21-5339 ORIGINAL

No. _____

Supreme Court, U.S.
FILED
APR 13 2021
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IN THE

SUPREME COURT OF THE UNITED STATES

Joseph Miller 2:12-CR-10 PETITIONER
(Your Name)

vs.

United States of America. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Seventh Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joseph Miller
(Your Name)

P.O. Box 5000
(Address)

Greenville, Ill 62246
(City, State, Zip Code)

(Phone Number)

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SUPREME COURT, U.S.

QUESTIONS PRESENTED FOR REVIEW

I.

As a matter of first impression in this court, pursuant to Supreme Court Rule 10(C), does an attorney's failure to advise his client of the adverse ramifications of raising any claims of IAC on direct appeal constitute the substantial denial of a constitutional right, debatable among jurist of reasons, as contemplated by this court's decision in *Slack v. McDaniel*, 529 U.S. 473 (2000), particularly when the district court failed to conduct an evidentiary hearing to resolve the issue, where petitioner had material evidence showing that his attorney never consulted with him, in that regard?

II.

Does the Seventh Circuit's denial of Miller's request for a COA, grounded in Miller's contentions that the prosecution failed to timely disclose its use of fabricated evidence in search and arrest warrants, constitute an issue debatable among jurist of reason, pursuant to *Slack v. McDaniels*, the substantial denial of a constitutional right, and most importantly, does this decision conflict with this court's decision in *Brady v. Maryland*, 373 US. 83, so as to warrant the grant of certiorari by this court under Supreme Court Rule 10(C)?

III.

Does the Seventh circuit's denial of Miller's request for a Certificate of Appealability on two separate pre-trial, 4th and 5th Amendment, IAC issues—one citing *Brown v. Illinois*, 422 U.S. 590 (1975) and the other, *Franks v. Delaware*, 438 U.S. 154 (1978)—constitute decisions debatable among jurist of reason, pursuant to *Slack v. McDaniel*, and moreover, substantially conflict with this court's decisions in *Kimmelman v. Morrision*, 477 U.S. 365 (1986), so as to warrant the grant of certiorari by this court under Supreme Court Rule 10(c), particularly when the information utilized in the search and arrest warrants were derived from undisclosed, fabricated information and evidence in violation of *Brady*?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the.cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals For the Seventh Circuit appears at Appendix A to the petition and is unpublished.

JURISDICTION

The Date on which the United States Court of Appeals for the Seventh Circuit decided petitioner's case was September 25, 2020. On January 3, 2021, a petition for rehearing was filed, which was denied on February 1, 2021. An extension of time to file a writ of certiorari was granted to and including March 10, 2021, before denial of the petition for rehearing was denied by the Seventh Circuit.

CONSTITUTIONAL AND STATUTORY PROVISONS INVOLVED

The Fourth Amendment to the U.S. Constitution states in pertinent part: "The Right of the people to be secure in their persons, house...against unreasonable searches and seizures, shall not be violated, and no Warrant 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 Fifth Amendment to the U.S. Constitution states in pertinent part: "NO person shall be...deprived of life, liberty, or property without due process of law..."

The Sixth Amendment to the U.S. Constitution states in pertinent part: "In all criminal prosecutions, the accused shall...have the assistance of counsel for his defense."

I.

STATEMENT OF CASE

In January 2012, Miller was charged by way of complaint with one count of Bank Robbery and later indicted on the same charge several days later. Miller proceeded to trial by jury on June 24, 2013 and was found guilty by a jury on June 25, 2013 on the bank robbery count.

On July 12, 2013, Miller filed a pro-se motion for new trial based primarily upon his attorney's ineffectiveness. After being appointed counsel, an amended Rule 33 motion for new trial was filed. A hearing was held on May 21, 2014 regarding Miller's new trial motion. On June 12, 2014, the trial court denied the motion. Miller was sentenced on August 1, 2014 to a 225-month term of imprisonment, 3 years of supervised release and an order of Restitution in the amount of $5,606 and a special assessment of $100.

Miller directly appealed his sentence and conviction to the Seventh Circuit Court of Appeals. The Seventh Circuit affirmed. Thereafter, Miller filed a timely petition for rehearing en banc, unsuccessfully, then a writ of certiorari. The certiorari was denied on February 29, 2016.

On February 27, 2017, Miller filed a 2255 motion in the Northern District of Indiana. On October 21, 2019, the district court denied that motion. See Appendix B ("App.__"). On December 10, 2019, Miller filed a timely notice of appeal.

Miller timely filed an application requesting a Certificate of Appealability ("COA") to the Seventh Circuit raising several claims. On September 25, 2020, the Seventh Circuit denied Miller's COA, summarily, without issuing an opinion. This Writ of Certiorari followed.

(A). Arrest and Indictment

Miller was arrested on Jan 5, 2012 and later charged with one count of Bank Robbery in violation of 18 U.S.C. 2113(a).

Events leading up to Miller's arrest started out with a search warrant formulated by Detective M. Detterline (A Hammond Indiana Law Enforcement official) to secure records of a phone believed to be owned by Miller (App. (C) December 23, 2011 search warrant).

> Detective Detterline's affidavit stated:
> During the course of this investigation, affiant was informed that AMTECH Pro Audio located at 7033 Calumet, Ave., Hammond, Lake County, Indiana had video surveillance of the suspect and the vehicle that was used... On December 21, 2011, affiant spoke to FBI Agent Michael Peasley who informed affiant that HIDTA analysis Ken Fortsythe was able to enhance the registration plates on the vehicle used by the suspect in the bank robbery of Standard Bank on December 13, 2011. This vehicle was a Blue 1998 Ford Utility with an Illinois registration of L429151, expiring 6/2012 and VIN # 1FMZU34EOWUC17967. The individual(s) registered to this vehicle are Joseph B. Miller and Tena E. Miller, 105 S. Ashland Ave., Chicago, IL, 60607.

App. C

On January 4, 2012, Special agent Michael Peasley ("Agent Peasley") filed an application and affidavit for a search warrant, specifically, for a 1998 Ford Explorer that belonged to Miller. See App. D, annexed hereto, 1/4/12 search warrant. In that search warrant, on pg. 4, ¶ 9, Agent Peasley made reference to an analyst at Lake Count High Intensity Drug Trafficking Area ("HIDTA") task force who "Enhanced a part of the copy of the (AMTECH) video and was able to discern the vehicle's license plate number" but never identified "Ken Forsythe" as being the analyst, as was done in Detterline's affidavit. See App. D.

On January 5, 2012, Agent Peasley along with several armed FBI Agents and local police arrived at the house where Miller resided to "execute the warrant on his truck." When Miller came to the door at Agent Peasley's request, Miller was forced to turn around and cuff up and placed under arrest for the Bank Robbery offense, against his will and taken into custody (Trial Transcript ["Tr.__"] at 316 without Agent Peasley having a warrant for his physical arrest. App. (N).

Miller was taken to the Lansing Police Department where he "allegedly" confessed to the bank robbery—a confession that the government described as "not full-fledged" at a subsequent

detention hearing. (Detention Hearing ["Dt. Hr. __"] at 6). On January 6, the following day an arrest warrant was ***then*** issued for Miller based on a purported confession even as Miller had already been arrested and was in custody, based on the surveillance evidence purportedly enhanced by HIDTA. See App. E. annexed hereto, arrest warrant.

On January 12, 2012, Agent Peasley appeared before the grand jury to testify about the evidence he gathered against Miller surrounding the bank robbery. See App. F. annexed hereto, grand jury transcripts. At that hearing, Agent Peasley testified in pertinent part that (1) Bank Teller Judy Tauber ("Tauber") essentially identified Miller as the culprit who robbed the bank from a photo line-up; (2) Agent Peasley was unable to read the license plated number; (3) He (Peasley) sent the AMTECH evidence to HIDTA to be enhanced, at which time HIDTA was able to extract Miller's license plate number off the still photos; (4) Bank Teller Pakama Hoffman ("Hoffman") could not identify Miller as the bank robber because Hoffman did not know that the bank had actually been robbed until afterwards; and (5) Miller confessed to the bank robbery. App. F. pgs. 5, 13-14, 17-19.

(B). Pre-Trial proceedings.

Miller filed a motion for leave to conduct witness depositions (Docket #26. "R.__"). Miller's concern was that Agent Peasley mischaracterized the testimony of one of the bank clerks, Tauber, as to her identification of him as the bank robber. A conference was setup between Miller's attorney, the government and Ms. Tauber, at which time (she) Tauber, indicated she disagreed with the agent's reports. More specifically, she stated that, at no time did she say that the courier or Miller resembled the bank robber, at all. (R. 28) Miller's motion was denied.

Miller, again, subsequently met with his attorney, Mr. Tavitas, briefly discussing issues concerning his case. Thereafter, Miller did not meet or speak with Tavitas until six months later, a week prior to trial, which was ultimately commenced on June 24, 2013.[1]

(C). The Trial.

On December 13, 2011, the Standard and Bank Trust, located at 7007 Calmet Ave., in Hammond, IN was robbed sometime between 9:30 and 10:30 in the morning (Tr. 116). Hoffman and Tauber were working as tellers that morning. Hoffman was the teller supervisor. (Tr. 116-117).

Tauber died prior to trial as a result of circumstances unrelated to the case (Tr. 117). Hoffman testified that an individual handed Tauber a note which Hoffman originally thought was a check. She later learned that it was a bank robbery note instructing Tauber to give the robber the money (Tr. 120). The absence of Tauber as a witness for the government was significant, in that, Agent Peasley testified at the grand jury proceedings that Hoffman didn't even know that the bank was being robbed, at all, until after the fact—after the crime was committed. See App. F, Peasley's grand jury testimony, pgs. 5-6. Hoffman testified that, she did not realize that the bank was being robbed until she seen Tauber handing over the money...at which time the robber left the bank and exited to the left in the direction of a surveillance company named AMTECH (Tr. 126).

On December 21, 2011, in a 302 report prepared by FBI Agent Peasley, Hoffman, after briefly reviewing photos given to her by law enforcement officials, stated she could not identify the bank robber, at all. App. G, 302 statement. Nevertheless, at trial, Hoffman positively

[1] By this time, the government had already released all *Brady* and *Jencks* material. Crim. Doc. 46. In that pre-trial disclosure, the government released a 302 document entitled "working copy" a 302 in relation to HIDTA's alleged participation in an "image refinement" of surveillance footage that the government sought to utilize as evidence against petitioner at trial. The document states that HIDTA staff "conducted an image refinement" of a still image from the video and "contacted agents to indicate they had obtained the licenses plate from the video and could see it was L429151, Illinois." See App. G, copy of working order annexed hereto. The license plate number to the 1988 Ford Explorer that was registered to Miller, and suspected of being used as the getaway car in the bank robbery.

identified Miller as the bank robber (Tr. 130). Hoffman testified prior to that moment that she had not been able to identify Miller as the bank robber through any picture or any other way and had never seen him in person before testifying that day. (Tr. 149).

Agent Peasley also recovered a separate surveillance video that was taken outside the AMTECH building. (Tr. 275). The AMTECH surveillance video showed an individual dressed in a similar fashion as the bank robber entering an older model SUV (Tr. 276). Agent Peasley was able to produce still photos, which depicts the area in which the license plate was located on the getaway vehicle. (Tr. 277). Agent Peasley further stated that he was able to read all but one of the digits on the license plate affixed to that vehicle; and that "he" was able to attach the license plate number to a vehicle owned by Miller and his mother, Tena (Tr. 277-279).

Agent Peasley also testified that Miller—although not wholeheartedly— allegedly confess to the robbery (Tr. 299-303). He (Peasley) was forced to acknowledge that Miller's alleged statement was merely a document in a 302 form, but was never recorded, video, audio or otherwise for the purposes of verifying if Miller, in fact, made the said confession (Tr. 313).

The case was ultimately submitted to the jury. Miller was found guilty of the offense.

(D). Hearing on motion for new trial.

Represented by a new attorney, Mr. Visvalidis Kupsis ("Kupsis"), the district court held a hearing in Miller's motion for new trial under Rule 33, alleging IAC. More specifically, Kupsis raised 3 claims of IAC. First, he argued that trial counsel was ineffective for failing to make a confrontation clause objection to testimony at trial by Agent Peasley identifying Miller's vehicle as being near the scene of the bank robbery.

Second, Miller contended that counsel should have cross-examined Agent Peasley at Trial concerning a portion of Peasley's affidavit in support of the criminal complaint, in which Peasley recounted having showed a photo line-up to Tauber, which turned out to be a factually incorrect identification of Miller.

Third, Miller argued that counsel was ineffective for failing to call two witnesses to rebut the government's evidence that he was having financial problems and therefore had a motive to commit the robbery. As a result of counsel's amended motion, the district court conducted an evidentiary hearing. During the hearing, Peasley was again questioned about his ability to identify the license plate number. Peasley testified that he sent the surveillance footage to HIDTA; However, he did not know how HIDTA actually received the video: (by mail, or otherwise) and did not know the process or technology utilized by HIDTA to enhance the surveillance footage and did not know who allegedly enhanced the video at HIDTA and he (Peasley) was not a computer expert; and that HIDTA's (alleged) enhancement of the surveillance footage assisted him in determining the license plate number on the truck (Tr. NTH 69-74).

Agent Peasley also admitted during his testimony at the hearing that his testimony at trial was inaccurate in relation to Miller's bank account being overdrawn by $700. Rather, Peasley stated that he was looking at the day of January 13, one month after the robbery, when he determined the account was overdrawn by $700 (Tr. Nth 76).

Miller's trial attorney, Tavitas, testified at the hearing. He acknowledged that the license plate evidence was a strong piece of evidence and that, if the defense were to concede that the vehicle belonged to Miller, it would be easier for the government to prove its case (Tr. NTH 19). Tavitas, when questioned in regard to the alleged confession provided to Agent Peasley Miller, indicated that Miller's statements were not a full blown confession and that no video or written statement existed in regard to this alleged confession (Tr. NTH 20). He acknowledged that the confession rested on Peasley's word alone.

Tavitas also acknowledged that, in light of Miller's alleged confession, Tavitas did not have any particular reason as to why he did not try to impeach Agent Peasley with his mischaracterization of Ms. Tauber's testimony—in conjunction to admitting that Tauber's non-

identification of Miller was a "big piece of [exculpatory] evidence". (Tr. NTH 21, 56). Tavitas, however, asserted that, to bring in the Tauber evidence would essentially constitute bringing in a second ID of Miller (in conjunction with Hoffman's post hoc, in court identification) (Tr. NTH 66).

At the conclusion of the hearing, the district court heard arguments from both sides, via briefing. On June 12, 2014, the district court ultimately denied Miller's motion for new trial, finding that Miller failed to show Tavitas provided IAC in any of the three ways asserted by Miller via Kupsis's amended motion.

(E). Sentencing.

On September 15, 2014, the district court imposed a 225 month term of imprisonment upon Miller, three years of supervised release, and restitution in the amount of $5606 with a special assessment of $100.

(F). Direct appeal proceedings.

Miller, convinced that the HIDTA/AMTECH photo stills (concerning the plate number) were highly suspect, was based upon Agent Peasley's false and vague testimony concerning how the video enhancements were actually conducted and by who as there was no chain of custody document ever submitted by the government. Miller filled a FOIA request to HIDTA, making an explicit request in reference to precisely what type of tests were conducted on the surveillance evidence in Miller's case, and by who. See App. H, copy of a FOIA request. Miller was endeavoring to discern, by his request, the validity of the process utilized by HIDTA and the chain of custody in relation to the evidence (i.e., who had what, when and how the evidence was handled).

HIDTA subsequently responded to Miller's request. Therein, in response to each of Miller's specific inquiries concerning their handling of the evidence in Miller's case, a representative of HIDTA stated:

> HIDTA does not maintain or possess any public records of photos or documents described in your request. HIDTA does not maintain or possess video footage and still as described in your request. HIDTA does not maintain or possess any records relating to your request for a "chain of custody evidence" HIDTA does not maintain or possess any record of information regarding the testing as described in your request. HIDTA does not maintain or possess any information regarding any communications regarding any communications by phone, fax, email or otherwise as described in your request.

See App. I, copy of HIDTA response.

Armed with this new intel—that HIDTA never dealt with or handled the surveillance evidence in Miller's case—Miller transcribed several letters to appellate counsel, Mr. Kupsis, putting him on notice of HIDTA's response to his FOIA request. Miller also requested on several occasions (via phone, when Miller could actually get in touch with Kupsis, letters and emails) that Kupsis raise, inter alia, a due process challenge to the chain of custody regarding the AMTECH evidence pursuant to HIDTA never handling this evidence. See App. J, emails dated 12/22/14 and 3/16/15.

Miller, via email, again advised Kupsis that he never confessed to any crime. See App. J email of Miller to Kupsis, dated 3/2/15. On one of the rare occasions that he (Miller) did catch him (Kupsis) in his office, he advised Kupsis to be sure to allow him to see the appeal brief before it was filed in the court. See 3/16/15 email, App. J.

Significantly, although Miller was able to garner a general understanding, based upon his curt and minimal conversations with Kupsis, that he (Kupsis) would be challenging the effectiveness of Miller's trial attorney on direct appeal in some context... Kupsis never, at any time, discussed the ramifications of proceeding on Direct Appeal with any claims of IAC without, for example the record being developed enough to bring all claims of IAC against his trial attorney. That, pursuant to controlling Seventh Circuit precedent in *People v. U.S.*, 403 F.3d 844, 847-48 (7th Cir. 2005), for example, Miller would essentially, for the most part, be barred from challenging other aspects of his trial attorney's ineffectiveness in a collateral attack on his conviction and sentence if he moved forward with any claims of IAC on Direct Appeal.

Against this backdrop, Mr. Kupsis did, in fact, raise claims of IAC on direct appeal, filing the opening brief without even allowing Miller to review it. More specifically, Kupsis raised two claims on Direct Appeal in relation to Miller's conviction. The first claim dealt with whether or not the trial court erred when it determined that Agent Peasley's false testimony as to the determination of the license plate numbers and bank account balances was harmless and did not impact Miller's right to a fair trial. Incorporated into this argument was a perjured testimony claim surrounding Peasley testifying to the identity of the vehicle as belonging to Miller.

Second, Kupsis asserted that counsel's representation of Miller was ineffective for 3 reasons. First, counsel failed to properly object to the in-court identification of Miller at trial by Hoffman. Second, counsel failed to impeach Peasley with the fact that he had previously mischaracterized the testimony of Tauber, the deceased teller, as identifying Miller. Third, counsel failed to correct Agent Peasley's inaccurate testimony as to Miller's bank account balance.

After receiving the brief, Miller wrote several emails and letters to Kupsis concerning issues that were not raised, that Miller wanted to raise on appeal, eg., among other things, a challenge to the chain of custody. See App. J, copy of email from Miller, dated 3/16/15. Miller also made it clear that he wanted to see a copy of the reply brief before it was filed by Kupsis. Furthermore, Miller unsuccessfully sought permission to file a supplemental appeal brief to the Seventh Circuit, raising claims that he, himself (Miller), wanted reviewed by the court. Specifically issues counsel failed to raise pertaining to the chain of custody of the AMTECH evidence.

Again, Kupsis ultimately filed the reply brief (to the government's response) without consulting or allowing Miller to review the said pleading. Miller, again, transcribed a letter to Kupsis elaborating upon the fact that Kupsis failed to speak and confer with him before filing the initial brief, then failed to allow Miller to see the reply brief before it was filed as he was asked

to do; Miller again, spoke on how Kupsis failed to raise claims that Miller wanted raised on appeal. See App. J, copy of 3/16/15 letter to Kupsis.

Subsequent to briefing by both parties, oral arguments were granted by the Seventh Circuit. It was at this point that Kupsis misled the Seventh Circuit Court of Appeals, by asserting that he advised Miller of the ramifications of proceeding on Direct Appeal with any claims of IAC. See oral arguments, Appeal No 14-2779. This is Miller's contention, and swears under penalty of perjury that Mr. Kupsis did not do. After oral arguments, Miller's case was submitted to the court for issuance of a decision.

(G). Decision by the Seventh Circuit.

On July 22, 2015, the Seventh circuit issued a decision affirming Miller' conviction and sentence. See *U.S. v Miller*, 795 F.3d 619 (7th Cir. 2015).

In short, Miller raised three claims on appeal: (1) Agent Peasley presented perjured testimony in relation to his description of who was responsible for sharpening the image on the AMTECH evidence to identify the license plate number; (2) Agent Peasley's perjured testimony surrounding Miller's bank account being overdrawn; and (3) a claim of IAC, asserting that Tavitas was ineffective surrounding the in-court identification of Miller. See *Miller*, 795 F.3d 619-623. The Seventh Circuit, in deciding Miller's case, acknowledged that a series errors did occur in relation to the trial proceedings and Tavitas's representation of Miller. All of the said errors, however, were either "harmless," "negligible" or did not "prejudice" the outcome of the proceedings. The Seventh Circuit, thus, affirmed Miller's conviction and sentence.

(H). 2255 motion and proceedings in the Seventh Circuit thereafter.

In February 2017, Miller filed a timely 2255 motion in the district court. (R. 144). He also filed two supplements to that 2255 motion (R. 155 and 157).[2] Cumulatively, Miller raised

[2] The supplement, Civil Doc. 157, was filed as a result of new information Miller acquired from Kupsis in May 2018. More specifically, in the latter part of 2017 on up through the first part of 2018, Miller was corresponding with Kupsis, trying to obtain any *Brady/Jencks* material Kupsis had in his possession in relation to Miller's case file. It was at this time that Kupsis sent Miller a copy of Detterline's search warrant affidavit. Upon reading Detterline's

several claims in his 2255, including, but not limited to (1) Kupsis was ineffective for failing to consult with, and advise Miller of the adverse ramifications of raising any claims of IAC on Direct Appeal; (2) two claims of IAC surrounding Tavitas's failure to investigate and raise two separate Fourth Amendment challenges to the admission of Miller's alleged confession (and, incorporated into that claim, a Due Process claim surrounding the fabrication of evidence); and (3) a *Brady v. Maryland*, 373 U.S. 83 (1963) claim concerning the prosecution's withholding of material evidence, the existence of fabricated evidence perpetrated by Agent Peasley, a member of the prosecutions team. Id. R. 144, 155 and 157.

On October 21, 2019, the district court issued an order denying Millers §2255 motion, and denied a COA without conducting an evidentiary hearing. App. B. In doing so, the district court repeatedly misapprehended, and misconstrued the underlying basis of Miller's arguments, and ignored relevant parts of the record and documentary evidence attached to Miller's 2255 motion and supplemental pleadings that materially support Miller's claims that, if proven true, would entitle him to relief from his conviction.

Miller filed a timely notice of appeal, and COA to the Seventh Circuit Court of Appeals, in December, 2019. On September 25, 2020, the Seventh Circuit issued an order summarily denying Miller's COA, without transcribing a written opinion. On or about January 3, 2021, Miller filed a petition for rehearing, rehearing en banc. On February 1, 2021, the Seventh Circuit issued an order denying that petition. This Writ of Certiorari followed.

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affidavit, Miller discovered, for the first time, that Peasley identified that analyst at HIDTA as "Ken Forsythe". From there, Miller filed another FOIA to HIDTA asking them if they had any information on an employee by the name of Ken Forsythe who worked for their organization between the years of 2011 and 2012. See App. K. HIDTA responded on 5/30/18 stating that they never employed and have no information on or about anyone named "Ken Forsythe". See App. L, HIDTA FOIA response. That FOIA response formed the underlying basis of the second supplemental motion, Civil Doc. 170, raising additional *Brady* claims, claims of IAC and *Franks v. Delaware*.

II.

REASON FOR GRANTING WRIT

This court should grant Certiorari for three intricately related reasons. First, this court should decide, as a matter of first impression pursuant to Supreme Court Rule 10(b), whether an attorney has an affirmative duty to consult with his client surrounding the adverse ramifications of raising any claims of ineffective assistance of counsel ("IAC") on Direct Appeal, and clarify whose choice it is to decide whether to raise IAC claims on Direct Appeal: The Attorney or the Defendant?

Here, based on the fact that Miller has documentary evidence (in conjunction with the sworn allegations in his §2255) in support of his position that his appellate attorney never advised him of the ramifications of raising any IAC claims on Direct Appeal pursuant to *People v. U.S.*, 403 F.3d 844, 846 (7the Cir. 2005) and *U.S. v. Flores*, 739 F.3d 337, 341 (7th Circ. 2013), compared to appellate counsel's contentions to the Seventh Circuit during oral arguments (on Miller's Direct Appeal) that he did advise Miller of such ramifications(2) jurist of reason could debate that this material dispute in the record, concerning Miller's failure to consult claims, warrants an evidentiary hearing (3) or is adequate to deserve encouragement to proceed further" *Slack v. McDaniels*, 529 U.S. 473, 483-04 (2000), contrary to the Seventh Circuit's summary dismissal of Miller's COA on this claim—which essentially disregarded this court exhortation in *Buck v. Davis*, 137 S.Ct. 759 (2017) that "The [COA] inquiry...is not co-extensive with a merits analysis."

Intricately related to the resolution of this failure-to-consult claim is the manner in which the district court ruled on the merits of the remainder of Miller's IAC claims. In sum, based on the resolution of Miller's failure-to-advise claim, jurist of reason can debate whether the remainder of Miller's IAC claims against his pre-trial and trial attorneys are procedurally barred.

Second and for example, jurist of reason would agree that the Seventh Circuit's decision summarily affirming the district court's denial of Miller's COA conflicts, overwhelmingly, with this court's decisions in *Brady v. Maryland, Kimmelman v. Morrision*, 477 U.S. 365 (1986) and *Franks v. Delaware*, 438 U.S 154 (1978), warranting the exercise of this court's supervisory authority under Supreme Court Rule 10(c).

On the former front, Miller presented evidence that Agent Peasley, a member of the "prosecution's team" failed to disclose the fact that he fabricated the information about HIDTA's handling of the AMTECH evidence in several documents, including Detterline's affidavit, his (Agent Peasley's) search warrant affidavit, Peasley's arrest warrant and Peasley's grand jury testimony, information that was surely "impeaching" and "Material" to the outcome of not just the trial, but also, three pre-trial motions Miller could have filed challenging evidence presented by the government in its case.

On the latter front, Miller presented evidence that Agent Peasley did not have an arrest warrant at the time he seized Miller, but only a search warrant for Miller's truck; and that Peasley presented fabricated evidence in two search warrants and an arrest, and this false information was provided to a judiciary with a "reckless disregard for the truth" in violation of *Franks v. Delaware*, supra, in order to obtain those warrants.

This court should thus grant Certiorari pursuant to Supreme Court Rule 10(b) & (c) for the purposes of answering a legal question of first impression in this court and also, assuring that the decisions issued by the Seventh Circuit maintains uniformity with the decisions of this court.

Standard of Review

28 U.S.C. §2253(c) permits the issuance of a COA only where a petitioner made a "substantial showing of the denial of a constitutional right." *Slack v. McDaniels*, 529 U.S. 473,483-84 (2000). Significantly, this court, in *Buck v. Davis,* 137 S.Ct 759, 773 (2017) clarified that "[T]he [COA] inquiry…is not coextensive with a merits analysis. At the COA stage, the

only question is whether the applicant has shown that "jurist of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." (citing *Miller-El v. Cockrell*, 527 U.S. 322, 336 (2003)). *Id.*

Summarizing the requirements for issuance of a COA, in *Miller-El* v. Cockrell, this court stated:

> "The COA determination under 2253(C) requires an overview of the claims in the habeas petition and general assessment of their merits...A COA does not require a showing that the appeal will succeed. Accordingly, a Court of Appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief... We do not require petitioner to prove, because issuance of a COA, that some claims would be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail."

Id. At 336-338

"A COA does not require a showing that the appeal will succeed..." should be kept in mind when examining the legal validity of the Seventh Circuit's decision to summarily affirm the district court's denial of Miller's COA.

A.

AS A MATTER OF FIRST IMPRESSION IN THIS COURT, DOES AN ATTORNEY'S FAILURE TO ADVISE HIS CLIENT OF THE ADVERSE RAMIFICATIONS OF RAISING ANY CLAIMS ON IAC ON DIRECT APPEAL CONSTITUTE THE SUBSTANTIAL DENIAL OF A CONSTITUTIONAL RIGHT, DEBATABLE AMONG JURISTS OF REASON, AS CONTEMPLATED BY THIS COURT'S DECISION IN *BUCK V. DAVIS*, 137 S.CT 759 (2017) PARTICULARLY WHEN THE DISTRICT COURT FAILED TO CONDUCT AN EVIDENTIARY HEARING TO RESOLVE THE ISSUE, WHERE MILLER HAD MATERIAL EVIDENCE SHOWING THAT HIS ATTORNEY NEVER CONSULTED WITH HIM IN THAT REGARD?

The underlying basis of Miller's claim here is that Kupsis failed to advise him that, pursuant to controlling precedent in this circuit that, "[i]neffective assistance of counsel is *a Single ground for relief no matter how many failings the lawyer may have displayed.*" *People v. U.S.*, 403 F.3d 844, 846 (7th Cir. 2005), so "[a] litigant gets to argue ineffective assistance...*just once.*" *U.S.* v. *Flores,* 739 F.3d 337, 34 (7th Cir. 2013), and with that being the case, if Miller

chose to raise *any* claims of IAC on direct appeal, he would "*relinquish any opportunity to obtain relief on collateral review*." *Id.,* at 342, in a 2255 motion (emphasis added).

Most importantly here, and the crux of Miller's claim is grounded in how this court "regularly ask counsel at oral argument whether the defendant is *personally aware* of the risk of presenting an ineffective assistance argument on direct appeal and, if so, *whether the defendant really wants to take that risk.*" Flores, at 341—a case repeatedly cited by Miller, but ignored by the district court when ruling on [his] 2255 motion, instead citing *Garza v. Idaho*, 139 S.Ct. 738, 746 (2019) and *Jones v. Barnes*, 463 U.S. 745, 751 (1983), which are inapposite to the facts of Miller's case.[3]

Miller asserts that this is precisely what occurred in the case at bar: a three judge panel of the appellate court asked Kupsis during oral arguments, whether he advised Miller of the ramifications of proceeding, on direct appeal, with *any claims of IAC* and "whether [Miller] really want[ed] to take that risk". *Id.* See, *U.S. v. Miller*, Appeal No. 14-2779 (oral arguments). Kupsis falsely responded to that direct inquiry by saying "Yes." *Id.* Miller, by contrast, averred under the penalty of perjury in his §2255 motion, that he was not made aware of such ramifications by Kupsis, with documentary evidence in support of his contentions. See, 2255 memo at 22-29; also see App. J various emails and letters.

In similar situations, several jurist of reason, in various different, but similar context, have routinely found appellate attorneys ineffective for failing to properly advise defendants on

[3] Inapposite because the Garza decision, in particular, deal with whether *Roe v. Flores-Ortega's* (528 U.S. 470 (2000)) presumption of prejudice, in relation to an attorney's failure to file a notice of appeal waiver—a legal question that was answered in the affirmative. The outcome of the *Garza* case, based on the specific question presented to the court, however, was made in the limited context of the attorney having discretion to choose among arguments traditionally raised on direct appeal, those dealing with errors made during the course of the trial, plea and sentencing phases of the proceedings. *Garza*, 139 S.Ct. at 747. By contrast, this court has carved out an exception that that generally accepted principle of law when it comes to the defendant's attorney attempting to raise IAC claims on direct appeal, to wit: pursuant to *U.S. v. Flores*, 739 F.3d 337 (7th Cir. 2013), counsel must consult with the defendant concerning the ramifications of such a maneuver and ask the defendant if he really wants to move forward with raising any IAC claims on direct appeal—a real tangible risk this court has repeatedly emphasized over and over again. See e.g., *U.S. v. Miller*, 327 F.3d 598, 602 (7thc Cir. 2005); *Harris v. U.S.* 366 F.3d 593, 595 (7th Cir. 2004); *U.S. v. Harris*, 394 F.3d 543, 557-59 (7th Cir. 2005); *Fuller v. U.S.*, 398 F.3d 644, 649 (7th Cir. 2005).

procedural issues that later had an adverse effect on the defendants securing habeas corpus relief from their convictions. See e.g. *U.S. v. rel Brumley v. Godinez*, 1995 U.S. Dist. LEXIS 8725 (N.D. Ill 1995) (failure to advise concerning right to habeas corpus); *U.S. v. Johnson*, 308 Fed. Appx. 768, 769 (5th Cir. 2009) (failure to advise concerning right to file a writ of cert); *Gunner v. Welch*, 749 F.3d 511 (6th Cir. 2014) (failure to advise on time limit to file a habeas corpus petition). For this reason, alone, Miller has established a showing of a substantial denial of a constitutional right, as contemplated by 28 U.S.C. 2253(c), in that his claim that counsel was ineffective for failing to advise him of the ramifications of proceeding with any claims of IAC on appeal is an "issue debatable among jurist of reason." See, *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003).

The district court and Seventh Circuit, by declining to issue a COA on this debatable claim, failed to recognize that Miller need not establish that he'd win on the merits of his claim on appeal. See, *Buck v. Davis*, 137 S.Ct. 759, 773 (2017) (clarifying that "The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the *only question* is whether the applicant has shown that "jurist of reason could disagree with the district court's resolution of his constitutional claims or that jurist could conclude the issue presented are adequate to deserve encouragement to proceed further."); *Id.* At 773 (stating, "[A] court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims", and ask "only if the district court's decision was debatable" (quoting *Miller-El*, 537 U.S. at 327)); *Id* at 774 (stating, "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." (quoting *Miller-El*, 537 U.S. at 328)). Rather, the decisions in *U.S. v. rel Brumley,* supra, *U.S. v. Johnson,* supra and *Gunner v. Welch*, themselves, establish that Miller's failure-to-advise claim is an issue that could be resolved differently by jurist of reason. But there's more.

Miller argued that he was "prejudiced" by Kupsis's omission in this regard, *Strickland v. Washington*, 466 U.S. at 691 (1984), because, had he been put on notice of the ramifications of proceeding on appeal with any claims of IAC, he would have categorically chose to preserve his right to bring all of his IAC claims in his §2255 motion, because the record was not developed enough for Miller to have raised several claims, that he raised in his §2255 motion, on direct appeal.[4]

Now, as a result of Kupsis's material omission on this regard, the district court has found that the four claims in relation to trial counsel's ineffectiveness, during the pre-trial and trial stages of the proceedings, are procedurally barred from being raised in §2255 proceedings (See App. B, pg. 17, district court order), although the record was not properly developed for those claims to be raised on direct appeal.

As such, the "outcome of [Miller]s direct appeal would have been different" *Strickland,* Id. At 694, had Kupsis properly advised Miller of the legal formalities associated with moving forward on appeal with any claims of IAC pursuant to controlling Seventh Circuit case law precedent: Miller would have told Kupsis to preserve his right so as to bring all of his IAC claims in the §2255 proceedings, thus, preventing the district court from denying Miller relief on any of those grounds for relief, without being in a position to consider all of Miller's claims at once, the "cumulative effect" of any errors committed by trial counsel. *Malone v. Walls*, 538 F.3d 744, 762 (7th Cir. 2008). And most importantly, prevented the district court from finding that Miller's four claims against Tavitas are "procedurally barred". App. B, pg. 9.

Furthermore, pursuant to *U.S. v. rel Brumley,* supra, *U.S. v. Johnson,* supra and *Gunner v. Welch,* jurist of reason could debate the correctness of the district court's procedural ruling in

[4] Coined as the failure to advise claims and independent record claims in Miller's 2255 motion. The claims are distinguished, one set of claims from the other based on the arguments where the record was not developed enough to raise the claims of IAC on direct appeal (see 2255 at 23-27. The failure to advise claims) and where the record was developed enough to raise IAC claims on direct appeal (22 2255 at 27-30 the independent record claims) See COA at 31-33.

failing to conduct an evidentiary hearing on this material issue. This is so because the district court failed to resolve the material dispute between Kupsis's allegations at oral arguments that he extended Miller advice surrounding the ramifications of moving forward with any IAC claims on direct appeal, then asked Miller whether he wanted to raise the said claims on direct appeal: compared to Miller's sworn allegations in his §2255 motion, pgs. 22-30, that he (Kupsis) did not, with evidence in support of those claims, App. J, (emails and letters). Controlling precedent in this court dictates that it's not enough for the district court to automatically accept and believe Kupsis's oral argument contentions over Miller's sworn allegations in his §2255—especially when Miller has presented documentary evidence in support of his contentions that Kupsis never extended him such advice. See 3/16/15 email, App. J. To the contrary, pursuant to this court's decision in *Taylor v. U.S.*, 287 F.3d 658, 660 (7th Cir. 2002), jurist of reason would agree that the district court procedurally erred in failing to conduct an evidentiary hearing to resolve this material dispute in the record. 287 F.3d at 660 (stating that, "if the record on a motion to vacate contains an evidentiary conflict on a material issue of fact, a judge must hold an evidentiary hearing to decide who is telling the truth—it is not sound to say that, in every conflict between a movant and his attorney, the attorney must be believed."); see also, *Bruce v. U.S.*, 256 F.3d 592, 598 (7th Cir. 2002) (stating, "District court must conduct and evidentiary hearing in a §2255 proceeding only when the allegations raised in the motion, if true, would entitle petitioner to relief").

Finally, the importance of a decision issued by this Court, one way or another, does not turn on whether Miller, himself, stands in the limelight of public recognition or in the shadows of anonymity. Rather, the significance of the outcome of this case rests on the procedural impact that a determination and clarification of this court is likely to have on the future course of pro-se litigants in the same position as Miller, and hence, on the lives of countless others.

Imagine, for example, a judicial world where attorneys, at least those who practice law in front of the Seventh Circuit, knows, pursuant to *U.S. v. Miller*, Appeal No: 14-2779, that their free to mislead the appellate court, with impunity, during oral arguments, in reference to whether they actually consulted with their clients about the adverse ramifications of raising any claims of IAC on direct appeal. The content of the Pandora's box, released upon the substantive and procedural rights of criminal defendant's right to file §2255 motions challenging their attorney's ineffectiveness, would be earth shattering. By no more than a unilateral stroke of the pen, on appeal, without a defendant's consent, and without any change in law implemented by Congress—direct appeal attorneys would essentially be granted the authority to suspend a federal criminal defendant's right to [the modified] Great Writ [i.e., §2255], with no other recourse for the defendant to raise collateral attacks to their convictions and sentences outside of presenting new evidence of factual actual innocence, or the (rare) availability of a new Supreme Court decision made retroactively applicable on collateral review pursuant to 28 U.S.C. §2255(h).

In short, when considered from this perspective, the jurist of reason could conclude that the issue presented instantly, both substantively and procedurally, are "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. 731, this question deserves this court's attention and clarification as the district court believes that it is the attorney's choice whether to raise IAC claims on direct appeal and not the defendant's and counsel does not need to consult with the defendant regardless of the adverse ramifications on procedural issues that may later prevent the defendant from securing habeas corpus relief from their conviction.

In other words, does an attorney have the right to raise IAC claims on direct appeal without advising his client of the adverse ramifications of raising those claims at that time, thereby sabotaging the defendant's opportunity to raise any IAC claims on collateral review? And does this choice to raise IAC claims on direct appeal belong to the client pursuant to *Peoples v. U.S.* 403 F.3d 844, 846 (7th Cir. 2005) and *U.S. v. Flores*, 739 F.3d 337, 341 (7th Cir.

2013), or to the attorney pursuant to *Garza v. Idaho*, 139 S.Ct 738, 746 (2019) as the district court believes.

B.

DOES THE SEVENTH CIRCUIT'S DENIAL OF MILLER'S REQUEST FOR A COA, GROUNDED IN MILLER'S CONTENTIONS THAT THE PROSECUTION FAILED TO TIMELY DISCLOSE ITS USE OF FABRICATED EVIDENCE IN SEARCH AND ARREST WARRANTS, CONSTITUTE AN ISSUE DEBATABLE AMONG JURIST OF REASON PURSUANT TO SLACK V. MCDANIELS, THE SUBSTANTIAL DENIAL OF A CONSTITUTIONAL RIGHT, AND MOST IMPORTANTLY, DOES THIS DECISION CONFLICT WITH THIS COURT'S DECISION IN BRADY V. MARYLAND, SO AS TO WARRANT THE GRANT OF CERTIORARI BY THIS COURT UNDER SUPREME COURT RULE 10(C)?

(I). Standard of Review.

The law requires the prosecution to produce *Brady* material whether or not the defendant requests any such evidence. *Stickler v. Green,* 527 U.S. 263 (1999). More specifically, due process imposes an "inescapable" duty on the prosecutor "to disclose the known, favorable evidence rising to a material level of importance." *Kyles v. Whitely*, 514 U.S. 438 (2000). Favorable evidence includes both exculpatory and impeachment material that is relevant to either guilt or punishment. *Bagley v. U.S.,* 473 U.S. 674-76 (1985).

Intricately related to this legal inquiry is the fact that a prosecutor will be held responsible for the conduct (and misconduct) committed by members of the "prosecutor's team". The term "prosecutor's team" has been broadly construed, and it includes both investigative and prosecutorial personnel. *U.S. v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996); *U.S. v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995) (the "prosecutor is deemed to have knowledge of and access to anything in the custody or control of any federal agency participating in the same investigation of the defendant.").

Members of the prosecutor's team may include testifying police officers and federal agents who submit to the direction of the prosecutor and aid the government in its investigation. *U.S. v. Linder*, 2013 U.S. Dist. LEXIS 29641 at 109 (N.D. III (2013).

For example, in *U.S. v. Wilson*, 237 F.3d 827, 832 (7th Cir. 2001), the Seventh Circuit held that members of the Marshals service discover any information that might plausibly be helpful to the defense, the Marshals Service becomes a part of the prosecutor's team and is acting as an arm of the government. *Id.* 832.

Keeping these legal principles in mind, a *Brady* violation has three elements. *Stickler*, 527 U.S. 281-82. First, there must be evidence that is favorable to the defense either because it's exculpatory or impeaching. *Id. At 281-82*. Secondly, the government must have willingly or in advertently failed to produce the evidence. *Id.* Thirdly, the suppression must have prejudiced the defendant. *Id.*

(ii). Discussion

Here, the record clearly reflects that Miller requested all *Brady* and *Jencks* material, and that the government purportedly handed it all over to the defense. Crim. Doc. # 46. But Agent Peasley—who was the lead case agent, worked closely with the prosecutor, sat at the table with the prosecutor during trial and whose testimony made up one fourth of the trial transcript—a member of the "prosecutor's team", failed to disclose the fact that he fabricated the information about HIDTA's handling of the AMTECH evidence and identification of the license plate numbers, including Detective Detterline's affidavit (App. C), his (Agent Peasley) search warrant affidavit (App. D) his (Agent Peasley) arrest warrant (App. E) and his (Agent Peasley) grand jury testimony (App. F), information that was surely "impeaching" and "material" to the outcome, of not just the trial, but also, three pre-trial motions Miller could have filed (elaborated upon in the next claim) challenging evidence presented by the government in its case: a motion to dismiss the indictment; a motion to suppress Miller's alleged confession based on the

impermissible warrantless arrest executed against him; and a motion to suppress his alleged confession, under *Franks v. Delaware*, based on materially false statements made in the subsequent arrest warrant affidavit.

Furthermore, intricately related to Peasley's failure to disclose the material evidence to Miller concerning the HIDTA fabrication is Peasley's failure to transcribe and/or disclose the two required FBI reports pertaining to his handling of the AMTECH evidence.

More specifically, pursuant to Section 3.3.5 of the FBI policy guide, the FBI personnel "must"[5] document in a report "all reviews and searches of Digital Evidence ("DE") from the point of the receipt of DE through completion of the search..." and establishes how "[t]he documentation must be serialized [in the report] to the investigation file". The said policy states that "such documentation should identify, at a iminium, the general nature and manner in which the search of the media was conducted, major steps taken during the search, and forensic tools employed during the search." App. M.

In another section of that same policy, 3.3.5.2, it requires the agent handling the DE to formulate a "DEtx Report" (Digital Evidence Technician's Report) which is described as a "factual report that details who performed the work, when it was performed, what was reviewed and found, and where it was found. See App. M, FBI Policy.

Miller asserts that these two reports were not created or intentionally not turned over, we now know, because Peasley never turned the AMTECH evidence over to HIDTA—so Peasley had a reason not to turn over the reports. Miller, furthermore assets that, in light of the fact that Peasley is a member of the "prosecutor's team", and the release of the FBI reports (via discovery) was necessary for Miller's attorneys to review the chain of custody prior to trial so as to be in a position to formulate a defense against the government's case... Failure on the part of

[5] The FBI policy's use of the mandatory term "must" dictates that Peasley had no discretion in whether to follow the policy. See e.g. *Hewitt v. Helms*, 459 U.S. 460 (1983) (stating that statute or regulation must use language of an unmistakably mandatory character requiring that certain procedures... "must" be employed does not specify substantive predicates)

Peasley and his FBI constituents to transcribe and disclose the report and chain of custody documentation is a *Brady* violation, in and of itself.

This is so because Peasley's failure to adhere to FBI policy directive 3.3.5 and 3.3.5.2 of the FBI Policy manual, violates Miller's due process rights under the *Accardi* doctrine. See *Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (holding that "agencies may not violate their own rules and regulations to the prejudice of others.")[6]

Miller, furthermore, needed access to the said reports to be in a position to know whether HIDTA ever handled the AMTECH evidence in any context. Because, (if not), if HIDTA never handled the AMTECH evidence—and it did not, See FOIA response, App. H-I, K-L—again, Miller would have been in a position to file a pre-trial motion to dismiss the indictment based up on the perjured testimony Peasley provided to the grand jury on this issue. (App. F. pg. 13-14).

Thus, under the first prong of the *Brady* inquiry, Peasley's categorical failure to timely disclose his fabrication about the HIDTA identification, transcribe and turn over the two FBI reports, are surely "favorable" and "exculpatory".

Second, the record clearly reflects that Peasley, as part of the "prosecutor's team" "willfully" failed to release the said information about the fabrication of the HIDTA identification and the said FBI reports as part of the pre-trial discovery under *Brady*. Rather, the only evidence released prior to trial on this subject is Peasley's affidavit and the working order. Consequently, based upon the fact that the government, via Peasley, had a duty to disclose its use of the said fabricated information and reports in time for the defense to make use of it but did not... Miller has satisfied the second "suppression" prong of the *Brady* inquiry.

[6] FBI Policy, Section 1.2 "Background, pg. 1" states "All personnel that encounter DE (Digital Evidence) must understand how to properly handle, review and process DE to avoid damaging the integrity of the evidence or violating the constitutional rights of a person during the course of an investigation". (emphasis added). The FBI policy, itself, thus contemplates protecting a criminal defendant's constitutional rights by complying with the regulations set forth therein. App. M. (Policy Statement 8.1).

Finally, to find prejudice under *Brady*, it is not necessary to find that the jury verdict would have come out different. *Kyle*, 515 U.S. at 434. In suffices that there be "a reasonable probability of a different result" as to guilt. *Id.* Prejudice exist "when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id.*

Here, the government's failure to release the said fabricated information and reports via Peasley was "material" to the outcome of Miller's case in (at least) two different ways. First, the release of the said information and reports would have put Miller on notice that HIDTA never dealt with the AMTECH evidence in any context. Tavitas, thus, would have been in a position to emphatically object to the admissibility of the AMTECH evidence not only on the grounds as being in violation of Fed. R. Evi. Rule 901 and void of a proper chain of custody...but also, as being fraudulent representations to the court, in that, according to representatives of HIDTA, they never dealt with any AMTECH evidence handed over to them by the FBI concerning Miller's case. (App. H).

Keeping these facts in mind, had Tavitas been in a position to move to have the AMTECH evidence precluded from being admitted into evidence from a review of the said reports, Miller would have been successful in eliminating any physical evidence the government would have had that tied him to the bank robbery, via Miller's truck allegedly being on the scene of the crime. As such, since the focus of the "prejudice" prong of a *Brady* inquiry is on the "potential impact that the undisclosed evidence might have had on the fairness of the proceedings," *Kyle*, 115 S.Ct. 1566, rather than on the overall strength of the government's case, the court, in light of the fact that the jury was exposed to inadmissible evidence as a result of the government's failure to disclose the fabricated information and the said FBI reports, cannot be assured as to whether Miller received a trial with a "verdict worthy of confidence." *Kyle*, 115 S.Ct. 1566.

Second, had the FBI reports and chain of custody been released prior to trial, Tavitas could have been in a position to move to have the indictment lodged against him, dismissed on the grounds that any testimony that Peasley gave at the grand jury proceedings concerning the HIDTA identification was perjured.

More specifically, at pages 13-14 of the grand jury proceedings, Peasley testified that the AMTECH evidence was sent off to HIDTA for enhancement, for the purposes of putting him in a position to identify the license plate number on the 1998 Ford Explorer. See App. F. pg. 13-14. However, as the FOIA response from HIDTA reveals, App. H-I, K-L, this said testimony of Peasley was perjured in violation of Miller's due process right to a fair trial. Add this perjured testimony in with the fact that (a) Peasley also presented false testimony at the grand jury proceedings about Tauber identifying Miller as the bank robber (because she did not) and (b) Peasley admitting at the grand jury proceedings that Hoffman never even knew that the bank was being robbed until after the robbery was over. See App. F. pg. 5. And collectively, had Tavitas had access to the said information to know that Peasley never forwarded the AMTECH evidence to HIDTA for enhancement, he would have been position to move to have the indictment dismissed based upon the fact that, absent any existence of the HIDTA identification and absent any identification by Tauber and Hoffman... The grand jury would not have been in a position to find probable cause that Miller violated 18 U.S.C. 2113. Stated another way: Peasley's perjured testimony in relation to the HIDTA identification and Tauber (that the prosecution knew or should have known was perjured) "substantially influenced the grand jury's decision to indict." See, *U.S.* v. *Vincent*, 416 F.3d 593, 600 (7th Cir. 2005), to the point that Miller was "prejudiced" by the presentation of that said evidence." *Id.*

A jurist of reason could debate, consequently, whether Miller established that he was "prejudiced" under the third prong of the *Brady* analysis, in that the government violated his due process right to a fair trial by refusing to turn over or disclose the said information via Peasley,

and the true reports required by FBI protocol and policy, including the chain of custody of the AMTECH evidence. This court should thus grant certiorari to address the Seventh Circuit's decision to the contrary.

C.

DOES THE SEVENTH CIRCUIT'S DENIAL OF MILLER'S REQUEST FOR A COA ON TWO SEPARATE PRE-TRIAL, 4TH AND 5TH AMENDMENT IAC ISSUES—ONE CITING BROWN V. ILLINOIS, 422 U.S. 590 (1975), THE OTHER, FRANKS V. DELAWARE, 438 U.S., 154 (1978)—CONSTITUTE DECISIONS DEBATABLE AMONG JURIST OF REASON PURSUANT TO BUCK V. DAVIS, 137 S.CT 759 (2017) AND MOREOVER SUBSTANTIALLY CONFLICT WITH THIS COURT'S DECISION IN KIMMELMAN V. MORRISON, 477 U.S., 365 (1986) SO AS TO WARRANT THE GRANT OF CERTIORARI BY THIS COURT UNDER SUPREME COURT RULE 10(C), PARTICULARLY WHEN THE INFORMATION UTILIZED IN THE SEARCH AND ARREST WARRANT WERE DERIVED FROM UNDISCLOSED, FABRICATED INFORMATION AND EVIDENCE?

(a). *Brown v. Illinois* claim

(i). Tavitas performance was deficient

In Kimmelman v. Morrison, 477 U.S. 365 (1986), this Court held that counsel's failure to make a timely suppression motion was ineffective assistance where counsel had "neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery" prior to the petitioner's trial on rape charges. *Id.* 385. The court explained in *Kimmelman* "Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principle allegation of ineffectiveness, 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*, 477 U.S. at 375. To make this determination, the court must, of course, examine the Fourth Amendment basis for the IAC claim. *Id.*

Against this backdrop, in a motion to suppress evidence seized pursuant to a violation of the Fourth Amendment the allocution of the burden of proof depends upon whether or not a

warrant was issued. In federal courts, "if the search or seizure was effected pursuant to a warrant, the defendant bears the burden of proven its illegality; if the police acted without a warrant. The prosecution bears the burden of establishing legality." *U.S. v. Longmire*, 761 F.2 411, 417 (7th Cir. 1985)

Here, the record irrefutable reflects that, at the time Peasley arrived at Miller's residence, he only had a search warrant for the vehicle (App. D), but *did not* have a warrant for Miller's arrest. See Trial Tran. 290-291, annexed hereto as Appendix N. Peasley, nevertheless, actually "arrested" Miller, based upon his own testimony—and subsequent affidavit to the arrest warrant, App. E; and, in doing so, admitted that Miller did not willingly submit to the authority of law enforcement when being arrested. See Trial Tran. 316, App. N.

Miller was thus "arrested"—without a warrant—for the purposes of the Fourth Amendment inquiry—especially since, in this case, at least eight law enforcement officers arrived at his home guns drawn at the time of coming into contact with Miller, placing Miller in handcuffs, and transporting him to the Lansing Police Department against his will. See *California v. Hofari D*, 499 U.S. 621 (1991) (An arrest, of course, is the archetypical "seizure" of a person under the Fourth Amendment): *Brendlin v. California*, 551 U.S. 249 (2007) ("A person is 'seized' when his or her freedom of movement is eliminated by intentionally applied physical force or submission to assertion of authority.").

Keeping these facts in mind, one must make the determination whether Peasley had probable cause to execute that warrantless arrest of Miller. "The probable cause determination is made *at the moment the arrest is made*. *Maltby v. Winston,* 36 F.3d 557 (7th Cir. 1994). "Any evidence, therefore, that came to light after the arrest is not relevant to the probable cause inquiry." *Id.* (emphasis added). Police have probable cause to arrest a suspect if, at any time of the arrest, the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person of reasonable caution into believing that the suspect has committed an offense.

Gonzales v. City of Elgin, 578 F.3d 526, 537 (7th Cir. 2009). "Whether the police acted on probable cause is a determination based on the common-sense interpretation of a reasonable police officer as to the totality of circumstances at the time of arrest." *U.S. v. Villegas*, 495 F.3d 761, 770 (7th Cir. 2007).

Here, the information in Peasley's possession at the time he went to Miller's house in the morning with a *search warrant* for a *vehicle* was not sufficient, as a matter of law, to establish that probable cause existed to arrest Miller. Had attorney Tavitas properly investigated the discovery materials handed over to him by the government, in conjunction with other relevant information that was subsequently brought to his attention in the events leading up to trial... Tavitas would have been able to establish the following facts at a pre-trial suppression hearing in support of the fact that Peasley had no probably cause to "seize" and "arrest" Miller on the morning of January 5, 2012.

First, Agent Peasley never corresponded with anyone at HIDTA for the purposes of getting the AMTECH surveillance video/photo enhanced. And, in fact, lied about the existence of Kenneth Forysthe (HIDTA Technician) See, App. H-I, K-L. Thus, a simple investigation into this matter would have yielded the same type of response Miller received from HIDTA through his FOIA request—that HIDTA never handled or dealt with that evidence in any context; and, since HIDTA never handled the AMTECH evidence, it could credibly be asserted (in a pre-trial motion to suppress) that any AMTECH surveillance evidence and identification of Miller's license plate number in Peasley's possession, allegedly connecting the license plate to Miller's truck, was inadmissible as matter of law to establish that Peasley had probable cause, in any context, to arrest Miller (being that the HIDTA evidence was plainly fabricated).

Second, the bank teller Tauber, at the pre-trial conference between Tauber, the government, and counsel for Miller, unequivocally laid to rest any assumptions that she

identified Miller as the bank robber. See pg. 5, Crim. Doc. 28 Govt. Response to Miller's motion to deposition.

Third, prior trial, the second and only other teller in the bank, Hoffman—according to Peasley's testimony at the grand jury—said that she could not identify the bank robber because, at the time the bank was being robbed, she did not even know that a robbery was occurring. See App. F, pg. 5-6, grand jury testimony. Hoffman furthermore, in a 302 drafted by law enforcement, unequivocally stated that she could not identify the bank robber. App. G.

Thus, had Tavitas eliminated, in a pre-trial motion to suppress the AMTECH surveillance evidence, and both eyewitnesses to the bank robbery, as being evidence in support of probable cause that Miller committed the bank robbery... The government would have bore a heavy burden in proving that there was *any* information in Peasley's possession in support of his position that he had probable cause to arrest Miller at that particular time. In sum, viewed from this perspective, Peasley had nothing: No evidence to tie Miller's vehicle to the crime. No eyewitness to place Miller at the scene of the crime. Only a search warrant for the 1998 Ford Explorer—that was invalid.

As such, Peasley had no probable cause to arrest Miller—in, nor outside of his house. Keeping these facts in mind, and this court, in *Brown v. Illinois*, 422 U.S. 590 (1975), held that a confession following an illegal arrest must be excluded from evidence unless it's sufficiently attenuated to purge the primary taint. The threshold requirement for admissibility is that the confession was voluntary; if so, then the court considers the temporal proximity of the illegal conduct to the statements, the presence of any intervening circumstances and most importantly, the purpose and flagrancy of police misconduct. *U.S. v. Reed*, 349 F.3d 457, 463 (7th Cir. 2003) (Citing, *Brown*, 422 U.S. at 603-04).

Here, as Miller has asserted from the outset of the judicial proceedings he never, *ever*, confessed to the bank robbery, or the vehicle in the video as belonging to him in any context.

Rather, if anything, Peasley—who has a clear track record of intentionally mischaracterizing words, falsifying evidence, committing perjury, and participating in egregious conduct, in general, inserted imaginary facts into his police report in an effort to generate probable cause to arrest Miller, which is why he sought the arrest warrant *after the fact*. See App. E, January 6, 2013 arrest warrant, with complaint and affidavit annexed thereto, describing, inter alia, Miller's alleged confession as one of the reasons for probable cause for his arrest.

First, Peasley admits that Miller did not "willingly" come to the police department (Trial. Tran. 316). Here, Peasley is essentially admitting to the fact that, when Miller finally came to the door of the house to see what law enforcement wanted with him, Peasley asked him to come to the police department for questioning, Miller asked him why he wanted him to come to the police department; and was he (Miller) under arrest. Peasley said no. From there, Miller told Peasley that, since he's not under arrest, then he's not going anywhere and that they could talk right there at the house. From that point on, Peasley specifically told Miller to cuff up because he was now under arrest. This is what Peasley meant, in his own words, when he said Miller did not go "Willingly." (Trial. Tran. 316).

Later in Peasley's testimony, however, he asserts that he never told Miller he was under arrest; and that Miller "didn't ask." (Trial. Tran. 316). Keeping these facts in mind… If Miller did not "willingly" go to the police station, according to Peasley… The question must be asked: Why wouldn't Miller ask if he was under arrest? Furthermore, if Miller did not willingly go down to the police station and, since Peasley never told him what the interview was about, what would, all of a sudden, possess Miller to confess to the bank robbery? Confess, then, all of a sudden, make more "offhand" statements. (Trial. Tran. 270-71). Just relying upon those portions of the trial record and Peasley's (and Officer Gemeinhart's) testimony on these points were patently unbelievable.

Finally, the Lansing Police Department is only ten minutes away from Miller's residence. Miller was arrested and taken into custody by law enforcement at 6:00, *no later* than 7:00 in the morning. This fact naturally begs the question: Why would it take almost 5-6 hours for Miller to sign a Miranda warning? What happened between the time Miller was taken into custody and the Miranda warning being given at 11:46 am? In sum, Miller's alleged confession (that did not happen), after he was forcefully arrested and taken into custody, was not "voluntary." *Reed,* 349 F.3d 457, 463 (7th Cir. 2003).

On a similar note, there is no bright-line test for temporal proximity. The Seventh Circuit has suppressed statements made two and six hours after arrest, but found admissible a confession made only 45 minutes after an illegal arrest. *Reed*, 349 F.3d 464, 65 (collecting cases). Accordingly, the Seventh Circuit has suggested that the court consider temporal proximity factor in conjunction with the presence of intervening circumstances. *Id.* At 464. The type of intervening events that may serve to attenuate official misconduct include subsequent release from custody, arraignment before a magistrate judge, discussion with counsel, the discovery of other incriminating evidence implicating the defendant and causing defendant to confess spontaneously, the defendant's self-transport from the scene of the illegal arrest to another location and proper arrest on unrelated charges following initial arrest. *Id.* In the present case, even without there being evidence in the record as to the time span between when Miller was arrested by Peasley, none of the intervening events described by the Seventh circuit in *Reed* apply to Miller's case situation. As such, on the temporal proximity factor, instantly, the record does not reflect that the time span between the time Miller allegedly confess was sufficiently attenuated to purge the primary taint of his illegal arrest. *Reed*, supra.

As for the final *Brown* factor, the purpose and flagrancy of the official misconduct: Courts have previously found Fourth Amendment violations flagrant and purposeful where (1) the impropriety of the misconduct was obvious or the officer knew, at the time, that his conduct

was likely unconstitutional but engaged in it nevertheless; (2) the misconduct was investigatory in design and purpose and executed in the hopes that something might turn up. *U.S. v. Carter*, 573 F.3d 418, 425 (7th Cir. 2009). Where the police erred, but the record does not support an inference of bad faith, the violation will generally be deemed non-flagrant. *Id.* At 425-26.

Here, the record could not be any more pellucid in relation to the fact that Peasley "knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless." *Id.* This is unambiguously so, in light of the fact that he showed up to Miller's house with a *search warrant for the 1998 explorer*. Not an arrest warrant for Miller. Again, the arrest warrant—utilizing Miller's fabricated confession therein—did not come until *after* the fact. Peasley, therefore, knew at that particular time he had absolutely no probable cause to arrest Miller for the bank robbery offense. He, nevertheless, did so against Miller's "will" (Trial. Tran. 316), then, endeavored, in his own words, to not let Miller know that he was under arrest(*Id)* until he was in position to gather enough information to create probable cause to arrest Miller. After illegally arresting Miller, Peasley, in his own words, laid out the intent of his interview with Miller, when he stated: "My intent was to ask Miller if he robbed the bank" (Trial. Tran. 292). Clearly, Peasley sought to exploit the illegal arrest of Miller, in every way imaginable. The record, thus, also irrefutable reflects that Peasley's "misconduct was investigatory in design and purpose and executed in the hopes that something might turn up." *U.S. v. Carter*, 573 F.3d 418, 425 (7th Cir. 2009).

In sum, relying upon the relevant factors set forth in *Brown* and its progeny, there was no sufficient attenuation to purge the primary taint of Miller's illegal arrest. His fabricated confession, therefore, should have and would have been suppressed had Tavitas properly investigated Miller's discovery, then, filed a timely pre-trial motion to suppress the evidence.

(ii). Miller was prejudiced by Tavitas's conduct

As a preliminary matter, Miller must again point out the fact that, if law enforcement authorities act without a warrant in executing an arrest—as was the case, instantly—"the prosecution bears the burden of establishing legality." *U.S. v. Longmire*, 761 F.2d 411, 417 (7th Cir. 1985). Keeping this fundamental principle of law in mind, Tavitas's outright failure to file the said pre-trial motion in the instant case, a jurist of reason would agree, was deficient performance that prejudiced Miller, in that Tavitas has effectively shifted the burden of proof over to Miller to prove that his constitutional rights were violated. See e.g., *Malave v. Smith*, 559 F.Supp. 2d 264 (2nd Cir. 2008) (in context of a habeas corpus case, stating that, "[T]his shift in the burden of proof may be problematic... For example, if there were evidence that Malave's statement was voluntary, the prosecution could not possible have met its burden at a suppression hearing; in such a case, one might well ask why Malave should shoulder the burden of proving that the statement was involuntary on habeas review simply because his counsel misunderstood the law."); *Id.*, at 559 F.Supp. 2d 277 n.3 (stating that "whether an outcome determinative shift in the burden of proof due to counsel's ineffectiveness might itself constitute prejudice under *Strickland* is an intriguing question..."); *Huffman v. U.S.*, 2010 U.S. Dist. LEXIS 135872 (4th Cir. 2010) (stating that the burden of proof is upon the petitioner to establish a preponderance of the evidence a claim upon which he seeks to have the judgement vacated in a 28 U.S.C. 2255 proceeding.").

Consequently, for that reason, almost alone, jurist of reason could, at least, debate whether Miller was prejudiced by Tavitas's omissions. But that's not it.

For the reasons set out above, in the "deficient performance" section of this claim, Miller's Fourth Amendment claim was meritorious and would have been successful, for the purposes of Kimmelman and its progeny. Miller was thus prejudiced in that regard by Tavitas's omissions. He was furthermore prejudiced because, absent Miller's (fabricated) confession being

submitted as evidence by the government. The Seventh Circuit, in affirming Miller's conviction, would not have been in a position to rely so heavily upon Miller's alleged confession to arrive at the conclusion that any errors raised by Miller on direct appeal would not have "affected the judgement of the jury", were "harmless" or otherwise "negligible." *Miller*, *Id.* At 627-631.

This court should, this, grant Certiorari on this issue, so as to assure that the Seventh Circuit's decisions remain in uniformity with the decisions of this court in Kimmelman v. Morrison and its progeny.

(b). **Franks v. Delaware claim**

(i). Counsel's performance was deficient

To prevail on an IAC claim premised on counsel's failure to object to the admission of evidence at trial, a defendant must establish that the evidence was, in fact, wrongfully admitted for the purposes of establishing the "deficient" prong of the Strickland analysis. *Kimmelman*, 477 U.S. 365.

Correspondingly, under *Franks v. Delaware*, 438 U.S. 154 (1975) a criminal defendant is entitled to a pre-trial evidentiary hearing if he can establish that law enforcement officers utilized false information in a warrant affidavit. *U.S. v. Hancock*, 844 F.3d 702, 708 (7th Cir. 2016). The criteria for being granted a *Franks* hearing requires that a defendant makes a substantial showing that (1) the warrant affidavit contains false statements; (2) the false statements were made intentionally or with the reckless disregard for the truth; and (3) the false statements were material in the finding of probable cause. *Hancock*, supra, at 708.

Keeping these legal standards in mind, and counsel's failure to conduct an investigation to discover the HIDTA fabrication, then failing to file a pre-trial motion for a *Franks* hearing does not require much discussion.

This is so because the record clearly reflects that the information Peasley provided in his search warrant affidavit (App. D), arrest warrant affidavit (App. E), working order (App.G) and Detterline's search warrant affidavit (App.C) about that transfer of the AMTECH evidence to HIDTA (to Ken Forsythe, in particular) for the purposes of enhancing the surveillance footage, were (1) false statements, see FOIA responses, App. H-I, K-L; (2) false statements made with a reckless disregard for the truth; and (3) were false statements material in finding probable cause because, without being able to directly tie Miller's vehicle to the bank robbery offense via the alleged license plate number, Peasley, first of all, would not have been able to obtain probable cause and falsely identify Miller as a suspect in the bank robbery, or obtain any warrants.

The false statements concerning the HIDTA identification in the search warrant affidavit, App. D, thus, were material in the finding of probable cause. This is especially so when Peasley literally utilized the search warrant as a tool to physically arrest Miller against his will, then made use of the same false information in Peasley's subsequent arrest warrant affidavit (App.E), working order (App.G), and grand jury testimony (App.F) surrounding the fabricated HIDTA evidence.

Absent the fabricated HIDTA allegations in all of Peasley's affidavits—and had counsel properly moved to suppress Miller's fabricated statement as fruits of the poisonous tree as outlined in section C (i) herein—Peasley would have been deprived of any probable cause or evidence to arrest Miller.

Had Tavitas properly investigated the facts of Miller's case, then filed a pre-trial motion under *Franks v. Delaware*, Miller would have been successful in getting any evidence derived from Peasley's search and arrest warrant suppressed—i.e. identification of Miller's truck, Miller's alleged confession, and the HIDTA evidence.

A jurist of reason could consequently debate whether counsel's performance was deficient in this regard.

(ii). Miller was prejudiced by counsel's omissions

For substantially the same reasons set forth above, jurist of reason could debate whether Miller was "prejudiced" by counsel's omissions in failing to investigate and file a pre-trial motion under *Franks*. This is so because, had counsel done so, there's a reasonable probability that the outcome of the proceedings would have been different. Miller would have been successful in getting his case dismissed or otherwise getting the most damaging pieces of evidence used against him at trial, suppressed, i.e. Millers truck being identified as the getaway vehicle via the HIDTA identification and Miller's alleged confession as fruits of the poisonous tree.

This court should this grant certiorari so as to assure that the decisions of the Seventh Circuit remain in uniformity with this court.

CONCLUSION

Based on the foregoing, Miller requests that this court grant his request for a writ of certiorari.

Respectfully submitted,

Joseph Miller

Joseph Miller # 12481-424
Federal Correctional institution
PO BOX 5000
Greenville, IL 62246

Date
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