Nos. 09-3932, 10-2190, and 10-2689

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

SERGIO S. RAMIREZ,
FRANCISCO OCAMPO-PINEDA, and
LUIS MANDUJANO-GONZALEZ,
Defendant-Appellants.

Consolidated Appeals from the United States District Court
for the Northern District of Illinois, Western Division and Eastern Division
Case Nos. 3:09-cr-50023-1, 1:09-cr-00632-1, and 1:09-cr-00586-1
The Honorable Frederick J. Kapala, the Honorable Virginia M. Kendall, and
the Honorable Amy J. St. Eve,
United States District Judges, Presiding.

Petition for Rehearing and Suggestion for Rehearing En Banc of Defendant-Appellants, Sergio S. Ramirez, Francisco Ocampo-Pineda, and Luis Mandujano-Gonzalez

FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF ILLINOIS
300 W. Main St.
Urbana IL 61801-2624
Telephone: (217) 373-0666
Fax: (217) 373-0667

RICHARD H. PARSONS
Federal Public Defender

JONATHAN E. HAWLEY
Appellate Division Chief

A. BRIAN THRELKELD
Staff Attorney

Attorneys for Defendant-Appellants,
SERGIO S. RAMIREZ and
LUIS MANDUJANO-GONZALEZ

ANTHONY W. HILL
Attorney for Defendant-Appellant,
FRANCISCO OCAMPO-PINEDA

ORAL ARGUMENT REQUESTED

Disclosure Statement

The undersigned counsel for Defendant-Appellant furnishes the following list in compliance with Federal Rule of Appellate Procedure 26.1:

1. The full name of every party or amicus the attorney represents in the case: SERGIO S. RAMIREZ and LUIS MANDUJANO-GONZALEZ.

2. Neither party is a corporation.

3. The names of all law firms whose partners or associates have appeared for the parties or are expected to appear for the parties in the case: Richard H. Parsons, Jonathan E. Hawley, and A. Brian Threlkeld of the Federal Public Defender's Office for the Central District of Illinois; for Mr. Ramirez on appeal, Carol Ann Brook of the Federal Defender Program, Inc.; the following attorneys in the district court for Mr. Ramirez: Paul Edmund Gaziano and Haneef Labeeb Omar of the Federal Defender Program, Inc. (the Illinois Attorney Registration & Disciplinary Commission's Lawyer Search application at <https://www.iardc.org/lawyersearch.asp> indicates that Mr. Omar is now in private practice); and the following attorneys in the district court for Mr. Mandujano: Gary W. Adair; and Sergio Fidel Rodriguez of the Illinois Federal Defender Program, Inc.

s/ A. Brian Threlkeld
A. BRIAN THRELKELD
Staff Attorney

The undersigned counsel for Defendant-Appellant furnishes the following list in compliance with Federal Rule of Appellate Procedure 26.1:

1. The full name of every party or amicus the attorney represents in the case: FRANCISCO OCAMPO-PINEDA.

2. The party is not a corporation.

3. The names of all law firms whose partners or associates have appeared for the parties or are expected to appear for the parties in the case: Anthony W. Hill.

s/ Anthony W. Hill
ANTHONY W. HILL

Dated: August 3, 2011

Table of Contents

Page

Table of Authorities

Cases **Page**

Statutes

Other Authorities

Federal Rule of Appellate Procedure 35(b)(1)(A) Statement Regarding Reasons for Granting Rehearing

Rehearing en banc is necessary for three reasons:

I. *First*, the panel decision creates circuit splits with the First and Third Circuits, which are the only other courts to have ruled on the question of what showing a defendant in a non-fast-track district must make to prove that he is similarly situated to defendants in fast-track districts. *See* Fed. R. App. P. 35(b)(1)(B). Specifically, the panel decision requires a defendant requesting a fast-track disparity reduction(1) to waive the same rights a defendant in a fast-track district would waive despite receiving no benefit from the government in exchange for that waiver, and (2) to make a heightened and rigorous evidentiary showing of his eligibility for a fast-track plea bargain and of the benefits he would receive from such a bargain in each fast-track district. *Compare United States v. Ramirez*, 2011 U.S. App. LEXIS 14847, at *2 (7th Cir. July 20, 2011), *with United States v. Rodriguez*, 527 F.3d 221, 230-31 & n.14 (1st Cir. 2008), *and United States v. Arrelucea-Zamudio*, 581 F.3d 142, 156-57 & n.14 (3d Cir. 2009). These circuit splits also warrant panel rehearing. *See* Fed. R. App. P. 40 and Circuit Rule 40(e).

II. *Second*, the panel decision deviates from the standard this Court just established in *United States v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010) (holding that a defendant need state only that he would have taken a fast-track plea, rather than requiring him to execute a complete waiver of rights). *See* Fed. R. App. P. 35(b)(1)(A).

III. *Third*, the panel decision involves a question of exceptional importance under Fed. R. App. P. 35(b)(1)(B) because it imposes an illogical and insurmountable standard upon every illegal reentry defendant seeking a fast-track disparity reduction.

Reasons Rehearing Should be Granted[1]

I. Introduction

This appeal presented a narrow question with significant consequences. The panel determined what showing a defendant charged with illegal reentry must make before the district court "is obliged to consider his request for a lower sentence to account for the absence of a fast-track program in that judicial district." *United States v. Ramirez*, 2011 U.S. App. LEXIS 14847, at *2 (7th Cir. July 20, 2011). Rehearing en banc or panel rehearing is required for three reasons.

First, the panel opinion creates two separate circuit splits by adopting an entirely new, categorically different two-pronged standard regarding the showing a defendant in a non-fast-track district must make to demonstrate that he is similarly situated to defendants in fast-track districts. *See* Fed. R. App. P. 35(b)(1)(B) (explaining that a party may petition for rehearing en banc when "the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue."). Despite creating these splits, it does not appear that the panel circulated its opinion as required by Circuit Rule 40(e).[2] Second, rehearing or rehearing en banc is necessary because the decision deviates from the standard this Court just established in *United States v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010). *See* Fed. R. App. P. 35(b)(1)(A) (allowing a party to petition for rehearing en banc when "the panel decision conflicts with a decision of the court to which the petition is addressed"). Third, the opinion requires defendants to provide information that the

[1] Counsel thank Alison Siegler (Associate Clinical Professor, University of Chicago Law School) and Sarah Nudelman (Class of 2013) for their generous assistance in writing this petition.

[2] Appellants acknowledge that they were not aware of this circuit split at the time of the briefing in this case and did not alert the panel to it. Appellants urge the panel and this Court to reconsider the holding in light of the split and its consequences.

Department of Justice refuses to make public and hides even from its own line prosecutors, and thus sets a standard that is both illogical and impossible for defendants to meet.

The panel decision conflicts with the law in other circuits in two ways. The primary conflict is that *Ramirez* requires defendants seeking fast-track disparity reductions to formally waive specific rights, including the right to appeal, without receiving any benefit from the government in exchange for that waiver. In contrast, the other circuits that recognize district court discretion to consider the fast-track disparity have uniformly held that a defendant seeking a reduced sentence based on the fast-track disparity argument is not required to blindly waive the same rights defendants in fast-track districts relinquish because — unlike in an actual fast-track district — the Government is not promising the same benefit (*i.e.*, to request a lower sentence). *See United States v. Rodriguez*, 527 F.3d 221, 230-31 (1st Cir. 2008); *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 156-57 (3d Cir. 2009). In both the First and Third Circuits, the defendant need show only that he would have taken a fast-track plea *if* the government had offered it. Until the panel decision, this Court had taken the same position as those other circuits: This Court recently held in *Reyes-Hernandez* that the defendant need show merely that he *would have* pursued fast-track status, in that he would have agreed to plead guilty and waive his rights had he been offered a fast-track plea deal. *See* 624 F.3d at 420.

The panel decision creates a second circuit split by requiring defendants in the Seventh Circuit to make a far more rigorous evidentiary showing than the First and Third Circuits require regarding the eligibility criteria for reduced sentences in the various fast-track districts and the benefits defendants in those districts receive. Specifically, the panel decision requires a defendant (1) to provide detailed proof of his hypothetical eligibility for

fast-track consideration elsewhere, as well as to advise the court if he might be ineligible in any fast-track district; and (2) to demonstrate the particular sentence reduction defendants in each of the fast-track districts receive when they enter into fast-track plea agreements.

II. The panel decision creates a circuit split and deviates from this Court's own precedent by requiring defendants seeking fast-track disparity reductions to waive certain rights without receiving any benefit in exchange.

The panel decision held that a district court is required to consider a defendant's fast-track disparity argument only if, among other things, he "execute[s] an enforceable waiver of specific rights before or during the plea colloquy." *Ramirez*, 2011 U.S. App. LEXIS 14847, at *3. The waiver requirement is unprecedented and creates a clear split with both the First and Third Circuits. It also deviates sharply from the standard articulated by this Court in *Reyes-Hernandez*.

The First and Third Circuits have both held that a defendant in a non-fast-track district is not required to waive the same rights that an actual fast-track defendant waives[3] in order to prove that he is similarly situated. Both courts explained that a defendant need not surrender these rights because he does not receive the same benefit provided in fast-track districts (specifically, a plea agreement in which the government agrees to request a lower sentence in exchange for the defendant's waiver of rights).

In *Rodriguez*, the First Circuit reprimanded the government for arguing that the defendant was not similarly situated to other defendants because "he filed pretrial motions

[3] Defendants in fast-track districts waive the following rights: "To receive leniency in any fast-track district, a defendant must, as a starting point, promptly plead guilty, agree to a factual basis for the offense, and [unconditionally] waive his rights to file pretrial motions, to appeal, and to seek postconviction relief under § 2255." *Ramirez*, 2011 U.S. App. LEXIS 14847, at *17 (citing Memorandum from the U.S. Attorney General to U.S. Attorneys at 3 (Sept. 22, 2003), *available at* http://www.justice.gov/ag/readingroom/ag-092203.pdf) (hereinafter "Attorney General's Fast-Track Memorandum").

and did not waive his right to appeal." 527 F.3d at 230. The court held: "[T]he government is trying to have it both ways. Lacking the benefit of the bargain inherent in fast-track programs, a defendant cannot be expected to renounce his right to mount a defense." *Id.* at 231 (quoting *United States v. Tierney*, 760 F.2d 382, 388 (1st Cir. 1985) ("Having one's cake and eating it, too, is not in fashion in this circuit.")).

In *Arrelucea-Zamudio*, the Third Circuit similarly concluded that a non-fast-track defendant lacks "the opportunity to waive his appellate or other rights in exchange for the departure recommendation, as is part of a plea agreement in fast-track districts (and not available to a defendant in a non-fast-track district)." 581 F.3d at 156 n.14 (citing *Rodriguez*, 527 F.3d at 230-31).[4] Because defendants in non-fast-track districts do not receive the same benefits as defendants in fast-track districts, the Third Circuit requires only that a defendant in a non-fast-track district "demonstrate that he would have taken the fast-track guilty plea if offered (and, in so doing, waived his appellate rights, including his habeas rights but for ineffective assistance of counsel)." *Id*. at 157. The Third Circuit emphasized:

> "We do not require a more extensive showing. Requiring anything more . . . would create an insurmountable obstacle for a defendant because the point in affording a sentencing judge discretion to consider the disparity created between fast-track and non-fast-track districts as part of the compendium of

[4] *Ramirez* quotes this exact same section of *Arrelucea-Zamudio*, but the panel fails to acknowledge that the panel decision rejects *Arrelucea-Zamudio*'s holding. *See Ramirez*, 2011 U.S. App. LEXIS 14847, at *16 (" 'To justify a reasonable variance by the district court, a defendant must show at the outset that he would qualify for fast-track disposition in a fast-track district.' ") (quoting *Arrelucea-Zamudio*, 581 F.3d at 156-57).

> § 3553(a) sentencing factors is that this type of plea is not available to a defendant in a non-fast-track district."

Id.[5]

Thus, before the panel decided this case, both the First Circuit and the Third Circuit had held that defendants in non-fast-track districts are not required to suffer the detriment of actually relinquishing their rights because they do not receive the reciprocal benefit of a government request for a lower sentence which is granted to defendants in fast-track districts.[6] In fact, the First and Third Circuits agree that a defendant who does not receive "the benefit of the bargain inherent in fast-track programs . . . cannot be expected to renounce his right to mount a defense." *Rodriguez*, 527 F.2d at 231. The panel decision in *Ramirez* departed from those decisions by requiring a defendant in the Seventh Circuit to unconditionally waive his rights to appeal and to challenge his conviction under 28 U.S.C. § 2255 during or before the guilty plea colloquy, *see Ramirez*, 2011 U.S. App. LEXIS 14847,

---

[5] *Arrelucea-Zamudio* held that the defendant in that case had met his burden by (1) "offer[ing] to accept a plea agreement and waive his appellate (and, we presume, his habeas) rights if the Government would stipulate to a four-level departure at sentencing," and (2) informing the court at the sentencing hearing that he "would have accepted a fast-track plea." 581 F.3d at 157. The Third Circuit's holding is consistent with the essential requirements for fast-track programs laid out in the Attorney General's Fast-Track Memorandum, *supra* note 3, which makes clear that fast-track plea agreements include *both* the defendant's waiver of rights *and* the government's agreement "in exchange" to request a reduction of the defendant's sentence by either moving for a downward departure or entering into a charge bargain. Attorney General's Fast-Track Memorandum at 3. Notably, although *Ramirez* cites the Attorney General's Memorandum for the rights that a fast-track defendant must waive, the panel decision does not acknowledge the benefits the government confers in exchange for that waiver. *See Ramirez*, 2011 U.S. App. LEXIS 14847, at *17.

[6] It should be noted that Judge Carnes on the Eleventh Circuit has taken the same position as the First and Third Circuits on the issue of waiver. *See United States v. Vega-Castillo*, 548 F.3d 980, 982 (11th Cir. 2008) ("Of course, a defendant cannot be required to file an appeal waiver covering the fast track program disparity issue as a condition of appealing that very issue. However, it might well be reasonable to require the defendant to offer to file an appeal waiver covering every issue except fast track disparity in order to align himself as closely as possible with those defendants in other districts who have received the departure.") (Carnes, J., concurring in the denial of rehearing en banc).

at *24-25, and by prohibiting a defendant from conditioning his waiver of rights on the receipt of a future benefit, *id.* at *17.

By creating a new waiver requirement, the panel decision also breaks with this Court's own very recent precedent. This Court held in *Reyes-Hernandez* that a defendant seeking a fast-track disparity reduction "must first . . . show that he would have in fact pursued the [fast-track] option (by pleading guilty and waiving his appellate rights)." 624 F.3d at 420. The standard this Court set in *Reyes-Hernandez* is identical to the Third Circuit's standard, which requires the defendant to "demonstrate that he would have taken the fast-track guilty plea *if offered* (and, in so doing, waived his appellate rights, including his habeas rights but for ineffective assistance of counsel)." *Arrelucea-Zamudio*, 581 F.3d at 157 (emphasis added). The panel's decision changes this Court's settled precedent. Rather than merely requiring the defendant to state that he would have accepted a fast-track plea agreement, the panel's decision imposes an entirely new requirement that a defendant must abandon all the rights relinquished in fast-track plea agreements *without any promise* that the Government will provide the benefit of a reduced sentence in return.[7]

III. The panel decision creates an additional circuit split by requiring defendants to provide extremely detailed information about all fast-track programs.

The panel decision in *Ramirez* also creates a circuit split by crafting an extraordinarily high evidentiary burden for non-fast-track defendants. Specifically, *Ramirez* differs with the

[7] Although the defendant in one of the consolidated cases, *United States v. Ocampo-Pineda,* 10-2190, relied on this Court's precedent in *Reyes-Hernandez* at the district court level, the *Ramirez* panel denies him a remand for resentencing, based on the new standard it created. *See* Appellant's Supplemental Submission, at 2 (explaining the various ways in which Ocampo demonstrated that he would have pursued a fast-track plea had it been available, including pleading guilty promptly, foregoing pretrial motions, agreeing to the government's factual basis, and "execut[ing] a conditional waiver of rights that would take effect if he received fast-track consideration in his sentence," in which he "agreed to surrender all of the same rights required for fast-track participation in other districts.").

First and Third Circuits on what a defendant must show (1) to prove that he would be hypothetically eligible for a fast-track reduction elsewhere, and (2) to demonstrate the benefits available to defendants in fast-track districts (*i.e.*, the extent of the sentence reduction provided to those defendants).

On the question of eligibility, *Ramirez* imposes a far heavier evidentiary burden than the other circuits. *Ramirez* requires a defendant to "show that he actually would be eligible to receive a fast track benefit in at least one judicial district" and to make "a candid assessment of the number of programs for which he would not qualify." *Ramirez*, 2011 U.S. App. LEXIS 14847, at *3. In contrast, the First Circuit places the burden for demonstrating hypothetical eligibility on the government rather than on the defendant. *See Rodriguez*, 527 F.3d at 231 ("[T]he criteria for fast-track programs vary from district to district, and the government has not suggested that the appellant would be categorically foreclosed from receiving fast-track benefits."). The Third Circuit requires a minimal evidentiary showing, in that it expects a defendant to "show at the outset that he would qualify for fast-track disposition in a fast-track district" (*e.g.*, showing whether his "serious criminal history . . . disqualif[ies] him in most fast-track districts"), *Arrelucea-Zamudio*, 581 F.3d at 156, but that showing is far less onerous than the one imposed by the *Ramirez* panel. In fact, the Third Circuit emphasizes that the defendant does not have to make the eligibility showing with "exacting particularity," *id.* at 156 n.14, and does not have to identify districts in which he might be ineligible.

On the question of benefits, neither the First Circuit nor the Third Circuit requires a defendant to demonstrate the specific sentence-reduction benefits available in each fast-track district. *Ramirez* splits with those circuits by requiring a defendant to provide "a thorough account of the likely benefit in each district where the defendant would be eligible for a fast-

track sentence." *Ramirez*, 2011 U.S. App. LEXIS 14847, at *26. Notably, the opinion acknowledges that the government did *not* ask the Court to impose such a requirement. *Id*. ("[W]e think that the government's position omits what is probably the most useful information.").

IV. The new waiver standard created by the panel's decision is logically incoherent, and the new eligibility standard is impossible to meet.

The panel decision is also incorrect on the merits. With regard to the waiver-of-rights circuit split, although the panel decision claims that its new waiver standard renders defendants in the Seventh Circuit similarly situated to defendants in fast-track districts, the decision in fact makes defendants in this circuit *differently* situated, because it forces them to give up rights without receiving the same benefits accorded to fast-track defendants. With regard to the evidentiary-burden circuit split, the panel decision sets an unachievable standard because it requires defendants to provide information about fast-track eligibility and benefits that is confidential and impossible to obtain.

A. The panel's waiver requirement is illogical because it amplifies rather than reduces the disparity between defendants within the Seventh Circuit and defendants in fast-track districts

The panel's holding that a defendant can prove he is similarly situated only by waiving his rights without receiving any reciprocal benefit rests on flawed reasoning. Though the panel decision professes to set a standard that renders defendants in the Seventh Circuit "similarly situated" to defendants in fast-track districts, the opinion actually forces defendants in the Seventh Circuit to put themselves in a *worse position* — not a "similar" one — to defendants in fast-track districts. The panel decision justifies its waiver requirement by explaining: "A defendant who wants to claim parity with an eligible defendant in a fast-track district must be prepared to accept the detriments that come with that status," which include

waiving the relevant rights "immediately when [a defendant] enters his guilty plea." *Ramirez*, 2011 U.S. App. LEXIS 14847, at *19. But forcing a defendant to waive rights *without* receiving the reciprocal benefit of a plea agreement containing the government's recommendation for a reduced sentence does not make that defendant similarly situated to fast-track defendants. Defendants in fast-track districts receive a "type of plea [that] is not available to a defendant in a non-fast-track district," *Arrelucea-Zamudio*, 581 F.3d at 157, in which they waive rights "in exchange for" a lower sentence, *see* Attorney General's Fast-Track Memorandum, *supra* note 3, at 3, § II.C ("*In exchange for* the above [waived rights], the attorney for the Government may agree to move at sentencing for a downward departure from the adjusted base offense level" or may provide "a charge-bargain[ed] . . . sentencing reduction.") (emphasis added).[8] There is thus no "parity" at all between a defendant in a fast-track district who accepts the detriments that come with fast-track status in exchange for a reduced sentence, and a defendant in a non-fast-track district who accepts the detriments without receiving the benefit.

B. The new evidentiary showing *Ramirez* requires is unachievable

The panel opinion sets an insurmountable hurdle and creates a due process concern by requiring defendants to provide information that is not publicly available and that the Department of Justice and its constituent United States Attorney's Offices steadfastly refuse to share with defendants in non-fast-track districts. Defendants simply cannot access the information which the opinion requires them to provide; DOJ considers the specifics of each district's fast-track program to be secret and confidential. As the opinion acknowledges,

[8] The Attorney General's fast-track memorandum was cited by both parties and by the panel decision. *See United States v. Mandujano*, No. 10-2689, Appellant's Brief at 16; Appellee's Brief at 15; *Ramirez*, 2011 U.S. App. LEXIS 14847, at *17.

"[T]he United States Attorneys in the judicial districts that offer fast-track sentencing have not adopted uniform eligibility criteria" and "the [sentencing] guidelines do not catalogue the eligibility criteria employed in the 16 fast-track programs." *Ramirez*, 2011 U.S. App. LEXIS 14847, at *18. The government admitted in its briefs that it was "not aware of any public resource that identifies the individual criteria and prosecution guidelines each U.S. Attorney's Office has adopted for its fast-track programs." *United States v. Ramirez*, 09-3932, Appellee's Brief, at 25 n.4; *United States v. Mandujano-Gonzalez*, 10-2689, Appellee's Brief, at 22 n.3. The government made substantially the same admission at oral argument. Appellant likewise alerted the Court to the lack of available information about the details of the individual fast-track programs both in the briefs and during oral argument. *See, e.g.*, *United States v. Ocampo-Pineda*, 10-2190, Appellant's Supplemental Submission, at 6 n.2 ("As the details of each District's Fast-Track program are not in the public domain, the government is in a much better position to clarify these points than defense counsel."); *id.* at 7 (explaining that a defendant "would have no easy way to establish the specific criteria used in every Fast-Track district").

Given the deep secrecy in which information about the specifics of each fast-track program is shrouded, the only way a defendant can even attempt to meet the stringent standard set by the panel decision is to rely on the incomplete and dated information in a sentencing exhibit submitted by a prosecutor to a district court six years ago. *See* Fast-Track Dispositions District-by-District Relating to Illegal Reentry Cases, *reprinted in* 21 FED. SENT'G REP. 339 (2009), *cited in Ramirez*, 2011 U.S. App. LEXIS 14847, at *18 (hereinafter "District-by-District Memorandum"). But the panel decision itself casts doubt on the District-by-District Memorandum, calling it a "timeworn document . . . which may or

may not still be accurate, and which does not include any information about the two newest [fast-track] programs." *Ramirez*, 2011 U.S. App. LEXIS 14847, at *18. In fact, the document omits information about two other fast-track programs, those in Puerto Rico and Utah.[9]

At best, the District-by-District Memorandum might enable a defendant to show that he is *not ineligible* in at least one fast-track district. But the panel decision requires a far more rigorous showing than that. It requires: (1) proof that the defendant would definitively be eligible for a reduction in at least one fast-track district, (2) a list of any districts in which the defendant might be ineligible, and (3) proof of the specific sentence-reduction benefits the defendant would receive in each and every fast-track district. *See Ramirez*, 2011 U.S. App. LEXIS 14847, at *23-*24, *27. In light of this litany of requirements, the panel decision's acknowledgment "that establishing that a defendant in this circuit would have received a fast-track benefit in a district that offers one can be a little complicated," *id* at *21, is a gross understatement. It is simply impossible for a defendant to make the particularized showing required by the panel in a complete and definitively accurate way.

In sum, the panel decision requires defendants either to provide district courts with information that is impossible to obtain or, alternatively, to rely on an incomplete, possibly

---

[9] Perhaps the best evidence that the District-by-District Memorandum is unreliable is the panel's own reliance on it for information that is demonstrably and unequivocally *in*accurate. For example, the panel decision cites the Memorandum to assert that Mr. Ocampo-Pineda would have received a 1-level Guideline reduction in the Western District of Texas. *Id*. at *27. Unbeknownst to the panel, the U.S. Attorney's Office in that district had discontinued its fast-track program as of at least December 28, 2009. *See* David W. Ogden, Memorandum: Authorization for Certain Early Disposition Programs 1-2, *available at* http://www.fd.org/pdf_lib/Fast%20Track%20Ogden%20memo%2012.28.09.pdf. The Ogden memorandum also demonstrates that as of 2009 there were only 15 fast-track districts, not 16, as the panel's reliance on the 2006 District-by-District Memorandum led it to believe. *See Ramirez*, 2011 U.S. App. LEXIS 14847, at *18. It should be noted that the 2009 Ogden memorandum is one of the only pieces of publicly available information about the various fast-track programs, that it says nothing about the provisions of each district's fast-track programs, and is itself over a year old.

inaccurate, and admittedly "timeworn" document. A more realistic standard would be akin to the one set by the First Circuit: Place the burden on the government to provide information about a defendant's potential eligibility for, and the benefits accorded by, the various fast-track programs. *See Rodriguez*, 527 F.3d at 231; *United States v. Ocampo-Pineda*, 10-2190, Appellant's Supplemental Submission, at 6 n.2. This standard is appropriate because the Department of Justice and the United States Attorney's Offices that operate fast-track programs are the only entities that possess comprehensive and fully accurate information about the specific provisions of each district's program. That information simply is not available to defendants in the Seventh Circuit.

V. The strict limits the panel decision places on district courts' 18 U.S.C. § 3553(a)(6) discretion are at odds with congressional mandate and established precedent.

By creating onerous requirements for a defendant in a non-fast-track district to prove that he is similarly situated to defendants in fast-track districts, the panel decision improperly usurps the discretion that Congress, the Supreme Court, and this Court have all accorded to sentencing courts, and runs afoul of the deferential standard of review in *United States v. Booker*, 543 U.S. 220 (2005), and its progeny. The Supreme Court held in *Gall v. United States*, 552 U.S. 38 (2007), that "[t]he sentencing judge is in a superior position to find facts *and judge their import* under § 3553(a) in the individual case." *Id.* at 51 (emphasis added). In addition, the Supreme Court has consistently reaffirmed that Congress intended that sentencing courts, rather than courts of appeals, make factual findings and draw legal conclusions under 18 U.S.C. § 3553(a)(6). *See, e.g.*, *Kimbrough v. United States*, 552 U.S. 85, 108 (2007) ("Section 3553(a)(6) directs *district courts* to consider the need to avoid unwarranted disparities — along with other § 3553(a) factors — when imposing sentences.")

(citation omitted); *Gall*, 552 U.S. at 55 (approving a sentencing court's exercise of its § 3553(a)(6) discretion to determine that a particular disparity or similarity is "unwarranted"); *Booker*, 543 U.S. at 259-60 ("The [Sentencing Reform] Act requires [district] judges to consider . . . the need to avoid unwarranted sentencing disparities.") (citing § 3553(a)(6)). This Court likewise has held that, in making § 3553(a)(6) determinations, "the [district] court is free to have its own policy about which differences are 'unwarranted.'" *United States v. Bartlett*, 567 F.3d 901, 909 (7th Cir. 2009). The question of whether one defendant is "similarly situated" enough to another defendant to render a disparity in their sentences unwarranted is part of any § 3553(a)(6) determination — a determination that Congress, the Supreme Court, and this Court have all assigned to the district court.

VI. Summary

The Court should grant rehearing en banc or the panel should grant rehearing because the panel decision creates two circuit splits among the courts of appeals and deviates from this Court's own precedent. In fact, the panel decision effectively reverses the holding in *Reyes-Hernandez*, a decision that every active Circuit Judge on the Seventh Circuit approved. *Reyes-Hernandez* appropriately granted defendants the right to argue for consideration of an unwarranted disparity, but the panel opinion makes it effectively impossible to present that argument by creating a standard that no defendant can meet. En banc or panel review is necessary to give *Reyes-Hernandez* the meaning this Court intended it to have.

Conclusion

For the reasons set forth in this petition, Defendant-Appellants, SERGIO S. RAMIREZ, FRANCISCO OCAMPO-PINEDA, and LUIS MANDUJANO-GONZALEZ, request a panel rehearing or rehearing en banc.

Respectfully submitted,

RICHARD H. PARSONS
Chief Federal Public Defender

JONATHAN E. HAWLEY
Appellate Division Chief

By: s/ A. Brian Threlkeld
A. BRIAN THRELKELD
Staff Attorney

Attorneys for Defendant-Appellants,
SERGIO S. RAMIREZ and
LUIS MANDUJANO-GONZALEZ

s/ Anthony W. Hill
ANTHONY W. HILL

Attorney for Defendant-Appellant
FRANCISCO OCAMPO-PINEDA

On the petition:
ALISON SIEGLER
Associate Clinical Professor
University of Chicago Law School
(Assisted by Sarah Nudelman, Class of 2013)

Certificate of Compliance with Fed. R. App. P. 35(b)(2)

The undersigned certify that this petition complies with the volume limitations of Federal Rule of Appellate Procedure 35(b)(2) in that the Petition for Rehearing and Suggestion for Rehearing En Banc is less than 15 pages, exclusive of material not counted under Federal Rule of Appellate Procedure 32.

s/ A. Brian Threlkeld
A. BRIAN THRELKELD
Staff Attorney
Federal Public Defender's Office
300 W. Main St.
Urbana IL 61801-2624
Tel. (217) 373-0666
Fax (217) 373-0667

s/ Anthony W. Hill
ANTHONY W. HILL
LAW OFFICES OF ANTHONY W. HILL
The Monadnock Building
53 W. Jackson Blvd. Ste. 615
Chicago IL 60604-3668
Tel. (312) 922-8980

Dated: August 3, 2011

Nos. 09-3932, 10-2190, and 10-2689

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. SERGIO S. RAMIREZ, FRANCISCO OCAMPO-PINEDA, and LUIS MANDUJANO-GONZALEZ, Defendant-Appellants.	Appeal from the United States District Court for the Northern District of Illinois, Western Division and Eastern Division Case Nos. 3:09-cr-50023-1, 1:09-cr-00632-1, and 1:09-cr-00586-1 Hon. Frederick J. Kapala, Hon. Virginia M. Kendall, and Hon. Amy J. St. Eve, United States District Judges, Presiding.

Notice of Filing and Proof of Service

TO: Mr. Gino Agnello, Clerk, United States Court of Appeals, 219 S. Dearborn St. Ste. 2722, Chicago IL 60604-1874

Mr. Sergio S. Ramirez, Reg. No. 30283-424, CI Adams County, Correctional Institution, PO Box 1600, Washington MS 39190-1600

Mr. Francisco Ocampo-Pineda, Reg. No. 41399-424, USP Marion, U.S. Penitentiary, PO Box 1000, Marion IL 62959-7500

Mr. Luis Mandujano-Gonzalez, Reg. No. 41368-424, FCI Bennettsville, Federal Correctional Institution, PO Box 52020, Bennettsville SC 29512-5220

Ms. Monica Mallory, Office of the United States Attorney, 308 W. State St. Ste. 300, Rockford IL 61101-1140

Ms. Yasmin Noelle Best and Ms. Helene B. Greenwald, Office of the United States Attorney, 219 S. Dearborn St. Ste. 500, Chicago IL 60604-1700

PLEASE TAKE NOTICE that on August 3, 2011, the undersigned attorneys filed the Petition for Rehearing and Suggestion for Rehearing En Banc of Defendant-Appellants, Sergio S. Ramirez, Francisco Ocampo-Pineda, and Luis Mandujano-Gonzalez, with the Clerk of the

United States Court of Appeals for the Seventh Circuit and served the Petition upon all counsel of record, by electronic filing of the Petition in digital media formatted in Portable Document Format.

BY: s/ A. Brian Threlkeld

A. BRIAN THRELKELD
Staff Attorney
Federal Public Defender's Office
300 W. Main St.
Urbana IL 61801-2624
Tel. (217) 373-0666
Fax (217) 373-0667

s/ Anthony W. Hill

ANTHONY W. HILL
LAW OFFICES OF ANTHONY W. HILL
The Monadnock Building
53 W. Jackson Blvd. Ste. 615
Chicago IL 60604-3668
Tel. (312) 922-8980