OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: RAFAEL PERETZ Petitioners v.

UNITED STATES

CASE NO: 90-615

PLACE: Washington, D.C.

DATE: April 23, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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RAFAEL PERETZ, :

Petitioner :

v. : No. 90-615

UNITED STATES :

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Washington, D.C.

Tuesday, April 23, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

JOEL B. RUDIN, ESQ., New York, New York: on behalf of the Petitioner.

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 90-615, Rafael Peretz against the United States.

Mr. Rudin.

ORAL ARGUMENT OF JOEL B. RUDIN

ON BEHALF OF THE PETITIONER

MR. RUDIN: Mr. Chief Justice, and may it please the Court:

As in the case of Gomez against United States, the critical jury selection stage of petitioner's felony trial was conducted by a magistrate from whom Congress had withheld the authority to preside. The Solicitor General concedes that this was error. The principal issue about which the parties disagree is whether or not the issue was preserved for this Court's review despite counsel's purported consent on petitioner's behalf. We say the issue was preserved because the defect was not subject to waiver, and that if it was subject to waiver the requisite statutory or constitutional waiver standard was not met.

The framers gave Congress exclusive power to create the inferior tribunals, or tribunals inferior to this Court, to invest these tribunals with jurisdiction, to authorize the appointment of officers to exercise that

jurisdiction, and to allocate or to distribute power to be exercised by these officers.

The framers gave Congress the exclusive power to adjust the allocation of jurisdiction in the lower Federal courts to meet changing societal needs, so long as the adjustment was within the constraints of article III.

The magistrates act was an attempt by Congress to do just that, to meet the litigation explosion of the latter part of the 20th century by creating the new office of magistrate, by defining its jurisdiction powers and duties, and then, as this Court pointed out in Gomez, by carefully circumscribing magistrates' trial jurisdiction in the interest of policy as well as constitutional constraints.

Congress gave magistrates consent trial jurisdiction in the area of misdemeanor and petty offense trials and for civil trials, but withheld consent trial jurisdiction for magistrates in felony cases. And the Solicitor General concedes that this withholding applies to the critical voir dire stage of a felony trial.

A district court may not override Congress' policy judgment to withhold this jurisdiction from magistrates, and petitioner could not consent to consent trial jurisdiction being exercised when Congress had withheld such trial jurisdiction. And in our view any

such consent would be a nullity, and therefore counsel's waiver was a nullity and could not prevent petitioner from raising the defect on appeal.

QUESTION: (Inaudible) waiver?

MR. RUDIN: Your Honor, it was not an effective waiver. It was -- I am using the term a purported waiver. It was a -- it could not be an effective waiver for the reasons that I have just explained, and as I will go on later in my argument to explain, even if a waiver could be made in this area it would have to meet the standards set by Congress and by the Constitution in order for the waiver to forfeit petitioner's right to appeal.

An officer's -- the Glidden case, we believe, disposes of this case, at least on the question of whether or not the error may be reviewed by this Court. In the Glidden case, in an opinion by Justice Harlan, the Court reached the merits of the petitioner's article III argument even though the court that delegated power to an officer, who arguably was not an article III officer, itself had subject matter jurisdiction.

QUESTION: Was that an opinion of the Court, Mr. Rudin, in Glidden?

MR. RUDIN: Your Honor, that was an opinion by Justice Harlan for a plurality of the Court. It was an opinion joined by two other members of the Court. But

there were four other members of the Court who participated in the decision, two in a dissenting opinion and two in a plurality opinion, and none of them took issue with Justice Harlan's analysis of whether or not the error could be reviewed by the Court, even though the petitioners had not objected in the courts below.

In the Glidden case there were two matters that were consolidated. One case involved a criminal trial in the district court in the District of Columbia in which a judge from the court of customs and patent appeals presided. And the petitioner argued that that judge was not an article III judge and therefore, consistent with the Constitution, could not preside.

The other case involved an appeal to the court of appeals in the Second Circuit in which one of the three judges who was designated to preside by the chief justice of the United States and by the chief judge of the court of appeals of the Second Circuit was a court of claims judge. And again, petitioner argued that that judge did not have jurisdiction to preside under article III.

Justice Harlan in his opinion treated this defect as a nonwaivable jurisdictional type defect because it was necessary to do so to permit this Court to protect institutional interests that were far broader than the narrow interests of an individual litigant.

QUESTION: But in order to make this case parallel to that you would have to establish that there was not only a violation of the statute here, but a violation of article III.

MR. RUDIN: Well, Your Honor, I would respectfully --

QUESTION: And so far all you have said is that this was not in accordance with the statutory requirements.

MR. RUDIN: Your Honor, I would respectfully disagree with the premise of Your Honor's question because it -- my understanding of article III is that for an officer to exercise judicial authority under article III there need not only be inherent authority for Congress to confer the jurisdiction, but Congress in fact has to then confer the jurisdiction. In the Schor case and all the other cases in which this Court has discussed article III issues and the exercise of power by nonarticle III officers or the exercise of judicial power by adjuncts, in every single one of those cases the power was exercised pursuant to a statutory scheme. It's well established --

QUESTION: It's pursuant to a statutory scheme that violated article III. But here you have a statutory scheme which you are not asserting violates article III, or you haven't asserted it so far. Assuming that the

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statutory scheme is in compliance with article III, all you have is a violation of the statute, and that is not comparable to what was the problem in Glidden.

MR. RUDIN: Well, Your Honor, we certainly have argued in our brief and I am prepared to argue this morning that there was an inherent violation of article III, that had Congress authorized this function to be exercised, that it would have violated article III. But Congress did not even authorize the function to be exercised. And this Court has said over and over and over again that there is no authority or jurisdiction for an officer to exercise the judicial power of the United States in an article III setting unless Congress has authorized that exercise of power.

That was true in the Schor case. In the Schor case the petitioner, or the litigant, invited an article I tribunal before the CFTC to exercise jurisdiction over his -- that petitioner's claim. And even though petitioner had invited the tribunal to exercise that jurisdiction, this Court still reached the merits of the petitioner's structural article III claim, even though it could be said that petitioner had invited the jurisdictional error. There is simply no such thing as invited jurisdictional error.

The same rule was applied in the Owen Equipment

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and Erection Company against Kroeger case, which is not in my brief, 437 U.S. 365. There the petitioner had concealed his citizenship at the trial court level, and thereby concealed from the district court that there was a lack of diversity. And on appeal the petitioner was permitted to raise lack of diversity before this Court, and this Court dismissed the civil action.

The same result in American Fire and Casualty Company against Finn, 341 U.S. 6. The petitioner in that case asked the district court to remove an action that had been brought in the State court under the statutory removal jurisdiction established by Congress. The district court did remove the case. And then on appeal to this Court the petitioner successfully argued that that removal jurisdiction had been erroneously exercised because it exceeded what Congress had authorized.

QUESTION: Of course those cases deal with subject matter jurisdiction, and I really don't think yours does.

MR. RUDIN: Well, Your Honor, I suppose that there can be a distinction made between whether or not the court that delegates the authority has subject matter jurisdiction, and the jurisdiction or the authority of the officer who actually exercises the jurisdiction. In this case the Government correctly concedes that the court that

purported to delegate its jurisdiction did not have the authority to make that delegation, and Congress prohibited the district courts from making this type of delegation.

But it seems to me that it's significant as to whether or not the officer who exercises the jurisdiction, which is really the matter that we should be concerned with, who actually exercises the jurisdiction, in this case that officer, the magistrate, did not have jurisdiction, did not have power given to him by Congress to preside over the subject matter of a felony trial or a critical stage of that trial, and that being voir dire.

In the Northern Pipeline case an argument was made that bankruptcy judges were adjuncts of the district court, and that it was the district court that had subject matter jurisdiction, and the bankruptcy judges derived jurisdiction from the jurisdiction that the district courts had. And this Court, in a plurality opinion, termed that a facade -- that the jurisdictional grant was a facade because the officer who actually exercised the jurisdiction was not in power to do so.

And that, of course, is what happened in Glidden. In the Glidden case the district court that sat at a criminal trial and the court of appeals which sat at an appeal of a civil trial, clearly those two courts had subject matter jurisdiction, but the officer who actually

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exercised the jurisdiction did not. And Justice Harlan felt that that was akin to a jurisdictional error or at least should be treated by the Court as a jurisdictional-type error so that the Court could reach the truly important interest, which was not whether or not an individual litigant was deserving of a new trial or whether or not he somehow could be blamed for not having made an explicit objection, but rather to protect the proper administration of judicial business, which is this Court's obligation in the Federal system. That is the way Justice Harlan put it. And also to protect the constitutional plan of checks and balances and separation of powers.

If the error that occurred to this case -- that occurred in this case is treated as waivable, and therefore this Court does not reach the merits of the error which the Government concedes, then there will be no change in the law in the Second and the Third Circuits. Both those circuits have held that the magistrate does have power under the additional duties clause, despite this Court's analysis in Gomez, to preside at voir dire.

As recently as within the last 6 months a judge in the Eastern District of New York attempted, with the defendant's consent that he asked for and obtained, to delegate voir dire to a magistrate. And the Government

had to go to the Second Circuit in In Re Sayeedi and ask the Second Circuit to grant the writ of mandamus to prevent the judge from doing that. And I would submit that the obvious reason the judge did -- the Government did that was that they were concerned that built-in reversible error would occur.

Interestingly, in the Second Circuit in their opinion in Sayeedi, even though they had held in the Musacchia case that, despite Gomez, it was okay for a magistrate to conduct felony voir dire if the defendant did not make a written motion under rule 12(b)(2) asserting his right to voir dire before a district judge, the Second Circuit in Sayeedi said that for the Government it was okay to object at the time of trial.

And it equated the right involved for the Government as equal to the right to trial by jury, and said that if the Government, if trial by jury can only occur, a waiver of that can only occur where the defendant makes a knowing, voluntary, and intelligent consent and if the Government makes a consent as well, then this right is at least as important and that therefore the Government should be entitled to object to protect all of society's interests.

This was a classic separation of powers or checks and balances-type error. The district judge, in

what could be referred to as a power grab from Congress, took over from Congress its exclusive authority under the Constitution to determine the allocation of power in the district courts. At the same time --

QUESTION: Excuse me. You can say that whenever a court goes beyond what the statute or the rules permit it to do. I mean, in a sense any violation of laws by a State or by a Federal executive officer or a judicial officer, in a sense that, in the broad sense you're using it that's a violation of separation of powers, whenever you don't obey Congress as you should. Right? But, I mean, in that sense everything is a violation of separation of powers. Nothing is unlawful unless it is.

MR. RUDIN: Well, Your Honor, there I would distinguish between a procedural violation and a jurisdictional violation. I think that where the Congress has given -- the courts have certain discretion over the procedure that they employ to adjudicate matters that Congress has granted them jurisdiction to adjudicate, but this is a substantive jurisdictional question. It's not a mere question of procedure.

But even if the Court were to view this as a procedural issue rather than a jurisdictional or separation of powers issue, it seems to me that Congress has answered the question there as well, and that the

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question of whether or not this procedural right is waivable can be determined merely by analyzing the statute. Of course in the Gomez case this Court relied upon the familiar principle that the Court will attempt to construe statutes to avoid constitutional issues, especially issues involving separation of powers.

QUESTION: Well, to call this a separation of powers case is, I think, a misnomer. I mean, the magistrate is not doing something -- he's being supervised by an article III judge. It's not as if somehow the judicial power is being infringed on.

MR. RUDIN: No, Your Honor, it's -- this case really has, it seems to me, has two components in terms of the separation of powers analysis. And what's strange about it is that up until, certainly during the Gomez case and in the cases that followed Gomez the issue has been analyzed as whether or not Congress infringed upon the power of the judiciary by authorizing magistrates to carry out this function. But what is strange about it is that as the Government concedes, Congress did not authorize magistrates to carry out this function. So it is difficult to say that Congress is infringing upon the power of the judiciary when the judiciary asserts a basically inherent authority to transfer, to delegate its jurisdiction to someone from whom Congress has withheld

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that power.

It seems to me that the separation of powers problems here and the problem of checks and balances under the -- as the framers intended that to work, is that the district court here asserted its right to delegate power, and this is a jurisdictional statute that repeatedly uses terms like "jurisdiction" and "power to preside," to a magistrate that Congress had implicitly forbidden to exercise that power. And so the problem --

QUESTION: So it's a violation of a law passed by Congress.

MR. RUDIN: But a jurisdictional statute, Your Honor.

QUESTION: Well, you call it a jurisdictional statute. I mean, that's a cloak of many colors.

MR. RUDIN: That is true. But there is no other source of authority for an officer, a judicial officer to act, except to the extent that that officer is empowered by Congress to do so. The framers gave that power to Congress because the framers believed that Congress was best situated to adjust the allocation of power in the Federal courts to meet changing social needs.

Congress could have decided, for example, that the way to deal with the litigation explosion and the overloading of the Federal courts was to strip the courts

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of diversity jurisdiction. That certainly would have -- would have eased the burden somewhat.

Or Congress could have decided that because the volume of misdemeanor and petty offense cases is so great, and perhaps compared to the volume of felonies maybe there are less felonies, that we'll allow magistrates to preside at felonies and not criminal trials or petty offenses.

QUESTION: Mr. Rudin, do you think Congress could have expressly authorized the use of magistrates to make the initial voir dire of jurors?

MR. RUDIN: No, Your Honor. The reason is that the judicial power under article III must in the final analysis be exercised, especially in a criminal case, by an article III judge. That is why --

QUESTION: Well, do you think since the ultimate seating of the jury is left for the judge, that our holding in Raddatz speaks to this issue?

MR. RUDIN: Well, it speaks to the issue, but I don't think it determines the issue. The reason is that, of course in Raddatz, the Court repeatedly, explicitly relied on the existence of a very careful statutory scheme which provided guidance for the Court and for the parties as to the procedure to be followed, that in the statutory scheme required that the magistrate make written findings of fact and conclusions of law, that it's recommended

findings of fact and conclusions of law, which the district judge was obligated to review independently and to go on to review de novo any aspects of the magistrate's decision that a party objected to.

QUESTION: How is it, then, that a magistrate can preside over a misdemeanor trial?

MR. RUDIN: What the Raddatz case, I think, went to great pains to point out with the decision it pointed out was that the degree of review that must be provided under article III must be directly related to the importance of the interest under article III that is in question. That's why the -- it seems to me that that's why the Raddatz case focused on the distinction between the interest at stake in a pretrial suppression hearing, where the ultimate question of truth or innocence is not involved, and the trial itself. That was the reason, I believe, why Justice Marshall in Raddatz dissented, because Justice Marshall did not accept that distinction. But that was a distinction urged by the Government.

QUESTION: But the Court has held, as I take it, that a misdemeanor trial can be presided over by a magistrate, that's an exercise of the judicial power, if it is a misdemeanor trial before an article III court, has it not?

MR. RUDIN: Well, the misdemeanor trial -- this

Court has not reached that question as to whether or not a misdemeanor trial may be delegated to a magistrate. Other courts, lower courts, have. But it seems to me that if Raddatz and Northern Pipeline, Schor -- all the Court's article III cases have looked in the first instance to the importance of the function under article III that is at stake. Then the Court has gone on to look at whether the review procedure provided by a statute is sufficient to protect the interest underlying article III.

In the Raddatz case the Court found that the procedure was sufficient because it provided for a very careful review procedure. The magistrate made written findings. The parties had 10 days to make written objections. The magistrate could rehear testimony.

The Gomez case, on the other hand, points out that that is -- that even if such a procedure was provided by statute, and here Congress did not provide for any such procedure over felony voir dire, it almost certainly would not be sufficient. There is no way for a reviewing court to review credibility or demeanor-type determinations made by the judge who presides pertaining to the fitness of a juror to preside.

QUESTION: Well, you could make the same argument exactly in suppression hearings, and a magistrate listening to the testimony in the suppression hearing.

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And the Court rejected that. So I don't think that washes at all.

And moreover, in jury selection, as I understand it, it goes back to the district court judge to make the final jury selection. If the defendant's counsel has objections at that time to the seating of any juror, they could be asserted. The whole thing is done under the supervision, in effect, of the district court judge. I just don't see how article III would prohibit that kind of a scheme.

MR. RUDIN: The reason, Your Honor, I -- first of all I think that the reasoning underlying Your Honor's question would also justify having the entire trial assigned to a magistrate. It seems to me that the jury-selection phase of the trial is, if anything, the one phase where the trial judge's role is most important. It's the one stage of the trial where the court itself is making subjective credibility determinations that are not subject to review. How could the district court, for example in this case, have reviewed the determination by a magistrate to excuse a particular juror over the defendant's objection at the Government's request?

I submit that if the Court looks at the colloquy, the colloquy does suggest that perhaps the juror was biased, but it was by no means conclusive. And so the

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magistrate had to rely upon her subjective evaluation of the juror's credibility and bias or lack of bias. And that is not something that the district judge could have reviewed without questioning the juror all over again.

QUESTION: But that's exactly the same thing that happens when a magistrate hears testimony it witnesses at a suppression hearing. And whether evidence is admitted or not is crucial to the criminal trial.

MR. RUDIN: That is certainly true, Your Honor, but the difference is that at a suppression hearing there is no jury present. There are no third parties who are being affected by the goings-on. If the magistrate, if the judge chooses to hold the whole suppression hearing all over again, there won't be any impact on the trier of fact at the trial. But here it's the trier of fact itself that is being impacted. Anything that the magistrate says, anything that a participant in the process says is having an impact on these prospective jurors.

Plus, there's an inseparable relationship between the jury selection and what goes on at the trial. The trial judge establishes his control of the jury. The trial judge sets a tone for the entire trial. The trial judge must impress upon the jury the importance of the proceedings and of the legal principles, such as presumption of innocence and reasonable doubt, so that he

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obtains candid answers.

The trial judge must learn about the intellectual functioning of the jury so he can decide later one whether or not, under rule 403, to admit evidence even though it's -- the defense counsel argues that the evidence's likelihood of prejudicing the jury outweighs its probative value. The trial judge has to decide later on during the trial whether or not to exercise his discretion to admit expert testimony. He has to decide about his charge to the jury. These are all things that --

QUESTION: Do you say that his determination as to whether to admit expert testimony depends on his evaluation of the competence of a particular jury?

MR. RUDIN: I think that it, it is influenced to some extent by his view of the ability of the jury as a whole to understand the evidence, with or without the assistance of --

QUESTION: In other words the same judge, faced with the same question of admissibility of expert testimony, the only difference being two different juries, might decide well, I think jury A can handle it, but I think jury B can't handle it? That's a very strange argument.

MR. RUDIN: Your Honor, I think that ordinarily

the capability of the jury or the composition of the jury would not affect that determination, but in a close case it might. And that's one of the reasons that the Court defers to that exercise of discretion by the district judge. I mean, all the district judge's, or most of his discretionary determinations during the course of a trial are reviewed by a clearly erroneous standard. And one of the reasons is that he is present, including during the jury-selection phase, and has a handle on the entire proceeding.

Turning again to the statutory issue of whether or not this --

QUESTION: Are evidentiary rulings reviewed on appeal under a clearly erroneous standard? I don't think they are. Factual determinations are.

MR. RUDIN: Yes, but the determination of whether or not to admit expert testimony, the district judge is afforded wide discretion. And my point is only that one of the reasons is that he is aware of everything that has gone on, including the composition of the jury. Certainly if there is a juror disqualification question that arises it is necessary that he be aware of these -- the qualities of specific jurors.

As to the question of waiverability, as viewing this as a procedural right, we believe that this is akin

-- the analysis should be akin to the analysis that has been applied to the requirement under rule 31(a) for a unanimous verdict. Justice Kennedy in the Lopez case in the Ninth Circuit, in a holding that has been joined by six out of seven circuits, held that the right to a unanimous verdict is simply not waivable under the Federal Rules of Criminal Procedure.

It is clear that Congress may fix standards for waiverability that control whether or not a right can be waived. That reasoning applies to the magistrates act.

Congress permitted the right to trial before a district court to be waived in civil and misdemeanor and petty offense cases, but not in felony cases. Congress -- and that is one of the main points relied on in the Lopez case and the other case. Congress was concerned, with the waiver of a unanimous verdict requirement -- the inherent coercion of a request from a district judge during the midst of jury deliberations, and did not want to put a defendant in that situation.

Well, we submit that that was the same concern that Congress had with waiver in the magistrates context. Congress in the civil consent part of the act explicitly required as a matter of statutory language that the clerk put the question to the litigant, not the judge, because of the inherent coerciveness of it. And in the criminal

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context required a knowing, written, intelligent, voluntary waiver on the record, also to ensure voluntariness. And that is another reason why Congress, we submit, made this right nonwaivable for felonies, because the interests at stake in a felony trial are simply far greater.

Finally, we believe that the critical issue here is whether or not this issue was preserved for review. If the issue was preserved for review because an injection was not required, or because a consent would be ineffective, or because a waiver had to meet a standard set by Congress or the Constitution that was not met in this case, then there is no reason to turn to plain error analysis. Plain error analysis only applies where an issue is not preserved for review because of a failure to meet the contemporaneous objection requirement.

In the Gomez case this Court held that this error is not subject to harmless error analysis. And therefore if the Court reaches the merits in this case, as we submit that it should, it must reverse the conviction.

QUESTION: Thank you, Mr. Rudin.

Mr. Bryson, we'll hear from you.

ORAL ARGUMENT OF WILLIAM C. BRYSON

ON BEHALF OF THE RESPONDENT

MR. BRYSON: Mr. Chief Justice, and may it

please the Court:

Let me begin very briefly by addressing the point raised near the end of the argument with respect to rule 31 and the nonwaivability of unanimous jury. The Court in Lopez, through Justice Kennedy sitting as a circuit justice -- judge -- held that the rule itself, viewing it to the language and the legislative history of the rule, indicated that a unanimous jury was nonwaivable. That was a construction of the rule, and obviously Congress or this Court, through its rule -- the promulgation of the rules -- can decide that a particular error will be nonwaivable. If it says so in effect or in plain language, that's the end of the matter.

This case does not involve a congressional declaration that a particular error is nonwaivable, and therefore we have to look at more general principles -- the contemporaneous objection rule, the invited error doctrine -- and ask whether in this particular case there is anything that takes this case and like cases out of those doctrines.

Now, it's important to emphasize, I think, at the outset that this case involves a very narrow question of remedy. This is a case in which it is true, as we see it, that there was an error. But the question is what is the consequence of the error in this particular case. Is

it -- does it require reversal.

And we submit that there should be very few case where the law will say that -- or will recognize a defendant coming in and saying yes, I asked for a particular procedure, yes, I got the procedure that I asked for, but no, I wasn't entitled to it and therefore please reverse my conviction. In our view that's what this case comes down to, and we have to ask the question is there some reason that we are required to reverse in this case, in spite of the defendant's having asked for the procedure, precisely the procedure that he got.

QUESTION: Mr. Bryson, that sounds very reasonable with respect to everything that has happened in the past. But if we come out the way you say, the same thing can continue to happen in the future, can it not?

MR. BRYSON: Well, it could --

QUESTION: And the congressional desire that there not be a magistrate for these things can simply be evaded by the defendant agreeing to have a magistrate.

MR. BRYSON: Well, the key element in the evasion, if it were to occur, of course, would be the district court, which has complete control over whether a reference to the magistrate is made. And I submit, Your Honor --

QUESTION: And a great interest in using its

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magistrates.

MR. BRYSON: That's true, Your Honor. But I think you can't assume that district judges will simply disregard this Court's decision if this Court decides --

QUESTION: What's to be disregarded? I mean, there's no harm done.

MR. BRYSON: Well, it isn't a question of harm.

QUESTION: Volenti non fit injuria, right? If the defendant wants it, and we hold the way you say, everything is fine. There's been no harm done.

MR. BRYSON: No, there has been no harm done, but not -- it's not the case that everything is fine. What's happened is there has been a violation of the law. The district judge, to assign a jury selection to a magistrate, if this Court were to hold that that is a violation of the law, as we believe it is, would have to say so what, I am going to assign it to a magistrate anyway -- even though I know it's a violation of the law. And we submit that isn't something that district judges are going to do. I think they recognize the difference between something that is error and may not be done, and something that is authorized to be done.

And in effect I'd call Your Honors' attention to the Ford case, which was the en banc Fifth Circuit case in which this issue was specifically addressed in the

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majority which held that, number one, the jury selection could not be referred to a magistrate, but number two, found that it was not plain error in that case because the matter was not raised by the defendant.

And there's a footnote at the end of the en banc majority's opinion in which the court said we assume confidently that district judges will not simply disregard our holding and assign things to the magistrates, even though there may be consent to the doing of that.

I would -- I think there's an analogy, if I may, with a case a few years ago from this Court, Parker against Randolf, which held that a -- the introduction, I believe, of cross-corroborating confessions was error but it was always harmless error. Now, you could say, of course, well, district judges could simply introduce -- allow that kind of evidence to come in because it will always be regarded as harmless error and never, therefore never result in reversal.

But the answer to that, it seems to me, is that it is the obligation of the district court to follow the law. We can assume the district courts will follow the law. And the fact that the consequence will not be reversal of the conviction doesn't mean the district judges will disregard their obligations. Now --

QUESTION: I suppose it would take two other

people to carry that out.

MR. BRYSON: That's right.

QUESTION: The prosecutor and the magistrate would have to connive, too, wouldn't they?

MR. BRYSON: That's right. That's right. But even let's even assume that everybody wanted a magistrate to conduct the jury voir dire. I think it is assuming a disregard for the law on the part of the district judges that I don't think there's any basis for assuming.

If we have, as we do, a general principle that the contemporaneous objection rule and especially in its more aggravated form, the invited error doctrine, is applicable generally to errors, and errors in this case of statutory violations, what are the exceptions to that rule that could conceivably apply in this case? We submit there are three possible exceptions, and we suggest that none of them applies here.

First, the plain error doctrine. Second, the doctrine which petitioner relies on most heavily, of jurisdictional nonwaivable error. And third, a nonwaivable article III error.

Now, first with respect to plain error. Plain error requires a showing that there has been essentially a miscarriage of justice, that there has been something that has gone terribly wrong, an egregious error in the

proceedings that result in great prejudice to the defense, going to the merits of the case. This case simply does not have any element of that.

It is true that this Court in Gomez held that the Court would not recognize the harmless error doctrine in respect to magistrate conducting voir dire, but that is a very different matter from saying that plain error is applicable.

This Court demonstrated that distinction, I think, in the grand jury context when, in Vasquez against Hillery, the Court held that you could not have a harmless error doctrine with respect to claims of the unlawful exclusion of persons on the basis of race from a grand jury. But that did not override this Court's prior decisions that such an error was not plain error. The distinction, it seems to us, is clear and is based on the very limited nature of a plain error, which is that it has to go to the merits of the case or somehow reflect on the integrity and public reputation of judicial proceedings, which this surely does not.

This -- and particularly in this particular case there is no claim that there was anything about this jury selection procedure.

QUESTION: Well, you say, you tell us -- you're telling us what plain error is. What is harmless error or

harmful error?

MR. BRYSON: Well, harmful error is anything as to which you cannot say with confidence, or in the case of constitutional error great confidence, did not result in either --

QUESTION: You don't think it means inevitably harmful?

MR. BRYSON: No. I think it means that you simply can't be sure --

QUESTION: Well, what if it did? What if it did?

MR. BRYSON: -- that it was not harmful.

QUESTION: What if it did? What if -- I suppose in certain contexts -- I suppose you could say it would be inevitable, harmless error -- harmful error means inevitably harmful.

MR. BRYSON: Well, I think it's a question of degree. The kind of harmful or harm that has to ensue, I think, for something to be plain error is not simply something that could conceivably have an effect on the outcome of the case, but it has to be something that really renders the proceedings a miscarriage of justice.

QUESTION: Something really harmful.

MR. BRYSON: It has to be really harmful, that's right. Egregious error, a miscarriage of justice,

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something as to which you say this judgment simply cannot stand even though there was no objection. Now --

QUESTION: Or a structural violation under article III, if we have a structural violation.

MR. BRYSON: That's right, and that's my third category. And you could have a structural violation under article III, which then would be cognizable within the context of the rules under rule 52 as plain error, but it is, I am treating it as separate categories.

QUESTION: Are there examples of nonstructural errors, the kind of colloquy you were having with Justice White, in the case law of cases where there is plain error but that is not harmful, not prejudicial?

MR. BRYSON: I can't think of --

QUESTION: I can't think of any.

MR. BRYSON: -- a case that this Court has decided in which it has held that there is plain error which is not harmful, because the way we read the language of rule 52, and I think it's consistent with the way this Court has done so in Frady and in Young, is to say that it has to be an egregious error affecting the defendant's substantial rights.

Now, I can think hypothetically a case that would, I think, be recognized as plain error even though it might not specifically prejudice the defendant, and

that is if something really absurd happened at a trial, something that just wouldn't happen, but hypothetically you could say if the judge stepped off the bench and said I'm going to let my 4-year-old granddaughter sit on the bench now and rule on objections, because I think it would be cute and I'd like to get a picture of it. I mean, I'm reaching very far. But you could, in that case I think the reputation of the public proceedings, of judicial proceedings in the public's eye, would be impaired to an extent that you would have to say that judgment cannot stand.

QUESTION: Shocks the conscience.

MR. BRYSON: Well, that's right. I think that's right. I think that's right. But otherwise you have to show prejudice to the defendant of a substantial sort.

Now, the second area and the one in which petitioner puts his most reliance is this notion that there is jurisdictional error and that it's nonwaivable. Well, again, of course the word jurisdiction is a murky term, but I think what the Court has said in this area is that jurisdiction, when there is jurisdictional error that means that the district judge, there is no subject matter jurisdiction, the district judge does not have authority with respect to a particular class of cases to enter a binding judgment with respect to the parties.

That clearly is not the case here. Here there is no question that there was subject jurisdiction in this case in the district court. The only question is did the district court make a mistake in assigning this particular part of the case, this particular function, to an officer of the court who should not have had that assignment. This has nothing to do with jurisdiction in the traditional sense. It's a question of authority of that officer and the permissibility of the assignment.

For that reason this case, in our view, is no different from what it would have been had the district judge, with respect to jurisdiction now, had the district judge simply said I want to assign the jury selection to the judge in the chambers next door, who is not busy right now, and I have two jury trials going. The parties fail to raise the objection, which would be, I think, a valid objection under the rule that this does not constitute a proper assignment, and that would, I think, be clearly waivable.

There is no question, in our view, that that wouldn't be a jurisdictional defect if the judge from the chambers next door came in and selected the jury. Even though, of course, as respondent -- or, excuse me, petitioner contends, that judge would be viewing all of the prospective jurors and wouldn't have whatever

advantages there might accrue to the judges, the trial judge's exposure to the jury during that period. But nonetheless, that is not a jurisdictional defect, we say.

QUESTION: And you would say the same thing, I suppose, if you want to imagine something, that the judge assigned the entire trial of a felony case --

MR. BRYSON: Yes.

QUESTION: -- to a magistrate?

MR. BRYSON: We would say, we would say the same thing. That's right. And I think that the answer to that question is compelled by the answer that this Court has not addressed but the lower courts have uniformly agreed, I think 12 circuits have addressed the question, which is that civil cases and misdemeanor trials, which are authorized to be assigned to magistrates by the statute, can constitutionally be assigned to magistrates. I don't think that you can find a distinction in article III or in questions of jurisdiction between misdemeanors and felonies.

Sure, felonies are more important to the parties typically than misdemeanors and often than civil cases, but there is no article III basis for that distinction. And we think there is no basis in jurisdictional concepts for that distinction. So, yes, we would say that, certainly with consent, reference to a magistrate for a

felony trial would be appropriate, given especially all of the protections that are available by way of the magistrate's position within the judicial branch as an inferior officer.

QUESTION: Of course it would be different if the defendant objected?

MR. BRYSON: I think it would be a different analysis. I wouldn't go so far as to say it absolutely would be constitutionally prohibited, but there is no question but that it would be a harder argument. And I think each of the lower courts that has addressed the question of the constitutionality of the civil and misdemeanor jurisdiction has relied heavily on consent. But I think it would not be constitutionally dead. I think there is room for a fair constitutional argument that it could be done without consent, just as in Raddatz --

QUESTION: Well, it certainly would be error, wouldn't it?

MR. BRYSON: It would be error under the statute as it now exists, certainly. I was addressing --

QUESTION: And if there was an objection, I suppose there would be a new trial, wouldn't there?

MR. BRYSON: Oh, yeah, absolutely. Under Gomez I think I would have to agree with that, certainly.

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QUESTION: Yes.

MR. BRYSON: That's right.

QUESTION: The magistrate could have conducted a perfect trial --

MR. BRYSON: That's right.

QUESTION: -- and then still, under Gomez --

MR. BRYSON: Absolutely.

QUESTION: -- that would be reversible.

MR. BRYSON: Because we would not be allowed to claim that, harmless error under Gomez. That's correct.

QUESTION: And why would that be, do you suppose?

MR. BRYSON: Well, the Court --

QUESTION: I know that you could say Gomez says that.

MR. BRYSON: Yes. Well, I think that the reasoning --

QUESTION: Why do you think --

MR. BRYSON: I think what the Court in Gomez was getting at is saying that this is one of those areas, such as where you have a potentially biased fact-finder, in which it is simply impossible to make a fine determination as to whether there was absolutely no prejudice. Therefore we will not allow the Government to come in and say, ah ha, there has been no prejudice in this case. But

--

QUESTION: Finish your answer.

MR. BRYSON: But I think that's very different from the inquiry that has to be made under plain error doctrine.

QUESTION: It seems to me that your whole line of argument here undercuts your concession or your reading of Gomez. It seems to me that it's either delegable with consent under Gomez, or that it's not waivable. I think there's a very fine line you're trying to draw here where you say that it's nondelegable, even with consent, but that it can be waived. It seems to me those are really contradictory.

MR. BRYSON: Well, I don't think they're contradictory, Your Honor. I think they -- and let me see if I can explain the way we see the distinction. We say that what Gomez said was that the additional duties clause in particular of the magistrates act does not include voir dire. Now, we further say that the parties agreeing consent does not make it so, does not change what the statute says. The statute says voir dire simply isn't included within the additional duties that the statute assigns.

But that is very different from saying that you then must apply plain error to the statutory violation.

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Yes, the statute is violated, but no, you don't automatically get relief simply by virtue of a violation of the statute. And in fact we think there will be very few cases in which you will get relief if you don't object.

QUESTION: The analogy, I suppose, would be if there were a statute saying you cannot stipulate as to any given line of evidence, and the parties stipulated that certain evidence could be introduced. I suppose, that's the only example I can think of.

MR. BRYSON: Well, except that I think our case is stronger, because it's not that Congress said you may not assign jury selection to a magistrate. What Congress simply left out of the additional duties clause, as that clause was construed by this Court in Gomez, the -- it simply failed to include jury selection. Now, it would be a somewhat different case, we think, if Congress had said, number one, you can do the following additional duties but you'd better not do jury selection. You may not do jury selection in misdemeanor or felony cases. That's not what the statute says.

Now, I think, moving on to the article III point, there we rely on two lines of cases. First those cases such as Raddatz and Crowell, in which the Court has said that an adjunct to a district court can perform

services in aid of the district judge as long as the district judge maintains control of the proceedings, as long as the essential attributes of judicial power are preserved in the district court. Now, and the second line of cases is a case illustrated by the Schor case, in which the Court has attached great weight to the presence of consent with respect to the waiver of the individual component of the article III right.

It's important, I think, in focusing on the article III claim to see just exactly what it is we have here with respect to a magistrate. We have an officer who, it was appointed by the district court, who is removable by the district court, who is supervised in everything that he or she does by the district court, who's subject to the district court's appointment in the particular case. The district court does not have, by law or practice or rule, have to assign the magistrate to a particular case. And the district court may withdraw from the magistrate the reference at any time. The magistrate's work, moreover, is subject to whatever degree of review the district court can perform, upon the party's request, if they should request it.

In this case, and I think that this is a very important point, in this particular case there was no request for a review, and there's a good reason, because

this jury selection procedure was clean as a whistle. It's not surprising that there was no request for review because frankly there was nothing to review. The only one point on which the magistrate ruled against the defendant, in a manner of speaking, by excusing someone that the defendant preferred not to have excused, was a case which, as we discuss in our brief, was very clearly somebody that was properly challenged for cause.

And the defendant didn't come to the district court and say Your Honor, this juror should not have been challenged for cause. This was, there was no basis for that. He acquiesced, in effect, in the magistrate's decision with respect to that juror. And I might say, there were something like eight other decisions that the magistrate made which went against the Government and in favor of the defense. So that it's not surprising that the defense, number one, wanted to have a magistrate select the jury. The defense might very well have concluded that they were better off with the magistrate than they would have been with a district judge, who might have been a little less patient and asked a few fewer questions.

QUESTION: Mr. Bryson, if supervisory authority is all that is necessary to prevent a violation of article III, then I presume that a district judge can let the

magistrate conduct the entire trial, so long as he supervises it?

MR. BRYSON: I think with consent, Your Honor, that's, that would be our position. And I think that's demonstrated by the statutory authorization which we think is constitutional, and which --

QUESTION: For felony trials as well?

MR. BRYSON: For felony -- well, that's right. The statutory --

QUESTION: So Congress could -- and if the court can do it on its own, I suppose that Congress can require the court to do it. So Congress could pass a statute requiring that all felonies be tried by magistrate subject only to some kind of judicial review by the district court. Is that the system we have?

MR. BRYSON: I think that gets harder, because there you have taken a very important ingredient away from the judicial branch, which is -- from the article III judges. You have taken from the article III judges the complete discretion as to whether to assign particular cases to magistrates, and that, I think, is an important ingredient of separation of powers.

QUESTION: Why? I don't understand why.

MR. BRYSON: Well --

QUESTION: If supervision is enough, you're

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adopting a general principle that supervision is enough. If it is, Congress can say we don't -- you know, we're having more and more Federal criminal cases, and we have too many Federal judges. Magistrates will try them all, Federal district judges will be, in effect they'll just supervise. They'll case manage.

MR. BRYSON: Well, I think -- what I'm saying is I think that the decision to assign in a particular case is part of the supervision. It demonstrates how much control the district judge has over the work of the magistrate and how much control the district court retains over its own jurisdiction. This is not a case, in other words, in which Congress can, has decided that district judges can't be trusted, but we think magistrates as a group are more favorably disposed to the kinds of outcomes that we're looking for. Therefore we're going to require all cases to be heard by magistrates. That may be hypothetical, but that's the argument that would be made to attack a statute that didn't permit the district courts to assign to the magistrates, at their election, those cases that they chose.

QUESTION: That's all the statute has to say? That if the district judge wishes, the district judge may try the case himself or herself. But otherwise all felonies must be tried by magistrates. That's all the

statute need say, and it's fine?

MR. BRYSON: Well, if the statute -- I'm not sure a statute that required that they be sent, that all cases be sent to magistrates would necessarily be unconstitutional. I don't want to suggest that. But I think that's a harder constitutional argument than the constitutional argument that would be faced by a statute that permitted it. Now, the language that you propose, I think, could be read as suggesting that there ought, the district court has to have some good cause for withholding cases from the magistrate. But assuming that the district court is, by the statute, given the authority to choose yea or nay, then I think that that is precisely the kind of thing that this Court has found in the Raddatz case to be an important element of not creating a violation of article III.

QUESTION: So all the Constitution really contains is a guarantee that you'll have a Federal judge supervising your criminal trial if that's all he thinks is necessary? That's all that all that Sixth Amendment and all that good stuff says? That's all?

MR. BRYSON: Supervision and having a substantial responsibility at some point in the process, whether that's, in the case of consent whether that's a case of review of the judgment that's made if it's,

suppose it's a misdemeanor trial conducted by the magistrate, review of the judgment by the district court in the case of consent is enough. That's certainly what Congress has said, and we think that's constitutional.

QUESTION: When you get to what Congress said, Congress said misdemeanors.

MR. BRYSON: That's right. That's right.

QUESTION: And they deliberately didn't say felonies.

MR. BRYSON: That's right. What we're saying is --

QUESTION: And they certainly had a reason for that, didn't they?

MR. BRYSON: Oh yes, they did.

QUESTION: So you want us to draw the line.

MR. BRYSON: No, we don't really want you to draw the line, Your Honor.

QUESTION: Well, how can we say Congress meant felonies --

MR. BRYSON: I don't think it did. It's quite clear that it didn't.

QUESTION: Well then how can we rule with you?

MR. BRYSON: Well, I think because there's a difference between saying that Congress did not authorize it and that the consequence of a violation of what, the

statute that Congress wrote, is that there absolutely has to be a reversal in every case.

QUESTION: There is a difference between one year in the penitentiary and life, isn't there?

MR. BRYSON: Oh, certainly, Your Honor, and --

QUESTION: Okay.

MR. BRYSON: -- that's, there's no doubt that that's why Congress chose to --

QUESTION: You keep saying there's no difference between misdemeanors and felonies.

MR. BRYSON: Well, I think there's no difference for purposes of article III.

QUESTION: There is quite a difference.

MR. BRYSON: Well, there is a difference in the real world, but in the world of article III --

QUESTION: 60 or 70 years.

MR. BRYSON: Yes, but there is nothing in article III, we submit, that draws a distinction.

QUESTION: Well, suppose we disagree with you on that and say that even with consent a magistrate can't try a felony case. Where are you then?

MR. BRYSON: We win, we submit, still because --

QUESTION: Because?

MR. BRYSON: -- we say that the magistrate, there's a big difference between the magistrate's trying

the whole felony case from beginning to end and the magistrate simply performing one limited function within the sphere of the felony case. We think there is no --

QUESTION: And because -- and do you rely on supervision --

MR. BRYSON: Yes. We rely on supervision both in the --

QUESTION: I thought Gomez really questioned the whole business of the efficacy of a judge reviewing voir dires.

MR. BRYSON: Well, Gomez questioned whether --

QUESTION: Didn't it? Didn't it?

MR. BRYSON: Yes. There is no question as a general matter the Court in Gomez said this was going to be something that would be difficult to do. But that's a general matter. Let's look at this case, and as I have tried to argue here, this case involves what happened in this case, because we're arguing about the remedy in this case. And in this case there was no problem with review. Indeed there was nothing to review. So this was not a case that raised, for example, Batson problems. This was not a case in which, for example, as was the case in Gomez, the magistrate gave a long instruction to the jury about the legal principles applicable to the case. The judge gave that instruction in this case, so the judge was

the judicial officer who was dealing with the jury on questions --

QUESTION: So you don't mind us, our just for purposes of deciding this case, assuming that the magistrate in no circumstances could try a felony?

MR. BRYSON: We certainly don't object.

QUESTION: And that we should then, then address whether or not conducting a voir dire is part of a felony trial, or --

MR. BRYSON: Well, it wouldn't be enough for it to be part of a felony trial, I think, just as it would not immediately be unconstitutional or contrary to, well, unconstitutional, for a magistrate, for example, to perform other services in the context of a felony trial, such as accepting the verdict, or even were the district judge to be ill during the time that the instructions had to be given, to reading the district judge's instructions, or perform other services.

I can even imagine there might be circumstances in which, certainly with the consent of the parties, the district court had been called away for an emergency and the magistrate would briefly sit as a presiding officer in the trial. That doesn't withdraw, there's no constitutional magic drop dead clause that makes that case automatically reversible by virtue of that limited

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participation.

QUESTION: Your hypothesis is with consent, I take it?

MR. BRYSON: With consent, that's correct. That's correct. Now, it is true, we would not object to your arguendo accepting the proposition that -- thank you.

QUESTION: Thank you, Mr. Bryson.

Mr. Rudin, do you have rebuttal? You have 3 minutes remaining.

REBUTTAL ARGUMENT OF JOEL B. RUDIN

ON BEHALF OF THE PETITIONER

MR. RUDIN: Thank you, Your Honor. First of all, following up on Justice Kennedy's question, if the defect that occurred in this case was not waivable, then we submit that no objection was required. And if no objection was required, then the Court cannot punish this defendant for not having made an objection.

Second of all, Mr. Bryson has left out of his analysis a critical exception to the plain error rule, and that exception is that where Congress fixes the waiver standard, whether it be by the Johnson v. Zerbst knowing, intelligent, and voluntary standard or that it be not waivable at all, the Court cannot require the defendant to object. Again, the Court cannot punish the defendant for not, for failing to object when the right that's involved

is such an important structural right that Congress has required either that it not be waivable or that any waiver by the defendant meet the Johnson v. Zerbst standard.

We submit that in this case, this case can be decided as a matter of statutory construction and the constitutional issues that have been raised this morning can be avoided. The reason is --

QUESTION: You're saying that the only cases in which we can require an objection to be made are cases where the matter would be waivable? Are you sure that that comports with all our cases? It seems to me a very sweeping rule.

MR. RUDIN: If Congress makes a determination, Your Honor, that a particular procedure, or I shouldn't say procedure, that a particular exercise of power is something that cannot be done by a particular judicial officer, then all I am arguing is that an objection cannot be required to that exercise of power, because it's Congress' prerogative in taking into account all sorts of societal interests that go beyond the narrow interest of the defendant not to make it waivable.

On the other hand, Congress can be paternalistic and can say that the right is so important, the right to trial before a proper judge or trial before the proper entity, as the Court put it in Gomez, is so important that

we're not going to permit a judge to ask a defendant whether or not he wants to waive that right, where the judge is the person who will be presiding at the balance of the trial and will be able to sentence the defendant upon conviction, as in this case, to life in prison. Mr. Peretz was charged with a mandatory 10 year offense where he was facing up to life in prison.

Finally, the Government keeps on trying to trivialize the defect that occurred in this case. The defect occurred involving what this Court in Gomez called a critical stage of trial, where the right to trial before a judge of competent jurisdiction attached. This Court uses the term "critical," calls a right critical when it's not de minimis or not inconsequential. The Court in Gomez pointed out the inseparability between --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rudin.

The case is submitted.

(Whereupon, at 11:07 a.m., the case in the above-entitled matter was submitted.)

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