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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

A. INTRODUCTION

The Government seeks to short-circuit application of the constitutional avoidance doctrine by arguing there is no constitutional requirement that a defendant affirmatively and personally waive his right to an Article III judge at jury selection and, thus, that delegation to a magistrate judge under 28 U.S.C. § 636(b)(3) is proper without such a waiver. U.S. Br. 16-17. This contention is also central to the Government's position that trial counsel's failure to object below should be imputed to petitioner for purposes of Federal Rules of Criminal Procedure 51(b) and 52(b). *See* U.S. Br. 34. The premise supporting these related arguments is erroneous and is based on a misinterpretation of *Peretz v. United States*, 501 U.S. 923 (1991).

As explained below, the Government's premise is actually an open question: whether the Constitution permits defense counsel to unilaterally waive the defendant's right to an Article III judge at felony jury selection. There *is,* therefore, a serious constitutional question to be avoided, and the Government has offered no credible argument why the Court should not, as a means of constitutional avoidance, interpret § 636(b)(3) as petitioner has proposed.

B. WHETHER A DEFENDANT MUST AFFIRMATIVELY AND PERSONALLY WAIVE HIS RIGHT TO AN ARTICLE III JUDGE AT FELONY JURY SELECTION IS AN OPEN AND SERIOUS CONSTITUTIONAL QUESTION.

1. Contrary To The Government's Reading Of *Peretz*, The Right To Jury Selection By An Article III Judge Does Not Materialize Only Upon Demand.

The Government initially claims that the rule to be distilled from *Peretz* and *Gomez v. United States*, 490 U.S. 858 (1989), is that a defendant has a right to an Article III judge at felony jury selection only if the defense objects to the magistrate judge's role or demands an Article III judge. According to the Government, without such an objection or demand, the right to an Article III judge never materializes and, thus, no affirmative waiver of such a right is required. *See, e.g.,* U.S. Br. 14 ("[A] defendant has no constitutional right to have an Article III judge supervise *voir dire* absent an objection or demand by the defense.").[1]

[1] This initial argument by the Government presumably would be the same in a case – unlike petitioner's – in which a magistrate judge had not solicited consent from defense counsel and, instead, simply selected the jury without any objection from defense counsel or the defendant.

The Government's interpretation of *Peretz* in support of its position is erroneous. Exploiting ambiguity in the Court's decision,[2] the Government selectively quotes from passages discussing the need for an "objection" or "demand." *See, e.g., Peretz*, 501 U.S. at 936. Several other passages in *Peretz*, however, require a defendant's "consent" to felony jury selection by a magistrate judge[3] or speak of a defendant's "waiver" of the right to an Article III judge.[4] "Consent," even in its most basic sense, necessarily means more than mere silence. *See United States v. Sims*, 428 F.3d 945, 953 (10th Cir. 2005) (discussing "consent" in the Fourth Amendment context and stating that it at least involves "mental awareness so that the act of consent was that of one who knew what he was doing"). Similarly, a "waiver" of a fundamental right in criminal cases requires the knowing and

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[2] *See United States v. Gamba*, 483 F.3d 942, 951 (9th Cir. 2007) (Fisher, J., dissenting) (noting such "ambiguity").

[3] *See, e.g.*, *Peretz*, 501 U.S. at 932 ("[T]he defendant's consent significantly changes the constitutional analysis."); *id.* at 936 ("There is no constitutional infirmity in the delegation of felony trial jury selection to a magistrate when the litigants consent."); *see also Gomez*, 490 U.S. at 870 ("[a] crucial limitation on [magistrate judges' authority] is consent").

[4] *Peretz*, 501 U.S. at 936 (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986)). As reframed by the Court, the first question presented in petitioner's case certainly appears to assume that a defendant has a "right" to an Article III judge at jury selection by default; the only issue concerns the procedure by which the right can be waived. *See Gonzalez v. United States*, 128 S. Ct. 32, 33 (2007).

intentional relinquishment of that right. *United States v. Olano*, 507 U.S. 725, 733 (1993).

Therefore, any reference in *Peretz* to the requirement of an "objection" or "demand" must be read in light of the "crucial" need for "consent" or "waiver." *Peretz*, 501 U.S. at 931 n.8 & 933. Under *Peretz*, a defendant's failure to object to a magistrate judge's participation or to demand an Article III judge at jury selection, by itself, does not operate as a waiver. Rather, a defendant's silence is relevant only *after* he has consented – either personally or, as in *Peretz*, through defense counsel in the defendant's immediate presence with the specific confirmation that the defendant himself has consented. *Peretz*, 501 U.S. at 925 & n.2.[5] That scenario is materially different from what occurred in petitioner's case, in which defense counsel unilaterally consented to the magistrate judge outside of the earshot of petitioner and without a statement that petitioner himself had knowingly consented.

The Government also overstates the significance of *United States v. Gagnon*, 470 U.S. 522 (1985) (*per*

[5] Peretz was in his counsel's presence when the latter stated that his "client" consented. *See* Joint Appendix 4-5, *Peretz v. United States*, No. 90-615; *see also* Brief of the United States in Opposition, *Peretz*, *supra*, 1990 WL 10022950, at *2 (filed Nov. 1, 1990) ("[T]he magistrate to whom jury selection had been assigned again inquired *in petitioner's presence* whether petitioner wished to consent to have the magistrate preside over jury selection. Petitioner's counsel again gave his express consent.") (emphasis added).

curiam), and *Levine v. United States*, 362 U.S. 610 (1960), two of the cases cited by the Court in *Peretz* for the general proposition that, like the right to an Article III judge, "[t]he most basic rights of criminal defendants are similarly subject to waiver." *Peretz*, 501 U.S. at 936. The Government interprets the Court's citation of these cases in *Peretz* as standing for the proposition that the right to an Article III judge is "lost if not affirmatively asserted by the defendant." U.S. Br. 15 n.3. However, in *Gagnon* and *Levine*, which addressed (respectively) waivers of a criminal defendant's right to presence under Federal Rule of Criminal Procedure 43[6] and a defendant's constitutional right to have a "public" trial, the Court was careful to observe that the alleged deprivations of these rights had occurred in the immediate presence of *both* defense counsel *and* their clients without objection.[7] Petitioner's case, as noted, is clearly distinguishable in this respect. In

[6] Contrary to the Government's apparent interpretation of *Gagnon* – as having held that a defendant's *constitutional* right to presence during all critical stages of trial is waived by a mere lack of objection, *see* U.S. Br. 15 n.3, 26 – the Court's discussion of waiver in *Gagnon* was limited to the *non-constitutional* right to presence under Rule 43. *See Gagnon*, 470 U.S. at 525-30 (discussing the defendant's waiver of his Rule 43 claim only after first concluding that no constitutional violation occurred). The Court in *Taylor v. Illinois*, 484 U.S. 400 (1988), subsequently stated that the *constitutional* right to presence can be waived only through the "fully informed and publicly acknowledged consent of the [defendant]." *Id.* at 417-18 & n.24 (citing *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963)); *accord Larson v. Tansy*, 911 F.2d 392, 396-97 (10th Cir. 1990).

[7] *See Gagnon*, 470 U.S. at 523; *Levine*, 362 U.S. at 617-20.

any event, "the Court [in *Peretz*] was invoking these cases to illustrate that the right to an Article III judge at a critical stage of a criminal trial is *subject* to waiver if the defendant consents, not to resolve the nature of that consent in all cases." *Gamba*, 483 F.3d at 953 n.1 (Fisher, J., dissenting) (emphasis in original).

Judge Fisher clearly was correct concerning the Court's citation of such cases in *Peretz* because, as petitioner has observed (Pet. Br. 28-29), the Court in *Schor* specifically indicated that waiver of the right to an Article III judge requires a defendant's affirmative, personal consent. *Schor*, which was cited by the Court in *Peretz* (501 U.S. at 936), equated a litigant's "consent" to have a non-Article III adjudicator with "waiver" of the right to an Article III judge and specifically analogized such waiver to the type of affirmative waiver required when a criminal defendant relinquishes the right to a jury. *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 civil and criminal matters must be tried.*") (emphasis added; citing, *e.g., Duncan v. Louisiana*, 391 U.S. 145, 158 (1968), and Fed. R. Civ. P. 38(d)).[8] In criminal

[8] The Government's attempt to distinguish *Schor* on the ground that it involved a civil litigant's complete waiver of the right to an Article III judge, while *Peretz* involved waiver of that right during only one critical stage of a federal felony trial, *see*

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cases, waiver of the right to a jury trial requires an affirmative, personal waiver by the defendant. *Patton v. United States*, 281 U.S. 276, 312 (1930); *see also Duncan*, 391 U.S. at 158 & n.27 (citing *Patton*).[9]

2. *Peretz* Does Not Allow Defense Counsel To Unilaterally Waive A Defendant's Right To An Article III Judge At Jury Selection.

The Government alternatively – and erroneously – contends that, if affirmative waiver of some type is required, then *Peretz* "refutes the contention that a defendant must personally and explicitly waive his right to have an Article III judge preside over *voir dire*." U.S. Br. 13. Initially, the Government's argument fails to appreciate that *Peretz* did not resolve the form-of-consent issue. The Court simply *assumed* valid consent by the defendant in *Peretz*, which is confirmed by the questions presented as reframed by the Court.[10] The scope of the grant of certiorari thus

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U.S. Br. 25, is unpersuasive. The right to have an Article III judge conduct felony jury selection is certainly no less important than the right to an Article III judge in a civil case. *Peretz*, 501 U.S. at 933.

[9] Conversely, in federal civil cases, a litigant's right to a jury trial under the Seventh Amendment is waived by a failure to demand it. *United States v. Moore*, 340 U.S. 616, 621 (1951) (citing Fed. R. Civ. P. 38).

[10] The two questions concerning "consent" were: (1) "Does 28 U.S.C., Section 636, permit a magistrate to conduct the *voir dire* in a felony trial if the defendant consents?" and (2) "If 28 U.S.C., Section 636, permits a magistrate to conduct a felony trial *voir dire* provided that the defendant consents, is the

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did not include what particular *form* of "consent" is necessary, and the Court's assumption that Peretz's consent was sufficient cannot be treated as a holding of the Court. *See Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (prior assumption of the Court, the validity of which was not addressed in the prior case, is not binding in a subsequent case in which the issue is actually raised).

Even assuming *Peretz* can be read to have implicitly addressed the issue of whether the defendant's consent was sufficient to bestow authority on the magistrate judge in that case, *Peretz* does not resolve the issue in petitioner's case, which involved counsel's unilateral waiver. In support of its erroneous reading of *Peretz*, the Government first points to the Court's statement that the facts of *Peretz* "differ[ ] critically from *Gomez* because *petitioner's counsel*, rather than objecting to the Magistrate's role, affirmatively welcomed it." *Peretz*, 501 U.S. at 932 (emphasis added). The Government next contends that *Peretz* refused to require personal consent from the defendant because the majority "did not adopt the view of three dissenting Justices that counsel's consent was insufficient" under 18 U.S.C. § 3401(b). U.S. Br. 14 (citing *Peretz*, 501 U.S. at 947 n.6 (Marshall, J., dissenting)). Finally, the Government (U.S. Br. 14) points to language in a footnote of the majority opinion stating

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statute consistent with Article III?" *Peretz v. United States*, 498 U.S. 1066 (1991).

that "[w]e are confident that . . . *defense counsel* can sensibly balance these considerations [about the difficulty of meaningful judicial review by an Article III judge of jury selection] in deciding whether to object to a magistrate's supervision of *voir dire*." *Peretz*, 501 U.S. at 935 n.12 (emphasis added).

None of these three passages can bear the weight the Government places on them. The Court's reference to the fact that Peretz's counsel "affirmatively welcomed" the magistrate judge's role in that case rather than "objecting" must be read in the context of the Court's earlier reference to counsel's express statement – in his client's presence and without contradiction – that his "client" consented. *Id.* at 925 & n.2. This fact undermines whatever inferential value that the Government seeks to place on the Court's later reference to *counsel's* "welcom[ing]" the role of the magistrate judge. The Government's inference also is belied by the sentence that follows the above-quoted passage: "The considerations that led to our holding in *Gomez* do not lead to the conclusion that a magistrate's 'additional duties' may not include supervision of jury selection *when the defendant has consented*." 501 U.S. at 932 (emphasis added).

The Government's claim that the majority in *Peretz* rejected the argument made in footnote 6 of Justice Marshall's dissenting opinion is untenable. As Justice Marshall observed in that footnote, the majority simply *assumed* that the defendant himself – in addition to his counsel – had given valid consent. *See Peretz,* 501 U.S. at 947 n.6 (Marshall, J., dissenting).

The majority thus had no reason to address Justice Marshall's alternative argument, and the majority's lack of response should not be deemed a holding that an attorney can unilaterally waive a defendant's right to a district judge at felony jury selection.

The Government's reliance on footnote 12 of the majority opinion in *Peretz* is likewise misplaced. The Court's reference to the option of "defense counsel" to object or not object to a magistrate judge's role in jury selection says nothing about whether the defendant himself must personally waive his right to an Article III judge even if defense counsel does not object. Indeed, the very next sentence in the footnote says: "We stress, in this regard, that *defendants* may *waive* the right to judicial performance of other important functions. . . ." *Peretz*, 501 U.S. at 935 n.12 (emphasis added).

In addition to reading too much into these three passages, the Government fails to account for other portions of *Peretz* that assumed that defense cannot unilaterally consent. *See Peretz*, 501 U.S. at 933 ("Construing [the Federal Magistrates Act] absent concerns about raising a constitutional issue or depriving a defendant of an important right, we should not foreclose constructive experiments that are acceptable to *all participants in the trial process*. . . .") (emphasis added); *id.* at 934 ("If a criminal defendant, *together with his attorney*, believes that the presence of a [district] judge best serves his interests during the selection of the jury, then *Gomez* preserves his right to object to the use of a magistrate.") (citation

omitted; emphasis added); *cf. Gomez*, 490 U.S. at 870-71 & n.21 (quoting from legislative history of 18 U.S.C. § 3401(b), in which it was stated that "magistrates will be used only as the bench, bar, *and litigants* desire [and] only in cases where they are felt by *all participants* to be competent") (citations omitted; emphasis added). Read as a whole, *Peretz* does not support the Government's contentions.

3. Jury Selection By An Article III Judge Is A Fundamental Right That, If Waived, Requires An Affirmative, Personal Waiver By A Defendant.

In addition to misconstruing *Peretz*, the Government fails to rebut petitioner's arguments on pages 22 through 31 of his opening brief. Petitioner there discussed the significance of the Court's common citation in *Schor*, *Taylor*, *Gomez*, and *New York v. Hill*, 528 U.S. 110 (2000), to the line of precedent concerning "basic" constitutional rights that require a defendant's express, personal waiver of such rights for the waiver to be constitutionally effective (*e.g.*, the right to a criminal jury). Seeking to have the Court resolve the serious constitutional question in this case,[11] the Government contends that the right to an

[11] By responding to the Government's argument, petitioner does not likewise seek to have the Court answer the constitutional question. His arguments are meant to show that there is a serious constitutional issue to avoid by interpreting the Federal

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Article III judge at jury selection does not fall within this "limited class of fundamental rights" and, therefore, that defense counsel can unilaterally waive that right as a matter of "strategy." U.S. Br. 17-21. The Government claims that the decision of "which neutral judicial officer should preside over one stage of the criminal proceeding[,] the selection of the jury," is not one that has a "pervasive impact" on the trial in the same way that the waiver of the right to a jury or counsel does, and that a magistrate judge is "not inherently unfit" to pick a felony jury. *Id.* at 20-21.

The basic premise underlying the Government's argument is fundamentally flawed. The choice between an Article III judge and a magistrate judge is not simply the choice between two "neutral judicial officers." Rather, it is the choice between two qualitatively different judicial officers from the perspective of Article III's allocation of federal "judicial [p]ower." The question is not whether magistrate judges are "unfit"; rather, it is whether they are the type of judicial officers envisioned by the Framers to preside over felony jury selection in a federal case. Because they are not, they cannot preside absent a valid waiver of the right to an Article III judge by a defendant.

The Government's argument also proves too much. That a magistrate judge is capable of competently and impartially performing the judicial tasks

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Magistrates Act to require a defendant's express, personal waiver of the right to an Article III judge at felony jury selection.

involved in jury selection does not mean that defense counsel can unilaterally waive a defendant's right to an Article III judge at jury selection. The same could be said of a defendant's personal rights to grand and petit juries in a federal felony case. Decision-makers other than grand juries are not "inherently unfit" to find probable cause and bring formal charges,[12] yet waiver of the right to an indictment by a federal grand jury cannot be accomplished by defense counsel unilaterally.[13] And district judges certainly are not "inherently unfit" to decide whether the prosecution has proved a federal defendant's guilt beyond a reasonable doubt, yet defendants must personally waive the right to a petit jury. *Patton*, 281 U.S. at 312.

The rights to federal grand and petit juries and the right to an Article III judge each reflect important constitutional value judgments made by the Framers.[14] Such value judgments concern the *identity of*

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[12] *See Beck v. Ohio*, 369 U.S. 541, 545 (1962); *cf. Gerstein v. Pugh*, 420 U.S. 103, 112-19 (1975). The Court has long recognized grand juries are not constitutionally required in state felony cases. *Hurtado v. California*, 110 U.S. 516 (1884); *accord Rose v. Mitchell*, 443 U.S. 545, 557 n.7 (1979).

[13] *United States v. Ferguson*, 758 F.2d 843, 850-51 (2d Cir. 1985); *see also Smith v. United States*, 360 U.S. 1, 6 & n.4 (1959).

[14] The Government's suggestion that the right to have an Article III judge conduct felony jury selection is a "modest" or "technical" right (U.S. Br. 47) "trivializes the nature and import of having an Article III judge preside over the critical phases of a felony trial." *Gamba*, 483 F.3d at 952 (Fisher, J., dissenting); *see also United States v. Hatter*, 532 U.S. 557, 567-70 (2001) (discussing the importance of Art. III, § 1, to the Framers).

decision-makers in a federal criminal case as opposed to the constitutional rules that otherwise govern the criminal adjudication process (*e.g.*, a defendant's rights under the Confrontation Clause and Compulsory Process Clause). Simply because there are alternative means of fairly and effectively performing the tasks constitutionally assigned to grand and petit juries and Article III judges in federal criminal cases does not mean that defendants' fundamental rights to these decision-makers can be unilaterally waived by defense counsel.

In a similar vein, the Government errs in arguing that the waiver of the right to have an Article III judge preside over jury selection is more akin to defendants' waivers of the right to testify, the right to appeal, the right to a public trial, and the various procedural rights related to selecting jurors, none of which require an on-the-record affirmative waiver by a defendant.[15] The right to testify, while a "personal" right of a defendant that counsel cannot unilaterally waive, *see Ortiz*, 82 F.3d at 1070, is not ordinarily waived in an express manner by a defendant because requiring such an on-the-record waiver conducted by

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[15] *See Roe v. Flores-Ortega*, 528 U.S. 470, 478-80 (2000) (right to appeal); *Levine*, 362 U.S. at 619 (right to public trial); *United States v. Ortiz*, 82 F.3d 1066, 1069-70 & n.8 (D.C. Cir. 1996) (right to testify); *United States v. Boyd*, 86 F.3d 719, 723 (7th Cir. 1996) (decisions about whether to exercise challenges for cause with respect to prospective jurors are "entrusted to counsel rather than to defendants personally"); *see also* U.S. Br. 18, 23, 26, 28.

a judge potentially would "interfere[ ] with the client-counsel relationship . . . [and] disrupt[ ] trial strategy." *Id.* at 1069-70. The Government's suggestion that an on-the-record personal waiver of a defendant's right to an Article III judge at jury selection similarly would disrupt the attorney-client relationship is baseless. Unlike a defendant's right to testify – the invocation or non-invocation of which is the most important "strategic" decision in many trials – the right to an Article III judge at jury selection can be waived without any significant infringement on the defense's strategy or the attorney-client relationship. Indeed, no one has ever suggested that a defendant's personal, express waiver of the right to an Article III judge in a federal misdemeanor case, as required by 18 U.S.C. § 3401(b), in any manner disrupts defense strategy or the attorney-client relationship. And, as petitioner has noted, in the same courthouse where petitioner was tried, magistrate judges regularly solicit defendants' personal, express waivers of the right to an Article III judge at felony guilty plea hearings. *See* Pet. Br. 40-41.[16]

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[16] Since *Peretz*, such personal waivers regularly occur in many other federal districts and typically involve a defendant's execution of a written waiver. *See, e.g.*, *United States v. Reyna-Tapia*, 328 F.3d 1114, 1116 (9th Cir. 2003) (*en banc*); *United States v. Ciapponi*, 77 F.3d 1247, 1249 (10th Cir. 1996). This apparently uniform practice of obtaining a defendant's express, personal consent in the guilty plea context is telling: it suggests that the district courts have interpreted *Peretz* to require such personal consent.

The Government's analogy to the right to appeal is also inapposite. The right to appeal, which is waived by the failure to file a timely notice of appeal, differs significantly from the constitutional "right" or "privilege"[17] of an Article III judge. There is no constitutional right to appeal. *McKane v. Durston*, 153 U.S. 684, 687-88 (1894). In any event, waiver of the right to appeal through the omission of a timely notice of appeal is preceded by an express admonishment from a judge that the defendant has the right to appeal. *See* Fed. R. Crim. P. 32(j).

The Government's argument that the right to a public trial is equivalent to the right to an Article III judge for waiver purposes is mistaken. The function of the right to a public trial is to allow the scrutiny of public spectators to aid in the fair treatment of the accused and to help uncover the truth. *Waller v. Georgia*, 467 U.S. 39, 46 (1984). That right is much more analogous to the defendant's rights under the Confrontation Clause or Compulsory Process Clause, which similarly seek to promote the adversarial truth-finding process and which can be unilaterally waived by defense counsel. *See Taylor*, 484 U.S. at 417-18 & n.24.

Finally, the Government errs by attempting to liken the decision to allow a magistrate judge to

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[17] *Peretz*, 501 U.S. at 929-30 & n.6; *see also Schor*, 478 U.S. at 848-49 (recognizing "[a]s a personal right, Article III's guarantee of an impartial and independent federal adjudication").

conduct felony jury selection to the many decisions made by counsel in selecting a jury. These myriad discrete strategic decisions (which occur *during* jury selection) are different in kind, and not merely in degree, from the single decision of whether to waive an Article III judge *before* jury selection begins.

Waiving the right to an Article III judge at felony jury selection is not a mere "strategic" decision within the province of counsel's sole discretion. Although the Government is "undoubtedly correct that an attorney will be best equipped to understand the legal concerns at issue," "such is the case in all legal decisions that we reserve to the defendant personally," such as waiving the right to a jury. *Gamba*, 483 F.3d at 953 (Fisher, J., dissenting); *cf. Florida v. Nixon*, 543 U.S. 175, 187-88 (2004) (acknowledging 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).

At the very least, as the foregoing discussion demonstrates, the argument that the Constitution requires a personal waiver by the defendant of his right to an Article III judge at felony jury selection is a serious question. The Court can and should avoid answering that question by interpreting 28 U.S.C. § 636(b)(3) to require such a waiver.

C. AS PART OF CONSTITUTIONAL AVOIDANCE, THE COURT SHOULD IMPORT 18 U.S.C. § 3401(b) INTO 28 U.S.C. § 636(b)(3).

The Government tellingly devotes a scant portion of its brief to petitioner's argument that the express waiver provision of 18 U.S.C. § 3401(b) should inform the Court's interpretation of 28 U.S.C. § 636(b)(3), as a means of constitutional avoidance in this case. *See* U.S. Br. 30-32. The Government gives three reasons supporting its contention that there is no "plausible basis for importing the Section 3401(b) requirements" into § 636(b)(3). U.S. Br. 30. First, the Court in *Peretz* previously refused to do so. Second, Congress, had it considered the issue, would not have intended such a waiver requirement for delegations under 28 U.S.C. § 636(b)(3) because felony jury selection is not equivalent to complete delegation in a misdemeanor case.[18] And, third, the Court in *Roell v. Withrow*, 538 U.S. 580 (2003), rejected such a waiver requirement with respect to analogous delegations under § 636(c) in civil cases. None of these contentions have any merit.

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[18] The Government errs by stating that "Congress's failure to act in the wake of *Peretz* suggests that Congress chose" not to require express, personal consent from a defendant for delegation of felony jury selection. U.S. Br. 31. The Court repeatedly has stated that it is "reluctant to draw inferences from Congress's failure to act." *Brecht*, 507 U.S. at 632-33. The Court should not draw any inference here. As discussed above, *Peretz* did not resolve the form-of-consent issue and, thus, Congress would have had nothing to tacitly approve.

First, as explained above, the Court in *Peretz* did not reject Justice Marshall's alternative argument (made in a footnote in his dissenting opinion) that a defendant's consent to delegation of felony jury selection to a magistrate judge should comply with § 3401(b). The majority had no reason to respond to his argument because the Court *assumed*, without deciding, that Peretz's consent was valid. *See supra* text, at 9-10. Because the defendant's consent was assumed sufficient, there was no constitutional doubt in applying § 636(b)(3) to the facts of *Peretz*, and thus no need to consider § 3401(b)'s requirements as a model for interpreting § 636(b)(3) to avoid such doubt.

Second, the Government errs by suggesting that Congress "could well have concluded" that delegation of felony jury selection is not equivalent to delegation of a misdemeanor trial and, thus, would not have required "such a high level of personal consent." U.S. Br. 31. The Court in *Peretz*, however, believed that a magistrate judge's supervision of felony jury selection is "comparable in responsibility and importance" to delegation of an entire misdemeanor case to a magistrate judge. *Peretz*, 501 U.S. at 933. As reflected in both the plain language and the legislative history of § 3401(b), Congress clearly believed that waiver of the constitutional right to an Article III judge in misdemeanor cases requires a "high level of personal consent." *See* NACDL *et al.* Amicus Brief 18-25. It defies logic to say that Congress, had it intended felony jury selection to be delegated to magistrate

judges, would not have required the same type of personal waiver.

Finally, the Government's reliance on *Roell* is misplaced for several reasons. First, *Roell* is distinguishable in that the respondent (who had given express, personal consent) complained that the petitioners' implied consent was insufficient to bestow authority on the magistrate judge under the Federal Magistrates Act. *See Roell*, 538 U.S. at 589-90. Because the respondent in *Roell* (unlike petitioner here) was not complaining that his *own* right to an Article III judge was violated, constitutional avoidance was not paramount in that case. Second, as petitioner discussed in his opening brief (Pet. Br. 42-43 n.33), *Roell* interpreted the civil delegation provision of the Federal Magistrates Act, which not only has different statutory language but also applies to an entirely different class of litigants. *Cf.* Fed. R. Civ. P. 38(d) (civil litigant's mere failure to demand a jury trial constitutes a waiver of the Seventh Amendment right to a civil jury). Third, unlike criminal defendants, who possess a constitutional right to be present during all critical stages of trial,[19] civil litigants do not possess an equivalent constitutional right to be present, *see, e.g., Faucher v. Lopez*, 411 F.2d 992, 996 (9th Cir. 1969), at least when they are represented by counsel. *See Fillippon v. Albion Vein Slate Co.*, 250

[19] That right must be waived by defendants personally. *See Taylor*, 484 U.S. at 417-18 & n.24 (citing *Cross*, 325 F.2d at 631-32).

U.S. 76, 81 (1919) (stating that civil litigants should be permitted "to be present in person *or* by counsel") (emphasis added). In federal civil cases, the acts and omissions of counsel regarding waiver of a litigant's right to an Article III judge – like waiver of any other right in civil cases – are imputed to counsel's client. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'shp*, 507 U.S. 380, 396-97 (1993).[20] Finally, in *Roell* – just as in *Peretz* – the consent to have a magistrate judge preside that was given by the petitioners in both cases, while not express (*i.e.*, from the mouths of the petitioners themselves), was implied (*i.e.*, knowingly evinced by their conduct). *Roell*, 538 U.S. at 584 & n.1 (at jury selection, the magistrate judge announced in open court that "both sides had consented to her jurisdiction to hear the case" without objection); *see also Peretz*, 501 U.S. at 925 & n.2. In that way, "the Article III right [was] substantially honored" by such knowing, implied consent. *Roell*, 538 U.S. at 590; *cf. Schor*, 478 U.S. at 849-50. The same cannot be said of petitioner's case. The record reflects absolutely no consent, express or implied, by petitioner. Pet. Br. 3-5.

In sum, the Government has not allayed the serious constitutional concerns raised by the delegation of

[20] Therefore, the statement in *Roell* that "the better rule is to accept implied consent where, as here, the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge," *Roell*, 538 U.S. at 590, has no relevance in petitioner's criminal case.

jury selection to the magistrate judge in petitioner's case. To avoid such doubt, the Court should fill the gap in § 636(b)(3) in the manner that petitioner has proposed. Finally, even if the Court were not to import the waiver requirement of § 3401(b),[21] the Court should require at least the type of knowing acquiescence by the defendant that occurred in *Peretz*. *Cf. Larson v. Tansy*, 911 F.2d 392, 397 (10th Cir. 1990) ("Although it may be possible to effectuate a waiver [of the defendant's right to presence] without a formalistic process, the facts of this case do not support a holding that this defendant waived his right. . . .").

D. THE PLAIN-ERROR STANDARD DOES NOT APPLY TO PETITIONER'S CLAIM.

The Government fails to refute petitioner's arguments that the plain-error standard does not apply to his form-of-consent claim and also wrongly contends that petitioner has not shown reversible plain error (in the event the standard does apply).

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[21] Assuming the Court concludes that Congress would have enacted a waiver provision like the one in § 3401(b) had it intended felony jury selection to be delegated to magistrate judges, nothing less would suffice to effect a valid waiver under § 636(b)(3). *See United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("an express waiver clause may suggest that Congress intended to occupy the field and preclude waiver under other, unstated circumstances").

With respect to the threshold question of whether the standard applies, the Government's initial argument – that trial counsel's acts and omissions are attributable to petitioner under Federal Rules of Criminal Procedure 51(b) & 52(b) – turns on its mistaken view that waiver of the right to an Article III judge at jury selection does not require a defendant's affirmative, personal waiver. U.S. Br. 33-34. If the Court concludes that an affirmative, personal waiver is required, then exclusion of petitioner from the bench conference, where the magistrate judge solicited only counsel's consent, deprived him of the "opportunity to object"[22] – particularly when petitioner's own characteristics, including his lack of fluency in English and lack of experience in the federal criminal justice system, are considered.[23]

The Government also fails to rebut petitioner's related argument that Rule 52(b) does not apply to invalid waivers of rights – like the right to an Article III judge – that require a defendant's personal waiver to be effective. Notably, the Government chooses to ignore Justice Scalia's concurring opinion in *Freytag v. Comm'r*, 501 U.S. 868 (1991). While observing that

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[22] Fed. R. Crim. P. 51(b).

[23] The Government's argument that petitioner himself should have objected once the magistrate judge announced her title in open court, U.S. Br. 34 n.8, lacks merit. The magistrate judge's mere announcement of her title – without any explanation that petitioner had a right to an Article III judge – is irrelevant, and petitioner's lack of objection cannot be deemed an effective waiver. *See also* Pet. Br. 44-45 n.34.

"in the federal judicial system, the rules generally governing the forfeiture of claims are set forth in Federal Rules of Criminal Procedure 51 and 52(b)," Justice Scalia noted that "[s]ome rights may be forfeited by means short of waiver, . . . but others may not." *Id.* at 894 n.2 (Scalia, J., concurring in part and concurring in the judgment).[24] Significantly, this concurring opinion was joined not only by Justices Kennedy and Souter,[25] but also by Justice O'Connor, the author of *Olano*, the Court's seminal modern decision discussing the plain-error standard in federal criminal appeals.[26] If the Court concludes that (1)

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[24] Just as the Court in *Schor* (in discussing waiver of the right to an Article III judge) referred to waiver of the right to a criminal jury as an example of an analogous waiver procedure, *see Schor*, 478 U.S. 848-49, Justice Scalia cited the right to a criminal jury as an example of a right that cannot be forfeited "short of [valid] waiver." 501 U.S. at 894 n.2.

[25] Subsequently, Justice Souter was the author of *United States v. Vonn*, 535 U.S. 55 (2002), and *United States v. Dominguez Benitez*, 542 U.S. 74 (2004) – two other plain-error decisions of the Court on which the Government mistakenly relies. U.S. Br. 35-36 & n.9.

[26] Notably, *Olano* approvingly cited Justice Scalia's opinion in *Freytag* for the proposition that there is a difference between "waiver" and "forfeiture." *See Olano*, 507 U.S. at 733. *Olano*'s discussion of Rule 52(b) also is consistent with Justice Scalia's point. *Olano* observed that Rule 52(b) was intended to adopt the traditional view of error preservation, which states that a right "'may be forfeited in criminal . . . cases by the *failure to make timely assertion of the right*. . . .'" *Olano*, 507 U.S. at 731 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)) (emphasis added). A right that must be affirmatively and personally waived by a defendant – in order to be effectively waived – logically is a

(Continued on following page)

the right to an Article III judge at jury selection is a personal right that requires an affirmative waiver by a defendant for there to be an effective waiver; and (2) petitioner did not waive that right, then, under Justice Scalia's reasoning, the plain-error standard would not apply in petitioner's case. The Court should not treat *Johnson v. United States*, 520 U.S. 461 (1997), as foreclosing this narrow exception to the general applicability of Rule 52(b). *Johnson* held that "structural" errors, as a class, are not exempt from Rule 52(b). *Id.* at 466. However, *Johnson* did not address the separate issue of whether an invalid waiver of a fundamental right requiring a defendant's affirmative, personal waiver is subject to Rule 52(b)'s limitations. Although an invalid waiver of such a personal right qualifies as "structural" error, *see* Pet. Br. 30, it is not the "structural" nature of the right *per se* that is relevant but, instead, the fact that the right, to be effectively waived (and, thus, forfeited), must be affirmatively and personally waived by the defendant.

The Government's reliance on *Vonn* and *Dominguez Benitez* is misplaced. *Vonn* held that defense counsel's failure to object to a district court's noncompliance with Federal Rule of Criminal Procedure 11 is attributable to a defendant for purposes of Rule 52(b). *Vonn*, 535 U.S. at 73 & n.10. However, the Court in

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right that need not be "asserted" to apply; lack of assertion, thus, cannot be deemed a waiver or forfeiture of such a right.

Vonn only addressed non-constitutional Rule 11 errors and did not retreat from the Court's longstanding requirement that a defendant must *personally waive* fundamental rights at a guilty plea hearing in order for the guilty plea to be valid and, furthermore, that a failure to do so will result in a reversal of the conviction on direct appeal. *See Boykin v. Alabama*, 395 U.S. 238 (1969). Indeed, in *Dominguez Benitez*, the Court subsequently confirmed that an appellate court on direct review must reverse the defendant's conviction when "the record . . . contains no evidence that a defendant knew of the rights he was putatively waiving." 542 U.S. at 84 n.10 (citing *Boykin*).[27] In this regard, it is relevant that the Court in *Schor* cited *Boykin* as an example of the type of waiver procedure to be employed when a defendant waives his "personal" right to an Article III judge. *Schor*, 478 U.S. at 849.

The Government next contends that Justice Scalia's dissenting opinion in *Peretz*, 501 U.S. at 953-55 (cited by petitioner as yet another reason why

[27] The Government erroneously contends that this statement of the Court in *Dominguez Benitez* merely "addressed the showing needed to establish an effect on substantial rights under Rule 52(b) for different kinds of violations" and that it did not create an exception to Rule 52(b). U.S. Br. 36 n.9. That is not a fair reading of the Court's description of *Boykin*. In stating that constitutional *Boykin* errors "must be reversed" on appeal, *Dominguez Benitez*, 542 U.S. at 84 n.10, the Court was indicating that the discretionary plain-error standard in Rule 52(b) would not apply.

Rule 52(b) does not apply in this case) has lost its relevance. U.S. Br. 37-38. The Government claims that "[m]ore recent decisions of this Court have . . . refined the standard for plain-error review" and "addressed" Justice Scalia's then-valid concerns by allowing courts to decide whether there was "error" before deciding whether reversal is required. U.S. Br. 38. This argument fails to appreciate that the same situation existed before *Peretz*. *See, e.g., United States v. Young*, 470 U.S. 1, 9-20 (1985) (finding "error" but refusing to reverse under Rule 52(b) because of lack of prejudice). Finally, contrary to the Government's position that the "modern" plain-error standard is unyielding in all situations where an objection was not raised in the court below, the Court in *Nguyen v. United States*, 539 U.S. 69 (2003), refused to apply Rule 52(b)'s strictures to a "fundamental" – as opposed to a merely "technical" – question of "judicial authority" raised for the first time in this Court. *Id.* at 78-81; *see also Roell*, 538 U.S. at 599 (Thomas, J., dissenting, joined by Stevens, Scalia, & Kennedy, JJ.) (discussing a matter not addressed by the majority). Because such a fundamental question exists in this case, the Court should eschew the plain-error standard.[28]

[28] Assuming that Rule 52(b) does apply, the Government errs with respect to each prong of *Olano*'s standard. Petitioner has established that there is reversible plain error under that standard. Pet. Br. 58-60.

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted,

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