No. 18-8273

IN THE SUPREME COURT OF THE UNITED STATES

CECILIO CUERO PAYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a criminal defendant must be provided an additional, independent attorney to counsel him on whether to accept an appeal waiver in a guilty plea agreement that does not preserve claims that his principal attorney provided ineffective assistance during sentencing.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not published in the Federal Reporter but is available at 2019 WL 326324.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2019. The petition for a writ of certiorari was filed on March 1, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiring to possess with the intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 21 U.S.C. 960(b)(1)(B)(ii); 46 U.S.C. 70503(a), 70506(a) (Supp. V 2017); 46 U.S.C. 70506(b). Judgment 1. The district court sentenced petitioner to 108 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals dismissed petitioner's appeal. Pet. App. 1-8.

1. In June 2017, officers on a United States maritime patrol airplane detected a "go fast" boat in a known drug-smuggling area approximately 140 nautical miles south of Punta Arenas, Costa Rica. Plea Agreement 20. The officers saw multiple packages, fuel drums, and three people on the boat, but saw no indicia of nationality, contributing to their suspicion that the boat was involved in drug smuggling. Ibid. The officers alerted a United States Coast Guard vessel, which intercepted the boat. Id. at 20-21.

Coast Guard officers boarded the boat and found petitioner, along with Luis Ramirez and Plinio Alberto Orobio Landazuri. Plea Agreement 21. Ramirez claimed that he was the master of the boat and claimed Colombian nationality for himself and the boat. Ibid. When contacted, however, the Colombian government neither confirmed nor denied the nationality claims. Ibid. Because the

Coast Guard officers did not see a flag or other indicia of nationality on the boat and the crew members failed to provide registration documents, the officers treated the boat as without nationality and conducted a full boarding inspection. Ibid.

During the inspection, the boarding team found, among other things, 23 bales of a substance that field-tested positive for cocaine. Plea Agreement 21-22. The total estimated weight of the 23 bales was 924 kilograms. Id. at 22. Following the inspection, the Coast Guard detained the three crew members, and transferred the contraband and crew members to its vessel. Ibid. Because the go fast boat could not be towed to shore, the Coast Guard sank it after everything was safely transferred to the Coast Guard vessel. Ibid.

2. A grand jury in the Middle District of Florida returned an indictment charging petitioner and his two crewmates with conspiring to possess with the intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 21 U.S.C. 960(b)(1)(B)(ii); 46 U.S.C. 70503(a), 70506(a) (Supp. V 2017); 46 U.S.C. 70506(b), and possessing with the intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 18 U.S.C. 2; 21 U.S.C. 960(b)(1)(B)(ii); 46 U.S.C. 70503(a), 70506(a) (Supp. V 2017). Indictment 1-2. Petitioner pleaded guilty to the

conspiracy count pursuant to a written plea agreement. Judgment 1; Plea Agreement 1-23.

As part of the plea agreement, petitioner agreed that the district court had authority to impose "any sentence up to the statutory maximum" and:

> expressly waive[d] the right to appeal [his] 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 [petitioner'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 [petitioner] is released from his waiver and may appeal the sentence as authorized by 18 U.S.C. § 3742(a).

Plea Agreement 17-18.

In exchange, the government agreed, among other things, to dismiss the remaining count against petitioner, not to charge petitioner with other offenses related to the conduct underlying the plea agreement, to recommend a sentence at the low end of the advisory Guidelines range determined by the district court, and to recommend a Guidelines reduction for acceptance of responsibility under Sentencing Guidelines § 3E1.1 (2016). Plea Agreement 3-5.

During the change-of-plea hearing, a magistrate judge informed petitioner of his various rights and discussed the appeal waiver, explaining that petitioner was "giving up [his] right to appeal [his] sentence on all grounds" except the "four very limited

grounds" listed in the plea agreement, which she explained to petitioner. Plea Tr. 16-17; see Pet. App. 3-4. The magistrate judge reiterated, "[o]ther than those four very limited grounds, [petitioner would] be waiving and giving up [his] right to appeal [his] sentence." Plea Tr. 17; Pet. App. 4. Petitioner confirmed that he understood, that he had discussed the waiver of his right to appeal with his attorney, and that he had no questions about it. Plea Tr. 17-18; see Pet. App. 4. After a series of additional questions concerning, among other things, the potential penalties and the consequences of his plea, the magistrate judge found that petitioner was pleading guilty knowingly, freely, and voluntarily. Plea Tr. 26-27; see Pet. App. 4. In accordance with the magistrate judge's recommendation, the district court accepted petitioner's guilty plea. D. Ct. Doc. 37 (Oct. 6, 2017).

3. The Probation Office prepared a presentence report, which calculated a base offense level of 38 under Sentencing Guidelines § 2D1.1(c)(1). Presentence Investigation Report (PSR) ¶ 19. The report recommended a two-level reduction under the "safety valve" set forth in Sections 2D1.1(b)(17) and 5C1.2, and a three-level reduction for acceptance of responsibility under Section 3E1.1. PSR ¶¶ 20, 26-27. Those adjustments yielded a total offense level of 33 and, combined with petitioner's criminal history category I, an advisory Guidelines range of 135 to 168 months of imprisonment. PSR ¶¶ 28, 34, 57.

Petitioner objected to the absence of an adjustment under Section 3B1.2 for his allegedly minor role in the offense, which, if applied, also would have entitled him to an additional four-level reduction under Section 2D1.1(a)(5). Addendum to PSR 1-2. Petitioner thus argued for a total offense level of 27 and an advisory Guidelines sentence of 120 months of imprisonment. Id. at 2. The government did not raise any objections to the presentence report, but moved for a two-level downward departure under Sentencing Guidelines § 5K1.1 based on petitioner's substantial assistance to authorities. D. Ct. Doc. 63 (Dec. 6, 2017).

At the sentencing hearing, the district court denied petitioner's request for a minor-role reduction. Sent. Tr. 9-18. The court determined that, considering (1) the degree to which petitioner understood the scope and structure of the criminal activity, (2) the degree to which petitioner exercised decisionmaking authority, (3) the nature and extent of his participation in the commission of the offense, and (4) the degree to which petitioner stood to benefit from the criminal activity, petitioner was not entitled to the reduction. Ibid. The court granted the government's request for a two-level reduction for substantial assistance, yielding a revised advisory Guidelines range of 108 to 135 months. Id. at 19-21, 23. After considering the factors under 18 U.S.C. 3553(a), and in accordance with the government's recommendation, the court sentenced petitioner to the

low end of the revised sentencing range -- 108 months of imprisonment. Sent. Tr. 23, 26.

At the close of sentencing, the district court asked if either party had objections to the sentence or the manner of its announcement. Sent. Tr. 29. Defense counsel responded, "None other than those previously stated." Ibid. The court reminded petitioner that he had waived the right to appeal except in narrow circumstances, but it advised petitioner of his right to counsel on direct appeal and of the process for filing a notice of appeal if petitioner nonetheless chose to appeal. Id. at 30.

4. Petitioner appealed and, with new appointed counsel, challenged the district court's denial of a minor-role reduction and argued that his trial counsel had provided ineffective assistance during sentencing by failing to object to the court's denial of that reduction. Pet. C.A. Br. 15-28; see Pet. App. 5.

The government moved to dismiss petitioner's appeal. Gov't C.A. Mot. to Dismiss 9-18. The government argued that the appeal was precluded by petitioner's explicit waiver of his right to appeal his sentence except on certain specific grounds and that petitioner could not "circumvent the terms of the sentence-appeal waiver simply by recasting a challenge to his sentence as a claim of ineffective assistance, thus rendering the waiver meaningless." Id. at 11 (quoting Williams v. United States, 396 F.3d 1340, 1342 (11th Cir.), cert. denied, 546 U.S. 902 (2005)). The government argued in the alternative that the court should decline to consider

petitioner's ineffective-assistance claim in the context of a direct appeal and that, even if the court were to consider petitioner's claim, the record refuted petitioner's suggestion that defense counsel's advocacy was deficient or that it prejudiced petitioner. Id. at 12-17.

In an unpublished per curiam opinion, the court of appeals granted the government's motion and dismissed the appeal. Pet. App. 1-8. After reviewing the record, the court determined that petitioner's appeal waiver was knowingly and voluntarily made, observing that petitioner was specifically advised of the waiver and its scope and that petitioner had confirmed that he understood and agreed to the waiver. Id. at 7. And the court explained that it was "not persuaded" by petitioner's arguments that his appeal waiver should not be enforced against his claim of ineffective assistance because his trial counsel could not have ethically advised him whether to waive his right to pursue an ineffective-assistance claim as part of plea agreement. Id. at 6-7; see id. at 6 (noting that "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'") (quoting Williams, 396 F.3d at 1342). The court noted that petitioner could raise ineffective-assistance-of-counsel claims "unrelated to his sentencing" in a motion under 28 U.S.C. 2255, including any claim that counsel rendered ineffective assistance in advising

petitioner about entering into the proposed plea agreement. Pet. App. 8 n.1.

ARGUMENT

Petitioner contends (Pet. 4-20) that the court of appeals erred in enforcing his appeal waiver in the context of an appellate claim of ineffective assistance of counsel at sentencing, because he was not provided an additional, independent attorney during sentencing to counsel him on the advisability of waiving such a claim. The court's determination that petitioner validly waived his right to appeal his sentence is correct and its unpublished opinion does not directly conflict with any decision of this Court or another court of appeals. Moreover, this case would be a poor vehicle to address the question presented because petitioner cannot establish that he was denied the effective assistance of counsel. Further review is not warranted.

1. This Court has repeatedly recognized that a defendant may validly waive constitutional and statutory rights as part of a plea agreement so long as his waiver is knowing and voluntary. See Ricketts v. Adamson, 483 U.S. 1, 9-10 (1987) (upholding plea agreement's waiver of right to raise double jeopardy defense); Town of Newton v. Rumery, 480 U.S. 386, 389 (1987) (affirming enforcement of plea agreement's waiver of right to file an action under 42 U.S.C. 1983). As a general matter, statutory rights are subject to waiver in the absence of some "affirmative indication" to the contrary from Congress. United States v. Mezzanatto, 513

U.S. 196, 201 (1995). Likewise, even the "most fundamental protections afforded by the Constitution" may be waived. Ibid. Indeed, the very nature of a plea and plea agreement involves a waiver of the Seventh Amendment right to a jury trial. See Hurst v. Florida, 136 S. Ct. 616, 623 (2016) (guilty plea "necessarily" waives right to jury trial); Boykin v. Alabama, 395 U.S. 238, 243 (1969).

Here, petitioner expressly waived his right to appeal his sentence "on any ground," except those grounds enumerated in the plea agreement, none of which was ineffective assistance of counsel. Plea Agreement 17-18. The magistrate judge specifically engaged in a colloquy with petitioner about that appeal waiver before finding that petitioner's plea was knowing, intelligent, and voluntary. Plea Tr. 16-17, 26-27. Petitioner identifies no basis for disturbing that finding. Accordingly, the court of appeals correctly determined that petitioner's knowing and voluntary appeal waiver was valid and enforceable and covered petitioner's challenges to his sentence. Pet. App. 6-8.

Petitioner relies on various state bar ethics advisory opinions concluding that a defense attorney may not advise criminal defendants to waive their right to seek relief on the basis of the attorney's ineffective assistance of counsel. See Pet. 9-11, 14. Those ethics opinions, however, do not purport to address whether a plea agreement including a waiver of the type at issue here is lawful and enforceable. See, e.g., Fla. Bar Ethics Op. 12-1, at

1 (June 22, 2012) ("[W]hether particular plea agreements are lawful, enforceable and meet constitutional requirements are legal questions outside the scope of an ethics opinion."); N.C. State Bar, Ethics Op. RPC 129, at 1 (Jan. 15, 1993) ("Whether a plea agreement is constitutional and otherwise lawful is a question to be determined by the courts."); Supreme Court of Ohio, Bd. of Comm'rs on Grievances & Discipline Op. 2001-6, at 1 (Dec. 7, 2001) ("This opinion does not address whether such waivers are legal or constitutional."); see also Va. State Bar, Legal Ethics Op. 1857, at 2 (July 21, 2011) ("Federal courts have consistently held that such a provision is legally enforceable against the defendant.").

Petitioner also relies on a 2014 memorandum from the former United States Deputy Attorney General instructing federal prosecutors not to seek waivers of ineffective assistance claims in plea agreements. Pet. 10. But the same memorandum explains that "federal courts have uniformly held a defendant may generally waive ineffective assistance claims pertaining to matters other than entry of the plea itself, such as claims related to sentencing." Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, on Department Policy on Waivers of Claims of Ineffective Assistance of Counsel 1 (Oct. 14, 2014), http://www.justice.gov/file/70111/download (Cole Memorandum). And it expresses the Department's "confiden[ce] that a waiver of a claim of ineffective assistance of counsel is both legal and

ethical." Ibid. The memorandum thus provides no ground for further review.

2. Petitioner's assertion (Pet. 4-9) of a conflict between the unpublished and nonprecedential decision below and the D.C. Circuit's decision in In re Sealed Case, 901 F.3d 397 (2018), does not warrant this Court's review.

In In re Sealed Case, the D.C. Circuit concluded that "a generic appeal waiver does not affect a defendant's ability to appeal his sentence on yet-to-arise ineffective-assistance-of-counsel grounds." 901 F.3d at 399. The court did not identify any constitutional or statutory bar against a knowing and voluntary waiver of the right to appeal a sentence on ineffective-assistance grounds. Rather, the court recognized that, in general, "allowing a defendant to waive his right to appeal his yet-to-be-imposed sentence * * * improves the defendant's bargaining position and increases the probability he will reach a satisfactory plea agreement with the Government." Id. at 400 (citation omitted). And it reasoned that enforcing such waivers "serves the important function of resolving a criminal case swiftly and finally." Ibid. (citation omitted).

The D.C. Circuit nevertheless declined to enforce the generic appeal waiver in that case against the defendant's ineffective-assistance claim, because it could not "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." In re Sealed Case, 981 F.3d at 402 (citation omitted; brackets in original). As a "final consideration" supporting its decision, the court stated that, if a generic appeal waiver were interpreted to encompass a claim of ineffective assistance, it would raise a potential conflict of interest for trial counsel. See id. at 403-404 (noting that "an attorney generally cannot advise a client about whether to waive a pending claim against the attorney herself"). And the court expressed disagreement with "[s]everal of [its] sister circuits," including the Eleventh Circuit, that had enforced generic appeal waivers in similar circumstances. Id. at 404 (citing, inter alia, Williams v. United States, 396 F.3d 1340 (11th Cir.), cert. denied, 546 U.S. 902 (2005)). For several reasons, however, the D.C. Circuit's decision does not suggest that further review is warranted in this case.

First, it is not clear that the D.C. Circuit would find petitioner's appeal waiver unenforceable against a claim of ineffective assistance in the circumstances of this case. In In re Sealed Case, the plea agreement provided that the defendant "waive[d] any and all appeals and collateral attacks in this case and agree[d] that this case [would] become final once he ha[d] been sentenced." 901 F.3d at 401 (citation omitted; brackets in original). The court emphasized that neither the district court nor his attorney had adequately advised the defendant that, "by

generically giving up his right to appeal," he was forgoing any appeal alleging ineffective assistance of counsel during sentencing. Ibid. And the court observed that at the defendant's sentencing hearing the government's attorney "appeared to assume" that ineffective assistance claims were not covered by the plea agreement. Id. at 403.

By contrast, although the waiver here did not expressly state that petitioner was waiving his right to appeal his sentence on ineffective-assistance grounds, it made clear that petitioner was giving up his right to appeal the sentence "on any ground" with the exception of the four limited exceptions listed in the agreement. Plea Agreement 17-18. The magistrate judge repeatedly informed petitioner that he retained the right to appeal his sentence on "only [those] four very limited grounds," which she explained to petitioner. Plea Tr. 16-17; see Pet. App. 3-4. And, unlike in In re Sealed Case, there was no apparent confusion about whether ineffective-assistance claims were included within the scope of that waiver. At the close of sentencing, the district court reiterated that petitioner had waived his right to appeal his sentence "unless [the court] sentenced [him] unlawfully," and it stated that, because in the court's view, the court had sentenced petitioner lawfully, it "th[ought] [he] ha[d] no remaining right of appeal." Sent. Tr. 30.

Second, the D.C. Circuit in In re Sealed Case relied in part on its conclusion that, if it enforced the defendant's waiver in

that case, which waived both the right to appeal and the right to seek collateral review, the defendant would be deprived of his "ability to bring an ineffective-assistance claim * * * to vindicat[e] [his] right to counsel at sentencing," 901 F.3d at 403; see ibid. ("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.") (emphasis added). Petitioner's agreement, however, waived only his right to appeal, not his right to bring claims on collateral review. Plea Agreement 17. The court of appeals recognized that, as a result, petitioner remained free to raise ineffective-assistance claims in a motion under Section 2255. See Pet. App. 8 n.1. The court suggested that petitioner, having chosen to assert such a claim on appeal, could not re-raise his ineffective-assistance claim "[]related to his sentencing" on collateral review, ibid., but had petitioner initially raised his ineffective-assistance claim on collateral review, the government would have had no basis for arguing that the plea agreement precluded the court of appeals from resolving that claim.

The fact that petitioner's waiver does not extend to collateral review is particularly noteworthy in the Eleventh Circuit, where a claim of ineffective assistance generally can be adjudicated only on collateral review. See United States v. Khoury, 901 F.2d 948, 969 (1990) ("[A] claim of ineffective

assistance of counsel may not be raised on direct appeal where the claim has not been heard by the district court nor a factual record developed."); see also Massaro v. United States, 538 U.S. 500, 504 (2003) ("[I]n most cases a motion brought under §2255 is preferable to direct appeal for deciding claims of ineffective assistance."). The D.C. Circuit is unusual among the courts of appeals in allowing defendants to raise ineffective assistance claims on direct appeal as well as in collateral proceedings. See United States v. Haight, 892 F.3d 1271, 1278 (2018) ("Unlike most federal courts of appeals, we allow defendants to raise ineffective assistance claims on direct appeal."), cert. denied, 139 S. Ct. 796 (2019). That distinct treatment of ineffective-assistance claims on direct appeal provides a basis not present in other circuits for the D.C. Circuit to decline enforcement, at the direct-appeal stage, of appeal waivers that encompass ineffective-assistance claims.

Third, as the D.C. Circuit itself recognized, any conflict on whether a defendant can waive claims of ineffective assistance at sentencing on direct appeal is "of limited practical significance on a prospective basis." In re Sealed Case, 901 F.3d at 404. The petition provides no evidence that a substantial number of cases would be affected by the question presented. In particular, the 2014 Cole Memorandum instructs federal prosecutors, as a matter of policy, not to seek waivers of ineffective assistance claims in plea agreements. See Cole Memorandum 1. The adoption of that policy suggests the number of cases raising this issue is therefore

small and decreasing, and any decision of this Court on the issue is likely to have a practical effect only in appeals that are already pending, involve plea agreements and appellate waivers with language similar to the agreement in this case, and include a meritorious claim of ineffective assistance of counsel that could be litigated on direct appeal.[1] Although the appeal waiver here -- contained in a plea agreement executed after the Department policy was issued -- did not include an express exception for ineffective assistance claims, as noted, it did not purport to waive such claims on collateral review, the Eleventh Circuit's preferred procedure for adjudicating such claims. See pp. 15-16, supra. And the government sought to enforce the waiver on direct appeal only because petitioner's claim did not result in prejudice or raise "a serious debatable issue that a court should resolve." Cole Memorandum 1; see pp. 17-20, infra.

3. Finally, this case would be a poor vehicle to address the question presented because, even if his appeal waiver allowed

[1] The D.C. Circuit suggested that, if trial counsel were found to have operated under a conflict of interest in negotiating the plea agreement, 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.'" In re Sealed Case, 901 F.3d at 404 (citation omitted). But the court of appeals in this case disclaimed ruling on any claim that petitioner's trial counsel "rendered ineffective assistance in advising [him] about [the] proposed plea agreement," suggesting that such a claim could still be raised on collateral review. Pet. App. 8 n.1.

for such a claim, the record provides no basis to conclude that petitioner received ineffective assistance at sentencing.[2]

To establish ineffective assistance of counsel, petitioner would have to prove both (1) deficient performance and (2) prejudice. See Strickland v. Washington, 466 U.S. 668, 687 (1984). The deficient-performance prong requires a showing that defense counsel's conduct fell below an "objective standard of reasonableness" that would overcome the "strong presumption" that counsel's strategy and tactics fell "within the wide range of reasonable professional assistance." Id. at 688-689. The prejudice prong, in turn, requires a showing that counsel's deficient performance "prejudiced the defense" by demonstrating a "reasonable probability" that, but for counsel's unprofessional errors, "the result of the proceeding would have been different." Id. at 687, 694. Petitioner has failed to establish either prerequisite.

Petitioner argued below that his trial counsel was constitutionally ineffective in failing to object to what he characterized as "the district court's finding that [petitioner's] status as a crewmember alone disqualified him from receiving a minor role adjustment." Pet. C.A. Br. 26. Because petitioner presses this claim on direct appeal, he has not made any

[2] Petitioner does not argue otherwise in the petition, instead contending (Pet. 13-17) only that he received ineffective assistance in connection with the appeal waiver itself. The decision below does not appear to foreclose him from raising that claim on collateral review. See Pet. App. 8 n.1.

evidentiary submissions. And nothing supports his contention that his counsel's performance during sentencing was deficient, or suggests any entitlement to a remand for further development of his claim. To the contrary, his counsel argued at length for a minor-role reduction in his objections to the presentence report, Addendum to PSR 1-2; his sentencing memorandum, Pet. Sent. Mem. 2-7; and at the sentencing hearing, Sent. Tr. 4-7. He then reiterated petitioner's objection to the denial of a minor-role reduction at the close of sentencing, after the district court provided its explanation for the denial. Sent. Tr. 29.

Furthermore, the record reflects that the district court relied on much more than petitioner's "status as a crewmember," Pet. C.A. Br. 26, in denying a minor-role reduction. Indeed, the district court made clear that it was not "denying a role adjustment based on a single factor" -- for which it had previously been reversed by the Eleventh Circuit. Sent. Tr. 9-11. Rather, the court explained that petitioner "ha[d] not, could not, demonstrate that he was materially less culpable than the average participant," id. at 12, based on a host of factors, including (1) "the degree to which [petitioner] understood the scope and structure of the [criminal] activity," id. at 13; (2) "[t]he degree to which [petitioner] exercised decision-making authority," ibid.; (3) "the nature and extent of his participation in the commission of the [criminal] activity," id. at 14; and (4) "the degree to which [petitioner] stood to benefit from the criminal activity,"

ibid., as well as the massive quantity of drugs involved, see id. at 18; see also id. at 24 (explaining that "the street value of th[e] cocaine is somewhere between 20 and $30 million"). In light of this thorough explanation, defense counsel was not deficient in failing to argue that the district court was improperly relying on a single factor.

The record likewise provides no basis to find a "reasonable probability," Strickland, 466 U.S. at 694, that, but for the asserted error, petitioner would have obtained a lower sentence. The district court sentenced petitioner at the bottom of the applicable Guidelines range and "incorporate[d]" its comments about petitioner's role in the offense into its "description of the pertinent offense" for purposes of the Section 3553(a) factors. Sent. Tr. 27. The court added that this was a "serious offense" and that its chosen sentence was necessary "in order to deter others who would consider the same offense, in order to enhance respect for the law, and in order to protect the community." Id. at 28.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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