-cr-10034 D. Ct. Doc. 745, at 4-7, 17-23 (May 18, 2022). He instead challenged only the constitutionality of the restitution and forfeiture components of his sentence. See *ibid.*; see also Pet. App. 1a-2a.

The government maintained that petitioner's Section 2255 motion should be denied for three independent reasons: (1) petitioner's "challenge to the restitution and forfeiture orders are not cognizable under § 2255"; (2) petitioner procedurally defaulted those challenges by failing to raise them in his direct appeal; and (3) the constitutional claims lacked merit. Pet. App. 4a; see 13-cr-10034 D. Ct. Doc. 751, at 1, 5-9 & n.5 (Oct. 6, 2022).

The district court denied petitioner's Section 2255 motion. Pet. App. 1a-7a. The court observed that, under settled Eleventh Circuit precedent, "'collateral' challenges to noncustodial punishment, such as challenges to restitution, cannot be addressed under § 2255." *Id.* at 5a-6a.

Before a federal prisoner may appeal from a final Section 2255 order, he must obtain a certificate of appealability issued by "a circuit justice or judge." 28 U.S.C. 2253(c)(1). A certificate of appealability may issue only if the prisoner has made "a 'substantial showing of the denial of a constitutional right.'" *Gonzalez* v. *Thaler*, 565 U.S. 134, 137, 143 (2012) (quoting 28 U.S.C. 2253(c)(2)). Where a district court has denied relief on procedural grounds, a prisoner must "show both [1] 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Id.* at 140-141 (quoting *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000)).

Here, the district court denied a certificate of appealability. Pet. App. 6a-7a.

4. Petitioner applied to the court of appeals for a certificate of appealability. 25-10955 C.A. Doc. 9 (Apr. 6, 2025). He accepted that the governing standard "'has two components'" requiring that he make "'both [of two] showings,'" *i.e.*, that jurists of reason would find (1) that "the [district] court's jurisdictional holding debatable" and (2) that his Section 2255 "petition debatably states a valid denial of a constitutional right." *Id.* at 18 (citing *Slack*, 529 U.S. at 478). Petitioner accordingly argued that "[r]easonable jurists would debate whether [his motion] is jurisdictionally cognizable under § 2255, from a procedural perspective," *ibid.*; see *id.* at 19-28, and that such jurists would also "'find it debatable whether [his] petition states a valid claim of the denial of a constitutional right,'" *id.* at 33 (citation omitted); see *id.* at 33-38.

The court of appeals, acting through a single circuit judge, denied petitioner's application. Pet. App. 8a. The court stated that, to obtain such a certificate, petitioner "must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise." *Ibid.* The court stated that petitioner "failed to make the requisite showing." *Ibid.*

A two-judge panel denied petitioner's motion for reconsideration, explaining that petitioner provided no "arguments of merit to warrant relief." Pet. App. 9a; cf. 11th Cir. R. 22-1(c). Shortly thereafter, petitioner completed his term of supervised release. See 25-10955 C.A. Doc. 9, at 25 (acknowledging that petitioner's supervised-release term would end in January 2026).

ARGUMENT

Petitioner contends (Pet. 21-26) that he was entitled to challenge the noncustodial restitution and forfeiture components of his sentence under 28 U.S.C. 2255. Petitioner further contends (Pet. 8-21) that he should been granted a certificate of appealability because the courts of appeals have disagreed about that procedural issue, showing that reasonable jurists disagree on the question. The orders of the court of appeals are correct and do not warrant this Court's review. The district court correctly determined that Section 2255 does not extend to petitioner's claims challenging only the noncustodial restitution and forfeiture components of his sentence, and the courts of appeals are not divided about whether such challenges to noncustodial aspects of a sentence like petitioner's are cognizable under Section 2255. Thus, the legal predicate for petitioner's second question does not exist and, in any event, that question does not warrant this Court's review. Indeed, this case would be a poor vehicle for review, because petitioner's procedural default of his underlying challenges to the restitution and forfeiture components of his sentence, by failing to present them on his direct appeal, independently bars Section 2255 relief. The Court should deny certiorari.

1. Petitioner contends (Pet. 21-26) that he was entitled to challenge the restitution and forfeiture components of his sentence in a motion under Section 2255. Section 2255 applies where "[a] prisoner in custody under sentence of a [federal] court * * * claim[s] the right to be released." 28 U.S.C. 2255(a). But because restitution and forfeiture, like other financial penalties, do not impose custody or affect a prisoner's right to be released from custody, orders imposing such penalties are not subject to direct collateral attack under Section 2255.

Accordingly, no court of appeals to have fully considered and squarely addressed the question has held that Section 2255 authorizes challenges to such monetary sanctions. See Brian R. Means, *Postconviction Remedies* § 7:7 (June 2026 update) ("Lower courts * * * have uniformly held that the imposition of a fine or an order of restitution does not satisfy the 'custody' requirement") (footnotes omitted); *id.* nn.2-3 (collecting cases); see, *e.g.*, *United States* v. *Mayhew*, 995 F.3d 171, 182-183 (4th Cir. 2021) (citing cases); *United States* v. *Rutigliano*, 887 F.3d 98, 104-107 & n.2 (2d Cir. 2018) (same); *United States* v. *Ross*, 801 F.3d 374, 380-381 (3d Cir. 2015) (same); *Mamone* v. *United States*, 559 F.3d 1209, 1210-1211 (11th Cir. 2009) (per curiam) (same); *United States* v. *Bernard*, 351 F.3d 360, 361 (8th Cir. 2003) (same), cert. denied, 541 U.S. 1000 (2004); *United States* v. *Thiele*, 314 F.3d 399, 401-402 & n.3 (9th Cir. 2002) (same), cert. denied, 540 U.S. 839 (2003). Petitioner errs in contending (Pet. 21-22) that the Second and Sixth Circuits have held otherwise.

The Second Circuit's decision in *Gonzalez* v. *United States*, 792 F.3d 232 (2015) (per curiam) (cited at Pet. 21), concluded that a criminal judgment becomes final for purposes of Section 2255's statute of limitations only after substantive proceedings, including an amended restitution order that follows an appellate vacatur of the original one, have terminated. See *id.* at 239. In discussing the issue, the court noted that it had "'not as yet foreclosed the possibility"' that, in a "rare situation," "'a restitution order might entail a sufficiently severe restraint on liberty * * * as to amount to a form of custody.'" *Id.* at 237 (quoting *Kaminski* v. *United States*, 339 F.3d 84, 87 (2d Cir.), cert. denied, 540 U.S. 1084 (2003)).

But in the decision that *Gonzalez* quotes, the Second Circuit determined that "the restitution order before [it]" was *not* a "custod[ial]" punishment and thus could *not* be challenged under Section 2255. *Kaminski*, 339 F.3d at 87. The court stated that it "need not reach" the question "[w]hether a fine or restitution order could ever be such a restraint on the liberty of a petitioner as to amount to custody." *Ibid.* And the Second Circuit has since continued to "le[ave] open th[at] question" and as yet has not found occasion to "pronounce[] 'fines and restitution orders to be, *ipso facto*, noncustodial' so as categorically to preclude their § 2255 review." *Rutigliano*, 887 F.3d at 105 (citation omitted). The court has also observed that district courts applying its precedent "dismiss[] § 2255 challenges to even multi-million-dollar restitution orders," and the Second Circuit itself has continued to reject "challenges to the restitution parts of [prisoners'] sentences" that have been presented to it on appeal as "not cognizable under § 2255." *Id.* at 106-107.

In *United States* v. *Watroba*, 56 F.3d 28 (6th Cir.), cert. denied, 516 U.S. 904 (1995), the Sixth Circuit, like other courts of appeals, recognized that a federal prisoner may not challenge the imposition of a monetary penalty under Section 2255 in the context of criminal fines on which release does not depend, because such a penalty does not satisfy Section 2255's "'custody' requirement." *Id.* at 29 & n.1. And the court has applied *Watroba* in determining that a prisoner could not challenge a "monetary assessment" under Section 2255 because doing so does "not 'claim[] the right to be released' from custody." *Amaya* v. *United States*, 71 F.4th 487, 490 (6th Cir. 2023) (following *Watroba* in considering challenge to special assessment).

Notwithstanding those decisions, petitioner suggests (Pet. 22) that *Ratliff* v. *United States*, 999 F.2d 1023, 1027 (6th Cir. 1993), reflects that monetary restitution may properly be challenged under Section 2255. *Ratliff*, however, did not address that question. *Ratliff* rejected the government's contention that the prisoner procedurally defaulted his challenge to an order of restitution because, in *Ratliff*, both cause (based on ineffective assistance of counsel) and prejudice excused the default. *Id.* at 1025-1026. *Ratliff* then resolved the prisoner's Section 2255 challenge to a restitution order, *id.* at 1026-1027, without considering the distinct question (which the government did not argue) of whether Section 2255 authorizes such a challenge to a noncustodial portion of a sentence. Indeed, *Ratliff* also entertained a Section 2255 challenge to a fine without considering that Section 2255/custody question, *id.* at 1028, notwithstanding that, as *Watroba* later made clear, such challenges cannot properly be brought in the Sixth Circuit under Section 2255. See *Watroba*, 56 F.3d at 29 & n.1.

In *Weinberger* v. *United States*, 268 F.3d 346 (6th Cir. 2001), petition for cert. dismissed, 535 U.S. 967 (2002) (cited at Pet. 22), the Sixth Circuit noted in a footnote the government's position that a prisoner "cannot challenge a restitution order in a § 2255 petition because such a challenge does not claim a right to be released from custody." *Id.* at 351 n.1. After observing that its decision in *Watroba* involved a fine, rather than restitution, the court stated that it would "follow [its earlier] precedent in *Ratliff*," which "allow[ed] a petitioner to contest a restitution order under § 2255 based on a meritorious ineffective assistance of counsel claim." *Ibid.* Thus, as the Fourth Circuit has explained, the Sixth Circuit in *Weinberger* "provided [no] reasoning for [its] decision," *Mayhew*, 995 F.3d at 183, beyond its view that its prior precedent in *Ratliff*—which itself provided no discussion of the issue—had entertained an ineffective-assistance claim under Section 2255 involving restitution.

To the extent that *Weinberger*'s or *Ratliff*'s unreasoned dispositions would constitute binding precedent in the Sixth Circuit, that precedent is limited to Section 2255 claims challenging restitution based on constitutionally ineffective counsel. See *Weinberger*, 268 F.3d at 352 n.1. The Sixth Circuit itself distinguishes *Weinberger* on that ground. *Amaya*, 71 F.4th at 490 n.3 (declining to follow *Weinberger* because "*Weinberger* emphasized * * * that its rule concerned the special circumstance of ineffective assistance of counsel claims"). *Weinberger* also involved a Section 2255 petition that included an actual challenge to the prisoner's ongoing custodial sentence (based on constitutionally ineffective assistance affecting the "calculation of his offense level for sentencing") in addition to a challenge to restitution. See *Weinberger*, 268 F.3d at 351-352. The Sixth Circuit has not confronted—let alone disagreed with other circuits about—Section 2255 motions like petitioner's, which neither includes any cognizable challenge to his custody nor challenges restitution based on asserted counsel ineffectiveness. See 13-cr-10034 D. Ct. Doc. 745, at 4-7, 17-23 (May 18, 2022) (Section 2255 motion).

2. Petitioner relatedly argues (Pet. 8-21) that this Court should grant review to decide whether the certificate of appealability standard is met where the "circuit precedent" governing his case forecloses his Section 2255 claim but other courts of appeals disagree with that precedent. Pet. 8. In petitioner's view (*ibid.*), the "existence of [such] a circuit split" on his entitlement to

challenge his forfeiture and restitution orders under Section 2255 shows that "reasonable jurists could find [the] claim debatable," thus warranting a certificate of appealability.

That question, like the one discussed above, does not warrant this Court's review. The legal predicate for the second question petitioner presents is the existence of a square circuit split reflecting another court of appeals' disagreement with relevant "home circuit precedent." Pet. 8. And as previously explained, the courts of appeals are not divided over whether challenges to restitution and forfeiture like petitioner's are cognizable under Section 2255. See pp. 9-12, *supra*. The legal predicate for the certificate-of-appealability question that the petition purports to present is absent from this case.

Even if the certificate-of-appealability question were in fact presented here, it would not warrant certiorari. As the government recently explained in *Berry* v. *United States*, petition for cert. pending, No. 25-7026 (filed Mar. 10, 2026), this Court's review is unwarranted notwithstanding any limited disagreement in the courts of appeals about whether a certificate of appealability should be granted if binding circuit precedent forecloses a Section 2255 claim but the decision of another court of appeals squarely conflicts with that precedent. Br. in Opp. at 9-17 & n.2, *Berry*, *supra*. In short, the answer to that question does not appear to have any significant practical effect on the ultimate disposition of Section 2255 claims. *Id*. at 11-17.[2]

3. Finally, this case would be a poor vehicle for this Court's review. Petitioner's challenges to his restitu-

[2] The government has served petitioner with a copy of its brief in opposition in *Berry*, which is also publicly available on this Court's online docket.

tion and forfeiture orders are independently barred by the doctrine of procedural default.

If a prisoner fails to raise a claim on direct appeal, the claim is procedurally defaulted for purposes of collateral review, and a court may not consider the defaulted claim unless the prisoner establishes both "cause" for the default and "actual prejudice," or shows that he is "actually innocent" of the offense. *Bousley* v. *United States*, 523 U.S. 614, 622-623 (1998) (citations and internal quotation marks omitted). And here, despite being permitted an overlength brief, petitioner intentionally declined to challenge his sentence of restitution and forfeiture on direct appeal.

Petitioner represented to the court of appeals at that time that he had chosen to challenge his conviction, which provided the basis for his restitution and forfeiture order. See pp. 4-5, *supra*. As he recognized at the time, a successful challenge to his conviction would have eliminated his sentence, including all restitution and forfeitures. See p. 5, *supra*. But when the court of appeals properly denied petitioner's belated request to rebrief his appeal after oral argument, petitioner elected to abandon his appeal entirely rather than try to continue challenges to his conviction that could have fully eliminated the restitution and forfeiture orders. See *ibid*. His challenge to those orders on collateral review has accordingly been procedurally defaulted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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