APPEAL NO: 21-5977

IN THE

SUPREME COURT OF THE

UNITED STATES

In Re: Rigoberto Melero Aguirre

_____PETITIONER

-V-

United States of America

_____RESPONDENT

PETITION FOR REHEARING ON DENIAL PURSUANT TO RULE 39 OF THE SUPREME COURT RULES, PURSUANT TO WRIT OF PROHIBITION UNDER ALL WRITS ACT 28 U..C. 1651(a) DIRECTED TO THE ASSOCIATE JUSTICE WITH SUPERVISORY CONTROL OVER THE FIFTH CIRCUIT UNDER SUPREME COURT RULE 22-1

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

(NAME OF COURT THAT LAST RULED ON YOUR CASE)

RIGOBERTO MELERO AGUIRRE
FED. REG. # 48168-280
FEDERAL CORRECTIONAL
INSTITUTION - LA TUNA
P.O. BOX 3000
ANTHONY, NM/TX 88021

CERTIFICATE OF PARTY (RIGOBERTO MELERO AGUIRRE) UNREPRESENTED BY COUNSEL

This is to certify that Petitioner Rigoberto Melero Aguirre, pursuant to Rule Rule 39 of the Supreme Court Rules, is proceeding in this petition informa pauperis.

Rigoberto Melero Aguirre is currently under the custody of the B.O.P. at the Federal Correctional Institution, La tuna, P.O. Box 3000, Anthony NM/TX 88021.

Petitioner further certifies that his application for rehearing is presented in good faith and not for delay. Petitioner understands that the filing of this Petition is predicate on wither intervening circumstances of a substantial or controlling effect or other substantial grounds not previously presented.

QUESTION PRESENTED IN GOOD FAITH AND NT FOR DELAY

A ISSUE 1

WHETHER THE MOTION'S PANEL OF THE SUPREME COURT'S FAILURE TO ADHERE TO SUPREME COURT RULE 21-1, CREATES A DANGEROUS PRECEDENT IN THE ADMINISTRATION OF JUSTICE, WHEN THE RULE IN PERTINENT PART STATES, AND RIGOBERTO MELERO AGUIRRE PARAPHRASES;

> ... A PETITION CAN BE DIRECTED TO THE ASSOCIATE JUSTICE IN CHARGE OF THE CIRCUIT WITH SUPERVISORY AND JURISDICTIONAL CONTROL OVER THE PETITIONER.' FURTHER, IF THE PETITION IS DENIED BY THAT PARTICULAR ASSOCIATE JUSTICE, THE PETITIONER CAN RE-A SUBMIT HIS CLAIMS TO ANOTHER JUSTICE OF THE SUPREME COURT, INCLUDING THE CHIEF JUSTICE..."

ISSUE 2

BY FAILING TO FOLLOW ITS OWN RULES, THE SUPREME COURT, THE HIGHEST COURT OF THE LAND, CREATED AN "IMPRIMATUR FOR A MISCARRIAGE OF JUSTICE," IT ALS CONSTITUTES A COUNTER FRICTION TO ITS TIME HONORED HOLDING THAT;

> "...AS LONG A THERE IS EVIDENCE OF THE VIOLATION OF A FEDERALLY PROTECTED RIGHT, COURTS MUST DO JUSTICE BY GRANTING RELIEF."

That did not happen in this case. (In Re: Rigoberto Melero Aguirre).

ISSUE 3

RIGOBERTO MELERO AGUIRRE'S PETITION FOR A WRIT F PROHIBITION WAS NOT TRANSFERRED, PURSUANT TO RULE 22-2 OF THE SUPREME COURT RULES, TO THE ASSOCIATE JUSTICE IN CHARGE OF THE FIFTH CIRCUIT, TO EXAMINE AND DETERMINE WHY THE LOWER COURT, THE FIFTH CIRCUIT FLAGRANTLY AND LITERALLY BROKE EVERY RULE IN THE BOOK. NEITHER ID THIS HONORABLE COURT, SEND RIGOBERTO MELERO AGUIRRE ANY DENIAL OF HIS CLAIMS, ACCORDING TO SUPREME COURT SUPREME COURT RULE 22-2. THE VIOLATION OF THESE FUNDAMENTAL SUPREME COURT RULE DEPRIVED PETITIONER THE OPPORTUNITY TO RE-SUBMIT THESE CLAIMS FOR CONSIDERATION, TO ANOTHER ASSOCIATE JUSTICE OF THE SUPREME COURT, INCLUDING THE CHIEF JUSTICE OF THE SUPREME COURT.

IN MARBURY V. MADISON (CITATIONS OMITTED) THIS HONORABLE COURT UNEQUIVOCALLY STATED "IT IS THE EXCLUSIVE PROVINCE OF THE JUDICIARY TO INTERPRET THE LAW," IN THIS PARTICULAR CASE, A PANEL OF THE FIFTH CIRCUIT DID NOT INTERPRET THE LAW. WHAT IT ID WAS PUTTING TOGETHER A SUPREME COURT CAE,

THE ERRORS COMMITTED BY THE GOVERNMENT IN THE FACTUAL BASIS OF RIGOBERTO AGUIRRE'S PLEA OF GUILTY, , ALLIED WITH THE FIFTH CIRCUIT COURT OF APPEALS RUBBERSTAMPING THE ERRORS, WHEN PETITIONER WAS SENTENCED AS A CAREER OFFENDER UNDER 4B1.1 INSTEAD OF 2B1.1 AND REFUSING TO ACT WITHIN ITS DISCRETION TO GRANT PETITIONER RELIEF PURSUANT TO UNITED STATES V. HUGHES (CITATIONS OMITTED) MAY HAVE RENDERED HIS PLEA OF GUILTY INVOLUNTARY, UNKNOWING AND NOT INTELLIGENTLY RENDERED, RESULTING IN THE NEED FOR DISMISSAL OF HIS SENTENCE AND CONVICTION.

To be valid, a guilty plea must be made voluntarily and with full knowledge of the consequence. Boykin v. Alabama, 395 U.S. 238 (1969); Stano v. Dugger, 921 F.2d 1125 (11th Cir. 1991); overruled by United States v. Garer, 540 F.3d 1253 (11th Cir.. 2008). In Coleman v. Alabama, 827 F.2d 1469 (11th Cir. 1987), the court construed Boykin to require that n accused have information concerning the range of punishment prescribed by the act to which he my be sentenced. In order for guilty plea to be entered knowingly and intelligently made, the defendant must have the mental competence to understand and appreciate the nature and consequence of the plea. Rigoberto Melero Aguirre was denied this very crucial fact, at a very critical state of his judicial proceedings.

Clearly, it is evident from the record of Rigoberto Melero Aguirre judicial proceedings, especially from the inception of the proceedings to its culmination,, that his counsel was only interested in doing s little a possible without subjecting the government's case to strict adversarial testing, as required by law. Strickland v. Washington (citations omitted).

Rigoberto Melero Aguirre was not reasonably informed about the legal options and the alternatives that were available to hi, A plea may may be involuntarily whether the accused, Rigoberto Melero Aguirre does not understand the nature of the constitutional protections that he was waiving or because the accused has such an incomplete understanding of the range of sentence, that his plea cannot stand by reason of an unintelligent admission of guilt. Gady v. Linaham, 780 F.2d 935 (11th Cir. 1986).

A guilty plea is not knowing and voluntary made when the defendant has been misinformed about the critical elements of the charged offense, even when the misinformation is the result of the court's erroneous interpretation of a criminal statute, and even if the interpretation is correct at the time the plea was entered. United States v. Brown, 117 F.3d 471 (11th Cir. 1997).

Even if the law was not clear at the time it was entered, the attorney has the duty to inform the defendant that the law was not clear, rather than advising him incorrectly that there was no chance of any additional confinement after the criminal sentence was served. Bouder v. Department of Corrections, State of Florida, 619 F.3d 1271, 471 (11th Cir. 2010). In the case at bar, for the reasons adopted by the Supreme Court in Kimbrough, 552 U.S. 85, and the mitigation set forth in Rigoberto Melero Aguirre's moving papers, the court should have imposed less severe sentence.

The revelation itself rendered the indictment constructively amended. Because there was a fatal variance between what the indictment alleged and the proof at trail. The Supreme Court considered whether the government is required to provide Brady or Giglio information to the defendant before plea is entered in United States v. Ruiz, 536 U.S. 622 (2002).

In the Southern District of California, a defendant is sometimes given the opportunity to enter a "fast track guilty plea, pursuant to the program. The government will furnish Brady information to the defendant, but will not provide Giglio material impeachment information about the witnesses des not not taint the guilty plea or violate Due Process Clause.

The fact that a defendant enters a guilty plea at the time of the plea that is given freely and voluntarily does not necessarily preclude the defendant from subsequently challenging the voluntariness of the plea. Blackledge v. Allison, 431 U.S. 63 (1977). In Marin v. Kemp, 760 F.2d 1244 (11th Cir. 1985), for example the defendant entered a guilty plea and acknowledged that it was freely an voluntarily entered with no duress. In a collateral attack however, he offered evidence that the state threatened to prosecute his wife if he did not plead guilty.

INVOKED OUT OF CONTEXT.

DATE: NOVEMBER 1, 2021

REPECTFULLY SUBMITTED,

RIGOBERTO MELERO AGUIRRE

The cumulative effect of errors that are harmless by themselves, could so prejudice the defendant's rights to a fair judicial proceeding. United States v. Ladson, 643 F.3d 1335, 1342 (11th Cir. 2011); United States v. Preciado-Cordobas, 981 F.2d 1206 (11th Cir. 1993); United States v. Adam, 74 F.3d 1093 (11th Cir. 1996); United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995); United States v. Pearson, 746 F.2d 787 (11th Cir. 1984). Assessing the cumulative errors, the court reviews all errors preserved for appeal and all plain errors. United States v. Ladson, supra.

The appellate court reviews whether counts in the indictment were impermissibly amended. The dismissal of an indictment on the grounds of prosecutorial misconduct is a discretionary call. Consequently, the appellate court reviews the district court's decision for an abuse of discretion. United States v. Barner, 441 F.3d 1310 (11th Cir. 2006).

LEGAL ANALYSIS/DISCUSSION

CONSTITUTIONAL DEFECTS THAT MAY HAVE TAINTED THE JUDGMENT OF THE THREE PANEL CIRCUIT JUDGES, HIGGINBOTHAM, SMITH, and ENGELHARDT IN THEIR DENIAL OF AGUIRRE'S SECOND SUCCESSIVE MOTION IMPLICATING RES JUDICATA AND WHY A REHEARING IS NEEDED TO REVEAL FRAUD UPON THE COURT, AND AVOID A MISCARRIAGE OF JUSTICE

As a threshold matter, Aguirre avers, as the Arkansas Supreme Court has described, that Res Judicata as a Rule of Justice is to be applied in particular situations as fairness and justice require, and that it is not so rigidly applied as to defeat the ends of justice or so as to work an injustice. An adverse judgment, free from fraud or collusion, as Rigoberto Melero Aguirre would demonstrate, prevents a second claim involving the same issues. See, Page 2 & 3, Paragraph 4, Document 00515871437 Date filed 05/21/2021

> "IT IS ORDERED that Aguirre's motion for authorization to file successive motion is DENIED. This is Aguirre's second motion for authorization to file a successive Section 2255 motion, and one of his claims he now seeks to raise is essentially identical to the claims he identified in his prior motion for authorization. Accordingly, Aguirre is WARNED that the filing of repetitive or frivolous motions for authorization to file successive Section 2255 motions will invite the imposition of sanctions, including dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court's jurisdiction.

NOT TRUE.

Listed hereunder are some of the pivotal issues at stake that would negate and alleviate the above referenced warning from the Honorable three Circuit Judges.

Aguirre avers that a limitation arises when a court recharacterizes a pro se litigant's motion as a first 28 U.S.C.S. Section 2255 motion. Aguirre's first Section 2255 motion was dismissed procedurally without a merits determination. So, as a matter of law, it doesn't count as a section 2255 for purposes of a second successive petition. Further, the record would show that his next petition was a Section 2241 Writ of Habeas corpus, which Hon. Judge Frank Montalvo re-characterized as a Section 2255 motion without a 'Castro' warning. It may have been memorialized as a Section 2255 motion, which it wasn't.

In such circumstances, the district court must notify the pro se litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent Section 2255 motion will be subject to the restrictions on "second or successive' motions, and provide the litigant an opportunity to withdraw or amend the motion so that it contains all the Section 2255 claims he believes he has.

If the court fails to do so, the motion cannot be considered to have become a Section 2255 motion for purposes of applying to later motions the law's "second or successive' restrictions Section 2255, Para. 8. An unwarned recharacterization of a motion cannot count as a 22 U.S.C. Section 2255 motion for purposes of the 'second or successive provision of Section 2255, whether the unwarned pro se litigant does, or does not take an appeal.

LEGAL LIMITS THAT NINE CIRCUITS HAVE PLACED ON RECHARACTERIZATION

See Adams v. United States, 155 F.3d 582, 583 (CA2 1998))(per curiam); United States v. Miller, supra, at 6467 (CA3); United States v. Emmanuel, 288 F.3d 644, 646-647)CA4 2002); In re Shelton, 295 F.3d 620, 622 (CA6 2002)(per curiam; Henderson v. United States, supra, at 710-711 (CA7); Morleas v. United States, 304 F.3d 764, 767 (CA8 2002); United States v. Seesing, 234 F.3d 456, 483 (CA9 2000); United States v. Kelly, supra, at 1240-1241 (CA10); United States v. Palmer, 296 F.3d at 1146 (CADC(; see also 290 F.3d at 1273, 1274 (case below)(suggesting that courts provide such warning)

THE LAW OF THE CASE DOCTRINE DOES NOT APPLY TO AGUIRRE'S CASE

Aguirre contends that the law of the case doctrine does not apply in this case. The law of the case doctrine simply expresses common judicial practice; it does not limit the courts' power. It cannot prohibit a court from disregarding an earlier holding in an appropriate case. The law of the case doctrine cannot pose an insurmountable obstacle to the courts' reaching this decision. It simply 'expresses common judicial practice, it does not "limit' the court's power. See Messenger v. Anderson, 225 U.S. 436, 444, 56 L.Ed 1152, 32 S.Ct. 739 (1912)(Holmes, J). It cannot prohibit a court from disregarding an earlier holding in an appropriate case, which for the reasons set forth, we find this case to be.

AGUIRRE WAS SENTENCED AS A CAREER OFFENDER, NOT ON QUANTITY OF DRUGS

1(c) The Panel's assertion that Aguirre is not a career offender and was not sentenced as a career offender but on the quantity of drugs would raise serious constitutional questions. Aguirre was over 18 years of age when he committed this offense, and it was allegedly a 'controlled substance' within the meaning of USSG Section 4B1.1(a). his sentence was therefore allegedly subject to being enhanced under he "Career offender' guidelines provision of USSG Section 4B1.1, if he had 'at lease two prior felony convictions either a "controlled substance offense' or a crime of violence." The PSR construed USSG Section 4B1.1 which defines a 'controlled substance offense' and crime of violence." In this instant case, the interpretation of Controlled Substance has changed since Aguirre's sentence was enhanced for his case involving "Delivery" in the State of Texas. Enhancement Under 21 U.S.C. Section 851 and Section 4B1.1 became null and void.

Since Aguirre's judicial proceedings the guidelines have been amended several times in response to congressional directives, to provide greater emphasis on the defendant's conduct and role in the offense, rather than the drug quantity. the assertion that Aguirre was sentenced on drug quantity is ludicrous because the practice of finding sentencing-enhancing drug quantities at sentencing was a violation of the Sixth Amendment right to trial. See e.g. Alleyne v. United States, 133 S,.Ct. 2151 (2013)While Congress enacted Section 404 to rectify wrongs. it would be untenable to assume that Congress, when acting to rectify wrongs meant to direct courts to perpetuate unconstitutional practices.

Aguirre's pivotal argument in his application for a second or successive Section 2255 motion is a state crime cannot qualify as an Armed Career criminal Act (ACCA) predicate if its elements are broader than those of a listed generic offense. How a given defendant actually perpetrated the crime ---what the Supreme Court has referred to she underlying brute facts or means of commission ---makes no difference, even if his conduct fits within the generic offense, the mismatch of elements saves the defendant from an ACCA sentence.

In sum, Aguirre's instant Section 2255 is his first, because the first was dismissed procedurally, and the second was a Writ of Habeas Corpus. See Case 2:20-cv-00109-KWR-SCY Document 1, filed 02/06/2020) transferred to U.S. District Court , El Paso, where it was recharacterized, as a Section 2255 without a 'Castro' warning. In light of this, the three Panel of Circuit Judges' Admonition in the final paragraph of its judgment, should not apply to Aguirre. The panel was misled by Hon. Judge Frank Montalvo.

MISCHARACTERIZATION OF AGUIRRE'S CLAIMS BY THE THREE CIRCUIT PANEL AND THE DISTRICT COURT CONSTITUTED THE REASON FOR THE DENIAL OF HIS JOHNSON - BASED CLAIMS.

A district court cannot exercise (2020 U.S. Dist. LEXIS 10) jurisdiction over a second or successive Section 2255 petition without the authorization from the court of appeals. See 28 U.S.C. Section 2244(b).. Crone v.Cockrell, 324 F.3d 833, 836 (5th Cir. 2003). A petition is successive it it raises a claim that was or could have been raised in an earlier petition or otherwise constitutes an abuse of the writ. Hardemon v. Quaterman, 516 F.3d 272, 275 (5th Cir. 2008); Crone, 324 F.3d at 836-37. If it essentially presents a second attack on the dame conviction raised in the earlier petition, a petition is successive. Hardemon, 516 F.3d at 275-76 (distinguishing Crone because "Crone involved multiple Section 2254 petitions attacking a single judgment"). A second petition is not successive if the prior petition was dismissed due to prematurity or for lack of exhaustion, however. See Slack v. McDaniel, 529 U.S. 473, 487 (2000).

Here Petitioner Melero Aguirre challenges the same conviction in a prior federal petition (2241) that was denied on its merits. Under Hardemon and Crone, he was required to present all available claims in that petition. A claim is available when it 'could have been raised has the prisoner exercised due diligence." Leonard v. Dretke, No.. 3:02-CV-0578, 2004)(recommendation of Mag. J), adopted by 2004 WL 884578 (N.D. Tex. Apr. 20 2004). The crucial question in determining availability is whether Melero Aguirre knew or should have known through the exercise of due diligence the facts necessary to his current claims when he filed his prior federal petition challenging the same conviction.

Melero Aguirre's new federal petition is successive within the meaning of 28 U.S.C. Section 2244(b) because it raises claims that were or could have been raised in his initial federal petition. When a petition is successive, the petitioner, as here, must seek an order from the Fifth Circuit Court of Appeals that authorizes the filing of a second or successive application . See U.S.C. Section 2244(b)(3)(A). The Fifth Circuit "may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of (Section 2244 (b))"Section 2244(b)(3)(C).

To present a claim (2020 U.S. Dist. LEXIS 12) in a second or successive application that was not presented in a prior application, the application must show that it is based on: (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found him guilty of the offense; oar (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. Id. Section 2244(b)(2).

WHETHER THE MISMATCH OF ELEMENTS BETWEEN MELERO'S TEXAS SENTENCE FOR POSSESSION OF COCAINE AND ...SAVES HIM FROM AN ACCA SENTENCE AND THEREFORE HE SHOULD BE REMANDED BACK TO FOR SENTENCING WITHOUT THE UNCONSTITUTIONAL PREDICATE.

LEGAL ANALYSIS/DISCUSSION

As an initial mater, Melero Aguirre avers that in the resolution of whether or not his State of Texas conviction for delivery of has been abrogated in the federal scheme for purposes of enhancement. it will be instructive to note that the following 21 U.S.C. Section 802(44) states in pertinent part, t he following;

> "The term 'felony drug offense" means an offense that is punishable for more than one year under he law of the United States or a state of foreign country that prohibits or resists conduct relating to narcotic drugs, marihuana, anabolic steroids or depressants or stimulant substances, 2 U.S.C. Section 802(44). This broad language conduct relating to "the listed substance encompasses simple possession, as well as more serious conduct, so long as the substance involved falls within the federal definition of the listed drugs.

On the merits, Melero Aguirre's case (2020 U.S. Dist. LEXIS 10) analysis outlined in Mathis v. United States, 136 S.Ct. 2243,

195 L.Ed.2d 604 (2016) an United States v. Elder, 900 F.3d 491 (7th Cir. 2018) is applicable to Melero Aguirre's Texas conviction for delivery of drugs, may indeed be overbroad when compared to Section 802(44) and it related drug definitions. The Seventh Circuit made clear in Elder that the categorical approach explained in Mathis is the appropriate approach explained in Mathis as he appropriate method to determine whether a conviction under a particular state statute may serve as a predicate offense to enhance a sentence under 21 U.S.C. Section 841. See also United States v. De La Torre, 940 F.3d 938, 949 (7th Cir. 2019)(applying analysis i Elder and Najera-Rodriguez, 1993 version of 720 1lcs 570/420(c) is "categorically broader than the federal definition of a felony drug "offense" and cannot support a sentence enhancement under 21. U.S.C. Sub-Section (b)(1)(A) ad 851, Najera-Rodriguez v. Barr, 926 F.3d 343 (7th Cir. 2019)(holding that 720 1Lacs 570/402(c) is t divisible, includes controlled substances, ad is therefore overbroad).

Further, the categorical approach that shifts the inquiry away from the facts of how a particular defender committed a crime to the objective definition of the crime. The test limits to the elements that the criminal statute sets out, but the standard pattern jury instructions and case law also consulted for what elements are needed to prove the crime. Once the crime's elements are ascertained, then the test looks for the least culpable act that meets those elements, See U.S. v. Strevis, 663 Fed Appx 908, 2016 U.S. App. LEXIS 19537, 2016 WL 6406597 *2 (11th Cir. 2016)(summarizing the Supreme Court decisions of Descamps, Moncrief and Mathis, regarding the Categorical Approach as well as U.S. v. Estrella, 758 F.3d 1239 (11th Cir. 2014).

MELERO AGUIRRE'S INVOCATION OF ACTUAL INNOCENCE AND CAUSE AND PREJUDICE TO OVERCOME PROCEDURAL DEFAULT

AND WAIVER OF APPEAL.

In Shaid the Fifth Circuit stated:

> A defendant must meet this cause and actual prejudice test even when he alleges a fundamental constitutional error. Murray v. Carrier, 477 477 U.S. 478, 493, 106 S.Ct. 2639, 2648, 91 L.Ed.2d 397 (1986)(applying the test to fundamental defects affecting the court's truth finding function). The Court has held that the cause ad prejudice standard applies to inadvertent attorney errors as well as deliberate tactical decisions. Smith v. Murray, 477 U.S. 527, 533, 106 S.Ct. 2661, 2665, 91 L.Ed.2d 434 (1986); to racial discrimination in the compositing of the grad jury, Davis v. United States, 411 U.S. 233, 242-45, 93 S.Ct. 1577, 1582-84, 36 L.Ed.2d (1973); and to claims that may affect the truth finding function of the trial, Engle v. Isaac, 456 U.S. 107, 129, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783 (1982). The Court recently demonstrated its continued commitment to this test by requiring its use i the context f abuse of the writ. McClesky v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 1468-71, 113 L.Ed.2d 517 (1991).

Id. The Fifth Circuit has made it clear that the movant must demonstrate both cause and prejudice. Shaid, 937 F.2d at 232-236. Melero Aguirre contends he is able to meet this burden of showing cause and prejudice, consequently should not be barred from attacking his conviction or the Johnson based claim of sentencing enhancement.

As a initial matter, Melero Aguirre avers that to decide whether the kid of claim he asserts, this Honorable Court may decide whether or not the claim falls within the scope of Section 2255(f)(3). See generally, Figuereo-Sanchez v. U.S 678 F.3d 1203, 1207 (11th Cir. 2012)(noting the general rule "that a court other than the Supreme Court may determine retroactivity under Section 2255(f)(3)(3)."). To all intents and purposes, Melero Aguirre's first Section 2255 Motion filed in 2015 to Vacate et al, was dismissed for procedural reasons, and therefore does not count as a first 2255 Motion.

His next motion was a Section 2241 Motion which was denied. Therefore, his instant motion is really his first 2255 to all intent and purposes. To assist this curt in its determination, Melero Aguirre turns to case law. In Williams v. U.S., 663 Fed. Approx. 836 2016 U.S. App. LEXIS 18348, 2016 WL 5899738 (11th Cir. 2016), the Eleventh Circuit permitted that movant to challenge hi ACCA sentence enhancement on Johnson grounds in a first Section 2255 motion. The court discerned however, no on-point binding precedent from the Eleventh Circuit that says that a Johnson-based claim, applied to a Residual Clause outside of ACCA, is not the kind of 'right asserted' that Section 2255(f)(3) contemplates (2007 U.S. Dist. LEXIS 8).

In expanding its case law, the Eleventh Circuit cites two district court cases outside of the Eleventh Circuit that directly considered Section 2255(f)(3) timeliness in the context of movant like Melero Aguirre who use their first Section 2255 to raise a Johnson based challenge to the Residual Clause of Section 924(c). The district court in Brown v. U.S. 2016 U.S. Dist. LEXIS 145246, 2016 WL 5439718 (E.D. Tenn. 2016) found the motion timely under Section 2255(f)(3)---although it found the Johnson based attack on his Section 924(c) conviction to fail on their merits. Similarly, the district courts in Fowler v. U.S. 2016 U.S. Dist. LEXIS 143950, 2016 WL 6084100 (M.D. Fla. 20160 found those movant's' first section 2255 motions untimely for the reason being that their Johnson-based attacks on their Section 924(c) convictions fail on the merits.

The the Eleventh Circuit resolved the timeliness issue in in the Movant's favor. First, his claim for relief does (2017 U.S. District LEXIS 9) bear a clear analogous, like Melero Aguirre, relationship to the Johnson Holding. That, the ACCA and the Se, just like the Texas delivery of Cocaine charge, which by analogy is the same in the context of this case. The Eleventh circuit found the analogous relationship sufficient to invoke section 2255(rf)(3). Second, as in this case, Section 2255(f) and federal habeas corpus law, generally, create an imperative to raise claims for relief as early as possible Melero Aguirrre could not have raised his Johnson-based claim in his futile Section 2255 Motion to vacate et al, because he was then foreclosed by Fifth Circuit and Eleventh Circuit precedent.

REASON FOR GRANTING THE PETITION

The decision below conflicts with this Court's opinion in *Hurst v. Florida*, __U.S.__, 136 S.Ct. 616 (Jan. 12, 2016).

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that any fact other than a prior conviction that increased the defendant's maximum sentence must be proven to a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. In *United States v. Booker*, 543 U.S. 220 (2005), it applied this holding to the then-mandatory federal sentencing Guidelines, finding that judges may not make the factual findings that alter the maximum of a mandatory Guideline range. *See Booker*, 543 U.S. at 226. To remedy the constitutional violation, this Court severed the provision of the United States Code making the federal Guidelines mandatory. *See id.* at 245-246. The *Booker* opinion did not, however, leave the district courts free to impose any sentence within the statutory range in all cases. *See id.* at 259-264. Rather, the district court is now required to calculate an advisory range, to apply the factors enumerated at 18 U.S.C. §3553(a), and to impose a sentence no greater than necessary to achieve certain sentencing goals. *See id; Gall v. United States*, 552 U.S. 38, 50-51 (2007). Should the sentencing court fail to perform that task in a substantively reasonable fashion, the sentence may be reversed by the court of appeals. *See Booker*, 543 U.S. at 261-264; *Gall*, 552 U.S. at 50-51. The facts underlying this analysis may be made by a judge, provided the judicial fact-finding is not clearly erroneous. *See Gall*, 552 U.S. at 51.

Petitioner argued below that the facts that altered the maximum or minimum reasonable sentence must be made by a jury beyond a reasonable doubt. The court below rejected that claim, citing its prior decision in *United States v. Tuma*, 738 F.3d 681 (5th Cir. 2013). *See* [Appendix A]. *Tuma* held that judges may find any fact so long as it does not increase a statutory maximum, as this kind of fact-finding merely "influences judicial discretion." *Tuma*, 738 F.3d at 693 (quoting *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151 (2013)).

The decision below is not consistent with *Hurst*. Mr. Hurst was sentenced to death by a Florida judge, following an advisory verdict by a jury. *See Hurst*, 136 S.Ct. at 620. Under Florida law, a defendant convicted of capital murder may not receive a death sentence unless a trial judge

finds one of 16 enumerated aggravating factors. *See* F.S.A. §921.141(5). A Florida death sentence also requires the further finding "[t]hat sufficient aggravating circumstances exist ... and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." F.S.A. §921.141(3). Notwithstanding the existence of an advisory jury, this Court held that the Florida scheme violated the Sixth Amendment. *See Hurst*, 136 S.Ct. at 621. Of particular importance for current federal cases, the Court premised its Sixth Amendment holding on the reality that, under Florida law, "[t]he trial court alone must find 'the facts ... [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Id.* at 622 (quoting F.S.A. §921.141(3)).

The findings "that sufficient aggravating circumstances exist" to impose the death penalty and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances," is not analytically distinguishable from the finding required by 18 U.S.C. §3553(a), namely that the sentence is "sufficient, but not greater than necessary, to comply with the purposes set forth in" 18 U.S.C.§ 3553(a)(2), including punishment, deterrence, protection of the public, and provision of training and medical care. Both the Florida findings that authorize a death sentence and the finding required by 18 U.S.C. §3553(a) embody a value judgment – neither represents a simple, value-neutral finding of historical fact.[2] Both the Florida system and the federal post-*Booker* system require that the necessary findings be made explicitly. *See* F.S.A. §921.141(3); 18 U.S.C. §3553(c). And both provide appellate review of both the underlying historical facts and the resulting sentencing judgment. *See* F.S.A. §921.141(3); *Booker*, 543 U.S. at 261-264; *Gall*, 552 U.S. at 50-51. There is no material difference between the structure of the Florida system held unconstitutional in *Hurst* and

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[2]Although the Florida system provides a limited set of facts upon which a higher sentence (the death penalty) may be based, while the federal system is more open-ended, this distinction has already been held irrelevant for Sixth Amendment purposes. *See Blakely v. Washington*, 542 U.S. 296, 305 (2004)("Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence.")

CONCLUSION

Traditionally, efficiency and finality have carried less with than fairness in the criminal context, because criminal sanctions, may result in imprisonment and greater social stigma than civil sanctions. See, Stacy & Dalton, supra note 2, at 137 ("As our ...commitment to the availability of habeas corpus, finality and efficiency concerns carry relatively less sway in criminal cases than in civil cases - a product of criminal defendants\'s countervailing liberty interest." (footnote omitted).

The category known as trial errors can be harmless if the government can show beyond a reasonable doubt that they did not contribute to the verdict. See id at 24, see also Sullivan v. Louisiana, 508 U.S., 275, 279 (1993)(stressing that the test for harmlessness "is not whether, in a trial that occurred without the error, a guilty verdict would have surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.").

The Supreme Court has recognized a narrow set of rights that, if denied are structural errors, the rights to counsel, see Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963) and to counsel of choice, see United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006)(deeming deprivation of counsel of choice a structural error.); the right of self representation, see McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984)(finding harmless error analysis inapplicable to deprivations of the right to self-representation, because exercising the right increases the chance of a guilty verdict); the right to an impartial judge, see Tunney v. Ohio, 273 U.S. 510, 534 (1927)(holding that trial before a biased judge "necessarily involves a lack of due process").

Also denominated in the narrow set of rights deemed structural error, is the freedom from racial discrimination, in grand jury selection. This denial has been found to undermine "the objectivity of those charged with bringing a defendant to judgment"), the right to a public trial, see Waller v. Georgia, 467 U.S. 30, 49 (1984)("the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee"), and the right to accurate reasonable-doubt instruction, see Sullivan v. Louisiana, 508 U.S. 275, 280 (1993)(finding that because of an inadequate reasonable= doubt instruction, no actual jury verdict could thus not apply harmless error analysis to determine whether error affected the verdict.).

By contrast, the list of trial errors is extensive. See Arizona v. Fulminante, 499 U.S. 279, 306-07 (1991)(declaring that "almost all constitutional errors can be harmless," and naming sixteen examples of trial error. While the list of structural errors have remained consistent, the Supreme Court methods of distinguishing between trial and structural errors have fluctuated. The prejudicial impact of these constitutional errors is assessed by asking whether the error had " substantial and injurious effect or influence in determining the jury's verdict." Bretch v. Abrahamson, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 S.Ct. 1710, 123 L.Ed.2d 353 (1993), See also Fry v. Pliler, 551 U.S. 112, 119-120, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007)(holding that the Bretch standard applies whether or not the state court recognized the error and reviewed it for harmlessness.).

RELIEF SOUGHT

WHEREFORE, Petitioner Jose Guerra, premises considered moves this Honorable Court of Appeals for the Fifth Circuit, to grant his requested relief, by granting his application for Rehearing with Suggestions for Rehearing En Banc.

DATE: November 30, 202

Respectfully Submitted,

CERTIFICATE OF SERVICE

This is to certify that I, Rigoberto Melero Aguirre, deposited a true copy of the petition "PETITION FOR REHEARING PURSUANT TO DENIAL OF HIS PETITION FOR A WRIT OF PROHIBITION..ET AL". This petition was sent, pursuant to Houston v.. Lack (citations omitted), to the following pertinent parties;,

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, DC 20543-0001

OFFICE OF THE SOLICITOR GENERAL
950 PENNSYLVANIA AVE
WASHINGTON, D.C. 20530

CLERK OF COURT
U.S. COURT OF APPEALS
600 E. MAESTRI PLACE
NEW ORLEANS, LA 71310

DATE; DECEMBER 1, 2021

RESPECTFULLY SUBMITTED,

RIGOBERTO MELERO AGUIRRE
FED. REG. # 48168-280
FEDERAL CORRECTIONAL
INSTITUTION - LA TUNA
P.O. BOX 3000
ANTHONY, NM/TX 88021

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

November 15, 2021

Mr. Rigoberto Melero Aguirre
Prisoner ID #48168-280
FCI La Tuna
P.O. Box 3000
Anthony, TX 88021

Re: In Re Rigoberto Melero Aguirre
No. 21-5977

Dear Mr. Aguirre:

The Court today entered the following order in the above-entitled case:

The petition for a writ of prohibition is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk