

No. 18-8604

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IN THE SUPREME COURT OF THE UNITED STATES

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IVAN VAZQUEZ-GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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#### QUESTION PRESENTED

Whether petitioner was entitled to a certificate of appealability from the denial of a motion under 28 U.S.C. 2255 to vacate his sentence, where he had waived his right to seek collateral review, his motion was filed more than one year after his judgment of conviction became final, 28 U.S.C. 2255(f)(1), and his underlying claim asserts ineffective assistance of counsel in a discretionary collateral proceeding under Federal Rule of Criminal Procedure 35(b).

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OPINIONS BELOW

The order of the court of appeals denying a certificate of appealability (Pet. App. A1) is unreported. The order of the district court denying petitioner relief and denying petitioner a certificate of appealability (Pet. App. A2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2018. The petition for a writ of certiorari was filed on February 11, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Illinois, petitioner was convicted on one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848; one count of entry into the United States without inspection, in violation of 8 U.S.C. 1325(a); one count of conspiring to launder monetary instruments, in violation of 18 U.S.C. 1956(a)(i) and (h); and one count of interstate travel in support of racketeering, in violation of 18 U.S.C. 1952(a)(3). The court sentenced petitioner to 521 months of imprisonment, to be followed by 5 years of supervised release. Petitioner did not appeal. Later, acting under Federal Rule of Criminal Procedure 35(b), the court reduced the term of imprisonment to 396 months.

Petitioner subsequently filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court dismissed the motion, and the district court and court of appeals both declined to issue a certificate of appealability (COA). Pet. App. A1-A2.

1. In July 2011, a grand jury in the United States District Court for the Southern District of Illinois returned a multi-defendant indictment charging petitioner with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848; conspiracy to distribute cocaine and to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), 21 U.S.C. 841(b)(1)(A) (2012), and 21 U.S.C. 846; entry into the United

States without inspection, in violation of 8 U.S.C. 1325(a); conspiracy to launder monetary instruments, in violation of 18 U.S.C. 1956(h); and interstate travel in support of racketeering, in violation of 18 U.S.C. 1952(a)(3). 11-cr-30046 D. Ct. Doc. 388, at 1-23 (July 19, 2011). Petitioner agreed to plead guilty to all five charges and to cooperate with the government. 11-cr-30046 D. Ct. Doc. 739, at 1-20 (Dec. 14, 2011). As part of the plea agreement, petitioner "waive[d] his right to contest any aspect of his conviction and sentence that could be contested under Title 18 or Title 28, or under any other provision of federal law." Id. at 12. The only exceptions to the waiver were for a sentence above the range recommended by the Sentencing Guidelines (or any higher statutory minimum), a retroactive change in the law rendering him actually innocent, or a retroactive Guidelines amendment. Id. at 12-13.

On June 28, 2012, the district court entered a judgment of conviction on four of the five charges. 11-cr-30046 D. Ct. Doc. 1191, at 1-7. The court declined to enter judgment on the drug-trafficking charge, on the ground that it was included within the greater offense of engaging in a continuing criminal enterprise. Id. at 1; see Rutledge v. United States, 517 U.S. 292 (1996). The court sentenced petitioner to imprisonment for 521 months. 11-cr-30046 D. Ct. Doc. 1191, at 3. Petitioner did not appeal.

In December 2012, the government filed a motion under Federal Rule of Criminal Procedure 35(b)(1) to reduce petitioner's sentence because petitioner had "provided substantial assistance in investigating or prosecuting another person." See C.A. Doc. 9, at 3-4 (Jan. 4, 2016) (Gov't Resp.). On November 13, 2013, the district court granted the motion. Petitioner had asked the court to reduce the term of imprisonment to 260 months, but the court reduced it to 396 months. Id. at 3-5. Petitioner did not appeal. Id. at 5.

2. On November 10, 2014, petitioner moved under 28 U.S.C. 2255 to vacate his sentence. C.A. Doc. 1. He claimed that he had received ineffective assistance of counsel in his Rule 35(b) proceedings because his attorney had "failed to appeal or counsel [him] about the pros and cons of appealing." Id. at 2. In response, the government argued that petitioner's motion was untimely under 28 U.S.C. 2255(f)(1) because petitioner had filed it more than one year after the date when his "judgment of conviction bec[ame] final." Ibid.; see Gov't Resp. 5-9. The government also argued that petitioner's motion was barred by the waiver of collateral review in his plea agreement. Id. at 9-13.

The district court summarily dismissed the Section 2255 motion and denied a COA. Pet. App. A2. The court of appeals likewise denied a COA. Id. at A1.

## ARGUMENT

Petitioner contends (Pet. 7-12) that his motion under 28 U.S.C. 2255 was timely and that the court of appeals should therefore have issued a COA. Petitioner's contention lacks merit; he fails to identify any conflict among the courts of appeals; and this case would in all events be a poor vehicle to address the issue, because the court of appeals did not identify untimeliness as the basis for its denial of a COA and because petitioner would not have been entitled to a COA irrespective of the timeliness of his Section 2255 motion.

1. Petitioner errs in contending (Pet. 7-12) that his Section 2255 motion was timely and that the court of appeals should therefore have granted him a COA.

A federal prisoner may appeal the denial of a motion under 28 U.S.C. 2255 to vacate his sentence only if he obtains a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). A prisoner satisfies that standard only if he shows both that (1) "jurists of reason" could conclude that his claim is not barred on "procedural grounds" and (2) "jurists of reason" could conclude that the motion "states a valid claim of the denial of a constitutional right." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

In this case, the district court did not state its reasons for dismissing petitioner's motion under 28 U.S.C. 2255, and neither that court nor the court of appeals stated its reasons for denying a COA. Petitioner assumes (Pet. 7-12) that the court of appeals denied a COA solely on the ground that his Section 2255 motion was untimely. Petitioner's premise is not necessarily correct; as discussed below (see pp. 8-10, infra), the denial of a COA could also properly have rested on his waiver of his right to file such a collateral attack or the lack of merit in his underlying constitutional claim. But even assuming petitioner's premise, the denial of a COA on timeliness grounds would be sound.

Federal law fixes a one-year limitations period for filing a motion under Section 2255. See 28 U.S.C. 2255(f). Petitioner agrees (Pet. 7) that the one-year period in this case began running on "the date on which the judgment of conviction bec[ame] final." 28 U.S.C. 2255(f)(1). The judgment of conviction here became final on July 13, 2012, 14 days after the district court entered the judgment, because no party filed an appeal. See Clay v. United States, 537 U.S. 522, 527 (2003); Fed. R. App. P. 4(b)(1)(A)(i) and (ii). Petitioner, however, did not file a Section 2255 motion until February 11, 2014 -- more than one year later. Petitioner's Section 2255 motion was therefore time-barred.

Petitioner contends (Pet. 8-9) that his motion was timely because "a district court's modification of sentence under Rule 35



must be treated as resetting the one-year clock under § 2255(f)(1).” The statute of limitations, however, provides that the limitations period begins running on “the date on which the judgment of conviction bec[ame] final,” not the date on which a court decided a motion under Rule 35. 28 U.S.C. 2255(f)(1). And a separate statute confirms that, “[n]otwithstanding the fact that a sentence of imprisonment can subsequently be \* \* \* corrected pursuant to the provisions of rule 35 \* \* \* a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.” 18 U.S.C. 3582(b).

Petitioner also contends (Pet. 9-12) that his motion was timely because he is entitled to equitable tolling. But petitioner has forfeited any claim that he is entitled to equitable tolling, because he failed to seek equitable tolling in his opening brief in the district court. See Gov’t Resp. 8. In addition, this Court has explained that a prisoner may be entitled to equitable tolling in the context of a collateral attack only in “extraordinary circumstance[s]” that go beyond “a ‘garden variety claim’ of attorney negligence.” Holland v. Florida, 560 U.S. 631, 651-652 (2010). Petitioner has not established any such “extraordinary circumstances” here.

Petitioner does not contend that the court of appeals’ decision conflicts with the decision of any other court of appeals. To the contrary, both courts of appeals that have considered the

issue have determined that the modification of a sentence under Rule 35(b) does not extend the time for filing a motion under Section 2255. See Byers v. United States, 561 F.3d 832, 835-836 (8th Cir. 2009); Murphy v. United States, 634 F.3d 1303, 1308-1309 (11th Cir. 2011). And petitioner's factbound request for equitable tolling likewise does not warrant this Court's review.

2. In all events, this case would be a poor vehicle for reviewing petitioner's contentions regarding the timeliness of his Section 2255 motion. Neither the district court nor the court of appeals issued a written opinion in this case, and neither specified that untimeliness was the basis for the denial of relief. This Court, which is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), should not address the issue of untimeliness without the benefit of an opinion on that issue from either court below.

In addition, petitioner would not be entitled to relief even if his Section 2255 motion were timely. First, petitioner waived his right to bring this Section 2255 motion. In his plea agreement, petitioner expressly "waive[d] his right to contest any aspect of his conviction and sentence that could be contested under Title 18 or Title 28, or under any other provision of federal law," subject to exceptions that do not apply here. Gov't Response 10; see p. 3, supra (describing exceptions). The plea agreement describes this provision as a "waiver of [petitioner's] right to

appeal or bring collateral challenges" and as a "waiver of his appeal and collateral review rights." Id. at 10-11 (emphasis added; citation omitted). This Court has explained that "§ 2255 proceedings" are "'collateral proceedings.'" Wall v. Kholi, 562 U.S. 545, 553 (2011) (citation omitted). Although a waiver "only precludes challenges that fall within its scope," Garza v. Idaho, 139 S. Ct. 738, 744 (2019) (citation omitted), petitioner has identified no sound basis to conclude that his claim falls outside the scope of this waiver. See also Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to All Federal Prosecutors, Re: Department Policy on Waivers of Claims of Ineffective Assistance of Counsel (Oct. 14, 2014), <https://www.justice.gov/70111/download> (authorizing prosecutors to seek enforcement of waivers of ineffective-assistance claims in appropriate circumstances).

Second, petitioner's underlying constitutional claim lacks merit. Petitioner claims that he received ineffective assistance of counsel during his Rule 35 proceedings because his lawyer failed to file an appeal and failed to counsel him about appealing. As the courts of appeals have uniformly recognized, however, the Constitution confers no right to assistance of counsel in Rule 35(b) proceedings in the first place. See, e.g., United States v. Taylor, 414 F.3d 528, 536 (4th Cir. 2005); United States v. Palomo, 80 F.3d 138, 142 (5th Cir. 1996); Scott v. United

States, 473 F.3d 1262, 1264 (8th Cir.), cert. denied, 550 U.S. 964 (2007); United States v. Orjuna, 351 Fed. Appx. 418, 420-421 (11th Cir. 2009) (per curiam).

The Sixth Amendment guarantees counsel only to "the accused." U.S. Const. Amend. VI; see Rothgery v. Gillespie County, 554 U.S. 191, 198 (2008). A prisoner in a Rule 35 proceeding is not an "accused"; a motion under the rule "can only benefit him by reducing his already final sentence," Taylor, 414 F.3d at 536. Further, this Court has held that the Constitution does not guarantee a right to counsel in "collateral proceedings," Coleman v. Thompson, 501 U.S. 722, 755 (1991), which would include proceedings under Rule 35, see Kholi, 562 U.S. at 553. Finally, the Court has held that a defendant does not have a constitutional right to counsel in discretionary appeals (as opposed to direct appeals as of right). See Ross v. Moffitt, 417 U.S. 600, 610 (1974). If "the right to counsel does not attach to discretionary proceedings challenging the legality of a sentence or conviction," there is "little to justify holding that a convicted inmate has a right to counsel with respect to proceedings brought by the government for the purpose of requesting the sentencing court to reduce that inmate's sentence." Taylor, 414 F.3d at 536 (quoting Palomo, 80 F.3d at 142) (brackets omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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