No.

In the Supreme Court of the United States

LARRY A. WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MIRIAM R. NEMETZ
Counsel of Record
MAYA D. SONG
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

QUESTION PRESENTED

Whether a criminal defendant's claim that his jury trial waiver did not satisfy constitutional requirements, if raised for the first time on appeal, is subject to "plain error" review.

Blank Page

Blank Page

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Larry A. Williams, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a–19a) is reported at 559 F.3d 607. The order of the court of appeals denying the petition for rehearing (*id.* at 20a–21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2009. A petition for rehearing was denied on June 11, 2009. App., *infra*, 20a–21a. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Question Presented implicates Article III, § 2 and the Sixth Amendment to the United States Constitution, and Federal Rules of Criminal Procedure 11, 23(a), and 52. The pertinent parts of those provisions are set forth in the Appendix.

INTRODUCTION

This case presents an important and recurring question about which the Seventh Circuit and other circuits disagree: What standard of review applies to a criminal defendant's claim, raised for the first time on appeal, that the waiver of his right to a jury trial did not satisfy constitutional requirements? Other circuits review the validity of a jury trial waiver *de novo*—even when the defendant has failed to argue

before the trial court that the waiver was infirm. In the decision below, however, the court of appeals reviewed petitioner's claim of invalid jury waiver for "plain error." Applying that demanding standard, it affirmed petitioner's conviction despite acknowledging that the trial record did not permit it to conclude that petitioner's waiver of his jury trial right was knowing and intelligent.

Petitioner orally agreed to have a bench trial rather than a jury trial. Nothing in the trial record, however, indicated that he understood the fundamental right that he was waiving. Stating that it "ha[d] no way to assess [petitioner's] mental state," the court of appeals conceded the possibility that petitioner "had no idea what he was doing" and "would have insisted on a jury trial had he been properly admonished." App., *infra,* 14a. Nevertheless, the court of appeals did not hold that the trial court erred in accepting the waiver. Instead, it held that the record's very silence as to petitioner's state of mind required the court of appeals to reject his contention that the waiver failed to satisfy constitutional requirements.

In so holding, the Seventh Circuit purported to follow *United States* v. *Vonn*, 535 U.S. 55 (2002), and *United States* v. *Dominguez Benitez*, 542 U.S. 74 (2004). In those cases, this Court held that claims of error based on the trial court's failure to adhere to the procedures for accepting a guilty plea specified in Federal Rule of Criminal Procedure 11, when raised for the first time on appeal, are subject to plain error review under Federal Rule of Criminal Procedure 52(b). Citing *Vonn* and *Dominguez Benitez*, the court of appeals concluded that plain error review also must apply to claims that a jury trial waiver was not

knowing and intelligent, when such claims are raised for the first time on appeal. It therefore held that petitioner could prevail only if he could point to evidence in the trial record affirmatively demonstrating that (1) he did not have a concrete understanding of his right to a jury trial, and (2) but for the trial court's failure to ensure that he had that understanding, there was a reasonable probability that he would not have waived the right. Because the trial record disclosed nothing about his mental state, petitioner's claim was rejected.

In conflict with the decision below, other circuits review the validity of a jury waiver *de novo*, even when the defendant has failed to argue before the trial court that the waiver was insufficient. Applying this *de novo* standard, these courts examine the record to determine whether it indicates that the waiver was knowing and intelligent. If the record contains affirmative evidence establishing the defendant's informed consent, they affirm; but if such evidence is absent, they hold the waiver invalid and reverse. No other court of appeals has held that silence or ambiguity in the trial record regarding the defendant's understanding of his rights requires rejection of the claim that the waiver was invalid.

Because the Seventh Circuit's ruling conflicts with decisions of other courts of appeals, misinterprets this Court's decisions in *Vonn* and *Dominguez Benitez*, and affords insufficient protection to an important constitutional right, review by this Court is warranted.

STATEMENT

A. District Court Proceedings

On November 4, 2001, petitioner was arrested on charges relating to drugs seized by government agents the previous year, and on November 30, 2004, he was indicted in the Northern District of Illinois on one count of knowingly and intentionally distributing crack cocaine in violation of 21 U.S.C. § 841(a)(1). App., *infra,* 2a. Petitioner pleaded not guilty at his arraignment on December 7, 2004, and was appointed counsel. After a series of status conferences and continuances, petitioner's counsel moved to withdraw in May 2006. The district court granted the motion, and, on May 19, 2006, appointed an attorney from the Federal Defender Program, Mr. Rodriguez, to represent petitioner. *Id.*

At a status hearing on November 30, 2006, at which petitioner was not present, petitioner's attorney requested a bench trial. The relevant excerpt from the transcript of that status conference reads:

> Mr. Rodriguez: Good morning, your Honor. Sergio Rodriguez from the Federal Defender Program on behalf of Larry Williams. He was not brought over, but I was in contact with him. Your Honor, we are here to get a trial date finally. We are going to ask that this Court consider a bench trial. It should only be a couple of days long.
>
> * * *
>
> The Court: How long will it take?

Mr. Rodriguez:	It is only going to be a couple of days.
Mr. Gurland: [Assistant U.S. Attorney]	It should be quick.
The Court:	And you have consented?
Mr. Gurland:	I have no objection to a bench trial.
Mr. Rodriguez:	He is smiling, Judge.
The Court:	Well, you actually have to consent.
Mr. Gurland:	I consent.
The Court:	I know that is painful.

App., *infra,* 2a–3a.

At no point during the status conference did Mr. Rodriguez tell the district court that petitioner understood his constitutional right to a jury trial. Nevertheless, the district court set the matter down for a bench trial on March 5, 2007. Shortly after this status conference, Mr. Rodriguez moved to withdraw as counsel, mentioning without elaboration that petitioner "still wishe[d] to have a bench trial." Petitioner was appointed a new attorney. App., *infra,* 3a.

On the morning of petitioner's bench trial on March 5, 2007, the district court judge addressed petitioner for the first time regarding his jury waiver: "I just want to make sure that you know you do have a right to have a jury trial," he stated. "And would you like to have a bench trial and waive the jury trial?" Petitioner replied, "Yes, sir." App., *infra,* 4a. The district court judge, making no inquiry into petitioner's understanding of his jury right, commenced

the trial. Petitioner did not execute a written waiver of his jury right.

The district court judge found petitioner guilty on March 6, 2007, and on July 12, 2007, sentenced him to a prison term of 252 months. App., *infra*, 4a. Petitioner filed a timely notice of appeal to the Seventh Circuit, and was appointed a different attorney on appeal.

B. Petitioner's Appeal

With the assistance of new counsel, petitioner contended on appeal that he had not knowingly and intelligently waived his right to a jury trial, as is required for a valid waiver of a fundamental constitutional right. He argued that the district court erred in accepting his jury waiver when there was no basis to conclude that he understood the right he was waiving. He also pointed out that neither the Government nor the district court judge had attempted to procure a written waiver, even though such a waiver is required by Federal Rule of Criminal Procedure 23(a). App., *infra,* 3a–5a.

Petitioner further argued that his waiver was ineffective because the district court judge failed to comply with a supervisory rule adopted by the Seventh Circuit in *United States* v. *Scott*, 583 F.2d 362 (7th Cir. 1978) (per curiam). This rule requires district court judges, before accepting a criminal defendant's jury waiver, to confirm by means of interrogation that the defendant understands the nature of the right and the consequences of his waiver. App., *infra,* 7a. In *United States* v. *Delgado*, 635 F.2d 889 (7th Cir. 1981), the Seventh Circuit established this model colloquy: the district court judge is to explain to the defendant that (1) "a jury is composed of

twelve members of the community"; (2) the "defendant may participate in the selection of jurors"; (3) "the verdict of the jury is unanimous"; and (4) in a bench trial, "the judge alone will decide guilt or innocence." *Id.* at 4a. As the court of appeals acknowledged, "[t]he court's brief exchange with [petitioner] at the start of the trial did not cover these points; the court simply confirmed that [petitioner] knew he had a right to a jury trial and wished to waive it." *Id.* at 4a–5a.

C. The Decision Below

The Seventh Circuit affirmed, holding that petitioner failed to show that the district court committed plain error in accepting his jury waiver.

The court of appeals noted that the district judge had neither undertaken the colloquy required by *Scott* and *Delgado* nor procured a written waiver. App., *infra*, 8a. It pointed out, however, that "the sole constitutional requirement is that the waiver be voluntary, knowing and intelligent." *Id.* Thus, it stated, a jury waiver may be valid despite "the failure to comply with one or both of these requirements," as long as the defendant has a "concrete understanding of his right to a jury trial." *Id.* at 7a–8a (internal quotation marks omitted).

The court of appeals was unable to say that petitioner possessed such a "concrete understanding" of his jury trial right. In fact, the court concluded, the record "thr[ew] little if any light on [petitioner's] understanding of the right he waived," and the court "ha[d] no way to assess his mental state." App., *infra*, 8a, 14a. Indeed, while it was possible that petitioner "had an adequate understanding of the right, whether by virtue of his attorney's advice or his own

education and experience," it was "also possible that [petitioner] *had no idea what he was doing and that he would have insisted on a jury trial had he been properly admonished.*" *Id.* at 14a (emphasis added).

Nevertheless, the court of appeals did not hold that the district court had erred in accepting the waiver. Instead, it held that the record's silence must be construed against the defendant, concluding that this Court's decisions in *United States* v. *Vonn*, 535 U.S. 55 (2002), and *United States* v. *Dominguez Benitez*, 542 U.S. 74 (2004), required that result. App., *infra*, 13a–14a.

Vonn and *Dominguez Benitez* both dealt with putative errors under Federal Rule of Criminal Procedure 11, which outlines procedures for accepting a guilty plea. In *Vonn*, this Court concluded that when a defendant challenges the validity of his guilty plea by claiming a violation of Rule 11 for the first time on appeal, he bears the burden of showing that the defect constitutes plain error affecting his substantial rights. App., *infra*, 10a. In *Dominguez Benitez*, the Court further held that a defendant who raises a defect in the Rule 11 plea colloquy for the first time on appeal must establish that it was reasonably likely that he would not have pleaded guilty had he been properly apprised of his rights. *Id.* at 11a.

In the view of the court of appeals, *Vonn* and *Dominguez Benitez* "le[ft] no doubt as to the standard of review that governs [petitioner's] claim." App., *infra*, 13a. Invoking these two cases, it concluded that when a defendant raises a constitutional challenge to his jury waiver for the first time on appeal, he bears the burden of proof, and must show that any error by the trial court in receiving the waiver affected his substantial rights. *Id.* Specifically, the defendant

must point to affirmative evidence that (1) he did not have a concrete understanding of his right, and (2) but for the trial court's failure to ensure that he had that understanding, there is a reasonable probability that he would not have waived the right. *Id.*

Concluding that petitioner could not make this showing on the silent record, the Seventh Circuit affirmed his conviction. App., *infra*, 19a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari in this case to clarify what standard of review applies to a defendant's claim, raised for the first time on appeal, that the waiver of his right to a jury trial did not satisfy constitutional requirements. There is a clear conflict in the circuits regarding this important and oft-recurring question, the answer to which is outcome determinative in many cases. Review is warranted to ensure that the lower courts follow a consistent approach that affords an appropriate degree of protection to an important constitutional right.

The Seventh Circuit is alone in reviewing for plain error under the circumstances presented here. No other court of appeals has declined to evaluate the validity of a defendant's jury waiver on the ground that the defendant failed to raise the issue in the district court. Instead, other circuits review the validity of a jury waiver *de novo*; pursuant to that standard, they examine the record independently to determine whether it demonstrates that the defendant gave informed consent. If, as in this case, the record reveals nothing about the defendant's state of mind, these courts deem the waiver insufficient and reverse. Indeed, petitioner's conviction likely would have been reversed had his appeal been filed in a cir-

cuit applying *de novo* review. The Seventh Circuit's departure from the approach of other circuits warrants review by this Court.

This Court's intervention is especially appropriate because the decision below rests on an erroneous extension of *Vonn* and *Dominguez Benitez*. In those cases, this Court clarified the substantial showing required of a defendant who asserts error under a *procedural rule*—Federal Rule of Criminal Procedure 11—for the first time on appeal. The Court did not remotely suggest that the same burden should be placed on a defendant when the claimed error is the failure to satisfy the *constitutional requirement* that the waiver of a fundamental right be knowing and intelligent. Yet, the Seventh Circuit has interpreted this Court's decisions to mandate that outcome.

Finally, review by the Court is warranted because the Seventh Circuit's approach inadequately protects the right to trial by jury guaranteed in the Constitution. Under the standard of review adopted by the Seventh Circuit, reviewing courts in most cases will not even assess the sufficiency of a jury waiver challenged for the first time on appeal. Instead, unless the defendant can make the improbable showing outlined by the Seventh Circuit in this case, the appellate court will simply affirm on the basis that the defendant has failed to show plain error. That approach virtually ensures that, in many cases, jury waivers that fail to satisfy constitutional requirements will never be reviewed on the merits. This Court should not allow that result without further review.

I. The Decision Below Conflicts With Decisions Of Other Circuits

The Seventh Circuit's ruling regarding the standard of review applicable to claims of invalid jury waiver conflicts with decisions of at least six other circuits. No other circuit applies plain error review to claims of invalid waiver raised for the first time on appeal.

The Second, Fourth, Ninth, Tenth, and Eleventh Circuits conduct *de novo* review of claims that a jury trial waiver was invalid. See *U.S.* v. *Carmenate*, 544 F.3d 105, 107 (2d Cir. 2008) (per curiam), *cert. denied*, 129 S. Ct. 586 (2008); *U.S.* v. *Khan*, 461 F.3d 477, 491 (4th Cir. 2006); *U.S.* v. *Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997); *U.S.* v. *Robertson*, 45 F.3d 1423, 1430 (10th Cir. 1995); *U.S.* v. *Diaz*, 540 F.3d 1316, 1321 (11th Cir. 2008) (per curiam). These courts do not, as the Seventh Circuit did in this case, place on the defendant the burden of demonstrating interference with substantial rights. Instead, they simply examine the record and make an independent determination of whether the jury trial waiver was adequate.

Thus, if the record shows that the defendant gave informed consent to a bench trial, these courts conclude that the district court's acceptance of the waiver was proper, and affirm. See, *e.g.*, *Carmenate*, 544 F.3d at 106 (affirming district court's decision to grant a bench trial because the record showed that defendant's waiver was valid); *Khan*, 461 F.3d at 492 (same). If, however, the record does not show that the defendant's purported waiver was knowing and intelligent, then the court of appeals will vacate the conviction. See, *e.g.*, *Duarte-Higareda*, 113 F.3d at 1003 (reversing conviction because record did not

show that defendant's purported waiver was made voluntarily, knowingly, and intelligently); *Robertson*, 45 F.3d at 1433 (vacating conviction and remanding with instructions to provide defendant a jury trial because "there [was] no evidence in the record to indicate the waiver of her right to trial by jury was knowing, intelligent, and voluntary at the time it was accepted by the district court"); and *Diaz*, 540 F.3d at 1323 (vacating conviction and remanding because record showed that defendant "did not effectively waive his right to a jury trial").

Decisions of the Ninth, Tenth, and Eleventh Circuits conflict most starkly with the decision below. These courts have applied *de novo* review to claims of invalid jury waiver raised for the first time on appeal, and have vacated the defendants' convictions after concluding that the trial records did not indicate valid waiver.

In *Duarte-Higareda*, the Ninth Circuit, applying *de novo* review, reversed the defendant's conviction after concluding that the record did not show that the defendant's purported waiver was knowing, intelligent, and voluntary. 113 F.3d at 1002–03. At a pretrial hearing, Duarte's trial attorney told the district court that his non-English-speaking client would waive his right to be tried by a jury. *Id.* at 1002. Duarte then signed a written waiver, printed entirely in English; the record did not reflect whether the written waiver was translated into Spanish for the defendant. *Id.* Further, the district court at no point addressed Duarte through a Spanish interpreter to confirm that Duarte understood the right he was waiving. *Id.*

The Ninth Circuit concluded that the district court erred in failing to conduct a colloquy with

Duarte to ensure that he understood the right he was waiving. *Duarte-Higareda*, 113 F.3d at 1003. In doing so, it reaffirmed that "*the showing [in the record]* that a waiver is voluntary, knowing, and intelligent remains a necessary precondition" for valid waiver. *Id.* (internal quotation marks omitted; emphasis added). Since Duarte's record was silent as to the validity of his waiver, the court reversed Duarte's conviction.[1] *Id.*

Similarly, in *Robertson*, the Tenth Circuit vacated the defendant's conviction because "there [was] *nothing in the record* before [it] indicating [the defendant] personally understood her right and knowingly waived it." 45 F.3d at 1433 (emphasis added). The defendant, convicted after a bench trial, challenged her jury trial waiver for the first time on appeal. The Tenth Circuit reviewed the record *de novo* (*id.* at 1430), and found that the record did not contain a written waiver signed by the defendant (it was signed only by her attorney), nor had the district court "inquired as to the circumstances surrounding

---

[1] In an earlier decision, *United States* v. *Saadya*, 750 F.2d 1419 (9th Cir. 1985), the Ninth Circuit, while not explicitly applying *de novo* review, similarly reversed and remanded the defendants' conviction because the record contained no evidence that defendants' jury waiver had been knowing and intelligent: "Because neither a written waiver of appellants' right to a trial by jury, nor appellants' oral consent to a trial without a jury appears on the record, we are required to reverse and remand." *Id.* at 1420. In that case, too, the defendants raised their claim of invalid jury waiver for the first time on appeal. The Ninth Circuit emphasized that a "defendant's waiver of his right to jury trial *must appear on the record* prior to the time the trial commences. The absence of a waiver on the record of the right to trial by jury cannot be remedied by subsequent proceedings on remand." *Id.* at 1422 (emphasis added).

the waiver and no discussion was ever held in the presence of Ms. Walker regarding her decision to waive the right to trial by jury." *Id.* at 1432–33. There was no other indication in the record that the defendant gave informed consent to the jury waiver. "Under these circumstances," the Tenth Circuit stated, "there is no way for a reviewing court to determine whether Ms. Walker's waiver was knowing, voluntary, and intelligent." *Id.* at 1433.

Moreover, the Tenth Circuit stated, the silence of the record as to whether the defendant gave informed consent, "coupled with the strong presumption against finding a waiver of fundamental constitutional rights, compels us to reject the government's argument that her waiver is nevertheless valid." *Robertson*, 45 F.3d at 1433. To otherwise find the waiver valid, the court stated,

> would require us to permit the waiver of a fundamental constitutional right based on nothing more than conjecture and speculation. This we decline to do. The right of trial by jury is one enjoyed by the people as well as defendants and courts should be hesitant to dispense with that right.

Id. Accordingly, the Tenth Circuit held that the defendant's "conviction must be vacated as there is no evidence in the record to indicate the waiver of her right to trial by jury was knowing, intelligent, and voluntary at the time it was accepted by the district court." *Id.*

Finally, in *Diaz*, the Eleventh Circuit vacated the defendant's conviction "[a]fter *reviewing the record* and the parties' briefs, and with the benefit of oral argument," concluding that "Diaz did not knowingly

waive his right to a jury trial." 540 F.3d at 1317 (emphasis added). Diaz was convicted after a bench trial and asserted for the first time on appeal that his waiver of his jury right had not been knowing and voluntary. Conducting *de novo* review (*id.* at 1321), the Eleventh Circuit found that the record contained no written jury waiver, and the defendant's "motion and statements regarding his intent to waive his right to jury trial were equivocal," not knowing and intelligent. *Id.* at 1323. Accordingly, the court "conclude[d] that Diaz did not validly waive his right to a jury trial." *Id.* at 1322.

The Second and Fourth Circuits also have explicitly applied *de novo* review to claims of invalid jury waiver raised for the first time on appeal. They have affirmed convictions after concluding upon plenary review of the record that the defendant's jury waiver was valid. These decisions also conflict with the decision below: Unlike the Seventh Circuit here, the reviewing courts reached the merits of the constitutional issues presented to them, and affirmed only after concluding that the trial record reflected a valid waiver.

The defendant in *Carmenate* argued on appeal to the Second Circuit that his jury waiver was not valid because he never signed a written jury waiver as required by Rule 23(a), and the district court did not properly inform him of the scope of the right and the consequences of a waiver before granting a bench trial. 544 F.3d at 106. Reviewing the district court's grant of a bench trial *de novo* (*id.* at 107), the Second Circuit stated that it "[could]not say that defendant's waiver of his constitutional right to a jury trial was fatally flawed." *Id.* at 108. The record showed that the defendant had been present when his attor-

ney first requested a bench trial and explained that the decision was based on trial strategy; the defendant also was present when, at the final pre-trial conference, the district court requested a written waiver (though a valid one was never furnished); and, before the start of the bench trial, the district court "questioned defendant on the record to be sure that his wishes [for a bench trial] were accurately understood."[2] *Id.*

The Second Circuit concluded that "[d]espite certain technical flaws in the waiver process, *the record indicates* that defendant's waiver of his right to a jury trial was knowing, voluntary, and intelligent," and accordingly affirmed. *Carmenate*, 544 F.3d at 106 (emphasis added).

Similarly, in *Khan*, the defendants were convicted after a bench trial, and for the first time on appeal argued that their "jury trial waiver was invalid because the district court did not obtain their written waiver or otherwise conduct a colloquy on the record to determine that their waiver was knowing, voluntary, and intelligent." 461 F.3d at 491. Applying *de novo* review (*id.*), the Fourth Circuit, after conducting an independent review of the record, stated, "[W]e find that *the record supports a conclusion* that the waivers were voluntary, knowing, and intelligent, even though signed by counsel and in the absence of a colloquy." *Id.* at 492 (emphasis added);

---

[2] In support of its conclusion that the waiver was valid, the Second Circuit also stated that "there [was] no indication in the record that defendant was incapable of clearly and independently expressing his wishes, such that we might conclude that defense counsel did not accurately convey defendant's decision to forego a jury trial." *Carmenate*, 544 F.3d at 109.

see also *id.* ("the record reflects that the defendants' Rule 23 waivers were a knowing, voluntary, and intelligent part of their trial strategy").[3] Accordingly, the Fourth Circuit upheld the defendants' jury waiver as valid. *Id.*[4]

Although not expressly applying *de novo* review, the Fifth Circuit also places on the government the burden to show on appeal that the defendant's jury waiver was valid. In *United States* v. *Igbinosun*, 528 F.3d 387 (5th Cir. 2008), the defendant argued for the first time on appeal that her jury waiver was not knowing and intelligent. *Id.* at 390. The Fifth Circuit in that case stated that the government bore the initial burden of proof. It ultimately concluded that "the *government has carried its burden to demonstrate adequate waiver* under Rule 23(a)," because

---

[3] The court of appeals concluded that the defendants' waiver was valid because the record showed that they had moved for a bench trial "as a back door attack on the district court's denial of their motions to sever," and the waiver, "a calculated part of the defendants' trial strategy," was thus knowing and intelligent. *Khan*, 461 F.3d at 492.

[4] The First Circuit also has applied *de novo* review to a claim of invalid jury waiver—albeit in a case in which the issue was raised before the district court. In *United States v. Leja*, 448 F.3d 86 (1st Cir. 2006), the defendant filed a post-trial motion for a new trial, claiming, among other things, that his jury waiver was invalid because he had not personally signed it and the court had not conducted an in-depth colloquy with him on the subject. *Id.* at 91. The district court denied the motion, finding that Leja's jury waiver was knowing, intelligent, and voluntary. On appeal, the government argued that the court should review the denial of Leja's motion for new trial for harmless error. *Id.* at 92. The First Circuit refused to give anything but "plenary review," however, "[g]iven the significance of the constitutional right at issue here and its relationship to the inquiry of how the district court handled the issue of waiver." *Id.*

"the record demonstrates that Igbinosun signed a written waiver, in addition to filing a motion for a bench trial and twice stating on the record that she had consulted with counsel before waiving her right to a jury trial." *Id.* at 390 (emphasis added). Because the Fifth Circuit concluded that the defendant could "point to no prejudice to overcome the presumption that her written waiver was knowing and intelligent," the court found her jury waiver valid. *Id.*

The approach of these circuits to review of claims of invalid jury waiver contrasts sharply with that of the Seventh Circuit. If petitioner had presented his claim to a court employing *de novo* review, the lack of record evidence demonstrating that his waiver was knowing and intelligent would have been treated as rendering the waiver defective, requiring reversal of petitioner's conviction. See, *e.g.*, *Robertson,* 45 F.3d at 1433 (vacating conviction because of silent record); *Diaz*, 540 F.3d at 1322 (same). At the very least, the reviewing court would have directly confronted the question of whether petitioner's waiver was constitutionally sufficient. Here, in contrast, the Seventh Circuit affirmed petitioner's conviction without concluding that the waiver of his jury trial right was in fact knowing and intelligent.

Thus, a defendant who seeks to challenge his jury waiver for the first time on appeal faces a much higher burden in the Seventh Circuit than in other circuits. Indeed, the court of appeals acknowledged that, had petitioner raised his claim in the district court, "the result of this appeal might well have been different on such a limited record." App., *infra*, 16a–17a. The divergence between the Seventh Circuit

and the other federal appellate courts warrants review.

II. The Seventh Circuit's Application Of "Plain Error" Review To Petitioner's Claim Was Based On A Mistaken Construction Of *Vonn* and *Dominguez Benitez*

In importing the plain error test from *Vonn* and *Dominguez Benitez*, the Seventh Circuit failed to distinguish between the standard of review that applies to non-constitutional errors of the sort at issue in those cases, and the constitutional error claimed by petitioner in this case. Indeed, in *Dominguez Benitez*, this Court explicitly distinguished *constitutional* claims of invalid waiver of fundamental rights from the Rule 11 error raised by the defendant in that case. Nevertheless, the Seventh Circuit erroneously concluded that "[t]hese two decisions leave no doubt as to the standard of review that governs [petitioner's] claim." App., *infra*, 13a.

Rule 11 "requires a judge to address a defendant about to enter a plea of guilty, to ensure that he understands * * * his rights as a criminal defendant." *Vonn*, 535 U.S. at 62. Under Rule 11(b), the district court "must address the defendant personally in open court," and "[d]uring this address * * * inform the defendant of, and determine that the defendant understands" such rights as "the right to plead not guilty"; "the right to a jury trial"; and "the right to be represented by counsel." Fed. R. Crim. P. 11(b)(1). In addition, "[b]efore accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary." *Id.* at 11(b)(2).

As the Seventh Circuit noted, the purpose of the detailed colloquy required by Rule 11 is, "like the *Delgado* colloquy * * * designed to ensure that the [defendant's] decision to waive his constitutional rights is freely and intelligently made." App., *infra*, 10a. And, again like the *Delgado* supervisory rule, Rule 11 is not a constitutional mandate; it is not required as an element of due process. See *Dominguez Benitez*, 542 U.S. at 83 (emphasizing that "the violation claimed [by defendant] was of Rule 11, not of due process"). Indeed, Rule 11 itself contains a standard of review that instructs "that not every violation of its terms calls for reversal of conviction." *Dominguez Benitez*, 542 U.S. at 80 (citing Fed. R. Crim. P. 11(h)).

Neither of the defendants in *Vonn* and *Dominguez Benitez* claimed constitutional error in the waiver of their fundamental rights in their pleas—they did not contend that their waiver of these rights was not voluntary, knowing, and intelligent. Instead, they merely asserted error under Rule 11. See *Vonn*, 535 U.S. at 1047 (on appeal, defendant challenged the district court's "Rule 11 omission"); *Dominguez Benitez*, 542 U.S. at 79 (on appeal, defendant argued that the district court failed "to warn him, as Rule 11(c)(3)(B) instructs, that he could not withdraw his guilty plea if the court did not accept the Government's recommendations").

This Court, in setting forth the standard of review that applies to claims of Rule 11 error raised for the first time on appeal in those two cases, explicitly distinguished claims of constitutional error. In *Dominguez Benitez*, this Court stated that review of a Rule 11 error "contrast[s] with the *constitutional question* whether a defendant's guilty plea was

knowing and voluntary." 542 U.S. at 84 n.10 (emphasis added). The Court continued:

> We have held * * * that when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed. *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). *We do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless.*

Id. (emphasis added). This Court thus explicitly excluded constitutional challenges from the stringent standard of plain error review set forth in *Vonn* and *Dominguez Benitez.*

In applying plain error review to claims that a jury waiver was *constitutionally* invalid, the Seventh Circuit has extended *Vonn* and *Dominguez Benitez* beyond the intended limits of those decisions. Because the Seventh Circuit has misread and misapplied this Court's decisions and, in doing so, has sharply curtailed the appellate court's role in protections an important constitutional right, review by this Court is warranted.

III. The Seventh Circuit's Decision Insufficiently Protects The Right To A Jury Trial

The Seventh Circuit's adoption of the "plain error" standard substantially weakens the role of the appellate courts in ensuring that jury trial waivers satisfy constitutional norms. Other courts of appeals undertake plenary review to ensure that the trial court accepting a jury waiver had sufficient information before it to conclude that the waiver was know-

ing and intelligent. Under the Seventh Circuit's approach, however, jury waivers may routinely be upheld on appeal even when there is no evidence in the record indicating that they are constitutionally valid. When a challenge to the waiver is not presented to the district court, the court of appeals will not even assess the sufficiency of the waiver unless there is affirmative evidence that the defendant *did not* understand his rights. Because the decision below excessively dilutes the protection afforded to an important constitutional right, this Court's review is warranted.

The right to a trial by jury is fundamental to our system of criminal justice; indeed, it is guaranteed by two separate constitutional provisions: Art. III, § 2, and the Sixth Amendment. The right exists to prevent governmental oppression and arbitrary law enforcement. *Williams* v. *Florida*, 399 U.S. 78, 100 (1970) (citing *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968)). Because this right is so essential, courts must "indulge every reasonable presumption against waiver" of the right." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Further, the jury right must be "jealously preserved," and "before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." *Patton* v. *U.S.*, 281 U.S. 276, 312 (1930). Finally, this Court has counseled appellate courts not to discharge their duty "as a mere matter of rote but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from [jury] trial[s] or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." *Id.*

Under the plain error standard adopted by the Seventh Circuit, the reviewing court effectively begins with the assumption that the waiver *was* valid, and looks to the trial record for evidence to the contrary. Here, the court of appeals rejected petitioner's claim because "[n]othing in this record reveals that [he] lacked a concrete understanding of his right to a jury trial or that he likely would have elected a jury trial but for the district court's failure to properly admonish him as to the nature of this right." App., *infra,* 14a. In other words, the lack of evidence of *invalid* waiver was deemed dispositive—contravening this Court's directive that courts should "indulge every reasonable presumption against waiver" of constitutional rights. *Johnson*, 304 U.S. at 464.

The Seventh Circuit asserted that its adoption of plain error review "does not compel us to abandon language in our earlier decisions to the effect that we will not presume a valid waiver of the defendant's right to a jury trial from a silent record." App., *infra,* 16a. It insisted that it was "presuming nothing as to the validity of [petitioner's] jury waiver," but was "simply holding that he has not carried his burden of establishing plain error in the district court's acceptance of the waiver." *Id.* That is a distinction without a difference, however: The practical effect of the Seventh Circuit's decision is to infer valid waiver from a silent record.

The Tenth Circuit's discussion in *Robertson* illustrates the correct approach. In that case, the court concluded that the absence of evidence in the trial record that the defendant's waiver was knowing, voluntary, and intelligent, "*coupled with the strong presumption against finding a waiver* of fundamental constitutional rights, compels us to reject the gov-

ernment's argument that her waiver is nevertheless valid." 45 F.3d at 1433 (emphasis added) (citation omitted). "Accepting the government's argument," the court continued, "would require us to permit the waiver of a fundamental constitutional right based on nothing more than conjecture and speculation. This we decline to do. The right of trial by jury is one enjoyed by the people as well as defendants and courts should be hesitant to dispense with that right." *Id.*

In holding that respondent's claim is reviewable only for plain error, the Seventh Circuit has done what the Tenth Circuit warned against in *Robertson*: It has allowed "the waiver of a fundamental constitutional right based on nothing more than conjecture and speculation." 45 F.3d at 1433, Because the jury trial right should be adequately protected in *all* circuits, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MIRIAM R. NEMETZ
Counsel of Record
MAYA D. SONG
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

SEPTEMBER 2009