

“THE FEDERAL CORNER”

A Judge, A Prosecutor and a Defense Lawyer Work Together
to Give the Judges of the Third Circuit an Unbelievable Case

Buck Files

A prosecutor who is overly aggressive can introduce error into the trial of a case. A defense lawyer who sits on his hands and does not object can limit the appellate court’s consideration of an issue to a plain error standard. A trial judge who considers testimony improperly adduced by an aggressive prosecutor in determining what sentence to impose can make the case difficult for an appellate court to affirm. That is the conduct of the district judge and the two lawyers in *United States v. Moreno*, ___F.3d___, 2016 WL 53796 (3rd Cir. 2016). This required a panel of the United States Court of Appeals for the Third Circuit to vacate the sentence imposed by United States District Judge Norma Barry Fischer of the Western District of Pennsylvania and to remand the case for re-sentencing, only. [The panel: Circuit Judges Fisher, Chagares, and Jordan. Opinion by Fisher.]

An Overview of the Case

Jason Moreno was indicted on two counts of conspiracy to commit wire fraud, in violation of [18 U.S.C. § 1349](#); and, five counts of wire fraud in violation of [18 U.S.C. §§ 1343](#) and 2. He pleaded not guilty and proceeded to trial. On September 19, 2013, the jury returned a verdict of guilty on all seven counts. On appeal, Moreno’s lawyer raised issues as to a Confrontation Clause violation, the admission of hearsay evidence and as to a four-level sentencing enhancement. Each of these grounds of error was rejected by the Court. What remained for the Court was the issue of allocution. Judge Fisher’s opinion reads, in part, as follows:

[At the Sentencing Hearing]

Moreno called eight character witnesses. Defense counsel asked questions of each, and the prosecutor questioned three of them. After the final witness, defense counsel informed the Court that Moreno wanted to exercise his right of allocution.

[Moreno Addressed the Court]

Then Moreno, under oath, addressed the Court directly without questions from defense counsel. He asked the Court for mercy and listed several mitigating circumstances for the Court—among other things, he apologized to his victims, explained that he was relatively young when he committed the crimes, spoke of recent changes in his life, said that he had become more religious, and stated that he was dedicating his life to preventing

others from making the mistakes he had made. He also stated that he was prepared to accept the consequences of his actions, and he asked the Court for mercy. *He did not attempt to re-contest factual issues of innocence and guilt.* (emphasis added)

*[Moreno's Lawyer Did Not Object When the Prosecutor
Cross-Examined His Client]*

When Moreno had finished speaking, the prosecutor—without leave of court—engaged in an extensive cross-examination in which he questioned Moreno about his criminal conduct. Defense counsel did not object. Moreno, who had not testified at trial, had no choice but to testify on matters of his guilt. The prosecutor explained to the District Court, '[W]hat I'm trying to figure out is what ... he knowingly, fraudulently submitted to the lenders.' (App.1706–07). *The prosecutor asked Moreno: 'Tell the Court, what were the other lies that were in these appraisals that you were submitting to the lender?'* (App.1704). *When Moreno asked for clarification on a question, the prosecutor responded, 'Tell the Court, you're the one accepting responsibility now.'* (App.1705). *The prosecutor got Moreno to admit that the evidence of fraud introduced at trial was 'just the tip of the iceberg.'* (App.1710). (emphasis added)

[Moreno's Lawyer Questioned His Client]

After the cross-examination, the District Court offered defense counsel the opportunity to ask questions, which he took.

[The District Court Made Findings of Fact]

The District Court then made findings of fact regarding the testimony of the witnesses, Moreno's statement, and the prosecutor's cross-examination. (emphasis added)

[The Prosecutor's Argument on Sentencing]

The prosecutor's sentencing argument addressed Moreno's statement and then argued that the seriousness of the offense had been 'ratcheted up' based on what he had been able to 'drag out' of Moreno on cross-examination. (App.1755). *The prosecutor also referred to the cross-examination to undercut Moreno's expression of remorse.* (emphasis added)

*[The District Judge Considered Moreno's Testimony
on Cross-Examination in Sentencing Him]*

When explaining the sentence, the District Court referenced the cross-examination in rejecting various defense arguments for a lower sentence. The District Court also noted Moreno's admission during the cross-examination that he had prepared more than the 110 fraudulent appraisals that had been proven at trial. (emphasis added)

* * *

[The Rule 32 Provision]

Finally, we turn to the issue of allocution. Before imposing sentence, a district court must ‘address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence....’ [Fed.R.Crim.P. 32\(i\)\(4\)\(A\)\(2\)](#).

[Moreno’s Contention]

Moreno contends that this right was violated when, immediately following the allocution, the prosecutor engaged in a vigorous and lengthy cross-examination of him. Moreno concedes that the issue was not preserved and is therefore subject to plain error review.

[The Right to Allocution]

‘ “The right of allocution is deeply rooted in our legal tradition” and dates back to at least the fifteenth century.’ [United States v. Ward](#), 732 F.3d 175, 180–81 (3d Cir.2013) (alteration omitted) (quoting [United States v. Adams](#), 252 F.3d 276, 282 (3d Cir.2001)), *cert. denied*, — U.S. —, 134 S.Ct. 2684, 189 L.Ed.2d 212 (2014). Although the right of allocution ‘is not a right guaranteed by the Constitution,’ we have explained that Congress, ‘acknowledging the historical and common law roots of the right of allocution, ... codified the right in 1944 by promulgating [Federal Rule of Criminal Procedure 32](#).’ *Id.* at 181. ‘Furthermore, while the right of allocution is not constitutional, nonetheless it is ancient in origin, and it is the type of important safeguard that helps assure the fairness, and hence legitimacy, of the sentencing process.’ [Adams](#), 252 F.3d at 288 (citing [Green v. United States](#), 365 U.S. 301, 304–05, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961)).

[The Purpose of Rule 32]

As we stated in *Ward*, the critical purpose of [Rule 32](#) is threefold: ‘(1) to allow the defendant to present mitigating circumstances, (2) to permit the defendant to present personal characteristics to enable the sentencing court to craft an individualized sentence, and (3) to preserve the appearance of

fairness in the criminal justice system.’ *Ward*, 732 F.3d at 181. We further explained that ‘allocution “is designed to temper punishment with mercy in appropriate cases, and to ensure that sentencing reflects individualized circumstances.”’ *Id.* (quoting *United States v. De Alba Pagan*, 33 F.3d 125, 129 (1st Cir.1994)). Allocution also ‘has value in terms of maximizing the perceived equity of the process, because the defendant is given the right to speak on any subject of *his* choosing prior to the imposition of sentence.’ *Id.* at 181–82 (emphasis added) (internal citations and quotation marks omitted).

[The Government’s Contention]

The government contends that the District Court did not err in permitting the prosecutor to cross-examine Moreno because Rule 32 does not explicitly prohibit cross-examination and because neither the Supreme Court nor our Court of Appeals has ever specifically held that the practice is impermissible.

[Cross-Examination is Contrary to the Purpose of Rule 32]

But cross-examination is still contrary to the purpose of allocution as outlined in Rule 32, which is to ‘permit the defendant to speak or present any information to mitigate the sentence.’ Fed.R.Crim.P. 32(i)(4)(A)(ii). As we said in *Ward*: ‘The reason for allocution is not to permit the defendant to re-contest the factual issues of innocence and guilt. Rather, the purpose of allocution is to afford the defendant an opportunity to raise mitigating circumstances and to present his individualized situation to the sentencing court.’ *Ward*, 732 F.3d at 182.

[What Moreno Said in His Allocution]

{ "pageset": "S48 In his statement to the District Court, Moreno did not attempt to re-contest factual issues of guilt or innocence. To the contrary, Moreno presented personal characteristics and explained at length that, though he had gone to trial, he was accepting responsibility for his crimes.

[What the Prosecutor Did on His Cross-Examination of Moreno]

But the prosecutor used his cross-examination to do exactly what we said in *Ward* was impermissible for a defendant to do: he bolstered the factual case against Moreno by drawing out several admissions about the scope of the conspiracy, which he then used in his sentencing argument.

[This Was Error]

Cross-examination on the subject of Moreno's guilt was contrary to the purpose of [Rule 32](#) and to the purposes of allocution as stated in *Ward*. The District Court thus committed error in permitting the prosecutor to cross-examine Moreno.

[The Court's Holding on Plain Error]

We also hold that the error was plain because it was clear and obvious in light of this Court's discussion in *Ward*.

* * *

[The Court Could Exercise Its Supervisory Power]

Even if we were to conclude that the error in this case was not plain (and we do not so hold), we would nevertheless exercise our supervisory power and hold that a defendant may not be cross-examined during allocution.

[My Thoughts]

- It would have been interesting to have been a fly on the wall during the judges' conference on *Moreno*. Judge Fischer was not a "rookie judge." She had been nominated by President George W. Bush and took the oath of office as a District Judge in February, 2007. The judges had surely seen cases in which the defendant's lawyer failed to object; however, they had probably never seen one in which an Assistant United States Attorney cross-examined a defendant who had just finished his allocution to the court.
- So, what's the lesson for us all? Object. Object. Object. *Moreno's* lawyer forced the Court to review his allocution argument on a plain error standard. In this case, that was not a problem for the Court; in other cases, though, failing to object could make it unlikely that a defendant would have success on appeal.
- From a reading of *Moreno*, it appears that the prosecutor had a rather simple task in convicting the defendant. Once again, we have a case of an over-zealous prosecutor who was not satisfied with a win on guilt/innocence and who was trying for a home run on sentencing. Now, he is forced to re-litigate the sentencing issue.
- What surprised me? That the Court did not require Moreno to be sentenced, on remand, by a different judge. It is always impossible to un-ring the bell or to put the meow back in the cat. It will be interesting to see what sentence Judge Fischer imposes.