FILED
United States Court of Appeals
Tenth Circuit

September 4, 2019

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. OSCAR GARCIA, also known as "O", Defendant - Appellant.	No. 18-2060

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. NO. 2:16-CR-01601-RB-3)

Deborah L. Roden, Woodhouse Roden Nethercott, LLC, Cheyenne, Wyoming, for Appellant.

Finnuala Tessier, United States Department of Justice, Appeals Section, Criminal Division, (John C. Anderson, United States Attorney, and C. Paige Messec, Assistant United States Attorney, United States Attorney Office, Albuquerque, New Mexico, with her on the brief), Washington, D.C., for Appellee.

Before **TYMKOVICH**, Chief Judge, **BACHARACH**, and **McHUGH**, Circuit Judges.

TYMKOVICH, Chief Judge.

This case requires that we resolve whether federal magistrate judges can accept and enter guilty pleas in criminal proceedings where the parties have consented to appearing before the magistrate judge. Longstanding precedent says they can do so. In *United States v. Ciapponi*, 77 F.3d 1247, 1251 (10th Cir. 1996), we held that "with a defendant's express consent, the broad residuary 'additional duties' clause of the Federal Magistrates Act authorizes a magistrate judge to conduct a Rule 11 felony plea proceeding, and such does not violate the defendant's constitutional rights." But in this case, Mr. Oscar Garcia argues that this precedent has been abrogated by subsequent changes to the Federal Rules of Criminal Procedure, and that only district court judges can accept pleas we deem to be dispositive. He contends these changes to the Rules allow him to withdraw his previously accepted plea of guilty as a matter of right.

While Garcia's argument is persuasive, we are bound by our prior precedent. For that reason, we affirm the district court.

I. Background

Garcia was charged by indictment with money laundering, conspiracy to possess with intent to distribute a controlled substance, and possession with intent to distribute a controlled substance. Following plea negotiations, the government filed an information, charging Garcia with only two counts: conspiracy to possess

with intent to distribute a controlled substance and money laundering. The parties entered into a plea agreement with a stipulated sentence of 180 months.

Garcia consented to appearing before a federal magistrate judge for his change of plea hearing the same day. After Garcia's change-of-plea hearing before the magistrate judge, but prior to his sentencing before the district judge, Garcia moved to withdraw his plea. The magistrate judge did not make a written recommendation nor did the clerk of court file a notice as to any objections to the magistrate judge's recommendation.

In support of his motion to withdraw, Garcia argued that the Federal Magistrates Act of 1968 does not authorize a magistrate judge to accept a felony guilty plea if the plea is considered a "dispositive matter" under Federal Rule of Criminal Procedure 59. This rule states that a "district judge may refer to a magistrate judge for *recommendation* of a defendant's motion to dismiss or quash an indictment or information, a motion to suppress evidence, or *any matter that may dispose of a charge or defense*." Fed. R. Crim P. 59 (emphasis added). Thus, Garcia contended he should be permitted to withdraw his guilty plea as a matter of right under Federal Rule of Criminal Procedure 11(d)(1), which allows withdrawal "for any reason or no reason" before the court accepts the plea.

The government, in response, relied on *Ciapponi*, 77 F.3d at 1251, where we held that the Federal Magistrates Act authorizes a magistrate judge to accept a

felony guilty plea with the defendant's consent. The district court agreed and concluded Garcia was not entitled to withdraw his plea as a matter of right. The district court also determined that there was no fair or just reason to allow Garcia to withdraw his guilty plea.

In an unusual turn of events, the *government* then moved the district court for reconsideration of the defendant's motion, and urged that it be granted. The government argued a magistrate judge cannot accept a felony guilty plea under the language of Rule 59 of the Rules of Criminal Procedure, which had been adopted *after* we decided *Ciapponi*. The government thus disavowed its previous reliance on *Ciapponi* and other Tenth Circuit cases that predated the promulgation of Rule 59.

Relying on our precedent in *Ciapponi*, the district court denied the parties' request to allow Garcia to withdraw his guilty plea.

II. Analysis

The Federal Rules of Criminal Procedure outline two ways for a criminal defendant to withdraw a guilty plea. If the court has not yet accepted the plea, the defendant can withdraw it "for any reason or no reason." Fed. R. Crim. P. 11(d)(1). But if the court has accepted the plea, the defendant may only withdraw it if he "can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). Garcia contends the magistrate judge lacks the authority to

accept a felony guilty plea in the first place, so no plea can be accepted by a magistrate judge for purposes of Rule 11. Thus, he seeks to withdraw his guilty plea as a matter of right under Rule 11(d)(1).

While Garcia acknowledges our decision in *Ciapponi* allows magistrate judges to accept pleas, he argues that the promulgation of Rule 59 fatally undercuts *Ciapponi*'s reasoning. Rule 59 allows district courts to refer both dispositive and nondispositive matters to magistrate judges. But the rule requires magistrate judges to issue reports and recommendations to the district judge on all dispositive matters.

Before turning to the merits, we consider the government's contention that Garcia not only forfeited his Rule 59 argument, but that he affirmatively waived this claim by failing to raise it before the district court.

A. Forfeiture

Garcia contends that since the government raised this argument in its motion to reconsider, he implicitly adopted the argument by not objecting, and thus preserved it for appeal.

As a general matter, arguments not raised before the district court are forfeited on appeal. *See Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1127–28 (10th Cir. 2011). On appeal, we can only consider forfeited arguments under the plain error standard of review. *Id*. But if a defendant does not argue for plain

error in his opening brief on appeal, he waives any plain error argument. *See McKissick v. Yuen*, 618 F.3d 1177, 1189 (10th Cir. 2010) (stating that "defendants waive [t]he arguments in this court" if they forfeit an argument below and fail to "explain in [the] opening appellate brief . . . how they survive the plain error standard").

We acknowledge that Garcia did not explain how he survives plain error in his opening appellate brief. But that is because the issue was preserved below. The question we ask is "whether the district court was adequately alerted to the issue." *United States v. Harrison*, 743 F.3d 760, 763 (10th Cir. 2014). Although *Harrison* involved a defendant's objections at a sentencing hearing, rather than objections or new arguments after the hearing, *Harrison* aims to protect the district court's decision on appeal. That is, the appellate court cannot review issues and arguments that the district court never had an opportunity to consider. But if the district court was "adequately alerted to the issue," and perhaps even responded to the issue, then we are able to review on appeal. In this case, the district court chose to address the government's new Rule 59 argument. Even though the district court denied the motion because the arguments were untimely, the district court rejected the new argument on the merits. The district court, and the parties, were alerted to the new argument, and both parties have continued to address this argument on appeal.

We also acknowledge that motions for reconsideration are generally not appropriate vehicles in which to raise new arguments. *See United States v. Verner*, 659 F. App'x 461, 467 (10th Cir. 2016); *Braswell v. Cincinnati Inc.*, 731 F.3d 1081, 1093 (10th Cir. 2013). These motions are not the place to relitigate already-resolved issues but rather to point out errors or newly discovered evidence. *See* Fed. R. Civ. P. 60(b).[1] The circumstances of this case, however, warrant a departure from the general rule. Here, the government did not simply raise a new theory or argument. In the motion to reconsider, the government entirely changed its position. Whereas initially the government objected to Garcia's motion to withdraw his guilty plea, the government later argued that Garcia should be able to withdraw his guilty plea. Now on appeal, the government has changed positions once again, arguing that Garcia should not be able to withdraw his guilty plea. Perhaps if the government had not objected to Garcia's initial motion to withdraw but had agreed with Garcia from the start, the district court might have granted Garcia's motion.

As the district court noted, this is a "highly unusual situation," and arguments raised in motions to reconsider are usually forfeited on appeal. But in this case, we are able to consider Garcia's Rule 59 argument. Both parties have,

[1] Because the Federal Rules of Criminal Procedure do not provide for motions to reconsider, courts look to Federal Rules of Civil Procedure 59 and 60 for guidance.

at some point in the proceedings, advocated for this argument, and the district court fully addressed the argument on the merits. Accordingly, Garcia is entitled to challenge the ruling on appeal.

B. The Authority of Federal Magistrate Judges

The "Judicial Power" of the United States is established in Article III of the Constitution. It states:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

U.S. Const. Art. III, § 1 (alteration in original). In addition to creating and expanding circuit and district courts under Article III, since the Founding, Congress has utilized its power to create what we call Article I courts or tribunals. The officers of these courts are statutorily authorized, and they preside over certain types of proceedings. For example, the United States Tax Court oversees federal income tax disputes, the United States Court of Federal Claims oversees contract disputes against the federal government, and the United States Bankruptcy Courts over see bankruptcy cases.

Federal magistrate judges present an interesting hybrid—they are a product of both Article I and Article III. On one hand, they are authorized by Congress, and the scope of their authority is guided by statute. On the other, they exist and

perform their duties exclusively within Article III district courts, and they are expressly authorized to oversee criminal proceedings.

Although Congress has set forth the authority of federal magistrate judges by statute, the scope of the authority is often directed or supervised by the Article III district judges. To determine whether the acceptance of felony guilty pleas falls within the scope of their authority, we therefore must examine how their duties are guided by the Constitution, the Federal Magistrates Act, and the Federal Rules of Criminal Procedure.

1. The Constitution

Before discussing the grant of authority in the Federal Magistrates Act, it is important to recognize the constitutional limitations of magistrate judges. Magistrate judges are created by Congress under Article I, Section 8 of the Constitution. As we discuss below, the Supreme Court has recognized limits on Article I tribunals that exercise the constitutional duties of Article III courts.

Article III protects the judiciary by "barring congressional attempts to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts, and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (internal citations and quotations omitted). The judicial power given to Article III courts extends to

> all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects. . . .
>
> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

U.S. Const. art. III. § 2 (alteration in original). When analyzing a magistrate judge's authority, we must look to the kind of authority the magistrate judge is exercising and ask whether that authority falls within the scope of the judicial power vested in Article III. *See* William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. (forthcoming 2020).

2. Federal Magistrates Act

To understand the scope of a magistrate judge's authority, it is useful to review the history and development of our magistrate judge program. In the very early days of the United States, Congress authorized "commissioners" to assist and take on certain duties. *See, e.g.*, Act of March 2, 1793, ch. 22, § 4, 1 Stat. 334 (allowing "discreet persons learned in the law" to accept bail). Congress later created a more formal system when it passed the United States

Commissioners Act of 1896, which established the position of "commissioner" and created a uniform fee schedule for the commissioners. Act of May 28, 1896, ch. 252, 29 Stat. 184 (repealed 1948).

Eventually the system of commissioners was replaced by the federal magistrates program, which was authorized by the Federal Magistrates Act of 1968. In this Act, Congress created a more uniform system and increased the authority exercised by the magistrate judges. It added provisions that gave magistrate judges the authority to oversee "minor offenses" and take on "additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). Among other things, magistrate judges were also empowered to preside over jury trials of civil matters or criminal misdemeanors. Section 636(b) authorizes district courts to designate other matters to magistrate judges, for example, motions for summary judgment, motions to certify a class action, and motions to suppress evidence.

The Act specifies different levels of judicial review by the district court depending on the kind of matter resolved by the magistrate judge. More significant matters are subject to de novo review, whereas other matters are only subject to a clearly erroneous standard. Thus, for example, a motion for summary judgment would require de novo review but discovery sanctions would only require review for clear error. *See Hutchinson v. Pfeil*, 105 F.3d 562, 566 (10th

Cir. 1997). While the Act is explicit in stating that district judges can refer certain matters to magistrate judges, the statute left open the opportunity to designate "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). The so-called "additional duties clause" is the source of authority for magistrate judges to assist courts with duties not explicitly mentioned in the Federal Magistrates Act.

The Supreme Court has examined the "additional duties" clause in but a few cases. The first, *Wingo v. Wedding*, 418 U.S. 461, 472–73 (1974), held that magistrate judges cannot oversee habeas corpus proceedings. The Court found that Congress, in its legislation governing federal habeas procedures, did not allow United States commissioners to preside in such matters. Because magistrate judges function similarly to commissioners, and the text of the Federal Magistrates Act did not state anything to the contrary, the Court concluded magistrate judges had no authority to preside over habeas proceedings.

Disagreeing with the Supreme Court's limitations on magistrate judge authority, Congress amended the Federal Magistrates Act to "clarify the present jurisdictional provisions" in light of *Wingo* and the Speedy Trial Act. Report of the Proceedings of the Judicial Conference of the United States 31–32 (Mar. 1975). Congress sought to increase the scope of a magistrate judge's authority by empowering magistrate judges to conduct evidentiary hearings in habeas cases, try

issues of a civil case with the parties' consent, and try criminal misdemeanor cases. In addition, this amendment provided a way for litigants to appeal a magistrate judge's ruling to a district judge, and serve as a special master. Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. § 636(b)).

With the modern framework in mind, several cases discussing the "additional duties" clause of the Federal Magistrate Act are illustrative. In *Mathews v. Weber*, 423 U.S. 261 (1976), the Supreme Court held that district courts can refer all Social Security benefit cases to magistrate judges for an initial review. But the magistrate judge's role is limited to determining whether there was substantial evidence in the record to support the Secretary's decision. *Id.* at 270. The magistrate judge can then propose a recommendation to the district court judge, which the district court judge is free to accept or reject in full or in part. The Court concluded this "preliminary-review function" fell within the "additional duties" clause of the Federal Magistrates Act because it "substantially assist[ed] the district judge in the performance of his judicial function." *Id.* at 271–72.

A few years later, in *United States v. Raddatz*, 447 U.S. 667 (1980), the Supreme Court held the district court could consider the magistrate's findings and recommendation without rehearing the relevant testimony. The Supreme Court

noted the Federal Magistrates Act requires a de novo determination of dispositive motions rather than a de novo hearing. *Id.* at 674–75.

Over time, these "additional duties" have been construed more broadly. In *Gomez v. United States*, 490 U.S. 858 (1989), the Supreme Court held that, without the defendant's consent, a magistrate judge cannot conduct *voir dire* in a felony jury trial. The Supreme Court noted jury selection is an important part of a jury trial because it invokes important constitutional rights of the defendant. *Id.* at 873. Because magistrate judges cannot conduct felony jury trials, they cannot preside over critical subparts of a felony jury trial. Furthermore, the statute does not provide a standard of review, yet it is "incongruous to assume . . . that Congress intended not to require any review." *Id.* at 874. Thus, the Court concluded "[t]he absence of a specific reference to jury selection in the statute, or indeed, in the legislative history, persuades us that Congress did not intend the 'additional duties' clause to embrace this function." *Id.* at 875–76.

But later, in *Peretz v. United States*, 501 U.S. 923 (1991), the Supreme Court held magistrate judges may conduct *voir dire* in a felony proceeding with the defendant's consent. The Court noted district judges may delegate civil and misdemeanor trials to a magistrate judge with the parties' consent, and these duties "are comparable in responsibility and importance to presiding over *voir dire* at a felony trial." *Id.* at 933. The Court acknowledged that while litigants

"may not waive structural protections provided by Article III," the question of conducting a felony *voir dire* did not implicate any structural protections. *Id* at 937.

In Justice Marshall's dissent in *Peretz*, joined by Justices White and Blackmun, he argued that consent has no "bearing on the statutory power of a magistrate to conduct felony jury selection." *Id.* at 946. The dissent relied on *Gomez*, arguing that Congress's grant of authority to conduct civil and misdemeanor trials implied that magistrate judges could not preside over felony trials. *Id.* at 943. Because *voir dire* is a part of a felony trial, Congress intended to preclude magistrate judges from exercising such authority. *Id.* According to the dissent, consent of the parties does not affect the authority granted by Congress. In addition, the dissent argued that Congress did not articulate any standard of review for jury instructions in felony trials and that no such meaningful review exists. *Id.* at 944–45.

Because the Supreme Court has only addressed the "additional duties" clause in a few cases, the scope of these additional duties remains unclear. What has become clear is that—over time—the phrase has been interpreted more broadly. But just because magistrate judges are empowered to take on more responsibility under the additional duties clause does not mean this power is

unlimited. Instead, it is important to understand the constitutional limitations as well as the limitations imposed by statute and our own precedent.

3. Federal Rules of Criminal Procedure

To help clarify the role of magistrate judges further, the federal courts enacted Federal Rule of Civil Procedure 72 in 1983 to regulate court-ordered referrals to magistrate judges in civil cases. Importantly, Rule 72 distinguished between "dispositive" and "nondispositive" matters—that is, whether the ruling would dispose of a party's claim or defense. It provided that when a nondispositive pretrial matter "is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision." But when a pretrial matter is dispositive, the "magistrate judge must enter a recommended disposition [to the district court judge], including, if appropriate, proposed finding of fact."[2]

But no counterpart existed for criminal matters. Thus, courts received no guidance on handling criminal matters referred to magistrate judges. As a result,

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[2] For dispositive matters, a magistrate judge is required to issue a report and recommendation to a district court judge. A report and recommendation is exactly as it sounds—a report of proposed factual findings and a recommendation as to the resolution of the matter. The parties have an opportunity to file objections to the report and recommendation, which the district court reviews de novo. The district court may then "accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

courts have reached different conclusions. For example, both the First and Seventh Circuits held that for nondispositive matters, a defendant who objects to the magistrate judge's decision must challenge that decision before the district court to preserve appellate court review. *See United States v. Brown*, 79 F.3d 1499, 1503–04 (7th Cir. 1996); *United States v. Akinola*, 985 F.2d 1105, 1108–09 (1st Cir. 1993). In contrast, the Ninth Circuit held that the criminal rules, unlike the civil rules, do not set forth the procedure parties should follow when they object to a magistrate judge's ruling on nondispositive matters. *United States v. Abonce-Barerra*, 257 F.3d 959, 968 (9th Cir. 2001). Thus, parties preserve these issues for appeal, even if they do not appeal the order to the district court.

Because of the resulting circuit split, in 2002, the Federal Committee on Rules began an effort to reconcile the competing views, and adopt a criminal rule counterpart for Federal Rule of Civil Procedure 72.

In considering the proposed modifications, the Committee was specifically asked to determine whether the proposed rule would include felony guilty pleas as dispositive matters requiring a report and recommendation by the magistrate judge. The Committee was also asked to recommend that the rule address felony guilty pleas explicitly, requiring a defendant's consent, a magistrate judge's report and recommendation, and de novo review by the district court upon a party's objection. The Committee even discussed and considered the Tenth

Circuit's approach in *Ciapponi*. Ultimately, the Committee rejected this position and recommended that this new rule not enumerate felony guilty pleas as case-dispositive. Magistrate Judges Committee Agenda for Dec. 2002, at 1. Today, Rule 59 does not address whether a felony guilty plea is a dispositive matter. As a result, the Committee left open this question for courts to decide.

As adopted in 2005, Rule 59 states district judges may refer to a magistrate judge dispositive and nondispositive matters. For nondispositive matters, the parties may object within 14 days, and the district court must consider objections by reviewing the magistrate judge's order for clear error. For dispositive matters, the magistrate judge must make a report and recommendation to the district court for disposing of the matter, and, again, the parties may object within 14 days. If the parties do not object to the magistrate's recommendation, then the district court may accept the report and recommendation. If the parties do object to the magistrate judge's recommendation, then the district court must consider de novo the objections. Rule 59 does not clarify what constitutes a dispositive or nondispositive matter, leaving to the courts to decide what can be properly referred to a magistrate judge and what requires a report and recommendation.

Read together, the Constitution, the Federal Magistrates Act, and Rule 59 leave much to the courts. We know that Congress is restricted from transferring Article III power to Article I judges. We also know that Congress told the district

courts they could refer "additional duties" to magistrate judges as long as these duties did not interfere with the authority granted under the Constitution. And we know that some of these "additional duties" encompass the handling of dispositive and nondispositive matters.

The question, then, is whether the acceptance of a felony guilty plea is a dispositive matter that falls within the "additional duties" clause of the Federal Magistrates Act and whether it undermines the structural integrity of Article III courts.

C. Ciapponi *is Binding*

We have had several opportunities to consider whether magistrate judges can properly accept felony guilty pleas.

Prior to the adoption of Rule 59, we first considered the scope of a magistrate judge's authority in conducting felony plea hearings in *Ciapponi* where we held that, "with a defendant's express consent, the broad residuary 'additional duties' clause of the Magistrates Act authorizes a magistrate judge to conduct a Rule 11 felony plea proceeding, and such does not violate the defendant's constitutional rights." *Ciapponi*, 77 F.3d at 1251. And "[a]bsent an objection or request for review by the defendant, the district court was not required to engage in any more formal review of the plea proceeding." *Id.* at 1251. This court concluded that "neither the Magistrates Act nor Article III requires that a referral

be conditioned on subsequent review by the district judge, so long as a defendant's right to demand an Article III judge is preserved." *Id.* at 1251–52.

We reaffirmed the reasoning of *Ciapponi* more recently in *United States v. Salas-Garcia*, 698 F.3d 1242 (10th Cir. 2012), a case which, of course, post-dates the adoption of Rule 59. There, we held the magistrate judge could properly accept a guilty plea even though the parties deferred acceptance of the plea agreement to the district court judge. We noted that "even if the magistrate judge had deferred acceptance of the *plea agreement* itself, the magistrate judge accepted Salas-Garcia's plea for the purposes of Rule 11." *Id.* at 1253 (emphasis added). Thus, the court distinguished between a guilty plea and a plea agreement. This is supported by Rule 11 where the rules allow for the withdrawing of a guilty *plea* if the court rejects a *plea agreement*. Importantly for our purposes here, Salas-Garcia did not challenge the district court's conclusion that the magistrate judge had the authority to accept a guilty plea.[3]

[3] In an unpublished decision, we recently reaffirmed *Ciapponi*. In *United States v. Qualls*, 741 F. App'x 592 (10th Cir. 2018), the panel held the magistrate judge properly accepted a felony guilty plea before the defendant moved to withdraw it. We "recognized that Congress authorized these duties by magistrate judges, but to the extent any constitutional ambiguity remained, 'the consent requirement . . . saves the delegation' from doubt." *Id.* at 595 (quoting *United States v. Williams*, 23 F.3d 629, 633 (2d Cir. 1994)). Again, the Rule 59 argument was not raised on appeal.

Based on our precedent, it is clear that in the Tenth Circuit, federal magistrate judges have the authority to accept felony guilty pleas without a report and recommendation. But not all circuits are in agreement. The Seventh Circuit, for example, held that "[t]he task of accepting a guilty plea is a task too important to be considered a mere 'additional duty.' . . . the additional duties clause cannot be stretched to reach acceptance of felony guilty pleas, even with the defendant's consent." *United States v. Harden*, 758 F.3d 886, 888 (7th Cir. 2014). The Seventh Circuit placed special weight on the fact that the defendant is not just admitting guilt when he pleads guilty to a felony—he is consenting to a judgment without a trial and therefore waiving his right to trial before a jury or district court judge. *Id.* The court also placed weight on the experience of district court judges, taking the position that they are better equipped to determine whether a defendant is competent and making a voluntary choice to plead guilty to the charges. *Id.* at 889.

The Fifth Circuit allows defendants to withdraw a guilty plea after pleading guilty before a magistrate judge, but before the district court accepts the report and recommendation. In *United States v. Arami*, 536 F.3d 479 (5th Cir. 2008), the court held the defendant could withdraw his guilty plea before the district court accepted the magistrate judge's recommendation. The magistrate judge had presided over a Rule 11 plea hearing and recommended that the district court

accept the defendant's guilty plea. The defendant filed a motion to withdraw his guilty plea eight days prior to the district court's adoption of the magistrate judge's recommendation. The court noted that "explicit language or an implicit acceptance of the defendant's guilty plea" is required before the closure of the defendant's right to withdraw a guilty plea for any reason. *Id.* at 482.

The First Circuit has likewise ruled that defendants can withdraw guilty pleas before the recommendation has been accepted by the district court. *United States v. Davila-Ruiz*, 790 F.3d 249 (1st Cir. 2015). The court held that because the magistrate "merely recommended acceptance of the plea rather than actually accepting it, further action by the district court was needed." *Id.* at 252. While this does not touch directly on the issue before this panel—because the magistrate judge made a recommendation to the district court—the reasoning once again shows the extent to which different circuits have allowed magistrate judges to handle felony guilty pleas.

Garcia urges us to view *Ciapponi* in a different light after the adoption of Rule 59. Although *Ciapponi* makes clear that magistrate judges have the authority to accept a felony guilty plea, Garcia asserts that Rule 59 limits this authority by requiring different procedures for dispositive and nondispositive matters. He contends that a felony guilty plea is a dispositive matter, which requires a report and recommendation from the magistrate judge.

While we are sympathetic to this argument, it fails for two reasons. First, it is clear the Rules Committee declined to specify that felony guilty pleas are dispositive matters, leaving this determination up to the courts. According to the Committee notes, the Committee was presented with the opportunity to clarify the matter, and it declined to do so.

Second, the promulgation of a new rule of Federal Criminal Procedure does not vitiate our prior decision in *Ciapponi*. We have squarely held that magistrate judges can accept guilty pleas. Even in the cases following the promulgation of Rule 59, we endorsed the reasoning of *Ciapponi*. We are consequently "bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *See In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam).

Federal rules have the force and effect of law. *United States v. Marion*, 404 U.S. 307, 319 (1971). But in order for the rules to abrogate prior decisions, there must be some conflict between the rule and judicial decision. Rule 59 is not clearly "at odds with longstanding legislative and judicial constructions" of a magistrate judge's authority. *Id.* We might reach a different result if we found Rule 59 "is so indisputable and pellucid . . . that it constitutes intervening (i.e., superseding) law." *Barnes v. United States*, 776 F.3d 1134, 1147 (10th Cir. 2015). But we cannot reach this conclusion.

While Rule 59 clearly distinguishes the procedural requirements for dispositive matters from the requirements for nondispositive matters, it does not consider the effect that consent may have on these requirements. We know that defendants' "most basic rights" can be waived by consent. *Peretz*, 501 U.S. at 936. For instance, even though a criminal defendant has a constitutional right to a jury, the Supreme Court held that "a defendant has no constitutional right to have an Article III judge preside at jury selection if the defendant has raised no objection to the judge's absence." *Id*. at 936.

It must therefore be the case that certain matters, even dispositive matters, can be handled by a magistrate judge with the defendant's consent. Even if we think that felony guilty pleas should ultimately be affirmed by district court judges, nothing in the language of Rule 59 indicates that magistrate judges cannot accept felony guilty pleas when the parties consent. The Federal Magistrates Act does not prohibit this type of magistrate judge's authority, and Rule 59 places the discretion of such authority in the hands of the courts absent explicit instruction otherwise.

In sum, because the acceptance of a guilty plea by a magistrate judge with the defendant's consent is not prohibited by the Federal Magistrates Act or Rule 59, we are bound by *Ciapponi*.

D. Magistrate Judges and the Constitution

Even though we rely on precedent, we recognize other courts have concluded differently. As discussed above, the Seventh Circuit flatly held that a magistrate judge's acceptance of a felony guilty plea for purposes of Rule 11 violates the Federal Magistrates Act. *Harden*, 758 F.3d at 891.[4] Other circuits have held that while a magistrate judge can conduct a Rule 11 plea hearing, the magistrate judge must make a report and recommendation to the district court judge, who has the last word. *See, e.g.*, *United States v. Reyna–Tapia,* 328 F.3d 1114, 1119–22 (9th Cir. 2003) (en banc); *United States v. Torres,* 258 F.3d 791, 796 (8th Cir. 2001); *United States v. Dees,* 125 F.3d 261, 263, 265 (5th Cir. 1997); *United States v. Williams,* 23 F.3d 629, 631–34 (2d Cir. 1994). Still other circuits, like this one, allow magistrate judges to accept felony guilty pleas with the defendant's consent and without a report and recommendation. *See, e.g.*, *United States v. Benton,* 523 F.3d 424, 431–32 (4th Cir. 2008); *United States v. Woodard,* 387 F.3d 1329, 1332–33 (11th Cir. 2004); *Ciapponi,* 77 F.3d at 1250–52. Given these distinct approaches to an important aspect of our criminal

[4] In *Harden*, the Seventh Circuit did not reach Harden's constitutional claim because it found the statutory violation was clear. 758 F.3d at 891.

justice system, the parties and the courts might benefit from clarification by the Supreme Court.[5]

Were we not bound by *Ciapponi*, we are persuaded that the acceptance of a felony guilty plea is in fact a dispositive matter. Rule 59 talks of decisions that "dispose of a charge or offense." A guilty plea does exactly that. While magistrate judges may have such authority to accept a felony plea under the "additional duties" clause of the Federal Magistrates Act, this authority is limited by Rule 59. Thus, the magistrate judge must issue a report and recommendation as required by Rule 59(b)(1).

Rule 59(b)(1) only specifies that a magistrate judge must issue a report and recommendation after a dispositive matter has been referred to the district court judge. So the question that remains is whether a report and recommendation is required on a dispositive matter when the parties consent to appearing before a magistrate judge. We would answer that question affirmatively.

The Supreme Court has restricted its discussion of magistrate judge authority to specific factual scenarios presented in different cases. The Court has largely avoided constitutional questions by resting its decisions on litigant consent. The Court has "declined to adopt formalistic and unbending rules" so as

[5] While several of these cases post-date the adoption of Rule 59, they do not address the impact of Rule 59.

not to "unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers." *Schor*, 478 U.S. at 851. The Court, instead, considers a number of factors "with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Id.* But this flexible approach cannot be adopted when the structural separation of powers is threatened.

It is clear that "[t]he most basic rights of criminal defendants are . . . subject to waiver." *Peretz*, 501 U.S. at 936. But "[t]o the extent that [a] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III." *Schor*, 478 U.S. at 850–51. This is because "Article III, § 1, safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [from constitutional to legislative courts] for the purpose of emasculating' constitutional courts." *Id.* at 850 (quoting *Nat'l Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949)). The characteristics of an Article III judge "remove[] the possibility that the courts will use adjudication as a tool to complement other responsibilities, such as developing policy through legislation (as by Congress) or administering the government (as by the

executive)." F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 Vand. L. Rev. 715, 736–37 (2018).

Consent, therefore, cannot cure constitutional command. The question is not whether the parties agreed to a magistrate judge authority but instead what *power* the magistrate judge is exercising and whether that exercise is consistent with the Constitution. We would find that by accepting a guilty plea for purposes of Rule 11, a magistrate judge is exercising the judicial power of the United States in violation of Article III of the Constitution.

Because Article III does not grant individual rights, but rather vests the judicial power of the United States in a specific branch of government, Article III power cannot be waived by consent. Therefore, no criminal defendant can legitimately waive this provision and consent to a magistrate judge's acceptance of a guilty plea. This is because a criminal defendant can only waive his individual rights—he cannot authorize the transfer of power away from an independent branch of government.

The discussion in *Wellness International Network Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), is illuminating. There, the Supreme Court held that an Article I bankruptcy court may enter an enforceable judgment against parties. The Supreme Court then noted that consent alone is enough to waive any constitutional problems "so long as Article III courts retain supervisory authority

over the process." *Id.* at 1944. Dissenting, Chief Justice Roberts stated that private parties may not consent to an Article III violation. He argued that it is irrelevant who supervises or controls the bankruptcy courts—what matters is that a non-Article III court entered judgment on a non-core bankruptcy proceeding that the Supreme Court previously held required an exercise of Article III power. He stated that "practical considerations of efficiency and convenience cannot trump the structural protections of the Constitution." *Id*. at 1959 (Roberts, C.J., dissenting). Justice Thomas, dissenting separately, noted that "a final judgment enforceable without any further action by an Article III court" may require the exercise of judicial power. *Id.* at 1968 (Thomas, J., dissenting). Final judgments, which would constitute dispositive matters, "bear unique qualities that spring from the exercise of the judicial power." *Id.*

The acceptance of a felony guilty plea is a dispositive matter, finding the criminal defendant guilty of the crimes charged and disposing of the matter before the court. It is a final judgment against the defendant—the same final judgment that would have issued had a jury of his peers found him guilty. Thus, a judge who accepts the felony guilty plea is exercising the "judicial power of the United States" and rendering a final judgment.

This judicial power is exclusively vested in Article III courts. Unlike individual protections, which parties can waive through consent, the "judicial

power of the United States" cannot be given away by a litigant. The Constitution acknowledges that sometimes, a branch can transfer limited power based on consent of another branch. The Senate can consent to the President's appointment of officers. States may enter into agreements with other states with the consent of Congress. Officers may only accept presents or emoluments with the consent of Congress. But the Constitution is silent on whether consent, particularly a litigant's consent, can alter who exercises "the judicial power of the United States." Because the vesting of the judicial power is a structural component of the Constitution, and the Constitution does not explicitly allow for consent to compromise this structure, we would find that a party's consent to a magistrate's acceptance of a felony guilty plea—a final judgment—does not authorize a magistrate judge to accept the guilty plea for purposes of Rule 11. Rather, a magistrate judge must issue a report and recommendation so that final acceptance is left to Article III judges who exercise the judicial power of the United States.

In *Ciapponi*, we found no constitutional violation exists when a magistrate judge accepts a felony guilty plea. This conclusion has been reaffirmed several times in our circuit. But perhaps it is worth revisiting. Since *Ciapponi*, there has been no "en banc reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d at 724. Thus, we decline to address whether *Ciapponi* was wrongly decided as a constitutional matter. Instead, we

simply note that while we are bound by our own precedent, given the development in this particular area of law, it is necessary to grapple with the implications of allowing magistrate judges to accept felony guilty pleas without any mandatory review by a district court.

Regardless of how we, as a circuit, continue to handle these matters, the Supreme Court will have the final word. In *Raddatz*, the Court noted that jury selection by magistrate judges avoided the Article III question because jury selection took place entirely under the "district court's total control and jurisdiction." 447 U.S. at 681. And in *Schor*, the Supreme Court emphasized the fact that the Article I tribunal's decision was subject to de novo review by the district court. 478 U.S. at 853. Because we agree that felony guilty pleas are dispositive, it seems the only way to avoid the Article III dilemma is to subject the plea to de novo review so that it continues to fall within the "district court's total control and jurisdiction." *Raddatz*, 447 U.S. at 681.

None of this is meant to undermine or denigrate the vital work of magistrate judges. Without their diligence, the business of the judiciary would likely come to a near halt. But in assisting district judges, magistrate judges must act within the confines of the Federal Magistrates Act, Rule 59, and the United States Constitution.

III. Conclusion

In conclusion, we AFFIRM the district court, holding that the magistrate judge accepted Garcia's felony guilty plea for purposes of Rule 11 and Garcia is unable to withdraw his plea as of right.

United States v. Garcia, No. 18-2060
BACHARACH, J., concurring.

I join all except Part II(D) of the majority opinion. We are bound by *United States v. Ciapponi*, 77 F.3d 1247 (10th Cir. 1996). Given this precedent, I would not unnecessarily opine on the correctness of that opinion. I thus do not join Part II(D).