

No.

IN THE  
**Supremme Court of the United States**

**PAUL ALLEN ANDERSON,**

Petitioner(s)

**v.**

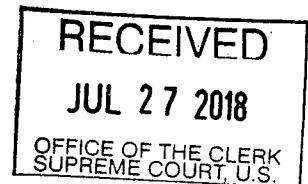
**UNITED STATES OF AMERICA,**

Respondent(s)

**On Petition For Writ Of Certiorari  
To The Sixth Circuit Court of Appeals**

P E T I T I O N   F O R   W R I T   C E R T I O R A R I

Pro se  
Paul Allen Anderson #  
Federal Correctional Complex Medium  
P.O. Box 1032  
Coleman, Florida 33521-1032



**QUESTION(S) PRESENTED**

WHETHER AN APPEAL WAIVER CAN BE ENFORCED IN A  
TITLE 28 U.S.C. § 2255 PROCEEDING WHEN  
PETITIONER HAS BASED HIS CLAIMS ON INEFFECTIVE  
ASSISTANCE OF COUNSEL

WHETHER A DEFENDANT IS ENTITLED TO A CERTIFICATE  
APPEALABILITY TO ADDRESS THE CLAIMS OF INEFFECTIVE  
ASSISTANCE OF COUNSEL CLAIMS IN A § 2255 HABEAS  
CORPUS PROCEEDING

## LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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APRIL 30, 2018

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## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Sixth Amendment Constitutional right to effective assistance of Counsel

Federal Rule of Criminal Procedure 11(b)(1)(N)

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was APRIL 30, 2018.

No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_A\_\_\_\_\_.  
 The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

[ ] A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_A\_\_\_\_\_.  
The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## REASONS FOR GRANTING THE PETITION

A circuit conflict exists on the issue, that warrant this Court's review because the issue is fundamentally premised on the interpretation of Title 28 U.S.C. § 2255 motions, and specific legal importance regarding whether a person can collaterally attack his guilty plea based on ineffective assistance of counsel claim.

This case would be the best vehicle for this Court's review because petitioner's guilty plea was based on ineffective assistance of counsel and petitioner asserts in the foregoing, that this conflict can become an increasing problem for a class of defendants with similar claims of ineffective assistance of counsel regarding appeal waiver's and whether they are enforceable in collateral attack proceeding pursuant to Title 28 U.S.C. § 2255.

Further review is warranted.

## **STATEMENT OF THE CASE**

Petitioner was charged in a criminal complaint with conspiracy to distribute heroin and cocaine in violation of 21 U.S.C. § 846 and 841 (a)(1). (Doc.cr-#1.) Petitioner proceeded to trial, and in the middle of trial, petitioner's attorney negotiated a plea in which he informed his client that he would seek a reduction in his guideline range and he was sure petitioner would receive 10 years. Defendant ended his trial and accepted his attorney's plea deal. Petitioner did not receive the anticipated deal and he then moved the district court to withdraw his plea which was subsequently denied. Petitioner's initial appeal was denied, and petitioner then moved the district court pursuant to Title 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By A Person in Federal Custody, claiming that he received ineffective assistance of counsel and the district court and court of appeals denied him a review of his ineffective assistances of counsel claim based on the appeal waiver he made initially. Petitioner now seeks a writ of certiorari for the Sixth Circuit court of appeals decision not to grant him a certificate of appealability on the claims of ineffective assistance of counsel.

## **STATEMENT OF FACTS**

Petitioner was charged in a conspiracy to distribute heroin and cocaine in violation of 21 U.S.C. § 846 and 841(a)(1). Petitioner was detained pending trial. On September 25, 2013, Petitioner was indicted and charged with intent to distribute

heroin and to distribute cocaine base, cocaine, and herion in violation of 21 U.S.C. § 846 and § 841(a)(1) Count 1, three individual counts of possession with intent to distribute cocaine and heroin in violation of 21 U.S.C. § 841(a)(1) and 841 (b)(1) (A) Counts 2, 5-6., and use of a communication facility in facilitation of the commission of a felony under the controlled substance act in violation of 21 U.S.C. § 843(b) Count 8. A Superseding Indictment was filed on April 9, 2014, which charged the amounts involved in the conspiracy, but the charges against petitioner did not change.

From June 13, 2014 through June 17, 2014, a jury trial was held. However, on June 18, 2014, Petitioner's trial was terminated and he plead guilty to all Counts of the Superseding Indictment in exchange for a three-level reduction for acceptance of responsibility. As a result of the plea counsel negotiated. The plea agreement contained a waiver of his right to collaterally attack his conviction and sentence under § 2255. Notably, trial counsel was permitted to withdraw, new counsel was appointed, and a motion to withdraw his plea was filed and denied. Also, the appeal waiver does not contain a provision that Petitioner cannot raise a claim of ineffective assistance of counsel in a Section 2255 motion.

Petitioner was sentenced on June 9, 2015, committing Petitioner to the Bureau of Prisons for 292 months (Counts 1 and 2), 240 months (Counts 5 and 6) and 48 months (Count 8) all to be served concurrently. Petitioner appealed and on June 16, 2015,

the Sixth Circuit court of appeals granted Petitioner's counsel motion to withdraw. On October 5, 2015, the Sixth Circuit granted the Government's motion to dismiss the appeal based on Petitioner's waiver of right to appeal, concluding that Petitioner's plea was entered into knowingly and voluntarily and finding that his claim that he was promised a ten year sentence was belied by his testimony at the plea hearing that no promises had been made to him other than those contained in the plea agreement.

On September 27, 2016, Petitioner filed a motion under Title 28 U.S.C. § 2255 motion to Vacate, Set Aside, or Correct his Sentence. On October 11, 2016, the Government filed a motion to dismiss Petitioner's motion to vacate sentence. Petitioner responded on November 8, 2016. Petitioner made various Sixth Amendment claims centering on ineffective assistance of counsel. On December 27, 2017, the district court issued an order adopting the Report and Recommendation of the Magistrate, to deny Petitioner's motion, the order also denied Petitioner's certificate of appealability. Petitioner then filed an application for certificate of appealability to the Sixth Circuit court of appeal, which ultimately denied his request on April 30, 2018. (Appendix-A).

Petitioner now submits his request for writ of certiorari based on a decision in conflict with a decision previously rendered by the same United States court of appeals for the Sixth Circuit.

## CASE AUTHORITY/ARGUMENT

### A Direct and Concise Argument Amplifying the Reasons Petitioner Relies on for Allowance of the Writ

The primary issue to be presented in Petitioner's request for writ of certiorari, is whether or not a person/defendant can waive his right to collaterally attack his conviction and sentence based on a claim of ineffective assistance of counsel.

In Lafler v. Cooper, 132 U.S. 1376 (2012), this Court clarified that the Sixth Amendment right to the effective assistance of counsel extends specifically "to negotiation and consideration of plea offers that lapse or are rejected." The record is clear regarding the event's surrounding Petitioner's guilty plea and his request to withdraw his plea and waiver. Notably, Petitioner had initially proceeded to trial, soonafter trial began, counsel informed Petitioner that he had negotiated a plea deal. Subsequently, Petitioner plead guilty based on his counsel's advise, and the fact that he would only receive 10 years for his involvement in the conspiracy. Counsel even had an tell Petitioner that he would not object to the 10 year term. The agent vouched for the attorney in aid of getting petitioner to terminate trial and enter a plea of guilty. The plea agreement entailed a waiver of his rights to appeal his conviction and sentence, including a collateral waiver.

The Sixth Circuit has noted that "under 'limited circumstances,' even a knowingly-entered, otherwise-valid appellate waiver will not bar a defendant's challenge to his sentence." See United States v. Ferguson, 669 F.3d 756, 764

(6th Cir. 2012). In United States v. McGilvery, 403 F.3d 361, 363 (6th Cir. 2005), the Sixth Circuit "strongly encouraged the government to promptly file a motion to dismiss the defendant's appeal where the defendant waived his appellate rights as part of a plea agreement," pointing out the language of the appellate-waiver provision in the Rule 11 agreement and providing the transcript of the plea colloquy showing that the district court had complied with Fed.R.Crim.P. 11(b)(1)(N).

In this case, Petitioner's appeal waiver does not support the district court's decision to adopt the Magistrate's Report and Recommendation ("R&R") where Petitioner had made a "substantial showing of the denial of a constitutional right." As required by 28 U.S.C. § 2253(c)(2), Of ineffective assistance of counsel, which is a Sixth Amendment constitutional violation. The Sixth Circuit also notes that a waiver is neither informed nor voluntary when the defendant does not understand, or is not apprised of, the operation of the waiver. United States v. Gibney, 519 F.3d 301, 306 (6th Cir. 2008)(citing United States v. Murdock, 398 F.3d 491, 495-97 (6th Cir. 2005)). Specifically, in this case, Petitioner's appeal waiver states that:

Defendant waives the right to appeal his convictions and sentences on any grounds in exchange for the government's recommendation and motion that defendant be granted a reduction of three levels for acceptance of responsibility under USSG § 3E1.1 (a) and (b).... Defendant agrees that all decisions regarding the defendant's sentence made by the district court judge will be final and not subject to appeal.

The plea agreement is void as to whether Petitioner could pursue a claim of ineffective assistance of counsel.

In Roe v. Flores-Ortega, 528 U.S. 470 (2000), the Supreme Court positioned that, when a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, courts do not ask whether, had he gone to trial, the result of that trial would have been different than the result of the plea bargain. That is because, while court's ordinarily apply a strong presumption of reliability to judicial proceeding, they cannot accord any such presumption to judicial proceedings that never took place. Instead, the court consider's whehter the defendant was prejudiced by the "denial of the entire judicial proceeding...to which he had a right." Id. at 483. Also, as the Supreme Court held in Hill v. Lockhart, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsels errors, he would not have plead guilty and would have insisted on going to trial." Id. 474 U.S. at 59. Counsel's error in this matter, was one that affected Petitioner's understanding of the consequences of pleading guilty where counsel placed particular emphasis on the lower sentencing guideline range to convince his client to abandon the trial, which was already in progress, and plead guilty to an illusionary plea that the government had offered. The Sixth Amendment guarantees a defendant the right to effective assistance of counsel at a critical stage of a criminal proceeding, including when he enters a guilty plea.

Lee v. United States, 582 U.S. \_\_\_\_ (2017).

In light that over 95% of all federal criminal cases are resolved with plea's and waiver's, this Court's review is essential, because the issue is fundamentally premised on the interpretation of Title 28 U.S.C. § 2255 motions and the specific legal importance regarding whether a person or defendant can collaterally attack his guilty plea based on an ineffective assistance of counsel claim.

The denial from the Sixth Circuit, of Petitioner's request for COA conflicts with it's own prior precedent, where the court stated that Anderson undermine the validity of his guilty plea or provision in his plea agreement waiving his right to file a collateral attack. (Appendix-A, pg. 3). A waiver of appeals rights may be challenged on the grounds ... of ineffective assistance of counsel. United States v. Toth, 668 F.3d 374, 377 (6th Cir. 2012)(quoting In re Acosta, 480 F.3d 421, 422 (6th Cir. 2007)). A claim of ineffective assistance of counsel "goes to the validity of the waiver." Acosta, 480 F.3d at 422. Thus, it would be "entirely circular for the government to argue that defendant has waived his right to appeal or collateral attack when the substance of the claim challenges the validity of the waiver itself." Id.

**A Defendant is Entitled to Certificate of Appealability to Address the Claims of Ineffective Assistance of Counsel Claims in a Title 28 U.S.C. § 2255 Habeas Corpus Proceeding**

The district court has denied Petitioner a full review on his Title 28 U.S.C. § 2255 motion based on an appellate-waiver

provision. Notably, the Sixth Circuit has, in the past, ruled that "A guilty plea can be involuntary as a result of the ineffective assistance of counsel." United States v. Gardner, 417 F.3d 541, 545 (6th Cir. 2005). Likewise, "a waiver of appeal rights can be challenged on various-albeit narrow-grounds, including that it...was the product of ineffective assistance of counsel." Campbell v. United States, 686 F.3d 353, 358 (6th Cir. 2012). The district court and the Sixth Circuit court of appeals in this matter, failed to first address Petitioner's claim that his guilty plea resulted from ineffective assistance of counsel before they both addressed the waiver issue. See United States v. Maxwell, 569 Fed. Appx. 363.

In the Sixth Circuit, and all other circuits within the jurisdiction require a certificate of appealability (COA), which is required to appeal the denial of a motion to vacate sentence under 28 U.S.C. § 2255. A COA may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant must "show that reasonable jurist could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issue presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

As this Supreme Court has emphasized, a court "should not decline the application for COA merely because it believes that the applicant will not demonstrate entitlement to relief."

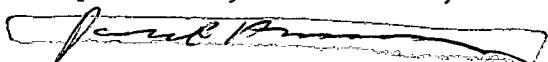
Miller-El v. Cockrell, 537 U.S. 322, 337 (2003). Noting that a COA is necessarily sought in the context in which the petitioner has lost on the merits, this Court has explained, "We do not require petitioner to prove, before the issuance of the COA, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Id., 537 U.S. at 338.

Petitioner in this matter asserts that he did not waive his right to any Sixth Amendment right to effective assistance of counsel and the district court's order fails to address or explain how petitioner cannot make a claim of ineffective assistance of counsel claim in his title 28 U.S.C. § 2255 motion based on ineffective assistance of counsel. Petitioner asserts that he has a number of cognizable claims that warrant relief, that are deserving to proceed further.

#### **CONCLUSION**

Therefore, premised on the above foregoing, petitioner prays that this Honorable Supreme Court exercise it's supervisory power where the Sixth Circuit United States court of appeals has entered a decision that conflict with its prior decision, and has decided an important federal question in a way that conflicts with this Supreme Court prior rulings.

Respectfully submitted,



Paul Allen Anderson  
Federal Correctional Complex Medium  
P.O. Box 1032  
Coleman, Florida 33521-1032