No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROGELIO ORTIZ-MARTINEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this direct criminal appeal, the Fifth Circuit initially denied petitioner's challenge to the 16-level sentencing enhancement he received under the illegal-reentry Sentencing Guideline, based on circuit law holding that the Texas burglary statute was a divisible, elements-based statute. That enhancement increased Mr. Ortiz-Martinez's Guidelines range by at least three years, and he received a within-Guidelines sentence. Subsequently, the en banc Fifth Circuit reversed the circuit law and held, exactly as Mr. Ortiz-Martinez had persistently argued, that the Texas statute is not divisible, and reaffirmed that Texas burglary is broader than generic burglary, and thus does not qualify for enhancement.

After the en banc change in the law, Mr. Ortiz-Martinez moved to file a rehearing petition out of time, because the Fifth Circuit had retained jurisdiction over the appeal by withholding its mandate. The Fifth Circuit initially granted Mr. Ortiz-Martinez leave to file the untimely petition for rehearing. However, the Fifth Circuit subsequently granted reconsideration and instead denied the motion for leave to file for rehearing by treating it a motion to recall the mandate, despite the fact that the court had never issued its mandate. The day after it denied the motion to "recall" the mandate, the Fifth Circuit issued its mandate for the first time.

I. In a direct criminal appeal, is it a serious departure from the accepted and usual course of judicial proceedings when a federal court of appeals refuses to consider an intervening change in the controlling law, issued while the court still had jurisdiction over the appeal, that would have resulted in a three-year reduction in a prisoner's Sentencing Guidelines range?

II. In such a case, does it represent a serious departure from the accepted and usual course of judicial proceedings for the court of appeals to construe a motion to file an out-of-time rehearing petition as a motion to recall the mandate in order to deny relief to a prisoner, when in fact the mandate had not yet been issued?

PARTIES TO THE PROCEEDINGS

All parties to petitioners' Fifth Circuit proceedings are named in the caption of the case before this Court.

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PRAYER

Petitioner Rogelio Ortiz-Martinez prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit, and to review the order denying his motion to file an amended petition for rehearing out of time, by instead treating that motion as a motion to recall the unissued mandate.

OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, Pet. App. 1a-2a, is unpublished and reported at 692 Fed. Appx. 768. The Fifth Circuit's order granting the United States' motion for reconsideration and denying Mr. Ortiz-Martinez leave to file for rehearing out of time is included in the appendices at Pet. App. 43a-44a.

JURISDICTION

The Fifth Circuit's judgment and opinion was entered on July 10, 2017. Petitioner's timely petition for rehearing was denied on August 7, 2017. This Court denied a petition for a writ of certiorari on February 20, 2018. Following an en banc change in the law, the Fifth Circuit initially granted Mr. Ortiz-Martinez leave to file an untimely petition for rehearing on May 22, 2018, but subsequently granted the United States' motion for reconsideration and denied the motion for leave to file for rehearing (by treating it a motion to recall the mandate) on June 19, 2018. This petition is timely filed within 90 days of the Fifth Circuit's denial of untimely rehearing. See Sup. Ct. R. 14(3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

The text of Federal Rules of Appellate Procedure 40 and 41 and United States Sentencing Guideline § 2L1.2 (2015) are reproduced in the appendices at Pet. App. 3a-5a, 6a-9a, and 10a-11a, respectively.

STATEMENT OF THE CASE

Petitioner Rogelio Ortiz-Martinez was convicted by guilty plea of being an alien found unlawfully present in the United States after deportation, in violation of 8 U.S.C. § 1326(a) and (b). Pet. App. 1a. At sentencing, using the 2015 edition of the United States Sentencing Guidelines ("USSG"), the district court overruled petitioner's objection and assessed a 16-level enhancement under USSG § 2L1.2, based on a determination that Mr. Ortiz-Martinez's 2000 Texas felony conviction for burglary of a habitation qualified as a "crime of violence" under § 2L1.2(b)(1)(A)(ii). Pet. App. 1a. With the enhancement, Mr. Ortiz-Martinez was subject to a Guidelines imprisonment range of 77 to 96 months. The district court sentenced him to 77 months of imprisonment. Pet. App. 1a.

Had the district court not erroneously increased Mr. Ortiz-Martinez's offense level by 16 levels, his total offense level would have been, at most, 13. Combined with his criminal history category of VI, this would have resulted in a Guidelines imprisonment range of 33 to 41 months—36 to 44 months lower than the 77-month sentence imposed under the erroneous 77-to-96 month range.

Mr. Ortiz-Martinez diligently challenged the 16-level sentencing enhancement in the district court, in the Fifth Circuit, and in this Court. In the district court and in his letter brief to the Fifth Circuit, he acknowledged that his challenge was foreclosed in the Fifth Circuit by then-controlling law, United States v. Uribe, 838 F.3d 667 (5th Cir. 2016), which held that the Texas burglary statute was a divisible, elements-based statute. Pet. App. 1a-2a. Mr. Ortiz-Martinez's consistent argument was that his Texas conviction for burglary of

a habitation does not qualify as a crime of violence under USSG § 2L1.2, because the Texas burglary statute, Texas Penal Code § 30.02, is: (1) broader than generic "burglary of a dwelling" because it requires no intent to commit a crime at the time of the unlawful entry or remaining within the habitation; and (2) indivisible under Mathis v. United States, 136 S. Ct. 2243 (2016). Pet. App. 1a-2a.

Because the issue was foreclosed in the Fifth Circuit, Mr. Ortiz-Martinez filed a motion for summary disposition and a letter brief, in order to expeditiously seek further review, arguing that Uribe was wrongly decided in light of Mathis v. United States, 136 S.Ct. 2243 (2016). See Appellant's Unopposed Motion for Summary Disposition and Letter Brief, 5th Cir. No. 16-41514, Dkt. Entry Nos. 26 & 27 (Mar. 14, 2017). The Fifth Circuit subsequently granted the motion for summary disposition and affirmed the district court, in reliance on Uribe. Pet. App. 1a-2a.

On July 19, 2017, Mr. Ortiz-Martinez filed a timely petition for panel hearing in light of the Fifth Circuit's July 10, 2017 grant of en banc rehearing in United States v. Herrold, in which the petitioners asked the en banc Fifth Circuit to overrule Uribe. He requested that the panel stay the resolution of the rehearing petition until a decision was issued in Herrold and then apply Herrold to his case. See Appellant's Petition for Panel Rehearing, 5th Cir. No. 16-41514, Dkt. Entry. No. 46 (July 19, 2017). The Court denied that petition. See Court Order, 5th Cir. No. 16-41514, Dkt. Entry. No. 49 (Aug. 7, 2017). However, the Fifth Circuit did not issue its mandate in this case.

Mr. Ortiz-Martinez sought and received two extensions of time—totaling 60 days, the maximum time that this Court will extend the certiorari deadline, see Supreme Court Rule 13.5— in which to file a petition for a writ of certiorari in this Court, based on the fact that Herrold was still pending in the Fifth Circuit, and might change the controlling circuit law. See Docket, Ortiz-Martinez v. United States, Supreme Court No. 17-7395. Mr. Ortiz-Martinez then filed a petition for a writ of certiorari, arguing that the Fifth Circuit's resolution of the divisibility of the Texas burglary statute was incorrect under Mathis. See Petition for a Writ of Certiorari, Ortiz-Martinez, No. 17-7395 (Jan. 4, 2018).

This Court denied that petition on February 20, 2018. On that same day, the Fifth Circuit issued its en banc decision in Herrold, which: (1) overruled Uribe to hold that the Texas burglary statute, Tex. Penal Code § 30.02 is an indivisible statute, not subject to application of the modified categorical approach, and; (2) reaffirmed that Texas burglary is broader than generic burglary, because it does not require an intent to commit a crime at the time of the unprivileged entry into or remaining within the habitation or building. See United States v. Herrold, 883 F.3d 517, 522-24, 530-36 (5th Cir. 2018) (en banc), pets. for cert. filed (U.S. April 18, 2018) (No. 17-1445), and (U.S. May 21, 2018) (No. 17-9127). Herrold confirmed Mr. Ortiz-Martinez's consistent position that the Texas burglary statute is overbroad and indivisible, and cannot qualify as a crime of violence under § 2L1.2. See id. at *3-4, 9-13.

On February 22, 2018, after the Fifth Circuit's en banc opinion in Herrold, Mr. Ortiz-Martinez filed a motion in the Fifth Circuit for leave to file an amended petition for

rehearing out of time, asserting that he was entitled to resentencing under Herrold. Pet. App. 12a-41a. In that motion, he pointed out that the Fifth Circuit still had not issued its mandate in the case and therefore retained jurisdiction to grant rehearing. Pet. App. 33a. The government opposed Mr. Ortiz-Martinez's motion for leave to file the amended petition out of time, but declined to file any response to the motion.

On May 22, 2018, in a single-judge order, Judge Edith H. Jones granted Mr. Ortiz-Martinez's motion to file the amended petition for rehearing, and ordered the United States to file a response to the petition for rehearing. Pet. App. 42a. In its response to the amended petition for rehearing, the government acknowledged that Mr. Ortiz-Martinez was entitled to resentencing under Herrold, but sought reconsideration of Judge Jones' order granting Mr. Ortiz-Martinez leave to file the amended petition for rehearing. The United States requested that the Fifth Circuit simply act as if it had issued its mandate, retroactively treat Mr. Ortiz-Martinez's motion for leave to file the rehearing out of time as a motion to recall the mandate, and deny the motion. See United States' Response to Amended Petition for Panel Rehearing and Incorporated Motion for Reconsideration, 5th Cir. No. 16-41514, Dkt. Entry No. 74 (May 29, 2018). Petitioner filed a reply to the United States' response, pointing out that the United States' suggestion was contrary to the Fifth Circuit's longstanding practice regarding the issuance of mandates and was contrary to the Fifth Circuit's interpretation of its own authority under Federal Rules of Appellate Procedure 40 and 41. See Reply to the United States' Response, 5th Cir. No. 16-41514, Dkt. Entry No. 78 (June 4, 2018).

On June 19, 2018, the Fifth Circuit granted the United States' motion for reconsideration and, without any explanation or reasoning, stated that "appellant's amended petition for rehearing must be construed as a motion to recall the mandate, and the motion to recall the mandate is DENIED pursuant to Federal Rule of Appellate Procedure 41(d)(2)(D)." Pet. App. 43a-44a.

On June 20, 2018, the Fifth Circuit actually issued the mandate for the first time in this case, despite having denied what it construed as a motion to "recall" the mandate the previous day. Pet. App. 45a (providing that the judgment was "issued as the mandate on Jun. 20, 2018").

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's refusal to apply new controlling law announced while that court still had jurisdiction over this appeal conflicts with this Court's precedent and precedent from other circuits, and so far departs from the accepted and usual course of judicial proceedings that exercise of this Court's supervisory power is warranted.

The Fifth Circuit refused to grant out-of-time rehearing to apply new controlling law announced by the en banc Fifth Circuit, pursuant to which petitioner, a federal prisoner, would be entitled to resentencing, despite the fact that the Fifth Circuit had not issued its mandate in this case and thus retained jurisdiction over this direct appeal. The Fifth Circuit's refusal to grant rehearing to apply new controlling law issued while it retained jurisdiction over this appeal conflicts with precedent from this Court, as well as precedent from other circuits. Instead, the Fifth Circuit departed from its own longstanding procedures governing the issuance of mandates, treated Mr. Ortiz-Martinez's motion for leave to file out-of-time rehearing as a motion to "recall" the mandate that had never issued, and then denied the motion to "recall" the unissued mandate. Moreover, the Fifth Circuit's refusal to grant rehearing resulted in fundamentally unfair and disparate treatment of Mr. Ortiz-Martinez, compared to other prisoners in similar circumstances, who have received the benefit of the changed law.

Because there was a change in the controlling en banc law issued while petitioner's appeal was still pending in the Fifth Circuit, under this Court's precedent, the Fifth Circuit should have granted rehearing to modify its earlier opinion. See Huddleston v. Dwyer, 322 U.S. 232, 235 (1944); see also Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 428-30 (2d Cir.), cert. denied, 400 U.S. 829 (1970). Pursuant to Federal Rule of

Appellate Procedure 40(a)(1), federal courts of appeals have the authority to enlarge the time for filing a petition for rehearing, at least "to serve the interests of justice." Knoblauch v. C.I.R., 752 F.2d 125, 128 (5th Cir. 1985); see Young v. Harper, 520 U.S. 143, 147 n.1 (1997) (noting that court of appeals had power to allow a petition for rehearing and to treat it as timely although it was filed late).

This Court has vacated a court of appeals' judgment when it failed to consider an intervening opinion that changed the controlling law, which was handed down after the time for rehearing had expired but while jurisdiction remained in the appellate court. See Huddleston, 322 U.S. at 235. In Huddleston, a diversity case, the Tenth Circuit had affirmed the district court's denial of a petition for mandamus based on its conclusion that Oklahoma law did not provide a county with a certain kind of tax authority that the petitioners' claims depended on. See id. at 234. Petitioners filed for rehearing, which was denied. Id. at 235. More than two months later—and six months after entry of judgment in the Tenth Circuit—petitioners moved for leave to file a second petition for rehearing, which raised a newly issued Oklahoma Supreme Court decision that overruled the case law on which the Tenth Circuit had relied in affirming the denial of mandamus. Id. The Tenth Circuit denied the rehearing petition. Id.

This Court vacated the Tenth Circuit's opinion, holding that, prior to the entry of final judgment, where state law provided the controlling rule of decision, the Second Circuit should have entertained the petition for rehearing based on the change in state law. See id. at 236-37. The Court held that the new Oklahoma Supreme Court decision "has at

least raised such doubt as to the applicable Oklahoma law as to require its reexamination in the light of that opinion and of later decisions of the Supreme Court of Oklahoma on which respondents rely, before pronouncement of a final judgment in the case by the federal courts." Id. This Court vacated the Tenth Circuit's judgment and remanded the case for reconsideration by that court, in light of the changed law. Id. at 237-38.

Other circuits likewise allow an out-of-time petition for rehearing based on a subsequent change in the law, in order to modify what would otherwise be an erroneous decision. See Braniff Airways, 424 F.2d at 428-30. In Braniff Airways, the Second Circuit relied on Florida state case law to decide the statute of limitations on an implied-warranty claim. See id. at 428-29. The decision was filed May 19, 1969 and a petition for rehearing en banc was denied on June 13, 1969. See id. at 429. In July 1969, the Florida Supreme Court reversed the Florida case law on which the Second Circuit had relied, calculating a different date for the statute of limitations for implied-warranty claims. See id. The defendants filed a petition for certiorari on September 11, 1969, which was denied on December 8, 1969. Id. After certiorari was filed, but before it was denied, plaintiffs learned of the Florida Supreme Court's decision and filed a motion for "modification of decision of the court or for enlargement of the time to petition for rehearing." Id.

Four months after the denial of certiorari, the Second Circuit held that "[i]t seems clear to us that we have the power to enlarge the time to petition for rehearing, and to modify an erroneous decision although the time for rehearing may have expired." See id. (citations omitted). The Second Circuit noted that it had long shown a willingness to correct

an erroneous interpretation of the law when an intervening decision indicated a better view, and considered "the proper resolution of the controversy more important than rigid adherence to" procedural rules. Braniff Airways, 424 F.2d at 429 (citing Johnson v. Cadillac, 261 F. 878 (2d Cir. 1919)). The Second Circuit accordingly granted the petition to enlarge the time for filing a petition for rehearing and for rehearing, and reinstated one of the claims it had previously dismissed as barred by the statute of limitations. Braniff Airways, 424 F.2d at 430.

Prior to Mr. Ortiz-Martinez's motion for leave to file an amended petition for rehearing out of time, the Fifth Circuit had not issued the mandate in this case. The Fifth Circuit thus retained jurisdiction over the appeal, and had the authority to modify its opinion. See Charpentier v. Ortco Contractors, 480 F.3d 710, 713 (5th Cir. 2007); Johnson v. Bechtel Assocs. Prof'l Corp., D.C., 801 F.2d 412, 415 (D.C. Cir. 1986). The Fifth Circuit has long held that Federal Rule of Appellate Procedure 41(b) grants it the "power to shorten or enlarge the specified period [for issuance of the mandate] by order," including by informal order to the clerk. Sparks v. Duval County Ranch Co., Inc., 604 F.2d 976, 979 (5th Cir. 1979), judgment aff'd, 449 U.S. 24 (1980).[1] The Fifth Circuit has also asserted

[1] In accordance with the procedure outlined in Sparks, the Fifth Circuit regularly withholds issuance of a mandate in one case pending the resolution of another case or proceeding that may affect the controlling law. See, e.g., Rocha v. Thaler, 619 F.3d 387, 408 (5th Cir. 2010) (instructing the clerk not to issue the mandate until the resolution of Balentine v. Thaler, 609 F.3d 729 (5th Cir. 2010)); Nelson v. Quarterman, 472 F.3d 287, 349-50 (5th Cir. 2006) (Smith, J., dissenting) (discussing multiple cases in which a mandate was held pending potential en banc resolution of an issue); Huss v. Gayden, 5th Cir. No. 04-60962, 2006 WL 5013195, at *1 (5th Cir. Dec. 27, 2006) (unpublished) (granting panel rehearing and instructing the clerk to hold the mandate until further direction of the Court); United States v. Branch, 91 F.3d 699, 711 (5th Cir. 1996) (applying binding precedent but holding the mandate pending en banc resolution of United States v. Kirk, 70 F.3d 791 (5th Cir. 1995)); Nichols v. Petroleum Helicopters, Inc., 995 F.2d 85, 85 (5th Cir. 1993), opinion after grant of reh'g, 17 F.3d 119 (5th Cir. 1994) (discussing the procedure of a member

the authority to withhold a mandate after this Court denies a petition for a writ of certiorari, so long as it was withholding the mandate for a reason independent of the pending petition for certiorari. See First Gibraltar Bank v. Morales, 42 F.3d 895, 898 (5th Cir. 1995).

But the Fifth Circuit departed from its longstanding procedures regarding the issuance of mandates to deny relief to Mr. Ortiz-Martinez. It initially granted him leave to file an untimely petition for rehearing, based on the changed law after Herrold. Pet. App. 42a. As Mr. Ortiz-Martinez pointed out in his motion for leave to file that petition for rehearing, the Fifth Circuit had not issued the mandate in the case and so it retained jurisdiction to grant rehearing. Pet. App. 33a. But subsequently, the court granted the United States' motion for reconsideration and instead treated the motion for leave to file a rehearing petition out of time as a motion to "recall" the mandate, and then denied the motion to "recall" the never-issued mandate. Pet. App. 43a-44a. The day after it denied the motion to "recall" the mandate—that is, Mr. Ortiz-Martinez's motion to file for rehearing out of time—the Fifth Circuit actually issued the mandate for the first time. Pet. App. 45a.

To deny relief to Mr. Ortiz-Martinez, the Fifth Circuit ignored its own precedent recognizing that new controlling law should be applied to a pending case if it is issued while jurisdiction remains in the appellate court. See United States v. Middlebrooks, 624 F.2d 36 (5th Cir. 1980). In the original panel opinion in Middlebrooks, the Fifth Circuit rejected the appellant's argument that the district court erred in imposing a special parole

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of the Court holding a mandate to question the propriety of the resolution of a case); Babineaux v. McBroom Rig Bldg. Serv., Inc., 811 F.2d 852, 853 (5th Cir. 1987) (instructing the clerk to hold the mandate pending resolution of an issue by the Louisiana Supreme Court).

term under 21 U.S.C. § 846, relying on previous Fifth Circuit precedent. Subsequent to the filing of a rehearing petition, this Court issued Bilfulco v. United States, 447 U.S. 381 (1980), which overruled Fifth Circuit precedent on the special-parole issue. See Middlebrooks, 624 F.3d at 37. The Fifth Circuit denied the first petition for rehearing. Id. However, after the appellant filed an amended petition for rehearing calling the Fifth Circuit's attention to the Bilfulco decision, the Fifth Circuit granted rehearing and issued a new opinion holding that "[b]ecause Bilfulco was decided while the appellant's case was pending before this court, it would be an overly technical reliance on the time requirements for filing a petition for rehearing to foreclose the appellant from the benefits of that decision." See id.; see also First Gibraltar Bank v. Morales, 42 F.3d 895, 896-97 (5th Cir. 1995) (vacating prior opinion to apply new state statute that became effective after the decision, but before the issuance of the mandate).

Similarly, in United States v. Taylor, 889 F.2d 272 (5th Cir. 1989), the Fifth Circuit granted an out-of-time petition for panel rehearing and vacated its previous opinion in the case, on the basis of a conflicting, subsequently published opinion in United States v. Lopez, 871 F.2d 513 (5th Cir. 1989). See Taylor, 889 F.2d at 272. A petition for a writ certiorari had already been denied by this Court prior to the Fifth Circuit's grant of rehearing, in which Justice Stevens noted the conflicting Fifth Circuit decisions and called on the Fifth Circuit to "exercise additional care in the administration of justice in this case." See Taylor v. United States, 493 U.S. 906 (1989) (mem.).

The Fifth Circuit's error in this case is even more egregious, because a change in the application of a Guidelines enhancement directly impacts Mr. Ortiz-Martinez's liberty. See Molina-Martinez v. United States, 136 S. Ct. 1338, 1346 (2016) ("The Guidelines inform and instruct the district court's determination of an appropriate sentence. In the usual case, then, the systemic function of the selected Guidelines range will affect the sentence."). The Guidelines miscalculation increased Mr. Ortiz-Martinez's range by at least three years, from the correct range of 33 to 41 months, all the way up to the erroneously enhanced range of 77 to 96 months. And the district court imposed a Guidelines sentence of 77 months.

As this Court has recently reminded the Fifth Circuit, "[t]o a prisoner, this prospect of additional time behind bars is not some theoretical or mathematical concept." Rosales-Mireles v. United States, 138 S. Ct. 1897, 1907 (2018) (quoting Barber v. Thomas, 560 U.S. 474, 504 (2010) (Kennedy, J., dissenting)). Instead, "any amount of actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration." Rosales-Mireles, 138 S. Ct. at 1907 (internal quotation marks and alterations omitted) (quoting Glover v. United States, 531 U.S. 198, 203 (2001), and United States v. Jenkins, 854 F.3d 181, 192 (2d Cir. 2017)). "It is crucial in maintaining public perception of fairness and integrity in the justice system that courts exhibit regard for fundamental rights and respect for prisoners 'as people.'" Rosales-Mireles, 138 S. Ct. at 1907 (quoting T. Tyler, Why People Obey the Law 164 (2006)).

The Fifth Circuit's refusal to consider and apply changed controlling law to Mr. Ortiz-Martinez also resulted in starkly disparate treatment between him and other prisoners. "Uniformity and proportionality in sentencing are achieved, in part, by the Guidelines' significant role in sentencing." Molina-Martinez, 136 S. Ct. at 1342 (citing Peugh v. United States, 133 S.Ct. 2072, 2082-83 (2013)); see also Rosales-Mireles, 138 S. Ct. at 1908. Yet by refusing to apply the correct controlling law to Mr. Ortiz-Martinez's Guidelines calculation, the Fifth Circuit refused to treat Mr. Ortiz-Martinez the same as other defendants in similar or even identical circumstances, without justification. After en banc review was granted in Herrold, Mr. Ortiz-Martinez filed a timely petition for rehearing and requested that the Fifth Circuit hold that petition pending the resolution of Herrold, and then apply Herrold in his case. See Appellant's Petition for Panel Rehearing, 5th Cir. No. 16-41514, Dkt. Entry. No. 46 (July 19, 2017). The Fifth Circuit denied that petition without explanation. See Court Order, 5th Cir. No. 16-41514, Dkt. Entry. No. 49 (Aug. 7, 2017).

But in numerous other cases, the Fifth Circuit granted a similar request to stay resolution of a petition for panel rehearing, or simply held a petition for panel rehearing during the pendency of Herrold, and then vacated and remanded those defendants' sentences after Herrold. See United States v. Rodriguez-Cepeda, 5th Cir. No. 16-41243, 714 Fed. Appx. 442, 443 (5th Cir. 2018) (unpublished); United States v. Daniels, 5th Cir. No. 16-10232, 714 Fed. Appx. 413, 413 (5th Cir. 2018) (unpublished); United States v. Gasca, 5th Cir. No. 16-40189, 714 Fed. Appx. 414, 414 (5th Cir. 2018) (unpublished);

United States v. Ramirez-Villalzana, 5th Cir. No. 16-40529, 729 Fed. Appx. 344, 344 (5th Cir. 2018); United States v. Reyna-Lozano, 5th Cir. No. 16-40086, 730 Fed. Appx. 220, 221 (5th Cir. 2018) (unpublished); United States v. Bacio-Gonzales, 5th Cir. No. 16-40663, 713 Fed. Appx. 357, 357-58 (5th Cir. 2018) (unpublished).

Many other pending cases were also placed in abeyance pending the resolution of Herrold, either at the request of the defendant or sua sponte by the Fifth Circuit, and the Fifth Circuit vacated and remanded many of those sentences after Herrold. See, e.g., United States v. Maldonado-Flores, 5th Cir. No. 17-50741, 734 Fed. Appx. 285, 285-86 (5th Cir. 2018) (unpublished); United States v. Gallegos-Lira, 5th Cir. No. 17-50210, 734 Fed. Appx. 283, 284 (5th Cir. 2018) (unpublished); United States v. Vera, 5th Cir. No. 17-20177, 734 Fed. Appx. 263, 264 (5th Cir. 2018) (unpublished); United States v. Valle-Jaimes, 5th Cir. No. 16-50993, 733 Fed. Appx. 200, 200-01 (5th Cir. 2018) (unpublished); United States v. Elrod, 5th Cir. No. 16-10355, 730 Fed. Appx. 239, 240 (5th Cir. 2018) (unpublished); United States v. Prentice, 5th Cir. No. 17-10113, 721 Fed. Appx. 393, 393-94 (5th Cir. 2018) (unpublished); United States v. Hernandez-Saenz, 5th Cir. No. 16-10084, 733 Fed. Appx. 144, 146, 148 (5th Cir. 2018) (unpublished); United States v. Flores, 5th Cir. No. 16-40622, 730 Fed. Appx. 216, 217 (5th Cir. 2018) (unpublished); United States v. Vela, 5th Cir. No. 16-41000, 729 Fed. Appx. 370, 371 (5th Cir. 2018) (unpublished).

As a result, the defendants in those numerous other cases, whose appeals raised a similar issue as Mr. Ortiz-Martinez's, and whose appeals were pending at the same time,

received the benefit of Herrold, while Mr. Ortiz-Martinez did not. He instead remains sentenced under a 16-level enhancement that, after Herrold, is clearly erroneous. All this, despite Mr. Ortiz-Martinez's persistent and diligent challenge to the 16-level enhancement in every court at every stage of his case.

Though there must be limits to the doctrines relating to out-of-time rehearing, granting Mr. Ortiz-Martinez the right to benefit from controlling en banc law that was issued while jurisdiction remained at the Fifth Circuit falls well within them. The interests of justice clearly dictate that the Fifth Circuit should have granted Mr. Ortiz-Martinez untimely rehearing. Mr. Ortiz-Martinez should benefit from the en banc Fifth Circuit's decision in Herrold, where he preserved his claim in the district court and pursued it on appeal, both in the Fifth Circuit and in this Court, but was prevented from succeeding on appeal by the existence of circuit precedent that has now been abrogated by the en banc Fifth Circuit, in an opinion that was issued before the Fifth Circuit's judgment was final in his case. See Huddleston, 322 U.S. at 235; Middlebrooks, 624 F.2d at 37; Braniff Airways, 424 F.2d at 428-30.

The Fifth Circuit erroneously refused to consider and apply the changed controlling law that was issued while this case remained on direct appeal in that court. That changed law would require Mr. Ortiz-Martinez's resentencing under a lower Guidelines range. In these circumstances, the Fifth Circuit's refusal to consider that change in controlling law so far departs from the accepted and usual course of judicial proceedings that exercise of this Court's supervisory power is warranted to correct the error. See Sup. Ct. R. 10(a).

II. Granting the petition, vacating the Fifth Circuit's decision, and remanding for reconsideration in light of the change in Fifth Circuit law may be appropriate in this case.

This Court may wish to consider granting the petition, vacating the Fifth Circuit's judgment, and remanding petitioner's case for reconsideration in light the Fifth Circuit's en banc decision in Herrold. See 28 U.S.C. § 2106; Lawrence v. Chater, 516 U.S. 163, 166-67 (1996) (discussing the standards for a GVR order); Stutson v. United States, 516 U.S. 193, 194 (1996) (applying the GVR-order standards to criminal cases).

This Court has explained that an order granting, vacating and remanding ("a GVR order") may be appropriate "[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation. . . ." Lawrence, 516 U.S. at 167. Indeed, that was precisely the action this Court took in Huddleston, when a state-court decision changed the controlling law subsequent to the Tenth Circuit's decision in a diversity case. See Huddleston, 322 U.S. at 236-38; see also Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co., 520 U.S. 893, 894. 896 (1997) (issuing a GVR order when state law changed after the court of appeals' decision in a diversity case).

In accordance with these standards, this Court recently issued two GVR orders in light of intervening en banc authority in two criminal cases out of the Eighth Circuit. See

Brown v. United States, 138 S. Ct. 1545, No. 17-6344 (Apr. 16, 2018); Sykes v. United States, 138 S. Ct. 1544, No. 16-9604 (Apr. 16, 2018). In both cases, the Court vacated and remanded in light of subsequent en banc authority that either expressly overruled the panel decision below (petitioner Sykes' case), or expressly overruled the decision relied upon by the panel below (petitioner Brown's case). The situation is the same in Mr. Ortiz-Martinez's case, where the intervening en banc authority of Herrold overruled the Fifth Circuit's decision in Uribe, the decision relied on by the panel to deny him relief. Pet. App. 1a-2a; Herrold, 883 F.3d at 529.[2] This Court has also previously granted a petition for a writ of certiorari and vacated the judgment when the Fifth Circuit refused to apply its binding precedent, and instead made an erroneous interpretation of a Sentencing Guideline. See Salinas v. United States, 547 U.S. 188, 188 (2006).

A GVR order may thus be appropriate to return this case to the jurisdiction of the Fifth Circuit to consider the application of the changed law, particularly given the direct impact the error had on Mr. Ortiz-Martinez's Sentencing Guidelines range, and thus on the length of his sentence. The Fifth Circuit denied Mr. Ortiz-Martinez leave to file an amended rehearing petition in light of Herrold, and instead pretended that it had issued the mandate on a previous date, treated his motion to file a rehearing as a motion to recall the mandate, and denied that motion to "recall" the mandate. Pet. App. 43a-45a. By so doing, the Fifth Circuit refused to consider the meaning or application of Herrold in this case. But

[2] In fact, if not for the unlucky timing of his petition in this Court being denied on the same day that the Fifth Circuit issued the en banc opinion in Herrold, Mr. Ortiz-Martinez could have requested the same relief as the petitioners in Sykes and Brown on his first petition for a writ of certiorari.

the application of Herrold is dispositive in this case, because it means that the 16-level enhancement cannot apply and Mr. Ortiz-Martinez is entitled to resentencing under a lower Guidelines range.

"Finally, it is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated." Stutson, 516 U.S. at 196-97. This Court has noted specifically in the context of GVR orders that "procedural accommodations to prisoners are a familiar aspect of our jurisprudence." Id. (citing 28 U.S.C. § 2255 (1988 ed.) (habeas review in spite of an adverse final appellate decision); Evitts v. Lucey, 469 U.S. 387 (1985) (relief for ineffective assistance of retained counsel on appeal); Schacht v. United States, 398 U.S. 58, 63-64 (1970) (unlike in civil cases, time limits for petitions for certiorari in criminal cases are not jurisdictional)). A GVR order would also fulfill this Court's guidance to courts of appeals that they not lose sight of the additional months and years a person may spend in prison as a result of judicial errors, when the cost of correction with a resentencing proceeding using the right Guidelines range is so small. See Rosales-Mireles, 138 S. Ct. at 1907-08.

In this case, a GVR order guarantees Mr. Ortiz-Martinez full and fair consideration of his rights in light of the entire circumstances of his case and allows him to receive the benefit of the changed controlling law that the Fifth Circuit erroneously refused to consider. See Stutson, 516 U.S. at 196-97.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari. Given the en banc change in the controlling Fifth Circuit law resulting from Herrold, a GVR order for the Fifth Circuit to reconsider its decision may be appropriate.

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Respectfully submitted,

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