

No. 20-_____

**IN THE
SUPREME COURT of the UNITED STATES**

OSCAR GARCIA,

Petitioner,

v.

UNITED STATES,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Tenth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether or not a magistrate judge can fully and finally accept a felony guilty plea with the defendant's consent such that it cannot be withdrawn for any reason under Rule 11, or if the United States Constitution, the Federal Magistrates Act, and the Rules of Criminal Procedure require that such guilty plea be accepted by an Article III judge and until such time it can be withdrawn for any reason under Rule 11.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Oscar Garcia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion is published and reported at 936 F.3d 1128 (10th Cir. 2019) (Pet.App.A). The Tenth's Circuit's *Order* denying the *Petition for Rehearing En Banc* is unpublished and unreported. (Pet.App.D). The District Judge's *Memorandum Opinion and Order* denying Petitioner's *Motion to Withdraw Plea* can be found at 2017 WL 3701236. (Pet.App.B). The District Judge's *Memorandum Opinion and Order* denying the Government's *Motion for Reconsideration* can be found at 2017 WL 5186052 .(Pet.App.C).

JURISDICTION

The Tenth Circuit entered its Order on the merits of the appeal on September 4, 2019 and its Order denying the *Petition for Rehearing en Banc* on December 13, 2019. (Pet.App.A,D). Pursuant to Supreme Court Rule 13, the Petition for Writ of Certiorari is due ninety (90) days from the date of the order, or by March 12, 2020. This Court's jurisdiction is derived from 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Article III, section I of the U.S. Constitution provides:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

The Federal Magistrates Act provides in most relevant part:

A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

28 U.S.C. §636(b)(3).

Rule 59(b) of the Federal Rules of Criminal Procedure states:

(b) Dispositive Matters.

(1) Referral to Magistrate Judge. A district judge may refer to a magistrate judge for recommendation a defendant's motion to dismiss or quash an indictment or information, a motion to suppress evidence, or any matter that may dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately serve copies on all parties.

(2) Objections to Findings and Recommendations. Within 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

(3) De Novo Review of Recommendations. The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions.

Rule 11(d) of the Federal Rules of Criminal

Procedure states:

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:
(A) the court rejects a plea agreement under Rule 11(c)(5); or
(B) the defendant can show a fair and just reason for requesting the withdrawal.

STATEMENT OF THE CASE

Under 18 United States Code §3231 the “district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.” Petitioner was charged with violating 21 U.S.C. §§846 and 841(a)(1) and (b)(1)(A) and 18 U.S.C. §1956(h). Accordingly, the District Court had original subject matter jurisdiction over this matter. The Tenth Circuit Court’s jurisdiction was derived from 28 U.S.C. §1291 and 18 U.S.C. §3742, which give the appellate court jurisdiction from all final decisions of the district courts and allow for appeal of a sentence.

Petitioner Garcia pled guilty to conspiracy to possess with intent to distribute a controlled substance and money laundering and consented to and appeared in front of a magistrate judge for his change of plea hearing. After the change of plea hearing, there were no written recommendations from the magistrate entered into the docket or any notice from the clerk as to objections to the magistrate recommendations. There were no hearings conducted or substantive pleadings filed. After his change of plea hearing before the magistrate and prior to sentencing before the District Court, Mr. Garcia moved to withdraw his plea.

The *Motion to Withdraw* argued that the plea had not been accepted by the District Court and accordingly could be withdrawn as a matter of right under Rule 11 of the Federal Rules of Criminal Procedure. Mr. Garcia argued that the Federal

Magistrates Act (FMA) does not authorize the acceptance of a guilty plea by a magistrate judge as it is a dispositive matter and proceeding in such a way violated his constitutional rights. Additionally, the *Motion* argued that since the matter was held before a Magistrate Judge and the District Judge had not acted on the plea, Mr. Garcia could withdraw his plea as a matter of right. In sum,

If the magistrate is without authority to accept a guilty plea and the District Court has not acted beyond the referral of the case to the magistrate, the plea has not been accepted – the clear language of the statute dictates that Mr. Garcia be allowed to withdraw his plea under Fed. R. Crim. Proc. 11, the Federal Magistrate’s Act, and Article III of the United States Constitution.

The Government initially objected and the District Court denied the *Motion*. (Pet.App.B).

In an interesting procedural twist, the day following entry of the *Order*, the Government moved for reconsideration, arguing that a felony guilty plea

is a dispositive matter under F.R.Cr.P. 59(b) and it is not accepted for Rule 11 purposes until the District Judge accepts the Magistrate Judge's report and recommendation. The Government further argued that some of the Tenth Circuit's jurisprudence on the issue predated the promulgation of Rule 59 and the rulings after Rule 59 did not discuss the impact of the Rule. Despite the concurrence of the parties, the District Court once again denied the request to allow Mr. Garcia to withdraw his guilty plea. (Pet.App.C). Ultimately, the District Court sentenced Mr. Garcia to one hundred eighty (180) months of incarceration and entered *Judgment*.

Mr. Garcia then filed an *Appeal* to the Tenth Circuit. On appeal Mr. Garcia argued that a felony guilty plea is a dispositive matter for which a magistrate is allowed only to make a recommendation and the plea can be withdrawn as a

matter of right under Rule 11 until it is formally accepted by the District Court. He argued that consent did not alter the analysis based on the structural limitations in Article III of the United States Constitution. For the structural protections of Article III to remain intact, the district court must maintain total control and jurisdiction. Mr. Garcia argued this is the missing protection when the magistrate is allowed to fully and finally accept a felony guilty plea with no further action by the district court. On appeal the Government changed its position once again, arguing that the District Court's actions were proper.

The Tenth Circuit upheld the District Court, finding that it was bound by its prior precedent set in *United States v. Ciapponi*, 77 F.3d 1247 (10th Cir. 1996), but two judges of the panel noted that “[w]ere we not bound by *Ciapponi*, we are persuaded that the

acceptance of a felony guilty plea is in fact a dispositive matter. . . . So the question remains is whether a report and recommendation is required on a dispositive matter when the parties consent to appearing before a magistrate judge. We would answer that question affirmatively.” *United States v. Garcia*, 936 F.3d 1128, 1140 (10th Cir. 2019) (Pet.App.A). The Tenth Circuit Court noted that “by accepting a guilty plea for purposes of Rule 11, a magistrate judge is exercising the judicial power of the United States in violation of Article III of the Constitution. . . . Article III power cannot be waived by consent. *Id.* at 1141. Despite, the Tenth Circuit stating that “it is worth revisiting” *Ciapponi* it denied Petitioner’s request for rehearing en banc and accordingly this *Petition for Writ of Certiorari* follows. *Id.* at 1142. (Pet.App.D).

ARGUMENT

I. Circuits are Split

A split of authority in the circuits is a legitimate basis for a petition for writ of certiorari under Rule 10 of the United States Supreme Court. The circuits are in fact split with regard to the ability of a magistrate to accept a felony guilty plea without further review by the district court, with a defendant's consent, and under Rule 11 when the plea is formally accepted for purposes of the standard to withdraw the plea. One circuit does not allow, even with consent, a magistrate to accept a felony guilty plea. Four circuits do allow a magistrate to conduct a felony change of plea with *de novo* review, either automatically or upon objection, from the district court. Lastly, the three circuits allow with consent a magistrate to fully and finally accept a felony guilty plea for purposes of Rule 11.

A. Absolute Bar

The Seventh Circuit has held that a magistrate judge may not conduct a change of plea hearing, even with consent, noting Congress did not specifically provide this authority in the Federal Magistrates Act. “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.” *United States v. Harden*, 758 F.3d 886, 891–92 (7th Cir. 2014).

[I]t 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 [the defendant’s] guilty plea, even with his consent, the magistrate judge violated the Federal Magistrates Act.

Harden, 758 F.3d at 889. *Harden* addressed the circuit split that exists and explained the range of procedures utilized by the other circuits, as discussed below.

B. De Novo Review Required to Avoid Violations of Structural Protections of Article III

The Second, Fifth, Eighth and Ninth Circuits all require *de novo* review of magistrates actions in

accepting a felony guilty plea, either automatically or upon objection of the defendant, to not run afoul of the Constitution. The Second Circuit found that the “structural protections of Article III are not implicated. Because the district court remains in control of the proceeding, and the matter is reported to that court for its approval, there should be no concern that the use of a magistrate judge to allocute a defendant accused of a felony will tend to devitalize Article III courts.” *United States v. Williams*, 23 F.3d 629, 634 (2d Cir.1994). Similarly, for the Fifth Circuit, it was the district court’s ability, if objection is made, for *de novo* review of the magistrate judge’s action that it found cured any Article III structural concerns. *United States v. Dees*, 125 F.3d 261, 268 (5th Cir. 1997). Likewise the Eighth Circuit found in *United States v. Torres* that since the district court conducted a *de novo* review of the magistrate’s

recommendation that the procedure did not violate the FMA or the structural guarantees of Article III. 258 F.3d 791, 796 (8th Cir. 2001). Lastly, the Ninth Circuit has also held that if objection is made the district court must review *de novo* the magistrate's ruling. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

C. Outright Acceptance by Magistrate

The Fourth, Tenth, and Eleventh Circuits allow magistrate judges to fully and finally accept felony guilty pleas without entering a report and recommendation with the defendant's consent. *United States v. Benton*, 523 F.3d 424 (4th Cir. 2008); *United States v. Garcia*, 936 F.3d 1128 (10th Cir. 2019); *United States v. Woodard*, 387 F.3d 1329 (11th Cir. 2004).

Benton held that “magistrate judges possess the authority to bind defendants to their plea for the

purposes of Rule 11, so long as district judges retain the authority to review the magistrate judge's actions *de novo*." *Benton*, 523 F.3d at 429. However, the Fourth Circuit limited this *de novo* review to whether there was a "fair and just reason" to withdraw, thus effectively concluding that the plea is fully accepted for Rule 11 purposes after proceeding before a magistrate.

Defendants with substantive or procedural concerns about their plea proceedings before a magistrate judge are entitled to *de novo* review in the district court. While the standard of review is *de novo*, the substantive rule of decision is whether the defendant has established a "fair and just" reason to withdraw his plea after the magistrate judge has accepted it. A "fair and just" reason would obviously include a defective plea proceedings before the magistrate judge.

Id. at 432. Similarly the Eleventh Circuit held that the FMA authorizes a magistrate judge to conduct Rule 11 proceedings with a defendant's consent and

that such action is not a usurpation of Article III. *Woodard*, 387 F.3d at 1331. With regard to the structural concerns, the Eleventh Circuit held that “[i]t is ‘the availability of [de novo] review, upon request by the parties, rather than a required performance thereof, that safeguard[s] the integrity of the federal judiciary.’” *Id.* at 1334.

In this case, the Tenth Circuit held that it was bound by its prior precedent in *United States v. Ciapponi*, 77 F.3d 1247 (10th Cir. 1996). As the majority of the Tenth Circuit panel recognized:

It is clear that “[t]he most basic rights of criminal defendants are . . . subject to waiver.” *Peretz*, 501 U.S. at 936. But “[t]o the extent that [a] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III.” *Schor*, 478 U.S. at 850–51. This is because “Article III, § 1, safeguards the role of the Judicial Branch in our

tripartite system by barring congressional attempts ‘to transfer jurisdiction [from constitutional to legislative courts] for the purpose of emasculating’ constitutional courts.” *Id.* at 850 (*quoting Nat’l Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949)).

United States v. Garcia, 936 F.3d 1128, 1140-41 (10th Cir. 2019). The panel’s majority further recognized,

Consent, therefore, cannot cure constitutional command. * * * We would find that by accepting a guilty plea for purposes of Rule 11, a magistrate judge is exercising the judicial power of the United States in violation of Article III of the Constitution.

Because Article III does not grant individual rights, but rather vests the judicial power of the United States in a specific branch of government, Article III power cannot be waived by consent. Therefore, no criminal defendant can legitimately waive this provision and consent to a magistrate judge’s acceptance of a guilty plea. This is because a criminal defendant can only waive his individual rights—he cannot authorize the transfer of power away

from an independent branch of government.

* * *

The acceptance of a felony guilty plea is a dispositive matter, finding the criminal defendant guilty of the crimes charged and disposing of the matter before the court. It is a final judgment against the defendant—the same final judgment that would have issued had a jury of his peers found him guilty. Thus, a judge who accepts the felony guilty plea is exercising the “judicial power of the United States” and rendering a final judgment.

This judicial power is exclusively vested in Article III courts. Unlike individual protections, which parties can waive through consent, the “judicial power of the United States” cannot be given away by a litigant. * * * Because the vesting of the judicial power is a structural component of the Constitution, and the Constitution does not explicitly allow for consent to compromise this structure, we would find that a party’s consent to a magistrate’s acceptance of a felony guilty plea—a final judgment—does not authorize a magistrate judge to accept the guilty plea for purposes of Rule 11. Rather, a magistrate judge must issue a report and recommendation so that final

acceptance is left to Article III judges who exercise the judicial power of the United States.

Id. at 1141-42. Yet the Tenth Circuit's decision affirming the District Court allowed exactly what the panel majority concluded was a violation of Article III of the Constitution. As the majority of the Tenth Court's panel suggested, Supreme Court review would be appropriate:

In *Ciapponi*, we found no constitutional violation exists when a magistrate judge accepts a felony guilty plea. This conclusion has been reaffirmed several times in our circuit. But perhaps it is worth revisiting. Since *Ciapponi*, there has been no "en banc reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d at 724. Thus, we decline to address whether *Ciapponi* was wrongly decided as a constitutional matter. Instead, we simply note that while we are bound by our own precedent, given the development in this particular area of law, it is necessary to grapple with the implications of allowing magistrate judges to accept felony guilty pleas without any mandatory review by a district court.

United States v. Garcia, 936 F.3d 1128, 1142 (10th Cir. 2019).

II. The Structural Protections of the Constitution and Importance of the Proceeding Require De Novo Review Even With Consent

The proper analysis of this issue does not hinge on the complexity of a change of plea, but rather on the judicial power exercised at and the importance of a felony change of plea hearing. There are mixed opinions as to the complexity of a change of plea hearing. “[W]hen a judge accepts a guilty plea, the judge is required to conduct a long, searching colloquy, as required by Federal Rule of Criminal Procedure 11(b), to ensure that the defendant's waivers of his important rights are “voluntary ... knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.’ *Brady*, 397 U.S. at 748, 90

S.Ct. 1463.” *Harden*, 758 F.3d at 888–89. The counter argument is that “Rule 11 proceedings, although of undeniable importance, are considerably less complex than suppression hearings. A change-of-plea is a highly structured event that follows a familiar script and is governed by the specific terms of Rule 11. Unlike an out-of-court admission or confession, a change-of-plea takes place in the judge's presence; the defendant's free will can be assessed by the judge first-hand, and does not depend on the credibility of conflicting witnesses, as is usually the case at suppression hearings.” *Reyna-Tapia*, 328 F.3d at 1119. Nonetheless, the level of complexity does not denigrate the Constitutional structural and procedural protections based on the exercise of judicial power and the importance of the proceeding.

A. Judicial Power

Judicial power is a sovereign power which only a sovereign can delegate. F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 Vand. L. Rev 715, 742 (2018). “[T]he Constitution insulates the judiciary from popular opinion through life tenure and salary guarantees” and such assignment of judicial power also protects the rule of law. *Id.* at 723, 736. The Constitution has provisions that confer individual rights and structural provisions that allocate power. *Id.* at 747. The structural provisions of Article III of the Constitution preserve an impartial and independent judiciary and serve as a check and balance on our tripartite system, ensuring that one branch of government cannot be enlarged or deflated by another branch. *Commodity Futures Trading*

Comm'n v. Schor, 478 U.S. 833, 850, 106 S. Ct. 3245, 3256–57, 92 L. Ed. 2d 675 (1986).

To the extent that this structural principle is implicated in a given case, the parties by consent cannot cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, §2. When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.

Id. at 850-51 (internal citations omitted). “These important functions of Article III are too central to our constitutional scheme to risk their incremental erosion.” *Id.* at 861, 3262 (Brennan and Marshall dissenting). If individual defendants are allowed to consent to a non-article III judge, for one of the most critical stages of a felony criminal proceeding – adjudication – it will be not an incremental erosion, but rather a colossal erosion of Article III.

Undoubtedly, a defendant can waive even constitutional rights. The more relevant question, however, is can the Court waive its legal mandates regarding authority? The answer is no. “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.” *Harden*, 758 F.3d at 891–92.

[I]t 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 [the defendant’s] guilty plea, even with his consent, the magistrate judge violated the Federal Magistrates Act.

Id. at 889.

[O]ur precedents establish that Article III, § 1, not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as “an inseparable element of the constitutional system of checks and balances.” Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts “to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating” constitutional courts, and thereby preventing “the encroachment or aggrandizement of one branch at the

expense of the other.” *To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.*

Schor, 478 U.S. at 850–51, 106 S. Ct. at 3256–57.

(internal citations omitted) (emphasis added).

Consent of the parties does not alter the constraints of the structural protections of the Constitution. Consent does not alter the authority of a court to act or refrain from acting. Consent is irrelevant in determining a court’s authority. Even with consent of the parties, when a magistrate conducts a felony plea of guilty, the magistrate can only make a recommendation and the district court

still must accept the plea. In this case, the District Court did not accept the plea prior to Mr. Garcia's motion to withdraw his plea pursuant to Rule 11, a time when he could withdraw as a matter of right.

Peretz v. United States is the oft-cited seminal case regarding the additional duties clause found in the Federal Magistrates Act. 501 U.S. 923, 222 S.Ct. 2661, 115 L.Ed.2d 808 (1991). In discussing the structural protections of Article III, the majority found that the protections were intact because the district court maintained total control and jurisdiction. "Because 'the entire process takes place under the district court's total control and jurisdiction,' there is no danger that use of the magistrate involves a 'congressional attemp[t] 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts.'"

Peretz, 501 U.S. at 937, 111 S.Ct. at 2669-70 (internal citations omitted).

This is the missing piece in Mr. Garcia's case. Since the procedure set forth in Rule 59, of a formal recommendation to the District Court, opportunity to object, and the District Court's acceptance, rejection, or modification, was not followed, the District Court did not maintain total control and jurisdiction and the procedural safeguard was absent. This is the safeguard that must be present to avoid constitutional concerns. This is also the step where the District Court accepts the plea, a step that did not occur in Mr. Garcia's case. Since the plea was not accepted by the District Court, Rule 11 allows Mr. Garcia to withdraw his plea as a matter of right.

To maintain the structural protections of Article III the district court must maintain total control and jurisdiction. *Peretz*, 501 U.S. at 937, 111

S.Ct. at 2669-70. Allowing a magistrate judge to make a report and recommendation to the district court, for the district court's *de novo* review, is the only procedure which maintains the district courts total control and thus satisfies the structural protections of Article III. This procedure would also align the FMA and Federal Rule of Criminal Procedure 59¹. The residual clause of the FMA only

¹ F.R.Cr.P. 59, adopted in 2005, delineates magistrate judge authority regarding dispositive matters.

(b) Dispositive Matters.

(1) Referral to Magistrate Judge. A district judge may refer to a magistrate judge ***for recommendation*** a defendant's motion to dismiss or quash an indictment or information, a motion to suppress evidence, ***or any matter that may dispose of a charge or defense.*** The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on the record ***a***

allows for “such additional duties *as are not inconsistent with the Constitution and laws of the United States.*” 28 U.S.C. § 636(b)(3) (emphasis added). Rule 59, with the force and effect of law, allows magistrate judges to hear dispositive matters and then make a recommendation for resolution to the district court. *United States v. Marion*, 404 U.S. 307, 319, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). It is this Court’s “obligation zealously to guard that independence so that our tripartite system of

recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately serve copies on all parties.

(3) De Novo Review of Recommendations. ***The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions.*** (emphasis added).

government remains strong and that individuals continue to be protected against decision makers subject to majoritarian pressures.” *Schor* at 867, 3265-66 (Brennan, J. and Marshal, J. dissenting).

B. Importance of Task Requires Article III Judge

A felony guilty plea adjudicates a criminal defendant guilty of a crime. A felony adjudication comes with potential punishment of at least one year of incarceration. In the federal system that is almost always a foregone conclusion. For Mr. Garcia his adjudication resulted in fifteen (15) years of incarceration. In a federal felony criminal case, the adjudication is of paramount importance, it either results in felony conviction or acquittal/dismissal. Sentencing has major practical implications and motions can resolve or narrow issues -- but it all hangs on the final adjudication. In a criminal case

one would be hard pressed to find another stage of the proceeding that is more important.

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.

“[A] guilty plea is a waiver of important constitutional rights designed to protect the fairness of a trial.” *Johnson v. Ohio*, 419 U.S. 924, 925, 95 S.Ct. 200, 42 L.Ed.2d 158 (1974). It is “more than an admission of past conduct: it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or judge.” *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). In addition to waiving these core rights and protections afforded by our system of criminal justice, defendants often waive their appellate and habeas corpus rights as well. In such cases, accepting a guilty plea is even more final than a guilty verdict.

Harden, 758 F.3d at 888. “A felony guilty plea is equal in importance to a felony trial leading to a verdict of guilty . . . [and] 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.” *Id.* at 891–92. It would be incongruent to require that a felony trial which results in adjudication on the merits must be heard by an Article III judge, but to allow an admission of guilt which also results in adjudication on the merits to proceed without *de novo* review by an Article III judge.

III. Rule 11 Withdrawal of Plea

The outcome of the Constitutional analysis controls the effect of Rule 11. The timing of the legal acceptance of the change of plea determines whether a defendant can withdraw as a matter of right under 11(d)(1) or if the defendant needs to show a fair and

just reason under 11(d)(2)(b). Pursuant to Rule 11(d)(1) of the Federal Rules of Criminal Procedure a “defendant may withdraw a plea of guilty . . . before the court accepts the plea, for any reason or no reason.” “Under this standard, a District Court is without discretion to deny a pre-acceptance withdrawal of a plea.’ *United States v. Arami*, 536 F.3d 479, 483 (5th Cir. 2008); *United States v. Jones*, 472 F.3d 905, 908 (D.C. Cir. 2007.)” (Pet.App.B). The issue raised herein is when does the District Court accept the defendant’s guilty plea pursuant to Federal Rule of Criminal Procedure 11 following a change of plea hearing conducted by a Magistrate Judge?

The Federal Magistrates Act, 28 U.S.C. § 636 . . . , 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).

Harden, 758 F.3d at 888 (emphasis added). It is under this last additional duties clause that the circuit have analyzed whether or not a magistrate judge has the authority to accept a felony guilty plea.

The First and Fifth Circuits have held that a defendant may withdraw a guilty plea after pleading before a magistrate so long as it is before the district court accepts the report and recommendations. *United States v. Davila-Ruiz*, 790 F.3d 249 (1st Cir. 2015); *United States v. Arami*, 536 F.3d 479 (5th Cir. 2008). In *Davila-Ruiz* the First Circuit did not

analyze the issue of Constitutional structural protections, but rather focused its analysis on Rule 11. It held that even after the expiration of the fourteen (14) day objection period to the magistrate's report and recommendation the defendant could still withdraw his plea as a matter of right under Rule 11 because the district court had not yet formally accepted the plea. 790 F.3d at 251-52. At least in the case of *Davila-Ruiz* the report and recommendation procedure was utilized which allowed the district judge *de novo* review and no constitutional issues were raised. Similarly, in *Arami* the Fifth Circuit, analyzing the Rule 11 issue under a plain error standard, held that a defendant has an absolute right to withdraw his guilty plea before the district court accepts it, even when the request to withdraw came two months after the hearing before the magistrate. 536 F.3d 479 (5th Cir. 2008).

CONCLUSION

The structural protection of Article III of the United States Constitution require, at a minimum, that an Article III judge review the magistrates recommendations de novo following a felony guilty plea and these structural protections cannot be waived via consent. Requiring a magistrate to make a recommendation to the District Court for acceptance of a felony guilty plea, even with consent of the defendant, is the only way to emphasize the importance of the proceedings and not run afoul of Rule 59, the Federal Magistrates Act, and Article III of the Constitution. Accordingly, Mr. Garcia respectfully requests that this Court grant writ of certiorari and ultimately hold that de novo review by the district court is required and until that occurs a defendant may withdraw his plea as a matter of right under Rule 11.

Respectfully submitted this 13th day of March, 2020.

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