No. 20-_____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

CYNTHIA LOZANO,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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Question Presented

Whether the Ninth Circuit improperly split from the well-established rule of the Court and other Circuits that changes to the legal rights and obligations of written judgments restart the time to file a notice of appeal under the Federal Rules of Appellate Procedure.

List of Parties

[X] All parties appear in the caption of the case on the cover page.

[] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

List of Directly Related Proceedings

1. United States District Court for the Southern District of California, *United States v. Lozano,* 13cr1354-AJB. The district court entered the judgment on July 20, 2017, and then amended that judgment on August 26, 2019. *See* Appendix C.

2. United States District Court for the Southern District of California, *United States v. Lozano,* 16cr1332-AJB. The district court entered the judgment on July 20, 2017, and then amended that judgment on August 26, 2019. *See* Appendix D.

3. United States Court of Appeals for the Ninth Circuit, *United States v. Lozano,* Nos. 19-50285, 19-50286. *See* Appendix A. The Ninth Circuit entered judgment on January 19, 2021, and denied a petition for rehearing and suggestion for rehearing en banc, on April 15, 2021. *See* Appendix B.

4. No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Cynthia Lozano, asks for a writ of certiorari to review the memorandum opinion of the United States Court of Appeals for the Ninth Circuit entered on January 19, 2021.

Opinion Below

The memorandum decision of the court of appeals, *United States v. Lozano*, 833 F. App'x 705 (9th Cir. 2021), appears at Appendix A to this petition and is unpublished.

Jurisdiction

The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc on April 15, 2021. *See* Attachment B. This petition is being filed within the 150-day time limit for certiorari petitions arising during the coronavirus pandemic.[1] The Court has jurisdiction under 28 U.S.C. § 1254(1).

Involved Federal Law

Federal Rule of Appellate Procedure 4(b):

> Appeal in a Criminal Case.
>
> (1) Time for Filing a Notice of Appeal.
> (A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:
> (i) the entry of either the judgment or the order being appealed; or
> (ii) the filing of the government's notice of appeal.
> (B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:
> (i) the entry of the judgment or order being appealed; or
> (ii) the filing of a notice of appeal by any defendant.
> (2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

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[1] https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf

Statement of the Case

Cynthia Lozano was indicted in a tax fraud and identity-theft prosecution, and was in the process of resolving her case when the United States arrested her on new fraud charges. The second indictment originated from Lozano using the proceeds of the first case to commit fraud in a Section 8 Tenant-Based Assistance Housing Choice Voucher Program. Lozano plead guilty to both indictments. While the cases had separate case numbers, sentencing for both indictments occurred during the same proceeding and involved the filing of identical sentencing related documents.

The Presentence Report grouped all counts together under the Sentencing Guidelines and recommended concurrent sentences for all but two counts of the separate indictments. The United States, however, asked the district court to conduct separate guideline calculations for each indictment and have the sentences run consecutive, as if the frauds were two separate cases. Lozano requested that the court adopt the Presentence Report approach of concurrent sentencing on most counts.

At the sentencing hearing, "the district judge misspoke and corrected himself several times," but also "clarified no less than four times that the sentences were to run consecutively or be a total of 175 months." *United States v. Lozano*, 833 F. at 706.

When the district court issued the judgments for the two cases, neither case mentioned the other:

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:
FIFTY-SEVEN (57) MONTHS -As to Counts 1-26 as to each count, Concurrent
TWENTY-FOUR (24) MONTHS - As to Counts 27-33 as to each count, Concurrent with each other and run Consecutive to Counts 1-26.

Judgment in 13cr1354-AJB.

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:
SEVENTY (70) MONTHS - As to each Counts 16-29, Concurrent
SIXTY (60) MONTHS - As to each Counts 1-15 and 30-37, Concurrent and Concurrent with Counts 16-29
TWENTY-FOUR (24) MONTHS - As to each Counts 38-51, Concurrent and Consecutive to Counts 1-37.

Judgment in 16cr1332-AJB.

Because the sentences were imposed at the same time, and neither judgment referenced the other, the written judgments called for concurrent sentences totaling 94 months in custody. *See* 18 U.S.C.S. § 3584(a) ("Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively.").

Lozano initially filed notices of appeal for each written judgment. But later, and relying on the "careful consultation of counsel," she moved to voluntarily dismiss the appeals.

Over a year later, the United States asked the district court to "clarify" the judgments to effectuate the district court's intended 175-month sentence. After appointing Lozano counsel and taking briefing, the district court amended the

judgments by adding a sentence ordering consecutive sentences for each the two cases:

> IMPRISONMENT
> The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:
> FIFTY-SEVEN (57) MONTHS-As TO COUNTS 1-26 AS TO EACH COUNT, CONCURRENT
> TWENTY-FOUR (24) MONTHS -As TO COUNTS 27-33 AS TO EACH COUNT, CONCURRENT WITH EACH OTHER AND
> RUN CONSECUTIVE TO COUNTS 1-26.
>
> **SENTENCE IMPOSED IN CASE#13CR1354-AJB IS TO RUN CONSECUTIVE TO THE SENTENCE IMPOSED IN CASE #16CR1332-AJB.**

Amended Judgment in 13cr1354-AJB (emphasis added).

> IMPRISONMENT
> The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:
> SEVENTY (70) MONTHS - As to each Counts 16-29, Concurrent.
> SIXTY (60) MONTHS -As to each Counts 1-15 and 30-37, Concurrent and Concurrent with Counts 16-29.
> TWENTY-FOUR (24) MONTHS -As to each Counts 38-51, Concurrent and Consecutive to Counts 1-37.
>
> **SENTENCE IMPOSED IN CASE#13crl332-AJB IS TO RUN CONSECUTIVE TO THE SENTENCE IMPOSED IN CASE #13crl354-AJB.**

Amended Judgment in 13cr1332-AJB (emphasis added).

Lozano appealed the amended judgments. In addition to claiming that the district court lacked jurisdiction under Federal Rule of Criminal Procedure 36 to amend judgments from imposing concurrent to consecutive sentences, Lozano argued for resentencing because the consecutive sentences resulted from an incorrect guideline calculation. As to Lozano's Guidelines argument, the United

States took the position that the Ninth Circuit should not reach the merits, because Federal Rule of Appellate Procedure Rule 4(b) did "not permit her to litigate" any claim that could "have been litigated in her first appeal."

The Ninth Circuit agreed with the United States that Lozano's incorrect calculation of the Guidelines error could not be considered because Lozano voluntarily dismissed her appeal of the original judgments. The Ninth Circuit recognized the general rule that "the period for filing an appeal begins anew when 'a district court enters an amended judgment that revises legal rights or obligations,' 'even where the appeal concerns a different matter from that revised by the district court.'" *Lozano*, 833 Fed.App'x at 706 (quoting *United States v. Doe*, 374 F.3d 851, 853–54 (9th Cir. 2004)). The Ninth Circuit, however, created an exception to that rule when the "words reduced to writing in the judge's Judgment/Commitment Order" do not reflect "unambiguous sentences pronounced at the sentencing hearing." *Id.* In these situations, the oral pronouncement "constitute[s the] legal obligations," and any subsequently amended judgments do begin the time to file a notice of appeal anew, because the subsequent judgment would not "not revise those obligations." *Id.*

Reasons to Grant the Writ

I. The Ninth Circuit has split from the well-established rule that the appeal clock begins anew when a reentered or revised judgment changes the legal rights and obligations of a prior judgment.

The Court has announced a general rule that "the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll

the time within which review must be sought." *Fed. Trade Comm'n v. Minneapolis-Honeywell Regul. Co.*, 344 U.S. 206, 211 (1952). On the other hand, "when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment," the time period to appeal should "begin to run anew." *Id.* The question for restarting a new clock becomes, "whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Id.*

The Circuit courts have uniformly applied this rule to Federal Rule of Appellate Procedure 4. *See United States v. Cheal*, 389 F.3d 35, 52 (1st Cir. 2004) ("It is only when the judgment-issuing court alters matters of substance or resolves some genuine ambiguity that the entry of an amended judgment winds the appeals clock anew.") (quotations omitted); *In re Am. Safety Indem. Co.*, 502 F.3d 70, 72 (2d Cir. 2007) ("[O]nly when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken ... begin to run anew.") (quotations omitted); *United States v. Lewis*, 921 F.2d 563, 565 (5th Cir. 1991) ("an immaterial change in an amended judgment does not enlarge the time for filing an appeal or post-judgment motion") (quotations omitted); *United States v. Michelle's Lounge*, 39 F.3d 684, 703 (7th Cir. 1994), abrogated on other grounds by *Kaley v. United States*, 571 U.S. 320, 134 S. Ct. 1090, 188 L. Ed. 2d 46 (2014) ("Unless the second order has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality, the first order controls for the time of appeal.")

(quotations omitted); *United States v. Campbell*, 971 F.3d 772, 773–74 (8th Cir. 2020) ("The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality."); *United States v. Doe*, 374 F.3d 851, 853–54 (9th Cir.2004) ("[w]here a district court enters an amended judgment that revises legal rights or obligations, the period for filing an appeal begins anew"); *see also* Wright & Miller, 16A Fed. Prac. & Proc. Juris., Criminal Cases—Time for Appeal, § 3950.8 (5th ed.) (the "times set by Rules 4(b)(1)(A)(i) and 4(b)(1)(B)(i) begin to run anew from the entry of an amended judgment only if it disturbs or revises legal rights and obligations established by the original judgment") (emphasis added).

In this case, however, the Ninth Circuit significantly deviated this well-established rule. Instead of following the Court's simple instruction to compare the "prior judgment" with the "reentered or revised" judgment, the Ninth Circuit held that what mattered was "the words pronounced by the judge at sentencing, not the words reduced to writing in the judge's Judgment/Commitment Order." *Lozano*, 833 F. App'x at 706. As such, in the Ninth Circuit the appeal clock does not begin anew unless the amended judgment changes the legal rights and obligations of the oral pronouncement. But in the rest of the circuits, the appeal clock begins anew if the amended judgment changes the legal rights and obligations of the prior written judgment. The Court should grant certiorari to regain uniformity.

II. The Ninth Circuit's deviation from the rest of the Circuits is wrong and deeply troubling.

The Ninth Circuit's rule of comparing the oral pronouncement with the revised judgment conflicts with the Court's decision in *Minneapolis-Honeywell Regul. Co.* The Court's decision unambiguously contemplates a comparison of written judgments, by noting the "power to supersede the judgment," discussing "a judgment previously entered" and "reentered or revised," and announcing the test as "whether the lower court, *in its second order*, has disturbed or revised legal rights and obligations which, *by its prior judgment*, had been plainly and properly settled with finality." 344 U.S. at 211-12 (emphasis added).

Comparing judgments entered, rather than an amended judgment with the oral pronouncement, is also consistent with the plain language of Federal Rules of Appellate Procedure 4. Rule 4(b)(1) expressly tethers the start of the time to file an appeal to the "entry of ... the judgment." Fed. R. App. P. 4(b)(1). And by rule, the day "the court announces a decision, sentence, or order" does not implicate the appeal clock. Fed. R. App. P. 4(b)(2). Moreover, a "judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket." Fed. R. App. P. 4(b)(6). Thus, even if the Ninth Circuit was correct that "words pronounced by the judge at sentencing ... constitute the legal sentence," *Lozano*, 833 F. App'x at 706, the words pronounced at sentencing have nothing to do the time to file an appeal under Rule 4(b). Instead, because Rule 4 starts the clock based on the "entry of the judgment," a comparison of the judgments entered is the proper test.

The Ninth Circuit's approach embeds unnecessary practical problems into the

appellate process. The Court has recognized that "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S. Ct. 719, 721, 85 L. Ed. 1037 (1941)). In accord with this principle, the majority rule is simple and promotes just results. Litigants review just the written judgment when entered and make a decision of whether they are satisfied with the judgment, knowing that if the judgment is ever materially amended, they will be able to appeal all issues underlying the judgment.

But the Ninth Circuit's rule of comparing the amended judgment to the oral pronouncement, adds a level of uncertainty and potential unfairness. Under the Ninth Circuit's approach litigants cannot rely on written judgments when deciding whether to appeal. Instead, litigants will need to evaluate the oral pronouncement, and determine the often-difficult legal question of whether there exists a direct conflict between an unambiguous oral pronouncement and the written judgment or whether the oral articulation was ambiguous and the written judgment merely clarified the ambiguity. *See e.g. United States v. Munoz-Dela Rosa*, 495 F.2d 253, 255 (9th Cir. 1974).

This case presents an example of how the Ninth Circuit's rule can defeat the ends of justice. The original judgments clearly provided for concurrent sentences totaling 94-months of custody. Lozano had no reason to appeal the judgments because they provided the relief she requested at sentencing – concurrent sentences. She also had no reason to expect the sentence would change because the government did not appeal the judgments and had not moved to correct the

judgments for months after entry. But when the judgments were subsequently amended to impose consecutive sentences, the Ninth Circuit's rule prevented Lozano from appealing the sentence. Such after-the-fact determination of the meaning of the oral pronouncement is a consideration for the merits of an appeal, not a consideration for litigants to navigate when deciding whether to appeal. As such, the Court should grant certiorari to prevent the Ninth Circuit's unique rule from defeating the ends of justice.

III. Resolving the question presented is important to promote effective assistance of counsel regarding appellate rights.

The defendant's right to appeal is central to the protections provided by the Sixth Amendment. The Court has held that the Sixth Amendment guarantees defendants effective assistance of counsel regarding appellate rights and defense counsel generally "has a constitutionally imposed duty to consult with the defendant about an appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). And "when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed 'with no further showing from the defendant of the merits of his underlying claims.'" *Garza v. Idaho*, 139 S. Ct. 738, 742 (2019) (quoting *Flores-Ortega*, 528 U.S. at 484).

The Ninth Circuit's rule interferes with counsel's ability to provide effective assistance of counsel. This case demonstrates the perils counsel face under the Ninth Circuit's rule. Lozano moved to voluntarily dismiss her appeals of the original judgments after "careful consultation of counsel." But because of the Ninth Circuit

having a different rule than the other circuits, the dismissal was most likely due to misadvise of counsel. Counsel most likely informed Lozano of the legal effect of the written judgments—that based on the four-corners of the judgment and the relevant statute her sentences were to run concurrently. Counsel also most likely informed Lozano that the circumstances would not change—the judge had issued the judgments and the government had not indicated any disagreement with the judgments. And if counsel was aware of the well-settled rule that any material amendment of the judgments would provide a new opportunity to appeal, but unaware that the Ninth Circuit had a different rule based on the oral pronouncement, counsel likely provided affirmatively wrong advice that cost Lozano her right to appeal.

No reasonable counsel aware of the well-settled comparison of judgment rule would have advised Lozano to go forward with the appeal. Only counsel familiar with the Ninth Circuit's unique practice would have counseled Lozano to press on. The Court should grant certiorari to eliminate this trap set for federal defense counsel when advising clients about their important appellate rights.

IV. The question presented was squarely decided below and determined the outcome.

This case is a perfect vehicle to decide the question presented. The amended judgments indisputably "disturbed or revised legal rights and obligations" of the original judgments by changing Lozano's sentence from a concurrent sentence of 94 months to a consecutive sentence of 175 months. But the application of the Ninth Circuit's reliance on the oral pronouncement precluded an appeal, while an appeal

would have proceeded under the rule of all other circuits. Moreover, the outcome of how the Court resolves the question presented will make a difference in Lozano's sentence because the government effectively conceded that the district court miscalculated the Guidelines when imposing consecutive sentences. Thus, the Court should grant certiorari because Lozano will most likely be resentencing if the Court adopts the comparison of judgments rule that would allow her appeal to go forward.

Conclusion

A writ of certiorari is warranted.

Respectfully submitted,

Dated: September 13, 2021

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