No. 15-787

In the Supreme Court of the United States

BENJAMIN BARRY KRAMER, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government's brief in opposition is, in reality, a merits brief—most of which is directed at the wrong court. The government first argues the merits of the jurisdictional question presented to this Court, contending that petitioner's Section 2255 motion was "second or successive" even though no court has ever considered the merits of his collateral challenge to this judgment. But as explained in the petition—and by at least four circuits—the government's rule cannot be squared with this Court's reasoning in *Magwood* v. *Patterson*, 561 U.S. 320 (2010). Indeed, the government concedes that the courts of appeals "have reached differing conclusions about *Magwood*'s scope," Br. in Opp. 15; the government's disagreement with certain of those courts is a reason to grant review, not to deny it.

The bulk of the government's brief attacks the merits of petitioner's collateral challenge. What the government calls "vehicle defects" are actually the defenses the government expects to raise on the merits in the district court in the event that this Court reverses the decision below. But the government's (mistaken) position that the collateral challenge is without merit is irrelevant to the threshold jurisdictional question presented here. And if this Court is to await a vehicle in which the government concedes that the underlying collateral challenge has merit, then that is likely to be a long wait, indeed. Notably, the respondent in *Magwood* made a similar vehicle argument in its unsuccessful effort to oppose certiorari. The government's vehicle arguments should fare no better here.

Conspicuously absent from the brief in opposition is any serious argument that there is a vehicle defect that would prevent this Court from resolving the question presented. Like the courts below, this Court is required to address the jurisdictional issue first, and that is the only question resolved by either the district court or the court of appeals. If review is granted, the question presented will be answered.

Despite all this, the government insists that this Court should wait. But there is a big difference between allowing additional "percolation" to sharpen a nascent conflict and allowing a widespread and acknowledged circuit split to boil over. Just since this petition was filed, courts of appeals have issued two more decisions involving this question. *Askew* v. *Bradshaw*, — F. App'x —, 2016 WL 384829 (6th Cir. Feb. 2, 2016); *Patterson* v. *Sec'y, Fla. Dep't of Corr.*, — F.3d —, 2016 WL 370660 (11th Cir. Jan. 29, 2016). As the brief in opposition acknowledges, "[t]he question presented here and related questions may warrant this Court's review in an appropriate case." Br. in Opp. 16. Respectfully, this is it.

A. The Government Concedes There Is Widespread Conflict Among The Circuits

The government concedes that there is "existing disagreement among the circuits," Br. in Opp. 24, and that "courts have reached differing conclusions about *Magwood*'s scope," *id.* at 15. Contrary to the government's half-hearted assertions, there is nothing to gain from further delaying resolution of this acknowledged split.

1. The government does not seriously contend that further percolation on the actual question presented here is warranted. Rather, the government urges this Court to delay review so that

ancillary questions raised by *Magwood* can be further developed. Br. in Opp. 16. But that misses the point entirely: the issue presented here is the most fundamental question left open after *Magwood*. It makes no sense to delay resolution because further ancillary conflicts may also arise.

Moreover, this "percolation" argument is just a rehash of the government's brief in opposition—filed nearly three years ago—in *Suggs* v. *United States*, 705 F.3d 279 (7th Cir.), cert. denied, 133 S. Ct. 2339 (2013). Indeed, the government's current brief in opposition recites the same set of examples and pre-*Suggs* case law proffered in that brief. Compare Br. in Opp. 24–27, with Br. in Opp. at 13–16, *Suggs* v. *United States*, No. 12-978 (Apr. 10, 2013) ("*Suggs* Opp.). The government, Br. in Opp. 24, even repeats verbatim the claim that "[m]any of these fact patterns have not been addressed in the courts of appeals (or by more than one court of appeals), and, therefore, the implications of the competing approaches are unclear." *Suggs* Opp. at 13.

But significant percolation on these other issues has, in fact, occurred since *Suggs*. The courts of appeals agree that clerical error corrections are non-substantive and thus do not produce "new judgments" under *Magwood*. See *Marmolejos* v. *United States*, 789 F.3d 66, 71–72 (2d Cir. 2015) (collecting cases); *Johnson* v. *Duffy*, 591 F. App'x 629, 629–630 (9th Cir. 2015); *In re Martin*, 398 F. App'x 326, 327 (10th Cir. 2010). Likewise, circuits have refused to apply *Magwood* to technical sentence corrections such as 18 U.S.C. 3582(c) modifications. See *United States* v. *Jones*, 796 F.3d 483, 485–487 (5th Cir. 2015) (collecting cases); *White* v. *United States,* 745 F.3d 834, 836–837 (7th Cir. 2014). Circuits have treated separately challenges relating

to "conviction and sentence" and challenges "relating to denial of parole, revocation of a suspended sentence, and the like." *United States* v. *Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011) (per curiam) (collecting cases). These ancillary questions have been largely resolved, and, in any event, resolution of this case will likely help settle any lingering uncertainty on the remaining issues.[1]

2. Further percolation would serve no purpose because the conflict presented here is already entrenched and the issue is frequently recurring. Yet the government repeatedly urges against review "at this time," Br. in Opp. 9, 16, 24, perhaps in the hope that one day the split may not be so lopsided against its approach. Already in 2016, however, two courts of appeals have issued decisions applying the rule that petitioner sought unsuccessfully in the Seventh Circuit. The Sixth Circuit reaffirmed its rule that an initial collateral challenge to a judgment produced after a resentencing is not "second or successive," regardless of whether it "attack[s] the sentence, the conviction, or both." *Askew*, 2016 WL 384829, at *6 (quoting *King* v. *Morgan*, 807 F.3d 154, 158 (6th Cir. 2015)). The Eleventh Circuit similarly reapplied this rule in a case involving a substantively amended judgment. See *Patterson*, 2016 WL 370660, at *6 (citing *Insignares* v. *Sec'y, Florida Dep't of Corr.*, 755 F.3d 1273, 1278 (11th Cir. 2014)). Judge William Pryor, however, urged in dissent that because the case involved an intervening order that barred the imposition of chemical castration but had no bearing on the

[1] Some tension has emerged about whether a revision of supervised release produces a new judgment. Compare *In re Parker*, 575 F. App'x 415, 419 (5th Cir. 2014), with *United States* v. *Ailsworth*, 610 F. App'x 782, 785 n.5 (10th Cir. 2015).

prisoner's confinement, no "new judgment" existed. *Id.* at *14 (Pryor, J., dissenting). Thus, even where the unitary-judgment rule is firmly established by circuit precedent, "reasonable jurists can disagree about what constitutes a new judgment under *Magwood*." *Id.* at *9 (majority opinion) (citing *Kramer* v. *United States*, 797 F.3d 493, 502 (7th Cir. 2015)). This Court's guidance is needed to resolve the issue that *Magwood* left open.

B. This Case Presents A Proper Vehicle To Review The Jurisdictional Rule

1. The government does not dispute that the question presented is jurisdictional. Nonetheless, the government devotes most of its attention to arguing the underlying merits of petitioner's Section 225 motion. The government inaccurately refers to these merits arguments as vehicle defects. But it is beyond serious dispute that, if this Court grants review, it will reach the question presented and resolve the conflict that is rampant in the courts of appeals.

This Court routinely reviews cases where it is uncertain if the petitioner will ultimately succeed on remand. See, *e.g.*, *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430–1431 (2012). This is not news to the Solicitor General, who has argued time and again that uncertainty as to "the ultimate outcome" of a case "does not deny * * * a vehicle for the Court to consider important questions concerning [statutory] interpretation," and that the possibility that respondents might win on alternative grounds "would not prevent the Court from addressing the questions presented in the petition." Cert. Reply Br. for Fed. Pet. at 10, *Match-E-Be-Nash-She-Wish Band* v. *Patchak*, 132 S. Ct. 2199 (2012) (Nos. 11-246, 11-

247); accord Cert. Reply Br. for Pet. at 8, *Astrue* v. *Capato*, 132 S. Ct. 2021 (2012) (No. 11-159).

Indeed, this Court rejected an almost identical vehicle argument made by the respondent in *Magwood*. Br. in Opp. at 19, *Magwood* v. *Patterson*, No. 09-158 (October 8, 2009); *Magwood*, 561 U.S. at 340 (2010). Jurisdiction is, after all, "a threshold matter spring[ing] from the nature and limits of the judicial power of the United States." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (internal quotation marks omitted). Courts of appeals regularly refrain from considering the underlying merits of a claim during a "second or successive" inquiry and confine review to the question of "second or successive" jurisdiction. See, *e.g.*, *In re Brown*, 594 F. App'x 726, 730 (3d Cir. 2014); *Wentzell* v. *Neven*, 674 F.3d 1124, 1125 (9th Cir. 2012).

While the government urges this Court to consider whether petitioner will eventually be "entitled to relief," Br. in Opp. 16, the district court expressly dismissed petitioner's challenge "for lack of jurisdiction," and granted a certificate of appealability on that issue alone. Pet. App. 27a. As this Court has recognized, "until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003). Petitioner did not receive a certificate of availability as to the underlying merits of his claim. Accordingly, the Seventh Circuit "confine[d] [its] review to the question specifically certified by the district court." Pet. App. 22a; see also *Sylvester* v. *Hanks*, 140 F.3d 713, 715 (7th Cir. 1998) ("Unless the parties may

confine attention to the questions in the certificate of appealability, specification serves no function.").

What is more, the government contended below that "review should be limited to the issue identified in the certificate of appealability," U.S. C.A. Br. at 13, and explicitly eschewed other issues as "unnecessary to raise" before the question of jurisdiction was resolved, *id.* at 25. Having successfully persuaded the courts below to limit their review, the government cannot now request that this Court consider non-jurisdictional matters that have not been fully briefed or argued.

2. In any event, the government's vehicle contentions are incorrect. Petitioner's prior attempts to raise the *Richardson* error do not count for purposes of the "second or successive" bar. The government correctly notes that *Slack* v. *McDaniel*, 529 U.S. 473 (2000), specifically involved "dismissals without prejudice * * * for state prisoners who fail to exhaust state-court remedies." Br. in Opp. 17. But there is no good reason why the rule should be different where, as here, the prior petition was dismissed as "second or successive"—in both instances, the merits of the petition are left unreviewed. The government fails to cite any case where a collateral challenge was labeled "second or successive" because of an earlier collateral challenge that had been dismissed for lack of jurisdiction. Such a dismissal should not count for the "second or successive" bar because, as Chief Justice Rehnquist reasoned in a similar context, "[t]o hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 645 (1998).

3. The government does not dispute that petitioner was convicted under invalid jury instructions. Nonetheless, the government contends that the error was necessarily harmless beyond a reasonable doubt, Br. in Opp. 21, and that petitioner's collateral challenge will ultimately be denied as untimely. *Id.* at 19. On these issues, too, the government is wrong.

The government argues that because the indictment alleged only one violation after the CCE statute took effect, the jury must have unanimously agreed on that violation. Br. in Opp. 22. But the jury was instructed that it must agree either on a substantive drug offense that occurred after the effective date of the CCE statute "*or* that the enterprise in which a defendant was a principal * * * received $10 million in gross receipts" after the effective date. *United States* v. *Kramer*, 955 F.2d 479, 484 (7th Cir. 1992). Thus, the jury could have unanimously agreed that the enterprise received $10 million, without ever reaching agreement as to the substantive drug offenses required for a CCE conviction.

The government's arguments on timeliness are likewise misguided. For example, petitioner's application was filed less than one year after this Court decided *Alleyne* v. *United States*, which established that petitioner's conviction under an invalid jury instruction violated his constitutional right to have "each element of a crime be proved to the jury beyond a reasonable doubt." 133 S. Ct. 2151, 2156 (2013). In addition, eleven circuits—including the court below—have recognized that equitable tolling may be available for Section 2255 motions. See *Ramos-Martinez* v. *United States*, 638 F.3d 315, 322 (1st Cir. 2011) (collecting cases). While

the government is quick to point out that the district court "noted 'doubts about whether [petitioner] filed his current motion within the limitations period,'" Br. in Opp. 7 (alteration in original), the government fails to quote the remainder of that sentence, in which the district court observed that petitioner's case "deserves further consideration," Pet. App. 27a.

4. While the government discounts the urgency of resolving this issue, at least four circuit decisions have confronted it since petitioner's appeal was decided by the Seventh Circuit. The government's protests notwithstanding, this case is the best available vehicle to address a range of outstanding *Magwood* issues in a timely fashion.

United States v. *Garza*, for example, involves the reentry of judgment to resolve a timeliness issue—an issue more akin to the clerical error cases, see pp. 3–4, *supra*, than to the core issue presented here. See 624 F. App'x 208, 212 (5th Cir. 2015) ("The district court merely performed a ministerial task permitting an out-of-time appeal."), petition for cert. pending, No. 15-7552 (Dec. 30, 2015). The dispute in *Patterson* largely turns on a subsidiary question about punishment and imprisonment—complicated by the unique issues raised by chemical castration imposed as part of the sentence. See *Patterson*, 2016 WL 370660, at *4. The State of Ohio elected not to seek review of the Sixth Circuit's decision in *King*, 807 F.3d 154, and there is no indication that it will do so in *Askew*, 2016 WL 384829. This issue continues to arise so frequently that this Court should not wait on a vehicle the government finds acceptable. The lower courts need guidance now.

C. The Decision Below Is Wrong

The government devotes a portion of its brief to previewing the merits of its argument on the question presented. The government's position, however, rests on an interpretation of AEDPA that cannot be squared with this Court's reasoning in *Magwood*.

Magwood adopted a "straightforward rule: where * * * there is a 'new judgment intervening between the two habeas petitions' * * * an application challenging the resulting new judgment is not 'second or successive' at all." *Magwood*, 561 U.S. at 341–342 (internal citation omitted). The "resulting new judgment" is the entire judgment, not merely the portion of it altered by prior collateral relief. See *King*, 807 F.3d at 157–158.

The government's proposed alternative to *Magwood*'s judgment-based approach—a "new error" framework—has no grounding in the text of AEDPA, which "focuses on * * * the state court's 'judgments[.]'" *King*, 807 F.3d at 159. *Magwood's* only discussion of "new errors" does not appear in a part of the Court's opinion explaining *why* a motion following an intervening judgment is not "second or successive," but rather in parts explaining why the Court's conclusion was consistent with an earlier decision, *Burton* v. *Stewart*, 549 U.S. 147 (2007) (per curiam), and dismissing an appeal to legislative intent as misguided. Indeed, that discussion began with a reminder that "the existence of a new judgment is *dispositive*." *Magwood*, 561 U.S. at 338 (emphasis added).

Even if the "new error" discussion played a part in the Court's construction of AEDPA, the government confuses the nature of the "errors" that

Magwood identified. The government repeatedly asserts that such new errors must "aris[e] after the original judgment." Br. in Opp. 12–13. Not so. In fact, *Magwood* noted that "[a]n error committed a second time is still a new error." 561 U.S. at 339. Although the Court observed that was "*especially* clear [in *Magwood*], where the state court conducted a full resentencing and reviewed the aggravating evidence afresh," *ibid.* (emphasis added), the use of "especially" suggests that an error can be "committed a second time" even without a full rehearing because it is incorporated into the new judgment.

The government's policy argument—that the unitary judgment approach "would inequitably provide certain prisoners with a second opportunity to challenge a conviction," Br. in Opp. 14—is likewise mistaken. If the government's rule were adopted, a prisoner who obtains a new judgment after correcting a constitutional error through a collateral challenge may have no way to obtain a hearing on a later statutory claim, even if this Court resolved an open question in his favor. See 28 U.S.C. 2255(h). He would thus be worse off than someone whose judgment contained only a single error—a disparity far more perverse than the one the government identifies.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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