

No. 18-5168

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

PETITIONER'S REPLY TO
GOVERNMENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

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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?

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TO THE HONORABLE UNITED STATES SUPREME COURT:

NOW COMES petitioner JOSE PALACIOS, JR., who files this
Petitioner’s Reply to Government’s Brief in Opposition to Petition for a
Writ of Certiorari, and respectfully states as follows:

The parties have briefed their reasons for whether certiorari should be
granted or denied in their prior pleadings, and any further reply by petitioner

on why certiorari should be granted would be repetitious. However, petitioner does believe a reply is necessary to the Brief for the United States in Opposition, e-filed September 7, 2018, regarding ¶ 3 at pages 12-14 (pdf pp. 14-16 on electronic copy), in which the government argues that certiorari should be denied because petitioner would not prevail on the merits of his two unresolved sentencing objections. These arguments are premature, because the purpose of the petition for a writ of certiorari and any brief in opposition, are to inform this Court why certiorari should be granted or denied, not why the party should win or lose on the merits. The merits of this case are reserved for the Briefs on the Merits, which would not be due until this Court granted certiorari, and ordered the parties to file briefs on the merits, and appropriate responsive briefs.

Additionally, the government's arguments in ¶ 3, pages 12-14 (pdf pp. 14-16 on electronic copy) as to why petitioner would lose on the merits of his remaining sentencing objections are speculative, and cannot be supported by the sparse record in this case. Instead, the remaining sentencing objections should be decided by the district court on remand if this Court grants certiorari, and reverses or vacates this case is for resentencing. Nothing in the district court's resentencing record indicates that the district

judge has already decided the remaining sentencing objections adverse to petitioner. Instead, it is clear that the district court believed that these remaining objections could not be reviewed on resentencing because that would violate the mandate rule as interpreted by the Fifth Circuit, since those two sentencing objections were not discussed in the original appeal.

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*

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