No. 09-310

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

REPLY BRIEF FOR PETITIONER

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

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

RULES

INTRODUCTION

Certiorari should be granted to resolve a significant disagreement among the circuits on an important question of criminal procedure. Contrary to the government's assertion, plain error review is not appropriately applied to a criminal defendant's claim, raised for the first time on appeal, that his jury trial waiver did not satisfy constitutional requirements. As the government concedes, the Seventh Circuit is alone in subjecting such claims to review for plain error pursuant to *United States* v. *Vonn*, 535 U.S. 55 (2002), and *United States* v. *Dominguez Benitez*, 542 U.S. 74 (2004). Other circuits correctly apply *de novo* review. This Court's review is warranted to resolve this significant circuit conflict and to ensure that the Seventh Circuit henceforth applies a standard that is sufficiently protective of a criminal defendant's jury trial right.

ARGUMENT

I. Plain Error Review Does Not Apply To Petitioner's Claim.

1. The government contends that constitutional rights "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right," and that such forfeited claims are subject to plain error review under Federal Rule of Criminal Procedure 52(b). Opp. 5 (quoting *United States* v. *Olano*, 507 U.S. 725, 731 (1993)). As this Court has repeatedly affirmed, however, a criminal defendant's right to trial by jury is so fundamental to our system of criminal justice that it may not be forfeited except by valid waiver. See *Patton* v. *United States*, 281 U.S. 276, 312–313 (1930); *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 277–278 (1942); *Brady* v.

United States, 397 U.S. 742, 748 (1970); Pet. 22–23. Waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). To waive the right to a jury, a defendant must give knowing, intelligent, and voluntary consent. *Brady*, 397 U.S. at 748. Importantly, the validity of a waiver is assessed from the evidence in the trial record. When, for example, "the record of a criminal conviction obtained by guilty plea *contains no evidence* that a defendant knew of the rights he was putatively waiving"—which includes the right to a jury—"the conviction must be reversed." *Dominguez Benitez*, 542 U.S. at 84 n.10 (emphasis added) (citing *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969)).

The government contends that petitioner is not entitled to that relief because he "forfeited [his] claim that his waiver of a jury trial was procedurally invalid." Opp. 5. But petitioner does not merely complain about procedural deficiencies such as the absence of a *Delgado* colloquy or the lack of written waiver—although both errors undisputedly tainted the proceedings. He contends that there was *no valid waiver* at all because there was no basis for the trial court *or* the court of appeals to conclude that the waiver was "voluntary, knowing *and* intelligent" (Pet. App. 8a) (emphasis added), as the Constitution requires. Because the "record contains no evidence" of *constitutionally valid* waiver, "the conviction must be reversed." *Dominguez Benitez*, 542 U.S. at 84 n.10.

Addressing the above-quoted statement from *Dominguez Benitez*, the government contends that the Court's observation "has no application here, because petitioner was expressly told that he had a

right to a jury before he waived that right." Opp. 10 n.1. That the record shows petitioner's voluntary consent says nothing about whether he gave *informed* consent, as the Constitution requires. The court of appeals acknowledged that the record did *not* contain evidence of petitioner's informed consent, stating that it "ha[d] no way to assess [petitioner's] mental state on this record." Pet. App. 14a; see also *id.* at 8a (again acknowledging the absence of evidence that petitioner's jury trial waiver "was knowing and intelligent").

Indeed, the court of appeals was able to affirm petitioner's conviction despite the lack of evidence of *valid* waiver only because it concluded that plain error review applied. After noting that "[t]he import of a silent record depends on which party bears the burden of production and persuasion on this question" (Pet. App. 9a), it held that petitioner's failure to raise the issue in the trial court placed the burden of production on him, and therefore required affirmance when the record was silent as to whether the waiver was valid. That ruling amounts to a holding that the right to a jury trial may be forfeited *without* being validly waived. Accordingly, it clearly conflicts with this Court's precedents and merits further review.

2. It is true, as the government contends, that certain constitutional rights may be forfeited short of waiver. See *Freytag* v. *Comm'r*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring) (listing constitutional rights that are forfeitable short of waiver). Indeed, the government provides two examples of such forfeitable rights. Opp. 7. In *Johnson* v. *United States*, 520 U.S. 461, 463 (1997), the defendant did not object at his perjury trial when the judge decided

the issue of materiality, even though he had the right to have a jury decide the issue. And in *United States* v. *Cotton*, 535 U.S. 625 (2002), the defendants did not object to the omission from their indictments of a fact (*i.e.*, drug quantity) that enhanced their statutory maximum sentences, even though they had a constitutional right to have such facts presented to the grand jury. In both cases, the defendants raised their objections for the first time on appeal, and this Court, concluding that the defendants had forfeited their rights, applied plain error review.

This Court has made clear, however, that the right to a trial by jury falls into the narrow category of rights that may *not* be forfeited by means short of valid waiver. See *Patton*, 281 U.S. at 312–313; *Adams*, 317 U.S. at 277–278; *Brady*, 397 U.S. at 748; see also *Freytag*, 501 U.S. at 894 n.2 (Scalia, J., concurring) (stating some rights may be forfeited by means short of waiver, "but others may not," and citing *Patton*, 281 U.S. at 312). As a consequence, the invalid waiver of the jury right can never be harmless, and the error of holding a bench trial without first obtaining a constitutionally adequate waiver always requires reversal of a conviction.

The government states that "[d]efendants routinely plead guilty, waiving oodles of constitutional rights"—including the right to a jury trial—"in proceedings where the rights are named but not explained." Opp. 9 (quoting *Whitehead* v. *Cowan*, 263 F.3d 708, 733 (7th Cir. 2001)). The "proceedings" referred to are those under Federal Rule of Criminal Procedure 11, which governs plea agreements and which was specifically at issue in *Vonn* and *Dominguez Benitez*. But the circumstance of a person who pleads guilty to an offense is far different from one

who denies guilt and then is convicted by the decision of a single judge rather than a jury of his peers. Most importantly, this Court has never held that "the right-naming (but not right-explaining) protocol under Fed. R. Crim. P. 11 suffices" in the bench trial context. *United States* v. *Hill*, 252 F.3d 919, 924 (7th Cir. 2001). Unless it can be shown that the defendant gave informed consent to such a trial, the conviction obtained from a bench trial is unsustainable.

3. The government's position—and the decision of the court of appeals—that plain error review applies to a claim such as petitioner's is particularly untenable given the importance of the jury right and the discretionary nature of Rule 52(b). The standard of plain error review is "permissive, not mandatory": If a forfeited "error" is "plain" and "affects substantial rights," the court of appeals has authority to order correction "but is *not required* to do so." *Olano*, 507 U.S. at 735 (emphasis added). See also Opp. 5 ("a reviewing court 'may exercise its discretion to notice a forfeited error'") (quoting *Johnson*, 520 U.S. at 467).

If claims of invalid jury waiver, raised for the first time on appeal, were subject to plain error review, then an appellate court's decision to reverse a conviction obtained following an invalid jury waiver would be discretionary. Thus, even if the court of appeals had concluded that petitioner had shown that "his substantial rights were affected" by the district court's errors (Pet. App. 13a), it would not have been obliged to reverse the conviction. See, *e.g.*, *Cotton*, 535 U.S. at 632–633 (under plain error review, declining to reverse even assuming that "respondents' substantial rights were affected"). Such a result is irreconcilable with the constitutional guaran-

tee of a jury trial. See Pet. 22; Pet. App. 5a–8a. When a conviction is obtained via a bench trial that follows an invalid jury waiver, the appellate court *must* reverse the conviction.

Furthermore, it defies constitutional precepts—as well as logic—to require a defendant to object contemporaneously to a bench trial on the basis of his own ignorance of his jury right, as the application of plain error review would require. Under Rule 52(b), if a defendant "believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue." *Puckett* v. *United States*, 129 S. Ct. 1423, 1428 (2009). "If he fails to do so in a timely manner, his claim for relief from the error is forfeited." *Id.* Such a rule presupposes that a defendant is aware of his guaranteed rights under the Constitution. But this Court has admonished that the right to trial by jury is so essential that courts must "indulge every reasonable presumption against waiver." *Zerbst*, 304 U.S. at 464. That presumption forecloses the application of plain error review. See also *Vonn*, 535 U.S. at 79 n.7 (Stevens, J., concurring in part and dissenting in part) (in the waiver-of-counsel context, it is "illogical" to "require the presumptively unknowing defendant to object to the court's failure to adequately inform" him of the risks of proceeding *pro se*).

4. The government adds that "plain-error analysis applies even to 'structural' errors—*i.e.*, errors that 'affect[] the framework within which the trial proceeds.'" Opp. 7 (quoting *Arizona* v. *Fulminate*, 499 U.S. 279, 310 (1991)). This assertion mischaracterizes the Court's decisions relating to structural error. See Pet. App. 14a (structural errors are fundamental constitutional errors that "defy analysis by

'*harmless error*' standards") (emphasis added) (quoting *Neder* v. *United States*, 527 U.S. 1, 7 (1999)). Further, courts have declined to apply plain error analysis to structural errors such as the deprivation of the right to counsel. In *United States* v. *Erskine*, 355 F.3d 1161 (9th Cir. 2004), for example, the Ninth Circuit, rejecting the government's argument that plain error review applied to defendant's claim that he did not knowingly and intelligently waive his right to counsel, stated:

> The Court's reasoning in *Vonn* * * * is inapposite where a defendant has not yet been adequately informed of all the elements that he must take into account in making his decision to forgo counsel and where the error in question involves the failure to provide him with that information.

Id. at 1166. Stating that "plain error review would be inappropriate" in such circumstances, the Ninth Circuit reviewed defendant's claim *de novo*. *Id.* at 1166–1167.

II. The Seventh Circuit's Decision Conflicts With The Decisions Of Other Circuits.

As the petition explains, the Seventh Circuit alone applies plain error review to claims of invalid waiver raised for the first time on appeal. At least five other circuits have held "that the standard of review for a jury-waiver claim is *de novo*" (Opp. 10)—as the government concedes. See Opp. 10–11 (citing cases).[1] In these circuits, reviewing courts examine

---

[1] In addition to these five circuits, the Fifth Circuit also differs from the Seventh Circuit; as explained in the Petition, that court places on the government the burden to show that the defendant's jury waiver was valid. Pet. 17.

the record to determine whether the trial court acted appropriately in accepting the jury waiver and do not affirm unless the record contains sufficient indicia that the waiver was voluntary, knowing, and intelligent. Pet. 11–19. The government's attempts to minimize the divide between the Seventh Circuit's approach and that of the other courts of appeals (Opp. 10–11) is unpersuasive.

1. That none of the other courts of appeals have even considered applying the plain error standard to claims of invalid waiver (Opp. 11) simply shows the extent of the Seventh Circuit's departure from the prevailing approach. Far from negating the existence of "a circuit conflict worthy of this Court's review" (*id.*), the Seventh Circuit's isolation in applying *Vonn* and *Dominguez Benitez* in this context establishes that there is a significant conflict meriting the Court's attention.

2. The government also errs in contending that "[t]here is no indication that the claims of error at issue in those cases had been forfeited." Opp. 11. In fact, in the cases discussed in the petition, it was apparent from the opinions that the defendants' claims of invalid jury waiver were raised for the first time on appeal. See, *e.g.*, *United States* v. *Khan*, 461 F.3d 477, 491 (4th Cir. 2006) (defendants on appeal "now argue" invalid jury waiver); *United States* v. *Robertson*, 45 F.3d 1423, 1432 n.9 (10th Cir. 1995) (defense counsel had to explain to appellate court at oral argument the circumstances of the putative waiver).

3. The government's contention that there is no "indication that the result in this case would have been any different in other circuits" (Opp. 11) is belied by the holdings in those cases. In *United States* v. *Carmenate*, 544 F.3d 105 (2d Cir. 2008), for exam-

ple, the Second Circuit concluded that the defendant's jury waiver was valid because the record showed that he was present when his attorney, explaining that the decision was a "strategic calculation," requested a bench trial. *Id.* at 108. He was also present when the court requested a written waiver. *Id.* And before the start of defendant's bench trial, the district court, in the presence of the defendant, "reviewed the letter from defense counsel memorializing his client's request for a bench trial," and "then questioned [the] defendant on the record to be sure that his wishes were accurately understood." *Id.* The record in petitioner's case, however, does not permit the same conclusion: the court of appeals concluded that the record was so sparse that it "ha[d] no way to assess [petitioner's] mental state on this record." Pet. App. 14a.

Likewise, in *Khan*, the Fourth Circuit, examining the entire record, concluded that the defendants' jury waivers were made "as a calculated part of the defendants' trial strategy." 461 F.3d at 492. The court held that the record thus reflected that the jury waivers were knowing, voluntary, and intelligent, whereas the silent record here would not warrant such a finding.

The facts underlying the Tenth Circuit's decision in *Robertson* are most similar to the facts here. In that case, the defendant's counsel filed a motion waiving her client's jury right; although the motion noted the defendant's "agreement to waive," the defendant did not herself sign the motion. 45 F.3d at 1430. And as in petitioner's case, the district court "accept[ed] the waiver of [the defendant's] jury trial right without first inquiring as to whether she understood the nature of the right and consequences of

waiving it." *Id.* at 1431–1432. The "district court never inquired as to the circumstances surrounding the waiver." *Id.* at 1433. Given the silence of the record, the Tenth Circuit concluded that there was "no way for a reviewing court to determine whether [the defendant's] waiver" was valid. "This fact, coupled with the strong presumption against finding a waiver of fundamental constitutional rights," compelled the court to conclude that the waiver was invalid and to vacate the conviction. *Id.* Given the factual similarities between *Robertson* and this case, the conclusion is inescapable that petitioner's claim of invalid waiver would have been resolved differently had it been brought in the Tenth Circuit.

4. The government purports to distinguish this case from *United States* v. *Duarte-Higareda*, 113 F.3d 1000 (9th Cir. 1997), *Robertson*, 45 F.3d 1423, and *United States* v. *Diaz*, 540 F.3d 1316 (11th Cir. 2008), because petitioner here answered "yes" when asked whether he wished to have a bench trial. Opp. 12. But that evidence shows only that the waiver was voluntary, not that it was knowing and intelligent. All three are required in order for a jury waiver to be valid (see *Patton*, 281 U.S. at 312–313; *Adams*, 317 U.S. at 277–278; *Brady*, 397 U.S. at 748), and the absence of any indicia of informed consent in petitioner's case marks the putative waiver invalid.

5. Finally, the government gives examples of other circuits that purportedly have applied or "would likely apply plain-error review" to claims such as petitioner's (Opp. 12), but all of these examples are inapt. In *United States* v. *Boynes*, 515 F.3d 284 (4th Cir. 2008), the Fourth Circuit applied *de novo* review to the defendant's claim of invalid jury

waiver but suggested that it would have applied plain error review to defendant's separate claim that his adversarial relationship with his attorney interfered with trial proceedings. *Id.* at 287 & n.1. In *Russell* v. *United States*, 429 F.2d 237 (5th Cir. 1970), the Fifth Circuit applied plain error review to defendant's claim that he did not validly waive his right to remain silent. See *id.* at 238–239. And in *United States* v. *Lorenzo*, 995 F.2d 1448 (9th Cir. 1993), the Ninth Circuit nominally undertook plain error review of defendant's claim regarding waiver of counsel. See *id.* at 1457.

None of these cases involve the application of plain error review to a defendant's claim of invalid jury waiver; nor did the courts indicate that they would apply plain error review to such claims in the future. To the extent that these decisions suggest that other circuits may be inclined to follow the Seventh Circuit's flawed approach, however, they further demonstrate that review 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

DECEMBER 2009