

High Court Seems Skeptical Of 5th Circ. Sentencing Practice

By **Elizabeth Bailey and Jill Winter** (December 13, 2019)

The U.S. Supreme Court heard oral arguments on Tuesday in a case that may clarify how specific a defendant's lawyer must be when objecting to a criminal sentence, and when she must make that objection, in order to receive a more favorable standard of review on appeal.[1]

The question before the justices in *Holguin-Hernandez v. United States* was whether the U.S. Court of Appeals for the Fifth Circuit has been requiring criminal defendants to make unnecessary post-sentencing objections in the name of Rule 51 of the Federal Rules of Criminal Procedure.

Upholding the practice would maintain the status quo, in which it is harder for defendants in the Fifth Circuit to convince the appellate court to overturn their sentences on appeal. Questions and comments from the justices revealed substantial skepticism about the practice, though it remains uncertain whether their decision will provide clear guidance on necessary specificity in making objections.

A Fifth Circuit Practice Unto Itself

In the Fifth Circuit — unlike in its sister circuits that have ruled on the issue — criminal defendants must specifically object to the reasonableness of a sentence after the trial judge issues it, in addition to any arguments made during the sentencing process itself.

If such an objection is not made, the Fifth Circuit applies plain-error review to the sentence on appeal, instead of a more defendant-friendly review for substantive reasonableness. The Fifth Circuit has reasoned that Rule 51(b) requires litigants to preserve objections to court rulings, and sentences should be treated no differently than other rulings, even where the sentence has been hotly debated during the exact same hearing.

The Supreme Court had to appoint someone to defend the Fifth Circuit's practice after the U.S. Department of Justice declined to support it, which alone did not seem to bode well for the circuit court. Based on the questioning at oral argument, the court may, at a minimum, be leaning towards rejecting the Fifth Circuit's rigid approach to timing. Even the court-appointed amicus conceded that Rule 51 mandates no such timing requirement.

In practice, as the defendant Gonzalo Holguin-Hernandez pointed out to the Supreme Court, Fifth Circuit panels have applied the plain-error standard to over 200 appeals challenging the substantive reasonableness of a sentence.[2]

Holguin-Hernandez presented the Supreme Court with an appeal by a defendant who had been sentenced for a violation of his supervised release for a prior crime but whose lawyer failed to formally "object ... to the reasonableness of the sentence imposed." [3]

When Holguin-Hernandez appealed to the Fifth Circuit, the court held that plain-error review applied because of the failure to adequately preserve his objection. The court ultimately affirmed the sentence, and Holguin-Hernandez appealed to the Supreme Court, asking



Elizabeth Bailey



Jill Winter

whether “a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant’s sentence.”[4]

Tellingly, the U.S. government declined to oppose his appeal, which forced the Supreme Court to appoint an amicus to advocate for letting the Fifth Circuit keep its unique requirement. Morgan L. Ratner, assistant to the U.S. solicitor general, ultimately split argument time with Kendall Turner of O’Melveny & Myers LLP, who represented Holguin-Hernandez, with K. Winn Allen of Kirkland & Ellis LLP, the court-appointed amicus, arguing third.

At argument, subtle alliances and divisions among the parties caused confusion, and the justices spent much time trying to determine exactly how each of the three positions differed from one another.

No Need to Tell the Court Twice

Turner argued that “there’s no need to tell the court [the same thing] twice” in order to satisfy Rule 51, and that the Fifth Circuit’s requirement of a post-sentencing objection “flouts” this rule. She noted that there was “no evidence that a district court has ever reconsidered a sentence in light of a post-sentencing objection” — a point that the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders also made in their amicus brief.

Justice Brett Kavanaugh later pressed the Allen on this point, calling it “one of the strongest things Ms. Turner said, in addition to her legal arguments.”

Turner also argued against the Allen’s position that litigants must make objections to the trial court in terms of the purely appellate standard of substantive reasonableness. By way of analogy, she pointed out that parties making evidentiary objections at trial need not frame their objections to the appellate standards of abuse of discretion or clear error.

When Chief Justice John Roberts and Justice Samuel Alito questioned how merely requesting a particular sentence necessarily puts the trial court on notice that anything longer would be substantively unreasonable, Turner reiterated that defendants should not be required to frame their arguments in the district court with an appellate standard.

Justice Sonia Sotomayor asked whether adequate notice must include “the basis ... for you believing” a certain sentence does not satisfy the parsimony principle of Title 18 U.S. Code Section 3553(a) (the obligation of a court to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes” proscribed by law).

Turner pointed out that, in practice, defense counsel would have already briefed and argued such substantive issues extensively before the sentence was imposed, and warned that requiring more specificity than previously called for by the Court’s precedents would be “unwise” and “create new problems.”

The DOJ Argues for at Least Some Specificity in Objections to Sentences, but How Much?

Ratner echoed Turner’s argument that the trial court needs only “one opportunity, not two” to consider and address objections; however, she added that a defendant must state the “circumstances that the defendant feels are important under Section 3553(a)” in order to “fairly put the district court on notice of the substance of his claim.”

Justice Sotomayor asked whether the Supreme Court needed to give detailed instructions on how much specificity is enough to put trial courts on notice of an objection to the reasonableness of a sentence, or whether it would be enough for the court's opinion to say, "it's too absolute ... to require a specific objection under all circumstances." Ratner responded that "there would be significant value in the Court offering some clarity" rather than potentially causing further confusion by failing to describe what would and would not constitute proper preservation in this context.

Pressed by Justice Kavanaugh, Ratner admitted that, while there is a difference between the substantive reasonableness and plain-error standards, it is "very small" and "probably wouldn't be dispositive in most cases." Indeed, it was the government's position that applying substantive reasonableness in Holguin-Hernandez's case would not have changed the outcome.

But, she concluded, "the key problem with the Fifth Circuit's rule here is that it's requiring parties to say, in the district court, the applicable appellate standard of review. And that's just not something that litigants are required to do in any other context."

Reframing the Narrative to Partially Defend the Fifth Circuit

Allen took great pains to paint the Fifth Circuit's current practice as mostly appropriate and consistent with the federal rules. He argued that a defendant must at least object "that an imposed sentence is beyond the range of choice a district court has under [Section] 3553(a)," and "identify the facts and circumstances supporting that argument" in order to adequately preserve an objection.

Justice Kavanaugh challenged Allen to describe the daylight between his position and that of the government. Allen proposed that the only difference is that in his view, the defendant must make a distinct legal argument regarding a sentence, which the government would not require. But Allen asserted support from the government for the idea that a defendant must identify the facts and circumstances supporting the sentence objection.

Notably, Allen conceded that a rule requiring an objection post-sentence "would be an incorrect reading of Rule 51," but suggested that objections were "most sensibly ... made after sentencing," once the district court pronounces the longer sentence and explains its reasoning to the defendant. Although Allen tried reframing the Fifth Circuit's requirements to be a rule of substance rather than timing, it was not clear that the court accepted that gambit.

Justice Kavanaugh went back to the idea that there was little difference in practice between the substantive reasonableness and plain-error standards, and Allen agreed that there is some, but not much, difference between the two standards. Even though the likelihood of an appeals court finding any particular imposed sentence to be substantively unreasonable is "exceedingly rare," though, Allen acknowledged that the Supreme Court should not "prejudge" the issue because of the "fact-intensive nature" of such inquiries.

Ultimately, Allen posited that the issue would be most significant when the imposed sentence "differs dramatically" from both the guidelines range and what the defendant requested, so that parties must "engage with the district court about the sentence it imposed" to ensure that the appellate court is not addressing those issues for the first time.

In a short rebuttal, Turner argued that Allen's proposed test would also be inconsistent with

Rule 51, and targets a “problem that does not exist,” because nine circuits have demonstrated that “the Fifth Circuit’s rule is not necessary” to prevent appellate courts from addressing issues without the benefit of argument below.

Exactly How Far Will the Court Go?

Oral argument foreshadowed that, at a minimum, the court is likely to reject the Fifth Circuit’s practice of requiring a post-sentence objection. The more difficult outcome to predict is whether the court will provide guidance as to how specific a defendant must be in her objections and what that guidance may look like.

Counsel for all parties fundamentally agreed that a defendant must provide the court with fair notice of what the issues are but disagreed on how to do so. The court’s careful questioning to divine the differences between the parties’ positions may preview its desire to provide defendants with more clarity than they have now.

Elizabeth R. Bailey and Jill Winter are associates at Buckley LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Quotations in this article are based on the Official-Subject to Review transcript posted by the U.S. Supreme Court on December 10, 2019.
https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-7739_g31h.pdf.

[2] Holguin-Hernandez Reply in Support of Petition for Writ of Certiorari at 3-4.

[3] United States v. Holguin-Hernandez, 746 Fed. Appx. 403, 403 (5th Cir. Dec. 27, 2018).

[4] Holguin-Hernandez Petition for Writ of Certiorari at i.