

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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| UNITED STATES OF AMERICA, |) |
| |) Criminal Case No. 01 CR 348-3 |
| Plaintiff, Respondent, |) John F. Grady, |
| |) Judge Presiding |
| vs. |) |
| |) |
| BETTY LOREN-MALTESE, |) |
| |) |
| Defendant, Petitioner. |) |

**MEMORANDUM OF LAW IN SUPPORT OF
PETITION TO VACATE OR SET ASIDE JUDGMENT AND SENTENCE**

Betty Loren-Maltese, by her attorney, Leonard C. Goodman, submits the following memorandum of law in support of her Petition to vacate or set aside judgment and sentence filed under authority of 28 U.S.C. § 2255, on the grounds of ineffective assistance of counsel.

INTRODUCTION

Petitioner's rights under the Sixth Amendment were violated at trial where her counsel failed to present the evidence that would have exonerated her although that evidence was readily available. Ms. Loren-Maltese was materially prejudiced by her attorney's unreasonable failure to present evidence critical to her defense.

A. Factual and Procedural Background.

On February 22, 2002, Petitioner Betty Loren-Maltese was charged, along with seven others, with racketeering conspiracy (18 U.S.C. § 1962(d)), wire fraud (§ 1343), mail fraud (§ 1341), and conspiracy to impede the IRS in the assessment and collection of taxes (§ 371). R110. On August 23, 2002, petitioner Loren-Maltese was convicted of one count of RICO conspiracy, in violation of 18 U.S.C. §1962(d) (Count 1), and five counts of wire and mail fraud, in violation of 18 U.S.C.

§1341, §1343 and §1346 (Counts 2-6). R. 306. On August 26, 2002, the jury found that Loren-Maltese had a forfeiture interest in the sum of \$3,250,000. R.323.

All counts of conviction relate to petitioner's alleged complicity in the theft of millions of dollars from the Town of Cicero by a crooked company called Specialty Risk, which handled the Town's insurance claims between 1992 and 1997.

On January 23, 2006, Loren-Maltese was sentenced to a term of imprisonment of 97 months incarceration; was fined \$100,000; and was ordered to pay restitution of \$8,362,733, and a special assessment of \$600. (R. 955) (This was a re-sentencing; the original sentence having been vacated by the Appellate Court. See *United States v. Spano*, 421 F.3d 599 (7th Cir. 2005).)

Loren-Maltese began serving her sentence on January 31, 2003.

B. The Evidence Presented At Trial.

1. The SRC Fraud.

This case involves a fraud committed against the Town of Cicero (the "Town") by Specialty Risk Consultants ("SRC"), formed in 1992, before Petitioner Betty Loren-Maltese became President of the Town.

The Town of Cicero is self-insured – it provides for the health insurance of its employees through its own funds and uses a third-party administrator to process claims. In 1992, the Town retained SRC to handle its health insurance. Tr. 176-77, 319-22. At the time Cicero hired SRC, Henry Klosak was the Town President. Tr. 233-34. Klosak's friend, Frank Maltese, was the Republican committeeman and a Town Trustee. Frank's wife, Betty, held a minor position with the Town. Tr. 233-34, 439-41, 644-47.

Frank Taylor, SRC's general manager until June, 1995, and the government's key

cooperating witness, testified that in 1992, John LaGiglio, the owner of a trucking concern, approached him about forming SRC, an insurance company that would be funded by Michael Spano, Sr. and that could secure the Town of Cicero's insurance business. SRC was incorporated by Charles Schneider, an attorney and accountant. Tr. 1263-64. Taylor prepared a proposal, and with Frank Maltese, met with Klosak. Bypassing the bidding process, SRC was retained to process insurance claims for the Town. Tr. 576, 579, 1282-1301.

Klosak died in December, 1992, and Frank Maltese recommended that his wife be appointed interim president of the Town of Cicero. In January, 1993, the Board appointed Loren-Maltese as Town President; Joseph DeChicio as Treasurer; and Emil Schullo, as Director of a newly-created Department of Public Safety. Tr. 442-49, 563-65, 648-50. Frank Maltese died of cancer in October, 1993. Tr. 3041.

Taylor first met petitioner after she took office. In early February, he spoke with her about SRC handling the Town's workmen's compensation in addition to its health insurance. Eventually, SRC took over all of the Town's insurance. Tr. 1313-16.

About 90% of SRC's money came from the Town. Tr. 1457, 3268. SRC transferred Town money to Plaza Partners, a company it used, among other things, to purchase and renovate a golf course; to pay for expenses for LaGiglio's interest in a horse farm; to build Spano, Sr. a summer home; and for personal expenses of Taylor and other SRC defendants. Tr. 1476-80, 1531, 1555-77, 3281, 3359-88, 4660.

The Town funded SRC through weekly wire transfers that escalated in amount. Tr. 660-61, 1588, 3007. Taylor testified that he discussed these increases with Schullo and Loren-Maltese and received their approval, but he also acknowledged lying to the Town defendants about why SRC

needed more money. Tr. 1590-91, 1894-98.

In mid-1993, Eugene Berkes took over as Comptroller. Tr. 1428, 2941-43. Berkes testified that when SRC demanded that the weekly wire transfers increase in amount, he complained to DeChicio, who told him to “take it up” with petitioner. Tr. 2947-53.

To cover the increased costs of insurance, the Town increased its line of credit, and in January, 1994, the Town amended its Plan to require employee contributions. Tr. 633-36, 2954-57, 2966-72. Berkes, concerned about insurance costs and the Town’s related cash flow problems, recommended that SRC be terminated. Tr. 1429-33, 2966-67. He spoke to petitioner and she would “nod in agreement.” An insurance committee was formed to address these problems. Tr. 2974-79. In January, 1994, Berkes asked Taylor for a breakdown of insurance costs. According to Berkes, two days later, DeChicio told him that Schullo and Loren-Maltese had asked DeChicio to fire Berkes. Tr. 3012-19.

Joseph Bielaga took over Berkes’s position. Bielaga testified that the Town President had nothing to do with the wire transfers, which went through the Treasurer; the President “second signed” the authorization, although the “signature” could be a stamp used by the accounting department. He never discussed the amounts with petitioner and never saw her sign or stamp the authorizations. Tr. 875-79, 890-91, 963-65, 1172.

Bielaga, too, questioned the insurance costs. Tr. 885-86. The Town’s insurance budget repeatedly was exceeded and the Town was running a deficit. Tr. 891, 1107-11, 1122-24, 1173. Bielaga testified that he never suspected a fraud. Tr. 1031.

For the fiscal year 1992, SRC did not furnish the Town’s independent auditors with supporting documentation. The auditors advised Town officials that this was a “reportable

condition,” which, unless remedied, would result in a “qualified” audit opinion. After Nuehring, the manager of the account, met with the Town defendants, SRC produced documentation and the Town received an unqualified audit. Tr. 2981-86,5706-07. Thereafter, although the auditors continued to question the amounts being paid to SRC and sent management letters highlighting insurance as a matter of concern, their audit reports were “unqualified.” Nuehring acknowledged that he never advised petitioner that he suspected fraud, or suggested that SRC be terminated. Tr. 931-41, 968, 976-77, 5773-74, 6042-43, 6061-66, 6337-39.

In October, 1996, the media reported a federal investigation of SRC and the Town’s insurance program. In early 1997, SRC was terminated. Tr. 5192. During its five years of handling Cicero’s insurance, SRC stole millions of dollars from the Town. See Sentencing Tr. 60.

2. The Government Introduced No Evidence That Petitioner Was Directly Involved In SRC’s Fraud or that She Even Knew About The Fraud Prior to October, 1996.

No one testified that petitioner was involved in the decision to form SRC or in any of SRC’s activities. There was no evidence that petitioner was ever told about a fraud prior to October 1996. To the contrary, several government witnesses acknowledged that SRC sent the Town documentation that was designed to make their expenses appear legitimate, and that petitioner was placated with assurances that the rising insurance costs were attributable to an increase in insurance claims and to arrearages. Tr. 1894-98, 2314, 2336, 3026-28, 3047, 3828-33, 6110-11.

3. The Government Introduced No Evidence That Petitioner Personally Profited From the Fraud.

The government did not allege that Loren-Maltese received any of the funds which SRC skimmed from the Town's insurance. Nor did it introduce any evidence that she received any illicit financial benefit in her capacity as Town President. Rather, the government alleged that she profited indirectly from the SRC fraud in two ways. First, it alleged that petitioner caused SRC to reimburse her personal health claims at 100 percent while other participants in the Town's health insurance Plan were paid 80% of covered claims. However the proof failed to establish that the 100% coverage was in any way related to the SRC fraud. Several key Town employees, including the Town defendants and their family members, and non-defendants, such as the Town Clerk, received 100% payment of some claims, an exception that was permitted if there was proper documentation of the request for a non-contract payment. This practice existed well before SRC took over. Tr. 353-361, 373, 387-91, 552, 2331-32, 2427-28, 2466-75, 2592-94, 5198-99, 5253. This Court also expressed skepticism that the payment of petitioner's personal health claims was intended to influence her official actions. Tr. 8229.

To bolster its case that the full reimbursement of petitioner's personal health claims was related to the SRC fraud, the government called a claims supervisor, Cynthia Camp, who testified about a cancer patient named Carol Guido, covered by the Town's insurance, whose medical bills for her chemotherapy went unpaid for insufficient funds and were sent to collections. According to Ms. Camp, the situation remained unresolved throughout the spring of 1995. Tr. 2461-65. Ms. Camp further testified that, during this same time period, a \$875.00 medical bill for Loren-Maltese was handled on a priority basis "ahead of the \$462,270.84 in arrearages that had accrued up to that

point” Tr. 2466. In closing argument to the jury, the government argued that Loren-Maltese insisted on prompt payment for her health claims while Carol Guido’s bills for her cancer treatments were ignored. Tr. 8802-03.

The government also alleged that petitioner received preferential treatment on the return of her investment in the Four Seasons golf course which had been purchased by co-defendant LaGiglio. Petitioner had invested her personal funds in LaGiglio’s golf course, an investment secured by a promissory note and a second mortgage on the property. Petitioner, who did not acquire an equity interest in the property, received partial repayment of her investment. Other investors, although not all, also were paid back some or all of their investments. Tr. 3401-07, 3454-55, 3478, 3553-54, 3680-81, 3712-13, 3834-37, 3867-69, 5284-86, 5657. The government did not establish that the return of funds in an amount less than her original investment and without the promised interest was in any way linked to the insurance fraud.

C. The Minutes of the Meetings of Cicero’s Board of Trustees – Which the Trial Jury Never Saw – Show That When the Fraud Was Uncovered in the Fall of 1996, Petitioner Ordered An Independent Investigation and the Cessation of Payments to SRC, But Co-defendant DeChicio, the Town Treasurer, Continued Wiring Funds to SRC Behind the Back of Petitioner and the Board.

Petitioner’s defense at trial was that she had no knowledge that SRC was stealing from the Town’s insurance funds until October, 1996, when the federal investigation of SRC was made public. Then when she learned of the fraud, she took appropriate action. However, in support of this defense, her lawyer offered no evidence.

The minutes of the public meetings of the Cicero Board of Trustees would have powerfully supported petitioner’s defense. But this evidence was excluded at trial after DeChicio’s attorney falsely alleged that the minutes were fabricated or altered by Loren-Maltese.

The dispute over the minutes centered on Board meetings that took place between October, 1996, when publicity about SRC surfaced, and February, 1997, when SRC was terminated. The most pertinent excerpts from these excluded minutes are as follows:

1. On October 29, 1996, Town Treasurer DeChicio moved to “ask the State’s attorney to investigate the allegations” regarding the Town’s insurance. Ex. B-Colpo.
2. On November 12, 1996, the Board decided to instead contact an independent investigator, William Kunkle. Ex. Min-Nov12.
3. On December 2, 1996, the Board voted to approve Kunkle as Special Investigator. DeChicio voted against this ordinance. Ex. Min-Dec2.
4. On December 10, 1996, the Board removed an SRC invoice submitted for payment from an itemized list of bills to be paid by the Town. Ex. D-Colpo.
4. On December 16, 1996, the Board approved an auditor to assist Kunkle; DeChicio voted against this ordinance. Ex. Min-Dec16.
5. On January 6, 1997, DeChicio submitted a request for transfer of \$172,000 to SRC to cover insurance claims but the Board deferred payment and directed that the legal department investigate the legitimacy of the claims and report to the Board at the next meeting. During discussion of this matter, Trustee DeChicio stated that: “no payments were made since October/1996.” Ex. E-Colpo.
6. On January 14, 1997, a Board member moved to amend the minutes of the January 6, 1997 meeting to include the following:

“President Loren-Maltese twice asked Trustee DeChicio if any town payments were made to Specialty Risk Consultants since the October, 1996 Board Meeting at which time the Board directed no further monies be paid to Specialty Risk Consultants unless by Town Board Approval. Trustee DeChicio twice stated, ‘No monies at all were released to Specialty Risk Consultants from his department since October/1996.’”

This amendment was voted on and approved, with DeChicio and Resnick abstaining. Ex. F-Colpo.

7. At the February 11, 1997, Board meeting, a stenographer was brought in to record the discussions. At this meeting, a Board member moved to amend the minutes of the February 3 meeting to include the following:

“Mr. DeChicio of the Treasurer’s Office was told in the October meeting that they were not to make any payments without Board approval, especially claims, and since then Mr. DeChicio has made over \$1.2 million in wire transfers without Board approval after the Treasurer said he would not do that. * * * [These payments were] signed by Mr. DeChicio by handstamp without authorization”

This amendment was voted on and approved, with DeChicio and Resnick abstaining. In addition, the Board, with DeChicio opposing, voted to release the results of the Kunkle report to the public. Ex. B-Zayas,¹ and Min-Feb11.

At trial, the government sought to introduce the Board minutes as business or public records, pursuant to Fed. R. Evid., 803(6) and 803(8). Tr. 7469, 7481-82. DeChicio opposed the admission of the minutes. R. 197; Tr. 7217-18, 7469-80. In his motion, DeChicio argued that the minutes are not “accurate recitations of the discussions held at proceedings of the Board of Trustees” and should therefore be excluded. R. 197.² DeChicio offered no evidence to support his claim of doctoring. Indeed, the government conceded, in its written response to DeChicio’s motion that it “has no information or evidence that the minutes as amended are inaccurate. While the veracity of statements made at Town Board meetings may or may not themselves be true, the government has no information that the statements contained in the minutes were not accurately reported.” R. 200.

Loren-Maltese opposed DeChicio’s motion and sought to have the minutes admitted, either

¹ This stenographic transcript is incomplete because the remaining pages cannot be located.

² DeChicio also alleged that the minutes violated his right to confrontation because they contained accusatory statements by Loren-Maltese which he could not cross-examine. While this Court expressed sympathy for this argument, its decision to exclude the minutes was based on suspicions about trustworthiness and lack of an authentication witness. In any event, petitioner’s new evidence shows that DeChicio’s confrontation argument lacked merit. The board minutes have been duly authenticated by sworn affidavits. They contain DeChicio’s admissions against interest, admissible as an exception to the rule against hearsay under Federal Rule of Evidence 804(b)(3).

by the government or during the defense case. R. 277, 292; Tr. 7468-94, 8565-72. But her lawyer did not call a single witness to authenticate these critical documents.

This Court sided with DeChicio and excluded the minutes based on a finding that they were insufficiently trustworthy to qualify as business records. The Court was particularly suspicious of the amendments to the minutes in early 1997. The Court found:

[W]e have at least arguably a litigant who was in a position to influence the making of the very document that is presented as a neutral, objective, regular knee-jerk type of record; namely, Ms. Maltese. She is the president of the town. She participated in the amendment of these minutes, and obviously had a motive to do so.

This is not something that's done by a clerk or somebody wearing a green eyeshade in the back room sending out invoices of that kind. This is a robust litigant who is if not in charge at least one of the persons in charge of preparing the very minutes that are under discussion here.

Tr. 7484-85.

The Court also described the January 14 amendment to the minutes as “self-serving” and “back-filling.” Tr. 7608. This was based on the Court’s belief that the January amendment was an illegitimate attempt to re-write history by amending the minutes of the October 29, 1996 meeting to add a Board resolution directing DeChicio to cease all payments to SRC.³

³ The properly authenticated minutes do not support this finding by the Court. First, the Board made no attempt to amend the October minutes. All amendments to the minutes, without exception, relate back only to the preceding Board meeting. The January 14 amendment relates back to the January 6 Board meeting, while the February 11 amendment relates back to the February 3 meeting. These amendments merely reflect the Board’s collective recollection that Loren-Maltese had directed DeChicio to cease payments to SRC back in October 1996.

Second, the wording of these amendments suggest that the October order to stop payments to SRC was done by executive order rather than by Board action. The February 11 amendment to February 3 minutes, which was recorded by a stenographer, states: “Mr. DeChicio of the Treasurer’s Office *was told* in the October meeting that they were not to make any payments without Board approval ...” Ex. B-Zayas (emphasis added). As Town President, petitioner certainly had the authority to order the Treasurer to stop the payments. This would

This Court's distrust for the amendments to the minutes carried over to all of the minutes. The Court stated: "But the unamended minutes, it seems to me, are under the same cloud as far as motivation to doctor the record." Tr. 7491.

The Court concluded:

The rule doesn't mean that I have to be able to state with certainty that the minutes are wrong. What it means is that I as the gatekeeper have to be able to say whether this is respectable enough to present to the jury, and I hold that it is not. That doesn't mean that I am convinced it's wrong. It could be right. But the odds are as far as I can see, it's not. Tr. 7494.

Defense counsel argued that Petitioner had no ability to alter the minutes because the keeper of the minutes, Town Clerk Mark Moro, was a political opponent of hers. But the Court found: "we don't have any evidence in this record" as to "whether Moro is pro-Maltese or anti-Maltese." Tr. 8571.

The Court indicated that it would re-evaluate its rulings if evidence was presented by counsel for Loren-Maltese showing that the minutes were accurate. "But if the minutes are valid, if they are really true, then there are people who will come in and say under oath what happened." Tr. 7494. In particular, the Court invited counsel to call a witness to say that DeChicio was told in October not to pay SRC invoices.

[C]ertainly it's within the scope of any proper defense, if you can show that DeChicio was instructed at any time, if you can show that, for instance, back in October '96 is what I recall we were talking about, if you can show that Mr. DeChicio was told not to make any further payments at that point, you can do that. Tr. 8009.

Trial counsel told the Court that he would call witnesses to authenticate the minutes. Petitioner's attorney told the Court: "I plan on calling them all, Judge, Ms. Colpo and all of the other

also explain why the *stop order* was not recorded in the minutes. As Ms. Colpo explains in her sworn affidavit, her minutes recorded primarily actions taken by voting of the Board.

...” Tr. 7494-95. However, counsel failed to produce a single witness to authenticate the minutes or to rebut the claims of fabrication.

In his summation to the jury, DeChicio’s lawyer argued that it was Loren-Maltese and not DeChicio who had continued to send money to SRC after the fraud was revealed in October 1996. “DeChicio lacked the authority” he argued to the jury. Tr. 9100-02.

The jury convicted Loren Maltese of all charges while it acquitted DeChicio.

D. The Direct Appeal and Remand for Re-Sentencing.

The Appellate Court affirmed Loren-Maltese’s conviction but vacated her sentence and remanded. *United States v. Spano*, 421 F.3d 599 (7th Cir. 2005). At her re-sentencing, this Court sentenced petitioner to 97 months incarceration. R. 955. The Appellate Court affirmed. *United States v. Spano*, 476 F.3d 476 (7th Cir. 2007).

E. Petitioner Submits Sworn Affidavits and Documentary Evidence Which Would Have Established Her Innocence But Which Her Trial Attorney Never Presented.

1. The Affidavits of Marylin Colpo, Moses Zayas, Richard Smetana and Michael Frederick Demonstrate That the Board Minutes Were Authentic Public Records and Should Have Been Admitted at Trial, and that DeChicio’s Allegations of Doctoring Were Baseless.

Several witnesses have signed sworn affidavits attesting to the authenticity of the excluded minutes. These witnesses include the current elected Town Clerk and three former members of the Board of Trustees. Each of these witnesses were present at Board meetings during fall and winter of 1996-97 and each verifies that the minutes are accurate, including the disputed amendments to the minutes from January and February, 1997.

Marylin Colpo is the elected Town Clerk of Cicero. She has held that position for ten years and has stood for election three times. From 1978 through January 1997, Colpo was the Deputy

Clerk. One of her duties was to attend Board of Trustee meetings, take notes and type the minutes. Exhibit Colpo Aff.

Colpo recorded the minutes faithfully. She did not permit any person to influence her recording of the minutes or to alter them. Colpo explains that the minutes are not a transcript of the Board meetings in that she did not record everything that was said. Rather, she recorded Board actions; ie., “who made the motion, who seconded the motion, and a summary of the action taken, including any vote.” Colpo often took notes on a pre-printed agenda which listed the motions scheduled to be put up for a vote at that meeting. Ex. Colpo Aff.

Colpo recalls that at the October 29, 1996, meeting, there was a discussion about the Town’s insurance. She states in her affidavit:

This item was not listed on the agenda. I cannot recall everything that was said at that meeting. At some point, a motion was made by DeChicio. When it came time for me to type the minutes of that meeting, I asked my boss, Town Clerk Mark Moro, for help to ensure the accuracy of the minutes. Moro said DeChicio had his motion written down and he would get it for me. That is what I typed into the minutes. Ex. Colpo Aff.

Colpo’s handwritten notes reveal that she did not record the discussion about the insurance, but only the fact that a motion for the “state atty’s to investigate the Town’s insurance program and accusations” was made by DeChicio and that another motion to “investigate and examine all contracts of Town” was made by Resnick. Exhibit B-Colpo. Her typed minutes (Ex. C-Colpo) corroborate that she typed verbatim DeChicio’s handwritten motion which Mark Moro had given to her. Ex. A-Colpo.

Ms. Colpo also recalls, and her recollection is corroborated by her minutes, that on December 10, 1996, a list of itemized bills for payment mistakenly included a payment to SRC and that petitioner ordered this item stricken off the list. Ex. Colpo Aff.

Colpo testified for the government at petitioner's trial but was never asked about the disputed minutes. Tr. 4259-88. She, like all the other affiants, was available to testify for the petitioner but never asked to do so. Ex. Colpo Aff.

Richard Smetana was a member of the Board of Trustees from 1991 through 1997. In his sworn affidavit, Smetana states, in pertinent part:

In the fall of 1996, the Board split into two factions as Joe DeChicio, Mark Moro, Alison Resnick, Bob Balsitis and Emil Schullo prepared to run a slate of candidates in opposition to Betty Loren Maltese in the February 1997 primary election. At the same time (fall of 1996), allegations began to appear in the press about misconduct relating to the handling of the Town's insurance and misconduct of Town officials. Board meetings that fall and winter were heated and contentious.

I recall a Board meeting in the fall of 1996 at which Betty told Joe DeChicio not to make any more payments to Specialty Risk (the firm handling the Town's insurance). I also recall that the Board agreed to start looking at itemized breakdowns of the insurance payments before any payment was approved. I recall a subsequent meeting at which Betty asked DeChicio if he had made any payment and DeChicio said, "no" he had not.

Exhibit Smetana Aff.

Smetana also recalls the disputed amendments to the minutes in early 1997 and confirms their accuracy. According to Smetana, the process of amending the minutes was common and was sometimes necessitated, in his opinion, by the malfeasance of Town Clerk Mark Moro, a political opponent of Loren-Maltese. Smetana states:

Mark Moro, the Town Clerk, had control over the drafting of the minutes for Board of Trustee meetings. I recall disputes over the minutes where Mark would leave something out that was damaging to his slate of candidates and we would have to amend the minutes to put it back in.

At a Board meeting in January, 1997, I recall making a motion to amend the minutes from the preceding Board meeting. Betty had asked me to make this amendment which described a discussion between Betty and Joe DeChicio relating to insurance payments which had been left out of the minutes. The discussion had truly occurred at the prior meeting and the amendment was accurate, otherwise I would not have agreed to sponsor it.

In late January, 1997, questions arose about the legitimacy of invoices submitted by the firm that was doing the Town's landscape work. As a result, the Board requested itemized invoices from the firm. This request was not included in the minutes and I recall sponsoring an amendment to the minutes. I also recall that the owner of this firm was rumored to be associated with Emil Schullo who was on the slate of candidates with Mark Moro, the Town Clerk. This was another example, in my opinion, of how items sometimes got left out of the minutes to protect Moro's political allies.

Later in February, 1997, a stenographer was brought in to record Board Meetings and to help resolve disputes over the minutes.

Ex. Smetana Aff.

Moses Zayas was a member of the Board of Trustees from 1995 through 1999; he currently holds the position of Chief of the Auxiliary Police. Zayas also recalls that during the fall and winter of 1996-1997, the Board was split into two political factions with DeChicio, Moro, and Resnick opposing Loren-Maltese and the rest of the Board. Zayas confirms that Moro controlled what items were recorded in the written minutes. Exhibit Zayas Aff.

Zayas recalls several heated discussions during the winter of 1996-97 between Loren-Maltese and DeChicio "relating to town payments made to the firm handling the Town's insurance" and that Petitioner "had asked for an investigation of these payments to the insurance firm." Exhibit Zayas Aff.

Zayas further states that the disputed amendments to the minutes in January and February 1997 are consistent with his "recollection of discussions which occurred at Board meetings around this time period." Zayas explains:

The process of amending the minutes of a prior board meeting was not at all uncommon. The fact that the above-described amendments were voted upon, that both Betty and Joe DeChicio were present for this vote, and that no one voted against either amendment suggests to me that the amendments accurately reflects the discussions which took place at the prior meetings. If there was any dispute about the accuracy of either amendment, someone would have voted to oppose it.

Exhibit Zayas Aff.

Michael Frederick was a member of the Board from November 26, 1996 until 2000. In his sworn affidavit, Frederick states, in pertinent part:

During Board of Trustee meetings in the winter of 1996-1997, there were numerous discussions about the town insurance. I recall that on at least two occasions, Betty directed Joe DeChicio not to wire any more payments to Specialty Risk Consultants, the firm that was handling the Town's insurance. I recall that Betty expressed anger and frustration with DeChicio during Board meetings on the issue of the insurance. I also recall that Betty complained that her political rivals had a stamp with her signature and were using that stamp to sign documents without her consent or authorization.

On December 16, 1996, the day of my father's death, Betty called a special Board meeting for the purpose of retaining Kunkle's firm to investigate allegations of improprieties relating to the Town's insurance.

In February, 1997, there was a bitter primary election in Cicero in which DeChicio, Resnick, Schullo and Moro ran a slate of candidates against Betty's slate. Tensions were high already in December 1996 when candidates file their petitions.

Exhibit Frederick Aff.

Frederick also recalls the disputed amendments to the minutes in early 1997 and he confirms that these amendments were legitimately made and accurately recorded. Frederick states:

I have reviewed the minutes of the Board of Trustees meetings for January 14, 1997 and February 11, 1997. Both of these documents contain an amendment to the minutes of the preceding Board meetings. I do not recall these particular discussions. However, the process of amending the minutes of a prior board meeting was not at all uncommon. Mark Moro, the Town Clerk and Betty's political rival, had control over what went into the minute. Betty did not have control over what went into the minutes which explains why some of the amendments to the minutes were made.

Exhibit Frederick Aff.

The disputes between Board members about the recording of the minutes came to a head in late January-early February, 1997. At that time, Deputy Clerk Marilyn Colpo was no longer keeping the minutes and this job was left to a less experienced clerk named Linda Feliciano. See Colpo Aff.

At the February 11, 1997, Board meeting, a stenographer was brought in to record the minutes to avoid discrepancies between what took place at the meeting and what was recorded in the minutes. The transcript of this meeting reveals a heated discussion between Board member Smetana, a Loren-Maltese loyalist, and Mark Moro, a DeChicio loyalist, wherein Smetana accuses Moro of intentionally leaving items out of the minutes to aid his political allies. See Exhibit B-Zayas.

2. The Sworn Affidavits of Carol Guido and Dennis Both Establish that Petitioner Acted Promptly to Remedy Problems With the Town's Insurance, Contrary to the Evidence Offered Against Her at Trial.

When Affiant Carol Guido was diagnosed with bladder cancer in 1994, she was covered by the Town's health insurance through her husband Louis Guido. In her sworn affidavit, Guido states, in pertinent part:

In about early 1995, I received a notice from the hospital saying that my bills had not been paid and threatening to put a lien on our home. My husband Louie called Town President Betty Loren-Maltese to find out why the insurance was not paying my bills. After Louie explained the situation, Betty asked him to put me on the phone. Betty told me not to worry, the bills would be taken care of and that I should keep going to my treatments. She also said that we were not the only ones to complain about their health insurance claims not being paid. She said that she going to hire some people to investigate because "we have millions of dollars put away to pay insurance claims and this shouldn't be happening," This was the first time I had ever spoken to Betty.

Within three weeks of this phone call, my bills were paid.

I did not speak to Betty's attorney at the time of her trial; nor did I speak to anyone from the government. Had I been asked, I would have been willing to testify to the information stated in this affidavit or any information that is relevant to her case.

Exhibit Guido Aff.

Guido's testimony would have refuted the trial testimony of government witness Cynthia Camp, a claims adjuster, who told the jury that Guido's bills for her cancer treatment went unpaid while petitioner's medical bills were paid promptly. Guido's affidavit reveals that petitioner was not

indifferent to the plight of Ms. Guido, or to the plight of any person covered by the Town's insurance. To the contrary, when the situation was brought to her attention, petitioner personally intervened and Ms. Guido's bills were paid.

Affiant Dennis Both was the Town Attorney from 1985 to 1997. In September 1994, he wrote a letter, at petitioner's request, "to Frank Taylor, then President of Specialty Risk Consultants, expressing concerns over his firm's handling of the Town's health insurance claims and threatening to fire his firm, if its performance did not improve." A copy of this letter is attached as Exhibit A-Both. Both further recalls: "During the two years which followed the letter to Taylor, Betty asked representatives of the Town to explore other options regarding the Town's health insurance program. These options included finding another firm to take over the Town's health insurance to administer the claims and the purchase of a commercial major medical policy covering both active and retired employees." Exhibit Both Aff.

Both was also available to testify for the defense at trial. Indeed, he testified for the government about unrelated matters under a grant of immunity.

REASON FOR GRANTING THIS PETITION

I. BETTY LOREN-MALTESE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO CALL AVAILABLE WITNESSES WHO WOULD HAVE ESTABLISHED THAT SHE WAS NOT A KNOWING PARTICIPANT IN THE FRAUD.

The Sixth Amendment to the United States Constitution guarantees every defendant the right to effective assistance of counsel. U.S. Const. amend. VI. The Supreme Court has established a familiar two-part test to determine if counsel's errors deprived a defendant of this constitutional guarantee. First, the court must determine if counsel's performance fell below an "objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Second, the court must determine whether these errors prejudiced the defendant - i.e. "whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In this case, petitioner's trial counsel's failed to present readily available exculpatory evidence on behalf of petitioner. As a result, counsel's performance was constitutionally deficient and prejudicial to petitioner's chances for an acquittal.

A. The Performance of Petitioner's Lawyer was Constitutionally Deficient.

In assessing counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Raygoza v. Hulick*, 474 F.3d 958, 962 (7th Cir. 2007) (citing *Strickland*). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. However, this presumption is overcome where the lawyer fails to conduct a

reasonable investigation or present available exculpatory evidence. See *Washington v. Smith*, 219 F.3d 620, 632-33 (7th Cir. 2000) (“an adequate investigation is surely a right”); *Harris v. Cotton*, 365 F.3d 552, 556 (7th Cir. 2004) (failure to conduct a reasonable investigation may satisfy the performance prong of *Strickland*); *Williams v. Washington*, 59 F.3d 673, 681 (7th Cir. 1995) (defense counsel was ineffective for failure to investigate witnesses who could have undermined the credibility of the prosecution’s witnesses).

1. Trial Counsel’s Failure to Authenticate the Board Minutes and to Rebut False Allegations that the Minutes Were Doctored was Deficient Under *Strickland* Where the Evidence was Readily Available.

At trial, the government introduced scant evidence linking petitioner to the fraud committed by SRC, a company which had been retained by the Town to process its insurance claims before petitioner became Town President. The case against petitioner rested largely on her position as Town President.

The most damning evidence against petitioner was the continued payments to SRC *after* the company’s fraud was revealed. The government established that the SRC fraud was made public in October 1996; yet the Town continued paying SRC through January, 1997. To emphasize this evidence, the government introduced a summary chart showing disbursements from the Town to SRC from October 1996 through January 1997. Tr. 495-97, 7597-7608, 8006-10. The government alleged that as Town President, Loren-Maltese controlled all disbursements of Town funds. Co-defendant DeChicio (though his attorney) made similar allegations. Thus, the jury was told, Town President Loren-Maltese must have been in cahoots with the crooks, otherwise she would have cut off their funds in October, 1996.

The Board minutes reveal that these central allegations against petitioner were entirely false.

The Town could and did pay SRC without its president's knowledge. The minutes establish that petitioner ordered Town Treasurer DeChicio to cease payments to SRC in October 1996, when the fraud was exposed, but DeChicio disobeyed this order and sent another \$1.2 million of Town funds to the crooked company. These payments were "signed by Mr. DeChicio by handstamp without authorization" Exhibit B-Zayas. Moreover, the minutes show that at the January 6, 1997, Board meeting, DeChicio falsely denied that he had made any payments to SRC since October. Exhibit F-Colpo.

Properly authenticated, the minutes were admissible pursuant to firmly established exceptions to the hearsay rule – the exception for reports of the activities of public offices. Fed.R. Evid. 803(8), and for business records, Fed. R. Evid. 803(6).⁴ This Court excluded the minutes based on its concerns about their integrity. It also repeatedly invited counsel to call witnesses to testify that the minutes were faithfully taken and unaltered. Yet, counsel failed to allay the court's concerns despite

⁴ The disputed amendments also contain admissions by DeChicio and were thus alternatively admissible under Federal Rule of Evidence 804(b)(3). The amendments describe a colloquy in which DeChicio was reminded that he had been ordered in October to stop paying SRC, and accused of disobeying this order by continuing the payments ("over \$1.2 million") without authority. The amendment was put up for a vote at which time DeChicio had an opportunity to oppose if he disagreed. But DeChicio did not oppose; rather he abstained.

DeChicio's failure to oppose the amendment was an admission by silence. "The law on admission by silence recognizes that when a person acquiesces in certain statements, he may, under proper circumstances admit the truth of those statements. His silence, then, may be a statement." *United States v. Andrus*, 775 F.2d 825, 852 (7th Cir. 1985). "Before admitting the proffered admission by silence, the trial judge must determine, as a preliminary question, whether the statement was such that under the circumstances an innocent defendant would normally be induced to respond.... Ordinarily, the jury then decides, with proper instructions from the court, whether in the light of all the surrounding facts, the defendant actually heard, understood, and acquiesced in the statement." *Id.* (citation omitted).

Here, the amendment was put up for a vote and DeChicio was directly called upon to respond to the accusation. Accordingly, his failure to oppose the amendment was an admission.

the fact that the authenticating witnesses were readily available. Indeed, the most essential authentication witness, Marilyn Colpo, was already in court testifying for the government about unrelated matters.

There was no reasonable strategic reason for trial counsel to *not call* available witnesses to authenticate the minutes and to rebut the false allegations that his client had fraudulently altered the minutes. See *e.g.*, *Raygoza*, 474 F.3d at 964 (“it is almost impossible to see why a lawyer would not at least have investigated the alibi witnesses more thoroughly”); *Davis v. Lambert*, 388 F.3d 1052, 1064 (7th Cir. 2004) (counsel’s decision to reject potentially exculpatory witnesses without even talking to them was not “tactical” * * * “How could ‘a theory of the case’ that relies on self-defense ‘not require’ the testimony of the only eye-witness to the altercation who was sober and alert, as well as that of other witnesses who would impeach testimony presented by the State regarding whether the victim was armed?”); *Hampton v. Leibach*, 347 F.3d 219, 249 (7th Cir. 2003) (“it was not reasonable for [counsel] to believe that it was unnecessary to identify and interview potentially exculpatory eyewitnesses....”)

The excluded minutes were critical to petitioner’s defense and would have likely led to her acquittal. Her trial counsel recognized the importance of this evidence. He argued for admission of the minutes and, when this Court ruled against his client, he submitted the minutes as an offer of proof to preserve the issue for appeal. Yet, inexplicably, counsel failed to call witnesses to authenticate the minutes and to rebut the false allegations that they were “doctored.”

Trial counsel’s failure to call available witnesses to authenticate and introduce the very evidence that would have likely led to his client’s acquittal deprived petitioner of her Sixth Amendment right to the effective assistance of counsel under the *Strickland* test. See *Raygoza*, 474

F.3d at 966 (trial counsel’s performance was constitutionally deficient for failure to investigate and present available alibi evidence); *Hampton*, 347 F.3d at 249 (defendant’s trial lawyer was constitutionally deficient for failure to contact exculpatory witnesses); *Washington v. Smith*, 219 F.3d 620, 629-31 (7th Cir. 2000) (performance prong met when counsel failed to produce critical alibi witness at trial; counsel made only “minimal attempts” to contact witness before trial and waited to subpoena her until two days before she was to testify, despite knowing that she was “hard to reach”); *Montgomery v. Petersen*, 846 F.2d 407, 413-14 (7th Cir. 1988) (performance prong met when counsel failed to investigate the “only disinterested witness in the case,” a store clerk from whom petitioner allegedly purchased bicycle on day of robbery) (emphasis in original).

2. Trial Counsel’s Failure to Rebut the Claim that Petitioner Callously Ignored Complaints from Town Employees Whose Medical Bills Went Unpaid By SRC was also Deficient Performance Under *Strickland*, Where the Evidence was Readily Available.

At trial, the government elicited inflammatory testimony about a cancer patient named Carol Guido who could not get the Town to pay for her chemotherapy. During this same time period, the jury was told, Loren-Maltese’s medical bills were paid in full.

The picture which the government painted – of a callous Town President indifferent to the suffering of her employees -- was entirely false. In September 1994, Loren-Maltese wrote a letter to Frank Taylor, the general manager of the firm contracted to process health claims (SRC), complaining about SRC’s performance in handling the health insurance claims of Town employees and threatening to fire his firm if its performance did not improve. Thereafter, petitioner actively explored replacements for SRC. When in 1995 petitioner learned that the bills for Carol Guido’s cancer treatments were not being paid, she personally intervened to promptly remedy the situation

and to make sure that Ms. Guido's treatments were never interrupted.

The truth is that petitioner was actively engaged in fixing the problems with the Town's insurance as those problems were brought to her attention. But the jury never heard this evidence because her lawyer failed to call the readily available witnesses. This failure to present pivotal evidence to rebut the government's false claim of callous nonfeasance again deprived petitioner of her Sixth Amendment right to the effective assistance of counsel under *Strickland*. Petitioner is entitled to habeas relief if she can establish that she was prejudiced by her attorney's deficient performance. See *Raygoza*, 474 F.3d at 965.

B. Petitioner was Materially Prejudiced by Her Attorney's Unreasonable Failure to Introduce Evidence Critical to Her Defense.

To establish prejudice under the *Strickland* test, petitioner 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." *Strickland*, 466 U.S. at 694.

Had trial counsel done his job and authenticated the Board minutes and refuted the false claims of fabrication, petitioner would most likely have been acquitted. At trial, there was no evidence that she received any part of the \$10,000,000 which SRC stole from the Town. SRC's general manager conceded that he repeatedly deceived petitioner with phony invoices and assurances that increasing insurance costs were caused by the high costs of health care.

The jury deliberated eleven days before reaching its verdict. After the verdict, one juror told the Chicago Tribune that he switched his vote to guilty on the final day of deliberations under "extreme pressure from the others"; but he continued to have second thoughts.

“You’ve got to have evidence,” he said. “You can’t send somebody to jail without evidence. They showed me some evidence she was involved, but I still questioned it.”

Ex. Trib. Art.

The minutes establish that when petitioner became aware of the fraud in October 1996, she ordered the Town Treasurer, DeChicio, to stop paying SRC and she ordered an independent investigation of the fraud. Further, the minutes reveal that DeChicio disobeyed this order and continued payments to SRC without her knowledge or authorization and then lied to the Board about making these payments.

The failure to authenticate and introduce the minutes left the jury with only the government’s theory of the case – that petitioner continued sending money to the crooks even after their fraud was revealed. The absence of the minutes also enabled DeChicio to falsely allege that Loren-Maltese and not he controlled all disbursements to SRC. In his summation to the jury, counsel for DeChicio falsely argued that it was Loren-Maltese and not his client who had approved the continuation of payments to SRC after the fraud was revealed in October 1996. 9100-02. “DeChicio lacked authority,” he told the jury. Tr. 9102. In response to petitioner’s claim that she had ordered DeChicio to stop payments to SRC in October, 1996, DeChicio’s lawyer correctly pointed out that there was “not a shred of evidence” to support this claim. Tr. 9145.

This Court repeatedly remarked on the power of the Board minutes to potentially alter the outcome of the trial. Were the minutes admitted, the court noted, they could “shift the blame to DeChicio.” Tr. 7492. The Court stated:

And for the jury to learn that he did this having been told not to would put the government in a position and put Maltese in a position to argue that DeChicio was so wedded to the alleged conspirators in the SRC operation that he disobeyed specific instructions to stop paying them. He was so deeply involved with the in the conspiracy that he threw caution to

the winds even and made these payments. And then when confronted about it at a later time, falsely denied that he had made them.

Now I have been paying attention to what the evidence is against the various defendants so far. And this would be by far the most incriminating testimony against DeChicio. I mean it would stand in a class by itself. There is nothing like that, nothing remotely approaching that that we have heard so far.

Tr. 7482-83. Then at sentencing, the Court remarked that the minutes “would have taken all of the blame from the shoulders of Ms. Maltese and placed it on the shoulders of Mr. Dechicio.” Sent. Tr. 61-62.

Trial counsel’s failure to introduce this critical evidence also prejudiced petitioner at her sentencing hearing. This Court enhanced petitioner’s guideline range by four levels for an “extraordinary abuse of trust” and sentenced her to 97 months incarceration. Her trial counsel’s failure to authenticate the minutes contributed to this severe sentence in two ways.

First, after arguing so strenuously to the Court that the board minutes were critical to petitioner’s defense, trial counsel’s failure to call a single witness to authenticate the minutes was taken by the Court as a concession that the minutes were phony. This Court stated:

The minutes were phony, just as phony as they could be. I haven’t used that word before, but – * * * you have just prompted me to do so. And that’s why nobody was called to authenticate them. They weren’t going to subject themselves to cross examination and possible perjury prosecution.

Sent. Tr. 65. See *e.g.*, *Washington v. Smith*, 219 F.3d at 634 (there was a “negative inference” against Washington based on counsel’s failure to call witnesses to support his alibi).

Second, after determining that the minutes were phony, this Court found that petitioner’s alleged act of altering the minutes to deflect the blame away from herself onto another defendant required harsh punishment in order to deter others in her position from committing similar acts. The

Court stated:

Well, here you have somebody running the town and having, in addition the ability to fabricate the town's records, to cover up what was going on. That is a highly unusual situation. Even in municipalities where wrongdoing is frequently encountered, it would be rare that any head of the government could say, we're going to - - we're going to make up some minutes to show something that never happened, and those are going to be the minutes of the town board.

This kind of person we have to think about deterring. And you don't deter a person with that kind of power with a threatened slap on the wrist or with a threatened modest period of years in prison. Deterrence of that kind of misconduct by that kind of person enjoying virtual immunity from supervision and every expectation that there will be no day of reckoning, it has to be a very substantial sentence to be meaningful.

Sent. Tr. 62-63.

Petitioner was further prejudiced by her attorney's failure to rebut the evidence and argument that Loren-Maltese was made aware that employee health insurance claims were not being paid but failed to take any action. Had trial counsel presented readily available evidence, he could have shown that the exact opposite was true. Petitioner threatened to fire and replace SRC in September 1994, and then investigated options to move the account. When in 1995, petitioner learned that SRC had failed to pay for Carol Guido's cancer treatments, she personally intervened to make sure that the bills were paid and that Ms. Guido's treatments were not interrupted. There is a reasonable probability that counsel's failure to present this critical evidence altered the outcome of the trial and lengthened petitioner's sentence.

CONCLUSION

Under *Strickland*, the reviewing Court must assess the totality of the omitted evidence rather than the individual errors. Had trial counsel put on a reasonable defense on behalf of petitioner, she would most likely have been acquitted. See *e.g.*, *Raygoza*, 474 F.3d at 965 (failure to call available witnesses could have affected result where the prosecution’s case “was not particularly strong” despite the testimony of three eyewitnesses identifying him as the shooter); *Stanley v. Bartley*, 465 F3d 810 (7th Cir. 2006) (defendant would have had reasonable chance of acquittal if attorney had conducted interviews that would have uncovered possibility that third-party committed murder and would have discredited another witness who claimed that defendant had admitted to committing instant crime); *Washington v. Smith*, 219 F.3d 620, 633-34 (7th Cir. 2000) (the prosecution’s case was “far from unassailable” despite two eyewitnesses and physical evidence including the shotgun recovered from the defendant’s car).

For all the foregoing reasons, petitioner respectfully requests the Court to issue a Writ of Habeas Corpus to vacate her unconstitutional convictions, hold an evidentiary hearing on this matter, or grant such other relief as may be appropriate and necessary to dispose of the matter as law and justice require.

Respectfully submitted,

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