No. 15-182

IN THE

# Supreme Court of the United States

DESMOND FARMER,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## REPLY IN SUPPORT OF CERTIORARI


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The Government concedes that how criminal defendants plead guilty turns on where they live: magistrates may accept pleas in Richmond, Denver, and Atlanta, while district judges must accept them in Chicago and (likely) San Francisco. Opp. 12; Pet. 8–15. And the Government does nothing to suggest this case is a bad vehicle for resolving that important split. The petition should be granted.

## I. THE CIRCUITS ARE DIVIDED OVER WHETHER MAGISTRATES MAY ACCEPT FELONY PLEAS.

Three circuits have held that magistrates may accept felony guilty pleas with the defendant's consent, while another has held (and a second strongly suggested) they may not. *See* Opp. 12 & n.3. The Government provides no good reason to ignore that undisputed conflict.

*First*, it claims the split is "comparatively thin" because only four circuits have taken sides. Opp. 12. Yet twice *this Term* the Court will hear cases presenting "thinner" splits, granted over the Government's timeworn objection. *E.g.*, Brief in Opposition, *Ocasio v. United States*, No. 14-361 (U.S. *argued* Oct. 6, 2015), 2014 WL 7387210, at *7 ("shallow," "comparatively recent," one-to-one split about Hobbs Act conspiracy); Brief in Opposition, *Molina-Martinez v. United States*, No. 14-8913 (U.S. *argument set for* Jan. 12, 2016), 2015 WL 5766729, at *14–22 ("overstate[d]" two-to-one split about plain-error review).

The Government also claims the split is "immature" because only the Fourth Circuit has "had occasion to respond to" *United States v. Harden*, 758

F.3d 886 (7th Cir. 2014). Opp. 12. That is doubly irrelevant. The Fourth and Seventh Circuits have said that they will hold to their positions despite the conflict, *see Harden*, 758 F.3d at 891 & n.1; *United States v. Ross*, 602 Fed. App'x 113, 115 n.* (4th Cir. 2015) (per curiam), and a persistent one-to-one split warrants certiorari. Moreover, this Court lets splits percolate to fully air an issue, not to let disagreements fester. Here, *United States v. Benton*, 523 F.3d 424, 429–33 (4th Cir. 2008), spent five pages exploring the question, and *Harden* spent five more explicitly disagreeing, *see* 758 F.3d at 888–92. The Ninth, Tenth, and Eleventh Circuits have also discussed it. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121–22 (9th Cir. 2003) (en banc); *United States v. Salas-Garcia*, 698 F.3d 1242, 1253 (10th Cir. 2012); *United States v. Woodard*, 387 F.3d 1329, 1331–34 (11th Cir. 2004) (per curiam). There is no reason to wait for others to simply pick sides.

*Second*, the Government contends that review is unnecessary because no court on its side of the split has considered whether Federal Rule of Criminal Procedure 59 independently bars magistrates from accepting guilty pleas. Opp. 13–14. This argument ignores the Government's own view of Rule 59. Had the Government *conceded* that Rule 59 bars magistrates from accepting pleas, all would agree that Petitioner's conviction was unlawful and the circuit split would be academic. But that is not what the Government thinks. Its curious silence here notwithstanding, it argues that "Rule 59 applies [only] to matters where there was no consent by the Defendant." Brief of the United States, *Harden*, 2014 WL 586911, at *12. It acts on that belief by

continuing to participate in plea proceedings where magistrates accept pleas. *E.g.*, Dkt. No. 14, *United States v. Millan-Pena*, No. 15-cr-04352 (D.N.M. Dec. 7, 2015). The Government thus asks this Court to deny review of an acknowledged split about the Magistrates Act now because it might later fail in its efforts to read Rule 59 narrowly. The word for that is chutzpah.

This argument also undermines the Government's interpretation of the Act. Rule 59 allows district courts to refer "[n]ondispositive [m]atters" "for determination" and "[d]ispositive [m]atters"—including "a defendant's motion to dismiss or quash an indictment" and "a motion to suppress evidence"—"for recommendation." That framework, however, comes unmistakably from the Act. As this Court put it before Rule 59's enactment, section 636(b)(1)(A) authorizes district courts to refer for determination pretrial matters other than "*dispositive* pretrial motions," *Gomez v. United States*, 490 U.S. 858, 868 (1989) (emphasis added), a category that includes motions "to dismiss or quash an indictment" or "to suppress evidence in a criminal case," 28 U.S.C. § 636(b)(1)(A); everything else requires a report and recommendation, *see id.* § 636(b)(1)(B). Rule 59 thus does not provide some independent basis for refusing to resolve the conflict over the Magistrates Act. It illustrates that the Act does not authorize magistrates to accept pleas.

*Third*, the Government suggests that this Court has already passed on the question presented by denying certiorari in *Marinov v. United States*, 135 S. Ct. 1843 (2015), and *Benton*, which the Government sees as involving only "slightly different

procedural circumstances." Opp. 5 n.2. The Government needs new glasses. The decision below in *Marinov* did not address the question—raised only in a stricken *pro se* brief—and instead dismissed because of the defendant's appeal waiver. Brief in Opposition at 17, *Marinov*. Worse, Marinov's (untimely) petition did not present the question because the *district court* accepted his plea. *Id.* at 12–17. It is no wonder this Court denied an untimely petition addressing an irrelevant question ignored below. *Benton*, for its part, predated *Harden* (and thus any square conflict).

## II. THIS CASE IS A GOOD VEHICLE.

The Government contends that this case is a "poor vehicle" because Petitioner did not object to the magistrate's participation in the district court and therefore faces plain-error review. Opp. 14. That poses no obstacle to this Court's review of the question presented.

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the defendant arguably failed to object to the portion of the jury instructions later invalidated by this Court. The Government "assert[ed] [that] a plain-error standard" should apply, but that question was not addressed by the lower court, and this Court "s[aw] no special reason to decide [it] in the first instance." *Id.* at 1252. So too here, where the Fourth Circuit decided Petitioner's claim on the merits without addressing whether Petitioner must (or could) satisfy plain-error review. Pet. App. 2a-3a. The right approach, then, is to grant the petition, resolve the split, and remand if necessary.

In any event, Petitioner need not show plain error. *Nguyen v. United States*, 539 U.S. 69 (2003), demonstrates that while "a failure to object to trial error *ordinarily* limits an appellate court to review for plain error," the plain-error standard does not apply if "ignor[ing] the violation … would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld." *Id.* at 80. That occurs where the violation concerns a "statutory provision that embodies a strong policy concerning the proper administration of judicial business," such as who may hear certain matters. *Id.* at 81.

The Government distinguishes *Nguyen* because here the district court could have accepted a magistrate's (hypothetical) recommendation to accept the plea, whereas in *Nguyen* "no one other than a properly constituted panel of Article III judges was empowered" to hear the cases. Opp. 16 (internal quotation marks and emphasis omitted). That purported distinction is puzzling. Petitioner claims that no magistrate may ever accept a felony guilty plea, just as the petitioners in *Nguyen* argued that no non-Article III judge may sit on an appellate panel. It is no answer to say that the district judge *could have* accepted the magistrate's *recommendation* (but did not), just as it would have been no answer in *Nguyen* to say that the panel could have been (but was not) composed entirely of Article III judges or that the Ninth Circuit could have reviewed the case en banc (but did not).

The Government also contends that *Nguyen* actually applied (most of) the plain-error factors. Opp. 17. That would be news to the *Nguyen* Court,

which never suggested that the petitioners *had* to meet any of them and instead stressed its ability to correct the error regardless of "the underlying merits" or "the validity of petitioners' convictions." 539 U.S. at 79, 81. It would also be news to Justice Thomas. *See Gonzalez v. United States*, 553 U.S. 242, 270 (2008) (Thomas, J., dissenting) (explaining that *Nguyen* "specifically declined to apply the plain-error rule"). Indeed, it is even news to the Government. *See* Brief of the United States, *Musacchio v. United States*, No. 14-1095 (U.S. *argued* Nov. 30, 2015), 2015 WL 5996329, at *52 (*Nguyen* invalidated the judgments below "without resort to [the] plain-error rule").

Magistrates Act cases further demonstrate that plain-error review does not apply. Both *Gonzalez* and *Peretz v. United States*, 501 U.S. 923 (1991), involved Magistrates Act claims raised initially on appeal, and yet the Court never suggested that the petitioners had to prove plain error. Moreover, two Justices said that they did not need to do so. *See Gonzalez*, 553 U.S. at 269–71 (Thomas, J., dissenting); *Peretz*, 501 U.S. at 953–55 (Scalia, J., dissenting). The Government offers no response to Justice Thomas's views, and its response to Justice Scalia's—that he "recognized the applicability of plain-error review," Opp. 15—is incorrect. He *acknowledged* that Peretz could not prove plain error but *would have reversed regardless* because "[e]ven when an error is not 'plain,' this Court has in extraordinary circumstances exercised discretion to consider claims forfeited below." 501 U.S. at 954 (Scalia, J., dissenting). That discretion should be exercised where, as here, applying the ordinary rules

would prevent *any* court from addressing the merits. *See id.* at 954–55.[1]

Finally, were there doubt about whether plain-error review applies, the Court should add a question rather than deny the petition. *Peretz* did that. The Court granted to resolve "a conflict among the Circuits" about the authority of a magistrate to conduct *voir dire* with the defendant's consent, but it also instructed the parties to address whether the petitioner's consent "constitute[d] a waiver of the right to raise this error on appeal." 501 U.S. at 927. *Gonzalez* followed suit. The Court granted both of Gonzalez's questions presented—whether the defendant must personally consent to *voir dire* before a magistrate and whether "the Court of Appeals err[ed] when it reviewed petitioner's objection for plain error." 551 U.S. 1192 (2007) (mem.).

The Court could follow that approach here. The circuits disagree about whether an identical claim in the same posture as Petitioner's is subject to plain-error review. *Compare Harden*, 758 F.3d at 889–91 (no), *with Woodard*, 387 F.3d at 1331 (yes), *and Harden*, 523 F.3d at 433 (applying plain error without considering *Nguyen*). The ability to resolve

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[1] The Government responds by claiming that *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1949 (2015), distinguished "whether a litigant consented to having a non-Article III judge make a determination" from "whether the litigant forfeited any objection on appeal." Opp. 15 n.6. It is unclear why the Government believes this point is responsive, as it insists that Petitioner—and apparently everyone else who does not seek review in the district court—must prove plain error.

two circuit splits is hardly reason to refuse to resolve one.

## III. MAGISTRATES MAY NOT ACCEPT FELONY GUILTY PLEAS.

Petitioner (and *Harden*) have explained why magistrates may not accept felony guilty pleas: Congress carefully distinguished between non-dispositive issues that a magistrate may decide himself and dispositive ones that he must refer back to the district court with a recommendation, and Congress would have considered accepting a felony guilty plea too important a task to fall within the additional-duties clause. Pet. 25–32; *Harden*, 758 F.3d at 888–92.

The Government first contends that supervising a plea colloquy and entering a guilty plea is not particularly difficult or important, at least when compared with presiding over civil and misdemeanor trials. Opp. 7–8. Congress disagrees. At the same time it authorized magistrates to preside over civil and misdemeanor trials, it recognized that magistrates "[could] only accept guilty pleas in misdemeanor cases." S. Rep. No. 96-74, at 17 (1979). The Senate would have "permit[ted] a … magistrate to accept a guilty plea … in a case lying outside his trial jurisdiction" if the defendant consented and the district court "assur[ed] himself that there [wa]s a factual basis for the plea accepted" prior to sentencing. *Id.* But the House disagreed, the Senate "recede[d]," and Congress asked the Judicial Conference to "study the issue." S. Rep. No. 96-322, at 10 (1979) (Conf. Rep.). The Judicial Conference shared the House's concerns: because "the taking of

a guilty plea is a critical step in a criminal case and represents a disposition on the merits," it recommended that "no change be made in the current law that reserves [guilty pleas] to judges." The Federal Magistrate System: Report to the Congress by the Judicial Conference of the United States 52, 53 (1981); *see also* Administrative Office of the U.S. Courts, A Constitutional Analysis of Magistrate Judge Authority, 150 F.R.D. 247, 306 (1993) (noting the Magistrate Judges Committee's "strong view that … the acceptance of guilty pleas … should not be delegated to magistrate judges" regardless of consent).

The Government next notes that several circuits allow magistrates to conduct colloquies and then contends that there is no real difference between a district court accepting a plea upon a magistrate's recommendation and the magistrate accepting it (subject to de novo review) in the first instance. In either scenario, the district court "still make[s] the final adjudication of guilt when it sentences the defendant and actually enters judgment against him." Opp. 8. Similarly, the Government argues that accepting a felony plea is no more "important" than writing a recommendation after a colloquy because either way the magistrate makes the "same determinations" about the defendant's choice. Opp. 9.[2]

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[2] The Government asserts that Petitioner "does not dispute" that magistrates may conduct plea colloquies. Opp. 7. Petitioner does dispute that claim, but the Court need not address it to conclude that magistrates may not actually accept pleas.

These arguments prove too much. They would, for instance, authorize magistrates to preside over felony trials with the parties' consent, because the district court would still "make the final adjudication of guilt when it sentence[d] the defendant and actually enter[ed] judgment against him." But this Court has already held that "the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial." *Gomez*, 490 U.S. at 872; *see* 28 U.S.C. § 636(a)(3), 636(c)(1). Similarly, if the Government were correct, a magistrate could decide a suppression motion because, once again, the district court would be the one that "actually enters judgment" against the defendant. Congress, however, has carefully restricted the magistrate's authority to resolve such "dispositive" motions in the first instance. *See* 28 U.S.C. § 636(b)(1)(A)–(B). The Government, by contrast, would do what this Court prohibited: construe the "general, nonspecific terms" of the additional-duties clause "so expansive[ly] that [the clause] [would] overshadow[] all that goes before." *Gonzalez*, 553 U.S. at 245.

The Government is also wrong to suggest that accepting a plea is no different than recommending that it be accepted. Common sense proves as much. Everyone would agree, for example, that the President's advisors had usurped an important duty if they formally nominated Article III judges (subject to the President's de novo review if requested), rather than recommending candidates, even though those tasks involve the "same determinations."

Congress also recognized the difference between making a recommendation about a decision and making the decision itself in the Act's most concrete provisions: magistrates may "hear and determine" some matters, but may only make "recommendations" on others. 28 U.S.C. § 636(b)(1). In the context of guilty pleas, the Federal Rules further embody that distinction. Where a magistrate makes a report after supervising the colloquy, the defendant may withdraw "for any reason or no reason" until the district court accepts the plea. Fed. R. Crim. P. 11(d)(1); Opp. 9. But where the magistrate "accepts the plea," the defendant must "show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B); Opp. 9.[3] Similarly, whether a pleading defendant must be detained pending sentencing under 18 U.S.C. § 3143(a)(2) also turns on whether the magistrate accepted the plea or made a recommendation. *Compare United States v. McGrann*, 927 F. Supp. 2d 279, 283–84 (E.D. Va. 2013) (ordering detention because magistrate accepted plea per *Benton*), *with United States v. Yanni*, No. CR-09-1363, 2010 WL 3522271, at *3–6 (D. Ariz. Sept. 2, 2010) (refusing to order detention because magistrate made recommendation per *Reyna-Tapia*).

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[3] The Government contends that Rule 11(d)'s withdrawal provisions are irrelevant because Petitioner did not seek to withdraw before sentencing. Opp. 10. The point, however, is that Rule 11 proves that accepting a plea is too important to fall within the additional-duties clause. That point stands whether or not Petitioner himself sought to withdraw.

Contrary to the Government's claims, then, this distinction matters. It lies at the heart of Congress's carefully crafted scheme, and it affects procedural "safeguard[s]" "separate and distinct" from the defendant's right to challenge the magistrate's conduct, *United States v. Dávila-Ruiz*, 790 F.3d 249, 253 (1st Cir. 2015).

Finally, constitutional avoidance counsels in favor of prohibiting non-Article III judges from accepting felony pleas. *See* Pet. 30–33. The Government claims that the district court's "power to conduct *de novo* review" cures any structural Article III problem. Opp. 11. Again, however, this argument lacks any limiting principle; if it were true, a magistrate could conduct an entire felony trial. This Court has already recognized the constitutional concerns inherent in that scenario. *See Gomez*, 490 U.S. at 863 & n.9.[4]

## CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] The Government hints that Petitioner waived constitutional *avoidance* arguments by not *directly* challenging the Act's constitutionality below. Opp. 10. In the very case the Government cites, the Court considered avoidance arguments—which speak to the statute's proper interpretation, not its constitutionality—even though the party raised no square constitutional challenge below. *See B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1304–05 (2015).

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Respectfully submitted,

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