No. 21-

IN THE

Supreme Court of the United States

EDISON BURGOS MONTES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a court of appeals may deny a certificate of appealability to a prisoner whose 28 U.S.C. § 2255 motion is summarily denied even though the record fails to "conclusively show that the prisoner is entitled to no relief" under § 2255(b).

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RELATED PROCEEDINGS

- Original criminal judgment of conviction: *United States v. Burgos-Montes*, Crim. No. 06-0009 (D.P.R. Oct. 9, 2013).
- Direct appeal: *United States v. Burgos-Montes*, No. 13-2305 (1st Cir. May 14, 2015).
- Petition for certiorari *Burgos-Montes v. United States*, 577 U.S. 1036 (2015) (mem.) (Dec. 7, 2015).
- § 2255 motion docketed under: *Burgos-Montes v. United States*, No. 16-3175 (D.P.R. Mar. 31, 2020).
- Petition for Certificate of Appealability: *Burgos-Montes v. United States*, No. 20-1638 (1st Cir. Aug. 19, 2021), rehearing denied (Dec. 6, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Edison Burgos-Montes respectfully petitions for a writ of certiorari to review the judgment of the First Circuit.

OPINIONS BELOW

The direct appeal affirming the original judgment of conviction was published at *United States v. Burgos-Montes*, No. 13-2305, 786 F.3d 92 (1st Cir. 2015). A petition for certiorari to review that decision was denied in *Burgos-Montes v. United States*, 577 U.S. 1036 (2015) (mem.) (Dec. 7, 2015). Those are the only reported decisions relating to this case. Since the issues decided in that appeal are not germane to que question presented, these are not included in the Appendix[1] to this petition.

The Appendix includes the Order and Judgment of the district court which denied the § 2255 Motion. Pet. App. at 5a and 6a. It also includes the government filing that the district court relied on when it denied the motion. Pet. App. at 11a-20a. Also included are the district court's denial for reconsideration, Pet. App. at 4a, the Judgment of the First Circuit denying a certificate of appealability, Pet App. at 2a-3a, and the First Circuit's Order denying rehearing. Pet. App. at 1a. None of these decisions are reported.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on August 19, 2021. A petition for rehearing was sought and denied on December 6, 2021. Rule 13.1 of the Supreme Court allows for ninety days within which to file a petition for a writ of certiorari after entry of the judgment of the court of appeals. The rule further provides that if a petition for

[1] All references to the Appendix are designated "Pet. App."

rehearing is timely fled in the lower court by any party, the time for filing runs from the denial of rehearing. Accordingly, this petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2255(b):

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto

STATEMENT OF THE CASE

On December 29, 2005, Mr. Burgos was arrested in the District of Puerto Rico and ordered detained on federal drug charges made by criminal complaint. Jurisdiction was predicated on 18 U.S.C. § 3231. In January 2006, Mr. Burgos was indicted on these charges and was ordered detained without bail. A May 2006 superseding indictment added two murder counts, stemming from the disappearance of Mr. Burgos's girlfriend, Madelyn Semidey-Morales ("Semidey"), on the theory she had been killed by Mr. Burgos after he learned that she had been acting as a government informant. Part of the evidence against Mr. Burgos is that the alleged murder victim disappeared on July 4, 2005, and that an employee of his was seen cleaning the inside of his car two days later on July 6, 2005.

After over six years of extensive motion practice in this certified capital case, the trial commenced in March of 2012. The trial docket includes 1001 docket entries, twenty-five days of jury *voir dire*, and thirty days of witness testimony and 200 exhibits. After hearing thirty days of trial evidence, a jury convicted Mr. Burgos on the four counts charged and he was eventually sentenced to life imprisonment.

The conviction was later affirmed on appeal. *United States v. Burgos-Montes*, 786 F.3d 92 (1st Cir. 2015). A petition for writ of certiorari was filed with the United States Supreme Court and denied on December 7, 2015. *Burgos-Montes v. United States*, 577 U.S. 1036 (2015) (mem.).

From prison, Mr. Burgos sent a *pro se* § 2255 motion to the U.S. District Court for the District of Puerto Rico. One ground raised in the petition was "ineffective assistance of counsel based on counsel's failure to investigate a[n] adequate defense." Mr. Burgos alleged that witnesses had seen Semidey, the alleged murder victim, alive after her supposed disappearance and death, and that counsel failed to adequately investigate this development and neglected to interview these witnesses. Mr. Burgos also requested appointment of counsel. Pet. App. at 7a.

The government was ordered to respond to the petition and granted time to do so. Pet. App. at 7a-8a. In its response, regarding Mr. Burgos's ineffective assistance of counsel claim, the government characterized counsel's decisions as reasonable, strategic, and tactical choices, and argued in conclusory fashion that "[Mr. Burgos] received meaningful

assistance by a competent counsel throughout his criminal proceeding." Pet. App. at 16a, 19a. The government also argued that the § 2255 motion was "inadequate on its face" and that its "conclusory allegations were contradicted by the record." Pet. App. at 18a. It therefore argued that the district court "should summarily deny Burgos-Montes's petition without an evidentiary hearing." Pet. App. at 19a.

After the government's response, the district court referred the motion to a magistrate for a report and recommendation. Pet. App. at 8a.

The court thereafter received a *pro se* filing by Mr. Burgos. The filing responded to the government's arguments, submitted exhibits of sworn testimony, and requested an evidentiary hearing. Pet. App. at 8a. Mr. Burgos submitted part of the transcript of testimony from his bail hearing in which a former employee of his testified that he had seen the alleged murder victim several days after her alleged disappearance. Pet. App. at 21a-29a.

A separate witness affidavit submitted by Mr. Burgos supporting his § 2255 motion asserts that the affiant had also seen the alleged murder victim after she had purportedly disappeared and suggested that additional witnesses had also seen her after her supposed disappearance. Pet. App. at 30a-33a.

That witness also affirmed that only the most cursory contact was made by Mr. Burgos's counsel to investigate the matter:

> On October of 2009, I received a call from a person who identified himself as an investigator who worked for [Mr. Burgos's] attorneys and defense.... He asked me if I had seen [Semidey] after the date of July 4, 2005. I told him yes, that I had seen her pass by the 25 de Julio street three or four days after July 4, 2005, at approximately between two or four in the afternoon. The investigator agreed to call me again to arrange for an interview in person but did not call me again and the interview never happened.

Pet. App. at 31a.

The district court subsequently granted Mr. Burgos's request to appoint counsel, and the Federal Public Defender's Office was appointed. Pet. App. at 8a.

Sometime later, with no interceding proceedings or orders, the district court changed course, issuing an order vacating and setting aside the referral to a magistrate for report and recommendation, Pet. App. at 8a, and an order denying Mr. Burgos's § 2255 motion including his request for an evidentiary hearing, "for the reasons stated in the governments' Opposition thereto." Pet. App. at 9a.

In its order, the district court also mandated that "no certificate of appealability should be issued in the event that Petitioner files a notice of appeal because there is no substantial showing of a denial of a constitutional right under 28 U.S.C. § 2253(c)(2)." Pet. App. at 6a.

Immediately upon notice of the order, Mr. Burgos moved for reconsideration indicating that his claims could not be adjudicated based on the record; that his claims required discovery and an evidentiary hearing; and that denial of the motion without such proceedings was not proper.

Mr. Burgos also pointed to the complexity and time-consuming nature of preparing this case in consideration of the voluminous record, the complicated background, the need to evaluate the course of Mr. Burgos's legal representation, and the difficulty in communicating with him since he was imprisoned out of state. Mr. Burgos further cited the need to avoid a miscarriage of justice, and the lack of any prejudice to the opposing party.

The motion for reconsideration was ultimately denied in September 2020, Pet. App. at 4a, and Mr. Burgos appealed, moving the United States Court of Appeals for the First Circuit to grant him a certificate of appealability (or "COA") on the following question:

> **Whether the district court acted improperly when it summarily denied, without further record development, Mr. Burgos's ineffective-assistance-of-counsel claim based on counsel's failure to investigate.**

On August 19, 2021, the court of appeals issued a judgment concluding that Mr. Burgos was not entitled to a COA because he had failed to demonstrate that the district court's procedural handling of the § 2255 motion was debatable or wrong. Pet. App. at 2a-3a. A timely-filed petition

for rehearing was denied on December 6, 2021. Pet. App. at 1a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. Rules of the Supreme Court, Rule 10(c).

The decision below so clearly misapplied the applicable statutory standard and this Court's precedents that the judgment below should be summarily reversed and remanded as requested below.

I. Standard for Granting a Certificate of Appealability: Debatability as to whether the § 2255 motion should have been resolved in a different manner.

Under 28 U.S.C. § 2253(c)(1), Mr. Burgos cannot appeal the denial of his § 2255 motion "[u]nless a circuit justice or judge issues a certificate of appealability." Although the district court declined to issue a certificate of appealability, the court of appeals below had authority to grant one and should have done so under the applicable standard. See *Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). A certificate must issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

That standard is met when "reasonable jurists could debate whether (or, for that matter, agree that) the [§ 2255 motion] should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Indeed, "[a]t the

COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)).

This inquiry "is not coextensive with a merits analysis." *Id.* The threshold debatability question "should be decided without full consideration of the factual or legal bases adduced in support of the claims." *Id.* (citation omitted). "Obtaining a certificate of appealability 'does not require a showing that the appeal will succeed,' and 'a court of appeals should not decline the application ... merely because it believes the applicant will not demonstrate an entitlement to relief.'" *Welch v. United States*, 136 S.Ct. 1257, 1263-64 (2016) (quoting *Miller-El*, 537 U.S. at 337). A court should also issue a COA if "the issues presented are adequate to deserve encouragement to proceed further." *Buck*, 137 S. Ct. at 773.

"This is a low bar." *Muller v. Goguen*, 385 F. Supp. 3d 121, 130 (D. Mass. 2019). A claim can be considered "debatable" even if every reasonable jurist would agree that the petitioner will not prevail. *Miller-El*, 537 U.S. at 338.

The summary denial of Mr. Burgos's claim that he was convicted in violation of his right to effective assistance of counsel satisfies the "substantial showing" test and warrants issuance of a COA. Therefore, a COA should have issued to address whether the district court improperly denied Mr.

Burgos's § 2255 claim for reasons cited by the government in its opposition.

II. Under 28 U.S.C. § 2255(b), a movant is entitled to develop the record on his claim "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."

The statutory language applicable to Mr. Burgos's claim requires development of the record "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b) (emphasis added). In *Machibroda v. United States*, 368 U.S. 487, 494 (1962) this Court held that a district court must grant a hearing and "'determine the issues and make findings of fact and conclusions of law with respect thereto' unless 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'"

There, this Court determined that a § 2255 motion and supporting affidavit claiming that pleas of guilty had not been voluntary did not "conclusively show" the movant was "entitled to no relief" and he should therefore have been granted a hearing on his motion. *Id.* The Court noted that the allegations made were "detailed and specific" and might be "corroborated or disproved" by evidence. *Id.* at 495. It concluded that even though the allegations made by the movant were "improbable," the statutory language required further development of the record:

> [T]he specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible. If the allegations are true, the petitioner is clearly entitled to relief. Accordingly, we think the function of 28 U.S.C. § 2255, can be served in this case only by affording the hearing which its provisions require.

Id. at 496. Since *Machibroda*, this Court has consistently held that the statutory language prevents a court from denying a § 2255 motion where the record does not demonstrate definitively that the claim advanced cannot succeed.

In *Sanders v. United States*, 373 U.S. 1, 19-20 (1963) a prisoner claimed he had been mentally incompetent while his case was pending as the result of administration of narcotic drugs while he was held in jail. In an affidavit, Sanders claimed his waiver of rights and plea of guilty during the period was involuntary. This Court reversed the denial of the § 2255 motion pointing out that "the facts on which petitioner's claim in his second application is predicated are outside the record." *Id.* As a result "the files and records of the case, including the transcript, could not conclusively show that the claim alleged … entitled the petitioner to no relief." *Id.*

In *Fontaine v. United States*, 411 U.S. 213, 214-215 (1973), this Court considered a prisoner's claim that his plea of guilty had been induced by fear, coercive police tactics, and illness, including mental illness. The allegations described facts supporting the petition and provided supporting

documentation. This Court determined that "[o]n this record, we cannot conclude with the assurance required by the statutory standard 'conclusively show' that under no circumstances could the petitioner establish facts warranting relief under § 2255." It therefore vacated the judgment denying the motion and remanded for a hearing.

At issue in *Blackledge v. Allison*, 431 U.S. 63, 75-76 (1977) was a prisoner's claim that his plea was induced by an unkept promise. *Id.* The petition provided specific factual allegations indicating the terms of the promise; when, where, and by whom the promise had been made; and the identity of one witness to its communication. This Court concluded that the § 2255 motion should not have been summarily denied, holding that the "critical question is whether these allegations … were so palpably incredible, [and] so patently frivolous or false, … as to warrant summary dismissal." *Id.* (citations and internal quotation marks omitted)

This statutory standard is consistently invoked by circuit courts of appeal in reversing § 2255 denial orders which require further factual development based on reasonably specific but underdeveloped claims. *See e.g.*, *United States v. Mayhew*, 995 F.3d 171, 176-177 (4th Cir. 2021) (reversing denial of a § 2255 motion based on standard from § 2255(b) requiring development of the record "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief"); *United States v. Scripps*, 961 F.3d 626, 631-632 (3d Cir. 2020) (same); *Mayfield v. United States*, 955 F.3d 707, 710 (8th Cir. 2020) (same); *United States v. Kallas*, 814 Fed. App'x 198, 200 (9th Cir. 2020) (same);

Hurtado v. United States, 808 Fed. App'x 798, 801 (11th Cir. 2020) (same); *United States v. Fields*, 949 F.3d 1240, 1246 (10th Cir. 2019) (same); *United States v. Allen*, 918 F.3d 457, 462 (5th Cir. 2019) (same); *Thompson v. United States*, 728 Fed. App'x 527, 537 (6th Cir. 2018) (same); *Sawyer v. United States*, 874 F.3d 276, 278 (7th Cir. 2017) (same); *Quinones v. United States*, 637 Fed. App'x 42, 43 (2d Cir. 2016) (same).

Additionally, circuit courts continue to cite this Court's precedents in cases like *Machibroda* in evaluating whether denials of § 2255 motions are proper or improper. *See e.g.*, *Mayhew*, 995 F.3d at 176-177; *Fields*, 949 F.3d at 1246; *Martin v. United States*, 889 F.3d 827, 833 (6th Cir. 2018); *Williams v. United States*, 660 Fed. App'x 847, 849 (11th Cir. 2016); *González v. United States*, 722 F.3d 118, 130-131 (2d Cir. 2013).

Here Mr. Burgos's § 2255 motion was denied in violation of this long-established standard.

III. Since the record did not "conclusively show" Mr. Burgos was entitled to "no relief," Mr. Burgos should have been allowed to further develop his ineffective-assistance claim.

The information available to the district court supporting the § 2255 motion shows that further development of the record might have allowed Mr. Burgos to make a showing of ineffective performance and of prejudice.

Mr. Burgos's case involved a death-penalty trial. The death-eligible charge itself, murder, was not supported by the

type of evidence usually present in a murder case. There was no body, there was no weapon, there was no eyewitness to the murder and the government presented no evidence about the place, manner, or means of death. The alleged murder was shown by weak circumstantial evidence: the alleged victim's disappearance, statements attributed to Mr. Burgos, and trace amounts of the alleged victim's DNA in Mr. Burgos's car.

Mr. Burgos's allegations were plausible and record development could have entitled him to habeas relief. These facts are not contested:

- Mr. Burgos was convicted and sentenced to life imprisonment for the death of Madelyn Semidey, his girlfriend, whose body was never found and whose murder was never witnessed. *United States v. Burgos-Montes*, 786 F.3d 92 (1st Cir. 2015).
- **According to the government's theory, Semidey was killed before July 6, 2005**, when an employee of Mr. Burgos was seen by law enforcement cleaning the inside of Mr. Burgos's car. *Id.* at 100.
- Along with his § 2255 motion, Mr. Burgos presented the testimony **of a witness who claimed to have seen and spoken to Semidey on July 6 and 7**.
- A second sworn statement by another witness attested that **the witness had seen Semidey 3 or 4 days after July 4, 2005, and that he was willing to so testify in court**.

- This witness statement also suggests that that witness knew of other persons who saw Semidey after her supposed death.
- This witness also states he was eventually contacted by a person introducing himself as an investigator for Mr. Burgos's attorney, but that after a brief exchange, the investigator never followed up for an interview.

Mr. Burgos's § 2255 motion affirms — and submits supporting testimony — to show that the alleged victim in this case might have been alive after her supposed disappearance by murder. This evidence would have been significantly and uniquely exculpatory, especially given the speculative nature of the evidence supporting the murder charge.

An adequate investigation could have led to further credible evidence that the murder victim had not died after her disappearance. The witness affidavit submitted by Mr. Burgos supporting his § 2255 motion suggests that other people had seen the alleged murder victim after she had purportedly disappeared. It also demonstrates that only the most cursory contact was made by counsel with at least one witness who could have provided relevant information. ("The investigator agreed to call me again to arrange for an interview in person but did not call me again and the interview never happened," Pet. App. at 31a.)

Defense counsel undoubtedly had a duty to reasonably investigate this possible defense and appears to have failed to do so. Mr. Burgos's claim that these leads were inadequately

investigated by his counsel depend on facts not available on the record when the district court dismissed the case.

The record does not contain information as to how or when counsel considered and decided whether to pursue investigation of this possible defense that Semidey had not died in the manner or at the time the government claimed. Nor does it contain information as to how or why counsel rejected investigating this information. The record does not provide information as to counsel's justification for not pursuing such investigation or the plausibility of that justification, or the context in which the decision was made.

Given these lapses in the record, further development was necessary to consider Mr. Burgos's ineffective-assistance-of-counsel claims. *See e.g.*, *United States v. Miller*, 911 F.3d 638, 646 (1st Cir. 2018) (explaining that "without some insight into trial counsel's reasoning," the "meager record" did not allow for consideration of the ineffective-assistance-of-counsel claim); *Sawyer v. United States*, 874 F.3d 276 (7th Cir. 2017) (holding denial of § 2255 motion improper because although it was possible counsel had valid strategic reasons for decision, the record did not contain sufficient information to make that determination); *United States v. Samaniego*, 532 Fed. App'x. 531 (5th Cir. 2013) (holding that court abused its discretion in failing to further develop the § 2255 record through an evidentiary hearing where there was a colorable basis to file a suppression motion and the record did not show counsel's reasons for failing to request suppression); *United States v. Rivas-Lopez*, 678 F.3d 353 (5th Cir. 2012) (vacating denial of § 2255 motion for further factual development since counsel's

reasoning was not clear from the record, and additional facts had to be evaluated to adjudicate the ineffective-assistance claim); *Cherys v. United States*, 405 Fed. App'x. 589 (3d Cir. 2011) (holding that § 2255 movant was entitled to evidentiary hearing on claim to determine what information was known to counsel when she failed to ask for a competency hearing).

Ineffective-assistance-of-counsel claims are fact-driven and require the movant to demonstrate (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Id.* at 698.

In ineffective-assistance claims, only rarely is there a sufficiently well-developed record to allow a Court to assess the claim without further discovery or hearing. *See Massaro v. United States*, 538 U.S. 500, 501 (2003) ("[I]neffective-assistance claims ordinarily will be litigated in the first instance in the district court, the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial."). Showing that counsel's performance was ineffective frequently turns on facts that are not apparent on the face of the record. These facts can include the nature of counsel's alleged ineffective action, counsel's stated justification for his or her choice, the plausibility of that justification, and the particular context in which the decision was made.

Especially regarding an error of omission, such as the failure-to-investigate claim raised by Mr. Burgos, "[t]he trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them." *Massaro*, 538 U.S. at 505. According to this Court, a court addressing an ineffective-assistance claim "may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance" to develop sufficient facts to decide the issue. *Id.*

Development of the record is also critical to evaluating the prejudice prong of *Strickland*. This prong requires a factual evaluation of the potential effect had counsel performed its duty effectively. *Lee v. United States*, 137 S.Ct. 1958, 1964 (2017) (A defendant raising an ineffective-assistance-of-counsel claim can demonstrate prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); *See e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 390-393 (2005) (failure to investigate mitigation evidence in a capital case resulted in omission of information which might have influenced the jury's appraisal of defendant's moral culpability); *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (same).

Without further development of the evidentiary record, there is no to assess whether Mr. Burgos's trial might have had a different result if counsel had adequately investigated and developed this possible defense and presented it. *See generally, Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (noting that where counsel's error is failing to advise client as to a

potentially exculpatory defense the "prejudice" inquiry will depend largely on the level of success such a defense would likely have had at trial.")

In the government's response to the § 2255 motion, relied on by the court when it summarily denied the motion, the government asserted that an evidentiary hearing was not warranted because Mr. Burgos's "conclusory allegations are contradicted by the record." Pet. App. at 18a. Mr. Burgos's allegations are not conclusory; they are specific. He points to the testimony of named witnesses asserting specific information. And the government pointed to no material contradictions in the record. The government also speculated that failing to investigate was part of a conscious and reasonable strategy, Pet. App. at 17a-18a, but pointed to nothing in the record that would support that claim or render it plausible.

"Counsel cannot justify a failure to investigate simply by invoking strategy.... Under *Strickland*, counsel's investigation must determine strategy, not the other way around." *Browning v. Baker*, 875 F.3d 444, 472-3 (9th Cir. 2017). Even if the government articulated a theory about how failing to investigate this defense might have been sound strategy — and it has not — merely articulating a reasonable strategy does not end the inquiry when that strategy does not explain the decision itself. *See* Wayne R. Lafave, et al., Criminal Procedure § 11.10(c), at 797 (6th ed. 2016) ("[A] decision apparently based on a tactical judgment is not therefore rendered immune from an incompetency challenge.")

Without development of the record, the district court did not have the facts it needed to determine whether failing to investigate involved sound strategy as opposed to an oversight, or a decision based on a mistaken or improper assessment of the facts or unsupported or unreasonable assumptions by counsel. Third-party discovery addressed to trial counsel and other members of the defense team (consultants, investigators, etc.) could have generated new information regarding the efforts made, if any, to investigate evidence that the alleged murder victim was not dead, and what reasons existed for abandoning that line of investigation or failing to present it at trial. The resulting information could show that Mr. Burgos is entitled to relief under § 2255.

In a strikingly similar case, *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999), a habeas petitioner challenged his state murder conviction. Lord claimed that his trial counsel had been ineffective when they failed to personally interview three witnesses who had seen the murder victim the day after the state contended she had been killed. Lord's trial attorneys testified about their decision at an evidentiary hearing conducted by the habeas court. *Id.* at 1089. Without ever talking to these witnesses, counsel simply did not believe this testimony and were concerned that putting the witnesses on the stand would have harmed their own credibility with the jury. *Id.*

Drawing careful conclusions, the court in *Lord* held that failing to adequately investigate and introduce this evidence constituted deficient performance. *Id.* at 1093. The court further concluded that, although it was "mindful" of the

deference owed to counsel's strategy, counsel's "cursory investigation of the three possible alibi witnesses, and their subsequent failure to put them on the stand, constitute deficient performance that was prejudicial to Lord's defense." *Id.*

Central to the court's conclusions was an in-depth probe, beyond the original record and the allegations in the habeas petition, of substantial additional evidence such as investigative files and testimony about counsel's decisional process. The opinion considered the original police investigation, the information available to counsel at the time, how this unused testimony might have fit in with the defense strategy, the lawyers' stated justifications for failing to interview or investigate the assertions of these witnesses, all vis-a-vis the evidence presented by the government against the defendant.

Mr. Burgos's situation is analogous to that in *Lord*, although the record for Mr. Burgos's claim has not been developed through an evidentiary hearing like Lord's. Mr. Burgos has referenced, not general and vague, but specific information, that two witnesses had exculpatory information relevant to the charges against him. This information, if believed, would have shown his innocence, or at least cast serious doubt on his guilt. This information was known to his counsel, and his counsel apparently failed to adequately investigate and follow up on it. This information is neither inherently improbable nor contradicted by the evidence presented at trial and is uncontested.

Mr. Burgos has therefore made out a *prima facie* showing of his counsel's deficient performance on this score that warrants further exploration. Especially given the circumstantial nature of the case against him, Mr. Burgos should have been allowed to further develop the record on his claim to show that he is entitled to relief.

The district court's initial instincts were correct. After receiving the government's response to the § 2255 motion, and even before receiving Mr. Burgos's reply, the court determined that the matter should be referred to a magistrate for further proceedings. The court also determined, upon Mr. Burgos's request, that his claim warranted the appointment of counsel. In suddenly changing course, the district court gave no reason why further development of Mr. Burgos's claims was no longer appropriate.

Mr. Burgos should have been allowed an opportunity to develop the record as to these facts and circumstances before the court summarily denied his § 2255 motion without warning based only on his uncounseled writings to the court. Without development of the record, the district court did not have the facts it needed to "conclusively" determine that Mr. Burgos was not entitled to relief. Summary denial without further record development did not conform to the statutory standard.

IV. Summary dismissal with no warning was improper.

As described above, both the performance and the prejudice components of the *Strickland* formula require an extensive and inclusive understanding of the trial record and an evaluation as to the potential exculpatory value of the evidence which would have been available had counsel adequately investigated the uninvestigated defense. The court's judgment of dismissal was issued suddenly and without warning and, more important, without allowing appointed counsel to address any concerns which might have arisen after the court's original decision that the case should be litigated.

Summary *sua sponte* dismissal of Mr. Burgos's § 2255 motion was legally erroneous because "[u]nder the applicable legal standards, *sua sponte* dismissal is appropriate only when the petition presents obviously untenable arguments that further factual development, legal explication, or the assistance of counsel cannot make tenable." Randy Hertz and James S. Liebman, Federal Habeas Corpus Practice and Procedure, Sixth Edition § 15.2[c][i] at 895 (Matthew Bender 2011); see also 28 U.S.C. § 2255(b) (stating that a district court must grant an evidentiary hearing "unless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief."). Mr. Burgos's claims were not so "vague (or) conclusory," "palpably incredible," or "patently frivolous or false" as to permit summary disposition. *Blackledge v. Allison*, 431 U.S. 63, 73 and 75 (1977).

This is especially so since the Court was evaluating the case based on Mr. Burgos's *pro se* and *in forma pauperis* filings. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed.") *Denton v. Hernández*, 504 U.S. 25, 32 (1992) ("[I]nitial assessment of the *in forma pauperis* plaintiff's factual allegations must be weighted in favor of the plaintiff.") "'[A] pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Thus, *pro se* pleadings are entitled to a liberal construction that includes all reasonable inferences which can be drawn from them. *See Haines*, 404 U.S. at 521.

Unconditional dismissal with prejudice is uniformly considered a drastic and severe remedy which runs counter to the strong policy of the law favoring the disposition of cases on their merits. *See Lawes v. CSA Architects and Engineers LLP*, 963 F.3d 72, 91 (1st Cir. 2020); *Hildebrand v. Allegheny Cty.*, 923 F.3d 128, 132 (3d Cir. 2019); *Bergstrom v. Frascone*, 744 F.3d 571, 576 (8th Cir. 2014).

The record did not show that the facts alleged by Mr. Burgos are false, frivolous or that his ineffective-assistance claim is insupportable as a matter of law or that he was "entitled to no relief." Under such circumstances, dismissal was improper.

V. At the very least, reasonable jurists would disagree that summary denial of the § 2255 motion was not warranted without further record development.

In denying the motion without warning, the district court did not find that the record "conclusively shows" that Mr. Burgos is not entitled to relief. It also did not analyze this question or explain its decision according to this standard. The government also did not argue against the claim on this basis below. Nor was the court of appeals in a position to determine that the record conclusively shows that Mr. Burgos is entitled to no relief either. At a minimum, reasonable jurists could disagree as to whether Mr. Burgos's § 2255 motion was properly dismissed.

The best evidence that reasonable jurists might disagree in this case is that the same jurist who ultimately dismissed the case, had initially directed the government to respond to the § 2255 motion, and after receiving the government's response, referred the § 2255 motion to a magistrate for a report and recommendation and appointed counsel to Mr. Burgos as to his claim. When it did so, the court knew that further development of the claim was the appropriate course.

Habeas corpus stands as the last safeguard protecting personal liberty. It is Mr. Burgos's last line of defense against a wrongful conviction. Mr. Burgos's § 2255 motion should not have been denied without allowing him to develop and present his case to the court.

The court of appeals should have granted a certificate of appealability in the proceeding below and remanded the case for further record development.

Because the First Circuit's decision that it was neither debatable nor wrong to dismiss a § 2255 motion without further record development clearly misapplied the applicable statutory standard and this Court's precedents, the petition should be granted and the First Circuit's judgment should be summarily reversed and the case remanded with instructions to issue a certificate of appealability for remand to the district court and further development of Mr. Burgos's claims.

CONCLUSION

Based on the reasons above, the petition for a writ of certiorari should be granted and the judgment below summarily reversed.

Respectfully submitted.

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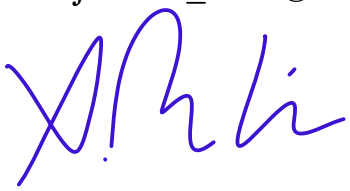

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