

No. 26-5220

ORIGINAL

FILED

MAY 22 2026

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA,
Respondent-Appellee

-VS-

JAMES HENRY KELLEY III
Petitioner-Appellant

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE FIFTH CIRCUIT

CASE NO. 25-10903

PETITION FOR WRIT OF CERTIORARI

JAMES HENRY KELLEY III

Pro-SE Petitioner

#06608-509

PO BOX 5000

Greenville, IL 62246

QUESTIONS PRESENTED

- I. Whether a second-in-time motion under 28 U.S.C. § 2255 is impermissibly “Second or successive” under AEDPA where the petitioner’s first § 2255 motion was used to reinstate a lost right to direct appeal and the district Court, upon granting that motion, Re-entered the criminal judgment and GRANTED a new direct appeal, thereby creating a new judgment that petitioner is challenging for the first time in his second-in-time § 2255 motion.
- II. Whether the Fifth Circuit’s application of U.S. v. Orozco-Ramirez, 211 F. 3d 862 (5th Cir. 2000), to bar petitioner’s second-in -time motion as “second or successive” conflicts with the holdings of a majority of circuit courts-the Second, Third, Forth’ Seventh, Ninth, Tenth, and Eleventh circuits, Which uniformly hold that a first § 2255 motion used to reinstate appellate rights does not count as a “first” petition for AEDPA purposes, and that a subsequent § 2255 attacking the convection or sentence is not “second or successive”.
- III. Whether the Fifth Circuit’s denial of Certificate of Appealability conflict with the Supreme Court’s ruling in Magwood v. Patterson, 561 U.S. 320 (2010), Panetti v. Quarterman, 551 U.S. 930 (2007) and Roe v. Flores-Ortega, 528 U.S. 470 (2000), when the district court Re-Entered petitioner’s criminal judgment specifically to afford him the direct appeal of which he was deprived by constitutionally ineffective counsel.
- IV. Whether the district court erred in denying petitioner’s collateral relief under § 2255 without conducting an evidentiary hearing on substantial claims of constitutional error arising from underlying criminal proceedings in Case No. 4:20-cr-243.

PARTIES TO THE PROCEEDINGS

Petitioner James Henry Kelley III is a federal prisoner convicted in the United States District Court for the Northern District of Texas (Criminal Case No. 4:20-CR-243-Y) and sentenced on February 2 2021 to 180 months of imprisonment pursuant to 21 U.S.C. § 841 (a)(1) and (b)(1)(B)

Respondent is the United States of America

TABLE OF CONTENTS

Questions Presented.....	3
Parties to the proceedings.....	4
Table of Contents.....	5, 6
Table of Authorities.....	7, 8
Index to Attachments.....	8
Opinion Below.....	9
Jurisdiction	9
Statutory Provisions Involved	9
 STATEMENT OF THE CASE	 10-13
A. The Underlying Convection and sentence.....	10
B. The First § 2255 Motion: Restoring the Right to a Direct Appeal.....	10, 11
C. The Out-of-Time Direct Appeal.....	11, 12
D. The Second-in-Time § 2255 Motion.....	12
E. The Fifth Circuit's Denial of Certificate of Appealability.....	12, 13
 REASONS FOR GRANTING THE WRIT.....	 13-15
I. THE CIRCUITS ARE DEEPLY AND IRRECONCILABLY DIVIDED ON WHETHER A FIRST § 2255 MOTION USED TO REINSTATE DIRECT APPEAL RIGHTS RENDER A SUBSEQUENT § 2255 MOTION "SECOND OR SUCCESSIVE"	13
A. The Fifth Circuit's Narrow and Minority Rule under Orozco-Ramirez.....	14
B. The fifth Circuit has Itself Recognized the Limits of Orozco-Ramirez.....	15
 II. THE MAJORITY OF CIRCUIT'S -SEVEN IN TOTAL- HOLD THAT PETITIONER'S SECOND-IN-TIME § 2255 IS NOT "SECON OR SUCCESSIVE"	15-21
A. The second Circuit: <u>Urinyi</u> and its progeny.....	16, 17
B. The Third Circuit: Re-Olabode and Hill.....	17, 18

C. The Fourth Circuit: in Re Goddard and Killian v Hall.....	18.
D. The Seventh Circuit: Shepeck v. United States.....	18.
E. The Ninth Circuit: Johnson v. U.S. and Winkles v. McDaniel.....	19, 20
F. The Tenth Circuit: Scott v. United States.....	20
G. The Eleventh circuit: Mclver v. United States.....	21
III. THIS COURT’S PRECEDENTS IN MAGWOOD, PANETTI, AND FLORES-ORTEGA COMPEL REVERSAL OF THE FIFTH CIRCUIT’S DECISION.....	21-24
A. Magwood v. Patterson.....	21, 22
B. Panetti v. Quarterman.....	22, 23
C. Roe v. Flores-Ortega.....	23, 24
IV. THE RE-ENTRY OF PETITIONER’S CRIMINAL JUDGMENT CONSTITUTES A “NEW JUDGMENT” UNDER MAGWOOD, MAKING PETITIONER’S SECOND § 2255 HIS FIRST CHALLENGE TO THAT JUDGMENT.....	24, 25
V. THE FIFTH CIRCUIT’S RULE FORECLOSES ANY MEANINGFUL COLLATERAL REVIEW AND WORKS A STRUCTURAL CONSTITUTIONAL INJUSTICE.....	25-29
A. The Fifth Circuit’s attack on Orozco-Ramirez Misreads AEDPA’s Text.....	27
B. The Government’s Orozco-Ramirez Argument Cannot Override the New Judgment Rule.....	28, 29
VI. THE FIFTH CIRCUIT’S RIGID BAR PRODUCES SEVERE CONSTITUTIONAL INJUSTICE AND CALLS FOR THIS COURT’S SUPERVISORY POWER.....	29-31
A. The procedural Bar was applied without the Individualized inquiry That the Constitution Requires.....	29
B. Categorical Foreclosure of Meritorious Constitutional Claims Violates Due Process and the Suspension Clause.....	30
C. The Specific Constitutional Violations Suffered by Petitioner are of Compelling Gravity.....	30, 31
Conclusion.....	32, 33

TABLE OF AUTHORITIES

SUPREME COURT CASES

Magwood v. Patterson, 561 U.S. 320 (2010)	Passim
Panetti v. Quarterman, 551 U.S. 930 (2007)	3, 13, 22, 23, 27, 28, 29
Roe v. Flores-Ortega, 528 U.S. 470 (2000)	3, 4, 13, 23, 24, 26, 29
Slack v. McDaniel, 529 U.S. 473 (2000)	27
Stewart v. Martinez-Villareal, 523 U.S. 637 (1998)	27
Strickland v. Washington, 466 U.S. 668 (1984)	10, 29, 31
Brady v. Maryland, 373 U.S. 83 (1963)	29, 30
U.S. v. Bagley, 473 U.S. 667,682 (1985)	30

CIRCUIT COURT CASES

Carranza v. United States, 794 F. 3d 237 (2 nd Cir. 2015)	17
In re Goddard, 170 F.3d 435 (4 th Cir. 1999)	18
Monroe Johnson v. United States, 362 F.3d 636 (9 th Cir. 2004)	19, 20
McIver v. United States, 307 F.3d 1327 (11 th Cir. 2002)	21
United States v. Orozco-Ramirez, 211 F.3d 862 (5 th Cir. 2000)	Passim
Re-Olabode (United States v. Olabode) 325 f. 3D 166, 170-173 (3 rd Cir. 2003)	17
Johnson v. U.S. 196 F.3d 802 (7 th Cir. 1999)	19
O'Conner v. U.S. 133 F. 3d 548, 550 (7 th Cir. 1998)	19
Scott v. United States, 124 F. 3d 1328 (10 th Cir. 1997)	20
Shepeck v. United States, 150 F. 3d 800 (7 th Cir. 1998)	19
Tuan Vu v. United States, 648 F. 3d 111 (2 nd Cir. 2011)	16
Urinyi v. United States, 607 F. 3d 318 (2 nd Cir. 2010)	16, 17, 19, 26
United States v. Muhammad, 124 F. 4 th 955 (5 th Cir 2025)	15
United States v. West, 240 F. 3d 456 (5 th Cir. 2001)	11, 24

STATUTES

28 U.S.C. § 2244 (b).....	Passim
28 U.S.C. § 2253 (c).....	10
28 U.S.C. § 2255.....	Passim
21 U.S.C. §§ 841 (a) (1), (b) (1) (B).....	4,10

INDEX TO ATTACHMENTS

Release of Internal Affairs Investigation Reports.....	23, 30
Internal Affairs Investigation Reports and dispensary findings.....	23, 30

No. _____

IN THE
UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA,
Respondent-Appellee.

-VS-

JAMES HENRY KELLEY III
Petitioner-Appellant

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

CASE NO. 25-10903

Now comes, petitioner, James Henry Kelley III, Pro-Se, and hereby petitions this Honorable Court to issue a writ of certiorari to review the opinion rendered in this case by the United States Court of Appeals for the Fifth Circuit and in support thereof, sets forth as follows:

OPINIONS BELOW

The Fifth Circuit Court of Appeals issued its decision denying petitioner's Certification of Appealability was entered on March 9, 2026, in case No. 25-10903.

The order of the United States District Court for the Northern District of Texas granting the government's Motion to Dismiss, entered on May 9, 2025 (Docket No. 9), and the Final Judgment (Docket No. 10) in Civil case No. 4:25-cv-0004-Y. The order granted Petitioner's first § 2255 Motion and Re-Entering the criminal judgment dated January 26, 2023 (Docket No. 55 Criminal Case No. 4:20-CR-243-Y).

JURISDICTION

The Fifth Circuit denied Petitioner's Certificate of Appealability on March 9, 2026. The Court has jurisdiction pursuant to 28 U.S.C. § 1251 (1) The petition is timely filed within (90) days of that denial.

STATUTORY PROVISIONS INVOLVED

28 § U.S.C. (h) 2255 Provides in relevant part: "A second or successive motion must be certified as provided in § 2244 by a panel appropriate courts of appeals to contain: (1) newly discovered evidence ..or (2) a new constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable".

28 U.S.C. § 2244 (b) (1) Provides: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."

28 U.S.C. § 2253 (c) (1) (B) Provides that an appeal from a final order in a § 2255 proceeding may be taken only if a circuit judge issues a certificate of appealability.

STATEMENT OF THE CASE

A. The Underlying Conviction and sentence

On February 2, 2021, Petitioner James Henry Kelley III was sentenced by the United States District Court for the Northern District of Texas to 180 months of imprisonment following a conviction for a violation of 21 U.S.C. § 841 (a) (1) and (b) (1) (B) in Criminal Case No. 4:20-CR-243-Y. The judgment of conviction and sentence was entered on the docket as Entry No. 38.

Petitioner's trial counsel failed to file a direct appeal after instructed and failed to protect petitioners constitutionally guaranteed right to pursue direct review of his conviction and sentence. As a direct result of this constitutionally deficient performance squarely recognized as ineffective assistance under Roe v. Flores-Ortega, 528 U.S. 470 (2000), and Strickland v. Washington, 466 U.S. 688 (1964). Petitioner was entirely stripped of his direct appeal as though it never existed.

B. The First § 2255 Motion: Restoring the Right to a Direct Appeal

On January 31, 2022, petitioner timely filed a motion pursuant to 28 U.S.C. § 2255 in Civil Case No. 4-22-cv-00081-Y (5th Cir. No. 23-100093), asserting narrow grounds that Trial Counsel rendered ineffective by failing to file a direct appeal. This Motion was procedural in nature and did not reach the merits of petitioner's conviction due to the dismissal of the remanding claims without prejudice in granting in parts of Kelley's first § 2255.

Granting him an out-of-time direct appeal restored the appellate right that counsel's constitutional dereliction had destroyed. On January 26, 2023, the district court granted relief. In a ruling entirely consistent with the Fifth Circuit's holding in U.S. v. West 240 F. 3d 456, 459-462 (5th Cir. 2001) the Court Ordered as follows:

"This Court must dismiss the remainder of Kelley's § 2255 motion without prejudice and Re-Enter the Criminal Judgement on docket. See U.S. v. West, 240 F. 3d 456, 459-462 (5th Cir. 2001) The Clerk of Courts is DIRECTED to Re-Enter the February 4, 2021 judgment (Doc 38 in 4:20-CR-243-Y) on docket in the criminal case." (Docket No. 55 Criminal case No. 4:20-CR-243-Y).

This is the essential procedural fact upon which this entire petition turns: The district court did not merely "Grant" the § 2255 and leave the old judgment in place. It affirmatively directed Re-Entry of the criminal judgment, and dismissed the remainder of the § 2255 motion without prejudice, explicitly reserving petitioner's right to bring future collateral claims. The district court thus recognized, consistent with West and the holdings of seven sister circuits, that a petitioner who has used his first 2255 to restore the right to direct appeal has not yet had any opportunity for a full collateral review.

C. The Out-of-Time Direct Appeal

Following the Re-Entry of the judgment, petitioner pursued his restored direct appeal to the Fifth Circuit. On November 29, 2023, the Fifth Circuit affirmed the district court's judgment, the direct appeal petitioner was constitutionally entitled to from the moment of his sentencing, but was denied by his counsel's failure is now complete.

At this stage, the petitioner stood in precisely the same procedural position as any

defendant who has (1) been convicted and sentenced, (2) pursued a direct appeal that was decided on the merits, and (3) not yet filed any collateral attack on the conviction or sentence. Petitioner had never received a single merits determination on any substantive claim arising from his underlying criminal proceeding.

D. The Second-in-Time § 2255 Motion

On January 2, 2025, petitioner filed a § 2255 motion in Civil Case No. 4:25-cv-0004-Y, presenting substantive constitutional claims attacking his conviction and sentence, the first collateral challenge of any kind to the merits of his case. On February 24, 2025, the Government filed a motion to dismiss for lack of jurisdiction, or alternatively, as Time-barred.

On May 9, 2025, the district court granted the Government's motion and dismissed the § 2255 motion as "Second or Successive" under 28 U.S.C. § 2255 (h), applying the Fifth Circuit's framework from U.S. v. Orozco-Ramirez, 211 F.3d 862 (5th Cir. 2000). A final judgment dismissing all claims without prejudice was also entered on May 9, 2025.

Petitioner timely filed a Rule 59 (e) motion on May 28, 2025, which tolled the deadline for appeal. The Court denied the Rule 59 (e) Motion on June 3, 2025. Petitioner filed a timely notice of appeal and requested to proceed in forma pauperis on June 30, 2025. On November 11, 2025, the district court denied IFP status but docketed the appeal.

E. The Fifth Circuit's Denial of Certificate of Appealability

On December 11, 2025, Petitioner filed his request for a Certificate of appealability ("COA") in Case No. 25-10903. On March 9, 2026, the Fifth Circuit denied the COA,

relying upon U.S. v. Orozco-Ramirez, 211 F. 3d 862, 869-871 (5th Cir. 2000), to hold that petitioner's second-in-time § 2255 motion was "Second or successive" and barred under AEDPA.

The Fifth Circuit's denial stands in direct and irreconcilable conflict with the holdings of the Second, Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits, all of which have held that under materially identical circumstances, a first § 2255 used to reinstate the right to direct appeal, followed by a second-in-time motion in NOT "second or successive". It also conflicts with this Court's governing precedents in Magwood v. Patterson, 561 U.S. 320 (2010), Panetti v. Quarterman, 551 U.S. 930 (2007), and Roe v. Flores-Ortega, 528 U.S. 470 (2000)-

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DEEPLY AND IRRECONCILABLY DIVIDED ON WHETHER A FIRST § 2255 MOTION USED TO REINSTATE DIRECT APPEAL RIGHTS RENDER A SUBSEQUENT § 2255 MOTION "SECOND OR SUCCESSIVE"

The question presented has divided the Federal Courts of Appeals for nearly three decades, producing a circuit split of extraordinary breadth. Seven circuits have aligned on one side; The Fifth Circuit stands virtually alone on the other. This Court should grant certiorari to resolve this entrenched conflict and vindicate the constitutional rights of Federal prisoners whose counsel's failures – not their-own- denied them their one full opportunity for collateral review.

A. The Fifth Circuit's Narrow and Minority Rule under Orozco-Ramirez

In United States v. Orozco-Ramirez, 211 F. 3d 862 (5th Cir. 2000), the Fifth Circuit considered whether a second-in-time § 2255 motion filed after a first § 2255 motion successfully reinstated direct appeal rights was "second or successive" under AEDPA. The Court adopted a claim-by-claim approach, holding that:

- (1) Claims that could have been raised in the first § 2255 motion (i.e., during the reinstatement proceeding) Are second or successive and therefore barred; and
- (2) Only claims that arose after the first § 2255 such as ineffective assistance of appellate counsel are not second or successive because they could not previously have been raised.

The practical consequence of this narrow rule is severe: a federal prisoner who files a procedurally targeted first § 2255 to recover his lost rights is permanently foreclosed from ever obtaining full merits review of his conviction and sentence in a § 2255 proceeding. Even though his first § 2255 never adjudicated a single substantive claim, the court treats it as consuming his one opportunity for collateral review. He is penalized for doing exactly what habeas law required him to do.

The Fifth Circuit's most recent application of Orozco-Ramirez to petitioner's case in Case No. 25-10903 confirms that the circuit continues to adhere to this minority position, even as it conflicts with seven other circuits and this Court's subsequent decisions in Magwood and Panetti.

B. The fifth Circuit has Itself Recognized the Limits of Orozco-Ramirez

Significantly, the Fifth Circuit itself has recently acknowledged that the Orozco-Ramirez Rule does not apply categorically in all successive-petition scenario. In

U.S. v. Muhammad, 124 F. 4th 955 (5th Cir. 2025), the Fifth Circuit held that where a prisoner's first § 2255 motion was not adjudicated on the merits, and the court thereafter recalled the mandate in the direct appeal and affirmed the conviction on the merits, a subsequently filed § 2255 petition is not "second or successive" because the recall of the mandate "Resets the Count Of The Prisoner's Habeas Petitions To Zero."

Muhammad, 124 F. 4th at 957.

The Muhammad court's reasoning strongly supports petitioner's position. The Re-Entry of the criminal judgment ordered by the district court in petitioner's case is functionally equivalent to the recall of the mandate in Muhammad: In both cases, an intervening judicial act restored the prisoner to the position he would have occupied had his appellate rights never been lost. If a recalled mandate resets the habeas count in Muhammad, logic and consistency demand that a Re-Entered judgment obtained by way of a successful § 2255 motion likewise resets the count in petitioner's case.

II. THE MAJORITY OF CIRCUIT'S -SEVEN IN TOTAL- HOLD THAT PETITIONER'S

SECOND-IN-TIME § 2255 IS NOT "SECON OR SUCCESSIVE"

An overwhelming majority of circuit courts have rejected the Fifth Circuit's approach and have instead adopted a judgment-based rule that properly accounts for the unique nature of a first § 2255 that serves as a procedural vehicle to restore appellate rights. A brief survey of the circuits holdings follows.

A. The second Circuit: Urinyi and its progeny

The Second Circuit was among the first circuits to squarely hold that a first § 2255 motion used to reinstate direct appeal rights does not count as a “first” petition that renders subsequent § 2255 motion “second or successive”.

In Urinyi v. United States, 607 F. 3d. 318 (2nd Cir. 2010), the court held that a prisoner’s second § 2255 motion filed after his first § 2255 successfully reinstated his right to direct appeal was not “second or successive” under AEDPA. The court reasoned that two habeas applications are not “successive” simply because they are filed by the same prisoner. Rather, a second application is: “successive” only if it “represent[s] a second attack by federal habeas petition on the same conviction”. Urinyi, 607 F. 3d. at 320. Because the first § 2255 “certainly concerns his conviction, it did not attack that conviction,” the second motion was not successive; it was the prisoner’s first actual collateral attack. ID., at 321.

The court further explained that by permitting the second § 2255 to proceed, the petitioner “is restored to the procedural posture he would have enjoyed if he had been represented by effective counsel who had timely filed a notice of appeal.” ID. This equitable principle lies at the heart of why the Fifth Circuit’s contrary rule is wrong: It punishes a prisoner for his attorney’s constitutional failure, Not his own.

The Second Circuit reinforced and extended Urinyi in Tuan vu v. U.S., 648 F. 3d. 111 (2nd Cir. 2011), holding that even an unsuccessful first § 2255 that sought reinstatement of direct appeal rights does not render a subsequent § 2255 “second or successive” Whether successful or not, a first § 2255 seeking reinstatement of direct appeal rights “does not render a later collateral

proceeding a duplicative attack on the conviction.” Vu, 648 F. 3d. at 114 and in Wall v. U.S., (2nd Cir.2010), the court confirmed: “when a petitioner is forced to use a (§ 2255) motion to obtain a direct appeal, and a district court enters an amended judgment to afford such appeal, we will not bar a subsequent § 2255 motion attacking the amended judgment, for to do so “would strip the petitioner of the opportunity to lodge a true collateral attack on his conviction and sentence, which is the explicit purpose of [§] 2255. Urinyi, 607 F. 3d at 321.

Most recently, in Carranza v. U.S., 794 F. 3d 237 (2nd Cir. 2015), the court reaffirmed this framework, confirming that a prisoner who used his first § 2255 to reinstate his appeal rights had not “attack[ed]” his conviction, and is entitled to one full opportunity to seek collateral review of the judgment on the merits.

B. The Third Circuit: Re-Olabode

The Third Circuit has likewise adopted the majority position. In case arising from resentencing-based § 2255 proceedings, the Third Circuit held, consistent with Magwood v. Patterson, that a second-in-time § 2255 petition attacking a new judgment entered after partial § 2255 relief is not “second or successive”. In Re-Olabode 325, F. 3d 166, 170-173 (3rd Cir 2003) This holding places movant in the same position he would have been in but for denial of right to appeal. The court expressly applied Magwood’s judgment-based framework to § 2255 proceedings, holding that a petition challenging a new judgment for the first time is the petitioner’s “first” petition with respect to that judgment.

The Third Circuit’s reasoning translates directly to the Petitioner’s circumstances: the district court’s Re-Entry of the criminal judgment on January 26, 2023, (DKT 55) constitutes a new

judgment that petitioner has never previously challenged in any § 2255 proceeding on the merits.

C . The Fourth Circuit: in Re Goddard

The Fourth Circuit has directly and explicitly adopted the majority rule in the context most analogous to petitioner's case. In Re Goddard, 170 F. 3d. 435 (4th Cir. 1999) the court held: "Because Goddard used his first § 2255 motion to reinstate his right to direct appeal, that motion does not count against the AEDPA gate." Id at 437. A subsequent § 2255 motion "is therefore not "second or successive" under § 2255 (h)". Id

The Fourth Circuit's holding in Goddard was specifically recognized and cited with approval by the Fifth Circuit in Orozco-Ramirez itself, where the court acknowledged that the Fourth Circuit "would hold that none of Orozco-Ramirez's claims are barred by AEDPA's restrictions on "second or successive" motions. Orozco-Ramirez, 211 F. 3d. at 871. The Fifth Circuit then explicitly declined to follow Goddard, instead adopting the claim-by-claim approach that has now locked petitioner out of any collateral review.

The Fourth Circuit further extended this reasoning, confirming that a petitioner who successfully used § 2255 to reinstate appellate rights stands, after completion of direct review, in the same position as any petitioner seeking their first full collateral review of a judgment.

D. The Seventh Circuit: Shepeck v. United States

In Shepeck v. U.S., 150 F. 3d 800 (7th Cir. 1998), the Seventh circuit squarely addresses the successive petition question in the out-of-time appeal context. The court recognized that “if Shepeck’s appellate lawyer furnished ineffective assistance of counsel, that constitutional violation occurred after the grant of his first petition under § 2255” that sought to permit an out-of-time appeal.

Shepeck, 150 F. 3d at 801. Because the substantive IAC claim could not have been raised in the first § 2255- it had not yet occurred- the subsequent § 2255 raising that claim was not “second or successive”. Id.

The Seventh Circuit’s broader principle, recognized in Johnson v. U.S., 196 F. 3d. 802 (7th Cir. 1999), is that a prisoner is “entitled to one, but only one, full and fair opportunity to wage a collateral attack.” Orozco-Ramirez, 211 F. 3d. at 868 (quoting O’Connor v. U.S., 133 F. 3d. 548, 550 (7th 1998). If the first § 2255 was used to reinstate appellate rights, the subsequent § 2255 represents his first, NOT second, attempt at collateral review.

E. The Ninth Circuit: Monroe Johnson v. U.S.

The Ninth Circuit adopted the majority position in Johnson v. U.S., 362 F. 3d. 636 (9th Cir. 2004), holding that a first § 2255 motion to reinstate the right to appeal did not count as a petition for purposes of the AEDPA successive petition bar. The court explained that when a district court grants a § 2255 relief on ineffective – assistance-for-failure-to-appeal claim, it typically enters an amended judgment to restore the appeal rights. The second § 2255 filed after completion of that

restored constitutes the petitioner's "first true 'collateral' attack to his convection." Urinyi, 607 F. 3d at 321, quoting Johnson, 362 F. 3d. at 638.

The ninth Circuit extended this reasoning, confirming that a petitioner who has been restored to the position of a direct-appeal defendant by virtue of a successful § 2255 is entitled to one full round of collateral review after the direct appeal concludes. To hold otherwise, the court notes, would deny the petitioner the very rights that the successful § 2255 was designed to restore.

F. The Tenth Circuit: Scott v. United States

The Tenth Circuit recognized the successive-petition limitation in the failure-to-appeal context in Scott v. U.S., 124 F. 3d. 1328 (10th Cir. 1997). The court held that a claim of ineffective assistance of appellate counsel during an out-of-time appeal "did not even exist until the direct appeal process concluded", and therefore could not be treated as "second or successive". Scott, 124 F. 3d. at 1130. The Fifth circuit explicitly cited and relied on Scott in Orozco-Ramirez while nevertheless reaching a narrower result than Scott's broader logic would support.

The Tenth Circuit's logic applies with equal force to petitioner's substantive collateral claims: those claims could not have been meaningful pressed in the first § 2255, which was limited to restoring appellate rights, and they were properly raised for the first time only after the direct appeal was fully resolved.

G. The Eleventh circuit: McIver v. United States

The Eleventh Circuit similarly adopted the majority position in McIver v. U.S., 307 F. 3d. 1327 (11th Cir.2002) holding that a second-in-time § 2255 was not “second or successive” where the first § 2255 had been used to reinstate direct appeal rights. The Eleventh Circuit recognized that the prisoner, having never had any merits review of his conviction in federal court, could not fairly be said to have enjoyed the “one full opportunity” for collateral review that AEDPA’s successive petition bar was designed to regulate. Id.

III. THIS COURT’S PRECEDENTS IN MAGWOOD, PANETTI, AND FLORES-ORTEGA COMPEL REVERSAL OF THE FIFTH CIRCUIT’S DECISION.

A. Magwood v. Patterson

In Magwood v. Patterson, 561 U.S. 320 (2010), this Honorable Court held that a habeas application is not “second or successive” if it is “the first application challenging [a] new judgment.” Id., at 340. The court’s analysis focused on whether the petition challenged the same judgment that was challenged in a prior habeas application. Because Magwood’s petition challenged a new sentence imposed after resentencing -a new judgment- it was not “second or successive” even though it was his second filing overall. Id.

Magwood’s core reasoning applies with decisive force here. The district court’s order of January 26, 2023, which directed the clerk to Re-Enter the February 4, 2021, judgment on the docket in the criminal case, is functionally equivalent to the resentencing that created a new judgment in Magwood. Indeed, the Re-Entry was directed specifically to

restore the criminal record to a state from which a direct appeal could be taken- i.e., to create a fresh "entry of judgment" from which the appellate clock would run anew. Under Magwood's judgment-based framework, petitioner's second-in-time- § 2255 is the first application challenging the Re-Entered January 26, 2023, judgment. It is therefore not "second or successive" under 2244 (b). The Fifth Circuit's reliance on Orozco-Ramirez's claim-by-claim approach directly conflicts with Magwood's instruction to look to the judgment being challenged, not the individual claims.

B. Panetti v. Quarterman

In Panetti v. Quarterman, 551 U.S. 930 (2007), this court held that a habeas claim is not "second or successive" if it was unavailable -not ripe- at the time of the first petition. Id., at 947. The Court recognized that AEDPA's successive petition bar cannot fairly be applied to claims that a petitioner had no opportunity to bring in his first petition. Petitioner's substantive collateral claims were not available at the time of his first § 2255 motion, which was filed on January 31, 2022, before the completion of the out-of-time appeal. The direct appeal which was completed on November 29, 2023, is the procedural prerequisite to any § 2255 motion challenging the conviction on the merits. Until the direct appeal concludes, § 2255 motion raising substantive claims challenging the conviction would be pre-mature. As seen in the chronological filings, the original § 2255 was submitted on January 31, 2022 (DKT 45). The docket sheet clearly reflects the Re-Entry of the criminal judgment on January 26, 2023 (DKT 55),

"Order dismissing remainder of motion under § 2255. Granting out-of-time appeal, Directing RE-ENTRY OF CRIMINAL JUDGMENT, Appointing Counsel for CRIMINAL APPEAL, and denying certificate of appealability as to James Henry Kelley III it is, therefore, ORDERED that the remainder of Kelley's § 2255 motion regarding his second claim be DISMISSED WITHOUT PREJUDICE the clerk of the court is DIRECTED to Re-Enter the February 4, 2021 judgment. Therefore, never reaching the merits. As seen in the appendix attachments No.(A1, A2) the fundamental foundation of the claims presented in the second-in-time § 2255 were not made available until the release of the Fort Worth Police Department Internal Affairs Investigation Reports on January 28, 2023 These records were later acquired by petitioner's civil attorney during his successful civil suit on the Fort Worth Police Department. The records were later released upon request to the petitioner's appellate counsel. Thereafter, appellate counsel attempted to supplement the record on direct appeal, which was denied April 21, 2023, and under Panetti, they cannot be barred as "second or successive"

C. Roe v. Flores-Ortega

In Roe v. flores-Ortega, 528 U.S. 470 (2000), This Court held that counsel's failure to file a notice of appeal, where the defendant would have taken an appeal, constitutes constitutionally ineffective assistance. The Court held that a prejudice is presumed in this context- the defendant is automatically entitled the appeal he was denied.

Roe v. Flores-Ortega is the foundation which petitioner's first § 2255 was built and succeeded. Petitioner was denied his direct appeal by his counsels sixth amendment violation. His first § 2255 motion corrected that violation by restoring the lost appeal.

To now treat the remedial first § 2255 as consuming petitioner's one opportunity for full collateral review- thereby permanently foreclosing any merits review of his conviction- would be a mockery of Flores-Ortega's guarantee. Flores-Ortega entitles a defendant to the "same procedural posture" he would have occupied absent of counsel's failure. That posture includes the right to file a merits-based § 2255 after completing a direct review.

**IV THE RE-ENTRY OF PETITIONER'S CRIMINAL JUDGMENT CONSTITUTES A
"NEW JUDGMENT" UNDER MAGWOOD, MAKING PETITIONER'S SECOND § 2255 HIS
FIRST CHALLENGE TO THAT JUDGMENT.**

The District Court's January 26, 2023 order directing Re-Entry of the criminal judgment pursuant to U.S. v. West, 240 F. 3d. 456 (5th Cir. 2001). Is independently dispositive of the successive petition question under Magwood. The Court did not merely "GRANT" the § 2255 and leave the original 2021 judgment undisturbed. It affirmatively directed a new docket entry – a Re-Entered judgment- and dismissed the remaining claims without prejudice, preserving petitioner's future collateral right.

The Re-Entry of judgment is the precise procedural mechanism that the Fifth Circuit itself has sanctioned in West for restoring lost appellate rights. The clerk was directed to create a new docket entry for the February 4, 2021 judgment. That new docket entry is a new entry of judgment for purposes of the appellate clock and, under Magwood, for purposes of the AEDPA successive- petition analysis. Petitioner's second § 2255- filed on

January 2, 2025, is challenging that Re-Entered judgment. It is under Magwood, NOT "second or successive".

The government's position before the district court- and the district court's adoption of that position- ignores the significance of the Re-Entry of judgment. By treating the original January 2022 § 2255 as the operative first § 2255 for AEDPA purposes, while simultaneously treating the Re-Entered 2023 judgment as still the "same" judgment as the original 2021 judgment, the government inverts Magwood's logic. Magwood holds that what matters is the judgment being challenged- and when there is a new judgment, the petition challenging it is "first", NOT "successive" 561 U.S. at 340.

The analogy to Magwood is direct and compelling. In Magwood, the state court resentenced the prisoner and entered a new death sentence -a new judgment. The subsequent habeas petition challenging that new sentence was the prisoner's first challenge to the new judgment and therefore not successive. Here the court Re-Entered the criminal judgment -a new docket entry- and petitioner's subsequent § 2255 is his "first challenge" to that Re-Entered judgment. The result must be the same.

**V. THE FIFTH CIRCUIT'S RULE FORECLOSES ANY MEANINGFUL COLLATERAL REVIEW
AND WORKS A STRUCTURAL CONSTITUTIONAL INJUSTICE.**

The consequences of the Fifth Circuit's rule are constitutionally intolerable. Under the fifth circuit's application of Orozco-Ramirez to this case, petitioner faces the following paradox: his counsel's sixth amendment violation (failing to file a direct appeal) has been compounded – not corrected- by the very remedial process designed to cure it.

A defendant who receives effective counsel at his sentencing can, after direct appeal, file one full § 2255 motion raising. All substantive grounds for collateral attack on his conviction. A defendant whose counsel fails to file a direct appeal (committing a Flores-Ortega violation) must first file a remedial § 2255 to restore the lost appeal. Under the Fifth Circuit's rule, the act of filing that remedial § 2255 the act the law requires the defendant to take consumes his one collateral opportunity, leaving him permanently unable to raise substantive challenge to his conviction.

The out-come rewards the most egregious constitutional violation (complete deprivation of the right to appeal). It punishes the victim of a Sixth Amendment violation more severely than it punishes the defendant whose counsel performed adequately and who received a full direct appeal followed by one merits § 2255.

The majority circuits recognized this injustice and crafted the correct remedy: restore the prisoner to the position of a defendant who received effective counsel at sentencing- that is one full direct appeal followed by one full merits § 2255. As the second circuit explained in Urinyi, the remedial principle is that "by permitting the petitioner to file a § 2255 motion attacking the conviction and sentence, the petitioner is restored to the procedural posture he would have enjoyed if he had been represented by effective counsel who had timely filed a notice of appeal." 607 F. 3d. at 321

The Fifth Circuit's rule, by contrast, ensures that petitioner a victim of constitutional ineffective assistance- is permanently worse off than any similarly situated defendant who received competent counsel. That cannot be what AEDPA's successive petition bar

was designed to achieve. As this court has recognized, AEDPA's limitations on successive petitions were enacted to curb abuse and promote finality- not to render the habeas remedy a nullity for defendants whose constitutional rights were violated at the most fundamental level. See Panetti, 551 U.S. at 945 (AEDPA's gatekeeping provisions cannot "bar a first federal habeas petition raising a genuinely new claim").

A. The Fifth Circuit's attack on Orozco-Ramirez Misreads AEDPA's Text

The Fifth Circuit Orozco-Ramirez anchored its holding on the statutory text of § 2255(h), which limits "second or successive" motions to those meeting narrow criteria. But the statute does not define "second or successive", in Magwood this court specifically noted that congress did not define the phrase, instructing courts to determine its meaning from "the statutory context". 561 U.S. at 331.

That context, combined with the well-established principle that "second or successive" is a "term of art" that does not mean every second-in-time filing, supports the majority rule. As this court held in Stewart v. Martinez-Villareal, 523 U.S. 637 (1998), and Slack v. McDaniel, 529 U.S. 473 (2000), The successive petition bar does not apply mechanically to every petition filed after the first. It applies to petitions that represent a "second attack" on the same judgment. A petition that constitutes a petitioner's first attack on the merits of a Re-Entered judgment, filed after completion of a restored direct appeal, is not a "second" attack -it is a first.

B. The Government's Orozco-Ramirez Argument Cannot Override the

New Judgment Rule

The government's position in the district court was that petitioner's second § 2255 is barred because the claims could have been- or should have been- raised in his first § 2255 motion. This argument fails for at least three independent reasons. First, it directly conflicts with Magwood. The Supreme Court in Magwood specially rejected the government's opportunity-based argument- that a second petition is "second or successive" if the petitioner "could have raised" the same claims in his first petition and replaced it with the judgment-based inquiry. 561 U.S. at 336-338 The "could have raised" test that Orozco-Ramirez relies upon is precisely the test that Magwood rejected. The Attachment's show the claims could not have been raised in first § 2255. The documents were not released nor were they available.

Second, the premise is factually false: Petitioner's substantive claims could not have been raised in the January 2022 § 2255 because the direct appeal had not been completed and the documents that his claims were based on were not made available until January 28, 2023 during the direct appeal process. A § 2255 filed while a direct appeal is pending is premature. Petitioner's first § 2255 was filed January 26, 2022; the out-of-time appeal was directed by the court on January 26, 2023; two days before the release of the documents and the Fifth Circuit affirmed the direct appeal on November 29, 2023. Until that appeal concluded, any substantive § 2255 motion would have been premature and likely dismissed.

Third, the Panetti principle independently bars application of successive-petition rule to claims that were unavailable at the time of the first § 2255. As the Court explained

in Panetti, the successive petition bar cannot fairly apply to claims that the petitioner had no opportunity to bring at the time of his first petition. 551 U.S. at 947.

**VI. THE FIFTH CIRCUIT'S RIGID BAR PRODUCES SEVERE CONSTITUTIONAL INJUSTICE
AND CALLS FOR THIS COURT'S SUPERVISORY POWER**

Even where a question does not present a clean circuit split, this Court has recognized that certiorari is warranted when a lower court has so far departed from the accepted and usual course of judicial proceedings as to require the court's supervisory correction. Sup. Ct. 10(c). The Fifth Circuit's decision in this case satisfies the standard.

**A. The procedural Bar was applied without the Individualized inquiry That the
Constitution Requires**

The district court's denial of petitioner's § 2255 motion summarily, without an evidentiary hearing, and without engaging the merits of petitioner's constitutional claims- was itself error. Under 28 U.S.C. § 2255 (b), A hearing is mandatory unless "the case conclusively shows that the prisoner is entitled to no relief". Petitioner presented specific, non-conclusory, well supported factual allegations, that if true, would entitle him to relief under Strickland, 466 U.S. 668, Brady v. Maryland, 373 U.S. 83 (1963), and Flores-Ortega, 466 U.S. 470. The court was not free to deny those claims without a hearing on the basis of a procedural bar, and the Fifth Circuit's affirmance of the summary disposition compounds the constitutional error.

**B. Categorical Foreclosure of Meritorious Constitutional Claims Violates Due Process
and the Suspension Clause**

The constitutional guarantee of due process includes a meaningful opportunity to be heard on claims of constitutional right. Where, as here, a categorical procedural rule operates to extinguish those claims without any individualized determination of their merit or whether the petitioner had a genuine prior opportunity to litigate them, By doing this, the right to due process is violated. The suspension Clause reinforces this conclusion: Congress's codification of habeas remedy in § 2255 cannot be construed to eliminate the constitutional core of the writ- the ability to test the legality of one's imprisonment based on constitutional violations.

**C. The Specific Constitutional Violations Suffered by Petitioner are of Compelling
Gravity.**

Petitioner's claims are not abstract or technical. They go to the heart of the constitutional guarantee of fair proceedings. The prosecution's suppression of evidence favorable to the accused violates due process where the evidence is material either to guilt or punishment, regardless of good faith or bad faith of the prosecution. **Brady v. Maryland**, 373 U.S. 83, 87 (1963). Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, The result of the proceeding would have been different. **U.S. v. Bagley**, 473 U.S. 667, 682 (1985).

As seen in the attachments (A1, A2) the Evidence that was suppressed IS TRUE and would have been favorable to the defense. Petitioner presented detailed, factual and

specific allegations in support of each ground for § 2255 relief. The district court denied relief without a hearing, and the Fifth Circuit affirmed that ruling. This approach contravenes § 2255 (b) and the court's standards for evaluating ineffective assistance claims under Strickland v. Washington, 466 U.S. (1984).

CONCLUSION

The question presented in this petition- whether a first § 2255 motion used to reinstate a lost right to direct appeal renders a subsequent § 2255 "second or successive" is one of the most consequential and most deeply contested questions on post-conviction habeas law. It has divided the federal circuits for nearly three decades. Seven circuits have answered the question in favor of the petitioner's; the Fifth circuit stands alone in a contrary position that forecloses meaningful collateral review for an entire class of prisoner whose constitutional rights were violated in the most fundamental way.

This circuit split is mature, entrenched, and irreconcilable without this court's intervention. The question is of exceptional importance concerning the constitutional rights of federal prisoners nationwide. It is squarely presented on the facts of this petition. Right now, your ability to raise claims depends on geographical location. The Fifth Circuit's resolution of it conflicts directly with the decisions of seven sister circuits and with this Honorable Court's own precedents in *Magwood*, *Panetti*, and *Flores-Ortega*.

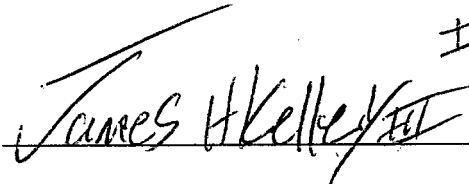
Petitioners are deprived of their constitutional guarantee of effective counsel, due process, and access to the courts because the Fifth Circuit's categorical bar forecloses any review of them, not because they lack merit, but because of the mechanical application of a circuit-specific rule that conflicts with the decisions of The Supreme Court and every other circuit to have considered the question.

For the foregoing reasons, the petition for a writ of certiorari should be GRANTED.

Upon review, this court should reverse the Fifth Circuit's denial of COA , hold that petitioner's second-in-time § 2255 is not "second or successive" under 28 U.S.C. § 2255 (h), and § 2244 (b), and remand for full merits review of petitioner's substantive constitutional claims challenging his conviction and sentence in Criminal Case No. 4:20-243-Y.

Petitioner James Henry Kelley III respectfully submits this petition and asks this Honorable Court to grant the writ of Certiorari.

Respectfully submitted,


James H. Kelley III

#06608-509

5-22-2026

James Henry Kelley III
Pro-Se Petitioner
#06608-509
FCI Greenville
P.O. BOX 5000
Greenville, IL 62246