No. 11-133

In the Supreme Court of the United States

RALPH RAUSCH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible error when, at petitioner's second supervised release revocation hearing, the court failed to invite petitioner to reallocute before revoking his supervised release and neither petitioner nor his attorney objected.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 638 F.3d 1296.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2011. A petition for rehearing was denied on May 3, 2011 (Pet. App. 54a). The petition for a writ of certiorari was filed on August 1, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of Colorado to possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). He was sentenced to time-served of one

day and to a lifetime of supervised release. Petitioner violated the terms of his supervised release, and the district court revoked it, resentencing him to supervised release with new conditions. When petitioner subsequently violated the new terms of supervised release, the district court revoked petitioner's supervised release a second time and sentenced him to two years of imprisonment and a lifetime of supervised release. The court of appeals affirmed. Pet. App. 1a-12a.

1. In 2006, an investigation in Europe revealed the existence of an internet-based bulletin board that operated as a trading platform designed to facilitate the exchange of child pornography. *United States* v. *Rausch*, 570 F. Supp. 2d 1295, 1298 (D. Colo. 2008). Law enforcement officers traced one of the bulletin board user's internet provider address to petitioner and determined that petitioner had posted to the bulletin board 112 times in less than three months. *Ibid.* Officers executed a search warrant at petitioner's residence, where they seized numerous images of child pornography. *Id.* at 1299.

2. Petitioner pleaded guilty to one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). *Rausch*, 570 F. Supp. 2d at 1296. Although petitioner faced an advisory Guidelines sentencing range of 97-121 months of imprisonment, the district court sentenced him only to time served, which was a single day. *Id.* at 1296-1298, 1307. The court based its decision in large part on petitioner's poor health and need for a kidney transplant. *Id.* at 1300-1303, 1308. The district court also imposed a lifetime term of supervised release, the conditions of which banned computer use and viewing pornography and required compliance with a sex-offender treatment program. Pet. App. 1a.

In 2010, the probation office moved to revoke petitioner's supervised release because petitioner had violated its conditions by viewing pornography on television, violating the rules of sex-offender treatment, and leaving his residence without permission. Pet. App. 2a. At a preliminary scheduling hearing, petitioner's counsel indicated that petitioner would not contest the violations and the district court advised petitioner that any further violations of supervised release conditions would result in jail time. *Ibid.* At the revocation hearing, the parties agreed that petitioner's advisory Guidelines sentencing range was 3-9 months, and that the statutory maximum was two years of imprisonment. *Ibid.* The parties also agreed that petitioner should be sentenced to a new term of supervised release and live in a halfway house instead of in his home. *Id.* at 2a-3a. Before imposing the new sentence, the district court asked to hear from petitioner, who apologized to the district court and stated that he did not want to appear in court ever again. *Id.* at 3a. The district court then advised petitioner that it would impose the statutory maximum sentence of two years of imprisonment if petitioner violated his supervised release conditions again. *Id.* at 3a-4a.

Two months later, the probation office filed another motion to terminate petitioner's supervised release, after it learned that petitioner had been terminated from his sex-offender treatment program as a result of his noncompliance with program requirements. Pet. App. 4a. The district court held a second revocation hearing, at which the parties again agreed that petitioner's Guidelines range was 3-9 months and the statutory maximum was two years of imprisonment. *Ibid.* After hearing testimony from petitioner's sex-offender counselor, the district court found that petitioner had violated a

condition of supervised release. *Id.* at 5a. Petitioner's counsel argued at length that the district court should impose a sentence of supervised release rather than imprisonment, detailing his dire medical condition, its affect on his mental capacity to participate in treatment, and alternative program options for him to try. *Id.* at 5a, 20a-28a. The district court did not personally invite petitioner to speak to the court, and petitioner did not do so. *Id.* at 5a. As it had previously warned that it would, the district court revoked petitioner's supervised release and sentenced him to two years of imprisonment. *Ibid.*; see *id.* at 13a-42a.

3. The court of appeals affirmed, holding that the district court's failure to advise petitioner of his allocution rights under Federal Rule of Criminal Procedure 32.1 did not amount to plain error. Pet. App. 5a-11a. The court first concluded that petitioner's failure to object in the district court required that his claim be reviewed under the plain-error standard. *Id.* at 5a. The court noted that the plain-error standard requires a defendant to show (1) an error, (2) that is plain, that (3) affects his substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 5a-7a (citing *United States* v. *Caraway*, 534 F.3d 1290, 1298 (10th Cir. 2008)).

Applying that standard, the court commented that it was unclear whether petitioner satisfied the first two prongs because Federal Rule of Criminal Procedure 32.1(b)(2)(e), which governs revocation proceedings, does not explicitly require a district court to advise a defendant of his allocution right at a supervised release revocation hearing. Pet. App. 7a-8a. The court contrasted that rule with Federal Rule of Criminal Procedure 32(i)(4)(A)(ii), which governs original sentencing

hearings and expressly states that a district court "must" advise the defendant of his allocution right. *Id.* at 7a-9a. The court also did not determine whether petitioner had satisfied the third prong of plain-error review (*i.e.*, whether any error affected petitioner's substantial rights) because previous decisions from the Tenth Circuit had presumed that prejudice resulted from an allocution error. *Id.* at 9a n.2.

Turning to the final prong of plain-error review, the court held that, even if the district court had plainly erred, reversal was not warranted because any error did not seriously affect the fairness, integrity, or public reputation of the proceedings. Pet. App. 9a-11a. The court emphasized that petitioner had appeared before the district court three times for sentencing, two of which were specifically for violations of the conditions of his supervised release. The court noted that the district court had repeatedly warned petitioner that additional violations would result in prison time and that petitioner had acknowledged those warnings after the court had "personally invited [petitioner] to speak in mitigation of sentence." *Id.* at 9a. The court held that "[o]n these particular facts," any error in the failure to invite petitioner to speak "does not seriously affect the fairness, integrity, or public reputation of the revocation proceeding." *Ibid.* The court observed that "every court to have encountered similar circumstances has reached the same conclusion." *Id.* at 10a (citing cases). Finally, the court found support for its decision in petitioner's failure to explain what he would have said in an allocution to mitigate his punishment. The court therefore exercised its discretion not to correct the alleged error. *Id.* at 10a-11a.

ARGUMENT

Petitioner asks this Court to review the court of appeals' exercise of its discretion not to correct an error at his second supervised-release revocation proceeding when the district court followed through on its earlier warning that he would go to prison for another violation without inviting petitioner to speak first. Petitioner's arguments do not merit review.

1. a. Petitioner does not contest (see Pet. 18) that he failed to make a contemporaneous objection to the district's failure to invite him to allocute under Federal Rule of Criminal Procedure 32.1. Under Federal Rule of Criminal Procedure 52(b),[1] petitioner's claim of error must be reviewed under the plain-error standard. Petitioner argues (Pet. 23-27) that, under this Court's decisions in *Green* v. *United States*, 365 U.S. 301 (1961), *Van Hook* v. *United States*, 365 U.S. 609 (1961), and *Hill* v. *United States*, 368 U.S. 424 (1962), "when a court fails to personally address a defendant to offer the opportunity to allocute in a revocation hearing, the court of appeals must remand the case for resentencing unless it is clear that the error was harmless." Petitioner is incorrect.

The Court in *Green* held that the predecessor to Federal Rule of Criminal Procedure 32 (which governs initial sentencing hearings) required that a defendant be accorded a personal opportunity to speak before the imposition of a sentence. 365 U.S. at 304. But *Green* did not address whether Rule 32 violations are subject to review for plain error. Nor did the decision in *Hill* address the applicability of plain-error review to claims

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[1] Rule 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

about allocution. Rather, the Court in *Hill* held that a violation of a defendant's right of allocution is not a basis for obtaining collateral relief. The Court explained that such a violation "is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." 368 U.S. at 428. Finally, the decision in *Van Hook* is a two-sentence per curiam opinion issued soon after the decision in *Green* that grants the petition for a writ of certiorari, vacates the court of appeals' decision, and remands "for resentencing in compliance with Rule 32 of the Federal Rules of Criminal Procedure," citing the decision in *Green*. 365 U.S. 609. Thus, none of those decisions holds that a violation of the right of allocution is not subject to plain-error review.

Rather, the court of appeals was correct that petitioner's allocution claim must be reviewed under the plain-error standard. In *Johnson* v. *United States*, 520 U.S. 461 (1997), the Court held that Rule 52(b) applies to all errors that have not been brought to the attention of the district court. The Court explained that Rule 52(b) "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; see *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (criminal defendant's "constitutional right" or "a right of any other sort" may be forfeited by the failure to make a timely objection). Similarly, in *United States* v. *Vonn*, 535 U.S. 55 (2002), the Court concluded that a violation of Federal Rule of Criminal Procedure 11, which governs guilty plea proceedings in the district court, is subject to plain-error review, noting that Rule 52(b) "appl[ies] by its terms to error in the application of any other Rule of Criminal Procedure." *Id.* at 56; see

United States v. *Reyna*, 358 F.3d 344, 348-350 (5th Cir.) (en banc) (finding that *Green*, *Hill*, and *Van Hook* do not preclude application of Rule 52(b) to allocution errors), cert. denied, 541 U.S. 1065 (2004); *United States* v. *Adams*, 252 F.3d 276, 283 (3d Cir. 2001) (finding it appropriate to "reassess the seemingly simple directive of *Green*, *Van Hook*, and *Hill* * * * that on direct appeal the defendant is automatically entitled to resentencing when he is not afforded his right of allocution" given the Court's more recent "emphasis on Rule 52").

b. Petitioner asks (Pet. 11-12) the Court to resolve a division among the courts of appeals about whether violations of a defendant's right of allocution at a revocation hearing are reviewed for plain error or should automatically result in a remand for resentencing, citing the Second Circuit's decision in *United States* v. *Gonzalez*, 529 F.3d 94 (2008). In that case, the Second Circuit, exercising its supervisory powers, concluded that "the remedy for omission of an opportunity for presentence allocution should be vacation of the sentence and a new sentencing proceeding." *Id.* at 98. But the court in *Gonzalez* did not hold that Rule 52 is not applicable to allocution errors; indeed, the court specifically acknowledged that "supervisory powers are not to be used to circumvent the harmless error rule[.]" *Ibid.* In addition, the district court had recognized the allocution error in *Gonzalez* directly after sentencing rather than on appeal. In such a situation, the court of appeals held "in th[at] case and prospectively," the correct remedy is for the district court to vacate the sentence and impose a new sentence after allocution rather than permitting the defendant to speak and then stating that the court had not "change[d] its mind." *Ibid.* Because the holding of *Gonzalez* is not directly applicable in petitioner's situa-

tion, it does not create an inter-circuit conflict warranting this Court's intervention.[2]

2. Petitioner argues (Pet. 27-31) that, even if plain-error review of his allocution claim is appropriate, reversal is warranted in this case. The court of appeals correctly determined that petitioner was not entitled to relief under the plain-error standard of Rule 52(b), and that fact-bound determination does not warrant review by this Court.

a. In *Olano*, 507 U.S. at 732, this Court explained that Rule 52(b) requires a defendant to demonstrate that there was "an 'error' that is 'plain' and that 'affect[s] substantial rights'"; even then, a reviewing court should correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Accord *Johnson*, 520 U.S. at 466-467. The court of appeals assumed for the sake of argument that the district court committed an error that was plain in failing to invite petitioner to allocute at his second revocation hearing. Pet. App. 8a-9a. The court also assumed that the court's error prejudiced petitioner, noting that previous Tenth Circuit cases "appear[ed] to presume prejudice for allocution errors." *Id.* at 9a n.2. But the court held that remand was not appropriate in this case because any error by the district court did "not seriously affect the fairness, integrity, or public reputation of the revocation proceeding." *Id.* at 9a.

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[2] Prior to the decision in *Gonzalez*, the Second Circuit did apply plain-error review to a forfeited allocution claim. *United States* v. *Rosenbauer*, 47 Fed. Appx. 606, 607 (2002). Any intra-circuit tension between *Gonzalez* and *Rosenbauer* regarding the applicability of plain-error review to a forfeited allocution claim would not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

The court of appeals correctly concluded that any error in this case did not seriously affect the fairness, integrity, or public reputation of the proceeding. The revocation hearing at issue was petitioner's third appearance before the district court—and his second within two months. As early as the preliminary scheduling hearing for petitioner's first revocation proceeding, the district court warned petitioner that a subsequent violation of supervised release conditions would result in the imposition of the two-year statutory maximum. Although petitioner was invited to speak and acknowledged at that time that he understood the consequence of further violations of supervised release conditions, he again violated those conditions within only two months. Under these circumstances, the court of appeals correctly determined that the failure to invite petitioner to speak did not warrant an exercise of its discretion to correct a failure to invite allocution. See *Reyna*, 358 F.3d at 346-353 (revocation court's failure to advise defendant making his third appearance in court of his allocution right did not meet the fourth prong of the plain error doctrine); see generally *Hill*, 368 U.S. at 428 (violation of the right of allocution "is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure").

Although petitioner now contends (Pet. 17-18) that he would have informed the court that he was next in line for a kidney transplant and made a personal plea for his liberty, his petition for a writ of certiorari is the first place he articulated what he would have said in an allocution if given the opportunity. The court of appeals specifically found support for its exercise of discretion in the absence of such statement in the appellate pro-

ceedings. Pet. App. 10a ("We also note that our decision is supported by [petitioner's] failure to set forth what he would have said to the district court prior to sentencing that might have mitigated his sentence."). This Court should not grant review to determine in the first instance a fact-bound question not presented to the court of appeals.

b. Petitioner argues (Pet. 11-17) that review is warranted because different courts of appeals apply plain-error review to claims of allocution errors in different ways. But there is no division among the courts of appeals that warrants intervention by this Court.

Petitioner relies primarily on decisions of the Seventh and Eleventh Circuits, contending (Pet. 12) that those courts have "adopted standards that require a remand for resentencing in virtually all cases in which a district court has failed to personally offer a defendant the opportunity to alloc[u]te in a revocation hearing." Petitioner cites the Seventh Circuit's decision in *United States* v. *O'Hallaren*, 505 F.3d 633 (2007), which found plain error when a district court revoked a defendant's supervised release and sentenced him to prison without advising him of his allocution right. The court stated in that case that it would "presume prejudice when there is any possibility that the defendant would have received a lesser sentence had the district court allowed him to speak before imposing a sentence." *Id.* at 636. And the court noted that "remand is generally required" under the fourth prong of plain-error review when a defendant has been denied the right to allocute. *Ibid.* Petitioner also relies on the Eleventh Circuit's decision in *United States* v. *Carruth*, 528 F.3d 845 (2008), which reached a similar result. There, the court stated that "[p]rejudice is presumed when a defendant is not given the opportu-

nity to allocute and there exists the possibility of a lower sentence," and noted that in such cases the fourth prong of plain-error review was satisfied and reversal warranted. *Id.* at 847 n.4.

But petitioner overstates the case in suggesting that the decisions in *O'Hallaren* and *Carruth* announced a strict requirement that reversal is always warranted in those circuits when a district court commits an allocution error. Rather, consistent with the Court's holding in *Puckett* v. *United States*, 129 S. Ct. 1423, 1433 (2009), that the fourth prong of plain-error review is "a case-specific and fact-intensive" inquiry, the Seventh and Eleventh Circuits have on specific facts denied relief to correct allocution errors at revocation and initial sentencing hearings. *E.g.*, *United States* v. *Noel*, 581 F.3d 490, 503-504 (7th Cir. 2009) (district court twice mentioned in open court defendant's right to allocute and permitted a letter from defendant to be read at sentencing hearing), cert. denied, 131 S. Ct. 76 (2010); *United States* v. *DeBerry*, 376 Fed. Appx. 612, 614 (7th Cir.) (defendant was permitted to speak at some point during his sentencing hearing and failed to identify on appeal anything more or different he would have said in mitigation if invited to speak), cert. denied, 130 S. Ct. 2060 (2010); *United States* v. *Knowles*, 180 Fed. Appx. 110, 111-112 (11th Cir.) (defendant's counsel indicated he had nothing further to say, district court imposed below-Guidelines sentence, and "there [was] nothing in the record indicating had [defendant] addressed the court personally, apologized, and accepted responsibility for his actions, as he claims he would have, he would have received a shorter sentence"), cert. denied, 549 U.S. 892

(2006).[3] That approach is consistent with the court of appeals' decision here and with the Fifth Circuit's decision (cited at Pet. 13-14) in *United States* v. *Magwood*, 445 F.3d 826, 830 (2006), denying discretionary relief for an allocution error when the defendant failed to satisfy the fourth prong of plain-error review.

In addition, neither of the courts in *O'Hallaren* or *Carruth* confronted circumstances like those here, where the district court repeatedly informed petitioner at the first revocation hearing that it would impose the two-year statutory maximum if petitioner continued to violate his conditions of supervised release—which petitioner did less than two months later—and where counsel made a full factual presentation of all of the mitigation circumstances and requested another chance. Pet. App. 20a-28a. Nothing suggests that, in these circumstances, the Seventh or Eleventh Circuits would have exercised their discretion differently.[4]

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[3] This Court denied petitions for writs of certiorari in *Noel* and in *United States* v. *Coleman*, 280 Fed. Appx. 388 (5th Cir. 2008), cert. denied, 129 S. Ct. 900 (2009), both of which presented the question whether an allocution error rose to the level of reversible plain error. There is no reason for a different result here.

[4] Petitioner also argues that the Eighth Circuit's decision in *United States* v. *Robertson*, 537 F.3d 859 (2008), goes farther than the decision below because it "holds categorically that the denial of an opportunity to allocute in a revocation hearing is an 'error [that is] not plain.'" Pet. 14-15 (quoting *Robertson*, 537 F.3d at 863) (brackets in original). But the Eighth Circuit did not determine whether the third and fourth prongs of plain-error review were satisfied in that (or in any) case. Rather, the court noted that the district court had personally addressed the defendant during the sentencing hearing, that the court had asked whether the defendant or his counsel had anything to say by way of mitigation before imposing sentence, and that neither the defendant nor his counsel had objected that the opportunity to allocute was insufficient. *Robertson*, 537 F.3d at 863. Under those circumstances, the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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court concluded, even if the district court had not satisfied the requirements of Rule 32.1, "the issue was forfeited, and the error was not plain." *Ibid.*