UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff, v. ALFRED TRENKLER, Defendant.	)	Criminal No. 1:92-cr-10369-RWZ

DEFENDANT ALFRED TRENKLER'S MOTION FOR A HEARING ON REMAND AND MOTION TO APPEAR AT SAME; MEMORANDUM IN SUPPORT OF SAME

Defendant Alfred Trenkler hereby moves for a hearing on remand so that he may exercise his constitutional and statutory rights to appear, allocute, and raise appropriate objections before the Court implements the appellate mandate and reimposes his previously vacated illegal sentence. Mr. Trenkler's right to appear in court when his sentence is reimposed is explicit in Rule 43, and is guaranteed by the Constitution. Furthermore, as discussed below, while the First Circuit has now taken the view that the interest of finality trumps the fundamental constitutional right to be legally sentenced, Mr. Trenkler continues to believe that that holding is at odds with binding Supreme Court law and the Constitution. He also stands by his arguments, raised on appeal but not addressed in the First Circuit's opinion, that no court has authority to impose or reimpose an illegal sentence at any point in time, including on remand. The possibility that the Supreme Court will overrule the First Circuit, either explicitly when Mr. Trenkler petitions for certiorari, or implicitly by virtue of other decisions that may issue while his petition is pending, is real. Mr. Trenkler must be afforded an opportunity to preserve his objections to the reinstatement of what even the First Circuit has acknowledged is an illegal sentence.

I. BACKGROUND

This case has a long history, which has been well documented in prior briefing. In short, however, after being convicted of violations of 18 U.S.C. §§ 844(d) and (i) in 1991, Mr. Trenkler was illegally sentenced to two concurrent life terms in excess of the statutory maximums. [Case 1:06-cv-12072-RWZ, Docket No. 3 at 1, 7]. Absent a jury directive, which was neither sought nor obtained, the statutes at the time authorized a maximum sentence of a term of years less than life. [*Id.* at 1-2, 7.] The maximum term was further limited to ten years, since, as the Government has since conceded, it neither sought nor obtained the factual jury findings required to impose a higher sentence. (Government's Appellate Response Brief at 49, 55 ("[T]he parties did not submit jury instructions asking the jury to decide" these facts, "nor was the jury told to consider those issues."). Regrettably, however, these errors were not discovered until many years later. In 2005, Mr. Trenkler wrote to this Court notifying it of the sentencing error, after which the Court appointed the undersigned counsel to represent him in the matter. [Case 1:06-cv-12072-RWZ, Docket No. 3 at 3].

In November 2006, Mr. Trenkler, through his counsel, filed a petition for a writ of coram nobis, asking the Court to vacate the illegal sentences and replace them with legal ones. [Docket No. 673]. In February 2007, the Court granted the petition without Government opposition. [Case 1:06-cv-12072-RWZ, Docket No. 3]. After the petition was granted, the Government sought reconsideration, which the Court ultimately denied. It held a hearing on April 4 2007, at which point the original sentence was formally vacated and a new sentence of 37 years imposed instead. [Docket No. 690; *see* Docket at 4/04/2007].

The parties cross-appealed. The Government challenged this Court's authority to correct its own fundamental errors, arguing that 28 U.S.C. § 2255 forecloses post-conviction relief in all cases that do not satisfy the narrow "gatekeeping" provisions of that statute. It did not appeal the

revised sentence itself. Mr. Trenkler cross-appealed the 37-year sentence, arguing that it exceeded the ten-year maximum under the Sixth Amendment principles established in *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and their progeny. In its Opposition, the Government conceded that the court had no authority to impose a sentence above 10 years, because the jury was not asked to and did not make the required factual findings. (Government's Appellate Response Brief at 49, 55.) Mr. Trenkler also argued that, regardless of this Court's authority to have vacated the original sentence, neither the First Circuit, this Court, nor any other could reinstate a sentence that it knows to be illegal. (*See* Principal and Response Brief on Appeal at 26-32; 76-83.)

On August 1, 2008, the First Circuit granted the Government's appeal, which it held rendered Mr. Trenkler's appeal moot. *Trenkler v. United States*, 536 F.3d 85 (1st Cir. 2008). The First Circuit opinion did not address Mr. Trenkler's argument that an illegal sentence cannot be reinstated once vacated, even if its vacation occurred without authority. On September 12, 2008, Mr. Trenkler filed a petition for rehearing en banc, which the First Circuit denied on September 24. On October 6, the mandate issued, ordering that "The amended judgment and sentence are vacated and the district court shall proceed forthwith to reinstate the original sentence." [Docket No. 718].

II. ARGUMENT

Mr. Trenkler has an unassailable statutory and constitutional right to appear before this Court when it implements the First Circuit's mandate and reinstates his original sentence. *United States v. Behrens,* 84 S. Ct. 295, 298 (1963) (Harlan, J., concurring) ("[T]he requirements of criminal justice . . . leave no doubt of [a defendant's] right to be present when a final determination of sentence is made. The elementary right of a defendant to be present at the imposition of sentence and to speak in his own behalf, . . . is not satisfied by allowing him to be

present and speak at a prior stage of the proceedings which results in the deferment of the actual sentence.") Federal Rule of Criminal Procedure 43 is explicit that "[u]nless this rule . . . provides otherwise, the defendant must be present at . . . (2) every trial stage," and "(3) sentencing." Fed. R. Crim. P. 43(a) (emphasis added).[1] The only exceptions listed in the Rule are situations where the defendant is an "organizational defendant," where the offense is a "misdemeanor offense," where "the proceeding involves only a conference or hearing on a question of law," or where "[t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)." Fed. R. Crim. P. 43(b).

None of these exceptions apply here. The first three are self-evidently inapposite to the present circumstances. The last applies only to Rule 35 and Section 3582 proceedings. Even if the present situation could be analogized to one of those proceedings, the exception only allows for a defendant's absence if an existing sentence is "corrected" or "reduced" through the proceeding. It does not apply where a previous sentence has been vacated and a new one is to be imposed. Nor does it apply in any circumstance where a sentence is to be increased. As the Fifth and Second Circuits have explained:

> We have long recognized the distinction between proceedings in the district court that modify an existing sentence and those that impose a new sentence after the original sentence has been set aside. In the former instance, the presence of the defendant usually is not required, unless the modification makes the sentence more onerous. In the latter instance, however, we have consistently held that a defendant's rights to be present and to allocute at sentencing, which are of constitutional dimension, extend to resentencing proceedings.

United States v. Moree, 928 F.2d 654, 656 (5th Cir. 1991); *accord United States v. Arrous*, 320 F.3d 355, 359-360 (2d Cir. 2003) ("The law recognizes a distinction between a proceeding by

[1] The Rule also makes exceptions for arraignments and initial appearances under Rule 5 and Rule 10, which obviously do not apply here.

which the district court corrects or changes a pre-existing sentence, and one where the district court re-enters a sentence which has been vacated or set aside by the Court of Appeals . . . . In the former situation, we have held that a defendant need not be present; while in the latter, a defendant has a constitutional right to be present, because technically a new sentence is being imposed in place of the vacated sentence.") (citations omitted); *see also* Rule 43, Advisory Committee Notes to 1998 Amendment (citing *Moree* and explaining that a sentencing proceeding being conducted on remand after an appeal "require[s] the defendant's presence."); *cf. United States v. Sabatino,* 1992 U.S. App. LEXIS 20669 (1st Cir. June 8, 1992) (citing *Moree,* 928 F.2d 654, and distinguishing between mandates ordering a reduction of an existing sentence and mandates vacating a sentence with instructions to impose a new one).

Here, there is no question that the First Circuit vacated the existing 37-year sentence and ordered that a new one (the original) be reimposed. As the mandate states, "The amended judgment and sentence are vacated and the district court shall proceed forthwith to reinstate the original sentence." [Docket No. 718 (emphasis added)]. Moreover, as the original sentence is greater than the vacated one, the new sentence constitutes an increase, not a reduction. Under these circumstances, both Rule 43 and the Constitution guarantee Mr. Trenkler's right to be present when the Court implements the First Circuit's mandate, no matter how technical the proceeding may be. *See Moree*, 928 F.2d at 656 ("The mandate did not . . .instruct the district court simply to reduce [defendant's] existing sentence to the legal maximum. Rather, the mandate rendered [his] previous sentence null and void. While we might have fashioned the mandate differently, we did not; the vacatur is the law of the case, and the district court 'has no power or authority to deviate' from it. {The defendant] was entitled to be present and to allocute at his resentencing."); *Arrous*, 320 F.3d 355, 359-360 (2d Cir. 2003) ("[W]e generally adhere to

the fine line between modifying a sentence, and imposing a new sentence, however technical such distinction may be in some cases."); *cf. Sabatino,* 1992 U.S. App. LEXIS 20669 (In contrast to the present case, where the "sentence 'correction' was a 'reduction,'" rather than an increase, "defendant's presence was not required under the term of the rule," nor "did defendant have any constitutional right to be present when his sentence was reduced.")

In addition to his constitutional and statutory right to be present, Mr. Trenkler stands by his sound position, followed by other Circuits and the Supreme Court, that no court has authority to impose or reimpose an illegal sentence. *See, e.g., United States v. Green,* 405 F.3d 1180, 1188 (10th Cir. 2005) (A court may "reinstate the defendant's original sentence . . . only if that sentence is permissible."); *Rutledge v. United States*, 517 U.S. 292, 297 (1996) ("Courts may not 'prescrib[e] greater punishment than the legislature intended.'"); *Ex parte Lange*, 85 U.S. 163, 176-177 (1874) (An extrastatutory sentence is "in excess of the authority of the court, and forbidden by the Constitution."); *Libretti v. United States,* 516 U.S. 29, 55 (1995) (Stevens, J., dissenting on other grounds) ("[E]xtrastatutory punishments implicate the very power of a court to act"). Although the mandate instructs this Court to reimpose the original sentence, the First Circuit opinion on which the mandate is based did not address this argument. While this Court may not share Mr. Trenkler's view, Mr. Trenkler must be afforded an opportunity to object to the knowing, prospective imposition of an illegal sentence by a court of the United States, particularly where the Government now concedes that the maximum sentence permitted by the jury verdict was 10 years, a fact it contested prior to the appeal. Mr. Trenkler also intends to file a petition for certiorari, and must be given the opportunity to raise his objections and preserve his rights in the event that the Supreme Court grants his petition or decides another case implicating his post-conviction rights while his petition is pending.

Finally, Mr. Trenkler's right to speak at his re-sentencing is not diminished by the fact that his words cannot, as a practical matter, impact the length of his sentence. The right is "elementary" and of "constitutional dimension." *See Behrens,* 84 S. Ct. at 298 (Harlan, J., concurring) (There is an "elementary right of a defendant to be present at the imposition of sentence and to speak in his own behalf"); *Moree*, 928 F.2d at 656 (A defendant has "rights to be present and to allocute at sentencing, which are of constitutional dimension."). Moreover, while his right to speak might not impact the duration of his sentence, it could well impact its execution. For instance, Mr. Trenkler intends to request that he remain at Ft. Devens where he is currently incarcerated, due both to his heart condition and to his family situation. On the latter point, Mr. Trenkler's mother has just passed away abruptly from lung cancer, and his father, who resides in Massachusetts, is elderly and in poor health and would have difficulty traveling to see him if he were transferred. While the First Circuit mandate instructs the Court to reimpose a life sentence, this Court is free to decide any issues outside the mandate, including how the reimposed sentence is implemented.

III. CONCLUSION

For the foregoing reasons, Mr. Trenkler respectfully requests that the Court (1) hold a hearing before implementing the First Circuit's mandate, and (2) allow Mr. Trenkler to be present, as the Rules and Constitution require.

Respectfully Submitted,

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Dated: October 10, 2008

LOCAL RULE 7.1(A)(2) CERTIFICATION

I, Corey A. Salsberg, counsel for Defendant Alfred Trenkler, hereby certify that on October 3, 2008, counsel for Mr. Trenkler met and conferred with the U.S. Attorney by e-mail, but the parties were unable to reach an agreement on this matter.

/s/ Corey A. Salsberg
Corey A. Salsberg (BBO # 671430)

CERTIFICATE OF SERVICE

I, Corey A. Salsberg, counsel for Defendant Alfred Trenkler, hereby certify that on October 10, 2008, a true copy of the above document was served upon all counsel of record for the other parties by ECF/mailing.

/s/ Corey A. Salsberg
Corey A. Salsberg (BBO # 671430)

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