No. 06-11612

In The Supreme Court of the United States

HOMERO GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Must a federal criminal defendant explicitly and personally waive his right to have an Article III judge preside over *voir dire*?

II. Did the Court of Appeals err when it reviewed petitioner's objection for plain error?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

TABLE OF AUTHORITIES – Continued

Page

OPINION BELOW

The opinion of the Court of Appeals, J.A. 24-33, is reported at 483 F.3d 390.

JURISDICTION

The judgment of the Court of Appeals was entered on March 30, 2007. The petition for a writ of certiorari was filed on May 24, 2007, and granted on September 25, 2007. J.A. 35. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The Questions Presented implicate Article III, § 1, of the United States Constitution, the Federal Magistrates Act (28 U.S.C. § 636), and Federal Rules of Criminal Procedure 51(b) and 52(b). The pertinent parts of those provisions are set forth in the Appendix.

STATEMENT OF THE CASE

In 2004, a federal grand jury in Laredo, Texas, returned a superseding indictment charging the petitioner, Homero Gonzalez, with conspiracy and substantive drug-trafficking offenses. Mr. Gonzalez, who was represented by counsel, pleaded not guilty, and his case was set for a jury trial.

At the time of trial, Mr. Gonzalez was a 45-year-old Mexican citizen who resided in the United States as a permanent resident alien. *See* Presentence Report ("PSR") ¶ 58.[1] His criminal record consisted of two state misdemeanor convictions (for driving while intoxicated and theft). PSR ¶¶ 54-55. His formal education was limited to secondary school in Mexico, PSR ¶ 63, and his employment record consisted of various types of manual labor. PSR ¶ 64.

The initial court proceedings in this case, including the detention hearing and arraignment, were before United States Magistrate Judge Adriana Arce-Flores. R. 116, 131. Thereafter, there were four pretrial conferences before United States District Judge George P. Kazen. R. 276-84; R. 272-73; R. 227-33; R. 235-40. Because Mr. Gonzalez did not speak fluent English,[2] he required the assistance of an official court interpreter to translate the English proceedings into Spanish. *See, e.g.*, R. 133, 152.[3]

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[1] The record on appeal ("R.") is cited according to the pagination appearing on the lower right-hand corner of each document. The presentence report ("PSR") is cited by paragraph number. The Joint Appendix ("J.A.") is cited by its internal pagination.

[2] In addition to using an official court interpreter throughout the district court proceedings, Mr. Gonzalez required the assistance of a Spanish interpreter when he was interrogated by law enforcement officers. R. 459-60. During his testimony at trial, Mr. Gonzalez stated – in Spanish, using an interpreter – that he understood "some" English but "not very much." R. 567.

[3] In accordance with the common practice in federal court in Laredo, the interpreter spoke to Mr. Gonzalez via an audio

(Continued on following page)

At no point during any of the pretrial conferences was Mr. Gonzalez or his defense counsel ever informed that a magistrate judge would conduct jury selection. The only mention of jury selection came at the end of the last pretrial conference, when Judge Kazen stated that "we're picking a jury" the following Friday or Monday, although he made no reference to a magistrate judge's participation in jury selection. R. 240.

At jury selection, Magistrate Judge Arce-Flores appeared as the sole presiding judge. At the outset, she directed "the attorneys [to] approach the bench." R. 151 (J.A. 15). The record is clear that the prosecutor and defense counsel physically approached the bench and engaged in a discussion with the magistrate judge. R. 151 (J.A. 15-16). The magistrate judge asked the attorneys to stand near the microphone at the bench being used to record the proceedings. *Id.*; *see also* R. 226 (certification that the *voir dire* proceedings were transcribed "from the electronic sound recording of the proceedings").

At the bench, the following verbal exchange occurred:

> THE COURT: I need to ask the parties at this time if they are going to consent to having th[is] United States Magistrate Judge proceed in assisting in the jury selection of this case.

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device; Mr. Gonzalez heard the translation through earphones. *See, e.g.*, R. 292.

> MS. GARCIA-MARMOLEJO [the prosecutor]: Yes, we are, your Honor.
>
> MR. OSCAR PENA SR.: Yes, your Honor, we are.
>
> THE COURT: Thank you. Then we'll proceed in a just a moment.
>
> MS. GARCIA-MARMOLEJO: Thank you, your Honor.
>
> THE COURT: The parties have agreed through consent that this Court will be assisting through the process of jury selection. Is the defendant present?
>
> MR. OSCAR PENA SR.: He is present, your Honor.
>
> THE COURT: Mr. Pena, does the defendant need the assistance of an interpreter at this time, sir?
>
> MR. OSCAR PENA SR.: Yes he does, your Honor.

R. 151-52 (J.A. 16).

It appears from the record that, after this discussion at the bench was concluded, the attorneys returned to their tables, and the magistrate judge then addressed the members of the venire in open court. *See* R. 152 (J.A. 17) (transcript notes that a "pause" occurred after the bench conference and that, immediately thereafter, the magistrate judge addressed the members of the venire). The magistrate judge

conducted the entire *voir dire* process, including the actual empaneling of the petit jury. R. 220.

The magistrate judge never asked Mr. Gonzalez whether he personally consented to have her conduct jury selection. She never mentioned to him that his counsel had consented at the bench. And, as the Court of Appeals recognized, Mr. Gonzalez never executed any type of written consent or waiver. J.A. 26.

No Article III judge played a role in the jury selection process.[4] Although the magistrate judge informed the attorneys that "the issue of eligibility and excuses and/or exemptions ha[s] already been addressed with the district court" before *voir dire*, R. 152 (J.A. 16-17), she actually meant that prospective jurors "had already spoken to the clerk's office and basically . . . went through" exemptions and

[4] No order of referral to Magistrate Judge Arce-Flores – from a federal district judge – appears in the record. Nor does there appear to be a "standing order" issued by a federal district judge that referred jury selection to Magistrate Judge Arce-Flores in all felony cases. There is a 2002 "General Order" signed by Judge Kazen – in his former capacity as the chief district judge for the Southern District of Texas – which provides that: "Duties which may be performed by a magistrate judge include . . . [c]onducting voir dire and selecting petit juries for the district court, to the extent allowed by law." *In the Matter of Jurisdiction and Procedures For Duties Assigned To United States Magistrate Judges In This District*, General Order No. 2002-13 (S.D. Tex. Dec. 13, 2002), available at www.txs.uscourts.gov/district/genord/2002/2002-13.pdf (visited Oct. 15, 2007).

exclusions with an unnamed staff member. R. 153 (J.A. 18).

After jury selection, the trial commenced before a visiting federal district judge, the Honorable Adrian Duplantier. R. 290. The jury convicted Mr. Gonzalez, R. 76-77, and Judge Kazen sentenced him to serve 190 months in prison. R. 92-98.

Mr. Gonzalez appealed to the United States Court of Appeals for the Fifth Circuit. Represented by new counsel on appeal (the Federal Public Defender), Mr. Gonzalez contended that the delegation of jury selection to the magistrate judge was erroneous because he had not explicitly and personally waived his right to have an Article III judge conduct jury selection. The Court of Appeals rejected his argument on alternative grounds: first, holding that the plain-error standard applied because Mr. Gonzalez had raised his claim for the first time on appeal, the court concluded that the alleged error of which he complained was not "plain"; alternatively, addressing the merits of his claim, the court held that delegation of jury selection to the magistrate judge was permissible because Mr. Gonzalez's trial counsel had given valid consent, and that the record need not also reflect Mr. Gonzalez's personal consent. J.A. 26-33.

SUMMARY OF ARGUMENT

A. Read together, the Court's decisions in *Gomez v. United States*, 490 U.S. 858 (1989), and

Peretz v. United States, 501 U.S. 923 (1991), allow a magistrate judge to conduct felony jury selection under the "additional duties" clause of the Federal Magistrates Act ("FMA")[5] only if a defendant consents. Such consent is necessary for an effective waiver of the defendant's right to an Article III judge. Section 636(b)(3) is silent about the *form* of consent by a defendant that is required for there to be an effective waiver of the defendant's right to an Article III judge. The Court has held that a defendant's explicit, personal waiver of other important constitutional rights that affect the framework within which the trial proceeds, such as the right to a jury trial,[6] is necessary for an effective waiver. Similarly, in order to effect a constitutional waiver of a federal defendant's right to an Article III judge, the defendant must give explicit, personal consent to have a magistrate judge preside over critical stages of a felony trial, including jury selection. Consent of defense counsel alone is not constitutionally sufficient to waive the defendant's right to an Article III judge.

The Court, however, need not address the serious constitutional question of whether a district court can delegate felony jury selection to a magistrate judge based solely on defense counsel's consent.

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[5] 28 U.S.C. § 636(b)(3).

[6] *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 275, 277-78 (1942) (citing *Patton v. United States*, 281 U.S. 276, 312 (1930), *overruled on other grounds, Williams v. Florida*, 399 U.S. 78, 90-93 (1970)).

Rather, applying the doctrine of constitutional avoidance, the Court should interpret the FMA's "additional duties" clause to require a federal criminal defendant's explicit, personal consent to such delegation in order to authorize a magistrate judge to conduct felony jury selection under the statute. In filling the statutory interstice in the FMA concerning the type of consent required, the Court should import the statutory waiver provision in 18 U.S.C. § 3401(b). The additional duties clause and § 3401(b) clearly are *in pari materia*. The latter requires the record to reflect the defendant's explicit, personal consent to have a magistrate judge preside in a federal misdemeanor case. No less should be required in a federal felony case in which a critical stage of the proceedings is delegated to a magistrate judge.

Because Mr. Gonzalez did not give valid consent, he did not waive his right to have an Article III judge conduct jury selection. At the time his attorney purported to give consent to the magistrate judge at the bench, Mr. Gonzalez was not present at the bench and did not have the assistance of an interpreter. The record thus fails to show that Mr. Gonzalez gave express, personal consent. Alternatively, even if this Court were to apply a less exacting personal waiver standard than the one in § 3401(b) – instead, only requiring, as occurred in *Peretz*, that defense counsel consent in his client's presence and also confirm his client's consent – no such consent appears in the record in this case. Under either standard, Mr. Gonzalez did not waive his right to an Article III judge.

B. Although Mr. Gonzalez raised his claim for the first time on direct appeal, it is not subject to the plain-error standard set forth in Federal Rule of Criminal Procedure 52(b) for four reasons. First, under Federal Rule of Criminal Procedure 51(b), Rule 52(b) does not apply because Mr. Gonzalez did not have a realistic opportunity to object to the magistrate judge's failure to obtain his personal consent. Second, because a defendant must personally and affirmatively waive the right to an Article III judge, Mr. Gonzalez's silence did not qualify as a "forfeiture" under Rule 52(b); without a valid waiver or forfeiture, the plain-error standard simply does not apply. Third, because this type of "lack-of-personal-waiver" claim raised by Mr. Gonzalez on appeal necessarily would not arise without a lack of objection in the district court, it would be illogical to apply the plain-error standard to this type of claim. Fourth, application of the federal plain-error standard to this type of lack-of-personal-waiver claim would anomalously impose stricter error-preservation requirements on federal defendants than the requirements for similarly situated state defendants who appeal to this Court. For these reasons, Rule 52(b) does not apply in this case.

Alternatively, even if Rule 52(b) applies in this case, Mr. Gonzalez would still be entitled to a reversal of his conviction under the plain-error standard set forth in *United States v. Olano*, 507 U.S. 725 (1993). Under the Court's precedents, the delegation of jury selection to the magistrate judge without

Mr. Gonzalez's personal consent was plain error, both as a constitutional and statutory matter. The type of structural error caused by the nonconsensual delegation satisfies *Olano*'s requirement that the error affected Mr. Gonzalez's "substantial rights." And, finally, the nonconsensual delegation of a critical stage of a federal felony case to a non-Article III judge seriously affects the fairness, integrity, and public reputation of the judicial proceedings.

ARGUMENT

I. UNDER THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE, THE COURT SHOULD INTERPRET 28 U.S.C. § 636(b)(3) TO REQUIRE A FEDERAL CRIMINAL DEFENDANT'S EXPLICIT AND PERSONAL WAIVER OF THE RIGHT TO AN ARTICLE III JUDGE IN ORDER FOR A MAGISTRATE JUDGE TO CONDUCT FELONY JURY SELECTION.

A. Introduction

The Federal Magistrates Act ("FMA") provides that, besides certain duties expressly set forth in the Act, "[a] magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). Section 636(b)(3) is silent about whether a defendant must consent to a district judge's delegation of a critical stage of a federal felony case, such as jury selection, to a magistrate judge. In

Gomez v. United States, 490 U.S. 858 (1989), the Court unanimously held that, in order to avoid the serious constitutional question that would arise if a magistrate judge conducted felony jury selection without a defendant's consent, the Court would interpret § 636(b)(3) to prohibit nonconsensual delegation of jury selection. *Gomez*, 490 U.S. at 860, 863-64, 870-76. Because there was no consent of any type given in *Gomez* – by defense counsel or the defendant – this Court did not address whether delegation with consent is permissible.

Two years later, in *Peretz v. United States*, 501 U.S. 923 (1991), a closely divided Court held that there was no serious constitutional question to avoid in interpreting the "additional duties" clause because there was evidence in the record that both Peretz and his attorney had consented to have a magistrate judge conduct felony jury selection. *Id.* at 932-40.[7] In *Peretz*, in the presence of his client, defense counsel stated that he "would love the opportunity" to have the magistrate judge conduct jury selection (in place of the district judge) and later specifically confirmed

[7] In dissent, three Justices concluded, after applying the doctrine of constitutional avoidance, that 28 U.S.C. § 636(b)(3) does not permit a magistrate judge to conduct jury selection in a federal felony prosecution even with a defendant's consent. *Peretz*, 501 U.S. at 940-52 (Marshall, J., dissenting, joined by White & Blackmun, JJ.). Justice Scalia separately dissented, on the ground that the statutory language of the FMA did not authorize delegation of felony jury selection to magistrate judges. *Id.* at 955-56 (Scalia, J., dissenting).

on the record that the magistrate judge had the "consent" of both defense counsel and his "client" to conduct jury selection. *Id.* at 925 & n.2. The Court in *Peretz* concluded "that there is no Article III problem when a district court judge permits a magistrate to conduct *voir dire* in accordance with the defendant's consent" and, therefore, that the magistrate judge had authority to conduct jury selection under § 636(b)(3). *Id.* at 932. The defendant's consent was "the crucial difference" between that case and *Gomez*. *Peretz*, 501 U.S. at 933.

The question not addressed in *Gomez* and *Peretz*[8] – which is presented in Mr. Gonzalez's case – is whether a defense attorney's consent to have a magistrate judge

[8] In *Gomez*, the defendant expressly objected to the delegation, and in *Peretz* defense counsel both consented in the presence of his client and expressly confirmed that his client also had consented to the delegation. *Gomez*, 490 U.S. at 860; *Peretz*, 501 U.S. at 925 & n.2. Justice Marshall's dissenting opinion in *Peretz* contended that, assuming *arguendo* that a magistrate judge has authority to conduct jury selection with a defendant's consent, a defendant himself must give personal, express consent in writing (rather than through his counsel's oral statement). *See Peretz*, 501 U.S. at 947 n.6 (Marshall, J., dissenting). The majority opinion, Justice Marshall observed, had simply "assum[ed] that there was effective consent in" *Peretz*. *Id.* The majority opinion in *Peretz* did not respond to the alternative argument made by Justice Marshall in footnote 6 of his dissenting opinion – likely because the Court's order granting certiorari in *Peretz* did not ask the parties to address what *form* of "consent" is required. Instead, it simply asked the parties to address the larger issue of whether 28 U.S.C. § 636 "permit[s] a magistrate to conduct *voir dire* in a felony trial if the defendant consents." *Peretz v. United States*, 498 U.S. 1066 (1991).

conduct felony jury selection is constitutionally sufficient to waive a defendant's right to an Article III judge or whether, instead, the defendant's personal consent is necessary. Mr. Gonzalez contends that delegation of jury selection to a magistrate judge without a defendant's express and personal consent violates the defendant's constitutional right to an Article III judge. However, as explained below, under the doctrine of constitutional avoidance, this Court should avoid addressing this constitutional issue by interpreting § 636(b)(3) to require such consent.

B. Whether A Magistrate Judge May Conduct Felony Jury Selection Without The Express, Personal Consent Of The Defendant Is A Serious Constitutional Question.

1. Article III Judges Occupy A Place Of Historic Importance Within Our Constitutional System.

Article III vests the "judicial [p]ower" of the United States in life-tenured federal judges whose positions are not subject to diminution in salary; such judges are appointed by the President with the advice and consent of the Senate and can only be removed through the impeachment process. *See* U.S. Const. art. III, § 1; *see also United States v. Hatter*, 532 U.S. 557, 567-70 (2001) (discussing Article III, § 1).

The Founders clearly believed that such independent "Article III judges" would be integral to our

tripartite constitutional system of government. *See Hatter*, 532 U.S. at 567 (discussing Alexander Hamilton's influential *Federalist Nos. 78 & 79*, in which he explained why Article III, § 1, is a critical component of our tripartite system of government); *id.* at 568 ("Hamilton's view, and that of many other Founders, was informed by first-hand experience with the harmful consequences brought about when a King of England 'made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.'") (quoting THE DECLARATION OF INDEPENDENCE ¶ 11).

Article III's provision for an independent federal judiciary exists not only to benefit individual litigants in particular cases but also to guarantee the fairness, integrity, and public reputation of the judicial process by fostering excellence within the federal judiciary and promoting the doctrines of separation of powers and checks and balances. *See Hatter*, 532 U.S. at 568; *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-51 (1986) (discussing both the "structural" and "personal" interests protected by Article III, § 1). With respect to litigants' personal interests under Article III, § 1, federal criminal defendants benefit the most from judicial independence. As Chief Justice John Marshall said two centuries ago, judicial independence is most significant when a judge is required to decide "between the Government and the man whom the Government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular."

Hatter, 532 U.S. at 568-69 (citation and internal quotation marks omitted).[9] The "greatest scourge . . . ever inflicted," said Marshall, was a "dependent judiciary." *Id.* at 569 (citation and internal quotation marks omitted). The Founders' concerns about the need to establish an independent federal judiciary as reflected in Article III, § 1, "are no less important today than in earlier times." *Id.*

2. Federal Magistrate Judges Lack The Institutional Independence of Article III Judges.

Although magistrate judges are considered "adjuncts" to Article III (district) judges, *see Thomas v. Arn*, 474 U.S. 140, 154 n.14 (1985), they are nonetheless not Article III judges, and their office does not have the structural protections created by Article III, § 1. In particular, magistrate judges serve eight-year terms, may be removed from office by district judges for cause,[10] and are subject to potential diminution of their salaries and outright abolition of their office by

[9] The "protected core" of Article III judicial power includes federal criminal cases, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 n.25 (1982) (plurality); *see also United States v. Johnston*, 258 F.3d 361, 366-72 (5th Cir. 2001) (concluding that even consensual delegation of a post-conviction felony criminal proceeding under 28 U.S.C. § 2255 to a magistrate judge violates Article III); *id.* at 370 n.5 ("[M]atters relating to federal criminal [cases] evince greater Article III concerns than do those linked to civil cases.").

[10] *See* 28 U.S.C. § 631(e) & (i).

Congress.[11] If magistrate judges seek to serve additional terms, they must undergo a reappointment process in which they are potentially subject to criticism by various institutional players[12] – such as members of the local bar, including federal prosecutors. In addition, some magistrate judges aspire to obtain perceived higher or better offices – often an Article III judgeship or the office of the United States Attorney, both of which require presidential appointment and confirmation by the Senate.[13] Therefore, a sitting magistrate judge is subject to the type of influences that the Founders feared would jeopardize judicial independence.

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[11] *See* J. Anthony Downs, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1060 (1985).

[12] *See* 28 U.S.C. § 631(b)(5); *see also* Judicial Conference of the United States, *Selection, Appointment, and Reappointment of United States Magistrate Judges*, Appendix H ("Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges," ch. 3) (2001).

[13] *See, e.g.*, *Judge Hopes For A Hearing: Clock Is Ticking, But Fresno-Based Magistrate May Slide Through Confirmation*, FRESNO BEE, Sept. 2, 2006, at B1, 2006 WLNR 15392459 (discussing President's nomination of federal magistrate judge for a federal district judgeship); *Magistrate Judges Demystified: Once Underappreciated, U.S. Magistrate Judges Finally Get Some Respect*, TEXAS LAWYER, Jan. 7, 2002, at 1 (available on Westlaw) (reporting that "U.S. Magistrate Judge Jane Boyle of Dallas was nominated to be U.S. attorney for the Northern District").

That federal district judges are the ones who initially appoint and later decide whether to reappoint magistrate judges does not allay these concerns. As Judge Posner has observed (in contending that magistrate judges should not be permitted to try federal civil cases even with consent):

> The fact that the appointing power has been given to Article III judges is the opposite of reassuring. It makes magistrates beholden to judges as well as to Congress. The separation of powers is not merely tripartite. The Constitution built internal checks and balances into . . . the judicial branch by guaranteeing all federal judges – not just Supreme Court Justices, or appellate judges generally – tenure during good behavior and protection against pay cuts. Appellate judges can reverse district judges, can mandamus them, can criticize them, can remand a case to another judge, but cannot fire district judges, cow them, or silence them – cannot prevent them from making independent judgments and expressing independent views. . . . [A]s long as the [district] judges . . . enjoy the tenure and compensation protections of Article III, they are independent of [appellate] judges . . . Magistrates do not have those protections; the [district] judges control their reappointment.

Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1053 (7th Cir. 1984) (Posner, J., dissenting); *see also Northern Pipeline*, 458 U.S. at 59 n.10 (plurality) ("The guarantee of life tenure insulates [an Article

III] judge from improper influences not only by other branches but by [judicial] colleagues as well, and thus promotes judicial individualism.").

3. Having An Independent Judge Conduct Felony Jury Selection Is A Core Article III Concern.

The constitutional right to trial by jury in a criminal prosecution "is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). By placing the right to a jury trial in federal criminal cases in Article III, § 2, cl. 3, of the original Constitution – before the Bill of Rights was adopted – the Founders demonstrated their belief that juries in federal criminal cases were a structural protection similar in importance to vesting federal judicial power in life-tenured, independent judges. *See Wilkerson v. Whitley*, 28 F.3d 498, 502 (5th Cir. 1994) (*en banc*) (quoting from Hamilton's *Federalist No. 83*, which referred to Article III's right to a criminal jury trial as "the very palladium of free government"); *see also Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) ("That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.").

Of the many "critical stages" of a felony case, jury selection is one of the most important in our justice

system because it implicates not only the defendant's interest in a fair trial[14] but also society's interest in having the jury serve a "representative function" in our constitutional democracy.[15] The Court repeatedly has recognized that application of the many constitutional rules governing jury selection – rules concerning the questions to be posed to the members of the venire, the standards for removing prospective jurors for cause, and challenges to allegedly discriminatory use of peremptory strikes – are primarily safeguarded by the careful exercise of a trial judge's sound discretion.[16]

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[14] *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992) ("*Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.") (citations and internal quotation marks omitted).

[15] *Miller-El v. Dretke*, 545 U.S. 231, 272-73 (2004) (Breyer, J., concurring) (noting the importance of a fair jury selection process because " 'the institution of the jury raises the people . . . to the bench of judicial authority [and] invests [them] with the direction of society' ") (quoting 1 A. de Tocqueville, DEMOCRACY IN AMERICA 287 (H. Reeve transl. 1900)).

[16] *See, e.g.*, *Uttecht v. Brown*, 127 S. Ct. 2218, 2223 (2007) ("The judgment as to whether a venireman is biased . . . is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.") (citations and internal quotation marks omitted); *Hernandez v. New York*, 500 U.S. 352, 364 (1991) (plurality) ("Since the trial judge's findings in the context [of allegedly discriminatory peremptory strikes] largely turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference."); *Ristaino*

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In view of both the tremendous importance of proper jury selection and the weighty responsibility vested in a trial judge during the selection process, both federal criminal defendants and members of society, including prospective jurors, have a keen interest in having an independent Article III judge conduct jury selection. Although a majority of the Court in *Peretz* concluded that a defendant could consent to have a magistrate judge conduct felony jury selection, the Court in *Gomez* unanimously concluded that "we harbor serious doubts that a district judge could review this function meaningfully." *Gomez*, 490 U.S. at 874; *accord Peretz*, 501 U.S. at 935 n.12. The Court's doubts were based on the fact that, during the jury selection process, almost all of the decisions made by the presiding judge are within the judge's essentially unreviewable discretion. *See id.* at 874-75 (in deciding whether prospective jurors are biased, the judge "must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality"). Even if review of a magistrate judge's decision-making during jury selection by a district judge were possible, "only words can be preserved for review; no transcript can recapture the atmosphere of *voir dire*,

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v. Ross, 424 U.S. 589, 594-95 (1976) ("*Voir dire* is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. . . . This is so because the determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge.") (citations and internal quotation marks omitted).

which may persist throughout the trial." *Id.* And, even if a district judge on review were to re-question members of the venire, "as a practical matter a second interrogation might place jurors on the defensive, engendering prejudices irrelevant to the facts adduced at trial." *Id.* at 875 n.29.

4. A Constitutionally Effective Waiver Of The Right To An Article III Judge At Felony Jury Selection Requires A Federal Defendant's Express And Personal Consent To Delegation To A Magistrate Judge.

The Court's decisions in *Gomez* and *Peretz*, when read together, hold that a federal criminal defendant's consent to have a magistrate judge conduct jury selection is sufficient to bestow authority on the magistrate judge under 28 U.S.C. § 636(b)(3) and avoid constitutional doubt; however, those decisions do not specifically address what *type* of consent is sufficient to avoid constitutional doubt. As discussed below, this Court's precedents – addressing both the right to an Article III judge and similar fundamental rights of criminal defendants – require a defendant's express and personal consent to delegation of jury selection to a magistrate judge in order to accomplish a constitutionally effective waiver of the right to an Article III judge.

a. A Defendant's Mere Silence Does Not Amount To "Consent" Or "Waiver."

Obtaining a defendant's consent to have a magistrate judge conduct jury selection is not a routine matter. Rather, it is nothing less than waiver of the defendant's right to have an Article III judge preside during that critical stage of trial. *See Peretz*, 501 U.S. at 936-37 ("There is no constitutional infirmity in the delegation of felony trial jury selection to a magistrate when the litigants *consent*. . . . We have previously held that litigants may *waive* their personal right to have an Article III judge preside over a civil trial.") (citing *Schor*, 478 U.S. at 848) (emphasis added); *see also Schor*, 478 U.S. at 848-50 (discussing concepts of "waiver" and "consent" interchangeably) (citations omitted).

There are passages in the *Peretz* majority opinion that, when read in isolation, appear to equate a defendant's lack of objection to delegation of jury selection to a magistrate judge with "consent" or "waiver."[17] Such passages, however, must be read in

[17] *See Peretz*, 501 U.S. at 936-37 ("[A] defendant has no constitutional right to have an Article III judge preside at jury selection if the defendant has raised no objection to the judge's absence. . . . [T]he Constitution gives . . . no assistance to a defendant who fails to demand the presence of an Article III judge at the selection of the jury."); *id.* at 940 ("We agree . . . that permitting a magistrate judge to conduct the *voir dire* in a felony trial when the defendant raises no objection is entirely

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the context of the particular circumstances of *Peretz*: the lack of objection in that case occurred only after the defense attorney (in the presence of his client) expressly had consented and thereafter confirmed on the record that the consent was both the attorney's and his client's. *Peretz*, 501 U.S. at 925 & n.2. Therefore, the Court's discussion of Peretz's failure to object was set against the backdrop of his knowledge that his attorney had expressly consented for him and his failure thereafter to object. In other words, this Court's decision in *Peretz* cannot be read beyond its facts to broadly provide that a defendant's silence *by itself* constitutes "consent" or "waiver."

Moreover, to read *Peretz* as creating a rule that a defendant's silence by itself equates to consent – and, thus, waiver of his right to an Article III judge – would conflict with this Court's definition of "waiver." In *United States v. Olano*, 507 U.S. 725 (1993), the Court stated that a defendant's "waiver" of a right is not accomplished by a defendant's mere silence; instead, "waiver" is "the intentional relinquishment or abandonment of a known right." *Id.* at 733 (citations and internal quotation marks omitted);[18] *cf.*

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faithful to the congressional purpose in enacting and amending the [FMA].").

[18] In *Olano*, the Court stated that: "Whether a particular right is waivable [at all]; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." 507 U.S. at 733. As explained above, a federal defendant's

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North Carolina v. Butler, 441 U.S. 369, 373 (1979) ("[M]ere silence is not enough [for a valid *Miranda* waiver]. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his [*Miranda*] rights."). Therefore, a defendant's mere silence by itself when a magistrate judge selects a felony jury does not amount to "waiver" under *Peretz*.

The Court's discussion of the concept of waiver in *Olano* is consistent with the Court's treatment of the Article III waiver issue in *Schor*. The Court held that Schor, a civil litigant, had "waived" his right to an Article III judge and thereby "consented" to have a non-Article III adjudicator preside. *Schor*, 478 U.S. at 849. The Court's conclusion that an effective waiver had occurred was not based on Schor's silence when a non-Article III adjudicator presided but, instead, was based on the fact that Schor had "expressly demanded" that his adversary proceed in the non-Article III forum and "was content to have the entire dispute settled in the forum he had selected until the [administrative law judge] ruled against him on all counts." *Id.*

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right to have an Article III judge conduct felony jury selection is the type of right that requires the defendant's personal participation in the knowing and voluntary waiver of the right.

b. Defense Counsel Cannot Unilaterally Waive A Defendant's "Personal" And "Basic" Right To An Article III Judge.

Relying on the Court's decision in *New York v. Hill*, 528 U.S. 110 (2000), the Court of Appeals held that, notwithstanding Mr. Gonzalez's silence, his counsel was empowered unilaterally to consent to have the magistrate judge conduct jury selection. J.A. 26, 32-33 ("[T]he right to have an Article III judge conduct voir dire is one that may be waived through the consent of counsel."). The Court of Appeals' reliance on *Hill* was misplaced.

In *Hill*, the Court held that a defense attorney's agreement to continue his client's trial validly waived the defendant's right to a speedy disposition of charges under the Interstate Agreement on Detainers ("IAD"), even though the record did not establish the defendant's personal assent to counsel's waiver of the IAD's time limits. 528 U.S. at 111-13. The Court stated that, "What suffices for waiver depends on the nature of the right at issue." *Id.* at 114. "For certain fundamental rights, the defendant must personally make an informed waiver"; "[f]or other rights, however, waiver may be effected by action of counsel." *Id.* "'Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has – and must have – full authority to manage the conduct of the trial.'" *Id.* at 114-15 (quoting *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)). The Court concluded

that the attorney's agreement to continue his client's trial was by itself sufficient to waive his client's rights under the IAD because "[s]cheduling" a trial is the type of "routine" strategic decision within the province of counsel's discretion. *Hill*, 528 U.S. at 115-18.

Waiver of the right to have an Article III judge conduct felony jury selection differs significantly from waiver of the right to a speedy disposition of criminal charges and other such "routine" issues during the trial proceedings. In contrast to a mere "[s]cheduling matter," *Hill*, 528 U.S. at 115, the right to have an Article III judge preside in a federal felony case – particularly during a critical stage like jury selection – is a weighty one with an impressive constitutional pedigree. *See Hatter*, 532 U.S. at 568-69; *see also Schor*, 478 U.S. at 847-48; *Northern Pipeline*, 458 U.S. at 57-60, 70 n.25 (plurality). And, unlike evidentiary matters and routine legal objections made (or forgone) during the course of a trial, which concern issues of strategy and thus are within the province of defense counsel's discretion, *see Hill*, 528 U.S. at 115,[19] waiver of the right to have an Article III judge

[19] *See, e.g.*, *Taylor*, 484 U.S. at 417-18 (holding that an attorney's deliberate decision to engage in misconduct regarding pretrial disclosure of the identity of a defense witness was imputed to the defendant for purposes of waiving the defendant's right to compulsory process; "[t]he adversary process could not function effectively if every tactical decision required client approval").

conduct felony jury selection is not a mere strategic or tactical matter.[20]

Instead, the right to have an Article III judge preside during a critical stage of a federal felony case is one of those "'basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client. . . .'" *Hill*, 528 U.S. at 114-15 (quoting *Taylor*, 484 U.S. at 417-18). As examples of such "basic rights" requiring a defendant's personal waiver, the Court in *Hill* cited cases concerning the right to counsel, *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938), and the right to plead not guilty, *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966). *See Hill*, 528 U.S. at 114-15. Similarly, in *Taylor*, in addition to citing *Brookhart*, the Court gave, as examples, cases involving other "basic" rights requiring a defendant's personal waiver: *Doughty v. State*, 470 N.E.2d 69 (Ind. 1984) (right to a jury trial), and *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963) (constitutional right to be present during trial). *See Taylor*, 484 U.S. at 417-18 & n.24. The Indiana Supreme Court's decision in *Doughty*, which this Court

[20] Although there may be a strategic or tactical reason for allowing a magistrate judge to select the jury, the waiver of the right to an Article III judge during felony jury selection "is not simply a strategic choice" that may be exercised by defense counsel alone. *Cf. Florida v. Nixon*, 543 U.S. 175, 187-88 (2004) (stating that "[w]hile a guilty plea may be tactically advantageous for the defendant, . . . the plea is not simply a strategic choice" that can be made solely by defense counsel).

cited in *Taylor* as an example of the waiver procedure for a "basic" right, set forth that procedure:

> A waiver of this right [to a jury trial] must be made in a knowing, intelligent, and voluntary manner, with sufficient awareness of the surrounding circumstances and the consequences. . . . The record must reflect that such a waiver was made, so that the question of an effective waiver can be reviewed even though no objection was made at trial. . . . The record reflection must be direct and not merely implied. It must show the personal communication of the defendant to the court that he chooses to relinquish the right.

Doughty, 470 N.E.2d at 70.[21]

Significantly, in *Schor*, which was cited by the Court in *Peretz* for the proposition that the right to an Article III judge can be waived,[22] the Court held that

[21] *See also Duncan v. Louisiana*, 391 U.S. 145, 158 (1968) (discussing a defendant's waiver of right to trial by jury and citing *Patton*, 281 U.S. at 312); *Patton*, 281 U.S. at 312 (requiring "the express and intelligent consent of the defendant" for a valid waiver of jury trial to occur). To this list of basic rights requiring a personal waiver by a defendant should be added the right to a felony indictment by a federal grand jury. *See United States v. Macklin*, 523 F.2d 193, 196 (2d Cir. 1975) ("[T]he waiver of indictment has been deliberately clothed in formal procedure. It must be made in open court and the defendant must be told the nature of the charge and informed of his rights before he is allowed to consent to the waiver.").

[22] *Peretz*, 501 U.S. at 936 ("litigants may waive their personal right to . . . an Article III judge" in civil cases) (citing *Schor*).

the "personal right [conferred by] Article III[ ] . . . is subject to waiver, *just as are other personal constitutional rights that dictate the procedures by which . . . criminal matters must be tried*." 478 U.S. at 848-49 (emphasis added). As examples of two such "personal" rights subject to waiver in the criminal context, the Court in *Schor* cited cases involving the right to plead not guilty, *Boykin v. Alabama*, 395 U.S. 238 (1969), and the right to a jury trial, *Duncan*, 391 U.S. at 158. *See Schor*, 478 U.S. at 848-49. The right to plead not guilty and the right to a jury trial are the same type of "basic," "personal" rights discussed by the Court in *Hill* and *Taylor*; as noted, both require an express, personal waiver by the defendant for the waiver to be constitutionally effective. *See Hill* 528 U.S. at 114-15.

In another context, the Court has described this class of personal rights that "dictate the procedures by which . . . criminal matters must be tried," *Schor*, 478 U.S. at 848-49, as rights that "affect[ ] the framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The Court in *Fulminante* identified this special class of rights as those which, if violated, would result in a reversal of a defendant's conviction on appeal without any showing that the violation had harmed the defendant. *See id.* at 309-10 ("These are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards."). The Court gave, as examples, the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the right to an

impartial judge, *Tumey v. Ohio*, 273 U.S. 510 (1927). *See Fulminante*, 499 U.S. at 309.

Notably, in *Gomez*, the Court unanimously characterized the right to an Article III judge during felony jury selection as a "basic fair trial right" that, if violated, would not be subject to harmless-error analysis on appeal. *Gomez*, 490 U.S. at 876. The Court specifically analogized the right to an Article III judge to the right to an impartial judge or jury, and observed that violations of these basic rights always will result in a reversal of a defendant's conviction because they are not amenable to harmless-error analysis. *Id.* Although the Court in *Gomez* was speaking in the context of harmless-error analysis rather than in the context of waiver requirements, the Court's decisions in *Fulminante* and *Schor*, when read together, suggest that the Court's treatment of a right as "structural" and "basic" in the former context should inform, at least in part, its treatment of the right as "personal" and "basic" in the latter. *Cf. United States v. Nelson*, 277 F.3d 164, 205-07 (2d Cir. 2002) (doubting that a meritorious claim of an actually biased jury could be "waived" by a criminal defendant; stating that, at the very least, such a waiver would require a defendant's knowing and voluntary relinquishment of the right to an impartial jury) (citing *Brookhart*, 384 U.S. at 4).

The Court repeatedly has said that waiver of such fundamental rights, in order to be valid, must constitute the "intentional relinquishment or abandonment of a known right or privilege." *See, e.g.,*

College Savings Bank v. Florida Prepaid Postsecondary Educational Expense Board, 527 U.S. 666, 682 (1999) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), as providing the "classic description" of such a waiver formulation). This waiver formulation necessarily implies that, at minimum, the defendant himself must be aware of the relinquishment of the right in question and give his personal assent to its relinquishment.

Furthermore, these basic rights share something in common: they "must be exercised or waived at a specific time or under clearly identifiable circumstances. . . ." *Barker v. Wingo*, 407 U.S. 514, 529 (1972) (listing, as examples, waivers of "the rights to plead not guilty, to demand a jury trial, to exercise the privilege against self-incrimination, and to have the assistance of counsel"). The Court has "placed the entire responsibility on the prosecution to show the claimed waiver [of such basic rights] was knowingly and voluntarily made." *Id.*

c. The Constitutional Avoidance Doctrine Requires The Court To Avoid The Serious Constitutional Question Raised In This Case.

The foregoing discussion of the Court's precedents demonstrates that the right to an Article III judge during felony jury selection ranks among what the Court has characterized as "basic" and "personal" rights of a criminal defendant. Therefore,

this fundamental right should be subject to the same constitutional waiver requirements as similar rights – in particular, that "the express and intelligent consent of the defendant" appear on the record in order for a valid waiver to occur. *Patton*, 281 U.S. at 312. However, rather than so holding as a constitutional matter, the Court can and should avoid resolving that serious constitutional question by instead interpreting 28 U.S.C. § 636(b)(3) to require such a personal waiver of the right to an Article III judge by a defendant. *Cf. Gomez*, 490 U.S. at 862-64 (applying constitutional avoidance doctrine in interpreting § 636(b)(3) to prohibit nonconsensual delegation of jury selection to a magistrate judge); *see also Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("[I]t is a cardinal principle that this Court will first ascertain whether a construction of [a] statute is fairly possible by which the [serious constitutional] question may be avoided."). As discussed below, in addition to the doctrine of constitutional avoidance, well-established principles of statutory construction support such an interpretation of the "additional duties" clause.

C. The "Additional Duties" Clause Of The FMA Should Be Interpreted *In Pari Materia* With 18 U.S.C. § 3401(b).

The "additional duties" clause is silent about whether a defendant's "waiver" or "consent" permits delegation of felony jury selection to a magistrate judge and, for that reason, obviously does not prescribe any *form* of waiver or consent. Therefore, in

interpreting the statute to avoid the serious constitutional question discussed above, the Court must do what often is required when Congress has been silent: judicial "gap filling in an area left open by statute." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31 (1990); *cf. Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) ("We have filled the gaps of the habeas corpus statute. . . .").

In *Gomez*, the Court unanimously recognized – and the United States agreed – that, in enacting the FMA, "Congress . . . did not contemplate inclusion of jury selection in felony trials among a magistrate's additional duties." 490 U.S. at 872 & n.22; *see also id.* at 875-76. In *Peretz*, a majority of the Court concluded that, notwithstanding such a lack of congressional intent, "the structure and purpose of the [FMA] convince us that supervision of *voir dire* in a felony proceeding is an additional duty that may be delegated to a magistrate under 28 U.S.C. § 636(b)(3) if the litigants consent." 501 U.S. at 935.

What the Court is left to do in petitioner's case is to fill the gap by determining what Congress would have done in enacting the FMA had it expressly addressed the "crucial"[23] consent issue.[24] The Court

[23] *Peretz*, 501 U.S. at 933 ("[T]he litigants' consent makes the crucial difference. . . .").

[24] *Cf. Zadvydas v. Davis*, 533 U.S. 678, 690-702 (2001) (avoiding constitutional doubt by filling gap in federal immigration statute concerning whether indefinite detention of non-removable aliens is permitted; divining likely congressional

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need not rewrite a significant portion of the FMA to do so but, instead, need only fill a single interstice. *See United States v. Jackson*, 390 U.S. 570, 580 (1968) ("It is one thing to fill a minor gap in a statute. . . . It is quite another thing to create from whole cloth a complex and completely novel procedure . . . for the sole purpose of rescuing a statute from a charge of unconstitutionality.").

There is a ready answer to the question of what Congress would have done in enacting the FMA had it been prescient of this Court's decisions in *Gomez* and *Peretz*. The answer is provided by a closely related statute, 18 U.S.C. § 3401(b). Section 3401(a) provides that "any United States magistrate judge shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district." 18 U.S.C. § 3401(a). Section 3401(b) specifically addresses the crucial consent issue:

> Any person charged with a misdemeanor, other than a petty offense may elect, however, to be tried before a district judge for the district in which the offense was committed.

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intent and creating presumptive rule that non-removable aliens must be released after six months of detention); *see also Dixon v. United States*, 126 S. Ct. 2437, 2445 (2006) ("The offenses . . . were created by statute in 1968. . . . There is no evidence in the Act's structure or history that Congress actually considered how the duress defense should work in this context. . . . [Thus,] we must determine what that defense would look like as Congress 'may have contemplated' it.") (citations omitted).

> *The magistrate judge shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a district judge. . . . The magistrate judge may not proceed to try the case unless the defendant, after such explanation, expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge. Any such consent and waiver shall be made in writing or orally on the record.*

18 U.S.C. § 3401(b) (emphasis added). This statutory provision unquestionably requires the very type of "explicit" and "personal" waiver mentioned in the Court's first question presented in this case.[25]

The legislative history regarding § 3401 is informative. *See City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113, 129 (2005) (Stevens, J., concurring in the judgment) ("[W]e must fill the gap in the statute's text by examining all relevant evidence that sheds light on the intent of the enacting Congress[,] [including] legislative history."). The House Report concerning this statutory provision stated:

> . . . 18 U.S.C. § 3401 would be amended to allow full and part-time magistrates to try with consent of the accused any criminal jury

[25] Like this Court in *Peretz* and *Schor*, Congress's simultaneous use of the terms "consent" and "waiver" in section 3401(b) suggests that Congress believed that these two concepts are closely related in the Article III context.

> or non-jury misdemeanor [case] . . . It should be noted that the Supreme Court has defined a waiver of rights under the Constitution as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In order for a waiver of a constitutional right to occur, a "knowing and intelligent waiver" is necessary. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). Subsection (b), by requiring that the magistrate "carefully" explain the right to trial before a district judge . . . incorporates this case law. It also requires that the record show that the accused intelligently and understandably rejected the offer, for "anything less is not waiver." *Carnley v. Cochran*, 369 U.S. 506 (1962). . . .

H.R. Rep. No. 287, 96th Cong., 1st Sess., 17-18 (1979).

The FMA and 18 U.S.C. § 3401(b) clearly are *in pari materia*,[26] as Congress explicitly cross-referenced § 3401 in § 636. *See* 28 U.S.C. § 636(a)(3) ("Each United States magistrate judge . . . shall have . . . the power to conduct [misdemeanor] trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section[.]").

[26] *See* Norman J. Singer, 2B SUTHERLAND ON STATUTORY CONSTRUCTION § 51:3 (6th ed. 2000) ("Statutes are considered to be *in pari materia* when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object.") (footnotes and citations omitted).

Therefore, in filling the gap in the "additional duties" clause, the Court should import § 3401(b)'s waiver provision. *See Grace v. Collector of Customs,* 79 F. 315, 319 (9th Cir. 1897) ("This rule of construction [*i.e.*, the *in pari materia* canon] often requires gaps left in the act, not amounting to *casus omiss[us]*, to be filled from the materials supplied by other statutes upon the same subject, and in harmony with them."); *see also Wachovia Bank v. Schmidt*, 546 U.S. 303, 305 (2006) (under the *in pari materia* canon of statutory construction, "statutes addressing the same subject matter generally should be read as if they were one law") (citations and internal quotation marks omitted).[27]

It requires no stretch of logic to conclude that Congress would have required such explicit, personal consent by a defendant if Congress had enacted a specific waiver provision for delegation of felony jury selection to a magistrate judge. Indeed, as a majority of the Court in *Peretz* stated, the complete delegation of "civil and misdemeanor trials" to magistrate judges

[27] As discussed above, although the unanimous Court in *Gomez* appeared to believe that delegation of felony jury selection to a magistrate judge was a *casus omissus* (*i.e.*, an intentional omission) in the FMA, *see Gomez*, 490 U.S. at 875-76, the subsequent majority in *Peretz* stated that "the Act's 'additional duties' clause permits a magistrate to supervise jury selection in a felony trial provided that the parties consent." *Peretz*, 501 U.S. at 933. Therefore, in light of *Peretz*, this Court should resort to the *in pari materia* canon of statutory construction to fill the gap in the FMA by importing the waiver provision in 18 U.S.C. § 3401(b).

under 28 U.S.C. § 636(a)(3) and (c) is "comparable in responsibility and importance to [a magistrate judge's] presiding over *voir dire* at a felony trial." *Peretz*, 501 U.S. at 933; *but see id.* at 942-43 (Marshall, J., dissenting, joined by White & Blackmun, JJ.) (contending that a magistrate judge's supervision of felony jury selection is *more* important than a magistrate judge's presiding over misdemeanor and civil cases). If, in enacting the FMA, Congress believed a defendant's explicit, personal consent was constitutionally necessary to bestow authority upon a magistrate judge in federal misdemeanor cases, then *a fortiori* Congress would have believed that such explicit, personal consent is necessary to permit a magistrate judge to conduct felony jury selection.

In sum, the Court should fill the statutory gap in the FMA by importing the closely analogous consent provision in 18 U.S.C. § 3401(b). *Cf. DelCostello v. International Broth. of Teamsters*, 462 U.S. 151, 171-72 (1983) (adopting a closely analogous federal statute's limitations period, in exercise of "interstitial lawmaking," because "the federal policies at stake" were identical in the two statutory contexts). The Court should do so to avoid constitutional doubt, or, at the very least, as an exercise of this Court's supervisory authority. *See Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of . . . procedure that are binding in those tribunals."); *see also United States v. Maragh*, 174 F.3d 1202, 1206-07 (11th Cir.)

(announcing a rule in the court's "supervisory capacity" requiring a showing on the record of a defendant's personal consent to have a magistrate judge conduct felony jury selection), *supp. op. on reh'g*, 189 F.3d 1315 (11th Cir. 1999).

D. The Requirement Of Explicit, Personal Consent By A Defendant Promotes, Rather Than Impairs, Judicial Efficiency.

In response to the defendants' arguments in *Hill* and *Taylor* that personal waivers of their rights were required, the Court observed that personal waivers in those situations would unnecessarily disrupt the trial proceedings and waste judicial resources.[28] Conversely, a bright-line rule requiring a criminal defendant's explicit, personal consent to have a magistrate judge conduct jury selection would promote, rather than frustrate, the efficient administration of justice.

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[28] *See Hill*, 528 U.S. at 115 ("Requiring express assent from the defendant himself for such routine and often repetitive scheduling determinations would consume time for no apparent purpose."); *Taylor*, 484 U.S. at 418 (refusing to require personal waiver of the defendant's compulsory process rights because "the adversary process could not function effectively" if such a "tactical" matter required the defendant's personal approval); *see also* Wayne R. LaFave *et al.*, 3 CRIMINAL PROCEDURE 607 (2d ed. 1999) ("The practical necessities of the litigation process, although perhaps not dominant, certainly influence the allocation of control between counsel and client. The exercise of defendant's personal choice requires an opportunity for meaningful consultation that often is not practicable.") (citation and internal quotation marks omitted).

The right to an Article III judge during jury selection can be "waived at a specific time [and] under clearly identifiable circumstances"[29] (*i.e.*, during a pretrial conference or at the outset of jury selection); would take a brief amount of time; and could be done either orally or in writing in order to be in the record. It would be no more time-consuming than other explicit, personal waivers by criminal defendants at predictable junctures in the proceedings that occur on a daily basis in the federal criminal justice system. *See, e.g.*, Fed. R. Crim. P. 7(b) (waiver of right to an indictment by grand jury);[30] Fed. R. Crim. P. 23(a)(1) (waiver of right to jury trial).[31] Indeed, in the very division of the Southern District of Texas where Mr. Gonzalez's trial occurred, the district court routinely refers felony guilty plea hearings to magistrate judges, who obtain explicit, personal waivers of the right to an Article III judge from defendants. *See, e.g.*,

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[29] *Barker v. Wingo*, 407 U.S. 514, 529 (1972).

[30] "An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant – in open court and after being advised of the nature of the charge and of the defendant's rights – waives prosecution by indictment." Fed. R. Crim. P. 7(b).

[31] "If the defendant is entitled to a jury trial, the trial must be by jury unless . . . the defendant waives a jury trial in writing. . . ." Fed. R. Crim. P. 23(a)(1). The Advisory Committee Notes following this rule provide that: "The provision for waiver of jury trial by the defendant embodies existing practice, the constitutionality of which has been upheld [in] *Patton v. United States*, . . . 281 U.S. 276. . . ." 1944 Advisory Committee Note to Subdivision (a). As discussed above, *Patton* required the express, personal waiver of a criminal defendant's right to a jury trial.

United States v. Luin-Cabarroca, 2005 WL 2840638 (S.D. Tex. – Laredo Div. Oct. 28, 2005) (unpublished order); *United States v. Soveranes-Ortiz*, 2005 WL 2840648 (S.D. Tex. – Laredo Div. Oct. 13, 2005) (unpublished order).

Finally, such a bright-line rule would prevent post-conviction litigation involving claims that a defendant's trial counsel provided ineffective assistance by consenting without obtaining the defendant's knowing and voluntary concurrence. *Cf. United States v. Gamba*, 483 F.3d 942 (9th Cir. 2007) (in 2-1 decision, rejecting claim of ineffective assistance of counsel, which alleged that defense counsel's consent to have magistrate judge preside over closing argument in felony trial did not reflect the defendant's personal consent), *cert. pet. filed* (Aug. 17, 2007) (No. 07-6054).

E. Alternatively, An Effective Waiver At Least Requires The Record To Reflect The Defendant's Knowing and Voluntary Acquiescence In His Attorney's Explicit Waiver Of The Right To An Article III Judge.

Even if the Court were not to adopt a bright-line rule requiring an on-the-record showing that a criminal defendant himself expressly and personally consented, at the very least this Court should require a showing on the record that the defendant knowingly

and voluntarily acquiesced in his counsel's expressed consent.[32] In *Peretz*, that is what the record showed, *Peretz*, 501 U.S. at 925 & n.2, and the Court assumed that such a showing was sufficient evidence of the defendant's valid consent.[33]

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[32] Some Courts of Appeals have followed this approach regarding a defendant's waiver of the right to a jury trial. *Compare United States v. Leja*, 448 F.3d 86, 92-95 (1st Cir. 2006) (record established defendant's waiver of his right to a jury where, although only counsel signed the written waiver form, the college-educated defendant was present when the waiver was discussed in open court; counsel specifically stated that "she had discussed the matter with Leja and he had agreed to the waiver"), *and United States v. Page*, 661 F.2d 1080, 1080-83 (5th Cir. 1981) (finding waiver of defendant's right to jury trial where defense counsel waived highly-educated, English-speaking defendant's right to a jury in defendant's presence and also assured judge that client personally consented to a bench trial), *with United States v. Mendez*, 102 F.3d 126, 129-31 (5th Cir. 1996) (distinguishing *Page* and reversing Spanish-speaking defendant's conviction where record failed to show that the defendant gave "specific acquiescence" to his attorney's decision to waive a jury).

[33] A majority of the Court found similar conduct by civil litigants to be sufficient to "imply" their consent to have a magistrate judge preside over their federal civil case. *See Roell v. Withrow*, 538 U.S. 580, 582-88 (2003); *but see id.* at 591-97 (Thomas, J., dissenting, joined by Stevens, Scalia & Kennedy, JJ.) (contending that express consent is required for valid delegation and that allowing delegation of civil trial to magistrate judge based solely on "implied" consent "raises serious constitutional concerns" under Article III). In *Roell*, the civil defendants (medical professionals employed by a state prison who had been sued by a state prisoner) did not sign a consent form or give express oral consent but – akin to the conduct of the criminal defendant in *Peretz* – voluntarily appeared before the

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If such a less exacting consent requirement were applied, the Court should conclude that Mr. Gonzalez still did not validly waive his right to have an Article III judge conduct jury selection. As the record demonstrates, when his attorney consented to have the magistrate judge conduct jury selection at the bench conference, Mr. Gonzalez was not present at the bench and did not have the assistance of an interpreter. J.A. 15-17. Unlike in *Peretz*, Mr. Gonzalez's counsel never stated that he had his client's consent. The record thus does not allow for a reasonable inference that Mr. Gonzalez – a Spanish-speaking Mexican citizen, who had no formal education in the United States, and whose prior experience in the state criminal justice system would not have informed him of his right to an Article III judge in a

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magistrate judge after being expressly informed of their right to an Article III judge and their right to refuse consent to the magistrate judge. *Id.* at 582-87.

The Court's approval of implied consent in civil cases should not be followed in the criminal context. As the Court explained in *Roell*, the relevant waiver provision of the FMA for civil cases, 28 U.S.C. § 636(c)(1), speaks only of consent *simpliciter*, *Roell*, 538 U.S. at 587, as opposed to the much more stringent consent requirement set forth in 18 U.S.C. § 3401(b), which the Court should adopt in formulating a consent requirement for referrals to magistrate judges in felony cases under the "additional duties" clause of the FMA. Furthermore, as discussed above, the right to an independent, life-tenured federal judge under Article III, § 1, is even more important in criminal cases than in civil cases. *See United States v. Johnston*, 258 F.3d 361, 370 n.5 (5th Cir. 2001) ("[M]atters relating to federal criminal [cases] evince greater Article III concerns than do those linked to civil cases.").

federal felony proceeding – was at all aware of what his counsel was saying. This Court must "indulge every reasonable presumption against waiver of fundamental constitutional rights" and cannot "presume acquiescence in the loss of fundamental rights." *College Savings Bank*, 527 U.S. at 682 (citations and internal quotation marks omitted). The record in this case does not establish that Mr. Gonzalez validly waived his right to an Article III judge, either explicitly or implicitly.

Finally, assuming *arguendo* that Mr. Gonzalez heard what was said at the bench conference, counsel's purported waiver of the right to an Article III judge was insufficient because the magistrate judge, in soliciting consent, did not state that Mr. Gonzalez had a right to refuse her request and demand an Article III judge; she merely asked if she could "assist" in jury selection. J.A. 15-16; *see Roell*, 538 U.S. at 587 n.5 ("Certainly, notification of the right to refuse the magistrate judge is a prerequisite to any inference of consent. . . ."); *see also United States v. Wright*, 516 F. Supp. 1113, 1119 (E.D. Pa. 1981) (joint op. of Pollak & Shapiro, JJ.) (concluding that consent form that stated misdemeanants' willingness "to be tried . . . before" a magistrate judge was legally insufficient because it did not "specifically waive" the defendant's right to a district judge).[34]

[34] Notably, in Mr. Gonzalez's native country of Mexico (where he was educated), a "magistrate" judge (a "*magistrado*"

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II. THE COURT OF APPEALS ERRED BY APPLYING THE PLAIN-ERROR STANDARD TO PETITIONER'S CLAIM THAT THE MAGISTRATE JUDGE LACKED AUTHORITY TO CONDUCT JURY SELECTION.

The Court of Appeals erred by applying the plain-error standard of Federal Rule of Criminal Procedure 52(b) to Mr. Gonzalez's claim that the magistrate judge lacked authority to conduct jury selection.[35] Alternatively, even if Rule 52(b) were to apply, the Court of Appeals erred by finding no reversible plain error. There are several independent reasons why Mr. Gonzalez is entitled to relief on appeal, notwithstanding the fact that he raised his claim for the first time on appeal.

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in Spanish) is not a mere "adjunct" to a trial judge as is true in this country but, instead, is an appellate judge who is superior vis-á-vis both state and federal trial judges. *See* Stephen Zamora, *et al.*, MEXICAN LAW 193-94, 204 (Oxford 2004). A Mexican citizen with knowledge of his own country's legal system being prosecuted in the United States' federal court system could not be expected to understand the difference between a United States "district" judge and "magistrate" judge without an explanation.

[35] After first applying the plain-error standard, the Court of Appeals proceeded to fully address the merits of Mr. Gonzalez's claim in the alternative. J.A. 31-33.

A. Because Mr. Gonzalez Did Not Have The Opportunity To Object To His Attorney's Purported Waiver Of His Right To An Article III Judge, Rule 52(b) Does Not Apply.

Federal Rule of Criminal Procedure 51(b) provides that "[a] party may preserve a claim of error by informing the court . . . of . . . the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). "If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party." *Id.* In other words, Rule 52(b)'s plain-error standard does not apply if a party raising a claim for the first time on appeal did not have an opportunity to raise that claim in the district court; instead, in that situation, *de novo* review applies. *United States v. Schray*, 383 F.3d 430, 432 n.1 (6th Cir. 2004). Because Mr. Gonzalez did not have an opportunity to raise his invalid waiver claim in the district court, the plain-error standard does not apply on appeal.

If, as Mr. Gonzalez contends, a federal criminal defendant's right to have an Article III judge conduct jury selection is one of those "basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client," *Taylor v. Illinois*, 484 U.S. 400, 417-18 & n.24 (1988), then – based on the particular circumstances of Mr. Gonzalez's case – his lack of objection to the magistrate judge's failure to obtain his personal consent does not trigger Rule 52(b)'s plain-error standard. The

record demonstrates that, when the magistrate judge solicited consent from defense counsel and the prosecutor at the bench conference, Mr. Gonzalez was not present at the bench and, furthermore, did not have the assistance of an interpreter at that point. J.A. 15-17. Moreover, at no point does the record reflect that anyone thereafter informed Mr. Gonzalez that his counsel had consented and asked whether he also consented. Under these circumstances, Mr. Gonzalez never had a realistic opportunity to lodge an objection in the district court to the magistrate judge's conducting jury selection without his personal waiver.

That Mr. Gonzalez's trial counsel had the opportunity to object to the magistrate judge's failure to obtain Mr. Gonzalez's personal consent is beside the point: the essence of the claim on appeal is that *Mr. Gonzalez* never personally waived his right to an Article III judge and, additionally, that his attorney's purported consent outside of his presence was by itself legally insufficient. It thus would be illogical to say that counsel could forfeit an objection concerning a violation of Mr. Gonzalez's personal right if the law provides that "the attorney cannot waive [a federal defendant's right to an Article III judge] without the fully informed and publicly acknowledged consent of the client." *Taylor*, 484 U.S. at 417-28*; see also Freytag v. Comm'r*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in judgment, joined by O'Connor, Kennedy & Souter, JJ.) ("Some rights may be forfeited by means short of waiver, . . .

but others may not [be forfeited by means short of waiver] . . . at least in the same proceeding.") (parentheses omitted). Therefore, trial counsel's lack of objection when the magistrate judge failed to obtain Mr. Gonzalez's personal waiver cannot be attributed to Mr. Gonzalez for purposes of Rule 52(b) and, under Rule 51(b), Mr. Gonzalez is entitled to *de novo* review of his claim that the magistrate judge lacked authority to conduct jury selection.[36]

[36] The record disposes of any suggestion that Mr. Gonzalez's trial counsel was engaging in improper "opportunistic" behavior by intentionally creating an error to raise on appeal. *Cf. Roell*, 538 U.S. at 590. The record demonstrates that, at the very outset of jury selection, the magistrate judge directed only the attorneys to approach the bench and solicited their consent without also asking whether Mr. Gonzalez personally consented. There is thus no indication that defense counsel did anything to invite or exploit the magistrate judge's error. *See also* R. 100 (in his motion to withdraw as Mr. Gonzalez's defense counsel after the trial was over, trial counsel suggested that there was no meritorious issue to be raised on appeal). Moreover, the rarity of what occurred in Mr. Gonzalez's case – defense counsel's consent given to the magistrate judge outside of the defendant's presence and hearing – militates against creating an error-preservation rule based on concerns of "gamesmanship." *See Nguyen v. United States*, 539 U.S. 69, 81 n.12 (2003) ("Countervailing concerns for gamesmanship, which animate the requirement for contemporaneous objection, therefore dissipate in these cases in light of the rarity of the improper panel assignment at issue.").

B. The Plain-Error Standard Cannot Be Applied To A Claimed Violation Of A Basic Right That Must Be Personally Waived By A Criminal Defendant When The Record Does Not Reflect An Adequate Waiver.

Even if Rule 51(b) does not apply, Rule 52(b)'s plain-error standard is inapplicable to a criminal defendant's claim, made for the first time on appeal, that a lower court judge failed to obtain a valid waiver of a "personal" and "basic" right. Rule 52(b)'s plain-error review, as this Court has held, embodies the concept of "forfeiture" rather than "waiver." *United States v. Olano*, 507 U.S. 725, 732-34 (1993). "Some rights may be forfeited by means short of waiver, . . . but others may not [be forfeited by means short of waiver] . . . at least in the same proceeding." *Freytag*, 501 U.S. at 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment, joined by O'Connor, Kennedy & Souter, JJ.) (parentheses omitted). Therefore, if a right is of the type that *cannot* be forfeited by means short of a valid waiver, then a claim on appeal that such a right was violated – because the defendant did not validly waive the right in the district court – is not subject to Rule 52(b)'s strictures. *See Freytag*, 501 U.S. at 894 n.2 (Scalia, J., concurring); *cf. United States v. Erskine*, 355 F.3d 1161, 1166-67 (9th Cir. 2004) (*de novo* review rather than the plain-error standard applies to a defendant's claim, made for first time on direct

appeal, that he did not validly waive his right to counsel in the district court).[37]

In his concurring opinion in *Freytag*, Justice Scalia gave two examples of rights that, if not properly "waived," are not subject to "forfeiture": the right to counsel and the right to a jury trial. 501 U.S. at 894 n.2. He cited the very same precedents[38] that this Court cited in *Hill*, *Taylor*, and *Schor* as examples of "basic" rights that, if waived, must be done *personally* by a defendant on the record. *See Hill*, 528 U.S. at 114-15 (citing *Johnson*, 304 U.S. at 464-65 (waiver of right to counsel)); *Taylor*, 484 U.S. at 417-18 & n.24 (citing *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984)

[37] In a like manner, the Court has implied that the strictures of Rule 52(b) would not apply to a defendant's constitutional claim made for the first time on appeal that he did not validly waive a personal right "when the record . . . contains no evidence that a defendant knew of the right[ ] he was putatively waiving." *United States v. Dominguez Benitez*, 542 U.S. 74, 84 n.10 (2004) (contrasting claims of nonconstitutional violations of Rule 11 raised for the first time on appeal with constitutional violations under *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), and stating that reversal on appeal would occur if *Boykin*'s constitutional waiver rule was violated); *see also United States v. Vonn*, 535 U.S. 55, 79 n.7 (2002) (Stevens, J., concurring in part and dissenting in part) ("Assume a defendant states that he wishes to proceed *pro se*, and the trial judge makes no attempt to warn the defendant of the dangers and disadvantages of self-representation [as required by *Faretta v. California*, 422 U.S. 806 (1975)]. If the defendant makes no objection to the trial court's failure to warn, surely we would not impose a plain-error review standard upon this nonobjecting defendant.").

[38] *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Patton v. United States*, 281 U.S. 276, 312 (1930).

(waiver of the right to jury trial));[39] *Schor*, 478 U.S. at 848-49 (citing *Duncan*, 391 U.S. at 158 & n.27, which in turn cited *Patton*, 281 U.S. at 312, concerning waiver of the right to jury trial). If the Court concludes that an effective waiver of a federal defendant's right to an Article III judge requires a defendant's express and personal waiver, then Rule 52(b) would not apply to Mr. Gonzalez's claim that he did not validly waive that right at jury selection because, without a valid waiver, he could not have forfeited the claim.

C. Applying The Plain-Error Standard Would Be Untenable Because The Very Nature Of Mr. Gonzalez's Claim Necessarily Means It Must Be Raised For The First Time On Appeal.

Application of the contemporaneous objection rule embodied in Rule 52(b) would be untenable in this case for yet another reason: the very nature of the Article III waiver issue raised by Mr. Gonzalez on appeal necessarily means that it was not raised in the district court and thus must be raised, if at all, for the first time on appeal. As Justice Scalia stated in his

[39] As discussed above, *Doughty* stands for the same proposition as *Patton*, which requires "the express and intelligent consent of the defendant [to proceed without a jury]" in order for a valid waiver to occur. *Patton*, 281 U.S. at 312.

dissenting opinion in *Peretz* (regarding a matter not addressed by the majority):[40]

> Even when an error is not "plain," this Court has in extraordinary circumstances exercised discretion to consider claims forfeited below. . . . In my view, that course is appropriate here. Petitioner's principal claims are that the [FMA] does not allow a district court to assign felony *voir dire* to a magistrate even with the defendant's consent, and that in any event the consent here was ineffective because given orally by counsel and not in writing by the defendant. By definition, these claims can be advanced only by a litigant who will, if ordinary rules are applied, be deemed to have forfeited them: A defendant who objects will not be assigned to the magistrate at all. Thus, if we invariably dismissed claims of this nature on the ground of forfeiture, district courts would never know whether the Act authorizes them, with the defendant's consent, to refer felony *voir dire* to a magistrate, and, if so, what form the consent must take. . . .

Peretz, 501 U.S. at 953-55 (Scalia, J., dissenting) (citations omitted); *cf. Freytag*, 501 U.S. at 879 (majority op.) ("It is true that, as a general matter, a

[40] The majority in *Peretz* did not even mention "plain error" or Rule 52(b) and, instead, rejected the petitioner's claim on the ground that he had waived his right to an Article III judge during jury selection by validly consenting to have the magistrate judge conduct *voir dire*. *See Peretz*, 501 U.S. at 924-40.

litigant must raise all issues and objections at trial. . . . We conclude that this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255-57 (1981).[41]

For the reasons set forth by Justice Scalia in his dissenting opinion in *Peretz*, the Court should eschew application of Rule 52(b) in Mr. Gonzalez's case. However, Mr. Gonzalez's argument against application of the plain-error standard is even more compelling than the defendant's argument in *Peretz*. As explained above, unlike the defendant in *Peretz*, Mr. Gonzalez did not "plainly forfeit[ ] the right to advance his current challenges to the Magistrate's role."

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[41] In *City of Newport*, a civil appeal, this Court stated:

> We undertake review here in order to resolve . . . the uncertainty [about the state of the law concerning punitive damages in civil rights cases], and it would scarcely be appropriate or just to confine our review to determining whether any error that might exist is sufficiently egregious to qualify under [the "plain error" standard applicable to forfeited claims in civil appeals]. The very novelty of the legal issue at stake counsels unconstricted review. In addition to being novel, the [legal] question is important and appears likely to recur. . . . [W]e conclude that restricting our review to the plain-error standard would serve neither to promote the interests of justice nor to advance efficient judicial administration.

City of Newport, 453 U.S. at 257.

Peretz, 501 U.S. at 953 (Scalia, J., dissenting). The defendant in *Peretz* was aware of his attorney's consent on his behalf and, indeed, the defendant personally consented, although that personal consent was communicated to the court through his attorney. *Peretz*, 501 U.S. at 925 & n.2. His claim on appeal essentially was that a more formal type of waiver or consent was required. *See id.* at 954 (Scalia, J., dissenting). In contrast, the record in Mr. Gonzalez's case demonstrates that he in no way personally waived the right to an Article III judge, either impliedly or expressly. Because the right to have an Article III judge conduct felony jury selection by definition cannot be "forfeited" short of a valid waiver, no forfeiture occurred in Mr. Gonzalez's case because no waiver occurred. *Freytag*, 501 U.S. at 894 n.2 (Scalia, J., concurring in part and concurring in the judgment).

D. Application Of Rule 52(b) As A Procedural Bar To Mr. Gonzalez's Claim Would Serve No Legitimate Governmental Interest And Anomalously Would Impose Stricter Error-Preservation Requirements On Federal Defendants Than Those For Similarly Situated State Defendants.

Mr. Gonzalez has shown why application of Rule 52(b) would be illogical based on the nature of his Article III claim and the record in this case and, thus, would serve no legitimate governmental interest. In this regard, this Court repeatedly has held that a

state court's invocation of one of its procedural default rules will not be treated as an independent and adequate state law ground under 28 U.S.C. § 1257 on review of a state appeals court's judgment if application of the state's procedural rule serves no valid "state interest" in a particular case.[42] Because application of Rule 52(b) as a procedural bar in Mr. Gonzalez's case would serve no legitimate governmental interest, the Court should not apply it here. If this Court will not give jurisdictionally-preclusive effect to a state procedural bar on review of a state court judgment where the state's error-preservation rule serves no legitimate state interest, the Court likewise should refuse to give preclusive effect to a similar, non-jurisdictional[43] federal error-preservation rule that serves no governmental interest in a particular case. *See Kaufman v. United States*, 394 U.S. 217, 228 (1969) ("There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations."), *overruled*

[42] *James v. Kentucky*, 466 U.S. 341, 349 (1984); *cf. Lee v. Kemna*, 534 U.S. 362, 376-78 (2002) (following same approach to error preservation on federal habeas corpus review).

[43] Rule 52(b) – unlike 28 U.S.C. § 1257 – is not jurisdictional in nature. *United States v. Hayes*, 218 F.3d 615, 619-20 (6th Cir. 2000). Thus, this Court more readily can suspend its operation for good cause. *Cf.* Fed. R. Crim. P. 2 ("These rules are to be interpreted to provide for the just determination of every criminal proceeding [and] to secure . . . fairness in administration. . . .").

on other grounds, *Stone v. Powell*, 428 U.S. 465 (1976).

There is a second, related reason why application of Rule 52(b) as a procedural bar to Mr. Gonzalez's claim would create an anomalous situation, subjecting federal defendants to more stringent error-preservation requirements than similarly situated state defendants. This reason can best be explained by a hypothetical: Suppose a state defendant's attorney purported to waive his client's constitutional right to a jury trial[44] outside of the defendant's presence, and further suppose that the trial record in the case failed to show that the defendant himself knowingly waived that right. Finally, suppose that the defendant (represented by new counsel) for the first time on appeal contended that his conviction should be reversed because the record did not reflect that he had *personally* waived his right to a jury trial; however, the state appeals court applied its contemporaneous objection rule and refused to address the merits of the defendant's claim because it had not been raised in the trial court.

[44] As discussed above, *see supra* text at 27-29, the Sixth Amendment right to a jury trial (in a state or federal criminal case) is analogous to a federal defendant's right to an Article III judge in that both are "personal" and "basic" rights of defendants that must be waived in a knowing and voluntary manner by defendants themselves rather than unilaterally by defense counsel.

If this Court were to review the decision of the state appeals court, it would not treat the state court's procedural default ruling as an "independent and adequate state law ground" because the trial record would not establish that the defendant himself had given "express and intelligent consent." *Patton*, 281 U.S. at 312. In other words, because the federal question itself would be inextricably intertwined with the error-preservation issue, *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) ("The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law."), the state court's procedural bar would not preclude *de novo* review by this Court. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) ("[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded."); *cf. Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (requiring, in the context of a guilty plea, that "the prosecution spread on the record the prerequisites of a valid waiver" of the fundamental rights that a defendant waives by pleading guilty, including the right to a jury trial; refusing, on review of a state court judgment, to "presume a waiver of these . . . important federal rights from a silent record").

If this Court would review *de novo* a state defendant's claim that he did not personally and expressly waive his right to a jury trial, then this Court should do the same on a federal direct appeal involving an

analogous claim that a federal defendant did not personally and explicitly waive his right to an Article III judge.

E. Even If The Court Were To Apply The Plain-Error Standard, Mr. Gonzalez Would Still Be Entitled To Reversal Of His Conviction.

Finally, even if the Court were to apply the plain-error standard, Mr. Gonzalez would still be entitled to a reversal of his conviction. In *Olano*, the Court set forth a four-pronged standard to apply in deciding whether a defendant who "forfeited" a claim is entitled to relief on appeal: whether (1) a "plain" (2) "error" occurred that (3) "affects substantial rights" of the defendant and that (4) "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings." *Olano*, 507 U.S. at 733-36 (citations and internal quotation marks omitted). Mr. Gonzalez can satisfy all four prongs of the *Olano* standard.

First, the error in this case was plain under this Court's precedents discussed *supra* at pages 10-38. In particular, *Gomez* and *Peretz* establish that a magistrate judge does not have authority to conduct felony jury selection under the FMA unless a defendant gives valid "consent," which is another way of saying that a defendant must validly "waive" his right to an Article III judge. In addition, *Schor* states that a litigant's right to an Article III judge is a "personal" right and indicates that it must be waived as other such basic, personal rights are waived, *i.e.*, by the

litigant himself. *See Schor*, 478 U.S. at 848-49 ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which . . . criminal matters must be tried.") (citing cases requiring the defendant's personal waiver of right to plead not guilty and right to jury trial); *see also Peretz*, 501 U.S. at 925 & n.2 (implicitly requiring defendant's knowing acquiescence in counsel's waiver of defendant's right to an Article III judge in order to accomplish a valid waiver). Because Mr. Gonzalez did not validly waive his right to an Article III judge, the magistrate judge lacked authority to conduct jury selection, and plain error occurred.

With respect to the third *Olano* factor, because nonconsensual delegation is structural error, as this Court held in *Gomez*, 490 U.S. at 876, this factor is satisfied. *See, e.g.*, *United States v. Recio*, 371 F.3d 1093, 1101 (9th Cir. 2004).[45] Finally, the Article III violation in this case is precisely the type that seriously affects the

[45] This Court has not yet decided whether a structural error satisfies *Olano*'s third factor. *See United States v. Cotton*, 535 U.S. 625, 632-33 (2002); *see also Olano*, 507 U.S. at 735 ("There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome.") (citing *Fulminante*, 499 U.S. at 310). However, the Courts of Appeals that have addressed the issue all have held that a structural error satisfies *Olano*'s third prong. *See Recio*, 371 F.3d at 1101 (citing decisions from Third and Fourth Circuits also holding that a structural error satisfies *Olano*'s third prong); *see also United States v. Barnett*, 398 F.3d 516, 526-27 (6th Cir. 2005) (citing cases).

fairness, integrity, and public reputation of the judicial proceedings. *See Schor*, 478 U.S. at 848 (stating that Article III serves both important "structural" interests as well as a litigant's "personal" interests). Therefore, because Mr. Gonzalez has shown reversible plain error, his conviction should be reversed.

CONCLUSION

The judgment of the United States Court of Appeals should be reversed, and petitioner's case should be remanded for a new trial because he did not waive his right to have an Article III judge conduct jury selection.

Respectfully submitted,

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APPENDIX

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art. III, § 1.

* * *

[28 U.S.C.] § 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law –

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)(1) Notwithstanding any provision of law to the contrary–

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by

a judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of

Civil Procedure for the United States district courts.

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

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary –

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of

such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any

party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

28 U.S.C. § 636(a)-(c).

* * *

A party may preserve a claim of error by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. . . .

Fed. R. Crim. P. 51(b); and

A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. Crim. P. 52(b).