

No. 23- _____

Supreme Court of the United States

LUIS ALBERTO MARCANO-GODOY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Javier A. Morales-Ramos
326 Pasadena
San Juan, PR 00926
Tel.: (787) 356-4616
E-Mail: jamprlaw@yahoo.com
Counsel for Petitioner

I. Question Presented

Whether a criminal defendant must raise the issue of an appeal waiver in his opening brief or whether it falls upon the government to raise the waiver as a defense in its reply.

II. List of Proceedings

1. United States District Court for the District of Puerto Rico, Criminal Case 19-cr-150 (FAB), USA v. Gonzalez-Lunar et al., Judgment was entered on 5/24/2021 (Docket Entry - “DE” - 303); and,
2. United States Court of Appeals for the First Circuit, Appeal 21-1485, United States v. Luis Alberto Marcano-Godoy, Judgment was entered on 9/18/2023 (Entry ID: 6592051).

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V. PETITION FOR WRIT OF CERTIORARI

Luis Alberto Marcano-Godoy, by and through Javier A. Morales-Ramos, Counsel of Record, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit.

VI. OPINIONS BELOW

The Court of Appeals for the First Circuit issued its judgment on September 18, 2023. *See* Appendix at 1. Panel rehearing was denied on November 3, 2023. *See* Appendix at 2.

VII. JURISDICTION

The Court of Appeals for the First Circuit issued its judgment on September 18, 2023. A request for panel rehearing was timely filed on September 18, 2023. Panel rehearing was denied on November 3, 2023. This Honorable Court has jurisdiction under 28 U.S.C. § 1254, and Rule 13(3) of the Rules of the Supreme Court. The District Court for the District of Puerto Rico assumed jurisdiction under 18 U.S.C. § 3231.

VIII. STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is 28 U.S.C. § 1291.

IX. STATEMENT OF THE CASE

Marcano was intervened by USCG personnel on or about February 14, 2019, while aboard a Venezuelan vessel in the high seas (approximately 65 nautical miles south of the United States Virgin Islands). This vessel carried cocaine bales. On February 15, 2019, the Government of Venezuela confirmed registration of the vessel and authorized the USCG to search its cargo and crew. The next day, February 16, the Government of Venezuela waived its primary right to exercise jurisdiction over the vessel.

On February 23, 2019, Marcano and other members of the crew of the vessel were charged by way of a criminal complaint filed in the District of Puerto Rico. On February 27, 2019, a grand jury returned a three-count indictment charging Marcano and other co-defendants with conspiracy to possess with intent to distribute a controlled substance on board a vessel subject to the jurisdiction of the United States (Count One), possession with intent to distribute a controlled substance

onboard a vessel subject to the jurisdiction of the United States (Count Two), and conspiracy to destroy property subject to forfeiture pursuant to section 511(a) of the Comprehensive Drug Abuse Prevention Act of 1970 while on board a covered vessel (Count Three) in violation of the Maritime Drug Law Enforcement Act (“MDLEA”), 46 U.S.C. §§ 70502(c)(1), 70503(a) and 70506(a).

On January 31, 2020, Marcano filed a Motion to Dismiss, arguing - inter alia - that “Congress has exceeded its authority under the Piracies and Felonies Clause by enacting the MDLEA without [requiring] a nexus [to the United States].” The motion was denied by the District Court via an Opinion and Order entered May 21, 2020. Subsequently Marcano pled guilty to Count I of the Indictment pursuant to a plea agreement that contained a waiver of appeal clause. He was sentenced on May 24, 2021. On June 7, 2021 Marcano filed a notice of appeal.

On appeal, Marcano mainly attacked the constitutionality of the MDLEA by: a. not requiring a “nexus” between drug trafficking activities of Venezuelan nationals at the High Seas and the United States of America; and, b. not giving notice to Marcano, a Venezuelan

national. He also attacked the Venezuelan waiver. Regarding the standard on review Marcano, citing Class v United States, 138 S. Ct. 798 (2018), presented to the Court of Appeals for the First Circuit his position that “[a] guilty plea does not by itself bar a criminal defendant from challenging the government’s authority to constitutionally prosecute the conduct that the defendant admitted to.” While Marcano did make reference to Class, insofar his main arguments (lack of nexus and lack of notice) implicated the very power of the State to prosecute him, he did not address the waiver of appeal head-on, nor specifically explain why the appeals court should entertain the appeal in his opening brief. Marcano did address the waiver of appeal in his reply brief, relying on Class and noting that the unconstitutional arguments had been presented to the District Court through a motion to dismiss which presented the questions of the nexus requirement, and that the consent of a foreign nation was irrelevant given that foreign governments cannot bestow additional legislative powers on Congress, thus preserving said issues for appellate review.

The Court of Appeals for the First Circuit dismissed the appeal given Marcano’s lack of direct argumentation on his opening brief about

the waiver of appeal clause. This adverse determination, and the circuit split as to whether Marcano was obliged to raise the issue of an appeal waiver in his opening brief or not (or address it later, if needed, in a reply brief), are the *raison d'être* of this petition.

X. REASONS FOR GRANTING THE WRIT

A. Circuit Split

The circuits are split as to whether waivers of appeals must be argued as a threshold matter. The First Circuit requires a criminal appellant to include an argument in its opening brief while the Third Circuit and the D.C. Circuit do not.

B. First Circuit Position

In 2015, the First Circuit clearly enunciated its standard as follows: “We expect and require counsel to address a waiver of appeal head-on and explain why we should entertain the appeal. An appellant who fails to do this buries his head in the sand and expects that harm will pass him by.” United States v. Arroyo-Blas, 783 F.3d 361, 367 (1st Cir. 2015). Marcano understands that while it is true that “the very purpose of an appeal waiver is to bar an appeal” Arroyo-Blas, *supra*; it

is also true - as Marcano presented to the court of appeals - that “[a] guilty plea does not bar a direct appeal in [his] circumstances.” Class v. United States, 138 S. Ct. 798, 805 (2018).

C. Third Circuit and D.C. Circuit

The other side of the coin is taken by the Third and D.C. Circuits. The Third Circuit has held that “judicial efficiency is the only basis that weighs in favor of requiring a defendant to affirmatively address the applicability of an appellate waiver in his opening brief, and then only slightly.” United States v. Goodson, 544 F.3d 529, 534 (3d Cir. 2008).

Goodson scrutinized the “judicial efficiency argument” and held that said argument “is outweighed by several reasons that favor permitting a defendant to wait until the government first chooses to invoke the waiver.” *Id.* It went on to place the burden on the first instance upon the government: “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

¹ Circumstances where he “challenge[s] the Government’s power to criminalize [his] (admitted) conduct” and that “call into question the Government’s power to ‘constitutionally prosecute’ him.” Class, *supra*.

the first instance.” *Id.* Making reference to United States v. Story, 439 F.3d 226 (5th Cir. 2006), it noted that “an appellate waiver may have no bearing on an appeal if the government does not invoke its terms.” *Id.*² This was recognized by this Honorable Court in Garza v. Idaho, 139 S. Ct. 738, 744-45 (2019)(“even a waived appellate claim can still go forward if the prosecution forfeits or waives the waiver. *E.g.*, *United States v. Story*, 439 F.3d 226, 231 (CA5 2006).”) The Third Circuit noted that another reason “for allowing a defendant to address the inapplicability of an appellate waiver in his reply brief is because a defendant may file his opening brief with a reasonable belief that the appellate waiver in his plea agreement does not extend to the issue or

² The Third Circuit also reasoned:

Although it is an imperfect analogy, in the civil context, "waiver" and the validity of a contractual provision are affirmative defenses that must be pleaded by the party seeking to avoid liability. Fed.R.Civ.P. 8(c). We do not expect a plaintiff to raise invalidity in her complaint. Thus, the approach we set forth is not only logical inasmuch as it requires the party relying upon a waiver provision to affirmatively invoke it, it is also in conformity with our traditional regime of resolving waiver issues in civil litigation.

Goodson, 544 F.3d at 535 n.3.

issues raised in his appeal.” *Id.*, at 535.

The D.C. Circuit has similarly expressed its position that appellants do not need to address waivers of appeals in their opening briefs and that, if needed, they could do so in reply briefs. Note: “It is true that appellants ordinarily must raise any issues ripe for our consideration in their opening briefs. ... But an appellant generally may, in a reply brief, “respond to arguments raised for the first time in the appellee’s brief.” 16AA Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction* § 3974.3 (4th ed. 2017) ; *see MBI Grp., Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568, 575 (D.C. Cir. 2010).” United States v. Powers, 885 F.3d 728, 732 (D.C. Cir. 2018). The D.C. Circuit specifically cited Goodson, and noted Arroyo-Blas. *Id.*

D. Petitioner’s Position

Marcano sides with the Third and D.C. Circuits rationale. Said circuits are in compliance with the basic rules for efficient administration of justice. *See*: Rule 2 of the Federal Rules of Criminal Procedure (“These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable

expense and delay.”) The position of the First Circuit is contrary to these basic tenets: it requires the review of the language of Plea Agreements; requires the request of transcripts of change of plea hearings; requires the detailed analysis of plea colloquies; and, requires legal research to support the non-applicability of the waiver. Indirectly, it abridges the appellant’s right to appeal by making it more difficult to prepare a brief; sometimes requiring briefing of a matter that may not be pertinent.

XI. CONCLUSION

Marcano requests this Honorable Court to decide whether a criminal defendant must raise the issue of an appeal waiver in his opening brief or whether it falls upon the government to raise the waiver as a defense in its reply. The circuit split between the First Circuit vis-a-vis the Third and D.C. Circuits presents a question of first impression in this forum.

It has been said that appeal waivers are not a “monolithic end to all appellate rights.” Garza v. Idaho, 139 S. Ct. 738, 744 (2019). In our adversary system it is usually the parties who raise whatever

controversies they deem proper, they do so amongst themselves, and are not usually forced into controversies that they may deem not pertinent. There are sufficient “heightened standards and related hurdles that attend many postconviction proceedings” Garza, 139 S. Ct. at 749; we do not need additional ones. The adversarial system promotes efficiency, simplicity and decreases unnecessary expenses and delays. If the government does not claim nor suggest that a waiver of appeal applies, the matter should be deemed settled. The circuit split should be addressed by this Honorable Court in favor of the position taken by the Third and D.C. Circuits. The writ should be granted.

Respectfully submitted,

In San Juan, Puerto Rico, this 15th of November 2023.

S/ Javier A. Morales-Ramos
Javier A. Morales-Ramos
Law Offices of Javier A. Morales Ramos
326 Pasadena
San Juan, PR 00926
Tel. (787) 356-4616
E-mail: jamprlaw@yahoo.com
Counsel For Petitioner Luis Alberto Marcano-Godoy

XII. APPENDIX

- A. Court of Appeals' Judgment September 18, 2023 APP-1
- B. Court of Appeals' Order November 3, 2023 APP-2

United States Court of Appeals For the First Circuit

No. 21-1485

UNITED STATES,

Appellee,

v.

LUIS ALBERTO MARCANO-GODOY,

Defendant - Appellant.

Before

Kayatta, Montecalvo and Rikelman,
Circuit Judges.

JUDGMENT

Entered: September 18, 2023

Defendant-Appellant Luis Alberto Marciano-Godoy appeals from his conviction for conspiracy to possess with intent to distribute a controlled substance on board a vessel subject to the jurisdiction of the United States under the Maritime Drug Law Enforcement Act, 46 U.S.C. § 70503(a)(1). Defendant-appellant executed an appeal waiver as part of his plea agreement. As an initial matter, by failing to address that waiver in his opening brief, defendant-appellant has waived any challenge to the validity and/or application of the waiver. See United States v. Arroyo-Blas, 783 F.3d 361, 367 (1st Cir. 2015) ("[defendant] has waived any argument that we should refuse to enforce his waiver of appeal"). In any event, based on the available record, the appellate waiver appears valid and enforceable. See United States v. Edelen, 539 F.3d 83, 85 (1st Cir. 2008) (citing, *inter alia*, United States v. Teeter, 257 F.3d 14, 25 (1st Cir. 2001) (general principles)).

In accordance with the foregoing, the appeal is dismissed. See 1st Cir. Loc. R. 27.0(c). All pending motions, to the extent not mooted by the foregoing, are denied.

By the Court:

Maria R. Hamilton, Clerk

cc: Max J. Pérez-Bouret, José Capó-Iriarte, Mariana E. Bauzá Almonte, David Christian Bornstein, Javier A. Morales-Ramos, Luis Alberto Marciano-Godoy

United States Court of Appeals For the First Circuit

No. 21-1485

UNITED STATES,

Appellee,

v.

LUIS ALBERTO MARCANO-GODOY,

Defendant - Appellant.

Before

Kayatta, Montecalvo and Rikelman,
Circuit Judges.

ORDER OF COURT

Entered: November 3, 2023

The "motion for reconsideration" is construed as a petition for panel rehearing, and that petition is denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

Max J. Pérez-Bouret

José Capó-Iriarte

Mariana E. Bauzá Almonte

David Christian Bornstein

Javier A. Morales-Ramos

Luis Alberto Marcano-Godoy