No. 06-643

In the Supreme Court of the United States

STACEY MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the court of appeals' panel was required by Federal Rule of Appellate Procedure 34(a)(2) to hold oral argument.

2. Whether petitioner was entitled to relief on his collateral challenge under 28 U.S.C. 2255 based on his claim that trial counsel rendered constitutionally ineffective assistance by failing to name three additional witnesses on his notice of alibi.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is not published in the *Federal Reporter* but is reprinted in 183 Fed. Appx. 571. The opinion and order of the district court (Pet. App. 19a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2006. A petition for rehearing was denied on August 8, 2006 (Pet. App. 32a). The petition for a writ of certiorari was filed on November 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted on two counts of distributing more than five

grams of cocaine base, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 400 months of imprisonment, to be followed by eight years of supervised release. The court of appeals affirmed. *United States* v. *Miller*, 327 F.3d 598 (7th Cir. 2003). In July 2004, petitioner filed a motion for post-conviction relief pursuant to 28 U.S.C. 2255. Gov't C.A. Br. 6. The district court denied relief, Pet. App. 19a-30a, and the court of appeals affirmed, *id.* at 1a-18a.

1. a. In May 2001, police officers in Madison, Wisconsin, arranged a series of undercover drug buys from Mark Winfield, a suspected drug dealer. On May 7, 2001, an undercover officer met petitioner while purchasing crack cocaine from Winfield at Winfield's apartment. On May 10, 2001, the officer again arranged to purchase crack cocaine from Winfield, and Winfield told the officer to go to Winfield's apartment to complete the transaction. When the officer arrived at Winfield's apartment, petitioner was present, and petitioner sold the drugs to the officer. Later that day, the officer made an additional drug purchase from petitioner at Winfield's apartment. *Miller*, 327 F.3d at 599; Gov't C.A. Br. 13-14.

Petitioner was charged with two counts of distributing five or more grams of cocaine base, in violation of 21 U.S.C. 841(a)(1).[1] Before trial, petitioner's counsel gave notice that two witnesses would testify as alibi witnesses, and that both witnesses would testify that petitioner was in Chicago, Illinois, on the afternoon of May 10, 2001, when the drug purchases from petitioner took place. One of the named alibi witnesses failed to show

[1] Winfield was also charged with drug offenses but pleaded guilty before trial. *Miller*, 327 F.3d at 600.

up at trial. During the trial, the district court barred petitioner from calling three additional alibi witnesses because those witnesses had not been named on the notice of alibi, see Fed. R. Crim. P. 12.1(a). *Miller*, 327 F.3d at 602; Gov't C.A. Br. 4-5.

b. The court of appeals affirmed petitioner's convictions. *Miller*, 327 F.3d at 598-605. Petitioner argued that the district court should have granted him a further continuance because his replacement trial counsel, who took over his case when his initial counsel fell ill, needed additional time to prepare for trial. *Id.* at 600-602, 604. Petitioner contended that, if he had been granted an additional continuance, his replacement counsel could have corrected the notice of alibi and presented the three additional alibi witnesses. *Id.* at 602. In rejecting petitioner's argument, the court of appeals found that the "additional alibi witnesses would not have produced a different result." *Id.* at 605; see *id.* at 602 (concluding that it was "unlikely that additional alibi witnesses would have produced a different result in [petitioner's] trial"). The court also observed that the jury had "heard testimony from more than one government witness regarding [petitioner's] intention to produce false alibi witnesses," and that it was unclear whether the additional alibi testimony "would have been admissible or even favorable to [petitioner]." *Ibid.*

2. a. In July 2004, petitioner filed a collateral challenge to his conviction pursuant to 28 U.S.C. 2255. Gov't C.A. Br. 6. Petitioner argued, *inter alia*, that his trial counsel had rendered ineffective assistance, including by failing to subpoena favorable witnesses. Pet. App. 28a.

The district court denied petitioner's Section 2255 motion. Pet. App. 19a-30a. With respect to petitioner's claim that his trial counsel was ineffective in failing to

subpoena favorable witnesses, the court found that petitioner had "not provided sufficiently precise information of what those witnesses would have contributed to the proceedings." *Id.* at 28a. The court also denied as untimely petitioner's motion to submit affidavits from two of the three additional alibi witnesses whose testimony petitioner had unsuccessfully sought to present at trial. The court noted that the affidavits, even if timely, "would not have changed the outcome of [the Section 2255] motion," and that the affidavits were "not specific and [were] based in large part on hearsay." *Id.* at 29a.

b. The court of appeals affirmed in an unpublished order that adopted the district court's opinion. Pet. App. 1a-18a. Judge Ripple dissented from the court's decision to resolve the appeal in a summary order. He believed that the appeal was not "facially frivolous" and that the court's summary order failed to provide "an adequate explanation of [the court's] decision." *Id.* at 18a. Judge Ripple stated that he would have "set [the] case for oral argument in due course." *Ibid.*

c. Petitioner sought rehearing and rehearing en banc, arguing, *inter alia*, that the court was required to hold oral argument in his case because Judge Ripple had stated that he would have set the case for argument. Pet. for Reh'g 8-9. Petitioner relied on Federal Rule of Appellate Procedure 34(a)(2), which states that "[o]ral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary" for certain specified reasons.[2] The court of appeals de-

[2] The specified reasons are that "the appeal is frivolous," the "dispositive issue or issues have been authoritatively decided," or that "the facts and legal arguments are adequately presented in the briefs,

nied petitioner's motion for rehearing or rehearing en banc, observing that the original panel (including Judge Ripple) had unanimously voted to deny panel rehearing, and that no judge had requested a vote on the petition for rehearing en banc. Pet. App. 32a.

ARGUMENT

1. Petitioner renews his contention (Pet. 9-14) that the court of appeals was required to hold oral argument before resolving his appeal. That contention does not warrant review.

Federal Rule of Appellate Procedure 34(a)(2) states that "[o]ral argument must be allowed * * * unless a panel of three judges * * * unanimously agrees that oral argument is unnecessary." Petitioner contends that that rule was violated in this case. Review of that case-specific issue is not warranted, particularly in the circumstances of this case. The court of appeals' unpublished summary order does not establish circuit precedent on the application of Rule 34(a)(2). See 7th Cir. R. 32.1(b) and (d). And although Judge Ripple remarked in his dissent that he would have set the case for oral argument, the focus of his dissent was not on the question of whether oral argument should (or must) be held, but instead was on the question of whether the case was suitable for a summary affirmance of the district court's opinion without any further analysis or explanation by the court of appeals. See Pet. App. 18a.

Remanding the case for the court of appeals to reconsider whether to hold oral argument would serve no cognizable purpose. Although petitioner argued in his petition for rehearing that the panel was required by Rule

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and the decisional process would not be significantly aided by oral argument." Fed. R. App. P. 34(a)(2)(A)-(C).

34(a)(2) to hold oral argument, the panel—including Judge Ripple—voted unanimously to deny rehearing, and no judge voted in favor of en banc review. Accordingly, even the dissenting judge on the panel evidently is now of the view that oral argument need not be held, or at least would serve no constructive purpose. This Court need not grant review to superintend the court of appeals' application of the oral-argument rule in those specific circumstances. Cf. *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993).[3]

This Court's review of whether the court of appeals should hold oral argument is especially unwarranted given that, as explained below, pp. 6-9, *infra*, petitioner's underlying claim is plainly lacking in merit.

2. Petitioner contends (Pet. 15-19) that trial counsel rendered ineffective assistance by failing to provide timely notice of three additional alibi witnesses. That fact-bound claim lacks merit and does not warrant review.

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[3] The brief of the Amici Former Judges extols the virtues of oral argument on appellate decision-making, including in this Court (Br. 10-11)—a general proposition that cannot be disputed. Yet, this Court not infrequently issues summary reversals over the dissents of Justices who would set the cases for briefing and argument and who criticized the failure to do so. See, *e.g.*, *United States* v. *Watts*, 519 U.S. 148, 170-171 (1997) (per curiam) (Kennedy, J., dissenting); *Montana* v. *Hall*, 481 U.S. 400, 405-410 (1987) (per curiam) (Marshall, J., dissenting); *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 270-272, 275 (1982) (per curiam) (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). Indeed, and contrary to amici (Br. 10), such summary reversals have been issued over the dissents of four members of the Court. See *Calderon* v. *Coleman*, 525 U.S. 141, 147-152 (1998) (per curiam) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting).

As an initial matter, petitioner could not establish prejudice in connection with his claim of ineffective assistance. See *Strickland* v. *Washington*, 466 U.S. 668 (1984). In his direct appeal, in denying petitioner's claim that his trial counsel should have been granted an additional continuance, the court of appeals rejected petitioner's argument that the denial of a continuance prejudiced him by depriving him of the opportunity to call the three additional alibi witnesses. The court applied the same prejudice standard that would apply to petitioner's ineffective assistance claim, *i.e.*, whether, if the additional alibi witnesses had testified, there was "a reasonable probability of a different outcome at trial." *Miller*, 327 F.3d at 602; see *Strickland*, 466 U.S. at 694. The court found that the "additional alibi witnesses would not have produced a different result." *Miller*, 327 F.3d at 605; see *id.* at 602 ("find[ing] it unlikely that additional alibi witnesses would have produced a different result in [petitioner's] trial"). The same conclusion equally applies to petitioner's ineffective-assistance claim.[4]

Petitioner also could not demonstrate that his counsel rendered deficient performance by failing to include the three additional witnesses in the notice of alibi. Trial counsel interviewed and investigated all of the potential alibi witnesses, including the three additional witnesses that petitioner now contends should have been included in the notice of alibi. Gov't C.A. Br. 28-29. While having investigated those potential alibi wit-

[4] In the district court proceedings on petitioner's Section 2255 motion, petitioner sought to submit affidavits from two of the potential alibi witnesses. The district court rejected those affidavits as untimely, however, and further explained that the affidavits in any event would not affect the court's decision to deny petitioner relief. Pet. App. 29a.

nesses, trial counsel elected in the notice of alibi to include only two other witnesses, both of which lacked the sort of close personal relationship with petitioner that could have afforded grounds for impeachment. The circumstances indicate that counsel's decision was a tactical judgment concerning which witnesses were most persuasive and least vulnerable to impeachment. See *id.* at 28-30.

Contrary to petitioner's argument (Pet. 15-18), the court of appeals' denial of his ineffective-assistance claim does not conflict with the Sixth Circuit's decision in *Clinkscale* v. *Carter*, 375 F.3d 430 (2004), cert. denied, 543 U.S. 1177 (2005). In that case, the court held that trial counsel's failure to file a notice of alibi witnesses constituted ineffective assistance. *Id.* at 443-445. In *Clinkscale*, unlike here, counsel failed entirely to file a notice of alibi witnesses, thus resulting in "wholesale exclusion of the defense" apart from the defendant's own testimony. *Id.* at 443. Petitioner's trial lawyer, by contrast, included two alibi witnesses in his notice of alibi, had interviewed the additional potential alibi witnesses, and had chosen not to amend his notice of alibi to add them. Gov't C.A. Br. 28-30. In *Clinkscale*, moreover, the Sixth Circuit determined that the alibi testimony would have given rise to a reasonable probability of a different result because it would have corroborated the defendant's own testimony and because the prosecution's identification testimony was "highly suspect." 375 F.3d at 444-445. Here, by contrast, the court of appeals determined in petitioner's direct appeal that the additional alibi witnesses would not have affected the result at trial, and the court also noted that the jury heard tes-

timony to the effect that petitioner "inten[ded] to produce false alibi witnesses." *Miller*, 327 F.3d at 602, 605.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] There is no merit to petitioner's fact-bound contention (Pet. 19) that the district court was required to hold an evidentiary hearing. The district court explained that petitioner had failed to "provide[] sufficiently precise information of what [the] witnesses would have contributed to the proceedings," and ruled that the affidavits submitted by petitioner were untimely and would not have changed the court's decision. Pet. App. 28a-29a.