CAUSE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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JIM WALTER QUALLS, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respectfully submitted,

J. Lance Hopkins, OBA#14852
219 W. Keetoowah
Tahlequah, OK 74464
(918) 456-8603
Counsel for Petitioner
Jim Walter Qualls, Jr.

a. The Question Presented for Review Expressed in the Terms and Circumstances of the Case.

Whether the Supreme Court should resolve a conflict among the Circuit Courts of Appeals, and find that the Tenth Circuit erred in affirming Petitioner's conviction, due to the fact that a United States Magistrate Judge does not have statutory authority to accept a guilty plea in a felony case and adjudge a defendant guilty.

b. List of All Parties to the Proceeding.

U.S. vs. Jim Walter Qualls, Jr.

c. Table of Contents and Table of Authorities.

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Petitioner, by and through his attorney, J. Lance Hopkins, respectfully submits this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. On Petitioner's behalf, counsel has submitted a Motion to Proceed In Forma Pauperis, a Proof of Service, and a copy of the Order and Judgment from the appellate court.

This petition has been arranged in the order specified by Rule 14.1 of this Court. The individual sections have been lettered to correspond with the subparagraphs of Rule 14.1. Pursuant to Rule 39.2 of this Court, ten copies of this petition are being submitted for filing.

d. Reference to the Official and Unofficial Reports of Any Opinions.

U.S. v. Jim Walter Qualls, Jr., 10th Cir. No. 17-2046, Opinion dated July 12, 2018

e. Concise Statement of Grounds on Which Jurisdicition of this Court is Invoked.

i. Date of Judgment sought to be reviewed: July 12, 2018

ii. Date of any order regarding rehearing: None

iii. Cross-Petition: None

iv. Statutory Provision Believed to Confer Jurisdicition:

This case involves review of a count of conviction involving a United States Criminal Statute, and this Court has jurisdiction over such interpretation and application of United States Statutes.

f. Constitutional Provisions, Statutes and Rules Which this Case Involves.

i. Constitutional provisions: Right of Due Process pursuant to the Fifth Amendment to the United States Constitution.

ii. Statutes involved: Rule 11(d)(1) of the Federal Rules of Criminal Procedure.

g. Statement of the Case:

The Petitioner, Jim Walter Qualls, Jr., was convicted of all four-counts of a four-count Indictment in the United States District Court for New Mexico. Each of the four counts alleged that between October 20, 2013 and February 24, 2014, Appellant did employ, use, persuade, induce, entice, and coerce a minor child to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which visual depiction was produced using materials that had been mailed, shipped, and transported in interstate and foreign commerce by any means, including by computer, specifically, a visual depiction with a SHA 1 hash value beginning 4427b, in violation of 18 U.S.C. §§225l(a), 225l(e), and 2256.

Mr. Qualls entered a plea of guilty to all four counts of the Indictment without the benefit of a plea agreement. He subsequently was sentenced to 50 years imprisonment as to each of the four counts running consecutively, resulting in a total term of 200 years imprisonment.

The change-of-plea hearing was held before a United States Magistrate Judge. At the hearing, Mr. Qualls signed a form giving the Magistrate Judge consent to accept his guilty plea. Prior to sentencing before a United States District Judge, Qualls filed an amended motion to set aside his guilty plea, on the basis that because the plea was before a Magistrate, and not before a District Judge, he had an absolute right to withdraw his plea under Rule 11(d)(1) of the Federal Rules of Criminal Procedure.

While the District Court recognized that Mr. Qualls would be allowed to withdraw his plea of guilty under the precedent of some other circuits, it interpreted Tenth Circuit case law to the contrary and found that Qualls was not entitled to withdraw his guilty plea, citing *U.S. v. Salas-Garcia*, 698 F.3d 1242, 1253 (10th Cir. 2012) and *U.S. v. Ciapponi*, 77 F.3d 1247, 1251 (10th Cir. 1996), and therefore denied the motion.

The Tenth Circuit affirmed the District Court's denial of the Motion to Withdraw Guilty Plea on appeal, with the Tenth Circuit explicitly finding as follows:

> **At bottom, Qualls contends only United States District Court judges possess the power to formally accept guilty pleas. Our precedent, however, squarely forecloses this argument. We have held that "with a *defendant's express consent*, the broad residuary 'additional duties' clause of the Magistrates Act authorizes a magistrate judge to conduct a Rule 11 felony plea proceeding, and such does not violate the defendant's constitutional rights." *United States v. Salas-Garcia*, 698 F.3d 1242, 1253 (10th Cir. 2012)(emphasis added) (quoting *United States v. Ciapponi*, 77 F.3d 1247, 1251 (10th Cir. 1996)). Thus, "[m]agistrate judges have the authority to conduct plea hearings and accept guilty pleas." *Id.* In so concluding, we recognized that Congress authorized these duties by magistrate judges, but to the extent any constitutional ambiguity remained, "the consent requirement—fulfilled in this case—saves the delegation" from doubt. *United States v. Williams,* 23 F.3d 629, 633 (2d Cir. 1994) (relied on by *Ciapponi*); *accord United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); *United States v. Torres*, 258 F.3d 791, 796 (8th Cir. 2001); *United States v. Dees*, 125 F.3d 261, 267 (5th Cir. 1997).**

U.S. v. Qualls, -- Fed.Appx --, 2018 WL 3414584 (10th Cir., 2018), at 2.

Accordingly, the Tenth Circuit has repeatedly found that United States Magistrate Judges have statutory authority to accept guilty pleas.

h. Review of the Judgment of a State Court: Not Applicable

i. Review of the Judgment of a Federal Court:

The Petitioner was convicted in the United States District Court for the District of New Mexico. The Conviction was affirmed by the United States Court of Appeals for the Tenth Circuit.

j. Direct and Concise Argument Amplifying the Reason Relied on for Allowance of the Writ.

PROPOSITION ONE: *Whether the Supreme Court should resolve a conflict among the Circuit Courts of Appeals, and find that the Tenth Circuit erred in affirming Petitioner's conviction, due to the fact that a United States Magistrate Judge does not have statutory authority to accept a guilty plea in a felony case and adjudge a defendant guilty.*

The Federal Rules of Criminal Procedure provide that: [a] defendant may withdraw a plea of guilty before the court accepts the plea, for any reason or no reason." Fed. R. Crim. Proc 11(d)(1). The record reflects that the Petitioner's guilty plea had not been accepted by a United States District Judge for the District Court of New Mexico at the time he moved to withdraw the plea.

Rule 11 (d)(1) is an absolute rule: a defendant has an absolute right to withdraw his or her guilty plea before a court accepts it. The District Court has no discretion to deny a pre-acceptance withdrawal of a guilty plea. In fact, Fed. R. Crim. Proc. 11 (d) was amended in 2002 to allow a defendant to withdraw a guilty plea for any reason or for no reason before the District Court accepts the plea. In Mr. Quall's case the District Court did not conduct his plea hearing. His sentencing was not conducted prior to Mr. Quall's timely filing of his motion to withdraw his plea, nor had the District Court indicated in any fashion that it had accepted his plea prior to his motion to withdraw being filed.

While a magistrate judge certainly has the authority to accept a guilty plea if a defendant grants consent, such acceptance is provisional, and the defendant has an absolute right to withdraw his or her plea under Rule 11(d)(1) prior to the District Court formally accepting the plea.

In addition, a United States Magistrate Judge has no express or implied authority under the Federal Magistrates Act, 28 U.S.C.A. § 636(b)(3), to accept guilty pleas in felony cases and adjudge a defendant guilty.

The Seventh Circuit recently addressed this issue in *U.S. v. Harden,* 758 F.3d. 886 (7th Cir. 2014). Pursuant to a written plea agreement, Stacy Lee Harden pled guilty to possession with the intent to distribute cocaine. With Harden's consent, the district court instructed a magistrate judge to conduct a Federal Rule of Criminal Procedure 11 plea colloquy under a local

rule allowing for magistrate judges to accept felony guilty pleas. The magistrate judge accepted Harden's guilty plea, and the district court then conducted a sentencing hearing and imposed sentence. Harden appealed the magistrate judge's acceptance of his guilty plea, arguing that the magistrate judge's acceptance of a felony guilty plea, instead of preparing a report and recommendation to the district court, was a violation of the Federal Magistrates Act, 28 U.S.C. §636; Rule 59 of the Federal Rules of Criminal Procedure; and the United States Constitution. The Seventh Circuit agreed and reversed Harden's conviction.

The Seventh Circuit stated the following:

> **The Federal Magistrates Act, 28 U.S.C. §636 ("FMA" or "Magistrates Act"), defines the scope of the duties that United States magistrate judges are permitted to undertake. The FMA lists three types of duties for magistrate judges. They may undertake certain enumerated tasks without the parties' consent, such as enter a sentence for a petty offense, or hear and determine certain pretrial matters pending before the court. 28 U.S.C. § 636(a)(4), (b)(1)(A). They are permitted to perform other enumerated duties, such as presiding over misdemeanor trials, only with the litigants' consent. 28 U.S.C. § 636(a)(3); 18 U.S.C. § 3401(b). And they are permitted to undertake "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3).**
>
> **The Supreme Court has explained that whether a duty not listed in the statute qualifies as a permissible additional duty depends on whether the duty is "comparable" to those that are actually listed in the Act. *Peretz v. United States,* 501 U.S. 923, 931–933, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991). If an unlisted duty is comparable to those duties listed in the Act, that duty may be performed by the magistrate judge with the parties' consent. *Id.* at 933, 111 S.Ct. 2661. The basis for comparison is "responsibility and importance": in *Peretz,* the Court concluded that a magistrate judge may oversee jury selection in a felony case with the parties' consent, because "with the parties' consent, a district judge may delegate to a magistrate supervision of entire civil and misdemeanor trials," and "[t]hese duties are comparable in responsibility and importance to presiding over *voir dire* at trial." *Id.***
>
> **The acceptance of a guilty plea in a felony case is not a described power or duty, so we must interpret the "additional duties" clause of the statute to determine whether the Act permits magistrate judges to discharge that function, even with the consent of the defendant and the government. Based on the statute and the Supreme Court decisions limning the limits of federal magistrates' authority, we determine that magistrates are not permitted to accept guilty pleas in felony cases and adjudge**

a defendant guilty. The task of accepting a guilty plea is a task too important to be considered a mere "additional duty" permitted under §636(b)(3): it is more important than the supervision of a civil or misdemeanor trial, or presiding over *voir dire.* Because of this importance, the additional duties clause cannot be stretched to reach acceptance of felony guilty pleas, even with a defendant's consent.

U.S. v. Harden, supra, at 888.

The Seventh Circuit went on to state:

Once a defendant's guilty plea is accepted, the prosecution is at the same stage as if a jury had just returned a verdict of guilty after a trial. Unlike the preliminary nature of *voir dire*—which is an important, but preliminary, juncture that will be followed by numerous other substantive opportunities to contest the government's evidence, case, and conduct before any determination of guilt—the acceptance of a guilty plea is dispositive. It results in a final and consequential shift in the defendant's status. For this reason, the acceptance of the guilty plea is quite similar in importance to the conducting of a felony trial. And it is clear that a magistrate judge is not permitted to conduct a felony trial, even with the consent of the parties. The Supreme Court so reasoned using a canon of statutory interpretation that gives significance to the careful contours of the authority granted to magistrates in the Magistrates Act: *Expressio unius est exclusio alterius. Gomez v. United States,* 490 U.S. 858, 872, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989) ("[T]he carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial.").

That same limiting principle leads us to our conclusion that the acceptance of a guilty plea in a felony case, a task no less important, is also not authorized by the statute. In accepting Harden's guilty plea, even with his consent, the magistrate judge violated the Federal Magistrates Act.

U.S. v. Harden, supra, at 889.

After holding that Harden's guilty plea before the magistrate violated the Federal Magistrates Act, the Seventh Circuit noted that its ruling was in conflict with those of other circuits:

We note that our reasoning places us in conflict with several of our sister circuits. There is widespread agreement that a magistrate judge may conduct a Rule 11(b) colloquy for the purpose of making a report and recommendation. *See, e.g., United States v. Reyna–Tapia,* 328 F.3d 1114, 1119–22 (9th Cir.2003) (en banc); *United States v. Torres,* 258 F.3d 791, 796 (8th Cir.2001); *United States v. Dees,* 125 F.3d 261, 263, 265 (5th Cir.1997); *United States v. Williams,* 23 F.3d 629, 631–34

(2d Cir.1994). We agree that this is a permissible practice (and are told that the district court for the Southern District of Illinois now delegates the conduct of a plea colloquy to a magistrate judge only when a report and recommendation on the plea is sent back to the district judge). Several circuits go further and authorize magistrate judges to accept felony guilty pleas with the parties' consent. *See United States v. Benton,* 523 F.3d 424, 431–32 (4th Cir.2008); *United States v. Woodard,* 387 F.3d 1329, 1332–33 (11th Cir.2004); *United States v. Ciapponi, 77* F.3d 1247, 1250–52 (10th Cir.1996). Those courts place great import on the statement in *Peretz* that "Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process...." 501 U.S. at 932, 111 S.Ct. 2661.

The desire to make more efficient the district courts' management of large criminal caseloads is understandable. These days, over 97% of criminal convictions are the result of guilty pleas. See "Statistical Tables for the Federal Judiciary," Table D–4 (June 2013), available at *http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2013/june/D04 Jun13.pdf* (visited July 14, 2014) (finding that of 84,060 total criminal convictions in a twelve-month period, 81,955 were the result of guilty pleas). Truly, "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper,* —— U.S. ——, 132 S.Ct. 1376, 1388, 182 L.Ed.2d 398 (2012). Yet, the prevalence of guilty pleas does not render them less important, or the protections waived through them any less fundamental. A felony guilty plea is equal in importance to a felony trial leading to a verdict of guilty. And without explicit authorization from Congress, the district court cannot delegate this vital task. The authority to experiment set forth in *Peretz* is bounded; the Court has never suggested that magistrate judges, with the parties' consent, may perform every duty of an Article III judge, regardless of the duty's importance.

U.S. v. Harden, supra, at 891-892.

As noted by the Seventh Circuit above, the Ninth, Eighth, Fifth, and Second Circuits all allow a magistrate judge to conduct a Rule 11(b) colloquy for the purpose of making a report and recommendation to the district judge, with the district judge ultimately accepting or rejecting the plea, which the Seventh Circuit agrees is a permissible practice. However, the Seventh Circuit also noted that the Fourth, Eleventh, and Tenth Circuits go further and authorize magistrate judges to accept felony guilty pleas with the parties' consent, which the Seventh Circuit does not deem a permissible practice. As to those Circuits which allow a magistrate judge to conduct a change of plea hearing and make a report or recommendation to the district judge, it is obvious

that those Circuits agree with the Seventh Circuit that a magistrate judge does not have authority to accept a guilty plea and adjudge a defendant guilty of a felony. Accordingly, the Second, Fifth, Seventh, Eighth, and Ninth Circuits all agree that a magistrate judge does not have authority to accept a guilty plea and adjudge guilt, while the Fourth, Eleventh, and Tenth Circuit find that a magistrate judge does have such authority. So there is certainly a serious split among the Circuit Courts of Appeal that must be resolved by the United States Supreme Court.

In the Tenth Circuit opinion in the matter at bar, the Court of Appeals stated the following:

> **Qualls points us to two cases that, in his view, demonstrate a magistrate judge lacks authority to accept a guilty plea: *United States v. Arami*, 536 F.3d 479 (5th Cir. 2008), and *United States v. Davila-Ruiz*, 790 F.3d 249 (1st Cir. 2015). Neither case, however, stands for this proposition. In both cases, the magistrate judges only *recommended* that the district court accept the defendants' pleas—and the defendants moved to withdraw their guilty pleas *before* the district court had formally adopted the magistrate judges' recommendations. *Davilla-Ruiz*, 790 F.3d at 250; *Arami*, 536 F.3d at 481. Accordingly, both courts allowed the defendants to withdraw their pleas because the pleas had not, in fact, been accepted by *either* a magistrate judge *or* a district court judge. *Davilla-Ruiz*, 790 F.3d at 250; *Arami*, 536 F.3d at 482–83. These cases thus involved a straightforward application of Rule 11(d)(1): when a magistrate judge only *recommends* the district court accept a plea but does not actually accept it, the defendant can withdraw the plea anytime *before* the district court formally accepts it.**

U.S. v. Qualls, supra, at 2.

All due respect to the holding by the Tenth Circuit stated above, Mr. Qualls, however, believes that those two cases, *Arami* and *Davila-Ruiz*, are relevant, in that each of those are instances, one in the First Circuit and the other in the Fifth Circuit, where the magistrate judge was not allowed to accept a guilty plea and adjudge guilt, but simply allowed to conduct a Rule 11(b) colloquy for the purpose of making a report and recommendation to the district judge, with only the district judge allowed to accept the plea and adjudge guilt. If the First Circuit and Fifth Circuit agreed with the Tenth Circuit, then the magistrate judges in those instances would have

accepted the guilty pleas and adjudged guilt, not simply issued reports and recommendations to the district judge.

In *U.S. v. Arami,* 536 F.3d 479 (5th Cir. 2008), Arami was indicted on five counts stemming from a conspiracy to transport illegal aliens for purposes of prostitution. The Government offered to drop counts one through four if Arami would plead guilty to count five. Arami agreed. He then consented to having his Rule 11 plea hearing and entering his plea before a magistrate judge, and pleaded guilty to count five. Prior to sentencing and acceptance of the plea by the district court, Arami moved to withdraw his plea. The district court subsequently held a hearing on the motion to withdraw the plea and denied it, and the court then adopted the magistrate's report and recommendation and formally accepted Arami's guilty plea.

On appeal, the Fifth Circuit reversed, finding that the district court should have allowed Arami to withdraw his guilty plea pursuant to Federal Rule of Criminal Procedure 11(d)(1).

The Court of Appeals stated the following:

> **Federal Rule of Criminal Procedure 11(d) provides, "A defendant may withdraw a plea of guilty or nolo contendere: (1) before the court accepts the plea, for any reason or no reason ...." FED.R.CRIM.P. 11(d). Therefore, "[u]nder Rule 11(d)(1) ... the district court has no discretion to deny a pre-acceptance withdrawal of a guilty plea." *United States v. Jones*, 472 F.3d 905, 908 (D.C.Cir. 2007). Before the 2002 amendments to the Rules, there was no explicit provision governing a defendant's withdrawal of a plea before the court accepted it. *See United States v. Lopez, 385 F.3d 245, 250 n.8 (2d Cir. 2004). Rule 11(d)(1)* now allows withdrawal as a matter of right. *Id.* Once the court accepts the defendant's plea, however, the defendant may withdraw that plea before sentencing only if the court rejects a plea agreement under Rule 11(c)(5) or if "the defendant can show a fair and just reason for requesting the withdrawal." FED.R.CRIM.P. 11(d)(2). A defendant may not have a guilty plea set aside after the court has imposed a sentence except on direct appeal or collateral attack. FED.R.CRIM.P. 11(e).**

U.S. v. Arami, supra, at 482.

In citing the Eighth Circuit precedent of *U.S. v. Lozano*, 63 Fed.Appx 962 (8th Cir.2003), the Fifth Circuit went on to state:

> **We have not previously had the occasion to expound upon the meaning of Rule 11(d)(1). The most analogous case is an unpublished decision from the Eighth Circuit. *See United States v. Lozano, 63 Fed.Appx. 962 (8th Cir. 2003* (per curiam). There, the defendant appeared before a magistrate judge and pleaded guilty to a drug charge. *Id.* at 962. The magistrate judge issued a report recommending that the district court accept the defendant's guilty plea. *Id.* Thirteen days later, before the district court accepted the guilty plea or imposed a sentence, the defendant moved to withdraw his plea. *Id.* The court denied the defendant's motion. *Id.* On appeal, the Eighth Circuit noted that the district court improperly considered the defendant's request to withdraw his plea under the "fair and just reason" standard of Rule 11(d)(2), because the district court had not formally accepted the defendant's plea. *Id.* at 963. The court reversed, ruling that the defendant had an absolute right to withdraw his plea under Rule 11 (d)(1), and remanded the case to allow the defendant to withdraw his guilty plea and proceed to trial. *Id.***

U.S. v. Arami, supra, at 482.

Accordingly, because Mr. Qualls had the absolute right to withdraw his guilty pleas prior to their acceptance by the District Court under Rule 11(d)(1), the District Court erred in denying his motion to withdraw his guilty pleas, and the Tenth Circuit erred in affirming the District Court.

The First Circuit recently addressed this issue in *U.S. v. Davila-Ruiz*, 790 F.3d 249 (1st Cir. 2015). Davila-Ruiz was indicted in the United States District Court for the District of Puerto Rico with attempted carjacking and use of a firearm during a crime of violence. He entered into a plea agreement, and a change of plea hearing was held before a magistrate judge. At the hearing, Davila-Ruiz signed a form giving consent to proceed before the magistrate judge, which stated the following:

> **I HEREBY: Waive (give up) my right to trial before a United States District Judge and express my consent to proceed before a Magistrate–Judge while I plead guilty (Rule 11 proceedings) and the entry of a judgment of conviction upon the Magistrate–Judge's recommendation. I understand that sentence will be imposed by a District Judge.**

After Davila-Ruiz entered his plea, the magistrate judge issued a written report and recommendation (the R&R). The R&R contained a recommendation that the district court accept the plea. Prior to the district court accepting the plea, however, Davila-Ruiz filed a motion to withdraw his plea. Citing Rule 11(d)(1), he claimed that because the court had not yet accepted his guilty plea, he had an absolute right to withdraw it. The government objected, arguing that the magistrate judge had authority to accept the defendant's guilty plea; that Rule 11(d)(2)(B) therefore governed; and, that the defendant would have to show a "fair and just reason" in order to withdraw his plea under that rule. The district court sided with the government: it noted that it had reviewed the change-of-plea transcript and that the plea had been "adequately and thoroughly taken," with the result that Rule 11(d)(1) was no longer available. Since the defendant had not proffered a fair and just reason for withdrawing his plea, the court denied the plea-withdrawal motion and thereafter denied a motion for reconsideration.

Davila-Ruiz appealed the denial of his motion to withdraw his plea pursuant to Rule 11(d)(1). The First Circuit agreed, and vacated his guilty plea and conviction, remanding to the District Court.

The First Circuit stated the following:

> **Rule 11(d)(1) is clear as a bell: it renders a district court powerless to deny a plea-withdrawal motion when the motion is made before the plea has been accepted.** ***See, e.g., United States v. Arami, 536 F.3d 479, 481 (5th Cir. 2008); Jones, 472 F.3d at 908*** **[citing** ***United States v. Jones*****, 472 F.3d 905 (D.C. Cir. 2007)]. In this case, the defendant asseverates that he filed his plea-withdrawal motion prior to the time that the district court accepted his plea and that, therefore, the court had no choice but to grant the motion without regard to his reasons for seeking such relief. For all practical purposes, then, the question reduces to whether the undisputed chain of events requires a finding that the plea was accepted before the defendant moved to withdraw it.**

U.S. v. Davila-Ruiz, supra, at 252.

The Court of Appeals also stated:

> **We recognize that Rule 11 does not specify how a plea is to be accepted. *See United States v. Battle,* 499 F.3d 315, 321 (4th Cir. 2007). Sometimes, the use of equivocal language during a change-of-plea colloquy may complicate the issue. *See Byrum, 567 F.3d at 1259-64 [citing United States v. Byrum, 567 F.3d 1255, 1258-59 (10th Cir. 2009)]*; *Jones*, 472 F.3d at 909; *United States v. Head*, 340 F.3d 628, 630-31 (8th Cir. 2003). Here, however, there was nothing equivocal about the magistrate judge's statements and actions; those statements and actions were crystal clear. During the hearing, the magistrate judge said that she would *recommend* that the district court accept the plea and she proceeded to do just that. Because the magistrate judge merely recommended acceptance of the plea rather than actually accepting it, further action by the district court was needed. *See Arami, 536 F.3d at 485; Torres-Rosario*, 447 F.3d at 67[*United States v. Torres-Rosario*, 447 F.3d 61, 65 (1st Cir. 2006); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003 (en banc).**

U.S. v. Davila-Ruiz, supra, at 252.

As noted by the First Circuit in *Davila-Ruiz*, Rule 11(d)(1) is clear as a bell: it renders the District Court powerless to deny a plea-withdrawal motion when the motion is made before the plea has been accepted. In the matter at bar, Mr. Qualls moved to withdraw his guilty plea prior to its acceptance by the District Court. Accordingly, the District Court erred in denying his motion to withdraw his guilty plea, and the Tenth Circuit erred in affirming the District Court.

In conclusion, the issue in the matter at bar is one where there is a serious split among the Circuits that must be resolved by the United States Supreme Court. It is Petitioner's contention that the Tenth Circuit's position on the issue is erroneous, that the opposite position of the Seventh Circuit and other Circuits is correct, and therefore a Writ of Certiorari to the Tenth Circuit must be issued by the Supreme Court.

k. Appendix:

i. Opinion delivered upon the rendering of judgment by the Tenth Circuit Court of Appeals, which is the subject of this Petition: *U.S. v. Jim Walter Qualls, Jr.*, 10th Cir. No. 17-2046, opinion dated July 12, 2018.

ii. Any other opinions rendered in the case necessary to ascertain the grounds of judgment: None

iii. Any order on rehearing: None

iv. Judgment sought to be reviewed other than opinion referenced in (1):

None

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari issue for review of the Order and Judgment of the United States Court of Appeals for the Tenth Circuit in U.S. v. Jim Walter Qualls, Jr., No. 17-2046 (10th Cir., July 12, 2018).

Respectfully submitted,

BY: /s/ J. Lance Hopkins

J. Lance Hopkins, OBA#14852
CJA Appellate Panel Attorney
219 W. Keetoowah
Tahlequah, OK 74464
(918) 456-8603
(918) 456-1407 (fax)
Lance.Hopkins@lunalunallp.net
bacaviola@yahoo.com
Counsel for Petitioner
Jim Walter Qualls, Jr.

CERTIFICATE OF COMPLIANCE

As required by Fed.R.App. P.32(a)(7)(C), I certify that this petition for certiorari is proportionally spaced and contains 4,625 words. I relied on Microsoft Word count to obtain word count, and I used Times New Roman, 12 pt.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ J. Lance Hopkins
J. Lance Hopkins

FILED
United States Court of Appeals
Tenth Circuit

July 12, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JIM WALTER QUALLS, JR., Defendant-Appellant.	No. 17-2046 (D.C. No. 5:14-CR-03519-RB-1) (D. N.M.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **MORITZ**, and **EID**, Circuit Judges.

Jim Walter Qualls, Jr. pleaded guilty to producing child pornography. Yet after a magistrate judge accepted the plea, Qualls had a change of heart and moved to withdraw his plea. The district court denied the motion. Qualls appealed, arguing the district court erred for two reasons. He first contends the district court should have allowed him to withdraw his plea for any reason because he moved to withdraw the plea before it had been formally accepted. If

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* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

the plea had been accepted, Qualls argues the district court should have permitted him to withdraw it because he did not knowingly and voluntarily plead guilty.

We affirm. Qualls could not withdraw his plea for any reason because the magistrate judge accepted the plea before Qualls moved to withdraw it. And it is well settled in this circuit that magistrate judges have the authority to conduct plea hearings and enter pleas in felony cases. Further, the district court did not abuse its discretion when it concluded Qualls entered his plea knowingly and voluntarily.

I. Background

Acting on a tip, Department of Homeland Security agents went to Qualls's residence to execute a federal search warrant relating to a child pornography investigation. During the incident, Qualls waived his Miranda rights and admitted to taking nude photographs of his then three-year-old daughter, uploading these pictures to the Internet, and emailing with others to trade images of his daughter for images of other children engaged in sexual conduct.

A grand jury indicted Qualls on four counts of production of child pornography. With Qualls's criminal history, he faced between 25 and 50 years of imprisonment on each count, and the sentences could run consecutively.

Qualls agreed to plead guilty. He then appeared for a hearing in front of a magistrate judge and signed a consent form to waive his right to have his guilty

plea taken by a United States District Court judge. During the hearing, the magistrate judge confirmed that Qualls had discussed the form with his attorney and voluntarily signed it. The discussion then moved to the length of Qualls's potential sentence. The government explained there was a disagreement. The government contended the maximum sentence for each count was 50 years' imprisonment due to Qualls's past conviction for enticement of a child. In contrast, the defense posited the sentence would carry a maximum of 30 years per count. After confirming he understood the consequences of sentencing and the possibility the government's position was correct, Qualls pleaded guilty to all four counts.

Later, however, Qualls filed a pro se motion to withdraw the guilty plea after his counsel withdrew due to a conflict of interest. With the help of new counsel, Qualls filed an amended motion that argued he could withdraw his guilty plea for two reasons. He based his first argument on Federal Rule of Criminal Procedure 11(d)(1), which allows defendants to withdraw guilty pleas for any reason before they are accepted. In Qualls's view, only district courts have the authority to accept guilty pleas; federal magistrate judges, he contended, lack this power. Accordingly, since his plea had only been accepted by a magistrate judge, Qualls argued the plea had never been formally accepted, and he could consequently withdraw it for any reason. If his plea had been accepted, Qualls contended Federal Rule of Criminal Procedure Rule 11(d)(2)(B) allowed him to

withdraw the plea because he had a "fair and just reason" for doing so—namely, that he would move to suppress his post-arrest statements to law enforcement if the plea were withdrawn.

The district court denied the motion because, in its view, the magistrate judge possessed the authority to accept Qualls's plea, and Qualls had not shown a fair and just reason for withdrawal. The court then sentenced Qualls to four consecutive sentences of 50 years, for a total of 200 years imprisonment.

II. Analysis

Qualls contends the district court erred in denying his motion to withdraw his guilty plea. He first argues he could withdraw the plea for any reason because the magistrate judge lacked the power to formally accept it. Qualls also argues he demonstrated a fair and just reason to withdraw the plea.

A. Qualls Could Not Withdraw His Plea For Any Reason

"[B]efore the court accepts" a defendant's guilty plea, the defendant can withdraw it "for any reason or no reason." Fed. R. Crim. P. 11(d)(1). But "after the court accepts the plea," a defendant can only withdraw it if he "can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B).

Qualls contends the district court should have allowed him to withdraw his guilty plea for any reason because the court had not yet accepted the plea when he moved to withdraw it. But the record reveals that *before* Qualls moved to the

withdraw his plea, the magistrate judge had accepted it. App. 78–79 ("I hereby accept your pleas of guilt and I now adjudge you guilty of each of the crimes in your indictment."). Thus, Qualls could only withdraw his guilty plea if he could demonstrate a fair and just reason for doing so.

Yet Qualls insists the magistrate judge did not—and indeed could not—have accepted his plea because the magistrate lacked the authority to do so. At bottom, Qualls contends only United States District Court judges possess the power to formally accept guilty pleas. Our precedent, however, squarely forecloses this argument. We have held that "with a *defendant's express consent*, the broad residuary 'additional duties' clause of the Magistrates Act authorizes a magistrate judge to conduct a Rule 11 felony plea proceeding, and such does not violate the defendant's constitutional rights." *United States v. Salas-Garcia*, 698 F.3d 1242, 1253 (10th Cir. 2012) (emphasis added) (quoting *United States v. Ciapponi*, 77 F.3d 1247, 1251 (10th Cir. 1996)). Thus, "[m]agistrate judges have the authority to conduct plea hearings and accept guilty pleas." *Id.* In so concluding, we recognized that Congress authorized these duties by magistrate judges, but to the extent any constitutional ambiguity remained, "the consent requirement—fulfilled in this case—saves the delegation" from doubt. *United States v. Williams,* 23 F.3d 629, 633 (2d Cir. 1994) (relied on by *Ciapponi*); *accord United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); *United*

States v. Torres, 258 F.3d 791, 796 (8th Cir. 2001); *United States v. Dees*, 125 F.3d 261, 267 (5th Cir. 1997).[1]

Despite this, Qualls points us to two cases that, in his view, demonstrate a magistrate judge lacks authority to accept a guilty plea: *United States v. Arami*, 536 F.3d 479 (5th Cir. 2008), and *United States v. Davila-Ruiz*, 790 F.3d 249 (1st Cir. 2015). Neither case, however, stands for this proposition. In both cases, the magistrate judges only *recommended* that the district court accept the defendants' pleas—and the defendants moved to withdraw their guilty pleas *before* the district court had formally adopted the magistrate judges' recommendations. *Davilla-Ruiz*, 790 F.3d at 250; *Arami*, 536 F.3d at 481. Accordingly, both courts allowed the defendants to withdraw their pleas because the pleas had not, in fact, been accepted by *either* a magistrate judge *or* a district court judge. *Davilla-Ruiz*, 790 F.3d at 250; *Arami*, 536 F.3d at 482–83. These cases thus involved a straightforward application of Rule 11(d)(1): when a magistrate judge only *recommends* the district court accept a plea but does not actually accept it, the defendant can withdraw the plea anytime *before* the district court formally accepts it.

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[1] We realize Qualls believes "*Salas-Garcia* is an erroneous application of Rule 11(d)(1)." Aplt. Br. at 30. But "[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *United States v. Nichols*, 169 F.3d 1255, 1261 (10th Cir. 1999) (quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993)).

But here, in stark contrast to *Davilla-Ruiz* and *Arami*, the magistrate judge formally *accepted* the guilty plea, rather than merely *recommending* its acceptance. App. 78–79 ("I hereby accept your pleas of guilt and I now adjudge you guilty of each of the crimes in your indictment."). Thus, *Davilla-Ruiz* and *Arami* are not factually on point. And more fundamentally, neither case suggests magistrates lack the authority to accept guilty pleas.

Thus, the district court properly held that Qualls could not withdraw his guilty plea for any reason pursuant to Rule 11(d)(1) because the magistrate judge had formally accepted the plea.

B. Qualls Knowingly and Voluntarily Pleaded Guilty

Qualls next argues he did not knowingly and voluntarily plead guilty because he received no benefit or consideration in exchange for his plea.

1. Forfeiture and Waiver

As an initial matter, Qualls forfeited this argument because he did not raise it before the district court. He then waived the argument by not arguing for plain error review on appeal.

Defendants forfeit arguments they fail to raise before the district court. *See Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1127–28 (10th Cir. 2011) (explaining that if a "theory simply wasn't raised before the district court, we usually hold it forfeited"). We can consider forfeited arguments on appeal, but only under the plain error standard of review. *Id.* Crucially, though, if a

defendant "fail[s] to argue for plain error and its application on appeal," he waives the argument before this court. *See id.* at 1331; *McKissick v. Yuen*, 618 F.3d 1177, 1189 (10th Cir. 2010) (concluding that if a defendant forfeits an argument and then fails to "explain in her opening appellate brief . . . how they survive the plain error standard," this "waives the argument[] in *this* court").

Applying this standard here, Qualls's sole argument before the district court was that he wanted to contest "the statement that was provided implicating him in the instant offense." App. 17. He never referenced the voluntary or willing nature of his plea. Qualls therefore forfeited any challenge to his plea on that basis. And when Qualls raised this argument for the first time on appeal, he waived it because his briefing made no mention of the plain error standard of review.

2. Merits

Even if Qualls had not forfeited the argument, we would still conclude the district court did not abuse its discretion in denying the motion to withdraw.

When, as here, the court accepted the defendant's plea, the defendant can only withdraw the plea if he can "show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). To evaluate whether the defendant has satisfied this burden, we examine a number of non-exclusive factors—often called the "*Gordon* factors":

(1) whether the defendant asserted his innocence,

> (2) whether the plea was knowing and voluntary,
> (3) whether defendant was assisted by counsel,
> (4) whether the defendant delayed filing his motion and, if so, why,
> (5) whether withdrawal would prejudice the government,
> (6) whether withdrawal would substantially inconvenience the court, and
> (7) whether withdrawal would waste judicial resources.

United States v. Gordon, 4 F.3d 1567, 1572 (10th Cir. 1993); *see United States v. Hamilton*, 510 F.3d 1209, 1214 (10th Cir. 2007). More recent cases also instruct us to consider an eighth factor of whether the government would be likely to convict the defendant at trial. *United States v. Sanchez-Leon*, 764 F.3d 1248, 1258 (10th Cir. 2014). We "review the district court's application of the *Gordon* factors for abuse of discretion, with the exception of two factors which we review de novo: whether the plea was knowing and voluntary and, if reviewable on direct appeal, whether counsel provided effective assistance." *United States v. Marceleno*, 819 F.3d 1267, 1272 (10th Cir. 2016).

The district court found that Qualls was not entitled to withdraw his plea based on any of the first three factors. These factors are the most important in our evaluation and are frequently dispositive. *See United States v. Byrum*, 567 F.3d 1255, 1265 (10th Cir. 2009) ("[A] court need not address the prejudice to the government, the timing of the defendant's motion, the inconvenience to the court, or the waste of judicial resources factors 'unless the defendant establishes a fair

and just reason for withdrawing his guilty plea' in the first instance." (quoting *Hamilton*, 510 F.3d at 1217)).

Qualls contests only the second factor: he argues he did not plead guilty knowingly and voluntarily. In making this argument, he relies on general principles of contract law. He contends he received no consideration in exchange for his offer to plead guilty, such as a reduced sentence. This lack of consideration, he claims, proves he "did not knowingly and voluntarily enter the plea." Aplt. Br. at 12.

Qualls is right that if defendants enter plea agreements with the government, some circuits apply ordinary contract interpretation principles and require consideration. *See United States v. Brunetti*, 376 F.3d 93, 95 (2d Cir. 2004) (per curiam) ("[A] guilty plea can be challenged for contractual invalidity, including invalidity based on a lack of consideration." (citing *United States v. Parrilla-Tirado*, 22 F.3d 368, 371 (1st Cir. 1994))). Critically, though, in these cases courts employ contract interpretation principles to analyze plea agreements *with the government*. And here, Qualls did *not* enter a plea agreement with the government. Thus, consideration could not have been required because there was no "contract" between Qualls and the government—Qualls simply pleaded guilty.

He also claims he did not plead knowingly and voluntarily because "[e]ven with the assistance of counsel, [he] did not understand that he was looking at a life sentence as a consequence of his plea . . . ." Aplt. Br. at 16. But the

magistrate judge specifically asked Qualls whether he fully understood that he could be sentenced to "200 years" in prison and would definitely face at least "15 years" of imprisonment on each of the four counts—the mandatory minimum. App. 71. Qualls affirmatively responded to the court's inquiry, confirming he understood he could be facing an effective life sentence.

Finally, Qualls points to *United States v. Romero*, 360 F.3d 1248 (10th Cir. 2004), and *United States v. Fard*, 775 F.3d 939 (7th Cir. 2015), claiming these cases generally support his right to withdraw under Rule 11(d)(2)(B) for "a fair and just reason." But neither case involved remotely similar facts.

In *Romero*, the defendant was mistakenly indicted after the government promised not to prosecute him in federal court in exchange for his cooperation. We held the district court is required to uphold and enforce the agreements between the defendant and the government. *Romero*, 360 F.3d at 1253–54. That case bears no resemblance to the facts here, however, because Qualls possessed no plea agreement with the government.

Fard, a Seventh Circuit decision, is equally inapplicable. There, the court held the defendant did not knowingly and voluntarily plead guilty because he did not know or understand the elements of the crime he pleaded guilty to. *Fard*, 775 F.3d at 943–44. But Qualls does not claim he did not understand the elements of the crimes listed in his guilty plea. He instead claims he did not understand the

consequences of his plea—that he was receiving an effective life sentence with no consideration in exchange. Thus, *Fard* is inapplicable.

In sum, the district court did not abuse its discretion when it concluded Qualls did not proffer a "fair and just reason" for withdrawing his guilty plea.

III. Conclusion

We therefore **AFFIRM** the district court's denial of Qualls's motion to withdraw his guilty plea.

ENTERED FOR THE COURT

Timothy M. Tymkovich
Chief Judge