No._____

IN THE

# Supreme Court of the United States

_____

DAISY MILLER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

_____

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

_____

**PETITION FOR A WRIT OF CERTIORARI**

_____

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October 7, 2023

## QUESTIONS PRESENTED

The questions presented are:

Whether trial counsel's near total reliance on the defendant's characterization of proposed defense witnesses' testimony, and the failure to conduct meaningful, independent investigations of those witnesses, is Constitutionally ineffective.

Whether trial counsel's failure to call known, available witnesses, other than the defendant herself, whose testimony would have directly rebutted the prosecution's evidence against the defendant, is Constitutionally ineffective.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Daisy Miller, an inmate who is currently serving her federal sentence on house arrest in Hollywood, Florida.

Respondent is the United States of America.

There are no corporate parties involved in this case.

## RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Daisy Miller v. United States of America*, No. 20-11988 (11th Cir. July 10, 2023);
- *Daisy Miller v. United States of America*, No. 1:16-cv-21090-JEM (S.D. Fla. May 1, 2020);
- *United States of America v. Daisy Miller*, No. 1:12-cr-20757-JEM-2 (S.D. Fla. September 11, 2013).

There are no other proceedings related to this case under Rule 14.1(b)(iii).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Daisy Miller, respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit's ("Eleventh Circuit," "USCA11," or "11th Cir.") opinion affirming the United States District Court for the Southern District of Florida's ("Southern District of Florida" or " S.D. Fla.") denial of petitioner's Motion for Relief Pursuant to 28 U.S.C. § 2255 is found at *Miller v. United States*, No. 20-11988, 2023 United States App. LEXIS 17227 (11th Cir. July 10, 2023) and is reproduced as Appendix A. The Southern District of Florida's denial of petitioner's Motion for Relief Pursuant to 28 U.S.C. § 2255 is

found at *Miller v. United States*, S.D. Fla. Case: 1:16-cv-21090-JEM Document: 72 and is reproduced as Appendix B.

## JURISDICTION

The court of appeals entered final judgment on July 10, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for [her] defense…" presented to "…an impartial jury,"

The Fifth Amendment to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime… nor be deprived of life, liberty, or property, without due process of law[.]"

Section 2255 of Title 28 of the United States Code ("§ 2255") provides an avenue of relief for a federal prisoner who can show that she was convicted or sentenced "in violation of the Constitution or laws of the United States . . . or [that her case] is otherwise subject to collateral review." § 2255(a). The statute requires that if a "court finds . . . that there has been such a denial or infringement of the Constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence [her] or grant [her] a new trial or correct the sentence as may appear appropriate. § 2255(b).

## INTRODUCTION

The decision below denying the Petitioner relief under § 2255 involved two independent errors. First, the Eleventh Circuit erred in holding that, in failing to conduct meaningful, independent investigations of potential defense witnesses proposed to him by his non-lawyer client, and instead relying on assertions made by that client, the Petitioner's counsel failed to satisfy the performance prong of this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), and second, that, had defense counsel called those recommended witnesses, the prejudice prong of *Strickland* would still not have been satisfied, that is, that there was "…no reasonable probability that [Mrs.Miller's] prosecution would have had a different outcome…" *Miller v. United States*, No. 20-11988, 2023 United States App. LEXIS 17227, at *21 (11th Cir. July 10, 2023).

## STATEMENT OF THE CASE

On the evening of October 3, 2012, during the first presidential debate against Mitt Romney, then President Barack Obama extolled his tough stance against healthcare fraud. He stated that his administration "…went after medical fraud in Medicare and Medicaid very aggressively — more aggressively than ever before…"[1] As proof of that statement, a few hours later in the dark, early morning hours of October 4, more than 500 agents from the FBI, ATF, and even the Post Office police, arrested 91 people in seven cities across the United States in a

[1] *Transcript and Audio: First Obama-Romney Debate*, accessed online at https://www.npr.org/2012/10/03/162258551/transcript-first-obama-romney-presidential-debate on 7/15/2018.

coordinated raid by the Medicare Fraud Task Force.[2] That preplanned, headline-grabbing, taxpayer-funded campaign stunt put a period on the end of President Obama's declaration of his administration's war on healthcare fraud made during the debate the night before.

Petitioner Daisy Miller is a casualty of that war. At about 5:00 a.m. on October 4, 2012, she was among the 91 arrestees; arrested and charged with nine federal counts relating to healthcare fraud that had been committed by her employer at Hollywood Pavilion ("HP"), a stand-alone psychiatric hospital in Hollywood, Florida. On June 28, 2013, in a joint trial, a jury convicted her of each of those nine counts. On September 11, 2013, she was sentenced to 180 months in federal prison, followed by three years of supervised release. She appealed her conviction. *United States v. Kallen-Zury, et. al.*, S.D. Fla. Case: 1:12-cr-20757-JEM-2 -2 Document: 557.

The Eleventh Circuit Court of Appeals affirmed the District Court's denial of that appeal. *United States v. Kallen-Zury*, 629 F. App'x 894 (2015).

Petitioner then filed a Motion for Relief Pursuant to 28 U.S.C. 2255 based on her court-appointed counsel's Constitutionally ineffective assistance. *United States v. Kallen-Zury, et. al.*, S.D. Fla. Case: 1:12-cr-20757-JEM-2 Document: 724/*Miller v. United States,* S.D. Fla. Case 1:16-cv-21090-JEM Document: 1. That motion was denied by the District Court. *United States v. Kallen-Zury, et. al.*, S.D. Fla. Case:

[2] *Medicare Fraud Strike Force Charges 91 Individuals for Approximately $430 Million in False Billing*, accessed online at https://archives.fbi.gov/archives/news/pressrel/press-releases/medicare-fraud-strike-force-charges-91-individuals-for-approximately-430-million-in-false-billing on 7/15/2018.

1:12-cr-20757-JEM-2 Document: 849/*Miller v. United States,* S.D. Fla. Case: 1:16-cv-21090-JEM Document: 72. She appealed that denial. *Miller v. United States,* USCA11 Case: 20-11988 Document: 45. The Eleventh Circuit Court of Appeals affirmed the lower court's denial. *Miller v. United States*, No. 20-11988, 2023 U.S. App. LEXIS 17227 (July 10, 2023). That denial of relief by the Eleventh Circuit Court of Appeals is the subject of this petition.

Charged with violations of 18 U.S.C. §§ 371, 1343, 1347, and 1349, Daisy Miller was facing up to 145 years in prison, yet her court-appointed counsel chose, instead of providing her with a competent defense, to "phone it in," failing to meaningfully investigate dozens of potential witnesses identified to him by his client, and by refusing to call any of those few witnesses whose investigations he conducted. As a result of her attorney's Constitutionally deficient performance, the jury was denied the opportunity to fully consider all the evidence in the case. Other than through the defendant's testimony, the jury was never fully presented Daisy Miller's side of the story and, thus, was unable to fully consider anything other than the tale presented to them by government prosecutors and their parade of miserables. In short, the jury, hearing only from her accusers in any meaningful way, was denied the opportunity to fairly consider Daisy Miller's case and her Constitutional rights to "…have [effective] assistance of counsel for [her] defense…" presented to "…an impartial jury," United States Const. amend. IV. Further, her right to "…due process of law…" United States Const. amend. V, was also denied.

### A. The Government's "Primary" Witnesses

According to the Eleventh Circuit Court of Appeals in their affirmation of the denial of the motion that is the subject of this writ:

> The government's theory of the case [against Daisy Miller] was that [she] and her co-defendants conspired to defraud the United States by creating a healthcare kickback scheme through Medicare reimbursements and that Miller participated in the scheme in order to keep her job, title, salary, and status.
>
> *Miller v. United States*, No. 20-11988, 2023 United States App. LEXIS 17227, at *4 (11th Cir. July 10, 2023).

The government established their theory of the illegal acts alleged in the indictment, the so-called "backbone of the government's case," *id.*, primarily through the testimony of a series of cooperating witnesses, admitted and convicted felons, whose testimony was given in exchange for the promise that the sentences for their crimes would potentially be reduced (and which actually led to vast reductions of the sentences in each of their cases). These cooperating witnesses included Alan Gumer, a former psychiatrist and medical director at HP and at American Therapeutics Corporation ("ATC"), and five "'…patient recruiters [and halfway house owners/operators] – Keith Humes, Jean-Luc Veraguas, Mathis Moore, Curtis Gates, and Gloria Himmons – 'who pleaded guilty to Medicare fraud related to HP and other facilities.'" *Id.,* quoting *United States v. Kallen-Zury*, 629 F. App'x 894, 897 (11th Cir. 2015).

Importantly, other than Gloria Himmons, and despite having made admissions to significant, ongoing, criminal activities (including fraud committed at Hollywood Pavilion), not one of these admitted felons – whose testimony was so

crucial to the prosecution of Daisy Miller – was charged in connection with the Hollywood Pavilion case. These, then, are the cooperating witness with which the government made its case:

**Alan Gumer**

Facing 50 years in federal prison for his role in the ATC case, Alan Gumer was charged with one count of violating 18 U.S.C. § 1349 (Conspiracy to Commit Healthcare Fraud) and four counts of Health Care Fraud, 18 U.S.C. § 1347. *United States v. Mark Wilner*, et. al., S.D. Fla. Case 1:11-cr-20100-PAS-2 Document: 3. After agreeing to cooperate with the government in the ATC case, he was sentenced to just 30 months. *Id.* Document: 1656. Following his testimony in the HP case, Mr. Gumer's sentence was ultimately reduced to time served, just over 18 months. *Id.* Document: 1747.

Mr. Gumer, who admitted to having a "pathological gambling addiction," *United States v. Kallen-Zury, et. al.,* Case S.D. Fla.: 1:12-cr-20757-JEM-2 Document: 312 at 1407:17-1408:10, and a "tax problem" from not having paid his full taxes in more than 10 years, *id.* at 1408:11-22, was never charged for the crimes he admitted to committing at HP, nor was he ever prosecuted by the Internal Revenue Service.

**Gloria Himmons**

A co-defendant in the HP case, Gloria Himmons was facing 15 years for one count of violation 18 U.S.C. § 371 (Conspiracy to Defraud the United States and to Receive and Pay Health Care Kickbacks) and two counts of Receipt of Kickbacks in Connection with a Federal Health Care Benefit Program (42 U.S.C. § 1320a-

7b(b)(2)(A). *United States v. Kallen-Zury, et. al.,* Case S.D. Fla.: 1:12-cr-20757-JEM-5 Document: 3. After becoming a cooperating witness and testifying against her co-defendants, including Daisy Miller, she was instead sentenced to just 24 months in prison. *United States v. Kallen-Zury, et. al.,* S.D. Fla. Case: 1:12-cr-20757-JEM-5 Document: 596.

**Curtis Gates**

In the HP trial, Curtis Gates testified that he was facing ten years' incarceration for "[t]aking kickbacks and committing healthcare fraud," at "Biscayne Milieu" and "American Therapeutic," *United States v. Kallen-Zury, et. al.,* S.D. Fla. Case: 1:12-cr-20757-JEM-2 Document: 332 at 2275:16-24. In truth, Mr.Gates was actually facing up to 40 years prior to becoming a cooperating witness for the government: 35 for his role in the ATC case for Conspiracy to Defraud the United States and to Receive and Pay Health Care Kickbacks (18 § U.S.C. 371), Conspiracy to Commit Health Care Fraud (18 U.S.C. § 1956(h)), and Conspiracy to Commit Money Laundering (18 U.S.C. § 1349), *United States v. Wilner, et. al.,* S.D. Fla. Case 1:11-cr-20100-PAS-20 Document: 3, as well as five years in the Biscayne Milieu case for Conspiracy to Receive health care kickbacks (18 § U.S.C. 371). *United States v. Macli, et. al.,* S.D. Fla. Case 1:11-cr-20587-PAS Document: 2. After agreeing to cooperate with the government, Mr. Gates was sentenced to a concurrent 57 months for both of those cases. After testifying in the HP case, his sentence was further reduced to just 30 months. *S.D. Fla. Case 1:11-cr-20100-PAS* Document: 1697.

A Faginesque mentor of sorts, Mr. Gates could be considered the "mastermind" behind the health care fraud at both HP and at ATC. Mr. Gates testified in the HP trial that he taught "…the [patient recruiting] business… to … "[a]t least five" different individuals, including Keith Humes and Mathis Moore. *United States v. Kallen-Zury, et. al.,* Case S.D. Fla.: 1:12-cr-20757-JEM Document: 332 at 2286 6-11. Mr. Moore, along with Mr. Gates, was also indicted in the ATC case. *United States v. Wilner*, et. al., S.D. Fla. Case 1:11-cr-20100-PAS-15, Document: 3

**Mathis Moore**

Mathis Moore testified that he had met Mr. Gates in 2005 while the two were in "treatment," and that Mr. Gates introduced him to the business of patient brokering. In Mr. Moore's words, Mr. Gates: "Told me that we can make money by selling clients to outpatient program and get paid for it." *United States v. Kallen-Zury, et. al.,* Case S.D. Fla.: 1:12-cr-20757-JEM-2 Document: 334 at 2428-24 – 2429-11. Charged with one count of Conspiracy to Commit Healthcare Fraud (18 U.S.C. 1349), one count of Conspiracy to Defraud the United States and to Receive and Pay Health Care Kickbacks (18 U.S.C. § 371), and one count of Conspiracy to Commit Money Laundering (18 U.S.C. § 1956(h)), Mr. Moore had been facing 15-years in prison for his role in the ATC case, *United States v. Wilner, et. al*., S.D. Fla. Case 1:11-cr-20100-PAS-15, Document: 3. After agreeing to cooperate with the government, he was initially sentenced to 27 months in federal prison. *Id.* at Document: 1657. That sentence was reduced to "time served" after his testimony in

the Hollywood Pavilion case. *Id.* at Document: 1744. Mr. Moore served just over 16 months.

**Keith Humes**

Similarly, Keith Humes testified that he first got into the health care fraud "business" in 2004 or 2005 after he was "…introduced by a guy named Curtis Gates." *United States v. Kallen-Zury, et. al.,* Case S.D. Fla.: 1:12-cr-20757-JEM-2 Document: 298 at 449:1-50:11. Prior to testifying against Daisy Miller in the Hollywood Pavilion trial, he had been charged with one count of Health Care Fraud Conspiracy, 18 U.S.C. § 1349, for his role in *United States v. Marrero, et. al.,* a fraud case in which, through a company called Tendercare Medical Center, he and others billed Medicare for HIV infusion treatments that were either not medically necessary or were not delivered. S.D. Fla. Case: 1:09-cr-21019-CMA-3 Document: 3. He was facing 10 years in prison, *id*, and was sentenced to 84 months. *Id.* at Document: 158. That sentence was reduced to 42 months after his cooperation in the HP case *Id.* at Document: 214.

**Jean-Luc Veraguas**

Jean-Luc Veraguas, was charged with a single count of violating 18 U.S.C. §§ 1347 and 1349 (Conspiracy to Commit Healthcare Fraud), in a second American Therapeutic Corporation ("ATC") case, which also involved his own company "Neu Ways, Inc." *United Stats v, Veraguas,* S.D. Fla. Case: 1:12-cr-20287-FAM, Document: 3. Facing 10 years in prison, he was originally sentenced to 18 months.

*Id.* Doc. 32. After he testified in the Hollywood Pavilion ("HP") trial, that sentence was reduced to just 324 days, *id.* at Doc. 50, just over 10 1/2 months.

As Assistant United States Attorney Robert Zink, the lead prosecutor in the HP case, told the jury in his closing arguments: "You are the company you keep." *United States v. Kallen-Zury, et. al.,* Case S.D. Fla.: 1:12-cr-20757-JEM-2 Document: 387 at 4253:16. "Criminals," he said, "work with criminals." *Id.* at 4253:18. This, then, was the company that was kept by the United States Department of Justice. These, then, were the witnesses who were the "backbone" of the government's case.

### B. The Government's "Secondary" Witnesses

The cooperating felons were not, however, the only witnesses called upon by the government in the case at bar. In addition to several experts and law enforcement officers, several employees and former employees from Hollywood Pavilion also testified. The testimony of these "secondary" witnesses was crucial to the government's case as well. These witnesses included, *inter alia*: Delores Bedasee, Marcia Starkman, Marci Kagan, Maureen Deutch, Jean Lombardo, and Sherri Kokinda.

#### Delores Bedasee

Delores Bedasee, a registered nurse and the former director of nursing at HP, was terminated after leaving the facility without nursing coverage for the night. *Id.* at Document: 313 at 1031:12-15. She claimed in her testimony to have addressed with Daisy Miller the issue of "professional patients," *id.* at 1020:10-18, the length

of patients' stays at the hospital, *id.* at 1021:23-1022:9, the type of out-of-state patients admitted to the hospital and the reasons for their admission, *id.* at 1022:16-1023:21, as well as the admissions process itself. *Id.* at 1024:3-21).

**Marcia Starkman**

Marcia Starkman, another former director of nursing at HP, *id.* at Document: 345 at 2842:10, testified that she also raised concerns with Daisy Miller about the type of patients at the hospital, *id.* at 2843:20-25, her concerns about the nursing stations being unclean and unsafe, *id.* at 2844:4-6, and general concerns about the cleanliness of the facility. *Id.* at 2844:10-24. Ms. Starkman testified that she had discussed inappropriate "patient populations," *id.* at 2845:6-23, and expressed concerns about specific patients. *Id.* at 2848:21-2851:16.

One particular patient, Henry McCullouch, was described to the jury as an overweight man who was diabetic used a walker. When she heard that Mr. McCullouch was being discharged from HP and that he would be returning home to Louisiana by bus, she told the jury that she expressed her concern to Daisy Miller that he might become incontinent on such a long bus journey. She claimed that, in response, Daisy Miller stated: "If worse comes to worse, you know, we'll get him diapers." *Id.* at 2851:17-2854-3. Ms. Starkman also testified that she intercepted a falsified document from Mr. McCulloch's patient chart, which another nurse had been instructed to destroy, which she said she reported to the Petitioner. Daisy Miller, she advised the jury, later prevented her from bringing the incident up at an administrative meeting. *Id.* at 2854:18-2857:1.

**Marci Kagan**

Marci Kagan, a psychiatric social worker and psychotherapist at HP, testified that she raised concerns about the type of patients and patients' length of stay with Daisy Miller, only to be ignored. *Id.* Document: 329 at 1923:15-1924:22. She also claimed to have raised a concern about patients coming to the hospital from out of state, again, only to be ignored. *Id.* 1925:20-1926:4

**Maureen Deutsch**

Maureen "Moe" Deutsch was a therapist at Hollywood Pavilion's Intensive Outpatient Program. *Id.* Document: at 1681:8. She had a master's degree in Mental Health Counselling, *id.* at 1682:2, and was a certified addictions counselor. *Id.* at 1682:10. A former employee at ATC, she testified that she left there after she learned that "[t]hey were committing fraud" by falsifying her records. *Id.* at 1683:17-19. She testified her patients at HP complained that the sober houses (or "halfway houses") where they lived, which were operated by Keith Humes, Jean-Luc Veraguas, and Mathis Moore (among others), were substandard and that they, the patients, were being mistreated by the halfway house managers. When she advised Daisy Miller several times about her "…patients' complaints about the quality of the halfway houses," there was never any improvement. *Id.* at 1690:22-1693:20. She also described Daisy Miller as participating in "hinky conduct" relating to patient files, intimating that those records were being tampered with. *Id.* at 1716:1-14.

**Jean Lombardo**

Jean Lombardo had been the director of transportation at HP, who oversaw transporting patients to and from the facility and to various activities and appointments. *Id.* Document: 330 at 2054:3-9. She testified that, after Daisy Miller began working at HP, her job duties increased dramatically, primarily in picking up patients from bus stations, something she had not previously done, *id.* at 2054:20-21, the implication being that the Petitioner introduced the practice of bringing of out-of-state patients to HP.

**Sherri Kokinda**

Sherri Kokinda worked in the admissions department of HP under Daisy Miller. She testified that "95 percent" of the patients, when she worked there, came from a "referral source." *Id.* at 2090:14-19. Part of her job in admissions, she said, was to check a referred patient's Medicare information, including the "lifetime amount of days for inpatient services like mental health." *Id.* at 2090:12-17. She implied that patients who had "more than 14 or more days" left on their inpatient were automatically admitted to the hospital. *Id.* at 2091:7-10. This 14-day rule, she said, was told to her by Daisy Miller. *Id.* at 2092:4-5. She also testified that Daisy Miller instructed her when and how to add names to the "do-not-admit list." *Id.* at 2094:16-2095:1. She also discussed the frequency of out-of-town patients coming to the hospital. 2096:8-15. She related an incident when Daisy Miller became "furious"

with her when a "Referral Source" binder, allegedly used for keeping track of patient referrals, was not filled out. *Id.* at 2110:1-2111:12.

Ms. Kokinda's testimony, in particular, corroborated the government's primary theory of guilt. If the appellate court considered the testimony of the cooperating patient recruiters and Alan Gumer as the "primary" witnesses in the government's case against the petitioner, *Miller v. United States*, No. 20-11988, 2023 United States App. LEXIS 17227 (11th Cir. July 10, 2023), these non-felon witnesses, while perhaps secondary, were by no means insignificant. Assistant United States Attorney Andrew Warren's closing argument mentioned Maureen Deutsch 13 times, Marci Kagan 12, Sherri Kokinda ten, Marcia Starkman nine, and Jean Lombardo twice. *United States v. Kallen-Zury, et. al.,* Case S.D. Fla.: 1:12-cr-20757-JEM-2 Document: 385 at 4015:10-4073:18. In AUSA Zink's rebuttal close, Maureen Deutsch was mentioned another 18 times, Ms. Kagan five, Ms. Starkman four, and Ms. Lombardo once. *Id.* Document: 387 at 4250:13-4285:7. The testimony of these "secondary" witnesses was crucial to the government's case against Daisy Miller, yet was largely overlooked by the Eleventh Circuit.

In fact, the very first words the jury heard from AUSA Warren in the government's first closing argument were "Henry McCullouch." *Id.* Document: 385 at 4015:10. His invocation of Mr. McCullough's treatment at Hollywood Pavilion, as alleged by Marcia Starkman, summarizes the government's purpose for putting on all of the non-cooperating, non-"primary" witnesses: to paint Daisy Miller as a

callous, heartless, money-grubbing fraudster who cared nothing about her patients and everything about bilking Medicare out of millions of dollars.

> Henry McCullouch, a Vietnam veteran, a diabetic drug addict, rode for 24 hours from Shreveport, Louisiana, to come to Hollywood Pavilion. He had Medicare with plenty of days left, so he was promptly admitted. He was rushed to the emergency room three times with chest pains in the span of nine days. When he went back to Hollywood Pavilion, he was put on a bus and sent back to Louisiana with a sack lunch. In diapers.
>
> Henry McCullouch was sent to Hollywood Pavilion by Gloria Himmons, a patient recruiter who was paid $271,000, paid by the defendant, Karen Kallen-Zury. Henry McCullouch was kicked to the curb by Daisy Miller, who knew that a doctor at HP had tried to shred a document in his patient file that falsified McCullouch's treatment. And why? So that HP could bill Medicare for McCullouch's treatment for $9,000.
>
> *Id.* at 4015:10-24

Trial counsel's failure to call available witnesses, who would have offered credible evidence rebutting much of the testimony of the government's primary and secondary witnesses, was Constitutionally ineffective and fails under both the performance prong and the prejudice prong of this Court's decision in *Strickland*.

## THE *STRICKLAND* PERFORMANCE PRONG

The question of whether trial counsel in this case "rendered reasonable professional assistance" in this case boils down to this: is it reasonable for a trial attorney to rely solely or almost exclusively on the representations made by his or her client about potential witnesses in their case and the testimony that they may provide? The answer to this question is, of course, an emphatic and resounding "no."

> At the heart of effective representation is the independent duty to investigate and prepare. "Counsel have a duty to interview potential

> witnesses and 'make an independent examination of the facts, circumstances, pleadings, and laws involved."
>
> *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982) quoting *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir. 1979), *quoting Von Moltke v. Gillies*, 332 United States 708, 721, 68 S. Ct. 316, 322, 92 L. Ed. 309 (1948).

In this case, the Petitioner provided her defense counsel with a list of literally dozens of potential witnesses, along with suggestions as to what each witness would testify. As the magistrate judge pointed out in his Report and Recommendation in this case:

> There is little doubt that Miller proved to be a diligent client who supplied [trial counsel T. Omar] Malone with comprehensive memoranda, including detailed lists of witnesses and comments about their likely assistance. It is also clear that Malone and his investigator did not contact all of the witnesses before trial, though they did speak with several and learned about some of the witnesses' likely testimony indirectly.
>
> *Miller v. United States*, No. 16-21090-CIV-MARTINEZ/GOODMAN, 2019 U.S. Dist. LEXIS 89016, at *124 (S.D. Fla. May 24, 2019)

While it appears from the Eleventh Circuit's opinion that her trial counsel made cursory contact with some of those witnesses, it also appears that no more than a handful of the dozens of witnesses were contacted in any meaningful way. *Miller v. United States*, No. 20-11988, 2023 United States App. LEXIS 17227 (11th Cir. July 10, 2023). Trial counsel's near total reliance on his client's "comprehensive memoranda" was misplaced and was, by all measures, Constitutionally deficient. Daisy Miller was not an attorney. Although she may have had specific knowledge as to each of the witnesses that she provided in her list to her attorney, it would have been impossible for her to know exactly what they would testify to. More

importantly, as a non-attorney it would have been impossible for her to know from a strategic standpoint what was and was not relevant to her defense.

> An attorney's failure to investigate can constitute deficient performance if the attorney fails to perform an investigation and this failure resulted from negligence rather than a conscious decision to conserve an attorney's limited time and resources.
>
> *United States v. Walker*, No. 04-CR-0099-CVE, 2008 United States Dist. LEXIS 59059, at *43 (N.D. Okla. Aug. 5, 2008) citing *Strickland,* 466 United States at 690-91

It was the responsibility of her trial attorney to meaningfully investigate witnesses on her behalf, a responsibility that Daisy Miller's trial attorney negligently, inexcusably, and unconstitutionally disregarded.

The lower court's conclusion that the investigation made by trial counsel in this case was "adequate" is not supported by the evidence. In a case in which so many witnesses were slated to be called to testify against the Petitioner, and so many witnesses were available in rebuttal, it is difficult to imagine any situation in which an experienced, competent defense attorney would rely almost exclusively on their client's representation of any witness's possible testimony when making decisions about how to conduct a trial. But that is exactly what happened in the case below. Clearly, trial counsel's performance in this case was not "adequate." On the contrary, trial counsel's performance in Daisy Miller's case was negligent, incompetent, and Constitutionally deficient.

## THE *STRICKLAND* PREJUDICE PRONG

The lower court also relied heavily on the Magistrate's Report and Recommendation conclusion that "[m]ost of the witnesses who submitted affidavits

had only impermissible character evidence about Miller -- evidence which [the trial court] excluded." *Miller v. United States*, No. 16-21090-CIV-Martinez/Goodman, 2019 U.S. Dist. LEXIS 89016, at *125 (S.D. Fla. May 24, 2019). While it may be true that the dozens of witnesses provided to defense counsel would have been able to testify to as to Daisy Miller's character and good standing in her profession, this conclusion by the Magistrate and the lower court nevertheless begs the question: what else did these witnesses know? What more than Petitioner's notes to her attorney could they have testified to? How much more would Petitioner's counsel have learned about the potential testimony of the proffered witnesses had he conducted any sort of meaningful, independent investigation (rather than simply relying on his client's opinion of what would and would not be relevant)? To an experienced criminal defense attorney representing a client in a complicated federal trial such as the one at bar, every witness is important, every witness's testimony is crucial. Having had the benefit of reviewing the prosecution in the ATC trial, *United States v. Wilner*, et. al., S.D. Fla. Case 1:11-cr-20100-PAS, which included similar charges and many of the same witnesses, including Alan Gumer, Keith Humes, and Mathis Moore, *id*. at Document: 870, trial counsel's failure to investigate and develop potential witnesses was inexcusable. With such a clear road map available to him, how could trial counsel have justified failing to anticipate and investigate witnesses that would be necessary for his client's defense? This answer is, of course, he could not. Relying on a non-legal lay opinion regarding the potential

testimony of a witness, without more, cannot be considered Constitutionally effective and must, therefore, fail under the performance prong of *Strickland*.

The lower court's reliance on the proffered witnesses' testimony as it relates to the government's "primary" witnesses disregards the potential effect that testimony may have had on the government's secondary witnesses. The defendant's witnesses could have readily rebutted witnesses like Ms. Starkman and Ms. Deutsch, who testified directly to the government's theory of the case that Daisy Miller was everything except a patient-oriented, caring, healthcare professional, and that she participated in her employer's scheme to defraud Medicare in order to keep her job. The failure of her trial counsel to call any of these witnesses necessarily prejudiced the Petitioner.

The jury never heard from Manuel Llano, the CEO of Fort Lauderdale Behavioral Health Center, who supervised Daisy Miller at Sunrise Medical Center, and that her performance there was "Always patient centered, cared about the patients, very thorough in her work. Very ethical about everything she did at the facility." *Miller v. United States*, S.D. Fla. Case: 1:16-cv-21090-JEM Document: 57 81:13-15. They never heard that Mr. Llano offered executive-level employment to Daisy Miller "multiple times" during the time she was working at HP. In fact, Mr. Llano hired her immediately after she resigned from HP, offering her a higher-level position and more pay. *Id.* at 57 98 83:16-85:11.

The jury also never heard from Dr. Michael Piercey, medical director and co-owner of Premier Clinical Research Institute in Miami, that, when he worked with

Daisy Miller, she was ethical, professional, patient-oriented, and he had at least twice considered – and would have still considered even in light of the accusations made by the government in this case – hiring Daisy Miller away from HP. *Id.* at 98:17-104:16.

Likewise, the jury was prevented from hearing from Rita Sordellini, a 40-year mental health therapist, who was the former dean of students at Barry University in Miami. *Id.* at 139:4-12. In addition to her general denial of the government's primary theory of the case as cited by the lower court, Ms. Sordellini denied that the hospital was "…dirty [and] full of insects and vermin," directly contradicting Ms. Bedasee's testimony. *Id.* at 162:11-23. She described Daisy Miller as a "healer," and would have testified to the jury that:

> Daisy was our director and our treatment team leader. She was an incredible leader for us. She made the patients and the therapists a real good fit so that the patient could get the best possible treatment known to man. And she was -- talk about consistent, she was consistent. She was always on the floor, always with us. She was the only reason I was there. She was an incredible honor. A trustworthy and amazing therapist and clinician in her own right. She cared for the patients as no one in my experience has ever. And even the staff, she took care of us all. She was an incredible leader for us. And it was only because I had to go for open heart surgery that I had to leave Hollywood Pavilion and Daisy Miller, to my regret.
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> *Id.* at 157:7-19

This is hardly a description of a callous and calculating fraudster, and one which the jury never had an opportunity to hear.

As recounted in the lower court's opinion, Melvin Hunter, who worked directly under Daisy Miller at HP, testified at the evidentiary hearing in this case –

and would have testified in the trial – in direct contradiction of the government's primary theory of the case. *Miller v. United States*, No. 20-11988, 2023 United States App. LEXIS 17227 at 11 (11th Cir. July 10, 2023). As "…the senior admissions specialist" at HP*, Miller v. United States, S.D. Fla.* Case: 1:16-cv-21090-JEM Document: 57 at 191:2, his testimony would have been instrumental – if not crucial – to the jury fully understanding the admissions process. In addition to offering for the jury's consideration an alternative explanation to HP's high admission rates of patients with Medicare, *id.* at 224:22-228:6, Mr. Hunter would have been able to testify directly to several of the secondary issues raised by the government. Specifically, the jury would have heard from Mr. Hunter, and not just Daisy Miller, that there was no 14-day rule as testified to by several witnesses, including Ms. Kokinda, and that Daisy Miller was not callous towards patients or motivated by greed or the hospital's profitability and that she never mistreated patients. *Id*. at 236:10-237:12. These issues, which went to the heart of the government's "secondary" theory of the case, were never considered by the jury because no one other than Daisy Miller was called to tell them.

As recounted by the lower court, the jury did not hear from Michael Calabria, Sandra Novak, or Roy Rindom, all of whom were readily available to testify and would have done so in direct contradiction of the government's callous and greedy Daisy Miller theory. *Miller v. United States*, No. 20-11988, 2023 United States App. LEXIS 17227 at 11-12 (11th Cir. July 10, 2023). Importantly, the jury never heard from Arlene Parker, a former director of nursing at HP, whom trial counsel

investigated in a more thorough manner than the rest, and who, in fact he had planned to call on Daisy Miller's behalf. *Case 1:12-cr-20757-JEM-2* Document: 724 at 32-33. But because of trial counsel's incompetence, the trial court judge refused to authorize payment for the witness to be flown in from California to testify. *Id.* Her potential testimony, "that Daisy had consistently gone 'above and beyond' on behalf of the patients, whom she was adamant were 'not just a bunch of drug addicts,'" *id.*, would have directly contradicted that of Dolores Bedasee and others, testimony that went to the heart of the government's theory of the case.

The result of Daisy Miller's trial, because of her trial counsel's failure to investigate and call appropriate witnesses on her behalf, was unfair. As cited by the lower court in this case, to prevail on the prejudice prong:

> …"[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *[Strickland]* at 693. The petitioner instead must show that counsel's deficient representation rendered the result of the trial unfair. *See id.* at 697. The prejudice component of the *Strickland* standard thus reflects "[t]he purpose of the Sixth Amendment guarantee of counsel," which is to "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."
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> *Miller v. United States*, No. 20-11988, 2023 United States App. LEXIS 17227 at 20-21 (11th Cir. July 10, 2023) citing *Strickland v. Washington*, 466 United States 668 (1984).

While the lower court properly relied on the *Strickland* decision, it is clear that it misapplied the *Strickland* "reasonable probability" standard as it relates to the prejudice prong in this case. As Justice Jackson and Justice Sotomayor wrote in a dissent of this Court's recent denial of a petition for a writ of certiorari, the

"reasonable probability" standard as set forth in *Strickland* should be relatively easy for a defendant to reach:

> We have repeatedly said that the "reasonable probability" standard is not the same as the "more likely than not" or "preponderance of the evidence" standard; it is a qualitatively lesser standard. *Kyles* v. *Whitley*, 514 U. S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (collecting cases); see also *Dominguez Benitez*, 542 U. S., at 83, n. 9124 S. Ct. 2333, 159 L. Ed. 2d 157; *Strickler* v. *Greene*, 527 U. S. 263, 298, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (Souter, J., concurring in part and dissenting in part). In fact, it is "contrary to" our precedent to equate the "'reasonable probability'" materiality standard with the more-likely-than-not standard. *Williams* v. *Taylor*, 529 U. S. 362, 405-406, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).
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> *Chinn v. Shoop*, 143 S. Ct. 28, 28 (2022)

The "reasonable probability" standard in *Strickland*, therefore, could be likened to a law enforcement officer's "reasonable suspicion" standard when conducting an investigation; the "'more likely than not' or 'preponderance of the evidence' standard," *id*., would therefore be akin to an officer's probable cause to arrest.

By this definition, Daisy Miller clearly satisfied the *Strickland* prejudice prong "reasonable probability" standard and the lower court's affirmation of the denial of her appeal is "contrary to" Supreme Court precedent. Had Petitioner's attorney put on the witness stand any on the litany of witnesses that could have testified to Daisy Miller's professionalism, ethics, and level of patient care, as well as to offer alternative theories to the government's primary theory of the case, there is no doubt there was a "reasonable probability" that the jury's decision would have been different.

## CONCLUSION

The government's primary theory of guilt in this case was that the Petitioner went along with the fraud that was being committed by her employer in order to keep her job. Secondarily, they went to great lengths to paint the Petitioner as a greedy, callous, and heartless person who knowingly and readily went along with the fraud. Trial counsel, although having dozens of witnesses at his disposal to refute both theories, failed to meaningfully investigate the vast majority of those witnesses or call those few that he did. Instead, he relied solely on the representations made to him by his client, a non-lawyer, calling only her as a witness.

Trial counsel's failure to do his job was Constitutionally deficient, and thus satisfies the "Performance Prong" of *Strickland*. That there is a "reasonable probability" the jury's verdict would have been different had they heard the testimony from the Petitioner's witnesses, instead of from just the Petitioner herself, there can be no doubt. Thus the "Prejudice Prong" of *Strickland* is satisfied.

Summary reversal in this case is warranted or, at the very least, certiorari in this case should be granted.

Respectfully submitted,

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