

No. 20-5300

In the
Supreme Court of the United States

VICTOR SANTANA-GONZALEZ,

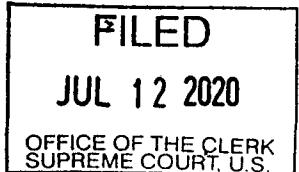
Petitioner,

vs.

ORIGINAL

UNITED STATES OF AMERICA,

Respondent.



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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does plain error apply to Federal Rule of Criminal Procedure Rule 32(i)(4)(a)(ii) when the error is caused by the sentencing court

**PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW**

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the First Circuit and the United States District Court for the District Court Puerto Rico.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

Victor Santana-Gonzalez, the Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit, whose judgment is herein sought to be reviewed, is unpublished *United States v. Santana-Gonzalez*, 18-1586 (1st Cir. April 15, 2020) is reprinted in the separate Appendix A to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on February 12, 2020. The Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1654(a) and 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

Federal Rules of Criminal Procedure 32(i)(4)(A)(ii) provides in relevant part:

(i) Sentencing.

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness’s statement, the court must not consider that witness’s testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court’s determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(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.

Id. Federal Rules of Criminal Procedure 32(i)(4)(A)(ii).

STATEMENT OF THE CASE

This case concerns two gangs from the public housing projects of San Juan, Puerto Rico - La ONU, and La Rompe ONU. La ONU was formed in 2003 to benefit all gangs by stopping violence between rival drug gangs and increasing the sale of illegal drugs. The peace between the gangs did not last long. A year to a year-and-a-half later, La ONU split into two groups: La ONU and La Rompe ONU. Though unwritten, the general rules members of La ONU had to follow, included, but were not limited to 1) no associating with La Rompe members; 2) kill La Rompe members on sight; 3) no killing of other members of La ONU without leadership authorization; 4) no-overtaking housing projects/drug points owned by another member of La ONU, and 5) no cooperating with law enforcement. Any violation of these rules resulted in punishment by death to the violator and/or his/her family members. The purposes of the enterprise included the following: enriching the members and associates of the enterprise through the distribution of narcotics; preserving and protecting the power, territory, and profits of the enterprise through the use of intimidation, violence, threats of violence, assault, and murder; Promoting and enhancing the enterprise and its members' and associates' activities and keeping individuals/victims in fear of the enterprise and fear of its members and associates through threats of violence and murder.

A. Criminal Charges

On March 20, 2012, Santana along with another thirty-two (32) codefendants was subject to a Thirty-Three Count Superseding Indictment rendered by a District of Puerto Rico Grand Jury. The Santana was charged in Counts 1-3, 13-16, and 29-30. Count One charged Santana and the other 32 defendants with conspiring from in or about 2004 through in or about March 2012, in violation of 18 U.S.C. § 1962(d), to conduct the affairs of ONU, alleged to constitute an “enterprise” as defined by id. § 1961(4), through a pattern of racketeering activity, contrary to id. § 1962(c) (“RICO”).

B. Change of Plea

On October 20, 2016, Santana plead guilty to Count One of the superseding indictment according to a plea agreement accorded under the provisions of Fed. R. Crim. P. 11(c)(1)(A) and (C). Santana acknowledged he understood the charges, that he reviewed the plea agreement and that he understood the terms of the plea agreement. The statutory maximum sentence was explained. Santana acknowledged that he was agreeing to “waive his right to appeal if you are sentenced under the terms and conditions outlined in the sentencing recommendation. Finally, Santana acknowledged he was waiving his right to a jury trial is right to testify in his defense, right to remain silent, and his right to compel witnesses to testify in his defense. The terms of the agreement called for the

following guideline computations: a base offense level of 43, according to USSG §§ 2E1.1(a)(2) and 2A1.1(c)(4); and a 3 level reduction for acceptance of responsibility. The parties agreed that Santana may recommend a sentence of no less than 216 months of imprisonment and the United States may recommend a sentence of up to 312 months of imprisonment. Any recommendation for a sentence below or above the stipulated sentencing range of 216 to 312 months of imprisonment constituted a material breach of this Plea Agreement.

C. Sentencing Hearing

On May 24, 2018, the Honorable Delgado-Colon, Aida M., held Santana's sentencing. At this stage, Santana was represented by new counsel, Ricardo Izurieta-Ortega. During the sentencing hearing, the court inquired from Santana (as required by Id. R. 32(i)(4)(A)(ii), whether he wished to address the court:

THE COURT: And do you understand that the information that appears within the report is correct or is there any clarification that you would like to make to the same?

THE DEFENDANT: I don't understand why the previous attorney didn't give any of my medical records supporting my condition.

THE COURT: Well, there's nothing from the prior -- nor from Mr. Izurieta either. I see the probation officer just stood.

(Discussion between the Court and the probation officer off the record.)

THE COURT: When you allude, Mr. Santana, to the medical record -- let me clarify this for you. This set of papers that you see here is the description -- is information or photocopies of what appears in your medical record, okay? So the probation officer has it. But what I've been making reference to, and actually this goes back as to -- let me check the last date that we have here. Documents from 2010. In addition, we have some others 2009. We have information here from -- let me get the date on this other document. 2009 as well. What I'm saying is that concerning the argument made by Mr. -- I'm returning this to the probation officer. Concerning the argument of shortened life expectancy, there is no evidence in support of that. No doctor has said Mr. Santana is expected to live five more years, ten more years because of his medical condition. What studies tend to say is that if the person is strong, is healthy, as otherwise it appears you are, you can have a normal life expectancy. To the extent that counsel argues or makes reference to a study that says otherwise, what I'm saying is that what is missing is any doctor certifying I have done this type of test and the result is -- or indicate that his life expectancy is X number of years. That is not on the record. The other information is on the record. Okay. Anything else that you would like to mention or say at this time, Mr. Santana, that you would like me to consider?

THE DEFENDANT: I would like to see if that evaluation could be done, like you said, to see if --

MR. IZURIETA ORTEGA: If I may, Your Honor.

THE COURT: Uh-huh. MR. IZURIETA ORTEGA: Yes. We raised the report that we raised with the probation officer from the National Spinal Cord Injury Center. It is there in our memo.

THE COURT: Page four and five. I read it.

Id. Sentencing Transcripts.

After hearing from the government and without returning to Santana to allow him to complete his allocution the court sentenced Santana to 264 months incarceration. The court also imposed a term of supervised release of 5 years and imposed a \$ 100.00 special assessment.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND THE DISTRICT COURT HAVE DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10 CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

I. DOES PLAIN ERROR APPLY TO FEDERAL RULE OF CRIMINAL PROCEDURE RULE 32(i)(4)(A)(ii) WHEN THE ERROR IS CAUSED BY THE SENTENCING COURT

A. The district court committed reversible plain error

Addressing plain error head on, Santana presents that the District Court committed error in not allowing Santana to complete his allocution after he began. In short substance, the following colloquy occurred:

THE COURT: When you allude, Mr. Santana, to the medical record -- let me clarify this for you. This set of papers that you see here is the description -- is information or photocopies of what appears in your medical record, okay? So the probation officer has it. But what I've been making reference to, and actually this goes back as to -- let me check the last date that we have here. Documents from 2010. In addition, we have some others 2009. We have information here from -- let me get the date on this other document. 2009 as well. What I'm saying is that concerning the argument made by Mr. -- I'm returning this to the probation officer. Concerning the argument of shortened life expectancy, there is no evidence in support of that. No doctor has said Mr. Santana is expected to live five more years, ten more years because of his medical condition. What studies tend to say is that if the person is strong, is healthy, as otherwise it appears you are, you can have a normal life expectancy. To the extent that counsel argues or makes reference to a study that says otherwise, what I'm saying is that what is missing is any doctor certifying I have done this type of test and the result is -- or indicate that his life expectancy is X number of years. That is not on the record. The other information is on the record. Okay. Anything else that you would like to mention or say at this time, Mr. Santana, that you would like me to consider?

THE DEFENDANT: I would like to see if that evaluation could be done, like you said, to see if --

MR. IZURIETA ORTEGA: If I may, Your Honor.

THE COURT: Uh-huh. MR. IZURIETA ORTEGA: Yes. We raised the report that we raised with the probation officer from the National Spinal Cord Injury Center. It is there in our memo.

Santana was never allowed the opportunity to completely allocute as to his medical condition prior to the imposition of the sentence. He started and wanted to allocute, however, the court's interruption of the allocution was per-se an error that meets the first prong of the plain error standard of review.

1. The error was plain, that is, it was obvious under current well-settled law.

The failure to allow Santana to allocute was an obvious error. Santana a paraplegic with limited use of his hands, wanted to allocute and explain his medical conditions in hopes of mitigating his sentence, at least to the minimum sentence permitted in the plea agreement. The plea agreement permitted a sentencing range of 216 to 312 months of imprisonment. Santana was sentenced to 264 months. A difference of 48 months. The difference in the sentence, based on not allowing Santana to completely allocute, meets the plain error standard.

Gonzalez-Melendez, 594 F3d 28 (1st Cir. 2010) (resentencing was required because the defendant was denied right under Fed. R. Crim. P. 32(i)(4)(A)(ii) to address district court and be heard before sentencing; denial of the right to allocute was not a harmless error; although defendant's sentence was at the low end of U.S. Sentencing Guidelines range, it was possible that defendant's presentation could have led to non-Guidelines sentence.) *United States v Middleton*, 2014 US App

LEXIS 16266 (11th Cir. 2014) (defendant appealed his 70-month sentence for possessing access device-making equipment and possessing document-making implement with the intent to produce false identification document, district court's failure to allow him to allocute affected his substantial rights because his sentence of 70 months exceeded low end of his advisory sentencing range of 63 months; on remand court had to give him chance to speak or present any information to mitigate sentence before his sentence was imposed.)

2. The error affected Santana's substantial rights

Santana's substantial rights were affected by the error. Not allowing a basic right under Fed. R. Crim. P. 32(i)(4)(A)(ii) warrants this Court's intervention.

United States v. Mejía-Encarnación, 887 F.3d 41 (1st Cir. 2018) (It is settled that a failure to comply with the mandate of Rule 32[(i)(4)(A)(ii)] ordinarily requires vacation of the sentence imposed without a concomitant inquiry into prejudice.").

Instead, this error irredeemably poisons the sentence and requires that the proceedings be held afresh.) *United States v Avery*, 395 Fed Appx 72 (4th Cir. 2010) (The district court's plain error in obstructing the Defendant's opportunity to allocute ... he might have articulated other factors that would have persuaded the district court that further leniency was appropriate; because there was possibility defendant may have received lower sentence had he been allowed to personally

address district court before imposition of his sentence, court was constrained to vacate defendant's sentence and remand for resentencing.)

In not allowing Santana to continue to allocute on his medical condition, affected Santana's substantial rights, as there was a permitted 48-month lower sentence the court could have imposed had he been allowed to allocute.

3. The error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

Finally, the error affected the fairness of the judicial proceeding. Given Santana's medical condition, it was not too much to allow Santana to allocute for the lowest possible sentence of Rule 11(c)(1)(C) plea. The purpose of the plea was to limit Santana's exposure in order to avoid a possible life sentence if he proceeded to trial and was found guilty. Based on his medical condition and the court's failure to allow Santana to allocute, the sentence imposed was the equivalent of not having a plea agreement. Even if Santana had not even said a word, the error, and failure to address it, affect the reputation of the judicial proceedings. See *United States v. Frady*, 456 U.S. 152, 163, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982) (noting that plain error assumes an error so clear-cut that the court should have avoided it, "even absent the defendant's timely assistance in detecting it"); *United States v Avery*, 395 Fed Appx 72 (4th Cir. 2010) (District court's plain error in denying defendant opportunity to allocute affected defendant's substantial rights because defendant may have raised argument

regarding sentencing disparity between crack cocaine and powder cocaine and persuaded district court to find that disparity was unwarranted, or he might have articulated other factors that would have persuaded district court that further leniency was appropriate; because there was possibility defendant may have received lower sentence had he been afforded opportunity to personally address district court prior to imposition of his sentence, court was constrained to vacate defendant's sentence and remand for resentencing); *United States v Locklear* 631 F3d 364, (6 th Cir. 2011) (Sentence for defendant's convictions for bank robbery and firearm offense had to be vacated on appeal because district court did not offer to defendant opportunity to allocute at his sentencing hearing pursuant to Fed. R. Crim. P. 32(i)(4)(A); thus, remand was required to provide the opportunity to allocute.) Here all four prongs of the plain error standard of review have been met. The appellate waiver should not be enforced as Santana agreed to be sentenced in accordance with the Federal Rules of Criminal Procedure and not a hybrid version.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and order the Court of Appeals for the First Circuit and the District Court to address the matters of the issues filed herein.

Done this 17, day of July 2020



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