

IN THE SUPREME COURT OF THE UNITED STATES

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CECILIO CUERO PAYAN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

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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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## 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 OFFERED 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.

In its Brief in Opposition, the government raises several erroneous arguments which will be addressed in the order they were written.

First, the government argues that Mr. Payan has identified no basis for disturbing the finding that his appellate waiver was knowingly and voluntarily entered. (Brief in Opposition, 10). To the contrary, as cited throughout Mr. Payan's Petition, the Court in *In re Sealed Case*, 901 F.3d 397 (D.C. Cir. 2018) explained that "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.'" *In re Sealed Case*, 901 F.3d at 404 (quoting, *United States v. Guillen*, 561 F.3d 527, 530 (D.C. Cir. 2009). Accordingly, contrary to the government's first argument, Mr. Payan has identified a basis for relief.

Second, the government argues that the various state bar association ethics opinions that have found that defense counsel cannot ethically advise a criminal defendant concerning a waiver of the right to pursue an ineffective assistance of counsel claim do not address the issue of whether such waivers are enforceable. (Brief in Opposition, at 10-11). The government is correct. However, the opinions

strongly support the conclusion that such waivers should be deemed unenforceable. Accordingly, the government's second argument simply does not provide a basis to decline review.

Third, the government argues that the 2014 memorandum from the former United States Deputy Attorney General instructing federal prosecutors not to seek waivers of ineffective assistance claims in plea agreements also does not provide a basis for review. (Brief in Opposition, at 11). Again, the government is correct. However, as with the aforementioned ethics opinions, the memorandum strongly supports the conclusion that such waivers should be deemed unenforceable. Accordingly, the government's third argument likewise simply does not provide a basis to decline review.

Fourth, the government argues that "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." (Brief in Opposition, at 13). To the contrary, the D.C. Circuit explicitly found "that a generic appeal waiver does not reach claims of ineffective assistance of counsel at sentencing," and that "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.'" *In re Sealed Case*, 901 F.3d at 404. Accordingly, the government's fourth argument is disingenuous and does not provide a basis to decline review.

Fifth, the government apparently argues that in the Eleventh Circuit claims of ineffective assistance of counsel must be brought by way of a collateral proceeding, that Mr. Payan's waiver does not preclude him from raising a claim of ineffective assistance of sentencing counsel in a collateral proceeding, and that the appellate waiver is therefore enforceable because it will not prejudice Mr. Payan. (Brief in Opposition, at 14-16). The government's argument reflects a fundamental misunderstanding of Eleventh Circuit case law. First, claims of ineffective assistance of counsel can be brought on direct appeal in the Eleventh Circuit. *See, United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir. 2002) (Observing that if the record is sufficiently developed the court will consider an ineffective assistance of counsel claim on direct appeal). Second, the Eleventh Circuit has interpreted sentence appeal waivers such as the one contained in Mr. Payan's plea agreement as barring criminal defendant's from pursuing claims of ineffective assistance of sentencing counsel not only on direct appeal but, also, through collateral proceedings. *See, Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (Concluding that a sentence appeal waiver precludes a defendant from arguing that his counsel performed ineffectively during sentencing in a collateral proceeding). Accordingly, the government's argument that Mr. Payan was not prejudiced by the Eleventh Circuit's enforcement of the appellate waiver is wholly erroneous, as enforcement of the waiver means Mr. Payan will never be able to raise a claim of ineffective assistance of sentencing counsel, despite the fact he was not provided



with conflict free counsel to counsel him as to the advisability of waiving such a claim. *See, Id.*

Sixth, the government argues that the 2014 memorandum instructing federal prosecutors not to seek waivers of ineffective assistance claims in plea agreements means that the number of defendants impacted by this issue is small and decreasing. (Brief in Opposition, at 16-17). To the contrary, 5 years after the memorandum was issued, and despite being expressly directed not to seek such waivers, federal prosecutors are still seeking enforcement of such waivers and doing so as a standard practice in one of the busiest districts in the nation for criminal filings - the Middle District of Florida. *See, e.g., United States v. Pannullo*, 709 F. App'x 683 (11th Cir.), cert. denied, 139 S. Ct. 65, 202 L. Ed. 2d 45 (2018); *United States v. Hanlon*, 694 F. App'x 758, 759 (11th Cir. 2017), cert. denied, 138 S. Ct. 1032, 200 L. Ed. 2d 258 (2018) (It should be noted that at the time this Court denied review in *Pannullo* and *Hanlon*, the conflict case of *In re Sealed Case*, 901 F.3d 397 (D.C. Cir. 2018) had not yet been decided). Furthermore, the 2014 memorandum, which is simply being ignored in the Middle District of Florida, may be rescinded at any time. Accordingly, the government's argument that it is unnecessary for this Court to grant review and put an end to the practice of enforcing waivers of claims of ineffective assistance of counsel which have not been entered into with the assistance of conflict free counsel is mistaken.

Seventh, the government argues that Mr. Payan's case would provide a poor vehicle for review because he has not demonstrated that his sentencing counsel

performed ineffectively. (Brief in Opposition, at 17-20). However, the question of whether Mr. Payan's sentencing counsel performed ineffectively is simply not before this Court. The Eleventh Circuit made no finding as to whether sentencing counsel performed ineffectively and, instead, found simply that Mr. Payan was precluded from raising such a claim by his appellate waiver. Accordingly, the issue before this Court is simply whether an appellate waiver precludes a defendant from raising a claim of ineffective assistance of counsel on appeal where he has not been provided with a conflict free attorney to counsel him as to the advisability of agreeing to the waiver. Consequently, Mr. Payan's case is the ideal case to review this issue, as Mr. Payan has asked this Court to review only the validity of his purported waiver of the right to pursue a claim of ineffective assistance of counsel, the resolution of which will impact criminal defendants throughout the nation, and to leave the issue of whether Mr. Payan has proven he was deprived of his right to the effective assistance of counsel during sentencing to the Eleventh Circuit to decide.

Accordingly, for the reasons set forth above and in Mr. Payan's Petition, 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.

## CONCLUSION

For the reasons stated above and in Mr. Payan's Petition, 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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