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Bringing United States v. Harden to Its Conclusion: The Seventh Circuit's Reluctance to Act on the Flawed Decision's Consequences

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BRINGING *UNITED STATES v. HARDEN* TO ITS CONCLUSION: THE SEVENTH CIRCUIT'S RELUCTANCE TO ACT ON THE FLAWED DECISION'S CONSEQUENCES

INTRODUCTION

Though United States magistrate judges have a large impact on the federal judiciary, and have had in some capacity for well over 200 years, questions persist on how far their authority extends. These questions arise from a grant of authority in the Federal Magistrates Act that provides that "[a] magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."[1] One of the additional duties that district courts have assigned to magistrate judges is presiding over guilty plea proceedings.[2]

A defendant in the Southern District of Illinois consented to having a magistrate judge conduct and accept his felony guilty plea.[3] The magistrate judge accepted the defendant's plea, but later the defendant appealed, claiming that magistrate judges lack the statutory authority to accept felony guilty pleas, making his plea invalid.[4] In *United States v. Harden*, the United States Court of Appeals for the Seventh Circuit agreed with the defendant and determined that magistrate judges lack the statutory authority to accept a defendant's felony guilty plea—that is, adjudge them guilty—even with a defendant's consent.[5] The decision created a split among the circuits on whether magistrate judges may accept defendants' guilty pleas after performing Rule 11(b) colloquies.[6]

Since the court's decision in *Harden*, many federal prisoners who had a magistrate judge accept their felony pleas have attempted to collaterally attack their sentences.[7] So far, no prisoner has been successful in obtaining collateral

1. 28 U.S.C. § 636(b)(3) (2012).

2. Admin. Office of the U.S. Courts, Table S-17. Matters Disposed of by U.S. Magistrate Judges During the 12-Month Periods Ending September 30, 2006 Through 2015, 2015 Annual Report of the Director: Judicial Business of the United States (2015).

3. United States v. Harden, 758 F.3d 886, 887 (7th Cir. 2014).

4. *Id.*

5. *Id.* at 888.

6. *Id.* at 891 n.1.

7. *See, e.g.*, United States v. Ross, 602 F. App'x 113, 114 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 794 (2016); Coe v. Snyder-Norris, No. CV 16-60-HRW, 2016 WL 3197130, at *3 (E.D. Ky. June 6, 2016); Carlucci v. United States, No. 2:14-CV-924, 2015 WL 5944071, at *1 (D.

relief through *Harden*.[8] Despite the current unwillingness to grant relief, according to *Harden*, these defendants never were adjudicated guilty.

Part I of this Note provides a brief history of the magistrate judge system and describes the authority of magistrate judges. Part II examines *Harden*'s analysis and argues that the court decided incorrectly based on misapplication of Supreme Court precedent and flawed reasoning. Part III accepts *Harden*'s decision as the law of the Seventh Circuit and examines what remedies should be available to defendants who had magistrate judges accept their pleas prior to the *Harden* decision.

I. HISTORY AND AUTHORITY OF MAGISTRATE JUDGES

A. A Brief History of Magistrate Judges

United States magistrate judges disposed of 1,090,734 matters in 2015.[9] The Supreme Court recently remarked on the importance of non-Article III judges like magistrate judges stating, "it is no exaggeration to say that without the distinguished service of these judicial colleagues, the work of the federal court system would grind nearly to a halt."[10] The dependence on magistrate judges is nothing new. The Court noted in 1991 that magistrates[11] "account[ed] for a staggering volume of judicial work" when they presided over what now seems like a meager half-million judicial proceedings.[12]

But the judiciary's use of the magistrate judge dates back much further than that, all the way to 1793 when Congress provided authority for "discreet persons learned in the law" appointed by "any person having authority from a circuit court" to take bail for federal offenses.[13] In 1817, Congress first referred to these ministerial officials as commissioners,[14] and they soon came

Utah Oct. 13, 2015); Chaney v. United States, No. 15-0461-DRH, 2015 WL 5467628, at *1 (S.D. Ill. Sept. 17, 2015); United States v. Burgard, No. 10-CR-30085-DRH, 2014 WL 5293222, at *1 (S.D. Ill. Oct. 16, 2014).

8. *See, e.g.*, McCoy v. United States, 815 F.3d 292, 296 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 260 (2016); Washington v. United States, No. 14-933-DRH, 2015 WL 5568396, at *4 (S.D. Ill. Sept. 21, 2015).

9. Admin. Office of the U.S. Courts, *supra* note 2.

10. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1938–39 (2015).

11. The proper title for the office is now "magistrate judge." Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5089, 5117.

12. Peretz v. United States, 501 U.S. 923, 928–29 n.5 (1991) (citing Gov't of Virgin Is. v. Williams, 892 F.2d 305, 308 (3d Cir. 1989)).

13. Act of Mar. 2, 1793, ch. 22, § 4, 1 Stat. 333, 334 (1793).

14. Act of Mar. 1, 1817, ch. 30, 3 Stat. 350 (1817); United States v. Maresca, 266 F. 713, 720 (S.D.N.Y. 1920) ("[I]t was from this [discreet persons learned in the law] seed that 'commissioners' grew; the title was assumed, but was recognized by the act of 1817 (3 Stat. 350), which in enlarging the powers of the 'discreet persons' of 1793, speaks of the 'commissioners who now are or hereafter may be' appointed.").

to be known as circuit court commissioners.[15] Nearly eight decades later, in 1896, Congress replaced the office of circuit court commissioner with the United States commissioner, increased the office's duties, and made clear that United States commissioners were officers of the district courts, not the circuit courts.[16] The office of United States commissioner existed until Congress abolished it and established in its place the office of United States magistrate, by passage of the Federal Magistrates Act ("FMA") on October 17, 1968.[17] Subsequent amendments to the FMA steadily increased the authority of United States magistrates.[18] In 1990, Congress changed the title once again to its current title of United States magistrate judge to reflect the authority of the office.[19] Through its roots, then, the office of United States magistrate judge remains just four years younger than the federal judiciary itself and even predates the existence of Circuit Judges of the United States Courts of Appeal.[20]

B. The Authority of Magistrate Judges

The FMA promulgates specific acts that magistrate judges may perform. These authorities include the power to administer oaths and affirmations, issue orders concerning release or detention of defendants pending trial, and take affidavits and depositions.[21] Magistrate judges also have the power to enter sentence for class A misdemeanors with the parties' consent and the power to enter sentence for petty offenses even without consent.[22] They have the power to try persons accused of misdemeanors, provided the defendant expressly and specifically waives the right to trial and judgment by a district judge.[23] The FMA further vests magistrate judges with the authority to hear and rule on all but eight dispositive pretrial matters, to which a district judge is bound unless the ruling is "clearly erroneous or contrary to law."[24] The FMA also vests magistrate judges with the authority to conduct hearings and to submit to a

15. Charles A. Lindquist, *The Origin and Development of the United States Commissioner System*, 14 AM. J. LEGAL HIST. 1, 6 (1970).

16. Act of May 28, 1896, ch. 252, § 19, 29 Stat. 140, 184 (1896) ("[A]ll commissioners of the circuit courts heretofore appointed shall expire . . . and such office shall on that day cease to exist . . . . It shall be the duty of the district court of each judicial district to appoint such number of persons, to be known as United States commissioners.").

17. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968).

18. *See, e.g.*, Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729; Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549.

19. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5089, 5117.

20. Hon. Lisa Margaret Smith, *Top 10 Things You Probably Never Knew About Magistrate Judges*, FED. LAWYER, May/June 2014, at 36, 36.

21. 28 U.S.C. § 636(a)(2) (2012).

22. § 636(a)(4).

23. § 636(a)(3); 18 U.S.C. § 3401 (2012).

24. 28 U.S.C. § 636(b)(1)(A).

district judge their proposed findings of fact and recommendations for disposition, even for the eight matters on which the FMA prohibits them to rule directly.[25] Upon consent of the parties, magistrate judges may also conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment.[26] Through their delineated duties alone, magistrate judges wield significant judicial power. For example, a magistrate judge struck down Idaho's ban on same-sex marriage through the authority to hear and order the entry of judgment in civil cases.[27] The Supreme Court cited the case when it struck down similar bans on same-sex marriage.[28] Through the authority to issue warrants to search for and seize property, a magistrate judge from the Central District of California ordered Apple Inc. to provide "reasonable technical assistance" to law enforcement agents in obtaining access to data on an iPhone that belonged to the assailant in the 2015 San Bernardino terror attack.[29]

The FMA does not limit the authority of magistrate judges to the delineated powers alone. It also provides that magistrate judges may perform "such additional duties as are not inconsistent with the Constitution and laws of the United States."[30] The plain language of this section reads as a broad grant of authority.[31] However, what powers and duties the additional duties clause actually grants causes litigation. In 1989, the Supreme Court in *Gomez v. United States* ruled that conducting voir dire proceedings in felony cases was not an additional duty under the FMA.[32] The Court determined that "[a]ny additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties."[33] In other words,

25. § 636(b)(1)(B).

26. § 636(c)(1).

27. Latta v. Otter, 19 F. Supp. 3d 1054, 1059, 1076–77 (D. Idaho 2014) (Mag. J. Dale), *aff'd*, 771 F.3d 456 (9th Cir. 2014).

28. Obergefell v. Hodges, 135 S. Ct. 2584, 2609 (2015).

29. FED. R. CRIM. P. 41(b); *In re* the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203, No. 15-0451M, 2016 WL 618401, at *1 (C.D. Cal. Feb. 16, 2016) (Mag. J. Pym); Eric Lichtblau & Katie Benner, *Apple Fights Order to Unlock San Bernardino Gunman's iPhone*, N.Y. TIMES (Feb. 17, 2016), http://www.nytimes.com/2016/02/18/technology/apple-timothy-cook-fbi-san-bernardino.html?_r=0 [https://perma.cc.N79K-76EZ].

30. 28 U.S.C. § 636(b)(3).

31. H.R. REP. NO. 94-1609, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172 ("[§ 636(b)(3)] enables the district courts to continue innovative experimentations in the use of this judicial officer. At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates.").

32. 490 U.S. 858, 874 (1989).

33. *Id.* at 864.

the FMA created an office to which Congress assigned specific duties.[34] Those duties outline the attributes of the office.[35] The additional duties clause should be read in light of the structure and purpose of the FMA and only allow magistrate judges to perform similar duties.

However, just two years later, the Supreme Court ruled in *Peretz v. United States* that magistrate judges did have the authority to conduct voir dire proceedings in felony cases with the consent of the defendant.[36] While not overruling *Gomez*, the Court lessened its rigid interpretation of the additional duties clause stating that "[t]he generality of the category of 'additional duties' indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen."[37]

In *Gomez*, the principle of constitutional avoidance, the "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues," concerned the Court.[38] Before the Court would recognize an additional duty under the FMA that raised a substantial constitutional question, the Court wanted clear evidence that Congress actually intended to permit magistrate judges to take on that role.[39] But, in *Peretz*, the defendant affirmatively consented to the magistrate judge's supervision of voir dire, which "significantly" changed the constitutional analysis.[40] The defendant's consent removed the concern of wanting "unambiguous evidence" of Congress's intent to include presiding over voir dire as an additional duty under the act.[41] Because the action no longer raised constitutional questions, the Court "attach[ed] far less importance" to the lack of Congressional forethought on magistrate judges presiding over voir dire as an additional duty.[42] While the Court said it admittedly would be "reluctant . . . to construe the additional duties clause to include responsibilities of far greater importance than the specified duties assigned to magistrate[judges]," even then, the Court found a litigant's consent to the additional duty makes "the crucial difference."[43] The Court declared that its less rigid "reading of the 'additional duties' clause will permit the courts, with the litigants' consent, to 'continue innovative

34. *Id.*
35. *Id.*
36. Peretz v. United States, 501 U.S. 923, 933 (1991).
37. *Id.* at 932.
38. *Gomez*, 490 U.S. at 864.
39. *Peretz*, 501 U.S. at 930.
40. *Id.* at 932.
41. *Id.*
42. *Id.*
43. *Id.* at 933.

experimentations' in the use of magistrates to improve the efficient administration of the courts' dockets."[44]

II. *HARDEN* ON THE ACCEPTANCE OF FELONY GUILTY PLEAS

A. Felony Guilty Plea Proceedings

One of the varied ways in which district courts use magistrate judges to improve the efficient administration of the courts' dockets is in felony guilty plea proceedings. In 2015, magistrate judges completed 28,083 of these proceedings.[45] As the FMA intended, the way in which district courts use magistrate judges in felony guilty plea proceedings varies from district to district. All circuits authorize magistrate judges to conduct Rule 11(b) plea colloquies, that is, guilty pleas, with a defendant's consent.[46] In many districts, magistrate judges submit their proposed findings of fact and recommendations for disposition, also known as a report and recommendation, to a district judge.[47] The district judge then adopts the magistrate judge's report and recommendation and adjudicates the defendant guilty by entering the judgment.[48] In some districts, though, magistrate judges may accept felony guilty pleas without a report and recommendation.[49] That is, the magistrate judge may not only conduct the defendant's plea, but also accept it and enter the judgment of guilt. The United States Court of Appeals for the Fourth and Eleventh Circuits have found this practice lawful and constitutional.[50] Indeed, until *Harden*, every Circuit that had ruled on the issue found the practice to be both lawful and constitutional.[51] Splitting the circuits, the Seventh Circuit in

44. *Peretz*, 501 U.S. at 934.

45. Admin. Office of the U.S. Courts, *supra* note 2.

46. PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM 32 (2014), http://www.fedbar.org/PDFs/A-Guide-to-the-Federal-Magistrate-Judge-System.aspx?FT=.pdf [https://perma.cc87HZ-JT4N]; *see, e.g.*, United States v. Torres, 258 F.3d 791, 796 (8th Cir. 2001); United States v. Dees, 125 F.3d 261, 266 (5th Cir. 1997); United States v. Ciapponi, 77 F.3d 1247, 1250–52 (10th Cir. 1996); United States v. Williams, 23 F.3d 629, 634 (2d Cir. 1994).

47. *See* United States v. Harden, 758 F.3d 886, 891 (2014) (listing circuits where practice is prevalent among the districts).

48. *See* Brown v. United States, 748 F.3d 1045, 1071 n.53 (11th Cir. 2014) ("For although the magistrate judge purported to adjudge the defendant guilty, it was the district court that actually entered judgment. That is, the magistrate judge did not make the final adjudication of guilt.").

49. *See, e.g.*, M.D. Fla. R. 6.01(c)(12); W.D.N.C. Crim. R. 57.1(A)(9); U.S.D.C.L.Cr.R. 59.1(b)(3).

50. United States v. Benton, 523 F.3d 424, 431–32 (4th Cir. 2008); *Ciapponi*, 77 F.3d at 1251–52.

51. *Harden*, 758 F.3d at 891 n.1 (noting that the opinion "creates a split among circuits").

Harden held that magistrate judges lack the statutory authority to accept a felony guilty plea.[52]

B. Harden*'s Background*

A local rule of the United States District Court for the Southern District of Illinois allowed magistrate judges to accept felony guilty pleas with the consent of the parties.[53] Defendant Stacy Lee Harden affirmatively consented to plead guilty before a magistrate judge on felony charges of possession with the intent to distribute cocaine.[54] The magistrate judge asked Harden before taking his plea, "You understand that by signing this waiver and consent, if I accept your plea today you don't have any right to later come back and complain that your plea wasn't taken by [the district court judge]?"[55] "Yes, sir," Harden answered.[56] Later, a district court judge held a sentencing hearing and sentenced Harden.[57] Afterwards, Harden appealed his guilty plea and asserted that the magistrate judge's acceptance of the plea violated the FMA and the Constitution.[58] On appeal, the Seventh Circuit held that the FMA did not authorize magistrate judges to accept guilty pleas in felony cases.[59] As it said, "[i]n accepting Harden's guilty plea, even with his consent, the magistrate judge violated the Federal Magistrates Act."[60] Accordingly, the court did not reach Harden's constitutional claim but reversed the district court on statutory grounds and vacated Harden's plea.[61]

C. Harden*'s Logic*

In reaching its conclusion, the court noted that the delineated duties of the FMA do not provide magistrate judges with the authority to accept felony guilty pleas.[62] To determine whether or not magistrate judges possessed the authority, the court looked to the additional duties clause of the FMA to examine if the action compared to the responsibility and importance of the FMA's enumerated powers.[63] The court concluded that the acceptance of

52. *Id.* at 891.
53. *Id.* at 887.
54. *Id.*
55. *Id.* (alteration in original).
56. *Harden*, 758 F.3d at 887.
57. *Id.*
58. *Id.*
59. *Id.* at 888.
60. *Id.* at 889.
61. *Harden*, 758 F.3d at 891.
62. *Id.* at 888.
63. *Id.*

felony guilty pleas was too important to be considered a mere additional duty, and, therefore, the FMA did not authorize magistrate judges to accept them.[64]

Harden's logic was simple. It noted that the FMA does not permit magistrate judges to conduct felony trials.[65] According to *Harden*, once a judge accepts a defendant's guilty plea, "the prosecution is at the same stage as if a jury had just returned a verdict of guilty after a trial" because each "results in a final and consequential shift in the defendant's status."[66] The acceptance of a felony guilty plea, therefore, is "quite similar in importance to the conducting of a felony trial."[67] Because a magistrate judge cannot conduct a felony trial, and felony guilty pleas are of similar importance, it concluded that magistrate judges may not accept felony guilty pleas.[68] *Harden*'s logic is valid but not sound.

D. Harden*'s Flawed Premise*

As *Harden* noted, the FMA does not specifically list the power to accept felony guilty pleas among the tasks magistrate judges may perform. But magistrate judges may perform additional duties as are not inconsistent with the Constitution and laws of the United States.[69] The Supreme Court has noted that an additional duty "reasonably should bear some relation to the specified duties" or be "comparable in responsibility and importance" to a specified duty to be considered proper.[70] The crucial point on which *Harden* relied was that the FMA does not authorize magistrate judges to conduct felony criminal trials.[71] *Harden* maintained that the acceptance of a felony guilty plea places the prosecution at the same stage as a verdict of guilty in a trial, which somehow makes the acceptance of a felony guilty plea comparable in responsibility and importance to conducting an entire felony trial.[72] It further noted that, because many guilty pleas are commensurate with plea bargains forbidding collateral attack and appeal, that for a defendant, "accepting a guilty

64. *Id.*

65. *Id.* at 889. Indeed, this is true. Gomez v. United States, 490 U.S. 858, 872 (1989) ("[T]he 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.")

66. *Harden*, 758 F.3d at 889.

67. *Id.*

68. *Id.*

69. 28 U.S.C. § 636(b)(3) (2012).

70. *Gomez*, 490 U.S. at 864; Peretz v. United States, 501 U.S. 923, 933 (1991).

71. *Harden*, 758 F.3d at 889.

72. *Id.* Of note, magistrate judges may accept a jury's verdict in a felony criminal case. United States v. Johnson, 962 F.2d 1308, 1312 (8th Cir. 1992). Magistrate judges may even poll the jury in a felony case with consent of the parties. United States v. Gomez-Lepe, 207 F.3d 623, 631–32 (9th Cir. 2000).

plea is even more final than a guilty verdict."[73] Regardless of whether placing the prosecution at the same stage qualifies two tasks as equal in importance, it is simply incorrect to say that the acceptance of a guilty plea is "more final" than a guilty verdict.

Under Federal Rule of Criminal Procedure 11, a defendant may withdraw a plea of guilty after the court accepts the plea but before it imposes sentence if "the defendant can show a fair and just reason for requesting the withdrawal."[74] Rule 29, though, governs the permanence of a guilty verdict.[75] It provides only one way to withdraw a guilty verdict: a motion for judgment of acquittal.[76] A court may grant a judgment of acquittal only if "the evidence is insufficient to sustain a conviction," that is, only if no "rational jury could have returned a guilty verdict."[77] Juxtapose the standards of Rule 11 and Rule 29. When defendants plead guilty, they may withdraw the plea for any "fair and just reason."[78] When a jury finds a defendant guilty, a defendant may have the conviction withdrawn only if no rational jury could have returned a guilty verdict.[79] This alone demonstrates that *Harden*'s premise was incorrect or, at least, imprecise.

Getting more specific, if any judge erred in the long, searching Rule 11 colloquy during a guilty plea proceeding, a defendant may later withdraw the guilty plea. As the Seventh Circuit recently put it, "[a] guilty plea taken without attention being given to the matters set forth in Rule 11 could constitute a 'fair and just' reason justifying the request for withdrawal of a plea, and the denial of a motion to withdraw under such a circumstance would be an abuse of discretion."[80] Put another way, if the very thing *Harden* fears may happen happened, Rule 11 entitles the defendant to withdraw the plea.

Even so, the court stated that the acceptance of a felony guilty plea "results in a final and consequential shift in the defendant's status. *For this reason*, the acceptance of the guilty plea is quite similar in importance to the conducting of a felony trial."[81] *Harden* was premised on this mistaken belief that a magistrate judge's acceptance of a plea is final, which makes it "equal in importance to a felony trial leading to a verdict of guilty."[82] With this analysis, *Harden* deflated the importance of a felony trial, full of numerous discretionary tasks, and inflated the importance of accepting a felony guilty plea, thereby skewing

73. *Harden*, 758 F.3d at 888.
74. FED. R. CRIM. P. 11(d)(2)(B).
75. FED. R. CRIM. P. 29(c)(2).
76. *Id.*
77. United States v. Hausmann, 345 F.3d 952, 955 (7th Cir. 2003).
78. FED. R. CRIM. P. 11(d)(2)(B).
79. *Hausmann*, 345 F.3d at 955.
80. United States v. Fard, 775 F.3d 939, 943–44 (7th Cir. 2015).
81. United States v. Harden, 758 F.3d 886, 889 (2014) (emphasis added).
82. *Id.* at 891.

its analysis under *Peretz*. In this way, *Harden* went against established Supreme Court precedent on what a court should and should not construe as an additional duty of the FMA.

E. Harden*'s Misapplication of Precedent*

Prior to *Peretz*, in *Gomez*, the Supreme Court found that any additional duty a magistrate judge may perform must bear some resemblance to the duties the FMA specifically lists.[83] In *Gomez*, because it could not find a resemblance of a magistrate judge's supervision of voir dire in a felony case to any listed duties in the FMA, it found the practice unlawful.[84] Just two years later, in *Peretz*, the Court upheld the practice of a magistrate judge's supervision of voir dire because the defendant affirmatively consented to the magistrate judge's involvement.[85] The Court explained its apparent about-face noting that the defendant's consent to the magistrate judge's involvement in *Peretz* "significantly" changed the constitutional analysis.[86] The Court asserted that, when the defendant consents, it is of "far less importance" that Congress may not have focused on the particular task as a possible additional duty for magistrate judges.[87] The Court went so far as to say that even in cases where the additional duty was of "far greater importance" than other tasks the FMA authorizes, the defendant's consent makes "the crucial difference."[88] The additional duties clause gives "significant leeway" to the courts.[89] Likewise, the Court wanted its reading of the additional duties clause to "permit the courts, with the litigants' consent, to 'continue innovative experimentations' in the use of magistrates to improve the efficient administration of the courts' dockets."[90]

The Seventh Circuit in *Harden* did not follow *Peretz*'s standard. While it used the basic framework of comparative importance, it disregarded the Court's analysis. *Harden* stated that the acceptance of a felony guilty plea "is more important than the supervision of a civil or misdemeanor trial, or presiding over *voir dire*. Because of this importance, the additional duties clause cannot be stretched to reach acceptance of felony guilty pleas, even with a defendant's consent."[91] But *Peretz* made clear that when determining whether or not something is an additional duty under the FMA, the defendant's

83. Gomez v. United States, 490 U.S. 858, 864 (1989).
84. *Id.* at 875–76.
85. Peretz v. United States, 501 U.S. 923, 933 (1991).
86. *Id.* at 932.
87. *Id.*
88. *Id.* at 933.
89. *Id.* at 932.
90. *Peretz*, 501 U.S. at 934.
91. United States v. Harden, 758 F.3d 886, 888 (2014).

consent makes "the crucial difference."[92] It makes the crucial difference even when the duty is of "*far greater* importance" than the FMA's enumerated duties.[93] *Harden* concluded that taking a felony guilty plea was "more important" than the listed duties, a seemingly lesser standard than "far greater importance."[94] Where the Supreme Court is willing to allow magistrate judges to complete tasks of far greater importance, the Seventh Circuit refused to allow a magistrate judge to complete a task that it deemed "more important."

This combined with the fact that *Harden*'s determination that accepting a felony guilty plea and entering a judgment of guilt was "more important" than voir dire or other permissible duties is itself flawed. *Harden* failed to provide a satisfactory reason why a felony guilty plea is of far greater importance—or even simply more important—than presiding over the jury selection in a felony trial. Its only reason was that "[u]nlike the preliminary nature of *voir dire* . . . the acceptance of a guilty plea is dispositive."[95] Yet, as established, a defendant may withdraw a guilty plea.[96] The court's flawed conclusion, then, cannot account for finding that accepting and entering the plea of a defendant who admits guilt and consents to a magistrate judge's participation is of far greater importance than overseeing the selection of a jury—a group of individuals who will decide a contested case of guilt.

Since *Harden*, the Supreme Court again has emphasized how significant consent is in quieting Article III concerns.[97] In *Wellness International Network v. Sharif*, the Court decided that with consent of the litigants, a non-Article III bankruptcy judge may adjudicate *Stern* claims.[98] In deciding that bankruptcy judges indeed could adjudicate the claims with consent, the Court relied heavily on comparisons to magistrate judges.

> Bankruptcy judges, like magistrate judges, are appointed and subject to removal by Article III judges. They serve as judicial officers of the United States district court, and collectively constitute a unit of the district court for that district. Just as the ultimate decision whether to invoke a magistrate judge's assistance is made by the district court, bankruptcy courts hear matters solely on a district court's reference, which the district court may withdraw sua sponte or at the request of a party. Separation of powers concerns are

92. *Peretz*, 501 U.S. at 933.

93. *Id.* (emphasis added).

94. *Harden*, 758 F.3d at 888.

95. *Id.* at 889.

96. FED. R. CRIM. P. 11(d).

97. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944–45 (2015). Of note, *Wellness* overruled a Seventh Circuit opinion. *Id.* at 1949; Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013). Judge Daniel Tinder authored the Seventh Circuit's decisions in both *Wellness* and *Harden*. *Wellness*, 727 F.3d at 754; *Harden*, 758 F.3d at 887.

98. *Wellness*, 135 S. Ct. at 1944–45; *see also* Stern v. Marshall, 131 S. Ct. 2594, 2600–01 (2011).

> diminished when, as here, the decision to invoke a non-Article III forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction remains in place.[99]

In the wake of *Wellness*, consent lessens the constitutional issues in allowing magistrate judges to accept and enter guilty pleas from defendants who affirmatively consent.[100] *Wellness* places the acceptance of felony guilty pleas with consent squarely under the Court's conclusion in *Peretz*, "absent concerns about raising a constitutional issue or depriving a defendant of an important right, we should not foreclose constructive experiments that are acceptable to all participants in the trial process and are consistent with the basic purposes of the statute."[101]

F. Harden*'s Inconsistency*

Harden described acceptance of a felony guilty plea as a task "too important" to be considered an additional duty.[102] Accepting a guilty plea, especially in a felony matter, is an important and serious undertaking. As *Harden* observed, the Supreme Court has stated that a guilty plea is "more than an admission of past conduct: it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or judge."[103] Federal Rule of Criminal Procedure 11 promulgates a specific formula to ensure the court has the defendant's consent that judgment of conviction may be entered without a trial.[104] Rule 11 instructs the court that it "must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands" fifteen different subparagraphs.[105] Among what the court *must* inform the defendant is the right to plead not guilty, the right to a jury trial, the right to be represented by counsel, and the nature of each charge to which the defendant is pleading.[106] *Harden* acknowledged, as it must, that asking the defendant the list of questions is "not hard."[107] Other courts similarly have noted that a Rule 11 colloquy is not difficult but rather "a highly structured

99. *Wellness*, 135 S. Ct. at 1944–45 (internal quotations and citations omitted).

100. In *Gonzalez v. United States*, the Court noted that "[c]onsent from an attorney will suffice" in allowing a magistrate judge to preside over jury examination and jury selection. 553 U.S. 242, 253 (2008). This principle also demonstrates how far consent goes in alleviating constitutional concerns.

101. Peretz v. United States, 501 U.S. 923, 933 (1991).

102. *Harden*, 758 F.3d at 888.

103. *Id.* (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

104. FED. R. CRIM. P. 11(b)(1).

105. FED. R. CRIM. P. 11(b)(1)(A–O).

106. FED. R. CRIM. P. 11(b)(1)(B–D, G).

107. *Harden*, 758 F.3d at 889.

event that follows a familiar script."[108] *Harden* emphasized that a defendant's answers to the Rule 11 questions "are critical to ensuring that a guilty plea is valid."[109]

Though the court emphasized the importance of the questions and the critical answers, with *Harden*, the Seventh Circuit forgot the more practical, lenient view it has taken to guilty plea proceedings. In *United States v. Vazquez-Ortero*, for example, the defendant entered a plea of guilty after the required Rule 11 plea colloquy.[110] But the district judge failed to perform the plea colloquy properly.[111] At no time during the plea proceeding did the district judge inform the defendant of two basic rights.[112] The district judge failed to inform the defendant of his right to plead not guilty and persist in that plea and his right to counsel—two rights that the district judge "must inform the defendant" and determine that the defendant understands.[113] Though the colloquy failed to inform the defendant of his constitutional rights, as Rule 11 requires, the Seventh Circuit upheld the plea anyway.[114] The court boldly asserted that the defendant "obviously knew about his right to counsel because a retained lawyer was with him during the colloquy, and since the very purpose of the colloquy was to change his plea from not guilty to guilty, he also knew that pleading guilty was optional."[115]

This ad hoc reasoning violates the text of Rule 11 and the questions *Harden* held so dear. The text of Rule 11 is unambiguous: "the court must inform the defendant."[116] It specifically foresaw individuals who, having originally pleaded not-guilty, wished to change their plea. It requires judges to inform defendants of their "right to plead not guilty, *or having already so pleaded, to persist in that plea*."[117] That language would have no purpose if the court can simply presume that a defendant who previously pleaded not-guilty knows that pleading guilty is optional. So, while Rule 11 plea colloquies are—or at least should be considered—important, the Seventh Circuit has upheld

108. United States v. Reyna-Tapia, 328 F.3d 1114, 1120 (9th Cir. 2003) (en banc) (finding "Rule 11 proceedings, although of undeniable importance, are considerably less complex" than other tasks magistrate judges may perform).

109. *Harden*, 758 F.3d at 889.

110. 285 F. App'x 281, 283 (7th Cir. 2008). Though *Vazquez-Ortero* is an unpublished opinion, the way the court applied Rule 11 to Vazquez-Ortero himself was no less contradictory. Further, the Seventh Circuit recently has cited approvingly to the case in a published opinion. *See* United States v. Collins, 796 F.3d 829, 834 (7th Cir. 2015) ("Those claims mirror the facts in *U.S. v. Vazquez-Ortero*, a case we find persuasive here.").

111. *Vazquez-Ortero*, 285 F. App'x at 283.

112. *Id.*

113. *Id.*; FED. R. CRIM. P. 11(b)(1)(B, D).

114. *Vazquez-Ortero*, 285 F. App'x at 283.

115. *Id.* (emphasis omitted).

116. FED. R. CRIM. P. 11(b)(1).

117. FED. R. CRIM. P. 11(b)(1)(B) (emphasis added).

pleas where the district judge violated Rule 11. It has upheld these pleas even though it believes a change of plea to be "more than an admission of past conduct: it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or judge."[118]

Further, while *Harden* found a magistrate judge lawfully cannot enter a guilty plea, it found magistrate judges still could have an integral part in felony guilty plea proceedings.[119] *Harden* noted that widespread agreement exists that a magistrate judge may conduct a Rule 11 colloquy for the purpose of making a report and recommendation.[120] *Harden* agreed that this is a "permissible practice."[121] But that conclusion undermines the previous reverence the opinion had for Rule 11 plea colloquies. The Seventh Circuit elsewhere has noted that at a plea hearing, it is the "district judge who observes a defendant's appearance, demeanor, and tone of voice."[122] But this does not occur when a magistrate judge conducts the plea and issues a report and recommendation because the district judge is not present. In a report and recommendation, the district judge cannot observe the defendant's appearance, demeanor, or tone of voice during the colloquy. The district judge instead must rely entirely on the judgment of the magistrate judge's observation and the hearing's transcript.[123] Whether a magistrate judge enters a judgment of guilt or merely issues a report and recommendation, the district judge does not observe the defendant. Yet the former is unlawful, the latter permissible.

Allowing one and disavowing the other is even more confounding because a district judge's review of a report and recommendation in a felony guilty plea rarely even occurs.[124] The FMA provides that "[a] judge of the court shall make a de novo determination of those portions of the report or specified

118. United States v. Harden, 758 F.3d 886, 888 (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

119. *Id.* at 891.

120. *Id.*

121. *Id.*

122. United States v. Collins, 796 F.3d 829, 834 (7th Cir. 2015).

123. In discussing a court's review of a magistrate judge's actions in voir dire, the Supreme Court "harbor[ed] serious doubts that a district judge could review this function meaningfully." United States v. Gomez, 490 U.S. 858, 874 (1989). Like with voir dire, in plea proceedings, judges must observe "not only spoken words but also gestures and attitudes," which "no transcript can recapture" for a reviewing judge. *Id.* at 875. *Harden* trusted magistrate judges to give competent and impartial performance to act as the sole observer of a defendant's demeanor during a guilty plea. *Harden*, 758 F.3d at 891. But, it prohibited them from actually being the one to adjudicate defendants guilty because that would be "too important." *Id.* at 888.

124. MCCABE, *supra* note 46, at 32 ("[E]xperience has shown that in the districts where Magistrate Judges conduct Rule 11 guilty-plea proceedings with consent, the parties rarely object to the resulting reports and recommendations, and *de novo* review by a District Judge is not necessary.").

proposed findings or recommendations *to which objection is made*."[125] If a defendant does not object within fourteen days of the magistrate judge's report and recommendation, the district court will accept it and enter a judgment of guilt.[126] This lack of reevaluation demonstrates why report and recommendations in cases of felony guilty pleas are unusual and counterintuitive.

The FMA provides that a "magistrate judge shall file his proposed findings and recommendations" with the court and then "[w]ithin fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations . . . ."[127] In most instances of a report and recommendation, there is an aggrieved party who will want to object. Put simply, someone will have lost. Imagine that a magistrate judge made an evidentiary ruling finding a certain piece of evidence admissible. The party who had objected to the evidence's admission would object to the magistrate judge's findings and require the district judge to review and rule on the report and recommendation. Therefore, the adversarial system provides a check on magistrate judges because parties frequently make objections that district judges must review. But in the case of a felony guilty plea, a defendant is pleading guilty willfully and voluntarily. It remains unlikely that a defendant will later object to any of the findings when the defendant consented to plead guilty and admitted to the criminal conduct in open court.[128] Reports and recommendations also offer defendants no added protection from faulty plea proceedings because were a plea proceeding to be conducted improperly, a defendant could withdraw the plea under Rule 11, the report and recommendation notwithstanding.[129]

Even if a defendant were to enter a guilty plea before a magistrate judge and object to the report and recommendation, the review offers little. The objection would require the district judge to make a de novo determination.[130] But the district judge was not present at the change of plea hearing and therefore has only the transcript and the recommendation to make the determination. The transcript or audio would show whether the magistrate judge asked every question and admonished the defendant as Rule 11 requires. The answers a defendant gives to the questions themselves are "presumed to be

125. 28 U.S.C. § 636(b)(1) (2012) (emphasis added).

126. *Id.*

127. *Id*.

128. MCCABE, *supra* note 46, at 32.

129. *See* United States v. Fard, 775 F.3d 939, 943–44 (7th Cir. 2015).

130. The district judge need not hold a new hearing but must make only a de novo determination. *See* United States v. Raddatz, 447 U.S. 663, 675–76 (1980).

true."[131] So, if the magistrate judge asked every question and the defendant answered accordingly, the district judge would have no reason not to adopt the report and recommendation and would enter a judgment of guilt. The only issue, then, would be whether the magistrate judge followed Rule 11's procedure, and *Harden* itself noted that "[t]he questions are not hard to ask."[132] And, again, if the magistrate judge failed to ask the required questions, the defendant could have withdrawn the plea under Rule 11.[133]

G. Harden*'s Aftermath*

After *Harden*, defendants from the Seventh Circuit and circuits across the country have attempted to collaterally attack their sentences arguing that the magistrate judge lacked authority to adjudicate them guilty.[134] Even in circuits where the Court of Appeals has held the practice both legal and constitutional, collateral attacks have emerged.[135] In 2008, the United States Court of Appeals for the Fourth Circuit held in *United States v. Benton* that the FMA allows magistrate judges to accept felony guilty pleas with consent.[136] Even so, prisoners from the Fourth Circuit have attempted to collaterally attack their sentences relying on *Harden*.[137] The Fourth Circuit noted that it would not depart from its ruling in *Benton* even in light of *Harden*.[138] While *Harden* does

131. United States v. Chavers, 515 F.3d 722, 724 (7th Cir. 2008); *see also* United States v. Collins, 796 F.3d 829, 834 (7th Cir. 2015) (noting every representation a defendant makes at guilty plea is entitled to a "presumption of verity").

132. United States v. Harden, 758 F.3d 886, 889 (2014); *see also* United States v. Osborne, 345 F.3d 281, 286 (4th Cir. 2003) (finding Rule 11 colloquy "is less complex, and involves less discretion, than the duties the [FMA] expressly authorizes a magistrate judge to perform."); United States v. Williams, 23 F.3d 629, 632 (2d Cir. 1994) ("The catechism administered to a defendant is now a standard one, dictated in large measure by the comprehensive provisions of Rule 11 itself, which carefully explain what a court must inquire about, what it should advise a defendant and what it should determine before accepting a plea.").

133. *See Fard*, 775 F.3d at 943–44.

134. *See, e.g.*, Chaney v. United States, No. 15-0461-DRH, 2015 WL 5467628, at *1 (S.D. Ill. Sept. 17, 2015); United States v. Burgard, No. 10-CR-30085-DRH, 2014 WL 5293222, at *1 (S.D. Ill. Oct. 16, 2014).

135. *See, e.g.*, United States v. Ross, 602 F. App'x 113, 114 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 794 (2016); Coe v. Snyder-Norris, No. CV 16-60-HRW, 2016 WL 3197130, at *3 (E.D. Ky. June 6, 2016); Carlucci v. United States, No. 2:14-CV-924, 2015 WL 5944071, at *1 (D. Utah Oct. 13, 2015).

136. 523 F.3d 424, 432 (4th Cir. 2008).

137. *Ross*, 602 F. App'x at 115.

138. United States v. Farmer, 599 F. App'x 525, 526 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 794 (2016) ("Regardless of the Seventh Circuit's contrary decision in *Harden*, we are bound by *Benton.*"); *see also Ross*, 602 F. App'x at 115 n.* ("We imply no disapproval of *Benton.* Indeed, in *Peretz*, the Supreme Court held that when enumerated and unenumerated duties of magistrate judges are similar in level of responsibility and importance, the defendant's consent and the district court's supervision cure any constitutional concerns about a magistrate judge's actions.").

not bind other circuits, it is binding in the Seventh Circuit, despite its flaws. That raises the question, what remedies do defendants have who had magistrate judges wrongfully enter their guilt?

III. SEEKING A REMEDY

A. The Court's Initial Dodge

Among the defendants in the Seventh Circuit to challenge a pre-*Harden* guilty plea accepted by a magistrate judge was Christopher McCoy. A grand jury had indicted McCoy with five felony charges, and in September 2011, McCoy consented to have a magistrate judge conduct and accept his guilty plea on all five counts.[139] Pursuant to Local Rule 72.1(b)(2) for the Southern District of Illinois, United States Magistrate Judge Donald G. Wilkerson conducted and accepted McCoy's guilty plea.[140] McCoy's crimes and their underlying conduct are exceedingly disturbing.[141] For them, District Court Judge David R. Herndon sentenced McCoy to 327 months' imprisonment, at the top of the guidelines range, with a lifetime term of supervised release to follow.[142] McCoy filed a direct appeal from his sentence that argued it was unreasonable and that the district court unreasonably weighed the sentencing factors.[143] The Seventh Circuit rejected his arguments and affirmed his sentence.[144]

McCoy attempted to collaterally attack his sentence by filing a *pro se* motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255.[145] He argued that he received ineffective assistance of counsel and that an insufficient factual basis existed to support guilt on one of his five counts.[146] The district court appointed McCoy counsel, and on March 25, 2014, McCoy filed an amended § 2255 motion that raised three common grounds.[147] Unrelated to McCoy's case at the time, on July 14, 2014, the Seventh Circuit issued its opinion in *Harden* and found Local Rule 72.1(b)(2) violated the FMA because magistrate judges lacked the statutory authority to adjudicate felony guilt.[148] On July 31, 2014, the district court denied all three grounds of McCoy's § 2255 motion and later declined to issue McCoy a certificate of

139. McCoy v. United States, 815 F.3d 292, 293–94 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 260 (2016).

140. S.D. Ill. R. 72.1(b)(2); *McCoy*, 815 F.3d at 294.

141. *See* United States v. McCoy, 493 F. App'x 767, 768 (7th Cir. 2012).

142. *Id.* at 770.

143. *Id.* at 768.

144. *Id.*

145. *McCoy*, 815 F.3d at 294.

146. *Id.*

147. *Id.*

148. United States v. Harden, 758 F.3d 886, 891 (2014).

appealability.[149] Then, on October 14, 2014, McCoy filed a motion with the Seventh Circuit to vacate his § 2255 appeal for lack of subject matter jurisdiction based on *Harden*.[150] The Seventh Circuit construed the motion as an application for certificate of appealability, issued an order granting McCoy's certificate of appealability, and on its own motion recruited counsel to brief two issues: (1) did McCoy default any claim regarding the acceptance of his pleas by a magistrate judge? (2) if the claim is not defaulted, is McCoy entitled to any relief, and if so, what is the appropriate remedy?[151]

McCoy argued that he did not default on the claim because he could show cause for and prejudice from his failure to raise the *Harden* issue on his direct appeal or earlier in the § 2255 proceedings.[152] He maintained that he had cause for failing to raise the *Harden* issue earlier because the *Harden* decision did not yet exist, and that the magistrate judge's acceptance of his felony guilty plea was a structural error that required no showing of prejudice.[153] In its opinion, the Seventh Circuit determined that McCoy failed the first prong; he failed to show cause.[154] The court noted that *Harden* came out "a full two weeks" before the hearing in the district court on McCoy's § 2255 motion.[155] *Harden*, then, would have been fully available to McCoy to amend his § 2255 motion by the time of the July 31, 2014 hearing. The Seventh Circuit noted that an "appellant cannot raise for the first time on appeal a claim not presented to the district court in the § 2255 proceedings below."[156] While the Seventh Circuit seems not to have hesitated to issue *Harden*'s circuit splitting decree that magistrate judges lack the statutory authority to perform the "vital task" of adjudicating guilt,[157] it gives pause when dealing with *Harden*'s implications.

B. A Judgment Invalid as a Matter of Federal Law

In *Harden*, the court held that magistrate judges lack the statutory ability to accept a felony guilty plea.[158] If no statute provided them with the authority to

149. *McCoy*, 815 F.3d at 294.

150. *Id.*

151. *Id.*

152. *Id.* at 294–95.

153. *Id.* at 295.

154. *McCoy*, 815 F.3d at 296.

155. *Id.*

156. *Id.* at 295. Although the court states this principle, the case it cites for the proposition actually states, "[h]e failed to raise this issue in his § 2255 motion before the district court, and it is therefore waived *absent plain error*." Pierce v. United States, 976 F.2d 369, 371 (7th Cir. 1992) (emphasis added).

157. United States v. Harden, 758 F.3d 886, 891 (7th Cir. 2014). No judge voted to hear the case en banc. *Id.* at 891 n.1.

158. *Id.* at 891 ("[T]he magistrate judge's acceptance of Harden's guilty plea violated the Federal Magistrates Act . . . . ").

adjudicate a defendant guilty of a felony, "the decree[s] in which [they] took part w[ere] unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error, or certiorari."[159] Practical and procedural hurtles aside, defendants who "pleaded guilty" to magistrate judges must have a remedy.[160]

The Supreme Court has made clear that some errors are structural in nature, "requir[ing] automatic reversal."[161] Circumstances "in which federal judges or tribunals lack[] statutory authority to adjudicate the controversy" amount to structural error.[162] When this structural error happens, the resulting judgments are "invalid as a matter of federal law."[163] The Seventh Circuit in *Harden* plainly stated that the FMA "simply does not authorize a magistrate judge to accept a felony guilty plea," meaning magistrate judges lack the statutory authority to adjudicate defendants guilty.[164] This statement morphs easily into the Supreme Court's own words discussing structural error, "federal [magistrate] judges . . . lacked statutory authority to adjudicate the controversy. We have held the resulting judgment in such cases invalid as a matter of federal law."[165]

The situation here bears a strong analytical similarity to *Nguyen v. United States*, another case where the Supreme Court found a judgment invalid as a matter of federal law.[166] There, the United States Court of Appeals for the Ninth Circuit sat in the Northern Mariana Islands during a special session.[167] The panel consisted of two Ninth Circuit judges and the Chief Judge of the District for the Northern Mariana Islands sitting by designation.[168] Federal law allows a district judge to sit upon the Court of Appeals by designation.[169] The process is not uncommon.[170] The issue in *Nguyen* was that judges of the

159. *See* Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co., 148 U.S. 372, 387 (1893) (emphasis omitted).

160. *See* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.").

161. Rivera v. Illinois, 556 U.S. 148, 160 (2009) (quoting Washington v. Recuenco, 548 U.S. 212, 218–19 (2006)) (alteration in original).

162. *Id.* at 161.

163. *Id.*

164. United States v. Harden, 758 F.3d 886, 891 (7th Cir. 2014).

165. *See Rivera*, 556 U.S. at 161.

166. 539 U.S. 69, 81 (2003).

167. *Id.* at 73.

168. *Id.* at 72.

169. 28 U.S.C. § 292(a) (2012).

170. For instance, a federal district judge sitting by designation authored the opinion in *McCoy* and was on the panel that decided *Harden*. McCoy v. United States, 815 F.3d 292, 293

District for the Northern Mariana Islands are not Article III district judges but Article IV territorial court judges.[171] Territorial court judges, like magistrate judges, are not appointed through the Article III process and do not enjoy any of Article III's protections.[172] The Ninth Circuit's panel therefore consisted of two Article III judges and one non-Article III judge.[173] In the Ninth Circuit's decision, all three judges agreed on the merits of the case and affirmed without dissent.[174] In a regular panel hearing, only two judges need to agree to decide the case. Ignoring the non-Article III judge who sat on the panel, two Article III judges still heard the case and ruled on its merits. Nevertheless, the Supreme Court reversed.[175]

In urging the Court to uphold the Ninth Circuit's decision, the government pointed out that neither party objected to the panel's makeup or petitioned for rehearing.[176] The government asserted that this "failure to challenge the panel's composition at the earliest practicable moment completely foreclose[d] relief in [the] Court."[177] But because the error in the case involved a violation of a statutory provision that "embodi[ed] a strong policy concerning the proper administration of judicial business," the Court invalidated the judgment of the Court of Appeals without even assessing prejudice or the parties' failure to object.[178]

> [T]o ignore the violation of the statute in these cases would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld. Even if the parties had expressly stipulated to the participation of a non-Article III judge in the consideration of their appeals, no matter how distinguished and well qualified the judge might be, such a stipulation would not have cured the plain defect in the composition of the panel.[179]

Like *Nguyen*, cases where magistrate judges purported to adjudicate defendants guilty involve a violation of a statutory provision that concerns the proper administration of judicial business. It would cast doubt on the administration of justice if the Seventh Circuit recognized judgments of guilt accepted by judicial officers that it has found lack the statutory authority to do so. Regardless of when the defendants pleaded guilty to magistrate judges,

n.* (7th Cir. 2016), *cert. denied*, 137 S. Ct. 260 (2016); United States v. Harden, 758 F.3d 886, 887 n.* (7th Cir. 2014).

171. *Nguyen*, 539 U.S. at 73–74.
172. *Id.* at 73.
173. *Id.* at 72.
174. *Id.* at 73.
175. *Id.* at 83.
176. *Nguyen*, 539 U.S. at 77.
177. *Id.*
178. *Id.* at 81.
179. *Id.* at 80–81.

prohibiting them from now withdrawing the pleas "would incorrectly suggest that some action (or inaction) on [their] part could create authority Congress has quite carefully withheld."[180]

The United States Court of Appeals for the Fourth Circuit came to a similar conclusion in *United States v. Jackson*.[181] There, the defendant pleaded guilty in the Western District of Virginia to one count of drug conspiracy.[182] At the same time, a grand jury in the Western District of Pennsylvania indicted him with one count of being a felon in possession of a weapon.[183] The District Court for the Western District of Pennsylvania transferred its indictment to the Western District of Virginia, as Federal Rule of Criminal Procedure 20 allows.[184] Through oversight, the District Court for the Western District of Virginia ultimately sentenced the defendant to 262 months' imprisonment on the drug conspiracy count and to a concurrent term of 180 months' imprisonment on the felon-in-possession, Pennsylvania count.[185] The defendant, though, never pleaded guilty to the felon-in-possession count transferred from the Western District of Pennsylvania.[186] Though he failed to object to the entry of a judgment of conviction on the felon-in-possession count, the Fourth Circuit still vacated the judgment noting that, "the entry of a judgment reflecting that [the defendant] was convicted of a crime for which he neither pleaded guilty nor received a jury trial was error that was plain, and that affected his substantial rights."[187]

No one adjudicated McCoy and similarly-situated defendants within the Seventh Circuit guilty. Because *Harden* found magistrate judges lack the statutory authority to accept and adjudicate felony guilt, the entrance of these defendant's guilt was void from its inception. These individuals should be allowed to withdraw their pleas, but that wording fails to encapsulate the more nuanced issue. No actual plea exists to withdraw. If the FMA never authorized magistrate judges to adjudicate defendants guilty, then the plea never truly existed in the first place. Nevertheless, the court still entered a judgment of

180. *See id.* at 80.

181. 200 F. App'x 191, 192 (4th Cir. 2006).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Jackson*, 200 F. App'x at 192.

187. *Id.* Recall that the Seventh Circuit declined to grant McCoy relief because he had procedurally defaulted on his § 2255 motion. McCoy v. United States, 815 F.3d 292, 296 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 260 (2016). Yet, the Seventh Circuit has held that failing to raise an issue in a § 2255 motion before the district court is waived *absent plain error*. *See* Pierce v. United States, 976 F.2d 369, 371 (7th Cir. 1992). Here, the Fourth Circuit specifically found that it was plain error to enter a judgment that the defendant was convicted of a crime to which he never pleaded guilty. *Jackson*, 200 F. App'x at 192.

guilt and sentenced the defendants. The question after *McCoy* is how do defendants obtain that remedy?

C. Writ of Habeas Corpus and § 2255

The members of the Constitutional Convention included the writ of habeas corpus within the country's founding document.[188] The privilege of the writ still exists today and affords prisoners the right to collaterally attack their convictions, sentences, and imprisonment.[189] Congress provided a statutory conduit by which prisoners may avail themselves of the writ—28 U.S.C. § 2255.[190] Section 2255 motions are available to "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States."[191] Relief under § 2255 typically "is available only for errors of constitutional or jurisdictional magnitude, or where the error represents a 'fundamental defect which inherently results in a complete miscarriage of justice.'"[192] A prisoner may not file a writ of habeas corpus outside of § 2255 if relief is available under the Section.[193] Regardless of how glaring the error, collateral attacks under § 2255 have limits and procedural barriers.[194] First among these limits is the one-year period of limitation to file a motion under the section.[195] This one-year limitation begins at the latest of one of four events: the date the judgment became final; the date a government-created impediment that prevented the defendant from making the motion is removed; the date on which the Supreme Court recognized and made retroactively applicable a new right the prisoner now asserts; or the date on which the facts supporting the claim presented could have been discovered through the exercise of due diligence.[196]

Because of these procedural barriers, § 2255 no longer affords relief to defendants who had their guilty pleas accepted by magistrate judges pre-

188. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

189. United States v. Hayman, 342 U.S. 205, 219 (1952).

190. *Id.* ("[T]he sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.").

191. 28 U.S.C. § 2255 (2012).

192. Kelly v. United States, 29 F.3d 1107, 1112 (7th Cir. 1994).

193. 28 U.S.C. § 2255(e) ("An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.").

194. § 2255(f).

195. *Id.*

196. § 2255(f)(1–4).

Harden. The Seventh Circuit issued its opinion in *Harden* on July 14, 2014.[197] The one-year limitation passed, and none of § 2255's time extensions readily appear to extend it. The Seventh Circuit noted that it "has not yet decided whether *Harden* applies retroactively in collateral proceedings."[198] District courts have noted their belief that *Harden* does not apply retroactively.[199] This discussion of retroactivity misses the point. *Harden* did not announce a new rule. The decision was "premised solely on a statutory interpretation of the Federal Magistrates Act."[200] As *Harden* put it, "the [Federal Magistrates Act] simply does not authorize a magistrate judge to accept a felony guilty plea."[201] *Harden* did not announce a new constitutional idea or principle to even make retroactive; it stated what the law is. It, by its very nature, is retroactive, not because it came up with a new idea or changed previously existing law, but because it clarified that a statute does not impart the authority to enter judgments of felony guilt. If the statute does not impart authority today, it could not have yesterday—regardless of whether courts were operating under the assumption that it did.

Section 2255's ineffectiveness in this scenario does not lessen the defendants' right to use the writ of habeas corpus. Indeed, by the text of the statute, Congress envisioned for situations such as this where § 2255 could not provide a remedy. Section 2255's so-called saving clause "allows prisoners to bring § 2241 petitions if they can show that the § 2255 remedy 'is inadequate or ineffective to test the legality of [the prisoner's] detention.'"[202] The saving clause applies only in a "narrow class of cases."[203] But it applies when a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States."[204] Because magistrate judges lack the authority to adjudicate felony guilt, no one has ever adjudicated these prisoners guilty. These individuals provided a guilty plea to magistrate judges, who, according to the Seventh Circuit, had as much statutory authority to accept felony guilty pleas as, say, a United States Senator, the Secretary of Commerce, a courtroom deputy, or even television personality "Judge Judy" Sheindlin. Of course, none of these individuals have the statutory authority to accept felony guilty pleas,

197. United States v. Harden, 758 F.3d 886 (7th Cir. 2014).

198. Solano v. United States, 812 F.3d 573, 575 n.1 (7th Cir. 2016).

199. Washington v. United States, No. 14-933-DRH, 2015 WL 5568396, at *4 (S.D. Ill. Sept. 21, 2015); United States v. Edwards, No. 3:LLCRL00, 2015 WL 5123331, at *6 (E.D. Va. Aug. 31, 2015).

200. *Washington*, 2015 WL 5568396, at *5.

201. *Harden*, 758 F.3d at 891.

202. Garza v. Lappin, 253 F.3d 918, 921 (7th Cir. 2001) (quoting 28 U.S.C. § 2255) (alteration in original).

203. *Id.*

204. 28 U.S.C. § 2241(c)(3) (2012).

and according to the Seventh Circuit, neither do magistrate judges.[205] Incarcerating an individual in a federal penitentiary who never pleaded guilty—and never waived the right to a trial—is in violation of the Constitution and laws of the United States. It is an error of constitutional magnitude that affects the jurisdiction of the court itself, and it represents a "fundamental defect which inherently results in a complete miscarriage of justice."[206]

The Seventh Circuit itself has noted that "a core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence."[207] Section 2255's inability to provide relief to prisoners in this circumstance does not render them unentitled to relief. As the Seventh Circuit noted, "there is no reason to assume that our procedural system is powerless to act" in stopping the infliction of an unconstitutional sentence.[208] Section 2255 is inadequate and ineffective in this instance because it does not allow the prisoners "a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of [their] conviction[s] and sentence[s]."[209] Because of this inability, the prisoners must challenge their pleas under § 2241. In a way, it does seem somewhat bizarre to allow prisoners to collaterally attack their convictions and sentences when these individuals have themselves admitted guilt, however improper the proceeding. But the Seventh Circuit specifically has allowed the use of § 2241 even when prisoners are not making a claim of actual innocence of the offense, the very situation here.[210]

These prisoners' claims are not ones of actual innocence, but rather ones of no guilt, or at least no judgment of guilt. Over a half-century ago, the United States Court of Appeals for the Tenth Circuit recognized that § 2255 does not stop a defendant from using habeas corpus to attack his or her imprisonment when there was no judgment of guilt in the case.[211]

> Section 2255 does not operate to take away the right of a prisoner to urge the contention that he is being held in confinement without any judgment of a court. Under such conditions he could challenge his unlawful detention by writ of habeas corpus without first resorting to the procedure under Section 2255.[212]

205. *Harden*, 758 F.3d at 891.

206. *See* Kelly v. United States, 29 F.3d 1107, 1112 (7th Cir. 1994) (quoting Belford v. United States, 975 F.2d 310, 313 (7th Cir. 1992).

207. Webster v. Daniels, 784 F.3d 1123, 1139 (7th Cir. 2015).

208. *Id.*

209. *In re* Davenport, 147 F.3d 605, 609 (7th Cir. 1998).

210. *Webster*, 784 F.3d at 1137 ("*Garza* thus offers one illustration of a situation in which a petitioner was entitled under the savings clause to use section 2241 to attack a sentence, even though he was not making a claim of actual innocence of the offense.").

211. Brown v. Hunter, 187 F.2d 543, 545 (10th Cir. 1951).

212. *Id.*

Logically and historically speaking, this conclusion must be so. The purpose of the writ of habeas corpus is "the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[213] Imprisoning an individual whom the government never found guilty is the epitome of a wrongful restraint upon liberty in its most literal sense.[214] The court, then, must allow the defendants to vacate their invalid judgments of guilt. Section 2241 and the principles of the writ of habeas corpus must serve as a remedy to those who remain incarcerated, but what is the remedy for defendants who were adjudicated guilty by a magistrate judge but have since completed their sentences?

D. The Writ of Error Coram Nobis

A writ of error *coram nobis* allows a defendant relief from a judgment even after the defendant has completed his or her sentence.[215] Even after completion of the imposed sentence, most criminal convictions still entail adverse collateral legal consequences.[216] The grant of a writ of error *coram nobis* is proper "in those cases where the errors were of the most fundamental character; that is, such as rendered the proceeding itself irregular and invalid."[217] Defendants in the Seventh Circuit who had their guilt adjudicated by magistrate judges could be successful in a writ of error *coram nobis*. *Harden* recognized that magistrate judges lack the statutory authority to adjudicate guilt, and thereby lack jurisdiction. The United States Court of Appeals for the Eleventh Circuit has noted that "[w]hen a court without jurisdiction convicts and sentences a defendant, the conviction and sentence are void from their inception and remain void long after a defendant has fully suffered their direct force."[218] It found that a claim that the "court lacked jurisdiction to adjudicate the petitioner guilty may well be a proper ground for *coram nobis* relief as a matter of law."[219] This "jurisdictional error is by its nature of such a 'fundamental character' as to render proceedings 'irregular

213. Jones v. Cunningham, 371 U.S. 236, 243 (1963).

214. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2632 (2015) (Thomas, J., dissenting) ("As used in the Due Process Clauses, 'liberty' most likely refers to 'the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; *without imprisonment or restraint, unless by due course of law*.' That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.") (emphasis added) (citation omitted).

215. United States v. Morgan, 346 U.S. 502, 507 (1954).

216. Spencer v. Kemna, 523 U.S. 1, 12 (1998).

217. *Morgan*, 346 U.S at 509 n.15.

218. United States v. Peter, 310 F.3d 709, 715 (11th Cir. 2002).

219. *Id.* (internal quotation and citation omitted).

and invalid,' and *coram nobis* relief affords a procedural vehicle through which such error may be corrected."[220]

But a word of caution: since these defendants would not be asserting actual innocence, it may be foolhardy for them to proceed with a writ of error *coram nobis*. If a court were to grant a defendant's motion to vacate the judgment, thus essentially erasing it from the defendant's criminal history, then the defendant could risk re-prosecution for the underlying conduct without raising double jeopardy concerns. That double jeopardy "does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence."[221]

The risk to the defendant is that the government could, upon successful conviction or plea, impose upon the defendant a sentence greater than that which he or she has served already. In *Alabama v. Smith*, the Supreme Court upheld a similar scenario.[222] There, the defendant pleaded guilty and received a sentence from the court, but afterwards, moved to withdraw the plea, claiming he did not enter it knowingly and voluntarily.[223] After the court allowed him to withdraw the plea, the government proceeded to trial where a jury convicted the defendant on all counts, and the court sentenced him to a longer term of imprisonment than he had received in his original guilty plea.[224] The defendant challenged this longer sentence calling it vindictive.[225] The Supreme Court disagreed and noted "that no presumption of vindictiveness arises when the first sentence was based upon a guilty plea, and the second sentence follows a trial."[226] While, then, those in the Seventh Circuit who had magistrate judges accept and enter their judgments of felony guilt and have since completed their sentences may well be able to have their judgments vacated, they would open themselves up to re-prosecution and possibly more imprisonment were they to receive a sentence greater than their time already served. This outcome is especially possible because the defendants likely received a lighter sentence in exchange for their original pleas.[227]

220. *Id.* (internal citation omitted).

221. North Carolina v. Pearce, 395 U.S. 711, 720 (1969) (quoting United States v. Tateo, 377 U.S. 463, 465 (1964)).

222. 490 U.S. 794, 795 (1989).

223. *Id.* at 796.

224. *Id.* at 795.

225. *Id.* at 803.

226. *Id.* at 795.

227. Lighter sentences often accompany guilty pleas. Sentences from pleas are often significantly less than statutory maximum sentences and even Federal Sentencing Guidelines recommendations. *See* United States v. Diaz-Jimenez, 622 F.3d 692, 694 (7th Cir. 2010) ("The government's recommendation for lenity is an important part of the consideration for a defendant's entering a plea of guilty . . . .").

CONCLUSION

Harden diminished the authority of magistrate judges and weakened the additional duties clause of the FMA in the Seventh Circuit. It did so despite *Peretz* and the Supreme Court's expansive interpretation of the additional duties clause in cases where consent exists. I share the hesitance in allowing non-Article III judges to conduct more and more judicial business of increasingly greater importance.[228] However, unless the Court overturns *Peretz*, alters the jurisprudence through other cases, or Congress legislates in the area, the Seventh Circuit must follow the Court's current precedent, much like it must now follow its own precedent in *Harden*. Unless it is overruled, *Harden* remains the law of the Seventh Circuit, however flawed. If the Federal Magistrates Act does not provide magistrate judges the statutory authority to accept a felony guilty plea, then every defendant within the Seventh Circuit who had a magistrate judge purport to enter their plea never truly pleaded guilty. It may be a tautology, but individuals statutorily incapable of adjudicating felony guilt cannot adjudicate felony guilt. Nevertheless, these defendants remain in federal prison or with the crimes left to linger on their criminal records though no court lawfully adjudicated them guilty. And courts consistently have denied their requests for collateral relief. The Seventh Circuit can choose to overrule *Harden*, but if it wants to continue to follow *Harden*, it must take it to its natural conclusion, however hard that may be to accept.

GRANT R. FORD*

228. *See* Gonzalez v. United States, 553 U.S. 242, 259, 268–69 (2008) (Thomas, J., dissenting) ("I . . . would overrule *Peretz* . . . . The Framers viewed independent judges, no less than the right to a jury of one's peers, as indispensable to a fair trial. . . . [W]hatever their virtues, magistrate judges are no substitute for Article III judges in the eyes of the Constitution."); Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1950 (2015) (Roberts, C.J., dissenting) ("The Framers adopted the formal protections of Article III for good reasons, and the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. . . . The majority's acquiescence in the erosion of our constitutional power sets a precedent that I fear we will regret.") (internal quotation and citation omitted).

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