**No. 25-1199**

# In the Supreme Court of the United States

FRED DAVIS CLARK, JR.,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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

## PETITIONER'S REPLY BRIEF


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## REPLY

### I. The Court should grant certiorari in both *Berry* and *Clark* to decide the certificate-of-appealability standard once and for all

1. A certificate of appealability should issue when an applicant has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A quarter century ago, this Court suggested in *Slack v. McDaniel* that a "substantial showing" under § 2253(c)(2) can be established by an underlying circuit split alone. 529 U.S. 473, 484 (2000). That was so because a circuit split had necessarily (1) "show[n] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" *or* (2) "show[n] … that the issues presented were adequate to deserve encouragement to proceed further." *Id.* at 483–84 (punctuation and citation omitted).

Since then, as *Berry* and *Clark* explain (along with *Berry*'s *amici*), a 3-3 circuit split has crystallized over exactly what to do with a circuit split when there's contrary home circuit precedent. *Berry* Pet. 12–17; *Berry* Reply 2–5; *Clark* Pet. 8–21. Even the Solicitor General concedes it's at least a 2-1 split. *Berry* BIO 10–11 & nn.1–2. And that split is sufficiently square, fresh, and entrenched that further percolation would be pointless. It's time for this Court to resolve it.

2. The best way to resolve this split is to grant and consolidate both *Berry* and *Clark*, which present narrow and broad versions of the same conflict. At minimum, the Court should grant *Berry* and hold *Clark*.

Here's why: *Berry* involves an acknowledged circuit split on an underlying issue in which those courts of appeals have expressly held that their holdings diverge. Thus, granting in *Berry* alone would pose the issue in its narrowest framing: whether an acknowledged circuit split presents a sufficiently "substantial question" under § 2253(c)(2) to obtain a certificate of appealability, or whether home circuit precedent is dispositive.

But *Clark* is slightly different, and granting both petitions together would allow the Court a rare chance to pursue a more consequential prize. Unlike *Berry*, which involves the narrowest kind of underlying split, *Clark* involves either an underlying split that's unacknowledged but still actual or at minimum what even the Solicitor General concedes are many instances of Article III jurists "find[ing] a claim debatable," *Slack*, 529 U.S. at 784, and leaving it open for future cases.

Thus, granting *Berry* and *Clark* together would allow the Court to consider the core issue in a broader framing: whether an acknowledged circuit split, an unacknowledged-but-actual circuit split, or *dicta* from this Court, a sister circuit, or an Article III jurist alone present a sufficiently "substantial question" under § 2253(c)(2) to obtain a certificate of appealability, or whether home circuit precedent is dispositive.

Given that broader framing of the issue if this Court simultaneously granted in *Berry* and *Clark* for consolidated merits proceedings, consider the various rules that this Court might ultimately adopt:

First, the Court could agree with the Solicitor General's merits argument and hold home circuit precedent is always dispositive, which in practice would stymy habeas applicants by inexorably leaving home circuit precedent immune from *en banc* review and "trapped in amber." *United States v. Rahimi*, 602 U.S.

680, 691 (2024). Second, the Court could agree with *Berry* but not *Clark* by drawing the line somewhere between them and holding that acknowledged circuit splits despite contrary home circuit precedent are sufficient for certificates of appealability (*Berry*), whereas unacknowledged-but-actual circuit splits or *dicta* from this Court, a sister circuit, or Article III jurists alone are not (*Clark*). Third, the Court could agree with *Berry* and *Clark* that acknowledged circuit splits, or unacknowledged-but-actual circuit splits, or *dicta* from this Court, a sister circuit, or Article III jurists are sufficient.

Thus, judicial efficiency and finality in the form of granting *Berry* and *Clark* together would outweigh judicial incrementalism in the form of granting *Berry* alone. Indeed, *Berry*'s and *Clark*'s simultaneous pendency presents a rare opportunity to fully deliberate and decide the certificate-of-appealability standard once and for all. So ultimately, the question at the certiorari stage turns on how narrowly or broadly the Court would prefer to consider the issue.

Recent history supports the broader approach. For instance, in the recent past, this Court has often granted multiple petitions together to consider particular issues with a 360-degree factual view along with the full panoply of possible legal formulations of the ultimate holding. Consider two recent examples:

First, in *Brown v. United States*, this Court granted two defendants' certiorari petitions and consolidated the cases. 602 U.S. 101, 108 (2024). That allowed this Court to consider three different timing rules for when predicate offenses might qualify as ACCA predicates. *See id.* at 108–11. Second, in *Greer v. United States*, this Court granted two defendants' certiorari petitions and consolidated the cases. 593 U.S. 503, 507 (2021).

Doing so allowed this Court to consider on plain-error review whether there was a "reasonable possibility" that one defendant would've been acquitted and whether the other wouldn't have pleaded guilty. *Id.* at 508. Thus, in cases like *Brown* and *Greer*, the purpose of granting two petitions and consolidating the cases was to allow this Court to consider the full array of options at its disposal. And that's what the Court should do here as well.

3. Regardless whether this Court takes a narrow or broad approach, the Solicitor General's vehicle concerns about *Berry* and *Clark* are unpersuasive.

3.a. For starters, resolving the split is meaningful. In *Clark*, as he did in *Berry*, the Solicitor General asserts that resolving the circuit split about the certificate-of-appealability standard is "unwarranted" because he thinks an acknowledged 3-3 or 2-1 circuit split that has hardened over a quarter century merely reflects "limited disagreement" and would have no "significant practical effect." BIO 13. In *Berry*, he claimed the "burdens of briefing and merits disposition of every case in which the issue is asserted, with an outcome controlled by circuit precedent, will secure no significant offsetting benefit to litigants or courts." *Berry* BIO 12. He is mistaken. *See Berry* Reply 6–13; *Clark* Pet. 9–15.

Most obviously, the issuance of a certificate of appealability triggers the appointment of counsel and the availability of both a petition for initial hearing *en banc* and a petition for rehearing *en banc*. *See* Fed. R. App. P 40(a), (g). In particular, petitions for initial hearing *en banc* can be especially useful tools for appellants when unreasoned circuit precedent has gone off the rails from the jump. *See, e.g.*, C.A. Docs. 42 & 53, *United States v. Ruan*, No. 24-12319 (11th Cir.)

(seeking initial *en banc* review of post-*Ruan II* 2-2-1 circuit split regarding pain clinic conspiracy convictions based on incorrect substantive-count instructions). And *en banc* rehearing can be useful even when both circuit precedent and sister circuits have incorrectly albeit unanimously rejected an appellant's position. *See, e.g.*, C.A. Docs. 117 & 123, *United States v. Lebarron*, 178 F.4th 646 (11th Cir. 2026) (No. 21-12157) (seeking rehearing of causation, *mens rea*, and *actus rei* elements of Controlled Substances Act's death enhancements at panel's unanimous invitation). Thus, the Solicitor General errs when he says "the issuance of a certificate of appealability to allow the prisoner to appeal would simply authorize an appeal to an appellate panel that itself would be bound by the same precedent." *Berry* BIO 12. That's just not how ordinary *en banc* appellate procedures work.

And resolving the split is judicially efficient. Granting certificates of appealability on debatable issues notwithstanding contrary home circuit precedent facilitates issue percolation and precedential refinements, which could simplify or even reduce this Court's caseload. *See Berry* Reply 8. Similarly, the burdens on courts of appeals that correctly issue certificates of appealability despite contrary home circuit precedent are minimal. *See id.* at 10 (citing *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983)).

3.b. Also, the Solicitor General's vehicle concerns about *Berry* are fanciful (*see Berry* Reply 13–15), and his vehicle concerns about *Clark* are equally feigned.

Indeed, the Solicitor General doesn't seriously dispute that the issue is important and recurring or that it implicates major structural concerns for the development of federal habeas law. *See Clark* Pet. 14–15. Nor does the Solicitor General dispute that Petitioner "'pressed'" his question in both the district court and the court of appeals, both of which "'passed'" on it. *United States v. Wells*, 519 U.S. 482, 488 (1997) (quoting *United States v. Williams*, 504 U.S. 36, 42 (1992)); *see also Clark* Pet. 15–16. Instead, he raises two other vehicle concerns. Neither has merit.

3.b.1. The Solicitor General quibbles with the taxonomy of Petitioner's underlying circuit split about the redressability of financial penalties under § 2255. BIO 8–12. In fact, trying to dodge the question, he tactically inverts the order of Petitioner's certiorari arguments. BIO 8–14. Regardless, he's wrong.

He doesn't dispute that, as Petitioner already explained, "[t]he First, Third, Fifth, Seventh, and Eleventh Circuits have adopted an inflexible, one-size-fits-all rule that financial penalties are never cognizable under § 2255." Pet. 21 (collecting cases). Instead, he takes issue with Petitioner's interpretation of the Second and Sixth Circuit's precedents. BIO 8–12. Citing a treatise plus cases from the majority side of the split, most of which Petitioner already cited (Pet. 21), he says, "no court of appeals to have fully considered and squarely addressed the question has held that Section 2255 authorizes challenges to such monetary sanctions." BIO 9 (citations omitted).

But two of his cases expressly acknowledged "the possibility that an exceptionally draconian restitution order 'might entail a sufficiently severe restraint on liberty ... as to amount to a form of custody,' so that a challenge to the order could constitute a claim 'to be released' within the meaning of § 2255." *United States v. Mayhew*, 995 F.3d 171, 183 n.4 (4th Cir. 2021); *accord United States v. Rutigliano*, 887 F.3d 98, 105–07 (2d Cir. 2018) ("we have left open the question whether such fines and orders 'could ever be such a restraint on the liberty of a petitioner as to amount to custody'" (citation omitted)). Others never considered that possibility either way. *Mamone v. United States*, 559 F.3d 1209, 1210–11 (11th Cir. 2009); *United States v. Bernard*, 351 F.3d 360, 361 (8th Cir. 2003); *United States v. Thiele*, 314 F.3d 399, 401–02 & n.3 (9th Cir. 2002). And one of his cases (BIO 9) involved a challenge to a $100 special assessment, *see United States v. Ross*, 801 F.3d 374, 380–81 (3d Cir. 2015), which is a teeny bit different from the half *billion* dollars in financial penalties to which Petitioner (and his wife) remain subjected.

Thus, contrary to the Solicitor General's framing, it's more accurate to say that no court of appeals to have fully considered and squarely addressed the question has *rejected the possibility* that § 2255 authorizes challenges to draconian monetary sanctions. In fact, beyond the Fourth Circuit in *Mayhew*, the Solicitor General concedes that the Second Circuit has expressly and repeatedly left open the possibility that financial penalties could be so draconian that they qualify as "custody" for § 2255 purposes. BIO 9–10 (discussing *Gonzalez v. United States*, 792 F.3d 232, 237 (2d Cir. 2015), and *Kaminski v. United States*, 339 F.3d 84, 87 (2d Cir. 2003)). But neither the Fourth nor the Second Circuit has encountered a § 2255 challenge to truly draconian financial penalties as here.

Next, the Solicitor General tries to cabin the Sixth Circuit's holdings in *Ratliff v. United States*, 999 F.2d 1023, 1027 (6th Cir. 1993), and *Weinberger v. United States*, 268 F.3d 346, 362 (6th Cir. 2001), as "limited to Section 2255 claims challenging restitution based on constitutionally ineffective counsel." BIO 10–12. But he's evading Petitioner's assertion that an open-air debtor's prison—which is exactly what a half-billion-dollar financial penalty is—still qualifies as "custody" within § 2255's meaning. And his suggestion that the government "did not argue" to the Sixth Circuit whether § 2255 reaches financial-penalty claims is wrong. *See Weinberger*, 268 F.3d at 351 n.1.

Regardless whether financial penalties are framed as constitutional violations or the deprivation of effective counsel, it's indisputable that the Sixth Circuit has *twice* held that restitution awards were cognizable via § 2255. *Weinberger*, 268 F.3d at 351 n.1; *Ratliff*, 999 F.2d at 1027. Those holdings can't be harmonized with the majority of circuits to consider that statutory question, so there's an actual circuit split.

The Sixth Circuit's subsequent holdings in *United States v. Watroba*, 56 F.3d 28, 351 n.1 (6th Cir. 1995), and *Amaya v. United States*, 71 F.4th 487, 490 (6th Cir. 2023), don't alter that precedent. *Watroba* "rejected a prisoner's challenge in a § 2255 motion to the imposition of the costs of his imprisonment and supervised release—not a restitution order." *Weinberger*, 268 F.3d at 351 n.1. And *Amaya* was a § 2255 challenge to a special assessment. 71 F.4th at 490. Moreover, the Sixth Circuit's horizontal *stare decisis* places exclusive precedential weight on the first panel to decide a question, with no exceptions for prior panels that overlooked possible arguments. *See Rutherford v. Columbia Gas*, 575 F.3d 616, 621 (6th Cir. 2009).

So what's the upshot? No court of appeals to have fully considered and squarely addressed the question has *rejected the possibility* that § 2255 authorizes challenges to draconian monetary sanctions. But at least one court of appeals (the Second) has expressly and repeatedly left that question open, and another (the Fourth) has acknowledged the possibility that it could be an open question. As a general matter, five courts of appeals have adopted rules that generally reject the possibility that financial penalties are cognizable under § 2255, at least in mine run cases. But at least one (the Sixth) has twice held that restitution awards were cognizable.

This disarray reflects that reasonable jurists are actively debating the question per *Slack* and awaiting a case with appropriate facts to resolve it. But even though Petitioner's case arose with the appropriate facts, the Eleventh Circuit's one-size-fits-all rule that renders home circuit dispositive barred it from issuing a certificate of appealability and prevented it from considering the question *en banc* via a petition for initial hearing *en banc* or a petition for rehearing *en banc*. That's the problem—and that's why it's so critical for this Court to revisit the certificate-of-appealability standard broadly to resolve it once and for all.

3.b.2. Reprising his similarly baseless objection in *Berry* (*see Berry* BIO 18–20), the Solicitor General says Petitioner procedurally defaulted his claims about his financial penalties when he dismissed his appeal. BIO 13–14. But he's wrong.

Factually, he overlooks that Petitioner's 25-page motion for supplemental briefing presented his substantive arguments about restitution and forfeiture (Pet. Supp. App. 11a–17a), and the court of appeals denied leave after considering those merits (*id.* 20a). Thus, for preservation purposes, Petitioner "'pressed'" the question, and the court of appeals "'passed'" upon it. *Wells*, 519 U.S. at 488 (citation omitted). If a claim is preserved for further appellate review, it can't be procedurally defaulted per § 2255. Indeed, the Solicitor General cites no authority for the proposition that litigants procedurally default positions asserted by motion (*see* Pet. Supp. App. 1a–19a) and rejected by interlocutory order (*see id.* 20a). And Petitioner is aware of none.

*Bousley v. United States*, 523 U.S. 614, 622–23 (1998) (cited at BIO 14), doesn't hold otherwise. Instead, it describes the procedural-default standard that the court of appeals would apply on remand. *See Berry* Reply 13–15. Indeed, it's odd that the Solicitor General is pursuing a procedural-default argument that tries to capitalize on the government's prior successful opposition to Petitioner's motion for supplemental briefing. *See* C.A. Doc. 144 at 2–12, *United States v. Clark*, No. 16-10811 (11th Cir.).

4. Finally, the Solicitor General's merits defense of a rule that always renders home circuit precedent dispositive (BIO 8) is half-hearted and wrong. *See Berry* Reply 5; *Clark* Pet. 16–21.

## II. The Court should also grant certiorari to consider whether § 2255 challenges to draconian financial penalties are cognizable when they restrain liberty

A half billion dollars is a lot of money. *See Clark* Pet. 21–26. That financial penalty is so draconian that it bars Petitioner (and his wife) from participating in political and commercial life. *Id.* In effect, they're unconstitutionally imprisoned by financial penalties. *Id.*

The Solicitor General doesn't dispute that this issue is important or that this Court has unambiguously held that restitution and forfeiture awards are criminal punishment. Pet. 22. Nor does he dispute that criminal justice debt wreaks havoc on defendants even after they've completed their sentences, including the loss of voting rights and limitations on the ability to engage in commerce. *Id.* at 22–24. Nor does he dispute this Court has repeatedly held that physical custody is not a strict jurisdictional requirement under § 2255. *Id.* at 25–26. Nor does he dispute that debtor's prisons are unconstitutional. *Id.* at 26.

Thus, if the Court grants certiorari on the certificate-of-appealability question, it should also grant certiorari on the substantive question whether draconian financial penalties are cognizable via § 2255. The Sixth Circuit has twice held restitution awards are cognizable, *Weinberger*, 268 F.3d at 351 n.1; *Ratliff*, 999 F.2d at 1027, the Fourth Circuit has acknowledged the possibility that financial penalties could be cognizable, *Mayhew*, 995 F.3d at 183 n.4, and the Second Circuit has repeatedly and expressly left that question open, *Rutigliano*, 887 F.3d at 105–07; *Gonzalez*, 792 F.3d at 237; *Kaminski*, 339 F.3d at 87. No circuit has expressly rejected the possibility. This Court should resolve it. And resolving it would also buttress that the *Slack* standard means what it says.

## CONCLUSION

The *Berry* and *Clark* petitions should be granted and consolidated. Alternatively, the *Berry* petition should be granted, and the *Clark* petition should be held.

Respectfully submitted,

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