

No. 25-7026

IN THE
Supreme Court of the United States

COREY DURAN BERRY,
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

SUPPLEMENTAL BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
SUPPLEMENTAL BRIEF FOR PETITIONER	1
I. The COA question warrants review	1
II. This case is the rare, ideal vehicle	2
III. The Court should hold rather than consolidate <i>Clark</i>	6
CONCLUSION.....	8

TABLE OF AUTHORITIES

Cases

<i>Beeman v. United States</i> , 871 F.3d 1215 (11th Cir. 2017)	3–5
<i>Clark v. United States</i> , (U.S. No. 25-1199)	1–8
<i>Crespo v. United States</i> , 142 S. Ct. 841 (2022) (mem.) (U.S. No. 21-6585).....	5
<i>Fernandez v. United States</i> , 114 F.4th 1170 (11th Cir. 2024).....	3–5
<i>Granda v. United States</i> , 146 S. Ct. 1817 (2026) (mem.) (U.S. No. 25-6759).....	5
<i>Hamilton v. Sec’y, Fla. Dep’t of Corr.</i> , 793 F.3d 1261 (11th Cir. 2015)	2–3, 5
<i>Ortiz v. United States</i> , 145 S. Ct. 225 (2024) (mem.) (U.S. No. 23-7649).....	5
<i>Ramdeo v. United States</i> , 136 F.4th 1348 (11th Cir. 2025).....	6

Statutes

18 U.S.C. § 924(c).....	5
28 U.S.C. § 2255.....	3, 5–6

Rule

Sup. Ct. R. 15.8	1
------------------------	---

Other Authorities

<i>Brown v. United States</i> , 602 U.S. 101 (2024), Cert. Reply (U.S. No. 22-6640) (Apr. 13, 2023)	6
<i>Pugin v. Garland</i> , 599 U.S. 600 (2023), Br. for the Resp. (U.S. No. 22-23) (Oct. 7, 2022)	6
<i>Rutherford v. United States</i> , 146 S. Ct. 1320 (2026), Cert. Reply (U.S. No. 24-820) (May 13, 2025)	6
<i>Young v. Swaney</i> , 145 S. Ct. 1889 (2025) (mem.) Br. for the Resp. (U.S. No. 24-686) (Feb. 26, 2025)	5

SUPPLEMENTAL BRIEF FOR PETITIONER

The question presented is: should a certificate of appealability (COA) issue where a habeas petitioner's claim would be foreclosed by precedent in his home circuit but accepted by another circuit? The Court relisted this case once before the summer recess. The Court then appears to have held this case so that it could be considered alongside *Clark v. United States* (U.S. No. 25-1199), which presents the same COA question (as well as a second question). The government has now responded in *Clark*, and petitioner Clark has now replied. Pursuant to Rule 15.8 of this Court, petitioner Berry files this supplemental brief to address the recent filings in *Clark*. As explained below: (1) the government's opposition in *Clark* confirms that the COA question warrants review; (2) petitioner Clark does not dispute that *Berry* is the superior vehicle, and the record in *Clark* highlights that *Berry* is the rare vehicle that cleanly presents the COA question; and (3) Clark's alternative proposal that the Court grant review in both cases—as opposed to granting review in *Berry* alone—is unnecessary. Accordingly, the Court should grant certiorari in *Berry* and hold the petition in *Clark*.

I. The COA question warrants review.

The government was effectively afforded the opportunity to file a sur-reply in this case through its brief in *Clark*. Although the government was aware that the Court had relisted *Berry* before the summer recess, and although the government had the benefit of petitioner Berry's reply brief, the government's brief in *Clark* offers no new arguments for why the COA question presented does not warrant review. The government merely incorporates by reference its *Berry* opposition. *Clark*, BIO 13.

As a result, everything petitioner Berry wrote in his reply remains true. The circuits are divided 3–3 on the COA question. *See* Cert. Reply 2–5. The government does not defend the COA-denying rule adopted by three circuits. *See* Cert. Reply 5. And the COA question otherwise warrants review because: it recurs frequently; a habeas petitioner’s right to appeal should not depend on the happenstance of geography; and the COA-denying rule adopted by three circuits impedes them and this Court from ensuring the uniformity of federal habeas law. *See* Cert. Reply 6–13. As Berry and his *amici* have explained, the standard criteria for review are satisfied.

II. This case is the rare, ideal vehicle.

Because the COA question warrants review, the only remaining question should be: which is the better vehicle, *Berry* or *Clark*? *Berry* is the undisputed answer.

Indeed, petitioner Clark does not dispute that *Berry* is the superior vehicle. He conspicuously does not ask the Court to grant *Clark* and hold *Berry*. Instead, Clark asks the Court either to grant review in both cases (addressed *infra*) or, at a minimum, to grant *Berry* and hold *Clark*. *See Clark*, Cert. Reply 1, 11. Thus, Clark himself agrees that, if the Court grants review in one case, that case should be *Berry*.

Although Clark does not explain why *Berry* is the superior vehicle, there are several reasons. And those reasons highlight that *Berry* is not only the better vehicle here but also the rare vehicle that will cleanly present the COA question for review.

1. As petitioner Berry has explained, the basis for many COA denials is unclear, but the COA denial in *Berry* is unambiguous. The court of appeals expressly applied its precedent in *Hamilton v. Sec’y, Fla. Dep’t of Corr.*, 793 F.3d 1261, 1265–

66 (11th Cir. 2015), which established the rule that a COA must be denied whenever binding circuit precedent forecloses the petitioner’s claim, even if it would prevail in another circuit. The court also rejected Berry’s argument that *Hamilton* conflicts with this Court’s COA precedent. The court then proceeded to apply its binding burden-of-proof precedents in *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017) and *Fernandez v. United States*, 114 F.4th 1170 (11th Cir. 2024). And those precedents were the exclusive basis of the COA denial. See Pet. App. 2a–3a & n.1; Pet. 27–29; Cert. Reply 13–14. Thus, the basis of the COA denial in *Berry* is clear on its face.

In *Clark*, by contrast, the COA ruling did not cite *Hamilton* or specify the basis of the denial. The Eleventh Circuit’s single-judge order merely stated that Clark had “failed to make the requisite showing” that “reasonable jurists could find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise.” *Clark*, Pet. App. 8a. And the Eleventh Circuit’s subsequent two-judge order denied reconsideration on the ground that Clark “has offered no new evidence or arguments of merit to warrant relief.” *Clark*, Pet. App. 9a. Thus, the orders under review did not specify the basis on which the Eleventh Circuit was denying a COA.

In that regard, there were several possible bases. The district court there denied relief on the ground that Clark’s claims challenging restitution and forfeiture were not cognizable under 28 U.S.C. § 2255. (Dist. Ct. No. 23-cv-10027, ECF No. 5 at 4 (S.D. Fla.)). That is the ground on which petitioner Clark alleges a circuit conflict. But the government opposed relief on the additional grounds that Clark’s claims failed on the merits and were procedurally defaulted. (See Dist. Ct. ECF No. 4-6 at 1,

5–9 & n.5). By referring to the “merits” and “procedural issues,” the Eleventh Circuit’s single-judge order may have denied Clark a COA not because his claims were non-cognizable but rather because his claims failed on the merits and/or were procedurally defaulted. That is how Clark himself characterized the COA denial in his motion for reconsideration. (*See Clark*, C.A. ECF No. 13 at 8–10, 12–13, 16–18). So it is at best unclear whether the COA was denied on the basis of the alleged split.

2. Moreover, *Berry* is an especially good vehicle because there is no dispute that the circuits are indeed divided on the underlying burden-of-proof issue resolved in *Beeman* and *Fernandez*. As petitioner has explained: the government’s brief in opposition in *Fernandez* conceded to this Court that the circuits are divided on that issue; Judge Rosenbaum’s concurrence in *Fernandez* noted a 7–3 circuit split; and other circuits have recognized the same split for many years now. *See* Pet. 28–29; Cert. Reply 13. Because the Eleventh Circuit’s COA denial in *Berry* relied exclusively on *Beeman* / *Fernandez* to deny relief, and there is no dispute that other circuits have disagreed with those circuit precedents, this case squarely tees up the COA question.

In *Clark*, by contrast, the underlying split is disputed. The government argues that there is no split at all. It further contends that, at most, a single circuit has decided the issue in Clark’s favor (albeit without reasoning), and it has limited that precedent to ineffective assistance of counsel claims—a claim that Clark did not raise. *See Clark*, BIO 8–12. Clark disagrees. *See Clark*, Cert. Reply 7–8. Regardless of who is correct, the point here is that the parties in *Clark* dispute both the existence of an

underlying split and whether any split is implicated by that case. So the predicate of the COA question presented—*i.e.*, an underlying split—may not even exist in *Clark*.

* * *

In short, *Berry* is not only the superior vehicle but the ideal vehicle. The Eleventh Circuit’s COA order expressly relied on and reaffirmed *Hamilton*. The court then expressly applied its binding precedents in *Beeman* and *Fernandez*. There is no dispute that other circuits disagree with those precedents. And the Eleventh Circuit (and the district court) relied exclusively on those precedents to deny *Berry* relief.

Moreover, *Clark* confirms that *Berry* is also an unusually good vehicle. Pet. 4, 12, 27; Cert. Reply 13. As the record in *Clark* reflects, most cases in this posture are poor vehicles because the basis of the COA denial is unclear, and/or there is some dispute about the underlying circuit split. The Court has denied certiorari in recent years where one of those vehicle defects existed.¹ Neither defect exists here, making *Berry* the rare vehicle that squarely presents the COA question. The Court should therefore seize this unique opportunity to resolve that recurring question at long last. Indeed, it is unclear when, if ever, a vehicle this pristine will come to the Court again.²

¹ See, e.g., *Granda v. United States*, 146 S. Ct. 1817 (2026) (mem.) (U.S. No. 25-6759) (denying certiorari, without calling for a response, of the same COA question where the COA denial merely recited the COA standard); *Ortiz v. United States*, 145 S. Ct. 225 (2024) (mem.) (U.S. No. 23-7649) (same); *Crespo v. United States*, 142 S. Ct. 841 (2022) (mem.) (U.S. No. 21-6585) (same); *Young v. Swaney*, 145 S. Ct. 1889 (2025) (mem.), Br. for the Resp. 8–14 (U.S. No. 24-686) (Feb. 26, 2025) (opposing review of the same COA question on the ground that there was no underlying circuit split).

² In addition to the ideal record in this case, the COA question also has great practical importance for *Berry*. He is currently serving a seven-year prison sentence for a section 924(c) conviction that all agree is legally invalid. And section 2255 is the

III. The Court should hold rather than consolidate *Clark*.

Because the COA question warrants review, and because this case is not only the superior vehicle but the rare vehicle cleanly presenting it, the Court should grant *Berry* and hold *Clark*. Resisting that standard disposition, Clark alternatively urges the Court to grant review in both cases and consolidate them. That is unnecessary.

The Court typically consolidates cases where doing so is necessary to ensure the full presentation or resolution of the issues. *See, e.g., Rutherford v. United States*, 146 S. Ct. 1320 (2026), Cert. Reply 6–8 (U.S. No. 24-820) (May 13, 2025); *Brown v. United States*, 602 U.S. 101 (2024), Cert. Reply 1 (U.S. No. 22-6640) (Apr. 13, 2023); *Pugin v. Garland*, 599 U.S. 600 (2023), Br. for the Resp. 18–19 (U.S. No. 22-23) (Oct. 7, 2022). That is not the situation here. Petitioners Berry and Clark both advance the same position with respect to the question presented: a circuit split warrants a COA notwithstanding adverse home circuit precedent. And granting both cases would not otherwise help ensure the full consideration or resolution of the question presented. Indeed, that question is straightforward and binary; it has only two possible answers: either adverse home circuit precedent precludes a COA; or a split warrants a COA.

Clark advances two arguments for consolidation, but neither is persuasive.

1. For the first time in his reply brief, Clark draws a distinction between an underlying split that is “acknowledged” and one that is “unacknowledged-but-

exclusive remedy for that invalid conviction. Clark, by contrast, is already out of custody. *Clark*, BIO 7. And, regardless of Clark’s custodial status, circuit precedent permits him to challenge restitution/forfeiture by way of *coram nobis*. *See Ramdeo v. United States*, 136 F.4th 1348 (11th Cir. 2025). Thus, Clark does not even need a COA or a section 2255 motion to seek relief; he may petition for *coram nobis* at any time.

actual.” According to Clark, *Berry* involves the former type of split while *Clark* involves the latter. Therefore, Clark argues, the Court should grant review in both cases so that it can address both types of circuit splits. *See Clark*, Cert. Reply 1–3.

However, Clark’s distinction between types of splits is entirely contrived. As explained above, the fact that the underlying split in *Berry* is “acknowledged” makes this case an ideal vehicle. But when it comes to the merits, Berry has never argued that only an “acknowledged” split warrants a COA. And for good reason: none of the three circuits on Berry’s side of the COA split have held that the underlying split must be “acknowledged” in order to warrant a COA. Indeed, it would make little sense for the COA standard to depend on whether a split happens to be “acknowledged” (however that term is defined) at the time of the COA ruling. So it is unsurprising yet telling that Clark identifies no COA decision to recognize the illusory distinction that he now concocts between different types of splits, and Berry is not aware of one either.

Because Berry does not seek a COA rule that is limited only to “acknowledged” splits, and because no circuit distinguishes among types of splits in the COA context, granting review in both cases to address that non-existent distinction is unnecessary.

2. Given the dispute about the underlying split in his case, Clark also goes beyond splits entirely. Again for the first time in his reply, he argues that, even if there is no underlying split at all, he is *still* entitled to a COA because one circuit has left his issue open. So, he argues, the Court should grant review in both cases so that it can consider his much broader theory, which appears to be that a COA is warranted whenever a federal court reserves an issue in dicta. *See Clark*, Cert. Reply 2–3, 6–9.

However, Clark’s proposal has a fundamental flaw: his new, broader theory is not encompassed by the COA question he presented, which is expressly predicated on “the existence of [an underlying] circuit split.” *Clark*, Pet. i. And for good reason: the existence of an underlying split is the only scenario that has divided the circuits. Clark identifies no circuit to address let alone adopt his novel and dubious theory that a COA is warranted whenever any federal court leaves an issue open in dicta. Berry is unaware of any such authority either. Nor does Clark identify any confusion in the lower courts over how to apply the COA standard in that discrete scenario. His request for consolidation thus amounts to a fact-bound argument that is outside the scope of the question presented and does not satisfy the standard criteria for review.

* * *

In sum, there is no need for the Court to grant plenary review in *Clark* in addition to *Berry*. And because it is undisputed that *Berry* is the superior vehicle, the Court should simply follow the normal course by granting *Berry* and holding *Clark*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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