
In the Supreme Court of the United States
at Washington, District of Columbia

JOSE PALACIOS, JR.,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit at New Orleans, Louisiana

PETITION FOR A WRIT OF CERTIORARI

Gregory Sherwood
Attorney
P.O. Box 200613
Austin, Texas 78720-0613
(512) 484-9029
Texas Bar # 18254600
Email: gsherwood@mail.com

Court-Appointed Attorney for
Appellant Jose Palacios, Jr.

QUESTION PRESENTED FOR REVIEW

The Fifth Circuit, and two other circuits, have interpreted the mandate rule in a “restrictive” or “waiver” approach, meaning that when a case is remanded from the appellate court to the district court for resentencing, only the issues raised in the appeal may be determined on remand. However, five other circuits have held that there is a *de novo* approach to resentencing on remand, which is not restricted to what was raised in the appeal that resulted in the remand.

Petitioner’s first appeal only argued that the district court erred in failing to permit him to allocute, and did not discuss any other sentencing errors, and the Fifth Circuit vacated and remanded so that Petitioner could allocute. As a result, Petitioner could not argue at resentencing that the district court erred in imposing a two level enhancement for possession of a firearm, or whether he should receive safety valve relief. If Petitioner had been sentenced in a circuit that follows the *de novo* approach to resentencing on remand, he could have had these arguments decided on remand.

Should this Court resolve the conflict among the circuits concerning whether the remand rule should be interpreted restrictively, as held by three circuits, including the Fifth Circuit, or whether the *de novo* approach to resentencing on remand should apply, as held by five circuits, so that the same rule will apply to all federal criminal defendants who obtain a remand for resentencing?

Table of Contents

QUESTION PRESENTED FOR REVIEW	<u>i</u>
Table of Contents	<u>ii</u>
Opinion Below	<u>1</u>
Statement of Jurisdiction.....	<u>2</u>
Statement of the Case.....	<u>2</u>
Argument Amplifying Reasons for Granting the Writ	<u>10</u>
Conclusion and Prayer for Relief.....	<u>13</u>

Appendix

Tab

<i>United States v. Palacios</i> , 844 F.3d 527 (5 th Cir. Dec. 27, 2016) (slip op.) - Fifth Cir. 17-40560 ROA.234-244	A
May 17, 2017 Amended Judgment in a Criminal Case - Fifth Cir. ROA.278-282	B
<i>United States v. Palacios</i> , 721 Fed. Appx. 405 (5 th Cir. May 10, 2018) (slip op.)	C

Table of Authorities

Cases

<i>United States v. Atehortva</i> , 69 F.3d 679 (2 nd Cir. 1995)	<u>10</u>
<i>United States v. Blackson</i> , 709 F.3d 36 (D.C. Cir. 2013)	<u>11</u>
<i>United States v. Catrell</i> , 774 F.3d 666 (10 th Cir. 2014)	<u>11</u>
<i>United States v. Cornelius</i> , 968 F.2d 703 (8 th Cir. 1992).....	<u>11</u>
<i>United States v. Eason</i> , No. 17-1402, ___ F.3d ___ (8 th Cir. May 25, 2018)	<u>11</u>
<i>United States v. Flores</i> , 725 F.3d 1028 (9 th Cir. 2013)	<u>11</u>
<i>United States v. Garcia-Robles</i> , 640 F.3d 159 (6 th Cir. 2011).....	<u>11</u>
<i>United States v. Griffith</i> , 522 F.3d 607 (5 th Cir. 2008).....	<u>8</u> , <u>9</u> , <u>11</u>
<i>United States v. Hunter</i> , 809 F.3d 677 (D.C. Cir. 2016)	<u>11</u>
<i>United States v. Jennings</i> , 83 F.3d 145 (6 th Cir. 1996)	<u>11</u>
<i>United States v. Lee</i> , 358 F.3d 315 (5 th Cir. 2004).....	<u>5</u> , <u>8</u> , <u>9</u> , <u>11</u>
<i>United States v. Lewis</i> , 842 F.3d 467 (7 th Cir. 2016)	<u>11</u>
<i>United States v. Marmolejo</i> , 139 F.3d 525 (5 th Cir. 1998).....	<u>8-11</u>
<i>United States v. Palacios</i> , 721 Fed. Appx. 405 (5 th Cir. 2018).....	<u>9</u>
<i>United States v. Palacios</i> , 844 F.3d 527 (5 th Cir. 2016).....	<u>3</u>
<i>United States v. Parker</i> , 101 F.3d 527 (7 th Cir. 1996)	<u>11</u>
<i>United States v. Petras</i> , 879 F.3d 155 (5 th Cir. 2018)	<u>9</u>

United States v. Ponce, 51 F.3d 820 (9th Cir. 1995).....[11](#)

United States v. Smith, 116 F.3d 857 (10th Cir. 1997)[11](#)

United States v. Whren, 111 F.3d 956 (D.C. Cir. 1997)[11](#)

Statute, Guideline Amendment, and Rules

18 U.S.C. § 3553(a)[8](#)

Sup. Ct. Rule 10(a).....[12](#)

Sup. Ct. Rule 13.1[2](#)

U.S.S.G. Amend. 782 (eff. Nov. 1, 2014)[4](#), [6](#), [7](#)

In the Supreme Court of the United States
at Washington, District of Columbia

JOSE PALACIOS, JR.,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit at New Orleans, Louisiana

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE UNITED STATES SUPREME COURT:

NOW COMES petitioner JOSE PALACIOS, JR., who files this
Petition for a Writ of Certiorari, and respectfully states as follows:

Opinion Below

The Fifth Circuit's opinion below is *United States v. Jose Palacios, Jr.*, 721 Fed. Appx. 405 (5th Cir. May 10, 2018). The slip opinion is included at Tab C of the Appendix.

Statement of Jurisdiction

The judgment or order sought to be reviewed was entered May 10, 2018 in an unpublished opinion by the United States Court of Appeals for the Fifth Circuit, reported at 721 Fed. Appx. 405. The slip opinion is at Tab C of the Appendix. The slip opinion of the Fifth Circuit's December 27, 2016 published opinion, reported at 844 F.3d 527, is included as Tab A of the Appendix. The district court's May 17, 2017 Amended Judgment in a Criminal Case is included as Tab B of the Appendix. This petition will be timely if electronically filed and mailed to this Court's clerk's office within ninety (90) days of the date of the Fifth Circuit's May 10, 2018 opinion, or by August 8, 2018. Sup. Ct. Rule 13.1.

Statement of the Case

Petitioner was originally sentenced on March 6, 2014 in a sentencing hearing that is reported at Fifth Circuit 17-40560 ROA.384-407 (hereinafter "17-40560 ROA"). Petitioner had filed objections to the Presentence Report ("PSR"), which included an objection to the two level enhancement for possession of a weapon, 17-40560 ROA.560-561 (Objection No. 6), and an objection to the failure to consider Petitioner for safety valve relief. 17-

40560 ROA.561 (Objection No. 7). The objection to the two level increase for possession of a weapon was discussed at sentencing at 17-40560 ROA.391-392, and the safety valve issue was discussed at 17-40560 ROA.392-394. The government stated that Petitioner did not fully debrief, and the district judge stated that Petitioner needed to truthfully and fully debrief, that Petitioner could do so at a later date, and the sentencing court would consider a sentence reduction if such a motion was brought by the government. 17-40560 ROA.393-395. No express ruling was made at sentencing on Petitioner's objection to the two level increase for possession of weapons. The district court sentenced Petitioner to 144 months imprisonment. 17-40560 ROA.403-404. *See* 17-40560 ROA.177-181, for the written judgment of conviction.

Petitioner appealed to the Fifth Circuit, which applied plain error review, vacated his sentence, and remanded for resentencing, because the district court failed to permit Petitioner to allocute before pronouncing sentence. *United States v. Palacios*, 844 F.3d 527, 529, 534 (5th Cir. 2016). The slip copy of this opinion is at Appendix Tab A, with pages 1 and 11 of the slip opinion being the page numbers cited above. The opinion only discussed the failure to permit allocution, and did not discuss whether safety

valve relief should have applied, or whether it was error to impose a two level increase for possession of a weapon.

On remand, Petitioner filed February 13, 2017 objections to the PSR, 17-40560 ROA.636-651, which argued in part that: (1) Petitioner's base offense level should be reduced by two levels due to the Nov. 1, 2014 enactment of Amendment 782 of the United States Sentencing Guidelines, which retroactively reduced drug offense levels by two levels, 17-40560 ROA.639 (Objection #1); (2) Petitioner should not have his offense level increased by two levels for possession of a firearm (Objection #2), 17-40560 ROA.639-640; and (3) Petitioner is eligible for safety valve relief (Objection #3). 17-40560 ROA.640-646. The government filed its March 17, 2017 response to Petitioner's objections, 17-40560 ROA.652-670, and first stated that the mandate rule, as interpreted by the Fifth Circuit, prevented Petitioner from raising these objections since the only issue raised in his prior appeal was the failure to allocute, meaning this was the only issue to be discussed on remand. 17-40560 ROA.653-654, ¶ II.A. The remainder of the government's response included a substantive discussion of Petitioner's objections, and why the government thought those objections should be

overruled if the district court considered their merits. 17-40560 ROA.654-670, ¶¶ II.B-D.

Petitioner filed his March 27, 2017 reply to the government's response to Petitioner's objections, 17-40560 ROA.671-677, first noting that a majority of jurisdictions apply a *de novo* approach to the mandate rule for resentencing on remand, and acknowledging that the Fifth Circuit did not follow this rule, but instead applied a restrictive interpretation that the district court could only consider the issues raised in the appeal on remand. 17-40560 ROA.672, 1st full ¶. Petitioner also noted that there were three exceptions to this rule, which would permit a district court to decide an issue not raised in the prior appeal: (1) the evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly wrong and would work a manifest injustice. 17-40560 ROA.672, last ¶, *citing United States v. Lee*, 358 F.3d 315, 320 n. 3 (5th Cir. 2004) (applied to the mandate rule, as stated at 358 F.3d at 321). Petitioner then admitted that he did not raise the issues of the weapon enhancement or lack of safety valve relief in his prior appeal, and then stated that those issues could not have been raised in the prior appeal, but only the failure to allocute. 17-40560 ROA.673. Petitioner

further argued that the two level enhancement for possession of a weapon would be clearly erroneous and would work a manifest injustice, and also argued that, “solely for the purpose of further appellate review, that the Fifth Circuit’s cases which preclude *de novo* resentencing following a remand should be overturned consistent with the authority of other circuits which require *de novo* resentencing.” 17-40560 ROA.673. The remainder of Petitioner’s reply argued that the base offense level in effect on the date of sentencing should apply, which would include the two level reduction required by Amendment 782, and discussed whether safety valve relief should have been granted. ROA.673-676.

The resentencing hearing was held on May 11, 2017, and is reported at 17-40560 ROA.408-468. The sentencing court opened the hearing by stating that Petitioner could not have an opportunity to request safety valve relief on remand because his appeal did not discuss that issue, but only the failure to allocute. 17-40560 ROA.410, l. 17-23. The court continued:

THE COURT: I want to make sure the record is clear so that you can have your appellate point on that. Did I articulate that correctly?

[Petitioner]: Yes, sir.

THE COURT: All right. The Court is aware that some Circuits are in agreement with the Court and at least one

Circuit is in disagreement with the Court's ruling, and so that can be a point that perhaps the Supreme Court will have to decide, given the Circuit split on that. [¶] All right. So let's proceed now with the resentencing. We're here because the Defendant wasn't given an opportunity to allocute, so we're going to allow the Defendant to allocute at this time, and then I will hear arguments from counsel.

17-40560 ROA.410-411. After Petitioner allocuted, 17-40560 ROA.411-438, the district court first agreed with Petitioner's counsel that the base offense level should be reduced by two levels because of Amendment 782. 17-40560 ROA.439-440. The sentencing court then heard from Petitioner's counsel on the weapons objection and the objection to failure to consider safety valve relief, heard arguments from the government on these subjects, and heard further comments from Petitioner himself on possible employment opportunities after release from custody, and reference letters. 17-40560 ROA.440-460. The sealed portion of the sentencing hearing also discussed the safety valve issue at 17-40560 ROA.469-492.

The district court found that the offense level should be reduced from level 34 to 32, increased by two levels for possession of a weapon, and decreased by three levels for acceptance of responsibility, resulting in an advisory guideline range of 108 to 135 months for offense level 31 (32 + 2 - 3), and criminal history category I. 17-40560 ROA.460-461. The

sentencing court then considered the sentencing factors under 18 U.S.C. § 3553(a), and imposed a sentence of 108 months, the low end of that range, as well as a four year term of supervised release, no fine, and the \$100 special assessment, which the lower court noted had already been paid. 17-40560 ROA.461-462. The written Amended Judgment in a Criminal Case includes these terms. 17-40560 ROA.249-253.

Petitioner timely filed a notice of appeal to the Fifth Circuit. 17-40560 ROA.254-255. This writer was appointed to represent Petitioner in that appeal. 17-40560 ROA.291. After reviewing the applicable Fifth Circuit case law, which foreclosed any argument that for reversal of the Fifth Circuit's case law, absent a contrary opinion from either the *en banc* court, or this Supreme Court, this writer filed in the Fifth Circuit, Appellant's Unopposed Motion for Summary Affirmance, and Alternative Opposed Motion for *En Banc* Hearing.

The motion for summary affirmance noted that *United States v. Griffith*, 522 F.3d 607, 610 (5th Cir. 2008), *United States v. Lee*, 358 F.3d 315, 323 (5th Cir. 2004), and *United States v. Marmolejo*, 139 F.3d 525, 530-531 (5th Cir. 1998), all adopted the "restrictive" approach to resentencing on remand, meaning that only the issues raised in the underlying appeal could

be discussed at resentencing on remand. The *Marmolejo* opinion, written in 1998, noted that the Fifth, Seventh and District of Columbia Circuits followed the “restrictive” approach limiting issues at resentencing on remand to those included in the underlying appeal, while a majority of circuits, (Second, Sixth, Eighth, Ninth and Tenth Circuits), held that a *de novo* approach should apply, meaning that any issue could be discussed at resentencing on remand, not just the issues raised in the underlying appeal. *Marmolejo*, 139 F.3d at 530-531. Since Fifth Circuit case law foreclosed this issue, summary affirmance was sought.¹

The Fifth Circuit issued its unpublished opinion on May 10, 2018, *United States v. Palacios*, 721 Fed. Appx. 405 (5th Cir. 2018), granting summary affirmance because the sole issue presented was foreclosed by the Fifth Circuit’s interpretation of the mandate rule in *United States v. Griffith*, 522 F.3d 607, 610 (5th Cir. 2008), and *United States v. Lee*, 358 F.3d 315,

¹ Since one panel of the Fifth Circuit cannot overrule another panel opinion under the “rule of orderliness,” *United States v. Petras*, 879 F.3d 155, 164 & n. 9 (5th Cir. 2018), this writer filed an alternative motion for *en banc* hearing, opposed by the government, in order to provide an opportunity for the *en banc* court to reconsider its cases holding that a restrictive approach should apply to resentencing on remand, and instead hold that a *de novo* approach should apply. However, the motion for *en banc* hearing was denied by the Fifth Circuit in a May 23, 2018 order.

323 (5th Cir. 2004). *See slip op.* at 2, attached at Appendix Tab C. This certiorari petition is now being filed to ask this Court to resolve this circuit conflict raised by prior counsel at resentencing.

Argument Amplifying Reasons for Granting the Writ

This Court should grant certiorari in order to resolve the conflict among circuits on whether *de novo* resentencing on remand should apply, as held by the Second, Sixth, Eighth, Ninth and Tenth Circuits; or whether the “restrictive” or “waiver” view of resentencing on remand, which limits the issues on remand to those that were decided in the underlying appeal, followed by the Fifth, Seventh, and District of Columbia Circuits, should apply.

According to *Marmolejo*, 139 F.3d 528, 530 (5th Cir. 1998), the following is a listing of the circuits that have ruled on what issues should be determined at a resentencing on remand, with notations to more recent case cites as applicable:

Majority view - resentencing conducted
de novo if not limited by remand order:

- * Second Circuit: *United States v. Atehortva*, 69 F.3d 679, 685 (2nd Cir. 1995);

- * Sixth Circuit: *United States v. Jennings*, 83 F.3d 145, 151 (6th Cir. 1996) (“Where the remand does not limit the District Court’s review, sentencing is to be *de novo*.”) – discussed in *United States v. Garcia-Robles*, 640 F.3d 159, 166 (6th Cir. 2011);
- * Eighth Circuit: *United States v. Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992) – discussed in *United States v. Eason*, No. 17-1402, ___ F.3d ___ (8th Cir. May 25, 2018) (slip op., at 3);
- * Ninth Circuit: *United States v. Ponce*, 51 F.3d 820, 826 (9th Cir. 1995) – discussed in *United States v. Flores*, 725 F.3d 1028, 1043 (9th Cir. 2013); and
- * Tenth Circuit: *United States v. Smith*, 116 F.3d 857, 859 (10th Cir. 1997) – discussed in *United States v. Catrell*, 774 F.3d 666, 669-671 (10th Cir. 2014).

Minority view - “restrictive” or “waiver” approach to resentencing,
limited to issues raised in underlying appeal that resulted in remand:

- * Fifth Circuit: *United States v. Griffith*, 522 F.3d 607, 610 (5th Cir. 2008); *United States v. Lee*, 358 F.3d 315, 323 (5th Cir. 2004); and *United States v. Marmolejo*, 139 F.3d 525, 530-531 (5th Cir. 1998);
- * Seventh Circuit: *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996) – discussed in *United States v. Lewis*, 842 F.3d 467, 473-474 (7th Cir. 2016); and
- * District of Columbia Circuit: *United States v. Whren*, 111 F.3d 956, 959-960 (D.C. Cir. 1997) (opinion by Ginsburg, C.J., adopting Seventh Circuit approach) – discussed in *United States v. Hunter*, 809 F.3d 677, 681 (D.C. Cir. 2016) (“In short, the district court ‘generally does not have authority to resentence a defendant *de novo*.’”, citing *United States v. Blackson*, 709 F.3d 36, 40 (D.C. Cir. 2013)).

This case listing shows that the Circuit conflict on this issue is “alive and well,” since there are numerous recent cases on both sides of this issue. Resolving circuit conflicts is one of the considerations to be considered by this Court in deciding whether to grant certiorari. See Sup. Ct. Rule 10(a): “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter”

Because Petitioner, who was sentenced in a Fifth Circuit jurisdiction, failed to discuss in his initial appeal his objections to the two level increase for possession of a weapon, and the failure to consider Petitioner for safety valve relief, the district court held that he could not raise these issues at his resentencing on remand. If Petitioner had been sentenced in the Second, Sixth, Eighth, Ninth or Tenth Circuits, which hold that a *de novo* approach to resentencing on remand should apply, then his failure to brief those issues in his initial appeal would not have prevented him from raising them at the resentencing on remand.

For these reasons, petitioner asks this Court to grant this petition for a writ of certiorari to resolve this circuit conflict on whether resentencing on remand should be governed by: (1) a “restrictive/waiver” approach limited

to issues raised on appeal, or (2) a *de novo* approach, which would not limit issues to be discussed at resentencings on remand, so that there is a uniform rule on this subject that is applicable to all federal criminal defendants in the United States.

Conclusion and Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, petitioner JOSE PALACIOS, JR. respectfully asks this Court to grant this petition for a writ of certiorari, set this case for oral argument and request briefing on the merits, and that on hearing thereof, this court reverse the opinion of the Fifth Circuit, and remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ Gregory Sherwood

Gregory Sherwood
Attorney

P.O. Box 200613
Austin, Texas 78720-0613

(512) 484-9029

Texas Bar # 18254600

Email: gsherwood@mail.com

Court-Appointed Attorney for
Petitioner Jose Palacios, Jr.