No. 07-818

In the Supreme Court of the United States

ARMANDO NUNEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the limited waiver in petitioner's plea agreement of his right to seek collateral relief under 28 U.S.C. 2255 bars his collateral challenge seeking relief on the ground that his attorney provided him with ineffective assistance of counsel by disregarding his asserted direction to file an appeal from his judgment of conviction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 495 F.3d 544. The opinion of the district court (Pet. App. 10a-17a) is not reported in the Federal Supplement, but is available at 2005 WL 2675043.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2007. A petition for rehearing was denied on September 19, 2007 (Pet. App. 18a). The petition for a writ of certiorari was filed on December 18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Northern District of Illinois, peti-

tioner was convicted of conspiring to distribute in excess of five kilograms of cocaine, in violation of 21 U.S.C. 846. He was sentenced to 135 months of imprisonment, to be followed by 60 months of supervised release. Thereafter, petitioner filed a motion under 28 U.S.C. 2255 collaterally attacking his conviction. The district court denied the motion, Pet. App. 10a-16a, and the court of appeals affirmed, *id.* at 1a-8a.

1. Petitioner and others agreed to transport drugs, which were concealed in automobiles, from the Chicago area to distribution points throughout Illinois, Indiana, and New Jersey. Pet. App. 11a. Petitioner personally drove to New Jersey an average of twice a month over a period of approximately four months to distribute drugs concealed in his automobile. *Ibid.* On July 11, 2002, petitioner distributed cocaine to an undercover law enforcement officer. *Ibid.*

Petitioner was charged in a three-count indictment with conspiring, during two different time periods, to possess a substance containing cocaine with the intent to distribute it, in violation of 21 U.S.C. 846 and 18 U.S.C. 2 (Counts 1 and 2), and distributing a substance containing cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 3). Gov't C.A. Br. 3. Petitioner entered into a plea agreement with the government under which petitioner agreed to plead guilty to Count 2 and the government agreed to dismiss Counts 1 and 3 as well as to recommend a sentence at the low end of the applicable range under the Sentencing Guidelines. Pet. App. 11a.

In the plea agreement, petitioner specifically waived all rights relating to trial and "all appellate issues that might have been available if he exercised his right to trial." App., *infra*, 10a. Petitioner also specifically waived his right to appeal "any sentence within the max-

imum provided in the statute of conviction," as well as "the manner in which that sentence was determined." *Ibid.* In addition, in the agreement, petitioner waived his right to challenge by collateral attack "his sentence or the manner in which it was determined." *Ibid.* The agreement excluded from petitioner's waiver the right to make a "claim of involuntariness, or ineffective assistance of counsel, which relates directly to this waiver or to its negotiation." *Ibid.*

At the change of plea hearing, petitioner was provided a Spanish interpreter to assist him. Pet. App. 13a. In the plea colloquy, petitioner admitted to the conduct constituting the offense to which he was pleading guilty. *Id.* at 14a. He stated that he understood the agreement. *Ibid.* The district court specifically asked petitioner if the plea agreement had been read to him before he signed it, to which petitioner answered "Yes," and whether it had been read to him in Spanish, to which he answered "No." Gov't C.A. Br. 8. Petitioner's counsel then informed the court that he had made sure petitioner understood their discussion of the plea agreement in English. *Ibid.* The court then asked petitioner if he was "convinced [he] underst[ood] the provisions of this plea agreement," and whether he was "satisfied with it having gone over it with [his] lawyer in English." *Ibid.* Petitioner responded "Yes" to both. *Ibid.* The court additionally asked petitioner if he understood that he was "giving up [his] right to appeal, direct appeal, of any aspects of [his] case, including the validity of [his] plea and the sentence [he] ultimately receive[d]," and would retain only a right to bring a collateral attack based on "a claim of involuntariness or ineffective assistance of counsel" that is "related to this waiver in the plea agree-

ment." *Id.* at 19-20. Petitioner again responded "Yes." *Id.* at 20.

At sentencing, petitioner was represented by new counsel and again had the assistance of a Spanish interpreter. Pet. App. 14a-15a. Petitioner did not object to the plea agreement at that time despite having the opportunity to do so. *Ibid.* Consistent with the government's recommendation, which conformed to its commitment in the plea agreement, the district court sentenced petitioner at the bottom of the Guidelines range, to 135 months of imprisonment. *Id.* at 11a; Gov't C.A. Br. 6, 12.

2. Petitioner filed a pro se motion for collateral relief under 28 U.S.C. 2255. Petitioner's motion raised a number of claims including counsel's ineffective assistance for failing to challenge federal criminal jurisdiction over the sale of narcotics within the territory of a State, 04-cv-3385 Docket entry No. 1, at 6 and addendum 1 (N.D. Ill. May 13, 2004), the district court's failure to assess the mandatory fee for each offense, *id.* at 5, and its failure to construe Section 2D1.1 of the Sentencing Guidelines narrowly, *id.* at 6. In the motion, petitioner also alluded to the fact that his lawyer failed to file a notice of appeal. *Id.* at 3, 6. In a supplemental filing, petitioner asserted two claims: (1) that his appellate waiver was involuntary because he did not understand English, and (2) that counsel's failure to file a notice of appeal was itself ineffective assistance of counsel. *Id.* Docket entry No. 5, at 2-3 (Mar. 7, 2005) (Section 2255 Supp. Mot.). In his reply to the government's response, petitioner asked the district court to consider "only the issues raised in the Supplemental motion." *Id.* Docket Entry No. 16, at 1 (Sept. 22, 2005) (Section 2255 Reply).

Petitioner's supplemental filing asserted that he had "wished to appeal the ineffectiveness of his lawyer in going into the negotiation in the first place" as well as counsel's failure to utilize an interpreter, and that "[c]ounsel agreed to file the notice of appeal, even though he did not have to do the appeal as the claim was to be against him." Section 2255 Supp. Mot. 2. Petitioner speculated that "counsel failed to file this notice of appeal" because of a conflict of interest "in as much as he was aware the complaint was about his actions or inactions." *Ibid.* After the government's response pointed out that counsel who helped negotiate the plea had withdrawn by the time of petitioner's sentencing and conviction, and therefore had no obligation to file a notice of appeal on petitioner's behalf, see 04-cv-3385 Docket entry No. 15, at 24-26 (N.D. Ill. Sept. 9, 2005), petitioner asserted that it was instead his sentencing counsel, and not the counsel who negotiated the plea, who had been asked, but failed, to file a notice of appeal, Section 2255 Reply 3.

The district court denied the Section 2255 motion. As relevant here, the court held that petitioner's "testimony and the attendant circumstances at his change of plea hearing demonstrate that his plea was knowing and voluntary." Pet. App. 13a. The court reviewed in detail the colloquy between petitioner and the court at his plea hearing, including his specific statement that he was satisfied with having reviewed the plea agreement with counsel in English. *Id.* at 14a. The court noted that petitioner had received the assistance of an interpreter at both the plea and sentencing hearings, but had raised no objection to the plea or its provisions at either. *Id.* at 14a-15a. In light of the court's holding that the plea agreement was valid and enforceable, the court con-

cluded that petitioner's claim that his counsel was constitutionally ineffective because he failed to file an appeal was "moot." *Id.* at 16a. See *id.* at 13a ("because the plea agreement allows [petitioner] to challenge the voluntariness of his agreement either on appeal or on post-conviction review," the district court stated that it would "incorporate his voluntariness arguments into the pending § 2255 petition, which arguments also subsume his ineffective assistance allegations").

3. The court of appeals affirmed. Pet. App. 1a-8a. On appeal, the government argued, with respect to petitioner's failure-to-appeal claim of ineffective assistance, that petitioner had failed to show that he ever asked sentencing counsel to file a notice of appeal. The government noted that petitioner's vague claim that he had made such a request of sentencing counsel was contradicted by his own earlier statement that it was his plea counsel whom he had instructed to appeal. Gov't C.A. Br. 26-28. The government also argued that petitioner could not show prejudice from any failure to appeal because the district court had given full consideration to petitioner's claim that his plea was involuntary, *id.* at 28-29, and correctly rejected that claim as directly contrary to the extensive exchange between petitioner and the district court at the change of plea hearing, *id.* at 16-21.

For purposes of its decision, the court of appeals assumed that petitioner had requested that his counsel file a notice of appeal, although the government contested that assertion. Pet. App. 2a. The court also determined that it was unnecessary to resolve the merits of the question whether counsel's failure to appeal constituted ineffective assistance. Rather, the court held that the waiver of collateral review in petitioner's plea agreement encompassed his claim based on post-sentencing

ineffective assistance of counsel, and that that waiver was valid and binding. *Id.* at 2a-3a, 7a-8a.

The court of appeals acknowledged that six courts of appeals have held that a criminal defense counsel's failure to file a notice of appeal, if requested to do so by his client, constitutes per se ineffective assistance of counsel, even where the defendant has waived his right to appeal. Pet. App. 3a-4a. The court further found "much to be said for this position" since "waivers of appeal are not airtight" and "waivers of appeal have different scope." *Id.* at 4a.

The court nevertheless expressed "some doubt about the constitutional reasoning of those circuits." Pet. App. 5a. The court noted that this Court's decision in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), which found per se ineffective assistance in counsel's failure to file a requested appeal, was based on the view that the filing of a notice in that case was "a purely ministerial task." Pet. App. 5a (quoting *Flores-Ortega*, 528 U.S. at 477). The court of appeals reasoned that, where a criminal defendant has waived his right to appeal in exchange for the benefits of a plea agreement, and the agreement would be put in jeopardy by filing an appeal, the filing of a notice is no longer a simple ministerial act. *Id.* at 5a-6a. Instead, the court suggested, at least where the client has not expressed a desire to withdraw from the plea agreement, such a circumstance requires the attorney to reconcile what are, in effect, two inconsistent directions from his client. *Ibid.* The court recognized that counsel normally cannot substitute his judgment for that of the client on whether an appeal is frivolous, but must instead follow the approach described in *Anders* v. *California*, 386 U.S. 738 (1967). Pet. App. 6a. Here, however, the court believed that the *Anders* approach was

inapplicable because petitioner had waived his right to appeal. *Ibid.*

The court of appeals, however, ultimately determined that it "need not decide" the merits of petitioner's ineffective-assistance claim based on counsel's failure to file a notice of appeal because it found the claim barred by petitioner's separate waiver of his right to bring a collateral attack. Pet. App. 7a-8a. The court construed the plea agreement as "forswear[ing] * * * any opportunity to wage a collateral attack," and having reserved the right to raise in a collateral attack only "a defect in the waiver itself." *Id.* at 3a, 8a. On that basis, the court concluded that "[a] claim of post-sentencing ineffective assistance falls squarely within the waiver," *id.* at 3a, and, therefore, "[i]f the plea (and thus the waiver) is valid," petitioner's collateral attack is barred, *id.* at 8a.

Although petitioner challenged the voluntariness of his plea and associated waiver, the court of appeals affirmed the district court's conclusion that petitioner's claim that his plea was involuntary "would lose on *any* standard" of review. Pet. App. 2a. The court explained that petitioner's claim that he did not understand the plea bargain's terms was "inconsistent with assurances given to the judge, under oath, when entering the plea," at which time petitioner "told the judge—through an interpreter—that he fully understood the plea and the bargain's terms," answered the judge's questions in a way that demonstrated understanding, and told the court that he had understood the conversations he had with counsel in English about the plea. *Id.* at 2a-3a. The court observed that petitioner had given "no reason at all" for the disparity between his sworn statements to the district court at the time of his plea and his position in his Section 2255 motion. *Id.* at 3a. Because the plea

was, on any standard of review, voluntary and enforceable, the court concluded that petitioner's collateral attack must be dismissed, regardless of whether his counsel should have filed a notice of appeal "on demand." *Id.* at 8a.

DISCUSSION

Petitioner seeks review (Pet. i) of the question whether counsel for a criminal defendant is per se ineffective if he fails to file a notice of appeal, as requested by the defendant, even in the face of a plea agreement waiving the right to appeal. The court of appeals expressly declined to resolve the question petitioner asks this Court to review, and instead rested its judgment upon a different ground—*i.e.*, its understanding that petitioner had waived his right to bring a collateral attack, a waiver that the court determined was valid and enforceable under any standard. Petitioner does not separately seek review by this Court of the court of appeals' construction of the collateral-attack waiver or the court of appeals' enforcement of that waiver, the only issues that the court of appeals did decide.

Although petitioner does not challenge the court of appeals' reading of the collateral-attack waiver, that reading was not urged by the government and is not supported by the text of the plea agreement. Moreover, that incorrect construction of the plea agreement has been relied upon, and even expanded, in other cases within the Seventh Circuit. Therefore, while the court of appeals' decision does not warrant plenary review by this Court, the government suggests that the Court grant the petition for a writ of certiorari for the limited purpose of vacating the court of appeals' judgment and

remanding for further consideration in light of the government's narrower reading of the waiver's scope.

1. Because the court of appeals did not reach the issue on which petitioner seeks review, and instead relied upon an independent ground to deny the motion for relief under 28 U.S.C. 2255, there is no need for this Court to review the issue in this case. The question as posed in the petition (Pet. i) concerns whether, under this Court's decision in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), a criminal defense counsel is per se ineffective when he fails to file a notice of appeal on behalf of a client who has waived his right to appeal in a plea agreement, but nonetheless requests the attorney to appeal. *Flores-Ortega* held that a lawyer who disregards a criminal defendant's specific instructions to file an appeal acts in a professionally unreasonable manner, *id.* at 477; see *Rodriguez* v. *United States*, 395 U.S. 327 (1969), and that, with respect to the prejudice prong of the inquiry under *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984), the defendant need not show that the appeal would have had merit; it is enough to show that, but for counsel's error, the defendant would have timely appealed, *Flores-Ortega*, 528 U.S. at 484.

Flores-Ortega did not involve, and the Court did not address, the question whether it amounts to ineffective assistance for an attorney to disregard a defendant's direction to file an appeal even where the defendant has explicitly waived his right to appeal in a plea agreement.[1] In the wake of *Flores-Ortega*, some courts of

[1] In discussing whether counsel has "a constitutionally imposed duty to consult with the defendant about an appeal" in a plea-based conviction, the court mentioned as a relevant factor "whether the defendant received the sentence bargained for as part of the plea and *whether the plea expressly reserved or waived some or all appeal rights*." *Flores-*

appeals have held that, notwithstanding any appeal waiver provision in a plea agreement, counsel provides ineffective assistance when he disregards a defendant's direction to file an appeal. See *United States* v. *Poindexter*, 492 F.3d 263, 273 (4th Cir. 2007); *United States* v. *Tapp*, 491 F.3d 263, 265-266 (5th Cir. 2007); *United States* v. *Campusano*, 442 F.3d 770, 772-777 (2d Cir. 2006); *United States* v. *Sandoval-Lopez*, 409 F.3d 1193, 1195-1199 (9th Cir. 2005). Other courts have held that a lawyer's failure to comply with a defendant's direction to file an appeal constitutes ineffective assistance notwithstanding that the defendant's plea agreement contains an appeal waiver so long as the defendant has not waived all of his appellate rights. See *Watson* v. *United States*, 493 F.3d 960, 964 (8th Cir. 2007); *Gomez-Diaz* v. *United States*, 433 F.3d 788, 793-794 (11th Cir. 2005); *United States* v. *Garrett*, 402 F.3d 1262, 1266-1267 (10th Cir. 2005).

In this case, although the court of appeals expressed reservations about whether counsel's failure to appeal in those circumstances would be constitutionally ineffective, Pet. App. 5a, it did not resolve the merits of that issue, or what relief would be appropriate as a result—the issue that petitioner asks this Court to consider. Rather, the court expressly stated that it "need not decide" the issue because petitioner's Section 2255 motion had to be dismissed for the independent reason that petitioner had waived his right to bring the collateral at-

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Ortega, 528 U.S. at 480 (emphasis added). But the Court had no occasion to consider in *Flores-Ortega* whether an appeal waiver could limit an attorney's otherwise-absolute duty to file an appeal upon request because the defendant in that case "ha[d] not clearly conveyed his wishes one way or the other," *id.* at 477, and because the defendant had not waived his right to appeal, *id.* at 474.

tack, *id.* at 7a-8a, and that his waiver was, under any standard of review, voluntary and enforceable, *id.* at 2a-3a.

Petitioner contends that the court of appeals' purported "alternate holding" that his present ineffective-assistance challenge is barred by the waiver of collateral review "does not eliminate the conflict." Pet. 21. But, in fact, the decision below does not implicate any conflict. The court of appeals' holding with respect to the collateral-attack waiver is not an "alternative holding," *ibid.*; rather, it is the *only* holding of the court of appeals, which expressly declined to resolve the question petitioner asks the Court to address. Pet. App. 7a ("we need not decide" whether counsel's failure to appeal was ineffective assistance). Because the issue presented in the petition was not resolved below and did not form the basis for the judgment, this case provides no occasion for the Court to address that question.

2. Petitioner does not separately seek review in this Court of the court of appeals' decision that the waiver in his plea agreement barred this collateral challenge. See Pet. i. The question whether a plea agreement can validly waive a collateral challenge to alleged post-plea ineffective assistance would not warrant this Court's plenary consideration even if petitioner had presented it. But the court of appeals' case-specific decision that petitioner *did* waive his current claim rests on a broad reading of the collateral-attack waiver in petitioner's plea agreement that the government did not advocate and that is contrary to the government's understanding of the waiver's scope. Although plenary review of the court's interpretation of specific waiver language is not warranted, the error could produce (and appears already to have produced) broader misunderstandings

about the scope of standard waiver terms. The government therefore suggests that the judgment be vacated and the case remanded for further consideration in light of the government's views of the proper construction of the waiver provision.

a. Even if petitioner did seek review on the question whether a collateral-attack waiver can be enforced with respect to an ineffective-assistance-of-counsel claim based on counsel's failure to file a requested notice of appeal, that issue would not warrant plenary review by this Court. Contrary to petitioner's contention (Pet. 21-22), the court of appeals' holding that a collateral-attack waiver can foreclose a claim of post-sentencing ineffective assistance of counsel does not conflict with the decision of any other court of appeals. Petitioner's assertion of a conflict relies on four cases in which the courts upheld similar ineffective-assistance-of-counsel claims on collateral review notwithstanding the defendant's waiver of his right to collaterally attack his sentence as part of his plea agreement. See *Tapp*, 491 F.3d at 264, 265-266; *Campusano*, 442 F.3d at 772 n.1; *Gomez-Diaz*, 433 F.3d at 790; *Garrett*, 402 F.3d at 1266 n.5. In two of those cases, *Campusano* and *Gomez-Diaz*, the courts describe but do not analyze the collateral appeal waiver, and the waiver in question was expressly limited to a collateral attack on the defendant's "sentence." *Campusano*, 442 F.3d at 772 n.1; *Gomez-Diaz*, 433 F.3d at 790. Although *Tapp* did separately address the collateral-attack waiver in that case, that waiver was also limited to an attack on the petitioner's "sentence." 491 F.3d at 264, 265-266. In *Garrett*, the court noted that "[t]he government has not argued that this [collateral-attack] waiver bars a § 2255 motion based on counsel's failure to file a requested appeal," and went on to explain that "the plain language of

the waiver does not address the type of claim he has raised." 402 F.3d at 1266 n.5. By negative implication, *Garrett* suggests that a collateral-attack waiver that *does* waive post-plea ineffectiveness claims would present a different question.

In this case, the court of appeals specifically determined that petitioner's plea agreement "forswears * * * any opportunity to wage a collateral attack," Pet. App. 8a, with the sole exception of reserving the right to claim "a defect in the waiver itself," *id.* at 3a, such as a claim of "[i]neffective assistance before the plea's acceptance [that] might spoil the plea's validity and thus undermine the waiver," *id.* at 8a. Thus, the court of appeals concluded that "[a] claim of post-sentencing ineffective assistance falls squarely within the waiver." *Id.* at 3a. Because none of the other court of appeals decisions cited by petitioner involved a plea agreement that was interpreted to waive the right to bring a collateral attack concerning post-sentencing ineffective assistance, those decisions do not conflict with the holding of the court of appeals here.

Petitioner argues that the court of appeals' "reasoning ignores the fact that if the plea itself were involuntary in its entirety—an issue that [petitioner] would have raised on direct appeal—the collateral review waiver would have been invalid as well." Pet. 21. But the court of appeals and district court each specifically considered the question of the voluntariness of petitioner's plea, and the court of appeals made clear that it had to do so in order to enforce the waiver against him. Pet. App. 8a ("If the plea (and thus the waiver) is valid, an argument that counsel furnished ineffective assistance of counsel is among the foreclosed theories."). Moreover, although the standard for considering a forfeited

claim of involuntariness is more demanding on collateral review than direct appeal, the court of appeals, noting that fact, specifically held that petitioner's plea was voluntary under "*any* standard." Pet. App. 2a. Thus, petitioner received full consideration of his voluntariness challenge and all the process he was due in light of the collateral-attack waiver, as the court of appeals understood it. Petitioner's argument that he was nonetheless entitled to collateral relief granting him the opportunity to pursue an untimely direct appeal is, in effect, an argument that no collateral-attack waiver, no matter how broadly written, can in fact waive the right to challenge such post-sentencing ineffective assistance of counsel. No court of appeals has so held. There is, therefore, no conflict among the courts of appeals for this Court to resolve, even if petitioner had sought review on that issue.

b. Although petitioner does not challenge the court of appeals' interpretation of the collateral-attack waiver contained in his plea agreement, which is the premise of the court's holding that petitioner's Section 2255 motion was barred, the court of appeals construed the waiver more broadly than the government does. The government's brief on appeal did not argue that petitioner's ineffective-assistance-of-counsel claim was barred by his collateral review waiver. Rather, the United States argued that petitioner's ineffective-assistance-of-counsel claim failed on the merits because (1) petitioner had failed to offer evidence that would support a finding that he did, in fact, ask his counsel to file a notice of appeal, see Gov't C.A. Br. 26-28, and that, (2) even if he had, petitioner was not prejudiced by the failure because the only claim that would have been open to him on appeal would have been an attack on the voluntariness of the

plea agreement itself (and its appellate waiver), and the district court had already rejected that claim after a full hearing on that issue in this Section 2255 proceeding, *id.* at 28-29, a determination that was fully supported on the record, see *id.* at 16-25.

As previously noted, the court of appeals did not decide the merits of petitioner's ineffective-assistance-of-counsel claim, as the government urged, but rather held that the claim was barred by the collateral-attack waiver in petitioner's plea agreement. The United States' brief had accurately represented the plea agreement as having waived petitioner's "right to challenge his sentence or the manner in which it was determined in any collateral attack." Gov't C.A. Br. 6. The waiver provisions state, in full:

> 12. Defendant understands that by pleading guilty he is waiving all the [trial] rights set forth in the prior paragraph. Defendant's attorney has explained those rights to him, and the consequences of his waiver of those rights. Defendant further understands he is waiving all appellate issues that might have been available if he exercised his right to trial.
>
> 13. The defendant is also aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging this, the defendant knowing waives the right to appeal any sentence within the maximum provided in the statute of conviction, or the manner in which that sentence was determined, in exchange for the concessions made by the United States in this Plea Agreement. The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not

> limited to a motion brought under Title 28, United States Code, Section 2255. The waiver in this paragraph does not apply to a claim of involuntariness, or ineffective assistance of counsel, which relates directly to this waiver or to its negotiation.

App., *infra*, 10a.

The court of appeals did not, however, read the waiver as limited to collateral attacks on petitioner's "sentence or the manner in which it was determined," App., *infra,* 10a, but instead as "forswear[ing] * * * *any opportunity to wage a collateral attack*," Pet. App. 8a (emphasis added). Based on that construction, the court of appeals held, consistent with its decision in *Jones* v. *United States*, 167 F.3d 1142, 1145 (7th Cir. 1999), that the only ineffective-assistance-of-counsel claim that was excepted from petitioner's collateral-attack waiver was one that relates to "[i]neffective assistance before the plea's acceptance [that] might spoil the plea's validity and thus undermine the waiver." Pet. App. 8a.

The court's reliance on *Jones* was misplaced. In *Jones*, the defendant's cooperation agreement had expressly "waive[d] his right to appeal or contest directly, under 18 U.S.C. § 3742 or [28] U.S.C. § 2255, or otherwise, his conviction and the eventual sentence . . . *on any grounds*, unless the court was to impose a sentence in excess of the statutory maximums . . . or otherwise imposes a sentence in violation of any law." 167 F.3d at 1143 n.1 (emphasis added). Here, by contrast, petitioner's collateral-attack waiver was specifically limited to a collateral challenge to his "sentence or the manner in which it was determined." App., *infra,* 10a. Although it is possible that the court of appeals inferred from the express reservation of petitioner's right to bring "a claim of involuntariness, or ineffective assistance of

counsel, which relates directly to this waiver or to its negotiation," *ibid.*, that the waiver barred all other ineffective-assistance-of-counsel claims, that construction is not supported by the text.[2] The collateral-attack waiver is, by its terms, limited to an attack on petitioner's "sentence or the manner in which it was determined." *Ibid.* The following sentence does not reflect a waiver of any additional class of claims, but expressly states that the earlier waiver does not, and indeed could not under *Jones*, bar a claim of involuntariness or ineffectiveness relating to the plea agreement itself. In our view, that limiting language is not properly interpreted as converting the limited waiver of a collateral attack on the sentence into a broader waiver of all claims other than those that would invalidate the plea agreement itself.

The Seventh Circuit has, in other cases, construed similar waiver language in plea agreements to have a more limited scope. For example, in *Bridgeman* v. *United States*, 229 F.3d 589 (2000), the court considered a waiver provision in which the defendant "agree[d] not to contest my sentence or the manner in which it was determined in any post-conviction proceeding, including

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[2] The district court described the collateral-attack waiver in similar terms in the change of plea colloquy, in which it stated "the only review rights you retain would be what is called a collateral attack, which would allow you to raise a claim of involuntariness or ineffective assistance of counsel," but "only related to this waiver in the plea agreement." See Gov't C.A. Br. 20 (quoting transcript of plea colloquy). The district court's oral description of the plea agreement, however, did not broaden the scope of the waiver as clearly stated in the agreement's text. See *United States* v. *Vega*, 241 F.3d 910, 912 (7th Cir. 2001) (per curiam) (construing a waiver provision in a plea agreement: "The terms of a plea agreement are interpreted according to the parties' reasonable expectations at the time they entered it.").

but not limited to, a proceeding under Title 28, United States Code, Section 2255." *Id*. at 590. The defendant later filed a Section 2255 motion alleging that his guilty plea was involuntary because of ineffective assistance in his attorney's advise about the plea agreement. *Id.* at 591. The court held that the challenge fell outside of the waiver, explaining that "[a] plea agreement that also waives the right to file a § 2255 motion is generally enforceable," but here, the defendant "only agreed not to contest his *sentence*; the plea agreement is silent as to a waiver of any challenge to his underlying *conviction*." *Ibid*. Accord *United States* v. *Behrman*, 235 F.3d 1049, 1051-1052 (7th Cir. 2000) (construing waiver of the right to appeal "any sentence within the maximum provided in the statute(s) of conviction" not to bar a challenge to a restitution order imposed pursuant to a separate statute; "just as we are willing to enforce waivers of appeal, we enforce them only to the extent of the agreement"); *United States* v. *Vega*, 241 F.3d 910, 911-912 (7th Cir. 2001) (per curiam) (construing waiver of right to appeal "any sentence" not to bar an appeal from the post-sentence entry of an amended judgment increasing the sentence). Under the principles applied in those cases, petitioner's waiver of his right to challenge "his *sentence* or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under Title 28, United States Code, Section 2255," App., *infra*, 10a (emphasis added), does not bar a challenge to his attorney's alleged post-sentence ineffective assistance in failing to file a notice of appeal upon request.

Because petitioner has not challenged the court of appeals' interpretation of the plea agreement's waiver provision, that issue would not normally warrant any relief by this Court. In this instance, however, we be-

lieve that vacatur and remand to the court of appeals to reconsider its construction of the waiver in light of the government's views would be appropriate. As noted, see p. 15, *supra*, the government did not urge the court of appeals to hold that petitioner's collateral-attack waiver independently barred his ineffective-assistance-of-counsel claim relating to the failure to appeal and did not urge the broad reading of the waiver provision that the court of appeals adopted.

The court of appeals' sua sponte holding that the terms of petitioner's plea agreement barred this collateral claim of post-sentencing ineffective assistance of counsel has, moreover, been applied in other cases within the Seventh Circuit that have similarly phrased collateral-attack waivers, and in at least one case with no waiver of collateral-attack rights at all.[3] In *Salas* v. *United States*, No. 2007-cv-417-DFH-WTL, 2007 WL 3286611 (S.D. Ind. Nov. 6, 2007), for example, the defendant's plea agreement waived his right to collaterally attack his sentence in the same terms as petitioner's plea agreement did. See *id.* at *1. While the district court recognized that the language of the waiver "does not preclude a collateral challenge by Salas to his conviction," *id.* at *3, it went on to hold that, under the court of appeals' decision in this case, the waiver "renders * * * unavailable" Salas's claim of ineffective assistance of counsel based on counsel's failure to file a notice of appeal, *ibid.* In *Stephenson* v. *United States*, No.

[3] Although the court of appeals' opinion does not quote the language of the plea agreement that it construes as having waived all post-plea claims of ineffective assistance of counsel, the district court opinion, which is readily available at 2005 WL 2675043 (N.D. Ill. Oct. 18, 2005), does quote the relevant language, see Pet. App. 12a.

06-2887 (7th Cir. Sept. 27, 2007), petition for cert. pending, No. 07-9267 (filed Dec. 26, 2007), the court of appeals, after inviting briefing on the effect of the decision in this case, affirmed without discussion the dismissal of a Section 2255 motion raising a similar ineffective assistance of counsel claim, although the plea agreement in that case contained no collateral-attack waiver at all. See U.S. Br. at 9, *Stephenson*, *supra*.[4]

In other circumstances, the issue of the scope of the waiver would implicate only an unpreserved error on a case-specific interpretation of a plea agreement that would not warrant corrective action by this Court. But the court of appeals' published decision in this case concerning standard language appearing in numerous plea agreements may come to be understood as a precedential holding with broader ramifications. In the view of the government, those broader consequences of the court of appeals' holding warrant vacating the judgment and remanding for further proceedings in light of the government's views about the proper construction of the waiver provision in petitioner's plea agreement.

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[4] We are providing to petitioner a copy of the government's brief in *Stephenson, supra,* along with this filing.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings in light of the positions articulated by the United States in this brief.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

MAY 2008

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 CR 871
Judge Harry D. Leinenweber

UNITED STATES OF AMERICA

v.

ARMANDO NUNEZ

[Filed: Dec. 19, 2002]
[Docketed: Dec. 23, 2002]

PLEA AGREEMENT

This Plea Agreement between the United States Attorney for the Northern District of Illinois, PATRICK J. FITZGERALD, and defendant ARMANDO NUNEZ and his attorney, JOHN M. CUTRONE, is made pursuant to Rule 11 of the Federal Rules of Criminal Procedure.

This Plea Agreement is entirely voluntary and represents the entire agreement between the United States Attorney and defendant regarding defendant's criminal liability in case 02 CR 871.

This Plea Agreement concerns criminal liability only, and nothing herein shall limit or in any way waive or release any administrative or judicial civil claim, demand or cause of action, whatsoever, of the United States or its agencies. Moreover, this Agreement is limited to the United States Attorney's Office for the Northern District of Illinois and cannot bind any other federal, state or local prosecuting, administrative or regulatory authorities except as expressly set forth in this Agreement. By this Plea Agreement, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, and the defendant ARMANDO NUNEZ and his attorney, JOHN M. CUTRONE, have agreed upon the following:

1. Defendant acknowledges that he has been charged in the indictment in this case with conspiring to knowingly and intentionally possess with intent to distribute and to distribute a controlled substance, from October, 2000 to October, 2001, namely, in excess of five kilograms of mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance (Count One), in violation of Title 21, United States Code, Section 846; with conspiring to knowingly and intentionally possess with intent to distribute and to distribute a controlled substance, from October, 2001 to September, 2002, namely, in excess of five kilograms of mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance (Count Two), in violation of Title 21, United States Code, Section 846; and knowingly and intentionally distributing a controlled substance, namely, in excess of 500 grams of mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance, in vio-

lation of Title 21, United States Code, Section 841(a)(1) (Count Three).

2. Defendant has read the charges against him contained in the indictment in this case and those charges have been fully explained to him by his attorney.

3. Defendant fully understands the nature and elements of the crimes with which he has been charged.

4. Defendant will enter a voluntary plea of guilty to Count Two of the indictment in this case.

5. Defendant will plead guilty because he is in fact guilty of the charge contained in Count Two of the indictment. In pleading guilty to Count Two of the indictment defendant admits the following facts, and admits that these facts establish his guilt beyond a reasonable doubt:

From in or about October, 2001 to in or about September 2002, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant ARMANDO NUNEZ ("NUNEZ"), conspired and agreed with others known and unknown to the Grand Jury, to knowingly and intentionally possess with intent to distribute and to distribute a controlled substance, namely, in excess of five kilograms of mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1), and in violation of Title 21, United States Code, Section 846 and Title 18, United States Code, Section 2.

Specifically, during the period from approximately October, 2001 to approximately September, 2002, defendant NUNEZ was part of a drug organization (Drug Organization 2). It was part of the conspiracy that

NUNEZ agreed with his co-conspirators, in exchange for money, to use automobiles to pick-up loads of cocaine in the Chicagoland area, conceal the cocaine within the vehicles, and to distribute the cocaine to locations in and about Illinois and Indiana. On average, NUNEZ picked-up and distributed at least approximately 20 to 50 kilograms per month utilizing hidden compartments within the vehicles, which totaled at least approximately 240 kilograms of cocaine during this time period. It was further part of the conspiracy that at times would pick-up drug proceeds in and about the Chicagoland area, based on sales of cocaine by his co-conspirators to third parties, and then would deliver the accumulated drug proceeds to other co-conspirators in the drug organization. It was further part of the conspiracy that on one occasion NUNEZ accumulated approximately $300,000 in drug proceeds and distributed it other co-conspirators who were members of the drug organization. It was further part of the conspiracy that NUNEZ would use the telephone to discuss drug trafficking with his co-conspirators, and to negotiate and arrange for the purchase and sale of multi-kilograms quantities of cocaine by NUNEZ and his co-conspirators for sale to third parties, the proceeds of which sales would be used to pay for the cocaine. It was further part of the conspiracy that NUNEZ and his co-conspirators would and did hide and conceal and attempt to hide and conceal the purposes, objects and acts in furtherance of the conspiracy to avoid detection by law enforcement. All in violation of Title 21, United States Code, Section 846 and Title 18, United States Code, Section 2.

6. The defendant acknowledges that for the purpose of computing his sentence under the United States Sen-

tencing Guidelines, the following conduct, to which he stipulates, constitutes relevant conduct under Section 1B1. 3 of the Guidelines:

A. During the period from approximately October, 2000 to approximately October 2001, defendant NUNEZ was part of a drug organization (Drug Organization #1). It was part of the conspiracy that NUNEZ agreed with his co-conspirators, in exchange for money, to use automobiles to pick-up loads of cocaine in the Chicagoland area, conceal the cocaine within the vehicles, and to distribute the cocaine to locations in and about New Jersey. It was further part of the conspiracy that during an approximate four month period, from approximately July, 2001 to approximately October, 2002, on average, NUNEZ made two trips per month between the Chicagoland area and the New Jersey area, and on each of these eight trips he concealed in the vehicle he was driving approximately four kilograms of cocaine, for a total of approximately 32 kilograms of cocaine, which cocaine he distributed to his co-conspirators for resale to third parties, the proceeds of which sales would be used to pay for the cocaine. It was further part of the conspiracy that NUNEZ would use the telephone to discuss drug trafficking with his co-conspirators, and to negotiate and arrange the purchase and sale of multi-kilograms quantities of cocaine by NUNEZ and his co-conspirators for sale to third parties, the proceeds of which sales would be used to pay for the cocaine. It was further part of the conspiracy that NUNEZ and his co-conspirators would and did hide and conceal and attempt to hide and conceals the purposes, objects and acts in furtherance of the conspiracy to avoid detection by law enforcement.

B. On July 11, 2002. NUNEZ knowingly and intentionally distributed a controlled substance, namely approximately two kilograms, net weight, of mixtures containing cocaine, to an Undercover Law Enforcement Agent ("UCA"). One kilogram of cocaine was sold to the UCA for approximately $18,500. A second kilogram of cocaine was given by NUNEZ to the UCA on consignment to sell to third parties, the proceeds of which sales were purportedly to be used by the UCA to pay for the second kilogram of cocaine.

7. For purposes of applying the guidelines promulgated by the United States Sentencing Commission pursuant to Title 28, United States Code, Section 994, the parties agree on the following points:

(a) The amount of cocaine involved in the offense of conviction and relevant conduct for which the defendant is accountable is more than 150 kilograms of cocaine. Therefore, pursuant to Guidelines §2D1.1(c)(1), the base offense level is level 38.

(b) Based on evidence now known to the government, the government and defendant agree, subject to the Court's approval, that Guideline Section 5C1.2 and Title 18, United States Code, Section 3553(f) are applicable, and that the Court therefore shall impose sentence in accordance with the applicable Guidelines without regard to any statutory minimum sentence. In addition, the offense level is reduced by two levels, pursuant to Guideline Section 2D1.1(b)(6).

(c) Defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct. If the government does not receive additional evidence in conflict with this pro-

vision, and if the defendant continues to accept responsibility for his actions, within the meaning of Guidelines §3E1.1(a), a two level reduction in the offense level is appropriate.

(d) Defendant has notified the government timely of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, within the meaning of Guideline §3E1.1(b); an additional one-point reduction in the offense level is therefore appropriate, provided the court determines the offense level to be 16 or greater prior to the operation of Guideline §3E1.1(a)

(e) Based on the facts known to the government, the defendant's criminal history points equal 0 and the defendant's criminal history is I.

(f) The defendant and his attorney and the government acknowledge that the above calculations are preliminary in nature and based on facts known to the government as of the time of this Agreement. The defendant understands that the Probation Department will conduct its own investigation and that the Court ultimately determines the facts and law relevant to sentencing, and that the Court's determinations govern the final Sentencing Guidelines calculation. Accordingly, the validity of this agreement is not contingent upon the probation officer's or the Court's concurrence with the above calculations.

8. Errors in calculations or interpretation of any of the guidelines may be corrected by either party prior to sentencing. The parties may correct these errors or misinterpretations either by stipulation or by a state-

ment to the probation office and/or court setting forth the disagreement as to the correct guidelines and their application. The validity of this Agreement will not be affected by such corrections, and the defendant shall not have a right to withdraw his plea on the basis of such corrections.

9. Defendant understands that the count to which he will plead guilty carries a maximum penalty of life in prison and a maximum fine of $4,000,000. Defendant further understands he is subject to a statutory minimum sentence of 10 years imprisonment, if it applies. In addition, defendant understands that this charge also carries a term of supervised release of at least five years and up to any number of years, including life, which the court may specify, as well as any restitution which the Court my order.

10. Defendant understands that in accord with federal law, Title 18, United States Code, Section 3013, upon entry of judgment of conviction, the defendant will be assessed $100 on the count to which he has pled guilty, in addition to any other penalty imposed. Defendant agrees to pay the special assessment of $100 at the time of sentencing with a check or money order made payable to the Clerk of the United States District Court.

11. Defendant understands that by pleading guilty he surrenders certain rights, including the following:

(a) If defendant persisted in a plea of not guilty to the charges against him, he would have the right to a public and speedy trial. The trial could be a jury trial or a trial by the judge sitting without a jury. The defendant has a right to a jury trial. However, in order that the trial be conducted by the judge sitting without a

jury, the defendant, the government and the judge all must agree that the trial be conducted by the judge without a jury.

(b) If the trial is a jury trial, the jury would be composed of twelve laypersons selected at random. Defendant and his attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising so-called peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that defendant is presumed innocent, and that it could not convict him unless, after hearing all the evidence, and considering each count of the indictment separately, it was persuaded of defendant's guilt beyond a reasonable doubt.

(c) If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, and considering each count of the indictment separately, whether or not the judge was persuaded of defendant's guilt beyond a reasonable doubt.

(d) At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against defendant. Defendant would be able to confront those government witnesses and its attorney would be able to cross-examine them. In turn, defendant could present witnesses and other evidence in his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the court.

(e) At a trial, defendant would have a privilege against self-incrimination so that he could decline to testify, and no inference of guilt could be drawn from his refusal to testify. If the defendant desired to do so, he could testify in his own behalf.

12. Defendant understands that by pleading guilty he is waiving all the rights set forth in the prior paragraph. Defendant's attorney has explained those rights to him, and the consequences of his waiver of those rights. Defendant further understands he is waiving all appellate issues that might have been available if he exercised his right to trial.

13. The defendant is also aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging this, the defendant knowingly waives the right to appeal any sentence within the maximum provided in the statute of conviction, or the manner in which that sentence was determined, in exchange for the concessions made by the United States in this Plea Agreement. The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under Title 28, United States Code, Section 2255. The waiver in this paragraph does not apply to a claim of involuntariness, or ineffective assistance of counsel, which relates directly to this waiver or to its negotiation.

14. Defendant understands that the indictment and this Plea are matters of public record and may be disclosed to any party.

15. Defendant understands that the United States Attorney's Office will fully apprise the District Court

and the United States Probation Office of the nature, scope and extent of defendant's conduct regarding the charges against him, and related matters, including all matters in aggravation and mitigation relevant to the issue of sentencing.

16. Defendant agrees to repay to the United States the undercover drug buy money utilized on July 11, 2002 as described above, in the amount of $18,500, as a special condition of supervised release.

17. At the time of sentencing, the government shall recommend that the Court impose a sentence at the low end of the applicable guideline range, or the statutory mandatory minimum sentence, whichever is higher.

18. It is understood by the parties that the sentencing judge is neither a party to nor bound by this Agreement and, subject to the limitations of the Sentencing Guidelines, may impose the maximum penalties as set forth in paragraph 9 above. The defendant further acknowledges that if the Court does not accept the sentencing recommendation of the parties, the defendant will have no right to withdraw his guilty plea.

19. After sentence has been imposed on Count Two to which defendant pleads guilty as agreed herein, the government will move to dismiss the remaining counts in the indictment.

20. Defendant understands that his compliance with each part of this Plea Agreement extends throughout and beyond the period of his sentence, and failure to abide by any term of the Plea Agreement is a violation of the Agreement. Defendant further understands that in the event he violates this Agreement, the government,

at its option, may move to vacate the Plea Agreement, rendering it null and void, and thereafter prosecute the defendant not subject to any of the limits set forth in this Agreement, or to resentence the defendant. The defendant understands and agrees that in the event that this Plea Agreement is breached by the defendant, and the government elects to void the Plea Agreement and prosecute the defendant, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against the defendant in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of such prosecutions.

21. Defendant and his attorney acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to cause defendant to plead guilty.

22. Defendant agrees this Plea Agreement shall be filed and become a part of the record in this case.

23. Should the judge refuse to accept the defendant's plea of guilty, this Agreement shall become null and void and neither party will be bound thereto.

24. Defendant acknowledges that he has read this Agreement and carefully reviewed each provision with his attorney. Defendant further acknowledges that he understands and voluntarily accepts each and every term and condition of this Agreement.

AGREED THIS DATE: [December 19, 2002]

/s/ PATRICK J. FITZGERALD by MSP
PATRICK J. FITZGERALD
United States Attorney

/s/ JOHN H. NEWMAN
JOHN H. NEWMAN
Assistant United States Attorney

/s/ ARMANDO NUNEZ
ARMANDO NUNEZ
Defendant

/s/ JOHN M. CUTRONE
JOHN M. CUTRONE
Attorney for defendant