

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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ANGELA DE JESUS-CONCEPCION,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE THIRD CIRCUIT COURT OF APPEALS FROM A  
FINAL DECISION DENYING A PETITION FOR HABEAS  
CORPUS AND DENIAL OF PETITION FOR REHEARING

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PETITION FOR WRIT OF CERTIORARI

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SUBMITTED BY:

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## QUESTIONS PRESENTED

1. Whether Petitioner's Sixth Amendment right to the effective assistance of counsel impermissibly violated, when the district court erred in failing to grant petitioner an evidentiary hearing where she could establish her claim of ineffective assistance of counsel.
2. Whether Petitioner's Sixth Amendment right to the effective assistance of counsel impermissibly violated, where trial counsel and the court misrepresented to the Petitioner that she would be entitled to credit towards her sentence for the time spent on house arrest.

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner, Angela de Jesus-Concepcion, respectfully asks that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit issued on July 2, 2020 which affirmed the denial of a certificate of appealability of the opinion and order of the United States District Court denying a petition to vacate the conviction.

### **OPINION BELOW**

The Order of the United States Court of Appeals for the Third Circuit denying the petition for an en banc panel rehearing, decided July 2, 2020, appears at Appendix A to the petition. The opinion of the United States Court of Appeals for the Third Circuit denying a certificate of appealability dated March 12, 2020, appears at Appendix B to the petition. The opinion and order of the United States District Court for the District of New Jersey denying the petition to vacate the conviction pursuant to 28 U.S.C. § 2255, dated August 29, 2019, appears at Appendix C to the petition.

### **JURISDICTION**

A timely petition for rehearing was denied by the United States Court of Appeals for the Third Circuit on July 2, 2020 and a copy of the order denying

rehearing appears at Appendix A. Jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is filed within 90 days of the United States Court of Appeals for the Third Circuit denial of the petition for an en banc panel rehearing, decided July 2, 2020.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case involves 28 U.S.C. § 2255, the primary avenue for collateral review of federal judgments and the Federal Constitutional Provisions of the Sixth Amendment to the United States Constitution.

## **STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

On April 24, 2014, Ms. de Jesus-Concepcion was charged in a three count Indictment, alleging False Representation of United States Citizenship, contrary to 18 U.S.C. § 911 and § 2 (Count One); Use of Passport Secured By False Statement, contrary to 18 U.S.C. § 1542 (Count Two); and Aggravated Identity Theft, contrary to 18 U.S.C. § 911 (Count Three).

A jury was sworn on October 1, 2014, with testimony on October 1, 2, and 3, 2014. On October 3, 2014, the government rested, the trial judge conducted a charge

conference, and instructed the jury on October 6, 2014 after which the parties gave their summations. On October 7, 2014, de Jesus-Concepcion was found guilty of all three counts. (Appendix C-2)

Ms. de Jesus-Concepcion moved for a new trial on the grounds that the verdict was against the weight of the evidence. This motion was denied on November 25, 2014. On July 21, 2015, de Jesus-Concepcion was sentenced to a term of twelve months on Counts One and Two, to run concurrently with each other and twenty-four months on Count Three to run consecutively to Counts One and Two, for a total of 36 months of incarceration. (Appendix C-2)

On June 16, 2016, the Third Circuit Court of Appeals denied Petitioner's appeal and affirmed both her conviction and sentence. United States v. de Jesus-Concepcion, 652 F. App'x 134, 137-38 (3d Cir. 2016). The United States Supreme Court denied Petitioner's request for a writ of certiorari. See de Jesus-Concepcion v. United States, 137 S. Ct. 519 (2016).

Ms. de Jesus-Concepcion filed a petition for a writ of habeas corpus relief asking the United States District Court for the District of New Jersey to vacate, set aside or correct her sentence pursuant to 28 U.S.C. § 2255. On August 29, 2019, the District Court denied the petition in its entirety and denied petitioner's request for a certificate of appealability. (Appendix C-1 to C-12)

On April 10, 2020, the Third Circuit Court of Appeals denied Petitioner's appeal and her request for a certificate of appealability. (Appendix B-1 to B-2) On

July 2, 2020, the Third Circuit Court of Appeals denied Petitioner's request for an en banc rehearing. (Appendix A-1)

## B. STATEMENT OF FACTS

### 1. TRIAL

Ms. de Jesus-Concepcion was arrested on March 17, 2012 as she was re-entering the United States at the Newark Liberty International airport. She had just returned from visiting her critically ill father in the Dominican Republic. Enforcement Officer Richard William Moses, who worked for the office of Customs and Border Protection (CBP), was responsible for the investigation of criminal activity at Newark Liberty International Airport. On March 17, 2012, he was shown by another officer "two passport applications bearing the same name, Isis Pichardo, with two different pictures". This resulted in a lookout being placed. Although it is standard practice to look through passport applications, Moses testified that he saw the passport being handed over by de Jesus-Concepcion to the CBP officials in the primary inspection area and, after doing so, he then escorted de Jesus-Concepcion into the secondary inspection area.

Moses took de Jesus-Concepcion's passport and her customs declaration form and then brought her to an interview room where she was fingerprinted electronically, with the fingerprints sent to FBI and the DHS immigration system in

order to cross match any identities who have been arrested criminally or have any immigration violations in the past. After about five minutes the fingerprint results came back with the identity of Angela de Jesus. The fingerprint card was admitted at trial.

De Jesus-Concepcion's belongings were then searched, and a driver license was found in the name of Isis Pichardo along with a debit card in the name of Angela de Jesus." Ms. de Jesus-Concepcion was then arrested, read her Miranda rights, and placed in a holding cell. The U.S. passport used to come into the country, bearing the name Isis Carolin Pichardo, was admitted into evidence at trial." The date of birth was listed as September 3rd, 1982, with a birthplace of the Dominican Republic, and issued on December 27, 2007. The passport reflected a prior trip to the Dominican Republic on December 30, 2007 with a return to the United States on January 16, 2008.

The driver's license that De Jesus-Concepcion had in her possession was in the name of Isis Pichardo, a birth date of September 3, 1982, an address of 155 East Main Street, Bergenfield, New Jersey, and an issuance date of May 22, 2009. The debit card in de Jesus-Concepcion's name was admitted into evidence as Exhibit 315. Both documents were also admitted at trial. Finally, the Customs Declaration in the name of Isis Pichardo (with a birthdate of September 3, 1982) was admitted at trial.

At trial, Moses identified the passport as belonging to Isis Pichardo noting that there was a stamp reflecting entrance to the Dominican Republic on July 30, 2003, with return to the United States on August 26, 2003. He further testified that there

was another entry reflecting an entrance on July 20, 2004 into the Dominican Republic with departure on August 24, 2004. A March 26, 2005 stamp appears to reflect entrance to Mexico, with an April 3, 2005 entrance to the United States. And finally, an October 12, 2006 stamp reflects entrance to the Dominican Republic, with November 10, 2006 entrance into the United States. Moses testified had never met de Jesus-Concepcion prior to the evening of March 17, 2012. De Jesus-Concepcion did not present the passport or declaration form to Moses; he testified that “it was presented to another officer who then handed it off to him.

Justin McCabe Ellard, a Special Agent with the United States Department of State Diplomatic Security Service, testified he conducts investigations into passport and visa fraud. At trial, Ellard reviewed the contents of the Isis Carolin Pichardo passport and noted that the signature appeared to be Isis Carolin Pichardo and it was submitted on July 16, 2003 to a post office at Kingsbridge Station in the Bronx, NY. Ellard also reviewed the Certificate of Naturalization of Isis Carolin Pichardo and testified that the Certificate of Naturalization information appeared to be the same as the information on the passport application. Ellard testified that the photograph on the passport matched the photograph on the passport application. Ellard testified that the New Jersey Driver’s License submitted in connection with passport application had an issuance date of December 17, 2007. However, Ellard admitted that he had no personal knowledge whether the person depicted in the passport physically went and obtained that passport or if they that person received it in some other way.

Christopher Granato, an enforcement officer (investigator) with the United States Department of Homeland Security, United States Customs and Border Protection, Criminal Enforcement Unit, New York Field Office, testified that he was the case agent or primary investigator on this case. Granato testified that immigration statutes in the United States are: 1) United States citizen (born in the United States or naturalized by applying for citizenship five years of being a lawful permanent resident); 2) permanent resident; 3) a visitor; or 4) a visitor under the visa waiver program. If a person does not fall within one of these categories, they are an illegal alien. Granato testified that de Jesus-Concepcion had been placed into removal proceedings sometime in 1997. As to 2012, Granato testified that she had been administratively detained, and her claim status review was denied by an immigration judge. Granato testified that defendant admitted that she is not a U.S. citizen before the United States Immigration Judge.

Granato explained that an “A” file is generated when an individual is either granted some type of lawful status in the United States or when the individual has been administratively removed from the country. He explained that the “A” stands for alien. “A” files are maintained by the United States Citizenship and Immigration Services which is an agency within the Department of Homeland Security. “A” files are tracked in a National File Tracking System called “NFTS.” Granato testified, based upon his review of documents in De Jesus-Concepcion’s “A file”, “that she is not a United States citizen.” De Jesus-Concepcion received a denial letter from Homeland Security dated June 17, 2005 concerning her application for status as a

permanent resident. De Jesus-Concepcion was rejected “[b]ecause she was not lawfully admitted to the United States at a port of entry.” Granato identified an Application for replacement Naturalization/Citizenship Document by “Isis C. Pichardo” dated February 1, 2006. Granato testified that the outcome of this application was that a new passport was sent. Granato testified that the photograph on the Certificate of Naturalization in the name of Isis Carolin Pichardo dated August 11, 2006 was a photograph of De Jesus-Concepcion. According to Granato, the Certificate of Naturalization issued May 16, 2003 to Isis Carolin Pichardo portrayed a photograph of Isis Carolin Pichardo. Granato identified the excerpt from a certified copy of the April 3, 2012 Immigration Court hearing where is stated “And that is correct, you are not a citizen of the United States?” to which defendant answered: “Yes, Your Honor.” Over defense objection, the “tape recording” of the hearing was admitted into evidence. At the time, De Jesus-Concepcion had been held in administrative detention.

Isis Carolin Pichardo testified that she was born on September 3, 1982 in the Dominican Republic. In the 1980’s her parents came to the United States, with Isis joining them in the United States when she was 6 years old (in 1982). Isis became a United States citizen at age 19 when she was naturalized. In July 2003, Isis completed a Passport Application and received her passport issued on July 22, 2003. Isis visited her grandmother in the Dominican Republic from October 12, 2006 to November 15, 2006. Isis knows de Jesus-Concepcion because she used to work with Isis’s mother at a coffee shop at 178th Street and Broadway. De Jesus-Concepcion

worked at the coffee shop from 2000 until sometime in 2002 when de Jesus-Concepcion got married. Isis testified she would go to parties at de Jesus-Concepcion's house and defendant would go to Isis's mother's house in New York. Isis testified that she last saw de Jesus-Concepcion in the year 2003 before she was naturalized. Isis testified that she did not consider Defendant a friend and did not attend de Jesus-Concepcion's wedding in 2002. Isis testified that she did not complete the application for replacement naturalization/citizenship document dated February 1, 2006 nor did she authorize anyone to complete it. Isis testified that she did not obtain the certificate of naturalization dated August 11, 2006. Isis testified that she never saw the passport application until she began preparing for her testimony at trial. Isis testified she did not complete the application and did not authorize anyone to complete the application on her behalf. Isis testified she first saw the driver's license application printout dated October 17, 2007 in her name when she was preparing for her testimony. Isis said she neither applied for this driver's license nor allowed anyone to complete it for her. The signature on the application is not hers; and she did not sign the application. Isis testified that the passport is not her passport, and the photograph looks like de Jesus-Concepcion.

In October of 2012 Isis was contacted by an Agent Carroll of the diplomatic service about her filing for a lost passport. Isis met with him on or about October 28, 2012 and asked her if she could identify two photographs of de Jesus-Concepcion. Isis advised him that the photograph in the looked similar to a woman that worked with her mother. Isis denied ever selling the documents and stated she never left them

out. Isis gave a written statement under oath which was admitted into evidence at trial. Isis testified she completed the Application for a United States Passport on July 23, 2003 and that she received the passport on July 23, 2003. One week later, on July 30, 2003, she travelled to the Dominican Republic, returning on or about August 26, 2003. She testified that she travelled to the Dominican Republic again on July 20, 2004, staying until August 23, 2004. Both trips were during her summer breaks at school. On March 26, 2005, Isis travelled to Cancun, Mexico for spring break and returned on April 3, 2005.

Phillip D. Morgan, a fingerprint examiner instructor for the Federal Bureau of Investigation (FBI), was qualified as a fingerprint examination expert. Morgan examined a ten-print fingerprint card which was associated with the arrest of de Jesus-Concepcion. Agent Morgan testified that an FBI number is a number that's given to a set of fingerprints and biographical data when someone or a subject commits a crime. Morgan compared the fingerprints and concluded that the fingerprints matched and were from the same person.

Merilda Rios, a "record technician" at the New Jersey Motor Vehicle Commission, testified that facial recognition was one way in which people with more than one driver's license are brought to her attention. A full investigation occurs when the motor vehicle commission determines that one person has two driver's license numbers. When that happens, the two names will then be merged into the correct name. Rios testified that a license issued on August 4, 2004 in the name of Angela DeJesus contained a photograph of a person which the computer identified as

belonging to the same person depicted in her other photographs. The license in the name of Angela DeJesus expired on October 25, 2004, and the earliest license for Isis C. Pichardo was issued on August 4, 2005. Rios identified a motor vehicle application in the name of Isis C. Pichardo for a duplicate license. However, she admitted that she cannot say who submitted the applications as she was not there during the application process.

## **2. DIRECT APPEAL**

On direct appeal to the Third Circuit Court of Appeals, Ms. de Jesus raised the following issues:

### **POINT I**

**THE IMPROPER ADMISSION OF APPELLANT ANGELA DE JESUS-CONCEPCION'S PRIOR "BAD ACTS" 404(B) EVIDENCE DEPRIVED HER OF HER FIFTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL AND CONSTITUTES REVERSIBLE ERROR**

### **POINT II**

**THE IMPROPER ADMISSION OF APPELLANT DE JESUS-CONCEPCION'S A-FILE WITHOUT PROPER FOUNDATION OR CHAIN-OF-CUSTODY DEPRIVED HER OF HER FIFTH AMENDMENT DUE PROCESS RIGHTS AND SIXTH AMENDMENT CONFRONTATION RIGHT MANDATING A REVERSAL OF HER CONVICTIONS**

### **POINT III**

**THE ERRONEOUS ADMISSION OF THE IMMIGRATION PROCEEDING RECORDING DEPRIVED APPELLANT DE JESUS-CONCEPCION OF HER FIFTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL AND SIXTH AMENDMENT CONFRONTATION RIGHTS MANDATING A REVERSAL OF HER CONVICTIONS**

### **POINT IV**

**THE HIGHLY PREJUDICIAL TESTIMONY OF WITNESSES**

LACKING PERSONAL KNOWLEDGE DEPRIVED THE APPELLANT  
DE JESUS-CONCEPCION OF HER FIFTH AMENDMENT DUE  
PROCESS RIGHT TO A FAIR TRIAL AND SIXTH AMENDMENT  
CONFRONTATION RIGHTS

POINT V

THE DISTRICT COURT ERRED IN IMPOSING A TWO-POINT  
ENHANCEMENT PURSUANT TO GUIDELINE §2L2.2(b)(1)

POINT VI

THE DISTRICT COURT ERRED IN REFUSING TO GRANT A  
DOWNWARD REDUCTION OF TWO POINTS PURSUANT TO  
GUIDELINES § 5H1.6 FROM OFFENSE LEVEL 12 TO  
OFFENSE LEVEL 10 (WITH A SENTENCE RANGE OF SIX  
TO TWELVE MONTHS AND PERMITTING HOME CONFINEMENT)

POINT VII

THE DISTRICT COURT ABUSED ITS DISCRETION IN IMPOSING  
A 36 MONTH SENTENCE OF IMPRISONMENT

The Third Circuit Appellate Division rejected all of the arguments raised by Defendant and affirmed the sentence imposed. (A1 to A11)

### 3. HABEAS CORPUS PETITION

In a petition for habeas corpus relief to the District Court of New Jersey, Ms. de Jesus raised the following issues:

- 1) Trial counsel provided ineffective assistance of counsel when she failed to present evidence that Petitioner's father died from terminal cancer prior to her arrest.
- 2) Trial counsel provided ineffective assistance of counsel when she failed to present evidence that Petitioner's son had an incurable illness.

3) Trial counsel provided ineffective assistance of counsel when she failed to present evidence that Petitioner's mother was handicapped and in poor health.

4) Trial counsel provided ineffective assistance of counsel when she failed to present evidence that Petitioner faced deportation if she was convicted.

5) Trial counsel provided ineffective assistance of counsel when she failed to present evidence of Petitioner's real relationship with witness Isis Pichardo which would have served to impeach Ms. Picardo's testimony.

6) Trial counsel provided ineffective assistance of counsel when she failed to present evidence of witness Pichardo's actual involvement in the case:

7) Trial counsel provided ineffective assistance of counsel when she failed to present evidence of a conspiracy between Isis Pichardo and Lucia Pichardo.

(Appendix C-3)

The District Court of New Jersey rejected all of Petitioner's claims and denied the petition for relief. (Appendix C1 to C12) The Third Circuit denied Petitioner's request for a certificate of appealability and further denied a panel for an en banc rehearing. This timely petition for a writ of certiorari follows from that denial.

## REASONS FOR GRANTING THE PETITION

### POINT I

THE THIRD CIRCUIT ERRED IN FAILING TO GRANT A CERTIFICATE OF APPEALABILITY TO DETERMINE IF THE DISTRICT COURT ERRED IN FAILING TO GRANT PETITIONER AN EVIDENTIARY HEARING WHERE SHE COULD ESTABLISH HER CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

Ms. DeJesus-Concepcion submits that her petition established a claim of ineffective assistance of counsel and that the District Court erroneously rejected her Sixth Amendment ineffective assistance of counsel claims and unreasonably applied clearly established federal law. Ms. de Jesus has established counsel's deficient performance and the prejudice required by Strickland v. Washington 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984), and recent Supreme Court decisions. Therefore, the lower courts erroneously rejected her Sixth Amendment claim and unreasonably applied the Strickland standards in a manner that was contrary to clearly established federal law. Accordingly, this Court should grant this petition and remand the matter for an evidentiary hearing.

The Sixth Amendment guarantees a criminal defendant the assistance of counsel in his defense. U.S. Const. Amend. VI. This Court extended the Sixth Amendment right to the effective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). To prevail on an ineffectiveness claim, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at

694, 104 S. Ct. at 2068. Strickland constitutes “clearly established federal law” for purposes of habeas relief under 28 U.S.C. § 2255. See Williams v. Taylor, 529 U.S. 362, 391, 120 S. Ct. 1495, 1512 (2000)

Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without effective counsel, the right to a trial itself would be of no avail. Indeed, of all the rights an accused person has, it is the right to be represented by competent counsel that is by far the most pervasive, because it has the ability to further assert other rights. U.S. v. Cronic, 464 U.S. 648, 653, 104 S.Ct. 2039 (1984). As stated by the U.S. Supreme Court, “Without the guiding hand of counsel, an innocent defendant may lose his freedom because he doesn’t know how to establish his innocence.” Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55 (1932). Thus, it is the right to effective legal representation that provides the foundation for all other rights of a criminal defendant.

The cornerstone of our criminal justice system rests upon the right for every person who is being prosecuted for criminal charges to be afforded the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) The Sixth Amendment of the United States Constitution requires that an attorney for an accused must be an advocate for the defendant. Jones v. Barnes 463 U.S. 745, 758; 103 S. Ct. 3308, 3316 (1983). The importance of the defendant’s right to the effective assistance of counsel has been summarized by the U.S. Supreme Court,

The substance of the Constitution’s guarantee of effective assistance of counsel is illuminated by reference to its underlying purpose. “Truth...

is best discovered by powerful statements on both sides of the questions. This dictum describes the unique strength of our system of criminal justice.” The very premise of our adversary system of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550 (1975)

This very premise, therefore, underlies and gives meaning to the Sixth Amendment. Its goal is to assure fairness in the adversary criminal process. Unless the accused receives the effective assistance of counsel, “a serious risk of injustice infests the trial itself.” Cuyler v. Sullivan, 466 U.S. 335, 100 S.Ct. 1708 (1980).

The Sixth Amendment not only provides defendants in criminal proceedings with the right to assistance of counsel, but it also guarantees that such assistance be effective. Ibid.; United States v. Swinehart, 617 F.2d 336, 340 (3<sup>rd</sup> Cir. 1980). There are times when trial counsel acts in a manner that is so contrary to the interests of the client that the courts will judge the performance and its constitutionality without even looking to the further consequences of the actions themselves. Other times, counsel’s failure is less obvious and while still deficient, the court’s will look further to ascertain if there was prejudice that resulted from the constitutionally inadequate performance. In order to better articulate this legal analysis, the United States Supreme Court has developed a test for determining whether an attorney has provided the effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); U.S. v. Chronic, 466 U.S. 648, 104 S. Ct. 2039 (1984).

As stated by the United States Supreme Court,

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been

the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making the determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. Id. at 690, 104 S. Ct. at 2066, 80 L.Ed.2d at 695

Strickland, therefore, sets forth the criteria to be utilized in determining when a defendant's conviction must be reversed based upon ineffective assistance of counsel. The benchmark for such a claim is whether, "counsel's conduct so undermined the proper functioning of the adversarial process that the defendant may have been unjustly convicted." Strickland, Supra at 2065. A defendant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Id. at 694. Thus, evaluating any such claim requires the court to consider a two-pronged test; (1) was counsel's performance, viewed as of the time of counsel's action, objectively deficient and (2) was there a reasonable probability that, absent the errors, the fact finder would have a reasonable doubt respecting guilt." Id. at 2069.

Under the first prong of the test, the performance prong, the appropriate inquiry is whether counsel's assistance was reasonable considering all the circumstances. In other words, Defendant must show that counsel's performance, judged by an objective standard of reasonableness, was so deficient as to fall beyond the wide range of professionally competent assistance. Strickland v. Washington, Supra at 687-690. The basic premise of the adversarial system of criminal justice is

that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. U.S. v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984). Defendant's performance would be incompetent if it failed to make the adversarial testing process work.

Under the second prong, the prejudice prong, the test is whether counsel's deficient performance materially contributed to the conviction. Strickland v. Washington, Supra at 687. Defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, Supra at 694.

When considering a § 2255 motion, a district court must "accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record." United States v. Tolliver, 800 F.3d 138, 141 (3d Cir. 2015) (quoting United States v. Booth, 432 F.3d 542, 545 (3d Cir. 2005)). Additionally, a district court must hold an evidentiary hearing on the motion if "the files and records do not show conclusively that [the movant] was not entitled to relief." Id. quoting Solis v. United States, 252 F.3d 289, 294 (3d Cir. 2001) In this case, it is respectfully submitted Ms. DeJesus-Concepcion was improperly denied an evidentiary hearing in which she could establish her claims of ineffective assistance of counsel. As set forth in detail below, the district court failed to accept the truth of Ms. De Jesus-Concepcion's factual allegations as presented in her petition as required under

federal law. Moreover, because the record did not show conclusively that she was not entitled to relief, an evidentiary hearing is required to resolve the matter.

**A. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO EFFECTIVELY CROSS EXAMINE WITNESS PICHARDO ABOUT THE TRUE RELATIONSHIP THAT EXISTED BETWEEN THE PARTIES**

In Ms. DeJesus-Concepcion's petition for a writ of habeas corpus she specifically explained in detail how the main witness for the state, Isis Pichardo, had actually participated in the alleged offenses being committed. (Exhibit F, Pg. 17) Additionally, it was not only Isis, but her mother, Lucia Pichardo that had conspired together to perpetrate a fraud. Yet, neither of these two individuals were ever even charged with an offense, let alone prosecuted at a trial. The involvement of the Pichardo's was so obvious that the court itself even remarked at how their testimony at trial did not add up and that it had caused numerous discussions with Judges court clerks about how what allegedly happened could have even been done. (Exhibit F, Pg. 17, quoting trial transcript of October 7, 2014, Pg. 645)

In the petition, Ms. DeJesus raised this as an issue and pointed out that trial counsel never brought this information out during the cross examination of either witness. She argued that reasonably competent counsel would certainly have posed these critical questions because it would have greatly impeached their credibility before the jury and completely undermined their testimony that they were victims of identity fraud. Yet, inexplicably, trial counsel failed to ask any of these questions.

In its written opinion, the District Court held that trial counsel did elicit substantial testimony from Ms. Pichardo regarding the nature of her relationship with Petitioner. (Exhibit C, Pg. 4) The Court then held that the claim was without merit because the majority of the testimony elicited by trial counsel was specifically about the relationship between Petitioner and Ms. Pichardo and, in this petition, there exists nothing more than a “bare allegation.” (Exhibit C, Pg. 6) According to the District Court Opinion, “Absent additional information, Petitioner has not demonstrated that trial counsel was deficient for failing to elicit certain testimony regarding her relationship with Ms. Pichardo, especially given that defense counsel thoroughly cross-examined Ms. Pichardo on this general issue.” Id.

However, this is simply incorrect. In fact, Ms. DeJesus-Concepcion did provide additional information. Specifically, she stated in her petition that there was the “existence of a conspiracy” and yet, neither of the two Pichardo’s were prosecuted. While trial counsel may have asked several questions about the parties’ relationship in general, there were never specific questions regarding a conspiracy. Reasonably competent counsel would never have overlooked such important questions. Competent counsel would have recognized that questions about a plan or an agreement, and more specifically, questions about the possibility of a criminal prosecution because of this plan, would be an incredible motivation for the Pichardo’s to lie on the witness stand.

It is respectfully submitted that the District Court erred because it failed to accept the truth of Ms. DeJesus-Concepcion’s factual allegations as it is required to

do in determining whether to grant an evidentiary hearing. Simply put, the Court held that Ms. DeJesus-Concepcion failed to provide additional information about trial counsel's misconduct, yet at the same time, denied her an evidentiary hearing where she could establish these very facts. Only at an evidentiary hearing can trial counsel be asked why she completely avoided asking such important questions. Only at an evidentiary hearing can trial counsel be questioned about her understanding of the facts and the law of this case. Only at a hearing can trial counsel be required to explain how she failed to bring out during cross examination the most important challenges to the credibility of these two witnesses.

In denying the certificate of appealability, the United States Court of Appeals for the Third Circuit held Jurists of reason would not debate the District Court's conclusion that Appellant did not show that her Sixth Amendment right to the effective assistance of counsel was violated. (Exhibit D, Pg. 1) However, respectfully, this reasoning fails to recognize that the District Court never specifically addresses the most important claim she has raised in her petition. Specifically, Ms. DeJesus-Concepcion was asking for an evidentiary hearing where she could establish her claim of ineffective assistance of counsel. She needed a hearing to question her trial counsel regarding this obvious failure. She needed a hearing to ask why there was no effective cross examination two crucial witnesses at trial. Again, this is a failure that is so obvious that the court even made a comment on the record that the witness's testimony did not appear to be possible. It is respectfully submitted that Jurists of reason would debate the District Court's conclusion that Ms. DeJesus-Concepcion

was not entitled to an evidentiary hearing, if her factual allegations were looked as truthful. United States v. Tolliver, 800 F.3d 138, 141 (3d Cir. 2015) (quoting United States v. Booth, 432 F.3d 542, 545 (3d Cir. 2005)).

Moreover, because a district court must hold an evidentiary hearing on the motion if “the files and records do not show conclusively that [the movant] was not entitled to relief.”, Jurists of reason would clearly debate whether this standard was met. United States v. Tolliver, 800 F.3d 138, 141 (3d Cir. 2015) quoting Solis v. United States, 252 F.3d 289, 294 (3d Cir. 2001) Again, the files and the records do not show conclusively that there were no questions to ask these witnesses. Nothing shows this fact to be true more than the musings of the Judge on the record. Why else would the Judge state, “I frankly don’t know how it was done, and I’m still interested, to the extent that I even asked my clerks how this could have been done. But, you know, whatever. We have our speculations. But I’m not getting into that now.” (Trial Transcript, October 7, 2014, Pg. 645)

Effective cross examination of these two witnesses would have drastically altered this jury trial. The District Court erred in denying Ms. DeJesus Concepcion an evidentiary hearing to substantiate her claims of ineffective assistance of counsel and the United States Court of Appeals for the Third Circuit erred in failing to grant a certificate of appealability in which to address the issue. Accordingly, Petitioner respectfully requests that the writ of certiorari be granted and that the matter be remanded for an evidentiary hearing.

**B. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT EVIDENCE THAT MS. DE JESUS-CONCEPCION'S FATHER HAD DIED JUST BEFORE HER ARREST AND THAT HER MOTHER WAS IN POOR HEALTH**

In the petition for a writ of habeas corpus, Ms. DeJesus-Concepcion also pointed out that trial counsel failed to bring to the attention of the jury other important facts, including the death of her father from cancer, her son's incurable illness, her handicapped mother's poor health and the petitioner's future deportation. (Exhibit F, Pg. 16-17) In rendering its decision, the District Court noted that the court had specifically prohibited the introduction of evidence about Ms. DeJesus-Concepcion's son and about her future deportation. (Exhibit C-4) However, it conceded that the trial court never expressly prohibited the introduction of evidence regarding the loss of her father or the illness of her mother. Id. Instead, the trial court had instructed counsel not to pursue arguments that were intended to invite a jury nullification. Id. So, the admonishment was not a prohibition against this testimony nor was it a ruling denying the admissibility of evidence.

However, even though trial counsel could ask these questions and introduce evidence that would have established these facts, she did not. Instead, trial counsel avoided this evidence during the entire trial and greatly prejudiced Ms. DeJesus-Concepcion. By denying an evidentiary hearing on this issue, the District Court effectively made sure trial counsel could never be questioned about these failures and thus prevented the establishment of a claim of ineffective assistance of counsel. Again, the District Court was required to consider as truth the factual allegations in the claims of Ms. DeJesus-Concepcion when deciding to grant an evidentiary hearing.

Moreover, this record did not establish conclusively the reasons why trial counsel failed to introduce this evidence.

In denying the certificate of appealability as to this issue, the United States Court of Appeals for the Third Circuit held Jurists of reason would not debate the District Court's conclusion that Appellant did not show that her Sixth Amendment right to the effective assistance of counsel was violated. (Exhibit D, Pg. 1) However, as argued in Point I, Subpoint A, this continues to not recognize the denial of the hearing. As set forth by Ms. DeJesus-Concepcion, in her petition, trial counsel was "under duress by threat of being sanction[ed]". (Exhibit F, Pg. 17) Only at an evidentiary hearing could trial counsel be asked about why she felt she was under duress. Only at a hearing could she be questioned about the threat of sanctions that was made to her regarding the introduction of evidence that had not been excluded by the court. Only at a hearing could trial counsel explain who threatened to impose these sanctions. Again, by denying the evidentiary hearing, the District Court has blocked Ms. DeJesus-Concepcion's only means of establishing her claim. It is respectfully submitted that it is error to hold that she has not presented sufficient evidence to establish her claim, while at the same time denying her the very hearing necessary to establish that claim.

Ms. DeJesus-Concepcion flew to the Dominican Republic to see her father who was dying of cancer and her mother who was handicapped and in poor health. These facts, if presented to the jury, would have significantly altered this trial. The District Court erred in denying Ms. DeJesus Concepcion an evidentiary hearing to

substantiate her claims of ineffective assistance of counsel and the United States Court of Appeals for the Third Circuit erred in failing to grant a certificate of appealability in which to address the issue. Accordingly, Petitioner respectfully requests that the writ of certiorari be granted and that the matter be remanded for an evidentiary hearing.

## POINT II

### THE THIRD CIRCUIT ERRED IN FAILING TO GRANT A CERTIFICATE OF APPEALABILITY TO DETERMINE IF THE DISTRICT COURT ERRED IN FAILING TO CREDIT PETITIONER WITH THE TIME SHE SERVED ON HOUSE ARREST TOWARDS HER PRISON SENTENCE

In this case, it is clear that Ms. DeJesus-Concepcion was told she would receive credit for the time she would serve under home arrest. As stated by the court:

THE COURT: So I have no reason to not give her the benefit of that. But I think that might alleviate the concerns of the Government, and I think it would be fair -- any period of house arrest would be obviously credited to any eventual imprisonment term I might impose upon her. (Transcript at 643)

Yet, at the time of sentencing, this promise was denied by the court when trial counsel raised the issue. As stated on the record:

TRIAL COUNSEL: Well, my client recalls that at that time Your Honor indicated that you were giving her house arrest, but that she would get credit for the time she was in.

THE COURT: I never said that. I challenge that. (Sentencing Transcript 49-9 to 49-13)

A. THE COURTS ERRED IN FINDING THAT THE PETITIONER HAD NOT ESTABLISHED A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL SUFFICIENT TO BE GRANTED AN EVIDENTIARY HEARING

Ms. DeJesus-Concepcion was undoubtedly misled by the court's statements, and, as the record reveals, the Court was incorrect when it denied making the statements. However, what is striking during this colloquy is that trial counsel phrases her comments to the court as if they were not true. Trial counsel states, "my client recalls" and never once adds any credence to the statement by telling the court what trial counsel recalls. Surely trial counsel has a recollection of events that take place during court proceedings.

In fact, reasonably competent counsel would be well aware, not only of what the court states, but what their client understands. Competent counsel would have been listening to the court when it made the statement that credit would be given for the home arrest and competent counsel would have made a note of that. In discussing the case for several months before the final sentencing, competent counsel would have discussed the jail credit issue with their client and never have let a misunderstanding like this occur. Only at an evidentiary hearing can counsel be questioned about why she failed to tell the court that Ms. DeJesus-Concepcion had been promised credit for the time she served. Only at a hearing can counsel be asked about her understanding of the law on credits and if she believed the Court was correct when it made that

statement. Only at hearing can counsel be asked if she failed to correct the court out of a fear of being sanctioned.

Fundamental fairness and due process require that Ms. DeJesus-Concepcion receive the credit she was promised. Jurists of reason can plainly disagree on why the statement was made by the Court, why trial counsel did not attempt to correct the misunderstanding, and what was trial counsel's understanding of the law. Only at an evidentiary hearing can counsel be asked these fundamental questions. Accordingly, Ms. DeJesus Concepcion is entitled to the remand of her case for an evidentiary hearing for full consideration of all her issues.

#### **B. THE COURTS ERRED IN FINDING THAT THIS POINT WAS PROCEDURALLY BARRED**

In the decision of the District Court of New Jersey, the court held that this jail credit issue was procedurally barred from being raised because it had been previously raised during the direct appeal. Notably, the District Court opinion concedes that nowhere in the opinion from the Third Circuit Court of Appeals is the issue discussed. Instead, the District Court points to the discussion of the jail-credit issues as raised in the petitioner's prior direct appeal brief and in the Government's responsive brief. (Exhibit C, Pg. 9) Based on this reasoning, the District Court held that petitioner is barred because she was using the § 2255 motion to relitigate question which were raised and already considered on direct appeal. Id.

However, the issue being raised in this petition was entirely different than the issue raised on direct appeal. It was not being relitigated because it involved

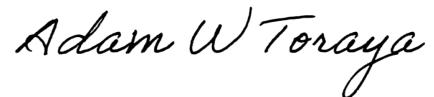
ineffective assistance of counsel regarding the court's promise to provide jail credit during her home arrest. On direct appeal, counsel for Ms. DeJesus-Concepcion argued that the sentencing court failed to consider a downward reduction of two points based upon family circumstances and that it was generally unreasonable. He never argued ineffective assistance of counsel.

Yet the most compelling rebuke of the District Court's reasoning comes directly from the Third Circuit's denial of the certificate of appealability. In this opinion, the court specifically rules that Jurists of reason could not differ on the findings of the District Court. However, only a few sentences later, the Court of Appeals directly contradicts the findings of the District Court regarding this very issue. In fact, the District Court held specifically that this issue was procedurally barred because it had already been raised and adjudicated on direct appeal. (Exhibit C, Pg. 9-10) Yet, the Court of Appeals specifically holds that the issue is procedurally barred because it was not raised previously, and therefore waived. (Exhibit B, 1-2) So, in this situation we have Jurists of reason expressly offering two diametrically opposing views of whether this issue is procedurally barred and for what reason. Respectfully, Ms. DeJesus-Concepcion cannot have raised the issue previously and not raised the issue previously at the same time. It must be one or the other. Therefore, it is respectfully submitted that the Third Circuit misapplied its discretion in failing to grant a certificate of appealability on this issue and the case must be remanded for further consideration.

## CONCLUSION

For the foregoing reason, petitioner requests that this Court grant the petition for certiorari.

Respectfully Submitted,

A handwritten signature in black ink that reads "Adam W. Toraya". The signature is fluid and cursive, with "Adam" and "W." on the first line and "Toraya" on the second line.

Dated: September 12, 2020

Adam W. Toraya