No. 08-1009

In the Supreme Court of the United States

NANCY MONTGOMERY WARE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in refusing to review a magistrate judge's order finding that defendant waived her Sixth Amendment right to counsel, where the defendant did not object to that order before the district court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rules:

Rules—Continued: Page

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A17) is not published in the *Federal Reporter* but is reprinted in 292 Fed. Appx. 845.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2008. A petition for rehearing was denied on November 10, 2008 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on February 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the Middle District of Florida, petitioner was convicted of two counts of willfully attempting to evade tax, in violation of 26 U.S.C. 7201,

and three counts of willfully failing to file a tax return, in violation of 26 U.S.C. 7203. She was sentenced to 33 months of imprisonment, to be followed by three years of supervised release. Pet. App. A20-A25. The court of appeals affirmed. *Id.* at A3-A17.

1. Petitioner was a partner in a pediatric dentistry practice in Lakeland, Florida. For 1998 and 1999, petitioner reported more than $1 million in gross income on her individual income tax returns and paid federal income tax on that income. In 2000, petitioner requested that the partnership stop withholding federal income tax, Social Security tax, and Medicare tax from her earnings. Petitioner presented the partnership with "tax protestor" literature that falsely claimed that paying income tax was voluntary. Petitioner also opened two checking accounts for unincorporated associations that were not linked to her Social Security number. Pet. App. A7-A8; Gov't C.A. Br. 4-5.

Petitioner completed W-4 forms claiming that she was "exempt" from federal withholding. Based on those forms, the partnership stopped withholding taxes from petitioner's earnings. After receiving the W-4 forms, however, the IRS informed the partnership that petitioner was not exempt and sent petitioner a delinquency notice. When the partnership received the notification from the IRS, it began withholding taxes again. In 2004, petitioner left the partnership but continued to practice at the same location. Pet. App. A8-A9; Gov't C.A. Br. 6, 8, 11.

Petitioner failed to file tax returns for the tax years 2000 through 2004. The IRS calculated that petitioner owed a total of $362,212.24 in federal income taxes, excluding penalties and interest. Pet. App. A9, A11; Gov't C.A. Br. 17; see *id.* at 7-12.

2. A federal grand jury sitting in the Middle District of Florida returned an indictment charging petitioner with two counts of willfully attempting to evade tax, in violation of 26 U.S.C. 7201, and three counts of willfully failing to file a tax return, in violation of 26 U.S.C. 7203. Pet. App. A7.

At her initial arraignment, petitioner asked to be represented by her husband, who is not an attorney. The magistrate judge continued the arraignment for two weeks until it could hold a *Faretta* hearing. Minute Order (Apr. 18, 2007); see *Faretta* v. *California*, 422 U.S. 806 (1975).

At the hearing, petitioner acknowledged that she did not know of any authority that would allow her husband to represent her, and she requested to represent herself. Pet. App. A36-A37. The magistrate judge advised at the beginning of the hearing that an attorney with the Federal Public Defender's office was present and available for consultation should petitioner wish to "ask an experienced defense counsel any questions," but petitioner declined the opportunity. Gov't C.A. Br. 13 (citation omitted). The prosecutor then summarized the charges and the maximum penalties. *Id.* at 13-14. When the magistrate judge asked petitioner if she understood the charges and penalties, petitioner responded that she had heard the prosecutor but that "[t]here's no law making me liable. They've not established that there is a law making me, as an individual, liable." *Id.* at 14 (citation omitted); see *id.* at 13-14.

The magistrate judge reiterated that petitioner had a constitutional right to be represented by an attorney and that, if she submitted a financial affidavit showing that she lacked the financial resources to retain an attorney, the court would appoint someone to represent

her. Petitioner responded, "No, I don't wish to do that, but I do need the assistance of counsel." Gov't C.A. Br. 14 (citation omitted). The magistrate judge then explained that standby counsel would be available to assist petitioner if she chose to represent herself. Petitioner responded that she did not want to be assisted by anyone with "a bar number," based on her view that "anyone who has a bar number is beholding [*sic*] to the IRS." *Ibid.* (citation omitted); see Pet. App. A36-A37.

The magistrate judge asked petitioner why she sought to represent herself in this case. The following discussion ensued:

> THE DEFENDANT: I feel that I will retain all the rights that I came into this courtroom with if I represent myself and speak for myself.
>
> THE COURT: Okay.
>
> THE DEFENDANT: And I believe I can understand and read the manuals and follow along with the rules of court as long as we are following those rules.
>
> THE COURT: So, you, in effect, think that you can represent yourself better than somebody else could?
>
> THE DEFENDANT: Yes, I do.

Gov't C.A. Br. 15-16 (citation omitted). The magistrate judge then strongly urged petitioner not to represent herself, but petitioner reiterated that she still wished to do so. At the conclusion of the hearing, the magistrate judge reiterated, "Are you absolutely sure about this decision?" Petitioner responded, "Yes, absolutely." *Id.* at 16; Pet. App. A7.

The magistrate judge found that petitioner knowingly, intelligently, and voluntarily had waived her right

to counsel. Gov't C.A. Br. 16. The magistrate judge then issued a written order memorializing that ruling. Pet. App. A35-A40. Although the order expressly advised petitioner that she had ten days from the date of the order to seek review by the district court, *id.* at A39 n.5, she did not do so, *id.* at A13.

The court appointed the Federal Public Defender's office as standby counsel. Order (May 23, 2007); see Pet. App. A39-A40.

3. Petitioner pleaded not guilty and proceeded to trial pro se. The jury found petitioner guilty of all five charges. The district court sentenced petitioner to serve 33 months of imprisonment, to be followed by three years of supervised release; fined her $25,000; and ordered her to pay $362,212.24 in restitution. Pet. App. A20-A31.

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A3-A17.

On appeal, petitioner argued for the first time that she did not knowingly and voluntarily waive her right to counsel. The court of appeals concluded that petitioner "waived this argument because she failed to object to the order of the magistrate judge that granted [her] request to represent herself." Pet. App. A13-A14. The court of appeals added that it therefore "lack[ed] jurisdiction to review that order." *Id.* at A14 (citing *United States* v. *Brown*, 441 F.3d 1330, 1352 (11th Cir. 2006), cert. denied, 549 U.S. 1182 (2007)).

ARGUMENT

As relevant here,[1] petitioner contends (Pet. 14-15) that the circuits are in conflict on the question whether,

[1] On March 18, 2009, this Court requested that the government file a response "in Question No. 1 only."

in an appeal from a final judgment of a district court, the courts of appeals have jurisdiction to review a magistrate judge's decision on a nondispositive pretrial matter when no party sought review of that ruling by the district court. Further review on that question is not warranted. The recently adopted Rule 59 of the Federal Rules of Criminal Procedure provides that the failure to file timely objections to a magistrate judge's non-dispositive pretrial determination "waives a party's right to review." Fed. R. Crim. P. 59(a). Therefore, petitioner could not obtain relief in the court of appeals, even if it asserted jurisdiction over her unpreserved claim. The court's statement that it lacked jurisdiction was incorrect in the government's view, but the statement was unnecessary to its decision and does not warrant further review.

1. a. Under the Federal Magistrates Act, 28 U.S.C. 636, a district court may refer certain nondispositive pretrial matters to a magistrate judge for resolution, subject to review by the district court "where it has been shown that the magistrate's order is clearly erroneous or contrary to law." 28 U.S.C. 636(b)(1)(A). Dispositive pretrial matters and petitions for habeas corpus may also be referred to magistrate judges for appropriate proceedings, proposed findings of fact, and recommendations as to disposition. 28 U.S.C. 636(b)(1)(B) and (C).

In criminal cases, review of matters before a magistrate judge is governed by Rule 59. For both dispositive and nondispositive matters, Rule 59 provides that "[f]ailure to object in accordance with this rule waives a party's right to review." Fed. R. Crim. P. 59(a) and (b)(2). An objection is preserved if filed with the district court within ten days. *Ibid.*; see also 28 U.S.C. 636(b)(1) (codi-

fying the ten-day limit for appeals from "proposed findings and recommendations").

Rule 59's waiver provision drew on this Court's decision in *Thomas* v. *Arn*, 474 U.S. 140 (1985). Fed. R. Crim. P. 59 advisory committee's note (2005). In *Thomas*, this Court held that the courts of appeals could permissibly (but need not) adopt a rule that a litigant waives further review if she fails to file timely and specific objections to a magistrate judge's recommendation on a dispositive matter. 474 U.S. at 155. The Court observed that the rule under review in that case was a "non-jurisdictional waiver provision," and that the court of appeals "may excuse [a] default." *Ibid.*; see *id.* at 146. The advisory committee notes to Rule 59 explain the committee's view that the same would be true under that rule: "Despite the waiver provisions, the district judge retains the authority to review any magistrate judge's decision or recommendation whether or not objections are timely filed."

b. Rule 59 is dispositive here, as the court of appeals recognized. Pet. App. A13-A14 ("[Petitioner] waived this argument because she failed to object to the order of the magistrate judge that granted [petitioner's] request to represent herself. *See* Fed. R. Crim. P. 59(a)."). That waiver holding amply supports the court of appeals' conclusion that petitioner could not obtain any further review of her right-to-counsel claim.

Petitioner's only contention to the contrary (Pet. 19) is the assertion that Rule 59(a) "is a rule of procedure" that "does not speak to jurisdiction or appeals from final judgment." Although Rule 59(a) does not speak to jurisdiction, compliance with the rule *is* a prerequisite to appellate review. See Fed. R. Crim. P. 59 advisory committee's note (2005) ("Th[e] waiver provision is intended

to establish the requirements for objecting in a district court to preserve *appellate* review of magistrate judges' decisions.") (emphasis added). As the decision in *Thomas* (relied on by the drafters of Rule 59) makes clear, the purpose of the objection requirement is to preclude appeal *beyond* the district court when a party does not appeal *to* the district court. See, *e.g.*, 474 U.S. at 147-148 ("The [waiver] rule, by precluding appellate review of any issue not contained in objections, prevents a litigant from 'sandbagging' the district judge by failing to object and then appealing. Absent such a rule, any issue before the magistrate would be a proper subject for appellate review."). The waiver plainly extends to proceedings in the appellate courts.

That point is particularly clear in the context of a magistrate judge's ruling on a nondispositive matter, like the one here. Magistrate judges may be authorized to "hear and determine" those matters, 28 U.S.C. 636(b)(1)(A), and no formal action by the district court is required to adopt or ratify their rulings. Thus, petitioner cannot even make the argument that the litigant in *Thomas* unsuccessfully advanced: that the district court was required to exercise some form of review when adopting magistrate judges' recommended rulings on dispositive motions (which could in turn be reviewed on appeal). 474 U.S. at 149-150. This Court rejected that argument. See *ibid.*

2. Because the court of appeals correctly held that petitioner waived her argument under Rule 59(a), this case does not present any genuine issue about the court of appeals' jurisdiction to review a magistrate judge's ruling on a nondispositive matter in a criminal case where the defendant did not appeal to the district court. The court of appeals' non-precedential decision did re-

cite, based on circuit precedent that predated Rule 59, that it "lack[ed] jurisdiction." Pet. App. A14. But the court did not, as the government requested,[2] dismiss petitioner's appeal as to her challenge to her waiver of counsel. Instead, the court affirmed the judgment of conviction, precisely the appropriate disposition in light of the holding of waiver.

As explained in previous briefs to this Court, the government does not agree with the court of appeals' precedent concluding that a failure to object to a magistrate judge's ruling deprives the court of appeals of jurisdiction to consider that ruling on an appeal from final judgment.[3] The correctness of that precedent, however, does not present a significant question that warrants plenary review.

a. In the most relevant precedent, the court of appeals held that it lacked jurisdiction because "[a]ppeals from the magistrate's ruling must be to the district court." *United States* v. *Brown*, 299 F.3d 1252, 1260

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[2] The government's brief to the court of appeals in this case relied principally on Rule 59(a), but also cited the circuit precedent holding that the waiver has jurisdictional consequences, and asked that the appeal be dismissed. Gov't C.A. Br. 18, 20, 30.

[3] The government first asserted that position in its brief in *Brown* v. *United States*, suggesting that the Court grant the petition and remand to the Eleventh Circuit for further consideration. U.S. Br. at 5, *Brown* v. *United States*, 538 U.S. 1010 (2003) (No. 02-8263). The Court adopted that suggestion. After the Eleventh Circuit reafffirmed its view, *United States* v. *Brown*, 342 F.3d 1245 (2003), and Brown again sought certiorari, the United States reaffirmed its position on the jurisdictional issue, but opposed review, principally because proposed Rule 59(a) would resolve the matter; the issue arises only rarely in criminal cases; and Brown's claim would fail even if reviewed on the merits. U.S. Br. in Opp. at 5-7, *Brown* v. *United States*, 543 U.S. 823 (2004) (No. 03-9931). This Court denied certiorari. 543 U.S. 823 (2004).

(11th Cir. 2002) (brackets in original; citation omitted), vacated mem., 538 U.S. 1010, reinstated, 342 F.3d 1245 (11th Cir. 2003), cert. denied, 543 U.S. 823 (2004). But the appeal in that case (as in this one) was not taken directly from the magistrate judge's order. Rather, the defendant appealed from the final judgment of conviction entered by the district court in her case. The court of appeals had jurisdiction of that appeal pursuant to 28 U.S.C. 1291 (courts of appeals have jurisdiction of appeals from "all final decisions of the district courts"). And interlocutory rulings in a criminal case are appealable on entry of the final judgment. See *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (per curiam) (citing *DiBella* v. *United States*, 369 U.S. 121, 124 (1962)). Once the court of appeals acquires jurisdiction, Federal Rule of Criminal Procedure 52(b) prescribes the standard for review of a claim that was forfeited by not being presented to the district court (but was also not waived). That rule provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

The defendant in *Brown* sought review in this Court on those grounds. The government filed a brief agreeing that the court of appeals had jurisdiction and suggesting that this Court grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand for further proceedings. U.S. Br. at 5, *Brown* v. *United States*, 538 U.S. 1010 (2003) (No. 02-8263). This Court did so. 538 U.S. 1010 (2003). On remand, however, the court of appeals held that it was bound by the former Fifth Circuit's precedent in *United States* v. *Renfro*, 620 F.2d 497, 500, cert. denied, 449 U.S. 921 (1980), and could not reconsider that rule ex-

cept sitting en banc. *United States* v. *Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003). This Court denied certiorari. *Brown* v. *United States*, 543 U.S. 823 (2004).

b. At the time the Court denied certiorari in *Brown*, the courts of appeals were divided on the question whether failure to object to a magistrate judge's ruling implicates the court of appeals' jurisdiction. Compare, *e.g.*, *United States* v. *Akinola*, 985 F.2d 1105, 1108-1109 (1st Cir. 1993), and *Brown*, 299 F.3d at 1260 (following *Renfro*, 620 F.2d at 500), with *United States* v. *Brown*, 79 F.3d 1499, 1504 (7th Cir.) (concluding that "failure to challenge before a district judge a magistrate's pretrial rulings * * * waives the right to attack such rulings on appeal," but that "this rule is not jurisdictional") (citation omitted), cert. denied, 519 U.S. 875 (1996), and *United States* v. *Polishan*, 336 F.3d 234 (3d Cir. 2003) (similar), cert. denied, 540 U.S. 1220 (2004), and *United States* v. *Abonce-Barrera*, 257 F.3d 959, 967-969 (9th Cir. 2001) (failure to challenge a magistrate judge's order on nondispositive pretrial issues has no effect on appealability).

That issue lacks prospective significance now that Rule 59 provides a rule of waiver in criminal cases.[4] In any case in which the claimant did not preserve an objection in the district court, Rule 52(b) limits the court

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[4] In civil cases, the analysis may differ because the relevant rule, Rule 72(a) of the Federal Rules of Civil Procedure, is phrased differently. Rule 72(a) provides that an objection to a magistrate judge's order on a nondispositive matter must be made within 10 days and that "[a] party may not assign as error a defect in the [magistrate judge's] order not timely objected to." Applying Rule 72(a), the courts of appeals have reached different conclusions about whether a party's failure to object deprives the appellate court of jurisdiction to review the order. See *Brown*, 79 F.3d at 1504 n.34 (citing cases).

of appeals to plain-error review. And as this Court explained in *United States* v. *Olano*, 507 U.S. 725 (1993), any objection that has been waived cannot be error, much less reversible plain error. See *id.* at 733-734. That principle applies to waivers under Rule 59 as to other waivers. Under those circumstances, no appellate relief would be possible, see *id.* at 732, whether or not the court has appellate jurisdiction.

In light of Rule 59, no issue of importance is implicated by the question presented.[5] Even before Rule 59, the issue arose only infrequently in criminal cases.

3. Petitioner's underlying contention that she did not knowingly and intelligently waive her right to counsel would not have resulted in reversal of her conviction even if the court of appeals had reviewed her claim for plain error. It is well established that a defendant has a Sixth Amendment right to conduct her own defense. *Faretta* v. *California*, 422 U.S. 806, 819-832 (1975). To waive her right to counsel, the defendant must be competent to stand trial and must knowingly, intelligently, and voluntarily waive her Sixth Amendment right. *Godinez* v. *Moran*, 509 U.S. 389, 400 (1993). Accordingly, a trial court's duty at a *Faretta* hearing is to establish that the defendant "knows what [s]he is doing and [that] h[er] choice is made with eyes open." *Faretta*, 422 U.S. at 835 (citation omitted). The court fulfilled that duty here.

Petitioner already had some familiarity with litigation at the time of her trial. She owned a copy of the Federal Rules of Evidence and the Federal Rules of

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[5] The Eleventh Circuit recently dismissed an appeal in part, citing *Brown* and *Renfro*, but the magistrate judge's order in that case was entered before Rule 59 took effect. *United States* v. *Schultz*, No. 06-11673, 2009 WL 1067393, at *5-*6 (Apr. 22, 2009).

Criminal Procedure; she had represented herself several times in civil litigation against her business partner; and she had been represented by counsel in connection with other business and personal matters. Gov't C.A. Br. 14-15. Petitioner also confirmed, "I believe I can understand and read the manuals and follow along with the rules of court as long as we are following those rules." *Id.* at 15. Petitioner was also well educated, holding a graduate degree in dentistry. *Id.* at 14.

The magistrate judge repeatedly urged petitioner to secure counsel and discussed, at some length, the dangers and disadvantages of self-representation. Gov't C.A. Br. 34-35. For instance, the magistrate judge pointed out that although petitioner obviously was well educated, "[t]he courtroom is a different arena," where things that cannot be anticipated likely will occur. *Id.* at 34 (brackets in original; citation omitted). She also cautioned petitioner, "[Y]ou are stepping out in new territory if you've never represented yourself in a criminal case." *Ibid.* (brackets in original; citation omitted).

Despite these admonitions, petitioner unequivocally stated that she wished to represent herself:

> THE DEFENDANT: Then I'll represent myself then.
>
> THE COURT: Are you sure about that?
>
> THE DEFENDANT: Yes. I'm positive.
>
> THE COURT: Okay. Has anyone promised you anything or threatened you in any way to get you to give up your right to have counsel represent yourself?
>
> THE DEFENDANT: No.

> THE COURT: Are you absolutely sure about this decision?
>
> THE DEFENDANT: Yes, absolutely.

Gov't C.A. Br. 32-33 (citation omitted). On this record, the magistrate judge committed no reversible plain error in finding that petitioner waived her right to counsel.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioner does not contend, nor does the record suggest, that she was incompetent to waive her rights or that a defective waiver at the hearing justifies her failure to heed the magistrate judge's admonition that objections be filed within ten days.