No. 12-7958

IN THE

Supreme Court of the United States

JOHN A. FORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

1. The dual approaches among the courts of appeals do not, as the Government suggests (Opp. 10), "reflect the same underlying concept," but rather an entrenched split that permits some courts to ignore the effect of the constitutional error under the guise of "overwhelming evidence" while counseling other circuits to weigh the error against the record as a whole. The former approach is inconsistent with *Chapman* v. *California*, which explicitly disfavored an overwhelming-evidence test. 386 U.S. 18, 23 (1967) (discussing the California courts' "overemphasis[] upon the court's view of 'overwhelming evidence'").

The minority's deviation from *Chapman*'s harmless-error rule was predicted by Justice Brennan's dissent in *Harrington* v. *California*, 395 U.S. 250, 255–56 (1969), which noted that an overwhelming-evidence test "puts aside the firm resolve of *Chapman*." Just as Justice Brennan feared, several circuits now conduct a harmless-error analysis that solely considers "the extent of accumulation of untainted evidence rather than the impact of tainted evidence on the jury's decision." *Id.* at 256; see also *id.* (stating the "focus of appellate inquiry should be on the character and quality of the tainted evidence as it relates to the untainted evidence and not just on the amount of untainted evidence"). Even the majority in *Harrington* did not go so far. See *id.* at 254 ("[o]ur judgment must be based on our own reading of the record and . . . the probable impact of the two confessions on the minds of an average jury.").

The Solicitor General tries to erase the split by pointing to individual panel decisions that seem to

apply the overwhelming-evidence test within the very circuits that Petitioner identified as taking the "effect-of-the-error" side of the split. That there may be inconsistency within those self-identified circuits only proves that the test is conceptually difficult and the Court's guidance is warranted. Further, even though the Solicitor General may consider the split reconcilable (and in a way that is wholly consistent with how he would have the issue resolved), that is not the present state of the law. Many circuits have explicitly acknowledged that there are two rules. E.g., *Wilson* v. *Mitchell*, 498 F.3d 491, 503–04 (6th Cir. 2007) (recognizing that harmless error could be defined in "either of two" ways but that only one meaning is consistent with Supreme Court precedent: "whether the error had an actual impact on the outcome" and *not* "whether a hypothetical new trial would likely produce the same result." (citing *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993))). And circuits have not only recognized the two standards, they have expressly chosen a side, following the rule that "a reviewing court must assess the record *as a whole* to determine the impact of the improper evidence upon the jury," requiring that "[t]he prejudicial effect of the improper evidence must be weighed against the weight of the properly admitted evidence." *United States* v. *Ofray-Campos*, 534 F.3d 1, 22 (1st Cir. 2008) (emphasis added) (internal quotation marks omitted) (employing harmless-error factor test analyzing "the centrality of the tainted evidence, its uniqueness, its prejudicial impact, the use to which the evidence was put, and the relative strength of the parties' cases"); *Gray* v. *Klauser*, 282 F.3d 633, 655 (9th Cir. 2002), *vacated on other grounds*, 537 U.S. 1041 (2002) ("Our precedent likewise dictates that we must not construct a

hypothetical trial, but instead consider the effect of the trial error on the actual jury's actual verdict."); *United States* v. *Murphy*, 241 F.3d 447, 453 (6th Cir. 2001) ("In determining whether an error is harmless, we must take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened." (internal quotation marks omitted)); *United States* v. *Cunningham*, 145 F.3d 1385, 1388 (D.C. Cir. 1998) ("[H]armless error review . . . calls for an inquiry as to whether the Government has shown beyond a reasonable doubt that the error at issue did not have an effect on the verdict, not merely whether, absent the error, a reasonable jury could nevertheless have reached a guilty verdict."). Far from a mere percolation problem, the state of the law reflects the deep confusion that infects every corner of every circuit across the country.

The Seventh Circuit is not immune from this waffling. In some decisions, the Seventh Circuit has analyzed only the "overall strength of the *prosecution's* case against the defendant" in assessing harmless error, see *United States* v. *Savage*, 505 F.3d 754, 762 (7th Cir. 2007) (emphasis added) (internal quotation marks omitted); *United States* v. *Boling*, 648 F.3d 474, 481 (7th Cir. 2011) (assessing "the overall strength of the *government's remaining evidence*" after finding trial error (emphasis added)); *United States* v. *Foster*, 652 F.3d 776, 786 (7th Cir. 2011) (rejecting error claims because of "the strength of the case *against*" the appellant (emphasis added)). Other times it has framed the inquiry as one that must be taken up "in light of the *entire record*," rather than only the evidence adverse to the defendant. *Jones* v. *Basinger*, 635 F.3d 1030, 1053–54 (7th Cir. 2011) (emphasis added) (reversing courts

below because they "failed to apply the correct legal standard," as they "simply imagined what the record would have shown without Lewis' statement and asked whether the remaining evidence was legally sufficient to sustain a finding of guilt"); see also *United States* v. *Miller*, 673 F.3d 688, 701 (7th Cir. 2012) (considering several factors "beyond the strength of the other evidence," and asking if the Court could say "'with fair assurance' that the verdict was not substantially swayed by the error.").

Despite the Solicitor General's efforts to downplay it, the Tenth and Eleventh Circuits have repeatedly and deliberately employed the same approach as the Seventh Circuit below in following the "overwhelming evidence" test.[1] The Solicitor General's assertion that these (and other) circuits have used a variety of tests only serves to demonstrate that these circuits are indiscriminately applying a bedrock standard of criminal law.

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[1] *See, e.g.*, *Wilson* v. *Simmons*, 536 F.3d 1064, 1121 (10th Cir. 2008) ("Though we emphasize that these remarks were improper, we cannot find that the remarks deprived Mr. Wilson of a fundamentally fair trial because . . . the evidence of guilt in this case was overwhelming."); *United States* v. *Williams*, 376 F.3d 1048, 1055 (10th Cir. 2004) ("Any error in admitting the challenged evidence was harmless because the evidence of Williams' guilt was overwhelming."); *see also United States* v. *Malol*, 476 F.3d 1283, 1292 n.7 (11th Cir. 2007) ("[W]e hold that even if the admission of the chart was error, it was harmless error based on the overwhelming evidence of guilt. Thus, we need not address whether, in fact, error exists."); *United States* v. *Harriston*, 329 F.3d 779, 789 (11th Cir. 2003) ("We often have concluded that an error in admitting evidence of a prior conviction was harmless where there is overwhelming evidence of guilt.").

The hazards of the overwhelming-evidence approach are amply illustrated by the panel decision below, which focused solely on the Government's remaining evidence, rather than the record as a whole. The panel ignored the defense's vigorous challenge to the DNA case, *compare United States* v. *Ford*, 683 F.3d 761, 768 (7th Cir. 2012) (calling the DNA evidence "unimpeached") *with* Trial Tr. 239–40, 275–77, 353–55 (making multiple challenges to DNA results and methodology). It also ignored the jury's explicit request for additional photos of Ford, which indicated that the DNA evidence was not unassailable. See Br. of Appellant at 12. And the panel below certainly did not weigh the effect of admitting the improperly suggestive lineup against the DNA evidence that it decided—*sua sponte* and on only the authority of a Wikipedia entry—was insurmountable. *Ford*, 683 F.3d at 768 (citing "DNA Profiling," *Wikipedia*, http://en.wikipedia.org/wiki/DNA_profiling (last visited May 20, 2013)).

In short, the panel below stepped into the role of a "second jury," *Neder* v. *United States*, 527 U.S. 1, 19 (1999), when it ignored the record evidence and failed to balance the error. The decision below belies the Solicitor General's claim that the approaches reflect merely "the same underlying conduct." One accounts for the error; the other does not. Redress from a serious constitutional error should not rest on the vagaries or predilections of the reviewing panel, but rather on a principled application of this Court's harmless-error jurisprudence. The circuits are split and the petition should be granted.

2. Review in this court is also warranted because the forfeiture-versus-waiver distinction articulated by

this Court in *Wood* v. *Milyard* (and several other cases) applies and the Seventh Circuit abridged it. The Solicitor General devotes much of his brief to an analysis of an irrelevant question: whether, under any circumstances, courts can engage in *sua sponte* harmless error review. This question is irrelevant because it overlooks the role of the Government's *waiver*. This Court's jurisprudence makes it clear that courts are not free to act *sua sponte* in the face of a party's waiver—defined as the "intentional relinquishment or abandonment of a known right." *United States* v. *Olano,* 507 U.S. 725, 733 (1993); *Wood* v. *Milyard*, 132 S. Ct. 1826, 1834 (2012); *Day* v. *McDonough*, 547 U.S. 198, 210 n.11 (2006).

The Solicitor General's misdirection cannot hide the fact that the forfeiture-versus-waiver distinction in *Wood* applies to harmless error. The Solicitor General contends that no court of appeals has applied *Wood* in the harmless-error context, ignoring the fact that the Seventh Circuit expressly found it applicable in the instant case. Pet. App. 14a. In fact, courts of appeals routinely apply the forfeiture-versus-waiver distinction in criminal cases, disclaiming the ability to review claims that have been waived by litigants. See, e.g., *United States* v. *Tichenor*, 683 F.3d 358, 362–363 (7th Cir. 2012); *United States* v. *Goldberg*, 67 F.3d 1092, 1099–1102 (3d. Cir. 1995); *United States* v. *Harrison*, 393 F.3d 805, 806 (8th Cir. 2005). Furthermore, this Court incorporated the forfeiture-versus-waiver distinction into its interpretation of Federal Rule of Criminal Procedure 52(b), *Olano*, 507 U.S. at 733, a provision of the very rule that the Solicitor General relies on to support his contention that the forfeiture-versus-waiver distinction does not apply. Opp. 15.

The Solicitor General's other grounds for distinguishing *Wood* are unpersuasive. First, though the Solicitor General relies heavily on the language of Federal Rule of Criminal Procedure 52(a) that requires courts to disregard harmless errors, he ignores the fact that this Court has interpreted that same rule as placing the burden of proving harmlessness on the prosecution. *Olano*, 507 U.S. at 734–35. This judicial gloss makes it clear that the rule neither mandates nor creates a "strong policy in favor of" *sua sponte* harmless error review. Furthermore, federal rules that encourage *sua sponte* review do so explicitly, whereas Rule 52(a) is written in the passive voice and is therefore silent on the issue of how harmlessness can be established. See Fed. R. Crim. P.. 29(a) ("…The court *may on its own consider*…); Fed. R. Civ. P. 60(a) (" The court may correct a clerical mistake or a mistake arising from oversight or omission. . . . [t]he court may do so on motion or *on its own*…) (emphasis added).

The Solicitor General's contention that harmless error arguments are distinct from threshold defenses because they cannot be waived in order to steer a court towards the merits is also incorrect. Courts routinely address harmlessness in lieu of addressing merits arguments. See, e.g., *Milton* v. *Wainwright*, 407 U.S. 371, 372 (1972) ("Assuming, *arguendo*, that the challenged testimony should have been excluded, the record clearly reveals that any error in its admission was harmless beyond a reasonable doubt."); *United States* v. *Hamilton*, 107 F.3d 499, 506 (7th Cir. 1997).

The Solicitor General clings to the Seventh Circuit's use of the word "forfeit" in its opinion, but the court never addressed the forfeiture-versus-waiver

distinction (which Mr. Ford could not raise because the Seventh Circuit acted *sua sponte*). When asked about harmless error at oral argument, the Department of Justice attorney replied that he was not raising a harmless error argument:

> …[R]eviewing the trial transcript, it does seem that the [] the eyewitness identification was a substantial part of the case. We think there is a reasonable argument that can be made it's nonetheless harmless. But, given the beyond a reasonable doubt standard for [] given that it's a due process issue, we haven't made a harmlessness argument with respect to that.

Pet. 11. This response unequivocally demonstrates deliberate conduct constituting a waiver. Even the Solicitor General's euphemism of choice—that the attorney "did not press" a harmless error argument—connotes that the attorney made a tactical decision and therefore acted deliberately.

Finally, the Solicitor General also recites the Seventh Circuit's assertion that the Department of Justice attorney had a "mistaken" understanding of the harmless error rule. Like the court of appeals, however, the Solicitor General never identifies the nature of this "mistake." In fact, the attorney correctly articulated the applicable harmless-error standard and explained precisely why he chose not to raise it—because there was substantial doubt that Mr. Ford would have been convicted. Pet. 11. In any event, a judicial inquiry into the reasoning underlying the government's tactical decisions is not germane to a waiver analysis. *Ryan* v. *United States,* 688 F.3d 845, 848 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 1275, (2013) ("…[A] mistake in reaching a decision to withhold a known defense does not make

that decision less a waiver. This court is neither authorized nor inclined to delve into the deliberational process that preceded a decision by the United States Attorney; we must respect the decision announced in court.") (Easterbrook, C.J.) (applying *Wood*).

3. This case presents an excellent vehicle for addressing the questions presented because it involves a clear waiver and a clear constitutional violation.[2] There is little doubt that admission of the photo array was prejudicial, and the Solicitor General's belated attempt to argue harmlessness now is directly contradicted by the record below. For one, at oral argument, Judge Posner described the lineup as "very suggestive," observing "your eyes are drawn to Ford." Oral Argument at 7:00–7:20, *United States* v. *Ford*, 683 F.3d 761 (Apr. 25, 2012) (No. 11–2034) (*available at* http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=11&casenumber=2034&listCase=List+case%28s%29). Moreover, the very same witness who the Solicitor General argues "had a high degree of confidence" when selecting Mr. Ford out of a photo array a full sixteen months after the robbery had mistakenly identified a different bank customer as the perpetrator just the day after the robbery. Br. of Appellant at 7–8. Finally, the DNA evidence was not

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[2] The Solicitor General notes that the first question presented here is also presented in *United States* v. *Acosta-Ruiz*, 481 F. App'x 213 (5th Cir. 2012), *pet. for cert. filed*, (U.S. Oct. 22, 2012) (No. 12-6908) The Acosta-Ruiz petition, however, is subject to a plain error review, which makes it an imperfect vehicle to consider the issue presented. These same questions in Ford are fully preserved, which makes it the better case for this Court's review.

"unimpeached"; it was vigorously contested at trial. See, e.g., Trial Tr. 239–40; 275–77; 353–55. And it is clear that the jury did not find the DNA evidence conclusive because it requested more photographs of Mr. Ford during deliberations. Br. of Appellant at 12.

Had the panel employed the "effect-of-the-error" test and reviewed the entire record (not just the prosecution's remaining evidence), as it should have, then the import of the jury's question and the defense challenge to the DNA could not have been denied and Mr. Ford would likely have been granted a new trial. *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993) ("The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.") (emphasis in original). At the very least, the Seventh Circuit would have been compelled to actually complete the two-part test to determine whether the photo array should have been excluded. As it stands, courts in the Seventh Circuit (and other circuits) may abdicate their constitutional responsibilities if they believe that other evidence, standing alone, is "overwhelming." The error in Mr. Ford's case was not harmless, as the Department of Justice attorney acknowledged. That courts, including the Seventh Circuit panel here, believe that they are empowered to step in and override the parties' deliberate choices warrants this Court's review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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