

**PROTECTING THE RIGHT TO ALLOCUTION: *UNITED STATES V. AVILA-CORTEZ*, NO. 08-41219, 2009 WL 2882829
(5TH CIR. SEPT. 10, 2009)**

Highlight

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Manuel Avila-Cortez (Appellant) appealed his sentence, complaining of reversible error committed by the district court, when he was not given his right to allocution prior to the pronouncing of his sentence.¹ Appellant “pleaded guilty to one count of being an alien unlawfully found in the United States after having been previously denied admission, excluded, deported, or removed from the country, in violation of 8 U.S.C. § 1326(a) and (b).”² The district court never addressed appellant personally, and the only time appellant was given an opportunity to speak was in response to whether he had received the presentencing report and had an opportunity to review it.³

The district court then sentenced Appellant to thirty months imprisonment, the maximum sentence for the crime charged, concluding that:

The court has selected the high end of the guidelines on recognition of the defendant’s recidivism. The court feels that he is just not getting the message. He was even on supervision when this was accomplished. The court feels that the high end of the guidelines adequately addresses the sentencing factors of 18 U.S.C. § 3553, especially the recidivism of the defendant.⁴

The issue before the Fifth Circuit on appeal was to determine “whether the district court committed an error, whether that error [was] plain, and whether the error affect[ed] substantial rights.”⁵

The court previously held in *United States v. Reyna* that a district court commits plain error when “it fails to comply with Federal Rule of

¹ *United States v. Avila-Cortez*, No. 08-41219, 2009 WL 2882829, at *1 (5th Cir. Sept. 10, 2009).

² *Id.*

³ *Id.*

⁴ *Id.* at *2.

⁵ *Id.* (internal quotations omitted).

Criminal Procedure 32 by not addressing the defendant personally and giving him or her an opportunity to make a statement in mitigation of sentence.”⁶ Appellant and Appellee both contended that plain error was committed by the district court when it failed to allow Appellant his right of allocution. Thus, the issue before the court was whether such plain error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.”⁷

Distinguishing prior cases where the court found that the defendant’s right to allocution would not have affected the outcome of the sentencing, or where the defendant had no meritorious argument to provide the court in support of allocution, Appellant provided the court with an explanation of what he would say in his brief if he was given the opportunity.⁸ Appellant claimed that he would have “explained how he tackled, and continued to tackle, his alcohol abuse problem and what plans he and his wife had made to make a permanent life for themselves in Mexico.”⁹ Additionally, the court found that even “[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.”¹⁰

Distinguishing these cases, the court held that the district court “failed to follow the Supreme Court’s guidance that ‘trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing.’”¹¹ The failure to do so amounted to plain error that affected Appellant’s substantial rights and seriously affected “the fairness, integrity, or public reputation of judicial proceedings.”¹²

Criminal defense attorneys will find this opinion particularly useful because it affirms the defendant’s right to allocution. The decision does not appear to allow a sentence to be vacated when the sentence is the minimum allowable punishment. The question remains, however, as to whether a sentence falling in between the minimum and maximum sentencing range would formulate the same results, and how much more than the minimum would be necessary. But, where any defendant is denied his right to allocution and is sentenced more than the minimum possible sentence, if the defendant has a valid and meritorious statement

⁶ *Id.* (citing *United States v. Reyna*, 358 F.3d 344, 350 (5th Cir. 2004)).

⁷ *Id.*

⁸ *Id.* at *4.

⁹ *Id.*

¹⁰ *Id.* (quoting *Green v. United States*, 365 U.S. 301, 304 (1961)).

¹¹ *Id.* at 5 (quoting *Green*, 365 U.S. 301 at 305).

¹² *Id.*

to provide the court in mitigation of his sentence, then that defendant's request will be granted and the sentence will be vacated for resentencing.