No. 19-

IN THE

Supreme Court of the United States

HAFIZ MUHAMMED SHER ALI KHAN
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This Petition prays that the Court addresses a once novel issue which is quickly becoming more prevalent nationwide. Many cases now rely on witnesses located outside of the country, who may not be able to be extradited or produced for testimony by traditional means. The procedure for producing and preserving the testimony of these witnesses must be clear, uniform and authoritative, and in line with the guaranteed rights of petitioners as set forth in the Constitution, as well as with the precedent of this Court's prior holdings.

This Petition presents the following questions:

1. Does the failure of defense trial counsel to follow specific orders from the District Court, as to how to preserve testimony of material witnesses located outside the country, constitute ineffective assistance of counsel?
2. Does Petitioner bear the burden under *Strickland v. Washington*[1] of demonstrating that material witnesses definitively would have been both available and able to testify, had defense trial counsel followed the orders of the District Court, in order to establish prejudice?

[1] 466 U.S. 668,104 S. Ct. 2052 (1984).

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Hafiz Muhammad Sher Ali Khan, was the defendant in the District Court for the Southern District of Florida and the Appellant at the Eleventh Circuit Court of Appeals. Respondent, the United States of America, was the prosecution in the District Court and the Appellee at the Eleventh Circuit Court of Appeals. There are no other parties in this matter.

RELATED CASES

There are no related cases, other than the opinions below identified in this matter.

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IN THE

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PETITION FOR WRIT OF CERTIORARI

Petitioner Hafiz Muhammad Sher Ali Khan respectfully prays that a writ of certiorari issues to review the judgment below.

OPINIONS BELOW

The decision of the Eleventh Circuit immediately below is located at *Khan v. United States*, No. 18-12629, __ F.3d ___ (11th Cir. July 3, 2019) (hereafter referenced as "Appellate Decision");

The decision of the District Court on the habeas petition is *Khan v. United States*, No. 16-24483, 2018 U.S. Dist. LEXIS 100149 (S.D.N.Y. June 23, 2018); and

The decision of the Eleventh Circuit on direct appeal is located at *Khan v. United States*, 794 F.3d 1288 (11th Cir. 2015).

STATEMENT OF JURISDICTION

Petitioner initiated this action pursuant to 28 U.S.C. § 2255 to present evidence of ineffective assistance of counsel. On June 13, 2018, the District Court granted Petitioner a Certificate of Appealability, and he timely appealed to the Eleventh Circuit Court of Appeals. The Appellate Court ruled against him on July 3, 2019. Petitioner timely files this Petition within 90 days of that Judgment.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- The Sixth Amendment to the Constitution provides:

  In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

- 28 U.S.C. § 2255 provides:

  (a)
  A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
  (b)
  Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

The Eleventh Circuit Court of Appeals affirmed the District Court's denial of Petitioner's habeas corpus petition under 28 U.S.C. § 2255 based on ineffective assistance of counsel, despite the undisputed fact that defense counsel at trial failed to follow explicit orders of the District Court on how to preserve and present the testimony of four material witnesses located in Pakistan, which ultimately resulted in the loss of their testimony. On appeal, the Eleventh Circuit ruled that (1) failure to follow the specific orders of the District Court was strategic, not deficient; and (2) Petitioner did not demonstrate prejudice under *Strickland v. Washington.* because he did not show that the Pakistani government definitively would have permitted this testimony if trial counsel had followed the orders of the District Court. This Petition follows.

I. Khan's Criminal Case, No. 1:11-CR-20331-RNS-1

In March 2013, Petitioner was convicted on the four following counts under 18 U.S.C. § 2339(A): conspiracy to provide material support to terrorists (Count 1), conspiracy to provide material support to a designated foreign terrorist organization under 18 U.S.C. § 2339(B) (Count 2), material support to terrorists under 18 U.S.C. § 2339(A) (Count 3), and material support to a designated foreign terrorist organization under 18 U.S.C. § 2339(B) (Count 4). Despite his plea of not guilty, the jury found him guilty on all four counts; he received consecutive sentences of 15 and 10 years, which he is currently serving.

The charges against Appellant stem from money transfers to his family in Pakistan, whom the government alleged supported the Pakistani Taliban. The government identified Ali Rehman, Amina Khan and Alam Zeb as conduits for the alleged support, and argued

that they gave money to the Taliban on Petitioner's behalf.

The Prosecution advised Petitioner's counsel early on that "if the defense envisions any [depositions] in a place like Pakistan -- that will take months in order to arrange logistics, security issues, even assuming that they are feasible."[2] On the last day to do so, defense trial counsel filed a Rule 15 motion seeking video depositions of material exculpatory witnesses Noor Mohammad, Ali Rehman, Amina Khan, and Alam Zeb.[3] He later made a request as to Abdul Qayyum as well.[4] In its Order granting the motion, the District Court required proof that "the Pakistan government explicitly (a) permits these depositions to be held or (b) acknowledges that it is aware of these depositions and that no official permission is needed for them to occur."[5] The District Court noted that while proof is not required by law, the District Court "does not want all the preparations for the depositions to be laid ... only to have the depositions fall through at the last minute because the Pakistani government will not allow them to occur."[6] The District Court clarified "[t]ime is of essence in carrying out these depositions. The court has made reasonable accommodations to allow these depositions to occur. There will be no more accommodations."[7]

Instead of abiding by the District Court's Order, or getting letters rogatory, defense trial counsel submitted a Pakistani lawyer's affidavit claiming that permission and letters rogatory were not needed. In response, the District Court accurately foresaw the present

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[2] DE. 825 at 14. For clarity, all docket entries from the habeas action in the District Court are referenced as "DE." and all docket entries from the original criminal trial are referenced as "Doc."
[3] DE. 364.
[4] DE. 366.
[5] DE. 562.
[6] *Id.*
[7] *Id.* at 10.

issues, cautioning defense counsel:

> I'd rather hear this now than two years from now on a 2255. I mean, it's going to be resolved someday whether this should have happened or shouldn't have happened, what you could've done and couldn't've done, and I'd rather do everything now, do everything we can to try and make it happen, so we know for sure, not speculating two years from now trying to figure out what could've been done.[8]

The prosecution was equally leery, asserting it had told defense trial counsel "months ago, 'Here's how you do it. You do letters rogatory. You go to the State Department website.' There is a mechanism that you get the approval for the process. That was clear. You can find it in our pleadings."[9] Defense trial counsel made several promises to the jury in his opening statement that he did not ultimately keep, including that defense trial counsel would present witnesses from Pakistan whose testimony would clear Petitioner:

> You are going to hear that all of these financial transactions, we are going to be able to show you what they went to. We are going to bring you someone who is going to tell you, based on listening to the phone calls and based on the financial paperwork, essentially what was the intention of that money that was sent. And then we are going to show you from the folks in Pakistan how they used the money. Through those calls they say, yes, we used the money as you asked us to use it ... And you are also going to hear that the money that was sent, this approximately $50,000 the Government is claiming, that not one penny went to buy any guns, any bullets. The money goes, you are going to hear, to pay teachers, to try to buy some cement for the roof to fix that roof, to pay off the other staff that needs to be paid, to help his children who are asking for money...[10]

After the prosecution rested, co-defendant Ali Rehman testified via live video feed from Pakistan.[11] The jury saw Mr. Mohammad, Mr. Zeb, Mr. Qayyum and Ms. Khan sworn

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[8] DE. 620 at 96.
[9] *Id.* at 99.
[10] DE. 833 at 61-62. Counsel also referred to anticipated rebuttal testimony while cross-examining witnesses, such as Mr. Muhammad not having a bullet wound as alleged. DE. 836 at 154. This rebuttal testimony was never presented, because of the dropped video feed.
[11] DE. 847.

in to testify.[12] However, the video feed was disrupted and not regained.[13] This resulted in Mr. Mohammad's testimony, which had just begun, being struck, and the remaining material witnesses' testimony being unavailable.[14] Prosecutors had referred to Mr. Mohammad as an "injured Taliban member."[15] His alleged injury was a bullet wound to his back.[16] As supported by his later Declaration, he would have testified he never joined, supported or fought for the Taliban, or was injured.[17] Amina Khan and Alam Zeb were

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[12] DE. 847 at 10; DE. 848 at 6-7.

[13] DE. 848 at 45, 50-1. "Defense counsel, speaking on a cell phone from Pakistan, reported that Pakistani government officials "suddenly" appeared ... where the depositions were taking place, and ... informed him the [feed] for live video teleconferencing had been blacklisted by the [Pakistani government]." *Khan v. United States*, 794 F.3d 1288, 1309 (11th Cir. 2015).

[14] There was much discussion by trial defense counsel outside the of causing Pakistani authorities to shut down the feed, which was never proven and the District Court did not entertain: "Okay. Wait. That suggests to me that we're trying to do this in a way keeping it secret from the Pakistani government and my order originally specifically said not only do they have to know about it, but we want something back them from affirmatively saying that they either agree with it or they acknowledge that it can happen and they don't care. So the fact that they found out yesterday seems to me -- I gave you the benefit of the doubt by relying on your lawyer instead of -- my order said I want something from the Pakistani government so we don't waste our time and go through this exercise and have something like this happen. You told me you couldn't get something from the government, so I again bent over backwards to help you out and I accepted the affidavit your lawyer and said, okay, we'll let it go forward because he spoke to somebody in the government. So it's totally contrary to the purpose of what we're trying to do here, to say this thing was thwarted because the Pakistani government found out the location. It's supposed to be open and notorious to them." DE. 848 at 52; *see also id.* at 58-60. The District Court permitted defense trial counsel to attempt to obtain visas for the witnesses, and the District Court even sent an email to expedite the process. DE. 849 at 28-29. The District Court also permitted defense counsel to present the witnesses from the United Arab Emirates, but defense trial counsel's efforts at this failed as well. *Id.* at 29-31. As the district court noted, this issue was of defense trial counsel's own making: "So you made a tactical decision, okay, let's go to Pakistan. Let's not get the official approval of the Government, even though Judge Scola ordered that, okay, and let's take a shot at it, okay, instead of saying, okay, let's figure it out." *Id.* at 8-9.

[15] DE. 833 at 31; DE. 834 at 122, 127, 131, 143-144, 150; DE. 835 at 40, 70; DE. 854 at 59.

[16] DE. 836 at 148-9, 154-5.

[17] Doc. 18 at 20-22.

described as "devoted Taliban supporters."[18] The prosecution alleged Petitioner sent money to Ms. Khan for Taliban fighters.[19] As shown by her later affidavit, Ms. Khan would have testified that she never supported the Taliban or gave money to fighters.[20] As shown by Mr. Zeb's later affidavit, his testimony would have rebutted allegations that he was a Taliban member.[21] Finally, as shown by Mr. Qayyum's later affidavit, his testimony would have provided record keeping on where Appellant's money actually went.[22]

Unable to re-establish the live video feed at trial and actually present this exculpatory testimony to the jury as promised, trial counsel had Petitioner testify without any advance warning or preparation. Although trial counsel had not intended to have Petitioner testify, he had no other alternatives after his failure to produce the promised testimony. This occurred despite pre-trial motions filed by defense counsel stating that Appellant was incompetent due to dementia. The testimony shows the confusion expected of a dementia patient in his eighties, and trial counsel conceded the following on direct appeal:

> With no other way of presenting his defense, Mr. Khan, who had been evaluated for competency and suffered from dementia, had no alternative but to testify at the trial. Given that witnesses who would have supported his defense did not testify, the jury understandably disbelieved Mr. Khan's testimony, which probably at times sounded like the rambling, confusing, and often-times incoherent narrative of an octogenarian.[23]

II. The 28 U.S.C. § 2255 Proceedings

In February 2017, Petitioner filed an amended motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, asserting that his trial counsel's failure to comply

[18] DE. 833 at 37, 41; DE. 835 at 52; DE. 837 at 94.
[19] DE. 854 at 193-5.
[20] Doc. 18 at 3-4.
[21] Doc. 18 at 11-12.
[22] DE. 364, 366.
[23] Doc. 20-1 at 14, citing Appellate Reply Brief of Petitioner-Appellant, at 14-15.

with the District Court's Order rendered that assistance constitutionally ineffective. In his supporting Memorandum, Petitioner attached declarations of Mr. Mohammad, Mr. Zeb, Mr. Qayyum and Ms. Khan. On April 23, 2018, Magistrate Judge White issued a report recommending that Petitioner's motion to vacate be denied.[24] The District Court affirmed and adopted Magistrate Judge White's report and recommendation. The District Court, however, also granted a Certificate of Appealability to Petitioner on his claim of ineffective assistance of counsel, as to trial counsel's failure to preserve and present the material testimony of the above-referenced witnesses located in Pakistan in the manner the District Court ordered.

Petitioner appealed to the Eleventh Circuit Court of Appeals. Ruling against Petitioner, the Eleventh Circuit found that (1) the failure of Petitioner's trial counsel to follow the orders of the District Court constituted a strategic decision, and not ineffective assistance of counsel; and (2) even if trial counsel's representation had been ineffective, Petitioner did not suffer prejudice because he had not established that the witnesses in Pakistan would definitely have been allowed by the Pakistani government to testify, if trial counsel had abided by the orders of the District Court. Appellate Decision at 33-36. Petitioner hereby requests that this Court issue writ of certiorari to the Eleventh Circuit Court of Appeals.

[24] Doc. 28.

REASONS FOR GRANTING THE PETITION

I. Treating an Attorney's Failure to Follow Orders of a Court as "Strategic" Harms the Judicial System as a Whole, and Undermines the Ability of District Court Judges to Properly Preside Over Trial Court Proceedings.

A. Deficient Performance under the First Prong of *Strickland* v. *Washington* Includes Failure to Present Exculpatory Evidence.

In analyzing claims based on ineffective assistance of counsel, courts must answer two questions: (a) whether defense counsel failed to provide "reasonably effective assistance" in the underlying criminal proceeding, and (b) whether that failure prejudiced the client. *Strickland,* 466 U.S. at 687. Performance is deficient when attorneys behave in a manner "which is objectively unreasonable under prevailing professional norms." *Id.* at 688.

An attorney's failure to present available exculpatory evidence constitutes deficient performance, "unless some cogent tactical or other consideration justified it." *Washington v. Murray*, 952 F.2d 1472, 1476 (4th Cir. 1991). This Court requires looking beyond labels like strategy or tactic, and asking whether counsel had a reasonable basis for the decision made. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003); *see also Cave v. Singletary*, 971 F.2d 1513, 1518 (11th Cir. 1992) ("[T]he mere incantation of the word 'strategy' does not insulate attorney behavior from review. The attorney's choice of tactic must be reasonable under the circumstances"). Key to any counsel's "strategy" is making every effort for the introduction of material, exculpatory evidence. *See, e.g., Eldridge v. Atkins*, 665 F.2d 228, 235 (8th Cir. 1981) ("A competent lawyer's duty is to utilize every voluntary effort to persuade a witness who possesses material facts and knowledge of an event to testify and then, if unsuccessful, to subpoena him to court in order to allow the judge to use his power to

persuade the witness to present material evidence. . . . Counsel need not attain perfection, but he must exercise reasonable diligence to produce exculpatory evidence").

B. Trial Counsel's Failure to Follow the District Court's Order Cannot Be Appropriately Considered Strategic.

The Appellate Court held that the facts of this case do not demonstrate ineffective assistance of counsel, because Petitioner's trial counsel acted within the bounds of acceptable professional conduct. The Appellate Court found specifically that under the objective standard of reasonableness established in *Strickland*, trial counsel's intentional disregard of the District Court's Order to obtain formal approval constituted a "choice dictated by reasonable trial strategy." Appellate Decision at 17, citing *Michael v. Crosby*, 430 F.3d 1310, 1320 (11th Cir. 2005). The Appellate Court correctly noted that trial counsel was in unchartered territory as "a deposition in an American criminal case had never been taken in Pakistan, nor had any formal request to conduct such a deposition ever been made to the Pakistani government. And there was no meaningful alternative to conducting the depositions in Pakistan." Appellate Decision at 22. The Appellate Court also noted the potential difficulties of securing the depositions from Pakistan and the fact that the United States had never been granted direct access to a Pakistani national who is under indictment or wanted by the United States, to conduct a deposition on Pakistani soil. Appellate Decision at 23. The District Court and the Government shared these concerns before and at trial, and

those concerns led to the District Court's clear instructions on how to secure and produce those witnesses:[25]

The Appellate Court stated that trial defense counsel was not ineffective, because he took various alternative steps to attempt to secure foreign depositions of the testimony at issue, though it recognized these steps were not in accordance with the Order of the District Court. Appellate Decision at 27.

In this case, Petitioner's trial counsel failed to preserve and present indisputably material testimony[26] at trial because he failed to comply with the District Court's Order, despite already having made the determination that presenting these witnesses was crucial to the defense's case. Directly disregarding a court order on how to preserve the testimony of exculpatory witnesses is not a trial strategy, and counsel risk consequences to their client's cases when they choose to ignore court orders. *Batson v. Neal Spelce Associates, Inc.*, 765 F.2d 511, 515 (5th Cir. 1985) ("it is

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[25] Trial counsel argued that he could not have known that Pakistani authorities would find out about and shut down the video feed, which led to this response from the District Court: "Okay. Wait. That suggests to me that we're trying to do this in a way keeping it secret from the Pakistani government and my order originally specifically said not only do they have to know about it, but we want something back them from affirmatively saying that they either agree with it or they acknowledge that it can happen and they don't care. So the fact that they found out yesterday seems to me -- I gave you the benefit of the doubt by relying on your lawyer instead of -- my order said I want something from the Pakistani government so we don't waste our time and go through this exercise and have something like this happen. You told me you couldn't get something from the government, so I again bent over backwards to help you out and I accepted the affidavit your lawyer and said, okay, we'll let it go forward because he spoke to somebody in the government. So it's totally contrary to the purpose of what we're trying to do here, to say this thing was thwarted because the Pakistani government found out the location. It's supposed to be open and notorious to them." DE. 848 at 52; *see also id.* at 58-60.

[26] Based on their declarations, all agreed these were material witnesses for this purpose. DE. 847 at 10; DE. 848 at 6-7; DE. 848 at 45, 50-1; *Khan* 794 F.3d at 1309.

universally understood that a court's orders are not to be willfully ignored, and certainly, attorneys are presumed to know that refusal to comply will subject them and their clients to sanctions)." If the holding of the Eleventh Circuit stands, this holding sets bad precedent in permitting attorneys to disregard court orders whenever they please, shielded by the umbrella of trial strategy and thereby rendering their decisions immune from review.

Petitioner's trial counsel did not make a tactical decision to not to call these Pakistani witnesses for the defense. He made the strategic choice specifically to have these witnesses testify, because he deemed their testimony central to the defense. The distinction that this was not a question of whether to call witnesses, which is a strategic choice, but a failure to utilize the proper procedure by which to call witnesses already deemed material, makes a key difference here which the Eleventh Circuit overlooked.

The situation presented in this case resembles one where trial counsel may decide that instead of using the subpoena power of a court, counsel will just invite witnesses to testify, because that approach is much friendlier and less costly than issuing formal subpoenas. Yet courts provide constitutional safeguards that, when properly used, protect the right to exculpatory testimony. Therefore, failure to subpoena witnesses simply to save money or because it's nicer constitutes deficient performance. *See Washington v. Smith*, 219 F.3d 620, 630 (7th Cir. 2000) (finding that counsel's failure to produce material witness due to failure to subpoena and minimal attempts to contact the witness did not fall within the range of competent assistance under *Strickland*); *see also Atkins*, 665 F.2d at 236. The situation here is not about

a strategic choice, but blatant disregard of a court order. Petitioner's trial attorney should have complied with the orders of the District Court; had he done so, the testimony could have been preserved and available to be presented to the jury. Trial counsel improperly refused to follow the orders of the District Court which specified the procedure he was to use, and there is no sufficient justification for this failure. The defense's case heavily relied on the testimony which was expected to come from, and could have come from, these Pakistani witnesses. Trial counsel promised the jury in his opening statement that it would hear from these witnesses, who could explain the use of the funds sent to Pakistan. He could not deliver on that promise, due to his own insufficient actions and his disregard of the specific court Order, and Petitioner suffered for it. *See Chilcutt v. United States*, 4 F.3d 1313, 1324 (5th Cir. 1993) ("this court has often emphasized that an innocent party should not be severely penalized for the misconduct of its counsel") (quoting *Batson*, 765 F.2d at 515).

C. The Consequences of Permitting Trial Counsel to Fail to Follow Court Orders by Classifying the Decision as Strategic Weaken the Justice System

The Sixth Amendment right to effective assistance of counsel effectuates the due process right to a fair trial. This Court has intentionally left the particular standards for effective assistance broad to account for the wide variety of issues which may arise in legal cases. But even this broad standard must have limits, to ensure real and meaningful exercise of the right to effective assistance of counsel. The "objective standard of reasonableness" articulated in *Strickland* requires that trial counsel make all reasonable efforts to present testimony of material witnesses. There cannot be a fair trial where the defendant is suddenly and unexpectedly deprived of his most material witnesses, then as a result forced to testify, unprepared, after his

own counsel earlier sought to have him declared incompetent due to dementia. The right to present witnesses is crucial for a fair trial, and it is a right which can only be exercised through counsel—no petitioner has this right exclusive of his counsel. Here, trial counsel failed to ensure this right of Petitioner's, despite having been drawn a roadmap by the District Court on how to do so. This Court has the ability to ensure that the right of a defendant to present witnesses and thus ensure a fair trial is not so easily dismissed as it was here. "[T]his Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland*, 466 U.S. at 684.

Classifying a failure to follow orders of a court as strategic risks severe negative future implications for criminal defendants. If all errors may be sanctioned as strategic shifts, the safeguards to defendants' Sixth Amendment rights to effective assistance of counsel begin to fade.

II. Imposing a Higher Burden on Petitioners to Demonstrate Prejudice than the Burden Articulated under *Strickland* Contradicts the Standard Articulated by this Court and Impairs the Ability of Courts Nationwide to Remedy Situations with Ineffective Assistance of Counsel.

A. Demonstrating Prejudice to Meet the Second Prong of *Strickland* Requires a Showing that the Outcome Could Have Been Different, Not That It Definitely Would Have Been Different.

To demonstrate prejudice, a petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693.

A counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

The second prong of *Strickland* requires showing a probability that, but for the deficient performance of counsel, the outcome could have been different. In this case, the testimony of the witnesses from Pakistan would explain the monetary transactions at issue. Only one of those witnesses testified before the video link dropped. If trial counsel had gone through the proper channels, as he was repeatedly ordered by the District Court to do, the testimony of all those witnesses could have likely been preserved and able to be presented to the jury. Trial counsel's failure was not just in not getting the witnesses to the stand; it was his failure to even attempt to do so in the manner clearly set forth in the District Court's orders. When attorneys ignore the rules of procedure or the rules of evidence in other matters, they risk losing the opportunity to present important and advantageous witness testimony and evidence. *See* Fed. R. Civ. P. 37(b)(2)(A)(i)-(vii), 11(c); S.D. Fla. Local Rules 16.1(1), 16.1(b)(6); *see also Link v. Wabash R. Co.*, 370 U.S. 626, 82 S. Ct. 1386 (1962) (finding that the trial court's order dismissing petitioner's action due to the failure of his counsel to appear at a pretrial conference was permissible); *see also Clark v. Keen*, 346 Fed. Appx. 441, 442-43 (11th Cir. 2009) (finding that the district court did not abuse its discretion in dismissing plaintiff's action with prejudice where counsel failed to comply with court orders regarding discovery).

To meet his burden to show prejudice, Petitioner need only evince a "probability sufficient to undermine confidence in the [underlying proceeding's] outcome[,]" and not that the deficient conduct "more likely than not altered the outcome of the case."

Strickland, 466 U.S. at 694-95. This test does not require Petitioner to show the trial's outcome necessarily would have been different, only that it could have been different. *Code v. Montgomery,* 799 F.2d 1481, 1484 (11th Cir. 1986) (citing *Strickland* in support of the proposition that "[w]e do not determine whether, despite the eyewitness testimony, alibi testimony would have resulted in [the petitioner's] acquittal").

B. Trial Counsel's Failure Resulted in the Loss of Key Testimony and Loss of Petitioner's Credibility

By ignoring the District Court's Order and the warnings of numerous Government attorneys more familiar with the process for securing foreign testimony, trial counsel lost the opportunity to present indisputably material, exculpatory testimony. The District Court's Order explicitly gave trial counsel two options: either (a) go through the recognized channels to compel the witnesses to appear at a certain place at a certain time, or (b) confirm that the Pakistani Government would not interfere with the testimony. *Khan,* 794 at 1308. Trial counsel opted against both, despite the District Court's unambiguous warning that there would be "no more accommodations" provided.[27] However, the Appellate Court ruled that "Khan's failure to prove a causal connection between [trial counsel]'s decision to disregard the district court's discussion and the failure of the deposition witnesses to testify is fatal to his claim." Appellate Decision at 34. Counsel should have complied with the procedure clearly outlined by the District Court and the government for producing these.

As a result of the loss of key witnesses, defense counsel saw no remaining alternative but to put Petitioner on the stand without any prior warning or

[27] DE. 562 at 10.

preparation. Prior to trial, counsel had filed motions stating that Petitioner was incompetent due to dementia; the unprepared testimony in the trial showed a level of confusion and incoherence consistent with a dementia patient in his eighties. Petitioner's unprepared and incoherent testimony destroyed his credibility, and the prosecution seized on this opportunity when it told the jury "[t]here were a lot of variations within his own testimony and that is because the Defendant was lying to you ... Witness credibility, ladies and gentlemen, the Defendant has none."[28] The trial court enhanced Petitioner's sentence, specifically identifying one of its reasons for doing so as the fact that Petitioner's testimony "makes no sense".[29] This loss of credibility, combined with the subsequent statements made by the prosecution, undoubtedly impacted the jury's opinion of Petitioner's guilt, resulting in avoidable prejudice to his case.

C. Speculation as to Whether All Would Have Gone Well is Inappropriate and Imposes a Burden Far Beyond That Articulated in *Strickland.*

The standard for a court reviewing a counsel's failure to subpoena a critical witness, under the *Strickland* test, is not to speculate whether the witness would have complied or testified, or even whether the subpoena would have been issued at all. Instead, where defense counsel "knew of the witnesses and considered their testimony 'very vital to the defense [,]'" courts consistently find that trial counsel's failure to subpoena these witnesses at all constitutes deficient performance. *Garton v. Swenson*, 417 F. Supp. 697, 700-01 (W.D. Mo. 1976); *see, e.g., Goodman v. Bertrand*, 467 F.3d

[28] DE. 854 at 173; *see also* DE. 854 at 144, 162, 164-5, 169, 172-3, 183-4, 205-6, 210-1; DE. 855 at 82-3, 89-91, 93, 98.
[29] DE. 861 at 9-10, 13-14.

1022 (7th Cir. 2006) (finding counsel's failure to subpoena witness, combined with other failures, resulted in prejudicial error); *Washington,* 219 F.3d at 630 (finding counsel's failure to subpoena witness to be unreasonable and prejudicial); *Miller v. McKinney*, No. 12-CV-3009, 2013 U.S. Dist. LEXIS 173936, at *13-17 (N.D. Iowa Dec. 12, 2013) (finding counsel's failure to call witness, even though the witness may not have appeared, unreasonable and prejudicial); *see also Armstrong v. Kemna*, 534 F.3d 857, 865-66 (8th Cir. 2008) ("Thus, whether or not trial counsel personally believed the subpoenas would be unenforceable . . . , we find it difficult to understand the logic of trial counsel's decision to forego even attempting to subpoena the witnesses[]"). The proper standard, then, is to analyze whether the expected testimony of the four out of country witnesses could have made a difference in the outcome if presented at trial. *See McCauley-Bey v. Delo,* 97 F.3d 1104, 1105-06 (8th Cir. 1996), cert. denied, 520 U.S. 1178, 117 S. Ct. 1453, 137 L. Ed. 2d 558 (1997).

The Eleventh Circuit imposed a far heavier burden on Petitioner. The Appellate Court found that Petitioner failed to prove prejudice because "Khan has made no effort to prove that if [trial counsel] had formally requested approval from the Pakistani government for permission to conduct the depositions, the request would have been granted. Khan did not produce any affidavit from the Pakistani government attesting what procedures should have been used to obtain permission for the depositions, and that if these procedures had been followed, permission would have been granted." Appellate Decision at 33. Proving that material witness testimony would definitively have been available in the past, based on knowledge of what a foreign government's discretionary judgement may been, is an impossible standard

which goes far beyond that articulated by this Court in *Strickland*. The question to consider is not whether the defendant would have been acquitted outright absent counsel's errors, but instead "whether there is a reasonable probability" that "the factfinder would have had a reasonable doubt." *Id.* at 695.

The Appellate Court speculated as to how these witnesses would have testified and the impact of their testimony. Appellate Decision at 36. That is not the appropriate standard; as discussed above, in order to find prejudice, Petitioner need not show that the outcome of the trial necessarily *would* have been different, but simply that it *could* have been different. *See Montgomery*, 799 F.2d at 1484 (citing *Strickland* in support of the proposition that "[w]e do not determine whether, despite the eyewitness testimony, alibi testimony would have resulted in [the petitioner's] acquittal"); *see also Kemna*, 534 F.3d at 865-66 ("Thus, whether or not trial counsel personally believed the subpoenas would be unenforceable ..., we find it difficult to understand the logic of trial counsel's decision to forego even attempting to subpoena the witnesses[] . . .").

To the extent Petitioner does bear the burden of showing the outcome could have been different, he has met his burden. As previously noted when the Eleventh Circuit affirmed Petitioner's conviction on direct appeal, "'the specificity with which the defense was able to describe the witness's expected knowledge or testimony' and 'the degree to which such testimony was expected to be favorable to the accused'—pointed in Khan's favor."[30] And, in a civil case involving one of Petitioner's sons and identified to the District and Appellate Courts in this matter, these same witnesses were able to

[30] *Khan*, 794 F.3d at 1312.

testify from Pakistan through depositions taken in advance of trial.[31] That demonstrated fact sufficiently removes the need for any further speculation, and accordingly addresses any appropriate need to speculate as to the prejudice Petitioner suffered by not having that testimony presented to the jury at his trial.

D. The Eleventh Circuit Essentially Created a New and Impossible Standard for Showing Prejudice Resulting from Deficient Assistance of Counsel Where Out of Country Witnesses Are Involved.

The decision of the Appellate Court creates an outlier in this area of law. Allowing this to stand could impair the ability of courts throughout the country to remedy ineffective assistance of counsel through the habeas process. This matter addresses a once novel issue which is quickly becoming more prevalent nationwide. Many cases now rely on witnesses located outside of the country, who may not be able to be extradited or produced for testimony by traditional means. The procedure for producing and preserving these witnesses must be clear, uniform and authoritative.

By creating a new standard that permits unchecked speculation on what a foreign government may or may not have allowed in the past, instead of relying on what the witness' testimony would be as set forth under the *Strickland* standard, the opinion of the Appellate Court in this matter creates uncertainty, and therefore injustice, for habeas petitioners. "The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States v. Nixon*, 418 U.S. 683, 709 (1974). In the interests of justice, Petitioner

[31] *Ikram Khan v. United States Citizenship and Immigration Services, et. al*, No. 1:15-cv-23406-DPG (currently on appeal to the Eleventh Circuit).

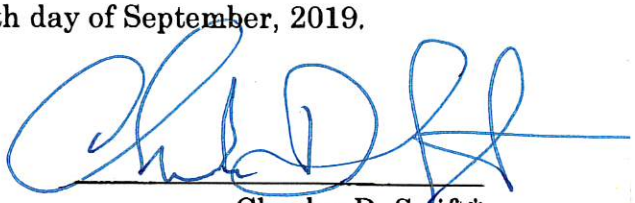
therefore respectfully requests that this Court issue a writ of certiorari to the Eleventh Circuit Court of Appeals.

CONCLUSION

The decision of the Eleventh Circuit as written shields defense counsel from any obligation to pursue overseas witnesses. Doing so impairs the Sixth Amendment rights of Petitioner and those like him "to have compulsory process for obtaining witnesses in his favor," and also chips away at the protective intent of 28 U.S.C. § 2255 to prevent ineffective assistance of counsel for such individuals. Taken further, the logic of the Eleventh Circuit's decision would equally shield the decision of a trial court to disallow foreign depositions because such a decision could never meet the prejudice standard set forth by the Eleventh Circuit's requirement that the defendant prove that the witness would have been available, as opposed to proving that the witness' testimony would have been material. Distinguishing the testimony of foreign witnesses in such a manner is inconsistent with the plain language of federal statutes, the standards articulated by this Court's prior holdings, and the clearly articulated rights enumerated in the Constitution for the production of beneficial witnesses. Accordingly, Petitioner prays that this Court grant his Petition for writ of certiorari and take this matter under consideration.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion to Proceed *In Forma Pauperis* and Petition for Writ of Certiorari have been sent to all counsel of record and the Court in accordance with all applicable rules, on this 27th day of September, 2019.



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