Nos. 03-2656, 03-2665

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Respondent

v.

DANIEL J. MARAVILLA & RAFAEL J. DOMINGUEZ

Defendants-Petitioners

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BRIEF FOR THE UNITED STATES AS RESPONDENT

R. ALEXANDER ACOSTA
Assistant Attorney General

MARK L. GROSS
MARIE K. McELDERRY
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - PHB 5024
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3068

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

ARGUMENT:

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

RULES:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 03-2656, 03-2665

UNITED STATES OF AMERICA,

Plaintiff-Respondent

v.

DANIEL J. MARAVILLA & RAFAEL J. DOMINGUEZ

Defendants-Petitioners

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BRIEF FOR THE UNITED STATES AS RESPONDENT

JURISDICTION

These are appeals from an order denying a renewed motion for bail pending a decision on petitioners' successive motion under 28 U.S.C. 2255. In this case, the district court lacked jurisdiction over petitioners' Section 2255 motion as petitioners failed to seek authorization from this Court for filing a second or successive Section 2255 motion. *Pratt* v. *United States*, 129 F.3d 54, 57 (1st Cir. 1997), cert. denied, 523 U.S. 1123 (1998). Accordingly, the district court also

lacked jurisdiction to determine the motion for bail.[1]

This Court treats an appeal from a motion for bail pending a Section 2255 motion as a petition for writ for mandamus. *United States* v. *DiRusso*, 548 F.2d 372 (1st Cir. 1976). As argued herein, however, petitioners do not meet the standard for mandamus.

ISSUES PRESENTED

1. Whether this Court has jurisdiction over these appeals.

2. Whether the district court grossly abused its discretion in denying the motion for bail where the alleged newly-discovered evidence on which petitioners relied below has either previously been considered by this Court or does not constitute material evidence of their actual innocence.

STATEMENT OF THE CASE

Petitioners Daniel J. Maravilla and Rafael J. Dominguez (hereinafter "petitioners" or "Maravilla" and/or "Dominguez") are former special agents with the United States Customs Service in San Juan, Puerto Rico. On May 13, 1987, a federal grand jury returned an eight-count indictment charging Maravilla and

---

[1] In addition, the motion is procedurally defective because it was not signed by either Maravilla or Dominguez or by an attorney representing them. Rather, it was signed by Maravilla's wife, who does not appear on the record to be an attorney licensed to practice law on behalf of petitioners. Accordingly, the motion is subject to summary dismissal.

Dominguez with various federal offenses as the result of their having abducted, robbed, and murdered Yamil Mitri Lajam (Mitri), a money courier and citizen of the Dominican Republic (D.E. 1, CR 87-161).[2] On September 15, 1987, they were found guilty after a jury trial of depriving an "inhabitant" of the United States of civil rights, in violation of 18 U.S.C. 242 and 2 (Count One); robbery, in violation of 18 U.S.C. 1951(a) and 2 (Count Two); receiving and transporting stolen money, in violation of 18 U.S.C. 2315, 2314 and 2 (Counts Three and Four); and various instances of perjury and obstruction of justice, in violation of 18 U.S.C. 1623, 1001 and 1503 (Counts Five through Eight). See *United States* v. *Dominguez*, 951 F.2d 412, 414 (1st Cir. 1991), cert. denied, 504 U.S. 917 (1992).

On appeal, this Court upheld the convictions except as to Count One, which it reversed on the ground that Mitri, who did not intend to spend more than a few hours in Puerto Rico, was not an "inhabitant of the United States" within the meaning of 18 U.S.C. 242. *United States* v. *Maravilla*, 907 F.2d 216 (1st Cir. 1990). The Court remanded for resentencing as to Counts Two through Eight. See *Dominguez*, 951 F.2d at 414.

On remand, the district court sentenced each petitioner to a total of 50 years

---

[2] The record relevant to these appeals is docketed in several different files in the district court. Documents are cited in this Brief to the docket number ("D.E. xx") and the case number in which the document appears.

imprisonment and imposed a fine, as to each, of $30,000. This Court affirmed the sentences. *Id.* at 412.

Since that time, Maravilla and Dominguez have submitted a series of *pro se* attacks on their convictions and sentences. Some of those petitions have included motions for bail.

1. *Motion For New Trial Under Federal Rule of Criminal Procedure 33*

On June 22, 1992, Maravilla and Dominguez filed a motion for new trial, pursuant to Federal Rule of Criminal Procedure 33, based on newly-discovered evidence. The district court denied the new trial motion, and this Court affirmed. *United States* v. *Maravilla*, No. 93-1315, 1993 WL 378660 (1st Cir. 1993), cert. denied, 512 U.S. 1219 (1994).

2. *First Motion Under 28 U.S.C. 2255*

On November 8, 1994, Maravilla and Dominguez submitted a motion to vacate under 28 U.S.C. 2255 (First Section 2255 Motion), which the district court denied. See *Maravilla* v. *United States*, 901 F. Supp. 62 (D.P.R. 1995). The district court also denied petitioners' motion for bail. Maravilla submitted notices of appeal both on the merits and as to bail, but then withdrew the appeal as to bail (D.E. 250-252, CR 87-161). This Court affirmed the district court's decision on the merits. *Maravilla* v. *United States*, No. 96-1237, 1996 WL 496318 (1st Cir.

1996), cert. denied, 520 U.S. 1202 (1997).

3. *Prior Attempts To File Second Or Successive Section 2255 Motions*

In 1998, Maravilla filed two applications with this Court seeking leave to file second or successive Section 2255 motions. This Court denied both. See *United States* v. *Maravilla*, 6 Fed. Appx. 33 (1st Cir. 2001), cert. denied, 534 U.S. 968 (2001).

In 1999, Dominguez also submitted a second or successive motion to vacate his sentence under Section 2255 (D.E. 2, 99-CV-2334 (D.P.R.)). On December 27, 1999, the district court dismissed that motion, and informed Dominguez that he needed approval from this Court to submit a second or successive motion under Section 2255 (D.E. 4, CV 99-2334). No such approval was sought.

4. *Unsuccessful Petitions Filed In Districts of Incarceration*

In 1999, both Maravilla and Dominguez filed petitions in the judicial districts in which they are incarcerated. Maravilla's petitions, filed pursuant to 28 U.S.C. 2241, were either dismissed or denied by the United States District Court for the Middle District of Florida, that ruled that they were "an impermissible attempt to circumvent the requirements imposed on second or successive § 2255 motions by the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA')." See *United States* v. *Maravilla*, 6 Fed. Appx. at 34, citing *Maravilla*

v. *Parks*, No. 99-CV-231 (M.D.Fla., Aug. 20, 1999). The Eleventh Circuit affirmed. *Maravilla* v. *Parks*, 220 F.3d 592 (11th Cir. 2000) (TABLE).

Dominguez submitted a Section 2255 motion in the United States District Court for the Eastern District of North Carolina. On January 12, 2000, that court transferred the motion to the United States District Court for the District of Puerto Rico. The Puerto Rico district court dismissed the motion to allow Dominguez to seek an order from this Court authorizing a second or successive Section 2255 petition (D.E. 7, CV 00-1172). Dominguez appealed, but this Court issued an order requiring Dominguez to apply for a certificate of appealability from the district court. Dominguez's request for a certificate of appealability was denied by the district court, and this Court issued an informal mandate denying Dominguez's request for a certificate of appealability, terminating the appeal. (D.E. 8, 11, 12, 13, 15, CV-00-1172).

5. *Maravilla's 2000 Motion To Correct Sentence Pursuant To Federal Rule Of Criminal Procedure 35(a)*

On July 11, 2000, Maravilla submitted a motion to correct his sentence, pursuant to Federal Rule of Criminal Procedure 35(a). The district court denied the motion, and this Court affirmed. *United States* v. *Maravilla*, 6 Fed. Appx. at 37.

6. *The Proceedings Leading To These Appeals*

On February 27, 2002, Maravilla and Dominguez filed in the district court a "Petition To Redetermine The Suppression Merits Of Petitioners Initial § 2255 Denial Opinion And Ruling That Is Based Upon Abuses Of Discretion Of Material Errors Of Law To Deny Relief." The district court treated that motion as a request for reconsideration of its October 18, 1995, Opinion and Order denying the First Section 2255 Motion, and denied the motion on April 18, 2002, for lack of jurisdiction (D.E. 23, CV 94-2514).

On May 29, 2002, Maravilla and Dominguez submitted a petition for bail pursuant to Federal Rule of Appellate Procedure 23(b) (hereinafter "First Bail Petition").[3] In the bail petition, they claimed actual innocence (D.E. 269, CR 87-161; Addendum at 1-6). On that same date, Maravilla filed a petition requesting leave to amend and supplement a Section 2255 motion (D.E. 268, CR 87-161).[4]

---

[3] In Criminal No. 87-161 (HL), the docket entry reflects a filing date of May 29, 2001 (D.E. 269). The petition, however, has a district court date stamp of May 29, 2002. (Addendum at 1). For purposes of these appeals, the United States assumes the accuracy of the later of the two dates.

[4] Petitioners were apparently unaware that the district court had already denied their Section 2255 motion on April 18, 2002. On July 22, 2002, Maravilla filed a motion requesting that the court order the United States to answer the petition for reconsideration he filed on February 27, 2002 (D.E. 27, CV 94-2514). The district court denied that motion on August 1, 2002, stating that it had already denied the

(continued...)

The district court denied petitioners' First Bail Petition on June 10, 2002 (D.E. 270, CR 87-161; Addendum at 7), and held that Maravilla's 2255 petition was moot. Petitioners did not appeal. On or about December 11, 2002, the district court issued a second Order denying petitioners' First Bail Petition (Respondent's Addendum at 1).

On June 18, 2003, Silvia Maravilla, petitioner Maravilla's wife, submitted a motion on behalf of both Maravilla and Dominguez entitled "Petition Of Actual Innocence Pursuant To 28 U.S.C. § 2255 And The Rules That Govern § 2255 Proceedings" (D.E. 29, CV 94-2514). That motion is still pending in the district court.

On June 18, 2003, petitioners submitted a second motion requesting bail pursuant to Rule 23(c) (hereinafter "Second Bail Petition"), in which they again claimed actual innocence. (D.E. 282, CR 87-161; Addendum at 8-12). On June 26, 2003, the district court issued an Order denying petitioners' Second Bail Petition. (D.E. 284, CR 87-161; Pet'rs App. B). Petitioners did not appeal the denial of the Second Bail Petition.

---

[4](...continued)
February 27 motion for lack of jurisdiction (D.E. 28, CV 94-2514). The August 1, 2002, order also directed the clerk to send Maravilla copies of the court's April 18, 2002, order. *Ibid.*

On October 15, 2003, Maravilla and Dominguez submitted a renewed petition for bail (hereinafter "Third Bail Petition"). Again, petitioners claimed actual innocence (D.E. 293, CR 87-161; D.E. 32, CV 94-2514; Pet'rs App. C). In an Endorsed Order, the district court denied petitioners' Third Bail Petition (Pet'rs App. C). On November 3, 2003, Maravilla and Dominguez submitted notices of appeal as to the order denying the Third Bail Petition (D.E. 294, Cr 87-161).

STATEMENT OF THE FACTS

1. *Evidence At Trial*

On the morning of September 10, 1982, Yamil Mitri Lajam (Mitri), a citizen and resident of the Dominican Republic who managed a money exchange house, flew to Puerto Rico carrying a briefcase containing $693,838.43, over $300,000 of which was in cash. Mitri was supposed to go directly to a bank in downtown San Juan and deposit the money. This planned deposit, known only to Mitri and his employer, never occurred.

Upon arriving at the San Juan airport around midday, Mitri proceeded to the United States Customs Office, where Maravilla and Dominguez worked as special agents. He presented customs declarations showing that he was carrying $370,000 in cash and $323,000 in checks. *United States* v. *Maravilla*, 907 F.2d 216, 218 (1st Cir. 1990). An inspector referred Mitri to Dominguez for an interview.

Dominguez searched, interviewed and processed Mitri, and he and Maravilla interviewed Mitri together. *Ibid.*

After the interview, Mitri left the customs office with Dominguez and was never seen alive again. *Ibid.* Dominguez did not return to the customs office for four to five hours after departing with Mitri. Around the same time that Dominguez left with Mitri, Maravilla also left the customs office and was not seen there again for the rest of the day. *Ibid.*

As noted above, Mitri never arrived at the bank in downtown San Juan to deposit the money he was carrying. On September 20, 1982, ten days after his arrival at the San Juan airport, Mitri's partially decomposed body was found in the rain forest at El Yunque National Park, approximately 23 miles from the airport. Dr. Rafael Criado, a forensic pathologist, testified that Mitri was killed by a gunshot wound to the back of the neck that fractured bone and caused trauma to the cervical spinal cord. When the body was found, Mitri's head was severed from his body. Additional medical testimony established that Mitri had been killed on, or close in time to, the date of his disappearance, *i.e.*, September 10, 1982.

On the very day of Mitri's disappearance, Dominguez and Maravilla began to spend and secrete away large sums of money. Dominguez and Maravilla, whose yearly salaries were $37,000 and $34,000 respectively, each had less than

$100.00 in the bank as of September 10, 1992. On the evening of September 10, 1992, however, Dominguez and Maravilla purchased, with cash, first-class plane tickets from Puerto Rico to Miami. They carried a briefcase containing approximately $260,000 in cash. While in Miami, they gave $220,000 to Wayne Sausmer, a friend, who took the money to Panama and deposited it in numbered, unnamed Swiss bank accounts.

During the next few months, Dominguez gave $7,000 in cash to his girlfriend; bought postal money orders totaling $3,500; gave his uncle $15,000 to buy a car for Dominguez; deposited, through a friend, $5,000 in a Miami bank account; and contracted to buy a house costing $82,000, agreeing to make a cash down payment of $30,000. Similarly, during that time frame Maravilla made deposits totaling $18,300 in cash in his bank account in San Juan, and, through a friend, deposited $2,000 in a Miami bank account. 907 F.2d at 218-219. In February 1983, Maravilla flew to Colombia with $53,700 in cash. *Ibid.* He was detained at the airport in Barranquilla, Colombia, for failing to declare the cash he was carrying.

Maravilla and Dominguez provided several false stories to customs agents, the DEA, the FBI, and/or the grand jury regarding the source of this money. When Maravilla was stopped at the Barranquilla airport, he told a DEA agent that the

money was his wife's inheritance. At trial, Wayne Sausmer testified about several stories that he and Maravilla concocted concerning the source of the money. 907 F.2d at 219.

Approximately one week after Mitri's disappearance, and before his body was discovered, Dominguez asked his girlfriend, Debra Placey, to take Dominguez's .357 pistol to Miami to have its barrel replaced. Dominguez asked Placey to return the old barrel to him along with the retooled pistol. The gunshop owner noticed marks on the barrel consistent with efforts to remove it with improper tools. He restored, rather than replaced, the barrel and returned the pistol to Placey. 907 F.2d at 221.

The government argued to the jury that Dominguez sought to have the barrel of the gun replaced before Mitri's body was discovered because Dominguez feared that a firearms expert could trace the bullet that killed Mitri to the barrel of his pistol. This evidence was offered to show Dominguez's consciousness of guilt. On direct appeal, this Court rejected the defendants' argument that introduction of the gun evidence was irrelevant. 907 F.2d at 221-222. The Court found that Dominguez's effort to replace the barrel of the gun tended to make his guilt more probable than not, and thus was relevant under Federal Rule of Evidence 401. *Id*. at 222.

2. *Maravilla's First Freedom Of Information Act Request*

On April 1, 1994, Maravilla received a number of documents from the Federal Bureau of Investigation, pursuant to a request under the Freedom of Information Act, 5 U.S.C. 552 (FOIA). Those items included a single paragraph FBI Form 302 dated July 11, 1985. That report, which contains the results of a search of the crime scene conducted nearly three years after Mitri's disappearance, states that "[a]pproximately 25 feet east of where the cadaver head would have been located, a bullet of approximately .22 caliber was discovered."

FBI agents conducted two searches of the area where Mitri's body was found, in May 1985 and again in July 1985. FBI Special Agent Frank DeRonja, a metallurgist, swept the crime scene with a metal detector. In May, he discovered, approximately five feet from the location where Mitri's body had been found, "an aluminum metal fragment which appeared to have been struck by a high speed projectile." (Pet'rs App.: Ex. 9 at 1). During the July 11, 1985, search, almost three years after Mitri was murdered, DeRonja discovered a .22 caliber bullet, which he described as a "metal object that appeared to be a small caliber bullet," *id*. at 2, about "50 to 100 feet from the body location." *Ibid*. Approximately five feet from the bullet, DeRonja found a "rusted metal can with a bullet hole through it" that "appeared to be a .22 caliber bullet hole and was consistent in every

respect with the size of the metal object." *Ibid.* This juxtaposition led DeRonja to conclude that the bullet and the metal can had been used by someone for target practice. *Ibid.*

DeRonja brought all of the recovered evidence, including the bullet, to the FBI laboratory in Washington, D.C., for analysis. Since he did not consider the bullet to be directly related to the case, he did not assign it a "Q" number, and he described it on the FBI laboratory report -- released to the defense in discovery -- as "an additionally submitted metal object," rather than as a bullet (*Id.* at 2, ¶ 7).[5] He requested that the bullet and the aluminum metal fragment discovered in May be examined by a serologist to determine whether either had passed through a human body. *Id.* at 3,¶ 8. After the serologist found human protein on the aluminum metal fragment but determined that the presence of human protein was not indicated on the bullet, DeRonja did not submit the bullet for any further analysis. *Id.* at 3.

Another of the items released to Maravilla in 1994 pursuant to his first FOIA request was an FBI report of a witness interview conducted on April 30, 1984, more than a year-and-a-half after the crime. Pet'rs App.: Ex. 4. The

---

[5] Accordingly, it would not have been apparent from the report that a bullet had been discovered. However, neither Maravilla nor Dominguez made any follow-up requests about the metal object referred to in the report.

witness, a gas station attendant, stated that approximately two years earlier, *i.e.*, April 1982, around 4:30 or 5:00 p.m. he had seen a man who resembled the money courier whose death he had read about in the newspaper. According to the witness, this man was riding in a white van with three other men. Ex. 4 at 1. The report states that the witness was shown photographs of Mitri, Maravilla, and Dominguez, but he could not be certain that he had ever seen them. *Id.* at 2.

3. *The 1994 Section 2255 Petition*

On November 1, 1994, Maravilla and Dominguez petitioned the district court, pursuant to 28 U.S.C. 2255, for reversal of their convictions based upon the information received from the FBI in response to Maravilla's FOIA request. The Section 2255 petition alleged, *inter alia*, that the government's failure to disclose that information constituted a violation of their rights to a fair trial under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

On October 18, 1995, the district court denied the 2255 petition. *Maravilla* v. *United States*, 901 F. Supp. 62 (D.P.R. 1995). The district court, applying the standard in *Kyles* v. *Whitley*, 514 U.S. 419 (1995), found that the evidence that the government failed to disclose "had little materiality and thus little exculpatory value." 901 F. Supp. at 65. Concerning the failure to disclose the discovery of the .22 caliber bullet, the court found that ballistics evidence was but a minor aspect

of the government's case. 901 F. Supp. at 65-66. Rather, as this Court recognized on direct appeal (907 F.2d at 218-219), the government's main evidence involved the defendants' opportunity to commit the crime and the large amount of money they obtained at the time of Mitri's death. In addition, the district court found that (1) the bullet was found more than two and a half years after the victim was murdered, (2) a serologist's test of the bullet had determined that it contained no human protein, and (3) a rusted metal can that had a bullet hole of the size of a .22 caliber bullet was found near the bullet, thus suggesting that it had been used for target practice. 901 F. Supp. at 65. As to the interview of the gas station attendant, the court noted that "[b]ecause of the attendant's wavering and uncertain memory" concerning the date when he thought he saw the victim, and his inability to identify a photograph of Mitri, there was "little exculpatory value in his story." *Id.* at 66.

The court considered the cumulative effect of the undisclosed evidence and concluded that there was no reasonable probability that, had the evidence been disclosed at trial, the result of the trial would have been different, and thus its exclusion did not undermine confidence in the outcome of Maravilla's trial. *Ibid.*, citing *Kyles*, 514 U.S. at 434. Only Maravilla appealed the district court's denial of the Section 2255 motion.

This Court affirmed the district court's judgment "essentially for the reasons stated in the district court's opinion." *Maravilla* v. *United States*, No. 96-1237, 1996 WL 496318, at **1 (1st Cir. 1996), cert. denied, 520 U.S. 1202 (1997). This Court also stated that the district court had neither applied the wrong legal standard nor abused its discretion, and refused Maravilla's request that the district judge be recused. *Ibid.*

This Court subsequently denied two applications Maravilla filed in 1998 (Nos. 98-8014 & 98-8021) seeking leave to file a second or successive Section 2255 motion in the district court. See *United States* v. *Maravilla*, 6 Fed. Appx. 32, 34 (1st Cir.) (ruling on motion to correct sentence), cert. denied, 534 U.S. 968 (2001). As to Dominguez, the district court dismissed a Section 2255 motion filed on December 22, 1999, on the grounds that Dominguez had failed to seek approval from this Court to file a second or successive Section 2255 motion. The district court also dismissed, on the same grounds, a subsequent Section 2255 motion that Dominguez filed in the Eastern District of North Carolina where he is incarcerated that was transferred by that court to the District of Puerto Rico. Dominguez appealed this second dismissal, but was unsuccessful in obtaining a certificate of appealability from either the district court or this Court. See discussion *supra*, p. 6.

Despite this Court's having found in its 1996 per curiam opinion that the district court had neither applied the wrong legal standard nor abused its discretion in denying petitioners' First Section 2255 Motion, petitioners have now filed in the district court a series of attacks on the district court's 1995 judgment. Those attacks include a purported petition of actual innocence filed by Maravilla's wife, Silvia Maravilla, on behalf of petitioners, claiming abuses of discretion and material errors of law in the 1995 denial of habeas corpus. They also filed three petitions for bail, all of which the district court denied. In denying the First Motion for Bail, the district court said,

> Defendants are not entitled to bail as their convictions have been repeatedly upheld and they are not entitled to successive § 2255 petitions. *Maravilla* v. *United States*, 95 F.3d 1146 (1st Cir. 1996) (per curiam) (Table), *cert. denied*, 520 U.S. 1202 (1997); *Maravilla* v. *United States*, No. 98-8014 (1st Cir. June 19, 1998); *Maravilla* v. *United States*, No. 98-8021 (1st Cir. Sept. 8, 1998).

(D.E. 270, CR 87-161; Addendum at 7). While petitioners did not appeal the denial of either of the first two petitions for bail, they did appeal the October 17, 2003, Order denying the Third Bail Petition.

SUMMARY OF ARGUMENT

Petitioners sought release on bail from the district court pending the court's decision on a successive Section 2255 motion to vacate their convictions.

However, under the Antiterrorism and Effective Death Penalty Act (AEDPA), a prisoner cannot file a successive Section 2255 motion unless a court of appeals authorizes its filing. Petitioners failed to move in this Court for an order authorizing the district court to consider their successive Section 2255 motion. 28 U.S.C. 2255; 28 U.S.C. 2244(b)(3)(A). As a result, the district court has no jurisdiction to decide petitioners' Section 2255 motion. Since a court may consider a request for bail only when it accompanies a motion that might result in a defendant's freedom, the district court also lacked jurisdiction to entertain petitioners' motion for bail.

Even if this Court has jurisdiction, the district court's order should be affirmed because denial of the renewed motion for bail clearly was not a gross abuse of the district court's discretion. *Woodcock* v. *Donnelly*, 470 F.2d 93 (1st Cir. 1972). Here, nearly all of the arguments made in petitioners' latest Section 2255 motion involve not newly discovered evidence, but rather evidence that has already been presented to the district court and this Court in connection with prior post-conviction motions or evidence that was available at the time of trial. Issues that have been considered and rejected in a prior appeal will not be reviewed again in a Section 2255 motion. See *Dirring* v. *United States*, 370 F.2d 862, 864 (1st Cir. 1967). Therefore, the district court did not grossly abuse its discretion in

denying petitioners' motions for release on bail.

Moreover, the decisions of the district court and this Court in prior post-conviction litigation demonstrate that even the one category of evidence that would qualify as newly-discovered would not, "if proven and viewed in light of the evidence as a whole," be sufficient to "establish by clear and convincing evidence that no reasonable factfinder would have found [petitioners] guilty of the offense[s]" for which they are imprisoned. 28 U.S.C. 2255. This is the standard petitioners need to meet in order to obtain authorization from this Court to file their successive Section 2255 motion in the district court. None of the evidence, old or new, provides any basis for calling into question the reasonableness of the jury's verdict with respect to petitioners' convictions for robbery, receiving and transporting stolen money, perjury and obstruction of justice. Their only actual "new" evidence relates solely to what the district court has previously found was not the major thrust of the government's case - - evidence concerning Dominguez's gun. 901 F. Supp. at 65-66.

STANDARD OF REVIEW

This Court treats an appeal from a motion for denial of bail pending decision on a Section 2255 motion as a petition for a writ of mandamus. *United States* v. *DiRusso*, 548 F.2d 372 (1st Cir. 1976); *Woodcock v Donnelly*, 470 F.2d

93, 94 (1st Cir. 1972). The Court reviews a district court's denial of bail pending a Section 2255 motion only to determine whether the district court acted without jurisdiction or grossly abused its discretion. *Woodcock*, 470 F.2d at 94.

ARGUMENT

I

THIS COURT LACKS JURISDICTION OVER THESE APPEALS FROM THE DISTRICT COURT'S ORDER DENYING PETITIONERS' RENEWED MOTION FOR BAIL

This Court should dismiss petitioners' appeal as it lacks jurisdiction to hear the case. Petitioners filed their first Section 2255 motion in 1994. This motion was denied by the district court in 1995 (*Maravilla* v. *United States*, 901 F. Supp. 62 (D.P.R. 1995)), and this Court affirmed that denial in 1996. *Maravilla* v. *United States*, No. 96-1237, 1996 WL 496318 (1st Cir. 1996), cert. denied, 520 U.S. 1202 (1997). As detailed *supra*, since that time, each of the petitioners has filed numerous successive Section 2255 motions regarding his conviction. Each of the petitioners has also filed numerous successive motions for bail. All of these motions have either been denied or dismissed. See, *e.g.*, *Maravilla* v. *United States*, No. 98-8014 (1st Cir. June 19, 1998); *Maravilla* v. *United States*, No. 98-8021 (1st Cir. Sept. 8, 1998); *United States* v. *Maravilla*, 6 Fed. Appx. at 33 (1st Cir.), cert. denied, 534 U.S. 968 (2001), citing *Maravilla* v. *Parks*, No. 99-CV-231

(M.D.Fla., Aug. 20,1999); *Maravilla* v. *Parks*, 220 F.3d 592 (11th Cir. 2000) (TABLE).

It was precisely this pattern of behavior that led Congress in 1996 to amend Section 2255. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), this Court must authorize the filing of a successive 2255 motion in district court. 28 U.S.C. 2255; 28 U.S.C. 2244(b)(3)(A). This "gatekeeping provision" of the AEDPA strips "the district court of jurisdiction over a second or successive habeas petition unless and until the court of appeals has decreed that it may go forward." *Pratt* v. *United States*, 129 F.3d 54, 57 (1st Cir. 1997), cert. denied, 523 U.S. 1123 (1998),

This Court has not "decreed" that petitioners' successive 2255 motion "go forward;" indeed, petitioners have not even sought this Court's permission to file the successive motion. As a result, the district court lacks jurisdiction over petitioners' successive Section 2255 motion. If the district court lacks jurisdiction over petitioners' successive Section 2255 motions, it likewise lacks jurisdiction over their motions for bail. See *Shackleford* v. *United States*, 383 F.2d 212 (D.C. Cir. 1967) (appeal from denial of bail dismissed for lack of jurisdiction where defendant failed to comply with jurisdictional prerequisite of Bail Reform Act that he first seek relief from magistrate that set conditions for pretrial release).

Therefore, this Court should dismiss petitioners' appeal for lack of jurisdiction.

II

ASSUMING *ARGUENDO* THAT THIS COURT HAS JURISDICTION, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONERS' THIRD BAIL PETITION

A. Bail Pending Determination On The Merits Of A Section 2255 Motion Is An Extraordinary Remedy

1. Petitioners Must Meet The Rigorous Standard For A Grant Of Mandamus

The denial of a motion for bail pending determination of the merits of a Section 2255 motion is not a final order that is appealable pursuant to 28 U.S.C. 1291. Other courts of appeals have granted appellate review by viewing the denial of bail as appealable under the collateral order doctrine. See*, e.g.*, *United States* v. *Smith*, 835 F.2d 1048, 1049-50 (3rd Cir. 1987); *Cherek* v. *United States*, 767 F.2d 335, 337 (7th Cir. 1985). This Court, however, treats an appeal from a motion for bail pending a Section 2255 motion as a petition for writ for mandamus. *United States* v. *DiRusso*, 548 F.2d 372 (1st Cir. 1976); *Woodcock* v. *Donnelly*, 470 F.2d 93, 94 (1st. Cir. 1972). A writ of mandamus is a drastic remedy to be used only in extraordinary circumstances where the petitioner can show a clear and

indisputable right to the relief sought. *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 662 (1978). See *Kerr* v. *United States District Court,* 426 U.S. 394, 402 (1976); *In re: Beard*, 811 F.2d 818, 827 (4th Cir. 1987) ("Courts are extremely reluctant to grant a writ of mandamus.")

A person seeking to be released on bail during pursuit of Section 2255 relief faces a formidable barrier created by the fact of conviction and the government's interest in executing its judgment. In *Cherek*, 767 F.2d at 337, the Seventh Circuit (Posner, J.) stated:

> A defendant whose conviction has been affirmed on appeal * * * is unlikely to have been convicted unjustly; hence the case for bail pending resolution of his postconviction proceeding is even weaker than the case for bail pending appeal. And the interest in the finality of criminal proceedings is poorly served by deferring execution of sentence till long after the defendant has been convicted.

Therefore, "in the absence of exceptional circumstances * * * the court will not grant bail prior to the ultimate final decision unless [the applicant] presents not merely a clear case on the law, * * * but a clear, and readily evident, case on the facts." *Glynn* v. *Donnelly*, 470 F.2d 95, 98 (1st Cir. 1972) (citations omitted). This Court reviews such a denial of bail only to determine whether the district court "acted without jurisdiction or grossly abused its discretion." *Woodcock*, 470 F.2d at 94.

2. Petitioners' Allegations Do Not Meet The Standard For Mandamus

Maravilla's and Dominguez's allegations clearly do not present the type of "exceptional" or "extraordinary" circumstances that would justify a grant of bail pending determination on the merits of their Section 2255 petition.[6] Accordingly, the district court did not "grossly abuse its discretion" in denying their motions for bail.

In support of their claim of actual innocence, Maravilla and Dominguez offer a number of categories of alleged newly discovered evidence.[7] Most of that

---

[6] Petitioners argue (Br. 4-5, 35-36) that the district court erred in failing to state reasons for the denial of their renewed bail motion, and request remand for specific findings of fact. Citing to the orders denying their Second and Third Bail Petitions, petitioners claim that "[t]his Court is ill-equipped to render a determination without a reasoned statement from the District Court for its decision to deny bail." Contrary to petitioners' claim (Br. 35-36), the district court was not required to make the specific findings enumerated in 18 U.S.C. 3143(b) because the Bail Reform Act of 1984 does not apply to federal prisoners seeking post-conviction relief. Moreover, since the district court correctly found that petitioners' claims have already been addressed and rejected in prior district court and appellate decisions, more detailed findings are unnecessary.

[7] As summarized by petitioners (Br. 6-7), those categories are: 1) the prosecution suppressed evidence of the possible murder bullet; 2) the prosecutor suppressed evidence of an eyewitness that had observed the victim and could have identify the actual robbers; 3) the United States suppressed impeachment evidence related to two government witnesses, Jose Gonzalez and Dr. Rafael Criado; 4) a sworn alibi statement of Ernest Urritia has been filed showing petitioners could not have done the crime; 5) the prosecutor suppressed FBI firearm expert reports and photographs that showed that there were no marks on the alleged murder weapon

(continued...)

evidence, however, is not newly discovered. Some of that evidence was known to petitioners at the time of trial, and some is evidence the district court considered either in its March 3, 1993, order denying petitioners' motion for a new trial or in its October 18, 1995, decision denying petitioners' initial Section 2255 motion, both of which were affirmed by this Court. As to the evidence released by the FBI in 2001 in response to Maravilla's second FOIA request, petitioners's arguments do not meet the standard this Court set forth in *Glynn*, 470 F.2d at 98.

B. The District Court And This Court Have Considered Most Of The Evidence That Petitioners Now Claim Is Newly Discovered

1. Evidence Considered And Rejected In Connection With Petitioners' 1993 New Trial Motion

a. Impeachment Evidence Regarding Witness Jose Gonzalez

Petitioners reassert evidence of government witness Jose Gonzalez's

---

[7](...continued)
which countered a government witness's testimony; 6) the prosecutor suppressed a potential defense witness whose testimony would have showed the victim intended to stay the night; 7) the prosecution's expert pathologist, Dr. Joseph Davis, now states that he would have changed his opinion testimony had he known of the metal fragment/bullet; 8) a former FBI expert, Dr. Frederic Whitehurst, would now testify that the FBI did not follow FBI standards in reviewing the metal fragment/bullet and ring found two years after the crime; and 9) there is evidence that the petitioners could not have taken the victim through a side door exit because they did not have a key to unlock the door; and 10) the United States suppressed reliable exculpatory FBI scientific evidence, a serology test report, documenting a bullet that could have been the murder bullet but the FBI failed to do some tests.

criminal activities dating back to 1982, including his 1985 conviction of perjury in New Jersey (Br. 23). Gonzalez ran a gunshop in Miami and testified that Dominguez's girlfriend asked him to replace the barrel on Dominguez's gun. The district court disposed of this claim in denying petitioners' 1993 motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure (Pet'rs App.: Ex. 12 at 3-9). This Court affirmed. *United States* v. *Maravilla*, No. 93-1315, 1993 WL 378660 (1st Cir. 1993), cert. denied, 512 U.S. 1219 (1994). As this claim was previously adjudicated, it was clearly not a basis for bail. See *Dirring* v. *United States*, 370 F.2d 862, 864 (1st Cir.1967) ("[i]ssues disposed of on a prior appeal will not be reviewed again by way of [a 28 U.S.C. 2255] motion").

This case is distinguishable from *Ouimette* v. *Moran*, 942 F.2d 1 (1st Cir. 1991), on which petitioners relied below. In *Ouimette*, this Court held that the defendant's due process rights were violated by a state prosecutor's failure at trial to disclose the extensive criminal record of the state's chief witness, as well as the existence and nature of the witness's deals with the State in return for his inculpatory testimony where the evidence against Ouimette was almost entirely generated by that witness. Here, in contrast, the district court in its 1993 decision stated that Gonzalez's testimony was "corroborated by other evidence," *i.e.*, testimony of Dominguez's girlfriend Debra Placey that Dominguez asked her to

take the .357 to Gonzalez's gun shop in Miami to have the barrel replaced and by gun shop records independently documenting that transaction (Pet'rs App.: Ex. 12 at 7-8).[8]

Petitioners now claim that the falsity of Gonzalez's testimony is shown by documents released in 2001, that show that the FBI reported that there were no marks on the barrel of Dominguez's .357 weapon. But Maravilla made this same argument in his 1996 appeal to this Court (Br. of Pet'r in No. 96-1237, p. 16).[9] Further, the FBI examined the gun *after* it was repaired by Gonzalez's gun shop, and the FBI report states that the pistol had an "abraded metal surface finish" and had been "refinished" and "'reblued' subsequent to manufacture" (Pet'rs App.: Exhibit 10 - page 2 of January 3, 1986, FBI laboratory report & pp. 4-5 of pictures). This does not demonstrate that Gonzalez testified falsely when he stated

---

[8] The district court also found, contrary to petitioners' allegation (Br. 23-28), that there was no evidence that the prosecutors in this case were aware of any allegations of Gonzalez's illegal activities prior to trial (Ex. 12 at 4-6); that Gonzalez's perjury conviction, that related to an attempt to cover up his own criminal activity, did not prove that Gonzalez testified falsely concerning the repair of Dominguez's gun (*id.* at 7); and that it was not reasonable to believe that Gonzalez testified falsely in this case in order to curry favor with the government (*id.* at 7-8).

[9] The exhibit cited in Maravilla's 1996 brief as Exhibit I -page 2 is the January 3, 1986 FBI report that appears in Petitioners' Appendix to its brief in these appeals as Exhibit 8.

at trial that he observed marks indicating an inept attempt to remove the barrel at the time the gun was delivered to him for repair.

b. Impeachment Evidence Regarding Dr. Rafael Criado

Petitioners also allege (Br. 28-29) that the prosecution did not reveal to the defense that pathologist Dr. Rafael Criado participated in the cover-up of a murder committed by the Puerto Rico Police. Although they offer this impeachment material as newly-discovered, that evidence - - the decision of this Court in *United States* v. *Torres-Lopez*, 851 F.2d 520, 528 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989) - - was available to petitioners at the time they filed their 1993 motion for a new trial and their First Section 2255 Motion in 1995. They have not shown why they were unable to raise that claim in either of their prior motions.

The district court in 1993 *did* consider petitioners' claim that Dr. Criado "conspired to fix autopsy reports to conform to the official police versions of the causes of death which occurred at Cerro Maravilla," and found that there was "no showing that presentation of this evidence would probably produce an acquittal" (Pet'rs App.: Ex. 12 at 9). These additional allegations against Dr. Criado, offered belatedly in petitioners' latest successive Section 2255 motion, have never

even been proven.[10]

c. "Alibi" Evidence From Ernst Urrutia

Petitioners are also trying to revive alibi evidence claim by submitting a new statement from Ernst Urrutia (Br. 33; Pet'rs App.: Ex. 20). Urrutia's "alibi" evidence was considered by the district court in its 1993 decision denying petitioners' motion for a new trial. In that decision, the court stated that the gist of Urrutia's claim was available to the defense before trial, but Urrutia was not called as a defense witness because he could not testify under oath that the date of his lunch with petitioners was September 10, 1982 (*United States* v. *Maravilla*, Cr. Nos. 87-161, 87-162, D.P.R., March 5, 1993, slip op. at 15-16), aff'd, No. 93-1315, 1993 WL 378660 (1st Cir. 1993). In 1993, Urrutia stated that he remembered that the lunch occurred on a Friday in September. In the January 30, 2002, statement attached to petitioners' currently pending Section 2255 motion, Urrutia now claims that his lunch date with petitioners occurred on September 10, 1982. Like the belated recollection offered to the district court in petitioners' 1993 new trial motion, Urrutia's 2002 statement contains no "records or receipts

---

[10] Petitioners allege here that Dr. Criado helped cover-up a homicide. This Court's decision reveals, however, that this was solely an allegation by one of the defendants, and that the court affirmed the denial of subpoenas for Criado and six other potential witnesses. 851 F.2d at 527.

which document [petitioners'] claim that the Friday in question was the date of [Mitri's] disappearance." (Pet'rs App.: Ex. 12 at 15-16). Without such independent evidence, Urrutia's bare, belated recollection would do nothing to demonstrate petitioners' actual innocence.

2. Evidence Considered And Rejected In Connection With Petitioners' First Section 2255 Motion

Petitioners are also reasserting claims that were addressed and rejected by both the district court and this Court in connection with petitioners' First Section 2255 Motion. *Maravilla* v. *United States*, 901 F. Supp. 62 (D.P.R. 1995), aff'd, No. 96-1237, 1996 WL 496318 (1st Cir 1996), cert. denied, 520 U.S. 1202 (1997). In the First Section 2255 Motion, petitioners raised a number of alleged violations of *Brady* v. *Maryland*, 373 U.S. 83 (1963), including an allegation that the government failed to produce evidence concerning a possible murder bullet and evidence of an eyewitness who had allegedly observed the victim and could have identified the actual robbers.

a. Claims Related To Evidence Of Possible Murder Bullet

In connection with petitioners' First Section 2255 Motion, the district court considered the argument (Br. 15-16) that defense counsel was unaware that FBI Special Agent Alan Sterneckert participated in two crime scene searches in 1985

and recovered "evidence," including a .22 caliber bullet. Indeed, the affidavit of defense attorney Robert G. Amsel declaring that he would have made use of the .22 caliber bullet in petitioners' defense (Pet'rs App.: Ex. 21), was attached to the First Section 2255 Motion.

The district court found in 1995 that "the excluded evidence had little materiality and thus little exculpatory value." 901 F. Supp. at 65. The court found that "the evidence of the .22 caliber bullet does not pertain to the main thrust of the Government's case against Maravilla" which was evidence of Maravilla and Dominguez's opportunity to commit the crime and evidence of the large amounts of money that petitioners spent and deposited immediately following Mitri's disappearance. *Id.* at 65-66. As the district court noted, this Court ruled on direct appeal that this evidence was sufficient for conviction. *Id.* at 66, citing 907 F.2d at 218-219. Thus, petitioners' current arguments (Br. 20-21) about the .22 caliber bullet do not demonstrate petitioners' actual innocence.

Petitioners claim (Br. 7) that because of the existence of the .22 bullet, Dr. Davis, who testified about the decomposition of Mitri's body, "has now altered his trial testimony time frame of the murder [in a way] that would now exonerate petitioners," and is now "of the opinion that the crime scene bullet could be the murder bullet." That assertion greatly exaggerates Dr. Davis's letters to

petitioners (Pet'rs App.: Exs. 16 & 17). Dr. Davis prefaced his June 29, 2000, letter (Ex. 16) with a statement that "[c]ollection and interpretation of evidence and how it was handled is well outside of [his] limited involvement" in the case, that concerned only expert opinion on "the decomposition patterns of dead bodies." Ex. 16 at 1. Dr. Davis's statement that the conditions in the rain forest, where the .22 caliber bullet lay for two and a half years before being discovered, "are not conducive to the preservation of proteins" on a metal object is a far cry from stating that the .22 caliber bullet could be the murder bullet. Ex. 16 at 2. It does not, therefore, provide evidence of actual innocence.

Likewise, Dr. Davis's January 11, 2001, letter (Ex. 17) states that he recalls that the decomposition of Mitri's body was consistent with a time of death on September 10, 1982, when Mitri was last seen alive, but he cannot state "whether [death] occurred earlier or later that day." In fact, Dr. Davis admitted on cross-examination at trial that he could not tell the jury for sure on what day Mitri died (September 14, 1987, Trial Tr. at 47), and that the autopsy photographs were consistent with a date of death after September 10 or 11 (*id.* at 48).

b. Claims Related To The Statement Of The Gas Station Attendant

The district court also determined in 1995 that evidence regarding the gas station attendant who (1) was interviewed more than a year and a half after the

crime, (2) could not be sure of the exact date when he has saw someone resembling the money courier whose picture he had seen in the newspaper, and (3) could not identify a photograph of Mitri, "is similarly lacking in materiality and exculpatory value." 901 F. Supp. at 66. This Court affirmed that judgment. No. 96-1237, 1996 WL 496318 (1996). Petitioners' arguments (Br. 13-15) that the district court erred in 1995 in evaluating the gas station attendant's credibility should have been raised on appeal from the district court's 1995 decision.

c. Evidence That Mitri Intended To Stay Overnight In Puerto Rico

Petitioners allege that the prosecutor suppressed evidence of a potential eyewitness whose testimony would have shown that the victim intended to stay the night in Puerto Rico and not to return to the Dominican Republic on September 10, 1982. (Pet'rs App.: Ex. 3). Maravilla relied on this same witness statement in his May 1998 motion for leave to file a second or successive Section 2255. It is not newly-discovered evidence. Moreover, even if petitioners could prove that Mitri planned to stay overnight, that would not alter the fact that he disappeared before reaching the bank on September 10 to deposit the money he was carrying, that petitioners started spending large sums of money later that very day, and that they lied to the grand jury about the source of the money.

d. Whether Either Petitioner Had A Key To The Side Door Exit

Maravilla and Dominguez allege that there is evidence that they could not have taken the victim through a side door exit because they did not have a key to unlock the door. Other than a drawing and their claims, petitioners have not provided evidence to prove this point. Nor do they explain why they could not have obtained this information at the time of trial. If it is true that they didn't have a key, they would have known that fact in 1985 and could have produced testimony from Customs officials to that effect at trial. Indeed, Supervisory Customs Inspector Hector Benitez Rivera testified at trial that agents had keys to all the exit doors at the Customs enclosure, and defense counsel did not challenge that testimony on cross-examination. September 9, 1987 Trial Tr. at 85-91.

Further, although Maravilla sought to gather evidence from Customs that *he* did not receive a side door exit key until after Mitri's disappearance (Pet'rs App.: Ex. 19 at5), the record reflects that *Dominguez, not Maravilla,* was last seen with the victim. See *Maravilla*, 907 F.2d at 218.

B. Neither Do The Claims Based Upon Evidence Obtained In 2001 Provide A Basis For Relief

Petitioners' remaining claims of innocence are based upon the 39 pages of documents the FBI released in 2001 in response to Maravilla's second FOIA request (Pet'rs App.: Ex. 10). None of that newly-released evidence constitutes

material evidence of actual innocence.

Petitioners argue that the FBI lab documents demonstrate that serology test results on the .22 caliber bullet found near the crime scene undercut the declaration of FBI Special Agent Frank S. DeRonja, submitted by the United States in 1995 in opposition to petitioners' First Section 2255 Motion (Pet'rs App.: Ex. 9). Petitioners allege (Br. 32) that they have contacted an expert forensic consultant, Dr. Frederick Whitehurst, who would testify that there were "numerous lab discrepancies and procedural lapses" in regard to the serology tests performed on the .22 bullet. They do not, however, provide any documentation or evidence from Dr. Whitehurst. Although the serologist's conclusion that the .22 caliber bullet contained no human protein was a factor that contributed to the district court's conclusion in its 1995 decision that evidence concerning the .22 caliber bullet "had little materiality and thus little exculpatory value," it was not the only factor the court considered. The determinative factor was that evidence concerning this bullet did nothing to undercut the "main thrust of the Government's case." 901 F. Supp. at 66. Moreover, Dr. Davis's June 29, 2000, letter (Ex. 16) states that a negative serology test would not be at all unusual in a situation where the bullet was found on the jungle floor two-and-a-half years after the murder. Any possible testimony from Dr. Whitehurst concerning alleged

irregularities by the FBI laboratory in performing the serology tests in 1985 would provide scant support for petitioners' claims of actual innocence.

Petitioners also rely on the FBI lab reports to assert that, contrary to the prosecutor's statement that there were "no ballistics" (Pet'rs App.: Ex. 11), the FBI performed numerous ballistics tests on Dominguez's .357 revolver and his .38 caliber Colt revolver in an effort to link either of those weapons to the metal fragment found at the crime scene and labeled "Q-1."[11] Contrary to petitioners' contention (Br. 21), evidence regarding the ballistics tests on Dominguez's guns (Ex. 10 at 13-26) would not have ruled out his .357 revolver as the murder weapon. These newly-released ballistics tests provide the background data supporting the FBI's statement (that was released to petitioners in 1994) that "no conclusion could be reached as to whether Q1 was struck by a bullet fired from"

---

[11] Exhibit 11 reflects that the prosecutor's statement that "there are no balistics [sic]" was made during a side bar outside the jury's presence. The prosecutor's statement was in response to defense counsel's argument that Gonzalez's testimony should be excluded because the government "can in no way connect [the .357 revolver] to the crime in this case. There are no balistics [sic]. There is nothing." Ex. 11, lines 1-3. Thus, the government was arguing that despite the lack of ballistics evidence to connect Dominguez's gun to the murder, Gonzalez's testimony was relevant to show evidence of Dominguez's effort to alter the possible murder weapon. *Id.* at lines 10-12.

either of Dominguez's weapons (Ex. 8 at 2).[12] The district court, whose decision this Court affirmed, has already found that evidence concerning the discovery of the .22 caliber bullet "had little materiality and thus little exculpatory value." 901 F. Supp. at 65. The ballistics tests add nothing that calls into question the correctness of those prior decisions.

Based on the foregoing, petitioners have not met their "exceptional burden," *Glynn* v. *Donnelly*, 470 F.2d 95, 97 (1st Cir. 1972), of showing that the district court grossly abused its discretion in denying their requests for release on bail. Since they have not demonstrated that they are entitled to a writ of mandamus, this Court should deny the writ.[13]

---

[12] Exhibits 8 and 9 describe "Q-1" as an aluminum metal fragment, found by DeRonja at the crime scene (two and a half years after Mitri's death), that appeared to have been struck by a high speed projectile.

[13] This Court has sometimes followed a "pragmatic approach" in dealing with procedural missteps of *pro se* petitioners. In *Pratt* v. *United States*, 129 F.3d 54, 58 (1st Cir. 1997), cert. denied, 523 U.S. 1123 (1998), for example, the Court treated a notice of appeal from the dismissal of a successive Section 2255 motion as a request for authorization to file a successive motion.

If the Court decides to follow a similar course here, it could treat petitioners' appeal from the denial of their bail motions as a request for authorization to file their successive Section 2255 motion and to apply for bail pending the district court's decision on that motion. In that case, the successive Section 2255 motion must be certified by this Court as containing "newly discovered evidence that, if proven and viewed in light of the evidence as a whole,

(continued...)

CONCLUSION

The appeals should be dismissed for lack of jurisdiction. Alternatively, the district court's judgment should be affirmed because the district court did not grossly abuse its discretion in denying bail. Accordingly, if this Court exercises jurisdiction over these appeals, it should deny the writ of mandamus.

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General

MARK L. GROSS
MARIE K. McELDERRY
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - PHB 5024
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

---

[13](...continued)
would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense * * *." *Id.* at 57.

As the United States has argued in this Brief (pp. 26-38, *supra*), petitioners have demonstrated absolutely nothing that would entitle them to file a successive 2255 motion. There is nothing asserted that could legitimately call into question the legitimacy or accuracy of defendants' convictions. Accordingly, if this Court considers this appeal as a request for authorization to file a successive Section 2255, it should deny certification.

United States Court of Appeals

FOR THE FIRST CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS

Appeal Nos. 03-2656, 03-2665 UNITED STATES OF AMERICA,
PLAINTIFF -RESPONDENT,
v.
DANIEL J. MARAVILLA & RAFAEL J. DOMINGUEZ,
DEFENDANTS- PETITIONERS

1. This brief has been prepared using (SELECT AND COMPLETE ONLY ONE):

| X | 14 point, proportionally spaced, serif typeface (such as CG Times or Times New Roman). Specify software name and version, typeface name, and point size below (for example, WordPerfect 8, CG Times, 14 point):

WordPerfect 9, Times New Roman, 14 point

| | 12 point, monospaced typeface (such as Courier or Courier New). Specify software name and version, typeface name, and characters per inch below (for example, WordPerfect 8, Courier, 12 point):

_____

2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of citations; addendum; and the certificate of service, the brief contains (SELECT AND COMPLETE ONLY ONE):

| | _____ Pages (give specific number of pages; may not exceed **30** pages for opening or answering brief or **15** pages for reply brief); ***OR***

| X | **9077** Words (give specific number of words; may not exceed **14,000** words for opening or answering brief or **7,000** for reply brief); ***OR***

_____ Lines of Monospaced Type (give specific number of lines; may not exceed **1,300** lines for opening or answering brief or **650** for reply brief; may be used ONLY for briefs prepared in monospaced type such as Courier or Courier New).

I understand that a material misrepresentation can result in the Court striking the brief or imposing sanctions. If the Court so directs, I will provide a copy of the word or line print-out.

Date: May 20, 2004

_____
Signature of Filing Party

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2004, two copies of the BRIEF FOR THE UNITED STATES AS RESPONDENT were served by first class mail, postage prepaid, on the petitioners:

Daniel J. Maravilla, Pro Se
#02165-069, Medium Security C-1
F.C.C. Coleman
P. O. Box 1032
Coleman, FL 33521-1032

Rafael J. Dominguez, Pro Se
#32274-004
Low Security Institution
P.O. Box 999, Unit Vance-A
Butner, NC 27509-0999

MARIE K. McELDERRY
Attorney

Addendum