No. 18A269

IN THE
SUPREME COURT OF THE UNITED STATES

Miguel Cabrera-Rangel,

Applicant,

v.

United States,

Respondent.

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

APPLICATION FOR FURTHER EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI

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APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI

To: Justice Samuel A. Alito, Jr., Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Applicant Miguel Cabrera-Rangel respectfully requests a second extension of thirty (30) days in which to file his petition for writ of certiorari, challenging the decision of the U.S. Court of Appeals for the Fifth Circuit in *United States v. Cabrera-Rangel*, 730 F. App'x 227 (5th Cir. 2018) (No. 17-41123), a copy of which is attached herewith. In support of this application, Applicant provides the following information:

1. The Fifth Circuit issued its decision in this case on July 9, 2018. App. 1. On September 14, 2018, this Court granted a thirty-day extension of time within which to file a petition for certiorari until November 6, 2018. Granting this additional thirty-day extension would make the petition due on December 6, 2018.

2. As noted in the first application, this case is a serious candidate for certiorari review. It raises two related questions: (a) whether a court violates the Sixth Amendment if it bases a criminal defendant's sentence in part on conduct for which he was tried and acquitted, and (b) whether the Sixth Amendment at least prevents a federal court from imposing a sentence that is substantively reasonable only because of the consideration of conduct for which the defendant was acquitted. Three of this Court's Justices recently called for the Court to address the latter question in an appropriate case. *See*

Jones v. United States, 135 S. Ct. 8 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari). And numerous federal appellate judges—including then-Judge Kavanaugh, who has since joined this Court—have suggested that this Court consider the broader Sixth Amendment ramifications of considering acquitted conduct at sentencing. *See United States v. Bell*, 808 F.3d 926, 927-28 (D.C. Cir. 2015) (Kavanagh, J., concurring in the denial of rehearing en banc); *id.* at 928-32 (Millett, J., concurring in the denial of rehearing en banc); *United States v. Papakee*, 573 F.3d 569, 577-78 (8th Cir. 2009); *United States v. White*, 551 F.3d 381, 386-97 (6th Cir. 2008) (Merritt, J., dissenting); *United States v. Mercado*, 474 F.3d 654, 658-60 (9th Cir. 2007) (Fletcher, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349-53 (11th Cir. 2006) (Barkett, J., concurring).

3. This case is an excellent vehicle for resolving these questions. The Government charged Applicant with two offenses: assault on a federal officer by physical contact causing physical injury, 18 U.S.C. §§ 111(a)(1) & (b), and the less serious offense of assault on a federal officer by physical contact, 18 U.S.C. § 111(a)(1). The jury convicted on the lesser offense but acquitted on the greater one. Yet at sentencing the district court set Applicant's base offense level according to the greater charge and accordingly imposed a sentence several years longer than the U.S. Sentencing Guidelines' recommended range for the offense of conviction.

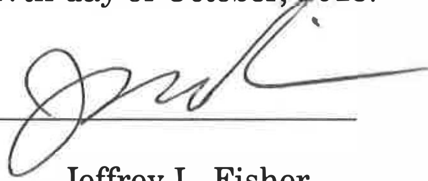
Applicant argued in the district court and on appeal that the court's reliance on his acquitted conduct violated the Sixth Amendment. But the

courts rejected his contentions, finding them foreclosed by Fifth Circuit precedent and thus viable only for this Court. *See* App. 2-3 (citing *United States v. Hernandez*, 633 F.3d 370, 374 (5th Cir. 2011), *United States v. Jackson*, 596 F.3d 236, 243 n.4 (5th Cir. 2010), and *United States v. Farias*, 469 F.3d 393, 399 (5th Cir. 2006)).

4. This application is not filed for purposes of delay. Because of the importance of this case, Applicant has retained new lead counsel for Supreme Court proceedings: Jeffrey L. Fisher of the Stanford Supreme Court Litigation Clinic. Yet Mr. Fisher has been, and continues to be, is extremely busy with several other matters currently pending in this Court. Among other things, he argued two cases during the past two weeks: *Mt. Lemmon Fire Dist. v. Guido*, No. 17-587, and *United States v. Sims*, No. 17-766. He also is scheduled to present oral argument on October 31, 2018 in *Jam v. International Monetary Fund*, No. 17-1011. Finally, Mr. Fisher has secondary responsibility for several other matters in which Stanford Supreme Court Litigation Clinic is involved. Accordingly, the time sought here is necessary for new counsel to produce the best possible work product.

5. For all of these reasons, Applicant respectfully requests the entry of an order extending his time to file their petition for a writ of certiorari until December 6, 2018.

RESPECTFULLY SUBMITTED this 17th day of October, 2018.

by 

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-41123
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
July 9, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff−Appellee,

versus

MIGUEL CABRERA-RANGEL,

Defendant−Appellant.

Appeal from the United States District Court
for the Southern District of Texas
No. 5:17-CR-198-1

Before HIGGINBOTHAM, JONES, and SMITH, Circuit Judges.

PER CURIAM:*

Miguel Cabrera-Rangel appeals the sentence imposed for assault on a

* 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 officer by physical contact. He was acquitted of assault on a federal officer by physical contact inflicting bodily injury.

Cabrera-Rangel contends that the district court ignored the jury's verdict and impermissibly relied on acquitted conduct. He maintains that the assessment of his base offense level and the application of enhancements under U.S.S.G. § 2A2.2(b)(2)(B) and (3)(E) violated the Sixth Amendment because the determinations were premised on actions of which he was acquitted. Cabrera-Rangel concedes that this claim is foreclosed by *United States v. Watts*, 519 U.S. 148, 157 (1997), and that we have held that *Watts* is valid after *United States v. Booker*, 543 U.S. 220 (2005). He notes, however, that a reevaluation of *Watts* is necessary because it did not address whether consideration of acquitted conduct at sentencing violates the Sixth Amendment and that *Watts* otherwise did not account for principles articulated in *Booker* and later Supreme Court decisions.

A panel of this court may not overrule another panel's decision without en banc reconsideration or a superseding contrary Supreme Court decision. *United States v. Lipscomb*, 299 F.3d 303, 313 n.34 (5th Cir. 2002). We have held that *Watts* remains valid following *Booker*, *see United States v. Jackson*, 596 F.3d 236, 243 n.4 (5th Cir. 2010); *United States v. Farias*, 469 F.3d 393, 399 (5th Cir. 2006), and the Court has not held otherwise, *see Cunningham v. California*, 549 U.S. 270, 274–94 (5th Cir. 2007). Cabrera-Rangel thus has not shown that the district court erred when it considered conduct of which he was acquitted. *See Farias*, 469 F.3d at 399

Cabrera-Rangel contends that his sentence is improper because the district court relied on judge-found facts as to his acquitted conduct; Cabrera-Rangel maintains that, if only the facts encompassed by the verdict were considered, his sentence is unreasonable. He asserts that his sentence violates

the Sixth Amendment and should be vacated.

As Cabrera-Rangel concedes, his claim is foreclosed. Regardless of whether Supreme Court precedent has foreclosed as-applied Sixth Amendment challenges to sentences within the statutory maximum that are reasonable only if based on judge-found facts, our precedent forecloses such contentions. *United States v. Hernandez*, 633 F.3d 370, 374 (5th Cir. 2011).

AFFIRMED.