Appendix A

# United States Court of Appeals
## For the First Circuit

No. 18-1586

UNITED STATES,

Appellee,

v.

VICTOR SANTANA-GONZALEZ, a/k/a Run Run, a/k/a Pequeno,

Defendant - Appellant.

Before

Thompson, Kayatta and Barron,
Circuit Judges.

**JUDGMENT**

Entered: April 15, 2020

Victor Santana-Gonzalez pleaded guilty to a racketeering conspiracy charge, see 18 U.S.C. § 1962(d), and was sentenced to 264 months in prison, a term below the guideline sentencing range and within the range stipulated in the Fed. R. Crim. P. 11(c)(1)(C) plea agreement. Although the plea agreement also contained a waiver of the right to appeal, Santana appealed, arguing that the waiver does not bar review of his claim that he was not afforded an adequate opportunity to allocute as required by Fed. R. Crim P. 32(i)(4)(A)(ii). The government argues that the claim is within the scope of the waiver and maintains that the waiver is valid and enforceable.

The plea agreement's appeal waiver bars an appeal of the judgment or sentence so long as Santana is "sentenced in accordance with the terms and conditions set forth in the Sentencing Recommendation provisions" of the agreement. The Sentence Recommendation provisions allowed Santana to recommend a sentence of no less than 216 months' imprisonment and the government to recommend a sentence of up to 312 months' imprisonment, and stated that any recommendation above or below the stipulated range of 216-312 months would constitute a material breach of the plea agreement. Santana argues that he was not sentenced in accordance with the Sentence Recommendation provisions because the denial of his right to allocute deprived him of an opportunity to personally request a sentence of 216 months and offer mitigating information. But the Recommendation provisions do not say anything specific about the right of allocution or compliance with the Federal Rules of Criminal Procedure and, although Santana did

not himself articulate a request for a 216-month sentence, his counsel did so on his behalf, and presented mitigating arguments both in a sentencing memorandum and at the sentencing hearing.

Although Santana was not prevented from recommending a sentence at the low end of the stipulated range and received a sentence within that range, he nevertheless argues that his claim of error falls outside the scope of the waiver because he entered the plea agreement with the understanding that he would be sentenced in accordance with the Federal Rules of Criminal Procedure and under the belief that the sentencing process would protect his right to allocution.

We need not decide whether a claim of error regarding allocution falls within the scope of the type of appeal waiver at issue here because even if the waiver does not apply, Santana cannot make the showing required to obtain relief. Santana concedes that he did not preserve the claim of error for review and that it is therefore reviewable, if at all, only for plain error. See, e.g., United States v. Daoust, 888 F.3d 571, 575 (1st Cir. 2018). To meet that standard, Santana must demonstrate "'(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings.'" Id. (quoting United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001)).

While Santana correctly notes that the failure to provide an opportunity to allocute is not harmless error and has been held to meet the plain error standard, See United States v. Gonzalez-Melendez, 594 F.3d 28, 38 (1st Cir. 2010) (denial of right to allocution is not harmless error, requires resentencing); United States v. Gonzalez-Huerta, 403 F.3d 727, 736, 739 (10th Cir. 2005) (en banc) (denial of right to allocute is an error that satisfies fourth prong of plain error standard, as it seriously affects the fairness, integrity, or public reputation of judicial proceedings), that standard is not met in this case because petitioner's allocution rights were not violated. Rule 32(i)(4)(A)(ii) requires that, before imposing sentence, the sentencing court must "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence[.]" The Rule is satisfied if "the court, the prosecutor, and the defendant . . . interact in a manner that shows clearly and convincingly that the defendant knew he had a right to speak on any subject of his choosing prior to the imposition of sentence." United States v. De Alba Pagan, 33 F.3d 125, 130 (1st Cir. 1994); accord Gonzalez-Melendez, 594 F.3d at 37-38.

Here, the district court addressed Santana directly and asked if there was anything he would like to say or have the court consider before imposing sentence. This invitation was sufficient to inform Santana of his right to speak broadly on any subject of his choosing. See De Alba Pagan, 33 F.3d at 129. Instead of offering mitigating information and arguing for a 216-month sentence, Santana inquired about the possibility of obtaining further evidence to support his argument that his medical condition warranted leniency, and then was interrupted by defense counsel. A discussion about existing evidence concerning Santana's condition ensued, and the court then heard from the government. Before proceeding to impose sentence, the court asked if "either side" had anything else to add. Santana said nothing. Santana argues that the court's initial open-ended invitation failed to provide an adequate opportunity for allocution because Santana was interrupted by counsel and the court did not renew its invitation after defense counsel finished speaking; although the court asked if either side had anything to add before imposing sentence, it did not specifically address Santana. But we have held that the Federal Rules "do not require a sentencing

court to remind a defendant of the right to allocute so long as the court clearly notifies the defendant once," United States v. Burgos-Andujar, 275 F.3d 23, 28-29 (1st Cir. 2001), and other courts have found that the right of allocution was satisfied based on similar facts. See United States v. Archer, 70 F.3d 1149, 1151-52 (10th Cir. 1995) (holding right to allocution not denied when court included defendant in initial invitation to speak but did not renew invitation after defense counsel finished speaking); United States v. Washington, 44 F.3d 1271, 1276-77 (5th Cir. 1995) (holding that failure to renew a previous offer of allocution does not violate Rule 32); United States v. Franklin, 902 F.2d 501, 506-07 (7th Cir. 1990) (holding right to allocution not denied when court addressed defendant by name and asked him if he had anything to say, but defense counsel interrupted and court did not renew invitation after counsel finished speaking). Neither Santana nor his counsel indicated that Santana had anything further to say, and Santana does not now identify any additional facts or arguments in mitigation that were not presented to and considered by the court.

Affirmed. See 1st Cir. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

cc:
Victor Santana-Gonzalez
Jenifer Yois Hernandez-Vega
Victor O. Acevedo-Hernandez
Mariana E. Bauza Almonte
Marie Christine Amy
Antonio Perez-Alonso