IN THE SUPREME COURT OF THE UNITED STATES

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HOMERO GONZALEZ, :

Petitioner :

v. : No. 06-11612

UNITED STATES. :

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Washington, D.C.

Tuesday, January 8, 2008

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

APPEARANCES:

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

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

C O N T E N T S

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

Article III judge at felony jury selection.

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

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

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

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

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

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

right to an impartial jury --

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

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

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

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

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

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

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

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

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

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

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

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

Article II or Article III?

MR. NEWTON: Well --

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

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

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

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

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

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

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

counsel?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: I suppose it was dicta.

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

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

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

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

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

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

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

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

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

to come to the bench.

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

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

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

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

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

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

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

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

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

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

Peretz has --

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

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

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

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

MR. NEWTON: Yes, Your Honor.

JUSTICE SCALIA: So you can't simply say it

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

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

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

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

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

MR. NEWTON: Your Honor, I would think in

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

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

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

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

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

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

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

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

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

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

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

This is done every day in America.

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

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

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

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

But picking the jury, the jury selection or,

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

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

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

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

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

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

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

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

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

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

If I could --

JUSTICE SCALIA: Could I --

MR. NEWTON: Sure.

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

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

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

MR. NEWTON: I think the Court has already

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

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

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

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

jury or a grand jury.

And if I could reserve my additional time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Newton.

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

So it's an important right. It implicates

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

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

JUSTICE SCALIA: Did she rule on strikes for cause?

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

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

MS. BLATT: Right, and defense counsel's

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

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

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

MS. BLATT: An implied consent in --

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

MS. BLATT: If an explicit personal --

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

should go down that route.

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

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

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

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

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

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

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

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

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

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

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

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

I also wanted to point out --

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

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

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

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

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

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

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

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

(Laughter.)

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

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

MS. BLATT: Maragh --

JUSTICE GINSBURG: -- case where the 11th

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

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

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

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

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

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

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

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

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

MS. BLATT: Right. Well, I --

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

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

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

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

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

the voir dire, what would happen?

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Ms. Blatt.

Mr. Newton, you have four minutes remaining.

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

MR. NEWTON: Thank you, Your Honor.

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

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

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

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

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

JUSTICE SCALIA: I see. I see.

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

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

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

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

III judge.

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: You can finish your sentence.

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

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

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