No. ____

IN THE
Supreme Court of the United States

KAY ELLISON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for Writ of Certiorari

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Question Presented

In *Strickland v. Washington*, 466 U.S. 668, 694 (1984), this Court delineated core aspects of the Constitutional right to the effective assistance of counsel. Under the paradigmatic test, the reviewing court is asked to evaluate whether "but for" counsel's error, would the result have been different, essentially asking whether the error was so material as to deprive the defendant of a fair proceeding. *Id*. Subsequent to *Strickland*, this Court further recognized that the "but for" test becomes tenuously speculative when counsel's error deprives the defendant of an entire proceeding. *See Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). Under those circumstances, the test is not centered on a projected, hypothetical outcome had counsel performed with the Constitutionally-protected effectiveness but, rather, whether the defendant would have availed themselves of the proceeding foregone.

This case presents a simple, important, but unresolved question:

1. Is the loss of the opportunity to present an affirmative case due to Constitutionally-deficient representation during trial the loss of a "proceeding" such that the process-based test for prejudice applies to Petitioner's claim for habeas relief?

Parties to the Proceedings

In the Petition arising from Appeal No. 22-2169 in the United States Court of Appeals for the Third Circuit, Petitioner is Kay Ellison ("Petitioner").

Respondent is United States of America ("Respondent").

There are no corporate parties involved in this case.

Statement of Related Proceedings

This case arises from the following proceedings in the United States Court of Appeals for the Third Circuit and the United States District Court for the District of New Jersey:

Kay Ellison v. United States of America, Appeal No. 22-2169, United States Court of Appeals for the Third Circuit. Opinion filed December 30, 2024, Petition for Rehearing *En Banc* denied December 23, 2024.

Kay Ellison v. United States, No. 2:21-cv-16230-SDW, United States District Court for the District of New Jersey. Opinion filed June 7, 2022.

United States v. Kay Ellison, Appeal No. 18-3683, United States Court of Appeal for the Third Circuit. Opinion filed February 12, 2020.

United States v. Judy Tull & Kay Ellison, No. 2:15-cr-622-SDW, United States District Court for the District of New Jersey. Judgment entered on November 29, 2018 and Amended Judgment entered on February 22, 2019.

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Petition for a Writ of Certiorari

Petitioner respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Third Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported as *Kay Ellison v. United States of America,* No. 22-2169, 120 F.4th 338 (3d Cir. 2024). United States Court of Appeal for the Third Circuit. Opinion filed and judgment was entered on October 30, 2024, reprinted at App. 1a. Petition for Rehearing *En Banc* was denied on December 23, 2024. App. 69a.

The District Court's June 7, 2022 memorandum and order denying Petitioner's writ of habeas corpus reported at *Kay Ellison v. United States*, No. 2:21-cv-16230-SDW, 2022 WL 2047035, United States District Court for the District of New Jersey. Opinion filed June 7, 2022. App.19a

Jurisdiction

The United States Court of Appeals for the Third Circuit issued its opinion and judgment on October 30, 2024. App.1a. Petitioner's petition for rehearing *en banc* was denied on December 23, 2024. App. 69a. Under Supreme Ct. Rule 13.3, this Petition is timely. The Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes at Issue

The Fifth Amendment to the United States Constitution provides in part: "No person…shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law[.]" U.S. CONST. AMEND. V. App. 71a.

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense." U.S. CONST. AMEND. VI. App. 72a.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property without due process of law[.]" U.S. CONST. AMEND XIV. App. 73a.

28 U.S.C. § 2255(a) provides:

> [a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack,

> may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28. U.S.C. § 2255(a). App. 75a.

Introduction and Summary

Due to the Constitutionally-infirm advice of counsel, Petitioner, Ms. Kay Ellison, lost a proceeding—her case-in-chief at her criminal trial. Ms. Ellison waived the right to present her case-in-chief not because she was counseled that she *should not* present a defense; rather, she was counseled that she *could not* present a defense unless she waived her Fifth Amendment right against self-incrimination. Ms. Ellison sought habeas relief, which was denied by the District Court and affirmed by the United States Court of Appeals for the Third Circuit ("Third Circuit").

The Third Circuit Panel's (the "Panel") opinion announced a rule regarding the application of the process-based test for prejudice under the Sixth Amendment that is contrary to this Court's precedent. The Panel's opinion creates a novel, and erroneous, standard: if the error underlying an ineffective assistance of counsel claim occurs during a trial or a trial-like proceeding, the outcome-based test for prejudice applies to the claim no matter how much of the proceeding is impacted or foregone. The Panel further erred by likening the process-based test for prejudice with the per se finding of prejudice associated with structural error. This inappropriate grouping of the two tests fails to recognize three distinct lines of this Court's precedent.

The Panel's opinion is contrary to this Court's precedent and subverts the intention of *Strickland v. Washington,* 466 U.S. 668, 694 (1984), *Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985), and their progeny. This case presents the Court with an opportunity to correct the Third Circuit's course, clarify the tests for prejudice in ineffective assistance of counsel claims, and avoid confusion among other federal courts.

Statement of the Case

I. Ms. Ellison's Criminal Trial and Conviction

In 2016, Ms. Kay Ellison and co-defendant Judy Tull were charged by a superseding indictment with eight counts of bank fraud, wire fraud, and conspiracy to commit the same. App. 2a, 20a. Ms. Ellison was represented throughout the litigation by James Lees, Esq. App. 29a. Ms. Ellison and Ms. Tull were co-founders of Southern Sky Air & Tours d/b/a Myrtle Beach Direct Air and Tours ("Direct Air"). App. 2a. Direct Air was purchased by Avondale, and after Direct Air's purchase, Ms. Ellison and Ms. Tull continued to work for Direct Air in a limited capacity. App.46a.

The indictment alleged that Ms. Ellison and Ms. Tull fraudulently conspired to withdraw funds held in escrow for Direct Air's customers by allegedly making and canceling reservations for fictitious passengers, and by fraudulently concealing Direct Air's financial condition from its creditors through the submission of fraudulent release requests and financial statements to these creditors. App. 20a-26a. Robert Keilman, who held the title of CFO, among other titles, was a third individual involved in the alleged conspiracy. App. 26a. Mr. Keilman was not charged in the conspiracy and was a key witness for the government. A main issue in the criminal trial was how funds reserved for vouchers for future travel, consisting of a membership

fee and a voucher for air travel, were to be treated in escrow. App. 25a, 31a-32a.

Throughout the litigation, Ms. Ellison maintained her innocence and prepared to vigorously defend against the government's allegations. Ms. Ellison took several steps that demonstrate she intended to present a defense in some capacity, by either testifying herself or presenting a number of supporting defense witnesses. App. 29a. For example, Ms. Ellison participated in a mock jury weeks ahead of her trial, paid a jury consultant $5,000 to prepare her to testify, and even paid an IT expert more than $80,000 to testify regarding issues with the airline's accounting system. App. 36a. In fact, it had always been Mr. Lees' position, and Ms. Ellison's understanding, that her testimony and testimony of the other witnesses would be pivotal to maintaining a defense. App. 36a. ("Ultimately however conviction or acquittal at trial will rest primarily upon your performance when you are on the witness stand at trial. I do not believe you can be acquitted at trial without taking the stand and testifying."). Mr. Lees and Ms. Ellison prepared twelve witnesses to testify in Ms. Ellison's defense. App. 36a.

At trial, Mr. Lees promised the jury that it would hear Ms. Ellison's testimony and evidence:

> I will tell you these two citizens have been waiting

> years to be here, to come tell their side of the story as to why the Department of Justice, and this is our position and as we go through trial I will try as best I can to introduce evidence, have been sold a bill of goods by some bitter, bitter people to make these two women the patsies for a bankruptcy.

App. 29a. After presenting seven days of witnesses and over three thousand exhibits, the prosecution rested. App. 32a. Despite his previous promise to the jury that Ms. Ellison's testimony and other evidence would be pivotal to her defense, Mr. Lees urged Ms. Ellison not to testify. App. 37a. Critically, Mr. Lees also erroneously informed Ms. Ellison that if she did not testify, she would not be able to present any of the other witnesses that were prepared to testify in her defense. App. 37a. Ms. Ellison acquiesced and agreed to rest without presenting a defense, effectively leaving the government's case unopposed. App. 3a, 32a-33a, 37a.

Ms. Ellison and her counsel participated in a colloquy with the trial court, where she acknowledged that she was waiving her right to testify. App. 37a. However, that colloquy included nothing with respect to Ms. Ellison's ability to present other witnesses and

testimony even if she elected to assert her Fifth Amendment right against self-incrimination:

> THE COURT: All right. And have you had the opportunity to discuss with Mr. Lees, obviously, your right not to testify as well as your right not to put on a case[?] Have you had those discussions with [counsel]?
>
> DEFENDANT ELLISON: Yes, ma'am.
>
> THE COURT: And understa nding, after you've had those discussions with Mr. Lees, has it been your decision voluntarily to waive your right to testify in this matter?
>
> DEFENDANT ELLISON: Yes, ma'am.

App. 3a. Although this colloquy advises Ms. Ellison regarding the exercise of her Fifth Amendment rights, it does nothing to decouple the patently erroneous advice by Mr. Lees attaching such an invocation with the right to present *any* witnesses or evidence at all. App. 3a. Although Ms. Ellison states that she had discussions with her counsel regarding her rights,

there is no evidence she was aware at that time that his advice was erroneous. App. 3a.

After a one-sided jury trial in which Ms. Ellison, relying on counsel's misrepresentations, waived her right to present a defense that she had so rigorously prepared, on March 28, 2017, the jury convicted Ms. Ellison on all eight counts in the superseding indictment. App. 3a. After her conviction, Ms. Ellison was sentenced to a 94-month term of imprisonment, 5-years of supervised release, and ordered to pay $19,663,429.50 in restitution. App. 33a. Ms. Ellison appealed her conviction and sentence, but both were affirmed in 2020. App. 33a; *see also United States v. Ellison*, 804 Fed. Appx. 153 (3d Cir. 2020).

II. Proceedings Below.

Ms. Ellison filed a petition for habeas corpus under 28 U.S.C. § 2255 in the United States District Court for the District of New Jersey seeking to vacate her sentence because her counsel's erroneous advice resulted in the ineffective assistance of counsel. App. 19a. The District Court denied habeas relief without holding an evidentiary hearing, ruling that Ms. Ellison did not reach the threshold of demonstrating prejudice under the outcome-based test for prejudice announced in *Strickland*, 466 U.S. at 694. App. 67a.

Ms. Ellison timely appealed the decision of the District Court, and the Third Circuit issued a certificate of appealability certifying two questions:

"(1) whether Ellison's ineffectiveness claim should be analyzed using the standard for prejudice set forth in *Palmer v. Hendricks*, 592 F.3d 386, 397-99 (3d Cir. 2010), or whether the analysis in *Vickers v. Supt. Graterford SCI*, 858 F.3d 841, 857 (3d Cir. 2017), requires us to revisit that standard; and (2) whether a certificate of appealability (COA) is required to appeal from the denial of an evidentiary hearing." App. 16a-18a. The second question is not at issue in this petition.

After briefing and oral argument, the Third Circuit held that the *Strickland*, outcome-based test for prejudice applied to Ms. Ellison's ineffective assistance of counsel claim and affirmed the holding of the District Court that the evidence and testimony Ms. Ellison intended to present would not have changed the outcome of the proceeding. App. 14a.

However, the panel erred in three regards. *First*, the Panel erred by holding that the process-based test for prejudice only applies outside of a "trial or 'trial-like' context[.]" App. 8a. This holding is directly contrary to this Court's precedent. *Second*, the panel erred by holding that Ms. Ellison did not forfeit a right that resulted in a loss of a proceeding, which is required to trigger the process-based test for prejudice. App. 14a. *Third*, the Panel erroneously stated that Ms. Ellison sought a per se finding of prejudice in her appeal, which is not accurate.

Reasons for Granting the Petition

I. The Decision Below Misapplies This Court's Precedent From *Hill* And Its Progeny.

Under *Strickland*, a *prima facie* showing of prejudice requires the petitioner to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694 (examining whether counsel was ineffective for by allegedly presenting insufficient mitigation evidence in a capital case). This has come to be known as the "substantive" or "outcome-based" test for prejudice. Many cases default to using this outcome-based test without any further analysis as to why it is the appropriate test. *See, e.g.*, *Palmer,* 592 F.3d. at 394-95 (applying *Strickland* without discussion to a waiver of defendant's right to testify case).

In *Hill*, decided one year after *Strickland*, this Court departed from *Strickland*'s outcome-based test and held that in certain circumstances, the test for prejudice looks not to whether the defendant can show, more likely than not, that the outcome would have been different but, rather, whether the defendant would have utilized a process lost due to counsel's ineffectiveness. 474 U.S. at 59-60. *Hill*'s progeny from this Court, and as applied by circuit

courts of appeal, hold that where ineffectiveness leads to the forfeiture of an option to exercise a fundamental right to process that is reserved to the defendant, the proper prejudice inquiry is whether the defendant can demonstrate a reasonable probability that but-for counsel's ineffectiveness, the defendant would have opted to exercise that right. *See, e.g., Lafler v. Cooper*, 566 U.S. 156, 164 (2012); *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000); *see also Vickers*, 858 F.3d at 841; *Velazquez v. Supt. Fayette SCI*, 937 F.3d 151, 162-63 (3d Cir. 2019).

To hold otherwise distorts the nature of the Sixth Amendment guarantee to effective counsel at every stage of the proceeding because it is unfair and unworkable to require habeas petitioners to prove that the outcome of the proceeding would have been different where counsel's error leads to the deprivation of an entire process or proceeding. *See, e.g.*, *Garza v. Idaho*, 586 U.S. 232, 243-44 (2019) (refusing to require a defendant to demonstrate how the outcome of a proceeding that never occurred would have been different); *Lee v. United States*, 582 U.S. 357, 366-67 (2017) (same).

A. *Hill* And Its Progeny Created A Test For Prejudice That Acknowledges The Unfairness Of Requiring A Defendant To Demonstrate The Effect Of The Error On The Outcome Of A Proceeding That Did Not Occur.

In *Hill*, this Court determined that in plea-bargaining cases, the petitioner must only show that she would have made a different decision in the process. 474 U.S. at 59. Stated otherwise, a petitioner can show that there is a reasonable probability that, "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* The petitioner was not required to show that he would have prevailed at the end of the hypothetical trial. *Id.*

In so holding, the Court established a line between circumstances where counsel's poor performance essentially precluded the happening of a single event (*i.e.*, the defendant's testimony) and where counsel's actions forfeited an entire process (such as an entirely foregone trial).

Subsequently, this Court clarified in *Flores-Ortega*, 528 U.S. at 484, that the process-based prejudice standard announced in *Hill* applies beyond the plea-bargaining context. Rather, it is applicable where "counsel's alleged deficient performance arguably leads not to a judicial proceeding of disputed reliability, but rather to a forfeiture of a proceeding." *Id.* at 483 (applying the process-based test for

prejudice where alleged ineffectiveness was counsel's failure to file a notice of appeal, because it would be unfair to require petitioner to demonstrate the outcome of a hypothetical appeal). This Court recognized that where counsel's deficient performance led to the loss of an entire process, it would be "unfair to require a[] defendant to demonstrate that his hypothetical appeal had merit." *Id.* at 486.[1]

Where there is a loss of an entire process, whether it be through a plea, failure to appeal, or foregoing the

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[1] The burden associated with requiring a criminal defendant to demonstrate a reasonable probability that but-for counsel's deficient performance, the outcome of the proceeding would have been different, has also drawn comment. In dissenting from the majority in *Strickland*, Justice Thurgood Marshall criticized the outcome-based prejudice standard as follows:

> First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer.

Strickland, 466 U.S. at 710 (Marshall, J., dissenting).

presentation of any affirmative case, it may be difficult or impossible for a court to make a determination about the result of an entire lost proceeding, the contents of which may forever remain unknown. The outcome-based test for prejudice is far more workable where a court is tasked with limited, discrete decisions about how singular witnesses or individual pieces of evidence would be received by the fact finder, such as in *Strickland* where the Court examined how mitigation evidence would have affected a sentencing. Whereas here, the Court must assess a slew of hypothetical witnesses, evidence, and argument from a defendant's foregone case-in-chief. As such, it must delve into an alternate universe where that defense was presented and project how these various witnesses, including experts, and pieces of evidence would have affected the trial. The innumerable variables render such an exercise unworkable.

Additionally, the use of the process-based test for prejudice applies where a defendant forfeited a fundamental right and, despite counsel's error, a fair trial nonetheless occurs. *Lafler*, 566 U.S. at 164-65. *Lafler* confirmed that the process-based analysis is appropriate where a defendant lost the ability to exercise a constitutional right she otherwise would have invoked even in the context of a trial. *Id.* at 172-73.

On multiple occasions, this Court has affirmed the use of the process-based test for prejudice where it would be unduly difficult or unfair to require the defendant to demonstrate the outcome of a proceeding that did not occur. *See Garza*, 586 U.S. at 240 (defendant only needed to show he would have exercised the right to take an appeal without any further showing of his claim's merit); *Lee*, 582 U.S. at 366-67 (defendant made adequate showing of prejudice by demonstrating that he would have rejected his plea if counsel had properly informed him of the consequences despite the fact that he had no viable defense at trial).

The Panel notably did not analyze whether Ms. Ellison lost an entire proceeding when her counsel erroneous informed her that if she herself did not testify, she could not present any witnesses or evidence in her defense. Instead, it summarily assumed that when counsel's error occurred within the context of a trial, it was a strategic decision akin to making the decision not to testify rather than looking to whether the effect of the decision was to, essentially, forgo a proceeding to which the *Hill* inquiry applies. Ms. Ellison did not "opt[] not to present a defense" as the Panel characterized, but, rather, based upon counsel's misrepresentations, Ms. Ellison understood that she faced a Hobson's choice -- waive her Fifth Amendment right against self-incrimination and testify or present no affirmative case at all.

B. The Process-Based Test For Prejudice Applies To Any Circumstance Where, As Here, A Defendant Loses A Proceeding.

The process-based test for prejudice applies to ineffective assistance of counsel claims where counsel's ineffectiveness resulted in a deprivation of a proceeding. *Flores-Ortega*, 528 U.S. at 483; *see also Velazquez*, 937 F.3d at 163. In that circumstance, the defendant need not show that "the decision to undergo the process would have resulted in a more favorable outcome." *Id.* Instead, they need only demonstrate a reasonable probability that, but-for counsel's error, the defendant would have chosen to exercise the right or take advantage of the opportunity of which they were deprived. *See, e.g.*, *Flores-Ortega*, 528 U.S. at 481-82; *Garza*, 586 U.S. at 244-45. The appellate courts have interpreted *Flores-Ortega* and *Garza* similarly. *See Velazquez*, 937 F.3d at 163 (citing *Garza*, 586 U.S. at 242-244); *Honie v. Powell*, 58 F.4th 1173, 1203 (10th Cir. 2023) ("[W]hen a defendant claims ineffective assistance arising out of the waiver of a fundamental right that only the defendant can personally waive, the proper prejudice inquiry is whether the defendant can demonstrate a reasonable probability that, but for counsel's ineffectiveness, they would have opted to exercise that right.") (citing *Flores-Ortega*, 566 U.S. at 169-70) (Lucero, J., dissenting).

1. Ms. Ellison's deprivation of her case-in-chief is akin to the deprivation of an entire proceeding.

The right to present a complete defense is a fundamental Constitutional right. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [] or in the Compulsory Process or Confrontation clauses of the Sixth Amendment [], the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense.") (citations omitted). While trial management may be the province of defense counsel, it is the defendant who holds the ultimate right to make fundamental decisions in her case, including, *inter alia*, "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see also* ABA Model Rule of Professional Conduct 1.4.

Like the decision to plead guilty, file an appeal, and waive a jury trial, the decision whether to present a defense rested solely with Ms. Ellison. *Jones*, 463 U.S. at 751; *see also United States v. Rahm*, 993 F.2d 1405, 1414 (9th Cir. 1993) ("The rule the government suggests would eviscerate several constitutional rights. Rahm, like all criminal defendants, had the right not to testify. By choosing not to testify, she did not forfeit her right to present a defense or introduce testimony.").

The Panel determined that matters that happen within the confines of the trial itself do not constitute the denial of a proceeding. But, such a standard fails recognize the large continuum between discrete trial decisions, such as whether to present a witness or submit a piece of evidence (which may be considered strategic decisions), and broader situations, such as the one presented here, that constitute a deprivation of an entire proceeding. If, for example, after the Government had presented their case-in-chief, the court told Ms. Ellison that she was unable to present any evidence in her defense, it seems clear that Ms. Ellison would have been deprived of a proceeding. Moreover, it cannot be said that Ms. Ellison chose not to present a defense or decided that she should not present a defense. Ms. Ellison was told that if she did not herself testify, she could not present a defense at all.

Applying the process-based test for prejudice in circumstances where a defendant lost their right to present any defense whatsoever furthers the rights identified in *Strickland* and *Hill*. While it may be possible for a Court to weigh the effect one defendant's testimony or weigh the effect that a few witnesses would have on the outcome of the proceeding, hypothetically projecting the effect an entire case-in-chief may have on the jury is a difficult and speculative task. This is especially true here where Ms. Ellison's case-in-chief would have spanned a dozen witnesses prepared to testify in her defense,

expert testimony, and 56 boxes of exculpatory evidence that were not introduced. The record demonstrates that, at a minimum, Ms. Ellison had prepared an expert to rebut the government's testimony as to the amount of funds allegedly fraudulently transferred, which could have had a significant impact on the amount of restitution Ms. Ellison owes. The potential effect that an entire case-in-chief may have had on the jury is almost impossible to determine.

Recently, this Court expressed the inequity in requiring a defendant who was deprived of a proceeding to demonstrate the prospective merits of the proceeding that never took place. In *Garza*, this Court considered the loss of the right to appeal and noted that "when deficient counsel causes the loss of an entire proceeding, [the court] should not bend the presumption of prejudice rule simply because a particular defendant seems to have had poor prospects." *Garza*, 586 U.S. at 242-43 . In *Lee*, this Court applied a similar inquiry to the decision to accept a plea notwithstanding the lack of a viable defense at trial. *Lee*, 582 U.S. at 365. Petitioner freely recognizes that along the journey from individual trial decision to waiver of proceeding there exist numerous weigh stations. However, as this Court has recognized, when proceedings are forfeited, the *Strickland* test becomes Constitutionally speculative and unwieldy. Petitioner felt compelled to present no affirmative defense much in the way this Court has

previously held the acceptance of a plea or a waiver of appeal deprives the defendant of guaranteed process. Just as requiring a trial court to project the outcome of a trial or appeal foregone fails to fully protect the Fifth and Sixth Amendment interests at stake, so too does a rule that any decision made "in the trial proceeding," no matter how great the magnitude of the matter relinquished, requires trial court projection of a case never tried.[2]

2. The Panel's holding that the process-based test for prejudice only applies outside the context of a trial or trial-like proceeding is contrary to this Court's precedent.

Contrary to the Panel's decision that this test only applies outside of the context of a trial or trial like proceeding, this Court has applied the process-based test for prejudice within the context of a trial.

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[2] The Panel summarily stated that Ms. Ellison did not lose an entire proceeding because "waiving the right to testify or call witnesses is not tantamount to forfeiture of an entire proceeding[.]" App. 14a. However, Ms. Ellison waived *both* her right to testify and the right to present any evidence in her defense. This waiver occurred because counsel erroneously advised her that if she invoked her Fifth Amendment rights, she could not present any evidence or witnesses in her defense whatsoever leading to the loss of her case in chief. While Ms. Ellison's case may represent the ceiling for applying process-based test for prejudice, the facts of her case demonstrate that a proceeding was, in fact, lost.

See Lafler, 566 U.S. 164-65. In *Lafler*, counsel's erroneous advice led the defendant to forego his option to accept a plea deal and proceed to trial. *Id.* at 160. Despite the fact that a trial occurred, the Court applied the process-based test for prejudice and rejected the idea that the defendant needed to show that the outcome of the proceeding would have been different. *Id.* at 174. In *Lafler*, this Court directly rejected the idea that where a trial, in some form, nonetheless occurs, it wipes clean the taint of counsel's ineffectiveness. *Id*. at 169. Even *Strickland* acknowledged that "[t]he benchmark for judging any claim of ineffectiveness must be whether the counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686. Accordingly, the process-based test for prejudice is applicable even where a trial occurs.

This Court has applied the process-based test for prejudice numerous times and in a variety of different factual and procedural circumstances, rendering the Panel's assertion that the process-based test for prejudice only applies outside of a trial or trial-like proceeding incorrect. *Hill* applied the process-based test to pleas, *Flores-Ortega* applied the process-based test to appeals, and *Lafler* applied the process based test to declined plea offers. *See Hill*, 474 U.S. at 59-60; *Flores-Ortega*, 528 U.S. at 468; *Lafler*, 566 U.S. at 169. Here, as in *Lafler*, the process-based test for prejudice should apply even though part of a trial

occurred. As detailed at length above, Ms. Ellison's counsel's ineffectiveness led to the loss of an entire proceeding—her case-in chief, warranting the application of the process-based test for prejudice.

C. The Process-Based Test For Prejudice Sets Forth A Third Test For Prejudice That Is Consistent With *Strickland* And Does Not Require A Per-Se Finding Of Prejudice.

In its Opinion, the Panel improperly compares the process-based test to prejudice to a structural error. App. 11a. ("Like Ellison, the Petitioner in *Palmer* insisted that he was not required to show prejudice to prevail on his claim because depriving him of the right to testify is a 'structural defect in the entire trial process that requires automatic reversal[.]'"). However, this comparison is incorrect.

On one hand, structural errors are errors that "affect the framework within the trial proceeds, rather than being simply an error in the trial process itself." *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017)(citing *Arizona v. Fulminate*, 499 U.S. 279, 310 (1991)(internal quotations omitted). In the few cases where a structural error is found, prejudice is irrebuttably presumed. *Id*. at 295-96. On the other hand, *Hill*, *Flores-Ortega*, *Lafler,* and their progeny apply an analysis that is materially different than the structural error test. That inquiry asks whether but-for counsel's error, the client would have elected to exercise her right to the proceeding of which she was

denied. *Hill*, 474 U.S. at 59; *Flores-Ortega*, 528 U.S. at 483-85; *Lafler*, 566 U.S. at 164. A defendant that has lost the right to a proceeding is not granted a per se finding of prejudice as a defendant asserting a structural error may be.

In fact, *Flores-Ortega,* this Court expressly overturned the lower court's per se finding of prejudice and, instead, further developed the rule from *Hill* that where a defendant is deprived of an entire proceeding, the test for prejudice examines the process leading to the deprivation instead of the hypothetical outcome of the proceeding. *Flores-Ortega*, 528 U.S. at 483-85. Indeed, *Flores-Ortega* specifically notes that its holding is consistent with *Hill*. *Id*. at 485. Notably in *Flores-Ortega*, this Court identified a level of proof necessary to demonstrate a Constitutional violation. Rejecting a presumed prejudice standard for the loss of a proceeding in that instance, the Court required that the petitioner demonstrate at an evidentiary hearing that he would have appealed his conviction had he been properly advised by his counsel. *Id*. at 483-85. Notably, the inquiry upon remand was *not* whether the petitioner would have prevailed on his appeal, *i.e.* would proper legal representation had made an ultimate difference in the outcome. *Id*. at 485-86. Rather, the inquiry was whether the petitioner would have availed himself of the process potentially foregone as a result of counsel's defective advice. *Id*. Likening the process-based test

for prejudice to the per se finding of prejudice found when counsel's ineffectiveness leads to a structural error is an improper application of this Court's precedent.

II. This Case Presents An Appropriate Vehicle For Resolving An Important Question Of Federal Law And Settling Confusion In The Circuits.

Based on this Court's precedent, prior to its opinion in this case, the Third Circuit clarified the application of the process-based test for prejudice by stating:

> The combined effect of *Vickers*, *Lee*, and *Garza* is that petitioners alleging ineffective assistance of counsel resulting in a deprivation of process need not show that the decision to undergo the process would have resulted in a more favorable outcome. Instead, they need only demonstrate a reasonable probability that, but-for counsel's error(s), they would have made the decision—that is chosen to exercise the right or take advantage of the

> opportunity of which they were deprived.

Velazquez, 937 F.3d at 163; *Vickers*, 858 F.3d at 857. After the Third Circuit's clarification of the process-based test for prejudice, other Circuits began to examine the test set forth in *Vickers* and *Velazquez*. *See, e.g., Honie*, 58 F.4th at 1203 ("[W]hen a defendant claims ineffective assistance arising out of the waiver of a fundamental right that only the defendant can personally waive, the proper prejudice inquiry is whether the defendant can demonstrate a reasonable probability that, but for counsel's ineffectiveness, they would have opted to exercise that right.") (citing *Vickers*, 858 F.3d at 856) (Lucero, J., dissenting), *cert denied*, 144 S. Ct. 504 (2023).

In *Honie*, the defendant seeking habeas relief where counsel's purported error lead to a waiver of a jury sentencing. *Id*. at 1185. The Tenth Circuit did not reach the ultimate issue of whether the process-based test for prejudice applied to waivers of jury sentencing. *Id*. at 1194. Because the defendant's petition for habeas corpus derived from a state court conviction, the defendant was required to demonstrate that "clearly established law" applied to the defendant's claim under the principles of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Id*. at 1193. The Tenth Circuit did not determine whether the process-based test for prejudice applied to the defendant's claim because

application of the process-based test for prejudice was not clearly established law. *Id.* at 1198. The dissent went on to argue that *Hill*, *Flores-Ortega*, and *Lafler* provided an avenue for extending application of the process-based test for prejudice into waivers of jury sentencing. *Id.* at 1203. The courts would benefit from a clearly defined rule from this Court, which would avoid further misapplication of *Hill* and its progeny and prevent further conflicting case law from developing therein.

Conclusion

For these reasons, Petitioner respectfully requests that the Court grant this Petition for Writ of Certiorari, vacate the judgments of the United States Court of Appeals for the Third Circuit, and remand for further consideration.

Respectfully submitted,

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MARCH 24, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED OCTOBER 30, 2024

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2169

KAY ELLISON,

Appellant ,

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 2-21-cv-16230)
District Judge: Honorable Susan D. Wigenton

Argued: May 7, 2024

Before: MATEY, MONTGOMERY-REEVES, and ROTH, *Circuit Judges*

(Opinion filed: October 30, 2024)

OPINION OF THE COURT

MATEY, *Circuit Judge.*

Ineffective assistance of counsel claims under the rubric created in *Strickland v. Washington* turn on

prejudice, "a reasonable probability" that, but for the attorney's error, "the result of the proceeding would have been different." 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Kay Ellison argues her convictions for federal wire fraud, bank fraud, and conspiracy violate the Sixth Amendment because she relied on her attorney's erroneous advice that if she did not testify, she could not present other evidence. Applying the familiar *Strickland* standard, we agree with the District Court that there is no reasonable probability that this alleged error changed the jury's verdict. So we will affirm the denial of her petition for a writ of habeas corpus.

I.

A.

Ellison, along with co-defendant Judy Tull, founded and managed a now-defunct charter airline called Southern Sky Air & Tours operating as Myrtle Beach Direct Air & Tours (Direct Air). The Department of Transportation requires charter operators to deposit passengers' payments into an approved bank account and keep the funds escrowed until the flight is completed. 14 C.F.R. Part 380. But Direct Air had cash flow problems. So Ellison siphoned millions of dollars out of the escrow account through fictitious "dummy" passenger reservations and falsified corporate records. When the scheme was uncovered, the United States charged both Ellison and Tull with conspiracy to commit wire fraud and bank fraud in violation of 18 U.S.C. § 1349, wire fraud in violation of 18 U.S.C. §§ 1343 and 2, and bank fraud in violation of 18 U.S.C. §§ 1344 and 2.

Ellison and Tull proceeded to a jury trial, and Ellison opted not to present a defense. Her counsel stated, outside the presence of the jury, that he had "explained to [Ellison] the decision to testify or not to testify was hers and hers alone to make" and that Ellison had decided "not to testify and not to call witnesses on her behalf." App. 363. The trial court then questioned Ellison on the record:

> Court: All right. And have you had the opportunity to discuss with [counsel], . . . *your right not to testify as well as your right not to put on a case*, as you have no burden in this matter, the burden rests with the Government for the entire case[?] Have you had those discussions with [counsel]?
>
> Ellison: Yes, ma'am.
>
> Court: And understanding, after you've had those discussions with [counsel], has it been your decision voluntarily to waive your right to testify in this matter?
>
> Ellison: Yes, ma'am.

App. 364–65 (emphasis added). The jury convicted Ellison and Tull of all counts. Ellison was sentenced to ninety-four months' imprisonment and ordered to pay $19,663,429.50 in restitution. We affirmed her convictions on direct appeal. *See United States v. Ellison*, 804 F. App'x 153, 158 (3d Cir. 2020).

B.

Ellison then moved to vacate her sentence, pursuant to 28 U.S.C. § 2255, claiming her trial counsel incorrectly advised her that if she declined to testify at trial, she could not present other witnesses or evidence. Ellison argued this advice prejudiced her defense by depriving her of the opportunity to contest key portions of the Government's case.[1] The District Court denied Ellison's motion without an evidentiary hearing and declined to issue a certificate of appealability. In reaching its decision, the District Court did not directly address Ellison's allegation that counsel erroneously advised her of a contingent link between the right to testify and the right to present a defense. Rather, the District Court concluded that, even assuming Ellison could prove counsel was ineffective, her claim would still fail because she could not show prejudice.[2] Accepting as true Ellison's statements of the nature of the expected testimony,[3] the District Court focused the prejudice

1. Ellison's petition described her intended trial testimony, as well her own "brief summary" of the intended testimony of her twelve proposed witnesses. App. 129; *see also* App. 127–33.

2. "Because failure to satisfy either prong defeats an ineffective assistance claim, and because it is preferable to avoid passing judgment on counsel's performance when possible," courts often address the prejudice prong first where it disposes of a petitioner's claims. *United States v. Cross*, 308 F.3d 308, 315 (3d Cir. 2002).

3. Although Ellison swore to *her own* understanding of what her proposed witnesses "were prepared to testify to" at trial, App. 129, she did not provide any sworn statements from the witnesses themselves. But showing *Strickland* prejudice "may

inquiry on "whether there is a reasonable probability . . . that if Ellison had testified herself and presented the testimony of her proposed witnesses, the jury would have acquitted." App. 61. And it found no such possibility:

> Ellison's defense, with or without the proposed witness testimony, was dependent on the jury concluding . . . that the DOT regulation permitted (1) charter airlines to sell vouchers and take membership and luggage fees out of escrow before passenger flights had been completed; and (2) to withdraw from the escrow account without flight by flight accounting of the funds. The jury rejected this argument and there is nothing about the proposed defense testimony that makes it . . . more persuasive in light of the DOT's position that voucher sales were never permitted and withdrawals from escrow required a flight by flight accounting. The uncontradicted evidence of Direct Air's continuous losses and high fuel bills makes it unlikely the jury would believe the escrow shortage was caused solely by undiscovered computer errors and that there was no intent

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not be based on mere speculation about what the witnesses . . . might have said." *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989). Rather, "[u]nder usual circumstances," we expect that "information [obtainable through an adequate investigation] would be presented to the habeas court through the information of the potential witnesses." *Duncan v. Morton*, 256 F.3d 189, 202 (3d Cir. 2001) (alteration in original) (quoting *Gray*, 878 F.2d at 712). Ellison made no such presentation.

> to deceive the banks. Evidence of Ellison's involvement in running Direct Air makes it unlikely the jury would conclude she was not involved in the inflation of the year-end financial statements.

App. 81.

A motions panel of this Court then granted Ellison a certificate of appealability as to whether the District Court should have addressed Ellison's "assertion that her counsel advised her that the right to testify was linked to the right to present a defense."[4] App. 83. The

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4. The motions panel denied a certificate of appealability for all other claims, including whether Ellison demonstrated prejudice under the outcome-based standard applied by the District Court. But the panel also referred "[t]he question of whether a certificate of appealability is required to challenge the District Court's denial of an evidentiary hearing." App. 84.

We agree with both Ellison and the Government that the certificate of appealability statute applies only to "final order[s]" in § 2255 proceedings, *see* 28 U.S.C. § 2253(c)(1)(B), and does not explicitly cover interlocutory orders, such as the denial of a request for an evidentiary hearing. *See Harbison v. Bell*, 556 U.S. 180, 183, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009) (explaining that § 2253(c)(1) refers to orders that "dispose of the merits" of the proceeding). But that conclusion does not affect our jurisdiction. An order denying an evidentiary hearing on an ineffective-assistance claim is not independently appealable under the collateral order doctrine. *See In re Grand Jury*, 705 F.3d 133, 144–45 (3d Cir. 2012) (noting that to be immediately appealable, an interlocutory order must be "effectively unreviewable on appeal from the final judgment in the underlying action") (internal quotation marks

order directed the parties to address "whether Ellison's ineffectiveness claim should be analyzed using the standard for prejudice set forth in *Palmer v. Hendricks*, 592 F.3d 386, 397–99 (3d Cir. 2010), or whether the analysis in *Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 857 (3d Cir. 2017), requires [this Court] to revisit that standard." App. 84.[5]

II.

Strickland announced the now-familiar test for claims of ineffective assistance. *First*, "the defendant must show that counsel's performance was deficient." 466 U.S. at 687.[6] *Second*, "the defendant must show that the deficient performance prejudiced the defense." *Id.*

A.

"[P]rejudice is defined in different ways depending on the context in which it appears." *Weaver v. Massachusetts*,

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omitted). Rather, under the merger rule, that order would "merge into the final judgment" denying the § 2255 motion itself, and then "may be challenged on appeal from that judgment." *In re Diet Drugs Prods. Liab. Litig.*, 418 F.3d 372, 377 (3d Cir. 2005). That is what happened here.

5. The District Court exercised jurisdiction under 18 U.S.C. § 3231 and 28 U.S.C. § 2255. We have jurisdiction under 28 U.S.C. §§ 1291, 2253(c)(1)(B), and 2255(d). On the denial of a § 2255 motion, we "review legal conclusions de novo and factual findings for clear error." *United States v. Folk*, 954 F.3d 597, 601 (3d Cir. 2020).

6. The District Court assumed that Ellison's attorney was ineffective, and we do the same. *See* App. 61; *Cross*, 308 F.3d at 315.

582 U.S. 286, 300, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017). When an attorney's error occurs during trial or another legal proceeding that is "sufficiently like a trial in its adversarial format and in the existence of standards for decision,"[7] "[t]he defendant must show that there is a reasonable probability[8] that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 at 686–87, 694. In these cases, the prejudice analysis is conceptually clear-cut because we generally presume that trials and "trial-like" proceedings are reliable, aside from the alleged error. *Id.* at 695 ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."). So to evaluate prejudice, we look at the "result of the proceeding" and consider the likelihood that, absent the ineffective assistance, that result "would have been different." *Id.* at 693, 694.

B.

But where counsel's misstep occurs outside trial or a "trial-like" context, *Strickland*'s prejudice prong is less intuitive. As a result, the Supreme Court has, at

7. *See Strickland*, 466 U.S. at 686-87 (analogizing capital sentencing to trial).

8. A "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. That requires a "substantial," not just a "conceivable," likelihood of a different result. *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

times, retrofitted the test for claims arising from other stages of the adjudicative process. For example, *Hill v. Lockhart*—decided one year after *Strickland*—involved an ineffective-assistance claim arising from a guilty plea. 474 U.S. 52, 53, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). There, counsel allegedly misadvised the defendant about the length of his statutorily required parole term, and the defendant claimed that made his guilty plea involuntary and unintelligent. *Id.* at 55–56. The Court made clear that the "two-part *Strickland* . . . test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Id.* at 58. But on the prejudice prong, it did not conduct a *Strickland* "outcome-based" analysis—*i.e.*, asking whether the defendant would have still been convicted had he proceeded to trial rather than pleading guilty. Instead, the Court adopted a "process-based" standard, under which the defendant could demonstrate prejudice merely by showing that, "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

Over several decades, the Court has only applied *Hill*'s process-based standard for prejudice to a narrow class of ineffectiveness claims, including where counsel deficiently advised the defendant to reject a plea deal, *see Lafler v. Cooper*, 566 U.S. 156, 163–64, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), or counsel failed to file a notice of appeal, *see Roe v. Flores-Ortega*, 528 U.S. 470, 484, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). In those cases, the Court explained that the defendant must instead show

> a reasonable probability that the plea offer would have been presented to the court (*i.e.*,

> that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed

Lafler, 566 U.S. at 164, or "a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed," *Flores-Ortega*, 528 U.S. at 484. In these cases, the Supreme Court has presumed prejudice, "with no further showing from the defendant o[n] the merits of [the] underlying claim[]," where the ineffective assistance "rendered the proceeding presumptively unreliable or entirely nonexistent." *Flores-Ortega*, 528 U.S. at 484; *see also Lafler*, 566 U.S. at 168–89.

III.

Ellison argues that *Strickland*'s outcome-based prejudice test is irrelevant because her counsel's ineffective assistance deprived her of both her right to testify and her right to present a defense,[9] and thus the process-based prejudice test should apply. We disagree, and our decisions in *Palmer* and *Vickers* explain why.

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9. A right the Supreme Court announced in *Rock v. Arkansas*, 483 U.S. 44, 51–53, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

Appendix A

A.

As here, *Palmer* involved counsel allegedly failing to advise that the defendant alone could decide whether to testify. 592 F.3d at 394. The petitioner later claimed that, had he been properly advised, he would have told the jury "[his] side of what really happened." *Id.* at 390. But he did not offer any details on his proposed testimony, let alone any factual analysis of how his testimony would have swayed the jury. *See id.* at 395. Like Ellison, the petitioner in *Palmer* insisted that he was not required to show prejudice to prevail on his claim because depriving him of the right to testify is a "structural defect in the entire trial process that requires automatic reversal[.]" *Id.* at 396–97 (internal quotation marks omitted). But we rejected that argument, *see id.* at 397–99,[10] and concluded

10. A conclusion shared by every other circuit court to consider the issue, *see Palmer*, 592 F.3d at 397–98 (collecting cases), and still consistent with more recent decisions, *see, e.g.*, *Hartsfield v. Dorethy*, 949 F.3d 307, 312–16 (7th Cir. 2020) (finding it "not reasonably probable that [the petitioner's] proposed testimony would have affected the jury's verdict" and noting "the unanimous weight of authority" rejecting the contention that a defendant "need not show prejudice when the case involves the right to testify"); *Smith v. Dickhaut*, 836 F.3d 97, 106 (1st Cir. 2016) (finding no prejudice in a right-to-testify claim because petitioner failed to show "that, had he testified, there is a reasonable probability that the outcome of his trial would have been different").

We have continued to demand prejudice in right-to-testify cases since *Palmer*. *See, e.g.*, *Ruiz v. Superintendent Huntingdon SCI*, 672 F. App'x 207, 212 (3d Cir. 2016) (finding "no reasonable probability that the outcome would have been different had [the petitioner] testified at his trial" because his "proposed testimony

there could be no prejudice under *Strickland* because the petitioner did not show "'that the decision reached'" at his trial "'would reasonably likely have been different absent the errors,'" *id.* at 395–96 (quoting *Strickland*, 466 U.S. at 696).

B.

Our decision in *Vickers* does not change the application of the *Strickland* prejudice standard to the case before us. There, the petitioner claimed ineffective assistance based on counsel's advice to forgo his right to a jury trial and choose a bench trial instead. *Vickers*, 858 F.3d at 844–46. Following *Strickland*, our precedent at the time required showing that a jury trial would have resulted in a more favorable outcome than the bench trial. *See United States v. Lilly*, 536 F.3d 190, 196–97 (3d Cir. 2008). But *Vickers* reasoned that later Supreme Court decisions like *Lafler* require applying the process-based test for prejudice, not the traditional outcome-based prejudice inquiry. 858 F.3d at 857.[11] Accordingly, the question became "whether the defendant can demonstrate a reasonable probability that, but for counsel's ineffectiveness, he would have opted to exercise [the] right [at issue]." *Id.*

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would not have changed an objective factfinder's view of all of the evidence"); *United States v. Aldea*, 450 F. App'x 151, 153 (3d Cir. 2011) (finding no prejudice because the petitioner's testimony "would not have undermined the verdict"). And we reaffirmed this aspect of *Palmer* just over two years ago. *See Lesko v. Sec'y Pa. Dep't of Corr.*, 34 F.4th 211, 236–37 (3d Cir. 2022).

11. We reasoned that our "holding regarding the appropriate prejudice inquiry in this context" merely "align[ed] *Lilly* with the Supreme Court's subsequent decision in *Lafler*," and thus "d[id] not necessitate en banc review." *Vickers*, 858 F.3d at 857 n.15.

IV.

The *Palmer* outcome-based prejudice standard, not the *Vickers* process-based prejudice standard, controls here. This is because showing "actual prejudice" is required where the alleged error occurs within a judicial proceeding that is otherwise "presumptively reliable." *Flores-Ortega*, 528 U.S. at 484. That must include right-to-testify claims like Ellison's, because the error in those cases (*i.e.*, failing to present testimony from the defendant or other defense witnesses) occurs "'during the presentation of the case to the jury' and 'may therefore be quantitatively assessed in the context of other evidence presented in order to determine'" what effect, if any, it had on the jury's verdict. *Palmer*, 592 F.3d at 397 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307–08, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). The prejudicial effect will necessarily depend on the significance of the facts to which the defendant and her witnesses might have testified, evaluated alongside the rest of the evidence produced at trial. *Id.* at 399. So, following *Palmer*, Ellison needed to show a reasonable probability that, but for counsel's errors, she would have exercised her trial rights, and that doing so would have changed the result. That is the analysis the District Court correctly conducted.[12]

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12. In so observing, we are mindful of the confines of the certificate of appealability, limited to whether the District Court applied the correct legal standard for prejudice under *Strickland*. Because we hold that it did, we "will not consider" arguments challenging the District Court's conclusion after applying that

The cases Ellison relies on are distinguishable because they involved the forfeiture of *entire proceedings* to which the defendant was entitled—a trial rather than a plea (*Hill*), an appeal (*Flores-Ortega*), a plea rather than a trial (*Lafler*), and a jury trial instead of a bench trial (*Vickers*). But that did not happen here. Waiving the right to testify or call witnesses is not tantamount to forfeiture of the entire proceeding, nor does it render the trial per se "fundamentally unfair."[13] *Strickland*, 466 U.S. at 700; *cf. Vickers*, 858 F.3d at 857. Rather, "when a defendant states, 'I would have testified to X, Y, and Z, but my attorney would not put me on the stand,' the significance of such testimony can be evaluated in the context of the remainder of the evidence in order to assess the impact of the constitutional violation." *Palmer*, 592 F.3d at 399. We conclude from this that *Palmer*'s outcome-based prejudice

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standard, as they are "not within the scope of the issue on which we granted a certificate of appealability." *Miller v. Dragovich*, 311 F.3d 574, 577 (3d Cir. 2002).

13. Of course, "[t]here are good tactical reasons why it may not be best for the defendant to testify in some circumstances." *United States v. Teague*, 953 F.2d 1525, 1533 n.9 (11th Cir. 1992). "Some examples might be if the defendant might provide evidence of missing elements of the crime on cross-examination, if the defendant might be prejudiced by revelation of prior convictions, or if the prosecutor might impeach the defendant using a prior inconsistent statement." *Id.* It would thus misstate both law and common practice to suggest that waiving the right to testify or call witnesses "so undermine[s] the proper functioning of the adversarial process that," in general "the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

standard is the appropriate one in Ellison's ineffective-assistance case.

* * *

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Because Ellison failed to demonstrate that her attorney's alleged error affected the jury's verdict, we will affirm the District Court's denial of her petition for a writ of habeas corpus.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED NOVEMBER 3, 2022

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 22-2169

KAY ELLISON,

Appellant

v.

UNITED STATES OF AMERICA

(D.N.J. Civ. No. 2-21-cv-16230)

Present: AMBRO, KRAUSE, and PORTER, *Circuit Judges*

Submitted is Appellant's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1), which includes a request for an evidentiary hearing in the above-captioned case.

Respectfully,

Clerk

Appendix B

ORDER

The foregoing request for a certificate of appealability is granted in part, referred to the merits panel in part, and denied in part. Appellant filed a motion to vacate her conviction and sentence under 28 U.S.C. § 2255, in which she claimed that she received ineffective assistance of counsel with regard to her rights to testify and to present a defense. In denying her claims, the District Court did not address Appellant's assertion that her counsel advised her that the right to testify was linked to the right to present a defense. *See* ECF No. 1-1 at 4-5. Because jurists of reason would debate the District Court's treatment of this claim, we grant her request for a certificate of appealability on this claim. The question of whether a certificate of appealability is required to challenge the District Court's denial of an evidentiary hearing is referred to the merits panel.

A briefing schedule shall be issued. In addition to any other arguments the parties wish to raise in their briefs, they should address (1) whether Ellison's ineffectiveness claim should be analyzed using the standard for prejudice set forth in *Palmer v. Hendricks*, 592 F.3d 386, 397-99 (3d Cir. 2010), or whether the analysis in *Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 857 (3d Cir. 2017), requires us to revisit that standard; and (2) whether a certificate of appealability (COA) is required to appeal from the denial of an evidentiary hearing. *See United States v. Scripps*, 961 F.3d 626, 630 (3d Cir. 2020) (requiring, without discussion, a COA to challenge denial of an evidentiary hearing); *Roundtree v. United States*,

751 F.3d 923, 924 (8th Cir. 2014) (same); *United States v. Gonzalez*, 596 F.3d 1228, 1244 (10th Cir. 2010) (same); *but see Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016) (holding COA is not required to appeal denial of evidentiary hearing); *cf. Harbison v. Bell,* 556 U.S. 180, 182-83 (2009) (holding COA not required to challenge denial of counsel's post-judgment motion to expand the scope of representation to a non-habeas proceeding).

With respect to the other claims Appellant raised in her § 2255 motion, we deny her application for a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel,* 529 U.S. 474, 484 (2000). Reasonable jurists would not debate the District Court's decision to deny those claims on the merits. *See Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003). In particular, Appellant has not shown that she was arguably prejudiced by her counsel's performance, such that, had he presented her proposed testimony and that of the defense witnesses, "the result of the proceeding would have been different." *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Appellant's request for an evidentiary hearing is denied.

By the Court,

s/Thomas L. Ambro
Circuit Judge

Dated: November 3, 2022

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED JUNE 7, 2022

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 21-16230 (SDW)

KAY ELLISON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Filed June 7, 2022

WIGENTON, District Judge

OPINION

Presently before the Court is Petitioner Kay Ellison's ("Ellison") amended motion to vacate sentence brought pursuant to 28 U.S.C. § 2255 and her memorandum in support thereof, challenging her criminal conviction and sentence in Criminal Action No. 15-622-2. (Civ. ECF Nos. 4, 5).[1] The Government filed an answer to the amended

1. This Court will cite to docket entries in this civil proceeding under § 2255 using "Civ. ECF No(s)." and will cite to

§ 2255 motion (Civ. ECF No. 9), to which Ellison replied (Civ. ECF No. 10), and requested an evidentiary hearing (Civ. ECF Nos. 11, 12). For the reasons set forth below, this Court will deny Ellison's amended § 2255 motion without an evidentiary hearing and will deny Ellison a certificate of appealability.

I. BACKGROUND

A. The Superseding Indictment

In December 2016, Ellison and her co-defendant, Judy Tull ("Tull"), as principle officers of Southern Sky Air & Tours d/b/a Myrtle Beach Direct Air & Tours ("Direct Air"), were charged with an eight-count superseding indictment for their fraudulent scheme to withdraw escrowed passenger money before those passengers completed their flights. (Crim. ECF No. 44.) The Superseding Indictment charged Ellison and Tull, under Count One, with conspiracy to commit wire fraud and bank fraud, in violation of 18 U.S.C. §§ 1343, 1344. (*Id.* at 1-10.) The Superseding Indictment alleged, in relevant part, the following background:

> a. Southern Sky Air & Tours, d/b /a "Myrtle Beach Direct Air & Tours" ("Direct Air"), was a public charter company founded in or about 2006 and headquartered in Myrtle Beach, South Carolina. In or about 2007, Direct Air

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docket entries in Ellison's related Criminal Action, 15-cr-622-2, using "Crim. ECF No(s)."

commenced operations as a public charter operator. A public charter operator books airline reservations and arranges for charter flights to be flown by contracted airline carriers. Direct Air offered charter services in a number of cities, including Newark, New Jersey.

b. Defendant JUDY TULL co-founded Direct Air, served as its Chief Executive Officer, handled Direct Air's flight operations, and had frequent communications with Direct Air's credit card processors and its corporate depository bank, "Bank # 1." [Valley National Bank].

c. Defendant KAY ELLISON co-founded Direct Air and served as its Managing Partner. Defendant ELLISON was involved in Direct Air's customer reservations.

d. Robert Keilman ("Keilman"), a co-conspirator not charged as a defendant herein, co-founded Direct Air and held the title of Chief Financial Officer ("CFO"). Keilman's responsibilities included, among other things, preparing Direct Air's financial statements.

e. Defendant TULL, defendant ELLISON, and others owned equity shares in Direct Air and received salaries and bonuses from Direct Air.

f. The U.S. Department of Transportation ("DOT") . . . regulated public charter operators such as Direct Air. . . .

Among other things, DOT regulations required charter operators to protect passengers financially either by having the charter operator post a security or by having the charter operator keep passenger payments for future flights in a designated depository or escrow account with an approved bank. DOT regulations further protected flying passengers by not allowing charter operators like Direct Air to receive a passenger's funds from the depository or escrow account until the passenger's flight was completed.

g. Bank # 1 was a regional bank . . . insured by the Federal Deposit Insurance Corporation, and was a financial institution under Title 18, United States Code, Section 20. Bank # 1 was approved by the DOT to maintain depository or escrow accounts. Direct Air maintained a depository account at Bank # 1 (the "Bank # 1 Depository Account") and caused passenger payments for future flights to be deposited into the Bank # 1 Depository Account. Direct Air and Bank # 1 agreed that these payments for purchased flights would remain in the Bank # 1 Depository Account and would not be released to Direct Air until completion of the purchased flights. Upon completion of purchased flights,

defendant TULL, defendant ELLISON, or a Direct Air employee, acting at the direction of either Defendant TULL or defendant ELLISON, sent either a facsimile or an e-mail from Direct Air's office in South Carolina to Bank #1 in New Jersey requesting payment from the Bank #1 Depository Account ("Bank #1 Release Requests"). The Bank # 1 Release Requests contained information detailing the purported revenue associated with the completed flights.

h. "Bank #2" [Merrick Bank] . . . was insured by the Federal Deposit Insurance Corporation, and was a financial institution under Title 18, United States Code, Section 20. Bank #2 acquired, cleared, and settled credit and debit card payments made by certain customers booking flights through Direct Air. When Direct Air customers paid for their charter reservations using certain credit and debit cards, Bank #2 acquired the funds to cover the purchases and deposited the funds into the Bank # 1 Depository Account, where the funds were supposed to remain until the completion of the purchased flights. If a customer sought a refund of a credit or debit card charge, Bank #2 had to initiate a "chargeback" to recover the funds from Direct Air.

i. The "Card Processor" [JetPay] was a credit and debit card processor. . . . The Card

Processor contracted with Direct Air and Bank #2 to process credit and debit card payments acquired by Bank #2 and deposited into the Bank # 1 Depository Account, where the funds were supposed to remain until the completion of the purchased flights. The Card Processor, acting on behalf of Bank #2, also periodically received and reviewed financial statements that contained information regarding Direct Air's purported financial performance and health, and transmitted these financial statements to Bank #2 for additional review. Both the Card Processor and Bank #2 relied upon these financial statements.

j. The "Credit Card Company" [American Express] . . . was a bank holding company, and was a financial institution under Title 18, United States Code, Section 20. The Credit Card Company funded and processed its own credit card payments. Some Direct Air passengers paid for future flights on Direct Air using credit cards issued by the Credit Card Company. The Credit Card Company deposited funds to cover the purchases to Direct Air to the Bank # 1 Depository Account, where the funds were supposed to remain until the completion of the purchased flights. If a customer sought a refund of a credit card charge, the Credit Card Company had to initiate a chargeback to recover the funds from Direct Air and credit them to the customer's account. The Credit

Card Company also periodically received and reviewed financial statements that contained information regarding Direct Air's purported financial performance and health. The Credit Card Company relied upon these financial statements.

k. Direct Air periodically offered a promotion called the "Family Ties" program, which allowed passengers to purchase vouchers redeemable for future flights. As part of the program, Direct Air divided a passenger's total payment into a "membership fee" and a separate "ticket price."

1. Direct Air ceased operations and declared bankruptcy in or about March 2012. After Direct Air ceased operations, its flights were cancelled. By this time, passengers had already purchased tens of thousands of tickets for future travel. Pursuant to DOT regulations and agreements with Bank #2, the Card Processor, and the Credit Card Company, money associated with these tickets should have been held in the Bank # 1 Depository Account and should have totaled in the tens of millions of dollars. In reality, however, the Bank # 1 Depository Account contained only approximately $1 million at the time Direct Air ceased operations. As a result, there were insufficient funds in the Bank # 1 Depository Account from which to reimburse Direct Air

> passengers who had prepaid for flights that were canceled upon Direct Air's termination of operations.

(Crim. ECF No. 44 at 1-5.)

The alleged conspiracy occurred between October 2007 and March 2012, the object of which was for Tull, Ellison and co-conspirator Keilman to fraudulently withdraw funds from escrow, held by Valley National Bank for Direct Air's customers, and to fraudulently conceal Direct Air's true financial condition from Merrick Bank, JetPay and American Express. (*Id.* at 6-7.) The alleged conspiracy was accomplished by:

> on various occasions between 2008 through 2010, defendant TULL, defendant ELLISON, and others:
>
> (a) made and directed others to make reservations for fictitious passengers in Direct Air's reservation system in order to inflate the revenue associated with completed flights; (b) submitted and directed others to submit fraudulent Bank #1 Release Requests to Bank #1 with these inflated revenue figures; and (c) canceled and directed others to cancel the fictitious reservations in Direct Air's reservation system. Defendant TULL, defendant ELLISON, and others thereby fraudulently caused millions of dollars to be released from the Bank # 1 Depository Account in the manner described in this paragraph.

Appendix C

. . .

It was further part of the conspiracy that defendant TULL, defendant ELLISON, Keilman, and others became aware of a shortfall in the Bank # 1 Depository Account and concealed that shortfall in the Bank # 1 Depository Account by submitting and causing the submission of fraudulent financial statements to Direct Air's creditors and the creditors' agents, including Bank #2, the Card Processor, the Credit Card Company, and others.

. . .

It was further part of the conspiracy that, the conduct of defendant TULL and defendant ELLISON would and did affect one or more financial institutions, namely, Bank #1, Bank #2, and the Credit Card Company, all within the meaning of Title 18, United States Code, Sections 20 and 3293, in that these financial institutions were exposed to a new and increased risk of loss, and suffered actual loss, in three ways. First, the defendants' conduct caused Bank # 1 to release from the Bank # 1 Depository Account monies which, at various times, were owned by and in the custody and control of Bank # 1, Bank #2, and the Credit Card Company. Second, as a result of the defendants' conduct, and after

> the shortfall in the Bank # 1 Depository Account was discovered, Bank # 1, Bank #2, and the Credit Card Company engaged in civil litigation and expended monies in fees, costs, and related expenses defending their respective interests. Third, as a result of the defendants' conduct, Bank # 1, Bank #2, and the Credit Card Company risked harm to their respective commercial and professional reputations. All in violation of Title 18, United States Code, Section 1349.

(Crim. ECF No. 44 at 7-10.)

Counts Two through Five of the Superseding Indictment alleged wire fraud in violation of 18 U.S.C. § 1343 and Section 2, in connection with four facsimile transmissions sent to Valley National Bank:

> [o]n or about the dates set forth below, in Passaic County, in the District of New Jersey and elsewhere, defendants **JUDY TULL and KAY ELLISON** and others having knowingly and intentionally devised and intending to devise a scheme and artifice to defraud, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, which scheme and artifice would affect financial institutions, and for the purpose of executing such scheme and artifice, knowingly and intentionally transmitted and caused to be transmitted by

> means of wire communications in interstate and foreign commerce the following writings, signs, signals, pictures, and sounds, each constituting a separate count of this Superseding Indictment:

(*Id.* at 11-12.)

B. Ellison's Opening Statement at Trial

Ellison and Tull were tried jointly beginning on March 19, 2018, and concluding on March 28, 2018. Ellison was represented by James B. Lees, Jr, Esq. ("Lees"). When Lees presented Ellison's opening statement at trial, he told the jury that the defendants "had been waiting years to be here, to come tell their side of the story as to why the Department of Justice . . . have been sold a bill of goods by some bitter, bitter people to make these two women the patsies for a bankruptcy." (Crim. ECF No. 98 at 25.) Lees also pointed to evidence that Direct Air's CFO, Keilman, became the majority stockholder in Direct Air in 2009, and this gave him the legal authority to make all of the decisions for the company. Keilman was a CPA and a former Vice President of the Bank of New York. His purpose for investing in Direct Air was to take the company public and make a lot of money. When Direct Air went bankrupt, he pled guilty to financial crimes and blamed Ellison and Tull. (Crim. ECF No. 98 at 30-31, 33-36.)

Lees argued the real story was that Direct Air sold vouchers, which were transferable certificates to be used for booking future flights. The vouchers had an

expiration date, and sometimes they expired before being used. Vouchers were not regulated by Part 380 of the Code of Federal Regulations because a voucher is not an airline ticket, it is a transferable certificate that could be exchanged in the future for a flight. A voucher sale did not create a passenger; therefore, there was no passenger money to put in escrow under the regulations. In May 2009, however, Direct Air, through its counsel, Aaron Goerlich, agreed to voluntarily put money from voucher sales in escrow. Direct Air's policy was to place the portion of the money from a voucher sale that was allocated for air travel in the escrow account and make sure it remained in escrow until a passenger completed a flight using the voucher. The other portion of a voucher sale was a membership fee, which provided free luggage transportation and other land-based benefits. The membership fees did not have to remain in escrow. The only money withdrawn from the escrow account by Ellison and Tull were funds derived from the membership fees on vouchers. Valley National Bank agreed that these funds could be withdrawn from escrow. Ellison and Tull meticulously kept track of what money could and could not come out of escrow.

Direct Air had an annual income over $80 million and it rented a computer system called Radixx, which was widely used in the airline industry, although it was not designed for charter airlines. Direct Air made unintentional accounting errors, which were discovered by looking at how the computer system worked. Radixx staff informed Ellison and Tull that the computer system could not capture financial transactions made by gate agents, such as payments for luggage or other fees. Therefore,

Ellison and Tull kept track of these transactions by hand. Radixx was wrong, however, as the computer system captured these transactions, and this resulted in the transactions being counted twice. The total for the transactions was $7 million.

Ellison and Tull were accused of falsifying sales for passengers who had completed flights for the purpose of illegally withdrawing money from escrow. Lees argued there was a legitimate explanation for the fictitious flights. When a Direct Air flight was canceled, DOT regulations required Direct Air to purchase a ticket for the passenger on another commercial flight, a practice called passenger protection. By law, according to Lees, the passenger was no longer a passenger of Direct Air, but instead a passenger of the airline on which the passenger was rebooked. Therefore, the money originally paid to Direct Air could be taken out of escrow. The escrow bank required only that Direct Air report the number of "protected passengers" and to simply pick a random flight to associate with the protected passengers. This made it look like 600 or 700 passengers were on one flight, but it was not fraud because the escrow bank understood this was how protected passenger transactions were reported, rather than having to report each rebooked passenger on a particular commercial flight. The money could legally be withdrawn from the escrow account.

Before the company was sold to Avondale, Direct Air's officers began to realize there was a shortage of money in escrow, but they did not know why the numbers were off. They disclosed the escrow shortage of $5.4 million and

sold the company to Avondale, which had a plan to make the company profitable again.

Direct Air kept meticulous records to establish that every penny withdrawn from escrow was legally withdrawn under the regulations, but those records were taken by the bankruptcy trustee after Avondale declared bankruptcy. After this prosecution began, Direct Air discovered that 57 of its records were destroyed when the roof collapsed in the bankruptcy trustees' storage facility. These were the documents that would have shown the calculations made by Direct Air regarding the funds they could legally withdraw from escrow. (Crim. ECF No. 98 at 25-57).

C. The trial and appeal

At trial, without referring to Direct Air's voucher sales, the Government focused on allegations that Ellison and Tull sent false or misleading "Release Requests" to Valley National Bank and withdrew passengers' funds before their flights were completed, contrary to their representations that Direct Air was in compliance with DOT regulations. The Government rested after a 7-day jury trial. At that time, Lees confirmed in open court that he had conferred with Ellison, advised her of her rights, and that Ellison decided not to testify or to present a defense. (Crim. ECF No. No. 112 at 13-14, 1270.) Ellison agreed to Lees representations in a colloquy with this Court. (Crim. No. ECF No. 113 at 5-6.) Thus, in Ellison's closing argument at trial, Lees stated:

> And believe me, we do not take lightly the fact that in consultation with my client, given what they have presented in this courtroom, we have chosen to end this and not go forward with the evidence. And go to you today and say, under the law, there is no case. There should be an acquittal, if you follow the law.
>
> That is a trust we have in your ability and your intellect to apply the law that is going to be given to you tomorrow morning by your Honor.

(Crim. ECF No. 112 at 82-83.)

On March 28, 2018, the jury convicted Ellison on all counts. (Crim. No. ECF No. 108.) Ellison was sentenced on November 28, 2018, to a 94-month term of imprisonment, 5 years of supervised release, and ordered to pay $19,663,429.50 in restitution. (Crim. No. ECF No. 139.) An amended judgment was filed in February 2019. (Crim. No. ECF No. 156.) After briefing on post-trial motions, this Court denied Ellison's motion for judgment of acquittal and for a new trial. (Crim. No. ECF No. 119.) Upon Ellison's appeal, her conviction and sentence were affirmed by the United States Court of Appeals for the Third Circuit on February 12, 2020. *United States v. Ellison*, 804 F. App'x 153 (3rd Cir. 2020).[2]

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2. On appeal, Ellison and Tull argued, in part, that their convictions should be overturned for lack of evidence because the Government did not distinguish between "the improperly withdrawn monies from those validly taken out of escrow. And as a result, they conclude, it cannot prove which withdrawals

Appendix C

II. DISCUSSION

A. Legal standard

A prisoner in federal custody may file a motion under 28 U.S.C. § 2255 to challenge the validity of his or her sentence. Section 2255 provides, in relevant part, as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack,

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violated DOT regulations." *Ellison*, 804 F. App'x at 157. The Third Circuit held:

> [b]ut the elements of all three charged offenses center on whether there was a scheme to defraud through false representations. Here, the evidence established that the escrow release requests hinged on inflated passenger rosters. It also shows that Defendants were aware of the growing deficiency in the escrow account, and they took active steps to conceal Direct Air's financial condition. A rational jury could find that this shows that the escrow requests were part of a scheme to defraud, as those requests triggered the improper release of at least some funds. That is enough for both bank and wire fraud.

Id.

> may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255. When determining a pro se § 2255 motion, courts must accept "as true the allegations of the petitioner, unless they are clearly frivolous." *United States v. Travillion*, 759 F.3d 281, 293, n. 23 (3d Cir. 2014) (quoting *Moore v. United States*, 571 F.2d 179, 184 (3d Cir. 1978)). An evidentiary hearing on a motion to vacate is not required where "the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." *United States v. Booth*, 432 F.3d 542, 545 (3d Cir. 2005) (quoting R. Governing § 2255 Cases R. 4(b)).

B. Ellison's amended § 2255 motion and memorandum of law

Ellison presents the following sole ground for relief in her amended § 2255 motion:

> Mrs. Ellison was deprived of the effective assistance of counsel in preparation for and during trial, as a result of counsel's failures: 1) to present Mrs. Ellison's testimony which he had promised the jury in his opening statement; and 2) to present the defense witnesses who had been prepared to testify in Mrs. Ellison's defense at her trial.

(Civ. ECF No. 4 at 5; Civ. ECF No. 5 at 6 (capitalization altered)).

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Ellison submitted a declaration in support of her amended § 2255 motion, wherein she asserts that she participated in a mock trial to determine the value of her truthful exculpatory testimony, and the mock jury acquitted her. (Civ. ECF No. 1-1, ¶ 6.) Therefore, she alleges that no reasonable attorney would have failed to present her testimony, which the jury was expecting to hear after her counsel's opening statement. (Civ. ECF No. 5 at 7-8.) She argues that her counsel was likewise professionally unreasonable by failing to present the testimony of Ellison's many exculpatory witnesses because their testimony would have resulted in a reasonable probability of acquittal. (Civ. ECF No. 5 at 9.)

Ellison submitted a copy of an October 2017 email from Lees to herself:

> I [] believe [] that we have a decent defense and that for each allegation being made by the government I do have a viable position that argues against criminal activity. Ultimately however conviction or acquittal at trial will rest primarily upon your performance when you are on the witness stand at trial. I do not believe you can be acquitted at trial without taking the stand and testifying.

(Civ. ECF No. 5 at 11, citing Ex. 2.)

At the close of the Government's case at trial, Lees advised Ellison that the Government had not presented sufficient evidence to convict, and her testimony would

only lead to jury confusion. (*Id.* at 11-12.) Ellison claims that Lees incorrectly told her that if she did not testify, she would not be allowed to present any of the defense witnesses. (*Id.* at 12, n. 8.) Ellison expressed her concern to Lees about his opening statement "promising the jury [her] testimony," but after more than two hours of discussion, Ellison acquiesced in his advice not to put on a defense. (*Id.* at 12, n. 9.) Ellison alleges her counsel's advice was motivated by his desire to save himself days of labor presenting witnesses at trial. (*Id.* at 14.) Ellison argues that she was prejudiced by ineffective assistance of counsel because she was deprived of the opportunity to contest key facts essential to the Government's case, which she and her exculpatory witnesses were prepared to contest. (*Id.* at 17-18.)

C. The Government's answer

The Government contends that Ellison and her counsel agreed on a strategy not to put on a defense because they believed that the Government had not proven its case. (Civ. ECF No. 9 at 2.) Further, by virtue of her colloquy with the Court where she represented that it was her decision not to testify or put on a defense, Ellison waived her allegation that counsel told her the defense witnesses could not testify unless she did. (*Id.* at 2.)

Alternatively, the Government argues that a hearing is unnecessary because Ellison has failed to show prejudice. (*Id.*) The Government submits that the defense testimony would have been cumulative to the opening statement, cross-examination and summation, and, if

presented, could have confused the jury. (Civ. ECF No. 9 at 13-14.) Contrary to the email presented by Ellison, where Lees suggested to her that she would need to testify if she hoped for an acquittal, the Government notes that Lees also sent Ellison an email before trial, advising her of the substantial likelihood that she would be convicted based on the documentary evidence and co-conspirator testimony. (*Id.* at 16-17, citing Ellison's Ex. 2.) Although Lees had told the jury in his opening statement that the defendants were anxious to testify, he explained in closing argument that he did not put on a case because the Government failed to meet its burden. (*Id.* at 17.) Finally, the Government contends Ellison's assertion that Lees' strategy was motivated by his desire to avoid additional work is frivolous, based on the amount of work he put into the case. (*Id.* at 18.)

D. Ellison's reply brief

In her reply brief, Ellison contends that she is entitled to an evidentiary hearing because she has declared under oath that Lees told her she could not present defense witnesses if she did not testify herself, and the Government has not refuted this allegation. (Civ. ECF No. 10 at 2.) Ellison argues that her acquiescence to counsel's advice does not speak to the adequacy of the advice. (Civ. ECF No. 10 at 7.) Thus, she concludes that because she has made a prima facie showing of ineffective assistance, her counsel must be called to testify. (*Id.* at 9-10.)

Ellison submitted a declaration summarizing the nature of her proposed testimony and that of the defense

witnesses. (Civ. ECF No. 1-1.) Additionally, Ellison seeks to present the testimony of her exculpatory witnesses at an evidentiary hearing in order to make a showing of prejudice. Ellison maintains that defense counsel's arguments to the jury cannot replace defense witness testimony because counsel's arguments are not evidence. Therefore, she claims prejudice by counsel's failure to put on a defense.

E. Sixth Amendment ineffective assistance of counsel standard of law

To state a claim of ineffective assistance of counsel in violation of the Sixth Amendment, a petitioner must show that counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *United States v. Travillion*, 759 F.3d 281, 289 (3d Cir. 2014) (quoting *Strickland*.) The petitioner must show that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687; *United States v. Shedrick*, 493 F.3d 292, 299 (3d Cir. 2007). The standard for attorney performance is that of objectively reasonable assistance under prevailing professional norms. *Id.* at 687-88. Determination of the objective reasonableness of counsel's performance is made under all of the circumstances and from counsel's perspective at the time, without relying on hindsight. *Id.* at 688-89.

Even when a petitioner is able to show that counsel's representation was deficient, the petitioner must still demonstrate that counsel's deficient performance

prejudiced the defense. *Id.* at 692-93. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. The petitioner must demonstrate that "there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *Shedrick*, 493 F.3d at 299. "[N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding" *Id.* at 693. However, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* Instead, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "Because failure to satisfy either prong [deficient performance and prejudice] defeats an ineffective assistance claim, and because it is preferable to avoid passing judgment on counsel's performance when possible, [citing *Strickland*, 466 U.S. at 697-98]," courts should address the prejudice prong first where it is dispositive of a petitioner's claims. *United States v. Cross*, 308 F.3d 308, 315 (3d Cir. 2002).

F. Analysis

This Court will first address the prejudice prong of *Strickland* because it is dispositive of this matter. A petitioner's "failure to include a sworn statement

regarding the nature of [defense witnesses'] proposed testimony is fatal to his making a prima facie showing of prejudice." *Tolentino v. United States*, No. CIV.A. 13-4168 WJM, 2014 U.S. Dist. LEXIS 107400, 2014 WL 3844807, at *3 (D.N.J. July 31, 2014) (citing *Duncan v. Morton*, 256 F.3d 189, 202 (3d Cir. 2001) (additional citations omitted). Petitioner has not included sworn statements from her proposed defenses witnesses. Moreover, even accepting as true Ellison's statements of the nature of her proposed witnesses' testimony, she has not established a prima facie showing of prejudice. To determine prejudice under *Strickland*, this Court considers whether there is a reasonable probability, "sufficient to undermine confidence in the outcome" that if Ellison had testified herself and presented the testimony of her proposed witnesses, the jury would have acquitted. To begin the prejudice analysis, this Court looks to the closing arguments for a summary of the evidence presented at trial and the arguments made by counsel.[3]

1. The Government's closing argument

After trial, the Government summarized its case in closing argument. (Crim. ECF No. 112 at 57-80.) The Government asked the jury to focus on seven lies in letters prepared and signed by Ellison and Tull, which were sent to Valley National Bank to steal passengers' money. According to Direct Air stockholder Ed Warneck's ("Warneck") testimony, these letters falsely inflated the

3. A summary of co-defendant Tull's closing argument and the Government's redirect in closing are omitted.

amount of money Direct Air was entitled to withdraw from the escrow account for actual completed flights. Lisa Swafford Brooks ("Brooks") from the DOT testified that a DOT regulation, referred to as Part 380, protected passengers' money, with limited exceptions, by requiring all passengers' money to be held in an escrow account until after the passengers' flights were completed. Aaron Goerlich ("Goerlich"), Direct Air's aviation lawyer, described the same basic rule. Lori Rooney ("Rooney") from Valley National Bank testified that she took Direct Air's Release Request letters for withdrawals from escrow at face value. She did not know why the numbers were inflated. However, Warneck explained that the letters falsely inflated income by adding in exorbitant cash lines, some reflecting as high as $50,000 to $100,000 in cash payments for a single flight, which never happened with a discount carrier like Direct Air.

Mary Ann Jarrell ("Jarrell"), employed in Direct Air's reservation center in West Virginia, testified as to how she created reports for Release Requests upon Ellison's orders. Ellison, her boss, would call her and tell her to "dummy up reservations" for flights that were already completed. Jarrell would open up reservations from the past, trips that had already taken place, and she would add fake passengers to flights. She had to make the reservations using a cash entry because she did not have a credit card for this purpose. Ellison would tell her to cancel the reservations after making them, which would make sense if she needed to know how much money Direct Air actually had, not including cash from the false sales. Jarrell "freaked out" when Ellison called

her on the last day Direct Air was in business and told her to get her purse and go home. Ellison told Jarell that she was having a bad day because she was $24 million in debt. The Government argued this was tantamount to a confession because the debt represented the consequences of her crimes.

While Jarrell could not explain why Ellison had asked her to falsify passenger reservations, Diane Drummond, who worked at Direct Air's headquarters in Myrtle Beach, testified that Tull and Ellison were the people in charge at Direct Air. They paid the bills, including the fuel bills. They were the only two people at Direct Air who were allowed to look at the daily fax from the escrow bank. Keilman's testimony explained why no one was allowed to look at the escrow account statements, because the statements told the grim reality that Direct Air had insufficient funds. Keilman admitted that and he and the defendants added the balance of the escrow account to the company's net income to make the company look like it was making money when, in reality, it was losing money. They all knew this was wrong but lied to the credit card companies and banks because Direct Air could not continue to do business without their services. They hoped to keep the company alive and sell it for a profit.

Referring to Keilman's testimony about Direct Air's year-end financial statements, the Government submitted that over the course of Direct Air's existence, while Direct Air's internal financial documents showed net year-end losses ranging from $700,000 to $3.4 million, Direct Air was submitting external financial statements to Merrick

Bank and American Express that showed yearly profits ranging from $200,000 to almost $2 million.

2. Ellison's closing argument

In Ellison's closing statement at trial (Crim. ECF No. 112 at 81-115), Lees argued on her behalf that the Government had failed to prove she committed any of the crimes charged. First, Lees attacked Keilman's credibility based on his testimony that he had entered into an agreement with the Department of Justice, which permitted him to receive a lighter sentence for testifying against Ellison and Tull. Keilman admitted that he lied to the Government in interviews leading up to his prosecution, and that he had lied to Direct Air's bankruptcy trustee. Lees posed the question: "Why did the Department of Justice believe Keilman now?"

Next, Lees argued that it is not a crime to steal your own money. Joseph Pabst ("Pabst") from American Express testified that the money held in Direct Air's escrow account with Valley National Bank was deferred revenue, specifically, that it was Direct Air's revenue. Thus, it was not a crime to take the money out of escrow. Further, Lees noted the indictment charged Ellison with obtaining money owned by or in the custody and control of Valley National Bank, Merrick Bank, and American Express, but that the Government had not presented any evidence that Merrick Bank or American Express owned or had the escrow money in their custody and control. With respect to Valley National Bank's "custody and control" of the escrow account, Lees pointed to Rooney's testimony

that Valley National Bank did not own the money in the escrow account.

Lees then explained the importance of Direct Air's voucher sales. Warneck testified that Direct Air, through its Family Ties program, sold vouchers that included a membership fee and a transferable certificate for the future booking of a charter airline ticket. In 2009, the DOT opened an enforcement investigation into Direct Air's Family Ties program but closed the investigation without taking any action. Ellison and Tull continued to sell vouchers on the advice of their aviation counsel, Goerlich. Goerlich testified that he was surprised when the DOT reopened the investigation in 2011, and the DOT admitted it made a mistake by not enforcing the prohibition on voucher sales in its earlier investigation of Direct Air. It was only after Direct Air went bankrupt that the DOT issued its clarifying statement that it would consider voucher sales by charter airlines a per se violation of its rules. Lees suggested that after the DOT misled Ellison and Tull into believing voucher sales by charter airlines were permitted, it was wrong for the Government to charge Ellison with a crime for selling vouchers and taking money from voucher sales out of the escrow account. Lees concluded that the Government did not prove any crime had been committed because it did not distinguish between the money that Ellison permissibly withdrew from the escrow account for voucher sales from money that came from passengers who held a confirmed ticket but had not yet flown.

Lees then explained to the jury that it was only the manner in which the requests for withdrawal of escrow funds were made that was problematic, not that the money was impermissibly withdrawn. He referred to an email between Ellison and Jarrell, the reservation supervisor at Direct Air. Jarell informed Ellison that Troy at Radixx, the company from which Direct Air leased their airline computer system, told her they had to enter a booked date and a canceled date in the system to record an instance where Direct Air had to purchase a scheduled airline ticket for a customer whose charter flight was canceled. Thus, Lees suggested that the sales numbers reported in the Release Requests to Valley National Bank were not inflated because they included not only the number of sales for charter flights that had been completed, but also the sales of charter flights which were canceled and Direct Air had purchased a scheduled airline ticket for passenger accommodation. Rooney from Valley National Bank testified that once a scheduled airline received money for a rebooked passenger, it was the scheduled airline that was required to keep the funds in escrow until the flight was completed. Lees concluded that Ellison's requests for release of funds from escrow were not fraudulent but instead were requests for funds that Direct Air was permitted to withdraw.

Lees then turned to the issue of the sale of Direct Air to Avondale. He argued that Ellison and Tull were merely employees of Avondale after Avondale purchased Direct Air on September 29, 2011. Jeff Conry ran the company for Avondale after the sale. Keilman testified that the $5.4 million escrow shortage was properly

disclosed to Avondale prior to the sale. Lees argued that the escrow shortage was the result of a problem Direct Air had discovered with the Radixx computer system, and there was no intent to deceive any buyer of Direct Air regarding the shortfall. Avondale had a plan to make up Direct Air's shortfall and become profitable by using bigger planes for the charter flights. Lees suggested that Avondale's decision to declare bankruptcy in 2012 caused the loss suffered by Direct Air's customers when it ceased operations. Keilman testified that all of the sales made by Direct Air prior to its sale to Avondale came from completed flights or vouchers which had expired, leaving the responsibility of the $5.4 million shortfall on Avondale. Lees stated the only reason Ellison and Tull were charged with a crime was so Keilman could receive a lighter sentence.

Finally, Lees addressed the profit and loss statements. Keilman testified that Ellison and Tull told him to lie on the financial statements, but what they actually told him was to report the dollar amount from the escrow account as an asset on the profit and loss statements, and this was a legitimate way to report deferred revenue, according to the testimony of Joseph Pabst from American Express. This was the heart and soul of the case, Lees told the jury, and it was not a lie because the escrowed amount should be reported under sound accounting principles. He explained, "there's a liability to customers, and that liability is offset on the asset side of the balance sheet with cash, a cash entry. They [the prosecution] would not dare bring an accountant in here because that's the explanation, and thank God Pabst was here to give it." (Crim. ECF No.

112 at 108.) Lees sought to persuade the jury that Keilman had the most to lose if Direct Air failed, he had the most experience in accounting, and he was solely responsible for covering up any accounting errors and putting the blame on others to receive a lighter sentence. (*Id.* at 109.)

3. Proposed defense testimony

To determine whether Ellison was prejudiced by the advice not to testify or call defense witnesses, the Court considers Ellison's proposed testimony, stated in her declaration:

- She was not guilty
- She was being used as a scapegoat by the cooperators
- Why they handled passenger protection in the way they did
- That she never signed a charter filing
- She was only put on the account in 2010 because Judy Tull's health was failing
- The first time she filed a report, she called Valley National Bank and sent two reports, one with and one without cash protection
- About the limitations of the Radixx Reports versus the Radar Reports

- Radixx knew there were issues that a Charter Carrier needed versus a Scheduled Carrier, and Radixx did not tell them about the report being off, and what that meant to Direct Air

- How the Family Ties process worked and when they [vouchers] expired

- What happened on the day Ellison called the reservation center and Mary Ann Jarrell would not come to the phone (contesting that they spoke to each other).

Further, Ellison submits, verbatim, how she expected the defense witnesses would have testified:

- Amber Bostic—Advance Technology. The defense's expert on computer programming and coding errors. She was going to testify that the Radixx reporting system was off as much as 6% due to coding error. She had worked all the codes and knew what the exact issues were. She was going to testify about the limitations of Family Ties and how the system would not auto-cancel memberships. The memberships were canceled by the reservationist and could have human error. Also how many were used and how many

were never used. The protection of passengers was another area she was to cover . . . explaining the total number of cancelled passengers and how much was recommended for protection.

- Shawn Ulerup—Management in the reservation center. He was going to explain system limitations, manual refund limitations, and the reservation policy on Family Ties memberships. He would have told the jury [that] Mary Ann Jarrell refused to come to the phone the day the company closed and that she refused to talk to me.

- Theresa Randall—Protection Supervisor and over the recommendation desk. She would have testified to the large number of protections and the policies of the company.

- Kevin Tull—Judy Tull's son who worked for the company as contract labor for the first year and trained Keilman on balancing the escrow. He explained the rules and helped Keilman set it up and the credit card processing. He would have testified what Keilman said about his knowledge and involvement was a lie.

- Reese Boyd—the corporate lawyer who came in and out of our office every day. He spent most of his time working with Direct Air. He personally meet [sic] with Keilman and knew everything about what everyone said or did within the company. And he was prepared to say Keilman was lying.

- Ron Peri—a longtime friend to Marshall and me. He was the owner of Radixx. He had come clean and told me that the Radixx Reports had issues and the coding was lost when the guy who developed it left the company. He was scrambling to get Radar [the new software program] up but knew that it was an issue.

- Chris Jenson—Senior VP at Radixx. He told me he would come into court and tell the truth; that Radixx had issues and what they were. After being the number 2 guy and leaving the company, they settled with him with a contract not to tell what was wrong but under oath he would have to tell and it would not have affected his contract.

- Jessica Murphy—Bankruptcy Trustee's Counsel. Would have testified about the destroyed documents and the hidden

documents. She would have had to come clean about the time that the documents were destroyed and if and why she had these documents.

- Penny Bly-Keeper of the BK Direct Air Documents and worked on accounting. She could have testified about missing docs and her Direct Air inaccurate accounting.

- Greg Lukenville—President of Sky King. Knew the involvement of Keilman and new owners (their issues of the past). Keilman told Lukenville during a meeting that he was running the show.

- Avondale-New Owners-Jeff Conry, Wayne Greene CFO, Hank Torbert, and Donald Stukes. They would have testified against each other about intent for the company, and who was running what.

- Mary Baldwin. She would have testified about what her boss Robert Keilman did or did not do. She was offered help getting a job [and] basically kept up the Keilman story.

(ECF No. 1-1, ¶¶10-11.)

4. The defense theory

Based on Lees' opening statement, the defense theory was as follows: 1) that the escrow shortfall was created by undisclosed flaws in the Radixx computer system; 2) Ellison's representations to Valley National Bank in support of escrow withdrawal requests were not intended to deceive but were withdrawals permitted under DOT regulations, specifically revenue from membership fees from voucher sales and refunds to Direct Air for rebooking passengers on scheduled flights; 3) Keilman was actually running Direct Air and acted alone in falsifying the financial statements; and 4) the sale of Direct Air to Avondale exonerated Ellison for the shortfall in escrow.

The proposed defense testimony relies on the same defense theory presented by Lees, but without the benefit of not exposing any of the defense witnesses to cross-examination. Ellison claims that the defense testimony would contest the key facts essential to the Government's case, but she does not explain why they jury was more likely to believe the defense witnesses' testimony. For the reasons discussed below, there is not a reasonable probability that the jury would have been persuaded to acquit. The proposed defense testimony on each aspect of the defense is discussed below.

a. Keilman's credibility

Ellison submits she would have testified that she was not guilty and was a scapegoat for the cooperators. This was the theme of the defense and was presented in opening

and closing statements by defense counsel. While it is true, as Ellison asserts, that an attorney's argument is not evidence,[4] Lees referred to the evidence in the record that supported the defense theory. Ellison has not provided any reason why the jury was any more likely to believe the same defense theory if she had testified that she was not guilty and merely a scapegoat. As discussed further below, Ellison would have been subjected to difficult cross-examination.

In support of her argument that Keilman lied about the conspiracy, Ellison would have presented the testimony of Kevin Tull, Judy's Tull's son, who worked for Direct Air for its first year and trained Keilman on balancing the escrow. He would have testified, according to Ellison, "what Keilman said about his knowledge and involvement was a lie." Keilman testified that Kevin Tull had experience using QuickBooks for a charter airline's accounting, and he set up QuickBooks and showed Keilman and Baldwin how to use it. (Crim. ECF No. 110 at 221-22.)

When Lees asked Keilman about their accounting method, Keilman explained:

> QuickBooks kept track of everything coming in and out of—in and out on a cash basis, and that's how virtually how we ran the company. I am not sure I answered your question. But we ran the system with QuickBooks on an accrual—cash basis principally and only accrued for big items.

4. *See* Jury Charge, Crim. ECF No. 113 at 17.

(*Id.* at 224.) Lees, implying that it was highly irregular to use a hybrid cash/accrual basis of accounting, questioned how their balance sheets work. Keilman responded, "[p]rincipally, on a cash basis, because it was a cash business so the records always reflected that." Keilman did not remember if he had told Ellison and Judy Tull that he accrued "some of the big items[,]" which meant including anticipated versus actual financial transactions. (*Id.* at 225-26.) To explain why Ellison would have told Keilman to include the escrow account balance in the financial statements, the basis for the charges of falsely inflating the income in the year-end financial statements, Lees suggested that Direct Air moved from accounting on a cash basis to an accrual basis in order to capture income that would be coming in from future flights based on voucher sales. (Crim ECF No. 110 at 228-30.) Keilman denied this explanation and admitted to their wrongdoing, "we put the money in the escrow account that wasn't ours on the balance statement and income statement." (*Id.* at 231.)

Joseph Pabst from American Express testified that he asked Keilman, by email, how Direct Air reported deferred revenue from its escrow account in its balance sheets. (Crim. ECF No. 111 at 147.) Pabst explained that when a passenger buys an airline ticket for a future flight, the money goes into a deferred revenue account in the balance sheet. (*Id.* at 146-47.) Because the airline has a liability to the customers until the flights are completed, the liability "is offset on the asset side of the balance sheet with cash." (Crim. ECF No. 111 at 147.) Pabst agreed that Direct Air's financial statements should have the Valley

National Bank escrow balance on the liability side of the statement with a corresponding offset on the asset side. (*Id.*) But Keilman, in a phone call, told Pabst that they did not include a deferred revenue account on their balance sheet because it was not their money. (Crim. ECF No. 111 at 147.) In other words, Direct Air was accounting on a cash basis. Keilman told Pabst that the Valley National Bank account reported in the balance sheet *was not an escrow account*, but an account that received money from the escrow account for flights that were already completed. (*Id.* at 149-50.) This was not true. Keilman testified that he reported the escrow account balance as income upon Ellison's direction. Assuming Ellison and Kevin Tull would have testified in support of Lees' argument that the escrow balance was properly reported on the income and balance sheets on an accrual basis, they would have been subject to cross-examination on this contrary evidence.

Ellison further submits that Reese Boyd ("Boyd"), Direct Air's corporate lawyer, would have testified that he "personally meet [sic] with Keilman and knew everything about what everyone said or did within the company. And he was prepared to say Keilman was lying." This proposed testimony is too vague to explain how it would have persuaded the jury to acquit, in light of the evidence of Ellison's involvement from other witnesses.

Next, Ellison proposes that Mary Baldwin ("Baldwin"), Direct Air's bookkeeper, "would have testified about what Robert Keilman did or did not do. She was offered help getting a job basically kept up the Keilman story." Keilman pled guilty to conspiracy to commit bank and

wire fraud. Thus, it is not clear how testimony about what he "did or did not do" would have tended to exonerate Ellison. Further, Baldwin would have been subject to cross-examination on the difference between Direct Air's internal documents showing losses each year and the external financial statements showing profits, and questioned about who would have input and access to each of those statements. This could have harmed the defense.

In a further attempt to attack Keilman's credibility, Ellison submits that J. Greg Lukenville, President of Sky King, "knew the involvement of Keilman and new owners [Avondale] (their issues of the past). Keilman told Lukenville during a meeting that he was running the show." Given the evidence at trial of Ellison's signature on Release Requests to Valley National Bank and testimony that Ellison and Tull ran the business, and in particular, that they paid the bills and managed the escrow account, the proposed testimony that Keilman was running the show at the time of the sale of Direct Air to Avondale would do little to sway the jury.

b. Whether passenger protection explains the cash sales reported on the Release Requests

The defense's explanation at trial for the "dummy reservations" was a practice called passenger protection. Direct Air created a record to submit to Valley National Bank for reimbursement of passenger money, after Direct Air had purchased flights on scheduled airlines to accommodate passengers whose charter flights were

cancelled. According to the defense, once Direct Air paid the scheduled airlines to rebook the passengers, they could withdraw the passengers' money from escrow, and it was up to the scheduled airlines to maintain passengers' money in escrow until the flights were completed. Ellison states she would have testified "why they handled passenger protection in the way they did." This does not add anything to the information Lees brought out on this subject in cross-examination.

Ellison further proposed to testify that "the first time she filed a report, she called Valley National Bank and sent two reports, one with and one without cash protection[.]" Theresa Randall, the protection supervisor at Direct Air, would have testified to "the large number of protections and the policies of the company." Amber Bostic, the defense's computer expert, would have explained "the total number of cancelled passengers and how much was recommended for protection."

The proposed defense testimony raises difficult questions for cross-examination. If Direct Air experienced many flight cancellations where passengers were protected in this manner, why were there so few Release Requests supported by large cash sales, and none in 2008 or 2011? Rooney from Valley National Bank testified that before money could be released from the escrow account, Valley National Bank would also have to receive notification from the specific air carriers "that they did in fact fly a particular flight." (Crim. ECF No. 101 at 114.) The dummy reservations described by Jarrell did not provide a flight by flight reporting of funds from escrow, so how were the

funds released upon confirmation from the specific air carriers on which the passengers were rebooked?

Along the same lines, Brooks from the DOT testified that even if a charter company bought a ticket for a passenger on a scheduled flight after cancellation of a charter flight, the money had to be escrowed until the flight was completed. (Crim. ECF No. 98 at 75-79.) Brooks explained the typical practice was to transfer the funds from the charter airline's escrow account to the scheduled airlines' escrow accounts, because if the money was simply withdrawn by the charter airline after buying the passenger a new ticket "we would never really know what carrier had the money, how much was paid, and we wouldn't know how much the public charter operator would have been entitled to." (Crim. ECF No. 98 at 79.) Goerlich, Direct Air's aviation counsel, testified that under the DOT regulation there has to be flight by flight accounting in escrow, matching passengers to flights. (*Id.* at 66-67.) Based on the record as a whole, the proposed defense testimony regarding passenger protection was not likely to persuade the jury that Direct Air only withdrew money from escrow that represented flights completed by real passengers.

c. Ellison's role in Direct Air

Ellison submits she would have testified that she never signed a charter filing, and that she was only put on the [escrow] account in 2010 because Tull's health was failing. Testimony and evidence admitted at trial established that Direct Air made various representations to Valley National

Bank, American Express and Merrick Bank that Direct Air was in compliance with DOT regulations. Warneck, Jarrell, Drummond, and Keilman testified that Ellison and Tull, based on their decades of airline experience, ran the company, and this was consistent with their biographies on Direct Air's website. (Crim. ECF No. 98 at 106, 112-16; Crim. ECF No. 101 at 29-30, 173; Crim. ECF No, 110 at 123). Warneck and Keilman testified that Tull and Ellison managed the escrow account. (Crim. ECF No. 98 at 124-26; ECF No. 110 at 136-37.) Jarrell testified it was Ellison who directed her to create the dummy reservations. (Crim ECF No. 101 at 183-85.) The reason that Ellison became a signatory on the escrow account does not suggest that she was not involved in the conspiracy.

d. Whether the total escrow shortfall was caused by unknown errors in the Radixx computer system

Ellison proposes that she would have testified about the limitations of the Radixx Reports, and that Radixx knew there was a problem with the software and did not disclose the reports being off. Amber Bostic, the defense's expert on computer programming and coding errors, would have testified that the Radixx reporting system was off as much as 6% due to coding error. Direct Air employee Shawn Ulerup would have "explain[ed] system limitations, manual refund limitations." Ron Peri, owner of Radixx, would have testified that he admitted to Ellison that the Radixx Reports had issues and the coding was lost when the developer left the company. Chris Jenson, Senior VP at Radixx, would have testified about the issues with the Radixx reports.

In opening argument, Lees suggested the evidence would show that the escrow shortage was caused by Radixx computer errors, unknown to Ellison at the time of the alleged false representations in the escrow Release Requests. The resulting escrow shortfall of $5.4 million was properly disclosed to Avondale, which assumed responsibility for the shortfall when it purchased Direct Air. Therefore, there was no crime. The proposed testimony by Ellison and others was not likely to have persuaded the jury to acquit for several reasons. First, if there was no crime because the shortfall was caused by unknown computer errors and it was properly disclosed to the purchaser, why did Keilman plead guilty? Second, if the escrow shortfall was only $5.4 million, and Direct Air was losing an average of $2 million dollars per year, how did the company pay its bills until it went bankrupt because it could no longer pay for fuel? (Crim. ECF No. 110 at 92-96.) On cross-examination, the defense witnesses would be subject to questioning about testimony that Ellison and her co-defendant handled the escrow account, would not allow anyone to see the daily fax containing the escrow balance (Crim. ECF No. 110 at 88), and they told Baldwin what bills to pay and when. (Crim. ECF No. 110 at 89, 120, 137.) This evidence is inconsistent with Ellison being unaware of the cause of the escrow shortage.

Finally, the proposed defense testimony about the $5.4 million escrow shortfall does not address Keilman's testimony that the shortfall was closer to $20 million, and that the disclosure to Avondale, prepared by Ellison from a report from the Radixx computer system, was misleading because they intentionally made it difficult for Avondale to

figure out the true shortfall. (Crim. ECF No. 111 at 65-66.) The gross revenue in the disclosure to Avondale included $7 million dollars in membership and luggage fees that they had taken out of escrow, which was required to be replaced because the passengers were entitled to refunds. (*Id.* at 67.) Avondale would have to discover on its own how to determine the total escrow shortfall because the Radixx Report did not tell the whole story:

> the total shortage would be the difference between the eighteen million seven seventy-one and the eleven million nine shown between gross revenue and net, or an additional $7 million has to be added to the five million four and has to be added to the seven million zero seven seven.

(Crim. ECF No. 111 at 94-95.) In other words, there was another $14 million escrow shortfall at the time of the disclosure. The proposed defense testimony does not address this key testimony.

e. The relevance of Direct Air's voucher sales

According to Ellison, the voucher sales were important to establish that no crime was committed. Ellison would have testified "how the Family Ties process worked and when they [vouchers] expired[.]" Direct Air employee Shawn Ulerup would have explained "the reservation policy on Family Ties memberships." This, however, does not address the testimony that the jury heard from

Goerlich, Direct Air's aviation counsel. He testified that when the DOT opened an investigation into Direct Air's Family Ties program in 2009, Direct Air explained to him how they managed the program. (Crim. ECF No. 101 at 74-76.) He reported this to the DOT, but the information that he was provided was incomplete. (*Id.* at 76.) It did not account for the fact that Direct Air did not keep the membership fees in the escrow account until the flights were completed. (Crim. ECF No. 101 at 77-78.) Therefore, when Direct Air had to refund membership and luggage fees for vouchers that were unused, it created a shortfall. This was corroborated by Keilman's testimony that the $5.4 million shortfall did not include the $7 million that had to be returned to the escrow account for membership and luggage fees. (Crim. ECF No. 111 at 66-69.)

Whether revenue from the voucher sales was withdrawn from the escrow account in compliance with the DOT regulation was a question of fact for the jury to decide. Brooks from the DOT testified that a voucher program does not provide protection of consumer funds under the escrow provisions. (Crim. ECF No. 98 at 87-88.) She explained,

> [y]ou were not supposed to sell vouchers if you were a public charter operator because the rules specifically say any money you take from consumers has to go in a specific flight account. If you did not purchase a ticket for a specific flight the rules do not apply, that is why we don't allow vouchers.

(*Id.* at 88.) Goerlich testified similarly, that the voucher program was incompatible with the regulations, which required accounting for sales on a flight by flight basis. (Crim. ECF No. 101 at 81.) Goerlich also testified that he warned Direct Air of the risk of future DOT enforcement after DOT closed the 2009 investigation, but Direct Air decided to accept the risk because the voucher program was important to them. (*Id.* at 75.) Given this testimony, Ellison's and Ulerup's explanation of how the Family Ties program worked and the defense theory that taking money out of escrow for membership fees was permitted does not raise a reasonable probability of a different outcome at trial.

f. The credibility of Jarell's testimony

Jarrell, Direct Air's reservations center supervisor, testified that on the last day Direct Air was in business, Ellison called her and told her to go home because the company was shutting down and the Department of Transportation or IRS was coming. (Crim. ECF No. 101 at 196.) Ellison told Jarrell that she was having a bad day because she was $24 million in debt. (*Id.* at 197.) In closing argument, the Government described this phone call as tantamount to a confession. (Crim. ECF No. 112 at 66.) Ellison asserts she would have testified that she never spoke to Jarell because Jarrell refused to come to the phone, and Shawn Ulerup, a manager in the reservation center, would have corroborated Ellison's testimony.

The defense contested Jarrell's testimony at trial. Lees impeached Jarrell because she gave different accounts

of the phone call in interviews with the Department of Justice on several occasions. Jarrell testified on redirect examination, that even if she did not recall the correct timing or exact words of the phone conversation, she remembers the event because it was so distressing to her that she went straight home and called her mother.

It is significant to Jarrell's credibility that Jarrell testified she had known Ellison since 1996, and she worked for Direct Air from when it opened in 2007 until it closed in 2012, and primarily reported to Ellison. (Crim. No. ECF 101 at 167-69.) She spoke to Ellison every day. (*Id.* at 172.) As the reservations supervisor, she worked six days a week, opening at 7:00 a.m. and staying until 7:00 p.m., supervising up to 100 people. (*Id.* at 174-75.) Her testimony was inconsistent with a person who would have left the office early in the day, leaving behind stranded customers when all of their flights were cancelled, if she had not received a call from Ellison telling her to leave. Jarrell testified that the phone conversation she described with Ellison was the last time she ever spoke to her, and Ellison has not described any other conversation they had after Jarrell learned about the shut-down on the last day Direct Air was in business. (Crim. ECF No. 101 at 198.) Ellison has not shown a reasonable probability that the outcome of the trial would have been different if Ellison and Ulerup had denied the phone conversation.

g. The relevance of the missing Direct Air bankruptcy documents

Ellison submits that Penny Bly, who kept the Direct Air bankruptcy documents and worked on accounting,

"could have testified about missing docs and her Direct Air inaccurate accounting." H. Jessica Murphy, the bankruptcy trustee's counsel, "would have testified about the destroyed documents and the hidden documents. She would have had to come clean about the time that the documents were destroyed and if and why she had these documents." In light of the problems in the defense theory discussed above, it is unlikely the result of the trial would have been different if Ellison testified that Direct Air properly accounted for all of the transactions in the escrow account in compliance with the DOT regulation, with the exception of the errors caused by the Radixx system, but she could not prove this because the documents were inadvertently destroyed by the bankruptcy trustee.

h. The relevance of Avondale's purchase of Direct Air

According to Ellison, Avondale officers Jeff Conry, Wayne Greene, Hank Torbert and Donald Stukes "would have testified against each other about intent for the company [Direct Air], and who was running what." However, as the Government argued in its closing statement, the fraud alleged in this case occurred before Avondale bought Direct Air. Besides, as discussed above, there was testimony that the escrow shortfall was much greater than the $5.4 million disclosed to Avondale, calling into question the defense theory that Direct Air was not responsible for any losses because Avondale accepted responsibility for the shortfall. Therefore, this proposed testimony would not have persuaded the jury.

III. CONCLUSION

Ellison's defense, with or without the proposed witness testimony, was dependent on the jury concluding, as a finding of fact, that the DOT regulation permitted (1) charter airlines to sell vouchers and take membership and luggage fees out of escrow before passenger flights had been completed; and (2) to withdraw from the escrow account without flight by flight accounting of the funds. The jury rejected this argument and there is nothing about the proposed defense testimony that makes it a more persuasive in light of the DOT's position that voucher sales were never permitted and withdrawals from escrow required a flight by flight accounting. The uncontradicted evidence of Direct Air's continuous losses and high fuel bills makes it unlikely the jury would believe the escrow shortage was caused solely by undiscovered computer errors and that there was no intent to deceive the banks. Evidence of Ellison's involvement in running Direct Air makes it unlikely the jury would conclude she was not involved in the inflation of the year-end financial statements. Factual allegations of prejudice are an essential component to a prima facie showing entitlement to habeas relief, and Ellison has not alleged sufficient facts to establish prejudice. Therefore, an evidentiary hearing is unnecessary. *Palmer v. Hendricks*, 592 F.3d 386, 400 (3d Cir. 2010) (prima facie showing of prejudice is required before an evidentiary hearing is necessary to determine and ineffective assistance of counsel claim on habeas review.) Therefore, for the reasons stated above, the amended § 2255 motion is DENIED. An appropriate order follows.

Appendix C

IV. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c), the petitioner in a § 2255 proceeding may not appeal from the final order in that proceeding unless he or she makes "a substantial showing of the denial of a constitutional right." "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented here are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Because jurists of reason could not disagree with this Court's conclusion that Ellison failed to establish the prejudice prong of her ineffective assistance of counsel claim, Ellison has failed to make a substantial showing of the denial of a constitutional right, and no certificate of appealability shall issue.

Date: June 7, 2022

/s/ Susan D. Wigenton
Hon. Susan D. Wigenton,
United States District Judge

APPENDIX D — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED DECEMBER 23, 2024

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2169

KAY ELLISON,

Appellant,

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the District of New Jersey
(No. 2-21-cv-16230)
District Judge: Honorable Susan D. Wigenton

BEFORE: CHAGARES, Chief Judge, and
JORDAN, HARDIMAN, KRAUSE,
RESTREPO, BIBAS, PORTER, MATEY,
PHIPPS, FREEMAN, MONTGOMERY-REEVES,
CHUNG, ROTH* Circuit Judges

Filed December 23, 2024

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellant Kay Ellison in the above-captioned matter has been submitted

* Jude Roth's vote is limited to panel rehearing only.

to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service. No judge who concurred in the decision asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified did not vote for rehearing by the Court en banc. It is now hereby ORDERED that the petition is DENIED.

BY THE COURT

s/ Paul B. Matey
Circuit Judge

Dated: December 23, 2024
Lmr/cc: All Counsel of Rec

APPENDIX E — CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix E

U.S.C.A. Const. Amend. VI-Jury Trials

AMENDMENT VI. JURY TRIALS FOR CRIMES, AND PROCEDURAL RIGHTS [TEXT & NOTES OF DECISIONS SUBDIVISIONS I TO XXII]

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

Appendix E

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Appendix E

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer ofany State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Appendix E

28 U.S.C.A. § 2255. Federal custody;
remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

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

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

> **(1)** the date on which the judgment of conviction becomes final;
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> **(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
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> **(3)** the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.