No. --

IN THE

SUPREME COURT OF THE UNITED STATES

JOSUE EMMANUEL MARTINEZ,

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 is subject to plain error review in the absence of objection?

PARTIES

Jose Emmanuel Martinez 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, Josue Emmanuel Martinez, 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 published opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Martinez,* 775 Fed. Appx. 778 (5th Cir. August 23, 2019), and is provided in the Appendix to the Petition. [Appx. A]. The judgment of conviction and sentence was entered September 26, 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 August 23, 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 Josue Emmanuel Martinez pleaded guilty to one count of possessing a firearm af-ter having sustained a felony conviction, one count of drug trafficking, and one count of possessing a firearm in connection with drug trafficking. He received an aggregate sentence of 144 months, run concurrently to certain pending state cases, and consecutive to any sentence the court would impose in a pending federal revocation. After the hearing, the same court imposed a 15 month sentence of imprisonment in the revocation proceeding, run consecutively to the instant sentence.

B. The Appeal

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, contending that the district court erred in ordering the sentence served consecutively to a revocation sentence it had not yet imposed. In support of the claim, he relied on Fifth Circuit precedent holding that a district court may not run a federal sentence consecutive to an anticipated federal sentence before another court. *See United States v. Estrada-Martinez*, 740 Fed. Appx. 85, 86 (5th Cir. October 17, 2018)(unpublished); *United States v. Quintana-Gomez*, 521 F.3d 495, 498 (5th Cir. 2008); *United States v. Nava*, 762 F.3d 451, 452 (5th Cir. 2014).

But he also relied on the defendant's procedural rights in a revocation hearing, arguing that "[w]hen a judge orders a sentence served consecutively to a sentence he or she has not yet imposed, the judge effectively binds himself or herself to a particular out-come on the concurrent/consecutive question in the second case before the sentencing hearing has occurred," and that such predetermination is "plainly contrary to the expectation of Federal Rule of Criminal Procedure 32.1(b)(2) and the due process clause [as construed in] *Morrissey v. Brewer*, 408 U.S. 471 (1971)." (Initial Brief, at pp.5-6). But more specifically, he relied on his right of allocution, contending that the court's pre-commitment to consecutive sentences rendered the right of allocution in the revocation hearing meaningless. He said, that the court's pre-commitment deprived him of "such important protections as the right to introduce evidence, question adverse witnesses, present

mitigation evidence, and allocution." (Initial Brief, at p.7)(citing Fed. Rule of Crim. Proc. 32.1(b)(2)).

The court of appeals affirmed. It first found that any error had to be reviewed under the plain error standard for want of an effective objection. [Appx. A]. It then held that Petitioner "cannot make the required showing under the plain-error standard of review." [Appx. A]. Specifically, it thought Fifth Circuit precedent could be distinguished to the extent that it addressed an anticipated federal sentence before another judge. [Appx. A]. And it thought that Petitioner could not meet his burden to show an effect on his substantial rights, because the court imposed the same consecutive sentence in the revocation proceeding. [Appx. A]. As such, it found that two prongs of plain error had not been satisfied. [Appx. A].

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 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.*

The lower courts are 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*.

The present case is an appropriate vehicle to address this division of authority. The predetermination of the concurrent/consecutive aspect of the sentence directly implicates the defendant's right to a meaningful allocution in the revocation hearing. *See* [Appx. A]. But the court below did not determine whether he would be entitled to relief on plenary review. *See* [Appx. A]. Rather, the court of appeals passed directly on the standard of review, set forth the requirements for plain error relief, and named the particular deficiencies under that standard. *See* [Appx. A]. The issue was directly addressed below, and formed the basis for its decision. The circuit split may be addressed in this case.

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 vacate the sentence and remand to the United States District Court for the Northern District of Texas, or order that the United States Court of Appeals do so. Alternatively, he prays that this Court determine the proper standard of review, and remand to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 21st day of November, 2019.

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