

No. 18-

IN THE
Supreme Court of the United States

GALINDO JOSE RUIZ-HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner, GALINDO JOSE RUIZ-HERNANDEZ, was tried and convicted of transporting undocumented aliens within the United States. The District Court added two sentencing enhancements to Mr. Ruiz-Hernandez's Guidelines range and sentenced him to serve a term of eighty months in the custody of the Bureau of Prisons. On direct appeal, Mr. Ruiz-Hernandez argued the two sentencing enhancements should not have been imposed by the District Court. More specifically, Mr. Ruiz-Hernandez challenged a sentencing enhancement under U.S.S.G. § 2L1.1(b)(6) for an increase in offense levels due to a foreseeable risk of death or serious bodily injury to an alien as a result of the smuggling. The other issue involved an argument to a second sentencing enhancement under U.S.S.G. § 2L1.1(b)(7), which increases the offense level if anyone dies "in the course of" the smuggling. Following oral argument, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") affirmed the imposition of the enhancements by the District Court.

Respectfully, the decision of the Fifth Circuit decided important federal questions in a way that conflicts with relevant decisions of this Court. As to the first enhancement, in a fashion and manner which is contrary to this Court's stare decisis, the Appellate Court did not require the Government to establish Mr. Ruiz-Hernandez could reasonably foresee an actual risk of serious bodily injury or death. On the cause of death enhancement, the Court incorrectly held that only a de minimis "but for" causation of death was required. A compelling reason is thus presented in support of discretionary review by this Honorable Court. Mr. Ruiz-Hernandez therefore respectfully requests that this Honorable Court grant

this Petition for Writ of Certiorari and allow this case to proceed to resentencing with the sentencing enhancements withdrawn.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Galindo Jose Ruiz-Hernandez: Petitioner (Defendant-Appellant in the lower Courts)

United States of America: Respondent (Plaintiff-Appellee in the lower Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, GALINDO JOSE RUIZ-HERNANDEZ, requests this Court grant this petition and issue a Writ of Certiorari to review the decision of the Fifth Circuit. Mr. Ruiz-Hernandez respectfully submits the District Court committed reversible error by granting two sentencing enhancements based on the creation of harm and a resulting death. Based on the Government's arguments, the Fifth Circuit did not apply the correct law to the facts of this case. (Appendix A, page 2). Hence, the Appellate Court accepted the Government's arguments and affirmed the District Court without the proper application of the sentencing enhancements. Therefore, it can only be concluded that the District Court's findings were invalid on this point of error and that the Fifth Circuit did not apply the correct standard of review. Accordingly, the sentence imposed must be vacated and this matter reversed and remanded for resentencing without the enhancements applied to the sentence imposed in this case.

REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Galindo Jose Ruiz-Hernandez*, No. 17-40577 (5th Cir. May 10, 2018), appears at Appendix A to this petition and is reported at *United States v. Ruiz-Hernandez*, 890 F.3d 302 (5th Cir. 2018).

The Amended Judgment in a Criminal Case of the United States District Court for the Southern District of Texas, Brownsville Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUND FOR JURISDICTION

This Petition arises from a direct appeal which granted final and full judgment against Mr. Ruiz-Hernandez. This action is on a criminal prosecution initiated by the Government. Mr. Ruiz-Hernandez proceeded to trial and was found guilty of transporting an alien within the United States. The District Court imposed sentencing enhancements pursuant to U.S.S.G. § 2L1.1(b)(6) for an increase in offense levels due to a foreseeable risk of death or serious bodily injury to an alien as a result of the smuggling, and U.S.S.G. § 2L1.1(b)(7) for an increase in offense levels due to a death occurring in the course of the smuggling. The imposition of these enhancements are at issue in this Petition. A copy of the Judgment appears at Appendix B. Mr. Ruiz-Hernandez argued to the Fifth Circuit that the District Court committed reversible error in applying these enhancements to the facts of this case. The Fifth Circuit rejected this argument in a published opinion dated May 10, 2018, and affirmed the decision of the District Court. A copy of the decision appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Overview:

On an early morning in April of 2015, Mr. Ruiz-Hernandez was swimming with the help of a blue inner tube across the Brownsville Ship Channel in Brownsville, Texas. (ROA.695). He was accompanied by a friend from Mexico, Patricia Guadalupe Cervantes-Garcia, who was floating in a pink inner tube. (ROA.695). Suddenly, both were hit by a fast moving U.S. Coast Guard boat running with its lights off. (ROA.695-96). Although Mr. Ruiz-Hernandez survived, the boat's propeller killed Ms. Cervantes-Garcia. (ROA.695-96).

Mr. Ruiz-Hernandez proceeded to trial and a jury found him guilty of alien smuggling resulting in death. (ROA.185-86). The Judge sentenced him to serve 80 months in the custody of the Bureau of Prisons, (ROA.213-16), and Mr. Ruiz-Hernandez timely filed a notice of appeal. (ROA.192).

Indictment

A two count indictment was returned against Mr. Ruiz-Hernandez on October 20, 2015. (ROA.22-23). The first count charged Mr. Ruiz-Hernandez with conspiracy to transport an illegal alien and included an enhancement allegation that the activity resulted

in the death of an alien. (ROA.22). The second count charged Mr. Ruiz-Hernandez with transporting an illegal alien and included an enhancement for violations of the law for financial gain and for violations resulting in the death of a person. (ROA.23).

Jury Trial: Testimony and Evidence

The first witness the Government called to testify was a security guard who was working at 6:15 a.m. on the morning of April 23, 2015, in the shrimp basin at the Brownsville Port, which is part of the ship channel. (ROA.383-85). The security guard testified that he was leaving work when a person approached him and told him that someone had been hit by a boat and needed help. (ROA.386). This individual directed the security guard to places around the basin where he could look and then left. (ROA.390-393). The guard stated he again encountered this same individual a while later, (ROA.394), and this time the person told him that someone had witnessed the accident. (ROA.396). According to his testimony, the security guard thought “nothing of it all” and went home. (ROA.397-98).

Nonetheless, the guard continued, once he got home he received an inquiry from an officer with the Port of Brownsville, who asked him to provide information about what had happened earlier that day. (ROA.391-93). He stated that he identified Mr. Ruiz-Hernandez as the man he had seen that morning. (ROA.403). However, on cross-examination the guard concurred that he did not have a flashlight and could not see “10 feet away” from himself because it was dark at the time. (ROA.403-04).

The next witness called by the Government was Rolando David Doria, who was a police officer at the Port of Brownsville. (ROA.407). He pointed out that the Brownsville

Ship Channel runs from Port Isabel all the way into Brownsville. (ROA.409-10). He stated that he was working at the port on April 24, 2015, at 7:25 a.m., when dispatch notified him that a "Galindo Jose Ruiz-Hernandez" called about a female who may have been hit by a vessel. (ROA.412). The officer went to the "suspect" area on "Angler's Head," but did not encounter anyone. (ROA.414). He stated he then headed to the other side of the basin to Fisherman's Road, where a man on a bike waived him down and told him there was a female body on the shoulder of the bank. (ROA.414). The officer testified that he searched but did not find anything until he looked at some rocks near the perimeter fence. (ROA.414-19). He stated that it was there he found a female body with part of a leg severed and which was covered with lacerations. (ROA.419). The officer said he contacted dispatch to alert EMS and the fire department. (ROA.419). As he was waiting for help to arrive, the officer said he looked over toward the body and saw a floating device in the channel nearby. (ROA.420). The officer concluded his testimony on direct by stating that the body of the deceased was identified as Patricia Guadalupe Garcia-Cervantes and the man on the bicycle was identified as Galindo Jose Ruiz-Hernandez. (ROA.425).

This witness testified on cross-examination that boats traveling the waters of the shrimp basin must "slow down" to prevent any "wakes" from causing damage or harm to the basin. (ROA.427-28). At this juncture, a statement by a prosecutor should be noted regarding the legal elements of the "led to death" portion of the immigration charges pending against Mr. Ruiz-Hernandez at that time. The prosecutor asked the Judge:

[M]ay I add that the indictment charge is not causing the death but resulting in death which is a legal difference and therefore our objection is to relevance.

(ROA.428). Apparently, the Government believed causation of death is irrelevant to the issues in this case. *See* (ROA.428).

In any event, the next witness called by the Government on direct was Edgar Garcia, who was a police officer at the Port of Brownsville at the time in question. (ROA.433). He stated that the ship channel was 40 feet deep and an estimated 500 feet wide. (ROA.442). The officer also testified there was “a lot of illegal alien traffic in the area” and the channel was a dangerous place at night. (ROA.446-48). This witness also discussed several videos from cameras in the port area which show an individual on a bike and described how a light from a boat was moving around the area apparently attempting to look for an individual during the dark morning hours of the day in question. (ROA.448-64). Although this portion of the record is admittedly difficult to follow, it appears the officer was of the opinion that it had been concluded this was the Coast Guard vessel at issue searching the channel. *See* (ROA.448-64).

The Government then called Sofia Tovar to the stand. (ROA.464). Ms. Tovar was the manager of a pawn shop which provided Western Union transfers. (ROA.466). She testified about a money transfer which took place on April 22, 2015. (ROA.271-73). According to Ms. Tovar, on that date, \$650 was transferred to “Gabriel Alberto Sanchez.” (ROA.272-73). She said that the money transfer originated in New York and the transfer came from a man named Elias Rehome. (ROA.473-74).

The next witness called by the Government was Jesus Rosas, an investigator with the Cameron County Sheriff’s Office. (ROA.475-76). He testified that he was dispatched to the

shrimp basin and the channel to investigate the discovery of a body on the morning of the incident. (ROA.477-79). The investigator stated that Mr. Ruiz-Hernandez was in the back seat of one of the officer's cars when he arrived. (ROA.480). The investigator went on to say that he went to the channel and looked over the body. (ROA.481). He said it was his opinion the injuries on the deceased were consistent with a boating accident. (ROA.481). He then testified that Ms. Cervantes-Garcia was pronounced dead at 9:30 on the morning of April 25, 2015. (ROA.483).

The investigator described what happened next. He stated that he transported Mr. Ruiz-Hernandez to the sheriff's office so he could give his statement. (ROA.484). He testified that he prepared Mr. Ruiz-Hernandez' statement as Mr. Ruiz-Hernandez spoke. (ROA.485). The investigator said that, as he began reviewing the statement, he determined "this might be a federal criminal case" and so he gave Mr. Ruiz-Hernandez his *Miranda* warnings. (ROA.490, 493). According to the investigator, Mr. Ruiz-Hernandez and he continued to discuss the facts of the events in question. (ROA.494). As relayed by the investigator, Mr. Ruiz-Hernandez' statement includes the following representations:

- * at 3 a.m. on the morning on April 24, 2015, he and his friend "Pati" [his name for Ms. Cervantes-Garcia] swam the harbor channel;
- * she was wearing a pink floating inner tube and he was wearing a blue floating inner tube;
- * Pati was swimming faster than Mr. Ruiz-Hernandez;
- * the two were about half way across the channel when they saw a boat coming toward them "traveling very fast and without any lights";

- * the boat crashed into the two of them, hitting Mr. Ruiz-Hernandez on his left arm and pushing him away from Pati;
- * two minutes later, Mr. Ruiz-Hernandez found Pati. She was upside down in the water and unresponsive;
- * he kept her head above the water as he swam with her to the edge of the channel;
- * he noticed a large wound and did “mouth to mouth” but she did not react;
- * the boat which hit them did not return to provide help and Mr. Ruiz-Hernandez was “scared and shocked”;
- * he called his cousin “Gabriel Sanchez” and told him what had happened;
- * Mr. Ruiz-Hernandez then “warned” the security guard at the shrimp basin, but when he asked the guard later what had happened, the guard told Mr. Ruiz-Hernandez he did not find anything;
- * he then called 911 and asked for help;
- * two harbor sheriff’s deputies arrived and he told them there was a person on the water’s edge by the channel;
- * Mr. Ruiz-Hernandez did not tell the deputies he was with Ms. Cervantes-Garcia or exactly what had happened because he was scared;
- * He was put in a patrol car and went with the investigator to the sheriff’s office to give his statement.

(ROA.695-97). Mr. Ruiz-Hernandez emphasized in this statement that he was guiding Ms. Cervantes-Garcia into the country as a “favor to his cousin Pati because her husband in Mexico drank too much and hit her.” (ROA.695). He also said his cousin Gabriel Sanchez, the man he called and told what had happened, had also asked him to help Ms. Cervantes-Garcia by escorting her into the United States. (ROA.695). Specifically, Mr. Ruiz-Hernandez’ said in this statement that:

- * on the day before the incident, Mr. Sanchez picked him up at his job in Port Isabel and again asked him to help Pati;
- * he did not want to help but Mr. Sanchez insisted because Pati had left her home in the interior of Mexico and had been waiting for five days in the border town of Matamoros, Mexico, located across the channel from Brownsville;
- * Mr. Sanchez and a reluctant Mr. Ruiz-Hernandez went to the H.E.B. grocery store and picked up two tubes for flotation;
- * the two went to where Pati was located;
- * a “peasant” (peasant was later translated to mean “rancher” at ROA.549) arrived and told Mr. Ruiz-Hernandez it would cost 6,000 pesos for him to help the two cross the river;
- * this man subsequently took Mr. Ruiz-Hernandez and Ms. Cervantes-Garcia across the river by boat at 9:30 the night before April 24, 2015;
- * the man told them to follow the red light to the harbor, which they did;
- * after four or five hours, they arrived at the channel and inflated their tubes and started to cross the channel.

(ROA.695-96). Mr. Ruiz-Hernandez concluded his statement by saying that he “did it to help Patti and not for money.” (ROA.696).

The investigator who took Mr. Ruiz-Hernandez’ statement also testified that he had taken a photograph of the inner tube he had seen on the morning in question. (ROA.500-01). He confirmed in court that the picture showed the same type of pink floating device Mr. Ruiz-Hernandez had described and that the inner tube had indeed been found floating in the water near Ms. Cervantes-Garcia’s body. (ROA.505). Finally, the investigator testified on direct that Mr. Ruiz-Hernandez was not arrested, but released, after he gave his statement. (ROA.504).

On cross examination, the investigator stated that Mr. Ruiz-Hernandez was cooperative. (ROA.512). This witness also continued to describe the incident in question as a "boating accident" on cross examination. (ROA.513). On re-direct, he said that an investigation determined that Ms. Cervantes-Garcia was not Mr. Ruiz-Hernandez' cousin and that Mr. Ruiz-Hernandez had not met her before he attempted to guide her into the United States. (ROA.525).

The next witness for the Government was Carlos DeLeon. (ROA.529). Mr. DeLeon was an investigator with the Cameron County District Attorney's Office and a fingerprint expert. (ROA.530-33). He testified that the man on trial was the same man as the individual referenced in immigration documents as Mr. Ruiz-Hernandez. (ROA.534-35).

The second to last witness called was Luz Antonio Gonzalez, an agent with the United States Department of Homeland Security. (ROA.540-51). He testified he had also interviewed Mr. Ruiz-Hernandez. (ROA.545-46). The agent stated that Mr. Ruiz-Hernandez told him he had agreed to bring Mr. Cervantes-Garcia into the United States after Gabriel Sanchez had called him four times and asked him four times to bring Ms. Cervantes-Garcia, a relative of Mr. Sanchez, across the border. (ROA.549). The agent confirmed that Mr. Ruiz-Hernandez said a "rancher" (previously translated as a "peasant" at ROA.595) was paid 6,000 pesos (just over 300 American dollars) to take Ms. Cervantes-Garcia and him across the river. (ROA.549). It was again emphasized that the rancher told Mr. Ruiz-Hernandez and Ms. Cervantes-Garcia to follow a light and then cross the channel. (ROA.551). It was also pointed out again that the boat which crashed into the two had accelerated very quickly

toward them just before impact. (ROA.551-53). The agent also stated that Mr. Ruiz-Hernandez told him that the boat did not return and then later stated it did return. (ROA.553). This witness also testified that Mr. Ruiz-Hernandez told him he would not be paid for his part in helping Mr. Cervantes-Garcia enter the United States. (ROA.553). The agent then confirmed the testimony of the pawn shop manager that Mr. Sanchez had received a \$650 money transfer via Western Union shortly before Ms. Cervantes-Garcia was killed. (ROA.579).

On cross examination, defense counsel established that an investigation had shown that a man from New York had paid Gabriel Sanchez the \$650 to smuggle Ms. Cervantes-Garcia into this country. (ROA.587). Significantly, the agent agreed that the Coast Guard's investigation report of the incident proved that the darkness and the fact that its boat was accelerating were factors contributing to Ms. Cervantes-Garcia's death. (ROA.588). The agent also confirmed that an investigation had revealed that Ms. Cervantes-Garcia was in fact abused by her husband. (ROA.590).

The last witness to testify at trial was the forensic pathologist who conducted the autopsy on Ms. Cervantes-Garcia. (ROA.595). She concluded the cause of Ms. Cervantes-Garcia's death was "boat propellor trauma with drowning" and that there was "extensive propeller injuries." (ROA.601). This marked the conclusion of the evidence.

The Trial: Closing Arguments and the Verdict

After the jury and the Court heard the parties' closing arguments, the case was submitted to the jury. However, counsel respectfully submits there is a portion of the

prosecution's closing argument which is relevant to the Government's position on the elements of a "resulting death" and "private financial gain" requirements which the Government prove beyond a reasonable doubt. The prosecutor for the Government told the jury to find Mr. Ruiz-Hernandez because the "incident" resulted in death and private financial gain. Specifically, he stated:

If he's guilty of those offenses, then you are asked to consider did he—did this result in a death. Not did he cause the death. Not that he legally caused the death. Not that it was an intentional death. Did this incident result in the death of a person. And I believe the evidence shows that. We believe the evidence shows that. It's unfortunate, but it does. Also, so we ask you to check, yes, it did.

And then did this incident involve private financial gain? The question isn't private financial gain for him because it's been defined what private financial gain is. Was there private financial gain in this incident? Submit to you that the evidence shows that it does show that there is. And, therefore, you should answer, yes, you find that there is private financial gain.

(ROA.642-43). This does not appear to be a correct representation of the law and likely confused the jury into incorrectly believing that Mr. Ruiz-Hernandez' criminal responsibility arose out of the "incident," *i.e.*, the Coast Guard crew driving the boat into Mr. Ruiz-Hernandez and Ms. Cervantes-Garcia and killing Ms. Cervantes-Garcia with its propeller, as opposed to the immigration charges pending against Mr. Ruiz-Hernandez. Indeed, the jury convicted Mr. Ruiz-Hernandez and answered all enhancements in the affirmative. (ROA.645-46).

The PSR: Facts

The Court then ordered a pre-sentence investigation report ("PSR") be prepared. The Probation Officer set forth facts in the PSR which are by and large consistent with those

presented at trial. However, in addition to these facts, the PSR includes important observations. The first notable observation concerns the Coast Guard vessel. Significantly, the Coast Guard conceded the boat did not have its navigation lights on until a captain of a nearby barge signaled the crew that their ship was running dark and the lights must be turned on. (ROA.723). The second observation is that the PSR confirms that Gabriel Sanchez-Aburto, the friend who had pushed Mr. Ruiz-Hernandez to agree to guide Ms. Cervantes-Garcia into the United States in order to help her escape an abusive marriage, specifically stated that Mr. Ruiz-Hernandez was not paid and no one offered to pay him for his assistance. (ROA.723). Finally, and of importance, the Probation Officer determined that Mr. Ruiz-Hernandez did not have a supervisory role or any decision making authority in the activities at issue. (ROA.727).

The PSR Calculations

The PSR provides that Mr. Ruiz-Hernandez' base offense level is 12. (ROA.729). However, a subsequent enhancement makes this base offense level of 12 irrelevant. (ROA.729). Indeed, the enhancement raises the beginning offense level to a level 18. (ROA.729).

To this end, the PSR provides that under U.S.S.G. § 2L1.1(b)(6), when an offense involves intentionally or recklessly creating a substantial risk of death, or serious bodily injury, there is to be an increase of 2 levels, unless the base offense level is less than 18. (ROA.729). If the base offense level is less than 18, the offense level is to be increased to 18. (ROA.729). The PSR officer reviewed the facts previously found and concluded by law

enforcement, found these facts to be true, and determined the § 2L1.1(b)(6) enhancement should be applied. (ROA.729). Therefore, the base offense level for Mr. Ruiz-Hernandez became 18. (ROA.729).

Next, the Probation Officer in the PSR added 10 levels under U.S.S.G. § 2L1.1(b)(7)(D). (ROA.729). The PSR states that this enhancement was added because a person died, even though an 18-level increase had already been imposed for creating a substantial risk of harm or bodily injury. (ROA.729). This brought Mr. Ruiz-Hernandez' offense level to 28. (ROA.729).

The PSR then provides yet another increase. Two levels were added for obstruction of justice. Therefore, Mr. Ruiz-Hernandez' final base offense level was calculated to be a level 30.

The PSR next sets forth a calculation for Mr. Ruiz-Hernandez' criminal history level. (ROA.730). His resulting score was zero; therefore, the PSR designated Mr. Ruiz-Hernandez at a Criminal History Category I. (ROA.731).

Accordingly, with an offense level of 30 and a criminal history category of I, the PSR placed Mr. Ruiz-Hernandez at a Guidelines sentencing range between 97 and 121 months' imprisonment. (ROA.736). Any departures were left to the sound discretion of the Court. (ROA.739).

Objections to the PSR

Mr. Ruiz-Hernandez filed objections to the PSR. (ROA.714). He objected to the above-enhancement for creating a substantial risk of death or serious bodily injury, as well

as the 10-level increase for the alleged resulting death. (ROA.714). Essentially, defense counsel asserted that the Coast Guard vessel created this risk and resulting death by traveling without sufficient lights and at a high rate of speed when no extenuating circumstances warranted such action. (ROA.714).

The Sentencing Hearing: Objections and the Ruling

Mr. Ruiz-Hernandez was sentenced on May 22, 2017. (ROA.650). His attorney again objected to the offense level increase for creating a substantial risk of death or serious bodily injury and the offense level increase for the resulting death. (ROA.653-54). As he had argued in his written objections, defense counsel asserted it was the Coast Guard which had caused the death and created the risk of harm to Ms. Cervantes-Garcia. (ROA.653). He noted the boat was “traveling at a higher rate of speed than was necessary, it didn’t have sufficient lighting knowing that it was an area that could’ve been traveled by smugglers.” (ROA.653).

The District Court found the enhancements were appropriate even under the circumstances surrounding Ms. Cervantes-Garcia’s death and overruled the objections. (ROA.663-64). The Judge specifically stated:

As far as the intervening cause argument, the Court overrules that objection. His conduct was placing that deceased woman in the path of a Coast Guard vessel at night when he is aware himself, having–working in that area knows the unpredictability. I mean, there’s no traffic lights, like you can rely on on the street, to know that traffic is supposed to stop. I mean, it’s people come and go–or vessels come and go, it was at night, he–no human being would have a chance against even a smaller boat than a Coast Guard vessel, I would think, under those circumstances. You know, the short distance was–or somebody referred to the short distance. You know a short distance, even a pool, is dangerous if you’re not prepared and for the circumstances and so I

mean, just being in the water is dangerous, the fact that they needed flotation devices.

(ROA.663).

Pronouncement of Sentence

Despite the Court's determination that the PSR had made a correct determination regarding Guidelines calculations, the Judge made a departure downward in his punishment. The Court sentenced Mr. Ruiz-Hernandez to serve 80 months in the custody of the Bureau of Prisons because he had voluntarily disclosed to law enforcement the location of the body of Ms. Cervantes-Garcia. (ROA.674-75).

Conclusion of the Sentencing Hearing and Notice of Appeal

After imposing punishment, the Judge advised Mr. Ruiz-Hernandez he could appeal his sentence. (ROA.679). A final judgment was later entered. (ROA.213-19). Mr. Ruiz-Hernandez timely filed his notice of appeal on May 26, 2017. (ROA.192).

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. Overview

This Court in *United States v. Booker*, 534 U.S. 220 (2005), struck down the unconstitutional provisions of the Sentencing Reform Act, leaving in place what is now the governing structure for federal sentencing: under *Booker*, the absolute maximum sentence which a District Court may lawfully impose is a sentence whose length could be upheld on appeal as substantively reasonable. With reference to the “overarching” substantive standard Congress has established in the Sentencing Reform Act, a “reasonable” sentence

means one which a court could fairly find to be “not greater than necessary” to further the purposes of criminal sentencing. *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (explaining goal of 18 U.S.C. § 3553(a)’s “overarching instruction [is] to impose a sentence sufficient, but not greater than necessary, to accomplish the sentencing goals advanced in § 3553(a)(2)”). Historically, the *Apprendi* rule was equally applicable: under the Sixth Amendment, the sentence which a court imposes on a defendant must not exceed the maximum sentence which is legally authorized based on those facts either admitted by the defendant or found by a jury beyond a reasonable doubt. *See Blakely v. Washington*, 542 U.S. 296, 303 (2004) (explaining how *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is to be applied).

In and after *Booker*, this Honorable Court has made clear important principles of federal sentencing law. First, as the Court held in *Apprendi*, the Sixth Amendment limits the authority of a Judge to enhance or reduce a sentence based on facts not in the record. *Id.* Second, even if the District Court follows all of the decision making steps which the Sentencing Reform Act and the Rules of Criminal Procedure procedurally require, the sentence ultimately imposed must nevertheless be substantively reasonable as defined by the Act. Third, just as a sentence can be too lenient, (*i.e.*, substantively unreasonable because it is insufficient to achieve the purposes of sentencing); it can also be too harsh (*i.e.*, substantively unreasonable because it is greater than necessary to achieve those ends). Mr. Ruiz-Hernandez respectfully submits these principles compel the following conclusions: (1) any sentence imposed must comply with *Apprendi*; (2) the reasonableness

review contains a substantive component; (3) a within-Guidelines sentence is nevertheless substantively unreasonable if greater than necessary to serve the purposes of sentencing; and (4) under *Apprendi*, if a sentence would be substantively unreasonable absent a fact sufficiently in the record, then that sentence violates the Sixth Amendment.

II.

The Risk of Serious Bodily Injury or Death

It has been explained that defining the contours of the enhancement for an alleged creation of a risk of death or serious bodily injury “is dependent upon carefully applying the words of the guideline in a case-specific analysis.” *United States v. Solis-Garcia*, 420 F.3d 511, 516 (5th Cir. 2005). Matters concerning the risk, if any, created as a result of certain conduct will ultimately turn on whether it was reasonably foreseeable that the conduct did create the risk. *United States v. De Jesus-Ojeda*, 515 F.3d 437, 442-43 (5th Cir. 2008).

Mr. Ruiz-Hernandez asserted that it was not reasonably foreseeable that a Coast Guard boat—indeed, any vessel—would be running across the waters of a shipping channel, as opposed to the open-sea, in the dark at an accelerated rate of speed without its lights. The principal issue is based on “reasonable foreseeability” of death or serious bodily injury. *Id.* In this regard, Mr. Ruiz-Hernandez continues to assert it was not reasonably foreseeable that any vessel, much less a boat operated by a federal law enforcement and rescue agency, would be traveling the channel in such a dangerous manner.

In response to this argument, the Fifth Circuit confirmed that the risk of harm must be reasonably foreseeable. *United States v. Ruiz-Hernandez*, 890 F.3d 202, 212 (5th Cir. 2018). However, the Court provided a novel interpretation of this Guideline. The Court

determined the enhancement is appropriate if there is “only . . . *some* risk of death or serious bodily injury [which is] foreseeable, not the specific harm that actually occurred.” *Id.* (emphasis in original). This observation in turn led the Fifth Circuit to conclude that “the relevant inquiry focuses on whether the defendant’s conduct posed inherently dangerous risks to the aliens being transported.” *Id.* (citing *Solis-Garcia*, 420 F.3d at 516, quoting *United States v. Guerrero*, 313 F.3d 892, 896 (5th Cir. 2002)). The Court also reiterated that “the focus is exclusively on the defendant’s conduct, ignoring the results of that conduct.” *Id.* (emphasis in original) (quoting *United States v. Munoz-Tello*, 531 F.3d 1174, 1185 (10th Cir. 2008)).

In applying these legal concepts to the facts in this case, the Fifth Circuit concluded “it was reasonably foreseeable that a person swimming across a busy ship channel in the dark of night would be struck by a passing ship.” *Ruiz-Hernandez*, 890 F.3d at 212. The Court also referred to its previous discussion on the foreseeability of harm. *Id.* at 211. These observations were significant and should be noted:

Ruiz-Hernandez argues that it was not reasonably foreseeable that a Coast Guard vessel—which he contends was operating in violation of speed limitations, wake restrictions, and lighting requirements—would strike a person swimming across the ship channel. The thrust of his argument is that it is unforeseeable that a government vessel, the presence of which is intended to enforce the law and to protect and assist persons present in the channel, would operate in violation of the law and, in so doing, cause harm. We recognize the tragic irony of the circumstances of Cervantes’s death, but, as a legal matter, Ruiz-Hernandez confuses the foreseeability of *harm* with the foreseeability of the *manner* in which harm ultimately occurs. The foreseeability inquiry turns on whether “harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person.” *In re Signal Int’l, LLC*, 579 F.3d 478, 492 (5th Cir. 2009). “The precise nature of the [resulting] injury and the manner of its infliction is

immaterial . . . , so long as the injury is of a type that, in the circumstances, might reasonably have been expected to occur.” *Hall v. Atchison Topeka & Santa Fe Ry. Co.*, 504 F.2d 380, 385 (5th Cir. 1974). Here, it was reasonably foreseeable that a person swimming across a high-traffic ship channel in the dark of night would be struck by a passing ship.

That the ship’s lights were, we assume, not on at the time of the accident does not change our conclusion. The negligent acts of others are foreseeable and thus do not break foreseeability. *See Allied Chem. Corp. v. Hess Tankship Co. of Del.*, 661 F.2d 1044, 1060 (5th Cir. Unit A 1981) (“A subsequent negligent act does not excuse prior negligence except in most unusual circumstances.”). A ship travelling at night without lights is not so “extraordinary” that a reasonable person would not foresee it, *see Becker v. Tidewater, Inc.*, 586 F.3d 358, 372 (5th Cir. 2009) (explaining that only “highly extraordinary” actions will constitute a superseding cause of harm), and does not render Ruiz-Hernandez’s conviction a manifest miscarriage of justice. Accordingly, we affirm Ruiz-Hernandez’s conviction under [8 U.S.C.] § 1324(a)(1)(B).

Id. (footnote omitted).

Mr. Ruiz-Hernandez submits it was not reasonably foreseeable that a vessel large enough to kill would turn off its lights in a pitch black setting and turn on the accelerator. As the Court noted, this was a high traffic waterway, with no lighting. *Id.* at 211, 212. The channel is inside of a no wake zone. (ROA.427-28) (testimony establishing that vessels traveling waters of Brownsville shrimp basin must “slow down” to prevent any “wakes” from causing damage or harm). In this regard, it is the equivalent of walking across a residential street at night where it would not be reasonably foreseeable that a vehicle would be speeding down the road with its lights having been turned off. Counsel submits it is not reasonably foreseeable that others would act in such a dangerous activity. Indeed, even the Fifth Circuit has taken notice that running a vessel at an excessive rate of speed without lights is a provocative, dangerous act. *United States v. Francisco Hernandez*, Cause No.

14-41184, Document: 00513264239 (5th Cir. Nov. 9, 2015) (unpublished) (citing *United States v. Watson*, 611 F.App'x 647, 663 (11th Cir. 2015) (applying U.S.S.G. § 2L1.1(b)(6) enhancement to pilot of overcrowded vessel which was speeding without its lights on and then attempted to evade Coast Guard)). Accordingly, Mr. Ruiz-Hernandez respectfully submits compelling reasons exist for granting this petition and removing the enhancement under U.S.S.G. § 2L1.1(b)(6) which was imposed upon his sentence in this case.

III. Resulting Death

U.S.S.G. § 2L1.1(b)(7) provides for an increase in the offense level if a person died in the course of smuggling illegal aliens. In this case, the Fifth Circuit held this section only requires “that a defendant’s conduct be the but-for, not proximate, cause of the resulting death.” *Ruiz-Hernandez*, 890 F.3d at 212. To this end, the Fifth Circuit relied on this Court’s holding in *Barrage v. United States*, 134 S.Ct. 881, 888 (2014), wherein it was noted that “but-for” causation exists if the result would not have occurred without the conduct at issue. *Id.* The Fifth Circuit cited *Barrage* and explained that “a particular result can be caused by multiple necessary factors—multiple but-for causes—yet one of those single factors will still be considered a but-for cause so long as the result would not have occurred in its absence.” *Id.* at 212-13. Hence, the Fifth Circuit found causation because but-for the smuggling across the ship channel, Ms. Cervantes would not have died. *Id.* at 213.

However, Mr. Ruiz-Hernandez’s argument under *Barrage* was not addressed by the Fifth Circuit. Specifically, this crucial observation by this Court was not addressed:

Thus, “where A shoots B, who is hit and dies, we can say that A [actually] caused B’s death, since but for A’s conduct B would not have died.” [1 W. LaFave, Substantive Criminal Law § 6.4(a), pp. 467-468 (2d ed. 2003)] (italics omitted). This same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel’s back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived. *See, e.g., State v. Frazier*, 339 Mo. 966, 974-975 (98 S.W.2d 707, 712-713 (1936)).

Barrage, 134 S.Ct. at 888 (full citation to LaFave provided from earlier portion of opinion).

Respectfully, this explanation, and the Fifth Circuit’s corresponding failure to discuss the same, is fatal to the holding on appeal on the causation of death. Applying the holding in *Barrage* to the facts of this case: swimming across the channel with a flotation device that was working perfectly until a fast moving, lightless, vessel became “the straw that broke the camel’s back” so to speak in this case. *Id.* Despite the citation to *Barrage*, the Fifth Circuit opinion does not respond to a crucial aspect of limiting the application of this profound sentencing enhancement. This decision therefore mandates this Court’s use of its discretionary authority to grant this writ.

CONCLUSION

For the reasons set forth above, Mr. Ruiz-Hernandez respectfully submits, on the important issue of federal sentencing concerns, compelling reasons are presented in support of discretionary review by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner herein respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari and review the

decision of the United States Court of Appeals for the Fifth Circuit which affirmed the sentence imposed by the District Court. Mr. Ruiz-Hernandez also respectfully requests any further relief to which he may be entitled under the law and in equity.

Respectfully Submitted,



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