No. 19-5949

IN THE SUPREME COURT OF THE UNITED STATES

MARCELINO MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has shown, under plain-error review, that an assumed violation of the prohibition on judicial participation in plea negotiations affected his substantial rights.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Martinez, No. 17-cr-53 (Oct. 3, 2017)

United States Court of Appeals (5th Cir.):

United States v. Martinez, No. 17-50889 (June 14, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is not published in the Federal Reporter, but is reprinted at 777 Fed. Appx. 709, and is available at 2019 WL 2494529.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2019. The petition for a writ of certiorari was filed on September 10, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of conspiracy to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C) and 846. Pet. App. B1. The court sentenced petitioner to 240 months of imprisonment, to be followed by five years of supervised release. Id. at B2-B3. The court of appeals affirmed. Id. at A1-A10.

1. From 2014 to 2017, petitioner headed a drug-trafficking organization that distributed methamphetamine in Texas. See Pet. App A4; 8/16/17 Presentence Investigation Report (PSR) ¶ 12. Petitioner directed his accomplices to pick up methamphetamine from suppliers in Katy and Houston, store the drugs near Austin, and then distribute those drugs to dealers in Central Texas. Ibid. Petitioner also coordinated the drug-trafficking organization's financial transactions, receiving proceeds from the sales of the drugs and using some of those proceeds to pay the organization's suppliers. Pet. App. A4; C.A. ROA 151-152.

In February 2017, a grand jury indicted petitioner and six others on one count of conspiracy to possess with intent to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A), and 846, and five counts of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a) and (b)(1)(C). Indictment 1-4. The district court entered a scheduling order, which included a statement that

the court would not honor any "plea agreement entered into after" April 28, 2017 "without good cause shown for the delay." D. Ct. Doc. 95, at 4 (Mar. 14, 2017). That order was known as an "Ellis order," after a case in which the Fifth Circuit had held that the district court's authority "to control the scheduling of trial procedures in ongoing prosecutions" included the discretion to set a deadline for entering into plea agreements. United States v. Ellis, 547 F.2d 863, 868 (5th Cir. 1977).

2. On April 19, 2017, slightly more than a week before the plea-agreement deadline, petitioner agreed in writing to plead guilty to the conspiracy count in exchange for dismissal of the remaining five counts. C.A. ROA 142-149. The parties entered into an the agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), meaning that if the district court accepted the agreement, it would be bound to impose the sentence -- 151 months of imprisonment -- specified in the agreement. C.A. ROA 143; see Hughes v. United States, 138 S. Ct. 1765, 1773 (2018) (explaining "Type-C" agreements).

Approximately a week after signing the agreement, however, petitioner advised the government -- which in turn alerted the district court -- that petitioner sought to proceed to trial. C.A. ROA 76-78. On April 28, 2017, as the court prepared to conclude a previously scheduled status conference, the court stated to petitioner's counsel: "The Ellis order runs out at 5:00 today, and I'm sure you have explained to [petitioner] the significance

of that order. So after today, if there's a trial, there will be no advantage one way or the other." 4/28/2017 Docket Call Tr. 2. As the conference was ending, petitioner interjected, asking the court about the "Ellis deal or something." Id. at 3. The court responded:

> Your lawyer will explain to you what the Ellis order is. You have a certain amount of time to negotiate a plea with the government, if you wish to. If you do not get an agreement, then you go to trial. But there are consequences for that that the law has placed here. Usually it is a three-level increase if you go to trial and are found guilty under the guideline system. It's not always. It depends on the evidence one way or the other.
>
> But you've had two seasoned criminal lawyers who are in this courtroom and the other federal courtrooms all the time.

Id. at 3-4. The court also told petitioner:

> The bottom line is * * * you've got a couple of hours today to decide if you wish to plead or not. And if you stay and want a trial, which is your constitutional right, there's no problem. I've just gotta set it. I just have lots and lots of trials. I've got criminal trials set all the way through this year into next year. Many of them are large. Most of them won't go to trial, but I don't know which ones will and which ones won't, so I have to arrange for the ability to try the case. And that's where you are.
>
> It doesn't look very good when [five other co-defendants] have already entered pleas because that makes all of them witnesses, if they wish to testify or the government wish for them to testify. But that's just a factor that you could talk intimately * * * with your lawyer. But go ahead and talk to him and talk to him about the Ellis order. And just like the gentlemen beforehand, if he enters a plea before 5:00 where I can cut the jury numbers down, then he's still within the Ellis order. But after today, he's not.

Id. at 5-6.

3. Later that day, petitioner entered into a new plea agreement that was materially identical to his first agreement.

Pet. App. A5 n.5; C.A. ROA 150-157. In the afternoon, a magistrate judge conducted a plea colloquy with petitioner, explaining that the district court could accept or reject the agreement. 4/28/2017 Plea Tr. 11-12. The magistrate judge further explained that, if the court accepted the plea agreement, the "downside" was that petitioner would receive a sentence of 151 months, but the "[u]pside" was a guaranteed sentence of that length, where "the maximum sentence [was] life." Id. at 12. The magistrate judge clarified that, if the court rejected the plea agreement, the agreement would not "be counted against" petitioner, and that he would return to the same position he had occupied before pleading. Ibid. Petitioner stated that this explanation had "pretty much made it clear" and proceeded with his guilty plea. Id. at 13. The magistrate judge found the plea to be "freely, voluntarily, and intelligently made." Id. at 25.

The district court accepted the plea but reserved acceptance of the plea agreement until sentencing. Pet. App. A5. At the sentencing hearing, the court rejected the agreement. Ibid. The court explained that the presentence report prepared by the Probation Office attributed more than 100 kilograms of methamphetamine to petitioner, a quantity that would have yielded an advisory Sentencing Guidelines range of 360 months to life -- more than the 151-month sentence set out in the agreement. 7/14/2017 Sent. Tr. 3-4. The government responded that it had agreed to a sentence corresponding to a lower drug quantity because

it lacked confidence that it could prove the higher quantity that the presentence report attributed to petitioner. Id. at 5-6. The court nevertheless declined to accept the agreement, reiterating its concern about the "disparity" between the agreed-upon sentence and the range recommended in the presentence report. Id. at 6-8.

Later that month, the government filed a superseding information charging petitioner with a single count of conspiracy to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C) and 846. Pet. App. A6. By omitting the drug quantity, the superseding information lowered the statutory maximum sentence from life to 20 years of imprisonment. Ibid. Petitioner pleaded guilty to the superseding information without a plea agreement. Ibid. The district court sentenced petitioner to 240 months of imprisonment, to be followed by five years of supervised release. Ibid.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A10. The court rejected petitioner's argument -- raised for the first time on appeal -- that the district court's comments at the April 28, 2017 docket call violated Federal Rule of Criminal Procedure 11(c)(1), which provides that the government and defense counsel "may discuss and reach a plea agreement" and that "[t]he court must not participate in these discussions." The court observed that, because petitioner did not raise that argument in the district court, he had to establish "plain error" -- that is, an error that is clear or obvious, that affected his

substantial rights, and that so seriously affected "'the fairness, integrity or public reputation of judicial proceedings'" that it warranted an exercise of the court's discretion to correct forfeited errors. Pet. App. A6 (citation omitted). The court noted the government's concession "that the district court's statement that it did not 'look very good' for [petitioner] may have been a technical violation of Rule 11(c)(1)." Id. at A7 (emphasis omitted). The court of appeals did not, however, decide whether that or any other statement at the April 28, 2017 docket call violated Rule 11(c)(1). The court instead determined that, even if the district judge committed "clear and obvious" error by "opining on the likelihood of success at trial," petitioner "ha[d] not shown an adverse effect on his substantial rights." Id. at A8.

In making that determination, the court of appeals explained that a defendant claiming that an error under Rule 11 affected his substantial rights "must show a reasonable probability that, but for the error[,] he would not have entered the plea." Pet. App. A8 (citation omitted). The court further explained that, when the claimed error is a violation of Rule 11(c)(1), "a close temporal proximity between the timing of the plea and the district court's participation can support a finding of prejudice." Ibid. But the court stated that, although "[t]he primary focus of the prejudice analysis must be the period between the district court's participation and the defendant's guilty plea[]," its review must

also be "informed by the entire record." Ibid. Reviewing the entire record, the court found that "temporal proximity is not dispositive here." Ibid. (brackets and citation omitted). The court identified two other factors that, "taken together," "likely influenced" petitioner's decision to plead guilty: (1) "the benefit" petitioner obtained from securing a 151-month sentence on a charge that carried a maximum of life imprisonment and (2) "the imminent expiration of the Ellis order deadline," which the district court had explained to petitioner at the docket call that preceded his guilty plea. Id. at A8-A9. In light of those factors, the court determined that petitioner "ha[d] not shown a reasonable probability that but for the district court's statements on the docket call he would not have entered the plea." Id. at A9.

The court of appeals also separately rejected petitioner's argument that the district court's statements at the hearing in which it declined to accept the first plea agreement required invalidation of his second plea under Rule 11(a)(1). Pet. App. A9-A10.

ARGUMENT

Petitioner renews his contention (Pet. 7-12) that the district court's statements at the hearing preceding his guilty plea constitute plain error. The court of appeals correctly determined that petitioner's claim fails the third prong of the plain-error test, and its factbound, unpublished decision does not conflict with any decision of this Court or another court of

appeals. This case also would be an unsuitable vehicle for considering petitioner's contention concerning the third prong of the plain-error test, because petitioner's claim would in any event fail under the fourth prong. Further review is unwarranted.

1. The court of appeals correctly rejected petitioner's contention that the district court's statements at the April 28, 2017 docket call preceding his entry of a guilty plea required vacatur of that plea based on Federal Rule of Criminal Procedure 11(c)(1), which provides that "[t]he court must not participate in [plea] discussions." Because petitioner failed to object to those statements in the district court, the court of appeals properly reviewed that objection only for plain error. See Fed. R. Crim. P. 52(b); Pet. App. A6. Petitioner has not shown plain error here.

To establish plain error, a defendant must demonstrate that (1) the district court committed an "error"; (2) the error was "clear" or "obvious"; (3) the error affected his "substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993) (citations omitted). In United States v. Davila, 569 U.S. 597 (2013), this Court held that the standard applies to claimed violations of Rule 11(c)(1)'s prohibition on judicial participation in plea discussions just as it does to other forfeited claims. Id. at 608-612. In particular, the court explained that the third requirement of the plain-error test, to show an effect on substantial rights, applies equally to

all violations of Rule 11. Id. at 612. To satisfy that requirement, a defendant must show that "it was reasonably probable that, but for the" statements that violated the Rule, he "would have exercised his right to go to trial." Ibid. The Court stressed that "particular facts and circumstances matter" in answering that question, and explained that the judicial statements at issue "should be assessed, not in isolation, but in light of the full record." Id. at 611-612. The Court also stated that the reviewing court must "consider all that transpired in the trial court in order to assess the impact of the error on the defendant's decision to plead guilty." Id. at 608.

The court of appeals correctly applied that legal standard to the facts of this case. See Pet. App. A8-A9. Having assumed that the district court's comments at the docket call constituted an obvious error, the court of appeals turned to the requirement to show an effect on substantial rights. Id. at A8. The court recognized, as had this Court in Davila, that "a close temporal proximity between the timing of the plea and the district court's participation can support a finding of prejudice." Id. at A8 & n.25 (citing Davila, 569 U.S. at 611). But the court explained, consistent with Davis, that although "[t]he primary focus of the [substantial rights] analysis must be the period between the district court's participation" and the guilty plea, the court's review also had to be "informed by the entire record." Id. at A8 (brackets and citation omitted).

The court of appeals then identified case-specific factors that undercut any inference that the allegedly improper judicial statements caused petitioner's guilty plea. Pet. App. A8-A9. The court emphasized "[t]he benefit" petitioner obtained from securing a 151-month sentence on a charge that carried a maximum of life imprisonment. Id. at A9. The court also observed that petitioner entered his plea shortly after the district court had clarified the significance of the plea-agreement deadline -- which petitioner does not allege to have been improper -- that was due to expire later that day. Id. at A8-A9. The court of appeals correctly determined that this "imminent" deadline, "taken together" with the "favorable" terms of a plea agreement that petitioner decided to sign for a second time, reduced the probability that petitioner's decision was attributable to any prohibited judicial comments. Id. at A9.

2. Contrary to petitioner's contention (Pet. 7-12), the court of appeals' analysis fully accords with this Court's decision in Davila. Petitioner asserts that this Court suggested in Davila that the temporal proximity between a court's statements and the defendant's plea could show that the statements were prejudicial, and that the government acknowledged in that case that a "serious" Rule 11(c)(1) violation, followed immediately by the plea, "'would likely qualify as prejudicial.'" Pet. 7-8 (citation omitted). Davila, however, did not establish a categorical rule that temporal proximity between a Rule 11(c)(1) violation and a defendant's

guilty plea automatically establishes an effect on substantial rights. Indeed, such a holding would have been inconsistent with the Court's rejection of per se rules of prejudice in the Rule 11 context, its "essential point * * * that particular facts and circumstances matter," and its emphasis on the need to evaluate any erroneous judicial comments "in light of the full record." Davila, 569 U.S. at 611-612; see id. at 608, 611. As explained above, the court of appeals here properly conducted such a "full-record assessment," id. at 612, recognizing the significance of "temporal proximity" but also considering the presence of other case-specific factors relevant to the prejudice analysis. Pet. App. A8-A9.

Petitioner likewise errs in arguing (Pet. 9-10) that the court of appeals' decision conflicts with this Court's decision in United States v. Dominguez Benitez, 542 U.S. 74 (2004). Petitioner contends (Pet. 9-10) that the court of appeals' statement that factors other than the district court's challenged comments "likely influenced" petitioner's plea decision, Pet. App. A9 (emphasis added), conflicts with this Court's statement in Dominguez Benitez that a reasonable—probability showing does not require "a defendant [to] prove by a preponderance of the evidence that but for [the] error things would have been different." 542 U.S. at 83 n.9. The Court in Dominguez Benitez itself, however, explained that the reasonable-probability standard it adopted was "similar to one already applied by some Courts of Appeals,"

including courts that asked how a Rule 11 violation "'likely affected'" or was "'likely to affect'" a defendant's willingness to plead guilty. Id. at 82 n.8 (citations omitted). Accordingly, nothing in the court of appeals' use of the word "likely" suggests that it deviated in substance from the standard set forth in this Court's precedents -- especially given that the court of appeals cited Dominguez Benitez and quoted the "reasonable probability" standard. Pet. App. A8 & n.23.

3. Petitioner errs in contending (Pet. 8, 12) that this Court's review is warranted because some courts of appeals "are not according adequate weight to close temporal proximity as a factor" in assessing the prejudicial effect of a Rule 11(c)(1) error and "are thus reaching divergent outcomes on cases presenting similar facts." Since Davila, every court of appeals assessing whether a violation of Rule 11(c)(1) affected a defendant's substantial rights, including the court below, has recognized that "[t]he temporal proximity between a court's improper participation in plea negotiations and a plea hearing is a circumstance that may support a finding of prejudice." United States v. Thompson, 770 F.3d 689, 697 (8th Cir. 2014); see Pet. App. A8 (same); United States v. Ushery, 785 F.3d 210, 221-222 (6th Cir.), cert. denied, 136 S. Ct. 375 (2015); United States v. Harrell, 751 F.3d 1235, 1241 (11th Cir. 2014). The courts in the cases that petitioner cites have simply concluded that case-specific factors other than temporal proximity reduced or eliminated any probability that the

defendants would have gone to trial absent the judicial remarks claimed (or found) to violate Rule 11(c)(1). See Ushery, 785 F.3d at 221-222; Thompson, 770 F.3d at 697-698; United States v. Castro, 736 F.3d 1308, 1314-1315 (11th Cir. 2013) (per curiam), cert. denied, 571 U.S. 1221 (2014). Those decisions are thus fully consistent with both the Court's recognition that temporal proximity can be a significant factor in determining prejudice, see Davila, 569 U.S. at 611, and the "full-record assessment" prescribed in Davila, id. at 612.

Contrary to petitioner's suggestion (Pet. 8-9, 12), the analysis in the above cases is also consistent with the decisions he cites from the Fourth Circuit. In United States v. Sanya, 774 F.3d 812 (2014), the Fourth Circuit concluded that the defendant established an effect on his substantial rights based in part on the "close temporal proximity" between the judicial comments that violated Rule 11(c)(1) and his entry into a plea agreement. Id. at 818. But the court stressed that its conclusion turned on "the particular facts and circumstances [of that] case," id. at 819, and that those circumstances included the defendant's "demonstrated * * * desire to go to trial" on the relevant charges, id. at 817 n.3 -- which the court identified as one of the facts that distinguished Sanya's case "in important respects" from decisions such as Thompson and Castro, supra. Sanya, 774 F.3d at 820. And although the Fourth Circuit later stated that it based a finding of prejudice "largely [on] the timing of [the

defendant's] decision to plead guilty," United States v. Braxton, 784 F.3d 240, 244 (2015), the court again did so in a case involving a defendant who had long "insisted on exercising his right to go to trial," id. at 240, even in the face of a potentially substantial mandatory minimum sentence. See id. at 244. Nothing in the Fourth Circuit's decisions, in short, indicates that the Fourth Circuit categorically attaches more weight to temporal proximity than other courts of appeals or that it would reach a different result than the court below given "the particular facts and circumstances in this case." Sanya, 774 F.3d at 819.

Petitioner also notes (Pet. 12) that the Fourth Circuit in Sanya criticized the Eleventh Circuit's articulation of the burden a defendant claiming a Rule 11(c)(1) violation bears in showing an effect on substantial rights. See 774 F.3d at 819-820. But this case does not implicate any disagreement over the precise articulation of that burden because the court of appeals in this case did not employ the formulation from the Eleventh Circuit that Sanya criticizes. As explained above, see p. 13, supra, the court instead accurately recited and applied the reasonable-probability standard as it was stated in Dominguez Benitez, 542 U.S. at 83.

4. In any event, this case would be an unsuitable vehicle for reviewing the court of appeals' application of the substantial-rights prong of the plain-error test, because petitioner would not be entitled to relief under the fourth prong. Under that prong, "the court of appeals should exercise its discretion to correct

the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." Rosales-Mireles v. United States, 138 S. Ct. 1897, 1905 (2018) (citation omitted). The inquiry "is meant to be applied on a case-specific and fact-intensive basis," Puckett v. United States, 556 U.S. 129, 142 (2009), and petitioner bears the burden of persuading a reviewing court that the facts of his case satisfy that standard, Rosales-Mireles, 138 S. Ct. at 1909 n.4.

Petitioner cannot meet that burden on the unique facts of his case. Unlike most defendants who assert that their guilty plea was attributable to a Rule 11(c)(1) violation, petitioner was not convicted or sentenced pursuant to the plea agreement that followed the claimed Rule 11(c)(1) violation. As explained above, the district court rejected the plea agreement that followed the court's remarks at the docket call, and it declined to impose the 151-month sentence to which petitioner had agreed. Pet. App. A5. That ruling gave petitioner another opportunity to "exercise[] his right to go to trial," Davila, 569 U.S. 612, but petitioner instead elected to plead guilty to a superseding information. Pet. App. A6. Although petitioner ultimately received a sentence higher than the one offered in the plea agreement, that result was traceable not to his initial guilty plea following the docket call, but to his considered decision to plead guilty to a different charging instrument after the district court had rejected the plea agreement (and after petitioner had seen the advisory sentencing

range calculated in the presentence report). Given the attenuated connection between the Rule 11(c)(1) violation petitioner asserts here and the sentence ultimately imposed, any error did not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." See Rosales-Mireles, 138 S. Ct. at 1905 (citation omitted). And because petitioner would therefore not be entitled to relief even if he satisfied the third prong of the plain-error test, this case would not be an appropriate vehicle for reviewing the court of appeals' application of that prong.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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