

IN THE
SUPREME COURT OF THE UNITED STATES

BRYAN KENDALL PITTSINGER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Reply in Support of Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

The circuits are divided on the proper standard of review for unpreserved allocution error.

An important rationale for the requirement of contemporaneous objections concerns the possibility of curing error without appeal. Rule 51 insists on a contemporaneous objection precisely because a district court might, in most cases, correct itself in the face of objection. *See Puckett v. United States*, 556 U.S. 129, 140 (2009); *United States v. Vonn*, 535 U.S. 55, 73 (2002). But objections to allocution error trigger a significantly different dynamic. Putting aside the high correlation of such errors with a hostile judge, a defendant cannot be confident that an objection will cure an allocution error. Rather, the defendant is likely to believe that a judge that has proceeded to sentence without allocution, or who has indicated his or her intention to do so, is not likely to be swayed by allocution. *See United States v. Luepke*, 495 F.3d 443, 450 (7th Cir 2007)(defendant has “little incentive to share his thoughts on the matter of a sentence that he had every reason to believe had already been decided.”); *accord United States v. Wolfe*, 71 F.3d 611, 614 (6th Cir. 1995). Allocution errors “instill timidity.” *United States v. Li*, 115 F.3d 125, 134 (2d Cir. 1997); *United States v. Sarno*, 73 F.3d 1470, 1503 (9th Cir. 1995). And there is a real risk that objection will be perceived as positively counter-productive to the defendant’s cause. *See Luepke*, 495 F.3d at 450 (defendant may “quite reasonabl[y] ... conclude that a manifestation of any disagreement with the court at that juncture would be interpreted as disrespectful and warranting additional sanctions...”).

For these reasons, these Court’s pronouncements about the need for contemporaneous objections do not resolve the proper standard of review in this case. Most errors can be cured by objection; allocution errors, only rarely. Removing allocution errors from the strictures of plain error review, moreover, would adhere to the text of Rule 51. Unlike the exemptions requested by defendants in *Johnson v. United States*, 520 U.S. 461 (1997), *Vonn*, and *Puckett*, cited by the government, an exception for allocution errors would fall comfortably within the exception expressly set forth in Rule 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.

Fed. R. Crim. P. 51(b). Petitioner does not, like the defendants above, seek to advance a claim of structural error, untethered from the language of the Rule. Rather, he seeks only to apply the text of an exemption recognized by the Rule itself.

The government ignores all of these critical differences between allocation errors and the bulk of issues covered by Rule 51. When they are considered, the government's arguments against review fall apart.

First, the government notes that “[o]ver the last two decades, this Court has consistently reinforced that unobjected-to errors are forfeited and receive only plain-error review on appeal.” (Brief in Opposition, at pp.6-7). This is true, but it ignores the important differences between allocation errors and other errors. Allocation errors fall within the plain text of the Rule's own exception; the error itself deprives the defendant of an “opportunity to object.”

Second, the government argues that *Vonn* and *Puckett* are producing a trend away from *de novo* review in cases like the one at bar. *See* (Brief in Opposition, at pp.9-11). It thus suggests that the circuit splits attending this issue will spontaneously resolve. But even as it makes this argument, the government concedes that at least one circuit, the Ninth, “continues to review all allocation-error allegations *de novo*.” (Brief in Opposition, at p.11). And, indeed, the division of authority between the circuits has been acknowledged by the Tenth Circuit as recently as 2017. *See United States v. Bustamante-Conchas*, 850 F.3d 1130, 1137, n.3 (10th Cir. 2017)(collecting and contrasting cases).

The government's evidence that *Vonn* and *Puckett* are producing movement toward plain error review, moreover, is overstated. Certainly, it is not strong enough to predict uniformity in this area of the law any time soon. Of the four circuits the governments concedes to have applied *de novo* review, only one – the Sixth Circuit, *see United States v. Carter*, 355 F.3d 920 (6th Cir. 2004) – has expressly repudiated or limited its prior relevant precedent. And none of these four courts have cited *Puckett* or *Vonn* as a reason to change course. *See Carter*, 355 F.3d at 926, n.3; *United States v.*

Hentges, 817 F.3d 1067, 1069-1070 (8th Cir. 2016); *United States v. Prouty*, 303 F.3d 1249, 1251-1252 (11th Cir. 2002).

As the government notes, the Eighth and Eleventh Circuits have used the plain error standard in some cases. *See Hentges*, 817 F.3d at 1069-1070; *Prouty*, 303 F.3d at 1251-1252. But they have done so reflexively, and without acknowledging their prior holdings. *See Hentges*, 817 F.3d at 1069-1070; *Prouty*, 303 F.3d at 1251-1252. Indeed, the Eighth Circuit has described the question as an open one, and has noted the circuit split. *See United States v. Griggs*, 431 F.3d 1110, 1114, n.4 (8th Cir. 2005); *see also United States v. Williams*, 237 Fed. Appx. 117, 118-119 (8th Cir. 2007)(unpublished). It has also proceeded to address unpreserved allocation errors without applying plain error, even after *Puckett*. *See United States v. Davis*, 510 Fed. Appx. 489, 490 (8th Cir. 2013)(unpublished). And the Eleventh Circuit appears to have operationally defined allocation error as reversible plain error, consistent with its earlier precedent. *See United States v. Perez*, 661 F.3d 568, 583 (11th Cir. 2011)(“We conclude that the district court failed to afford Perez his right of allocation as Rule 32 requires. The failure constitutes plain error and a manifest injustice, requiring the vacation of Perez’s sentences and the remand of his case for resentencing.”).

The Ninth Circuit, likewise, has not repudiated its precedent, *United States v. Gunning*, 401 F.3d 1145 (9th Cir. 2005), calling for *de novo* review. The government understands *United States v. Daniels*, 760 F.3d 920 (9th Cir. 2014), as an “acknowledg[ment] that *Puckett* and other cases might have abrogated *Gunning*.” (Brief in Opposition, at p.11). But *Daniels* is hardly that. Rather, the *Daniels* panel simply reproduced the government’s argument to that effect, before declaring it irrelevant, because the defendant would prevail under plain error. *See Daniels*, 760 F.3d at 922. Nothing suggests receptiveness to the government’s argument about the significance of *Vonn* and *Puckett*. *Gunning*, after all, was decided after *Vonn*.

Given this state of affairs, it is exceedingly unlikely that **every** circuit with precedent calling for *de novo* review will spontaneously abandon that precedent because of *Puckett* and *Vonn*. That speculative prediction ignores the critical distinctions between allocation errors and the kinds of

errors discussed in *Vonn* and *Puckett*. Exempting allocation errors from plain error – unlike the claims mounted in *Vonn* and *Puckett* – does not depend on a theory of structural error, but on the plain text of the Rule.

The notion that *Vonn* and *Puckett* will produce uniform application of the plain error doctrine to allocation errors is belied, moreover, by the continued existence of separate rules for allocation errors in the circuits that *do* apply plain error. Indeed, virtually *every* circuit treats unpreserved allocation errors differently than unpreserved errors of other kinds. The Third, Fifth, and Seventh Circuits all apply a presumption of prejudice to unpreserved allocation errors, notwithstanding *Puckett* and *Vonn* and *United States v. Olano*, 507 U.S. 725 (1993). *See United States v. Adams*, 252 F.3d 276, 287 (3d Cir. 2001); *United States v. Reyna*, 358 F.3d 344, 351-352 (5th Cir. 2004)(*en banc*); *Luepke*, 495 F.3d at 450. The Fourth Circuit significantly relaxes the required showing of prejudice. *See United States v. Cole*, 27 F.3d 996, 999 (4th Cir. 1994). All four of these circuits adhere to these special rules for allocation cases, even well after *Puckett*. *See United States v. Hubbard*, 2018 U.S. App. LEXIS 2223, at *12 (3rd Cir. 2018)(unpublished)(“When conducting a plain error review ‘in the context of violations of the right of allocution, ‘as a general matter . . . prejudice should be *presumed* whenever the opportunity exists for this violation to have played a role in the district court’s sentencing decision.’”)(quoting *United States v. Paladino*, 769 F.3d 197, 201 (3d Cir. 2014) (emphasis in *Paladino*) (quoting *Adams*, 252 F.3d at 289); *United States v. Chavez-Perez*, 844 F.3d 540, 544 (5th Cir. 2016)(“In cases involving the right to allocute, we presume that the defendant’s substantial rights were affected if ‘the record reveals that the district court did not sentence at the bottom of the guideline range or if the court rejected arguments by the defendant that would have resulted in a lower sentence.’”)(quoting *Reyna*, 358 F.3d at 353); *United States v. Conour*, 716 Fed. Appx. 538, 543 (7th Cir. 2017)(unpublished)(“We ‘presume prejudice when there is any possibility that the defendant would have received a lesser sentence had the district court heard from him before imposing sentence.’”)(quoting *Luepke*, 495 F.3d at 450); *United States v. Johnson*, 557 Fed. Appx. 240, 243 (4th Cir. 2013)(unpublished)(“If, however, we can identify a

ground on which a lower sentence might have been based, we may notice the error.”). This state of affairs directly rebuts the government’s chief argument here: that pronouncements by this Court in *Puckett* and *Vonn* will eventually cause all classes of unpreserved error to be treated alike in all circuits. Plainly not.

Third, the government opposes review because Petitioner did in fact request a chance to allocute. *See* (Brief in Opposition, at pp.8-9). This, in the government’s view, shows that he had an “opportunity to object” within the meaning of Rule 51(b). To the contrary, it shows that his objection is insufficient to preserve error unless it were made at the time it was least useful – after the district court made clear that it intended to choose the sentence without listening to him. A mere request to allocute made before the district court effectively chooses the sentence, *see* (ROA.135), does not, in the view of either the government or the court below, preserve error. Alternatively, the government’s position that a pre-ruling request to allocute *is* a meaningful opportunity to object contradicts its position below. Below, the government maintained quite explicitly that no error may be preserved until it is committed:

Even if this Court were to consider defense counsel’s statement that Pittsinger wished to speak as an attempt to preserve error, it came on the wrong side of the alleged error. Assuming that the court’s deferment of the defendant’s allocution were error, defense counsel failed to bring the error to the court’s attention after it was committed.

(Appellee’s Brief, at p.6). Now, it suggests that a pre-ruling request to allocute, if sufficiently specific, may be adequate. *See* (Brief in Opposition, at pp.8-9). This partial change of position is grounds to summarily vacate and remand in light of the government’s new contention. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

Fourth, the government opposes review because it does not think Petitioner would prevail on plenary review. Of course, its possible that any case where the standard of review would make a difference could be resolved either way on plenary review. Any case where plain error review makes a difference involves an error short of plain, at least in the circuits where the third and fourth prongs of *Olano* are relaxed for allocution errors.

And in this case there are three strong reasons to believe that Petitioner would prevail on plenary review. *First*, the court of appeals twice emphasized the limited nature of the review. *See* [Appx. A]; *United States v. Pittsinger*, 874 F.3d 446, 451, 453-454 (5th Cir. 2018). This is good reason to suspect that it might resolve the case in Petitioner's favor if this Court simply addressed the standard of review and remanded.

Second, this is not a case where the district court, after declaring its intent to impose a within-Guideline sentence, left open the question of where to sentence within the Guidelines. Rather, it is a case where the Guideline range collapsed to a single point. To deny a motion for variance was to select the sentence.

Third, the district court stated that its ruling was "final," rather than "tentative." (ROA.131, 135). While the government maintains that a district court could have denied a motion for variance and then imposed a *sua sponte* variance, this distinction is hardly obvious to the defendant. As this Court has emphasized, a judge must "unambiguously address themselves to the defendant" and thus "leave no room for doubt that the defendant had been issued a personal invitation to speak prior to sentencing." *Green v. United States*, 365 U.S. 301, 305 (1961). Where the defendant has to wonder whether the district court's "final" ruling on a motion for variance excludes the possibility of a *sua sponte* variance, or merely a variance on the only grounds the defendant has presented to it, there is, to say the least, "room for doubt" about whether the allocution right is meaningful.

Finally, there is one more consideration that makes the case a strong vehicle for *certiorari*. The defendant's sentence was exceptionally severe: 360 months. That situation is one where a look in the eyes from the defendant, and hearing his "halting eloquence" before the sentence has been selected, is especially likely to provoke mercy.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. He prays that it then vacate the sentence and remand to the United States District Court for the Northern District of Texas, or order that the United States Court of Appeals do so. Alternatively, he prays that this Court determine the proper standard of review, and remand to the United States Court of Appeals for the Fifth Circuit. As a further alternative, he prays that this Court grant *certiorari*, vacate the judgment below, and remand in light of the Solicitor General's position, taken in the Brief in Opposition, that a defendant may preserve error by requesting a chance to allocute before allocution has been denied. Finally, he requests such relief as to which he may be justly entitled.

Respectfully submitted this 25th day of May, 2018.

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