NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

GEORGE FERRER SANCHEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Across all federal circuits, the courts of appeals have held that, as part of a plea agreement with the government, a criminal defendant can waive his right to appeal his conviction and sentence. A number of federal judges have dissented from this view, stating that the right of appeal cannot be waived in a plea agreement. A number of State Supreme Courts agree that the right of appeal is non-waivable. Petitioner, whose appeal to the United States Court of Appeals for the Eleventh Circuit was dismissed based on the appeal waiver in his plea agreement, urges this Court to hold that appeal waivers in plea agreements are not enforceable.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

George Ferrer Sanchez respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case No. 20-10484 in that court on February 19, 2021, in *United States v. Sanchez*. A-1. This judgment affirmed the judgment of the United States District Court for the Southern District of Florida. A-6. On April 19, 2021, the Eleventh Circuit denied Sanchez' petition for rehearing and rehearing en banc. A-5.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Sanchez*, 847 Fed. Appx 825 (11th Cir. Feb. 19, 2021) (unpublished) is contained in the Appendix. A-1. This decision affirmed the judgment and commitment of the district court. A-6. A copy of the order of the Eleventh Circuit denying Sanchez' petition for rehearing and rehearing en banc is also contained in the Appendix. A-5.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The Court of Appeals' decision was entered on February 19, 2021, and its order denying rehearing and rehearing en banc was entered on April 19, 2021. This petition is timely filed pursuant to SUP. CT. R. 13.1 and this Court's March 19, 2020 Covid Order Regarding Filing Deadlines (rescinded, in part, July 19, 2021). The District Court had jurisdiction because petitioner was charged with violating federal criminal laws. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

U.S. Const. Amend. V:

> No person shall be deprived of life, liberty, or property, without due process of law.

Sup. Ct. R. 10(a):

> [When deciding whether to grant a petition for a writ of certiorari] the Court considers [whether a decision by] a United States court of appeals . . . call[s] for an exercise of this Court's supervisory power.

STATEMENT OF THE CASE

1. Statement of Facts and Course of Proceedings.

The three-count Indictment charged a Hobbs Act conspiracy (Count 1), an alien smuggling conspiracy (Count 2), and a money laundering conspiracy (Count 3). DE12. In a plea agreement, Sanchez agreed to plead guilty to the third count of the three-count Indictment (money laundering conspiracy), and the government agreed to dismiss the remaining two counts. DE301:1.

Sanchez's written plea agreement contained an appeal waiver, which provided:

> [I]n exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by [28 U.S.C. §] 1291 and [18 U.S.C. §] 3742 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or an upward variance from the advisory guideline range that the Court establishes at sentencing. . . .

DE30:5-6. In addition, the plea agreement provided that if government appealed the defendant's sentence, the defendant would be released from his appeal waiver. DE30:5. Additionally, the plea agreement provided that Sanchez waived any right to appeal the forfeiture, or any restitution order. DE30:5.

At Sanchez' plea colloquy, the district court determined that Sanchez was aware of his appeal waiver (though the district court remarked, with regard to the appeal waiver: "you guys write that in the plea agreement all the time, and the Eleventh Circuit hears appeals." DE68:16-18 (quoted in *United States v. Sanchez*, 847 Fed. Appx. 825, 828 (11th Cir. Feb. 19, 2021) (unpublished) (A-2)).

At sentencing, the district court overruled defense objections to its application of the Federal Sentencing Guidelines, and imposed a sentence of 108 months. DE69:34. The district court subsequently granted the government's request for $5.4 million in forfeiture, and ordered forfeiture of two Florida homes. DE58. The government later sought $1.2 million in restitution. Sanchez moved to dismiss this restitution demand, arguing that it was not based on the offense of conviction, and, in a paperless order entered after a hearing, the district court granted Sanchez' motion to dismiss the restitution demand. DE120.

On appeal, Sanchez challenged the district court's sentencing and forfeiture rulings. In response, the government moved to dismiss this appeal, based on Sanchez' appeal waiver in his plea agreement. Sanchez opposed dismissal of his appeal, arguing that the district court did not adequately explain the appeal waiver at the plea colloquy, and, alternatively, that appeal waivers should be unenforceable. The Eleventh Circuit granted the government's motion to dismiss Sanchez' appeal. *Sanchez*, 2021 WL 650935 at * 4.

Sanchez filed a petition for rehearing and rehearing en banc, again arguing that the district court did not adequately explain the appeal waiver, and, alternatively, again urging the Eleventh Circuit to hold en banc that appeal waivers are unenforceable. The Eleventh Circuit denied Sanchez' petition for rehearing and rehearing en banc. A-5.

REASONS FOR GRANTING THE WRIT

1. Appeal waivers should be unenforceable.

Sanchez acknowledges that waivers of appeals of sentencing errors in plea agreements have long been held enforceable in all Circuits. But, when Rule 11 of the Federal Rules of Criminal Procedure was amended to require district courts to ensure at the plea colloquy that a defendant understood that he was waiving the right to appeal the sentence, the Advisory Committee pointedly took "no position on the underlying validity of such waivers." Advisory Committee Notes to 1999 Amendments to Rule 11. To date, this Court has not directly addressed this question. In *Garza v. Idaho*, __U.S. __, 139 S.Ct. 738, 745 (2019), this Court held that defense counsel was constitutionally deficient in failing to file a notice of appeal even when the defendant had agreed to an appeal waiver, but did not address whether such waivers are valid and enforceable – the parties had not raised this issue. Sanchez submits that appeal waivers should be unenforceable.

A. Appeals waivers "are inherently unknowing and unintelligent."

Due Process requires a guilty plea to be "voluntary and knowing." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). But, at the time a plea agreement is entered into, the future occurrence of a sentencing error is *unknowable*. As a dissenting opinion forcefully argued, a defendant entering into a plea agreement is therefore not capable of waiving an appeal of a future sentencing error "knowingly and voluntarily":

> . . . [G]iving up the right to trial, to confront witnesses at trial, and to preserve the privilege against self-incrimination are all known trial rights that necessarily are forfeited by the very act of pleading guilty instead of proceeding to trial. The defendant consequently knows precisely what he or she is giving up in exchange for the benefits of

> the guilty plea at the very moment the plea is entered—a trial and the constitutional rights that accompany it.
>
> Sentencing, however, does not occur contemporaneously with the plea and waiver. It is a future event, and the mistakes from which one might have reason to appeal have not yet occurred at the time a defendant waives the right to appeal or collaterally attack the plea or sentencing proceedings. A defendant cannot know what he or she has given up by waiving the right to appeal until after the judge and counsel have reviewed a yet-to-be-prepared presentence investigation report, after the judge has considered other information not known to the defendant at the time of the plea, and after the judge has actually imposed sentence. By then it is too late, no matter how disproportionate the sentence or how egregious the procedural or substantive errors committed by the sentencing judge or the defendant's own counsel. It is hard to see how a defendant at the plea hearing can ever knowingly and intelligently—that is, with "a full awareness of both the nature of the right [s] being abandoned and the consequences of the decision to abandon it," *Moran v. Burbine*, 475 U.S. 412, 422, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) – waive the right to appeal or collaterally attack a sentence that has not yet been imposed. Such prospective waivers in anticipation of unknown future events *are inherently unknowing and unintelligent.*

United States v. Medina-Carraso, 815 F.3d 457, 464 (9th Cir. 2015) (Friedman, J., dissenting) (emphasis added).[1] *Accord United States v. Mutschler*, 152 F. Supp. 2d 1332, 1338-41 (W. D. Wash. 2016) (declining to accept a plea agreement that contained an appeal waiver because such waivers are "inherently unknowing"); *People v. Harrison*, 386 Mich. 269, 275, 191 N.W. 2d 371, 374 (Mich. 1971) (invalidating appeal waivers as "constitutionally obnoxious").

The Fourth Circuit concluded that appeal waivers "are valuable precisely because they cover *unforeseen circumstances* and thus add certainty to the criminal proceeding." *United States v. Thornsbury*, 670 F.3d 532, 538 (4th Cir. 2012) (emphasis added). This view is mistaken. Parties to

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[1]Footnote 3 of Judge Friedman's dissent cites to numerous opinions and law review commentaries, from 1992 to 2015, which, like his dissent, take the view that appeal waivers should not be enforced. *Medina-Carrasco*, 815 F.3d at 463, n. 3 (Friedman, J., dissenting)

a plea agreement are able to have a "meeting of the minds" with respect foreseeable events, but they are unable to know, and therefore unable to meaningfully agree on, "unforeseen circumstances," such as a district court's future possible sentencing errors in calculating the term of incarceration, the amount of restitution, or the amount of forfeiture. Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L. Q. 127, 203 (1995) (prospective sentencing errors cannot be a valid basis for knowing and voluntary waivers). This Court has implicitly recognized the incapacity of parties to agree on a future possible error when it held, in *Class v. United States*, __U.S. __, 138 S.Ct. 798, 805 (2018), that a defendant's agreement to give up his right to appeal his conviction did not waive his right to challenge the constitutionality of the statute underlying the conviction. *Accord* Aliza Hochman Bloom, *Sentence Appeal Waivers Should Not Be Enforced in the Event of Superseding Supreme Court Law: The Durham Rule as Applied to Appeal Waivers*, 18 Florida Coastal L. R. 113, 125 (2016) (when intervening Supreme Court decisions unexpectedly modify the applicable law, an appeal waiver "cannot be described as 'knowing' or 'voluntary.'").

As noted above, in *Garza v. Idaho*, this Court held that defense counsel was constitutionally deficient in failing to file a notice of appeal, even though a defendant agreed to an appeal waiver. 139 S.Ct. at 745. *Garza* explained that, when filing a notice of appeal, defense counsel is not able to competently determine whether any valid appellate issues exist, since appellate claims are "likely to be ill defined or unknown at this stage." *Id.*

Similarly, at the plea colloquy stage, because the defense is not a position to challenge the punishment that will ultimately be imposed, the defense is not a position to forego a sentencing appeal "knowingly and voluntarily."

Like other circuits, the Eleventh Circuit has taken a transactional approach to the validity of appeal waivers, viewing such waivers as "another chip the defendant can bring to the bargaining table and trade for additional concessions from the government." *United States v. Bascomb*, 451 F.3d 1292, 1294 (11th Cir. 2006) (citations omitted); *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999) ("While it may appear unjust to allow criminal defendants to bargain away meritorious appeals, such is the necessary consequence of a system in which the right to appeal may be freely traded.").

But this transactional approach to the validity of appeal waivers obscures much, if not all, of the underlying reality. Because of the government's "great advantage in bargaining power . . . [i]t is illusory to suggest that a defendant has any real bargaining power in this context, any free and deliberate choice." *Medina-Carrasco*, 806 F.3d at 1211, n. 4 (Friedman, J., dissenting). In *United States v. Lutchman*,, after finding that the government gave up nothing in return for a defendant's appeal waiver, the Second Circuit declined to enforce this appeal waiver, because it was "unsupported by consideration." 910 F.3d 33, 38 (2d Cir. 2018).

The government demonstrated its "great advantage in bargaining power" when it obtained appeal waivers from defendants in exchange for concessions that later had to be ruled "off-the-table." The government had used its plea bargaining power to withhold sentence reductions for "acceptance of responsibility" unless a defendant agreed to waive his right to appeal – until the Sentencing Commission issued a guideline to prohibit this practice. U.S.S.G. App. C, Amend. 775 (Nov. 1, 2013) (resolving Circuit conflict and providing that "acceptance of responsibility" sentence reduction recommendations could not be exchanged for a defendant's appeal waiver). Until the Justice Department itself stepped in, prosecutors were extending appeal waivers to foreclose possible

future claims of ineffective assistance of counsel at sentencing. *See* Memorandum from James M. Cole, Deputy Attorney General, to All Federal Prosecutors (Oct. 14, 2014) (instructing all federal prosecutors to cease seeking waivers of ineffective assistance of counsel claims, and to cease enforcing those waivers in previous plea agreements). Very recently, in a brief to this Court, the government took the view that despite caselaw holding that an appeal waiver in a plea agreement cannot waive the issue whether a defendant's conduct fell within the statute of conviction, such a waiver "would properly preclude review" of this issue. Brief of the United States in Opposition in *Jean v. United States*, No. 20-7958 (Aug. 25, 2021).

The present case illustrates that a defendant does not "freely" trade an appeal waiver. Sanchez' plea agreement waived an appeal of "any restitution order." DE30:5. Ten months later, the government filed a motion, seeking $1.2 million in restitution. DE106. Sanchez opposed this restitution demand. After a restitution hearing, the district court dismissed the government's demand. DE120. The government did not appeal this ruling, which suggests that its $1.2 million restitution request had little merit. Yet, had the district court ordered Sanchez to pay $1.2 million in restitution, Sanchez' appeal waiver would have foreclosed him from seeking appellate review of this order. This abandonment of the right to appeal cannot be viewed as having been "freely traded": Sanchez could not have "freely" waived an appeal of a future order to pay $1.2 million in restitution when no demand for $1.2 million in restitution had been made.

B. Appeal waivers are a use of federal prosecutors' bargaining power that undermines judicial integrity.

This Court has supervisory powers "to preserve judicial integrity" in federal court proceedings. *United States v. Hasting*, 461 U.S. 499, 505 (1983) (citing *McNabb v. United States*,

318 U.S. 332, 345 (1943)); *United States v. Payner*, 447 U.S. 727, 735 n. 8 (1980) ("we agree [with the dissent that] the supervisory power serves the 'twofold' purpose of deterring illegality and protecting judicial integrity.") (quoting *id.* at 744 (Marshall, J., dissenting)). This supervisory power includes the power to address, as here, abuse of process by federal law enforcement. *Rea v. United States*, 350 U.S. 214, 216-17 (1956) (the propriety of a federal law enforcement agency's conduct presented a question "concerning our supervisory powers of federal law enforcement agencies") (citing *McNabb*, 318 U.S. 332); Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 Colum. L. Rev. 324, 330 (2006) ("In still other instances, courts use the term 'supervisory authority' to refer to the power of a federal court to supervise law enforcement officials.").

Sanchez urges this Court to exercise its supervisory powers to hold that appeal waivers are unenforceable in the federal courts. When federal prosecutors extract appeal waivers from defendants, they use their bargaining power in a way that undermines the integrity of the federal courts.

Two circuits hold that "[a]n appeal waiver includes the waiver of the right *to appeal difficult or debatable issues or even blatant error*." *United States v. Grinard-Henry*, 399 F.3d 1294, 1296 (11th Cir. 2005) (emphasis added); *accord United States v. Blick*, 408 F.3d 162, 171 (4th Cir. 2005) (citing *Grinard-Henry*). But evasion of difficult or debatable issues, or of blatant error, undermines the legitimacy of the judicial Branch. Left uncorrected, "plain" errors – *i.e.*, undebatable errors –are errors that "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732 (1993).

In *Rosales-Mireles v. United States*, __U.S. __, 139 S.Ct. 1897, 1908 (2018), this Court held that a district court's "plain error" miscalculation of the sentencing Guidelines range seriously affects

the fairness, integrity, or public reputation of judicial proceedings. *Rosales-Mireles*' reasoning supports Petitioner's view here:

> In broad strokes, the public legitimacy of our justice system relies on procedures that are "neutral, accurate, consistent, trustworthy, and fair," and that "provide opportunities for error correction." Bowers & Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 215-16 (2012). . . . "[W]hat reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?" *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014) (Gorsuch, J.).

Rosales-Mireles, 139 S.Ct. at 1908.

Appellate review is also essential to the systematic development of the law. *See United States v. Gardner*, 905 F.2d 1432, 1436 (5th Cir. 1990) (after the adoption of the sentencing guidelines "appellate courts now have a more active role to play to insure adherence to the guidelines' policies of uniformity and proportionality in sentencing.") (citing Sentencing Guidelines, Ch. 1, Part A, Intro. 3). Appellate review thus fosters the "legitimation of the criminal justice system in the eyes of the public." Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L. Q. at 163, 213; *see id.* at 503. As this Court has noted, waivers should be unenforceable when they "irreparably discredit the federal courts." *United States v. Mezzanatto* 513 U.S. 196, 204 (1995) (citation and bracketed material omitted). Appeal waivers are this type of waiver.

No doubt mindful that appeal waivers, taken to their logical extreme, would undermine the legitimacy of the criminal justice system, appellate courts created exceptions to appeal waivers, based on "notions of due process," or to avoid a "miscarriage of justice." *United States v. Caruthers*, 458 F.3d 459, 471-72 (6th Cir. 2006) (collecting cases), *abrogated on other grounds by Cradler v.*

United States, 891 F.3d 659, 671 (6th Cir. 2018). The Eleventh Circuit, for example, does not enforce an appeal waiver if the sentence imposed exceeded the statutory maximum, reasoning that "there are certain fundamental and immutable legal landmarks within which the district court must operate regardless of the existence of sentence appeal waivers." *United States v. Bushert*, 997 F.2d 1343, 1350 n. 18 (11th Cir. 1993).

But these court-created exceptions to appeal waivers do not preserve appeals of erroneous orders of restitution, which appeal waivers make *per se* unreviewable in many circuits. *See In re Sealed Case*, 702 F.3d 59, 64-65 (D.C. Cir. 2012) (collecting cases). Nor, the government claims, would these court-created exceptions apply to orders of forfeiture, since forfeiture is "not subject to any prescribed statutory maximum." Brief of the United States in Opposition to Certiorari in *Mearing v. United States*, 2018 WL 6382980, * 20 (Dec. 4, 2018) (citing *United States v. Schulte*, 436 F.3d 849, 851 (8th Cir. 2006)).

More fundamentally, abnegation of "difficult or debatable issues or even blatant error," *Grinard-Henry*, 399 F.3d at 1296, discredits the Judicial Branch. *Cf. State v. Ethington*, 121 Ariz. 572, 573-74, 592 P.2d 768, 769 (Ariz. 1979) ("We hold that the right to appeal is not negotiable in plea bargaining, and that as a matter of public policy a defendant will be permitted to bring a timely appeal from a conviction notwithstanding an agreement not to appeal."); *Spann v. State*, 704 N.W. 2d 486, 494 (Minn. 2005) ("We therefore conclude that allowing a defendant to waive his right of appeal after trial conviction and sentencing is inconsistent with the court's role as an objective supervisor whose purpose includes maintaining the integrity of the judicial system.").

Appeal waivers are said to conserve appellate resources, and to foster the "finality of criminal judgments." *Garza v. Idaho*, 139 S.Ct. at 755-56 (Thomas, J., dissenting). But this is questionable.

Appeal waivers result in a significant amount of litigation. *See People v. Thomas*, 34 N.Y. 3d 545, 598-99 (N.Y. 2019) (Wilson, J., dissenting) (noting that appeal waivers "produced – not avoided – vast amounts of additional effort in trial courts and litigation in appellate courts as they struggle to establish and determine, respectively, the validity of such waivers," and stating that these waivers should be unenforceable).

In this case, the district court noted that, in its experience, even in cases where appeal waivers are addressed at the plea colloquy, "somehow they still get appealed." (cited at A-2, *Sanchez*, 2021 WL 650935 at * 2). The district court added: "What I think counsel is saying, [counsel for the government], is you guys write that in the plea agreement all the time, and the Eleventh Circuit hears appeals." *Id.* On appeal, the Eleventh Circuit found that these comments by the district court had no effect on Sanchez' understanding of his appeal waiver, and therefore rejected Sanchez' argument that these comments impaired his correct understanding of the appeal waiver. A- 4. This Petition does not challenge this aspect of the Court of Appeals' ruling. Nonetheless, the district court's impression that the Eleventh Circuit still "somehow . . hears appeals" despite an appeal waiver in a plea agreement confirms that appeal waivers do not predictably contribute to the finality of criminal judgments. *See People v. Batista*, 167 A.D. 3d 69, 86 N.Y.S. 3d 492, 499, 502 (N.Y. App. Div. 2d 2018) (Sheinkman, J., concurring) (finding that appeal waiver colloquy "serve[] only as a pathway to future litigation," and noting that, over the past five years, in at least 380 published cases state-wide the Appellate Division "has held an appeal waiver to be invalid"); Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. of Michigan Journal of Law Reform 347, 383 (2015) (noting that "enforcement of a valid appellate waiver often consumes a considerable amount of appellate resources," and proposing that, to save resources, these waivers only be permitted after sentencing);

see also People v. Bisono, __N.Y. 3d __, 2020 NY Slip Op. 7484, p. 4 and Appendix (N.Y. 2020) (Garcia, J., concurring and dissenting in part) (noting that New York State appellate courts invalidated 90 appeal waivers in the past year).

2. Sanchez' appeal was challenging significant sentencing errors.

The prejudice of a rule that enforces a defendant's waiver of appellate review of possible future sentencing errors becomes most concrete when a defendant, on appeal, raises meritorious challenges to his sentence. In the Initial Brief he filed in the Eleventh Circuit, Sanchez identified several significant sentencing errors.

First, Sanchez challenged an 18-level Guidelines sentence enhancement for his money-laundering conviction. This enhancement was based on a finding that the "loss amount" was $5.4 million. DE69:34. The record indicates that $5.4 million was the amount an alien had agreed to pay for being smuggled into the United States. But there is no evidence that this $5.4 million was ever *laundered*. Based on the record, Sanchez should only have been subject to a 14-level enhancement, on account of $702,700 in funds he received and laundered.

Second, over defense objection, Sanchez received a 2-level enhancement for "sophisticated laundering." DE69:17. The Sentencing Guideline criteria for "sophisticated laundering" include setting up fictitious entities, shell corporations, offshore financial accounts, or "layering" transactions. But the district court relied on the existence of 15 checks. DE69:18. As defense counsel objected at sentencing, these checks made the money *easily traceably* -- the fifteen checks were direct evidence of money laundering. DE69:18. The record contains no evidence of "sophisticated laundering."

Third, over defense objection, Sanchez received a 4-level enhancement for being "an organizer or leader." DE69:20. But the facts that the district court cited in support of this finding were related to his *alien smuggling*, not to *money laundering*. DE69:20. Yet money laundering, not alien smuggling, was the offense of conviction.

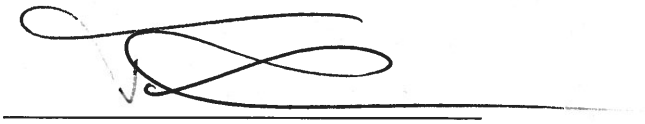
Finally, Sanchez was ordered to forfeit substitute property in the amount of $5.4 million, based on a finding that Sanchez used "a portion of the $5.4 million in [alien] *smuggling* funds" to acquire two homes. DE58.2 (emphasis added). Again, the offense of conviction in this case was not alien smuggling, but money laundering. The evidence did not identify a nexus between money laundering and the two homes the district court ordered forfeited.

But, by dismissing Sanchez' appeal, the Eleventh Circuit left all these significant issues unaddressed.

CONCLUSION

George Ferrer Sanchez respectfully requests that this Court grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

By: 

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Washington, D.C.
September, 2021

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit, *United States v. Fabian Perpall*, 847 Fed. Appx. 825 (11th Cir. May 18, 2021) A-1

Order of the Court of Appeals for the Eleventh Circuit denying petition for rehearing and rehearing en banc A-5

Judgment imposing sentence A-6

2021 WL 650935
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of
America, Plaintiff-Appellee,
v.
George SANCHEZ, Defendant-Appellant.

No. 20-10484
|
Non-Argument Calendar
|
FILED February 19, 2021

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:19-cr-20085-MGC-1,

Attorneys and Law Firms

Emily Rose Stone, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, Miami, FL, Andrea G. Hoffman, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, Miami, FL, for Plaintiff-Appellee

Timothy Cone, Timothy Cone, Esq., Washington, DC, for Defendant-Appellant

George Ferrer Sanchez, Pro Se

Before NEWSOM, BRANCH, and GRANT, Circuit Judges.

Opinion

PER CURIAM:

*1 George Sanchez pleaded guilty, pursuant to a written plea agreement, to one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B), (h). He was sentenced to 108 months' imprisonment and was required to forfeit all property involved in, or traceable to, the conspiracy, including certain real properties. He now seeks to appeal his sentence and the forfeiture order. The government moved to dismiss the appeal pursuant to the sentence-appeal waiver in the plea agreement. Sanchez opposes the motion, arguing that the waiver is not enforceable because the district court failed to address the terms of the waiver specifically before accepting Sanchez's plea and "downplayed the significance" of the waiver. [1] After review, we conclude that the appeal waiver is valid. Therefore, we grant the government's motion and dismiss this appeal.

We enforce appeal waivers that are made knowingly and voluntarily. *See United States v. Bascomb*, 451 F.3d 1292, 1294 (11th Cir. 2006); *United States v. Bushert*, 997 F.2d 1343, 1350–51 (11th Cir. 1993). To demonstrate that a waiver was made knowingly and voluntarily, the government must show that either (1) the district court specifically questioned the defendant about the waiver during the plea colloquy; or (2) the record makes clear that the defendant otherwise understood the full significance of the waiver. *Bushert*, 997 F.2d at 1351.

Sanchez's written plea agreement contained the following appeal waiver:

> [I]n exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by [28 U.S.C. §] 1291 and [18 U.S.C. §] 3742 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or an upward variance from the advisory guideline range that the Court establishes at sentencing....
>
> [I]f the United States appeals the defendant's sentence ..., the defendant shall be released from the above waiver of his right to appeal his sentence....
>
> By signing this agreement, the defendant acknowledges that the defendant has discussed the appeal waiver set forth in this agreement with the defendant's attorney.

Additionally, the plea agreement provided that Sanchez "waive[d] any right to appeal the forfeiture." Sanchez and his counsel signed the agreement.

During the plea colloquy, in relation to the sentence-appeal waiver, the district court explained that

> *2 under certain circumstances you may be able to appeal your sentence and [in] other circumstances the United States may be able to appeal the sentence.

> So as an example, if I were to sentence you to higher than the advisory guideline range, you may be able to appeal the sentence. If I sentence you to lower than the advisory guideline range, the United States may be able to appeal the sentence. Do you understand that?

Sanchez confirmed that he understood. The district court then asked the government to explain the terms of the plea agreement for the record. The government reviewed various terms of the plea agreement, including that the agreement contained "an appellate waiver which memorializes the conditions under which the defendant can appeal his sentence, and that the defendant has waived his right to appeal his sentence under most circumstances." The court then asked Sanchez whether the terms the government reviewed were "[his] understanding of the plea agreement in this case," and Sanchez responded "Yes, your Honor." After explaining the other rights Sanchez would be giving up by pleading guilty, confirming that he was pleading guilty of his own free will, and establishing a factual basis for the plea, the district court accepted Sanchez's plea, finding that it was knowing and voluntary.

The government then asked the court "if we could stop," because it "want[ed] to confirm that the defendant understood that there was an appellate waiver contained within [the agreement]." The following colloquy then occurred:

> The Court: I will say it, but somehow they still get appealed.
>
> Sir, do you understand that by pleading guilty in this case you are giving up your right to appeal except as required by law?
>
> [Defense Counsel]: Your Honor, I think you did ask the question. Mr. Sanchez understands that he can appeal under limited circumstances, that if the court goes above the statutory maximum or goes above the applicable guideline range at the time of sentencing.
>
> [The Government]: I don't—one second, your Honor. I don't believe—
>
> The Court: What I think counsel is saying, [counsel for the government], is you guys write that in the plea agreement all the time, and the Eleventh Circuit hears appeals.
>
> [Defense Counsel]: Judge, even with a waiver we are considered ineffective if we don't file it when the client requests it. [Government]: I understand, you Honor. I think that my office is trying to do a better job of making clearer on the record that there is, in fact, an appellate waiver contained within these plea agreements and that the defendant understands that he is foregoing his right to appeal under most circumstances.
>
> The Court: I understand. Sir, do you understand that under most circumstances you are giving up your right to appeal the sentence in this case?
>
> The Defendant: I am sorry, could you please repeat?
>
> The Court, Sir, do you understand that as counsel said in exchange for your plea of guilty in this case, you are giving up your right to appeal the sentence in this matter?
>
> The Defendant: Yes, Your Honor.

Sanchez argues that the appeal waiver is invalid because the district court failed to address the terms of the waiver specifically before accepting Sanchez's plea—instead addressing the waiver after accepting the plea—and "downplayed" the significance of the waiver. We disagree.

*3 Here, when considered as a whole, the record demonstrates that Sanchez understood the full significance of the waiver. First, the terms of the appeal waiver were clearly set forth in the plea agreement, and the plea agreement provided that by signing the agreement, Sanchez "acknowledge[d] that [he] ha[d] discussed the appeal waiver set forth in this agreement with [his] attorney."[2]

Second, any confusion caused at the change-of-plea hearing by the district court's explanation that "under certain circumstances" Sanchez might be able to appeal,[3] was immediately eliminated by the government's subsequent explanation that the plea agreement contained "an appellate waiver which memorializes the conditions under which the defendant can appeal his sentence, and that the defendant has waived his right to appeal his sentence *under most circumstances*." Furthermore, Sanchez confirmed that the government's explanation was also his understanding of the terms of the plea agreement. Moreover, unlike in *Bushert*, Sanchez's counsel confirmed that Sanchez understood "that he can appeal under limited circumstances, that if the court goes above the statutory maximum or goes above the applicable guideline range at the time of sentencing."[4] And, prior to the end of the change-of-plea hearing, the district court expressly inquired as to whether Sanchez understood that "in exchange for your plea of guilty in this case, you are

giving up your right to appeal the sentence in this matter," and Sanchez confirmed he understood.[5]

*4 Sanchez also argues that the appeal waiver is invalid because the district court "downplayed" the significance of the waiver based on its discussion in front of Sanchez that, despite the existence of appeal waivers in many plea agreements, the Eleventh Circuit hears appeals in many cases. But an appeal waiver "cannot be vitiated or altered" by a district court's comments made during court proceedings. *See Bascomb*, 451 F.3d at 1297 (11th Cir. 2006); *see also United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999) (holding that the district court's encouragement of the defendant to appeal was dicta and "had no effect on the terms of a previously approved plea agreement"). Further, any alleged confusion generated by the district court's comments was cured by the subsequent explanation to Sanchez that by pleading guilty, he was waiving his right to appeal his sentence, which Sanchez unequivocally confirmed that he understood.

In sum, at no point during the change-of-plea hearing did Sanchez or his counsel express any objection, hesitation, or misunderstanding concerning the scope of the appeal waiver. Rather, the opposite occurred—Sanchez's counsel confirmed that Sanchez understood the terms of the appeal waiver, and Sanchez himself twice stated that he understood that the appeal waiver was part of his plea agreement. Thus, the record as a whole demonstrates that Sanchez understood the full significance of the appeal waiver and it was knowing and voluntary. Therefore, the appeal waiver is valid and enforceable. *Bushert*, 997 F.2d at 1351.

Moreover, none of the exceptions to Sanchez's sentence-appeal waiver apply here. Sanchez's 108-month sentence does not exceed the statutory maximum of 20 years' imprisonment and is at the bottom of the applicable advisory guideline range of 108 to 135 months' imprisonment. *See* 18 U.S.C. § 1956(a)(1)(B) (providing that the statutory maximum for conspiracy to commit money laundering is 20 years' imprisonment). With regard to his challenge to the forfeiture order, it is well established that criminal forfeiture is part of a defendant's sentence. *See Libretti v. United States*, 516 U.S. 29, 39, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995); *United States v. Gilbert*, 244 F.3d 888, 924 (11th Cir. 2001) ("It is beyond doubt that criminal forfeiture is part of a defendant's sentence"). The forfeiture order is therefore covered by Sanchez's appeal waiver.

Accordingly, because Sanchez's challenges to his sentence do not fall within an exception to his appeal waiver, we GRANT the government's motion to dismiss.

APPEAL DISMISSED.

All Citations

--- Fed.Appx. ----, 2021 WL 650935

Footnotes

1 Sanchez also argues for purposes of preserving the issue for *en banc* review by this Court or review by the Supreme Court that appeal waivers are invalid as a matter of law and should be unenforceable. Because this argument is foreclosed by binding precedent and made for preservation purposes only, we do not address it further. *See United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993) (holding that sentence-appeal waivers are enforceable provided they are knowingly and voluntarily made).

2 We acknowledge that an examination of the terms of the plea agreement alone is insufficient to demonstrate that the waiver was knowing and voluntary. *Bushert*, 997 F.2d at 1352. However, the terms of the agreement may be considered as part of determining whether in light of the record as a whole it is clear that the defendant understood the full significance of the waiver.

3 The district court's statement that "under certain circumstances [Sanchez] may be able to appeal [his] sentence," was the type of language that we deemed "confusing" in *Bushert* and rendered Bushert's appeal waiver invalid because it "did not clearly convey to Bushert that he was giving up his right to appeal under *most* circumstances." 997 F.2d at 1352–53 (emphasis in original).

4 In a footnote in his response in opposition to the motion to dismiss, Sanchez takes issue with counsel's statement that Sanchez could appeal if the district court sentenced him "above the *applicable* guideline range." He maintains that the use of the term "applicable" as opposed to "advisory" guideline range erroneously implied that Sanchez could challenge whether a particular Guideline was "applicable" (*i.e.*, the calculation of the guidelines range). To the extent that he also argues that this statement rendered the appeal waiver invalid, we rejected a similar argument in *United States v. Boyd*,

975 F.3d 1185 (11th Cir. 2020) (denying argument that, because the plea agreement did not specify who would calculate the guideline range, the plea agreement was ambiguous and should not bar defendant's challenges to the calculation of the range itself).

5 In response to the motion to dismiss, Sanchez makes much of the fact that this latter colloquy occurred after the district court accepted his plea and is inconsistent with Federal Rule of Criminal Procedure 11(b)(1)(N), which provides that "[b]efore the court accepts a plea of guilty ... the court must inform the defendant of, and determine that the defendant understands ... the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." However, Rule 11 also provides that "[a] variance of this rule is harmless error if it does not affect substantial rights." Fed. R. Crim. P. 11(h). Here, while the district court varied from Rule 11(b)(1)(N) by squarely addressing the appeal waiver after accepting the plea (instead of doing so before accepting the plea) the variance was harmless and did not affect Sanchez's substantial rights as the record demonstrates that Sanchez clearly understood the full significance of the appeal waiver. *See id.*; *see also United States v. Hernandez-Fraire*, 208 F.3d 945, 950 (11th Cir. 2000) (explaining, in the context of a challenge to the validity of a guilty plea itself, that "[g]enerally this circuit will uphold a plea colloquy that technically violates Rule 11, but adequately addresses the three core concerns"—(1) that the plea is free from coercion; (2) the defendant understands the nature of the charges; and (3) defendant knows and understands the consequences of his plea).

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10484-BB

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

GEORGE FERRER SANCHEZ,

Defendant - Appellant.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: NEWSOM, BRANCH, and GRANT, Circuit Judges.
PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
GEORGE FERRER SANCHEZ

JUDGMENT IN A CRIMINAL CASE

Case Number: **19-20085-CR-COOKE**
USM Number: **17958-104**

Counsel For Defendant: **Philip Horowitz, Esq.**
Counsel For The United States: **Ignacio Vazquez, AUSA**
Court Reporter: **Jill Wells**

The defendant pleaded guilty to count 3 of the Indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18, U.S.C. 1956(h)	Conspiracy to commit money laundering.	12/2018	3

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

All remaining counts are dismissed on the motion of the government.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence:

1/22/2020

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge

January 22, 2020

DEFENDANT: **GEORGE FERRER SANCHEZ**
CASE NUMBER: **19-20085-CR-COOKE**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **108 months**.

The court makes the following recommendations to the Bureau of Prisons: Designation to a facility in the Southern District of Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **GEORGE FERRER SANCHEZ**
CASE NUMBER: **19-20085-CR-COOKE**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **GEORGE FERRER SANCHEZ**
CASE NUMBER: **19-20085-CR-COOKE**

SPECIAL CONDITIONS OF SUPERVISION

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: **GEORGE FERRER SANCHEZ**
CASE NUMBER: **19-20085-CR-COOKE**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

The determination of restitution is deferred until 3/25/2020. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount to be determined at the restitution hearing scheduled for March 25, 2020 at 10:00 a.m. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **GEORGE FERRER SANCHEZ**
CASE NUMBER: **19-20085-CR-COOKE**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

The Government shall file a preliminary order of forfeiture within 3 days.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.