No.

IN THE SUPREME COURT OF THE UNITED STATES

CECILIO CUERO PAYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the sixth amendment, a criminal defendant may waive his right to raise a claim of ineffective assistance of counsel as part of a plea-agreement, where he has not been provided with a conflict free attorney to counsel him as to the advisability of doing so?

PARTIES TO THE PROCEEDING

Parties to the proceeding include Cecilio Payan (Appellant/Petitioner), Dane K. Chase, Esquire (Appellant/Petitioner's Counsel), Maria Chapa Lopez, Esquire (Interim United States Attorney), Yvette Rhodes (Assistant United States Attorney), David P. Rhodes (Assistant United States Attorney), Michael Gordon (Assistant United States Attorney) and Noel Francisco, Esquire (Solicitor General of the United States of America).

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The decision of the Eleventh Circuit Court of Appeals *infra*, was not selected for publication. The decision can be found at *United States v. Payan,* No. 18-12400, 2019 WL 326324 (11th Cir. Jan. 24, 2019), and is attached as Appendix A.

JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeals, which had jurisdiction under Title 28 U.S.C. § 1291, was entered on January 24, 2019. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF FACTS

As a preliminary matter, should this Court wish to consult the district court docket while reviewing the instant Petition, citations to the docket are set forth in the Petition and are made by the letter "D" followed by the appropriate district court docket number, followed by the appropriate page number.

On June 28, 2017, Mr. Payan was charged by Indictment, in the Middle

District of Florida, Tampa Division, with, *inter alia*, conspiracy to possess with intent to distribute and to distribute five or more kilograms of cocaine while aboard a vessel subject to the jurisdiction of the United States in violation of Title 46 U.S.C. §§ 70503(a), 70506(a), and 70506(b), and Title 21 U.S.C. § 960(b)(1)(B)(ii). (D-1).

On September 18, 2017, Mr. Payan pled guilty pursuant to a plea agreement, and his plea was ultimately accepted by the district court on October 6, 2017. (D-26,29,30,31,32,37). The plea-agreement contained the following waiver:

Defendant's Waiver of Right to Appeal the Sentence

> The defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum and expressly waives the right to appeal defendant's sentence on any ground, including the ground that the Court erred in determining the applicable guidelines range pursuant to the United States Sentencing Guidelines, except (a) the ground that the sentence exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution; provided, however, that if the government exercises its right to appeal the sentence imposed, as authorized by 18 U.S.C. § 3742(b), then the defendant is released from his waiver and may appeal the sentence as authorized by 18 U.S.C. § 3742(a).

(D-26, at 17-18)(Emphasis in original).

Thereafter, Mr. Payan proceeded to sentencing, and the district court imposed a sentence of one hundred eight (108) months imprisonment, followed by sixty (60) months supervised release. (D-104).

Mr. Payan then filed a Notice of Appeal. In his Initial Brief, Mr. Payan

argued that his sentencing counsel had performed ineffectively, and that his Judgment and Sentence should be reversed, and his case remanded for a new sentencing hearing. (Initial Brief, at 15-28). The Government then filed a motion to dismiss Mr. Payan's appeal, arguing that, under the appellate waiver contained in his plea-agreement, Mr. Payan had waived his right to appeal on the grounds his sentencing counsel had performed ineffectively during sentencing. (Government's Motion to Dismiss, at 9-17). In response, Mr. Payan argued that any such waiver was not knowingly and voluntarily made, as he had not been provided conflict free counsel to advise him as to whether waiving the right to appeal on said grounds was in his best interest. (Reply Brief, 1-18). Accordingly, Mr. Payan argued his appellate waiver did not preclude him from raising his ineffective assistance of counsel claim on appeal. *Id.*

Despite Mr. Payan's argument, the Eleventh Circuit Court of Appeal granted the Government's motion to dismiss, "because 'a contrary result would permit a defendant to circumvent the term of the sentence-appeal waiver simply by recasting a challenge to his sentence as a claim of ineffective assistance, thus rendering the waiver meaningless.'" *United States v. Payan*, No. 18-12400, 2019 WL 326324, at *2 (11th Cir. Jan. 24, 2019) (quoting, *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005)).

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT, UNDER THE SIXTH AMENDMENT, A CRIMINAL DEFENDANT MAY NOT VALIDLY WAIVE HIS RIGHT TO PURSUE A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL UNLESS HE IS OFFERRED A CONFLICT FREE ATTORNEY TO COUNSEL HIM AS TO THE ADVISABILITY OF DOING SO, TO RESOLVE THE CIRCUIT SPLIT ON THIS ISSUE, AND ENSURE AN APPELLATE WAIVER MEANS THE SAME IN FLORIDA AS IT DOES IN WASHINGTON, D.C.

At issue in this Petition is whether a criminal defendant may waive his right to raise a claim of ineffective assistance of counsel as part of a plea-agreement, where he has not been provided with a conflict free attorney to counsel him as to the advisability of doing so. The United States Court of Appeals, District of Columbia Circuit, in a well-reasoned opinion has found that any such waiver is invalid, *see*, *In re Sealed Case*, 901 F.3d 397 (D.C. Cir. 2018), while the Eleventh Circuit has upheld such waivers. This Court should grant review, adopt the reasoning of the District of Columbia Circuit, and establish that under the sixth amendment, a criminal defendant may not validly waive his right to pursue a claim of ineffective assistance of counsel unless he has first been provided an independent attorney to counsel him as to the advisability of doing so.

1. The Circuit Split.

The Eleventh Circuit concluded that the appellate waiver contained in Mr. Payan's plea-agreement precluded him from appealing on the grounds that his trial counsel performed ineffectively during his sentencing hearing "because 'a contrary result would permit a defendant to circumvent the term of the sentence-appeal waiver simply by recasting a challenge to his sentence as a claim of ineffective

assistance, thus rendering the waiver meaningless.'" *United States v. Payan*, No. 18-12400, 2019 WL 326324, at *2 (11th Cir. Jan. 24, 2019) (quoting, *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005)).

Conversely, in *In re Sealed Case*, 901 F.3d 397 (D.C. Cir. 2018), the Court resolved the issue of whether an appellate waiver, such as the one entered into by Mr. Payan, precluded the defendant from arguing on appeal that he was deprived of his right to the effective assistance of counsel as follows:

> Addressing the matter here, we note at the outset that our general duty to construe ambiguities in an appeal waiver in the defendant's favor is especially salient in the context of claims alleging ineffective assistance of counsel. Because "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system," a person's "inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel." *Martinez v. Ryan*, 566 U.S. 1, 12, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012); *see also United States v. Taylor*, 139 F.3d 924, 931 (D.C. Cir. 1998) ("The court ... must 'indulge every reasonable presumption against the waiver of the unimpaired assistance of counsel.' " (quoting *Campbell v. United States*, 352 F.2d 359, 361 (D.C. Cir. 1965))). That understanding about "the effective assistance of counsel at trial" is equally true about ineffective assistance at sentencing.
>
> We cannot conclude that a defendant who executes a generic appeal waiver "is aware of and understands the risk[ ]" that, by doing so, she waives any ability to appeal if her counsel later provides constitutionally ineffective assistance at sentencing. *Guillen*, 561 F.3d at 529. The key to understanding why lies in recognizing that (i) the defendant retains her Sixth Amendment right to counsel in the upcoming sentencing proceeding, and (ii) unlike other rights, her right to counsel can practically be vindicated only through an appeal or collateral proceeding.

First, a defendant who generically waives a right to appeal of course retains a Sixth Amendment right to counsel at sentencing. The government has not suggested that appellant in this case, or defendants in appellant's circumstances generally, somehow give up the right to counsel by generically waiving the right to appeal. And a defendant's right to counsel's assistance at sentencing necessarily means the right to *effective* counsel. After all, ineffective counsel is no counsel at all, as far as the Sixth Amendment is concerned. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

Second, a defendant can practically vindicate the right to the effective assistance of counsel at sentencing only through an appeal or collateral proceeding. Ineffective-assistance claims differ from other sorts of claims in that respect. With other claims that may arise at sentencing, the defendant's counsel can often present the issue in the sentencing court itself. The defendant thus would retain some ability to air the issue even if she waives her ability to take an appeal or seek collateral review.

That is not the case with an ineffective-assistance claim that arises at sentencing. Counsel cannot be expected to raise such an ineffective-assistance claim in the sentencing court itself: an attorney, to say the least, will be "unlikely to raise an ineffective-assistance claim against himself." *Massaro v. United States*, 538 U.S. 500, 502-03, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003).

Nor is the defendant herself well positioned to identify her counsel's deficient performance and bring it to the sentencing court's attention. We have recognized that counsel fulfills an essential function at sentencing by navigating the sentencing guidelines and presenting the various considerations that may drive the court's sentencing determination. *See United States v. Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997). Any expectation that a defendant would understand and identify her counsel's inadequacies would be tantamount to assigning her principal responsibility to carry out the representation herself, in the face of "the dangers and disadvantages of self-representation." *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Additionally, "[i]neffective assistance claims often depend on evidence outside the trial record." *Martinez*, 566 U.S. at 13, 132 S.Ct. 1309. Claims of ineffective assistance thus frequently require the development of a record on collateral review (or on remand from an appeal). Those considerations underlay the Supreme Court's decision in *Massaro v. United States*. 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714. There, the Court held that ineffective-assistance claims may be brought for the first time on collateral review. It grounded that conclusion in its recognition that the trial "record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis" governing ineffective-assistance claims. *Id.* at 505, 123 S.Ct. 1690. That is all the more reason defendants cannot be expected to catch such claims and bring them initially in the district court.

For those reasons, the ability to bring an ineffective-assistance claim on collateral review or on appeal (with the possibility of a remand for factual development) is essential to vindicating a defendant's right to counsel at sentencing. It follows that a waiver of the right to appeal and collateral review, if construed to encompass ineffective-assistance-of-counsel claims, acts essentially as a waiver of the right to counsel at sentencing.

In that light, the question is whether a defendant who retains a right to counsel at sentencing would nevertheless understand that, by generically waiving her right to appeal, she would essentially give up her ability to preserve her right to counsel. We do not think so. Indeed, the defendant might agree to an appeal waiver in significant measure precisely because of her right to counsel's assistance at sentencing: even if she relinquishes her ability to raise a sentencing error on appeal, she at least will have her attorney's assistance in identifying any sentencing error to the sentencing court itself, in the hope that the sentencing court will correct the error and obviate any need for an appeal. The government's own attorney appeared to assume as much in appellant's sentencing hearing, stating: "the defendant agreed to waive his right to appeal, I think except for ineffective assistance of counsel." Sentencing Tr. 34-35.

In short, construing a generic appeal waiver to extend to ineffective-assistance-of-counsel claims would be inconsistent with our understanding that a defendant must be "aware of and understand[ ] the risks involved in his decision." *Guillen*, 561 F.3d at 529. A contrary conclusion would mean that the defendant retained her right to counsel at sentencing while nonetheless giving up her ability to preserve that right. We do not believe that a generic appeal waiver brings about that result, much less that it unambiguously does so. *See Hunt*, 843 F.3d at 1027.

We note a final consideration pointing in the same direction. If a generic appeal waiver *did* encompass a claim of ineffective assistance of counsel at sentencing, the waiver then would give rise to a conflict of interest for counsel: an attorney generally cannot advise a client about whether to waive a pending claim against the attorney herself, *see* John Wesley Hall, Jr., Professional Responsibility in Criminal Defense Practice § 10:27 (3d ed. 2017), and the same is necessarily true of advice about whether to waive a future claim against the attorney. A number of state bar associations thus have determined that agreements to waive claims against an attorney violate state ethics rules as conflicts of interest. *Id.* What is more, if counsel operates under a conflict of interest when giving advice about an appeal waiver, the waiver would be unenforceable "insofar as" there is then "a colorable claim" that the defendant "received ineffective assistance of counsel in agreeing to the waiver." *Guillen*, 561 F.3d at 530. The better resolution, and the one we adopt here, is to conclude that a generic appeal waiver does not reach claims of ineffective assistance of counsel at sentencing.

We recognize that other courts of appeals have determined otherwise. Several of our sister circuits have held that a general waiver of appeal rights bars a defendant from appealing on the ground that counsel provided ineffective assistance at sentencing. *See Williams v. United States*, 396 F.3d 1340, 1341-42 (11th Cir. 2005); *United States v. White*, 307 F.3d 336, 338, 343-44 (5th Cir. 2002); *United States v. Cockerham*, 237 F.3d 1179, 1180, 1185-86 (10th Cir.

> 2001). *But see United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005). But for the reasons set out in this opinion, we respectfully reach a different conclusion, guided by our own court's precedents governing the enforceability of appeals waivers. *See Guillen*, 561 F.3d at 529-31; *Hunt*, 843 F.3d at 1026-29.

In re Sealed Case, 901 F.3d at 402–04 (emphasis added).

For the reasons that follow, this Court should grant review and approve the decision of the District of Columbia Circuit.

2. Ethics opinions, scholarly opinions, and the Government's position.

Various bar associations throughout the United States have considered whether a criminal defense attorney may ethically advise a criminal defendant concerning a plea-agreement which contains a waiver of the right to pursue relief on the basis of a claim of ineffective assistance of counsel. The overwhelming majority of these associations have concluded that defense attorneys may not ethically counsel defendants concerning such waivers because the waivers create a conflict of interest. *See*, Neb. Lawyers Ethics Advisory Comm, Op. 14-03 (2014); Ky. Bar Ass'n, Advisory Ethics Op. KBAE-435 (2012); Prof'l Ethics of the Fla. Bar, Op. 12-1 (2012); Ala. State Bar, Formal Op. 2011-02 (2011); State Bar of Nev. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 48 (2011); Va. State Bar, Legal Ethics Op. 1857 (2011); Advisory Comm. of the Supreme Court of Mo., Formal Op. 126 (2009); Vt. Bar Ass'n, Advisory Ethics Op. 95-04 (1995); N.C. State Bar, Ethics Op. RPC 129 (1993); The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Op.2001-06 (2001); Pennsylvania Opinion 2004-100; Tennessee Opinion 94-A-549; Utah State Bar Ethics Advisory Opinion Committee, Op. 13-04

(2013); *but see*, State Bar of Arizona, Ethics Op. 95-08 (1995); Supreme Court of Tex. Prof'l Ethics Comm., Op. 571 (2006); N.Y. State Bar Assoc'n Comm. Prof'l Ethics, Op. 1048 (2015). In fact, most bar associations have further concluded that a prosecutor may not ethically require a criminal defendant to waive the right to pursue a claim of ineffective assistance of counsel as part of a plea-agreement. *See*, *Id*. Furthermore, legal scholars throughout the country have reached the same conclusion. *See*, Peter A. Joy & Rodney J. Uphoff, *Systemic Barriers to Effective Assistance of Counsel in Plea Bargaining*, 99 Iowa L. Rev. 2103 (2014); Susan R. Klein; Aleza S. Remis; Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73 (2015). Were that not enough, the Government itself has made it its policy "in support of the underlying Sixth Amendment right," not to include waivers of the right to pursue an ineffective assistance of counsel claim within Government offered plea-agreements – though, as Mr. Payan's case demonstrates, that policy is not always followed. *See*, Memorandum for All Federal Prosecutors from the Office of the Deputy Attorney General (Oct. 14, 2014), https://www.justice.gov/file/70111/download.

Further still, to the extent that the government attorneys in this case sought to induce Mr. Payan to waive his right to pursue an ineffective assistance of counsel claim as part of his plea-agreement, the government attorneys were themselves in breach of the ethical standards governing government attorneys under the very statutes they are tasked with enforcing. *See*, 28 U.S.C. § 530B(a) ("An attorney for

the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.") Prof'l Ethics of the Fla. Bar, Op. 12-1 (2012)("A prosecutor may not make an offer that requires the defendant to expressly waive ineffective assistance of counsel and prosecutorial misconduct because the offer creates a conflict of interest for defense counsel and is prejudicial to the administration of justice.") The conflict of interest created by such waivers is not only an ethical concern, but also, as the next section explains, deprives a criminal defendant of his right to the effective assistance of counsel during the plea-bargaining process.

3. Plea-agreements containing a waiver of the right to pursue a claim of ineffective assistance of counsel inherently deprive the defendant of his sixth amendment right to counsel.

A criminal defendant's waiver of the right to appeal must be knowing and voluntary. *United States v. Guillen*, 561 F.3d 527, 529-30 (D.C. Cir. 2009); *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993). In the context of a guilty plea, the Eleventh Circuit has explained "[w]ithout 'reasonably effective assistance of counsel in connection with the decision to plead guilty,' a defendant cannot enter a knowing and voluntary plea because the plea does not represent an informed choice." *Stano v. Dugger*, 921 F.2d 1125, 1151 (11th Cir. 1991) (citing, *McCoy v. Wainwrigh*t, 804 F.2d 1196, 1198 (11th Cir. 1986); *Scott v. Wainwright*, 698 F.2d 427, 429 (11th Cir. 1983)). The same is true here: without the assistance of conflict free counsel in connection with the decision of whether to waive the right to appeal

the effectiveness of counsel's sentencing representation, Mr. Payan's waiver cannot be said to be knowing and voluntary, as the waiver does not represent an informed choice. *See*, *Id.*

More specifically, because Mr. Payan was not provided an independent attorney to counsel him as to the advisability of waiving his right to challenge the effectiveness of his counsel on appeal, Mr. Payan was ultimately waiving the right to challenge the effectiveness of his counsel based upon the advice of the counsel whose effectiveness he was waiving the right to challenge, thus creating a clear conflict of interest, which deprived Mr. Payan of his right to the effective assistance of counsel concerning the appellate waiver. *See*, *In re Sealed Case*, 901 F.3d at 404 ("if counsel operates under a conflict of interest when giving advice about an appeal waiver, the waiver would be unenforceable 'insofar as' there is then 'a colorable claim' that the defendant 'received ineffective assistance of counsel in agreeing to the waiver.' *Guillen*, 561 F.3d at 530."); *United States v. Adkins*, 274 F.3d 444, 453 (7th Cir. 2001) ("The Sixth Amendment entitles a criminal defendant to representation by conflict free counsel." citing, *Cuyler v. Sullivan*, 446 U.S. 335, 345, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). Accordingly, the waiver is not enforceable, because, as pertaining to the issue of waiving the right to challenge counsel's effectiveness on appeal, trial counsel had a conflict of interest which deprived Mr. Payan of his right to the effective assistance of counsel while deciding whether to accept the waiver, and thus the waiver was not knowingly and

voluntarily made. *See*, *In re Sealed Case*, 901 F.3d at 404; *Adkins*, 274 F.3d at 453; *Stano*, 921 F.2d at 1151; *Guillen*, 561 F.3d at 529-30; *Bushert*, 997 F.2d at 1351.

Furthermore, this Court's recent decisions establishing that criminal defendants have a right to the effective assistance of counsel during the plea bargaining process, dictate a finding that unless a conflict free attorney is appointed to counsel a criminal defendant as to the advisability of entering into a plea-agreement that requires him to waive his right to pursue a claim of ineffective assistance of counsel, the waiver cannot be enforced.

More specifically, this Court has recognized that a criminal defendant has a Sixth Amendment right to the effective assistance of counsel in the plea bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 168, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012) ("If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it.") Furthermore, this Court has explained that a criminal defendant is deprived of his right to the effective assistance of counsel where an actual conflict of interest adversely affected his attorney's performance. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002).

Here, as pertaining to the appellate waiver contained in Mr. Payan's plea agreement, an actual conflict of interest existed which adversely affected his attorney's performance. *See*, *In re Sealed Case*, 901 F.3d at 404. Accordingly, Mr. Payan's appellate waiver cannot be said to have been knowingly and voluntarily

made, and, as such, Mr. Payan did not waive his right to appeal the effectiveness of his counsel's representation during sentencing. *See*, *Id.*

A. An actual conflict of interest existed as pertaining to the appellate waiver contained in Mr. Payan's plea agreement.

"An actual conflict exists when an attorney actively represents incompatible interests; it is more than a "mere theoretical division of loyalties." *United States v. Fuller*, 312 F.3d 287, 291 (7th Cir. 2002) (citing, *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 1243, 152 L.Ed.2d 291 (2002). Here, assuming, as the Eleventh Circuit concluded, that the appellate waiver in Mr. Payan's plea agreement waived his right to appeal the effectiveness of counsel's performance during sentencing, an actual conflict of interest necessarily existed between Mr. Payan and his trial counsel.

More specifically, Mr. Payan had an interest in preserving his right to appeal the effectiveness of his counsel's performance during sentencing, and trial counsel had an interest in ensuring Mr. Payan waived the right to attack his representation on appeal. As succinctly stated by the Kentucky Bar Association:

> The lawyer in the plea agreement setting has a "personal interest" that creates a "significant risk" that the representation of the client "will be materially limited." The lawyer has a clear interest in not having his or her representation of the client challenged on the basis of ineffective assistance of counsel. The lawyer certainly has a personal interest in not having his or her representation of the client found to be constitutionally ineffective.

Ky. Bar Ass'n, Advisory Ethics Op. KBAE-435, 2 (2012).

Accordingly, as pertaining to the appellate waiver contained in the plea agreement, an actual conflict of interest existed between Mr. Payan and his trial counsel during plea negotiations, as it was in Mr. Payan's interest to negotiate a plea agreement that would permit him to challenge the effectiveness of his counsel's representation during sentencing, and it was in counsel's interest to ensure Mr. Payan entered into a plea agreement that waived the right to challenge his representation. *See*, *Fuller*, 312 F.3d at 291 (An actual conflict exists when an attorney actively represents incompatible interests).

B. Mr. Payan was adversely effected by his trial counsel's actual conflict of interest.

The Eleventh Circuit has explained the three part standard for establishing adverse effect as follows:

> To prove adverse effect, a habeas petitioner must satisfy three elements. First, he must point to "some plausible alternative defense strategy or tactic [that] might have been pursued." *United States v. Fahey,* 769 F.2d 829, 836 (1st Cir.1985); *see also Porter [v. Wainwright,* 805 F.2d 930, 939–40 (11th Cir.1986), *cert. denied,* 482 U.S. 918, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987)]. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, *see Strickland,* 466 U.S. at 692, 104 S.Ct. 2052, the petitioner "need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used," rather he only need prove that the alternative "possessed sufficient substance to be a viable alternative." *Fahey,* 769 F.2d at 836. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, "he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." [*Fahey,* 769 F.2d at 836].

Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir. 1999) (quoting, *Freund v. Butterworth*, 117 F.3d 1543, 1579-80 (11th Cir. 1997)). "With respect to the third prong-that counsel's failure to pursue the objectively reasonable defense strategy was linked to the conflict-the *Freund* court explained that the petitioner is entitled to prove such a link in either of two ways: (1) by 'establish[ing] that the alternative defense was inherently in conflict with ... the attorney's other loyalties or interests' (the 'first aspect of the *Freund* test'), or (2) by otherwise showing that the alternative defense was 'not undertaken due to' those other loyalties or interests (the 'second aspect of the *Freund* test')" *United States v. Nicholson,* 611 F.3d 191, 212 (4th Cir. 2010) (citing, *Freund*, 165 F.3d at 860).

i. Plausible alternative strategy or tactic that might have been pursued.

Independent counsel, not impacted by the conflict – which, in this case, would have required the appointment of a second attorney to counsel Mr. Payan as to the advisability of waiving his right to appeal the effective assistance of counsel during his sentencing - plausibly could have advised Mr. Payan to refuse to waive his right to appeal the effectiveness of his counsel's representation during sentencing as part of his plea agreement with the government. Accordingly, the first prong of the adverse effect standard has been met. *See*, *Freund*, 165 F.3d at 860 (The first prong of the adverse effect test requires the defendant to point a plausible alternative defense strategy or tactic that might have been pursued.)

ii. The alternative strategy or tactic was reasonable under the facts.

Mr. Payan clearly had a vested interest in ensuring that his counsel performed effectively during sentencing. Accordingly, it would have been reasonable for Mr. Payan to refuse to waive his right to appeal the effectiveness of his trial counsel's representation during sentencing. Accordingly, the second prong of the adverse effect standard has been met. *See*, *Freund*, 165 F.3d at 860 (The second prong of the adverse effect test requires the defendant to demonstrate that the alternative strategy or tactic was reasonable under the facts.)

iii. The decision to forego the alternative strategy was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

The alternative strategy, which would have been to advise Mr. Payan to refuse to waive his right to appeal the effectiveness of his sentencing counsel as part of his plea agreement with the government, was inherently in conflict with trial counsel's interest in foreclosing Mr. Payan's ability to attack his representation on appeal by advising acceptance of the waiver. Accordingly, the third prong of the adverse effect standard has been met. *See*, *Freund*, 165 F.3d at 860 (The third prong of the adverse effect test requires the defendant to show that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests); *Nicholson*, 611 F.3d at 212 (The third prong may be met by demonstrating either (1) the alternative defense was inherently in conflict with the attorney's other interests, or (2) the alternative defense was not undertaken due to the attorney's other interest).

C. As a result of the conflict of interest, Mr. Payan did not knowingly and voluntarily waive his right to appeal the effectiveness of his counsel's sentencing representation.

For the foregoing reasons, as pertaining to the appellate waiver, trial counsel's actual conflict of interest adversely effected his representation of Mr. Payan during plea negotiations. Accordingly, Mr. Payan cannot be said to have knowingly and voluntarily waived his right to appeal the effectiveness of his counsel during sentencing, as he was not afforded conflict free counsel to advise him as to the wisdom of doing so. *See*, *Lafler*, 566 U.S. at 165, 132 S. Ct. at 1385 ("The constitutional guarantee [to the effective assistance of counsel] applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice."); *Rubin*, 292 F.3d at 402 (Observing that prejudice is presumed because, "[w]hen lawyers' conflicts of interest adversely affect their performance, it calls into question the reliability of the proceeding and represents a breakdown in the adversarial process fundamental to our system of justice").

4. Review should be granted.

A criminal defendant's decision to waive his right to appeal his counsel's representation during sentencing is a decision that the defendant cannot be left to make without counsel's advice, and trial counsel is unable to provide meaningful advice as to the waiver, as the waiver creates an actual conflict of interest between trial counsel and the defendant, that adversely impacts trial counsel's representation, *i.e.*, trial counsel's advice concerning the waiver. Accordingly, a

criminal defendant may only validly waive his right to appeal the effectiveness of his sentencing counsel if he is first appointed a second attorney to counsel him as to the advisability of doing so. *See*, *In re Sealed Case*, 901 F.3d at 404; *Lafler*, 566 U.S. at 165, 132 S. Ct. at 1385; *Freund*, 165 F.3d at 860; *Nicholson*, 611 F.3d at 212; *Fuller*, 312 F.3d at 291; *Mickens*, 535 U.S. 162, 122 S.Ct. 1237.

In short, in light of *Lafler's* pronouncement that criminal defendants have the right to the effective assistance of counsel during the plea negotiation process, and cannot be presumed to make critical decisions without counsel's advice, Mr. Payan respectfully submits a criminal defendant cannot waive his right to appeal the effectiveness of his counsel as part of a plea agreement, unless the defendant is provided independent counsel to advise him as to whether doing so is in his best interest. Accordingly, this Court should grant review to resolve the circuit split on this issue, and establish that, under the sixth amendment, a criminal defendant may not validly waive his right to pursue a claim of ineffective assistance of counsel, unless he is offered a conflict free attorney to counsel him as to the advisability of doing so, to ensure that appellate waivers, and the sixth amendment, mean the same in Florida as they do in Washington, D.C.

Finally, because Mr. Payan was not afforded independent counsel to advise him as to whether it was in his best interest to waive his right to appeal the effectiveness of his trial counsel's representation during sentencing, the Eleventh Circuit's Opinion in Mr. Payan's case should be quashed, and his case should be

remanded to the circuit court with directions that it enter an opinion addressing the merits of Mr. Payan's appeal. *See*, *Id.*

CONCLUSION

For the reasons stated above, this Court should grant Mr. Payan's Petition for Writ of Certiorari, and establish that a criminal defendant cannot waive his right to raise a claim of ineffective assistance of counsel as part of a plea-agreement, unless he has been provided with a conflict free attorney to counsel him as to the advisability of doing so.

Respectfully Submitted,

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INDEX TO APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12400
Non-Argument Calendar

D.C. Docket No. 8:17-cr-00316-SDM-JSS-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CECILIO CUERO PAYAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(January 24, 2019)

Before MARTIN, NEWSOM, and ANDERSON Circuit Judges.

PER CURIAM:

Cecilio Cuero Payan appeals his 108-month sentence for conspiracy to possess with intent to distribute 5 kilograms or more of cocaine while aboard a vessel subject to the jurisdiction of the United States. He argues that the district court clearly erred by denying his request for a two-level minor-role reduction under United States Sentencing Guidelines ("Guidelines") § 3B1.2(b). He also asserts that he was deprived of effective assistance of counsel during sentencing by his trial counsel's failure to object to the district court's denial of the minor-role reduction. After careful review, we conclude that Payan knowingly and voluntarily waived his right to appeal his sentence on the grounds he raises in this appeal. We therefore dismiss the appeal.

I.

In June 2017, a grand jury returned an indictment against Payan and two co-defendants, charging them with possession of and conspiracy to possess with intent to distribute 5 kilograms or more of cocaine while aboard a vessel subject to the jurisdiction of the United States. Payan entered a plea agreement under which he would plead guilty to the conspiracy count in exchange for the government dismissing the possession count. The plea agreement included a section entitled, "Defendant's Waiver of Right to Appeal the Sentence," which provided:

> The defendant agrees that this Court has jurisdiction and authority to impose any sentence up the statutory

> maximum and expressly waives the right to appeal defendant's sentence on any ground, including the ground that the Court erred in determining the applicable Guidelines range pursuant to the United States Sentencing Guidelines, except (a) the ground that the sentence exceeds the defendant's applicable Guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution; provided, however, that if the government exercises its right to appeal the sentence imposed . . . then the defendant is released from his waiver and may appeal the sentence as authorized by 18 U.S.C. § 3742(a).

Payan initialed the bottom of each page of the agreement and signed the final page, indicating that he agreed to its terms.

During a change-of-plea hearing, a magistrate judge informed Payan, through an interpreter, of his various rights and discussed the appeal waiver, explaining:

> THE COURT: Normally, a criminal defendant can appeal his sentence on any ground, but in this plea agreement you're waiving and you're giving up your right to appeal your sentence on all grounds. There's only four very limited grounds that would remain for you to be able to appeal your sentence. Otherwise, you're waiving and you're giving up your right to appeal your sentence.

The magistrate judge then described the four limited grounds on which Payan reserved the right to appeal and confirmed that Payan understood and agreed to waive his appeal rights as explained.

> THE COURT: Other than those four very limited grounds, you'd be waiving and giving up your right to appeal your sentence. Do you understand and agree to that?
>
> THE DEFENDANT (via interpreter): Yes.
>
> THE COURT: Did you discuss a waiver of your right to appeal with your attorney?
>
> THE DEFENDANT (via interpreter): Yes.
>
> THE COURT: Do you have any questions at all about your waiver of your right to appeal your sentence?
>
> THE DEFENDANT (via interpreter): No.
>
> THE COURT: Do you have any questions at all about the plea agreement?
>
> THE DEFENDANT (via interpreter): No.

After finding that Payan had entered his plea knowingly and voluntarily and that he understood the consequences of the plea, the magistrate judge recommended that the district court accept Payan's guilty plea. The district court did so.

At Payan's sentencing hearing, the district court granted the government's motion for a two-level reduction for substantial assistance under Guidelines § 5K1.1 and 18 U.S.C. § 3553(e) but denied Payan's request for a two-level minor-role reduction. After calculating Payan's guideline range of 108 to 135 months, the district court sentenced him to 108-months imprisonment.

Payan appealed his sentence, arguing the district court clearly erred by rejecting his request for a minor-role reduction. Payan also asserted his trial counsel provided ineffective assistance during sentencing by failing to object to the district court's denial of a minor-role reduction. In response, the government filed a motion to dismiss Payan's appeal based on the appeal waiver in his plea agreement. The government alternatively argued that the record is insufficiently developed for this Court to resolve Payan's ineffective assistance-of-counsel claim on direct appeal and that, in any event, Payan has not shown that his sentence would have been different if his counsel had objected to the district court's denial of the minor-role reduction.

II.

"We review the validity of a sentence appeal waiver de novo." United States v. Johnson, 541 F.3d 1064, 1066 (11th Cir. 2008). Such waivers are valid and enforceable if they are made knowingly and voluntarily. Id. The government can demonstrate a waiver was knowing and voluntary by showing either that (1) the district court specifically questioned the defendant about the waiver during the plea colloquy, or (2) the record makes clear that the defendant otherwise understood the full significance of the waiver. Id. When reviewing the plea colloquy, we look for clear language from the district court explaining what rights

the defendant is giving up. See United States v. Bushert, 997 F.2d 1343, 1352–53 (11th Cir. 1993).

We have held that a defendant waived his ineffective-assistance-of-counsel-claim regarding counsel's performance during sentencing because "a contrary result would permit a defendant to circumvent the term of the sentence-appeal waiver simply by recasting a challenge to his sentence as a claim of ineffective assistance, thus rendering the waiver meaningless." Williams v. United States, 396 F.3d 1340, 1342 (11th Cir. 2005); see also Bushert, 997 F.2d at 1351; United States v. Hanlon, 694 F. App'x 758, 759 (11th Cir. 2017) (holding that "sentence appeal waiver bars [defendant's] sentence claims and his claims that his trial counsel was ineffective at sentencing, which is an indirect challenge to his sentence"). Absent "extreme circumstances—for instance, if the district court had sentenced [the defendant] to a public flogging—[under which] due process may require that an appeal be heard despite a previous waiver," United States v. Howle, 166 F.3d 1166, 1169 n.5 (11th Cir. 1999), this Court strictly enforces knowing and voluntary appeal waivers, see Johnson, 541 F.3d at 1068.

III.

Payan does not assert that this appeal is based on any of the grounds for which he reserved his right to appeal. Nonetheless, he argues that his appeal waiver does not bar this appeal. Payan says his challenge to the district court's

denial of his request for a minor-role reduction is permitted because the basis for the district court's denial of the reduction was unreasonable and unforeseeable. Payan also argues he did not validly waive his right to appeal on the ground that his counsel performed ineffectively during sentencing, primarily asserting that his trial counsel could not have ethically advised him on whether to waive his right to pursue an ineffective assistance of counsel claim as part of a plea agreement.

We conclude that Payan's appeal waiver was knowingly and voluntarily made. The magistrate judge specifically questioned Payan about the appeal waiver, describing each of the limited grounds on which Payan reserved the right to appeal. Payan confirmed that he understood the appeal waiver and that he agreed to its terms. Beyond that, the written appeal-waiver explicitly mentioned that Payan waived the right to appeal on the basis that the district court miscalculated his guideline range. At no point did Payan express confusion about the appeal rights he was giving up. We are not persuaded by Payan's arguments for why his appeal-waiver should be deemed unenforceable as to the claims he asserted on appeal. See Williams, 396 F.3d at 1342 (holding that a knowing and voluntary appeal waiver precluded a defendant from "attempting to attack, in a collateral proceeding, the sentence through a claim of ineffective assistance of counsel during sentencing"); Howle, 166 F.3d at 1168–69 (holding that a knowing and voluntary appeal waiver barred a defendant from challenging a district court's

denial of a motion for a downward departure). Neither are we convinced that Payan has shown any "extreme circumstance[]" requiring his appeal to be heard despite his knowing and voluntary waiver of the right to appeal. Id. at 1169 n.5. Therefore, we must honor the plea agreement and dismiss this appeal.[1]

DISMISSED.

[1] To the extent Payan wishes to raise ineffective-assistance-of-counsel claims unrelated to his sentencing in a 28 U.S.C. § 2255 motion, we do not address them here. Cf. United States v. Puentes-Hurtado, 794 F.3d 1278, 1285 (11th Cir. 2015) (reserving for a § 2255 motion questions about whether counsel rendered ineffective assistance in advising a defendant about a proposed plea agreement).