

No. _____

In the Supreme Court of the United States

ERIC RICHARD GARZA,

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 PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

Did the Fifth Circuit misapply its restrictive interpretation of the mandate rule which does not permit *de novo* resentencing, but limits to resentencing to only those discrete particular issues identified by the appeals court for remand, when it affirmed petitioner's conviction for count one, vacated and remanded for resentencing on count two, but then permitted the district court to impose a different sentence for count one at resentencing?

List of Parties

The names of the parties are listed in the caption of this case. The Amended Judgment in a Criminal Case was issued by the Hon. Nelva Gonzales Ramos, United States District Judge for the Southern District of Texas, Corpus Christi Division, and is included at Appendix Tab B. The United States Court of Appeals for the Fifth Circuit affirmed the Amended Judgment in a Criminal Case in an unpublished *per curiam* opinion, at Appendix Tab A, with the panel consisting of the Hon. Jacques L. Weiner, Jr., the Hon. James C. Ho, and the Hon. Irma Carrillo Ramirez, United States Circuit Judges.

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Opinion Below

The opinion sought to be reviewed was issued on May 8, 2025, by the United States Court of Appeals for the Fifth Circuit, and is at Appendix Tab A.

Statement of Jurisdiction

Petitioner Eric Richard Garza was convicted on two counts: (1) interference with commerce by attempted robbery; and (2) discharge of a firearm during a crime of violence. Fifth Cir. ROA.23-40490.257-262. The district court sentenced petitioner Garza to 78 months for Count One, and 120 months for count two, to be

served consecutively for a total term of 198 months. Fifth Cir. ROA.23-40490.258. Petitioner Garza appealed that judgment and sentence in *United States v. Garza*, No. 21-40759 (5th Cir. March 15, 2023) (unpublished), which held that Mr. Garza's conviction on count two for discharge of a firearm during a crime of violence would be vacated under plain error review because attempted Hobbs Act robbery conviction is not a crime of violence that could support this conviction under *United States v. Taylor*, 596 U.S. 845, 142 S.Ct. 2015 (2022), decided during the pendency of Garza's prior appeal. *United States v. Garza*, No. 21-40759 (5th Cir. March 15, 2023) (unpublished), pdf slip op., at pp. 4-5, and Fifth Cir. ROA.23-40490.293-294. The Fifth Circuit's opinion concluded, "We AFFIRM other than as to the sentence on count two. We VACATE that sentence and REMAND for resentencing." *Id.*, pdf slip. op. p. 7, and ROA.23-40490.296.

But instead of vacating count two, and resentencing Garza to the 78 months sentence previously imposed for count one, the district court imposed a 144 months sentence for count one. *See* the Amended Judgment in a Criminal Case, at Appendix Tab B. Petitioner appealed that ruling to the Fifth Circuit, arguing that the Fifth Circuit's restrictive interpretation of the mandate rule prevented the district court from altering count one's original sentence of 78 months, since the Fifth Circuit's prior opinion stated that petitioner's conviction was affirmed other than as to count two's sentence, and vacated only that sentence in remanding for resentencing. *United States*

v. Garza, No. 21-40759 (5th Cir. Mar. 15, 2023) (unpublished), pdf slip op., at 7, and Fifth Cir. ROA.23-40490.296.

Petitioner Eric Richard Garza timely filed both a petition for panel rehearing and a petition for *en banc* rehearing with the Fifth Circuit, with both rehearing petitions denied on June 4, 2025. Fifth Cir. No. 23-40490, Dkt. No. 90-2. This certiorari petition will be due within 90 days after the Fifth Circuit's June 4, 2025 order denying rehearing, or by September 2, 2025. Sup. Ct. Rule 13.1.

Statement of the Case

Petitioner Eric Richard Garza seeks review of the Fifth Circuit's May 8, 2025 opinion, which is at Appendix Tab A.

Statement of Procedural History

Petitioner Eric Richard Garza was convicted on two counts: (1) interference with commerce by attempted robbery; and (2) discharge of a firearm during a crime of violence. Fifth Cir. ROA.23-40490.257-262. The district court sentenced appellant Garza to 78 months for Count One, and 120 months for Count Two, to be served consecutively for a total term of 198 months. Fifth Cir.ROA.23-40490.258. Petitioner Garza appealed that judgment and sentence in *United States v. Garza*, No. 21-40759 (5th Cir. March 15, 2023) (unpublished), which held that Mr. Garza's conviction on count two for discharge of a firearm during a crime of violence would be vacated under plain error review because attempted Hobbs Act robbery conviction

is not a crime of violence that could support this conviction under *United States v. Taylor*, 596 U.S. 845, 142 S.Ct. 2015 (2022), decided during the pendency of Garza’s prior appeal. *United States v. Garza*, No. 21-40759 (5th Cir. March 15, 2023) (unpublished), pdf slip op., at 4-5, and Fifth Cir. ROA.23-40490.293-294. The opinion concluded, “We AFFIRM other than as to the sentence on count two. We VACATE that sentence and REMAND for resentencing.” *Id.*, pdf slip. op. p. 7, and Fifth Cir. ROA.23-40490.296.

On remand, the April 17, 2023 Amended Presentence Investigation Report (hereinafter “Amended PSR”) recalculated petitioner’s offense level for the remaining conviction on count one at a range of 135 to 168 months. Fifth Cir. ROA.23-40490.1007, ¶ 58. Petitioner Garza objected to any recalculation of the sentence for count one, arguing that the Fifth Circuit’s restrictive interpretation of the mandate rule on resentencing prevented that, and required that the 78 month sentence originally imposed for Count One be imposed at resentencing:

Defendant objects to the Amended Presentence Report in that it revisits Count One which was not vacated by the Court of Appeals and it reflects new specific offense characteristics in paragraph 23. of this report which was not originally computed in the original Count One sentence. The Total Offense level has gone from 26 to 31.

Fifth Cir. ROA.23-40490.311, ¶ 2.

At the August 15, 2023 resentencing hearing, U.S. District Judge Nelva Gonzalez Ramos overruled Garza’s objection by noting that at the original sentencing in 2021, there were two counts of conviction, and that the seven level increase in the

Amended PSR for a firearm being discharged in the offense charged in Count One, Fifth Cir. ROA.23-40490.1000, ¶ 23, could not have been included in the 2021 sentencing calculation, since that would have been impermissible double counting because that conduct was the charged offense in Count Two, which had been vacated on appeal and did not exist at resentencing. Fifth Cir. ROA.23-40490.904-905. There was no discussion at the resentencing hearing on whether the Fifth Circuit’s mandate prevented changing Garza’s 78 months sentence originally imposed for count one since that count had been affirmed, and only count two had been vacated in the prior appeal. The district court imposed a 144 months sentence for Count One. Fifth Cir. ROA.23-40490.327, and Fifth Cir. ROA.23-40490.914:18-19. Mr. Garza timely appealed, Fifth Cir. ROA.23-40490.333, and undersigned counsel was appointed to represent Garza on appeal. Fifth Cir. ROA.23-40490.337.

This writer initially filed a January 16, 2024 *Anders* brief (Dkt. No. 18), but the Fifth Circuit issued a May 3, 2024 Order by Judge Ramirez (Fifth Cir. No. 23-40490, Dkt. No. 34-2), ordering this writer to either file a supplemental *Anders* brief or a merits brief, stating in part:

Garza previously appealed his convictions for attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (Count One), and discharge of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (Count Two). In that case, we ordered, “We AFFIRM other than as to the sentence on count two. We VACATE that sentence and REMAND for resentencing.” *United States v. Garza*, No. 21-40759, 2023 WL 2525655, at *4 (5th Cir. Mar. 15, 2023) (emphasis added). Counsel’s *Anders* brief fails to address the potentially nonfrivolous issue regarding the district court’s compliance with the

mandate rule insofar as it resentenced Garza as to Count One. *See Anders*, 386 U.S. at 744; *United States v. Garland*, 632 F.3d 877, 879-80 (5th Cir. 2011); *see also United States v. Marmolejo*, 139 F.3d 528, 531 (5th Cir. 1998).

Fifth Cir. May 3, 2024 Order, pp. 1-2 (Fifth Cir. No. 23-40490, Dkt. No. 34-2).

On May 24, 2024, this writer filed a supplemental *Anders* brief. Fifth Cir. No. 23-40490, Dkt. No. 35. The Fifth Circuit then issued an October 2, 2024 Order by Judge Ramirez for either a supplemental *Anders* brief or a merits brief to be filed (Dkt. No. 51-2), stating in part:

In the initial *Anders* brief, appointed counsel concluded that there were no nonfrivolous issues to raise on appeal with respect to the district court’s resentencing on Count One. In the context of criminal resentencing, however, the mandate rule provides that the only issues that are properly before the district court on remand “are those issues arising out of the correction of the sentence ordered by this court.” *United States v. Marmolejo*, 139 F.3d 528, 531 (5th Cir. 1998). Accordingly, this court ordered counsel to file a supplemental brief addressing whether the district court was authorized to resentence Garza on Count One pursuant to the mandate rule.

Counsel has now filed a supplemental *Anders* brief, to which Garza has not filed a response. In the supplemental *Anders* brief, appointed counsel interprets the remand order as vacating Count Two and remanding for resentencing on Count One, but the order affirmed every aspect of the district court’s judgment but the sentence on Count Two. Counsel’s supplemental *Anders* brief fails to acknowledge authority holding that, when this court vacates convictions or sentences on fewer than all counts, the district court on remand is only authorized to reconsider the sentences that were vacated. *See, e.g., United States v. Clark*, 816 F.3d 350, 361 (5th Cir. 2016); *United States v. Henry*, 709 F.2d 298, 304 (5th Cir. 1983) (case decided before the Sentencing Reform Act of 1984); *see also United States v. Solorzano (Solorzano II)*, 65 F.4th 245, 248-49 (5th Cir. [2023]) (interpreting narrowly the mandate in *United States v. Solorzano (Solorzano I)*, 832 F. App’x 276, 282-84 (5th Cir. 2020)), *cert. denied*, 144 S. Ct. 306 (2023). Accordingly,

counsel has not demonstrated that a challenge to the resentencing on Count One would lack arguable merit and be “wholly frivolous.” *Anders*, 386 U.S. at 744.

Fifth Cir. October 2, 2024 Order, p. 2 (Fifth Cir. No. 23-40490, Dkt. No. 51-2) (bracketing and underlining added).

Petitioner Garza filed an October 10, 2024 merits brief (Fifth Cir. No. 23-40490, Dkt. No. 52), raising the following issue:

The district court erred in resentencing [petitioner Garza] to a longer sentence for Count One, since this Court’s mandate affirmed Count One, vacated Count Two, and remanded for resentencing. Count One’s sentence should have remained 78 months with a three years supervised release term, and the case should be remanded for resentencing to those terms.

Appellant’s Brief filed in Fifth Cir. No. 23-40490, Dkt. No. 52, p. 3 (pdf 9). Bracketing added. The government filed its January 10, 2025 Brief of Plaintiff-Appellee (Fifth Cir. No. 23-40490, Dkt. No. 64), and petitioner filed a January 14, 2025 Appellant’s Reply Brief (Fifth Cir. No. 23-40490, Dkt. No. 69).

The Fifth Circuit, with a panel consisting of Judges Wiener, Ho, and Ramirez, issued its unpublished May 8, 2025 *per curiam* opinion affirming the district court’s amended judgment and sentence. See Appendix Tab A. After stating that the issue raised by petitioner Garza was whether the resentencing on count one to a higher sentence than originally imposed violated the Fifth Circuit’s previous mandate, and then stating the appellate *de novo* standard of review for this issue, the Fifth Circuit held, “Here, we are persuaded that the district court complied with the letter and spirit

of our mandate by resentencing Garza on Count One[,]” citing two Fifth Circuit opinions, with no additional explanation. *See* Appendix A, p. 2 (bracketing added).

Petitioner Eric Richard Garza timely filed both a petition for panel rehearing and a petition for *en banc* rehearing with the Fifth Circuit, with both rehearing petitions denied on June 4, 2025. Fifth Cir. No. 23-40490, Dkt. No. 90-2.

Question Presented for Review (Restated)

Did the Fifth Circuit misapply its restrictive interpretation of the mandate rule which does not permit *de novo* resentencing, but limits to resentencing to only those discrete particular issues identified by the appeals court for remand, when it affirmed petitioner’s conviction for count one, vacated and remanded for resentencing on count two, but then permitted the district court to impose a different sentence for count one at resentencing?

Argument Amplifying Reasons for Granting the Writ

Discussion of Facts Related to this Ground: The facts and procedural history discussed in the Statement of Procedural History of this certiorari petition are incorporated by reference herein.

Why Certiorari Should be Granted: Certiorari should be granted because petitioner contends that the Fifth Circuit has misapplied its own restrictive interpretation of the mandate rule which does not permit a *de novo* resentencing, but instead limits resentencing only to the discrete particular issues identified by the appeals court for remand. In the prior appeal, the Fifth Circuit affirmed petitioner’s conviction and 78 months sentence for count one, and vacated and remanded for

resentencing only on count two, which was an invalid conviction under this Court's opinion in *United States v. Taylor*, 596 U.S. 845, 142 S.Ct. 2015 (2022). This should have resulted in petitioner being resentenced to the original 78 months sentence imposed for count one, not to the district court's imposition of a 144 months sentence for that count at resentencing. This allowed the government to obtain a *de novo* resentencing on remand, even though the Fifth Circuit stated in petitioner's prior appeal that, "We AFFIRM other than as to the sentence on count two. We VACATE that sentence and REMAND for resentencing." *United States v. Garza*, No. 21-40759 (5th Cir. Mar. 15, 2023) (unpublished) pdf slip. op. p. 7, and Fifth Cir. ROA.23-40490.296.

"In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948) (internal citations omitted).

When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895) (internal citations omitted).

There are two different circuit interpretations for the scope of a district court's resentencing after an appellate court has reversed a judgment and remanded for

resentencing, which were recently summarized by the Fifth Circuit in *United States v. Garza*, 127 F.4th 954 (5th Cir. Feb. 7, 2025). This opinion involves a different Mr. Garza than petitioner, and was authored by Judge Ho, one of the judges on the panel that decided petitioner’s appeal in the *per curiam* opinion at Appendix Tab A:

The mandate rule requires courts to comply with the directives of a superior court on remand, and bars the re-litigation of issues expressly or implicitly resolved by the appellate court. [Citation omitted].

In the resentencing context, different circuits have adopted competing approaches to the mandate rule. Some circuits permit district courts to conduct a *de novo* resentencing hearing, except where the appellate court otherwise directs. [Citations omitted].

Other circuits, by contrast, take a more “restrictive” approach, and limit district courts to “only those discrete, particular issues identified by the appeals court for remand.” [Citations omitted].

Garza correctly observes that we share the First Circuit’s restrictive approach to the mandate rule in the resentencing context. [Citations omitted].

United States v. Garza, 127 F.4th 954, 957 (Fifth Cir. Feb. 7, 2025) (bracketing added).

It was improper for the district court to resentence petitioner Eric Richard Garza to a higher sentence for count one than the 78 months sentence originally imposed for that count, because the Fifth Circuit only vacated the sentence for count two in the appeal which resulted in resentencing, meaning that count one’s sentence was affirmed and could not be altered on resentencing. By imposing the a higher sentence for count one, the district court allowed the government to have a “second bite at the

apple,” which a defendant is prohibited from having on resentencing by *United States v. Marmolejo*, 139 F.3d 528, 531 (5th Cir. 1998).

In *United States v. Clark*, 816 F.3d 350, 353 (5th Cir. 2016), one of the two cases cited in the opinion at issue (Appendix Tab A, p. 2), the Fifth Circuit affirmed Clark’s convictions on counts 1, 2, 3, and 5, but reversed his conviction on count 4 and remanded for a new trial. *Id.* When Clark’s case was set for a new trial, the government moved to dismiss count 4, which was granted, no resentencing hearing occurred, and no amended judgment was entered. *Ibid.* Nearly 16 years later, Clark filed a motion to be orally resentenced and for an amended judgment to be entered, arguing in part that he believed that his postsentence conduct might reduce his remaining sentence on the affirmed counts. *Id.*, 816 F.3d at 354. The district court granted Clark’s request for entry of an amended judgment, but denied his request for resentencing. *Ibid.*

Clark appealed that ruling to the Fifth Circuit, first arguing that his sentences were “unbundled,” which would permit a resentencing on the counts that were affirmed, *id.*, 816 F.3d at 360, but the Fifth Circuit disagreed:

In some cases, when we reverse convictions or sentences on fewer than all counts, the aggregate sentence must be unbundled, and the defendant must be resentenced on all counts. [Citation omitted]. This occurs when the sentences or counts are interrelated or interdependent – for example, when the reversal of the sentence on one count necessarily requires the review of the entire sentence. This is not the case here. Counts 1 and 2 carried mandatory life sentences, and count 4 carried a mandatory minimum sentence that by statute had to be imposed consecutively to the sentences on all other counts. [Citation

omitted]. The district court ordered the sentences on counts 1, 2, 3, and 5 to run concurrently with one another, but, as required by statute, it ordered the sentence on count 4 to run consecutively to all other counts. On appeal, we affirmed Clark’s convictions and sentences on all counts except count 4. Our reversal of count 4 did not unbundle any sentencing package of which count 4 was a part. Accordingly, the district court was not obligated to resentence Clark on the basis that the sentencing package had become unbundled.

United States v. Clark, 816 F.3d at 360 (5th Cir. 2016).

A similar result occurred in *United States v. Solorzano (Solorzano II)*, 65 F.4th 245 (5th Cir. 2023), the other case cited in the opinion at issue. *See* Appendix Tab A, p. 2. After the Fifth Circuit held that plain error occurred in Solorzano’s sentencing regarding counts 3 and 5, and remanded for resentencing, the district court stated that only counts 3 and 5 could be resentenced, and that the remainder of the judgment would be left “untouched.” *Id.*, 65 F.4th at 248. The Fifth Circuit found that ruling was correct, and affirmed. *Id.*, 65 F.4th at 249.

The Fifth Circuit’s contrary holding presented in its opinion affirming petitioner Garza’s resentencing at Appendix Tab A, has allowed the government to have a *de novo* resentencing on count one, when the Fifth Circuit’s mandate affirmed count one’s sentence in the prior appeal by stating, “We AFFIRM other than as to the sentence on count two. We VACATE that sentence and REMAND for resentencing.” *United States v. Garza*, No. 21-40759 (5th Cir. Mar. 15, 2023) (unpublished) pdf slip. op. p. 7, and Fifth Cir. ROA.23-40490.296. That holding conflicts with *United States v. Marmolejo*, 139 F.3d 528, 531 (5th Cir. 1998), and related cases which hold that a

de novo sentencing is not permitted under the Fifth Circuit's restrictive interpretation of the mandate rule on resentencing.

Because the Fifth Circuit has misapplied its restrictive interpretation of the mandate rule on resentencing by allowing the district court to impose a larger sentence than originally imposed on the only count remaining on remand, certiorari is sought by petitioner Eric Richard Garza.

Conclusion and Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, petitioner ERIC RICHARD GARZA respectfully prays that this Court grant this petition for a writ of certiorari, set this cause for oral argument and for briefing on the merits, and vacate or reverse the Fifth Circuit's opinion, and remand to the Fifth Circuit for resentencing at the original 78 months sentence with a three year supervised release term.

Respectfully submitted,

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