No. 24-590

IN THE

Supreme Court of the United States

BRIAN KELSEY,

PETITIONER,

V.

UNITED STATES,

RESPONDENT.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit

BRIEF OF THE CENTER FOR AMERICAN RIGHTS AS AMICUS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

What level of specificity does Federal Rule of Criminal Procedure 51 require from counsel making an objection to preserve an error for an appellate review?

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INTEREST OF THE AMICUS CURIAE[1]

The Center for American Rights is a non-profit, non-partisan public-interest law firm based in Chicago. Its mission is to defend Americans' most fundamental constitutional rights through direct litigation, education, research, and advocacy. Its areas of interest include free speech, media accountability, educational freedom, and constitutional law. In addition to its interest in a robust defense of constitutional rights, its litigators represent clients in court hearings or depositions and face the challenge of making a good record "live on the record," such that they are familiar with and could be affected by the level of specificity that appellate courts require to preserve an issue for appeal.

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[1] No other counsel authored any part of this brief, and no other person or entity prepared or funded it. *R. 37.* Notice was provided sufficiently in advance to the Solicitor General on behalf of the Respondent.

Amicus discloses that Brian Kelsey is a personal friend and sometime colleague of the Center and its leaders. Counsel of record testified as a character witness at Kelsey's sentencing hearing; the reasonability of that sentence is in no way an issue in this appeal.

SUMMARY OF ARGUMENT & INTRODUCTION

Mr. Kelsey's first question presented is important not only to the federal courts of appeals, which review trial transcripts to discern sufficient objections to preserve errors for appeal, but also to state trial and appellate courts as well. Especially in criminal trials where federal constitutional rights are frequently at stake, this Court has an interest in ensuring a clear and fair standard for preserving error in all courts.

Like the federal courts of appeals, state appellate courts frequently struggle to decide whether an attorney has made a sufficient objection to preserve the issue for appeal. Most state courts follow a formulation similar to the test used in federal courts: "An objection stating distinctly the objectionable matter and the grounds for objection is sufficient; particular words or phraseology need not be employed." 9C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2553 (3d ed. 2008)[2]; *id.* § 2554.[3] Some jurisdictions even follow Federal Rule of Criminal Procedure

[2] cf. 21 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5036.1 (2d ed. 2005) (explaining that informing a trial judge of an evidentiary objection "does not mean that the lawyer must utter the magic word 'objection'; it is enough that the trial judge understands that an objection is being made").

[3] "Rule 51 is not top-heavy with technical reasons for concluding that an objection is insufficient under the rule. No particular formality is required of the objection so long as it is clear that the trial judge was informed of possible errors in the charge and was given an opportunity to correct them."

51 word-for-word. N.D.R. Crim. P. Rule 51; D.C. SCR-Crim. Rule 51; V.I. R. CRIM. P. Rule 51. Others incorporate Wright & Miller's federal standards into their caselaw. *See, e.g., Kemper Architects, P.C. v. McFall, Konkel & Kimball Consulting Eng'rs*, 843 P.2d 1178, 1183 (Wyo. 1992).

This Court should grant the petition to provide not only lower federal courts but state courts as well with clear guidance as to the level of specificity necessary to preserve an issue for appellate review. After all, many of those state court decisions will also be reviewed in federal court on *habeas corpus* petitions.

ARGUMENT

The Sixth Circuit's decision here requiring a particular formula or extended exchange in order to establish an objection conflicts not only with the Third, Fourth, Fifth, Seventh, and D.C. Circuit courts, Pet. 15, but also most state courts. *See Husbands v. Del. Dep't of Educ.*, 2020 Del. LEXIS 136, at *12, n. 47 (Del. S.Ct. April 7, 2020) (recognizing conflict between Third and Ninth Circuits on level of specificity required for an objection to evidence). *See also* Christopher A. Young, *In Search of Consistency: Jury Instructions Under Rule 51 of the Federal Rules of Civil Procedure*, 83 Iowa L. Rev. 471, 481 (1998) (describing three different approaches taken by circuits to the specificity requirement of Fed. R. Crim. Pro. 51).

Many state courts, like those circuits (Pet. 18), do not require a specific shibboleth or "magic words" or a particular length or garrulousness (Pet. 22) to establish an objection. For instance:

Arizona: "Just as there are no magic words which render the testimony to a 'reasonable degree of medical probability or certainty,' no magic words are needed to preserve the objection." *In re MH*, 220 Ariz. 160, 170 n.15 (Ct. App. 2008).

California: "no magic words or incantations are required to preserve an objection." *People v. Smith*, 2022 Cal. App. Unpub. LEXIS 3414, *10 (June 1, 2022).

Florida: "The test that governs here is well established: the party seeking appellate review must show that it raised in the tribunal of first instance the specific legal ground upon which a claim is based. This is not a 'magic words' test. But the argument presented must be 'sufficiently specific to inform the trial judge' of the issue to be decided." *Ellison v. Willoughby*, 373 So. 3d 1117, 1120 (Fla. 2023) (cleaned up).

Illinois: "No magic words such as 'I object' are required. Only a reasonable indication of an objection is necessary to preserve error." *People v. Pankey*, 58 Ill. App. 3d 924, 926 (1978).

Oregon: "The fact that plaintiff made his request politely and did not use the word 'objection' does not make his objection inadequate." *Charles v. Palomo*, 347 Ore. 695, 701 (2010).

Texas: "To be sufficiently specific, an objection need not employ hypertechnical or formalistic words or phrases, magic words, or a citation to a particular statute. Rather, the objecting party must let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it." *Hansen v. State*, 2024 WL 2335686, 2024 Tex. App. LEXIS 3557, *13 (3rd Ct. App., May 23, 2024) (cleaned up).

Even still, multimember courts frequently disagree amongst themselves about whether an objection is sufficiently specific, as indeed the Sixth Circuit panel did here (Pet. 13).

Alabama: "Magic words such as 'objection' or 'the instructions are incomplete' are not required." *T&J White, LLC v. Williams*, 375 So. 3d 1225, 1235 (Ala. 2022) (Parker, C.J., concurring/dissenting).

Arkansas: "I believe the objection by appellant's counsel was proper and specific. Apparently he failed to utter magic words of some sort." *Hess v. Treece*, 286 Ark. 434, 448 (1985) (Purtle, J., dissenting).

Colorado: "While I agree with the majority that this request could have been clearer, we do not require talismanic language to make or preserve a claim." *CAW Equities, L.L.C. v. City of Greenwood Vill.*, 2018 COA 42M, P49 (Berger, J., dissenting).

Connecticut: "Although the defendant did not use magic words citing the particular constitutional sections guaranteeing a speedy trial when he addressed

the court and objected to severance of the charges, I have no trouble understanding his objection to the severance as his assertion of a right to a speedy trial." *State v. Fleury*, 135 Conn. App. 720, 732 (2012) (Flynn, J., concurring).

Florida: "The Court cannot ignore the context within which the objection was made. . . . where defense counsel objects to prosecutorial misconduct on the grounds of 'improper argument,' but it is obvious from the record that the trial judge clearly understood the nature of the objection, I would conclude that the objection is sufficiently specific to preserve the closing argument issue for appeal." *Braddy v. State*, 111 So. 3d 810, 872 (Fla. 2012) (Pariente, J., dissenting).

As the foregoing examples illustrate, the result of the current confusion is a certain arbitrariness—certain defendants' rights are protected because their lawyer came close enough, while other defendants are out of luck because their lawyer did not use the right words to satisfy a reviewing panel's majority. "At the [Nevada] Supreme Court, we feel the reality of the failure to make a record in a way that can be intensely frustrating. We often encounter litigants who may have been entitled to relief if their trial counsel had simply uttered two magic words: 'I object.'" [Justice] Lidia S. Stiglich & Kathryn Combs, *Appealing Appeals: Persuasive Appellate Case-building and Best Practices*, 29 Nevada Lawyer 8, 8 (June 2021).

This leads to unfortunate and unfair results: "[T]his apparent arbitrariness in applying preservation rules is unwise. These rules should not be treated like a game of magic words or stilted technicalities." *State v.*

Younger, 556 P.3d 838, 869 (Kan. 2024) (Stegall, J., concurring). The end product is that some defendants receive plenary review, while others like Mr. Kelsey are denied any meaningful consideration of their rights.

By focusing on the precise words used, reviewing courts lose sight of the reason behind the rule, which should dictate the outcome in many of these instances:

> The general purpose of requiring a contemporaneous objection is to place the trial court on notice of a possible error and give the court the opportunity to correct it. Strict, formalistic terminology is not necessary to accomplish this goal, and we have held that 'magic words' are not required to preserve an objection. This is a commonsense rule because attorneys are not robots and should not be expected to follow a rote script while in the courtroom. To require exact language is contrary to the purpose of preservation and operates to the detriment of a client, regardless of whether that client is a private party, the State, or an accused.

State v. Pacchiana, 289 So. 3d 857, 862 (Fla. 2020) (Labarga, J., dissenting) (cleaned up).

Indeed, in some state courts the stakes for an objection are much higher because "[w]hile all states apparently now use harmless error review, not all have followed federal law and adopted plain error review for forfeited errors. Some that do limit plain error review to certain

kinds of errors (usually constitutional ones), meaning that other kinds of errors are still subject to absolute forfeiture. Some have adopted a sort of safety valve that allows appellate review for forfeited claims in 'the interest of justice.' . . . state appellate courts routinely decline to consider unpreserved claims." Darryl K. Brown, *Does It Matter Who Objects? Rethinking the Burden to Prevent Errors in Criminal Process*, 98 Tex. L. Rev. 625, 638-639 (2020). The consequence is that in many states, "the traditional, absolute forfeiture rule still holds; errors that may have affected the trial judgment cannot be corrected on appeal," even if the error was not harmless. *Id.*

Though states are not bound by this Court's decisions interpreting the Federal Rules of Criminal Procedure, no one would doubt that this Court can exercise tremendous influence on the overall direction of the law in a particular area. Granting Mr. Kelsey's petition to set a clear standard for what constitutes an objection would help guide not only confused circuit courts of appeals (a confusion demonstrated in the petition, 15-27) but also state appellate courts.

CONCLUSION

Every trial court hearing on the record puts counsel in an unrelenting pressure cooker: if you miss any objection or fail to formulate your objection in the right words, your client could suffer tremendously and turn around and sue you for malpractice.

Mr. Kelsey's case is proof of that problem: If his lawyer had simply said what he'd said plus, "I object," the Sixth Circuit would have ordered a new trial (Pet. 13).

Instead, like a human being rather than a robot, his counsel said several lines raising the issue to the judge's attention but without invoking the "magic words." Two judges on the Sixth Circuit concluded his effort was insufficient to state an objection, and a third concluded that it was sufficient (Pet. 13). As a result, he stands to serve a term in a federal prison rather than receive a new trial.

This Court should act to end the arbitrariness that infects standards of review in federal and state courts nationwide. Mr. Kelsey's case shows the need. It also presents a clean, clear, straightforward vehicle for this Court to take the next logical step after *Holguin-Hernandez*[4]: clarifying the specificity required to state an objection under Federal Rule of Criminal Procedure 51.

Respectfully submitted,

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[4] *Holguin-Hernandez v. United States*, 589 U.S. 169, 174 (2020).