NO. _____

In The
Supreme Court of the United States

DUSTIN XAVIER WILKINS, also known as Dxavier Wilkins, also known as Xavier Wilkins, also known as Chosen Wilkins,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

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Dated: August 29, 2018

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QUESTIONS PRESENTED

I. Whether this Court should grant certiorari to determine whether the Petitioner should have been allowed to withdraw his guilty plea based on ineffective assistance of counsel by his court-appointed lawyers?

II. Whether this Court should grant certiorari to determine whether the Petitioner should be granted a new sentencing hearing, based on ineffective assistance of counsel by his court-appointed lawyers?

PARTIES TO THE PROCEEDINGS

Petitioner is Dustin Xavier Wilkins, who filed this action under 28 U.S.C. § 2255 and was the Appellant below. Respondent is the United States of America, which was the Appellee below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Dustin Xavier Wilkins respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals, issued on June 5, 2018, is reproduced in the Appendix to this Petition ("Pet. App.") at 1a. The District Court's Memorandum Opinion, issued June 6, 2017, is included therein at Pet. App. at 6a, and its decision granting a Certificate of Appealability to Petitioner, issued on July 5, 2017, is included therein at Pet. App. at 35a.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2018. Pet. App. 1a. This Court has jurisdiction over this Petition for a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL & STATUTORY PROVISIONS

Title 28 U.S.C. § 2255(a) provides 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 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.

STATEMENT OF THE CASE

A. Procedural Background

On September 17, 2013, a grand jury returned an Indictment against Dustin Xavier Wilkins, charging him as the only defendant with conspiracy (Count 1), wire fraud (Counts 2-9), access device fraud (Counts 10-11), and first-degree fraud under the D.C. Code (Counts 12-14). JA:24. As District Judge Bates later summarized, the listed crimes were part of "a fraudulent debit card scheme." JA:820. Most of the Indictment's listed charges were dated. JA:26 (2013 Indictment alleges conspiracy from June 2008-April 2010). By the time this indictment was returned, Wilkins had already been convicted in a Henrico County, Virginia state case involving one of these same debit cards, on which he had received a three-year custodial sentence, and had served and completed 31 months in Virginia state prison.

On October 8, 2013, over 3 years after his last indicted act, and after Wilkins had already been released from custody by Virginia, Wilkins was suddenly arrested on the instant federal case. Tony W. Miles, an attorney with the D.C. Federal Public Defender's Office, was appointed to represent him.

Although the Indictment (and its forfeiture provision) listed a total of only $35,615.73 in losses, a Statement of the Offense later entered at Wilkins' guilty plea stated that the parties had agreed that the total amount of loss for relevant conduct purposes was almost three times higher: $106,668.29. Many of these additional loss amounts arose from alleged past conduct that had occurred more than five years before Wilkins' guilty plea date of June 20, 2014. *See* JA:708 (summary). On June

20, 2014, Wilkins pled guilty to Count Two of the Indictment, but as a part of that plea, he agreed to $106,668.29 as the relevant conduct amount of loss. JA:47 & 1352.

Shortly after this guilty plea, as exhibits presented at Wilkins' § 2255 proceedings later revealed, Wilkins told his attorney, Miles, that he still contested certain stated loss amounts, and wanted them investigated further; Wilkins also conveyed that he had not fully understood his plea proceedings or his rights at that time, and wanted to withdraw his guilty plea. No such motion was ever filed by Miles, but before Wilkins was sentenced, on June 10, 2015, the District Court granted Miles' motion to withdraw as Wilkins' counsel, and appointed Mark J. Carroll.

As his September 16, 2015 sentencing date approached, Carroll filed a sentencing memorandum on Wilkins' behalf, JA:1404, which did not seek a downward variance, and asked for the same custody sentence the Assistant U.S. Attorney himself was requesting – 33 months, at the low end of Wilkins' 33-41 month Guideline range. In particular, no request at all was made for any downward variance by citing or analogizing U.S.S.G. § 5K2.23, even though Wilkins had already served 31 months in custody on a Virginia state case which involved this same type of conduct, during the very same time frame, for using one of the same debit cards.

At sentencing, Wilkins received a 33-month sentence. JA:92. At the hearing, Carroll did briefly ask for a downward variance, but did not provide any specific justification or citations for that request, JA:68, never mentioning Wilkins' prior jail time spent on his state case in Virginia, and never referencing U.S.S.G. § 5K2.23.

A Notice of Appeal was then filed, JA:91, and Wilkins abegan submitting various *pro se* filings in the district court, asking to withdraw his plea, and alleging ineffective assistance by his appointed counsel. *E.g.,* JA:103 & 105

A new lawyer, Edward C. Sussman, was appointed to represent Wilkins. Because Wilkins' stated issues focused on ineffective assistance, and since no evidentiary record on that issue had yet been developed, Sussman decided to dismiss Wilkins' appeal and raise these issues instead in a post-conviction petition under 28 U.S.C. § 2255. A § 2255 petition was then filed on November 30, 2015, JA:107, and an order dismissing his direct appeal was issued on December 10, 2015. JA:114.

On December 22, 2015, District Judge Bates denied Wilkins' request to further extend his self-surrender date. JA:115. Wilkins then sought to file a *pro se* request to reconsider that ruling (which was denied). Shortly thereafter, private counsel Bernard Grimm briefly filed, but then withdrew, a motion on Wilkins' behalf seeking an expedited hearing to extend Wilkins' reporting date. JA:124,129. Grimm never entered an appearance, but during the brief window of time when his motion was pending, attorney Sussman moved to withdraw as Wilkins' appointed counsel. JA:127. Wilkins surrender date arrived and he reported as required.

On January 5, 2016, Sussman's appointment as counsel was terminated and undersigned counsel was appointed for these § 2255 proceedings. JA:132.

On June 1, 2016, Wilkins' § 2255 petition was supplemented to include not only a request to withdraw his plea, but also a request for a new sentencing. JA:133. The

petition was supplemented again on September 15, 2016, within the 1-year filing window. JA:150.

B. Summary of Wilkins' § 2255 Proceedings

In his § 2255 proceedings, Wilkins asked for his conviction to be vacated, arguing that his plea agreement (which had basically tripled the relevant conduct amount above what the Indictment alleged) had not been knowingly and intelligently entered. Wilkins said he was unaware of his right to challenge this calculation, which never made it into his assessment of whether to plead guilty or take this case to trial. He also asked for a new sentencing hearing, based on ineffective assistance of counsel in connection with his sentencing.

Various additional filings, status conferences and directed briefings ensued, culminating in an evidentiary hearing held on November 28-29, 2016. That evidentiary hearing included the submission of numerous documentary exhibits, plus live testimony from both Wilkins and the two appointed lawyers he claimed had provided ineffective assistance: Miles and Carroll.

1. Testimony of Petitioner Wilkins and Documentary Exhibits

Wilkins testified first, and he stated that his first attorney, Miles, had often been insulting, and seemed like a second prosecutor. JA:185-86. This was his first time in the federal criminal justice system, and he swore there had never been any discussion with Miles about how most of the losses being included in his plea agreement were over five years old at that time, or how they might thus be challengeable as beyond the statute of limitations. JA:220-22. Wilkins stated that he

would not have pleaded guilty if he had received competent counsel, and instead would have fought the charges and loss amounts. JA:413-14. Among other items, Wilkins disagreed with the plea agreement's $106,668.29 stated loss amount, and said he pleaded guilty only because his requests to his lawyer for witness interviews had been rebuffed, and he felt helpless. JA:259-60. He later sought to withdraw his plea, but said that by the time Carroll entered the case, he was told it was too late to do so. JA:267. With respect to sentencing, Wilkins said he never saw Carroll's sentencing memorandum before it was filed, JA:279-80, and that Carroll never held discussions with him about seeking a downward variance. JA:270,280. He said Carroll had never brought to the Court's attention the fact that almost all his charged offenses were 5-8 years old by the time of his sentencing, or the mitigating factor that this case forced him to cancel an audition to perform in a NBC live performance of "The Wiz" – collateral punishment thus already suffered. JA:283-84. He also testified there had been no discussions at all with Carroll about Wilkins' Henrico County, Virginia conviction possibly being a "related" case. JA:290-91.

Beyond Wilkins' testimony, many exhibits were introduced at Wilkins' § 2255 hearing – mostly documents from the Government's discovery in the criminal case – revealing problems with certain loss amounts, which were added to his Judgment & Commitment Order as restitution.[1] A sampling included the following:

[1] Wilkins' issues are not dependent on his own testimony, but arise primarily from documentary exhibits plus the testimony of Messrs. Miles and Carroll, thus rendering irrelevant Judge Bates' decision not to credit his testimony. *See* JA:833-34 (declaring Wilkins' testimony not credible).

May 2007 charges from the Capitol Hilton claimed $7445.90 in losses, despite the hotel's own notation that no charges should be authorized above $5690. JA:712. Wilkins was charged for two rooms, and a spa charge from an unrelated third room never included on his folio was also oddly added to his bill. JA:713-14. Also referenced was an AmeriPark credit, JA:720, which, at his § 2255 hearing, Wilkins explained arose after a valet driver took his parked vehicle to New Jersey, yielding an expected write-off of his hotel charges, JA:310-12, but no such credit was applied.

December 2007 charges from the Mandarin similarly charged him for two separate rooms, JA:721; similar to the Capitol Hilton above, at his § 2255 hearing, Wilkins testified he had never authorized charges for two rooms. JA:308,313.

December 2007 charges at the Park Hyatt claimed Wilkins stayed there during the same dates when other documents showed he was *simultaneously* being charged for a stay at the Essex House in New York City. JA:727-30. At his § 2255 hearing, Wilkins testified he had only stayed at the Essex, and never authorized these charges at the Park Hyatt in December 2007. JA:316-20.

February 2008 charges at the Ritz involved two separate folios with different departure dates. JA:731-33. At his § 2255 hearing, Wilkins again testified that he never authorized charges for two separate rooms. JA:328.

May 2008 charges at the Four Seasons involved charges above a stated $4500 cap, JA:734, plus stay dates that *overlapped* with his charged stay at a different hotel (Hotel George) during the same period, JA:742-43; Wilkins testified he had never stayed at the Four Seasons or authorized these charges. JA:336-37.

May 2008 charges at the Fairmont Hotel involved $1747.70 in charges attributed to Wilkins in this case, encompassing a limousine loss of $1050 which *the hotel's own records admitted the hotel had not incurred.* JA:746.

The May 2008 Melrose Hotel's charges were for a stay during dates that overlapped with the Fairmont Hotel stay, JA:747-49; at his § 2255 hearing, Wilkins testified that he did not stay at the Melrose or ever authorize its charges. JA:345.

The June 2008 Renaissance's charges, JA:750-53, were for a stay that *overlapped* with stay dates at the Parker Meridian in New York, JA:754-55; at his § 2255 hearing, Wilkins testified that he did not stay at the Renaissance or authorize these charges. JA:349.

The June 2008 Willard Hotel's records showed that after hotel personnel grew suspicious of Wilkins, the Willard changed the locks to his room, JA:760-61; despite this, the Willard's bill, JA:756-59, continued to charge him even for dates after it had locked him out of his room.

The July-August 2008 Donovan House's records showed that in September 2008, it had been able to process all the charges, JA:770; at his § 2255 hearing, Wilkins stated his understanding that the Donovan had been fully paid. JA:363-64.

For a February 2009 Madison Hotel stay, a statement described how Wilkins had refused a rate hike and checked out of the hotel, JA:793-94, yet its folio revealed it still charged him for extra days at the higher rate anyway. JA:775.

Based on a March 2010 charge, Wilkins was also held responsible for a $900.20 Abe's Limousine reservation, even though Abe's records described how its own

investigation had found an "individual posed as Wilkins," and how "[s]omeone close to Xavier knows his tricks and is using his name." JA:798.

Around that same time, Wilkins was also held responsible for a $2448.15 Hertz rental charge in April 2010, even though his name was badly misspelled on Hertz's forms, JA:799, and documents showed a vehicle return date of April 24, 2010, JA:803 – a week after Wilkins had been incarcerated on his Virginia state case. JA:402.

At the Aloft Hotel, Wilkins' folio included charges for staying there April 16-20, 2010, JA:804-05 – *including dates when he was incarcerated in Virginia.*

In January 2013, Abe's Limousine claimed $1235.00 in losses, after claiming Wilkins was picked up at the W Hotel, JA:807, 809 – despite W Hotel's own records stating that "Wilkins never arrived." JA:814.

After a September 2013 stay at the Hyatt Arlington, Wilkins was held responsible for $587.23 of loss, despite the Hyatt's own records showing his card used for that stay did not match any of the suspect cards. JA:815-17. The hotel's records also revealed "The funds were paid to our bank." JA:818. At his § 2255 hearing, Wilkins said he understood the Hyatt was fully paid for this hotel stay. JA:410-12.

As Wilkins noted during his § 2255 hearing, none of these issues were investigated by his counsel. Certain debit/credit cards at issue in this case did not even include Wilkins' name on them, JA:710-11, and as Abe's Limousine documents revealed, some evidence of "copycatting" also existed. Jealously was also apparent from Internet stories about Wilkins, JA:169-74, with blogs often discussing his interactions with various celebrities. JA:659-88.

2. Testimony of Appointed Defense Lawyer Tony C. Miles

Miles was called as a witness, and he admitted Wilkins had questioned his stated loss amounts, JA:558, both before his guilty plea, and later. JA:606. But "on the day he pled guilty, he told me he agrees with everything in the plea agreement." JA:605. While Miles suggested that was not the only day Wilkins agreed to this, and he claimed he had reviewed all of the Government's discovery, Miles admitted "we did not go over all the discovery associated with each vendor together." JA:566.

Rather than scrutinizing the Government's discovery critically, and finding discrepancies, Miles largely tried to turn this issue back on Wilkins, demanding that Wilkins identify and bring any such issues to him. Miles admitted Wilkins had specifically questioned one such charge, involving the Aloft Hotel charge that Wilkins said was invalid since he was incarcerated in Virginia during certain stay dates. Miles said his office investigator then checked into that issue, but he claimed "I didn't see a conflict," since he described the dates as merely "close." JA:533. Miles said, "I recall that after reviewing the information about the dates, comparing it with the records, that there was not an overlap." JA:564. As the exhibits revealed, however, this was wrong; the dates were not merely "close," but did overlap. Miles' office got written verification that Wilkins was in jail on April 19 & 20, 2010, JA:535,691-93, during the same dates when Wilkins was charged with staying at the hotel. JA:594. After being shown this exhibit during the § 2255 hearing, Miles admitted he was wrong: "[R]ight now I see the documents and I see that there is [an overlap]. The end of one of the stays overlaps a little bit with the jail stay." JA:564. Miles nevertheless claimed that while Wilkins "didn't accept it immediately," Wilkins had eventually

become "satisfied" with "whatever reason" Miles had come up with at the time as to "why it didn't prove that he didn't stay at that particular hotel." JA:565.

No other discrepancies in the charged loss amounts were explored by Miles. For example, on the Fairmont Hotel's listed loss amount, Miles at the § 2255 hearing acknowledged the Fairmont's own file, earlier produced in Government discovery, "says that they did not lose a thousand fifty of charges for limo services. It indicates the loss was 700." JA:569-70. Miles said "I don't recall" when asked if he had noticed this discrepancy before. JA:570. No objection was lodged, and Wilkins was ordered to pay not $700, but $1747.70 to the Fairmont Hotel as its restitution.

The Government's discovery also revealed sometimes eye-popping charges claimed by these hotels, raising questions about whether all of their claims were true "losses" – such as one instance of $300.00 charged for a rollaway bed, another involving limousine charges of more than $7000.00 for two nights, and listed charges such as $4.40 for a Sprite, $4.13 for a Milky Way, and $4.40 for orange juice. Looking at the various loss issues, Miles said he did "not recall" if he had ever found a single dollar or penny to challenge in any of the Government's listed loss amounts. JA:571.

As noted, as a part of Wilkins' guilty plea, the Government sought to significantly expand the loss amounts attributable to him, by almost three-fold. In particular, the Statement of Offense expanded his stated losses from the $35,615.73 delineated in the federal Indictment, to a total amount of $106,668.29. JA:707-08. As previously noted, however, due to delays in filing this federal Indictment, most of these newly-added alleged loss amounts were years old. By the time a plea agreement

was proposed, the Government's ability to prosecute Wilkins for these extra, older financial charges was dubious. When Wilkins' guilty plea was being negotiated, the vast majority of these newly-added losses were more than five years old, and thus outside the statute of limitations window for prosecution. *See* 18 U.S.C. § 3282(a).

Miles said he was aware many of these newly-added charges were over 5 years old when Wilkins' plea negotiations took place, JA:561, but said, "I can't say that I did" when asked if he ever talked to Wilkins about potential statute of limitations defenses that might limit Wilkins' legal exposure on these extra losses. JA:561-62.[2]

Miles also acknowledged that the Statement of Offense had expanded not only loss amounts, but also the dates of the charged offenses – from the conspiracy charge's narrower window of 2008-10 to a broader range of May 2007 through September 2013. JA:560-61. Miles could not recall if any changes had been made to the Government-drafted Statement of Offense. JA:587. This expansion of dates, which also added two small 2013 charges, led to Wilkins receiving two additional criminal history points, since the newly-added 2013 acts of relevant conduct (though not in the Indictment) were during times when Wilkins was subject to the 2010 Henrico, Virginia sentence.

Miles said Wilkins agreed to plead guilty, and also then admitted under oath to the facts in the Statement of Offense. But within days, Wilkins clearly resumed,

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[2] Although he admitted that he did not recall ever discussing the statute of limitations with Wilkins, Miles did suggest that the Government perhaps could have tried to supersede the Indictment to expand its conspiracy charge to include the older credit card charges included in the Statement of Offense – but he also conceded that the Government's evidence of conspiracy was always disputed by Wilkins. Wilkins consistently denied that any other criminal actors were involved, *even when that cut against his own interests*. For example, Wilkins told Miles he was unable to admit to a conspiracy, even after learning that a conspiracy plea might reduce his Sentencing Guideline score, by reducing his Base Offense Level from 7 to 6. JA:460-61.

in his communications with Miles, his questions about the loss amounts described therein, JA:536, and also requested to withdraw his guilty plea, at times before his sentencing date. JA:574-75. Miles did not deny that Wilkins' requests to withdraw his guilty plea started almost immediately after his guilty plea –the Monday thereafter. JA:575 ("it may have been"). In his email at JA:694-95 Wilkins also stated that, by that August 2014 date, this request had been made on multiple occasions; Miles could not say this was inaccurate. JA:584. Miles said he told Wilkins that he (Miles) would need to withdraw as counsel if Wilkins wanted to withdraw his guilty plea. JA:537. Miles explained that "[h]e did ask me to get off his case or to withdraw on several occasions, and on each occasion I'd have a conversation … [and] until the end, he always ultimately did not want me off." JA:577. Miles said this occurred on "multiple" occasions. JA:580. Miles did not deny that Wilkins said he had "asked you several months ago to authenticate the dollar amounts and re-interview some of the witnesses who the Government says are victims." JA:584,694-95.

Miles said he responded by trying to turn such requests back onto Wilkins: "I remember that would come up a few times, and I would ask him to tell me, you know – I looked at the discovery. I didn't find any issues, and I asked him to point out any concerns that he had so I can look at it and evaluate it." JA:584-85. Miles admitted that neither he nor anyone at the Federal Public Defender's office ever interviewed any hotel or other witnesses identified by the Government. JA:549.[3]

[3] Miles said the only phone call he ever placed was to a single hotel, where he spoke to "whoever picked up the phone" about its credit card charging procedures. JA:549. He could not recall if Wilkins had specifically given him the name of a Palomar employee to contact about excessive charges. JA:549-50.

After receiving Wilkins' initial Presentence Report, Miles claimed he had sent it onto Wilkins, but admitted he had nothing in writing verifying it was sent. JA:590. The Probation Office's acknowledgement and receipt form showed only Miles' signature, and not Wilkins' signature. JA:590,696. Although Miles felt sure he had sent this PSR to his client, Wilkins' subsequent lawyer, Mark Carroll, later recalled emailing a copy of the PSR to Wilkins, and said it "would not surprise me" if Wilkins had told him he had never received the PSR. JA:628-29.

Miles did submit PSR objections, but none affected Wilkins' Guideline range. Miles could not say with certainty if he had ever shown this submission to Wilkins before it was sent in. JA:590-91. The PSR was also notable for what it affirmatively showed: even if Miles had somehow been unable on his own to discern from the Government's discovery that Wilkins was being charged for stays in *different hotels during the same periods of time*, this was crystal clear in the PSR's own descriptions. Page 9 of the PSR showed Wilkins was charged for hotel stays at the Four Seasons and the Hotel George on some of the same days. JA:709. Upon being shown PSR page 9 at the § 2255 hearing, Miles confirmed these overlapping stay dates. Asked if he had noticed that before, Miles said, "I don't recall if I noticed or not"; he also said he could not recall if he had ever discussed this discrepancy with Wilkins. JA:592-93.

Similarly, page 9 of the PSR also showed the stay dates for Wilkins' charges at the Fairmont and Melrose Hotels overlapped. JA:709. After being shown this at the § 2255 hearing, Miles again confirmed the overlapping stay dates, but could not recall if he had noticed this at the time, or discussed it with Wilkins. JA:594. Ultimately, in his PSR objections, Miles never questioned any claimed loss amounts. JA:595.

In addition, Paragraph 61 of the PSR described Wilkins' prior Henrico, Virginia credit card conviction on which Wilkins had received three years of custody JA:591, yielding 3 criminal history points under the Guidelines. JA:596,598-99. As noted in Paragraph 63, that same conviction had also added another two points onto Wilkins' criminal history score under the Guidelines, based on a finding that Wilkins had committed the instant offense (i.e., newly-added 2013 charges) while under the criminal justice sentence in that Henrico case. JA:599. So this Henrico, Virginia case alone added 5 criminal history points to Wilkins' Criminal History score.

Miles did not file any PSR objections claiming that this Virginia prior conviction and the instant Indictment involved the same relevant conduct. Miles agreed "there was some similarity" between that case and this one, since "the charge is similar." JA:598. He did not recall if he knew the PrivaCash card used in that Virginia state case had involved one of the same cards used in the allegations of the instant federal indictment. JA:597. Miles did acknowledge, however, "there's a presumption of a concurrent time with related cases." JA:598.

Although such concurrent time was no longer possible – since the Virginia term of incarceration had already been fully served by the time the federal government finally got around to indicting Wilkins here – the U.S. Sentencing Guidelines include a specific, encouraged downward departure that can accomplish the same result in such situations, under U.S.S.G. § 5K2.23. Miles said he was familiar with U.S.S.G. § 5K2.23, but said he did not raise it in Wilkins' PSR objections because the plea agreement did not allow for such downward departures. Miles admitted he had

allowed this plea agreement to proceed without a § 5K2.23 carve-out, and further admitted he had never even asked the prosecutor to include such a carve-out. JA:600-01. Asked if he had ever discussed with Wilkins the fact that, under this plea agreement, he would be giving up his right to seek a downward departure under § 5K2.23, Miles said, "I doubt I ever had that specific discussion with him." JA:604.

Asked whether he found it troubling "that Wilkins' Virginia credit card fraud case, involving the same credit card, the same time frame, the same type of charge, and the fact that he served three years on that would not be something that he could get credited for in the federal court unless you did something further," Miles made it clear that he actually ***did*** intend to raise this issue at sentencing, by means of a downward variance request – and he further made it clear that this issue ***should*** be raised on Wilkins' behalf at his sentencing hearing:

> I remember his criminal history, and I recall a variance could be an argument that could be made at sentencing [under the plea agreement]. My practice is I don't talk about variances in my objections to the presentence report. I do those in the sentencing memorandum. But I think that if I were to represent him at sentencing, ***that's an issue that should be argued to get a below-guideline sentence.***

JA:602 (emphasis added). *Accord* JA:603 ("I know I planned to argue for [that].").

Throughout his representation of Wilkins, Miles acknowledged that his relationship with Wilkins had at times been "sour" JA:536, with their attorney-client conversations even "heated." JA:556. Miles acknowledged he had "probably raised my voice" at Wilkins, and called Wilkins "a manipulator." JA:557. Miles did not deny that he might have called his own client "a liar" during conversations. JA:557-58.

By May 22, 2015, Wilkins asked Miles to get off his case again, and Miles eventually brought that issue to the Court's attention, on June 9. JA:578-80. In the interim, with Miles declining to raise issues as requested, Wilkins even went so far as to ask Miles for the prosecutor's contact information, so he could try to contact the prosecutor directly. JA:582-83. Miles never asked the Court to withdraw Miles' plea at all, however, even though Wilkins had asked him to do that, and even though "in June, he insisted that this is what he wanted to do." JA:580-81. Rather than moving to withdraw Wilkins' plea, Miles simply moved to withdraw as his counsel in this case, claiming that Wilkins' request had created a conflict of interest for him.

3. Testimony of Appointed Defense Lawyer Mark Carroll

Attorney Mark Carroll was then appointed as replacement counsel for Wilkins. JA:611. Carroll, a former FBI agent and federal prosecutor, stated his own personal view that Wilkins was "fortunate to get the plea offer that he did," JA:618, and called the 33-month prison term that Wilkins had received "a good sentence." JA:622,638.[4]

Carroll admitted he had never moved to withdraw this guilty plea, and said this was because Wilkins never asked him to. He claimed Miles had never even told him Wilkins had requested to withdraw his plea. JA:644.[5]

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[4] Carroll also disparagingly described how "[h]e behaved like a diva," JA:616, and stated "He is a diva, yes. He is a diva. There's no doubt," although he also claimed that he did not consider this description disrespectful. JA:625. Carroll also went out of his way during his testimony to describe how "he impressed upon me and everyone I've read that he was like the ultimate diva walking into a hotel lobby, you know, sashaying with the hands going." JA:616.

[5] Asked if he had been surprised that Wilkins had so quickly made a *pro se* filing seeking to withdraw his plea, so soon after the sentencing hearing ended, Carroll stated, "Nothing my clients do surprise me." JA:627.

Carroll did not file additional PSR objections beyond what Miles had already filed. He also agreed that he probably never met with Wilkins in person on any occasion other than days when they had a court hearing. JA:630. Carroll did file a sentencing memorandum, but it sought nothing more than the very same sentence the prosecutor himself was requesting – the low end of Wilkins' 33-41 month Guideline range. JA:638,1404,1409.[6]

During Wilkins' sentencing hearing, Carroll did argue briefly for a downward variance, but it consisted of only a few lines in the sentencing transcript. JA:68. He offered no citations, and no reason was even given by Carroll for this downward variance request, other than a short, generic claim that a 33-month sentence "might be a little excessive," JA:68 – which contrasted with his *own sentencing memorandum*'s request for *that very same sentence*. JA:1408.

At the § 2255 hearing, Carroll attempted to defend this position by essentially asserting that making good legal arguments for his client would have been bad. "I didn't argue for more than that because I thought it would hurt my client." JA:621. *Accord* JA:1328. Although he initially said he had told his client that a downward departure or variance should not be sought in this particular case, because "we don't want to eat with both hands," JA:1329, Carroll admitted that in fact he *did* ask for a downward variance later, but said, "I did it softly." JA:636. "I thought it would be

[6] Carroll admitted he never pointed out to the Court that almost all of Wilkins' charges were dated (5-8 years old), stating he didn't do that because it was "obvious." JA:647. He also never mentioned to the Court Wilkins' lost "Wiz" audition, claiming "I didn't think it would be helpful." JA:647-48. *Compare* JA:67 (arguing instead at sentencing that "he's a thief, but not a very good thief.")

insulting to a court to be asking, when all was said and done, at 33 months … You insult the court when you say, well, we want to go lower than this." JA:637.

Asked whether he had discussed with his client this idea of not asking for a downward variance until the sentencing hearing itself, Carroll initially said:

> It wasn't an issue. The plea agreement didn't allow for a variance on the guideline levels. On paragraph (c) it said neither party will argue what the guideline levels are, but the defense was free to argue under 18 U.S.C. § 3553(a), I believe.

JA:637. After it was pointed out that § 3553(a) is in fact the *source* of variances, and that he ultimately *had* argued for a variance, albeit "softly," Carroll admitted the plea agreement allowed such arguments JA:638. He also conceded he never told Wilkins that he was not going to seek a variance in his sentencing memorandum. JA:638.

Carroll claimed it would have been harmful to Wilkins "to stand up in front of the judge and argue, you know, he's a nice guy." JA:1328. But this explanation did not address the legal issue that had nothing to do with whether Wilkins was a good or bad person: the fact that he got no credit for any time previously served on his Henrico, Virginia state case, and how Wilkins was essentially being double-punished simply because of the timing of when his state and federal cases were prosecuted.

Asked about the fact that a 33-month federal sentence meant that Wilkins received no credit at all for his Virginia state case, Carroll initially tried to claim that "I don't think that this was part of the same scheme." JA:639. Carroll was then shown the Government's sentencing memorandum filed in this federal case, which specifically stated that "the Defendant was arrested and detained in Henrico County, Virginia, on a charge of credit card fraud in April 2009, ***stemming from a virtually***

identical scheme involving JetBlue Airlines." JA:639-40 (emphasis added). Carroll also said, "I didn't think it was the same credit card" used in that Virginia state case, thus admitting he was unaware the same card was used there. JA:639. Carroll ultimately appeared to concede that the Henrico, Virginia state conviction involved not only the same time frame, not only the same card, but a virtually identical scheme to the current case, as the federal prosecutor himself had also stated. JA:640.

Carroll then tried to explain his failure to raise this issue by discussing how he had had spoken on the phone with the U.S. Probation Officer to discuss various Guideline issues. Carroll claimed that "she pointed out how, because of the timing of the sentencing, that he would not get the benefit of it being a concurrent case, and also because of the timing of it, that it would count towards his criminal history points." JA:640. Carroll thus agreed that the reason Wilkins was not getting credit for this Virginia state time served was simply because of its timing. JA:640.

Carroll was then asked about U.S.S.G. § 5K2.23. Carroll claimed he was familiar with this guideline, but denied he had discussed this issue with Wilkins: "I don't know if I ever referred to any of the guidelines specifically like that, because it would be lost on him, and any other clients as well." JA:642.

Asked if he had told Wilkins that a potential departure, or at least a variance on similar grounds, could be brought because Wilkins was unable to get any concurrent time on this related case, Carroll initially seemed to misapprehend what U.S.S.G. § 5K2.23 allows, stating, "No, I didn't, because how could he get concurrent time if he's already done his time in Virginia on a state case and now this is a federal

case?" JA:642. Carroll was then asked, "[T]hat's what § 5K2.23 is for, isn't it? It's for discharge[d] terms of imprisonment where you can't argue for concurrent time anymore because your term of imprisonment on the previous case has been discharged, finished. That's the whole purpose of the rule, isn't it?" JA:642. Carroll then responded simply that "as his sentencing attorney, I did not raise that argument because I didn't think it would be helpful to him." JA:643. Carroll claimed that at most, he and the U.S. Probation Officer "may" have touched on this issue, *or not*; he admitted he did not know whether they had ever discussed this particular guideline. JA:644. Carroll also acknowledged that he had not performed any legal research of his own on § 5K2.23. JA:645. And Carroll ultimately admitted U.S.S.G. § 5K2.23 was never raised during Wilkins' sentencing proceedings, either in Carroll's sentencing memorandum or in his court arguments. JA:644. In short, this important legal issue – which Miles himself testified "should" be raised at Wilkins' sentencing – never was raised by either of Wilkins' lawyers, during any of his federal sentencing proceedings.

C. The District Court Opinions

After the § 2255 evidentiary hearing concluded, and post-hearing briefs were filed, District Judge Bates issued his decision and an accompanying Memorandum Opinion, on June 6, 2017. JA:819,820. While Judge Bates denied Wilkins' request for § 2255 relief, his ruling was not an exoneration. The Court openly criticized certain of Miles' actions. For example, Judge Bates said Miles' failure to investigate and resolve certain of the hotel discrepancies "fell short of best practices," JA:835, although the Court also ultimately held that at least this element of Miles work did

not, in his opinion, fall "below an objective standard of reasonableness" under *Strickland v. Washington*, 466 U.S. 668 (1984), and was thus not constitutionally infirm. With respect to Miles' failure to explore Wilkins' potential statute of limitations defenses, however, Judge Bates was more critical, affirmatively declaring that his representation was constitutionally defective under Strickland: "[T]he Court finds that Miles' performance—in failing to identify, research, and consider a possible affirmative defense to approximately half of the conduct that his client pleaded guilty to—was objectively unreasonable." JA:837. Wilkins was denied § 2255 relief only because Judge Bates declared that despite these deficiencies, he believed Wilkins had "suffered no prejudice as a result of Miles' performance." JA:837.

With respect to sentencing, and on Carroll's failure to seek a downward variance by citing U.S.S.G. § 5K2.23 – the argument that even Miles testified "should have" been raised – Judge Bates agreed "[a] different lawyer could have reasonably reached a different decision" than Carroll. JA:848. Judge Bates also did not suggest that this issue, if it had been raised, would have made no difference; instead, he pointedly made no findings at all on the issue of prejudice, leaving that question open, specifically stating that "Carroll could have taken a different, more aggressive approach at sentencing, which *may or may not have benefitted Wilkins*." JA:848. The Court based its denial of relief solely on what it claimed was a "strategic choice" by Carroll, declaring only that "his failure to [present this argument] does not indicate that his performance was unreasonable under *Strickland* and *Abney*." JA:848.

Judge Bates also agreed that, even beyond this "state jail credit" downward variance issue, there were "a host of [other] potentially beneficial arguments" at sentencing that could have been, but were never, raised by Wilkins' counsel. In particular, he identified two points raised by Wilkins in § 2255 proceedings, which had increased his score under the Sentencing Guidelines: (1) "the loss amounts used to calculate the guidelines range," and (2) the two criminal history points added because of a finding that the instant offense occurred while he was under a criminal justice sentence for his Henrico County, Virginia conviction. Unless the Indictment had been expanded as the Statement of Offense allowed, both issues would have led to a lower guidelines score, since (1) the loss amounts in the Indictment were no more than $35,615.73, and (2) the Indictment's last listed crime had occurred in April 2010 – *before* the Henrico County conviction was imposed on May 18, 2010. JA:843-44.

On these issues, the District Court held these "[t]wo … arguments must fail because they contradict his plea agreement." JA:843. The District Court held that new attorney "Carroll could not have raised those arguments at the sentencing hearing without also asking the Court to allow Wilkins to withdraw his plea," JA:843 – thus finding that Carroll's hands were tied by the deal that Miles negotiated. Judge Bates' Opinion never specifically addressed, however, Wilkins' separate argument that Miles' negotiation of a deal that foreclosed these two clearly viable sentencing arguments, without seeking any carve out, itself represented ineffective assistance of counsel. The Opinion also did not directly address Wilkins' separate argument that the evidence at his hearing proved that the Judgment & Commitment Order was at

times *simply wrong*, with undisputed evidence verifying that Wilkins' sentence contains clear factual errors – including restitution ordered for *losses not owed*.

Following the District Court's ruling below, Wilkins filed a timely Notice of Appeal. JA:849. Thereafter, Judge Bates granted a Certificate of Appealability, agreeing Wilkins had made a "substantial showing of the denial of a constitutional right," both on his request to withdraw his plea and on his resentencing request:

> Although the Court denied his petition, the Court found that his counsel at the plea stage performed deficiently by failing to consider how a statute of limitations defense should affect Wilkins' decision to plea. Nearly half of the loss amount is from conduct that occurred arguably outside the statute of limitations for the offense to which he pleaded guilty. The Court found that no prejudice resulted from this deficient performance, but "reasonable jurists" could debate whether 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."
>
> Wilkins also asserted that competent counsel would have raised several arguments at the sentencing hearing based on the sentencing guidelines that could have led to a lower sentence. In particular, Wilkins contended that his counsel should have argued that a prior offense was "relevant conduct" to the instant offense under § 1B1.3 of the United States Sentencing Guidelines, and therefore should not have counted as part of his criminal history score. Although the Court determined that his counsel's performance was not "objectively unreasonable," it acknowledged that counsel could have raised this argument and that whether he should have done so is a "close[] call." Thus, "reasonable jurists could debate whether … the petition should have been resolved in a different manner."

JA:850-51 (brackets in original; case citations omitted).

D. The Court of Appeals Opinion

Following oral argument, the court of appeals affirmed, in a Judgment which included an unpublished opinion. With respect to Wilkins' conviction, the court of appeals rejected Wilkins' ineffectiveness claim on prejudice grounds alone, Pet. App.

2a ("We conclude, like the district court, that Wilkins has not demonstrated that any deficiency in Miles's performance prejudiced Wilkins."), declaring that "Wilkins has not shown that such information would have changed his mind with respect to the plea." *Id.* The court of appeals treated Wilkins' own testimony as not credible, and saw "no indication that different advice about the loss amounts or potential arguments at sentencing would have led Wilkins to reject the plea offer," *id.*, since there seemed "little hope of an acquittal" and if a trial had been sought, "the government presumably would have sought convictions on the other counts in the indictment, including the conspiracy count." Moreover, the court of appeals declared, "had Wilkins gone to trial, the government indicated that it would have sought a higher sentence," in that "[t]he government specifically suggested that it would introduce evidence supporting a higher loss amount that would increase Wilkins' sentencing guidelines range." The court of appeals later seemed to acknowledge that any such "loss amount" increase might have been more than offset by other arguments Wilkins had given up in his plea agreement, such that "Wilkins still could have been better off going to trial and maintaining the ability to argue for departures from the sentencing guidelines, like the § 5K2.23 downward departure," but it claimed without any explanation whatsoever that this argument had somehow not been adequately developed by Wilkins in the District Court's § 2255 proceedings.

The court of appeals also rejected Wilkins' claim of ineffective assistance at sentencing. It said "[i]t is true, as Wilkins points out, that Carroll might have applied for a below-guidelines sentence by analogy to § 5K2.23," and that if the District Court

had "been receptive to the concerns underlying § 5K2.23, Wilkins might have received the benefit of a downward variance." While "Carroll could have made such an argument," it said "Carroll's failure to do so was not constitutionally deficient performance," since the decision to raise variance issues was "discretionary" and also "not without risks." Pet. App. at 4a. Specifically referencing its "'highly deferential' standard of review" in this context under *Strickland v. Washington*, 466 U.S. 668 (1984), the court of appeals affirmed. The court of appeals also said Carroll was not ineffective in failing to challenge the 2010 Henrico, Virginia related case's treatment as a prior conviction which added points to Wilkins' Criminal History score. This was *not* because these points were *properly* added, but merely because the court of appeals said this argument was "foreclosed" by the plea agreement and there was "no indication" the District Court would have done accepted this argument if made. *Id.* at 4a. The court of appeals also declared that Wilkins' attempt to correct his restitution amounts was a challenge "not congnizable under 28 U.S.C. § 2255." *Id.*

REASONS FOR GRANTING THE PETITION

I. Certiorari is Warranted so Wilkins Can Withdraw His Guilty Plea and/or Get a Resentencing Hearing Based on Ineffective Assistance of Counsel

As this Court has held, "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under *Strickland*, a defendant claiming ineffective assistance of counsel must meet a two-part test. "First, the defendant must show that counsel's performance was deficient." 466 U.S. at 687. And "[s]econd, the defendant must show that the deficient performance prejudiced the defense." *Id. Strickland's* two-part test is satisfied here.

Throughout these proceedings, and as explained in more detail below, Wilkins did not receive adequate "assistance" of counsel. Too often he was never even informed of available options, by lawyers who admitted they assumed he was incapable of even comprehending legal principles, and who frequently made crucial choices for him, failing to raise legally viable arguments because of their own view of what was best for him. That paternalistic approach is not how our criminal justice system is supposed to work; it is appropriately the client, not the lawyer, who serves as the "master" of his defense. *See Faretta v. California*, 422 U.S. 806 (1975) (Sixth Amendment "speaks of the 'assistance' of counsel … and an assistant, however expert, is still an assistant."). *See also McCoy v. Louisiana*, 584 U.S. --- (2018). Clients cannot be kept in the dark about their lawyers' key decisions, which may affect the client's fate and freedom. Wilkins did not receive adequate counsel, and he was prejudiced thereby. Reversal is warranted so § 2255 relief can be afforded.

A. Wilkins Received Ineffective Assistance of Counsel on his Guilty Plea, and Should Now be Allowed to Withdraw his Plea

"It is well-established that the validity of a guilty plea depends on 'whether the plea represents a voluntary and intelligent choice,' and that 'the voluntariness of the plea depends on whether counsel's advice satisfies the Sixth Amendment guarantee of effective assistance.'" *In re Sealed Case*, 488 F.3d 1011, 1015 (D.C. Cir. 2007) (quoting *Hill v. Lockhart*, 474 U.S. 52, 56 (1985)). For a plea to be intelligently entered, a defendant must be informed of his rights, so he can logically assess his legal options. Critical to that equation – for a person like Wilkins facing the federal criminal justice system for the first time – is adequate legal analysis from his counsel.

Here, this federal case was not filed until several years after the indicted events. As discussions about Wilkins' possible guilty plea ensued, the Government sought to expand Wilkins alleged loss amount substantially, from the $35,615.73 delineated in the Indictment to a total of $106,668.29. By the time of the plea discussions, however, the Government's ability to prosecute him for these extra financial charges was dubious. At all times when Wilkins' guilty plea was being negotiated, many of these losses were more than five years old, and outside of the general statute of limitations window for non-capital federal crimes. *See* JA:708.

Wilkins' counsel, Miles, admitted he was aware many of these charges were over 5 years old at the time of this guilty plea, but acknowledged "I can't say that I did" when asked if he ever talked to Wilkins about potential statute of limitations defenses that might have barred Wilkins from being held accountable for those extra losses. Judge Bates agreed, in his Memorandum Opinion, that this never should have happened, and that Miles' performance was constitutionally deficient. Judge Bates explained that, "because the Court cannot find any evidence that Miles exercised professional judgment at all regarding whether the statute of limitations provided a viable defense, or whether it was in Wilkins' interest to accept the plea deal anyway … the Court finds that Miles' performance—in failing to identify, research and consider a possible affirmative defense to approximately half of the conduct that his client pleaded guilty to—was objectively unreasonable." JA:837.

Judge Bates denied Wilkins § 2255 relief only because he also found that "Wilkins suffered no prejudice as a result of Miles' [deficient] performance," declaring

there was such "ample" evidence there was no reasonable possibility that, but for counsel's errors, [Wilkins] would not have pleaded guilty and would have insisted on going to trial." JA:837. In reaching this conclusion, Judge Bates relied in part on views from Messrs. Miles and Carroll that the plea deal was favorable. JA:837-38. But this ignores that this decision belonged to Wilkins, not his lawyers. *See United States v. Cronic*, 466 U.S. 648, 656-57 n.19 (1984) (lawyer is obligated to honor his client's wishes to stand trial and hold the government to its burden of proof regardless of whether lawyer finds client's desire to prove his innocence persuasive). Wilkins' plea agreement, in which he agreed that his relevant conduct amount would be *tripled* over what the indictment had alleged, was not intelligently entered. Wilkins clearly would have been within his legal rights to contest these additions, but was never made aware of that right, and this calculation therefore never made it into his assessment of whether to plead. His decision to enter into this plea agreement was not a fully-informed, intelligent choice, and his plea properly ought to be vacated.

In evaluating prejudice, Judge Bates also claimed that he could examine the other charges Wilkins might have faced if he had insisted on a trial, including the conspiracy charge to which he did not plead guilty. JA:838. In this regard, Judge Bates noted how Wilkins elsewhere had argued that "all of his conduct part of one continuous scheme," in an effort to establish that his Henrico, Virginia conviction was a related case. Judge Bates then declared that, "[w]hile that might help his argument regarding sentencing … it hurts his argument here," declaring that "[i]f all of his conduct is one scheme, then it is likely all part of the same conspiracy." JA:838. But

this conclusion wrongly ignores the undisputed fact that Wilkins had repeatedly, consistently denied that any other person was a criminal actor in these transactions, and that a conspiracy even existed. Indeed, even when it was plainly in his interest to say otherwise, such as when he was told that a plea to conspiracy could *reduce* his base offense level, Wilkins specifically declined to accept that version of the facts – with Miles himself acknowledging that it was quite possible no co-conspirators existed at all. No others were ever charged or even named in this conspiracy, and Judge Bates' assumption that Wilkins would have surely seen a conspiracy conviction as inevitable if he had gone to trial was unwarranted and unsupported by any facts. The bottom line is that Wilkins was never informed of his choices before entering into this guilty plea. Any claim of how Wilkins would have reacted if he had known half of his alleged losses might be challengeable as time-barred involves sheer speculation.

Just as importantly, Judge Bates' Memorandum Opinion also ignores Wilkins' separate argument about other vital issues that could have been, but never were raised by Miles, or negotiated at all, in connection with this plea agreement. For example, by entering into this plea agreement, with no carve-outs included or even sought by Miles, Wilkins clearly gave up important rights at sentencing, including his right to seek a downward departure under U.S.S.G. § 5K2.23. Miles deemed this argument viable, and thus was ineffective in failing to *ever discuss* this issue with his client, and in admittedly failing to *even attempt* to get this departure ground included as a carve-out in this plea agreement that otherwise barred such downward departures. The requirement of reasonable consultation was entirely absent, and had

this issue been raised with Wilkins, he would have been entirely rational in insisting that his attorney at least ask for its inclusion before entering into a plea agreement that forfeited this important right. Since U.S.S.G. § 5K2.23 involves an expressly "encouraged" departure ground, it cannot be assumed the Government would have balked and insisted that it not be added to this plea agreement. *See also* JA:417 (Judge Bates says "[w]e'll be missing something without having Last here, but that's a decision that counsel get to make"). Even if Wilkins might have eventually entered into some type of guilty plea, it cannot be said it would have been a guilty plea on the same terms, which here limited his sentencing arguments.[7] At a minimum, it is more likely than not that these proceedings would have been different, which suffices to establish prejudice under *Strickland*. Wilkins' counsel, Miles, was ineffective in failing to ever discuss these issues with Wilkins prior to his plea, and in failing to even to ask for reasonable protective plea terms, and reversal is warranted.

Wilkins' decision to enter into this plea agreement was not a fully-informed, intelligent choice, and his plea should now be vacated on this ground.

B. Wilkins Received Ineffective Assistance of Counsel Leading Up to and During His Sentencing Hearing

In the alternative, resentencing is required under § 2255, based on certain undisputed facts – from the mouths of Wilkins' previous counsel themselves:

- Miles admitted that with respect to Wilkins' Virginia credit card conviction (PSR ¶ 61, JA:1381-82), he never argued that case was "related", and also did not recall ever checking to see if the same debit card had been used in that case as here. JA:595-97. If it was related,

[7] Miles acknowledged that the plea agreement barred him from raising this issue as a downward departure, and limited this issue to one in which he would instead be seeking only a downward variance, by analogy to U.S.S.G. § 5K2.23.

Miles agreed a presumption then should have existed that Wilkins' Virginia state jail time should run concurrent to the instant sentence – if its time had not already been served. JA:598.

- Miles also "was aware" that Wilkins would not receive any credit for completed jail time served on his Henrico, Virginia credit card fraud case, JA:602, which Miles agreed had "some similarity, yes," to the instant case, because both cases involved the same time frame, same debit card, and both were credit card fraud cases JA:597-98. But he allowed the Plea Agreement to proceed without any carve-out allowing Wilkins to seek a downward departure under U.S.S.G. § 5K2.23. This was not because such a carve-out was impossible; Miles admitted that he simply never asked for one. JA:600-01. Miles also admitted he did not think he ever discussed with Wilkins whether to waive his § 5K2.23 rights before accepting the Plea Agreement. JA:604,1297.

- Miles did say he planned to argue for a downward variance on this same ground at sentencing, JA:602-03,604, but he withdrew as counsel prior to sentencing.

- Mark Carroll then entered as Wilkins' sentencing counsel, and did not seek a downward variance on any specific ground. While Carroll claimed he was familiar with U.S.S.G. § 5K2.23, he admitted he never performed any legal research on § 5K2.23, did not know if he ever discussed § 5K2.23 with the U.S. Probation Officer JA:644-45, and did not know if he had ever talked to Wilkins about U.S.S.G. § 5K2.23, claiming any such attempt "would be lost on him." JA:642. Carroll at first tried to claim he did not believe the instant case was part of the same scheme as Wilkins' Virginia case, but later acknowledged that even the Government had argued otherwise; his assessment in this regard also was based on incomplete information, since he too admitted that he was unaware that Wilkins' Virginia credit card fraud conviction involved the same debit card used in the instant case. JA:639-40. Carroll admitted he never mentioned § 5K2.23 in filings or at Wilkins' sentencing hearing, and never sought a downward variance by analogy, under its rubric.

Carroll's failure to seek, or even discuss with his client, a downward variance based on 31 months of time he had served[8] on a similar Virginia credit card case

[8] PSR ¶ 61 shows Wilkins was arrested 04/19/2010, then sentenced on 05/18/2010 to 3 years of custody. He was released 11/19/2012 – twoyears and 7 months (31 months) after his arrest. JA:1381.

conflicts with what Miles himself agreed should have been done in this case: "[T]hat's an issue that should be argued to get him a below-guideline sentence." JA:602. *See also* JA:603-04 ("I know I planned to…. That is something I would have done.").

In evaluating Wilkins' § 2255 claims of ineffective assistance of counsel at sentencing, Judge Bates' Opinion found that Carroll's performance was not deficient. He declared that certain sentencing arguments were foreclosed by the plea agreement itself – but did not address whether Miles' failure to discuss or seek potential carve-outs in that agreement independently represented ineffective assistance of counsel.[9] With respect to Wilkins' arguments related to his Henrico County conviction, Judge Bates agreed Wilkins had been "convicted in Henrico County for a fraudulent scheme similar to the one here." JA:844. Judge Bates then declared it a "close[] call"[10] whether Wilkins would have benefitted from Carroll raising U.S.S.G. § 1B1.3 or U.S.S.G. § 5K2.23. Nevertheless, Judge Bates cited Carroll's testimony that he had "considered" these arguments, but "ultimately rejected them." JA:846. With respect to whether the decision to reject them was informed, Judge Bates conceded Carroll's "research consisted primarily of consulting with the probation officer who prepared the presentence investigative report." JA:846. He declared the failure to raise U.S.S.G. § 1B1.3 – which could have reduced Wilkins' criminal history score five

[9] With respect to certain issues raised, Judge Bates declared that "the gravamen of Wilkins' argument is that Carroll should have been more persuasive, not that there were valid arguments Carroll should have raised but did not." With respect to those arguments, Judge Bates said "Carroll's decision of when and how to raise these arguments is the type of strategic choice that does not support an ineffective assistance of counsel claim." JA:845.

[10] Although Judge Bates used the words "closer call" in his Memorandum Opinion, JA:847, his Order granting a Certificate of Appealability declared this a "close[] call." JA:851.

points – a "strategic choice" by Carroll, and deemed sufficiently robust his contact with the probation officer, going "over the guidelines together on the phone." JA;847.

With respect to U.S.S.G. § 5K2.23, Judge Bates acknowledged Carroll had "determined § 5K2.23 could technically apply." JA:847.[11] But Judge Bates then cited Carroll's testimony that "in his judgment he believed that using that section as the basis to ask for a below-guidelines sentence could be seen as asking for too much, and would ultimately 'hurt [Wilkins'] position.'" JA:847. Judge Bates acknowledged "[a] different attorney could have reasonably reached a different decision," JA:848 – an apparent nod to Miles' plans to raise it, and statement that it "should" be raised. Judge Bates also acknowledged that it could not be said that this argument would have made no difference, since it was "[t]rue" that "Carroll could have taken a different, more aggressive, approach at sentencing, which may or may not have benefitted Wilkins." JA:848. Ultimately, however, Judge Bates declared Carroll's failure to raise a § 5K2.23 argument "the sort of judgment call that attorneys are expected to make at a sentencing hearing, and which therefore are not appropriate for second-guessing through a collateral attack." JA:848. Never addressed by Judge Bates was the fact that Wilkins had been kept in the dark, and never informed that he had this viable variance argument that was not going to be presented.

The Court thus credited Carroll's claim that he feared Judge Bates might somehow retaliate against his client if he, as Wilkins' lawyer, had the temerity to

[11] Judge Bates did not explain how Carroll could reconcile his claim that § 5K2.23 could apply to his case, with a view that § 1B1.3 could not. Judge Bates' legal analysis was that the two issues likely rose or fell together. And he certainly never suggested that the Henrico County case was not part of the same relevant conduct – instead conceding that "[t]he acts underlying the Henrico County offense used a similar modus operandi…. a similar 'charge back' scheme." JA:846.

seriously seek a sentence below the Guideline range. Carroll sought to justify his approach by claiming that arguing Wilkins was a "good guy" would have been counterproductive. There are problems with this analysis, however.

First, there seems little question that, viewed as a purely legal matter, this downward variance argument was a viable one. Miles even said it was an issue that "should be argued." Any notion that Carroll's decision, essentially arguing that "raising a good legal claim for my client will be bad for him," must be honored as a "strategic choice" is problematic.[12] If courts credit such claims, every lawyer who is ever challenged as ineffective will be able to insulate himself from a § 2255 challenge by incanting a "Bizarro world" theory that "good" may have been "bad." Fear that a judge might retaliate against a lawyer who has the temerity to make a legal argument is not a recognized strategic choice. *Cf. State v. Aplaca*, 74 Haw. 54, 71-72, 837 P.2d 1298 (1992) ("his reasoning for not making an offer of proof does not, as a matter of law, constitute trial strategy or a valid on-the-spot strategic choice. As trial counsel testified, 'well, quite frankly, I didn't want to upset the judge. That's one of the reasons.'") (declaring counsel's performance deficient, finding ineffective assistance of counsel, reversing conviction and ordering new trial). Indeed, if such actions were condoned, criminal justice itself would be diminished – yielding a system that keeps judges in the dark and unapprised of genuine, viable legal claims that may warrant

[12] As noted, the § 2255 hearing also showed that Carroll did not understand how U.S.S.G. § 5K2.23 works. [484-85] (Carroll asks how he could have argued for concurrent time on a sentence already served, seemingly unaware that § 5K2.23 departures are allowed precisely because of that problem).

a lower sentence, undermining the goal of courts' *statutory mandate* to impose a sentence "sufficient but not greater than necessary" under 18 U.S.C. § 3553(a).

Moreover, even if such a "good arguments may be bad" assertion might be countenanced in certain limited circumstances, several prerequisites should exist before a court can appropriately accept Carroll's strained contention below that it was only appropriate to argue for a downward variance in a "soft," (i.e., insincere) manner.

First, any contention that raising a viable argument would harm the client would need to be based on complete information. That was not true here. While Carroll expressed a view that this was not a "related" case, he acknowledged that his conclusion, which was neither obvious nor accepted by Judge Bates, had been reached by him *without knowing* that case had involved *the very same debit card* used here. *See, e.g., Woods v. McSwain*, 2016 U.S. Dist. LEXIS 20921, *17 (E.D. Mo. 2016) ("where there is evidence of lack of diligence in preparation and investigation by counsel, such strategic choices are not protected by the presumption in favor of counsel") (citations omitted); *United States v. Gray*, 878 F.2d 702 (3d Cir. 1989) ("counsel can hardly be said to have made a strategic choice … when s/he has not yet obtained the facts on which such a decision could be made"). *See also United States v. Weathers*, 493 F.3d 229, 236 (D.C. Cir. 2007) ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); *United States v. Mitchell*, 796 F. Supp. 13, 16 (D.D.C. 1992) ("strategic choices made after incomplete investigation are only reasonable to the extent reasonable professional judgment supports the limits on the

investigation"); *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) ("court must consider the reasonableness of the investigation said to support that strategy").

Second, withholding a viable argument on the theory that it may harm the client cannot be accepted absent the client's consent, or at least client knowledge. Here, while Carroll did claim that he generally discussed with Wilkins the fact that he did not think it wise to, as he put it, "eat with both hands," he also admitted to never discussing U.S.S.G. § 5K2.23 *at all* with Wilkins. Any supposed consent by Wilkins, therefore, could not possibly have been knowing and intelligent. As a non-lawyer facing his first federal criminal case, and with no Guidelines experience at all, Wilkins could not possibly have signed off on or even acceded to a strategic decision when he had no idea what it was about, or how strong these arguments might be. That is why client consultation needed to occur before Wilkins' potential challenge to five criminal history points, and possible variance, was waived. *Cf. Bonner v. Wenerowicz*, 2014 U.S. Dist. LEXIS 86544 at *27 (E.D. Pa. 2014) ("no strategic basis for failure to [provide copies of filed papers to client] and prejudice should be presumed since Petitioner was kept 'in the dark' about the issues and procedures").

Finally, any decision to withhold a viable argument when representing a client surely must logically flow from the stated premise for never raising it – not simply a stated "fear" that a judge might somehow retaliate against a client for the lawyer's impertinence in asking for more (since such "fears" could be cited in any § 2255 case, creating a loophole that swallows the rule). Here, that connection is absent. Carroll said he saw risks in arguing that Wilkins was a "good guy." But the instant argument

had *absolutely nothing to do with* whether Wilkins was a "good" or "bad" guy. It was a *purely systemic* argument, arising from the fact that his two convictions involved the same relevant conduct, and the stacking of sentences in two jurisdictions, based purely on the timing of the prosecutions that made concurrent time impossible.

The key argument that ***never was***, but ***should have been made*** to this sentencing court was a compelling one – and an argument that had nothing whatsoever to do with Wilkins' character. It was the following:

> ***If you impose a 33-month sentence on Wilkins, that in reality will be a 64-month sentence for his criminal activity – because Wilkins has already served, on a related Virginia state case, which was based on this same type of conduct, during this very same time frame, and even using one of these same debit cards, 31 months in prison.*** If the sentence in that case had not been fully served before the federal government finally got around to prosecuting the instant case, your federal sentence would presumptively need to be run concurrent with that Virginia sentence – a presumption the Guidelines have codified for related cases. Because Wilkins' Virginia state sentence is now over, that option is presently impossible, but U.S.S.G. § 5K2.23 expressly permits a departure to accomplish this same objective in these circumstances – in what is even an "encouraged" downward departure ground. And even if not considered in the form of a departure, this Court can consider it in the form of a downward variance, since a new 33-month prison sentence is "greater than necessary" under § 3553 here: other people with Wilkins' exact same criminal history score and exact same relevant conduct do not end up with 64-month sentences, and this Court can adjust its sentence below the 33-month bottom of the Guidelines to take that into account. Indeed, even at the top of his Guidelines, Wilkins should ordinarily get only 41 months – not 64 months. ***Wilkins should not now end up doing nearly twice as much time in prison as other defendants in his same range – with similar crimes and criminal history scores – simply because these were staggered prosecutions by two separate jurisdictions.***

And this multiple-punishment inherent in a stacked sentence was also ***on top of*** the negative impact this Virginia state sentence had ***already*** had on Wilkins' Criminal History score – adding 5 criminal history points, *see* PSR ¶¶ 61 & 63, and moving him

from Criminal History Category III (6 points) to Category V (11 points), PSR ¶ 64, changing his Sentencing Guideline Range from 24-30 months to 33-41 months. Those 5 points also could have, and should have been challenged, but never were.

Whether the deficiency was Miles' failure to ask for a carve-out from the Plea Agreement for U.S.S.G. § 5K2.23's "encouraged" downward departure, or Carroll's failure at sentencing to raise a downward variance argument that even Miles said "should have" been made – or both – the reality is Wilkins's viable, below-guidelines double-punishment argument was never made, and he was never even told it existed. That was ineffective assistance.

Lawyers – even fine, experienced lawyers – do not get to "play God" (or judge) like this. The fact that Carroll *personally* felt 33 months was a "good sentence," or his belief that Wilkins was "fortunate" or even "lucky" to get the deal he did, did not authorize him to decide on his own, in private, to essentially hide viable legal arguments under a bushel. Even if one ignores Carroll's troubling, mocking description of his ex-client as the "ultimate diva … sashaying with the hands going," JA:616 and his public disclosure of a highly personal secret his ex-client had disclosed only in confidence, JA:649-50, this Court cannot fairly countenance defense counsel unilaterally *burying* of this substantial legal argument, not only from his own client, but also from a sentencing court tasked with fashioning a sentence "not greater than necessary." 33 months ***stacked on top of*** a 31-month Virginia sentence already served in a related case ***was greater than necessary***. Effective federal sentencing

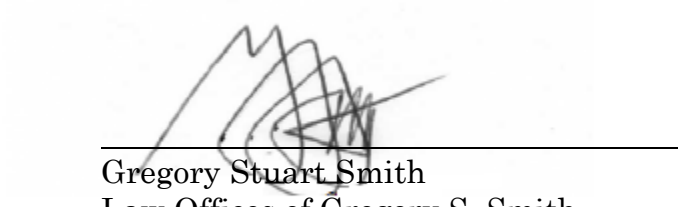
counsel would have pointed out this relevant mitigating factor at Wilkins' sentencing hearing, and any Court applying § 3553(a) should have wanted to know it.

Accordingly, certiorari should be granted and Wilkins' counsel's performance at sentencing deemed deficient, with this case ultimately remanded for a determination of prejudice, and Wilkins afforded a resentencing hearing at which his viable, significant mitigating legal issues can finally be considered by the court below, and factored into an appropriate sentencing decision under 18 U.S.C. § 3553(a).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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