

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

United States v. Ackerly

No. 19-1967, United States Court of Appeals for the First Circuit (November 24, 2020)

SUMMARY

The First Circuit affirmed the grant of a new trial after a jury convicted Ackerly of wire fraud, honest services wire fraud, and conspiracy. The district court found a Confrontation Clause violation when the prosecutor, during redirect examination, asked a witness about a co-conspirator's guilty plea—a testimonial statement—without providing an opportunity for cross-examination. On appeal, the government argued that the statement was not admitted into evidence and that curative instructions eliminated any constitutional violation, but the First Circuit held that because the government failed to preserve these arguments, plain error review applied, and the claimed error was neither clear nor obvious under existing case law. The court also noted that curative instructions address prejudice, not whether a constitutional violation occurred, and affirmed that the district court did not abuse its discretion in ordering a new trial.

CASE DETAILS

COURT	United States Court of Appeals for the First Circuit
WRITING FOR THE COURT	Selya, Circuit Judge; Howard, Chief Judge; Barron, Circuit Judge
JURISDICTION	Federal
DECIDED	November 24, 2020
DOCKET	19-1967
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the United States District Court for the District of Massachusetts. The district court granted defendant's motion for a new trial based on a Confrontation Clause violation. The government appeals.
STANDARD OF REVIEW	The court reviewed the government's specific claims under the plain error standard because the arguments were not preserved. The district court's grant of a new trial is ordinarily reviewed for abuse of discretion.
PRECEDENTIAL VALUE	published

PARTIES

United States of America v. Donna M. Ackerly, a/k/a Donna Kalmaczewski

TOPICS

criminal procedure

sixth amendment

appellate procedure

standard of review

harmless error

PRACTICE AREAS

criminal law

appellate procedure

QUESTIONS PRESENTED

1. Whether the district court's finding of a Confrontation Clause violation was clear or obvious error when the testimonial statement was not admitted into evidence.
2. Whether the district court's finding of a Confrontation Clause violation was clear or obvious error when the question was unanswered and followed by curative instructions.

HOLDINGS

1. The argument was not preserved because the government did not raise it in the district court, so it is subject to plain error review.
2. Even assuming error, it was not clear or obvious because the law is unsettled on whether the Confrontation Clause applies to statements not admitted into evidence.
3. The argument was not preserved because it was not raised below, so plain error review applies.
4. It was not clear or obvious because case law does not support the government's proposition that a single question cannot be a violation.

KEY QUOTATIONS

"To prevail on plain error review, the government must demonstrate "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected [its] substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings."" (11)

"We hold that to the extent the district court may have erred in treating the prosecutor's improper statement as working a Confrontation Clause violation — a matter that we do not decide — that error was neither clear nor obvious. And because the government has failed to carry the devoir of persuasion with respect to the second element of the plain error construct, plain error is plainly absent." (19)

"It is the unfronted testimonial statement that comprises the Confrontation Clause violation, and curative instructions cannot suffice to put the genie back into the bottle." (23)

FACTUAL BACKGROUND

The defendant was a senior account executive at Georgeson, a proxy-solicitation firm. She was charged with participating in a scheme to bribe an ISS employee, Brian Zentmyer, for nonpublic information. At her separate

trial, the government did not call Zentmyer but instead called a cooperating witness, Keith Haynes. During Haynes' redirect examination, the prosecutor asked a question that referenced Zentmyer's guilty plea. The question was not answered, and the district court sustained the objection. The district court later granted a new trial, concluding that the question violated the Confrontation Clause because it brought a testimonial statement to the jury's attention without an opportunity for cross-examination.

PROCEDURAL HISTORY

The defendant was indicted for wire fraud, honest services wire fraud, and conspiracy. After a mistrial involving co-defendants, the defendant was retried separately. During the trial, the prosecutor asked a question referencing a co-defendant's guilty plea, which was not admitted into evidence. The district court granted a new trial, finding a Confrontation Clause violation. The government appealed.

DISPOSITION

affirmed

CASES CITED

- United States v. Garske, 939 F.3d 321 (1st Cir. 2019), cert. denied, 140 S. Ct. 1121 (2020)
- Chapman v. California, 386 U.S. 18, 24 (1967)
- Kotteakos v. United States, 328 U.S. 750, 776 (1946)
- United States v. Theodore, 468 F.3d 52, 56 (1st Cir. 2006)
- United States v. Madsen, 809 F.3d 712, 717 (1st Cir. 2016)
- United States v. Lilly, 13 F.3d 15, 18 (1st Cir. 1994)
- United States v. Taylor, 54 F.3d 967, 972-73 (1st Cir. 1995)
- United States v. Andrade, 94 F.3d 9, 14 (1st Cir. 1996)
- United States v. Indelicato, 611 F.2d 376, 386 (1st Cir. 1979)
- United States v. Earle, 488 F.3d 537, 542 (1st Cir. 2007)
- Crawford v. Washington, 541 U.S. 36 (2004)
- United States v. Ofray-Campos, 534 F.3d 1, 23 (1st Cir. 2008)
- United States v. Carraway, 108 F.3d 745, 756 (7th Cir. 1997)
- Douglas v. Alabama, 380 U.S. 415 (1965)
- Robbins v. Small, 371 F.2d 793, 796 (1st Cir. 1967)
- Williams v. Illinois, 567 U.S. 50 (2012)
- Ohio v. Roberts, 448 U.S. 56 (1980)
- United States v. Morosco, 822 F.3d 1, 12 (1st Cir. 2016)
- United States v. Marquez, 898 F.3d 1036, 1047-48 (10th Cir. 2018)
- United States v. Spriggs, 591 F. App'x 149, 151-52 (3d Cir. 2014)
- Ryan v. Miller, 303 F.3d 231, 248-249 (2d Cir. 2002)
- United States v. Maher, 454 F.3d 13, 23 (1st Cir. 2006)

- Greer v. Miller, 483 U.S. 756 (1987)
- Doyle v. Ohio, 426 U.S. 610, 618 (1976)
- Donnelly v. DeChristoforo, 416 U.S. 637, 643-44 (1974)
- Hardy v. Maloney, 909 F.3d 494, 501 (1st Cir. 2018)
- United States v. Jones, 748 F.3d 64, 69-70 (1st Cir. 2014)
- United States v. Pinkham, 896 F.3d 133, 136-37 (1st Cir. 2018)
- United States v. Olano, 507 U.S. 725, 734 (1993)
- United States v. Bennett, 469 F.3d 46, 50-51 (1st Cir. 2006)
- United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001)
- United States v. Hunnewell, 891 F.2d 955, 956 (1st Cir. 1989)