

No.

IN THE SUPREME COURT OF THE UNITED STATES

FRANK PANNULLO,

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

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QUESTION PRESENTED

Whether, under the sixth amendment, a criminal defendant may waive his right to raise a claim of ineffective assistance of counsel as part of a plea-agreement, where he has not been provided with a conflict free attorney to counsel him as to the advisability of doing so?

PARTIES TO THE PROCEEDING

Parties to the proceeding include Frank Pannullo (Appellant/Petitioner), Dane K. Chase, Esquire (Appellant/Petitioner's Counsel), Maria Chapa Lopez, Esquire (Interim United States Attorney), Linda Julin McNamara (Assistant United States Attorney), David P. Rhodes (Assistant United States Attorney), Jay G. Trezevant (Assistant United States Attorney) and Noel Francisco, Esquire (Solicitor General of the United States of America).

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the Eleventh Circuit Court of Appeals *infra*, was not selected for publication. The decision can be found at *United States v. Pannullo*, 709 F. App'x 683 (11th Cir. 2018), and is attached as Appendix A.

JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeals, which had jurisdiction under Title 28 U.S.C. § 1291, was entered on January 29, 2018. Mr. Pannullo filed a Timely Motion for Rehearing, which was denied on February 21, 2018. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF FACTS

As a preliminary matter, should this Court wish to consult the district court docket while reviewing the instant Petition, citations to the docket are set forth in the Petition and are made by the letter "D" followed by the appropriate district court docket number, followed by the appropriate page number.

On May 17, 2016, Mr. Pannullo was charged by Information, in the Middle District of Florida, Tampa Division, with Conspiracy to Make False Statements to the Social Security Administration in violation of 18 U.S.C. § 371. (D-1). On June 6, 2016, Mr. Pannullo pled guilty pursuant to a plea agreement which contained the following appellate waiver:

Defendant's Waiver of Right to Appeal the Sentence

The defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum and expressly waives the right to appeal defendant's sentence on any ground, including the ground that the Court erred in determining the applicable guidelines range pursuant to the United States Sentencing Guidelines, except (a) the ground that the sentence exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution; provided, however, that if the government exercises its right to appeal the sentence imposed, as authorized by 18 U.S.C. § 3742(b), then the defendant is released from his waiver and may appeal the sentence as authorized by 18 U.S.C. § 3742(a).

(D-3, at 12).

Thereafter, Mr. Pannullo proceeded to sentencing, and the district court imposed a sentence of twenty-four (24) months imprisonment followed by thirty-six (36) months supervised release. *Id.* at 32, 34.

Mr. Pannullo then filed a Notice of Appeal. In his Initial Brief, Mr. Pannullo argued that his sentencing counsel had performed ineffectively, and that his Judgment and Sentence should be reversed, and his case remanded for a new

sentencing hearing. The Government then filed a motion to dismiss Mr. Pannullo's appeal, arguing that, under the appellate waiver contained in his plea-agreement, Mr. Pannullo had waived his right to appeal on the grounds his sentencing counsel had performed ineffectively during sentencing. In response, Mr. Pannullo argued that he did not knowingly and voluntarily waive his right to appeal on the grounds his sentencing counsel had performed ineffectively, as he had not been provided conflict free counsel to advise him as to whether waiving the right to appeal on said grounds was in his best interest. Specifically, Mr. Pannullo argued that the trial attorney who represented him during plea negotiations was the same attorney whose representation he was challenging on appeal. Accordingly, Mr. Pannullo argued he was deprived of his right to conflict free counsel with respect to his waiver of the right to appeal on the grounds that his sentencing counsel performed ineffectively, and, as such, his waiver of the right to appeal on said grounds was not knowingly and voluntarily made, and was therefore void.

Despite Mr. Pannullo's argument, the Eleventh Circuit Court of Appeal granted the Government's motion to dismiss, finding:

The Government's motion to dismiss this appeal pursuant to the appeal waiver in Appellant's plea agreement is GRANTED. *See United States v. Bushert*, 997 F.2d 1343, 1350-51 (11th Cir. 1993) (sentence appeal waiver will be enforced if it was made knowingly and voluntarily); *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (defendant cannot avoid application of an appeal waiver by recasting a sentencing challenge as an ineffective-assistance-of-counsel claim).

Pannullo, 709 F. App'x at 683-84.

Mr. Pannullo then filed a motion for rehearing, however, the motion was denied.

This Petition follows.

REASONS FOR GRANTING THE PETITION

- I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT, UNDER THE SIXTH AMENDMENT, A CRIMINAL DEFENDANT MAY NOT VALIDLY WAIVE HIS RIGHT TO APPEAL ON THE GROUNDS HIS COUNSEL PERFORMED INEFFECTIVELY UNLESS HE IS OFFERED A CONFLICT FREE ATTORNEY TO COUNSEL HIM AS TO THE ADVISABILITY OF DOING SO, TO RESOLVE THE CIRCUIT SPLIT ON THIS ISSUE, AND ENSURE AN APPELLATE WAIVER MEANS THE SAME IN FLORIDA AS IT DOES IN NORTH CAROLINA.

At issue in this Petition is whether a criminal defendant may waive his right to raise a claim of ineffective assistance of counsel as part of a plea-agreement, where he has not been provided with a conflict free attorney to counsel him as to the advisability of doing so. As observed by the Nebraska Supreme Court's Advisory Ethics Committee, the failure of the federal courts to address the ethical concerns created by such waivers "has placed criminal defense counsel in a difficult position," and, as such, this Court should grant review to address the issue and the ethical concerns associated with it. Neb. Lawyers Ethics Advisory Comm, Op. 14-03 (2014).

1. The circuit split.

The Eleventh Circuit concluded that the appellate waiver contained in Mr. Pannullo's plea-agreement precluded him from appealing on the grounds that his trial counsel performed ineffectively during his sentencing hearing. *See, United States v. Pannullo*, 709 Fed. Appx. 683 (11th Cir. 2018). However, in a case originating from North Carolina, the Fourth Circuit has reached a contrary conclusion finding that "a defendant can[not] fairly be said to have waived his right to appeal his sentence on the ground that the proceedings following entry of the guilty plea were conducted in violation of his Sixth Amendment right to counsel, for

a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations.” *United States v. Attar*, 38 F.3d 727, 732 (4th Cir. 1994) (citations omitted).

For the reasons that follow, this Court should grant review and establish that under the sixth amendment, a criminal defendant may not validly waive his right to appeal on the grounds that his sentencing counsel performed ineffectively unless he has first been provided an independent attorney to counsel him as to the advisability of doing so.

2. Ethics opinions, scholarly opinions, and the Government’s position.

Various bar associations throughout the United States have considered whether a criminal defense attorney may ethically advise a criminal defendant concerning a plea-agreement which contains a waiver of the right to pursue relief on the basis of a claim of ineffective assistance of counsel. The overwhelming majority of these associations have concluded that defense attorneys may not ethically counsel defendants concerning such waivers because the waivers create a conflict of interest. *See*, Neb. Lawyers Ethics Advisory Comm, Op. 14-03 (2014); Ky. Bar Ass’n, Advisory Ethics Op. KBAE-435 (2012); Prof’l Ethics of the Fla. Bar, Op. 12-1 (2012); Ala. State Bar, Formal Op. 2011-02 (2011); State Bar of Nev. Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 48 (2011); Va. State Bar, Legal Ethics Op. 1857 (2011); Advisory Comm. of the Supreme Court of Mo., Formal Op. 126 (2009); Vt. Bar Ass’n, Advisory Ethics Op. 95-04 (1995); N.C. State Bar, Ethics Op.

RPC 129 (1993); The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Op.2001-06 (2001); Pennsylvania Opinion 2004-100; Tennessee Opinion 94-A-549; Utah State Bar Ethics Advisory Opinion Committee, Op. 13-04 (2013); *but see*, State Bar of Arizona, Ethics Op. 95-08 (1995); Supreme Court of Tex. Prof'l Ethics Comm., Op. 571 (2006); N.Y. State Bar Assoc'n Comm. Prof'l Ethics, Op. 1048 (2015). In fact, most bar associations have further concluded that a prosecutor may not ethically require a criminal defendant to waive the right to pursue a claim of ineffective assistance of counsel as part of a plea-agreement. *See, Id.* Furthermore, legal scholars throughout the country have reached the same conclusion. *See*, Peter A. Joy & Rodney J. Uphoff, *Systemic Barriers to Effective Assistance of Counsel in Plea Bargaining*, 99 Iowa L. Rev. 2103 (2014); Susan R. Klein; Aleza S. Remis; Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73 (2015). Were that not enough, the Government itself has made it its policy “in support of the underlying Sixth Amendment right,” not to include waivers of the right to pursue an ineffective assistance of counsel claim within Government offered plea-agreements – though, as Mr. Pannullo’s case demonstrates, that policy is not always followed. *See*, Memorandum for All Federal Prosecutors from the Office of the Deputy Attorney General (Oct. 14, 2014), <https://www.justice.gov/file/70111/download>. The conflict of interest created by such waivers is not only an ethical concern, but also, as the next section explains,

deprives a criminal defendant of his right to the effective assistance of counsel during the plea-bargaining process.

3. Plea-agreements containing a waiver of the right to pursue a claim of ineffective assistance of counsel inherently deprive the defendant of his sixth amendment right to counsel.

A criminal defendant's waiver of the right to appeal must be knowing and voluntary. *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993). In the context of a guilty plea, the Eleventh Circuit has explained "[w]ithout 'reasonably effective assistance of counsel in connection with the decision to plead guilty,' a defendant cannot enter a knowing and voluntary plea because the plea does not represent an informed choice." *Stano v. Dugger*, 921 F.2d 1125, 1151 (11th Cir. 1991) (citing, *McCoy v. Wainwright*, 804 F.2d 1196, 1198 (11th Cir. 1986); *Scott v. Wainwright*, 698 F.2d 427, 429 (11th Cir. 1983)). The same is true here: without the assistance of conflict free counsel in connection with the decision of whether to waive the right to appeal the effectiveness of counsel's sentencing representation, Mr. Pannullo's waiver cannot be said to be knowing and voluntary, as the waiver does not represent an informed choice. *See, Id.*

More specifically, because Mr. Pannullo was not provided an independent attorney to counsel him as to the advisability of waiving his right to challenge the effectiveness of his counsel on appeal, Mr. Pannullo was ultimately waiving the right to challenge the effectiveness of his counsel based upon the advice of the counsel whose effectiveness he was waiving the right to challenge, thus creating a clear conflict of interest, which deprived Mr. Pannullo of his right to the effective

assistance of counsel concerning the appellate waiver. *See, United States v. Adkins*, 274 F.3d 444, 453 (7th Cir. 2001) (“The Sixth Amendment entitles a criminal defendant to representation by conflict free counsel.” citing, *Cuyler v. Sullivan*, 446 U.S. 335, 345, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). Accordingly, the waiver is not enforceable under *Bushert*, because, as pertaining to the issue of waiving the right to challenge counsel’s effectiveness on appeal, trial counsel had a conflict of interest which deprived Mr. Pannullo of his right to the effective assistance of counsel while deciding whether to accept the waiver, and thus the waiver was not knowingly and voluntarily made. *See, Adkins*, 274 F.3d at 453; *Stano*, 921 F.2d at 1151; *Bushert*, 997 F.2d at 1351.

Furthermore, this Court’s recent decisions establishing that criminal defendants have a right to the effective assistance of counsel during the plea bargaining process, dictate a finding that unless a conflict free attorney is appointed to counsel a criminal defendant as to the advisability of entering into a plea-agreement that requires him to waive his right to pursue a claim of ineffective assistance of counsel, the waiver cannot be enforced.

More specifically, this Court has recognized that a criminal defendant has a Sixth Amendment right to the effective assistance of counsel in the plea bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 168, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012) (“If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it.”) Furthermore, this Court has explained that a criminal defendant is deprived of his right to the effective

assistance of counsel where an actual conflict of interest adversely affected his attorney's performance. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002).

Here, as pertaining to the appellate waiver contained in Mr. Pannullo's plea agreement, an actual conflict of interest existed which adversely affected his attorney's performance. Accordingly, Mr. Pannullo's appellate waiver cannot be said to have been knowingly and voluntarily made, and, as such, Mr. Pannullo did not waive his right to appeal the effectiveness of his counsel's representation during sentencing.

A. An actual conflict of interest existed as pertaining to the appellate waiver contained in Mr. Pannullo's plea agreement.

"An actual conflict exists when an attorney actively represents incompatible interests; it is more than a "mere theoretical division of loyalties." *United States v. Fuller*, 312 F.3d 287, 291 (7th Cir. 2002) (citing, *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 1243, 152 L.Ed.2d 291 (2002)). Here, assuming, as the Eleventh Circuit concluded, that the appellate waiver in Mr. Pannullo's plea agreement waived his right to appeal the effectiveness of counsel's performance during sentencing, an actual conflict of interest necessarily existed between Mr. Pannullo and his trial counsel.

More specifically, Mr. Pannullo had an interest in preserving his right to appeal the effectiveness of his counsel's performance during sentencing, and trial counsel had an interest in ensuring Mr. Pannullo waived the right to attack his representation on appeal. As succinctly stated by the Kentucky Bar Association:

The lawyer in the plea agreement setting has a “personal interest” that creates a “significant risk” that the representation of the client “will be materially limited.” The lawyer has a clear interest in not having his or her representation of the client challenged on the basis of ineffective assistance of counsel. The lawyer certainly has a personal interest in not having his or her representation of the client found to be constitutionally ineffective.

Ky. Bar Ass’n, Advisory Ethics Op. KBAE-435, 2 (2012).

Accordingly, as pertaining to the appellate waiver contained in the plea agreement, an actual conflict of interest existed between Mr. Pannullo and his trial counsel during plea negotiations, as it was in Mr. Pannullo’s interest to negotiate a plea agreement that would permit him to challenge the effectiveness of his counsel’s representation during sentencing, and it was in counsel’s interest to ensure Mr. Pannullo entered into a plea agreement that waived the right to challenge his representation. *See, Fuller*, 312 F.3d at 291 (An actual conflict exists when an attorney actively represents incompatible interests).

B. Mr. Pannullo was adversely effected by his trial counsel’s actual conflict of interest.

The Eleventh Circuit has explained the three part standard for establishing adverse effect as follows:

To prove adverse effect, a habeas petitioner must satisfy three elements. First, he must point to “some plausible alternative defense strategy or tactic [that] might have been pursued.” *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir.1985); *see also Porter [v. Wainwright]*, 805 F.2d 930, 939–40 (11th Cir.1986), *cert. denied*, 482 U.S. 918, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987)]. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, *see Strickland*, 466 U.S. at 692, 104 S.Ct. 2052,

the petitioner “need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used,” rather he only need prove that the alternative “possessed sufficient substance to be a viable alternative.” *Fahey*, 769 F.2d at 836. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, “he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.” [*Fahey*, 769 F.2d at 836].

Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir. 1999) (quoting, *Freund v. Butterworth*, 117 F.3d 1543, 1579-80 (11th Cir. 1997)). “With respect to the third prong—that counsel's failure to pursue the objectively reasonable defense strategy was linked to the conflict—the *Freund* court explained that the petitioner is entitled to prove such a link in either of two ways: (1) by ‘establish[ing] that the alternative defense was inherently in conflict with ... the attorney's other loyalties or interests’ (the ‘first aspect of the *Freund* test’), or (2) by otherwise showing that the alternative defense was ‘not undertaken due to’ those other loyalties or interests (the ‘second aspect of the *Freund* test’)” *United States v. Nicholson*, 611 F.3d 191, 212 (4th Cir. 2010) (citing, *Freund*, 165 F.3d at 860).

- i. Plausible alternative strategy or tactic that might have been pursued.

Independent counsel, not impacted by the conflict – which, in this case, would have required the appointment of a second attorney to counsel Mr. Pannullo as to the advisability of waiving his right to appeal the effective assistance of counsel during his sentencing - plausibly could have advised Mr. Pannullo to refuse to waive his right to appeal the effectiveness of his counsel's representation during

sentencing as part of his plea agreement with the government. Accordingly, the first prong of the adverse effect standard has been met. *See, Freund*, 165 F.3d at 860 (The first prong of the adverse effect test requires the defendant to point a plausible alternative defense strategy or tactic that might have been pursued.)

ii. The alternative strategy or tactic was reasonable under the facts.

Mr. Pannullo clearly had a vested interest in ensuring that his counsel performed effectively during sentencing. Accordingly, it would have been reasonable for Mr. Pannullo to refuse to waive his right to appeal the effectiveness of his trial counsel's representation during sentencing. Accordingly, the second prong of the adverse effect standard has been met. *See, Freund*, 165 F.3d at 860 (The second prong of the adverse effect test requires the defendant to demonstrate that the alternative strategy or tactic was reasonable under the facts.)

iii. The decision to forego the alternative strategy was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

The alternative strategy, which would have been to advise Mr. Pannullo to refuse to waive his right to appeal the effectiveness of his sentencing counsel as part of his plea agreement with the government, was inherently in conflict with trial counsel's interest in foreclosing Mr. Pannullo's ability to attack his representation on appeal by advising acceptance of the waiver. Accordingly, the third prong of the adverse effect standard has been met. *See, Freund*, 165 F.3d at 860 (The third prong of the adverse effect test requires the defendant to show that the alternative defense was inherently in conflict with or not undertaken due to the attorney's

other loyalties or interests); *Nicholson*, 611 F.3d at 212 (The third prong may be met by demonstrating either (1) the alternative defense was inherently in conflict with the attorney's other interests, or (2) the alternative defense was not undertaken due to the attorney's other interest).

C. As a result of the conflict of interest, Mr. Pannullo did not knowingly and voluntarily waive his right to appeal the effectiveness of his counsel's sentencing representation.

For the foregoing reasons, as pertaining to the appellate waiver, trial counsel's actual conflict of interest adversely effected his representation of Mr. Pannullo during plea negotiations. Accordingly, Mr. Pannullo cannot be said to have knowingly and voluntarily waived his right to appeal the effectiveness of his counsel during sentencing, as he was not afforded conflict free counsel to advise him as to the wisdom of doing so. *See, Lafler*, 566 U.S. at 165, 132 S. Ct. at 1385 ("The constitutional guarantee [to the effective assistance of counsel] applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice."); *Rubin*, 292 F.3d at 402 (Observing that prejudice is presumed because, "[w]hen lawyers' conflicts of interest adversely affect their performance, it calls into question the reliability of the proceeding and represents a breakdown in the adversarial process fundamental to our system of justice").

4. Review should be granted.

A criminal defendant's decision to waive his right to appeal his counsel's representation during sentencing is a decision that the defendant cannot be left to

make without counsel's advice, and trial counsel is unable to provide meaningful advice as to the waiver, as the waiver creates an actual conflict of interest between trial counsel and the defendant, that adversely impacts trial counsel's representation, *i.e.*, trial counsel's advice concerning the waiver. Accordingly, a criminal defendant may only validly waive his right to appeal the effectiveness of his sentencing counsel if he is first appointed a second attorney to counsel him as to the advisability of doing so. *See, Lafler*, 566 U.S. at 165, 132 S. Ct. at 1385; *Freund*, 165 F.3d at 860; *Nicholson*, 611 F.3d at 212; *Fuller*, 312 F.3d at 291; *Mickens*, 535 U.S. 162, 122 S.Ct. 1237.

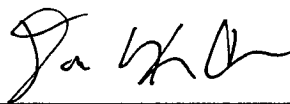
In short, in light of *Lafler's* pronouncement that criminal defendants have the right to the effective assistance of counsel during the plea negotiation process, and cannot be presumed to make critical decisions without counsel's advice, Mr. Pannullo respectfully submits, a criminal defendant cannot waive his right to appeal the effectiveness of his counsel as part of a plea agreement, unless the defendant is provided independent counsel to advise him as to whether doing so is in his best interest. Accordingly, this Court should grant review to resolve the circuit split on this issue, and establish that, under the sixth amendment, a criminal defendant may not validly waive his right to appeal on the grounds his counsel performed ineffectively, unless he is offered a conflict free attorney to counsel him as to the advisability of doing so, to ensure that appellate waivers, and the sixth amendment, mean the same in Florida as they do in North Carolina.

Finally, because Mr. Pannullo was not afforded independent counsel to advise him as to whether it was in his best interest to waive his right to appeal the effectiveness of his trial counsel's representation during sentencing, the Eleventh Circuit's Opinion in Mr. Pannullo's case should be quashed, and his case should be remanded to the circuit court with directions that it enter an opinion addressing the merits of Mr. Pannullo's appeal. *See, Id.*

CONCLUSION

For the reasons stated above, this Court should grant Mr. Pannullo's Petition for Writ of Certiorari, and establish that a criminal defendant cannot waive his right to raise a claim of ineffective assistance of counsel as part of a plea agreement, unless he has been provided with a conflict free attorney to counsel him as to the advisability of doing so.

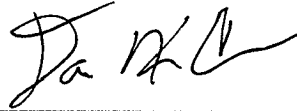
Respectfully Submitted,



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CERTIFICATE OF SERVICE

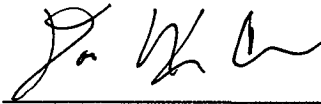
I HEREBY CERTIFY that a true copy of the foregoing Writ of Certiorari was furnished by United States Mail to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530-0001, on this the 10th day of April, 2018.



Dane K. Chase, Esquire
Florida Bar Number: 0076448

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief contains 5,031 words and complies with rule 33.1(h).



Dane K. Chase, Esquire
Florida Bar Number: 0076448

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13194
Non-Argument Calendar

D.C. Docket No. 8:16-cr-00222-MSS-JSS-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK PANNULLO

Defendant-Appellant.

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

(January 29, 2018)

Before WILLIAM PRYOR, MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

The Government's motion to dismiss this appeal pursuant to the appeal waiver in Appellant's plea agreement is GRANTED. *See United States v. Bushert*, 997 F.2d 1343, 1350-51 (11th Cir. 1993) (sentence appeal waiver will be enforced

if it was made knowingly and voluntarily); *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (defendant cannot avoid application of an appeal waiver by recasting a sentencing challenge as an ineffective-assistance-of-counsel claim).