No. 22-13571

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

NETTISIA MITCHELL,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States certifies that, in addition to those persons defendant-appellant identifies in her brief, the following persons may have an interest in the outcome of this case:

1. Clarke, Kristen, U.S. Department of Justice, Civil Rights Division, counsel for the United States.

The United States certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

s/ Natasha N. Babazadeh
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Date: January 5, 2024

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument is unnecessary. Defendant's sentencing and limited appeal waiver arguments do not raise any complex or novel issues that cannot be resolved on the briefs.

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STATEMENT OF JURISDICTION

This appeal is from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant Nettisia Mitchell on September 9, 2022. Doc. 266.[1] On October 3, 2022, Mitchell filed a pro se motion to appoint counsel and extend the deadline to file a notice of appeal. Doc. 270. After Mitchell's attorney responded to the district court's order to show cause (*see* Docs. 271, 272), the court granted Mitchell's motion for a 30-day extension based on its failure to advise Mitchell of her appeal rights at sentencing (Doc. 276). On October 19, 2022, Mitchell filed a timely notice of appeal from the court's judgment. Doc. 277. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742.

STATEMENT OF THE ISSUES

Defendant-appellant Nettisia Mitchell pleaded guilty to one count of conspiracy to commit sex trafficking by force, fraud, and coercion, in violation of 18 U.S.C. 1594(c). In her plea agreement, Mitchell agreed to waive her right to appeal her conviction or sentence except on the grounds of ineffective assistance of counsel or prosecutorial misconduct. The district court sentenced Mitchell to 120

[1] Citations to "Doc. __, at __" refer to the documents in the district court record, as numbered on the docket sheet, and page numbers within those documents. "Br. __" refers to page numbers in Mitchell's opening brief.

months' imprisonment, and she now appeals her sentence. The following issues are raised on appeal:

1. Whether Mitchell knowingly and voluntarily waived her right to appeal her sentence and, if so, whether she raises a claim of ineffective assistance of counsel that falls within one of the waiver's exceptions.

2. If this Court reaches the merits of Mitchell's sentencing challenge, whether the district court properly declined to apply a two-level minor role reduction under Sentencing Guidelines § 3B1.2.

STATEMENT OF THE CASE

A. Factual Background

In March 2020, Mitchell lived in Montgomery, Alabama, where she was largely confined to her home because of injuries she suffered in a car accident. Doc. 300, at 26-27. Her brother and co-defendant Lonnie Mitchell (Lonnie) sent young women, including BTJ, to Mitchell's home to assist with her recovery and perform household chores. *Id.* at 27-28. While there and to Mitchell's knowledge, these women performed commercial sex acts—*i.e.*, "sexual relations with customers in exchange for money." *Id.* at 28-29. Mitchell did not stop them from doing so and allowed them to stay at her home. *Id.* at 29. Under Lonnie's direction, Mitchell received and collected proceeds from the women's commercial sex acts. *Id.* at 30-31. Mitchell several times saw Lonnie engage in violent acts

against BTJ, including by striking "BTJ with a phone charging cable and forcefully pull[ing] BTJ by her hair inside [Mitchell's] home." Doc. 220, at 11.

B. Procedural History

a. A federal grand jury returned a superseding indictment charging Mitchell with four counts of sex trafficking by force, fraud, or coercion as to four women, including BTJ, in violation of 18 U.S.C. 1591. *See* Doc. 55, at 1-4. Mitchell later pleaded guilty to a one-count Information charging her with conspiracy to commit sex trafficking by force, fraud, or coercion of BTJ, in violation of 18 U.S.C. 1591 and 1594. Doc. 216; *see* Doc. 220, at 17.[2] In the plea agreement, Mitchell agreed to waive her right to appeal her conviction or sentence except "on the grounds of ineffective assistance of counsel or prosecutorial misconduct." Doc. 220, at 11-12. She also acknowledged that she "will have no right to withdraw a guilty plea on the basis that the [c]ourt calculates an advisory Guidelines range that differs from the range projected by the defense attorney or the government." *Id.* at 13-14. In return, the government agreed "to recommend a sentence of no greater than the

[2] Lonnie proceeded to trial and was convicted of ten counts of sex trafficking in violation of Section 1591, as well as recruiting and coercing some of his victims to travel interstate to engage in prostitution, in violation of 18 U.S.C. 2422. *See* Doc. 55, at 1-6; Doc. 141; Doc. 237, at 1-4. The district court sentenced Lonnie to 720 months' imprisonment. Doc. 290, at 3-4.

bottom . . . of the advisory Guidelines range," as calculated by the district court at sentencing. Doc. 220, at 3.

b. At the plea colloquy, the magistrate judge asked Mitchell a series of questions to ensure that Mitchell's guilty plea was "valid, knowing, and voluntary." Doc. 300, at 5; *see id.* at 5-32. The judge asked Mitchell if she "had ample opportunity to discuss [her] case with [her] attorney" and whether she was "satisfied with the counsel, representation, and advice given to [her]." *Id.* at 7. Mitchell responded "Yes" to both questions. *Ibid.* The judge also asked Mitchell if she had read and signed the plea agreement and if the agreement represented "in its entirety the understanding [she has] with the Government." *Id.* at 18. Mitchell again responded, "Yes." *Ibid.*

The government then summarized the terms of the agreement, including that Mitchell agreed to "waive her right of appeal . . . except as to prosecutorial misconduct and ineffective assistance of counsel." Doc. 300, at 19. Mitchell's attorney agreed with that summary. *Id.* at 21. The magistrate judge then asked Mitchell if she understood the terms of the agreement and wished to enter the agreement. *Id.* at 22. Mitchell responded, "Yes." *Ibid.* The judge also asked if she understood that the district court can reject the agreement's recommendations without allowing Mitchell to withdraw her guilty plea "and impose a sentence that is more severe than [she] may anticipate up to the maximum permitted by law."

Id. at 23. Mitchell again responded, "Yes." *Ibid.* The judge found the plea agreement "to be in proper form" and entered it into the record. *Id.* at 25.

The magistrate judge then discussed sentencing with Mitchell. *See* Doc. 300, at 25-26. The judge asked Mitchell if she understood that, by entering the plea agreement, she "will have waived or given up [her] right to appeal . . . all or part of [her] sentence?" *Id.* at 26. Mitchell responded, "Yes." *Ibid.* The judge concluded the colloquy finding that Mitchell's "plea of guilty is a knowing and voluntary plea supported by an independent basis in fact containing each of the elements of the offense." *Id.* at 32. The judge accepted the plea and adjudged Mitchell guilty of the offense. *Ibid.*

c. Before sentencing, Mitchell moved for a downward variance based on the circumstances of her upbringing. *See* Docs. 248, 252. The government, in its sentencing brief, calculated a "total offense score of 29 with a guideline range of 121-151 months." Doc. 249, at 1. In doing so, the government requested that the district court decrease Mitchell's offense level by two levels under Sentencing Guidelines § 3B1.2(b) for being a minor participant in the criminal activity. *Id.* at 2. The government explained that, as compared to Lonnie, Mitchell "had minor knowledge of the scope and structure of the criminal activity," did not participate "in the planning and organizing," and "had very little decision-making authority." *Ibid.* The government further acknowledged that Mitchell's "participation was

limited in time and scope," and she "benefited minimally from the criminal activity." *Ibid.* In a supplemental memorandum, Mitchell agreed that the two-level reduction should apply. Doc. 256, at 1.

The Probation Office prepared a Presentence Investigation Report (PSR), calculating a base offense level of 34 and an adjusted offense level of 31 after applying a three-level reduction for acceptance of responsibility. Doc. 262, at 8-9. Based on an offense level of 31 and a criminal history category of IV, the Probation Office calculated an advisory guidelines range of 151 to 188 months' imprisonment. *Id.* at 16. The PSR did not include a two-level role reduction under Sentencing Guidelines § 3B1.2(b). In discussing the impact of the plea agreement, the PSR noted that had Mitchell been convicted of the four counts specified in the superseding indictment, her total offense level would be 39 and she "would be subject to the statutory mandatory minimum terms of not less than 15 years as to each of those counts." *Id.* at 17.

d. At sentencing, the district court acknowledged the appeal waiver and accepted the plea agreement. *See* Doc. 302, at 3-4. The government did not object to the PSR's calculations but requested that the court apply Section 3B1.2(b)'s two-level reduction based on Mitchell's minor role in Lonnie's sex-trafficking scheme. *Id.* at 6. Mitchell's attorney agreed with the request and emphasized that Mitchell's involvement constituted a short period in the overall scheme. *Id.* at 10.

The Probation Office disagreed and asserted that a role adjustment was inappropriate because Mitchell was convicted of conspiracy and held accountable solely for her own conduct. *Id.* at 10-11. The court concluded that Mitchell was not "entitled to the mitigating role adjustment" but stated it would take her role "into account on the variance request." *Id.* at 11. Mitchell objected to the court's ruling. *Ibid.*

The court adopted the PSR's calculations. Doc. 302, at 11-12. The court found that Mitchell's involvement in the sex-trafficking scheme was more than just the several weeks she spent recovering from her injuries. *Id.* at 17. The court emphasized that, according to the PSR, Mitchell dealt a lot of drugs from her home, drove the women to perform commercial sex acts, and routinely answered calls from Lonnie about how much money had been made. *Id.* at 16-17. The court further pointed out that Mitchell witnessed Lonnie physically abuse the women and that Mitchell would physically restrain the women if she believed they were going to try to injure Lonnie. *Id.* at 17. The court agreed that although Mitchell "was not an equal partner . . . she was an extension of [Lonnie] to some extent." *Ibid.*

The court, however, granted Mitchell's request for a downward variance, explaining that it was "taking into account her overall role," including the fact that "[s]he was a very key player" in the sex-trafficking scheme, "and her age as well." Doc. 302, at 17. The court stated that Mitchell's "household" served as the

"epicenter" of significant sex-trafficking and drug-related activity. *Id.* at 18. After emphasizing that it was taking "the whole picture into account as to the appropriate sentence," the court sentenced Mitchell to 120 months' imprisonment (*i.e.*, below the recommended 151 to 188 months' imprisonment) and five years of supervised release. *Id.* at 18-19.

SUMMARY OF ARGUMENT

This Court should dismiss Mitchell's appeal. By plea agreement, Mitchell knowingly and voluntarily waived her right to appeal her sentence. Her challenge to the district court's decision not to apply a minor role adjustment at sentencing neither falls within the waiver's limited exception for ineffective assistance of counsel nor carries any merit.

1.a. Mitchell's appeal waiver is valid. At the plea colloquy, the magistrate judge specifically questioned Mitchell about the appellate waiver, and Mitchell responded that she understood she was waiving her right to appeal her sentence. The government summarized the terms of the agreement, explicitly mentioning that Mitchell was waiving her right to appeal her sentence except as to any claim of prosecutorial misconduct or ineffective assistance of counsel. Mitchell again attested that she understood the terms of the plea agreement and wished to enter the agreement. The record confirms that Mitchell understood the full significance of the waiver; she testified that she discussed the case with her attorney, she was

happy with her counsel's representation, she read and signed the plea agreement, and the agreement represented her entire arrangement with the government.

1.b. Mitchell's challenge on appeal falls outside the waiver's exception for ineffective assistance of counsel. Mitchell's trial counsel specifically requested a two-level reduction under Section 3B1.2; as courts have held, that was sufficient to overcome any finding of deficiency. Mitchell otherwise fails to support her argument that not citing Section 3B1.2's text and commentary or referencing this Court's case law amounts to deficient performance. In any event, counsel's performance did not prejudice Mitchell because the district court ultimately considered the request and correctly denied the adjustment.

2. Even if this Court reaches the merits of Mitchell's sentencing challenge, the district court was correct not to apply Section 3B1.2(b)'s two-level minor role reduction. Mitchell was convicted of a lesser offense and reduced her sentencing exposure by pleading guilty to one count of conspiracy although her criminal activity exceeded that of conspiracy. She dealt drugs from and allowed women to perform commercial sex acts in her home, drove these women to also perform commercial sex acts elsewhere, and routinely answered calls from Lonnie about how much money had been made. Mitchell witnessed Lonnie physically abuse the women and even physically restrained the women herself if she believed they were trying to injure Lonnie. She did not stop the women from performing commercial

sex acts in her house; instead, she allowed the women to stay at her home, and she collected and received the proceeds from their sex acts. The record supports the district court's decision not to apply the adjustment.

ARGUMENT

I. This Court should dismiss Mitchell's appeal because she entered into a valid appeal waiver and her appeal falls outside the waiver's exception for ineffective assistance of counsel.

A. Standard of review

This Court reviews the validity of an appeal waiver *de novo*. *See United States v. Copeland*, 381 F.3d 1101, 1104 (11th Cir. 2004). This Court will enforce such waiver if it was made "knowingly and voluntarily." *United States v. Johnson*, 541 F.3d 1064, 1066 (11th Cir. 2008). To establish as much, the government must show either that: "(1) the district court specifically questioned the defendant about the waiver; or (2) the record makes clear that the defendant otherwise understood the full significance of the waiver." *Ibid.* An appeal waiver includes a waiver of the right to appeal difficult or debatable legal issues, including obvious errors. *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999).

B. Mitchell knowingly and voluntarily waived her right to appeal her sentence.

1. Mitchell knowingly and voluntarily relinquished her right to appeal her sentence except for claims of prosecutorial misconduct and ineffective assistance of counsel. This waiver expressly included any challenge based on Mitchell's

disagreement with the district court's application of the Sentencing Guidelines. *See* Doc. 220, at 11-12.

Here, the district court specifically questioned Mitchell about the plea agreement's appellate waiver provision. During the plea colloquy, the magistrate judge asked if Mitchell understood that she "will have waived or given up [her] right to appeal . . . all or part of [her] sentence." Doc. 300, at 26. Mitchell responded, "Yes." *Id.* at 26. The government also summarized the terms of the plea agreement, including that Mitchell "waive[d] her right of appeal . . . except as to prosecutorial misconduct and ineffective assistance of counsel." *Id.* at 18-20. Mitchell's counsel agreed with that summary, and Mitchell confirmed that she understood the terms of the plea agreement and wished to enter the agreement with the government. *Id.* at 21-22. This Court should rely on Mitchell's representations below. *See United States v. Martinez-Barrera*, 348 F. App'x 533, 535 (11th Cir. 2009) (emphasizing that this Court applies "a strong presumption that [a defendant's] statement under oath that he understood the sentence-appeal waiver in his plea agreement was true" (citing cases)).

The record further confirms that Mitchell understood the "full significance" of the appellate waiver. *Johnson*, 541 F.3d at 1066. In a section entitled "The Defendant's Waiver of Appeal and Collateral Attack," Mitchell waived her right to appeal her sentence apart from claims of prosecutorial misconduct or ineffective

assistance of counsel. *See* Doc. 220, at 11 ("defendant expressly waives any and all rights . . . to appeal the . . . sentence"). Mitchell signed that agreement. *See id.* at 17. At the plea colloquy, the judge asked Mitchell if she "had ample opportunity to discuss [her] case with [her] attorney" and, if so, whether she was "satisfied with the counsel, representation, and advice given to [her]." Doc. 300, at 7. Mitchell responded "Yes" to both questions. *Ibid.*; see also Doc. 220, at 15. The judge also asked Mitchell if she had read and signed the plea agreement, both of which Mitchell confirmed. *See* Doc. 300, at 18. The judge further inquired if the agreement "represent[ed] in its entirety the understanding [Mitchell has] with the Government," to which Mitchell also said, "Yes." *Ibid.* And then the judge asked if Mitchell understood that she would not be able to withdraw from her guilty plea if the district court refuses to impose a sentence recommended by the parties and imposes a more severe sentence, to which Mitchell again said, "Yes." *Id*. at 23-24; *see also* Doc. 220, at 4-5, 13-14.

Based on the record, the magistrate judge correctly found that Mitchell's "plea of guilty is a knowing and voluntary plea." Doc. 300, at 32; *see United States v. Pimentel*, 796 F. App'x 1011, 1012-1013 (11th Cir. 2020) (upholding a sentence-appeal waiver as valid where defendant signed plea agreement containing waiver after discussing it with his lawyer, the magistrate judge expressly informed

him that he was waiving his right to appeal his sentence, and defendant stated he understood the terms of the agreement).

2. In arguing to the contrary, Mitchell fails "to meet [her] heavy burden to show otherwise." *Martinez-Barrera*, 348 F. App'x at 535.

First, Mitchell argues that she did not knowingly or voluntarily agree to the appeal waiver because the "district court failed to specifically question [her] about the appeal waiver's terms during the plea colloquy.'" Br. 17. But the court did not need to specifically "mention the terms of the waiver," as Mitchell asserts. Br. 19. Mitchell cites no case requiring district courts to do so. Indeed, this Court has upheld an appeal waiver under almost identical circumstances where the district court did not explicitly mention the exceptions to the waiver. *See Pimentel*, 796 F. App'x at 1012-1013. In any event, the government, in summarizing the terms of the plea agreement at the change of plea hearing, explicitly stated the exceptions to the appeal waiver and Mitchell, in response, stated that she understood the terms of the agreement. Doc. 300, at 19-22.

Second, Mitchell repeatedly cites to this Court's decision in *United States v. Bushert* to argue "the record is not 'manifestly clear' that she understood the waiver's 'full significance.'" Br. 17 (quoting 997 F.2d 1343, 1351 (11th Cir. 1993)). But *Bushert* does not change the outcome here. In that case, this Court held that a plea colloquy was deficient where the district court only "informed

[defendant] that he might have the right to appeal his *sentence* under some circumstances." 997 F.2d at 1352-1353. This Court explained that this language was "confusing" because the district court "did not clearly convey to [defendant] that he was giving up his right to appeal under *most* circumstances." *Ibid.* This Court thus concluded that it was "not manifestly clear that [defendant] understood he was waiving his appeal rights." *Id.* at 1353.

This case differs from *Bushert* in significant respects. As explained, the magistrate judge asked Mitchell about the plea waiver and, more specifically, whether she understood that she was waiving her right to appeal all or part of her sentence. *See* Doc. 300, at 26. The plea colloquy was the inverse of *Bushert*, in that the magistrate judge stated that Mitchell may be relinquishing the entirety of her right to appeal her sentence. The record throughout also shows that Mitchell understood the "full significance" of the appeal waiver, the entirety of which the government made clear on the record. *See* pp. 11-13, *supra*; *see also United States v. Buchanan*, 131 F.3d 1005, 1008 (11th Cir. 1997).

C. Mitchell's appeal does not fall within the limited exception for ineffective assistance of counsel.

Mitchell argues that even if the plea agreement were made knowingly and voluntarily, her challenge on appeal falls within its limited exception for claims of ineffective assistance of counsel. Br. 21-24. It does not.

1. This Court rarely addresses claims for ineffective assistance of counsel on direct appeal, "[e]xcept in the rare instance when the record is sufficiently developed." *United States v. Merrill*, 513 F.3d 1293, 1308 (11th Cir. 2008); *see*, *e.g.*, *Milligan v. United States*, 213 F. App'x 964, 966 (11th Cir. 2007) (holding that because defendant "did not assert ineffective assistance of trial counsel prior to his direct appeal" and, indeed, "stated he was satisfied with his counsel at his plea colloquy," this Court "would not have heard his claim on direct appeal"). Here, because Mitchell failed to raise her ineffective-assistance argument before the district court, "there is no record from which [this Court] can evaluate the merits of this claim." *United States v. Martin*, 362 F. App'x 69, 71 (11th Cir. 2010). This Court should thus decline to address the issue in the first instance. *Ibid.*; *see*, *e.g.*, *United States v. Torres*, 251 F. App'x 595, 596 n.1 (11th Cir. 2007) (declining to address whether counsel's failure to "adequately argue for a minor role reduction" constituted ineffective assistance of counsel on direct appeal).

2. Even if this Court entertains Mitchell's argument that her appellate waiver should not bar this appeal (*see* Br. 23), her argument fails on the current record. To raise an ineffective-assistance claim, Mitchell must show both that (1) her counsel's performance was constitutionally deficient, and (2) the deficient performance prejudiced her. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Neither element is met.

a. Mitchell argues that her counsel's performance was deficient because counsel "fail[ed] to cite either the plain text of the guidelines and the commentary or this Court's precedents that show . . . [she is] entitled to be considered for a role reduction" under Section 3B1.2(b). Br. 21. Not so.

To properly apply for a minor participant adjustment, defense counsel had to specifically request the adjustment under Section 3B1.2. *See United States v. Soto*, 132 F.3d 56, 58 (D.C. Cir. 1997); *see also United States v. Headley*, 923 F.2d 1079, 1084 (3d Cir. 1991) (finding ineffective assistance where defendant's attorney failed to request an adjustment under Section 3B1.2, which deprived the defendant "of the opportunity to have the district court consider whether she qualified for an adjustment"). Mitchell's counsel did so here. *See* Doc. 256, at 1-2; Doc. 302, at 9-10; *see United States v. Montoan-Herrera*, 351 F.3d 462, 465 (10th Cir. 2003) (holding that the defendant failed to show deficient performance where his trial counsel specifically requested a minor-role adjustment under Section 3B1.2). Indeed, the adjustment was squarely before the district court, given that both the government and the defendant requested the two-level reduction.

Mitchell argues that defense counsel's failure to elaborate on the basis for the adjustment amounts to deficient performance. Apart from citing no support for that argument, the record belies the argument. During sentencing, the government

requested the two-level adjustment under Section 3B1.2(b) and explained the relevant factors that guide such analysis and how they applied to the facts of Mitchell's case. *See* Doc. 302, at 7-9. Mitchell's counsel then elaborated as to additional facts that, in his view, supported granting the adjustment. *Id.* at 9-10. On this record, Mitchell cannot show that her counsel's performance was constitutionally deficient.

b. Defense counsel's performance also did not prejudice Mitchell. Whether prejudice results from a failure to request an adjustment "depends on whether the district court would have granted the request, a matter only the district court can decide." *Montoan-Herrera*, 351 F.3d at 465. Here, the district court considered Mitchell's request for a two-level reduction under Section 3B1.2(b) and denied the request. Thus, even assuming Mitchell's counsel's performance was deficient—and it was not—she did not suffer any prejudice. *See id.* at 466 (holding that the defendant failed to show prejudice because the district court denied the request for a mitigating role adjustment). Holding otherwise would create an end-run around the express terms of Mitchell's plea agreement, which made clear that she could not withdraw from her plea agreement or challenge her sentence simply because she disagreed with the district court's application of the Guidelines. *See* Doc. 220, at 4-5, 11, 13-14.

In any event, even if this Court entertains the merits of Mitchell's sentencing challenge, she "would not have . . . a reasonable probability of success on appeal." *Joiner v. United States*, 103 F.3d 961, 963 (11th Cir. 1997). As explained in II.B., the district court properly refused (and did not clearly err in refusing) to apply the two-level adjustment. *See* pp. 19-24, *infra*.

Accordingly, because Mitchell cannot show ineffective assistance of counsel, this Court should dismiss Mitchell's appeal.

II. The district court properly declined to apply a two-level minor role reduction under Sentencing Guidelines § 3B1.2.

A. Standard of review

Even if this Court reaches the merits of Mitchell's argument under Section 3B1.2, she cannot prevail.

This Court reviews a district court's denial of a minor participant role reduction for clear error. *United States v. Bernal-Benitez*, 594 F.3d 1303, 1320 (11th Cir. 2010). Such review is deferential, and this Court "will not disturb a district court's findings unless [it is] left with a definite and firm conviction that a mistake has been committed." *United States v. Ghertler*, 605 F.3d 1256, 1267 (11th Cir. 2010) (internal quotation marks and citation omitted). The district court's "choice between two permissible views of the evidence" regarding the defendant's role in the offense cannot constitute clear error "[s]o long as the basis of the trial court's decision is supported by the record and does not involve a

misapplication of a rule of law." *United States v. Rodriguez De Varon*, 175 F.3d 930, 945 (11th Cir. 1999) (en banc) (emphasis and citation omitted). Mitchell "bears the burden of proving that she played a minor role by a preponderance of the evidence." *United States v. Presendieu*, 880 F.3d 1228, 1249 (11th Cir. 2018).

B. The district court did not clearly err in denying Mitchell a minor participant role reduction.

1. If this Court reaches the merits of Mitchell's sentencing challenge, it should uphold the district court's judgment.

a. Section 3B1.2(b) allows for a two-level reduction in offense level where the defendant was a "minor participant" in the criminal offense. Sentencing Guidelines § 3B1.2(b). A minor participant is someone "who is less culpable than most other participants, but whose role could not be described as minimal." Sentencing Guidelines § 3B1.2(b) comment. (n.5). A district court need not apply the two-level reduction, however, where the defendant is not "substantially less culpable than the average participant in the criminal activity" or did not "perform[] a limited function in the criminal activity." Sentencing Guidelines § 3B1.2 comment. (n.3(A)).

The adjustment also need not apply "[i]f a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by [her] actual criminal conduct." Sentencing Guidelines § 3B1.2 comment. (n.3(B)). This is because the "defendant is not substantially less

culpable than a defendant whose only conduct involved the less serious offense." Sentencing Guidelines § 3B1.2 comment. (n.3(B)).

"In making the ultimate determination of the defendant's role in the offense, the sentencing judge has no duty to make any specific subsidiary factual findings." *Rodriguez De Varon*, 175 F.3d at 939. "So long as the district court's decision is supported by the record and the court clearly resolves any *disputed* factual issues, a simple statement of the district court's conclusion is sufficient." *Ibid.* In those circumstances, "it will be rare for an appellate court to conclude that the sentencing court's determination is clearly erroneous." *Id.* at 945.

The district court's determination whether to apply the adjustment, however, should be informed by two principles: (1) "the defendant's role in the relevant conduct for which she has been held accountable at sentencing"; and (2) "her role as compared to that of other participants in her relevant conduct." *Rodriguez De Varon*, 175 F.3d at 940.

As for the first principle, "the district court must assess whether the defendant is a minor . . . participant in relation to the relevant conduct attributed to the defendant in calculating her base offense level." *Rodriguez De Varon*, 175 F.3d at 941. "Only if the defendant can establish that she played a relatively minor role in the conduct for which she has already been held accountable—not a minor role in any larger criminal conspiracy—should the district court grant a downward

adjustment for [a] minor role in the offense." *Id.* at 944. "[W]here the relevant conduct attributed to a defendant is identical to her actual conduct, she cannot prove that she is entitled to a minor role adjustment simply by pointing to some broader criminal scheme in which she was a minor participant but for which she was not held accountable." *Id.* at 941. This Court has recognized that the first prong of the analysis will, in many cases, be dispositive. *Id.* at 945. Such is the case here.[3]

b. In Mitchell's case, the district court properly denied the two-level minor participant role reduction and sentenced Mitchell based on the activities to which she pleaded guilty. Mitchell received a lesser offense level (*i.e.*, 31, including a

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[3] "Whether a defendant is entitled to a minor role reduction is 'based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.'" *Presendieu*, 880 F.3d at 1249 (quoting Sentencing Guidelines § 3B1.2(b) comment. (n.3(C))). The commentary to Sentencing Guidelines § 3B1.2, which Mitchell primarily relies on, provides a non-exhaustive list of factors for a district court to consider when deciding whether a defendant qualifies for a minor role reduction. *See* Br. 13-25; Sentencing Guidelines § 3B1.2 comment. (n.3(C)). These factors include: (1) "the degree to which the defendant understood the scope and structure of the criminal activity"; (2) "the degree to which the defendant participated in planning or organizing the criminal activity"; (3) "the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority"; (4) "the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts"; and (5) "the degree to which the defendant stood to benefit from the criminal activity." *Presendieu*, 880 F.3d at 1249-1250. "[T]he district court has considerable discretion in making this fact-intensive determination." *United States v. Boyd*, 291 F.3d 1274, 1277-1278 (11th Cir. 2002).

three-level reduction for acceptance of responsibility) and reduced sentencing exposure (*i.e.*, no mandatory minimum) by pleading guilty to one count of conspiracy, as compared to the higher offense level (*i.e.*, 39) and sentencing exposure (*i.e.*, a 15-year statutory minimum) that would attach to four counts of sex trafficking by force, fraud, or coercion, in violation of 18 U.S.C. 1591. *See* Doc. 55, at 1-4; Doc. 262, at 17; Sentencing Guidelines § 3B1.2 comment. (n.3(B)); *see also United States v. Quoc Cong Le*, 212 F. App'x 900, 901-902 (11th Cir. 2006) (holding that the district court did not error in refusing to apply Section 3B1.2 where the "evidence demonstrate[d] that [defendant's] participation was actually broader than [the] conduct" used to establish the base offense level for conspiracy); *United States v. Irvine*, 317 F. App'x 755, 758 (10th Cir. 2009) (holding same where defendant "was allowed to plead guilty to a lesser included offense . . . [which] had the effect of freeing [him] from a lengthy minimum mandatory sentence").

Indeed, the record shows that Mitchell's criminal activity exceeded that of conspiracy. As the district court pointed out, Mitchell participated in the sex-trafficking scheme for more than just several weeks. Doc. 302, at 17. She dealt drugs from her home, drove the women to perform commercial sex acts, and routinely answered calls from Lonnie about how much money had been made. *Id.* at 16-17. The court also recognized that Mitchell witnessed Lonnie physically

abuse the women and even physically restrained the women if she believed they were going to try to injure Lonnie. *Id.* at 17. Mitchell also did not stop the women from committing commercial sex acts, including in Mitchell's home, and allowed the women to stay at her home during this period. Doc. 300, at 28-29. And she received and collected proceeds from the sex-trafficking scheme. *Id.* at 30-31; Doc. 262, at 6.

The district court did not clearly err in declining to apply the Section 3B1.2 adjustment based on Mitchell's conspiracy conviction, which held her accountable for her conduct only. Doc. 302, at 10-11. Consistent with the Eleventh Circuit's prior decisions, this Court should uphold the district court's determination here. *See United States v. Valois*, 915 F.3d 717, 732 (11th Cir. 2019) (holding that the district court did not clearly err in denying the defendant's request for a minor-role reduction where the record showed he "knowingly participated" in the offense, was "important to that scheme," and was "held responsible only for that conduct"); *see also United States v. Valdez*, No. 19-12522, 2021 WL 3478402, at *9 (11th Cir. Aug. 9, 2021) (explaining that the district court did not clearly err in denying a Section 3B1.2 adjustment where the defendant pleaded guilty to conspiracy to patronize a minor and ultimately "did the patronizing" and was held "responsible for his own role in that conduct"); *United States v. Hudson*, 695 F. App'x 528, 529 (11th Cir. 2017) (holding that the district court did not err in denying a Section

3B1.2 role adjustment where the defendant's actual conduct—sex trafficking—was identical to the conduct for which he was held accountable); *United States v. Terriquez*, 150 F. App'x 973, 974 (11th Cir. 2005) (finding that because defendant's "relevant conduct and actual conduct were identical," he did not meet the first prong of *Rodriguez De Varon*).[4]

2. Mitchell incorrectly argues that this Court's precedent supports applying a role reduction even if a defendant is held accountable only for her own conduct. Br. 12 (citing *United States v. Valdez*, 820 F. App'x 980, 982 (11th Cir. 2020)). She contends that the district court should have considered the non-exhaustive list of factors set forth in the commentary to Section 3B1.2, *see* note 3, *supra*, but failed to do so by basing its decision "on a single factor"—that she was responsible only for her own conduct. Br. 12-14. Mitchell's argument fails.

First, the district court did not need to cite the factors listed in the commentary or explicitly engage in a factor-driven analysis to support its decision not to apply a role adjustment. *See Rodriguez De Varon*, 175 F.3d at 939 (recognizing that "[s]o long as the district court's decision is supported by the

[4] The government concedes that, based on this Court's precedent and Section 3B1.2's commentary, the two-level role reduction did not necessarily apply to Mitchell; the Probation Office correctly recommended against the adjustment.

record and the court clearly resolves any *disputed* factual issues, a simple statement of the district court's conclusion is sufficient").

In any event, Mitchell misconstrues the events at sentencing. In denying Mitchell's request for the two-level reduction, the court first heard arguments by the government and defense counsel about how the factors set forth in the commentary to Section 3B1.2 applied to Mitchell's conduct. *See* Doc. 302, at 7-10. Only then did the court conclude, agreeing with the Probation Office, that the adjustment did not apply because Mitchell was convicted of *conspiracy*—despite the extent of her substantive criminal activity—and was held accountable solely for her own conduct. *Id.* at 11.

Later, when the court considered Mitchell's request for a downward variance, the court discussed the facts supporting Mitchell's significant role in the conspiracy and properly concluded that, although she "was not an equal partner," she was an "extension of [Lonnie] to some extent." Doc. 302, at 17. The record easily supports the court's decision, which is all that is required here. *See Rodriguez De Varon*, 175 F.3d at 939; *see also* pp. 21-24, *supra*.

Second, none of this Court's precedents change the outcome here. In *Presendieu*, this Court held, in the context of a drug conspiracy, that the district court erred in refusing to apply a Section 3B1.2 adjustment based "solely on the ground that [the defendant] was being held accountable only for her own actions as

opposed to the broader conspiracy." 880 F.3d at 1250 (internal quotation marks omitted). This Court recognized that "[w]hile that is not an impermissible factor, it is only one of many relevant factors" and emphasized that "there is conflicting evidence regarding the scope of [defendant's] role as compared with the other participants in this criminal scheme." *Ibid.* This Court could not confidently say that the record supported the district court's determination. *See also Valdez*, 820 F. App'x at 981-983 (holding similarly that the district court erred in refusing to apply a Section 3B1.2 adjustment where the record offered conflicting evidence as to the scope of the defendant's role).

Moreover, where this Court has questioned the district court's reliance on one factor in rejecting a two-level role reduction, that reliance was accompanied by an incorrect statement of law. In *United States v. Cruickshank*, for example, this Court held that "it was legal error for the district court to say that [drug quantity] is the only factor to be considered in a [drug trafficking] case." 837 F.3d 1182, 1187, 1195 (11th Cir. 2016) (emphasis omitted). This Court recognized that "[w]hile it is possible that the district court did not rely solely on drug quantity in making its minor-role determination, the consequences for . . . [the] advisory sentencing range could be significant" and the "wisest course of action" was therefore to vacate and remand. *Id.* at 1195.

Here, unlike *Presendieu* and *Valdez*, the record did not offer conflicting evidence that required the district court to make more extensive factual findings to support its holding. *See Rodriguez De Varon*, 175 F.3d at 939. Nor, unlike *Cruickshank* and as explained, did the court base its decision on "one factor," as Mitchell contends. *See* pp. 21-25, *supra*. At any rate, the district court's statement that Mitchell was held accountable for her own conduct does not undermine the court's holding. *See United States v. Boyd*, 291 F.3d 1274, 1277-1278 (11th Cir. 2002) (rejecting argument that "the district court erred in stating that rarely will a defendant be a minor participant when he is only being held accountable for his own conduct" and, based on the record, upholding the denial of an adjustment).

* * *

In sum, Mitchell knowingly and voluntarily agreed to a valid appeal waiver. Her appeal does not fit within the limited exception for challenging her sentence because there was no ineffective assistance of counsel. Mitchell's counsel specifically requested an adjustment under Section 3B1.2(b), and Mitchell cannot show how failing to elaborate on that request amounted to deficient performance. Nor can Mitchell show that any deficient performance prejudiced her where the district court, within its discretion, considered and rejected the minor-role adjustment. In any event, the court did not clearly err in declining to apply a two-level role reduction. Mitchell was convicted of one count of conspiracy, a lesser

offense than what her criminal activity entailed, and the extent of her conduct was significant.

CONCLUSION

For the reasons stated above, this Court should dismiss this appeal or, in the alternative, affirm the judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,558 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365, in 14-point Times New Roman font.

s/ Natasha N. Babazadeh
NATASHA N. BABAZADEH
Attorney

Date: January 5, 2024

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2024, I electronically filed the forgoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. I further certify that seven paper copies of the foregoing brief were sent to the Clerk of the Court by Federal Express.

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