No. 22-6461

IN THE SUPREME COURT OF THE UNITED STATES

SEGUNDO MARCIAL DOMINGUEZ-CAICEDO
ADRIAN ANDRES CORTEZ-QUINONEZ,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO UNITED STATES BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The question presented in the petition asks a legal question about the meaning of Federal Rule of Criminal Procedure 5(b) upon an arrest on the high seas.[1] Specifically, whether courts must consider delays resulting from the government's choice of district to transport when determining whether the individual was taken before a magistrate "without unnecessary delay." The Eleventh Circuit holds that is a legally relevant factor that should be considered during a court's Rule 5 analysis. *United States v. Cabezas-Montano*, 949 F.3d 567, 591-92 (11th Cir. 2020). The Ninth Circuit Court says the opposite. *United States v. Dominguez-Caicedo*, 40 F.4th 938 (9th Cir. 2022). The Ninth Circuit reasoned that because the government has broad discretion to choose the district for prosecution, "the proper inquiry is whether transportation to the United States as a whole was unnecessarily delayed, rather than whether there was some other district in the United States in which the defendant could have been brought before a magistrate judge more quickly." *Id.* at 953.

This Ninth Circuit rule creates a circuit split involving an "important matter" of criminal law. S. Ct. R. 10(a). The rule is also contrary to the long history at common law that the government must bring a person to a magistrate "as quickly as possible." *Mallory v. United States*, 354 U.S. 449, 454 (1957); *Corley v. United*

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[1] The first name of Petitioner Cortez-Quinonez was incorrectly misspelled in the original petition. Thus, this Court's docket lists the case with the misspelled first name. The correct spelling of his name is Andrian, not Adrian.

States, 556 U.S. 303, 306 (2009) (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 61–62 (1991) (SCALIA, J., dissenting).

The government contends that this Court should deny review. In doing so, it does not argue that courts, as a matter of law, must ignore delay associated with the government's choice of where to bring a maritime prosecution. Nor does it argue that such a rule would create a circuit split with the Eleventh Circuit.

Instead, the government claims that this case is not worthy of review because the Ninth Circuit did not create such a blanket rule. What the circuit really did, it contends, was to merely find that any additional delay created by the government's choice is not dispositive to the "unnecessary delay" analysis. And it finds that the Ninth Circuit, like the Eleventh Circuit, stated that this additional delay can be a factor to consider. The government further argues that this case is not a good vehicle for review because even if the Ninth Circuit would have found a Rule 5 error, Petitioners would not be entitled to any remedy.

But the Ninth Circuit did, in fact, create a rule that courts must defer to the government's choice of district and cannot consider the government's ability to transport arrestees more quickly to another district. The Ninth Circuit found that comparing the time it took to get a person to the government's chosen district, as opposed to another more proximate district is not legally relevant. And the Ninth Circuit applied this rule when reviewing the Rule 5 challenge of this case. The circuit court only focused on the time it took to transport from point of arrest to the government's chosen district. The circuit court refused to consider the fact that the

government chose to forgo a district where the petitioners could have been brought five days earlier when determining whether there was "unnecessary delay." The Ninth Circuit's rule is contrary to the important rule of prompt presentment. Moreover, because the facts in this case were significantly developed below during an evidentiary hearing, this case does present a perfect vehicle to decide this issue. And any issues involving remedy should there be error, can be resolved by the Ninth Circuit in the first instance on remand.

In short, this Court should grant review to resolve the circuit split and confirm that courts must consider delay associated with where the government chooses to prosecute when determining whether the individual was taken before a magistrate without "unnecessary delay."

ARGUMENT

I. In conflict with the Eleventh Circuit, the Ninth Circuit held that any additional delay resulting from the government's choice of district to prosecute is legally irrelevant to the unnecessary delay analysis of Rule 5.

Under Rule 5(b), "[a] person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise." The Ninth Circuit qualifies that rule. It claims that because a person arrested on the high seas "may be tried in *any* district," that person can be taken by the government before a magistrate *anywhere* in the United States without consideration of the availability of a more proximate magistrate judge in another district.

According to the government, the Ninth Circuit did not hold that the availability of a more proximate magistrate would be legally irrelevant to the unnecessary delay analysis. Instead, it claims, the Ninth Circuit, only stated that such a fact was not determinative. Brief in Opposition ("BIO") 11. The government implies that the Ninth Circuit, like the Eleventh Circuit, merely views this fact as one fact, among many, that may be considered in evaluating compliance with Rule 5. BIO 11-12. According to the government, it is the Petitioners, not the Ninth Circuit, that seek to create a per se rule that "always requires [the government to] transport to the most proximate magistrate —no matter how disruptive that may be." BIO 12. Each of these points are unfounded.

Contrary to the government's assessment, the Ninth Circuit did reject the premise that additional delay resulting from the government's choice of district is relevant to whether there was "unnecessary delay." The circuit made clear that the only focus is the time it takes to get from point of arrest to the district of the government's choice. *Dominguez-Caicedo*, 40 F.4th at 952-53.

The Ninth Circuit emphasized that no other case in the circuit had "compare[d] the time it took the government to bring the defendants to the prosecuting district to the time it *would* have taken to bring the defendants to the *closest* district." *Id.* at 952. It found that the only case to have specifically dealt with this Rule 5 "distinction" was the Eleventh Circuit in *Cabezas-Montano*. Quoting portions of *Cabezas-Montano* that were discussing a separate forum shopping issue, the Ninth noted that the Maritime Drug Law Enforcement Act (MDLEA) "'does not

prohibit the government from taking offenders'" to one district over the other since a ""person violating the MDLEA may be tried in any district, if the offense was begun or committed upon the high seas.'" *Dominguez-Caicedo*, 40 F.4th at 952 (quoting *Cabezas-Montano*, 949 F.3d at 591). The Ninth interpreted the Eleventh Circuit to say that because the government has broad discretion to decide venue, the courts should not get into comparing the government's choice of district to a more proximate one when evaluating compliance with Rule 5. The Ninth Circuit concluded that "[l]ike the Eleventh Circuit, we hold that the proper inquiry [for the Rule 5 analysis] is whether transportation to the United States as a whole was unnecessarily delayed, rather than whether there was some other district in the United States in which the defendant could have been brought before a magistrate judge more quickly." *Dominguez-Caicedo*, 40 F.4th at 953. Thus, the Ninth Circuit did create a blanket rule.

The Ninth Circuit's applied that rule to the Rule 5 factual analysis in this particular case further supporting that it rejects *any* consideration of additional delays resulting from the government's choice in district. The Ninth Circuit rejected consideration of the fact that the government was initially transporting petitioners to Florida before changing course for California. *Dominguez-Caicedo*, 40 F.4th at 953. The Ninth Circuit also rejected consideration of the fact that the government knew they could get to Florida five days earlier than California. *Id.* The only relevant question to the Rule 5 analysis, according to the Ninth Circuit, was the amount of time it took to "transport Defendants from near the Galapagos Islands to

San Diego." *Id.* That is, the court will only look at how long it took to get the defendants from point of arrest to a location within the government's chosen district of prosecution, without any regard to the government's ability to get defendants to another magistrate more quickly.

The Ninth Circuit's rule is contrary to that of the Eleventh Circuit, creating a circuit split. The government does not dispute that there was no such similar holding in the Eleventh Circuit. BIO 13-14. To the contrary, the Eleventh Circuit in *Cabezas-Montano* states that courts look to delays resulting from the government's choice of district when evaluating "the reasons or circumstances behind the delay." *Cabezas-Montano*, 949 F.3d at 591-92; BIO 14 (acknowledging that the Eleventh Circuit's finding that such a fact "might affect analysis" of Rule 5). The Ninth Circuit, however, ignores that portion of *Cabezas-Montano*.

Finally, contrary to the government's claims, Petitioners do not seek a per se rule that requires transport to the most proximate magistrate no matter what. *See* BIO 12. Nor do the Petitioners argue the Ninth Circuit erred in failing to do the same four-part test done by the Eleventh Circuit. BIO 14. Instead, Petitioners argue that the government's choice and the effect of that choice in regard to how quickly a person is brought to a magistrate is a relevant legal consideration as to whether the person was brought "without unnecessary delay." It cannot be, as the Ninth Circuit insists, that the government's choice of venue should always trump the critically important rule of prompt presentment. The Ninth Circuit's rule minimizes the importance of Rule 5 by deferring to the convenience of the government.

II. This case is the right vehicle for resolving this issue.

Petitioners' case squarely presents the issue of whether delay resulting from the government's choice of where to bring a person arrested in the high seas is a relevant inquiry to the Rule 5 analysis. The government does not dispute that the factual issues in this case surrounding the unnecessary delay analysis was fully developed during a five-day evidentiary hearing in the district court. But it nonetheless claims harmless error as a basis to decline review. The government contends that even if the courts below incorrectly applied the unnecessary delay analysis, it is unlikely there would be a remedy. According to the government, the lower courts would not have granted dismissal of the indictment nor would have suppression of statements changed the outcome of the trial. BIO 14-15.

But those issues were never addressed in the first instance by the Ninth Circuit. Because the Ninth Circuit did not find any Rule 5 error, it did not reach whether the case should have been dismissed by the district court. *Dominguez-Caicedo*, 40 F.4th at 951. ("Because we conclude that [the government] did not [violate Rule 5], we need not reach the question of whether the district court should have dismissed the indictment on that basis."). And, as the government acknowledges, the Ninth Circuit did not even address the alternative remedy of suppressing the statements. BIO 8, n. 2.

Thus, any issue of harmless error does not diminish the value of this case as a vehicle to address the circuit split regarding the unnecessary delay analysis of Rule 5. It is not this Court's practice to address harmlessness issues in the first

instance. *See, e.g., Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019); *Skilling v. United States*, 561 U.S. 358, 414 (2010). Because this Court could readily leave any harmless-error inquiry for the court of appeals on remand in the event of a reversal - as the Court has indicated it prefers to do, *see, e.g., Rose v. Clark*, 478 U.S. 570, 584 (1986) - the government's arguments about harmless error pose no obstacle to resolving the question presented.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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