No. ________

In The
Supreme Court of the United States

LANCE K. POULSEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the lower courts abdicated their responsibility to provide a vigilant and independent review of Mr. Poulsen's claims by straining to deny a hearing on ineffective assistance of counsel and affirming money laundering convictions resting on a legally flawed foundation which trial counsel overlooked and neglected, and which resulted in the reversal of parallel convictions of Mr. Poulsen's codefendants.

II. Whether the Sixth Circuit erred in its application of *Strickland v. Washington*, 466 U.S. 668 (1984) and departed from the law of other circuits when still presuming reasonable the performance of trial counsel who overlooked and neglected arguments that resulted in the reversal of parallel convictions of Mr. Poulsen's codefendants.

III. Whether the lower courts departed from decisions in other circuits and improperly applied circular reasoning to deny Mr. Poulsen a statutorily required hearing to establish his lawyers' ineffectiveness and other constitutional claims based on evidence that went unchallenged because of his lawyers' ineffectiveness.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lance K. Poulsen respectfully submits this petition for a writ of certiorari to review the judgment entered by the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

On May 29, 2015, a magistrate judge for the Southern District of Ohio entered a Report and Recommendation, recommending that the district court deny two motions to vacate Mr. Poulsen's convictions and sentences pursuant to 28 U.S.C. § 2255. The Report and Recommendation was not published in the Federal Reporter but is available at 2015 WL 3457248 and is reproduced *infra* at App. 31. The district court adopted the Report and Recommendation on August 12, 2015 in an unpublished opinion available at 2015 WL 4763640 and reproduced *infra* at App. 23. The Sixth Circuit Court of Appeals affirmed the district court's dismissal in an unpublished opinion available at 2017 WL 4511489 and reproduced *infra* at App. 1. The Sixth Circuit denied panel rehearing in an unpublished entry which is reproduced *infra* at App. 87.

JURISDICTION

Petitioner timely filed a petition for panel rehearing on November 24, 2017. The Sixth Circuit Court of Appeals denied rehearing on November 28, 2017. This petition is being filed within 90 days of that entry, pursuant to Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Mr. Poulsen's constitutional challenges are premised upon violations of the Fifth and Sixth Amendments to the United States Constitution. The Fifth Amendment provides that no criminal defendant may be "deprived of life, liberty, or property, without due process of law." The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Mr. Poulsen appeals the denial of two motions seeking vacatur of his convictions and sentences pursuant to 28 U.S.C. § 2255(a), which allows a federal inmate whose sentence was imposed in violation of the Constitution or laws of the United States to "move the court which imposed the sentence to vacate, set aside or correct the sentence." Mr. Poulsen also appeals the denial of a hearing pursuant to 28 U.S.C. § 2255(b), which is mandatory "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."

Mr. Poulsen seeks to vacate convictions under 15 U.S.C. § 77q(a) and 18 U.S.C. §§ 371, 1343, 1956(a)(1)(B)(i) and (h). Mr. Poulsen also appeals a judgment of forfeiture pursuant to 18 U.S.C. §§ 981(a)(1)(C) and 982(a), and 28 U.S.C. § 2461(c).

15 U.S.C. § 77q(a) makes it unlawful for any person, in the offer or sale of any securities, "to employ any device, scheme, or artifice to defraud," to obtain money or property "by means of any untrue statement of a material fact," or to engage in any transaction "which operates or would operate as a fraud or deceit upon the purchaser."

18 U.S.C. § 371 prohibits two or more persons from conspiring "either to commit any offense against the United States, or to defraud the United States. . . ."

18 U.S.C. § 1343 prohibits transmission "by means of wire, radio, or television communication in interstate or foreign commerce," any writings or sounds for the purpose of executing a scheme to defraud.

18 U.S.C. § 1956(a)(1)(B)(i) makes it a felony for any person to conduct a financial transaction while knowing that the property involved represents the proceeds of unlawful activity, and that the transaction is "designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds. . . ."

18 U.S.C. § 1956(h) provides that any person who conspires to commit any offense defined in section 1956 is "subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

18 U.S.C. §§ 981(a)(1)(C) and 982(a) subject to forfeiture any property involved in a transaction which violates 18 U.S.C. § 1956.

28 U.S.C. § 2461(c) allows the government to include notice of forfeiture in an indictment, and states that "[i]f the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence. . . ."

STATEMENT OF THE CASE

On May 19, 2006, a United States Grand Jury in the Southern District of Ohio returned a 60-count indictment, charging Mr. Poulsen and six codefendants with fraud, money laundering and forfeiture offenses against the United States. Mr. Poulsen was charged with conspiracy to violate statutes of the United States, in violation of 18 U.S.C. § 371 (Count 1); securities fraud, in violation of 15 U.S.C. §§ 77q(a), 77x and 18 U.S.C. § 2 (Counts 2-7); wire fraud, in violation of 18 U.S.C. §§ 1343 and 2 (Counts 8-19, 22 and 26); mail fraud, in violation of 18 U.S.C. §§ 1341 and 2 (Counts 27-37); money laundering conspiracy, in violation of 18 U.S.C. § 1956(h) (Count 38); promotion money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (Counts 39-45); and concealment money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (Counts 46-48, 51-52, 56 and 58). The indictment also sought forfeiture of the proceeds of the alleged offenses pursuant to 18 U.S.C. §§ 981(a)(1)(C) and 982(a), 28 U.S.C. § 2461(c) and Rule 32.2 of the Federal Rules of Criminal Procedure (Count 60). Mr. Poulsen was arraigned on June 2, 2006 and entered pleas of not guilty to all counts.

On July 10, 2007, a Southern District of Ohio grand jury returned a superseding indictment, again charging Mr. Poulsen and the same codefendants with fraud, money laundering and forfeiture. It also added a codefendant. Mr. Poulsen was charged with conspiracy, in violation of 18 U.S.C. § 371 (Count 1); securities fraud, in violation of 15 U.S.C. §§ 77q(a) and 77x, and 18 U.S.C. § 2 (Counts 2-7); wire fraud, in violation of 18 U.S.C. §§ 1343 and 2 (Count 10); money laundering conspiracy, in violation of 18 U.S.C. § 1956(h) (Count 17); and concealment money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (Counts 18-20, 23). Forfeiture claims pursuant to 18 U.S.C. §§ 981(a)(1)(c) and 982, and 28 U.S.C. § 2461 were charged in Count 27. (This superseding indictment is referred to as the "securities fraud" indictment).

Several months later, on October 23, 2007, a Southern District of Ohio grand jury indicted Mr. Poulsen and one codefendant for conspiracy to commit offenses against the United States, in violation of 18 U.S.C. § 371 (Count 1). On December 4, 2007, a Southern District of Ohio grand jury returned a superseding indictment, adding a charge of witness tampering, in violation of 18 U.S.C. § 1512(b)(2)(A) (Count 2). (This superseding indictment is referred to as the "obstruction" indictment).

The obstruction case went to trial in March 2008 and, on March 26, the jury returned verdicts of guilty on all counts. On September 8, 2008, Mr. Poulsen was sentenced to a total of 120 months imprisonment.

The securities fraud case went to trial six months later and on October 31, 2008, the jury returned verdicts of guilty on all counts. Mr. Poulsen was sentenced to a total of 360 months imprisonment, to run concurrently with his sentence in the obstruction case. As a result, Mr. Poulsen is currently serving a sentence of 30 years imprisonment.

Mr. Poulsen appealed both convictions, and the Sixth Circuit Court of Appeals consolidated the appeals. Ultimately, the Sixth Circuit affirmed Mr. Poulsen's convictions and sentences, and this Court denied Mr. Poulsen's petition for a writ of certiorari.

Mr. Poulsen subsequently filed separate motions to vacate both convictions pursuant to 28 U.S.C. § 2255. The district court denied his requests for discovery and an evidentiary hearing and dismissed both § 2255 motions. The district court granted Mr. Poulsen's requests for certificates of appealability on the issues of whether he was denied the effective assistance of counsel, and whether the district court properly dismissed his claims as procedurally defaulted. The Sixth Circuit subsequently granted Mr. Poulsen's motion to expand the scope of the certificates of appealability to include whether the district court erred in denying his requests for discovery and an evidentiary hearing with respect to his ineffective assistance of counsel claim.

The Sixth Circuit consolidated Mr. Poulsen's appeals on October 5, 2015, and affirmed the district court's denial of Mr. Poulsen's § 2255 motions on October 10, 2017. On November 24, 2017, Mr. Poulsen timely filed a petition for panel rehearing. The Sixth Circuit denied the petition in an unpublished order dated November 28, 2017.

REASONS FOR GRANTING THE WRIT

As this Court has stressed, "judges must be vigilant and independent in reviewing petitions for the writ, a commitment that entails substantial judicial resources." *Harrington v. Richter*, 562 U.S. 86, 91 (2011). Reviewing capital cases which are a matter of life and death, this Court has repeatedly demonstrated what a vigilant and independent review entails, particularly when the defendant alleges counsel failed to provide effective assistance. *See*, *e.g.*, *Buck v. Davis*, 137 S. Ct. 759 (2017); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

Though Mr. Poulsen has been convicted of white collar offenses rather than murder, at 74 years old, his age and lengthy prison term make his case also a matter of life and death. But the courts below failed to provide a vigilant and independent review of Mr. Poulsen's claims that his counsel failed to provide effective assistance. To the contrary, the courts below concocted reasons to affirm Mr. Poulsen's money laundering convictions, even though they rest on a legally flawed foundation which Mr. Poulsen's lawyers failed to identify and which led to the reversal of parallel convictions of Mr. Poulsen's codefendants. Additionally, unwilling to commit "substantial judicial resources," the courts below refused to provide a statutorily required hearing before summarily dismissing his claims of constitutional error. These realities provide several reasons why this Court should grant Mr. Poulsen a writ of certiorari or even consider a summary reversal of the decision below.

The Sixth Circuit Court of Appeals has created a rule which functionally allows attorneys to render effective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), by ignoring new Supreme Court precedent which could exonerate a defendant. On June 2, 2008, this Court decided *Cuellar v. United States*, 553 U.S. 550 (2008), which heightened the *mens rea* required to prove violations of the federal money laundering statute, 18 U.S.C. § 1956. Four months later, Mr. Poulsen was convicted of three counts of concealment money laundering and one count of money laundering conspiracy as charged in an indictment that was explicitly based on the legal theory rejected in *Cuellar*. His attorneys were oblivious to *Cuellar* when developing a trial defense and therefore entirely failed to introduce evidence and argue to the jury at trial that, like Regalado Cuellar, Mr. Poulsen lacked the requisite *mens rea* to be convicted under 18 U.S.C. § 1956.

Despite his attorneys' neglect of *Cuellar*, the Sixth Circuit held that Mr. Poulsen failed to satisfy *Strickland* because it believed a *Cuellar* argument would have been futile in light of the evidence adduced at trial. But this conclusion demonstrates a fundamental misunderstanding of the performance assessment required by *Strickland*, which, in this case, begins and ends with a single question: whether Mr. Poulsen's attorneys performed reasonably by preparing for trial while overlooking a recent, dispositive Supreme Court case. The Sixth Circuit used hindsight to categorize counsel's blunder as reasonable performance under *Strickland*. Other circuits refuse to indulge in such flawed reasoning. Therefore, the Sixth Circuit's decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" and is "in conflict with the decision[s] of [ ]other United States court[s] of appeals." Sup. Ct. R. 10(a).

Additionally, the Sixth Circuit denied Mr. Poulsen a hearing pursuant to 28 U.S.C. § 2255(b), which is mandatory unless the "files and records of the case ***conclusively*** show that the prisoner is entitled to no relief." *Id.* (emphasis added). It contended no hearing was needed based on its mistaken belief that the evidence at trial was so one-sided that a *Cuellar* defense would have been futile. This ignores the obvious: that the evidence on the money laundering charges was one-sided solely because Mr. Poulsen's attorneys overlooked *Cuellar* and thus made no effort to prepare for and present the critical *mens rea* defense that *Cuellar* made newly compelling. Thus, the effect of denying a § 2255(b) hearing was to penalize Mr. Poulsen twice for his attorneys' failure to effectively challenge the government's case – rather than to recognize properly the import and impact of counsel's failings being "the result of inattention, not reasoned strategic judgment." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). The only "conclusive" showing in the files and record presented below was the deficient performance of Mr. Poulsen's counsel with respect to a critical new Supreme Court case that undercut key charges; that showing alone justified and demanded affording Mr. Poulsen a full hearing, as Congress provided in 28 U.S.C. § 2255(b), to ensure the vigilant and independent review of all his constitutional claims.

Ironically, and disconcertingly, the Sixth Circuit's own rulings in cases involving Mr. Poulsen's codefendants make plain why the record below does not conclusively show that Mr. Poulsen is entitled to no relief: the Sixth Circuit vacated parallel money laundering convictions premised upon ***the exact same transactions and evidence*** that underlie Mr. Poulsen's convictions, all while citing *Cuellar* as authority to do so. The Sixth Circuit's denial of a § 2255(b) hearing in this case, to explore substantive and procedural flaws in Mr. Poulsen's money laundering convictions as well as others tainted by counsel's ineffectiveness, "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power," and presents another "conflict with the decision[s] of [ ]other United States court[s] of appeals." Sup. Ct. R. 10(a).

Mr. Poulsen and other federal defendants convicted of a range of offenses have every reason to expect and demand that courts give their convictions and sentences the same "vigilant and independent" review that this Court and other courts regularly give to state defendants convicted of capital offenses. But the record below strongly suggests Mr. Poulsen inappropriately received only a second-rate form of review. For these reasons, this Court should grant a writ of certiorari or even consider a summary reversal of the decision below.

I. THE SIXTH CIRCUIT DEPARTED FROM OTHER CIRCUITS BY DENYING RELIEF BASED ON THE IMAGINED WEAKNESS OF AN ARGUMENT OVERLOOKED AND NEGLECTED BY MR. POULSEN'S ATTORNEYS.

Straining for a reason to deny Mr. Poulsen relief, the Sixth Circuit departed from other circuits by ignoring his lawyers' inexcusable failure to familiarize themselves with and argue a highly publicized, recent decision of this Court that should have been dispositive of the money laundering charges against Mr. Poulsen. To appreciate the scope of the Sixth Circuit's departure from the norm requires understanding the nature of Mr. Poulsen's lawyers' error.

A. The record shows conclusively that Mr. Poulsen's attorneys were unfamiliar with *Cuellar*.

To succeed on his claim of ineffective assistance of counsel, Mr. Poulsen had to demonstrate that his attorneys' performances were deficient, and that he was prejudiced by that deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Sixth Circuit Court of Appeals found that Mr. Poulsen could not satisfy the "performance" prong of this test.

The Sixth Circuit acknowledged that "the record – most notably, the filing of Supplemental Authority on appeal – supports the inference that Poulsen's counsel did not become aware of *Cuellar* until [after his trial and] the convictions of Poulsen's codefendants were vacated." App. 13. Nevertheless, it held that Mr. Poulsen's ineffective assistance of counsel claim failed because (1) he could not rebut the presumption that his attorneys' performances were objectively reasonable; (2) *Cuellar* was not "well-established" in the Sixth Circuit at the time of Mr. Poulsen's trial; and (3) a *Cuellar*-based theory would have been futile in light of the evidence adduced at trial. These findings starkly contrast with other circuits' approaches and present issues of significant national importance.

B. The Sixth Circuit's incorrect presumption that Mr. Poulsen's trial attorneys performed reasonably is at odds with other circuits' application of the Sixth Amendment.

While there exists a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," App. 12, other circuits recognize that this "presumption is defeated when counsel fails to do basic legal research, because lack of preparation and research cannot be considered the result of deliberate, informed strategy." *United States v. Carthorne*, 878 F.3d 458, 469 (4th Cir. 2017) (citing *Hyman v. Aiken*, 824 F.2d 1405, 1416 (4th Cir. 1987)). Other circuits also hold that competent performance requires counsel to "research relevant facts and law, or make an informed decision that certain avenues will not be fruitful." *United States v. Freeman*, 818 F.3d 175, 178 (5th Cir. 2016) (citing *United States v. Fields*, 565 F.3d 290, 294 (5th Cir. 2009)) (internal quotation marks omitted). Thus, "solid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention." *Id.*

The Sixth Circuit departed from these fundamental principles. It presumed that Mr. Poulsen's trial attorneys performed reasonably despite acknowledging that they failed to discover *Cuellar* until after trial, and indeed, until after briefing his appeal. *Compare* App. 13 ("Contrary to the district court's determination regarding counsel's awareness of the Supreme Court's decision in *Cuellar*, we find that the record – most notably, the filing of Supplemental Authority on appeal – supports the inference that Poulsen's counsel did not become aware of *Cuellar* until the convictions of Poulsen's codefendants were vacated") *with* App. 17 ("Poulsen has failed to rebut the presumption that his counsel's performance was objectively reasonable").

In other circuits, these findings would be mutually exclusive. *See Carthorne*, 878 F.3d at 469 (4th Cir. 2017); *Freeman*, 818 F.3d at 178 (5th Cir. 2016); *see also Tapia v. United States*, 42 F.3d 1402, at *1 (9th Cir. 1994) ("failure to investigate and research a valid defense constitutes deficient representation") (citing *Morris v. State*, 966 F.2d 448, 454-55 (9th Cir. 1991)). The undersigned is unaware of authority from any other circuit which confers a presumption of reasonable performance despite counsel's known, significant and non-strategic omissions. This issue alone warrants a writ of certiorari.

C. The Superseding Indictment was explicit in resting on a theory that *Cuellar* unambiguously rejected.

Mr. Poulsen was convicted of four counts of "concealment money laundering," in violation of 18 U.S.C. § 1956(a)(1)(B)(i), which requires that the subject financial transaction be "designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control" of criminally derived proceeds. This Court's decision in *Cuellar* set forth a limiting interpretation of identical language in a neighboring provision, § 1956(a)(2)(B)(i), which criminalizes "transportation money laundering." *See United States v. Faulkenberry*, 614 F.3d 573, 585 (6th Cir. 2010). *Cuellar* held that in the money laundering context, the term " 'design' means purpose or plan; *i.e.*, the intended aim of the transportation." *Id.* at 586 (quoting *Cuellar*, 553 U.S. 550, 563). *Cuellar* clarified that even a defendant with knowledge that a complicated financial transaction would conceal its true nature was not guilty of money laundering because a conviction of money laundering requires proof that concealment was "an animating purpose of the transaction." *Faulkenberry* at 586 (citing *Cuellar* at 563).

In conflict with *Cuellar*'s clear ruling that concealment must be a goal rather than merely a means to an end, the Superseding Indictment was explicit that "the goal of the scheme," *i.e.*, its animating purpose and intended aim, "was to enrich [the defendants]." *Superseding Indictment*, S.D. Ohio Case No. 2:06-cr-00129, Doc. # 257 at PageID #1937. It was equally explicit in describing concealment as among the "manner and means" by which the alleged goal of self-enrichment was accomplished, rather than as an intended aim or animating purpose. *See, e.g.*, *id*. at PageID #1938-39, ¶¶ 17.3 ("manner and means" included hiding shortfalls), 17.3.1 (fabricating data in investor reports), 17.3.2 (double counting money), 17.3.3 (false statements to investors and potential investors), and 17.3.4 (loading false data into the accounting system).

Furthermore, comparable activities underlie Messrs. Poulsen's, Faulkenberry's and Dierker's substantive money laundering convictions. Mr. Poulsen was convicted of concealment money laundering in connection with Counts 18-20 and 23 of the Superseding Indictment, which alleged improper diversions of investor funds as the money laundering transactions. Mr. Faulkenberry was convicted of concealment money laundering in connection with Count 24, and Mr. Dierker in connection with Counts 25-26, all of which similarly alleged improper diversions of investor funds as the money laundering transactions.

In *Dierker* and *Ayers*, the Sixth Circuit expressly noted that the money laundering convictions of Messrs. Faulkenberry, Dierker and Ayers arose from the same underlying fraud. *Dierker*, 417 F. App'x 515, 522 (6th Cir. 2011); *Ayers*, 386 F. App'x 558 (6th Cir. 2010). Mr. Poulsen's money laundering and money laundering conspiracy convictions also arose from the same underlying fraud as those of Messrs. Faulkenberry, Dierker and Ayers. App. 32.

D. The application of *Cuellar* to Mr. Poulsen's case was obvious.

The Sixth Circuit's dismissal of Mr. Poulsen's arguments on grounds that *Cuellar* was not "well-established in [the] Circuit" at the time of trial grossly exaggerates the complexity of *Cuellar*'s rule, which in fact was straightforward:

> Even with abundant evidence that petitioner had concealed the money in order to transport it, the Government's own expert witness . . .

> testified that the purpose of the transportation was to compensate the leaders of the operation. . . . ***The evidence suggested that the secretive aspects of the transportation were employed to facilitate the transportation . . . but not necessarily that secrecy was the purpose of the transportation. . . .*** [T]he Government failed to introduce any evidence that the reason drug smugglers move money to Mexico is to conceal or disguise a listed attribute of the funds.

Cuellar, 553 U.S. at 566-67 (emphasis added). In fact, Mr. Poulsen's trial attorneys could have merely inserted the facts of his case into the preceding paragraph from *Cuellar*:

> Even with abundant evidence that petitioner had concealed the money in order to [facilitate the transactions], the Government's own expert witness . . . testified that the purpose of the [transactions] was to [pay a settlement]. . . . ***The evidence suggested that the secretive aspects of the [transactions] were employed to facilitate the [transactions] . . . but not necessarily that secrecy was the purpose of the [transactions]. . . .*** [T]he Government failed to introduce any evidence that the reason [Mr. Poulsen ordered the June 5, 2001 transactions was] to conceal or disguise a listed attribute of the funds.

Cuellar's new standard should have influenced every line of questioning posed by Mr. Poulsen's attorneys at trial. Instead, his attorneys were ignorant of

Cuellar's existence until nearly two years after Mr. Poulsen's conviction.

Contrary to the Sixth Circuit's suggestion, *Cuellar* and its implications were well known by the time of Mr. Poulsen's trial. National news outlets immediately reported the opinion: "*Supreme Court Ruling Makes Money Laundering More Difficult to Prove*." FOXNEWS.COM (June 2, 2008)[1] ("prosecutors must show that the purpose of transporting funds in a money laundering case was to conceal its ownership, source or control"). *See*, *e.g.*, Bill Mears, *Money laundering gets a little harder to prove*, CNN.COM (last updated 3:36 p.m. June 2, 2008)[2] ("prosecutors failed to prove the reason for moving the money across the border was to hide its source"); Linda Greenhouse, *Justices Narrow Money Laundering Law*, NYTIMES.COM (June 3, 2008)[3] ("secrecy must be part of a larger 'design' to disguise the source or nature of the money"); Robert Barnes, *Victories for Money-Laundering Defendants*, WASHINGTONPOST.COM (June 3, 2008)[4] (the law now "require[s] more than simply proving the money was concealed").

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[1] *Available at* http://www.foxnews.com/story/2008/06/02/supreme-court-ruling-makes-money-laundering-more-difficult-to-prov-1296856992.html.

[2] *Available at* http://www.cnn.com/2008/CRIME/06/02/scotus.moneylaundering/index.html.

[3] *Available at* http://www.nytimes.com/2008/06/03/washington/03scotus.html.

[4] *Available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/06/02/AR2008060202624.html.

Excusing Mr. Poulsen's attorneys' ignorance of *Cuellar* was clearly wrong and conflicts with rulings in other circuits that "solid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention." *United States v. Freeman*, 818 F.3d 175, 178 (5th Cir. 2016) (citing *United States v. Fields*, 565 F.3d 290, 294 (5th Cir. 2009)) (internal quotation marks omitted). This too warrants issuance of a writ of certiorari.

E. But for the Sixth Circuit's aberrant interpretation of *Strickland*, *Cuellar* would have been dispositive.

It was improper for the Sixth Circuit to consider the strength of a potential *Cuellar* argument given counsel's failure to perform the research necessary to make an informed decision about its application. *Compare* App. 13 *with* Section B, *supra*. As already explained, doing so was at odds with decisions of other circuits. And, beyond that impropriety, it was unreasonable for the court – having vacated the money laundering convictions of four codefendants based upon *Cuellar* – to find that a *Cuellar* argument would have been ineffectual.

As noted before, the money laundering case against Mr. Poulsen was virtually indistinguishable from the cases against his codefendants. Furthermore, the Sixth Circuit reached its flawed conclusion based on evidence that had ***nothing to do with the alleged money laundering transactions***, *i.e.*, course of conduct evidence relating to Mr. Poulsen's fraud convictions, which even without *Cuellar* would have been insufficient for concealment money laundering. *See United States v. Garcia-Emanuel*, 14 F.3d 1469, 1474 (10th Cir. 1994) ("Merely engaging in a transaction with money whose nature has been concealed through other means is not in itself a crime. . . . [T]he government must prove that the ***specific transactions*** in question were designed, at least in part, to launder money . . . ") (emphasis added).

The Sixth Circuit's conclusion is further undermined by its reversal of the money laundering convictions of Randolph Speer, which were premised upon ***the same transactions and evidence*** that underlie Mr. Poulsen's convictions. *Compare United States v. Speer*, 419 F. App'x 562, 569-70 (6th Cir. 2011) ("Speer's convictions on Counts 17-22 should be reversed") *with Superseding Indictment*, S.D. Ohio Case No. 2:06-cr-00129, Doc. # 257 at PageID #1951-53 (charging both Mr. Poulsen and Mr. Speer with Counts 17 through 20). The Superseding Indictment charged Mr. Poulsen and Randolph Speer with identical concealment money laundering charges premised upon three June 5, 2001 transactions: a $3,255,434.00 transfer from NPF VI, Inc. to Chartwell Diversified Services, Inc. (Count 18); a $1,500,000.00 transfer from NPF VI, Inc. to Lifecare Solutions West, Inc. (Count 19); and a $4,750,000.00 transfer from NPF VI, Inc. to HMA (Count 20).

The evidence relating to these transactions says nothing about *Cuellar* intent. The only government witnesses who testified about these transactions were

Jessica Bily, Craig Porter and Special Agent Jeffrey Williams. Bily and Porter merely authenticated wire transfer requests and related documents. Special Agent Jeffrey Williams testified regarding the government's investigation of the transactions, as well as NCFE's creation of receivables purchase reports to facilitate the transactions. Consistent with the Superseding Indictment, all three acknowledged that the transactions were intended to satisfy a settlement obligation.

That is the only testimony that the district court considered in finding sufficient evidence of money laundering: "[Counts 18-20] were substantiated at trial through the testimony of Porter, Bily, and Williams." App. 54. It denied Mr. Poulsen's motion for a judgment of acquittal with respect to those counts because a fraudulent purchase report prepared in connection with the transactions "served to hide the fact that the wires were actually pure conversion of investor funds to satisfy the debts of a third-party company in which Poulsen had a financial stake." For that reason, "the Court [found] that Poulsen's money laundering conviction was based on sufficient evidence." App. 56.

Those findings were self-evidently about the ***effect*** of the reports rather than the ***purpose*** of the transactions. In other words, at the close of the government's case-in-chief, the receivables purchase reports generated for the June 5, 2001 transactions were the only purported evidence of a "design to conceal" –

which is to say that there was no evidence at all of *Cuellar* intent.

The contrast with the Sixth Circuit's treatment of Mr. Poulsen's codefendants is striking. The Sixth Circuit vacated their concealment money laundering convictions because phony receivables reports were not enough:

> The government is correct that the Receivables Purchase Reports involved concealment: They falsely represented that investors' funds were being legitimately used, and thereby induced the Trustees to wire the funds to providers. ***But that explains only how, and not why, the money was moved. . . .*** The government proved only that the Reports facilitated the advances; it did not prove that the Reports, or concealment generally, were the transactions' purpose.

United States v. Ayers, 386 F. App'x 558, 565 (6th Cir. 2010) (emphasis added); *United States v. Faulkenberry*, 614 F.3d 573, 587 (6th Cir. 2010). *See United States v. Speer*, 419 F. App'x 562, 570 (6th Cir. 2011) (vacating money laundering convictions based on the same transactions and receivables reports as supported Mr. Poulsen's convictions).

The only real support identified by the Sixth Circuit for its anomalous application of *Strickland*'s performance prong is the Eleventh Circuit's decision in *Magluta v. United States*, 660 F. App'x 803 (2016), but that decision provides little support for the ruling below. Most important, *Cuellar* had not been decided at the time of Magluta's trial and there were no parallel convictions of codefendants reversed on the basis of *Cuellar*. *Id.* at 808-09. Unlike in this case, Magluta's attorney had not overlooked and neglected a recent, dispositive decision of this Court in preparations for trial and there was no compelling basis for finding that the evidence at Magluta's trial would be insufficient to satisfy the new requirements of *Cuellar*. In this case, in sharp contrast, Mr. Poulsen's counsel did overlook and neglect the Court's ruling in *Cuellar* while preparing for trial, and appellate courts concluded that the exact same evidence used to convict Mr. Poulsen of money laundering was insufficient to sustain the parallel convictions of his codefendants in light of the new requirements of *Cuellar*.

The lower court rulings in this case, if allowed to stand, would make it impossible to succeed on a claim of ineffective assistance of counsel if counsel's blunders allowed the government to adduce unchallenged evidence at trial which can be argued to have outweighed the mistakes. This cannot be the law. This Court should grant a writ of certiorari and vacate the decision below.

II. THE SIXTH CIRCUIT DEPARTED FROM DECISIONS IN OTHER CIRCUITS AND IMPROPERLY APPLIED CIRCULAR REASONING TO DENY AN EVIDENTIARY HEARING.

Mr. Poulsen could have addressed and should have been permitted to address effectively all of the above-described evidence – and more – at a 28 U.S.C. § 2255(b) hearing, which is statutorily required unless the record "***conclusively*** shows that the prisoner is entitled to no relief." *Id.* (emphasis added). The Sixth Circuit denied a hearing because it believed the evidence was so one-sided that it would have rendered a *Cuellar* argument futile. This is the epitome of a "Catch-22": Mr. Poulsen was denied a hearing – his only opportunity to fully demonstrate his lawyers' ineffectiveness and its impact – because of the evidence that went unchallenged ***because of his lawyers' ineffectiveness***.

Other circuits refuse to impose such an impossible standard. In *United States v. Squillacote*, 183 F. App'x 393 (4th Cir. 2006), for example, the court held that the defendant was entitled to a § 2255(b) hearing because the prisoner made a "sufficient showing of potential prejudice to necessitate a hearing on both prongs of *Strickland*" based on her lawyers' having prevented her from testifying. *Id.* at 394. In vacating the trial court's order dismissing her claim, the Fourth Circuit was explicit that a hearing was essential for the proper resolution of any question as to the impact and possible prejudice of her attorneys' performance. *Id.* (expressing "***no opinion on the merits of Squillacote's ineffective assistance claim or the believability of her proposed testimony***" while stressing that her allegations were sufficient to require a hearing to be properly resolved) (emphasis added).

Guerrero v. United States, 84 F. App'x 933 (9th Cir. 2003) is similar. There, the petitioner won acquittals on all charges other than conspiracy, on which the jury hung. *Id.* at 934. During a retrial on that charge, the petitioner's attorney decided to introduce evidence that the petitioner had threatened his co-conspirators in an attempt to defeat the "agreement" element of the conspiracy. *Id.* Acknowledging the presumption that tactical decisions of counsel are reasonable, the Ninth Circuit held that "there is sufficient question as to the reasonableness of counsel's decisions, and sufficient conflict in the facts, to lead us to conclude that Guerrero's claim is not so 'palpably incredible or patently frivolous as to warrant summary dismissal.'" *Id.* at 934-35 (citing *United States v. Pope*, 841 F.2d 954, 958 (9th Cir. 1988)). It ordered an evidentiary hearing so that Guerrero could "develop a record as to what counsel did, why it was done, ***and what, if any, prejudice resulted.***" *Id.* at 935 (emphasis added); *see also United States v. James*, 8 F.3d 32, at *2 (9th Cir. 1993) ("[A] district court should be especially hesitant to deny a section 2255 motion predicated on a particularized ineffective assistance claim without holding an evidentiary hearing or supplementing the record with sworn affidavits").

Had Mr. Poulsen been given the statutorily mandated evidentiary hearing, he might have been able to demonstrate that his trial counsel neglected to introduce potentially dispositive evidence and argument that Mr. Poulsen lacked *Cuellar mens rea*. He might have been able to demonstrate that *Cuellar*'s new standard would have influenced every line of questioning posed by his lawyers at trial. The introduction of such evidence at the hearing 28 U.S.C. § 2255 contemplates – which would have been provided in other circuits – had at least the potential to demonstrate that, contrary to the Sixth Circuit's unwarranted assumption, a *Cuellar* argument at trial would most decidedly ***not*** have been futile.

Title 28 U.S.C. § 2255(b) expressly provides that courts must "grant a prompt hearing" to assess a federal prisoner's motion unless the record "***conclusively*** shows that the prisoner is entitled to no relief" because Congress plainly recognizes what all lawyers know: a live hearing with the presentation of evidence in open court can advance the pursuit of truth and the cause of justice more than a cold file. Mr. Poulsen's case is a textbook example of why a hearing is so very important in this setting: review of a cold file makes it far too easy to jump far too quickly to the conclusion that even obvious flaws in the proceedings below should not call for reversal of convictions for a high-profile white-collar defendant. But a "close enough for government work" approach to review of convictions, whether for defendants accused of the most brutal of murders or of the biggest of frauds, is not consistent with either American law or American traditions. Rather, as this Court has stressed and as Congress has provided for alleged murderers and thieves alike, "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the ***duty*** of the court to provide the necessary facilities and procedures for an adequate inquiry." *Harris v. Nelson*, 394 U.S. 286, 300 (1969) (emphasis added). The courts below failed in discharging this duty with respect to Mr. Poulsen, and he continues to contend that at a proper statutory hearing he would be able to demonstrate the various bases on which he is entitled to relief.

CONCLUSION

The Sixth Circuit has departed from the law of other circuits concerning the application of *Strickland* and 28 U.S.C. § 2255(b). For these and all of the other reasons cited above, the Court should grant a writ of certiorari.

Respectfully submitted,

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