

No. 17A617

IN THE
SUPREME COURT OF THE UNITED STATES

Willie Lindsey Sylvester, Jr., — PETITIONER
(Your Name)

VS.

United States of America, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

On Appeal From The Eleventh Circuit Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Willie Lindsey Sylvester, Jr.

(Your Name)

Federal Correctional Complex
P.O. Box 1031 (Low custody)

(Address)

Coleman, Florida 33521-1031

(City, State, Zip Code)

none

(Phone Number)

QUESTIONS PRESENTED

1. In *Buck v. Davis*, 137 S. Ct. 759 (2017) this Court pronounced that an appellate court lacks subject-matter jurisdiction to decide a habeas appeal without granting a certificate of appealability. In this case, the Eleventh Circuit granted a certificate of appealability on one issue, but summarily decide the appeal on another issue.

Did the Court of Appeals exceed its subject matter jurisdiction?

2. If successful, a facial attack on the constitutionality of a statute renders the statute void from inception. Correspondingly, the nullification of the statute retroactively extinguished the district court's jurisdiction to adjudicate the controversy logically, such a challenge to a statute cannot be waived, otherwise the parties rather than Congress will have enacted the statute.

Can a plea agreement appeal waiver bar a challenge to the constitutionality of a statute?

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:

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☒ is unpublished.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 2014 U.S. Dist. LEXIS 55405; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

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 April 27, 2017.

☒ 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 February 18, 2018 (date) on November 27, 2017 (date) in Application No. 17 A 617.

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

☐ For cases from **state courts**:

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).

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A	Eleventh Circuit's Order Grant the Government's Motion for Summary Affirmance.
APPENDIX B	United States District Court, Northern District of Georgia, Atlanta Division adopting the R&R and denied § 2255 motion.
APPENDIX C	Eleventh Circuit's Order granting certificate of appealability and ~~in~~ forma pauperis (IFP).
APPENDIX D	This Court's grant for an extension of time until February 18, 2018.
APPENDIX E	
APPENDIX F	

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253(c)(1)(A),(B):

(c)(1): Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

STATEMENT OF THE CASE

On March 31, 2009, the district court sentenced Mr. Sylvester to 188 months of imprisonment for violation of 18 U.S.C. §§ 922(g) and 924(e) with possession of a firearm by a convicted felon; 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) and 851 possession of crack cocaine with intent to distribute.

Mr. Sylvester filed a notice of appeal, and on August 15, 2011, based on the knowing and voluntary appeal waiver the Eleventh Circuit dismissed his appeal.

On October 1, 2012, this Court denied Mr. Sylvester's writ of certiorari.

On April 22, 2014, the district court denied Mr. Sylvester's § 2255 and the denied the issuance of a certificate of appealability. On June 12, 2014, the district court denied his motion for reconsideration and again denied a COA.

On August 26, 2015, the Eleventh Circuit Court of Appeals granted Mr. Sylvester a COA on one issue: "Whether Mr. Sylvester's sentence appeal waiver bars him from challenging the constitutionality of his sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) in a 28 U.S.C. § 2255 motion.

On April 27, 2017, the Court of Appeals in an unrelated matter to the grant of the COA stating: "regarding the validity of his appeal waiver, he was properly sentenced under the ACCA. As such, the government's position that Sylvester was properly sentenced as an armed career criminal 'is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." (Appendix "A").

This petition follows:

REASONS FOR GRANTING THE PETITION

Willie Sylvester challenged the constitutional validity of 18 U.S.C. § 924(c)(1) in his 28 U.S.C. § 2255 motion. The district court denied the motion holding that appeals waiver in the plea agreement foreclosed consideration of the constitutional claim.

Mr. Sylvester argued that the waiver did not apply, since a facial attack on a statute involved not merely a constitutional claim, but also a jurisdictional claim. Cf. **United States v. Evans**, 476 F.3d 1176 (11th Cir. 2007)(identifying that a statutory construction argument "might be regarded as challenge to jurisdiction."). Simply, if the statute is unconstitutional vague, thus void from inception, then the statute can never have given the district court power to act. See generally **Rivers v. Roadway Express**, 511 U.S. 298, 312-13 (1994); **In re Civil Rights Cases**, 109 U.S. 3, 8-9 (1983).

Nonetheless, the district court held the waiver precluded consideration of the claim. Mr. Sylvester applied to the Eleventh Circuit Court of Appeals for a certificate of appealability. The appeals court granted the certificate of appealability on the question. Yet, the appeals court chose not to address the question its panel certified instead it decided the rule on the underlying merits of the § 2255 motion itself.

A substantial departure from the ordinary course of proceedings where the district court rules on the merits first, and only then does the appeals court opine.

The Eleventh Circuit's departure from settled practice is amplified because the decision necessarily conflicts with this Court's decision in **Buck v. Davis**, 137 S. Ct. 795 (2017) and illuminates a circuit split on whether a challenge to the facial constitutionality of a statute is a jurisdictional challenge.

1. This Court holds that a properly issued certificate of appealability is a jurisdiction prerequisite for an appeals court to review a § 2255 judgment. The Eleventh Circuit from that rule when it made a merits determination without either issuing on additional COA or resolving the question previously certified.

This Court identified the jurisdictional nature of the certificate of appealability. The jurisdictional nature of the COA runs from 28 U.S.C. § 2253(c)(1)'s plain terms, "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals." This Court explained, that "until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeal from habeas petitioners." **Miller-El v. Cockrell**, 537 U.S. 322 (2003).

The Eleventh Circuit granted Mr. Sylvester a COA on the issue of whether his challenge to the ACCA's constitutionality could be waived, then the appeals court skipped the COA question and decided the merits of the § 2255 motion. A leap that has jurisdictional consequences, as well as due process implications.

The due process implications are obvious, the appeals court's sua sponte switching the issue prevented Mr. Sylvester from being heard on the question. In other words, the appellate court's deciding the appeal based on an issue not contained in the COA effectively denied Mr. Sylvester due process of law: notice of the controversy and opportunity to be heard.

Mr. Sylvester is aware that § 2253(c)(2) is non-jurisdictional and that the appeals court may craft a question for appeal that is different than that the petitioner applied for. See **Russello v. United States**, 464 U.S. 16, 24 (1983). But the ability to write any cognizable question is different than the power to decide an issue not certified.

Stated otherwise, a court of appeals lacks jurisdiction to decide any issue not presented in a COA. If COA is granted, and the appeals court decides that another issue must be resolved, then the district court should expand the COA to encompass the new question. If the appeals court does not, then the appeals court lacks jurisdiction to resolve the issue.

The Eleventh Circuit issued a COA on whether an appeals waiver forecloses a facial challenge to the constitutionality of the statute, then instead of resolving the COA issue, summarily dismisses the appeal based on a merits analysis. This Court should grant the writ and direct the Eleventh Circuit to comport with its procedures to those this Court announced in **Buck v. Davis** 137 S. Ct. 795 (2017).

2. **The Eleventh Circuit sanctioned the district court's departure from settled precedent that jurisdictional claims cannot be waived.**

Mr. Sylvester challenge the constitutionality of 18 U.S.C. § 924(e) and the validity of this Court's holding in **Almendarez-Torres v. United States**, 523 U.S. 224 (1998).

Implicitly, the Court of Appeals concluded that Mr. Sylvester waived the constitutional challenge. Mr. Sylvester does not doubt that an ordinary constitutional claim be waived. But when a constitutional claim also implicates a court's subject-matter jurisdiction, then the petitioner cannot waive the claim. See **Ins. Corp of Ireland, Ltd. v. Compagnie des Baurites de Guinee**, 456 U.S. 694, 702 (1982)(subject-matter jurisdiction is an area of law in which "principles of estoppel do not apply and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings"). Significantly, only Congress can make conduct criminal. Cf. **United States v. Cotton**, 535 U.S. 625, 630 (2002)(litigants cannot consent to subject-matter jurisdiction only Congress has that authority to import jurisdiction).

The concept that a facial attack on the constitutionality of a statute is a challenge to a court's subject-matter jurisdiction resolves the COA question and requires reversal of the appeals court's order. Simply, the district court erroneously believed the waiver foreclosed a subject-matter jurisdiction (facial

challenge to the existence of the statute) ground. But such a challenge can never be waived and may be raised at any stage in the criminal proceedings. See **Arbaugh v. Y.H. Corp.**, 546 U.S. 500 (2006); **Mansfield, C and L. M.R. Co., v. Swan**, 111 U.S. 379, 382 (1884)(challenge may be raised at any stage).

A 28 U.S.C. § 2255 motion, despite its civil number, is actually another step in the criminal proceedings, thus even aside from § 2255(a)'s explicit authority to hear jurisdictional claims, a petitioner may challenge the criminal court's original or continuing subject-matter jurisdiction, and the right to raise that challenge cannot logically be waived. Nonetheless, the circuit courts are in conflict on the issue.

The majority favor the rule, "[t]he constitutionality of a statute under which a defendant is convicted presents a jurisdictional issue that the defendant does not waive by pleading guilty." **United States v. Saac**, 632 F.3d 1203, 1208 (11th Cir. 2011); **United States v. Palacios-Casquete**, 55 F.3d 557, 561 (11th Cir. 1995). Yet, other appeals courts have reached the opposite conclusion. See **United States v. Diverali**, 512 Fed. Appx. 896, 901-02 (11th Cir. 2013); **United States v. Maillet**, 440 Fed. Appx. 292, 294 (5th Cir. 2011). The conflict runs deep because in the majority's view a district court that enforces the waiver usurps Congress's authority to determine the criminal conduct.

Further, the minority view effectively approves of the miscarriage of justice. In essence a person mistakenly convicted of a non-crime would have to continue to experience the manifest injustice because they (unknowingly) waived their right to challenge or prevent injustice.

Neither American society nor the Constitution can tolerate such a result. There is no legitimate basis for enforcing a waiver against a facially unconstitutional statute — without the statute the district court has not authority to act and any order is coram non iudice.

Conclusion

This Court should grant the writ and reverse the Court of Appeals for the Eleventh Circuit's order. This Court should direct the Court of Appeals to limit its inquiry to the question authorized by the certificate of appealability. And, this Court should direct the Court of Appeals with instructions to ignore the waiver and adjudicate the merits of Mr. Sylvester's ground.

Prepared with the assistance of Frank L. Amodec and submitted on this 16th day of February, 2018, by:

Willie L. Sylvester
Willie L. Sylvester

APPENDIX "A"

ELEVENTH CIRCUIT COURT OF APPEALS ORDER