

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMERL M. WORTHAM,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether a defendant waives appellate review of his Sixth Amendment right to a unanimous verdict when the government and defense counsel jointly submit a jury instruction that does not require the jury to agree on an essential element of the offense.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jamerl M. Wortham respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 3, 2021.

OPINION BELOW

The Eighth Circuit's judgment affirming Mr. Wortham's conviction and sentence is reported at *United States v. Wortham*, 990 F.3d 586 (8th Cir. 2021), and is included in the Appendix along with copies of the orders denying rehearing.

JURISDICTION

On March 3, 2021, the Court of Appeals affirmed Mr. Wortham's appeal from his conviction and sentence, and subsequently denied the timely petition for rehearing by the panel on April 13, 2021, and rehearing en banc on May 12, 2021. In accordance with Supreme Court Rule 13.3, this petition for writ of certiorari is filed within ninety days of the date on which the Court of Appeals entered its final order. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254, 28 U.S.C. § 2253 and Sup. Ct. R. 13.3 and 13.5.

CONSTITUTIONAL PROVISION INVOKED

U.S. CONST. amend. VI.

STATEMENT OF THE CASE

District Court Proceedings

Following a jury trial, Mr. Wortham was convicted of aiding and abetting distribution of phencyclidine [PCP] in violation of 21 U.S.C. § 841(a)(1)(b)(1)(C) and using a short-barreled shotgun in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A), (B)(i). *United States v. Wortham*, 990 F.3d 586, 588 (8th Cir. 2018). Prior to trial the parties jointly submitted an instruction for the PCP distribution offense (Appendix D) that only required the jury to find that PCP was distributed “to another.” *Id.* at 589. The evidence at trial, however, established that PCP was involuntarily distributed by Mr. Wortham’s codefendant to two separate victims. The district court also failed to instruct the jury that its verdict had to be unanimous.

Appeal to the Eighth Circuit

On appeal before the Eighth Circuit, the court affirmed Mr. Wortham’s conviction and sentence. The court declined to review whether the jury instruction violated Mr. Wortham’s Sixth Amendment right to a unanimous verdict because defense counsel and the government jointly proposed the instruction at issue. *Id.* The court held that when a defendant specifically requests a particular instruction, he cannot later assert on appeal absent an objection that the instruction was given in error. *Id.* (citing *United States v. Tillman*, 765 F.3d 831, 836 (8th Cir. 2014)). Because counsel for Mr. Wortham did not object to the tendered jury instruction before the district court, the court declined to review his challenge to the

instruction.

REASONS FOR GRANTING THE WRIT

The judgment of the Eighth Circuit Court of Appeals has decided an important question of federal law in a way that significantly departs from the criteria for waiver this Court enumerated in *United States v. Olano*, 507 U.S. 725 (1993).

Waiver is the “intentional relinquishment or abandonment of a known right.” *Id.* at 733. *Olano* instructs that whether a particular right is waivable depends on the right at stake, whether the defendant must participate personally in the waiver, whether certain procedures are required for waiver, and whether the defendant’s choice must be particularly informed or voluntary. *Id.* (citing 2 W. LaFave & J. Israel, Criminal Procedure § 11.6 (1984)).

A review of this criteria demonstrates the Eighth Circuit’s holding below cannot be squared with *Olano*. The right at stake, the Sixth Amendment right to a unanimous jury verdict, is paramount. Just last year, the Supreme Court held that the Sixth Amendment right to a unanimous verdict is “fundamental to the American scheme of justice” and applies to the States under the Fourteenth Amendment. *Ramos v. Louisiana*, 140 S.Ct. 1390, 1397 (2020). This Court’s holding in *Ramos* follows other caselaw that holds the Sixth Amendment right to a unanimous jury verdict is non-waivable. *See, e.g. United States v. Eagle Elk*, 820 F.2d 959, 961 (8th Cir. 1987).

Mr. Wortham did not personally participate in submitting the joint jury

instructions, which were filed unilaterally by the government. The government filed a “Notice of Instruction Conference” but that title is misleading to the extent it implies an actual hearing or meeting that involved Mr. Wortham, who was detained before trial. Mr. Wortham never attended the conference between the parties and had no opportunity to participate in the process of submitting joint jury instructions to the district court. This practice is commonplace as a defendant has no right to be present at a proceeding that “involves only a conference or hearing on a question of law.” Fed. R. Crim. P. 43(b)(3).

The Eighth Circuit prescribes no procedures that must be followed in order to find a defendant has waived his Sixth Amendment right to jury unanimity. The only requirement pertains to defendant’s counsel. Once defendant’s counsel (or the government in the case of a jointly submitted instruction) submits a jury instruction and fails to object to it at trial, the defendant waives the right to seek appellate review of that jury instruction, whether the defendant knows it or not.

The Eighth Circuit does not even require that defendant’s counsel understand or be aware of the issue being waived. *But see United States v. Hugs*, 384 F.3d 762, 766-67 (9th Cir. 2004) (declining to find waiver because record did not establish defense counsel was aware of erroneous jury instruction); *United States v. Barrow*, 118 F.3d 482, 491 (6th Cir. 1997) (declining to find waiver pertaining to jointly submitted instructions because “government was as much at fault for inviting the error as the defendant since the parties stipulated to the same instructions”). The Eight Circuit’s “strict liability” approach to applying waiver to

jointly submitting jury instructions is inconsistent with the criteria this Court formulated in *Olano*.

Because the district court's procedure for filing the joint jury instructions pertained exclusively to the attorneys, the record here cannot show Mr. Wortham's waiver of his right to a unanimous verdict was particularly informed or voluntary.

Each *Olano* factor refutes a finding that Mr. Wortham waived his Sixth Amendment right to a unanimous jury verdict. Based on *Olano*, this record cannot establish Mr. Wortham intentionally relinquished or abandoned his Sixth Amendment right to a unanimous jury verdict. Based on the importance of the right at issue, this Court should review the lower court decision to rectify the Eighth Circuit's failure to adhere to *Olano*.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Wortham respectfully requests this Court grant his petition for certiorari.

Respectfully submitted,

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APPENDIX

Appendix A - Judgment of the Eighth Circuit Court of Appeals

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