No. 06-11612

IN THE SUPREME COURT OF THE UNITED STATES

HOMERO GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to a new trial because the district court delegated voir dire to a magistrate judge with the consent of defense counsel but without petitioner's express personal consent.

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DECISION BELOW

The decision of the court of appeals (Pet. App. A at 21-25) is published at 483 F.3d 390.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2007. The petition for a writ of certiorari was filed on May 24, 2007. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to possess more than 1,000 kilograms of

marijuana with intent to distribute it, in violation of 21 U.S.C. 841(b)(1)(A) and 846, and four counts of aiding and abetting the possession of more than 100 kilograms of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. 2. He was sentenced to 190 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A at 21-25.

1. Petitioner was a high-level member of a narcotics trafficking organization based in Laredo, Texas, that was responsible for the transportation of thousands of kilograms of marijuana from Mexico to various destinations in the United States. Drugs from Mexico were delivered to warehouses in Laredo, where they were loaded onto trailers with commercial products for transportation to points north. Petitioner and others were responsible for preparing one warehouse to receive the marijuana loads and arranging for the marijuana to be loaded onto trailers and transported out. Petitioner helped to traffic more than 2,600 kilograms of marijuana. Presentence Report ¶¶ 8-35.

2. A federal grand jury in the United States District Court for the Southern District of Texas charged petitioner with conspiracy and aiding and abetting offenses. His initial appearance, detention hearing, and arraignment took place before United States Magistrate Judge Adriana Arce-Flores. Petitioner pleaded not guilty and elected to be tried by a jury. United

States District Court Judge George P. Kazen handled four pretrial conferences. Gov't C.A. Br. 3; Pet. App. A22.

On January 21, 2005, petitioner and his counsel appeared before Magistrate Judge Arce-Flores for jury selection. At the beginning of the process, the magistrate judge asked both parties "if they are going to consent to having the United States Magistrate Judge proceed in assisting in the jury selection of this case." Pet. App. C at 36. Counsel for the government responded: "Yes, we are, your Honor." Ibid. Petitioner's counsel also responded: "Yes, your Honor, we are." Ibid. The magistrate judge then stated: "The parties have agreed through consent that this Court will be assisting through the process of jury selection." Id. at 36-37. The magistrate judge did not ask petitioner directly whether he consented to having a magistrate judge perform jury selection, and petitioner did not execute a written consent. Pet. App. A at 22; Pet. App. C at 37.

Petitioner was present during that exchange, and the magistrate judge asked whether petitioner required the assistance of a translator. Petitioner's counsel responded: "Yes he does, your Honor." Pet. App. C at 37. The magistrate judge then introduced herself: "I'm the United States Magistrate Judge, Adriana Arce-Flores, and I'm going to be conducting today's jury selection process." Ibid.

Voir dire proceeded without incident or objection by

petitioner. The magistrate judge provided the parties and venire members with a detailed explanation of the jury selection process. She permitted the parties to make statements to the venire members and to frame and ask their own series of questions. The magistrate judge also questioned venire members personally. All prospective jurors excused for cause were excused either at defense counsel's request or without objection by defense counsel. Gov't C.A. Br. 7-8; Pet. App. A at 22.

3. United States District Court Judge Adrian G. Duplantier presided over petitioner's trial. The jury found petitioner guilty of all counts. He received a sentence of 190 months of imprisonment, to be followed by five years of supervised release.

4. The court of appeals affirmed, rejecting petitioner's claim that the district court erred in delegating voir dire to a magistrate judge without petitioner's express personal consent. Pet. App. A at 21-25. Because petitioner had failed to object to the delegation before the district court, the court of appeals reviewed for plain error. Id. at 22. The court noted, however, that it found petitioner's argument unpersuasive even "under a less stringent standard." Id. at 24.

The court of appeals held that the right to have an Article III judge conduct voir dire may be waived through counsel. Pet. App. A at 25. It noted that, under this Court's decision in Peretz v. United States, 501 U.S. 923, 940 (1991), jury selection may be

delegated to a magistrate judge in the absence of an objection by the defendant. Pet. App. A at 22-23. The court found that "[t]he fact pattern in Peretz, in which the delegation was found to be permissible, is almost identical to that in the instant case," and that Peretz contains "no indication" that this Court found "the absence of specific consent by the defendant to be a dispositive, or even relevant consideration." Id. at 24.

The court acknowledged that one court had reached the opposite conclusion, see United States v. Maragh, 174 F.3d 1202 (11th Cir.), modified and pet. for reh'g denied, 189 F.3d 1315 (11th Cir. 1999) (per curiam), and found the decisions of other courts of appeals inapposite because their debate "appears to turn on whether affirmative consent is required at all, not on what form this consent must take." Pet. App. A at 24. The court declined to follow Maragh, noting that "[w]hat suffices for a waiver depends on the nature of the right at issue," ibid. (quoting New York v. Hill, 528 U.S. 110, 114 (2000)), and that the right to have an Article III judge conduct voir dire is even more "limited" in nature than other rights that can be waived by counsel, id. at 24-25. Having determined that the right to have an Article III judge preside at voir dire is not so fundamental that it must be waived personally, the court of appeals found no error and affirmed the judgment of the district court. Id. at 25.

ARGUMENT

Petitioner contends (Pet. 8-19) that he is entitled to a new trial because the district court delegated voir dire to a magistrate judge without his express personal consent. That claim lacks merit and does not warrant further review.

1. The Federal Magistrates Act, 28 U.S.C. 636, permits district courts to assign magistrate judges certain described powers and duties, as well as "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. 636(b)(3); see Gomez v. United States, 490 U.S. 858, 860 (1989). In Gomez, this Court held that those "additional duties" do not encompass the selection of a jury in a felony trial over the defendant's objection. Id. at 872. Two years later, in Peretz v. United States, 501 U.S. 923 (1991), the Court considered whether the Act permits a magistrate judge to supervise voir dire with the consent of the parties. Id. at 933.

In Peretz, the district court judge asked at a pretrial conference whether there was "[a]ny objection to picking the jury before a magistrate." 501 U.S. at 925. The defendant's counsel responded: "I would love the opportunity." Ibid. Before jury selection began, the magistrate again requested "assurances from counsel for [the defendant] and from counsel for his codefendant that she had their clients' consent to proceed with the jury selection." Ibid. Counsel for the defendant responded: "Yes, your

Honor." Id. at 925 n.2. The defendant was present for both exchanges, but never personally consented to the delegation. See id. at 925; United States v. Gamba, 483 F.3d 942, 948-949 (9th Cir. 2007) ("[T]here is no express indication in Peretz that the defendant ever personally consented to the magistrate's presence.").

The Court held that "supervision of voir dire in a felony proceeding is an additional duty that may be delegated to a magistrate under 28 U.S.C. § 636(b)(3) if the litigants consent." Peretz, 501 U.S. at 935. It declined to reach the question whether Article III provides criminal defendants a constitutional right to demand the presence of an Article III judge at voir dire, determining instead that "a defendant has no constitutional right to have an Article III judge preside at jury selection if the defendant has raised no objection to the judge's absence." Id. at 936. The Court noted that the failure to raise a timely objection may result in the loss of a host of personal constitutional rights, including the right to be present at all stages of a criminal trial, see United States v. Gagnon, 470 U.S. 522, 528 (1985), the right to an open courtroom, see Levine v. United States, 362 U.S. 610, 619 (1960), and the Fourth Amendment right to be free from unreasonable searches and seizures, Segurola v. United States, 275 U.S. 106, 111 (1927). Peretz, 501 U.S. at 936; see Yakus v. United States, 321 U.S. 414, 444 (1944) ("No procedural principle is more

familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right."). The Court also held that, because the ultimate decision whether to empanel the jury remains in the hands of the district court judge, the right to have an Article III judge preside over jury selection does not fall within any category of "structural protections" that litigants cannot waive. Id. at 937-939.

Nothing in Peretz suggests that a defendant must state his express personal consent to a magistrate judge's supervision of voir dire, and the Court's opinion indicates that defense counsel's consent on his client's behalf is sufficient. The Court found it "critical[]" in distinguishing Gomez that the "[defendant's] counsel, rather than objecting to the Magistrate's role, affirmatively welcomed it." Peretz, 501 U.S. at 932 (emphasis added). The Court also expressed "confiden[ce] * * * that defense counsel can sensibly balance [the relevant] considerations in deciding whether to object to a magistrate's supervision of voir dire." Id. at 935 n.12 (emphasis added). As the court of appeals recognized, "there is no indication [in Peretz] that the Court found the absence of specific consent by the defendant to be a dispositive, or even relevant consideration." Pet. App. 24 at C; see Gamba, 483 F.3d at 949 ("We do not know * * * whether the Peretz court 'contemplated' that defendant's consent must be

personal, but it by no means required it.").

Based on Peretz, four courts of appeals have held that a defendant need not give any form of affirmative consent to the supervision of voir dire by a magistrate judge. See United States v. Desir, 273 F.3d 39, 44 (1st Cir. 2001) (holding that "affirmative consent is not required" and that "a magistrate may conduct jury selection unless the defendant or his attorney registers an objection");[1] Clark v. Poulton, 963 F.2d 1361, 1366 n.5 (10th Cir.) ("Peretz permits referral to the magistrate of felony trial jury voir dire where the parties consent or where the defendant raises no objection."), cert. denied, 506 U.S. 1014 (1992);[2] United States v. Arnoldt, 947 F.2d 1120, 1123 (4th Cir. 1991) (under Peretz, the failure to object to the delegation of authority to the magistrate waives any resulting constitutional error), cert. denied, 503 U.S. 983 (1992); United States v. Jones,

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[1] See also United States v. Nickens, 955 F.2d 112, 116 n.1 (1st Cir.), cert. denied, 506 U.S. 835 (1992); United States v. Martinez-Torres, 944 F.2d 51, 52 (1st Cir. 1991) (en banc) ("[I]nsofar as the appellants urge that a magistrate might only empanel in a felony case upon the defendant's specific, written consent, it is dispositive to note that in Peretz itself no such written consent existed.").

[2] Petitioner suggests, based on a pre-Peretz decision, that the Tenth Circuit would require a "voluntary, knowing, and intelligent" waiver of the right to have an Article III judge supervise voir dire. Pet. 14 (citing United States v. Dobey, 751 F.2d 1140, 1141-1143 (10th Cir. 1985)). The court in Dobey made no such holding, and its subsequent decision in Clark makes clear that the Tenth Circuit considers the delegation of voir dire to a magistrate judge proper under Peretz in the absence of an objection by the defendant. See Clark, 963 F.2d at 1366 n.5.

938 F.2d 737, 744 (7th Cir. 1991) (holding that "our outcome is the same" whether the defendant "simply did not object or in fact consented to this procedure").

Two other courts of appeals have required affirmative consent to a delegation of voir dire to a magistrate judge, but also have indicated that a statement by counsel is sufficient. The Eighth Circuit, in a civil case, Harris v. Folk Construction Co., 138 F.3d 365 (1998), reiterated its "consistent[]" holding that "[s]ection 636(c) requires a clear and unambiguous statement in the record of the affected parties' consent." Id. at 369 (internal quotation marks omitted). It acknowledged, however, that the statements of counsel at issue in Peretz can serve as a sufficiently "clear and unambiguous statement." Id. at 369 (distinguishing Peretz on the ground that in "the instant [case] * * * there was no discernible statement of consent by the litigants"); see also Reiter v. Honeywell, Inc., 104 F.3d 1071, 1073 (8th Cir. 1997) ("In Peretz v. United States, the parties expressly consented to the magistrate judge's conducting of the voir dire."). Similarly, the Ninth Circuit has held, in other contexts, that "'consent by failure to object' is insufficient to clothe the magistrate with § 636(c) powers," United States v. Gomez-Lepe, 207 F.3d 623, 631 (2000) (quoting Nasca v. Peoplesoft, 160 F.3d 578, 579 (9th Cir. 1998)), but it has concluded that a statement of consent by counsel is sufficient under the reasoning of Peretz, see Gamba, 483 F.3d at

948.

Only one court of appeals has reached a result contrary to the decision of the court of appeals in this case. In United States v. Maragh, 174 F.3d 1202 (11th Cir. 1999) (Maragh I), supp. on panel reh'g, 189 F.3d 1315 (11th Cir. 1999) (per curiam) (Maragh II), the Eleventh Circuit held that, "[t]o effectuate appropriate consent when a magistrate judge is delegated the district court's authority to conduct voir dire, the magistrate judge or the district court judge must obtain, on the record, explicit and personal consent from all parties involved, particularly from the defendant." Id. at 1206. The court made clear that the consent of counsel, on behalf of his client, is not enough: "the record must reflect the consent of the defendant herself." Maragh II, 189 F.3d at 1318. The court distinguished Peretz on the ground that, in that case, defense counsel had stated that the court had the consent of his client. Maragh I, 174 F.3d at 1206 (citing Peretz, at 501 U.S. at 925 n.2); Maragh II, 189 F.3d at 1316 (in Peretz, "the record clearly reflected that the defendant, not just counsel, consented to the conduct of the voir dire by the magistrate judge").

Both the court of appeals in this case and the Ninth Circuit in Gamba have correctly rejected the reasoning of Maragh. Because the decision whether to empanel the jury selected under a magistrate judge's supervision "remains entirely with the district court," Peretz, 501 U.S. at 937, and consent to the delegation in

no way surrenders a right to judicial review of the proceedings, Pet. App. C at 23-24, the right to have an Article III judge supervise voir dire does not fall within the narrow category of rights "so fundamental that they must be waived personally by the defendant." Id. at 24 (citing New York v. Hill, 528 U.S. 110, 114 (2000)). Even assuming, as petitioner argues (Pet. 17), that the Constitution protects a personal right to voir dire proceedings conducted by an Article III judge, it is well-established that counsel may make a tactical decision to waive equally fundamental personal rights on behalf of a defendant, even when the waiver invites serious consequences. See Gamba, 483 F.3d at 948 ("[I]t cannot reasonably be said that such a 'right' -- if there is one at all -- rises to the level of such basic and fundamental rights as deciding whether to plead guilty or appeal one's conviction."). This Court's reliance in Peretz on rights that can be waived through a failure to object, with no affirmative statement of consent, 501 U.S. at 936, substantially undermines the Maragh court's conclusion that the delegation of supervisory authority over voir dire requires an express statement of consent on the record by the defendant himself.

Further, the Maragh court's effort to distinguish Peretz is unpersuasive. There is no meaningful difference between an attorney's statement of consent on behalf of his client -- in this case, a statement by petitioner's counsel that "we are" going to

consent, Pet. App. C at 36 -- and an attorney's statement that his client consents. See Gamba, 483 F.3d at 948-949 (rejecting an attempt to distinguish Peretz because "there is no express indication in Peretz that the defendant ever personally consented to the magistrate's presence, or that the Court requires that such consent * * * be personally given").

The narrow conflict over the question whether defense counsel's consent, rather than the defendant's personal consent, is sufficient under Peretz does not warrant review by this Court at this time. Only two courts of appeals, the Fifth Circuit in this case and the Eleventh Circuit in Maragh, have considered that precise issue, and the parties did not seek rehearing en banc in either of those cases. Because the Eleventh Circuit may yet harmonize its decisions with the prevailing view that a defendant may consent to supervision of voir dire by a magistrate through either a failure to object or a statement of consent by counsel, review by this Court would be premature.

2. Even if the conflict otherwise warranted this Court's review, this case would be a poor vehicle for that review because petitioner failed to make any objection to the delegation before the district court. Accordingly, his claim would be reviewed only for plain error, and he would not be entitled to relief because he has made no claim of prejudice.

Petitioner acknowledges (Pet. 8) that he raised no objection

before the district court, either before or after jury selection, to the delegation of voir dire to the magistrate judge. Indeed, neither petitioner nor his counsel raised any objection even when directly asked "if they are going to consent to having the United States Magistrate Judge proceed in assisting in the jury selection of this case." Pet. App. C at 36. It was not until after his conviction that petitioner reversed course and complained that the magistrate's role in jury selection was such a fundamental error that, in spite of his acquiescence in the procedure, his conviction was void and he was entitled to a new trial. Applying ordinary principles of forfeiture, this Court would review for plain error and reverse only if it found "an 'error' that is 'plain' and that 'affect[s] substantial rights,'" and if it determined, in its discretion, that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732 (1993) (quoting Fed. R. Crim. P. 52(b)). Because petitioner makes no claim that Magistrate Judge Arce-Flores's supervision of jury selection prejudiced the result of his trial or otherwise affected his substantial rights, he is not entitled to reversal.

Petitioner argues (Pet. 8-11) that this Court should review his claim de novo because it is of a type that can be advanced only by a litigant who, under ordinary rules, will be deemed to have forfeited it. Relying on Justice Scalia's solo dissent in Peretz,

petitioner concedes that he has "plainly forfeited the right to advance his current challenges to the Magistrate's role," 501 U.S. at 954-955, but asks this Court to exercise its discretion to entertain his challenge.[3] See Maragh II, 189 F.3d at 1316-1317. Petitioner acknowledges (Pet. 9) that courts of appeals overwhelmingly have reviewed claims identical to petitioner's for plain error. See Pet. App. A at 22; Maragh I, 174 F.3d at 1204; Jones, 938 F.2d at 744; United States v. Wey, 895 F.2d 429, 430 (7th Cir. 1990) (Easterbrook, J.), cert. denied, 497 U.S. 1029 (1990); United States v. Mang Sun Wong, 884 F.2d 1537, 1544-1546 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990); United States v. Rivera-Sola, 713 F.2d 866, 874 (1st Cir. 1983).

Assuming, arguendo, that this Court in its discretion may review petitioner's claim de novo, however, such review would be inappropriate here. Petitioner's counsel, in petitioner's presence, expressly agreed to have the magistrate preside over jury selection. Pet. App. C at 36. That decision can be readily understood as a tactical judgment: counsel may have believed that the magistrate judge would conduct a more thorough voir dire because she had fewer distractions, that the magistrate judge would permit counsel to play a greater role in voir dire proceedings, or

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[3] The majority in Peretz had no need to determine the applicable standard of review because it held that there is no error at all where a magistrate judge supervises voir dire with the consent of the parties. See id. at 954 & n.* (Scalia, J., dissenting).

that the magistrate judge would be more willing than the district judge to grant for-cause challenges to prospective jurors. To relieve counsel of the obligation to object allows the defendant to have the best of both worlds: the procedure the defendant prefers at the trial level, and a potentially winning argument on appeal if the case turns out badly. Plenary review in this case, where there has been no suggestion that the alleged error resulted in prejudice to petitioner, is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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