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District Court Review of Findings of Fact Proposed by Magistrates: Myth or Reality

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District Court Review of Findings of Fact Proposed by Magistrates: Reality Versus Fiction

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Magistrates have become an indispensable and ubiquitous part of the federal judicial system.[2] District judges can assign to magistrates the tasks of conducting hearings and making proposed findings with respect to a wide variety of civil and criminal matters. The Magistrates Act of 1968 confers this power subject to the district judge's duty to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."[3] Given their increasingly large caseloads, district judges make extensive use of this mechanism, often in circumstances in which the findings are determinative of the outcome of a case.[4]

The use of magistrates to make proposed findings of fact that have the potential to be outcome determinative raises two constitutional concerns. First, since magistrates are not judges within the meaning of Article III, their use to make outcome-determinative proposed findings of fact arguably violates Article III. Second, when a district court decides to uphold or reject

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[2] For descriptions of the increasingly important roles of magistrates, see generally Kevin Koller, Deciphering De Novo Determinations: Must District Courts Review Objections Not Raised Before a Magistrate Judge? 111 Colum. L. Rev. 1557 (2011); Leslie Fochio, A History of the Development of the Office of United States Commissioner and Magistrate Judge System, 1999 Fed. Courts L.Rev. 4 (1999).
[3] 28 U.S.C. §636(b)(1).
[4] Koller, supra. note 2, at 1557.

a magistrate's proposed finding without conducting an evidentiary hearing, the court arguably violates due process. The Supreme Court addressed both issues in its 1980 decision in United States v. Raddatz.[5] The Court held that the use of magistrates to make outcome-determinative proposed findings is consistent with Article III because "the magistrate acts subsidiary to and only in aid of the district court," "the entire process takes place under the district court's total control and jurisdiction," and "the statute grants the judge broad discretion to accept, reject, or modify the magistrate's proposed findings."[6]

The Court concluded that "in providing for a 'de novo determination,' rather than de novo hearing, Congress intended to permit whatever reliance a district judge, in the exercise of his sound judicial discretion chose to place on a magistrate's proposed findings and recommendations."[7] The Court then held that due process does not require a district judge to conduct a hearing if he decides to adopt a magistrate's proposed finding even when that finding has the effect of virtually ensuring that a criminal defendant will be convicted.[8] The Court added a footnote,[9] however, that has been the source of a great deal of litigation:

[5] 447 U.S. 667 (1980).
[6] Id. at 680-81.
[7] Id. at 676.
[8] Id. at 680.

> [W]e assume it is unlikely that a district judge would reject a magistrate's findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witnesses whose credibility is in question could well give rise to serious questions which we do not reach.

The Court's assumption has proven to be unfounded—district judges often reject findings proposed by magistrates without conducting a new oral evidentiary hearing, thereby requiring circuit courts to address the questions the Court did not reach.

Six circuits have held that a district judge cannot reject a magistrate's proposed outcome-determinative finding without conducting a new evidentiary hearing when the result is likely to be conviction of a criminal defendant.[10] The courts have announced that holding in the context of findings that a guilty plea was voluntary,[11] that a defendant consented to a search,[12] that a law enforcement officer had probable cause to conduct a

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[9] Id at 681 n. 7.
[10] United States v. Hernandez-Rodriguez, 443 F.3d 138, 148 (1st Cir. 2006); United States v. Ridgeway, 300 F.3d 1153, 1154 (9th Cir. 2002); United States v. Cofield, 272 F.3d 1303, 1306 (11th Cir. 2001); Cullen v. United States, 194 F.3d 401, 407 (2d Cir. 1999); Hill v. Beyer, 62 F.3d 474, 482 (3d Cir. 1995); Louis v. Blackburn, 630 F.2d 1105, 1109 (5th Cir. 1980).
[11] Louis v. Blackburn, 630 F.2d 1105.
[12] United States v. Cofield, 272 F.3d 1303.

search,[13] that a prosecutor used race as a factor in objecting to jurors in a criminal case,[14] and that a criminal defendant's lawyer provided ineffective assistance.[15] All of those holdings were announced in the context of a criminal defendant's objection to a district judge's rejection of a magistrate's proposed finding that was favorable to the defendant. All were based on the courts' application of the due process clause. That reliance on due process would seem to be essential, given the Supreme Court's holding in *Raddatz* that Congress had an "unmistakeable" intent to confer on district judges discretion to reject findings proposed by magistrates without conducting a new evidentiary hearing.[16]

Until June 2012, all of the holdings that district judges could not reject magistrates' proposed findings without conducting a new hearing were based on due process and were limited to the context of district court rejection of a magistrate's proposed finding that was favorable to a criminal defendant. In United States v. Thoms,[17] however, the Ninth Circuit broadened the scope of its prior holding by applying it to a district judge's rejection of a proposed finding that was favorable to the government. Since due process does not apply in such a context, the court could not rely on

[13] United States v. Bergera, 512 F.2d 391 (9th Cir. 1975).
[14] Johnson v. Finn, 665 F.3d 1063 (9th Cir. 2011).
[15] Cullen v. United States, 194 F.3d 401.
[16] 447 U.S. at 676.
[17] 684 F.3d 893 (9th Cir. 2012).

constitutional reasoning to support its new, much broader holding. It based its new broader rule on its power "to mandate procedures deemed desirable from the viewpoint of sound judicial practice although in no wise commanded by statute or by the constitution."[18] The court concluded that "all litigants" have a right to a new hearing before a district judge can reject a magistrate's proposed finding that is favorable to the litigant.[19]

If it is adopted by other circuits or upheld by the Supreme Court, the Ninth Circuit's broad prohibition on district court rejection of a magistrate's proposed finding without conducting a new hearing will have major effects on the relationship between district judges and magistrates in all contexts, including reversal of proposed findings favorable to the government and reversal of proposed findings made in civil cases. In this article, I argue that the broad restriction on the power of district judges announced by the Ninth Circuit in *Thoms* is indefensible. In section I, I argue that even the pre-existing restriction on the power of district judges to reject proposed findings favorable to criminal defendants is based on an erroneous interpretation and application of the due process clause. In section II, I argue that the new broad restriction on the power of district judges violates both Article I and

[18] Id. at 903. The court recognized one exception to the rule it announced. The exception applies "where the district judge finds that the magistrate judge's credibility determinations had no sufficient evidentiary basis, so that, were they jury determinations, judgment as a matter of law would issue for the defendant." Id. at 903.
[19] Id. at 900.

Article III of the Constitution. In section III, I use Supreme Court decisions issued in the context of administrative law to demonstrate that the circuit court restrictions on the relationship between district judges and magistrates is inconsistent with the principles and reasoning the Supreme Court has long used as the basis for its decisions that govern both the relationship between agencies and courts and the relationship between Administrative Law Judges (ALJ) and agencies. In section IV, I urge courts to adopt a legal regime governing the relationship between district judges and magistrates that is based on the approach the Fifth Circuit took in United States v. Marshall[20] and the approach the Supreme Court has long required all courts to take in the analogous context of the relationship between ALJs and agencies.

I. The Pre-*Thoms* De Novo Hearing Requirement Is Not Supported by Due Process

Each of the pre-*Thoms* circuit court opinions that restricted the power of district judges to reject findings proposed by magistrates was based on the courts' conclusions that such a rejection violates due process when the judge rejects a magistrate's proposed finding that is favorable to a criminal

[20] 609 F.2d 152 (5th Cir. 1980).

defendant without conducting a new evidentiary hearing. Typically, the court began by reciting the Supreme Court holding in Mullane v. Central Hanover Bank & Trust—due process requires a "hearing appropriate to the case."[21] It then determined the kind of hearing that is "appropriate to the case" by reciting and applying the three-part test the Supreme Court announced in Mathews v. Eldridge:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[22]

The court then concluded that the interest at stake is important; the failure to conduct a new oral evidentiary hearing before rejecting a magistrate's

[21] 339 U.S. 306, 313 (1950).
[22] 424 U.S. 319, 335 (1976).

finding creates an unacceptably high risk of error; and the cost of conducting such a hearing is low.[23]

The result of the application of the first part of the test is undeniably correct in the context of district court reversal of a magistrate's proposed finding where the reversal is likely to result in the conviction and incarceration of a criminal defendant. The result of application of the third part of the test is questionable, however, and the result of the application of the second part of the test is unsupportable.

Courts should recognize that the cost of requiring a district judge to conduct a new evidentiary hearing before rejecting a magistrate's proposed finding is high. Those costs arise in at least two forms—the practical cost of requiring a busy district judge to conduct a new evidentiary hearing and the constitutional cost of reducing the district judge's ability to control the fact finding process. The Supreme Court rejected the argument that delegation of the task of making proposed findings to an Article I magistrate violates Article III based on its belief that "the entire [fact-finding] process takes place under the district court's total control . . . ."[24] To the extent that circuit courts render the process of district court rejection of magistrate's proposed findings burdensome by conditioning it on the use of costly

[23] E.g., Johnson v. Finn, 665 F.3d 1063, 1075-76.
[24] 447 U.S. at 681.

additional procedures, they render inaccurate the assumption that was the basis for the Supreme Court's holding that delegation of the process of making proposed findings to magistrates is consistent with Article III.

The sole justification for the enactment of the Magistrates Act of 1968 and for the Supreme Court's decision to uphold the Act was the well-supported belief by Congress and the Court that district judges have heavy caseloads and that conducting hearings to find facts is such a major part of the burden of deciding cases that district judges should be permitted to delegate the task of conducting hearings to make proposed findings to magistrates. Thus, the conclusion of six circuit courts that requiring a district judge to conduct a new hearing as a prerequisite for rejection of a magistrate's proposed finding is a low cost procedure is inconsistent with the sole justification for delegating the proposed fact-finding process to magistrates.

The requirement to conduct a new hearing is particularly burdensome when the hearing must be conducted by a judge other than the judge who is presiding in the case in which the proposed finding will have substantive effects, as most circuits require.[25] Once a court mandates a new hearing, it is easy to understand why the court then concludes that the hearing should be

[25] E.g., Boyd v. Waymart, 579 F.3d 330, 333 (3d Cir. en banc); United States v. Hernandez-Rodriguez, 443 F.3d 138, 148; Cullen v. United States, 194 F.3d 401, 409.

conducted by a new judge. Judge Chambers has provided a good explanation for that part of the requirement: "I cannot agree with the concept that a district judge can accept without hearing . . . a magistrate's ruling (recommendation), but he must hold a hearing de novo before he can reverse. In practice, fair as the judge may be, if he exercises a discretion to hold a hearing, it will usually mean that he has almost made up his mind to reverse the magistrate. That is not good."[26]

It is hard to disagree with Judge Chambers' logic. If the legal regime that governs the relationship between judges and magistrates empowers a judge to reject a magistrate's proposed finding if, but only if, the judge conducts a de novo hearing, the judge's decision to conduct the hearing is powerful evidence that he has prejudged the issue of fact that is the sole reason for the hearing. Thus, if the de novo hearing requirement makes any sense, the hearing must be conducted by a judge other than the judge who orders the hearing. That, in turn, makes the de novo hearing requirement particularly costly. A decision by a district judge to convene a de novo hearing requires the judge to impose the high cost of conducting such a hearing on a colleague who already is grappling with his own heavy

[26] United States v. Bergera, 512 F.3d 391, 394.

caseload. That adds to the inherent cost of the de novo hearing additional costs in the form of friction and resentment between judges.

Even when a judge is confident that a magistrate's proposed finding is wrong, he is unlikely to incur the high interpersonal relations cost of requiring a colleague to conduct a de novo hearing. That understandable reluctance of district judges to require colleagues to conduct new hearings when the judge believes that a magistrate's proposed finding is wrong undermines the Supreme Court's assumption that the fact-finding process "takes place under the district court's total control" when a district court delegates the task of making proposed findings to a magistrate. Yet, that assumption was the basis for the Supreme Court's decision to hold that Congress can empower a District Judge to delegate the initial fact finding process to a Magistrate without violating Article III of the Constitution.

The courts' error in the application of the *Mathews* test is even more apparent in the context of the second part of the test. Each of the circuit courts that have held that due process requires a de novo hearing as a prerequisite to rejecting a proposed finding that is favorable to a criminal defendant has concluded that failure to conduct a de novo hearing creates an intolerably high cost of error and that conducting a de novo hearing

significantly reduces that risk.[27] That conclusion, in turn, is based solely on the assertion that findings made by someone who hears live testimony are systematically more accurate than findings that are based on a "cold record."

If an assertion could become true as a result of the frequency with which it is made, all courts would have to accept the accuracy of this assertion. Every anglo-american court, including the Supreme Court has repeatedly distinguished between accurate findings that are based on observation of the demeanor of witnesses and findings that are unreliable because they are based on a "cold record." In *Raddatz*, the Supreme Court repeated this assertion and quoted an 1867 opinion of the Privy Council to support it:

> The most careful note must often fail to convey the evidence fully in some of its most important elements . . . . It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; . . . the dead body of the evidence, without its spirit;

[27] E.g., United States v. Ridgeway, 300 F.3d 1153, 1155; United States v. Cofield, 272 F.3d 1303, 1305; Louis v. Blackburn, 630 F.2d 1105, 1110; United States v. Bergera, 512 F.2d 391, 394.

> which is supplied, when given openly and orally, by the ear and eye of those who receive it.[28]

The only problem with this eloquent statement is its totally mythical nature. The assertion in hundreds of judicial opinions for over a century that live testimony is more reliable than a "cold record" is inconsistent with an enormous body of evidence in the social science literature.

Olin Wellborn's meta-study of the literature on the role of demeanor in fact-finding led him to conclude:

> Psychologists and other students of human communication have investigated many aspects of deceptive behavior and its detection. As part of this investigation, they have attempted to determine experimentally whether ordinary people can effectively use nonverbal indicia to determine whether another person is lying. In effect, social scientists have tested the legal premise concerning demeanor as a scientific hypothesis. With impressive consistency, the experimental results indicate that this legal premise is erroneous. According to the empirical evidence, ordinary people cannot make effective use of

[28] Queen v. Bertrand, 4 Moo.PC.N.S. 460, 481, 16 Eng. Rep. 391, 397 (1867), quoted at 447 U.S. at 679.

> demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments.[29]

William Stuntz has noted that the cases in which courts have required de novo hearings of magistrate's proposed findings in order to enhance accuracy arose in a context in which demeanor is particularly likely to detract from accuracy and to mislead a judge.[30] Police officers are professional witnesses who have more experience testifying than most criminal defendants and are more articulate than most criminal defendants. A judge who concentrates on witness demeanor in making findings in such a context is likely to discount important factors like context and to believe the articulate and relaxed testimony of the professional witness when a focus on context would lead the judge to the opposite conclusion with respect to a contested issue of fact.

It is time for courts to resign their long-time memberships in the flat earth society and to recognize in this and many other contexts that demeanor is worse than worthless as a means of choosing which witnesses to believe.

[29] Olin Wellborn, Demeanor, 76 Corn. L. Rev. 1075 (1991). See also Charles Wright, Arthur Miller, Mary Kane & Richard Marcus, Federal Practice & Procedure §3070.2 (2012); Richard Marcus, Completing Equity's Conquest? 50 U. Pitt. L. Rev. 725, 757-62 (1989).
[30] William Stuntz, Warrants and Fourth Amendment Remedies, 77 Va. L.Rev. 881, 914 (1991).

Demeanor is affirmatively misleading. District court review of magistrates' proposed findings is a good place to begin. It is indefensible for a court to hold a statute unconstitutional based on an assertion that is demonstrably false.

II. The Broad De Novo Hearing Requirement in *Thoms* Is Unconstitutional

In *Thoms*, the Ninth Circuit confronted a situation in which a district judge had rejected a magistrate's proposed finding that was *unfavorable* to a criminal defendant. The court recognized that due process could not support a requirement that a district judge must conduct a de novo hearing before rejecting a proposed finding that is *unfavorable* to the defendant.[31] It held, however, "that a district court abuses its discretion when it reverses a magistrate's judge's credibility determinations, made after receiving live testimony and favorable to the government, without viewing key demeanor evidence, . . ."[32] The court stated that the right to a de novo hearing is "shared by all litigants," presumably including civil litigants as well as the government.[33] The court supported its broadening of the de novo hearing requirement to apply to all litigants by referring to the ancient myths that

[31] 684 F.3d at 902.
[32] Id. at 903.
[33] Id. at 900.

"live testimony is the bedrock of the search for truth;" "where an unresolved factual dispute exists, demeanor evidence is a significant factor in judging credibility;" and, resolution of factual disputes on a "cold record" detracts from accuracy in the fact-finding process.[34] The court referred to no evidence to support its assertions. There is no such evidence. The court could support its mythical assertions only by quoting similar assertions made in the past by other members of the flat earth society.

The broad holding in *Thoms* is inconsistent with the "unmistakeable" congressional intent not to require de novo hearings that the Supreme Court recognized in *Raddatz*.[35] The *Thoms* court claimed the power to trump that decision of Congress based on its "supervisory authority 'to mandate procedures deemed desirable from the viewpoint of sound judicial practice although in no wise commanded by statute or by the Constitution.'"[36] That does not work. The supervisory power of the courts is independent of statutes, but it is inferior to the legislative power of Congress. Thus, while a court does not need a statutory source of power to require a lower court to

[34] Id. at 903-04.
[35] 447 U.S. at 676.
[36] 684 F.3d at 903.

adopt a particular procedure, it cannot exercise its "supervisory power" in a manner that is inconsistent with a statute.[37]

A court can order a lower court to act in a manner that is inconsistent with a statute only if it concludes that the statute is unconstitutional. The *Thoms* court did not even attempt to make the case that the congressional command to allow a district judge to engage in de novo review, rather than a de novo hearing, to make a decision to accept, amend, or reverse a magistrate's proposed finding that is favorable to the government violates the Constitution. There is no conceivable theory on which a court could hold the Magistrates Act unconstitutional in the context of an action by a district judge that is unfavorable to the government in a criminal case.

The *Thoms* court's attempt to use its supervisory power to trump a statute violates Article I by usurping power that is conferred exclusively on Congress. It also violates Article III. If a district judge is prohibited from rejecting a proposed finding by a magistrate without requiring a colleague to conduct a new hearing in every context in any criminal or civil case, it simply cannot be said that the fact-finding process remains in a "district court's total control" when a district judge delegates the task of making a

[37] The Supreme Court has recognized the legislative supremacy of Congress in many cases. See, e.g. Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.") For a detailed discussion of legislative supremacy, see Daniel Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281 (1989).

proposed finding to a magistrate. Yet, that was one of the critical predicates for the Supreme Court's decision in *Raddatz* to reject the argument that the Magistrates Act violates Article III.[38] Once that predicate is eliminated, the delegation of the power to make proposed findings of fact in the Magistrates Act cannot survive an Article III challenge.

III. A Broad Restriction on the Power of District Judges to Reject Proposed Findings by Magistrates Is Inconsistent with Core Administrative Law Doctrines

In *Raddatz*, all of the Justices agreed that cases in which the Court has determined the permissible relationship between agency hearing officers and agencies and between agencies and courts are "relevant" to the process of determining the permissible relationship between magistrates and district judges.[39] The Justices then placed heavy reliance on the principle announced in the Court's 1936 opinion in Morgan v. United States that "the one who decides must hear."[40]

[38] 447 U.S. at 681.
[39] 447 U.S. at 680, 696-711.
[40] 298 U.S. 468, 481 (1936), quoted at 447 U.S. at 677, 696. The *Raddatz* Court also relied heavily on another obsolete administrative law doctrine—the requirement that a court must engage in de novo review of agency findings of constitutional fact, announced in St. Joseph Stockyards Co. v. United States, 298 U.S. 38 (1936), cited at 447 U.S. at 683, 709-10. The demise of the constitutional fact doctrine is described in

That principle has long been obsolete.[41] It is inconsistent with the basic characteristics of the administrative state that have existed for decades and that have been enshrined in numerous Supreme Court opinions. In its 1951 opinion in Universal Camera Corp. v. NLRB,[42] the Court upheld the decision of Congress in the Administrative Procedure Act to empower agencies to substitute their findings for those of an Administrative Law Judge (ALJ) even though the ALJ heard the evidence and the agency decision maker did not.[43] In its 1955 opinion in FCC v. Allentown Broadcasting Corp,[44] the Court reversed a circuit court opinion in which the circuit court had held that an agency is bound to accept the findings of an ALJ when they are based on demeanor. The Court held that, while an agency must consider the ALJ's findings in making its findings, it can make findings that are inconsistent with the ALJ's findings without conducting a de novo hearing even when the ALJ's findings were based on the ALJ's observation of the demeanor of the witnesses.[45]

Courts routinely uphold agency findings that are inconsistent with ALJ findings where the ALJ heard the testimony and made a finding based

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detail in Richard Pierce, Sidney Shapiro & Paul Verkuil, Administrative Law & Process §5.2.2 (5th ed. 2009).

[41] The demise of the rule announced in the 1936 opinion in *Morgan* is described in detail in Richard Pierce, Administrative Law Treatise §8.6 (5th ed. 2010).

[42] 340 U.S. 474 (1951).

[43] Id. at 492-94.

[44] 349 U.S. 358 (1955).

[45] Id. at 364-65. For a detailed discussion of Allentown, see Pierce, supra. note 41 at §11.2.

on demeanor and the agency decision maker did not hear the evidence.[46] In such a common situation, the court upholds the agency finding as long as the agency explains why it made a finding that differs from the ALJ's finding.[47] Courts should use administrative law cases as an aid to determining the permissible relationship between magistrates and district judges, as the Supreme Court did in *Raddatz*.[48] Courts should use modern cases, rather than obsolete old cases, for that purpose, however. There is a near perfect analogy between the relationship between ALJs and agencies, on the one hand, and between magistrates and district judges on the other. In both contexts, Congress conferred on a superior institution the power to reject findings proposed by a subordinate to whom the superior delegated the task of initial fact-finding without holding a new evidentiary hearing. In both contexts, courts should uphold that congressional decision.

IV. Courts Should Uphold District Court Decisions to Reject Proposed Findings by Magistrates Without Conducting a New Hearing If the Judge Gives Adequate Reasons for the Decision

[46] E.g., Long v. Social Security Administration, 635 F.3d 526, 530-31 (Fed Cir. 2011). For discussion of scores of similar cases, see Pierce, supra. note 41 at §11.2.
[47] E.g., Leatherbury v. Dep't of Army, 524 F.3d 1293 (Fed. Cir. 2008). For discussion of scores of similar cases, see Pierce, supra. note 41 at 11.2.
[48] 447 U.S. at 680, 696-711.

Cases like *Universal Camera* and *Allentown Broadcasting* provide a good framework for determining the permissible relationship between magistrates and district judges. A district judge should have the discretion to reject a finding proposed by a magistrate without conducting a new hearing if, but only if, the judge provides an adequate explanation for his decision. Two of the circuit court opinions that address the relationship between magistrates and district judges illustrate well the way this legal regime should work in the context of district court review of magistrate's proposed findings.

Ironically, *Thoms* is both the case in which the Ninth Circuit expanded the scope of its de novo hearing requirement to cover all litigants and a case that illustrates particularly well the circumstances in which a circuit court should uphold a district judge's rejection of a magistrate's proposed finding without conducting a new hearing. In *Thoms*, a policeman testified that he had probable cause to search a house based on his detection of the smell of marijuana emanating from the house as he drove past at a distance of 400 to 600 feet.[49] Seven witnesses testified for the defendant.[50] All maintained that it was impossible for anyone to smell marijuana in those circumstances, given the defendant's use of a sophisticated combination of insulation and

[49] 684 F.3d at 896.
[50] Id. at 897.

filtration.[51] The witnesses for the defendant included Professor Richard Doty, Director of the Smell and Taste Center of the University of Pennsylvania School of Medicine.[52] Professor Doty explained in detail why it is impossible for anyone to detect the smell of marijuana at a distance of 400 to 600 feet from a house, given the use of the insulation and filtration system installed in the house.[53]

The magistrate proposed a finding that the officer smelled the marijuana as he drove past the house and, thus, had probable cause to conduct the search. He relied on the officer's demeanor as the basis for his finding. The district judge explained in detail why he disagreed with the magistrate's proposed finding:

> To conclude that Investigator Young did smell marijuana from the road, while in his vehicle would require the court to assume that Thoms' filtration system was either saturated or not functional; that the odor of marijuana left the outbuilding unfiltered and remained warm long enough to stay above the vegetation behind the Thomses' house; that it either traveled around the Thomses' two-story residence or stayed warm long enough to traverse above it then suddenly

[51] Id. at 898.
[52] Id. at 897.
[53] Id. at 898.

> dropped in the area Young claimed to smell marijuana; and that it followed the described 450 foot course without dispersing beyond perceptible levels. Those assumptions are contrary to a preponderance of the evidence presented at the *Franks* hearing.[54]

The judge explained that he did not need to conduct a new hearing because:

> [T]his court has had access to a transcript of the original evidentiary hearing and has explained at length [in the previously quoted order] how the evidence presented renders it highly improbable (indeed, it seems to this court in light of all the evidence, virtually impossible) that Investigator Young could smell the marijuana grow under the circumstances that existed at the time. That conclusion would not change simply because this court heard the evidence all over again. The issue here does not turn on the demeanor of the witnesses, but rather on the implausibility of the officer's conclusion that he smelled the marijuana grow inside a sealed building at least 450 feet away, which was screened by forest vegetation and a hill with a house on it. These considerations, which are paramount in rendering Young's

[54] Id. at 898. For the complete detailed opinion of the district judge, see United States v. Thoms, 788 F.Supp. 1001 (D. Alaska 2011).

> conclusion unbelievable, are either derived directly from or are entirely consistent with Investigator Young's own testimony. It would serve no purpose but delay to conduct a second hearing to hear the testimony all over again.[55]

Any court would uphold as adequate the district judge's reasons for rejecting the magistrate's proposed finding if it were an agency's rejection of a finding made by an ALJ. There is no good reason for a court to find those reasons inadequate in the analogous context of a district judge's rejection of a magistrate's proposed finding. The only reason given by the Ninth Circuit—that a finding based on a "cold record" is inherently less accurate than a finding made by someone who observed the demeanor of the witnesses[56]—is poppycock that is inconsistent with *every* empirical study of demeanor.[57]

The facts and reasoning of the Fifth Circuit in United States v. Marshall[58] provide a stark contrast with the facts and reasoning of the Ninth Circuit in *Thoms*. In *Marshall*, a magistrate conducted a hearing to determine whether customs officers had probable cause to search a vessel

[55] 684 F.3d at 903-04.
[56] Id. at 904.
[57] See sources cited in note 29 supra.
[58] 609 F.2d 152 (5th Cir. 1980).

and whether the operator of the vessel had consented to the search.[59] The magistrate proposed findings that the officers lacked probable cause and that the operator had not consented to the search.[60] He filed a report with the district judge in which he explained his proposed findings with reference to the evidence presented at the hearing.[61] The district judge rejected the magistrate's proposed findings without conducting a new hearing, without reading the transcript of the hearing before the magistrate, and without giving reasons for rejecting the magistrate's proposed findings. [62]

The Fifth Circuit held that a district judge need not conduct a de novo hearing before acting on a finding proposed by a magistrate.[63] The court also held, however, that a district judge cannot reject a proposed finding without first reading the transcript of the hearing, providing counsel for both sides an opportunity "to point out by memorandum or brief, whatever in the evidence each deems important to the judge's ruling," finding in the transcript "an articulable basis for rejecting the magistrate's original resolution of credibility," and stating his reasons for rejecting the magistrate's proposed finding so that the circuit court can determine whether they are adequate.[64]

[59] Id. at 153.
[60] Id. at 153.
[61] Id. at 153.
[62] Id. at 153-54.
[63] Id. at 155.
[64] Id. at 155-56.

The holding in *Marshall* is eminently sensible—a judge must provide adequate reasons for rejecting a magistrate's proposed findings. The *Marshall* opinion created a legal regime that mirrors the approach courts have taken for decades in reviewing agency decisions to reject ALJ findings. All circuits should adopt that approach.

Unfortunately six circuits have instead renewed their memberships in the flat earth society by prohibiting district judges from rejecting a magistrate's proposed finding that is favorable to a criminal defendant without conducting a new hearing based on the unsupportable assertion that observation of the demeanor of witnesses enhances the accuracy of fact-finding. In *Thoms*, the Ninth Circuit broadened that holding to cover any proposed finding by a magistrate that is favorable to any litigant in a criminal or civil case. Even the Fifth Circuit abandoned its eminently sensible holding in *Marshall* in favor of the mindless and unsupportable holding that a district judge can not reject a proposed finding that is favorable to a criminal defendant based on a "cold record."[65] It is time for circuit judges and Supreme Court Justices to resign their memberships in the flat earth society by refraining from basing decisions on assertions about the value of demeanor evidence that are contradicted by *all* of the available

[65] Louis v. Blackburn, 630 F.2d 1105, 1109-10 (5th Cir. 1980).

scientific evidence. Courts should apply to the relationship between magistrates and district judges the legal regime they have long applied to the analogous relationship between ALJs and agency decision makers.