CONSTITUTIONALITY AND STATUTORY AUTHORIZATION OF JURY SELECTION BY A U.S. MAGISTRATE IN FELONY CASES

United States v. Garcia, 848 F.2d 1324 (2d Cir. 1988)

In *United States v. Garcia*[1] the Second Circuit rejected both statutory interpretation[2] and separation of powers[3] challenges to a district court's delegation of jury selection in a felony prosecution[4] to a United States magistrate.[5]

The *Garcia* defendants[6] were charged with various narcotics-related offenses.[7] Over the objections of several defendants, the district court assigned the duty of jury selection to a magistrate.[8] The trial judge offered to review any juror challenge not sustained by the magistrate. The

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1. 848 F.2d 1324 (2d Cir. 1988).

2. There is no specific statutory authorization for United States magistrates in felony trials. The controversy centers on the interpretation of the following statutory provision: "A magistrate may be assigned such additional duties as are not inconsistent with the Constitution of the United States." 28 U.S.C. § 636(b)(3) (1982).

3. The separation of powers doctrine is not contained in any specific constitutional provision. Rather, it is founded on the premise that governmental power should be allocated between the legislative, executive and judicial branches of the national government. The power to make law, therefore, is severed from the ability to apply it. *See generally* Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371 (1976) (discussing the evolution of the concept of separation of powers throughout American history).

To insure the independence of the federal judiciary, article III of the United States Constitution insulates the salary and tenure of federal judges from the control of Congress and the executive branch. U.S. CONST. art III, § 1 states:

> The judicial power of the United States shall be vested in the Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at stated Times, receive for their services, a compensation, which shall not be diminished during their Continuance in Office. *Id.*

The separation of powers challenge is grounded on the fact that magistrates serve for a fixed term and are, therefore, not afforded the tenure protections of article III judges. 28 U.S.C. § 631(e).

4. The issue only exists with respect to felony trials because statutes authorize magistrates to conduct misdemeanor trials, 28 U.S.C. § 636(a)(3) (1982), and civil trials, 28 U.S.C. § 636(c) (1982). The parties' consent, however, is required to allow a magistrate to conduct a trial. *Id.*

5. United States magistrates are lower-tier judicial officers. *See infra* notes 13-19 and accompanying text.

6. Although the indictment originally charged eleven people, six of them, for various reasons, never went to trial. *Garcia*, 848 F.2d at 1327.

7. The court convicted the defendants of narcotics racketeering in violation of Racketeer Influenced and Corrupt Organizations Act (RICO) under 18 U.S.C.§ 1962(c) (1982); distribution of cocaine, possession with intent to distribute, and conspiracy to distribute under 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986); and illegal interstate travel under 18 U.S.C. § 1952 (1982 & Supp. IV 1986). *Garcia*, 848 F.2d at 1327.

8. *Garcia*, 848 F.2d at 1327.

defendants, however, declined to make any challenges.[9] The jury convicted the defendants.[10] On appeal, the Second Circuit affirmed the convictions and held: to allow a magistrate to preside at jury selection in a felony case, without the defendant's consent, does not violate either the Federal Magistrate's Act[11] or the separation of powers doctrine.[12]

In 1968 Congress enacted the United States Magistrate Act which created the U.S. Magistrate system.[13] Congress aimed to create a more efficient federal judiciary by "cull[ing] from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers"[14] thus permitting federal judges to spend more time on their "traditional adjudicatory duties."[15] The Act, as amended,[16] empowers magistrates, at the discretion of the district court judge, to perform various functions. The district judge may authorize the magistrate to try civil[17] and misdemeanor[18] cases with the parties'

9. *Id.* The only juror challenged for cause had been excused by consent. The defendants made no claim of prejudice from the delegation of voir dire to the magistrate.

10. *Id.*

11. *See infra* notes 13-19 and accompanying text.

12. *Garcia*, 848 F.2d at 1332-33.

13. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C. §§ 631-639 (1982)). The U.S. Magistrate system replaced the U.S. Commissioner system, which was inadequate for several reasons: commissioners were underpaid, understaffed, had limited jurisdiction and many were not attorneys. H.R. REP. No. 1692, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 4562, 4255 [hereinafter 1968 H.R. REP.]. The 1968 Act made several changes designed to correct these problems. In particular, it replaced the "anachronistic fee system of compensation" with a salary system. Further, the 1968 act expanded jurisdiction, required that all magistrates be attorneys where possible, and gave full-time magistrates an eight year term of office. *Id.* at 4254.

14. 1968 H.R. REP., *supra* note 13, at 4255.

15. H.R. REP. No. 1609, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. CODE CONG. & ADMIN NEWS 6162,6163-66 [hereinafter 1976 H.R. REP.].

16. Congress amended the Act in 1976. Pub. L. No. 94-577, 90 Stat. 2729, (codified as amended at 28 U.S.C. §§ 631-639 (1982)). The purpose of the 1976 amendments was to "clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court. These additional duties generally related to the hearings of motions in both civil and criminal cases. . . ." 1976 H.R. REP., *supra* note 15, at 6162. Congress adopted the amendments in response to several cases that had construed the scope of the magistrate's duties narrowly. *See, e.g., Wingo v. Wedding*, 418 U.S. 461 (1974) (Congress did not intend to authorize magistrates to hold evidentiary hearings in habeas corpus proceedings); *T.P.O. v. McMillan*, 460 F.2d 348 (7th Cir. 1972) (magistrate could not hear motions to dismiss or motions for summary judgement even if the magistrate's order was appealable to the district court judge).

Congress amended the Act again in 1979, Pub. L. No. 96-82, 93 Stat. 643 (codified as amended at 28 U.S.C. §§ 631-639 (1982)). These amendments gave magistrates power, upon consent of the parties, to conduct civil and misdemeanor trials.

17. 28 U.S.C. § 636(c)(1) (1982).

consent, to hear and determine pretrial matters with certain exceptions,[19] and to perform "such additional duties as are not inconsistent with the Constitution and laws of the United States."[20]

In interpreting the "additional duties" language, the Supreme Court had allowed the district court to assign the magistrate various duties not enumerated in the Act.[21] The Courts of Appeals, following the Supreme Court's lead, have broadly interpreted the "additional duties" language.[22] However, the Circuits are split on whether the additional duties language includes jury selection.

In *United States v. Rivera-Sola*,[23] the First Circuit interpreted "additional duties" to authorize delegation of jury selection in a felony trial. The court concluded that Congress intended for the "additional duties" clause to be broadly construed to encompass a wide range of "quasi judi-

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18. 28 U.S.C. § 636(a)(3) (1982).

19. 28 U.S.C. § 636(b)(1)(A) (1982). The magistrates may not make a final determination on:

> motion[s] for injunctive relief, for judgement on the pleadings, for summary judgement, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim on which relief can be granted, and to involuntarily dismiss an action.

Id.

Magistrates are empowered to conduct hearings and submit proposed findings and recommendations to the district judge with respect to the items listed above, as well as for "applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement." 28 U.S.C. § 636(b)(1)(B).

The Act also empowers magistrates to serve as special masters, 28 U.S.C. § 636(b)(2), and to administer oaths, affirmations and take acknowledgements, affidavits and depositions, 28 U.S.C. § 636(a)(2).

20. 28 U.S.C. § 636(b)(3) (1982).

21. *See, e.g.*, United States v. Raddatz, 447 U.S. 667, 681-84 (1980) (upholding suppression hearing referred to magistrate); Mathews v. Weber, 423 U.S. 261, 271-72 (1976) (upholding social security benefit cases referred to magistrate). In *Raddatz* the Court recognized that de novo review by an Article III judge of a magistrate's decision satisfies any due process or separation of powers problems. *Raddatz*, 447 U.S. at 674-85. The de novo review does not require the judge to conduct a new hearing. *Id.* at 675. Rather the judge makes his determination on the record, but without being bound to adopt the findings and conclusions of the magistrate.

In dissent, Justice Stewart argued that the Act's phrase "shall make a *de novo determination*" required the district court judge to have a new hearing so that he can observe the demeanor of the witnesses. *Id.* at 689 (emphasis in opinion).

22. *See, e.g., In re* Establishment Inspection of Gilbert & Bennett Manufacturing Co., 589 F.2d 1335, 1340-44 (7th Cir.) (magistrate may issue a search warrant: "the only limitations on § 636(b)(3) are that the duties be consistent with the Constitution and federal laws and that they not be specifically excluded by 636(1)"), *cert. denied*, 444 U.S. 884 (1979); United States v. Boswell, 565 F.2d 1338, 1341-42(5th Cir.) (permitting magistrate to preside over closing argument when trial judge became ill), *cert. denied*, 439 U.S. 819 (1978).

23. 713 F.2d 866, 873-74 (1st Cir. 1983).

cial" tasks, including jury selection.[24] The court noted that jury selection had been widely recognized as a magistrate duty.[25] Further, it found that the defendant failed to demonstrate any prejudice from the use of the magistrate and thus the court found no error.[26]

The Ninth Circuit expanded on *Rivera-Sola* in *United States v. Bezold*.[27] In *Bezold*, the defendants argued that the conduct of voir dire by a non-Article III officer violated both the separation of powers doctrine[28] and the due process clause.[29] The court disagreed, concluding that the review and control vested in the district court judge was sufficient to satisfy constitutional concerns.[30] The *Bezold* court placed great weight on the district court judge's power to review the transcript of the voir dire, observe the panel at trial and disqualify jurors during trial.[31] In addition, the court stated that the defendants' consent is unnecessary

24. *Id.* at 872. The court relied on the legislative history of the 1968 Act and the 1976 amendments in reaching that conclusion. For example, the court drew from a Supreme Court opinion, Mathews v. Weber, 428 U.S.261, 267-68 (1976) (citing *Hearings on the Federal Magistrate Act Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 81 (1968) (statement of Senator Tydings, sponsor)), that quoted congressional testimony at length: "We hope and think that innovative, imaginative judges who want to clear up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of the courts." *Rivera-Sola*, 713 F.2d at 873.

25. *Rivera-Sola*, 713 F.2d at 873. The court noted that the Legal Manual for United States Magistrates lists "conduct of voir dire and selection of juries for district judges" as "additional duties." *Id.* (citing Administrative Office of the United States Courts, Legal Manual for United States Magistrates, § 3.10(3)).

The court also emphasized that the use of a magistrate for jury selection had met with judicial approval in a previous case. *Id.* (citing Haith v. United States, 231 F.Supp. 495, 497-99 (E.D. Pa. 1964)). Finally, it noted that the United States District Court for the District of Puerto Rico had a local rule allowing magistrates to conduct voir dire in criminal cases. *Id.*

26. *Id.* Because Rivera did not object to the role of the magistrate, the court reviewed only for plain error. FED. R. CRIM. P. 52(b).

27. 760 F.2d 999 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063(1986).

28. *Id.* at 1001.

29. "Due process" protection is contained in the fifth amendment to the United States Constitution which states in pertinent part: "No person shall be. . .deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V. For an argument that due process does not require the presence of a trial judge during voir dire, see 3 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 24.65, at 180 (1966).

30. *Bezold*, 760 F.2d at 1002. In concluding that review by the district court judge made the delegation constitutionally permissible, the court relied heavily on United States v. Raddatz, 447 U.S. 667 (1980). The *Raddatz* Court held that the delegation of a suppression motion to a magistrate did not violate Article III or the due process clause as long as "the ultimate decision is made by the district court." *Raddatz*, 447 U.S. at 683.

31. *Bezold*, 760 F.2d at 1002.

for the delegation of jury selection to the magistrate.[32] Finally, as in *Rivera-Sola*, the court placed great emphasis on the defendants' failure to prove actual prejudice in the composition of the panel or assert that they lacked an opportunity for full view by the district court of problems during the voir dire.[33]

A sharply divided Fifth Circuit reached the opposite conclusion in *United States v. Ford*.[34] The *Ford* court concluded that the availability of review by a district court judge failed to satisfy constitutional concerns.[35] The majority stated that because of the importance of "sight and sound"[36] in the conduct of voir dire, the review by a district court judge of the magistrate's handling of jury selection would be "difficult at best"[37] and that the power to reject the magistrate's findings would be "illusory."[38]

The *Ford* court further stated that the Act did not authorize the delegation of jury selection.[39] The court concluded that Congress intended that courts read the "additional duty" clause narrowly,[40] and that jury selection was one of the "traditional adjudicatory dut[ies]"[41] Congress

32. *Id.* at 1003.

33. *Id.* In the same year *Bezold* was decided, the Ninth Circuit also upheld the delegation of jury selection to a magistrate over statutory interpretation and constitutional objections. United States v. Peacock, 761 F.2d 1313 (9th Cir.), *cert. denied*, 474 U.S. 847 (1985).

34. 824 F.2d 1430 (5th Cir. 1987) (en banc), *cert. denied*, 108 S.Ct. 741 (1988).

35. The defendant did not attempt to obtain a review by the district court judge of the magistrate's findings. *Id.* at 1432.

36. *Id.* at 1437.

37. *Id.* at 1436.

38. *Id.* The court distinguished United States v. Raddatz, 447 U.S. 667 (1980). *See supra* note 30. The *Ford* court found that, unlike a suppression hearing, review of voir dire would present serious practical problems because "the second voir dire . . . may never capture the original scene." *Ford*, 824 F.2d at 1437. In addition, the court opined that "carrying a challenged venireman on to a second interrogation before the district judge would be a delicate exercise at best. Unlike dispositive pretrial motions, there is no opportunity to convince the jury afresh at trial." *Id.*

39. *Id.* at 1438.

40. *Id.* The court based its conclusion on several difficulties with statutory interpretation. First, courts are obligated "to read statutes to avoid constitutional difficulty." *Id.* at 1435. Second, the court found that "the difficulties of review by an Article III judge of a magistrate's rulings in jury selection and the absence of a statutory procedure for review [of the jury selection process] in the face of explicit review procedures for other pretrial matters" was evidence that Congress did not intend delegation of jury selection. *Id.* at 1437. Finally, "a broad reading of congressional purpose [with respect to the 'additional duty' clause] would render superfluous the balance of the statute." *Id.* at 1438.

41. *Id.* The court stated, "we see jury selection as such an integral component of trial that we are not persuaded that Congress envisioned its delegation to magistrates." *Id.*

intended to reserve to Article III judges.[42]

In *United States v. Garcia*,[43] the Second Circuit reviewed both statutory interpretation and separation of powers challenges to the delegation of jury selection to a magistrate in a felony case.[44] The court first considered whether the Act authorized the delegation of jury selection.[45] The defendants argued that a close reading of the statute and its history revealed that the "additional duties" clause applies only to pretrial matters and that jury selection is a part of the trial.[46] The court rejected this argument. It reasoned that Congress intended for district courts to experiment with the assignment of duties that go "beyond duties traditionally characterized as pretrial."[47]

Next, the defendants argued that, because the Act allows magistrates to conduct misdemeanor and civil trials[48] only upon the consent of the parties, a fortiori Congress intended consent to be a prerequisite for magistrate selection of a jury in felony cases.[49] The court disagreed. It concluded that the consent requirement from other sections of the Act does not extend, as a matter of consistent statutory interpretation, to the "additional duties" section. Congress stated that this section was to be unrestricted by "any other specific grant of authority to magistrates."[50]

The court next considered the defendant's separation of powers arguments. First, the defendants contended that delegation of jury selection to a non-Article III officer threatened the independence of the judiciary because jury selection is an "inherently judicial task."[51] The court rejected this argument, finding that the independence of the judiciary was

42. The court, however, affirmed the conviction, holding that because the defendant did not object to the proceeding and the trial was fair, the use of a magistrate was harmless error. *Id.* at 1438-39.

43. 848 F.2d 1324 (2d Cir. 1988).

44. *Id.* at 1327-28.

45. *Id.* at 1328.

46. *Id.* at 1329. In support of this contention, defendants noted the reference in the legislative history to "pretrial matters": "The district court would remain free to experiment in their assignment of other duties to magistrates which may not necessarily be included in the broad category of 'pretrial matters'." *Id.* (quoting 1976 H.R. REP., *supra* note 15, at 6172).

47. *Id.* The court found that the legislative history cited by the defendants, *supra* note 46, actually cut in favor of the court's conclusion that Congress intended magistrates' duties to extend beyond pretrial matters. *Id.*

48. *See* 28 U.S.C. §§ 636(a)(3), 636(c) (1982).

49. *Garcia*, 848 F.2d at 1329.

50. *Id.* (quoting 1976 H.R. REP., *supra* note 15, at 6172).

51. *Id.* at 1331.

not endangered[52] because the Article III judge decides which matters, including voir dire, will be assigned to the magistrate.[53] This lessens the separation of powers concern that another branch will encroach upon the power of the judiciary.[54] Furthermore, the district court retains the "inherently judicial power," through de novo review, to make the final decision regarding the composition of the jury.[55] Therefore, the delegation of jury selection did not violate the separation of powers doctrine.[56]

Second, the defendants argued that, because jury selection is an integral part of trial, nonconsensual delegation violated their individual constitutional rights to have an Article III judge preside at their trial.[57] However, the court did not agree that the defendants' right to the physical presence of an Article III judge attached at the jury selection stage.[58] The court noted that, historically, judges were not required to be present during voir dire.[59] Finally, the court reiterated the importance of de novo review by the district court judge, stating that such review assured that defendants would receive the benefits of an independent judiciary.[60]

The *Garcia* dissent opined that the availability of district court review did not necessarily satisfy the litigant's constitutional right to an impartial jury.[61] The dissent contended that the delegation of jury selection to a magistrate demeaned the voir dire process[62] and would result in a jury that is less attentive to the trial judge and a judge who is less sensitive to the problems of individual jurors.[63]

The *Garcia* majority properly concluded that the delegation of jury selection to a magistrate did not violate the separation of powers doc-

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52. *Id.* at 1331.

53. *Id.*

54. *Id.*

55. *Id.* The court stated that they were "[G]uided by . . . 'practical attention to substance rather than doctrinaire reliance on formal categories.'" (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986)).

56. *Garcia*, 848 F.2d at 1330-33.

57. *Id.* at 1332. More specifically, the defendants argued that unless a defendant consents to the use of a non-Article III magistrate, delegation violates a right to have claims decided before judges who are free from potential domination by other government branches. *Id.*

58. *Id.*

59. *Id.* (citing *United States v. Ford*, 824 F.2d 1430, 1441 (Rubin, J., dissenting)).

60. *Id.*

61. *Id.* at 1337 (Oakes, J., dissenting). The dissent noted that such review would create practical problems, citing as an example that "the second interrogation of a potential juror would be likely to put that individual on the defensive." *Id.*

62. *Id.* A magistrate would make the process "appear essentially clerical in nature."

63. *Id.*

trine.[64] The majority is persuasive in arguing that, as a practical matter, the independence of the judiciary was not likely to be compromised when the delegation of duties was strictly at the judge's prerogative and the magistrate's actions were subject to the judge's review.[65] As the Supreme Court in *Raddatz* noted, this type of judicial control satisfies constitutional concerns with respect to other magistrate duties.[66] Jury selection is neither a more crucial part of a trial nor more potentially outcome determinative than many of these other duties.[67]

Further, although the *Ford* court argued that judicial review of a magistrate's voir dire presented significant problems,[68] no such problems have yet arisen. In *Rivera-Sola*[69] and *Bezold*[70] the defendants did not contend, much less demonstrate, that any actual prejudice resulted from the delegation.[71] The *Garcia* court properly refused to deprive district judges of their congressionally granted power merely because of a purely hypothetical problem.

The *Garcia* majority also properly decided the statutory interpretation challenge. The court focused on the underlying Congressional purpose of the Act and examined whether the delegation of jury selection furthered that purpose.[72] Congress intended to improve the overburdened federal judiciary by relieving judges of some of their functions.[73] To that end, Congress urged the courts to be innovative and imaginative in their use of magistrates.[74] A broad reading of the statutory language to include the task of jury selection is, therefore, consistent with that intent.

Finally, although the *Ford* court argued that courts should construe the statutory language narrowly,[75] that argument is not well supported. The *Ford* court, in reaching its conclusion, virtually ignored the legisla-

64. *See supra* text accompanying note 56.

65. *See supra* text accompanying notes 52-55.

66. United States v. Raddatz, 447 U.S. 667 680-81(1980). *See also* United States v. Bezold, 760 F.2d 999, 1001-02 (9th Cir. 1985) (adopts the majority approach in *Raddatz* to voir dire for criminal cases).

67. For example, the suppression motion in *Raddatz*, 447 U.S. 667, *see supra* note 30, is certainly as crucial—and possibly more crucial—to the outcome of a trial than is the jury voir dire.

68. *See supra* text accompanying notes 35-39.

69. *See supra* text accompanying note 23.

70. *See supra* text accompanying note 27.

71. *See supra* notes 9, 30 and accompanying text.

72. *See supra* text accompanying notes 47, 50.

73. *See supra* text accompanying notes 14-15.

74. *See supra* note 24.

75. *See supra* text accompanying note 40.

tive history.[76] The *Garcia* court adopted the better approach by relying on the clear expression of intent in the legislative history.

The *Garcia* decision strengthens the argument that the delegation of jury selection duties to a magistrate in a felony trial, even over the defendant's objections, is both statutorily authorized and constitutional.

S.H.T.

76. *See supra* note 40.