

No. ____

October Term, 2024

In The
Supreme Court of the United States

OSCAR ROBINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

HECTOR DOPICO
FEDERAL PUBLIC DEFENDER
BERNARDO LOPEZ
Assistant Federal Public Defender
Attorney for Petitioner
1 E. Broward Blvd, Ste. 1100
Ft. Lauderdale, FL 33301
(954) 356-7436
Bernardo_Lopez@fd.org

QUESTION PRESENTED FOR REVIEW

An error raised for the first time on appeal is reviewed for plain error. Under the plain error doctrine, “there must be error, the error must be plain, and the error must affect substantial rights.” *United States v. Olano*, 507 U.S. 725, 732-36 (1993)). If these three prongs are met, the court of appeals has the discretion to correct the error, and it should do so if that error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Olano*, 507 U.S. at 736. In order to meet the third prong of the plain error analysis – that the error affected the defendant’s substantial rights – a defendant need only demonstrate a reasonable probability of a different outcome. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1348-49 (2016). Mr. Robinson argued on appeal that the government breached the plea agreement when it requested sentences for count one and count two that were different than the agreed recommendations contained in the plea agreement. The two sentences were required to be imposed and served consecutively, and the total sentences for the consecutive sentences would have remained the same. Here, two things are clear: 1) the sentences imposed on Mr. Robinson on each of the two counts would have been different absent the error; and 2) the combination of the two consecutive sentences would likely have been the same.

QUESTION PRESENTED

When a criminal defendant demonstrates that, but for the plain error raised on appeal, his sentence as to each of two separate counts would be different, does he meet the requirement that the claimed error affects his substantial rights even where the combined sentence of the two consecutive sentences would likely remain the same?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED CASES

United States v. Oscar Robinson, 2:22-cr-14064-KMM (S.D. Fla. 2023)

United States v. Oscar Robinson, 23-12324 (11th Cir. July 24, 2024)

TABLE OF CONTENTS

| | |
|---|-----|
| QUESTION PRESENTED FOR REVIEW | i |
| INTERESTED PARTIES | ii |
| TABLE OF AUTHORITIES | iv |
| PETITION FOR WRIT OF CERTIORARI | 1 |
| OPINION BELOW..... | 2 |
| STATEMENT OF JURISDICTION | 2 |
| STATUTORY AND OTHER PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE..... | 3 |
| STATEMENT OF FACTS | 4 |
| REASONS FOR GRANTING THE WRIT | |
| On plain error review, a prosecutor’s breach of the plea agreement that results in a substantially different sentence for each of two counts of conviction violates a defendant’s substantial rights where the sentences are required to be imposed and served consecutively, and absent the error, each separate sentence would be different. The decision of the Court of Appeals to the contrary conflicts with the established precedent of this Court..... | |
| CONCLUSION..... | |
| APPENDIX | |
| Decision of the Eleventh Circuit Court of Appeals, <i>United States v. Oscar Robinson</i> , (July 24, 2024) No. 23-12324..... | |
| | A-1 |
| Judgment in a Criminal Case <i>United States v. Oscar Robinson</i> , (June 29, 2023) No. 22-cr-14064-KMM..... | |
| | A-2 |

TABLE OF AUTHORITIES

Cases:

Molina-Martinez v. United States,

136 S. Ct. 1338 (2016)..... 6, 7, 9, 11

Santobello v. New York,

4040 U.S. 257 (1971)..... 10

United States v. Hunter,

835 F.3d 1320 (11th Cir. 2016)..... 7, 9

United States v. Olano,

507 U.S. 725 (1993)..... 1, 6

United States v. Robinson,

2024 WL 3519611 (11th Cir. July 24, 2024) 5, 10, 11

United States v. Thomas,

487 F.3d 1358 (11th Cir. 2007)..... 7, 8

Statutes And Other Authority:

U.S. Const., amend. V..... 2

18 U.S.C. § 924(c)..... 10

18 U.S.C. § 3553(a) 5

18 U.S.C. § 3742..... 5, 2

28 U.S.C. § 1254(1) 5, 2

28 U.S.C. § 1291..... 5, 2

Sup. Ct. R. 13.1 2

| | |
|---|---|
| Part III of the Rules of The Supreme Court of The United States | 2 |
|---|---|

**IN THE
SUPREME COURT OF THE UNITED STATES**

No:

**OSCAR ROBINSON,
*Petitioner,***

v.

**UNITED STATES OF AMERICA,
*Respondent.***

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

Mr. Oscar Robinson respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 23-12324 in that court on July 24, 2024, *United States v. Robinson*, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on July 24, 2024. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provision:

U.S. Const., 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.

STATEMENT OF THE CASE
COURSE OF PROCEEDINGS AND DISPOSITION
IN THE DISTRICT COURT

A federal grand jury charged Mr. Oscar Robinson in a three-count superseding indictment with one count of possession of a firearm by a convicted felon (count one), one count of possession with intent to distribute cocaine (count two) and possession of a firearm in furtherance of a drug trafficking crime (count three). DE 38. Pursuant to a written plea agreement, Mr. Robinson entered a plea of guilty as to counts two and three of the superseding indictment. DE 76. The district court sentenced Mr. Robinson to a 156-month term of imprisonment. DE 93.

STATEMENT OF FACTS

Mr. Oscar Robinson is a sixty-eight year-old United States citizen. Presentence Report (PSR) at ¶ 75. Mr. Robinson left school after completing the eighth grade. He never attended high school and never obtained a GED. PSR ¶ 88.

Mr. Robinson began abusing alcohol at the tender age of eleven years old, and, as a teenager, he began to abuse crack cocaine. PSR ¶¶ 85, 86. His crack cocaine addiction ushered in a long string of criminal convictions from ages eighteen to thirty-three. PSR ¶¶ 33-44. In 1993, Mr. Robinson was convicted for possession and sale of cocaine in a Florida state court, and the state court sentenced Mr. Robinson to a thirty-year term of imprisonment. PSR ¶ 45.

In the present case, state police executed a search warrant for Mr. Robinson's residence while Mr. Robinson was attending a state court hearing. DE 78 at 2.

During the search, the police found 2.66 grams of cocaine, a .357 caliber revolver and \$10,900 in U.S. currency. *Id.*

A federal grand jury charged Mr. Oscar Robinson in a three-count superseding indictment with one count of possession of a firearm by a convicted felon (count one), one count of possession with intent to distribute cocaine (count two) and possession of a firearm in furtherance of a drug trafficking crime (count three). DE 38. Mr. Robinson initially elected to proceed to trial on all three charges. However, on the first day of trial, Mr. Robinson decided to enter into a written plea agreement with the government. Pursuant to a written plea agreement, Mr. Robinson entered a plea of guilty as to counts two and three of the superseding indictment. DE 76. In the agreement, the parties agreed to jointly recommend a sentence of eleven years as to count two and a sentence of two years as to count three with the sentencing to run consecutively. *Id.*

At the sentencing hearing, both parties reiterated their recommendation as spelled out in the plea agreement that Mr. Robinson be sentenced to eleven years on Count Two and two years on Count Three with the two sentences to run consecutively. DE 109 at 5-6. However, later in the sentencing hearing, the prosecutor, who was not the prosecutor who made the written plea agreement, changed his recommendation. Despite the clear and express language in the written plea agreement, the prosecutor instead recommended that Mr. Robinson be sentenced to 96 months as to Count Two and 60 months as to Count Three. *Id.* at 9.

Once counsel from the government made his recommendation, the district court accepted that recommendation and imposed sentence as follows:

The Court has considered the statements of all parties, the Pre-Sentence Report which contains the advisory Guidelines, and the statutory factors as set forth in Title 18 United States Code, Section 3553(a). Based upon the agreement of the parties, an upward variance to the advisory Guideline range is warranted as this will provide sufficient punishment and deterrence. It is the finding of the Court that the Defendant is unable to pay a fine. It is the judgment of the Court that the Defendant, Oscar Robinson, is committed to the Bureau of Prisons to be imprisoned for 156 months. This sentence consists of 96 months as to Count 2 and 60 months as to Count 3, to be served consecutively.

Id. at 11; DE 93.

The plea agreement signed by Mr. Robinson contained a waiver of sentencing appeal. Mr. Robinson argued inter alia on appeal that the waiver was unenforceable because the government breached the plea agreement by requesting sentences as to each consecutive count that differed from the agreed recommendations contained in the plea agreement. On appeal, the Court of Appeals affirmed Mr. Robinson's conviction and sentence holding that Mr. Robinson properly waived any right to appeal his sentence. *United States v. Robinson*, No. 23-12324, 2024 WL 3519611 (11th Cir. July 24, 2024). Specifically as to the claim of a breach of the plea agreement, the court of appeals, on plain error review, held that although there was error that was plain, Mr. Robinson failed to demonstrate that the error affected his substantial rights. *Id.* at *5.

REASONS FOR GRANTING THE WRIT

On plain error review, a prosecutor's breach of the plea agreement that results in a substantially different sentence for each of two counts of conviction violates a defendant's substantial rights where the sentences are required to be imposed and served consecutively, and absent the error, each separate sentence would be different. The decision of the Court of Appeals to the contrary conflicts with the established precedent of this Court.

An error raised for the first time on appeal is reviewed for plain error. Under the plain error doctrine, “there must be error, the error must be plain, and the error must affect substantial rights.” *United States v. Olano*, 507 U.S. 725, 732-36 (1993)). If these three prongs are met, the court of appeals has the discretion to correct the error, and it should do so if that error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Olano*, 507 U.S. at 736. In order to meet the third prong of the plain error analysis – that the error affected the defendant's substantial rights – a defendant need only demonstrate a reasonable probability of a different outcome. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1348-49 (2016).

Here, Mr. Robinson bargained for, and the government agreed to recommend, a sentence of two years on count two and eleven years as to count three. Instead, at sentencing, the government recommended a sentence of 96 months as to count two and 60 months as to count three. The district court accepted that oral recommendation and sentenced Mr. Robinson to 96 months' imprisonment on count two and 60 months as to count three. The two sentences were ordered to be served consecutively as required by statute. As to each specific count, Mr. Robinson has

clearly demonstrated that, but for the claimed error, his sentence on each count would be different. He has thus met the requirement that the claimed error affected his substantial rights. *See Molina-Martinez*, 136 S. Ct. 1345. Because the sentences on counts one and two are required to be served consecutively, the fact that the two consecutive sentences would likely add up to the same total sentence does not change the fact that as to count two, the claimed error clearly resulted in a substantial sentence increase. That is all that is required to meet prong three of the plain error analysis.

Mr. Robinson argued on appeal that the government breached the plea agreement when it requested sentences for count one and count two that were different than the agreed recommendations contained in the plea agreement. The two sentences were required to be imposed and served consecutively. Here, two things are clear: 1) the sentences imposed on Mr. Robinson on each of the two counts would have been different absent the error; and 2) the combination of the two consecutive sentences would likely have been the same.

“A material promise by the government, which induces a defendant to plead guilty, binds the government to that promise.’ Hence, the government breaches a plea agreement when it fails to perform promises on which the plea was based.” *United States v. Hunter*, 835 F.3d 1320, 1324 (11th Cir. 2016) (quoting *United States v. Thomas*, 487 F.3d 1358, 1360 (11th Cir. 2007)). “Whether the government violated the agreement is judged according to the defendant’s reasonable understanding of the agreement when he entered the plea.” *Thomas*, 487 F.3d at 1360. The breach of a

plea agreement by the prosecutor requires remand for specific performance of the plea agreement. *Santobello v. New York*, 4040 U.S. 257, 262-263 (1971).

Here, the plea agreement, written by the prosecution, contained the following express promise by the prosecution:

This Office and the Defendant agree that, although not binding on the probation office or the Court, they will jointly recommend that the Court impose **a total sentence of thirteen years' imprisonment, consisting of eleven years on Count Three and two years on Count Two, to be served consecutively.**

DE 77 at ¶ 8 (emphasis in original). Counsel for Mr. Robinson fulfilled her end of the bargain at sentencing by recommending a sentence of eleven years as to count three and two years as to count two. Although the prosecutor initially made the same recommendation, the prosecutor later inexplicably changed his recommendation:

Prosecutor: Your Honor, first I'd like to clarify. When Your Honor asked to divide the recommended sentence, co-counsel did point out that Count 3 is a 924(c) and that does require a five-year sentence. We would recommend, despite Mr. Porter indicating otherwise in the sentencing memorandum, that Count 2 be 96 months and Count 3 be 60 months in order to satisfy the recommendation – or the requirements, rather, of Section 924(c).

DE 109 at 9. The district court then imposed a sentence exactly as recommended by the prosecutor. *Id.* at 11. The recommendation from the prosecutor differed from the express recommendation in the written plea agreement. Specifically, as to count two, the recommendation from the prosecutor substantially exceeded the agree-upon recommendation in the plea agreement. As such, it is a direct breach of the plea agreement. *See Hunter*, 835 F.3d at 1324.

Plain Error

Because the breach was not brought to the attention of the district court, the breach must be reviewed for plain error. Again, the breach was error that is plain. The written plea agreement spelled out what the specific joint recommendation was as to each count: eleven years as to count three and two years as to count two. Counsel for Mr. Robinson fulfilled that obligation. As the record makes clear, the prosecutor expressly failed to meet his obligation. The sentencing judge followed the recommendation of the prosecutor at sentencing instead of the joint recommendation contained in the plea agreement.

The failure of the prosecutor to make the recommendation as detailed in the plea agreement affected Mr. Robin's substantial rights. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1348-49 (2016) (holding that an error in Sentencing Guidelines calculations which may have resulted in an erroneous deprivation of liberty affected substantial rights). Under the joint recommendation, Mr. Robinson was to receive a two-year sentence as to count two. Instead, Mr. Robinson received a sentence of 96 months as to count two. Immediately after the prosecutor made his changed recommendation, the district court imposed a sentence exactly as recommended by the prosecutor. That is a substantial increase in sentence as to count two and it clearly affected Mr. Robinson's substantial rights. *See Molina-Martinez*, 136 S. Ct. at 1348-49.

The prosecutor stated that he was concerned for the statutory requirements of 18 U.S.C. § 924(c). However, he was mistaken. Count three, the 924(c) count, carried

a mandatory minimum of five years and a maximum sentence of life. That was already properly taken into count by recommendation contained in the written plea agreement of eleven years as to that count. There was no violation of 924(c) under the agreed-upon recommendation. It is unclear why the government decided to change his recommendation.

The government clearly breached the expressed terms of the written plea agreement, which the prosecutor himself wrote. Regardless of the sentence that the district court would have imposed absent the change in recommendation, the government's actions constitute a breach of the plea agreement and provide another, separate, basis to not enforce the appellate waiver contained in the written plea agreement. *See Santobello*, 404 U.S. at 262-263 (noting that the influence or lack of influence of the prosecutor's recommendation was immaterial to the question of whether the plea agreement was breached). As it was, the breach directly affected the sentence imposed by the court.

However, on appeal, the Eleventh Circuit held that the breach of the plea agreement did not constitute plain error. *See United States v. Robinson*, No. 23-12324, 2024 WL 3519611 (11th Cir. July 24, 2024). The Court assumed that there was error and that the error was plain. However, the Court of Appeals held that the error did not affect his substantial rights because the total sentence of 13 years' imprisonment would not have changed even though the individual sentence for each count would have been different:

The total sentence the government recommended at sentencing was a term of 13 years' imprisonment, which is the same total sentence the

parties agreed to recommend, the same total sentence in the government's memorandum, and the same total sentence he ultimately received. Mr. Robinson has thus failed to satisfy the third prong of the plain error standard. He has not shown that there is a "reasonable probability" that his sentence would have been different if the government's sentencing recommendation as to each individual count was identical to the text of the plea agreement.

Id. at *5.

Under this Court's precedent, a defendant needs to demonstrate a reasonable probability of a different outcome absent the claim plain error in order to satisfy the third prong of the plain error analysis that the error affects the defendant's substantial rights. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). Here, two things are clear: 1) the sentences imposed on Mr. Robinson on each of the two counts would have been different absent the error; and 2) the combination of the two consecutive sentences would likely have been the same. Because the two sentences were required to be imposed consecutively, each sentence stood alone as an independent sentence.

Mr. Robinson bargained for, and the government agreed to recommend, a sentence of two years on count two. Instead, at sentencing, the government recommended a sentence of 96 months as to count two. The district court accepted that oral recommendation and sentenced Mr. Robinson to 96 months' imprisonment on count two. As to that specific count, Mr. Robinson has clearly demonstrated that, but for the claimed error, his sentence on count two would be different and substantially less. He has thus met the requirement that the claimed error affected his substantial rights. *See Molina-Martinez*, 136 S. Ct. 1345. Because the sentences

on counts one and two are required to be served consecutively, the fact that the two consecutive sentences would likely add up to the same total sentence does not change the fact that as to count two, the claimed error clearly resulted in a substantial sentence increase. That is all that is required to meet prong three of the plain error analysis. Because the Court of Appeals erred when it ruled that Mr. Robinson has not met the third prong of the plain error analysis, this Court should grant cert and reverse the judgment of the Court of Appeals.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

HECTOR DOPICO
FEDERAL PUBLIC DEFENDER

Fort Lauderdale, Florida
October 22, 2024

By: s/Bernardo Lopez
Bernardo Lopez
Assistant Federal Public Defender
Counsel For Petitioner Robinson