692 Fed.Appx. 768 (Mem)
This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee
v.
Rogelio ORTIZ-MARTINEZ, Defendant-Appellant

No. 16-41514
|
Summary Calendar
|
Filed July 10, 2017

Appeal from the United States District Court for the Southern District of Texas, USDC No. 1:16-CR-498-1

Attorneys and Law Firms

Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX, for Plaintiff-Appellee

Marjorie A. Meyers, Federal Public Defender, Kayla R. Gassmann, Assistant Federal Public Defender, Federal Public Defender's Office, Southern District of Texas, Houston, TX, for Defendant-Appellant

Before JONES, WIENER, and CLEMENT, Circuit Judges.

Opinion

PER CURIAM:*

Rogelio Ortiz-Martinez appeals the 77-month sentence imposed following his guilty plea conviction for being present in the United States following removal. He contends that the district court erred by ***769** enhancing his sentence under § 2L1.2(b)(1)(A)(ii) of the 2015 version of the Sentencing Guidelines. The enhancement was based on a determination that his conviction for burglary of a habitation under Texas Penal Code § 30.02 was equivalent to a conviction for the generic offense of "burglary of a dwelling." Ortiz-Martinez argues that, in light of *Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), § 30.02 defines a single indivisible offense too broad to meet that generic definition, and that the district court erred when it narrowed his offense of conviction using the modified categorical approach.

In *United States v. Conde-Castaneda*, 753 F.3d 172, 175-76 (5th Cir. 2014), this court held that § 30.02 is a divisible statute and that courts may apply the modified categorical approach to determine which of the three subsections in § 30.02(a) formed the basis of a defendant's conviction. This court reaffirmed that decision in *United States v. Uribe*, 838 F.3d 667, 669-71 (5th

Cir. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 1359, 197 L.Ed.2d 542 (2017), specifically determining that *Mathis* did not alter its prior holding. Although Ortiz-Martinez contends that *Uribe* was wrongly decided, he concedes that his argument is foreclosed by that decision.

Accordingly, Ortiz-Martinez's motion for summary disposition is GRANTED. The judgment of the district court is AFFIRMED.

All Citations

692 Fed.Appx. 768 (Mem)

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Federal Rules of Appellate Procedure Rule 40, 28 U.S.C.A.

Rule 40. Petition for Panel Rehearing

Currentness

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf--including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Answer. Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

(4) Action by the Court. If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

CREDIT(S)

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 28, 2016, eff. Dec. 1, 2016.)

F. R. A. P. Rule 40, 28 U.S.C.A., FRAP Rule 40
Including Amendments Received Through 9-1-18

End of Document

United States Code Annotated
Federal Rules of Appellate Procedure (Refs & Annos)
Title VII. General Provisions

Federal Rules of Appellate Procedure Rule 41, 28 U.S.C.A.

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

Currentness

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

<[Text of subdivision (b) effective until December 1, 2018, absent contrary Congressional action.]>

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

<[Text of subdivision (b) effective December 1, 2018, absent contrary Congressional action.]>

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.

(c) Effective Date. The mandate is effective when issued.

<[Text of subdivision (d) effective until December 1, 2018, absent contrary Congressional action.]>

(d) Staying the Mandate.

(1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) Pending Petition for Certiorari.

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

<[Text of subdivision (d) effective December 1, 2018, absent contrary Congressional action.]>

(d) Staying the Mandate Pending a Petition for Certiorari.

(1) Motion to Stay. A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the petition would present a substantial question and that there is good cause for a stay.

(2) Duration of Stay; Extensions. The stay must not exceed 90 days, unless:

(A) the period is extended for good cause; or

(B) the party who obtained the stay notifies the circuit clerk in writing within the period of the stay:

(i) that the time for filing a petition has been extended, in which case the stay continues for the extended period; or

(ii) that the petition has been filed, in which case the stay continues until the Supreme Court's final disposition.

(3) Security. The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(4) Issuance of Mandate. The court of appeals must issue the mandate immediately on receiving a copy of a Supreme Court order denying the petition, unless extraordinary circumstances exist.

CREDIT(S)

(As amended Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 26, 2018, eff. Dec. 1, 2018, absent contrary Congressional action.)

F. R. A. P. Rule 41, 28 U.S.C.A., FRAP Rule 41
Including Amendments Received Through 9-1-18

United States Sentencing Guidelines (2015)

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels if the conviction receives criminal history points under Chapter Four or by **12** levels if the conviction does not receive criminal history points;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels if the conviction receives criminal history points under Chapter Four or by **8** levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by **8** levels;

(D) a conviction for any other felony, increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Commentary

[. . .]

(B) Definitions.—For purposes of subsection (b)(1):

[. . .]

(iii) "Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

No. 16-41514

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROGELIO ORTIZ-MARTINEZ,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

APPELLANT'S AMENDED PETITION FOR PANEL REHEARING

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STATEMENT OF THE PANEL REHEARING ISSUE

Whether the Court should grant rehearing in light of United States v. Herrold, No. 14-11317, which overruled United States v. Uribe, 838 F.3d 667 (5th Cir. 2016), and makes clear that Texas burglary of a habitation is both broader than generic burglary and indivisible under Mathis v. United States, 136 S. Ct. 2243 (2016), and thus cannot qualify as a crime of violence under § 2L1.2 (2015).

ARGUMENT

The Court should grant rehearing in light of United States v. Herrold, No. 14-11317, which overruled United States v. Uribe, 838 F.3d 667 (5th Cir. 2016), and makes clear that Texas burglary of a habitation is both broader than generic burglary and indivisible under Mathis v. United States, 136 S. Ct. 2243 (2016), and thus cannot qualify as a crime of violence under § 2L1.2 (2015).

Petitioner Rogelio Ortiz-Martinez pleaded guilty to illegally reentering the United States in violation of 8 U.S.C. § 1326(a) and (b). At sentencing, the district court assessed a 16-level "crime of violence" enhancement under USSG § 2L1.2(b)(1)(A)(ii) (2015) based on Mr. Ortiz-Martinez's 2000 Texas felony conviction for burglary of a habitation under Tex. Penal Code § 30.02(a). With the enhancement, Mr. Ortiz-Martinez was subject to a Guidelines imprisonment range of 77 to 96 months. Mr. Ortiz-Martinez objected to the 16-level enhancement in the district court, but acknowledged that his objection was foreclosed by this Court's precedent. The district court sentenced Mr. Ortiz-Martinez to 77 months of imprisonment.

On appeal, Mr. Ortiz-Martinez maintained his challenge to the 16-level "crime of violence" enhancement. He argued that the Texas statute is broader than generic "burglary of a dwelling" under § 2L1.2 because it requires no intent to commit a crime at the time of the unprivileged entry and that the Texas burglary statute is indivisible. He acknowledged that this issue was currently foreclosed by this Court's precedent in United States v. Uribe, in which a panel of this Court concluded in a published decision that Texas Penal Code § 30.02(a) was a divisible, elements-based statute. See United

States v. Uribe, 838 F.3d 667, 670 (5th Cir. 2016), cert. denied, 137 S. Ct. 1359 (2017). Because the issue was foreclosed, 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 at 3-4 and Letter Brief (Mar. 14, 2017). This panel subsequently granted the motion for summary disposition and affirmed the district court, in reliance on Uribe. See United States v. Ortiz-Martinez, 692 Fed. Appx. 768 (5th Cir. 2017) (unpublished) (reproduced as an appendix to this petition).

On July 19, 2017, Mr. Ortiz-Martinez filed a timely petition for panel hearing in light of the July 10, 2017 grant of en banc rehearing in United States v. Herrold, in which the petitioners asked the en banc Court to overruled 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 (July 19, 2017). The Court denied that petition. Mr. Ortiz-Martinez subsequently filed a petition for a writ of certiorari, which was denied on February 20, 2018.

On that same day, the en banc Court issued its opinion in Herrold, which: (1) overrules 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) reaffirms 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, – F.3d –, 2018 WL 948373, at *3-4, 9-13 (5th Cir. 2018) (en banc).

With respect to divisibility, the Court held "that Texas Penal Code §§ 30.02(a)(1) and (a)(3) are indivisible," because "Texas case law settles the question" that "a jury need not unanimously agree on whether Texas Penal Code § 30.02(a)(1) or (a)(3) applies in order to sustain a conviction for burglary." Id. at *3. "Under Mathis, when state law does not require jury unanimity between statutory alternatives, the alternatives cannot be divisible." Id. at *4.

With respect to overbreadth, the en banc Court exhaustively reviewed the purpose of the categorical approach and the generic definition of "burglary" in this Court's precedent and in the Supreme Court and concluded that "to be guilty of generic burglary, a defendant must have the intent to commit a crime *when* he enters or remains in the building or structure." Id. at *9. The Court therefore reaffirmed this circuit's prior precedent that Tex. Penal Code § 30.02(a)(3) is broader than generic burglary. Id. at *9 & n.85. The Court reviewed and rejected the government's invitation to conflate the "remaining in" method of committing a burglary, in which an individual has an unlawful intent to commit a crime at the specific time he unlawfully remains in a place (such as remaining in a store after hours) with the distinct situation in which an

individual has no unlawful intent at the time of entry or at the time in which he remains in a particular place, but subsequently commits a crime inside. See id. at *10-13.

The Court concluded that: "Because Texas Penal Code § 30.02(a)(3) is plainly broader than generic burglary, and because Texas Penal Code §§ 30.02(a)(1) and (a)(3) are indivisible," neither Mr. Herrold's conviction for burglary of a habitation nor his conviction for burglary of a building qualify as a predicate violent felony under the Armed Career Criminal Act. Id. at *13.

This Court has already held that the overbreadth of Texas Penal Code § 30.02(a)(3) renders a conviction under that subsection not equivalent to generic "burglary of a dwelling" under § 2L1.2. See United States v. Trevino-Rodriguez, 463 Fed. Appx. 305, 307 (5th Cir. 2012) (citing United States v. Constante, 544 F.3d 584, 587 (5th Cir. 2008) (holding that § 30.02(a)(3) was not equivalent to a "violent felony" for purposes of ACCA)); see also United States v. Herrera-Montes, 490 F.3d 390, 391-92 (5th Cir. 2007) (holding that a Tennessee statute, identical in relevant part to § 30.02(a)(3), is not equivalent to the enumerated offense of burglary of a dwelling for purposes of § 2L1.2). Thus, although Herrold concerned the definition of burglary under ACCA, its overbreadth and divisibility rulings apply equally to the definition of "burglary of a dwelling" under § 2L1.2, and make clear that Mr. Ortiz-Martinez's prior Texas conviction for burglary of a habitation cannot qualify as a crime of violence

under that provision. See Herrold, 2018 WL 948373, at *3-4, 9-13; Trevino-Rodriguez, 463 Fed. Appx. at 307; Herrera-Montes, 490 F.3d at 391-92.

The error was not harmless in this case. 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.[1] 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.[2]

Moreover, the record does not demonstrate that the district court would have imposed a non-Guidelines, 77-month sentence for the same reasons stated at the sentencing hearing, or that the court's sentence was not influenced "in any way" by the erroneous range. See United States v. Martinez-Romero, 817 F.3d 917, 924 (5th Cir. 2016); United States v. Ibarra-Luna, 628 F.3d 712, 718-19 (5th Cir. 2010). The court gave no indication that it would impose the same sentence even if counsel was correct that the 16-level enhancement was unwarranted. And the court's selection of the bottom of the tainted Guidelines range indicates that the

[1] This Court need not decide the potential applicability or non-applicability of any other enhancements in this appeal, but may leave those questions for the district court to resolve in the first instance. See, e.g., United States v. Calderon-Peña, 383 F.3d 254, 262 (5th Cir. 2004) (en banc) (reversing 16-level enhancement under § 2L1.2(b)(1)(A)(ii), but "leav[ing] it to the district court to determine on remand whether Calderon-Peña's prior offense can be considered an 'aggravated felony' that would call for application of § 2L1.2's eight-level sentence enhancement").

[2] Mr. Ortiz-Martinez's current projected release date is December 9, 2021.

range affected the court's sentencing determination. See Martinez-Romero, 817 F.3d at 925-26 (holding that the "district court's selection of the bottom of the incorrect guideline range indicates that the improper guideline calculation influenced the sentence.").

Lastly, as Mr. Ortiz-Martinez pointed out in his motion for leave to file this petition, this Court has not issued its mandate in this case, and there is thus no question that this Court has the authority to modify its earlier opinion in light of Herrold. See Charpentier v. Ortco Contractors, 480 F.3d 710, 713 (5th Cir. 2007); First Gibraltar Bank v. Morales, 42 F.3d 895, 897 (5th Cir. 1995). Moreover, Fifth Circuit and Supreme Court precedent indicate that the Court should modify its earlier opinion in light of new controlling law in Herrold. See United States v. Middlebrooks, 624 F.2d 36, 37 (5th Cir.), cert. denied, 449 U.S. 984 (1980); see also Huddleston v. Dwyer, 322 U.S. 232, 235 (1944); Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 428-30 (2d Cir.), cert. denied, 400 U.S. 829 (1970).

In these circumstances and in the interests of justice, this Court should grant rehearing in light of Herrold, vacate Mr. Ortiz-Martinez's sentence and remand for resentencing without the erroneous 16-level enhancement.

CONCLUSION

For the foregoing reasons, Mr. Ortiz-Martinez respectfully requests that the panel grant rehearing, vacate its previous opinion in this case, vacate Mr. Ortiz-Martinez's sentence, and remand for resentencing.

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

s/ Kayla Gassmann
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CERTIFICATE OF SERVICE

I certify that on February 22, 2018, the foregoing petition for panel rehearing was served upon Assistant United States Attorney Carmen Castillo Mitchell, counsel for appellee, by notice of electronic filing with the Fifth Circuit CM/ECF system.

s/ Kayla Gassmann
KAYLA GASSMANN

CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of Fed. R. App. P. 40(b)(1) because it contains 1,644 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(f).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

3. This petition complies with the privacy redaction requirement of 5th Cir. R. 25.2.13 because the brief has been redacted of any personal data identifiers.

4. This petition complies with the electronic submission of 5th Cir. R. 25.2.1 because this petition is an exact copy of the paper document.

5. This petition is free of viruses because the brief has been scanned for viruses with the most recent version of Symantec Antivirus scanning program.

/s/ Kayla Gassmann
KAYLA GASSMANN

692 Fed.Appx. 768 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee
v.
Rogelio ORTIZ-MARTINEZ, Defendant-Appellant

No. 16-41514
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Summary Calendar
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Filed July 10, 2017

Appeal from the United States District Court for the Southern District of Texas, USDC No. 1:16-CR-498-1

Attorneys and Law Firms

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Marjorie A. Meyers, Federal Public Defender, Kayla R. Gassmann, Assistant Federal Public Defender, Federal Public Defender's Office, Southern District of Texas, Houston, TX, for Defendant-Appellant

Before JONES, WIENER, and CLEMENT, Circuit Judges.

Opinion

PER CURIAM:*

Rogelio Ortiz-Martinez appeals the 77-month sentence imposed following his guilty plea conviction for being present in the United States following removal. He contends that the district court erred by ***769** enhancing his sentence under § 2L1.2(b)(1)(A)(ii) of the 2015 version of the Sentencing Guidelines. The enhancement was based on a determination that his conviction for burglary of a habitation under Texas Penal Code § 30.02 was equivalent to a conviction for the generic offense of "burglary of a dwelling." Ortiz-Martinez argues that, in light of *Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), § 30.02 defines a single indivisible offense too broad to meet that generic definition, and that the district court erred when it narrowed his offense of conviction using the modified categorical approach.

In *United States v. Conde-Castaneda*, 753 F.3d 172, 175-76 (5th Cir. 2014), this court held that § 30.02 is a divisible statute and that courts may apply the modified categorical approach to determine which of the three subsections in § 30.02(a) formed the basis of a defendant's conviction. This court reaffirmed that decision in *United States v. Uribe*, 838 F.3d 667, 669-71 (5th Cir. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 1359, 197 L.Ed.2d 542 (2017), specifically determining that *Mathis* did not alter its prior holding. Although Ortiz-Martinez contends that *Uribe* was wrongly decided, he concedes that his argument is foreclosed by that decision.

Accordingly, Ortiz-Martinez's motion for summary disposition is GRANTED. The judgment of the district court is AFFIRMED.

All Citations

692 Fed.Appx. 768 (Mem)

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

No. 16-41514

v.

ROGELIO ORTIZ-MARTINEZ,
Defendant-Appellant

APPELLANT'S OPPOSED MOTION FOR LEAVE TO FILE AMENDED PETITION FOR REHEARING OUT OF TIME

Defendant-Appellant Rogelio Ortiz-Martinez requests leave to file an amended petition for rehearing out of time, due to this Court's en banc decision in United States v. Herrold, – F.3d –, 2018 WL 948373 (5th Cir. 2018), which is a change in the law that determined the outcome of this case.

In this illegal-reentry case, Mr. Ortiz-Martinez has diligently challenged the 16-level sentencing enhancement applied to him under USSG § 2L1.2 in the district court, in this Court, and in the Supreme Court. His consistent argument has been that his Texas conviction for burglary of a habitation does not qualify as a crime of violence under § 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). In his earlier pre-Herrold briefing, he acknowledged that his challenge was foreclosed in this Court by United States v. Uribe, 838 F.3d 667 (5th Cir. 2016), and this Court affirmed his sentence on the basis of Uribe. See United States v. Ortiz-Martinez, 692 Fed. Appx. 768 (5th Cir. 2017) (unpublished).

On February 20, 2018,[1] this Court issued its en banc decision in United States v. Herrold, – F.3d –, 2018 WL 948373 (5th Cir. 2018), which overruled Uribe. Herrold instead confirms Mr. Ortiz-Martinez's 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. Prior to issuance of the en banc opinion in Herrold, this Court denied Mr. Ortiz-Martinez's previous petition for panel rehearing, but has not yet issued its mandate.

Mr. Ortiz-Martinez now moves this Court for leave to file an amended petition for panel rehearing, in light of Herrold and for the reasons that follow.

I. Factual and procedural background.

Mr. Ortiz-Martinez pleaded guilty to being an alien found unlawfully present

[1] Also on February 20, 2018, the Supreme Court denied Mr. Ortiz-Martinez's petition for a writ of certiorari.

in the United States following deportation, in violation of 8 U.S.C. § 1326. ROA.14, 69-71. In calculating Mr. Ortiz-Martinez's Sentencing Guidelines range, the presentence report ("PSR") applied a 16-level enhancement under USSG § 2L1.2(b)(1)(A)(ii) (2015) on the ground that his 2000 Texas felony conviction for burglary of a habitation qualified as a conviction for a "crime of violence." ROA.178, 180 (PSR ¶¶ 15, 28). With the enhancement, Mr. Ortiz-Martinez was subject to a Guidelines imprisonment range of 77 to 96 months. ROA.155-56, 187 (PSR ¶ 68). Although acknowledging that the issue was foreclosed, Mr. Ortiz-Martinez objected to application of the 16-level enhancement, arguing that the Texas burglary statute is overbroad and indivisible, and therefore cannot be narrowed to a qualifying "crime of violence" conviction using the modified categorical approach. See ROA.44-48, 150-53. The court sentenced Mr. Ortiz-Martinez to 77 months of imprisonment. ROA.160.

On appeal, Mr. Ortiz-Martinez maintained his challenge to the 16-level "crime of violence" enhancement, continuing to acknowledge that this issue was foreclosed by this Court's decision in United States v. Uribe, 838 F.3d 667, 670 (5th Cir. 2016), cert. denied, 137 S. Ct. 1359 (2017), in which a panel of this Court concluded in a published decision that Section 30.02(a) was a divisible, elements-based statute. Because the issue was foreclosed, he filed a motion for summary

disposition and a letter brief, in order to expeditiously seek further review. See Appellant's Unopposed Motion for Summary Disposition and Letter Brief (Mar. 14, 2017).

In his letter brief preserving the burglary issue, Mr. Ortiz-Martinez noted that this Court has long held that the Texas burglary statute, Tex. Penal Code § 30.02(a), is not a categorical match with the enumerated offenses of "burglary" or "burglary of a dwelling" because, unlike the generic versions of those crimes, subsection (a)(3) of Tex. Penal Code § 30.02 does not require the defendant to harbor a felonious intent at the time of his unlawful entry. See United States v. Constante, 544 F.3d 584, 587 (5th Cir. 2008). Mr. Ortiz-Martinez also argued that the divisibility analysis of Uribe incorrectly applied the Supreme Court's decision in Mathis v. United States, 136 S. Ct. 2243 (2016), that the Texas statute is indivisible, and that courts could not employ the modified categorical approach to determine whether the defendant was convicted under the overbroad portion of the statue, subsection (a)(3), or under the generic portions of the statute, subsections (a)(1) and (a)(2).

On July 10, 2017, this Court granted Mr. Ortiz-Martinez's motion for summary disposition and affirmed the district court, in reliance on Uribe. See United States v. Ortiz-Martinez, 692 Fed. Appx. 768 (5th Cir. 2017) (unpublished). On July 7, 2017, this Court granted en banc rehearing in United States v. Herrold. See Order

on Petition for Rehearing, Herrold, No. 14-11317 (5th Cir. July 7, 2017).[2]

On July 19, 2017, Mr. Ortiz-Martinez filed a timely petition for panel hearing in light of the grant of en banc rehearing in Herrold, and 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 (July 19, 2017). The Court denied that petition.[3] Mr. Ortiz-Martinez then sought and received two extensions of time—totaling 60 days, the maximum time that the Supreme Court will extend the certiorari deadline, see Supreme Court Rule 13.5—in which to file a petition for certiorari, based specifically on the fact that Herrold was still pending in this Court, and might change the controlling circuit law. See Docket, Ortiz-Martinez v. United States, Supreme Court No. 17-7395. Mr. Ortiz-

[2] Defense counsel was unaware of the grant of rehearing in Herrold, which occurred on a Friday, prior to the panel's issuance of its opinion in this case, which occurred on the following Monday.

[3] Multiple panels of this Court either 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. See United States v. Gasca, No. 16-40189 (panel granted request to stay resolution of rehearing petition in light of Herrold); United States v. Reyna-Lozano, No. 16-40086 (panel took no action on petition for panel rehearing filed after the grant of en banc in Herrold and petition remains pending); United States v. Bacio-Gonzales, No. 16-40663 (same); United States v. Rodriguez-Cepeda, No. 16-41243 (same).

Other cases were placed in abeyance pending Herrold, prior to the issuance of any decision. See, e.g., United States v. Vela, No. 16-41000; United States v. Davila-Medina, No. 16-41027; United States v. Hernandez, No. 17-20521; United States v. Garcia-Turrubiate, No. 16-41611. And a petition for en banc rehearing on the Texas burglary statute in the context of § 2L1.2 remains pending in United States v. Ramirez-Villalzana, No. 16-40529.

Martinez then filed a petition for certiorari, arguing that this Court's resolution of the divisibility of the Texas burglary statute was incorrect under Mathis. See Petition for a Writ of Certiorari, Ortiz-Martinez, Supreme Court. No. 17-7395 (Jan. 4, 2018). Coincidentally, the Supreme Court denied that petition on February 20, 2018, the exact same day that this Court issued its en banc decision in Herrold.

II. In light of *Herrold*, this Court should grant Mr. Ortiz-Martinez permission to file an amended petition for panel rehearing out of time.

This Court has not issued its mandate in this case, and thus there is no question that this Court has the authority to modify its earlier opinion at this time. "This court retains control over an appeal until [it] issue[s] a mandate. Before [the] mandate issues, [the Court] ha[s] the power to alter or modify [its] judgment." Charpentier v. Ortco Contractors, 480 F.3d 710, 713 (5th Cir. 2007) (citing First Gibraltar Bank v. Morales, 42 F.3d 895, 897 (5th Cir. 1995). The Court's decisions are not final until it issues a mandate. Charpentier, 480 F.3d at 713; see also United States v. Jackson, 549 F.3d 963, 980 (5th Cir. 2008).

Pursuant to Federal Rule of Appellate Procedure 40(a)(1), this Court has 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 also Young v. Harper, 520 U.S. 143 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).

More specific to the circumstances of this case, this Court's precedent, Supreme Court precedent and out-of-circuit precedent all provide that, where there has been a change in the controlling law, the Court should grant leave to file an out-of-time petition for rehearing, even if one petition for rehearing has already been denied and even if a petition for a writ of certiorari has been denied. See United States v. Middlebrooks, 624 F.2d 36, 37 (5th Cir.), cert. denied, 449 U.S. 984 (1980); see also Huddleston v. Dwyer, 322 U.S. 232, 235 (1944); Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 428-30 (2d Cir.), cert. denied, 400 U.S. 829 (1970).

In Middlebrooks, this Court did precisely what Mr. Ortiz-Martinez asks the Court to do in this case. In the original panel opinion in Middlebrooks, this Court rejected the appellant's argument that the district court erred in imposing a special parole term under 21 U.S.C. § 846, relying on Cantu v. United States, 598 F.2d 471 (5th Cir. 1979). The appellant filed a petition for rehearing, but did not raise the special parole issue in the petition. See id. Subsequent to the filing of the petition, the Supreme Court issued Bilfulco v. United States, 447 U.S. 381 (1980), which overruled Cantu. See Middlebrooks, 624 F.3d at 37. On July 1, 1980, the Court denied the first Middlebrooks petition for rehearing. Id. On July 3, 1980, the

appellant filed an amended petition for rehearing, calling the Court's attention to the Bilfulco decision. See id.

This Court issued an opinion on rehearing 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. In support, the Court cited Federal Rule of Appellate Procedure 40(a). See id. The Court accordingly vacated the special parole term by vacating the denial of the petition for rehearing, granting the petition, and modifying the original opinion with respect to the parole term. Id.; see also First Gibraltar Bank, FSB 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).

Indeed, the Supreme Court has indicated that a court of appeals may abuse its discretion when it refuses to consider a new controlling opinion that is handed down after the time for rehearing has expired, but while jurisdiction remains 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.

The Supreme 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. The Supreme 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 have likewise allowed 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, even after a petition for certiorari has been denied. 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. (citing Fed. R. App. Proc. 26, 40; United States v. Certain Land, 420 F.2d 370 (2d Cir. 1969); National Comics Publishers v. Fawcett, 198 F.2d 929 (2d Cir. 1952), and United States v. 63.04 Acres of Land, 257 F.2d 68, 69 (2d Cir. 1958)). 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.

Whatever the outer limits of these rules or doctrines may be, there is no cause for this Court to approach those limits to grant Mr. Ortiz-Martinez the relief he seeks, where the interests of justice so clearly dictate that the Court allow Mr. Ortiz-Martinez to file an amended petition for rehearing. Mr. Ortiz-Martinez has diligently pursued his arguments that Uribe was wrongly decided and that his Texas conviction for burglary of a habitation does not qualify as a crime of violence under § 2L1.2, in a timely manner, at every stage of his case. Herrold now makes clear that Mr. Ortiz-Martinez was in fact correct all along, that the Texas burglary statute is overbroad and indivisible, and that his Texas burglary of a habitation conviction does not qualify for the 16-level § 2L1.2 enhancement. Mr. Ortiz-Martinez should benefit from Herrold, where he preserved his claim in the district court and pursued it on appeal, both in this Court and in the Supreme Court, but was prevented from succeeding on appeal by the existence of circuit precedent that has now been

abrogated by the en banc Court, in an opinion that was issued before the Court's judgment is final in this case. See Huddleston, 322 U.S. at 235; Middlebrooks, 624 F.2d at 37; Braniff Airways, 424 F.2d at 428-30.

Moreover, application of the correct law to Mr. Ortiz-Martinez's case could provide substantial relief to him. 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.

In these circumstances and in the interests of justice, this Court should exercise its authority to allow Mr. Ortiz-Martinez to file an amended petition for rehearing.

III. Conclusion.

For the above reasons, this Court should permit Mr. Ortiz-Martinez to file his amended petition for panel rehearing in light of Herrold. The amended petition is attached to this motion.

Assistant United States Attorney Carmen C. Mitchell, counsel for appellee, has advised that the government opposes this motion.

Respectfully submitted,

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Federal Public Defender
Southern District of Texas

/s/ Kayla Gassmann
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CERTIFICATE OF SERVICE

I certify that on February 22, 2018, a copy of this motion was served on Assistant United States Attorney Carmen C. Mitchell, counsel for appellee, by notice of electronic filing with the Fifth Circuit CM/ECF system.

/s/ Kayla Gassmann
KAYLA GASSMANN

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. Rule 27(d)(2)(A) because it contains 2,874 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

3. This motion complies with the privacy redaction requirement of 5th Cir. R. 25.2.13 because the brief has been redacted of any personal data identifiers.

4. This motion complies with the electronic submission of 5th Cir. R. 25.2.1 because this petition is an exact copy of the paper document.

5. This motion is free of viruses because the brief has been scanned for viruses with the most recent version of Symantec Antivirus scanning program.

/s/ Kayla Gassmann
KAYLA GASSMANN

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41514

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ROGELIO ORTIZ-MARTINEZ,

Defendant - Appellant

Appeal from the United States District Court for the
Southern District of Texas

O R D E R :

IT IS ORDERED that Appellant's opposed motion for leave to file amended petition for rehearing out of time is GRANTED and the Clerk's Office is to notify Appellee, United States Government, that it is to file a response within 7 days.

/s/Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41514

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ROGELIO ORTIZ-MARTINEZ,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

Before JONES, WIENER, and CLEMENT, Circuit Judges.

PER CURIAM:

This panel previously granted appellant's opposed motion for leave to file an amended petition for rehearing out of time. The panel has considered the government's motion for reconsideration requesting that the amended petition for rehearing, filed as of May 22, 2018, be construed as a motion to recall the mandate and that the motion to recall the mandate be denied. IT IS ORDERED that appellee's motion for reconsideration is GRANTED.

IT IS FURTHER ORDERED 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).

IT IS FURTHER ORDERED that appellee's alternative motion, if the motion for reconsideration is denied, is DENIED AS UNNECESSARY.

IT IS FURTHER ORDERED that appellant's unopposed motion for leave to file a reply to the response/opposition is GRANTED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

July 10, 2017

Lyle W. Cayce
Clerk

No. 16-41514
Summary Calendar

D.C. Docket No. 1:16-CR-498-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ROGELIO ORTIZ-MARTINEZ,

Defendant - Appellant

Certified as a true copy and issued as the mandate on Jun 20, 2018

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

Appeal from the United States District Court for the
Southern District of Texas, Brownsville

Before JONES, WIENER, and CLEMENT, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the sentence imposed by the District Court is affirmed.