No. 17-7568

IN THE SUPREME COURT OF THE UNITED STATES

BRYAN KENDALL PITTSINGER, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

SONJA M. RALSTON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly reviewed petitioner's forfeited claim that the district court infringed his right to allocution for plain error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 874 F.3d 446.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2017. The petition for a writ of certiorari was filed on January 24, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of sexually exploiting a minor, in violation of 18 U.S.C. 2251(a). Judgment 1. He was sentenced to 360 months of imprisonment, to be followed by eight years of supervised release. Id. at 2. The court of appeals affirmed. Pet. App. A1-A11.

1. In 2014, petitioner produced child pornography of his then seven-year-old daughter, whom he had sexually abused for several years. See Presentence Investigation Report (PSR) ¶¶ 14-32. Petitioner distributed some of that child pornography to other individuals who were under federal investigation, PSR ¶¶ 7-8, which eventually led to his apprehension, PSR ¶¶ 9-37. A federal grand jury in the Northern District of Texas subsequently returned an indictment charging petitioner with sexually exploiting a minor, in violation of Section 2251(a). Indictment 1. Petitioner pleaded guilty without a written plea agreement. Pet. App. A1.

The Probation Office calculated a total offense level of 43 and a criminal history category of I, which would have resulted in an advisory Sentencing Guidelines range of life imprisonment. PSR ¶¶ 64, 73, 128. But, because the statutory maximum sentence for a violation of Section 2251(a) is 360 months of imprisonment, the Probation Office recommended a Guidelines range of 360 months. PSR ¶ 128; see Sentencing Guidelines § 5G1.1(a) (2015). Petitioner moved for a downward variance, arguing that empirical research indicated he had a limited risk of recidivism. Pet. App. A2; Sent. Tr. 3.

2. At sentencing, the district court first announced a "tentative" ruling that petitioner's motion for a downward variance should be denied. Sent. Tr. 3. The court then invited the parties to present evidence or argument. Id. at 3-4. Petitioner's counsel argued in favor of a downward variance and called petitioner's mother as a character witness. Id. at 4-7. After petitioner's mother testified, petitioner's counsel stated that petitioner "would like to address the [c]ourt." Id. at 7. The court stated, "We're not there yet," to which petitioner's counsel responded, "Thank you." Ibid.

The district court denied the variance motion, adopted the findings of the Probation Office, and then asked petitioner if he "would like to say [anything] further on [his] own behalf." Sent. Tr. 8. Petitioner apologized to the court and his family, asked for mercy, and said he was ready for psychological help. Id. at 8-9. After petitioner allocuted, the court asked the government if it "wish[ed] to be heard" on the sentence. Id. at 9. The government asked whether, at that time, the court "intend[ed] to impose a guideline sentence." Ibid. When the court responded in the affirmative, the government indicated it "ha[d] nothing further." Ibid.

The district court announced that, "after consideration of all the factors set out in [18 U.S.C.] 3553(a)," it was the judgment of the court that the petitioner "be committed to the custody of the Federal Bureau of Prisons for a period of 360 months" and that upon release, petitioner "shall be placed on supervised release for a term of eight years." Sent. Tr. 9-10. At no point during the sentencing hearing did petitioner object to the timing of his allocution or the order of proceedings. Id. at 1-12.

3. On appeal, petitioner for the first time challenged the district court's decision to deny his motion for a downward variance before his allocution, claiming that it violated his allocution rights under Federal Rule of Criminal Procedure 32(i). Pet. C.A. Br. 7-16; see Pet. App. A4. The court of appeals affirmed. Pet. App. A1-A11.

The court of appeals first determined that plain-error review applied. Pet. App. A4-A6. The court reasoned that petitioner had failed to apprise the district court of his view that its chosen order of operations -- Guidelines objections, variance motion, allocution, sentencing -- was improper at a time when the court could have corrected any error. Id. at A5. Although petitioner's counsel had indicated before the district court denied the variance motion that petitioner "would like to address the [c]ourt," the court of appeals observed that "[petitioner]'s counsel said nothing about when [petitioner] wanted to address the court." Id. at A4-A5. And the court of appeals pointed out that after the district court had responded that it was not yet time for allocution, petitioner's counsel "did nothing to clarify his request." Id. at A5; see Sent. Tr. 7 (petitioner's counsel responding, "Thank you").

Reviewing petitioner's claim under plain-error review, the court of appeals found no clear or obvious error. Pet. App. A6-A10; see United States v. Olano, 507 U.S. 725, 732-737 (1993). The court noted that although "it may be the 'better practice'" to permit allocution before ruling on a variance motion, Rule 32 requires only that the defendant be permitted to address the court and present mitigating evidence at a time when the court "remains open to hear and consider what the defendant has to say." Pet. App. A6-A9 (citation omitted). The court explained that Rule 32(i) "does not prohibit courts from stating their mere intentions to impose a particular sentence before giving defendants the opportunity to speak." Id. at A7. And the court reasoned that because the district court here retained discretion to impose a lower sentence in light of the factors set out in 18 U.S.C. 3553(a), without regard to petitioner's variance motion, it did not clearly contravene the rule. Pet. App. A10. The court of appeals also noted that the district court's willingness to hear additional argument from the government after petitioner had addressed the court further supported the determination that the court had not yet made up its mind on the sentence. Id. at A9.

ARGUMENT

Petitioner contends (Pet. 7-12) that the court of appeals erred in reviewing his forfeited claim of allocution error under the plain-error standard. This Court has repeatedly and recently denied petitions for a writ of certiorari in cases raising claims about the proper approach to appellate review of allocution errors. See Chavez-Perez v. United States, 137 S. Ct. 2215 (2017) (No. 16-8118); Villa-Lujan v. United States, 137 S. Ct. 2212 (2017) (No. 16-7160); Moreira v. United States, 136 S. Ct. 1155 (2016) (No. 15-5613); Coleman v. United States, 555 U.S. 1104 (2009) (No. 08-6122); De Anda-Duenez v. United States, 543 U.S. 1004 (2004) (No. 04-5456); Reyna v. United States, 541 U.S. 1065 (2004) (No. 03-8903); Paz-Aguilar v. United States, 528 U.S. 1119 (2000) (No. 99-6633). The same result is warranted here.

1. Rule 32(i) requires a district court, "[b]efore imposing sentence," to "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)(ii). Although petitioner argued in the court of appeals that the district court failed to comply with that rule by deciding his variance motion before inviting him to address the court, he did not object to the court's order of operations until his appeal. The court of appeals therefore correctly reviewed petitioner's forfeited claim under the plain-error standard set out by Rule 52(b).

Over the last two decades, this Court has consistently reinforced that unobjected-to errors are forfeited and receive only plain-error review on appeal. See United States v. Olano, 507 U.S. 725, 731 (1993) ("No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.") (citation and internal quotation marks omitted). In Johnson v. United States, 520 U.S. 461 (1997), for example, the Court refused to recognize an exception to Rule 52(b) for structural errors, explaining that the rule "by its terms governs direct appeals from judgments of conviction in the federal system," and that the Court has "no authority" to make "an exception to it." Id. at 466. Similarly, in United States v. Vonn, 535 U.S. 55 (2002), the Court held that Rule 52(b) applies to forfeited claims of error under Rule 11, even though Rule 11(h) contains its own harmless-error provision. See id. at 73. The Court rejected the argument that applying the plain-error rule "would discount the judge's duty to advise the defendant by obliging the defendant to advise the judge," explaining that "the point of the plain-error rule" is that "the value of finality requires defense counsel to be on his toes, not just the judge, and the defendant who just sits there when a mistake can be fixed cannot just sit there when he speaks up later on." Ibid. And, in Puckett v. United States, 556 U.S. 129 (2009), the Court refused to make an exception to plain-error review for forfeited claims that the government breached a plea agreement. "The real question," the Court explained, was "not whether plain-error review applies when a defendant fails to preserve a claim

* * * but rather what conceivable reason exists for disregarding its evident application." Id. at 136.

In keeping with those decisions, nearly every court of appeals now reviews forfeited claims of allocution error -- like other forfeited claims -- under the plain-error standard. See United States v. Silsby, 43 F.3d 1456 (1st Cir. 1995) (per curiam); United States v. Valentin, 469 Fed. Appx. 48, 50 (2d Cir.), cert. denied, 568 U.S. 926 (2012); United States v. Adams, 252 F.3d 276, 284-285 (3d Cir. 2001); United States v. Muhammad, 478 F.3d 247, 248-249 (4th Cir. 2007); United States v. Reyna, 358 F.3d 344, 350 (5th Cir.) (en banc), cert. denied, 541 U.S. 1065 (2004); United States v. Carter, 355 F.3d 920, 926 (6th Cir. 2004); United States v. Luepke, 495 F.3d 443, 446-447 (7th Cir. 2007); United States v. Hentges, 817 F.3d 1067, 1069–1070 (8th Cir. 2016); United States v. Bustamante-Conchas, 850 F.3d 1130, 1134-1135 (10th Cir. 2017); United States v. Prouty, 303 F.3d 1249, 1251-1252 (11th Cir. 2002). The court of appeals properly followed that approach here.

Petitioner contends (Pet. 8-9) that claims of allocution error should always be reviewed de novo, even when raised for the first time on appeal, asserting the existence of "good reasons to doubt that a defendant denied allocution has a meaningful opportunity to object within the meaning of Rule 51." See Fed. R. Crim. P. 51(b) ("If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party."). But even assuming that might be true in some allocution cases, it is not true here. To the contrary, in the court of appeals, petitioner argued that his counsel did timely object by stating, prior to the district court's ruling on the variance motion, that petitioner wished to address the court. Although the court of appeals correctly determined (and petitioner does not dispute in this Court) that the statement was insufficiently specific about when petitioner wanted to address the district court to preserve petitioner's allocution-timing claim, the exchange between petitioner's counsel and the court illustrates that he had the opportunity to assert a timely objection. See Pet. App. A5 ("[W]hen the court responded that it was not yet time for the allocution, [petitioner's] counsel did nothing to clarify his request."). The possibility that defendants in other cases may not have such an opportunity provides no basis for the categorical exception to plain-error review that petitioner urges here.

2. Petitioner also contends (Pet. 9-12) that further review is warranted because "the lower courts are hopelessly divided over the proper standard of review to apply to allocution errors." Pet. 9. Petitioner significantly overstates the disagreement among the courts of appeals. No court of appeals decision on which petitioner relies concerns the order of operations a district court must follow in deciding a variance motion and inviting allocution. And any genuine conflict on the review of allocution claims more

broadly is both stale and limited, and does not warrant this Court's review.

In United States v. Wolfe, 71 F.3d 611 (1995), the Sixth Circuit reviewed de novo (but rejected) the defendant's forfeited claim that he was denied his right to allocute. See id. at 614-615. But the Sixth Circuit has since explained that Wolfe applies only in cases in which the defendant claims "a complete denial" of allocution. See Carter, 355 F.3d at 926 n.3 ("[W]here the allegation is * * * only an inappropriate limitation, the defense should indicate some type of discontent."). Moreover, it is unclear whether the Sixth Circuit would adhere to Wolfe even in that circumstance after Vonn and Puckett. The court in Wolfe reasoned that a defendant has little incentive to object "because if he did the district court is likely simply to offer the defendant and his counsel the opportunity to allocute or re-allocute." 71 F.3d at 614. But as Vonn and Puckett have since made clear, the fact that the district court may promptly remedy errors brought to its attention is precisely why the plain-error standard applies when the court was not given an opportunity to do so. See Puckett, 556 U.S. at 140; Vonn, 535 U.S. at 73.

Similarly, the Eighth and Eleventh Circuits at one time reviewed forfeited claims of allocution error under a de novo standard. See, e.g., United States v. Patterson, 128 F.3d 1259, 1261 (8th Cir. 1997) (per curiam); United States v. Taylor, 11 F.3d 149, 151 (11th Cir. 1994) (per curiam). But those decisions likewise pre-dated this Court's decisions in Puckett and Vonn, and more recent decisions of each circuit apply plain-error review to forfeited allocution claims consistent with this Court's guidance. See Hentges, 817 F.3d at 1069–1070; Prouty, 303 F.3d at 1251-1252.

The Ninth Circuit is the only court of appeals that continues to review all allocution-error allegations de novo. See, e.g., United States v. Gunning, 401 F.3d 1145, 1148 & n.6 (9th Cir. 2005). Even that court, however, has recognized that its approach is in tension with this Court's plain-error pronouncements. See United States v. Daniels, 760 F.3d 920, 922 (9th Cir. 2014) (acknowledging that Puckett and other cases might have abrogated Gunning, but declining to decide because the standard of review was not outcome determinative); Gunning, 401 F.3d at 1149 n.6 (acknowledging that the Ninth Circuit's precedent is arguably inconsistent with Olano, but finding the error not harmless in any event). In a case in which the standard of review is outcome determinative, the Ninth Circuit will have the opportunity to review its precedent in light of Vonn, Puckett, and this Court's other cases. Until it does, review by this Court would be premature.

3. Finally, even if the question presented otherwise warranted this Court's review, this case presents an unsuitable vehicle for addressing it because petitioner's claim would fail even under harmless-error review, because no error occurred.

Rule 32(i)(4)(A)(ii) requires that the defendant receive an opportunity at sentencing to address the court on his own behalf and present any mitigating information. See Hill v. United States, 368 U.S. 424, 426 (1962); Green v. United States, 365 U.S. 301, 304 (1961). As petitioner notes, some courts of appeals have held that a defendant does not receive a meaningful opportunity to do so when the court "definitively announc[es]" the sentence before allocution. United States v. Landeros-Lopez, 615 F.3d 1260, 1268 (10th Cir. 2010); see Luepke, 495 F.3d at 450. But the court of appeals in this case correctly observed that "Rule 32 does not prohibit courts from stating their mere intentions to impose a particular sentence" before allocution. Pet. App. A7; see id. at A7-A8 (citing cases applying both plain-error and harmless-error review). And petitioner has not identified any decision from this Court or another court of appeals to the contrary.

Before petitioner's allocution in this case, the district court did no more than announce its intention to impose a Guideline sentence. Although the court had denied the specific variance motion that petitioner had made, the court retained discretion under Section 3553(a) and this Court's decision in United States v. Booker, 543 U.S. 220 (2005), to impose whatever sentence within the statutory range it reasonably deemed appropriate. See Pet. App. A8-A9. The district court's invitation for further argument from the government after petitioner's allocution, Sent. Tr. 9, reinforces that the court had not yet definitively settled on a sentence and that petitioner was afforded an opportunity to address the court while it "remained open to consider other factors that might influence the sentence." Pet. App. A9. And, unlike the district courts in the cases on which petitioner relies (Pet. 13), the district court here "explicitly invited [petitioner] to speak on any topic of his choosing by asking, in very broad terms, if there was 'anything [he] would like to say.'" Pet. App. A10. Because the court therefore complied with the requirements of Rule 32(i), petitioner would not be entitled to resentencing under any standard of review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

SONJA M. RALSTON
Attorney

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