No. 09-310

In the Supreme Court of the United States

LARRY A. WILLIAMS, 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

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
ROBERT A. PARKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a defendant's claim that his jury-trial waiver was invalid is reviewed for plain error when raised for the first time on appeal.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 4
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminante*, 499 U.S. 279 (1991) 8
Boykin v. *Alabama*, 395 U.S. 238 (1969) 10
Gonzalez v. *United States*, 128 S. Ct. 1765 (2008) 8
Iowa v. *Tovar*, 541 U.S. 77 (2004) 9
Johnson v. *United States*, 520 U.S. 461 (1997) 5, 7, 8
Puckett v. *United States*, 129 S. Ct. 1423 (2000) 6, 8
Russell v. *United States*, 429 F.2d 237 (5th Cir. 1970) . . . 12
United States v. *Boynes*, 515 F.3d 284 (4th Cir. 2008) . . . 12
United States v. *Carmenate*, 544 F.3d 105 (2d Cir.), cert. denied, 129 S. Ct. 586 (2008) 10, 11
United States v. *Cotton*, 535 U.S. 625 (2002) 7, 8
United States v. *Delgado*, 635 F.2d 889 (7th Cir. 1981) . . . 3
United States v. *Diaz*, 540 F.3d 1316 (11th Cir. 2008) 11, 12
United States v. *Dominguez Benitez*, 542 U.S. 74 (2004) 4, 6, 9, 10
United States v. *Duarte-Higareda*, 113 F.3d 1000 (9th Cir. 1997) 10, 12
United States v. *Gordon*, 712 F.2d 110 (5th Cir. 1983) . . . 11

Cases—Continued: Page

United States v. *Hill*, 252 F.3d 919 (7th Cir. 2001), cert. denied, 536 U.S. 962 (2002) 9
United States v. *Igbinosun*, 528 F.3d 387 (5th Cir.), cert. denied, 129 S. Ct. 725 (2008) 11
United States v. *Khan*, 461 F.3d 477 (4th Cir. 2006), cert. denied, 550 U.S. 956 (2007) 10, 12
United States v. *Lorenzo*, 995 F.2d 1448 (9th Cir.), cert. denied, 510 U.S. 881, and 510 U.S. 882 (1993) . . . 13
United States v. *Olano*, 507 U.S. 725 (1993) 5, 7
United States v. *Robertson*, 45 F.3d 1423 (10th Cir.), cert. denied, 515 U.S. 1108, and 516 U.S. 844 (1995) 10, 12
United States v. *Ruiz*, 536 U.S. 622 (2002) 8
United States v. *Vonn*, 535 U.S. 55 (2002) 4, 6
Whitehead v. *Cowa*n, 263 F.3d 708 (7th Cir. 2001), cert. denied, 534 U.S. 1116 (2002)) 9
Yakus v. *United States*, 321 U.S. 414 (1944) 5, 7

Constitution, statutes and rules:

U.S. Const.:
Amend. V 7
Amend. VI 7
21 U.S.C. 841(a)(1) 2
Fed. R. Crim. P.
Rule 11 . . . . . 4, 6, 9
Rule 11(b)(1)(C) 9
Rule 11(b)(1)(D) 6
Rule 11(c)(3)(B) 6

Rules—Continued: Page

Rule 23(a) 3, 9

Rule 52(b) 5

In the Supreme Court of the United States

No. 09-310

LARRY A. WILLIAMS, 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. 1a-19a) is reported at 559 F.3d 607.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2009. A petition for rehearing was denied on June 11, 2009 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on September 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of distribution of 50 grams or more of co-

caine base, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 252 months of imprisonment, to be followed by ten years of supervised release. The court of appeals affirmed. Pet. App. 1a-19a.

1. On October 30, 2003, petitioner telephoned an acquaintance and offered to sell him two-and-a-half ounces (about 70 grams) of crack cocaine. Presentence Investigation Report 2 (PSR). Unbeknownst to petitioner, his acquaintance was a confidential informant for the Bureau of Alcohol, Tobacco, and Firearms (ATF). Later that day, the informant and ATF Special Agent Vernon Mask, who was working undercover, traveled to a residence in Elgin, Illinois, where they purchased 58.6 grams of cocaine base from petitioner. *Id.* at 1-2. Petitioner engaged in the transaction at the front door of the home, in full view of another law-enforcement officer who was conducting surveillance from a nearby unmarked car. *Id.* at 2; 3/5/07 Tr. 33-35, 135-138. Petitioner was arrested and admitted that he sold Special Agent Mask and the informant more than 50 grams of cocaine base. *Id.* at 161-162. Petitioner also provided detailed information concerning his suppliers of cocaine base and his ongoing sales of crack cocaine. *Id.* at 162-163.

2. A grand jury returned an indictment charging petitioner with a single count of distribution of 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1). Petitioner pleaded not guilty. At a status hearing, petitioner's counsel informed the district court that petitioner wished to have a bench trial rather than a jury trial, and the government consented. Pet. App. 2a-3a. Counsel subsequently moved the court to appoint new counsel (at petitioner's request), but confirmed to the court, in writing, that petitioner "still wishes to have

a bench trial and would like one as soon as possible." *Id.* at 3a-4a. Before the trial began, the district court asked petitioner directly, "I just want to make sure that you know you do have a right to a jury trial. * * * And would you like to have a bench trial and waive the jury trial?" *Id.* at 4a. Petitioner answered, "Yes, sir." *Ibid.* Petitioner, who was at all times represented by counsel, never objected to his bench trial. The judge found petitioner guilty. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-19a. On appeal, petitioner contended for the first time that his waiver of a jury trial was invalid. The court of appeals agreed with petitioner that the district court had erred in accepting his waiver. It noted that Federal Rule of Criminal Procedure 23(a) permits waiver of a jury trial only when the defendant consents in writing, the government consents, and the district court approves. Pet. App. 6a. In this case, however, petitioner's waiver was oral, not written. *Id.* at 4a. The court of appeals further observed that the district court had "fail[ed] to conduct [the] colloquy" necessary to approve a jury-trial waiver that the Seventh Circuit adopted as a supervisory rule in *United States* v. *Delgado*, 635 F.2d 889 (1981). Pet. App. 8a. Under *Delgado*, the district court must "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 (quoting *Delgado*, 635 F.2d at 890).

Nonetheless, the court of appeals held that because petitioner had not objected to his bench trial, he could succeed on appeal only if he could satisfy the standards of plain-error review by showing "that he did not have a

concrete understanding of his right to a jury trial, and that but for the trial court's failure to ensure he had that understanding, there is a reasonable probability that he would not have waived the right." Pet. App. 13a. In reaching that conclusion, the court of appeals relied on this Court's decision in *United States* v. *Vonn*, 535 U.S. 55 (2002), which held that a defendant's unpreserved challenge to a violation of Rule 11 of the Federal Rules of Criminal Procedure, which governs the process of taking guilty pleas, is reviewed for plain error. *Id.* at 73-74; Pet. App. 10a-11a. The court of appeals further held that, under *United States* v. *Dominguez Benitez*, 542 U.S. 74 (2004), petitioner bore the burden of establishing that he affirmatively did not understand his jury-trial right and there is a reasonable probability that he would not have accepted a bench trial but for the district court's error. Pet. App. 12a-13a (citing *Dominguez Benitez*, 542 U.S. at 82-83).

Petitioner created no record in the district court concerning "what he did or did not understand about his right to a jury and whether he still would have waived a jury trial had he known all that he was entitled to know about that right." Pet. App. 18a. Indeed, the court of appeals emphasized that petitioner had not "submitted * * * so much as his own affidavit averring that he did not adequately comprehend the nature of his right to a jury trial." *Id.* at 14a. The court therefore concluded that petitioner had failed to demonstrate that he was entitled to relief on plain-error review. *Id.* at 18a-19a.

ARGUMENT

Petitioner contends (Pet. 11-24) that the court of appeals erroneously extended 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), in applying plain-error review to his forfeited claim that his waiver of a jury trial was procedurally invalid. He further asserts that the decision below conflicts with decisions of several other courts of appeals. His claims lack merit, and further review is not warranted.

1. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Federal Rule of Criminal Procedure 52(b) gives "a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court," *Olano*, 507 U.S. at 731, by providing that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention," Fed. R. Crim. P. 52(b). Under Rule 52(b), "before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (brackets in original) (quoting *Olano*, 507 U.S. at 732). When all three requirements are satisfied, "the court of appeals has authority to order correction, but [it] is not required to do so." *Olano*, 507 U.S. at 735. Instead, a reviewing court "may * * * exercise its discretion to notice a forfeited error" only if a fourth condition is satisfied: "the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson*, 520 U.S. at 467 (brackets in original) (citation omitted).

a. In *Vonn*, the judge did not explain the right to counsel at trial as set forth in Federal Rule of Criminal Procedure 11(b)(1)(D). 535 U.S. at 59-61. In *Dominguez Benitez*, the judge did not explain that the defendant could not later withdraw his plea if the court did not accept the government's sentencing recommendation, as required by Federal Rule of Criminal Procedure 11(c)(3)(B). 542 U.S. at 77-78. In each case, the defendant did not object in the district court, and the Court applied plain-error review. In *Vonn*, the Court explained that the Rule 11 error does not excuse a defendant's silence: otherwise, "a defendant could choose to say nothing about a judge's plain lapse under Rule 11 until the moment of taking a direct appeal, at which time the burden would always fall on the Government to prove harmlessness." 535 U.S. at 73. Although the judge has a "duty to advise the defendant" of his rights, "the value of finality requires defense counsel to be on his toes, not just the judge," and the defendant cannot "simply relax and wait to see if the sentence later str[ikes] him as satisfactory." *Ibid.*; see *Puckett* v. *United States*, 129 S. Ct. 1423, 1428 (2009) ("[T]he contemporaneous-objection rule prevents a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor."). On plain-error review, the defendant has the burden to show an effect on his substantial rights, and this "burden should not be too easy for defendants." *Dominguez Benitez*, 542 U.S. at 80, 82. In order to establish reversible plain error under Rule 11, a defendant must show that he affirmatively did not understand his rights and there is a reasonable probability that he would not have pleaded guilty had he been properly advised. *Id.* at 82-83.

The court of appeals correctly applied those principles in this case. As in *Vonn* and *Dominguez Benitez*, petitioner's counsel had a duty to be "on his toes" and to object to any perceived error in his client's waiver of a jury trial in order to provide the district court an opportunity to correct its mistake. Having failed to object, petitioner, like Vonn and Dominguez Benitez, must make the showings required under plain-error review.

b. Petitioner attempts (Pet. 19-21) to distinguish *Vonn* and *Dominguez Benitez* by characterizing his claim as one of "constitutional" error. But the plain-error rule is fully applicable to forfeited claims of constitutional error. This Court has held that forfeited claims of denial of the Sixth Amendment right to a petit jury or the Fifth Amendment right to a grand jury are both subject to plain-error review. *Johnson* v. *United States*, 520 U.S. 461, 465-466 (1997) (violation of Sixth Amendment right to jury determination of all elements of offense is subject to plain-error review if not objected to at trial); *United States* v. *Cotton*, 535 U.S. 625, 631, 634 (2002) (same for Fifth Amendment right to grand jury indictment on all elements of offense); see also *Olano*, 507 U.S. at 731 (plain error applies to forfeiture of "'a constitutional right,' or a right of any other sort" (quoting *Yakus*, 321 U.S. at 444)). As the Court explained, "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure," and federal courts have "no authority" to "creat[e] out of whole cloth * * * an exception" to the plain-error rule for constitutional claims. *Johnson*, 520 U.S. at 466.

Indeed, plain-error analysis applies even to "structural" errors—*i.e.*, errors that "affect[] the framework within which the trial proceeds," and that, if properly

preserved, would result in reversal without regard to an assessment of prejudice. *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991). This Court has reserved the question whether structural errors automatically affect substantial rights so as to satisfy the third prong of plain-error analysis. *Puckett*, 129 S. Ct. at 1432. But even in cases involving errors that were assumed to be structural, the Court has made clear that reversal is improper under *Olano*'s fourth prong unless a defendant establishes that the error seriously affects the fairness, integrity, and public reputation of judicial proceedings. *Johnson*, 520 U.S. at 468, 470; *Cotton*, 535 U.S. at 632-634.

c. Petitioner cannot show that the district court's error affected his substantial rights or had a serious effect on the fairness, integrity, or public reputation of judicial proceedings. On the morning of trial, the judge said to petitioner "I just want to make sure that you know you do have a right to a jury trial" and asked him "would you like to have a bench trial and waive the jury trial?" Pet. App. 4a. Petitioner said, "Yes, sir." *Ibid.* Under those circumstances, the constitutional requirement that the jury trial right be waived personally, and not by counsel, see *Gonzalez* v. *United States*, 128 S. Ct. 1765, 1771 (2008), was fully satisfied. To the extent that a waiver of a jury trial must be voluntary, knowing, and intelligent, see Pet. App. 6a, petitioner does not question the voluntary character of his action, *ibid.*, and he has made no showing that he did not understand "the nature of the right" to a jury trial and "how it would likely apply *in general* in the circumstances." *United States* v. *Ruiz*, 536 U.S. 622, 629 (2002). Petitioner did not, for example, ask the court "what's that?" when asked whether he wished to waive a jury trial. And he gives no

reason to doubt that he had the same degree of understanding of the jury of any defendant who pleads guilty after being told by the judge that he has "the right to a jury trial." Fed. R. Crim. P. 11(b)(1)(C). "Waiver does not depend on astute (or even rudimentary) understanding of how rights can be employed to best advantage. Defendants routinely plead guilty, waiving oodles of constitutional rights, in proceedings where the rights are named but not explained. For example, the judge will tell the defendant that the plea waives the right to a jury trial, but will not describe how juries work, when they are apt to find a prosecutor's case insufficient, why the process of formulating and giving jury instructions creates issues for appeal, and so on." *Whitehead* v. *Cowan*, 263 F.3d 708, 732-733 (7th Cir. 2001), cert. denied, 534 U.S. 1116 (2002) (quoting *United States* v. *Hill*, 252 F.3d 919, 924 (7th Cir. 2001), cert. denied, 536 U.S. 962 (2002)).

Even making the assumption that this record does not establish the knowing and intelligent character of the plea, cf. Pet. App. 8a-9a, and granting petitioner's claim of a violation of Rule 23(a)'s written-waiver requirement and a Seventh Circuit supervisory-powers rule requiring explanation of the jury right, *id.* at 8a, petitioner has not shown prejudice, as is his burden on plain-error review. See *Dominguez Benitez*, 542 U.S. 83 (defendant must show "a reasonable probability" of a different outcome in challenging his guilty plea on appeal based on a forfeited Rule 11 violation); cf. *Iowa* v. *Tovar*, 541 U.S. 77, 92-93 (2004) (noting that a defendant who collaterally challenged his waiver of counsel before entering a plea had not carried his burden to call into question the competent and intelligent character of his waiver, when he had not asserted unawareness of his

right to counsel and had not articulated what additional information counsel could have provided to him before he pleaded guilty). Petitioner has not provided any reason to think 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." *Id.* at 14a. Under those circumstances, petitioner cannot show that any error affected his substantial rights or called into question the fairness or integrity of the proceedings.[1]

2. Petitioner also contends (Pet. 11-19) that the decision below conflicts with the decisions of several other courts of appeals. But none of the cases petitioner cites as evidence of a supposed circuit conflict considered, let alone decided, whether to apply plain-error review. Instead, each of the decisions simply asserts, in a single sentence, that the standard of review for a jury-waiver claim is de novo. See *United States* v. *Carmenate*, 544 F.3d 105, 107 (2d Cir.), cert. denied, 129 S. Ct. 586 (2008); *United States* v. *Khan*, 461 F.3d 477, 491 (4th Cir. 2006), cert. denied, 550 U.S. 956 (2007); *United States* v. *Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997); *United States* v. *Robertson*, 45 F.3d 1423, 1430-1431 (10th Cir.), cert. denied, 515 U.S. 1108, and 516

[1] Petitioner relies (Pet. 21) on the Court's statement in *Dominguez Benitez* that a conviction could not be affirmed on plain-error review, even with overwhelming evidence that the defendant would have pleaded guilty regardless of the error, if the record contained "no evidence that a defendant knew of the rights he was putatively waiving." 542 U.S. at 84 n.10 (citing *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969)). Whatever the merit of that observation, it has no application here, because petitioner was expressly told that he had a right to a jury before he waived that right.

U.S. 844 (1995); *United States* v. *Diaz*, 540 F.3d 1316, 1321 (11th Cir. 2008) (per curiam).[2] There is no indication that the claims of error at issue in those cases had been forfeited, and it appears that there was no dispute among the parties in any of these cases concerning the standard of review. Moreover, none of the cases analyzes or even cites *Vonn* or *Dominguez Benitez* (or any other plain-error case), on which the court below principally relied. Since none of the decisions considered the question presented here, they do not establish a circuit conflict worthy of this Court's review.

Nor is there any indication that the result in this case would have been any different in other circuits. In *Carmenate*, for example, the evidence of waiver was nearly identical to that in this case: defense counsel informed the court orally and in writing that the defendant wanted a bench trial, and the court then asked the defendant directly if he was willing to waive his right to trial by jury. 544 F.3d at 106-107. The Second Circuit rejected petitioner's contention that his waiver was not knowing, intelligent, and voluntary, holding that counsel's statement and the court's abbreviated colloquy was constitutionally sufficient. *Id.* at 106, 108-110. In *Khan*, the Fourth Circuit concluded that there need not be a colloquy at all and that a written statement signed only by

[2] Petitioner also relies (Pet. 17-18) on *United States* v. *Igbinosun*, 528 F.3d 387 (5th Cir.), cert. denied, 129 S. Ct. 725 (2008), but the court of appeals there did not specify a standard of review at all, nor did it state whether the defendant had preserved an objection to the adequacy of her waiver. *Id.* at 390. Moreover, the court rejected the proposition that the district court must "orally examine the defendant to determine if the waiver was intelligently made"; instead, it held that "absent a claim of prejudice by the defendant, it is assumed that the waiver was knowingly made." *Ibid.* (quoting *United States* v. *Gordon*, 712 F.2d 110, 115 (5th Cir. 1983)).

counsel satisfies constitutional requirements. 461 F.3d at 491-492.

The other cases petitioner cites involved facts very different from those here. *Robertson*, for example, involved a waiver granted without government consent and with "no discussion * * * ever held in the presence of [the defendant] regarding her decision to waive the right to trial by jury." 45 F.3d at 1433. In *Duarte-Higareda*, the defendant did not speak English and was never informed in his own language of his right to a jury trial. 113 F.3d at 1002-1003. And in *Diaz*, the defendant—who suffered from a "personality disorder" with "schizotypal and antisocial features"—proceeded *pro se* and engaged in a long, rambling exchange with the district court in which he repeatedly contradicted himself and created significant doubt as to whether he wanted a jury trial or not. 540 F.3d at 1318-1322. In contrast, petitioner was asked directly whether he wished to proceed with a bench trial instead of a jury trial, and he unequivocally stated that he did. Pet. App. 4a.

Finally, several of the courts on whose decisions petitioner relies have made clear, in other cases, that they would likely apply plain-error review to a forfeited claim of an invalid waiver. In a case decided after *Khan*, the Fourth Circuit observed that it would "[o]rdinarily" apply plain-error review to a defendant's unpreserved claim that his waiver of a jury trial was not knowing, intelligent, and voluntary, but noted that it was unnecessary to reach that question if (as in *Khan*) de novo review revealed no error in the first place. *United States* v. *Boynes*, 515 F.3d 284, 288 n.1 (4th Cir. 2008). And the Fifth and Ninth Circuits have applied plain-error review to unpreserved claims that rights were not waived knowingly, intelligently or voluntarily, see *Russell* v. *United*

States, 429 F.2d 237, 238-239 (5th Cir. 1970) (waiver of right to remain silent); *United States* v. *Lorenzo*, 995 F.2d 1448, 1456-1457 (9th Cir.) (waiver of right to counsel), cert. denied, 510 U.S. 881, and 510 U.S. 882 (1993), further undermining petitioner's claim that those circuits are in conflict with the court below.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
ROBERT A. PARKER
Attorney

DECEMBER 2009

[3] Petitioner's final argument—that the decision below "insufficiently protects the right to a jury trial"—is incorrect. Pet. 21-24 (emphasis omitted). He argues (Pet. 22-23) that trial by jury is an important right that deserves protection, and that courts should not presume that the right has been waived. The decision below is fully consistent with those propositions. The court of appeals held that the district court's acceptance of petitioner's waiver was error, Pet. App. 4a-8a, and then considered whether that error affected petitioner's substantial rights, an inquiry that "presum[es] nothing as to the validity of [petitioner's] jury waiver," *id.* at 16a.