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STANDARDS OF REVIEW: A SOLUTION TO THE POTENTIAL PROBLEMS OF THE 1976 AMENDMENT OF THE FEDERAL MAGISTRATES ACT?

With passage of the Federal Magistrates Act¹ in 1968, much controversy developed regarding the extent of the powers and jurisdiction conferred upon federal magistrates. Loose wording² in this statute led to numerous and often conflicting decisions in the area of referral jurisdiction.³ To remedy this problem, Congress, in 1976, amended the "powers and jurisdiction" section of the statute,⁴ intending to delineate clearly the powers and functions of magistrates⁵ as envisioned but not carefully detailed by the original act. However, this recent amendment raises important questions involving the standard of review to be used by district courts in considering magistrates' decisions,⁶ the finality of magistrates' decisions as to the credibility of witnesses, and even whether the problems of the original act have been remedied.

Congress passed the Federal Magistrates Act, creating a new and hopefully more efficient initial level in the federal judicial system, to help reduce the burden placed on the federal district courts by enormously increased caseloads.⁷ The powers and jurisdiction of the United States magistrates include several specified duties⁸ as well as such "additional

1. 28 U.S.C. §§ 631-39 (1970). Section 636 delineates jurisdiction, power, and temporary assignment of United States magistrates under the act.

2. See the text at note 9, *infra*.

3. See, e.g., *Weber v. Secretary of HEW*, 503 F.2d 1049 (9th Cir. 1974), *aff'd*, 423 U.S. 261 (1976); *Ingram v. Richardson*, 471 F.2d 1268 (6th Cir. 1972).

4. Act of Oct. 21, 1976, Pub. L. No. 94-577, § 1, 90 Stat. 2729 amending 28 U.S.C. § 636(b) (affecting jurisdiction, powers, and temporary assignment, of federal magistrates).

5. "The purpose of the bill is to . . . clarify and further define the additional duties which may be assigned to a United States Magistrate. . . ." H.R. REP. NO. 1609, 94th Cong., 2d Sess. 2 (1976).

6. "A judge of the court may reconsider any pretrial matter under this paragraph [A] where it has been shown that the magistrate's order is clearly erroneous or contrary to law." Act of Oct. 21, 1976, Pub. L. No. 94-577, § 1, 90 Stat. 2729.

7. H.R. REP. NO. 1629, 90th Cong., 2d Sess. 14, *reprinted in* U.S. CODE CONG. & AD. NEWS 4253, 4257; Comment, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779 (1974). Congress recognized the heavy workload of the federal district courts in their report and specifically intended to ease this situation by the creation of magistrates. *Cf.* [1968] U.S. CODE CONG. & AD. NEWS 4257.

8. "The additional duties . . . may include, but are not restricted to—(1) service as a special master, . . . (2) assistance of a district judge in the conduct of pretrial or discovery proceedings . . . (3) preliminary review of applications for post-trial relief . . . and submission of a report and recommendations to . . . the district judge . . . as to whether there should be a hearing." 28 U.S.C. § 636(b) (1970).

duties as are not inconsistent with the Constitution and the laws of the United States."⁹ This omnibus clause sanctions the use of magistrates in such areas as the conducting of pretrial and discovery proceedings and preliminary review of applications for posttrial relief. Since the examples in the statute were apparently not exclusive,¹⁰ the extent of referral jurisdiction was uncertain, leaving to the courts the task of attempting to define its scope.

Prior to the 1976 amendment, perhaps the most troublesome questions concerning referral jurisdiction were the extent of magistrates' authority and the nature of their powers in petitions for posttrial relief.¹¹ The act lists as an illustrative duty of the federal magistrates the preliminary review of such petitions, and this duty includes the submission of recommendations to the district judge to aid him in his decision on whether to hold a hearing on the petition.¹² The federal courts of appeals came to different conclusions with respect to the additional duties that may be assigned to implement the functions set forth in the statute.¹³ The solutions ordinarily followed the express wording of the statute and required that magistrates only examine the petitioner's motion and give recommendations to the district judge on whether to hold an evidentiary hearing.¹⁴ However, several courts went further and allowed the magistrates to actually hold preliminary hearings.¹⁵ In an attempt to resolve this conflict in the circuits, the United States Supreme Court, in *Wingo v. Wedding*,¹⁶ held that the requirement in the Habeas Corpus Act¹⁷ that a judge is to

9. *Id.*

10. The phrase used is "the additional duties . . . may include, but are not restricted to. . . ." *Id.* in [1968] U.S. CODE CONG. & AD. NEWS 4262. *But see* *Wedding v. Wingo*, 483 F.2d 1131 (6th Cir. 1973).

11. *See* *Wingo v. Wedding*, 418 U.S. 461 (1974); *Murrah v. United States*, 507 F.2d 719 (5th Cir. 1975); *McCusker v. Cupp*, 506 F.2d 459 (9th Cir. 1974); *Kirby v. Ciccone*, 491 F.2d 1310 (8th Cir. 1974); *O'Shea v. United States*, 491 F.2d 774 (1st Cir. 1974); *Ellis v. Buckhoe*, 491 F.2d 716 (6th Cir. 1974); *Noorlander v. Ciccone*, 489 F.2d 642 (8th Cir. 1973); *McKinney v. Parsons*, 488 F.2d 452 (5th Cir. 1974); *Henderson v. Brierly*, 468 F.2d 1193 (3d Cir. 1972). Posttrial relief is broader than habeas corpus alone, see *Kirby v. Ciccone*, 491 F.2d 1310 (8th Cir. 1974).

12. U.S.C. § 636(b)(3) (1970).

13. *Compare* *Kirby v. Ciccone*, 491 F.2d 1310 (8th Cir. 1974) *and* *Noorlander v. Ciccone*, 489 F.2d 642 (8th Cir. 1973) *with* *McCusker v. Cupp*, 506 F.2d 459 (9th Cir. 1974).

14. *See, e.g.,* *Henderson v. Brierly*, 468 F.2d 1193 (3d Cir. 1972).

15. *See, e.g.,* *Kirby v. Ciccone*, 491 F.2d 1310 (8th Cir. 1974); *O'Shea v. United States*, 491 F.2d 774 (1st Cir. 1974); *Noorlander v. Ciccone*, 489 F.2d 642 (8th Cir. 1973).

16. 418 U.S. 461 (1974).

17. 28 U.S.C. § 2243 (1970).

conduct the hearing of a petitioner's motion was not changed by the Federal Magistrates Act, and therefore that the district judge must personally hold these evidentiary hearings and could not delegate this task to a magistrate.¹⁸

In *Campbell v. United States District Court for the Northern District of California*,¹⁹ the Ninth Circuit allowed magistrates to hear motions to suppress evidence, holding that the *ejusdem generis*²⁰ doctrine used by the Sixth Circuit in *Wedding v. Wingo*²¹ did not apply in interpreting the act and that the term "additional duties" was not limited to those like the three examples enumerated in the statute.²² However, in *T.P.O., Inc. v. McMillen*,²³ the Seventh Circuit refused to allow the district judge to refer to a magistrate motions to dismiss or motions for summary judgment, holding that referral was precluded because such motions involved ultimate decision making power. The referral of actions to review administrative determinations of entitlement to benefits under the Social Security Act,²⁴ another area of conflict in the circuits,²⁵ was resolved in *Mathews v. Weber*,²⁶ where the United States Supreme Court held that the term "additional duties" was broad enough to encompass such referral as long as the district judge retained final authority and responsibility in the decision making process.²⁷

The above problems and decisions led directly to the 1976 amendment²⁸ of the "powers and jurisdiction" subsection of the act.²⁹ The House report indicates that Congress intended the act to define more

18. 418 U.S. at 472 (1974). The holding thus overruled those decisions that allowed magistrates this authority. *Id.* at 473 n.19.

19. 501 F.2d 196 (9th Cir.), *cert denied*, 419 U.S. 879 (1974).

20. The *ejusdem generis* doctrine refers to the rule of interpretation that when certain examples are enumerated, nonenumerated examples are interpreted as being included within the frame of analysis only when they fit within the general outline of the enumerated examples.

21. 483 F.2d 1131 (6th Cir. 1973). *Ejusdem generis* was not discussed by the Supreme Court in its affirmance. *Campbell v. United States Dist. Ct.*, 501 F.2d 196, 201 (9th Cir. 1974).

22. *Campbell v. United States Dist. Ct.*, 501 F.2d 196, 201 (9th Cir. 1974).

23. 460 F.2d 348 (7th Cir. 1972).

24. 42 U.S.C. § 405(g) (1970).

25. Compare *Ingram v. Richardson*, 471 F.2d 1268 (6th Cir. 1972) with *Weber v. Secretary of HEW*, 503 F.2d 1049 (9th Cir. 1974), *aff'd*, 423 U.S. 261 (1976).

26. 423 U.S. 261 (1976).

27. *Id.* at 271.

28. See H.R.REP. NO. 1609, 94th Cong., 2d Sess. 3 (1976).

29. Act of Oct. 21, 1976, Pub. L. No. 94-577, §1, 90 Stat. 2729, *amending* 28 U.S.C. § 636(b) (1970).

clearly the additional duties which may be assigned to a federal magistrate.³⁰ The amendment overrules *Wingo* and *T.P.O., Inc.*³¹ and accepts *Campbell* and *Matthews*,³² thus allowing federal magistrates to conduct hearings, including evidentiary hearings³³ in all cases involving posttrial relief applications by individuals convicted of criminal offenses, as well as motions to dismiss, motions for summary judgment, motions to suppress evidence in criminal cases, and reviews of administrative decisions in Social Security appeals.³⁴

In attempting to clarify the extent of referral jurisdiction, Congress may have created a series of new problems. One such problem involves the standard of review imposed by the amendment on the district courts for the review of magistrates' decisions. The traditional standard of review for special masters' decisions, the "clearly erroneous" rule,³⁵ was extended to cover the district judge's review of certain federal magistrates' decisions.³⁶ The "clearly erroneous" rule³⁷ provides for full substitution of judgment by the reviewing court, *except* as to the credibility of witnesses, if the decision of the reviewed body appears on the face of the record to be clearly erroneous. The legislative history of the amendment indicates that Congress considered this the standard already in use³⁸ for review of magistrates' decisions, and if this determination was correct, the amendment makes no real change in the law. However, the existing case law fails to indicate that the district courts are using the "clearly erroneous" rule.³⁹

Establishing the "clearly erroneous" rule as the standard of review both for federal magistrates and for special masters fails to recognize the fundamental difference in the activities of these officials, yet forces the district judge to give equal weight to their decisions. Special masters and

30. H.R. REP. NO. 1609, 94th Cong., 2d Sess. 2 (1976).

31. *Id.* at 6, 11. This result was anticipated by the United States Supreme Court in *Wingo v. Wedding*, 418 U.S. 461, 467 n.4 (1974).

32. *Cf.* H.R. REP. NO. 1609, 94th Cong., 2d Sess. 3 (1976).

33. Act of Oct. 21, 1976, Pub. L. No. 94-577, § 1, 90 Stat. 2729, *amending* 28 U.S.C. § 636 (b)(1)(B) (1970).

34. *See* H.R. REP. NO. 1609, 94th Cong., 2d Sess. 11 (1976).

35. FED. R. CIV. P. 53(e).

36. Act of Oct. 21, 1976, Pub. L. No. 94-577, § 1, 90 Stat. 2729, *amending* 28 U.S.C. § 636 (b)(1)(A) (1970).

37. *See* NLRB v. Universal Camera Corp., 190 F.2d 429 (2d Cir. 1951) (one discussion of the "clearly erroneous" rule). *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

38. H.R. REP. NO. 1609, 94th Cong., 2d Sess. 9 (1976).

39. *See, e.g.,* *Matthews v. Weber*, 423 U.S. 261 (1976).

magistrates are used in very different circumstances, and the Supreme Court, in *Matthews*, recognized that this leads to different relationships with the district judge.⁴⁰ The Court pointed out that a magistrate could properly review administrative decisions since the trial judge remained free to give the magistrate's recommendations whatever weight he chose, and was not bound by the more restrictive "clearly erroneous" rule applied to the findings of a special master.⁴¹ The Supreme Court recognized the fundamental difference between the role of a special master and that of a magistrate, inherent in the Federal Rules of Civil Procedure requirement that "reference to a master shall be the exception and not the rule," used in non-jury cases "only upon a showing that some exceptional condition requires it."⁴² The Court acknowledged that the master is to be used only in the very special case where the facts are so complicated that an "independent expert" is needed to make preliminary fact-finding decisions. On the other hand, a magistrate is delegated tasks that are largely only time-consuming and easily disposed of, as simple as the master's are complex,⁴³ thus freeing the trial judge for more important and complicated decision-making. This important distinction, the rationale upon which the Court allowed referral to a magistrate in *Matthews*, is ignored by the amendment,⁴⁴ which severely restricts the district judge's freedom to review a magistrate's recommendations.

Integrally connected with the question of the appropriate standard of review is the issue of credibility. This refers to the magistrate's acceptance or rejection of a witness's testimony as the truth, and involves the district judge's review of the magistrate's determination. The magistrate, now with the authority to hear testimony from witnesses, draws inferences and reaches a conclusion as to truthfulness. Ordinarily, this is the function of the trial judge, but under the amendment he has only a written record on which to base his decision, although it seems that Congress approved the suggestion in *Campbell* that the district judge listen to a tape recording of the magistrate's proceedings.⁴⁵ From this he will be able to draw certain

40. *Id.* at 273.

41. *Id.*

42. *Id.* at 272. FED. R. CIV. P. 53. Under the 1976 amendment to the Federal Magistrates Act, special masters are limited to consent cases only under subparagraph (b)(2) of Act of Oct. 21, 1976, Pub. L. No. 94-577, § 1, 90 Stat. 2729.

43. 423 U.S. at 275.

44. The amendment would require application of the "clearly erroneous" rule to certain decisions of the federal magistrates. 28 U.S.C. § 636 (b)(1)(A) (1970).

45. H.R. REP. NO. 1609, 94th Cong., 2d Sess. 3 (1976), quoting from *Campbell v. United States Dist. Ct.*, 501 F.2d 196, 206 (9th Cir.), cert. denied, 419 U.S. 879 (1974).

inferences of his own, though not to the same extent as if he had conducted the proceedings himself. Therefore, by application of the "clearly erroneous" rule in matters where a decision is based on the credibility of conflicting witnesses, a magistrate, hearing those witnesses and drawing inferences of truthfulness, will have, in effect, final adjudicative authority,⁴⁶ a result clearly not accepted by the courts under the old statute.⁴⁷

Courts might solve this problem and still allow the statute to function properly by adopting a standard of review that would be less restrictive⁴⁸ than the "clearly erroneous" rule. In dealing with motions to dismiss, to suppress, to grant summary judgment, to review administrative decisions, and any other motions that would involve a final decision of a case, the district judge could receive proposed findings of fact and recommendations from the magistrate, but either party would be entitled to a *de novo* determination by the district judge on timely and specific objection.⁴⁹ The trial judge could then "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate."⁵⁰ This more extensive review would recognize the fundamental difference between masters and magistrates, and would solve the problem of the review of witnesses' credibility. The trial judge would be forced to be the final decision-maker, and could, if necessary, bring witnesses before the court for a rehearing of testimony to determine credibility. In matters where the magistrate handles issues that will be ultimately dispositive of the case, the parties would not be denied the right to be heard by a district judge who would retain final decision-making responsibilities. In all other matters, application of the more restrictive "clearly erroneous" rule to the magistrate's findings would do no real harm—for the more restrictive standard would not, in itself, change the final decision of the case.

To accomplish this result, the district judge can define, via his authority under subparagraph (b)(4),⁵¹ any matter that would be ultimately

46. This "final adjudicative authority" is only relative, being subject to review at all stages of the appellate process.

47. See, e.g., *Matthews v. Weber*, 423 U.S. 261, 273 (1976); *Campbell v. United States Dist. Ct.*, 501 F.2d 196, 205 (9th Cir. 1974); *T.P.O., Inc. v. McMillen*, 460 F.2d 348 (7th Cir. 1972).

48. The "clearly erroneous" rule is more restrictive in that, like the standard allowing the judge to accept, reject, or modify the magistrate's recommendation, it allows full substitution of judgment *except* as to credibility of witnesses. See the text at note 50, *infra*.

49. There is authority for this standard of review in subparagraphs (b)(1)(B) and (C) of the amendment. Act of Oct. 21, 1976, Pub. L. No. 94-577, § 1, 90 Stat. 2729.

50. *Id.*, amending 28 U.S.C. § 636(b)(1)(C) (1970).

51. "Each district court will establish rules pursuant to which the magistrates will discharge their duties." 28 U.S.C. § 636(b)(4) (1976).

dispositive⁵² of the case as fitting within the scope of the standard of review that allows him to accept, reject, or modify the magistrate's findings,⁵³ and therefore falling outside of the scope of the "clearly erroneous" rule. This would comport with the scheme of the court decisions, follow the intent of the statute, and reduce the number of problems that may result from application of the "clearly erroneous" rule.

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INCIDENTS TO REDHIBITORY ACTIONS UNDER
CIVIL CODE ARTICLE 2531

Two controversial 1973 Louisiana decisions dealing with redhibition significantly altered the relative positions of consumers, retail sellers and manufacturers.¹ The supreme court, in *Prince v. Paretti Pontiac Co.*,² held, "There is no requirement that a purchaser who seeks redhibition must first give his vendor the opportunity to repair the thing sold,"³ thus resolving any doubts which may have existed due to contrary indications in the jurisprudence.⁴ Additionally, the court detailed the prerequisites to

52. Subparagraph (b)(1)(A) lists eight pretrial motions that would be ultimately dispositive of a case and excepts them from the "clearly erroneous" standard. These motions are to be decided under the standard of review set out in subparagraph (b)(1)(C) where the judge can accept, reject, or modify the magistrate's recommendations.

53. See the text at notes 49 & 50, *supra*. The amendment reads that a "judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations . . . and . . . may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate . . . and may also receive further evidence or recommit the matter to the magistrate with instructions." 28 U.S.C. § 636(b)(1)(C) (1976).

1. Campbell, *The Remedy of Redhibition: A Cause Gone Wrong*, 22 LA. B.J. 27 (1974); Robertson, *Manufacturers' Liability For Defective Products In Louisiana Law*, 50 TUL. L. REV. 50, 94-99 (1975).

2. 281 So. 2d 112 (La. 1973).

3. *Id.* at 116.

4. The court stated that these doubts resulted from inferences drawn from cases in which the buyer had in fact given the seller an opportunity to repair before filing his redhibition suit. *Id.* at 116. Language supporting the inference that an opportunity to repair is a prerequisite to a redhibition suit is found in the following cases: *Kodel Radio Corp. v. Shuler*, 171 La. 469, 472, 131 So. 462, 463 (1930) ("The defendant, therefore, after making timely complaint, and giving the plaintiff ample