

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-5630

TITLE KATHY THOMAS, Petitioner V. DOROTHY ARN, SUPERINTENDENT,
OHIO REFORMATORY FOR WOMEN

PLACE Washington, D. C.

DATE October 7, 1985

PAGES 1 thru 53



(202) 628-9300
20 F STREET, N.W.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -x

KATHY THOMAS, :
Petitioner, :
V. : No. 84-5630
DOROTHY ARN, SUPERINTENDENT, :
OHIO REFORMATORY FOR WOMEN :

- - - - -x

Washington, D.C.
Monday, October 7, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:05 a.m.

APPEARANCES:
CHRISTOPHER DANAHY STANLEY, ESQ., Cleveland, Ohio; on
behalf of the petitioner.
RICHARD DAVID DRAKE, ESQ., Assistant Attorney General of
Ohio, Columbus, Ohio; on behalf of the respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>STATEMENT OF</u>	<u>PAGE</u>
CHRISTOPHER DANAHY STANLEY, ESQ.,	
on behalf of the petitioner	3
RICHARD DAVID DRAKE, ESQ.,	
on behalf of the respondent	26
CHRISTOPHER DANANY STANLEY, ESQ.,	
on behalf of the petitioner - rebuttal	50

1

2

5

7

8

9

16

22

1 A little history of the case. My client was
2 charged with murder in Cuyahoga County in Cleveland,
3 where she was convicted. On appeal, Judge Krensler, who
4 is now a Federal District Court Judge in Cleveland, held
5 that from the current psychological and sociological
6 research has emerged a profile of a battered woman as
7 one who displays unique behavioral patterns and
8 psychological characteristics as well as differences in
9 reaction and perception, all of which are not within the
10 knowledge of the average juror.

11 He concluded that without expert testimony on
12 the battered woman syndrome, a jury would be unable to
13 have a sufficient comprehension of the defendant's state
14 of mind at the time of the homicide. The Ohio Supreme
15 Court granted review of the case and reversed the
16 reversal.

17 I then went to the Federal District Court
18 Judge in Cleveland. It was referred to a magistrate,
19 who recommended that the petition for habeas corpus be
20 denied. The District Court Judge had a de novo
21 determination. Notwithstanding the failure to file
22 objections, the Sixth Circuit, implementing what is now
23 known as the Walters policy, held that by failing to
24 object to the magistrate's report, one waives the right
25 to appeal to the circuit from the District Court order.

"

1 I then petitioned for cert and this Court granted it.

2 There are basically four points I would like
3 to make on argument today. The first and most important
4 one is the interplay between the magistrate's act and
5 Article 3 of the United States constitution.

6 When our forefathers were setting up the new
7 government after the Revolutionary War, they were very
8 wary of putting all the governmental power, basically
9 the legislative, executive, and judiciary, into the same
10 hands. Accordingly, they felt that it was necessary
11 that there be an independent judiciary. They wrote
12 Article 3.

13 Article 3 basically says that there shall be a
14 Supreme Court and such inferior courts as Congress may
15 establish. It also said that those courts were to be
16 staffed by judges who have life tenure and a set
17 salary.

18 I must admit that Article 3 at first blush
19 seems a relatively simple statement of fact. It spawned
20 a great deal of litigation in this Court. "I do not
21 pretend to understand Article 3 and the litigation it
22 has spawned, particularly in such cases as Northern
23 Pipeline.

24 However, with regard to the interplay between
25 Article 3 and the Magistrates Act, this Court has quite

1 clearly stated what the law is. Now, the Magistrates
2 Act was provided in Congress in 1976 and subsequently
3 amended basically to set up a series of inferior
4 judicial officers, inferior, that is, to the District
5 Courts, to help the District Courts with the
6 overwhelming case law that they were being presented
7 with.

8 Basically, they may consider nondispositive
9 pretrial matters, conduct evidentiary hearings of
10 dispositive motions, habeas corpus, et cetera. In the
11 section that we are dealing with here, that is, 28 USC
12 636(b)(1)(B), they can conduct hearings on a habeas
13 corpus and then provide the judge with proposed findings
14 of fact and recommendations for disposition by the
15 Judge. Parties may file objections, and the Judge shall
16 make a de novo determination of those portions of the
17 report objected to. However, the last sentence, I
18 think, is the key.

19 The Court may accept, reject, or modify the
20 report. This Court in several cases has considered the
21 interplay between Article 3 and the Magistrates Act,
22 most often through the pen of Chief Justice Burger.

23 The basic cases are the United States versus
24 Raddatz and Mathews versus Weber. This Court quite
25 clearly has said the Magistrates Act is constitutional

1 because the ultimate decisionmaking rests with the
2 United States District Court. Those cases basically
3 came up with three points.

4 One, in going over the legislative history of
5 the Magistrates Act, this Court has said Congress was
6 sensitive to the Article 3 considerations. They were
7 sensitive to not putting in a magistrate Article 3
8 duties. Hence this Court stressed and Congress stressed
9 that the ultimate adjudicatory determination was
10 reserved to the District Court.

11 The second point this Court has made in
12 Raddatz and Mathews is, the Court says that the ultimate
13 authority and responsibility to make an informed formal
14 determination must remain with the Judge.

15 Three, the Court stressed the magistrate's
16 role is one of helping the Court to narrow the dispute,
17 focusing on the legal issues. However, it again
18 stressed the Court alone remains the ultimate
19 decisionmaker. In sum, this Court said in Raddatz and
20 Weber, the delegation of the magistrate to hear issues
21 does not violate Article 3 so long as the ultimate
22 decision is made by the District Court.

23 QUESTION: Mr. Stanley, did you receive notice
24 of the waiver rule?

25 MR. STANLEY: Yes. In the --

1 QUESTION: Did you request to file objections
2 within ten days?

3 MR. STANLEY: In the printed portion of the
4 magistrate's report, at the very end, contained what I
5 now recognize to be notice that if I don't file
6 objections, there would be a waiver.

7 MR. STANLEY: Did the District Court give you
8 an extension of time within which to file objections?

9 MR. STANLEY: Yes, they did.

10 QUESTION: Did you file any?

11 MR. STANLEY: No, I did not.

12 QUESTION: How much additional time did he
13 give you?

14 MR. STANLEY: I --

15 QUESTION: Two or three months?

16 MR. STANLEY: Two or three -- whatever the
17 time. I don't remember.

18 QUESTION: How would the District Court ever
19 know that you objected if you failed to file any
20 objections?

21 MR. STANLEY: First of all, if I may say, the
22 issues were fully briefed. When I filed the petition
23 for habeas corpus, I included with it a memorandum of
24 law concerning the issues I was to raise. It was
25 approximately 20 pages long. In my opinion, this

1 Court's decisions in Raddatz and Weber mandate
2 independent judicial review of the magistrate's report
3 by a District Court.

4 QUESTION: On its own -- on its own
5 initiative.

6 MR. STANLEY: No, on the initiative -- what is
7 included in 626(b)(1)(B). That is, failure to object --
8 the penalty for failure to object as enunciated by
9 Congress is no de novo determination. The Court may
10 accept, reject, or modify the report of the magistrate.
11 It seems that this Court has quite clearly said the
12 Court must be the ultimate decisionmaker. Otherwise,
13 you have a situation where the magistrate ends up being
14 an Article 3 judge. For instance, in the Sixth --

15 QUESTION: Mr. Stanley, if you had filed
16 objections, would you be here now?

17 MR. STANLEY: Well, probably not, but
18 hopefully I would have won down there and you would have
19 accepted it anyway.

20 QUESTION: All of this is brought about by
21 your failure to file a piece of paper.

22 MR. STANLEY: That's correct.

23 QUESTION: And that is what we are using our
24 time up for.

25 MR. STANLEY: Pardon?

1 QUESTION: That is what we are using our time
2 up for.

3 MR. STANLEY: Well, Your Honor, I believe it
4 is a much more serious matter than that. Here we have
5 Raddatz and Weber requiring a District Court judge to
6 make a final determination. The Walters policy as
7 enunciated by the Sixth Circuit and other circuits in
8 their policies have stated that the District Court
9 doesn't really even have to consider the case if you
10 don't file objections.

11 That raises a magistrate to the ultimate
12 decisiomaker in a case.

13 QUESTION: Mr. Stanley, if you are right that
14 Raddatz and the other case stand for the proposition
15 that the District Court is an independent adjudicator,
16 the adoption of your view would really allow counsel
17 losing before the magistrate to simply go directly to
18 the Court of Appeals without even paying any attention
19 to the District Court.

20 MR. STANLEY: Well, I disagree with you,
21 Justice Rehnquist. First of all, the magistrate's
22 report is not a final appealable order. Congress in
23 writing the statute says, if there are no objections,
24 the District Court doesn't have to make a de novo
25 review, but the District Court still must consider the

1 case. It must be the ultimate decisionmaker.

2 The District Court then making an independent
3 review but with the magistrate having focused the issues
4 spends much less time on the case, makes a
5 determination, and that is -- it is from that --

6 QUESTION: But the District Court would surely
7 be even more focused if it had the benefit of objections
8 to the magistrate's report from the losing party.

9 MR. STANLEY: I am not going to disagree with
10 you, Your Honor. However, it seems to me, for instance,
11 in this case, where I had filed a 20-page brief, the
12 issues were before the Court. It was an issue of law.
13 This is the sixth court that my client has been to, that
14 I have been to on her behalf. To say that there is a
15 waiver of anything is, in my opinion, untenable. We
16 have -- I raised the issue. I briefed the issue. The
17 magistrate came to a different conclusion. All the
18 District Court judge had to do is in fact what he did
19 do, because he did conduct a de novo determination
20 anyway. What he did do was read my brief, read the
21 magistrate's report, come to a conclusion.

22 QUESTION: Well, in this instance, how was
23 Article 3 violated, because by your own statement the
24 District Court did give review to the magistrate's
25 finding here, and the finding became the District Court

1 finding. Now, if you make no objections in the District
2 Court, if the proceedings at trial have been in the
3 District Court initially, a court of appeals is not
4 going to consider things that aren't raised at the
5 District Court level. Why should it be different with
6 the magistrate's report that is considered by the
7 District Court?

8 MR. STANLEY: Well, Justice O'Connor, if one
9 reads the opinions in the circuits, there is only one
10 circuit report which discusses this issue in terms of
11 procedural default. The Sixth Circuit does not talk in
12 terms of procedural default. The Sixth Circuit says
13 specifically you waive your right to appeal, period.

14 Now, in a procedural default, you are not
15 waiving your right to appeal. You still have the right
16 to appeal, but the Circuit Court says you didn't
17 preserve it below. It seems to me --

18 QUESTION: The effect is the same. In either
19 event the Court of Appeals wouldn't be hearing it.
20 Isn't that right?

21 MR. STANLEY: That's correct, but it seems to
22 me in a situation like this it is a question of form
23 over substance.

24 Where you have, Number One, a brief on the
25 issue, the matters that are in issue before the Court on

1 behalf of the petitioner and the magistrate's report,
2 you have a right as enunciated by Congress to appeal
3 from the denial of a habeas corpus. That is an
4 independent right that Congress has seen fit to give to
5 a petitioner in a habeas corpus proceeding. I don't
6 know that a court can say we are going to ignore
7 Congress and we are going to impose this penalty.
8 Further --

9 QUESTION: Well, Mr. Stanley, did I understand
10 you to say that the recommendation of the magistrate to
11 which you did not object was nevertheless the subject of
12 de novo review by the District Judge?

13 MR. STANLEY: That's correct.

14 QUESTION: And does the judgment that the
15 District Judge entered reflect that determination on
16 that issue?

17 MR. STANLEY: The judgment of the District
18 Court reflects that there was a --

19 QUESTION: No, did it reflect the
20 determination of the issue, the subject of a
21 recommendation by the magistrate to which you did not
22 object?

23 MR. STANLEY: That's correct.

24 QUESTION: And you didn't agree with that --
25 the judgment in that respect?

1 MR. STANLEY: On the District Court? No, I
2 did not.

3 QUESTION: Is that what you wanted to have
4 reviewed in the Court of Appeals?

5 MR. STANLEY: That is correct. I filed a
6 notice from the judgment entry of the District Court,
7 notice of appeal to the Sixth Circuit.

8 QUESTION: Whether the District Court
9 purported to review the report de novo or not, the only
10 time that you get an appealable judgment is when the
11 District Judge enters an order.

12 MR. STANLEY: That's correct.

13 QUESTION: In any case, it is going to be a
14 District Court judgment.

15 MR. STANLEY: That's correct.

16 QUESTION: And what do you say -- why does
17 that raise a problem under Article 3?

18 MR. STANLEY: Well, to be honest with you,
19 Judge, as you pointed out in your dissent in Northern
20 Pipeline, I am not convinced that I know what --

21 QUESTION: You are taking a lot of your time
22 on this Article 3 issue. You have got something else
23 going, haven't you?

24 MR. STANLEY: Yes, Your Honor. Only because
25 Article 3 in interpreting the Magistrates Act has said

1 the reason that it is constitutional is that the
2 decisionmaker must be the District Court.

3 QUESTION: Well, it always is.

4 MR. STANLEY: That's correct, and since the
5 District Court must review the magistrate's report,
6 whether objections are filed or not, it seems to me that
7 the Walters policy and the other circuits are wrong when
8 they say that there is a waiver of the right to appeal,
9 because --

10 QUESTION: You have consumed 17 minutes now on
11 this point. If you want to save some time for the other
12 matters, you should get on to it.

13 QUESTION: I must say that if you are right,
14 then even if Congress said you either object or you
15 waive, that would be unconstitutional.

16 MR. STANLEY: I would agree with you.

17 A second point that I wish to make in my
18 remaining 13 minutes --

19 QUESTION: May I ask one question before you
20 go to your second point?

21 MR. STANLEY: Certainly.

22 QUESTION: Do you understand the Sixth Circuit
23 rule to be that they think the statute compels a waiver,
24 or that as a matter of practice in the Sixth Circuit we
25 will enforce the waiver rule?

1 MR. STANLEY: Well, their writing, the
2 language that they said was, although you may file
3 --objections is something that you may or may not do, we
4 feel they felt that under the supervisor power they
5 could force this issue by making it a rule in the Sixth
6 Circuit. One of the dangers of that in my opinion,
7 Justice Stevens, is the fact that different circuits
8 have different rules for jurisdiction, and if we go to
9 what was going to be my third point, which is that the
10 courts cannot limit their own jurisdiction that Congress
11 has given them, in different circuits some people can
12 appeal. In four of the circuits you can appeal no
13 matter what the magistrate does, whether or not you file
14 objections or not, you can appeal from the denial of a
15 habeas.

16 In the sixth circuit you cannot appeal from a
17 denial. You do not file objections. In one of the
18 circuits they talk about procedural default, and one of
19 the circuits, the Eighth Circuit, rejects the waiver
20 theory. So, you have differing jurisdictions of the
21 Court of Appeals as a result from these differing
22 policies with regard to whether or not you file
23 objections.

24 QUESTION: Well, there may not be a difference
25 after this case is decided.

1 MR. STANLEY: Hopefully not.

2 My second argument is a due process argument
3 as it was enunciated in United States versus Raddatz by
4 the Chief Justice, which basically says that what due
5 process you are entitled to is appropriate to the nature
6 of the case. Citing Mathews versus Aldridge, it goes
7 into the question of private interests, the risk of
8 erroneous determination by reason and process supported,
9 and the public interest in administrative burdens.

10 It seems to me that when we are talking about
11 the great petition of habeas corpus, and where Congress
12 has required the right to appeal as giving you that
13 right, that due process requires in habeas corpus that
14 the ultimate decisionmaking be with the District Court,
15 and that the right to appeal be given to a petitioner.

16 I have already mentioned in reference to
17 Justice Stevens' argument my fourth point, which is that
18 I do not believe that the courts can limit their own
19 jurisdiction.

20 I would say that in summation, that Walters is
21 wrong because it limits their jurisdiction. Congress
22 never said in its statute that a failure to object is a
23 waiver. There already exists a penalty for failure to
24 object, which is, you do not get a de novo
25 determination. The statute says, if there are

1 objections, there shall be a de novo determination.
2 That is the penalty for failure to object, not waiver of
3 the right to appeal.

4 QUESTION: Well, you say you do not get one,
5 but do you argue that the judge may nevertheless give
6 one?

7 MR. STANLEY: No, I believe the judge may give
8 -- in fact, if the court -- the court can do whatever it
9 decides to do. As the Chief Justice said in Raddatz and
10 Weber, the magistrate is there to help the District
11 Court in its overburdened case law. It is there to
12 focus the issues. The Court can reject or give whatever
13 weight it wants to to the findings of the magistrate.

14 QUESTION: Did Judge Conti hear oral argument
15 in this case after the magistrate's report?

16 MR. STANLEY: No, he did not.

17 QUESTION: So the thing was never set down on
18 the District Court's docket in the sense of being kind
19 of a petition to review the magistrate's order. You
20 didn't submit anything to the District Court, and he
21 held no hearing.

22 MR. STANLEY: Well, I will agree with you as
23 far as the timetable is concerned. There was nothing
24 submitted after the magistrate's report. The case was
25 assigned to Judge Conti's docket. I filed the brief

1 with Judge Conti's docket, a 20-page brief that fully
2 outlined our position on the issues of law.

3 QUESTION: Was this the same brief you gave
4 the magistrate?

5 MR. STANLEY: Yes, so I mean when I file it it
6 goes to Judge Conti. Judge Conti fills out a little
7 form and sends it to the magistrate. The magistrate
8 sends it back to Judge Conti with the report
9 recommendation.

10 I would indicate for the record in -- I was
11 responding to Justice Brennan that two of the circuits
12 in this country indicate that where there is no
13 objections, the District Court does not even have to
14 review the magistrate's report. There is nothing more
15 for the District Court to do in the case. It elevates
16 in my opinion a magistrate to a Judge.

17 I would reserve the rest of my time for
18 rebuttal.

19 QUESTION: Aren't you going to argue that the
20 statute forbids this, for heaven's sake?

21 MR. STANLEY: I thought I had, Your Honor, in
22 the article -- in interpreting --

23 QUESTION: Well, Article 3 would make the
24 statute irrelevant.

25 MR. STANLEY: Well, in my opinion the statute

1 says, and right in conjunction, that you may file -- the
2 magistrate is to file a report and recommendations for
3 final decision by the Judge, is what the statute says.

4 QUESTION: Isn't one of your arguments that
5 the statute on its face and its legislative history
6 forbids this result?

7 MR. STANLEY: Yes.

8 QUESTION: All right.

9 QUESTION: Do you think there is any difference
10 between the magistrate's recommendations on factual
11 findings as opposed to points of law? As I understand
12 your argument, it makes no difference which it is, an
13 issue of law or of fact. There is no waiver in your
14 view.

15 MR. STANLEY: That's correct. I recognize
16 that four of the circuits have held that a waiver --
17 that a failure to object waives the right to appeal
18 factual findings but not of legal conclusions. As
19 Justice Marshall pointed out in his dissent in Raddatz,
20 I believe that Justice Brandeis, and I would agree with
21 him, indicates that in habeas corpus petition you are
22 entitled to review of the facts and the law by a judge,
23 and in my opinion because of the great place that we
24 have for the petition of habeas corpus in our society,
25 and the fact that we are talking about a liberty

1 interest, we really must have a judge, and based upon
2 the statute, which holds that the Judge is the ultimate
3 decisionmaker, the judge must decide everything.

4 QUESTION: One point. Is your only point the
5 fact that you don't have to file an objection?

6 MR. STANLEY: Let me make it clear, Justice
7 Marshall.

8 QUESTION: That is what I am trying to do.

9 MR. STANLEY: I would dearly have loved to
10 file the objection because then I wouldn't be here
11 having to argue --

12 QUESTION: Well, that is the only point that
13 is here, isn't it? Do you agree?

14 MR. STANLEY: Yes. Yes. In my opinion --

15 QUESTION: You want us to say that the rule of
16 the circuit is wrong.

17 MR. STANLEY: That's correct.

18 QUESTION: Unconstitutional.

19 MR. STANLEY: In my opinion, yes, based upon
20 the decisions --

21 QUESTION: Well, what part of the constitution
22 does it violate?

23 MR. STANLEY: It violates due process, and it
24 violates Article 3 by practice of the policy, which is
25 that you do not have -- the District Court --

1 QUESTION: You mean Five? Which one are you
2 -- which amendment are you talking about?

3 MR. STANLEY: Amendment Five and Fourteen,
4 Your Honor.

5 QUESTION: Five and Fourteen. And that denies
6 you due process?

7 MR. STANLEY: In my opinion, a magistrate --
8 not having a judge --

9 QUESTION: Now, what else would you have filed
10 with the Court under an objection more than the 20 pages
11 that you filed?

12 MR. STANLEY: Nothing. To be honest --

13 QUESTION: So, what are we complaining about
14 other than that you just don't like filing a piece of
15 paper?

16 MR. STANLEY: Well, like I said, if I had to
17 do it over again, I would. What I don't -- what we --
18 where the law stands now is that it elevates a
19 magistrate to something higher than he should be by
20 allowing him to be the final determination of the
21 issue.

22 The issues were before Judge Conti. He
23 recognized that and he decided them.

24 QUESTION: You say that you wouldn't file it
25 again?

1 MR. STANLEY: I said if I had to do it over
2 again I would file them.

3 QUESTION: Suppose we send it back. Will you
4 file it or not?

5 MR. STANLEY: You tell me to file them, I will
6 file them. I will file them. If it is going to cure
7 the problem that exists and the reason I am here, I will
8 file them.

9 QUESTION: I am still trying to find out what
10 is here.

11 MR. STANLEY: What is here is the question of
12 whether or not the Sixth Circuit's determination in my
13 case that I could not appeal from the District Court
14 order is viable. I say to this Court that my client has
15 the right to appeal to the Sixth Circuit from the denial
16 by the District Court Judge of a petition for habeas
17 corpus. They say that not -- failing to file objections
18 waives that right, and I say that is unconstitutional.

19 QUESTION: Mr. Stanley, was your failure to
20 file objections intentional or an oversight?

21 MR. STANLEY: You have to understand, Justice
22 Blackmun, I am an assault practitioner. Up until
23 Friday, when the Circuit Court Judge granted a stay
24 based upon your latest Mitchell versus Wyatt, I was
25 supposed to go back tomorrow to Akron to start a

1 month-long jury trial.

2 I have to put out my time in each case as best
3 I see it. In this case I had filed a brief. The issues
4 were before the District Court Judge. I felt to file an
5 objection would have been just simply an exercise in
6 futility, that the magistrate considered my petition, my
7 position on the issue, and made his recommendation.

8 QUESTION: So it was not an oversight.

9 MR. STANLEY: No, it was simply a matter where
10 I didn't feel that it would add anything to the
11 controversy before Judge Conti by filing objections. I
12 would have simply refiled my brief that I had already
13 filed.

14 QUESTION: Mr. Stanley, how is conditioning an
15 appeal in these cases on filing of objections any
16 different than conditioning an appeal on the timely
17 filing of a brief or payment of a filing fee or
18 something of that kind?

19 MR. STANLEY: Well, I think it is different
20 because, Number One, Congress has given a petitioner for
21 a writ of habeas corpus the right to appeal. Number
22 Two, Congress --

23 QUESTION: Well, even so, can't the courts
24 enforce a requirement filing memos and briefs on a
25 timely basis and so forth?

1 MR. STANLEY: Certainly.

2 QUESTION: So why not this?

3 MR. STANLEY: Well, because this is where a
4 Circuit Court is saying, we are not going to let you
5 appeal because you didn't do something in the District
6 Court, namely, file objections. Number One, it goes to
7 statutory construction of Congress's intent, which this
8 Court has repeatedly said Congress's intent is for the
9 District Court to be the ultimate decisionmaker, not the
10 magistrate.

11 Number Two, the penalty for failure to file
12 objections is quite clear from Congress's intent that
13 you just simply do not get a de novo review. There is
14 no express policy outlined in any of the statutes or any
15 of the legislative history from Congress that they
16 expected a waiver of the right to appeal.

17 I would say to this Court that where you have
18 a petition for habeas corpus and the right to appeal,
19 that the Circuit Courts cannot limit their own
20 jurisdiction.

21 As I pointed out to Justice Stevens, you now
22 have a mishmash in the different circuits where in some
23 circuits you can appeal, even though you have a failure
24 to file objections, and in other circuits you can't, and
25 I think that is untenable.

1 QUESTION: Very well.

2 Mr. Drake?

3 ORAL ARGUMENT OF RICHARD DAVID DRAKE, ESQ.,

4 ON BEHALF OF THE RESPONDENT

5 MR. DRAKE: Mr. Chief Justice, and may it
6 please the Court, the issue in this case is whether a
7 Federal Circuit Court may condition appellate review
8 upon the filing of objections to the report and
9 recommendation of a federal magistrate.

10 QUESTION: Mr. Drake, the way you state the
11 question interests me. You are not contending then that
12 there is a statutory requirement that Circuit Courts
13 take this view.

14 MR. DRAKE: No.

15 QUESTION: You are saying it is a matter --
16 each circuit can adopt its own rule.

17 MR. DRAKE: Yes, and I am saying the Sixth
18 Circuit has adopted it under its supervisory powers.
19 The rule is --

20 QUESTION: A permissible rule that is not
21 required by statute.

22 MR. DRAKE: A rule which is not only
23 permissible, but --

24 QUESTION: Makes a lot of sense.

25 MR. DRAKE: Fosters Congressional intent. I

1 don't believe that the Magistrates Act actually speaks
2 directly to this question. The question is whether the
3 Sixth Circuit may do this, not whether it is compelled
4 to do so.

5 QUESTION: And therefore it also follows, I
6 guess, that it is not a jurisdictional rule.

7 MR. DRAKE: It is definitely not a
8 jurisdictional rule.

9 QUESTION: Because they didn't make it
10 retroactive, so obviously they thought they had
11 jurisdiction to go either way.

12 MR. DRAKE: They made it prospective only to
13 accommodate what I feel they perceive to be potential
14 due process difficulties.

15 QUESTION: Do you think that -- is their rule
16 limited to the cases where the defendant gives notice?

17 MR. DRAKE: Absolutely.

18 QUESTION: And is that your position also?

19 MR. DRAKE: Yes.

20 QUESTION: That if he doesn't get notice,
21 there can be no waiver?

22 MR. DRAKE: The rule was promulgated in a
23 case, United States versus Walters, which is cited in
24 the brief. The rule was not even utilized in that
25 case. It was made prospective only from the date of

1 that decision.

2 QUESTION: Then it is -- you don't push for
3 any wider waiver rule.

4 MR. DRAKE: No. No, Your Honor. I don't
5 believe the statute compels it perforce, no.

6 QUESTION: So you -- I take it the answer to
7 Justice Stevens that other circuits could have just the
8 contrary rule.

9 MR. DRAKE: The circuits could in their
10 wisdom, I believe, though, if you look to the
11 Congressional intent underlying the Magistrates Act, a
12 circuit who declines to adopt the Sixth Circuit rule is
13 essentially for reasons unknown to me fostering upon
14 itself review de novo.

15 QUESTION: But it would be permissible, you
16 are saying.

17 MR. DRAKE: It would be permissible.

18 QUESTION: You don't urge us then to try to
19 make the rule uniform or not?

20 MR. DRAKE: I think that if affirmance is
21 given in this case, we might have more circuits adopting
22 this rule in their own self-interest. As I pointed out
23 in the brief, the difficulty is not uniform to all the
24 circuits. For instance, the District of Columbia
25 Circuit apparently has very little difficulty, if you

1 look at the statistics, whereas the Fourth, Fifth,
2 Sixth, and now the Eleventh Circuits are having
3 considerable difficulty.

4 QUESTION: At least there is a question as to
5 whether this was a proper exercise of the supervisory
6 power.

7 MR. DRAKE: I believe that is the only
8 question before the Court.

9 QUESTION: And Congress did indicate what a
10 penalty for failure to file was, or is.

11 MR. DRAKE: As to the District Court, yes.

12 QUESTION: Why should a court impose a further
13 penalty for failure to file?

14 MR. DRAKE: Because the purpose underlying the
15 Magistrates Act -- and it has had a checkered history.
16 The original 1968 version encountered a series of
17 adverse judicial decisions, including ones from this
18 Court, and it was in response to your invitation and
19 that of the Chief Justice that the 1976 amendments were
20 actually enacted.

21 The theory underlying the 1976 amendments very
22 much parallels the master system used in the United
23 Kingdom or the referee system used in most states today,
24 which is to use non-Article 3 jurists, here magistrates,
25 to delineate the scope of the dispute. Oftimes you will

1 have in a civil case a multicount complaint filed. The
2 magistrate might recommend summary judgment as to let's
3 say 18 of those, and the litigant will then have --
4 essentially the magistrate will serve as a filtration
5 system, where the litigant will then make an intelligent
6 judgment as to whether or not he wants to proceed. That
7 is the entire theory underlying this, that the
8 magistrates will filter this litigation in the
9 nondispositive context. The review is under the clearly
10 erroneous standard. In the dispositive context, as I
11 said, the Magistrates Act did not fare well in the
12 Courts.

13 They were very, very aware of Article 3
14 difficulties, and they made it absolutely clear that if
15 the litigants so desire, he could obtain, he had the
16 opportunity to obtain review anew, but he could forfeit
17 that opportunity. This case is tantamount in my opinion
18 strictly to a failure to prosecute or any other
19 procedural default.

20 QUESTION: Suppose the 20-page paper that he
21 filed, suppose the first page of it said I object for
22 the following reasons.

23 MR. DRAKE: In other words, you are saying,
24 suppose the objections would have been filed, Your
25 Honor?

1 QUESTION: Suppose he said, "I object for the
2 following reasons." That is all he put on the top of
3 the 20-page thing he filed. Would that be
4 satisfactory?

5 MR. DRAKE: You mean initially, when he
6 initiated this litigation, Your Honor?

7 QUESTION: Yes.

8 MR. DRAKE: No, Your Honor, I don't.

9 QUESTION: Didn't he file something with the
10 District Court?

11 MR. DRAKE: Your Honor, I think there is a
12 misstatement or misunderstanding here. After the
13 magistrate issued the report and recommendation, the
14 only thing he filed was a motion for extension of time.
15 He never refiled anything in the District Court,
16 anything of any --

17 QUESTION: What is this 20-page thing he is
18 talking about?

19 MR. DRAKE: When he essentially filled out the
20 form, the habeas corpus form, which is provided for in
21 the rules, and he also attached thereto a brief
22 reiterating the claims he had made in the state courts --

23 QUESTION: You mean, that was a filing before
24 the magistrate.

25 MR. DRAKE: That was referred to the

1 magistrate, yes.

2 QUESTION: That was referred to the
3 magistrate.

4 MR. DRAKE: Yes, and considered by the
5 magistrate in conjunction with briefs filed by the state
6 of Ohio and a very voluminous transcript.

7 QUESTION: What did he file with the District
8 Court?

9 MR. DRAKE: With the clerk's office, when he
10 initiated this action --

11 QUESTION: Well, I -- the District Court means
12 clerk's office.

13 MR. DRAKE: Right, he filed the petition and a
14 brief in conjunction therewith. That is all he ever
15 filed except for the motion for extension of time --

16 QUESTION: And after the magistrate ruled, he
17 didn't file anything else.

18 MR. DRAKE: Except for a motion for extension
19 of time, he filed nothing.

20 QUESTION: He filed nothing.

21 MR. DRAKE: Nothing. Surprising, he didn't
22 even file a 59E motion to alter or amend judgment, which
23 probably would have avoided this question also, at least
24 many circuits have held. It wasn't too late even when
25 the judgment was issued, in my opinion, but --

1 QUESTION: Why wouldn't it be too late, then?
2 Under the Sixth Circuit rule, it seems to me if you
3 don't file --

4 MR. DRAKE: The Sixth Circuit has never really
5 addressed the issue.

6 QUESTION: As far as we know, the Sixth
7 Circuit rule seems to be an inflexible rule. If you
8 don't file objections --

9 MR. DRAKE: No, Your Honor. First of all, the
10 Sixth Circuit rule is not inflexible at all. As I
11 pointed out in the brief, there was a pro se litigant,
12 and the Sixth Circuit found in that instance that there
13 was cause for the failure to -- the procedural default,
14 and wanted to avoid a manifest injustice.

15 The rule is not inflexible, and we are not
16 talking about jurists who are unreasonable.

17 QUESTION: Let me just go back for a second to
18 Justice Marshall's -- I'm sorry -- question. If after
19 the magistrate's ruling, your opponent had filed a piece
20 of paper which said I object to the magistrate's rulings
21 for the reasons stated in the memorandum I filed
22 originally, period, that would have been enough,
23 wouldn't it?

24 MR. DRAKE: The Sixth Circuit has never
25 addressed it. What you are talking about -- in any

1 published decision, in any event. What you are talking
2 about is the pro forma blanket objection. I don't
3 know. I can't answer your question. I don't know if
4 they would hold an attorney at law --

5 QUESTION: Well, that wouldn't even be pro
6 forma, because they would have filed -- you would have
7 spelled out his argument. Well, I see what your point
8 is.

9 MR. DRAKE: I think that in the case of a pro
10 se applicant, that would be sufficient. He is doing the
11 best he can. Here we are talking about someone who is
12 admitted to the bar, and in point of fact Mr. Stanley
13 had filed four claims. When he went to the Sixth
14 Circuit, he abandoned three of those. Here we have a
15 District Judge who sui sponte took it upon himself to
16 unnecessarily waste time on three claims which obviously
17 he had intended to abandon anyway. The Act would have
18 worked in this instance.

19 He would have filed objections in theory on
20 only one of the four claims, and Judge Conti, who at
21 that time had been elevated to the Circuit Court, would
22 not have had to deal with 75 percent of this litigation,
23 Your Honor, and that is what the Sixth Circuit is trying
24 to do, not take away someone's right to appeal, but
25 merely mandate that they perfect that right to appeal,

1 and not -- here we have not only a failure to file
2 objections, but in the Sixth Circuit Mr. Stanley did not
3 so much as file a reply brief indicating why he hadn't
4 filed the objections. Even though our brief dealt at
5 length and initially with this question, Mr. Stanley did
6 not appear at the oral argument.

7 The Circuit Court below had neither written
8 nor oral explanation as to why these objections were not
9 filed.

10 QUESTION: Mr. Drake, what about a situation
11 when the District Court sui sponte alters the finding or
12 recommendation of the magistrate on, for example, a
13 point of law, and no objections had been filed in a
14 timely basis, but the District Court on its own reaches
15 some legal conclusion different from the magistrate's
16 recommendation. Would there have to be a right to
17 appeal from that?

18 MR. DRAKE: For instance, Your Honor, you are
19 indicating perhaps Judge Conti would have granted the
20 writ as to one of these claims?

21 QUESTION: Yes.

22 MR. DRAKE: Had Judge Conti granted the writ
23 as to one of these claims, and I here have to speculate
24 to some degree, because it has never really arisen in
25 the Sixth Circuit, but it would be my judgment the state

1 of Ohio could appeal, that Mr. Stanely could appeal
2 raising as the sole ground for affirmance that relied
3 upon in the District Court, and could neither file a
4 cross appeal nor could he rely upon the other three
5 grounds that were not considered by Judge Conti. I
6 think that would be the logical extension of what the
7 Sixth Circuit states.

8 QUESTION: And if a circuit nevertheless tried
9 to apply the waiver rule, would there be anything in the
10 statutory scheme or the Constitution to prevent it?

11 MR. DRAKE: If the Sixth Circuit in the case
12 where the writ is granted --

13 QUESTION: Yes.

14 MR. DRAKE: -- tried to --

15 QUESTION: Enforce a waiver.

16 MR. DRAKE: I can't imagine myself ever making
17 that argument, and I don't think the Sixth Circuit could
18 do that.

19 QUESTION: Well, is there anything in the
20 statutes or the Constitution that would prohibit a
21 circuit from having so stringent a rule of waiver?

22 MR. DRAKE: Would prohibit it? Nothing would
23 come to mind except for a general concept of fairness,
24 Your Honor. I can't imagine a Circuit Court ever doing
25 that. I am unaware of any remotely analogous

1 situation.

2 QUESTION: How specific do you think the
3 notice must be?

4 MR. DRAKE: I think it --

5 QUESTION: Here it was quite specific --

6 MR. DRAKE: I think the notice --

7 QUESTION: -- but what if it weren't? What if
8 it were a general notice?

9 MR. DRAKE: I think that --

10 QUESTION: That you might lose your right to
11 appeal?

12 MR. DRAKE: Some Circuit Courts have had
13 difficulty with this, and I think that the Sixth Circuit
14 has taken the wiser course and mandated the notice be so
15 specific that any child who really can read or write at
16 all could understand that notice. Here we are talking
17 about some people that are in prison but aren't that
18 educated, and I am certain that if you can read at all,
19 you understand what that notice means. It is not
20 ambivalent or ambiguous to any extent whatsoever, and I
21 think Mr. Stanley's contrary assertion is sheer
22 sophistry, Your Honor. That is a very explicit notice.
23 And it is even in capital letters, as you can see at
24 Page 50 of the joint appendix.

25 QUESTION: Well, if there were no notice, or

1 if the rule did not allow an appeal in the other
2 circumstance, I suggest, does that raise due process
3 concerns then, in your view?

4 MR. DRAKE: If there were no notice? Yes.
5 For instance, in the United States versus Walters itself
6 had the Sixth Circuit promulgated a supervisory, and in
7 that case it would have taken away the right, the
8 government's right to appeal, as it turns out, but had
9 it gone the other way, I do see due process concerns. I
10 think that notice is absolutely essential.

11 QUESTION: So far as notice, do you think that
12 each individual attorney has to be advised by the
13 government or by somebody, by the Court of their right
14 to appeal from a judgment of the District Court to the
15 Court of Appeals?

16 MR. DRAKE: No, Your Honor. For instance, had
17 there been a rule, any rule of appellate procedure is
18 not obviously incorporated in every order of a Court.
19 Attorneys are deemed to be on notice, and are to some
20 degree pro se litigants, are deemed to be on notice of
21 rules that are long standing.

22 This Court doesn't, for instance, send me
23 rules of practice every time I come here, but I think
24 that the rule -- it is the wiser course, because we are
25 --

1 QUESTION: I thought you were saying it was
2 constitutionally --

3 MR. DRAKE: I think notice is constitutionally
4 mandated, the fact that you actually put it in every
5 pleading, which is what happens in the Sixth Circuit.
6 Every report and recommendation --

7 QUESTION: Yes, but I thought your answer to
8 Justice O'Connor's question was, if there weren't that
9 sort of notice, there would be real constitutional
10 implications. I wonder how you score that with the fact
11 that nobody gets any notice other than reading the
12 statute of their right to appeal from the District Court
13 to the Court of Appeals.

14 MR. DRAKE: Your Honor, I meant that for
15 instance if a Circuit Court came up with some
16 supervisory rule that took litigants by surprise and
17 made it retroactive to appeals which were pending, I
18 would have some difficulty --

19 QUESTION: You are talking about kind of a
20 judge-made rule.

21 MR. DRAKE: Right, which is what we have here,
22 is essentially a rule which the Sixth Circuit perceives,
23 and I agree, is very congruent with the intents
24 underlying the Magistrates Act. You simply cannot have
25 your Article 3 District Judge being bypassed and

1 sandbagged.

2 The idea is to serve as some sort of a
3 filtration system. Congress certainly did not mean to
4 aid Article 3 District Judges and to the detriment of
5 Article 3 Circuit Court judges.

6 QUESTION: But of course Judge Conti doesn't
7 seem to have taken advantage of the latitude which you
8 say Congress gave him.

9 MR. DRAKE: He did not take full advantage of
10 the latitude which Congress gave him. Perhaps that
11 might -- I have no idea why Judge Conti did what he
12 did. It certainly was not incumbent upon him to do so.

13 QUESTION: Maybe he enjoys reviewing
14 magistrates' decisions.

15 MR. DRAKE: I honestly do not know, obviously,
16 Your Honor, why he did what he did.

17 QUESTION: Well, you certainly wouldn't need
18 to reach any constitutional argument if notice weren't
19 provided by the court rule. All you would have to say
20 or hold here is that it was an improvident exercise of
21 his supervisory power not to require noticed. You
22 wouldn't have to reach any constitutional issue.

23 MR. DRAKE: I would agree. Here notice,
24 express notice was given, Your Honor. Mr. Stanley
25 acknowledges that he got the notice. The fact that he

1 filed the motion for extension of time, which was
2 granted, is indicative of that fact.

3 There is no dispute that -- the only dispute
4 is his belated misinterpretation of what that fairly
5 plain language meant, Your Honor. But once again, I
6 would point out that we are here dealing with a court
7 who has decided to exercise its supervisory power.

8 Reversal can only obtain if that supervisory
9 power is repugnant either to the Constitution or
10 statute. Mr. Stanely has pointed out no repugnancy that
11 I can ascertain. He simply disagrees with the wisdom of
12 the supervisory rule.

13 Here I believe that, and I believe the
14 statistics indicate that there should be some latitude
15 here for the various circuits to operate in the manner
16 that they wish to operate absent some repugnancy to an
17 overriding statute or the Constitution. And no one has
18 said that this rule is mandated nationwide.

19 Some circuits, particularly the Eighth
20 Circuit, obviously doesn't perceive the need to have
21 such a rule. If they want to allow District Judges to
22 be bypassed, Congress has indicated that they can do so,
23 I believe.

24 I believe that if the court below is affirmed,
25 perhaps Circuit Courts will feel a little more latitude

1 and be a little more receptive to the Sixth Circuit
2 rule.

3 I believe, though, if the court below is
4 affirmed, perhaps Circuit Courts will feel a little more
5 latitude and be a little more receptive to the Sixth
6 Circuit rule.

7 What Mr. Stanley is attempting to do is
8 relieve himself of the obligation as an officer of the
9 Court to apprise the Court of the fact that he is
10 dissatisfied with a portion of the magistrate's report
11 or, for that matter, the whole thing, and he is putting
12 the onus on the judiciary to do his job. This is
13 precisely what the Circuit Court said we are not going
14 to allow this to happen.

15 This is no different than any other legitimate
16 procedural requisite. It is just that Congress said to
17 file the brief, to file a timely notice of appeal, to
18 appear at a pretrial conference, to give discovery.
19 Essentially what we have here is a failure to prosecute,
20 and we have a totally unexcused failure to prosecute. I
21 have no idea --

22 QUESTION: May I ask -- may I interrupt for
23 just a second?

24 MR. DRAKE: Yes, Your Honor.

25 QUESTION: Is it your view or the view in the

1 Sixth Circuit that a District Judge acts improperly if
2 when there are no objections to the magistrate's report
3 or file the District Judge decides on his own initiative
4 to review the whole report and decide whether he agrees
5 or disagrees with it?

6 MR. DRAKE: I don't know what the Sixth
7 Circuit view on that would be, Your Honor. What Judge
8 Conti did in this case is highly unusual, though, as a
9 matter of common practice.

10 QUESTION: The force, the effect of the rule
11 as I understand it, though, really doesn't have anything
12 to do with what the District Judge may do. He can still
13 either review or not review his own election.

14 MR. DRAKE: Yes.

15 QUESTION: Which is what Congress seemed to be
16 thinking about mostly. The whole force of this rule is
17 to protect the Court of Appeals --

18 MR. DRAKE: That's right.

19 QUESTION: -- as I understand it from
20 reviewing cases where there was a procedural default
21 before the magistrate, and it is irrelevant what the
22 District Court does.

23 MR. DRAKE: That's correct, Your Honor.

24 QUESTION: Even if the District Court writes
25 a great long opinion, they will say we won't bother

1 reading the opinion because of the failure at the
2 magistrate level.

3 MR. DRAKE: I don't believe that they would
4 say in each and every instance some inflexible --

5 QUESTION: Well, the general rule would be --

6 MR. DRAKE: Yes.

7 QUESTION: But this rule does nothing to
8 protect the District Judge, as I understand it.

9 MR. DRAKE: The District Judge is -- in point
10 of fact what really happens is the District Judge
11 ordinarily does not do what Judge Conti did here. But
12 the rule is not designed to protect him. I doubt if it
13 could.

14 QUESTION: But the judge is free to do it if
15 he has a new magistrate, he is not confident, or
16 something, he could --

17 MR. DRAKE: If the Judge, for instance, got a
18 new group of law clerks and wants to let them practice,
19 he wants to review these magistrate reports, he
20 certainly is privileged to do so, and I would have great
21 problems if the Circuit Court told him he couldn't do
22 that.

23 QUESTION: The only time the judge is really
24 required to give de novo review is if there is an
25 objection.

1 MR. DRAKE: Yes.

2 QUESTION: And if the objection only runs --
3 goes to part of the report, that is all he has to give
4 de novo review of.

5 MR. DRAKE: Which -- and this is a classic
6 case, Your Honor. There is only one complaint before
7 this Court on the merits, and there were four
8 originally. Presumably Mr. Stanley would have objected
9 only as to this battered wife syndrome question,
10 abandoned the other three claims, with a considerable
11 savings of time in the long run to judges like Judge
12 Conti.

13 The judges should not be presumed to be forced
14 or compelled to do what Mr. Stanley wants when the
15 litigants are not before him complaining.

16 QUESTION: May I interrupt once more? If I
17 understand your position correctly, say there is -- the
18 District Judge thought there was merit to one of the
19 four claims to which no objection had been made. The
20 District Judge would have the power to grant relief.

21 MR. DRAKE: Yes.

22 QUESTION: But the Court of Appeals would
23 not. If the District Judge denied relief, the failure
24 to object would deny the Court of Appeals the power to
25 grant relief, if they enforce this rule just

1 automatically.

2 MR. DRAKE: Once again, Your Honor, I don't
3 believe it has been erected as an inflexible
4 jurisdiction.

5 QUESTION: I understand, but as a general
6 rule, the Court of Appeals said, we don't have to look
7 at this appeal because there is this failure here.
8 Affirm. Whereas the District Judge doesn't have to.

9 MR. DRAKE: You might well have a proffer here
10 that Mr. Stanley was in the hospital, that he was ill.

11 QUESTION: The District Judge just might have
12 been extremely conscientious and decided he wants to
13 take a good, hard look at it, but the Court of Appeals
14 would just say we don't have jurisdiction because they
15 didn't follow this rule.

16 MR. DRAKE: Absent at least a proffer of cause
17 and an indication of -- you might even have, at least in
18 the judgment of one of the judges below, some indication
19 of manifest injustice, because he thought there was some
20 merit. I disagree with him as to that point, but it is
21 the two prongs. Here there was not so much as a
22 proffer. Your Honor, the motion for rehearing which was
23 the first instance --

24 QUESTION: No, but there was a proffer in the
25 Court of Appeals, because in the Court of Appeals they

1 said, look, there is a meritorious point here, and the
2 Court of Appeals said, we are not going to listen to
3 your argument because you have failed to object before
4 the magistrate.

5 MR. DRAKE: But there was -- Mr. Stanley never
6 gave a proffer as to why he failed to do this.

7 QUESTION: Well, he didn't explain his failure
8 to object. I understand that.

9 MR. DRAKE: In a motion for rehearing, Your
10 Honor, he said, and I am quoting, "Counsel is the one
11 who screwed up." That is a quote, and he did not
12 elaborate.

13 Your Honor, that does not -- that does not to
14 me equate with cause here. I mean, this entire case is
15 to alleviate one individual in a habeas corpus action
16 from exercising his duties as an officer of the court,
17 and we are at the United States Supreme Court. This is
18 not a onerous burden put on counsel, Your Honor, in my
19 opinion, and particularly --

20 QUESTION: Nobody is suggesting it is. The
21 point is, what is the power of the Court of Appeals when
22 this set of facts develops? The District Court is free
23 to look at it, as I understand; the Court of Appeals is
24 not, as a normal practice.

25 MR. DRAKE: I don't think that the Court of

1 Appeals is saying that the District Court can't look at
2 it, Your Honor, if I understand your question. They are
3 saying that in what we consider to be this sort of a
4 sandbagging scenario, we will not transfer ourselves
5 into essentially the first Article 3 court that reviews
6 the substance of these claims.

7 And as my brief points out, the circuits which
8 have adopted this rule are the circuits which are
9 inundated with precisely these kinds of cases, because
10 certain circuits -- for instance, the District of
11 Columbia doesn't have that many prisoner petitions, I
12 presuppose, at least according to the statistics,
13 whereas the Fifth, the Eleventh, the Fourth and the
14 Sixth do.

15 And again, I am not asking for some nationwide
16 rule of uniformity. I am simply making the point that I
17 believe the Sixth Circuit has taken the wiser course.
18 And even if it is not the wiser course, it is not one
19 that is repugnant to the statute or the United States
20 Constitution.

21 QUESTION: Well, Mr. Drake, the Sixth Circuit,
22 as I understood it, acknowledged that it had
23 jurisdiction of an appeal, but it dismissed it for
24 failure to make the objection below, just as it might
25 refuse to entertain an appeal on other issues that

1 aren't raised below.

2 MR. DRAKE: Your Honor, procedural default
3 seems to --

4 QUESTION: Isn't that right?

5 MR. DRAKE: Yes. As a matter of fact, Engel
6 versus Isaac arouse out of the Sixth Circuit. They had
7 jurisdiction to hear those claims, but because of the
8 preprocedural default, they were not -- they could not
9 do it essentially. It is not the power to review here.
10 We are talking about the supervisory rule, which was
11 only given after this express notice, and the rarity of
12 these cases is demonstrated by this case, I believe. I
13 mean, you do not see a flood of instance where the Sixth
14 Circuit has to invoke this rule even against pro se
15 litigants, and as I have indicated, it is not an
16 inflexible barrier, jurisdictional or otherwise, because
17 they have at least in one reported decision granted
18 leave to review those merits when there was a proffer of
19 cause and a feeling that there had been an injustice by
20 the magistrate's ruling, Your Honor.

21 Are there any further questions?

22 CHIEF JUSTICE BURGER: Very well.

23 MR. DRAKE: Thank you.

24 CHIEF JUSTICE BURGER: Do you have anything
25 further, Mr. Stanley?

1 ORAL ARGUMENT OF CHRISTOPHER DANAHY STANLEY, ESQ.,

2 ON BEHALF OF THE PETITIONER - REBUTTAL

3 MR. STANLEY: Very briefly. First of all,
4 with regard to Justice O'Connor's statements, this, the
5 Sixth Circuit's rule is not a procedural default rule.
6 There is only one circuit, the Fourth Circuit, that
7 would cause a procedural default. The Attorney General
8 may be trying to translate it into that. The Sixth
9 Circuit says, under a supervisory power, you have to
10 file objections or you waive your right to appeal. If
11 there is procedural default, there will be an order of
12 the court, and then that should apply presumably around
13 the country. Here we have, if you are going to talk
14 procedural default, in four the circuits, it doesn't
15 matter, and in two of the circuits it does. That
16 doesn't make any sense. Justice Marshall in your
17 question.

18 QUESTION: But you don't say it is a
19 jurisdictional rule, do you?

20 MR. STANLEY: In my opinion, form over
21 substance, it is a jurisdictional rule. You cannot
22 appeal because you didn't file objections. It is not
23 procedural default. It is a jurisdictional rule. It is
24 a jurisdictional prerequisite, is the way the Sixth
25 Circuit put it in one of its unpublished opinions. And

1 in talking about the differences between the magistrate
2 and the judge, the judge has the case from the
3 beginning. He never loses jurisdiction over it. It
4 doesn't go from the judge to the magistrate, and that
5 somehow they are two different people. The magistrate
6 is working under the judge. The judge has the ultimate
7 determination.

8 The brief that was filed, presented, that is
9 what we are talking about in this case. Were the
10 issues, gut reaction, were the issues before the trial
11 judge, before the District Court? Yes, they were. I
12 filed a memorandum, extensive memorandum of law. This
13 case has been argued extensively and briefed extensively
14 between -- and this is the sixth court I have been to
15 for relief from my client.

16 Now, there simply cannot be a waiver construed
17 from that. As I said before, I am sorry I didn't file
18 the objections, because then we wouldn't have to be
19 here, but the fact of the matter is, the issues were
20 before the District Court, and the District Court made
21 the de novo determination. Congress has given us the
22 right to appeal from a denial of habeas corpus, and the
23 Sixth Circuit in their role is trying to take away that
24 right, which I don't think it has anything to do with.

25 QUESTION: Mr. Stanley, did you address the

1 waiver issue before the Court of Appeals?

2 MR. STANLEY: No, it was never addressed, and
3 I might say that I was ill on the day of oral argument,
4 and after consultation with his predecessor from the
5 Attorney General has agreed that we could waive oral
6 argument.

7 QUESTION: Well, you did not raise the --
8 issue in your brief.

9 MR. STANLEY: I didn't. They did. There was
10 never any reply brief filed.

11 QUESTION: You filed no reply brief.

12 MR. STANLEY: No.

13 QUESTION: And you agreed not to argue the
14 case orally.

15 MR. STANLEY: Because I was sick on that day.

16 QUESTION: CA Six never heard this argument.

17 MR. STANLEY: Pardon?

18 QUESTION: The Court of Appeals never heard
19 this argument.

20 MR. STANLEY: I filed the petition then for
21 rehearing making this argument, and they denied it, and
22 that is what bring us to this Court.

23 QUESTION: The petition for rehearing?

24 MR. STANLEY: Yes, petition for rehearing from
25 their denial.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:57 a.m., the case in the
above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 84-5630 - KATHY THOMAS, Petitioner v. DOROTHY ARN, SUPERINTENDENT,

OHIO REFORMATORY FOR WOMEN

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY

Paul A. Richardson

(REPORTER)

85 OCT 11 P2:52

RECEIVED
SUPREME COURT U.S.
MARSHAL'S OFFICE