UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 05-12148-D

LUCIOUS LATTIMORE

Petitioner- Appellant,

v.

UNITED STATES OF AMERICA

Respondent-Appellee.

APPEAL OF A DENIAL OF A PETITION UNDER 28 U.S.C. § 2255

BRIEF OF APPELLANT

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NO. 05-12148-D

Lucious Lattimore v. United States of America

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I HEREBY CERTIFY that the following named persons are parties interested in the outcome of this case:

1. Anthony David "Butch" Berry, District Court Counsel for Defendant-Petitioner Lattimore at plea and sentencing

2. Robin Gerstein, Assistant United States Attorney

3. Julie Hackenberry Savell, Assisant United States Attorney

4. United States Magistrate Judge Marcia M. Howard

5. William Mallory Kent, habeas counsel for Lattimore at district court and on request for certificate of appealablity

6. Lucious Lattimore, Petitioner-Appellant

7. Don Pashayan, Assistant United States Attorney

8. United States District Court Judge Harvey E. Schlesinger

STATEMENT REGARDING ORAL ARGUMENT

Petitioner-Appellant Lucious Lattimore respectfully requests oral argument.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant Lattimore certifies that the size and style of type used in this brief is 14 point Times New Roman.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the appeal in this cause under 28 U.S.C. § 2253(c)(1)(B) because a certificate of appealability was issued. The Certificate of Appealability was issued by Judges Tjoflat and Dubina on October 5, 2005, as to the following issue:

> Whether the district court erred by concluding that Lattimore knowingly and voluntarily waived his right to raise an ineffective assistance of counsel claim in a 28 U.S.C. § 2255 motion in light of the magistrate judge's (1) failure to inform Lattimore at the plea colloquy that he was waiving his right to collaterally attack his sentence and (2) statement at the colloquy that Lattimore was not waiving his right to effective assistance of counsel by entering a guilty plea.

STATEMENT OF THE ISSUE

I. The District Court erred by concluding that Lattimore knowingly and voluntarily waived his right to raise an ineffective assistance of counsel claim in a 28 U.S.C. § 2255 motion in light of the magistrate judge's (1) failure to inform Lattimore at the plea colloquy that he was waiving his right to collaterally attack his sentence and (2) statement at the colloquy that Lattimore was not waiving his right to effective assistance of counsel by entering a guilty plea.

STATEMENT OF THE CASE

Course of Proceedings, Disposition in the Court Below and Relevant Facts

This is an appeal of a summary denial of a timely filed federal habeas petition challenging ineffective assistance of counsel as it related to the imposition of a federal sentence, filed under authority of 28 U.S.C. § 2255, in the United States District Court for the Middle District of Florida, Jacksonville Division, Harvey E. Schlesinger, United States District Court Judge.

Background

Lattimore pled guilty to a one count information charging him with conspiracy to distribute crack cocaine from on or about September 2002 through November 2002, in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(A)(iii), pursuant to a written plea agreement which contained only one guideline stipulation - a stipulation by the government to recommend a three level downward adjustment for acceptance of responsibility, and one factual stipulation of relevance to the application of the guidelines, a stipulation in the factual basis attached to the plea agreement that his offense involved more than 50 grams of crack cocaine. The information was filed well after the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). The information did not allege any factor relevant to the application of the federal sentencing guidelines beyond the allegation of a ten year minimum

mandatory quantity of cocaine, i.e., 50 grams or more of crack cocaine.

His presentence investigation report ("PSR") dated October 16, 2003 scored him at a base level 34 under U.S.S.G. § 2D1.1 based on a finding *by the probation officer* that Lattimore was accountable not for 50 grams of crack cocaine, but for at least 150 grams of crack cocaine.

The PSR reduced the base offense level by three levels for acceptance of responsibility for a total offense level of 31.

The PSR determined the applicable criminal history category was determined to be Category III based on four criminal history points.

Sentencing was scheduled for October 28, 2003. The day before sentencing, Assistant United States Attorney Julie H. Savell hand delivered a two page letter to United States Probation Officer Fred Fortenberry (a true and correct copy of which is hereunto annexed and by this reference made a part hereof), in which the government alleged that Lattimore (who was rendering substantial assistance cooperation pursuant to the terms of his plea agreement), had been interviewed by AUSA Savell, AUSA Don Pashayan and DEA Task Force Agent Rodney Blunt at the Baker County Jail in connection with their trial preparation for the trial of Bryan Wayne Sparks, case number 3:02-cr-249-J-21MCR, and in that interview Lattimore told them about a number of drug transactions he had conducted with another cooperating source,

Demetrius Barnes. The government said that Barnes had denied the accusations. According to the letter, Sparks's trial was postponed while the government investigated the claim. The letter claimed that on October 23, 2003, in another interview with Lattimore, Lattimore told AUSA Savell and DEA Task Force Agents Blunt and Eileen Simpson that his earlier information about Barnes had been a lie, made up to get back at Barnes.

The government also belatedly took the position that due to Lattimore's continued drug use while on bond the government opposed acceptance of responsibility. This was a change in position from the position the government had consistently taken to the contrary up until October 23, 2003, despite the government's ongoing knowledge of Lattimore's drug abuse problem and dirty urine tests.

The government's October 27, 2003 letter to Probation concluded:

> [I]t is the position of the United States that the obstruction enhancement under U.S.S.G. § 3C1.1 applies because Lucious Lattimore's materially false statements to the law enforcement officers on October 19, 2003 obstructed the administration of justice during the course of the investigation and prosecution (*sic*).

Lattimore proceeded to sentencing based on this new information without preparation of an amended PSR. The judge asked Lattimore's counsel, Anthony

"Butch" Berry,[1] at the commencement of the sentencing proceeding, if he wished additional time to research or otherwise prepare to respond to the new allegations, and Berry declined. [T3][2] The government moved on the record for loss of acceptance of responsibility and for obstruction. [T4]

As to the denial of acceptance, the government pointed to three instances of urinalysis showing drug use by Lattimore, one in May 2003, one in August 2002 and one in October 2003.

All three urinalysis problems were known to the government when the PSR was released on October 16, 2003 and the government had not objected to Lattimore receiving acceptance of responsibility. [T4-8]

The government stated that it was this dirty urine problem that led to the government asking for a continuance of the Sparks's case. [T8] This was contrary to what the government had previously represented in its October 27, 2003 letter to Probation. In that letter the government claimed that it was the new information about

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[1] *See The Florida Bar v. Berry*, 744 So.2d 457 (Fla. 1999)(suspension from the Bar).

[2] References to the sentencing transcript will be in the form T followed by the applicable page number of the transcript.

Barnes that led to the continuance.[3]

On the other side of this issue was the fact, demonstrated by a memorandum to the court from pretrial services that Lattimore had undergone 27 surprise curfew visits and was present and accounted for all 27 times, and had undergone an additional 23 urine tests, all of which were negative. [T10]

Berry noted that Lattimore had a drug addiction problem which accounted for his three dirty urine tests. [T11] Lattimore had a years long history of drug addiction including having gone through drug rehab in 1995. [T13] Lattimore himself told the court that he was heavily on cocaine at the time of his arrest. [T14]

Regarding the alleged obstruction conduct, AUSA Pashayan told the court, not under oath, and as a witness in his own case, that on one occasion, on Tuesday, October 14, 2003, Lattimore:

> [F]or the first time mentioned that Mr. Barnes had double-dealed on DEA *one time*, and he said that in early September 2002, *prior to any of the recording deals that Mr. Barnes participated in, that Mr. Barnes had gone to Mr. Lattimore and purchased cocaine from him*.

[T24-25]

Pashayan added:

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[3] Judge Schlesinger apparently saw the contradiction and rehabilitated the record by having Pashayan later state that the delay of the Sparks's trial was because of the information Lattimore gave about Barnes.

> Mr. Lattimore told us that in September of 2002, *prior to any of Mr. Barnes' interaction or wired phone calls and conversations with DEA,* that Mr. Barnes had done a number of dealings with him, you know, that DEA did not know about. And, in particular, Your Honor, Mr. Lattimore said at one of these dealings, that Mr. Barnes had come back to his house with another individual named Applehead and that Mr. Lattimore had sold Mr. Barnes and this other gentlemen named Applehead like another two or three cookies of crack cocaine.

[T25-26]

AUSA Pashayan said that the government then interviewed Barnes who denied the accusation. [T26] The government then confronted Lattimore with this on Sunday, October 19, 2003, but Lattimore stuck to his statement against Barnes. [T27] The government then went to court on Monday, October 20, 2003 and disclosed this to defense counsel for Sparks and to the judge in Sparks's case. [T27] Apparently later on the very same day the government moved to continue Sparks's trial, the government met with Lattimore again, and Lattimore conceded that his accusation against Barnes was not true. [T28] At this point the government went back to court and Sparks's trial was rescheduled for November 3, 2003. [T29] Sparks was tried, convicted and sentenced to 188 months imprisonment. [Middle District of Florida case number 3:03cr249, docket number 155]

Lattimore's counsel, Butch Berry, conceded that the government's recital of facts was correct. [T32] Berry acknowledged that he was not present for the crucial

interview between the government and his client and that if he had been, the problem may never have occurred. [T32]

The judge then scored Lattimore with a two level increase for obstruction. [T33]

The judge also took away the three levels for acceptance of responsibility finding that if it had been only the obstruction alone, he might have found it to be an exceptional case that did not warrant the loss of acceptance despite the finding of obstruction, but given both the drug usage and the obstruction, he was not going to give Lattimore acceptance of responsibility. [T35]

This brought the total offense level up from 31 to 36. [T36] With a Criminal History Category III, the new sentencing range was 235 to 293 months. [T36] The court imposed sentence at the low end of the range, 235 months. [T51]

Facts Relevant to Certified Question

No appeal was taken from the original judgment and sentence. However, a petition under 28 U.S.C. § 2255 followed in a timely manner. The district court ordered the government to respond in writing, which was followed by a reply from Petitioner Lattimore. Lattimore brought to the district court's attention intervening authority relating to the application of the standard appeal waiver in the Middle District

of Florida to *Blakely*[4] error and the extension of the appeal waiver to habeas claims of ineffective assistance of counsel (*Williams v. United States*, 396 F.3d 1340 (11th Cir. January 24, 2005), and *United States v. Rubbo*, 396 F.3d 1330 (11th Cir. January 21, 2005), but distinguishing Lattimore's case from *Rubbo* and *Williams*.

In particular, Lattimore pointed out to the district court that there had not only not been an adequate *Bushert* waiver during the plea colloquy, but additionally the magistrate judge who took the plea affirmatively advised Lattimore without objection from the government that he was not waiving his right to effective assistance of counsel:

> 24 You do have the right to the effective assistance
> 25 of a lawyer at every stage of the proceedings, including
>
> 32
>
> 1 your trial, and Mr. Berry would be with you throughout, and
> 2 that is one right that you do not waive by pleading guilty.
> * * *
> 15 Now, again if you plead guilty, those rights, with
> 16 the exception of the right to counsel, will all go away.

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[4] *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004).

17 The only steps that remain would be the presentence report
18 and the sentencing hearing. So a plea of guilty admits the
19 truth of the charge and sets you towards sentencing, whereas
20 a plea of not guilty denies the charge, and you would
21 maintain all those rights we just covered.
22 Do you understand that?
23 THE DEFENDANT: Yes, sir.

[Docket 43, pp. 31-32]

Additionally, when the Magistrate Judge addressed the waiver of appeal language, the Magistrate Judge only advised Lattimore that he was giving up his right to a direct appeal. The Magistrate Judge did not explain to Lattimore that he was waiving his right to a 2255 challenge to the sentence.

11 THE COURT: If you'll pass it back up, I want to
12 cover certain parts of it. I will not read the entire
13 agreement in court, but I want to mention certain important
14 things.
15 There is in here a standard provision -- well, I
16 say standard; it's one that the United States Attorney's
17 Office has included locally, I think, in all plea

agreements -- concerning your right to appeal and the waiver of that.

Ordinarily, under the law you would have the right to appeal any sentence imposed by the District Judge on any ground you believe would be appropriate, but you can waive or give up that right and under this plea agreement you're waiving or giving up your right to appeal a sentence on any ground except for an upward departure by the sentencing

judge, a sentence above the statutory maximum or a sentence in violation of the law apart from the sentencing guidelines. I see the Safety Valve provision is included in this case.

MS. GERSTEIN: It is, Your Honor, although I don't believe he will qualify for the Safety Valve but because we did not put that provision in the plea agreement, it would be appropriate to leave it in the appellate section.

THE COURT: All right. And the last way that you could exercise your right to appeal is if the United States

exercises its right to appeal, then you would be released from your waiver as well. But except in those five circumstances concerning upward departures, sentences above the statutory maximum or a sentence in violation of the law or the United States appeals or perhaps the Safety Valve provision, you would not be allowed to appeal.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And are you waiving or giving up that right freely on your part? Is that free and voluntary on your part?

THE DEFENDANT: Yes, sir.

[Docket 43, pages 39-40]

Nevertheless, without further briefing from the government and without an evidentiary hearing, the district court summarily denied Lattimore's 2255 petition based solely on procedural bar arising out of the appeal waiver in his plea agreement.

The district court failed to address the merits of Lattimore's claims. Lattimore filed a timely notice of appeal which the district court construed as a request for certificate of appealability which the district court denied. Lattimore renewed his

request for a certificate of appealability at this Court, which was first denied then granted on rehearing as to the single question presented in this brief.

STANDARD OF REVIEW

Whether an appeal waiver is enforceable is a question of law which this Court reviews *de novo*. *United States v. Bushert*, 997 F.2d 1343, 1352 (11th Cir. 1993).

SUMMARY OF ARGUMENT

I. The District Court erred by concluding that Lattimore knowingly and voluntarily waived his right to raise an ineffective assistance of counsel claim in a 28 U.S.C. § 2255 motion in light of the magistrate judge's (1) failure to inform Lattimore at the plea colloquy that he was waiving his right to collaterally attack his sentence and (2) statement at the colloquy that Lattimore was not waiving his right to effective assistance of counsel by entering a guilty plea.

Under binding Eleventh Circuit precedent the plea colloquy in Lattimore's case insufficiently address the appeal waiver, at least insofar as it would also extend to include a waiver of Lattimore's right to petition under 28 U.S.C. § 2255. *United States v. Bushert*, 997 F.2d 1343 (11th Cir. 1993). Additionally, the magistrate judge's own advice to Lattimore that the legal effect of what he had done did not include a waiver of his right to effective assistance of counsel, in the absence of any timely objection by the government, was advice Lattimore was entitled to rely upon in entering his plea, and forecloses any subsequent contrary position by the district court or the government. Finally, even a valid appeal and collateral attack waiver does not waive a § 2255 challenge concerning ineffective assistance of counsel or the knowing and voluntary nature of the waiver itself absent a waiver hearing equivalent to a *Faretta* waiver proceeding.

ARGUMENT

I. The District Court erred by concluding that Lattimore knowingly and voluntarily waived his right to raise an ineffective assistance of counsel claim in a 28 U.S.C. § 2255 motion in light of the magistrate judge's (1) failure to inform Lattimore at the plea colloquy that he was waiving his right to collaterally attack his sentence and (2) statement at the colloquy that Lattimore was not waiving his right to effective assistance of counsel by entering a guilty plea.

The District Court failed to reach the merits of Lattimore's ineffective assistance of counsel argument in his § 2255 petition, instead denied the petition summarily, based solely on the appeal waiver provision in Lattimore's plea agreement.

The question on this appeal is whether the district court erred by concluding that Lattimore had knowingly and voluntarily waived his right to raise an IAC claim in a petition under Title 28, U.S.C. § 2255, in light of the magistrate judge's (1) failure to inform Lattimore at the plea colloquy that he was waiving his right to collaterally attack his sentence and (2) the magistrate judge's statement at the colloquy that Lattimore was *not waiving* his right to effective assistance of counsel by entering a guilty plea?

We argue that the question - which was framed in these very words by this Court - answers itself. Clearly under binding Eleventh Circuit precedent the failure of the district court to conduct an adequate plea colloquy concerning the defendant's understanding of an appeal waiver results in the invalidity of the waiver. *United States v. Bushert*, 997 F.2d 1343 (11th Cir. 1993)l.

Additionally, the magistrate judge clearly and expressly told Lattimore that he was not waiving his right to effective assistance of counsel, so even had there been an otherwise sufficient plea dialogue concerning the appeal waiver, the magistrate judge's instruction on the law and meaning of the appeal waiver - in the absence of any objection from the government - constitutes a binding interpretation of that waiver which the defendant is entitled to rely upon.

After Lattimore filed his 2255 petition, the Eleventh Circuit issued two decisions that bear on this question, *Williams v. United States*, 396 F.3d 1340 (11th Cir. 2005), and *United States v. Rubbo*, 396 F.3d 1330 (11th Cir. 2005). *Rubbo* and *Williams* were issued after the government's answer and the government did not file a notice of supplemental authority with the district court to alert the district court to this development in the law.

Nevertheless, because *Rubbo* and *Williams* were potentially the controlling cases for Lattimore's issues in our Circuit, counsel for Lattimore brought both cases to the district court's attention in his reply to the Government's answer.

Rubbo held that an appeal waiver that barred sentencing appeals also waives a *Booker* claim. *Williams* held that an appeal waiver from a Middle District of Florida plea agreement substantially the same as the appeal waiver in this case also waives the right to challenge a claim of ineffective assistance of counsel in a 2255 petition in

which the claim of ineffective assistance relates to a sentencing error.

Putting aside that both *Rubbo* and *Williams* are wrongly decided, which they are, neither has application to Lattimore, because the predicate of both is a knowing waiver under *United States v. Bushert*, 997 F.2d 1343 (11th Cir. 1993).[5]

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[5] *Rubbo* does not explain how an appeal waiver provision which misadvises a defendant that his sentence *must be imposed in conformity with the federal sentencing guidelines*, when that advice is wrong as a matter of law under *Booker* can be a valid waiver; *Rubbo* does not explain how an appeal waiver that is limited to a waiver of the misapplication of the sentencing guidelines bars a Constitutional challenge to the guidelines themselves; and *Rubbo* ignores the obvious fact that a defendant could not have knowingly entered into a waiver when the application of that waiver had to have been explained to him by his counsel interpreting it in light of then binding Eleventh Circuit precedent that foreclosed *Apprendi* claims against the guidelines.

Williams suffers similar infirmities. In addition, *Williams* elides the fact that the appeal waiver provision does not waive a claim of ineffective assistance of counsel and there is no basis in law or fact to expand the scope of a waiver beyond its express terms. Rather the standard rule of construction is to construe a document *against the draftsman*. The waiver was drafted by the government, not by Lattimore. There is not one word in the waiver about 28 U.S.C. § 2255, much less about an ineffective assistance of counsel claim. Indeed, the provision does not waive "collateral attacks" only the right to *appeal* the defendant's sentence, directly or collaterally, *whatever that might mean!* This language combobulates appeal and habeas terminology. We know from the Magistrate Judge's explanation to Lattimore that the Magistrate Judge interpreted it to not mean he was waiving a claim of ineffective assistance of counsel. The *Williams* court ignores the caption of the appeal waiver provision, which is captioned, significantly, "Appeal of Sentence; Waiver." The body of the provision contains three statutory references, all of which are to direct appeals, not to habeas proceedings or proceedings under 28 U.S.C. § 2255. The *Williams* decision is a strained and poorly reasoned decision.

Lattimore's case does not pass the *Bushert* test in so far as the government and district court tried to stretch the appeal waiver to cover a waiver of his right to file a 2255 challenge of ineffective assistance of counsel with respect to a sentencing error, because in Lattimore's case *the Magistrate Judge expressly advised Lattimore that by pleading guilty he did not give up his right to effective assistance of counsel*:

24 You do have the right to the effective assistance
25 of a lawyer at every stage of the proceedings, including

32

1 your trial, and Mr. Berry would be with you throughout, and
2 that is one right that you do not waive by pleading guilty.
* * *
15 Now, again if you plead guilty, those rights, with
16 the exception of the right to counsel, will all go away.
17 The only steps that remain would be the presentence report

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Although we confine this argument to a footnote, we do not do so with the intent of abandoning it, rather we think that the argument set forth in the body of this motion above trumps this argument. The Court will not need to address these concerns if it agrees with our argument that neither *Rubbo* nor *Williams* applies on the peculiar facts of Lattimore's case. Should the Court disagree, then we would press the Court to address the arguments made herein and otherwise distinguish *Williams* and *Rubbo* based on these arguments, or failing that, we seek to preserve this issue for *en banc* reconsideration or review by the Supreme Court.

18 and the sentencing hearing. So a plea of guilty admits the
19 truth of the charge and sets you towards sentencing, whereas
20 a plea of not guilty denies the charge, and you would
21 maintain all those rights we just covered.
22 Do you understand that?
23 THE DEFENDANT: Yes, sir.

[Docket 43, pp. 31-32]

If the government disagreed with the court's statement and interpretation of the appeal waiver, the time to object was at the time the magistrate explained it to Lattimore, not after Lattimore relied upon it in entering his plea, suffered under ineffective assistance of counsel and then in reliance upon the court's advice and the government's acquiescence by silence, filed his 2255 petition.

Additionally, when the Magistrate Judge addressed the waiver of appeal language, unlike *Williams*, the Magistrate Judge only advised Lattimore that he was giving up his right to a direct appeal. The Magistrate Judge did not explain to Lattimore that he was waiving his right to a 2255 challenge to the sentence.

11 THE COURT: If you'll pass it back up, I want to
12 cover certain parts of it. I will not read the entire
13 agreement in court, but I want to mention certain important

things.

There is in here a standard provision -- well, I say standard; it's one that the United States Attorney's Office has included locally, I think, in all plea agreements -- concerning your right to appeal and the waiver of that.

Ordinarily, under the law you would have the right to appeal any sentence imposed by the District Judge on any ground you believe would be appropriate, but you can waive or give up that right and under this plea agreement you're waiving or giving up your right to appeal a sentence on any ground except for an upward departure by the sentencing

judge, a sentence above the statutory maximum or a sentence in violation of the law apart from the sentencing guidelines. I see the Safety Valve provision is included in this case.

MS. GERSTEIN: It is, Your Honor, although I don't believe he will qualify for the Safety Valve but because we

did not put that provision in the plea agreement, it would be appropriate to leave it in the appellate section.

THE COURT: All right. And the last way that you could exercise your right to appeal is if the United States exercises its right to appeal, then you would be released from your waiver as well. But except in those five circumstances concerning upward departures, sentences above the statutory maximum or a sentence in violation of the law or the United States appeals or perhaps the Safety Valve provision, you would not be allowed to appeal.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And are you waiving or giving up that right freely on your part? Is that free and voluntary on your part?

THE DEFENDANT: Yes, sir.

[Docket 43, pages 39-40]

This is not an adequate *Bushert* waiver as to the claimed extension of the appeal waiver provision to a an ineffective assistance of counsel § 2255 petition, or a § 2255

petition generally. There is nothing in this record to show that the defendant was in any way advised or understood that he was waiving his right to file a petition under 28 U.S.C. § 2255. This is not an adequate record under *Bushert* on which to bar Lattimore from bringing a 2255 petition.

In *Bushert* itself the appeal waiver was not enforced because even though the district judge went over the appeal waiver provision with the defendant, the judge's choice of language in stating that the defendant was waiving his right to contest the *charges* was held to not be sufficient to inform the defendant that he was waiving his right to appeal the *sentence*, and this despite the clear language of the written plea agreement itself, by which the defendant waived his *sentencing* appeal rights.

This Court adopted the view that the validity or extent of the waiver would not be determined by simply reading the text of the waiver language itself:

> In *Bushert,* the district court informed the defendant "that under some circumstances, [Bushert] or the government may have the right to appeal any sentence that the Court imposes[.]" *Id.* at 1352. The district court also informed the defendant "that he was waiving the right to appeal the *charges* against him," but "did not specifically address the issue of the sentence appeal waiver in the Rule 11 hearing." *Id.* Thus, during the plea colloquy the district court told the defendant he may have the right to appeal his sentence but never mentioned at all that he had waived most of those appeal rights. Accordingly, we concluded that, because the district court "did not clearly convey to Bushert that he was giving up his right to appeal [his sentence] under *most* circumstances ... [i]t is not manifestly clear that Bushert understood he was waiving his appeal rights." *Id.* at 1352-53. Accordingly, we concluded that the sentence-appeal waiver was

unenforceable. *Id.* at 1353-54.

> Likewise, in the instant case, the district court never expressly indicated that Stevenson was waiving the right to appeal *his sentence* under most circumstances. Furthermore, the record of the plea colloquy did not make it "manifestly clear" that Stevenson understood he was waiving the right to appeal his sentence. While the plea agreement did contain a sentence-appeal waiver, we have rejected the view that an examination of the text of the plea agreement is *alone* sufficient to find the waiver knowing and voluntary. *See Bushert,* 997 F.2d at 1352. Rather, during the plea colloquy, the district court must at least refer to the fact that the defendant is waiving his rights to appeal his sentence under most or certain circumstances, as the case may be. Accordingly, the purported sentence-appeal waiver was ineffective, and we deny the government's motion to dismiss.

United States v. Stevenson, 131 Fed.Appx. 248, 249-250 (11th Cir. 2005).

This Court has strictly applied the *Bushert* requirement that the plea colloquy clearly and unequivocally explain the specific right as to which the government seeks to assert the waiver, in order for the waiver to be applied and upheld:

> The government asserts the appeal waiver provision in Gooden's plea agreement bars his *Booker* claim. A sentence appeal waiver contained in a plea agreement, made knowingly and voluntarily, is enforceable. *United States v. Bushert,* 997 F.2d 1343, 1345, 1350-51 (11th Cir.1993).
>
> > "[I]n most circumstances, for a sentence appeal waiver to be knowing and voluntary, the district court *must have specifically discussed the sentence appeal waiver* with the defendant *during the Rule 11 hearing." Id.* at 1351 (emphasis added). Absent this discussion, a sentence appeal waiver is also enforceable, when "it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver." *Id.*

> Based on our review, the district court did not mention the appeal waiver at Gooden's plea colloquy. Moreover, it is not "manifestly clear" that Gooden understood he was waiving the right to appeal his sentence based solely on the written provision in Gooden's plea agreement. *Id.* at 1352 (rejecting view that an examination of only the text of the plea agreement is sufficient to find the waiver knowing and voluntary). Accordingly, we will disregard the waiver and proceed to the merits of Gooden's *Booker* claim. *Id.* at 1353.

United States v. Gooden, 2005 WL 2185498, *3 (11th Cir. 2005) (slip opinion).

Bushert expressly held:

> We conclude that the defendant's knowledge and understanding of the sentence appeal waiver is one of the components that constitutes the "core concern" of the defendant's right to "be aware of the direct consequences of his guilty plea." *Id.* at 668. We agree with the *Marin* court's holding that "a waiver is not knowingly or voluntarily made if the district court fails to specifically question the defendant concerning the waiver provision of the plea agreement during the Rule 11 colloquy and the record indicates that the defendant did not otherwise understand the full significance of the waiver." 961 F.2d at 496 (citation omitted).
>
> In order to prevail in its argument that this court should enforce a sentence appeal waiver, the government need only demonstrate *one* of the two *Marin* items. The government must show that either (1) the district court specifically questioned the defendant concerning the sentence appeal waiver during the Rule 11 colloquy, or (2) it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver. [footnotes omitted]

United States v. Bushert, 997 F.2d 1343, 1351 (11th Cir. 1993).

Clearly there can be no reasoned distinction between an *appeal* waiver and a

habeas waiver - both are *statutory* not constitutional rights. Therefore, the language of *Bushert* although addressed to the waiver of the right of appeal must apply equally to the waiver of the right to pursue a collateral attack.

On this record the government fails both prongs. The magistrate judge clearly did not explain the habeas waiver with Lattimore and it is not otherwise clear from the record that Lattimore understood it. This is why Lattimore has argued that the habeas waiver in his case does not pass the *Bushert* test.

Lattimore alleged under oath that he did not knowingly waive his right to challenge his own lawyer's ineffective assistance of counsel with respect to the sentencing matters alleged in his 2255 petition, and disputed the government's claim that he did so by virtue of paragraph B.5 of his plea agreement [Docket 43].

It was clearly error for the District Court to deny relief on the basis of this procedural bar on the peculiar facts of this plea colloquy and the government's silent acquiescence at the time of the entry of the plea.

Finally, even a valid appeal and collateral attack waiver does not waive a § 2255 challenge concerning ineffective assistance of counsel or the knowing and voluntary nature of the waiver itself. This Court said as much in *Bushert*:

> Even judicially enforced, knowing and voluntary sentence appeal waivers as broad as Bushert's--which include a waiver of collateral appeal of his sentence--would not prevent a collateral § 2255 action concerning certain

> subjects. *See United States v. Abarca,* 985 F.2d 1012, 1014 (9th Cir.1993) (allowing, despite the existence of a sentence appeal waiver, §§ 2255 proceedings "such as a claim of ineffective assistance of counsel or involuntariness of waiver.") (citations omitted).

United States v. Bushert, 997 F.2d 1343, 1351, n. 17 (11th Cir. 1993).

Bushert clearly states that a criminal defendant retains his right to bring an ineffective assistance of counsel challenge as well as a challenge as to the knowing and voluntary nature of the appeal-collateral challenge waiver itself.[6]

This proposition is supported by the simple logic of maintaining integrity in our pretension of Due Process. As *Bushert* would say, it is axiomatic. Without such an inherent exception, criminal defendants could be lost in a horror house of mirrors - as was Lattimore. Assuming for the sake of this argument as this Court must in this posture of the case, that Lattimore's counsel was ineffective, then what this case presents is a waiver of appeal and collateral attack as to sentencing errors which was obtained as the result of the assistance and counsel of the very lawyer who was not competent to advise on those very sentencing issues. Can such a waiver be knowingly and voluntarily given?

But it is more than this. Clearly Lattimore had a Sixth Amendment right to

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[6] The *Williams* panel chose to ignore this portion of *Bushert* - not by distinguishing it as *dicta* but merely by silent disregard.

counsel at sentencing - in a federal criminal case perhaps the most critical stage of the proceeding. Lattimore exercised his right to counsel and retained counsel to represent him. He did not choose to proceed *pro se*. He did not choose to waive his right to counsel. He wished to have the close assistance of competent counsel. He needed the close assistance of competent counsel.

Had he changed his mind and appeared in court without counsel, the court would have been required to engage in a lengthy and explicit colloquy with him warning him on the dangers of proceeding without counsel at such a critical stage of the proceedings which would involve the application of a complex and technical set of sentencing guidelines as to which he would have had no ability to understand. The court could not have dispensed with counsel and allowed Lattimore to proceed *pro se* as cavalierly as the court allowed Lattimore to waive his right to effective assistance of counsel - - and yet, are the two not synonymous?

To permit the waiver of effective assistance of counsel by merely signing a plea agreement - which is what this case amount to - is to permit a criminal defendant to appear at a guideline sentencing proceeding without counsel as that term is understood under the Sixth Amendment.

Furthermore, when counsel is not simply "ineffective" but *concedes sentencing guilt*, as did Lattimore's counsel, he is no longer functioning as counsel under the Sixth

Amendment, but is counsel in name only. *Cf. Brookhart v. Janis,* 384 U.S. 1, 6-7, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (counsel lacks authority to consent to a guilty plea on a client's behalf); *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274, 395 U.S., at 242, 89 S.Ct. 1709 (1969) (a defendant's tacit acquiescence in the decision to plead is insufficient to render the plea valid), cited in *Florida v. Nixon,* 125 S.Ct. 551, 560 (2004). The complete deprivation of Sixth Amendment counsel at a critical stage is one of that rare category of events that is treated as structural error, entitling the criminal defendant to a *de novo* proceeding. *Cf. Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (a total deprivation of the right to counsel is structural error), cited in *Johnson v. United States*, 520 U.S. 461, 468-469, 117 S.Ct. 1544,1549-1550 (1997). Lattimore's counsel's failure to object to the misapplication of the guidelines in this case amounted to a concession of sentencing guilt that failed entirely to subject the sentencing proceeding to the adversarial testing or advocacy that is minimally required of counsel.

Again, this is not something Lattimore can waive unless the waiver is done with full knowledge and understanding of exactly what is being done.

It is one thing to warn the defendant in the plea colloquy that *his counsel's* estimate of the guidelines may be wrong - it is an entirely different thing to say that *the court's application of the guidelines will be wrong*, and because your lawyer is

incompetent the *court's error* will result in your being sentenced to a greatly enhanced sentence that you will forever after have no due process procedure by which to seek redress. That was not said. No one told Lattimore that and Lattimore did not agree to that.

> A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. *Parke v. Raley,* 506 U.S. 20, 28-29, 113 S.Ct. 517, 523, 121 L.Ed.2d 391 (1992) (guilty plea); *Faretta, supra,* 422 U.S., at 835, 95 S.Ct., at 2541 (waiver of counsel).[7] In this sense there *is* a "heightened" standard for pleading guilty and for waiving the right to counsel . . .

Godinez v. Moran, 509 U.S. 389, 400-401, 113 S.Ct. 2680, 2687 (1993).

Something far less than a "heightened" waiver occurred in Lattimore's case. Yet it was not within the power of the district court[8] to deprive Lattimore of his Constitutional right to the effective assistance of counsel by anything short of a clear waiver of his right to counsel.

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[7] *Faretta v. California,* 422 U.S. 806, 823, 95 S.Ct. 2525, 2535, 45 L.Ed.2d 562 (1975).

[8] Or, we would respectfully submit, the *Williams* panel.

CONCLUSION

Petitioner-Appellant Lucious Lattimore respectfully requests this honorable Court grant his petition, vacate his judgment and sentence and remand his case for a new sentencing or other further proceedings consistent herewith.

Respectfully submitted,

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RULE 28-1(m) CERTIFICATE OF WORD COUNT AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY pursuant to 11th Cir.R. 28-1(m) and FRAP 32(a)(7) that this document contains 7,023 words.

I ALSO HEREBY CERTIFY that two Adobe PDF copies of the foregoing were served by electronic mail to Todd Bradshaw Grandy, Esq., by emailing to:

todd.grandy@usdoj.gov

on November 11th, 2005.

_____
William Mallory Kent