No. 18-5771

IN THE SUPREME COURT OF THE UNITED STATES

JIM WALTER QUALLS, JR., 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

REPLY IN SUPPORT OF CERTIORARI

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I. THE GOVERNMENT ADMITS THAT THE CIRCUITS DISAGREE ABOUT WHETHER MAGISTRATE JUDGES MAY ACCEPT FELONY GUILTY PLEAS

The Government admits that "a conflict . . . exists in the courts of appeals about whether magistrate judges have the statutory authority to … accept [a] defendant's [felony] plea." BIO 11. The Seventh Circuit has held that magistrates are not authorized to "accept[] . . . a guilty plea in a felony case." United States v. Harden, 758 F.3d 886, 889 (7th Cir. 2014). Three other circuits allow them to do so. See United States v. Salas-Garcia, 698 F.3d 1242, 1253 (10th Cir. 2012); 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).

The Government cannot dispute that a three-to-one circuit split would ordinarily merit this Court's attention. See, e.g., Air & Liquid Sys. Corp. v. DeVries, 138 S. Ct. 1990 (2018) (mem.) (granting certiorari to resolve a one-to-one split about the scope of maritime asbestos liability); Roberts v. Sea-Land Servs., Inc., 556 U.S. 93, 99 & n.4 (2012) (granting certiorari to resolve a two-to-one split about benefits for certain highly paid workers covered by the Longshore and Harbor Workers' Compensation Act). Instead, it asserts that this Court should deny review because the split is "undeveloped." BIO 14.

It is unclear what the Government believes this Court needs before resolving the disagreement. Judge Wilkinson spent five pages defending the Government's position in Benton, see 523 F.3d at 429–33, and Judge Tinder spent five pages defending the contrary view in Harden, see 758 F.3d at 888–92. Three other circuits have also discussed the issue. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121–22 (9th Cir. 2003) (en banc); Salas-Garcia, 698 F.3d at 1253; Woodard, 387 F.3d at 1331–34. The pros and cons of each side have been fully explored.

The Government similarly suggests that other circuits haven't had enough time to consider the Seventh Circuit's views; "[t]he Fourth Circuit is the only court of appeals that has had occasion to respond to [Harden], and it has done so only in unpublished decisions." BIO 12. Again, it is unclear why the Government believes that this Court should wait for other circuits to take sides in a fleshed-out debate. And if the Government means to suggest that the Fourth Circuit might reconsider its position, it is wrong. That court has made clear that it does not "disapprov[e] of Benton," despite the Seventh Circuit's contrary views. See United States v. Ross, 602 Fed. App'x 113, 115 n.* (4th Cir. 2015); cf. 4th Cir. R. 35(b) (judges may call for rehearing en banc sua sponte). The Seventh Circuit isn't going anywhere either; because its decision

"create[d] a split among circuits," the Harden panel "circulated it . . . to all judges . . . in regular active service," yet "[n]one voted to hear the case en banc." 758 F.3d at 891 n.1. So even if one accepted the Government's newly minted rule that certiorari is inappropriate where "[n]o court has addressed the question . . . en banc," BIO 14, it would not matter here: two circuits have made clear that they will continue to disagree.

II. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THIS IMPORTANT QUESTION

This petition is the first clean vehicle through which this Court could resolve the acknowledged split. It should do so.

1. Mr. Qualls raised his complaint about the magistrate judge's authority before the district court. "Prior to sentencing, [Mr. Qualls] moved to withdraw his guilty plea." BIO 3. He argued that he could withdraw "for any reason or no reason" under Rule 11(d)(1), because "the magistrate judge's acceptance" of his plea did not count because of the limits on magistrates' authority. BIO 3–4; see Pet. App. 3. The district court rejected Mr. Qualls's view of magistrates' authority, demanded that he provide a "fair and just reason" for withdrawing under Rule 11(d)(2)(B), and found his proposed reasons wanting. Pet. App. 4. Because Mr. Qualls preserved the issue, the Tenth Circuit reviewed his challenge to magistrates'

authority de novo rather than for plain error. Pet. App. 4–7. The Government does not take issue with the Tenth Circuit's standard of review.

Mr. Qualls's case thus differs from every previous petition whose denial the Government cites to suggest that the question presented is not worth the Court's time. The (well-written) petitions in Farmer v. United States, 136 S. Ct. 794 (2016) (mem.), and Ross v. United States, 136 S. Ct. 794 (2016) (mem.), faced the barrier of plain-error review; as the Government pointed out at length, the defendants in those cases had not sought to withdraw their pleas (or otherwise complained about them) before the district court, instead challenging the magistrate's authority only on appeal. See BIO, Farmer, 2015 WL 7774495, at *14–18; BIO, Ross, 2015 WL 7774494, at *15–18. So, victory on the question presented likely would not have meant anything to Mr. Farmer or Mr. Ross, given the "difficult[y]" of satisfying "all four prongs" of the plain-error analysis. Puckett v. United States, 556 U.S. 129, 135 (2009).

The other previous denials the Government cites were even further afield. The petition from the Fourth Circuit's decision in Benton predated the Seventh Circuit's decision in Harden. See Benton v. United States, 555 U.S. 998 (2008) (mem.). It is little wonder this Court declined to review the issue before

there was a split. And the petition in Marinov v. United States, 135 S. Ct. 1843 (2015) (mem.), was the worst of all. The decision below there did not address the question -- raised in a stricken pro se brief -- and dismissed because of the defendant's appeal waiver. BIO, No. 14-7909, at 17. And Marinov's untimely petition did not even implicate the question, because the district court accepted Marinov's plea. See id. at 12–17.

2. The Government asserts that even though Mr. Qualls preserved his challenge to the magistrate's authority under the statute, this case is a bad vehicle for considering that question because he did not also question the magistrate's authority under Rule 59 of the Federal Rules of Criminal Procedure. BIO 15–16. This is baffling. It would be one thing if the Government asked the Court to grant, vacate, and remand because it now believed that Mr. Qualls's conviction violated Rule 59. It is another thing for the Government to insist that Rule 59 does not prohibit magistrates from accepting pleas -- as it did in Harden, see 2014 WL 586911, at *12, and does not disclaim here -- yet still argue that, because the Government might be wrong about Rule 59, the Court need not address the scope of the Magistrates Act.

Even setting aside the Government's chutzpah, its argument still makes no sense. Petitioners need not raise every possible challenge to a decision to secure review of those issues that they did raise and that the lower courts decided against them. Nor is there any canon of "statutory avoidance" cautioning this Court to avoid resolving the split about the scope of authority under the Magistrates Act because it might reach a similar outcome under the Federal Rules of Criminal Procedure.

And in any event, it would be passing strange if Rule 59 prohibited what the Magistrates Act allowed, because Rule 59 tracks the Magistrates Act. As this Court put it before Rule 59's enactment, the statute authorizes district courts to refer for determination pretrial matters other than "dispositive pretrial motions," Gomez v. United States, 490 U.S. 858, 868 (1989) (emphasis added), a category that includes motions "to dismiss or quash an indictment" or "to suppress evidence in a criminal case," 28 U.S.C. § 636(b)(1)(A); everything else requires a report and recommendation, see id. § 636(b)(1)(B). That is exactly the same line that Rule 59 draws: courts may refer "[n]ondispositive matters" "for determination," but "[d]ispositive matters" -- including "a defendant's motion to dismiss or quash an indictment" and "a motion to suppress evidence" -- may be referred merely "for recommendation." There

is no reason to avoid addressing the scope of the Magistrates Act just because Mr. Qualls decided not to raise a repetitive challenge to Rule 59's implementation of it.

3. The Government also contends that the question presented is of diminishing importance. "Since 2016," it has purportedly "instructed prosecutors to request that magistrate judges not accept felony guilty pleas and instead merely make recommendations to the district court." BIO 16.

To begin with, the Government provides no evidence of this supposed policy -- no public statement from officials, no reference to the manual provided to U.S. attorneys, nothing. It is quite something for the Government to urge this Court to decline review because of a "policy" it can't even be bothered to formalize enough to cite.

The Government also apparently has not abided by -- and likely will not continue to abide by -- that supposed new policy, at least when it pinches. In the immigration-heavy District of New Mexico, for example, courts must process many felony guilty pleas for unlawful reentry. To speed up the process, magistrates to this day apparently routinely accept guilty pleas, leaving for district judges the task of sentencing alone (to time served followed by immediate deportation). For example, on a single day this past September, magistrates

accepted guilty pleas from (at least) four different defendants, and the district judges who sentenced those defendants a few weeks later noted that the plea had already been accepted by the magistrate. See, e.g., Dkts. 13, 17, United States v. Perez-Perez, No. 18-cr-02885 (D.N.M.); Dkts. 14, 21, United States v. Espinoza-Perez, No. 18-cr-02879 (D.N.M.); Dkts. 13, 18, United States v. Gonzalez-Morales, No. 18-cr-02880 (D.N.M.); Dkts. 13, 18, United States v. Matute-Puerto, No. 18-cr-02881 (D.N.M.).

These cases were not unusual; many defendants appear to have pleaded guilty in similar fashion there. E.g., Dkts. 13, 17, United States v. Romero-Hernandez, No. 18-cr-02886 (D.N.M.); Dkts. 13, 18, United States v. Zurita-Cruz, No. 18-cr-02884 (D.N.M.); Dkts. 13, 17, United States v. Villegas-Davila, No. 18-cr-02883 (D.N.M.); Dkts. 13, 18, United States v. Perez-Marroquin, No. 18-cr-02882 (D.N.M.).[1] Perhaps that is why the Government can only say that the issue is "unlikely" to recur "with any frequency," not that it has stopped altogether. BIO 16.

[1] In a host of cases in the Western District of North Carolina, the form used by the magistrate declares that "the defendant's plea is hereby accepted," but then goes on to additionally "recommend that the district court accept" the plea. E.g., Dkt. 17, United States v. Mansoor, No. 17-cr-00330 (W.D.N.C.). It is unclear whether this self-contradictory form complies with the Government's new approach or not.

Finally, even if the Government had changed its ways, this Court should still grant certiorari. First, the Government's new policy cannot cure the violation suffered by Mr. Qualls, whose plea was accepted by a magistrate. And as the Government knows, there are others in Mr. Qualls's shoes. See BIO, Chiddo v. United States, No. 18-5945 (noting that case's plain-error posture). The Court should not ignore the violations of these defendants' rights just because the Government has begun complying with the law when it comes to others.

Second, nothing would stop the Government from abandoning its purported policy tomorrow. The Government insists that the Magistrates Act authorizes magistrates to accept felony guilty pleas. See BIO 6-11. It also complains that asking magistrates to produce a report and recommendation -- as it now purportedly does as a matter of grace -- turns plea proceedings into "a temporary and meaningless formality reversible at the defendant's whim." BIO 14 (internal quotation marks omitted); id. at 10-11 ("a dry run or dress rehearsal" that "degrade[s] the otherwise serious act of pleading guilty into something akin to a move in a game of chess" (internal quotation marks omitted)). Moreover, it takes time to produce reports and recommendations to be reviewed rather than already-guilty defendants to be sentenced. Accordingly, there is no reason to

believe that the Government's undocumented, informal, litigation-induced change of heart will continue to overcome the convenience of placing ever more responsibility on magistrates' shoulders -- particularly if this Court suggests that it will not review the question presented.

The Court has granted certiorari in nearly identical circumstances. Just last Term, the Government urged the Court to deny another plea-related issue because it had instructed prosecutors to "draft[] [certain] plea agreements with an eye to avoiding later litigation" over that issue. BIO, Hughes v. United States, 2017 WL 5001267, at *14. This Court took the case anyway. As the defendant explained, he and others continued to labor under old plea agreements, and there were reasons to believe that the Government could not draft its way around the issue entirely. See Hughes Reply, 2017 WL 5593297, at *4–5. So too here. Mr. Qualls faces 200 years in prison because of his magistrate-accepted plea, he is not alone in that fate, the Government has not guaranteed compliance with its new informal policy (and cannot do so anyway), and there are reasons to doubt whether that policy is long for this world. This Court should intervene.

III. MAGISTRATES MAY NOT ACCEPT FELONY GUILTY PLEAS

Because the Government admits there is a split and has no real complaints about this case as a vehicle, it spends most of its time debating the merits. BIO 6–11. The merits are irrelevant to certiorari, but the Government is wrong anyway. The text, history, and policy of the Magistrates Act establish that life-tenured district judges, not mere magistrates, must accept felony guilty pleas.

1. The Magistrates Act carefully sets forth the kinds of felony "pretrial matters" that magistrates may resolve. They may "hear and determine" any such matter except "a motion . . . to dismiss or quash an indictment or information made by the defendant" or "to suppress evidence." 28 U.S.C. § 636(b)(1)(A). For those "dispositive" motions, Gomez, 490 U.S. at 868, the magistrate must submit a report and recommendation for de novo "disposition" by the district court, 28 U.S.C. § 636(b)(1)(B); *see id.* § 636(b)(1)(C). Under these provisions, magistrates may not "hear and determine" the most "dispositive" "pretrial matter" of all -- a felony guilty plea.

Indeed, at the same time Congress authorized magistrates to preside over civil and misdemeanor trials, it recognized that magistrates "[could] only accept guilty pleas in misdemeanor cases." S. Rep. No. 96-74, at 17 (1979). Although the Senate

would have "permit[ted] a . . . magistrate to accept a guilty plea . . . in a case lying outside his trial jurisdiction" if the defendant consented and if the district court "assur[ed] [itself] that there [wa]s a factual basis for the plea" before sentencing, *id.*, the House disagreed, the Senate "recede[d]," and Congress asked the Judicial Conference to "study the issue," S. Rep. No. 96-322, at 10 (1979). The Judicial Conference took the House's view: because "the taking of a guilty plea is a critical step in a criminal case and represents a disposition on the merits," it recommended that "no change be made in the current law that reserves [guilty pleas] to judges." The Federal Magistrate System: Report to the Congress by the Judicial Conference of the United States 52, 53 (1981) ("Judicial Conference Report"); see also Admin. Office of the U.S. Courts, A Constitutional Analysis of Magistrate Judge Authority, 150 F.R.D. 247, 306 (1993) (noting the Magistrate Judge Committee's "strong view that . . . the acceptance of guilty pleas . . . should not be delegated to magistrate[s]" regardless of consent).

To be sure, the Act also authorizes magistrates to perform "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). But that clause cannot be read so broadly that it

"overshadows all that goes before," in particular the specific lines the statute draws between decisions that magistrates may make themselves and those for which they may only offer a recommendation. Gonzalez v. United States, 553 U.S. 242, 245 (2008). That is exactly what the Government's position does here. Why would Congress, say, prohibit magistrates from finally resolving a motion to suppress with the parties' consent, but nonetheless allow them to accept felony guilty pleas if the parties agree? That makes no sense. See Gomez v. United States, 490 U.S. 858, 871–72 (magistrates may not preside over felony trials because "the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases" is an "implicit withholding of the authority to preside at a felony trial").

Moreover, the task of accepting a felony guilty plea is not "comparable in responsibility and importance" to those duties spelled out in the Act. Peretz v. United States, 501 U.S. 923, 933 (1991). Unlike someone who, say, faces a recommended denial of his suppression motion after the magistrate judge considers the issue, "[a] defendant who [pleads guilty] simultaneously waives several constitutional rights," not least of which is the right to a trial. McCarthy v. United States, 394 U.S. 459, 466 (1969). And as Mr. Qualls knows all too well, once the court

accepts the plea, defendants lose other important rights -- such as the absolute right to withdraw it. Because a guilty plea works a "final and consequential" shift in the defendant's status in the same way as a guilty verdict after a felony trial, accepting it is simply too important a job for magistrates. Harden, 758 F.3d at 889; see id. at 891.

2. The Government does not try to square its position with the Act's enumeration of permitted and prohibited tasks. Instead, it argues that finding someone guilty of a felony is no big deal. After all, all agree that magistrates may conduct the plea colloquy; on the Government's view, accepting the plea merely adds the "ministerial" task of checking the "guilty" box afterward. BIO 7–10.

But not everyone shares the Government's dim view of the importance of felony guilty-plea proceedings; Congress, the Judicial Conference, and the Seventh Circuit, for instance, think finding someone guilty of a felony is an important occasion. See supra pp. 11–12; Harden, 758 F.3d at 889. And everyone but the Government knows the difference between making a recommendation and making a decision; the former is relatively costless for all concerned, but the latter irrevocably affects lives. This "critical step" in society's most solemn task --

criminal punishment -- should be "reserve[d]" for Article III "judges," not mere magistrates. Judicial Conference Report 53.

CONCLUSION

The petition should be granted.

November 21, 2018

Respectfully submitted,

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