

19-7145

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No. 19A370

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IN THE

SUPREME COURT OF THE UNITED STATES

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Carlos E. Rodriguez-Milian,

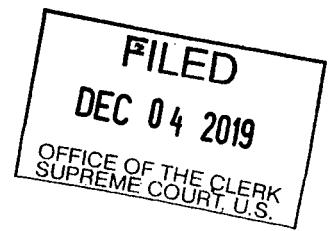
Petitioner,

ORIGINAL

v.

United States of America,

Respondent.



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PETITION FOR A WRIT OF CERTIORARI

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On Petition for Writ of Certiorari to  
The United States Court of Appeals  
for the First Circuit

\*\*\*\*\*

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QUESTIONS PRESENTED

1.

A court of appeals lacks subject-matter jurisdiction to decide a § 2255 appeal's merits without granting a certificate of appealability. The First Circuit, effectively, circumvented the rule and usurped jurisdiction by ignoring the district court's procedural error----that the movant defaulted an ineffective assistance claim by failing to raise it on appeal----and upholding an unexplained summary response that the § 2255 claims were meritless.

Can an appeals court disregard the district court's procedural error and decide a COA application based on the underlying merits?

2.

After the district court ruled on the § 2255 motion, the government revealed its failure to timely disclose material information concerning the informants. Mr. Rodriguez-Milian submitted pro se motions that were inaccurately labeled; instead of recharacterizing the motions as motions to remand for purposes of amendment, the First Circuit denied the motions as labeled.

Should the First Circuit have denied the pro se requests without liberally construing the motions in such a manner as to effectuate their purpose and avoid dismissal?

#### **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

#### **LIST OF CASES**

This case was originally heard in the United States District Court for the District of Puerto Rico, Case No.: 10-435 (PG).

The case was appealed to the United States Court of Appeals for the First Circuit, Case Number 14-1976.

#### **CORPORATE DISCLOSURE STATEMENT**

There are no publicly traded companies that have an interest in the outcome of this case.

#### **OPINIONS BELOW**

The opinion of the United States Court of Appeals appears at Appendix A, and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition, and is unpublished.

The opinion of the United States Court of Appeals appears at Appendix D to the petition, and is published at 820 F.3d 26 (1st Cir. 2016).

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## STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals decided Mr. Rodriguez's case was July 10, 2019. No petition for rehearing was filed. Justice Breyer extended the time for petitioning this Court for a writ of certiorari until December 7, 2019. (App. "C").

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**28 U.S.C. § 2253(c)(1)(B):** Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—the final order in a proceeding under section 2255.

**18 U.S.C. § 2253(c)(2):** A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

## STATEMENT OF THE CASE

In 2012, the United States indicted Carlos Rodriguez-Milian for importing more than 50 kilograms of cocaine into Puerto Rico, and transporting \$500,000 in drug-sales proceeds out of Puerto Rico. (App. D at 3-4). Mr. Rodriguez proceeded to trial. (App. D at 4). At trial, Jose Marrero Martell and Diego Perez Colon testified that Mr. Rodriguez played a role in the drug trafficking conspiracy. (App. D at 4).

In 2014, a jury convicted Mr. Rodriguez. (Id.). The district court sentenced him to 235 months. (Id.)

Mr. Rodriguez appealed. The Court of Appeals for the First Circuit affirmed the conviction and sentence, but remanded to the district court to consider the implications of Amendment 782 to Mr. Rodriguez's sentence. (App. D at 2). Thereafter, under 18 U.S.C. § 3582(c)(2), the district court reduced Mr.

Rodriguez's sentence to 188 months. (App. B at 2).

Nonetheless, Mr. Rodriguez filed a second direct appeal, the First Circuit affirmed. Then Mr. Rodriguez petitioned this Court for a writ of certiorari. This Court declined to issue the writ.

In 2017, Mr. Rodriguez turned to 28 U.S.C. § 2255. (App. B). The pro se motion contained ten claims. (App. B at 1). The district court denied the § 2255 motion because Mr. Rodriguez's claims of ineffective assistance of counsel were either procedurally defaulted (App. B at 5-7), or precluded as a result of similar, but not identical, claims having been decided on direct appeal. (App. B at 4-5, 7). The district court finally found that "the record and particularly the transcripts of sentencing procedures, belies petitioner's allegations regarding counsel's performance at the presentence stage." (App. B at 6)(two-sentence merits analysis).

The First Circuit recognized that the district court had applied the wrong rules of law concerning procedural default and claim preclusion. (App. A at 1)("[s]etting aside the district court's suggestions that petitioner's claims of ineffective assistance were barred...."). The First Circuit, however, leapt to a merits analysis and latched on to two sentences in the district court opinion where the district court appears to announced "alternative merits-based denial [] of petitioner's claims...." (App. A at 1).

An examination of the district court alternative language reveals no reasoned opinion or substantive analysis. (App. B at 7). The district court opinion does not contain any factual predicates or legal premises that support the alternative ruling. (App. B). In effect, the appeals court concluded that no reasonable jurist would find Mr. Rodriguez's claims meritorious. (App. A at 1). The appeals court denied the application for certificate of appealability. (Id.). This petition ensued.

## REASONS FOR GRANTING THE WRIT

The law entitles a § 2255 movant to an evidentiary hearing unless the record conclusively refutes the movant's allegations. Here, in order to avoid the evidentiary hearing, the district court misapplied the law—declaring the ineffective-assistance-of-counsel claim to be procedurally defaulted or previously decided on direct appeal. A legal impossibility. The appeals court, in order to avoid issuing a certificate of appealability, effectively decided the merits of the appeal. An jurisdictional order, one this Court forbids. This Court should grant the writ and realign the First Circuit with the law and the other federal circuits.

1. The district court primarily denied the § 2255 motion because, in its opinion, the claims were foreclosed by preclusive principles or procedural default. The appeals court recognized and ignored the district court's procedural errors, and chose to decide the application for COA on an unexplained merits analysis. A decision that conflicts with this Court's holding and those of other Court of Appeals' circuits.

This Court held that when a court of appeals sidesteps the certificate of appealability process and decides a habeas appeal on the merits, the appeals court acts without jurisdiction. *Buck v. Davis*, 137 S.Ct. 759 (2017). Functionally, the First Circuit took the same course by ignoring the district court's plainly erroneous procedural rulings, and denying the certificate of appealability on the merits. When the district court predicates its denial of a § 2255 motion on the movant procedurally defaulting (on direct appeal) an ineffective assistance of counsel claim, or concluding that although unpresented, an ineffective-assistance claim was resolved on a direct appeal, the district court necessarily distorts the integrity of the habeas corpus fact-finding process.

Under this circumstance, an appellate court should grant a COA on the procedural error in order for the parties to argue the effect of the mistake on development of the substantive claims, rather than deciding from an incomplete record that the substantive claims are without merit. Hence, the need for a COA to determine if the procedural error impacted the adjudication of cognizable § 2255 claims.

Here, the First Circuit disregarded the district court's procedural explanations for denying the § 2255 motion, and instead latched onto an unreasoned, two-line conclusory statement that the claims that were not meritorious. The unreasoned alternative basis for denying the § 2255 does not provide for meaningful merits review. Cf. generally *Ylst v. Nunnemacher*, 501 U.S. 797, 801 (1991). Effectively, the court of appeals decided the appeal's merits without a COA, thus without jurisdiction. *Buck*, 137 S.Ct. at 759-61.

Stated otherwise, at the COA stage, when the issue is procedural error, the appellate's court inquiry must not concern the substantive merits, rather the appellate court need only determine whether reasonable jurists could find the substantive claim valid. *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

By example, if Mr. Rodriguez's counsel had correctly advised him of the government's plea-bargain offer, then Mr. Rodriguez would have accepted the offer and faced a sentence less than half that imposed. (App. B at 2)(claim 1). A second example, trial counsel failed to object to numerous errors, thus significantly increasing the burden on direct appeal. "A party who fails to preserve potential claims of error in the trial court usually encounters strong headwinds on appeal. So it is here." (App. D at 2). The appellate court identified a swath of trial counsel error, which likely affected the direct appeal's outcome. Simply, jurists of reason would find these and other claims

valid regardless of the merits. A conclusion which makes the claims worthy of an evidentiary hearing in the district court, 28 U.S.C. § 2255(b), and a certificate of appealability from the appeals court. 28 U.S.C. § 2253(c).

**2. The First Circuit departed from the ordinary application the liberal construction doctrine, which effectively permitted a government misconduct claim from being heard and denied Mr. Rodriguez habeas corpus review of the constitutional error.**

In 2018, after the § 2255 decision, but before the denial of the certificate of appealability, Mr. Rodriguez learned that the government's witnesses against him were paid by the government. Mr. Rodriguez learned this from evidence disclosed in an unrelated case, **United States v. Raymondi-Hernandez**, No. 16-2490 (1st Cir. 2018); **United States v. Varestin-Cruz**, Nos. 17-1317, 18-1076, 18-1258 (1st Cir. 2018).

#### **Diligence**

Promptly, upon verifying the identities of the paid informants, Mr. Rodriguez submitted pro se motions notifying the appellate court of the discovery that the government withheld evidence material to both an elemental fact and key witness credibility. The motions were inaptly labeled, but liberally construing the motions, Mr. Rodriguez essentially asked for a remand to the district court to amend the § 2255 motion in order to raise the claims, which were then timely under 28 U.S.C. § 2255(f)(2) and (f)(4). See generally **Mayle v. Felix**, 545 U.S. 644 (2005); see also **United States v. Thompson**, 771 F.3d 711 (D.C. Cir. 2004).

#### **Liberal Construction**

The First Circuit, however, departed from the usual application of the liberal construction doctrine, **Haines v. Kerner**, 404 U.S. 519, 520 (1972) (per curiam), a departure that effectively insulated the government's misconduct from

review. That is, the government misconduct, which preexisted the defendant's § 2255 motion, becomes unreviewable if the government hides the misbehavior until after the § 2255 is complete. **Scott v. United States**, 890 F.3d 1239 (11th Cir. 2018); but see **Workman v. Bell**, 227 F.3d 331 (6th Cir. 2000).

#### **Brady Claim**

Mr. Rodriguez's new evidence supports allegations that make out a prima facie **Brady v. Maryland**, 373 U.S. 83 (1963), claim. Mr. Rodriguez's allegations that his purported co-conspirators (the two witnesses against him at trial) were paid informants. The witnesses' status was revealed in an unrelated trial. If the government had disclosed the witnesses' status, then Mr. Rodriguez's trial-outcome would have changed. First, the jury would have been instructed that a person cannot conspire with government agents. Second, the credibility of the two witnesses who tethered Mr. Rodriguez to the drug trafficking organization would have been significantly reduced if not erased.

#### **Manifest Injustice Without Liberal Construction**

Of course, that truth may never be determined because of the restrictions on second or successive habeas petitions. In other words, because Mr. Rodriguez does not know how to plead legal claims, and the First Circuit did not apply the liberal construction rules, then both the truth and the constitutional error will be buried without a hearing.

Furthermore, when the government hides a **Brady** claim, arguable that claim should not be subject to procedural defenses or even the Antiterrorism Effective Death Penalty Act's restrictions on "second or successive" petitions. See **United States v. Lopez**, 577 F.3d 1053, 1064-68 (9th Cir. 2009); **Workman**, 227 F.3d at 335 (recognizing the government's intentional deception of the court as an

exception to second or successive rules); but see **Tompkin v. Sec'y. Dep't. of Corr.**, 557 F.3d 1257, 1259-60 (11th Cir. 2009) (AEPDA restrictions apply even to intentional misconduct); **In re Siggers**, 615 F.3d 477, 479 (6th Cir. 2010); **Evans v. Smith**, 220 F.3d 306, 323 (4th Cir. 2000); see also **Crawford v. Minnesota**, 698 F.3d 1086, 1088-89 (8th Cir. 2012).

Although Mr. Rodriguez's filing did not involve a second-in-time filing, that jurisprudence is enlightening as to the fundamental nature of the error. Moreover, in conjunction with these facts it points to a fundamental question that is unresolved: when is a § 2255 motion final for purposes of amendment and appeal. See **Bannister v. Davis**, S.Ct. No. 18-6943 (2019) (circuits disagree on when § 2254 becomes final); **Amodeo v. United States**, 743 Fed. Appx. 381 (11th Cir. 2018) (unpublished).

This Court should grant the writ and direct the court of appeals to grant a COA on whether the liberal construction doctrine requires the pro se motions to be construed in a manner that avoids denial or dismissal.

#### CONCLUSION

This Court should grant the petition for certiorari, vacate the First Circuit's order, and remand with instructions to grant a certificate of appealability.

Prepared with the assistance of Frank L. Amodeo and respectfully submitted by Carlos E. Rodriguez-Milian on this 4th day of December, 2019:



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