

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HOMERO GONZALEZ, :

4 Petitioner :

5 v. : No. 06-11612

6 UNITED STATES. :

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8 Washington, D.C.

9 Tuesday, January 8, 2008

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:06 a.m.

14 APPEARANCES:

15 BRENT E. NEWTON, ESQ., Assistant Federal Public
16 Defender, Houston, Tex.; on behalf of the Petitioner.

17 LISA S. BLATT, ESQ., Assistant to the Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 06-11612, Gonzalez v. United States.

Mr. Newton.

ORAL ARGUMENT OF BRENT E. NEWTON

ON BEHALF OF THE PETITIONER

MR. NEWTON: Thank you, Mr. Chief Justice, and may it please the Court:

Petitioner was not present at the bench conference and did not have the assistance of an interpreter when the magistrate judge solicited his attorney's consent to conduct jury selection. The record does not reflect the Petitioner personally consented or ever learned of his attorney's consent. Whether defense counsel can unilaterally waive a criminal defendant's right to an Article III judge at felony jury selection, as occurred in this case, is a serious constitutional question. Applying the constitutional avoidance doctrine, this Court should avoid answering this question by interpreting the "Additional Duties" Clause of the Federal Magistrates Act to require defendant's explicit personal waiver of the right to an

1 Article III judge at felony jury selection.

2 JUSTICE GINSBURG: Mr. Newton, you're not
3 claiming in this case that the defendant was in any way
4 disadvantaged by the magistrate judge conducting the
5 voir dire, are you?

6 MR. NEWTON: I'm contending that the denial
7 of his right to an Article III judge at felony jury
8 selection violated his rights.

9 JUSTICE GINSBURG: But there was no
10 objection to any of the proceedings by the magistrate
11 judge. There were no objections to any -- well, she
12 didn't do the questioning. She allowed the lawyer to do
13 the questioning.

14 MR. NEWTON: Well, I think it was a
15 combination, Your Honor. No, we're not making any
16 allegation of discrete error during the jury selection
17 process. We're contending that there should have been a
18 personal waiver of the right to an Article III judge.
19 The "Additional Duties" Clause --

20 CHIEF JUSTICE ROBERTS: This may not be a
21 pertinent question, but where does the right to voir
22 dire come from in the first place?

23 MR. NEWTON: The Court has discussed the
24 right to voir dire in capital cases and in non-capital
25 cases as it relates to the right to a fair trial, the

1 right to an impartial jury --

2 CHIEF JUSTICE ROBERTS: So it's derivative
3 from other rights? In other words, it helps implement
4 the right to a fair trial, in the Batson context helps
5 guard against an equal protection violation, but it's
6 not on its own a free-standing right.

7 MR. NEWTON: Well, Your Honor, I would say
8 that the Court has said that, in a Federal case
9 particularly, you have a right to an Article III,
10 section 2 right to a jury, as well as a Sixth Amendment
11 right, and the Court has referred to this as an
12 allocation of Federal judicial power in the people as
13 well as in judges. So selecting the jury obviously is a
14 -- has constitutional implications with respect to the
15 structure of Article III as well as any personal right a
16 defendant may have to -- to an impartial jury.

17 The "Additional Duties" Clause is silent
18 about the type of waiver or consent required and the
19 silence is understandable.

20 JUSTICE ALITO: Well, where a defendant is
21 waiving a jury trial or pleading guilty, that's
22 something that an ordinary person can probably readily
23 understand. But how likely is it that an ordinary
24 defendant is going to have any kind of independent
25 opinion on the question of whether it's better for the

1 voir dire to be presided over by a district judge as
2 opposed to a magistrate judge? Isn't the situation
3 going to be in the vast, vast majority of cases that
4 your client will simply turn to you and say, which do
5 you think is better, and whatever the lawyer recommends,
6 that's what the client is going to do? Isn't that the
7 realistic situation?

8 MR. NEWTON: Your Honor, I don't think
9 that's necessarily true. I've had -- I represent people
10 in trial court as well as on appeal, and I've had many
11 clients who like district judges better than magistrates
12 or magistrates better than district judges, depending on
13 how they've encountered them in prior proceedings. So I
14 don't think that's an assumption I would make.

15 And, more importantly, other personal
16 rights -- the right to a grand jury, a petit jury --
17 those are rights that a lot of defendants don't
18 understand. I've had to explain to foreign clients what
19 a jury is because they don't have juries in foreign
20 countries.

21 JUSTICE GINSBURG: But there's a big
22 difference between having a judge trial and a jury of
23 one's peers. The difference between having a magistrate
24 judge and an Article III judge to do the voir dire
25 doesn't have -- is not a question of the same dimension.

1 MR. NEWTON: Well, Your Honor, it's hard to
2 put these rights in terms of relative importance. The
3 Framers clearly believed Article III independence was
4 essential to our separation of powers and to the rights
5 of defendants. John Marshall -- the Court in Hatter
6 quoted from former Chief Justice John Marshall saying
7 that the rights -- the right to an independent judge is
8 perhaps most important in a -- in a criminal case
9 because the rights of the most powerful person, the
10 prosecutor, versus --

11 JUSTICE GINSBURG: Well, we're not talking
12 about a trial. We're talking about the voir dire. And
13 perhaps you could tell me one piece of information. In
14 the Federal proceedings that I've observed, it's always
15 the judge who does the questioning, and this one seemed
16 to me extraordinary. The magistrate said it was her
17 practice to let the lawyers do it, right?

18 MR. NEWTON: Well, certain judges in Federal
19 court tend to give the lawyers a lot of leeway. Other
20 ones -- other judges I've appeared before do it
21 themselves. I think it depends. But ultimately it's
22 the magistrate who is ruling on challenges for cause or
23 ruling on what questions are appropriate.

24 JUSTICE SCALIA: Whose thumb is the
25 magistrate under? Is he under the thumb of Article I or

1 Article II or Article III?

2 MR. NEWTON: Well --

3 JUSTICE SCALIA: Who decides whether he
4 stays on or she stays on as a magistrate?

5 MR. NEWTON: Article III judges are the ones
6 who select magistrate judges --

7 JUSTICE SCALIA: So we're really not talking
8 here about giving away any Article III power. I mean,
9 the magistrate is only subject to Article III.

10 MR. NEWTON: Well, Your Honor, the
11 magistrate judges have been permitted to exercise the
12 attributes of Article III power when they are adjuncts.
13 The Court in Gomez unanimously thought that the
14 magistrate's role at felony jury selection was not
15 really that of an adjunct because there was no
16 meaningful Article III review of the --

17 JUSTICE SCALIA: That may well be, but the
18 reason -- the reason presumably is that an Article III
19 judge, which goes -- who goes through a much more
20 substantial process of selection and confirmation is
21 much more qualified. Now, if you want to make that
22 argument, that's fine, but that's a quite different
23 argument from saying that we're giving away Article III
24 powers to magistrates. Magistrates are creatures
25 of Article III.

1 MR. NEWTON: Well, I think it's a twofold
2 argument. It's one that we presume that Article III
3 judges who have gone through the Senate confirmation and
4 presidential appointment process, that they are more
5 qualified as a general rule. But it is also an Article
6 III exercise of power because magistrate judges do not
7 have those protections that Article III provides to
8 life-tenured district judges. So it is -- it's both of
9 those things.

10 JUSTICE SOUTER: Would you go back to I
11 think it was to Justice Ginsburg's question about the
12 comparative significance of the waiver here. The
13 paradigm examples of waivers that have to be personal
14 are, you know, waivers of counsel, waivers of the right
15 to put the State to trial. This question of waiving an
16 Article III judge as opposed to an Article III appointed
17 magistrate just does not seem to rise to the
18 significance of -- of the -- of the -- of those other
19 paradigm waivers and what is -- what is your response to
20 that? You started to say that, you know, that the
21 Framers said Article III judges are important because
22 they -- they have independence and so on. But beyond
23 that kind of high theoretical level, is there anything
24 in practical terms that you think brings this kind of a
25 waiver to the point of significance of, say, waiving

1 counsel?

2 MR. NEWTON: Yes, Your Honor. There are
3 basically three characteristics that I can discern in
4 the Court's jurisprudence about other personal rights
5 that must be personally waived by a defendant on the
6 record. First of all, it obviously must be a
7 fundamental right, and I think that the Court's
8 decisions in Hatter and Gomez and the plurality opinion
9 in Northern Pipeline, all those decisions I think
10 establish that the right to an Article III judge at a
11 critical stage of a criminal case is a fundamental
12 right. But there's more than just that. That's
13 necessary but not sufficient, because we have lots of
14 fundamental rights that can be waived during the trial
15 by the attorney.

16 The other two characteristics are I think
17 what distinguish this right and make it more like
18 waiving counsel and waiving a petit jury and a grand
19 jury and the right to go to trial at all. And besides
20 being fundamental, the second characteristic is that
21 this right concerns the players in the game as opposed
22 to the rules of the game, the framework of the
23 proceedings in the sense of the players. The right to a
24 jury trial, the right to a grand jury, the right to
25 counsel, those are rights that concern the players of

1 the game, as opposed to, say, the confrontational --

2 JUSTICE KENNEDY: Well, I see what you're
3 doing. You're constructing your argument so that we
4 have structural protections. I can understand that
5 in our case, but Justice Souter's question points out
6 just as a practical matter this is not nearly as
7 important as a failure to object to illegally seized
8 evidence, a post -- a post-arrest delay, open courtroom,
9 all of which are subject to waiver.

10 MR. NEWTON: Well, Your Honor, if I can
11 answer your question, but also the third characteristic.
12 The third characteristic of this kind of right is
13 timing, how it's waived. The Court in *Barker v. Wingo*
14 said these personal rights are to be waived at a
15 discrete point in time, as opposed to something during
16 the heat of battle of the adversarial process. So --
17 and I would respectfully disagree that the right to an
18 Article III judge, at least the right to have it without
19 a personal waiver, is a fundamental right. This is
20 something the Framers considered to be of utmost
21 importance, and in *Hatter* the Court said the
22 considerations that led the Framers to believe this was
23 an extremely important right --

24 JUSTICE KENNEDY: Well, I was interested in
25 your comment on trying cases, but to say that you have

1 to sit down and explain to the -- to the defendant the
2 difference between a magistrate and an Article III and
3 why you like this particular magistrate -- it's the
4 attorney that does all the questioning, after all -- it
5 seems to me is -- is a burden. It's not justified by
6 the position that you're -- you're submitting to us.

7 MR. NEWTON: Well, Your Honor, Congress has
8 made the judgment that this is such a fundamental right
9 that it must be personally waived by a defendant. In
10 misdemeanors --

11 CHIEF JUSTICE ROBERTS: In practice, it's
12 more a tactical decision than a theoretical one. I mean
13 you can explain to your client the difference between
14 Article III and a magistrate, but he's going to be more
15 interested in your judgment about, oh, judge so and so
16 doesn't let you get away with anything on voir dire, you
17 know, he runs a tight ship. This magistrate will let me
18 raise all sorts of other things. I mean, it's like an
19 objection at trial, in other words. It's going to be a
20 tactical decision rather than a theoretical
21 constitutional one.

22 MR. NEWTON: Your Honor, the very same thing
23 could be said of waiving a jury or a grand jury.

24 CHIEF JUSTICE ROBERTS: Well, if you get to
25 that point, which case of ours holds that the right to a

1 jury trial is a personal right that the defendant must
2 waive rather than waive through counsel?

3 MR. NEWTON: Two cases Your Honor: Patton
4 v. United States, 1932, and Adams ex rel. U.S. v.
5 McCann, which reaffirmed, and the Court has cited those
6 two cases repeatedly for the proposition that this is a
7 right that must be personally waived. The fact that
8 there is a --

9 JUSTICE SCALIA: You say it was a holding
10 in Patton?

11 MR. NEWTON: Patton I suppose would have
12 been --

13 JUSTICE SCALIA: I suppose it was dicta.

14 MR. NEWTON: But it became enshrined in
15 Adams, and it has been cited repeatedly for that
16 proposition. The rule reflects it. The rule of
17 criminal procedure reflects it. The fact that there is
18 a strategic or a tactical aspect --

19 JUSTICE SCALIA: I thought what Adams stood
20 for was that the defendant can himself waive the right
21 to jury without advice of counsel, that if he wants to
22 do it on his own he can do it without counsel. It
23 doesn't mean that if counsel does it without his
24 objecting at the time, it's invalid.

25 MR. NEWTON: Well, Your Honor, it's -- the

1 language in Adams which quotes from Patton says it must
2 be the express, intelligent consent of the defendant,
3 which has been widely interpreted as personal --

4 CHIEF JUSTICE ROBERTS: But that can be
5 expressed through counsel. I mean, does -- you know,
6 does your client consent to this? Yes.

7 I mean it's quite a different question to
8 say that he has to be the one who stands up in court and
9 says it.

10 MR. NEWTON: Well, my alternative position
11 is, at the very least, the record needs to reflect that
12 when counsel speaks, counsel is directly speaking with
13 the approval of the client.

14 In Peretz that was the situation. In Peretz
15 the pretrial conference involved a waiver by the defense
16 attorney in the presence of his client and then followed
17 up by -- at the jury selection process the magistrate
18 said: Mr. Attorney, do I have the consent of "your
19 client"? And this was, again, in the presence of the
20 defendant.

21 That's in marked contrast to what we have in
22 this case, which is all indications were going to be it
23 was going to be Judge Kazen picking the jury, the
24 Article III judge. And, then, all of a sudden, the
25 magistrate judge appears and directs only the attorneys

1 to come to the bench.

2 JUSTICE GINSBURG: You were referring a
3 while back to the Gomez case. And if I remember that
4 case correctly, it was the defense counsel who made the
5 objection to the magistrate; and there's nothing to
6 indicate whether the defense counsel had done that in
7 consultation with the defendant. We don't have any idea
8 what the defendant's wishes were, but it was the
9 defendant -- it was the lawyer who raised the objection.

10 MR. NEWTON: Well, Your Honor, I think
11 that's distinguishable because when one is objecting to
12 the violation of a right, that's different from
13 acquiescing in a knowing and voluntary and intelligent
14 waiver of the right.

15 JUSTICE GINSBURG: It was the lawyer's
16 choice, and we have no indication that it wasn't -- it
17 was anything other than the strategic choice of the
18 lawyer. And your position is that it must come from the
19 client, and there's no indication that it did in the
20 Gomez case.

21 MR. NEWTON: Well, Your Honor, in Gomez it
22 was an objection to a alleged violation of Article III,
23 as opposed to a waiver of the right to an Article III
24 judge. So it's -- it's the converse of what we have in
25 this case.

1 In this case, there was no showing on the
2 record, implicitly or explicitly, that Mr. Gonzalez,
3 Petitioner in this case, waived or knowingly acquiesced
4 in his attorney's waiver.

5 I want to return, if I could, to -- to
6 Congress's intent. In 18 U.S.C. Section 3401(b),
7 Congress was crystal clear they believed in a
8 misdemeanor case the waiver of a right to an Article III
9 judge had to be personal and express by the defendant.

10 CHIEF JUSTICE ROBERTS: But, of course, that
11 was for the whole trial. This is for a very discrete
12 aspect prior to trial.

13 MR. NEWTON: In Peretz the Court equated an
14 entire delegation of a misdemeanor trial to delegation
15 of felony jury selection. They were comparable, the
16 Court said. The dissent in that case, at least Justice
17 Marshall's dissent, said it's more important. So we
18 have at least eight members --

19 JUSTICE SOUTER: Peretz, also, if I
20 understand the case correctly, equated the waiver with a
21 failure to object. It seems to me that Peretz undercuts
22 your argument.

23 MR. NEWTON: Well, Your Honor, as I -- as I
24 think I've explained in the brief, Peretz is full of
25 many statements that are ambiguous. But everything in

1 Peretz has --

2 JUSTICE SOUTER: Well, you say they are
3 ambiguous, but isn't it -- I've reread Peretz after many
4 years getting ready for this argument, and it seems to
5 me that it's difficult to read Peretz without reading
6 the "waiver failure to object" phraseology as being
7 equivalent.

8 MR. NEWTON: Well, Your Honor, Peretz has to
9 be read in light of two things:

10 One, it has to be read in light of the facts
11 of that case where there was a failure to object after
12 the attorney had personally -- or had stated his client
13 personally considered it. Secondly, Peretz was decided
14 before the Court in Olano distinguished between waivers
15 and forfeitures. "Consent," even in the Fourth
16 Amendment context, means at least knowing acquiescence.
17 "Waiver" clearly means an intentional and knowing
18 relinquishment of a right, and mere silence cannot be
19 interpreted as -- a mere failure to object cannot be --

20 JUSTICE SCALIA: I mean, yes, but --
21 everybody concedes that, but the question is by whom?
22 Certainly very many rights, you will acknowledge, can be
23 waived by counsel.

24 MR. NEWTON: Yes, Your Honor.

25 JUSTICE SCALIA: So you can't simply say it

1 requires an express and knowing waiver, attributing that
2 express and knowing waiver to the defendant.

3 Sure, it does, but who has to be "express,"
4 and who has to be "knowing"? That's the issue before us
5 here.

6 MR. NEWTON: Yes, Your Honor. I was
7 responding to -- there is really -- the Government makes
8 two arguments based on Peretz: One, that mere silence
9 equals to a waiver or consent, and that's what I was
10 responding to.

11 The second argument -- Peretz did not deal
12 with the issue of who is the one to consent, because in
13 Peretz there was, practically speaking, personal
14 consent. The Court reframed the questions presented in
15 Peretz to assume consent. There is --

16 JUSTICE SOUTER: Well, except for one thing,
17 and that is, if -- if it is sound to say that Peretz
18 equated "waiver" with "failure to object," "failure to
19 object" is a -- is a failure, if you will, of counsel,
20 not of the defendant. Defendants don't get up and make
21 objections; counsel do. And, therefore, it seems to me
22 the implication of Peretz is that it would be a -- a
23 decision of the lawyer that would count for
24 constitutional purposes.

25 MR. NEWTON: Your Honor, I would think in

1 certain cases, if it's a personal right and a defense
2 lawyer stands up and says in the presence of his client,
3 my client consents, and the client doesn't object or
4 respond that, I disagree, then it's fair perhaps to
5 assume there's a sufficient showing of -- of personal
6 waiver by the defendant.

7 But, again, what we have in this case is
8 just vastly different. We have nothing in the record --

9 JUSTICE SOUTER: No, but the point was you
10 were saying that in fact Peretz cannot be read as
11 authority for the Government's position because the
12 facts in Peretz, quite as you correctly note, were that
13 the -- the client had in fact consented, or that was the
14 representation to the Court. And my point simply was
15 that does not seem to have been the reasoning of the
16 Court, because the reasoning of the Court in equating
17 "waiver" with "failure to object" was a reasoning that
18 in its reference to "failure to object" seemed to
19 pinpoint the actions of the lawyer alone. Clients don't
20 object; lawyers do. A failure to object, therefore,
21 refers to, in effect, a failure by the lawyer, alone;
22 and that would be the only significant datum for
23 constitutional purposes. What is your response to that?

24 MR. NEWTON: I disagree. I think that you
25 have to read Peretz in light of the very special facts

1 in that case, which involve two statements in the
2 presence of the defendant: That the defense was not
3 objecting or was consenting; and, then, in particular,
4 the defendant, himself, was giving consent.

5 And I think you have to also look at the
6 Court's repeated focus on the fact that Peretz himself
7 gave consent in that case.

8 There was no occasion to decide which --
9 which party, the lawyer or the defendant, was the one to
10 properly waive it in Peretz.

11 JUSTICE ALITO: Do you think there has to be
12 a showing on the record that the waiver is knowing?

13 MR. NEWTON: Under 18 U.S.C. Section
14 3401(b), which I contend is the obvious analog for
15 waiving in the felony context, yes, absolutely. I
16 think, at the very least, to avoid a constitutional
17 doubt, and that's -- also, I should say up front, all of
18 these arguments that we are -- or points we're engaging
19 in here simply show this is a serious constitutional
20 question.

21 JUSTICE ALITO: So you think there has to be
22 a colloquy like a Rule 11 colloquy or a waiver of
23 counsel's, this is the different -- this is what a
24 district judge is, this is what a magistrate judge is,
25 do you understand the difference between the two?

1 MR. NEWTON: It's going to obviously depend
2 on the defendant because every case involving waiver
3 depends on the particular circumstances. But, at the
4 very least, there needs to be a showing of a knowing,
5 voluntary waiver of the right to an Article III judge.

6 This is done every day in America.

7 JUSTICE STEVENS: I know it's a different
8 context, but -- it does not relate to the magistrate
9 versus Article III judge, but do you think that a lawyer
10 could stipulate that the judge or a magistrate presiding
11 could do all the questioning and the lawyers would do
12 none, without the -- without the express consent of his
13 client?

14 MR. NEWTON: In terms of the jury selection
15 process?

16 JUSTICE STEVENS: It seems to me that the
17 voir dire is peculiarly the -- an area in which the
18 lawyer knows what he is up to and what's at stake, and
19 the client does not.

20 MR. NEWTON: Well, I would think the lawyer
21 could in that situation for the simple reason that you
22 have already at that point established, presumably, an
23 Article III judge is presiding or it has been validly
24 waived.

25 But picking the jury, the jury selection or,

1 more properly, the jury exclusion, because it's really
2 excluding jurors rather than picking them, that is a
3 qualitatively different thing than deciding whether
4 there is a jury in the first place or whether an Article
5 III judge should preside over the jury selection. So I
6 would say the lawyer could do that, because that's more
7 the heat of the battle, the adversarial process working,
8 as opposed to a discrete point in time before it.

9 JUSTICE STEVENS: Do you think a
10 jurisdiction could adopt a rule that was especially
11 careful about selecting the jury panel and then decided
12 they would take the first 12 jurors off an arbitrary
13 list, just to pick them at random and have no voir dire
14 during the trial, but have a preliminary screening
15 of qualifications of the -- of the entire panel?

16 MR. NEWTON: I think certain jurisdictions
17 have done that before. I think there's been bargaining
18 by prosecutors and defense counsel. That again occurs
19 during the adversarial workings of the proceedings as
20 opposed to the discrete point in time before it.

21 The -- Justice Alito asked about how this
22 procedure would work. This has gone on every day in
23 American courtrooms since 1979. Every day around
24 America in courtrooms, Federal courtrooms, in magistrate
25 judge cases over misdemeanors this kind of colloquy goes

1 on. This is done every day. It's done in the very same
2 courthouse that Mr. Gonzalez was tried in because they
3 regularly refer felony guilty pleas to magistrate
4 judges.

5 And in the brief I've cited a couple of
6 cases reported in Westlaw where the District Judge Kazen
7 has accepted reports and recommendations where the
8 magistrate judge says, I went over this right to an
9 Article III judge with the defendant personally, he
10 executed a waiver, and this was done on the record.

11 So, this is not some innovative proceeding.
12 This has been done since 1979 when they amended Section
13 3401(b). The legislative history to Section 3401(b)
14 clearly shows that Congress believed the right to an
15 Article III judge was a constitutional right that had to
16 be personally waived by the defendant. That is further
17 evidence this is a serious constitutional question. The
18 Court should avoid answering that serious constitutional
19 question because you can easily interpret the Federal
20 Magistrates Act, in particular the "Additional Duties"
21 Clause, to allow for consensual delegation, which Gomez
22 talked about and Peretz talked about, only if it's
23 personal consent. So, this is not a leap of logic to
24 think that Congress would have intended this in a felony
25 case.

1 Gomez held Congress never intended this,
2 this was not something Congress intended, so the Court
3 is going to have to fill in a gap in terms of what kind
4 of consent is appropriate. And Congress has clearly
5 signaled they believe a defendant's personal express
6 consent is the type that is required. At the very least
7 there is a serious constitutional question.

8 CHIEF JUSTICE ROBERTS: Was there a right to
9 voir dire at common law? I have the impression the
10 judge would send somebody out and, you know, grab the
11 first 12 people they could find.

12 MR. NEWTON: I don't know, Your Honor. I
13 don't know the answer to that question.

14 If I could --

15 JUSTICE SCALIA: Could I --

16 MR. NEWTON: Sure.

17 JUSTICE SCALIA: Are we supposed to go
18 through every one of the rights that a defendant has in
19 a trial one by one and decide, you know, this one the
20 lawyer can make, this one the defendant must make
21 personally?

22 MR. NEWTON: No, Your Honor. I think --

23 JUSTICE SCALIA: One by one? I mean, I
24 never thought that that was the approach we take.

25 MR. NEWTON: I think the Court has already

1 decided the vast majority of these. Taylor clearly
2 referred to the confrontation or the Compulsory Process
3 Clause. There are numerous other cases in which the
4 Court has said, at least implicitly, that it's waived by
5 the lawyer's failure to object. But there are a special
6 class of rights: The right to a jury trial, the right
7 to a grand jury, the right to counsel, the right to
8 plead not guilty.

9 JUSTICE KENNEDY: That gets back to your
10 structural argument, which makes a certain amount of
11 sense just insofar as knowing where the line is.

12 On the other hand, I'm just not sure of the
13 practical significance of the client's participation
14 when it's really the attorney who is making the decision
15 whether or not this magistrate will allow him to strut
16 his stuff in front of the jury for a little longer than
17 the district judge would. I just don't see how the
18 client can really have much informed input into that at
19 all.

20 MR. NEWTON: Well, Your Honor, the Framers
21 clearly believed it was an extremely important right for
22 defendants. Congress clearly believed this was a
23 constitutional right defendants had to personally waive.
24 The fact that the lawyer may be in a better position to
25 make the judgment would be equally true in waiving a

1 jury or a grand jury.

2 And if I could reserve my additional time
3 for rebuttal.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Newton.

6 Ms. Blatt.

7 ORAL ARGUMENT OF LISA S. BLATT

8 ON BEHALF OF THE RESPONDENT

9 MS. BLATT: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 The decision whether to have a magistrate
12 judge conduct voir dire is a strategic call that counsel
13 is uniquely qualified to make. Counsel is best equipped
14 to determine whether the magistrate judge's particular
15 style, reputation or practice in addressing prospective
16 jurors or resolving objections outweigh the independence
17 conferred by Article III.

18 CHIEF JUSTICE ROBERTS: Of course, it might
19 be said of the right to plead guilty as well. The
20 lawyer has a lot more experience with what kind of
21 sentence the judge is going to impose, what the odds are
22 of the jury returning a verdict of innocence. I mean,
23 the fact that the lawyer is better situated to make the
24 judgment doesn't mean it's not a fundamental right.

25 MS. BLATT: That's correct. And for the few

1 fundamental decisions where the defendant must
2 personally explicitly make, they have a monumental
3 impact on the defendant, and they protect values that
4 extend beyond mere -- mere trial strategy.

5 If a defendant is indicted for a criminal
6 offense, he readily understands he's going to have to
7 decide, do I want to plead guilty, do I want to stand
8 trial, do I want counsel, do I want a jury. He does not
9 readily appreciate that decisions that occurred during
10 voir dire, such as whether to have an Article III judge
11 or a magistrate, whether to exercise peremptory
12 challenges, whether to challenge jurors for cause,
13 whether to object to the prosecutor's actions. These
14 are all decisions that are entrusted to counsel's best
15 professional judgment and his fiduciary obligation to
16 represent the defendant.

17 The defendant -- I mean, the defense lawyer
18 also speaks for the client in exercising the defendant's
19 Confrontation Clause rights, to introduce or object to
20 evidence, to object to the closing of the courtroom.
21 There's just a small handful of fundamental rights. And
22 for the vast majority of criminal defendants, they don't
23 even have Article III rights, Mr. Chief Justice; they're
24 in State court.

25 So it's an important right. It implicates

1 important trial issues. But nonetheless, counsel is
2 best equipped to make it. And I do think, unlike the
3 decision whether you're going to be convicted or stand
4 trial or even testify, this is a decision where the
5 defendant is overwhelmingly likely to defer to counsel's
6 tactical and strategic judgment.

7 In this case, I just wanted to point out one
8 other thing about the magistrate. As Justice Ginsburg
9 said, she not only let the lawyers pose their own
10 questions to the jurors, she also gave the lawyers each
11 an extra peremptory challenge. And that just shows that
12 magistrate judges can have particular styles or
13 practice, and counsel would be uniquely situated to
14 assess the value of that.

15 JUSTICE SCALIA: Did she rule on strikes for
16 cause?

17 MS. BLATT: They were all by consensus, so
18 yes, she ruled on them in that jurors were excused for
19 various reasons. But there was -- it was pretty much by
20 consensus by defense counsel and the prosecutor.

21 JUSTICE SCALIA: But that -- I mean, that
22 is, I suppose, the most significant power that the judge
23 who is conducting the voir dire or presiding at the voir
24 dire has, to allow or not allow a strike --

25 MS. BLATT: Right, and defense counsel's

1 going to have to weigh in any given case whether the
2 magistrate judge is going to rule on any objections and
3 de novo review is possible, but it's difficult as a
4 practical matter, as the Court noted in Peretz. The
5 defense counsel is best situated to decide, and I want
6 to get the most favorable jury I can for my client,
7 what's the best way to do that? Is this magistrate
8 judge better off -- am I better off with which one?

9 And defense counsel, if he has any concerns,
10 can object to the magistrate's role and then would be
11 entitled under the Federal Magistrate Act to have an
12 Article III judge conduct voir dire.

13 JUSTICE KENNEDY: Suppose -- I know you
14 don't like to contemplate this, but that we accept the
15 Petitioner's position that there has to be, that the
16 client has to waive. Would we be better off just
17 adopting the rule that there has to be express waiver,
18 or would you then recommend that we ask the further
19 question whether or not there was an implied consent?

20 MS. BLATT: An implied consent in --

21 JUSTICE KENNEDY: Well, he was there, he
22 probably knew and the record shows that he was aware of
23 what was going on.

24 MS. BLATT: If an explicit personal --

25 JUSTICE KENNEDY: I, frankly, don't think we

1 should go down that route.

2 MS. BLATT: If a personal explicit waiver is
3 required, there wasn't one here. The express waiver was
4 by defense counsel, so it would not meet that test of
5 having -- I don't know what the implied waiver would be.
6 There is an express waiver by defense counsel.

7 If counsel just said nothing and there was
8 no objection, which is not what is at issue in this
9 case, then there would be a question on how do you read
10 this Court's decision in Peretz.

11 JUSTICE STEVENS: May I ask how it works in
12 practice? Does the magistrate's ruling on objections to
13 jurors, are those rulings subject to review by the
14 district judge or are they final?

15 MS. BLATT: Under this Court's decision in
16 Peretz, there would be de novo review at the end of the
17 process. And here an Article III judge actually swore
18 in the jury but there was never -- nothing was ever
19 objected to by the magistrate's role. There was no --

20 JUSTICE STEVENS: But in practice, as I
21 understand it, very often the judge will, will review
22 the magistrate's decisions on contested objections.

23 MS. BLATT: He can. Right. Yes. And
24 the Court said in Peretz that the Constitution would
25 require that the review be de novo and they recognize in

1 a footnote this Court that as a practical matter it
2 might be difficult to reweigh credibility
3 determinations, and you have the same kind of issues
4 when a magistrate judge conducts Social Security cases
5 or suppression hearings, the magistrate rules on or
6 weighs credibility and there is a de novo review by the
7 Article III judge.

8 JUSTICE KENNEDY: How does that work? You
9 have some jurors, and you have jurors excused for
10 cause, and there is an argument about that, then that
11 juror has to sit down and wait for two days and then
12 they go back and they review that before the district
13 judge. I just don't know mechanically how that can
14 work.

15 MS. BLATT: I don't know if it can be done
16 that day. I mean, in this case, the jury selection was
17 just a matter of a couple of hours.

18 JUSTICE KENNEDY: Excuse me, if the Article
19 III judge says, oh, this should not have been excused
20 for cause, then you go back and you bump the juror that
21 was seated in his place. I guess that's the way you
22 have to do it.

23 MS. BLATT: I think this discussion just
24 shows why a defendant -- this would not be a right that
25 he would readily appreciate and understand. This is

1 something defense counsel would just decide. And is it
2 -- in this particular trial, and this was a short drug
3 trial, this voir dire occurred without incident and it
4 was pretty routine. Is this something that if it were
5 different type of case defense counsel might think, no,
6 I don't want whatever disruption it might be and we want
7 an Article III judge. And defense counsel is of course
8 able to object.

9 I also wanted to point out --

10 CHIEF JUSTICE ROBERTS: Do you -- do you
11 think the right to a jury trial is something that has to
12 be personally waived by the defendant or can that be
13 waived through counsel?

14 MS. BLATT: We read a discussion of it in
15 Florida v. Nixon and New York v. Hill as including that
16 among the rights that required a personal explicit
17 waiver. But if we're wrong about that --

18 CHIEF JUSTICE ROBERTS: Were those -- was
19 the right to a jury trial at issue in those cases?

20 MS. BLATT: No, it was just a descriptive:
21 There are decisions of such moment that the defendant
22 must personally make and this is usually included in the
23 list. But whatever -- whatever --

24 CHIEF JUSTICE ROBERTS: When I was
25 researching it, I saw that it was usually included in

1 the list, but I thought it would track back to some case
2 that held that it was, but it never -- never does.

3 MS. BLATT: Well, whatever is in the list,
4 it's a very small handful and it is something that the
5 defendant --

6 JUSTICE SCALIA: It's our list, after all,
7 right?

8 (Laughter.)

9 MS. BLATT: It's a very short list, and I
10 just think it's something that a defendant can readily
11 appreciate, even though it may be a strategic call,
12 whether or not he is going to plead guilty or even take
13 the stand. I mean, the right to testify is a decision
14 that personally belongs to the defendant, but you still
15 don't need an on-the-record, explicit personal consent
16 by the defendant personally. If the defense lawyer
17 says, we have no witnesses, the client's assent is
18 assumed and that's just the way our criminal justice
19 system works. The lawyer does speak for the defendant
20 in all but the very few exceptional cases.

21 JUSTICE GINSBURG: Ms. Blatt, if you, if the
22 Government prevails, what happens to the 11th Circuit's
23 ruling in the -- what was it, the Maragh --

24 MS. BLATT: Maragh --

25 JUSTICE GINSBURG: -- case where the 11th

1 Circuit said, we're not going to mess with any
2 constitutional question, but under our supervisory
3 power, we're going to tell the district -- the
4 magistrate judges, district judges in this circuit; it's
5 a simple thing to do, put on the record that the
6 defendant himself consented.

7 That would be -- that would no longer be
8 valid, right?

9 MS. BLATT: I don't think so. I mean, I
10 think a -- there is nothing to stop them --

11 JUSTICE SCALIA: You think it would be valid
12 or don't think it wouldn't be valid?

13 MS. BLATT: I don't think so. I mean -- and
14 I thought that's why the Court took the case to resolve
15 that circuit. And I read the decision as reading this
16 Court's decision in Peretz to require it. Or at least
17 there was some constitutional doubt about it but I don't
18 --

19 JUSTICE GINSBURG: They specifically said,
20 we're doing this under our supervisory powers, not under
21 the Constitution. So my question was could a circuit
22 still say, we think it's better for the defendant
23 himself to be told, so in our circuit that's going to be
24 the rule?

25 MS. BLATT: I mean, I don't think I have a

1 fully developed answer on that, but my guess would be
2 our position is no. But I don't -- I don't think
3 there's at least anything to stop the particular
4 magistrate judge in any given case from saying -- from
5 addressing the defendant or requiring it. But --

6 CHIEF JUSTICE ROBERTS: Well, I suppose the
7 question would come up. I mean, if the circuit does
8 that the question would come up, if the magistrate
9 doesn't do it and it's not objected to, because of
10 course if it's objected to you deal with it then.

11 MS. BLATT: Right. Well, I --

12 CHIEF JUSTICE ROBERTS: And then we'd have
13 to decide, or the Court would have to decide whether
14 that's a basis for reversal.

15 MS. BLATT: Right. And on that issue our
16 position is clear: There is a rule that would dictate
17 how it would be resolved and Rule 52(b) of the Federal
18 Rule of Criminal Procedures has no exception, and plain
19 error would apply. And so if there was some sort of
20 error, the defendant would have to make the necessary
21 showings for plain error review, and on that I would
22 like to address, since we are on the subject, that if
23 the Court disagreed with us on the merits, Rule 52(b)
24 would apply and we think that all the concerns that
25 animate a contemporaneous objection rule are at their

1 peak when the defense counsel expressly agrees to the
2 course of action followed by the court, and Petitioner's
3 rule of automatic reversal would open the door to
4 gamesmanship and sandbagging because it would allow
5 defense counsel to wait and see if the defendant is
6 convicted before objecting to the magistrate's role.

7 And before I get to -- I wanted to turn to,
8 if you apply plain error, I just wanted to point one
9 thing out about the Court's decision in Peretz. This
10 is not something that was just not at issue in the
11 case. The petitioner extensively argued that the waiver
12 in that case was ineffective because it did not meet the
13 requirements of Section 3401(b); there was no personal
14 explicit waiver; the defendant did not understand what
15 was happening, he didn't speak English well, and so on;
16 and the dissenting justices picked up on that and urged
17 the Court and dissented because there had -- one of the
18 reasons there was not an explicit and personal waiver by
19 the defendant. And the Court nonetheless upheld the
20 magistrate's role in jury selection despite the absence
21 of that waiver.

22 JUSTICE ALITO: If Mr. Gonzalez had stood up
23 at some point during the voir dire and said, Your
24 Honor, I've just learned you're not an Article III
25 judge, and I want an Article III judge to preside over

1 the voir dire, what would happen?

2 MS. BLATT: Well, our position is the
3 magistrate judge could say sit down. This is if the
4 defendant said my counsel is putting in some evidence
5 I don't like or my counsel is not cross-examining the
6 witness or my counsel just asked a juror a question that
7 I'm really uncomfortable with. I mean, this show
8 belongs to the lawyer, and the magistrate judge could
9 tell him to -- to be quiet.

10 The defendant has not made a -- and his time
11 is not up yet -- an ineffective-assistance-of-counsel
12 claim, but if he has some objection or he thinks that
13 this right rises to the level of the right to testify,
14 that he has some duty -- that the lawyer had some duty
15 of personal consultation, then he can make that Sixth
16 Amendment argument. We don't think it would have any
17 merit because this is no different than the myriad other
18 types of trial rights that belong to counsel.

19 JUSTICE KENNEDY: Do you think the
20 magistrate judge would overstep -- assuming you win and
21 that is that the rule is the attorney can make the
22 waiver, would the magistrate judge overstep by saying I
23 know you've consented to this, but I want you to talk to
24 your client about it; I want you to explain what the
25 rules are? Would that be overstepping?

1 MS. BLATT: No. I think there is some room
2 for that. I mean I -- some room for that for the court,
3 but it's -- it's not like it's the right to testify. It
4 would be hard to, you know, if there was some argument
5 over objection or how to question prospective jurors.
6 There's not a hybrid defense team where the -- the judge
7 is always supposed to turn to the defendant and say are
8 you sure you're comfortable with what your counsel is
9 doing?

10 If the Court does conclude that there is
11 error, the Petitioner, we don't think has made the
12 necessary showing for plain error review. The first
13 problem and the most fundamental is the error is not
14 plain, because this Court has already upheld the role of
15 the magistrate judge in jury selection in Peretz,
16 despite the absence of a personal waiver; and at least
17 four courts have read that decision to allow a
18 magistrate judge to conduct voir dire, either when there
19 is an absence of an objection or there is express
20 consent by defense counsel.

21 And even assuming this Court doesn't reach
22 the question of whether the error had an effect on
23 substantial rights, the error did not seriously affect
24 the fairness, integrity or public confidence of criminal
25 proceedings. The error -- the voir dire in this case

1 occurred without incident or objection, as Justice
2 Ginsburg pointed out, to anything that the magistrate
3 judge did; and there is no indication -- and I don't
4 think we have heard any -- there is no indication that
5 the defendant actually disagreed with his counsel's
6 professional judgment to consent to have the magistrate
7 judge, or even had an opinion on the subject. And
8 Petitioner's rule would, as I said, open the door to
9 gamesmanship because it would relieve counsel of any
10 obligation to call an error to the court's attention and
11 therefore give the court the opportunity to correct the
12 error.

13 If there are no questions, we would ask that
14 the Fifth Circuit's decision be affirmed.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Ms. Blatt.

17 Mr. Newton, you have four minutes remaining.

18 REBUTTAL ARGUMENT OF BRENT E. NEWTON
19 ON BEHALF OF THE PETITIONER

20 MR. NEWTON: Thank you, Your Honor.

21 I'd like to return to Section 3401(b), which
22 the plain language of, and the legislative history
23 behind, clearly show a congressional intent in the
24 misdemeanor context for personal waivers on the record by
25 defendants. It would be anomalous not to require the

1 same thing, at least in some similar form, in the felony
2 context.

3 JUSTICE SCALIA: Could I just -- a question
4 that has troubled me. Basically, what you say that is
5 of such importance here is the composition of a jury. I
6 mean, that's what it all boils down to, who's going to
7 rule on the composition of the jury, should it be a
8 magistrate or should it be an Article III judge. But
9 if -- you know, if that is -- is so fundamental that it
10 needs a special rule that the waiver has to be personal
11 by the defendant, then you can say the same thing about
12 -- about objections to -- to the court's failure to
13 permit a strike for cause. That affects the composition
14 of the jury.

15 Now do you need -- do you need the
16 defendant's consent to the judge's ruling on that point,
17 or is it enough if the lawyer makes no objection?

18 MR. NEWTON: It would be enough if the
19 lawyer made no objection, Your Honor, because that is
20 the kind of rule, as I described earlier that concerns
21 the heat of the battle of the adversary process, unlike
22 a discrete point in time before.

23 JUSTICE SCALIA: I see. I see.

24 MR. NEWTON: The other point I'm trying to
25 make is that the -- it's not just the fact that it's a

1 critical stage; it's a critical stage where there is a
2 right to an Article III judge over the critical stage.
3 The Court in Gomez clearly recognized that jury
4 selection is a critical stage. So it is the Article III
5 right that implicates the right to a jury trial, but it
6 is fundamentally the right to an Article III judge that
7 is at issue.

8 The Government makes much of its claim that
9 there could be meaningful Article III de novo review of
10 magistrate judge rulings. The court unanimously in
11 Gomez stated that the Court highly doubted it would be
12 possible to have such review, and it realistically
13 speaking is not possible because delays between the time
14 that the district judge can get back to conduct a
15 review, and in Gomez the Court pointed out that
16 if you bring jurors back and question them again, you
17 run the risk of making them hostile and think they
18 did something wrong -- where you don't have that in the
19 Raditz situation where you're delegating an evidentiary
20 hearing. Witnesses get recalled all the time. They
21 know that's part of the process.

22 So, realistically speaking, there is no de
23 novo review, which is why it's not an adjunct situation
24 here. It's not the magistrate judge acting as an
25 adjunct; it's the magistrate judge acting as an Article

1 III judge.

2 The Government argues plain error doctrine
3 should apply, Rule 52(b). Justice Scalia's concurring
4 opinion in Freytag noted that there are different kinds
5 of rights that can be waived or forfeited, and most
6 rights can be forfeited short of a waiver, but there are
7 certain kinds of rights -- and we contend this is one of
8 them -- that cannot be forfeited short of a valid
9 waiver.

10 The Court in Barker and in Boykin v. Alabama
11 stated that there are certain personal rights where the
12 prosecution has the entire responsibility to spread on
13 the record the valid waiver. And if the prosecution
14 doesn't meet that burden in the trial court, it's
15 illogical to apply the burden on the defendant on appeal
16 when it's the prosecution that would need to assure it
17 was the defendant's personal waiver that happened in the
18 trial court.

19 The Court in Wynn and Gliddon and other
20 cases moreover has said, if it's a fundamental question
21 of judicial administration, then it can be raised for
22 the first time on appeal.

23 I think the Court also should consider the
24 facts of this case in deciding whether there was
25 gamesmanship. There wasn't. Clearly there wasn't.

1 Mr. Gonzalez was cut out of the equation entirely. The
2 magistrate judge only invited the attorneys to the
3 bench, left him sitting there without the assistance of
4 an interpreter. You also have to consider his personal
5 characteristics. He had no experience in the Federal
6 criminal justice system. He did not speak English
7 fluently. He was in no position to object. He didn't
8 have the meaningful opportunity to object. And under
9 Rule 51(b), there should be de novo review for that
10 reason as well.

11 I finally I just -- I want to return to my
12 main point, which is -- I'm not asking the Court to
13 decide as a matter of constitutional law whether a
14 personal waiver is required. I think there's a very
15 strong argument based on the Court's precedent that
16 should happen and --

17 CHIEF JUSTICE ROBERTS: You can finish your
18 sentence.

19 MR. NEWTON: I'm asking the Court to avoid
20 that question by interpreting the "Additional Duties"
21 Clause, whether as a supervisory authority matter or
22 as a statutory construction matter, to basically model
23 3401(b). Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 The case is submitted.

1 (Whereupon, at 10:51 a.m., the case in the
2 above-entitled matter was submitted.)

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