

No. \_\_\_\_\_

In the Supreme Court of the United States

MICHAEL HERROLD,  
*Applicant,*

v.

UNITED STATES OF AMERICA,  
*Respondent,*

MOTION FOR LEAVE TO PROCEED  
*IN FORMA PAUPERIS*

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), Mr. Herrold asks leave to file the accompanying Application to Extend the Deadline to File a Petition for Certiorari without prepayment of costs and to proceed *in forma pauperis*. Mr. Herrold was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), both in the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted on January 7, 2020.

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APPLICATION FOR EXTENSION  
OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

To: The Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court and Circuit Justice for the Fifth Circuit.

Pursuant to Title 28, United States Code, Section 2101(c) and Supreme Court Rule 13.5, Applicant Michael Herrold respectfully requests that the time to file a Petition for a Writ of Certiorari in this case be extended to February 28, 2020.

**Basis for Jurisdiction**

The district court had original jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. Mr. Herrold pleaded guilty to possessing a firearm after a felony conviction in violation of 18 U.S.C. § 922(g)(1). This Court has previously granted two petitions for certiorari arising from the direct appeal. *See Herrold v. United States*, 137 S. Ct. 310 (2016); *see also United States v. Herrold*, 139 S. Ct. 2712 (2019).

The most recent Fifth Circuit opinion was issued on October 18, 2019. Twelve days later, within the time allotted for a rehearing petition under Federal Rules of Appellate Procedure 35 & 40, Mr. Herrold filed a Motion to Recall the Mandate

seeking reconsideration of that decision and citing the rehearing rules. The Fifth Circuit denied that motion on November 4, 2019.

### **Judgment to be Reviewed and Opinion Below**

The Fifth Circuit's most recent en banc opinion is published at *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019), reprinted on pages 1a–14a of the appendix. The order denying the request to reconsider that decision is reprinted on page 15a of the appendix.

### **Reasons for Granting an Extension**

At issue in this case is whether Mr. Herrold was properly sentenced as an Armed Career Criminal pursuant to 18 U.S.C. § 924(e). This Court has already granted certiorari twice, and the en banc Fifth Circuit has issued two opinions. The legal issues are complex and important. Mr. Herrold's attorney needs additional time to prepare an adequate petition for certiorari among a heavy press of other assignments.

1. To justify applying the ACCA, the lower courts relied on three prior Texas convictions: one was for possession of LSD with intent to deliver under Texas Health & Safety Code § 481.112(a), and two were for Texas “burglary” under Texas Penal Code § 30.02. Both of these statutes could give rise to a meritorious petition for certiorari.

a. As to the drug crime: in its February 2016 opinion, the Fifth Circuit held that the LSD offense was a “serious drug offense” under 18 U.S.C. § 924(e)(2)(A)(ii), notwithstanding the fact that Texas permits conviction where an offender merely offered to sell a controlled substance. *See Herrold*, 813 F.3d at 599–600 (“The word

‘involving’ has expansive connotations.”). This Court recently granted certiorari to decide whether a state crime must exactly match a generic offense to count as a “serious drug offense.” *See Shular v. United States*, 139 S. Ct. 2773 (2019). Respondent has asked this Court to hold any petitions for certiorari that challenge the ACCA-classification of Texas drug crimes to await the outcome in *Shular*. *See e.g.* U.S. Mem. 2–3, *Combs v. United States*, No. 19-5908 (U.S. filed Dec. 12, 2019).

b. As to the burglary crimes: Mr. Herrold intends to argue that the decision below created a split with the Seventh Circuit’s decisions in *Van Cannon v. United States*, 890 F.3d 656, 663–664 (7th Cir. 2018), and *Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019). But the opinion below also perpetuates a separate circuit conflict: whether the “realistic probability” test articulated in *Gonzales v. Duenas-Alvarez* 549 U.S. 183, 193 (2007), requires a defendant to *prove* that a state has *actually prosecuted* defendants for conduct that is clearly encompassed by the broadly worded language of a state statute. *Compare* App., *infra*, at 7a–8a (quoting *United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (en banc)) (“It is incumbent on the defendant to point to ‘cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.’”), *with e.g.* *Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) (“*Duenas-Alvarez* made no reference to the state’s enforcement practices. It discussed only how broadly the state criminal statute applied.”)

Whether these constitute a single “Question Presented” or separate questions is a complex judgment call. Counsel needs more time to work on the petition.

2. In addition to the ordinary work associated with preparation of a certiorari petition, this case has involved difficult and unfamiliar pragmatic concerns. After the February 2018 en banc decision, “the district court sentenced Herrold to time served.” App., *infra*, 4a. Mr. Herrold then began serving his term of supervised release, while the Government pursued review of the February 2018 decision in this Court.

While Mr. Herrold was under supervision, he suffered a debilitating stroke. The Fifth Circuit’s most recent decision reinstated the original ACCA sentence, and issued its mandate immediately. App., *infra*, 14a. The decision left Mr. Herrold’s attorney scrambling to alert the district court and prison officials to his current medical condition. Mr. Herrold’s attorney retained a psychologist and a neurologist and examine Mr. Herrold and to write expert reports about his medical condition for the benefit of the district court, the Government, and the Bureau of Prisons. Mr. Herrold is currently “under” the original, undischarged ACCA sentence, but officials cannot yet take him into custody because of his precarious medical situation. Efforts to resolve these practical difficulties continue.

3. The extra effort required by this case comes in the midst of an extraordinarily heavy press of other assignments. Applicant’s attorney has been fully occupied on other matters, including:

*United States v. Martinez-Ovalle*, 5th Cir. No. 19-10957 (Expedited Appeal): Initial Brief filed Nov. 13, 2019; Reply Brief filed Jan. 6, 2020; Oral Argument Calendared for Feb. 5, 2020;

*United States v. Macias-Macias*, Supreme Court No. 19-7165: petition for certiorari filed Dec. 31, 2019;

*United States v. Vickers*, 5th Cir. No. 18-10940: Appellee's Brief filed Dec. 20, 2019;

*In re Diggs*, 5th Cir. No. 19-11349: Motion for Authorization to File Successive § 2255 Motion filed Dec. 18, 2019;

*United States v. Edmonds*, 5th Cir. No. 19-11007: Motion for Certificate of Appealability and Brief in Support filed Dec. 17, 2019;

*United States v. Oliver*, 5th Cir. No. 19-10808: Initial Brief due Jan. 13, 2010; and

*United States v. Cardenas-Rodriguez*, Northern District of Texas No. 1:19-CV-153: Evidentiary hearing scheduled for January 16, 2020

4. Granting this extension, even in part, would eliminate any doubt about whether the 90 days runs from the Fifth Circuit's Oct. 18, 2019 order, or its November 4, 2019 order refusing to recall its mandate. Supreme Court Rule 13.3 provides, as a default rule, that the "time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed." S. Ct. R. 13.3. "But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of rehearing." *Id.*

Because the en banc Fifth Circuit chose to immediately issue its mandate along with its order, it was not clear to Applicant's counsel whether the Court would entertain a simple rehearing request, or if the mandate must be recalled. Mr. Herrold's Motion to Recall the Mandate cited the Appellate rehearing rules as authority for the Fifth Circuit to reconsider its decision, and the motion was filed within the 14-day deadline to seek rehearing. But the title of the motion was "Motion

to Recall the Mandate.” If this Court construes the motion as a “petition for rehearing,” then the 90-day deadline began to run on November 4. But if this Court does not construe the motion as a rehearing petition, the deadline began to run October 18. But, absent an extension, Mr. Herrold and his attorney will have to file the petition on or before January 16 or risk dismissal.

FOR THESE REASONS, Mr. Herrold asks this Court to extend the deadline to file a petition for certiorari to February 28, 2020. That would represent an extension of 43 days from the earlier potential deadline and 25 days for the later potential deadline. Both are within the limits of Supreme Court Rule 13.5.

### **CONCLUSION**

For all these reasons, Applicant and undersigned Counsel respectfully request that the Court extend the deadline to file a petition for certiorari to February 28, 2020.

Respectfully submitted on January 7, 2020,

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