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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's fourth post-conviction motion challenging his conviction for conducting a continuing criminal enterprise qualifies as "second or successive" within the meaning of 28 U.S.C. 2255(h), where the district court issued an amended judgment vacating a different count of conviction after petitioner's first post-conviction motion but before his second such motion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 797 F.3d 493. Additional prior opinions of the court of appeals are published in the Federal Reporter at 955 F.2d 479 and 347 F.3d 214. The memorandum and order of the district court (Pet. App. 23a-28a) is not published in the Federal Supplement but is available at 2014 WL 3907799. A prior opinion of the district court (Pet. App. 29a-36a) is not published.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2015. On November 3, 2015, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including December 16, 2015. The petition was filed on December 15, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted on one count of conspiring to distribute marijuana, in violation of 21 U.S.C. 846, and one count of conducting a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848. He was sentenced to concurrent prison terms of life on the CCE count and 40 years on the conspiracy count. Pet. App. 1a-2a, 5a. The court of appeals affirmed petitioner's convictions and sentence. 955 F.2d 479. This Court denied a petition for a writ of certiorari. 506 U.S. 998. Petitioner then filed a post-conviction motion in the Southern District of Illinois under 28 U.S.C. 2255 to vacate his CCE and conspiracy convictions. The district court vacated his conviction and sentence on the conspiracy count, but left intact the CCE conviction and life sentence, Pet. App. 37a-38a, and entered an amended judgment, *id.* at 39a-44a.

After the amended judgment was issued, petitioner filed a petition for a writ of habeas corpus and, in the alternative, a Section 2255 motion in the Southern District of Illinois to vacate his CCE conviction. 97-cv-04117 Docket entry No. 1 (Apr. 22, 1997). The court dismissed the petition for lack of jurisdiction. 99-cv-00684 Docket entry No. 15 (July 25, 2002) (7/25/02 Mem. & Order). Petitioner then filed another petition for a writ of habeas corpus and, in the alternative, a Section 2255 motion to vacate his CCE conviction in the Southern District of Indiana. That court also dismissed the petition for lack of jurisdiction. 02-cv-00317 Docket entry No. 13 (Apr. 21, 2003) (Entry Discussing Habeas Corpus Pet.). The court of appeals

affirmed. 347 F.3d 214 (per curiam). This Court denied a petition for a writ of certiorari. 541 U.S. 990.

Petitioner filed a fourth Section 2255 motion in the Southern District of Illinois, again seeking to vacate the CCE conviction. 14-cv-00678 Docket entry No. 1 (June 12, 2014). The district court dismissed that motion for lack of jurisdiction but issued a certificate of appealability. Pet. App. 23a-27a. The court of appeals affirmed. *Id.* at 1a-22a.

1. Petitioner, together with Eugene Albert Fischer and Randy Thomas Lanier, directed a vast enterprise that imported several hundred thousand pounds of marijuana from Colombia into the United States during the 1980s. Petitioner helped to orchestrate seven shipments of marijuana, one of which resulted in more than $50 million in sales and another of which yielded nearly $35 million. 955 F.2d at 481-483. He was indicted by a federal grand jury on one count of conspiracy to distribute marijuana, in violation of 21 U.S.C. 846, and one count of participating in a CCE, in violation of 21 U.S.C. 848. 87-cr-40070 Docket entry No. 1 (Nov. 25, 1987). A jury found petitioner guilty on both counts and found him liable for $60 million in forfeitures in connection with the CCE offense. 955 F.2d at 486. Petitioner was sentenced to concurrent prison terms of life on the CCE count and 40 years on the conspiracy count. Pet. App. 5a.

On direct appeal, petitioner contended that the district court had erred in failing to instruct the jury that it was required to agree unanimously on which of the predicate drug offenses constituted the "continuing series of violations" element of the CCE charge. See 21 U.S.C. 848(c)(2). The court of appeals rejected that claim, holding that under its previous decision in

United States v. *Canino*, 949 F.2d 928, 946-948 (1991), cert. denied, 503 U.S. 996, and 504 U.S. 915 (1992), juror unanimity on that issue was not required. 955 F.2d at 486-487.

2. In 1997, petitioner filed in the Southern District of Illinois a post-conviction motion under 28 U.S.C. 2255, which is the principal mechanism for prisoners to challenge federal convictions and sentences and which must be filed in the court of conviction, see 28 U.S.C. 2255(a). He argued that his simultaneous CCE and conspiracy convictions were invalid under this Court's decision in *Rutledge* v. *United States*, 517 U.S. 292 (1996), which held that a person may not be convicted on both a CCE offense and a drug-conspiracy offense based on the same facts. Pet. App. 30a, 33a. The government agreed that it was necessary to vacate the conspiracy conviction under *Rutledge*. *Id.* at 33a. The district court vacated that conviction, but left petitioner's conviction and sentence on the CCE count intact. *Id.* at 23a-36a. The district court issued an amended judgment in 1998 reflecting only that count. *Id.* at 37a-44a.[1]

3. In June 1999, this Court decided *Richardson* v. *United States*, 526 U.S. 813, which held that "a jury in a federal criminal case brought under [Section] 848 must unanimously agree not only that the defendant

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[1] The district court vacated the conspiracy conviction subject to reinstatement "in the event that for some reason the continuing criminal enterprise conviction is later overturned." Pet. App. 37a; see *Rutledge*, 517 U.S. at 305-307. Petitioner is currently serving a life sentence on the CCE conviction and was sentenced to 40 years imprisonment on the conspiracy conviction. Petitioner states (Pet. 4 n.1) that if the CCE conviction is overturned and the conspiracy conviction is reinstated, he "would likely be eligible for release in 2038."

committed some 'continuing series of violations' but also that the defendant committed each of the individual 'violations' necessary to make up that 'continuing series,'" overruling the Seventh Circuit's decision in *Canino*. *Id.* at 815 (citation omitted). Petitioner "filed a petition in September of 1999 for a writ of habeas corpus in the Southern District of Illinois, seeking relief under 28 U.S.C. § 2241, or alternatively, 28 U.S.C. § 2255." Pet. App. 10a-11a. Section 2241 authorizes district courts to grant writs of habeas corpus in appropriate cases to prisoners held within their districts, 28 U.S.C. 2241(a), although habeas relief is generally unavailable to federal prisoners unless they can show that the Section 2255 remedy is "inadequate or ineffective," 28 U.S.C. 2255(e).

The district court denied habeas relief under Section 2241 for lack of jurisdiction because at that time petitioner was incarcerated in a federal detention facility located in the Southern District of Indiana. 7/25/02 Mem. & Order 1-2; see Pet. App. 11a. The court also denied petitioner relief under Section 2255 on the ground that his motion was "second or successive" under 28 U.S.C. 2255(h). 7/25/02 Mem. & Order 2; see Pet. App. 11a. That provision requires a prisoner to seek preauthorization from the court of appeals before filing a "second or successive" Section 2255 motion and permits such preauthorization only in certain circumstances involving newly discovered exculpatory evidence, 28 U.S.C. 2255(h)(1), or new constitutional rules, see 28 U.S.C. 2255(h)(2).

In 2002, petitioner "refiled his petition, again under both sections 2241 and 2255, in the Southern District of Indiana." Pet. App. 11a. The district court dismissed the petition, see *id.* at 12a, and the court of

appeals affirmed, 347 F.3d 214. The court of appeals understood the district court to have "characterized [petitioner's] filing as a mislabeled § 2255 motion and dismissed [it] for lack of jurisdiction because [petitioner] had once before sought relief under § 2255 and had not received [the court of appeals'] permission to do so again." *Id.* at 216. The court agreed that the motion did not satisfy the criteria for preauthorization of a "second or successive" Section 2255 motion because *Richardson* did not announce "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," 28 U.S.C. 2255(h)(2), but instead merely "interpret[ed] the statutory phrase 'series of violations,' and [held] that it defines 'several elements' of a CCE offense." 347 F.3d at 217 (citation omitted).

The court of appeals further held that petitioner did not meet the requirements of Section 2255(e)'s savings clause to file a Section 2241 habeas petition because he could not "advance a non-frivolous claim that, after *Richardson*, he is actually innocent of conducting a criminal enterprise," a requirement under circuit precedent. 347 F.3d at 218; see *id.* at 217 (citing *Taylor* v. *Gilkey*, 314 F.3d 832, 835 (7th Cir. 2002)). The court explained that "[t]he jury at [petitioner's] trial heard evidence establishing that he helped import seven massive boatloads of marijuana (weighing from 14,000 to 152,000 pounds) into the United States." *Ibid.* Although the jury "was not required to agree unanimously about which of those seven transactions constituted the 'series of violations'" under the jury instructions that the district court provided, the court held that "such a shortfall has no bearing on whether [petitioner's] conduct vio-

lated the CCE statute." *Ibid.* The court therefore "affirmed the judgment of the district court dismissing [the] petition as an unauthorized successive § 2255 motion." *Id.* at 219 (capitalization altered). This Court denied a petition for a writ of certiorari. 541 U.S. 990.

4. In 2014, petitioner filed another Section 2255 motion in the Southern District of Illinois seeking to vacate the CCE conviction. The district court concluded that the motion was an unauthorized "second or successive" motion and dismissed it for lack of jurisdiction. Pet. App. 28a. It explained that petitioner had "not allege[d] any new errors that occurred during the entry of the amended judgment, which involved only vacating the conspiracy sentence and leaving untouched the CCE sentence." *Id.* at 25a. The court further noted "doubts about whether [petitioner] filed his current motion within the limitations period of [Section] 2255(f)." *Id.* at 27a. The district court granted a certificate of appealability. *Ibid.*

The court of appeals affirmed, rejecting petitioner's argument that the motion was not "second or successive" under this Court's 2010 decision in *Magwood* v. *Patterson*, 561 U.S. 320. Pet. App. 1a-22a. Interpreting a provision similar to Section 2255(h) governing post-conviction applications by state prisoners, 28 U.S.C. 2244(b), *Magwood* held that where a prisoner obtains vacatur of his sentence in a first post-conviction application and is then resentenced, a subsequent post-conviction application challenging the newly imposed sentence is not "second or successive." 561 U.S. at 323-324; see *id.* at 329-337, 338-342. The Court, however, reserved the question whether "a petitioner who obtains a conditional writ as to his

sentence [may] file a subsequent application challenging not only his resulting, *new* sentence, but also his original, *undisturbed* conviction," without satisfying the preauthorization requirement for a "second or successive" petition. *Id.* at 342.

The court of appeals held that *Magwood* did not entitle petitioner to file his motion. The court explained that its prior decision in *Suggs* v. *United States*, 705 F.3d 279, cert. denied, 133 S. Ct. 2339 (2013), had resolved the question left open by *Magwood*, reaffirming pre-*Magwood* circuit precedent holding that where a prisoner succeeds in his first Section 2255 motion in vacating his sentence and then challenges the underlying conviction in a subsequent Section 2255 motion, the later motion qualifies as "second or successive." Pet. App. 15a-17a; see *Suggs*, 705 F.3d at 282-283 (citing *Dahler* v. *United States*, 259 F.3d 763 (7th Cir. 2001)). Petitioner argued that *Suggs* was inapplicable here because petitioner's first Section 2255 motion succeeded in challenging a separate conviction, not the sentence for his CCE conviction. Pet. App. 19a. The court rejected that argument because petitioner could "not explain why that distinction is meaningful for the purposes of a *Magwood* analysis." *Id.* at 19a-20a (emphasis omitted). To the contrary, the court reasoned, "Suggs had an arguably stronger claim than" petitioner has, because Suggs sought to challenge a conviction that underlay the previously vacated sentence, while petitioner "is seeking to challenge an *entirely separate* conviction," for which "[b]oth his sentence and his conviction * * * were entirely undisturbed." *Id.* at 20a.

ARGUMENT

Petitioner contends that when a prisoner's first motion under 28 U.S.C. 2255 results in an amended judgment striking one of his convictions, a subsequent Section 2255 motion challenging a different, undisturbed conviction does not qualify as "second or successive." That contention lacks merit. The court of appeals correctly concluded that petitioner's current post-conviction motion, challenging an undisturbed conviction carried forward into an amended judgment, was "second or successive" under 28 U.S.C. 2255(h) and therefore that the district court lacked jurisdiction. But even if petitioner were correct, the petition would not warrant this Court's review. Most significantly, petitioner could not obtain relief even under his own legal theory, because he filed two other Section 2255 motions *after* the amended judgment was issued but before the current motion. In addition, his current motion is untimely by more than a decade, and the instructional error that he asserts was necessarily harmless beyond a reasonable doubt. And in any event, even if this case presented a viable vehicle to resolve the question presented, the contours of the disagreement among the circuits with respect to issues arising in the wake of *Magwood* v. *Patterson*, 561 U.S. 320 (2010), are not sufficiently clear to warrant review of the question presented by this Court at this time.

1. The court of appeals correctly held that petitioner's current Section 2255 motion is "second or successive" and is therefore barred by Section 2255(h) without preauthorization from the court of appeals. See Pet. App. 18a-22a.

a. Before 1996, state and federal prisoners were statutorily permitted to file repetitive applications for post-conviction relief in the district court without obtaining prior judicial authorization. Such repetitive filings, however, were often summarily dismissed based on judge-made doctrines like "abuse of the writ." See, *e.g.*, *McCleskey* v. *Zant*, 499 U.S. 467 (1991). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, altered that practice by imposing "new restrictions on successive petitions," *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996), by state and federal prisoners.

Today, a federal prisoner may not file a "second or successive" motion for post-conviction relief under Section 2255 unless he first obtains certification from the court of appeals that the motion satisfies one of two enumerated grounds. Those grounds are set forth in 28 U.S.C. 2255(h), and include (as relevant here) a claim based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255(h)(2). Similar restrictions apply to state prisoners seeking to file a second or successive application for federal habeas corpus. 28 U.S.C. 2244. When, as here, the prisoner has not obtained the required appellate preauthorization, the district court lacks jurisdiction to entertain the motion. See *Burton* v. *Stewart*, 549 U.S. 147, 153 (2007) (per curiam).[2]

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[2] The procedural provisions regulating the availability of successive post-conviction applications are contained in 28 U.S.C. 2244, and those provisions by their terms apply to state prisoners. The federal-prisoner analogue incorporates these procedural provisions. See 28 U.S.C. 2255(h) ("A second or successive motion must

The statutory phrase "second or successive" as used in AEDPA is a "term of art." *Magwood*, 561 U.S. at 332 (quoting *Slack* v. *McDaniel*, 529 U.S. 473, 486 (2000)). "Congress did not define the phrase," *id.* at 331-332, and this Court "has declined to interpret [it] as referring to all [applications for post-conviction relief] filed second or successively in time," *Panetti* v. *Quarterman*, 551 U.S. 930, 944 (2007). The Court has recognized that the term draws meaning in part from judicial precedents predating AEDPA, see *id.* at 943-944, as well as from "AEDPA's purposes," *id.* at 945, and the overall "statutory context," *Magwood*, 561 U.S. at 332.

For example, this Court held in *Slack* that "a habeas petition which is filed after an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies is not a 'second or successive' petition." 529 U.S. at 478. Although such a petition is literally "second or successive," the Court construed the term in light of its pre-AEDPA precedent in *Rose* v. *Lundy*, 455 U.S. 509 (1982), which "held that a federal district court must dismiss habeas corpus petitions containing both exhausted and unexhausted claims" but "contemplated that the prisoner could return to federal court after the requisite exhaustion." *Slack*, 529 U.S. at 486.

b. *Magwood* reflected the same understanding that "second or successive" is a term of art. 561 U.S. at 332. In *Magwood*, a state prisoner obtained relief from his death sentence—but not the adjudication of his guilt of the underlying offense—on his first federal habeas petition. *Id.* at 326. After the State held a new

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be certified as provided in section 2244."); see also *Alaimalo* v. *United States*, 645 F.3d 1042, 1057 (9th Cir. 2011).

sentencing proceeding at which the death sentence was reimposed, the prisoner filed a second federal habeas petition challenging the new death sentence. *Id.* at 327-328. This Court held that the prisoner's second habeas petition was not "second or successive" within the meaning of AEDPA, thus permitting the prisoner to file his petition without appellate preauthorization. *Id.* at 323-324.

The Court reached that conclusion based on the fact that a new criminal judgment had intervened between the prisoner's petitions, which meant both that the second petition was the prisoner's "*first* application challenging that intervening judgment" and, critically, that it was the prisoner's first opportunity to obtain review of "*new*" claims of error arising from the resentencing, including a claim of ineffective assistance of counsel at the resentencing. 561 U.S. at 339; see *ibid.* ("It is obvious to us * * * that his claim of ineffective assistance at resentencing turns upon new errors."); *ibid.* (explaining that the prisoner's "fair-warning claim" was new because the alleged error was made again at resentencing and noting that the "state court conducted a full resentencing and reviewed the aggravating evidence afresh"). This focus on new errors arising after the original judgment would have been entirely unnecessary if the only fact that mattered was the entry of an intervening criminal judgment. Accord *Panetti*, 551 U.S. at 942-947.[3]

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[3] Although *Magwood* addressed a habeas petition brought by a state prisoner under 28 U.S.C. 2254(a), the government agrees that the holding in *Magwood* applies to federal prisoners' motions for post-conviction relief under 28 U.S.C. 2255(a). See, *e.g.*, *Johnson* v. *United States*, 623 F.3d 41, 45 (2d Cir. 2010).

c. Given its focus on new errors arising after the original judgment, *Magwood* expressly reserved the question whether "a petitioner who obtains a conditional writ as to his sentence" is permitted "to file a subsequent application challenging not only his resulting, *new* sentence, but also his original, *undisturbed* conviction." 561 U.S. at 342; see *id.* at 342 n.16. The question presented in this case is one step further removed from *Magwood*: whether, when a prisoner obtains vacatur of one conviction in a first post-conviction motion, a second motion challenging a separate, undisturbed conviction qualifies as "second or successive." The court of appeals correctly held that such a motion qualifies as a "second or successive" motion and therefore that the district court lacked jurisdiction over petitioner's motion. Pet. App. 18a-22a.

i. The Seventh Circuit's pre-*Magwood* decision in *Dahler* v. *United States*, 259 F.3d 763 (2001) (Easterbrook, J.), and its post-*Magwood* decision in *Suggs* v. *United States*, 705 F.3d 279, cert. denied, 133 S. Ct. 2339 (2013), addressed the question that *Magwood* left open, holding that when a first post-conviction motion results in resentencing, a second post-conviction motion challenging the undisturbed conviction underlying the sentence qualifies as "second or successive." That conclusion is correct. It is true that once an amended judgment is issued, a prisoner is technically held in custody under that amended judgment, not the original, vacated judgment. Cf. *Magwood*, 561 U.S. at 332-333. But as explained above, this Court has long understood "second or successive" to be a term of art. *Id.* at 332. The most sensible understanding of that term of art in this context is that a second post-

conviction motion challenging portions of the original judgment that were *not* amended qualifies as a "second or successive" motion, not a first motion challenging the amended judgment.

The conclusion does not conflict with the specific holding of *Magwood*, since *Magwood* expressly left open the question decided in *Dahler* and *Suggs*. 561 U.S. at 342 & n.16. And contrary to petitioner's contention (Pet. 15), that determination is also consistent with the "logic" of *Magwood*. This Court's analysis relied substantially on the fact that the prisoner had asserted "*new*" errors stemming from events that postdated the original judgment and that led to the amended judgment. 561 U.S. at 339; see *id.* at 328-329. That analysis does not apply to portions of the original judgment carried forward into the amended judgment without change.

ii. It follows *a fortiori* from the Seventh Circuit's resolution of the question left open by *Magwood*—involving a challenge to a conviction after resentencing on the same conviction—that petitioner's challenge to a separate conviction qualifies as "second or successive." See Pet. App. 19a-20a. If anything, the case for deeming petitioner's challenge to be second or successive is stronger, because he seeks to challenge an entirely separate conviction from the one that led to the amended judgment. If petitioner were correct, it would give prisoners a new opportunity to challenge a conviction that they already had a full and fair opportunity to challenge, based on the fortuity that a court found an error in a separate conviction. That result would inequitably provide certain prisoners with a second opportunity to challenge a conviction that is not available to other prisoners, with no

sensible basis for that substantial difference in treatment.

2. Since *Magwood*, the lower courts have begun to address the question that *Magwood* reserved and related questions, such as the one presented here, and, as the court of appeals recognized (Pet. App. 21a), those courts have reached differing conclusions about *Magwood*'s scope. Some courts have held, like the court of appeals here, that second Section 2255 motions filed after an intervening judgment are subject to the "second or successive" bar where they do not raise issues unique to that judgment. See *In re Lampton*, 667 F.3d 585, 589-590 (5th Cir. 2012) (first motion under Section 2255 resulted in vacatur of one count of conviction; later motion challenging other counts was "second or successive"); see also *In re Martin*, 398 Fed. Appx. 326, 327 (10th Cir. 2010) (first habeas petition was followed by clerical correction of judgment; later petition was "second or successive"). Others have taken the opposite view. See *Johnson* v. *United States*, 623 F.3d 41, 43, 46 (2d Cir. 2010) (first Section 2255 motion resulted in amended judgment dismissing one count of conviction on double-jeopardy grounds; subsequent motion challenging other counts of conviction was not "second or successive"); *King* v. *Morgan*, 807 F.3d 154, 156-160 (6th Cir. 2015) (permitting challenge to convictions where sentence was amended after first post-conviction motion); *Wentzell* v. *Neven*, 674 F.3d 1124, 1126-1128 (9th Cir. 2012) (following denial of first federal habeas petition, one count of conviction was dismissed in state habeas proceedings and an amended judgment was entered; subsequent federal habeas petition challenging undisturbed counts of conviction was not "second or succes-

sive"), cert. denied, 133 S. Ct. 2336 (2013); *Insignares* v. *Secretary, Fla. Dep't of Corr.*, 755 F.3d 1273, 1277-1281 (11th Cir. 2014) (per curiam) (state judge granted defendant's motion to correct sentence, reducing mandatory-minimum sentence but leaving term of imprisonment intact; subsequent federal habeas petition challenging undisturbed counts of conviction was not "second or successive"); see also *In re Brown*, 594 Fed. Appx. 726, 729-730 (3d Cir. 2014) (per curiam) (first motion under Section 2254 resulted in vacatur of one count of conviction and state court resentenced on remaining counts of conviction; subsequent Section 2254 motion challenging remaining counts of conviction was not "second or successive").

The question presented here and related questions may warrant this Court's review in an appropriate case. But for two reasons, certiorari is not warranted at this time. First, for a number of significant reasons, this case presents an unsuitable vehicle to address the question presented: (i) this is *not* petitioner's first Section 2255 motion since the amended judgment was issued; (ii) petitioner's claim is untimely by over a decade; and (iii) the error under *Richardson* v. *United States*, 526 U.S. 813 (1999), that he identifies was necessarily harmless beyond a reasonable doubt. Second, this Court's ultimate review would benefit from further percolation in the courts of appeals of the diverse questions arising from *Magwood*.

a. This case is not a suitable vehicle to resolve the question presented. Even if petitioner's interpretation of "second or successive" were correct, he clearly would not be entitled to relief for three independent reasons.

i. First, this is not petitioner's first Section 2255 motion since the district court entered the amended judgment in 1998; it is his *third*. Petitioner filed two post-conviction motions after the amended judgment was issued, the first in 1999 and the second in 2002, both of which sought vacatur of petitioner's CCE conviction under Section 2241 or, alternatively, under Section 2255. 347 F.3d at 219; 7/25/02 Mem. & Order 2; see pp. 4-7, *supra*. Even under petitioner's understanding of the legal effect of the 1998 amended judgment, therefore, his current motion qualifies as "second or successive."[4]

Petitioner contends (Pet. 21 n.4) that because his 1999 and 2002 motions were "dismissed for lack of jurisdiction," "neither motion is counted for purposes of a subsequent 'second or successive' analysis." He quotes this Court's decision in *Slack*, *supra*, for the proposition that "[a] habeas petition filed after an initial petition was dismissed * * * without an adjudication on the merits is not a 'second or successive' petition." Pet. 22 n.4 (quoting 529 U.S. at 489) (ellipsis in petition). That argument is incorrect. Petitioner's quotation of *Slack* uses an ellipsis to omit the fact that its holding encompassed only dismissals without prejudice under *Rose*, *supra*, for state prisoners who fail to exhaust state-court remedies, not all jurisdictional dismissals. See *Slack*, 529 U.S. at 489 ("[A]

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[4] Although the government did not raise this argument in the court of appeals, the question whether petitioner's fourth Section 2255 motion qualifies as "second or successive" is jurisdictional, as petitioner acknowledges, and therefore the government would be free to seek affirmance of the court of appeals' judgment on that basis.

habeas petition filed after an initial petition was dismissed under *Rose* v. *Lundy* without an adjudication on the merits is not a 'second or successive' petition."); see also *id.* at 478 ("[A] habeas petition which is filed after an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies is not a 'second or successive' petition."); *id.* at 485-486 ("A habeas petition filed in the district court after an initial habeas petition was unadjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition."). As explained above, *Slack*'s holding rested on the fact that *Rose* "contemplated that [a] prisoner [whose petition was dismissed for failure to exhaust state remedies for some claims] could return to federal court after the requisite exhaustion," *id.* at 486, and on the Court's conclusion that AEDPA incorporates that background understanding into the term of art "second or successive," see *id.* at 486-487. Nothing in *Slack*'s holding or reasoning supports petitioner's view that his third Section 2255 motion after the amended judgment was issued should be treated as his first such motion.

Courts of appeals have not characterized as "second or successive" petitions or motions that suffer from technical or procedural deficiencies that a petitioner can rectify before refiling the petition, such as filing in the wrong venue. But petitioner's previously filed Section 2255 motions were not dismissed for such technical defects.[5] Rather, the courts determined that

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[5] The dismissal of petitioner's second motion was styled as "without prejudice." 7/25/02 Mem. & Order 2; see p. 5, *supra*. But even if that motion were not counted for these purposes, petitioner has provided no sound basis to ignore his third Section 2255 motion.

they were jurisdictionally barred by Section 2255(h). 347 F.3d at 219; 7/25/02 Mem. & Order 2.[6] Although petitioner believes that those decisions were wrongly decided in light of this Court's subsequent decision in *Magwood*, that does not mean that the current motion qualifies as his "first" motion since the amended judgment was issued.

ii. Second, petitioner's current Section 2255 motion is untimely by more than a decade. Section 2255(f)(3) requires a Section 2255 motion to be filed within one year of, as relevant here, "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." *Richardson* was decided more than 15 years before petitioner filed the current Section 2255 motion in 2014. As the district court suggested (Pet. App. 27a-28a), petitioner's motion is therefore untimely under Section 2255(f).[7]

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[6] In seeking this Court's review of the dismissal of his third motion, petitioner did not raise the argument he now presents: that his post-conviction motion was not "second or successive" because his successful first-in-time motion resulted in an amended judgment. See Pet., *Kramer* v. *United States*, No. 03-1337, 2004 WL 576133 (Mar. 18, 2004). Instead, petitioner acknowledged that he was not entitled to relief under Section 2255 because of the statutory bar against filing successive petitions. *Id.* at *8-*9.

[7] The government noted the timeliness bar in its appellate brief below and explained that because the district court lacked jurisdiction under binding Seventh Circuit precedent, the government had not raised the timeliness issue in the district court. See Gov't C.A. Br. 24-25. The government urged that "[s]hould [the court of appeals] remand this matter to the District Court for further proceedings, the government will present its timeliness argument as it addresses the merits." *Id.* at 25.

Petitioner appears to suggest (Pet. 7) that his 2014 Section 2255 motion was timely because *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013), "established that [petitioner's] *Richardson* claim was an error of constitutional dimension." That argument lacks merit. *Alleyne* held that facts that increase the mandatory-minimum sentence for an offense are elements that must be proved to a jury beyond a reasonable doubt, overruling *Harris* v. *United States*, 536 U.S. 545 (2002). *Alleyne*, 133 S. Ct. at 2155. The *Richardson* claim that petitioner presses in his Section 2255 motion does not relate to facts necessary for a mandatory-minimum sentence. Rather, petitioner contends (Pet. 3) that the jury should have received a unanimity instruction on facts necessary for him to be convicted and sentenced for a CCE offense at all. *Alleyne* did not address that issue or mention *Richardson*.

Petitioner quotes a sentence from the *Alleyne* plurality opinion stating that the Sixth Amendment right to trial by jury, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." Pet. 7 (quoting 133 S. Ct. at 2156 (opinion of Thomas, J.)). But that is a long-established bedrock principle of constitutional law, as reflected in the plurality's citation of *In re Winship*, 397 U.S. 358 (1970), to support that proposition. The right to have a jury find every element of a crime was therefore not "initially recognized by the Supreme Court" in *Alleyne*. 28 U.S.C. 2255(f)(3). And in any event, *Alleyne* is not retroactively applicable to cases on collateral review, see *Simpson* v. *United States*, 721 F.3d 875, 876 (7th Cir. 2013), so petitioner's claim for post-conviction relief

could not be predicated on any rule announced in *Alleyne*.[8]

Because petitioner's motion is clearly time-barred under Section 2255(f), this case is not an appropriate vehicle to address whether petitioner's motion is separately barred as "second or successive" under Section 2255(h).

iii. Third, petitioner ultimately could not obtain relief on his *Richardson* claim even if jurisdiction were proper because the district court's failure to provide a unanimity instruction on the CCE count was harmless beyond a reasonable doubt. See *Lanier* v. *United States*, 220 F.3d 833, 839 (7th Cir.), cert. denied, 531 U.S. 930 (2000). Under the facts proved at trial, the jury necessarily agreed unanimously on the identity of at least two substantive drug offenses he committed.[9]

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[8] In denying petitioner's 2002 post-conviction motion, the court of appeals correctly held that *Richardson* did not "announce[] a new rule of *constitutional* law" allowing the filing of a second or successive motion under Section 2255(h)(2). 347 F.3d at 217 (emphasis added). But *Richardson* was the first time that this Court recognized the statutory requirements to establish a CCE offense, such that an *initial* Section 2255 motion would have been timely under Section 2255(f)(3) if filed within a year of that decision. See *Dodd* v. *United States*, 545 U.S. 353, 358 (2005). While this Court has recognized that the structure of Section 2255, and in particular the interplay between Subsections (f)(3) and (h)(2), creates "the potential for harsh results in some cases," it has nonetheless noted that it is "not free to rewrite the statute that Congress has enacted." *Id.* at 359.

[9] The Seventh Circuit requires proof of only two predicate offenses to establish a CCE, but does not allow the included conspiracy to count as one of the two. See *United States* v. *Baker*, 905 F.2d 1100, 1104-1105 (1990). Other circuits require proof of three predicate offenses, but allow the included conspiracy to count as one of those three. *Ibid.* Either way, because petitioner was con-

Much of the conduct charged in connection with the CCE offense took place before Section 848 became effective on October 27, 1986. See Continuing Drug Enterprise Act of 1986, Pub. L. No. 99-570, § 1253, 100 Stat. 3207-14 to 3207-15. For that reason, the jurors were instructed that in order to find petitioner guilty on the CCE count, they had to unanimously find that he had committed at least one predicate act after that date or that the enterprise had received $10 million in gross receipts between October 27, 1986 and February 1987. 955 F.2d at 484. But the only activity that could have formed the basis for such a unanimous finding was the import and subsequent distribution of a bargeload of approximately 130,000 pounds of marijuana in San Francisco in November 1986. *Id.* at 482-483. And it is inconceivable that jurors unanimously agreed to convict petitioner on the CCE charge on the basis of that November 1986 marijuana shipment, but did not unanimously agree that petitioner was also guilty of the separate offenses of importation and distribution in connection with the same shipment. Accordingly, it is clear beyond a reasonable doubt that the district court's failure to give a *Richardson* instruction had no effect on the verdict.

The jury's forfeiture judgment (albeit under the preponderance standard) reinforces that conclusion. The jury found petitioner responsible for $60 million in profit from the criminal enterprise, but the proceeds from the two largest shipments of marijuana fell well short of that amount, at just over $30 million. Gov't C.A. Br. at 19-20, *United States* v. *Kramer*, No.

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victed of the included conspiracy, his Section 848 conviction would not be vacated if the jury would have agreed unanimously on the identity of two additional substantive drug offenses.

88-3444 (July 18, 1990). Thus, the jury necessarily tied at least three marijuana shipments to the criminal enterprise, establishing the requisite predicate offenses. See also *Lanier*, 220 F.3d at 840 ("Without finding [petitioner's co-conspirator] guilty of criminal participation in each of [the seven] shipments, the forfeiture total would have fallen short of $60 million.")

Finally, petitioner (and his co-conspirators) did not dispute at trial the government's proof of the predicate offenses. Instead, petitioner's defense was that he was not present at the November 1986 shipment, so that Section 848(b) (which went into effect in 1986) did not apply to him. See Gov't C.A. Br. at 17-18, *Kramer*, *supra* (No. 88-3444); Pet. C.A. Supp. Br. at 17-21, *Kramer*, *supra*, No. 88-3444 (July 6, 1989). But the jury necessarily rejected that defense by convicting him of the Section 848 offense. No rational jury in such circumstances would have failed to agree, unanimously, on the requisite predicate offenses. *Ibid.*[10]

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[10] For similar reasons, the court of appeals rejected the post-conviction *Richardson* claim of petitioner's co-conspirator, Lanier. Like petitioner, Lanier did not dispute at trial the government's proof of the predicate offenses; he admitted his involvement in the conspiracy, arguing that he was only a middle-man and not a principal administrator of the criminal enterprise. *Lanier*, 220 F.3d at 839. For that reason, the court of appeals was "sure that the jury agreed unanimously on at least two specific criminal violations," and rejected Lanier's *Richardson* claim. *Ibid.* Indeed, even if petitioner had contested the government's proof of the predicate offenses, he is responsible for the criminal acts of Lanier, his co-conspirator. See *Pinkerton* v. *United States*, 328 U.S. 640, 647-648 (1946). Since Lanier did not contest his involvement in the predicate offenses, the jury, having unanimously agreed that petitioner was a principal administrator of the enterprise and that his co-conspirator committed the requisite predicate offenses, would have

b. Even putting aside the multiple, alternative reasons why petitioner could not obtain relief, see pp. 16-23, *supra*, review of the issue left open by *Magwood* at this time would be premature, notwithstanding the existing disagreement among the circuits. As the United States explained in its brief in opposition to the petition for a writ of certiorari in *Suggs*, the precise question reserved in *Magwood* is only one of several closely related questions that can arise when a modification or correction is made or relief is granted—on collateral review or otherwise—as to some components of a criminal judgment and the prisoner later seeks post-conviction relief as to an undisturbed portion of the judgment. See U.S. Br. in Opp. at 7-9, *Suggs*, *supra* (No. 12-978) (Apr. 2013). Many 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. This Court's analysis would be aided by fuller consideration in lower courts of the range of issues that arise in this context.

For example, in addition to the question posed in this case about a separate, undisturbed conviction, related questions that some lower courts have considered include:

i. Whether a habeas court should treat the correction of a clerical error in the judgment under Federal Rule of Criminal Procedure 36 or equivalent state practice as an intervening judgment that would permit the filing of a second habeas petition. See *Hawkins* v. *Miller-Stout*, No. 12-cv-5477, 2012 WL 6114976, at *6-*8 (W.D. Wash. Nov. 15, 2012) (rejecting argument

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necessarily found petitioner responsible for the requisite predicate offenses as well.

that a "ministerial change to [the prisoner's] existing judgment" reset the "second or successive" counter); *Rice* v. *United States*, No. 11-cv-22172, 2012 WL 3095397, at *2 (S.D. Fla. July 30, 2012) (similar, with respect to clerical correction entered upon first Section 2255 motion); *Greene* v. *McDaniel*, No. 3:09-cv-00601, 2012 WL 297928, at *3-*5 (D. Nev. Jan. 31, 2012) (reluctantly concluding that a clerical correction does reset the "second or successive" counter as to all counts of conviction); cf. *Martin*, 398 Fed. Appx. at 327 (concluding that such a correction is not newly discovered evidence for purposes of 28 U.S.C. 2244(b)(2)(B)); 398 Fed. Appx. at 327-328 (Hartz, J., dissenting) (concluding that such a correction resets the "second or successive" counter).

ii. Whether a habeas court should treat an amendment to a term of supervised release on a Section 2255 motion as a new judgment. See *United States* v. *Ramirez-Fernandez*, No. 2:89-cr-00024, 2010 WL 4024600, at *3-*4 (D. Me. Oct. 12, 2010) (recommended decision concluding that, under a prior court of appeals decision in the prisoner's case, but perhaps not under *Magwood*, such an order did not reset the "second or successive" counter as to undisturbed portions of the judgment), aff'd, No. 89-cr-24, 2010 WL 4856506 (D. Me. Nov. 23, 2010).

iii. Whether other amendments to or modifications of the details of a criminal judgment restart the "second or successive" counter. See 18 U.S.C. 3582(c) (sentence modification based on, *inter alia*, retroactive amendment of Sentencing Guidelines); Fed. R. Crim. P. 35(b) (sentence reduction for substantial assistance); Fed. R. Crim. P. 32.2(e) (amendment of forfeiture order); 18 U.S.C. 3583(e) (modification of

terms of supervised release); Fed. R. Crim. P. 32.1(c) (same); *Mackey* v. *Sheets*, No. 3:12-cv-73, 2012 WL 3878145, at *9 (S.D. Ohio Sept. 6, 2012) (state court's modification of terms of post-release supervision does not reset the "second or successive" counter); cf. *Murphy* v. *United States*, 634 F.3d 1303, 1309 (11th Cir. 2011) (holding that post-judgment reduction of sentence for substantial assistance does not restart AEDPA's statute of limitations by establishing a new "date on which the judgment of conviction becomes final," 28 U.S.C. 2255(f)(1) (Supp. V 2011)).

iv. Whether the revocation of supervised release or probation under 18 U.S.C. 3565 or 3583(e)(3) and Federal Rule of Criminal Procedure 32.1(b) affects the "second or successive" counter. Cf. *Morgan* v. *Ryan*, No. 10-cv-2215, 2011 WL 6296763, at *4-*6 (D. Ariz. Nov. 28, 2011) (state revocation of probation resulted in a separate judgment, rather than a new judgment, and thus did not reset the "second or successive" counter as to the prisoner's underlying conviction), adopted, Docket entry Nos. 40, 49 (Dec. 16, 2011 & Feb. 14, 2012).

Lower-court decisions on these issues demonstrate that it is far from clear that the court of appeals' differing approaches to *Magwood* in certain contexts will translate to others in which second motions for post-conviction relief may be filed, or that the disagreement will persist as courts continue to refine their approaches to *Magwood* in such cases. The courts of appeals have had limited opportunities since *Magwood* to articulate and apply consistent principles of law across the range of possible scenarios. This Court would benefit from further analysis of these issues in the circuits, which would assure that the Court has in

view the variety of fact patterns left unaddressed in *Magwood* and has the full benefit of lower courts' efforts to address them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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