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1 P R O C E E D I N G S

2 (10:06 a.m.)

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

6 Mr. Newton.

7 ORAL ARGUMENT OF BRENT E. NEWTON

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. NEWTON: Well, Your Honor, it's hard to

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

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

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

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

1 MR. NEWTON: Well --

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

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

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

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

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

25 MR. NEWTON: Well, I think it's a twofold

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

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

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

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

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

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

23 JUSTICE KENNEDY: Well, I was interested in
24 your comment on trying cases, but to say that you have
25 to sit down and explain to the -- to the defendant the

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Well, if you get to
23 that point, which case of ours holds that the right to a
24 jury trial is a personal right that the defendant must
25 waive rather than waive through counsel?

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

7 JUSTICE SCALIA: You say it was the holding
8 in Patton?

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

11 JUSTICE SCALIA: I suppose it was dicta.

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

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

23 MR. NEWTON: Well, Your Honor, it's -- the
24 language in Adams which quotes from Patton says it must
25 be the express, intelligent consent of the defendant,

1 which has been widely interpreted as personal --

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

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

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

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

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

25 JUSTICE GINSBURG: You were referring a

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

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

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

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

24 In this case, there was no showing on the
25 record implicitly or explicitly that Mr. Gonzalez,

1 Petitioner in this case, waived or knowingly acquiesced
2 in his attorney's waiver.

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

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

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

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

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

25 JUSTICE SOUTER: Well, you say they are

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

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

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

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

22 MR. NEWTON: Yes, Your Honor.

23 JUSTICE SCALIA: So you can't simply say it
24 requires an express and knowing waiver, attributing that
25 express and knowing waiver to the defendant.

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

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

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

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

23 MR. NEWTON: Your Honor, I would think in
24 certain cases, if it's a personal right and a defense
25 lawyer stands up and says in the presence of his client,

1 my client consents, and the client doesn't object or
2 respond that, I disagree, then it's fair perhaps to
3 assume there's a sufficient showing of -- of personal
4 waiver by the defendant.

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

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

22 MR. NEWTON: I disagree. I think that you
23 have to read Peretz in light of the very special facts
24 in that case, which involve two statements in the
25 presence of the defendant: That the defense was not

1 objecting or was consenting; and, then, in particular,
2 the defendant, himself, was giving consent.

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

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

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

11 MR. NEWTON: Under 18 U.S.C. Section
12 3401(b), which I contend is the obvious analog for
13 waiving in the felony context, yes, absolutely. I
14 think, at the very least, to avoid a constitutional
15 doubt, and that's -- also, I should say up front, all of
16 these arguments that we are -- or points we're engaging
17 in here simply show this is a serious constitutional
18 question.

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

24 MR. NEWTON: It's going to obviously depend
25 on the defendant because every case involving waiver

1 depends on the particular circumstances. But, at the
2 very least, there needs to be a showing of a knowing,
3 voluntary waiver of a right to an Article III judge.

4 This is done every day in America.

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

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

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

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

23 But picking the jury, the jury selection or,
24 more properly, the jury exclusion, because it's really
25 excluding jurors rather than picking them, that is a

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

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

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

19 The -- Justice Alito asked about how this
20 procedure would work. This has gone on every day in
21 American courtrooms since 1979. Every day around
22 America in courtrooms, Federal courtrooms, in magistrate
23 judge cases over misdemeanors this kind of colloquy goes
24 on. This is done every day. It's done in the very same
25 courthouse that Mr. Gonzalez was tried in because they

1 regularly refer felony guilty pleas to magistrate
2 judges.

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

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

24 Gomez held Congress never intended this,
25 this was not something Congress intended, so the Court

1 is going to have to fill in a gap in terms of what kind
2 of consent is appropriate. And Congress has clearly
3 signaled they believe a defendant's personal express
4 consent is the type that is required. At the very least
5 there is a serious constitutional question.

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

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

12 If I could --

13 JUSTICE SCALIA: Could I --

14 MR. NEWTON: Sure.

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

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

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

23 MR. NEWTON: I think the Court has already
24 decided the vast majority of these. Taylor clearly
25 referred to the confrontation or the Compulsory Process

1 Clause. There are numerous other cases in which the
2 Court has said, at least implicitly, that it's waived by
3 the lawyer's failure to object. But there are a special
4 class of rights: The right to a jury trial, the right
5 to a grand jury, the right to counsel, the right to
6 plead not guilty.

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

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

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

25 And if I could reserve my additional time

1 for rebuttal.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Newton.

4 Ms. Blatt?

5 ORAL ARGUMENT OF LISA S. BLATT
6 ON BEHALF OF THE RESPONDENT

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

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

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

23 MS. BLATT: That's correct. And for the few
24 fundamental decisions where the defendant must
25 personally explicitly make, they have a monumental

1 impact on the defendant, and they protect values that
2 extend beyond mere -- mere trial strategy.

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

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

23 So it's an important right. It implicates
24 important trial issues. But nonetheless, counsel is
25 best equipped to make it. And I do think, unlike the

1 decision whether you're going to be convicted or stand
2 trial or even testify, this is a decision where the
3 defendant is overwhelmingly likely to defer to counsel's
4 tactical and strategic judgment.

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

13 JUSTICE SCALIA: Did she rule on strikes for
14 cause?

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

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

23 MS. BLATT: Right, and defense counsel's
24 going to have to weigh in any given case whether the
25 magistrate judge is going to rule on any objections and

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

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

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

18 MS. BLATT: An implied consent in --

19 JUSTICE KENNEDY: Well, he was there, he
20 probably knew and the record shows that he knew what was
21 going on.

22 MS. BLATT: If an explicit personal --

23 JUSTICE KENNEDY: I, frankly, don't think we
24 should go down that route.

25 MS. BLATT: If a personal explicit waiver is

1 required, there wasn't one here. The express waiver was
2 by defense counsel, so it would not meet that test of
3 having -- I don't know what the implied waiver would be.
4 There is an expressed waiver by defense counsel.

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

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

13 MS. BLATT: Under this Court's decision in
14 Peretz, there would be de novo review at the end of the
15 process. And here an Article III judge actually swore
16 in the jury but there was, nothing was ever objected to
17 by the magistrate's role. There was no --

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

21 MS. BLATT: He can. Right. Yes. And if
22 the Court said in Peretz that the Constitution would
23 require that the review be de novo and they recognize in
24 a footnote this Court that as a practical matter it
25 might be difficult to reweigh credibility

1 determinations, and you have the same kind of issues
2 when a magistrate judge conducts Social Security cases
3 or suppression hearings, the magistrate rules on or
4 weighs credibility and there is a de novo review by the
5 Article III judge.

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

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

16 JUSTICE KENNEDY: Excuse me, if the Article
17 III judge says, oh, this should not have been excused
18 for cause, then you go back and bump the juror.

19 MS. BLATT: I think this discussion just
20 shows why a defendant -- this would not be a right that
21 he would readily appreciate and understand. This is
22 something defense counsel would just decide. And is it
23 -- in this particular trial, and this was a short drug
24 trial, this voir dire occurred without incident and it
25 was pretty routine. Is this something that if it were

1 different type of case defense counsel might think, no,
2 I don't want whatever disruption it might be and we want
3 an Article III judge. And defense counsel is of course
4 able to object.

5 I also wanted to point out --

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

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

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

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

20 CHIEF JUSTICE ROBERTS: When I was
21 researching it, I saw that it was usually included in
22 the list, but I thought it would track back to some case
23 that held that it was, but it never -- never does.

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

1 defendant --

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

4 (Laughter.)

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

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

20 MS. BLATT: Maragh --

21 JUSTICE GINSBURG: -- case where the 11th th
22 Circuit said, we're not going to mess with any
23 constitutional question, but under our supervisory
24 power, we're going to tell the district -- the
25 magistrate judges, district judges in this circuit; it's

1 a simple thing to do, put on the record that the
2 defendant himself consented.

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

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

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

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

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

21 MS. BLATT: I mean, I don't think I have a
22 fully developed answer on that, but my guess would be
23 our position is no. But I don't -- I don't think
24 there's at least anything to stop the particular
25 magistrate judge in any given case from saying -- from

1 addressing the defendant or requiring it. But --

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

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

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

11 MS. BLATT: Right. And on that issue our
12 position is clear: There is a rule that would dictate
13 how it would be resolved and Rule 52(b) of the Federal
14 Rule of Criminal Procedures has no exception, and plain
15 error would apply. And so if there was some sort of
16 error, the defendant would have to make the necessary
17 showings for plain error review, and on that I would
18 like to address, since we are on the subject, that if
19 the Court disagreed with us on the merits, Rule 52(b)
20 would apply and we think that all the concerns that
21 animate a contemporaneous objection rule are at their
22 peak when the defense counsel expressly agrees to the
23 course of action followed by the court, and Petitioner's
24 rule of automatic reversal would open the door to
25 gamesmanship and sandbagging because it would allow

1 defense counsel to wait and see if the defendant is
2 convicted before objecting to the magistrate's role.

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

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

23 MS. BLATT: Well, our position is the
24 magistrate judge could say sit down. This is if defense
25 says my counsel is putting in some evidence I don't like

1 or my counsel is not cross examining the witness or my
2 counsel just asked a juror a question that I'm really
3 uncomfortable with. I mean, this show belongs to the
4 lawyer, and the magistrate judge could tell him to -- to
5 be quiet.

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

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

22 MS. BLATT: No. I think there is some room
23 for that. I mean I -- some room for that for the court,
24 but it's -- it's not like it's the right to testify. It
25 would be hard to, you know, if there was some argument

1 over objection or how to question prospective jurors.
2 There's not a hybrid defense team where the -- the judge
3 is always supposed to turn to the defendant and say are
4 you sure you're comfortable with what your counsel is
5 doing?

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

17 And even assuming this Court doesn't reach
18 the question of whether the error had an effect on
19 substantial rights, the error did not seriously affect
20 the fairness, integrity or public confidence of criminal
21 proceedings. The error -- the voir dire in this case
22 occurred without incident or objection, as Justice
23 Ginsburg pointed out, to anything that the magistrate
24 judge did; and there is no indication -- and I don't
25 think we have heard any -- there is no indication that

1 the defendant actually disagreed with his counsel's
2 professional judgment to consent to have the magistrate
3 judge, or even had an opinion on the subject. And
4 Petitioner's rule would, as I said, open the door to
5 gamesmanship because it would relieve counsel of any
6 obligation to call an error to the court's attention and
7 therefore give the court the opportunity to correct the
8 error.

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

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Ms. Blatt.

13 Mr. Newton, you have four minutes remaining.

14 REBUTTAL ARGUMENT OF BRENT E. NEWTON,
15 ON BEHALF OF THE PETITIONER

16 MR. NEWTON: Thank you, Your Honor.

17 I'd like to return to Section 3401(b), which
18 the plain language of, and the legislative history
19 behind, clearly show a congressional intent in the --
20 context for personal waivers on the record by
21 defendants. It would be anomalous not to require the
22 same thing, at least in some similar form, in the felony
23 context.

24 JUSTICE SCALIA: Could I just -- a question
25 that has troubled me. Basically, what you say that is

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

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

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

19 JUSTICE SCALIA: I see. I see.

20 MR. NEWTON: The other point I'm trying to
21 make is that the -- it's not just the fact that it's a
22 critical stage; it's a critical stage where there is a
23 right to an Article III judge over the critical stage.
24 The Court in Gomez clearly recognized that jury
25 selection is a critical stage. So it is the Article III

1 right that implicates the right to a jury trial, but it
2 is fundamentally the right to an Article III judge that
3 is at issue.

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

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

23 The Government argues plain error doctrine
24 should apply, Rule 52(b). Justice Scalia's concurring
25 opinion in Freytag noted that there are different kinds

1 of rights that can be waived or forfeited, and most
2 rights can be forfeited short of a waiver, but there are
3 certain kinds of rights -- and we contend this is one of
4 them -- that cannot be forfeited short of a valid
5 waiver.

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

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

19 I think the Court also should consider the
20 facts of this case in deciding whether there was
21 gamesmanship. There wasn't. Clearly there wasn't.
22 Mr. Gonzalez was cut out of the equation entirely. The
23 magistrate judge only invited the attorneys to the
24 bench, left him sitting there without the assistance of
25 an interpreter. You have to consider his personal

1 characteristics. He had no experience in the Federal
2 criminal justice system. He did not speak English
3 fluently. He was in no position to object. He didn't
4 have the meaningful opportunity to object. And under
5 Rule 51(b), there should be de novo for that reason as
6 well.

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

13 CHIEF JUSTICE ROBERTS: You can finish your
14 sentence.

15 MR. NEWTON: I'm asking the Court to avoid
16 that question by interpreting the "Additional Duties"
17 Clause, whether it's a supervisory authority matter or
18 as a statutory construction matter, to basically model
19 3401(b). Thank you.

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

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

24

25

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