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U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 14, 2014

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Department Policy on Waivers of Claims of Ineffective Assistance of Counsel

As we all recognize, the right to effective assistance of counsel is a core value of our Constitution. The Department of Justice has a strong interest in ensuring that individuals facing criminal charges receive effective assistance of counsel so that our adversarial system can function fairly, efficiently, and responsibly. Accordingly, in recent years, the Department has made support of indigent defense a priority. We have worked to ensure that all jurisdictions – federal, state, and local – fulfill their obligations under the Constitution to provide effective assistance of counsel, especially to those who cannot afford an attorney.

When negotiating a plea agreement, the majority of United States Attorney's offices do not seek a waiver of claims of ineffective assistance of counsel. This is true even though the federal courts have uniformly held a defendant may generally waive ineffective assistance claims pertaining to matters other than entry of the plea itself, such as claims related to sentencing. While the Department is confident that a waiver of a claim of ineffective assistance of counsel is both legal and ethical, in order to bring consistency to this practice, and in support of the underlying Sixth Amendment right, we now set forth uniform Department of Justice policies relating to waivers of claims of ineffective assistance of counsel.

Federal prosecutors should no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel whether those claims are made on collateral attack or, when permitted by circuit law, made on direct appeal. For cases in which a defendant's ineffective assistance claim would be barred by a previously executed waiver, prosecutors should decline to enforce the waiver when defense counsel rendered ineffective assistance resulting in prejudice or when the defendant's ineffective assistance claim raises a serious debatable issue that a court should resolve.

As long as prosecutors exempt ineffective-assistance claims from their waiver provisions, they are free to request waivers of appeal and of post-conviction remedies to the full extent permitted by law as a component of plea discussions and agreements.