

IN THE
Supreme Court of the United States

JONATHAN KEARN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY BRIEF

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES CITED	ii
Cases	ii
Statutes.....	ii
Other Authorities	ii
PETITIONER’S REPLY BRIEF.....	1
I. Review Is Necessary to Resolve An Entrenched Conflict In The Circuits ..	2
II. The Tenth Circuit Erred.....	4
III. This Case Is An Excellent Vehicle To Address This Extremely Important Issue	7
CONCLUSION.....	9

TABLE OF AUTHORITIES CITED

Cases	PAGE
<i>Grove City Coll. v. Bell</i> , 465 U.S. 555 (1984)	6
<i>NASA v. Nelson</i> , 562 U.S. 134 (2011)	6
<i>Roberts v. Galen of Va., Inc.</i> , 525 U.S. 249 (1999)	5
<i>Singleton v. Wulff</i> , 428 U.S. 106 (1976)	6
<i>Thomas v. Arn</i> , 474 U.S. 140 (1985)	7
<i>United States v. Ford</i> , 882 F.3d 1279 (10th Cir. 2018).....	8
<i>United States v. Rhodes</i> , 552 F.3d 624 (7th Cir. 2009)	8
<i>United States v. Wayne</i> , 591 F.3d 1326 (10th Cir. 2010).....	8
<i>United States v. Williams</i> , __ F.3d __, 2018 WL 1885065 (10th Cir. Apr. 20, 2018) ..	3
<i>Wood v. Milyard</i> , 566 U.S. 463 (2012)	7
Statutes	
18 U.S.C. § 3582(c)(2)	8
18 U.S.C. § 3583(e)(2)	8
18 U.S.C. § 3742(a)	7
Other Authorities	
Fed.R.App.P. 28	7

PETITIONER'S REPLY BRIEF

An entrenched conflict exists over a court of appeals' ability to invoke, sua sponte, forfeiture or waiver principles when the government agrees that the defendant properly preserved an issue in the district court. The majority rule, adopted by eight courts of appeals, holds that the government waives plain error review when it agrees that the appellant preserved the claim below. Pet. 7-8. The Eighth Circuit disagrees and reviews forfeited issues (or issues the Eighth Circuit sua sponte deems forfeited) for plain error even when the appellee has not invoked forfeiture (or plain error review) on appeal. Pet. 9. The Tenth Circuit also disagrees, but rather than conduct plain error review, the Tenth Circuit invokes waiver principles in light of the appellant's failure to argue plain error on appeal. Pet. 9-10.

In this case, for instance, the Tenth Circuit first held (sua sponte) that Mr. Kearn's appellate issue was subject to plain error review because he had forfeited it in the district court (despite the government's contrary position). Pet. App. 25a. The Tenth Circuit then held (again sua sponte) that Mr. Kearn had waived plain error review because he had not argued plain error on appeal. *Id.* As this case demonstrates, the Tenth Circuit's sua sponte invocation of forfeiture principles inexorably ends with the appellant's loss of his statutory right to appeal. In such instances, it is irrelevant that the appellant had no reason (or opportunity) to argue the issue under plain error review; the appellant's failure to do so is sufficient to hold the issue waived, and, thus, not subject to any appellate review.

The government acknowledges that this latter rule is "atypical and potentially

undesirable” because it “hold[s] a party responsible for omitting argument on a matter that the opposing party did not put in issue.” BIO 13. But the government opposes certiorari under the (nonsensical) view that the question presented does not encompass review of the Tenth Circuit’s rule. BIO 13. The government also makes a weak attempt to defend the minority rule, BIO 9-11, and claims, incorrectly, that this case is a poor vehicle to resolve the conflict presented by Mr. Kearns’s petition, BIO 13-14.

None of these counterarguments are persuasive. Mr. Kearns asks this Court to review the propriety of the Tenth Circuit’s rule, and that rule plainly conflicts with precedent from every other Circuit. The Tenth Circuit’s rule is also indefensible in that it holds waived an appellant’s issue where the appellee has conceded that the appellant sufficiently raised the issue in the district court. Finally, because resolution of this issue is extremely important, this case is a suitable vehicle to address the issue.

I. Review Is Necessary To Resolve An Entrenched Conflict In The Circuits.

Eight courts of appeals hold that it is improper for an appellate court to sua sponte invoke forfeiture principles when the government agrees that a claim was properly presented in the district court. Pet. 7-8. Those courts of appeals instead hold that the government waives plain error review when it agrees that the issue was properly preserved below. *Id.* The Eighth and Tenth Circuits disagree with this majority rule. The Eighth Circuit invokes plain error review when it sua sponte finds that an issue was not properly preserved below. Pet. 9. The Tenth Circuit goes further and holds

that the appellant has waived the issue in such circumstances (because the appellant has necessarily not argued plain error review). Pet. 9-10.

The government's summary assertion that this conflict does not exist is without merit. BIO 11. Although the government summarily claims that the eight Circuits that have adopted the majority rule have not in fact adopted the majority rule, it cites no authority whatsoever in support of its position. BIO 11. The cases cited in Mr. Kearns's petition speak for themselves. Pet. 7-8.

Moreover, for three reasons, the government's claim that the Eighth and Tenth Circuits sometimes apply the majority rule is likewise inconsequential. First, the government fails to cite one case from the Eighth Circuit employing the majority rule. BIO 11-12. Thus, the government's assertion has no empirical support. Second, to the extent that the Tenth Circuit in the past has applied the majority rule, it is clear that the Tenth Circuit no longer does so. Since the decision in this case, the Tenth Circuit has again held an issue waived where the government conceded that the issue was preserved below. *United States v. Williams*, __ F.3d __, 2018 WL 1885065, at *3-*4 (10th Cir. Apr. 20, 2018). No other Circuit employs such a rule. For that reason alone, review is necessary. And finally, even if there is some internal variation within the Eighth and Tenth Circuits, that variation is a reason to grant this petition, not a reason to deny it. Whether the Tenth Circuit always applies the minority rule is irrelevant; the fact that the Tenth Circuit applies the minority rule at all is reason enough for this Court's review in this case.

The government also claims that we have not asked this Court to address the

Tenth Circuit’s unique waiver rule in this context. BIO 13. That argument has no merit. The question presented asks this Court to resolve whether a district court can sua sponte invoke plain error review. Pet. i. Here, the Tenth Circuit did just that, but then further invoked waiver principles because Mr. Kearn never argued plain error on appeal. Pet. App. 25a. The question presented thus embraces the Tenth Circuit’s ultimate holding. After all, it is only the Tenth Circuit’s decision *in this case* that Mr. Kearn could possibly ask this Court to review. It is only the Tenth Circuit that would have held that Mr. Kearn waived a preserved issue because he failed to invoke plain error review in a case where the government conceded that the issue was properly preserved below. Pet. 7-10. It is thus imperative that this Court review the Tenth Circuit’s “atypical” and “undesirable” rule. *See* BIO 13.

II. The Tenth Circuit Erred.

The government spends much of its time attempting to defend the merits of the Tenth Circuit’s decision in this case. In doing so, the government repeatedly misrepresents the Tenth Circuit’s decision and our position in this case. First, on at least four occasions, including the government’s revamped “Question Presented,” the government claims that the Tenth Circuit reviewed the issue in this case for plain error. BIO I, 7, 9, 10. That is incorrect. The Tenth Circuit refused to review the issue at all because Mr. Kearn did not argue plain error review. Pet. 6. But Mr. Kearn did not argue plain error review because the government never claimed that the issue was forfeited, but instead asserted that the issue was properly preserved below. Pet. 5-6. The Tenth Circuit’s decision is “atypical” and “undesirable,” to say the least. BIO 11. Better stated, the Tenth Circuit’s decision in this case is indefensible. This Court

must correct it.

The government also suggests that we have conceded that Mr. Kern forfeited the issue in the district court. BIO 9. But that is untrue. Mr. Kern properly preserved his objection to the no-contact condition of supervised release. Pet. 4-5. The government conceded the point in the Tenth Circuit. BIO 6. That concession should have been the end of the matter. And that concession would have been the end of the matter in eight other courts of appeals. Review is necessary.

The government also claims that we do “not argue that the court of appeals abused its discretion by declining to adopt the parties’ view about the applicable standard of review.” BIO 10. But of course we have. It is our position that this Court should “grant[] certiorari and hold[] that an appellate court should not sua sponte invoke plain error review in cases where the government agrees with the defendant that the claim was properly preserved below.” Pet. 19-20. “The Tenth Circuit’s determination that a party ‘waives’ a claim because it has not argued for plain error review, where the government has never invoked that standard, is without merit and must be corrected.” Pet. 15.

Moreover, the government is wrong that this Court has held that courts of appeals are allowed to sua sponte address standards of review. The three cases the government cites in support of this proposition have nothing to do with standards of review. The cases merely note that a party’s concession does not bind the Court on a substantive issue of law. *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253 (1999) (per curiam); *Grove City Coll. v. Bell*, 465 U.S. 555, 562 n.10 (1984); *Singleton v. Wulff*,

428 U.S. 106, 121 (1976).

In particular, *Wulff* had nothing to do with “the preservation of legal arguments,” as the government claims. BIO 10. *Wulff* instead concerns what substantive issues a court of appeals should consider on appeal. 428 U.S. at 121. *Wulff* further makes clear that “injustice was more likely to be caused than avoided by deciding the issue without petitioner’s having had an opportunity to be heard.” *Id.* And this is precisely the problem here. The Tenth Circuit sua sponte held that Mr. Kearn forfeited the issue without any briefing on whether Mr. Kearn in fact forfeited the issue. Both parties informed the Tenth Circuit (correctly) that Mr. Kearn properly preserved the issue below. Pet. 4-5. In holding otherwise, without any briefing to support the contrary holding, the Tenth Circuit did just what *Wulff* says not to do – decide an issue without adversarial testing. *Wulff*, 428 U.S. at 121.

The government also cites Justice Scalia’s concurrence in *NASA v. Nelson*, 562 U.S. 134, 163 n.* (2011), again noting that courts “are not bound by a litigant’s concession on an issue of law.” BIO 10. But this statement had nothing to do with a litigant’s concession on a standard of review. And the majority in *NASA* assumed the correctness of the conceded substantive legal issue (without deciding the issue). 562 U.S. at 147. If a majority of this Court is willing to assume without deciding the correctness of a conceded substantive legal issue, then surely it is willing to assume without deciding the correctness of a conceded standard of review. Such a rule aligns perfectly with the principle of party presentation, Federal Rule of Appellate Procedure 28, and this Court’s decision in *Wood v. Milyard*, 566 U.S. 463, 472 (2012),

as we have already explained. Pet. 10-12.

Nor does this Court's decision in *Thomas v. Arn*, 474 U.S. 140, 146 (1985), support the Tenth Circuit's rule in this case. *Thomas* holds that a court of appeals can adopt rules under its supervisory power, but only if those rules do not conflict "with constitutional or statutory provisions." *Id.* at 146. And here, Rule 28 requires each party to set forth the appropriate standard of review. Pet. 11. There is no practical reason why Rule 28 would require both parties to set forth the standard of review if the default standard-of-review rule has no bearing on the resolution of the appeal.

Additionally, we have explained how the Tenth Circuit's rule raises serious due process concerns. Pet. 12. The government fails to respond to this portion of our petition. And the rule also calls into doubt a criminal defendant's statutory right to appeal all components of his sentence. *See* 18 U.S.C. § 3742(a). Where both parties indicate that the issue was properly preserved, it raises serious concerns when a court of appeals sua sponte departs from the parties' position and dismisses the issue in light of that departure (without additional briefing on the appropriate standard of review). The government has said nothing to indicate otherwise.

III. This Case Is An Excellent Vehicle To Address This Extremely Important Issue.

Finally, the government claims that this case is a poor vehicle because Mr. Kearns might benefit from "future legislative or administrative developments." BIO 13. But the government's summary mention of "future" developments is too speculative to carry any weight. The government points to nothing whatsoever to indicate that Congress (or anyone else) intends to change the rules (and do so retroactively)

controlling the imposition of conditions of supervised release. The government also cites 18 U.S.C. § 3582(c)(2), but that statute is limited to the modification of terms of imprisonment and has no application to conditions of supervised release.

Finally, the government claims that a district court's ability to modify conditions of supervised release negates review here. 18 U.S.C. § 3583(e)(2). But there are two problems with this line of argument. First, the lower courts recognize that conditions of supervised release are immediately appealable despite a district court's ability to modify those conditions at a later time. *See, e.g., United States v. Ford*, 882 F.3d 1279, 1284 (10th Cir. 2018). Indeed, requiring a defendant to file a motion to modify, rather than appeal, "will require he proceed pro se or retain an attorney near the end of his incarceration, not to mention the possibility that [the defendant] could be subjected to the challenged condition before his request to modify is considered by the district court." *Id.* (cleaned up) (quoting *United States v. Rhodes*, 552 F.3d 624, 629 (7th Cir. 2009)).

Second, the Tenth Circuit has additionally held that a criminal defendant must challenge "the legal and factual basis of the initial supervised release condition on direct appeal" or else the claim "is time-barred." *United States v. Wayne*, 591 F.3d 1326, 1334 (10th Cir. 2010). Under this rule, then, Mr. Kearn's *only* opportunity to challenge the disputed condition of supervised release is this direct appeal. There is simply no merit (at least in the Tenth Circuit) to the government's claim that Mr. Kearn "will be able to argue at the time of his release that the no-contact condition should be lifted." BIO 14.

For these reasons, this case is a suitable vehicle to address the question presented. And because that question, which splits the Circuits, is extremely important, Pet. 15-19, this Court should resolve it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MELODY BRANNON
Federal Public Defender



DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org
Counsel for Petitioner