In the

Supreme Court of the United States

JOHN W. WINGO, WARDEN
KENTUCKY STATE REFORMATORY
LaGRANGE, KENTUCKY,

Petitioner

vs

CARL JAMES WEDDING,

Respondent

Docket No. 73-846

Pages 1 thru 31

Washington, D.C.

April 22, 1974

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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Washington, D. C.

Monday, April 22, 1974

The above-entitled matter came on for argument at 2:18 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JAMES M. RINGO, ESQ., Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601, for the Petitioner.

JOSEPH G. GLASS, ESQ., 425 South Fifth Street, Suite 201, Louisville, Kentucky 40202, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-846, Wingo against Wedding.

Mr. Ringo, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES M. RINGO

ON BEHALF OF THE PETITIONER

MR. RINGO: Mr. Chief Justice, and may it please the Court: The issue before this Court today in this case is whether the U.S. Magistrate is empowered by the Federal Magistrates Act of 1968 to conduct evidentiary hearings in habeas corpus cases.

I would like to first briefly tell how the case got to this Court today. In 1971 the respondent, Carl James Wedding, after exhausting all of his available State post conviction remedies filed a petition in the U.S. district court for the Western District of Kentucky claiming that his 1949 conviction for willful murder was invalid based on the contention of the court his plea of guilty was ... assistance of counsel. The district court refused his petition and summarily dismissed it as being without merit. A certificate of probable cause was submitted.

The respondent, Mr. Wedding, then appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit reversed and remanded the district court's decision saying that the petition presented certain factual questions which required

an evidentiary hearing.

On remand the matter was assigned to the U.S. Magistrate to conduct the evidentiary hearing. The evidentiary hearing was conducted by the magistrate and recorded by an electronic sound recorder. The magistrate, after conducting the hearing, considering all the pleadings and all available State records, proposed findings of fact and conclusions of law and his report and recommendation that the petition of Mr. Wedding be dismissed.

The district court, upon request by counsel for respondent, Mr. Wedding, gave de novo consideration of the recorded testimony, the electronically recorded testimony, of the hearing. Thereafter, the district judge, after reviewing all the pleadings, de novo consideration of the recording of the evidentiary hearing, adopted the magistrate's findings of fact and conclusions of law and report and recommendation as his own and dismissed the petition.

Whereupon, the respondent once again appealed to the Sixth Circuit, and the Sixth Circuit reversed again stating that the U.S. Magistrates are not empowered by the Federal Magistrates Act to conduct evidentiary hearings in habeas corpus cases.

We submit that magistrates are empowered by Section 636(b) of the Federal Magistrates Act to conduct evidentiary hearings in post trial cases. 636(b) in substance

says that by concurrence of a majority of the judges of the district court , they can adopt rules assigning additional duties to the U.S. magistrate, so long as they are not inconsistent with the Constitution or laws of the United States.

Inherent in this language are two limitations of the duties assignable to the magistrate.

First, the magistrate may act only pursuant to a rule passed by a majority of the judges of the district court , as was done in this case, and

Two, the duty so assignable must be consistent with the Constitution and laws of the United States.

QUESTION: Does the rule of the district court not also provide that either party upon request may require the district judge to hear, to listen to the transcript of the testimony?

MR. RINGO: Yes, that's true, your Honor.

QUESTION: You may have said that, but if you did I missed it.

MR. RINGO: I didn't say it, but it's true.

These limitations which I have just mentioned are recognized by the drafters of the Proposed Rules Governing Habeas Corpus Proceeding, which is presently before the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. These proposed rules give magistrates the power to conduct evidentiary hearings in

habeas corpus cases, citing section 636(b) as authority.

We submit that allowing a U.S. magistrate to conduct evidentiary hearings in habeas corpus proceedings is not inconsistent with the Constitution and laws of the United States.

QUESTION: Don't we know that the U.S. magistrate has to be a lawyer?

MR. RINGO: The Act requires, your Honor, that the full-time U.S. magistrate has to be a lawyer except in situations where there are none available in the districts.

QUESTION: So he might not be.

MR. RINGO: That's right, your Honor.

QUESTION: So you might have a situation where a U.S. magistrate is proposing findings and conclusions when he is not a lawyer, even though a conviction, for instance, has been affirmed up through the Kentucky court system. Does this bother you at all?

MR. RINGO: In the instant case it does not because our magistrate was a member of the bar.

The duty of appointing the magistrate is upon the concurrence of a majority of the district judges, and I would submit that the judges would select a very qualified person in the event there were no lawyers.

QUESTION: Do you know whether there are any full-time magistrates in the United States that have been appointed

and now serving who are not lawyers?

MR. RINGO: I have no statistics on it. I know that the U.S. Commissioner system which this system replaced, that 30 percent were not lawyers.

The respondent in the Sixth Circuit submitted that the Magistrates Act was inconsistent with the Habeas Corpus Act. In constructing two statutes on like subjects, it is necessary to look to the intent and purpose of both Acts. The intent and purpose of the Habeas Corpus Act was to determine with regard to the detention of a person held in restraint of his liberty. The intent of the Magistrates Act in respect to haveas corpus petitions, it was clearly the intention of Congress to have magistrates assist the overburdened courts which were overburdened by habeas corpus applications by reviewing habeas corpus applications and conducting evidentiary hearings if necessary in order that the judge might have before him all the facts and circumstances surrounding the petition to facilitate his ultimate determination of the facts of the petition.

Now, in order that this new tier of judicial office which was created by this Magistrates Act of 1968, in order that they might be able to perform this function, Congress upgraded the old Commissioner system not only in position but in the qualifications so that magistrates would be qualified to adequately perform the much-needed assistance to the

judges of their crowded dockets of habeas corpus petitions. For this reason we submit that the Magistrates Act is consistent with the Habeas Corpus Act and actually fosters and supports its purpose and intent and that it ensures that the person who is detained is given a prompt determination as to the legality of the restraining of his liberty.

QUESTION: Mr. Ringo, what comment do you have about the provision in 636(b)(3), zeroing in on preliminary review of applications for posttrial relief, ending up "to facilitate the district judge having jurisdiction over the case as whether there should be a hearing."

MR. RINGO: The intention of Congress on that 636(b)(3) was clear that this was merely a suggested rather than a required duty. Therefore, it is not exclusive on the subject of ways in which the magistrates might be used in habeas corpus proceedings. The Congress intended to make this 636(b) purposely broad and flexible in order that the judges might be able to utilize the magistrates to the efficiency of the district court.

QUESTION: I suppose the district judge might, after listening to -- reading the proposed findings and report and recommendations and listening to the electronic recording might then decide to conduct a full-scale hearing himself.

MR. RINGO: That is well within his province. The

district judge can accept, reject, amend, do what he wants to with the magistrate's report, findings of fact and conclusions of law, and so forth.

So we submit also that the Magistrates Act is not inconsistent with the Constitution. Argument has been made with respect to Article III of the Constitution. Article III vests the judicial power in the Supreme Court and other inferior courts, as the district court.

QUESTION: Did the Sixth Circuit touch upon the constitutional issue at all? Or did they decide it as a matter of statutory construction?

MR. RINGO: Primarily statutory construction on the theory of use and generis.

QUESTION: And if we should disagree with them, do you think then that the case should be remanded to have them consider the constitutional issue in the first place?

MR. RINGO: I really -- the constitutional issue should be considered. As far as the constitutional issue concerning Article III, the Congress stated it was their intention that the magistrates would not have the power to make the ultimate determination of facts. And we concede this point that the ultimate determination of facts must be made by the Article III judge himself.

QUESTION: What sort of a proceeding do you have before Judge Gordon in the district court after the magistrate

has made findings like these? Did you have oral argument?

MR. RINGO: In this case there was no oral argument.

QUESTION: How did the matter go up to him? The report of the magistrate and briefs of the parties?

MR. RINGO: The matter was before the court on a petition and response to the petition. It came back to the Sixth Circuit on the first reverse remand. An evidentiary hearing was held. Subsequent to the evidentiary hearing ... State proceedings and then from there the judge considered de novo the recorded testimony, the available State records which were submitted to the court, and all the previous pleadings and then he adopted the findings of fact and conclusions of law of the magistrate as his own.

QUESTION: Did the parties have an opportunity to brief or object to the findings of the magistrate before Judge Gordon?

MR. RINGO: I don't believe there was any objection by either party.

For the foregoing reasons, assigning additional duty to the U.S. magistrate of conducting an evidentiary hearing in habeas corpus proceeding is neither inconsistent with the Constitution and laws of the United States, and we submit that this may be done.

QUESTION: The judge never saw any of the witnesses, never saw them, he never heard them testify.

MR. RINGO: That's true.

QUESTION: How could he weight the evidence?

MR. RINGO: He can consider the evidence in light of the State records. He gave de novo consideration --

QUESTION: What was the sense of having the evidentiary hearing?

MR. RINGO: To get before the court all the facts. This is why the Congress set up the judicial tier of magistrate.

QUESTION: I thought the Constitution set up Article III judges?

MR. RINGO: We submit that Article III judges are vested with the judicial power of the United States or the power to decide. The Congress upgraded the system of magistrates by --

QUESTION: They upgraded them to Article III judges?

MR. RINGO: No, your Honor.

QUESTION: How far?

MR. RINGO: Far enough up to give them the qualifications which would enable them --

QUESTION: So that what he could do is take the transcript of the testimony, the tapes of the hearing, the recommendations of the magistrate and just sign the recommendation and not change a word of it.

MR. RINGO: If he thinks they are adequate and fair.

QUESTION: Is that your idea of an Article III judge?

MR. RINGO: No, your Honor.

QUESTION: It's not mine, either.

MR. RINGO: They upgraded the --

QUESTION: I'm talking about the judge. I'm not talking about the magistrate. I don't think it's an Article III judge who lets a magistrate determine for him what the findings are to be.

MR. RINGO: The intention --

QUESTION: Am I wrong? Isn't that his job to make his own finding?

MR. RINGO: It's his job to determine the ultimate facts. The Congress intended to upgrade the qualifications of the magistrate in order that he might be vested with certain investigatory power, so to speak, in order that he could facilitate the decision of the judge. The problem of not overburdening of habeas corpus applicants is the fact the judge does not have to winnow the wheat from the chaff, so to speak. As far as applications, this is the purpose that the Congress intended for the magistrate to be able to perform.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Ringo.

Mr. Glass.

ORAL ARGUMENT OF JOSEPH G. GLASS

ON BEHALF OF THE RESPONDENT

MR. GLASS: Mr. Chief Justice, and may it please

the Court: It is the respondent's contention that the decision of the district court of the Sixth Circuit Court of Appeals should be affirmed. We have contended through these proceedings from the very inception that the language of 28 U.S.C. 636(b)(3) is very clear and very explicit in that it provides for a preliminary review by the magistrate of post conviction and posttrial proceedings and it provides for a report and recommendations as to whether there should be an evidentiary hearing. And it has been our contention that the language is very clear on that, that it doesn't provide that a magistrate may hold himself an evidentiary hearing.

QUESTION: What do you think section (2)of the statute means -- assistance to a trial judge in the conduct of pretrial or discovery proceedings in civil or criminal. Do you think that would embrace a pretrial proceeding for the suppression of evidence or not?

MR. GLASS: No, sir, I don't think it does embrace a --

QUESTION: What criminal matters do you think section (2)covers?

MR. GLASS: I would think that -- it's my impression, Mr. Chief Justice, that that would encompass something like a pretrial conference whereby the party litigants through counsel --

QUESTION: Do you have many pretrial conferences in

civil cases? -- in criminal cases, I meant to say.

MR. GLASS: There are a few. There are not many.

QUESTION: Are they directed at the suppression type motion?

MR. GLASS: Many of them are the suppression type motions or motions on constitutionality of statutes, things of that matter. But from time to time there are conferences with the court on legal matters in criminal cases.

QUESTION: Why is it that you say that a magistrate couldn't hear a suppression matter under paragraph (2)? It seems to cover by its terms, doesn't it?

MR. GLASS: As I interpret Criminal Rule 41 and as I have read the cases, that's within the province of the district court judge and that's a fact-finding process. And I think that's what we are talking about here in these proceedings, fact-finding processes.

QUESTION: But paragraph (1) of the rule talks about services of special master in an appropriate civil action. Certainly that's a fact-finding process.

MR. GLASS: Yes, sir, that's an advisory position, but it's not an evidentiary position.

QUESTION: Is this not advisory when the report is subject to requiring the judge to listen to the tape recording?

MR. GLASS: Not as this Court in 1941 interpreted Holiday v. Johnston and later in 1963 interpreted Townsend v.

Sane when it talked about the demeanor of witnesses and the credibility of witnesses. That's within the province, I think, of the district judge.

QUESTION: If a challenge is made there, is there anything in this statute that prevents the judge from saying after he has listened to the tape recording that, "I think there are serious and possibly difficult questions of credibility here, so we will set this down for a hearing." Isn't that what section (3) says a district judge can do?

MR. GLASS: Of the local rule?

QUESTION: No, section (3) of the statute.

MR. GLASS: I am sure that's correct.

QUESTION: I'll read the language that I am referring to: "...and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether or not there should be a hearing."

Now, could the judge not then set down --

MR. GLASS: I think that was the purpose the Act was intended for for the magistrate to be a recommending agency and not an evidentiary --

QUESTION: Well, but you mean the judge must have a hearing in every case after the magistrate has had a hearing?

MR. GLASS: No, sir. Habeas corpus doesn't provide that a judge must hold a hearing in every case.

It's our contention, Mr. Chief Justice, that the

Magistrates Act does not authorize an evidentiary hearing in any case by the magistrate, that this is within the province of the district judge. Now, there are certain things that he can do. I think the legislative history of the Act goes a long way towards explaining when it says to alleviate the judge from having to do the routine task.

QUESTION: Would that go at least as far as having magistrates sufficiently examine the matter to be able to say to the district judge, "It's my recommendation that you do or don't have a hearing."

MR. GLASS: I think that's permissible, because law clerks have been functioning in that capacity for years. That's an advisory --

QUESTION: But your position is he can't, and so the Sixth Circuit held. He can't go beyond that and conduct the actual evidentiary hearing and submit the record of that evidentiary hearing to the district judge.

MR. GLASS: That is our contention, your Honor, based on Holiday v. Johnston and actually Townsend v. Sane when it talks about the province of the district judge weighing the credibility and demeanor of the witnesses, which is unquestionably a very important and perhaps in many instances the most important step in the habeas corpus matter as such.

QUESTION: What about the special masters that district court judges can appoint in particular cases to take

evidence?

MR. GLASS: To take evidence in civil cases, your Honor? I'm not that familiar with it. In criminal cases they are not allowed. Again going back to Holiday v. Johnston, in 1971 Payne v. Wingo in our Sixth Circuit held that the special master, and in this case he was the duly appointed United States Commissioner. That's at 442 Fed. 2d.

QUESTION: I understand that. How about the civil case special master?

MR. GLASS: In a civil case he is allowed under the laws as I have read them, Mr. Justice White, to take depositions and things of that nature. But in an evidentiary --

QUESTION: He is entitled to take evidence and prepare a report.

MR. GLASS: As an adviser, but --

QUESTION: To which there are exceptions then by counsel. There is an argument on the exceptions before the judge. Isn't that the usual practice?

MR. GLASS: Mr. Justice Brennan, both the petitioner and the respondent have cited cases, for example TPO, Inc., which have held that there are only certain things in the civil nature that the magistrate can do, but they cannot be part of the decision-making process.

QUESTION: The masters. I am talking about the masters now.

MR. GLASS: Here again I think it can't be part of the decision, the decision-making process.

QUESTION: But nevertheless, there will be special masters appointed and the evidence will be taken by the special master and the judge will ultimately determine the facts without ever having seen the witnesses.

MR. GLASS: Well, in civil proceedings I have less concern about that than I do in habeas corpus.

QUESTION: But isn't that the case? Isn't that true? Isn't it true that that's what happens on the civil side with special masters?

MR. GLASS: I'm not that knowledgeable, Mr. Justice White, to really give you a good answer on that.

QUESTION: Are not all the cases in the United States Court of Claims cases that involve many millions of dollars tried in just that way?

MR. GLASS: Yes, as I understand it.

QUESTION: The Commissioner makes a report and recommendations and the court then reviews it and decides to accept or reject.

MR. GLASS: From reading some of the background on habeas corpus, this is my understanding. But here again some of the authors, and I believe that's been covered in "Twenty Am.Jur.Trials," an article by Mr. Scople? and also in 83 Harvard Law Review, that is, define these type of proceedings

as advisory proceedings, it's my recollection.

QUESTION: This is a civil proceeding that we're reviewing here, isn't it? Federal habeas is a civil --

MR. GLASS: It's denominated as such, Mr. Justice Rehnquist, but I don't think it fully -- I would go back to legislative history on that where Mr. Fred Vinson had some colloquy.

QUESTION: Do you think he prevailed? I doubt it. Senator Tydings gave him rather a difficult time, didn't he?

MR. GLASS: Yes, sir, he sure did.

QUESTION: Didn't he say in response to one question when Mr. Vinson said he assumed it did not intend to cover some of these things. The answer was, "We certainly intend that. We intend to lift this off the shoulders of the judges -- to lift off the shoulders of the judges as much of the routine nature of discovery or fact-finding operation connected with post conviction proceedings and petitions as possible." So that the Congress was presented with the two conflicting views and seems to have adopted Senator Tydings' view of master.

MR. GLASS: If the Court please, I subscribe to Mr. Vinson's view.

QUESTION: I suppose really in your emphasis on Holiday you get back to the fact that the words used to be "court justice or judge." And then Congress amended it just to make it "court."

MR. GLASS: Yes, sir.

QUESTION: And yet you're certain at least that made no change, and obviously whatever else may be true of the Magistrates Act, the Habeas Corpus Act always said "court" and meant "court" period.

MR. GLASS: Yes, it does.

QUESTION: That meant an Article III court.

MR. GLASS: 28 U.S.C. 2243 speaks in specific language.

QUESTION: That's really the gist of it.

MR. GLASS: Yes, sir.

QUESTION: And I gather that's actually the basis for the Sixth Circuit both in this case and in Wingo isn't it?

MR. GLASS: Yes, sir. And here again, going back to legislative history, initially when the statute was drafted it provided for preliminary consideration rather than preliminary review and because of all of the evidence that came out as a result of the hearings, they redrafted the legislation to say preliminary review of posttrial matters.

QUESTION: Certainly the statute could have been more clearly expressed.

MR. GLASS: Unquestionably it could have.

QUESTION: Mr. Glass, what is your comment about the provision in the statute giving the magistrate the power to conduct certain trials under section 3401 of the Code? If he has that power, what is so wrong with giving him the power

to conduct a preliminary hearing of this kind?

MR. GLASS: Mr. Justice Blackmun, there are some provisions in that statute which I think are important for this Court to consider. Number one, the magistrate in those Federal crimes statutes has jurisdiction of those crimes which are normally denominated as misdemeanors carrying up to a year in the penitentiary, up to a thousand dollar fine, or both. However, there is also the provision that the defendant and the Government have to agree to the trial before the magistrate. And there is also, of course, the right of appeal to the district court.

But I think that's a very important distinction because not only does it take the agreement of the parties, but the magistrate only has that limited jurisdiction. Whereas, if this Court were to hold that the magistrate had the authority to hold evidentiary hearings, he would be weighing the liberty of people filing habeas corpus who are incarcerated for a much lengthier period of time, as for example the respondent in this case who is under a life sentence.

QUESTION: Mr. Glass, how far do you think the magistrate can go on a habeas?

MR. GLASS: On a habeas? I would suggest, Mr. Justice Marshall, that he can review the pleadings, that he can appoint counsel when necessary, that with the aid of counsel he can define the legal issues, that with the aid of

counsel he can set out an order of proof for the evidentiary proceedings if that should be necessary, that he can submit a summary of the case to the district judge, and that with the aid of counsel on both sides he can project the length of the hearing that might be required before the district court.

QUESTION: Can he recommend that no hearing is necessary?

MR. GLASS: Certainly I think that's within his province.

QUESTION: Doesn't the judge accept that and there is no problem with it?

MR. GLASS: If he is recommending as a matter of law, I don't think there is anything -- I think he's authorized to do that under the Act.

QUESTION: Mr. Glass, did you object during the proceedings before the magistrate that he was not empowered or ought not to be conducting this sort of a hearing?

MR. GLASS: In point of fact, Mr. Justice Rehnquist, I filed a motion, a lengthy motion with the memorandum brief to disqualify the magistrate from holding the evidentiary hearing prior to it.

QUESTION: Is that in the record?

MR. GLASS: Yes, sir, and it's contained in the appendix on pages 15, 16, and the memorandum is 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27.

QUESTION: That was all you submitted, the magistrate had no authority to --

MR. GLASS: That's correct, your Honor.

QUESTION: Not on any reason for him personally to --

MR. GLASS: Not personally, no, sir. It was on the grounds that I didn't think the Act provided for him holding an evidentiary hearing.

QUESTION: .... the order that was issued on May 1, 1972 by the four Kentucky district judges ends up, "Upon written request of either party within 10 days the district judge shall proceed to hear the recording of the testimony given at the evidentiary hearing and give it de novo consideration." The counsel aren't there when that occurs.

MR. GLASS: That is correct. As a matter of fact, you make the request in writing and --

QUESTION: Which I see in the appendix here. And then his ultimate order recited that he had heard it.

MR. GLASS: That's correct.

QUESTION: But nobody is there.

MR. GLASS: That is also correct. In this case he listened to an Edison tape recording disc of the hearing as it was taken down at the evidentiary hearing.

QUESTION: And there is nobody there to verify whether or not there might be gaps in the tape recording or erasures.

MR. GLASS: That's correct.

QUESTION: Inadvertent or otherwise.

MR. GLASS: That is correct.

QUESTION: I am a little confused. You said you think the magistrate can conduct this preliminary process and make recommendations to the judge that no hearing need be held and if the judge accepts that recommendation, it's all right. But he may not go beyond that and hear the testimony and then make proposed recommendations or proposed findings of fact to the judge to the same end that no further hearing is necessary.

MR. GLASS: Mr. Chief Justice, I believe that that would be the posttrial consideration that he would be authorized to do. I think primarily he would be directing himself as a matter of law, looking towards whether the habeas corpus satisfies the prerequisites of Townsend v. Sane, 1963, and ? v. Noye in 1963. But here again, looking towards the legal aspects and the formality of the pleadings and thereafter submit a report on whether there should be an evidentiary hearing.

QUESTION: Does that suggest, for example, he might take the State record and go all through that and conclude that the requirements of Townsend, say, have been satisfied and that for that reason the case could be decided on the State record without any further Federal hearing.

MR. GLASS: Townsend v. Sane allows that, and he would have to --

QUESTION: And the magistrate could do this much?

MR. GLASS: Yes, sir, I think he would have to serve notice on the parties as to his report and recommendations along those lines.

QUESTION: If he had that basis, that goes rather far because he is now making the decision that there is a sufficient hearing in the State proceeding not to require an additional one and that the Federal constitutional claims, whatever they may be, may be decided on the basis of the State record without supplementing it with any Federal record.

MR. GLASS: Mr. Justice Brennan, perhaps I misunderstood your question. I think he can make recommendations based upon the law to the judge. I think the judge -- and I don't think there is any question within the circuits that the district judge is the ultimate decider of the question. And I don't think that should ever be changed.

QUESTION: I expect in many of these habeas corpus cases it ought to be true that the constitutional claims can be determined on a State record without supplementing it with a Federal record.

MR. GLASS: As I read Townsend --

QUESTION That's what Townsend contemplated.

Can a magistrate be given the responsibility, do you

think,of examining the State record, concluding that it suffices for the decision of the Federal constitutional claims and therefore recommend there is no reason to have any further hearing?

MR. GLASS: I think he can draw his own conclusions in that regard and submit them to the district judge by way of documentation and outline in that report and recommendations why he believes his findings to be correct. And if the district judge accepts it, then I suppose perhaps they can dismiss the petition as having been satisfied in the State proceeding.

QUESTION: And then that is, of course, appealable.

MR. GLASS: Yes, sir, it is.

QUESTION: That happened in this very case the first time up in the Court of Appeals and the Court of Appeals, a little different panel, Judge Miller sitting instead of Judge Phillips -- no, instead of Judge Cecil, remanded the case for a hearing.

MR. GLASS: That's correct.

QUESTION: That is what happened in this case, and that is always appealable. The question is whether that hearing was given as directed by the Court of Appeals the first time around.

MR. GLASS: Yes, sir.

I think it is very important to consider the cases

that have been cited by both parties in the brief and also as petitioner has conceded on page 12 of his brief, that the magistrates do not have the authority to decide and make ultimate determination of fact cases or controversies. This must be left to Article III courts.

QUESTION: Does anyone contend that they have final authority?

MR. GLASS: I think if you --

QUESTION: In the Article III sense?

MR. GLASS: In the Article III, that the magistrates have authority --

QUESTION: I have not found anyone who claimed that there is any finality about the magistrate's findings or recommendations any more than there is with a commissioner of the Court of Claims or a hearing examiner of the Federal Power Commission.

MR. GLASS: Not as such, but many of the courts have expressed, for example, in Rainhow v. Cassidy?, the pro forma laying on of hands of the magistrate's report and recommendations without, as Mr. Justice Stewart suggested, anyone being there to review how much input went into that particular review of the report and recommendations. I think that is the major concern in some of the cases that have even upheld or gone towards upholding the magistrate's holding the evidentiary hearings. For example --

QUESTION: There was no hearing the first time, and then the Court of Appeals sent it back, not to the magistrate, but he sent it back to the district court for a hearing in the district court, didn't he?

MR. GLASS: That is correct. And then at that time the district court appointed the magistrate.

During this intervening time the magistrate had been appointed, as a matter of fact. He was appointed in 1971, late, as I recall. Prior to that we had a commissioner during the first three years that the Act was in effect.

QUESTION: After the magistrate, in this case, filed his report and recommendations, summary, and sent the electronic tape up, was there anything to preclude the petitioner's lawyer from filing a request for -- filing exceptions to the report and asking for oral argument?

MR. GLASS: Mr. Chief Justice, the rule doesn't provide for oral argument.

QUESTION: All right. Does anything prevent him from doing it?

MR. GLASS: No, sir, but I did file a memorandum taking exceptions to the magistrate's report, and it was a lengthy --

QUESTION: Then it is up to the court whether to grant oral argument on that or not, I guess.

MR. GLASS: Yes, sir.

QUESTION: Did he grant oral argument?

MR. GLASS: No, sir.

QUESTION: We, of course, decide an enormous number of cases here without oral argument, as you know.

MR. GLASS: Yes, sir.

QUESTION: Is one of your concerns, Mr. Glass, what I would consider a perfectly legitimate feeling that although the rule perhaps contemplates the district judge sits there and listensto the tapes, if he is busy and doesn't want to just duplicate the time that the magistrate put in, he may short-circuit that process a little bit?

MR. GLASS: I think it is a legitimate concern. It is not a particular concern of me in that let me just say that I have a degree of faith in the three district judges that we have in the Western District of Kentucky. However, I do think that to allow the magistrate to hold an evidentiary hearing and still say that it is within the province of the Article III judge to hold another evidentiary hearing is just one more step in the judicial process, and I do not think that is what the Act was intended for. It is like another appeal. If the district judge rules that the magistrate's findings of fact and conclusions of law are correct, then you go up to the Sixth Circuit Court of Appeals in our situation, and so on. And I do not think that is what the Act calls for. The Act, I believe, was intended simply to reduce the routine and

mundane workload of the district judge so that he could address himself to things like evidentiary hearings. And the Sixth Circuit noted in their opinion in this case that they could not see how an evidentiary hearing, that is listening to the tape de novo, would require any more time than an actual evidentiary hearing. And along the lines of the suggestion I have made that the magistrate can do, I think that he could reduce the time necessary for an evidentiary hearing and could probably almost pinpoint it by taking these proceedings through with counsel in the form of prehearing conferences with counsel, because counsel is appointed. And then submit a report to the judge that the hearing is going to take 45 minutes; it's going to take an hour and a half; it's going to take three hours; these are the witnesses that will probably be called; these are the issues that will probably be determined; these are the facts that will probably be determined.

QUESTION: Supposing that the district court held a hearing under those ground rules. Would you say that the district judge would be justified in excluding out of hand any effort on the part of either party to go beyond the magistrate's recommendations as to the issues that evidence should be received on?

MR. GLASS: I think if it were important, and I would submit that if that were the situation, that there would

in all probability be a proviso that written motions or requests or notices could be filed with the court if the hearing were going to include anything other than that which was laid out by the recommendations of the magistrate.

QUESTION: But supposing you filed your motion or notice, would the district court be justified on the basis of the magistrate's recommendations to say, "No, I don't propose to hear that one. We will limit it to the issues specified by the magistrate."

MR. GLASS: I think if you go back -- if I can make an analogy -- if you go back to the appellate process and if the petitioner and/or his counsel knew at the time they had the prehearing conference with the magistrate that certain matters were available, that certain people were available, they wanted to get a certain issue into evidence that they knew at that time and didn't disclose it, then I think they would not be entitled to bring it up by way of notice or within the hearing itself under those circumstances.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Ringo?

Thank you, gentlemen. The case is submitted.

[Whereupon, at 3 p.m., the oral argument in the above-entitled matter was concluded.]