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 appeale-4e[(t)tf's felony guilty plea 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.

the FMA created an office to which Congress assigned specific duties.

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

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]

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 guilt1i4(f)3.500 Tc 0 Tw 16.489.6(ue)0.9 e

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"

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]

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

Coy v. UStSn .68.26Dn .68.26 I.8(]TJllD 43 6 139 14(c)t(y4 v. United States, 3(e)T(e)5(ed)T 00 F.3d 932 2 93(i)(4 ( )-.8 0 Td [(M)-54)0.5(t5 0 Td ( )Tj -97(n7 T5.3238.2 [(R93 T067 Tw 0.75(f

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

MCcatean /Spanehewcad149 <</MCID 25 >>B

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 wtald artd efth d [(p)-7.3(a8)2.11.790..2(t)e [(as)-41.5(h)-a1.1(d)-7ex.8(t)p.3(o)-7.3

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*

guilt and sentenced the defendants. The questiDC 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 cd2d [T[(T)-2.6(0.023 .5( )(0.023 .5( )(0.023 .5( )(0t)5.3(r)3.5(i)5.3(t)5c1 1 Tfoubt)5.3()3.5(y0 Tc

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'n9TD [(c)0.8EMC /P <5.3602use(ha)0.8y gu orhirs[f9e32cudgmc-2ausee ng w,

and according to the Seventh Circuit, neither do magistrate judges.[205]

S

S

CONCLUSION

Harden