No. 18-6061

IN THE SUPREME COURT OF THE UNITED STATES

ROGELIO ORTIZ-MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in construing petitioner's motion for leave to file an untimely petition for rehearing as a motion to recall the mandate.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 43a-44a) is unreported. A prior opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted at 692 Fed. Appx. 768.

JURISDICTION

The judgment of the court of appeals (Pet. App. 45a) was entered on July 10, 2017. This Court denied a prior petition for a writ of certiorari on February 20, 2018. 138 S. Ct. 1029 (No. 17-7395). The order of the court of appeals denying petitioner's amended petition for rehearing out of time was entered

on June 19, 2018. The petition for a writ of certiorari was filed on September 17, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(1). Judgment 1. The district court sentenced petitioner to 77 months of imprisonment. Judgment 2. The court of appeals affirmed. Pet. App. 1a-2a. This Court denied a petition for a writ of certiorari. 138 S. Ct. 1029 (No. 17-7395). Petitioner then filed a motion in the court of appeals for leave to file an amended petition for rehearing out of time. Pet. App. 28a-41a. A judge of the court of appeals granted that motion, id. at 42a, and petitioner filed the amended petition, id. at 12a-27a. The court subsequently granted the United States' motion for reconsideration, construed petitioner's amended petition for rehearing out of time as a motion to recall the mandate, and denied the motion. Id. at 43a-44a.

1. Petitioner is a native and citizen of Mexico. See Presentence Investigation Report (PSR) ¶ 44. In 2000, petitioner was found guilty in Texas of burglary of a habitation, in violation of Texas Penal Code Ann. § 30.02 (Supp. 2000), and sentenced to 25 years of imprisonment. PSR ¶ 6; see Pet. 4. In 2010, petitioner was removed to Mexico. PSR ¶ 6. He reentered the United States

illegally in 2016 and was discovered by immigration officers in Brownsville, Texas. PSR ¶ 5.

A federal grand jury charged petitioner with unlawfully reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(1). Indictment 1. Petitioner pleaded guilty. Pet. App. 1a. In calculating petitioner's offense level under the Sentencing Guidelines, the Probation Office added a 16-level enhancement based on his prior conviction in Texas for burglary of a habitation, which the Probation Office found is a felony "crime of violence" under Guidelines § 2L1.2(b)(1)(A)(ii) (2015). PSR ¶ 15. With that enhancement and other adjustments, petitioner's Guidelines offense level was 21 and his criminal history category was IV, resulting in an advisory sentencing range of 77 to 96 months of imprisonment. PSR ¶¶ 23, 34, 68.

Petitioner objected to the 16-level enhancement under Section 2L1.2(b)(1)(A)(ii), arguing that his prior burglary offense did not qualify as a "crime of violence." D. Ct. Doc. 24 (Sept. 14, 2016). Petitioner acknowledged, however, that his objection was foreclosed by Fifth Circuit precedent, see United States v. Uribe, 838 F.3d 667, 669-671 (5th Cir. 2016), cert. denied, 137 S. Ct. 1359 (2017), which had determined that Texas burglary of a habitation is a crime of violence. Pet. 3. The district court overruled petitioner's objection and sentenced him to 77 months of imprisonment. D. Ct. Doc. 27 (Nov. 3, 2016); Judgment 2.

2. The court of appeals affirmed. Pet. App. 1a-2a. Petitioner argued on appeal that the district court had erred in determining that his Texas burglary conviction was a crime of violence, contending that Texas Penal Code Ann. § 30.02 (Supp. 2000) defined a single, indivisible offense that was broader than the generic offense of burglary enumerated in Guidelines Section 2L1.2(b)(1)(A)(ii). Pet. App. 1a-2a. Petitioner again acknowledged, however, that his argument was foreclosed by existing circuit precedent. See id. at 2a. The court of appeals agreed that petitioner's argument was foreclosed by Uribe. Id. at 1a-2a.

Petitioner then filed a timely petition for panel rehearing in the court of appeals. See Pet. 4. He argued that the court should stay its consideration of his petition for rehearing pending its decision in United States v. Herrold, C.A. No. 16-41514, in which the court had recently granted rehearing en banc to consider issues addressed in Uribe. See Pet. 4. The court denied petitioner's petition for panel rehearing on August 7, 2017. Ibid.

This Court denied petitioner's petition for a writ of certiorari on February 20, 2018. 138 S. Ct. 1029 (No. 17-7395).

3. On February 22, 2018, petitioner filed a motion in the court of appeals for leave to file an amended petition for rehearing out of time. Pet. App. 28a-41a. Judge Jones granted that motion, id. at 42a, and petitioner filed the amended petition, id. at 12a-27a, arguing that rehearing was appropriate because the

en banc court of appeals in Herrold had recently overruled Uribe, on which petitioner's sentence had been based. See United States v. Herrold, 883 F.3d 517 (2018), petitions for cert. pending, No. 17-1445 (filed Apr. 18, 2018), No. 17-9127 (filed May 21, 2018)).

The government responded to the amended petition and moved the court of appeals for reconsideration of Judge Jones's order, contending that the court should treat petitioner's amended petition as a motion to recall the mandate and deny it. See Pet. 6. The government observed that Federal Rule of Appellate Procedure 41(b) provides that the court of appeals' mandate "must issue * * * 7 days after entry of an order denying a timely petition for panel rehearing." See Gov't C.A. Resp. to Am. Pet. for Panel Reh'g 6 (Gov't C.A. Reh'g Br.). The government further observed that petitioner never filed a motion to stay the issuance of the mandate pending a petition for a writ of certiorari. Id. at 4. The government accordingly contended that issuance of the mandate is a purely ministerial act that should have occurred seven days after petitioner's timely motion for panel rehearing was denied -- August 14, 2017 -- and that even though the court of appeals did not formally issue the mandate, it was appropriate for the court to treat the mandate as having been issued on that date. Id. at 6-10. The government added that allowing petitioner to seek untimely rehearing would permit him to evade the consequences

of his failure to use the proper procedure to seek a stay of the mandate. Id. at 9-10.

The government further observed that, even if petitioner had moved for a stay of the mandate and the court of appeals had granted that motion, Rule 41 provides that "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for a writ of certiorari is filed." Gov't C.A. Reh'g Br. 7 (quoting Fed. R. App. P. 41(d)(2)(D) (2017)).[1] Accordingly, the government contended that the court of appeals was required to issue the mandate, at the very latest, when this Court denied petitioner's petition for a writ of certiorari on February 20, 2018, before petitioner filed his amended petition for rehearing out of time in the court of appeals on February 22, 2018, and that the court of appeals' refusal to issue the mandate immediately would have constituted an abuse of discretion. Id. at 8-9 (citing Ryan v. Schad, 570 U.S. 521, 525 (2013) (per curiam)). Finally, the government contended that, because petitioner's conviction became final when this court denied his petition for a writ of certiorari, allowing him to seek untimely rehearing would evade the limitations on collateral

[1] Effective December 1, 2018, Rule 41(d)(2)(D) was repealed and replaced by Federal Rule of Appellate Procedure 41(d)(4), which provides that "[t]he court of appeals must issue the mandate immediately on receiving a copy of a Supreme Court order denying the petition [for a writ of certiorari], unless extraordinary circumstances exist."

review of final criminal judgments that Congress has enacted in 28 U.S.C. 2255. Gov't C.A. Reh'g Br. 14-15.

The court of appeals subsequently issued a per curiam order in which it granted the government's motion for reconsideration, explained that petitioner's "amended petition for rehearing must be construed as a motion to recall the mandate," and denied the motion. Pet. App. 43a-44a.

ARGUMENT

Petitioner contends (Pet. 8-20) that the court of appeals erred in construing his motion for leave to file an untimely petition for rehearing as a motion to recall the mandate. That contention lacks merit. The court of appeals' factbound decision correctly reflects proper appellate procedures, was well within the court's authority, and does not warrant this Court's review. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly found that it is appropriate to treat the mandate in petitioner's case as having already been issued in accordance with the Federal Rules of Appellate Procedure, even though the mandate had not been formally entered on the docket. The court issued its decision and entered its judgment in petitioner's case on July 10, 2017. Pet. App. 1a-2a. Petitioner filed a timely petition for rehearing, which the court denied on August 7, 2017. See Pet. 4. As a result, Federal Rule of Appellate Procedure 41(b) required that the mandate ordinarily "must issue * * * 7 days" later. The court neither

shortened nor extended that time by order. See ibid. (providing that "[t]he court may shorten or extend the time" in which the mandate must issue). Nor did petitioner seek to stay issuance of the mandate while he sought review in this Court. See Fed. R. App. P. 41(d)(2)(A) (2017) (authorizing a party to "move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court").

Due to an apparent clerical error, however, the mandate was not formally entered on the docket following the denial of petitioner's first petition for rehearing in August 2017. Nor was it entered on the docket following this Court's denial of petitioner's petition for a writ of certiorari on February 20, 2018, which triggered the "immediate[ ]" issuance of the court of appeals' mandate under the Rules then in force. Fed. R. App. P. 41(d)(2)(D) (2017). This Court has explained that a refusal by the court of appeals to enter the mandate in accordance with the Rules is ordinarily an abuse of discretion. See, e.g., Ryan v. Schad, 570 U.S. 521, 525 (2013) (per curiam) ("Even assuming a court of appeals has authority to do so, it abuses its discretion when it refuses to issue the mandate once the Supreme Court has acted on the petition [for a writ of certiorari], unless extraordinary circumstances justify that action.").[2] Thus, had

[2] As explained above, see p. 6 note 1, supra, Rule 41 was recently amended to include the "extraordinary circumstances" exception recognized in Schad and other cases. See Fed. R. App. P. 41(d)(4) (Dec. 1, 2018); see also Fed. R. App. P. 41, advisory committee's note (2018 Amendments).

the absence of formal issuance of the mandate here been deliberate, it would have been erroneous, unless supported by a finding of extraordinary circumstances that petitioner has not asserted were present in this case.

Contrary to petitioner's contention, the apparent clerical errors that resulted in the mandate not formally being entered on the docket in his case did not deprive the court of appeals of authority to treat the mandate as having been issued, and to therefore construe petitioner's motion for leave to file an untimely petition for rehearing as a motion to recall the mandate. Federal courts have long exercised discretionary authority to correct judicial records nunc pro tunc "so that [they] reflect[ ] what was actually done but never recorded due to clerical inadvertence." United States v. Taylor, 841 F.2d 1300, 1308 (7th Cir.), cert. denied, 487 U.S. 1236 (1988); see, e.g., Romero-Rodriguez v. Gonzales, 488 F.3d 672, 677-678 (5th Cir. 2007). Courts also commonly apply general principles of equity to "regard[ ] as done that which ought to [have been] done." 27A Am. Jur. 2d Equity § 89 (2008). Absent an affirmative decision by a court of appeals to modify or stay the timing of its mandate, the mandatory text of Rule 41 and this Court's decision in Schad make it appropriate for parties and courts to presume that the ministerial act of entering the mandate on the docket occurs on the dates specified in the Rule. Petitioner identifies no reason why the absence of a formal docket entry stating that the mandate

in his case had issued would have bound the court of appeals to conclude that his appeal was still properly before it, notwithstanding his failure to seek a stay of the mandate and this Court's subsequent denial of his petition for a writ of certiorari.

Once a mandate is deemed to have been issued, a court of appeals has inherent authority to recall the mandate and reassert jurisdiction over a case in limited circumstances. See Calderon v. Thompson, 523 U.S. 538, 549 (1998). "In light of the profound interests in repose attaching to the mandate of a court of appeals, however, the power can be exercised only in extraordinary circumstances. The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." Id. at 550 (citation and internal quotation marks omitted); see Schad, 570 U.S. at 525. This Court reviews the courts of appeals' exercise of this inherent authority for abuse of discretion. Calderon, 523 U.S. at 549.

Petitioner did not argue below that any "extraordinary circumstances" or "grave, unforeseen contingencies" warranted recalling the mandate in this case. Calderon, 523 U.S. at 550. Rather, petitioner contended that consideration of his untimely petition for rehearing was warranted because the court of appeals had recently overruled the precedent on which the panel had relied to affirm his sentence. But courts have routinely determined that it is neither "extraordinary" nor a "grave, unforeseen contingenc[y]," ibid., that a court of appeals' decision may fail

to predict accurately the circuit's or this Court's future resolution of legal issues. See, e.g., United States v. Ford, 383 F.3d 567, 568 (7th Cir. 2004) (per curiam) (denying motion to recall mandate in light of intervening Supreme Court decision), cert. denied, 125 S. Ct. 927 (2005); United States v. Prevatte, 300 F.3d 792, 797 (7th Cir. 2002) (same); Goodwin v. Johnson, 224 F.3d 450, 459-460 (5th Cir. 2000) (same), cert. denied, 531 U.S. 1120 (2001).[3]

Similarly, this Court has recognized in other contexts that the judicial system's institutional interest in the finality of judgments requires that final judgments not be disturbed on the basis of subsequent changes in the law. See, e.g., Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) (holding unconstitutional, as contrary to the separation of powers, an attempt by Congress to revive securities fraud claims that had been dismissed as untimely in judgments that had become final); Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 397, 398-401

[3] Indeed, the legal question on which petitioner based his appeal has not yet been finally resolved. The government has filed a petition for a writ of certiorari in United States v. Herrold; the defendant has filed a conditional cross petition; and those petitions remain pending in this Court. See No. 17-1445 (filed Apr. 18, 2018), No. 17-9127 (filed May 21, 2018). There is no need, however, to hold the petition for a writ of certiorari in this case pending this Court's resolution of the petitions for a writ of certiorari in Herrold, because this Court's decision regarding certiorari in Herrold, or its decision after briefing on the merits, will not affect the question presented by this petition for a writ of certiorari and will not affect petitioner's entitlement to relief.

(1981) (doctrine of res judicata precluded party who had failed to appeal adverse judgment from taking advantage of appealing parties' successful ruling based on new Supreme Court precedent). The court of appeals here reasonably could have concluded that "the profound interests in repose" outweighed any interest petitioner had in recalling the mandate, given that several months had passed since the court denied his timely petition for rehearing and petitioner declined to seek a stay of the mandate. Calderon, 523 U.S. at 550 (citation and internal quotation marks omitted).

That is particularly so because the only reason petitioner would have advanced for staying issuance of the mandate -- the pendency of Herrold -- was presented in the panel rehearing petition that the court of appeals denied. The court was not required to give petitioner the benefit of a clerical error to achieve a result that he would not likely have achieved had he followed the proper procedures. And it was especially appropriate for the court of appeals to decline to recall the mandate in this case given that petitioner's conviction and sentence had become final when this Court denied his first petition for a writ of certiorari. The denial of certiorari occurred on the same day that the court of appeals decided Herrold, which was before petitioner sought rehearing out of time. Once petitioner's sentence became final, Congress has limited his options for collaterally attacking his sentence -- including based on

intervening changes in the law -- to those described in 28 U.S.C. 2255.

2. Petitioner relies on several cases to support the contention that the court of appeals erred in denying his motion. None suggests that the court of appeals was required to reopen petitioner's case.

Petitioner asserts (Pet. 9-10) that, in Huddleston v. Dwyer, 322 U.S. 232 (1944) (per curiam), this Court found that an intervening opinion required a court of appeals to grant rehearing. Huddleston, however, predated the adoption of Rule 41 by over twenty years, and this Court determined that the court of appeals should have granted a petition for rehearing prior to final judgment on the narrow ground that "a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones." Id. at 236. No intervening state court decision arose in petitioner's case. Moreover, in Huddleston, final judgment had not been rendered in the case at the time the plaintiff sought rehearing in the court of appeals. 322 U.S. at 235. In contrast, petitioner's judgment became final when this Court denied his first petition for a writ of certiorari, before he sought leave to file an untimely petition for rehearing.

Petitioner also contends (Pet. 10) that the decision below conflicts with Braniff Airways, Inc. v. Curtiss-Wright Corp., 411 F.2d 451 (2d Cir.), cert. denied, 69 U.S. 959 (1969), reh'g granted, 424 F.2d 427 (2d Cir.), cert. denied, 400 U.S. 829 (1970), in which the Second Circuit reasserted jurisdiction over a case in order to permit a party to file an untimely petition for rehearing. But the Second Circuit there merely recognized that a court of appeals has the authority in certain circumstances to recall its mandate and consider an untimely petition for rehearing. See 424 F.2d at 429 (noting that, under Federal Rules of Appellate Procedure 26(b) and 41, the court of appeals had "the power to enlarge the time to petition for rehearing * * * and to modify an erroneous decision although the time for rehearing may have expired"); see also Calderon, 523 U.S. at 549. The court of appeals' discretionary decision to recall the mandate and consider untimely arguments in Braniff Airways does not suggest that the court of appeals here erred by declining to exercise its discretion in this case.

Petitioner further contends (Pet. 11-12) that the court of appeals' decision not to recall the mandate and consider his untimely submission conflicts with other Fifth Circuit decisions. That assertion, even if true, would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, most of the

cases upon which petitioner relies are inapposite because the court of appeals maintained its jurisdiction, such as by staying the mandate or extending the time to seek rehearing. See Sparks v. Duval Cnty. Ranch Co., 604 F.2d 976, 979 (5th Cir. 1979) (determining that the court of appeals had maintained its jurisdiction, prior to petitioner seeking this Court's review, by withholding issuance of the mandate and extending the time to hear the case en banc), aff'd sub nom. Dennis v. Sparks, 449 U.S. 24 (1980), cert. denied, 445 U.S. 943, and 449 U.S. 1021 (1980); First Gibraltar Bank, FSB v. Morales, 42 F.3d 895, 897-898 (5th Cir. 1995) (determining that the court of appeals had properly retained its jurisdiction by staying its mandate prior to this Court's denial of a petition for a writ of certiorari); see also Charpentier v. Ortco Contractors, 480 F.3d 710, 712-713 (5th Cir. 2007) (per curiam) (determining that the court of appeals had retained control over the appeal until its mandate was issued, which occurred just over a month after the order to remand the case was issued, and five months before the denial of a petition for a writ of certiorari); United States v. Middlebrooks, 624 F.2d 36, 37 (5th Cir.) (granting an amended petition for rehearing, which was filed two days after the initial petition for rehearing was denied and before the filing of a petition for a writ of certiorari, based on an intervening decision that arose while the court was considering the initial petition), cert. denied,

449 U.S. 984 (1980).[4] The discretionary determinations in those cases do not suggest that the court of appeals here was required to grant similar relief in the circumstances of this case.

3. Contrary to petitioner's contention (Pet. 18-20), granting the petition, vacating the decision below, and remanding is not warranted in this case. The decisions cited by petitioner (Pet. 18-19) in which this Court ordered further proceedings in light of an intervening en banc decision by a court of appeals are not analogous to this case, because the judgments there were not yet final when the en banc decision issued. Petitioner's judgment, by contrast, became final in February 2018 when this Court denied his first petition for a writ of certiorari, before he filed his amended petition for untimely rehearing in the court of appeals.

In any event, as petitioner acknowledges (Pet. 18), the relief he seeks is appropriate only when "intervening developments, or recent developments that [this Court] has reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." Lawrence ex rel. Lawrence v. Chater, 516 U.S. 163, 167 (1996). Here, no relevant developments have occurred since the court of

[4] In United States v. Taylor, 889 F.2d 272 (5th Cir. 1989) (Tbl.), the court of appeals vacated the defendant's sentence following the denial of a petition for a writ of certiorari in a case where his claim was the subject of an intra-circuit conflict, see 493 U.S. 906 (1989) (Stevens, J., respecting denial of certiorari). The court of appeals provided no explanation for its withdrawal of its prior opinion. 889 F.2d at 272.

appeals construed petitioner's amended petition for untimely rehearing as a motion to recall the mandate and denied the motion. The court has already determined that petitioner is not entitled to reopen his sentence based on the court's en banc decision in Herrold, and no reasonable prospect exists that the court would reconsider that determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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