IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

_____

No. _____

KATERIN MARTINEZ-ALBERTO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

_____

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

_____

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October 24, 2023

QUESTIONS PRESENTED

1. Does display of a defendant's body part (a foot) to the jury constitute testimony that subjects the defendant to cross-examination?

2. In a multi-defendant case, is it plain error for the court to repeatedly refer to the defendants as a single unit, especially where no instruction is given to treat each defendant individually?

List of All Proceedings

1. United States District Court, D.P.R., Docket No. 18-cr-00066-FAB; United States v. Figaro-Benjamin; judgment entered 12/2/2020.

2. United States Court of Appeals for the First Circuit, Docket Nos. 20-2129, 2183; United States v. Andino-Rodriguez; judgment entered 8/21/23.

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TABLE OF AUTHORITIES

Petitioner, Katerin Martinez-Alberto, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the First Circuit Court of Appeals entered in this proceeding on August 21, 2023.

OPINION BELOW

The decision of the First Circuit, United States v. Andino-Rodriguez, 79 F.4th 7 (1st Cir. 2023), appears in the Appendix hereto.

JURISDICTION

The judgment of the First Circuit was entered on August 21, 2023. This petition was timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constit., Amend. V: No person shall be … compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law…

U.S. Constit., Amend. VI: In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner Katerin Martinez-Alberto [hereinafter "Martinez"] was charged in a multi-defendant indictment with conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. sec. 841, and conspiracy to import five kilograms or more of cocaine into the United States, in violation of 21 U.S.C. sec. 952. Martinez and one co-defendant, Alexandria Andino-Rodriguez [hereinafter "Andino"], were jointly tried before a jury, and both were convicted of both charges. Martinez received concurrent ten-year terms of imprisonment, to be followed by concurrent five-year terms of supervised release.

The evidence showed that, in 2018, law enforcement intercepted a ship called Black Wolfpack that was heading to Puerto Rico from St. Thomas. Martinez, Andino, and two men were on board, as were 111 well-hidden bricks of cocaine. Martinez's cell phone had a photograph on it of what appeared to be wrapped bricks of cocaine with a partial foot in the lower corner of the photograph.

Martinez asked to be allowed to show her foot to the jury. The trial court ruled that she could only show her foot to the jury if she testified and was subject to cross-examination. The court ruled that if the defense asked a

single question of Martinez – Is the foot that appears on Exhibit 88 your foot? – that, too, would open the door to questions on cross about her involvement in the conspiracy. As a result, the defense rested without presenting evidence.

The evidence showed that Andino's involvement was more extensive than Martinez's, and there was more evidence, and more compelling evidence, against Andino than against Martinez. Not only did the court fail to tell the jury that it had to give separate consideration to each individual defendant, but its instructions also repeatedly referred to the defendants as a single entity.

The First Circuit denied Martinez's claims of error on appeal. It held that Martinez failed to proffer a proper evidentiary foundation to allow her to show her foot. It held that there was no foundation laid that the foot display would be relevant, because the government was using Exhibit 88 for its timing (taken on a prior drug-smuggling trip to St. Thomas) and for what it showed (cocaine bundles with logos matching those on the seized bricks).

The First Circuit held that the jury instructions, read in context and as a whole, directed the jury to consider Martinez and Andino separately. It relied on the indictment, which was provided to the jury and referenced by

the court in its instructions, and the verdict sheets, one for each defendant. However, the Court could only point to two times during the instructions where the trial court referred to "a Defendant," but there were over twenty times when the court referred to them as a single unit ("them," "their," "the Defendants"). The court, applying the plain error standard of review, denied Martinez's claim of instructional error.

REASONS FOR GRANTING THE PETITION

This case presents important questions of federal law that have not been, but should be, settled by this Court:

(1) whether display of a body part to the jury constitutes 'testimony' that opens up a defendant to cross-examination, and

(2) whether it is plain error to repeatedly refer to defendants as a unit, especially where no instruction is given that the jury must consider each defendant individually and weigh separately the evidence presented as to each.

The display of a body part is not 'testimony.'

When defense counsel proposed having Martinez show her foot to the jury, the court ruled she would have to testify and be subject to cross-examination. This was wrong – showing her foot would not be 'testimonial,' any more than showing her face or being identified by a witness is testimonial. The district court's erroneous ruling violated Martinez's constitutional due process rights.

'Testimony' is "typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford v. Washington, 541 U.S. 36, 51 (2004)(internal quotation marks and citation omitted). Only testimonial statements cause the declarant to be a witness subject to cross-examination. Davis v. Washington, 547 U.S. 813, 821 (2006). See also Kansas v. Cheever, 571 U.S. 87, 94 (2013)(when a defendant testifies in a criminal case, he cannot refuse to answer related questions on cross-examination).

It was error for the court to rule that, if Martinez showed her foot to the jury, she would be subject to cross-examination. Showing her foot to the jury would be no more testimonial than showing her face.[1] This ruling, effectively preventing Martinez from presenting exculpatory evidence to the jury by forcing her to choose between (1) foregoing the evidence or (2) presenting the evidence but being compelled to testify, implicated Martinez's right to due process, her privilege against self-incrimination, and her right to defend against the charges – that is, her right to her "day in court." In re Oliver, 333 U.S. 257, 273 (1948)(discussing the Sixth Amendment right to be heard in one's defense).

[1] Indeed, in closing the government asked the jury to compare the woman in another photograph admitted into evidence with Martinez. "You can do that comparison between the person in this picture and the person right there."

This erroneous ruling was not harmless. The evidence of Martinez's knowledge of the conspiracy was not overwhelming. The photograph showing the foot next to the bricks of cocaine was the most compelling evidence of knowledge, as reflected by the amount of time the prosecutor devoted to it in closing. As the prosecutor argued, "this photo right here, Exhibit 88, tells you the whole story." Stripping Martinez of the ability to counteract that evidence by showing the jury her foot necessarily contributed to the guilty verdicts.

Nor was the First Circuit's analysis – that the defense failed to establish the relevance of the proffered evidence – correct. Any dissimilarity between the foot pictured in the exhibit and Martinez's foot would undercut the government's theory that Martinez "took that photo on her phone," and therefore "knew exactly what she was doing." As the government argued, "A picture, you know, tells a thousand words." Undercutting the allegation that Martinez took the photo, by displaying her foot, necessarily would have a tendency to make a fact of consequence to the action more or less probable than it would be without the evidence. Fed. R. Evid. 402.

Jury instructions repeatedly referring to co-defendants as a single unit are plainly erroneous.

The court never instructed the jury that the charges against each defendant should be separately considered. It referred to the defendants as a unit throughout the instructions, and this created spill-over prejudice to Martinez, who was less culpable.

The evidence presented at trial concerning Andino was much more extensive and compelling than that implicating Martinez. Andino, but not Martinez, was present during an initial scouting mission to St. Thomas aboard the Wasikoki in April 2017. Andino, but not Martinez, participated in a trip to St. Thomas on the Black Wolfpack, in July or August of 2017. During that trip, the testimony was that Andino cleaned and wrapped the kilograms of cocaine, and helped count the bricks.

Andino, but not Martinez, went to St. Thomas in September 2017, and vacuum sealed the bricks of cocaine. Again, Andino was present when the bricks upon returning to Puerto Rico. Andino signed the Black Wolfpack into the marina during trips on November 4, 2017 and November 19, 2017, and again on the ill-fated trip on January 26-27, 2018. Andino advised codefendant Maximiliano Figaro-Benjamin that they should discard their phones once they realized their boat was being pursued by a police vessel.

Trial evidence included 17 photographs of Andino (but none of Martinez) with Bernardo Coplin, the kingpin of the operation. Andino was part of Coplin's inner circle of friends, and was a longtime friend of other co-conspirators as well. Martinez, on the other hand, was a waitress at a restaurant frequented by one of the co-conspirators.

Communication between Andino and Figaro on January 17, 2018 showed the two discussing the risks Figaro was taking. It also set forth complaints Andino had about her compensation. Andino was paid $7,000 per trip.

The court did not instruct the jury that it had to give separate consideration to each individual defendant. The court's failure to make clear to the jury that it was to give separate consideration to each defendant was plain error due to the very real risk of spill-over prejudice.

Although there were separate verdict forms for each defendant, the instructions[2] repeatedly referred to the defendants as if they were a single entity. For example, the court told the jury:[3]

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[2] The preliminary instructions, given before the presentation of evidence, were similarly flawed. The court did not inform the jury that it must consider each defendant separately, and consistently referred to them as a unit. E.g., "If you find that **the Defendants** are guilty of one or both of the conspiracy charges, you will also have to determine whether the Government has proven beyond a reasonable doubt that the conspiracy or

- "you are not to convict **them** of the charges against **them** unless you are persuaded of **their** guilt of these charges beyond a reasonable doubt."
- "the burden of proof is always on the Government to satisfy you that **the Defendants** are guilty of the crimes with which **they** are charged beyond a reasonable doubt."
- "If, after fair and impartial consideration of all the evidence, you have a reasonable doubt as to **the Defendants**' guilt of a particular crime, it is your duty to acquit **them** of that crime."
- "On the other hand, if, after fair and impartial consideration of all the evidence, you are satisfied beyond a reasonable doubt of **the Defendants**' guilt of a particular crime, you should vote to convict **them**."
- "I want to caution you that you are here to determine from the evidence presented whether the Government has proven **Defendants**' guilt beyond a reasonable doubt."

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conspiracies in which **they** were members involved 5 kilograms or more of cocaine."

[3] Emphasis is added.

- "The question of the possible guilt of others should not enter your thinking when you decide whether the Government has proved beyond a reasonable doubt that **the Defendants** committed the offenses alleged."
- "For you to find **the Defendants** guilty of conspiracy to distribute cocaine, you must be convinced … that **the Defendants** knowingly and willfully joined in that agreement."
- "For you to find **the Defendants** guilty of conspiracy to import cocaine into the United States, you must be convinced … that **the Defendants** knowingly and willfully joined in that agreement."
- "Both counts require the Government to prove beyond a reasonable doubt that **the Defendants** participated in conspiracies."
- "In one count, the Government must prove beyond a reasonable doubt that **the Defendants** participated in a conspiracy to possess cocaine with the intention of distributing it."
- "In the other count, the Government must prove beyond a reasonable doubt that **the Defendants** participated in a conspiracy to import cocaine …"

- "the Government must prove beyond a reasonable doubt that **the Defendants** knew the essential features and general aims of the venture."
- "Even if **the Defendants** were not part of the agreement at the very start, **they** can be found guilty of conspiracy if the Government proves that **they** willfully joined the agreement later."
- "**The Defendants** may be convicted as conspirators even though **they** may have played a minor part in the conspiracy."
- "If you find that **the Defendants** are guilty of a conspiracy charge, you will also have to determine whether the Government has proven beyond a reasonable doubt the amount of cocaine involved in the conspiracy."
- "In deciding whether **the Defendants** acted knowingly, you may infer that **the Defendants** had knowledge of a fact if you find that **they** deliberately closed their eyes to a fact that otherwise would have been obvious to **them**."
- "In order to infer knowledge, you must find … [f]irst, that **the Defendants** were aware of a high probability of the conspiracy to possess cocaine with intent to distribute it, or of the conspiracy to

import cocaine …, [s]econd, that **the Defendants** consciously and deliberately avoided learning of those facts; that is to say, **Defendants** willfully made **themselves** blind to those facts."

- "It is entirely up to you to determine whether **they** deliberately closed their eyes to the facts …"
- "The government is not required to show that **the Defendants** knew that the substance was actually cocaine. It is sufficient if the evidence establishes beyond a reasonable doubt that **the Defendants** believed **they** conspired to possess cocaine and had an intent to distribute it, or that **they** believed they conspired to import cocaine…"
- "To find **the Defendants** guilty of the offenses charged in the indictment …"
- "If you find that **the Defendants** conspired to distribute cocaine with the intention of distributing it, or that **they** conspired to
- "More specifically, you will be asked to determine whether the Government has proven beyond a reasonable doubt that **the Defendants** conspired to possess with the intention of distributing cocaine, or that **they** conspired to import cocaine…"

Where, as here, there is a risk of prejudice to a defendant from evidence of a co-defendant's wrongdoing, it can be cured by an instruction that the jury must "give separate consideration to each individual defendant and to each separate charge against him. Each defendant is entitled to have his or her case determined from his or her own conduct and from the evidence [that] may be applicable to him or to her." Zafiro v. United States, 506 U.S. 534, 541 (1993). See also Kansas v. Carr, 577 U.S. 108, 124 (2016)(risk of prejudice in a capital sentencing proceedings dispelled by instructions that jury "'must give separate consideration to each defendant,' that each was 'entitled to have his sentence decided on the evidence and law which is applicable to him,' and that any evidence in the penalty phase 'limited to only one defendant should not be considered by you as to the other defendant.'"). This Court should rule that such an instruction is required in multi-defendant trials.

Here, not only did the district court fail to instruct the jury to separately consider each individual defendant, but its repeated and consistent reference to them as a unit increased the danger from prejudicial spillover. Nor was this a case where the verdicts show that the jury distinguished among defendants. United States v. Figueroa, 976 F.2d 1446, 1454 (1st Cir.

1992), *cert. denied*, 507 U.S. 943 (1993)(acquittal of some defendants provided "an uncommonly convincing 'ex post validation'" of the court's instructions that the jury was to separately consider each defendant). Here, Andino and Martinez were convicted of the exact same charges.

The First Circuit's conclusion that separate verdict forms for each defendant meant that the jury considered each defendant's actions separately, slip op. at 45-46, is misguided. The verdict forms are not themselves instructions. As the court explained to the jury, they were "simply the written notices of the decisions you will reach in this case." The verdict forms alone could not have disabused the jury of the misimpression that the defendants were to be treated as a single entity.

The First Circuit wrongly relied on the fact that the jury had before it the indictment – "the charging document that spells out the counts against each defendant," slip op. at 45 – to support its conclusion that "the jury was sufficiently clear on its task to consider the defendants and the evidence against each separately." Slip op. at 47. However, every time the court referred to the indictment, it used that indictment to refer to the co-defendants as a single unit. Instead of clarifying that the jury had to

separately consider each defendant, the court used the indictment itself to suggest the defendants were to be viewed as a single entity:

- "… **the Defendants** have had an indictment filed against them…"
- "Count One of the indictment charges that **Defendants** Katerin Martinez-Alberto and Alexandria Andino-Rodriguez conspired with each other … to possess with intent to distribute more than 5 kilograms of cocaine."
- "Count Two of the indictment charges that **the Defendants** conspired to import cocaine …"
- "In the indictment, it is alleged that **the Defendants** conspired to possess with intent to distribute 5 kilograms or more of cocaine, and that **they** conspired to import 5 kilograms or more of cocaine …"
- "To find **the Defendants** guilty of the offenses charged in the indictment…"

Given the very real risk of spillover prejudice, contrary to the First Circuit's conclusion, the trial court's instructions constituted plain error. This Court should grant this Writ to clarify that in multi-defendant cases, the court must not refer to defendants as a single unit and must instruct the jury that it must give separate consideration to each defendant on trial.

Conclusion

For the foregoing reasons, Petitioner Katerin Martinez-Alberto respectfully requests that this Petition for Writ of Certiorari be granted.

October 24, 2023

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