

No.

22-5305

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

AILEEN KOGERA NJOROGE — PETITIONER
(Your Name)

Supreme Court, U.S.
FILED
JUN 08 2022
OFFICE OF THE CLERK

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Aileen Kogera Njoroge

(Your Name)

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

The Defendant, Aileen Kogera Njoroge, hereinafter “Kogera” appeals her conviction following a jury trial held on October 13th through October 16, 2020. On February 10, 2021, Kogera was sentenced to five years of probation, and ordered to pay \$143,099.84 in restitution and a \$100 special assessment.

LIST OF PARTIES

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:

RELATED CASES

Strickland v. Washington, 466 U.S. 668, 687-94, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

United States v. Gabe, 237 F.3d 954 (8th Cir.2001)

United States v. Jones, 545 F.2d 1112, 1115-16 (8th Cir. 1976), cert. denied,
429 U.S. 1075, 97 S.Ct. 814, 50 L.Ed.2d 793 (1977)

United States v. Morris, 723 F.3d 934 (8th Cir. 2013)

United States v. Ojeda-Estrada, 577 F.3d 871 (8th Cir. 2009)

United States v. Wilson, 665 F.2d 825 (8th Cir. 1981)

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STATUTES AND RULES

OTHER

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

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

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A _____ to the petition and is

reported at District of Nebraska - Lincoln _____ ; or,

has been designated for publication but is not yet reported; or,

is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____ ; or,

has been designated for publication but is not yet reported; or, is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____ ; or,

has been designated for publication but is not yet reported; or, is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____ ; or,

has been designated for publication but is not yet reported; or, is unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 15, 2022.

[] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 15, 2022, and a copy of the order denying rehearing appears at Appendix B.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

The Defendant, Aileen Kogera Njoroge, was convicted of theft of government money and property in violation of 18 U.S.C. §§ 641 and 2.

The Child Care and Development Block Grant fund was established to provide federal subsidies to low-income families to help them obtain quality child care (Tr¹, 50:19-52:1; 53:11-25). The State of Nebraska received 36.8 million dollars in federal funds from the U.S. Department of Health and Human Services for the fiscal year 2016 and 37 million dollars in federal funds for the fiscal year 2017 (Tr, 52:2-23). The state of Nebraska contributed state funds as well to the program (Tr, 53:2-4). For a day care to receive the subsidy for a child, the child must have actually been at the day care center during the time requested (Tr, 57:25-58:9). The day care centers were required to keep a calendar of each child's daily attendance and submit billing either monthly or bimonthly through the state child care portal (Tr, 58:15-25). The portal was described as an electronic billing system used by the day care centers (Tr, 59:17-60:1; 107:14-18). The billing was to be submitted in hourly increments if a child received 5.75 hours or below of care for that day and was to be billed as one day if the child received 6.0 hours to 9.0 hours of care for that day (Tr, 180:13-17).

1 Tr refers to the Trial Transcript from the trial proceedings in October of 2020.

Jo Pfeiffer, a Child Care Inspection Specialist Supervisor with the Department of Health and Human Services, testified that she was familiar with three day care centers in Nebraska identified as Mock's Loving Life Learning Center, Little Blessings of Omaha, and Little Blessings of Lincoln (Tr, 14:14-20; 21:12-18). Pfeiffer identified portions of Exhibit 32, an application for an amended license for Mock's Loving Life Learning Center LLC, including the request to add Aileen Kogera, Defendant, as a new director (Tr, 22:4-23:17; Ex. 32). Exhibit 33 was an application for a provisional license of a new child care center under the name of Little Blessings Learning Center LLC with the proposed licensee identified as Mubanga Chongo-Ofafa and the proposed director identified as Karen Flynn (Tr, 27:22-28:8; Ex. 33). Exhibit 34 was an application for a provisional license of a new child care center under the name of Little Blessings Learning Center LLC with the proposed licensee identified as Mubanga Chongo-Ofafa and the proposed director identified as Ann Laushman (Tr, 32:3-13; Ex. 34). Additionally, Pfeiffer testified that Mock's Loving Life Learning Center closed in 2015 (Tr, 34:5-11).

Exhibit 35A was the child care subsidy provider agreement for Mock's Loving Life Learning Center for June 2014 through May 31, 2015 (Tr, 66:2-7; 67:17-21). Exhibit 35B was the provider agreement from June 2015 through May 31, 2016 (Tr, 71:6-16). Exhibit 36 was the provider agreement for Little Blessings Learning Center of Omaha from November 2015 through October 31, 2016 (Tr, 73:14-18; 74:20-24). Karen Flynn was listed as the contact person for Little Blessings of Omaha (Tr, 77:25-78:2). Exhibit 36A was the provider agreement for Little Blessings of Omaha from November 1, 2016 through October 31, 2017 (Tr, 78:9-21). Exhibit 37A was the provider agreement for Little Blessings Learning Center of Lincoln for September 30, 2015 through September 30, 2016 (Tr, 80:9- 20). Exhibit 37B was the provider agreement for Little Blessings

Learning Center of Lincoln for October 1, 2016 through September 30, 2017 (Tr, 80:21-81:8). Ann Laushman was identified as the representative on Exhibit 37A (Tr, 82:12-16). Roberta Castillo was the representative on Exhibit 37B (Tr, 83:11-14).

Nicole Vint was an administrator with the Department of Health and Human Services responsible for administering the Child Care and Development Block Grant fund for the past seven years (Tr, 50:1-12). Vint testified on cross- examination that she was not able to determine who entered the information in the portal to initiate payment of the funds to the day care centers (Tr, 117:2-5).

Teresa Dailey, special agent with the United States Department of Health and Human Services, Officer of the Inspector General, testified that she investigates fraud within the department (Tr, 124:10-125:2). Dailey participated in execution of a search warrant on February 9, 2017, at Little Blessings of Lincoln (Tr, 125:5-21). Included in the documents seized were daily attendance forms from September 30, 2015 through February 9, 2017 (Tr, 126:10-20) (Exhibit 20). Employee files were seized for Alexis Johnson, Ann Laushman, Pam Mock, and Achol Deng (Tr, 127:5-16) (Exhibits 21A, 21B, 22, 23, and 24). A SNAP benefit form was seized for Awien (Tr, 128:5-23) (Exhibit 25).

Kevin Larm, another special agent with the United States Department of Health and Human Services, Officer of the Inspector General, testified that he participated in execution of a search warrant on February 9, 2017 at Little Blessings of Omaha (Tr, 129:23-130:22). Larm testified that Exhibit 2 was a sign- in sheet for Loving Life Learning Center found at Little Blessings of Omaha and Exhibit 4 contained typed-out time sheets for Mock's Loving Life Learning Center found at Little Blessings of Omaha (Tr, 132:1-133:6).

Larm testified Exhibit 3 contained additional handwritten time sheets for Little Blessings of Omaha from December of 2015 into January of 2017 (Tr, 133:21-134:17). Exhibit 3 indicated that it was prepared by Karen Flynn, the director (Tr, 134:23-25). Page 24 of Exhibit 3 purported to be a handwritten time sheet prepared by Karen Flynn between the 1st and 15th of January, 2016 (Tr, 166:16-24). For Jon [sic] and Arok there were entries for five hours each day (Tr, 166:25-167:4). For Ms. Dhieu's children Ajah, Akuol, and Maketh, showed no time on page 26 of Exhibit 3 (Tr, 167:9-21).

In the January 2016 billing file, Larm found a spreadsheet purportedly prepared by Kogera for November or December of 2015 on page 22 of Exhibit 46A (Tr, 168:2-19). For Maketh, the document showed six hours (Tr, 168:20-23). The question was asked "Now instead of hours, we have 60 hours and now 10 days?" to which Larm replied "Correct" (Tr, 169:3-4). The question was asked "Where the handwritten time sheet had nothing?" to which Larm replied "Correct. So, yeah, for the first 15 days on this time sheet, it indicates 10 days" (Tr, 169:5-7). On page 26, there was an entry referencing a time in February 1st of 2016, indicating "Last Modified by Aileen" (Tr, 169:13-17).

Employee files for Karen Flynn, Alice Speed, Pam Mock, Nyibol Lul, Madina Osman, Maha Ahmed, Ayen Mareng, and Rebecca Dhieu were recovered (Tr, 136:10-139:8) (Exhibits 6A, 6B, 7A, 7B, 9, 10, 11, 12, 13, and 14). Aileen Kogera's employee file from Little Blessings of Omaha was identified as Exhibit 8 (Tr, 137:2-7). Kogera was identified as Operations Director/School Age Teacher (Tr, 137:9-10). Page 2 of Exhibit 8 disclosed that Kogera applied for multiple positions: Operations Director and School Age Teacher (Tr, 156:15-25). Exhibits 15A through 15F were identified as Rebecca Dhieu's children's files (Tr, 141:23- 25). Exhibits 16A through 16E were

identified as Nyibol Lul's children's files (Tr, 142:14-143:2). Exhibit 17 was identified as Ayen Mareng's children's file (Tr, 143:9-16). Exhibit 18 was identified as Madina Osman's children's files (Tr, 143:21-144:5). Exhibit 19 was identified as Maha Ahmed's child's files (Tr, 144:11-16). Exhibits 29A, 29B, 30A, 30B, 31A and 31B were identified as Secretary of State documents for the aforementioned child care centers (Tr, 145:3- 146:12).

Larm further testified concerning Secretary of State documents obtained for the Midwest African Museum of Art, hereinafter "MAMA," showing involvement by Mock and Kogera (Tr, 146:14-19) (Exhibits 28A, 28B, and 28C). On cross- examination, the number of individuals expanded to include Pam Mock, Mubanga Chongo-Ofafa and others (Tr, 159:15-23). Mubanga Chongo-Ofafa was listed as the president, Benter Mock was listed as the secretary, and Brooke Shigley was identified as the treasurer (Tr, 160:11-16).

Bank statements, signature cards and authorizations were obtained for Little Blessings Learning Center LLC (Tr, 148:7-10). Exhibit 38A was a signature card for Mubanga Chongo-Ofafa for US Bank account Little Blessings Learning Center (Tr, 148:14-19). Exhibit 38B was a copy of bank statements for the same account (Tr, 148:20-23). Exhibits 38C and 38D comprised of bank documents evidencing deposits and checks (Tr, 149:2-17). Kogera was authorized as an agent on the bank account as evidenced by Exhibit 38A (Tr, 150:3-6).

Specific withdrawals were brought up to Larm on cross-examination (Tr, 161:18-163:19).

Mubanga Chongo-Ofafa withdrew \$3,000 on November 30, 2015 (Tr, 161:18-24) (Exhibit 38D). Larm did not know who withdrew \$7,507 and indicated he did not recognize the signature (Tr, 162:1-2).

Additionally, Larm did not recognize the signature for the withdrawal of \$14,000 from February 4, 2016 on page 4 of Exhibit 38D (Tr, 162:3-13). Larm was further unable to testify as to whether the counter withdrawals were cash (Tr, 163:3-6). Larm did identify Henry Njoroge as Kogera's husband (Tr, 164:19-25).

In addition, a warrant was executed on three Google account to obtain information related to the businesses (Tr, 150:9-12) (Exhibits 42, 43, 44 and 45). Google time sheets were recovered for Little Blessings of Omaha, and officers focused on certain families as part of the investigation (Tr, 152:1-153:2) (Exhibit 46A, 46B, 46C, 46D, 46E, 46F, 46G, 46H, 46I, 46J, 46K, and 46L). Certain emails were offered from the three Google accounts through Larm's testimony (Tr, 153:8- 154:15) (Exhibits 48A, 48B, 48C, 48D, 48E, 48F, 48G, 48H, 48I, 48J, 48K, and 48L).

Virginia Dyess testified she had recently retired from the Department of Health and Human Services wherein she was a resource developer (Tr, 171:3). Her job for a period of time was to be the point of contact between a child care center and the State if they had questions or issues regarding billing (Tr, 173: 7-13). In approximately May of 2015, Ms. Dyess had sent notice to Mock's Loving Life Center to make them aware of an upcoming review (Tr, 174:21-175:25). Dyess indicated she received some communications from Seth Mock that they were having some billing problems (Tr, 176:1-21). Mock mentioned that there may have been certain children overbilled (Tr, 176:22-24). Dyess found billing errors during her review (Tr, 179:1-3). She met with Seth Mock and Kogera at Mock's Loving Life Leaning Center (Tr, 179:4-9). Dyess explained that the day care center had been billing by the hour in instances when it should have been billing as days creating an obvious irregularity to her (Tr, 180:18-181:2). At that time, Mock told Dyess he wanted Kogera to take over the billing and that she would require training so as

to make sure there were no further billing errors (Tr, 181:6-13; 199:14-16; 204:24-205:2). Following the meeting, Dyess received notifications on at least three occasions from Kogera concerning “different billing issues” (Tr, 196:17-21; 202:13-25).

Based upon her review and visit, Dyess prepared a referral form to initiate an audit (Tr, 187:22-188:23) (Exhibit 26). An audit was done on Mock’s Loving Life Learning Center for the month of March 2015 (Tr, 190:8-12). As a result of the findings, the provider agreement was terminated effective December 1, 2015 as to Mock and Mock’s Loving Life Learning Center, preventing them from receiving further funds from the subsidy (Tr, 190:16-24; 195:13-18). For the month of March 2015 as it relates to Mock’s Loving Life Learning Center there was a finding of an overpayment of \$15,031.20 (Tr, 191:13-21) (Exhibit 27).

Karen Banik, formerly known as Karen Flynn, was a former director of Little Blessings of Omaha having worked there for approximately one year from the fall of 2015 to October of 2016 (Tr, 212:1-213:23; 220:7-14). Banik had the username and password to access the billing portal for the State of Nebraska (Tr, 233:4-6). Mubanga Chongo-Ofafa was the owner (Tr, 217:10-17). Banik was familiar with Kogera and knew that she handled the daycare’s payroll (Tr, 215:2- 23). Kogera would receive payroll information from Banik and forward it to Juanita Wilson (Tr, 215:21-216:2). Kogera was also the person to go to for supplies for the day care such as pest control or art supplies (Tr, 217:2-9; 218:1-8).

Banik explained the “in and out” list the daycare kept for tracking children (Tr, 222:5-9) (Exhibit 3). Parents were responsible for signing the children in and out, and Banik would fill it in if the parents did not (Tr, 222:5-12). Banik explained that she would put the timesheets in a manila envelope for Kogera and input the information into a spreadsheet (Tr, 226:3-12). Banik was unaware of what happened to the timesheets once provided to Kogera (Tr, 242:21-25). Banik stated she or Alexis Johnson, also known as Alexis Santee, would separately input them into the spreadsheet as a form of verification system to be compared to the information being sent for payment (Tr, 227:25-228:13; 230:1-8; 248:1-10). Banik

testified Kogera also had access to the spreadsheets (Tr, 248:11-14).

Banik testified concerning how payroll hours were kept through the use of a computer software program that employees would access at the beginning and end of their shifts (Tr, 236:23-237:12). Every two weeks Banik would send an email to a company email address that Kogera would receive containing a list of employee names with their corresponding hours they worked based upon the computer program's tally (Tr, 237:13-19; 239:18-20; 240:23-25; 249:16-3) (Exhibit 48B).

Banik was not aware of who all received the emails or had access to them (Tr, 249:25-250:1). On cross-examination Banik testified after having her memory refreshed that she spoke to the Department of Treasury following the raid in 2017 about Pam Mock overbilling Title XX (Tr, 245:15-247:12). Banik discovered the information upon logging into the portal (Tr, 247:12-14). Further, she overheard Pam Mock talking with her husband, Seth Mock (Tr, 247:13-21). Banik testified that the handwritten timesheets were not 100 percent accurate (Tr, 252:14-19; 253:10- 254:16).

Ms. Banik testified she was intimidated by Pam Mock due to her being rude and not nice to Banik (Tr, 251:18-20). Banik listed Pam Mock as her reason for leaving the day care (Tr, 25:23-25). She further testified that Pam Mock was hiring women with a lot of children who would qualify for Title XX benefits (252:6-8).

Alice Williams, formerly Alice Speed, was hired in 2016 by Seth Mock to be the director of Little Blessings of Omaha (Tr, 260:6-11; 262:18-23). Williams reported that Kogera was her point of contact between her and Seth Mock, and that she would go to Kogera when in need of supplies or having issues with parents (Tr, 264:25-265:11). Williams testified that she would email Kogera payroll information (Tr, 274:8-18) (Exhibit 48J). Williams testified on cross-examination that she told law enforcement officers that parents rarely signed in their kids on the signup sheets (Tr, 9-18).

Ann Larson, formerly Ann Laushman, testified that she was the director of Mock's Loving Life child care center (Tr, 314:17-315:21). From September of 2015 to December of 2015, she was the director

of Little Blessings in Lincoln (Tr, 317:18-21; 323:19-25). During that timeframe she received a phone call from Kogera informing her that she (Kogera) would be taking over the billing (Tr, 324:1-21). Prior to that, she inputted the information into the portal for billing Title XX (Tr, 328:14-19; 329:3-13).

Larson testified that Seth Mock would have her bill for children that did not show up, and he wanted her to bill at the highest rate (Tr, 331:11-25). Seth Mock further told Larson not to tell anyone he was still an owner of Little Blessings in Lincoln (Tr, 333:4-9). Further Seth Mock relayed to her that he wanted to hire people that had children that would qualify for Title XX (Tr, 334:13-22).

Alexis Santee worked for the Little Blessings Learning Center in Omaha and then transferred to the one in Lincoln in January of 2016 (Tr, 340:10-20). Santee testified Kogera handled the Title XX billings while Santee was at the Lincoln location (Tr, 342:3-25). Santee left Little Blessing in Lincoln in December of 2016 (Tr, 342:20-21). Twice per month Santee would provide the timesheets for the children to Kogera and input the same information into a spreadsheet (Tr, 348:8- 349:10; 371:12-18). Further, biweekly Santee would provide payroll information to Kogera by email (Tr, 355:4-25). Santee testified that Pam Mock became more involved with the day care over time (Tr, 360:8-13).

Juanita Wilson testified that during 2015 through 2017 she did payroll services for Little Blessings of Omaha and Little Blessings of Lincoln (Tr, 377:11- 15). In that capacity she met Kogera (Tr, 377:22-25). Kogera was usually the one that sent Wilson timesheets to do the payroll (Tr, 378:11-18; 385:18-20).

Kelsi Larsen, a special agent with the U.S. Department of Health testified she participated in execution of a search warrant and interviews at Little Blessings Learning Center in Omaha (Tr, 393:23-394:2). Her duties included interviewing Kogera (Tr, 394:3-7). Kogera told Larsen she had been the operations director for Little Blessings Learning Center in Omaha since November of 2015 (Tr, 394:15-25). Kogera told Larsen she had formerly worked at Mock's Loving Life Learning Center for Seth Mock (Tr, 395:1-11). Kogera further explained that Seth Mock and Mubanga Chongo-Ofafa merged businesses to form Little Blessings in November of 2015 (Tr, 395:12-24).

Kogera described her job as being “the biller” (Tr, 396:11). She billed through the state portal for the hours the children were at the center (Tr, 396:11- 16). Kogera indicated Seth Mock told her he would be taking over the billing for the Omaha location (Tr, 403:6-15) Seth Mock and Chongo-Ofafa directed her on the billings for Little Blessings (Tr, 406:3-8). Kogera created spreadsheets on a Google Drive for directors at both Little Blessings locations to input information so she could submit it through the state portal (Tr, 396:17-24; 397:5-11). Kogera had told Larsen that Seth Mock did not have access to the Google Drive spreadsheets (Tr, 397:9-16; 403:19-22). Kogera told Larsen she did not know how Seth Mock could bill without access to the Google Drive (Tr, 397:21-24; 404:1-4). Further, Kogera indicated she was the only one that had access to the email account lovinglifelearningcenter@gmail.com (Tr, 404:21-24). Kogera had given Mock the information to access the portal (Tr, 398:1-6; 406:16-24). Kogera also indicated she obtained payroll information from the Google Drive and provided it to Juanita (Tr, 398:11-23). Kogera was asked about employees being paid that did not work, and Kogera indicated that she did not pay them (Tr, 400:15-19).

Caroline Crosby with the Nebraska Department of Health and Human Services testified she did a financial review of the claims for Seth Mock (Tr, 417:1-12) (Exhibit 27). Crosby was asked to provide a submission of portal information for the year 2016 for Little Blessings Learning Center in Omaha (433:17-20) (Exhibit 47A). Crosby was additionally asked to do the same for some of the children during the same time frame at the same location (Tr, 435:2-12) (Exhibit 47C). The same information was obtained from Little Blessings Learning Center in Lincoln (Tr, 437:7-9) (Exhibits 47B and 47D). Crosby testified Exhibit 55 was a compilation of the overpayments for 2016 (Tr, 448:4-7). Crosby testified \$174,000 was the amount of what was paid to the child care providers for those children (Tr, 450:15-21) (Exhibit 55). According to the documentation received by the department, \$16,000 is what should have been paid (Tr, 450:22-24). The difference between the two represented an overpayment of \$158,000 (Tr, 451:1-3). Crosby confirmed that the state could not determine who was on the other end of the computer inputting

the information and submitting claims, and two different individuals could be logged in at the same time (Tr, 462:11-14; 463:3-5). Further, Crosby did not review the documents themselves that contained the time information for the children (Tr, 467:1-3). Rather, she was just provided the information from those documents (Tr, 467:1-2). To her knowledge, the information she received came from the sign-in sheets (Tr, 467:12-18). Investigator Larm provider her the hours from times sheets that she used (Tr, 478:3-6).

Larm provided Crosby with his “review of the 2016 Little Blessings handwritten time sheets for the eight specific families . . .” that were in his review what should have been submitted for billing to the state with the exception of a few months (Tr, 479:16-23). In explaining what he looked at, he referenced Exhibits 3 and 20 which were time sheets for Little Blessings of Omaha and Little Blessings of Lincoln (Tr, 480:1-11). Larm compared those to Exhibits 47C and 47D (Tr, 480:12-20). Larm also reviewed the Google Drive spreadsheets (480:21-25). Larm provided the “handwritten time sheet numbers” or in other words the numbers from the handwritten time sheets to Crosby (481:3-7). Exhibit 54 was the spreadsheet that Larm created from the information (Tr, 481:18-25).

Mubanga Chongo-Ofafa testified that she met Seth Mock in 2003 and began working with him on various projects (Tr, 509:19-16). She met Kogera in approximately 2008 or 2009 (Tr, 510:17-21). Chongo-Ofafa was approached in 2015 by Seth Mock who wanted to partner with her in opening a second day care (Tr, 511:3-8). Seth Mock had relayed to her a desire to eventually get out of the day care business and focus on an African museum (Tr, 511:8-14). Chongo-Ofafa turned him down initially because he was unable to replace her income (Tr, 512:3-Eventually he approached her with an opportunity at Little Blessings that would replace her income and free her up to also assist with getting the museum up and running (Tr, 512:11-19). Chongo-Ofafa understood that she would focus on getting the museum set up and then he would sell her the new day care (Tr, 512:22- 513:3). Chongo-Ofafa further understood she would get paid as the owner of the second day care (Tr, 513:1-9). One new day care turned into two, Little

Blessings of Omaha and Little Blessings of Lincoln, and Chongo-Ofafa became the owner of both (Tr, 513:10-19).

Chongo-Ofafa focused on the museum, and Kogera was her director of operations in charge of billing, supplies, and payroll (Tr, 529:12-530:3; 532:1-3).

Chongo-Ofafa explained that Seth Mock relayed to her that his Loving Life day care was transitioning to something different and that the children were being transferred to the Little Blessing's Day care (Tr, 513:20-514:515:1). She was not aware of it being closed down due to Title XX issues, nor was she even familiar with the Title XX program (Tr, 515:1-9). Once the two day cares were raided on February 9, 2017, Chongo-Ofafa learned that Seth Mock was involved in an investigation concerning Title XX (Tr, 515:7-17).

At the end of 2016, Seth Mock had approached Chongo-Ofafa about learning how to bill and taking over the billing for Kogera due to her announcing that she would be leaving to take an internship (Tr, 515:18-516:2). Due to the holidays and being busy the first part of 2017, Chongo-Ofafa had not learned the billing process prior to the raid in February of 2017 (Tr, 516:3-9).

Following the raid Seth Mock met with Chongo-Ofafa (Tr, 516:10-16). During that conversation, Seth Mock told Chongo-Ofafa not to tell the agents that he had the logins to the portal (Tr, 518:7-13). Following the raid Chongo-Ofafa learned that there was a large tax bill for the day care, and she tried to continue operating the day care (Tr, 520:1-21). At that point Seth Mock was not involved, and Chongo-Ofafa changed the logins and passwords so that only she and Kogera had access to the portal (Tr, 520:22-521:9). Kogera was still involved with the day care at that time, and she and Chongo-Ofafa met with the accountant, Juanita Wilson, to try to fix everything and find out what had been kept from them by Seth Mock (Tr, 521:10-24).

Chongo-Ofafa testified that she entered into a plea agreement with the Government (Tr, 522:3) (Exhibit 101). Essentially, Chongo-Ofafa pled guilty to a misdemeanor, theft of government property, and

as she understood it, she was taking responsibility for not doing her due diligence when forming the business relationship with Seth Mock (Tr, 523:5-524:20).

Chongo-Ofafa acknowledged lying to the investigators on February 9, 2017, when she told them she had bought the day care for \$15,000 (Tr, 528:10-16).

Exhibit 48A was an email sent to Kogera January 4, 2016, reflecting that Rebecca Dhieu had worked 10 hours the previous 2 weeks for purposes of payroll (Tr, 240:2-25). Exhibit 48A, page 3 showed Dhieu was to receive pay of \$10.75 per hour for 54 hours of work (Tr, 240:21-241:6). Exhibit 48B, page 3 showed Dhieu was to receive the same rate of pay for 80 hours of work (Tr, 241:7-21). Banik testified she did not send that information to Kogera (Tr, 241:19-24). Banik testified that had had to reprimand Dhieu on occasion for not showing up for work or being late (Tr, 242:15-18).

Exhibit 105 was received by way of stipulation and contained Kogera's Metro Credit Union bank statements (Tr, 535:19-536:4).

Kogera was found guilty (Tr, 561:4-16). The district court sentenced Kogera to five years of probation and ordered to pay \$143,099.84 in restitution and a \$100 special assessment.

SUMMARY OF THE ARGUMENT

The Government compared data submitted to the State of Nebraska for subsidy payments to various day cares under the control of Seth Mock with internal documents maintained at said day cares. Discrepancies with the data on the documents compared to what was submitted for subsidy payments was largely held against the day cares and alleged to be overpayments amounting to theft of government services. Because Kogera was a director of one of the day cares with access to the data and authority to submit claims for subsidy payments, she was held responsible for the alleged theft. The evidence, however, established that the Government's premise was flawed and Kogera was not the only one with access to submitting the subsidy claims. The Government did not prove that Kogera submitted the incorrect information through the portal.

Kogera received ineffective assistance of counsel when her counsel failed to call her two witnesses at trial, failed to offer evidence exposing the flaws in the overpayment determination, and failed to offer evidence of her incapacitation during times that billing was submitted to the portal. Kogera had two witnesses that would have testified that Kogera had attempted to improve the accuracy of the timesheets during the relevant timeframe. Further, there was evidence that would have exposed the flaws in the overpayment determination. Finally, during the relevant timeframe Kogera had surgery, got married, and took a vacation. While she was away during these events, billing was being submitted through the portal. Each of these failures on the part of her trial counsel amounted to ineffective assistance of counsel guaranteed Kogera by the Sixth Amendment to the United States Constitution.

REASONS FOR GRANTING THE PETITION

I. THERE WAS INSUFFICIENT EVIDENCE ADDUCED TO CONVICT KOGERA BEYOND A REASONABLE DOUBT.

A. Standard of Review

Sufficiency of the evidence claims are reviewed *de novo*, viewing evidence in the light most favorable to the government, resolving conflicts in the government's favor, and accepting all reasonable inferences that support the verdict. *United States v. Morris*, 723 F.3d 934 (8th Cir. 2013). The verdict will be affirmed if any rational jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Ojeda-Estrada*, 577 F.3d 871, 874 (8th Cir. 2009). Decisions regarding credibility of witnesses are resolved in favor of the jury's verdict. *United States v. Gabe*, 237 F.3d 954, 961 (8th Cir.2001).

B. Argument

The Government's case was entirely circumstantial against Kogera. They connected the following dots for Kogera: 1. She was identified as the new director of Mock's Loving Life Center LLC; 2. She may have prepared a spreadsheet for November 2015 to December 2015 due to it reflecting last edited by Kogera; 3. In her personnel file she was identified as the operations director and a school age teacher; 4. She had some involvement with the museum; 5. She was an authorized agent on a bank account; 6. She was married to Henry Njoroge; 7. During the summer of 2015 she was introduced by Seth Mock as the person taking over billing; 8. She had payroll responsibilities and usually was the one to communicate with Juanita Wilson concerning payroll; 9. She had access to time sheets; and 10. She received emails as to payroll. This evidence did not establish that she personally submitted incorrect information to the State through the portal for subsidy benefits. Nor did this evidence establish that she had knowledge of anyone else or help anyone else doing the same. Further, there was no evidence that she or her husband received any money fraudulently from the day care centers submitting claims for subsidy payments.

On the contrary, the evidence established that she was one of a handful of persons with access to the portal. There was evidence that Seth Mock was instructing a former director to overbill. There was evidence that Seth Mock was trying to keep information from the government. For example, he did not want the government to know that he had access to the portal. It was too late for that. Kogera had already told the investigators that he had access. Pam Mock, his wife, was also involved in the day care operations and was overbilling the benefits.

Additionally, the evidence offered contradicted the Government's theory that Kogera was a part of the fraud. Virginia Dyess testified that the \$15,000 overpayment for March of 2015 was for a time period prior to Kogera taking over the billing. Additionally, Dyess testified that after Kogera took over billing, Kogera would exchange emails with her that demonstrated she was checking to make sure she was billing properly.

Finally, the government used a flawed method for determining that fraud existed. The Government took the position that discrepancies between the handwritten time sheets and what was billed through the portal was, for the most part, overbilling the subsidy. This method was flawed because the testimony from the witnesses that were responsible for overseeing the handwritten timesheets indicated they were not accurate reflections of the time that the children spent at the day care. Despite their efforts to fill in gaps that the parents had left, they simply did not provide an accurate accounting of when the children were in the day care. To say that billing for a child who did not appear on the sign-in sheet was a fraud ignores the fact that the timesheets were not accurate. The agent admitted to having to guess at certain points, giving the day care the benefit of the doubt, that a child was at the day care for a certain number of hours based upon the child's track record.

In *United States v. Wilson*, 665 F.2d 825 (8th Cir. 1981) this Court vacated a conviction and remanded with an order to enter a judgment of acquittal. Wilson had been convicted of conspiracy to murder. On appeal Wilson argued that the Government failed to prove that he had knowledge of the

conspiracy and its intended objective. This Court found that viewing the evidence in the light most favorable to the Government, the evidence did not establish that Wilson knew that Scott intended to kill Tandy. Although a witness testified that Wilson helped to make the mixture ultimately used by Scott to set Tandy afire, there was no evidence that Wilson knew beforehand of Scott's intention to kill Tandy. *United States v. Jones* was cited for the proposition that "The evidence must do more than merely raise suspicion or possibility of guilt." *United States v. Jones*, 545 F.2d 1112, 1115-16 (8th Cir. 1976), *cert. denied*, 429 U.S. 1075, 97 S.Ct. 814, 50 L.Ed.2d 793 (1977).

This flawed method of computing overpayments combined with the inability to prove which individual or individuals actually inputted the information into the portal by logging into the account and physically inputting the necessary data amounted to a failure to offer sufficient evidence to convict Kogera beyond a reasonable doubt.

II. KOGERA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HER COUNSEL FAILED TO CALL HER WITNESSES IN HER DEFENSE.

A. Standard of Review.

To overturn a conviction on grounds of ineffective assistance of counsel, a defendant must demonstrate (1) his trial counsel's performance was so deficient as to fall below an objective standard of the customary skill and diligence displayed by a reasonably competent attorney, and (2) there is a reasonable probability the outcome of the trial would have been different absent the substandard actions of trial counsel. *See Strickland v. Washington*, 466 U.S. 668, 687-94, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

B. Argument.

Kogera had informed her trial counsel of two witnesses to call in her defense: Luisa Zamora and Mary Guma. They were both teachers at the day care centers. Zamora was a teacher and assistant director

at Little Blessings of Omaha. Her employment was from 2014 to 2016. Zamora would have testified that Kogera was trying to clean up the day care and improve the accuracy of the sign-in sheets by making sure the parents were consistently and accurately signing their children in and out of the centers. This testimony would have substantially countered the Government's position that Kogera was a part of the theft of the subsidy benefits. Guma worked at Mock's Loving Life and transferred to Little Blessings of Omaha. She too would have testified as to Kogera's efforts to clean up the day cares and obtain accurate times for the children. Further, Zamora and Guma would have testified that the three of them set up their schedules so that between the three of them, one was opening, and one was closing. This was set up by Kogera so as to make sure the data was being properly obtained on the children. Kogera would not have been going through the trouble to obtain accurate times for the children if she was just going to be inputting false data. She would have benefited from poor record keeping.

Kogera is represented by different counsel during this proceeding than she had during her trial. Because she has different counsel on this appeal, she is including this argument in her brief with the understanding that the argument alleged here is not contained within the record. Kogera asserts that her attorney fell below the standard of counsel practicing criminal defense by not calling these two witnesses to support her defense. Kogera further asserts that had these two witnesses testified as she has alleged, there exists a reasonable probability that there would have been a different result.

**III. KOGERA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HER
COUNSEL FAILED TO OFFER EVIDENCE EXPLAINING THE FLAWS IN THE
DETERMINATION OF THE OVERPAYMENT OF BENEFITS.**

A. Standard of Review.

Same as Argument IIA.

B. Argument.

Kogera had identified at least two errors with the audit done that eventually led to the conclusion of

the overpayment. First, a portion of the overpayment was a result of law enforcement determining that particular parents were not working during the time their children were receiving day care. For example, Kogera alleges that one of the mothers, Achol, was actually working at MAMA at the time. This could have been established by a review of the emails containing the hours and times worked at the museum. Additionally, some families had children that were school aged and others that were not. This meant that a parent would drop off a child or children and sign them in. Once the driver bussed the other child or children to the day care centers after school, the drivers would not sign them in. This provided for inaccurate time sheets that the overpayment was based on. Kogera's counsel did not point out these flaws or elicit any testimony concerning the same through the Government's witnesses or defense witnesses.

Kogera is represented by different counsel during this proceeding than she had during her trial. Because she has different counsel on this appeal, she is including this argument in her brief with the understanding that the argument alleged here is not contained within the record. Kogera asserts that her attorney fell below the standard of counsel practicing criminal defense by not eliciting this evidence to support her defense. Kogera further asserts that had this evidence been elicited, there exists a reasonable probability that there would have been a different result.

**IV. KOGERA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HER
COUNSEL FAILED TO OFFER EVIDENCE OF HER INCAPACITATION TO
HAVING BEEN ABLE TO SUBMIT BILLING INFORMATION THROUGH THE
PORTAL.**

A. Standard of Review.

Same as Argument IIA.

B. Argument.

Kogera had a number of things that occurred in her life during the relevant timeframe of the audit. This included travel, surgery, illness, and her wedding. Kogera maintains that there were claims submitted

through the State portal during these events in her life. She discussed this with her trial counsel. This evidence would have shown the jury that someone else was responsible for the overbilling. Despite having discussed this with her counsel and the relevance, her counsel did not elicit this evidence.

Kogera is represented by different counsel during this proceeding than she had during her trial. Because she has different counsel on this appeal, she is including this argument in her brief with the understanding that the argument alleged here is not contained within the record. Kogera asserts that her attorney fell below the standard of counsel practicing criminal defense by not eliciting this evidence to support her defense. Kogera further asserts that due to the nature of this evidence, there exists a reasonable probability that there would have been a different result had the jury been able to consider it.

CONCLUSION

For the reasons discussed, Aileen Kogera Njoroge respectfully requests that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Aileen Kogera Njoroge

Date: June 8, 2022