SUPREME COURT OF THE UNITED STATES

No. 07–9712

JAMES BENJAMIN PUCKETT, PETITIONER *v.* UNITED STATES

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

[March 25, 2009]

JUSTICE SOUTER, with whom JUSTICE STEVENS joins, dissenting.

Petitioner's situation does not excite sympathy, but the Court's holding will stand for a rule in circumstances less peculiar than those here. I disagree with my colleagues with respect to the interest at stake for a criminal defendant in a case like this, and I respectfully dissent.

This case turns on whether plain-error review applies to an unpreserved claim that the Government breached its plea agreement and on identifying the relevant effect, or substantial rights implicated, under the third prong of *United States* v. *Olano*, 507 U. S. 725, 734 (1993). I agree with the majority that plain error is the proper test, but depart from the Court's holding that the effect in question is length of incarceration for the offense charged (as to which the error here probably made no ultimate difference). I would hold that the relevant effect is conviction in the absence of trial or compliance with the terms of the plea agreement dispensing with the Government's obligation to prove its case.

The first two conditions for recognizing plain error, that there be error and that it be clear, see *id.*, at 732–734, are without doubt satisfied here. Before sentencing, a colloquy in accordance with Federal Rule of Criminal Procedure 11 laid the ground for satisfying the requirement

that the error be obvious, by making a public record of the terms of the plea agreement between Puckett and the Government. Both the written agreement and the Government's representation to the District Court included the Government's statement that Puckett qualified for a three-level reduction in his offense level under the Sentencing Guidelines, because of his acceptance of responsibility for his offense. See App. 54a ("The government agrees that Puckett has demonstrated acceptance of responsibility and thereby qualifies for a three-level reduction in his offense level"); *id.*, at 68a ("The government agrees that Mr. Puckett has demonstrated acceptance of responsibility and thereby would qualify for a three level reduction in his offense level").

Puckett does indeed appear to have satisfied the conditions on which the Government's commitment was premised: he accepted responsibility for committing "his offense[s]" and "assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty." United States Sentencing Commission, Guidelines Manual §3E1.1 (Nov. 2003). His subsequent criminality (during the unusual 3-year break between his guilty plea and sentencing) was not a failure on his part to accept responsibility for his prior crimes (the benefit of which the Government had already received by the time Puckett pleaded guilty). In any case, the Government could have insisted on a provision in the plea agreement allowing it to back out of its commitment if Puckett engaged in additional criminal conduct prior to sentencing, and did not do so. It should therefore be bound by the terms of the agreement it made, whether or not Puckett was in fact entitled to the reduction. In administering the criminal law no less than the civil, parties are routinely bound by agreements they wish they had not made. This is why the Government has no choice but to admit that it breached the plea agreement

when, at sentencing, it objected to the three-level reduction. Despite its contention that the plain-error doctrine does not save Puckett from his failure to object at the sentencing hearing, the Government does not deny that a deal is a deal and it does not deny that it broke its word.

The plain-error doctrine will not, however, avail Puckett anything unless the remaining conditions set out in *Olano* are satisfied, the third requiring a showing that sentencing Puckett on a plea given in return for an unfulfilled promise by the Government violated his substantial rights. See 507 U. S., at 734. The majority understands the effect in question to be length of incarceration. See *ante*, at 12, n. 4 ("When the rights acquired by the defendant relate to sentencing, the 'outcome' he must show to have been affected is his sentence"). Since Puckett can hardly show that a court apprised of his subsequent criminality would have given him the three-level reduction even in the absence of the Government's breach, in the majority's view he cannot satisfy the "substantial rights" criterion and so fails to qualify for correction of the admitted clear error.

I, on the contrary, would identify the effect on substantial rights as the criminal conviction itself, regardless of length of incarceration. My reason is simply that under the Constitution the protected liberty interest in freedom from criminal taint, subject to the Fifth Amendment's due process guarantee of fundamental fairness, is properly understood to require a trial or plea agreement honored by the Government before the stigma of a conviction can be imposed. That protection does not vanish if a convicted defendant turns out to get a light sentence. It is the trial leading to possible conviction, not the sentencing hearing alone, that is the focus of this guarantee, and it is the possibility of criminal conviction itself, without more, that calls for due process protection. In a legal system constituted this way, it is hard to imagine anything less fair

than branding someone a criminal not because he was tried and convicted, but because he entered a plea of guilty induced by an agreement the Government refuses to honor.

Agreements must therefore be kept by the Government as well as by the individual, and if the plain-error doctrine can ever rescue a defendant from the consequence of forfeiting rights by inattention, it should be used when the Government has induced an admission of criminality by making an agreement that it deliberately breaks after the defendant has satisfied his end of the bargain. Redressing such fundamentally unfair behavior by the Government, whether by vacating the plea or enforcing the plea agreement, see *Santobello* v. *New York*, 404 U. S. 257, 263 (1971), is worth the undoubted risk of allowing a defendant to game the system and the additional administrative burdens, see *ante*, at 5, 10–11. If the Judiciary is worried about gamesmanship and extra proceedings, all it needs to do is to minimize their likelihood by making it plain that it will require the Government to keep its word or seek rescission of the plea agreement if it has cause to do so. Thus, I would find that a defendant's substantial rights have been violated whenever the Government breaches a plea agreement, unless the defendant got just what he bargained for anyway from the sentencing court.

What I have said about the third *Olano* criterion determines my treatment of the fourth, addressing whether leaving the error uncorrected "may be said . . . 'seriously [to] affect the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, *supra*, at 744 (quoting *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936)). If I am right that in this case the protected interest is in the guarantee that no one is liable to spend a day behind bars as a convict without a trial or his own agreement, then the fairness and integrity of the Judicial Branch suffer when a court imprisons a defendant after he pleaded guilty in

reliance on a plea agreement, only to have the Government repudiate the obligation it agreed upon. That is precisely what happened here, yet the Judiciary denies relief under an appellate procedure for correcting patent error. Judicial repute does not escape without damage in the eyes of anyone who sees beyond the oddity of this case.

Puckett is entitled to relief because he and every other defendant who may make an agreement with the Government are entitled to take the Government at its word. Puckett insists that the Government keep its word, and if we are going to have a plain-error doctrine at all, the Judiciary has no excuse for closing this generally available avenue of redress to Puckett or to any other criminal defendant standing in his shoes.