No. 20-5110

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Gabriel Cardona-Ramirez — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Fifth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gabriel Cardona
(Your Name)

1697 FM 980
(Address)

Huntsville, TX 77343
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED FOR REVIEW

CIRCUIT CONFLICT(split):WHETHER a district court in a Section 2255 proceeding has the authority to raise a collateral-appeal waiver defense **sua sponte** prior to,or without,informing the parties of the court's intent?

WHETHER a collateral-appeal waiver provision in a plea agreement may be nullified where in a proceeding the district court allows for what the waiver prevents and where the government (hereinafter "govt(s)")fails to object to the court's express instruction in the same proceeding?

WHETHER under the present case circumstances the issue of waiver is debatable in light of this Court's ruling in the above-presented questions thus entitling the Petitioner to a Certificate Of Appealability("COA")

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- Gabriel Cardona-Ramirez vs. United States of America, No. 5:19-CV-18, U.S. District Court for the Southern District of Texas. Judgment entered February 7, 2019.

- United States of America v. Gabriel Cardona-Ramirez, No. 19-40143, U.S. Court of Appeals, Fifth Circuit. Judgment entered February 12, 2020.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts:** N/A

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 12th day of February 2020.

[✓] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:** N/A

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None are directly involved. Citations to them are provided for reference.

STATEMENT OF THE CASE

On August 11,2008,the Petitioner entered a plea on the advice of counsel for the offense of Conspiracy to Kidnap and Kill in a Foreign Country,namely Mexico.

Subsequently,on March 5,2009,the court sentenced the Petitioner to a LIFE sentence in the Bureau Of Prisons for a crime the Petitioner committed when he was arguably a youth.

Because the Petitioner raised allegations against both counsels--defense and govt--to which defense counsel confirmed while the govt failed to refute,the court gave the Petitioner permission to appeal on IATC grounds.The govt did not raise any objections.

Around June 2009,as instructed the Petitioner perfected an appeal,with the assistance of court-appointed counsel,raising Rule 11 errors and IATC claims.However,the appellate court affirmed and did not consider the IATC claims because the record was "not sufficient".In this appeal,appellate counsel failed to raise any sentencing errors which were apparent by reference to the USSGs and the record.Additionally,the govt did not raise any appeal-waiver defense in it's brief,even where appellate counsel mentioned it in his brief as rebuttal.

When the govt created impediment was removed,on January 29, 2019,the Petitionert brought a 2255 Motion in the district court challenging his conviction and sentence on several IATC and IAAC grounds.

On February 7,2019,without reaching the merits of the case, without following the principle of party presentation,and without notifying the parties of the court's intent,the court **sua sponte** dismissed the motion on two grounds:1)Timeliness and 2)appeal-

waiver bar.

On April 5,2019,timely applying for a COA and in pertinent part as it pertains to waiver (the appellate court did not consider the timeliness issue as it resolved it on waiver)the Petitioner argued how reasonable jurists could debate that a)the court was wrong to raise the waiver defense **sua sponte** because upon party presentation the Petitioner could effectively argue that the govt waived the defense when it failed to raise it on the Petitioner's direct appeal,thereby resolving the motion in a different manner; b)the court nullified the waiver provision at sentencing stage when,on the record,the court informed the Petitioner that he could appeal and where the govt failed to object;c)the waiver was entered involuntary,unknowingly and unintelligently due to a fear to a non-existing penalty.Therefore,the Petitioner argued,it is atleast debatable that the appeal-waiver is enforceable.

On February 12,2020,the appellate court denied a COA stating that the Petitioner's arguments did not meet the COA standards.

The Petitioner is now timely with this Court seeking review.

REASON FOR GRANTING THE WRIT

A.THE FIRST QUESTION IMPLICATES THE PARTY PRESENTATION RULE

In Day v McDonough,547 US 198,202(2006)this court stated that it would be an abuse of discretion if a district court overrides a party's wishes in raising or waiving a defense.That should a court ignore the same it would violate"the principle of party presentation basic to our adversary system". Because,as stated later in Greenlaw v United States,554 US 237,243(2008),it is the "parties[who] frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present".And "our adversary system is designed around the premise that the parties know what is best for them,and are responsible for advancing the facts and arguments entitling them to relief" id.at 244(quoting Castro v United States,540 US 375,386(2003))

Consistent with the "party presentation rule" this court again in Wood v Milyard,132 S.Ct.1826(2012) restated that a "court does not have carte blanche to depart from the principle of party presentation basic to our adversary system"id.at 1833(citation omitted).The court further stated that only where the state(or here the govt)"does not'strategically withhold the...defense or cho[o]se to relinquish it',and where the petitioner is accorded a fair opportunity to present his position,may a district court consider the defense on its own initiative".id

In the case at bar,there was zero party presentation;the lower court did not inform the parties of its intent to raise the waiver defense and did not afford the petitioner the opportunity to present his position.This is because of the Fifth Circuit Court's holding in United States v Del Toro-Alejandre,489 F3d 721(5th Cir.2007)which holds that a district court can raise the waiver defense sua sponte irrespective of the govts wishes,inconsistent with this court's precedents cited above.This holding also conflicts with the Eleventh Circuit's holding(Part B below).Had the lower court afforded the

Petitioner the opportunity to present his position he could have argued that the govt waived the issue for failing to invoke the defense on direct appeal and the govt would have had to concede to the same. See Del Toro-Alejandre, at 722, where the govt concedes that it waives the defense when it fails to raise it in its brief. It would therefore be an abuse of discretion should the court choose to rule otherwise.

However, because of the Fifth Circuit's holding in Del-Toro Alejandre, the lower court chose to invoke the waiver defense sua sponte irrespective of the parties position and this violation of the party presentation rule passed unabated through the circuit court. It is, therefore, this court's duty to exercise its supervisory power to correct this error of importance and not allow a lower court to depart from the course of usual procedures set in place by this court's precedents.

B. ANSWERING THE FIRST QUESTION WOULD RESOLVE A CIRCUIT CONFLICT BETWEEN THE FIFTH AND ELEVENTH CIRCUIT COURTS AND WOULD HARMONIZE ALL LOWER COURTS IN THE SUBJECT MATTER

In United States v Del toro-Alejandre, 489 F3d 721, 723(5th Cir.2007) the court held that a district court can dismiss a 2255 motion pursuant to a waiver provision sua sponte where "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief". The court further ruled that a lower court could do the same irrespective of the govts wishes i.e. whether the govt would insist that the waiver be enforced, in contravention of the party presentation rule and inconsistent with Day, Greenlaw, and Wood, supra.

In addition to sanctioning and causing lower courts--like at bar--to dismiss the motions without any regards to what the parties may present, or their position in the matter, as stated above, this holding concomitantly leaves lower courts to interpret "the motion and the files and records" in however silent fashion a lower court chooses. For example, in the case at bar is it part of

the "motion","files",or "records" the fact that at sentencing the govt did not object to the court's express instruction to the Petitioner informing him that he could appeal?[1] If so,then the Petitioner can make a case that the govt waived the defense then and there in failing to object.Atleast it's debatable. Next,is the appellate brief part of the same "motion","files",or"records"(see note 1)?If so,then the Petitioner can effectively argue that the govt waived the defense because it failed to raise it in its brief when the Petitioner directly appealed his conviction.See Del Toro-Alejandre,supra at 722(govt waives the defense when"it fails to invoke it in its brief").

That's why 2255 Rules are in place.Because when a court follows them it allows for two things to occur 1)party presentation and 2)introducing relevant documents and making things part of the"record","files",or"motion".Del toro-Alejandre denies that because it allows lower courts--like Here--to raise the waiver defense sua sponte without informing the parties whatsoever.Lastly,the circuit court aligned the waiver defense with the failure to exhaust defenseid. at 722-23,basically concluding that where it is apparent on the face of the record,a lower court can enforce the "bargained for waiver" sua sponte.

Au contraire mons freire says the Eleventh Circuit Court in Burgess v United States,874 F3d 1292(11th Cir.2017).

In holding that a lower court could not enforce a collateral-appeal waiver bar sua sponte without party notification,the Burgess court distinguis-

[1] This can only happen in 2 instances when 1)the court follows Section 2255 Rules 4-5(c)which requires the govt to furnish the relevant documents or2)an AFFLUENT prisoner is provided with the relevant documents by his retained counsel earlier when represented by the attorney.Otherwise any indigent pro se prisoner cannot make anything part of the record should the lower court deviate from the Section 2255 Rules or the usual course of procedures

hed "appeal-waiver defenses"from other defenses like exhaustion,retroactivity, timeliness and procedural bars and further elaborated on the differences id. at 1299-1300.Additionally,the circuit court gave two other reasons why it is improper to enforce a waiver defense sua sponte 1)"party presentation system requires the parties to invoke their own claims and defenses "while assigning courts as neutral arbiters and 2)the integrity of the judicial process is compromised when a court invokes a "government's benefit [] conferred by [an] agreement arising from [plea] negotiations",something prohibited pretrial by the Fed.R.Crim.Proc.11(c)(1),thus making "the neutral arbiter concern particularly apt".id.

This holding is instructive to lower courts because it encourages lower courts to follow with the party presentation rule and developing the record for review,in the process allowing the Fed.R.Civ.Proc. and the 2255 Rules to work in tandem.

Ultimately,both holdings conflict with each other in several ways.For example,1)whether to follow with Section 2255 Rules and the Fed.R.Civ.Proc. in informing the parties of the court's prospective action ;thereby allowing for party presentation; 2)classification of the collateral-appeal waiver defense;Burgess distinguishes it from other defenses as mentioned above while Del Toro-Alejandre does not;and 3)sua sponte enforcing the waiver defense. This conflict creates disharmony among lower courts and cases are decided in conflicting ways.

C.THE SECOND QUESTION INVOLVES MATTERS OF RECURRING IMPORTANCE FOR THE EFFECTIVE ADMINISTRATION OF JUSTICE IN PLEA BARGAIN CASES

"One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result in its forfeiture"United States v Calverley, 37 F3d 160,162 (5thCir.1994)."For criminal proceedings in the federal courts,

this principle is embodied in Federal Rule of Criminal Procedure 51,which requires 'a party,at the time the ruling or order of the [trial] court is made or sought,[to] mak[e] known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor'".Peretz v United States,111 S Ct 2661,2678 (1991)(SCALIA,J., dissenting).This principle,which is rooted in fairness,the public interest in bringing litigation to an end,and judicial economy,is universally known as basic: "a litigant must raise all issues and objections at trial".Freytag v Commissioner,111 S Ct 2631,2646-47 (1991)(SCALIA,J.,concurring in judgment).

Similarly,when it comes to plea bargains in criminal cases,the same foundations have equal operative force.That is that when parties agree to a plea bargain,it is rooted in fairness,the saving of scarce judicial (or prosecutor) resources and with the wish to bring litigation to an end.Ordinarily allowing only for appeal to issues not included in the agreement.

However,what happens when a claim arises after the conviction is entered and it is made known to the court and,thereafter,the court allows for appeal on related IATC grounds while at the same time the govt fails to object to the court's error or judicial disapproval of a specific plea bargain provision, namely appeal waiver?Is the specific appeal waiver provision--whether through judicial error or disapproval--effectively nullified?Does the district court even have discretion to eliminate a specific provision in a plea bargain agreement as opposed to the overall agreement?Cf Fed.R.Crim.Proc. 11(C)(3)(5) with Missouri v Frye,132 S Ct 1399,1410(2012)(recognizing the district court's wide discretion).In addition to the court's express instruction allowing for appeal,is the waiver provision nullified as the govt fails to object,in light of the above-cited authorities?This is the precise situation at bar:

When being sentenced,the Petitioner made clear to the court the reason why he entered a plea months previously.And that was because his attorney

coerced him by informing him that if he did not plea the govt would supersede the indictment calling for more serious penalties namely,life or the death chamber.The govt stood silent without refuting the allegations and the Petitioner's counsel confirmed the same.To an experienced judge,when the govt could, at the outset,charge the case calling for those more serious penalties but elected not to do so,the govt is now precluded from further doing so just because a defendant persists in exercising his constitutional rights.See Blackledge v Perry,417 US 21 (1974).Here,the court stated clearly that "the government could have pursued the death penalty.And they chose not to do so."Thus there was an apparent misapprehension of the law on the Petitioner's part and as a result of counsel's misadvice or misinforming the Petitioner.Stated differently, counsel is expected to know the law and accurately explain it to his client. Here,counsel should have informed the Petitioner that he could proceed forth to a trial by jury without fears because the govt could,but did not,at the outset charge the case with the more serious penalties.

Henceforth now is it in the district court's discretion to allow for appeal to this issue having arisen after conviction,even when the waiver of appeal is presumptively bargained for?The court made clear that the Petitioner could appeal on IATC claims and the govt did not object on grounds that the waiver of appeal was bargained for.

In short,claims do arise after a conviction is entered and this Court recognizes that.See Frye, at 1405.And here,a claim arose after the Petitioner's plea was entered.With this in mind,this Court is presented with the opportunity to answer this question which has recurring importance for the effective administration of justice because "[t]he plea bargain process is a subject worthy of regulation,since it is the means by which most criminal convictions are obtained",Frye,at1413-14 (2012)(SCALIA,J.,dissenting)and because today's federal system has become "a system of pleas not a system of trials".Lafler

v Cooper,132 S Ct 1376,1388 (2012).This Court is poised to answer this question.

D.THE FIFTH CIRCUIT'S DECISION AFFIRMING THE LOWER COURT'S RULING HAS SO FAR DEPARTED,AND SANCTIONED LOWER COURTS TO DEPART,FROM THE USUAL COURSE OF PROCEDURES SET-FORTH BY THIS COURT'S PRECEDENTS.

At bar,the fifth circuit court did not give any explanation as to how or why the Petitioner does not meet the COA standards set-forth by this Court's precedents in Slack v McDaniel,529 US 473 (2000) and Miller-El v Cockrell, 537 US 322 (2003) (See Appendix A).

This is presumably because of the circuit court's Del Toro-Alejandre case cited above,which the court relies on to state that the Petitioner's arguments do not meet the COA "debatability" showing.However,what is controlling is this Court's established precedents,In Slack v McDaniel,supra,this Court only requires the Petitioners to show debatability into a lower court's ruling or the procedural way by which the case was decided id at 483,484. That is "[t]hat jurist of reason could debate whether (or for that matter agree that)the [motion] should have been resolved in a different manner..."id. Or simply put,said precedents only require a reasonable disagreement into the court's ruling or another way how to solve the matter.To that end the Petitioner argued:

"A jurist of reason could debate whether Cardona moved forward voluntarily,in light of the fact that he stated clearly that he pled under what may have been a false apprehension to a more severe penalty.[]Immediately after Cardona stated that he did not know that he was waiving his right to appeal[] and the government stating that it would proceed to a trial by jury,Cardona decided to move forward.Clearly,a jurist of reason could debate,Cardona feared something and that something may be that life or death penalty,death a legal impossibility if the government could,but didn't,at the outset charge as such. This misapprehension renders such decision involuntary.

Second,a jurist of reason could debate whether the court essentially

eliminated the waiver provision,at sentencing,when the court clearly stated that Cardona could appeal,specifically to Ineffective Assistance of Counsel claims, claims that are,in usual and preferred practice,addressed on a § 2255 proceedings, not direct appeal.[]

Third,Cardona did appeal.Cardona did raise this IAC issue on appeal,but, it was not addressed.A jurist of reason could debate that these claims should be addressed on their merits--should Cardona prevail on his S[tatute]O[f] L[imitations] arguments above--because on appeal the government did not raise a waiver bar and appellate counsel--if shown--was ineffective.Stated differently,because the government didnot raise a waiver bar and but for appellate counsel's ineffectiveness there is a reasonable probability Cardona would have prevailed.

In light of the fact that the government did not raise a waiver defense on appeal,a jurist of reason could debate that the district court was wrong in sua sponte raising a waiver bar because upon referring the matter to a magistrate Cardona could argue that the government is judicially estopped because,on appeal the government did not raise it[]".

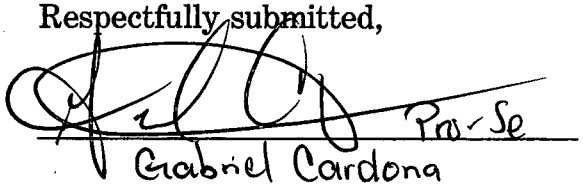
The Petitioner believes that these arguments are legitimate because a jurist of reason could not only disagree with the court's waiver ruling but also to how a reasonable jurist would resolve the matter differently i.e.referring the matter to a magistrate where party presentation would open the way for the Petitioner to effectively argue (as stated above)that the govt waived the waiver defense for failing to raise it on appeal and that the court further would abuse its discretion ruling otherwise,in light of Day,Wood,and Greenlaw,supra(Part A,above).

This Court should therefore exercise its supervisory power to correct the lower court's error in departing from the usual course of procedures.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: [redacted] June 14, 2020 [on resubmission as corrected]