

No. 17-71867

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.

**EMERGENCY MOTION FOR INJUNCTION PENDING RESOLUTION OF
PETITION FOR MANDAMUS UNDER FRAP 8 AND CIRCUIT RULE 27-3**

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

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CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to FRAP 8 and Circuit Rule 27-3, counsel for movants certifies as follows:

(i) Counsel contact information:

Counsel for Movants:

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(ii) Facts showing existence and nature of claimed emergency:

Pursuant to FRAP 8 and Circuit Rule 27-3(a), movants Rodrigo Zermeno-Gomez, Gustavo Hernandez-Gutierrez, and Martin Rios-Arias seek an emergency order from this Court enjoining the District Court for the District of Arizona to comply with this Court's opinion in *United States v. Sanchez-Gomez*, --- F.3d ---, 2017 WL 2346995 (9th Cir. May 31, 2017) (en banc), pending this Court's resolution of the above-captioned petition for writ of mandamus, filed contemporaneously herewith. The petition seeks a writ directing the District Court

for the District of Arizona to comply with *Sanchez-Gomez* notwithstanding the fact that this Court has issued a 90-day stay of the mandate in that case.

This Court issued its opinion in *Sanchez-Gomez* on May 31, 2017. The opinion declares unconstitutional a district court's district-wide policy of subjecting all in-custody defendants to five-point "full shackling" and holds that: (1) "if the government seeks to shackle a defendant, it must first justify the infringement [of defendant's right to be free of unwarranted restraints] with specific security needs as to that particular defendant"; (2) "Courts must decide whether the stated need for security outweighs the infringement on a defendant's right"; (3) "This decision cannot be deferred to security providers or presumptively answered by routine policies"; and (4) "All of these requirements apply regardless of a jury's presence or whether it's a pretrial, trial or sentencing proceeding." *Id.* at *13.

After the Court issued *Sanchez-Gomez*, initially some judges of the District of Arizona made individualized findings as to whether shackling was justified. But after this Court granted the government's motion for a 90-day stay of the mandate in *Sanchez-Gomez* on June 16, 2017, the Chief Judge of the District of Arizona issued a direction to the effect that judges of the district need not comply with *Sanchez-Gomez* while the stay is in effect. The judges of the District of Arizona now

refuse, with apparent uniformity, to comply with *Sanchez-Gomez*, and cite the stay of the mandate as their primary justification.

To avoid irreparable harm, relief is needed as soon as practicable. As in *Sanchez-Gomez*, movants seek relief not only on their own behalf but also for all in-custody defendants in the District of Arizona. If movants' position is correct, literally every weekday in-custody defendants in this district are being subjected to the unconstitutional indignity of "full shackling" in violation of the law of this circuit. Given that during the last fiscal year there were 5,214 criminal case filings in this district – an average of approximately 20 per working day – the number of individuals whose fundamental rights are being violated each working day, while respondent court continues to follow its current practice, is clearly substantial. *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)). The 90-day stay of the mandate in *Sanchez-Gomez* extends through September 14, 2017 – 80 days after the filing of this motion. It follows that if this motion is not ruled on until 21 days after its filing, it will have become moot as to roughly one quarter of the affected individuals.

(iii) Notice and service to opposing counsel:

Undersigned counsel gave the Clerk of this Court notice of movants' intention to file this motion and the accompanying petition for writ of mandamus via telephone conversation with Duty Attorney Monica Fernandez on June 26, 2017. Undersigned counsel gave government counsel notice of movants' intention to file this motion via email on June 26, 2017, and government counsel responded, confirming her awareness of movants' intention. This motion is being served on counsel for the government at the same time and in the same manner as the petition for writ of mandamus.

(iv) Unavailability of relief in district court:

As explained in the petition filed herewith, the members of the Office of the Federal Public Defender for the District of Arizona have been attempting to secure respondent court's compliance with *Sanchez-Gomez*, but the judges of that court have refused to comply, citing the stay of the mandate as their justification.

(v) Circuit Rule 27-8.1 Statement:

No previous applications for the relief sought here have been made. Movant Rodrigo Zermeno-Gomez is currently in custody serving his 75-day sentence in connection with the case pertinent to the petition; he expects to be released on or about July 24, 2017. Movant Gustavo Hernandez-Gutierrez is currently detained

pending trial in the case related to the petition. Movant Martin Rios-Arias is currently detained pending the district court's review of his guilty plea and plea agreement in the case related to the petition.

Respectfully submitted on June 26, 2017.

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

MEMORANDUM OF POINTS AND AUTHORITIES

“In deciding whether to grant an injunction pending appeal, the [C]ourt balances the plaintiff’s likelihood of success against the relative hardship to the parties.” *Se. Alaska Conservation Council v. U.S. Army Corps of Engineers*, 472 F.3d 1097, 1100 (9th Cir. 2006) (internal quotation marks omitted). Under the “traditional test,” the moving party must show: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). *Id.* The “alternative test” requires that the moving party demonstrate either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in his favor. *Id.* These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases; they are not separate tests but rather “outer reaches of a single continuum.” *Id.* (internal quotation marks omitted).

A. Movants are likely to succeed on the merits.

The issue addressed in the petition is whether respondent United States District Court for the District of Arizona is correct in its belief that it is not

required to comply with this Court's opinion in *Sanchez-Gomez* while the mandate in that case is stayed. Movants believe that this view is mistaken because this Court has rejected it in multiple published cases. *United States v. Gomez-Lopez*, 62 F.3d 304 (9th Cir. 1995) (refusing to "ignore" circuit opinion in case in which mandate was stayed because opinion "is the law of this circuit"); *Chambers v. United States*, 22 F.3d 939 (9th Cir. 1994), *vacated on other grounds*, 47 F.3d 1015 (9th Cir. 1995) (rejecting argument that circuit opinion was "not binding precedent until the mandate issue[d] in that case" because "[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"); *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d 923 (9th Cir. 1983) (holding that "even though the mandate ha[d] not yet issued" in circuit case, judgment was "nevertheless final for such purposes as stare decisis, and full faith and credit").

In the face of this precedent, respondent relies on other circuit opinions to support its position, but as explained in more detail in the petition filed herewith, those opinions address the "law of the *case*" doctrine and the circumstances under which an opinion becomes "final" in the sense that the obligations of the particular parties to the case become fixed – they do not address the question pertinent here, of whether a published opinion constitutes the binding "law of the *circuit*." To

counsel's knowledge, there are no on-point opinions that respondent or the government has cited in connection with this dispute holding that a published opinion of this Court does not constitute the binding law of the circuit while the mandate is stayed. Movants accordingly believe they are likely to succeed on the merits.

B. Movants and others in the class on whose behalf they seek relief will be irreparably harmed absent injunctive relief.

Like the petitioners in *Sanchez-Gomez*, movants here seek relief “not merely for themselves, but for all in-custody defendants in the district.” *Sanchez-Gomez*, 2017 WL 2346995, at *3. If movants' position is correct, all in-custody defendants who appear for non-jury proceedings in the District of Arizona are likely to be subject to the indignity of unconstitutional “full shackling” until the stay of the mandate in *Sanchez-Gomez* expires. This harm will occur simultaneously with defendants' in-court appearances, and nothing that happens afterward will serve to erase that violation of their fundamental rights. Nor will they have any effective after-the-fact remedy, as any attempt to seek damages would be met by an invocation of “[a]bsolute judicial immunity.” *Burton v. Infinity Capital Mgmt.*, 753 F.3d 954, 959 (9th Cir. 2014).

C. The balance of hardships favors movants.

The “hardship” that an injunction would place upon respondent would be that judges on the respondent court would be required, while the injunction is in effect, to comply with *Sanchez-Gomez*. This means that in proceedings in which the government seeks to shackle a defendant, these judges would be required to “decide whether the stated need for security outweighs the infringement on a defendant’s right” to be free of unwarranted restraints. *Sanchez-Gomez*, 2017 WL 2346995, at *13. This would add a discrete exercise of discretion to the tasks these judges must perform, in connection with proceedings in which the government makes such a request. But the hardship to a judge of making discretionary decisions – an ordinary and essential part of every federal judge’s job description – does not outweigh the hardship to defendants of being subjected to humiliating and unconstitutional restraint. Movants respectfully submit that this Court essentially reached that conclusion in *Sanchez-Gomez*. Movants further note that, based on information received from federal public defender offices in other high-volume districts within this circuit, those districts are generally complying with *Sanchez-Gomez*.

D. The public interest favors the injunction.

The *Sanchez-Gomez* Court addressed the question of the public interest, explaining that courtroom shackling practice profoundly impacts the public's "perception" of the dignity and fairness of their federal courts:

The most visible and public manifestation of our criminal justice system is the courtroom. Courtrooms are palaces of justice, imbued with a majesty that reflects the gravity of proceedings designed to deprive a person of liberty or even life. A member of the public who wanders into a criminal courtroom must immediately perceive that it is a place where justice is administered with due regard to individuals whom the law presumes to be innocent. That perception cannot prevail if defendants are marched in like convicts on a chain gang. Both the defendant and the public have the right to a dignified, inspiring and open court process.

Id. at *10. This passage confirms that the public interest favors the injunction that movants seek.

In sum, regardless of which test is applied, the pertinent factors strongly support the issuance of an injunction directing respondent court to comply with this Court's opinion in *Sanchez-Gomez*, pending this Court's resolution of the petition for writ of mandamus.

III. Conclusion

For the reasons set forth above, this Court should as soon as practicable enter an Order enjoining the District Court of the District of Arizona to comply

with this Court's opinion in *Sanchez-Gomez* pending this Court's resolution of movants' petition for writ of mandamus.

Respectfully submitted on June 26, 2017.

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

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I caused the foregoing Emergency Motion for Injunction Pending Resolution of Petition for Mandamus Under FRAP 8 and Circuit Rule 27-3 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 Emergency Motion for Injunction Pending Resolution of Petition for Mandamus Under FRAP 8 and Circuit Rule 27-3 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.

Dated this 26th day of June, 2017.

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