No. 01-220

In the Supreme Court of the United States

JESSE HERRERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an attorney may be convicted of contempt of court, under 18 U.S.C. 401(3), for violating a rule of the court.

2. Whether the district court plainly erred by sentencing petitioner to pay a fine as a condition of probation.

3. Whether the district court plainly erred by sentencing both petitioner and his law firm for contempt of court.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-7) is unpublished, but the decision is noted at 252 F.3d 1356 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2001. A petition for rehearing was denied on May 7, 2001 (Pet. App. 8-9). The petition for a writ of certiorari was filed on August 3, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Western District of Texas, petitioner was convicted on two counts of contempt of court, in violation of 18 U.S.C. 401(3). Petitioner was sentenced to

three years' probation on each count, to run concurrently. As a condition of probation, petitioner was ordered to pay a $15,000 fine. Pet. App. 1-3. The court of appeals affirmed. *Id.* at 7.

1. On January 23, 1998, Nelson Gonzalez was arraigned on narcotics charges in the Western District of Texas. 2/10/00 Findings of Fact and Conclusions of Law (Findings) 2. On February 11, 1998, petitioner filed a motion for substitution of counsel, in which he moved to replace Gonzalez's attorney. On February 26, 1998, the Magistrate Judge denied the motion until such time as Gonzalez's attorney withdrew from the case. *Ibid.* That same day, Eli Salinas, who was not licensed to practice in the Western District of Texas, entered an appearance on behalf of himself and the Herrera Law Firm. *Ibid.* Petitioner, the named partner of the Herrera Law Firm, supervised Salinas, who was an associate at the firm. *Id.* at 21; Pet. App. 2.

On March 3, 1998, Gonzalez's counsel moved to withdraw from his representation. Findings 3. On March 31, 1998, the Magistrate Judge issued an order denying Salinas's entry of appearance and barring Salinas, petitioner, and any member of the Herrera Law Firm from representing Gonzalez, based on an allegation that petitioner's uncle—who was a private investigator with the Herrera Law Firm—had threatened a prosecutor in connection with a state charge pending against Gonzalez. *Ibid.* Even after the Magistrate Judge's order of March 31, petitioner continued to represent Gonzalez. *Id.* at 3-4, 10-11; Pet. App. 4.[1]

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[1] Petitioner claims (Pet. 4, 6 n.1) that an affidavit that Salinas submitted to the district court—which the district court found to contain false statements (Pet. App. 7-10)—shows that petitioner did not perform work for Gonzalez after February 20, 1998. In

2. On August 20, 1998, the government filed an information against Salinas, petitioner, and the Herrera Law Firm. Count One charged that the defendants practiced law without authorization in violation of the Code of Professional Conduct for the State of Texas and the local rules of the United States District Court for the Western District of Texas. Count Two charged that the defendants represented Gonzalez after the Magistrate Judge barred them from the case. Both counts alleged violations of 18 U.S.C. 401(3). Information 1-2. Additional counts alleged further violations of 18 U.S.C. 401 by Salinas and the Herrera Law Firm.

After a bench trial, the district court found all three defendants guilty on Counts One and Two. As to Count One, the court found that Salinas had represented Gonzalez without being admitted to practice in the Western District of Texas, in willful violation of Local Rule AT-1. Findings 20-21, 28-29.[2] The court also found that petitioner willfully violated Local Rule AT-1 and Local Rule AT-4 (which requires attorneys to obey the Texas Disciplinary Rules of Professional Conduct) by aiding and abetting Salinas's unauthorized practice of law. *Id.* at 21-22. As to Count Two, the court ruled that all three defendants, "despite being expressly ordered not to do so, were representing Gonzalez" after the Magistrate Judge's March 31, 1998, order. *Id.* at 24. The court convicted Salinas on two additional counts. *Id.* at 25-28.

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fact, Salinas's affidavit indicates that petitioner took twelve calls from Gonzalez in April and May 1998. Findings Exh. A.

[2] Local Rule AT-1(f) provides: "No attorney who has not been admitted to practice before this Court shall appear for, or represent, a party in any case except by permission of the judge before whom the case is pending."

The court sentenced petitioner to three years' probation on each count, to run concurrently, and ordered him to pay a $15,000 fine as a condition of probation. Pet. App. 3. The court fined the Herrera Law Firm $5000. *Id.* at 6.

3. The court of appeals affirmed. Pet. App. 1-7. In an unpublished per curiam opinion, the court first held that there was sufficient evidence that petitioner willfully aided and abetted Salinas's unauthorized practice of law and willfully violated the Magistrate Judge's March 31, 1998, order. *Id.* at 3-5. The court also held, in relevant part, that it was not plain error for the district court to sentence petitioner to both a fine and probation (*id.* at 5-6); that it was not plain error for the district court to levy fines against both petitioner and his law firm (*id.* at 6); and that a violation of a local rule is the equivalent of a violation of a standing order of the district court, which is sufficient to support a contempt conviction under 18 U.S.C. 401(3) (Pet. App. 6-7).

ARGUMENT

1. Petitioner first argues (Pet. 8-13) that his conviction on Count One of the information should be reversed because it rested on a violation of the district court's local rules rather than a court order directed specifically to petitioner. Petitioner did not raise that argument in the district court. Accordingly, to obtain relief, petitioner would have to establish an error that is clear or obvious, and that the error affected his substantial rights; even then, the courts have discretion whether to correct the error and should do so only when the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461, 467-470 (1997). It is not clear that the court of appeals applied the plain-error

standard. See Pet. App. 6-7. Petitioners' claim, however, would not warrant review even if it were subject to de novo review.[3]

a. Section 401(3) of Title 18 authorizes a court to punish "[d]isobedience or resistence to its lawful writ, process, order, *rule*, decree, or command." 18 U.S.C. 401(3) (emphasis added). The plain language of Section 401(3) establishes that an attorney may be held in contempt of court for violating a local rule, and several courts of appeals have upheld such contempt convictions. See *In re Morrissey*, 168 F.3d 134 (4th Cir.), cert. denied, 527 U.S. 1036 (1999); *United States* v. *Cutler*, 58 F.3d 825 (2d Cir. 1995); *Cooper* v. *Texaco, Inc.*, 961 F.2d 71 (5th Cir. 1992); *United States* v. *Marthaler*, 571 F.2d 1104, 1105 (9th Cir. 1978) (per curiam); *Seymour* v. *United States*, 373 F.2d 629 (5th Cir. 1967). Petitioner's reliance (Pet. 9-10) on *United States* v. *Warlick*, 742 F.2d 113 (4th Cir. 1984), and *In re Brown*, 454 F.2d 999 (D.C. Cir. 1971), is misplaced. In both of those cases, the courts found it unnecessary to decide whether a violation of a local rule is punishable as contempt under Section 401(3). See *Warlick*, 742 F.2d at 117; *Brown*, 454 F.2d at 1006. And while the Fourth Circuit indicated in *Warlick* that there was "a split of authority," the issue in that case was whether a local rule that prohibited "conduct tending to pollute or obstruct the administration of justice or to bring the courts or the legal profession into disrepute" could be enforced through Section 401(3). 742 F.2d at 117. The enforce-

[3] The government did not suggest application of the plain-error standard before the court of appeals, but it did argue against reversal on the basis that petitioner could not show prejudice from the language of the information. Gov't C.A. Br. 12.

ability of a local rule specifically prohibiting the unauthorized practice of law was not at issue.

Petitioner maintains that some of the district court directives enumerated in Section 401(3) are specific to particular cases and therefore that the remaining enumerated categories of directives (and particularly the term "rule") should be construed in the same way. Pet. 10; see generally *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) (discussing doctrine of *noscitur a sociis*). That argument for consistency cannot overcome the plain meaning of the word "rule," which includes a local rule. Indeed, Congress first established the courts' contempt powers in Section 17 of the Judiciary Act of 1789, ch. 20, 1 Stat. 83, which was the very same Section of the Act in which Congress authorized courts to make general rules governing the conduct of their proceedings.

Petitioner is, in any event, mistaken in suggesting that such a construction of "rule" is inconsistent with the tenor of the other items in Section 401(3)'s list of directives. Section 401(3) includes violation of a court "command" as a basis for contempt, and that term could potentially reach a directive that is not specific to a particular case. A court "order," which also is enforceable through a contempt action under Section 401(3), is simply "[a] command, direction, or instruction." *Black's Law Dictionary* 1123 (7th ed. 1999). That term refers not only to directives toward a particular party, but also to standing orders, which "appl[y] to all cases pending before a court." *Id.* at 1124. Congress used "order" in that broader way in the Judiciary Act of 1793, ch. 22, § 7, 1 Stat. 335, which authorized federal courts "to make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules,

the entering and making up judgments by default, and other matters in the vacation and otherwise * * * to regulate the practice of the said courts." Likewise, in *Columbia Broadcasting Systems, Inc.* v. *United States*, 316 U.S. 407 (1942), the Court held that 47 U.S.C. 402(a), which provides jurisdiction over suits challenging "any order of the [FCC]," reaches "regulations which affect or determine rights generally, even though not directed to any particular person or corporation." *Id.* at 416, 417.

b. Petitioner also maintains (Pet. 11-12) that, even if local rules are enforceable through Section 401(3), his violation of local rules could not have been contemptuous because he was not given specific notice of the district court's prohibition on the unauthorized practice of law. The Information alleged in Count One (at 1), and the district court specifically found (Findings 22), that petitioner "wilfully violated" the court's prohibition on the unauthorized practice of law by aiding and abetting Salina's unauthorized practice. In view of the widespread and virtually universal understanding in the legal profession that an attorney must be admitted to practice in a court to make an appearance before it, petitioner could not plausibly maintain that he was ignorant of the substance of the prohibition, absent a reckless disregard for his professional obligations. Indeed, 28 U.S.C. 1654 provides that attorneys may conduct cases in federal courts only if authorized to do so by the court's rules. Under those circumstances, there was no unfairness in holding petitioner to compliance with the rules of the court. See *Cutler*, 58 F.3d at 837 (willfulness of contempt may be inferred from an attorney's reckless disregard for his professional duty); *In re Levine*, 27 F.3d 594, 596 (D.C. Cir.

1994) (per curiam) (same), cert. denied, 514 U.S. 1015 (1995).

Petitioner relies (Pet. 11) on cases in which contempt convictions were overturned because the directive that the defendant allegedly violated was unclear. See *In re LaMarre*, 494 F.2d 753 (6th Cir. 1974) (district court "request[ed]" defendant's presence at hearings); *In re Brown*, 454 F.2d at 1007-1009 & n.49 (defendant appears before court, although not a member of the local bar, after court of appeals appoints him as counsel). Petitioner does not suggest, however, that the prohibition against the unauthorized practice of law that is at issue in this case was ambiguous. *United States* v. *Cutler*, *supra*, on which petitioner also relies (Pet. 11-12), likewise is not on point. In that case, the Second Circuit observed—in the course of upholding a conviction under Section 401(3)—that the defendant had received personal notice of the relevant provisions of the local rules. 58 F.3d at 834-835. The Second Circuit did not, however, suggest that a defendant can be convicted of contempt only in such circumstances.

c. Finally, petitioner suggests (Pet. 12-13) that Count One of the information was defective, apparently because it did not identify a specific command directed toward petitioner and did not include the word "rule." Count One alleged that, in violation of 18 U.S.C. 401(3), petitioner

> did willfully disobey the lawful order and command of the United States District Court * * * by practicing law without authorization in violation of the Code of Professional Conduct for the State of Texas and the local rules of the United States District Court for the Western District of Texas.

Information 1. Because there is no requirement that a specific order be issued against a defendant to support a contempt citation under Section 401(3) and because the information made clear the "order and command" that petitioner violated, petitioner's challenge to the information is without merit.

2. Section 401 provides that contempt may be punished "by fine or imprisonment, at [the court's] discretion." 18 U.S.C. 401. Petitioner claims (Pet. 13-19) that the district court erred in this case by sentencing him to both a fine and a term of probation. That claim does not warrant this Court's review.

Noting that petitioner raised this issue for the first time on appeal, the court of appeals reviewed for plain error. See Pet. App. 5; *Johnson*, 520 U.S. at 466-470. Petitioner now contends (Pet. 14-17) that the substance of his claim was put before the district court in the Presentence Report (PSR), the government's Sentencing Memorandum (Sentencing Mem.), and petitioner's Emergency Motion to Dismiss Motion to Revoke Probation (Emergency Mot.) (filed Sept. 29, 2000). Those contentions are incorrect.

The PSR summarized the district court's options for incarceration, probation, a fine, and a special assessment, but did not suggest that any of those penalties was exclusive of any other. See PSR 8. In its Sentencing Memorandum, the government simply stated that "penalties under Title 18, United States Code, Section 401 are limited to either imprisonment or fine, with no other sanctions enumerated." Sentencing Mem. 4. The government did not suggest that the court could not combine a fine and probation in a single sentence. Petitioner, moreover, cites no authority holding that a criminal defendant can preserve an issue through the government's motion. Cf. *United States* v. *Harris*, 104

F.3d 1465, 1471 (5th Cir.) (co-defendant's objection insufficient to preserve defendant's right of appeal where defendant declined to object), cert. denied, 522 U.S. 833 (1997). Finally, in his Emergency Motion of September 29, 2000, petitioner sought to prevent revocation of his probation after he tested positive for drug use, but he did not seek correction of his sentence. See 9/29/00 Tr. 2-3; Emergency Mot. 3-4. Indeed, the emergency motion would have been untimely if it had been intended as a motion to correct the sentence, because it was filed five months after the judgment. See Fed. R. Crim. P. 35(c) (requiring motion for correction of sentence to be filed within seven days of imposition of the sentence).

As the court of appeals correctly held (Pet. App. 5-6), the district court did not commit plain error by imposing both a term of probation and a fine. Section 401 permits a court to punish contempt "by fine or imprisonment," but not both. See *In re Bradley*, 318 U.S. 50, 51 (1943) (construing predecessor to Section 401). Petitioner's sentence did not violate that rule, because he was sentenced to probation, not a prison term. Probation is not a type of incarceration, but rather a separate sentencing option independently authorized by 18 U.S.C. 3561 (1994 & Supp. V 1999). See S. Rep. No. 225, 98th Cong., 1st Sess. 88 (1983) ("In keeping with modern criminal justice philosophy, probation is described [in Sections 3561-3566] as a form of sentence rather than * * * a suspension of the imposition or execution of sentence."). Section 3561(a) permits a sentence of probation in all cases except (1) Class A or B felonies, (2) offenses in which probation is expressly precluded by statute, or (3) cases in which the defendant is imprisoned (eliminating "split" sentences). 18 U.S.C. 3561(a)(1)-(3). None of those three exceptions applies here.

Furthermore, petitioner's fine was not imposed in addition to his term of probation. The fine was a condition of the probation. See Pet. App. 3, 6. After authorizing 21 possible conditions of probation, 18 U.S.C. 3563(b) (1994 & Supp. V 1999) then authorizes courts to require a probationer to "satisfy such other conditions as the court may impose." 18 U.S.C. 3563(b)(22) (1994 & Supp. V 1999). Although the list of 21 authorized conditions does not include fines, the statute provides no basis for inferring that a fine may not be imposed as an "other condition[]." See S. Rep. No. 225, *supra*, at 95 ("The list is not exhaustive, and it is not intended at all to limit the court's options—conditions of a nature very similar to, or very different from, those set forth may also be imposed.").

Petitioner's argument that the district court's sentence is inconsistent with decisions of the Second, Seventh, and Eleventh Circuits (Pet. 18) is incorrect. Unlike this case, the decisions on which petitioner relies all involved terms of imprisonment. None of those decisions, moreover, addressed the application of Section 3561(a) or Section 3563(b). See *United States* v. *Versaglio*, 85 F.3d 943 (2d Cir. 1996); *United States* v. *Holloway*, 991 F.2d 370 (7th Cir. 1993); *United States* v. *White*, 980 F.2d 1400 (11th Cir. 1993).

3. Finally, petitioner contends (Pet. 19-20) that the district court violated the double jeopardy clause of the Fifth Amendment by punishing both petitioner and the Herrera Law Firm for contempt. According to petitioner (*Ibid.*), the firm is his alter ego and punishment of the firm therefore constitutes a second punishment of petitioner.

Neither petitioner nor the law firm objected to the alleged multiple punishments before the district court, and the court of appeals therefore rejected petitioner's

argument under the plain-error standard. Pet. App. 6. Petitioner nevertheless contends (Pet. 20) that his failure to raise a timely double-jeopardy claim should be excused because he was sentenced before the firm was. The sequence of sentencing cannot provide grounds for petitioner's failure to raise a double-jeopardy argument, however, because petitioner and the law firm were sentenced at the same hearing and petitioner and his counsel were present when the firm was sentenced. See 7/30/99 Tr. 14-28; Pet. 20. Nothing prevented petitioner from raising a double-jeopardy argument during the sentencing proceeding or by a timely written motion pursuant to Rule 35(c).

There was no plain error in this case. As an initial matter, petitioner—who has the burden of establishing double jeopardy, see *United States* v. *Trammell*, 133 F.3d 1343, 1349 (10th Cir. 1998); *United States* v. *Dortch*, 5 F.3d 1056, 1060-1061 (7th Cir. 1993), cert. denied, 510 U.S. 1121 (1994) and 513 U.S. 1126 (1995)—did not attempt to establish on the record that the law firm is his alter ego.[4] Indeed, while petitioner

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[4] Under Texas law, a corporation is the alter ego of its owner

> when there is such unity between corporation and individual that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice. It is shown from the total dealings of the corporation and the individual, including the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes.

Valdes v. *Leisure Res. Group, Inc.*, 810 F.2d 1345, 1353 (5th Cir. 1987) (quoting *Castleberry* v. *Branscum*, 721 S.W.2d 270, 272 (Tex. 1986)).

relies on the assertion (Pet. 8) that he is the sole owner of the Herrera Law Firm, the district court found only that petitioner was the senior, named partner in the firm. See Order Denying [Petitioner's] Post-Verdict Motions 3; Findings 21.

Furthermore, punishment of both a corporation and its sole shareholder does not constitute double jeopardy. See *United States* v. *Andrews*, 146 F.3d 933, 938-942 (D.C. Cir. 1998); *United States* v. *Woods*, 949 F.2d 175, 177 (5th Cir. 1991) (per curiam), cert. denied, 503 U.S. 961 (1992). The District of Columbia Circuit has held, moreover, that there is no double jeopardy when an individual and his alter-ego corporation are sentenced for the same offense unless the government pierces the corporate veil and satisfies the judgment against the coporation from the owner's assets, or at least attempts to do so. *Andrews*, 146 F.3d at 940. In this case, no effort was made to force petitioner to pay the law firm's fine out of personal, as opposed to firm, assets.[5]

[5] The firm's fine was paid by a cashier's check drawn in petitioner's name. Assuming that petitioner covered this check with personal assets—an assumption not supported by the record—petitioner does not allege that he was under any legal obligation to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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