

No. 26-5164

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8 of this Court, petitioner files this supplemental brief to call attention to intervening matter not available at the time of his last filing on July 21, 2026. References to “App.” are to the appendix to the petition.

Petitioner asks first that this petition be held for the disposition of *Berry* and *Clark* and then disposed of in light of those dispositions. If the Court does not hold the petition, petitioner asks that review be granted on the second question presented, as the petition requested, or that the petition be granted, the judgment vacated, and the case remanded for further consideration in light of *Flood*. The intervening matter set out below bears on whether the questions presented remain live and whether they are debatable.

This supplement does not assert a conflict among the courts of appeals. It addresses the considerations the petition invoked under this Court’s Rule 10: whether a court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for this Court’s supervisory power, and whether the petition presents an important question of federal law that this Court has not settled. Sup. Ct. R. 10(a), (c). The intervening decision discussed in Part II bears on both: it supplies the deciding circuit’s controlling framework for § 2255(b) hearings at the Rule 8 stage, and that framework has not been applied to petitioner’s case.

I. This petition presents the § 2253(c) question pending in *Berry v. United States*, No. 25-7026, and *Clark v. United States*, No. 25-1199, and should be held for their disposition.

When this petition was filed, *Berry v. United States*, No. 25-7026, had no live conference date; it had last been distributed for the conference of June 25, 2026. Since then, the Solicitor General filed a brief in opposition in *Clark v. United States*, No. 25-1199, on July 22, 2026; petitioner Clark filed a reply on August 4, 2026; *Clark* was distributed for the conference of September 28, 2026, on August 5, 2026; petitioner Berry filed a supplemental

brief under Rule 15.8 on August 5, 2026; and *Berry* was distributed for the conference of September 28, 2026, on September 18, 2026. This petition was distributed for that conference on August 13, 2026.

Both represented petitioners ask that, if the Court grants only *Berry*, *Clark* be held. *Berry*'s supplemental brief states that "the Court should grant certiorari in *Berry* and hold the petition in *Clark*." *Berry* Supp. Br. 1. *Clark*'s reply asks that the Court "grant and consolidate both *Berry* and *Clark*" and, "[a]t minimum," that it "grant *Berry* and hold *Clark*." *Clark* Reply 1.

The question in *Berry* and *Clark* is whether a court of appeals may deny a certificate because binding circuit precedent forecloses the claim although another circuit would sustain it. That is the first question presented here. Pet. i. The only issue petitioner's counseled informal brief presented was whether the district court erred in denying relief without an evidentiary hearing on a claim that counsel failed to investigate the search warrant. App. F at 43a. The same court of appeals had held on direct appeal that this warrant was "not facially deficient." *United States v. Fall*, 955 F.3d 363, 369-71 (4th Cir. 2020); Pet. 5-6. On the particularity grounds the district court "[a]ssum[ed] without deciding that the petitioner's assessment of the law is correct." App. B at 15a.

The order denying a certificate recites the general standard, citing *Buck v. Davis*, 580 U.S. 100, 115-17 (2017), and *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012), and states that, "[l]imiting [its] review of the record to the issues raised in *Fall*'s informal brief," petitioner "has not made the requisite showing." App. A at 3a. It gives no case-specific reason. Whether such an order may rest on the panel's own adverse precedent is the question *Berry* and *Clark* present, and their disposition will bear on the standard applicable to petitioner's appeal.

Petitioner does not contend that the court of appeals was required to state reasons. Section 2253(c)(3) provides that "[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)," and that

requirement “binds only the judge issuing the COA.” *Gonzalez v. Thaler*, 565 U.S. 134, 144 (2012). It does not speak to a denial. The consequence of an unexplained denial is therefore not a defect in the order. It is that the order denying relief remains the only case-specific decision on the question the informal brief preserved, App. F at 43a — and its refusal of a hearing rests on the § 2255(b) standard the deciding circuit has since had to settle.

The government’s position in the lead cases bears on this one. Its brief in opposition in *Clark*, filed July 22, 2026, maintains that “notwithstanding any limited disagreement in the courts of appeals,” the answer to the § 2253(c) question “does not appear to have any significant practical effect on the ultimate disposition of Section 2255 claims.” Br. in Opp. 13, *Clark v. United States*, No. 25-1199 (U.S. July 22, 2026). The premise, stated in *Berry*, is that a certificate “would simply authorize an appeal to an appellate panel that itself would be bound by the same precedent.” Br. in Opp. 12, *Berry v. United States*, No. 25-7026 (U.S. May 27, 2026). That premise does not describe this case. The only issue the informal brief presented was the denial of a hearing under § 2255(b), App. F at 43a — a question on which the deciding circuit had described its own decisions as “less than perfectly consistent,” and which it addressed in a published and divided opinion twenty-three days after this petition was filed.

Petitioner asks, as his petition asked, that this petition — which presents the same § 2253(c) question — be held and disposed of in light of the Court’s disposition of *Berry* and of *Clark*. Only if the Court does not hold the petition does petitioner ask that review be granted, and then on the second question presented.

II. The Fourth Circuit has since clarified how a § 2255(b) record is read at the Rule 8 stage, and that standard bears on whether the denial the second question challenges is one reasonable jurists could debate.

The right at issue is the Sixth Amendment right to the effective assistance of counsel; the claim is one of ineffective assistance, not a freestanding Fourth Amendment claim. The

question under § 2253(c)(2) is whether petitioner has made “a substantial showing of the denial of” that right, and the order under review denied a certificate on the ground that he had not. App. A at 3a. The intervening matter set out below bears directly on whether the assessment underlying that conclusion is one reasonable jurists could debate.

The order under review recites both branches of that standard. App. A at 3a. The district court denied relief on the merits of the Strickland claim, not on a procedural ground, App. B at 15a-16a, so the applicable formulation is the first: whether “reasonable jurists could find the district court’s assessment of the constitutional claims debatable or wrong.” App. A at 3a; see *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The assessment at issue is the denial of an evidentiary hearing, the only issue the informal brief preserved. App. F at 43a. *Flood* describes how those inquiries nest: “We review the denial of an evidentiary hearing for abuse of discretion. And a court abuses that discretion when it denies a hearing despite a record that does not conclusively show that the movant is not entitled to relief. And whether the record conclusively shows that turns on the merits of [the] *Strickland* claim.” *Flood*, slip op. 18 n.15. The question is whether reasonable jurists could debate that nested inquiry, not whether petitioner would prevail on it.

On August 13, 2026 — twenty-three days after this petition was filed — the Fourth Circuit decided *United States v. Flood*, No. 23-7032 (4th Cir. Aug. 13, 2026) (published). *Flood* answers a question on which that court had acknowledged it was “less than perfectly consistent”: what makes a showing conclusive under § 2255(b). *Id.*, slip op. 6 (quoting *United States v. Hashimi*, 110 F.4th 621, 627 n.3 (4th Cir. 2024)). “The statute’s text and the Rules Governing Section 2255 Proceedings supply the answer.” *Id.*, slip op. 7.

The answer has two parts. First, the standard varies by stage. A denial at the Rule 4 preliminary-review stage is reviewed under the principles governing a Rule 12(b)(6) dismissal, so the court “accept[s] a petitioner’s well-pleaded allegations as true.” *Id.*, slip op. 9 (quoting *United States v. Paylor*, 88 F.4th 553, 565 (4th Cir. 2023)) (cleaned up). A denial at the Rule 8

stage — “after receiving additional briefing and evidence, but without holding an evidentiary hearing” — means the reviewing court will “treat the district court’s decision like a grant of summary judgment.” *Id.*, slip op. 9-10 (second quotation quoting *Hashimi*, 110 F.4th at 627). Second, at the Rule 8 stage the reviewing court does “not weigh evidence or make credibility determinations,” and “at both the Rule 4 and Rule 8 stages” it “draw[s] all reasonable inferences in the movant’s favor.” *Id.*, slip op. 10. “Absent that showing, denying the claim without a hearing is an abuse of discretion.” *Id.* A district court’s suggestion that hearings are “the exception, not the norm, and there is a heavy burden on the petitioner” was “an error,” because “[t]he statute imposes no heavy burden and creates no default against hearings.” *Id.*, slip op. 22 n.19.

That sequence is what makes the second question debatable. A certificate issues if reasonable jurists could find the district court’s assessment “debatable or wrong.” App. A at 3a. When the court of appeals denied a certificate on February 23, 2026, the standard governing the only issue the informal brief presented was one on which that court had described its own decisions as “less than perfectly consistent.” Petitioner does not contend that the later opinion shows the earlier ruling was wrong. He contends that *Flood* supplies the framework by which the Rule 8 record must now be read — crediting the movant, drawing inferences in his favor, and weighing no evidence — and that on this record, read that way, what investigation preceded counsel’s decision not to examine the magistrate’s signature is unresolved. That is what makes the assessment one reasonable jurists could debate.

The order denying relief in this case invoked Rule 8(a). App. B at 5a (“The Court has reviewed the record and finds that an evidentiary hearing is not necessary because the record conclusively demonstrates that the petitioner is not entitled to relief on the § 2255 petition. See R. Gov. § 2255 Proc. in U.S. Dist. Cts. 8(a).”). The court had ordered counsel to file an affidavit responding to the claims, App. E at 34a, and relied on that affidavit in resolving the motion, App. B at 13a, 16a.

On the ground faulting counsel for filing no further suppression motions, the court relied in part on the observation that “the petitioner admits Attorney Kimball’s approach was ‘strategy.’” App. B at 15a. The court had expressly “[a]ssum[ed] without deciding that the petitioner’s assessment of the law is correct.” *Id.* The memorandum it cited frames that word as the argument petitioner anticipated, not as his concession: “You may say that the suppression my lawyer tried was trial strategy. I would point out that trial strategy was to suppress the evidence and he could have done as many suppression arguments as he could. If he had looked sooner for them and the one he chose he did not believe he would win any way.” ECF No. 164-1 at 3-4. Quoted in full, the closing clause cuts in both directions: it acknowledges that counsel selected one theory, and it states that counsel did not believe the theory he selected would succeed. A selection made without having looked for the alternatives, and without confidence in the one chosen, is the premise of petitioner’s claim rather than an answer to it. Which reading that memorandum bears is a question about the record; resolving it against the movant without a hearing is what review at the Rule 8 stage forecloses. On the ground faulting counsel for not investigating the signature, it found that “the petitioner provides no specific basis for his claims,” concluded that “counsel had no obligation to investigate the matter further,” and denied that ground on the deficiency prong alone. *Id.* at 15a-16a. *Flood* directs that at both the Rule 4 and Rule 8 stages the court “draw[s] all reasonable inferences in the movant’s favor.” The sentence the court itself quoted requires that “a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Strickland v. Washington*, 466 U.S. 668, 691 (1984); App. B at 15a-16a. Where the record contains counsel’s account of the omission but nothing about the basis for it, that direct assessment cannot be made on the papers.

Counsel’s statement, given “under oath,” App. E at 33a, is that “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.” *Id.* at 37a. That statement supplies what such a record usually

lacks: counsel's own account of the omission. That account establishes that no investigation occurred. What it does not supply is any account of what counsel did look at before concluding that there was "no basis to suspect" — whether he examined the warrant papers at all, and *Flood* requires that record to be assessed without weighing evidence or making credibility determinations, and with reasonable inferences drawn in the movant's favor. *Flood*, slip op. 10.

Petitioner does not read *Flood* as making the hearing question separable from the merits; *Flood* states that the two "merge because a hearing is owed only when crediting the movant would entitle him to relief." *Id.*, slip op. 10. That is petitioner's submission: crediting his allegations together with counsel's own sworn statement, and drawing reasonable inferences in his favor, the record does not conclusively foreclose relief. Petitioner identified a particular omission — the failure to investigate the magistrate's signature on the search warrant — and counsel's sworn statement confirms it: 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." App. E at 37a. That supplies counsel's reason; the record contains nothing about what inquiry, if any, preceded it. The same statement's assertion that counsel "raised all potentially meritorious issues in the motion to suppress," *id.*, is a conclusion about the motion counsel filed, not an account of the investigation that preceded the omission. *See id.* at 36a-37a. *Flood* limits itself accordingly. It states that "[o]ur decision therefore does not bear on" cases in which "the government initiated talks and defense counsel did nothing," and distinguishes a decision "remanding for a hearing where the movant identified a specific omission." *Id.*, slip op. 15 n.11 (citing *United States v. McNeil*, 126 F.4th 935, 945-47 (4th Cir. 2025)).

Petitioner does not ask this Court to determine what an investigation would have uncovered. That is a matter for the lower courts in the first instance. The point is narrower: counsel did not investigate, and the record therefore does not conclusively establish what an investigation would have revealed, or whether what it revealed would have supported a further

suppression motion. Under *Flood* that question is not resolved by weighing evidence or making credibility determinations on the papers. *Flood*, slip op. 10.

Petitioner discloses the following. The *Flood* panel affirmed, holding the district court's misstatement harmless because that court "then applied the correct standard." *Flood*, slip op. 22 n.19. Judge Heytens would have vacated and remanded for an evidentiary hearing, concluding that the district court's failure to apply the correct standard "alone was an abuse of discretion" and that "the default presumption is in favor of a hearing, not against one." *Id.*, slip op. 24-25 (Heytens, J., dissenting). The majority and the dissent stated the governing standard in the same terms; they divided over whether the district court had applied it. A petition for rehearing and rehearing en banc was filed in *Flood* on August 24, 2026, and the mandate was temporarily stayed on August 25, 2026. See *United States v. Flood*, No. 23-7032 (4th Cir.), Doc. 37 (Aug. 24, 2026); *id.*, Doc. 38 (Aug. 25, 2026). Here, by contrast, the district court denied relief without any hearing, expressly finding an evidentiary hearing unnecessary — and refused discovery and appointment of counsel on the same paper record and for the same reason. App. B at 5a, 24a-25a.

Twenty-six days after *Flood*, the Tenth Circuit reversed a denial of § 2255 relief entered without an evidentiary hearing. *United States v. Martin*, No. 24-3140 (10th Cir. Sept. 8, 2026) (published). There the district court had "ordered [the movant's] trial defense counsel to provide an affidavit responsive to the allegations," *id.*, slip op. 5, and "did not . . . specify its reasons for not holding a hearing," *id.*, slip op. 6. Because "[c]ounsel's affidavit does not give any indication that she knew about or had a strategic reason for" the omission, *id.*, slip op. 21, and because "the affidavit and sworn pleading do not make clear the totality of the facts bearing on the issue, an evidentiary hearing is necessary to resolve it," *id.*, slip op. 22, the court reversed. Judge Bacharach dissented, in part because the movant had not requested a hearing. *Id.*, slip op. 30-31 (Bacharach, J., dissenting). That objection has no purchase here. Petitioner moved for discovery and for counsel under Rules 6(a) and 8(c) of the Rules Governing Section

2255 Proceedings, ECF No. 164-1 at 12-13, and the district court understood the request and denied it on that footing: “Finding neither discovery nor an evidentiary hearing necessary in this matter, the Court determines that appointment of counsel is not appropriate.” App. B at 25a. The procedural sequence is materially similar here: the court ordered counsel to answer, App. E at 34a, and counsel answered that he had no basis to suspect and so did not investigate. *Id.* at 37a.

Petitioner’s motion was executed under penalty of perjury. ECF No. 164 at 14 (declaration under 28 U.S.C. § 1746, executed September 27, 2021). The form directs a movant to “[a]ttach additional pages if you have more than four grounds,” *id.* at 5; petitioner raised ten, and his sworn statement of the first ground incorporates them: “Please see pages numberd 1-10 with this application and the facts are set out in them.” *Id.* *Martin* treats a movant’s “sworn pleading” together with counsel’s affidavit as the record that must “make clear the totality of the facts bearing on the issue.” *Martin*, slip op. 22. The order below did not treat it so: it found that “many” of the claims were “largely unsupported by the record or any evidence,” App. B at 13a, though the sworn motion was itself that evidence.

Petitioner does not ask this Court to decide whether the omitted motion would have succeeded. He asks it to notice that no court has analyzed the question on which the judgment would now be defended. The order denying relief rested the ground faulting counsel for not investigating the magistrate’s signature on the deficiency prong alone: it concluded that counsel “had no obligation to investigate the matter further” and denied that ground for failure to “establish the deficiency prong under *Strickland*.” App. B at 15a-16a. Its only references to prejudice on that ground are omnibus sentences stating that petitioner failed to prove “either deficient performance or actual prejudice for any of his 10 grounds,” *id.* at 13a; see *id.* at 24a, unaccompanied by any analysis of the omitted motion. The order denying a certificate states no ground of its own. App. A at 3a.

The certificate inquiry is a threshold one. “[T]hat a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable.” *Buck v. Davis*, 580 U.S. 100, 116 (2017).

The intervening decisions show how that question is handled when a court reaches it. *Martin* did not decide prejudice; it “remand[ed] to the district court to determine prejudice.” *Martin*, slip op. 28. *Flood* resolved prejudice without a hearing only because the dispositive fact was fixed by sworn submissions — “both sides’ affidavits say so.” *Flood*, slip op. 19. And *Flood* explains why the order matters: “It is impossible for a court to determine whether an act or omission changed the outcome on the prejudice prong without an adequate understanding of the act or omission at issue.” *Id.*, slip op. 15 n.12. Here the omission is conceded and unexamined: counsel swore he “did not investigate that,” App. E at 37a, and the government’s response said the same, ECF No. 176 at 12. What the record lacks is any inquiry into what the omission cost — because none was made and none was ordered. *Flood* denied a hearing where the movant left an element unaddressed — “It is a gap, and the gap is his to fill,” *id.*, slip op. 22 — but the gap there was a fact the movant knew and did not state. The gap here is of a different kind: what an investigation would have produced is not within petitioner’s knowledge precisely because none was made, and the court denied discovery and counsel on the same paper record. App. B at 24a-25a. Petitioner does not contend that a movant may leave prejudice unpleaded; he contends that prejudice cannot be called undebatable when no court has examined it. This Court has remanded rather than resolve it, “because no court has yet evaluated the prejudice question by applying the proper inquiry to the facts of this case.” *Hinton v. Alabama*, 571 U.S. 263, 276 (2014) (per curiam).

CONCLUSION

The petition should be held pending this Court’s disposition of *Berry v. United States*, No. 25-7026, and of *Clark v. United States*, No. 25-1199, and then disposed of as appropriate

in light of those dispositions. If the Court does not hold this petition pending *Berry*, it should grant review on the second question presented, or grant the petition, vacate the judgment, and remand for further consideration in light of *United States v. Flood*, No. 23-7032 (4th Cir. Aug. 13, 2026). The court of appeals denied a certificate on February 23, 2026, and rehearing on April 24, 2026; *Flood* was decided on August 13, 2026. That court has had no occasion to apply it to petitioner's claim, and that application may determine whether the denial remains sustainable. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). Such a remand does not require a holding that the decision below was wrong; it requires a reasonable probability that the court below would reconsider if given the opportunity. *Ibid*. This Court has remanded so that a court of appeals may apply its own intervening decision. *See, e.g., Newbold v. United States*, 571 U.S. 1119 (2014) (granting leave to proceed *in forma pauperis*, vacating, and remanding to the Fourth Circuit for reconsideration in light of that court's decision in *Miller v. United States*, 735 F.3d 141 (4th Cir. 2013)).

Respectfully submitted,



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September 29, 2026