No. ________

In The

Supreme Court of the United States

MICHAEL WINANS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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March 16, 2018

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QUESTION PRESENTED

The United States Sentencing Guidelines applicable to cases of fraud provide for a base offense level of seven, which is increased incrementally depending on the amount of "loss." U.S.S.G. §2B1.1(b)(1) (2012). The Guidelines also provide that the "[l]oss shall be reduced by . . . the money returned . . . by the defendant . . . to the victim before the offense was detected." U.S.S.G. §2B1.1, Comment (n. 3(A)(i)) (2012).

Does a Court of Appeals err in failing to issue a certificate of appealability and/or order an evidentiary hearing on a defendant's claims of ineffective assistance of counsel where defendant accepted a guilty plea to wire fraud based on counsel's advice and where counsel (a) failed to investigate facts concerning the determination of the gross "loss" under §2B1.1; (b) failed to research the law and advise the defendant that certain amounts defendant repaid to investors were required to be subtracted from the gross "loss" amount and (c) failed to advise the defendant and the sentencing court that the sentencing range had been incorrectly calculated based on the gross rather than net "loss" amount.

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PETITION FOR WRIT OF CERTIORARI

Michael Winans, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's order denying Mr. Winan's application for a certificate of appealability, *Winans v. U.S.*, No. 12-1535 (6th Cir. Oct. 20, 2017) is attached at App. 1. The District Court's Opinion & Order denying Mr. Winans's petition to vacate his sentence under 28 U.S.C. §2255, denying Mr. Winans an evidentiary hearing, and denying the issuance of a certificate of appealability under 28 U.S.C. §2253(c)(2), *United States v. Winans*, Nos. 15 Civ. 11382, 12 Cr. 20598, 2017 WL 1354138 (E.D. Mich., Apr. 13, 2017) is attached at App. 11. The Sixth Circuit's opinion dismissing Mr. Winans's appeal, *United States v. Winans*, 748 F.3d 268 (6th Cir. 2014) is attached at App. 49.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1). The judgment of the court of appeals was entered on October 20, 2017. On January 11, 2018, Justice Kagan extended the time for filing a petition for a writ of certiorari to March 19, 2018.

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. Factual Background

In 2007, defendant Michael Winans invested $20,000 with a man named Tim Hunt, who had convinced Mr. Winans that he was investing in a legitimate Saudi Arabian crude oil bond that would pay high interest rates to investors. Mr. Winans was told that the oil bond would mature in September 2009. Shortly after investing his money with Mr. Hunt, Mr. Winans was asked by Mr. Hunt to recruit investors for shorter term bonds. Investment in these bonds required between $1,000 and $7,000 and a return was expected in sixty days. Mr. Winans then set up an investment business with eleven others who, in turn, also recruited investors. Mr. Winans encouraged his friends and own family to invest. Mr. Winans kept records of the names of people who were investing and amounts invested, as well as the amounts that he repaid to them. (Doc. #24, Pg ID 160-161, Def. Hab. Pet. ¶2, Doc. #24-2, Pg ID 225-26, Winans Aff. 2-3).

At the end of December 2007, Mr. Hunt abruptly terminated his business, without repaying Mr. Winans or his investors in full. Mr. Winans, however, continued to accept money from investors without disclosing to them that Hunt's bonds no longer existed. Mr. Winans tried to find other investment vehicles for investors. He also continued to repay investors using investor funds, borrowed money, and $1.5 million of his own earnings from his music business. In September of 2008, Mr. Winans closed his investment business. He had been unable to find a new and successful investment vehicle, and he had exhausted both investor and his own funds attempting to repay investors. (Doc. #24-2, Pg ID 226-27, Winans Aff. 3-4). Mr. Winans was unable to repay all investors completely. However according to his records, he repaid $6.5 million of the approximately $8 million that he received. (Doc. #24-2, Pg ID 27, Winans Aff. 4).

In December 2008, Mr. Winans sought legal advice from attorney William Hatchett regarding the investors to whom Mr. Winans still owed money. (Doc. #24-2, Pg ID 228, Winans Aff. 5).

Winans and the shareholders were sent a cease and desist order by the State of Michigan Office of Financial and Insurance Regulation in March of 2010. (Doc. #29-3, Pg ID 505, State of Michigan OFIR Cease and Desist Order, dated March 4, 2010). The Cease and Desist Order stated that "OFIR examined bank records and accounted for approximately $11.5 million of investor money that flowed through nearly 21 business accounts owned, operated or controlled by Winans Jr."

(Doc. #29-3, ¶49, Pg ID 513, OFIR Cease and Desist Order at ¶49, p. 9).

After learning that he was being investigated by the United States Government, Mr. Winans agreed to cooperate with the Government. In 2012, Mr. Winans, along with his Attorney Mr. Hatchett, met with an Assistant United States Attorney and an FBI Special Agent, who asked for Mr. Winans's help deciphering the investments. According to Mr. Winans, he was told that the Government was unable to determine the exact amount of money he received and that the investor receipts were "an accounting nightmare." Mr. Winans did not bring his own records to the meeting but he estimated that he had received about $7 to $8 million in total. Mr. Winans also told the FBI that he estimated that he had repaid approximately $6 million to investors. (Doc. #24-2, Pg ID 229, Winans Aff. 6).

The Government subsequently claimed that there were 790 people victimized by Mr. Winans's conduct. In response, Mr. Winans gave his attorney, Mr. Hatchett a list of 239 investors who had lost money to Winans, and estimated that he still owed people $2.2 million. (Doc. #24-2, Pg ID 229, Winans Aff. 6).

The Government ultimately filed a one-count information alleging that Mr. Winans had committed wire fraud in violation of 18 U.S.C. §1343. Mr. Winans agreed to plead guilty pursuant to a Rule 11 Plea agreement which stated that Mr, Winans "**obtained**" over $8 million from more than 1,000 victim investors. Under the Rule 11 Agreement the guidelines range was listed as "151-188 months." (Doc. #10, Pg ID 21-50, Plea Agmt.) (emphasis added).

According to Mr. Winans, the first time he saw the Rule 11 Agreement was approximately fifteen minutes before the plea hearing. Mr. Winans reiterated to his attorney, Mr. Hatchett, that the '$8 million, 250 victim' agreement was "wrong," that he could not accept the agreement and that he wanted to go to trial. Mr. Hatchett told Mr. Winans, amongst other things, that the Government "did not want" him to have any credit for the money he repaid to investors and that this was the best deal he could get. (Doc. #24-2, Pg ID 230, Winans Aff. 7). Mr. Winans signed the Rule 11 Agreement.

At the plea hearing, the court reviewed the Rule 11 Agreement including the charges contained in the Information with Mr. Winans, who said he agreed with the conduct described therein, had no questions and was satisfied with his attorney's advice. (Doc. #18, Pg ID 86-96, Plea Hrg. Tr. 5-15). Nonetheless, Mr. Hatchett then proceeded to conduct voir dire of his own client, Mr. Winans, with respect to the issue of wire fraud "so he understands exactly what it entails." (Doc. #18, Pg ID 101, Plea Hrg. Tr. 20). When Mr. Winans was asked to describe his conduct in his own words, he indicated that he believed, not that he had intentionally misled investors, but rather that what Mr. Winans originally believed was a legitimate investment, was now "over."

COURT: When you say, "the investment was over," do you mean to tell me that this investment in, as I understand crude oil bonds in Saudi Arabia, did not exist?

WINANS: I was made –

COURT: There was no such – that you were advised that there was no such investment?

WINANS: I was advised that the investment was over.

(Doc. #18, Pg ID 105, Plea Hrg. Tr. 24).

At this point, Mr. Winans's attorney, interrupted and asked to speak to Mr. Winans. Only after an off-the-record discussion with counsel, did Mr. Winans contradict his original statements and say that he "was aware that the investment was not a real investment and . . . continued to take funds." (Doc. #18, Pg ID 106, Plea Hrg. Tr. 25). The court then led Mr. Winans through the rest of his testimony which he originally was asked to relay in his own words. (Doc. #18, Pg ID 106-08, Plea Hrg. Tr. 25-27).

Mr. Winans was then asked if he wanted to plead guilty to the one count of wire fraud. He indicated that he did. The court accepted Mr. Winans's guilty plea finding that it had been made knowingly and voluntarily. (Doc. #18, Pg ID 109, Plea Hrg. Tr. 28).

Prior to sentencing on February 27, 2013, Mr. Winans's attorney filed objections to the presentence report, which stated that the total amounts owing to all investors was $2,185,000.00, and attached a list of individual investors who Mr. Winans believed were still owed money, and the amounts owed to each.

On February 20, 2013, the Government filed a sentencing memorandum claiming that Mr. Winans had obtained over $8 million from more than 1,000 investors. The Government did not mention that Mr. Winans had repaid some investors, nor the amounts that had been repaid. (Doc. #11, Pg ID 52, Govt Sent. Mem).

Mr. Winans's attorney filed a sentencing memorandum on February 22, 2013. Among other things, Mr. Hatchett also did not inform the court that Mr. Winans had repaid many investors and had done so by using his own money. Nor did defense counsel inform the court that most of the investors who had given money to Mr. Winans had been repaid their original investment. (Doc. #12, Pg ID 63, Def. Sent. Mem).

On February 27, 2013, the date of sentencing, the Government provided to defense counsel and the court a list of 612 victims and amounts owing to those victims, the total of which, according to a cover sheet was $4,386,522. There were no supporting documents submitted with the list. At a meeting with Mr. Winans and his family Mr. Winans voiced objections to, among other things, the Government's list. Mr. Hatchett admitted to Mr. Winans and his family that Mr. Hatchett knew the list was incorrect. However, Mr. Hatchett stated that he did not want to question anything because it could potentially inflame the judge. (Doc. #24-2 Pg ID 232, Winans Aff. 9).

At the sentencing Mr. Hatchett withdrew all of his previous objections to the presentence report, including any objection to the restitution amount which the judge set at approximately $4.8 million. Mr. Hatchett agreed that this amount was correct. (Doc. #19, Pg ID 117, Sent Hrg. Tr. 6). He did not inform the Court that Mr. Winans already had repaid the majority of investors using his own assets. The Court found that Winans had obtained over $8 million from over 1,000 victims, and had converted some of the money to his own use. (Doc. #19, Pg ID 133, Sent Hrg. Tr. 22). Unaware of the millions of dollars repaid by Winans to investors, the Court incorrectly noted that there had been no restitution payments. (Doc. #19, Pg ID 138, Sent Hrg. Tr. 27).

B. Procedural Background

The court sentenced Mr. Winans to 165 months of incarceration, five years of supervised release, and ordered restitution in the amount of $4,796,522. (App. 1-2).

Mr. Winans appealed his order of restitution to the Sixth Circuit arguing that the Rule 11 Plea Agreement, which contained an appeal waiver, did not extend to the District Court's restitution order, and that the restitution order itself exceeded the District Court's statutory authority. The Sixth Circuit dismissed Mr. Winans's appeal finding that the appeal waiver in Mr. Winans's plea agreement waived any right to appeal the restitution order. (App. 50).

Mr. Winans then filed for a writ of habeas corpus pursuant to 28 U.S.C. §2255 in the Eastern District of Michigan. (Doc. #24 Pg ID 160, Def. Habeas Pet.). Mr. Winans argued, among other things, that his Sixth Amendment right to effective assistance of counsel at the time of his plea and sentence had been violated, as well as his Fifth Amendment right to due process because he was sentenced based on inaccurate information as to the amount of loss he was responsible for and the number of victims, and that he was sentenced under the wrong Guidelines range. The District Court refused to order an evidentiary hearing, denied the petition and declined to issue a certificate of appealability. (App. 12).

Mr. Winans then filed an application for a certificate of appealability in the United States Court of Appeals for the Sixth Circuit. Mr. Winans again argued that that his trial counsel was ineffective in numerous respects and that he was sentenced based on inaccurate information. He also argued that the he was entitled to an evidentiary hearing to further establish that his plea was not knowing and voluntary because it was the product of ineffective assistance of counsel. The Sixth Circuit denied Mr. Winans's application for a certificate of appealability. (App. 10). The court found that Mr. Winans's allegation that he did not voluntarily enter his plea was belied by his statements at the plea hearing at which Mr. Winans plead guilty, and, among other things, said he knew that he was stipulating to an amount of losses of $8 million and at least 250 victims and acknowledged the guidelines range of 151 to 188 months. (App. 4-6). The Court of Appeals also found that it was not unreasonable for counsel to recommend that Mr. Winans accept the plea agreement on those terms, which was, according to counsel, the "best deal" the government would offer because the government could have provided evidence of a higher loss amount. (App. 6).

Additionally, the Sixth Circuit concluded that counsel did not perform deficiently by failing to challenge the loss amount or number at sentencing because doing so may have run afoul of the plea agreement and may have caused the government to recalculate the amount of losses. (App. 7-8). Mr. Winans's claim of prejudice was rejected because the court also found that even if counsel was deficient, reasonable jurists could not have concluded that Mr. Winans suffered prejudice because his sentence of 165 months was based on factors other than the loss amount. Thus he would not have necessarily received a lower sentence or chosen to go to trial. (App. 7-8).

According to the Sixth Circuit, there was no abuse of discretion for failing to grant an evidentiary hearing because reasonable jurists could not debate the District Court's rejection of Mr. Winans's claims based on the existing record. (App. 10).

Mr. Winans is now seeking a writ of certiorari in this Court.

REASONS FOR GRANTING THE WRIT

I. REASONABLE JURISTS COULD DISAGREE ABOUT THE EFFECTIVENESS OF COUNSEL'S REPRESENTATION OF DEFENDANT AND, AT THE VERY LEAST, THERE COULD BE DISAGREEMENT ABOUT DEFENDANT'S RIGHT TO AN EVIDENTIARY HEARING

This Court has recently re-emphasized that a certificate of appealability inquiry is "not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Therefore a Court of Appeals must not rule on the merits of a case; "the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (*quoting Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)).

This is a "threshold question" which "should be decided without full consideration of the factual or legal bases adduced in support of the claims." *Buck*, 137 S. Ct. at 759. "'When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.'" *Id.* (*quoting Miller-El*, 537 U.S. at 336-337).

Thus as an initial matter, this Court should determine whether the Sixth Circuit "phrased its determination in proper terms – that jurists of reason would not debate that [Winans] should be denied relief, . . . but it reached that conclusion only after essentially deciding the case on the merits." *Id.* at 773 (internal citation omitted).

Moreover, the District Court did not conduct an evidentiary hearing despite additional affidavits and evidence provided by Mr. Winans. Under 28 U.S.C. §2255(b) a court should hold a hearing: "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." While a petitioner must show more than mere assertions, the burden for establishing entitlement to an evidentiary hearing is "relatively light." *Valentine v. U.S.*, 488 F.3d 325, 333 (6th Cir. 2007), *Smith v. United States*, 348 F.3d 545, 551 (6th Cir. 2003).

As demonstrated below, the Sixth Circuit erred by not issuing a certificate of appealability and by finding that the District Court had not abused its discretion in ruling on Mr. Winans's claims without holding an evidentiary hearing "because reasonable jurists could not debate the District Court's rejection of Winans's claims based on the existing record." App. at 11.

A. Reasonable Jurists Could Have Disagreed Whether Defense Counsel Fulfilled His Obligation To Investigate The Facts, Research The Law And Competently Advise Defendant So That Defendant Could Make An Informed Decision Regarding Pleading Guilty Or Proceeding To Trial.

Once a plea of guilty has been entered, non-jurisdictional challenges to the conviction's constitutionality are waived, and only an attack on the voluntary and knowing nature of the plea can be sustained. *McMann v. Richardson*, 397 U.S. 759 (1970). *See also Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (finding that longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant"). However, a guilty plea cannot have been knowing and voluntary if a defendant does not receive reasonably effective assistance of counsel in connection with the decision to plead guilty, because the plea does not then represent an informed choice. *Mason v. Balcom*, 531 F.2d 717, 724-25 (5th Cir. 1976).

In order to succeed on a claim of ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. A defendant may show prejudice by demonstrating a reasonable probability that, but for counsel’s errors, he or she would not have pleaded guilty and would have insisted on going to trial. *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017).

The Sixth Circuit relied heavily on Mr. Winans’s statements at the plea hearing to conclude that his attorney’s performance was not deficient. This Court should review whether the Sixth Circuit erred in not considering relevant federal law which recognizes that “the failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis . . . as such an omission cannot be said to fall within ‘the wide range of professionally competent assistance’ demanded by the Sixth Amendment.” *Hill*, 474 U.S. at 65 (White, J., concurring) (*quoting Strickland v. Washington*, 466 U.S. at 690). *See also Stano v. Dugger*, 921 F.2d 1125, 1151 (11th Cir. 1991) (concluding that when defendant has pled guilty, he can still show deficient performance by demonstrating that counsel did not provide him “with an understanding of the law in relation to the facts, so that [he] may make an informed and conscious choice” between pleading guilty and going to trial.) (internal quotation omitted), *Bradbury v. Wainwright*, 658 F.2d 1083, 1087 (5th Cir. 1981) (recognizing that in context of advising client whether to plead guilty, counsel must be familiar with facts and law in order to advise defendant of options available), *Lee v. Hopper*, 499 F.2d 456, 463 (5th Cir.), *cert. denied*, 419 U.S. 1053 (1974) (acknowledging that guilty plea does not relieve counsel of responsibility to investigate potential defenses so that defendant can make an informed decision).

Counsel's advice need not be errorless or all-encompassing but it must be within the realm of competence demanded of attorneys representing criminal defendants. *Tollett v. Henderson*, 411 U.S. 258 (1973); *McMann v. Richardson*, 397 U.S. 759, 771 (1970). "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014).

Moreover, counsel advising defendants facing potential guilty pleas should "know the Guidelines." *United States v. Bui*, 795 F.3d 363, 367 (3rd Cir. 2015). "[F]amiliarity with the structure and basic content of the Guidelines . . . has become a necessity for counsel who seek to give effective representation." *United States v. Day*, 969 F.2d 39, 43 (3rd Cir. 1992). *See also*, *United States v. McCoy*, 215 F.3d 102 (D.C. Cir. 2000) (recognizing that counsel's performance fell below an objective standard of reasonableness where she failed to follow the formula specified on the face of the Guidelines, even though prosecutor also agreed with incorrect sentencing range), *United States v. Gaviria*, 116 F.3d 1498, 1513 (D.C. Cir. 1997) (finding that failure to find and apply a case interpreting the Guidelines constituted deficient performance under *Strickland*); *see generally Gaylord v. U.S.*, 829 F.3d 500, 506 (7th Cir. 2016) ("In the plea bargaining context, reasonably competent counsel will 'attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis before allowing his client to plead guilty.'") (*quoting Moore v. Bryant*, 348 F.3d 238, 241 (7th Cir. 2003); *Garmon v. Lockhart*, 938 F.2d 120, 121 (8th Cir. 1991) (finding that counsel's failure to advise client of his correct parole eligibility date satisfied first prong of *Strickland* where minimal research would have alerted counsel to his error.)

Accordingly reasonable jurists could have concluded, contrary to the courts below that Mr. Hatchett, provided objectively unreasonable assistance to Mr. Winans in several respects. For example, when Mr. Winans filed his §2255 petition, he submitted an affidavit of Margaret Raben, an experienced, licensed Michigan attorney who, among other things, reviewed defense counsel's files relating to Mr. Winans's case. (Doc. #24-2, Pg ID 239, Raben Aff.). Based on her review of the files, Ms. Raben concluded that Mr. Hatchett did not obtain discovery from the Government or otherwise investigate the Government's allegations or attempt to determine for himself an independent and reasonably accurate gross or net "loss" amount, or number of victims, all of which were relevant to Mr. Winans's decision to plead guilty. (Doc. #24-2, Pg ID 241, Raben Aff. 3, ¶11).

Reasonable jurists certainly could debate whether Mr. Hatchett even bothered to perform basic legal research regarding Mr. Winans's sentencing exposure. Mr. Hatchett informed Mr. Winans that the Government did not **want** Mr. Winans to receive credit for repayment amounts, a proposition which Mr. Winans felt compelled to accept after being pressured by Mr. Hatchett. However, Mr. Winans was never advised that under the applicable Sentencing Guidelines, Mr. Winans was **required** to receive credit for certain amounts repaid to investors.

Mr. Hatchett thus allowed the Government to maintain – and urged Mr. Winans ultimately to agree – that the amount of money that Mr. Winans took from investors also was equal to the net 'loss amount' under the Sentencing Guidelines. In the worksheet used to determine Mr. Winans's sentencing range under the Rule 11 Plea Agreement, the loss amount was listed as $8 million.[1] However basic research on this fundamental point would have revealed that the $8 million which Mr. Winans took from investors should have been

[1] The Total Offense Level appears to have been calculated as follows: (1) Petitioner received a level 7 increase for pleading guilty to wire fraud, pursuant to §2B1.1(a)(1); (2) Petitioner received a level 20 increase because the total loss amount was more than $7,000,000 and less than $20,000,000, pursuant to §2B1.1(b)(1)(K); (3) Petitioner received a level 6 increase because more than 250 victims were affected, pursuant to §2B1.1(b)(2)(C); and (4) Petitioner received a level 4 increase because he was the leader of the scheme, pursuant to §3B1.1. This produced a Base Offense Level of 37. With an Acceptance of Responsibility reduction of three levels, Petitioner's Total Offense Level became 34. App. at 14.

reduced by the $6.5 million that Mr. Winans repaid to investors.

Section 2B1.1, Application Note 3(A)(i), of the Sentencing Guidelines, which is applicable to fraud charges, defines "Actual Loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense." Note 3(A)(iii) further defines "Pecuniary harm" as "harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm." Section 2B1.1, Application Note 3(E)(i), "Credits Against Loss", further prescribes that "[l]oss shall be reduced by the . . . [t]he money returned . . . by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected" (emphasis added).

This operation of the Guidelines was confirmed in *United States v. Snelling*, 768 F.3d 509 (6th Cir. 2014). In *Snelling*, the Sixth Circuit held that under §2B1.1 Application Note 3(E)(i), the same guidelines under which Mr. Winans was sentenced, the loss figure used to calculate the sentencing guideline range in a Ponzi scheme had to be reduced by the value of the payments made to investor victims. *Id.* at 515. This reduction in amount of loss due to repayment in a Ponzi scheme is consistent with the calculation of actual loss under the Guidelines as "the net value, not the gross value, of what was taken." *United States v. Reddeck*, 22 F.3d 1504, 1512 (10th Cir. 1994), relying on *United States v. Gennuso*, 967 F.2d 1460, 1462 (10th Cir. 1992), *United States v. Smith*, 951 F.2d 1164, 1167 (10th Cir. 1991), and *United States v. Schneider*, 930 F.2d 555, 558 (7th Cir. 1991). Mr. Hatchett apparently was unaware that under *Snelling* and the Guidelines, credit had to be given for certain amounts repaid to investors. Mr. Hatchett's "ignorance of a point of law that [was] fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014).

Notably Mr. Hatchett submitted an affidavit in support of the Government's opposition to Mr. Winans's petition. (Doc. #29-17, Pg ID 563, Hatchett Aff.). While Mr. Hatchett refuted Mr. Winans's claims that he never told Mr. Winans that he was suspended from the practice of law when he began to advise Mr. Winans (Doc. #29-17, Pg ID 563, Hatchett Aff.), Mr. Hatchett did not dispute Mr. Winans's claims that Mr. Hatchett's performance was deficient under *Strickland.*

B. Reasonable Jurors Could Have Debated Whether Defendant Was Prejudiced By Defense Counsel's Constitutionally Deficient Performance.

When a defendant pleads guilty, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee v. U.S.*

137 S. Ct. 1958, 1967-69 (2017), *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). While the likelihood of success at trial may be a strong indicator of whether a defendant would plead guilty, this Court recognized that in certain instances a defendant is allowed to "throw a 'Hail Mary'" and risk trial: "where [a court is] . . . asking what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decisionmaking." *Id.*, *see also id.* at 1965 (recognizing that even when defendant's prospects of acquittal at trial were grim, errors that affected defendant's understanding of consequences of pleading guilty can constitute prejudice under *Strickland*). This Court also explained that courts should look to contemporaneous evidence to substantiate a defendant's expressed preferences about how he would have pled but for his attorney's deficiencies. *Id.*

Here, upon learning that the Government planned to present the court with a loss amount of $8 million and a victim count of over 1,000, and that the Government did not want Mr. Winans to get credit for amounts repaid to investors, Mr. Winans informed Mr. Hatchett that he would rather go to trial. Mr. Hatchett told Mr. Winans that Mr. Winans could not go to trial, that Mr. Winans would come out much worse and that this was the best deal that Mr. Winans could get. Critically, Mr. Hatchett advised Mr. Winans that the government did not **want** Mr. Winans to have credit for money paid to investors. Relying on Hatchett's deficient advice, Mr. Winans ultimately accepted the plea deal. However, a guilty plea does not bar Mr. Winans's claims that he received ineffective assistance of counsel in deciding whether to plead guilty or go to trial. *See Lee*, 137 S. Ct. at 1965.

The Sixth Circuit concluded that even if defense counsel had successfully challenged the amount of losses, Mr. Winans has not shown that he would have received a lower sentence or gone to trial. (App. 8). Reasonable jurists, however could disagree with this conclusion. Mr. Winans's records showed that he owed between $1.9 and $2.2 million. (Doc. #24-2, Pg ID 229, Winans Aff. 6; Doc. #24-4, Pg ID 241-42, Raben Aff. 3-4, ¶12). There was also evidence that once Mr. Winans's repayments to investors had been taken into account, the net loss to investors for sentencing guidelines purposes and the number of victims would have decreased his sentencing range from 155-181 to 79-97. (Doc. #24-4, Pg ID 242, Raben Aff. 4, ¶13). Such a shift in the Guidelines range would have affected Mr. Winans's sentence. As this Court has emphasized in another context:

> the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar. The Guidelines inform and instruct the district court's determination of an appropriate sentence. **In the usual case, then, the systemic function of the selected Guidelines range will affect the sentence.** This fact is essential to the application of Rule 52(b) to a Guidelines error. From the centrality of the Guidelines in the sentencing process it must follow that, when

> a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used.

Molina-Martinez v. U.S., 136 S. Ct. 1338, 1346 (2016) (emphasis added).

While the Sixth Circuit stated that a challenge to the $8 million loss figure may have caused the Government to assert a higher loss amount, like the defendant in *Lee*, Mr. Winans still would have gone to trial. Unlike the *Lee* defendant however, Mr. Winans would not necessarily have been throwing a "Hail Mary." *Lee v. U.S.*, 137 S. Ct. at 1965. Mr. Winans kept extensive records and strongly believed in his ability to prove that the gross loss amount was $8 million and the net amount was under $2.5 million because of his repayments to investors. (Doc. #31, Pg ID 570-71, Def. Reply Br. In Supp. Of Hab. Petn., at 4-5). Thus, Mr. Winans would have, as he claimed, gone to trial. He believed he could prove that the Government's higher loss amount was incorrect. (Doc. #31, Pg ID 571, Def. Reply Br. In Supp. Of Hab. Petn., at n.5).

It should also be noted that Mr. Winans may have had some success at trial regarding whether he had intended to defraud investors prior to December 2007. Even while he purported to admit to intentionally defrauding investors at the plea hearing, Mr. Winans, when he was allowed to use his own words, clearly believed that the crude oil bonds were a legitimate investment vehicle through Tim Hunt that "ended" in December 2007. The court then tried to clarify Mr. Winans's understanding by asking him whether he understood that the bonds were non-existent but again, Mr. Winans maintained that his understanding was that they were "over" which implied he believed that they had been legitimate. Mr. Winans's changed his statements only after defense counsel intervened and had an off the record discussion with Mr. Winans, who then said he was aware that the investment was not a real investment. (Doc. #18, Pg ID 104-06, Plea Hrg. Tr. 23-25). Jurors may have accepted that Mr. Winans initially had no intent to commit fraud.[2]

Thus, even if Mr. Winans chances of ultimate success at trial were "small, . . . [they] [were] not trivial. He [wa]s entitled to roll the dice." *DeBartolo v. U.S.*, 790 F.3d 775 (7th Cir. 2015); *see also Lee*, 137 S. Ct. at 1967-69.

Accordingly, this Court should grant certiorari to determine whether Mr. Winans has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve

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[2] Even before this exchange there is other evidence from the plea hearing that called into question Mr. Winans's understanding of the fraud charge. Though counsel had supposedly fully advised Mr. Winans about his plea, well into the colloquy, defense counsel asked for the opportunity to voir dire Mr. Winans with respect to the issue of wire fraud "so he understands exactly what it entails." (Doc. #18, Pg ID 101, Plea Hrg. Tr. 20).

encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. at 773 (internal quotes omitted).

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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