IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 2019

MELISSA MORTON,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GARY PAUL BURCHAM
BURCHAM & ZUGMAN
402 West Broadway, Suite 1130
San Diego, CA 92101
Telephone: (619) 699-5930
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether a defendant waives his right to challenge a jury instruction on appeal if he proposed the instruction below, even if the record contains no evidence demonstrating that he was aware of the right he was relinquishing at that time?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

FEDERAL RULES

No. _____

OCTOBER TERM, 2019

MELISSA MORTON,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 7, 2019. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing en banc, on August 13, 2019.

JURISDICTION AND CITATION OF OPINION BELOW

On June 7, 2019, the Ninth Circuit affirmed Petitioner's conviction in an unpublished Memorandum opinion, attached as Exhibit "A" to this petition. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing en banc, on August 13, 2019. [Ex. "B"]. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

INTRODUCTION

Petitioner asks this Court to grant review in the instant case to resolve a waiver issue which is the subject of significant inter and intra-Circuit conflict. The Ninth Circuit found that Petitioner had waived her right to challenge certain jury instructions on appeal because her counsel had jointly proposed the instructions below. The Ninth Circuit so found despite the fact that there was no evidence demonstrating that Petitioner had been aware of the specific rights she was relinquishing when proposing those instructions.

Several circuits, including the Ninth Circuit, have concluded that waiver only applies in this context if evidence in the record demonstrates that the defendant was specifically aware of the right which was being relinquished. See, e.g., United States v. Perez, 116 F.3d 840, 846 (9th Cir. 1997)(en banc). In other words, merely proposing the challenged instruction is not enough to invoke waiver. To impose waiver, the record must show that a defendant was aware of the basis for the instruction's invalidity when he proposed it. Even within these circuits, however, this rule has been applied inconsistently, as the instant case demonstrates.

Other circuits have adopted a much more rigid approach, finding waiver if the defendant merely proposes or agrees to the challenged instruction, without requiring any showing that counsel was aware of the right being abdicated. See, e.g.,

United States v. Mariano, 729 F.3d 874, 881 (8th Cir. 2013)("a defendant who requests and receives a jury instruction may not challenge the giving of that instruction on appeal.").

Due to the straightforward record below, this petition provides the Court with an excellent opportunity to resolve this inter and intra-circuit conflict as to the proper application of the waiver/forfeiture rule from United States v. Olano, 507 U.S. 725, 733 (1993), to the jury instruction context. Petitioner was foreclosed from appellate review of multiple claims in violation of Olano as well as controlling Ninth Circuit waiver precedent, and she asks the Court to grant review in this case to correct this error and also to provide much-needed guidance to lower courts as to this important waiver issue.

STATEMENT OF FACTS AND CASE

In November 2015, the grand jury returned an indictment charging Petitioner and her husband with conspiring to defraud the United States, in violation of 18 U.S.C. § 371, making false claims against the United States, in violation of 18 U.S.C. § 287, and knowingly passing false or fictitious instruments, in violation of 18 U.S.C. § 514(a), along with causing an act be to done, in violation of 18 U.S.C. § 2(b). [CR 1].[1]

As to the conspiracy count, the government charged both defendants with submitting to the IRS false tax returns and other documents seeking fraudulent tax returns. [ER 46]. The false claim counts also concerned the tax returns filed by both defendants. Id. Jury instructions as to the conspiracy and false claim counts were jointly submitted to the district court. There is nothing in the record indicating that Petitioner's defense counsel either recognized or considered any alternative instructions as to either of these counts.

On appeal, Petitioner challenged the jury instructions as to both the section 287 and 371 counts, asserting that the instructions as to these counts incorrectly omitted the requirement of willfulness. In its answering brief, the

[1] "CR" refers to the district court's clerk's record. "ER" refers to Appellant's excerpts of record filed in the Ninth Circuit Court of Appeals.

government argued waiver, asserting that because the jury instructions were jointly submitted, Petitioner waived any complaints about them. In her reply brief, Petitioner pointed the panel to the Ninth Circuit en banc precedent holding that, in this context, waiver only applies if the record shows that the defendant was specifically aware of the right she was relinquishing at the time she proposed these instructions. See United States v. Perez, 116 F.3d 840, 846 (9th Cir. 1997)(en banc)(finding that defendant's failure to propose an element in a jury instruction was not subject to waiver because neither defendant "knew of the right to have the omitted element submitted to the jury . . . ."). Petitioner asserted that because the record contained no such evidence, waiver was improper in this instance.

The panel declined to address these claims, finding that because the instructions were jointly proposed, and the cases relied upon by Petitioner on appeal had been decided by the time of her trial, Petitioner waived these claims. [Mem. 8]. In support of this ruling, the Ninth Circuit panel did not discuss Perez, but instead cited to United States v. Cain, 130 F.3d 381, 383-84 (9th Cir. 1997), which held that because counsel there "proposed the instruction to which he now objects," and the basis for his challenge "was already on the books" at the time of trial, the jury instruction claim was waived.

ARGUMENT

THE COURT SHOULD GRANT THIS PETITION TO RESOLVE THE SIGNIFICANT INTER AND INTRA-CIRCUIT CONFLICT REGARDING WHETHER A DEFENDANT WAIVES HIS RIGHT TO CHALLENGE A JURY INSTRUCTION ON APPEAL IF HE PROPOSED THE CONTESTED INSTRUCTION BELOW, EVEN IF THERE IS NO EVIDENCE DEMONSTRATING THAT HE WAS AWARE OF THE RIGHT HE WAS RELINQUISHING

Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). A forfeited error remains subject to review pursuant to Fed. R. Crim. Pro 52(b), while a waived claim is "extinguish[ed]." United States v. Olano, 507 U.S. 725, 733 (1993). "Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b)." Federal Rule of Criminal Procedure 30(d).

In the context of a jury instruction claim on appeal where defendant submitted the instruction below, significant inter and intra-Circuit conflict exists as to when the draconian remedy of waiver should apply in such a case. Five circuits -- the First, Second, Third, Fifth, and Ninth -- have concluded that the mere fact that a challenged jury instruction was submitted by the defendant does not, by itself, render any subsequent instructional claim waived. Instead, waiver only applies if there is specific evidence showing that the defendant was aware of the right being

relinquished when he proposed the contested instruction. Even within the Third and Ninth Circuits, however, other panels have come out differently on this issue.

The Fourth, Sixth, Seventh, Eighth, and Tenth Circuits have taken a more straightforward approach which is directly in conflict with the aforementioned circuits. These courts have held that if a defendant proposed the instruction below, the issue is waived for purposes of a later appeal, irrespective of whether there is evidence showing that defendant was aware of the right being relinquished.

A. Circuits Holding That Waiver Only Applies If There Is Evidence That The Defendant Was Aware Of The Right Being Abandoned

1. Ninth Circuit

In Perez, 116 F.3d at 845, defendants jointly proposed jury instructions which omitted the "in relation to" requirement for an 18 U.S.C. § 924(c) offense. Id. at 844. Although the improper jury instruction was jointly proposed, the Ninth Circuit declined to find the claim to have been waived because defense counsel was unaware of the basis for its invalidity at that time. Id. at 845-46. "[B]ecause neither [defendant] knew of the right to have the omitted element submitted to the jury, we must treat the right as forfeited, as opposed to waived." Id. at 845. "Although [defendants] did submit erroneous instructions, there is no evidence that they affirmatively acted to relinquish a known right. That is, there is no evidence that

[defendants] considered submitting the . . . element to the jury, but then, for some tactical or other reason, rejected the idea." Id.

The Ninth Circuit, however, has been inconsistent in applying Perez. In Cain, 130 F.3d at 383-84, the Ninth Circuit imposed waiver despite the fact that the record was void of any evidence showing that counsel actually was "[]aware of the basis for its invalidity at that time." Perez, 116 F.3d at 845. Instead, the Ninth Circuit made the inference that because the legal basis for the later challenge existed at the time of trial, that represented "'evidence in the record that the defendant was aware of, *i.e.,* knew of, the relinquished or abandoned right.'" Cain, 130 F.3d at 384 (quoting Perez, 116 F.3d at 845)). In the instant case, there was no evidence that Petitioner was aware of the willfulness-based claims his counsel raised on appeal. Despite a complete absence of "evidence that [Petitioner] affirmatively acted to relinquish a known right," Perez, 116 F.3d at 845, the panel imposed waiver as to these claims.

2. Third Circuit

In Virgin Islands v. Rosa, 399 F.3d 283, 292-93 (3d Cir. 2005), defendant challenged an erroneous first-degree murder instruction given at his trial. Relying on Perez, the Third Circuit rejected the government's waiver argument:

> Guided by the logical underpinnings of *Perez*, we hold that Rosa did not waive, but merely forfeited his rights to proper jury instruction. Despite his repeated acquiescence to the instructions, it is clear that he did not knowingly and intentionally waive his right to the proper charge. There is no indication that his attorney knew of and considered the controlling law, and despite being aware of the need for the government to prove a clear and deliberate intent to take human life to find his client guilty of first-degree murder, accepted the flawed instruction that included the additional language of inflicting serious bodily injury. We, therefore, will not hold that his attorney's failure to object to the erroneous first-degree murder instruction waived Rosa's right to have the jury correctly instructed on the elements of the crime for which he was charged.

Rosa, 399 F.3d at 292-93.

As with the Ninth Circuit, the Third Circuit has been inconsistent in applying the waiver doctrine in this context. In United States v. Holmes, 607 F.3d 332, 335 (3d Cir. 2010), that court found that because Holmes himself proposed the instruction given by the district court, the "invited error doctrine prevents him from challenging on appeal the definition that was provided to the jury." The Third Circuit "decline[d] to consider whether the definitions Holmes now advances are correct," despite the absence of any evidence demonstrating that he "knew of and considered the controlling law" and knowingly "accepted the flawed instruction." Rosa, 399 F.3d at 292-93.

3. First, Second, and Fifth Circuits

In United States v. Hansen, 434 F.3d 92, 101 (1st Cir. 2006), defendant requested that the district court charge the jury with a multiple conspiracies instruction. The district court declined to do so, and defendant, "through counsel, not only failed to object to the court's omission of his proposed multiple conspiracy instruction, but also affirmatively stated 'I am content' after the district court instructed the jury." The First Circuit found this claim to be waived, as "this statement constitutes an explicit withdrawal of the proffered charge on multiple conspiracies, and as such, the issue is waived and may not be revived on appeal."

The Second Circuit found similarly in United States v. Giovanelli, 464 F.3d 346, 351 (2d Cir. 2006). There, at "Giovanelli's request -- and with his approval -- [the district court] omitted the 'natural and probable' language from the jury charge." Both the government's proposed jury charge, and the district court's draft jury charge, included the 'natural and probable effect' phrase; only Giovanelli objected to the language." When, in response to the objection, the district court presented the parties with a revised draft jury charge that no longer included the "natural and probable effect" language, defense counsel acknowledged that she was "happy about [that particular omission]." The Second Circuit found this claim was waived, as there was "'approval or invitation" of the omission." Id.

In United States v. Swanson, 572 F.2d 523, 528 (5th Cir. 1978), defendant claimed on appeal that the district court erred by failing to *sua sponte* submit the issue of insanity to the jury. Defendant had previously withdrawn that defense during trial. Id. The Fifth Circuit found that this issue had been waived. Id. Due to defendant's "failure to object and the earlier withdrawal of the insanity defense, the trial judge was justified in concluding that [defendant] did not want the issue submitted to the jury." Id.

B. Circuits Which Have Adopted The Rule That Waiver Applies If A Defendant Proposed The Challenged Instruction, Even Absent Evidence Showing His Knowledge Of The Right Being Relinquished

1. Fourth Circuit

In United States v. Bennafield, 287 F.3d 320, 325 (4th Cir. 2002), defendant complained that the district court erred in its charge on the crime of simple possession. The Fourth Circuit found waiver due simply to the source of that instruction, writing that "[w]e need not address whether the instruction constituted error, however, because any error was clearly invited by Bennafield, who specifically requested the jury instruction of which he now complains." See also United States v. Hale, 857 F.3d 158, 170 (4th Cir. 2017)(same).

2. Sixth Circuit

In United States v. Demmler, 655 F.3d 451, 458 (6th Cir. 2011), defendant argued for the first time on appeal that the district court's instruction defining "corruptly" permitted the jury to find him guilty of conduct that is not illegal under the statutes. The Sixth Circuit found that the doctrine of invited error required waiver of this claim, as the "jury instruction that Demmler now challenges is the jury instruction that he, himself, requested." Id.

3. Seventh Circuit

The Seventh Circuit's approach aligns with these courts, but recent opinions have questioned its jury instruction waiver approach. In United States v. Natale, 719 F.3d 719, 729 (7th Cir. 2013), defendant challenged on appeal instructions related to false statement counts. In discussing whether the claim was waived, the Seventh Circuit noted that "[o]ur cases have strictly applied [waiver] to affirmative expressions of approval without examining whether the statements were a 'knowing and intentional decision' or resulted from 'negligently bypass[ing] a valid argument.'" Id. (citation omitted). The panel discussed the harshness of this approach, however, noting that a "defense attorney who has not objected to a proposed instruction will nearly always waive any potential objection, regardless of whether his 'no objection' resulted from a reasoned, strategic decision or from a

negligent failure to recognize the error.'" Id. at 730. See also United States v. Briseno, 843 F.3d 264, 274 (7th Cir. 2016)(noting that absent a calculated choice to stay silent by defendant, acceptance of jury instructions as waiver "can produce harsh results"); United States v. Ajayi, 808 F.3d 1113, 1121-22 (7th Cir. 2015)(declining to find waiver following defense counsel's "no objection" response to a pattern instruction).

4. Eighth Circuit

In United States v. Mariano, 729 F.3d 874, 881 (8th Cir. 2013), defendant sought to challenge the definition of the word "use" in an identity theft case. He had proposed the definition below. Id. The Eighth Circuit found waiver, as "a defendant who requests and receives a jury instruction may not challenge the giving of that instruction on appeal." Id. "We do not think *Olano* justifies a departure from our panel precedents that a defendant who requests and receives a jury instruction may not challenge the giving of that instruction on appeal."

5. Tenth Circuit

In United States v. Jereb, 882 F.3d 1325, 1341 (10th Cir. 2018), the Tenth Circuit found that the invited error doctrine precluded review of a jury instruction proposed by the defendant: "[b]ecause the defendant 'proffered the challenged instruction himself,' his attack on the sufficiency of that instruction was

barred." (citation omitted). See also United States v. Harris, 695 F.3d 1125, 1130 n.4 (10th Cir. 2012)("A defendant's failure to object to a district court's proposed jury instruction, or even the affirmative statement, 'No, Your Honor,' in response to the court's query 'Any objection?', is not the same as a defendant who proffers his or her own instruction, persuades the court to adopt it, and then later seeks to attack the sufficiency of that instruction.").

C. The Court Should Resolve This Direct Conflict, And Conclude That The Proper Approach Is That Waiver Should Only Apply If A Defendant Was Aware Of The Right He Was Relinquishing At The Time He Submitted The Challenged Jury Instruction

The approaches of these two groups of circuits are in direct conflict with one another. In the latter circuits, if defense counsel asked for the jury instruction, then it is deemed to be waived on appeal. In the former courts, waiver only applies if evidence exists that a defendant "considered submitting the . . . [instruction] to the jury, but then, for some tactical or other reason, rejected the idea," Perez, 116 F.3d at 845, and the "attorney knew of and considered the controlling law." Rosa, 399 F.3d at 292-93. This direct conflict warrants resolution by the Court, and the instant case is an appropriate one to address this issue.

As to the merits, the Court should resolve this conflict in favor of the circuits which give proper effect to the precedent of the Court regarding waiver.

Waiver is the "intentional relinquishment or abandonment of a known right." Olano, 507 U.S. at 733. It is not the intentional relinquishment of any and all rights, it is the intentional relinquishment of a *known* right. Id. Imposing waiver upon a criminal defendant can be a harsh measure, see Briseno, 843 F.3d at 274, and should only be done when the record sufficiently demonstrates that the defendant "affirmatively acted to relinquish a known right." Perez, 116 F.3d at 846. The automatic-waiver circuits ignore this crucial scienter requirement drawn from the precedent of the Court, see Johnson, 304 U.S. at 464 (waiver requires an "intentional relinquishment or abandonment of a known right or privilege"), and their rules imposing waiver upon a defendant absent any evidence that he or she was aware of the right being abandoned must be corrected.

Applying a proper application of the Court's waiver rule to the instant record, the Ninth Circuit improperly deviated from its own rule in imposing waiver upon Petitioner. Whether the basis for Petitioner's claim on appeal was "on the books" at the time of trial misses the point. The appropriate inquiry is whether Petitioner knew of the right at issue when he proposed the erroneous instructions as to these counts. Olano, and the Ninth Circuit in Perez, require a showing that Petitioner "considered submitting the . . . [instruction] to the jury, but then, for some tactical or other reason, rejected the idea." Id. at 845. Because there is no indication

such an analysis occurred in this case as to the challenged instructions, the Ninth Circuit's imposition of waiver in the instant case was error.

CONCLUSION

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: November 8, 2019

/s/ Gary Paul Burcham

GARY PAUL BURCHAM
BURCHAM & ZUGMAN
402 West Broadway, Suite 1130
San Diego, CA 92101
Telephone: (619) 699-5930
Attorney for Petitioner