



California Court Commissioners Association

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SUPREME COURT
FILED

December 7, 2010

DEC - 9 2010

Supreme Court Copy

Frederick K. Ohrtich Clerk

 Deputy

Clerk of the Supreme Court
State of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Gomez v. Superior Court (Felker) and consolidated cases*, Docket No. S179176

Dear Clerk:

In response to the Court's November 10, 2010 invitation, the California Court Commissioners Association (the "CCCA") submits the following letter brief addressing the issues raised by the Court. The CCCA, of course, takes no position on the merits or outcome of the case before the Court. Further, though the CCCA is in part organized to advocate for the interests of the commissioners, the CCCA's Board takes no position on the proper scope of a commissioner's powers or duties, that being fully within the discretion of the Legislature and this Court informed by constitutional, political, and administrative concerns.

The Court has asked the CCCA and other parties to comment on four issues relating to a commissioner's authority to hear and decide a petition for writ of habeas corpus. Specifically, these are: whether section 259 of the Code of Civil Procedure allows commissioners to determine such petitions as "ex parte" matters; whether commissioners actually did so prior to the adoption of Article VII, section 22 of the California Constitution defining a commissioner as a subordinate judicial officer ("SJO"); whether the scope of SJO authority was limited by this Court's decision in *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351; and whether the legal consequences pertaining to such petitions have changed since 1966 rendering the summary denial of such a petition no longer properly an SJO duty.

In light of the Canons of Ethics governing the conduct of judicial officers, the CCCA interprets the Court's invitation as a request for information on the past and current practice of commissioners in handling petitions for writs of habeas corpus, in essence a view of the "facts on the ground" much like the statistics on commissioner work contained in the Court's *Rooney* opinion. With that understanding, the CCCA responds to the four issues raised by the Court as follows:

Section 259 and Habeas Petitions. Several constitutional and legislative enactments shape the scope of a commissioner's statutory authority to decide habeas petitions. This authority ultimately derives from the Legislature's determination that the handling of such petitions constitutes the type of *chamber business* which an SJO can perform.

Under the 1849 California Constitution as amended in 1861, the Legislature was authorized to permit the courts to appoint commissioners to handle the "chamber business of the judges." Cal.Const. (1849) Art. VI, § 11. This provision was substantively carried over into the Constitution adopted in 1879, which stated in part that "The Legislature . . . provide for the appointment, by the several superior courts, of one or more commissioners . . . with authority to perform the chamber business of the judges of the superior courts" Cal.Const. (1879) Art. VI, § 14.

By the time of the adoption of the 1879 Constitution, the phrase *chamber business* already had an established meaning with the Legislature's earlier enactment of the Code of Civil Procedure in 1872. Code of Civil Procedure section 166 then (and now) provides in relevant part that judges may "in chambers: [] Grant all orders and writs that are usually granted in the first instance upon an ex parte application" Consistent with this definition of *chamber business*, Code of Civil Procedure section 259 (enacted at the same time) stated in part that "Every [court] Commissioner has power: [¶] 1. To hear and determine ex parte motions for orders and writs" See, *In re Roberts' Estate* (1942) 49 Cal.App.2d 71, 76 (holding that the act of approving or rejecting a creditor's claim in probate constituted "chamber business" which a commissioner could properly handle.)

Sections 166 and 259 of the Code of Civil Procedure are both contained in Part 1 of that Code entitled "Of Courts of Justice" which establishes the various courts and general powers of judicial officers for both civil and criminal matters. There is no separate authorizing statute in the Penal Code for commissioners in criminal matters.

The first express statutory authority for commissioners to hear habeas petitions came in 1929 when the Legislature added section 259a. That section allowed the courts in Los Angeles County (and later in other larger counties having populations of over 900,000), to assign certain duties to court commissioners beyond those specified in section 259. In the first subdivision, the statute states that court commissioners could be assigned "To hear and determine ex parte motions, for orders and alternative writs and writs of habeas corpus" In 1980, former section 259a was repealed and 259 amended to include, among other powers enumerated in former section 259a, the authority to decide ex parte habeas petitions

In 1966, the provisions regarding the judiciary in the California Constitution were reordered and amended. With respect to court commissioners, Article VI, Section 22 of the Constitution now reads that “The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties.” This Court in *Rooney v. Vermont Investment Corp.*, *supra*, 10 Cal.3d 351, 360-361 expressly held that the new phrase *subordinate judicial duties* was not intended to restrict the scope of what duties the Legislature could authorize a commissioner to perform under prior law.

The 1966 constitutional revision substituting the phrase *subordinate judicial duties* for *chamber business* occurred many years after commissioners of certain counties already had the statutory power to decide habeas petitions by the passage of former section 259a in 1929. That the Legislature considered such work to be a subordinate judicial duty was later reconfirmed in 1980 by the express inclusion of the power to decide habeas petitions in section 259 for commissioners of all counties.

In fact, since the adoption of the 1966 constitutional revision, the Legislature has authorized commissioners to handle a number of important matters beyond traditional chamber business. These include hearing and deciding infractions and small claims cases (Govt. Code §72190) and prejudgment attachment proceedings (Code Civ. Proc. §482.060), enforcing an Innkeeper’s Lien (Civ. Code §1861.28), conducting arraignments (Govt. Code § 72190.1), and issuing bench warrants (Govt. Code §72190.2). *See, People v. Lucas* (1978) 82 Cal.App.3d 87 (holding that Legislature could constitutionally empower commissioners to hear and decide traffic cases as a subordinate judicial duty.)

A commissioner, of course, may not render orders or sentences against a person which would subject them to imprisonment except by stipulation as a temporary judge. *See, e.g., In re Plotkin* (1976) 54 Cal.App.3d 1014, (“[T]he issuance of an order which can have the effect of placing the violator thereof in jail is ‘not a subordinate judicial duty.’”) No law, however, explicitly prohibits a court from having a commissioner consider an *ex parte* matter such as a habeas petition or probable cause determination, the effect of which may only be to *prolong* the imprisonment.

Finally, the specific statutory scheme for handling habeas petitions itself does not apparently prohibit the use of commissioners to determine such writs in the first instance. Although section 1476 of the Penal Code indicates that such petitions are to be referred to a “court or judge authorized to grant the writ” that language must be construed

in a manner consistent with former section 259a and the present version of section 259 of the Code of Civil Procedure, which allows courts to assign such matters to court commissioners. *In re Robert's Estate, supra*, 49 Cal.App.2d 71, 76-77 (Probate Code section vesting power only in judges to decide creditor's claim must be construed to permit assignment to commissioners to decide such claims under former section 259a.)

Further, the assignment to commissioners to handle writ petitions would not constitute an unlawful delegation of judicial function since commissioners are part of the judicial branch. *Compare, Reaves v. Superior Court* (1971) 22 Cal.App.3d 587. In *Reaves*, the San Joaquin Superior Court had devised a system by which the district attorney would investigate and write up a report on habeas petitions and obtain the records for those petitions with serious contentions. The matters were then reviewed and passed upon by a judge. While the court of appeal found that the system was proper in many respects and was the product of a well-intentioned effort to process a large volume of habeas petitions justly and fairly, the system necessarily involved an unconstitutional delegation of judicial function to the executive branch. *Id.* at 596.

Commissioners and Habeas Petitions. Despite apparent constitutional authority, to our knowledge, few courts have currently assigned habeas petitions to commissioners for determination. For example in Los Angeles County, which receives an average of 1200 habeas petitions for capital cases a year, research attorneys and commissioners work up reports on habeas petitions which are then referred to a judge to review and for ruling. This practice has apparently been in place for many decades, and there is no memory of commissioners handling such petitions themselves. This experience in Los Angeles County is significant in that nearly all habeas petitions are written by unrepresented inmates and more than 90% result in a summary denial or denial with explanation. The same appears true for other large counties such as Alameda and smaller counties such as Butte. It should be noted, though, that not all of the counties were able to be canvassed, nor were historical records searched for this letter brief so that we are unable to advise the Court as to pre-1966 practice.

Rooney and Habeas Petitions. This Court's 1973 decision in *Rooney v. Vermont Investment Corp., supra*, does not impose any restriction that would affect the ability of courts to assign the determination of habeas petitions to commissioners. *Rooney* involved, in part, the question of whether a commissioner could issue a judgment based upon a settlement stipulation as an uncontested proceeding. This Court expressly held that enabling commissioners to handle uncontested matters as specified in former section 259a (which also empowers courts to assign habeas petitions to commissioners) fell squarely within the scope of the legislative authority conferred by the California Constitution. 10 Cal.3d 351, 366.

The Court in *Rooney* noted, however, that the record contained no order from the trial court assigning uncontested matters to the commissioner whose judgment had been appealed. The Court then ruled that judgment had to be vacated since the stipulation did not contain all the essential terms for a judgment, so that extrinsic evidence was needed to prove the extent of the default under the stipulation, necessitating notice to the defendant which was not given. 10 Cal.3d at 368-369. Neither of these problems would apply to a commissioner properly assigned to decide habeas petitions as an ex parte matter.

In *Rooney*, the Court also observed that since the 1966 constitutional revision, the Legislature had authorized the courts to assign significant matters to commissioners including arraignments under Government Code section 72190.1. Holding that the Legislature must be deemed to have concluded that such powers constituted subordinate judicial duties, the Court stated that “this conclusion carries with it ‘the strong presumption in favor of the Legislature’s interpretation of a provision of the Constitution.’” (*Id.* at 363 citing, *Methodist Hospital of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 692.)

While habeas petitions may present important questions affecting the petitioner’s liberty, determining such petitions in the first instance is explicitly included in section 259’s authorization for matters that may be assigned to commissioners. California courts have long recognized that the Constitutional and legislative mandates enabling courts to appoint commissioners allow them to handle a wide variety of important matters considered to be chamber business or subordinate judicial duties. *See, e.g., West v. U.L.C. Corp.* (1965) 232 Cal.App.2d 85 (commissioner could, in default judgment, reform note and enjoin foreclosure) and *People v. Lucas* (1978) 82 Cal.App.3d 47 (commissioner could hear and determine traffic infractions without stipulation as temporary judge.)

Changed Circumstances Affecting Habeas Petitions. Two important changes have occurred since the 1966 constitutional revision which bear on the question of whether a commissioner’s handling of a habeas petition should continue to constitute a subordinate judicial duty. The first is the trend to professionalize the court commissioners in this State. The second is the federal legislation shortening the time and opportunity to seek relief by way of habeas petitions in capital cases.

Historically, commissioners came to be appointed to the municipal and superior courts through various means, some through general experience, some through specialized training relevant to their assignments, and some through other means or connection to the court. Since at least 1966 if not before, many counties moved to a merit system of appointing commissioners possessing many years of well-regarded generalized or specialized experience and demonstrated competence to perform the duties of a bench officer.

In Los Angeles County, for instance, commissioner applicants must submit an application that is almost identical to that submitted by applicants for judicial appointments and go through two rounds of interviews. Like judicial applicants, most commissioner applicants have extensive knowledge of criminal law and procedure, being former associate district attorneys and public defenders. The few successful applicants (less than 10%) are then put on a list for future election by the judges of the County as vacancies occur.

Since 2003, Rule 10.701 of the California Rules of Court (derived from former Rule 6.660) establishes the current minimum qualifications of superior court commissioners. Similar to the requirement for being a judge, section 10.701 requires that superior court commissioners be admitted to practice law for at least 10 years, though it allows special cases where, upon a finding of good cause by the court's presiding judge, a commissioner can be appointed with at least 5 years of practice. It also requires commissioner to meet certain minimum continuing education requirements which are the same as those recommended for judges.

While commissioners may have grown in their experience and knowledge such that many have the same skills and experience as judges needed to handle habeas petitions in capital cases, federal law has increased the gravity and need for processing such petitions in state court in a just and expeditious manner. With the passage of the Antiterrorism and Effective Death Penalty Act (the "AEDPA") in 1996, a state prisoner has only one year from the date a conviction becomes final to seek relief pursuant to writ of habeas corpus in federal court. 28 U.S.C. § 2244. A prisoner can only do so, of course, after exhausting all state remedies (such as habeas petitions.) 18 U.S.C. §2254.

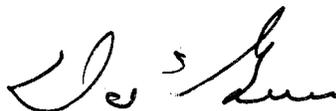
Conclusion. Consistent with the California Constitution, section 259 of the Code of Civil Procedure empowered courts to assign habeas petitions to commissioners, even though few courts have apparently ever done so. Since the framers' adoption of the phrase "subordinate judicial duties" in the 1966 Constitution, the State has seen a trend of

Clerk of the Supreme Court
State of California
Page 7
December 7, 2010

making commissioners more proficient as bench officers, while more recently federal law has heightened the need for swift and fair handling of habeas petitions.

The CCCA appreciates the significance of this Court's request for this letter brief and hopes that the information provided will assist the Court in its deliberations on the important issues raised by the case.

Respectfully submitted,



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