

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

MARVIN LOPEZ-AGUILAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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April 12, 2019

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

MARVIN LOPEZ-AGUILAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

QUESTION PRESENTED FOR REVIEW

Does the government forfeit its right to enforce a defendant's waiver of a collateral challenge to his conviction by failing to raise the waiver issue in the district court?

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

MARVIN LOPEZ-AGUILAR,

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DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Benjamin A. Gonzales, Assistant Federal Public Defender for the District of New Mexico, declare under penalty of perjury that I am a member of the bar of this court and counsel for Petitioner Marvin Lopez-Aguilar and that I caused to be mailed a copy of the petition for writ of certiorari to this court by first class mail, postage prepaid, by depositing the original and ten copies in an envelope addressed to the Clerk of this Court, in the United States Post Office at 1135 Broadway Blvd. NE, Albuquerque, New Mexico, at approximately ____p.m. on the 12th day of April 2019.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT**

Petitioner Marvin Lopez-Aguilar respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming the district court's summary dismissal of his § 2255 motion.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, *United States v. Lopez-Aguilar*, 10th Cir. No. 17-2121, affirming the dismissal of Mr. Lopez-Aguilar's § 2255 motion, was filed January 15, 2019. That opinion is attached as Appendix ("App.") A to this petition. The district court Memorandum Opinion and Order is attached as App. B.

JURISDICTIONAL STATEMENT

The district court had jurisdiction of this case under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction of the appeal of the district court's ruling pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The Tenth Circuit entered its judgment affirming Mr. Lopez-Aguilar's sentence on January 15, 2019. Pursuant to Supreme Court Rule 13.1 and 13.3, this petition is timely if filed on or before April 15, 2019.

FEDERAL LAW AT ISSUE

In relevant part, 28 U.S.C. § 2255 provides:

- (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.
- (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto . . .

STATEMENT OF THE CASE AND FACTS

Mr. Lopez-Aguilar's Plea and Sentence.

In 2011, Marvin Lopez-Aguilar pled guilty, pursuant to Fed. R. Crim. P. 11(c)(1)(C), to one count of interference with interstate commerce by robbery and aiding and abetting, in violation of 18 U.S.C. § 1951(a) and 18 U.S.C. § 2, and one count, under 18 U.S.C. §§ 924(j)(1), 1111 and 2, of use of a firearm during an “interference with commerce by robbery” offense which resulted in the death of another person, in violation of 18 U.S.C. § 924(c)(1)(A). In his plea agreement, he waived his rights to file a direct appeal and to collaterally attack his convictions.

The district court sentenced Mr. Lopez-Aguilar, in accordance with the plea agreement, to a total term of imprisonment of 40 years and concurrent terms of supervised release of five years. Mr. Lopez-Aguilar did not file a direct appeal.

The District Court Habeas Proceedings.

After this Court’s decision in *Johnson v. United States*, 576 U.S. ---, 135 S.Ct. 2551 (2015) (*Johnson II*), Mr. Lopez-Aguilar filed a motion under 28 U.S.C. § 2255 to vacate his conviction and sentence under 18 U.S.C. § 924(c). He argued that the residual clause of § 924(c)(3)(B) is no longer valid and that consequently his predicate offense—Hobbs Act robbery—no longer qualifies as a crime of violence.

The district court did not order the government to respond to Mr. Lopez-Aguilar’s petition and did not refer the case to a magistrate judge for issuance of proposed findings and a recommended disposition. Nearly eleven months after Mr. Lopez-Aguilar filed his

motion, the district court issued a ruling denying relief on the merits and summarily dismissed his motion to vacate his sentence. The district court decided that even if the residual clause of § 924(c)(3)(B) was no longer valid after *Johnson II*, Mr. Lopez-Aguilar's Hobbs Act robbery conviction constitutes a "crime of violence" under the "force" or "elements" clause of § 924(c)(3)(A).

The district court granted a certificate of appealability. Mr. Lopez-Aguilar appealed the district court's decision to the Tenth Circuit.

The Court of Appeals' Ruling.

In his appeal to the Tenth Circuit, Mr. Lopez-Aguilar argued that the district court wrongly decided that Hobbs Act robbery is a "crime of violence" under the force clause of 18 U.S.C. § 924(c)(3)(A). The government argued in response—for the first time—that the court of appeals should enforce Mr. Lopez-Aguilar's plea agreement waiver of a collateral challenge to his convictions. In replying to the government's argument, he contended that the government waived its right to enforce the waiver by failing to raise it in the district court.

The court of appeals concluded that the government lacked the opportunity to assert the waiver in the district court because it had not been ordered to respond to Mr. Lopez-Aguilar's motion. App. A at 2-3. It ruled that the government timely raised the waiver issue on appeal and on that basis, it affirmed the district court's summary dismissal of the § 2255 motion.

ARGUMENT FOR ALLOWANCE OF THE WRIT

This Court should grant certiorari in this case to resolve the conflict between circuits concerning whether the government forfeits its right to enforce a waiver of a collateral challenge to a conviction by failing to raise it in the district court.

The lower courts agree that when a defendant has agreed to a waiver of the right to seek relief in collateral proceedings, the government must timely seek to enforce the waiver or be found to have forfeited the waiver issue. They disagree, however, on what constitutes a timely request to enforce a waiver of a collateral challenge.

In this case, the court of appeals decided that the government's request to enforce the waiver was timely raised for the first time on appeal because the government was not afforded the opportunity to assert the waiver in the district court. App. A at 2-3. The court of appeals correctly stated that the district court did not order the government to respond to Mr. Lopez-Aguilar's § 2255 motion. However, the court of appeals failed to recognize that the government could have filed a motion requesting enforcement of the waiver during the nearly eleven months that elapsed between the filing of the §2255 motion and the district court's ruling on it. The government was served with the motion at the time it was filed. In the motion, Mr. Lopez-Aguilar expressly acknowledged his waiver of collateral review.

There is no dispute that a defendant's waiver of the right to a collateral challenge does not deprive a court of jurisdiction to decide a case on the merits. A waiver constitutes an affirmative defense and like other affirmative defenses, the government may forfeit it by failing to raise it. In *Sotirion v. United States*, 617 F.3d 27, 32 (1st Cir. 2010), the court determined that the government waives affirmative defenses in habeas

proceedings, such as procedural default, by failing to raise them in the district court. As in this case, the district court in *Sotirion* summarily denied the petition. Similarly, in *Calhoun v. United States*, 572 Fed. Appx. 335 (6th Cir. 2014), the court ruled that the government forfeited affirmative defenses with respect to the plea agreement's appellate waiver, the timeliness of the § 2255 petition, and Calhoun's alleged failure to state a sufficient ground for relief by failing to raise them in the district court. The district court had denied the petition in *Calhoun* without a hearing.

Courts have often declined to consider collateral review waivers raised for the first time on appeal. In *Hunter v. United States*, 160 F.3d 1109 (6th Cir. 1998), the court decided “that the government forfeited its right to rely on the appeal-waiver provision by failing to raise the issue in the district court.” *Id.* at 1114. In an appeal of the district court’s denial of a § 2255 motion in *United States v. Metzger*, 3 F.3d 756, 757 (4th Cir. 1993), the court decided that the government had forfeited its right to rely on the defendant’s appeal waiver. In addition to its failure to address the issue below, the government had agreed in *Metzger* that a *de novo* standard of review applied on appeal. *Id.* at 757. *See also United States v. Goodson*, 544 F.3d 529, 534 (3rd Cir. 2008) (“if the government seeks to preserve the benefit of its bargain for an appellate waiver, we believe it is incumbent upon the government to invoke the waiver’s applicability in the first instance.”).

As pointed out by the dissenting judge in *United States v. Linder*, 561 F.3d 339 (Mem.) (4th Cir. 2009), “[w]e have long held-as have our sister circuits-that ‘the

government's failure to raise [a] waiver as a procedural bar' [in the district court] constitutes 'a waiver of the waiver.'" *Id.* at 344 (citing *Metzger, United States v. Ware*, 416 F.3d 1118, 1121 (9th Cir.2005), and *United States v. Hicks*, 945 F.2d 107, 108 (5th Cir.1991)). She pointed out that habeas petitioners are routinely held to have procedurally defaulted their claims unless they have raised them at sentencing, on direct appeal, *and* in the district court and that "[f]undamental fairness requires that the Government not prevail on an argument that we would surely reject as defaulted if not raised by a petitioner until this late stage." *Id.*

The interest of judicial economy weighs heavily in favor of requiring the government to raise affirmative defenses in the district court in order to invoke the benefit of them on appeal. In this case, the district court's analysis of Mr. Lopez-Aguilar's legal claims and issuance of a decision on them required nearly eleven months. Where the government contends that such claims are subject to dismissal on grounds that would render unnecessary a decision on the merits, it should appropriately be required to raise the issue in time to spare the district court from needless expenditure of resources.

The Tenth Circuit's decision in this case conflicts with decisions from a number of its sister circuits. A defendant's ability to collaterally challenge his convictions should not turn on the vagaries of geography. This Court should grant certiorari to address the important and recurring issue this case presents and to resolve the conflict between the Tenth Circuit's decision in this case and those of other circuits.

CONCLUSION

For the reasons stated above, Petitioner Marvin Lopez-Aguilar requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Benjamin A. Gonzales, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this court and, as counsel for Marvin Lopez-Aguilar, I caused to be mailed copies of the motion for in forma pauperis and the petition for writ of certiorari by first class mail, postage prepaid, to the Solicitor General, Department of Justice, 950 Pennsylvania Ave. NW, Room 5614, Washington, DC 20530, and to be sent electronic copies of the foregoing by e-mail at supremectbriefs@usdoj.gov, on this 12th day of April 2019.

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