No. 15-182

In the Supreme Court of the United States

DESMOND FARMER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 636(b)(3), "[a] magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." The question presented is as follows:

Whether, under Section 636(b)(3), a federal district court may, with a criminal defendant's consent, delegate to a magistrate judge the authority to conduct a plea colloquy and announce acceptance of the plea, where the district court retains authority to review the magistrate judge's determination that the plea should be accepted and to enter any final adjudication of guilt.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 599 Fed. Appx. 525.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 2015. On June 1, 2015, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 10, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of North Carolina, petitioner was convicted of conspiracy to distribute and to possess, with the intent to distribute, 100 grams or more of phencyclidine (PCP), in violation of 21 U.S.C. 846. Pet. App. 5a-6a. The district court

sentenced petitioner to 168 months of imprisonment, to be followed by four years of supervised release. *Id.* at 7a-8a. The court of appeals affirmed. *Id.* at 1a-4a.

1. In 2009, local law enforcement began investigating petitioner for selling PCP. Pet. App. 30a. A confidential informant made a series of controlled purchases of PCP from petitioner, who later admitted to having sold, between 2009 and 2013, more than 1000 grams of PCP. *Id.* at 31a.

2. In 2013, a grand jury in the Eastern District of North Carolina returned an indictment charging petitioner with one count of conspiracy to distribute and to possess 100 grams or more of PCP with the intent to distribute it, in violation of 21 U.S.C. 846, and 12 counts of possession of PCP with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). C.A. App. 10-15. Petitioner and the government entered into a plea agreement in which petitioner agreed to plead guilty to the drug-conspiracy count and the government agreed to dismiss the 12 substantive counts of PCP distribution. Pet. App. 32a.

Pursuant to its local rules, the district court referred the matter of petitioner's arraignment to a magistrate judge. E.D.N.C. Crim. R. 5.2(b). Petitioner, along with his counsel, the government, and the magistrate judge, signed a consent form allowing the magistrate judge to conduct the arraignment. D. Ct. Doc. 24 (Sept. 4, 2013). At the arraignment, petitioner stated that he consented to have the magistrate judge conduct both the arraignment and his plea colloquy. Pet. App. 19a-20a.

The magistrate judge then conducted the plea colloquy. Pet. App. 21a-32a. At the conclusion of the colloquy, the magistrate found petitioner's guilty plea

to be knowing, voluntary, and otherwise valid and then stated: "[petitioner's] plea accepted, and he is adjudged guilty on Count 1." *Id.* at 32a. The magistrate judge then set the matter for sentencing before the district court. *Ibid.*

In the district court, petitioner never challenged the magistrate judge's involvement in his plea or moved to withdraw his guilty plea. The district court held the sentencing hearing, at which it accepted as accurate the Presentence Investigation Report, which set forth the facts that petitioner had admitted at the earlier plea colloquy. C.A. App. 47. The district court dismissed the substantive PCP distribution counts and sentenced petitioner to 168 months of imprisonment, to be followed by four years of supervised release. *Id.* at 59. The district court then entered judgment and "adjudicated [petitioner] guilty" of the drug-conspiracy count. Pet. App. 5a.

3. On appeal, petitioner argued for the first time that the magistrate judge had acted in violation of 28 U.S.C. 636. Pet. C.A. Br. 7-15. The court of appeals rejected petitioner's argument, recognizing that the question was controlled by its earlier decision in *United States* v. *Benton*, 523 F.3d 424 (4th Cir.), cert. denied, 555 U.S. 998 (2008). Pet. App. 3a.

In *Benton*, the court of appeals concluded that acceptance of a guilty plea is an "additional duty" that may be delegated to magistrate judges under 28 U.S.C. 636(b)(3) and that such a delegation, with the parties' consent, is constitutional. 523 F.3d at 433. Initially, the court noted the defendant's concession that "the law is clear on the fact that magistrate judges may conduct plea colloquies." *Id.* at 431 (internal quotation marks omitted). It concluded that a magis-

trate judge's acceptance of a plea is equally valid, reasoning that acceptance is "the natural culmination of a plea colloquy"; involves "far less discretion than that necessary to perform many tasks unquestionably within a magistrate judge's authority"; and is "comparable in responsibility and importance" to the plea colloquy itself. *Id.* at 431-432. As to potential Article III objections, the court reasoned that "a defendant's consent waives any individual right," and structural Article III concerns are satisfied by the district court's "ultimate control over the magistrate's plea acceptance." *Id.* at 432. Defendants would be entitled to receive "*de novo* review in the district court" of any "substantive or procedural concerns about their plea proceedings before a magistrate judge." *Ibid.*[1] It therefore held that "[m]any different reasons support the conclusion that the acceptance of a plea is an 'additional duty'" that a magistrate judge may perform under 28 U.S.C. 636(b)(3) and *Peretz* v. *United States*, 501 U.S. 923 (1991). *Benton*, 523 F.3d at 433. When the parties have consented, "acceptance of a plea is a duty that does not exceed the responsibility and importance of the more complex tasks a magistrate is explicitly authorized to perform * * * and the ultimate control of the district judge over the plea process alleviates any constitutional concerns." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 25-33) that, under the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, a mag-

[1] The court of appeals added that, because the plea had been accepted, the substantive standard for plea withdrawal was whether the defendant had established a "fair and just" reason, Fed. R. Crim. P. 11(d)(2)(B), but a defective colloquy would satisfy that standard. *Benton*, 523 F.3d at 432.

istrate judge may, with the parties' consent, conduct a guilty-plea colloquy in a felony case but may not accept the plea. That contention lacks merit. Although a recent, and comparatively thin, conflict in the circuits exists about the question, it does not yet warrant this Court's review. And this case would be a poor vehicle for its resolution because petitioner failed to preserve his objection and could not establish that any error was plain under Federal Rule of Criminal Procedure 52(b). The petition should be denied.[2]

1. Petitioner errs in contending (Pet. 25-33) that a magistrate judge may not, with the parties' consent, accept a guilty plea, even when the district court retains the authority to conduct *de novo* review of the plea and actually enters the final adjudication of guilt.

a. Magistrate judges are non-Article III judges who are appointed (and removable for cause) by district courts. 28 U.S.C. 631(a) and (i). They are authorized by statute to perform certain enumerated tasks, such as "enter[ing] a sentence for a petty offense" or, upon designation of the district court, determining certain pretrial matters (subject to clear-error review) and conducting hearings and submitting proposed findings of fact and conclusions of law (subject to *de novo* review upon objection by the parties). 28 U.S.C. 636(a)(4) and (b)(1)(A)-(B). District courts may also designate them to perform other enumerated functions, such as presiding over a civil trial or a mis-

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[2] The same question is presented by the pending petition for a writ of certiorari in *Ross* v. *United States*, No. 15-181 (filed Aug. 10, 2015). The Court denied petitions presenting similar questions in slightly different procedural circumstances in *Marinov* v. *United States*, 135 S. Ct. 1843 (2015) (No. 14-7909), and *Benton* v. *United States*, 555 U.S. 998 (2008) (No. 08-5534).

demeanor trial, with the consent of the parties. 18 U.S.C. 3401(a); 28 U.S.C. 636(a)(3) and (c)(1). As relevant here, magistrate judges may also "be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. 636(b)(3). This Court has been reluctant "to construe the additional duties clause to include responsibilities of far greater importance than the specified duties assigned to magistrates," but, when the litigants consent, such duties can extend to duties that are "comparable in responsibility and importance" to the duties specified in the statute, such as supervising "entire civil and misdemeanor trials." *Peretz* v. *United States*, 501 U.S. 923, 933-934 (1991). In *Peretz*, the Court held that Section 636(b)(3) permits a magistrate judge to supervise felony *voir dire* with the parties' consent. *Id.* at 935-936. It later reaffirmed that overseeing felony *voir dire* with the consent of the defendant's attorney is permissible because it does not require Section 636(b)(3)'s additional-duties clause to "be interpreted in terms so expansive that the paragraph overshadows" the statute's other express authorizations. *Gonzalez* v. *United States*, 553 U.S. 242, 245 (2008).

In light of those decisions, the courts of appeals have consistently recognized that, under Section 636(b)(3), a magistrate judge may, with the parties' consent, preside over a felony guilty-plea colloquy under Federal Rule of Criminal Procedure 11 and recommend that the plea be accepted by the district court. See *United States* v. *Harden*, 758 F.3d 886, 891 (7th Cir. 2014); *United States* v. *Woodard*, 387 F.3d 1329, 1331-1333 (11th Cir. 2004), cert. denied, 543 U.S. 1176 (2005); *United States* v. *Osborne*, 345 F.3d 281,

285-288 (4th Cir. 2003); *United States* v. *Reyna-Tapia*, 328 F.3d 1114, 1119-1122 (9th Cir.) (en banc), cert. denied, 540 U.S. 900 (2003); *United States* v. *Torres*, 258 F.3d 791, 794-796 (8th Cir. 2001); *United States* v. *Dees*, 125 F.3d 261, 263-266 (5th Cir. 1997), cert. denied, 522 U.S. 1152 (1998); *United States* v. *Williams*, 23 F.3d 629, 632-634 (2d Cir.), cert. denied, 513 U.S. 1045 (1994). When a magistrate judge conducts a plea colloquy for the purpose of recommending that the district court adjudicate the defendant guilty of a charged offense, the district court retains the authority to review the colloquy and determine whether to find the defendant guilty because he has knowingly and voluntarily admitted guilt and waived his trial rights. Conducting such a colloquy entails far less discretion than the other duties magistrate judges may perform with the parties' consent, such as presiding over entire civil and misdemeanor trials, 28 U.S.C. 636(c)(1); 18 U.S.C. 3401. As the Second Circuit has explained, administering an allocution is "less complex than a number of duties the Magistrates Act specifically authorizes magistrates to perform" regardless of the parties' consent, including making probable-cause determinations in preliminary hearings, 28 U.S.C. 636(b)(1)(A), and conducting suppression hearings and making recommendations for disposition by a district court, 28 U.S.C. 636(b)(1)(B). *Williams*, 23 F.3d at 632-633.

b. Petitioner does not dispute that a magistrate judge may, with the parties' consent, preside over a guilty-plea colloquy in a felony case. But he contends (Pet. 25-30) that Section 636(b)(3) prevents magistrate judges from concluding the colloquy by accepting a plea. That contention is incorrect, because the district

court still retains the authority at that point to conduct *de novo* review of the colloquy, though it is not required to exercise that power "unless requested by the parties." *Peretz*, 501 U.S. at 939 (citation omitted). As a result, even when the magistrate judge purports to "accept" the defendant's plea, that action is "akin to a report and recommendation rather than a final adjudication of guilt," because the district court itself will still make "the final adjudication of guilt" when it sentences the defendant and "actually enter[s] judgment" against him. *Brown* v. *United States*, 748 F.3d 1045, 1071 n.53 (11th Cir. 2014); see *Woodard*, 387 F.3d at 1334 & n.2 (acknowledging "a lack of uniformity in the language used by magistrate judges" when providing recommendations, with some describing their recommendations as "accept[ance]").

That is what happened in this case. Petitioner consented to have the magistrate judge conduct the plea colloquy. Pet. App. 19a-20a. After finding petitioner's guilty plea to be knowing and voluntary, the magistrate judge stated that he "accepted" petitioner's plea and "adjudged [him] guilty" of the drug-conspiracy count. *Id.* at 32a. But it was the district court that, after sentencing, actually entered the final judgment declaring that petitioner "is adjudicated guilty" of that offense. *Id.* at 5a. Although the district court could have reviewed the colloquy *de novo*, it was not obligated to do so when petitioner did not "request[] such review or object[] to some aspect of the magistrate judge's plea colloquy." *Osborne*, 345 F.3d at 290.

c. Petitioner nevertheless concludes that the act of accepting a guilty plea is too important to be handled by a magistrate, because Rule 11 requires the judge presiding over a plea colloquy to "ensure that the

defendant is competent, is acting voluntarily, comprehends the charges against him, understands the rights he relinquishes by pleading guilty, and knows the terms of any plea agreement." Pet. 9 (citing *Harden*, 758 F.3d at 888). But the magistrate must make all of those same determinations in the process of overseeing the colloquy and making a recommendation. And the district court is no more or less able to review those determinations if the conclusions of the magistrate who actually participates in the colloquy are styled as an acceptance of the plea instead of a recommendation that it be accepted. In other words, for purposes of the "responsibility and importance" of the duty performed by the magistrate judge (*Peretz*, 501 U.S. at 933), no material difference exists between making a recommendation that the plea be accepted (which petitioner would countenance) and accepting the plea subject to *de novo* review and final adjudication by the district court (which he would not).

Petitioner also contends (Pet. 21) that the timing of a guilty plea's acceptance has "significant consequences for the defendant's rights" because, once a plea is accepted by the court, any attempt to withdraw it before sentencing must be supported by a "fair and just reason." Fed. R. Crim. P. 11(d)(2)(B). But, unlike the defendants in *United States* v. *Benton*, 523 F.3d 424, 427 (4th Cir.), cert. denied, 555 U.S. 998 (2008), and *Reyna-Tapia*, 328 F.3d at 1117, petitioner did not seek to withdraw his guilty plea. Accordingly, it was immaterial to him whether his plea should be deemed to have been accepted by the court at the conclusion of his colloquy with the magistrate judge or only once he failed to raise any objection and then

appeared before the district court for sentencing and entry of judgment.

d. Finally, petitioner contends (Pet. 30-33) that his construction of the statute should be adopted to "avoid difficult constitutional questions" about the ability of Article III courts to supervise magistrate judges. As he acknowledges, he does not assert that the court of appeals' decision "would *in fact* violate the Constitution" (Pet. 30), and no constitutional claim was pressed or passed upon in the court of appeals. See *United States* v. *Williams*, 504 U.S. 36, 41-42 (1992); cf. *B&B Hardware, Inc.* v. *Hargis Indus.*, 135 S. Ct. 1293, 1304 (2015) (in response to constitutional-avoidance argument, noting "[a]t the outset" that no "constitutional objection" was before the Court when petitioner had not adequately preserved it in the court of appeals and certiorari-stage briefs).

In any event, petitioner's attempt to conjure serious constitutional concerns lacks merit because his "consent significantly changes the [Article III] constitutional analysis." *Peretz*, 501 U.S. at 932. Even assuming petitioner had a personal "constitutional right to have an Article III judge" directly accept his guilty plea, rather than act upon a magistrate's recommendation, that individual right, like "[t]he most basic rights of criminal defendants," would be "subject to waiver." *Id.* at 936. And, to the extent that petitioner invokes the judiciary's own "structural concerns" (Pet. 33), the Court recently explained that "allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process." *Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932, 1944 (2015).

In petitioner's view (Pet. 31), the Article III courts' "control is weakened or removed entirely" when "a magistrate judge finally accepts a plea." But that is not true. The district court has supervisory authority over the process because it makes the decision in the first instance to "assign[]" any "additional duties" to the magistrate judge (28 U.S.C. 636(b)(3)) and also possesses the power to conduct *de novo* review of any decision to accept (rather than simply recommend the acceptance of) a plea. Indeed, this Court has already recognized that nothing in Section 636(b)(3) "precludes a district court from providing the review that the Constitution requires." *Peretz*, 501 U.S. at 939; cf. *Executive Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2175 (2014) (finding that, even assuming a bankruptcy court lacked constitutional authority to adjudicate a civil claim, "the District Court's *de novo* review and entry of its own valid final judgment cured any error" in the bankruptcy judge's action). The courts of appeals that have considered constitutional challenges in this context have rejected them. See *Brown*, 748 F.3d at 1071 & n.53 (finding no constitutional violation where district court retains authority to review magistrate judge's decision); *Benton*, 523 F.3d at 432 ("[T]he district court's ultimate control over the magistrate's plea acceptance satisfies any Article III structural concerns in precisely the same manner it would in *Peretz* or the plea colloquy cases."); see also *Harden*, 758 F.3d at 890-891 (ruling for defendant on statutory grounds and finding no need to reach "constitutional claim"). Principles of constitutional avoidance do not support the adoption of petitioner's construction of the statute.

2. As petitioner notes (Pet. 8-15) a conflict—albeit an immature and comparatively thin one—exists in the courts of appeals about whether magistrate judges may not only conduct a plea colloquy but also accept a guilty plea. The Fourth and Tenth Circuits have held that they may accept a plea, as long as the district court retains "ultimate control * * * over the plea process." *Benton*, 523 F.3d at 433; see *United States* v. *Salas-Garcia*, 698 F.3d 1242, 1253 (10th Cir. 2012). The Eleventh Circuit has similarly concluded that, even when a magistrate accepts a plea, the district court retains the ability to review the colloquy, and the district court makes the final adjudication of guilt. *Brown*, 748 F.3d at 1071 n.53.

By contrast, the Seventh Circuit concluded last year that, after presiding over a plea colloquy, a magistrate judge may only submit a recommendation about whether the plea should be accepted. See *Harden*, 758 F.3d at 888-889, 891.[3]

The Fourth Circuit is the only court of appeals that has had occasion to respond to *Harden* (in unpublished decisions like the one in this case). In *United States* v. *Dávila-Ruiz*, 790 F.3d 249 (2015), the First Circuit found no need to address *Harden*, because the magistrate judge in that case had only made a recommendation that the guilty plea be accepted by the district court. *Id.* at 252-253.

In fact, although petitioner suggests (Pet. 18) that the "recurring nature of this issue" makes it worthy of this Court's review, 11 of the 17 district-court decisions that he identifies as considering claims "based

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[3] The Ninth Circuit reached a similar result in 2003, although only in dictum, as the case did not involve a magistrate judge's acceptance of a plea. See *Reyna-Tapia*, 328 F.3d at 1121-1122.

(or supposedly based) on" *Harden* in 15 months (Pet. 19 & n.5) simply reaffirm a magistrate judge's ability to conduct a plea colloquy and make a report and recommendation about acceptance of the plea.[4] In other words, they would be unaffected by a victory for petitioner in this case.

Significantly, none of the courts holding that the additional-duties clause permits magistrate judges to accept guilty pleas upon the consent of the parties has considered what limitations, if any, Rule 59 of the Federal Rules of Criminal Procedure imposes on the district court's authority. Rule 59 prescribes the procedures that should be followed in "Matters Before a Magistrate Judge," and it distinguishes between "[d]ispositive" and "[n]ondispositive" matters. Fed.

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[4] The handful of exceptions are *Moore* v. *Cross*, No. 15-cv-749, 2015 WL 4638342, at *3 (S.D. Ill. Aug. 4, 2015) (dismissing habeas petition under 28 U.S.C. 2241 as premature without addressing merits of *Harden* claim); *Williams* v. *United States*, No. 14-cv-37, 2015 WL 1100735, at *8 (N.D. W. Va. Mar. 11, 2015) (following controlling Fourth Circuit precedent in *Benton*); *Patterson* v. *United States*, No. 14-cv-342, 2014 WL 6769620, at *2 (W.D.N.C. Dec. 1, 2014) (same); *United States* v. *Burgard*, No. 10-cr-30085, 2014 WL 5293222, at *1 (S.D. Ill. Oct. 16, 2014) (finding *Harden*'s reasoning inapplicable to attempt to withdraw plea three years after sentence), aff'd, No. 14-3374 (7th Cir. Feb. 19, 2015); *Finley* v. *United States*, No. 13-cv-565, 2015 WL 4066895, at *9 (M.D. Ala. June 30, 2015) (following controlling Eleventh Circuit decisions without discussing difference between recommendation and acceptance of plea), vacated on other grounds by 2015 WL 4164873 (M.D. Ala. July 9, 2015); *Morton* v. *Maiorana*, No. 13-cv-2548, 2014 WL 5796749, at *1 (W.D. La. Nov. 5, 2014) (dismissing habeas petition, declining to follow *Harden* without discussing difference between recommendation and acceptance of plea).

R. Crim. P. 59(a) and (b).[5] If Rule 59 were held applicable to guilty-plea proceedings, it could have controlling effect on the magistrate judge's role. See, *e.g.*, *Dávila-Ruiz*, 790 F.3d at 250-251 (suggesting the magistrate judge's recommendation was consistent with Rule 59(b)(2)); *United States* v. *Moore*, 502 Fed. Appx. 602, 603-604 (7th Cir. 2013) (noting that acceptance of pleas "may well" be covered by the rule's provision for "dispositive" matters). The Fourth Circuit's decision in *Benton* did not have occasion to consider this issue because the July 2005 plea colloquy at issue (523 F.3d at 426) predated Rule 59's December 2005 effective date. And, although the Rule 59 argument was presented in *Harden*, the court did not address it. See 758 F.3d at 887. Petitioner's own belated challenge in the court of appeals did not invoke Rule 59, the court of appeals did not address that issue, and it is outside the scope of the question he presents in this Court, Pet. i. Because the rule's procedures may ultimately control or affect what magistrate judges may do in this context, regardless of what Section 636(b)(3)'s additional-duties clause otherwise allows, review of the narrow conflict over the additional-duties clause would be premature.

3. Even if the question presented otherwise warranted review, this case would be a poor vehicle for its resolution because petitioner's failure to object in the

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[5] Rule 59 provides that "[a] district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense," Fed. R. Crim. P. 59(a), and "may refer * * * *for recommendation* * * * any matter that may dispose of a charge or defense," Fed. R. Crim. P. 59(b)(1) (emphasis added), subject to the court's *de novo* review of timely objections, Fed. R. Crim. P. 59(b)(2) and (3).

district court to the magistrate judge's acceptance of his guilty plea means that his claim should be subject, at most, to review for plain error—the presence of which petitioner does not even suggest he would be able to establish. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). As the Court has explained, meeting "all four prongs" of the plain-error standard is "difficult." *Puckett* v. *United States*, 556 U.S. 129, 135 (2009).

Drawing upon the cases discussed in the Seventh Circuit's decision in *Harden*, which did not apply plain-error review, see 758 F.3d at 890-891, petitioner asserts (Pet. 23) that this Court has a "demonstrated willingness" to conduct review of claims like his "outside the strictures of the plain error doctrine." But the cases he discusses do not bear out that claim. In both *Peretz* and *Gonzalez*, the Court found that the magistrate judge had committed no error by presiding over *voir dire* with the consent of the defendant or his attorney, and the Court therefore had no occasion to address the consequences of any waiver or forfeiture. See *Peretz*, 501 U.S. at 940; *Gonzalez*, 553 U.S. at 269-270 (Thomas, J., dissenting) (addressing forfeiture argument only after disagreeing with the majority about whether there was error). Although petitioner relies (Pet. 23-24) on Justice Scalia's observation in *Peretz* that it was appropriate to exercise "limited discretion" to determine whether there had been any error in the magistrate judge's acting with the defendant's consent, 501 U.S. at 955 (Scalia, J., dissenting), Justice Scalia still recognized the applicability of plain-error review, see *id.* at 953-954 & n.*.[6]

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[6] Petitioner also suggests that a litigant who consents to proceed before a magistrate judge will "be deemed to have forfeited" any

Thus, petitioner chiefly analogizes (Pet. 22) his case to *Nguyen* v. *United States*, 539 U.S. 69 (2003), but that comparison is unavailing. In *Nguyen*, the Court excused the defendants' forfeiture of their claim that a court of appeals panel that included a non-Article III judge lacked statutory authority to adjudicate the defendants' appeals. *Id.* at 71-76, 79-83. The Court concluded that excusing the forfeiture was justified because "permit[ting] the decision below to stand" would contravene Congress's direction that "*no one* other than a properly constituted panel of Article III judges was empowered to exercise appellate jurisdiction in these cases." *Id.* at 83 n.17. The Court took care to explain that the case did not involve merely "an action which could have been taken, if properly pursued," but rather an action that "could never have been taken at all." *Id.* at 79. Here, by contrast, it is undisputed that the district court could have formally entered the adjudication of guilt upon the magistrate judge's recommendation and that the district court possessed authority to enter the actual judgment of conviction in the case. Accordingly, *Nguyen*'s reasoning does not justify a departure from plain-error review for petitioner's claim.

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objection to that procedure. Pet. 24 (quoting *Peretz*, 501 U.S. at 955 (Scalia, J., dissenting)). But, as the Court recently recognized, the question whether a litigant consented to having a non-Article III judge make a determination is separate from whether the litigant forfeited any objection on appeal to the district court or court of appeals. See *Wellness Int'l Network*, 135 S. Ct. at 1949 (remanding to permit the court of appeals to address whether litigant consented to bankruptcy-court adjudication of claim "and also whether" he had forfeited his Article III argument in the lower courts).

Moreover, although *Nguyen* did not address whether the petitioners in that case had suffered prejudice, 539 U.S. at 81, it still determined that the other prongs of plain-error review had been satisfied. With respect to the second prong, it described "the statutory violation" as "clear" and as a "plain defect." *Id.* at 77 n.9, 81. And, with respect to the fourth prong, it concluded that allowing the decision of an improperly constituted appellate panel to stand would "call into serious question the integrity as well as the public reputation of judicial proceedings." *Id.* at 83 n.17.

In this case, petitioner could not make either of those two showings, much less satisfy the prejudice prong of plain-error review. Any error was not clear or plain, given that binding Fourth Circuit precedent (as well as other persuasive precedent) supported the magistrate judge's ability to accept a guilty plea subject to review by the district court. See *Henderson* v. *United States*, 133 S. Ct. 1121, 1125 (2013) (noting that "error was not plain before" this Court resolved a circuit split about the issue); *Puckett*, 556 U.S. at 135 (noting that, to be plain, error cannot be "subject to reasonable dispute"). And when there is no dispute that a magistrate judge may preside over a plea colloquy and recommend that a guilty plea be accepted, it does not "seriously affect the fairness, integrity or public reputation of judicial proceedings" (*Olano*, 507 U.S. at 736 (citation omitted)) if the magistrate judge takes the additional step of accepting the plea, subject to *de novo* review by the district court. Petitioner does not contend that any procedural error in the acceptance of his guilty plea caused him prejudice. He gives no basis for suspecting that there is any

"reasonable probability that, but for the error, he would not have entered the plea." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 (2004).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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