

IN THE SUPREME COURT OF THE UNITED STATES

DOMINIC MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record

A. TYSEN DUVA
Assistant Attorney General

ROSALEEN T. O'GARA
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner is entitled to plain-error relief on his claim that the district court was obligated to invite him to allocute at his supervised release revocation hearing.

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellant below) is Dominic Miller.

Respondent (plaintiff-appellee below) is the United States of America.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Colo.):

United States v. Miller, No. 14-cr-156 (May 20, 2025)

United States Court of Appeals (10th Cir.):

United States v. Miller, No. 25-1219 (Jan. 2, 2026)

United States v. Miller, No. 16-1407 (Jan. 24, 2017)

United States v. Miller, No. 15-1127 (Oct. 13, 2015)

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No. 25-7056

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OPINIONS BELOW

The order and judgment of the court of appeals (Pet. App. A1-A4) is available at 2026 WL 17536. A prior order and judgment of the court of appeals is reprinted at 616 Fed. Appx. 388.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 2026. A petition for rehearing was denied on March 6, 2026 (Pet. App. B1). The petition for a writ of certiorari was filed on March 12, 2026. 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 District of Colorado, petitioner was convicted on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); and one count of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Judgment 1; Indictment 1-2. The district court sentenced petitioner to 106 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. While serving that term of supervised release, petitioner admitted to violating his conditions of supervised release, after which the court revoked his supervised release and ordered him to serve a 24-month term of imprisonment. D. Ct. Doc. 112, at 1-2 (May 21, 2025); Pet. App. A2. The court of appeals affirmed. Pet. App. A1-A4.

1. On March 6, 2014, petitioner was arrested in Aurora, Colorado with a stolen, loaded firearm and crack cocaine in his possession. Presentence Investigation Report (PSR) ¶¶ 9-10. At the time, petitioner was on parole after a prior conviction for aggravated felony robbery. PSR ¶ 10.

A grand jury in the District of Colorado charged petitioner with one count of possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); one count of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and

one count of possessing a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A). Indictment 1-2; PSR ¶ 1. Petitioner entered into a plea agreement and pleaded guilty to the two firearms counts. PSR ¶ 2. The district court sentenced him to 106 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

2. In February 2024, following his release from prison, the Probation Office alleged that petitioner had violated his supervised release conditions by associating with a person convicted of a felony. D. Ct. Doc. 77, at 1-3 (Feb. 27, 2024). The allegations concerned a September 2023 traffic stop in which petitioner rode in a vehicle with convicted felons and a February 2024 incident in which petitioner was contacted by law enforcement as a witness to a shooting. Ibid.

At a hearing, the district court advised petitioner that he was now subject to “zero-tolerance supervised release” and that petitioner should “bring [his] toothbrush” if he returned to court “because [he was] going to go to prison.” Pet. App. A2 (citation omitted; brackets in original). The court also modified petitioner’s supervised release conditions to include location monitoring and a curfew. Ibid.; D. Ct. Doc. 86, at 1-2 (Mar. 6, 2024).

In August 2024, petitioner was arrested on a state firearm charge relating to the February 2024 shooting incident. D. Ct. Doc. 102, at 5 (Apr. 15, 2025). Petitioner pleaded guilty to a

misdemeanor firearm offense and was sentenced to 300 days of imprisonment. Ibid. He finished serving his state sentence in February 2025. Ibid.

After his release from state custody, petitioner was arrested on a federal supervised release warrant. D. Ct. Doc. 102, at 5; Docket entry 92 (Feb. 19, 2025). The Probation Office had alleged that petitioner had violated multiple supervised release conditions, including by associating, communicating, or interacting with a person convicted of a felony and violating a state firearms law. D. Ct. Doc. 89, at 1-6 (July 31, 2024). The Probation Office calculated an advisory Sentencing Guidelines range of 12 to 18 months of imprisonment and recommended a sentence of 18 months, to be followed by an additional three years of supervised release. D. Ct. Doc. 102, at 3.

At a May 2025 hearing, petitioner admitted violating his supervised release conditions by possessing a firearm, and the government agreed to dismiss the other alleged violations. Pet. App. C2. The district court questioned both petitioner's counsel and petitioner himself about his admission. Id. at C2-C6. The court then declined to "use [the guidelines range] in this particular case" and instead "look[ed] at the individual circumstances of the case," emphasizing its "human aspects." Id. at C7-C8. After determining that petitioner's original Section 924(c) conviction was class A felony, id. at C9-C11, the court revoked his supervised release and ordered 24 months of

imprisonment, to be followed by three years of supervised release, id. at C11-C12. The court did not invite petitioner to allocute during the hearing. Petitioner raised no objection. Id. at A3.

3. On appeal, petitioner argued that the district court had violated Federal Rule of Criminal Procedure 32.1 by not inviting him to allocute. Pet. App. A1; see Fed. R. Crim. P. 32.1(b)(2)(E) (stating that a defendant "is entitled to * * * an opportunity to make a statement and present any information in mitigation" during a supervised release revocation hearing). Petitioner acknowledged that, due to his failure to raise an objection to the district court, his claim was reviewable solely for plain error. Pet. App. A1-A2; see Pet. C.A. Br. 5.

On plain-error review, petitioner bore the burden of establishing (1) an error that (2) was "clear or obvious," (3) "affected the defendant's substantial rights," and (4) "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Rosales-Mireles v. United States, 585 U.S. 129, 134-135 (2018) (citation omitted). And petitioner acknowledged that the court of appeals' earlier decision in United States v. Craig, 794 F.3d 1234 (10th Cir. 2015), overruled in part, United States v. Bustamante-Conchas, 850 F.3d 1130 (10th Cir. 2017) (en banc) -- which reasoned that "any potential error in not addressing [the defendant] personally" at a supervised release revocation hearing "is not 'plain'" "because neither the Supreme Court nor this circuit has interpreted Rule 32.1 to require a

personal invitation to allocute,” id. at 1239 -- foreclosed plain-error relief in his case. Pet. App. A3; see Pet. C.A. Br. 8.

The court of appeals affirmed in an unpublished order. Pet. App. A1-A4. The court agreed that plain-error review applied, id. at A3, and noted petitioner’s acknowledgment that Craig foreclosed plain-error relief, id. at A4.

ARGUMENT

Petitioner contends (Pet. 6-21) that the district court’s failure to invite his allocution before revoking his supervised release and imposing a 24-month sentence was plain error under Federal Rule of Criminal Procedure 52(b). This Court has repeatedly denied petitions for writs of certiorari raising similar claims about the proper approach to appellate review of forfeited allocution errors in the context of the imposition of a sentence following conviction. See, e.g., Pereznegron v. United States, 143 S. Ct. 582 (2023) (No. 22-5540); Pittsinger v. United States, 584 U.S. 1015 (2018) (No. 17-7568); Chavez-Perez v. United States, 581 U.S. 1019 (2017) (No. 16-8118); Villa-Lujan v. United States, 581 U.S. 1019 (2017) (No. 16-7160). The same result is warranted here.

1. Petitioner failed to make a contemporaneous objection to the district court’s failure to invite him to allocute under Federal Rule of Criminal Procedure 32.1(b)(2)(E), which states that a defendant “is entitled to * * * an opportunity to make a statement and present any information in mitigation” at a

supervised release revocation hearing. And petitioner does not dispute that, under Federal Rule of Criminal Procedure 52(b), he must satisfy the plain-error standard in order to obtain relief on appeal. See Pet. App. A3. Under that standard, petitioner may obtain such relief only if he shows that (1) the district court committed an error, (2) the error was "clear" or "obvious," (3) the error affected "substantial rights," and (4) the error seriously affected "the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-737 (1993).

The court below has explained that "any potential error in not addressing [the defendant] personally" at a supervised release revocation hearing "is not 'plain'" for purposes of the second plain-error requirement "because neither the Supreme Court nor this circuit has interpreted Rule 32.1 to require a personal invitation to allocute." United States v. Craig, 794 F.3d 1234, 1239 (10th Cir. 2015), overruled in part, United States v. Bustamante-Conchas, 850 F.3d 1130 (10th Cir. 2017) (en banc). To the extent that petitioner contends (Pet. 17-20) that any such error is in fact plain under this Court's decision in Green v. United States, 365 U.S. 301 (1961), he overreads that decision.

Green held that the predecessor to Federal Rule of Criminal Procedure 32 (which governs initial sentencing hearings) required that a defendant be accorded a personal opportunity to speak before the imposition of a sentence. 365 U.S. at 304. And contrary to

petitioner's assertion (Pet. 17), the language of the rule at issue there was not "nearly identical to the current language of Rule 32.1." The rule at issue in Green stated that "[b]efore imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf," 365 U.S. at 303 n.1, whereas Federal Rule of Criminal Procedure 32.1(b)(2)(E) provides only that the defendant "is entitled to * * * an opportunity to make a statement and present any information in mitigation." Green did not consider, let alone decide, that the differently worded provisions should be interpreted in the same way. Cf. Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted).

2. To the extent that petitioner contends (Pet. 7-15) that further review is warranted to address whether Rule 32.1(b)(2)(E)'s language requires a district court to affirmatively invite allocution at a supervised release revocation hearing, that issue is not squarely presented in this case. In light of the plain-error standard of review, the court of appeals did not need to -- and did not -- make a de novo determination about the proper interpretation of Rule 32.1(b)(2)(E). And to the extent that petitioner contends (Pet. 7-15) that further review is

warranted on the theory that, notwithstanding the forfeiture of his claim, he is entitled to relief, he is incorrect.

Even if the error here were deemed “plain,” he still cannot show “plain error warranting resentencing.” Pet. ii. In order to receive plain-error relief, a defendant bears the burden to demonstrate not only plain error, but also to demonstrate that the error “affect[s] substantial rights” and that it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 507 U.S. at 732 (brackets in original); see United States v. Vonn, 535 U.S. 55, 62-63 (2002); see also Johnson v. United States, 520 U.S. 461, 466-467 (1997). The burden is on the defendant to show that both of those additional requirements are met. See Vonn, 535 U.S. at 63.

Here, however, petitioner failed to address the third and fourth plain-error requirements in his court of appeals brief -- or his petition for a writ of certiorari.* See Pet. C.A. Br. 6-15; Pet. 6-21; see also Sawyers v. Norton, 962 F.3d 1270, 1286 (10th Cir. 2020) (“Issues not raised in the opening brief are

* Petitioner observes (Pet. 20) that the government did not argue in the court of appeals that he could not satisfy any other plain-error factor. But after petitioner filed an opening brief in the court of appeals acknowledging that he could not demonstrate plain error under existing circuit case law, see Pet. C.A. Br. 6-15, which included no attempt to meet the burden of showing the third and fourth plain-error factors, see pp. 9-10, supra, the government did not file an appellee brief. The issue remains in the case. See Dahda v. United States, 584 U.S. 440, 449-452 (2018) (affirming on an alternative ground that the government raised for the first time in response to the petition for a writ of certiorari).

deemed abandoned or waived.”) (citation omitted); cf. Yee v. City of Escondido, 503 U.S. 519, 535 (1992) (“[O]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court.”) (citation omitted). That omission forecloses plain-error relief in his case. The existence of circuit precedent that would foreclose relief based on the second element of plain-error review (plainness) should not excuse petitioner from even attempting to meet the showing that plain-error relief requires. Cf. United States v. McBride, 94 F.4th 1036, 1044 (10th Cir. 2024) (“[T]he failure to argue for plain error and its application on appeal . . . surely marks the end of the road for an argument for reversal not first presented to the district court.”) (citation omitted; brackets in original).

Without the requisite showings on the third and fourth elements of plain-error review, petitioner could obtain relief only if some sort of automatic-vacatur rule were to apply. But even assuming any court of appeals would grant such relief, this Court has rejected such categorical rules in the plain-error context. See Greer v. United States, 593 U.S. 503, 507-508 (2021) (explaining that defendant “must satisfy” the third requirement by showing “‘a reasonable probability that, but for the error, the outcome of the proceeding would have been different’” (quoting Rosales-Mireles v. United States, 585 U.S. 129, 134-135 (2018))); Puckett v. United States, 556 U.S. 129, 142 (2009) (explaining that the fourth plain-error component “is meant to be applied on

a case-specific and fact-intensive basis" and that a "'per se approach to plain-error review is flawed'" (quoting United States v. Young, 470 U.S. 1, 17 n.14 (1985)).

An automatic-vacatur approach would be particularly unwarranted given that, in the context of postconviction review of a claim regarding an original sentencing, the "failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed * * * is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962). Petitioner cannot simply assume, silently, that it is such an error in his case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

A. TYSEN DUVA
Assistant Attorney General

ROSALEEN T. O'GARA
Attorney

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