

IN THE SUPREME COURT OF THE UNITED STATES

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FRANK PANNULLO, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether a criminal defendant must be provided an additional, independent attorney to counsel him on whether to accept an appeal waiver in a guilty plea agreement that does not preserve claims that his principal attorney provided ineffective assistance during sentencing.

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OPINION BELOW

The order of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 709 Fed. Appx. 683.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2018. The petition for a writ of certiorari was filed on April 10, 2018. A petition for rehearing was denied February 21, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to make false statements to the Social Security Administration (SSA), in violation of 18 U.S.C. 371. Judgment 1. He was sentenced to 24 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals dismissed petitioner's appeal. Pet. App. A1-A2.

1. From 1998 to 2011, petitioner served as the Chief Financial Officer at the Hillsborough Achievement and Resource Centers (HARC), which operated group homes and organized community programs for people with developmental disabilities. Presentence Investigation Report (PSR) ¶¶ 8, 18, 25. HARC's clients were social security beneficiaries who received social security funds on a monthly basis. PSR ¶¶ 8, 12-14. For beneficiaries who lacked the ability to manage their own accounts, the SSA approved a "representative payee[]" to receive the monthly funds. PSR ¶ 15. Representative payees were required to use such funds exclusively for the specified beneficiary, and to certify annually to the beneficiary's spending and other financial information through Form SSA-6234. PSR ¶¶ 15-17.

HARC served as the representative payee for its clients, and maintained individual accounts to hold each client's social security funds. PSR ¶ 18. Each month, a HARC employee deducted

a set amount from each account for the client's room-and-board expenses and for a personal-needs allowance. Ibid.

In January 2001, HARC established an additional "Endowment Account," which purportedly was designed to safeguard HARC client funds, while ensuring that those clients remained eligible for social security benefits. PSR ¶¶ 19-20. When one of HARC's client accounts reached or approached \$2000, a HARC employee would transfer funds into the Endowment Account. PSR ¶ 20. An Excel spreadsheet was purportedly used to track each client's balance within the Endowment Account. PSR ¶ 21.

In reality, petitioner and his co-conspirators wrongfully diverted funds from the Endowment Account to the HARC general operating account to cover costs that were unrelated to the specific clients paying into the Endowment Account. PSR ¶ 22. To conceal their wrongful conduct, petitioner and other HARC employees under petitioner's supervision routinely submitted false SSA-6234 forms certifying HARC clients' annual spending and other financial information. PSR ¶ 24. Between 2001 and 2011, petitioner and his co-conspirators transferred \$617,435.19 from various individual HARC client accounts to the Endowment Account and then wrongfully diverted those funds to the HARC operating account. PSR ¶ 25.

2. Pursuant to a written plea agreement, petitioner waived the right to be charged by indictment and pleaded guilty to a one-count information that charged him with conspiracy to make a false

statement to the SSA, in violation of 18 U.S.C. 371. Plea Agreement 1-23; Information 1-8. As part of the agreement, petitioner also waived his right to appeal his sentence "on any ground," except for claims that (a) the sentence exceeded his advisory Guidelines range, as determined by the district court; (b) the sentence exceeded the statutory maximum penalty; or (c) the sentence violated the Eighth Amendment. Plea Agreement 12. The parties also agreed that petitioner would be released from his waiver if the government exercised its right to appeal the sentence imposed. Ibid.

In exchange, the government agreed not to charge petitioner with any other offenses known to it at the time of the agreement; to recommend a two-level downward adjustment to petitioner's advisory Guidelines range for acceptance of responsibility; to consider moving for a downward departure for substantial assistance; to recommend a sentence within the applicable advisory Guidelines range, subject to adjustment for any such departure; and to "make known to the Court \* \* \* the nature and extent of [petitioner's] cooperation and any other mitigating circumstances indicative of [his] rehabilitative intent." Plea Agreement 6; see id. at 3-6.

A magistrate judge held a plea hearing, during which she questioned petitioner at length about petitioner's understanding of the plea agreement, his rights, and the charge against him. Plea Hr'g Tr. 1-43. The magistrate judge walked through the

provisions of the plea agreement, verifying that petitioner understood its terms. Id. at 17-26. She specifically addressed the appeal waiver in particular, describing it as an "important provision" and noting that it was "important that [petitioner] d[id] understand [it]." Id. at 24; see id. at 24-25. Petitioner confirmed he understood that he was waiving his right to appeal his sentence "on any ground," except the "four limited grounds" listed in the agreement, that he had discussed the waiver with his attorney, with whom he was "fully satisfied," and that it was his "independent decision" to accept the waiver. Id. at 19, 24, 26; see id. at 24-26. The magistrate judge further confirmed that petitioner understood the charge against him. Id. at 31-32. The government explained the factual basis for the plea, with which petitioner agreed. Id. at 32-39. And, at the conclusion of the colloquy, petitioner informed the magistrate judge that he wished to plead guilty to the conspiracy charged in the information. Id. at 39-40.

The magistrate judge then explained that, based on her review of the information, the plea agreement, and the plea colloquy, she was "fully satisfied" that petitioner's plea was "being entered knowingly and voluntarily," that petitioner understood "the consequences of th[e] guilty plea," and that petitioner had entered his "guilty plea after having the advice and representation from a lawyer that [he said he was] satisfied with." Plea Hr'g Tr. 41. The magistrate judge therefore recommended that petitioner's

guilty plea be accepted. Ibid. The district court subsequently accepted petitioner's guilty plea, in accordance with the magistrate judge's recommendation. Sent. Tr. 5.

3. The Probation Office prepared a presentence report that assigned petitioner a base offense level of 22 under Sentencing Guidelines § 2X1.1. PSR ¶ 34. The report recommended a two-level enhancement under Section 3A1.1(b) because petitioner's crime was against vulnerable victims and a two-level enhancement under Section 3B1.3 because petitioner abused a position of trust to facilitate the offense. PSR ¶¶ 36-37. The report also recommended a three-level reduction under Section 3E1.1 for acceptance of responsibility. PSR ¶¶ 41-42. Those adjustments yielded a total offense level of 23. PSR ¶ 43. The report found that petitioner had no criminal history, PSR ¶¶ 44-45, and thus assigned him a criminal history category of I and calculated an advisory Guidelines range of 46 to 57 months, PSR ¶¶ 46, 82.

At the sentencing hearing, the district court adopted the factual statements and Guidelines calculations set forth in the presentence report. Sent. Tr. 6. In accordance with the plea agreement, the government then informed the court of petitioner's cooperation with the government after being told he was a target of the investigation. Id. at 7-9. The government explained that petitioner had acknowledged his wrongdoing and assisted the government in examining and understanding HARC documents. Id. at 7. The government also explained that petitioner had testified at

trial against the Chief Executive Officer (CEO) of HARC, and the jury had credited petitioner's testimony in finding the CEO guilty. Id. at 7-8. In light of petitioner's substantial assistance, the government moved for a downward departure under Section 5K1.1 equivalent to four offense levels. Id. at 8. Petitioner's attorney agreed with the government's statement of events but requested that the court grant a six-level departure. Id. at 9.

The district court granted the government's motion for a departure based on petitioner's substantial assistance. Sent. Tr. 14. Before determining the amount of the departure, the court inquired about the length of petitioner's testimony at the HARC CEO's trial and asked whether petitioner had testified against other co-conspirators. Id. at 8-9. The court noted that it typically grants a two-level reduction for each successful prosecution in which a defendant assists, but because of the length of petitioner's testimony against the HARC CEO and its significance to the government, the court granted a total departure of four levels. Id. at 14. Petitioner's counsel did not object. Ibid.

The advisory Guidelines range for a reduced offense level of 19 and a criminal history category of I was 30 to 37 months. Sent. Tr. 15. After considering the factors under 18 U.S.C. 3553(a), the court announced that it was imposing a sentence of 24 months of imprisonment -- a six-month downward variance from a Guidelines range that reflected petitioner's substantial assistance -- to be followed by three years of supervised release. Id. at 32.

4. Petitioner appealed and, with new appointed counsel, argued that his trial counsel was constitutionally ineffective when he failed "to object to the district court's erroneous use of a sentencing 'practice'" -- i.e., its own typical sentencing adjustment in analogous cases -- "while determining the level of departure [petitioner] was entitled to based upon the substantial assistance he provided." Pet. C.A. Br. 22.

The government moved to dismiss petitioner's appeal. Gov't C.A. Mot. to Dismiss 7-15. The government maintained that the appeal was precluded by petitioner's explicit waiver of his right to appeal his sentence except on certain specific grounds and that petitioner could not "circumvent the terms of the sentence-appeal waiver simply by recasting a challenge to his sentence as a claim of ineffective assistance." Id. at 8 (quoting Williams v. United States, 396 F.3d 1340, 1342 (11th Cir.), cert. denied, 546 U.S. 902 (2005)). Alternatively, the government argued that the court of appeals should dismiss petitioner's appeal because no evidence in the record suggested that defense counsel's advocacy was deficient or that it prejudiced petitioner, and the court should therefore decline to consider petitioner's ineffective assistance claim in the context of a direct appeal. Id. at 9-15.

The court of appeals granted the government's motion and dismissed petitioner's appeal. Pet. App. A1-A2. The court cited its prior decision in United States v. Bushert, 997 F.2d 1343, 1350-1351 (11th Cir. 1993), cert. denied, 513 U.S. 1051 (1994),

for the proposition that a "sentence appeal waiver will be enforced if it was made knowingly and voluntarily," and its decision in Williams, 396 F.3d at 1342, for the proposition that a "defendant cannot avoid application of an appeal waiver by recasting a sentencing challenge as an ineffective-assistance-of-counsel claim." Pet. App. A1-A2.

#### ARGUMENT

Petitioner contends (Pet. 5-17) that the court of appeals erred in enforcing his appeal waiver in the context of an appellate claim of ineffective assistance of counsel at sentencing, because he was not provided an additional, independent attorney during sentencing to counsel him on the advisability of waiving such a claim. The court's determination that petitioner validly waived his right to appeal his sentence is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, this case would be a poor vehicle to address the question presented because petitioner cannot establish that he was denied the effective assistance of counsel. Further review is not warranted.

1. This Court has repeatedly recognized that a defendant may validly waive constitutional and statutory rights as part of a plea agreement so long as his waiver is knowing and voluntary. See Ricketts v. Adamson, 483 U.S. 1, 9-10 (1987) (upholding plea agreement's waiver of right to raise double jeopardy defense); Town of Newton v. Rumery, 480 U.S. 386, 389 (1987) (affirming

enforcement of plea agreement's waiver of right to file an action under 42 U.S.C. 1983). As a general matter, statutory rights are subject to waiver in the absence of some "affirmative indication" to the contrary from Congress. United States v. Mezzanatto, 513 U.S. 196, 201 (1995). Likewise, even the "most fundamental protections afforded by the Constitution" may be waived. Ibid.

Here, petitioner expressly waived his right to appeal his sentence "on any ground," except those grounds enumerated in the plea agreement, none of which was ineffective assistance of counsel. Plea Agreement 12. The magistrate judge specifically engaged in a colloquy with petitioner about that appeal waiver before finding that petitioner's plea was knowing, intelligent, and voluntary. Plea Hr'g Tr. 24-25, 41. Petitioner identifies no sound basis for disturbing that finding. Accordingly, the court of appeals correctly determined that petitioner's knowing and voluntary appeal waiver is valid, enforceable, and covers petitioner's claim of ineffective assistance of counsel at sentencing. Pet. App. A1-A2.

Petitioner contends (Pet. 8) that his appeal waiver is not enforceable because, according to petitioner, his trial counsel had an interest in advising him to waive his right to challenge the effectiveness of counsel's performance during sentencing and, therefore, petitioner was not provided with "conflict free counsel" in negotiating the waiver. But "every Circuit to have addressed the issue has held that a valid sentence-appeal waiver,

entered into voluntarily and knowingly, pursuant to a plea agreement, precludes the defendant from attempting to attack \* \* \* the sentence through a claim of ineffective assistance of counsel during sentencing," even in collateral proceedings. Williams v. United States, 396 F.3d 1340, 1342 (11th Cir.) (citing decisions from the Second, Fifth, Sixth, Seventh, and Tenth Circuits), cert. denied, 546 U.S. 902 (2005). A fortiori, a valid sentence-appeal waiver precludes such a claim on direct appeal. See, e.g., United States v. Nunez, 223 F.3d 956, 959 (9th Cir. 2000), cert. denied, 534 U.S. 921 (2001); United States v. Joiner, 183 F.3d 635, 644-645 (7th Cir. 1999). And petitioner identifies no decision requiring that the defendant be "provided an independent attorney to counsel him," Pet. 8, on such a waiver in order to find it valid and enforceable.

Petitioner relies instead on various state bar ethics advisory opinions concluding that a defense attorney may not advise criminal defendants to waive their right to seek relief on the basis of the attorney's ineffective assistance of counsel. See Pet. 6-7, 10-11. Those ethics opinions, however, do not purport to address whether a plea agreement including a waiver of the type at issue here are lawful and enforceable. See, e.g., Fla. Bar Ethics Op. 12-1, at 1 (June 22, 2012) ("[W]hether particular plea agreements are lawful, enforceable and meet constitutional requirements are legal questions outside the scope of an ethics opinion."); N.C. State Bar, Ethics Op. RPC 129, at 1 (Jan. 15,

1993) ("Whether a plea agreement is constitutional and otherwise lawful is a question to be determined by the courts."); Supreme Court of Ohio, Board of Comm'rs on Grievances and Discipline Op. 2001-6, at 1 (Dec. 7, 2001) ("This opinion does not address whether such waivers are legal or constitutional."); see also Va. State Bar, Legal Ethics Op. 1857, at 2 (July 21, 2011) ("Federal courts have consistently held that such a provision is legally enforceable against the defendant."). And, in any event, advisory opinions from state bar committees could not create a conflict warranting this Court's review. See Sup. Ct. R. 10.

Petitioner also relies on a 2014 memorandum from the former United States Deputy Attorney General instructing federal prosecutors not to seek waivers of ineffective assistance claims in plea agreements. Pet. 7. But the same memorandum explains that "federal courts have uniformly held a defendant may generally waive ineffective assistance claims pertaining to matters other than entry of the plea itself, such as claims related to sentencing." Memorandum from James M. Cole, Deputy Atty. Gen., U.S. Department of Justice, on Department Policy on Waivers of Claims of Ineffective Assistance of Counsel 1 (Oct. 14, 2014), <http://www.justice.gov/file/70111/download> (Dep't Policy). And it expresses the Department's "confiden[ce] that a waiver of a claim of ineffective assistance of counsel is both legal and ethical."

Ibid.\* The memorandum thus provides no ground for further review.

2. Petitioner errs in contending (Pet. 5-6) that the court of appeals' decision conflicts with the Fourth Circuit's decision in United States v. Attar, 38 F.3d 727 (1994), cert. denied, 514 U.S. 1107 (1995). To the contrary, the Fourth Circuit observed in Attar that "a waiver-of-appeal-rights provision in a valid plea agreement is enforceable against the defendant so long as it is 'the result of a knowing and intelligent decision to forgo the right to appeal.'" Id. at 731 (citation omitted). And it determined that the waiver of appeal rights at issue was "generally valid and enforceable," without requiring the defendant to have been provided independent counsel for negotiating the plea agreement. Id. at 732.

"[T]he real dispute" in Attar was "not about the general validity of the waiver-of-appeal-rights provision, but about its scope." 38 F.3d at 732. In considering that question, the Fourth Circuit made the broad observation that "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." Ibid. And it determined that the waiver at issue could not "fairly

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\* The memorandum directs federal prosecutors not to enforce existing waivers of ineffective assistance of counsel claims if those claims are meritorious or raise "a serious debatable issue that a court should resolve." Dep't Policy 1. Petitioner's ineffective assistance of counsel claim does not meet those criteria. See pp. 14-17, infra.

be construed" as waiving the defendants' right to challenge their sentences on Sixth Amendment grounds. Id. at 733. But the appeal waiver in Attar, unlike petitioner's waiver, specifically preserved the defendants' "right to appeal based upon grounds of ineffective assistance of counsel \* \* \* not known to the Defendants at the time of the[ir] . . . guilty plea." Id. at 729 (brackets in original; citation omitted). Moreover, the Sixth Amendment claim in Attar -- alleging complete abandonment by counsel during sentencing -- was not the sort of "recasting [of] a sentencing challenge as an ineffective-assistance-of-counsel claim" that is at issue in this case. Pet. App. A2. In any event, petitioner has not asked this Court to revisit the court of appeals' determination of the scope of his appeal waiver, only its enforceability. See Pet. i.

3. Finally, this case would be a poor vehicle to address the question presented because, even if his appeal waiver allowed for such a claim, the record provides no basis to conclude that petitioner received ineffective assistance at sentencing. To establish ineffective assistance of counsel, petitioner would have to prove both (1) deficient performance and (2) prejudice. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Strickland's deficient-performance prong requires a showing that defense counsel's conduct fell below an "objective standard of reasonableness" that would overcome the "strong presumption" that counsel's strategy and tactics fell "within the wide range of

reasonable professional assistance.” Id. at 688-689. The prejudice prong, in turn, requires a showing that counsel’s deficient performance “prejudiced the defense” by demonstrating a “reasonable probability” that, but for counsel’s unprofessional errors, “the result of the proceeding would have been different.” Id. at 687, 694. Petitioner has failed to establish either prerequisite.

Petitioner argued below that his trial counsel was constitutionally ineffective in failing to object to the district court’s use of “an impermissible sentencing practice while determining the extent of [petitioner’s] substantial assistance adjustment, rather than conducting the individualized, case-by-case consideration of the extent and quality of his cooperation in making the downward departure determination, as required under” Section 5K1.1. Pet. C.A. Br. 20. Because petitioner presses this claim on direct appeal, he has forgone the benefit of making evidentiary submissions that could potentially support the claim. And the current record provides no support for petitioner’s contention that his counsel’s performance during sentencing was deficient.

As an initial matter, petitioner offered no in-circuit or Supreme Court precedent to support his claim that a district court commits reversible error at sentencing by engaging in a particular “practice” when determining the amount of a departure under Section 5K1.1. Pet. C.A. Br. 14; see id. at 14-22. In his court of

appeals brief, petitioner relied on United States v. King, 53 F.3d 589 (1995), in which the Third Circuit determined that a district court reversibly erred when it failed to give individualized consideration to the defendant's substantial assistance and instead enforced a practice in which it gave the same level reduction under Section 5K1.1 as it did for acceptance of responsibility under Section 3E1.1. Id. at 590-591. But, here, the district court explicitly gave individual consideration to the facts of petitioner's assistance, including the "significance of [petitioner's] undertaking with the Government and the length of his substantial testimony to secure [the CEO's] conviction," in determining that his assistance would appropriately be reflected by a downward departure equal to four offense levels. Sent. Tr. 14. The court's observation that it would typically grant a departure equivalent to two offense levels where, as here, a defendant assists in one prosecution only highlights the court's individual consideration of petitioner's case. Ibid. Defense counsel's decision not to object to the court's more generous downward departure thus did not amount to deficient performance.

The record likewise provides no basis to find a "reasonable probability" that, but for the asserted error, petitioner would have obtained a lower sentence. As noted, the district court ultimately granted a greater downward departure that it stated it would typically provide in a case of this sort. Sent. Tr. 14. Moreover, after considering the factors in 18 U.S.C. 3553(a), the

court then varied downward from the low end of the Guidelines range that reflected its substantial-assistance departure. Sent. Tr. 14-15, 32. Petitioner's 24-month sentence is still at the bottom-end of a Guidelines range that would have reflected the greater substantial-assistance departure that he requested at sentencing. And the record provides no indication that the court would have granted either a greater downward departure or lower sentence had petitioner's counsel timely objected to the court's application of Section 5K1.1.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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