No. --

IN THE

SUPREME COURT OF THE UNITED STATES

JESUS ALONZO GONZALEZ-GONZALEZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether allocution error deprives the defendant of an opportunity to object to that error within the meaning of Federal Rule of Criminal Procedure 51(b)?

PARTIES

Jesus Alonzo Gonzalez-Gonzalez is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jesus Alonzo Gonzalez-Gonzalez, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Gonzalez-Gonzalez,* 765 Fed. Appx. 49 (5th Cir. April 12, 2019), and is provided in the Appendix to the Petition. [Appx. A]. The judgment of conviction and sentence was entered June 13, 2018, and is also provided in the Appendix to the Petition. [Appx. B].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on April 12, 2019. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Federal Rule of Criminal Procedure 32(i) provides in relevant part:

> (4) Opportunity to Speak.
>
> (A) By a Party. Before imposing sentence, the court must:
>
> (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;
>
> (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and
>
> (iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

Federal Rule of Criminal Procedure 51 provides:

> Rule 51. Preserving Claimed Error
>
> (a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.
>
> (b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

Federal Rule of Criminal Procedure 52 provides:

> Rule 52. Harmless and Plain Error
>
> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

A. Facts and Proceedings Below

Petitioner Jesus Alonzo Gonzalez-Gonzalez pleaded guilty to possessing a firearm as an alien illegally present in the United States. (Record in the Court of Appeals, at pp. 19-20). A Presentence Report (PSR) determined that the defendant's advisory Guideline range was 37-46 months imprisonment. (Record in the Court of Appeals, at pp. 97).

The record reflects a motion for downward variance based on the defendant's mental and emotional impediments, his difficult early childhood, and connections to the United States. (Record in the Court of Appeals, at pp. 74-76). At sentencing, the following exchange occurred before the defendant was offered an opportunity to allocute:

> THE COURT: There being no objections to the fact findings in the presentence report, I adopt those findings as my own, and I'll now notify the parties of my tentative findings as to the disposition of the defendant's motion for downward variance.
> The defendant's motion should be denied.
> Does the government have any objection or evidence relating to that tentative finding?
> MR. LEWIS: No, Your Honor.
> THE COURT: Does the defendant?
> MR. LEHMANN: No, Your Honor.
> THE COURT: Then the defendant's motion for sentencing variance is finally denied.

(Record in the Court of Appeals, at pp. 73-74).

During the defendant's ultimate allocution, he asked for mercy, and sought to reassure the judge that he would not return, because he considered freedom in Mexico superior to incarceration in the United States. (Record in the Court of Appeals, at p. 78). The district court imposed a sentence of 42 months, the middle of the applicable Guideline range. (Record in the Court of Appeals, at p. 81).

B. The Appeal

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, contending that the district court's unequivocal "final" denial of his motion for downward variance before hearing from the defendant denied him the right to a meaningful allocution under Federal Rule of

Criminal Procedure 32. Specifically, he contended that the district court's statement effectively chose the final conclusion as to this aspect of the sentence, and accordingly should have followed rather than preceded a statement from the defendant. Announcing the intended sentence before the defendant's allocution, he noted, has been held in other circuits to deny meaningful allocution. *See United States v. Luepke*, 495 F.3d 443, 450 (7th Cir. 2007); *United States v. Landeros-Lopez*, 615 F.3d 1260, 1264-1268 (10th Cir. 2010). And because the Rule gave the defendant a right to speak on "any" matter before sentencing, defendants and their counsel may not be limited to discussion of where within the Guideline range a sentence should fall. *See United States v. Valtierra-Ortega*, 402 F. App'x 34, 36 (5th Cir. 2010)(unpublished); *United States v. Sarno*, 73 F.3d 1470, 1503 (9th Cir. 1995); *United States v. Mendoza-Lopez*, 669 F.3d 1148, 1152-1153 (10th Cir. 2012); *United States v. Maldonado-Zamora,* 325 Fed. Appx. 655, 656-657 (D.C. Cir. 2009).

The court of appeal summarily affirmed, finding that it was bound by precedent to conclude that "a district court does not commit plain error in ruling on a motion for a downward variance before giving the defendant the opportunity to allocute." [Appendix B, at p.2][citing *United States v. Pittsinger*, 874 F.3d 446, 451-54 (5th Cir. 2017)].

REASON FOR GRANTING THE PETITION

The circuits are divided on the proper standard of review for unpreserved allocution error.

Federal Rule of Criminal Procedure 32 requires that district courts provide the defendant and his or her counsel an opportunity to speak before sentencing. *See* Fed. R. Crim. P. 32(i)(4)(A). The defendant's personal right to allocution is deeply rooted in the American justice system, dating back to the English common law. *See Green v. United States*, 365 U.S. 301, 304 (1961)(plurality op.); *McGautha v. California*, 402 U.S. 183, 217 (1971) (allocution is a right of "immemorial origin"). The right serves an important role in securing both the reality and appearance of fairness, and serves important dignitary interests. *See United States v. Barnes*, 948 F.2d 325, 328 (7th Cir. 1991)("[a]side from its practical role in sentencing, the right has value in terms of maximizing the perceived equity of the process."). Multiple circuits have therefore concluded that this right is constitutionally guaranteed. *See Ashe v. North Carolina*, 586 F.2d 334 (4th Cir. 1978); *United States v. Huff*, 512 F.2d 66, 71 (5th Cir. 1975); *Boardman v. Estelle*, 957 F.2d 1523 (9th Cir. 1992); *United States v. Jackson*, 923 F.2d 1494, 1496 (11th Cir. 1991).[1] And unlike in other parts of the sentencing process, it is difficult – perhaps impossible – to estimate the impact it may have on the district court's choice of sentence. "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green*, 365 U.S. at 304.

The right is also deeply personal, in the sense that neither the defendant's silence nor the defendant's counsel can waive the right. The district court must "address the defendant personally and permit the defendant to speak," no matter what the attorney says or does not say. Fed. R. Crim. P. 32(i)(4)(A)(ii).

This absolute personal right often collides with a district court's desire to hasten the sentencing process. For example, the district court may announce a sentencing decision without first

[1] While the reasoning of these opinions remains valid, they no longer have much practical impact. Rule 32 provides relief for federal defendants, and the subsequently passed Antiterrorism and Effective Death Penalty Act forbids relief to state defendants absent a constitutional holding from this Court. *See* 28 U.S.C. §2254(d).

providing the defendant an opportunity to speak. This is recognized as a denial of the personal right of allocution. *See United States v. Luepke*, 495 F.3d 443, 450 (7th Cir. 2007); *United States v. Landeros-Lopez*, 615 F.3d 1260, 1264-1268 (10th Cir. 2010). But the circuits do not agree about how the defendant must respond to ensure plenary appellate review.

As a general matter, a party must *object* to any action of the court to preserve plenary review. Fed. R. Crim. P. 51(b). If he or she fails to preserve error, then it will be much harder to obtain relief on appeal. In the absence of objection, the defendant must show not only that the district court erred, but that the error is plain or obvious, that it affected his substantial rights, and that it seriously affected the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993); Fed. R. Crim. P. 52(b). Yet a different rule applies "[i]f a party does not have an opportunity to object to a ruling or order." Fed. R. Crim. P. 51(b). In that situation, "the absence of an objection does not . . . prejudice that party" on appeal. *Id.*

There are good reasons to doubt that a defendant denied allocution has a meaningful opportunity to object within the meaning of Rule 51. A defendant is simply not likely to object once the district court announces that its mind is made up – any allocution given the defendant will seem useless. *See United States v. Wolfe*, 71 F.3d 611, 614 (6th Cir. 1995)(so reasoning). Indeed, a premature ruling will tend affirmatively to deter objections – the defense may legitimately fear that objection to the denial of allocution will antagonize the judge. *See Luepke*, 495 F.3d at 450 (defendant may "quite reasonabl[y] ... conclude that a manifestation of any disagreement with the court at that juncture would be interpreted as disrespectful and warranting additional sanctions..."). And even if an objection is made and sustained, the value of allocution has already been diminished. A district court's indication that its mind is made up as to the sentence tends to instill timidity, and to render the defendant less persuasive. *See United States v. Li*, 115 F.3d 125, 134 (2d Cir. 1997); *United States v. Sarno*, 73 F.3d 1470, 1503 (9th Cir. 1995). A defendant has " little incentive to share his thoughts on the matter of a sentence that he had every reason to believe had already been decided." *Luepke*, 495 F.3d at 450. Accordingly, it is doubtful that a defendant such as Petitioner has

any but the most formal opportunity to object in a case where the sentence has already been imposed, in part or in whole, before allocution is offered.

A. The circuits are divided.

In light of these competing concerns – the need to preserve error, and the need for a meaningful opportunity to object – the lower courts are hopelessly divided over the proper standard of review to apply to allocution errors. At least three – and possibly four – circuits apply plenary review to allocution errors, even when there was no objection below. In *United States v. Wolfe*, 71 F.3d 611 (6th Cir. 1995), the Sixth Circuit considered the standard of review for allocution error, and declined to apply a preservation requirement. *See Wolfe*, 71 F.3d at 614. Once the district court proceeds to sentencing without first hearing from the defendant, the court recognized, the illusion that the personal statement could have an effect is shattered: "a defendant would probably not raise an allocution issue at sentencing before the district court, because if he did the district court is likely simply to offer the defendant and his counsel the opportunity to allocute or re-allocute." *Id*. (citing *United States v. Taylor*, 11 F.3d 149 (11th Cir. 1994)).

Similarly, the Ninth Circuit has repeatedly reviewed unpreserved allocution error for harmlessness, rather than under the plain error standard. *See United States v. Carper*, 24 F.3d 1157, 1162 (9th Cir. 1994)("We review the district court's failure to afford appellant his right of allocution for harmless error."); *United States v. Gunning*, 401 F.3d 1145, 1148 & n.6 (9th Cir. 2005). Its opinion in *United States v. Sarno*, 73 F.3d 1470 (9th Cir. 1995), illustrates part of the rationale. In that case, the district court told the defense not to speak unless spoken to, and then limited argument to the appropriate sentence within the Guideline range. *See Sarno*, 73 F.3d at 1503-1504. Although the defense did not object to the limitation, the Ninth Circuit reversed on *de novo* review, because to do otherwise would "countenance such court-inspired reticence" of the defendant to speak on its own behalf. *Id.* The reasoning and result of the Ninth Circuit is thus consistent with Rule 51, which dispenses with the preservation requirement when the defendant is deprived of an opportunity to object and obtain relief in the district court.

The Eighth Circuit agrees with this position. That court also applies *de novo* review to the defendant's allocution claim in a resentencing, even in the apparent absence of a defense objection. *See United States v. Walker*, 896 F.2d 295, 301 (8th Cir. 1990); *United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997). The Eleventh Circuit has applied both plenary and plain error review to these claims. ***Compare*** *Taylor*, 11 F.3d at 151 (applying harmless error) ***with*** *United States v. Prouty*, 303 F.3d 1249, 1251-1252 (11th Cir. 2002) (applying plain error, but summarily finding the error plain, before applying a relaxed substantial rights standard). Accordingly, three, and possibly four, circuits recognize either explicitly or implicitly that the defendant has little practical opportunity to object to allocution error.

The Second, Third, Fourth, Fifth, and Seventh Circuits, however, apply the plain error doctrine to allocution claims. *See United States v. Valentin*, 469 Fed. Appx. 48, 50 (2d Cir. 2012)(unpublished); *United States v. Adams*, 252 F.3d 276, 287 (3d Cir. 2001); *United States v. Muhammad*, 478 F.3d 247, 251 (4th Cir. 2007); *Luepke*, 495 F.3d at 450, and *United States v. Reyna*, 358 F.3d 344, 351-352 (5th Cir. 2004)(*en banc*). Most of these courts require that the defendant show clear or obvious error to obtain reversal, but presume prejudice once clear error has been shown. *See Luepke*, 495 F.3d at 451; *Reyna*, 358 F.3d at 351-52; *Adams*, 252 F.3d at 287. The Fourth Circuit fully applies the plain error standard to unpreserved claims of allocution error. *See Muhammad*, 478 F.3d at 251. Even the Fourth Circuit, however, finds an effect on "substantial rights" upon showing "a possibility" of a lesser sentence. *See United States v. Cole*, 27 F.3d 996, 999 (4th Cir. 1994). Any plausible ground that could have motivated leniency will satisfy this test, even if the defendant did not actually argue it on appeal. *See Cole*, 27 F.3d at 999.

The circuits apply directly opposite standards of review for the same class of cases. This Court's Rule 10 counsels in favor of *certiorari*.

B. The circuit split merits this Court's review.

This circuit split has been repeatedly acknowledged in judicial opinions. *See Landeros-Lopez*, 615 F.3d at1264 ("Our sibling circuits have reached conflicting conclusions regarding whether Rule

52(b) applies in the allocution context."); *Luepke*, 495 F.3d at 446 ("There is disagreement among the circuits about the proper standard of review for claims regarding the denial of the right to allocution when no contemporaneous objection is made at the sentencing hearing."). And it is not likely to resolve spontaneously. By counsels's count, at least three different circuits have taken a position on either side. Given the widespread and balanced nature of this dispute, it is thus unlikely that all circuits will eventually reach the same conclusion.

The issue is also substantively important. As noted, the right of allocution is ancient, fundamental, and possibly constitutional. *See Green*, 365 U.S. at 304; *McGautha*, 402 U.S. at 217. It impresses on sentencing courts the humanity of the defendant, *see Green*, 365 U.S. at 304, allows defendants to emphasize points their counsel may have overlooked, and promotes a perception of fairness in federal sentencing proceedings, *see Barnes*, 948 F.2d at 328.

Yet the position of the court below denies relief in all but the clearest cases of error. Due to the nature of the error, and the likelihood that the error itself actually deters objection, it will rarely be the case that the defendant has a realistic opportunity to object. As the Seventh Circuit noted in *Luepke*, and as has been echoed in the Second and Ninth Circuits, a defendant has little reason to object to the denial of allocution. *See Luepke*, 495 F.3d at 450; *Li*, 115 F.3d at 134; *Sarno*, 73 F.3d at 1503. The denial of allocution suggests that the judge's mind is made up, and hence that an objection is futile. *See Luepke*, 495 F.3d at 450. And even if an objection were lodged and sustained, there would be little a district court could do to correct its error. A defendant – already in the terrifying position of begging for his or her own liberty – is likely to be deeply discouraged by a district court's suggestion that the sentence has already been decided. *See Li*, 115 F.3d at 134; *Sarno*, 73 F.3d at 1503. He or she is therefore unlikely to speak persuasively. Certainly, an opportunity to speak after the sentence has been decided will not promote the perception of a fair sentencing. It will instead suggest that process does not matter, and that the court is merely going through the motions. As the Seventh Circuit put it, "the rule did not intend to place on the defendant the burden of changing the judge's mind after the judge had reached a firm decision." *Luepke*, 495 F.3d at 447.

The position of the Sixth, Eighth, Ninth and Eleventh Circuits – which do not require objection to obtain *de novo* review of allocution errors – honors the fundamental importance of this right, and takes appropriate account of the practical realities of the courtroom. Their position is textually defensible, and does not require a special exception to the plain error doctrine. *See Puckett v. United States*, 556 U.S. 129, 135 (2009)(forbidding such exceptions). Rather, to rule in favor of Petitioner, this Court need only hold that allocution error denies an opportunity to object under Federal Rule of Criminal Procedure 51(b). This does not carve out a special exception to the text of Rule 52. Instead, it merely applies the text of Rule 51(b) to a class of cases that clearly implicate its concerns.

Notably, the position of the opposing circuits is ***not*** textually defensible. Even the circuits that apply the plain error standard depart from the text of Rule 52 by dispensing with or relaxing the "substantial rights" showing. *See Luepke*, 495 F.3d at 451; *Reyna*, 358 F.3d at 351-52; *Adams*, 252 F.3d at 287; C*ole*, 27 F.3d at 999. This position – understandable given the difficulty of showing prejudice when allocution is denied, but unnecessary in light of Rule 51(b) – is not founded any literal reading of the Rule. Those courts intuitively recognize that denial of a personal right of allocution is not like other types of error. But that difference can be fully accommodated by applying Rule 51(b), rather than tinkering with the operation of Rule 52(b). Accordingly, the approach of the Sixth, Eighth, and Ninth Circuits avoids the fissures in plain-error jurisprudence opened by the opposing bloc.

C. The instant case is an ideal vehicle to resolve the conflict.

The standard of review for unpreserved allocution error is presented here in an unusually straightforward way. Here, the court of appeals decided the case solely based on its plain error precedent, giving no indication that it would have reached the same conclusion on plenary review. *See* [Appx. A, at 2].

A review of the merits confirms that the standard of review was likely dispositive. Given a plenary standard of review, there is good reason to believe that Petitioner would prevail. The district

court stated in clear and direct terms that the motion for downward variance was "finally" denied. *See* Record in the Court of Appeals, at pp.73-74. While the outcome is perhaps defensible on plain error review, the literal meaning of the language used manifested a firm commitment to a Guideline sentence.

During allocution, the district court may not forbid a request for a downward departure or variance. *See United States v. Valtierra-Ortega*, 402 F. App'x 34, 36 (5th Cir. 2010)(unpublished)(holding that the right of allocution is not "meaningful" if the defense is "not permitted to make a general mitigation argument or one for downward departure."); *Sarno*, 73 F.3d at 1503-04 (holding that the defendant's right of allocution was denied when the court invited him to speak, but only as to "what would be the appropriate sentence within the Guidelines range."); *United States v. Mendoza-Lopez*, 669 F.3d 1148, 1152-1153 (10th Cir. 2012)("The district court did plainly err, however, by inviting Mendoza-Lopez to address only 'where within [the Guidelines] range this Court should sentence.'"); *United States v. Maldonado-Zamora,* 325 Fed. Appx. 655, 656-657 (D.C. Cir. 2009)(finding that the district court deprived the defense a right to be heard by saying that local rule forbade argument for downward departure). Nor does a district court comply with Rule 32 by offering the defendant a chance to speak after the sentence has been announced. *See Luepke*, 495 F.3d at 450; *Landeros-Lopez*, 615 F.3dat 1264-1268. It follows from these propositions that a district court may not formally decide to impose sentence within the Guidelines before hearing from the defendant.

Finally, the government cannot show that any error is harmless under plenary review. Invoking Rule 51(b)'s exception to the preservation requirement will shift the burden of persuasion on prejudice to the Government. *See Olano*, 507 U.S. at 734 (preservation shifts burden to proponent of sentence to show that an error did not affect substantial rights). The government cannot meet this burden. It is precisely the point of *Green* that the impact of a defendant's allocution on the district court – what he or she will say, how he or she will say it, and the impact of the defendant's vocalized humanity – cannot be known. *See Green*, 365 U.S. at 304.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. He prays that it then remand to the court of appeals with instructions to vacate the judgment and remand to the district court. Alternatively, he prays that this Court determine the proper standard of review, and remand to the court of appeals. Finally, he prays for such relief as to which he may be lawfully entitled.

Respectfully submitted this 8th day of July, 2019.

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