

No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re RODRIGO ZERMENO-GOMEZ, GUSTAVO HERNANDEZ-
GUTIERREZ, MARTIN RIOS-ARIAS, Petitioners.

RODRIGO ZERMENO-GOMEZ, GUSTAVO HERNANDEZ-GUTIERREZ,
MARTIN RIOS-ARIAS, Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA, Respondent Court,

and

UNITED STATES OF AMERICA,
Real Party in Interest.

PETITION FOR WRIT OF MANDAMUS

D.C. Nos. 17-MJ-09200-ESW-1, CR-17-00803-PHX-DLR (MHB), 17-01387-MJ

JON M. SANDS
Federal Public Defender
District of Arizona

DANIEL L. KAPLAN
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007-2730
(602) 382-2700

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	ii
Relief Sought.....	1
Issue Presented	1
Factual Background	1
Reasons Why the Writ Should Issue	7
I. Mandamus relief is appropriate and necessary when a district court routinely refuses to follow a binding precedent of this Court and the pertinent factors are present.	7
II. The pertinent factors support the issuance of the writ in these cases.	7
Conclusion	22

TABLE OF AUTHORITIES

PAGE

Cases

Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247 (2013)17

Bauman v. U.S. Dist. Court, 557 F.2d 650 (9th Cir. 1977) 9

Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017)..... 21

Campbell v. Wood, 20 F.3d 1050 (9th Cir. 1994) 21

Carver v. Lehman, 558 F.3d 869 (9th Cir. 2009)6, 14, 15, 16

Chambers v. United States, 22 F.3d 939 (9th Cir. 1994)13

Chambers v. United States, 47 F.3d 1015 (9th Cir. 1995)13

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 10

Credit Suisse v. U.S. Dist. Court, 130 F.3d 1342 (9th Cir. 1997)..... 9

Diamond v. U.S. Dist. Court, 661 F.2d 1198 (9th Cir. 1981) 10

Douglas v. U.S. Dist. Court, 495 F.3d 1062 (9th Cir. 2007)..... 9

Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012).....17

Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001) 11, 17

Mix v. Asurion Ins. Servs. Inc., 2017 WL 131566 (D. Ariz. Jan. 13, 2017)..... 21

NRDC v. County of Los Angeles, 725 F.3d 1194 (9th Cir. 2013).....14, 15, 16

Roche v. Evaporated Milk Ass’n, 319 U.S. 21 (1943) 8

SEC v. Amerindo Inv. Advisors, Inc., 2014 WL 405339 (S.D.N.Y. Feb. 3, 2014), *aff'd*, 639 F. App'x 752 (2d Cir.), *cert. denied*, 136 S. Ct. 2429 (2016)..... 16

Thomas v. Smith, 2012 WL 5346856 (C.D. Cal. Oct. 25, 2012) 20

United States v. Caceres-Olla, 738 F.3d 1051 (9th Cir. 2013) 20, 21

United States v. Foumai, 910 F.2d 617 (9th Cir. 1990)6, 14, 16, 17

United States v. Gomez-Lopez, 62 F.3d 304 (9th Cir. 1995)13

United States v. Gonzalez-Hernandez, 2015 WL 1600781 (D. Ariz. Apr. 8, 2015), *aff'd*, 657 F. App'x 658 (9th Cir. 2016) 22

United States v. Gonzalez-Monterroso, 745 F.3d 1237 (9th Cir. 2014)..... 20

United States v. Havelock, 645 F.3d 1083 (9th Cir. 2011) 19

United States v. Hernandez-Gutierrez, No. CR-17-00803-PHX-DLR (MHB) 6

United States v. Howard, 480 F.3d 1005 (9th Cir. 2007)..... 10

United States v. Murguia-Rodriguez, No. 14-10400 21

United States v. Rios-Arias, No. 17-01387-MJ/CR-15-00280-JJT 7

United States v. Ruiz, 935 F.2d 1033 (9th Cir. 1991)6, 14, 15, 16

United States v. Sanchez-Gomez et al., --- F.3d ---, 2017 WL 2346995 (9th Cir. May 31, 2017) (en banc)*passim*

United States v. Smith, 123 F.3d 123 (9th Cir. 2017) 19

United States v. Wolf Child, 699 F.3d 1082 (9th Cir. 2012) 20

United States v. Zaragoza-Moreira, 780 F.3d 971 (9th Cir. 2015) 22

United States v. Zermeno-Gomez, No. CR-17-MJ-09200-ESW-1 5

Wedbush, Noble, Cooke, Inc. v. SEC, 714 F.2d 923 (9th Cir. 1983)..... 12, 13

Statutes

18 U.S.C. § 3401 16

Rules

FRAP 40(a)(1) 21

FRAP 41..... 18

FRAP 41(a) 12, 21

FRAP 41(b) 21

FRAP 41(c) 18

Other Authorities

District of Arizona Annual Statistical Report – Fiscal Year 2016: October 1, 2015 – September 30, 2016 (District Criminal Case Filings FY2016) (Office of the Clerk of Court, United States District Court, District of Arizona (Jan. 5, 2017) ... 23

The Bluebook: A Uniform System of Citation (Columbia Law Review Ass’n *et al.*, eds. (20th ed. 2015))..... 20

RELIEF SOUGHT

On behalf of themselves and all in-custody defendants in the District of Arizona, petitioners seek a writ of mandamus directing respondent court to treat as binding authority and comply with this Court's holding in *United States v. Sanchez-Gomez et al.*, --- F.3d ---, 2017 WL 2346995 (9th Cir. May 31, 2017) (en banc), notwithstanding the fact that this Court has stayed the issuance of the mandate in that case.

ISSUE PRESENTED

Must respondent United States District Court for the District of Arizona comply with this Court's published opinion in *Sanchez-Gomez*, notwithstanding the fact that the mandate has been stayed in that case?

FACTUAL BACKGROUND

1. On May 31, 2017, an en banc panel of this Court issued its published opinion in *United States v. Sanchez-Gomez et al.*, --- F.3d ---, 2017 WL 2346995 (9th Cir. May 31, 2017) (en banc), addressing the question of "whether a district court's policy of routinely shackling all pretrial detainees in the courtroom is constitutional." *Id.* at *2. The Court concluded that it is not. Such a policy, the Court held, undermines the presumption of innocence, infringes upon defendants'

fundamental right to be free of unwarranted restraints, and impairs the decorum and dignity of the courtroom. *Id.* at *8-*13. The Court summarized its holding in the following language:

The Constitution enshrines a fundamental right to be free of unwarranted restraints. Thus, we hold that if the government seeks to shackle a defendant, it must first justify the infringement with specific security needs as to that particular defendant. Courts must decide whether the stated need for security outweighs the infringement on a defendant's right. This decision cannot be deferred to security providers or presumptively answered by routine policies. All of these requirements apply regardless of a jury's presence or whether it's a pretrial, trial or sentencing proceeding. Criminal defendants, like any other party appearing in court, are entitled to enter the courtroom with their heads held high.

Id. at *13.

The *Sanchez-Gomez* Court was ruling on what it construed as petitions for writs of mandamus (they had been filed as appeals and emergency motions) filed by defendants in the Southern District of California. *Id.* at *3. In the petitioners' cases, that district had followed its policy of "allowing the Marshals Service to produce all in-custody defendants in full restraints for most non-jury proceedings." *Id.* at *2.

"Full restraints" means that "a defendant's hands are closely handcuffed together, these handcuffs are connected by chain to another chain running around the defendant's waist, and the defendant's feet are shackled and chained together." *Id.*

In the course of the litigation, the Southern District of California changed its

shackling policy – but the government indicated that it would seek to reinstate the policy unless this Court were to hold it unconstitutional. *Id.* at *8. This “voluntary cessation” did not moot the cases, but it did cause the Court to deny the mandamus petitions – even as it struck down the policy in question – because the policy was not “presently in effect.” *Id.* at *8, *13.

2. On June 14, 2017, the government moved for a 90-day stay of the issuance of the mandate in *Sanchez-Gomez. United States v. Sanchez-Gomez et al.*, Nos. 13-50561 *et al.*, DktEntry: 110-1. On June 16, 2017, Chief Judge Thomas entered an order granting the government’s motion. *Id.* DktEntry: 111.

3. In the District of Arizona, a routine-shackling policy resembling the San Diego policy held unconstitutional in *Sanchez-Gomez* is currently in effect. *See Sanchez-Gomez*, 2017 WL 2346995, at *5 (noting “some form of routine shackling has become a common practice” among district courts in this circuit). Immediately after *Sanchez-Gomez* was issued, District of Arizona judges in some cases made individualized determinations as to whether defendants would be shackled in their courtrooms. After this Court stayed the mandate, however, the Chief Judge of the District of Arizona issued a “direction” to the effect that, because the *Sanchez-Gomez* stay “does in fact stay that matter,” judges in the district need not comply with *Sanchez-Gomez* while the stay is in effect. App. C at 9:2-7. Consistently with

this “direction,” magistrate and district judges in this district now refuse – with apparent uniformity – to comply with *Sanchez-Gomez*, taking the position that the opinion is not binding authority while the mandate is stayed. While undersigned counsel is aware of more examples, the following illustrative examples are provided in the transcripts attached to this petition:

- *United States v. Zermeno-Gomez*, No. CR-17-MJ-09200-ESW-1. Rodrigo Zermeno-Gomez is a 36-year-old Mexican national with no history of violence. Pretrial Services Report (PTSR); I-213 Report at 1. The Office of Pretrial Services found “no known factors that indicate [Mr. Zermeno-Gomez] poses a risk of danger to the community.” PTSR at 2. Mr. Zermeno-Gomez was pulled over for “expired temporary tags” (I-213 Report at 2), and eventually pleaded guilty to unlawful entry into the United States. On June 21, 2017, Mr. Zermeno-Gomez appeared before a magistrate judge for his plea hearing and sentencing. App. A. His counsel requested that he be unshackled “[p]ursuant to *Sanchez-Gomez*.” *Id.* at 4:2-4. The court denied the request, noting that the mandate had been stayed, and citing *Carver v. Lehman*, 558 F.3d 869 (9th Cir. 2009); *United States v. Ruiz*, 935 F.2d 1033 (9th Cir. 1991); and *United States v. Foumai*, 910 F.2d 617 (9th Cir. 1990). App. A at 4:23-5:15. The court added that it found *Sanchez-Gomez*

“distinguishable” “from the proceedings that are held in the volume of this district.” *Id.* at 5:17-21.

- *United States v. Hernandez-Gutierrez*, No. CR-17-00803-PHX-DLR (MHB).

Gustavo Hernandez-Gutierrez is a 35-year-old Mexican national charged with importation and possession with intent to distribute methamphetamine.

Pretrial Services Report. The Office of Pretrial Services deemed him a danger to the community “based on the alleged instant offense.” *Id.* at 2. On

June 21, 2017, Mr. Hernandez-Gutierrez appeared before a magistrate judge

for his arraignment. App. B. His counsel requested that he be unshackled

“pursuant to *United States v. Sanchez-Gomez*.” *Id.* at 4:18-19. The court

denied the request, explaining that it believed *Sanchez-Gomez* was “not binding at this time” because the circuit law was “unclear,” and because

“[w]hen mandates issue, they state that the judgment takes effect on the

date of the mandate and they have not adopted a circuit rule.” *Id.* at 5:5-12.

The court added that it intended “to continue for initial appearances for

myself to review each case individually before a detention hearing is

conducted.” *Id.* at 5:20-23.

- *United States v. Rios-Arias*, No. 17-01387-MJ/CR-15-00280-JJT. Martin

Rios-Arias is a 40-year-old Mexican national with a criminal record including violent offenses. Pretrial Services Report. The Office of Pretrial Services believed that he posed a danger to the community “based on his prior criminal history.” *Id.* at 4. On June 21, 2017, Mr. Rios-Arias appeared before a magistrate judge for a combination change of plea and admit/deny hearing. App. C. His counsel objected to his being shackled. *Id.* at 8:15-19. The court overruled the objection, acknowledging “the Ninth Circuit opinion on this matter” but noting that it had “received direction from our chief judge on the issue of the stay, that that does in fact stay that matter and that the [c]ourt should continue to function as it has previously prior to the stay.” *Id.* at 8:20-9:7. The court accordingly denied the request, while noting that “that will all change, potentially, after any stay is lifted.” *Id.* at 9:8-9.

Petitioners now seek a writ of mandamus directing respondent court to comply with the holding of *Sanchez-Gomez* notwithstanding the entry of a stay of the mandate in that case.

REASONS WHY THE WRIT SHOULD ISSUE

I. Mandamus relief is appropriate and necessary when a district court routinely refuses to follow a binding precedent of this Court and the pertinent factors are present.

One of the most established uses of the writ of mandamus in aid of appellate jurisdiction is “to compel [an inferior court] to exercise its authority when it is its duty to do so.” *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943). This Court also has the authority to issue a writ of “supervisory mandamus” with respect to “questions of law of major importance to the administration of the district courts.” *Sanchez-Gomez*, 2017 WL 2346995, at *4 (internal quotation marks omitted). These are the types of relief that petitioners seek here.

II. The pertinent factors support the issuance of the writ in these cases.

This Court examines five factors in determining whether to grant a writ of mandamus: (1) does the party have other adequate means, such as a direct appeal, to attain the relief he desires?; (2) will the petitioner suffer damage or prejudice in a way not correctable on appeal?; (3) is the district court’s order clearly erroneous as a matter of law?; (4) has the district court committed an oft-repeated error or manifested a persistent disregard of the federal rules?; and (5) does the district court’s action raise new and important problems, or issues of law of first impression? *Douglas v. U.S. Dist. Court*, 495 F.3d 1062, 1065-66 (9th Cir. 2007)

(per curiam) (citing *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)); *Sanchez-Gomez*, 2017 WL 2346995, at *4. The third factor is a necessary condition for granting a writ of mandamus, but not all factors need be present for a writ to issue. *Douglas*, 495 F.3d at 1066. All of the factors are unlikely to be pertinent or to “point in the same direction” in any particular case. *Credit Suisse v. U.S. Dist. Court*, 130 F.3d 1342, 1345 (9th Cir. 1997) (citing *Bauman*, 557 F.2d 650 at 655). In this case, however, all of the factors are pertinent and support the issuance of the writ.

(i) No other adequate means to obtain relief. Here, as in *Sanchez-Gomez*, the petitioners challenge both the district court’s refusal to permit them to be unshackled in their individual cases, and respondent court’s district-wide shackling policy – which its judges have confirmed remains in effect notwithstanding *Sanchez-Gomez*. *See supra* at 3-6; *Sanchez-Gomez*, 2017 WL 2346995, at *3. With respect to their challenges to the shackling rulings in their individual cases, petitioners cannot obtain the relief they seek by means of an appeal from the final judgments, because by the time the judgments are entered they will have already suffered the unconstitutional shackling that they are challenging.

Relief in petitioners’ individual cases might, however, be available through interlocutory appeals of those rulings. *See United States v. Howard*, 480 F.3d 1005,

1011 (9th Cir. 2007) (applying “collateral order” doctrine to interlocutory appeals of shackling rulings), *overruled in part on other grounds by Sanchez-Gomez*, 2017 WL 2346995 at *9 & n.10; *Sanchez-Gomez*, 2017 WL 2346995 at *3 (discussing *Howard*); *see also Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-57 (1949) (discussing collateral order doctrine). Accordingly, if it is necessary to provide petitioners with meaningful relief, this Court should construe this petition as an interlocutory appeal of the shackling rulings in petitioners’ individual cases. *See Diamond v. U.S. Dist. Court*, 661 F.2d 1198, 1198-99 (9th Cir. 1981) (stating that fairness could justify construing a petition for writ of mandamus as an appeal). But insofar as petitioners are challenging the district-wide policy, and seeking relief “not merely for themselves, but for all in-custody defendants in the district” (*Sanchez-Gomez*, 2017 WL 2346995 at *3), relief is available solely by means of a writ of “supervisory mandamus.” *Id.* at *3-*4.

(ii) Damage not correctable on appeal. Absent the relief sought here, petitioners in their individual cases stand to face substantial further infringement of their fundamental right to be free of unwarranted restraints, as further hearings in their cases take place. As noted above, these infringements may not be remedied by appeal from the final judgments in their cases. Moreover, insofar as petitioners seek a writ of supervisory mandamus with regard to respondent’s district-wide shackling

policy, effective relief is not available by means of traditional *or* interlocutory appeal. *Id.*

(iii) District court rulings clearly erroneous. The District of Arizona's adherence to its routine shackling policy is clearly erroneous as a matter of law, both in petitioners' individual cases and as a matter of district-wide policy. The judges of the district have not questioned the fact that *Sanchez-Gomez* would, if presently in effect and binding, bar them from adhering to this policy. Instead, they have taken the position that *Sanchez-Gomez* is *not* presently in effect and binding, because this Court has stayed the issuance of the mandate in that case. *See supra* at 3-6. That position is incorrect as a matter of law.

“Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.” *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Unless and until either of those things happens, the opinion constitutes the binding law of the circuit, and “[a] district judge may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue[.]” *Id.* at 1170.

Contrary to respondent's conclusion, these principles are not nullified by this Court's entry of a stay of the mandate in a case involving a published opinion.

Indeed, when that argument has been made to this Court, this Court has firmly – and repeatedly – rejected it.

In *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d 923 (9th Cir. 1983), the SEC appealed from an injunction that a district court had entered in reliance on a recent Ninth Circuit opinion. *Id.* at 923-24. The SEC argued that the circuit opinion was “not authoritative because [the SEC’s] petition for rehearing ha[d] stayed the mandate in that case pursuant to Fed.R.App.P. 41(a).” *Id.* at 924. This Court “reject[ed] that argument.” *Id.* The Court noted that the circuit opinion in question had been “duly forwarded for publication,” and that “even though the mandate ha[d] not yet issued,” the judgment on which the district court relied was “nevertheless final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn by the court.” *Id.* The Court further noted that the clerk’s practice was to withhold the mandate when a timely petition for rehearing is filed, and observed that “[s]uch informal procedures illustrate the largely ministerial function of the mandate.” *Id.* at 924 n.2. The Court accordingly held that the district court had “correctly relied” on the mandate-stayed circuit opinion. *Id.* at 924.

The government pressed the same argument again in *Chambers v. United States*, 22 F.3d 939 (9th Cir. 1994), *vacated on other grounds*, 47 F.3d 1015 (9th Cir.

1995), maintaining that a published opinion of this Court was “not binding precedent until the mandate issues in that case.” *Id.* at 942 n.3. This Court “reject[ed]” the argument once again, explaining that “[i]n this circuit, once a published opinion is filed, it becomes the law of the circuit until withdrawn or reversed by the Supreme Court or an en banc court.” *Id.*

The government pressed the argument once more in *United States v. Gomez-Lopez*, 62 F.3d 304 (9th Cir. 1995), urging this Court to “ignore” an opinion recently issued by an en banc panel “since we have stayed the mandate to allow filing of a petition for certiorari.” *Id.* at 306. This Court’s response was the same: “[T]his we will not do,” the panel explained, “as [the mandate-stayed opinion] is the law of this circuit.” *Id.*

Notwithstanding this precedent, respondent appears to have accepted the government’s argument that it may ignore *Sanchez-Gomez* while the mandate is stayed. App. D; *supra* at 3-6. This argument, however, is misguided.

The government, and one of the judges who denied an unshackling request in the attached transcripts, have suggested that this Court’s opinions in *Carver v. Lehman*, 558 F.3d 869 (9th Cir. 2009); *NRDC v. County of Los Angeles*, 725 F.3d 1194 (9th Cir. 2013); *United States v. Ruiz*, 935 F.2d 1033 (9th Cir. 1991); and *United States v. Foumai*, 910 F.2d 617 (9th Cir. 1990), support respondent’s

position. App. D at 2-3; App. A at 5:4-15. Petitioners respectfully disagree. In relying on these opinions, respondent appears to have overlooked the important distinction between the doctrine of the law of the *case*, and the doctrine of the law of the *circuit*.

In *Carver*, the panel majority and a concurring judge differed over the propriety of the panel's having changed its holding when, before the mandate issued, a member of the original panel died and was replaced. *Carver*, 558 F.3d at 878-79, 880-881. The concurring judge took the view that it was "unwise" for the new panel majority to change the holding after a published opinion had issued for the "fortuitous and subjective" reason that a member of the original panel had died. *Id.* at 881 (Reinhardt, J., concurring). The majority countered by observing that "[n]o opinion of this circuit becomes final until the mandate issues," and thus the original opinion was not immune from modification by the new panel. *Id.* at 878. Neither the majority nor the concurring judge addressed the question of whether the original panel opinion constituted the binding law of the circuit *before* it was replaced.

The *NRDC* opinion is similarly inapposite. In *NRDC* a panel of this Court, following a remand from the Supreme Court, revisited its holding in an earlier published opinion in the same case on a matter that the Supreme Court had

declined to address. *NRDC*, 725 F.3d at 1202-04 & n.14. The Court noted that it was entitled to revisit that holding because the mandate had not yet issued, and thus its “earlier judgment” was neither “final” nor the “law of the case.” *Id.* at 1203. Like the *Carver* panel, the *NRDC* panel did not suggest that its original published opinion did not constitute the binding law of the circuit before it was replaced.

This Court’s decision in *United States v. Ruiz*, 935 F.2d 1033 (9th Cir. 1991), is likewise inapposite. In *Ruiz*, the Court addressed the appellant’s claim that a district court’s failure to follow a Ninth Circuit opinion upon which he had relied in entering into his plea agreement, but which was withdrawn between his plea agreement and his sentencing, violated his right to due process. *Id.* at 1034-35. The Court held that it did not, relying in part on the fact that, because the mandate had not issued in that case, the appellant was “not entitled to rely on it as settled circuit law” for due process purposes. *Id.* at 1036.

As in *Carver* and *NRDC*, the *Ruiz* panel did not suggest that the opinion in question did not constitute the binding law of the circuit before it was withdrawn. Nor need it have done so, because the question of whether an opinion is “settled” in the sense of creating a constitutionally protected expectation of finality is separate from the question of whether it is binding upon three-judge panels and

lower courts while it remains on the books. Indeed, *all* of this Court’s opinions are “unsettled” in the sense of being vulnerable to overruling by an en banc panel or the Supreme Court – but being “unsettled” in this sense does not impair an opinion’s precedential force. “If the mere possibility of reversal were enough to make authority non-binding, no precedent would ever control.” *SEC v. Amerindo Inv. Advisors, Inc.*, 2014 WL 405339, at *5 (S.D.N.Y. Feb. 3, 2014), *aff’d*, 639 F. App’x 752 (2d Cir.), *cert. denied*, 136 S. Ct. 2429 (2016).

Like the cases discussed above, *United States v. Foumai*, 910 F.2d 617 (9th Cir. 1990), did not address the law of the circuit doctrine. Indeed, the decision at issue in *Foumai* was not a circuit court decision at all – it was a decision of a *district* court, “sitting as a court of appeals pursuant to 18 U.S.C. § 3401” to review convictions entered by a magistrate judge. *Foumai*, 910 F.2d at 620.

The *Foumai* panel held that the district court violated the Double Jeopardy Clause by modifying its judgment after the time allowed for appeal had passed, at which point the defendant had acquired a “reasonable expectation of finality” for double jeopardy purposes. *Id.* at 619-21. Along the way, the Court noted that, because a court of appeals “may modify or revoke its judgment at any time prior to the issuance of the mandate,” the “finality of an appellate order hinges on the mandate.” *Id.* at 620. But this version of “finality” pertains to the question of

when an opinion becomes effective with respect to the parties to the particular case – *not* to when it becomes the binding law of the circuit. The district court decision in *Foumai* self-evidently was *never* the binding law of the circuit.

In short, in relying on these cases, respondent fails to recognize the important distinction between the law of the *case* and the law of the *circuit*. This Court has confirmed the importance of this distinction, holding that “exceptions to the law of the case doctrine are not exceptions to [the Court’s] general ‘law of the circuit’ rule, *i.e.*, the rule that a published decision of this court constitutes binding authority which ‘must be followed unless and until overruled by a body competent to do so[.]’” *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012), *aff’d sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) (*quoting Hart*, 266 F.3d at 1170). A published opinion is the law of the *circuit*, binding on three-judge panels and in-circuit district courts, regardless of the fact that it may not be “final” for purposes of the law of the *case*. A particular panel’s continuing authority to revisit a published opinion that it has issued while the mandate is stayed does not authorize all *other* three-judge panels, let alone district courts, to ignore that opinion for as long as that authority persists.

The government has also sought support in the 1998 amendment to FRAP 41, which added the language codified at FRAP 41(c). App. D at 3. But this argument is misguided for essentially the same reason.

The pertinent portion of FRAP 41 specifies that “[t]he mandate is effective when issued.” FRAP 41(c). It says nothing about the precedential effect of a published circuit court opinion. This is not surprising, because the purpose of the mandate – which issues in the same fashion in connection with precedential opinions as with non-precedential memorandums – is to render the court’s ruling effective and binding upon the *particular parties* to the case, and (if the case is remanded) upon the district court upon remand of the case.

Indeed, the advisory committee note to the 1998 amendment makes this clear. Far from suggesting that the amendment had anything to do with an opinion’s precedential force as the law of the circuit, the note specifies that “[a] court of appeals’ judgment or order is not final until issuance of the mandate; *at that time the parties’ obligations become fixed*” (emphasis added). The government focuses on the reference to “finality” in the first part of that statement, but overlooks the crucial qualifier in the second part. The “finality” in question does not relate to an opinion’s status as the binding law of the circuit; it refers to the point at which the obligations of the *particular parties* to the case become “fixed.”

In short, respondent has misconstrued authorities addressing the concept of “finality” with respect to the law of *case* as relevant to a published opinion’s authority as the law of the *circuit*. In addition to noting this legal flaw in respondent’s reasoning, it is useful to contemplate the implications of respondent’s position.

- If respondent were correct, it would be unclear why this Court routinely announces that an opinion as to which en banc rehearing has been granted “shall not be cited as precedent by or to any court of the Ninth Circuit.” *E.g., United States v. Havelock*, 645 F.3d 1083, 1084 (9th Cir. 2011). By respondent’s logic, such a declaration would be pointless, because the stay of the mandate pending a possible rehearing petition *by itself* nullifies the opinion’s status “as precedent.”

- If respondent were correct, there would presumably be a special citation form for cases in which the mandate has been stayed – *e.g., “United States v. Smith*, 123 F.3d 123 (9th Cir. 2017), *mandate stayed through Sep. 9, 2017* (DktEntry: 123)” – to signal the opinion’s lack of precedential force. No such citation form is identified in *The Bluebook*, nor does undersigned counsel recall ever having seen such a citation form used in his twenty years practicing in federal circuit courts. *The Bluebook: A Uniform System of Citation* (Columbia Law Review

Ass'n *et al.*, eds. (20th ed. 2015)) at 109-111 (Rule 10.7, Prior and Subsequent History).

- Perhaps most tellingly, if respondent were correct the ordinary citation practices of lawyers and judges in this circuit would be called into serious question, and the process of relying on this Court's published opinions would be severely complicated.

Lawyers and judges in this circuit routinely cite published decisions of this Court as precedent immediately after they are issued. *See, e.g., Thomas v. Smith*, 2012 WL 5346856, at *5 (C.D. Cal. Oct. 25, 2012) (citing opinion issued two days earlier in *United States v. Wolf Child*, 699 F.3d 1082 (9th Cir. 2012)); *United States v. Gonzalez-Monterroso*, 745 F.3d 1237, 1247 (9th Cir. Feb. 14, 2014) (holding that previously unresolved issue was “no longer an open question” in light of *United States v. Caceres-Olla*, 738 F.3d 1051 (9th Cir. 2013) (opinion issued Dec. 23, 2013; mandate issued Mar. 19, 2014)).

But this Court issues the mandate at the same time as the opinion only in “exceptional circumstances.” Ninth Circuit Gen. Ord. 4.6.a. In the ordinary case, the mandate is automatically stayed, or at least not issued, for 21 days after the opinion issues. *Id.*; FRAP 41(b) (mandate must issue 7 days after time to file petition for rehearing expires); FRAP 40(a)(1) (petition for rehearing due 14 days

after entry of judgment); *Campbell v. Wood*, 20 F.3d 1050, 1051 (9th Cir. 1994) (referring to the “21 days provided in Fed.R.App.P. 41(a)” during which the mandate does not issue). And frequently the mandate is stayed well beyond the standard 21 days, as parties secure extensions while considering whether to seek rehearing or certiorari. *See, e.g., United States v. Murguia-Rodriguez*, No. 14-10400 (DktEntry: 39, 40 (granting government’s motion for 60-day extension of rehearing deadline)); *United States v. Sanchez-Gomez*, Nos. 13-50561 *et al.*, DktEntry: 110-1, 111 (granting government’s motion for 90-stay of mandate).

By respondent’s logic, any lawyer or judge who cites as precedent an opinion that is less than three months old without checking to confirm that the mandate has issued would be guilty of serious carelessness. And yet this is standard practice among lawyers and judges – including judges of the respondent court. *See, e.g., Mix v. Asurion Ins. Servs. Inc.*, 2017 WL 131566 (D. Ariz. Jan. 13, 2017) (discussing Ninth Circuit opinion issued ten days earlier in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017) (mandate currently remains stayed)); *United States v. Gonzalez-Hernandez*, 2015 WL 1600781, at *2 (D. Ariz. Apr. 8, 2015), *aff’d*, 657 F. App’x 658 (9th Cir. 2016) (*citing United States v. Zaragoza-Moreira*, 780 F.3d 971 (9th Cir. 2015) (mandate issued May 14, 2015)).

In short, the troubling implications of respondent's position illustrate, at least as effectively as this Court's on-point precedent, the error of respondent's position.

(iv) Oft-repeated error. The attachments to this petition demonstrate that the error at issue here is an oft-repeated one in the District of Arizona. And it will no doubt continue to be repeated, in light of the fact that the Chief Judge has issued a "direction" to the effect that judges in this district need not comply with *Sanchez-Gomez* while the mandate is stayed. App. C at 9:3-7. Rulings consistent with this "direction" have been made in multiple hearings literally every day since the stay was issued, and continue to be made as of this writing.

(v) Important problem facing defendants in this district. The error identified in this petition implicates the fundamental rights not only of petitioners, but also of all current in-custody defendants in this district, as well as all individuals who will appear as in-custody defendants in this district over the next three months. In view of the fact that the District of Arizona had 5,214 criminal case filings in fiscal year 2016 – an average of over 1,300 cases per three-month period – that is bound to be a very substantial number of individuals facing the severe infringement of their fundamental rights. *See District of Arizona Annual Statistical Report – Fiscal Year 2016: October 1, 2015 – September 30, 2016* at 10 (District Criminal Case Filings

FY2016) (Office of the Clerk of Court, United States District Court, District of Arizona (Jan. 5, 2017)). Absent this Court's issuance of a writ of mandamus, the aggregate deprivation of fundamental rights during this period will be chronic, extensive, and severe.

CONCLUSION

This Court has spoken: "Criminal defendants, like any other party appearing in court, are entitled to enter the courtroom with their heads held high," free of the indignity of strict and humiliating shackling justified by nothing more than a district-wide policy applied without regard for their individual circumstances. *Sanchez-Gomez*, 2017 WL 2346995 at *13. This is the law of the circuit, and respondent cannot lawfully defy it, regardless of whether the mandate in *Sanchez-Gomez* has been stayed. This Court should issue a writ of mandamus to put a stop to respondent's systematic failure to comply with its controlling precedent.

Respectfully submitted on June 26, 2017.

s/Daniel L. Kaplan
DANIEL L. KAPLAN
Assistant Federal Public Defender
Attorney for Petitioners

CIRCUIT RULE 28-2.6 STATEMENT OF RELATED CASES

I certify that I am aware of one case that qualifies as a related case within the meaning of Circuit rule 28-2.6: *United States v. Sanchez-Gomez et al.*, Nos. 13-50561 *et al.*

s/ Daniel L. Kaplan
DANIEL L. KAPLAN
Assistant Federal Public Defender
Attorney for Petitioners

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I caused the foregoing Petition for Writ of Mandamus to be submitted to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on June 26, 2017, using the appellate CM/ECF system.

I further certify that on the same date I caused two copies of the foregoing Petition for Writ of Mandamus to be hand-delivered to Assistant United States Attorney Krissa Lanham, Two Renaissance Square, 40 North Central Avenue, Suite 1200, Phoenix, Arizona 85004-4408, and caused one electronic copy to be delivered to Ms. Lanham via email.

I further certify that on the same date I caused one copy of the foregoing Petition for Writ of Mandamus to be hand-delivered to the following members of respondent court:

HONORABLE JOHN Z. BOYLE
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 322
401 West Washington Street, SPC 75
Phoenix, AZ 85003-2160

HONORABLE EILEEN S. WILLETT
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 321
401 West Washington Street, SPC 13
Phoenix, AZ 85003-2120

HONORABLE JAMES F. METCALF
United States District Court
John M. Roll U.S. Courthouse
98 West 1st Street, Suite 2400
Yuma, AZ 85364

Dated this 26th day of June, 2017.

s/Daniel L. Kaplan
DANIEL L. KAPLAN
Assistant Federal Public Defender
Attorney for Petitioners

2:17-mj-09200-ESW-1, June 21, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)
)
 Plaintiff,) 2:17-mj-09200-ESW-1
)
 vs.) Phoenix, Arizona
) June 21, 2017
 Rodrigo Zermeno-Gomez,)
)
 Defendant.)
 _____)

BEFORE: THE HONORABLE EILEEN S. WILLETT, MAGISTRATE JUDGE

TRANSCRIPT OF PROCEEDINGS
PLEA HEARING AND SENTENCING

A P P E A R A N C E S

For the Government:
JENNIFER F. LEVINSON, ESQ.
U.S. Attorney's Office (Phoenix)
40 N. Central, Ste. 1200
Phoenix, AZ 85004-4408
602.514.7500/(fax) 602.514.7650

For the Defendant:
REKHA NAIR, ESQ.
Federal Public Defender (Phoenix)
805 W. Adams St., Ste. 201
Phoenix, AZ 85007
602.382.2700/(fax) 602.382.2800

Transcriptionist:
Elaine Cropper
Sandra Day O'Connor U.S. Courthouse
401 West Washington Street, SPC 35
Phoenix, Arizona 85003-2150
602.322.7245/(fax) 602.322.7253

Proceedings Recorded by Electronic Sound Recording
Transcript Produced by Transcriptionist

2:17-mj-09200-ESW-1, June 21, 2017

1 **P R O C E E D I N G S**

2 (These proceedings were interpreted by Renata Yawn.)

3 (Court was called to order by the courtroom deputy.)

4 COURTROOM DEPUTY: Case number 17-9200-mj, *United*
5 *States of America v. Rodrigo Zemeno-Gomez*, before the Court for
6 a plea hearing and sentencing.

7 MS. LEVINSON: Good morning, Your Honor. Jennifer
8 Levinson on behalf of the United States.

9 THE COURT: Good morning, Ms. Levinson.

10 MS. NAIR: Good morning, Your Honor. Rekha Nair on
11 behalf of Rodrigo Zemeno-Gomez who is present and in custody.

12 THE COURT: Good morning, Ms. Nair.

13 Good morning, Mr. Zemeno-Gomez.

14 THE DEFENDANT: Good morning.

15 THE COURT: Please raise your right hand as best you
16 can, sir. We're going to go ahead and swear you in and get
17 started.

18 (Whereupon the defendant was sworn.)

19 THE COURT: Sir, you may put your hand down. Thank
20 you.

21 You've now been placed under oath. You must tell the
22 truth when you're under oath. You can be convicted of perjury
23 if you lie. The Government has the right, in a prosecution for
24 perjury or false statement, to use against you any of the
25 statements that you give when you are under oath.

United States District Court

2:17-mj-09200-ESW-1, June 21, 2017

1 Sir, please tell me your full name for the record.

2 THE DEFENDANT: Rodrigo Zemeno-Lopez.

3 THE INTERPRETER: The interpreter stands corrected.

4 Gomez. Rodrigo Zemeno-Gomez.

5 THE COURT: And how old are you, sir?

6 THE DEFENDANT: 37 years old.

7 THE COURT: And how far did you go in school?

8 THE DEFENDANT: University.

9 THE COURT: Sir, if at any time I say something to
10 you today or ask you something that you don't understand, will
11 you please let me know?

12 THE DEFENDANT: Yes.

13 THE COURT: Have you been able to understand me so
14 far with the assistance of our court interpreter?

15 THE DEFENDANT: Um, yes.

16 THE COURT: Ms. Nair, are you bilingual?

17 MS. NAIR: I am, Your Honor, and I have been speaking
18 to him in Spanish. And I would just like to note for the Court
19 I would like the opportunity to make a motion for unshackling
20 as well.

21 THE COURT: All right. Hang on just a moment.

22 Sir, have you been able to understand your attorney
23 when she speaks with you in Spanish as well?

24 THE DEFENDANT: Yes.

25 THE COURT: All right.

2:17-mj-09200-ESW-1, June 21, 2017

1 Ms. Nair, you had a motion you would like to make?

2 MS. NAIR: Yes, Your Honor. Pursuant to
3 *Sanchez-Gomez*, we would respectfully request the Court to
4 unshackle Mr. Zemen-Gomez. As noted in that hearing, the
5 presumption should be unshackling and the Government is
6 required to show a specific security need for him to be
7 shackled during court proceedings. In this case, we
8 respectfully assert that the Government cannot meet that
9 burden.

10 Mr. Zemen-Gomez has one prior entry into the United
11 States and one prior deportation. And at that same time, he
12 pinked up a single conviction for false documents. He has no
13 history whatsoever of failing to appear, no history whatsoever
14 of any violent behavior. Therefore, we would respectfully
15 assert that there is no security need that requires the
16 shackling of him today.

17 THE COURT: Thank you, Ms. Nair.

18 Ms. Levinson?

19 MS. LEVINSON: Your Honor, it is the Government's
20 position that since the mandate hasn't issued yet, that the
21 decision in that case is not final, so we would ask that he
22 remain shackled.

23 THE COURT: I have had the opportunity to review the
24 order that came down from the Ninth Circuit. The Ninth Circuit
25 order was filed on June 16, 2017, and it did -- it did grant a

2:17-mj-09200-ESW-1, June 21, 2017

1 90-day stay of the issuance of its mandate. The extension of
2 time was granted to give the United States the opportunity to
3 file a motion for rehearing *en banc*.

4 I have reviewed the case law with regard to mandates
5 and the Court does find, based upon *Carver v. Lehman*, 558 F.3d
6 869, Ninth Circuit, 2009, as referenced in footnote number 16
7 which cites to the *United States v. Ruiz*, 935 F.2d 1033, Ninth
8 Circuit 1991, indicating that Ruiz clarifies that, quote, no
9 expectation of finality can attach during the period in which
10 either party may petition for rehearing.

11 *Ruiz* is quoting *United States v. Foumai*, F-O-U-M-A-I.
12 910 F.2d 617 at 620, the Ninth Circuit, 1990. Therefore, the
13 Court does find that the mandate -- the opinion is not fixed as
14 settled Ninth Circuit law. Reliance on that opinion would be a
15 gamble, as cited by the cases that I've just quoted to you.

16 MS. NAIR: Your Honor --

17 THE COURT: Hang on.

18 And the Court further finds distinguishable *Sanchez*
19 *v. Gomez*, the Court has reviewed the *Sanchez v. Gomez* case. I
20 do distinguish it from the proceedings that are held in the
21 volume of this district. And I am denying your motion. And if
22 you have something further that you would like to say on the
23 record, go right ahead, Ms. Nair.

24 MS. NAIR: Thank you, Your Honor. I just want to
25 note one additional citation. I do understand and I have read

United States District Court

2:17-mj-09200-ESW-1, June 21, 2017

1 the *Carver v. Lehman* case and that footnote and I understand
2 that that addresses the issue of finality which is slightly
3 different from whether or not a case is law of the circuit. So
4 there's finality, there's claim preclusion, and there is law of
5 the circuit. And then there's a case *United States v.*
6 *Gomez-Lopez*, 62 F.3d 304 at page 306.

7 THE COURT: Wait.

8 MS. NAIR: Sorry.

9 THE COURT: 62 F.3d?

10 MS. NAIR: 304.

11 THE COURT: Okay.

12 MS. NAIR: Ninth Circuit, 1995.

13 THE COURT: All right.

14 MS. NAIR: And at page 306 it says: The Government
15 urges us to ignore *Armstrong* -- that was a previously decided
16 1990 case -- since we've stayed the mandate to allow a filing
17 of petition of cert. This will not do as *Armstrong* is the law
18 of the circuit.

19 THE COURT: And it was *Gomez* -- what?

20 MS. NAIR: *United States v. Gomez-Lopez*.

21 THE COURT: *Gomez-Lopez*. Thank you, Ms. Nair.

22 Are you ready to proceed?

23 MS. NAIR: Yes, Your Honor. Thank you.

24 THE COURT: I do want to ask, however, if
25 Mr. Zermeno-Gomez has any physical reason why his shackles

2:17-mj-09200-ESW-1, June 21, 2017

1 should not be in place? Is he in pain? Does he have any
2 physical disability?

3 MS. NAIR: Not that I'm aware of, Your Honor.

4 THE COURT: All right.

5 Other than the *Sanchez/Gomez* case, is there any other
6 reason that you are asking for him to be unshackled?

7 MS. NAIR: No, Your Honor.

8 THE COURT: Okay. Thank you.

9 Then the Court affirms its ruling.

10 So, sir, you are here because there was a criminal
11 complaint that was filed against you on May 11, 2017, and it
12 charges you with a felony offense of reentry of removed alien
13 as well as alien eluding examination and inspection by
14 immigration officers of the United States.

15 And your attorney indicated that you want to enter
16 into a change of plea, so I'm going to be asking you some
17 questions about that.

18 Did you review the criminal complaint? Did she read
19 it out loud to you in Spanish with your lawyer?

20 THE DEFENDANT: Yes.

21 THE COURT: Did she explain to you the crimes that
22 you've been charged with?

23 THE DEFENDANT: Yes.

24 THE COURT: Did she tell you what the Government
25 would have to prove in order for a jury to find you guilty of

2:17-mj-09200-ESW-1, June 21, 2017

1 those crimes?

2 THE DEFENDANT: Yes.

3 THE COURT: Those are the elements of each of the
4 offenses, sir. Did you understand her when she explained them
5 to you?

6 THE DEFENDANT: Yes.

7 THE COURT: So do you understand the charges that
8 have been filed against you?

9 THE DEFENDANT: Yes.

10 THE COURT: So the last document we'll talk about,
11 sir, is your plea agreement itself. Was this plea agreement
12 read out loud to you in Spanish, page by page, line by line?

13 THE DEFENDANT: Yes.

14 THE COURT: Did your attorney explain to you what it
15 all means?

16 THE DEFENDANT: Yes.

17 THE COURT: Was she able to answer all the questions
18 that you asked about it?

19 THE DEFENDANT: Yes.

20 THE COURT: After the plea agreement was read out
21 loud to you in Spanish and your attorney explained it to you
22 and she answered all of your questions, did you then understand
23 your plea agreement?

24 THE DEFENDANT: Yes.

25 THE COURT: And once you understood the plea

2:17-mj-09200-ESW-1, June 21, 2017

1 agreement, sir, did you sign it here where I'm showing you on
2 page five?

3 THE DEFENDANT: Yes.

4 THE COURT: So standing before me today, sir, do you
5 believe that you understand the plea agreement?

6 THE DEFENDANT: Yes.

7 THE COURT: Did you have enough time to talk to your
8 attorney about it before you came here to talk to me about it?

9 THE DEFENDANT: Yes.

10 THE COURT: Do you need any more time to talk to your
11 attorney about your plea agreement? If you need more time, I
12 can give it to you.

13 THE DEFENDANT: No. Everything is fine.

14 THE COURT: Okay.

15 So are you satisfied, sir, with the representation
16 you've received from your lawyer?

17 THE DEFENDANT: Yes.

18 THE COURT: Has she done a good job for you so far?

19 THE DEFENDANT: Yes.

20 THE COURT: Have you had any drugs, alcohol or
21 medication within the last 48 hours.

22 THE DEFENDANT: No.

23 THE COURT: Are you thinking clearly today?

24 THE DEFENDANT: Yes.

25 THE COURT: You appear to be awake and alert. You

2:17-mj-09200-ESW-1, June 21, 2017

1 appear to be focused on the proceedings and understanding me so
2 far with the help of the Court interpreter.

3 Am I correct?

4 THE DEFENDANT: Yes.

5 THE COURT: Have you ever been treated, sir, for any
6 kind of a mental illness or emotional problem of any sort?

7 THE DEFENDANT: No.

8 THE COURT: Any reason to believe the defendant is
9 not competent to proceed today from the Government?

10 MS. LEVINSON: No, Your Honor.

11 THE COURT: From the defense?

12 MS. NAIR: No, Your Honor.

13 THE COURT: Has anybody forced you or threatened you
14 or coerced you in any way, sir, to get you to plead guilty
15 today?

16 THE DEFENDANT: No.

17 THE COURT: Has anybody promised you anything to get
18 you to plead guilty other than what's in your plea agreement
19 itself?

20 THE DEFENDANT: No.

21 THE COURT: Do you understand that you have the
22 absolute right to persist in a plea of not guilty?

23 THE DEFENDANT: Yes.

24 THE COURT: Your plea agreement says, sir, that
25 you're going to be pleading guilty to Count 2 of the complaint

2:17-mj-09200-ESW-1, June 21, 2017

1 and that was the Class B misdemeanor offense of alien eluding
2 the examination and inspection of immigration officers of the
3 United States. It is a violations of Title 8 of the United
4 States Code, Section 1325(a)(2).

5 Is that your understanding of what you're pleading
6 guilty to today?

7 THE DEFENDANT: Yes.

8 THE COURT: Are you voluntarily pleading guilty, sir?

9 THE DEFENDANT: Yes.

10 THE COURT: Is this what you want to do?

11 THE DEFENDANT: Yes.

12 THE COURT: Then let me tell you the maximum sentence
13 you can receive under the law for the crime that you are
14 pleading guilty to. The maximum sentence that you can receive
15 under the law for this crime is six months at the Bureau of
16 Prisons. On top of the prison time, I can order that you pay a
17 fine. The maximum fine that I can order that you pay is
18 \$5,000. On top of the fine, I can also order a special
19 assessment. The maximum special assessment I can order is \$10.
20 And then on top of all of that if it's applicable in your case,
21 I can also order that you pay restitution if there were any
22 victims involved.

23 Counsel, did I correctly state the maximum sentence
24 under the law for the crime?

25 MS. LEVINSON: Yes, Your Honor.

United States District Court

2:17-mj-09200-ESW-1, June 21, 2017

1 MS. NAIR: Yes, Your Honor.

2 THE COURT: Sir, do you understand the maximum
3 sentence you can receive under the law for the crime that
4 you're pleading guilty to?

5 THE DEFENDANT: Yes.

6 THE COURT: Knowing it, sir, do you still wish to go
7 forward with your guilty plea?

8 THE DEFENDANT: Yes.

9 THE COURT: The next thing we're going to talk about
10 are the agreements that you've reached with regard to
11 sentencing.

12 Did your attorney explain to you the sentencing
13 factors that I'll consider at the time of your sentencing? I
14 understand you would like to go to sentencing today.

15 THE DEFENDANT: Yes.

16 THE COURT: Did you understand her when she explained
17 those factors to you?

18 THE DEFENDANT: Yes.

19 THE COURT: So the plea agreement, sir, it says that
20 you and the Government have stipulated that you will be
21 sentenced to 75 days in prison or time served whichever is
22 greater. The time that you have served since your date of
23 arrest of 5-10-17 is less than 75 days and, therefore, pursuant
24 to the plea agreement, you are stipulating that you will be
25 sentence to do 75 days in prison. Do you understand that?

2:17-mj-09200-ESW-1, June 21, 2017

1 THE DEFENDANT: Yes.

2 THE COURT: Counsel, is anybody going to be asking me
3 for anything other than what the stipulation of the parties
4 reflects?

5 MS. LEVINSON: No, Your Honor.

6 MS. NAIR: No, Your Honor.

7 THE COURT: Sir, a stipulation is an agreement that
8 you've reached with the Government. It's kind of like a
9 contract. I am going to very carefully consider the
10 stipulation you've reached with the Government and it is my
11 inclination, sir, to accept that stipulation. But if I didn't,
12 if I rejected it, I would give you the chance to back out of
13 your plea agreement.

14 Do you understand that?

15 THE DEFENDANT: Yes.

16 THE COURT: If you are currently on supervised
17 release for a prior conviction, then your guilty plea will
18 establish a violation of your conditions of supervised release,
19 sir, and you can go to prison again on the crime for which
20 you're serving supervised release.

21 Do you understand that?

22 THE DEFENDANT: Yes.

23 THE COURT: If you are currently on probation for a
24 prior conviction, your guilty plea will establish a violation
25 of your conditions of probation. Your probation could get

2:17-mj-09200-ESW-1, June 21, 2017

1 revoked and you could be resentenced on that crime as well.

2 Do you understand that?

3 THE DEFENDANT: Yes.

4 THE COURT: And if you were to commit a new crime,
5 sir, sometime in the future, this conviction will be used
6 against you to increase any sentence you would receive on that
7 new crime if you were to commit a new crime sometime in the
8 future.

9 Do you understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: If you're not a U.S. citizen, you can be
12 deported or removed. You can be denied citizenship and you can
13 be denied reentry into the United States in the future.

14 Do you understand that?

15 THE DEFENDANT: Yes.

16 THE COURT: By pleading guilty, sir, you're also
17 giving up all of your constitutional trial rights. Let me tell
18 you what they are. You are presumed to be innocent of these
19 charges. You have the right to deny these charges and go ahead
20 and have a jury trial. You're entitled to be represented by
21 counsel. Your attorney is standing right next to you. She
22 would help you through that entire process from beginning to
23 end at no cost to you.

24 You can't be found guilty, sir, unless the Government
25 can prove beyond a reasonable doubt that you committed the

2:17-mj-09200-ESW-1, June 21, 2017

1 offenses that they have charged you with. The Government would
2 try to do that by bringing in witnesses who would come in and
3 testify under oath about what happened. Your attorney would
4 confront and cross-examine all the witnesses called by the
5 Government in your presence.

6 You also have the right to have your own witnesses
7 come in and testify on your behalf and people can be subpoenaed
8 which makes them come here to the courthouse at the time of
9 your trial so they would be here for you.

10 You can testify, too, if you wanted to during your
11 trial. But you don't have to because you have the right to
12 remain silent. No one can use your right to remain silent
13 against you in any way.

14 After all the witnesses have testified and all of the
15 evidence has been presented to the jury, then your jury is
16 going to decide whether or not you are guilty. If all 12
17 jurors unanimously find you guilty, then you can appeal that
18 conviction to a higher Court and that is the Ninth Circuit
19 Court of Appeals.

20 Those are all of your constitutional trial rights,
21 sir. Do you understand them all?

22 THE DEFENDANT: Yes.

23 THE COURT: Did your attorney explain to you the
24 trial process here in the United States?

25 THE DEFENDANT: Yes.

United States District Court

2:17-mj-09200-ESW-1, June 21, 2017

1 THE COURT: Did you understand her when she did?

2 THE DEFENDANT: Yes.

3 THE COURT: Do you understand, sir, that by pleading
4 guilty, you're giving up your right to have a trial and all the
5 rights that I just explained to you that come with a trial?

6 THE DEFENDANT: Yes.

7 THE COURT: Is that what you wish to do?

8 THE DEFENDANT: Yes.

9 THE COURT: Did your attorney explain to you all of
10 the possible defenses that you might have to these charges?

11 THE DEFENDANT: Yes.

12 THE COURT: Did she explain to you your appeal rights
13 and your collateral attack rights and how you can bring all of
14 those rights to the Court's attention as well?

15 THE DEFENDANT: Yes.

16 THE COURT: Did you understand her when she did?

17 THE DEFENDANT: Yes.

18 THE COURT: Sir, your plea agreement provides in the
19 Waiver of Defenses and Appeal Rights paragraph that by pleading
20 guilty instead of going to trial, you're giving up your right
21 to present all the possible defenses that you might have to
22 these charges as well as your right to appeal or to
23 collaterally attack your judgment and your sentence for any
24 reason whatsoever by all the legal means that are available to
25 you to do it, although you can still allege ineffective

2:17-mj-09200-ESW-1, June 21, 2017

1 assistance of counsel and prosecutorial misconduct.

2 Do you understand your defenses, appeal and
3 collateral attack rights?

4 THE DEFENDANT: Yes.

5 THE COURT: Do you understand, sir, that you're
6 giving them all up as well by pleading guilty?

7 THE DEFENDANT: Yes.

8 THE COURT: The elements of the crime that you're
9 pleading guilty to, eluding examination by an alien, one, that
10 you are an alien; two, that you knowingly eluded examination
11 and inspection by immigration officials of the United States
12 and you voluntarily entered the United States at a time and a
13 place other than as designated; and, three, you were found in
14 the District of Arizona.

15 Do you understand the elements of the crime that
16 you're pleading guilty to?

17 THE DEFENDANT: Yes.

18 THE COURT: Are you a citizen or national of the
19 United States?

20 THE DEFENDANT: No.

21 THE COURT: Were you voluntarily present and found in
22 the United States at or near Phoenix in the District of Arizona
23 on May 10, 2017?

24 THE DEFENDANT: Yes.

25 THE COURT: On or before May 10, 2017, did you

2:17-mj-09200-ESW-1, June 21, 2017

1 knowingly enter the United States at a time and a place other
2 than as designated by immigration officials of the United
3 States and since then have thereby eluded the examination and
4 inspection by immigration officers?

5 Did you come in at a time and a place other than as
6 designated by immigration officials of the United States?

7 THE DEFENDANT: Yes.

8 THE COURT: And since then, have you thereby eluded
9 the examination and inspection of immigration officers? Until
10 they caught you?

11 THE DEFENDANT: Yes.

12 THE COURT: Anything to add or change with regard to
13 the factual basis by the Government?

14 MS. LEVINSON: No, Your Honor.

15 THE COURT: Would the Government be able to prove its
16 case beyond a reasonable doubt were it to proceed to a jury
17 trial?

18 MS. LEVINSON: Yes, sir.

19 THE COURT: Anything to add or change with regard to
20 the factual basis?

21 MS. NAIR: No, Your Honor.

22 THE COURT: Do you have any questions whatsoever
23 about your plea agreement, sir? Now is the time to ask me if
24 you do.

25 THE DEFENDANT: No. Everything is fine.

United States District Court

2:17-mj-09200-ESW-1, June 21, 2017

1 THE COURT: Do you still want to go forward with it?

2 THE DEFENDANT: Yes.

3 THE COURT: Then, sir, to Count 2 of the complaint to
4 the charge of alien eluding the examination and inspection of
5 immigration officers of the United States as a Class B
6 misdemeanor offense, in violation of Title 8 of the United
7 States Code, Section 1325(a)(2), how do you plead, sir, guilty
8 or not guilty?

9 THE DEFENDANT: Guilty.

10 THE COURT: Any legal cause not to make findings?

11 MS. LEVINSON: No, Your Honor.

12 MS. NAIR: No, Your Honor.

13 THE COURT: And it's my understanding that the
14 defendant wishes to give up his right to have a presentence
15 report and go directly to sentencing; is that correct?

16 MS. NAIR: That's correct, Your Honor.

17 THE COURT: The Court does find that there's a
18 factual basis for the defendant's plea; the defendant has
19 entered his plea knowingly, intelligently, and voluntarily and
20 he is competent to enter the plea.

21 Sir, I will be accepting your plea. The next thing
22 that is going to happen is the Government is going to tell me
23 what it wants me to do with regard to your sentence. Then your
24 attorney has the opportunity to tell me everything that she
25 would like me to know before I sentence you as well.

United States District Court

2:17-mj-09200-ESW-1, June 21, 2017

1 And after the attorneys are done speaking, sir, you
2 have the chance to address me directly and tell me everything
3 that you want me to know or anything you would like to say to
4 me before I sentence you today.

5 So listen first to the attorneys and know that you'll
6 be able to talk to me when they are done.

7 Go right ahead, Ms. Levinson.

8 MS. LEVINSON: Your Honor, the Government asks that,
9 consistent with the plea agreement, that you impose a 75-day
10 sentence. It is appropriate in this case. It's consistent
11 with the sentences that have been given in two defendants that
12 are similarly situated. Based on the defendant's criminal
13 history, he does have the prior misdemeanor fraud conviction
14 for which he got 60 days imprisonment and so it also addresses
15 progressivity concerns.

16 THE COURT: And are you moving to dismiss Count 1
17 with prejudice?

18 MS. LEVINSON: That is correct, Your Honor.

19 THE COURT: And what would you like for me to do
20 about the special assessment?

21 MS. LEVINSON: The Government asks it that be
22 remitted.

23 THE COURT: Thank you.

24 Ms. Nair, go right ahead.

25 MS. NAIR: Thank you, Your Honor. We would also ask

2:17-mj-09200-ESW-1, June 21, 2017

1 the Court to impose a 75-day sentence stipulated in the plea
2 agreement. As stated earlier in these proceedings,
3 Mr. Zermeno-Gomez has very limited both immigration and
4 criminal history and, therefore, a 75-day sentence is
5 appropriate and fair in this case.

6 THE COURT: Thank you.

7 Sir, do you have anything that you would like to say
8 to me before I sentence you?

9 THE DEFENDANT: No. Everything is fine.

10 THE COURT: All right, sir.

11 The Court has considered all of the sentencing
12 factors set forth in Title 18 of the United States Code,
13 Section 3553(a). I do find that the sentence that the parties
14 have agreed upon as set forth in their plea agreement is an
15 appropriate sentence under all of these factors. It appears
16 from the preliminary trial services report that the defendant
17 has a limited prior criminal history he has previously served
18 60 days for. A sentence of 75 days in prison is a significant
19 increase from his prior contact with the Court. It
20 appropriately reflects the seriousness of this offense, his
21 history, his characteristics, the need for deterrence, need to
22 promote respect for the law, and it is in parity with similarly
23 situated defendants.

24 It is the judgment of the Court, sir, that you are
25 guilty pursuant to your plea of guilty.

United States District Court

2:17-mj-09200-ESW-1, June 21, 2017

1 It is the sentence of the Court that you be sentenced
2 to a term of imprisonment of 75 days.

3 I do give you credit, sir, for all of the time that
4 you have served. No fine is imposed because of your inability
5 to pay it and the special assessment is hereby remitted because
6 of an inability to collect it.

7 Count 1 of the criminal complaint is hereby dismissed
8 with prejudice.

9 Sir, earlier in these proceedings I did explain to
10 you your waiver of any right to appeal or to collaterally
11 attack your conviction and your sentence and I do find that the
12 sentence is consistent with the terms of your plea agreement.
13 So you have, therefore, waived all of these rights.

14 But if you disagree with me, sir, you do have to file
15 your notice of appeal within 14 days.

16 Do you understand?

17 THE DEFENDANT: Yes.

18 THE COURT: The Court signs the plea agreement this
19 date as well as the form of the judgment.

20 Is there anything further from the Government today?

21 MS. LEVINSON: No, Your Honor, thank you.

22 THE COURT: Is there anything further, Ms. Nair, from
23 the defense?

24 MS. NAIR: No, Your Honor. Thank you.

25

2:17-mj-09200-ESW-1, June 21, 2017

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Thank you very much.
This hearing is closed.
THE DEFENDANT: Thank you.
THE COURT: You're welcome, sir. Good luck to you.
(Proceedings concluded at 10:25 a.m.)

2:17-mj-09200-ESW-1, June 21, 2017

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, ELAINE M. CROPPER, court-approved transcriber, certify that the foregoing is a correct transcript, to the best of my skill and ability, from the official electronic sound recording of the proceedings in the above-entitled matter.

DATED at Phoenix, Arizona, this 22nd day of June, 2017.

s/Elaine M. Cropper

Elaine M. Cropper

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)
)
Plaintiff,)
) CR17-00800-PHX-SPL (DKD)
vs.) Phoenix, Arizona
) June 21, 2017
Jorge Fuentes-Perez,) 10:05 a.m.
)
Defendant.)
_____)
)
Gustavo Hernandez-Gutierrez,) CR17-00803-PHX-DLR (MHB)
)
Defendant.)
_____)
)
Melecio Nunez-Angulo,) CR17-00805-PHX-DGC (JZB)
)
Defendant.)
_____)
)
Jesus Negrete-Areuello,) CR17-00808-PHX-DJH (DKD)
)
Defendant.)
_____)

BEFORE: THE HONORABLE JOHN Z. BOYLE, MAGISTRATE JUDGE

TRANSCRIPT OF PROCEEDINGS

ARRAIGNMENT HEARING

Transcriptionist:
Elizabeth A. Lemke
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, SPC. 34
Phoenix, Arizona 85003-2150
(602) 322-7247

Proceedings Recorded by Electronic Sound Recording
Transcript Produced by Transcriptionist

A P P E A R A N C E S

For the Government:

U.S. ATTORNEY'S OFFICE
By: **Todd M. Allison, Esq.**
40 North Central Avenue, Suite 1200
Phoenix, AZ 85004

For the Government:

U.S. ATTORNEY'S OFFICE
By: **Jacqueline N. Schesnol, Esq.**
40 North Central Avenue, Suite 1200
Phoenix, AZ 85004

For the Defendant Jorge Fuentes-Perez:

Wallin Law Firm PLLC
By: **D. Stephen Wallin, Esq.**
1641 E. Osborne Road, Suite 8
Phoenix, AZ 85016

For the Defendant Gustavo Hernandez-Gutierrez:

FEDERAL PUBLIC DEFENDERS OFFICE
By: **Milagros A. Cisneros, Esq.**
850 West Adams Street, Suite 201
Phoenix, AZ 85007

For the Defendant Melecio Nunez-Angulo:

RODRIGUEZ LAW OFFICE PLLC
By: **Diego Rodriguez, Esq.**
340 East Palm Lane, Suite 118
Phoenix, AZ 85004

For the Defendant Jesus Negrete-Areuello:

LAW OFFICE OF GABRIEL VALDEZ JR.
By: **Gabriel Valdez, Jr., Esq.**
323 West Roosevelt Street, Suite 200
Phoenix, AZ 85003-1323

P R O C E E D I N G S

(Called to the order of court at 10:05 a.m.)

THE CLERK: Case number CR 17-800, *United States of America v. Jorge Fuentes-Perez*; case number 17-803, *United States of America v. Gustavo Hernandez-Gutierrez*; case number CR17-805, *United States of America v. Melecio Nunez-Angulo*; case number CR17-808, *United States of America v. Jesus Negrete-Areuello* for arraignment hearing.

THE COURT: Good morning.

MR. ALLISON: Good morning, Your Honor.

Todd Allison for the United States in all but one matter.

MS. SCHESNOL: Good morning, Your Honor.

Jacqueline Schesnol for the United States on the matter of Jesus Negrete-Areuello.

THE COURT: All right. Good morning.

MR. WALLIN: Good morning, Your Honor.

Steve Wallin representing Mr. Fuentes-Perez who is present in custody standing at the podium.

THE COURT: Let me just handle these one at a time. That will be easier. So let me handle your client first and then we'll just go individual by individual.

Mr. Wallin, did you review the Indictment with your client?

MR. WALLIN: I did, Your Honor. He understands the

1 charges against him.

2 His name is spelled correctly on the Indictment. He
3 would ask the Court to waive reading of the charges and enter
4 a plea of not guilty on his behalf.

5 THE COURT: Sir, the Court will enter a plea of not
6 guilty on your behalf.

7 It is ordered setting a 21-day pretrial motion
8 deadline. Your trial date is August 1st at 9:00 a.m. before
9 Judge Logan.

10 So, Mr. Fuentes-Perez, your next court date is August
11 1st, although that could be continued.

12 Mr. Wallin, anything else?

13 MR. WALLIN: Nothing further, Your Honor. Thank you.

14 THE COURT: Thank you. You're excused.

15 MS. CISNEROS: Good morning, Your Honor.

16 Milagros Cisneros on behalf of

17 Mr. Hernandez-Gutierrez who is present in custody.

18 Your Honor, at this time I move that my client be
19 unshackled pursuant to *United States v. Sanchez-Gomez*. We are
20 aware, of course, that the Ninth Circuit has stayed the
21 mandate.

22 However, our position, pursuant to the *United States*
23 *v. Gomez-Lopez* and *Chambers v. United States* is that that does
24 not -- that this is still the law of the Circuit, that that
25 case *Sanchez-Gomez* is still the law of the Circuit.

1 And therefore, since my client enjoys the presumption
2 of innocence and has no criminal history whatsoever and there
3 is no indication of any problem with regards to him that he
4 should be unshackled.

5 THE COURT: All right. Thank you.

6 I did find yesterday in a related -- in an unrelated
7 case that *Sanchez-Gomez* is not binding at this time for three
8 reasons.

9 One, case circuit law is unclear to me. When
10 mandates issue, they state that the judgment takes effect on
11 the date of the mandate and they have not adopted a circuit
12 rule.

13 I have understood your request today. It's denied.

14 MS. CISNEROS: With regards to the arraignment, Your
15 Honor, I have reviewed the Indictment with the defendant. His
16 name is spelled correctly. He waives a formal reading of the
17 Indictment and asks that the Court enter pleas of not guilty
18 to each of the counts and a denial of the forfeiture
19 allegations.

20 THE COURT: And to be clear as well, just so you and
21 your office know, I do intend to continue for initial
22 appearances for myself to review each case individually before
23 a detention hearing is conducted.

24 All right. Thank you.

25 Mr. Hernandez-Gutierrez, the Court will enter a plea

1 of not guilty on your behalf. It is ordered setting a 21-day
2 pretrial motion deadline.

3 It will be pleas on both -- of not guilty on both
4 counts and a denial of the forfeiture allegation.

5 So, sir, your court date is August 1st before Judge
6 Rayes. August 1st is your current trial date.

7 Ms. Cisneros, anything else?

8 MS. CISNEROS: Nothing else, Your Honor. Thank you.

9 THE COURT: All right. Thank you.

10 Mr. Rodriguez.

11 MR. RODRIGUEZ: Good morning, Your Honor.

12 On behalf of Mr. Nunez-Angulo, I can confirm that I
13 have reviewed the Indictment with my client. His name is
14 spelled correctly. We waive a formal reading and enter a plea
15 of not guilty on his behalf.

16 THE COURT: All right. Thank you. Good morning.

17 Good morning, Mr. Nunez-Angulo.

18 The Court will enter a plea of not guilty on your
19 behalf on both counts.

20 MR. RODRIGUEZ: Oh. And we also enter a denial of
21 the forfeiture allegations as well.

22 THE COURT: Thank you. And actually, that's all
23 three counts. A denial of the forfeiture allegation will be
24 entered. It's ordered settings a 21-day pretrial motion
25 deadline. Your trial date is August 8th before Judge

1 Campbell.

2 Mr. Rodriguez, anything else?

3 MR. RODRIGUEZ: No, Your Honor. Thank you.

4 THE COURT: All right. Thank you.

5 MR. VALDEZ: Yes, Your Honor.

6 With regards to my client, Mr. Negrete, his
7 second-last name we already corrected.

8 It should be Arguello, which is A-R-G-U-E-L-L-O.

9 I did review the Indictment with my client. At this
10 point we enter a not guilty plea on his behalf and we waive
11 reading.

12 THE COURT: Thank you.

13 Mr. Negrete-Arguello, the Court will enter a plea of
14 not guilty on your behalf as to both counts.

15 It's ordered setting a 21-day pretrial motion
16 deadline. Your trial date is August 1st at 9:00 a.m. before
17 Judge Humetewa. August 1st at 9:00 a.m.

18 Counsel, thank you.

19 (Proceedings adjourned at 10:11 a.m.)

20 * * *

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, ELIZABETH A. LEMKE, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

DATED at Phoenix, Arizona, this 21st day of June, 2017.

s/Elizabeth A. Lemke
ELIZABETH A. LEMKE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)
) No. 17-01387-MJ
Plaintiff,) CR-15-00280-PHX-JJT
)
vs.) Yuma, Arizona
) June 21, 2017
Martin Rene Rios-Arias,)
)
Defendant.)
)

BEFORE: THE HONORABLE JAMES F. METCALF, MAGISTRATE JUDGE

TRANSCRIPT OF PROCEEDINGS

Change of Plea, Admit/Deny Hearing

APPEARANCES:

For the Plaintiff:
U.S. Attorney's Office
By: **Joshua Kolsrud**, Esq.
7102 East 30th Street, Suite 101
Yuma, AZ 85365

For the Defendant:
Federal Public Defender's Office
By: **Jorge Leonardo Costales**, Esq.
2285 South 4th Avenue, Suite 2E
Yuma, AZ 85364

Transcriptionist:
Jennifer A. Pancratz
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, Spc 42
Phoenix, Arizona 85003-2151
(602) 322-7198

Proceedings Recorded by Electronic Sound Recording
Transcript Produced by Transcriptionist

P R O C E E D I N G S

1
2 THE COURT: All right. I'm calling the case of United
3 States of America versus Martin Rene Rios-Arias.

4 Appearances please, counsel.

5 MR. KOLSRUD: Good morning, Your Honor. Josh Kolsrud
6 on behalf of John Ballos for the United States.

7 THE COURT: Good morning.

8 MR. COSTALES: Good morning, Your Honor. Leo
9 Costales, attorney for Rios -- Mr. Rios-Arias, who's present
10 and in custody.

11 THE COURT: All right. Good morning, Counsel.

12 And good morning, Mr. Rios-Arias.

13 All right. Counsel, I know we have a change of plea
14 and also an admission on a supervised release violation. But I
15 think, to begin with, I do need to initial defendant on the
16 supervised release matter and go through all of those aspects
17 of the case first.

18 So with that, I'll begin by advising you, Mr. Rios,
19 that you have the right to remain silent. By that, I mean
20 you're not required to make any statement. If you've already
21 made a statement, you need say no more. If you start to make a
22 statement, you may stop at any time, and you're also advised
23 that anything that you say may be used against you.

24 You do have the right to have an attorney to represent
25 you at all stages of the proceedings against you. If you

1 cannot afford to hire an attorney, then the Court will appoint
2 one to represent you at no cost to you.

3 Additionally, I will advise you that if you are not a
4 citizen of the United States, then you may request that an
5 attorney for the United States Government or a United States
6 law enforcement official notify a consular officer from your
7 country of nationality that you have been arrested.

8 And again, we have attorney, Mr. Leo Costales, from
9 the Federal Defender's Office. And, Mr. Costales, you were
10 appointed in the underlying reentry case; is that right?

11 MR. COSTALES: Yes, Your Honor.

12 THE COURT: All right. And obviously we're proceeding
13 right now in English. I do note that for purposes of our
14 official record, it states that this is a Spanish interpreter
15 case. Is that not correct?

16 MR. COSTALES: Your Honor, I mean, we've -- I've
17 communicated with Mr. Rios in English and Spanish. I think
18 he's very proficient in English and would -- he's okay to
19 proceed in English.

20 THE COURT: Well, let me ask you, Mr. Rios, what
21 language is your best or primary language?

22 THE DEFENDANT: My primary language is Spanish, but I
23 can speak English. I can understand everything perfectly.

24 THE COURT: Hmm. I think that sounds like you might
25 need to go in Spanish.

1 Have you attended school in either language, either
2 Spanish or English?

3 THE DEFENDANT: In English.

4 THE COURT: All right. And how far along did you
5 go --

6 THE DEFENDANT: 11th grade --

7 THE COURT: -- in school?

8 THE DEFENDANT: -- sir.

9 THE COURT: I'm sorry?

10 THE DEFENDANT: 11th grade, high school.

11 THE COURT: Can we pull that microphone up?

12 Obviously, he's wearing a mask.

13 11th grade? And in talking about legal terms and
14 things that have to do with court hearings and things of that
15 nature, do you think that you would understand English better
16 or Spanish better?

17 THE DEFENDANT: English.

18 THE COURT: All right. Then it sounds like, then,
19 that may be the best situation.

20 So I will appoint Mr. Costales as to the petition case
21 as well.

22 And, Mr. Costales, have you received a copy of the
23 petition to revoke supervised release, and if so, have you had
24 an opportunity to review it with your client?

25 MR. COSTALES: Yes, Your Honor. I've reviewed the

1 supervised release petition with Mr. Rios-Arias, and I'd waive
2 formal reading as to that petition.

3 THE COURT: Mr. Rios, the U.S. Probation Office has
4 filed this document, and they also issued a warrant related to
5 the petition. You're already in custody on the other matter,
6 but the petition indicates that you were previously sentenced
7 in the federal district court back on June 8th of 2015 by
8 District Judge Tuchi in Phoenix.

9 And that sentence included a 36-month period of
10 supervised release which was going to commence upon your
11 discharge from imprisonment. And that indicates that it was on
12 February 22nd of 2017, and so the supervised release was
13 scheduled to expire on February 21st of 2020.

14 And the petition indicates that you were placed under
15 a Standard Condition 1, that you would not commit another
16 federal, state, or local crime during the term of your
17 supervision. And it's alleged that you violated that
18 condition, which is a Grade B violation, that by committing
19 this new reentry of removed alien offense, which you're pending
20 charge on here for that offense, that that violated that term.

21 Also, it's alleged in the petition that you were under
22 a Special Condition 1, that if deported, that you would not
23 reenter the United States without legal authorization to do so.
24 That's a Grade C violation. And again, that violation relates
25 to the same case that you're pending charge on for reentry

1 after removal.

2 So do you understand those allegations contained in
3 the petition in your case?

4 THE DEFENDANT: Yes, I do, Your Honor.

5 THE COURT: All right. And, Government, are you --
6 well, first, moving to unseal the warrant and petition?

7 MR. KOLSRUD: Yes, Your Honor.

8 THE COURT: I'll order those unsealed.

9 And are you requesting detention as to the supervised
10 release matter?

11 MR. KOLSRUD: Yes, Your Honor.

12 THE COURT: And what do you proffer on the issue of
13 detention?

14 MR. KOLSRUD: Government proffers the warrant and the
15 petition.

16 THE COURT: All right. And on the issue of detention
17 as to the supervised release case, Mr. Costales, what is your
18 position?

19 MR. COSTALES: Well, Your Honor, we'd submit based
20 upon matters of record on the issue of detention on the
21 supervised release matter.

22 THE COURT: All right. Then I will order detention on
23 the supervised release case based on my same findings which
24 were made in the underlying reentry case.

25 And then as to preliminary revocation hearing,

1 Counsel, I know that preliminary hearing was waived as to the
2 reentry case. Does your client wish to waive the preliminary
3 revocation hearing on the petition?

4 MR. COSTALES: Yes, Your Honor. My client intends to
5 take the plea, so he -- we're waiving preliminary revocation at
6 this time.

7 THE COURT: All right. Is that correct, Mr. Rios; you
8 want to waive the preliminary revocation hearing on the
9 petition matter?

10 THE DEFENDANT: That's correct, Your Honor.

11 THE COURT: All right. And I'll accept that waiver.

12 All right. So I think we are ready to proceed now on
13 the main matter, which is the plea and the admission.

14 All right. So, Mr. Rios, let me begin by advising you
15 that you do have the right to both enter a plea of guilty and
16 enter an admission to the supervised release violation if
17 that's what you wish to do before a district court judge in
18 Phoenix or a district court judge anywhere that judge would be
19 here in the District of Arizona.

20 So do you understand that you do have that right?

21 THE DEFENDANT: Yes, I do, Your Honor.

22 THE COURT: All right. And do you wish to give up
23 that right and both plead guilty and enter your admission here
24 today before me, a magistrate judge?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. And I have received Mr. Rios's
2 previously signed consent to proceed before a magistrate judge.

3 All right. Mr. Rios, before I ask you to enter your
4 plea, I'm going to ask you questions, and this goes along with
5 the admission. These questions will be to make sure that both
6 your plea and your admission are valid.

7 In order to enter a valid plea and an admission, you
8 must understand everything that happens today. And so if you
9 do not understand something today, or if you would like to
10 speak with Mr. Costales at any time during today's hearing,
11 then you should please let me know that.

12 Do you agree to do that?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: All right.

15 MR. COSTALES: Your Honor, I don't mean to interrupt
16 you, but I just -- I remembered something that I really should
17 have brought up at the outset, and that's, you know, Your
18 Honor, I'd like to note my objection to Mr. Rios-Arias
19 currently being shackled for the purpose of a COP.

20 THE COURT: All right. And I do note your objection,
21 and that's consistent with ongoing objections, I know, by your
22 office --

23 MR. COSTALES: Yes, Your Honor.

24 THE COURT: -- related to the issues outlined in the
25 Ninth Circuit opinion on this matter, presumed innocence of the

1 defendant, the decorum of the courtroom.

2 However, as I indicated, we've now received a stay of
3 the Ninth Circuit's mandate in that case. More specifically, I
4 have even received direction from our chief judge on the issue
5 of the stay, that that does in fact stay that matter and that
6 the Court should continue to function as it has previously
7 prior to the stay.

8 Of course, that will all change, potentially, after
9 any stay is lifted or if the stay ends and the decision is
10 mandated. But for purposes of this proceeding, I'm going to
11 deny your motion, but it is noted for the record. Thank you.

12 MR. COSTALES: Thank you, Your Honor.

13 THE COURT: All right. And, Mr. Rios, in a few
14 moments I am going to ask you what you did to determine if
15 there are facts to support a plea of guilty and an admission in
16 your case. And then you would be required, then, to give up
17 your constitutional right to remain silent and then tell me
18 what it is that you did to both commit the offense that you're
19 pleading guilty to as well as the violation which you would be
20 admitting.

21 Do you understand that?

22 THE DEFENDANT: Yes, I do, Your Honor.

23 THE COURT: All right. Then at this time, the clerk
24 is going to administer an oath. And you are advised that
25 everything that you will say will then be under oath and

1 subject to the penalties of perjury or making false statements
2 if you do not answer truthfully.

3 (Defendant sworn.)

4 THE COURT: You can lower your hand.

5 And so do you understand that you are now under oath
6 to tell the truth in these proceedings, subject to the
7 penalties of perjury or making false statements if you do not
8 answer truthfully? Do you understand that?

9 THE DEFENDANT: Yes, sir, Your Honor.

10 THE COURT: And is your true and correct name Martin
11 Rene Rios-Arias?

12 THE DEFENDANT: That's my true name, sir.

13 THE COURT: All right. And how old are you?

14 THE DEFENDANT: I am 40 years old right now.

15 THE COURT: And do you -- well, again, we're
16 conducting your hearing in English, and you've told me that you
17 do speak Spanish. Do you consider yourself bilingual?

18 THE DEFENDANT: Yes, I do, Your Honor.

19 THE COURT: But you do feel more comfortable in this
20 court hearing, with your educational background here in the
21 United States, having the hearing in English?

22 THE DEFENDANT: Correct, Your Honor.

23 THE COURT: All right. And you do understand that we
24 could have an interpreter here in about two minutes if you
25 needed an interpreter? You understand that?

1 THE DEFENDANT: And I wouldn't be understanding him
2 because they talk too fast and they use confused words,
3 honestly.

4 THE COURT: All right. Well, that's important to
5 know, so obviously you prefer English.

6 All right. And have you been able to understand
7 everything that your attorney has talked to you about in this
8 case as far as being able to communicate and understand
9 everything that has happened with your communications?

10 THE DEFENDANT: Yes, sir, Your Honor.

11 THE COURT: I'm sorry?

12 THE DEFENDANT: Yes, Your Honor. Sorry.

13 THE COURT: All right. No, it's not a problem. You
14 know, with the mask and the whole situation, you are going to
15 need to speak up. That's just how it's going to have to be.

16 All right. Have you taken any drugs, medicine, pills,
17 intoxicants, depressants, or drunk any alcoholic beverages
18 within the past 48 hours?

19 THE DEFENDANT: I take a sleeping pill.

20 THE COURT: All right. And was that something that
21 was prescribed to you by the medical staff at the detention
22 facility here?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: All right. When did you take the sleeping
25 pill?

1 THE DEFENDANT: Last night.

2 THE COURT: All right. And how are you feeling today?
3 I mean, are you fully awake and able to concentrate on what's
4 happening?

5 THE DEFENDANT: I'm fully awake. I'm -- yeah.

6 THE COURT: All right. And do you normally take any
7 types of other prescription medications besides that?

8 THE DEFENDANT: None at all.

9 THE COURT: Are you under the care of a psychiatrist,
10 a psychologist, or any other type of mental health care
11 provider?

12 THE DEFENDANT: Actually, the psychologist is the one
13 that provided that pill for me because I couldn't sleep.

14 THE COURT: All right. And how long have you been --
15 is it a psychologist or a psychiatrist or like a counselor?
16 What type of --

17 THE DEFENDANT: He says he's a psychologist.

18 THE COURT: Psychologist?

19 THE DEFENDANT: I requested one because I was having
20 problems like thinking too much and so like wouldn't be able to
21 sleep, concerning to the thing that I just got released and
22 violating my thing and going through stuff and family problems.

23 THE COURT: All right. And did he or she diagnose you
24 with any specific condition, or in the past have you been
25 diagnosed with anything related to that type of an issue?

1 THE DEFENDANT: No. Never, no.

2 THE COURT: All right. This was a -- just kind of a
3 specific thing done by this psychologist to deal with these
4 issues that you were describing?

5 THE DEFENDANT: Yes. Yes, Your Honor.

6 THE COURT: All right. And do you understand what's
7 happening today and the purpose of today's hearing?

8 THE DEFENDANT: Quite sure. Yes, Your Honor.

9 THE COURT: Do either counsel have any doubt as to
10 Mr. Rios's competence to proceed at this time?

11 MR. KOLSRUD: No, Your Honor.

12 MR. COSTALES: No, Your Honor.

13 THE COURT: Mr. Rios, have you had enough time to
14 fully and completely discuss your case with Mr. Costales?

15 THE DEFENDANT: Yes, I have, Your Honor.

16 THE COURT: And has he done everything that you've
17 asked him to do up to this point in your case?

18 THE DEFENDANT: Yes, he has, Your Honor.

19 THE COURT: And are you fully and completely satisfied
20 with his representation of you in your case?

21 THE DEFENDANT: I'm comfortable. I'm satisfied with
22 him --

23 THE COURT: All right.

24 THE DEFENDANT: -- Your Honor.

25 THE COURT: And have you -- and I know we just went

1 over the petition, but have you seen both the information in
2 your case -- and the information is the charge, reentry of
3 removed alien in your case, that's signed by the prosecutor in
4 the case.

5 Have you seen that document?

6 THE DEFENDANT: Yes, I did, Your Honor.

7 THE COURT: All right. And you also saw the petition
8 to revoke supervised release that I just reviewed with you?

9 THE DEFENDANT: Oh, yes, Your Honor.

10 THE COURT: All right. And first, on the information,
11 the charge, reentry of removed alien, did you either read it
12 yourself or have it read to you completely?

13 THE DEFENDANT: I read it myself, Your Honor.

14 THE COURT: All right. And as to the petition in your
15 case, did you again either read it yourself or have it read to
16 you?

17 THE DEFENDANT: I read it myself.

18 THE COURT: All right. And did you discuss both the
19 charge in your case and the petition in your case with
20 Mr. Costales and then have him answer any questions that you
21 might have had about both of those matters?

22 THE DEFENDANT: Excuse me?

23 THE COURT: In going over both the information again,
24 which is the charge against you, reentry of removed alien, and
25 the petition, did you have a chance to discuss both of those

1 with Mr. Costales, and then if you had questions, did he answer
2 all of your questions?

3 THE DEFENDANT: Oh, yes, he did. Yes, he did, Your
4 Honor. Sorry.

5 THE COURT: All right. Now, as to the information in
6 your case, again, the charge, reentry of removed alien, I will
7 advise you that under the Constitution of the United States,
8 you do have the right to have a grand jury review your case.
9 And a grand jury would be made up of at least 16 people but not
10 more than 23 people, at least 12 of whom must agree that there
11 is probable cause to believe that you have done what you are
12 accused of doing in order for your case to proceed.

13 Now, if your case was presented to the grand jury,
14 they might or might not decide that your case should proceed.
15 But if they determine that your case should proceed, then they
16 would sign what's called an indictment.

17 Instead of an indictment, your case is being brought
18 by this information, which was signed by the prosecutor, not by
19 the grand jury. You do have the right to insist upon a review
20 by the grand jury, but you can give up that right and agree to
21 proceed here today on this information signed by the
22 prosecutor.

23 Now, those are your rights to a grand jury review. Do
24 you understand them?

25 THE DEFENDANT: Yes, I do, Your Honor.

1 THE COURT: And have you talked with your attorney
2 about giving up your right to the grand jury review?

3 THE DEFENDANT: Yes, I did, Your Honor.

4 THE COURT: And have any threats or promises been made
5 in your case which have caused you or induced you to give up
6 your right to the grand jury review?

7 THE DEFENDANT: None of that matter, no.

8 THE COURT: All right. And do you wish to waive your
9 right to the grand jury review and proceed here today by way of
10 this information which was signed by the prosecutor?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: All right. And I have received Mr. Rios's
13 previously signed waiver of indictment form.

14 Now, I do have your original written plea agreement
15 here with me, Mr. Rios. Do you have a copy of your plea
16 agreement there in front of you or --

17 THE DEFENDANT: Yes --

18 THE COURT: -- nearby?

19 THE DEFENDANT: -- Your Honor, right here in front of
20 me. Thanks.

21 THE COURT: And did you sign your plea agreement after
22 either you read it yourself in its entirety or Mr. Costales
23 read it to you in its entirety?

24 THE DEFENDANT: I signed it after I read it, and he
25 read it for my -- for me also.

1 THE COURT: And, again, did you go over all of the
2 terms and conditions in your plea agreement with Mr. Costales
3 and have him answer all of your questions about it to your
4 satisfaction before you signed it?

5 THE DEFENDANT: So far, yes, Your Honor.

6 THE COURT: All right. Now, the plea agreement is as
7 it will be to the end. I mean, this is the plea agreement, the
8 final product. So you understand that there's not going to be
9 any change in this plea agreement. You understand that?

10 THE DEFENDANT: I understand, Your Honor, yeah.

11 THE COURT: All right. So did you understand that
12 when you signed it?

13 THE DEFENDANT: Yes, I did, Your Honor.

14 THE COURT: So you went over all of the things in the
15 plea agreement and you talked to Mr. Costales about everything
16 in the plea agreement, and then when you were satisfied with
17 the plea agreement, is that when you signed it?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Do you understand your plea agreement?

20 THE DEFENDANT: Yes, I do, Your Honor.

21 THE COURT: And does your plea agreement contain all
22 of the promises or assurances that have been made to you or to
23 your attorney by the prosecutor?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: And apart from what is contained within

1 your plea agreement, have any other promises or any other
2 agreements of any type been made in your case which have caused
3 you to plead guilty? In other words, is there anything else
4 other than what's written down in your plea agreement that is a
5 promise or agreement or anything that's causing you to plead
6 guilty in your case?

7 THE DEFENDANT: No. There's nothing else, Your Honor.

8 THE COURT: All right. And again, other than what's
9 contained in your plea agreement, has anyone, your attorney or
10 anyone else, made any promise to you or guarantee to you that
11 you would receive any specific sentence or disposition in your
12 case?

13 THE DEFENDANT: No, Your Honor.

14 THE COURT: Do you agree with everything contained in
15 your written plea agreement?

16 THE DEFENDANT: I agree, Your Honor, yeah.

17 THE COURT: And do you have any questions, Mr. Rios,
18 whatsoever about your written plea agreement?

19 THE DEFENDANT: No. No, Your Honor.

20 THE COURT: All right. Now, the plea agreement
21 provides that you would be pleading guilty to that charge in
22 the information in your case, and that's the violation of
23 Title 8 of the United States Code, Section 1326,
24 Subsection (a), with a possible sentencing enhancement under
25 either Subsection (b) (1) or (b) (2) of that statute. And that

1 is the offense of reentry of removed alien.

2 Additionally, your agreement provides that you would
3 be admitting an allegation of the Grade B violation of
4 supervised release in that case CR-15-00280-PHX-JJT. And
5 that's the violation which is contained in Allegation 1 related
6 to the standard condition of supervised release that you would
7 not commit another federal, state, or local crime during the
8 term of your supervision.

9 So that's the violation which you would be admitting
10 to through your plea agreement.

11 So do you understand both the charge you would be
12 pleading guilty to as well as the violation which you would be
13 admitting?

14 THE DEFENDANT: I understand, Your Honor, yes.

15 THE COURT: All right. Now what I'm going to do,
16 Mr. Rios, is I'm going to review with you the maximum penalties
17 which are possible for this offense as well as the disposition
18 which is possible under the violation.

19 So under Subsection (a) of that reentry of removed
20 alien statute, the offense is a Class E felony and punishable
21 by a maximum term of imprisonment of two years, with a maximum
22 fine of \$250,000, or both the term of imprisonment and a fine,
23 and a term of supervised release of up to one year.

24 If the sentencing enhancement, though, is under
25 Subsection (b) (1) of that statute, then the offense is a

1 Class C felony, and then the maximum term of imprisonment would
2 be 10 years.

3 If the sentencing enhancement is under
4 Subsection (b) (2) of that statute, then the offense is still a
5 Class C felony, but then the maximum term of imprisonment would
6 be 20 years.

7 And a Class C felony offense is punishable by both the
8 maximum applicable term of imprisonment and a maximum fine of
9 \$250,000 and a term of supervised release of up to three years.
10 And the maximum term of probation would be five years.

11 Additionally, according to the United States
12 sentencing guidelines, the district court judge shall order
13 payment of a fine, unless the Court finds that a fine is not
14 appropriate in your case, and also order service of a term of
15 supervised release when required by statute or when a sentence
16 of imprisonment of more than one year is imposed, with the
17 understanding that the Court can also impose a term of
18 supervised release in all other cases, and the Court is
19 required to order payment of a \$100 special assessment.

20 And the maximum term of imprisonment that can be
21 imposed upon revocation of supervised release for a Class C
22 felony would be two years of imprisonment, and the applicable
23 range of imprisonment under the United States sentencing
24 guidelines for a Grade B violation would be 4 to 27 months,
25 depending on criminal history.

1 And so do you understand, Mr. Rios, both the maximum
2 term of imprisonment possible for the offense that you would be
3 pleading guilty to as well as the violation which you would be
4 admitting?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: All right. Now, I do want to review with
7 you another additional aspect related to the sentencing cap
8 language in the plea agreement on page 3 that relates to that
9 matter. And it stipulates that the parties agree that the
10 sentencing for the violation of the supervised release matter
11 will not exceed the middle range of the applicable policy
12 statement range; and the parties, though, have no agreement
13 regarding whether the sentence for the new offense and the
14 supervised release matter would run concurrently or
15 consecutively.

16 In other words, it would be fully within the
17 discretion of the district court judge at the time of your
18 sentencing and disposition on the supervised release matter to
19 decide whether those two terms would run either at the same
20 time, which would be concurrent sentencing, or run stacked or
21 on top of each other. That would be a consecutive sentence,
22 which would be a longer term of imprisonment.

23 But either way, that's up to the district court judge
24 at the time of sentencing and disposition. Do you understand
25 that, Mr. Rios?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: All right. Additionally, under federal
3 law, sentencing guidelines will apply in your case which will
4 be considered to determine the sentence that you would receive.
5 And I see that there is a copy of the sentencing guideline
6 chart there in front of you at the lectern.

7 And have you had an opportunity to talk with your
8 attorney about the guidelines and how they may apply in your
9 case?

10 THE DEFENDANT: Yes, I did, Your Honor.

11 THE COURT: Do you understand the concept of the
12 sentencing guidelines and the other factors which will be
13 considered by the district court judge in determining your
14 sentence?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: And, Mr. Costales, have you discussed the
17 sentencing guidelines and these other factors with Mr. Rios?

18 MR. COSTALES: Yes, Your Honor. I've explained the
19 nature and purpose of the sentencing guidelines and also given
20 Mr. Rios my preliminary nonbinding calculation based upon
21 information I have now as to what sentencing range I believe
22 may apply in his case.

23 THE COURT: Mr. Rios, a presentence report is going to
24 be prepared in your case, which will, among other things,
25 investigate any criminal history that you might have. Until

1 that report is prepared, though, no one, not your attorney, the
2 prosecutor, or the judge, can tell you with certainty which of
3 the various guideline ranges would apply in your case.

4 Do you understand that?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: And even though the guidelines can
7 recommend a range of sentences, the district court judge can,
8 after considering other relevant factors in your case, impose
9 any reasonable sentence that is authorized by the statutes,
10 even if that sentence is more severe or less severe than that
11 called for in those guidelines.

12 Do you understand that?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: You and your attorney and the prosecutor
15 will have a chance to review your presentence report and to
16 challenge that report or dispute anything in your report which
17 any of you may think is wrong in any way. And the district
18 court judge will listen to you and to your attorney and the
19 prosecutor about anything that any of you may think is wrong in
20 your presentence report.

21 But you must understand, though, that if your plea and
22 the plea agreement are accepted by the district court judge,
23 then you would not be able to withdraw from your plea, even if
24 you disagree with the Court's determination about your
25 sentence, the sentencing guidelines, and the facts that apply

1 to you in your case. If your plea and the plea agreement are
2 accepted by the district court judge, then the only way you can
3 withdraw from it is if you're able to show a fair and just
4 reason for doing so.

5 Do you understand that?

6 THE DEFENDANT: I understand, Your Honor.

7 THE COURT: In the federal system, what's commonly
8 called good time is limited to 54 days each year, but that does
9 not start until after the first year.

10 Do you understand that?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: And the Court must order you pay a fine,
13 restitution if applied in your case, the cost of incarceration,
14 the cost of supervised release, unless the Court finds that you
15 lack the ability to pay for any or all of those things.

16 Do you understand that?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: And if you are sentenced to prison, then
19 the Court must impose a term of supervised release that would
20 follow the prison sentence. If you were to violate the terms
21 or conditions of your supervised release, then the supervised
22 release could be revoked and then you could be sent back to
23 prison for up to the full term of the supervised release.

24 Do you understand that?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: All right. And in addition to the
2 penalties under the sentencing guidelines, you are likely to
3 suffer adverse immigration consequences. In other words, in
4 all likelihood, you would be deported or removed from the
5 United States, and that would be once you have completed any
6 term of imprisonment that the district court judge may impose.

7 Also, you're also likely to be barred from all future
8 immigration benefits.

9 Do you understand that?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: Now, Mr. Rios, you do not have to plead
12 guilty or enter your admission. Under the Constitution of the
13 United States, you have the absolute right to plead not guilty
14 and to have a speedy public jury trial and you could persist in
15 that not guilty plea.

16 And at a trial, you would have the ability to have the
17 jury then decide whether you were guilty or not guilty and the
18 truth of any allegation that would increase your maximum
19 possible sentence, and you would have the right to be
20 considered for release until your trial and the right to be
21 represented by an attorney at all times, including at your
22 trial. And if, like today, you could not afford to hire an
23 attorney, the Court would provide one to represent you at no
24 cost to you.

25 Do you understand that?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: And also, if you chose to have a trial in
3 your case, then you would be presumed innocent. And then the
4 prosecutor, by the use of competent and reliable evidence,
5 would have to prove your guilt beyond a reasonable doubt before
6 you could be found guilty. At no time would you have to prove
7 your innocence.

8 Do you understand that?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Also, if you chose to have a trial, then
11 witnesses for the government would have to come into court and
12 testify in your presence, and then your attorney could
13 cross-examine all the witnesses called by the government; he
14 could object to the evidence offered by the government; and by
15 the use of a subpoena, he could require people to come into
16 court and testify on your behalf and to bring documents all for
17 your use and benefit at your trial.

18 Do you understand that?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: Also, if you chose to have a trial, then
21 you could either testify or remain silent. And if you chose to
22 remain silent at your trial, that fact could not be used or
23 held against you in any way.

24 Do you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Also, if you chose to have a trial, before
2 you could be found guilty, a trial jury made up of 12 jurors
3 would have to unanimously agree that you were guilty. And if
4 you were convicted, you would then have the right to appeal the
5 jury's verdict and any judgment or sentence that was imposed.

6 Do you understand that?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: Mr. Rios, if you do plead guilty and if
9 your plea is accepted by the district court judge, then you
10 will be giving up your right to a trial in this case, and you
11 will not have a trial. You will also be giving up your right
12 to have a jury decide the truth of any allegation that would
13 increase the possible sentence, and you'll be giving up all of
14 those other rights which I have described to you, explained to
15 you, and which are also described in your plea agreement. And
16 then the district court judge will sentence you after he or she
17 considers a presentence report.

18 Do you understand that?

19 THE DEFENDANT: Yes, I do, Your Honor.

20 THE COURT: Now, as to the supervised release matter,
21 you would also have the right to have a contested hearing on
22 the allegations contained in the petition to revoke supervised
23 release in your case. And that contested hearing would include
24 many of the same rights which I have just explained to you in
25 regard to your trial rights.

1 Now, as to the supervised release matter, you would
2 not have the right to have a jury decide that case. It would
3 be the district court judge alone who would determine whether
4 or not you had committed the alleged violations in your
5 petition. And in the supervised release matter, the prosecutor
6 would have to prove the violations by a preponderance of the
7 evidence, which is a lower standard of proof than the beyond a
8 reasonable doubt standard which would apply as to your trial
9 rights.

10 Do you understand that?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Now, your plea agreement does provide that
13 you would be giving up your right to appeal. You're also
14 giving up your right to collaterally attack the judgment and
15 sentence in your case. That means that you cannot in the
16 future attack the validity or correctness of this conviction or
17 the sentence in your case.

18 Do you understand that and agree with that?

19 THE DEFENDANT: Yes, sir. I agree.

20 THE COURT: Then having discussed your rights with you
21 and knowing those which are described in your written plea
22 agreement, Mr. Rios, do you want to give them up at this time
23 and enter a plea of guilty as well as an admission to the
24 supervised release violation?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: And are you both pleading guilty and
2 entering your admission voluntarily?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Has anyone threatened you or anyone else
5 in connection with the case or forced you in any way to plead
6 guilty or to enter your admission?

7 THE DEFENDANT: Never at any time.

8 THE COURT: Did you, as charged in the information in
9 your case, commit that offense of reentry of removed alien?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: And are you pleading guilty to this charge
12 in the information because you are, in fact, guilty of the
13 offense?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And did you, as alleged in the supervised
16 release petition in your case, commit that Grade B violation of
17 supervised release related to not committing another federal,
18 state, or local crime during the term of supervision?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And are you admitting that violation
21 because you did, in fact, commit that violation?

22 THE DEFENDANT: Absolutely, sir.

23 THE COURT: So what I'm going to do now, Mr. Rios, I'm
24 going to review with you the elements of the offense of reentry
25 of removed alien, because these are the things which the

1 prosecutor would have to prove at a trial in your case if you
2 were to maintain your right to plead not guilty and proceeded
3 to a trial.

4 And the prosecutor would have to prove each of the
5 elements of the offense beyond a reasonable doubt, and then a
6 jury would have to find unanimously that the prosecutor had
7 done so as to each element of the offense in order for you to
8 be found guilty at a trial.

9 And then I'm going to do essentially the same thing in
10 regard to the petition to revoke supervised release matter as
11 to what the prosecutor would have to prove by a preponderance
12 of the evidence in that matter.

13 But first, as to the charge in the information,
14 prosecutor would have to prove that on or about the date which
15 is alleged in the charging document in your case, which is
16 April 30th of 2017, that:

17 Number 1, that you're, in fact, an alien, which means
18 you're not a citizen or a national of the United States; and,
19 number 2, that you had been previously denied admission,
20 excluded, deported, or removed from the United States; and,
21 number 3, that you knowingly and voluntarily reentered or were
22 present after a voluntary entry and then found in the United
23 States in the District of Arizona; and, fourth, that you did
24 not obtain the express consent of the Attorney General or the
25 Secretary of Homeland Security to reapply for admission to the

1 United States prior to returning to the United States.

2 And so do you understand, Mr. Rios, that the
3 prosecutor would have to prove all of that in order for you to
4 be found guilty at a trial?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: All right. Now, as to the supervised
7 release matter, the prosecutor would have to establish to the
8 district court judge by a preponderance of the evidence that
9 you were previously placed on a term of supervised release as
10 part of a sentence in a prior federal district court matter and
11 that that was for a conviction that was a Grade -- or Class C
12 felony offense.

13 And that part of the sentence in that matter included
14 a 36-month period of supervised release, and that was a
15 sentencing on June 8th of 2015, and that upon termination or
16 end of your term of imprisonment, which was February 22nd of
17 2017, that you began that period of supervised release which
18 was to expire on February 21st, 2020, and that the supervised
19 release included a Standard Condition 1, that you would not
20 commit another federal, state, or local crime during the term
21 of supervision, and that you violated that term essentially by
22 committing this new reentry of removed alien offense that
23 you're pending trial on here now.

24 So do you understand those things which the prosecutor
25 would have to show in order for you to be found in violation of

1 the supervised release?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: All right. Now, there is a section which
4 is contained in your written plea agreement that is entitled
5 "Factual Basis." These are the facts which the government says
6 that they could prove at a trial in your case and also the
7 facts related to the supervised release matter. And they are
8 also the facts which you would be admitting are true through
9 your written plea agreement.

10 So, Mr. Rios, I'm going to read this entire section to
11 you. Please listen carefully, because when I am finished
12 reading it, I am going to ask you if these facts are all true
13 and correct.

14 It states: I am not a citizen or national of the
15 United States.

16 I was removed from the United States through Del Rio,
17 Texas, on February 25th, 2017.

18 I was voluntarily present and found in the United
19 States at or near San Luis, Arizona, on April 30th, 2017. I
20 did not obtain the express consent of the United States
21 Government to reapply for admission to the United States prior
22 to returning to the United States.

23 For sentencing purposes, I admit I was convicted of
24 illegal reentry after removal, a felony, on June 8th, 2015, in
25 the United States District Court, District of Arizona. I was

1 represented by an attorney, and I was sentenced to 26 months in
2 prison.

3 I further admit that I was under a term of supervised
4 release in Case No. CR-15-00280-PHX-JJT when the present
5 offense was committed.

6 Mr. Rios, are all of those facts true and correct?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: All right. Counsel, any additions,
9 corrections, modifications to the factual basis?

10 MR. KOLSRUD: Not from the government.

11 MR. COSTALES: No, Your Honor.

12 THE COURT: All right. Then, Mr. Rios, at this point
13 I would like to know if you have any questions whatsoever
14 either for me or for Mr. Costales, because I am about to ask
15 you to enter your plea and your admission. So if you have
16 questions, this is the time to ask your questions.

17 Any questions, sir?

18 THE DEFENDANT: No, sir.

19 THE COURT: All right. Then I will enter the
20 following findings and orders:

21 The plea agreement may be lodged, and I do find that
22 the defendant is competent to enter a plea of guilty at this
23 time, that he understands his right to trial and the nature
24 thereof, and that he understands the nature of the charge
25 against him to which he is pleading guilty and the possible

1 consequences of the guilty plea, including the range of
2 possible sentences and the sentencing guideline concept.

3 And I find that the plea is made knowingly,
4 voluntarily, and intelligently, and that there is a sufficient
5 factual basis for defendant's plea in order to determine guilt,
6 and I make those same findings in relation to the supervised
7 release matter.

8 And so then, Mr. Martin Rene Rios-Arias, as to the
9 charge contained in the information in your case, reentry of
10 removed alien, do you plead guilty or not guilty?

11 THE DEFENDANT: I plead guilty.

12 THE COURT: And as to the Grade B violation of
13 supervised release in that prior case, number
14 CR-15-00280-PHX-JJT, do you admit or deny that violation?

15 THE DEFENDANT: I admit, sir.

16 THE COURT: I will recommend to the district court
17 that the plea and admission be accepted, and I will order that
18 a presentence report be prepared.

19 It is further ordered that any motion for upward or
20 downward departure or any sentencing memoranda must be filed at
21 least seven business days prior to the sentencing date.

22 Responses are due three business days prior to the sentencing
23 date. Any motion to continue sentencing must be filed promptly
24 upon discovery of the cause for continuance and must state the
25 cause with specificity. Motions to continue sentencing filed

1 less than 14 days before sentencing are disfavored.

2 All right. I do have a sentencing and disposition
3 date to provide, and those are set for August 29th, 11:30,
4 before Senior District Judge McNamee here in Yuma.

5 All right, Counsel. Anything else that you want to
6 take up today or place on the record?

7 MR. KOLSRUD: Not from the government.

8 MR. COSTALES: No, Your Honor.

9 THE COURT: All right, then. Mr. Rios, that's all for
10 today, sir. Good luck to you.

11 THE DEFENDANT: Thank you, Your Honor.

12 (Proceedings concluded.)

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

I, JENNIFER A. PANCRATZ, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

DATED at Phoenix, Arizona, this 22nd day of June, 2017.

s/Jennifer A. Pancratz
Jennifer A. Pancratz

1 ELIZABETH A. STRANGE
Acting United States Attorney
2 District of Arizona

3 DOMINIC LANZA, AUSA (Cal. State Bar No. 225989, dominic.lanza@usdoj.gov)
Two Renaissance Square
4 40 N. Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408
5 Telephone (602) 514-7500
Attorneys for Plaintiff
6

7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF ARIZONA

10 United States of America,
11 Plaintiff,
12 v.
13 Ramiro Bojorquez Feliz,
14 Defendant.

Case No. 17-8242MJ

**UNITED STATES' MEMORANDUM
RE: SHACKLING DURING INITIAL
APPEARANCES**

15 On May 31, 2017, the Ninth Circuit issued an *en banc* opinion addressing the
16 circumstances under which defendants may be shackled during non-jury proceedings in
17 criminal cases. *See United States v. Sanchez-Gomez*, __ F.3d __, 2017 WL 2346995 (9th
18 Cir. 2017) (en banc). The mandate in *Sanchez-Gomez* has not yet issued. Nevertheless,
19 yesterday, in an effort to comply with *Sanchez-Gomez*, the Court addressed the issue of
20 shackling during the 3pm initial appearance calendar by making an initial determination,
21 based on the information contained in the defendants' pretrial services reports, whether
22 each defendant should be shackled. Next, the four defendants who were deemed by the
23 Court to warrant shackling were brought into Court as a group, in shackles, and each
24 defendant's attorney was immediately afforded an opportunity to challenge the shackling
25 determination. Finally, after those defendants' initial appearances were complete, the
26 three remaining defendants were brought into Court individually, without shackles, for
27 separate initial appearances.
28

1 For the reasons explained below, the Court should determine that *Sanchez-Gomez*
2 isn't binding and thus continue following the same process that was in place before
3 *Sanchez-Gomez* was decided (*i.e.*, all defendants making their initial appearances are
4 shackled). The Court may reach this conclusion because the mandate in *Sanchez-Gomez*
5 hasn't issued and the Ninth Circuit recently granted the United States' motion to further
6 postpone the issuance of the mandate.

7 Admittedly, the law in the Ninth Circuit is difficult to reconcile on the issue
8 whether an opinion immediately becomes binding upon publication or whether it only
9 becomes binding after the mandate has issued. On the one hand, there are a handful of
10 Ninth Circuit decisions from the mid-1990s suggesting that an opinion becomes binding
11 upon publication. See, e.g., *United States v. Gomez-Lopez*, 62 F.3d 304, 306 (9th Cir.
12 1995) ("The government first urges us to ignore *Armstrong* since we have stayed the
13 mandate to allow filing of a petition for certiorari; this we will not do, as *Armstrong* is the
14 law of this circuit."); *Chambers v. United States*, 22 F.3d 939, 942 n.3 (9th Cir. 1994)
15 ("We reject the government's argument that *X-Citement Video* is not binding precedent
16 until the mandate issues in that case. In this circuit, once a published opinion is filed, it
17 becomes the law of the circuit until withdrawn or reversed by the Supreme Court or an en
18 banc court.").¹ On the other hand, the Ninth Circuit's more recent pronouncements on
19 this issue suggest that opinions don't become binding until the mandate has issued. See,
20 e.g., *Nat. Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.3d 1194,
21 1203-04 (9th Cir. 2013) ("No opinion of this circuit becomes final until the mandate
22 issues' The mandate in this case has not issued. Consequently, our earlier judgment
23 is not final. Nor can it be considered the law of the case.") (citation omitted); *Carver v.*
24 *Lehman*, 558 F.3d 869, 878-79 (9th Cir. 2009) ("No opinion of this circuit becomes final
25

26
27 ¹ The Ninth Circuit's 1994 *Chambers* decision was subsequently
28 vacated. *Chambers v. United States*, 47 F.3d 1015 (9th Cir. 1995) (mem.). Ironically, it
was vacated because the Supreme Court granted review in *X-Citement Video*.

1 until the mandate issues Until the mandate has issued, opinions can be, and
2 regularly are, amended or withdrawn, by the merits panel at the request of the parties
3 pursuant to a petition for panel rehearing, in response to an internal memorandum from
4 another member of the court who believes that some part of the published opinion is in
5 error, or *sua sponte* by the panel itself. . . . Thus, the prior majority’s holding in this case
6 may or may not have survived until the mandate issued, but it was certainly not yet
7 enshrined as a binding construction of the Constitution [until the mandate issued].”).

8 Although the law in this area is not a model of clarity, there are two reasons to
9 believe that the later-decided cases reflect the true law of the Circuit—and, thus, that
10 *Sanchez-Gomez* isn’t yet binding on this Court. First, Federal Rule of Appellate
11 Procedure 41 was amended in 1998 to clarify that an appellate decision doesn’t become
12 final until the mandate has issued. *See* Fed. R. Crim. P. 41(c), 1998 Adv. Comm. Note
13 (“A court of appeals’ judgment or order is not final until issuance of the mandate”).
14 The timing of this amendment is arguably significant—it helps explain why the Ninth
15 Circuit adhered to a final-upon-publication rule before 1998, in *Gomez-Lopez* and
16 *Chambers*, but then replaced that approach with a not-final-until-the-mandate-issues rule
17 in its post-1998 decisions in *NRDC* and *Carver*. Second, it is notable that recent
18 decisions from other Circuits recognize that appellate decisions don’t become final—and,
19 thus, don’t bind district courts within the Circuit of issuance—until the mandate has
20 issued. *See, e.g., Bradford v. HSBC Mortgage Corp.*, 2012 WL 12875878, *1 (E.D. Va.
21 2012) (“On May 3, 2012—one week after the entry of final judgment in this matter—the
22 Fourth Circuit issued a published opinion in *Gilbert v. Residential Funding LLC* . . .
23 reaching several conclusions contrary to those reached in published decisions issued in
24 this matter. . . . [Nevertheless], the panel decision in *Gilbert* cannot yet be considered
25 binding here because the Fourth Circuit’s formal mandate has not yet issued in that
26 case. Indeed, the Fourth Circuit has stayed its mandate in *Gilbert* in light of appellees’
27 timely filed petition for rehearing and for rehearing en banc. . . . [G]iven that the
28 decisions of the court of appeals become binding on a district court only after the

1 issuance of the appellate court’s mandate, it is appropriate to defer decision on Bradford’s
2 motion to amend the judgment in this matter until the Fourth Circuit’s mandate in *Gilbert*
3 issues.”); *United States v. Swan*, 327 F. Supp. 2d 1068, 1071-72 (D. Neb. 2004)
4 (“[D]ecisions of the Eighth Circuit Court of Appeals have precedential value and must be
5 followed by the district courts within the Eighth Circuit. Nevertheless, the court finds it
6 is not bound to follow *Mooney* at this time, since the appeals court decision is not yet
7 final. . . . ‘A Court of Appeals’ judgment or order is not final until issuance of the
8 mandate, at that time the parties' obligation becomes fixed’ Accordingly, until the
9 mandate in *Mooney* issues, this court is not obliged to follow the dictates of the *Mooney*
10 decision.”). Although these out-of-Circuit decisions are obviously not binding on this
11 Court, they provide further evidence of a post-1998 consensus on this issue.

12 Respectfully submitted this 20th day of June, 2017.

13 ELIZABETH A. STRANGE
14 Acting United States Attorney
District of Arizona

15 /s/ *Dominic Lanza*
16 DOMINIC LANZA
Assistant U.S. Attorney

17 I hereby certify that on this date, I electronically transmitted the attached document to the
18 Clerk’s Office using the CM/ECF system for filing and transmittal of a Notice of
19 Electronic Filing to the following CM/ECF registrants: Ana Castillo
20
21
22
23
24
25
26
27
28