

No.

IN THE SUPREME COURT OF THE UNITED STATES

MIGUEL ALGARIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a party's failure to object to a magistrate's ruling under 28 U.S.C. § 636(b)(1)(A) creates a jurisdictional bar to appellate review, or merely waives the right to review subject to equitable exceptions?

PARTIES TO THE PROCEEDING

Parties to the proceeding include Miguel Algarin (Appellant/Petitioner), Dane K. Chase, Esquire (Appellant/Petitioner's Counsel), Maria Chapa Lopez, Esquire (United States Attorney), Todd B. Gandy (Assistant United States Attorney), Peter J. Scholl (Assistant United States Attorney), and Noel Francisco, Esquire (Solicitor General of the United States of America).

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the Eleventh Circuit Court of Appeals *infra*, was not selected for publication. The decision can be found at *United States v. Algarin*, No. 19-10555, (11th Cir. Jan. 9, 2020), and is attached as Appendix A.

JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeals, which had jurisdiction under Title 28 U.S.C. § 1291, was entered on January 9, 2020. A timely motion for reconsideration was filed on January 23, 2020, and not denied until March 4, 2020. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of

the court, of any motion excepted in subparagraph (A), of applications for posttrial¹ relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C.A. § 636(b)(1)(A)-(C).

STATEMENT OF FACTS

As a preliminary matter, should this Court wish to consult the district court docket while reviewing the instant Petition, citations to the docket are set forth in the Petition and are made by the letter “D” followed by the appropriate district court docket number, followed by the appropriate page number.

On September 7, 2017, a federal grand jury in the Middle District of Florida, Tampa Division, returned a two-count Indictment naming Mr. Algarin as the defendant. On March 13, 2018, a Superseding Indictment was returned charging Mr. Algarin with, *inter alia*, conspiracy to possess with intent to distribute and to distribute five or more kilograms of cocaine in violation of Title 21 U.S.C. §§ 846,

841(a)(1), and (b)(1)(A), and possession of a firearm in furtherance of a drug trafficking crime in violation of Title 18 U.S.C. § 924(c)(1)(A)(i). (D-1).

On February 22, 2018, a letter from Mr. Algarin was filed with the district court which the court construed to be a motion by Mr. Algarin to discharge his retained counsel. (D-36). The letter read, in pertinent part, as follows:

My family and I chose Mark J. O'Brien for counsel on 11/03/2017 and in three months of being fully retained and paid in full I find him to be incompetent and one of conflict of interest.

He has not provided me with the discovery in three months and none of the affidavits I requested since November. In addition, he has sided with the prosecution by continuing to pass threats and recommend I plead guilty. He has not provided the evidence set before me, i.e., digital recordings, prosecutor threats of "sufficient evidence", discovery, warrant, affidavits, etc.. My family has notified him of his termination and is in the process of getting the large sum of money back that they paid to him so we can obtain counsel. I have been threatened by Matthew Perry for months, through the C.J.A. and my paid counsel!!

...

The purpose of this letter is to make the courts aware of my troubles with defense and prosecutor.

I am again seeking counsel and don't believe it will take too long. I will be in the courts soon with new counsel.

(D-36, at 1-2).

Thereafter, a magistrate judge held a hearing on Mr. Algarin's motion. (D-44). At the outset of the hearing, defense counsel stated: "As of a few moments ago, Mr. Algarin no longer feels that I am representing him in his best interests, does not believe I'm giving him good advice and wishes to terminate me as counsel of record." *Id.* at 3. Thereafter, Mr. Algarin stated his family was in the process of

retaining another attorney, and he was seeking a court appointed attorney until they were able to do so. *Id.* The magistrate acknowledged that it could appoint Mr. Algarin another attorney, but stated there was no one better, to which Mr. Algarin stated “I’m fine with that, sir. I don’t want him.” *Id.* at 15-16. Ultimately the magistrate concluded that there wasn’t “any good reason to discharge” counsel, and declined to do so. *Id.* at 17-19, 20.

Nearly 6 months later, Mr. Algarin entered into a plea-agreement with the government while still represented by retained counsel, and was ultimately sentenced to 180 months imprisonment followed by 60 months supervised release. (D-85,87,107,106).

Mr. Algarin then appealed to the 11th Circuit Court of Appeal. On appeal, Mr. Algarin argued that the trial court reversibly erred by denying his request to discharge retained counsel, and that he was therefore entitled to have his Plea, Judgment, and Sentence reversed.

The government then moved to dismiss Mr. Algarin’s appeal, arguing that because Mr. Algarin failed to file objections to the magistrate’s ruling, the 11th Circuit lacked jurisdiction to consider his appeal.

Thereafter, the 11th Circuit dismissed Mr. Algarin’s appeal, as its existing precedent establishes it does not have jurisdiction to hear an appeal from a magistrate’s ruling where no objection to the ruling was presented to the district court.

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CIRCUIT SPLIT REGARDING WHETHER THE FAILURE TO OBJECT TO A MAGISTRATE'S RULING UNDER 28 U.S.C. § 636(b)(1)(A) CREATES A JURISDICTIONAL BAR TO APPELLATE REVIEW.

At issue in this Petition is whether a party's failure to object to a magistrate's ruling under 28 U.S.C. § 636(b)(1)(A) creates a jurisdictional bar to appellate review, or merely waives the right to review subject to equitable exceptions.

Under § 636(b)(1)(A), a magistrate judge may hear and determine certain non-dispositive matters. Within 14 days of the magistrate's ruling, a party may file objections with the district court. *Id.* The failure to file objections within 14 days waives a party's right to review. Fed. R. Crim. P. 59(a).

The Seventh Circuit has found that the failure to object waives a party's right to review subject to equitable exceptions, *see, United States v. Brown*, 79 F.3d 1499, 1505 (7th Cir. 1996), while the Eleventh Circuit, in Mr. Algarin's nearly identical case, has found the failure to object creates a jurisdictional bar to review without exception. This Court should grant review, adopt the reasoning of the Seventh Circuit, and establish that a party's failure to object to a magistrate's ruling under 28 U.S.C. § 636(b)(1)(A) merely waives their right to review subject to equitable exceptions.

1. The Circuit Split.

In *Brown*, the Court held:

... that failure to challenge before a district judge a magistrate's pretrial rulings under § 636(b)(1)(A) waives the right to attack such rulings on appeal. *See* /

Video Views, Inc. v. Studio 21, Ltd., 797 F.2d 538, 539 (7th Cir. 1986)]. However, as our original decision in this area acknowledged, this “rule is not jurisdictional” and thus “should not be employed to defeat the ‘ends of justice.’” *Id.* at 540 quoting *United States v. Walters*, 638 F.2d 947, 949–50 (6th Cir.1981). Equitable considerations come into play when determining whether an unchallenged pretrial ruling may yet be contested on appeal, and “under certain circumstances the failure to file objections may be excused,” *Video Views*, 797 F.2d at 540, which brings us back to the case at bar.

The unchallenged pretrial ruling at issue here was a denial of a motion for substitute counsel. As noted, Brown argued before the magistrate that his attorney was inadequate and that they were no longer able to communicate with or trust each other. The magistrate rejected these claims and denied the motion. Under local rules, Brown was required to challenge this ruling before the district judge within ten days, which he failed to do, giving rise to the government's claim of waiver. Yet we agree with Brown that it would be inequitable to foreclose appeal of this matter because the very attorney he claimed was inadequate and with whom he allegedly could not communicate failed to preserve the issue for appeal. If Brown is correct that his attorney was incompatible, if not incompetent, then he cannot fairly be held responsible for his attorney's failure to timely object to the magistrate's ruling. To bar appellate review under this limited circumstance would “defeat the ends of justice.” *Video Views*, 797 F.2d at 540. Therefore, we hold that Brown's failure to request reconsideration of the magistrate's choice of counsel ruling is excused and the issue is properly before us on appeal.

Brown, 79 F.3d at 1504–05.

Here, similar to *Brown*, the pretrial ruling was a denial of a motion to discharge counsel. As in *Brown*, here, Mr. Algarin conveyed to the court his belief that his attorney was inadequate, and the magistrate rejected his claim. As in *Brown*, the attorney Mr. Algarin claimed was inadequate then failed to challenge

the magistrate's ruling before the district court – despite Mr. Algarin's clear right to discharge counsel. *See, United States v. Gonzalez-Lopez*, 548 U.S. 140, 144-48, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (A criminal defendant has the right to discharge his retained counsel). While the Court in *Brown* found that the waiver of review was not jurisdictional, and to bar review under these circumstances would “defeat the ends of justice,” the Eleventh Circuit found that the failure to object created a jurisdictional bar to review without exception.

2. Review should be granted.

A criminal defendant's entitlement to review of a magistrate's ruling on his request to discharge counsel should not depend on which circuit he resides in. The same is true of other non-dispositive rulings made by a magistrate. Simply put, this Court's intervention is necessary to ensure a defendant's appellate rights do not vary by circuit. Accordingly, Mr. Algarin respectfully submits that this Court should grant review to resolve the circuit conflict and, because under a plain and ordinary reading of 28 U.S.C. § 636(b)(1)(A) it simply does not make the filing of objections to a magistrate's ruling a *jurisdictional* prerequisite to appellate review, approve the Seventh Circuit's decision in *Brown*, find that a party's failure to object to a magistrate's ruling under 28 U.S.C. § 636(b)(1)(A) waives their right to review subject to equitable exceptions, quash the decision below, and order that Mr. Algarin's appeal be reinstated.

CONCLUSION

For the reasons stated above, this Court should grant Mr. Algarin's Petition for Writ of Certiorari, resolve the circuit conflict, and establish that a party's failure to object to a magistrate's ruling under 28 U.S.C. § 636(b)(1)(A) merely waives their right to review subject to equitable exceptions, quash the decision below, and order that Mr. Algarin's appeal be reinstated.

Respectfully Submitted,



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10555-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MIGUEL ANGEL ALGARIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

Before: JILL PRYOR, BRANCH, and LUCK, Circuit Judges.

BY THE COURT:

The government's motion to dismiss this appeal for lack of jurisdiction is GRANTED. Miguel Angel Algarin has appealed from a magistrate judge order denying his construed motion to discharge counsel. However, we lack jurisdiction to hear appeals directly from magistrate judges and, instead, the order must be appealed first to the district court before we may consider it. *See United States v. Schultz*, 565 F.3d 1353, 1359 (11th Cir. 2009) (explaining the well-settled rule that we lack jurisdiction "to hear appeals directly from federal magistrates"); *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1066-67 (11th Cir. 1982) (stating that decisions by a magistrate judge "are not final orders and may not be appealed until rendered final by a district court"); *United States v. Renfro*, 620 F.2d 497, 500 (5th Cir. 1980) (same). The

government's motion to stay briefing is DENIED as MOOT. All pending motions are DENIED as MOOT.

APPENDIX B

Ch IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10555-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MIGUEL ANGEL ALGARIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

Before: JILL PRYOR, BRANCH and LUCK, Circuit Judges.

BY THE COURT:

Miguel Angel Algarin's motion for reconsideration of our January 9, 2020 order dismissing this appeal for lack of jurisdiction is DENIED.