No. 17-7716

IN THE

Supreme Court of the United States

DANIEL K. GARCIA,

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

---

REPLY TO MEMORANDUM

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Respondent contends Mr. Garcia's Petition for Writ of Certiorari was filed out of time. Sixteen days after the Eleventh Circuit Court of Appeals denied his Motion for Certificate of Appealability, Mr. Garcia filed a Motion to Reconsider, pursuant to Eleventh Circuit Rule 22-1(c). (App. A-1). The court subsequently denied that motion on August 31, 2017. (App. A-2). Within 90 days, a timely petition for writ of certiorari was filed in this Court, on November 29, 2017.

Respondent's claim that the petition is untimely rests on an imaginary distinction between a motion for reconsideration and a petition for rehearing. According to Respondent, the latter would toll the time to file a petition for writ of

certiorari in this Court, while the former would not. Both motions render the lower court's ruling non-final and subject to further review by the lower court. To be fair, the Eleventh Circuit does distinguish between a motion for "reconsideration" and a "petition for rehearing" in the rule governing motions for certificates of appealability. *See* 11th Cir. R. 22-1(c). The distinction is only made, however, to clarify between the processes of review. A motion for reconsideration can be reviewed by a single judge, while a petition for rehearing will be considered by the original three-judge panel, or the court as a whole. *See* 11th Cir. R. 22-1(c); Fed. R. App. P. 35. Nevertheless, this procedural difference does not change the fact that the appellate court's ruling is still non-final.

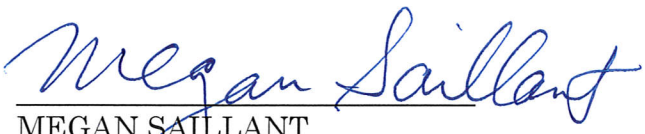
The time for filing a petition for writ of certiorari in this Court begins when the appellate court enters its final ruling in a case. In *United States v. Ibarra,* this Court determined the government's notice of appeal was timely because it was filed within thirty days of the trial court's ruling on the motion for reconsideration. 112 S. Ct. 4 (1991). The Court noted: "the consistent practice … has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending." *Id.* at 6 (quoting *United States v. Dieter,* 429 U.S. 6, 8, 97 S. Ct. 18, 19 (1976)). In *United States v. Healy,* the Court held that the government's notice of appeal was timely when it was filed within 30 days of the lower court's denial of the petition for rehearing. 376 U.S. 75, 84 S. Ct. 553 (1964). In doing so, the Court said "it would be senseless for this Court to pass on an issue while a motion for rehearing is pending below …" 376 U.S. at 80, 84 S. Ct. at 556-57.

Because Mr. Garcia's petition was filed within 90 days of the Eleventh Circuit's denial of his motion for reconsideration, the instant petition was timely filed.

Finally Mr. Garcia would reiterate, as noted by Respondent in its memorandum, that this Court has discretion to consider an untimely petition in a criminal case. *Schacht v. United States,* 398 U.S. 58, 63-65 (1970); *Bowles v. Russell,* 551 U.S. 205, 212 (2007). Although Mr. Garcia does not concede his petition is out of time, if this Court determines it is, he would request the Court exercise its discretion to consider the issue presented here on the merits.

Respectfully submitted,

RANDOLPH P. MURRELL
Federal Public Defender



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