

No.

IN THE SUPREME COURT OF THE UNITED STATES

ZAFAR MEHMOOD,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

Whether the plain error standard applies to appellate review of a claim that the district court's acceptance of a waiver by defense counsel of his client's right to the continuing services of an interpreter violated the statutory procedures under the Court Interpreters Act, 28 U.S.C. §1827(f)(1), which explicitly directs the presiding judge to personally explain "the nature and effect of the waiver" to the defendant prior to accepting a waiver?

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Petitioner Zafar Mehmood (“Petitioner”) respectfully prays that a writ of certiorari will issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered in Case Nos. 16-2639 and 16-2641 on July 13, 2018.

OPINION BELOW

On July 13, 2018, a three-judge panel of the United States Court of Appeals for the Sixth Circuit filed its opinion and order affirming Petitioner’s convictions for health care fraud and related offenses, vacating his sentence, and remanding his case for resentencing.

(App. 1a). The opinion and order is unpublished. The court of appeals denied Petitioner's timely petition for rehearing by a one-sentence order filed on August 13, 2018. (App. 43a) The United States District Court entered its criminal judgments on November 16, 2016. (App. 29a and 37a).

JURISDICTION

Petitioner seeks review of the opinion and order of the United States Court of Appeals for the Sixth Circuit entered on July 13, 2018. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. §1827:

(d) (1) The presiding judicial officer, with the assistance of the Director of the Administrative Office of the United States Courts, shall utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise qualified interpreter, in judicial proceedings instituted by the United States, if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case), or a witness who may present testimony in such judicial proceedings—

(A) speaks only or primarily a language other than the English language;

* * *

(f) (1) Any individual other than a witness who is entitled to interpretation under subsection (d) of this section may waive such interpretation in whole or in part. Such a waiver shall be effective only if approved by the presiding

judicial officer and made expressly by such individual on the record after opportunity to consult with counsel and after the presiding judicial officer has explained to such individual, utilizing the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise competent interpreter, the nature and effect of the waiver.

* * *

STATEMENT OF THE CASE

Petitioner, a native of Pakistan, owned and operated several home health care agencies in the Detroit area. These businesses were approved Medicare service providers.

Following an investigation by the United States Department of Health and Human Services into the agencies' billing practices, a federal grand jury in the Eastern District of Michigan returned an indictment charging Petitioner with conspiracy to commit health care fraud, conspiracy to pay and receive health care kickbacks, conspiracy to launder money, and related substantive violations of the health care fraud and money laundering statutes. The grand jury subsequently returned a second indictment charging him with obstruction of justice.

Mehmood's primary language is Punjabi. During a pretrial motion hearing, the district judge made the following observations regarding his language skills: "I note the defendant does not speak English as a first language. He does not express himself precisely in English. That's my view. And many other things that he has said, I think, are subject to interpretation."

Later in the proceedings, the two indictments were joined for trial. The case was then reassigned to another district judge who had only recently been appointed to the bench. The new judge arranged for the presence of an interpreter to assist Petitioner at trial. This arrangement was presumably based on the observations made by her predecessor regarding Petitioner's English language skills.

During the final pretrial hearing, defense counsel offered the following comments regarding his client's use of the interpreter: "He will follow most of it, but if there are any issues he's missing, he can consult him. So if you see the interpreter is not interpreting all the time, that's what's going on."

The original interpreter appeared in court to assist Petitioner for the first three days of the trial. No concerns were raised at that time regarding Petitioner's utilization of the interpreter's services. For reasons not disclosed in the record, a different interpreter appeared on day four of the trial. The behavior of this new interpreter drew the attention of the district judge.

After the jury was dismissed for the day, the judge questioned Petitioner's "need for an interpreter." She stated, "I haven't seen any words interpreted. I don't know what languages are being spoken." The judge asked defense counsel whether "there's any voir dire of her qualifications that you'd like to take . . . outside the hearing of the jury[?]" Counsel answered "no."

The district judge became more irritated. She told counsel, "I just don't know if there's any interaction with the interpreter, and if there's not, we won't need to have that

as part of the case.” Defense counsel responded, “I’m sensitive to the court’s concern. I’ll address that after I confer with him and report to the court.”

The interpreter did not appear on the fifth day of trial. After the first witness completed her testimony, the district judge became aware of the absence of the interpreter. She convened “a brief sidebar with the lawyers who are here,” and asked defense counsel, “[d]oes your client waive the interpreter.”

Counsel responded, “for now, your Honor, we are good without an interpreter.” Counsel remarked that the replacement interpreter “was falling asleep and I had to wake her up one time and said Judge may be looking at you.” The remainder of the almost three-week trial continued without an interpreter.

The jury found Petitioner guilty of all counts. Following preparation of a presentence investigation report, the district judge sentenced him to an aggregate 360-month prison term, a three-year term of supervised release, and ordered over \$40 Million in restitution. She also granted the government’s request to forfeit Petitioner’s property and assets.

Petitioner raised the denial of the services of the interpreter (from the fifth day of trial to the trial’s conclusion) as an issue in his direct appeal. He asserted that the district judge failed to follow the statutory procedures under the Court Interpreters Act for accepting a waiver of an interpreter after one had already been appointed for him.

The Sixth Circuit rejected Petitioner’s argument that his claim should be reviewed *de novo*. It declared that Petitioner’s “failure to object to the absence of the interpreter triggers plain error review[.]” (App. 4a)

The court of appeals agreed with Petitioner that the district judge's failure to follow the waiver procedures under the Act was an obvious defect in the proceedings. It denied relief, however, on the premise that "there is no evidence in the record that the absence of an interpreter affected [Petitioner's] understanding of the proceedings." (App. 7a) Therefore, said the appellate panel, "[Petitioner] has not carried his burden to demonstrate plain error because he has failed to demonstrate any effect on his substantial rights." (*Id.*)

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

THE PLAIN ERROR STANDARD DOES NOT APPLY TO APPELLATE REVIEW OF A CLAIM THAT THE DISTRICT COURT'S ACCEPTANCE OF A WAIVER BY DEFENSE COUNSEL OF HIS CLIENT'S RIGHT TO THE CONTINUING SERVICES OF AN INTERPRETER VIOLATED THE STATUTORY PROCEDURES UNDER THE COURT INTERPRETERS ACT, 28 U.S.C. §1827(F)(1), WHICH EXPLICITLY DIRECTS THE PRESIDING JUDGE TO PERSONALLY EXPLAIN "THE NATURE AND EFFECT OF THE WAIVER" TO THE DEFENDANT PRIOR TO ACCEPTING A WAIVER.

Subsection (d) of the Court Interpreters Act, 28 U.S.C. §1827, directs district courts to utilize the services of an interpreter to provide a criminal defendant who "speaks only or primarily a language other than the English language" with a translation throughout the proceedings. *Taniguchi v. Kan. Pacific Saipan, Ltd.*, 566 U.S. 560, 570 (2012). The purpose of the Act is "to protect the basic rights of litigants who are summoned into court by the United States and cannot fully comprehend the proceedings." *United States v. Murguia-Rodriguez*, 815 F.3d 566, 573 (9th Cir. 2016).

The need for an interpreter is especially acute in criminal trials “where individuals must communicate in precise language under stressful conditions and key determinations affecting the individual’s personal liberty or financial well-being are often made based on credibility.” *Id.* at 568 (internal citation and quotation marks omitted). For this reason, the Act imposes strict requirements for accepting a waiver of an interpreter after one has been appointed for the accused.

Under subsection (f)(1), a party may waive his right to an interpreter only if four requirements are met: 1) the waiver is made “expressly on the record” by the defendant, 2) the defendant has had an “opportunity to consult with counsel,” 3) the trial judge explains “the nature and effect of the waiver” to the defendant, and 4) the judge utilizes the assistance of an interpreter during the waiver colloquy.

As noted, the Sixth Circuit panel acknowledged that the district judge erred in accepting defense counsel’s waiver of an interpreter as a substitute for a personal waiver by Petitioner. But it concluded that Petitioner’s failure to object to this deviation from the statutory procedure triggered appellate review under the onerous plain error standard.

This Court has emphasized that the purpose of requiring a contemporaneous objection is to give the trial judge an opportunity to “correct or avoid the mistake so that it cannot possibly affect the ultimate outcome.” *Puckett v. United States*, 556 U.S. 129, 134 (2009). The contemporaneous objection rule prevents a party from “from ‘sandbagging’ the court – remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.” *Id.*

Strict enforcement of the contemporaneous objection requirement may be justified in cases where the defendant is a native English speaker. The law presumes he is capable of following the court proceedings and expressing any concerns to his lawyer, who, in turn, can raise objections if warranted.

But the appointment of an interpreter under the Court Interpreters Act presumes that the trial court has already made a preliminary finding that the defendant lacks the language skills to protect his own rights. Rigid enforcement of the contemporaneous objection rule would defeat the purpose underlying the strict waiver provisions of subsection (f)(1) of the statute.

This Court has recognized that “[f]or certain fundamental rights, the defendant must personally make an informed waiver.” *New York v. Hill*, 528 U.S. 110, 114 (2000). These rights include “whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.” *Florida v. Nixon*, 543 U.S. 175, 187 (2004). By legislative fiat, Congress has made the determination that the right to the assistance of an interpreter, *once one has been appointed*, falls within this protected class of fundamental rights requiring an informed waiver. 28 U.S.C. §1827(f)(1) .

Two state appellate courts have rejected the contention that an attorney may unilaterally waive his client’s right to an interpreter in a criminal prosecution. In *State v. Rodriguez*, 682 A.2d 764 (N.J. Super. 1996), the trial court appointed a Spanish-language interpreter to assist the defendant during a bench trial on driving under the influence and related traffic charges. The case was tried over three days. On the second day of the trial,

the court interpreter was unavailable. The defense attorney waived his client's right to the interpreter, and agreed to the use of a bilingual defense witness to interpret for his client.

On appeal, the New Jersey superior court analogized the standard for waiving an interpreter to the one used to waive the Sixth Amendment right to counsel. *Id.* 682 A.2d at 770. It cited *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938), in which this Court ruled that such a waiver must be knowing, voluntary, and intelligent.

Under this standard, said the superior court, the right to an interpreter "may not be waived by mere acquiescence or nonverbal conduct on the part of the accused." *Id.* 682 A.2d at 770. The court declared that before the trial judge may accept a waiver, "the defendant must explicitly state on the record that he is waiving his right to an interpreter, after having had the opportunity to consult with counsel and after having the judge explain the consequences of such action to him (via interpreter, if necessary)." *Id.* at 771.

The superior court reversed the defendant's convictions. It ruled that "although Rodriguez' attorney purported to waive his client's right to a court interpreter for the purpose of using the defense witness for that trial session, the waiver fell far short of the prevailing standard and was therefore null and void as a relinquishment of Rodriguez' right to an interpreter." *Id.*

The California Supreme Court took a similar approach in *People v. Aguilar*, 677 P.2d 1198 (Cal. 1984). The record disclosed that the trial court had appointed a Spanish-language interpreter to assist the defendant who was put on trial for murder. During the appearance of two Spanish-speaking prosecution witnesses, the trial court "borrowed" the interpreter

for the purpose of translating their testimony for the benefit of the jury. Defense counsel “acquiesced” to this arrangement.

The state supreme court likewise looked to *Johnson v. Zerbst* as providing an appropriate standard for waiving the assistance of an interpreter. The court concluded that the defendant’s “inaction in demanding his personal right did not result in a waiver.” *Id.* 677 P.2d at 1204. It explained: “There is no indication in the record that defendant made a voluntary and intentional waiver. An exchange took place--entirely in English--between the court, the prosecutor, the interpreter, and defense counsel. The defendant was excluded. This conversation, being a ‘babble of voices’ to the defendant, cannot be held to amount to a waiver by him of his right to an interpreter.” *Id.* at 1204-05 (footnote omitted).

As in the *Aguilar* case, Petitioner was not present during the district judge’s sidebar discussion about his continuing need for an interpreter. Petitioner could not have expressed his position to the district judge at that time even if he understood the ramifications of his attorney’s waiving the interpreter. Due to Petitioner’s judicially-determined need for an interpreter, and his absence from the sidebar proceedings, placing the burden on him to demonstrate an adverse effect on his substantial rights, as required by the plain error standard, is inconsistent with the Act’s legislative intent.

The application of the plain error standard affected the outcome of Petitioner’s appeal. Non-constitutional trial errors are subject to harmless error review under Fed. R. Crim. P. 52(a). Under this standard, “when the record is ‘so evenly balanced that a

conscientious judge is in grave doubt as to the harmlessness of an error,’ the judgment must be reversed.” *O’Neal v. McAninch*, 513 U.S. 432, 437-38 (1995).

In an effort to justify its ruling, the Sixth Circuit reasoned that Petitioner was capable of successfully conveying in English his objections and arguments during the sentencing hearing. (App. 7a) This justification reflects a cynical view of the record. Petitioner’s refusal of the assistance of legal counsel for sentencing points to a frustration on his part about not being able to voice his concerns during the proceedings due to the lack of an interpreter. He told the district judge, “Your honor, can I talk in English *as much as I can in broken English?*” This statement connotes a lack of confidence in his English skills, and supports the conclusion that he needed an interpreter during the trial.

The appellate panel also reasoned that the probation officer had no difficulty communicating with Mehmood during the presentence interview process. (*Id.*) But this is an apples and oranges comparison. The ability to speak with another person, one on one in an informal intimate setting, has little bearing on the question of the individual’s ability to follow formal court proceedings, which often involve arcane legal jargon and procedure. *See Murguía-Rodriguez*, 815 F.3d at 573.

The Sixth Circuit panel never explained how Petitioner could have known that the district judge had violated subsection (f)(1)’s directive, which required her to explain “the nature and effect of the waiver” before accepting it. In light of the original district judge’s comments regarding his negative assessment of Petitioner’s English language skills, and the highly fact-intensive and technical nature of the testimony and the legal and factual issues

pertaining to guilt under the health care fraud and money laundering statutes, this record should leave an appellate jurist with “grave doubt as to the harmlessness” of the defective procedure employed by the district court for waiving the assistance of an interpreter.

CONCLUSION

This petition presents the Court with a question of first impression. Is it fair to apply the plain error standard to appellate review of a claim that the district court failed to follow the statutory procedure for obtaining a waiver of a criminal defendant’s statutory right to the assistance of an interpreter? It would seem very unfair to penalize a defendant for not objecting to a district judge’s deviation from a statutory procedure that is intended to protect his right to an understanding of the judicial proceedings. For the foregoing reasons, Petitioner asks this Court to grant his petition for a writ of certiorari and to order full briefing and oral arguments on the merits.

Respectfully submitted,

Dated: November 12 , 2018

/s/Dennis C. Belli
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ATTORNEY FOR PETITIONER