

No. _____

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SUPREME COURT
FILED

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JAN 04 2010

ALFREDO GOMEZ,

Petitioner,

v.

THE SUPERIOR COURT OF LASSEN COUNTY,

Respondent;

TOM FELKER, as Warden, etc. et. al.,

Real Parties in Interest.

Frederick K. Ohlrich Clerk
Deputy

Court of Appeal

Case No. ~~C060773~~

C060710

(Lassen County

Superior Court

Case No. CHW2530)

consolidated with

MANUEL JUAREZ,

Petitioner,

v.

THE SUPERIOR COURT OF LASSEN COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

Court of Appeal

Case No. ~~C060710~~

C060773

(Lassen County

Superior Court

Case No. 47543)

PETITION FOR REVIEW

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By Appointment of the Court of Appeal
under the Central California Appellate
Program's Independent Case System

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PETITION FOR REVIEW

TO THE HONORABLE RONALD M. GEORGE, CHIEF
JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES
OF THE CALIFORNIA SUPREME COURT:

Petitioners Alfredo Gomez and Manuel Juarez, through their counsel, petition this Court for review of the decision of the Court of Appeal, Third Appellate District, filed November 20, 2009. That decision, in an opinion certified for publication, denied their petitions for writs of mandate challenging the disposition of their petitions for a writ of habeas corpus or other extraordinary relief in the trial court by a commissioner rather than a judge. A copy of the decision, including both a majority and concurring opinion, is appended hereto pursuant to California Rules of Court, rule 8.504.

QUESTION PRESENTED

Is a commissioner's summary denial of a prisoner's petition for a writ of habeas corpus or mandate a "subordinate judicial duty" within the meaning of article VI, section 22 of the California Constitution, or must final disposition of such a petition be made by a judge?

* * * * *

STATEMENT OF THE FACTS AND CASE

Gomez and Juarez, inmates at High Desert State Prison, filed petitions for extraordinary relief from conditions of their confinement in Lassen County Superior Court. (Typ. opn., p. 4.) Treating one of them as a petition for writ of mandate and the other as a petition for writ of habeas corpus, a superior court commissioner summarily denied both petitions. (Typ. opn., p. 4.) One of the petitioners then objected that the commissioner lacked authority to dispose of his petition because he “did not consent to the commissioner’s jurisdiction.” (Typ. opn., p. 4.) Relying on Code of Civil Procedure section 259, subdivision (a), the commissioner overruled the objections. (Typ. opn., p. 5.)

Each prisoner then sought extraordinary relief in the Third District Court of Appeal, challenging the power and authority of the commissioner to deny their petitions.¹ (Typ. opn., p. 5.) The Court of Appeal consolidated the two matters and issued alternative writs of mandate in order to decide “the constitutional challenge” to the commissioner’s authority to summarily deny the inmates’ petitions for relief in the Lassen County Superior Court. (Typ. opn., pp. 3 & 5.)

The Attorney General on behalf of the People, the real party in interest, filed a return to the alternative writ that cited California Constitution, article VI, sections 21 & 22, and agreed with petitioners that a commissioner is not empowered to rule on a petition for writ of

¹ Gomez filed a petition for writ of mandate. Juarez filed a petition for writ of habeas corpus, which the Court of Appeal treated as a petition for writ of mandate. (Typ. opn., p. 5, fn. 1.)

habeas corpus absent consent of the parties, and there had been no consent in this case.² (Typ. opn., p. 5.) The Attorney General argued that the denial of a petition for writ of habeas corpus is not a subordinate judicial duty because of the important liberty interests protected by the “Great Writ.” (*Ibid.*) Petitioners and the Attorney General further argued that the summary denial of a petition for writ of habeas corpus is the equivalent of a final judgment, and that entry of such judgments where fundamental rights are at stake cannot be deemed a “subordinate judicial duty.” (Typ. opn., pp. 5-6.) Respondent superior court filed its own return in which it argued that “together, article VI, section 22, of California’s Constitution and section 259 of the Code of Civil Procedure authorize a court commissioner to rule on ex parte applications for writs” for extraordinary relief. (Typ. opn., p. 6.)

The Court of Appeal ruled that summary denial of a petition for writ of habeas corpus or alternative writ of mandate constitutes a subordinate judicial duty that commissioners may perform pursuant to section 259, subdivision (a) of the Code of Civil Procedure, and is within the confines of California Constitution, article VI, section 21, because it is not the “trial” of a “cause.” (Typ. opn., p. 3.) The appellate court opined that once a court commissioner determines that the inmate’s petition has stated a prima facie case for writ relief, and

² California Constitution, article VI, section 21 permits a temporary judge to try a cause to final determination upon “stipulation of the parties.” All parties in the Court of Appeal agree that this provision did not empower the commissioner to deny the petitions, since there was no stipulation to exercise of that power. (See, e.g., typ. opn., pp. 5-6.)

therefore issues the writ of habeas corpus (or order to show cause why the habeas relief should not be granted)³ or alternative writ of mandate, then a cause is created and the commissioner may not try that cause without a stipulation from the parties. (Typ. opn., pp. 3-4 & 7-9.)

In summation, the Court of Appeal denied the petitions for writ of mandate after holding that the commissioner of the Lassen County Superior Court had authority, pursuant to article VI, section 21 of the California Constitution, to summarily deny their petitions for a writ of habeas corpus or alternative writ of mandate upon finding they failed to state a prima facie case for relief. (Typ. opn., p. 4, 21.)

In a concurring opinion, Justice Hull noted:

[I]t is a result that gives one pause as it holds that a nonjudicial officer is captain of the gate when a person being held in confinement seeks the protections of the "Great Writ." [Citation.] ... [A]bsent appellate court intervention, there will never be a cause to be tried without the Commissioner's permission to pass.

(Typ. opn. (conc. opn. of Hull, J. p. 1).)

* * * * *

³ Issuance of the writ of habeas corpus is equivalent to issuance of an order to show cause why the relief requested in the habeas petition should not be granted. (See, e.g., *People v. Romero* (1994) 8 Cal.4th 728, 738.)

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER A COURT COMMISSIONER HAS THE POWER TO DENY A PETITION FOR WRIT OF HABEAS CORPUS OR MANDATE AS A SUBORDINATE JUDICIAL DUTY WITHIN THE MEANING OF THE CALIFORNIA CONSTITUTIONAL PROVISION LIMITING THE JURISDICTION OF COMMISSIONERS TO THE PERFORMANCE OF SUCH DUTIES.

This Court may grant review of a decision by a Court of Appeal "[w]hen necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500, subd. (b)(1).) Here, review is necessary to settle an important question of law; namely, whether a commissioner is empowered under the California Constitution to deny a prisoner's petition for writ of habeas corpus or other extraordinary relief. No case has ever found that commissioners are authorized to do so. As Justice Hull observed, it gives pause for any court to so hold, for that holding vests a nonjudicial officer with the power to close the courthouse door on a person invoking the Great Writ to free him from illegal restraint. Given the constitutional tension between the power of a commissioner to perform subordinate duties and the power of a judge to issue the writ of habeas corpus and other extraordinary writs, this Court should give pause to the Court of Appeal's settlement of that tension by granting review of its decision.

A. The Constitutional Standing of a Commissioner's Power.

In *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, (*Rooney*), this Court traced the history of the power of a commissioner. In 1862, article VI of the California Constitution read: “The Legislature may ... provide for the appointment ... [of] commissioners ... with authority to perform chamber business of the judges of the superior courts, to take depositions, and to perform such other business connected with the administration of justice as may be provided by law.” (*Id.* at p. 361 (citing Cal. Const. of 1849, art. VI, § 11, as amended Sept. 3, 1862; Cal. Const., former art. VI, § 14).) “Under authority of former article VI, section 14, the Legislature conferred certain powers on all court commissioners throughout the state (§ 259⁴) and, in enacting section 259a in 1929, conferred these and additional powers on commissioners in [certain populous] counties” (*Id.* at p. 362.) “The powers given court commissioners in certain counties by section 259a are an enlargement on those given to court commissioners of all counties by section 259.” (*Id.* at p. 362, fn. 7.)

As this Court has recounted, “a general revision of article VI of the California Constitution was ratified” in 1966. (*Rooney, supra*, 10 Cal.3d at p. 361.) Pertinent here is the enactment in that article of section 22 as follows: “The Legislature may provide for the appointment by trial courts of ... commissioners to perform

⁴ All references to code sections in this pleading are to the Code of Civil Procedure, as was this Court’s reference in the quote set forth in the text.

subordinate judicial duties.” (*Rooney, supra*, 10 Cal.3d at p. 361 (quoting provision); see also typ. opn., p. 12.) At the time of this general revision of article VI, Code of Civil Procedure section 259a granted commissioners in populous counties powers that included the power “[t]o hear and determine ex parte motions, for orders and alternative writs and writs of habeas corpus in the superior court” (*Rooney, supra*, 10 Cal.3d at p. 362, fn. 7 (quoting then § 259a).)

Rooney held that the change in the duties of a court commissioner from performing “chamber business” to “subordinate judicial duties” was not intended to diminish the constitutional powers of a commissioner, nor “should [it] be interpreted as foreclosing or limiting court commissioners from exercising the powers which the Legislature had conferred upon them prior to 1966.” (*Rooney, supra*, 10 Cal.3d at p. 364; see also typ. opn., p. 13.) Rather, the change was simply “intended to eliminate any possibility that assigning subordinate judicial duties to commissioners would violate the constitutional doctrine of separation of powers” (*id.* at p. 362), and in fact effectively incorporated the powers of a commissioner then set forth in sections 259 and 259a (*id.* at p. 364). (See also typ. opn. at pp. 13-14.) In 1980, 259a was repealed and its provisions, including the critical one related to petitions for writs of habeas corpus and mandate, were consolidated in the present section 259. (Typ. opn. (conc. opn. of Hull, J., p. 4) (citing Stats. 1980, ch. 229, § 1, p. 472).)

In sum, article VI, section 22 of the California Constitution empowers the Legislature to “provide for the appointment by the trial courts of ... commissioners to perform subordinate judicial duties.”

The Legislature has done so mainly in Code of Civil Procedure section 259, which provides in pertinent part that “[s]ubject to the supervision of the court, every court commissioner shall have power to ... [h]ear and determine ex parte motions for orders and alternative writs and writs of habeas corpus” (§ 259, subd. (a).)

In contrast, the Constitution has placed judges on a status higher than commissioners and different in kind. It has done so not only by granting judges plenary judicial authority, but in a number of other ways to assure both quality and judicial independence. As explained by Justice Mosk:

There are, of course, significant differences between commissioners and judges. Without denigrating the administrative and subordinate judicial services often rendered by commissioners, they do not have the qualifications, responsibilities, independence and protections of judges. This principle is recognized in article VI of the California Constitution creating a judicial appointment and retention procedure designed to foster an independent judiciary. For example, section 18 of article VI provides that judges may be removed from office prior to the completion of their term only for willful misconduct, persistent failure to perform judicial duties, or other seriously detrimental conduct. Court commissioners, in contrast, are not institutionally protected by the Constitution and serve solely at “the pleasure of the court appointing [them].” (Gov. Code, § 70142.)

(*In re Horton* (1991) 54 Cal.3d 82, 103-104 (dis. opn. of Mosk, J.); see also majority opinion in *Horton* at p. 97 [noting that the lifetime tenure of a judge under Article III of the federal Constitution secures

an independent judiciary, and likewise “[t]he California Constitution, too, is based on the doctrine of the separation of powers, and ... [o]ur judicial system is grounded on the existence of a nonpartisan, independent judiciary”].)

B. The Constitutional Standing of the Writ of Habeas Corpus.

“The writ of habeas corpus enjoys an extremely important place in the history of this state and this nation. Often termed the ‘Great Writ,’ it ‘has been justifiably lauded as “the safe-guard and the palladium of our liberties.”’” (*People v. Villa* (2009) 45 Cal.4th 1063, 1068.) The writ is “a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law.” (*Hamdi v. Rumsfeld* (2004) 542 U.S. 507, 525.)

This Court has acknowledged the storied pedigree of the writ of habeas corpus in our State as follows:

The rules governing postconviction habeas corpus relief recognize the importance of the “Great Writ,” an importance reflected in its constitutional status, and in our past decisions. Indeed, the writ has been aptly termed “the safe-guard and the palladium of our liberties” [citation] and is “regarded as the greatest remedy known to the law whereby one unlawfully restrained of his liberty can secure his release” [citation] The writ has been available to secure release from unlawful restraint since the founding of the state. [citations].

(*In re Clark* (1993) 5 Cal.4th 750, 763-764.)

Petitions for writs of habeas corpus typically implicate weighty federal and state constitutional rights, including the guarantee that the state will not take life or liberty without due process of law (Cal. Const., art. I, § 7; U.S. Const. Amend XIV) or impose cruel and/or unusual punishment. (Cal. Const., art. I, § 17; U.S. Const. Amends. VIII & XIV.) This Court has long emphasized that habeas corpus concerns matters of the greatest importance:

It is well to remember that this case involves fundamental rights, and is of universal interest. Around those rights the English have waged their great battle for liberty. Without the narration of the conflicts to which they have given rise, the history of the English people would be a dull affair. The right of the government with reference to persons accused of crime has been, and is yet, a matter of great consideration. It led to the agitation which wrung from power the Great Charter, the Petition of Right, and the Habeas Corpus Act. All the great achievements in favor of individual liberty, of which the English people are so justly proud, may be said to have come through contests over the rights of persons imprisoned for supposed crime.

And justly it is deemed a matter of the utmost importance.

(*In re Begerow* (1901) 133 Cal. 349, 352.) Moreover, even for constitutional entitlements “which relate ‘solely to a matter of prison incarceration’” (typ. opn., p. 19, quoting *In re Ferguson* (1961) 55 Cal.2d 663, 669), “[t]he writ of habeas corpus is an indispensable adjunct to that entitlement.” (*Frias v. Superior Court* (1975) 51 Cal.App.3d 919, 923.)

C. Resolving the Tension Between the Constitutional Provisions.

The majority asserts that the concern of the People and petitioners with disposition of a habeas proceeding by a commissioner “is overstated given that not all petitions for writs of habeas corpus concern illegal imprisonment of an inmate or serious violations of a prisoner’s civil rights.” (Typ. opn., p. 19.) The majority’s holding, however, does not limit the jurisdiction of a commissioner to those asserted minor restraints upon the prisoner. As the concurring justice observed: “[It] should not matter whether the restraint challenged by a particular writ is considered ‘significant,’ but only whether it violates the law. According to my reading, the majority opinion does not suggest otherwise.” (Typ. opn. (conc. opn. of Hull, J. at p. 2).)

Vesting power in a commissioner to deny any and all petitions is at odds with the power and majesty of the writ, which one justice has described as follows:

The writ of habeas corpus, the right to which is made inviolate by ... the Constitution of this State and which the Supreme Court, District Courts of Appeal and superior courts are ... given power to issue, is the ancient prerogative writ through which one illegally imprisoned and charged with a criminal offense might seek his liberty. Under the Constitution of this state the courts have inherent power to issue the writ and this power may not be taken away by the Legislature nor may the exercise of the power to grant it be restricted by the Legislature

That the writ of habeas corpus, the right to which is protected by ... the Constitution of this state is the ancient prerogative writ granted to the people

of England under the Bill of Rights and as set forth in the Habeas Corpus Act passed by the Parliament of 1679 [citation] is apparent if we trace the history of our constitutional provisions.

(*In re Newman* (1960) 187 Cal.App.2d 377, 381 (dis. opn. of Nourse, J.))⁵

The Attorney General agrees with petitioners here:

- The unique and important role habeas corpus maintains in the judicial system” as a bulwark against unlawful restraint of an individual is incompatible with deeming the rendition of judgments in habeas proceedings as a subordinate judicial duty. (RPI’s Return, p. 5, and authorities cited therein; see also *In re Brindle*, (1979) 91 Cal.App.3d 660, 669 [habeas corpus may be used not only to secure “release of a prisoner” but also “to secure fundamental rights of a person lawfully in custody.”].)
- Precedent establishes that adjudication of a matter where liberty is at stake – as it always is in habeas proceedings, from the unlawful restraint complained of in these petitions up to and including imprisonment – may “never be classified

⁵ Indeed, under the Court of Appeal holding, a commissioner could deny a petition for writ of habeas corpus where life was at stake. Respondent court asserted it was “a misnomer” that “Commissioners [are] issuing final judgments on writs,” since petitioners “are able to file a new [petition for] writ in the Appellate Court” (Respondent’s Return, p. 8.) The majority agreed, stating, “In cases where the petition is denied and the prisoner believes the decision is unwarranted, the prisoner is not without recourse; he or she can file a petition for writ of habeas corpus in the appellate court.” (Typ. opn., p. 20.) But the lack of an appeal from a denial of a habeas petition, carrying with it the burden of filing a new petition for extraordinary relief that catches the attention of a busy appellate court, only emphasizes the inappropriateness of permitting a commissioner to render final judgment on a habeas petition.

as a subordinate judicial duty.” (RPI’s Return, p. 4, and authorities cited therein.)

- Code of Civil Procedure section 259 on the whole does not authorize a commissioner to render final judgments in any matter affecting the substantial rights of the parties, absent the consent or stipulation of the parties. (RPI’s Return, p. 5.)
- The only legislative exceptions to the restriction of commissioner decisions to preliminary non-dispositive matters rather than final adjudications are modern ones for what are inherently minor and relatively inconsequential matters – e.g., traffic violations and small claims. (RPI’s Return, pp. 7-8, citing Govt. Code, §§ 72190.1 and 72401, subd. (d).)

The court’s holding that allows commissioners appointed by the trial court to issue dispositive judgments in habeas or mandate proceedings wrongly reconciles against the imprisoned individual the tension between the constitutional guarantee to prosecute a petition for writ of habeas corpus (see Cal. Const., art. I, § 5) and the constitutional limit on a commissioner’s powers to the performance of “subordinate judicial duties.”

D. The Traditional Role of Court Commissioners.

“Court commissioners should be permitted to perform only *subordinate* judicial duties. I would place repeated emphasis upon the adjective.” (*Rooney v. Vermont Investment Corp.*, *supra*, 10 Cal.3d at p. 373 (conc. opn. of Mosk, J.)) (Italics in original.) So should this Court when the duty concerns a denial of a petition for writ of habeas corpus, for permitting commissioners to close the courthouse door on a claim of unlawful restraint before that claim has even come to the

attention of a judge is inconsistent with the preeminent position enjoyed by the writ of habeas corpus in our constitution.

The only spheres in which a commissioner may operate to render final judgments as a “subordinate judicial duty” have been modern innovations confined to the most mundane and inconsequential matters that concern the law – small claims and traffic infractions. Even there, judicial opinion has been divided on whether rendering judgments in such cases may indeed be deemed a subordinate duty. (See, e.g., *People v. Lucas* (1978) 82 Cal.App.3d 47, 56-64 (dis. opn. of Jefferson, J.) [“the majority’s holding [that adjudication of a traffic infraction is a subordinate judicial duty] constitutes a prostitution of the judicial process”]; *In re Kathy P.* (1979) 25 Cal.3d 91, 105 (dis. opn. of Bird, J.) [adjudication of whether juvenile committed a “routine traffic infraction” is not a subordinate judicial duty].)

Because of the critical differences between a judge and a commissioner, the courts have been rigorous in ensuring that a commissioner confine his actions to performance of the relatively minor ones permitted by the Constitution. (See, e.g., *Rooney, supra*, 10 Cal.3d 351.) Judicial independence is especially important when the rights of prisoners are being adjudicated. Habeas corpus, which acts as a tool of freedom for the powerless against the oppression of an almighty government, necessarily implicates “the role of the rule of law in a society that justly prides itself on being ‘a government of laws, and not of men’ (or women).” (See, e.g., *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068, where the

Court in those words heralded the rule of law against executive fiat.) Habeas corpus at its core concerns prisoners of the state, a group that is literally disenfranchised and enjoys little public sympathy or support. (See *id.* at p. 1119 [“[H]istory demonstrates that ... individuals who are unpopular or powerless [] have the most to lose when the rule of law is abandoned – even for what appears, to the person departing from the law, to be a just end.”]; see also *Landgraff v. USI Film Products* (1994) 511 U.S. 244, 253 [114 S.Ct. 1483, 128 L.Ed.2d 229] [An elected body’s “responsivity to political pressures poses a risk that it may be tempted to use [its power] as a means of retribution against unpopular groups or individuals.”].) When that retribution is in the form of wrongful imprisonment or other restraint, the need for habeas corpus relief is pressing. (See, e.g., *Kansas v. Hendricks* (1997) 521 U.S. 346, 356 [“freedom from physical restraint ‘has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action”].) There may be no higher judicial office than determination of the need for habeas relief, and every judge up to the Chief Justice of the California Supreme Court has authority to issue the writ in the first instance. Accordingly, that determination is not a subordinate judicial duty within the meaning of our constitution.

The majority introduced its opinion with the observation that “[s]tate prison inmates are a litigious bunch when it comes to filing writ petitions challenging conditions of confinement or raising a multitude of other grievances.” (Typ. opn., p. 2.) But reviewing courts have been cognizant of the need to avoid the kind of “second-

tier' justice" (*Settemire v. Superior Court* (2003) 105 Cal.App.4th 666, 669-670) that may result when courts relegate to commissioners undesirable cases that they "do not consider ... important enough to merit the attention of judges." (*Id.* at p. 674, quoting Jud. Council of Cal., Admin. Off. Of Cts., Rep. on Role of Subordinate Judicial Officers (adopt Cal. Rules of Court, rule 6.609), com., p. 4.)

E. The Pertinence of Code of Civil Procedure Section 259 to Resolution of the Constitutional Question.

The Court of Appeal relied on Code of Civil Procedure section 259 in support of its holding, in that it presently provides that a commissioner is empowered to "[h]ear and determine ex parte motions for orders and alternative writs and writs of habeas corpus in the superior court" (See typ. opn., pp. 14-18; see also typ. opn. (conc. opn. of Hull, J. at p. 5 ["[P]rior to 1966, commissioners were authorized to hear and determine writs of habeas corpus. Given the holding in *Rooney*, there is nothing more to be said."])).)

There remains much to be said, however, for the language in section 259 critical to this case had not been interpreted prior to *Rooney*, and until the instant case had never been construed by a court. (See, e.g., RPI's Return, p. 6 ["the interpretation of section 259, subdivision (a) is an unresolved question" on this point].) According to the Court of Appeal, the power to "hear and determine" habeas petitions permits a commissioner to either deny a petition for writ of habeas corpus or issue the writ (or order to show cause); when it issues the writ or order to show cause, however, it may not hear and determine the cause created thereby. (Typ. opn. at pp. 3-4.)

But interpreting section 259 to permit issuance of the writ or order to show cause, while not permitting final disposition of the matter by *either* denial of the petition or grant of the relief requested by writ, best achieves the constitutional objectives of empowering a judge to grant habeas relief and empowering a commissioner to perform subordinate judicial duties. Indeed, such an interpretation of section 259 places commissioners in the exact role of their federal counterpart, magistrate judges, in administration of the writ of habeas corpus and is mindful of the constitutional provisions ensuring an independent judiciary.

As our Constitution helps alleviate the demands on the judiciary with the provision of commissioners to perform subordinate judicial duties, so too did Congress provide in the Federal Magistrates Act for the use of magistrate judges in district courts for a similar purpose. Both the federal and state courts faced a parallel concern: how best to balance the “dictates of expediency” (*Rooney, supra*, 10 Cal.3d at p. 373 (conc. opn. of Mosk, J.) with the “constitutional responsibility” that final decisions on dispositive matters “be decided only by judges.” (*Ibid.*) As one justice has stated:

Some kind of screening capability is essential to the sensible fulfillment of habeas corpus responsibility. [¶] The gap between habeas corpus responsibility and capability is a well-known and unsolved problem in the administration of California justice. Court administrative facilities for handling prisoner petitions have fallen far behind substantive advances in prison law. [Citations.] [¶] Most superior courts have no legal or investigative assistants.

(*Frias v. Superior Court* (1975) 51 Cal.App.3d at p. 924 (conc. opn. of Friedman, J.)) State commissioners can perform that screening function, while protecting the judicial independence of judges, by considering habeas petitions in the same way that federal magistrates do.

The Federal Magistrates Act authorizes the district judge in habeas corpus actions to designate a United States magistrate judge to rule on any nondispositive pretrial matter. (28 U.S.C. § 636 (b)(1)(A) (2000); *Gomez v. United States* (1989) 490 U.S. 858, 867-868 [listing relatively routine types of “pretrial matter[s]” that judge may assign to magistrate judge to resolve]; *Thomas v. Arn* (1985) 474 U.S. 140, 151 [characterizing matters magistrate judges may hear and determine as “nondispositive”].) Under the Magistrates Act, the district court, in habeas matters, has the discretion to designate magistrate judges to hear, but *not* to make final decisions that dispose of a petition. Thus, for example, a magistrate judge may require a respondent to answer a petition, but cannot deny a petition; rather, the magistrate may only make a recommendation as to the final disposition of a petition, which is subject to meaningful de novo review by the district judge. (See *Gomez v. United States, supra*, 490 U.S. at pp. 864-865 [Court reiterates middle position that “limited, advisory review, subject to the district judge’s ongoing supervision and final decision, [is] among the ‘range of duties’ that Congress intended magistrates perform” and emphasized that final decision rests with district judge]; see also 28 U.S.C. § 636 (b)(1)(B) (2000) [in decision that finally disposes of a petition, the magistrate is limited “to submit[ting] to a judge of the

court proposed findings of fact and recommendations for the disposition, by a judge of the court”; *United States v. Raddatz* (1980) 447 U.S. 667, 673 [“as to ‘dispositive’ [matters], ... magistrate has no authority to make a final and binding disposition”].)

Similar to the federal court’s use of magistrates as subordinate officers, the Court of Appeal correctly construed the pertinent constitutional and statutory provisions as permitting a commissioner to issue the writ or an order to show cause on a petition for writ of habeas corpus, but precluding that commissioner from rendering final judgment on the petition. The Court of Appeal wrongly construed that language, however, as permitting a commissioner to deny a petition, for such a denial acts as a final judgment on the petition without any consideration by a judge.

Preclusion of a final judgment on a petition by a commissioner also is consistent with the historical use of commissioners, which has been limited to preliminary or uncontested matters. Traditionally, a commissioner has not been permitted to entering a final judgment that affects the substantial interests of a party appearing before it. Even within that tradition, a commissioner may not adjudicate preliminary matters that “so involve the exercise of due process rights that it would be required to be made by a judge rather than an officer such as a commissioner.” (*Loeb & Loeb v. Beverly Glen Music, Inc.* (1985) 166 Cal.App.3d 1110, 1121 (quoting Cal. Law. Rev. Comm., in turn quoting the legislative counsel).)

As Justice Hull aptly observed below:

I am sympathetic to the workload imposed on small counties that have large prison populations and few superior court judges. Even so, as Justice Mosk wrote in his concurring opinion in *Rooney* ... “one need not be unsympathetic to the administrative complexities of the court to insist, despite the dictates of expediency, that substantive controversies between litigants be decided only by judges to whom the constitutional responsibility has been assigned. (Cal. Const., art. VI, §§ 1, 4, 10.) As Justice Cardozo wrote, ‘codes and statutes do not render the judge superfluous.’ [Citation.]” [Citation.]

(Typ. opn. (conc. opn. of Hull, J., at p. 1) (brackets and ellipses in quote deleted).)

* * * * *

CONCLUSION

For these reasons, this Court should grant review.

Dated: December 29, 2009

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michael Satris', written over a horizontal line.

MICHAEL SATRIS

Attorney for Petitioners
Manuel Juarez & Alfredo Gomez

Court of Appeal, Third Appellate District
Gomez v. The Superior Court of Lassen County (Case No. C060710)
Juarez v. The Superior Court of Lassen County (Case No. C060773)

CERTIFICATE OF APPELLATE COUNSEL

I, Michael Satris, appointed counsel for Petitioners Gomez and Juarez, hereby certify, pursuant to rule 8.504 (d)(1) of the California Rules of Court, that I prepared the foregoing petition for review on behalf of my clients, and that the word count for this petition for review, including footnotes, is 5203 words. This petition for review therefore complies with the rule, which limits a petition for review or answer to petition for review to 8400 words. I certify that I prepared this document in Microsoft Word 2002, and that this is the word count Microsoft Word generated for this document.

Dated: December 29, 2009



MICHAEL SATRIS

Attorney for Petitioners
Manuel Juarez & Alfredo Gomez

FILED

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CERTIFIED FOR PUBLICATION

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COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT

BY _____ Deputy

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

ALFREDO GOMEZ,

Petitioner,

v.

THE SUPERIOR COURT OF LASSEN COUNTY,

Respondent;

TOM FELKER, as Warden, etc. et. al.,

Real Parties in Interest.

C060710

(Super.Ct.No. 47543)

Lassen County

MANUEL JUAREZ,

Petitioner,

v.

THE SUPERIOR COURT OF LASSEN COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

C060773

(Super.Ct.No. CHW2530)

Lassen County

ORIGINAL PROCEEDINGS. Petitions denied.

Michael Sattris, under appointment by the Court of Appeal, for Petitioners.

Jon A. Nakanishi for Respondent.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Senior Assistant Attorney General, Jessica N. Blonien, Supervising Deputy Attorney General, Heather M. Heckler and Christopher J. Rench, Deputy Attorneys General, for Real Party in Interest California Department of Corrections and Rehabilitation.

State prison inmates are a litigious bunch when it comes to filing writ petitions challenging conditions of confinement or raising a multitude of other grievances. The plethora of paperwork has a disproportionate impact on trial courts in counties where state prisons are located--many of which are small county courts. For example, there are two separate prison facilities housing approximately 11,000 inmates in Lassen County, which has only two trial court judges.

To timely address the many writ petitions filed there, the Lassen County Superior Court has been using a court commissioner to rule on ex parte applications filed by prison inmates seeking the issuance of writs of habeas corpus or writs of mandate or prohibition. It believes that doing so is authorized by Code of Civil Procedure section 259.

After their writ petitions were summarily denied by the commissioner, two prison inmates, Alfredo Gomez and Manuel Juarez, filed petitions in this court challenging the Lassen County trial court procedure, contending it violates California Constitution,

Article VI, sections 21 and 22. We issued alternative writs to address the constitutional challenge only. (*People v. Miranda* (1987) 44 Cal.3d 57, 119, fn. 37.)

The judicial power of the state is vested in the Supreme Court, Courts of Appeal, and superior courts. (Cal. Const., art. VI, § 1; *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 355.) The California Constitution authorizes the Governor to appoint superior court judges when there are vacancies but provides that, upon completion of their terms, superior court judges must sit for nonpartisan election. (Cal. Const., art. VI, § 16, & art. II, § 6.) Thus, as a general rule, only a duly elected or appointed judge can exercise the judicial power of a trial court. The California Constitution provides for two pertinent exceptions. Article VI, section 21 states: "On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause." Article VI, section 22 states: "The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties." The Legislature did so in Code of Civil Procedure section 259.

As we will explain, the summary denial of a prison inmate's ex parte application for the issuance of a writ of habeas corpus or a writ of mandate is a subordinate judicial duty that a commissioner may perform pursuant to section 259, subdivision (a) of the Code of Civil Procedure, without violating the Constitution, because it is not the "trial" of a "cause." However, if the court commissioner

determines that the inmate's petition has stated a prima facie case for writ relief, and therefore issues an alternative writ or order to show cause why relief should not be granted, then a cause is created and the commissioner may not try the cause without a stipulation from the parties.

Because the commissioner of the Lassen County Superior Court had authority to summarily deny the relief requested by Gomez and Juarez, we shall deny the writ petitions they filed in this court challenging the commissioner's "jurisdiction" to do so.

DISCUSSION

I

Gomez, an inmate at High Desert State Prison, filed a petition for writ of mandate in the Lassen County Superior Court, claiming that, due to prison officials' misapplication of procedural rules and improper application of illegal underground regulations, Gomez was prevented from pursuing an administrative grievance regarding a prison "mailroom and accounting office policy." The superior court commissioner summarily denied the petition. Gomez then objected that the commissioner lacked authority to do so because Gomez "did not consent to the Commissioner's jurisdiction." Relying on Code of Civil Procedure section 259, subdivision (a), the commissioner ruled his summary determination on a petition for writ of mandate cannot be challenged on that ground.

Inmate Juarez filed a petition for writ of mandate in the Lassen County Superior Court, claiming officials at High Desert State Prison failed to process three of his administrative appeals regarding conduct of prison staff. The superior court commissioner

treated it as a petition for writ of habeas corpus and summarily denied it for failure to state a prima facie case for relief.

(*People v. Duvall* (1995) 9 Cal.4th 464, 475).

Both Gomez and Juarez then filed writ petitions in this court,¹ challenging the authority of the commissioner to summarily deny the writ petitions they had filed in the superior court. They argue the commissioner could not rule on their petitions because they had not stipulated that he could act as a temporary judge.

We consolidated the two matters and issued alternative writs of mandate in order to decide whether the commissioner had the authority to summarily deny the inmates' requests for relief in the Lassen County Superior Court.

On behalf of the People, the Attorney General's Office agrees with Juarez and Gomez that a commissioner cannot rule on a petition for writ of habeas corpus unless the petitioner consents to the commissioner acting as a temporary judge in the matter. (Citing Cal. Const., art. VI, §§ 21 & 22.) In their view, although the Constitution authorizes a court commissioner to perform subordinate judicial duties (Cal. Const., art VI, § 22), the denial of a habeas corpus petition cannot be considered a subordinate judicial duty because of the important liberty interests protected by the "Great Writ." Asserting that the summary denial of a petition for writ of habeas corpus is the equivalent of a final judgment, they argue that

¹ Gomez filed in this court a petition for writ of mandate. Juarez filed in this court a petition for writ of habeas corpus, which we treated as a petition for writ of mandate.

commissioners should not be permitted to enter such judgments where fundamental rights are at stake. They fail to address a commissioner's authority to summarily deny a petition for writ of mandate.

Respondent Lassen County Superior Court disagrees, contending that, together, article VI, section 22, of California's Constitution and section 259 of the Code of Civil Procedure authorize a court commissioner to rule on ex parte applications for writs of habeas corpus, mandate, or prohibition. The constitutional provision allows the Legislature to enact laws permitting trial courts to appoint commissioners to "perform subordinate judicial duties." As pertinent to this case, the statute says that, "[s]ubject to the supervision of the court," a court commissioner "shall have power" to "[h]ear and determine ex parte motions for orders and alternative writs and writs of habeas corpus in the superior court for which the court commissioner is appointed." (Code Civ. Proc., § 259, subd. (a).) In the superior court's view, the Constitution's use of the words "subordinate judicial duties" was purposefully broad so the duties of a commissioner might be expanded to help reduce a court's workload and relieve an overburdened judicial system. The court observes that Lassen County has two state prisons, with approximately 11,000 inmates, and is "inundated" with writ petitions filed by prison inmates. Acknowledging that "habeas corpus can be used to challenge the constitutionality of incarceration and other civil rights violations," the court claims that the issues raised in the inmate's petitions "are rarely so complex," as demonstrated by Juarez's writ petition seeking in part to recover an art folder book

confiscated by prison officers. In sum, the court contends that summary denial of an ex parte writ is the type of subordinate judicial duty a commissioner should perform. If dissatisfied with the commissioner's decision, the petitioner is not without recourse; he or she can file a new writ petition in the appellate court.

For reasons that follow, our review of applicable law discloses that the position of the Lassen County Superior Court is correct.

II

As previously noted, article VI, section 21, of California's Constitution states: "On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause." Because the authority of a court commissioner, or any other temporary judge, to try a cause derives from the parties' stipulation, a judgment entered by a commissioner in the absence of a proper stipulation is void. (*In re Horton* (1991) 54 Cal.3d 82, 89-90.) Although a stipulation can be implied when a party appears and permits a cause to be tried before a commissioner without objection (*id.* at p. 91), Gomez and Juarez say a stipulation cannot be implied in their matters because their petitions were summarily denied without a hearing, which means they never had the opportunity to object. The People agree.

Gomez, Juarez, and the People overlook that the constitutional requirement for a stipulation applies only when a "cause" is "tried" by a commissioner while acting as a temporary judge. As explained by the authorities we cite below, a cause is not created by an ex parte petition for writ of habeas corpus until the court issues an order

to show cause why the requested relief should not be granted; and a cause is not created by a petition for writ of mandate or prohibition until the court issues an alternative writ directing the respondent to either grant the relief requested or show cause why it should not be granted.

In a habeas corpus proceeding, the "petition serves primarily to launch the judicial inquiry into the legality of the restraints on the petitioner's personal liberty" (*People v. Romero* (1994) 8 Cal.4th 728, 738.) "The return, which must allege facts establishing the legality of the petitioner's custody, 'becomes the principal pleading' [citation] and is 'analogous to the complaint in a civil proceeding' [citations]." (*Id.* at pp. 738-739, fn. omitted.) Upon the filing of the written return, the petitioner may file a response which "'may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge.' [Citation.]" (*Id.* at p. 739.) "[I]t is through the return and the traverse that the issues are joined in a habeas corpus proceeding. [Citations.]" (*Ibid.*) "[I]ssuance of a writ of habeas corpus or an order to show cause is an intermediate but nonetheless vital step in the process of determining whether the court should grant the affirmative relief that the petitioner has requested. The function of the writ or order is to 'institute a proceeding in which issues of fact are to be framed and decided.' [Citation.] The issuance of either the writ of habeas corpus or the order to show cause creates a 'cause,' . . . [Citations.]" (*Id.* at p. 740; *In re Lugo* (2008)

164 Cal.App.4th 1522, 1542 [absent an order to show cause or writ of habeas corpus, there is no "cause" before the court].)

Thus, summary denial of a petition for writ of habeas corpus, without the court having issued an order to show cause, is not a "trial" on, and determination of, a "cause"; it is simply a finding that the writ petition fails to state the prima facie case necessary to create a cause for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 475) This happened in Juarez's case when the commissioner treated his writ petition as a request for habeas corpus relief and summarily denied it.

With respect to an ex parte petition for a writ of mandate, a cause is not created until the court issues an alternative writ or "a peremptory writ in the first instance, thus dispensing with the need to await the filing of a return" (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178 & fn. 5; see also *Funeral Dir. Assn. v. Bd. of Funeral Dirs.* (1943) 22 Cal.2d 104, 106 ["It is only after an alternative writ has been issued that the matter becomes a 'cause'"]); accord, *In re Rose* (2000) 22 Cal.4th 430, 451.) An alternative writ directs the respondent to grant the relief requested, i.e., "to do the act required to be performed," or to show cause why such relief should not be granted. (Code Civ. Proc., § 1087.) A peremptory writ directs the respondent to grant the requested relief. (*Ibid.*)

"In nearly all instances in which the alternative writ procedure is used, the petitioner begins the writ proceeding by filing an ex parte application for issuance of an alternative writ." (Cal. Civil Writ Practice (Cont.Ed.Bar 4th ed. 2009) § 5.113,

p. 131.) Thus, Gomez filed in the superior court a writ petition, a request for an alternative writ, supporting memoranda, and supporting evidence, which he submitted to the court ex parte. (Cal. Civil Writ Practice, *supra*, § 5.15, p. 93.) That he served the court and the Attorney General does not mean his application was not ex parte; even in an ex parte proceeding, notice is required. Indeed, "[t]he petitioner must serve the ex parte application and any other papers (e.g., the petition, the supporting memorandum, or the proposed alternative writ) on all opposing parties at the first reasonable opportunity" (Cal. Civil Writ Practice, *supra*, § 5.115, p. 132; Cal. Rules of Court, rule 3.1206.)

Summary denial of a petition for writ of mandate, without the court having issued an alternative writ, is not a "trial" on, and determination of, a "cause" (*Palma v. U.S. Industrial Fasteners, Inc.*, *supra*, 36 Cal.3d 171, 178, fn. 5); it is simply a finding that the petition does not state a prima facie case necessary to create a cause for relief. This happened in Gomez's case when the commissioner summarily denied his petition for writ of mandate.

A court commissioner's authority to determine a matter is "not dependent on [the commissioner] qualifying as a temporary judge if in fact such authority to so act [has] been conferred upon him [or her] as a court commissioner." (*Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 360 (hereafter *Rooney*) [the absence of a stipulation for the commissioner to act as a temporary judge was irrelevant where the statute gave the commissioner the authority to determine uncontested actions or proceedings].) As this court has observed, Code of Civil Procedure section 259, subdivision (a)

authorizes commissioners to decide ex parte motions for orders and writs without obtaining the stipulation of the parties. (*Foosadas v. Superior Court* (2005) 130 Cal.App.4th 649, 654.)

Thus, the pertinent question is whether the commissioner's summary denial of the mandamus and habeas corpus petitions at issue here falls within the ambit of section 259, subdivision (a) and is a "subordinate judicial dut[y]" within the meaning of article VI, section 22 of the California Constitution. (Further section references are to the Code of Civil Procedure unless otherwise specified.)

III

Gomez, Juarez, and the People believe that the summary denial of the writ petitions cannot be considered a subordinate judicial duty because (1) it is the equivalent of a final judgment, and (2) when a petition for writ of habeas corpus is involved, the liberty interest protected by the writ is too important to be determined by a court commissioner. Their position is not persuasive.

California's Supreme Court has extensively discussed the meaning of the term "subordinate judicial duties." (*Rooney, supra*, 10 Cal.3d 351.) *Rooney* addressed the constitutionality of subdivision 6 of former section 259a, which stated: "Subject to the supervision of the court, every court commissioner of a county or city and county having a population of nine hundred thousand inhabitants or more shall, in addition to the powers and duties contained in section 259 of this code, have power: [¶] . . . [¶] 6. When ordered by the court appointing him so to do, to hear, report on and determine all uncontested actions and proceedings other than actions for divorce,

maintenance or annulment of marriage" (Former § 259a, repealed by Stats. 1980, ch. 229, § 2.)

For the following reasons, Rooney disagreed with a Court of Appeal's holding that a court commissioner's determination of an uncontested matter was beyond the scope of the former statute and was not a subordinate judicial duty.

The California Constitution was revised and ratified in 1966, and section 22 of article VI "replaced a provision that had been in our state Constitution in substantially the same form since 1862 (see Cal. Const. of 1849, art. VI, § 11, as amended Sept. 3, 1862; Cal. Const., former art. VI, § 14)" (Rooney, *supra*, 10 Cal.3d at p. 361.) The revision "describe[d] the type of judicial duties which may be assigned to commissioners by incorporating the simple statement that commissioners may be appointed 'to perform subordinate judicial duties.' This language replaced that which authorized commissioners 'to perform chamber business of the judges . . . , to take depositions, and to perform such other business connected with the administration of justice as may be prescribed by law.'" (*Id.* at p. 362.)

The words "subordinate judicial duties" were intended to be broad and to eliminate any possibility that assigning such duties to commissioners would violate the constitutional doctrine of separation of powers. (Rooney, *supra*, 10 Cal.3d at p. 362.)

Rooney held that the "scope of the subordinate judicial duties which may be constitutionally assigned to court commissioners should be examined in the context of the powers that court commissioners had and were exercising in 1966, when the present constitutional

provision was adopted." (Rooney, *supra*, 10 Cal.3d at p. 362.) Under the authority of former article VI, section 14, the Legislature conferred certain powers on court commissioners via sections 259 and 259a. "Exercising the powers authorized by these code sections, court commissioners were by 1966 making a most significant contribution to the reduction of the judicial workload in the superior courts." (Rooney, *supra*, 10 Cal.3d at pp. 362-363.)

Having examined the report of the California Constitution Revision Commission, the Legislative Counsel's analysis of the proposed revision, the arguments favoring and opposing the revision prepared for the voters, and a report from the Judicial Council, Rooney concluded: "Nothing in the history of the drafting and adoption of the constitutional provision indicates that the phrase 'subordinate judicial duties' should be interpreted as foreclosing or limiting court commissioners from exercising the powers which the Legislature had conferred upon them prior to 1966." (Rooney, *supra*, 10 Cal.3d at pp. 364-365 & fns. 9, 10.) Indeed, "[t]he absence of any manifestation of intent on the part of the framers of the revision of article VI to modify the powers of court commissioners under long-existing legislation affirmatively shows that they intended no such change." (*Id.* at p. 364; see also, *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 721 ["Article VI, section 22, was intended to retain constitutional authorization for existing statutes under which court commissioners had exercised their powers (see Code Civ. Proc., § 259), . . ."].)

Thus, "all the judicial powers that sections 259 and 259a authorized commissioners to exercise pursuant to the former

constitutional provision can fairly be described as 'subordinate,'" (Rooney, *supra*, 10 Cal.3d at p. 364.) Consequently, former "section 259a, subdivision 6, providing for the assignment to court commissioners of certain judicial duties with respect to uncontested matters, falls squarely within the scope of the legislative authority conferred by article VI, section 22, of the Constitution." (*Id.* at p. 366.)²

For the reasons expressed in *Rooney*, the statutory provision in section 259, subdivision (a), providing for commissioners to determine *ex parte* motions for orders and alternative writs and writs of habeas corpus, also falls squarely within the legislative authority conferred by article VI, section 22, of the Constitution.

The People argue the language of section 259, subdivision (a) is ambiguous and must mean only that court commissioners can determine *ex parte* motions for orders "in" writ proceedings, "such as requests for continuances or the appointment of counsel." The interpretation is linguistically untenable. The language of the statute provides

² Pursuant to former section 259a, subdivision 6, a commissioner, upon the order of the superior court, could hear and determine an uncontested matter without first reporting to the superior court. (*Rooney, supra*, 10 Cal.3d at pp. 366-367; see also *People v. Superior Court* (1965) 239 Cal.App.2d 99, 103-104.) Unlike large county court commissioners governed by the former statute, small county court commissioners did not have the authority to determine uncontested matters under the version of section 259 in effect when *Rooney* was decided. (See Stats. 1880, Amend., ch. 35, § 1, pp. 51-52.) In 1980, the Legislature repealed former section 259a and consolidated the duties stated therein with those in section 259, giving all court commissioners the same authority without any reference to the size of their county's population. (Stats. 1980, ch. 229, §§ 1, 2, pp. 472-473.)

that, subject to the supervision of the court, commissioners have the power to "[h]ear and determine ex parte motions for orders and alternative writs and writs of habeas corpus in the superior court for which the court commissioner is appointed." (§ 259, subd. (a).) The statute does not say that commissioners can hear and determine ex parte motions for orders "in" writ proceedings. Not only is the People's interpretation undermined by the plain language of the statute, it would render much of subdivision (a) superfluous. The conferral of power to determine ex parte motions for orders necessarily includes the power to determine such matters in all proceedings, including writ proceedings; it would be unnecessary to refer to alternative writs and writs of habeas corpus. We generally avoid an interpretation making any portion of a statute superfluous, unnecessary, or a nullity, presuming instead that the Legislature does not engage in such an idle act. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 634.)

The People's construction of section 259, subdivision (a) is also contrary to its intended meaning as is evidenced by the history of the statute.

Since 1872, section 259 has authorized court commissioners to determine ex parte motions for certain writs. As originally enacted, the section from which subdivision (a) is derived read: "Every such Commissioner has power: [¶] 1. To hear and determine ex parte motions for orders and writs (except orders or writs of injunction) in the District and County Courts of the county for

which he is appointed;" (Historical & Statutory Notes, 13A West's Ann. Code Civ. Proc. (2006 ed.) foll. § 259, p. 433.)

At the time *Rooney* was decided, section 259, subdivision 1 stated: "Every Court Commissioner shall have power" to "hear and determine ex parte motions for orders and writs, except orders or writs of injunction in the Superior Court of the county, or city and county, for which he is appointed; provided, that he shall have power to hear and determine such motions only in the absence or inability to act of the Judge or Judges of the Superior Court of the county, or city and county;" (Stats. 1880, Amend., ch. 35, § 1, p. 51-52.)"³

Section 259 remained unchanged for 100 years until it was amended in 1980 to provide in pertinent part: "Subject to the supervision of the court every court commissioner shall have power: [¶] 1. To hear and determine ex parte motions, for orders and alternative writs and writs of habeas corpus in the superior court for which he is appointed;" (Stats. 1980, ch. 229, § 1, p. 472.) Thereafter, in 1996, the comma following "motions" was

³ *Rooney* said the duties enumerated in section 259 and former section 259a could fairly be described as subordinate. (*Rooney, supra*, 10 Cal.3d at p. 364.) Former section 259a stated in part: "Subject to the supervision of the court, every court commissioner of a county or city and county having a population of nine hundred thousand inhabitants or more shall, in addition to the powers and duties contained in Section 259 of this code, have power: [¶] 1. To hear and determine ex parte motions, for orders and alternative writs and writs of habeas corpus in the superior court of the county, or city and county, for which he is appointed;" (Stats. 1949, ch. 469, § 1, p. 816; repealed by Stats. 1980, ch. 229, § 2, p. 473.)

deleted and the subdivision was amended to state: "Subject to the supervision of the court, every court commissioner shall have power to do all of the following: [¶] (a) Hear and determine ex parte motions for orders and alternative writs and writs of habeas corpus in the superior court for which the court commissioner is appointed." (Stats. 1996, ch. 957, § 1, p. 5665.) Other parts of the statute were later amended, but subdivision (a) remains the same today.

Although a "motion" for a writ is typically referred to as a petition or application, the various permutations of the statute from 1872 until the present indicate that "ex parte motions for" was, and is, intended to modify "writs" or "alternative writs and writs of habeas corpus."

The People claim that interpreting section 259, subdivision (a) to permit court commissioners to summarily deny ex parte motions for alternative writs or writs of habeas corpus would be at odds with the remaining provisions of section 259, which require either the consent of the parties or submission to the superior court for final approval.⁴ They argue we must construe section 259, subdivision (a)

⁴ The complete text of section 259 provides: "Subject to the supervision of the court, every court commissioner shall have power to do all of the following: [¶] (a) Hear and determine ex parte motions for orders and alternative writs and writs of habeas corpus in the superior court for which the court commissioner is appointed. [¶] (b) Take proof and make and report findings thereon as to any matter of fact upon which information is required by the court. Any party to any contested proceeding may except to the report and the subsequent order of the court made thereon within five days after written notice of the court's action. A copy of the exceptions shall be filed and served upon opposing party or counsel within the five days. The party may argue any exceptions before the court on giving notice of motion for that purpose within 10 days from entry

in context and harmonize it internally. The contention is contrary to established rules of statutory construction.

The fact the Legislature required a stipulation or approval in other subdivisions of the statute demonstrates it did not intend to impose these requirements in subdivision (a) of section 259. "When the Legislature has used a term or phrase in one part of a statute but excluded it from another, courts do not imply the missing term or phrase in the part of that statute from which the Legislature has excluded it." (*People v. Gardeley* (1996) 14 Cal.4th 605, 621-622.) If the Legislature had intended to impose one of the aforementioned requirements in subdivision (a) of the statute, it could have easily done so. It did not, and we may not rewrite the statute. It is a "cardinal rule that courts may not add provisions to a statute" or rewrite a statute to make it express an intention not expressed therein. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827; *Mutual*

thereof. After a hearing before the court on the exceptions, the court may sustain, or set aside, or modify its order. [¶] (c) Take and approve any bonds and undertakings in actions or proceedings, and determine objections to the bonds and undertakings. [¶] (d) Act as temporary judge when otherwise qualified so to act and when appointed for that purpose, on stipulation of the parties litigant. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner. [¶] (e) Hear and report findings and conclusions to the court for approval, rejection, or change, all preliminary matters including motions or petitions for the custody and support of children, the allowance of temporary spousal support, costs and attorneys' fees, and issues of fact in contempt proceedings in proceedings for support, dissolution of marriage, nullity of marriage, or legal separation. [¶] (f) Hear actions to establish paternity and to establish or enforce child and spousal support pursuant to subdivision (a) of Section 4251 of the Family Code. [¶] (g) Hear, report on, and determine all uncontested actions and proceedings subject to the requirements of subdivision (d)."

Life Ins. Co. v. City of Los Angeles (1990) 50 Cal.3d 402, 412; § 1858.)

The People and petitioners also argue that, because of the important liberty interests the writ is designed to protect, the determination of an ex parte motion for writ of habeas corpus is too important to be entrusted to a court commissioner.

Their concern is overstated given that not all petitions for writs of habeas corpus concern illegal imprisonment of an inmate or serious violations of a prisoner's civil rights. "[A] writ of habeas corpus may be sought to inquire into alleged illegal restraints upon a prisoner's activities which are not related to the validity of the judgment or judgments of incarceration, but which relate 'solely to a matter of prison administration.' [Citation.]" (*In re Ferguson* (1961) 55 Cal.2d 663, 669.)

Furthermore, the initial review of an application for a writ of habeas corpus is carefully constrained. "The court *must issue an order to show cause* if the petitioner has made a prima facie showing that he or she is entitled to relief. In doing so, the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. *If so, the court must issue an order to show cause.*" (Cal. Rules of Court, rule 4.551(c)(1), italics added.) We presume that official duty will be correctly performed, even if by a court commissioner. (Evid. Code, § 664; *Estate of Roberts* (1942) 49 Cal.App.2d 71, 76.)

In cases where the petition is denied and the prisoner believes the decision is unwarranted, the prisoner is not without recourse; he or she can file a petition for writ of habeas corpus in the appellate court. (*In re Crow* (1971) 4 Cal.3d 613, 621, fn. 8.) In other words, the courthouse doors are not closed by the commissioner's decision.

And if the petition states a prima facie case and an order to show cause issues, the matter will no longer be construed as an ex parte motion for a writ of habeas corpus. A cause will have been created, and the cause must be tried by a superior court judge, unless the court appoints a commissioner as a temporary judge and the parties stipulate to the cause being tried by the commissioner. (Cal. Const., art. VI, § 21.)

Lastly, petitioners note that section 259 requires the power conferred upon commissioners by section 259 must be exercised under the supervision of the superior court. They assert that, in the writ proceedings at issue, there is nothing in the record showing the court exercised the requisite supervision. In the words of petitioners' counsel: "For all we know from this record, the commissioner was a renegade acting without any authority of the court and without any supervision of his actions." This cynical speculation fails because, absent evidence to the contrary, we must presume the Lassen County Superior Court is correctly performing its official duty to provide such oversight. (Evid. Code. § 664; *People v. Surety Ins. Co.* (1975) 48 Cal.App.3d 123, 127; *People v. Superior Court*, *supra*, 239 Cal.App.2d at p. 104.)

In sum, without violating article VI, sections 21 and 22 of the California Constitution, a court commissioner may determine whether an ex parte petition for writ of habeas corpus or writ of mandate or prohibition states a prima facie case for relief, and may summarily deny the petition if it fails to do so.

DISPOSITION

The petitions for writ of mandate are denied.

SCOTLAND, P. J.

I concur:

RAYE, J.

Hull, J.

I concur in the result. But, without calling into question the abilities or integrity of California's commissioners who provide vital support to our judicial system, it is a result that gives one pause as it holds that a nonjudicial officer is captain of the gate when a person being held in confinement seeks the protections of the "Great Writ." (See Black's Law Dict. (8th ed. 2004) p. 728, col. 1.) While the majority is technically correct that at the time the petition for a writ of habeas corpus is summarily denied there is not yet a "cause" to be "tried," it is also correct that, absent appellate court intervention, there will never be a cause to be tried without the Commissioner's permission to pass.

The summary denial of a petition for a writ of habeas corpus is a determination of the dispute between the prisoner and the confining authority by a nonjudicial officer, although not technically a "trial," of a "cause." Whether this is significant is a conceptual dilemma we need not resolve here because, for the reasons that follow, under Code of Civil Procedure section 259, a commissioner has the authority to "hear and determine" writs of habeas corpus, an authority not undone by article VI, section 21 or 22. Surely, if a commissioner has the constitutional and statutory authority to "hear and determine" a petition for a writ of habeas corpus, a commissioner has the authority to decide whether the petition should be summarily denied due to its failure to state a prima facie case for relief.

Preliminarily, I note that it should not matter whether the restraint challenged by a particular writ is considered "significant," but only whether it violates the law. According to my reading, the majority opinion does not suggest otherwise.

I also note that, like the majority, I am sympathetic to the workload imposed on small counties that have large prison populations and few superior court judges. Even so, as Justice Mosk wrote in his concurring opinion in *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351 (*Rooney*), taking note of the demands on the courts in large metropolitan counties, "[o]ne need not be unsympathetic to the administrative complexities of [the] . . . court to insist, despite the dictates of expediency, that substantive controversies between litigants be decided only by judges to whom the constitutional responsibility has been assigned. (Cal. Const., art. VI, §§ 1, 4, 10.) As Justice Cardozo wrote, 'codes and statutes do not render the judge superfluous.' (Cardozo, *Nature or the Judicial Process* (1921) p. 14.)" (*Id.* at p. 373.)

The determination of this appeal is controlled by the California Supreme Court's holding in *Rooney*.

In *Rooney*, the court considered whether, in Los Angeles County, "[r]endition of a judgment in the terms stated and agreed upon in a written stipulation executed by the parties and filed in a pending civil action is among the 'subordinate judicial duties' that court commissioners may constitutionally be empowered to perform." (*Rooney, supra*, 10 Cal.3d at p. 357.) The court decided that rendition of judgment in those

circumstances was a subordinate judicial duty, holding that the duties set forth in "[then] section 259a, subdivision 6, providing for the assignment to court commissioners of certain judicial duties with respect to uncontested matters, falls squarely within the scope of the legislative authority conferred by article VI, section 22 of the Constitution." (*Id.* at p. 366.)

The high court reached its decision by referring first to the fact that, in November 1966, the electorate ratified a general revision of article VI of the California Constitution and that section 22 thereof read, as it does today, "The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties." The court found that the phrase "subordinate judicial duties" was merely a simpler way of stating the scope of commissioners' lawful duties allowed by the law prior to 1966 which authorized them "'to perform chamber business of the judges . . . , to take depositions, and to perform such other business connected with the administration of justice as may be prescribed by law.'" (*Rooney, supra*, 10 Cal.3d at p. 262.)

The court then reasoned that "[t]he scope of the subordinate judicial duties which may be constitutionally assigned to court commissioners should be examined in the context of the powers that court commissioners had and were exercising in 1966" (*Rooney, supra*, 10 Cal.3d p. 262.) In 1966, former Code of Civil Procedure section 259a authorized commissioners in counties having a population larger than

900,000 persons to, among other things, "hear and determine ex parte motions, for orders and alternative writs and writs of habeas corpus" (Former Code Civ. Proc., § 259a, italics added.) In 1980, Code of Civil Procedure section 259a was repealed and its provisions, including this one, were consolidated in the present section 259. (Stats. 1980, ch. 229, § 1, p. 472.)

Finally, the Supreme Court observed that "[n]othing in the history of the drafting and adoption of [article VI, section 22] indicates that the phrase 'subordinate judicial duties' should be interpreted as foreclosing or limiting court commissioners from exercising the powers which the Legislature had conferred upon them prior to 1966" (*Rooney, supra*, 10 Cal.3d at p. 364) and that "[t]he absence of any manifestation of intent on the part of the framers of the revision of article VI to modify the powers of court commissioners under long-existing legislation affirmatively shows that they intended no such change." (*Ibid.*)

Thus, *Rooney* held generally that subordinate judicial duties within the meaning of article VI, section 22 included at least those duties held by commissioners prior to 1966. In *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, our high court said, although without citation to *Rooney*, "the Constitution specifies that '[t]he Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties.'" (Cal. Const., art. VI, § 22.) Article VI, section 22, was intended to retain constitutional authorization for existing statutes under

which court commissioners had exercised their powers (see Code Civ. Proc., § 259)" (Id. at p. 721.)

As set forth in the majority opinion, prior to 1966, commissioners were authorized to hear and determine writs of habeas corpus. Given the holding in *Rooney*, there is nothing more to be said.

HULL, J.

Court of Appeal, Third Appellate District

Gomez v. The Superior Court of Lassen County (Case No. C060710)

Juarez v. The Superior Court of Lassen County (Case No. C060773)

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of Marin County. I am over the age of eighteen years and not a party to the within above entitled action. My business address is P.O. Box 337, Bolinas CA.

On December 30, 2009, I served the within **PETITION FOR REVIEW** on the interested parties in said action causing to be placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States Post Office box addressed to the parties as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Bolinas, California, on December 30, 2009.


Sabine Jordan