

IN THE SUPREME COURT OF THE UNITED STATES

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JOSUE EMMANUEL MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals erred in denying plain-error relief on petitioner's challenge to the district court's order that his sentence of imprisonment run consecutively to a term of imprisonment that it imposed later that day in a supervised-release revocation proceeding arising from the same conduct.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Martinez, No. 17-cr-545 (Sept. 26, 2018)

United States v. Martinez, No. 12-cr-27 (Sept. 26, 2018)

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

United States v. Martinez, No. 18-11274 (Aug. 23, 2019)

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No. 19-6747

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is reprinted at 775 Fed. Appx. 778.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2019. The petition for a writ of certiorari was filed on November 21, 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 Northern District of Texas, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Pet. App. B1; 17-cr-545 Presentence Investigation Report (PSR) ¶¶ 2, 5. Petitioner was sentenced to 144 months of imprisonment, to be followed by three years of supervised release. Pet. App. B2-B4. The court of appeals affirmed. Id. at A1-A3.

1. In 2012 -- several years before the offense at issue here -- petitioner pleaded guilty in the United States District Court for the Northern District of Texas to possessing a firearm as a felon. PSR ¶ 50. He was sentenced to 63 months of imprisonment, to be followed by two years of supervised release. 12-cr-27 Judgment 2 (July 5, 2012). Petitioner completed his prison sentence for that offense in April 2016 and then began his term of supervised release. PSR ¶ 50. Among other conditions of supervised release, petitioner was prohibited from possessing controlled substances, possessing a firearm, or committing another crime. 12-cr-27 Judgment 2 (July 5, 2012); see 18 U.S.C. 3583(d).

In 2017, officers in Carrollton, Texas, learned that petitioner was distributing heroin from his residence. PSR ¶ 8.

After a confidential informant purchased heroin from petitioner, officers obtained a search warrant for the residence. PSR ¶ 10. When they executed the warrant, they found 1.14 grams of heroin, \$6,999 in cash, five digital scales, six firearms, and 430 rounds of ammunition. PSR ¶¶ 12-14. A federal grand jury in the Northern District of Texas indicted petitioner for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). PSR ¶ 2. Petitioner pleaded guilty to all three charges. PSR ¶ 5.

The probation officer in petitioner's 2012 case then filed a report notifying the court that petitioner had violated the conditions of his supervised release. See Gov't C.A. Br. 2. On petitioner's unopposed motion, the 2012 case was reassigned to the district judge presiding over petitioner's 2017 case. 12-cr-27 D. Ct. Doc. 42 (Nov. 17, 2017); 12-cr-27 D. Ct. Doc. 52 (Nov. 27, 2017). The district court scheduled the sentencing hearing for the 2017 case and the revocation hearing for the 2012 case for the same date in September 2018. See Gov't C.A. Br. 2; 12-cr-27 Docket Entry No. 56 (May 14, 2018).

2. In advance of the hearing date, petitioner's counsel filed a motion in each case styled "Sentencing Notice and Request." 17-cr-545 D. Ct. Doc. 30 (Sept. 17, 2018) (Sentencing Request);

12-cr-27 D. Ct. Doc. 59 (Sept. 17, 2018). Petitioner asked the district court to order that he “serve the instant sentence[ in the 2017 case] concurrent to the sentence that this Court will impose based on the revocation of his term of supervised release related to [the 2012 case].” Sentencing Request 1.

At the sentencing in the 2017 case, which the district court conducted first, petitioner reiterated his request that the court “consider running this sentence concurrent to” any term of imprisonment imposed at the revocation proceeding later that day. 17-cr-545 Sent. Tr. 9 (Sent. Tr.); see id. at 18. Before imposing a sentence, the court informed petitioner that he had “the right to address [the court] personally at this time and present any information that” petitioner “would like in mitigation of [his] sentence.” Id. at 25. Petitioner took that opportunity to express regret for his actions. Ibid.

After hearing from the government and further from petitioner’s counsel, the district court imposed a sentence of 144 months of imprisonment, to be followed by three years of supervised release. Sent. Tr. 35-37. The court further ordered “that this sentence is to run consecutively to any sentence imposed in the revocation pending in case number 3:12-CR0027-L.” Id. at 37; see Pet. App. B2 (Judgment). Petitioner raised no objection to his sentence at that time.

Later that day, the district court held the revocation hearing in the 2012 case. The court revoked petitioner’s supervised

release and ordered him reimprisoned for 15 months. Pet. App. A2; see 18 U.S.C. 3583(e)(3). The court ordered that reimprisonment to be served consecutively to the sentence for the 2017 offense that the court had imposed earlier that day. Pet. App. A2; see 12-cr-27 Judgment 2 (Sept. 26, 2018).

3. On appeal, petitioner for the first time challenged his sentence in the 2017 case, contending that the district court had erred when it ordered the sentence to run consecutively to any term of imprisonment imposed at the subsequent revocation hearing. Pet. App. A2. Petitioner cited circuit precedents in which the court of appeals had held that a district court may not order a sentence to run consecutively to an anticipated sentence to be imposed by a different district court at a later time. See, e.g., United States v. Quintana-Gomez, 521 F.3d 495, 497 (5th Cir. 2008); Pet. C.A. Br. 4-6 (arguing that “district courts cannot order their sentences served consecutively to other federal sentences not yet imposed”). Petitioner acknowledged that his claim was subject to plain-error review in light of his failure to preserve it in the district court. See Pet. C.A. Br. 1 (stating that the issue presented for review was “[w]hether a district court plainly errs in ordering its sentence run consecutively to a federal sentence that the same judge expects to impose”).

The court of appeals affirmed under the plain-error standard. Pet. App. A1-A3. The court first distinguished this case from the circuit cases like Quintana-Gomez, supra, “because it involves two



sentences imposed by the same judge on the same day.” Pet. App. A3. “Even assuming, however, that the district court erred,” the court of appeals concluded that petitioner “cannot show that the error affected his substantial rights because immediately after the court imposed the 144-month sentence, it sentenced [petitioner] to 15 months on the revocation offense, and it ordered revocation to run consecutively to the already imposed sentence.” Ibid.

#### ARGUMENT

Petitioner contends (Pet. 5-8) that the court of appeals erred in reviewing his claim of sentencing error under the plain-error standard. Petitioner further contends (ibid.) that the decision below implicates a division of authority over the proper standard of review for forfeited claims of allocution error. Both contentions are mistaken. And in any event, resolving those issues in his favor would have no effect on the disposition of this case. The petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. ii, 5-8) that the court of appeals erred by applying the plain-error standard of review. But petitioner expressly stated below that plain error was the appropriate standard. See Pet. C.A. Br. 1 (stating that the issue presented for review was “[w]hether a district court plainly errs in ordering its sentence run consecutive to a federal sentence that the same judge expects to impose”); id. at 4 (contending that the “district court plainly erred in ordering its sentence run consecutive to a pending federal sentence”) (emphasis omitted).

The court of appeals recognized petitioner's position, see Pet. App. A2 ("[Petitioner] contends that the [district] court plainly erred in ordering his 144-month sentence to run consecutively to a pending revocation sentence."), and accordingly reviewed his claim "for plain error only," ibid.

Petitioner thus invited any error in the standard of review and cannot now claim that the court of appeals applied an incorrect one. At a minimum, this Court's "traditional rule" precludes certiorari where "'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). Petitioner provides no reason to depart from that rule to review the court of appeals' unpublished and nonprecedential decision here.

2. Petitioner also contends (Pet. 3, 8) that his right to allocution in the revocation hearing was violated by the district court's decision in this case. But that claim is also not properly before the Court.

Petitioner did not appeal in his 2012 revocation case; he appealed only in his 2017 case. See Pet. App. A2. And while his brief in that appeal included a passing reference to allocution at the revocation proceeding, see Pet. C.A. Br. 7, it did so only to contend that the district court's asserted error in the 2017 case affected his substantial rights and thereby constituted plain error, see id. at 4-5 ("[T]he district court imposed its sentence consecutively to a pending federal revocation. This was error.");

Fed. R. Crim. P. 52(b). The "allocution error" that petitioner now asks this Court to review (Pet. i) was accordingly itself "not pressed or passed upon below," Williams, 504 U.S. at 41 (citation omitted), and should not be reviewed by this Court.

3. Petitioner contends (Pet. 5-8) that the decision below implicates a division of authority over the proper standard of review for forfeited allocution errors. As explained above, however, the court of appeals was not asked to decide any question about an allocution error, and did not decide any such question, so its decision could not implicate any division of authority on that issue. In addition, petitioner does not cite any case reaching a contrary result in the circumstances at issue here -- a claim of allocution error for one proceeding based on a defendant's allocution rights in a subsequent proceeding.

4. Finally, this case is a particularly unsuitable vehicle for reviewing the question presented because resolution of the question in petitioner's favor would not affect the ultimate disposition. As the court of appeals explained, the district court not only required that petitioner's sentence in the 2017 case run consecutively to the term of imprisonment imposed in the revocation proceeding, but also required the term of imprisonment imposed in the revocation proceeding to run consecutively to petitioner's sentence in the 2017 case. See Pet. App. 3. Even if petitioner were to prevail on the question presented here, the district court's unchallenged order in the revocation proceeding would

still provide for consecutive sentences. The unavailability of any practical relief further counsels against review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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