NO. _____

In The Supreme Court of the United States

ROBERT FRANK MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLOMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether certiorari should be granted to clarify that probable cause must be based on actual facts, rather than mere assumptions interposed by the court during its review of those facts, and to clarify the proper appellate standards for "waived" arguments?

II. Whether certiorari should be granted to clarify that when ineffective assistance of counsel causes a party to lose the right to even raise an issue on appeal, that scenario should be treated in the same manner as when an appeal is untimely filed because of ineffective assistance of counsel – i.e., since in both situations no appeal was possible, with prejudice arising from the loss of the right of appeal itself, the party should simply be afforded a new appeal, without the need to prove *before that appeal is even briefed* that he would *also surely win that appeal on the merits*?

STATEMENT OF RELATED CASES

There are no directly related cases other than those before this Court on direct review, emanating in the district court and court of appeals:

- *United States v. Robert Frank Miller*, No. 1:05-cr-00143-1, U.S. District Court for the District of Columbia. Judgment entered December 3, 2018.

- *United States v. Robert Frank Miller*, No. 18-3090, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered (following denial of petition for rehearing en banc) entered February 5, 2021; a writ certiorari is now being sought on this case.

- *United States v. Robert Frank Miller*, No. 20-3079, U.S. Court of Appeals for the District of Columbia Circuit. Separate appeal from the District Court's denial of a motion for compassionate release; appeal is pending.

That district court case is now active again, following the court of appeals' limited remand for a resentencing and the issuance of its mandate in Appeal No. 18-3090. Previously, a judgment of conviction, entered by the same district court on December 23, 2008, had been affirmed by the same court of appeals in Appeal No. 08-3116, *see United States v. Miller*, 799 F.3d 1097 (D.C. Cir. 2015), and this Court denied a writ of certiorari in No. 15-9138.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Robert Frank Miller respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals, issued March 27, 2020, and published at *United States v. Miller*, 953 F.3d 804 (D.C. Cir. 2020), is reproduced in the Appendix to this Petition ("Pet. App.") at 1a. The District Court's Opinion, denying Mr. Miller's claim of ineffective assistance of counsel, is included therein at Pet. App. at 25a.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2020. Pet. App. 1a. A petition for rehearing *en banc* was denied on February 5, 2021. *See United States v. Miller*, 2021 U.S. App. LEXIS 3375 (D.C. Cir. 2021). This Court has jurisdiction over this Petition for a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY OR OTHER PROVISIONS

The Fourth Amendment to the U.S. Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment to the U.S. Constitution provides as follows:

> 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.

Title 18 U.S.C. § 3162(a)(2) provides as follows:

> If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

STATEMENT OF THE CASE

A. Overview of the Proceedings Below

After an appeal to this Court in which Miller challenged his conviction after a jury verdict, and a related 204-month consecutive prison sentence, the court of appeals had remanded this case back to District Judge Richard J. Leon for further proceedings, including factual development of certain issues related to Miller's claims of ineffective assistance of counsel ("IAC"). *See United States v. Miller*, 799 F.3d 1097 (D.C. Cir. 2015).

At the first status hearing following that limited remand, on March 2, 2016, the Government encouraged Miller to raise all of his IAC claims against his trial counsel in this proceeding, rather than splitting IAC claims between this proceeding on remand and a future § 2255 petition. JA:36 ("this is not something we would like to do two times"). All parties then agreed that any claims of IAC in Miller's pre-trial, trial and sentencing proceedings should be raised herein, or else waived. All of Miller's claims of IAC during his original appeal, and his right to raise those claims in a later § 2255 proceeding, were expressly reserved. JA:37.

These non-appellate IAC claims were then specified, JA:49, and Judge Leon held evidentiary hearings on September 12-13, and October 23, 2017. JA:71, 161, 745. The defense called Miller as a witness, and the Government called Jonathan Jeffress ("Jeffress"), who had served as Miller's lead counsel during his pre-trial, trial and sentencing proceedings. Beyond this live testimony, both sides also submitted various exhibits, most of which were accepted into evidence. JA:360-744

At the end of these hearings, each side submitted proposed findings of fact and conclusions of law, JA:772, 824, and Judge Leon heard oral arguments, JA:859, and allowed supplemental briefs. JA:948, 954. Nearly 10 months later, Judge Leon issued an Order and Opinion, docketed December 3, 2018. JA: 970,1003. His 33-page Memorandum Opinion did not adopt either side's proposed findings of fact, but did deny all of Miller's IAC claims. Miller filed a timely Notice of Appeal. JA:1004.

The court of appeals reversed in part, concluding that Miller had established ineffective assistance of counsel at his sentencing, but affirmed in all other respects.

B. Facts Developed on Remand Revealing IAC on Various Issues

The IAC facts developed below included evidence from both sides of the attorney-client relationship: Miller first testified on the IAC issues for himself, and the Government then called CJA-appointed counsel Jeffress as a rebuttal witness.[1]

Although Jeffress is now a well-regarded, seasoned criminal defense lawyer, he acknowledged that Miller's case had been only his third jury trial, and that this case was also the first time he had ever tried to prove standing at a suppression hearing. JA:300. Jeffress' IAC testimony included candid admissions of serious mistakes he made in representing Miller in pretrial proceedings and at sentencing.

1. Facts Demonstrating IAC at Miller's Suppression Hearing

Prior to this trial, Miller's lawyers, including Jeffress, filed a motion to suppress 22 boxes of documents seized by the Secret Service on April 8, 2004,[2] from a Ford Explorer parked in a parking space six floors below his offices in Washington, D.C., on the same day Miller was arrested. JA:257. These boxes were later held by the Secret Service for three weeks before a search warrant was sought. Jeffress said he filed this motion to suppress because he understood the importance of this issue

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[1] Two other lawyers, Jeffrey Fox and Maria Green, had appeared as co-counsel for Miller, but Jeffress made clear their participation was part of an arrangement in which his office would "occasionally partner up with a law firm, where attorneys are seeking to get courtroom experience"; while these co-counsel performed some work on Miller's case, "ultimately, the decisions were mine to make." JA:253.

[2] Federal authorities had also earlier obtained records concerning Miller during a Maryland search in 2002. Miller has testified herein that this earlier search involved an unlawful search of his home, where the woman who gave HUD Agent Lori DiCriscio his records lacked apparent authority to do so; Miller contends that an argument could have been, but was never raised by his defense counsel in this case, that his April 8, 2004 arrest itself was the fruit of an unlawful seizure. JA:120-21. Jeffress admitted he never looked into whether this earlier Maryland search may have been illegal, JA:270, and never made any argument that Miller's April 8, 2004 arrest may have been the fruit of an earlier illegal 2002 search by federal government officials in Maryland. JA:340-41.

to Miller's defense, JA:303; later, after this motion was denied, the Government used these seized records in the trial against Miller. JA:303.[3]

No warrant was obtained prior to this April 8, 2004 seizure of the 22 boxes. JA:97, 258. Miller's counsel, Jeffress, admitted both that the vehicle had been searched and that the boxes had been seized without a warrant, JA:304, and that searches and seizures of private property without a warrant are presumptively unreasonable. JA:304. Jeffress further said he was unaware of any reason why the Secret Service could not have called a magistrate for a search warrant at the time, and he felt they should have done so. JA:305.[4]

With respect to this April 8, 2004 search and seizure, a suppression hearing had been held, but the parties agreed to initially address only the threshold issue of standing – with additional suppression evidence to be presented later, only if standing was found. JA:257-58, 307, 318. Because Judge Leon ultimately ruled against Miller on standing, the motion to suppress was denied without any evidence ever being presented or any decision reached on the merits of the actual suppression issues. JA:387-88 (Miller "has no standing to challenge the seizure").

At the IAC hearing, Jeffress admitted he had not gotten the Government to concede standing JA:308. He believed, however, that Miller "had a strong case on the

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[3] Seized documents used at trial as Government exhibits included, among other things, checks received from investors and contracts signed with alleged victims; these seized records were also the basis for a Government's summary chart which was presented to the jury at trial. JA:123-24.

[4] Jeffress admitted that he did not challenge the unreasonableness of the Government holding these records for three weeks without seeking or obtaining a search warrant, but also claimed that "I don't think we got to that [stage], because we didn't get past standing." JA:339.

standing" issue JA:270, and that his suppression motion was meritorious. JA:277 ("we thought we had a good suppression issue"); JA:339 (Jeffress says he personally believed Miller had standing in the vehicle and boxes).

On this threshold issue of standing, which Jeffress acknowledged the Government had flagged as a "big issue," JA:306-07, Miller's defense counsel basically relied solely on his Stipulation with the Government JA:96, even though additional evidence was available.

The fact that the Stipulation alone would not suffice to establish Miller's standing was known to (and even admitted by) Miller's counsel. JA:308-09. *See also* JA:334-35 (relying on stipulation plus one parking payment of $840 as proof didn't prove standing). Defense counsel even told the Court at the suppression hearing that the parties "unfortunately … were not able to agree" on one fact they said "could be the key to the standing analysis" – a fact (whether the Ford Explorer was parked in a parking space AFIC had paid for) that went beyond the Stipulation – but which defense counsel never established JA:309; indeed, defense counsel never even proved that Miller was the sole owner of AFIC. JA:310-23, 334.

At the IAC hearing, Jeffress admitted he may have played along with the Government too much here – "I think I did." JA:336-37. He claimed he was surprised when the Government "attacked us for not producing enough evidence on the standing issue," and felt "aggrieved" that the Government was arguing the defendant's failure to meet its burden of production on standing was a ground to deny suppression, JA:261-62 – even though he later also conceded that the record itself

showed that AUSA Griffith had warned him several times of plans to make a burden-of-proof argument JA:322. Jeffress said he felt "misled" by the Government; once he finally realized the Government was arguing the defense had failed to meet its standing burden, Jeffress said "we were sort of scrambling." JA:263. Jeffress acknowledged that it's fair to say he would argue and represent things differently today, especially since additional evidence to establish standing was available. JA:335. Jeffress conceded there was no reason he couldn't have presented this other available evidence in a timely manner.

More particularly, AUSA John Griffith "went to the hearing and said, they haven't presented any evidence on whether Smith agreed to let Miller use [the] car, when [Griffith] knew he had a 302 that said this." JA:262. *See also* JA:270 ("having a 302 to the contrary of what he was saying was wrong… we felt sort of betrayed by him"). Nevertheless, Jeffress admitted he failed to offer timely evidence in response, although it was available to him then, and even though this evidence would have shown the 22 boxes were under Miller's control. JA:312.

Not only AUSA Griffith, but also Jeffress was then in possession of a document Jeffress referred to as a "302" (but which Jeffress later acknowledged, JA:326, referred to a HUD Memorandum of Interview of Tonya Smith, JA:465-67) which "supported standing." JA:259-60. This HUD Memorandum verified that "the government's own investigator had written, based on an interview with Ms. Smith, that the car was lent to Miller" on April 8, 2004. JA:259. Smith was "specifically indicating in there that she gave him [Miller] authority to use her vehicle," which

"would have been a way around the Fifth Amendment problem with her testifying" and also was *particularly credible* since she was admitting *some* of the things she had previously said were false, but was *still saying* "I agreed to let Miller use the car." JA:327.

Jeffress had received this HUD Memorandum before the suppression hearing, JA:315, in pretrial discovery. JA:141,296,315-16. But he did not submit it to the Court in a timely manner, either in response to AUSA Griffith's false representation that "there's no evidence to indicate they were in his control while they were in that vehicle" JA:312, or at any time before the suppression evidence closed. Jeffress conceded, "the 302 we should have admitted at the time." JA:315.

Jeffress essentially apologized for not bringing this to the Court's attention in a timely fashion, stating that "I clearly overlooked that we could have moved that 302 in." JA:316. Particularly given that the Government had laid down a marker that, even with the defendant's parking pass evidence, the defense had not met its standing burden, JA:317, Jeffress described his own performance as deficient: "I do think I should have … my most effective move would have been to contradict him on the spot at that hearing with that 302," JA:322, admitting "[we] didn't do our job in showing that he was being deceitful." JA:322.[5] Jeffress stated that "If I could do it again, … I

[5] Jeffress said he was "disappointed" AUSA Griffith "took a position that, without notifying the Court 'hey, we have a 302 where it says right here that Tonya Smith lent the car [to Miller],' he hid the ball," but Jeffress also conceded "we didn't do our job in showing that he was being deceitful." JA:322. Jeffress felt AUSA Griffith had falsely represented to the Court that "[t]here were no records that he [Miller] had been given authority [to use the vehicle], even though he [Griffith] did have records." JA:337.

would have just introduced the 302," but he admitted he had failed to do so until later, "after the fact," and "after the hearing was closed." JA:322.

This HUD Memorandum of Interview was thus never admitted at Miller's suppression hearing, even though it would have shown Miller had a possessory interest and expectation of privacy in the vehicle, JA:103-04,108,142, since it showed Smith gave him permission to use the Ford Explorer. Jeffress conceded this was "available evidence" he could have presented and did not before the record closed, JA:323; nothing had prevented him from introducing it earlier. JA:328. Jeffress agreed this document alone could have established Miller's standing to challenge the Government's search of this vehicle, JA:262, and said, "[Y]ou know, I wish I'd brought it up at the time," because he knew this was an important fact that could have established standing. JA:323.[6]

After failing to timely introduce this evidence before the suppression hearing closed, Jeffress recalled Miller asked him, "hey, why didn't you use this [302]?" and he believed he may have responded to Miller by pledging to "try to make this right." JA:326. Later recalled as a witness, Jeffress clarified this interaction:

> I do remember now we were at the jail, Miller said, hey, there's [a] 302. It says right here that Miss Smith gave me – loaned the vehicle to me – and he highlighted it in pink, which was

[6] The trial court had made it clear at the close of the evidentiary hearing on standing that it was "going to close the record, I'm going to deal with it on the four corners" of the evidence submitted, and while Jeffress did offer at that point to present more evidence, AUSA Griffith objected, and no new evidence was ever allowed, JA:324. *See also* JA:459-60 (The Court: "Mr. Fox got two bites, and that's the bites your side is getting, so don't argue any more on this issue…. I think Mr. Griffith hit the nail on the head when he said the court must decide this issue on the record before it, and the record before it is the record before it…. I'm going to take the four corners of the evidence I have and the documents I have on the issue of standing and make my decision based on that, and then depending upon what that decision is, we either will or we won't have an evidentiary hearing on the issue of suppression.").

> the version that I saw the last time. And I think I did say at that time that we should have submitted this, so we will do so now.

JA:748-49. *See* JA:661 (Jeffress: "while I do not have a specific recollection of saying 'I screwed up,' that seems like something that I would have said in reaction to Miller showing me the 302 and me realizing how valuable that document was given the position the government was taking on the standing issue").

Jeffress rejected any suggestion that his failure to present this document earlier may have somehow been part of a strategic decision; when specifically asked if he had seen "any tactical downsides to using this particular document" on standing, Jeffress responded, "[T]hat was not what my decision was based on, to not file this, or use it … clearly, because when I saw what was written there that Miller showed me, I filed." JA:756. When asked if he saw any downsides to presenting this "document you've been referring to as the 302" as affirmative evidence in support of his motion to suppress, Jeffress confessed, "I can't think of one." JA:754. *See also* JA:760 ("I did eventually submit it to the Court. So clearly, I felt that the benefits outweighed the costs."). *See also* JA:756 ("I had to meet my burden of production on [standing]…. Clearly, I think that her saying to them I loaned him the car would have helped me accomplish that.").

After his post-suppression hearing discussions with Miller in jail, Jeffress then tried to get Judge Leon to accept the HUD Memorandum out-of-time, by submitting a "Notice of Filing" on April 14, 2006, attaching a letter plus this HUD Memorandum of Interview with Tonya Smith as attachments. JA:110,468. AUSA Griffith objected to this filing, however, JA:475, and the HUD Memorandum was never accepted as

evidence on the standing issue. Although Jeffress tried to reopen the record after the hearings ended, in other words, he "couldn't," and this HUD Memorandum was "never before the Court" to be considered as a part of Miller's suppression motion or its standing issue. JA:323. *See* JA:7 (05/08/2006 Minute Order: "It is hereby Ordered that defendant's request to re-open the suppression hearing as stated in [Docket] 22 defendant's letter to the court dated April 14, 2006, is denied."). Because it was not before the Court before the record closed, and the record was never reopened, this evidence was never considered. JA:325. In its final ruling, this Court then made specific negative findings inconsistent with Ms. Smith's statement in this "302," such as that Miller "did not own or possess the car," did "not have permission or authorization to drive the car," "has not demonstrated direct control over the car," and "has not demonstrated control or access to the car." JA:386-87.

In addition, other evidence was also available to Jeffress to establish Miller's standing in this vehicle and its boxes, which Jeffress failed to timely present. For example, Deborah Key, Tonya Smith's mother and the owner of the Ford Explorer, could have provided helpful evidence on Miller's standing, *see* JA:462, but defense counsel never contacted her prior to the suppression hearing. JA:266,335-36. Miller also swore the keys to the Ford Explorer were in his pocket at the time of his arrest. JA:100-01,142. Miller had advised Jeffress that he possessed keys to this vehicle at the time, yet Jeffress never placed that information in the record. JA:111-12,142. Jeffress admitted Miller had informed him that he had possessed the keys to this vehicle at the time of his arrest, JA:263-64,325, and Jeffress agreed "if we could show

where the keys were, that would help prove that we were right about standing." JA:263. On this issue too, however, Jeffress said the first time he had attempted to show that Miller possessed the keys was after the evidentiary record closed. JA:328. He acknowledged Miller's possession of the vehicle keys at the time of his arrest "would have been an important factor" on the issue of standing, and that this issue also "should have been pursued before the record closed." JA:328.

Jeffress further conceded Miller himself could have testified on the issue of standing. JA:331-32. Jeffress felt he "probably" discussed with Miller the possibility of testifying at his suppression hearing, and said he may have told Miller not to do so, though he ultimately could not remember. JA:264. While Jeffress said he would have urged Miller not to testify at his suppression hearing, JA:332, he acknowledged that this decision about whether to testify is personal and belongs to the client alone, not to the lawyer – at least at trial, and "it probably is the same rule" at suppression hearings. JA:332. Miller himself testified, and Jeffress confirmed, that Jeffress never discussed the rule in *Simmons v. United States*, 390 U.S. 377 (1968) or how it could have protected Miller if he had chosen to testify at his suppression hearing, meaning its rule never factored into any decision-making on this issue. JA:115,264-65. Jeffress thus could not say that Miller ever said he did not want to testify at his suppression hearing, or had made an informed decision not to testify on suppression issues. JA:332. If Miller had taken the stand, Jeffress conceded Miller could have testified that he had leased the parking spot, JA:333, that he was the sole owner of AFIC, JA:333, that he owned the boxes and papers, JA:333, and various other things,

including that he had maintained control of the boxes, took them to the vehicle, supervised employees, locked the vehicle, had Tonya Smith's permission to use the vehicle, and held vehicle keys – basically filling in all the alleged standing gaps the Government argued were unproven. JA:333.

Jeffress also failed to raise other independent legal bases for standing. Although defense counsel had argued the Ford Explorer's location in a parking spot paid for by AFIC was probative of standing, JA:266-67, Jeffress admitted he failed to research or argue whether Miller had a leasehold interest in that parking space. JA:338. This parking space was not in an area open to the general public, but instead was in a private valet-supervised area of the parking garage for permit-only vehicles, JA:99, but Jeffress did not prove this fact, JA:337, which would have given Miller a separate leasehold interest in the parking space beyond his rights in the vehicle and boxes. JA:107,117. Jeffress admitted he failed to argue any trespass basis for suppression here, JA:338, and failed to argue Miller had a possessory as well as privacy interest in the boxes seized. JA:338.

Nothing prevented Jeffress from presenting any of these things before this suppression record closed, and he admitted he would argue and present things differently today. JA:335.

While Jeffress said much of Miller's trial involved testimonial evidence, he did not agree that suppression would have had no effect on Miller's trial. JA:750. Instead, he agreed that winning suppression "certainly would have made the government's job

more difficult" and "harder," JA:750, and "at a minimum" would have "made the government's case harder in proving Miller's guilt." JA:751-52.

2. Facts Demonstrating IAC on Speedy Trial Act Violations

The facts are undisputed that a Speedy Trial Act ("STA") violation occurred here; the Government conceded this in Miller's initial appeal. JA:82, JA:375-77.

While Jeffress had affirmatively invoked Miller's right to a speedy trial at the time of the initial arraignment JA:81,300,374, he conceded that he could not recall thereafter ever arguing Miller's speedy trial rights again. JA:300.

Jeffress said this was because Miller was not in a hurry to have a trial. JA:276. But as Jeffress also explained, the principle of speedy trial actually involves "two distinct issues" – one was "did we want a speedy trial," and the other was "should we have moved for dismissal of the case based on a speedy trial violation." JA:271-72. On the latter point, the record below was clear: no STA motion to dismiss was ever filed. JA:271,277,303.

Jeffress admitted that, before trial, he was not even aware that 70 non-excludable days had run or that a STA violation existed. JA:276,301. In this case, as the Government's previous appeal brief conceded, at a minimum "there were 171 non-excludable days," JA:376 – over 2½ times more than the STA allows.

While Jeffress did claim that at some point, it dawned on him that there had "probably" been a STA violation, JA:301, or at least "somewhere in my mind" he thought there "might be one," JA:757, Jeffress admitted he did not recall ever sitting down and counting the excludable days in this case to see if the STA had been

violated. JA:301,757. Whether or not Miller's lawyers ever discussed with him in general terms the STA's 70-day limit, excludable time, or the STA clock – Jeffress said they did, while Miller said that they did not, JA:82 – even Jeffress conceded that he did not recall *ever* discussing with Miller his right to a *dismissal* under the STA. JA:275,301,303, which Miller confirmed. JA:82,84. *See also* JA:82 (Miller says first time he became aware of STA violation was on appeal). Jeffress is aware now that a motion to dismiss under the STA could have been filed, and he also knew (even then) of the general rule that STA dismissals are mandatory if more than 70 non-excludable days pass. JA:302. A vested right to a STA dismissal thus existed before August 1, 2006, JA:376, but Jeffress admitted he was unaware at the time of this STA violation. JA:303. *See* JA:757 ("we missed the issue").

The record in this case also reveals that the Government, unlike the defense, appeared to be well aware of the fact that a STA violation existed – not only later on appeal, but even as this case was ongoing. Rather than acknowledging at that time that a STA problem existed, and dealing with it, Government counsel instead sought to downplay (or even hide) this fact that the STA was already violated, and that a vested right to dismissal existed. At a December 12, 2006 hearing, shortly after Judge Leon's denial of Miller's suppression motion on standing grounds, Government counsel affirmatively raised this STA issue on his own initiative, presenting it to Judge Leon not as a problem (even though a STA violation already existed), but as a mere "housekeeping matter." JA:393. AUSA Griffith then asked Judge Leon to take an action the law does not allow – asking the District Court to declare certain periods

of time to be excludable *retroactively*. JA:393. Judge Leon did not adopt the Government's request only because of his own mistaken belief that the existence of pending motions rendered such a finding unnecessary. JA:394

No STA motion to dismiss was ever filed, because Miller's defense counsel simply "missed" this issue. JA:303. The type of STA dismissal Miller might have obtained never factored into Jeffress' strategic analysis – he wasn't thinking about whether a dismissal might issue with or without prejudice, because he hadn't performed the STA calculations to even know that a dismissal was warranted. JA:760. Jeffress agreed that "I can't think of any other reasons why … not to file" a STA motion to dismiss in this case, other than purely "theoretical" ones. JA:275. And even if a theoretical reason might have existed why Miller could have chosen not to file a STA motion to dismiss, it did not come into play here – since Jeffress lacked any strategy on how to address a STA violation. JA:275 ("I don't recall a specific conversation with Miller about those reasons…. I don't remember discussing dismissal."); JA:757 ("I never dug down to actually doing out all the days and everything and then – and then analyzing, like, what would be the strategic benefit here for filing for a dismissal. We never got that far.").

Miller's IAC counsel also submitted viable arguments why this case should have been dismissed with prejudice; JA:140; JA:849-52. And even if STA dismissal would have been entered only without prejudice, Miller could have benefitted by seeking another suppression hearing in any re-indicted case, at which Jeffress could

have corrected his standing mistakes. Moreover, all STA issues "at least … [would have been] preserved for appellate review," as Jeffress conceded. JA:273.

Jeffress admitted he had not been paying close attention to STA law at the time of this violation. JA:272,757. Jeffress acknowledged that, under the law as he knows it today, his actions during this case were "incorrect," JA:273. Jeffress further agreed here that, if a STA motion to dismiss had been filed by him, this case would have been dismissed. JA:271,302.

3. Facts Demonstrating IAC at Trial

Potential trial witnesses also were never interviewed by Miller's counsel. For example, his appointed counsel never attempted to interview Secret Service Agent Saler. JA:128. Miller also wanted his employees interviewed, but believes they were never interviewed. JA:129-30. Jeffress disagreed with this, stating that in addition to Tonya Smith and Miller, either he or his investigator Nicole Caruso spoke to some other AFIC employees, although he did not recall how many. JA:342-43. No defense witnesses were ever subpoenaed, JA:343, however, and Miller said he was thus forced to seek trial postponements, after noting difficulties in Jeffress' consultations and inadequate trial preparations. JA:83-84,142, JA:532-59.

Miller also requested a real estate expert for trial, as well as an expert in investments and contract law, but none was provided or requested by his counsel. JA:130,142. Jeffress admitted that he never contacted anyone to potentially serve as a real estate expert, nor was any report prepared so that Jeffress could evaluate if such expert testimony would be helpful or harmful. JA:346-47.

Miller also testified that he had wanted to put on a defense case, and that although Jeffress told him there was no need since the Government bore the burden, he had requested that a defense case be presented anyway. JA:130. Miller testified that several investors had been paid back, and he wanted them called as witnesses. At least three – Michael Berger, Donna Harrell and Rodney Harrell – later swore in affidavits accepted at the IAC hearing that they would have testified that they were fully repaid, but that they were never contacted by any defense counsel or investigator. JA:139; JA:529,530,531. Miller also wanted favorable corporate records introduced to show AFIC's Certificates of Good Standing and Authority, which could have proven AFIC had no active criminal or civil issues, and was authorized to operate as a mortgage company. JA:131-34. Jeffress said he did not know which investors had been paid back, or who had been contacted before Miller's trial, JA:343-44, but believed those investors had been paid back too slowly for their testimony to be helpful. He did not dispute that the three witnesses noted above were never contacted. It is undisputed no defense case was presented at trial.

Miller believed his defense had available exculpatory evidence, and that if a defense case had been presented at trial as he requested, it would have caused a jury to have reasonable doubts as to his guilt. JA:140-41. For example, available evidence would have shown that Miller had (1) paid his employee Teresa Tan's legal fees to obtain a green card, and her costs involved in learning how to fill out federal and local tax returns (2) advanced employee Amelia Paviera $2900 for her trip home to the Philippines, and (3) recently hired Sandra Greene, a licensed real estate broker, to

guide AFIC's Real Estate Department, JA:137-38 – rebutting Government claims that Miller cared for nobody but himself and wasn't trying to build a company, and casting reasonable doubt on Government allegations. JA:142. Miller also testified that he had wanted to present public records available on file in the Baltimore City Recorder of Deeds' Office, which would have shown that AFIC had purchased 12 properties in Baltimore, JA:187,191-94; while Jeffress acknowledged that he believed this representation to be true, JA:287, he claimed he had not presented evidence of these other properties because of fears it could open the door to the Baltimore case to which Miller had already pleaded guilty, JA:288 – even though Miller swore those properties had nothing to do with his Baltimore case, as investigation would have revealed. Miller also testified that evidence of his pro bono affordable housing initiative with a Navy War College professor, JA:237, and other exculpatory evidence within the 22 boxes seized, showing legitimate business activities, JA:238, should have been presented.

4. Facts Demonstrating IAC at Sentencing

Miller also presented evidence below of the IAC he had received at his sentencing. Jeffress again acknowledged additional crucial errors he made at that stage. Because the court of appeals later agreed that such IAC existed and ordered a resentencing hearing, those issues need not be addressed by this Court.

C. Judge Leon's IAC Decision

During the proceedings below, Judge Leon surprisingly revealed that he had never, in his many years on the bench, presided over a single IAC hearing. Once that

hearing and briefing concluded, Judge Leon apparently kept his streak of IAC denials intact. On December 3, 2018, he issued an Order and Memorandum Opinion, denying all of Miller's IAC claims. JA:970,1003. Despite Jeffress' many admitted mistakes, Judge Leon largely skipped over them and focused primarily on *Strickland*'s prejudice prong, which he claimed had not been satisfied.

After describing this case's proceedings and the standards for IAC review, Judge Leon's Opinion turned to his Analysis, JA:981, described more fully below.

1. Claims Related to IAC at the Suppression Stage

Judge Leon first dealt with Miller's claims that Jeffress "missed a number of opportunities to present evidence at the suppression stage to establish Miller's Fourth Amendment standing, i.e., his individualized privacy (or possessory) interest." JA:982. At the hearing, Jeffress had admitted many such errors. But Judge Leon nevertheless denied IAC relief, primarily because "even assuming that … counsel's alleged failures amount to constitutional deficiency,"[7] he felt prejudice had not been shown – because he said he would have denied suppression, and because suppression would not have affected the trial result. JA:983.

[7] In a footnote, Judge Leon oddly asserted that the "record strongly supports" that Jeffress' conduct "did not fall outside the range of reasonable professional assistance." JA:982-82 n.2. No explanation was given for this conclusion, however, or how it could be reconciled with Jeffress' own admissions to errors he conceded were material. Nor did Judge Leon cite or adopt any facts. He simply stated that he was "accept[ing] the Government's proposed *conclusions of law* found in Gov't Br. 19-35." *Id.* Yet even that filing recognized that Jeffress had "testified that he 'overlooked' that the defense could have moved the Smith report in as evidence," that "Jeffress testified that it was not a strategic decision not to introduce the report at the suppression hearing," and Jeffress' open confession of error on this point: "I should have submitted this." JA:798. It also wholly ignores Miller's separate claims of IAC arising from Jeffress' failure to argue for standing through Miller's leasehold interest in the parking space on which the vehicle was parked, and "trespass" theory of suppression. *See* JA:833 at ¶ 23.

Judge Leon's conclusion that he still would have denied suppression was based on a claim that "[t]he record establishes that Agent Saler had probable cause" on the date of the seizure. JA:984. But the facts Judge Leon stated in support do not establish this conclusion. The seizure occurred on April 8, 2004, yet Judge Leon relied for his conclusion on facts Agent Saler cited in an affidavit submitted in support of a search warrant *three weeks later* – on April 27. JA:984-85. Judge Leon even admitted that "Agent Saler's affidavit is undated, raising the question whether he knew the aforementioned facts at the time of the April 8 search and seizure (an issue the Government does not address in its submissions)." JA:985. Remarkably, however, Judge Leon claimed that "had the issue been litigated … the Government likely would have established that by April 8 Agent Saler knew all – or at least the fast majority of – the facts set out in the affidavit." JA:985. This was sheer speculation. In an effort to create for the Government evidence of probable cause as of April 8 that does not exist in this record, Judge Leon referenced facts from outside the IAC hearing that he said showed Saler had begun investigating Miller a few weeks before the seizure date, and that Maryland law enforcement had been investigating Miller. But Judge Leon did not specify – nor could he have specified on this record – the supposedly incriminating facts Saler knew as of April 8.[8] By agreement of the parties at Miller's suppression hearing, the underlying merits of suppression – including issues such as the automobile exception's applicability and its underlying

[8] The only evidence this record established of what Agent Saler knew as of April 8 was that he "had received information that Miller was packing up boxes [of files], that they were being moved into a vehicle, and that he had told his employees not to come to work the next day," JA:987 – which was also Good Friday. This limited information cannot possibly rise to the level of probable cause.

requirement of probable cause – had been deferred until after a decision on standing. Because Jeffress' admitted errors led to Judge Leon improperly denying standing, no facts proving probable cause were developed then, and none have been developed since. *Cf.* JA:847 (warrantless search and seizure presumptively unreasonable under *Katz v. United States*, 389 U.S. 347 (1967); "[t]hat presumption has never been overcome, so on this record at present, a different suppression result would be required").

Judge Leon also denied it was "probable" that suppression would have resulted in a different verdict, deeming insufficient Jeffress' testimony that suppression of the 22 boxes would have "made the government's case harder in proving Miller's guilt." JA:988. Judge Leon conceded that "[t]he Government's case against Miller … was built on [these] documents seized from AFIC's offices," JA:988, but he said evidence also existed from other sources. Again engaging in speculation, since there was no evidence of this at all, and without any record citations, Judge Leon said that evidence obtained from other sources was "likely duplicative of – the contents of the 22 boxes seized from the Ford Explorer." JA:988. Because he considered the Government's trial evidence "overwhelming," Judge Leon said that a different result was improbable – never addressing the actual IAC standard on this prong, established by this Court in *United States v. Mohammed*, 863 F.3d 885, 892 (D.C. Cir. 2017) and specifically cited by Miller below: that the test is whether counsel's improved performance "would have enabled trial counsel to sow sufficient doubt … to sway even one juror."

2. IAC Claims on Jeffress' Failure to Seek a STA Dismissal

On the IAC issue relating to the STA, Judge Leon conceded "[t]he parties agree that the STA was violated," JA:990, but he still denied Miller IAC relief.

Judge Leon began his STA analysis by focusing on whether Jeffress' actions were "an unreasonable strategic judgment." JA:990. But as Jeffress had conceded, he never exercised such judgment at all. Instead, "we missed the issue." *See also* JA:757 (never dug down into analyzing strategic benefits of filing or not filing for a STA dismissal – "We never got that far."). Jeffress had admitted deficiencies on four levels: He did not research and was not really monitoring the STA case law. He never counted excludable days. He never told Miller of his right to a STA dismissal. And no STA motion to dismiss was ever filed.

Judge Leon's opinion noted that Miller had himself sought "continuances, deadline extensions and scheduling accommodations." JA:990. But as Jeffress conceded, there are "two distinct issues" here – i.e., not only "did we want a speedy trial," but also "should we have moved for dismissal of the case based on a speedy trial violation." Once this STA violation vested, the relevant question for Miller was no longer "Do you want a speedy trial?" but "Do you want a dismissal?" That question was never posed by Jeffress, and never evaluated by Miller or the defense.

Judge Leon declared that this "dichotomy does not hold water," since he said "the two questions, in this case, were inextricably intertwined," JA:991. But they were not "inextricably intertwined" at all; the reality was that none of Miller's own requests for trial extensions were even sought until *after* the STA had already been

violated (by August 1, 2006), and they also only arose because of Miller's concerns about his lawyers' inadequate preparations as the trial date approached. And Judge Leon's claim that Jeffress's strategic judgment was not constitutionally deficient, JA:991-92, ignores that no such strategic judgment was *ever exercised*.[9]

Judge Leon also declared a lack of IAC prejudice, because he said his application of the factors in 18 U.S.C. § 3162 would have yielded only a STA dismissal without prejudice. JA:992-97.[10] Judge Leon then addressed whether a STA dismissal without prejudice could yield *Strickland* prejudice, "conclud[ing] that the answer is: no!" JA:998. In a footnote, Judge Leon said it was "not at all clear that … that reindictment would have resulted in a new suppression hearing," or that Miller could have won that. He also suggested that Jeffress' failure to preserve the STA for appeal was meaningless, since he felt STA violations were "mechanical" and would always represent "plain" error on appeal in any event. JA:998 n.8.

3. IAC Claims on Other Pre-Trial and Trial Issues

Judge Leon's Opinion largely skipped over Miller's claims of IAC on other pre-trial issues and at trial, claiming "Miller appears to abandon these claims in his

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[9] Judge Leon said "to the extent that Jeffress perceived that taking inconsistent positions to obtain a statutory dismissal would have yielded at best, a Pyrrhic victory, his impression was well founded." JA:991. But Jeffress had never "perceived" this at all – by his own admission, he simply "missed the issue." *See also* JA:998 (claiming that "letting that sleeping dog lie was indeed a wise tactic for the defense" – even though Jeffress admitted no such decision was ever made).

[10] Judge Leon also rejected Miller's accusation of the prosecutor's misconduct in seeking "retroactive" STA excludable time by seeking a new ends-of-justice finding backwards, on 12/12/06. Judge Leon claimed no ends-of-justice STA finding was needed on 12/12/06, since he said motions were pending. JA:996. But that is incorrect. While motions were pending, they all had been fully submitted and not resolved within 30 days, as the STA requires. Even the Government's brief before the court of appeals, in Miller's initial appeal, conceded that 85 non-excludable days passed between 5/9/06 and 8/1/06, and another 62 non-excludable days passed between 9/16/06 and 11/16/06. JA:376-77. A STA violation thus plainly existed by 12/12/06, and the Government request for a "retroactive" finding of excludable time on 12/12/06 sought a ruling that *the law does not permit*.

proposed findings of fact and conclusions of law," JA:1002, even though those issues had been raised and briefed. Miller's IAC testimony had described key witnesses not interviewed or subpoenaed to trial, and affidavits from several witnesses verified what they would have testified. Judge Leon's Opinion did not discuss these in detail; instead, he simply adopted "Gov't Br. at 38-44." JA:1002.

4. IAC Claims at Sentencing

Finally, Judge Leon denied IAC at sentencing, despite Jeffress' admissions of material mistakes there too. The court of appeals would later reverse on this issue.

D. Proceedings in the Court of Appeals

As noted, the court of appeals affirmed in part and reversed in part. *United States v. Miller*, 953 F.3d 804 (D.C. Cir. 2020).

1. IAC on Suppression Issues

Examining the suppression issue, the court of appeals declared that, "even assuming deficient performance," *Strickland* prejudice was lacking, "because the suppression motion would have failed on the merits," agreeing with Judge Leon that there was "probable cause to believe that [the boxes] contained evidence of Miller's suspect fraud in the form of AFIC files" at the time of the seizure. App. 9a-10a. The court of appeals even specifically agreed with the district court's assessment that "had the issue been litigated at the suppression stage, the Government likely would have established that by April 8 Agent Saler knew all – or at least the vast majority of – the facts set out in the [later, undated search warrant] affidavit." App. 11a. There was no basis whatsoever for this assessment of what Saler "likely" knew from his

ongoing investigations as of the date of the seizure, other than sheer speculation. And even if probable cause had existed on that date, this was not enough by itself; the agents' failure to obtain a warrant before seizing required a recognized exception to the warrant requirement The court of appeals relied on the automobile exception, and then refused to address Miller's argument that the automobile exception was *inapplicable* because the vehicle had been "*moved* before any boxes were unloaded." App. 11a. The court of appeals conceded this factual distinction had been specifically raised by Miller in his Opening Brief, but it described it as "waived" because raised "only summarily and without explanation or reasoning," App. 12a – despite the Opening Brief's specific citation to *Barnett v. United States*, 384 F.2d 848 (5th Cir. 1967), where seizures from a vehicle already moved had been deemed invalid. Similarly, the court of appeals declined to address Miller's "independent trespass basis for suppression," declaring it forfeited on the ground "he did not adequately present it in the IAC hearing below." App. 11a.[11]

2. IAC on Speedy Trial Act Issues

Turning to the Speedy Trial Act, the court of appeals conceded a STA violation, but said that "even assuming that trial counsel's performance was deficient" in failing to move to dimiss, Miller "cannot establish prejudice under *Strickland*." App. 12a.

The court of appeals initially rejected Miller's argument that Jeffress' failure to move to dismiss had prejudiced him by denying him the right to appeal a without-

[11] The court of appeals did not adopt the District Court's finding that suppression of the 22 boxes would not have affected Miller's trial; its ruling on this issue turned entirely on its view that the suppression motion would have failed on the merits.

prejudice STA dismissal. The court of appeals acknowledged that Judge Leon had "incorrectly" concluded that Miller faced no prejudice on appeal, on the theory that he could still seek plain error review. It confirmed Jeffress' failure to file a STA dismissal motion "constitute[d] a waiver," which meant the issue could not even be raised on appeal. App. 14a. But it held that loss "not, by itself, sufficient to establish *Strickland* prejudice." *Id.* Rather than granting Miller the remedy of a new appeal in which the merits of that issue could be presented - as is typically done in other similar situations (such as failure to file a timely notice of appeal) where a litigant's appellate claims are barred – the court of appeals claimed that Miller had needed to argue the merits of his appeal on this issue before even being granted an appeal, and refused to consider arguments on this issue that Miller had incorporated from his briefings below. App. 14a-15a & n.4. The court of appeals also rejected Miller's other claims of prejudice, deeming them "too speculative." App. 17a.

3. IAC Claims at Trial

On Miller's claims of ineffective assistance at trial, the court of appeals squarely rejected Judge Leon's conclusion that Miller had "abandoned" those claims, noting how Miller had "raised this issue in his post-remand motion identifying his IAC claims, briefed it at length in the proposed 'finding of facts' section of his brief, and argued it during the post-hearing oral argument." App. 18a n.5. But the court of appeals noted that, at least on his trial decisions, Jeffress had testified that he declined to call these trial witnesses for strategic reasons, and it then affirmed after

deferring to the "strong presumption" that such decisions by counsel are within an "objective standard of reasonableness. App. 18a.

4. IAC at Sentencing

As noted, the court of appeals found IAC by Jeffress at Miller's sentencing hearing, and remanded the case for a new sentencing hearing. App. 19a-20a ("On this point, we agree with Miller."). *See also* App. 22a-24a (Williams, J., concurring).

REASONS FOR GRANTING THE PETITION

I. Certiorari is Warranted to Clarify that Probable Cause Must be Based on Facts, Not on What a Court Anticipates is Merely "Likely" Evidence, and to Clarify Appellate Standards for "Waived" Arguments

The court of appeals denied any IAC prejudice on Miller's suppression claim, because it said his motion to suppress would have been denied anyway. But the basis for that decision was premised on an assumption, not evidence. The relevant seizure had occurred on April 8, 2004, yet the court of appeals affirmed Judge Leon's conclusion that probable cause had existed based on facts Agent Saler cited in an affidavit submitted in support of a search warrant *three weeks later* – on April 27. JA:984-85. Judge Leon simply assumed – despite no proof – that Saler knew those facts on April 8, 2004, and the court of appeals erroneously affirmed that conclusion.

A judge cannot speculate and conclude, based on no evidence whatsoever, that facts known to an agent three weeks later were "likely" also known to him earlier. The Government could have had Agent Saler testify at this hearing. It chose not to do so. Judge Leon then improperly filled this evidentiary gap on his own, and the court of appeals affirmed that speculation. This was contrary to this Court's binding

precedent, and certiorari should be granted to restore that precedent's consistency. *See, e.g., In re Sawyer*, 360 U.S. 622, 628 (1959) ("Speculation cannot take over where the proofs fail."); *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29, 44 (1987) ("it was inappropriate for the Court of Appeals itself to draw the necessary inference"); *cf. Kotteakos v. United States*, 328 U.S. 750, 763 (1946) ("it is not an appellate court's function to … speculate upon the probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions but they cannot make them sole criteria for reversal or affirmance.") Moreover, the court of appeals' finding of no prejudice did not address or consider whether adequate prejudice might have arisen from cumulative error. *See, e.g., United States v. Brown*, 508 F.3d 1066, 1076 (D.C. Cir. 2007).

Even if this probable cause based on sheer speculation could have supported the automobile exception as the court of appeals found, it wholly refused to address Petitioner's separate challenges to the automobile exception itself, deeming Petitioner's argument that this exception could not apply because the vehicle had been moved, to be "waived" – despite Petitioner's specific citation of case law in support of that argument. Certiorari should also be granted to clarify that a court of appeals cannot simply refuse to adjudicate viable claims when they are raised by a Petitioner in an Opening Brief on Appeal and supported with legal authority. *See Trop v. Dulles*, 356 U.S. 86, 104 (1958) (where issues are properly raised, "the ordeal of judgment cannot be shirked").

II. Certiorari is Warranted to Clarify if a Party Who Loses the Right to Even Raise an Issue on Appeal, Due to Ineffective Assistance of Counsel, Should be Afforded a New Appeal on that Issue, Rather than Denied That Right Unless He *Also* Proves He Would *Win* that Appeal on the Merits, Even Before It Has Been Briefed or Argued

Miller's counsel's failure to file a motion to dismiss, at a minimum, caused him to lose his right to appeal that issue. In this case, a Speedy Trial Act violation was *admitted*. If an STA motion had been filed, dismissal was mandatory under 18 U.S.C. § 3162, and the only question would have been whether that dismissal would have been entered with or without prejudice. If a STA dismissal had been entered with prejudice, the court of appeals conceded *Strickland* prejudice would have existed. Even if the STA dismissal had been entered without prejudice, Miller could have appealed that decision – a right he lost based on his counsel's deficient performance.

The court of appeals declared that this loss did not demonstrate IAC's prejudice prong because the loss of a right to appeal was not itself sufficient to satisfy *Strickland*. In other analogous situations, such as where a counsel fails to file a timely notice of appeal, a defendant is typically granted a new appeal so that he can litigate those challenges on appeal – and the aggrieved defendant need not *also* prove (even before those issues are briefed) that he would *win* that appeal on the merits. But here, the court of appeals claimed that because Miller had not convinced them he would *win* an appeal not yet briefed or argued, *Strickland* prejudice was absent.

This Court should grant a writ of certiorari to resolve the conflict that exists between this case and those "failure to timely file" cases. *E.g., Stutson v. United States*, 516 U.S. 193, 196-97 (1996); *Evitts v. Lucey*, 469 U.S. 387 (1985); *cf. Thompson*

v. INS, 375 U.S. 384 (1964) (fairness required that court of appeals excuse untimely appeal). There is an illogical disparity when a defendant is *granted* an appeal when his lawyer failed to timely file a notice of appeal, but is *denied* that same appeal where his counsel's failure to file a required motion in the District Court had the *same effect* of waiving his right to even receive an appeal on an identical issue.

In this case, the court of appeals denied Miller relief, even though it conceded that, if his trial attorney had simply filed a STA motion to dismiss, a dismissal would have been granted. On remand in this case, the District Court had stated that it would have issued any STA dismissal only *without* prejudice. Although the court of appeals acknowledged that Miller could have appealed that decision, and had been denied that right here, since the appellate issue had been waived by trial counsel's failure to file a STA motion, the court of appeals said Miller had to not only prove the loss of an appeal, but the loss of an appeal *he would have surely won*. It faulted Miller for not arguing and proving, in this case, the merits of that appeal he had never received. The court of appeals also refused to even consider merits arguments Miller *had* raised in the District Court, and had attempted to incorporate in his appellate briefs. In issuing this finding, the court of appeals erred. Certiorari should be granted so this this Court can instruct the court of appeals that the proper remedy was to grant Miller a new appeal on this issue he had previously been precluded from raising, not rejection of any remedy at all for this conceded Speedy Trial Act violation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 18, 2019 Decided March 27, 2020

No. 18-3090

UNITED STATES OF AMERICA,
APPELLEE

v.

ROBERT FRANK MILLER, ALSO KNOWN AS ROBERT FRANKLIN MILLER,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:05-cr-00143-1)

Gregory S. Smith, appointed by the court, argued the cause and filed the briefs for appellant.

Daniel J. Lenerz, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Jessie K. Liu*, U.S. Attorney, and *Elizabeth Trosman*, *Suzanne Grealy Curt*, and *T. Anthony Quinn*, Assistant U.S. Attorneys.

Before: GARLAND and WILKINS, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

Concurring Opinion filed by *Senior Circuit Judge* WILLIAMS.

WILKINS, *Circuit Judge*: This case comes to us for a second time. This time, we consider Robert Miller's claims that he received ineffective assistance of counsel (IAC) under *Strickland v. Washington*, 466 U.S. 668 (1984). In 2007, Miller was tried and convicted on seven counts of travel fraud and two counts of wire fraud, and was sentenced to 204 months in prison. Miller appealed and was appointed new counsel. On appeal, he challenged both his conviction and his sentence. We affirmed his direct-review claims, but we remanded for the district court to consider in the first instance his IAC claims. *United States v. Miller*, 799 F.3d 1097 (D.C. Cir. 2015) ("*Miller I*"). On remand, Miller asserted IAC claims based on alleged pretrial, trial, and sentencing errors. After an evidentiary hearing, the district court denied all of Miller's IAC claims. *United States v. Miller*, No. CR 05-143 (RJL), 2018 WL 6308786 (D.D.C. Dec. 3, 2018). Miller has appealed. We conclude that Miller has established ineffective assistance with respect to his claim that trial counsel should have informed the district court that Miller had lost one year of Maryland state jail credits while awaiting his federal trial, and we remand for resentencing. In all other respects, however, we affirm the judgment of the district court.

I.

A.

Beginning in July 2003, Miller operated a company called American Funding and Investment Corporation (AFIC), through which he purported to offer two types of services: (i) high-yield real estate investments, and (ii) home-buying

assistance for people with poor credit. *Miller I*, 799 F.3d at 1100. He lured investors by promising to "buy and refurbish foreclosure properties and then resell those properties, at a profit, to home buyers with poor credit." *Id.* Then, he persuaded prospective home buyers with poor credit to give him cash "down payments," promising to help them obtain mortgages for a home they had preselected. *Id.* Miller made hundreds of thousands of dollars from this scheme, but he never purchased any real estate or secured any mortgages. *Id.* Instead, he used the money to "pay rent for AFIC's office space, compensate employees, buy office equipment, obtain newspaper advertisements to attract additional investors, cover personal and travel expenses, and make partial distributions to certain investors who demanded repayment." *Id.*

On April 6, 2004, Miller learned from a lawsuit filed by an aggrieved investor that the Secret Service was investigating this Ponzi-type scheme. Two days later, on April 8, 2004, Miller directed several AFIC employees to place twenty-two boxes of files and records into a Ford Explorer that his secretary, Tonya Smith, had borrowed from her mother and parked in the building garage in one of the four parking spots that AFIC paid for. The Secret Service agent investigating the case, Anthony Saler, learned from an AFIC investor that Miller was moving files out of the office and that he'd told his employees not to come in the next day. Concerned that Miller was trying to flee or destroy evidence, Agent Saler and other law enforcement officers arrested him at his office on unrelated outstanding Maryland arrest warrants.

Agent Saler encountered Smith in a different part of the office building. He asked her where the files were, told her of Miller's arrest, and told her that if she didn't cooperate, she could be arrested. Smith then told Agent Saler that the boxes of files were in her mother's Ford Explorer. After further

questioning, Agent Saler told Smith that he needed the files that night. Believing that she would be arrested if she didn't comply, she agreed to drive the Ford Explorer, with the boxes inside, to the Secret Service's Washington field office, with Agent Saler in the car with her. The Secret Service held the boxes, but did not search them until April 27, 2004, when they obtained a search warrant. This warrant also authorized the search of AFIC's offices.

B.

On April 22, 2005, a federal grand jury indicted Miller on nine counts of travel fraud, 18 U.S.C. § 2314, and two counts of wire fraud, 18 U.S.C. § 1343. By this time, Miller had already begun serving an eight- to twelve-year sentence based on his April 2004 conviction in Maryland state court on four counts of felony theft. On December 16, 2005, he was transferred to temporary custody of the United States Marshalls Service on a federal writ.

Less than a year after the indictment was handed down, trial counsel moved to suppress the twenty-two boxes seized from Smith's car. Miller's trial counsel and the government agreed to bifurcate the suppression hearing by first litigating whether Miller had Fourth Amendment standing to challenge the search of the Ford Explorer and the seizure of the boxes. The Secret Service had not obtained a warrant for either action. Before the hearing, the parties submitted a stipulation that (1) Smith was Miller's employee, (2) Smith's mother was the owner of the Ford Explorer, (3) Smith had "temporary use of the vehicle," (4) the boxes contained AFIC files and Miller's personal records, and (5) Miller told Smith to put the boxes in the Ford Explorer. In addition, Miller's counsel submitted a parking payment of $840 establishing that AFIC paid for parking spots in the garage where the Ford Explorer was

parked. Trial counsel did not submit any additional evidence before or during the suppression hearing to support Miller's standing.

After the suppression hearing, but before the court ruled on the motion, Miller's trial counsel submitted a "Notice of Filing," asking the court to accept a memorandum from the United States Department of Housing and Urban Development (HUD), which had been investigating Miller's real estate scheme since 2000. This memorandum summarized a HUD agent's interview of Smith in January 2006. The government had produced the HUD memorandum to trial counsel before the suppression hearing, during pretrial discovery. According to the HUD memorandum, Smith told the HUD agent that she had lent the Ford Explorer to Miller—a fact that could help establish Miller's standing to challenge the search of the car. In a minute order, the district court denied Miller's request to consider the HUD memorandum despite the memorandum's having been submitted out of time.

Several months later, the district court denied the motion to suppress for lack of standing, without reaching the merits of the motion. Specifically, the court concluded that Miller had "fail[ed] to demonstrate an objectively legitimate expectation of privacy in the vehicle" and that he therefore lacked "standing to challenge the seizure of the boxes located in that vehicle." *Miller I*, 799 F.3d at 1101.

The case then proceeded to trial. The parties agree that, because more than seventy non-excludable days passed before he was brought to trial, a Speedy Trial Act (STA) violation occurred in this case.[1] *See* 18 U.S.C. §§ 3161(c)(1),

[1] The district court didn't rule on the motion to suppress until December 12, 2006, at least 83 non-excludable STA days after the

3162(a)(2). Although trial counsel invoked Miller's STA rights at arraignment, he did not push for a speedy trial after that, so the court took no action. Nor did trial counsel ever move to dismiss the case on STA grounds.

The trial lasted nine days. Over a dozen witnesses testified against Miller, explaining that they had invested in his company, never been paid back, and struggled to get a response from him. Miller's trial counsel did not put on a defense case. The jury convicted Miller on all nine counts on November 20, 2007, and on December 10, 2008, the district court sentenced Miller to 204 months' imprisonment, to run consecutively to his eight- to twelve-year Maryland state sentence. He was returned to Maryland custody on January 7, 2009, but his detention on a federal writ caused him to lose over a year of "confinement credits" from Maryland. Trial counsel failed to bring this fact to the court's attention at sentencing.

Miller then appealed both his conviction and his sentence, and we appointed him new counsel. In 2015 we rejected all his direct-review claims, but, consistent with our general practice, we remanded for the district court to consider his IAC claims in the first instance. *Miller I*, 799 F.3d at 1103-04; *see United States v. Richardson*, 167 F.3d 621, 626 (D.C. Cir. 1999) (explaining that we normally do not resolve IAC claims on direct appeal unless the trial record conclusively answers the questions presented).

C.

On remand, Miller asserted various IAC claims. First, he asserted IAC during the suppression stage, based on trial

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indictment, so the disposition of the suppression motion occurred after the STA violation had taken hold.

counsel's failure to establish his standing to challenge the search of the Ford Explorer. Second, he asserted IAC based on counsel's failure to move for STA dismissal. Third, he asserted IAC during trial, based on counsel's failure to call as witnesses certain investors who Miller had paid back. Fourth, he asserted IAC claims during sentencing, based on counsel's failure to argue for a sentencing reduction in light of the year's worth of Maryland confinement credits he lost while awaiting his federal trial, as well as counsel's failure to request that the district court recommend him for a drug rehabilitation program.

The district court held an evidentiary hearing on the claims. Only two witnesses testified at the hearing: the defense called Miller himself, and the government called Miller's trial counsel. Nearly a year later, the district court issued an order and memorandum opinion denying Miller's IAC claims. *Miller*, 2018 WL 6308786, at *1. Miller has appealed. "[W]e review *de novo* a denial of an ineffective assistance of counsel claim." *United States v. Abney*, 812 F.3d 1079, 1087 (D.C. Cir. 2016).

II.

The Supreme Court first set forth the requirements for an IAC claim in *Strickland v. Washington*, 466 U.S. 668, 693 (1984). To prevail on such a claim, the defendant must show (1) deficient performance, that "his counsel's performance fell below an objective standard of reasonableness," and (2) prejudice, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *United States v. Mohammed*, 863 F.3d 885, 889 (D.C. Cir. 2017) (internal quotation marks omitted). When deciding a *Strickland* claim, "there is no reason for a court . . . to approach the inquiry in the same order

or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. "We review for clear error any findings of historical fact embedded in the District Court's conclusions on deficient performance and prejudice." *United States v. Gray-Burriss*, 920 F.3d 61, 65 (D.C. Cir. 2019) (internal quotation marks omitted).

A.

Miller first contends that the district court misapplied the standard for *Strickland* prejudice in its analysis. The Supreme Court has explained that the "reasonable probability" a claimant must prove is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. This standard is less exacting than the preponderance standard. *See id*. ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.").

Miller argues that our Court adopted a less exacting standard for showing prejudice in *United States v. Mohammed*, where we declared that "[i]n assessing prejudice, the ultimate question is whether [the defendant] has shown a reasonable probability that adequate investigation would have enabled trial counsel to sow sufficient doubt about [a witness's] credibility to sway even one juror." 863 F.3d at 892 (internal quotation marks omitted). Miller is incorrect, however, because this is merely a different articulation of the familiar *Strickland* prejudice test. To convict a defendant, a federal jury must unanimously concur in the verdict. Therefore, if an IAC claimant establishes "sufficient doubt" about the evidence strong enough to "sway even one juror," *see id*., then she has

necessarily "undermine[d] confidence in the outcome" under *Strickland*.

Miller also contends that the district court "erred in prospectively declaring that any IAC claims not raised by Miller will be deemed waived in any future 28 U.S.C. § 2255 action," because appellate counsel (who argued the IAC claims below) "could not fairly be expected to argue ineffectiveness against himself." Appellant's Opening Br. at 1, 34-35. This argument lacks merit, however, as the district court merely stated that "any IAC claims that are now ripe but not presently before the Court will be considered waived for purposes of any future § 2255 action." *Miller*, 2018 WL 6308786, at *5 n.1. Because any potential IAC claims based on appellate counsel's performance were not "ripe" at the time the district court issued its decision, the district court did not deem them waived.

B.

Miller next argues that trial counsel rendered ineffective assistance during the suppression stage. Specifically, he argues that trial counsel should have timely introduced the HUD memorandum to establish Miller's standing to challenge the search of the Ford Explorer. Here, we conclude that, even assuming deficient performance,[2] Miller has failed to establish *Strickland* prejudice, because the suppression motion would have failed on the merits.

"Where defense failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness,

[2] Because we conclude that Miller cannot establish prejudice, we need not decide whether trial counsel performed deficiently by failing to introduce the HUD memorandum, which would have established that Miller had permission from Smith to use the Ford Explorer. *See Strickland*, 466 U.S. at 697.

the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). Here, the district court concluded that even if Miller had proved standing to challenge the search of the Ford Explorer and the seizure of the boxes inside, he would have failed at suppressing the boxes, because there was "probable cause to believe that [the boxes] contained evidence of Miller's suspected fraud in the form of AFIC files, which Miller was in the process of moving to evade law enforcement scrutiny." *Miller*, 2018 WL 6308786, at *8. We agree.

"Probable cause exists where the facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370 (2009) (internal quotation marks and alterations omitted). "Authorities may conduct a warrantless search of a motor vehicle if they have probable cause to believe it contains contraband or evidence of a crime." *United States v. Lawson*, 410 F.3d 735, 740 (D.C. Cir. 2005). And police do not need probable cause to search an entire vehicle in order to search a container inside the vehicle for which there is probable cause to search. *California v. Acevedo*, 500 U.S. 565, 573 (1991). Moreover, officers may, as they did here, "seize a container and hold it until they obtain a search warrant." *Id.* at 575.

In concluding that the suppression motion would have failed, the district court relied on an affidavit signed by Agent Saler in support of the application for a warrant to search the Ford Explorer. Miller complains that this affidavit is undated,

preventing us from determining whether Agent Saler knew those facts at the time he searched the car. However, we agree with the district court that "had the issue been litigated at the suppression stage, the Government likely would have established that by April 8 Agent Saler knew all—or at least the vast majority of—the facts set out in the affidavit." *Miller*, 2018 WL 6308786, at *7. It is undisputed that Agent Saler had been investigating Miller for several weeks when he seized the boxes. And in the course of that investigation, he questioned many witnesses, including AFIC investors and former AFIC employees. In addition, Agent Saler had been in contact before the seizure with Maryland law enforcement officials and HUD, who were both investigating Miller for fraud. Finally, Agent Saler knew that Miller had told employees not to come to work and was packing up boxes of files and putting them in a vehicle. The sum of that information establishes probable cause, and because the Secret Service had probable cause for the search, trial counsel's failure to introduce the HUD memorandum did not cause Miller any prejudice under *Strickland*.

Miller also argues that the district court "failed to address [his] separate, independent trespass basis for suppression." Appellant's Opening Br. at 39. He argues that the trespass theory of the Fourth Amendment, "which requires a warrant (not just probable cause) to enter property, should have barred [Agent] Saler's physical intrusion onto Miller's parking space to even access this vehicle." *Id.* We agree with the government that Miller forfeited this argument, because he did not adequately present it in the IAC hearing below. *See* JA.833, 846; *Trudel v. SunTrust Bank*, 924 F.3d 1281, 1285 (D.C. Cir. 2019) ("Because plaintiffs failed to raise this argument below, they have forfeited it.").

Finally, Miller argues, in a single conclusory sentence, that the automobile exception to the warrant requirement is not

applicable here because the car "was *moved* before any boxes were unloaded." Appellant's Opening Br. at 39. "Because this argument was raised in the opening brief only summarily, without explanation or reasoning," we deem it waived. *See City of Waukesha v. E.P.A.*, 320 F.3d 228, 251 n.22 (D.C. Cir. 2003).

C.

Miller also asserts that his trial counsel rendered ineffective assistance by failing to move for dismissal based on the STA violation. It is undisputed that an STA violation occurred and that trial counsel failed to move for STA dismissal. However, even assuming that trial counsel's performance was deficient,[3] we conclude that Miller's STA-based claim fails because he cannot establish prejudice under *Strickland*.

The Speedy Trial Act "establishes a general rule: if a defendant is not brought to trial within seventy days of indictment, the court 'shall' dismiss the indictment 'on motion of the defendant.'" *Miller I*, 799 F.3d at 1104 (quoting 18 U.S.C. § 3162(a)(2)). "In the event of an STA violation, the district court retains discretion to determine 'whether to dismiss the case with or without prejudice' based on three statutory factors." *Id.* (quoting § 3162(a)(2)). "In the case of a dismissal without prejudice, the government has six months from the date of dismissal to secure the return of a new indictment." *Id.* (citing § 3288).

[3] Because we conclude that Miller cannot establish prejudice for his STA-based claim, we do not consider the parties' arguments about whether trial counsel was deficient in this regard.

In *United States v. Marshall*, 669 F.3d 288, 293-95 (D.C. Cir. 2011), we held that failing to move for STA dismissal in light of a clear-cut violation prejudiced the defendant. We left open, however, whether such a failure would constitute *Strickland* prejudice if the district court would have dismissed the indictment *without* prejudice, allowing the government to re-indict within six months. *Id.* at 295 ("Because the government raised this argument for the first time at oral argument, we decline to consider it."). Accordingly, in *Miller I*, we instructed the district court to first determine "whether, in the event of a successful STA objection, the case would have been dismissed with or without prejudice." 799 F.3d at 1104–05. Failing to move for what would have been a with-prejudice dismissal obviously demonstrates prejudice, but we instructed that "if the [district] court concludes that it would have dismissed without prejudice, thus leaving room for a retrial, the court will need to assess the implications of such a dismissal under *Strickland*'s prejudice standard." *Id.*

1.

Miller first argues, as he did in *Miller I*, that a without-prejudice dismissal, standing alone, constitutes *Strickland* prejudice. In *Miller I*, he argued that "a dismissal without prejudice would itself demonstrate *Strickland* prejudice," without the need for further factfinding. *Id.* at 1105. He renews this argument here, contending that even if the dismissal had been without prejudice, Miller would have at least preserved for appeal the issue of whether a without-prejudice dismissal was warranted. This is true. *See Marshall*, 669 F.3d at 295 (finding *Strickland* prejudice, in part, because "raising the [STA] issue would at least have preserved it for appeal, and thus [the defendant] would have secured dismissal of the indictment, later if not sooner").

The district court rejected this argument by incorrectly concluding that Miller could have raised the issue on direct appeal through plain error review. *See Miller*, 2018 WL 6308786, at *12 n.8 ("Miller's suggestion of prejudice from the attendant failure to preserve the STA violation for appellate review . . . fails because meritorious STA claims are mechanical in nature and 'will always be plain to a reviewing court and will always affect substantial rights.'") (quoting *United States v. Taplet*, 776 F.3d 875, 880–81 (D.C. Cir. 2015)). But the only way to appeal a failure by trial counsel to move for STA dismissal is through an IAC claim. That is so, because failing "to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal." 18 U.S.C. § 3162(a)(2). And we have held that due to the potential for gamesmanship by the defense, plain-error review is unavailable for claims based on failing to move for STA dismissal. *Taplet,* 776 F.3d at 879–81 (explaining that defendants would "have an incentive to withhold meritorious non-excludable time in their motions to dismiss on the chance that if their trials go badly, plain error review of an STA claim will act as a one-time reset button"). Indeed, we recognized in *Miller I* that, because "Miller never sought a dismissal on STA grounds before the district court," any "STA challenge he might bring on [direct] appeal … is waived." 799 F.3d at 1104 (citing *Taplet*, 776 F.3d at 879–81).

However, the fact that Miller would have preserved for appeal the issue of whether a dismissal should have been with prejudice is not, by itself, sufficient to establish *Strickland* prejudice. After all, such an appeal would have been subject to abuse-of-discretion review. *See id.* ("In the event of an STA violation, the district court retains discretion to determine 'whether to dismiss the case with or without prejudice' based on three statutory factors."). And Miller presents no reason to believe that, had counsel moved for STA dismissal, the district

court would have abused its discretion in dismissing without prejudice.[4] Indeed, given that Miller's crimes were very serious and that the trial delay was not attributable to the government, we conclude that the district court would have been well within its discretion to dismiss without prejudice. *See* 18 U.S.C. § 3162 (requiring the district court to consider "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice").

2.

Next, Miller argues that, under the circumstances of this case, failing to obtain a without-prejudice dismissal caused him prejudice under *Strickland*.

Where, as here, a dismissal would have likely been without prejudice, the defendant must establish a reasonable probability that either he wouldn't have been re-indicted or that he would have obtained a more favorable outcome on re-indictment. *United States v. McLendon*, 944 F.3d 255, 262 (D.C. Cir. 2019). However, a defendant cannot rest on a parade of hypotheticals to establish *Strickland* prejudice. *See id.* ("We acknowledge that the government *might* have refused to

[4] In a footnote, Miller asserts that it would be "premature" to present arguments "for why a STA dismissal should have been granted with prejudice in this case" and instead attempts to incorporate by reference arguments he made to that effect in the district court. Appellant's Opening Br. at 43 n.18. We do not consider such arguments. *Davis v. Pension Ben. Guar. Corp.*, 734 F.3d 1161, 1167 (D.C. Cir. 2013) (parties may not "incorporat[e] argument[s] presented in the district court, . . . as this would circumvent the court's rules, . . . regarding the length of briefs") (citing D.C. CIR. R. 32(a)).

reindict, a grand jury *might* have returned a different indictment, the government *might* have offered a plea agreement, or a new jury *might* have been unable to reach a verdict[.] . . . [S]uch hypotheticals are insufficient to undermine our confidence in the outcome of the proceedings[.]"). Rather, the defendant needs concrete evidence to establish a reasonable probability that "the outcome of the criminal prosecution would be different." *Id.* Such a showing is difficult, but can be made in myriad ways, including through evidence that: the government would not have re-indicted or would have offered a more favorable plea agreement, *see id.*; the statute of limitations would have run on one or more of the charges, *see United States v. Taylor,* 487 U.S. 326, 342 (1988); *United States v. Rushin*, 642 F.3d 1299, 1312–13 (10th Cir. 2011) (Holmes, J., concurring); or a key witness has become unavailable, *see Campbell v. United States*, 364 F.3d 727, 731 (6th Cir. 2004).

Miller does not allege (nor does the record support) any such circumstances. Rather, he points to two unique circumstances that he argues establish *Strickland* prejudice in this case.

First, Miller argues that, upon re-indictment, trial counsel would have "corrected his mistakes by presenting timely evidence of Miller's standing" to suppress the boxes in the Ford Explorer. Appellant's Opening Br. at 43-44. True as this may be, we have already concluded that Miller's suppression motion would have failed on the merits. Thus, the fact that he would have obtained a new suppression hearing upon reindictment is insufficient to show a reasonable probability that the outcome of his re-prosecution would have been different. *See McLendon*, 944 F.3d at 262.

Second, Miller argues that the failure to move for STA dismissal increased his time in federal prison. Specifically, he notes that he was transferred from Maryland state custody to federal authorities on a federal writ and that "[d]uring the 896 days of delay between this indictment and trial, [he] lost over a year of good time credits he otherwise would have earned in Maryland custody." Appellant's Opening Br. at 44. He further notes that the district court concluded that a dismissal without prejudice would have "prodded the Government and the Court to move quickly to trial." *Id.* (citing *Miller*, 2018 WL 6308786, at *12). Accordingly, he argues that, if his counsel had moved for STA dismissal, his trial upon reindictment would have "taken place quickly, and [he] could have been returned to Maryland state custody where he could earn additional good time credits, and as a result, he would now be getting out of federal prison sooner, since his federal consecutive sentence did not begin until his Maryland state custody ended." *Id.* at 45 (emphasis omitted).

We conclude that this argument is too speculative to establish *Strickland* prejudice. Indeed, even if trial counsel had moved for dismissal as soon as the violation occurred, and even if the government had moved as quickly as possible to re-indict him, there is little reason to believe that Miller would have spent less time in federal custody than he did in fact. If anything, he would have likely spent *more* time in federal custody, as the government would have been forced to re-do much of the pretrial proceedings to that point, including re-litigating the suppression motion. *See McLendon*, 944 F.3d at 262.

D.

Miller next argues that trial counsel provided ineffective assistance by failing to call as trial witnesses investors who'd

been paid back.[5] We disagree. As trial counsel explained at the evidentiary hearing, allowing these witnesses to testify would have helped prove the government's case: "the investors who got paid back got paid back for a reason, because they hounded Mr. Miller and threatened to call law enforcement." JA.815. Because there was a sound, strategic reason not to call these witnesses, we conclude Miller has failed to overcome the "strong presumption" that trial counsel's performance was within an "objective standard of reasonableness." *See Strickland*, 466 U.S. at 688-89

E.

Finally, Miller asserts ineffective assistance based on trial counsel's performance at sentencing. He alleges two specific deficiencies.

First, Miller argues that trial counsel should have requested that the court recommend to the Bureau of Prisons (BOP) that he be placed in the "Residential Drug Abuse Program" (RDAP). There is no dispute that Miller was eligible for RDAP. But Miller concedes that BOP retains absolute discretion over whether to place a defendant in RDAP. Thus, a district court's recommendation is not dispositive. Indeed, trial counsel testified that, while he "definitely" should have made the request, a recommendation from the court merely

[5] The district court concluded that Miller had "abandon[ed]" his trial-based claim, because the "proposed conclusions of law" section of Miller's brief failed to address it. *Miller*, 2018 WL 6308786, at *14. However, Miller raised this issue in his post-remand motion identifying his IAC claims, briefed it at length in the proposed "findings of fact" section of his brief, and argued it during the post-hearing oral argument. We therefore reject the government's contention that this claim is not properly before us. *See* Govt's Resp. Br. at 63 n.5.

"helps" place a defendant in the program. JA.353. As a result, even assuming that trial counsel's failure to ask the district court for an RDAP recommendation fell below an objective standard of reasonable performance, Miller has failed to show a reasonable probability that he would have actually been placed in RDAP had he received a recommendation from the district court.

Second, Miller argues that trial counsel should have notified the court that his being detained on a federal writ prevented him from earning over a year of confinement credits towards his Maryland state sentence. Failing to do so, Miller argues, caused the district court to believe that his Maryland sentence was one year shorter than it actually was. On this point, we agree with Miller.

At sentencing, trial counsel explained that, because Miller had already served four years of his Maryland state sentence, only four to eight years of that sentence remained. (Recall that Miller had received an eight- to twelve-year Maryland sentence.) However, trial counsel neglected to inform the court that Miller's detention on a federal writ while awaiting trial deprived him of the opportunity to earn approximately one year of Maryland confinement credits. His pretrial custody occurred in a federal facility, so he could not earn certain Maryland credits—such as for participating in a work detail—against the Maryland sentence during that time. *See, e.g.*, Md. Code Ann., Corr. Servs. § 3-705 (providing for work credits). The government does not dispute that this error fell below an objective standard of reasonable performance.

On remand, the district court concluded that this error did not prejudice Miller, because "even if Miller's counsel had notified [the court] during sentencing of this Maryland jail credit issue, it wouldn't have made a difference to the sentence

[the court] gave him, which was crafted to be a fair sentence for Miller's federal case." *Miller*, 2018 WL 6308786, at *14 (quotations and alterations omitted). Whether Maryland affords Miller credit for his time in federal custody, the district court explained, "is up to Maryland." *Id.* Not so.

The district court would not have been permitted to disregard the fact that Miller's detention on a federal writ caused him to lose one year of Maryland state jail credits. Had it done so, its conclusion would have been procedurally unreasonable. *See* 18 U.S.C. § 3553(a); *United States v. Flores*, 912 F.3d 613, 618 (D.C. Cir. 2019). As we explained in *Miller I*, the Sentencing Guidelines in effect at the time of Miller's sentencing provided that a "sentence . . . may be imposed to run concurrently, partially concurrently, or consecutively to the prior [sentence] to achieve a reasonable punishment for the instant offense." 799 F.3d at 1107 (citing U.S.S.G. § 5G1.3(c) (2008)). Thus, in order to determine whether a consecutive sentence is "reasonable," a sentencing court must know what the other sentence is and consider whether the federal sentence, when combined with the state sentence, is necessary to achieve a reasonable punishment. U.S.S.G. § 5G1.3(c) (2008). To be sure, the district court knew that Miller faced an "indeterminate" sentence in Maryland. *See Miller I*, 799 F.3d at 1107. But to craft a reasonable sentence, it would have needed to consider that there was an extra year at the bottom of that indeterminate range.[6]

[6] We take no position on the 18 U.S.C. § 3585(b) issues Judge Williams raises in his concurrence, because these issues were not raised below or briefed on appeal.

III.

Consistent with this opinion, we reverse the judgment of the district court insofar as it rejected Miller's sentencing-based IAC claim, and we remand for resentencing. In other all respects, we affirm.

WILLIAMS, *Senior Circuit Judge*, concurring:

I join the court's opinion in full. I write only to express my thoughts regarding the complexities of Miller's original sentencing and my understanding of how these complexities will impact his resentencing.

By the time the federal government prosecuted Miller, he had already been convicted of a state offense in Maryland and was serving time in the state's penitentiary. To further federal prosecution, Maryland authorities transferred Miller to federal custody in the District of Columbia in response to a writ of habeas corpus ad prosequendum.

Being held in federal custody had the direct effect of extending Miller's total time in incarceration by about a year (precision will require fact-finding in the district court). The Maryland legislature has adopted a generous prison credits scheme, wherein inmates receive credits against their sentence for various forms of good behavior. See, e.g., Md. Code Ann., Corr. Servs. § 3-705 (providing for work credits). It appears to be undisputed that because Miller came from Maryland on a writ of habeas corpus ad prosequendum, his period of federal custody on the writ counted *only* against his Maryland sentence and was not credited against his federal sentence as it would have been automatically if the custody had related directly and only to the federal case. See 18 U.S.C. § 3585(b); see also *Pickett v. Warden McKean FCI*, 726 F. App'x 104, 106 (3d Cir. 2018) ("The BOP was . . . correct in not awarding credit for time served by [a defendant] while on loan to federal authorities pursuant to a writ of habeas corpus ad prosequendum."). Thus, for the three years that Miller was in federal custody that federal law ascribed to his Maryland sentence, he lost the chance to earn Maryland credits.

But because ineffective trial counsel never pointed it out, the district court never learned that Miller's federal prosecution caused him to lose Maryland credits and thus spend roughly an extra year in jail. And when the district court did learn about the lost credits in the hearing below, it declared that it didn't matter: According to the district court, it would nonetheless have given Miller *the same* 204-month federal sentence, credits or no credits. As the court explains, the district court's analysis constitutes procedural error.

In most cases where a district court commits procedural error by refusing to consider a necessary factor, the district court can correct its oversight by reevaluating that sentence in light of the missed factor. If it finds the factor insignificant in the total constellation of relevant considerations, it is free to re-impose the original sentence.

But time is different from unquantifiable sentencing factors, such as a defendant's character or the nature of an offense. Here time was mishandled in the initial sentencing because the district court, thanks to the ineffective assistance of counsel, did not make an adjustment for the fact that Miller's federal charges had the direct effect of extending his total time in prison by a year. As counsel put it below, Miller will serve "an extra year of served time [that] is caused by this case, by him being writted in and being in federal custody instead of state custody during the time that he was serving Maryland incarceration." J.A. 904.

In order to reach a sentence reflecting the desired total period of time thought suitable for the federal charge, the district court needs to make an adjustment for direct effects that Miller's federal custody had on the state sentence. See 18 U.S.C. § 3553(a); U.S.S.G. § 5G1.3(c) (2008) (now codified at U.S.S.G. § 5G1.3(d)). To do otherwise would take away "an extra year of this man's life . . . simply because of the fortuity

[] that he is here on paper, federal paper, in this system instead of that system." J.A. 905.

Because this case comes to us as an ineffective assistance of counsel claim, we know what federal sentence the court sought to give (204 months) and how much it actually gave (approximately 216 months—the sum of the 204 months that the district expressly intended and approximately a year added by the federal custody for the Maryland proceedings).

Computing the Maryland credits Miller likely lost will require facts and some estimation, as the credits depend on an inmate's actions, such as performing a work detail. Without a corresponding reduction, Miller's federal sentence would remain unreasonable because it would be self-contradictory.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3090 **September Term, 2019**

FILED ON: MARCH 27, 2020

UNITED STATES OF AMERICA,
APPELLEE

v.

ROBERT FRANK MILLER, ALSO KNOWN AS ROBERT FRANKLIN MILLER,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:05-cr-00143-1)

Before: GARLAND and WILKINS, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause be reversed insofar as it rejected Miller's sentencing-based IAC claims, be affirmed in all other respects, and the case be remanded to the District Court for resentencing, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

Date: March 27, 2020

Opinion for the court filed by Circuit Judge Wilkins.
Concurring opinion filed by Senior Circuit Judge Williams.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3090 **September Term, 2020**

1:05-cr-00143-RJL-1

Filed On: February 5, 2021

United States of America,

Appellee

v.

Robert Frank Miller, also known as Robert Franklin Miller,

Appellant

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Garland*, Millett, Pillard, Wilkins, Katsas, Rao, and Walker, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Kathryn D. Lovett
Deputy Clerk

*Circuit Judge Garland did not participate in this matter.

AO 245B (Rev 06/05) (Rev. DC 12/15/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT
for the District of Columbia

UNITED STATES OF AMERICA
V.

ROBERT FRANK MILLER

JUDGMENT IN A CRIMINAL CASE

Case Number: 05CR143

DEC 9 2008

USM Number:

JONATHAN JEFFRESS; JEFFREY FOX AND MARIA GREEN
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) #1,#2,#3,#4,#5,#6,#7,#8, #9,#10,#11 OF THE INDICTMENT
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18USC23154 AND 2	INDUCEMENT TO TRAVEL IN INTERSTATE COMMERCE IN EXECUTION OF A SCHEME TO DEFRAUD AND AIDING AND ABETTING	4/2004	#1 THROUGH #9

The defendant is sentenced as provided in pages 2 through 13 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ is/are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

DECEMBER 10, 2008
Date of Imposition of Judgment

Signature of Judge

RICHARD J. LEON — U.S. DISTRICT JUDGE
Name of Judge — Title of Judge

12/22/08
Date

AO 245B (Rev 06/05) Judgment in a Criminal Case
Sheet 1A

DEFENDANT: ROBERT FRANK MILLER
CASE NUMBER: 05CR143

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18USC 1343 AND 2	WIRE FRAUD AND AIDING AND ABETTING	4/2004	#10 AND #11

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: ROBERT FRANK MILLER
CASE NUMBER: 05CR143

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

AS TO COUNTS # 1 THROUGH #9 FOR A PERIOD OF 120 MONTHS. COUNTS CONCURRENT TO EACH OTHER.
AS TO COUNTS #10 AND #11 FOR A PERIOD OF 204 MONTHS. CONCURRENT TO ALL COUNTS
THIS SENTENCE IS CONSECUTIVE TO THE MARYLAND SENTENCE DEFENDANT IS NOW SERVING.

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ROBERT FRANK MILLER
CASE NUMBER: 05CR143

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

36 MONTHS.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: ROBERT FRANK MILLER
CASE NUMBER: 05CR143

ADDITIONAL SUPERVISED RELEASE TERMS

MENTAL HEALTH TREATMENT - DEFENDANT SHALL PARTICIPATE IN A MENTAL HEALTH TREATMENT PROGRAM, WHICH MAY INCLUDE OUTPATIENT COUNSELING OR RESIDENTIAL PLACEMENT, AS APPROVED AND DIRECTED BY THE PROBATION OFFICE.

FINANCIAL RESTRICTIONS - DEFENDANT IS PROHIBITED FROM INCURRING NEW CREDIT CHARGES, OPENING ADDITIONAL LINES OF CREDIT, OR NEGOTIATING OR CONSUMMATING ANY FINANCIAL CONTRACTS WITHOUT THE APPROVAL OF THE PROBATION OFFICE.

RESTITUTION OBLIGATION - DEFENDANT SHALL PAY THE BALANCE OF ANY RESTITUTION OWED AT A RATE OF NO LESS THAN $500 EACH MONTH AND PROVIDE VERIFICATION OF SAME TO THE PROBATION OFFICE.

EMPLOYER NOTIFICATION - DEFENDANT SHALL NOTIFY ANY CURRENT OR FUTURE EMPLOYER OF YOUR CONVICITION, AS DIRECTED BY THE PROBATION OFFICE.

COMPUTER/INTERNET ACCESS RESTRICTION - DEFENDANT SHALL NOT POSSESS OR USE A COMPUTER THAT HAS ACCESS TO ANY "ON-LINE COMPUTER SERVICE" AT ANY LOCATION, INCLUDING YOUR PLACE OF EMPLOYMENT, WITHOUT THE PRIOR WRIITEN APPROVAL OF THE PROBATION OFFICE. "ON-LINE COMPUTER SERVICE" INCLUDES, BUT IS NOT LIMITED TO, ANY INTERNET SERVICE PROVIDER, BULLETIN BOARD SYSTEM, OR ANY OTHER PUBLIC OR PRIVATE COMPUTER NETWORK.

THE PROBATION OFFICE SHALL RELEASE THE PRESENTENCE INVESTIGATION REPORT TO ALL APPROPRIATE AGENCIES IN ORDER TO EXECUTE THE SENTENCE OF THE COURT. TREATMENT AGENCIES SHALL RETURN THE PRESENTENCE REPORT TO THE PROBATION OFFICE UPONTHE DEFENDANT'S COMPLETION OR TERMINATION FROM TREATMENT.

DEFENDANT: ROBERT FRANK MILLER
CASE NUMBER: 05CR143

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 1100.00	$ WAIVED	$ 495,954.49

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☑ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
ANTHONY STEVEN ROBERTS	$15,000.00	$15,000.00	
ROBERT DEBNAM	$133,000.00	$133,000.00	
HAYE CAPITAL GROUP	$40,000.00	$40,000.00	
DEBORAH KEY	$40,000.00	$40,000.00	
DEADRID BROWN	$60,000.00	$60,000.00	
CHADEAYNE GOODING	$40,000.00	$40,000.00	
HARRIETT CASTLE	$75,904.49	$75,904.49	
CHARLENE PETERS	$7,550.00	$7,550.00	
ANTHONY WILBURN	$4,500.00	$4,500.00	
DENISE MCQUEEN	$5,000.00	$5,000.00	
BRENDA ALSTON	$3,000.00	$3,000.00	
TOTALS	$ 495,954.49	$ 495,954.49	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☑ the interest requirement is waived for the ☐ fine ☑ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5A — Criminal Monetary Penalties

DEFENDANT: ROBERT FRANK MILLER
CASE NUMBER: 05CR143

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

THE SPECIAL ASSESSMENT FEE WAS PREVIOUSLY SATISFIED. RESTITUTION IS IMMEDIATELY PAYABLE TO THE CLERK OF THE COURT FOR THE US DISTRICT COURT, DISTRICT OF COLUMBIA. WITHIN 30 DAYS OF ANY CHANGE OF ADDRESS, YOU SHALL NOTIFY THE CLERK OF THE COURT OF THE CHANGE UNTIL SUCH TIME AS THE FINANCIAL OBLIGATION IS PAID IN FULL. THE COURT WAIVES THE PAYMENT OF INTEREST AND PENALTIES ON THE UNPAID BALANCE OF RESTITUION. THE COURT RECOMMENDS YOUR PARTICIPATION IN THE INMATE FINANCIAL RESPONSIBILTY PROGRAM.

THE COURT FINDS THE DEFENDANT DOES NOT HAVE THE ABILITY TO PAY A FINE INADDITION TO RESTITUTION AND. THEREFORE, WAIVES IMPOSITION IN THIS CASE.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5B — Criminal Monetary Penalties

DEFENDANT: ROBERT FRANK MILLER
CASE NUMBER: 05CR143

ADDITIONAL RESTITUTION PAYEES

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
JIMMY CHENG	$25,000.00	$25,000.00	
HOWELL WEBB	$2,000.00	$2,000.00	
HORACESTINE MILLER	$2,000.00	$2,000.00	
YERUSALEM WOLDESELASSIE	$5,000.00	$5,000.00	
ALISA MORROW	$5,000.00	$5,000.00	
RICHARD CHISOLM	$5,000.00	$5,000.00	
ANDRES TORRIENTE	$20,000.00	$20,000.00	
LEONARD AND ROSE WILLIAMS	$3,000.00	$3,000.00	
SELMAWIT TEWOLDE	$5,000.00	$5,000.00	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev 06/05) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: ROBERT FRANK MILLER
CASE NUMBER: 05CR143

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☑ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

DEFENDANT SHALL PAY THE BALANCE OF ANY RESTITUTION OWED AT A RATE OF NO LESS THAN $500.00 EACH MONTH.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.