No. _____

In The

Supreme Court of the United States

FLAVIO TAMEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The courts of appeals are divided over whether a criminal defendant's generic waiver of his right to appeal or bring a collateral attack can knowingly waive the defendant's specific right to bring a claim of ineffective assistance of counsel. Where, as here, a criminal defendant's waiver of his right to bring a collateral attack does not mention a claim of ineffective counsel, can that waiver ever be construed as a knowing waiver of the right to challenge his counsel's constitutional effectiveness?

2. In *Jae Lee v. United States*, this Court held that counsel's erroneous advice regarding the immigration consequences of his guilty plea could render the defendant's waiver of his right to trial not knowing. Does the rationale of *Lee* apply here, where Petitioner alleged the counsel's erroneous advice regarding his possible sentence rendered Petitioner's decision to waive his right to appeal the sentence not knowing?

3. In support of his request for certificate of appealability, Petitioner presented the court of appeals with lengthy cogent arguments supported by ample citations to precedent and record showing that the district court had committed legal error. The Fifth Circuit denied the COA in a brief order that neither acknowledged Petitioner's arguments nor explained the court's decision. Was this unexplained decision so arbitrary that it deprived the Petitioner of his right to due process under the Fifth Amendment?

QUESTIONS PRESENTED – Continued

In the alternative, should this court exercise its supervisory powers to vacate the lower court's decision where that unexplained decision precludes this court from any meaningful review of the basis of the Fifth Circuit's decision?

4. The Petitioner demonstrated that the district court, in denying Petitioner's petition under 28 U.S.C. § 2255 committed legal error by, among other errors, wrongly applying the law of the case doctrine, but the Fifth Circuit denied the COA without explanation. Was the Fifth Circuit's erroneous application of the COA standard so far below the expected performance of a federal court of appeals that this court should reverse the decision of the lower court?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

STATEMENT OF RELATED CASES

- *United States v. Flavio Tamez*, No. 0:2013dcrim40438, U.S. District Court for the Southern District of Texas. Judgment entered/case closed May 16, 2013
- *United States v. Flavio Tamez*, No. 0:2013dcrim40928, U.S. Court of Appeals, Fifth Circuit. Judgment entered/case closed December 10, 2015
- *United States v. Flavio Tamez*, No. 0:2013dcrim41176, U.S. Court of Appeals, Fifth Circuit. Judgment entered/case closed December 13, 2018
- *Flavio Tamez v. United States, et al.*, No. 0:2018usc41149, U.S. Court of Appeals, Fifth Circuit. Judgment entered/case closed
- *United States v. Flavio Tamez, et al.*, *No.* 2:2012cr00418, U.S. District Court for the Southern District of Texas. Judgment entered/case closed March 31, 2013
- *Tamez v. United States*, No. 2:2015cv00156 (file docketed in 2:12cr418) U.S. District Court for the Southern District of Texas. Judgment entered/case closed June 23, 2015

STATEMENT OF RELATED CASES – Continued

- *Tamez v. United States*, No. 2:2017cv00089 (file docketed in 2:12cr418) U.S. District Court for the Southern District of Texas. Judgment entered/case closed September 26, 2017
- *Tamez v. United States*, No. 2:2017cv00083 U.S. District Court for the Southern District of Texas. Judgment entered/case closed October 10, 2018

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PETITION FOR WRIT OF CERTIORARI

Petitioner Flavio Tamez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

ORDER DENYING ISSUANCE OF CERTIFICATE OF APPEALABILITY FROM UNITED STATES FIFTH CIRCUIT COURT OF APPEALS 12/13/2013 (EDITH JONES, JUSTICE) IS REPRODUCED IN Appendix A.

MEMORANDUM OPINION AND ORDER FROM DISTRICT COURT SOUTHERN DISTRICT OF TEXAS 1/18/2018 (NELVA GONZALES RAMOS, DISTRICT JUDGE) Appendix B.

MEMORANDUM OPINION AND ORDER FROM DISTRICT COURT SOUTHERN DISTRICT OF TEXAS 9/26/2017(NELVA GONZALEZ RAMOS, DISTRICT JUDGE) IS REPRODUCED IN Appendix C.

ORDER (PER CURIAM) GRANTING MOTION TO DISMISS APPEAL AND DENYING MOTION FOR EXTENSION OF TIME FROM UNITED STATES FIFTH CIRCUIT COURT OF APPEALS 1/26/2016 (CLEMENT, ELROD AND SOUTHWICK IS REPRODUCED IN Appendix D.

ORDER (PER CURIAM) ORDER DENYING MOTION FOR RECONSIDERATION AND REHEARING

EN BANC FROM UNITED STATES FIFTH CIRCUIT COURT OF APPEALS ___ 2/19/2019 ___ (JONES, ELROD, AND ENGELHART, JUSTICES) IS REPRODUCED IN Appendix E.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its original panel opinion on December 13, 2018. Requests for rehearing were denied on February 19, 2019. This Court's jurisdiction is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution which provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." 28 U.S.C. § 2255 and its interplay with the Sixth Amendment of the United States.

STATEMENT OF THE CASE

Since 2013, Petitioner has maintained two consistent positions. First, he accepts that he is factually and legally guilty of conspiracy to possess marijuana with intent to distribute and money laundering. For that reason, Petitioner pleaded guilty and has never sought to challenge his conviction. On the other hand,

Petitioner does not accept that the government's sentencing arguments, which the district court accepted, are either factually or legally correct.

In Petitioner's pro se proceeding under 28 U.S.C. § 2255, from which this petition for certiorari arises, Petitioner argued that his appeals had been dismissed because of his appellate counsel's constitutionally deficient performance. The petition for habeas relief also raised issues of ineffective assistance at the trial level, neither of which issues had never been litigated nor developed or addressed before any court of review.

The district court's reasoning in the dismissal of the Petitioner's pro se § 2255 proceeding ignored the standards applicable to all lower courts as set by this court regarding claims of deprivation of the guarantees of the Constitution's Sixth Amendment right to counsel; and as such impermissibly prevented any inquiry or factual development on this issue. For that reason, the court of appeals should have issued Petitioner a certificate of appealability, but the court of appeals denied his request without explanation. Petitioner now seeks certiorari review in this Court.

FACTUAL BACKGROUND

CRIMINAL CONDUCT CHARGED

In 2012, Petitioner was charged for his role in a conspiracy with a man named Jose Carbajal, who transported marijuana around the Falfurrias, Texas border patrol checkpoint on Texas Highway 281. Carbajal was

a critical link for the marijuana transporters that needed to get north of the checkpoint with their product. Getting around the checkpoint was a logistical part of the process. Once the marijuana had circumvented the checkpoint, Carbajal's workers would then deliver the loads to the respective transporters. These loads were then transported by the transporters (such as the Petitioner) to each of their own separate and distinct individual customers in the United States. Thus, while Carbajal was linked by agreements to each of the transporter middlemen such as Petitioner, the separate transporters were linked by agreement only to Carbajal and a specific distributor.

On July 25, 2012, a superseding indictment charged Petitioner with one count of possession of marijuana with intent to distribute and one count of money laundering. Petitioner was initially represented by attorney Omar Escobar. Based on Mr. Escobar's correct advice, Petitioner understood that he was factually and legally guilty of the conspiracy and money laundering charges. But based on Mr. Escobar's badly mistaken advice, Petitioner believed that the government would not have been legally able to argue for any sentence greater than the range that the guidelines required for the amount that Petitioner had agreed to transport.

Mr. Escobar presented Petitioner with the government's proposed plea agreement in which Petitioner would waive his right to appeal and his right to collaterally attack his conviction or sentence in exchange for the government arguing for the low-end of

the guideline range. Based on Mr. Escobar's erroneous advice, therefore, Petitioner believed he would be waiving these rights in exchange for the government's argument for a sentence exposure for only the amount of marijuana which Petitioner had jointly undertaken to move with Carbajal; Mr. Escobar did not advise the Petitioner that his plea agreement would expose him to punishment based on over 30,000 kilograms of marijuana. The amount of marijuana which the Petitioner had jointly undertaken to move with Carbajal was nowhere near 30,000 kilograms. Escobar's advice was very wrong.

Relying on Escobar's inaccurate advice, Petitioner signed the plea agreement on October 4, 2012.

After Petitioner's signing of the plea agreement, Mr. Escobar withdrew to seek political office. Petitioner was represented at sentencing by attorneys Ramirez and Ramos. At the March 6 hearing, Petitioner learned how badly Mr. Escobar's advice had mischaracterized what range of sentence the government would seek. The government attorney argued that Petitioner should be held responsible for all of the marijuana transported by Carbajal's entire operation, even the marijuana transported before Petitioner joined the alleged conspiracy. (The attorney for the government had to later concede that such an argument was foreclosed by circuit precedent).

The transcript of the March 6 hearing demonstrates that attorney Ramirez and the government's attorney were in dramatic disagreement regarding

their understanding of the plea agreement on sentencing. Ramirez explained he was not prepared to go forward to present his client's plea as he had not expected the government was advancing such a position. Given the very disparate positions advanced by the two attorneys, the court halted the proceeding and deferred the sentencing hearing until March 28, 2013.

At the subsequent hearing, Attorney Ramirez explained to the court that previous counsel for Mr. Tamez (Escobar) had provided faulty advice to Petitioner regarding the consequences of the plea offer. Counsel Ramirez was critical of Escobar and his representation of Tamez and argued that Tamez was not properly advised by former counsel Escobar. The trial court was given information that raised issue as to whether Attorney Escobar had provided competent counsel in the formulation of the plea, particularly regarding Petitioner's exposure to punishment. Prior to sentencing, Attorney Ramirez related that Petitioner wished to withdraw his plea because, he did not want to forego his right to challenge the government's sentencing and guideline calculation arguments (if they succeeded) on direct appeal.

Attorney Ramirez requested that the court allow Petitioner to withdraw his plea because it would be unjust to continue to sentence Petitioner with the appeal waiver in place based on the fact that he had received faulty advice from his previous attorney.

Ramirez was informing the court that prior counsel, Omar Escobar had provided defendant erroneous

if not incompetent advice regarding the sentencing calculations. Ramirez argued that he and his client wanted to preserve the right to appeal. The trial court took action that it would bilaterally dissolve the appeal waiver and the plea agreement, thus allowing Petitioner to maintain his right to appeal and releasing the government from any limitation in performing any of its obligations under the dissolved agreement. The government argued against this result by stating that Petitioner's plea was knowing and voluntary and so he should be bound by the waiver. Ramirez responded that defendant was properly making the request at this stage because it was being made before sentencing.

The district court received the government's evidence and factual and legal arguments, including its argument that Petitioner was a leader of five or more persons.

The court determined the resulting guideline range was 324 to 405 months, which was level 41 at criminal history category I. The court sentenced Petitioner to 324 months.

THE FIRST APPEAL AND ITS DISMISSAL

Petitioner timely filed a notice of appeal with the Fifth Circuit Court of Appeals on April 15, 2013. This first appeal was docketed as Case No. 13-40438 by the appellate circuit court. (D.E. 684). Petitioner retained attorney Larry Warner to represent him in this appeal. Warner's actions as Petitioner's counsel thereafter

should under any objective standard be considered unquestionably deficient and definitely harmed the Petitioner.

On May 16, 2013, the clerk of the Fifth Circuit dismissed the appeal for want of prosecution because appellate counsel, Larry Warner, failed to timely order the necessary transcripts or make financial arrangements with the court reporter. (D.E. 715). On May 22, 2013, Defendant, through Counsel Warner, filed a motion to reinstate his appeal, which the Fifth Circuit denied on July 9, 2013 because Defendant failed to remedy the default within 45 days from the date of dismissal. (App. D.E. 5/28/2013, 7/9/2013). Defendant next filed an unopposed motion for reconsideration, which was denied. (App. D.E. 7/9/2013, 10/21/2013). Counsel Warner then filed an unopposed motion for review by panel, which was also denied. (App. D.E. 10/31/2013, 1/16/2014). He next filed a petition for rehearing en banc; however, the Fifth Circuit declined to rule on the petition because it had already issued its final ruling. (App. D.E. 1/31/2014). Subsequently, attorney Warner filed a petition for a writ of certiorari with the Supreme Court, which was denied. (D.E. 4/22/2014, 5/20/2014).

THE TRIAL COURT'S FINDING OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WARNER

Then on December 31, 2014 in an apparent further attempt by Warner to rectify the effect of the cascade of his errors and omissions, he filed on defendant's

behalf a motion to reenter the judgment with the district court wherein he sheepishly attempted to explain his failure to file the appellate transcript by stating that he "*failed to supervise his assistants very carefully in the transition between a retiring assistant and a new assistant,"* and the appeal was dismissed "*[a]s a result of [his] not precisely monitoring the filing of the transcript order forms and the locating and prompt payment of all five court reporters."* (D.E. 820, p. 2).

On March 4, 2015, the trial court denied the motion to reenter judgment (D.E. 829) and correctly recognized the legal standard set by this court applicable to the situation before her in her memorandum opinion: "When an attorney fails to file or perfect an appeal on behalf of his client, it is *per se* ineffective assistance of counsel, regardless of the merits of the appeal." Citing *Roe v. Flores-Ortega*, 528 U.S. 470, 483-86 (2000); *United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007).

On April 1, 2015, Mr. Warner finally filed a petition under 28 U.S.C. § 2255 in which he again asserted sheepish excuses pointed at his assistants and to the different court reporters from whom he had to pay but did not. However, the attorney managed to acknowledge "that he now presents this claim against himself so that the court may reconsider reinstating applicant's appeal." (D.E. 833).

It is important to note that the government's position as per its pleadings to this point fully recognized that Petitioner was entitled to seek appellate review. In two separate pleadings, the government

affirmatively states that the district court had restored Petitioner's right to appeal. (See D.E. 828 at p. 2 and D.E. 842 at p. 10).

Consistent with this court's precedents, and Fifth Circuit precedent, the district court granted Petitioner the § 2255 relief as requested, re-entering judgment of conviction, on June 23, 2015.

Petitioner via attorney Warner then again timely filed notice of appeal, which the Fifth Circuit docketed as No. 15-40928.

THE DISMISSAL OF APPEAL NO. 15-40928 BY THE FIFTH CIRCUIT COURT OF APPEALS

In that second appeal, Mr. Warner did manage to file an opening brief. In response, on November 16, 2015 the government filed a motion to dismiss Petitioner's appeal or in the alternative for an extension of time to file its response brief. (COA Dkt. # 15-40928), the government did not present direct response to any of the issues raised in the Petitioner's brief. Instead, the government's motion to dismiss was predicated on an argument that the district court had lacked the power to reinstate Petitioner's right to appeal in the way that it did. In support, the government relied on *United States v. Serrano-Lara*, 698 F.3d 841 (5th Cir. 2012), but in that case the Fifth Circuit had merely held that a district court lacked the power sua sponte to excise an appeal waiver ***after*** sentencing. *Serrano-Lara*, thus does not address the procedure the district

court used to reinstate Petitioner's appeal right **prior to** sentencing.

In every instance, irrespective of the type of plea agreement involved, a defendant may, as a matter of right, withdraw his guilty plea before it has been accepted by the district court. See Fed.R.Crim.P. 11(d)(1). "Rule 11(d)(1) is an absolute rule: a defendant has an absolute right to withdraw his or her guilty plea before the court accepts it." *United States v. Arami*, 536 F.3d 479, 483 (5th Cir. 2008). The Court may also reject a plea agreement as authorized by Rule 11(c)(5) CCP. This is what the Court did in this instance. The Court allowed the defendant to proceed without a plea agreement and relieved the government of its obligations under the plea agreement.

Mr. Warner thus had at least two strong arguments in response to the government's motion to dismiss: (1) the government's less than candid argument was wrong on the merits (the facts of this case did not present a *Serrano-Lara* situation, they presented an 11(c)(5) situation and (2) in any event, because the government twice took a different position in the district court (See D.E. 828 at p. 2 and D.E. 842 at p. 10). This new argument should have been barred by collateral estoppel. Instead, Mr. Warner argued and did . . . nothing.

Service on Mr. Warner of the Government's motion to dismiss was on 11/16/2015. The Docket entry of the notice indicates that Warner was notified that Appellant's answer to that motion was due within 10 days of

said service under Rule 27(a)(3)(A). Despite notice, appellate counsel filed no response to the motion.

The appeal docketed as No. 15-40928 was summarily dismissed by the circuit court on December 10, 2015. (Appendix D).

The government had filed no reply brief and no other objection or direct response to the merits of the arguments in Petitioner's brief. The government filed no pleading controverting the factual basis asserted in the 2255 application filed by Warner. They did not contest the judicial admissions of attorney Warner in the 2255 applications that he had previously filed suggesting his ineffective assistance.

After the Fifth Circuit issued it summary dismissal of this second appeal, predicated on a motion that he did not even bother to answer by the required answer date set by the circuit court, Mr. Warner following almost a pattern fruitlessly sought rehearing from the court of appeals and again sought certiorari review from this court, which denied the petition on June 1, 2016.

THE PETITIONER FILES A PRO SE PETITION UNDER 28 U.S.C. § 2255

After Warner's twice botched efforts, on March 2, 2017, Petitioner filed pro se a petition under 28 U.S.C. § 2255 seeking to have his right to appeal reinstated. Petitioner therein argued that Mr. Warner's failure to oppose the government's motion had been

constitutionally deficient and Petitioner had been prejudiced when he (again) lost his right to present an appeal. Petitioner also presented the facts of the dismissal of the first appeal due to the attorney's failure to pay for the transcripts and his botched efforts to reinstate.

Petitioner in his pro se 28 U.S.C. § 2255 petition asserted two other grounds on which he could have obtained relief: Petitioner argued that if the government had been correct in arguing that the district court lacked the power to reinstate Petitioner's right to appeal using the procedure the court employed, then Mr. Ramirez had been constitutionally ineffective in acquiescing in the district court's use of the wrong procedure. And, even if Mr. Ramirez's efforts had been impossible to achieve, then Petitioner's initial agreement to waive his right to appeal had not been "knowing" because it had been made based on Mr. Escobar's wrong legal advice about Petitioner's possible sentence.

The district court order of denial of relief requested by Tamez tracked the government's argument, accepting that the law of the case doctrine was applicable to preclude litigation of § 2255 issues. It simply is not.

The court reasoned that in granting the government's motion to dismiss, the Fifth Circuit must have implicitly concluded that Petitioner's appeal waiver

was effective, which led the district court to the remarkable conclusion that some unarticulated conclusion in the Circuit Court summary dismissal order of the previous appellate cause number now exerted a preclusive effect on any attempt of the pro se litigant to raise any collateral attack, including any § 2255 matter and including any ineffective assistance of counsel claim that may have been the root cause of the waiver having been not knowingly agreed to.

As to Petitioner's claim that his waiver was not knowingly and voluntarily made because of counsel Escobar's erroneous advice, the district court merely concluded that the transcript of Petitioner's guilty plea did not evidence that the plea was unknowing. The question is not what Petitioner said at his plea, the question is whether the Petitioner's counsel during the plea negotiation stage had properly advised Petitioner and whether improper or ineffective advice had been relied upon to enter the agreement. See *Jae Lee v. United States*, supra.

ARGUMENT

I. The Fifth Circuit erred as a matter of law when it denied Petitioner a Certificate of Appealability where the District Court's decision dismissing Petitioner's claims was unquestionably legally erroneous.

The standard for a certificate of appealability is not impossible to meet; in fact it is not particularly onerous: a litigant need only show that the district court's decision is debatable. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In the next sub-section, Petitioner shows that the district court's decision pivoted on its application of the law of the case doctrine. In the following two subsections, Petitioner shows that the decision was plainly wrong regarding Petitioner's claim that his appellate waiver had not been knowing and was unquestionably wrong regarding Petitioner's claims that his appellate and sentencing counsels were ineffective.

A. The District Court wrongly viewed the Law of the Case Doctrine as an Absolute Bar.

The district court's denial of the pro se 28 U.S.C. § 2255, was based upon acceptance of the government's argument that relief sought was precluded by the circuit court's dismissal of the prior filed appeal by counsel Warner. Cause #15-40928 in the Fifth Circuit.

As stated above, Counsel Warner had managed to develop this appeal to the point of filing an opening brief. This was a quantum leap from the first appellate visit which the Fifth Circuit dismissed before any filings because of counsel's failure to pay for or file a record. By all reasoning, this brief should have framed the issues to be addressed by the court of appeals and to which a response should have been filed in cause #15-40928.

No direct factual or legal response was filed by the government to the issues asserted in Petitioner's brief. Instead it filed a dilatory motion to dismiss the appeal with a request for an extension of time to respond to the Petitioner's brief. The government argued for the first time that the district court had exceeded its powers when it had ruled that Petitioner's appellate waiver had been dissolved.

No response, reply or objection was offered to the government's motion by appellate counsel Warner within the time period by which Warner was directed to file such. The Fifth Circuit dismissed Petitioner's appeal with thirteen operative words and without any discussion, analysis or apparent rulings on any of the issues presented in Petitioner's brief.

Following the pattern of his actions in the previous dismissal caused by Counsel Warner, he filed on behalf of Petitioner's requests for rehearing and ultimately certiorari from this court.

On March 2, 2017, Petitioner timely filed his pro se petition under 28 U.S.C. § 2255 seeking to have his

appeal right reinstated. Petitioner made three related arguments. First, he argued his appellate counsel had been constitutionally deficient in failing to oppose or respond to the government's motion to dismiss. Second, Petitioner argued that if appellate counsel's efforts would have been futile, then sentencing counsel had been ineffective in failing to ensure that the district court used an effective procedure to reinstate Petitioner's right to appeal. And, third, Petitioner argued that if sentencing counsel's efforts would also have been futile, then based on his plea counsel's erroneous legal advice, Petitioner's decision to waive his appeal right had been not knowing. These issues had not been judicially addressed or litigated in any prior proceeding.

On September 26, 2017 the district court ruled on Petitioner's pro se 28 U.S.C. § 2255 motion. The district court order tracked the government's arguments and held that in its dismissing Petitioner's appeal, the Fifth Circuit had implicitly found that Petitioner's waiver had been knowing and that the district court had not reinstated Petitioner's right to appeal. (See Appendix C).

Courts use "the law of the case" in many contexts. The basic doctrine is straightforward: "The law of the case" doctrine generally provides that when a court decides upon a rule of law, that decision should continue to the same issues in subsequent stages of the same case. *Musacchio v. United States*, 577 U.S. ___, 193 L.Ed.2d 639 (2015). The law of the case doctrine governs subsequent stages of the same proceeding while

the term claim preclusion generally is the appropriate one when the same issues arise is a different proceeding. See *Currier v. Virginia*, 585 U.S. ___, 201 L.Ed.2d 650, 662 (2018). Similarly when a district court has the same case after remand from the court of appeals, "[t]he law of the case doctrine prohibits a district court from reviewing or deciding issues that have been decided on appeal, whether expressly or by implication." *United States v. Clark*, 816 F.3d 350, 361 (5th Cir. 2016).

The case before this court was not on remand. And the application of the doctrine to assume by "implication" that the issues raised by the pro se § 2255 petition were fully developed and litigated is not warranted. The government failed to even respond to any of the issues raised by Counsel Warner in the previous appeal.

The 13-word order of the Fifth Circuit order which both the government and the district court considered was now exerting a preclusive effect under the law of the case doctrine. A big flaw is that the issues sought to be precluded from "relitigation" (those defined by the appellant's brief) were never developed or litigated in the appellate court.

Further to assume that the 13 words of the prior appellate order was the result of a fair and full litigation of the issues presented in either of § 2255 applications or the issues raised for appellate review by the Appellant's brief is simply not tenable. There is no mutual identity of the issues.

Here, the district court plainly erred when it misapprehended this distinction.

The district court concluded that it was prohibited from addressing issues in the pro se 28 U.S.C. § 2255 proceeding under a theory that the issues raised in this new pro se petition been decided by implication. (See Appendix B, at 6-7). The Eleventh Circuit explained in *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544, 1550 n. 3 (11th Cir. 1990), "[w]hile the law of the case does not bar litigation of issues 'which might have been decided but were not,' . . . it does require a court to follow what has been decided explicitly, as well as by necessary *implication*, in an earlier proceeding. . . ."

The law of the case doctrine, however, "does not bar consideration of matters that could have been, but were not, resolved in earlier proceedings." *Thomas v. United States*, 572 F.3d 1300, (11th Cir. 2009) (analyzing the application of the law of the case doctrine to a 2255 claim of ineffective assistance of counsel after a dismissed appeal) and citing *Luckey v. Miller*, 929 F.2d 618, 621 (11th Cir. 1991) and *Lehrman v. Gulf Oil Corp*., 500 F.2d 659, 663 (5th Cir. 1974).

Even considering that this order was entered under the backdrop of the Government's unopposed motion to dismiss this appeal arguing that because the trial court lacked the power to reinstate Petitioner's right to appeal in the way that it did; the questions remain . . . *Did this order dispose of the issue of whether the appellate court explicitly or implicitly dispose of the*

issues of whether the defendant was afforded his Sixth Amendment Guarantees and whether the waivers of defendant were knowing and voluntary?[1]

These issues **could have** been explicitly addressed by the appellate court order dismissing the appeal – but they were not so addressed.

If the district court's view of the law of the case doctrine as an absolute bar to ineffective assistance of counsel claims were correct, any prisoner's habeas application under 28 U.S.C. § 2255 of any Sixth Amendment claims regarding either appellate counsel and/or trial counsel after any appeal would be meaningless as such would be barred, regardless of merit. Such illogical result could not have been Congress's intent in enacting § 2255; nor could it have been the intent of this court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).This court in *Massaro v. United States*, 538 U.S. 500, 504 (2003), clearly announced "We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal." See also *Blake v. United States*, No. 10-628, 2012 WL 1133946, at *4 (S.D. Ill. Apr. 4, 2012) (ineffective-assistance claim was not procedurally defaulted where the defendant previously asserted the claim in a Rule 33 motion but did not raise it on direct appeal); *Feliciano v. United States*, No. 01

[1] Further if the government were to respond to either of these questions "yes," the question then is: . . . Upon what facts **could** this appellate circuit court have relied upon to make such determination without a separate factual inquiry?

Civ. 9398, 95 CR. 941, 2004 WL 1787005 (S.D.N.Y. Aug. 10, 2004) (same). *United States v. Flores*, 739 F.3d 337, 341 (7th Cir. 2014) (stating that *Massaro* "held that a defendant is never obliged to raise an ineffective-assistance argument on direct appeal held, in other words, that it is always safe to reserve the issue for collateral review"). This clear line of authorities serve applicable to demonstrate that the trial court's denial of Petitioner's § 2255 was error that should be reviewed as such by this Court.

B. The District Court Unquestionably Erred When It Dismissed Petitioner's Claim That His Appeal Waiver Had Not Been Knowing.

In his § 2255 pro se application, Petitioner alleged that his decision to waive his appeal right when he signed the plea agreement on October 4, 2012, had been based on the erroneous advice given by his counsel, Mr. Escobar, regarding Petitioner's possible exposure at sentencing. It was alleged that but for Mr. Escobar's legally erroneous advice concerning sentencing Petitioner would not have waived his right to appeal. That allegation was supported by uncontroverted affidavits from Petitioner and sentencing counsel, Mr. Ramirez.

Prior to sentencing of Mr. Tamez, Mr. Ramirez alerted the trial judge of the deficient advice of Escobar. This was an unquestionably viable claim proper

for presentment and factual development to a district court under 28 U.S.C. § 2255.

In *Jae Lee v. United States*, 582 U. S. ___, 137 S.Ct. 1958, 198 L.Ed.2d 476 (2017), this court addressed a claim very similar to Petitioner's. In *Lee*, the criminal defendant argued that his waiver of his right to trial had not been knowing because it had been based on erroneous legal advice and but for that advice, he would have gone to trial. This Court agreed, recognizing that but for his counsel's erroneous legal advice regarding Petitioner's sentencing exposure he would likely never have waived his right to appeal his sentence.

In *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000), this Court held that the loss of a right to appeal was presumptively prejudicial under ***Strickland***. And just this year, this Court held that the Flores-Ortega rule of presumptive prejudice would even apply in the face of an appellate waiver. *Garza v. Idaho*, 586 U.S. ___, 139 S.Ct. 738, 203 L.Ed.2d 77 (2019).

In addition to the limitations of the law of the case doctrine to preclude subsequent presentation of issues actually litigated, an exception to the application of the doctrine is applicable when relevant evidence is newly available or a different mix of law and fact presents itself than was ruled upon earlier. See, e.g., *Rogers v. Valentine*, 306 F. Supp. 34, 41 (S.D.N.Y. 1969) (because the first judge, at the time of his decision, did not have the benefit of later developments in this case, a redetermination of the application of pendent

jurisdiction was appropriate), aff'd, 426 F.2d 1361 (2d Cir. 1970).

The motion panel of the circuit court had no presentation of evidence and no factual development of any prisoners § 2255 claim allegations other than the uncontroverted § 2255 pleading itself and its exhibits. The Petitioner's pro se § 2255 was legislatively designed for the development and presentation of "new" evidence in the district court forum. Warner's failure to timely respond was a "new" omission that deserved a forum for development. Surely this court will, and the lower courts should have recognized that at minimum, the failure to respond to a motion to dismiss was a deviation so serious that counsel was not functioning "as the 'counsel' guaranteed the defendant by the Sixth Amendment." See *Strickland*, 466 U.S. at 687.

The 28 U.S.C. § 2255 procedures for the development of these claims for all prisoners and the attendant rights to use this avenue for the presentation of facts (undeniably existent in this case) was denied to Petitioner based on sophistry that these issues were precluded by the law of the case doctrine.

In *Massaro v. United States*, 538 U.S. 500 (2003), this Court has stated:

> "ineffective-assistance claims ordinarily will be litigated in the first instance in the district court, the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial. The

> court may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance. See, *e.g.*, *Griffin*, *supra*, at 1109 (In a §2255 proceeding, the defendant "has a full opportunity to prove facts establishing ineffectiveness of counsel, the government has a full opportunity to present evidence to the contrary, the district court hears spoken words we can see only in print and sees expressions we will never see, and a factual record bearing precisely on the issue is created"); *Beaulieu v. United States*, 930 F.2d 805 (CA10 1991) (partially rev'd on other grounds *United States v. Galloway*, *supra*). In addition, the §2255 motion often will be ruled upon by the same district judge who presided at trial. The judge, having observed the earlier trial, should have an advantageous perspective for determining the effectiveness of counsel's conduct and whether any deficiencies were prejudicial. The ruling of the trial court is a serious deviation from this court's correct application of the legislative intent of the § 2255 motion."

There does not appear to be any part of the district court's ruling on this claim that was free from legal error. When Petitioner demonstrated these errors in his request for a certificate of appealability, he demonstrated that he met the necessary standard and was entitled to the certificate. The Fifth Circuit's unexplained denial was error as a matter of law.

C. The District Court Unquestionably Erred When It Dismissed Petitioner's Claims For Ineffective Assistance of Appellate Counsel and Sentencing Counsel.

Petitioner's claims in his § 2255 petition called for straightforward application of the Strickland ineffective assistance of counsel standard. Petitioner first argued that his appellate counsel had been ineffective in failing to file any opposition in response to the government's motion to dismiss. In the alternative, Petitioner argued that if appellate counsel's arguments would have been futile, then his sentencing counsel must have been ineffective for failing to request the district court to use an appropriate, effective procedure to reinstate Petitioner's appeal right.

Petitioner first addresses the issues regarding appellate counsel and then those involving sentencing counsel.

Petitioner argued that appellate counsel's failure to file any response to the government's motion to dismiss was a constitutionally deficient performance. The district court concluded that this claim was barred under the law of the case doctrine because by implication the Fifth Circuit must have held that the district court had in fact not rejected the entire plea agreement. (Appendix C at 8-9). That is, the Fifth Circuit must have held something to be true that is unquestionably refuted by the transcript of the sentencing hearing.

The government at the sentencing hearing understood that the district court was being asked to allow

Petitioner to be no longer bound by the plea agreement. In arguing against granting the relief, counsel for the government stated: "Your Honor, he should not be allowed to withdraw – to exit from the plea agreement." ST 15: 7-8. Indeed, the district court clarified before ruling that Petitioner's counsel was seeking to dissolve the plea agreement entirely as to both parties: "So I guess if you get out of the plea agreement, then the government doesn't have to abide by the plea agreement." ST 17:5-7.

And in granting the requested relief, the court was unequivocal in stating that the court was relieving both parties of their obligations under the entire plea agreement: "The Court is going to allow Defendant to retain his right to appeal. So his being relieved from the agreement also relieves the Government at this point. And I believe that's what you requested, Mr. Ramirez, if he was going to be relieved, that the Government be relieved, also." ST 18:15-19.

Given how clear the record is, one can fairly wonder how the Fifth Circuit could have so badly misread the record so as to conclude, according to the district court, that the court had not dissolved the entire plea agreement. (Appendix C). The answer is that the Fifth Circuit had before it a motion with a less-than-fully-candid argument from the government, and no argument from Petitioner's counsel.

In its brief (25-line) argument in support of its motion to dismiss Petitioner's direct appeal, the

government cited the part of the sentencing transcript in which the district court stated it was "going to allow Defendant to retain his right to appeal." Clearly taken out of context, that statement is badly misleading. The government based its argument on the Fifth Circuit's decision in *Serrano-Lara*, for the proposition that a district court lacks the power to excise an appeal waiver from a plea agreement as if it had a "line-item veto." Obviously the full record of what the district court did makes clear that it did not purport to simply excise the waiver from the plea. In *Serrano-Lara*, like Petitioner, the criminal defendant had entered into a plea agreement in which he waived his right to appeal. But unlike Petitioner, that defendant never challenged the waiver or the plea agreement. After sentence was imposed, however, the district court *sua sponte* announced that it was relieving the defendant from the appeal waiver. The government objected to that procedure, and, not surprisingly, the Fifth Circuit held the district court could not do what it purported to do. Importantly, the Fifth Circuit emphasized that a district court does have the power to reject a plea agreement *before sentencing*, which is what the record shows happened in Petitioner's case. The Fifth Circuit noted that in rejecting a plea agreement, the district court must follow the procedures of Rule 11, Federal Rules of Criminal Procedure. But the government forfeited any argument that the district court's procedure had been

insufficient by failing to make that argument in the district court.

There were, thus, ample, simple and apparent arguments and record facts upon which Warner could have asserted viable defenses to the government's motion.

Petitioner's appellate counsel not only failed to make these arguments; he completely failed to present any response at all. The failure to respond by court ordered deadline to a motion that could have and actually did result in summary disposition should be deemed not only far below the standard that any attorney should be held to, it is plain recklessness. It is difficult to conceive how Appellate counsel's omissions in this and the prior appeal can be argued to have been tactical, or inconsequential, or non prejudicial. Warner's "deficient performance arguably led . . . to the forfeiture of a proceeding itself." *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) (citing *Flores-Ortega*, 528 U.S. at 483).

Thus, the district court was unquestionably wrong to conclude that the Fifth Circuit's dismissing the direct appeal was an absolute bar even to Petitioner's ineffective assistance of counsel claim. Because the district court's ruling was unquestionably wrong. The Fifth Circuit's denial of a certificate of appealability, without explanation, was error as a matter of law.

Furthermore, it is critical also to note that on 10/4/2014, Deputy Attorney General James Cole distributed a memorandum to all federal prosecutors, regarding policy over ineffective assistance arguments

on appeal advising that they should no longer include provisions in plea agreements that ask criminal defendants to waive claims of ineffectiveness of counsel, **regardless of when the claims are raised**. See https://www.justice.gov/file/70111/download.

II. This Court should grant review to determine if the rationale of its recent decisions in *Jae Lee v. United States*, 137 S.Ct. 1958 (2017) and *Garza v. Idaho*, 586 U.S. ___ (2019) should be extended to the waiver of a defendant's right to appeal his sentence.

When analyzing whether a criminal defendant can establish the prejudice prong under *Strickland v. Washington*, this court has recognized two distinct situations: In one, the prejudice analysis turns on whether the attorney's error rendered unreliable a judicial proceeding that did actually occur; in the other, the prejudice analysis turns on whether the attorney's error caused a judicial proceeding never to have happened. See *Jae Lee v. United States*, 137 S.Ct. 1958, 198 L.Ed.2d 476, 484 (2017).

This Court has addressed this sort of *Strickland* prejudice in three important cases that are similar to the circumstances in Petitioner's case. In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), this court addressed the circumstance where an attorney had refused to file a direct appeal. This court concluded *Strickland* prejudice would be presumed where the "deficient performance arguably led not to a judicial proceeding of

disputed reliability, but rather to a forfeiture of a proceeding itself." Id. at 483.

In *Lee v. United States*, supra, this court addressed *Strickland* prejudice where attorney's erroneous advice regarding the immigration consequences of a conviction had induced the defendant to plead guilty. This court rejected the government's argument for a per se rule against *Strickland* prejudice where the defendant did not have realistic defenses for trial. Rather, this court concluded that prejudice could be established if the defendant could show a reasonable probability that he would have rejected the plea agreement if he had been correctly advised. See id., 198 L.Ed.2d at 487.

In *Garza v. Idaho*, which this court decided after the Fifth Circuit had denied Petitioner a COA, this court extended the presumption of *Strickland* prejudice from *Flores-Ortega* to the circumstances where counsel had refused to file an appeal after the defendant had entered a plea agreement that waived his right to appeal.

Petitioner's circumstances are an interesting mix of the circumstances from *Flores-Ortega*, *Lee*, and *Garza*.

Petitioner agreed to waive his right to appeal his sentence based on his counsel's erroneous advice regarding his potential sentence under the sentencing guidelines, which counsel and Petitioner discussed in detail. Specifically, counsel correctly advised Petitioner that he was legally and factually guilty of conspiracy to possess marijuana with intent to distribute because of his participation in Carbajal's marijuana smuggling

operation. And Petitioner correctly understood that his sentence would be based on his role in that conspiracy. But counsel incorrectly advised Petitioner that because of Petitioner's limited role in the conspiracy, the government would not be able to argue that Petitioner would be responsible for marijuana smuggled by others with whom Carbajal conspired but whom Petitioner never met nor was aware of. And significantly, counsel incorrectly also advised Petitioner that the government could not argue that he had been a leader or organizer of the conspiracy.

Based on this advice and their detailed discussion of the guidelines, Petitioner understood that the government would only be able to argue for a sentence range of around 135-168 months. Thus, he agreed to waive his right to challenge his sentence on appeal in exchange for the government's promise to recommend that he be sentenced at the low end of the guideline range. But at the sentencing hearing the government argued for, and the district court agreed, a guideline of 324 to 405 months. That range depended on the government's arguments that Petitioner was responsible for all the marijuana smuggled by anyone who had conspired with Carbajal and that Petitioner was a leader or organizer of Carbajal's smuggling operation. Both those arguments were precisely the arguments Petitioner's counsel had advised him the government could not make.

Unlike the defendant in *Lee*, Petitioner would not have gone to trial had he been given correct advice about the consequences of waiving his right to appeal. Rather he would have simply pleaded guilty without

the "benefit" of the government's plea agreement. By doing so, Petitioner would have been in an identical position for sentencing, but the government would have had to defend the district's court's decision on direct appeal. That decision would have been a "no-brainer" for Petitioner or anyone else in his circumstances.

Petitioner understands that any time a criminal defendant challenges his sentence on a direct appeal; he has no guarantees of success. But Petitioner believes he has solid, viable arguments which put him in a position that is stronger than the defendant in *Lee*, whom this court recognized had no viable defenses to raise at trial. Unlike the defendant in *Lee*, therefore, Petitioner's direct appeal would have been much more than a "hail mary." See *Lee*, 198 L.Ed.2d at 486.

This court should therefore grant review to decide the extent to which the rationale of *Flores-Ortega*, *Lee*, and *Garza* extends to a defendant, who, like Petitioner, has waived his right to appeal his sentence.

1. The courts of appeals are divided over whether a criminal defendant's generic waiver of his right to appeal or bring a collateral attack can knowingly waive the defendant's specific right to bring a claim of ineffective assistance of counsel. Where, as here, a criminal defendant's waiver of his right to bring a collateral attack does not mention a claim of ineffective counsel, can that waiver ever be construed as a knowing waiver of the right to challenge his counsel's constitutional effectiveness?

2. In *Jae Lee v. United States*, this court held that counsel's erroneous advice regarding the immigration

consequences of his guilty plea could render the defendant's waiver of his right to trial not knowing. Does the rationale of *Lee* apply here, where Petitioner alleged the counsel's erroneous advice regarding his possible sentence rendered Petitioner's decision to waive his right to appeal the sentence not knowing?

3. In support of his request for certificate of appealability, Petitioner presented the court of appeals with lengthy cogent arguments supported by ample citations to precedent and record showing that the district court had committed legal error. The Fifth Circuit denied the COA in a brief order that neither acknowledged Petitioner's arguments nor explained the court's decision. Was this unexplained decision so arbitrary that it deprived the Petitioner of his right to due process under the Fifth Amendment?

In the alternative, should this court exercise its supervisory powers to vacate the lower court's decision where that unexplained decision precludes this court from any meaningful review of the basis of the Fifth Circuit's decision?

4. The Petitioner demonstrated that the district court, in denying Petitioner's petition under 28 USC 2255 committed legal error by, among other errors, wrongly applying the law of the case doctrine, but the Fifth Circuit denied the COA without explanation. Was the Fifth Circuit's erroneous application of the COA standard so far below the expected performance of a federal court of appeals that this court should reverse the decision of the lower court?

III. The Fifth Circuit's Unexplained Decision, In Response to Petitioner's Detailed Cogent Arguments, Both Deprived Petitioner of Due Process and Disregarded This Court's Role in Reviewing the Lower Court's Decision.

It has been suggested that the most substantial check on the court's potential to act arbitrarily is the general requirement that it explain its decision with written opinions. The mere requirement to explain is a restraint. If, in rejecting petitioner's request for certificate of appealability, the Fifth Circuit had quipped "we are not in the certifying vein," cf. *Shakespeare, William, Richard III, Act 4, scene 2, p. 7,* there could be little question but the decision was an arbitrary act of will rather than any sort of reasoned judgment.

What the Fifth Circuit deigned to say in response to petitioner's request was merely to recite the standard and to declare without explanation that the petitioner had not met the standard: "Tamez has not made the required showing."

With the cut-and-paste of a name, and generic recital of § 2255 allegations, this order could serve to deny any other potential appellant a certificate of appealability. (Presumably his order was created by cutting-and-pasting petitioner's name into its boiler-plate language.)

Petitioner asserts that this unexplained rejection of his request for a certificate of appealability was a fatally flawed procedure in two regards: First, the Fifth

Circuit's order disregards the court's role as an inferior court in our hierarchical system; the Fifth Circuit is not final, its decisions cannot be deemed infallible. They are correct to the extent that they are correctly explained. In a nation ruled by laws, it is profoundly unhealthy for a judicial institution to rely for the legitimacy of its decisions on a presumption of infallibility. This is especially true where, as here, the court's decision was rendered by a single judge.

The second flaw in the decision is that it is an arbitrary deprivation of petitioner's right to an appeal. When a decision is so unexplained that it cannot be distinguished from an arbitrary action, then the decision is an arbitrary action. See *Encino Motorcars v. Navarro*, 195 L.Ed.2d 382 (2006) ("an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice") (alteration, internal quotation, and citation omitted). This court has for that reason insisted that sentencing judges must "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall v. United States*, 552 U.S. 38, 50, 169 L.Ed.2d 445 (2007).

When Congress enacted 28 U.S.C. § 2253(c)(2), it did not create, akin to this court's certiorari jurisdiction, a form a discretionary review for the courts of appeals. Rather Congress created a legal standard by which a litigant seeking to appeal the denial of his motion under 28 U.S.C. § 2255 has to first obtain a

certificate of appealability. The court of appeals *may not* decline an appeal where the standard has been met. See 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (reversing Fifth Court); *Miller-El v. Cockrell*, 537 U.S. 322, 331 (2003) (same).

Importantly the question is not whether a prospective appellant will ultimately prevail. See *Miller-El*, 537 U.S. at 331-338. A litigant need only show that "reasonable jurists could debate whether (or, for that matter agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484.

Indeed because the decision of a certificate of appealability is assigned to a single judge, if that judge decided either that he did not wish the appeal to go forward or that the litigant was not entitled to win, that judge would be assuming a power to summarily resolve appeals which power was never granted by Congress. The basic requirements for the Fifth Amendment due process could never be satisfied where a litigant's claims are rejected by a judge exceeding his or her delegated powers. That would surely be the paradigm of an arbitrary action.

But what prevents a judge from exercising in fact an arbitrary power to reject a request that he does not possess in law? Petitioner suggests the only practical limit on the arbitrary exercise of power in this situation is an order that is adequately explained so as to ensure the perception of a fair decision. Cf. *Gall*, 552

U.S. at 50. Indeed, where a judge's decision is without explanation, this court would be entitled to conclude that it was in fact an arbitrary exercise rather than reasoned judgment. Cf. *Encino Motorcars*, 195 L.Ed.2d at 382.

This court just this year not only reversed, but summarily reversed the Ninth Circuit where the court of appeals failed to explain its questionable decision to reverse the district court. See *City of Escondido v. Emmons*, 586 U.S. ___, 202 L.Ed.2d 455 (2019). In *Emmons*, the district court's well reasoned decision clearly showed that the court of appeals' unexplained reversal was flawed. In this case, on the other hand, the district court's clearly wrong decision – [which petitioner has in this petition set out] – likewise shows the court of appeals' unexplained decision to be flawed.

This court may perhaps not resolve the issue presented here of whether the Fifth Circuit's decision was so arbitrary that it deprived petitioner of due process, this court does have supervisory powers over the lower federal courts and can, in the interest of justice, require those courts to perform their judicial functions with adequate explanation. Cf. *Gall*, 552 U.S. at 50, with *Johnson v. Williams*, 568 U.S. 289, 185 L.Ed.2d 105, 115 (2013). ("We have no power to tell state courts how they must write their opinions."). This Court should require the Fifth Circuit to provide, at a minimum, an adequate explanation that both permits review by this court and eliminates the perception of arbitrary exercise of will.

REASONS FOR GRANTING REVIEW

In his plea agreement, Petitioner waived his right to collaterally attack his conviction or sentence. In dismissing his petition under 28 U.S.C. § 2255, the district court concluded that this waiver was valid and so precluded Petitioner's claims of ineffective assistance of counsel, although the waiver itself did not specifically mention claims of ineffective assistance. Under the Fifth Circuit's precedent, this is a possible result. see *United States v. White*, 307 F.3d 336, 338, 443-444 (5th Cir. 2002); accord *Williams v. United States*, 396 F.3d 1340, 1341-1342 (11th Cir. 2001). That would not be a possible result, however in the Fourth Circuit. See *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005), or in the D.C. Circuit, see *In re Sealed Case*, 901 F.3d 137, 151 (4th Cir. 2018) (discussing circuit split).

The D.C. Circuit's recent decision carefully analyzed the competing arguments and cogently set out why the decision of the Fifth, Eleventh, and Tenth Circuits were not persuasive. See *In re Sealed Case*, 901 F.3d at 400-404. While other circuits may in the future agree to follow the D.C. Circuit's persuasive reasoning, litigants such as Petitioner in the Fifth, Tenth, and Eleventh Circuits are barred from relying on this persuasive precedent because of those circuits' prior published decisions. This court, therefore, should grant certiorari to resolve this fundamental issue regarding the scope of a criminal defendant's waiver of his rights.

Petitioner's case is particularly well suited for this court to resolve this issue. The district court dismissed

Petitioner's petition under 28 U.S.C. § 2255 without evidentiary hearing. Thus, the legal question of what can be the scope of Petitioner's generic waiver is starkly presented. Also, Petitioner in his request for a COA argued at length to the Fifth Circuit that because the waiver does not mention specifically a claim for ineffective assistance of counsel, the waiver should not have been construed to be a knowing waiver of this claim. Thus, there can be no question but that this issue had been squarely before the court of appeals and so is well presented for this court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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