No. _____

In The Supreme Court of the United States

GABRIEL GALINDO-SERRANO,
PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF MAURICIO HERNANDEZ ARROYO
USSC Bar No. 207752

USCA-1st Cir. Bar No. 42462
Attorney for Petitioner
Gabriel Galindo Serrano
818 Avenue Hostos, Suite B
Playa de Ponce, Puerto Rico 00716
Tel No. (787) 597-4815
email: lawofficesmhernandez@gmail.com

QUESTION PRESENTED

Whether the standard of review on appeal of an untimely motion to suppress a confession, based upon the failure to bring the defendant before a magistrate judge within 6 hours after arrest and finding to be unreasonable and unnecessary delay by the Court of Appeals, is reviewed under a Plain Error or under a waiver and absent good cause standard.

LISTS OF PARTIES

All of the parties are listed on the front page of the Petition.

Petitioner is Gabriel Galindo-Serrano, defendant/appellant.

Respondent is the United States of America.

RELATED PROCEEDINGS

United States District Court (District of Puerto Rico):

United States v. Galindo-Serrano, Crim. No. 14-cr-00456-002 (PG), (July 6, 2016-Judgment in a criminal case).

United States Court of Appeals (1st Cir.):

United States v. Galindo-Serrano, No. 16-2505 (May 30, 2019) Judgment affirmed.

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Gabriel Galindo-Serrano ("Galindo") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the courts of appeals (App. B, infra, 2a-26a) is reported at 925 F.3d 40 (1st. Cir. 2019), was decided on May 30, 2019. The order of the court of appeals denying rehearing en banc (App. D, infra, 34a) is not published. The district court's judgment is unreported. App C, infra, 27a-33a.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2019. A petition for rehearing en banc was denied on July 19, 2019. An Application to enlarge the time to file the Petition for Writ of Certiorari was granted until December 16, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence in the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment (2) whether such defendant knew the nature of the offense with which he was charged or of which

he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of is right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need to be conclusive on the issue of voluntariness of the confession.

(c) If any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit, persons charged with offense against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession, is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, that the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used I this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Federal Rules of Criminal Procedure

Rule 5. Initial Appearance

(1) Appearance upon an Arrest.

(A) A person making an arrest within the United States must take the defendant without delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.

(B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge , unless a statute provides otherwise

Federal Rules of Criminal Procedure

Rule 12. Pleadings and Pretrial Motions

(a) PLEADINGS. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) PRETRIAL MOTIONS:

1. In general. A party may raise by pretrial motion any defense, objection or request that the court can determine without a trial on the merits. Rule 47 Applies to a pretrial motion.
2. Motions that may be made at any time. A motion that the court lacks jurisdiction may be made at any time while the case is pending.
3. Motions that must be made before trial. The following defenses objections, and request must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:
   (A) A motion alleging a defect in instituting the prosecution, including:
   (i) Improper venue;
   (ii) Preindictment delay:
   (iii) A violation of the constitutional right to a speedy trial;
   (iv) Selective or vindictive prosecution; and
   (v) An error in the gran-jury proceeding or preliminary hearing;
   (B) A defect in the indictment or information; including
   (i) Joining two or r offenses in the same count (duplicity
   (ii) charging the same offense in more than one count (multiplicity);
   (iii) lack of specificity;
   (iv) improper joinder; and
   (v) failure to state an offense;
   (C) suppression of evidence;
   (D) severance of charges or defendants under Rule 14; and
   (E) Discovery under Rule 16 .

   (4) Notice of the Government's Intent to Use Evidence.

(A) At the Government Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) At the defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(C) Deadline for a Pretrial Motion; Consequences of not Making a Timely Motion.

(1) Setting the Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of the trial.

(2) Extending or Resetting the Deadline. At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) Consequences of not making a Timely Motion under Rule 12(b) (3). If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense objection or request if the party shows good cause.

STATEMENT OF THE CASE

This case presents a significant and frequently occurring question of criminal law and procedure that requires the Court's review: whether the standard of review for an untimely motion to suppress a confession is for plain error or waiver absent good cause under the Federal Criminal Procedure Rule 12(b)(3) after the 2014 Amendments. There is a widely recognized conflict in the courts of appeals over this question that warrants review by this Court.

The following facts and procedural posture of this case are taken from the First Circuit opinion. On July 24, 2014, a federal grand jury in the District of Puerto Rico indicted Galindo and co-defendant Jean Morales-Rivera ("Morales") for carjacking , in violation of 18 U.S.C. § 2119 (1)and (2) ("Count One"), and use of a firearm in relation to a crime of violence, in violation of 18 U.S.C. §924 (c) ("Count Two"). Those counts described an incident that allegedly occurred on June 16, 2014. During the incident, Galindo and Morales allegedly approached a man ("J.F.M.") and a woman ("M.R.N.") standing near a car and threatened them with a revolver unless they handed over their car keys. Galindo then allegedly drove away in their car.

The indictment also charged Galindo with separate counts of carjacking "resulting in serious bodily injury, that is: sexual assault, in violation of 18 U.S.C. § 2119 (2) ("Count Three"), use of a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924 (c) ("Count Four"), and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) ("Count Five"). Those counts described an incident that allegedly occurred on July 8, 2014, in which Galindo allegedly pointed a gun at a woman ("N.A.M.") stopped at a traffic light, entered her car (which was

registered to her mother) and took over the wheel. He then allegedly drove her to a basketball court, where he raped her.

Galindo proceeded to trial on all five counts. Two days into the trial, he moved to suppress statements that he had made to Federal Bureau of Investigations ("FBI") agents following his arrest. In those statements, he confessed to both carjacking and to the sexual assault. The government objected that the motion to suppress was untimely. The district court noted that the motion had "been filed belatedly," but decided to "have a [suppression] hearing anyway." The District Court denied the motion.

At trial, the government presented testimony from M.R.N. and N.A.M. In that testimony, they recounted the carjacking and positively identified Galindo as the perpetrator. The government also presented testimony from the operator who took M.R.N.'s 911 call, the individual who assisted N.A.M. after she had been abandoned on the basketball court, the doctor who treated N.A.M. at the hospital and performed her raped kit, and the DNA specialist who tested the rape kit an determined that the DNA samples from the rape kit matched Galindo's DNA.

In addition, the government presented testimony from police officers. They testified that they had heard Galindo's confession following his arrest. One law enforcement officer observed

Galindo driving N.A.M.'s car while in possession of a firearm. The defense did not present any evidence. A jury convicted Galindo of all counts.

At the beginning of Galindo's sentencing hearing on July 6, 2016, defense counsel pointed out that Galindo had signs of self-inflicted injury and moved for a continuance so that a competency evaluation could be undertaken. The District Court, noting a lack of evidence of psychological problems in the record, responded that it would go forward with the sentencing that day but indicated that it would order a post-sentencing competency evaluation. Based on "the report from the evaluation," the District Court would "[re] consider the matter [of competency]" and might "resentence [Galindo] . . . or proceed accordingly, depending on the evaluation, what it says." The District Court then sentenced Galindo to concurrent 120-month prison sentences for Counts One, Three, and Five to be served consecutive to a seven-year prison sentence for Count Two and a thirty-three-year prison sentence for Count Four. In total, the District Court sentenced Galindo to 600 months in prison. After the District Court announced the sentenced, defense counsel again objected that Galindo "may or may not be competent to understand what the proceedings have been here today." Defense counsel did not, at

that time, make any other objection to Galindo's sentence based on the state of his mental health.

On July 7, 2016, defense counsel filed a motion for "an extension of time within which to file the notice of appeal or an appeal until 15 days after the mental health report is filed by the [Bureau of Prisons]." The District Court granted the motion on July 27, 2016.

The competency evaluation was filed with the District Court on November 23, 2016. The evaluation concluded that Galindo did not present with a mental disease or defect that rendered him incompetent to be sentenced. Galindo then appealed his convictions and sentence on November 29, 2016.

The First Circuit, lower court, found that the unreasonable and unnecessary delay in bringing a defendant before a magistrate judge would result in granting the motion to suppress a confession under the McNabb-Mallory and Corley Supreme Court precedent. However, the lower court, agreed with Galindo's reasoning of the unreasonable and unnecessary delay, held that the motion to suppress that was untimely filed in the district court, waived the argument from appellate review absent a showing of good cause. The lower court did not use the plain error standard of review for the motion to suppress arguments and the

result was affirming the conviction and judgment of the District Court when it imposed the 600-month sentence on Galindo. This is the sole issue on appeal in the instant petition as all of the collateral facts and matters on untimely appeal, Galindo's mental condition, the competency report and sentencing before the report was received, are only important to understand the human condition of Galindo.

As we will show and with the decision below, there is the Fifth Circuit, Sixth Circuit and Eleventh Circuits courts of appeals on one side of plain error review for Rule 12 (c)(3) application. The other circuits, First, Third, Sixth, Seventh, Eighth, Ninth, Tenth apply the Rule 12 good cause standard instead. The District of Columbia has acknowledged the split but chose not to take a position. There are petitions for certiorari before this Supreme Court from the Ninth Circuit. The circuit conflict on the question has vast practical consequences as the issue of protecting unconstitutional confessions adds convictions and years to the sentences of a large number of criminal defendants. Because there is an intractable conflict on this fundamental right for a criminal defendant that is an important question of criminal law, and because this cases presents the ideal vehicle in which to

resolve the conflict, the petition for a writ of certiorari should be granted.

A. Background

Rule 5(a)(1)-Initial Appearance, of the Rules of Criminal Procedure states that:

> "(A) person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise."

There is no statute that provides otherwise in the present case.

Further, 18 U.S.C. §3501(c) states:

> "In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention:..." .

It is an undisputed fact that more than 6 hours passed between Galindo's July 9, 2014, 7:00 p.m. arrest and the July 10, 2014 (1:58 p.m.) statement and "confession".

In Upshaw v. United States, 335 U.S. 410 (1948), the Supreme Court stated:

> "We hold that this case falls squarely within the McNabb ruling and is not taken out of it by what was decided in the Mitchell case. In the McNabb case (318 U.S. 332), we held that the plain purpose of the requirement that prisoners should promptly be taken before committing magistrates was to check resort by officers to 'secret interrogation of persons accused of crime.' We then [335 U.S. 410, 413] pointed out the circumstances under which petitioners were interrogated and confessed. This was done to show that the record left no doubt that the McNabbs were not promptly taken before a judicial officer as the law required, but instead were held for secret questioning, and 'that the questioning of petitioners took place while they were in the custody of the arresting officers and before any commitment was made.' The McNabb confessions were thus held inadmissible because the McNabbs were questioned while held in 'plain disregard of the duty enjoined by Congress upon Federal officers' promptly to take them before a judicial officer. In the McNabb case there were confessions 'induced by illegal detention,' United States v. Mitchell, supra, 322 U.S. at page 70, 64 S.Ct. at page 698, a fact which this Court found did not exist in the Mitchell case."

Upshaw further stated:

> "The Mitchell case, 332 U.S. at page 68, 64 S. Ct. at page 898, however, reaffirms the McNabb rule that a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological. [335 U.S. 410, 414]"

Corley v. United States, 556 U.S. 303 (2009) finds an answer to the double violation of Rule 5(c) and §3501:

> "We hold that §3501 modified McNabb-Mallory without supplanting it. Under the rule as revised by §3501(c), a district court with a suppression claim must find whether

the defendant confessed within six hours of arrest (unless a longer delay was "reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate]"). If the confession came within that period, it is admissible, subject to the other Rules of Evidence, so long as it was "made voluntarily and ... the weight to be given [it] is left to the jury." Ibid. If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the McNabb-Mallory cases, and if it was, the confession is to be suppressed."

The lower court in its Opinion and Order (App. B 2-26) adopted the following and agreed with Galindo's legal premises as to the exclusion of a confession of a defendant that is not timely brought before a magistrate judge and that does not meet the reasonable and necessary standard. This was the facts under our case when it took the FBI agents an eighteen-hour delay. The lower court summarized Supreme Court precedent from 1943 through 1957 and to 2009, and held:

> "Under Federal Rule of Criminal Procedure 5 (a) (1), a defendant who has been "arrest[ed] within the United States" is entitled to be brought "without unnecessary delay before a magistrate judge." Fed. R. Crim. P. 5(a) (1) (A) (emphasis added).
>
> The Supreme Court has explained - - in a line of precedent that begins with McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957) – that this right to prompt presentment "avoids all the evil implications of secret interrogation of persons accused of crime, " McNabb, 318 U.S. at 344, and ensures that the defendant "may be advised of his right" "as quickly as possible" and that "the issue of probable cause may be promptly determined, " Mallory, 354 U.S. at 454. To protect this right "the rule known simply as McNabb-Mallory, generally render[s]

> inadmissible confessions made during periods of detention that violat[e] the prompt presentment requirement of Rule 5 (a). " Corley v. United States , 556 U.S. 303, 309. (2009) (quoting United States v. Alvarez-Sanchez , 511 U.S. 350, 354 (1994) (alteration in original).
>
> There is, however, another provision of federal law that is relevant "following the Supreme Court's articulation of the McNabb-Mallory, exclusionary rule, Congress enacted 18 U.S.C. §3501 to create a safe harbor period for certain voluntary confessions [that are given within six hours of a defendant's arrest] " (fn2 omitted) Jacques, 744 F. 3d at 813 (citing Corley 555 U.S. at 309). Notwithstanding the safe harbor that §3501 establishes, the statute also provides that, if a confession is made more than six hours after a defendant's arrest and before his presentment to a magistrate judge, the "trial judge" is required to " find [] " that "the delay in bringing [the defendant] before [a] magistrate judge . . . is . . . Reasonable " before admitting the confession. 18 U.S.C §3501(c). The Supreme Court has interpreted "§3501 [to have] modified McNabb-Mallory without supplanting it. "Corley, 556 U.S. at 332. "Under the rule as revised by §3501 (c) , . . .[i]f the confession came within [six hours of arrest, it is admissible, subject to the other Rules of Evidence, so long as it was 'made voluntarily and . . . the weight to be given [it] is left to the jury.' ". Id. (quoting 18 U.S.C. §3501(c). "If the confession occurred before presentment and beyond six hours, "as was the case here, "the court must decide whether delaying that long was unreasonable or unnecessary under the McNabb-Mallory cases, and if it was, the confession is to be suppressed." Id.

The lower court reviewed the district court judge's denial of Galindo's motion to suppress and who found after an evidentiary hearing that the eighteen-hour delay was not unreasonable and was necessary in bring Galindo before a

magistrate judge. This finding was in light of the fact that the FBI agents and prosecutor had prepared documents and gone to the magistrate judge to obtain a search warrant. The lower court was troubled by the district's court's explanation for why it found that the eighteen-hour delay in bringing Galindo before a magistrate judge ""was not unreasonable" and was "necessary" for the FBI to be able to complete….the booking (and) the other matters that the FBI was doing to obtain their case to be able to present it to the magistrate judge," which included "preparation of the search warrant." Thus, notwithstanding the waiver, we explain the source of our concern in order to clarify the law in this area". App. B, infra, p. 12-13.

The First Circuit decision below accepted Galindo's argument that was raised in the district court, albeit untimely, that the Government's eighteen-hour delay in bringing Galindo before a Magistrate Judge was "unreasonable" and "unnecessary".

The lower court held that:

> "Thus, notwithstanding the District Court's finding that Galindo was not interrogated until shortly before his presentment to a magistrate judge, the critical question remains: what explains the delay at issue? The district Court found that the delay could be attributed to legitimate administrative concerns. See Jacques, 744 F.3d at 814 (noting that "a delay may be reasonable if caused by administrative concerns, such as the

unavailability of a magistrate following an arrest, or by a shortage of personnel" (citations omitted). We doubt, though, that the administrative concerns that the District Court identified – or any other "legitimate law enforcement purpose," Boche-Perez, 755 F.3d at 336 – made the delay in presentment reasonable or necessary here.

The undisputed record shows that "there were, approximately, seven to 10 people" "participating in the investigation." See, e.g. , United States v. Perez, 733 F.2d 1026 1035 (2d Cir. 1984) finding no "shortage of manpower" where "more than six agents were assigned to the case, and …one of them could have taken [the defendant] to the then available magistrate"). The District Court noted some agents may have been committed to assisting the Puerto Rico Police in containing the "real threat that a riot would take place" at the housing project where Galindo was arrested. But, no agent testified at the suppression earing as to how many FBI agents were in fact involved in containing – or needed to contain -- any impending riot or as to how long they were in fact there.

The District Court also noted that some FBI agents were occupied with "preparing a search warrant" for Galindo's mother residence, which involved "preparing the Affidavit, the complaint, talking to the Assistant U.S. Attorney on duty, and thereafter going to the magistrate judge who is on duty to request for the search warrant. ". The record again does not show how many agents were involved in that process. See United States v. Valenzuela-Espinoza, 697 F.3d 742, 752 (19th Cit. 2012) (noting that "the fact that one of nine was fulfilling his responsibility to obtain a search warrant did not make the delay reasonable under McNabb-Mallory ").

Moreover, the fact that the FBI agents went to a magistrate judge within six hours of Galindo's arrest to obtain the search warrant raises a question as to "why [Galindo could]not [have] accompanied [the agents] to [the same magistrate] for arraignment at that time. " Perez, 733 F.2d at 1036; cf. United States v. Wilson, 838 F.2d 1081, 1085 (9th Cir 1988) (finding the delay unreasonable where "arraignments were being conducted one flight upstairs from the room where [the defendant] was being questioned, and the magistrate was open for business while [the defendant] was being questioned").

In any event, the search warrant and impending riot can at most explained the overnight delay in bringing Galindo before a magistrate judge. See Thompson, 772 F.3d at 762-63. There remains the question why – as the undisputed record shows – Galindo was not brought before a magistrate judge until after 2 p.m. the day after his arrest, especially given that the undisputed

> record shows that an available magistrate judge was only fifteen minutes away from where the defendant was detained." App B, infra 2-25.

However, the lower court but did not afford Galindo any relief on this violation of Galindo's basic fundamental constitutional rights that should have excluded his confession and overturned his conviction but rather found Galindo had "waived" his rights for a lack of finding good cause under Fed. R. Cr. Proc. Rule 12 (c) (3).

The lower court did not scrutinize or review the record as it did with the district court's reasoning on the delay to review and consider good cause. The record in the district court did show that the veteran well-seasoned federal public defender had filed a motion in limine on January 10, 2016 to suppress D.E. #88 by the USA, two days before trial. D.E. 89. On January 11, 2016, defense counsel also filed a response to the USA's Motion in Limine regarding P.R. police records. D.E. 90. On the same January 11, 2016, one day before trial, defense counsel also filed a Motion to Restrict Document, D.E. 91 and an Ex-Parte Motion Requesting Order, D.E. 92. Thus, but for, the defense counsel not filing the motion in limine to suppress the confession two days earlier, which is the subject of the instant appeal, namely, the argument and outcome

would have been totally different. Assuming arguendo, the district court, and if not, the lower court herein having found unreasonable and unnecessary delay would have ordered the confessions excluded. In effect, the lower court would have overturned the district court's decision. Finally, the record in the public defender stated at the suppression hearing transcript that the USA designation of evidence under Rule 12 was only filed on January 4, 2016, eight (8) days before trial. Suggestions in opposition were due by January 22, 2016. (seven days after trial concluded). D.E. 80. See D.E. 157, pgs. 7-9.

The lower court correctly stated that the district court did not make any express findings as to whether Galindo had shown good cause for the untimeliness of the motion to suppress. The lower court held that the district court only stated that it was "going to have a (suppression) hearing anyway" and went to address the merits. App. B 2-26.

The finding of waiver absent good cause standard application under the Rule 12 untimely filing of a motion to suppress conflicts with Galindo's and hundreds of other defendant's well-established fundamental constitutional rights that cannot be all left to 2255 collateral attacks. This

violation of Galindo is well-stated in the United States Supreme Court case holding in Crane v. Kentucky, 476 U.S. 683 (1986), the Court in Crane stated at pages 691-692 that:

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, Chambers v. Mississippi, supra, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, Washington v. Texas, 388 U. S. 14, 388 U. S. 23 (1967); Davis v. Alaska, 415 U. S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. at 467 U. S. 485; cf. Strickland v. Washington, 466 U. S. 668, 466 U. S. 684-685 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. In re Oliver, 333 U. S. 257, 333 U. S. 273 (1948); Grannis v. Ordean, 234 U. S. 385, 234 U. S. 394 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U. S. 648, 466 U. S. 656 (1984). See also Washington v. Texas, supra, at 388 U. S. 22-23."

The Decision Below Implicates a Conflict Among The Court Of Appeals

This Supreme Court should grant certiorari as there is a need to clarify the standard of review that governs in the wake of the

2014 amendments to Federal Rule of Criminal Procedure 12. That rule requires certain "defenses, objections, and requests"—including a request for suppression of evidence—to be raised by pre-trial motion. Fed. R. Crim. P. 12(b)(3)(C). Before 2014, Rule 12 directed that a party "waives" any Rule 12(b)(3) defense, objection, or request not asserted in a pre-trial motion, but also provided that, "[f]or good cause, the court may grant relief from the waiver." Fed. R. Crim. P. 12(e) (2003). In the present case, the three-Judge Panel for the First Circuit interpreted this provision to mean that failure to file a timely motion in limine constitutes a waiver, based upon a theory for suppression not timely advanced in district court cannot be raised for the first time on appeal absent a showing of good cause. However, the motion to suppress, albeit untimely in the district court, raised the same claims for exclusion as Galindo did in the lower court. It did not raise for the first time the merits of his claim, rather the procedural challenge to it.

The First Circuit decision on waiver and reliance on U.S. v. Walker-Courtier, 860 F.3d 1, 9 n.1 (1st Cir. 2017) is procedural and factual different from the instant case. First, the Walker Court involved the pre-2014 Rule 12 amendments and the claims for suppression raised on appeal, reasonable suspicion, 4th

Amendment and prolonged stop, were not raised in the district court, rather only the challenged to the vehicle stop as pretextual. In our case, the same reasoning of unreasonable and unnecessary delay was decided by the district court and presented on appeal when the lower court found that the unreasonable and unnecessary delay finding warranted clarification on the case law.

The First Circuit has construed Rule 12's good-cause standard as displacing the plain-error standard under Federal Rule of Criminal Procedure 52(b), which ordinarily applies when a party presents an issue for the first time on appeal. In 2014, the text of Rule 12(e) was amended and moved to subsection (c)(3). Rule 12 now specifies the consequences of failing to make a timely motion in these terms:

(3) ***Consequences of Not Making a Timely Motion Under Rule 12(b)(3).*** If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause. Fed. R. Crim. P. 12(c)(3).

Since the 2014 amendments, the sister circuits court of appeals have reached conflicting conclusions on the standard of review that should apply in this context. Three circuits have held

that untimely Rule 12(b)(3) defenses, objections, and requests raised for the first time on appeal should be reviewed for plain error under Rule 52(b). *United States v. Vasquez*, 899 F.3d 363, 372–73 (5th Cir. 2018); *United States v. Sperrazza*, 804 F.3d 1113, 1119 (11th Cir. 2015); *United States v. Soto*, 794 F.3d 635, 654–55 (6th Cir. 2015). The other circuits to decide the issue continue to apply Rule 12(c)(3)'s good-cause standard instead. *United States v. Vance*, 893 F.3d 763, 769–70 & n.5 (10th Cir. 2018); *United States v. Walker-Couvertier*, 860 F.3d 1, 9 & n.1 (1st Cir. 2017); *United States v. Fattah*, 858 F.3d 801, 807 (3d Cir. 2017); *United States v. McMillian*, 786 F.3d 630, 636 & n.3 (7th Cir. 2015); *United States v. Anderson*, 783 F.3d 727, 741 (8th Cir. 2015); *see also United States v. Burroughs*, 810 F.3d 833, 83 (D.C.Cir.2016)(acknowledging the split without choosing a side). *See also The Ninth Circuit's pre-2014 decision in United States v. Wright*, 215 F.3d 1020, 1026–27 (9th Cir. 2000).

Galindo-Serrano contends that the lower court should have applied the plain error standard as the motion in limine was raised in the district court, which did not rule on the issue of timeliness. The district court made no finding of good cause and decided on the unreasonableness and unnecessary standards for exclusions, the same arguments raised on appeal. While the

motion to suppress was not timely filed, there was no knowingly abandonment or relinquishment of Galindo's rights that would constitute a waiver, rather than a forfeiture. U.S. v. Olano, 507 U.S. 725. 733 (1993).

Under the facts of this particular case and under the totality of the circumstances, the lower court should have aligned its reasoning with the circuits that review untimely defenses, objections, and requests for plain error. The issue in our facts is not a case of a waiver or preclusion, rather than forfeiture. Galindo-Serrano contends that plain-error review under Rule 52(b) is applicable and the lower court should have afforded relief regarding the inadmissibility of his confessions under McNabb-Mallory, Corley and Upshaw Supreme Court case law.

Plain-error review under Rule 52(b) should be the default standard governing consideration of issues raised in the district court, albeit untimely. The Supreme Court, pre-2014, has set a high bar for creating exceptions to the standard. See Puckett v. United States, 556 U.S. 129, 135–36 (2009); Johnson v. United States, 520 U.S. 461, 466 (1997). Appellate courts are also familiar with the elements required to show plain error under Rule 52(b), as they are called upon to apply that standard in a wide range of settings. In contrast, our First Circuit has been

less well-versed in applying Rule 12's good-cause standard, which often requires developing and analyzing facts to determine whether a defendant has shown good cause for the late filing.

As Galindo points out herein, Rule 12 no longer labels untimely defenses, objections, and requests as "waived." But the 2014 amendments to Rule 12 did not eliminate the good-cause standard. Nor did they clarify that appellate courts should apply Rule 52(b)'s plain-error standard instead of the good-cause standard. In fact, the rulemaking history indicates that the Advisory Committee chose not to take a position on which of the two standards should apply, leaving that matter for the circuit courts to decide: "The amended rule, like the current one, continues to make no reference to Rule 52 (providing for plain error review of defaulted claims), thereby permitting the Courts of Appeals to decide if and how to apply Rules 12 and 52 when arguments that should have been the subject of required Rule 12(b)(3) motions are raised for the first time on appeal." Report of the Advisory Committee on Federal Rules of Criminal Procedure to the Standing Committee on Rules of Practice and Procedure 5–6 (May 2013). Accordingly, Galindo states that our prior First Circuit precedent is clearly irreconcilable with the amended version of Rule 12 under the facts in the case at bar.

While Rule 12(c)(3)'s good-cause standard continues to apply when only in cases, unlike the case at bar, the defendant does attempts to raise **new** theories on appeal in support of a motion to suppress. Under the totality of the circumstances and procedural posture in the instant appeal, Galindo has shown and the lower court found unreasonable and unnecessary delay but did not constitute plain error standard of review and relief. The lower court found that the failure to address good cause constituted a waiver as Galindo did fail to present in a pre-trial motion the theory for suppression he raises in this appeal. However, the right is the identical claim filed in the district court, albeit untimely. Galindo has challenged the district court's rejection of the theory of unreasonable and unnecessary delay for taking him before a Magistrate Judge that he did raised below. Therefore, the lower court having found unreasonable and unnecessary delay should have reversed the district court's denial of Galindo's motion to suppress.

Galindo has shown plain error and has not waived and abandoned any of his fundamental rights, rather has been untimely, of his motion in limine to suppress his confession. There is no dispute that the lower court found the eighteen-hour delay in taking Galindo to a Magistrate Judge unreasonable and

unnecessary. The district court did not make any finding after the hearing as to any good cause for failing to present in pre-trial motion and there was not any new theory for suppression raised in the direct appeal. Galindo has challenged the district court's rejection on the same theory that he did raise below and the First Circuit found the district court's unreasonable and unnecessary delay rationale as error. Therefore, this Court should grant certiorari.

Waiver v Forfeiture:

Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right". United States v. Olano, 507 U.S. 725, 733 (1993). Johnson v. Zerbst, 304 U.S. 458, 464 (1938); see. e.g., Freytag v. Commissioner, 501 U.S. 868, 894, n.2 (1991).(SCALIA, J., concurring in part and concurring in judgment (distinguishing between "waiver" and "forfeiture"); United States v. Rodriguez, 311 F.3d 435 (1st Cir. 2002). Whether a right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver, and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. See e.g., 2 W.LaFave & J. Israel,

Criminal Procedure section 11.6 (1984)(allocation of authority between defendant and counsel).

As a general rule, a waived claim is unreviewable and thus, cannot be revisited on appeal. United States v. Orsini, 907 F.3d 115 (1st. Cir. 2018). Mere forfeiture, as opposed to waiver, does not extinguish an "error" under Rule 52(b). Although in theory it could be argued that "[i}f the question was not presented to the trial court no error was committed by the trial court, here there is nothing to review," this is not the theory that Rule 52 (b) adopts. If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an 'error" within the meaning of Rule 52(b) despite the absence of a timely objection. Finally, waiver does 'admit of an occasional exception "in exceptional circumstances. Nat'l Ass'n of Soc. Workers, 69 F.3d at 622, 627 (1st Cir. 1995). They are hen's-teeth rare and granted only sparingly when the "equities prepondence in favor of such a step" Id. The suppression claim in the case at bar meets the rigorous plain error standard overcoming the four hurdles, the error, that has not been affirmatively waived, the error must be clear, must have affected the appellant's constitutional rights and affected the outcome of the district court proceedings. If the three prongs are satisfied, the court of appeals

has the discretion to remedy the error – discretion that ought to be exercised only if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." Id. at 736, 113 S. Ct. 1770 (quoting United States v. Atkinson, 297 U.S. 157 (1936). The fundamental constitutional rights at stake and the lower courts' finding error due to the unreasonable and unnecessary delay, falls within the prongs of the plain error that warrants consideration and granting of the petition by this Honorable Court.

The Question Presented Is Exceptionally Important And Warrants Review In This Case

The division between the circuits is well developed. The conflict is clear, it is serious and affects a question of fundamental constitutional rights and statutory importance. The conflict affects one of the country's what should be considered is of this Court is being presented with "a question of importance not heretofore considered by this Court, and over which the Circuits are divided." Lehman v. Lycoming County Children's Servs Agency, 458 U.S. 50, 507 (1987).

The granting of certiorari is warranted here because "on account of the importance of the federal question raised and asserted conflicts in the Circuits." United B'hood of Carpenters v. United States, 330 U.S. 395, 400 (1947).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted.

Dated: this 16th day of December 2019.

LAW OFFICES OF MAURICIO HERNANDEZ ARROYO
s/ Mauricio Hernandez Arroyo

USSC Bar No. 207752

USCA-1st Cir. Bar No. 42462
Attorney for Applicant
Gabriel Galindo Serrano
818 Avenue Hostos, Suite B
Playa de Ponce, Puerto Rico 00716
Tel No. (787) 597-4815
email: lawofficesmhernandez@gmail.com

CERTIFICATE OF COMPLIANCE

I, Mauricio Hernandez Arroyo, the undersigned attorney of record for petitioner, do hereby certify that the petition filed herein complies with the Rule 33.1 of the Rules of the United States Supreme Court, that the petition contains typeface is Century Schoolbook, 12 point and contains 7,204 words that is less than the 9,000 words permitted as counted automatically by WordPerfect Office.

s/ Mauricio Hernandez Arroyo
USSC Bar No. 207752
Dated: this 16th day of December, 2019.