No. 08-569

In the Supreme Court of the United States

PRINCE S. KNOX, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
RITA M. GLAVIN
Acting Assistant Attorney General
DAVID E. HOLLAR
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a federal criminal defendant may waive venue.

2. Whether counsel may waive venue on the defendant's behalf.

3. Whether the court of appeals erred in concluding that petitioner waived his venue objection by failing to raise it in the district court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rules:

Miscellaneous:

In the Supreme Court of the United States

No. 08-569

PRINCE S. KNOX, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 540 F.3d 708.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2008. The petition for a writ of certiorari was filed on October 28, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of making a false statement in an immigration document, in violation of 18 U.S.C. 1546(a), and two counts of making a false statement to a federal officer, in violation of 18 U.S.C. 1001(a)(2). He

was sentenced to 12 months of imprisonment. The court of appeals affirmed. Pet. App. 1-25.

1. In response to civil unrest in Liberia and the Côte d'Ivoire (the Ivory Coast), the Department of Homeland Security (DHS) and other governmental agencies established a resettlement program permitting certain Liberians living in Côte d'Ivoire to enter the United States as refugees. Any individual who had belonged to an armed rebel group or engaged in terrorist activity was ineligible to participate. Pet. App. 2-3.

Petitioner applied for the program. On December 9, 2003, a DHS immigration officer interviewed petitioner in Abidjan, Côte d'Ivoire. Both in his oral responses and on two written forms, petitioner denied having provided aid to any armed groups or otherwise supporting terrorist organizations. In reliance on those answers, the immigration officer approved petitioner's application. Petitioner was admitted to the United States through Chicago O'Hare International Airport and settled in St. Louis, Missouri. Pet. App. 2-4.

After petitioner's resettlement, the United States learned that he had been actively involved in the Revolutionary United Front (RUF), a rebel group that was designated a terrorist organization by the State Department in 2001 based largely on its record of grievous human rights abuses. Petitioner served as a bodyguard for an RUF leader, attended RUF meetings, carried an AK-47 rifle, and wore rebel garb. Pet. App. 2-3, 6.

2. On December 6, 2006, a grand jury sitting in the Northern District of Illinois returned an indictment charging petitioner in four counts. Pet. App. 26-33. Counts One and Two, which are not at issue here, charged petitioner with violations of 18 U.S.C. 1546(a) for making false statements on the written immigration

forms he completed in the Ivory Coast and then presenting one of those forms to federal authorities upon his entry to the United States. Pet. App. 26-31. Count Three alleged that petitioner made a false statement to a federal officer "[o]n or about December 9, 2003, in Abidjan, Ivory Coast," in violation of 18 U.S.C. 1001(a)(2). Pet. App. 31. Count Four charged petitioner with making a false statement to a federal officer "[o]n or about March 29, 2006, in the Eastern District of Missouri and Northern District of Illinois," also in violation of 18 U.S.C. 1001(a)(2). Pet. App. 32. That count was based on a recorded telephone call in which petitioner, who was in St. Louis, told a DHS agent located in Chicago that petitioner had never carried a gun. *Id.* at 4.

Petitioner was first arrested on these charges in the Eastern District of Missouri, Docket Entry No. 5, and he proceeded to trial in the Northern District of Illinois. At the conclusion of the government's case-in-chief and again after closing arguments, petitioner's counsel moved orally for a judgment of acquittal under Federal Rule of Criminal Procedure 29. Pet. App. 7, 10-11 & n.2. At neither point did counsel specify the grounds for the motion or raise the issue of venue. *Ibid.* The district court twice denied the motion, and the jury found petitioner guilty on all counts. *Id.* at 7.

3. The court of appeals affirmed. Pet. App. 1-25. On appeal, petitioner argued for the first time that venue in the Northern District of Illinois was improper on Counts Three and Four. Def. C.A. Br. 26-37. Petitioner contended that the false statement offense alleged in Count Three occurred entirely in Côte d'Ivoire and therefore that, under 18 U.S.C. 3238, venue on that count lay only in the Eastern District of Missouri, the district in which petitioner had been "arrested or * * * first brought"

and "the district of [his] last known residence." Pet. C.A. Br. 30-31. Petitioner argued that venue was improper on Count Four because he was in Missouri at the time he participated in the recorded telephone call from which that charge arose. *Id.* at 33-35.

The court of appeals held that petitioner had waived those venue objections by failing to raise them in the district court. As to Count Three, the court observed that because that count alleged acts occurring only in Côte d'Ivoire, the venue defect was "apparent on the face of the indictment." Pet. App. 8-9. Relying on circuit precedent, the court concluded that petitioner was therefore required to challenge venue on that count before the close of the government's case and that his failure "to raise such an obvious issue is logically considered a knowing and intentional relinquishment." *Id.* at 9.

The court deemed the issue of waiver "more difficult" on Count Four. Pet. App. 10. Because any venue defect on that count was not apparent from the indictment, the court reasoned, petitioner was permitted to raise the issue for the first time in a motion for acquittal at the end of the government's case. *Ibid.* The court concluded, however, that petitioner's "bare Rule 29 motion, which did not mention venue (or anything else) specifically, was [in]sufficient to preserve the venue issue." *Ibid.* The court acknowledged that its earlier decision in *United States* v. *Jones*, 174 F.2d 746, 748 (7th Cir. 1949), had deemed a general motion for acquittal adequate to preserve a venue challenge when the alleged defect was not obvious from the indictment. Pet. App. 11. The court noted, however, that its more recent cases had distinguished or limited that ruling and that most other courts of appeals had concluded "that an objection

to venue is waived when not specifically raised in the Rule 29 motion." *Id.* at 13; see *id.* at 11-13. The court of appeals observed that venue occupies an "unusual status" because although it is a constitutional requirement, it is not an element of any offense, may be proved by a preponderance of the evidence, and is "universally recognized as waivable." *Id.* at 14. In addition, the court reasoned that "a defendant should not be permitted to hide in the weeds with an objection (especially on a waivable issue with a lower proof burden) only to pounce on appeal just in case things do not go as desired in the court below." *Ibid.* Based on that analysis, the court overruled *Jones* and held that "a defendant needs to be specific in a motion for acquittal in order to preserve a venue argument for appeal." *Ibid.*[1] Because petitioner had not specified venue as a ground for acquittal in the district court, the court deemed his objection waived and therefore did not consider it further. *Id.* at 15.

ARGUMENT

Petitioner contends (Pet. 7-16) that the Court should grant review to decide whether a defendant may waive venue; whether, if so, the defendant must do so personally; and whether the failure to raise a specific venue objection in the district court constitutes such a waiver. There is no merit to petitioner's arguments or any division of authority on the first two questions. Although the third question implicates a circuit conflict, the decision below is correct and accords with the position of the large majority of the courts of appeals. The issue on which the circuits disagree, moreover, is not likely to

[1] Because the panel was overruling prior circuit precedent, it circulated its opinion to the entire Seventh Circuit for approval. No judge of that court voted to hear the case en banc. Pet. App. 15.

arise with significant frequency. This Court's review is therefore not warranted.

1. Article III of the Constitution directs that criminal trials must "be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." U.S. Const. Art. III, § 2, Cl. 3. The Sixth Amendment further provides for trial by a "jury of the State and district wherein the crime shall have been committed." *Id.* Amend VI. Those provisions embody a "public policy that fixes the situs of the trial in the vicinage of the crime rather than the residence of the accused." *Johnston* v. *United States*, 351 U.S. 215, 220-221 (1956).

Petitioner argues (Pet. 8-10) that the constitutional venue provisions impose a constraint on the power of federal courts that defendants may not waive. He points to no court that has ever so held but rather relies (Pet. 8-9) on a series of decisions from this Court limiting the ability of litigants to waive subject matter jurisdiction or the right to an Article III trier of fact. Those cases are inapposite because, contrary to petitioner's contention, this Court has squarely stated that a defendant "can waive his right to be tried in the State and district where the crime was committed." *Singer* v. *United States*, 380 U.S. 24, 35 (1965); see *Borchardt* v. *United States*, 469 U.S. 937, 945 (1984) (Brennan, J., dissenting) (noting principle that "a defendant may waive [venue] in appropriate circumstances"). That rule stems from the Court's recognition that "[t]he provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." *United States* v. *Cores*, 356 U.S. 405, 407 (1958). Consistent with those cases, the

lower courts agree that "venue is a privilege provided for the benefit of the accused, rather than a limitation on the jurisdiction of the court." 2 Charles Alan Wright, *Federal Practice and Procedure* § 306, at 341-342 (3d ed. 2000).

2. There is no merit to petitioner's contention (Pet. 13-14) that the decision below conflicts with *Florida* v. *Nixon*, 543 U.S. 175 (2004), because it permits waiver of venue by counsel rather than the defendant himself. *Nixon* concluded that although a small set of "decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate," the general rule is that counsel need not "obtain the defendant's consent to 'every tactical decision.'" *Id.* at 187 (quoting *Taylor* v. *Illinois*, 484 U.S. 400, 418 (1988)). Whether to assert the right to stand trial in a particular location is not of the same importance or consequence as the type of decision that a defendant must make personally, such as "whether to plead guilty, waive a jury, testify in his or her defense, or take an appeal." *Ibid.* (quoting *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983)). The venue right is animated primarily by considerations of convenience for the defendant, *Cores*, 356U.S. at 407, and the determination of whether to exercise that right is a tactical matter properly entrusted to counsel. See *Taylor*, 484 U.S. at 417-418 (an attorney has authority to manage most aspects of the defense without obtaining his client's approval).

3. Petitioner also contends (Pet. 10-15) that this Court should review the conclusion of the court of appeals that petitioner waived his venue objection by failing to raise it at trial. He argues that the omission resulted only in forfeiture and therefore does not preclude review for plain error under Federal Rule of Criminal

Procedure 52(b). That contention is erroneous, and although the issue implicates a split of authority among the circuits, this Court's review is unnecessary.

a. The court of appeals correctly deemed petitioner's venue objection waived. As petitioner acknowledges, "[s]ome constitutional rights may be waived by counsel's, or the accused's, failure to object." Pet. 11. For the reasons the court of appeals identified, venue is properly considered such a right. Because venue is not an element of the offense in the traditional sense and defendants often elect not to challenge it, "the government will not necessarily seek to prove the" grounds for venue "unless the defense warns the government that the matter is at issue." *United States* v. *Cordero*, 668 F.2d 32, 44 (1st Cir. 1981). Requiring contemporaneous objection is thus particularly appropriate in this context. The opposite rule, which would permit a defendant to raise venue for the first time on appeal and potentially to force a new trial because of a defect that could have been addressed easily in the district court, would result in gross inefficiencies and encourage gamesmanship. See Pet. App. 14 ("a defendant should not be permitted to hide in the weeds with an objection (especially on a waivable issue with a lower proof burden) only to pounce on appeal just in case things do not go as desired in the court below").

Those considerations have persuaded the large majority of courts of appeals to adopt the general rule reflected in the decision below. See *Cordero*, 668 F.2d at 44 (1st Cir. 1981) ("courts have consistently ruled that a claim of improper venue must be raised at least prior to a verdict"); *United States* v. *Potamitis*, 739 F.2d 784, 791 (2d Cir.) ("Objections to venue are waived unless 'specifically articulated' in defense counsel's motion for

acquittal"; "[a] general motion for a judgment of acquittal * * * is not sufficient to raise and preserve for appeal the question of venue"), cert. denied, 469 U.S. 918, and 469 U.S. 934 (1984);[2] *United States* v. *Pitt*, 193 F.3d 751, 762 (3d Cir. 1999) ("the issue of improper venue, at the very latest, must be raised in every possible scenario before the jury reaches its verdict"); *United States* v. *Stewart*, 256 F.3d 231, 238 (4th Cir.) ("If an objection to venue is not raised in the district court, the issue is waived on appeal."), cert. denied, 534 U.S. 1049 (2001), and 535 U.S. 977 (2002); *United States* v. *Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984) ("a defendant can waive venue rights by his silence–just by his failure to lodge an objection prior to trial"); *United States* v. *Sopczak*, 742 F.2d 1119, 1123 (8th Cir. 1984) (defendant "waived any challenge to venue by not raising the issue in the district court"); *United States* v. *Powell*, 498 F.2d 890, 891 (9th Cir.) ("venue may be waived," and "where, as here, the objection was not raised until after the jury had returned its verdict of guilty, we find that waiver did in

---

[2] The Second Circuit has repeatedly embraced that rule. See *United States* v. *Rommy*, 506 F.3d 108, 119 (2d Cir. 2007), cert. denied, 128 S. Ct. 1681 (2008); *United States* v. *Matera*, 489 F.3d 115, 124 (2d Cir. 2007), cert. denied, 128 S. Ct. 424, and 128 S. Ct. 925 (2007); *United States* v. *Bala*, 236 F.3d 87, 95-96 (2d Cir. 2000); *United States* v. *Grammatikos*, 633 F.2d 1013, 1022 (2d Cir. 1980); *United States* v. *Menendez*, 612 F.2d 51, 54- 55 (2d Cir. 1979). It has thus implicitly overruled its decisions in *United States* v. *Gross*, 276 F.2d 816 (2d Cir.), cert. denied, 363 U.S. 831 (1960), and *United States* v. *Brothman*, 191 F.2d 70, 72-73 (2d Cir. 1951), which held that a defendant preserves a venue objection by making a general Rule 29 motion that does not specify any grounds for acquittal. See *United States* v. *Rivera*, 388 F.2d 545, 548 (2d Cir.) (describing *Gross* as indicating that a venue "objection is preserved by a general motion for acquittal after all the evidence has been received"), cert. denied, 392 U.S. 937 (1968).

fact occur"), cert. denied, 419 U.S. 866 (1974); *United States* v. *Greer*, 440 F.3d 1267, 1271 (11th Cir. 2006) (defendant must object to venue no later than close of evidence); *United States* v. *Gartmon*, 146 F.3d 1015, 1029 (D.C. Cir. 1998) (venue objection waived by failure to raise below).

b. Only one circuit has squarely adopted a contrary rule. In *United States* v. *Kelly*, 535 F.3d 1229 (2008), petition for cert. pending, No. 08-8328 (filed Dec. 2, 2008), a case petitioner does not cite, the Tenth Circuit held that where a possible defect in venue is not plain from the indictment, the defendant preserves his venue objection by making a non-specific motion for acquittal at the close of the evidence. The court reasoned that "[w]hen a defendant challenges in district court the sufficiency of the evidence on specific grounds, 'all grounds not specified in the motion are waived,'" *id.* at 1234 (quoting *United States* v. *Goode*, 483 F.3d 676, 681 (10th Cir. 2007), but when, in contrast, the defendant files "a general motion for acquittal that does not identify a specific point of attack, the defendant is deemed to be challenging the sufficiency of each essential element of the government's case, including venue," *id.* at 1234-1235. In a footnote, the court acknowledged "that some circuit authority could be construed as pointing in a different direction," but the court declined to conduct "a detailed analysis to determine whether these cases actually conflict with" its holding. *Id.* at 1235 n.2. Assuming that such a conflict existed, the court dismissed the contrary cases as "unpersuasive because they offer no explanation for why venue should be treated differently than any other offense element, the challenge to which would be preserved by a general motion for acquittal." *Ibid.* The court also noted that it was not aware "of a cogent

reason to apply such a differential treatment to the venue element of an offense on the issue of preservation." *Ibid.*

Petitioner cites *United States* v. *Zidell*, 323 F.3d 412, cert. denied, 540 U.S. 824 (2003), in which a panel of the Sixth Circuit considered on the merits (and rejected) a defendant's venue objection that was not specifically advanced during trial. The panel appeared to conclude, in line with the Tenth Circuit's later decision in *Kelly*, that "a general challenge to the Government's proofs in a Rule 29 motion for judgment of acquittal suffices to preserve the issue of venue, and * * * only a more specific Rule 29 motion operates to waive all grounds not specified." *Zidell*, 323 F.3d at 421.

c. These cases do not create a circuit disagreement worthy of this Court's review. To the extent *Zidell* conflicts with the decision below, it indicates confusion within the Sixth Circuit on the appropriate standard for finding waiver of a venue challenge. The panel in *Zidell* approached the question as one of first impression, stating that the Sixth Circuit had previously "indicated, albeit only in dicta," that a general motion for acquittal might suffice to preserve a venue objection. 323 F.3d at 421. The case it cited for that proposition, however, *United States* v. *Dandy*, 998 F.2d 1344, 1356-1357 (6th Cir. 1993), cert. denied, 510 U.S. 1163 (1994), did not address venue at all but rather concerned a general challenge to the sufficiency of the evidence. In fact, the Sixth Circuit on numerous occasions before *Zidell* has deemed venue objections waived where they were not raised at trial and in so doing has not drawn a distinction between general and specific motions for acquittal. See, *e.g.*, *United States* v. *English*, 925 F.2d 154, 158 (6th Cir.) (defendant "not allowed to challenge venue on ap-

peal because the issue was not raised in the court below"), cert. denied, 501 U.S. 1210, and 501 U.S. 1211 (1991); *United States* v. *Burkhart*, 501 F.2d 993, 996 (6th Cir. 1974) (venue waived where "[a]ppellant failed to object to venue until after the Government's case had been completed"), cert. denied, 420 U.S. 946 (1975); *United States* v. *McMaster*, 343 F.2d 176, 181 (6th Cir.) ("[No] objection having been made to venue prior to verdict, objection thereto was waived."), cert. denied, 382 U.S. 818 (1965); *Poliafico* v. *United States*, 237 F.2d 97, 113 (6th Cir. 1956) ("Objection to venue is waived by going to trial on the merits without raising the question."), cert. denied, 352 U.S. 1025 (1957); *Gowling* v. *United States*, 64 F.2d 796, 798 (6th Cir. 1933) ("[T]he question of venue was not raised until after conviction, and therefore came too late."). The *Zidell* panel did not acknowledge any of these cases or purport to overrule them.

Although *Kelly* directly conflicts with the Seventh Circuit's requirement that a defendant specifically raise venue at trial to preserve the issue for appeal, the Tenth Circuit stands virtually alone in its position.[3] The decision below is correct and consistent with the rule embraced by the large majority of the circuit courts. See pp. 8-10, *supra*. In addition, the situation implicating

---

[3] The Tenth Circuit reasoned that its holding was consistent with "the weight of authority in other circuits," *Kelly*, 535 F.3d at 1234, but that is incorrect. The court's support for its assertion consisted primarily of citations to two decisions that are no longer valid, *id.* at 1235 (citing *Gross*, 276 F.2d at 818-819, see note 2, *supra*, and *United States* v. *Browne*, 225 F.2d 751, 755 (7th Cir. 1955)), from circuits that have squarely rejected the Tenth Circuit's position. As explained in text, see pp. 8-10, *supra*, the large majority of circuits agree with the rule the Seventh Circuit applied in this case.

the circuit conflict does not appear to arise with any significant frequency. That conflict is relevant only where a defendant moves for acquittal under Rule 29 without specifying any basis for relief and fails at any point during trial to object to a venue defect that becomes apparent during the government's presentation of evidence. The disagreement therefore does not currently require resolution by this Court. If the conflict deepens or if courts of appeals that currently adhere to the majority view reevaluate that position in light of the Tenth Circuit's decision in *Kelly*, this Court may review the issue at that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
RITA M. GLAVIN
Acting Assistant Attorney General
DAVID E. HOLLAR
Attorney

JANUARY 2009