OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JOSE GOMEZ, Petitioner V. UNITED STATES; and
DIEGO CHAVEZ-TESINA, Petitioner V. UNITED STATES

CASE NO: 88-5014 and 88-5158

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

JOSE GOMEZ,

Petitioner

v. : No. 88-5014

UNITED STATES;

and

DIEGO CHAVEZ-TESINA,

Petitioner,

v. : No. 88-5158

UNITED STATES

Washington, D.C.

Monday, April 24, 1989

The above-entitled matters came on for oral argument before the Supreme Court of the United States at 1:30 o'clock p.m.

APPEARANCES:

JOEL B. RUDIN, ESQ., New York, N.Y.; on behalf of the Petitioners.

MICHAEL K. KELLOGG, ESQ., Assistant to the Solcitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(1:30 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 88-5014, Jose Gomez v. The United States and Number 88-5158, Diego Chavez-Tesina v. The United States.

ORAL ARGUMENT OF JOEL B. RUDIN

ON BEHALF OF THE PETITIONERS

MR. RUDIN: Mr. Chief Justice, and may it please the Court:

This case is here on a petition of certiorari to review a decision of the United States Court of Appeals for the Second Circuit. At issue is whether the Federal Magistrates Act authorizes a magistrate to conduct jury selection in a felony trial over the Defendant's objection and if so, whether that procedure is unconstitutional.

The government concedes that the Magistrate's Act provides no felony trial jurisdiction for magistrates, but to save this conviction, it argues that despite this Court's cases, the Federal Rules of Criminal Procedure, the Speedy Trial Act and common usage referring to jury selection as a part of trial, that Congress nevertheless understood jury selection to be a pretrial duty and intended it to be authorized by

the pretrial duty section of the act.

We think Congress had no such intention, that Congress understood that jury selection was part of trial and that when it precluded magistrates from exercising felony trial jurisdiction, it understood that preclusion to encompass the jury selection phase of trial.

The Magistrate Act recognizes the right of litigants to trial before a district court judge. It makes an exception to that right only where the litigants explicitly consent, and then only in misdemeanor, petty offense or civil cases.

Congress nowhere in the statutory language or in the legislative history gives any indication of any intent to make an exception for the jury selection phase of a felony trial. As a matter of fact, in the civil trial section of the Magistrates Act, Congress provides for litigants to consent to any or all proceedings in a civil case to be conducted by a magistrate, suggesting that Congress considered the possibility that a magistrate might conduct a part of the civil trial, yet there is absolutely no language indicating that Congress had any understanding that a magistrate might conduct any part of a felony trial.

Particularly where Congress was so careful to

require consent for misdemeanor, petty offenses and for civil trials, it doesn't make sense that Congress would have permitted magistrates to conduct the critically important jury selection phase of trial, which this Court has repeatedly referred to as integral to trial, without the party's consent -- the Defendant's consent.

QUESTION: Counsel, the Court did uphold the use of the magistrate for suppression hearings in criminal cases.

MR. RUDIN: Yes, ma'am.

QUESTION: Often those also require determinations of credibility of witnesses, and certainly in many cases can determine the outcome of the trial itself. They're pretty important aspects of the procedure, and yet we upheld the use of magistrates there.

MR. RUDIN: Yes, Your Honor. Of course, that procedure was explicitly authorized by the statute. This procedure is not authorized by the statute and there is the threshold --

QUESTION: Unless you say that it's an additional duty, within the additional duty language.

MR. RUDIN: Yes, Your Honor, and we say that it's not an additional duty for a number of reasons. One of the most important reasons is the reasoning that

I just alluded to, which is that despite the language used in the additional duties clause, Congress -- Congress and the government concedes that the trial provisions of the act preclude any felony trial jurisdiction and there's no indication that Congress intended an exception for jury selection.

I think that the -- the importance -- importance of the government's concession is even more than that, because in effect what the government concedes is that you have to look to the balance of the act and to look to the duties that Congress explicitly authorized or chose not to authorize, and it would defeat the purpose of this comprehensive statute, which Congress amended in 1976 precisely for the purpose of clarifying and defining the duties that magistrates might exercise and the standards of procedures for review. It would defeat that comprehensive purpose to allow the additional duties clause to override the balance of the statute.

QUESTION: Well, certainly there is evidence that Congress meant to give District Judges considerable flexibility in the additional duties they could assign.

MR. RUDIN: Your -- Your Honor, they use the language that we intend to permit district judges to innovate or to experiment, but the question is whether

or not the innovation and the experimentation that they had in mind was the assignment of constitutionally important adjudicative functions that elsewhere in the statute it declined to authorize magistrates to perform. The legislative history makes that even clearer.

The legislative -- the House and Senate -- the authoritative House and Senate reports indicate, after using the language that we intend to encourage experimentation or innovation, that it had in mind administrative-type functions in aid of the business of the courts, precisely for the purpose of freeing up district judge -- judges for their vital and traditional adjudicatory duties, which Congress repeatedly recognized involved most significantly a felony trial.

In addition --

QUESTION: When you get down to it, Mr. Rudin, a judge presiding at a felony trial can sit there for a couple of hours and he may make a couple -- maybe a ruling or two sustaining an objection to evidence. It isn't the most demanding part of the judge's role, certainly. It may have a figurative aspect.

MR. RUDIN: You -- you -- Mr. Chief Justice, you mean the jury selection phase?

QUESTION: No. I mean just during the -- the

-- course of a felony trial itself. The idea that that is somehow the apogei of judging is -- is more form than substance, I think.

MR. RUDIN: Well, I believe that this Court in in numerous cases has referred to the criminal trial as -- well, first of all the criminal cases involving the most important Article III values and also to trials as involving the most fundamental Article III values. In -- in the Federalist papers Hamilton pointed out that -- that the Framers had provided in Article III for the right to trial by jury but had not provided for the right to trial by -- in criminal cases -- but had not provided for the that in civil cases, because what's involved in a criminal case is the fundamental interest in liberty and, of course, also the --

QUESTION: I'm not suggesting that a criminal trial isn't of the most extraordinary importance to the Defendant and to the state too. But I'm -- I --if I got from your remarks the feeling that somehow the ultimate test of how -- how sound a judge is is the performance during a criminal trial, I'm not sure I agree with that.

MR. RUDIN: Well, it may not necessarily be the most intellectually demanding role. I would think that being a justice on the Supreme Court is probably the most intellectually demanding role --

QUESTION: But I think a district judge is called upon for many more intellectually demanding tasks than can frequently occur during periods of a criminal trial, when tne judge just isn't called upon the to do much.

MR. RUDIN: But not necessarily the most important role under Article III. The Framers, I think, understood -- and this has been repeatedly referred to in this Court's decisions -- in Northern Pipeline, in -- in other cases involving Article III, the Court has appeared to assume that criminal trials are different, and the reason that they're different is because the -- the liberty interest of the litigant is at stake.

In addition, there's the greatest danger of outsider majoritarian pressure and for these reasons, if -- if there is an absolute right under Article III to have the personal presence of a fully independent district court judge, it would appear to me that it would have to be the criminal trial -- or at least the felony trial, where the most is at stake and where the values underlying Article III of independent, impartial adjudication are potentially most at risk.

Congress must have understood that jury selection was part of trial when it wrote the statute in 1968 and when it revised it in 1976. In Swain v.

Alabama, this Court noted the long and widely-held belief that jury selection was, as the Court held in Lewis against United States in 1892 that "an essential part of trial" and between Lewis against United States and Swain v. Alabama, which was decided only three years before this statute was written in 1968, the Court repeatedly referred to Lewis against United States and repeatedly held that the Defendant had a right to be present during jury selection, because jury selection was part of trial.

The Speedy Trial Act was implemented in 1975, just a year before the revisions to the Magistrates Act, and in the Speedy Trial Act, Congress used the concept of trial and that -- that has been repeatedly interpreted by the courts -- although not yet by this Court -- to include jury selection within the concept of trial. And the Federal Rules of Criminal Procedure, Rule 24, dealing with jury selection, is -- is under the section, trial, and Rule 43A refers to jury selection as being part of trial.

So there is every reason to believe that when Congress wrote and revised this statute that Congress assumed, according to common usage and the decisions of this Court and the Rules of Criminal Procedure, that jury selection was part of trial.

There's simply no reason to believe that Congress intended -- an unorthodox understanding or view of jury selection, particularly that either it was not part of trial or that it was preliminary to trial. And there is no reason to believe that Congress intended any exception, if it viewed it as part of trial, given the total absence of any such reference in the statutory language or in the legislative history.

This is a comprehensive statute. Congress repeatedly indicated in 1976 that it intended to, in light of this Court's restrictive ruling in Wingo v. Wedding and the restrictive decisions of lower court cases interpreting the original Magistrates Act, that it -- it intended to clarify and to specifically define the duties of magistrates.

Most importantly, where constitutionally significant functions were involved, to -- Congress required a very careful and thorough review structure and the more significant the function, the more careful the review structure. And wherever a function was involved that Congress considered to be particularly important, it required de novo review.

Nevertheless, the government argues here for the first time that jury selection is a pretrial duty that falls under the pretrial duty section of the act.

The government, even though it now contends that that flows from the plain language of the statute, did not make that argument in the court below and it has not been accepted by any other court that has considered this issue, not even by the dissenters in the Fifth Circuit in the Ford case.

The government's position does not make sense when one analyzes the structure of this Act. The Act divides pretrial duties into dispositive and nondispositive duties. And as I mentioned before the dispositive duties, which are the more important duties, all require de novo review and they're specifically listed, yet jury selection is not listed amongst those duties.

The nondispositive duties require the magistrate to -- to finally determine -- to actually enter a final order. There's no statutory procedure for review. There is a recognition of a standard of review, but that standard is the highly deferential, clearly erroneous or contrary to law standard, which is plainly inadequate under this Court's decision in Raddatz, but more importantly for the purpose of interpreting this statute, it's plainly inconsistent with Congress' understanding that for constitutionally more significant functions de novo review is required.

The legislative history supports this interpretation, because repeatedly in the floor debate, in the subcommittee hearings and in the committee reports, Congress referred to the nondispositive duties as the preliminary processing of cases, procedural matters to get cases ready for trial. And the specific duties that it referred to in the legislative reports were all of this nature: ruling on continuances, holding scheduling conferences, ruling on matters of discovery, ruling on motions directed to the sufficiency of the pleadings and holding pretrial conferences.

I suggest that jury selection, even in Congress' understanding, could not possibly have been considered comparable to these more procedural and less constitutionally-significant functions.

Turning to the additional duties clause, Justice O'Connor, the absence of any provision for review with respect to duties under the additional duties clause I think says a lot about the limited scope of duties that Congress had in mind.

As I said before, wherever Congress had in mind constitutionally-significant functions, Congress provided for structure of review. Yet with additional duties, there's absolutely no structure of review, no standard of review which suggests that what Congress had

in mind for additional duties was more limited ministerial or administrative tasks; and those, in fact, are the kinds of duties that Congress listed in the committee reports.

Congress listed such things as reviewing default judgments, appointing CJA counsel, exonerating or forfeiting bail. There was absolutely no statement of an -- an intention to enhance the jurisdiction of magistrates using the vehicle of the additional duties clause.

QUESTION: The only thing that sort of rings false is -- is, if that's all their talking about it seems rather pretentious to say such insignificant duties as are not inconsistent with the Constitution and laws of The United States. I mean, why would they feel it necessary to hang that -- to hang that phrase on there if they were only talking about little, administrative things like that?

MR. RUDIN: Well, Justice Scalia, the -- Congress attempted in the balance of the statute to indicate in each -- during each phase of the process, whether the trial or the pretrial phase, what duties it had in mind.

Yet, nevertheless there are certain duties that Congress may have felt did not clearly fall within

any of those categories and Congress wanted to make clear that district judges had discretion to delegate those functions to the extent that they were not inconsistent with the Constitution or the laws of the United States and to the extent, of course, that Congress did not mean to preclude them in the --

QUESTION: Let me repeat my question, because you're not answering it. You told me that this phrase only applies to insignificant, trivial administrative things like keeping records and so forth, right?

MR. RUDIN: Yes, essentially.

QUESTION: But if that's the case, why couldn't they have just said, such additional administrative duties, instead of saying, such additional administrative duties as are not inconsistent with the Constitution and laws of the United States? Who had any doubt that the kind of duties you're referring to would not be inconsistent with the Constitution and laws of the United States?

When they use that language I think they must have in mind some duties of some significance, perhaps. So they have to say, now don't go too far -- don't violate the Constitution and laws.

MR. RUDIN: Well, I think they had in mind duties that were not covered in the balance of the act

and duties that were of an administrative or ministerial nature, otherwise they would not have omitted the language that they included in the pretrial section of the Act, notwithstanding any laws to the contrary.

Because Congress understood that in Wingo v. Wedding this Court had held that where a statute had used the term court, or justice, or judge, that -- for example, in the context of the Habeas Corpus Act, that magistrates did not have authority to conduct evidentiary hearings because that would be inconsistent with the use of the term, court.

Congress overrode that with respect to pretrial duties, they overrode it in 1979 with respect to civil duties, but they did not override it with respect to additional duties. Instead, they continued the language that had been in the original statute which this Court had narrowly construed and they indicated that -- that in 1976, as opposed to 1968 where the statute was far more general, they intended to more specifically define and to clarify what duties they had in mind.

It seems to me that a fair reading of the additional duties clause is that Congress intended district courts to be free to experiment with assigning other duties that because the balance of the act had precluded trial duties and had precluded pretrial

duties, that all that was left was administrative or ministerial type functions.

The only way to conclude that Congress had in mind something as significant as jury selection would be if -- if Congress had failed to consider something as significant as jury selection and it's clear that the Congress did consider the -- the function of trial and it intended the statute to be preclusive, as the government concedes with respect to felonies.

QUESTION: I take it the parties could have stipulated to have the magistrate select the jury?

MR. RUDIN: Well, I think that the analysis of of -- that question is different than the constitutional and in the statutory context. In the constitutional context, though, I would think that after this Court's decision in Shore that the parties probably could consent to have the matter --

QUESTION: So then it's not necessary for the validity of a criminal trial for the district judge just to be there?

MR. RUDIN: I think that the -- in Shore, this Court stressed that under Article III, that -- the -- from the litigant's individual point of view certain rights, such as the right to the presence of the district judge under Article III or the right to a jury

trial, are required, but that because those rights are essentially for the benefit of the individual litigant, they may be waived.

QUESTION: Now, in this case there was no particular decision that the Defendants complained of? There was no -- there was no challenge they made that was not accepted? There was no instruction given that they objected to? There were no further instructions requested?

MR. RUDIN: Well, there were, Your Honor, although they were not objections made to the district court based upon those events. There was an objection by defense counsel to -- or, a question that the government asked for as to whether or not any jurors understood Spanish, and the reason that the government gave was concern that the jurors might interpret for themselves tape-recorded conversations. Whereas the defense objected to that, I assume that what the defense had in mind was the fear of a Batson-type situation that the prosecution might excuse Hispanic jurors.

QUESTION: But that objection was not -- that matter was not renewed before the district court?

MR. RUDIN: No, it wasn't. There are all sorts of functions that occur during jury selection that are fundamentally important for the trial that do not

necessarily involve discrete decisions, that theoretically could be reviewed by the district court but, I would submit, in practice could not.

For example, it is during the jury selection that the trial judge has the first opportunity to gain the respect of the jurors and to gain control of the trial proceedings and this is important, not only because the respect of the jurors and the control of the trial proceedings may be important during the balance of the trial, when the trial judge asks the jurors to follow his rulings and his legal instructions, but it's also important because the jurors must give candid responses and complete responses during jury selection, and if they feel that the process has been demeaned by its assignment by the trial judge to a lesser judicial officer, then they may not take it as seriously. They may not give as candid a response.

QUESTION: I take it you don't see any problem with assigning the voir dire to another judge, another Article III judge, for convenience of the judge's schedule, or something of that sort?

MR. RUDIN: Your Honor, I would see a problem in that and the problem is the constitutional interest that underlies Rule 25A. Under Rule 25A, one judge may not substitute for the original judge at a trial unless

the original judge dies or becomes disabled and then only where the substitute judge certifies his familiarity with the record.

If jury selection is part of trial, as we suggest and as we believe Congress understood, then that rule would apply to jury selection as well as to the balance of the trial.

So that I think that there -- I think that there is a constitutional interest that the Defendant has in having the same judge present throughout the trial and while Rule 25A tries to accommodate that interest and to make certain very rare exceptions because of concern with lengthy criminal trials and the waste of time if they have to be repeated, in this case the trial judge assigned jury selection to a magistrate for no dire -- there was no dire emergency or reason why he had to do it. He did it merely for his own convenience.

And certainly when he -- when he replaced the magistrate he did not certify his familiarity with the record. He didn't order or read a transcript. He simply asked defense counsel whether there had been any challenges for cause that had not been granted and immediately after defense counsel responded that there had been none, he called in the jury panel and swore

them.

He -- he never indicated that the Defendants had any right to challenge more than the rulings of the magistrate on peremptory -- on challenges for cause and he never indicated that he --

QUESTION: On an instant of de novo review of the prisoner there wouldn't be a whole lot more than that to be challenged, would there?

MR. RUDIN: Well, there -- there -- I believe that there are a whole host of matters that could be challenged and there are --

QUESTION: Like what?

MR. RUDIN: There's another group of matters that, or -- potential prejudice that could not be challenged. For example, a ruling on a Batson claim. If -- if the Defendant claimed that the prosecutor was exercising peremptory challenges in a discriminatory fashion, I don't see -- that could be -- and the magistrate denied that application, I don't see how that could be reviewed by a district court judge.

If anything the prosecutor would be unhappy with that situation, because presumably in exercising peremptory challenges the prosecutor would rely upon not only the face value of the answers of the jurors but also upon demeanor and yet there's no way that a

district court judge could evaluate the demeanor of individual jurors who the prosecutor challenged.

So I think the prosecutor might be very unhappy with that situation. But certainly defense counsel would be, where his Batson challenge has been denied, because there's no way to recreate, as this Court in many cases has noted --

QUESTION: Well, that's a form of challenge. What -- what else, other than challenge to the seating of the jurors would be reviewed de novo, would a Defendant want reviewed de novo? Would a Defendant want reviewed de novo?

MR. RUDIN: Questions that the magistrate asked or did not ask. Answers that one juror gave that potentially prejudiced the balance of the jurors. Question -- comment to question of counsel that potentially may have unfairly prejudiced the balance of the jurors, and then all sorts of functions that do not involve discrete decision making.

During the preliminary legal instructions, it's critically important from the Defendant's point of view that the jury understands and is willing to follow the instructions as to presumption of innocence or reasonable doubt.

These are all concepts that lay people

frequently find difficult to understand and it's very important for the Defendant that the jurors not only accept those instructions, but give candid responses concerning their willingness to follow them.

There's no way for the magistrate or defense counsel, or the prosecutor or defense counsel in exercising their peremptory challenges, and there's certainly no way for a district judge who's not present to evaluate whether or not the jurors have been candid.

QUESTION: What do you do if you think they're not candid? I mean, supposing you go round and round with a juror, I suspect you don't go around too long about whether he accepts the presumption of innocence because he says he does. All you can is that you're not being candid. Well, how much can you make of that?

MR. RUDIN: No, the problem is that -- that where the magistrate is handed the function of jury selection, the only function that the district judge is handing to him as far as the jury is concerned, and the magistrate is the one who's giving the legal instructions and the magistrate is the one who is asking the questions of the jurors. If the jurors are not candid, there's no way for anyone to know that and that's one of the reasons why it's important that an Article III judge conduct this process and one of the

reasons why harmless error analysis cannot apply.

It -- it's for the same reason in Waller v. Georgia involving the right to a public trial in the context of a suppression hearing. This Court noted, if I may quote, "while the benefits of a public trial are frequently intangible, difficult to prove or a matter of chance, the Framers plainly thought them nonetheless real."

The Framers thought that having an independent, impartial judge present, particularly in a criminal proceeding involving the most fundamental interest and the greatest danger of majoritarian or outside pressure, that it was important to have -- for a litigant to have the benefit of that independent judgment.

QUESTION: Mr. Rudin, I suppose that in order to accept your position that this is not a pretrial matter for purposes of (b)(1)(a), I don't have to accept your position that it's not a pretrial matter for any purposes, including Rule 25, for example?

MR. RUDIN: I'm sorry, Your Honor, I don't understand your question.

QUESTION: Well your -- your -- your argument has said this is just clearly -- this is clearly part of the trial. I'm not sure I would agree with you that

It's part of the trial for -- for purposes -- many other purposes.

MR. RUDIN: Well, I think, Your Honor, that the --

QUESTION: But we're only talking here about (b)(1)(a), whether it is a pretrial matter within the meaning of that particular statute, right? And -- it could be -- It could be not a pretrial matter within the meaning of that, but be a pretrial matter for other purposes, couldn't it?

MR. RUDIN: This Court could decide that it's a pretrial matter for constitutional purposes, but that would not answer the question of what Congress had in mind, and given that the prevailing view in -- in this Court's decisions and the -- certainly the common usage that trial is -- that jury selection was part of trial.

I think it's significant that there's absolutely no discussion of it in the legislative history. It -- It's inconceivable to me that Congress would have intended the function of jury selection not to be viewed as part of trial without any such discussion, and the most logical explanation for why there was no discussion is because Congress assumed, like this Court, like the Federal Rules, that it was part of trial and therefore it's not -- that function is

precluded under the trial provisions of the Act.

Finally, I would just like to note concerning the question of harmless error, that in Wingo v. Wedding, involving the construction of the Magistrate's Act in connection with the Habeas Corpus Act, after holding that the Magistrate -- that assigning the function of holding an evidentiary hearing was inconsistent with the Habeas Corpus Act, this Court reversed without conducting any harmless error analysis, presumably because the Court reasoned that Congress had not empowered magistrates to conduct habeas corpus hearings, and for the same reason we believe there should be a reversal in this case.

Congress did not empower magistrates to conduct jury selection in a felony trial, which is the other point I wanted to make in response to Justice Kennedy. The statutory issue is different than the constitutional issue in this case.

Federal courts are courts of limited jurisdiction. Congress has given the -- the authority to hold criminal trial proceedings to the district court. It has authorized the district court to assign that function to magistrates in certain areas. It has not authorized district judges to assign that function to magistrates in the area of the felony trial.

If there are no further questions, I would like to reserve my additional time for rebuttal.

QUESTION: Very well, Mr. Rudin. Mr. Kellogg?

ORAL ARGUMENT OF MICHAEL K. KELLOGG

ON BEHALF OF THE THE RESPONDENT

MR. KELLOGG: Thank you, Mr. Chief Justice, and may it please the Court:

Congress designed the Magistrates Act to help district court judges cope with their overwhelming case loads. Congress wrote the statute in broad terms and specifically stated both in passing and in amending the act that its purpose was to encourage experimentation in the use of magistrates up to the limits of Article III in order to help district court judges dispense justice more efficiently and expeditiously.

There should be little question in this case but that the plain terms of the statute permit district court judges to delegate jury selection to magistrates. Technically there are two separate provisions of the Act which permit that delegation. First, Section 636(b)(1) permits district court judges to delegate pretrial matters to magistrates.

Now, as Justice Scalia pointed out, the term pretrial is subject to different interpretations, and the commencement of trial has been fixed at different

points for different purposes.

QUESTION: Well, what I was thinking of when I was when I was making that comment earlier is that this (b)(1)(a), which is what you're now referring to, says a judge may designate a magistrate -- it just doesn't say pretrial matter. It says a magistrate to hear and determine any pretrial matter. Does anybody hear and determine the seating of a jury? It's a very strange terminology to apply to that, isn't it?

MR. KELLOGG: Not really. You hear challenges for cause. You determine the quallfications of jurors in the same -- the terminology is no more awkward here than applied to, for example, the issuance of a writ of habeas corpus ad testificandum or the issuance of a subpoena, which are pretrial matters clearly within the meaning of the act.

QUESTION: Well, you hear arguments on both sides and you make your determination. That that's what I think that phrase normally brings to mind. It just seems to me strange to talk about hearing and determining the seating of jurors.

MR. KELLOGG: Well, Congress, of course, anticipated that there was a certain amount of ambiguity in the phrase, pretrial matters. We think the better argument is that jury selection is logically distinct

from and prior to the trial itself for this purpose, which begins with the swearing in of the jury, introductory arguments and presentation of evidence.

However, Congress anticipated the ambiguity and therefore provided in a separate subsection, Section 636 (b)(3), that magistrates may be delegated "such additional duties as are not inconsistent with the Constitution and laws of the United States."

Congress expressly stated in both the House and Senate reports that the purpose of this provision was to permit district courts to "experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of pretrial matters."

QUESTION: You keep talking about experiment. That's about the third or fourth time. Well, suppose I accept your view and say the experiment is wrong. Would that satisfy you?

MR. KELLOGG: Well, if the experiment proves --

QUESTION: To be an experiment, does that give it some backing or does it mean we should take it easy, or that means we should rubber stamp it? What does it mean?

MR. KELLOGG: Well, Congress specifically provided that duties may not be delegated to the extent

that they violate the Constitution or the laws of the United States. If, as petitioners suggest, there's a constitutional or a statutory bar, then the experiment would not be permitted. But merely because one thinks the experiment may be a less good idea or a bad idea, even, is not sufficient grounds given that Congress has expressly authorized it.

If the experiment proves unsuccessful, if magistrate selection of juries does not prove to save much time, then presumably district court judges, who retain absolute discretion over whether to assign the matter or not to magistrates, will decide not to do so.

QUESTION: It's a little strange, I think, Mr. Kellogg for Congress to have been quite precise in the other section of the act saying what magistrates can do by themselves, what they can do with de novo review, and then have a catch-all provision which really would make all the rest unnecessary, as interpreted by you.

MR. KELLOGG: Well, we don't say that it makes all the rest unnecessary. For example, we don't suggest that the additional duties clause allows magistrates to try felony cases. Congress specifically provided in the Act that magistrates could try misdemeanors and civil trials with the consent of the parties. It did not go on and say that they could try felony cases with or

without the consent. So the additional duties provision does not make superfluous what went before, either in terms of the matters that can be heard or the specific standard of review.

QUESTION: Well, how -- how about the provision authorizing a judge to designate a magistrate to hear and determine any pretrial matters pending before the court? Now, certainly (b)(3) would authorize that without the specific language of the earlier section, wouldn't it?

MR. KELLOGG: Well, the point of (b)(3) was to pick up other additional matters that were not covered in the broad category of pretrial matters, to permit further experimentation in innovative ways Congress might not even have anticipated.

QUESTION: Isn't there some sort of a ustem generis principle working here that if Congress has specified these several things it would be unusual for still a larger thing -- or what many people would think is even a more important responsibility, to be found in a catch-all clause?

MR. KELLOGG: Well, the question would be just how important is that additional responsibility.

QUESTION: Is a motion to suppress a pretrial motion?

MR. KELLOGG: A motion to suppress is a pretrial motion specifically covered under (b)(1).

QUESTION: The average dope case, if you lose that you lose the case.

MR. KELLOGG: It is ordinarily a case dispositive motion, that's correct.

QUESTION: I was waiting for you to emphasize that.

MR. KELLOGG: I was -- I was planning to.

QUESTION: Mr. Kellogg, do you think that if your position were correct that this was an additional duty which could be assigned, that de novo review is necessary to sustain it?

MR. KELLOGG: Well, of course the additional duties clause does not specify what the standard of review. It's left to the district court judges individually, or the district courts as a whole by rule. Provision (b)(4) specifically provides that the local courts consent rules governing matters to be assigned, standards --

QUESTION: Well, do you take the position that it can be assigned without de novo review to a magistrate in a felony case?

MR. KELLOGG: Yes. Our position would be that a clearly erroneous or contrary to law standard of

review would not violate either the statute or Article III in this instance. However, I would note that the Court in this case did offer de novo review.

QUESTION: Well, it's -- it's a little odd that Congress would have assigned certain pretrial matters that can be heard but subject to de novo review and yet something in the nature of voir dire in a felony case, that they would have said nothing about it.

MR. KELLOGG: Well, it's -- it's -- it's not particularly. As Justice Marshall pointed out, a motion to suppress is frequently case dispositive. There's a winner and a loser. Jury selection by contrast is not a zero sum gain. The key role in jury selection is not played by the court, it's played by the parties, and both sides, as in this case, may be satisfied with the jury chosen.

QUESTION: Well, it depends. You do have Batson problems and you do have, in some courts at least, the court asking the questions rather than the parties, or counsel.

MR. KELLOGG: In most federal courts, I believe that is the practice, Justice O'Connor. The two most important aspects of jury selection from the perspective of the Defendant are first to get biased jurors off the jury through challenges for cause, and

second to try to get as favorable a jury as possible through the intelligent exercise of peremptory challenges.

Now, the role of the presiding official in both those respects is, in fact, largely routine.

QUESTION: I don't see how that's the case in the Federal system when the presiding judge or the magistrate does the voir dire. Voir dire is very difficult.

MR. KELLOGG: The voir dire is very important in the sense that questions have to be asked to elicit sufficient responses both to elicit any sort of bias or -- and to give the parties sufficient understanding of the jurors to exercise their peremptory challenges in a -- in a intelligent way. Now, that's a matter that's fairly easily reviewable by the district court judge. In many federal districts the practice is to submit your proposed voir dire questions in advance to the court.

QUESTION: Do you think that trial lawyers would say that there's no art to a voir dire examination?

MR. KELLOGG: No. I would not suggest that there's no art to eliciting proper responses, but then there's no reason to suggest that magistrates are not up to that task. The act itself provides substantial requirements to ensure the competence and the

impartiality of magistrates.

QUESTION: Mr. Kellogg, you -- you -- you noted that a substantial number of district courts have local rules allowing the use of magistrates for conducting voir dire.

MR. KELLOGG: That's correct, Justice O'Connor.

QUESTION: Do those rules generally provide that the consent of the parties is necessary for voir dire in felony cases?

MR. KELLOGG: No, 51 of the 91 federal districts expressly provide that voir dire may be conducted by magistrates without any limitation -- for civil cases, criminal cases.

QUESTION: Do you know what the practice is? In practice, do they require consent of the parties for the most part, in felony cases?

MR. KELLOGG: It's not my understanding that that consent of the parties is required in most cases. I don't think there are authoritative statistics on that. The local rules do not require it. There are an additional 18 district courts which provide that magistrates may be delegated all the powers and duties that have been delegated to them under Section --

QUESTION: I take it in many districts in complex cases there are written questionnaires that are

the beginning of the process and magistrates spend a considerable amount of time with counsel reviewing the answers to the written questionnaires?

MR. KELLOGG: You're asking if they could?

QUESTION: I take it that that's a frequent practice.

MR. KELLOGG: Yes, I believe so. It is a frequent practice to have the initial voir dire conducted -- conducted on paper.

QUESTION: Mr. Kellogg, it seems to me in the clause you're addressing now what we're really discussing is the meaning of the word additional, and you've already acknowledged -- it can have two possible meanings, I suppose.

It could mean, number one, in addition to the other things that are herein specifically conferred upon magistrates. It could mean that -- what else could it mean -- and you reject that because you say, it doesn't mean that because you can't use magistrates in felony trials. Although that is one of the things that is not specifically conferred upon them here.

MR. KELLOGG: What we mean is, additional duties not specifically covered in (b)(1). So, for example, you can't -- (b)(1) doesn't become superfluous.

QUESTION: Well, felony trials aren't

specifically covered in (b)(1), so you don't mean that. You don't mean any additional duty that is not conferred in (b)(1). You plainly don't mean that. So what's the alternative?

MR. KELLOGG: Felony trial by negative implication is precluded by the structure of the rest of the act, because the act specifically provides for the trial of misdemeanors with consent and the trial of civil cases with consent.

QUESTION: Why doesn't additional naturally mean -- isn't there a second, quite reasonable natural meaning of additional? That is, additional to the areas covered in the statute here, and the areas covered in the statute very clearly are -- are pretrial proceedings that are covered by (b) and trial proceedings covered -- covered by (c). Any -- anything that is specifically part of pretrial or trial is covered and anything else is additional.

MR. KELLOGG: I think that's a fair reading.

QUESTION: It comes out the wrong way though, for you.

MR. KELLOGG: It's not inconsistent with what we're saying.

QUESTION: I think it is.

MR. KELLOGG: Because there's no indication

that Congress considered jury selection to be part of the felony trial.

QUESTION: No, I'm saying it's -- it's either trial or pretrial. Wouldn't you concede it's either one or the other, or not? Do you think it's --

MR. KELLOGG: I wouldn't concede it in the following sense: the inquiry under (b)(1) of pretrial draws some sort of line, obviously, at which point the trial starts. The inquiry under (b)(3) is to identify whether there's a sort of set of core adjudicatory functions that Congress intended to reserve in felony cases for district court judges to perform and not to delegate to magistrates.

Now, for example, there are several instances of matters that would not be pretrial matters and yet would not fall within the prohibition on the conduct of felony trials, such as the taking of a jury verdict. Congress in the legislative history specifically indicated that as one possible -- obviously that's a trial matter in one sense. It's not a pretrial matter within the meaning of (b)(1) and yet it is an additional duty that can be assigned under (b)(3).

Similar matters would be, for example, if a discovery dispute were to arise during trial, or if a belated motion to suppress were made that the judge

decided to permit despite the fact that it was belated. He could -- because those are collateral to the core functions of the trial -- assign those to the magistrate under the act and within --

QUESTION: Would a motion to suppress be collateral to the core? It's basically an objection to the admission of evidence. That's what happens at trial all the time.

MR. KELLOGG: Well, this Court in Raddatz made clear that the act permits the delegation of suppression hearings to magistrates under the -- under the pretrial provisions.

QUESTION: That's quite correct, but --

MR. KELLOGG: The mere fact that it arises -- happens to arise late and during trial does not make it part of the core functions that -- that Congress was not going to allow judges to delegate to magistrates.

QUESTION: Is it not true that some criminal convictions have been reversed solely on a juror's being put on the court who should not have been there? Witherspoon, for example.

MR. KELLOGG: That's correct. That's correct. If there was a biased --

QUESTION: How do you get that in the pretrial category? It determined the case.

MR. KELLOGG: The selection process of the juror, if a challenge for cause is not sustained -- that should have been sustained -- and a biased juror sits on the jury, then that can be grounds for overturning the conviction. But most challenges for cause, I should stress, are fairly routine. As we show at page 34 in our brief, they involve mainly people asking, can you be fair in this sort of case; and the juror -- prospective juror -- who doesn't really want to be there, says no and is then excused for cause.

QUESTION: How about death penalty cases?

MR. KELLOGG: Pardon?

QUESTION: Would you make an exception for death penalty cases under the Witherspoon decision?

MR. KELLOGG: There is at the moment, so far as I understand, no death penalty in federal court cases and therefore the issue would never arise. Now, it is true that the Witherspoon inquiry is very difficult.

QUESTION: You don't -- in other words, the whole importance about questioning for jurors is a pretrial matter, even if it involves the Constitution of the United States?

MR. KELLOGG: If there is a constitutional right to have a particular juror excused because of some statement of bias or partiality, certainly that is a

matter not only that the magistrate can handle, but it is also subject to review by the district court judge.

QUESTION: It -- I did -- you mean the magistrate can decide it and then you rely on the de novo point?

MR. KELLOGG: Certainly challenges for cause can be reviewed by the district court judge. In most cases, as I say --

QUESTION: And that is saving the district court judge's time?

MR. KELLOGG: Well, it certainly could well, because disputes will not arise in the run-of-the-mind cases. In this case, for example, they did not arise either. No one had any objections to any of the jurors excused for cause. We quote, actually, from the colloquies on page 34 of our brief in which the juror said, quite frankly, no, I couldn't be fair, and it's clear in those circumstances that the juror has to be excused.

Now, there are some slightly more complicated cases in which, for example, one of the jurors --

QUESTION: If you ask the juror, is he under 21 and he says yes, that's not the point I'm talking about. There was a reason for the trial judge picking juries from go, wasn't there? Wasn't there a reason for

an Article III judge to pick juries and to excuse jurors? There was a reason for it.

MR. KELLOGG: It's not altogether clear just what the requirements of Article III are, Justice Marshall. This Court's cases indicate that there are two principal concerns underlying this aspect of Article III. First of all, there's the institutional concern about protecting the judiciary from encroachments on or erosions by other branches of government. Second, there's the personal right of litigants to trial before an Article III judge.

Now, the first concern is simply not present in this case. The magistrate is an adjunct of the district court, not an independent Article I judge of the sort the court dealt with in Northern Pipeline. He's appointed by district court judges, subject to removal by district court judges and all matters assigned to magistrates are assigned by the district court judges. The magistrate, therefore, is fully integrated into the Judicial Branch.

Now, the personal right of litigants is satisfied by the fact that the trial proper is in fact conducted by the Article III judge. Jury selection is admittedly an important proceeding, but it's not part of the competing presentation of facts that's ordinarily

considered to constitute the trial proper.

QUESTION: The district judge, if he reviews de novo, reviews on the transcript?

MR. KELLOGG: He could, depending on the circumstances. It's totally up to him how he would want to do it.

QUESTION: Well, how else would he do it?

MR. KELLOGG: He could question the jury himself, if he wanted to.

QUESTION: But you still lose some of the nuances that happened the first time the question arose.

MR. KELLOGG: That's certainly true, but not nearly so much, I would assume, as in a suppression hearing where you have a credibility argument -- two witnesses arguing back and forth -- and the Court has already said that there's no objection to having the magistrate decide the case as an initial matter and for the judge to exercise de novo review, based on a reading of the transcript. There's no requirement that he hear the witnesses.

QUESTION: Mr. Kellogg, at one point in your argument you started to stress -- or, I understood you to start to make an argument based on the relative importance of this part of the whole process and suggested it was less important than the -- than the

main event that starts after the jury's selected.

Are there any statistics, or do you have any information about how often trial counsel delegates the job of jury selection to their associates and they don't bother sitting in?

MR. KELLOGG: That I don't know about, Justice Stevens. I -- I hadn't thought of it and I don't have any statistics.

QUESTION: My impression is trial counsel consider it rather important.

MR. KELLOGG: I suspect it would be a rare instance. It is -- I don't mean to denigrate the importance of jury selection at all. It is very important in the two respects I mentioned, of getting biased jurors off the jury and exercising your peremptories in an intelligent way.

Now, both those aspects -- the presiding official's role in both those aspects is easily reviewable by the district court judge.

QUESTION: That's true. But the thing that's really not reviewable and can't always be recaptured is the atmosphere at the beginning of what a lot of people think is the process that the Defendant is being subjected to. There is an element of -- the lawyers really try to create something that's going to persevere

throughout the trial by the way they question not only those who are excused, but those who remain on the jury.

MR. KELLOGG: Well, that's true. To the extent that the lawyers are doing it, of course, there's no problem with the magistrate there. I would point out that there's no Article III requirement that the same judge pick the jury as tries the case, so any -- there may well be marginal benefits to having somebody with continuity the entire way through, but Article III does not require it.

QUESTION: Mr. Kellogg, are you going to argue harmless error?

MR. KELLOGG: I'd be happy to address that if you wish, right now. I would hope the Court never has to reach it, but the point would be that unlike other cases -- unlike, for example, cases involving racial bias or failure to open trial proceedings, this is not a case in which there is some overriding policy objective that requires reversal of the conviction. Nor is this a case where there might be a hidden error, as for example where a Judge turns out to have a conflict of interest or where a Defendant is not represented by counsel.

In this case, without overriding policy objectives we can be very confident of the fact that the Defendants were not prejudiced in any way by the

selection of the jury by the magistrate. They were tried and convicted by an acknowledged impartial jury before an Article III judge.

The fact that a magistrate conducted the initial proceeding of selecting the jury would not seem to warrant, even assuming the Court were to decide that it violated Article III or the statute --

QUESTION: Of course, you could make roughly the same argument if a magistrate had sat up there and tried the whole case.

MR. KELLOGG: Well, I don't think we would try to make the argument in that instance, because that would be the entire proceeding. Here we have a discrete portion of the proceeding which has never been identified it had any adverse effect on the Defendants. There's no allegations that any of the questions asked by the magistrate were improper, that any challenges for cause should have been sustained that were not, or that there was a problem with the exercise of peremptory --

QUESTION: But doesn't this go to the very jurisdiction of the tribunal? I mean, you certainly wouldn't argue harmless error if the -- if the Defendant had been tried by some pick-up group that had no connection with the government, you know -- somebody decides let's convene a court and try somebody, and they

try the individual and afterwards you find it's a perfectly fair trial. You wouldn't come in and say, well, what harm's been done?

MR. KELLOGG: It's a question of degree.

QUESTION: It's not a trial, and if you don't have an Article III judge to judge, it's not a court.

MR. KELLOGG: But the trial proper we would say it was conducted by an Article III judge.

One final point that I want to make in response to Petitioners, this is not simply a matter of convenience. In the Southern District of Florida, the average district court judge tries 50 trials a year. Now, obviously that's going to be impossible unless the transition from trial to trial is a fairly smooth one.

The venire for the next trial has to be ready upon the close of the last one, but it's impossible to anticipate in all cases when a particular trial is going to end, so if your trial carries over you have a venire sitting there and you either have a choice of interrupting your trial to pick the jury for the next one, or else having the venire sit there while you conclude the prior trial. Obviously, the problem is further complicated if Speedy Trial Act constraints require the selection of the jury to begin on a certain date.

Now, if magistrates can pick juries, the district judge can finish his trial while the stage is being set for the next one and the transition will be smooth without wasted time for the judge, the jury or the parties.

QUESTION: Do you think the constitutional issue in this case is just frivolous, is that it?

MR. KELLOGG: No, not frivolous, but not very substantial.

QUESTION: Substantial? If it's a substantial issue, you certainly don't argue it.

MR. KELLOGG: Not after Raddatz. This case is really a fortiori from Raddatz. Raddatz involved a case dispositive suppression motion.

QUESTION: So you don't think there's a serious enough constitutional question to affect how you construe the statute?

MR. KELLOGG: Well, the statute itself provides for additional duties up to the limit of Article III. It says additional duties not inconsistent with the constitutional laws of the United States, so you can't really construe the statute --

QUESTION: I know. That really doesn't answer my question. If there were a serious constitutional question you might just avoid it by limiting the reach

of that such other duties.

MR. KELLOGG: It would be very difficult to do that given that Congress has said, we want this interpreted up to the limits of what's provided by the Constitution. In any event, we don't think that the Article III issue is so substantial as to require -- as to require the Court to strain in its interpretation of the plain language of the statute. Unless the Court has any further questions --

CHIEF JUSTICE REHNQUIST: Thank you Mr. Kellogg. Mr. Rudin, you have one minute left.

REBUTTAL ARGUMENT OF JOEL B. RUDIN

MR. RUDIN: Thank you, Your Honor.

In the Raddatz case, the government strenuously argued to this Court and a majority of this Court accepted that the interests at stake in a suppression hearing are far less significant.

In footnote number 11 of my reply brief I quote the government stating in Raddatz that the pretrial suppression hearing involves deterrence of official misconduct and -- and the exclusion of inherently reliable evidence as opposed to the accused's paramount interest in his liberty at trial.

The government argued in Raddatz, indeed, the Defendant's stake in the outcome of a suppression

hearing is significantly less than the individual interest implicated by various civil proceedings.

Now the government comes before this Court and argues that somehow the Defendant's interest in a suppression hearing is more important than his interest in jury selection, which in case after case after case, this Court has held is vitally important to the fairness of trial.

I would suggest that -- that the -- I would also say that this Court has repeatedly stated, for example in Wainwright v. Witt that de novo review is impossible in the jury selection context because of the importance of the fact-finder being present and observing the demeanor of jurors. Where a juror is erroneously excluded by a magistrate, that juror is gone. He can't be requestioned. Where defense counsel exercises a peremptory challenge because the magistrate has erroneously denied his challenge for cause, that juror has gone as well.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rudin. The case is submitted.

(Whereupon, at 2:28 o'clock p.m., the case in the above-entitled matters was submitted.)

CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the oral argument before the upreme Court of The United States in the Matter of:

No. 88-5014 - JOSE GOMEZ, Petitioner V. UNITED STATES;
and

No. 88-5158 - DIEGO CHEVEZ-TESINA, Petitioner V. UNITED STATES

nd that these attached pages constitutes the original ranscript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)