No. 19-

IN THE
Supreme Court of the United States

WAYNE A.G. JAMES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

If an attorney mistakenly remains silent and fails to object to inadmissible evidence, a later challenge is forfeited and subject to review only for plain error. If, on the other hand, that same attorney knows of the grounds for the objection but decides not to object, any later challenge is waived and wholly unreviewable.

Not all situations fall clearly into the "forfeited" or "waived" categories, however. Suppose that a more active trial judge asks the attorney if there is any objection to the inadmissible evidence, and the attorney answers, "no." That attorney has affirmatively declined the opportunity to object, but there is no evidence establishing that the attorney was aware of the grounds for the objection. Some jurisdictions find later challenges subject to plain error, while here, the Third Circuit found a later waived and thus unreviewable.

The question presented is:

Whether an otherwise silent trial record showing only that an attorney declined to object to the admission of evidence establishes forfeiture or waiver of later challenges to that evidence.

PARTIES TO THE PROCEEDING

Wayne A.G. James, petitioner on review, was the defendant-appellant below. The United States of America, respondent on review, was the plaintiff-appellee below.

RELATED PROCEEDINGS

Decisions below in the U.S. Court of Appeals for the Third Circuit:

United States v. *James*, No. 19-1250 (3rd Cir.) (Apr. 3, 2020) (reported at 954 F.3d 628)(upon filing of amended panel opinion, denying review *en banc*) (Pet. App. 1a-20a)

United States v. *James*, No. 19-1250 (3rd Cir.) (Apr. 3, 2020) (reported at 955 F.3d 336)(amended panel opinion finding intentional relinquishment of known right waived challenge to evidence)(Pet. App. 21-22)

United States v. *James*, No. 19-1250 (3rd Cir.) (Jan 23, 2020) (reported at 948 F.3d 638)(panel opinion finding intentional relinquishment of known right waived challenge to evidence)(Pet. App. 23-42)

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IN THE

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A. _____

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PETITION FOR A WRIT OF CERTIORARI

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Wayne A.G. James respectfully petitions for a writ of certiorari to review the judgment of the Third Circuit in this case.

INTRODUCTION

During the 2009 to 2010 term, James served as a senator in the Virgin Islands Legislature. The Legislature maintained a fund that James and other senators could use to pay for Legislature-related expenses, such as the costs of running their offices, supplies, or for legislative initiatives. Senators sometimes received

checks from the fund for such items. The government alleged that Mr. James used a large portion of the checks issued to him for his personal expenses.

Mr. James obtained these checks by presenting invoices associated with work on a historical project. Before becoming a senator, James took an interest in the 1878 Fireburn, a revolt on St. Croix. The Danish National Archives ("the Archives") possesses historical documents about the event. In February 2008, James inquired about retrieving documents from the Archives and received a cost estimate. For a fee, which had to be pre-paid by wire transfer, the Archives would gather and provide copies of documents to individuals outside of Denmark. James hoped to use the records to eventually produce a movie.

Over a year later, after James's election to the Legislature, he requested funds for his Fireburn research project from the Legislature. From April 2009 through mid-October 2010, James obtained several checks by submitting invoices for purported translation and research work for the Fireburn project. The government asserted (1) that only a fraction of the funds James received were used to pay for the Danish records and translations, and (2) James used most of the funds for his personal benefit, including for his re-election campaign.

The District Court permitted the use of a chart as a demonstrative aid to accompany the case agent's testimony. The chart captured information from admitted exhibits, including dates of check requests, amounts requested and paid, and dates checks were cashed. James objected to the Government's effort to offer the chart into evidence under Federal Rule of Evidence 1006. The Court took the objection under advisement. The Court thereafter asked if James objected to use of the chart as a demonstrative aid and James replied "no objection." The Court thereafter instructed the jury that it should consider the chart as a guide for testimony, not as substantive evidence. The Government used the chart during the case agent's testimony to discuss the transactions, but it was not admitted into evidence.

On appeal, Mr. James challenged the use of the summary chart during the examination of two FBI witnesses. Mr. James argued that the charts were inadmissible under Fed.R.Evid. 1006. Mr James also argued that the use of the charts violated Fed.R.Evid. 403, 701 and 702.

In its opinion of January 23, 2020, a Third Circuit panel rejected Mr. James' arguments. The panel determined that the chart was not introduced as

substantive evidence under Fed.R.Evid. 1006, but was instead used as a demonstrative aid under Fed.R.Evid. 611. Pet. App. 33a. More importantly, the panel concluded that since counsel replied "no objection" when the trial court objected to use of the charts as a demonstrative aid, counsel has intentionally relinquished a known right, and thus any challenge was forever waived. Pet. App. 34a-35a.

Mr. James sought rehearing by the panel or alternatively by the Court sitting *en banc*. The panel ultimately granted the petition for rehearing and issued an amended opinion on April 3, 2020. That amended opinion provided some additional discussion, but reached the same conclusions as the prior panel opinion. The panel concluded that the chart was not introduced as substantive evidence under Fed.R.Evid. 1006, but was instead used as a demonstrative aid under Fed.R.Evid. 611. Pet. App. 11a. The panel again concluded that the two-word response "no objection" constituted an "intentional relinquishment or abandonment of a known right," and added additional citations to the record to show that trial counsel "was not blindsided" and because trial counsel objected to a second chart. Pet. App. 12a.

In light of the issuance of the amended panel, "the En Banc Court determined that no further action is required on the petition currently before it." Pet. App. 22a.

The Third Circuit's decision that the mere statement "no objection" to a trial court's inquiry conflicts with both prior Third Circuit precedent as well as precedent from other circuits. The decision creates uncertainty regarding application of the waiver and forfeiture doctrines. The Third Circuit decision is at odds with this Court's precedent as it is with that of many other courts. But yet, it constitutes binding precedent which must be followed, and will thereby create further conflict. The Court should grant the petition and reverse.

OPINIONS BELOW

The Third Circuit's amended opinion is reported at 955 F.3d 336 Pet. App. 1a-20a. The Third Circuit's denial of rehearing *en banc* is reported at 954 F.3d 628. Pet. App. 21-22. The Third Circuit's original opinion is reported at 948 F.3d 638. Pet. App. 23-42.

JURISDICTION

The Third Circuit entered judgment on April 3, 2019. Pet. App. 1a-20a.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed.R.Evid. 103 provides in pertinent part:

"**(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. …

(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Fed,R,Evid. 611(a) provides in pertinent part:

"The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: **(1)** make those procedures effective for determining the truth; **(2)** avoid wasting time; and **(3)** protect witnesses from harassment or undue embarrassment.

Fed.R.Evid. 1006 provides in pertinent part:

"The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court."

Fed.R.Crim.P. 52(b) provides in pertinent part:

"A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT

A. A. Factual Background

During the 2009 to 2010 term, Wayne James served as a senator in the Virgin Islands Legislature. (Pet. App. 3a. The Legislature maintained a fund that James and other senators could use to pay for Legislature-related expenses, such as the costs of running their offices, supplies, or for legislative initiatives. Senators sometimes received checks from the fund for such items. *Id.*

James obtained checks by presenting invoices purportedly associated with work on a historical project. Before becoming a senator, James took an interest in the 1878 Fireburn, a revolt on St. Croix. The Danish National Archives ("the Archives") possesses historical documents about the event. Pet. App. 3-4. In February 2008, James inquired about retrieving documents from the Archives and received a cost estimate. For a fee, which had to be pre-paid by wire transfer, the Archives would gather and provide copies of documents to individuals outside of Denmark. James hoped to use the records to eventually produce a movie. *Id.* at 4a.

Over a year later, after James's election to the Legislature, he requested funds for his Fireburn research project from the Legislature. At trial the government claims that from April 2009 through mid-October 2010, James obtained several checks by submitting false invoices for purported translation and research work for the Fireburn project. Pet. App. 4a. The government claimed that (a) only a fraction of the funds James received were used to pay for the Danish records and translations, and (b) James used most of the funds for his personal benefit, including for his re-election campaign. *Id.*

Law enforcement investigated this conduct and, on October 1, 2015, a grand jury returned an indictment charging James with two counts of wire fraud in violation of 18 U.S.C. § 1343 and one count of federal program embezzlement in violation of 18 U.S.C. § 666(a)(1)(A). *Id.*

At trial, the District Court permitted the use of a chart as a demonstrative aid to accompany the case agent's testimony. Pet. App. 5a. The chart captured information from admitted exhibits, including dates of check requests, amounts requested and paid, and dates checks were cashed. James objected to the Government's effort to offer the chart into evidence under Federal Rule of Evidence 1006. *Id.* The Court took the objection under advisement. The Court thereafter

asked if James objected to use of the chart as a demonstrative aid and James replied "no objection." Pet. App. 5a. The Court thereafter instructed the jury that it should consider the chart as a guide for testimony, not as substantive evidence. The Government used the chart during the case agent's testimony to discuss the transactions, but it was not admitted into evidence. *Id.*

B. Procedural History

On appeal, Mr. James challenged the use of the summary chart during the examination of two FBI witnesses. Mr. James argued that the charts were inadmissible under Fed.R.Evid. 1006. Mr James also argued that the use of the charts violated Fed.R.Evid. 403, 701 and 702.

In its opinion of January 23, 2020, a Third Circuit panel rejected Mr. James' arguments. The panel determined that the chart was not introduced as substantive evidence under Fed.R.Evid. 1006, but was instead used as a demonstrative aid under Fed.R.Evid. 611. Pet. App. 33a. More importantly, the panel concluded that since counsel replied "no objection" when the trial court objected to use of the charts as a demonstrative aid, counsel has intentionally relinquished a known right, and thus any challenge was forever waived. Pet. App. 34a-35a.

Mr. James sought rehearing by the panel or alternatively by the Court sitting *en banc*. The panel ultimately granted the petition for rehearing and issued an amended opinion on April 3, 2020. That amended opinion provided some additional discussion, but reached the same conclusions as the prior panel opinion.

The panel first concluded that the chart was not introduced as substantive evidence under Fed.R.Evid. 1006, but was instead used as a demonstrative aid under Fed.R.Evid. 611. Pet. App. 11a.

Second, the panel again concluded that the two-word response "no objection" constituted an "intentional relinquishment or abandonment of a known right." Pet. App. 12a. The panel noted that trial counsel "was not blindsided because the Government allowed him to review the chart in advance." *Id.* Counsel also did not object when the government asked to display the chart "in a large format" throughout the trial. *Id.* The panel also noted that trial counsel objected to a second chart. Pet. App. 12a.

The panel distinguished between the doctrines of waiver and forfeiture. Pet. App. 12a-13a. The former bars subsequent challenge, while the latter calls for review under the deferential "plain error" standard of review. The panel

noted that the waiver doctrine is "premised on the adversarial nature of our system of justice," and thus "when a party clearly chooses a particular path, it will be respected and generally not further reviewed." Pet. App. 13a. The waiver doctrine encourages presentation of relevant arguments to the trial court, binds the parties to their strategic choices, protects against unfair surprise and promotes judicial efficiency. Pet. App. 13a. The panel concluded that since "James's affirmative no-objection statement to the chart's demonstrative use" constituted his decision to intentionally relinquish[] a right, he…may not seek review of any alleged error flowing from such a waiver." Pet. App. 13a-14a.

In light of the issuance of the amended panel, "the En Banc Court determined that no further action is required on the petition currently before it." Pet. App. 22a.

REASONS FOR GRANTING THE PETITION

II. THE DECISION BELOW CREATES INTRA- AND INTER-CIRCUIT SPLITS REGARDING WHETHER A STATEMENT OF "NO OBJECTION" CONSTITUTES FORFEITURE OR WAIVER.

A. The Decision Below Hopelessly Confuses Third Circuit Precedent Distinguishing Between Forfeiture and Waiver

Traditionally, a reviewing court distinguishes forfeiture and waiver by contextually determining whether a party overlooked an unknown right or intentionally abandoned a known right. Was it a mistake, or an informed decision? Silence-or-utterance has not previously been seen as dispositive, and mistakes are sometimes articulated aloud on the record. Indeed, before the panel decision in this case, the Third Circuit's lead case involved a party that *affirmatively stated its non-objection three times*—and still the Court found from the context forfeiture rather than waiver. *Government of Virgin Islands v. Rosa*, 399 F.3d 283, 287, 291-93 (3d Cir. 2005). Earlier this year, the Third Circuit deemed a challenge to a mandatory-minimum sentence merely forfeited, even though the party affirmatively told the district court it was "bound by the statutory minimum." *United States v. Bruce*, 950 F.3d 173, 175 (3d Cir. 2020).

Rosa was the lead case in the Third Circuit on distinguishing forfeiture and waiver. It was cited but not discussed in the Panel opinion. "The crux of [that] appeal" was whether a lawyer's affirmative statement that he had "no objections" to proposed jury instructions—coupled with responses that he did not wish to modify the instructions and that the instructions could be given with

respect to his client—effected a waiver or merely a forfeiture. 399 F.3d at 290, 287.

The *Rosa* Court explained that forfeiture and waiver are distinguished by whether the party is aware of the right being given up:

> The threshold question in deciding whether there is appellate authority to grant relief under [Fed. R. Crim. P. 52(b)] is therefore whether the appellant who failed to object in the trial court to an error that violated his rights was aware of the relinquished or abandoned right. If he had that knowledge, yet intentionally chose to abandon the right, his failure to object will be deemed a "waiver" depriving him of the opportunity to obtain relief on appeal.

399 F.3d at 291 (citation omitted). That is doctrinally correct, because this Court has defined waiver as "the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993)(quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

The *Rosa* Court then examined the context and found no indication the lawyer "knew of and considered the controlling law, and despite being aware of [it], accepted the flawed instruction . . . ." 399 F.3d at 293. Instead, the lawyer was apparently "unaware of the correct rule of law, or, if aware of it, did not realize that the [] instruction misstated it." *Id.* at 291. Thus, the Court found

forfeiture and reviewed for plain error—despite the lawyer's affirmative statements that he had no objection to (and in fact agreed with) the jury instruction. *Id.* at 291, 293-97.

B. Several Circuits Reject the Argument that a Statement of "No Objection" Constitutes Waiver.

The fact that an attorney states "no objection" to a trial court's inquiry does not mandate a finding of waiver. Several circuit courts have determined that despite an affirmative statement that the attorney does not object, the claim is forfeited and not waived. *See, e.g., United States v. Arviso-Mata*, 442 F.3d 382, 384 (5th Cir. 2006) (party's affirmative statement "no problem with the PSR" did not waive challenge to Guidelines calculation because there was "no evidence here that counsel knew of the sentencing guidelines issue and that he consciously chose to forego it"); *United States v. Depue*, 912 F.3d 1227, 1232-34 (9th Cir. 2019) (party's affirmative statement that "the rest of [the PSR] appeared to be correct" did not waive challenge to Guidelines calculation because "record is devoid of any evidence that [defendant] knew of the errors he now asserts, much less that he intended to relinquish them"); *United States v. Zubia-Torres*, 550 F.3d 1202, 1204-07 (10th Cir. 2008) (party's affirmative statement that Guidelines

range "was correctly calculated" did not waive challenge to Guidelines calculation because "[t]here is nothing in the record to suggest that counsel actually identified the issue [raised on appeal] and either invited the court to make the particular error or abandoned any claim" as to it).

Here, the Third Circuit appears to find something talismanic about the statement that trial counsel had "no objection" to the evidence in question. This bald statement, however, provides no evidence of awareness of an objection and an intentional relinquishment of that objection.

C. In other contexts, there is a circuit split regarding whether the failure to object subjects a claim to waiver or forfeiture.

Like the Third Circuit, the Fifth and Sixth Circuits have held that the failure to object to closure affirmatively waives the defendant's right to a public trial. *See United States v. Hitt*, 473 F.3d 146, 155 (5th Cir. 2006) ("Where a defendant, with knowledge of the closure of the courtroom, fails to object, that defendant waives his right to a public trial."). *Johnson v. Sh*erry, 586 F.3d 439, 444 (6th Cir. 2009) ("While we agree that the right to a public trial is an important structural right, it is also one that can be waived when a defendant fails to object to the closure of the courtroom."). At least ten state courts of last resort have

adopted similar rules that failure to object affirmatively waives the defendant's Sixth Amendment right to public trial. *See Wright v. State*, 340 So.2d 74, 79-80 (Ala. 1976); *People v. Bradford*, 929 P.2d 544, 570 (Cal. 1997); R*obinson v. State*, 976 A.2d 1072, 1082 (Md. 2009); *Commonwealth v. Morganti*, 4 N.E.3d 241, 247 (Mass. 2014); *People v. Alvarez*, 979 N.E.2d 1173, 1176 (N.Y. 2012); *State v. Beachum*, 342 S.E.2d 597, 598 (S.C. 1986), *overruled on other grounds by State v. Gentry*, 610 S.E.2d 494 (S.C. 2005); *Peyronel v. State*, 465 S.W.3d 650, 652-654 (Tex. Crim. App. 2015); *State v. Butterfield*, 784 P.2d 153, 157 (Utah 1989); *State v. Pinno*, 850 N.W.2d 207, 224-226 (Wis. 2014).

On the other side of the split, the First, Second, Seventh, Eighth, and Ninth Circuits have all held that the failure to object to the closure of a trial forfeits a defendant's claimed violation of the Sixth Amendment right to a public trial, but does not waive it. *See United States v. Espinal-Almeida*, 699 F.3d 588, 600 (1st Cir. 2012); *United States v. Gomez*, 705 F.3d 68, 75 (2d Cir. 2013); *Walton v. Brilley*, 361 F.3d 431, 434 (7th Cir. 2014); *Charboneau v. United States,* 702 F.3d 1132, 1138 (8th Cir. 2013); *United States v. Rivera*, 682 F.3d 1223, 1232 (9th Cir. 2012). The highest courts of six states and the District of Columbia have likewise found that the failure to object constitutes forfeiture. *See Barrows v. United States,*

15 A.3d 673, 677 (D.C. 2011); *People v. Vaughn*, 821 N.W.2d 288, 302 (Mich. 2012); *State v. Tapson*, 41 P.3d 305, 310 (Mont. 2011); *State v. Addai*, 778 N.W.2d 555, 570 (N.D. 2010); *State v. Bethel*, 854 N.E.2d 150, 170 (Ohio 2006); *State v. Bauer*, 851 N.W.2d 711, 716 (S.D. 2014); *State v. Wise*, 288 P.3d 1113, 1120 (Wash. 2012). In these jurisdictions, forfeited closure claims are not deemed waived and are at a minimum subject to review for plain error. *See* Fed. R. Crim. P. 52(b); *see also, e.g., Espinal-Almeida*, 699 F.3d at 600 ("Because none of the defendants objected to the procedure utilized by the court, our review is for plain error."); *Bauer*, 851 N.W.2d at 716 ("Because Bauer's trial counsel did not object to the courtroom closure, we review the trial court's actions for plain error."); *Vaughn*, 821 N.W.2d at 308 ("As a forfeited claim of constitutional error, it can be redressed if the defendant shows that the court's exclusion of members of the public during voir dire was a plain error") (internal quotation marks omitted); *Barrows*, 15 A.3d at 677 (D.C. 2011) ("We proceed therefore to review appellant's claim under the strictures of the plain-error standard."). *But see Wise*, 288 P.3d at 1121 ("a violation of [the] public trial right is per se prejudicial, even where the defendant failed to object at trial").

Many of these courts emphasize the important distinction *Olano* drew between "the failure to assert a right - forfeiture - [and] the affirmative waiver of a right." *Vaughn*, 821 N.W.2d at 302. These courts have explained that inadvertent failure to object at trial does not evince an "intentional relinquishment or abandonment of a known right." *Ibid.* (internal quotation marks omitted). Instead, the "failure to assert a constitutional right ordinarily constitutes a forfeiture of that right." *Id.* at 297; *accord Gomez*, 705 F.3d at 75. These courts have rejected reliance on "dictum" in *Peretz* that "conflates the concepts of waiver and forfeiture." *Vaughn*, 821 N.W.2d at 302.

The Seventh Circuit has explained that Supreme Court precedent "does not support" a waiver rule. *Walton*, 361 F.3d at 433. Judge Bauer, joined by Judges Posner and Easterbrook, concluded that a state prisoner was entitled to federal habeas relief because the closure of his trial violated the Sixth Amendment, although he had not made a contemporaneous objection. The court reasoned that the "presumption of waiver from a silent record is impermissible" because "[t]he Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial." *Id.* at 433 (*quoting*

Schneckloth v. Bustamonte, 412 U.S. 218, 241-242 (1973)). The Seventh Circuit emphasized that the public trial right, like other rights for which this Court has refused to infer waiver from silence, "concerns the right to a fair trial." *Id.* at 434. Public trials serve vital interests in "prevent[ing] perjury" and "unjust condemnation," and "keep the accused's 'triers keenly alive to a sense of their responsibility and to the importance of their functions.' " *Id.* at 432 (*quoting Waller*, 467 U.S. at 46).

II. THE QUESTION PRESENTED IS OF SUBSTANTIAL IMPORTANCE.

The question presented is in dire need of this Court's review. An appellate court's finding that a claim has been waived may forever bar further view of that claim – a decision that may be the difference between freedom and a lengthy prison sentence. Finding waiver merely from the bald statement of "no objection," without evidence of knowing and intentional relinquishment of an objection punishes unknowing defendants whose failure to object was based on ignorance, and not strategy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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