No. 20-5746

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON THOMAS FINNESY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the acceptance of petitioner's guilty plea to a felony offense by a magistrate judge, which took place with petitioner's consent, was erroneous and entitled him to automatic vacatur of his conviction when challenged for the first time on appeal.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-64a) is reported at 953 F.3d 675.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2020. A petition for rehearing was denied on April 17, 2020 (Pet. App. 65a). The petition for a writ of certiorari was filed on September 14, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Kansas, petitioner was convicted of escaping from federal custody, in violation of 18 U.S.C. 751. Judgment 1. The district court sentenced petitioner to 60 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-64a.

1. In May 2015, petitioner pleaded guilty to one count of misprision of a felony, in violation of 18 U.S.C. 4, after helping to conceal the unlawful possession of a confederate's semiautomatic shotgun. See Presentence Investigation Report (PSR) ¶¶ 13, 44; D. Ct. Doc. 24, at 1, United States v. Finnesy, No. 14-cr-10190 (D. Kan. May 15, 2015). The district court in that case imposed a sentence of 28 months of imprisonment, to be followed by one year of supervised release. PSR ¶ 13. In November 2016, petitioner was transferred to a residential reentry center, also known as a halfway house, to complete his sentence. PSR ¶ 14. Petitioner's release date was March 22, 2017. Ibid.

On January 9, 2017, petitioner cut off his ankle monitor, absconded from the halfway house, and did not return. PSR ¶ 15; see Gov't C.A. Br. 1. On February 3, 2017, petitioner was arrested by state law-enforcement officers after a car chase. PSR ¶ 45. Petitioner was a passenger in the car; after the driver crashed the car into a ditch, petitioner fled on foot. Ibid. Authorities

found him nearby. Ibid. Authorities also recovered a gun near the car, a second gun and ammunition inside the car, and multiple bags of methamphetamine, some of which had been thrown from the passenger-side window of the car during the car chase. Ibid.

2. While petitioner was still at large, a grand jury in the District of Kansas had returned a one-count indictment charging him with escaping from federal custody, in violation of 18 U.S.C. 751. Pet. App. 2a; Indictment 1. After he was apprehended, petitioner and the government entered into a written plea agreement under which he agreed to plead guilty to the escape charge and the government agreed to make certain sentencing recommendations. Pet. App. 3a-4a; see 1 C.A. ROA 19-24 (plea agreement).

On the same day that he entered into the plea agreement, petitioner and his attorney signed a document entitled "CONSENT TO PROCEED WITH GUILTY PLEA BEFORE A UNITED STATES MAGISTRATE JUDGE IN A FELONY CASE." C.A. Supp. ROA 1 (emphasis omitted). In that document, petitioner acknowledged that his attorney had "fully informed" him of his "legal right" to enter a guilty plea before a "U.S. District Judge." Ibid. And petitioner "[k]nowingly and voluntarily" agreed to "waive" that right and instead "consent[ed] to entering [his] guilty plea before U.S. Magistrate Judge Kenneth G. Gale," who also signed the document. Ibid.

Judge Gale conducted petitioner's plea colloquy. After placing petitioner under oath, the magistrate judge confirmed that

petitioner had been "advised" of his right to "have [his] plea hearing conducted by [a] U.S. District Judge but [had] agreed" to instead proceed before the magistrate judge, "in other words, a judge of lower ranking." Pet. App. 66a. The magistrate judge also confirmed that petitioner had received and signed the written consent form. Id. at 66a-67a. The magistrate judge then conducted an extensive plea colloquy, see 3 C.A. ROA 66-83, and concluded that petitioner was "fully competent and capable of" entering a guilty plea, Pet. App. 68a. At the end of the hearing, the magistrate judge stated that he "accept[ed] [petitioner's] guilty plea." Id. at 69a.

Before sentencing, the government filed a motion requesting that the district court determine whether petitioner had breached the plea agreement. Pet. App. 6a. In the agreement, petitioner had agreed not to "engage in additional criminal conduct." Ibid. (brackets and citation omitted). The government contended that petitioner had violated that commitment by "shank[ing]" another inmate in a prison altercation. Ibid. (citation omitted). Citing the remedies provision of the plea agreement, the government requested that the court find a breach of the agreement that would relieve the government from making the sentencing recommendations it had otherwise agreed to make. Id. at 6a-7a.

On March 6, 2018, petitioner appeared for sentencing before a district judge. 3 C.A. ROA 4-60. The district judge heard

testimony concerning the prison altercation, viewed a video of the incident, found that petitioner had in fact stabbed another inmate, and granted the government's motion. Pet. App. 7a-8a. The district judge also found that petitioner had violated the plea agreement by distributing contraband prescription drugs in prison. See ibid. The district judge imposed the statutory maximum term of 60 months of imprisonment, to be followed by three years of supervised release. Id. at 11a; Judgment 2-3. Consistent with the government's recommendation, made after petitioner's breach of the plea agreement, the district judge also ordered that the 60-month term of imprisonment be served consecutively to petitioner's state sentence arising from the guns and methamphetamine found after the car chase. Pet. App. 11a; see PSR ¶ 45; 3 C.A. ROA 42, 55, 57.

3. The court of appeals affirmed. Pet. App. 1a-64a. As relevant here, the court rejected petitioner's argument -- raised for the first time on appeal -- that the magistrate judge who conducted his plea hearing lacked authority to accept petitioner's guilty plea to a felony offense with petitioner's consent. Id. at 12a.

The court of appeals determined that plain-error review applied, rejecting petitioner's contention that the challenge implicated subject-matter jurisdiction and therefore warranted de novo review. Pet. App. 13a-17a. And the court found that

petitioner had "not cleared even the first hurdle of plain-error review: he has not demonstrated that the district court erred at all." Id. at 19a. The court explained that "[t]ime and time again, [the court] has continued to hold that a magistrate judge has the authority to accept a defendant's guilty plea, provided that the defendant has given consent to that procedure." Id. at 23a (citing United States v. Garcia, 936 F.3d 1128, 1138 (10th Cir. 2019), cert. denied, No. 19-7991 (June 22, 2020); United States v. Salas-Garcia, 698 F.3d 1242, 1253 (10th Cir. 2012); United States v. Montano, 472 F.3d 1202, 1204 (10th Cir.), cert. denied, 552 U.S. 896 (2007); and United States v. Ciapponi, 77 F.3d 1247, 1251-1252 (10th Cir.), cert. denied, 517 U.S. 1215 (1996)). The court also rejected petitioner's contention that its precedent had been undermined by the 2005 adoption of Federal Rule of Criminal Procedure 59, which describes matters that may be referred to a magistrate judge. Fed. R. Crim. P. 59(a) and (b)(1); see Pet. App. 25a-26a. The court explained that it had "squarely addressed" the same argument in a 2019 decision and had "determined that Rule 59 had no bearing" on its longstanding view that a magistrate judge may accept a felony guilty plea with the defendant's consent. Pet. App. 26a (discussing Garcia, 936 F.3d at 1139).

ARGUMENT

Petitioner contends (Pet. 9-22) that, under the Federal Magistrates Act, 28 U.S.C. 631 et seq., a magistrate judge lacks the authority to accept a felony guilty plea, even with the defendant's express consent. Petitioner's contention lacks merit. Although the Seventh Circuit has accepted that contention, no other court of appeals has done so; three have long rejected it. That shallow conflict does not warrant further review in this case, particularly because petitioner cannot demonstrate plain error. The question presented is also of limited prospective importance in light of the government's 2016 adoption of a new policy regarding plea proceedings before a magistrate judge. The Court has repeatedly and recently denied petitions for writs of certiorari presenting similar questions. See Garcia v. United States, No. 19-7991 (June 22, 2020); Chiddo v. United States, 139 S. Ct. 793 (2019) (No. 18-5945); Qualls v. United States, 139 S. Ct. 792 (2019) (No. 18-5771); Farmer v. United States, 577 U.S. 1062 (2016) (No. 15-182); Ross v. United States, 577 U.S. 1061 (2016) (No. 15-181); Marinov v. United States, 575 U.S. 965 (2015) (No. 14-7909); Benton v. United States, 555 U.S. 998 (2008) (No. 08-5534). It should follow the same course here.

1. Magistrate judges are non-Article III judges who are appointed (and removable for cause) by district judges. 28 U.S.C. 631(a) and (i). They are authorized by statute to perform certain

enumerated tasks, such as "enter[ing] a sentence for a petty offense," 28 U.S.C. 636(a)(4), or, upon designation of a district judge, determining certain pretrial matters (subject to clear-error review) and conducting hearings and submitting proposed findings of fact and conclusions of law (subject to de novo review upon objection by the parties), see 28 U.S.C. 636(b)(1)(A) and (B). District judges may also designate magistrate judges to perform other enumerated functions, such as presiding over a civil trial or a misdemeanor trial, with the consent of the parties. 18 U.S.C. 3401(a); 28 U.S.C. 636(a)(3) and (c)(1).

Magistrate judges may also "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). Provided that the litigants consent, such additional duties may include any duties that are "comparable in responsibility and importance" to the duties specified in the statute, such as supervising "entire civil and misdemeanor trials." Peretz v. United States, 501 U.S. 923, 933 (1991). In Peretz, this Court held that Section 636(b)(3) permits a magistrate judge to supervise voir dire in a felony criminal trial with the parties' consent. Id. at 935-936. The Court later reaffirmed Peretz's holding in Gonzalez v. United States, 553 U.S. 242, 246 (2008).

Peretz also determined that "allowing a magistrate judge to supervise jury selection -- with consent -- does not violate

Article III." Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1943 (2015) (citing Peretz, 501 U.S. at 936). In particular, the Court held that Article III of the Constitution does not bar Congress from granting district judges "the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants' activities." Peretz, 501 U.S. at 938-939 (quoting United States v. Raddatz, 447 U.S. 667, 686 (1980) (Blackmun, J., concurring)). The Court concluded that, because the ultimate decision to empanel the jury remains in the hands of the district judge, the right to have a district judge preside over jury selection does not fall within any category of "structural protections" that litigants cannot waive. Id. at 937-938. The Court further explained that "to the extent 'de novo review is required to satisfy Article III concerns, it need not be exercised unless requested by the parties.'" Id. at 939 (citation omitted).

Since Peretz, the courts of appeals have consistently recognized that, under Section 636(b)(3), a magistrate judge may, with the parties' consent, preside over a felony guilty-plea colloquy under Federal Rule of Criminal Procedure 11 and recommend that the district court accept the plea. See United States v. Harden, 758 F.3d 886, 891 (7th Cir. 2014); United States v. Woodard, 387 F.3d 1329, 1331-1333 (11th Cir. 2004) (per curiam),

cert. denied, 543 U.S. 1176 (2005); United States v. Osborne, 345 F.3d 281, 285-288 (4th Cir. 2003); United States v. Reyna-Tapia, 328 F.3d 1114, 1119-1122 (9th Cir.) (en banc), cert. denied, 540 U.S. 900 (2003); United States v. Torres, 258 F.3d 791, 794-796 (8th Cir. 2001); United States v. Dees, 125 F.3d 261, 264-269 (5th Cir. 1997), cert. denied, 522 U.S. 1152 (1998); United States v. Williams, 23 F.3d 629, 632-634 (2d Cir.), cert. denied, 513 U.S. 1045 (1994).

In recognizing that magistrate judges have such authority, courts have observed that presiding over a plea colloquy entails far less discretion than other duties that magistrate judges perform with consent, such as "conduct[ing] entire civil and misdemeanor trials" and supervising felony voir dire proceedings. Woodard, 387 F.3d at 1332-1333; see Osborne, 345 F.3d at 288; Williams, 23 F.3d at 633. Presiding over such colloquies is also "less complex" than many duties that magistrate judges perform even without consent, including making probable-cause determinations in preliminary hearings and conducting evidentiary hearings followed by recommendations for disposition by a district judge. Williams, 23 F.3d at 632-633; see Reyna-Tapia, 328 F.3d at 1120; Dees, 125 F.3d at 265-266.

2. Petitioner does not dispute that magistrate judges may, with the parties' consent, preside over guilty-plea colloquies in felony cases. Petitioner contends (Pet. 17-20), however, that

Section 636(b)(3) prevents magistrate judges from concluding the colloquy by accepting a plea. That contention lacks merit.

The additional-duties clause of the Federal Magistrates Act, 28 U.S.C. 636(b)(3), permits magistrate judges to accept felony guilty pleas with the parties' consent because doing so is "comparable in responsibility and importance," Peretz, 501 U.S. at 933, to other duties the statute permits magistrate judges to perform with the parties' consent. As the Fourth Circuit has explained, "the acceptance of a plea is merely the natural culmination of a plea colloquy," United States v. Benton, 523 F.3d 424, 431, cert. denied, 555 U.S. 998 (2008), which petitioner does not dispute may be conducted by a magistrate judge. "Much like a plea colloquy, plea acceptance involves none of the complexity and requires far less discretion than that necessary to perform many tasks unquestionably within a magistrate judge's authority, such as conducting felony voir dire and presiding over entire civil and misdemeanor trials." Id. at 432. The plea-acceptance process is comprehensively governed by Rule 11, which explains "what a court must inquire about, what it should advise a defendant and what it should determine before accepting a plea." Woodard, 387 F.3d at 1332 (quoting Williams, 23 F.3d at 632).

Here, for example, before accepting petitioner's plea as petitioner had consented for the magistrate judge to do, the magistrate judge informed petitioner of precisely the matters

required by Rule 11(b). Those matters included that petitioner had a right to plead not guilty and to proceed to a jury trial; that, at trial, he would have the right to counsel, the right to confront the witnesses against him, and the right to present a defense; and that petitioner would waive those and other rights by entering a plea of guilty. 3 C.A. ROA 72-74; cf. Fed. R. Crim. P. 11(b)(1) and (2). The colloquy included a discussion of the sentence petitioner might face. 3 C.A. ROA 74-77. Petitioner has never identified any defect in the colloquy, or any reason to view the acceptance of his plea, with his consent, as anything other than "an ordinary garden variety type of ministerial function that magistrate judges commonly perform on a regular basis." Williams, 23 F.3d at 632.

Petitioner nevertheless asserts (Pet. 17-18) that the act of accepting a guilty plea is not comparable in importance to the duties enumerated in the Federal Magistrates Act because a defendant who enters such a plea waives several constitutional rights, including the right to trial. But petitioner does not explain why determining that a defendant knowingly and voluntarily waived the right to trial involves greater "responsibility and importance," Peretz, 501 U.S. at 933, than presiding over a civil or misdemeanor trial, see 28 U.S.C. 636(a)(3) and (c)(1). And petitioner does not dispute that a magistrate judge may oversee the Rule 11 colloquy and make a recommendation to the district

judge to accept a felony guilty plea -- a process that already requires assessing whether the defendant knowingly and voluntarily waived the same constitutional rights petitioner stresses, see Fed. R. Crim. P. 11(b)(1) and (2).

Petitioner's position would also "degrade the otherwise serious act of pleading guilty." United States v. Hyde, 520 U.S. 670, 677 (1997). After a defendant "has sworn in open court that he actually committed the crimes, after he has stated that he is pleading guilty because he is guilty, after the court has found a factual basis for the plea, and after the court has explicitly announced that it accepts the plea," he should not be able to later "withdraw his guilty plea simply on a lark." Id. at 676.

3. To the extent that petitioner contends (Pet. 14-15, 19-20) that Federal Rule of Criminal Procedure 59 or Article III separately forecloses a magistrate judge from accepting a defendant's felony guilty plea with the parties' consent, those contentions are not properly before the Court. The scope of the question presented as framed in the petition addresses only Section 636(b)(3), see Pet. i, and, under Rule 14.1(a) of the Rules of this Court, "only the questions set forth in the petition, or fairly included therein, will be considered by the Court," Yee v. City of Escondido, 503 U.S. 519, 535 (1992) (brackets omitted). In any event, petitioner's reliance on Rule 59 and Article III is misplaced.

a. Rule 59(a) provides that a district judge may "refer to a magistrate judge for determination any matter that does not dispose of a charge or defense." Fed. R. Crim. P. 59(a). Rule 59(b) provides that 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." Fed. R. Crim. P. 59(b)(1). The rule specifies different standards of review for those two categories of proceedings. For proceedings under Rule 59(a), if a party timely objects to the magistrate judge's determination, the district judge must review the party's objections and set aside any part of the magistrate judge's order that is "contrary to law or clearly erroneous." Fed. R. Crim. P. 59(a). For proceedings under Rule 59(b), if a party timely objects to the magistrate judge's recommendation, the district judge "must consider de novo any objection." Fed. R. Crim. P. 59(b)(3). In either case, parties generally have only 14 days to object, and "[f]ailure to object in accordance with [Rule 59] waives a party's right to review." Fed. R. Crim. P. 59(a) and (b)(2).

Petitioner contends (Pet. 19-20) that the acceptance of a guilty plea with the defendant's consent is necessarily subject to the recommendation procedures in Rule 59(b). But although petitioner contends that acceptance of a plea necessarily "dispose[s] of a charge or defense," Fed. R. Crim. P. 59(b)(1), it

is far from clear that is so when the district court has yet to enter a sentence, see 18 U.S.C. 3553, or, in many cases, even to accept the plea agreement on which the guilty plea depends, see Fed. R. Crim. P. 11(c)(3) and (4). And the history of Rule 59 makes clear that it was not intended to settle that question. In drafting the Rule, the Rules Advisory Committee considered but ultimately declined to endorse a proposed version that would have "include[d] felony guilty pleas as dispositive matters requiring a report and recommendation by the magistrate judge." United States v. Garcia, 936 F.3d 1128, 1136 (10th Cir. 2019), cert. denied, No. 19-7991 (June 22, 2020); see id. at 1136-1137. The Committee instead determined to leave "to the case law" the task of categorizing particular matters as subject to Rule 59(a) or (b). Fed. R. Crim. P. 59 Advisory Committee Note (2005 Adoption).

In any event, this Court has recognized that the provisions of the Federal Rules of Criminal Procedure are "presumptively waivable." United States v. Mezzanatto, 513 U.S. 196, 201 (1995). Petitioner identifies nothing in Rule 59 itself to suggest any intent to "preclude waiver." Ibid.; see Garcia, 936 F.3d at 1139 (noting that "defendants' 'most basic rights' can be waived by consent," and reasoning that "[i]t must therefore be the case that certain matters, even dispositive matters, can be handled by a magistrate judge with the defendant's consent") (quoting Peretz, 501 U.S. at 936); see also Pet. App. 26a-27a (discussing Garcia).

Accordingly, the parties presumptively may agree to waive the provisions of Rule 59 -- for example, by consenting to the determination of a particular matter by a magistrate judge, whether or not the matter would otherwise fall under Rule 59(b) in the absence of consent. And that is effectively what petitioner did here when, with the assistance and advice of counsel, he "[k]nowingly and voluntarily" consented in writing to the acceptance of his guilty plea by a magistrate judge. C.A. Supp. ROA 1.

b. Article III likewise does not forbid Congress from authorizing magistrate judges to accept felony guilty pleas with the parties' consent. Even assuming that petitioner had a personal constitutional right to an Article III adjudicator, petitioner waived that right by consenting to have the magistrate judge accept his plea. See Peretz, 501 U.S. at 936 ("The most basic rights of criminal defendants are * * * subject to waiver."). And to the extent that petitioner invokes structural constitutional concerns, this Court has confirmed that "allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process." Wellness Int'l Network, 135 S. Ct. at 1944.

4. This Court has repeatedly declined to review the question petitioner presents. See p. 7, supra. As petitioner

notes (Pet. 9-13) a conflict -- albeit one that is much shallower than petitioner suggests -- exists in the courts of appeals about whether magistrate judges have the statutory authority to not only conduct a plea colloquy but also then accept the defendant's plea. That limited conflict does not warrant this Court's review.

The Fourth and Tenth Circuits have recognized that magistrate judges have statutory authority to accept a plea with the defendant's consent, as long as the district court retains "ultimate control * * * over the plea process." Benton, 523 F.3d at 433; see United States v. Salas-Garcia, 698 F.3d 1242, 1253 (10th Cir. 2012) (citing Ciapponi, 77 F.3d at 1251); Pet. App. 23a-24a (citing cases). The Eleventh Circuit has similarly determined that "a magistrate judge has the authority under the 'additional duties' clause of [the Federal Magistrates Act] to conduct Rule 11 proceedings when the defendant consents," although the district court must "retain[] the ability to review the Rule 11 hearing if requested." Woodard, 387 F.3d at 1333-1334.

The Seventh Circuit, however, concluded in United States v. Harden, supra, that, after presiding over a plea colloquy, a magistrate judge may only submit a recommendation about whether the plea should be accepted. See Harden, 758 F.3d at 888-889, 891. The Fourth Circuit is the only court of appeals that has responded to that aspect of Harden, and it has done so only in unpublished decisions. See United States v. Shropshire, 608 Fed.

Appx. 143, 144 (2015) (per curiam); United States v. Ross, 602 Fed. Appx. 113, 114 (2015) (per curiam), cert. denied, 577 U.S. 1061 (2016); United States v. Farmer, 599 Fed. Appx. 525, 526 (2015) (per curiam), cert. denied, 577 U.S. 1062 (2016); cf. Pet. App. 24a n.6 (noting that Harden distinguished between conducting a plea hearing and accepting the plea). Petitioner contends (Pet. 9-13) that other circuits agree with the Seventh Circuit that Section 636(b)(3) does not permit magistrate judges to accept felony guilty pleas. But the cases he cites -- all of which were decided before Harden -- do not support that proposition.

For example, the Ninth Circuit's decision in Reyna-Tapia, 328 F.3d 1114, did not address the question whether Section 636(b)(3)'s additional-duties clause permits a magistrate judge to accept a felony guilty plea with a defendant's consent. In Reyna-Tapia, the magistrate judge had conducted the Rule 11 colloquy and had recommended that the district court accept the defendant's plea, and the question presented was whether the magistrate judge had the authority to do so. Id. at 1118. The Ninth Circuit "join[ed] every other circuit examining the question in holding that the taking of a guilty plea by a magistrate judge, with the litigants' consent, qualifies as an additional duty under" Section 636(b)(3). Id. at 1119. Although the court of appeals mentioned a defendant's "absolute right to withdraw [his] guilty plea[]" before the district court accepts it as one of several applicable "procedural

safeguards," id. at 1121, the court did not directly consider or address "whether the magistrate judge has the power to accept a plea" under Section 636(b)(3). Benton, 523 F.3d at 433 n.2 (emphasis added). And other decisions on which petitioner relies also do not adopt his view of Section 636(b)(3). See United States v. Bearden, 274 F.3d 1031, 1038 (6th Cir. 2001) (holding jeopardy had not attached when the magistrate judge accepted the guilty plea of a defendant who had consented to allocution before the magistrate judge because the district court retained "ultimate decision[-]making responsibility" over the defendant's plea, but not deciding whether a magistrate judge could accept a guilty plea); Torres, 258 F.3d at 796 (upholding magistrate judge's authority to conduct plea colloquy where defendant had consented without deciding magistrate judge's authority to accept the plea); Dees, 125 F.3d at 269 (same); Williams, 23 F.3d at 634 (same).

Petitioner similarly errs in suggesting that the First Circuit's decision in United States v. Dávila-Ruiz, 790 F.3d 249 (2015), articulates a "rule" -- that a defendant who pleads guilty before a magistrate judge may withdraw that plea "as a matter of course" before a district court -- that supports the Seventh Circuit's approach in Harden. Pet. 10. In Dávila-Ruiz, the First Circuit found that it had no "occasion to" address Harden because the magistrate judge in Dávila-Ruiz had only made a recommendation that the guilty plea be accepted by the district court, and the

question presented was whether that recommendation in itself constituted an acceptance for purposes of Rule 11. 790 F.3d at 253; see id. at 250, 252-253. The First Circuit expressly declined to address the question whether a magistrate judge has the statutory authority to accept a guilty plea, explaining that, "even if magistrate judges can, by consent, accept pleas in felony cases, that is not what happened here." Id. at 253.

The disagreement between the Seventh Circuit and other circuits is undeveloped. No court has addressed the question presented en banc, and the Tenth Circuit declined to do so here. Pet. App. 65a. The disagreement also lacks significant practical consequences. Under Rule 11, the defendant may withdraw a guilty plea for "any reason or no reason" before it is "accept[ed]"; after the plea is accepted, the defendant may withdraw a guilty plea before sentencing only "for a fair and just reason." Fed. R. Crim. P. 11(d)(1) and (2)(B). Whether the plea is accepted by the magistrate judge or by the district court (after a report and recommendation) affects which of those standards applies at a given point in the proceedings. But a district court could consider "a defective plea proceeding before the magistrate judge" to be "[a] 'fair and just' reason" for withdrawing the plea. Benton, 523 F.3d at 432. Thus, the only likely consequence of allowing a magistrate judge to accept a guilty plea is to eliminate the ability of a defendant to unilaterally withdraw the plea after

consenting to proceed before the magistrate judge, participating in a proper plea colloquy, and knowingly and intelligently deciding to plead guilty. Holding such a defendant to the expected and anticipated consequences of his voluntary decisions simply ensures that the plea colloquy is not rendered "a temporary and meaningless formality reversible at the defendant's whim." Hyde, 520 U.S. at 677 (citation omitted). And a defendant is always free not to consent to having a magistrate judge accept his guilty plea.

5. In any event, this case would be a poor vehicle to address the shallow division of authority in the courts of appeals.

First, petitioner failed to object in the district court to the magistrate judge's acceptance of his guilty plea, so his claim is subject to review only for plain error. See Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 731-732 (1993). On plain-error review, petitioner has the burden to establish (1) error that (2) was "clear or obvious, rather than subject to reasonable dispute," (3) "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings,'" and (4) "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" Puckett v. United States, 556 U.S. 129, 135 (2009) (citations omitted); see Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904-1905 (2018); United States v. Dominguez Benitez, 542 U.S. 74, 81-82 (2004). "Meeting all

four prongs is difficult, 'as it should be.'" Puckett, 556 U.S. at 135 (quoting Dominguez Benitez, 542 U.S. at 83 n.9).

Petitioner cannot satisfy that standard. Even assuming that accepting the plea was error, any such error was not "clear or obvious." Both in-circuit and out-of-circuit precedent supported the magistrate judge's authority to accept petitioner's plea, with his consent. See Henderson v. United States, 568 U.S. 266, 270 (2013) (noting that an "error was not plain before" this Court resolved a circuit conflict on the issue); Puckett, 556 U.S. at 135 (noting that, to be plain, an error cannot be "subject to reasonable dispute"). Nor was petitioner prejudiced by the acceptance of his plea, with his consent, by a magistrate judge rather than a district judge. And because no dispute exists that a magistrate judge may preside over a plea colloquy and recommend that a guilty plea be accepted, the magistrate judge's acceptance of the plea, subject to review by the district court, would not in any event "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." Olano, 507 U.S. at 736 (citation omitted).

Petitioner argues (Pet. 20-22) that the court of appeals erred in applying the plain-error standard of review. But he has not sought this Court's review of that issue, and he identifies no precedent of this Court that would require de novo review of a challenge to a magistrate judge's statutory authority that a

defendant failed to advance in the district court. The Court did not address the standard of review in Peretz, 501 U.S. 923 (cited at Pet. 20), and Justice Scalia's dissenting opinion suggested only that he would exercise his discretion to review a claim notwithstanding the applicability of plain-error standards that would normally foreclose doing so. Peretz, 501 U.S. at 954 (Scalia, J., dissenting); see id. at 953-954. Federal Rule of Criminal Procedure 52(b) did not apply at all in Glidden Co. v. Zdanok, 370 U.S. 530 (1962), which was a civil case. And although the Court declined to apply Rule 52(b) in Nguyen v. United States, 539 U.S. 69 (2003), it emphasized that its decision there -- finding that the panel of the court of appeals that adjudicated the defendant's appeal had been improperly constituted, with two Article III judges and one Article IV territorial judge, see id. at 74-76 -- rested not on ordinary principles of appellate review, but rather on an exercise of the Court's "supervisory powers" over the lower federal courts, id. at 81, which petitioner does not ask the Court to invoke here. Finally, any rule of "'automatic reversal' * * * in cases 'in which federal judges or tribunals lacked statutory authority to adjudicate the controversy,'" Pet. 22 (citing Rivera v. Illinois, 556 U.S. 148, 161 (2009)), would be inapposite here. In this case, the district judge, not the magistrate judge, "adjudicate[d] the controversy," Rivera, 556 U.S. at 161, by entering the judgment of conviction, see p. 5,

supra, and petitioner does not challenge the district judge's statutory authority to do so.

Second, the question presented has limited prospective importance. Since October 2016, as a matter of policy, the Department of Justice has instructed prosecutors to request that magistrate judges make recommendations to district judges instead of accepting guilty pleas. The Department has also instructed prosecutors in every district not to oppose a defendant's motion to withdraw a guilty plea for any reason under Rule 11(d)(1) before the plea is accepted by a district judge. As the proceedings here reflect, the District of Kansas continues to assign magistrate judges to accept felony guilty pleas with the defendant's consent, and at least one other district in the Tenth Circuit does so as well. But the government's policy and practices significantly diminish the frequency with which the question presented arises.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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