United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 14, 2023
Lyle W. Cayce
Clerk

No. 22-60556

PORT ARTHUR COMMUNITY ACTION NETWORK,

Petitioner,

versus

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; JON NIERMANN, *in his official capacity as Chairperson of the Texas Commission on Environmental Quality*,

Respondents.

Appeal from Texas Commission on Environmental Quality
Agency No. 2021-0942-AIR

Before WIENER, GRAVES, and DOUGLAS, *Circuit Judges*.

JAMES E. GRAVES, JR., *Circuit Judge*:

When a Texas state agency departs from its own administrative policy, or applies a policy inconsistently, Texas law requires it to adequately explain its reasons for doing so. In this case, the Texas Commission on Environmental Quality ("TCEQ") declined to impose certain emissions limits on a new natural gas facility that it had recently imposed on another such facility. In doing so, it contravened its policy of adhering to previously imposed emissions limits, but it did not adequately explain why. It therefore acted arbitrarily and capriciously under Texas law. Accordingly, we VACATE the

Commission's order granting the emissions permit at issue and REMAND for proceedings consistent with our opinion.

I. BACKGROUND

The federal Clean Air Act authorizes the Environmental Protection Agency to establish nationwide air pollution standards, including standards for emissions of carbon monoxide (CO) and nitrogen oxides (NO_X). 42 U.S.C. §§ 7408-7409; 40 C.F.R. § 50. EPA outsources some enforcement of those standards to the states, which, in turn, must adopt EPA-approved State Implementation Plans ("SIPs").

In Texas, TCEQ is charged with enforcing the federal Clean Air Act and the Texas Clean Air Act. Under Texas's SIP, TCEQ is responsible for issuing Prevention of Significant Deterioration ("PSD") permits before any "major stationary source" of pollution may be constructed in an area that has attained EPA clean air standards. 40 C.F.R. § 52.21(a)(2)(i). A major stationary source is a facility that has the potential to emit more than 250 tons of a regulated pollutant per year. 40 C.F.R. § 52.21(b)(1)(i)(B).

To receive a PSD permit, an applicant must demonstrate that the emissions sources at its facility will satisfy Best Available Control Technology, or "BACT." 42 U.S.C. § 7475(a)(4); TEX. HEALTH & SAFETY CODE § 382.0518(b)(1). Generally, BACT requires new facilities to reduce pollution to the maximum degree possible, accounting for cost and other practical concerns. *See* 40 C.F.R. § 52.21(b)(12); 30 TEX. ADMIN. CODE § 116.10(1). TCEQ and EPA have each adopted definitions of BACT, though TCEQ's definition incorporates EPA's definition by reference. *See* 30 TEX. ADMIN. CODE § 116.160(c)(1)(A).

EPA and TCEQ have also developed guidance to aid applicants and permit reviewers. EPA's five-step method is detailed in its New Source Review Manual ("NSR Manual"). TCEQ's three-tier method is detailed in

its Air Permit Reviewer Reference Guide ("APDG 6110"). EPA approved TCEQ's three-tier method subject to a short list of conditions, including that TCEQ consider "[r]ecently issued/approved permits within the state of Texas." In accordance with that condition, Tier I of the APDG 6110 analysis requires TCEQ to compare each application "to the emission reduction performance levels accepted as BACT in recent [New Source Review] permit reviews."

Intervenor Port Arthur LNG, L.L.C. plans to build a liquified natural gas plant and export terminal in Port Arthur, Texas. Because the proposed facility has the potential to emit more than 250 tons of a regulated pollutant per year, and therefore would be classified as a major stationary source , Port Arthur LNG applied for a PSD from TCEQ in September 2019. Port Arthur LNG identified emissions sources including turbines, engines, oxidizers, and flares, and it proposed emission rates for each. As relevant here, Port Arthur LNG proposed, for its refrigeration compression turbines, emission rates of 9 parts per million by volume, dry ("ppmvd") of NOx and 25 ppmvd of CO.

After a technical review, TCEQ's Executive Director issued a preliminary decision and draft permit on June 2, 2020. The draft permit included Port Arthur LNG's proposed emission rates of 9 ppmvd of NO_X and 25 ppmvd of CO for the refrigeration compression turbines. After soliciting public comments, the Executive Director issued a final decision on March 24, 2021, concluding that Port Arthur LNG's draft permit complied with the applicable law. The Executive Director's final decision was referred to the Commission[1] for consideration at a subsequent public meeting.

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[1] In this opinion, we use "Commission" to refer to the adjudicative body that decided Port Arthur LNG's application and "TCEQ" to refer to the respondents in this case.

Petitioner Port Arthur Community Action Network ("PACAN") is a not-for-profit community organization in Port Arthur focused on environmental issues. PACAN requested a contested case hearing in response to the Executive Director's final decision. *See* TEX. HEALTH & SAFETY CODE § 382.056(n). It contested numerous aspects of the draft permit, including whether the proposed controls on various emission sources would satisfy BACT. Its request for a hearing was granted, and the Commission referred the application to the State Office of Administrative Hearings. *See* TEX. GOV'T CODE § 2003.047(a). An administrative law judge ("ALJ") held a preliminary hearing and determined that PACAN met the requirements for associational standing. *See* TEX. WATER CODE § 5.115(a).

Two ALJs then held a hearing on the merits of PACAN's challenge on February 22-24, 2022. In support of its application, Port Arthur LNG filed a certified copy of its application, the Executive Director's preliminary decision, and the draft permit. That was sufficient for Port Arthur LNG to make a prima facie case that the draft permit satisfied the applicable legal requirements. TEX. GOV'T CODE § 2003.047(i-1).

In response, PACAN introduced, as an exhibit, a 2020 amendment to a permit for Rio Grande LNG, a liquid natural gas facility in Texas that has been approved but not yet constructed. Rio Grande LNG had proposed using the same refrigeration compression turbines as the Port Arthur facility: General Electric Frame 7EA combustion turbines equipped with Dry-Low NO_X combustors. The amendment decreased the CO and NOx limits for Rio Grande LNG's refrigeration compression turbines from 9 ppmvd of NOx and 25 ppmvd of CO—Port Arthur LNG's proposed emission rates—to 5 ppmvd of NOx and 15 ppmvd of CO. The amendment stated that the new, decreased limits were "consistent with the lowest levels of control for Refrigeration Compressor Turbines; therefore, BACT is satisfied."

On May 20, 2022, the ALJs issued a Proposal for Decision and Proposed Order. Their analysis relied heavily on APDG 6110. Under APDG 6110's Tier I analysis, "a specific BACT proposal may be different than those accepted as BACT in recent permit reviews, [but] the proposal must have an overall emission reduction performance that is at least equivalent to those previously accepted as BACT." In some cases, the analysis may still proceed to Tier II, but only if "the applicant has demonstrated compelling technical differences between their process and others within the same industry."

The ALJs noted that Rio Grande LNG "utilizes the same GE Frame 7EA turbines in refrigerant compressor service" as Port Arthur LNG's proposed project, but that the NOx and CO limits proposed by Port Arthur LNG were higher. They also noted that Port Arthur LNG "failed to identify Rio Grande LNG in its BACT analysis[] and failed to demonstrate why a CO emission limit of 15 ppmvd is not BACT for the Facility." Further, "neither the [Executive Director] nor Applicant offered additional evidence to demonstrate that there is a 'compelling technical difference' as to why Applicant's CO BACT proposal is less than what has been accepted as BACT in recent permit reviews."

The ALJs explained that "because Applicant's proposed emission reduction level of 25 ppmvd for CO is not 'at least' equivalent to Rio Grande LNG, which is also located in an attainment area and recently permitted with a BACT CO emission limit of 15 ppmvd through the use of good combustion practices, the third step of [APDG's] Tier I analysis has not been demonstrated." Accordingly, the ALJs proposed that the Commission approve the application subject to amendments that limited Port Arthur LNG's refrigeration compression turbine emissions to 5 ppmvd of NO_X and 15 ppmvd of CO, the same as Rio Grande LNG.

TCEQ's Executive Director objected to the ALJs' proposal for decision. Citing EPA's NSR Manual and APDG 6110, he wrote that Rio Grande LNG's emissions limits had not been "demonstrated in practice," as Rio Grande LNG was "not in operation."

On August 31, 2022, David Garcia, a permitting staff member in EPA's regional office, submitted a letter disagreeing with the Executive Director.[2] Garcia explained that, under EPA's definition of BACT, a limit "is not always required to be operational or actually demonstrated in practice to be considered technically feasible and BACT." He also wrote that "[w]hile it is not mandatory to select a specific limit as BACT solely because another similar source has done so, the basis for selecting a less stringent limit should be documented in the permit record for evaluation."

Port Arthur LNG's application and the ALJs' proposal for decision then went to the Commission. Under Texas law, the Commission may amend a proposal for decision, "including any finding of fact," when it deems appropriate, but its amendments must be based on the record, and the Commission must explain the basis of the amendments. TEX. GOV'T CODE § 2003.047(m).

The Commission held a hearing on the ALJs' proposal for decision on September 7, 2022. On September 15, 2022, it granted Port Arthur LNG's permit application and rejected the ALJs' proposed amendments. It explained, as relevant here, that while Rio Grande LNG had stricter refrigeration compression emissions limits, no "operational data" showed

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[2] TCEQ argues that this letter cannot be considered by this court because it was never part of the administrative record. However, "[t]he record in a contested case shall include the following: (1) all pleadings, motions, and intermediate rulings." 30 TEX. ADMIN. CODE § 80.275. Because PACAN attached the letter as an exhibit to its motion for rehearing, it is part of the agency record.

that those limits are actually achievable. It also deleted the ALJs' conclusions of law referring to APDG 6110 and EPA's NSR Manual because they "exclude important elements of a BACT analysis" and because "TCEQ's and EPA's BACT guidance documents are non-regulatory and do not establish binding legal requirements."

PACAN moved for rehearing. The Commission did not act within 55 days, so the motion was overruled by operation of law. *See* 30 TEX. ADMIN. CODE §§ 55.211(f), 80.272(e)(1). PACAN timely petitioned this court for review.

II. STANDARD OF REVIEW

Federal appellate courts reviewing state agency proceedings generally adhere to the applicable state law standard of review. *See Township of Bordentown v. FERC*, 903 F.3d 234, 270 (3d Cir. 2018) ("Federal courts reviewing state agency action afford the agencies the deference they would receive under state law."). The parties here agree that this court should apply the standard of review that would apply to TCEQ in Texas state courts.

Under Texas law, the only issue for a reviewing court to decide is "whether the [Commission's] action is invalid, arbitrary, or unreasonable." TEX. HEALTH & SAFETY CODE § 382.032(e). Texas courts interpret this statute to incorporate the standard of review under the Texas Administrative Procedure Act. *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 801 (Tex. App.—Austin 2000, pet. dism'd); *Smith v. Hous. Chem. Servs., Inc.*, 872 S.W.2d 252, 257 n.2 (Tex. App.—Austin 1994, writ denied). Under the Texas APA, a court shall reverse or remand the case if the agency's findings, inferences, conclusions, or decisions are, *inter alia*, "not reasonably supported by substantial evidence" or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." TEX. GOV'T CODE §§ 2001.174(2)(E),(F). Whether that

standard is met is a question of law reviewed *de novo*. *Grissom*, 17 S.W.3d at 801; *see also Phillips Petroleum Co. v. Tex. Comm'n on Env't Quality*, 121 S.W.3d 502, 505 (Tex. App.—Austin 2003, no pet.) (citation omitted) (explaining that "[w]hether the Commission failed to follow its own rules presents a question of law" and is therefore subject to *de novo* review).

III. DISCUSSION

a. Standing

As a preliminary matter, Port Arthur LNG argues that PACAN lacks Article III standing to challenge the Commission's permit approval. As an association, PACAN may invoke the standing of its members. *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 536 (5th Cir. 2019). To do so, it must demonstrate, *inter alia*, that its members have individual standing. *Id.* (citation omitted). That is, its members must have suffered (1) an injury in fact, (2) fairly traceable to the challenged conduct, and (3) likely to be redressed by a favorable judicial decision. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). Here, PACAN invokes the standing of its president and founder, John Beard.

Port Arthur LNG argues that PACAN failed to allege that Beard suffered any injury traceable to CO emissions in particular. PACAN points to Beard's declaration submitted to the State Office of Administrative Hearings. There, Beard declared that his home is less than four miles from the proposed facility and that "[i]f Port Arthur LNG is allowed to emit *all of the air pollution it says it will emit* . . . I will . . . have to limit how much time I spend outside at my house." (Emphasis added.) He declared that he was concerned about health effects "as a result of *the additional pollution* Port Arthur LNG will add to the air at my property." (Emphasis added.) After detailing the ongoing recreational activities in which he has long engaged at nearby Pleasure Island and Keith Lake Cut, he declared, "I am concerned

that *air pollution* will harm recreational opportunities at Pleasure Island and near Pleasure Island, such as the Keith Lake Cut. I am worried because I am concerned that *air pollution* will harm air quality, water quality, and plant life in this area." (Emphasis added.)

The Supreme Court has found similar testimony of association members—reflecting reasonable concerns about the negative effect of pollution on their personal interests—to be sufficient to establish standing. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 182-84 (2000). The Court did not require that testimony to refer to specific pollutants. *See id.*

Accordingly, Beard's declaration is sufficient to support PACAN's standing.

b. The PSD Permit

PACAN argues that because Rio Grande LNG's emissions limits were BACT, the Commission erred by allowing higher CO and NO_X limits for Port Arthur LNG. TCEQ responds that the Commission's determination that those levels were not demonstrated and therefore not achievable, and thus should not be required, is consistent with governing clean air regulations.

"We may judge the sufficiency of the Commission's order solely on the basis given by the agency itself for its decision; to do otherwise would constitute an invasion of the agency's province." *City of El Paso v. El Paso Elec. Co.*, 851 S.W.2d 896, 899 (Tex. App.—Austin 1993, writ denied); *see also Morgan Drive Away, Inc. v. R.R. Comm'n of Tex.*, 498 S.W.2d 147, 152 (Tex. 1973) ("We may consider only what was written by the Commission in its order, and we must measure its statutory sufficiency by what it says.").

In the Explanation of Changes section of its order, the Commission explained why it rejected the limits the ALJs proposed for Port Arthur LNG's refrigeration compression turbines. As relevant here, it concluded "that a NO_X emissions limit of five ppmvd and a CO emissions limit of 15 ppmvd does not satisfy EPA's or the TCEQ's definition of BACT." It explained, quoting EPA's regulations, that EPA's definition is based on a case-by-case determination of what is "achievable," accounting for "energy, environmental, and economic impacts and other costs." *See* 40 C.F.R. § 52.21(b)(12). It also explained, quoting the Texas Administrative Code, that TCEQ defines BACT as a pollution-control method that "through experience and research, has proven to be operational, obtainable, and capable of reducing or eliminating emissions" while being "technically practical and economically reasonable for the facility." *See* TEX. ADMIN. CODE § 116.10(1). Any BACT analysis "requires a demonstration that the emissions limitations are achievable," using those federal and state definitions of BACT to guide the determination.

The Commission concluded that the ALJs' recommended limits "were not demonstrated to be achievable or proven to be operational, obtainable, and capable of being reached." It distinguished Port Arthur LNG from several other facilities. As to Rio Grande LNG, the Commission acknowledged that lower emissions limits had been approved for the refrigeration compression turbines there, but that facility was "not in operation and there is no operational data to prove that [its] permitted limits are achievable at this time."

The issue, then, is whether the Commission committed legal error by disregarding the Rio Grande LNG emissions limits because Rio Grande LNG is "not in operation." Contrary to the Commission's analysis, both state and federal guidelines direct the agency to adhere to previously imposed emissions limits in evaluating BACT. As the ALJs concluded, APDG 6110,

TCEQ's guidance document, says that a proposal "must have an overall emission reduction performance that is at least equivalent to those previously accepted as BACT." If the proposal falls below that level, "but the applicant has demonstrated compelling technical differences between their process and others within the same industry," the analysis proceeds to Tier II.

Meanwhile, the NSR Manual, EPA's guidance document, states that "a permit requiring application of a certain technology or emission limit to be achieved for such technology is sufficient justification to assume the technical feasibility of that technology or emission limit." It also states that "a commercially available control option will be presumed applicable if it has been or is soon to be deployed (e.g., is specified in a permit) on the same or a similar source type."

But the Commission concluded that "the TCEQ's and EPA's BACT guidance documents are non-regulatory and do not establish binding legal requirements." We agree—to an extent. As to the NSR Manual, EPA itself has explained that Texas is not "required to follow EPA's interpretations and guidance issued under the Act in the sense that those pronouncements have independent status as enforceable provisions of the Texas PSD SIP, such that mere failure to follow such pronouncements, standing alone, would constitute a violation of the Act." 57 Fed. Reg. 28,095 (June 24, 1992). The Supreme Court has also noted that "[n]othing in the Act or its implementing regulations mandates [the NSR Manual's] top-down analysis." *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 476 n.7 (2004) (citing 42 U.S.C. § 7479(3); 40 C.F.R. § 52.21(j)).

As to APDG 6110, TCEQ points to a recent decision of the Texas Court of Appeals concerning a different guidance document, called Modeling and Effects Review Applicability, or "MERA." The Court of Appeals concluded that MERA was not binding because it gave TCEQ discretion to

deviate when appropriate. *Tex. Comm'n on Env't. Quality v. Friends of Dry Comal Creek*, 669 S.W.3d 506, 521 (Tex. App.—Austin 2023, no pet. h.). Indeed, the MERA guidance explicitly stated that it "is not regulatory" and that "staff may deviate from this guidance with approval from their supervisors or from the Air Permits Division (APD) director." *Id.*

APDG 6110 contains essentially identical language:

> [T]his document is not regulatory and does not limit the permit reviewer's ability to require the applicant to provide additional information . . . In some instances, permit reviewers may deviate from this guidance on a case-by-case basis; deviation from the guidance may only occur with the approval of the permit reviewer's supervisors or of the Air Permits Division (APD) director.

Thus, like the MERA guidance—and EPA's NSR manual—APDG 6110 is not a binding rule.

But whether the guidelines are strictly binding does not render them irrelevant. An agency must explain its reasoning "when it appears to have departed from its earlier administrative policy or to be inconsistent in its determinations." *Oncor Elec. Delivery Co. LLC v. Pub. Util. Comm'n of Tex.*, 406 S.W.3d 253, 267 (Tex. App.—Austin 2013, no pet.); *see also City of El Paso*, 851 S.W.2d at 900. In *Oncor*, an electric utility challenged the state Public Utility Commission's ruling that the utility could not recover expenses incurred in earlier rate-setting proceedings without prior authorization. *Id.* at 259, 266. On appeal, the utility argued that the commission's prior authorization requirement was inappropriate because the commission had never imposed it in the past. *Id.* at 265. Indeed, the utility pointed to a number of cases where no prior authorization had been sought by a utility, but expenses were nonetheless recovered. *Id.* at 266. The commission countered that the utility had failed to point to an actual policy

or practice showing that the commission always allowed the expenses without prior authorization. *Id.*

The court sided with the utility. *Id.* at 267. Among the persuasive factors was the number of cases where the commission had allowed utilities to recover expenses without prior authorization. *Id.* Those cases established a policy, which the commission's new prior authorization rule contradicted. *Id.* Further, while the court based its conclusion in part on those prior cases, it explained that the question is one of law—that is, whether the commission legally erred by applying a new standard and "failing to adequately explain the reasoning for its change in position." *Id.* at 269. In particular, the commission failed to "provide any statutory, rule-based, or precedential support or analysis," or any evidence, to justify the prior authorization rule. *Id.* at 268. Thus, the commission "acted arbitrarily and capriciously by changing its position . . . without providing any explanation for its change in its prior practice and by denying Oncor's expenses on the basis of its new position." *Id.* at 272.

In this case, the Commission rejected the ALJs' proposed CO and NO_X emissions limits because they were "not demonstrated to be achievable or proven to be operational, obtainable, and capable." Even though those limits had been approved for Rio Grande LNG, there was no "operational data to prove" they were achievable.

Unlike the court in *Oncor*, we need not examine the Commission's decisions in other proceedings to see that this requirement was a change in policy. First, TCEQ's own guidance manual states that a new facility must reduce emissions to a degree "at least equivalent" to prior facilities that were "previously accepted" as BACT. Here, the record is clear—the limits imposed on Port Arthur LNG are not "at least equivalent" to those imposed on Rio Grande LNG. Therefore, the Commission's own policy directed it to

consider Rio Grande LNG's limits, even if Rio Grande LNG was not currently in operation.

TCEQ argues that APDG 6110 also "generally" requires an "emission reduction option" to have been "successfully demonstrated" before it can be imposed on a facility. But even assuming that the "emissions reduction options" at Rio Grande LNG were not "successfully demonstrated" when Rio Grande LNG's limits were accepted as BACT, APDG 6110 still requires consideration of those options subject to a number of factors—some of which are set forth in APDG 6110, but none of which the Commission discussed.

Second, TCEQ admitted at oral argument that it has defined the term "operational" inconsistently. Its counsel explained that, as used in TCEQ's BACT definition, 30 TEX. ADMIN. CODE § 116.160(c), the term means "*capable of* operating." Nevertheless, counsel explained that when the Commission evaluated Port Arthur LNG's permit application, it construed the term to mean "*currently* operating," thereby disqualifying Rio Grande LNG's limits from consideration.

Those facts demonstrate that the Commission's order, including its "operational data" requirement, departed from the Commission's policy of adhering to earlier permit limits. *Oncor*, 406 S.W.3d at 267. That departure triggered the Commission's burden to "adequately explain" why it did what it did. *Id.* at 269. But the Commission set forth no "statutory, rule-based, or precedential support or analysis" to justify why it disregarded its own policy, nor did it even acknowledge that it had done so. That was an error of law. As the Texas Court of Appeals has explained, an agency acts arbitrarily and capriciously when it changes its requirements without adequately explaining why doing so was justified. *See Oncor*, 406 S.W.3d at 269.

The Commission is not forever bound to the emissions limits that it set for Rio Grande LNG for all subsequent permits. Indeed, BACT determinations are intrinsically case-by-case determinations. *See* 40 C.F.R. § 52.21(b)(12). But in making those individualized determinations, the Commission must demonstrate that it is treating permit applications consistently. *See Oncor*, 406 S.W.3d at 267.

"The requirement of explanations or reasons is frequently imposed when it appears to the reviewing court that an agency has departed from its earlier administrative policy or there exists an apparent inconsistency in agency determinations." *City of El Paso*, 851 S.W.2d at 900. Here, the Commission departed from the policy contained in APDG 6110 that a facility "must have an overall emission reduction performance that is at least equivalent to those previously accepted as BACT." It then failed to adequately explain why it did so. Because the Commission failed to justify its deviation from its policy, it acted arbitrarily and capriciously. *See Oncor*, 406 S.W.3d at 269.

CONCLUSION

The Commission's order granting Port Arthur LNG's PSD permit application is VACATED and the matter is REMANDED to the Commission for proceedings consistent with our opinion.

United States Court of Appeals

FIFTH CIRCUIT
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November 14, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 22-60556 Port Arthur Cmty Actn Netwk v. TCEQ
Agency No. 2021-0942-AIR

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that respondents pay to petitioner the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

By:_____
Whitney M. Jett, Deputy Clerk

Enclosure(s)

Ms. Jessica Amber Ahmed
Ms. Natasha Bahri
Mr. Toby Baker
Mr. Christopher Beau Carter
Mr. Colin Cox
Ms. Amy Catherine Dinn
Mr. Derek Raymond McDonald
Mr. Chase Porter
Ms. Erin Kathleen Snody
Mr. Aaron Michael Streett