No. 08-_____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BENJAMIN PUCKETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

I. Did the Fifth Circuit violate the doctrines set forth in Santobello v. New York, 404 U.S. 257 (1971) when it applied a "plain error" standard of review to Defendant's appeal based on the government's admitted breach of the plea agreement and Defendant did not object to said breach at the time of sentencing?

II. Even if "plain error" is the correct standard of review when a defendant does not object at sentencing to the Government's breach of a plea agreement, did the Fifth Circuit err when it failed to find "plain error" was established when the breach of the plea agreement was admitted and the plea was obtained in exchange for clear promises that the Government failed to keep?

PARTIES

James Benjamin Puckett is the petitioner. The United States of America is the respondent.

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Petitioner, James Benjamin Puckett, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit opinion is captioned as United States of America v. James Benjamin Puckett, 505 F.3d 377 (5th Cir. 2007). A copy of the opinion is attached as Appendix A. A Motion for Rehearing En Banc was denied on December 4, 2007. A copy of that decision is attached as Appendix B.

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on October 23, 2007. [Appendix A]. Defendant's Motion for Rehearing En Banc was denied on December 4, 2007 [Appendix B]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOKED

Implicated in this case are the Fifth Amendment to the United States Constitution, which provides in relevant part that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . nor be deprived of life, liberty, or property without due process of law . . . .

and the Sixth Amendment to the United States Constitution, which provides:

> This case involves the Sixth Amendment rights to criminal defendants " to assistance of counsel: "In all criminal prosecutions, the accused shall

> enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

Also implicated is Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The remainder of the statutory and regulatory provisions are set out in the appendices.

STATEMENT OF THE CASE

James Puckett was charged by indictment in the Northern District of Texas of violating 18 U.S.C. § 2113(a) and (d) (Bank Robbery) and 18 U.S.C. § 924(c)(1) (Firearm enhancement) for allegedly robbing a bank on April 4, 2002. Mr. Puckett was on post-conviction supervised release for three prior federal felony offenses[1] at the time of this alleged offense.

On September 3, 2003, Mr. Puckett pled guilty to both counts charged in this cause and executed a plea agreement and factual resume for these crimes that was accepted by United States District Judge Barefoot Sanders. Paragraph 8 of that agreement states: "The government has agreed that Puckett has demonstrated acceptance of responsibility and thereby qualifies for a three-level reduction in his offense level." There were no conditions attached to this plea agreement.

On September 4, 2003, The Government filed its Motion to Decrease Offense Level Pursuant to USSG § 3E1.1(b), requesting that the Court to decrease defendant's offense level by one additional level. In that Motion, the Government alleged in support of this Motion that "the Government agrees that the defendant has clearly demonstrated acceptance of responsibility for his offense[.]" This Motion includes the language however, that the government "reserved the right to withdraw this motion in

[1] *See United States v. Puckett*, 3:97-CR-093-H(01); *United States v. Puckett*, 3:97-CR-175-H(01); and

the event that the defendant engages in conduct inconsistent with his acceptance of responsibility."

At sentencing however, the Government stated: "Your honor, to the acceptance of responsibility, that third level, which, of course, does not come into play unless the court finds that he should receive the downward - - the first two levels, that was made a long time ago. That was before the offense that was committed that Ms. [HARBGS/] included in her presentence report and we would object to him receiving *any acceptance or responsibility points at this point*." Defendant did not object to the Government's breach of the plea agreement, but objected on other grounds. Judge Sanders did not grant Defendant the three acceptance points in imposing sentence.

On appeal, Defendant raised the following issues: (1) whether the district court erred in denying Defendant's request to withdraw his guilty plea; (2) whether the Government breached the plea agreement, thus entitling Defendant to withdraw his guilty plea (3); whether the district court erred in denying Defendant acceptance points for allegedly taking part in a new criminal venture while incarcerated for this cause; and (4) whether the district erred in denying Defendant's Motion for Ineffective Assistance of counsel.

United States v. Puckett, 3:97-CR-176-H(01).

In response, the Government admitted that it breached the plea agreement at sentencing: "The government does not dispute that the prosecutor's objection at sentencing to Puckett receiving a reduction for acceptance of responsibility was contrary to the government's obligation as stated in the Plea Agreement." Appellee's Brief to the Fifth Circuit at 21. Despite this admission, the Fifth Circuit denied all of the Defendant's arguments on appeal and affirmed. Defendant petitioned for a rehearing en banc that was denied.

REASON FOR GRANTING THE WRIT

I. The Fifth Circuit violated Santobello when it applied a "plain error" standard of review to Defendant's appeal based on the government's admitted breach of the plea agreement and Defendant did not object to said breach at the time of sentencing.

Federal Rule of Criminal Procedure 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The First[2], Fourth[3], Fifth[4], Sixth[5], Seventh[6], Eighth[7], Ninth[8],

[2] See United States v. Saxena, 229 F.3d 1, 5 (1st Cir. 2000)("When a defendant has knowledge of conduct ostensibly amounting to a breach of a plea agreement, yet does not bring that breach to the attention of the sentencing court, we review only for plain error").

[3] See United States v. McQueen, 108 F.3d 64, 65-66 (4th Circuit 1997)("McQueen asserts that the Government's failure to argue the plea agreement terms to the sentencing court amounted to a breach of the plea agreement. . . . Because McQueen raises this issue for the first time on appeal, however, we must affirm the sentence imposed by the district court unless we find plain error").

[4] See United States v. Munoz, 408 F.3d 222, 226 (5th Cir. 2005)("Because Munoz did not object [to the breach of the plea agreement] at sentencing, the court reviews the argument for plain error").

Eleventh[9] and the D.C. Circuit[10] apply some form of a "plain error" standard where a Defendant failed to object at sentencing to the Government's breach of a plea agreement, then sought to raise it on direct appeal. The Second[11], Third[12] and Tenth[13]

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[5] See United States v. Barnes, 278 F.3d 644; 646 (6th Cir. 2002)("We review the question of whether the government's conduct, or lack thereof, violated its plea agreement with a defendant de novo. . . . However, because Defendant failed to object after the government did not offer a recommendation at sentencing, Defendant waived his right to appeal any breach of the plea agreement, and a plain error analysis thus guides this Court's review")(citation omitted).

[6] See United States v. Hicks, 129 F.3d 376, 378 (7th Cir. 1997)("A defendant's failure to allege the breach of a plea agreement at sentencing waives the matter for appeal. . . . We will, however, reverse even on a relinquished ground if the district court committed plain error").

[7] The Eighth Circuit holds that a Defendant's failure to object at sentencing to the Government's breach of a plea agreement waives this issue. See United States v. Cohen, 60 F.3d 460, 462 (8th Cir. 1995). However, a "plain error" standard has also been applied in unpublished decisions. See United States v. Gaines, 187 Fed.Appx. 658 (8th Cir. 2006)(When Defendant failed to object to the Government's breach of the plea agreement at sentencing, "[e]ven assuming there was no waiver, the matter of an alleged breach was not properly preserved, and we would review the claim only for plain error").

[8] See United States v. Maldonado, 215 F.3d 1046, 1051 (9th Cir. 2000)("Because Maldonado waived the breach of plea agreement issue, we review his claim for plain error").

[9] See United States v. Romano, 314 F.3d 1279, 1281 (11th Cir. 2002)("[T]he Government notes that appellant failed to raise [the issue of the Government's breach of the plea agreement] before the district court. The Government is right; hence, we review appellant's contention for plain error").

[10] See In re Sealed Case, 356 F.3d 313, 316-317 (D.C.Cir. 2004)("[W]e join the substantial majority of circuits holding that when a defendant raises a claim of breached plea bargain for the first time on appeal, the reviewing court should apply a plain error standard of review consistent with Fed. R. Crim. P. 52(b)").

[11] See United States v. Griffin, 510 F.3d 354, 360 (2nd Cir. 2007)(citations omitted). The Second Circuit applies a "de novo" review in situations where the Defendant does not object to breaches of the plea agreement at sentencing, noting "Because the government ordinarily has certain awesome advantages in bargaining power, any ambiguities in the agreement must be resolved in favor of the defendant.". . . .Where plea agreements are involved, the government must take particular "'care in fulfilling its responsibilities.'" Id.

[12] See United States v. Rivera, 365 F.3d 213 (3rd Cir. 2004)(Breach of plea agreement even if not raised at sentencing subject to "de novo" review, rejecting "plain error" standard articulated in Rule 52(b)).

apply a "de novo" review, regardless of whether the Defendant objected at sentencing to the breach. The conflict among the Circuits is real, and raises significant practical issues for Defendants who seek to challenge a prosecutor's breach on appeal after failing to raise this issue at sentencing.

The "plain error" standard is defined as: "[B]efore an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affects substantial rights." . . . If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error """seriously affects the fairness, integrity, or public reputation of judicial proceedings."""" Johnson v. United States, 520 U.S. 461, 467 (1997), citing United States v. Olano, 507 U.S. 725,732 (1993)(further citations omitted). "The plain error standard is very high, requiring that the error affect a substantial right of the defendant. . . . "A court of appeals may correct a plain, forfeited error affecting substantial rights 'only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.'" United States v. Thayer, 204 F.3d 1352, 1356 (11th Cir. 2000)(citations omitted).

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[13] See United States v. Courtois, 131 F.3d 937, 938, n.2 (10th Cir. 1997)("Because the failure to object to an alleged plea agreement does not waive the issue, we may review the defendant's claim de novo rather than for plain error").

Conversely, under a "de novo" standard, the Court stands in the shoes of the trial court- if a breach occurred, then these courts have held that a remand to the trial court for either sentencing or a withdrawal of the plea is necessary. This evaluation is set out clearly in United States v. Moscahlaidis, 868 F.2d 1357, 1360 (10th Cir. 1989):

> The facts of the case, if disputed, are determined by the district court and our review of those findings is limited to a clearly erroneous standard. *United States v. Carrillo*, 709 F.2d 35 (9th Cir. 1983). Whether the government's conduct violates the terms of the plea agreement is a question of law and our review is plenary. *United States v. Miller*, 565 F.2d 1273 (3d Cir. 1977), *cert. denied*, 436 U.S. 959, 57 L. Ed. 2d 1125, 98 S. Ct. 3076 (1978); *United States v. Crusco*, 536 F.2d 21 (3d Cir. 1976). As to the third question, the Supreme Court, in *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971), concluded that once the court finds a breach of the plea agreement by the government the case must be remanded for either resentencing or withdrawal of appellant's guilty plea. Under these standards, we review this case.

In the seminal case of Santobello v. New York, 404 U.S. 257 (1972), the Defendant attempted to withdraw his guilty plea when the prosecutor reneged on an earlier promise to make no recommendation as to the sentence to be imposed by the Judge. In overturning the conviction, the United States Supreme Court held directly: "[A] constant factor is that when a plea agreement rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Id. at 262.

The underpinnings for this holding are rooted in the United States Constitution, including the Sixth and Fourteenth Amendments. See Santobello at 265 (concurrence of Douglas, J.)("Although Kercheval's dictum concerning grounds for withdrawal of guilty pleas did not expressly rest on constitutional grounds (cf. Frame v. Hudspeth, 309 U.S. 632), Walker v. Johnston, 312 U.S. 275, clearly held that a federal prisoner who had pleaded guilty despite his ignorance of and his being uninformed of his right to a lawyer was deprived of that Sixth Amendment right, or if he had been tricked by the prosecutor through misrepresentations into pleading guilty then his due process rights were offended").

Justice Douglas continued, noting that "[s]tate convictions founded on coerced or unfairly induced please have also received increased scrutiny as more fundamental rights have been applied to the States."[14] Id. at 265-66. More specifically, Justice Douglas noted "But it is also clear that a prosecutor's promise may deprive a guilty

[14] See See Santobello at 265-66 (concurrence of Douglas, J.)("After Powell v. Alabama, 287 U.S. 45, the Court held that a state defendant was entitled to a lawyer's assistance in choosing whether to plead guilty. Williams v. Kaiser, 323 U.S. 471. In Herman v. Claudy, 350 U.S. 116, federal habeas corpus was held to lie where a lawyerless and uneducated state prisoner had pleaded guilty to numerous and complex robbery charges. And, a guilty plea obtained without the advice of counsel may not be admitted at a subsequent state prosecution. White v. Maryland, 373 U.S. 59. Thus, while plea bargaining is not per se unconstitutional, North Carolina v. Alford, 400 U.S. 25, 37-38, Shelton v. United States, 242 F.2d 101,, aff'd en banc, 246 F.2d 571 (CA5 1957), a guilty plea is rendered voidable by threatening physical harm, Waley v. Johnston, supra, threatening to use false testimony, ibid., threatening to bring additional prosecutions, Machibroda v. United States, supra, or by failing to inform a defendant of his right of counsel, Walker v. Johnston, supra. Under these circumstances it is clear that a guilty plea must be vacated")

plea of the "character of a voluntary act." Machibroda v. United States, supra, at 493. Cf. Bram v. United States, 168 U.S. 532, 542-543." Id. at 266. Further, Justice Douglas noted, "The lower courts, however, have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain[.] . . . As one author has stated, the basis for outright vacation is "an outraged sense of fairness" when a prosecutor breaches his promise in connection with sentencing. D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 36 (1966)." Id. at 266.

In Puckett, the Fifth Circuit acknowledged that the Government had breached the plea agreement. Applying the "plain error" standard, however, the Fifth Circuit denied Puckett's request to have his plea vacated. If the Fifth Circuit had used the "de novo" test, following Santobello, once the breach was established, it would have remanded the case to the district court for resentencing or for withdrawal of the plea. Defendant Puckett respectfully requests certiorari be granted to resolve the conflict among Circuits as to what standard should be applied when a Defendant appeals a sentence based on a breach of a plea agreement, but did not raise this issue at sentencing.

II. Even if "plain error" is the correct standard of review when a defendant does not object at sentencing to the Government's breach of a plea agreement, did the Fifth Circuit err when it failed to find "plain error" was established when the breach of the plea agreement was admitted and the plea was obtained in exchange for these promises?

Even in Circuits that have adopted the "plain error" standard in situations where a Defendant does not object to a breach of the plea agreement at sentencing, there is a wide disparity as to what that standard actually means. The Puckett decision is an example of a conventional application of a Rule 52(b) "plain error" evaluation, in which the three prong test is applied. After determining the first two prongs had been met, the Puckett court held;

> Concerning the third prong, whether this error affected a substantial right, Puckett has not carried his burden of showing prejudice. . . . Puckett has made no showing that, absent the government's recommendation, the district court would have disregarded his criminal conduct and granted the reduction for acceptance of responsibility. The record indicates exactly the opposite. Absent proof of prejudice, Puckett cannot establish plain error and is not entitled to relief on a forfeited objection.

Id. at __. See also United States v. Ingraham, 238 Fed. Appx. 523, 525-526 (Unpub-11th Cir. 2007)"For an error to affect substantial rights, "in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." United States v. Olano, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778,

123 L. Ed. 2d 508 (1993). The party seeking to establish plain error has the burden of persuasion as to prejudice. See United States v. Rodriguez, 398 F.3d 1291, 1299 (11th Cir. 2005). To establish prejudice, the defendant must show a reasonable probability of a different result. *Id.").*

Not all Circuits who apply the "plain error" standard apply it in this manner. Following Santobello, numerous decisions have held that proof a breach *is in and of itself* a showing of plain error, or at least triggers a much less onerous standard on the Defendant to show prejudice. For example, in United States v. McQueen, 108 F.3d 64, (4th Cir. 1997), the Defendant failed to object to the Government's breach of the plea agreement at sentencing, and the Fourth Circuit applied a "plain error" standard. However, the Fourth Circuit noted,

> The interpretation of plea agreements is guided by contract law, and parties to the agreement should receive the benefit of their bargain. Because a defendant's fundamental and constitutional rights are implicated when he is induced to plead guilty by reason of a plea agreement, our analysis of the plea agreement or a breach thereof is conducted with greater scrutiny than in a commercial contract. When reviewing a breached plea agreement for plain error, therefore, we must establish whether the breach was "so obvious and substantial that failure to notice and correct it affected the fairness, integrity or public reputation of the judicial proceedings."

Id. at 66 (footnoted omitted). Applying this standard, the Fourth Circuit held:

> The Government's failure to argue the terms of the oral plea agreement to the district court at the sentencing hearing constituted a breach of the plea agreement. And because violations of plea agreements on the part of the government serve not only to violate the constitutional rights of the defendant, but directly involve "the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government," we hold that the Government's breach constituted plain error.

Id. See also Teeple v. United States, 15 Fed. Appx. 323 (Unpub. 6th Cir. 2000)(Clay, C.J., dissenting)("Furthermore, such a plain error--the government's failure to honor its obligations under the plea agreement--affects the integrity of our judicial system and should be corrected. United States v. Taylor, 77 F.3d 368, 372 (11th Cir. 1996); United States v. Mondragon, 228 F.3d 978, 981 (9th Cir. 2000) ("The integrity of our judicial system requires that the government strictly comply with its obligations under a plea agreement.")); United States v. Barnes, 278 F.3d 644, 647-648 (6th Cir. 2002)("The fact that our review is guided by a plain error standard does not effect the application of Santobello, Cohen, and their progeny inasmuch as is well-settled that when a defendant pleads guilty in reliance on a plea agreement, he waives certain fundamental constitutional rights such as the right to trial by jury"); United States v. Saling, 205 F.3d 764, 766-67 (5th Cir. 2000) (summarily reversing when Government had breached plea agreement without specifying whether defendant had preserved his objection).

These cases show that Santobello requires a different "plain error" evaluation that is normally imposed under Rule 52(b). If such a "modified" plain error evaluation had been used in the instant case, the Fifth Circuit would have reversed and remanded. Defendant further requests that certiorari be granted to clarify the type of "plain error" evaluation to be used by the Circuits in cases where a defendant fails to object to the Government's breach of a plea agreement at sentencing.

Because this case presents a question implicating this Court's supervisory powers,[15] and an important question of federal law that has not been, but should be, settled by this Court, this Court should grant certiorari.

CONCLUSION

Because the Fifth Circuit violated the doctrines set forth in Santobello v. New York, 404 U.S. 257 (1971) when it applied a "plain error" standard of review to Defendant's appeal based on the government's admitted breach of the plea agreement and Defendant did not object to said breach at the time of sentencing, certiorari should be granted. In the alternative, even if "plain error" is the correct standard of review when a defendant does not object at sentencing to the Government's breach of a plea agreement, the Fifth Circuit erred when it failed to find "plain error" was

[15] See, e.g., Nguyen v. United States, 539 U.S. 69 73-74 (2003) (granting certiorari to exercise this Court's supervisory powers to review whether court of appeals in reviewing criminal cases had departed from accepted and usual course of judicial proceedings).

established when the breach of the plea agreement was admitted and the plea was obtained in exchange for clear promises, and certiorari should be granted.

LARS ROBERT ISAACSON
Counsel for Petitioner

No. 07-_____

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court for the

Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this th day of ___ 2008.

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PROOF OF SERVICE

I, Lars Robert Isaacson, do certify that on March 3, 2008, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served. I have served the Supreme Court of the United States via United States mail, with

first-class postage prepaid. The Solicitor General, Assistant United States Attorney Susan Cowger, and the petitioner were each served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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