22-5494

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

UNITED STATES OF AMERICA

Appellee

V

MICHAEL DALE TALLEY

Appellant

PETITION FOR CERTIORARI

ON APPEAL FROM THE ELEVENTH CIRCUIT
COURT OF APPEALS
No. 21-12499-J

Pro Se

Michael D. Talley #27888-001
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Questions Presented

1. Whether the Staff Attorney Programs in the lower courts violate non-delegation principles of Article III duties to non-Article III decision makers; exceeding the limited rule making authority of the Federal Courts.

2. Whether Pro Se appeals are unconstitutionally being decided by Staff Attorneys who are supervised, not by Article III Judges, but rather by "Supervisory" Staff Attorneys, thereby reducing the quality of decisions by the lower courts and allowing for opinions seemingly issued by Article III Judges, but in reality issued by non-judicial actors with only "rubber-stamping" by Article III judges which results in a "pay to play" venue in the lower courts as Pro Se filers under this scheme would not have access to Article III Judge determinations, while Counseled petitions do have such access.

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Statutes Referenced

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Petition For a Writ of Certiorari

Michael Dale Talley respectfully submits this Petition for a writ of Certiorari

Opinion

The Order of the Eleventh Circuit Court of Appeals
Reporter citation is unknown to Appellant, but can be located
at 2022 U.S. App LEXIS 5289 (11th Cir. Mar.10, 2022)
and denial of Petition for rehearing on May 20, 2022

Jurisdiction

The Eleventh Circuit entered judgment on March 10, 2022, and denied rehearing on May 20, 2022. Jurisdiction to review the judgment rests on 28 U.S.C. § 1254(1).

Statutory Provisions Involved

28 U.S.C. § 715 et seq

Statement of the Case

Petitioner Michael D. Talley (Talley) filed for compassionate release on October 26, 2020, citing comorbidities with COVID-19 and producing attachments in support of his request. That motion was denied on July 16, 2021 in a Sua Sponte Order, which Talley appealed to the Eleventh Circuit Court of Appeals. In his appeal, Talley cited multiple issues with the district court's denial including similarities with a fellow inmate's counseled appeal to the Eleventh Circuit, which the other inmate had won. Later, in his Petition for Rehearing, Talley cited United States v Cook, 998 F.3d 1180 (11th Cir. 2021), which was available to the district court when it issued the Sua Sponte denial, but was not available to Talley until after he filed his Initial Brief due to the prison's law library being consistently six to nine months behind in obtaining new caselaw.

The Constitution, under Article III, requires the vetment and independence of those who would decide weighty matters in a Federal Court; requiring life tenure and guaranteed pay for those who would be placed over decision-making matters of those same Courts. Additionally, Congress has authorized limited rule-making authority for Federal Courts themselves. Said limitation, though, forbids the delegation of the ability to make decisions on cases to "staff attorneys" - see e.g. Wellness Int'l Network, Ltd. v. Sharif, 135 S.Ct. 1932, 1939 (2015)(concerning delegation of judicial powers in bankruptcy courts); Commodity Futures Trading Comm'n v Schor, 478 U.S. 833, 844 (1986)(the independence clause protects litigants by providing a forum and adjudicator "free from potential domination" by others); Riley v Deeds, 56 F.3d 1117, 1118-20 (9th Cir. 1995)(suggesting that such an error is structural and will result in the granting of a habeas petition); United States v Sloan, 811 F.2d 1359, 1361 n.2 (10th Cir. 1987)(concerning delegation of jury instructions); and United States v Keiser, No. 305-CR-80, 2006 WL 3751452, at *3(D.N.D. Dec. 19, 2006)(rejecting pro se defendant's claims "that law clerks frequently act as de facto judges, that judges inappropriately delegate non-delegatable duties to their law clerks and that law clerks have usurped the duties of Article III judges," but noting that "each of these complaints, if real, would constitute a serious abuse of the law clerk system and would be grounds for grave concern"). The Eleventh Circuit's Staff Attorney Program, Talley avers, is just that - a program that delegates non-delegatable judicial powers to allow staff attorneys to work as proxies for the Judges on panels, with true oversight provided by a "supervisory staff attorney" rather than an Article III Judge, who merely "rubberstamps" the opinions provided by the staff attorneys, thereby reducing the quality of judicial opinions, and even in some cases creating binding precedent in the Eleventh Circuit (see Appendix D).

Reasons for Granting the Petition

I. Problems Caused by the Delegation of Prisoner Pro Se Cases

A) Increased Workload on The Supreme Court

In the cases where staff attorneys, rather than Article III Judges, make judicial opinions in the Eleventh Circuit, or any Circuit for that matter, the result of an inexperienced newly licensed attorney reducing the quality of judicial opinions is inevitably that the Supreme Court's Certiorari Pool will be more bloated than it otherwise would. Indeed, since the creation of the various staff attorney programs, the average number of Cert. Petitions has grown steadily, with the vast majority being in the prisoner Pro Se category - see U.S. Courts, Table C-2 - Statistical Tables For The Federal Judiciary (June 30, 2015), http://www.uscourts.gov/statistics/tablec-2/statistical-tables-federal-judiciary/2015/06/30 [hereinafter Table C-2] (listing cases that constitute "prisoner petitions"); see also Patricia W. Hatamyar Moore, The Civil Caseload of the Federal District Courts, 2015 U.Ill. L. Rev. 1177, 1211-15 (2015); and U.S. Courts, Table C-13 - Civil Pro Se and Non Pro Se Filings (Sept. 30, 2014), http://www.uscourts.gov/statistics/table/c-13/judicial-business/2014/09/30 - at Note 10, indicating that 93% of such cases are brought Pro Se. Additionally, see Appendix D , which is a table compiled by Judge Posner in his book Reforming the Federal Judiciary, Amazon CreateSpace Sept. 2017, pp 161-167. This table shows that in the Eleventh Circuit, staff attorneys decide a wide range of cases, including ones like Talley's - Pro Se Direct Appeals. (Appeals from the denial of a "compassionate release" request are treated as direct appeals in the Eleventh Circuit - United States v Fair, 326F.3d 1317, 1318 (11th Cir. 2003)(noting that proceedings under §3582(c) are criminal in nature and covered by the rules applied to criminal cases).

B) Claims That Cannot Be Delegated

Delegation of Article III power has received significant scrutiny in bankruptcy cases, which may include some claims that do not require Article III adjudication, alongside claims that do require Article III adjudication. If Congress creates legislation that vests Article III judicial power over Article III claims in non-Article III actors, the delegation may create a structural error, and expansion without Congressional authorization may be an Unconstitutional expansion of the Federal Court's limited rulemaking authority.

Article III vests the federal judicial power in certain courts (U.S. Const. art. III, §1 - "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."); and also determines who may sit on those courts, Id ("The judges, both of the Supreme Court 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 the Continuance in Office."); see also N.Pipeline Const. Co. v Marathon Pipe Line Co., 458 U.S. 50, 59 (1982)("The 'good Behaviour' Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment," whereas "[t]he Compensation Clause guarantees Art. III judges a fixed and irreducible compensation for their services"). In addition, Article III provides that the judicial power may only be exercised by those who enjoy life tenure and fixed compensation - Thomas v Union Carbide Agric. Products Co., 473 U.S. 568, 582(1985). These judicial qualifications are meant to ensure judicial branch independence and permit judges to be free from the pressure that might otherwise be exerted on them by the remaining branches (N.Pipeline Const. Co., 458 U.S. at 59). In addition, the requirements protect litigants by providing a forum and adjudicator "free from potential domination" by others - Commodity Futures Trading Comm'n v Schor, 478 U.S. 833, 848 (1986)(quoting United States v Will, 449 U.S. 200, 218 (1980)). Still, the right to an Article III judge is not absolute, Id. Congress may, in some instances, delegate certain decision-making to non-Article III judges without creating Constitutional problems, Id at 847.

The modern doctrine regarding delegation of the judicial power to judges who do not enjoy life tenure and fixed compensation begins with United States v Will, 449 U.S. 200 (1980). There, the Supreme Court struck down a law through which Congress repealed previous legislation giving federal judges cost-of-living pay increases - see Jonathan L. Entin Erik M. Jensen, Taxation, Compensation, and Judicial Independance, 56 Case W. Res.L.Rev. 965,976(2006). In finding a Compensation Clause violation, the Court emphasized that the Clause is aimed at promoting judicial independence - Will, 449 U.S. at 218.

Moreover, the Court traced the roots of the Compensation Clause to Hamilton's concern for protecting judicial pay (Id) - "In the general course of human nature, a power over a man's subsistence amounts to a power over his will"; and the Act of Settlement of 1701, which sought to "correct abuses prevalent under the reign of Stuart Kings" by inter alia, giving judges "ascertained and established salaries" Id (quoting 12 & 13 Will. III, ch2, §III, cl. 7(1701)). Though colonial judges originally enjoyed salary protection and life tenure, by 1761 they served at the pleasure of the King - Id. at 219. This "interference" would lead the Framers to ensure that "both the tenure and the compensation of judges would be protected from one of the evils that had brought on the Revolution" Id., Entin & Jensen, supra note 125, at 977. Since Will, cases addressing Article III judicial power delegation have emphasized the importance of judicial independence.

Delegation issues have arisen frequently in bankruptcy cases. In 1982's Northern Pipeline

v Marathon, 458 U.S. 50 (1982), the Court addressed whether Congress, through the Bankruptcy Act of 1978, had conferred Article III's judicial power to bankruptcy judges who did not enjoy life tenure or salary security - Id, at 52,53,60. The bankruptcy judges received jurisdiction "over all matters related to those arising under the bankruptcy laws," a delegation that violated Article III by giving the bankruptcy judges power that only Article III judges could enjoy - Id, at 76.

The delegation of Article III's judicial power to judges with periodical appointments compromised judicial independence - Id, at 58. The Court emphasized that this cannot be allowed: "our Constitution unambiguously enunciates a fundamental principle - that the 'judicial Power of the United States' must be reposed in an independent judiciary" Id, at 60. It saw no need to create courts and judges outside of Article III's purview for matters "related to those arising under the bankruptcy laws" (Id, at 76), including the appellant's "right to recover contract damages to augment its estate" (Id, at 71). The Court also rejected the argument that Congress could create courts with judges not subject to Article III's constraints simply because there was a need for such courts to adjudicate claims arising under specialized legislation - Id, at 72-73. Just such a "specialized legislation" is what allows for "compassionate release", and the resulting appeal from a denial of same. Accordingly, this Court should find that the delegation to staff attorneys in criminal matters violates Article III.

This view was upheld in Stern v Marshall, 564 U.S. 462, 469 (2011), wherein the Court addressed whether a bankruptcy judge could render final judgment in a "core" proceeding involving a common law tort counterclaim. The Court held that, although legislation (as here) permitted a non-Article III decisionmaker to do so, the Constitution did not - Id, at 485. Constitutionally, a bankruptcy judge improperly exercises the judicial power by entering final judgment in a state common law tort claim - Id, at 487. The Court emphasized the importance of keeping the judicial power with those who, through life tenure and fixed compensation, would render decisions without concern about "currying favor with Congress and the Executive" Id, at 494. Here, staff attorneys are only temporary appointees who are fresh out of law school and go on primarily to become federal proscutors - engendering a bias toward the Executive, Talley avers now. This conflict is in direct opposition to allowing for a "compassionate release". The integrity of the judiciary would be jeopardized, the Court explained, if Congress could confer judicial powers on non-Article III actors - Id. This is even more true when the limited rulemaking authority vested in the federal courts themselves is exceeded, as the Staff Attorney Program clearly does in the Eleventh Circuit (See Appendix D).

Stern prohibited Congress from altering who wields Article III judicial power by forbidding Congress from assigning away any claim brought within federal jurisdiction "made of 'the stuff of the traditional actions at common law tried by the courts at

Westminster in 1789'" Id. This category is commonly understood to mean claims that were the subject of suit "at the common law, or in equity, or in admiralty" Id; see also Murray's Lessee v Hoboken Land & Imp. Co., 59 U.S. 272, 284 (1855)(stating that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination"). Article III judges in Article III courts must decide them: Stern, 564 U.S. at 494 (quoting N. Pipeline Constr. Co. v Marathon Pipe Line Co., 458 U.S. 50, 86-87 (1982)).

Such matters include "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law" Id. The Court resoundingly refused to give weight to the argument that its holding, which would limit the work bankruptcy judges could do, would delay bankruptcy and render it more costly - Id, at 506. Instead, it noted that there is not constitutional pass given to a law or procedure that is "efficient, convenient, and useful in facilitating functions of government" Id (quoting INS v Chadha, 462 U.S. 919, 944 (1983)); and the Court should do likewise here for direct criminal appeals being handled by staff attorneys.

This has been supported by Chief Justice Roberts in his dissent to Wellness Int'l Network Limited v Sharif, 135 S.Ct. 1932, 1939 (2015)(wherein the Court announced that a party may knowingly and voluntarily consent to adjudication by a non-Article III judge). In his dissent, Chief Justice Roberts emphasized that party consent is not cure for a constitutional violation; a party, he wrote, "has not authority to compromise the structural separation of powers or agree to an exercise of judicial power outside of Article III" Id, at 1954 (Roberts, J., dissenting). Echoing his majority opinion in Stern, Roberts again noted that "practical considerations of the Constitution," even if the Congressional incursion into Article III is "de minimus" - Id, at 1959. Nevertheless, Wellness International's majority is the law; consent can in fact cure a structural constitutional violation in a civil context - see Id, at 1957-67 (2015)(Roberts, J. dissenting). The claims at issue here, however, are not (as in Wellness) being pulled between legislation and Article III courts; as here, no argument between public rights and private rights is being presented. Instead, they are claims arguably adjudicated by nonjudicial staff working within an Article III court.

C) Opinions That Cannot Be Delegated

Much attention has been devoted to delegation of appellate opinion writing, which also raises concerns about improper delegation of the Article III power. These concerns about improper delegation are anchored in institutionalized notion of who should be responsible for certain tasks.

for certain tasks.

In the context of appellate opinion writing, the concern over who writes important decisions intersects with concerns about litigants' increased reliance on decisions that were marked as unpublished. In 1964, the Judicial Conference decided that "only opinions of 'general precedential value'" would be published - Marin K. Levy, Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals, 81 GEO. WASH. L. REV. 401, 414-15 (2013). In 2006, the Federal Rules of Appellate Procedure were amended to permit citation of unpublished opinions - see Penelope Pether, Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law, 39 ARIZ.ST.L.J. 1, 2-5 (2007)(Pether does not challenge the assumption that staff attorney and law clerk work is second-rate. Instead, her article tackles the "discriminatory origins" of what she refers to as "institutionalized unpublication" - Id, at 7. As a result of the rule change, "circuit courts can no longer forbid lawyers to cite back to the [] decisions they have made but designated 'not for publication,' nor sanction them if they do." Id, at 8-9. Given the way all opinions are now in fact published, at a minimum, in some kind of electronic format, describing them as published or not is a distinction that makes little sense.

Still, there was significant judicial opposition to the seemingly innocuous change to the appellate rules (Fed. R. App. P. 32.1(d)). One explanation for the outsized reaction is the judicial perception that unpublished opinions do not create new law; instead, they represent decisions in routine matters and therefore merely affirm preexisting precedent - see Polly J. Price, Precedent and Judicial Power After the Founding, 42 B.C.L.Rev. 81, 111 (2000). But why worry about permitting citation to another kind of carefully drafted judicial writing? Perhaps because the unpublished decisions did not actually represent judicial writing. Refocused this way, the resistance to unpublished opinions begins to look like a resistance to opinions written by individuals who are not Article III judges. Indeed, if this were the case, then one would expect to see published opinions that contradict unpublished opinions supposedly written by the same judge. Such a contradiction can be seen in the Eleventh Circuit by Judge Tjoflat, who authored the published opinion in United States v Sigma International, 244 F.3d 841, 853 (11th Cir 2001) stating: "[a]lthough Bank of Nova Scotia did not explicitly overrule Mechanik, we query what, if anything, remains of the Mechanik rule" and later, in an unpublished decision, states that Mechanik controls the same set of circumstances as laid out in Sigma Int'l; see United States v Cobb, 856 Fed. App'x 812, 813 (11th Cir. 2021). The difference is that the former case was counseled, wehreas the latter was Pro Se, and therefore went to the Staff Attorney's Office for adjudication - see Appendix D .

Many of the judges who opposed the new citation rule believed that unpublished appellate opinions were authored "predominantly [by] recently-graduated corps of judicial clerks

and staff attorneys," individuals who are not meaningfully supervised - Pether, Supra note 165, at 10. These opinion authors were described as "kids that are just out of law school'" Id, at 6. Their work was understood to be "sloppy or wrong" Id, at 17. One author has suggested that "[c]lerks and staff attorneys are more likely than judges to make factually or legally wrong findings because they have missed or misinterpreted something where a more thoroughly trained or more experienced person might not have done" Id, at 39-40. The perception is that citable appellate opinions should be written by Article III judges because Article III judges are more likely to get the law right.

D) Tasks That Cannot Be Delegated

Like the resistance to giving increased stature to appellate opinions authored by law clerks and staff attorneys, there is significant discomfort when law clerks and staff attorneys take on typically judicial tasks. Judges should be presiding over cases, not their law clerks, and certainly not staff attorneys who often don't have any personal interaction with judges and in many courts don't even work in the same building as the judges they supposedly report to. Writing in 1981, Wade McCree, an esteemed former federal trial and appellate judge, and then Solicitor General, warned against increasing the number of law clerks working for federal judges - Wade H. McCree, Bureaucratic Justice: An Early Warning, 129 U.Pa.L.Rev. 777, 787 (1981). He worried that an increase in the number of law clerks would encourage an increase in the "critical aspects" of judicial work delegated to the new law clerks - Id, at 789. Honing in on the Article III implications of such a practice, he also warned that "excessive delegation poses a threat to the traditional institutional structure of the judicial office" Id. Judge Posner has summarized the problem with over-delegation to law clerks: a law clerk cannot try a case for a judge because such a delegation would convert law clerks into judges - Geras v Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1046 (7th Cir. 1984)(Posner, J. Dissenting). The same would be true of staff attorneys in any instance where the staff attorney mad ethe factual and legal conclusion in any case or appeal.

There are several reported examples of law clerk conduct that too closely resembled judicial action. A law clerk cannot rule on whether a victim's testimony can be read back to the jury, nor can one preside over the readback - Parker B. Potter, Jr., Law Clerks Gone Wild, 34 Seatlle U.L.Rev. 173, 184-85 (2010)(citing Riley v Deeds, 56 F.3d 1117, 1120 (9th Cir. 1995)). Such an error is so significant that it renders the trial in which it occurs unfair - Riley v Deeds, 56 F.3d 1117, 1118 (9th Cir. 1995)(suggesting that such an error is structural and will result in the granting of a habeas corpus petition). In Riley, the Ninth Circuit refused to review such an error for abuse of discretion because the standard "presupposes the trial judge exercised some judicial discretion in the matter

under review" and that in the underlying criminal case, the "judge was not present when the jury requested that the testimony be read back, nor does the record reflect he was consulted bout the matter," instead, the "law clerk made the decision to grant the jury's request to read back the testimony." Id, at 1120. At least on court has criticized a judge's decision to allow a law clerk to "settle" issues involving jury instructions; see United States v Sloan, 811 F.2d 1359, 1361 n.2 (10th Cir. 1987)(explaining that "instructions were settled with a law clerk and not the judge," even though "the Judge must resolve all the issue pertaining to the instructions, for it is the sole responsibility of the judge to see to it that the jury is correctly instructed upon the law" (emphasis in orginal)). A law clerk also may not preside over a final pretrial conference (Sanders v Union Pac. R.R. Co., 193 F.3d 1080, 1082 (9th Cir. 1999)(Tashima J. concurring) or handle peremptory challenges (United States v Visinaiz, 428 F.3d 1300, 1313 n.4 (10th Cir. 2005).

Courts have often rejected losing parties' arguments that a decision should be reversed because law clerks were acting as de facto judges on the grounds that the allegations were not true (see, e.g. United States v Kaiser, No. 305-CR-80, 2006 WL 3751452, at *3(D.N.D. Dec. 19, 2006); but each court to do so has noted that if the allegations were true, they would constitute a examples of shifting Article III power away from Article III judges see Id.

CONCLUSION

The delegation of judicial power to law clerks and staff attorneys has long been appoint of controversy in the federal court system. The delegation in the appellate courts, particulary the Eleventh Circuit, of all Pro Se appeals - even criminal appeals like the one Talley entered, has been criticized since its inception. Add to that the changes in appellate procedure that allow for citations to unpublished opinions and the fact that in the Eleventh Circuit, inexperienced staff attorneys do author published opinions at least on occasion as shown in Appendix D, and the staff attorney program becomes a vehicle that allows for unconstitutional delegation of Article III powers to non-vetted individuals who do not have the requirements constitutionally mandated to be in place in order to do the jobs they perform on a daily basis. Because of this, the Supreme Court should GRANT cartiorari in this instance and allow for proper discussion in open proceedings on the constitutionality of the staff attorney programs in federal courts across the United States. Respectfully Submitted,

Respectfully Submitted,

Michael D. Talley

7-26-2022

Date

Certificate of Service

I, Michael D. Talley, hereby swear under penalty of perjury that the foregoing was placed in the hands of the FSL Jesup Legal Mail Representative on 7-26-2022 and ask the Clerk of Court to notify the opposing party of same.

Respectfully Submitted,

Michael D. Talley

7-26-2022

Michael D. Talley Date