No. 01-___

IN THE

Supreme Court of the United States

Barrett N. Weinberger,

Petitioner,

v.

United States of America

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Victim and Witness Protection Act, 18 U.S.C. 3663, and the Mandatory Victims Restitution Act, 18 U.S.C. 3663A, specify that "the court" may impose an order of restitution as part of a criminal judgment. The district court in this case nonetheless delegated to the Probation Office the power to set the schedule for petitioner's restitution payments. The Sixth Circuit affirmed, expressly "declin[ing] to follow" numerous "other circuits [which] have held that the determination of the rate and terms of restitution (including determination of the amount, time, and schedule of installment payments) is a core judicial function that may not be delegated to probation officers."

The Question Presented is:

Whether the Sixth Circuit erred in holding – consistent with the Ninth and Eleventh Circuits, but in open conflict with the First, Second, Third, Fourth, Fifth, Seventh, and Eighth Circuits – that a district court may delegate authority to set the rate and terms for a defendant's payment of restitution?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are identified in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Barrett N. Weinberger respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The district court's opinion (Pet. App. 37a-59a) is published at 71 F. Supp. 2d 803. The Sixth Circuit's opinion (Pet. App. 1a-36a) (per Boggs, J., joined by Cohn, Senior D.J., with Moore, J., dissenting) is published at 268 F.3d 346.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Article III, Section 1 of the U.S. Constitution provides in relevant part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The Victim and Witness Protection Act, 18 U.S.C. 3663, provides in relevant part: "The court * * * may order * * * that the defendant make restitution * * *."

The Mandatory Victims Restitution Act, 18 U.S.C. 3663A, provides in relevant part: "[T]he court shall order * * * that the defendant make restitution * * *."

JURISDICTION

The court of appeals entered its judgment on October 5, 2001. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

This case presents a fundamental question of statutory and constitutional law that has divided the circuits and that has the potential to arise in almost every federal criminal case. Seven circuits categorically hold that a federal district court may not delegate to a probation officer the power to set a defendant's schedule for restitution payments. A divided

panel of the Sixth Circuit in this case, however, explicitly "decline[d] to follow" those decisions, adopting instead the contrary view of the Ninth and Eleventh Circuits. Certiorari should be granted to resolve the conflict.

I. Petitioner Barrett N. Weinberger ("petitioner") pleaded guilty to mail fraud, interstate transportation of money in execution of fraud, and tax evasion in violation of 18 U.S.C. 1341, 2314, and 7201. The district court sentenced petitioner to concurrent terms of forty-one months in prison, which included a sentence reduction for petitioner's acceptance of responsibility for his actions. The district court also ordered petitioner to pay restitution of more than $1 million to various parties and approximately $400,000 to the Internal Revenue Service ("IRS"). The court's order dictated that petitioner would pay restitution "through the Bureau of Prisons Inmate Financial Responsibility Program, and thereafter according to an installment plan developed by the Defendant and the probation officer, as more fully described in this Order; * * * the post-imprisonment plan to be developed by the Defendant and the probation officer will take into account his financial status and the needs of the Defendant's dependents." Pet. App. 49a.

Petitioner subsequently sought relief under 28 U.S.C. 2255 on the ground that his counsel had rendered constitutionally ineffective assistance by not objecting to the imposition of the restitution order in several respects. The district court, however, rejected his arguments. See Pet. App. 38a-59a.

II. On petitioner's appeal, the Sixth Circuit affirmed in part and reversed in part. Pet. App. 1a-26a.

a. The court of appeals unanimously held that the amount of restitution petitioner owed must be recalculated because the district court had failed to consider important factors under the statute, Pet. App. 14a-17a, and furthermore had severely overstated the restitution that petitioner owed to the IRS, *id.* 17a-19a.

b. A majority of the panel separately held that the district court did not err "by delegating the specific terms of Weinberger's restitution installment payment plan to the Bureau of Prisons and the United States Probation Office." Pet. App. 19a. The majority explicitly acknowledged that numerous "other circuits have held that the determination of the rate and terms of restitution (including determination of the amount, timing, and schedule of installment payments) is a core judicial function that may not be delegated to probation officers." *Id.* 21a n.3 (citing decisions of the Second, Third, Fourth, Fifth, and Seventh Circuits). The majority "decline[d] to follow these cases," however. *Id.*

The majority instead found "persuasive" two unpublished Sixth Circuit opinions holding (consistent with the Ninth and Eleventh Circuits) that "the district court can delegate to a probation officer the determination of the 'rate' of installment restitution payments so long as the district court sets the total amount of restitution that must be paid." Pet. App. 21a. The majority reasoned that, "'to the extent that [the defendant] is concerned that the probation department may abuse its delegated authority, he may always bring the probation department's orders concerning restitution to the attention of the district court and seek a modification of any order.'" *Id.* 22a (quoting *United States* v. *Signori*, 844 F.2d 635, 642 (CA9 1988) (alteration in original)).

c. On the basis of its holding that "the district court did not improperly delegate the scheduling of Weinberger's restitution payments to his probation officer," the majority also held that the "district court did not improperly delegate the scheduling of Weinberger's restitution payments while in prison to the Bureau of Prisons under the [Inmate Financial Responsibility Program]." Pet. App. 24a. Here too, the majority acknowledged that its decision conflicted with rulings of other courts of appeals, which had "established a consistent principle within their circuits that it was improper for courts to delegate scheduling of restitution payments either to prison officials or probation officers." *Id.* 23a.

d. Senior District Judge Cohn concurred to address what he regarded as "the practical implications if there is a contrary conclusion" to the court's holding that a district court may delegate the schedule of restitution payments. Pet. App. 26a. He regarded as "a mistake" the holdings of "a majority of the other Circuits" that "'the court,' *i.e.*, the district judge, must determine the defendant's restitution payment schedule at sentencing and that to allow a probation officer to set the schedule is an unconstitutional delegation of a judicial function." *Id.* 26a & n.1 (citing decisions of the First, Third, Fourth, Fifth, and Seventh Circuits).

Judge Cohn explained that "the district court here made no mention of the schedule under which the defendant was to pay the amount of restitution ordered," Pet. App. 27a, but took the view that "[t]his procedure recognized the practicality of deferring the setting of the restitution payment schedule until closer in time to when the defendant would realistically be making such payments, as opposed to setting a rigid schedule at the time of sentencing," *id.* 28a. He also noted that the legislative history of the provision governing the imposition of *fines* – 18 U.S.C. 3572 – states that the statute is intended to "eliminate the * * * requirement that the specific terms of an installment schedule * * * be fixed by the court. The court is thus able to delegate the responsibility for setting specific terms to a probation officer." H.R. Rep. No. 100-390, § 7 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2137, 2143, *and quoted at* Pet. App. 29a.

e. Judge Moore dissented from the majority's delegation holding. Pet. App. 30a-36a. She recognized that "[t]here is presently a split among the courts of appeals on this issue": "The Second, Third, Fourth, Fifth, and Seventh Circuits have held that it is impermissible to delegate the task of scheduling post-incarceration restitution payments to a probation officer. * * * Only the Ninth and Eleventh Circuits have adopted contrary rules * * *." *Id.* 34a (citations omitted). Judge Moore took the view "that the position adopted by the substantial majority of circuits is the better one." *Id.*

Judge Moore found support for her view in both the text of the statute and the Constitution. "The applicable statutory language makes clear that it is the province of 'the court,' and the court alone, to fix the amount of restitution, determine whether the restitution should be paid in a lump sum or in installments, and then, if the latter, establish the amount of each installment." Pet. App. 34a-35a (citing 18 U.S.C. 3572(d), 3663(f)(1), and 3664(f)). Furthermore, "[s]entencing a defendant is a core judicial act": Although district courts "may use 'nonjudicial officers to support judicial functions, as long as a judicial officer retains and exercises ultimate responsibility,'" "they may not delegate their authority to set the timing of restitution payments to a non-Article III entity without running afoul of the Constitution." *Id.* 36a (quoting *United States* v. *Johnson*, 48 F.3d 806, 808 (CA4 1995)).

III. On remand, the district court substantially lowered petitioner's restitution obligation – from more than $1 million to $5,000 – but, once again, delegated the authority to set the schedule of payments. The court's judgment provides: "If the Defendant is unable to pay restitution immediately he may do so according to an installment plan developed by the Defendant and the probation officer." "Amended Judgment Including Sentence Under The Sentencing Reform Act," *United States* v. *Weinberger*, No. CR-1-97-079, at 4 (Nov. 19, 2001). Because petitioner was no longer incarcerated at the time of the district court's ruling on remand, the court did not direct him to make payments through the Bureau of Prisons Inmate Financial Responsibility Program.

This petition followed.

REASONS FOR GRANTING THE WRIT

This petition presents an entrenched and widespread circuit conflict on a fundamental and recurring question of criminal procedure. The importance of the question presented is substantially heightened, moreover, because this Court's decision will also resolve two closely related circuit conflicts.

This case is an ideal vehicle through which to resolve those conflicts. Finally, the decision below is wrong on the merits. Certiorari accordingly should be granted.

I. Although the Sixth Circuit's holding that a district court may delegate the power to set a schedule of restitution payments to a probation officer is consistent with rulings of the Ninth and Eleventh Circuits, see Pet. App. 21a (citing cases), seven circuits flatly reject that conclusion. The question furthermore recurs frequently, as is obvious from the extraordinarily large number of appellate decisions on the question presented.

The First Circuit found improper delegation in *United States* v. *Merric*, 166 F.3d 406 (1999), and adhered to that rule in *United States* v. *Destefano*, No. 98-2054 (Nov. 22, 1999).

The Second Circuit found improper delegation in several cases – *United States* v. *Workman*, 110 F.3d 915, 918-19, *cert. denied*, 520 U.S. 1281 (1997); *United States* v. *Mortimer*, 94 F.3d 89, 90-91 (1996); and *United States* v. *Porter*, 41 F.3d 68, 71 (1994) – and adhered to that rule in *United States* v. *Kinlock*, 174 F.3d 297 (1999); *United States* v. *Probber*, 170 F.3d 345, 347 n.3 (1999); *United States* v. *Harris*, 79 F.3d 223, 232 n.6, *cert. denied*, 519 U.S. 851 (1996); *United States* v. *Kassar*, 47 F.3d 562, 568 (1995); and *United States* v. *Kowalewski*, No. 00-1493 (Apr. 5, 2001).

The Third Circuit found improper delegation in *United States* v. *Graham*, 72 F.3d 352, 357 (1995), *cert. denied*, 516 U.S. 1183 (1996), and adhered to that rule in *United States* v. *Coates*, 178 F.3d 681, 685 (1999).

The Fourth Circuit found improper delegation in *United States* v. *Johnson*, 48 F.3d 806, 808-09 (1995), and adhered to that rule in *United States* v. *Dawkins*, 202 F.3d 711, 717 (2000); *United States* v. *Blake*, 81 F.3d 498, 507 (1996); *United States* v. *Miller*, 77 F.3d 71, 77-78 (1996); *United States* v. *Short*, No. 01-4238 (Nov. 28, 2001) (per curiam); *United States* v. *Nelson*, No. 97-6111 (July 21, 1998) (per

curiam); *United States* v. *Williams*, No. 95-5305 (Mar. 4, 1997) (per curiam), *cert. denied*, 522 U.S. 837 (1997); *United States* v. *Bramson*, No. 96-4151 (Feb. 24, 1997) (per curiam), *cert. denied*, 521 U.S. 1127 (1997); and *United States* v. *Dickerson*, No. 94-5266 (May 1, 1995) (per curiam).

The Fifth Circuit found improper delegation in *United States* v. *Albro*, 32 F.3d 173, 174 (1994) (per curiam).

The Seventh Circuit found improper delegation in a series of cases – *United States* v. *Yahne*, 64 F.3d 1091, 1097 (1995); *United States* v. *Mohammad*, 53 F.3d 1426, 1438-39 (1995); *United States* v. *Murphy*, 28 F.3d 38, 42 (1994); *United States* v. *Ahmad*, 2 F.3d 245, 248-49 (1993); and *United States* v. *Boula*, 997 F.2d 263, 269 (1993) – and adhered to that rule in *United States* v. *Pandiello*, 184 F.3d 682, 688 (1999); *United States* v. *Arellano*, 137 F.3d 982, 986 (1998); *United States* v. *Reynolds*, 64 F.3d 292, 299 (1995), *cert. denied*, 516 U.S. 1138 (1996); and *United States* v. *Korando*, No. 95-3071 (Jan. 27, 1998) (per curiam).

The Eighth Circuit found improper delegation in *United States* v. *McGlothlin*, 249 F.3d 783, 785 (2001).

That the conflict is entrenched and outcome determinative is also demonstrated by the fact that the government repeatedly has been forced to concede on appeal that the defendant's sentence was unlawful under applicable circuit precedent because the district court delegated the authority to set a schedule of payments. See, *e.g.*, *Harris*, 79 F.3d at 232 n.6 (CA2); *Yahne*, 64 F.3d at 1097 (CA7); *Kowalewski*, No. 00-1493 (CA2 Apr. 5, 2001); *Bramson*, No. 96-4151 (CA4 Feb. 24, 1997).

Because it is patently unacceptable for important terms of a criminal defendant's sentence to differ based on the jurisdiction in which he happens to be sentenced and incarcerated, certiorari should be granted.

II. Certiorari is also warranted because this Court's determination whether district courts may delegate to probation officers the power to set a schedule of restitution

payments will be outcome determinative with regard to two other important circuit conflicts.

First, this Court's decision will resolve a conflict over whether district courts may delegate the power to set the terms and schedule for restitution payments by incarcerated inmates to the Bureau of Prisons under the Inmate Financial Responsibility Program. Compare *Mortimer,* 94 F.3d at 91 (CA2) (holding that non-delegation precedent regarding probation officers is "equally applicable" to delegations to Bureau of Prisons), *Miller,* 77 F.3d at 78 (CA4) (holding that delegation was impermissible as to both probation officer and Bureau of Prisons), and *Pandiello,* 184 F.3d at 688 (CA7) ("concerns about shifting responsibility from the Article III judge to another entity" are the same for delegations to either a probation officer or the Bureau of Prisons) with Pet. App. 21a, 24a (upholding delegation to both probation officer and Bureau of Prisons), and *Montano-Figueroa* v. *Crabtree,* 162 F.3d 548, 550 (CA9 1998) (upholding delegation to Bureau of Prisons and relying on previous circuit precedent with regard to probation officers).

Second, this Court's decision will determine whether district courts may delegate the power to set the schedule for payments of *fines*. Compare *Merric*, 166 F.3d at 409 (CA1) ("district judge could not empower the probation officer to make a final decision as to the installment schedule for payments" of fine), *Kassar,* 47 F.3d at 568 (CA2) ("The statutory language of [18 U.S.C.] §§ 3572(d) and 3663(f)(1) identically impose upon the 'court' the responsibility for determining installment payments; we accordingly hold that the *Porter* rule applies to fines as well as orders of restitution."), *Miller*, 77 F.3d at 77-78 (CA4) (holding that the reasoning of circuit precedent concerning non-delegation of restitution installment scheduling "equally applies when the delegation involves a fine"), and *Arellano,* 137 F.3d at 986 (CA7) (rejecting delegation to probation officer of payment schedule for fine, relying on prior precedent involving both fines and restitution) with *Montano-Figueroa,* 162 F.3d at

550 (CA9) (upholding delegation of fine payment schedule to the Bureau of Prisons).

III. Certiorari is also warranted because this case – in which the court of appeals squarely acknowledged the circuit conflict and adopted the minority view – presents an ideal vehicle through which to resolve the question presented. Four supposed vehicle problems that the Solicitor General might attempt to present are unavailing.

First, it makes no difference that this case arises under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. 3663, rather than the successor statute, the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. 3663A. The relevant statutory language – requiring that "the court" set the terms of restitution – is identical in both, see *supra* at 1, and cases under both statutes are, of course, subject to Article III of the Constitution. The circuits therefore uniformly hold that their precedents finding delegation prohibited under the VWPA are equally applicable under the MVRA. Compare *Dawkins*, 202 F.3d at 717 (CA4) (citing prior non-delegation precedent in a case under the MVRA), *Coates*, 178 F.3d at 685 (CA3) (applying its non-delegation rule developed under the VWPA to the MVRA), *Kinlock*, 174 F.3d at 299 n.2, 300 (CA2) (holding that "we need not reach the question of whether MVRA applies in this case" because "even if MVRA applies, the factors which the district court must consider when ordering restitution * * * are the same in either case" and then later noting that the "district court may not delegate its authority to schedule restitution payments" to either the Bureau of Prisons or the Probation Department), and *McGlothlin*, 249 F.3d at 785 (CA8) (relying on earlier delegation cases in rejecting delegation under MVRA) with *United States* v. *Keen*, No. 97-10351 (CA9 Jan. 19, 1999) (relying on prior circuit precedent to uphold delegation to probation officer of payment scheduling for restitution under MVRA), *cert. denied*, 526 U.S. 1152 (1999).

Second, it makes no difference that petitioner's delegation argument arises in the context of his ineffective assistance of counsel claim. The Sixth Circuit did not decide the ultimate question whether petitioner's counsel was ineffective by failing to object to the district court's delegation of its sentencing authority, but rather rejected petitioner's delegation argument on the merits. The Sixth Circuit nonetheless recounted that "[t]he government does not contest that Weinberger's trial counsel was deficient by not challenging the portions of Weinberger's sentence being appealed here, either at the time of Weinberger's sentencing and/or on direct appeal." Pet. App. 7a. And by vacating and remanding other aspects of the restitution order, the court of appeals necessarily found counsel to be ineffective as to those sentencing errors that were substantively established on appeal. If petitioner prevails in this Court on his claim that the restitution order entered by the district court constitutes an unlawful delegation, he will, *a fortiori*, establish that his counsel was constitutionally ineffective in failing to object on that ground. See *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984) (ineffective assistance of counsel is established by showing that, but for counsel's errors, the defendant's sentence would have been different). In any event, any element of petitioner's ineffective assistance claim that remained to be established after this Court's decision on the delegation question would be left for the Sixth Circuit to decide on remand in the first instance.

Third, it makes no difference that petitioner's challenges to the restitution order in this case arise in the context of a claim under 28 U.S.C. 2255 rather than on direct appeal. The Sixth Circuit rejected the government's suggestion (raised in a supplemental authority letter citing a decision of the Ninth Circuit) that petitioner's claims were not permitted under Section 2255 because he is not claiming a right to be released from "custody." Pet. App. 6a n.1. Conceivably, the Solicitor General could pursue that issue in this Court, albeit only through a conditional cross-petition for certiorari because the

government would be challenging the lower courts' jurisdiction over *all* of petitioner's claims, including the two on which he prevailed in the Sixth Circuit – *i.e.*, the amount of restitution he owed to parties and to the IRS. Such a cross-petition, of course, would provide a reason to *grant* certiorari, although it would rest on an insupportable reading of the statute: by its plain terms, Section 2255 applies to persons "in custody" (a term uniformly understood to encompass those who, like defendant, are serving supervised release); the statute does *not* require that the petitioner's claim seek his release "*from* custody." Indeed, the fact that the Sixth Circuit ruled for petitioner with respect to two challenges to his restitution order, finding substantial errors by the district court as to each, illustrates perfectly why Section 2255 is a necessary and appropriate mechanism for claims of the sort at issue in this case.[1]

Fourth, this case is not moot. On remand, the district court reduced petitioner's restitution obligation, see *supra* at 5, but the $5,000 that petitioner still owes is substantial in light of his current financial status and remains unpaid.

IV. Certiorari also is warranted because the decision below is wrong on the merits.

The VWPA and the MVRA expressly assign the responsibility for ordering restitution to "the court." See *supra* at 1. As numerous courts of appeals correctly have recognized, such plain language requires "the court" – as opposed to a delegate – to set both the amount and schedule of restitution. See, *e.g.*, *Johnson*, 48 F.3d at 808 (CA4) ("Sections 3663 and 3664 of Title 18 clearly impose *on the*

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[1] The Sixth Circuit's own position on the jurisdictional issue, which it discussed in this case only in a footnote that responded to a supplemental letter filed by the government, is not yet settled. In particular, the Sixth Circuit has not yet attempted to resolve any tension between its prior holdings that, under Section 2255, a defendant may challenge a restitution order but may not challenge the costs of his imprisonment and supervised release. Compare *Ratliff* v. *United States*, 999 F.2d 1023, 1025-27 (1993) with *United States* v. *Watroba*, 65 F.3d 28, 29 (1995).

court the duty to fix terms of restitution." (emphasis in original)); *Workman*, 110 F.3d at 919 (CA2) ("the plain language of § 3572(d) precludes delegation" of the scheduling of fine payments). Indeed, even the Eleventh Circuit has recognized "the plain language of the statute and the persuasive opinions from our sister circuits," but has found itself bound by contrary circuit precedent to hold that delegation is permitted. *United States* v. *Fuentes*, 107 F.3d 1515, 1529 (1997).

Furthermore, even if the statutory language were less than plain on its face, there is ample reason to construe the relevant statutory provisions as requiring the court itself to set the schedule. The terms of restitution, including the size and timing of installment payments, are an integral part of the sentencing process, and hence a core judicial function within the judicial power defined by Article III of the Constitution. See *Coates*, 178 F.3d at 685 ("A court abdicates its judicial responsibility when it permits a probation officer to determine the manner and schedule of restitution payments."); *Merric*, 166 F.3d at 409 ("it is the inherent responsibility of the judge to determine matters of punishment and this includes final authority over all payment matters"); *Johnson*, 48 F.3d at 808-09 ("delegation from a court to a probation officer would contravene Article III of the United States Constitution"; "making decisions about the amount of restitution, the amount of installments, and their timing is a judicial function and therefore is non-delegable"); *Albro*, 32 F.3d at 174 n.1 ("unauthorized delegation of sentencing authority from an Article III judicial officer to a non-Article III official affects substantial rights and constitutes plain error").

As the Seventh Circuit recognized, this "may seem like an insignificant detail, but in fact it implicates a fundamental principle of our form of government." *United States* v. *Pandiello*, 184 F.3d at 688. Absent a clear congressional intent to test the bounds of Article III by expressly authorizing such delegation, the rule of constitutional avoidance requires a construction that more readily comports

with the constitutional separation of powers. In this case, such a construction also happens to be the one that matches the plain language of the statute itself. It would be a disservice to both the separation of powers and notions of judicial restraint to impose a strained construction of the statute only to force a constitutional conflict.

Finally, it is no answer to the statutory language and constitutional requirements that, even with a delegation, the district court "'is empowered to "revoke or modify any condition of probation," including restitution, during the probationary period,'" and that the defendant may later "seek a modification of any order" by the probation officer. Pet. App. 22a (quoting *Signori*, 844 F.2d at 642 (CA9), and 18 U.S.C. 3651). Such a procedure would not constitute the setting of restitution, but rather would place the district court in a position of limited review, abandoning the court's responsibility for sentencing in the first instance. Whatever convenience a court might gain from not having to enter complete sentencing orders in each case is simply no justification for converting the core sentencing function into an administrative review procedure with the onus on the defendant to initiate further action in order to obtain the first judicial determination of a significant aspect of the sentence imposed.[2]

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[2] It would be a different matter if the district court merely sought preliminary recommendations from the probation officer as to schedule, and then itself entered the order scheduling payments. See *Graham*, 72 F.3d at 357 (CA3) ("While the district court is always free to receive and consider recommendations from the probation officer in this regard, we believe that section 3663 does not permit a district judge to delegate to the administrative staff these specifications."). Such a recommendation procedure would keep the primary responsibility with the district court while still providing whatever informational assistance the court might deem necessary.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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