No. _____

In the Supreme Court of the United States

JACOB HILBERT,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner appeared for trial along with counsel. The trial court stated that defense counsel had represented that defense counsel wanted a bench trial, which defense counsel confirmed. The matter proceeded to bench trial. Midway through the bench trial, the prosecutor asked the trial court if a written waiver of the right to a jury trial had been filed. Defense counsel indicated he would file a written waiver. No written waiver was filed. Petitioner was convicted. On appeal, the Missouri Supreme Court held that a constitutionally valid waiver of the right to jury trial did not require any affirmative action of the defendant, as long as the record established a knowing, intelligent, and valid waiver.

The question presented is: must a trial court obtain some personal acknowledgement from a criminal defendant that the defendant has waived the defendant's right to a jury trial for a purported waiver to be constitutionally sufficient?

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *State of Missouri v. Hilbert,* SC99747, Supreme Court of Missouri. Judgment entered March 21, 2023. Motion for Rehearing overruled May 2, 2023.
- *State of Missouri v. Hilbert,* EC109608, Missouri Court of Appeals, Eastern District. Judgment entered June 28, 2022.
- *State of Missouri v. Hilbert*, 1822-CR02383-01, 21st Judicial District, City of St. Louis, Missouri. Judgment entered April 12, 2021.

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PETITION FOR WRIT OF CERTIORARI

Jacob Hilbert, an inmate currently incarcerated at Eastern Reception Diagnostic Correctional Center in Bonne Terre, Missouri, by and through counsel, respectfully petitions this Court for a writ of certiorari to review the judgment of the Missouri Supreme Court.

OPINIONS BELOW

The opinion of the Missouri Supreme Court (collected in Pet. App. 1 to Pet. App. 15) is reported at 663 S.W.3d 462 (Mo. 2023). An earlier related opinion of the Missouri Court of Appeals, Eastern District (collected in Pet. App. 16 to Pet. App. 40) is unreported and is available at 2022 WL 2308663.

JURISDICTION

The Missouri Supreme Court entered its judgment on March 21, 2023. Pet. App. 1. Hilbert timely filed a motion for rehearing, which was denied on May 2, 2023. Pet. App. 40. On July 24, 2023, Justice Kavanagh extended the time to file this petition to September 29, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and

> district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

The Fourteenth Amendment to United States Constitution, provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, sec. 1.

STATEMENT OF THE CASE

In September 2018, Jacob Hilbert was charged under Missouri law with two counts of statutory sodomy in the first degree and one count of child molestation in the first degree. Pet. App. 1-2. The case was called for jury trial in January 2020. Pet. App. 2. During jury selection, the trial court ruled that the

jury panel was "blown," and the panel was released without being sworn in. *Id*. The trial court set a new date for a jury trial.

Several weeks later, a docket entry was made that indicated that the matter was set for bench trial. *Id*. There was no document or record associated with the docket entry. *Id.*

At a pretrial hearing, in Hilbert's presence, the following exchange occurred:

> THE COURT: So I think, Mr. Goulet [i.e. defense counsel], you've represented that you're wanting a bench trial instead of a jury trial; correct?
>
> [DEFENSE COUNSEL]: That is correct, your Honor.
>
> THE COURT: I think today we're just here talking about -- so we will do it that way starting tomorrow – talking about any motions in limine that either side has and anything else you guys have for me.

Pet. App. 2.

No further discussion of the bench trial occurred on February 24, 2020. On February 25, 2020, the bench trial began. Pet. App. 3.

At the close of State's evidence, the following exchange occurred:

[COUNSEL FOR THE STATE]: Your Honor, I don't know. Was there ever a written waiver of a jury trial filed for this? Because I want to make sure that's filed for the record.

[DEFENSE COUNSEL]: I'll do it.

THE COURT: There wasn't, but we will do that.

[DEFENSE COUNSEL]: I think we went on the record and said it. We were on the record and said it.

THE COURT: Yeah.

Pet. App. 3-4.

No written waiver was ever filed.

The trial court found Hilbert guilty of all counts. Pet. App. 4. At sentencing, Hilbert's mother made a statement, in Hilbert's presence, that included the following:

> The stress was a major influence in the decision to go with the bench trial. Jake's trial was moved several times, and each time, it took a toll on Jake and our family. The first, due to a death in our attorney's family. The second trial was started, but had a hung jury. The whole process was extremely debilitating, and we were all concerned that Jake could get a fair trial, as it seemed a huge pool of the jury had experiences that may lead to a conflict. This led us to ask whether a bench trial should

> be considered. After some research, our attorney advised that a judge would know what proof beyond a reasonable doubt is better than anybody, and Jake decided to go that route.

Pet. App. 4-5.

After the trial court pronounced sentence, Hilbert was questioned about the assistance of counsel:

> [The Court]: Did [defense counsel] explain your rights in a jury trial rather than in a bench trial?
>
> [Hilbert]: I decline to answer.
>
> [The Court]: Was it your decision to go to trial?
>
> [Hilbert]: I decline to answer.

Pet. App. 5.

Hilbert appealed the judgment. Pet. App. 5. The Missouri Court of Appeals, with one justice dissenting, reversed Hilbert's convictions. Pet. App. 16. The Court of Appeals held that a trial court commits evident, obvious, and clear error by proceeding to a bench trial in the absence of any specific indication that the defendant has himself knowingly, voluntarily, and intelligently waived his right to a jury trial. Pet. App. 22. The Missouri Court of Appeals held that the record established nothing more than that defense counsel wanted a bench trial, defense counsel intended to file a written jury waiver, Hilbert's mother had alleged knowledge of the decision to proceed to a bench trial, and that Hilbert had refused to answer any

questions. Pet. App. 24-25. The Missouri Court of Appeals concluded that nothing in the record "remotely constitutes" a personal communication by Hilbert to the trial court that Hilbert had chosen to relinquish the right to a jury trial. Pet. App. 25.

The Missouri Supreme Court granted transfer and affirmed the conviction. Pet. App. 5, n.4. Hilbert argued that without any affirmative action by him, personally, any purported waiver was not constitutionally sufficient. Pet. App. 10. The Missouri Supreme Court held that while the best practice would be for the trial court to personally question a defendant, a valid waiver can occur without any questioning on the record, if the record otherwise establishes that a defendant knowingly, voluntarily, and intelligently has waived the defendant's right to a jury trial and that the record here was sufficient. Pet. App. 7, 10.

REASONS FOR GRANTING THE WRIT

A. This Court has indicated that certain fundamental rights, including the right to a jury trial, must be waived personally by the defendant.

> The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.

Duncan v. Louisiana, 391 U.S. 145, 151 (1968). Jury trials came to the American along with the first English colonists and were jealously guarded by them. *Id.* at 152. Deprivation of the right to a jury trial was amongst the complaints of the First Congress of the American Colonies, and included in the objections leveled against the King in the Declaration of Independence. *Id.* To ensure the inviolability of the right to a jury trial in a criminal case, the Sixth Amendment to the Constitution of the United States makes clear that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed[.]" U.S. Const. amend. VI. The right to a trial by jury is extended to state criminal trial by way of the Fourteenth Amendment. *See e.g., Ramos v. Louisiana*, 206 L. Ed. 2d 583, 140 S. Ct. 1390, 1397 (2020).

While the right to a jury trial in a criminal proceeding is textually plain, jury trials are not mandatory. This Court has held that the right to a jury trial can be waived. *Patton v. United States*, 281 U.S. 276, 298 (1930). This Court has also made clear that like the right to enter a plea of guilty, testify on one's own behalf, or take an appeal, only the defendant can make the decision to waive a jury trial. These decisions cannot be made by the attorney. *McCoy v. Louisiana*, 200 L. Ed. 2d 821, 138 S. Ct. 1500, 1508 (2018).

As a general rule, this Court has held that what constitutes a valid waiver depends on the nature of the right at issue, and that some rights require the defendant "personally participate in the waiver," or other specific procedures, to ensure a valid waiver.

New York v. Hill, 528 U.S. 110, 114 (2000). This Court has also noted that there are some rights that can be waived by the attorney, some rights that can only be waived with the defendant's consent, and some circumstances where the defendant's consent to the waiver must be "explicit and on the record[.]" *Gonzalez v. United States*, 553 U.S. 242, 248 (2008).

Finally, this Court has noted that the right to a jury trial is one of the basic rights for which waiver requires public acknowledgement by the defendant. *Taylor v. Illinois*, 484 U.S. 400, 418, n.24 (1988). Despite that statement, this Court has never explicitly held that a valid waiver requires some form of personal affirmation by the defendant.

B. There is a split as to whether the defendant must personally waive the right to a jury trial.

In the absence of this Court's direction, different conclusions have proliferated.

Some states have permitted an attorney to convey the defendant's waiver without any express action by the defendant. The Supreme Court of Louisiana has indicated that it is preferrable, but not necessary, that the defendant waive the right to a jury trial personally, and that the defense attorney may waive the right to a jury trial. *State v. Pierre*, 2002-2665 (La. 3/28/03), 842 So. 2d 321, 322. The Supreme Court of North Dakota appears to have held that counsel can expressly waive the defendant's right to a jury trial, provided that it is clear that the attorney is waiving

on behalf of the defendant. *State v. Gates*, 496 N.W.2d 553, 555, n.2 (N.D. 1993).

However, other state courts have concluded that a constitutionally valid waiver requires some form of personal assent by the defendant. The Alaska Supreme Court has held that that the United States Constitution requires that the defendant be personally addressed by the trial court, and that the failure to do so is "*per se*" error. *Walker v. State*, 578 P.2d 1388, 1390 (Alaska 1978). The California Supreme Court has held that where the right to a jury trial is guaranteed by the federal Constitution, an express waiver on the record by the defendant is required, "even in cases in which the circumstances make it apparent that all involved—the trial court, the prosecutor, defense counsel, and the defendant—assumed that the defendant had waived or intended to waive the right to a jury trial." *People v. French*, 43 Cal.4th 36, 178 P.3d 1100, 1107 (2008). The Tennessee appellate court, relying on *Taylor v. Illinois,* 484 U.S. 400 (1988), has held that a judge cannot assume that an attorney who waives a jury necessarily invokes the wishes of the client, and that a valid waiver requires either a written waiver signed by the defendant, or that the defendant be advised by the trial court of the defendant's right to a jury trial and then "*personally* waive the right in open court for the record." *State v. Ellis*, 953 S.W.2d 216, 221–22 (Tenn. Crim. App. 1997) (emphasis in original).

Several other states have reached a similar result via a different route; requiring strict compliance with a state court rule or statute requiring a personal waiver. Arizona, pursuant to a state court rule,

requires either a written waiver or an oral waiver in open court, and case law requires the defendant be addressed personally by the trial court. *State v. MacHardy*, 254 Ariz. 231, 521 P.3d 613, 620 (Ct. App. 2022). In Florida, a state court rule requires that a written waiver be filed, but even when the written waiver is not filed, a valid oral waiver can exist where there is an "appropriate inquiry" that focuses the defendant's attention on the value of a jury trial, the likely consequences of a waiver, and that shows the waiver is "free and knowing, voluntary and intelligent." *Torres v. State*, 43 So. 3d 831, 833 (Fla. Dist. Ct. App. 2010). Mere oral affirmation to counsel's waiver is insufficient. *Id*. at 834. The Minnesota Supreme Court has held that a state court rule requiring a personal waiver, in writing or in open court, must be strictly complied with. *State v. Kuhlmann*, 806 N.W.2d 844, 848-849. (Minn. 2011). The Minnesota Supreme Court expressly held that a valid waiver would not occur when counsel expressed the waiver in the defendant's presence and the defendant remained silent. *Id.* at n.4. Similarly, the Montana Supreme Court has held that strict compliance with a state statute requiring a written waiver is necessary, and that the statute does not permit review of the "totality of the circumstances" to determine if there had been a knowing and voluntary waiver. *State v. Dahlin*, 1998 MT 113, ¶ 21, 961 P.2d 1247, 1250.

Other states have made clear that demanding strict compliance with a rule or statute requiring a personal waiver is the only way to ensure that the fundamental constitutional right to a jury trial is maintained. The Colorado Supreme Court has held that strict interpretation of a state court rule

providing for written or oral waivers is necessary to preserve the fundamental right of trial by jury. *Rice v. People*, 565 P.2d 940, 941 (1977). This requirement avoids any risk of misrepresentation and alleviates the difficult task of an appellate court attempting to determine the meaning of the defendant's silence. *Id.* at 942. The Hawai'i Supreme Court has held that a state court rule requiring a written or oral waiver.

> requires that the waiver of the right to jury trial be either in writing signed by the defendant or in open court from the mouth of the defendant. … [A]ny less, it is impossible for the trial court to discharge its duty to ensure that the defendant's waiver of this important constitutional right is made in a voluntary and knowing manner.

State v. Young, 73 Haw. 217, 221, 830 P.2d 512, 515 (1992).

Amongst the federal circuits, the issue is muddled. Federal Rule 23(a) states that a waiver of the right to a jury trial must be in writing, but it is unclear as to whether the defendant has to personally sign the waiver. Fed R. Crim. Pro. 23(a). Different circuits have reached different conclusions about what level of personal assent is necessary, when the defendant does not personally sign the written waiver.

The Fourth Circuit has held that a motion filed by counsel stating that the defendant requests that the trial court permit him to waive trial by jury, even if not signed by the defendant, is sufficient and the

constitution does not require the trial court to interrogate the defendant. *United States v. Khan*, 461 F.3d 477, 492 (4th Cir. 2006), as amended (Sept. 7, 2006). The necessary implication of the holdings of the Fourth Circuit is that no personal waiver of the right to a jury trial is required, and that it can be accomplished by counsel.

On the other hand, the Tenth Circuit has held that where there is no written waiver compliant with Rule 23(a), and nothing in the record indicating that the defendant "personally understood her right and knowingly waived it[,]" then there was no valid waiver. *United States v. Robertson*, 45 F.3d 1423, 1432-1433 (10th Cir. 1995). The Tenth Circuit further noted that whether a defendant has personally waived the right to a jury trial cannot be based on "conjecture and speculation." *Id.* at 1433.

The Ninth Circuit has held that a written waiver or an oral waiver made by the defendant personally is necessary to waive the right to jury trial. *United States v. Saadya*, 750 F.2d 1419, 1420 (9th Cir. 1985). The Ninth Circuit has held that the written waiver must be signed by the defendant. *United States v. Laney*, 881 F.3d 1100, 1108 (9th Cir. 2018). The written waiver is presumed valid, but an oral waiver does not carry the same presumption. *United States v. Shorty*, 741 F.3d 961, 966 (9th Cir. 2013).

The Seventh Circuit appears to have held that as long as some form of personal waiver by the defendant appears on the record, there is a "valid" waiver, though a defendant can still challenge whether the waiver was knowing, intelligent, and voluntarily

made. *United States v. Williams*, 559 F.3d 607, 610 (7th Cir. 2009). However, where there is no indication that the defendant personally waived the right to a jury trial or that defense counsel discussed the waiver with the defendant, then there is insufficient evidence to determine that the defendant validly waived the right. *United States v. Robinson*, 8 F.3d 418, 425 (7th Cir. 1993).

In summary, some jurisdictions permit an attorney to waive the right to a jury trial on behalf of the defendant. Other jurisdictions have concluded that the Constitution requires some form of personal waiver by the defendant to appear on the record. Some jurisdictions have held that a court rule or statute requiring a written or oral waiver must strictly complied with so as avoid any risk of running afoul of the Constitution. Missouri takes yet a different route.

C. The Missouri Supreme Court ruling is an outlier.

By way of a Missouri court rule, a defendant may waive his or her right to a jury trial, provided the waiver is made in open court and entered of record. Mo. Rule Crim. Pro. 27.01(b). However, the "Show Me" state does not require a defendant to demonstrate personally that he or she is waiving the right to a jury trial. The Missouri Supreme Court has held that while it is "best practice" for the trial court to personally question the defendant, a valid waiver can still occur without any inquiry of the defendant. *State v. Baxter*, 204 S.W.3d 650, 655 (Mo. 2006).

As noted above, the initial inquiry made by the trial court in this case did not ask if Hilbert was waiving his right to a jury, but instead asked if defense counsel wanted a bench trial. Pet. App. 2. The mid-trial inquiry similarly did not suggest that Hilbert would sign a written waiver, but that defense counsel would file one. Pet. App. 3-4. Yet, the Missouri Supreme Court found that this was a valid waiver. Pet. App. 10.

This means that the Missouri Supreme Court has held that not only is it unnecessary for a defendant to assent to a purported waiver entered by an attorney, but that the attorney need not even claim they are waiving on the defendant's behalf. Even North Dakota, which appears to permit a valid waiver through counsel, requires that counsel either file written waiver explicitly stating that the defendant is waiving the right to a jury trial, or orally stating that the defendant is waiving such right. *Gates*, 496 N.W.2d at 555. By requiring nothing similar, Missouri permits a valid waiver based on nothing more than the attorney's request.

The Missouri Supreme Court rationalized this holding by pointing to several things in the record, claiming that these supported a finding that the Hilbert had knowingly, intelligently, and voluntarily waived his right to a jury trial. However, for each factor the Missouri Supreme Court relied upon, another court has examined a similar factor and found it insufficient.

The Missouri Supreme Court noted that Hilbert was present when trial counsel waived the jury trial

and did not object. Pet. App. 10. Several courts have found that similar circumstances were insufficient to establish a valid waiver.

The Arizona Court of Appeals has held that the defendant's presence when his attorney waived his right to a jury trial, even with the defendant's failure to object, was insufficient to establish a knowingly, intelligent, and voluntary waiver of the right to a jury trial. *State v. Baker*, 217 Ariz. 118, 120, 170 P.3d 727, 729 (Ct. App. 2007). The Connecticut Supreme Court has held that a defendant's silence in the presence of his attorney's waiver is too ambiguous to support an inference that the defendant has waived such a fundamental right. *State v. Gore*, 288 Conn. 770, 782, 955 A.2d 1, 9 (Conn. 2008). The Hawai'i Supreme Court specifically overruled prior case law that found a valid waiver when the attorney waived a jury trial on the defendant's behalf, in the defendant's presence. *Young*, 830 P.2d at 514-515. The North Dakota Supreme Court specifically found that a defendant's waiver cannot be inferred from the circumstances of a particular case. *Gates*, 496 N.W.2d at 554. These states conclusively held that silence could not indicate assent, while the Missouri Supreme Court treats silence in the opposite manner.

The Missouri Supreme Court also noted that Hilbert had witnessed the prior uncompleted jury selection, concluding that this "is not a situation in which Hilbert may not have realized, until too late, that his case was proceeding without a jury." Pet. App. 12. The Indiana Supreme Court has rejected a similar argument, finding that even though a defendant had gone through a jury trial on some of the crimes

charged in the indictment, the attorney's waiver of a jury trial on other charges was insufficient. *Horton v. State*, 51 N.E.3d 1154, 1159 (Ind. 2016). The Indiana Supreme Court refused to create an exception to a statutory requirement of a personal waiver on the record, even where the defendants' prior experience with a jury trial indicated he was probably aware of the right the attorney had waived on his behalf. *Id.* The Ninth Circuit has held that prior experience with the criminal justice system does not establish the validity of a waiver of the right to a jury trial, especially where there is no evidence that on the prior occasion, the defendant was instructed about his right to a jury trial. *Shorty*, 741 F.3d at 968. And as noted above, the California Supreme Court has required a personal waiver, even when the circumstances indicate that the attorneys, the court, and the defendant all assumed that the defendant had waived or intended to waive the right to a jury trial. *French*, 178 P.3d at 1107.

The Missouri Supreme Court also relied on certain post-trial exchanges. Pet. App. 10. The Missouri Supreme Court found that Hilbert's refusal to answer questions about the assistance of counsel weighed against him, since he could have expressed a complaint at that time. Pet. App. 11. Notably, the Missouri Court of Appeals found that no information could be gleaned from this exchange, since there was no response. Pet. App. 25. The Missouri Supreme Court also relied on the statement made by Hilbert's mother for some additional support for the notion that Hilbert knew of and discussed his right to a jury trial with his attorney. Pet. App. 12. Again, the Missouri Court of Appeals interpreted the statement

differently, concluding that the statement demonstrated nothing more than alleged knowledge of the decision. Pet. App. 25. The fact that different courts could find different meaning in the same statements would appear to militate against using the statements to demonstrate a knowing, intelligent, and voluntary waiver. Regardless of the ambiguity of the post-trial exchanges, at least one court has specifically stated that post-trial statements cannot be used to establish a valid waiver of the right to a jury trial. *Laney*, 881 F.3d at 1108 (9th Cir. 2018).

Finally, the Missouri Supreme Court relied on the fact that Hilbert had not objected at the time of the purported waiver, raised the issue in a motion for a new trial, or argued on appeal that his waiver was not knowingly, intelligent, or voluntarily made. Pet. App. 11. Again, other states have dealt with allegations, raised for the first time on appeal, that a purported waiver was insufficient because it was not made personally by the defendant, but unlike Missouri, those courts concluded that additional evidence was necessary.

The Kentucky Supreme Court dealt with a similar situation in *Jackson v. Commonwealth*, 113 S.W.3d 128 (Ky. 2003), as modified (Sept. 11, 2003). There, the defendant had been informed about his right to a trial by jury at arraignment, and then stood by while, on two occasions, his attorney had requested a bench trial. Following his conviction, the defendant had sent letter to the trial court "but, significantly, expressed no surprise over the fact that the trial had been conducted without a jury present." *Id.* at 135. The Kentucky Supreme Court held that the state

court rule required a written waiver, but that an on-the-record colloquy with the defendant will suffice. *Id*. at 133. In the case below, however, there had been neither. *Id*. The Kentucky Supreme Court held that in the "extraordinary circumstance" where the issue of the validity of a purported waiver was raised on appeal alone, the conviction should be vacated, and the matter remanded for the prosecution to prove that there had been a viable waiver by showing that the attorney's waiver was made after consultation with the defendant. *Id.* at 136. Similarly, the Wisconsin Supreme Court remanded a proceeding so that the trial court could conduct an evidentiary hearing to determine if the jury trial waiver made by the defense attorney in the defendant's presence was "ratified by the defendant or by counsel authorized to so act on his behalf." *Krueger v. State*, 84 Wis. 2d 272, 275, 267 N.W.2d 602, 603 (1978). *See also United States v. Garrett,* 727 F.2d 1003, 1013 (11th Cir. 1984), aff'd, 471 U.S. 773, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985).

The Missouri Supreme Court did not remand the matter for further proceedings. Instead, the Missouri Supreme Court equated defense counsel's request for a bench trial with a waiver made by, or on behalf of, Hilbert. The Missouri Supreme Court then relied on circumstances that other states have held insufficient to establish the validity of the purported waiver.

D. The Question Presented is Important and Reoccurring.

The right to a jury trial is a fundamental right. *Duncan,* 391 U.S. at 149 (1968). Courts are to indulge "every reasonable presumption" against the waiver of

a fundamental constitutional right. *Johnson v. Zerbst*, 304 U.S. 458, 464, (1938). This Court has held that the right to a jury trial should be "jealously preserved" even in the face of a purported waiver. *Patton*, 281 U.S. at 312. It should be inarguable that the requirements for a valid waiver of this fundamental right presents an important question.

It is also difficult to imagine any argument that the question of whether a defendant must personally waive his right to a jury trial is not reoccurring. The case law cited above stands testament to this point; jurisdictions are often called upon to determine whether a purported waiver was valid, despite the absence of the defendant's personal assent. Missouri describes personal inquiry as the "best practice," but trial courts still fail to ask the questions. Higher courts promulgate supervisory rules that are not complied with. *See e.g., United States v. Rodriguez,* 888 F.2d 519, 527 (7th Cir. 1989). Mistakes and oversights are, and will continue to be, made.

As long as there is an open question about whether the Constitution requires a personal waiver these issues will be more common. If no personal assent by the defendant is necessary, if an attorney can enter a waiver of their own accord, then the precise words used by the attorney matter. "I waive a jury," is a different statement from "Defendant waives a jury," while "the defense waives a jury" could be interpreted either way. On the other hand, if personal assent is necessary, then the differences do not matter, because the record will also reflect the defendant's explicit consent. Without clarity as to whether the defendant must personally waive the right to a jury trial, on the

record, the issue will continue to arise in different contexts and with different and inconsistent results.

E. This case is the ideal vehicle for resolving this question.

As noted above, what constitutes a valid waiver of a fundamental right depends on the nature of the right. *Hill*, 528 U.S. at 114. This Court has also held that what constitutes a knowing, intelligent, and valid waiver of the constitutional right to a jury trial depends on the unique circumstances of each case. *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 278, (1942).

Here, the purported waiver was a question by the trial court, directed to defense counsel, asking if defense counsel wanted a bench trial. Pet. App. 2. There is no factual dispute about what occurred. The sole dispute is whether what occurred was sufficient to waive a Constitutional right, and thus, a narrow question is presented: can there be a valid waiver of the right to a jury trial, when the request is made by counsel and there is no personal acknowledgement by the defendant?

This case does not call upon the Court to privilege either oral waivers over written, or vice versa. This case does not call upon the Court to require any particular inquiry or colloquy or writing. This case does not even call upon the Court to resolve what would occur if a trial court directly attempted to obtain a personal waiver from a defendant and the defendant refused to answer, because arguably, the refusal to

answer in the face of direct questioning would constitute invited error or the equivalent of assent.

In addition, resolution of this narrow question would be dispositive of this appeal. If no personal waiver is required, then while Hilbert would contest the Missouri Supreme Court's analysis, then his convictions should be affirmed. If a personal waiver is required, there was none here, and Hilbert's convictions should be reversed. This Court need consider nothing more.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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