ORIGINAL

22-5191
No. _____

In the Supreme Court of the United States

ANIS BLEMUR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ANIS BLEMUR
Pro Se Petitioner
Fed. Reg. No. 19380-104
FCI Miami
P.O. Box 779800
Miami, Florida 33177

QUESTION PRESENTED

Whether the Eleventh Circuit's denial of a certificate of appealability, where the district court erred or alternatively abused its discretion in holding that Mr. Blemur's claims of ineffective assistance of counsel were waived by his guilty plea, is irreconcilable with controlling precedent, such that this Court should remand to the United States Court of Appeals for the Eleventh Circuit with instructions to issue a certificate of appealability?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those listed in the style of the case.

RELATED CASES

- *United States v. Anis Blemur*, No. 1:18-cr-20818-PCH-1, U.S. District Court for the Southern District of Florida at Miami. Judgment entered July 3, 2019.

- *United States v. Anis Blemur*, No. 19-12806, U.S. Court of Appeals for the Eleventh Circuit. Judgment Vacating and Remanding entered June 22, 2020.

- *Anis Blemur v. United States*, No. 1:21-cv-22009-PCH, U.S. District Court for the Southern District of Florida at Miami. Judgment entered Oct. 8, 2021.

- *Anis Blemur v. United States*, No. 21-13726, U.S. Court of Appeals for the Eleventh Circuit. Judgment denying COA entered March 3, 2022.

TABLE OF CONTENTS

Page

INDEX OF APPENDICES

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES AND OTHER AUTHORITIES

OPINIONS BELOW

The Judgment of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's motion for certificate of appealability is unpublished and may be found at USCA Case No. 21-13726; *Anis Blemur v. United States of America* (March 3, 2022) (*Appendix - A1*).

The Order of the United States District Court for the Southern District of Florida at Miami denying Petitioner's motion to vacate and denying him a certificate of appealability is unpublished and may be found at USDC Case No. 1:21-cv-22009-PCH; *Anis Blemur v. United States of America* (Oct. 8, 2021) (*Appendix - A2*).

A portion of the district court's rationale for the October 8, 2021 denial of Mr. Blemur's motion to vacate is found in the transcript of the § 2255 hearing, held October 8, 2021 and included in the Appendix. (*Appendix - A4*).

STATEMENT OF JURISDICTION

The judgment denying Petitioner's motion for certificate of appealability was issued on March 3, 2022. This petition is timely filed pursuant to Sup. Ct. R. 13. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a federal criminal defendant's constitutional rights under the Sixth Amendment, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

This case also involves the application of 28 U.S.C. § 2253(c). 28 U.S.C. § 2253(c) provides that:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> . . .
>
> (B) the final order in a proceeding under section 2255.
>
> . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

On May 31, 2021, Mr. Blemur initiated this proceeding by filing a timely counseled collateral attack on the judgment of the district court via the provisions of 28 U.S.C. §2255 (f)(1) ("§2255"). *[DE #1, #3]*. Mr. Blemur's §2255 sought to vacate his conviction and sentence on the basis that Mr. Blemur was deprived of rights guaranteed by the Sixth Amendment to the United States Constitution on the bases that his former counsel performed deficiently in: 1) failing to even consider filing a Motion to Suppress the eighteen (18) credit cards found in a search of his office; 2) failing to file a Sentencing Memorandum advocating relevant mitigating factors under 18 U.S.C § 3553(a); and 3) failing to review letters of support, submitted to the Court for consideration at sentencing, which trivialized Mr. Blemur's actions as mere "mistakes" and thus inflamed the Court. These failures, individually and cumulatively, substantially prejudiced Blemur, as evidenced by the lengthy and unreasonable sentence he received as a first-time, nonviolent offender.

Through his filings in the district court, Mr. Blemur established that former counsel was constitutionally ineffective in connection with sentencing matters. *See DE #24, pp. 5-6* (During the 2255 videoconference proceedings, Mr. Blemur's counsel conceded that the claim of ineffective assistance of counsel in connection to suppression matters "is not a viable issue for an ineffective assistance of counsel claim. . . Because this was a guilty plea, I do concede that the Motion to Suppress -- the failure to investigate and perhaps file a

Motion to Suppress is not justiciable in front of you. . .") Specifically, Mr. Blemur demonstrated that but for sentencing counsel's deficiencies there is a reasonable probability that Mr. Blemur's sentence would have been less severe. On this basis, Mr. Blemur claimed entitlement to have his sentence vacated and the matter reset for sentencing with effective assistance of counsel made available to Mr. Blemur.

On July 13, 2021, the District Court entered a paperless Order to show cause, requiring the United States to respond to Mr. Blemur's motion to vacate. [*DE #6*].

On August 16, 2021, the United States filed their response in opposition to Mr. Blemur's motion to vacate. [*DE #8*]. On August 31, 2021 Mr. Blemur filed his reply to the United States' response in opposition. [*DE #11*].

On September 20, 2021, the District Court issued a paperless Order setting a motion hearing on the pending 2255 – to be held via Zoom – for October 8, 2021. [*DE #13*]. On October 1, 2021, the United States filed a notice of supplemental authority and on October 8, 2021, the videoconference was held. [*DE #14; Transcript at App. C*]. The same day as the hearing, the District Court issued an Order, denying in all respects Mr. Blemur's then pending Motion to Vacate filed pursuant to 28 U.S.C. §2255 and denying him a certificate of appealability ("COA"). [*App. B*].

On October 26, 2021, Mr. Blemur timely filed his notice

of appeal. [*DE #17*]. On November 4, 2021, Mr. Blemur moved the lower court for permission to appeal *in forma pauperis* and supported his motion with an affidavit of indigency. [*DE #20, #21*].

On March 3, 2022, the United States Court of Appeals for the Eleventh Circuit denied COA, [*App. A, A1*]. This petition is timely submitted, within 90 days of the Eleventh Circuit's March 3, 2022 judgment denying COA. [*App. A*].

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of *certiorari*. At a minimum, this Court should order summary reversal because in denying a certificate of appealability, the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power. This is true because the district court's ruling, denying Mr. Blemur's claim of ineffective assistance of sentencing counsel as waived by his plea agreement is irreconcilable and in direct conflict with precedent and thus clearly debatable amongst jurists of reason under controlling precedent. Additionally, Petitioner's claim of ineffective assistance of counsel provided the required constitutional dimension for a certificate of appealability.

Specifically, Mr. Blemur's §2255 presented two claims that he was deprived of his right to the effective assistance of counsel, enshrined in and guaranteed by the Sixth Amendment to the United States Constitution, by

counsel's failures in connection to his sentencing in the lower court.

The district court denied Mr. Blemur's motion to vacate at the videoconference hearing and explained that ruling in its written order as follows:

> During the hearing, the Court DENIED the motion and provided two bases for its decision, each of which independently led to the denial of Blemur's motion. First, and for the reasons discussed in greater detail during the hearing, the Court determined that Blemur's arguments were waived. By knowingly, voluntarily, and intelligently pleading guilty to his charges, Blemur waived all three of the alleged nonjurisdictional defects in his court proceedings. See Wilson v. United States, 962 F.2d 996, 997 (11th Cir. 1992) ("A defendant who enters a plea of guilty waives all nonjurisdictional challenges to the constitutionality of the conviction, and only an attack on the voluntary and knowing nature of the plea can be sustained."); Bullard v. Warden, Jenkins Corr. Ctr., 610 F. App'x 821, 824 (11th Cir. 2015) (noting that a waiver of all nonjurisdictional challenges "includes any claim of ineffective assistance of counsel unless the deficient performance relates to the voluntariness of the plea itself");

> Bailey v. United States, No. 08-cr-529, 2011 WL 2270183, at *3 (M.D. Fla. June 6, 2011); Castillo-Perez v. United States, No. 10-cv-1157, 2011 WL 672356, at *2 (M.D. Fla. Feb. 17, 2011). Second, and for the reasons discussed in greater detail during the hearing, the Court determined that each of Blemur's arguments failed on the merits.
>
> *App. B, pp. 1-2.*

Mr. Blemur's claim of ineffective assistance of counsel in connection with sentencing matters is of constitutional dimension as it states a violation of the Sixth Amendment. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d (1984).

The district court's ruling that Mr. Blemur's claims of ineffective assistance of counsel are waived because he pleaded guilty is more than debatable, it is quite simply an error of law. Likewise, the lower court's cursory merits determination is debatable amongst jurists of reason and those claims provide the requisite constitutional dimension for issuance of a COA. The Eleventh Circuit's cursory adoption of the district court's rationale to deny Mr. Blemur the COA to which he is entitled should be summarily reversed by this Court.

A. The Certificate of Appealability Standard.

To obtain a certificate of appealability, a *habeas* petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner need not demonstrate that he would prevail on the merits. Rather, he "must '[s]how 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.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983)) (some internal quotation marks omitted)).

"[A] COA does not require a showing that the appeal will succeed." *Id.* at 337. As this Court has explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. In *Slack*, 529 U.S. at 478, this Court held:

> when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order

> may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Reasonable jurists could debate the merits of Petitioner's ineffective assistance of counsel claims and the lower court's ruling that he had waived the same. The legal arguments, set forth below, demonstrate that Petitioner has satisfied the § 2253(c) standard because, at a minimum, both the constitutional question and the procedural one are "debatable among jurists of reason." *Miller-El,* 537 U.S. at 336 (quoting *Barefoot*, 463 U.S. at 893 n.4).

B. Reasonable Jurists Could Debate Or, for That Matter, Agree That Mr. Blemur's Claims of Ineffective Assistance of Sentencing Counsel Were Not Waived by His Plea Agreement

The district court erred and abused its discretion by denying Mr. Blemur's §2255 motion on the grounds that his claims of ineffective assistance of counsel at sentencing were waived by his guilty plea. The cases relied on by the lower court do not stand for the proposition for which the lower court cites them. Specifically, each case has the same limiting language – that a plea of guilty waives all pre-plea nonjurisdictional

claims – excluding Mr. Blemur's claims of ineffective assistance at sentencing from the scope of the waiver. First, in *Wilson v. United States*, 962 F.2d 996, 997 (11th Cir. 1992), the Eleventh Circuit held that:

> A defendant who enters a plea of guilty waives all nonjurisdictional challenges to the constitutionality of the conviction, and only an attack on the voluntary and knowing nature of the plea can be sustained. Bradbury v. Wainwright, 658 F.2d 1083, 1087 (5th Cir.Unit B, 1981). Wilson's claim of ineffective assistance is not about his decision to plead guilty. Because the district court was familiar with the facts surrounding Wilson's conviction, having been the same court as had heard Wilson's guilty plea and sentenced him, and because the record before the district court fully reflected the voluntariness of Wilson's plea, *the court did not err in dismissing Wilson's claim, as it involved pre-plea issues,* without conducting an evidentiary hearing.
>
> *Id. at 997* (Emphasis added).

In fact, the primary case cited by the lower court, *Wilson*, addressed the merits of the ineffective assistance of counsel at sentencing claim raised by Wilson, showing that the waiver only applied to the pre-plea claims.

Wilson also attacks counsel's failure to object to the quantity of cocaine calculated at sentencing. The district court based Wilson's offense level on 400 grams, the amount of cocaine set forth in the P.S.I. Wilson claims he repeatedly advised counsel that less than 400 grams was involved, but when he was given an opportunity to speak at the conclusion of the sentencing hearing, Wilson himself said only that he was sorry. The real problem with Wilson's argument, however, is that he has not suggested any factual basis upon which counsel could have relied in making such a challenge. "Conclusory allegations of ineffective assistance are insufficient." United States v. Lawson, 947 F.2d 849, 853 (7th Cir.1991) (defendant contended counsel was ineffective for failing to object to inclusion of certain quantities of marijuana in sentencing determination). "Even if counsel had challenged these amounts, we cannot conclude that there is a reasonable probability that the result of the sentencing hearing would have been different." Id. *In short, Wilson has neither shown counsel's performance to be inadequate nor any resulting prejudice-except for his own bald assertion that counsel was ineffective.*

Id. at 998 (Emphasis added).

Each of the other cases relied on by the lower court similarly limited the waiver to claims which arose prior to the movant's entry of a guilty plea. *See Bullard v. Warden, Jenkins Corr. Ctr.*, 610 F. App'x 821, 824 (11th Cir. 2015) ("*Here Mr. Bullard does not contend that his plea was involuntary due to his counsel's failure to file a motion to suppress, so the ineffectiveness claim is waived by the plea.*" (Emphasis added).); *Bailey v. United States*, 2011 WL 2270183, at *3 (M.D. Fla. June 6, 2011) ("Bailey claims that his traffic stop did not comply with federal law because a "summons or arrest warrant" did not issue and because an illegal interrogation took place after he was stopped and during subsequent debriefings by law enforcement. [] While these are wholly unsupported allegations, *Bailey waived these arguments by pleading guilty.*" (Emphasis added.)); *Castillo-Perez v. United States*, 2011 WL 672356, at *2 (M.D. Fla. Feb. 17, 2011) ("[T]he Court concludes that Petitioner waived his right to bring any claim based on the fairness of his arrest by pleading guilty. It is well established that a voluntary, unconditional guilty plea "waives all nonjurisdictional challenges to the constitutionality of the conviction" *that arose before the guilty plea.*" (Emphasis added.)).

Although not included in the lower court's order, it should be noted that Mr. Blemur did not affirmatively waive the right to raise a claim of ineffective assistance at sentencing, as his plea agreement did not include the requisite collateral attack waiver language, required

under controlling precedent as a prerequisite to finding that such waiver was knowingly and intelligently entered. *See Plea Agreement, DE #8-5* ("The Defendant is aware that Title 18, United States Code, Section 3742 and Title 28, United States Code, Section 1291 afford the Defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the Defendant hereby waives all rights conferred by Sections 3742 and 1291 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. The Defendant further understands that nothing in this agreement shall affect the United States' right and/or duty to appeal as set forth in Title l 8, United States Code, Section 3742(1)) and Title 28, United States Code, Section 1291 . However, if the United States appeals the Defendant's sentence pursuant to Sections 37424b) and 1291, the Defendant shall be released from the above waiver of appellate rights. 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."); *see also Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) ("Here, at the plea colloquy, the court specifically questioned Williams concerning the specifics of the sentence-appeal waiver and determined that he had entered into the written plea agreement, which included the appeal waiver, knowingly and voluntarily. *See Bushert*, 997 F.2d at 1351.

The plain language of the agreement informed Williams that he was waiving a collateral attack on his sentence. Under these circumstances, the sentence-appeal waiver precludes a § 2255 claim based on ineffective assistance at sentencing. Accordingly, we affirm the district court's denial of collateral relief on this basis.").

Additionally, it should be noted that Mr. Blemur did not agree to a collateral attack waiver during his Rule 11 hearing, which is another prerequisite to finding his claims waived thereunder. *See Change of Plea Transcript*, DE #8-8 ("THE COURT: Okay. Something else in your plea agreement regards your rights to appeal. When someone, as in your shoes, pleads guilty and then later has a sentencing, you would normally have what I would call kind of a collection of rights to challenge your sentence, complain about it to a higher court, a court of appeals. You could file an appeal and ask the Court of Appeals to look over Judge Huck's decision, and you could urge them that he got it wrong and that they should send this back to him to resentence you. *In this plea agreement, you're giving up some of those rights but not all.* So in this agreement, what you're saying is that you're not going to appeal your sentence unless one of three circumstances were to take place. First, if Judge Huck were to sentence you to a sentence that is more than the maximum sentence that Congress sets out, you could appeal that because that would be an illegal sentence and you retain that right. Secondly, if Judge Huck were to sentence you to more than what the guidelines recommend, that may or may not be proper and you could complain about it. You could appeal that to the Court of

Appeals. And last, if the government was unhappy with the sentence, and it complained and appealed to the Court of Appeals, then you would be free to respond with any arguments you'd like to make on appeal. Beyond that though, you will have no right to complain about your sentence to the Court of Appeals. Is this making sense, sir? THE DEFENDANT: Yes, Your Honor, it does." (Emphasis added.)).

Mr. Blemur demonstrated a substantial denial of a constitutional right in the lower courts. This is true because one, like Mr. Blemur, who claims that his counsel was constitutionally ineffective at sentencing must show that counsel was deficient in connection with sentencing matters and that due to those deficiencies the imposed sentence was greater than it otherwise would have been. *See Glover v. United States*, 531 U.S. 198 (2001).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. amend. VI. A defendant's right to assistance of counsel may be violated if his attorney fails to provide adequate legal assistance. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). This right applies at all stages of a criminal proceeding, including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

In *Strickland*, this Court held that a petitioner must satisfy a two-pronged test to establish a claim of ineffective assistance of counsel. 466 U.S. at 686–87. First, the petitioner must show that his attorney's

performance fell below an objective standard of reasonableness. Id. at 688. Although the Court in *Strickland* left open "the role of counsel in an ordinary sentencing, which may ... require a different approach to the definition of constitutionally effective assistance," *Strickland*, 466 U.S. at 686, the courts of appeals have generally applied the same two-step *Strickland* test to noncapital sentencing hearings. *See e.g., United States v. Seyfert*, 67 F.3d 544, 547 (5th Cir.1995); *Carsetti v. Maine*, 932 F.2d 1007, 1012–14 (1st Cir.1991); *United States v. Stevens*, 851 F.2d 140, 145 (6th Cir.1988); *see also United States v. Russell*, 34 F. App'x 927, 927–28 (4th Cir.2002) (unpublished) (per curiam) (applying Strickland where counsel failed to object to the calculation of a base offense level at sentencing). To satisfy *Strickland*'s second prong, ineffective assistance claims in the context of noncapital sentencing cases require a showing that the defendant received a greater sentence than he would have, but for counsel's unprofessional errors. *See Glover v. United States*, 531 U.S. 198, 204 (2001). In *Glover*, the Supreme Court held that "any amount of actual jail time has Sixth Amendment significance," and therefore, a claim of ineffective assistance of counsel does not require a showing of a significantly increased sentence as a result of counsel's errors. *Id.*

An objective review of the record before the lower courts reveals that Mr. Blemur adequately pled both of his claims of ineffective assistance of counsel at sentencing in his motion to vacate and supporting papers – *see DE #1, pp. 6-8, 22-30; DE #3, pp. 9-15; DE #11, pp. 5-10* – and

argued the same convincingly at the videoconference hearing, – *see App. C.* – to the degree necessary to supply this application for COA with the requisite constitutional dimension. Moreover, the lower court's ruling that Mr. Blemur's claims of ineffective assistance at sentencing were waived by his guilty plea is more than debatable, it is quite simply an error of law. The cases the lower court cited are inapposite and the ruling itself is contrary to controlling precedent. Thus, the district court's denial of Mr. Blemur's motion to vacate under 28 U.S.C. § 2255 is debatable amongst jurists of reason. COA should issue as to this question or some derivative.

The Eleventh Circuit denied Petitioner a COA in a cursory single sentence judgment. [*App. A, A1*]. Both the district court's erroneous ruling and the Eleventh Circuit's cursory denial of COA are unsupportable on the record. As reasonable jurists could debate the appropriateness of the district court's decision as described, *supra*, a COA should issue as to this question.

C. <u>This Court Should Summarily Reverse the Eleventh Circuit's Denial of COA.</u>

This Court has authority to "reverse any judgment" brought before it and "remand the cause and direct entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. Summary reversals are "usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v.*

Hansen, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting); *see, e.g., United States v. Bass*, 536 U.S. 862, 864 (2002) (ordering summary reversal because the decision below was "contrary to" established law); *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (ordering summary reversal); *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (ordering summary reversal where the decision under review was "plainly wrong"). The Eleventh Circuit's order denying Petitioner's motion for a certificate of appealability is clearly wrong. Petitioner clearly satisfied the standard for a certificate of appealability. This case warrants summary reversal.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of *certiorari* to the United States Court of Appeals for the Eleventh Circuit, vacate the Eleventh Circuit's order denying COA and remand the matter to the Eleventh Circuit with instructions to grant COA.

Respectfully submitted,

Anis Blemur
Pro Se Petitioner
Fed. Reg. No. 19380-104
FCI Miami
P.O. Box 779800
Miami, Florida 33177

May 11, 2022.