26-5164
No. ______

IN THE
Supreme Court of the United States

ROBERT MICHAEL FALL
Petitioner,
v.
UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

Petition for a Writ of Certiorari

Robert Michael Fall
Petitioner Pro Se
4729 Adler Avenue
Virginia Beach, VA 23462
(757) 226-7766

Questions Presented

1. Whether a court of appeals may deny a certificate of appealability under 28 U.S.C. § 2253(c) solely because circuit precedent forecloses the claim, even though other courts have reached the opposite constitutional conclusion and the certificate would permit review of a denied evidentiary hearing rather than immediate merits relief.

2. Whether *Strickland v. Washington*'s presumption of reasonable strategy may be applied, without an evidentiary hearing under 28 U.S.C. § 2255(b), to an omission that counsel's own sworn statement attributes to a failure to investigate rather than to an informed tactical choice.

Parties to the Proceeding

The petitioner is Robert Michael Fall, who was the movant-appellant below. The respondent is the United States of America, which was the plaintiff-appellee below.

Corporate Disclosure Statement

The petitioner is a natural person. No corporate disclosure statement is required under this Court's Rule 29.6.

Related Proceedings

United States v. Fall, No. 2:17-cr-00012 (E.D. Va.) (judgment of conviction).

United States v. Fall, No. 18-4673, 955 F.3d 363 (4th Cir. Apr. 3, 2020) (affirming conviction on direct appeal), reh'g denied (June 2, 2020).

Fall v. United States, No. 19-8678 (U.S. Oct. 5, 2020) (petition for a writ of certiorari denied).

United States v. Fall, Nos. 2:17-cr-00012 & 2:21-cv-00556, ECF No. 195 (E.D. Va. Apr. 25, 2024) (order denying motion under 28 U.S.C. § 2255).

United States v. Fall, No. 24-6577 (4th Cir. Feb. 23, 2026) (order denying a certificate of appealability and dismissing the appeal), reh'g and reh'g en banc denied (Apr. 24, 2026).

United States v. Fall, No. 2:17-cr-00012, ECF No. 212 (E.D. Va. Nov. 21, 2024) (order modifying conditions of supervised release), appeal docketed, No. 24-7131 (4th Cir. Dec. 3, 2024), decided Feb. 23, 2026, reh'g denied Mar. 24, 2026, petition for a writ of certiorari submitted (July 2026).

Table of Contents

Table of Authorities

Cases

Constitutional Provisions and Statutes

Opinions Below

The unpublished per curiam opinion of the United States Court of Appeals for the Fourth Circuit (App. A), No. 24-6577, denying a certificate of appealability and dismissing the appeal, is not reported.

The order of the United States District Court for the Eastern District of Virginia denying petitioner's motion under 28 U.S.C. § 2255 (App. B), ECF No. 195, is unreported.

The order of the court of appeals denying rehearing and rehearing en banc (App. C) is unreported. The opinion of the Fourth Circuit affirming petitioner's conviction on direct appeal is reported at *United States v. Fall*, 955 F.3d 363 (4th Cir. 2020).

Jurisdiction

The court of appeals entered its judgment denying a certificate of appealability and dismissing the appeal on February 23, 2026. A timely petition for rehearing and rehearing en banc was denied on April 24, 2026. App. C. This petition is filed within 90 days of that denial. See Sup. Ct. R. 13.1, 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1). See *Hohn v. United States*, 524 U.S. 236 (1998).

Constitutional and Statutory Provisions Involved

28 U.S.C. § 2253(c) provides in relevant part that an appeal may not be taken from the final order in a proceeding under 28 U.S.C. § 2255 unless a circuit justice or judge issues a certificate of appealability, and that such a certificate "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

28 U.S.C. § 2255(b) provides in relevant part that, "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon."

U.S. Const. amend. IV provides in relevant part: "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. amend. VI provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Statement of the Case

A. The search of petitioner's home.

In August 2016, a relative staying in petitioner's home found a laptop she believed contained unlawful images and brought it to the Virginia Beach Police Department, where detectives viewed files on the device without a warrant. On the same day, and on the basis of those images, detectives obtained a warrant to search petitioner's residence and seized computers and other media. App. D.

The copy of the warrant in the record describes the things to be seized by the words "See attached." App. D. The warrant materials petitioner placed in the record below also reflect an apparent authentication irregularity: two versions of the warrant application's second page bear magistrate signatures that differ in form, and the record contains no explanation for the discrepancy. ECF No. 164-1, at PageID 2664–2665; see App. F (informal brief describing the discrepancy). Petitioner's pro se filings below described the discrepancy as a falsified signature. The claim pressed here is narrower: counsel never investigated an irregularity visible on the warrant papers themselves.

B. Trial, conviction, and direct appeal.

Petitioner was charged in the Eastern District of Virginia, No. 2:17-cr-00012, and proceeded to a jury trial in 2018. Trial counsel moved to suppress the fruits of the search, arguing that the warrantless viewing of the laptop was unlawful and that the residential warrant was its fruit; the district court denied the motion after a hearing, and petitioner was convicted.

The Fourth Circuit affirmed, upholding the search under the good-faith exception of *United States v. Leon,* 468 U.S. 897 (1984), on the ground that the supporting affidavit furnished an objectively reasonable basis to believe probable cause existed, and expressly declining to reach other questions. *United States v. Fall,* 955 F.3d 363, 369–71 (4th Cir. 2020). This Court denied certiorari. No. 19-8678 (Oct. 5, 2020).

C. The motion under 28 U.S.C. § 2255 and its summary denial.

Petitioner, proceeding pro se, moved to vacate his conviction under 28 U.S.C. § 2255, asserting among other grounds that trial counsel was ineffective for failing to investigate and challenge the warrant — specifically, its facial failure to particularize the things to be seized (the "See attached" description) and the irregularity of the magistrate's signatures. ECF No. 164.

The district court denied the motion without an evidentiary hearing. ECF No. 195 (E.D. Va. Apr. 25, 2024). It rejected the particularity-related ground on the view that counsel's approach was "strategy"[1] and because the petition "fails to identify any specific piece of evidence that was admitted at trial but without which the jury might have acquitted," and it rejected the signature ground on the view that "the petitioner provides no specific basis for his claims." App. B at 15a. The court denied a certificate of appealability.

In the § 2255 proceeding, trial counsel submitted a sworn statement responding to petitioner's claims. As to the magistrate's signature, counsel stated: "Defense counsel had no basis to suspect the state magistrate's signature on the search warrant was in any way false so did not investigate that." ECF No. 176-1 at 5 (App. E). The suppression motion counsel had filed challenged the warrantless viewing of the laptop, the niece's authority to consent to its search, the resulting fruit of the poisonous tree, and the supporting affidavit's probable cause; it did not challenge the warrant's facial "See attached" description of the things to be seized. ECF No. 75. In reply, petitioner pointed to the warrant documents themselves and argued that counsel "should have examined the paper work including signatures and times." ECF No. 179.

---

1 The district court noted that petitioner's own pro se memorandum used the word "strategy," ECF No. 164-1 at 3, and treated the description as an admission. App. B at 15a. Petitioner's motion and reply did not concede an informed strategic choice. See ECF Nos. 164, 179. Whether the omission reflected investigated strategy or the absence of investigation is itself a disputed question of fact that a hearing would resolve.

D. The denial of a certificate of appealability.

Petitioner sought a certificate of appealability. Limiting its review to the issues raised in petitioner's informal brief, see *Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014), the Fourth Circuit denied a certificate and dismissed the appeal, stating that petitioner had not made "a substantial showing of the denial of a constitutional right." No. 24-6577 (4th Cir. Feb. 23, 2026) (per curiam) (App. A).

Reasons for Granting the Petition

Introduction.

This petition should be held pending this Court's disposition of *Berry v. United States*, No. 25-7026, which presents a materially overlapping question about the certificate-of-appealability standard under 28 U.S.C. § 2253(c). Petitioner's first question asks whether a court of appeals may deny a certificate solely because circuit precedent forecloses the claim, even though other courts have reached the opposite constitutional conclusion and the certificate would permit review of a denied evidentiary hearing rather than immediate merits relief. If *Berry* confirms that adverse circuit precedent cannot by itself defeat debatability under § 2253(c), there is at least a reasonable probability that the decision below rested on a premise *Berry* rejects.

This petition also independently warrants review because the courts below denied a hearing on a documented ineffective-assistance claim by characterizing non-investigation as "strategy" and a record-based claim as "conclusory," even though the asserted defects appeared on the face of the government's own warrant papers and counsel's sworn statement attributed the omission to a failure to investigate. The petition does not ask this Court to decide the Fourth Amendment merits. It asks only that the threshold gate to appellate review and the record-development gate under § 2255(b) be applied as this Court's precedents require.

This case thus presents one procedural error at two successive stages. The certificate should have issued because the hearing question was debatable. The hearing should have been held because the motion, files, and records did not conclusively resolve whether counsel made an informed strategic choice or instead failed to investigate visible issues in the warrant papers.

I. This petition should be held pending Berry v. United States, No. 25-7026, and then disposed of as appropriate in light of that decision.

Berry presents a materially overlapping question concerning whether a court of appeals may deny a certificate of appealability solely because existing circuit precedent forecloses the claim, notwithstanding disagreement in other courts. That question matters here because petitioner sought a certificate to obtain review of the denial of an evidentiary hearing under § 2255(b), not immediate merits relief on the underlying Fourth Amendment issue. If adverse circuit precedent cannot by itself defeat debatability under § 2253(c), then there is at least a reasonable probability that the decision below rested on a premise *Berry* rejects.

That is so even though the court of appeals gave no case-specific reasons for its ruling. The panel decided this case against the backdrop of its own published decision holding this very warrant "not facially deficient," *United States v. Fall*, 955 F.3d 363, 369–71 (4th Cir. 2020) —

binding circuit law squarely adverse to the suppression theory the informal brief presented. It then denied a certificate without any case-specific explanation, stating only that, "[l]imiting [its] review of the record to the issues raised in [the] informal brief," petitioner "ha[d] not made the requisite showing." App. A at 3a. In that posture, the denial is most naturally read as treating binding circuit precedent as ending debate — the premise *Berry* examines. The district court, for its part, did not resolve the legal merits at all: it expressly "[a]ssum[ed] without deciding that the petitioner's assessment of the law is correct" and denied on other grounds. App. B at 15a. The only tribunal that could have found the claim not debatable as a matter of law was therefore the panel bound by its own precedent. If *Berry* rejects that approach, there is at least a reasonable probability that the decision below should be reconsidered in its light. See *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam).

II. The court of appeals collapsed the certificate-of-appealability threshold into the merits, contrary to Miller-El and Buck.

A. A certificate of appealability asks whether a claim is debatable, not whether it prevails.

The certificate-of-appealability requirement is a threshold, not a merits screen. A movant satisfies 28 U.S.C. § 2253(c)(2) by making "a substantial showing of the denial of a constitutional right," which this Court has defined not as a showing that the movant will win, but as a showing "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). The inquiry is deliberately modest: "a claim can be debatable even though every jurist of reason might agree, after the . . . case has received full consideration, that [the] petitioner will not prevail." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

This Court has twice corrected courts of appeals that lost sight of that distinction. In *Miller-El,* the Court reversed a court of appeals that had effectively resolved the merits under the guise of the threshold inquiry, explaining that a court "should not decline the application . . . merely because it believes the applicant will not demonstrate an entitlement to relief." Id. at 337. In *Buck v. Davis,* the Court reversed again: the court of appeals had "phrased its determination in proper terms" but reached its conclusion "only after essentially deciding the case on the merits." 580 U.S. 100, 115 (2017). At the certificate stage, a court of appeals must "limit its examination . . . to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable." Id. at 115–16 (quoting *Miller-El*, 537 U.S. at 327, 348).

B. Where other courts have reached the opposite constitutional conclusion, a certificate cannot be denied simply because the circuit goes the other way.

It follows from *Slack* and *Miller-El* that where the courts of appeals have actually divided on the constitutional question a claim depends on, the claim is at least debatable among reasonable jurists. If jurists of reason in one circuit have sustained the very claim the circuit of decision rejects, then reasonable jurists have not merely been able to debate the question; they have debated it and reached opposing results.

The courts of appeals are so divided. The Ninth Circuit has held that a petitioner meets the modest certificate standard even on a question well-settled within a circuit when another circuit has reached a conflicting view. *Lambright v. Stewart*, 220 F.3d 1022, 1025–26 (9th Cir. 2000). Other circuits treat binding adverse precedent as itself ending debate and foreclosing a certificate. *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015); *Allen v.*

Stephens, 805 F.3d 617, 627–28 (5th Cir. 2015); *Mitchell v. United States*, 43 F.4th 608, 612, 614 (6th Cir. 2022). That is the § 2253(c) question presented in *Berry*. Here the Fourth Circuit, in a summary order giving no case-specific reasons, denied a certificate on a claim other circuits would sustain, without acknowledging that the underlying question is one reasonable jurists have debated. That is the *Miller-El* and *Buck* error, and it is complete without reference to any other case.

C. The error is especially consequential here because the certificate would have opened onto review of a denied hearing, not immediate merits relief.

Whatever force the government's position might have where a certificate would lead only to a merits appeal the panel is bound to reject, it has none here. The certificate petitioner sought would have permitted review of the denial of an evidentiary hearing under § 2255(b) — a distinct, record-development question the Fourth Circuit's suppression precedent does not answer and could not answer. A panel bound by circuit law on the good-faith exception is not thereby bound to hold that the motion, files, and records "conclusively show" that petitioner is entitled to no relief.

That is why the certificate here was not "pointless." It would have permitted review of whether a hearing was wrongly denied on a record that does not conclusively refute the claim. Treating adverse merits precedent as foreclosing that distinct procedural question is the very collapse of threshold into merits that *Miller-El* and *Buck* forbid.

III. Independent of Berry, § 2255(b) entitled petitioner to an evidentiary hearing because the motion, files, and records do not conclusively refute a specific, document-based ineffective-assistance claim.

Even if the certificate question in Part II were set aside, this petition would warrant review for a second, self-standing reason: the courts below resolved on the paper record a factual dispute that the paper record does not resolve. That is the error § 2255(b) is written to prevent.

A. Section 2255(b) requires a hearing unless the record conclusively shows the movant is entitled to no relief.

By its terms, § 2255(b) commands that the district court "grant a prompt hearing" unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." This Court has repeatedly enforced that command. A hearing is required where the movant's allegations, if true, would entitle him to relief and are not so palpably incredible or patently frivolous as to justify summary dismissal. *Machibroda v. United States*, 368 U.S. 487, 494–95 (1962); *Blackledge v. Allison*, 431 U.S. 63, 76 (1977). A hearing may not be denied simply because the movant's account seems improbable; the question is whether the files and records conclusively refute it. *Blackledge*, 431 U.S. at 74–76; *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (per curiam).

The Fourth Circuit applies the same standard, repeatedly vacating summary denials of § 2255 relief where the record left a genuine factual dispute unresolved. *United States v. Mayhew*, 995 F.3d 171, 176–77 (4th Cir. 2021); *United States v. Paylor*, 88 F.4th 553, 564–65 (4th Cir. 2023). And in the same § 2255 posture presented here — a claim that counsel was ineffective as to a suppression theory — it recently did the same in *United States v. McNeil*, 126 F.4th 935, 941–45 (4th Cir. 2025), vacating the summary denial and remanding for an evidentiary hearing because the omitted suppression motion had at least "some substance" and the underlying Fourth Amendment issue was "highly fact-specific" and required factual development. That was the same posture as this case — yet here, where the asserted defects appeared on the face of the warrant and counsel did not investigate them, the courts below denied a hearing. The circuit's own standard was not applied.

B. Petitioner's claim rests on the government's own warrant papers, not on speculation or conclusory assertion.

The claim rejected below does not rest on bare accusation. It rests on the warrant documents themselves. The copy of the warrant in the record describes the things to be seized by the words "See attached"; whether a particularizing attachment was incorporated into and accompanied the warrant is a question the record does not resolve. The warrant papers also present an unexplained irregularity in authentication: two versions of the application's second page bear magistrate signatures that differ in form, ECF No. 164-1, at PageID 2664–2665; see App. F, and the record contains no explanation for that discrepancy. The claim does not depend on proof that the signatures were false; it is that visible irregularities on the face of the warrant papers were never investigated.

That documentary character matters. These are not reconstructed memories or post hoc suspicions. They are features visible on the face of the government's own papers. Where dispositive facts appear in, or are absent from, the warrant materials themselves, and the existing record does not conclusively resolve their significance, summary denial is improper.

C. The district court could not call non-investigation "strategy" or reject prejudice on the papers where counsel did not investigate visible defects in the warrant.

Petitioner's claim is one of ineffective assistance, not a freestanding Fourth Amendment challenge. Such a claim is cognizable on collateral review notwithstanding *Stone v. Powell,* 428 U.S. 465 (1976), and its merit turns on the strength of the suppression issue counsel failed to pursue. *Kimmelman v. Morrison,* 477 U.S. 365, 375, 382–83 (1986). To establish ineffective assistance, petitioner must show deficient performance and prejudice. *Strickland v. Washington,* 466 U.S. 668, 687–91, 694 (1984).

The central defect in the proceedings below is not merely that counsel omitted a particular suppression theory. It is that the courts treated a failure to investigate visible issues in the government's own warrant papers as "strategy" without first determining whether any investigation occurred. *Strickland* protects informed tactical judgment, not omission born of non-investigation. *Wiggins v. Smith,* 539 U.S. 510, 521–23 (2003); *Hinton v. Alabama,* 571 U.S. 263, 273–74 (2014) (per curiam). The "strategy" the district court invoked was petitioner's own descriptive word from his pro se memorandum, ECF No. 164-1 at 3, which the court treated as an admission. App. B at 15a. But whether counsel's omission was sound trial strategy is a legal conclusion that turns on counsel's actual reasoning and investigation — a professional judgment a pro se layperson is neither equipped to make nor competent to concede, and the very kind of judgment the Sixth Amendment guarantees counsel to supply. A defendant's descriptive use of the word cannot substitute for a record of the informed choice *Strickland*'s presumption requires and that *Wiggins* and *Hinton* hold must rest on investigation, particularly because his pro se filings are construed liberally. *Erickson v. Pardus,* 551 U.S. 89, 94 (2007) (per curiam). What counsel actually did, and why, is what a hearing under § 2255(b) exists to establish.

Here, the record does not merely fail conclusively to establish strategy; it affirmatively indicates non-investigation. As to the signature irregularity, counsel's sworn statement is explicit: he "had no basis to suspect the state magistrate's signature on the search warrant was in any way false so did not investigate that." ECF No. 176-1 at 5 (App. E). The government's opposition said the same — counsel "did not investigate the claim nor pursue it." ECF No. 176 at 12. As to the warrant's facial "See attached" description of the things to be seized, the statement is silent: the four suppression grounds counsel pressed — the warrantless viewing of the laptop, the niece's authority to consent, fruit of the poisonous tree, and the affidavit's probable cause — did not include it, ECF No. 75, and nowhere does counsel state that he examined the warrant's descriptive face. That counsel "raised all potentially meritorious issues" he had identified, ECF No. 176-1 at 5, does not establish that he ever identified or examined a defect appearing on the warrant's own face; whether he did is precisely what a hearing would resolve.

At minimum, that record required factual development rather than summary dismissal. An omission explained by the absence of investigation is not, without more, an informed strategic choice. Whether counsel reasonably failed to examine irregularities visible on the face of the warrant papers is precisely the sort of unresolved factual question that § 2255(b) reserves for a hearing.

The same is true of prejudice. The question at this stage is not whether petitioner has already proven that suppression would have been granted, but whether the omitted motion was substantial enough that the district court could not reject prejudice on the paper record. *Kimmelman* and *Grueninger* frame the inquiry that way. *Grueninger v. Director*, 813 F.3d 517, 524–25 (4th Cir. 2016). The district court instead required identification of "any specific piece of evidence that was admitted at trial but without which the jury might have acquitted," App. B at 15a — a stricter showing than the governing standard.

D. Groh supplies the needed legal substance; the Court need not decide the suppression merits now.

The omitted suppression theory was at least substantial. *Groh v. Ramirez* holds that a warrant failing on its face to particularize the items to be seized is facially deficient. 540 U.S. 551, 557–59, 563 (2004). *Leon* withholds good-faith protection from a warrant so facially deficient that officers cannot reasonably presume it valid. 468 U.S. at 923. That is enough for present purposes. Petitioner does not ask this Court to decide the suppression merits now. He asks only that a claim resting on that much legal substance, and on visible defects in the warrant papers themselves, not be rejected without a hearing.

E. The 2020 direct-appeal decision does not foreclose the questions presented here.

The government will rely on the Fourth Circuit's 2020 decision affirming the denial of suppression under the good-faith exception. But petitioner does not seek to relitigate the direct appeal. The 2020 panel addressed the suppression theories counsel actually litigated and rested on the affidavit's probable-cause showing, reasoning that even without the challenged observations the affidavit supplied an objectively reasonable basis to believe probable cause existed. *Fall*, 955 F.3d at 369–71.

That decision does not conclusively resolve the issues presented here for three reasons. First, although the panel used the phrase "not facially deficient," it did not separately analyze the specific "See attached" particularity problem now pressed, the authentication irregularity reflected on the face of the warrant papers, or whether either point should have been investigated by counsel before trial. Second, an ineffective-assistance claim is analytically distinct from the Fourth Amendment claim counsel litigated on direct appeal and is properly raised under § 2255. *Massaro v. United States*, 538 U.S. 500, 504–09 (2003). Third, the separate question under § 2255(b) is whether the motion, files, and records conclusively showed that counsel made an informed strategic choice and that petitioner was entitled to no relief without a hearing. The 2020 decision did not answer that question.

If *Berry* confirms that adverse circuit precedent cannot itself defeat debatability under § 2253(c), then the existence of the 2020 decision is the beginning of the certificate inquiry, not the end. Treating that prior decision as self-executing foreclosure is the very error this petition asks the Court to correct.

IV. The questions are important and recurring, and this case is a modest vehicle to address them.

A. The first question concerns an important recurring problem at the threshold of federal postconviction review.

The first question matters beyond this case because an unduly merits-like application of § 2253(c) can prevent appellate review of claims that are, by hypothesis, disputed among reasonable jurists. This Court has repeatedly emphasized that the certificate inquiry is a threshold one, not a substitute for deciding the appeal itself. *Miller-El*, 537 U.S. at 336–38; *Buck*, 580 U.S. at 115. *Berry* presents a materially overlapping version of that question and gives the Court an immediate occasion to address it.

B. The omitted suppression theory was substantial enough that it could not be dismissed without investigation and factual development.

The suppression issue underlying the ineffective-assistance claim has required document-specific and fact-intensive analysis in the lower courts. See, e.g., *United States v. Sheehan*, 70 F.4th 36, 47–55 (1st Cir. 2023) (declining to apply the good-faith exception to a deficient warrant), and *United States v. Szczerba*, 897 F.3d 929, 936–40 (8th Cir. 2018) (treating a warrant as insufficiently particular because it neither listed the items to be seized nor incorporated the affidavit, yet finding officers' reliance objectively reasonable under *Leon*). And *Szczerba* illustrates why the record matters: its good-faith holding turned on the supporting affidavit's having been signed by the issuing judge and having accompanied the warrant during the search — the feature that, in the court's words, "distinguishes this case from *Groh*," id. at 938 —

whereas here the warrant directs the reader to an attachment, and whether any particularizing document was incorporated into and accompanied the warrant is itself a question the papers do not conclusively resolve. The point is not that those cases create a clean merits split on petitioner's exact facts. It is that courts resolve these questions through careful review of warrant documents and surrounding circumstances. That is precisely why the omitted theory here could not be dismissed as insubstantial without investigation and factual development.

C. The second question presents a recurring legal problem: inferring strategy from a record that does not establish investigation.

The recurrence of this problem is demonstrated, not asserted. This Court set the governing hearing standard six decades ago in *Machibroda* and has had to enforce it since. *Fontaine*, 411 U.S. at 215. In the Fourth Circuit alone, three published decisions in the last four years have vacated summary denials of § 2255 relief because the paper record did not conclusively resolve the claim. *Mayhew* (2021); *Paylor* (2023); *McNeil* (2025). The decision below repeats the error in a pointed form: it inferred an informed strategic choice from a record containing no evidence that counsel investigated at all — indeed, from a record containing counsel's own affidavit that he assumed the warrant was regular. *Strickland*'s presumption of strategy follows investigation; it does not substitute for it. *Wiggins*, 539 U.S. at 521–23. The contrary approach effectively rewrites § 2255(b): it converts unresolved questions of investigation into findings of strategy at the pleading stage, and thereby resolves on the papers the very factual disputes the statute reserves for a hearing.

D. The relief sought is modest.

This is not a case in which the Court is asked to overturn a conviction or resolve a broad Fourth Amendment merits question. Petitioner asks only that the gate to appellate review be applied as this Court's decisions require, and that the record-development question § 2255(b) reserves for a hearing be answered by a hearing rather than on the papers. The realistic consequence of a favorable disposition is a remand for appellate consideration, under settled standards, of whether petitioner is entitled to an evidentiary hearing — a small corrective step, not a merits judgment.

Conclusion

The petition should be held pending this Court's disposition of *Berry v. United States*, No. 25-7026, and then disposed of as appropriate in light of that decision. If the Court does not hold this petition pending *Berry*, it should grant review on the second question presented: whether *Strickland*'s presumption of reasonable strategy may be applied, without an evidentiary hearing under 28 U.S.C. § 2255(b), to an omission that counsel's own sworn statement attributes to a failure to investigate rather than to an informed tactical choice.

Respectfully submitted,

Robert Michael Fall
Petitioner Pro Se
4729 Adler Avenue
Virginia Beach, VA 23462
(757) 226-7766

Dated: July 21, 2026