In the
Indiana Supreme Court

Braven Harris,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
24A-CR-00542

Trial Court Case No.
49D28-2209-MR-23928

Published Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 6/6/2025.

FOR THE COURT

Loretta H. Rush
Chief Justice of Indiana

Massa, Slaughter, and Goff, JJ., concur.
Rush, C.J., dissents from the denial of transfer with separate opinion in which Molter, J., joins.

Rush, C.J., dissenting.

Allocution—a defendant's right to make a personal, unsworn statement to the sentencer—is a right that is deeply rooted in America's legal tradition, dating back long before America's founding. *See, e.g.*, *Green v. United States*, 365 U.S. 301, 304 (1961). Our Legislature first codified this right in 1852. Ind. Rev. Stat., vol. II, pt. III, ch. 1, art. 12, § 126 (1852).[1] Today, the statute requires Indiana trial courts to "ask the defendant whether" they wish to "make a statement personally" on their "own behalf" at a sentencing hearing after trial. Ind. Code § 35-38-1-5 (the "Allocution Statute").

Here, the parties agree that the trial court neither advised Braven Harris of his right to make a statement nor asked him whether he wished to do so before imposing an aggravated sentence. Though the Court of Appeals acknowledged the trial court's error, the panel concluded that Harris was not entitled to a new sentencing hearing. *Harris v. State*, 245 N.E.3d 184, 190–93 (Ind. Ct. App. 2024). In reaching this conclusion, the panel first held that Harris waived his claim "by failing to object or assert his statutory right of allocution at the sentencing hearing." *Id.* at 192. And then it held that Harris failed to establish fundamental error, reasoning that he "declined to make a statement to the officer preparing the pre-sentence investigation report" and presented mitigating evidence at sentencing through his sister's testimony. *Id.* at 193.

We should grant transfer for at least four reasons. This case presents important issues of first impression for our Court, as we have never addressed a challenge under the Allocution Statute when a defendant was not asked to speak, did not speak, and showed no indication of knowing that right existed. Ind. Appellate Rule 57(H)(4). This decision conflicts with other Court of Appeals decisions, and it—along with other opinions—relies on inapposite precedent in resolving a defendant's challenge under the Allocution Statute. App. R. 57(H)(1), (5). Finally, this

[1] We have twice incorrectly stated that this right was first codified in 1905. *Strack v. State*, 186 N.E.3d 99, 102 (Ind. 2022); *Biddinger v. State*, 868 N.E.2d 407, 410 (Ind. 2007).

decision conflicts with nearly every decision from both state and federal jurisdictions that provide defendants with a mandatory right to allocution. App. R. 57(H)(3).

Ultimately, I would grant transfer, vacate Harris's sentence, and remand for a new sentencing hearing. When, as here, a trial court does not ask a defendant or their counsel whether the defendant wishes to make a statement at sentencing and there is no evidence the defendant knew of this statutory right, the defendant does not waive the issue by failing to object. As a result, review of this error falls under Appellate Rule 66(A). And the error here was not harmless.

I. The Court of Appeals' opinion renders the Allocution Statute advisory, and this Court passes up vital opportunities by denying transfer.

The right to allocution stems from the English common-law practice of allowing certain defendants to offer reasons why their sentence should not be imposed. Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 Fordham L. Rev. 2641, 2645–46 (2007). It was "given largely to persons convicted of capital felonies" who "were neither entitled to counsel nor able to testify on their own behalf at trial." *Id.* at 2645. During sentencing, the defendant was asked, "Do you know of any reason why judgment should not be pronounced upon you?" *Id.* They "could respond with a limited number of reasons," such as "pardon, pregnancy, insanity, misidentification, or benefit of the clergy." *Id.* at 2646. The right to allocution was "incorporated into American criminal practice," and "most early" cases "ordered resentencing" when a defendant's right was violated. *Id*.

Though criminal defendants today have more rights, including counsel to speak on their behalf and the ability to testify under oath, the right to allocution has a "long pedigree." *Id.* at 2649. And the opportunity to personally address the court before being sentenced retains both symbolic and practical significance. *See, e.g.*, *Green*, 365 U.S. at 304 (observing that "modern innovations" do not reduce "the need for the

defendant, personally, to have the opportunity to present to the court his plea in mitigation").

Indeed, our Court has recognized that "the purpose of the right of allocution is to give the trial court the opportunity to consider the facts and circumstances relevant to the sentencing of the defendant in the case before it." *Ross v. State*, 676 N.E.2d 339, 343 (Ind. 1996). And this purpose is accomplished only when the defendant is "given the opportunity to explain" their "view of the facts and circumstances." *Id.* (quoting *Shanholt v. State*, 448 N.E.2d 308, 320 (Ind. Ct. App. 1983)). To that point, as the Allocution Statute requires, trial courts "should unambiguously address the defendant and leave no question that the defendant was given an opportunity to speak on his own behalf." *Id.* at 344 (citing *Green*, 365 U.S. at 305). In this way, "[a]ffording a defendant the right of allocution requires a modest degree of formality." *Id.* at 343.

But, as this case exemplifies, there are times when that modest degree of formality is ignored. Such occasions have produced conflicting decisions regarding whether a defendant can waive their statutory right to allocution and how to assess a trial court's failure to provide that right. In resolving these issues, our appellate courts have at times relied on inapposite precedent. And both results have contributed to Indiana becoming an outliner among jurisdictions with similar allocution requirements.

A. There is a current conflict on whether a defendant can waive their statutory right to allocution and the effect of a trial court's error.

As noted above, Indiana has codified a defendant's right to allocution since 1852. The initial statute provided, "When the defendant appears for judgment, he must be informed by the court of the verdict of the jury, and asked whether he have any legal cause to show why judgment should not be pronounced against him." Ind. Rev. Stat. § 126 (1852). In the first case to address this statute, our Court found no error when a defendant spoke "without being asked," reasoning that "the necessity of asking [was]

superseded." *McCorkle v. State*, 14 Ind. 39, 47 (1859). But the Court recognized the statute has "application where the defendant, on the return of the verdict, takes no steps, and judgment passes immediately thereon." *Id.* Thus, the initial statute imposed a duty on the trial court—not the defendant—to take an affirmative action before pronouncing a sentence. This remains true today, as the Allocution Statute requires trial courts to "ask the defendant whether" they wish to "make a statement personally" on their "own behalf." I.C. § 35-38-1-5.

Though we have recognized this statute "places an affirmative duty on the trial court," we have at the same time concluded that "the failure of a defendant to object nevertheless waives any claim of error on appeal." *Angleton v. State*, 714 N.E.2d 156, 159 n.2 (Ind. 1999). Despite the broad latter statement, we held the defendant in *Angleton* waived his claim after pointing to three circumstances: (1) he had been a practicing attorney for eight years; (2) he was facing resentencing and had been asked at his initial sentencing hearing if he wished to make a statement but declined; and (3) his counsel was asked at the second sentencing hearing if he had any witnesses to present and stated that he did not. *Id.* at 159.

Following *Angleton*, our Court of Appeals has issued conflicting decisions on both waiver and the effect of a trial court's failure to personally ask a defendant whether they wanted to make a statement. Some opinions have relied on *Angleton* to find waiver and no reversible error when trial courts asked counsel if the defendants wanted to make a statement and counsel declined. *See, e.g.*, *Abd v. State*, 120 N.E.3d 1126, 1137 (Ind. Ct. App. 2019), *trans. denied*; *Woods v. State*, 98 N.E.3d 656, 662–63 (Ind. Ct. App. 2018), *trans. denied*. And the panel here likewise relied on *Angleton*—as well as *Abd* and *Woods*—in holding that Harris waived his claim even though neither he nor his counsel were asked whether Harris wanted to exercise his right to allocution. *Harris*, 245 N.E.3d at 191–92.

But other opinions have reached different conclusions. In *Owens v. State*, the trial court did not advise the defendant of his right to speak on his own behalf or allow him to make a statement. 69 N.E.3d 531, 534 (Ind. Ct. App. 2017). The appellate court—without mentioning waiver or *Angleton*—remanded for a new sentencing hearing, holding the trial

court's error constituted a "clear denial" of the defendant's "right to due process and an abdication of the trial court's statutory obligations." *Id.* Similarly, in *Jones v. State*, the majority distinguished *Angleton*, declined to find waiver, and remanded for a new sentencing hearing when the trial court asked counsel if the defendant wished to make a statement but failed to ask the defendant. 79 N.E.3d 911, 916–17, 917 n.5 (Ind. Ct. App. 2017). Addressing waiver, the majority reasoned that a defendant should not be required to give "counsel a proverbial 'kick under the table' to prevent being sentenced without allocution." *Id.* at 917. Despite not finding waiver, the majority nevertheless turned to and found fundamental error, rejecting "the contention that fundamental error cannot exist in the absence of any representation of what a defendant might have said." *Id.* Though Judge Vaidik dissented, she recognized that the case did not present "a situation where the defendant was not informed of his right of allocution." *Id.* at 918 (Vaidik, J., dissenting). But that is precisely the situation presented here: the trial court never advised Harris or his attorney of Harris's statutory right to allocution.

Granting transfer would thus allow us to both address a trial court's obligations under the Allocution Statute and resolve the conflicting decisions identified above. Our intervention is also needed to correct misguided reliance on precedent.

B. Indiana precedent has relied on inapposite caselaw when resolving challenges based on violations of the Allocution Statute.

Aside from the conflicts identified above, a review of recent decisions that address challenges under the Allocution Statute shows a need to correct two errors.

This Court and our Court of Appeals, including the panel here, have improperly imposed a "heavy" or "strong" burden on defendants who claim their statutory right to allocution was denied. *See, e.g.*, *Strack v. State*, 186 N.E.3d 99, 103 (Ind. 2022); *Harris*, 245 N.E.3d at 192; *Woods*, 98 N.E.3d at 664. This language originated in *Minton v. State*, where the court

reasoned that "[a] defendant who suggests that he was denied his right to allocution bears a heavy burden in establishing his claim." 400 N.E.2d 1177, 1178 (Ind. Ct. App. 1980). But that statement referred only to a defendant's burden to produce evidence showing a trial court failed to personally address the defendant. *See id.* Indeed, the appellate court followed the "heavy burden" language by immediately discussing and quoting from an opinion in which we had explained that a defendant on appeal must "affirmatively show" a trial court's failure to allow the defendant to speak "by the record." *Id.* (quoting *Lillard v. State*, 50 N.E. 383, 385–86 (Ind. 1898)). This is because, when the record is silent, we presume "the trial court discharged its duty as the law exacted." *Id.* (quoting *Lillard*, 50 N.E. at 386). As such, neither *Minton* nor *Lillard* support imposing a "heavy burden" on defendants who bring challenges under the Allocution Statute when the record shows the trial court failed to personally apprise the defendant of their right to make a statement.

Additionally, our Court of Appeals, including the panel here, has improperly relied on two of our decisions—*Vicory v. State*, 802 N.E.2d 426 (Ind. 2004) and *Biddinger v. State*, 868 N.E.2d 407 (Ind. 2007)—that did not involve a violation of the Allocution Statute. *See, e.g.*, *Harris*, 245 N.E.3d at 190 & n.5; *Abd*, 120 N.E.3d at 1137; *Woods*, 98 N.E.3d at 663. In *Vicory*, we considered "[w]hether one is entitled to the right to allocution during a probation revocation hearing." 802 N.E.2d at 429. Because the trial court does not "'pronounce a sentence' at a probation revocation hearing," we recognized that the Allocution Statute does not require the judge "to ask the defendant whether he wants to make a statement." *Id.* Still, we held that when such a defendant "specifically requests the court to make a statement . . . the request should be granted." *Id.* Three years later in *Biddinger*, we extended *Vicory*'s reasoning and application to sentencing hearings after a defendant has pleaded guilty. *Biddinger*, 868 N.E.2d at 412. But again, we recognized the statute did not compel the trial court to ask the defendant anything "[b]ecause a guilty plea is not based on 'the verdict of the jury or the finding of the court.'" *Id.* (quoting I.C. § 35-38-1-5). Thus, reliance on *Vicory* and *Biddinger* is misplaced when resolving a defendant's challenge under the Allocution Statute because it imposes explicit requirements on trial courts during sentencing hearings after trial.

Granting transfer would thus provide us with an important opportunity to correct these errors. It would also allow us to ensure Indiana is not an outlier among virtually every jurisdiction that affords defendants a mandatory right of allocution.

C. Other jurisdictions consistently find no waiver and require resentencing when a lower court violates mandatory allocution requirements.

A review of caselaw from jurisdictions that require a lower court to ask whether a defendant wishes to speak at sentencing establishes that we are an outlier, bolstering a conclusion that transfer should be granted.

In federal court, a defendant's right to allocution is codified in Federal Rule of Criminal Procedure 32. That rule, like the Allocution Statute, requires the sentencing court to "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence" before a sentence is imposed. Fed. R. Crim. P. 32(i)(4)(A)(ii). The U.S. Supreme Court traced the rule's origins in *Green* and highlighted the importance of giving a defendant "the opportunity to present to the court his plea in mitigation." *Green*, 365 U.S. at 304. Indeed, even "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Id.*

Based on these principles and the mandatory nature of Rule 32, some federal circuit courts have held that a defendant does not waive their right to allocution by failing to object and remanded for a new sentencing hearing when the right was violated. *See, e.g.*, *United States v. De Alba Pagan*, 33 F.3d 125, 129–30, 129 n.4 (1st Cir. 1994); *United States v. Barnes*, 948 F.2d 325, 330–32 (7th Cir. 1991); *United States v. Walker*, 896 F.2d 295, 300–01 (8th Cir. 1990). But even in circuits that find waiver and review for plain error, courts aptly recognize that "appellate courts should not speculate about the persuasive force of a hypothetical allocution" and that, "in the vast majority of instances in which a defendant could have received a lesser sentence, an allocution error is prejudicial." *United States*

v. Bustamante–Conchas, 850 F.3d 1130, 1139 (10th Cir. 2017) (en banc). As a result, when defendants in these circuits do not receive the lowest possible sentence, the circuit courts have presumed the error was prejudicial and remanded for a new sentencing hearing. *Id.* at 1138 (collecting cases); *see also United States v. Abney*, 957 F.3d 241, 247 (D.C. Cir. 2020).

State courts reach similar conclusions. Many states—unlike Indiana—provide for a defendant's right to allocution in a court rule analogous to Federal Rule of Criminal Procedure 32. In some of those same states and others, the right is also provided in statute. At least seven states have statutes that, like the Allocution Statute, require the lower court to personally address the defendant and determine whether they wish to make a statement before imposing a sentence.[2] Iowa Code § 901.4B(1)(c); Kan. Stat. Ann. § 22-3424(e); Mont. Code Ann. § 46-18-115(3); Nev. Rev. Stat. § 176.015(2)(b)(1); N.Y. Crim. Proc. Law § 380.50(1); Ohio Rev. Code Ann. § 2929.19(A); S.D. Codified Laws § 23A-27-1. And decisions from these states' supreme courts have consistently held that a defendant does not waive this statutory right by failing to object and remanded for a new sentencing hearing when the right was violated. *See, e.g.*, *State v. Lumadue*, 622 N.W.2d 302, 304–05 (Iowa 2001); *State v. Bafford*, 879 P.2d 613, 616–17 (Kan. 1994); *State v. Campbell*, 738 N.E.2d 1178, 1188–90, 1205 (Ohio 2000); *State v. Santoro*, 551 P.3d 822, 834 (Mont. 2024).

Thus, in jurisdictions like Indiana, where lower courts have a duty to personally address defendants and determine whether they wish to make a statement at sentencing, there is near-unanimous agreement on two issues. A defendant's failure to object generally does not waive an

[2] At least four states—Hawaii, Oregon, Rhode Island, and Wyoming—have found a state constitutional right to allocution: under the due process clauses in Hawaii and Wyoming, *State v. Hernandez*, 431 P.3d 1274, 1284 (Haw. 2018); *Harvey v. State*, 835 P.2d 1074, 1082 (Wyo. 1992); and under the right-to-be-heard clauses in Oregon and Rhode Island, *State ex rel. Huddleston v. Sawyer*, 932 P.2d 1145, 1153–54 (Or. 1997); *State v. DeCiantis*, 813 A.2d 986, 989 (R.I. 2003). Like Oregon and Rhode Island, Indiana has a constitutional provision that gives a criminal defendant "the right . . . to be heard by himself and counsel." Ind. Const. art. 1, § 13. While we have certainly implied this provision includes the right to allocution, *Samaniego v. State*, 553 N.E.2d 120, 124 (Ind. 1990), we have never definitively made such a declaration. And doing so here would be inappropriate, as Harris has not made this argument.

allocution issue for appellate review. 21 Am. Jur. 2d *Criminal Law* § 726 (2025) ("[W]here statutory provisions or rules requiring allocution are deemed mandatory, it appears that a waiver of allocution by the defendant may not be found."). And a lower court's failure to comply with its duty generally requires a new sentencing hearing. 24 C.J.S. *Criminal Procedure and Rights of Accused* § 2260 (2025) ("The court's failure to afford a defendant the right of allocution is error that requires resentencing."). Yet, as highlighted above, our jurisprudence largely conflicts with these conclusions, rendering Indiana an outlier.

All in all, granting transfer is needed to resolve conflicting opinions, rectify misguided reliance on precedent, and ensure we are not an outlier among jurisdictions with similar allocution requirements. And, as noted above, granting transfer would also allow us to answer two important questions that arise when a trial court violates its statutory duty to personally ask a defendant whether they wish to make a statement at sentencing: Does a defendant waive the issue for appellate review by failing to object? And how should our appellate courts review that error? I turn now to explain how I would answer those questions here.

II. When a trial court violates its duty under the Allocution Statute and nothing indicates the defendant was aware of their statutory right, the proper review is for harmless error.

As reflected above, the Allocution Statute grants to defendants a personal right to allocution and imposes on trial courts the duty to ask a defendant whether they wish to make a statement before pronouncing a sentence after trial. I.C. § 35-38-1-5. In this way, the statute imposes on trial courts a similar duty as the one to comply with the juvenile-waiver statute before accepting a juvenile's delinquency admission. *See* I.C. § 31-32-5-1. And when a trial court violates that statute, we don't require the juvenile, their guardian, or their attorney to object to preserve the error for appellate review. *See T.D. v. State*, 219 N.E.3d 719, 727–28 (Ind. 2023). The same should be true when a defendant is not personally addressed—as

required by the Allocution Statute—and no evidence reflects the defendant knew of this statutory right.

Such a conclusion also comports with the purposes of the general rule requiring a timely objection, which is "to promote a fair trial by preventing a party from sitting idly by and appearing to assent to an offer of evidence or ruling by the court only to cry foul when the outcome goes against him." *Hale v. State*, 54 N.E.3d 355, 358–59 (Ind. 2016) (quotation omitted). When there is no evidence that a defendant knew of their statutory right to allocution, there is no basis for concluding they were "sitting idly by." We have recognized "occasional exceptions" to the general waiver rule. *Durden v. State*, 99 N.E.3d 645, 651 (Ind. 2018) (quotation omitted). And this should be one of them. Indeed, when the record is devoid of evidence that a defendant knew of their statutory right, it follows that they cannot waive that right by failing to object. Concluding otherwise sanctions a finding of waiver every time a trial court ignores the duty imposed by the Allocution Statute, rendering it "merely advisory, in direct contradiction to its express language." *Campbell*, 738 N.E.2d at 1189.

Because an objection should not be required in these circumstances, the proper appellate review is for harmless error under Appellate Rule 66(A). Under that rule, "No error or defect in any ruling or order or in anything done or omitted by the trial court . . . is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." App. R. 66(A). I have little difficulty concluding that a defendant's statutory right to allocution is substantial. *Cf. State v. Lott*, 921 N.W.2d 428, 431 (N.D. 2019) ("[A]n individual who has been denied the right of allocution has generally met the burden of showing their substantial rights were affected."). But the probable impact of the trial court's deprivation on that substantial right will vary from case to case.

As for this case, I would hold that the probable impact of the trial court's error on Harris's substantial right to allocution was not sufficiently minor for three reasons. This is not a case where Harris's counsel was asked whether Harris wished to make a statement and counsel declined;

the trial court informed neither Harris nor his attorney of Harris's statutory right to speak. Additionally, Harris received an aggravated sentence. And, in imposing that sentence, the court explicitly cited Harris's lack of remorse three times, going so far as to state, "[Y]our lack of remorse really did you in." But again, Harris was never asked whether he wanted to speak before the court pronounced its sentence, during which he may (or may not) have expressed remorse.

To the latter point, I acknowledge that this judge skillfully presided over a contentious sentencing hearing where she both directed a guard to stand between families and threatened members of the victim's family with direct contempt. Thus, it seems likely the court simply forgot to ask Harris whether he wished to make a statement. I also acknowledge the court noted on its sentencing order that Harris "exhibited no remorse" and "blew" a "kiss at the victim's family after sentencing." So it seems likely that Harris would receive the same sentence on remand.

Those points aside, Braven Harris is just one of the thousands of Hoosiers who are sentenced in Indiana courtrooms each year. And our trial courts have a statutory duty after trial and before pronouncing a sentence to ask every one of these individuals whether they want to make a statement on their own behalf. I.C. § 35-38-1-5. As the Seventh Circuit has observed, "Because the sentencing decision is a weighty responsibility, the defendant's right to be heard must never be reduced to a formality. . . . [C]ourts must continue to be cautious to avoid the appearance of dispensing assembly-line justice." *Barnes*, 948 F.2d at 331. Thirty-four years later, these observations remain just as true today.

Indeed, public trust in our courts relies not only on *actual* fairness and impartiality, but also on the *appearance* of fairness and impartiality. And so, to uphold these ideals after trial and before a sentence is imposed, our trial courts must comply with their statutory duty to "ask the defendant whether" they wish to "make a statement personally" on their "own behalf." I.C. § 35-38-1-5. Because that was not done here, declining to grant transfer dilutes a defendant's right to allocution and effectively renders the Allocution Statute advisory. The Court is also passing up vital opportunities to decide important issues, resolve conflicting opinions,

rectify misguided reliance on precedent, and ensure Indiana is not an outlier among jurisdictions with similar allocution requirements. For these reasons, I dissent from the Court's decision to deny transfer.

Molter, J., joins.