No. 18-6061

IN THE SUPREME COURT OF THE UNITED STATES

ROGELIO ORTIZ-MARTINEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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MISCELLANEOUS

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Petitioner Rogelio Ortiz-Martinez submits this reply to the Brief in Opposition ("BIO") filed by the United States.

A review of the procedural history of this case shows that the Fifth Circuit seriously departed from the usual course of judicial proceedings when it treated a motion to file out-of-time rehearing as a motion to "recall" a mandate, when it had previously intentionally withheld issuance of that mandate. The Fifth Circuit initially denied petitioner's challenge to the 16-level "crime of violence" sentencing enhancement he received under the illegal-reentry Sentencing Guideline, based on then-controlling circuit law holding that his Texas burglary offense qualified for enhancement. Pet. App. 1a-2a. That enhancement increased Mr. Ortiz-Martinez's Guidelines range by at least three years, from 33 to 41 months, up to 77 to 96 months. Mr. Ortiz-Martinez received a 77-month sentence. Subsequently, the *en banc* Fifth Circuit reversed the circuit law and held, exactly as Mr. Ortiz-Martinez had persistently argued, that the Texas burglary offense does not qualify for enhancement. *See United States v. Herrold*, 883 F.3d 517, 522-24, 530-36 (5th Cir. 2018) (*en banc*).

The Fifth Circuit had retained jurisdiction over the appeal by withholding issuance of its mandate after its decision. So after the *en banc* change in the law resulting from *Herrold*, Mr. Ortiz-Martinez moved to file a rehearing petition out of time. Pet. App. 12a-41a. The Fifth Circuit initially granted Mr. Ortiz-Martinez leave to file the untimely petition for rehearing. Pet. App. 42a. However, the Fifth Circuit subsequently decided to treat the motion for leave to file for rehearing as a motion to "recall" the mandate, despite

the fact that the court had never issued its mandate. Pet. App. 43a-44a. The day ***after*** it denied the motion to "recall" the mandate, the Fifth Circuit issued its mandate for the first time. Pet. App. 45a.

In his petition for a writ of certiorari, Mr. Ortiz-Martinez argued that because there was a change in the controlling *en banc* law issued while his appeal was still pending in the Fifth Circuit, under this Court's precedent and court of appeals precedent, the Fifth Circuit should have granted rehearing to modify its earlier opinion. *See Huddleston v. Dwyer*, 322 U.S. 232, 235 (1944) (finding that court of appeals abused its discretion by refusing to grant rehearing when controlling law changed six months after entry of judgment, but while jurisdiction remained in the circuit); *see also Gibraltar Bank v. Morales*, 42 F.3d 895, 896-97 (5th Cir. 1995) (vacating prior opinion to apply new state statute that became effective after the decision, but before the issuance of the mandate); *Bryant v. Ford Motor Co.,* 886 F.2d 1526, 1528-31 (9th Cir. 1989) (vacating a prior *en banc* opinion in light of new legislation, after denial of certiorari, because the issuance of the mandate had been stayed); *United States v. Taylor*, 889 F.2d 272 (5th Cir. 1989) (vacating previous opinion in the case, on the basis of a conflicting, subsequently published opinion, after denial of certiorari); *United States v. Middlebrooks*, 624 F.2d 36 (5th Cir. 1980) (granting out-of-time rehearing to apply changed law, prior to issuance of the mandate); *Alphin v. Henson,* 552 F.2d 1033, 1034-36 (4th Cir. 1977) (modifying a prior judgment to conform to new legislation, after denial of certiorari, because the issuance of the mandate had been stayed); *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427,

428-30 (2d Cir. 1970) (granting rehearing to apply new state case law issued before issuance of the mandate, after the denial of certiorari). The Fifth Circuit's refusal to apply the changed law is particularly egregious, since this is a criminal case in which the error directly impacts Mr. Ortiz-Martinez's liberty, and because that court did apply the changed law to many other defendants in the same circumstances as Mr. Ortiz-Martinez. *See* Petition 14-17.

The government's brief in opposition rests on the erroneous assumption that the Fifth Circuit's withholding of the mandate was a clerical oversight or mistake. This is simply wrong. The Fifth Circuit's withholding of the mandate in this case was an affirmative act, and in keeping with that court's law and longstanding practice regarding the issuance of mandates. And regardless, even if it had been a clerical mistake, the jurisdictional fact is that the mandate was not issued, and the Fifth Circuit retained jurisdiction at a time when the controlling law had changed to reduce Mr. Ortiz-Martinez's Sentencing Guidelines range by more than three years. In those circumstances, the court's refusal to apply that new controlling law issued while this appeal was pending was an abuse of discretion, and so far departed from the accepted and usual course of judicial proceedings that this Court's supervisory intervention is warranted.

I. The Fifth Circuit's withholding of the mandate was not an oversight or clerical mistake, but was an intentional withholding of the mandate that is consistent with that court's law and longstanding practice.

The government's presentation of the law governing mandates, the facts of this case, and the Fifth Circuit's understanding of its own authority with respect to holding mandates,

is simply wrong. The government asserts that "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." BIO 7.[1] The government ignores the Fifth Circuit's law and longstanding practice regarding withholding mandates to assert that, because the Fifth Circuit did not enter an order extending the time for issuance of the mandate and Mr. Ortiz-Martinez did not seek a stay of the mandate, that the withholding of the mandate by the Fifth Circuit was "an apparent clerical error" that the court of appeals and this Court are free to ignore. BIO 7-8. Indeed, the government suggests that parties and courts may always ignore the formal issuance of the mandate, blithely asserting that, "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 [*Ryan v. Schad*, 570 U.S. 521 (2013)] 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." BIO 9.

But the Fifth Circuit's withholding of the mandate in this case was not an oversight or clerical mistake.[2] The Fifth Circuit has long claimed the authority to withhold issuance

[1] The court of appeals "found" nothing, as it did not explain its decision to treat Mr. Ortiz-Martinez's motion to file rehearing out of time as a motion to "recall" a mandate that it had never issued. *See* Pet. App. 43-44a.

[2] The Fifth Circuit has an internal or "court only" docket, which presumably this Court can review to confirm that the Fifth Circuit's withholding of the mandate was an affirmative act, and not a clerical oversight.

of a mandate by informal "instructions to the clerk to withhold issuance of the mandate," even without notice to the parties. *Sparks v. Duval Cty. Ranch Co.*, 604 F.2d 976, 979 (5th Cir. 1979), *aff'd sub nom. Dennis v. Sparks*, 449 U.S. 24, (1980); *see also United States v. Zedner*, 555 F.3d 68, 82 n.2 (2d Cir. 2008) (Pooler, J., dissenting) (describing the process of an active judge placing a "hold" on the mandate). The courts of appeals, including the Fifth Circuit, have also asserted the authority to withhold a mandate after this Court denies a petition for a writ of certiorari, so long as it was withholding the mandate for a reason independent of the pending petition for certiorari. *See First Gibraltar Bank v. Morales*, 42 F.3d 895, 898 (5th Cir. 1995); *see also Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) (holding that "a circuit court has the inherent power to stay its mandate following the Supreme Court's denial of certiorari"); *Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977) (same). Under this law, the Fifth Circuit regularly withholds the issuance of mandates without formal notice to the parties, as it did in this case.[3]

Other cases confirm that the Fifth Circuit intentionally withholds issuance of its mandate, sometimes without formal notice to the parties, and thereby retains jurisdiction over an appeal. For example, in *United States v. Randall*, 5th Cir. No. 12-31193, 770 F.3d 359 (5th Cir. 2014), the Fifth Circuit issued an opinion vacating the mandatory minimum

[3] Newly revised Federal Rule of Appellate Procedure 41(b), which became effective on December 1, 2018, appears to disallow this practice by providing that the "court may shorten or extend the time" for issuance of the mandate "by order." Fed. R. App. P. 41 (Dec. 1, 2018); *see also* Advisory Committee Notes (noting that changing the Rule to require a stay of the mandate "to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay"). This case, of course, proceeded under the old rule 41, which did not expressly require an order, and pursuant to which the Fifth Circuit regularly informally withheld mandates without notice to the parties. *See Sparks*, 604 F.2d at 979.

sentence on October 29, 2014. It then withheld the mandate without any formal notice, order, or docket entry. Months later, on February 9, 2015, the court withdrew the opinion and issued a new opinion affirming the mandatory minimum sentence. *See* Docket, *United States v. Randall*, 5th Cir. No. 12-31193. Or take *United States v. Gracia-Cantu*, 5th Cir. No. 15-40227, 733 Fed. Appx. 776 (5th Cir. 2018), a case in which the Fifth Circuit vacated and remanded for resentencing on May 9, 2018, but withheld the mandate. The court did not enter an order or give notice to the parties about the mandate hold until the defendant filed a motion for issuance of the mandate on June 8, 2018, which the court denied on August 2, 2018. *See* Docket, *Gracia-Cantu*, 5th Cir. No. 15-40227. As of the date of the filing of this reply, there remains on the docket an opinion vacating the sentence, yet the defendant cannot return to the district court for resentencing because the Fifth Circuit has not yet issued its mandate. *See id.*; *see also* Petition for a Writ of Mandamus, *In Re Jose Prisciliano Gracia-Cantu*, No. 18-5968 (U.S. Sept. 6, 2018) (denied Oct. 15, 2018).

Indeed, in a case issued around the same time as Mr. Ortiz-Martinez's request to file out-of-time rehearing, albeit not a criminal case with prison time at stake, the Fifth Circuit did precisely what Mr. Ortiz-Martinez requested: it acknowledged that the controlling law had changed, noted that "we retain jurisdiction over the appeal until we issue the mandate," granted permission to file out-of-time rehearing, and then reversed its own decision due to the changed law. *See Aldous v. Darwin Nat'l Assurance Co.*, 889 F.3d 798, 799-800 (5th Cir. 2018). The Fifth Circuit had no justification for not doing the same in this case.

It is undisputed that the issuance of the mandate is a jurisdictional act. "The mandate is effective when issued." Fed. R. App. P. 41(c). The court of appeals "retains control over an appeal until [it] issue[s] a mandate. Before [the] mandate issues, [the court has] the power to alter or modify [its] judgment." *Charpentier v. Ortco Contractors*, 480 F.3d 710, 713 (5th Cir. 2007); *see also*, e.g., *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 898 (5th Cir. 1995); *Johnson v. Bechtel Assocs. Prof'l Corp., D.C.*, 801 F.2d 412, 415 (D.C. Cir. 1986) ("Issuance of the mandate formally marks the end of appellate jurisdiction."); *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978) ("The effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and to remove it from the jurisdiction of this Court, returning it to the forum whence it came."). Thus, before the mandate issued, the court of appeals retained jurisdiction and retained the authority to modify its decision and judgment. An act with the level of jurisdictional significance that attaches to issuance of the mandate cannot be deemed irrelevant to the court and to the parties, as the government would have it, nor is it appropriate—or even permissible—for parties to assume that it has occurred when in fact it never did.

The propriety of the Fifth Circuit's mandate-holding procedure is not presented by this case. The fact is that the Fifth Circuit claims authority to hold a mandate and did hold the mandate in this case, thereby retaining jurisdiction. The government never asked the court of appeals to issue the mandate and never challenged its mandate hold. The court retained jurisdiction after the change in the *en banc* law, and had no justification for refusing to apply that changed law to Mr. Ortiz-Martinez.

II. Regardless of the reason the mandate was not issued, as a matter of fact, the court of appeals retained jurisdiction and should have allowed out-of-time rehearing.

Nor would it make any difference if the withholding of the mandate in this case was actually a clerical error. The government argues that it would be appropriate for the court of appeals to simply pretend as if the normal procedures had been followed if the withholding of the mandate was a clerical oversight.

But the reason why the mandate did not issue is irrelevant. "The mandate is effective when issued." Fed. R. App. P. 41(c). It is not effective when it should have or could have issued. And "[s]imply put, jurisdiction follows the mandate." *United States v. Rivera*, 844 F.2d 916, 921 (2d Cir. 1988). "Because issuance of the mandate is an event of considerable institutional significance," the Fifth Circuit was not free to say "that the mandate 'issued' simply because it should have been issued, or because the panel may have intended it to issue, or because the statute commands it to issue." *Rivera*, 844 F.2d at 921.

As a matter of jurisdictional fact, the mandate in this case did not issue and had not issued at the time that Mr. Ortiz-Martinez requested out-of-time rehearing, seeking to apply changed circuit law to his case. That changed law reduces his Sentencing Guidelines range by more than three years. At the time that Mr. Ortiz-Martinez sought rehearing, the Fifth Circuit retained jurisdiction over the appeal. In those circumstances, the Fifth Circuit should have applied the changed circuit law to Mr. Ortiz-Martinez, and had no justification for refusing to do so.

III. A GVR order would be appropriate in this case.

Finally, the government asserts that a grant, vacatur and remand in light of the Fifth Circuit's *en banc* decision in *Herrold* would be inappropriate, because the Fifth Circuit "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." BIO 17. But the Fifth Circuit made no such determination. Rather than addressing Mr. Ortiz-Martinez's argument that *Herrold* entitled him to resentencing with a lower Guidelines ranges, the court dodged that issue by pretending that it had issued its mandate and no longer had jurisdiction over the appeal, despite the fact that it had intentionally withheld its mandate and therefore did retain jurisdiction.

On remand, the Fifth Circuit could have no legitimate basis for refusing to apply the controlling law of the circuit to Mr. Ortiz-Martinez's case: it based its affirmance of the sentence on law that has since been squarely overturned by *Herrold*. *See* Pet. App. 1a-2a. Under *Herrold*, Mr. Ortiz-Martinez is entitled to resentencing. Even the government conceded in the Fifth Circuit that if *Herrold* is applied to Mr. Ortiz-Martinez's case, he would be entitled to resentencing. *See* United States' Response to Amended Petition for Panel Rehearing at 17, *Ortiz-Martinez*, 5th Cir. No. 16-41514 (May 29, 2018) (conceding that if the court allowed the filing for out-of-time rehearing, "the Government agrees that rehearing should be granted, and the case remanded for resentencing").

This case falls within the appropriate circumstances for a GVR order, because "intervening developments, or recent developments that we have 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, and where it appears that such a redetermination may determine the ultimate outcome of the litigation. . . ." *Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996); *see Brown v. United States*, 138 S. Ct. 1545, No. 17-6344 (Apr. 16, 2018) (GVR order in light of changed circuit law); *Sykes v. United States*, 138 S. Ct. 1544, No. 16-9604 (Apr. 16, 2018) (same).

It is of no significance that the legal question at issue in *Herrold* may yet be resolved by this Court. *See* BIO 11 n.3. *Herrold* and its holding that Mr. Ortiz-Martinez's prior Texas conviction for burglary cannot support the 16-level sentencing enhancement is the controlling law in the Fifth Circuit and applies to Mr. Ortiz-Martinez unless and until this Court overrules it. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986) (noting that even this Court's grant of certiorari "does not alter the authority of our prior decisions"). The appropriate procedure for this Court and the court of appeals is to apply the controlling law in this pending criminal appeal, which would require vacatur of Mr. Ortiz-Martinez's sentence and a remand for resentencing. The government would be free to appeal from that sentence, as any party is free to do through normal appellate procedures. *See* 18 U.S.C. § 3742(b) (providing for government appeal of a sentence).

The Fifth Circuit erroneously refused to consider and apply the changed controlling law that was issued while this case remained on direct appeal in that court. That changed law would require Mr. Ortiz-Martinez's resentencing under a Guidelines range that would

be three years less than the range used to sentence him. In these circumstances, the Fifth Circuit's refusal to consider that change in controlling law so far departs from the accepted and usual course of judicial proceedings that exercise of this Court's supervisory power is warranted to correct the error. *See* Sup. Ct. R. 10(a).

CONCLUSION

For the reasons stated above, in addition to the reasons in the petition for a writ of certiorari, this Court should grant the petition for a writ of certiorari. Given the *en banc* change in the controlling Fifth Circuit law resulting from *Herrold*, a GVR order for the Fifth Circuit to reconsider its decision may be appropriate.

Date: January 15, 2019

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