on November 2, 2002 and her readmittance for additional treatment on November 20, 2002, she told Tsui that she wanted Raeann to return to Canada. The Court finds that Yang was a truthful, credible witness who testified with a clear recollection of events.

Tsui, on the other hand, testified on direct examination that no demand for Raeann's return was made until April 4, 2003, when he received a letter from Yang's attorney. Tsui also stated that he did not remember any conversation prior to April 4, 2003 in which Yang demanded Raeann's return or insisted that her custody rights were being violated. On cross examination, however, Tsui directly contradicted this testimony. He admitted that he spoke with Yang between November 2, 2002 and November 20, 2002, that she insisted Raeann wanted to come home, and that she threatened legal action. Furthermore, Tsui admits in Proposed Finding of Fact 20 that the "[m]other demanded that Father return the Child to Canada in mid-November 2002, immediately before being readmitted to the hospital." Based on the evidence, the Court finds as a matter of fact that Yang demanded that Tsui return Raeann sometime before her readmittance to the hospital on November 20, 2002. Therefore, November 20, 2002 is the date of retention in this case.

2. Habitual Residence

*7 **[2]** Having determined the date of retention, the Court must now address the issue of habitual residence. As the Third Circuit recently held:

> a petitioner cannot claim that the removal or retention of a child is 'wrongful' under the Hague Convention unless the child to whom the petition relates is 'habitually resident' in a State signatory to the Convention and has been removed to or retained in a different State. Determination of a child's habitual residence immediately before the alleged wrongful removal or retention is therefore a threshold question in deciding a case under the Hague Convention.

Karkkainen, 445 F.3d at 287 (internal citation omitted).

The determination of habitual residence "is not formulaic; rather, it is a fact-intensive determination that necessarily varies with the circumstances of each case." *Whiting v. Krassner,* 391 F.3d 540, 546 (3d Cir.2004). The Third Circuit Court has "defined a child's habitual residence as the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective. The inquiry must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there." *Baxter,* 423 F.3d at 368 (internal citations omitted).

In *Karkkainen,* the Court of Appeals explained that "if a child becomes rooted in one country, we will not return her to another one where doing so would take her out of the family and social environment in which her life has developed. Simply put, this inquiry considers whether a child has made a country her home before the date of her removal or retention." *Karkkainen,* 445 F.3d at 292 (internal citation and punctuation omitted). However, "when a child is too young to have an intent regarding her habitual residence, the touchstone inquiry is shared parental intent." *In re Application of Adan,* 437 F.3d at 392 (internal citations omitted). On November 20, 2002-the date of retention-Raeann was only five years old and the Court finds as a matter of law that a five year-old child is too young to have an intent regarding her habitual residence. Thus, the "touchstone inquiry" in this case is whether Yang and Tsui shared an intent immediately prior to November 20, 2002 to make Pittsburgh Raeann's home. The facts in this case clearly demonstrate that they did not.

Both parties fundamentally agree that at the time Raeann left Canada to come to the United States they intended for her to live with her father until her mother recovered from surgery. Yang testified that her expected recovery time was two to three months. This is corroborated by the email that Yang sent to Tsui on October 9, 2002, in which she details the reason why she needed Tsui to take care of Raeann temporarily. She told Tsui that "I can't work at least two and a half months," and laments that "two month [sic] is not a short period of time. What kinds of friends can help so much?" While this was Yang's expectation, the parties also discussed what to do in the event that Yang would die from the surgery. They agreed

that, in that case, Raeann should continue to live with Tsui.

*8 On direct examination, Tsui denied that there was any discussion of a two or three month period and insisted that their understanding all along was that Raeann would live in Pittsburgh until Yang recovered, without any estimate as to the duration of her stay. But Tsui himself submitted a sworn affidavit on February 3, 2003 relating to the Canadian custody proceeding, in which he stated that "Elly expected full recovery within a couple of months." When confronted with this prior statement, Tsui attempted to harmonize it with his hearing testimony, insisting that he had been asked about two or three months, as opposed to a couple of months. He then elaborated that "so could be like couple months means like four, five months, something like that." This explanation strains credulity, particularly in light of that fact that Tsui earned a Ph.D. in the United States. In fact, when asked by the Court, Tsui admitted that Yang had told him she expected to recover in a couple of months. Tr. at 225-26.

Tsui argues that Yang's inclusion of a large suitcase of summer clothes in Raeann's luggage suggests that the parties expected her stay to be much longer than a few months. Yang's email describing what she packed, however, indicates that Raeann prefers to wear short sleeves. In addition, it appears that Yang was planning for the contingency that she might not live through the surgery by sending Raeann with the clothes she would need if her stay were to be longer than planned. This contingency does not refute the conclusion that her parents' intention was for Raeann to stay for only a few months.

The evidence demonstrates beyond doubt that the original intent of the parties was for Raeann to stay approximately two to three months and that soon after Raeann came to the United States, Tsui decided to assert unilateral custody over Raeann. This decision is reflected in Tsui's own testimony, as well as his behavior in the first few months of Raeann's time in the United States. Tsui brought Raeann to Pittsburgh on October 27, 2002. Less than a week later, on November 2, Yang was discharged from the hospital and was speaking to Raeann daily. This soon changed, however, when Tsui decided that daily conversations were too burdensome, and he allowed Yang to speak to her daughter only every other evening. Then, on December 11, 2002, Tsui filed for custody of Raeann in Pittsburgh. At trial he claimed he was planning to bring Raeann to Canada to visit Yang in the hospital, and obtained a custody order to protect Raeann, to "make sure Raeann can come back to the United States." Tr. at 204. The Court finds this testimony particularly troubling and probative, because Raeann is an American citizen who had no trouble traveling to the United States a mere six weeks before Tsui obtained the custody order.

Rather than a concern for her travel status on a trip they never made, Tsui's testimony clearly reflects the real reason behind his race to the courthouse. When asked by the Court why he has not returned Raeann following Yang's recovery, Tsui stated:

> *9 I have a custody right here. I believe Pittsburgh is the right place for Raeann and would be in the best interest for Raeann to stay with me. I'm the father of Raeann. In Chinese culture, the father is the center of the family, and kids follow father, and father basically, if the father is prosperous, the kids can get the benefit from father or from parents.... Here I can provide abundant [sic] of resources for Raeann and all my kids to learn, to learn better, and to get a better life, and hopefully, they can succeed in the future, and that's my part in life. I want to see my kids succeed in the future so we can keep our family tradition here because my dad, my mom, they are all teachers, and I follow the tradition here. I'm a school teacher as well. I would like to devote all my energies to my family, to my children so they can follow our family steps to have-to get a better education.

Tr. at 230-31. This admirable desire to care for the best interests of his daughter-which was nowhere apparent during the first five years of Raeann's life-surfaced almost immediately after she came to live in the United States. Most importantly, this sudden dedication comes from someone who was married at the time he impregnated another woman, whom he then invited to be his "number two wife." Although Raeann appears to be well adjusted

and receiving an outstanding education, these facts do not obviate Tsui's actions.

Thus, it is clear from the testimony of both parties that they intended for Raeann to stay with her father until Yang recovered, a period which they anticipated would last two to three months. At the time of retention, Raeann was less than a month into what was expected to be a two to three month stay. In the words of the Third Circuit in *Karkkainen,* she could not have become "firmly rooted in her new surroundings" nor was Pittsburgh at that time the "family and social environment in which her life has developed." 445 F.3d at 292. Even more important, the shared intent of the parents was not for Raeann to make Pittsburgh her home, unless Yang passed away. Accordingly, the Court finds that Canada was Raeann's habitual residence on November 20, 2002.

Tsui argues that Raeann's habitual residence is and was the United States rather than Canada. Yet respondent fails to cite a single Third Circuit case in support of this conclusion, pointing to cases from other circuits that he claims should determine Raeann's habitual residence. He first argues that the shared intent of the parents in this case was for Raeann to come to the United States for an indefinite period, which resulted in a change in her habitual residence. Tsui points out the large amount of clothes that Raeann brought to the United States, as well as the parents' understanding that, should Yang not survive the surgery, Raeann would stay and live with her father. Tsui then cites *Mozes v. Mozes,* 239 F.3d 1067 (9th Cir.2001), stating that "sometimes the circumstances surrounding the child's stay are such that, despite the lack of perfect consensus, the court finds the parents to have shared a settled mutual intent that the stay last indefinitely. When this is the case, we can reasonably infer a mutual abandonment of the child's prior habitual residence." *Id.* at 1077. In the very next sentence, however, the *Mozes* court stated:

> ***10** "[o]ther times, however, circumstances are such that, even though the exact length of the stay was left open to negotiation, the court is able to find no settled mutual intent from which such abandonment can be inferred." *Id.* The record is clear in this case that the parties' agreement was that Raeann would live with Tsui until Yang recovered, a period that was predicted to last approximately two to three months. The intent of the parents in this case falls into the second type of agreement discussed in *Mozes,* which demonstrates that Canada remained Raeann's habitual residence. Furthermore, and most significantly, Yang's conduct was diametrically opposed to an intent for Raeann to abandon Canada as her habitual residence. Rather, Yang's conduct consistently demonstrated a desire to have Raeann with her as long as she was physically able to care for her.

Tsui goes on to argue that the Court should consider Raeann's current level of acclimatization and degree of settled purpose in determining her habitual residence. This argument directly contradicts not only the established Third Circuit precedent but also the *Mozes* case upon which Tsui relies so heavily. The Ninth Circuit in *Mozes,* like the Third Circuit in *Karkkainen, Baxter* and *In re Adan,* directs that habitual residence be determined "*immediately prior* to the removal or retention." *Mozes,* at 1070 (emphasis added). As of November 20, 2002, Raeann had been in the United States for less than a month.

While the Court has found that retention occurred on November 20, 2002, the habitual residence determination would be the same even if retention was deemed to occur at a later date. The agreement of the parties was clearly that Raeann would stay with Tsui until Yang recovered. Although she made a demand for Raeann to be returned at the latest by the end of November, Yang then suffered complications resulting from her surgery and her recovery took longer than expected. It is undisputed, however, that Yang had recovered by April 2003, and had been consistently attempting to secure Raeann's return. As of April 2003, Raeann still was not old enough to warrant an analysis of her degree of settled purpose, and there can be no argument that the shared intent of the parents was for her to remain in the United States longer than it took Yang to recover. Thus, even if April 2003 were the date of retention in this case, Raeann was still living in Pittsburgh on a temporary basis until her mother recovered and had not become sufficiently settled to effect a change in her habitual residence.

3. Custody Rights of the Petitioner

[3] Having determined that Canada was Raeann's habitual residence, the Court must now examine whether Yang had custody rights at the time of retention. "The Convention defines custody rights as 'rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.' Hague Convention, art. 5(a), 19 I.L.M. at 1501." *In re Application*

of Adan, 437 F.3d at 391. "In determining custody, the Convention calls into play a State's choice of law rules as well as its internal custody rights laws. This requires a careful examination of the country of origin's custody laws to determine whether the party seeking the child's return had custody rights in that country and was exercising them, within the meaning of that country's law, at the time the child was removed." *Id.* (internal citations omitted).

***11** **[4]** At the hearing, both parties called expert witnesses to educate the Court on the custody law of British Columbia. These experts agreed that the operative statute is Canada's Family Relations Act, which states in pertinent part:

> 34 (1) Subject to subsection (2), the persons who may exercise custody over a child are as follows:
>
> (a) if the father and mother live together, the father and mother jointly;
>
> (b) if the father and mother live separate and apart, the parent with whom the child usually resides;
>
> (c) if custody rights exist under a court order, the person who has those rights;
>
> (d) if custody rights exist under a written agreement, the person to whom those rights are given.
>
> (2) If persons have conflicting claims to custody under subsection (1), the following persons may exercise custody to the exclusion of the other persons unless a court otherwise orders:
>
> (a) the person who has custody rights under a court order;
>
> (b) if paragraph (a) does not apply, the person granted custody by an agreement;
>
> (c) if paragraphs (a) and (b) do not apply, the person claiming custody with whom the child usually resides;
>
> (d) if paragraph (c) applies and 2 persons are equally entitled under it, the person who usually has day to day personal care of the child.

R.S.B.C.1996, c. 128, s. 34. In this case, on November 20, 2002, the father and mother lived separate and apart, and there was neither a court order nor a written agreement. Thus, section 34(1)(b) applies and custody belonged to the parent with whom the child usually resided.

Attorney Alison Ouelett, the expert called by Tsui, was asked a hypothetical by Yang's counsel that mirrors the facts of this case. Specifically, she was asked what the custody status would be if the mother told the father "you can have the child while I recover from the surgery that I need to get, and it is going to take several months, a couple of months." Ouelett's response is consistent with both the Court's view and Yang's expert's opinion. Ouelett responded:

> I think in that situation, a judge would determine based upon the facts, and it would be a finding of fact, whether when the mother said in several months I would like to have the child returned, if it was a specific date or if it was some indefinite date, and whether when she did that, she intended to hand over the custody rights. I think that the issues that would be looked at in determining that fact would be ... whether on the facts of the case before that judge it was considered to be an extended visit or to be a transfer of the custody.

Tr. at 152-53. Ouelett then agreed with the statement that "there really is no definition of limited period of time whether it be a day, a week, a month, it could be a couple months." Tr. at 167. In light of the testimony in this case, as well as the factual circumstances surrounding Raeann's travel to the United States, the Court finds that she usually resided with her mother and the temporary arrangement with Tsui was not meant to change that fact. Raeann's trip to the United States was intended by her parents to be an extended visit coextensive with Yang's convalescence and not a transfer of custody for an indefinite period of time.

***12** Yang's testimony established that she and Raeann lived with Tsui for the first six months of Raeann's life, from June 1996 until December 1996. They then traveled to Taiwan until May of 1997, returning to Pittsburgh until August or September of the same year. Tsui testified that he accompanied Yang and Raeann for the first two weeks of their trip to Taiwan in December 1996. In late 1997, Yang and Raeann moved to Taiwan and lived there

until April 2001, when they moved to Canada, where they remained until Yang took ill in October 2002. Thus, as of November 20, 2002, Raeann had not lived with her father since she was little more than a year old, and had spent no more than 10 months of her five and a half years in Pittsburgh. There is no evidence that she visited Pittsburgh between late 1997 and October of 2002. Not surprisingly, Raeann traveled to the United States with three suitcases full of belongings that her mother had packed for her, because there is no evidence that she had any clothes or personal belongings at her father's house.

At the time of retention, Raeann had been living with her father for less than a month. Other than the time immediately following her birth in 1996, she had lived exclusively with her mother in Taiwan and, subsequently, in Canada. It is clear to the Court that Raeann usually resided with her mother, not her father. Therefore, Yang had custody of Raeann under Canadian law.

4. Exercising Custody Rights

[5] Having determined that Yang had custody rights immediately before the retention, the Court next must examine whether she was exercising those rights. "Once it is determined that a party had valid custody rights under the country of origin's laws, very little is required of the applicant in support of the allegation that custody rights have actually been or would have been exercised." *In re Application of Adan,* 437 F.3d at 391. "If a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to 'exercise' those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child." *Baxter,* 423 F.3d at 370 *citing Friedrich v. Friedrich,* 78 F.3d 1060, 1065-66 (6th Cir.1996). Yang did nothing in this case that constitutes clear and unequivocal abandonment of Raeann, and thus she was exercising her custody rights at the time of retention.

Tsui argues that because Yang was very ill during November of 2002, and her medical complications persisted until she was fully recovered in April 2003, she could not have cared for Raeann and thus was not exercising whatever custody rights she had at the time of retention. Tsui does not cite any case law or other authority in support of his argument that a temporary inability to provide daily care constitutes a failure to exercise custody rights. Moreover, this argument contravenes the Third Circuit's guidance in *Baxter* that nothing short of clear and unequivocal abandonment constitutes a failure to exercise custody.

***13** In sum, the Court finds that Yang has satisfied her burden under the Hague Convention, having proved by a preponderance of the evidence that when Raeann was retained on November 20, 2002, Yang had, and was exercising, custody of Raeann and Canada was Raeann's country of habitual residence.

C. Respondent's Burden

Article 12 of the Convention mandates the return of children who have been wrongfully removed or retained: "where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith." Convention, art. 12, 19 I.L.M. at 1502-03. In this case, Yang filed her petition on October 23, 2003, within one year of the November 20, 2002 retention date. Thus, the Court must order that Raeann return to her mother unless one of the exceptions to mandatory return applies. [2]

The Third Circuit has held that, upon the showing of wrongful removal or retention, "the burden shifts to the party that wrongfully removed the child to show by clear and convincing evidence that the Article 13(b) exception applies, or by a preponderance of the evidence that the Article 13(a) exception applies. 42 U.S.C. § 11603(e)(2)(B)." *In re Application of Adan,* 437 F.3d at 390 (internal citations omitted). Article 13 of the Convention states:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-
>
> a. the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal of retention; or

b. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Convention, art. 13, 19 I.L.M. at 1502-03. The only exceptions relevant to this case are the Article 13(a) exception dealing with consent and the unnumbered paragraph dealing with the objection of the child. [3]

1. Article 13(a) Exception-Consented to or Acquiesced in Retention or Removal

*14 [6] The affirmative defenses of consent and acquiescence are separate and distinct, although both are narrow. "Consent need not be expressed with the same degree of formality as acquiescence in order to prove the defense under article 13(a). Often, the petitioner grants some measure of consent, such as permission to travel, in an informal manner before the parties become involved in a custody dispute. The consent and acquiescence inquiries are similar, however, in their focus on the petitioner's subjective intent." *Baxter,* 423 F.3d at 371 (internal citations omitted).

The Court will first determine whether Yang consented to Tsui's retention of Raeann. "In examining the consent defense, it is important to consider what the petitioner actually contemplated and agreed to in allowing the child to travel outside its home country. The nature and scope of the petitioner's consent, and any conditions or limitations, should be taken into account." *Id.* (internal citations omitted). Importantly for this case, "the fact that a petitioner initially allows children to travel, and knows their location and how to contact them, does not necessarily constitute consent to removal or retention under the convention." *Id.* (internal citations omitted).

The Court finds in this case as a matter of fact that the initial permission given by Yang for Raeann to travel to the United States was for the limited purpose of staying with her father until Yang recovered from her surgery. All the evidence in this case, from Yang's testimony to the documents she filed with the Canadian and Central Authorities, indicates a constant and determined effort by Yang since late 2002 to secure Raeann's return. The record is devoid of any evidence to suggest that Yang consented to Tsui's retention of Raeann. Accordingly, Tsui has not established consent by a preponderance of the evidence.

Regarding the defense of acquiescence, the Third Circuit stated in *Baxter* that it requires "an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time." *Baxter,* 423 F.3d at 371 (internal citations omitted). Having failed to carry the lighter burden of consent, Tsui cannot demonstrate acquiescence in this case. Indeed, the testimony in the Canadian custody hearing and the other written materials in this case are directly contrary to acquiescence insofar as Yang actively sought to have Raeann return to British Columbia. Thus, the Court finds that Tsui has not proven either of the Article 13(a) defenses by a preponderance of the evidence.

2. Wishes of the Child Exception

[7] The Court notes at the outset that the unnumbered paragraph of Article 13 delineating the "wishes of the child exception" leaves its application wholly to the discretion of the district court. It states that the Court *may* refuse to order the return of the child, in contrast to the mandatory directive *shall* included in Article 12. Moreover, "like the grave risk exception, the 'age and maturity' exception is to be applied narrowly." *England v. England,* 234 F.3d 268, 272 (5th Cir.2000) (internal citations omitted). The Explanatory Report to the Convention sheds light on the rationale behind this exception and the manner in which its framers intended it to be applied:

> *15 [S]uch a provision is absolutely necessary given the fact that the Convention applies, *ratione personae,* to all children under the age of sixteen; the fact must be acknowledged that it would be very difficult to accept that a child of,

> for example, fifteen years of age, should be returned against its will. Moreover, as regards this particular point, all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary, it seemed best to leave the application of this clause to the discretion of the competent authorities.

Explanatory Report by Elisa Perez-Vera, in 3 Actes et documents de la Quatorzieme session 426, ¶ 30 (1982) (Explanatory Report).[4] The report makes clear that the intent of this exception was not to allow its application to defeat the larger goals of the Convention itself:

> To conclude our consideration of the problems with which this paragraph deals, it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter ... [A] systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.
> Explanatory Report at ¶ 34. Even if the Court determined that Raeann had reached an age and degree of maturity such that her opinion should be given weight, refusing to return her to Canada under the facts of this case would be inappropriate and achieve exactly the result that the Report counsels against.

Any objection that Raeann may have to returning to Canada is a direct result of Tsui's wrongful retention. The record is devoid of any evidence indicating that Raeann wished to move to Pittsburgh to live with her father prior to Yang's illness. Nor has Tsui demonstrated such a desire at the time the retention occurred. On the contrary, it seems clear that any attachment that Raeann has made to her living conditions and family in Pittsburgh happened as a result of the passage of time during the instant litigation. To refuse to return children based upon their preferences developed while awaiting the disposition of wrongful removal and retention lawsuits would render the Convention essentially meaningless. Even worse, it would reward the malfeasant parents, allowing them the opportunity to seek to obviate their wrongful removal or retention during the pendency of legal disputes. In light of the foregoing, the Court will not invoke the discretionary exception to return contained in Article 13.

Even if this case presented a potentially appropriate instance in which to apply the wishes of the child exception, Tsui bears the burden of proving its applicability. At the direction of the President, the State Department submitted a legal analysis of the Convention, codified at 51 FR 10494-01, which discussed the wishes of the child exception. "This discretionary aspect of Article 13 is especially important because of the potential for brainwashing of the child by the alleged abductor. A child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child." 51 FR 10494-01, Section III.I(2). Thus, the Court must be satisfied not only that Raeann has reached an age and degree of maturity at which it is appropriate to take into account her views, but also that her objections are grounded in her own mature opinion and are not merely the conduit for the opinions of others. Based on the evidence of record, Tsui has failed to prove either fact by a preponderance of the evidence.

***16** In light of her relative youth and to protect her from any additional suffering beyond that which has already been visited upon her, the Court heard Raeann's testimony *in camera,* with counsel present. It is clear from her testimony that Raeann is a bright, intelligent, and pleasant child. This conclusion is bolstered by the expert testimony offered by Dr. Paul Bernstein, a psychologist and expert witness retained by Tsui, who examined Raeann to determine her level of maturity. Dr. Bernstein testified that Raeann is extremely intelligent, with an impressive memory and formidable analytical skills. Raeann told Dr. Bernstein that she wished to stay in Pittsburgh, and told him it is because "she loves her school. She is happy there. Prefers living in a house than living in a small apartment. Never bored because she has two brothers, and that she's doing well in school and would just like to remain where she is." Tr. at 100.

This testimony is consistent with Dr. Bernstein's report, prepared at the time of his examination, wherein he quotes Raeann as saying that "I have lived here for more than three years and I have many friends here." She added, "the

best school is in Pittsburgh, and I like being in a house rather than an apartment." Raeann assured Dr. Bernstein that "I miss my mom. I like to talk to her two to three times a week. I know she is very sick." Ex. M. Raeann testified similarly at the hearing, where she indicated a desire to stay in Pittsburgh because "we have our own pet and our own house, and I have lots of friends, and my grades got better, and my skin got better." Tr. at 131. Raeann also testified that she did not know when her mother got better.

Although he admitted that Raeann's experiences here in the United States with her father have had a "major impact" on her desire to stay, when asked about the possibility of coercion Dr. Bernstein testified that "this was a really independent, lively, smart little girl that showed no signs of coercion or pressure of her father or stepmother." Tr. at 101, 111. The facts of the case, however, indicate otherwise. It is clear from her presence at the hearing, along with the results of her current treatment, that Yang has sufficiently recovered from her surgery and the complications that followed. Yet Raeann was not aware that her mother had recovered, and in fact told Dr. Bernstein that her mother "is very sick." When questioned by the Court, Dr. Bernstein admitted that when Raeann stated that her mother "is very sick," she was necessarily expressing someone else's opinion, rather than her own. Tr. at 123.

Raeann also told Dr. Bernstein that "the best school is in Pittsburgh." Yet Dr. Bernstein acknowledged that Raeann is not able to compare the quality of American and Canadian schools. When asked by the Court if Raeann necessarily was expressing someone else's opinion about the "best school" being in Pittsburgh, Dr. Bernstein surmised that Raeann did not mean to use "best" in a comparative sense. He told the Court that "if you or I would use the word 'best,' it would be comparative. When a 9-year-old exclaims it's the best school, compared to what[?]" Tr. at 122. Dr. Bernstein then explained that "I think it was analogous to it's a great school. It's a wonderful school. I'm happy there. I don't think she was making a comparative statement." *Id.* This explanation is, at least on one level, at odds with Dr. Bernstein's report, which concluded that Raeann has a borderline genius IQ. The report explains that "the single best index of overall intelligence is Vocabulary." In fact, Dr. Bernstein concluded that "Raeann's scaled score of fifteen on this [vocabulary] test, fell within the Superior range, an indication of the wealth of her intellectual and cultural circumstances. This nine-year-old correctly defined: Amendment, Boast, Transparent, and Mimic." Ex. M.

***17** This detailed analysis belies the notion that Raeann did not understand the fundamental meaning of the word "best" when she spoke of her school in Pittsburgh. When looking to support his maturity determination, Dr. Bernstein characterized Raeann as a borderline genius with an impressive vocabulary. On the other hand, when evidence suggested undue influence or coercion by Tsui, Dr. Bernstein described Raeann as a nine year-old who does not understand the meaning of the word "best." Accordingly, the Court finds that when Raeann testified the "best school is in Pittsburgh," she was merely repeating what Tsui had told her, just as when she said that she knows her mother "is very sick." The fact that one of the reasons Raeann wants to stay in Pittsburgh and her perception of her mother's situation were both, in fact, the product of outside influence, especially when combined with her tender age, requires that little if any weight should be given to Raeann's expressed preference to remain in Pittsburgh.

Furthermore, the additional reasons Raeann offered-her friends in Pittsburgh, the comfortable living conditions, and the amount of time she has lived in Pittsburgh-have been held in other cases to be insufficient to satisfy the requirements of the Article 13 exception. The Court of Appeals for the Fifth Circuit, in discussing the maturity of a thirteen year-old child, held "that Karina has maintained her friendships with children in America, prefers America to Australia, and now enjoys a situation that has stabilized does not establish that she is mature enough for a court appropriately to consider her views on where she would prefer to live under the Hague Convention. Rather, these findings only establish that Karina prefers to remain in the United States and that some reasons support this preference." *England,* 234 F.3d at 272 (internal citation omitted).

Although Raeann may be more stable and well-adjusted than the child wrongfully removed in *England,* the approach to analyzing her proffered reasons remains the same. It appears clear that, as a friendly, talented, and well-adjusted child, Raeann has acclimated to her new surroundings, as anyone of her temperament would adjust to comfortable circumstances. This adjustment, however, does not provide the basis for a particularized objection

to returning to Canada above and beyond what any 10 year-old would feel when faced with the prospect of leaving family and friends. The Court cannot conclude, based on how narrowly it should interpret Article 13, that the exception is meant to give dispositive effect to the general hesitance of children to leave comfortable surroundings. In light of the evidence that others have influenced Raeann's opinion and the general nature of her objection, taking her views into account would not be appropriate in this case.

Thus, because the requirement for the wishes of the child exception have not been met, and because its application would be an inappropriate exercise of discretion in contravention of the purposes of he Hague Convention, the Court declines to invoke the exception.

VI. Conclusion

***18** Regardless of his motivation, it is clear from the evidence that sometime after Raeann came to the United States, Tsui decided that he would unilaterally exercise his paternal authority to keep her here. He began to limit Raeann's contact with her mother and procured an American custody order while Raeann's mother was hospitalized. This is precisely the type of improper retention and international custody forum shopping that the Convention is meant to prevent. Absent one of the exceptions contained in Article 13, Article 12 mandates that the Court "shall order the return of the child forthwith." Accordingly, the Court will grant Yang's Petition in an appropriate Order filed herewith.

ORDER

AND NOW, this August 25, 2006, Petitioner having filed a Petition for Return of Child (Doc. No. 1), Respondent having filed a Response (Doc. No. 6), a hearing having been held on June 28, 2006, the parties having submitted Proposed Findings of Fact and Conclusions of Law on August 3, 2006, it is hereby

ORDERED that the Petition for Return of Child is GRANTED; it is further

ORDERED that Respondent Fu-Chiang Tsui shall return Raeann Tsui forthwith to the custody of her mother, Petitioner Tsai-Yi Yang, as more specifically directed during a telephonic status conference on Monday, August 28, 2006 at 3:00 p.m.

All Citations

Not Reported in F.Supp.2d, 2006 WL 2466095

Footnotes

1 According to Yang, around January of 1996, approximately five months prior to the birth of their daughter, she began living with Tsui and his family. Tsui contends that Yang did not move in with his family until May of 1996. This discrepancy is immaterial to the decision in the case.

2 The Third Circuit stated in this case that one year had not elapsed, and thus "the 'well-settled' determination would not be relevant in this case." *Yang v. Tsui,* 416 F.3d 199, 203 n. 4 (3d Cir.2005).

3 Although Tsui pleaded the "grave risk of harm" defense, he abandoned it at the hearing. Tr. at 50. Furthermore, the Court has already determined there is no evidence of clear and unequivocal abandonment necessary to find that Yang was not exercising her rights under the Hague Convention.

4 The Explanatory Report falls within the ambit of materials that the Supreme Court has determined should be used to interpret treaties. *See Zicherman v. Korean Air Lines Co., Ltd.,* 516 U.S. 217, 226, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996) ("Because a treaty ratified by the United States is not only the law of this land ... but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (travaux préparatoires) and the postratification understanding of the contracting parties.")

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

v.

ROBERT SHACKELFORD,

Defendant.

Criminal No. 04-192

Judge Thomas M. Hardiman

MEMORANDUM OPINION

On August 5, 2004, a grand jury returned a one-count indictment charging Defendant Robert Shackelford (Shackelford) with possession of a firearm by a convicted felon, on or about March 31, 2004, in violation of 18 U.S.C. §922(g)(1). Presently before the Court is Shackelford's Motion to Suppress Evidence, which is the subject of this Memorandum Opinion.

I. Findings of Fact

In January 2001, Shackelford was paroled from a charge of simple assault and possessing an offensive weapon, brass knuckles. Consequently, he was placed on intermediate punishment by the Allegheny County Court of Common Pleas, which included house arrest with electronic monitoring at his mother's home in the Penn Hills area of Pittsburgh. Shackelford was supervised by Probation Officer David Giesey (Officer Giesey) of the Allegheny County Adult Probation and Parole Office (Probation Office). By December of 2001, Shackelford had tested positive for alcohol and had left the residence on several occasions without permission from the Probation Office, in violation of his intermediate punishment conditions.

EXHIBIT C

As a result of these violations, on March 11, 2002, Allegheny County Sheriff deputies and Officer Giesey visited Shackelford's home to arrest him for the violations. Incident to the arrest, and as part of the process of removing the electronic monitoring equipment, they searched Shackelford's bedroom. During this search, Officer Giesey found a loaded .32 caliber revolver under the covers of Shackelford's bed. After a violation hearing was held in May 2002, Shackelford's intermediate punishment was revoked and he was returned to the Allegheny County Jail.

After his release from prison in 2003, Shackelford was arrested for charges of aggravated assault, discharging a firearm, and illegal possession of a firearm. In March 2004, he was paroled from the sentence on these charges and again came under the supervision of the Probation Office and Officer Giesey. Shackelford was placed on house arrest with electronic monitoring at the same residence where he was on electronic monitoring in March of 2002.

On March 4, 2004, prior to Shackelford's release from prison, Officer Giesey met with him at the Allegheny County jail to review the rules and requirements of the electronic monitoring program. That same day, Officer Giesey made a field visit to the residence and installed the electronic monitoring equipment. He explained the conditions of the program to Shackelford's mother and insisted that there were to be no firearms in the residence.

Officer Giesey conducted field visits of Shackelford's residence on March 9 and March 19, 2004. On March 9, Officer Giesey took a urine sample from Shackelford, checked the electronic monitoring equipment, and warned Shackelford to stay in the residence. On March 19, Officer Giesey took a urine sample, checked the equipment, and spoke to Shackelford and his mother. Officer Giesey did not search the Shackelford residence during either of these visits.

In the time period between the March 19 visit and his next visit to the Shackelford home on March 31, 2004, Officer Giesey discovered a firearm at the home of another parolee under his supervision who lived approximately ten miles from Shackelford's home. Officer Giesey conducted a search at that parolee's home because he witnessed a drug transaction. It was this event – finding a gun on a field visit at another parolee's home – that heightened Officer Giesey's awareness for his own safety when conducting field visits. After finding this gun, Officer Giesey began searching, with some regularity, the residences of other parolees who had a history of guns, drugs, or violence. He recalled searching at least two or three other parolees' homes between March 19, 2004 and March 31, 2004, but discovered no firearms there.

On March 31, 2004, Officer Giesey arrived at Shackelford's residence to conduct a routine field visit. Shackelford met Officer Giesey at the door. Officer Giesey entered the residence and questioned Shackelford about his job search and potential employment. They proceeded to the bathroom at the back of the house on the first floor to obtain the requisite urine sample.

After Shackelford provided the urine sample, he and Officer Giesey walked toward the front of the house. Officer Giesey then advised Shackelford that he was going to search his bedroom, which was on the second floor. Shackelford did not respond and the two proceeded upstairs, with Officer Giesey leading the way. As they entered the room, Shackelford went straight to the bed and sat down. He became nervous and agitated. Officer Giesey then looked Shackelford in the eyes and asked whether he had anything under the bed. Shackelford did not respond. Officer Giesey then asked Shackelford whether he had a gun under the bed and Shackelford stood up and responded, "yes." Officer Giesey lifted up the mattress and found a

loaded .38 caliber firearm and a pouch containing marijuana.

On cross-examination at the suppression hearing, Officer Giesey admitted that he had decided before he arrived for his field visit at Shackelford's home that he was going to search Shackelford's bedroom for his own safety. However, Officer Giesey testified that he conducted the search on March 31 for several additional reasons: first, because he knew that Shackelford previously violated his parole conditions by possessing a firearm in March 2002; second, because he knew of another prior conviction involving the use of a firearm; third, because the charges for which Shackelford was currently on parole involved the discharge of a firearm, fleeing from the police, and an arrest with a firearm in his possession; and fourth, between March 19 and March 31, he had heard from other unidentified parolees that Shackelford was "afraid."

II. Discussion

As an initial matter, the Government concedes that the search of Shackelford's room on March 31, 2004 was not a consent search. Instead, the Government contends, based on the totality of the circumstances, that Officer Giesey had reasonable suspicion to conduct a warrantless search of Shackelford's room and the evidence of the firearm should not be suppressed.

The Fourth Amendment to the Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST., amend. IV. The Fourth Amendment was a response to the use of writs of

assistance and general warrants by which British officials searched colonists' homes in the years preceding the American Revolution. *See, e.g., Boyd v. United States*, 116 U.S. 616 (1886); *Weeks v. United States*, 232 U.S. 383, 390 (1914); *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). Consistent with the time-honored maxim that "a man's home is his castle," the Fourth Amendment makes warrantless searches of homes presumptively unreasonable. *United States v. Burton*, 288 F.3d 91, 102 (3d Cir. 2002) (citing *Payton v. New York*, 445 U.S. 573, 586, (1980)).

Under normal circumstances, the Fourth Amendment requires government officials to have both probable cause and a warrant to search a home. *United States v. Baker*, 221 F.3d 438, 443 (3d Cir. 2000). However, parolees do not enjoy "the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special probation restrictions." *Baker*, 221 F.3d at 443 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). Thus, the requisite level of suspicion that a government official must possess to search a parolee is reduced from "probable cause" to "reasonable suspicion." *Id.* A search may be conducted on the basis of such "reasonable grounds" as information indicating that there "might" be weapons in a parolee's home. *Id.* at 444 (citing *Griffin*, 483 U.S. at 880). However, prior to conducting a warrantless search, the government official must articulate "specific facts" supporting individualized "reasonable suspicion" of a parole violation for the search to be constitutional. *Id.*; *see also, United States v. Knights*, 534 U.S. 112 (2001); *United States v. Hill*, 967 F.2d 902, 909-911 (3d Cir. 1992).

In making "reasonable suspicion" determinations, courts must look at the "totality of the circumstances" and determine whether the officer has a "particularized and objective basis" for suspecting legal wrongdoing. *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002). In

examining the totality of circumstances at the time of the search, courts are to give "due weight" to the factual inferences and deductions drawn by the officers based on their experience and specialized training. *Id.* To demonstrate reasonable suspicion, however, "[t]he officer must be able to articulate more than an 'inchoate and unparticularized suspicion or 'hunch' of criminal activity.'" *United States v. Ubiles*, 224 F.3d 213, 217 (3d Cir. 2000) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000)).

In *United States v. Hill*, 967 F.2d 902 (3d Cir. 1992), the Court of Appeals for the Third Circuit extended the Supreme Court's holding in *Griffin v. Wisconsin* to parolees and concluded that a parolee's car or home can be searched on the basis of reasonable suspicion alone, even in the absence of an authorizing statute such as that in *Griffin*. *Hill*, 967 F.2d at 909. In *Hill*, the defendant was arrested for violating his parole, his apartment was searched and two guns were seized. *Id.* at 904-05. The officers in *Hill* were acting on a report from the parolee's estranged wife that he had committed several parole violations, including keeping drugs and guns in the home that they jointly owned. *Id.* at 904, 911. The Court of Appeals agreed with the district court that these facts were specific enough to give rise to reasonable suspicion. *Id.* The Court also concluded that, after an arrest, the interest in searching the parolee's residence intensifies and such a search is permissible. *Id.* at 911.

In *United States v. Baker*, 221 F.3d 438 (3d Cir. 2000), the Court of Appeals found that the search of the trunk of a parolee's automobile was not supported by reasonable suspicion. In *Baker*, the defendant parolee drove himself to the state parole office, in violation of a parole condition that he not drive without a license. *Id.* at 440. The parole officer asked Baker whether he had a driver's license and he replied that he did not. *Id.* Baker was then arrested as he

attempted to drive away after the meeting. After arresting Baker, the agents searched the passenger compartment of the car and the car's trunk, where they found what they suspected to be drug paraphernalia. *Id.* On the basis of what they found in the trunk, the officers then conducted a warrantless search of Baker's home, where they found numerous guns and 66 grams of heroin. *Id.* at 441. The Court of Appeals concluded that "neither Baker's violation of his parole by driving a vehicle nor his failure to document that he owned the vehicle can give rise to a reasonable suspicion that he was committing other, unspecified, unrelated parole violations – the evidence of which might be found in the trunk." *Id.* at 445. The Court held that "the parole officers' actions were not based on any 'specific facts' giving rise to suspicion that there would be some evidence of a further violation of parole in the trunk." *Id.* at 444.

When the facts of the instant case are considered in light of the controlling precedents, it is readily apparent that this case is akin to *Baker* and differs significantly from *Hill*. Unlike *Hill*, here Officer Giesey had no specific facts of a parole violation to justify his search. Indeed, Officer Giesey candidly admitted that he had decided *before* he arrived at Shackelford's residence that he was going to search the bedroom for his own safety. Nevertheless, the Government contends that the additional reasons stated by Officer Giesey, when taken as a whole, demonstrate that he had reasonable suspicion to conduct the warrantless search.

The additional reasons Officer Giesey provided for the search include: (1) he knew that Shackelford previously violated his parole by possessing a firearm in March 2002; (2) he knew Shackelford was previously convicted for use of a firearm; and (3) he knew that charges for which Shackelford was currently on parole involved the discharge of a firearm, fleeing from the police, and an arrest with a firearm in his possession. Shackelford possessed the same history

and characteristics when Officer Giesey conducted field visits on March 9 and March 19, yet he did not search Shackelford's bedroom on those occasions. The Government argues that Officer Giesey had reasonable suspicion on March 9 and 19, but did not act upon it. However, when questioned at the suppression hearing as to what changed for him after March 19, Officer Giesey testified that it was finding a firearm at another parolee's home, totally unrelated to Shackelford, that triggered a concern for his safety when conducting field visits. After finding a gun some ten miles from Shackelford's home, Officer Giesey began searching, with some regularity, the residences of other parolees who had a history of guns, drugs, or violence.

The Court found Officer Giesey generally to be a candid and credible witness at the suppression hearing. Finding a firearm at another parolee's home may rationally have heightened concern for his safety when conducting field visits, which common sense dictates are inherently dangerous for probation officers. But this inherent danger begs the question presented here, *viz*, whether Officer Giesey had individualized reasonable suspicion of a parole violation to support a search of Shackelford's bedroom on March 31, 2004.

The facts adduced at the hearing demonstrate that the reason Officer Giesey decided to search was because of his experiences with *other* parolees. This is plainly insufficient. Finding a firearm at another parolee's residence does not give Officer Giesey a general warrant to search the homes of other parolees under his supervision. Such an approach would be inimical to individual rights and is inconsistent with controlling law, which requires that the decision to search be based on "specific facts" giving rise to reasonable suspicion that *this* Defendant was violating the conditions of *his* parole. *Baker*, 221 F.3d at 444. The record is clear that Officer Giesey had decided *prior* to arriving at Shackelford's residence that he was going to search the

bedroom. Furthermore, the decision to search was not based upon any specific facts tending toward reasonable articulable suspicion of a parole violation by Shackelford as of March 31, 2004.

The alternative theories proffered by the Government are unpersuasive as well. Clearly, Shackelford's history of criminality involving firearms and his parole violation two years earlier indicate that Shackelford has a history of dangerousness. If a criminal record or a history of dangerousness were the linchpin for reasonable suspicion to search, Officer Giesey's conduct would have been entirely justified. But the law requires more than criminal history or dangerousness. Although parolees do not enjoy the absolute liberty to which every citizen is entitled, *Knights*, 534 U.S. at 119, "the touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at 118-19 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). The law is clear that warrantless searches of parolees' homes must still be supported by "reasonable suspicion" such that there is a "sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable." *Id.* at 121; *Baker*, 221 F.3d at 444. Officer Giesey was unable to articulate any such suspicion.

In addition, the Government's reliance on Shackelford's nervousness or agitation during the search itself is misplaced. Reasonable suspicion must exist prior to conducting the search of the bedroom. *Florida v. J.L.*, 529 U.S. 266, 271 (2000) ("The reasonableness of official suspicion must be measured by what the officers knew *before* they conducted their search."

(emphasis added)). Officer Giesey failed to identify any facts of a "particularized" and "objective" nature to show that he suspected legal wrongdoing on March 31 prior to advising Shackelford that he was going to search the bedroom. *See United States v. Arvizu*, 534 U.S. 266, 273-74 (2002).

Finally, Officer Giesey stated that in making his decision to search he may have also relied upon statements provided by other parolees in the Penn Hills area that Shackelford was "afraid." Officer Giesey did not identify these parolees at the suppression hearing. Although the Court recognizes that tips conveyed in person are more reliable than anonymous tips because the officer has the opportunity to assess the informant's credibility and demeanor, *United States v. Valentine*, 232 F.3d 350, 354-55 (3d Cir. 2000), the parolees here did not provide Officer Giesey with any specific credible information that Shackelford possessed a firearm or may have been violating other conditions of his intermediate punishment that would justify the search. The unidentified parolees merely stated that they thought Shackelford was "afraid." The Court finds this information too general to serve as a basis for reasonable suspicion to search Shackelford's bedroom.

III. Conclusion

For the foregoing reasons, the Court concludes that the search of Defendant Robert Shackelford's bedroom was not based on reasonable suspicion. The fruits of that search must therefore be suppressed.

An appropriate Order follows.

Thos M. Hardiman

Thomas M. Hardiman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	Criminal No. 04-192
ROBERT SHACKELFORD,	)	
	)	Judge Thomas M. Hardiman
Defendant.	)	

ORDER

AND NOW, this 3rd day of June, 2005, in accordance with the foregoing Memorandum Opinion, it is hereby ORDERED that Defendant's Motion to Suppress Evidence (Doc. No. 14) is GRANTED.

BY THE COURT:

Thos M. Hardiman

Thomas M. Hardiman
United States District Judge

cc: counsel of record as listed below

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Only the Westlaw citation is currently available.
United States District Court,
W.D. Pennsylvania.

Naresh I. BHATT, M.D., Plaintiff,
v.
BROWNSVILLE GENERAL HOSPITAL, Defendant.

No. 2:03-CV-1578.
|
Jan. 20, 2006.

Attorneys and Law Firms

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OPINION

HARDIMAN, J.

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*1 Plaintiff Naresh I. Bhatt, M.D. (Bhatt) sued Defendant Brownsville General Hospital (Brownsville or Hospital) after it revoked his staff privileges and allegedly interfered with his practice of medicine. Dr. Bhatt claims that the Hospital's adverse actions were taken because of his race in violation of 42 U.S.C. § 1981. Dr. Bhatt also brought state law claims alleging that the Hospital breached its contractual obligations to him by violating its own by-laws prohibiting discrimination and by failing to provide him with a fair hearing. Brownsville seeks summary judgment on all of Dr. Bhatt's claims. For the reasons that follow, the Court will grant Brownsville summary judgment on all counts.

I. FACTS

Upon review of Brownsville's statement of material undisputed facts and Dr. Bhatt's response thereto, the record reflects that the following facts are undisputed.

A. Parties

At all times relevant hereto, Defendant Brownsville was an acute-care facility located in Brownsville, Pennsylvania that had approximately 93 beds and could provide care for about 60 patients at any given time. [1] Approximately 100 physicians had staff membership and clinical privileges at the Hospital, about one-third of whom were Indian and one-third of whom were born in the United States. The remaining physicians were born in a number of foreign countries such as Korea, the Philippines and Pakistan.

Although he is licensed to practice medicine in the Commonwealth of Pennsylvania, Dr. Bhatt was born in India and matriculated there at Jai Hind College in 1967 and Sheth G.S. Medical College in 1971. Dr. Bhatt joined the medical staff of Brownsville in 1979. At the same time, he served on the medical staffs of various other health care institutions, including: Centerville Clinics, Inc. (Centerville Clinic or Centerville) in Fredericktown, Pennsylvania; Frick Hospital in Mt. Pleasant, Pennsylvania; Highlands Hospital in Connellsville, Pennsylvania; Monongahela Valley Hospital in Monongahela, Pennsylvania; and Uniontown Hospital (Uniontown) in Uniontown, Pennsylvania.

B. Brownsville's By-Laws And Review Committees

Brownsville maintained Medical Staff By-Laws (By-Laws) which, among other things, describe the rights and obligations of the Hospital's medical staff, establish and describe the functions of its committees, set forth policies and procedures for the operation of the Hospital, and prohibit discrimination. An Appendix to the By-Laws includes a "Fair Hearing Plan." The Fair Hearing Plan entitles medical staff members to a hearing in the event of denials, suspensions, revocations, reductions, or limitations of aspects of staff membership or clinical privileges at the Hospital, and sets forth procedures for those hearings.

Pursuant to the By-Laws, Brownsville maintained a Medical Executive Committee (MEC) comprised of no more than twelve members, including the Hospital's Chief of Staff, Vice-Chief of Staff, Immediate Past Chief of Staff, Secretary, Treasurer, Chairpersons of the Departments of Medicine and Surgery, Chairperson of the Credentials Committee, and two at-large members. The MEC had several functions, including: receiving and acting upon reports and recommendations from the Hospital's departments and medical staff committees concerning quality assurance/performance improvement activities, and making recommendations to the Hospital's Board of Directors regarding clinical privileges, corrective action, termination of membership, and the mechanism for a fair hearing.

*2 In addition to the MEC, Brownsville also maintained a Utilization Review Committee (URC), comprised of the Utilization Review Coordinator, Chief of Staff, Chief of Surgery, Chief of Medicine, Chief of Radiology, Director of the Rehabilitation Unit, representatives from Administration, Fiscal, Nursing, Social Service, the Psychiatric Center, Medical Records, and at least two members of the Medical Staff. The URC conducted utilization review functions as required by the Hospital's Utilization Review Plan and reviewed medical charts prepared by physicians to ensure that they were providing proper care to Hospital patients.

Betty Marcolini, R.N. (Marcolini) served as Brownsville's Utilization Management Coordinator from 1997 until 2001. Accordingly, Marcolini reviewed the charts and records of all patients admitted to the Hospital. If the treatment met established criteria, Marcolini approved the case; otherwise, she discussed the issues with the physician. If a case still did not meet established criteria

after the discussion with the patient's physician, Marcolini discussed the case with a utilization review physician advisor, who was a member of the URC. Marcolini testified that discrimination played no role in her work at Brownsville, including her work with Dr. Bhatt.

On those occasions that required consultation, the physician advisor would direct Marcolini to suggest that the patient's physician consider using a different care management strategy. Dr. Malkit Singh, Dr. Min Hi Park, Dr. John Martin or Dr. Bhagwan Wadhwani often served as the physician advisor with whom Marcolini spoke, depending upon their availability. If the patient's physician did not accept the physician advisor's suggestions, the physician advisor then would decide whether to submit the matter to the URC for review. Cases could be referred to the URC by a physician advisor or an entity outside the Hospital, such as a managed care company that denied payment or questioned care management. Charts selected for URC review by a physician advisor or outside entity are described as having "fallen out" for review.

The URC met approximately ten times per year. When the URC determined that a chart reflected patient care problems, it could ask the physician to explain the apparent problem. If the physician had no satisfactory explanation, the URC referred the charts to the MEC. Upon its receipt of charts that the URC referred, the MEC could review them and take further action. After it reviewed the charts, the MEC could recommend corrective action to the Hospital's Board of Directors, including suspension or revocation of the staff membership and clinical privileges of the physician in question. When the MEC voted to recommend corrective action, the physician was entitled to a hearing pursuant to the Fair Hearing Plan.

C. Fair Hearing Procedures

Under the Fair Hearing Plan, when a physician against whom the MEC recommended corrective action requested a hearing, Brownsville's Chief of Staff appointed a Fair Hearing Committee (FHC) comprised of five members of the Hospital's medical staff, none of whom initiated or investigated the matter at issue. Under the Fair Hearing Plan, the presiding officer was either the Chairperson of the FHC or an appointed hearing officer. In addition, physicians appearing before the FHC were entitled to counsel and to call and examine witnesses, introduce exhibits, cross-examine and impeach witnesses, rebut any evidence, and request that the hearing be recorded.

*3 Whenever a hearing was held pursuant to the Fair Hearing Plan, the MEC initially presented evidence in support of its recommendation. The subject physician then had to prove, by a preponderance of the evidence, that the grounds for the recommendation lacked any substantial factual basis or that the basis or conclusions drawn therefrom were arbitrary, unreasonable, or capricious. Under the Fair Hearing Plan, a hearing was finally adjourned when the FHC completed its deliberations. Within fourteen days thereafter, the FHC had to deliberate, make a written report of its findings and recommendations, and forward that report to the MEC. Within fourteen days after its receipt of the FHC report, the MEC had to consider the report, affirm, modify, or reverse its recommendation, and transmit the result to Brownsville's Chief Executive Officer.

Upon receipt of the decision of the MEC, the CEO was required promptly to send a copy thereof to the subject physician. If the decision was adverse, the CEO had to inform the physician of the right to request appellate review by Brownsville's Board of Directors by delivering a written request for appellate review to the CEO within fourteen days. If the physician appealed, the review was conducted by the Board of Directors as a whole, or by an Appellate Review Committee (ARC) of five members appointed by the Chairman of the Board. The ARC could allow the parties or their representatives to appear personally to state their positions. Upon conclusion of any oral statements, the appellate review was considered closed, and the ARC deliberated. Thereafter, the ARC could recommend that Brownsville's Board of Directors affirm, modify, or reverse the action taken by the MEC, or could remand the matter to the FHC. Within seven days after the conclusion of the appellate review process, the Board of Directors rendered its final decision in writing and sent notice thereof to the subject physician. Under the Fair Hearing Plan, a physician who requested a hearing or appellate review agreed to be bound by the provisions of Section 6.3-2 of the By-Laws, releasing the Hospital and its representatives from any civil liability relating to the revocation of the physician's clinical privileges.

D. Events Prompting Brownsville's Review Of Dr. Bhatt's Charts

On September 15, 1997, Centerville Clinic required Dr. Bhatt under threat of termination to sign a Reform Agreement regarding his practices of prescribing controlled substances. That Agreement provided that Dr. Bhatt's failure to abide by its terms would be sufficient cause to terminate his employment immediately. Dr. Bhatt testified in his deposition that the investigation into his prescription practices resulted from employees at Centerville stealing his prescription pads and forging his signature. He also testified that at least one employee was arrested and criminally charged in connection with this practice. Although Dr. Bhatt was investigated, he was not arrested or charged for any wrongdoing.

*4 On February 23, 1998, Centerville's Board of Directors voted not to renew Dr. Bhatt's contract. Dr. Bhatt testified that following Centerville's decision not to renew his contract, it brought an action to enforce a restrictive covenant which precluded him from practicing within twenty miles of Centerville for one year. During Centerville's restrictive covenant action against Dr. Bhatt, Kenneth Yablonski, who was President of the Board of Centerville, testified that the primary reason that the contract was not renewed was that Dr. Bhatt was not happy at Centerville and had previously asked to resign.

Some six months after Centerville chose not to review Dr. Bhatt's contract, in August 1998, Brownsville's MEC initiated a peer review of Dr. Bhatt's management of diabetic patients by sending Dr. Bhatt's charts on a diabetic patient to an Associate Professor of Endocrinology and Metabolism at the University of Pittsburgh School of Medicine. Based on the Associate Professor's findings and report, the MEC required Dr. Bhatt to obtain ten hours of education in diabetes management, which he completed.

Approximately a year later, in November 1999, the Medical Executive Committee of Uniontown Hospital recommended that Dr. Bhatt's appointment and clinical privileges not be extended beyond November 30, 1999. In a letter to Dr. Bhatt dated November 18, 1999, the President and CEO of Uniontown Hospital wrote:

> The reasons for this recommendation are your failure to meet your burden of establishing that you satisfy the qualifications of medical staff appointment and the basic responsibilities of medical staff membership, specifically, your obligation to abide by the medical staff bylaws, rules and regulations and all other lawful standards and policies, and that you prepare and complete in a timely fashion and in accordance with medical staff policies, appropriate medical records, and that you abide by the ethical principles applicable to your profession.

On or about November 30, 1999, after receiving the November 18, 1999 letter, Dr. Bhatt resigned from Uniontown Hospital. Uniontown reported Dr. Bhatt's loss of clinical privileges to the National Practitioner Data Bank (NPDB), an information clearinghouse which collects and releases information related to the professional competence of physicians, including suspensions, revocations, or other adverse actions. Dr. Bhatt filed a response to the NPDB entry disputing the legitimacy and accuracy of the reasons given for the action.

E. Brownsville's Reviews Of Dr. Bhatt's Patient Care Prior To October 2000

On April 3, 2000, after it learned of the adverse action report against Dr. Bhatt that Uniontown had submitted to the NPDB, Brownsville's MEC voted to send a letter to Dr. Bhatt asking for his explanation of the adverse action report. By letter to Brownsville dated April 17, 2000, Dr. Bhatt explained that Uniontown's CEO had informed him that it would not report him to the NPDB if he resigned from Uniontown. Dr. Bhatt further explained that he was "back stabbed" by Uniontown; and that the incident at Uniontown occurred because Dr. Bhatt had sued it twice for refusing to grant him privileges there.

*5 At a meeting on May 1, 2000, based on the adverse action report that Uniontown had submitted and on Dr. Bhatt's explanation of that report, the MEC voted to monitor Dr. Bhatt's inpatient progress notes for a period of three months. During the period of monitoring, from May 2, 2000 to August 2, 2000, Dr. Bhatt maintained his progress notes in accordance with Hospital policy and without retroactive misrepresentation.

At a meeting of the Department of Medicine on July 13, 2000, Dr. Bhagwan Wadhwani, a URC member who is Indian, informed the MEC of suspected problems with the medical care Dr. Bhatt provided to a patient who had died.[2] In August 2000, the URC observed issues regarding Dr. Bhatt's care of four patients who had been admitted to the Hospital that month and referred charts on those patients to the Department of Medicine.

On October 4, 2000, Dr. Malkit Singh, who is Indian, wrote to Dr. Bhatt to advise him that the Department of Medicine "felt very strongly that the fluid management for [a patient of Dr. Bhatt's] was unsatisfactory," that the patient's fluids should have been reviewed and adjusted daily, that the fluids should have been discontinued due to many factors, and that it was "absolutely essential that [Dr. Bhatt] closely monitor fluids for patients and make appropriate adjustments as needed." That same month, the URC determined that two of Dr. Bhatt's charts reflected patient care issues, and referred them to the MEC. At this meeting, the URC gave Dr. Bhatt the opportunity to explain the charts in question. After answering some questions regarding allegedly excessive and inappropriate testing that he had ordered for patients, Dr. Bhatt grew frustrated with what he perceived were repetitious questions that failed to acknowledge his prior answers and walked out of the meeting, slamming the door.

F. Formation Of MEC Subcommittee To Review Dr. Bhatt's Charts

The charts referred by the URC at the October 2000 meeting were reviewed by the MEC at a meeting held on November 6, 2000 at which it determined that Dr. Bhatt's charts reflected many problems. Accordingly, the MEC voted to form a subcommittee consisting of Brownsville's Chief of Staff, Chief of Medicine, Chief of Surgery, and CEO, to review Dr. Bhatt's charts that had fallen out for review. In attendance at the November 6, 2000 MEC meeting were: Dr. Ravindra Mehta, Credentials Chairman; Dr. Milena Janicijevic, Vice-Chief of Staff; Dr. Vincent Alcantara, immediate Past Chief of Staff; Dr. John Martin, Treasurer; Dr. Malkit Singh, Chief of Medicine; Dr. Ashok Sahai, Chief of Surgery; and Dr. Durga Malepati, At-Large Member. Doctors Mehta, Singh, Malepati and Sahai are Indian and Dr. Alcantara is Filipino.

The MEC subcommittee that had been formed to review Dr. Bhatt's charts met on November 16, 2000, and in attendance were: Dr. John Ewald, Chief of Staff; Dr. Malkit Singh, Chief of Medicine; Dr. Ashok Sahai, Chief of Surgery; Karen Fuducia, the Hospital's Interim Chief Executive Officer; and Danette Minehart, Medical Staff Coordinator. The MEC subcommittee reviewed ten of Dr. Bhatt's charts that had fallen out for review and determined that problems existed in nine of them, including a failure to respond to committees, fluid management problems, transfusion-related issues, and inappropriate testing. The MEC subcommittee then voted to meet with Dr. Bhatt to communicate to him the trends and patterns that were found during its review. The MEC and Dr. Bhatt met on November 29, 2000 and Dr. Bhatt admitted that he was aware that there were problems associated with his charts. The MEC subcommittee decided to review any of Dr. Bhatt's charts that may fall out for review during the three-month period from December 1, 2000 through March 1, 2001, and the three-month period from March 1, 2001 through June 1, 2001, to determine if any of the same trends or patterns continued to exist. The MEC subcommittee would then report its findings to the MEC. The MEC subcommittee noted on March 8, 2001 that none of Dr. Bhatt's charts had fallen out for review during the three-month period from December 1, 2000 to March 1, 2001.

***6** At a meeting on May 24, 2001, the URC noted that one of Dr. Bhatt's charts indicated that he had admitted to the Hospital a patient who did not meet the criteria for admission. The URC also questioned Dr. Bhatt's failure to adjust the patient's medications. On July 26, 2001, the URC decided to send several of Dr. Bhatt's charts to an outside reviewer and the MEC voted to approve that decision on August 6, 2001. On August 10, 2001, the Hospital wrote to Dr. Bhatt to inform him that four of his charts were being sent to an outside reviewer because of a continuous pattern of medical care that diverged from Hospital standards.

On October 3, 2001, in accordance with the URC's decision to send several of Dr. Bhatt's charts to an outside reviewer, Brownsville sent four of his patient charts to Dr. Mark S. Roberts, who at the time was an Associate Professor of Medicine, an Associate Professor of Health Services Administration, and Chief of the Section of Decisions Sciences and Clinical Systems Modeling at the University of Pittsburgh. Dr. Roberts had graduated *cum*

laude with a Bachelor of Arts degree in Economics from Harvard College in 1977, earned his M.D. from Tufts University School of Medicine in 1984, and a Masters of Public Policy from the John F. Kennedy School of Government at Harvard University in 1984. Dr. Roberts is board-certified in internal and geriatric medicine and licensed to practice medicine in Massachusetts and Pennsylvania. Dr. Roberts had also taught medicine at Harvard Medical School, the University of Pittsburgh School of Medicine, and practiced medicine at Shadyside Hospital.

G. Dr. Roberts' Report And Conclusions Regarding Dr. Bhatt's Patient Care

On November 7, 2001, Dr. Roberts submitted his report on Dr. Bhatt's cases in which he concluded that "in three of the four charts there are multiple examples of care that are, in my opinion, substantially below reasonable standards of care for the complaints and diagnoses for which the patients presented." Dr. Roberts also stated that "the nature of the lapses from standard care also appear to indicate a level of attention to clinical detail that allowed the clinician to miss obvious and significant signs of worsening clinical status." In one case, Dr. Roberts stated that "inappropriate fluid management was a significant contributor" to the patient's death, although "it is important to remember that this patient was quite ill upon presentation. She was a 98 year-old female with probable sepsis, and she had a high expected mortality rate from what was likely an occult infection." Dr. Roberts' report was distributed to Dr. Bhatt and all members of the MEC at a meeting on December 5, 2001. The MEC offered Dr. Bhatt the opportunity to provide information in conjunction with its review of Dr. Roberts' report.

On December 9, 2001, Dr. Bhatt wrote to the Chairman of the URC to inform him that he had reviewed Dr. Roberts' report and "agreed with the suggestions that have been made." Dr. Bhatt also said he would: exercise great caution in fluid replacement therapy for patients with congestive heart failure, use consultations liberally for difficult cases, scrutinize thyroid replacement therapy with extreme caution, and obtain additional hours of continuing medical education in the fields of congestive heart failure and thyroid disease.

H. The MEC Votes To Recommend Revoking Dr. Bhatt's Privileges

*7 At a meeting on December 10, 2001, the MEC noted that Dr. Roberts' report, along with other reports from various Hospital committees, showed a trend of substandard patient care provided by Dr. Bhatt. The following doctors attended the December 10, 2001 MEC meeting: Vicente Alcantara, Walter Bobak, John Ewald, John Martin, I. Prakorb, Ashok Sahai, Malkit Singh, and Mona Zaglama. At the meeting, the MEC voted to recommend to Brownsville's Board of Directors that Dr. Bhatt's staff membership and clinical privileges be revoked.

On December 12, 2001, Dr. Bhatt requested a leave of absence from the Hospital "due to personal health reasons." By letter dated December 13, 2001, the Hospital informed Dr. Bhatt of the MEC's decision to recommend revocation of his privileges and informed him that "the ongoing monitoring of the care rendered by you at Brownsville Hospital reveals a pattern of care which is substantially below any reasonable or acceptable standard of care."

I. The Fair Hearing Process

In its December 13, 2001 letter, the Hospital enclosed a copy of its Fair Hearing Plan and informed Dr. Bhatt that he had fourteen days after receipt of the letter to request a hearing. By letter dated December 25, 2001, Dr. Bhatt requested a hearing. On January 7, 2002, the Hospital's Board of Directors granted Dr. Bhatt's request for a leave of absence.

The FHC assembled by the MEC consisted of doctors James Dahl, Denise Ginart, Anita McDonald, Robert Smith, and Ravindra Vajjhala, who is Indian. All of these physicians were on staff at Brownsville at the time of the hearing. Drs. Dahl, Ginart, and McDonald were all family practitioners while Drs. Smith and Vajjhala practiced emergency medicine at Brownsville. Dr. Bhatt asserts that FHC member Drs. Dahl, Ginart, and McDonald were also affiliated with Centerville Clinic, with which Dr. Bhatt had previously been affiliated.

Dr. Bhatt retained Tomm A. Mutschler, Esq. of Mount Pleasant, Pennsylvania, to represent him at the fair hearing. In or about January 2002, Brownsville informed attorney Mutschler that Dr. Bhatt's hearing was scheduled for January 31, 2002. Mutschler requested a postponement, which was granted by letter dated January 24, 2002, in which Brownsville requested that Mutschler

contact the Hospital's counsel to discuss new hearing dates. At some point thereafter, Dr. Bhatt replaced attorney Mutschler with attorney William Maruca of Kabala & Geeseman. By letter dated April 19, 2002, Brownsville's CEO advised attorney Maruca that Dr. Bhatt's hearing was rescheduled for May 16, 2002 and disclosed the names of the patients who would be discussed at the hearing.

The hearing on the MEC's recommendation that Dr. Bhatt's staff privileges be revoked was held during three days (May 16, 2002, July 24, 2002, and September 4, 2002) and lasted over eight hours. Darice McNelis, an attorney with Buchanan Ingersoll, P.C., served as the Hearing Officer, attorney Maruca represented Dr. Bhatt, and Anne Mullaney, an attorney with Thorp Reed & Armstrong LLP, represented Brownsville's MEC at the hearing.

***8** At the beginning of the hearing, Hearing Officer McNelis advised the attendees of the Fair Hearing Procedures and administered oaths to the witnesses. Attorney Mullaney provided the FHC and attorney Maruca with a binder containing the exhibits to which the Hospital's witnesses would be referring, which included Dr. Roberts' November 7, 2001 report and his *curriculum vitae.* Attorneys Mullaney and Maruca both made opening statements at the beginning of the hearing and Drs. Ewald, Singh, and Park testified in support of the revocation of Dr. Bhatt's staff privileges.

Dr. Harry Haus, who was never on staff at Brownsville, testified on Dr. Bhatt's behalf. Dr. Haus graduated from the University of Pittsburgh with a B.A. and M.B.A. in 1979, and earned his M.D. from Albany Medical College in 1986. Dr. Haus is board certified in family practice, quality assurance and utilization review. After completing his residency in 2001, Dr. Haus worked in utilization review for K.E.P.R.O., an organization that reviews Medicare and Blue Cross/Blue Shield cases for hospitals. Dr. Haus later became Medical Director of Monongahela Valley Hospital.

Evidence was presented regarding nine patients of Dr. Bhatt, eight of whom are discussed below *seriatim.*

J. Evidence Presented At FHC Hearing

1. Patient A[3]

a. Evidence Presented By MEC

Dr. Ewald, who then was Chief of Staff at Brownsville, testified regarding Patient A for the MEC. A graduate of Muhlenberg College and the Milton S. Hershey College of Medicine, Dr. Ewald is board-certified in internal medicine, nephrology and geriatrics. At the hearing, members of the FHC questioned Dr. Ewald about his testimony and his review of Patient A's charts. Attorney Maruca cross-examined Dr. Ewald.

Patient A's chart had fallen out in a death review. According to Dr. Ewald, Patient A had received "17.2 liters of fluid with a urine output of 5.7 liters for a net gain of 11.5 liters. Chest x-rays continued to show worsening congestive heart failure and the fluid management here was questioned." Dr. Ewald further testified: "although the patient was 98, elderly, and one could argue not a good candidate necessarily to survive, the issue for the reviewer that brought this to our attention was, this fluid management made absolutely no sense." Dr. Ewald's testimony was consistent with the opinion of the outside reviewer, Dr. Roberts, who concluded that "the inappropriate fluid management was a significant contributor to [Patient A's] death."

b. Evidence Presented By Dr. Bhatt

Through his testimony and report, Dr. Haus opined that Patient A's fluids were not mismanaged by Dr. Bhatt. Dr. Haus opined that Patient A had obvious signs of dehydration, and that decreasing or stopping intravenous fluids would have exacerbated the patient's fever, dehydration, hypovolemia, and renal condition. Dr. Haus further noted that neither nursing nor pharmacy objected to Dr. Bhatt's course of treatment and that Dr. Bhatt was not notified when the patient's condition, which had been improving, began to deteriorate. Finally, Dr. Haus testified that Patient A had less fluid output than fluid input simply because of dehydration.

2. Patient B

a. Evidence Presented By MEC

***9** Dr. Ewald testified for the MEC regarding Patient B, whose chart fell out for review to inquire why the patient was taken from the medical ward to the psychiatric floor with a heart rate of forty-seven and then continued on beta-blockers and digoxin. Dr. Ewald also testified that a

heart rate of "47 in someone who already is elderly with a lot of medical problems should be an indicator ... to keep the patient on the floor...."

b. Evidence Presented By Dr. Bhatt

Both Dr. Bhatt and Dr. Haus defended the decision to transfer Patient B to the psychiatric ward. They testified that Patient B was stable at the time she was transferred and for nearly two weeks thereafter, during which time Dr. Mehta was the attending physician. Dr. Bhatt further testified that he was not informed of any medical problems with Patient B while she was in the psychiatric ward.

3. Patient C

a. Evidence Presented By MEC

Dr. Ewald testified for the MEC regarding Patient C, whose chart fell out for review because Dr. Bhatt had not ordered intravenous fluids for twenty-four hours after the patient's admission to the Hospital. Dr. Ewald opined that waiting to provide fluids was inconsistent with the standard of care for treating hyperglycemia or septicemia.

b. Evidence Presented By Dr. Bhatt

Both Dr. Bhatt and Dr. Haus disputed the assertion that Patient C should have been placed on intravenous fluids upon presentation at the Hospital. Dr. Bhatt testified that intravenous fluids were unnecessary because Patient C was able to take oral fluids upon arrival. Dr. Haus stated that attempting to correct a dehydration problem by having a patient take fluids orally is not a breach of the standard of care, particularly when the results of the tests had not yet been received that would show which, if any, intravenous treatments are needed.

4. Patient D

a. Evidence Presented By MEC

Dr. Ewald testified for the MEC about the review process regarding Patient D. The Hospital's Tissue Lab Blood Bank Committee (TLBBC) had asked Dr. Bhatt to explain why he did not use the fresh frozen plasma he had ordered for Patient D. After Dr. Bhatt's response to the TLBBC was delayed, the MEC then asked Dr. Bhatt to respond to the question. Dr. Ewald testified that when Dr. Bhatt responded, he instead explained why plasma was required in treating Patient D, indicating that he had used the plasma. Dr. Ewald also testified that Dr. Bhatt's failure to respond properly to the question made it appear to the committee that Dr. Bhatt was not taking seriously the review process regarding the fresh frozen plasma issue.

b. Evidence Presented By Dr. Bhatt

Dr. Bhatt testified that he did not fail to respond to the TLBBC for several months regarding its inquiry into his nonuse of the fresh frozen plasma ordered for Patient D. Rather, Dr. Bhatt asserted that he responded to the committee verbally, and did not know that a written response was required. Dr. Bhatt acknowledged that the letter he latter submitted to the MEC inaccurately indicated that he had used the fresh frozen plasma when he had not, but characterized the mistake as an unintentional error.

5. Patient E

a. Evidence Presented By MEC

***10** The MEC's second witness at the hearing was Dr. Malkit Singh. At the time of the hearing, Dr. Singh was Chairman of Brownsville's Department of Medicine. Members of the FHC questioned Dr. Singh about his testimony and review of the patients' charts. Attorney Maruca cross-examined Dr. Singh.

Dr. Singh testified that Patient E "came for a fracture of the knee and thrombophlebitis and ended up having unnecessary testing and unnecessary treatment which killed her." Dr. Singh testified that Patient E was given an unnecessary gastroscopy and an unnecessary colonoscopy because the blood found in her stool was likely caused by the drug Toradol, which she was taking. Dr. Singh testified that Patient E had a ruptured colon after the colonoscopy, and did not receive proper care thereafter. Specifically, Dr. Singh testified that Patient E was ordered to have a barium swallow when she "already had a rupture of the colon and peritonitis."

Dr. Singh testified further that Patient E should not have been admitted to the Hospital and that her final diagnosis was incorrect. Dr. Singh opined that other aspects of Patient E's treatment were improper as well. For example, Patient E's electrolytes went untested for five days "when the patient was receiving high doses of Lasix." In Dr. Singh's opinion, Patient E's blood urea nitrogen (BUN) levels should not have been ignored for "another

two days," and Kay-Ciel (a potassium chloride solution) should have been added to Patient E's intravenous fluids. Dr. Singh also questioned the administration of the drug digoxin to Patient E, as he knew of no rationale for administering that drug to her, and questioned the lack of testing of Patient E's digoxin levels prior to January 1, 2000. Dr. Singh also testified that Patient E "probably" should have been given only one unit of blood instead of two. Overall, Dr. Singh testified that Patient E's treatment fell "much below" the Hospital's standard of care.

b. Evidence Presented By Dr. Bhatt

Dr. Haus disputed Dr. Singh's allegations that the gastroscopy and colonoscopy performed on Patient E were unnecessary. He testified that after a hematologist was unable to discern the cause of the patient's anemia, the normal procedure is to look to the gastro-intestinal tract as the source of the bleeding. Dr. Haus noted that Dr. Bhatt did not perform Patient E's colonoscopy. Moreover, he opined that there was no proof that the colonoscopy, rather than a diverticular disease, was the cause of the suspected perforation.

Dr. Haus also disputed Dr. Singh's assertions that Patient E should not have been admitted to the Hospital, stating that it would be difficult to place a 93 year-old woman with a broken femur into a skilled-care facility, citing the fact that Medicare requires a three-day hospital stay for the patient to be eligible for a Medicare admission to one of those facilities. Dr. Haus also opined that sending Patient E to her own home or a personal care home was not a viable option because intravenous treatments could not be administered in those environments. Dr. Haus also criticized the fact that this chart was reviewed by Dr. Wadhwani, who himself cared for Patient E when Dr. Bhatt was out of town.

*11 Dr. Haus' report further disputed Dr. Singh's allegations, noting that Dr. Bhatt was not made aware of the BUN results immediately, and that Dr. Bhatt began intravenous fluids once he was made aware that the patient's BUN was elevated.

6. Patient F

a. Evidence Presented By MEC

Dr. Singh testified for the MEC regarding Patient F, who presented with bronchitis and sinusitis. Dr. Singh opined that Patient F did not meet the criteria for admission to the Hospital, and that Dr. Bhatt ordered an "unnecessary" hematology consultation for that patient. Of primary concern to Dr. Singh was the failure to manage Patient F's thyroid condition. Dr. Roberts' report also criticized the care provided to Patient F, opining that it was "hard to provide justification for the intravenous antibiotics especially given (from the chart) that [Patient F] was sent home without oral antibiotics."

b. Evidence Presented By Dr. Bhatt

Despite characterizing it as a "weak admission," Dr. Haus defended the decision to admit Patient F when she presented with bronchitis and sinusitis because outpatient treatment had failed to resolve the condition and the patient had extremely high blood pressure. Dr. Haus also noted that under normal Hospital policies and procedures, inappropriate admissions are flagged for certification by the Hospital on the day of admission, which did not occur in the case of Patient F. Dr. Haus opined that the hematology consultation ordered by Dr. Bhatt was warranted because the patient exhibited an elevated white blood cell count.

Dr. Haus also disputed the finding in Dr. Roberts' report concerning the antibiotic treatment prescribed for Patient E, asserting that outpatient treatment with oral antibiotics had already failed prior to admission, warranting intravenous antibiotics.

7. Patient G

a. Evidence Presented By MEC

Dr. Singh opined that Patient G did not meet criteria for admission to the Hospital. He also testified that Patient G had two unnecessary electrocardiograms and found Dr. Bhatt's treatment was inconsistent with the Hospital's standard of care.

b. Evidence Presented By Dr. Bhatt

In his report, Dr. Haus defended Dr. Bhatt's decision to admit Patient G to the Hospital, citing her BUN of 39 and creatine level of 2.0. Dr. Haus asserted that either of these test results would meet the Hospital's guidelines for admission. Regarding the allegedly unnecessary electrocardiograms administered to Patient G, Dr. Haus testified that Dr. Bhatt ordered

the initial electrocardiogram on the day the patient was admitted, and that the other electrocardiogram was ordered by a consulting cardiologist, not Dr. Bhatt.

8. Patient H

a. Evidence Presented By MEC

Dr. Min Hi Park was the MEC's third witness at the hearing, and testified regarding Patient H. At the time of the hearing, Dr. Park was Chairman of Brownsville's Utilization Review Committee. It appears that the primary evidence before the FHC regarding Dr. Bhatt's handling of Patient H was the report of Dr. Roberts. In Dr. Roberts' opinion, Patient H was not properly treated because the patient had recurrent atrial fibrillation but "was not on any form or [sic] chronic anticoagulation." Dr. Roberts opined that Patient H should have been "placed on anti-coagulation, and would have benefitted from taking an aspirin on a daily basis." Attorney Maruca cross-examined Dr. Park.

b. Evidence Presented By Dr. Bhatt

*12 Dr. Haus defended Dr. Bhatt's treatment of Patient H, asserting that he acted appropriately by consulting with a cardiologist immediately upon the patient's admission to the Hospital. Dr. Haus' report stated that cardiac care is provided by the cardiologist in a case of atrial fibrillation, and that medication orders (such as those for anti-coagulants) would come from the cardiologist and not from Dr. Bhatt as the primary care physician. Dr. Haus further testified that the aspirin therapy recommended in Dr. Roberts' report would have resulted in malpractice because the patient was already prescribed Coumadin, which cannot be taken simultaneously with aspirin.

Dr. Haus acknowledged that Dr. Bhatt did not identify heart sounds correctly in his treatment of Patient H, but asserted that this finding was "of minor note" and that the cardiologist agreed with Dr. Bhatt's treatment plan.

K. The Fair Hearing Committee's Deliberations And Conclusions

At the conclusion of the hearing, Hearing Officer McNelis stated that the parties would have ten days after receipt of the hearing transcript to submit their written statements. On October 2, 2002, attorney Mullaney submitted the MEC's written statement and attorney Maruca submitted Dr. Bhatt's written statement.

The following day, October 3, 2002, the FHC deliberated for almost two hours before concluding that the MEC's recommendation to revoke Dr. Bhatt's staff membership and clinical privileges was factually justified and was not arbitrary, unreasonable, or capricious. At the end of the deliberations, the FHC took a secret ballot to determine whether the MEC's recommendation to revoke Dr. Bhatt's membership and privileges at the Hospital should be affirmed. The FHC voted 4-1 to affirm the MEC's recommendation.

The lone FHC member who voted against the recommendation to revoke Dr. Bhatt's privileges was Dr. Vajjhala. In his deposition, Dr. Vajjhala testified that he voted against the recommendation to revoke Dr. Bhatt's privileges because he was concerned that the Hospital was in serious trouble because it was losing primary care physicians, and that Dr. Bhatt's expulsion would have meant the loss of several patients and admissions, which in turn would have led to a faster decline of the Hospital. [4] Apart from these practical concerns, Dr. Vajjhala testified that he believed that Dr. Bhatt's standard of care was "substandard" and he believed that Dr. Bhatt would only be able to meet the Hospital's standard of care if he received "intense supervision." Dr. Vajjhala further testified: "[a]t no point I felt any racial prejudice was in place."

The FHC stated its conclusions in a Report and Recommendation of Hearing Committee, which recommended that Dr. Bhatt's privileges be revoked. All five members of the FHC signed the Report and Recommendation which stated:

> The Hearing Committee concluded that there were significant issues concerning Dr. Bhatt's professional judgment and quality of care. The Hearing Committee also concluded that Dr. Bhatt's performance in these cases demonstrated a general lack of overall clinical judgment and lack of understanding of a disease process and/or course of treatment which would be consistent with proper care. The Hearing Committee further concluded that Dr. Bhatt's performance in these cases demonstrated poor patient management (Patients A, C and E) and specific performance issues with respect to fluid

management (Patient A and C), a basic patient care concept. The Hearing Committee's conclusions in this regard are supported by the evidence and testimony presented.

*13 It is the Hearing Committee's decision that the professional judgment and quality of care issues raised by these cases constitute a substantial factual basis in support of the Medical Executive Committee's recommendation. The Hearing Committee is of the opinion that the Hospital would be neglecting its responsibilities with regard to patient care if the recommendation of the Medical Executive Committee were not affirmed.

In summary, the Hearing Committee believes that the Medical Executive Committee was justified in recommending that Dr. Bhatt's staff membership and clinical privileges be revoked under these facts, and that Dr. Bhatt has not demonstrated that the Medical Executive Committee's recommendation lacked any substantial factual basis or that such basis or the conclusions drawn therefrom were either arbitrary, unreasonable, or capricious.

Dr. Bhatt concedes that there was no discussion of his race or national origin during the hearing, and has admitted the Hospital's assertion that there was no discussion of Dr. Bhatt's race or national origin during the FHC's deliberations. Three members of the FHC-Dr. Smith, Dr. Ginart and Dr. Vajjhala-have provided testimony or affidavits stating that Dr. Bhatt's race and national origin played no role in the FHC hearing or in the FHC's conclusions reached in its Report and Recommendation.

On October 17, 2002, the Hearing Officer forwarded the FHC's Report and Recommendation to the MEC. On October 22, 2002, the Hospital notified Dr. Bhatt that the MEC reviewed the FHC's Report, voted to affirm its recommendation that Dr. Bhatt's staff membership and privileges be revoked, and informed Dr. Bhatt that he had a right to request appellate review. On October 30, 2002, Dr. Bhatt requested appellate review of the FHC's decision.

On November 25, 2002, the Hospital informed Dr. Bhatt that his appellate review was scheduled for December 9, 2002. After the FHC issued its Report and Recommendation, Dr. Bhatt replaced attorney Maruca with Neal A. Sanders, Esq., to represent him both in the fair hearing process and in a legal malpractice lawsuit against attorney Maruca and his law firm.

L. Appellate Review Of The Fair Hearing Committee's Decision

The appellate review originally scheduled for December 9, 2002 was postponed to accommodate attorney Sanders' schedule. The Appellate Review Committee (ARC) met once, on February 18, 2003, to review whether the fair hearing process was proper, thorough, and fair to Dr. Bhatt. Dr. Bhatt admits that his race and national origin were not discussed during the appellate review process. After deliberation, the ARC affirmed the decision of the FHC to recommend revocation of Dr. Bhatt's privileges.

On March 11, 2003, the Hospital's Board of Directors received and reviewed the ARC's recommendation and voted to affirm the MEC's and the ARC's recommendations to revoke Dr. Bhatt's staff membership and clinical privileges. On March 17, 2003, the Hospital's Board of Directors informed Dr. Bhatt by letter of its decision to revoke his privileges. Dr. Bhatt is the only Indian doctor to lose privileges at the Hospital.

M. Evidence Of Brownsville's Ulterior Motivation Relating To Prior Litigation

*14 Dr. Bhatt testified that the Hospital revoked his privileges not because of the quality of care that he provided to patients, but rather because of a conspiracy to ruin his career that began in the mid-1990's when his wife sued Centerville Clinic and one Dr. Bolosky, with whom she had an extramarital affair, alleging "[s]exual misconduct with a patient."

Dr. Bhatt testified that he believes the participants in the conspiracy to ruin his career are Centerville Clinic, Uniontown Hospital, Kenneth Yablonski, Esq., Joseph Yablonski, Esq., Ed Yablonski, Judge David Gilmore, James Davis, Esq., Dr. John Ewald, and Dr. Bolosky. Dr. Bhatt further testified that he believes the conspiracy was controlled by attorney Kenneth Yablonski, who died in September 2002. Dr. Bhatt testified that Kenneth Yablonski told him in a dream that he was going to expel Dr. Bhatt and have all of his charts reviewed. For these reasons, Dr. Bhatt asserts that the Hospital's inclusion of anyone affiliated with Centerville Clinic on the FHC or ARC panels was inappropriate.

During Dr. Bhatt's deposition on August 17, 2004, he was questioned extensively regarding the alleged conspiracy. After a break in the deposition concluded at 11:00 a.m., Dr. Bhatt provided the following testimony in response to a question from the Hospital's counsel:

> Q. [Hospital's Counsel]: Now, Dr. Bhatt, this lawsuit you brought is over the revocation of your privileges at Brownsville General Hospital. And as you know, I think, the hospital says that your privileges were revoked because you failed to meet the standard of care. What do you think the real reason is?
>
> A. [Plaintiff]: The real reason is an ulterior agenda that Kenny Yablonski had and has and used his cousin Ed Yablonski, who is at Brownsville Hospital, to control them. He's controlling everybody, and his agenda is to get rid of me, and to permanently ruin my career and drum me to India.

After Dr. Bhatt provided this testimony, and merely eight minutes after the parties' prior break had concluded, Dr. Bhatt's counsel requested another break. Immediately after the second break, the following exchange occurred:

> A. [Plaintiff]: Would you please repeat your last question?
>
> Q. [Hospital's Counsel]: Why don't you please repeat it back. [Record read]
>
> Q. [Hospital's Counsel]: Now, you said that Mr. Ken Yablonski had an ulterior agenda. What was the ulterior agenda?
>
> A. [Plaintiff]: Because I am an Indian, because of my race, they want to get rid of me.

N. Dr. Bhatt's Evidence Of Brownsville's Discriminatory Motivation For Revoking His Privileges And Interfering With His Practice Of Medicine

In addition to the deposition testimony set forth *supra,* Dr. Bhatt cites two incidents as evidence of the Hospital's discriminatory motives for revoking his privileges. First, Dr. Bhatt testified that in 2000 he went to Dr. Ewald for advice concerning the heightened scrutiny to which his charts were being subjected. He testified that Dr. Ewald responded by stating that Dr. Bhatt is an Indian, that he has no chance, and the Hospital should have thrown him out a long time ago. Dr. Bhatt also alleges that Dr. Ewald yelled at Dr. Haus during the FHC hearing for defending Dr. Bhatt, though these remarks are not alleged to have indicated any racial bias against Dr. Bhatt.

***15** It is true that Dr. Ewald was Chairman of the Medical Evaluation Committee that initially recommended that Dr. Bhatt's privileges be revoked. By virtue of his position as the Chairman of the MEC, Dr. Ewald was also responsible for presenting the MEC's findings to the Board of Directors. However, Dr. Ewald was not a member of either the Fair Hearing Committee or Appellate Review Committee that reviewed the MEC recommendation, nor was he a member of the Board of Directors that made the final decision to revoke Dr. Bhatt's privileges. Rather, Dr. Ewald was a fact witness at the FHC proceedings, and was subject to cross-examination by Dr. Bhatt's lawyer.

Dr. Bhatt also has testified that James Davis, Esq., a former member of the Hospital Board of Directors, made racially charged remarks to Dr. Bhatt at a 1997 hearing concerning the Centerville Clinic employee who was charged with stealing Dr. Bhatt's prescription pads. According to Dr. Bhatt, Davis told him that he "can't speak English, can't express himself, and that he's from India and should just go home." Davis ceased having any affiliation with the Hospital in December 2000, and did not take part in any of the proceedings that resulted in the revocation of Dr. Bhatt's privileges.

II. LEGAL STANDARD

Summary judgment is required on an issue or a claim when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Saldana v. Kmart Corp.,* 260 F.3d 228, 231-32 (3d Cir.2001). An issue is "material" only if the factual dispute "might affect the outcome of the suit under the governing law." *Anderson,* 477 U.S. at 248.

"Summary judgment procedure is properly regarded not as a disfavorable procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett,*

477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (internal quotation marks omitted). The parties have a duty to present evidence; neither statements of counsel in briefs nor speculative or conclusory allegations satisfy this duty. *Ridgewood Bd. of Educ. v. N.E. for M.E.,* 172 F.3d 238, 252 (3d Cir.1999). After the moving party has filed a properly supported motion, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e). The non-moving party must make a showing sufficient to establish the existence of each element essential to her case on which she will bear the burden of proof at trial. *Celotex,* 477 U.S. at 322-23. The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the non-moving party on that issue. *See Anderson,* 477 U.S. at 249.

III. ANALYSIS

***16** Brownsville seeks summary judgment claiming that Dr. Bhatt has failed to establish a *prima facie* case of racial discrimination under § 1981. Brownsville also claims that even had Dr. Bhatt established a *prima facie* case, he has not rebutted with credible evidence of pretext the Hospital's legitimate, non-discriminatory reason for revoking his privileges or taking other adverse actions against him. Finally, Brownsville argues that it is immune under the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. § 11101 *et seq.,* from any damage award on Dr. Bhatt's breach of contract claims regarding the enforcement of its By-Laws.

Dr. Bhatt disputes the Hospital's assertions, arguing that he has set forth sufficient facts from which a factfinder could infer that race, and not performance, was the motivating factor in Brownsville's decision to revoke his privileges. Dr. Bhatt also argues that the other allegedly adverse actions taken against him by the Hospital were also motivated by his race. Finally, Dr. Bhatt contends that the HCQIA does not immunize the Hospital from his state law breach of contract claims because of defects in Brownsville's Fair Hearing Procedure.

A. § 1981 Claim

Section 1981, as amended by the Civil Rights Act of 1991, provides:

> [a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licences, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a). The coverage of the statute "includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). These rights are protected from encroachment by both private and state actors. *See* 42 U.S.C. § 1981(c). Although § 1981 does not explicitly mention race, it prohibits racial discrimination. *See Saint Francis College v. Al-Khazraji,* 481 U.S. 604, 609, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987).

The parties agree that Dr. Bhatt's § 1981 claims implicate the burden-shifting framework the Supreme Court articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). While Dr. Bhatt's brief refers to "direct evidence" of the Hospital's alleged discriminatory intent, it does so in the context of the *McDonnell Douglas* burden-shifting analysis, and, as such, does not appear to invoke a mixed-motive theory.

The Court of Appeals for the Third Circuit has summarized the proper application of the *McDonnell Douglas* framework as follows:

> Briefly summarized, the *McDonnell Douglas* analysis proceeds in three stages. First, the plaintiff must establish a prima facie case of discrimination. If the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Finally, should the defendant carry this burden, the plaintiff then must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the

> defendant were not its true reasons, but were a pretext for discrimination. While the burden of production may shift, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

***17** *Jones v. School Dist. of Philadelphia,* 198 F.3d 403, 410 (3d Cir.1999) (alteration in original) (citations omitted). In the instant case, Dr. Bhatt presents two distinct claims of racial discrimination. First, he claims that the revocation of his privileges was motivated by his race instead of his performance. In addition, Dr. Bhatt claims that the Hospital discriminated against him by interfering with his practice of medicine by, *inter alia,* refusing to allow him to retrieve mail, including patient test results, after his privileges were suspended.

1. Prima Facie Case

The Court of Appeals for the Third Circuit has stated in the context of a § 1981 claim that "the elements of a *prima facie* case depend on the facts of the particular case." *Jones,* 198 F.3d at 411. Where, as here, the plaintiff is a non-employee physician complaining of allegedly discriminatory acts of a hospital with whom he is affiliated, the elements of a *prima facie* case for a § 1981 claim are: (1) that the plaintiff belongs to an "identifiable class [ ] of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics," *Saint Francis College,* 481 U.S. at 613; (2) the defendant intended to discriminate against plaintiff on that basis; and (3) defendant's racially discriminatory conduct abridged a contract or right enumerated in § 1981(a). *See, e.g., Pamintuan v. Nanticoke Memorial Hosp., Inc.,* No. C.A. 965-233-SLR, 1998 WL 743680 at *12 (D.Del.1998), *aff'd,* 192 F.3d 378 (3d Cir.1999).[5]

The parties do not dispute that as a native of India, Dr. Bhatt satisfies the first element of his *prima facie* case. Nor do the parties dispute that the allegedly discriminatory revocation of Dr. Bhatt's staff privileges at the Hospital and the allegedly discriminatory treatment of his patients, if true, would interfere with a right protected by § 1981. Brownsville disputes that Dr. Bhatt has established that any of these allegedly discriminatory activities were undertaken because of his race.

To establish the second element of his *prima facie* case, Dr. Bhatt "must point to facts of record which, if proved, would 'establish that [defendant's] actions were racially motivated and intentionally discriminatory,' or, at least, 'support an inference that defendants intentionally and purposefully discriminated' against [him] on the basis of [his] race." *Pamintuan,* 1998 WL 743680, at *13 (citations omitted). In an effort to meet his burden on this element regarding both of his § 1981 claims, Dr. Bhatt points to two statements evidencing bias against Indian doctors that he claims were made by persons affiliated with the Hospital. Dr. Bhatt alleges that in 2000 he approached Dr. Ewald, who was then Chief of Staff at the Hospital, for advice after his medical charts began to be scrutinized, and that Dr. Ewald responded to his request for help by stating words to the effect of: "Help? You should have been out of here a long time ago, you Indian." Though Dr. Ewald has denied ever making this statement, the Court accepts Dr. Bhatt's account of this conversation as true for purposes of this summary judgment motion.

***18** The second statement cited by Dr. Bhatt was allegedly made during a 1999 proceeding regarding the theft of Dr. Bhatt's prescription pads at the Centerville Clinic. At that hearing, the attorney for one of the employees accused of the theft was James Davis, who later served on Brownsville's Board of Directors. Dr. Bhatt alleges that during the 1999 proceeding, attorney Davis told him that "he can't speak English, he can't express himself, and that he's from India and should just go home." Though Mr. Davis denies ever making this statement, the Court accepts Dr. Bhatt's account as true for the purposes of this summary judgment motion. Nevertheless, it is undisputed that attorney Davis was neither a member of the Hospital's Board of Directors at the time Dr. Bhatt's privileges were revoked, nor was he a member of the Board at the time of the alleged actions which Dr. Bhatt claims interfered with his practice of medicine. Dr. Bhatt has produced no other evidence of discriminatory intent, and therefore the Court must now consider whether this evidence is sufficient to establish the existence of circumstances giving rise to an inference that the Hospital's alleged interference with his practice of medicine or the revocation of his privileges were motivated by racial animus. These issues are addressed in turn.

a. Sufficiency Of Evidence Of Intent To Discriminate On The Basis Of Race Regarding Actions Allegedly Detrimental To Dr. Bhatt's Practice Of Medicine Including Mistreating Patients, Delaying Test Results And Withholding Mail.

Regarding Dr. Bhatt's claims that the Hospital interfered with his practice of medicine by treating his patients poorly, delaying test results, and withholding his mail, there is insufficient evidence to raise an inference that these actions were motivated by his race. Dr. Bhatt has proferred no specific evidence of any patient being mistreated by the Hospital, instead attempting to rely upon his own generalized deposition testimony claiming that his patients were mistreated as soon as his privileges were suspended in 2001. Dr. Bhatt has produced no evidence that Dr. Ewald or attorney Davis were in any way involved with the alleged decision of the Hospital to mistreat his patients, delay test results, or to refuse to admit his patients to the Hospital. Moreover, Dr. Bhatt admits to not knowing who was in charge of the alleged decision of the Hospital not to forward his mail after his privileges were suspended. The only documentary evidence on the issue is a letter from Ms. Sara Poling, CEO of the Hospital, which advised Dr. Bhatt that she conveyed his concerns regarding mail delivery to the appropriate persons within the Hospital in an effort to resolve "any potential problems which may have been caused." Dr. Bhatt offers no evidence that Ms. Poling was in any way biased against Indians or anyone else.

Under these circumstances, the Court cannot find any evidence that would create an inference that these allegedly discriminatory acts by the Hospital were motivated by Dr. Bhatt's race. Even accepting that all of these adverse actions occurred and impacted Dr. Bhatt's practice of medicine, there is no evidence that racial bias played any role in the Hospital's conduct. Dr. Bhatt has not established any link whatsoever between the two discriminatory statements of Dr. Ewald and attorney Davis and the adverse actions by Brownsville. Moreover, Dr. Bhatt has produced no evidence that any non-Indian doctors whose privileges were revoked by the Hospital were treated in a more favorable manner than was he. As such, the Court finds that Dr. Bhatt has not stated a *prima facie* case of racial discrimination under § 1981 regarding the alleged interference with his practice of medicine.

b. Sufficiency of Evidence Of Intent To Discriminate On The Basis Of Race Regarding The Revocation Of Dr. Bhatt's Privileges

***19** Dr. Bhatt's evidence of intent to discriminate is slightly more persuasive when considered in relation to the Hospital's revocation of his privileges. It is undisputed that Dr. Ewald was the Chief of Staff at the time the Hospital conducted Dr. Bhatt's review. By virtue of his position, Dr. Ewald was also the Chair of the Medical Executive Committee which made the initial recommendation to revoke Dr. Bhatt's privileges. As the Chair of the MEC, Dr. Ewald also would have been the person to present its recommendation to the Board of Directors. Assuming that Dr. Ewald made the discriminatory statement attributed to him by Dr. Bhatt, it may be sufficient to overcome Dr. Bhatt's relatively light burden of establishing a *prima facie* case of discrimination. Unlike Dr. Bhatt's other § 1981 claim, Dr. Ewald was at least connected with the events giving rise to the revocation of Dr. Bhatt's privileges. Despite the fact that this alleged statement occurred between one and two years before the MEC recommended that Dr. Bhatt's privileges be revoked, the Court will give Dr. Bhatt the benefit of the doubt regarding this issue and will proceed to the next step in the *McDonnell Douglas* analysis.

2. Pretext Analysis Regarding The Hospital's Proffered Legitimate, Non-Discriminatory Reasons For Revoking Dr. Bhatt's Privileges

To rebut Dr. Bhatt's allegations that his privileges were revoked because of his race, the Hospital cites significant issues concerning Dr. Bhatt's professional judgment, quality of care, lack of clinical judgment, and lack of understanding of a disease process and/or course of treatment which would be consistent with proper patient care. The parties do not dispute that these proffered reasons qualify as legitimate, non-discriminatory bases for revoking a physician's privileges.

To survive summary judgment when the defendant has articulated a legitimate, non-discriminatory reason for its action, a plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the defendant's action. *Fuentes v. Perskie,* 32 F.3d 759, 764 (3d Cir.1994). The plaintiff must point to "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the [defendant's] proffered legitimate reasons [such] that a reasonable factfinder could rationally find them 'unworthy of credence' " and hence infer that the proffered nondiscriminatory reason "did not actually motivate the [defendant's] actions." *Simpson v. Kay Jewelers, Inc.,* 142 F.3d 639, 644-45 (3d Cir.1998) (citations omitted). To

show that discrimination was more likely than not a cause of the defendant's action, the plaintiff must point to evidence with sufficient probative force that a factfinder could conclude, by a preponderance of the evidence, that race was a motivating or determinative factor in the decision. *See Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1111 (3d Cir.1997). [6]

***20** In the instant case, none of the evidence proffered by Dr. Bhatt is sufficient to meet his burden to show that the Hospital's stated reasons for revoking his privileges were pretextual. As an initial matter, the alleged statement of Dr. John Ewald cannot suffice. Although Dr. Ewald was the Chair of the MEC that initially recommended that Dr. Bhatt's privileges be revoked, the final decision to revoke Dr. Bhatt's privileges was made only after a full hearing before the FHC, an appeal to the ARC, and consideration by the Hospital's Board of Directors. Significantly, Dr. Ewald was not a member of any of these three groups. Although Dr. Ewald testified before the FHC and was subject to cross-examination by Dr. Bhatt's counsel, at no time during the FHC hearing did the issue of racial bias ever surface, and Dr. Ewald was never questioned regarding the racist statement he allegedly uttered years before. As such, it qualifies as a stray remark by a non-decisionmaker or a decisionmaker unrelated to the decision process, which is afforded little evidentiary weight, particularly because it was "made temporally remote from the date of *decision." Ezold v. Wolf, Block, Schorr and Solis-Cohen,* 983 F.2d 509, 545 (3d Cir.1993). *See also Gomez v. Allegheny Health Services, Inc.*, 71 F.3d 1079, 1085 (3d Cir.1995); *Fuentes,* 32 F.3d at 767. The alleged statements of attorney Davis are likewise immaterial to the pretext analysis, as he was not even remotely connected to the Brownsville decisionmakers at the time Dr. Bhatt's privileges were revoked.

Dr. Bhatt next argues that the Hospital's proffered reasons for revoking his privileges were a pretext for discrimination because he was the only doctor "singled out" by the Hospital for patient care issues, even though many doctors provided care to the patients at issue. This argument is likewise unpersuasive because Dr. Bhatt has offered no evidence regarding the other physicians who cared for these patients that would indicate that they avoided review because of their race. Moreover, Dr. Bhatt has offered no evidence that any of these other doctors had patient care problems of the magnitude and frequency as did he.

Dr. Bhatt also argues that the testimony of his expert witness provides evidence of pretext because Dr. Haus opined that the patient care problems attributed to Dr. Bhatt were ridiculous and fabricated. The Court notes that Dr. Haus' opinion stands in opposition to some fifteen other physicians who reviewed Dr. Bhatt's charts and found his care to be substandard. Indeed, the independent medical expert hired by the Hospital to review Dr. Bhatt's charts expressly found that "inappropriate fluid management was a significant contributor" to the death of one patient. Moreover, Dr. Singh, himself an Indian doctor at the Hospital, testified that Dr. Bhatt had improperly cared for another patient by ordering "unnecessary testing and treatment which killed her."

Dr. Bhatt also cites the testimony of Dr. Haus which disputes the medical findings of the three-level review process Dr. Bhatt underwent before his privileges were revoked. Under these circumstances, Dr. Haus' testimony can, at best, establish a difference of opinion between doctors regarding patient care. While Dr. Bhatt may quarrel with the Hospital's conclusions regarding these particular patients, the *bona fides* of the Hospital's determinations cannot be doubted in light of its reliance on the reasoned opinions of so many reviewing doctors, including other doctors of Dr.. Bhatt's race. As such, the evidence offered by Dr. Bhatt could not persuade a reasonable factfinder to conclude, by a preponderance of the evidence, that the Hospital's proffered legitimate reasons for revoking his privileges were mere pretext. Accordingly, the Hospital is entitled to summary judgment.

B. Health Care Quality Improvement Act

***21** The remaining counts of Dr. Bhatt's complaint assert claims for breaches of contract regarding the Hospital By-Laws. Brownsville asserts that it is immune from all such claims under the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. § 11101 *et seq.* Congress passed the HCQIA "to improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior." H.R.Rep. No. 903, 99th Cong., 2d Sess. (Sept. 26, 1986), *reprinted in* 1986 U.S.C.C.A.N. at 6384. Congress found that incompetent physicians could be identified through

"effective professional peer review," which it decided to encourage by granting limited immunity from suits for money damages to participants in peer review actions. 42 U.S.C. §§ 11101(2), 11134. A "professional review action" must satisfy certain standards in order to provide immunity to the participants: [7]

> For purposes of the protection set forth in Section 11111(a) of this title, a professional review action must be taken-
>
> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).
>
> A professional review action shall be *presumed to have met the preceding standards* necessary for the protection set out in Section 11111(a) of this title *unless the presumption is rebutted by a preponderance of the evidence.*

42 U.S.C. § 11112(a) (emphasis added). The statutory presumption that a peer review action is valid unless proved otherwise results in an "unusual standard" for granting summary judgment to a defendant, as "the *plaintiff* bears the burden of proving that the peer review process was *not* reasonable." *Matthews v. Lancaster General Hospital,* 87 F.3d 624, 633 (3d Cir.1996) (internal quotations and citations omitted) (emphasis in original). In this way, "the HCQIA places a high burden on a physician to demonstrate that a professional review action should not be afforded immunity." *Gordon v. Lewistown Hospital,* 423 F.3d 184, 202 (3d Cir.2005) (citing 42 U.S.C. § 11112(a)).

Dr. Bhatt asserts three arguments against HCQIA immunity on his state law claims. First, he argues that § 11112(a) is not satisfied in this case because various physicians provided care to the patients whose charts were reviewed, yet Dr. Bhatt was the only one held responsible. Dr. Bhatt also asserts that no other physician made any objection to the care he was providing to these patients at the time that the care was actually provided, and that none of the procedures that are to be followed in the event of an inappropriate admission to the Hospital was ever triggered. In addition, he cites the testimony of his expert witness, Dr. Haus, who opined that the charges against Dr. Bhatt were ridiculous and fabricated. Dr. Bhatt argues that this evidence shows that the Hospital could not have reasonably concluded that taking professional action against him would actually restrict incompetent behavior or protect patients, as is required by the first prong of § 11112(a), nor was the Hospital's decision to revoke his privileges made with the reasonable belief that such action was warranted by the known facts, as is required by the fourth prong of § 11112(a). Dr. Bhatt also argues that the third prong of § 11112(a) has not been satisfied because of Brownsville's refusal to call certain physician witnesses requested by Dr. Bhatt's counsel, its refusal to procure state ranking information regarding Dr. Bhatt, and its decision to appoint three physicians to the FHC who were affiliated with Centerville Clinic. Dr. Bhatt claims that these facts show that he was deprived of his procedural rights, which prevented him from receiving a truly fair hearing.

***22** The Court must review the record in this case "to determine whether [Dr. Bhatt] satisfied his burden of producing evidence that would allow a reasonable jury to conclude that the Hospital's peer review disciplinary process failed to meet the standards of the [HCQIA]." *Matthews,* 87 F.3d at 633 (citation omitted). Thus, the Court will "undertake the inquiry mandated by each of § 11112(a)'s four prongs to determine" if summary judgment in favor of the Hospital is proper based upon HCQIA immunity. *Id.* at 634.

1. Reasonable Belief That The Action Was In Furtherance Of Quality Health Care

The Third Circuit has held that the first prong of the § 11112(a) inquiry requires the application of an "objective standard" in determining whether a professional review action was taken in a reasonable belief that the action was in furtherance of quality health care. *Matthews,* 87 F.3d at 635. Accordingly, any subjective bad faith by Brownsville is immaterial to the inquiry. *Id.* Rather, the standard is satisfied "if the reviewers, with the information available to them at the time of the professional review action,

would reasonably have concluded that their actions would restrict incompetent behavior or would protect patients." *Id.*

The totality of the circumstances surrounding the professional review action taken against Dr. Bhatt reveal that the Hospital held a reasonable belief that revocation of his staff privileges would further quality health care. Prior to any recommendation to that effect, the URC first voted to send several charts of Dr. Bhatt's patients for an impartial external review after discovering anomalies in the care he provided. The MEC then reviewed this decision and voted to adopt the URC's recommendation. The charts were then sent to Dr. Roberts for review. Dr. Roberts' report identified several major deficiencies in the care provided to these patients by Dr. Bhatt. Upon consideration of Dr. Roberts' report and the reports of the other Hospital committees, the MEC then voted to recommend revocation of Dr. Bhatt's privileges. At the FHC hearing, Dr. Roberts' report was presented along with the testimony of various Brownsville physicians which further supported a finding that Dr. Bhatt had provided substandard care to these patients. Dr. Bhatt has produced no evidence that any bias against him, racial or otherwise, actually entered into the decisionmaking process, nor has he shown that the Hospital considered any evidence that was unrelated to the quality of health care that he had provided in rendering its final decision.

The Court finds unavailing Dr. Bhatt's argument that the Hospital's failure to investigate the conduct of the other doctors involved with the care of the patients in question renders unreasonable any belief that revoking his privileges would further quality health care. Dr. Bhatt appears to argue that removing him from the Hospital could not further quality health care because the other doctors who cared for the same patients were not investigated or removed. This argument is logically flawed. As an initial matter, accepting this argument would require the Court to conclude that no hospital could be immune from damages for professional review actions regarding any one incompetent doctor, so long as other arguably incompetent doctors had not yet been subjected to such actions. Nothing in the HCQIA or its legislative history supports such a counter-intuitive approach. Indeed, as the Third Circuit stated in *Pamintuan,* "nothing in the statute, legislative history, or case law suggests the competency of other doctors is relevant in evaluating whether [the hospital] conducted a reasonable investigation into [a doctor's] conduct." *Pamintuan,* 192 F.3d at 389 (citing *Smith v. Ricks,* 31 F.3d 1478, 1486 (9 th Cir.1994) (alteration in original). Rather, common sense dictates that regardless of how many arguably incompetent doctors may have privileges at a given hospital, the removal of any one them advances the cause of quality health care.

***23** Dr. Bhatt's other arguments that the Hospital had no reasonable belief that the action taken against him would further quality health care are likewise unavailing. Dr. Bhatt notes that his treatment of the patients at issue did not trigger internal Hospital controls designed to catch improper care. This contention is irrelevant to the question of whether the Hospital reasonably believed that suspending Dr. Bhatt's privileges would further quality health care. Likewise, the fact that one witness, Dr. Haus, testified that Dr. Bhatt's care was adequate does not render unreasonable the Hospital's belief that revoking his privileges would further quality health care. Indeed, the Hospital's acceptance of the report of an independent outside reviewer with impeccable credentials is eminently reasonable, and the mere fact that Dr. Haus disagrees with that report does not render it otherwise. *See, e.g., Matthews,* 87 F.3d at 636 n. 9 (conflicting expert reports do not establish unreasonableness of belief that quality of health care is being improved where no evidence exists that report relied upon is "so obviously inadequate or inaccurate" that reliance on it was itself unreasonable).

Because Dr. Bhatt has not produced sufficient evidence to rebut the statutory presumption that the Hospital's actions were taken in the reasonable belief that they would further quality health care, the Court finds that the Hospital has met the requirements of the first prong of § 11112(a).

2. Reasonable Effort To Obtain The Facts

Dr. Bhatt argues that the Hospital's decisions not to review the performance of other doctors or his own state ranking information were unreasonable. The Third Circuit has determined that the proper standard for reviewing the reasonableness of a factual investigation under the HCQIA is "whether the totality of the process leading up to [the professional review action] evidenced a reasonable effort to obtain the facts of the matter." *See Matthews,* 87 F.3d at 637. It is important to note that a "[p]laintiff is entitled to a reasonable investigation

under the [HCQIA], not a perfect investigation." *Sklaroff v. Allegheny Health Educ. Research Found.*, 1996 WL 383137, at *8 (E.D.Pa. July 8, 1996), *aff'd*, 118 F.3d 1578 (3d Cir.1997).

After review of the totality of Brownsville's investigative process, the Court is satisfied that its efforts were reasonable. The record in this case reveals that two Hospital committees, numerous Hospital physicians, and one independent reviewer all contributed to the investigation of the care that Dr. Bhatt was providing prior to the decision to revoke his privileges. To further this investigation, the Hospital established an MEC subcommittee dedicated to the task of discerning the facts surrounding these incidents. Though Dr. Bhatt believes that the testimony of more witnesses and the introduction of his state ranking information may have helped his case, the absence of such evidence does not transform the detailed and multi-layered review of patient charts conducted by the Hospital into an unreasonable effort.

***24** Because Dr. Bhatt bears the burden of rebutting the statutory presumption that the fact-finding efforts were reasonable and has not produced sufficient evidence to overcome that presumption, the Court finds that the Hospital has met the requirements of the second prong of § 11112(a).

3. Adequate Notice And Hearing Procedures

A defendant can satisfy the third prong of § 11112(a) of the HCQIA in two ways. First, it can show that it complied with all of the requirements of § 11112(b), which creates a "safe harbor." *Brader*, 167 F.3d at 841. Second, it can show that the notice and procedures afforded were fair under the circumstances. *See* 42 U.S.C. § 11112(a)(3).

The Defendant may qualify for "safe harbor" protection by establishing that the notice of the proposed action, the notice of hearing, and the conduct of the hearing and notice conform to the requirements of § 11112(b), except to the extent that any of these protections have been waived.

a. Notice Of Proposed Action

Regarding the notice of the proposed action, the statute requires

> (1) Notice of proposed action
>
> The physician has been given notice stating-
>
> (A) (i) that a professional review action has been proposed to be taken against the physician,
>
> (ii) reasons for the proposed action,
>
> (B) (i) that the physician has the right to request a hearing on the proposed action,
>
> (ii) any time limit (of not less than 30 days) within which to request such a hearing, and
>
> (C) a summary of the rights in the hearing under paragraph (3).

42 U.S.C. § 11112(b)(1). The undisputed evidence of record in this case reveals that the Hospital sent a letter dated December 13, 2001 that: (1) informed Dr. Bhatt of the MEC's decision to recommend that his privileges be revoked; (2) informed Dr. Bhatt that the recommendation was because "the ongoing monitoring of the care rendered by you at Brownsville Hospital reveals a pattern of care which is substantially below any reasonable or acceptable standard of care;" (3) informed Dr. Bhatt of his right to request a hearing and the deadline for doing so; and (4) enclosed a copy of the Hospital's Fair Hearing Plan describing his rights regarding the hearing. As such, the notice of proposed action given to Dr. Bhatt not only satisfied the safe harbor requirement of § 11112(b)(1), but was fair under the circumstances. [8]

b. Notice Of Hearing

Regarding the notice of hearing, the safe harbor provision of the HCQIA states:

> (2) Notice of hearing
>
> If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating-
>
> (A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and
>
> (B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

42 U.S.C. § 11112(b)(2). The parties do not dispute that Dr. Bhatt made a timely request for a hearing and that

Brownsville informed him of the time and date of the scheduled hearing. The undisputed record evidence also shows that the Hospital acquiesced to the request of Dr. Bhatt's counsel to postpone the hearing twice from the original date of January 31, 2002 until May 16, 2002. Moreover, the Hospital informed Dr. Bhatt's lawyer of the patients whose cases would be discussed at the hearing. The time given was sufficient for Dr. Bhatt to have an expert witness review the appropriate patient charts and prepare a report regarding the care provided. The record is devoid of Dr. Bhatt or his counsel making any objection to the notice of hearing provided to them. Thus, even though the Hospital did not provide Dr. Bhatt with notice of the witnesses expected to testify and thus cannot claim "safe harbor" for the notice of hearing, *see* 42 U.S.C. § 11112(b)(2)(B), the Court finds that the notice given to Dr. Bhatt was fair under the circumstances. The letters and conversations between the Hospital and Dr. Bhatt's lawyers unquestionably conveyed the information needed for Dr. Bhatt to appear and present an informed defense to the Hospital's allegations.

c. Conduct Of Hearing And Notice

***25** The HCQIA grants safe harbor protection to a health care entity regarding the conduct of a hearing when the following conditions and safeguards are in place:

> (3) Conduct of hearing and notice
>
> If a hearing is requested on a timely basis under paragraph (1)(B)-
>
> (A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)-
>
> (i) before an arbitrator mutually acceptable to the physician and the health care entity,
>
> (ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or
>
> (iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;
>
> (B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;
>
> (C) in the hearing the physician involved has the right-
>
> (i) to representation by an attorney or other person of the physician's choice,
>
> (ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,
>
> (iii) to call, examine, and cross-examine witnesses,
>
> (iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and
>
> (v) to submit a written statement at the close of the hearing; and
>
> (D) upon completion of the hearing, the physician involved has the right-
>
> (i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and
>
> (ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.
>
> A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.

42 U.S.C. § 11112(b)(3). The undisputed record evidence in this case establishes that the hearing before the FHC was conducted by a hearing officer appointed by the Hospital who was not in economic competition with the physician involved. *See* 42 U.S.C. § 11112(b)(3)(A)(ii). In addition, the FHC appointed by the Hospital to evaluate the evidence in Dr. Bhatt's hearing was comprised of six physicians, and the record contains no evidence that any of them were Dr. Bhatt's direct economic competitors. *See* 42 U.S.C. § 11112(b)(3)(A)(iii).

Dr. Bhatt argues that the composition of the FHC was improper because three of the appointed doctors were also affiliated with Centerville Clinic, with whom Dr. Bhatt had a dispute after his wife sued her treating psychiatrist at that facility after their extramarital affair. However, the statute only prohibits physicians who are economic competitors from service on such a review panel. Therefore, Dr. Bhatt's arguments on this issue are

unavailing, and the Court finds that the Hospital has satisfied the requirements of § 11112(b)(3)(A).

***26** The undisputed record evidence also establishes that Dr. Bhatt was represented by an attorney at the hearing and was permitted to call and cross-examine witnesses. A record was made of the proceedings, which was available to Dr. Bhatt. Dr. Bhatt was permitted to introduce evidence at the hearing, including his own testimony and the testimony and report of his expert witness, Dr. Haus.[9] After the hearing, both parties submitted written statements. Accordingly, the Court finds that the Hospital has satisfied all of the requirements of § 11112(b)(3)(c) in conducting the hearing.

The record also establishes that, after the FHC had heard all of the evidence and deliberated, Dr. Bhatt was provided with an explicit statement of the basis for the FHC's recommendation to revoke his privileges. Dr. Bhatt was then granted an appellate hearing regarding the FHC decision, in which he was again represented by counsel and was permitted to make an oral argument before the ARC. After the ARC affirmed the FHC recommendation to revoke Dr. Bhatt's privileges, the recommendation was considered by the Board of Directors. Dr. Bhatt then was notified of the Board's decision to affirm the findings of the MEC, as recommended by the ARC. For these reasons, the Court finds that the Hospital provided Dr. Bhatt with a hearing that was fair under the circumstances, and has satisfied the requirements of § 11112(b)(3)(D).

Because the Hospital has established that the procedure used to conduct the hearing regarding the professional review of Dr. Bhatt was fair under the circumstances and satisfied all of the requirements of § 11112(b), the Court finds that Dr. Bhatt has not produced sufficient evidence such that a reasonable trier of fact could conclude that the Hospital did not afford him adequate notice and hearing procedures. Therefore, the Court finds that Brownsville has met the requirements of the third prong of § 11112(a).

4. Reasonable Belief That The Action Was Warranted By Known Facts

As the Third Circuit has recognized, analysis of the fourth prong of § 11112(a) "closely tracks" the analysis of its first prong. *See Brader,* 167 F.3d at 843. In reviewing the reasonableness of the Hospital's belief that the professional review action was warranted, the Court is mindful of the Third Circuit's statement that "[t]he intent of [the HCQIA] was not to disturb, but to reinforce, the preexisting reluctance of courts to substitute their judgment on the merits for that of health care professionals and of the governing bodies of hospitals in an area within their expertise." *Brader,* 167 F.3d at 843 (alteration in original).

As previously outlined in Section III(B)(1), *supra,* all of Dr. Bhatt's arguments regarding the reasonableness of Brownsville's decision to revoke his privileges pertain to evidence that he believed should have been considered more heavily by the Hospital in making its decision. However, the undisputed evidence of record shows that the outside reviewer, Dr. Roberts, and several Brownsville physicians all found that Dr. Bhatt's treatment of patients was well below the acceptable standard of care. Indeed, the deaths of two patients were attributed to the care provided by Dr. Bhatt. Though Dr. Bhatt's expert witness disagrees with the conclusions of the other physicians, this fact is insufficient to rebut the statutory presumption that the Hospital's decision was based upon a reasonable belief that it was warranted under the facts known. *See Brader,* 167 F.3d at 843; *Matthews,* 87 F.3d at 638. Furthermore, there is no evidence, apart from Dr. Haus' contrary conclusions, that the report of Dr. Roberts was unreliable.

***27** For the foregoing reasons, the Court cannot conclude that Dr. Bhatt has produced sufficient evidence from which a trier of fact could find by a preponderance of the evidence that Brownsville did not act with a reasonable belief that suspending his privileges was warranted by the known facts. Accordingly, Dr. Bhatt has failed to rebut the statutory presumption of validity that applies to the decision to revoke his privileges, and Brownsville has satisfied the requirements of the fourth prong of § 11112(a).

5. Summary Of HCQIA Immunity

Because Dr. Bhatt has failed to rebut the statutory presumptions regarding any of the prongs of § 11112(a), the Court finds that the Hospital is entitled to immunity from monetary damages under the HCQIA on all of Dr. Bhatt's state law claims. Therefore, summary judgment is proper on these claims as well.

An appropriate Order follows.

All Citations

Not Reported in F.Supp.2d, 2006 WL 167955

Footnotes

1 The Court notes that Brownsville General Hospital, like other community hospitals in the area, suffered a steady financial decline during the time since the filing of this lawsuit. The Hospital was sold in June of 2005 to a group of private physicians who operated it as a for-profit business under the name "Tara Hospital" until it closed on January 8, 2006. *See* Christopher Snowbeck & Caitlin Cleary, *Hospital closing symptomatic of small-town medicine,* Pittsburgh Post-Gazette, Jan. 10, 2006, *available at* http://www.post-gazette.com/pg/06010/635364.stm.

2 Although the Hospital alleges that care issues existed as to two patients, Dr. Bhatt asserts that only one of his patients was reviewed. Dr. Bhatt denies any misfeasance concerning the patient at issue, but does not deny that the issue was brought before the MEC.

3 To protect patient privacy, the patients discussed at the hearing were identified by the parties as patients A, B, C, D, E, F, G, H, and I. This Opinion refers to these patients by the same designations. Because Brownsville's Statement of Undisputed Material Facts does not cite any substantive evidence presented to the FHC regarding Patient I, however, the Court will only consider the facts of record regarding Patients A-H.

4 As the Court noted previously, *see* n. 1 *supra,* Dr. Vajjhala's fears regarding the decline of the Hospital came to fruition when the Hospital was sold to private physicians in June of 2005 and was subsequently closed on January 8, 2006.

5 Plaintiff has advanced what he refers to as "the most common formulation of the *prima facie* elements" as requiring a showing that:

> (1) Plaintiff is a member of a protected class;
> (2) Plaintiff was qualified for the position in question;
> (3) Plaintiff was subjected to an adverse employment action; and,
> (4) Plaintiff was subjected to the adverse employment action under circumstances giving rise to an inference of discrimination.

The foregoing standard is inapplicable to the instant case because Dr. Bhatt has not asserted that he was an "employee" of the Hospital. Therefore, the Court will instead apply the three element standard accepted by the Third Circuit in *Pamintuan.*

6 The Court recognizes that *Keller, Simpson* and *Fuentes* are not racial discrimination cases, but the standards articulated therein have also been applied by the Third Circuit to race discrimination claims. *See, e.g., Jones,* 198 F.3d at 413.

7 The HCQIA defines a "professional review action" as "an action or recommendation of a professional review body which is taken or made in the conduct of a professional review activity ... which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of a physician." 42 U.S.C. § 11151(9).

The HCQIA defines a "professional review activity" as "an activity of a health care entity with respect to an individual physician-(A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity, (B) to determine the scope or conditions of privileges or membership, or (C) to change or modify such privileges or membership." 42 U.S.C. § 11151(10).

The parties do not dispute that the adverse actions taken against Dr. Bhatt by the Hospital qualify as "professional review actions" under the statute.

8 The Court recognizes that § 11112(b)(1)(B)(ii) states that a doctor must be informed of the thirty day deadline for requesting a hearing. The undisputed record evidence in this case shows that the Hospital did not comply with this requirement as it gave Dr. Bhatt only fourteen days to request his hearing. However, because Dr. Bhatt timely requested a hearing and did not raise any objection that the notice was inadequate, the Court deems this issue waived. *See* 42 U.S.C. § 11112(b) (a healthcare entity is "deemed to have met the adequate notice and hearing requirement ... if the following conditions are met (or are waived voluntarily by the physician)"). Regardless, the Court finds that even if this technical defect disqualified the Hospital from safe harbor protection, the notice was fair under the circumstances. *See* 42 U.S.C. § 11112(a)(3).

9 Dr. Bhatt has argued that his ability to present evidence was hindered by the Hospital because the other doctors involved in the care of the patients who were discussed at the hearing were not called to testify and Dr. Bhatt's state ranking information was not obtained. However, Dr. Bhatt's evidence that these requests were ever made to the Hospital is viewed skeptically by the Court, as it consists of a double-hearsay statement that was allegedly made by Dr. Ewald to Dr.

Bhatt's counsel, who then allegedly told Dr. Haus (who is the declarant of the statement). Regardless, even accepting this allegation as true, the Court views this request as akin to a request for a "comparative review" of Dr. Bhatt's performance relative to that of other physicians at the Hospital, which the Third Circuit has determined is not required for a professional review action to be valid. *See Pamintuan,* 192 F.3d at 389.

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Recommended Citation: Amy Howe, *Judge Thomas Hardiman – "Dark horse" Supreme Court candidate with solid conservative credentials*, SCOTUSBLOG (Jan. 30, 2017, 5:23 PM), http://www.scotusblog.com/2017/01/thomas-hardiman-dark-horse-supreme-court-candidate-solid-conservative-credentials/

REFLECTIONS ON THE WESTERN DISTRICT OF PENNSYLVANIA

Select materials on United Stated District Court Judge Donetta Ambrose

Jack FLAHERTY, Jr., Jack Flaherty, Sr. and Carol Flaherty, parents and natural guardians on their own behalf and their son, Jack, Jr., Plaintiffs,

v.

KEYSTONE OAKS SCHOOL DISTRICT, Dr. Carl DeJulio, Superintendent of Keystone Oaks School District, Scott Hagy, Principal of Keystone Oaks High School, Alex Covi, Assistant Principal of Keystone Oaks High School, Joseph Perry, Athletic Director of Keystone Oaks High School and Jeff Sieg, Athletic Coach of Keystone Oaks High School, Defendants.

Civil Action No. 01-586.

United States District Court,
W.D. Pennsylvania.

Feb. 26, 2003.

Parents brought action against school district on behalf of their son, alleging that certain policies in school's student handbook were unconstitutionally vague and overbroad in violation of First and Fourteenth Amendments as well as state constitution. Parents moved for summary judgment. The District Court, Ambrose, Chief Judge, held that: (1) breadth of handbook policies relating to discipline, student responsibility, and technology were overreaching in violation of students' free speech rights; (2) even if handbook policies were not overbroad, they were unconstitutionally vague in definition and as applied; (3) handbook policies which did not geographically limit school official's authority to discipline expressions that occurred on school premises or at school-related activities were overbroad and vague in violation of students' First Amendment free speech rights.

Motion granted.

1. Constitutional Law ⇐82(4)

A statute may be declared unconstitutional when it is sufficiently overbroad; an "overbroad statute" is one that is designed to punish activities that are not constitutionally protected, but which prohibits protected activities as well.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇐82(4)
Statutes ⇐47

Only a statute that is substantially overbroad may be invalidated on its face; in a facial challenge to overbreadth and vagueness of a law, a court must determine whether the enactment reaches a substantial amount of constitutionally protected conduct.

3. Constitutional Law ⇐82(4)

Under the "void for vagueness doctrine," a governmental regulation may be declared void if it fails to give a person adequate warning that his conduct is prohibited or if it fails to set out adequate standards to prevent arbitrary and discriminatory enforcement.

4. Constitutional Law ⇐48(4.1)

In determining the reach of a policy in response to an overbreadth argument, every reasonable interpretation must be considered to save the statute, including administrative interpretation and implementation of the policy.

5. Constitutional Law ⇐90.1(1.4)
Schools ⇐172

Student handbook policies relating to discipline, student responsibility, and technology which permitted students to be disciplined for "abusive," "offensive," "harassing," or "inappropriate" behavior, were overbroad in violation of students' First Amendment free speech rights; policies were not linked within the text to speech

that substantially disrupted school operations. U.S.C.A. Const.Amend. 1.

6. Constitutional Law ⇐90.1(1.4)
Schools ⇐172

Language in school board policy permitting discipline of students when student conduct interfered with educational program of the schools or threatened health and safety of others was insufficient to save student handbook from violating students' First Amendment free speech rights; board policy was not referred to or incorporated into student handbook, and even if it was, it did not limit discipline to conduct that caused substantial disruption to school operations. U.S.C.A. Const. Amend. 1.

7. Constitutional Law ⇐82(12)
Schools ⇐172

Even if student handbook policies relating to discipline, student responsibility, and technology, and permitting students to be disciplined for "abusive," "offensive," "harassing," or "inappropriate" behavior, were not overbroad, policies were unconstitutionally vague in definition and as applied; terms were not defined in any significant manner such as to put students on notice of prohibited conduct. U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⇐82(4)

A statute may not be so vague as to permit it to be arbitrarily enforced in violation of the First Amendment. U.S.C.A. Const.Amend. 1.

9. Constitutional Law ⇐90.1(1.4)
Schools ⇐172

Student speech which brought disrespect, negative publicity, and negative attention to school and to volleyball team was not sufficient to rise to the level of substantial disruption which would warrant prohibition of speech. U.S.C.A. Const.Amend. 1.

10. Schools ⇐172

A school district can justify a discipline policy where it can demonstrate a concrete threat of substantial disruption that is linked to a history of past events; to do so, however, the policy must have been created as a result of the past history of events.

11. Constitutional Law ⇐90.1(1.4)
Schools ⇐172

Student handbook policies on student speech which did not geographically limit a school official's authority to discipline student expressions that occurred on school premises or at school-related activities were overbroad and vague in violation of students' First Amendment free speech rights. U.S.C.A. Const.Amend. 1.

12. Constitutional Law ⇐90.1(1.4)
Schools ⇐172

School district could not look to school board policies which had not been incorporated in student handbook in order to save handbook from being unconstitutionally overbroad and vague for failure to limit a school official's authority to discipline student expressions that occurred on school premises or at school-related activities. U.S.C.A. Const.Amend. 1.

13. Constitutional Law ⇐90.1(1.4)
Schools ⇐172

Even if school district could look to school board policies which had not been incorporated in student handbook in order to demonstrate that handbook geographically limited a school official's authority to discipline student expressions to those that occurred on school premises or at school-related activities, handbook policies were still unconstitutionally vague; policy was read by school officials to cover speech occurring off school premises and that was not related to any school activity. U.S.C.A. Const.Amend. 1.

Pepper Hamilton, Attn. Kim M. Watterson, Esq., Pittsburgh, PA, ACLU of PA, Witold J. Walczak, Esq., Pittsburgh, PA, for Plaintiffs.

Peacock, Keller, Ecker & Crothers, Attn Douglas R. Nolin, Esq., Washington, PA, for Defendants.

OPINION and *ORDER OF COURT*

AMBROSE, Chief Judge.

SYNOPSIS

Pending before the Court is Plaintiffs' Motion for Summary Judgment (Docket No. 59) regarding the constitutionality of certain policies of Keystone Oaks School District's ("KOSD") Student Handbook of 2000–2001. Defendants have filed a Brief in Opposition (Docket No. 62), and Plaintiffs have filed a Reply Brief (Docket No. 65). After careful consideration of the submissions of the parties, and based on my Opinion set forth below, said Motion is granted.

OPINION

I. *BACKGROUND*

This action arises out of the disciplinary action taken against Jack Flaherty, Jr. by Defendants for posting Internet messages on a website message board. Engaged in a message board conversation regarding an upcoming volleyball game with Baldwin High School, Jack Flaherty, Jr. posted three messages from his parents' home and one from school.[1] For engaging in the

1. Jack Flaherty, Jr. entered the conversation at his home by posting the following message:

> K.O.
> I think that V.P. richard [sic] has made some very great points (especially about Baldwin) no one said that ko was winning states this year. I don't know where you got this outlandish idea. this [sic] is only the fourth year of mens volletball [sic] in our school and we don't have middle-school teams like some other teams in our section do. we [sic] are also a triple a team going against some teams with twice the enrollment as us. you [sic] also have to admit that our section is arguably the toughest in the state. Also our secret weapon [redacted] will show the "Icon" what's up. Im [sic] not out to make excuses I think we are gonna hold our own this year just ask North Hills.
> PS Bemis [Bemis is Pat Bemis, a student at Baldwin High School and on their volleyball team] from Baldwin: you're no good and your mom [Pat Bemis' mother is an art teacher at KOSD] is a bad art teacher
> baldwin [sic] please

See, Exhibit 4. The next message from Jack Flaherty, Jr. was from his home.

> hell yeah
> I couldn't agree with you more. Someone better call the Guiness book of world records, for the biggest lashing in mens volleyball history. These purple panzies [sic] are in for the suprise [sic] of their lives. I predict players and fans will want to transfer to Ko after this game is through. I also predict that Bemis is going to shed tears on the court. So people from baldwin [sic] I will tell you this, you better save the ridiculous price of 2 dollars to go watch your school get embarrassed at for Bemis to make a spectacle of himself [sic]
> P.S. My dog can teach art better than Bemis' mom.

Id. From home, Jack Flaherty, Jr. responded to a posting from someone with the name Kauffmoney.

> bitch please
> Keystone Oaks has a few prospects for the all W.P.I.A.L [sic] team for example Middle hitter [redacted]. He stands 6 foot 7 inches and is ready to show those plum foreigners how to spike in America. Also another player is # 5 Jack Flaherty (The True Icon) he is 72 inches of mullet madness who is ready to let loose. Last but not least is [redacted]. He is young but is a strong canidate [sic] for W.P.I.A.L. MVP this year. watch [sic] out he is only a freshman! P.S. Kaufmoney eat my wad ho

Id. The next message sent by Jack Flaherty, Jr. was sent from school while in a journalism class.

> how [sic] bad is ko [sic] going to beat Baldwin [sic] I predict a lashing and for Bemis to shed tears.

Id.

conversation and posting the messages both at home and school, Defendants punished Jack Flaherty, Jr. pursuant to their policies set forth in the Student Handbook.

Plaintiffs in this case, Jack Flaherty, Jr., Jack Flaherty, Sr. and Carol Flaherty, parents and natural guardians of Jack Flaherty, Jr., filed a Complaint and subsequently an Amended Complaint (Docket No. 37) against Defendants.[2] Therein, Plaintiffs allege, *inter alia*, that the policies used to punish Jack Flaherty, Jr. for expressions that occurred off campus and at home are vague and overbroad in violation of Plaintiffs' constitutionally protected rights under the First and Fourteenth Amendments to the United States Constitution, as well as Article I, § 7 of the Pennsylvania Constitution. *See*, Amended Complaint. The particular policies identified are contained within the Discipline, the Student Responsibility, and the Technology provisions. Plaintiffs' Exhibit 1, pp. 4–5, 17–18. Said provisions contain the terms "abuse" or "abusive," "harassment," "inappropriate," and "offend" which Plaintiffs argue are vague and overbroad.[3]

Defendants have filed a Brief in Opposition to Plaintiffs' Motion for Summary Judgment and Plaintiffs' filed a Reply Brief. The issue is now ripe for review.

II. *LEGAL ANALYSIS*

A. *Standard Of Review*

Summary judgment may only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R.Civ.P. 56(c). Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a

2. The parties have informed me that they have reached a partial settlement. As a result, Plaintiffs have filed a Motion for Summary Judgment on the only remaining issue of whether the policies set forth in the KOSD Student Handbook that govern student expression are unconstitutionally vague and overbroad. *See*, Motion for Summary, ¶ 1.

3. The KOSD Student Handbook sections at issue are as follows:

DISCIPLINE

INFRACTIONS AND CONSEQUENCES

* * * * * *

–Attack (physical, verbal, or written *abuse* directed toward a school employee)

* * * * * *

-Harassment (sexual, ethnic, racial, physical, verbal—see "Sexual Misconduct") /Bullying

Harassment is defined as any ongoing pattern of *abuse*, whether physical or verbal.

* * * * * *

–Inappropriate **language/verbal *abuse*** (may be considered "Attack") **toward an employee**

–Inappropriate **language/verbal *abuse*** **toward another student**

Plaintiffs' Exhibit 1, pp. 4–5 (bold emphasis in original, italic emphasis added).

STUDENT RESPONSIBILITIES

* * * * * *

It is the responsibility of the student to:

* * * * * *

13. express ideas and opinions in a respectful manner so as not to *offend* or slander others;

Id. at 17 (emphasis added).

* * * * * *

B. Technology *Abuse*

* * * * * *

c. use of computers to receive, create or send *abusive*, obscene, or *inappropriate* material and/or messages;

Id. at 18 (emphasis added).

showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In considering a motion for summary judgment, this Court must examine the facts in a light most favorable to the party opposing the motion. *International Raw Materials, Ltd. v. Stauffer Chemical Co.*, 898 F.2d 946, 949 (3d Cir.1990). The burden is on the moving party to demonstrate that the evidence creates no genuine issue of material fact. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.1987). The dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material when it might affect the outcome of the suit under the governing law. *Id.*

Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. *Id.* at 324, 106 S.Ct. 2548. Summary judgment must therefore be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *White v. Westinghouse Electric Co.*, 862 F.2d 56, 59 (3d Cir.1988), *quoting Celotex*, 477 U.S. at 322, 106 S.Ct. 2548.

B. *Overbroad and Vague*

[1–4] Plaintiffs seek a declaration that portions of the KOSD Student Handbook are unconstitutionally overbroad and vague because particular portions allow for punishment of speech that school officials deem to be "inappropriate, harassing, offensive or abusive" without defining those terms or limiting them in relation to geographic boundaries (at school or school sponsored events) or to speech that causes a material and substantial disruption to the school day in violation of *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).[4] *See*, Plaintiffs' Brief, p. 7–8. A statute may be declared unconstitutional when it is sufficiently overbroad. *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243, 258 (3d Cir.2002). "An overbroad statute is one that is designed to punish activities that are not constitutionally protected, but which prohibits protected activities as well." *Killion v. Franklin Regional School Dist.*, 136 F.Supp.2d 446, 458 (W.D.Pa.2001).

Only a statute that is substantially overbroad may be invalidated on its face. The Supreme Court has never held that

4. In a footnote, "Defendants dispute the Plaintiffs' legal contentions that there is some heightened standard beyond that set forth in *Tinker*.... " *See*, Defendants' Brief, p. 7, n. 4. I do not read Plaintiffs' Brief to argue in support of a heightened standard as it applies to the issue at hand. To the contrary, when discussing this Motion for Summary Judgment regarding the constitutionality of the policy, as opposed to the standard applicable to the settled question of whether KOSD could properly punish Jack for speech he uttered at home, Plaintiffs argue that the *Tinker* standard applies. *See*, Plaintiffs' Brief, p. 9, 11–12. Consequently, both parties apply the *Tinker* standard.

> a statute should be invalidated merely because it is possible to conceive of a single impermissible application. Instead, in a facial challenge to overbreadth and vagueness of a law, a court must determine whether the enactment reaches a substantial amount of constitutionally protected conduct.

Id. at 458 (citations omitted). Under the " 'void for vagueness doctrine,' a governmental regulation may be declared void if it fails to give a person adequate warning that his conduct is prohibited or if it fails to set out adequate standards to prevent arbitrary and discriminatory enforcement." *Killion,* 136 F.Supp.2d at 459, *citing, Chicago v. Morales,* 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) and *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *Sypniewski,* 307 F.3d at 266. In determining the reach of a policy, every reasonable interpretation must be considered to save the statute, including administrative interpretation and implementation of the policy. *Sypniewski,* 307 F.3d at 259; *Killion,* 136 F.Supp.2d at 458, *citing, Ward v. Rock Against Racism,* 491 U.S. 781, 795–96, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

1. *Substantial disruption*

[5] Initially, Plaintiffs argue that the policies are overbroad and vague because they can be interpreted to prohibit speech that is protected by the First Amendment in violation of *Tinker.* Plaintiffs' Brief, p. 12. In *Tinker,* the United States Supreme Court held that a student's speech at school may be regulated only where it substantially disrupts school operations or interferes with the rights of others or there is a realistic threat of doing so. *Id.* at 513, 89 S.Ct. 733; *Saxe,* 240 F.3d at 217; *Sypniewski,* 307 F.3d at 253. After a through review of the record, I agree with Plaintiffs. I note that at one point, Defendants make a fleeting reference to the freedom of expression provision in the Student Handbook which provides, in pertinent part: "Students have the right to express themselves in any manner unless such expression directly interferes with the educational process...." *See,* Defendants' Brief, p. 12, citing Plaintiffs' Exhibit 1, p. 12. Said provision, however, is separate and apart from the discipline, the student responsibility, and the technology provisions at issue. In addition, the freedom of expression provision does not require or put a school official on notice that his authority to discipline under a school policy is limited to those instances where a student's abusive, offensive, harassing or inappropriate behavior causes or is likely to cause a substantial disruption to school operations. *See, Tinker, supra.* Defendants have not cited, and I cannot find, any other language in the KOSD Student Handbook that would require school officials to make an assessment of whether the speech is substantially disruptive so as to justify employing the policies that would curtail speech.

[6] Rather, in opposition, Defendants go beyond the Student Handbook and look to Board Policies to save the Student Handbook from violating the *Tinker* standard. *See,* Board Policy Nos. 257, 248 and 218 at Defendants' Exhibits G–I (respectively). For example, Defendants assert Board Policy No. 218 complies with the substantial disruption requirement of *Tinker* when it states:

> Teaching staff members and other employees of this Board having authority over students shall have the authority to take such reasonable actions as may be necessary to control the disorderly conduct of students in all situations and in all places where such students are within the jurisdiction of this Board and *when such conduct interferes with the educational program of the schools or*

threatens the health and safety of self or others.

Defendants' Exhibit I, p. 4 (emphasis added). I find Defendants' reliance on the Board Policies lacking.

First, Board Policies are not referred to or incorporated in the Student Handbook of 2000–2001. *See,* Plaintiff's Exhibit 1. Therefore, I do not find the definitions or language in the Board Policies to be relevant to my analysis of the Student Handbook. Second, even if Board Policy No. 218 should be considered part of the same and read in conjunction therewith, the language contained in Board Policy No. 218 is inclusive, rather than restrictive, as required under *Tinker.* As a result, Board Policy No. 218 authorizes discipline where a student's expression that is abusive, offending, harassing, or inappropriate, "interferes with the educational program of the schools," but does not limit it to those circumstances that cause a substantial disruption to school operations as required under *Tinker.* Thus, I find that the breadth of the Student Handbook policies are overreaching in that they are not linked within the text to speech that substantially disrupts school operations. Absent said language, I can find no way to reasonably construe the Student Handbook policies to avoid this constitutional problem. Therefore, said policies are unconstitutionally overbroad.

[7, 8] Assuming, *arguendo,* I did not find that said policies were overbroad, I would still find that the Student Handbook policies are unconstitutionally vague. I recognize that "[g]iven a school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanction." *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 686, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986); *Sypniewski,* 307 F.3d at 260. Nevertheless, a statute may not be so vague as to permit it to be arbitrarily enforced in violation of the First Amendment. *Sypniewski,* 307 F.3d at 260, *citing, Saxe,* 240 F.3d at 207; *Killion,* 136 F.Supp.2d at 459. Here, the terms abuse, offend, harassment, and inappropriate, as set forth in the relevant Student Handbook policies are simply not defined in any significant manner. *See,* Plaintiffs' Exhibit 1, pp. 4–5, 17–18. Defendants argue that I should look to the Board Policies for more specific definitions. Again, I decline to do so because there is no reference in the Student Handbook to put the students on notice to look there. Thus, contrary to Defendants' assertions, I find that the relevant Student Handbook policies do not provide the students with adequate warnings of the conduct that is prohibited.

[9] Moreover, the policies are not just vague in definition, but are also vague in application and interpretation such that they could lead to arbitrary enforcement. In applying the Student Handbook policies (and the Board Policies as Defendants argue), Scott Hagy, Principal of Keystone Oaks High School, did not interpret the same to require him to first analyze the situation to determine if the expression creates or is likely to create a substantial disruption. Instead, Mr. Hagy testified that whether to discipline a student would "depend," but does not define with any particularity that it would depend on whether the expression caused or is likely to cause a substantial disruption. *See,* Defendants' Exhibit A, pp. 38–40, 49–51. While Mr. Hagy believes that he can discipline a student for bringing "disrespect, negative publicity, negative attention to our school and to our volleyball team," this is simply not sufficient to rise to the level of "substantial disruption" under *Tinker.* Defendants' Exhibit A, p. 40; *see also,*

Saxe, 240 F.3d at 215, *citing*, *Tinker*, 393 U.S. at 509, 89 S.Ct. 733 ("The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."); *Killion v. Franklin Regional School District*, 136 F.Supp.2d 446, 455 (W.D.Pa.2001), *quoting*, *Saxe*, 240 F.3d at 212 ("The mere desire to avoid 'discomfort' or 'unpleasantness' is not enough to justify restricting student speech under *Tinker*."). Thus, I find that relevant policies in the Student Handbook (even when considered in conjunction with the Board Policies) are so vague that it could permit Defendants to apply them arbitrarily.

[10] Defendants further argue that there was a history of problems with Jack Flaherty, Jr. and other students acting out at school and at school-sponsored events, such that the punishment was justified under the policy. *See*, Defendants' Brief, pp. 15–18. A school district can justify a policy where it can demonstrate a concrete threat of substantial disruption that is linked to a history of past events. *Sypniewski*, 307 F.3d at 262; *Killion*, 136 F.Supp.2d at 455. To do so, however, the policy must have been created as a result of the past history of events. Defendants' argument misconstrues this concept. If such was the case here, then the policies at issue must have been developed in response to the problems they were having with Jack Flaherty, Jr. and other students. *See, id.* There is no absolutely no evidence that the policies at issue were adopted in response to a history of particular actions or circumstances. Consequently, this argument lacks merit.

As a result, I find said portions of the Student Handbook to be unconstitutionally overbroad and vague in that they fail to limit a school official's authority to discipline a student's expression to those instances where the expression caused, or there exists a realistic threat of, a substantial disruption to school operations.[5]

2. *Geographical limitation*

[11, 12] Plaintiffs also argue that the Student Handbook is unconstitutionally overbroad and vague because it fails to geographically limit a school official's authority to discipline expressions that occur on school premises or at school related activities, thus providing unrestricted power to school officials. *See*, Plaintiffs' Brief. Defendants have not pointed to and I cannot find any language in the KOSD Student Handbook that geographically limits a school official's authority. In opposition, however, Defendants again go beyond the Student Handbook and look to Board Policies in an effort to save the Student Handbook from being unconstitutionally overbroad and vague. *See*, Board Policy No. 218 (Defendants' Exhibit I). Specifically, Defendants assert Board Policy No. 218 provides the requisite geographical limitation to "student conduct in school, during the time spent in travel to and from school, and all after school and evening activities, including [sic] detention," and "in all places where students are within the jurisdiction of the Board...." Defendants' Exhibit I, p. 3–4. The Board Policies, however, are not referred to or incorporated in the Student Handbook of 2000–2001. *See*, Plaintiff's Exhibit 1. Therefore, I do not find the definitions or language in the Board Policies to be relevant to my analysis of the Student Handbook. Thus, I find the breadth of the Student Handbook policies are overreaching in that they are not

5. I note that I could end my analysis here, because this finding, alone, is sufficient to render the relevant portions of the Student Handbook unconstitutional. Nevertheless, for completeness sake, I will continue with Plaintiffs' geographical limitation argument.

linked within the text to any geographical limitations. *See, Killion,* 136 F.Supp.2d at 459. Absent said language, I can find no way to reasonably construe the Student Handbook policies to avoid this constitutional problem. Therefore, said policies are unconstitutionally overbroad.

[13] Even if I did consider Board Policy No. 218, I would still find the Student Handbook policies unconstitutionally vague. Defendants' own interpretation of the application of said Board Policy in connection with the Student Handbook policies demonstrates the vagueness problems. Specifically, when Mr. Hagy was asked whether it matters if the comments of Jack Flaherty, Jr. were made from his home computer, Mr. Hagy said "No." Plaintiff's Exhibit 10, p. 38. Later, however, Mr. Hagy testified that punishment of speech depends on "if it's tied to the school." *Id,* p. 51. Mr. Hagy further testified that he believes that under the policies he can punish a student for speech that occurs outside of school premises and that is not related to any school activity, where the expression brings "disrespect, negative publicity, negative attention to our school and to our volleyball team." *Id.* at 40. Similarly, Jeff Sieg, athletic coach at Keystone Oaks High School, believes that he can punish Jack Flaherty, Jr. for posting an internet message from his home computer because "it's an embarrassment to my team and to my other players." Plaintiffs' Exhibit 11. pp. 16–17

"Q. Coach Sieg, explain to me what you think are the limits of your authority to punish your volleyball players for speech that takes place outside of school.

A. If it is going to bring shame to the school or my program, I basically do what I did. I could suspend; I could expel."

Id. at 32. Thus, without any further definition or limitation, the policy could be (and is) read by school officials to cover speech that occurs off school premises and that is not related to any school activity in an arbitrary manner. Therefore, the Board Policy language does not cure or negate the vagueness found in the Student Handbook. Consequently, I find the Student Handbook policies at issue to be unconstitutionally overbroad and vague because they permit a school official to discipline a student for an abusive, offensive, harassing or inappropriate expression that occurs outside of school premises and not tied to a school related activity.

Simply put, the Student Handbook policies could be interpreted to prohibit a substantial amount of protected speech. Based on the evidence, the policies are overbroad because they are not limited to speech that causes, or is likely to cause, a substantial disruption with school operations as set forth in *Tinker.* Moreover, the Student Handbook policies do not contain any geographical limitations. Thus, the policy could be read to cover speech that occurs off the school's campus and not school related. Therefore, the Student Handbook policies are unconstitutionally overbroad and vague.

ORDER OF COURT

And now, this **26th** day of February, 2003, after careful consideration of Plaintiff's Motion for Summary Judgment (Docket No. 59), it is ordered that said Motion (Docket No. 59) is granted. The Clerk of Court is directed to mark this case "CLOSED" *forthwith.*

Harris v. Morgan

United States District Court for the Western District of Pennsylvania

November 18, 1998, Decided ; November 18, 1998, Date Filed

Civil Action No. 98-639

Reporter
1998 U.S. Dist. LEXIS 21285 *; 49 U.S.P.Q.2D (BNA) 1302 **

CHARLES A. HARRIS, as the Executor of the, Estate of CHARLES "*TEENIE" HARRIS*, Plaintiff, -vs- DENNIS MORGAN, an individual and doing business as PITTSBURGH COURIER ARCHIVES, PITTSBURGH'S BLACK HERITAGE, PITTSBURGH BLACK HERITAGE PHOTOGRAPHIC ARCHIVES, and PITTSBURGH COURIER PHOTOGRAPHIC ARCHIVES, INC., JEROME WILLIAMS, and doing business as PITTSBURGH COURIER PHOTOGRAPHIC ARCHIVES, INC., and PITTSBURGH COURIER PHOTOGRAPHIC ARCHIVES, INC., a Pennsylvania corporation, Defendants.

Disposition: [*1] Harris' Motion for Preliminary Injunction (Docket #: 6) premised upon both copyright infringement and Lanham Act Violations DENIED.

Core Terms

photographs, negatives, one third, exhibiting, collection, signature, copyright infringement, prints, stored, applications, marketing, preliminary injunction, ownership, basement, film, gross profit, three year, injunctive, parties, profits, storage

Case Summary

Procedural Posture
Plaintiff seller filed a motion for a preliminary injunction in an action he filed against defendant buyers for copyright infringement, unfair competition, breaches of contract, and fraud arising out of the sale and acquisition of certain negatives, prints and films.

Overview
The buyers wanted to purchase the seller's collection of negatives and the seller agreed. The buyers took the negatives, vintage prints, and certain films, and the seller claimed that the prints and films were on loan. An acknowledgement between the parties mentioned the sale of the negative collection but did not mention the prints or film. The parties did not discuss the transfer of copyright ownership prior to signing the acknowledgement. The court denied the seller's motion for a preliminary injunction. The court found that the parties had not contracted for the transfer of copyrights because there was no indication that they understood and agreed to the terms of the acknowledgement. The court also found, however, that the mere filing of applications for copyright was not prima facie evidence of ownership and, therefore, the seller failed to meet his burden of establishing a likelihood of success on the merits of his copyright infringement claim.

Outcome
The seller's motion for a preliminary injunction was denied.

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN1[⬇] **Injunctions, Preliminary & Temporary Injunctions**

The grant of injunctive relief is an extraordinary remedy

which should be granted only in limited circumstances. In ruling on a motion for preliminary injunction, the court must consider the following factors: (1) the likelihood that the plaintiff will prevail on the merits; (2) the extent to which the plaintiff is being irreparably harmed; (3) the harm incurred by the defendant if the injunction is issued; and (4) the public interest. Only if the movant produces evidence sufficient to convince the trial judge that all four factors favor preliminary relief should the injunction issue.

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Burdens of Proof

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

Copyright Law > ... > Civil Infringement Actions > Standing > General Overview

HN2 **Civil Infringement Actions, Burdens of Proof**

In order to demonstrate a likelihood of prevailing upon a claim for copyright infringement, a plaintiff must establish: (1) an exclusive ownership in a valid, existing copyright, and (2) the copying or other use of the copyrighted work by the defendant without the plaintiff's approval.

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > Registration Requirement

Copyright Law > ... > Civil Infringement Actions > Remedies > Injunctions

Copyright Law > ... > Civil Infringement Actions > Standing > General Overview

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview

HN3 **Civil Infringement Actions, Jurisdiction**

Registration is a jurisdictional prerequisite to commencing suit for copyright infringement. *17 U.S.C.S. § 101 et seq.*

Counsel: For PLAINTIFF: CYNTHIA KERNICK ESQ, REED SMITH SHAW & MCCLAY, PITTSBURGH, PA.

For D. MORGAN, DEFENDANT: WILLIAM GALLAGHER ESQ, COHEN & GRIGSBY, PITTSBURGH, PA.

For J. WILLIAMS, DEFENDANT: RICHARD SANDOW ESQ, JONES GREGG CREEHAN & GERACE, PITTSBURGH, PA.

Judges: Donetta W. ***Ambrose***, U. S. District Judge.

Opinion by: Donetta W. Ambrose

Opinion

[1303] FINDINGS OF FACT CONCLUSIONS OF LAW and ORDER OF COURT**

Charles "***Teenie" Harris*** ("Harris") commenced this action on April 8, 1998. Although Harris has since died, his son and Executor of his estate, Charles A. Harris, has continued this suit. Harris named as Defendants Dennis Morgan ("Morgan"), both as an individual and as trading or doing business as several entities; Jerome Williams ("Williams"), Morgan's uncle; and Pittsburgh Courier Photographic Archives, Inc., a venture incorporated by Morgan and Williams in 1997. Briefly, Harris charges Williams and Morgan with copyright infringement, unfair competition, breaches of contract and fraud arising out of the sale and acquisition of certain negatives, prints **[*2]** and films created by Harris.

In conjunction with the Complaint, Harris also filed a Motion for Preliminary Injunction (Docket No. 6). Although Harris represents that the Motion is premised

upon both copyright infringement and Lanham Act violations, the proposed Findings of Fact and Conclusions of Law which he submits address only copyright infringements. Accordingly, I will not address the Motion in the context of Lanham Act violations.

The Court received testimony and exhibits concerning the propriety of ordering injunctive relief, over a three day period. The following Findings of Fact and Conclusions of Law are reached after considering the evidence presented during those hearings as well as the parties' submissions.

FINDINGS OF FACT

(A). The Creation of Harris' Work

1. Harris was born in Pittsburgh, Pennsylvania in 1908. He completed only eight years of formal education and, while he was able to identify numbers and certain words, he was functionally illiterate.

2. Fortunately, his illiteracy did not prevent Harris from compiling an amazing pictorial history of the African-American experience in the twentieth century.

3. Specifically, Harris devoted more **[*3]** than 40 years of his life (between the 1930s and the 1970s) to capturing on film, celebrities, sports figures, politicians and everyday life in Pittsburgh's Hill District.

4. Harris' body of work is comprised of 4 types of photographs: (1) those published in the Pittsburgh Courier; (2) unpublished "freelance" photographs; (3) photographs taken of family and corporate events; and (4) personal photographs and 16mm film.

5. Morgan admitted that Harris' images comprise the most significant historical documentation of the African-American experience "in any century."

(B). Relationship with the Pittsburgh Courier

6. Testimony elicited from Harris' family members, as well as other photographers whose work appeared in the Courier, suggest that Harris did not function as a Courier "employee." Specifically, Harris was free to chose or decline any assignments given by the Courier.

7. Additionally, despite a more than 40 year relationship, Harris did not receive a pension from the Courier.

8. Moreover, Harris developed and stored the negatives in his photography studio in the basement of his home.

9. Dr. Proctor, who also submitted photographs to the Courier during the same time **[*4]** frame, testified that he and Harris functioned as "free-lance photographers," not as employees.

10. Finally, in representing that he owned the copyrights to the photographs, Morgan himself implicitly acknowledged that the Courier did not have copyrights relating to Harris' work.

(C). Harris' Storage of His Work

11. Prior to the occurrence of the events giving rise to this action, Harris stored the photographic negatives at issue in his basement. The negatives were placed in boxes with labels identifying the year, the date, and the subject/person photographed.

12. Members of the Harris family testified that the basement was kept both cool and dry. Harris' sons further stated that they never saw the negatives stored in any drawers.

13. While Morgan testified that the photographs and negatives were scattered throughout Harris' basement, and that some storage boxes were rotted, I find Morgan's testimony in this regard to lack credibility.

(D). Introduction to Morgan and Williams

14. Sometime in 1985 or early 1986, Morgan was involved with establishing a booth at the Pittsburgh Home Show. Morgan intended that the booth showcase famous jazz musicians. An acquaintance **[*5]** suggested that Morgan speak with Harris.

15. Morgan visited Harris at Harris' home. Morgan explained that, initially, he was not given access to the basement. Yet after several repeat visits, Harris allowed **[**1304]** him to view the negatives stored in the basement.

16. Morgan testified that, upon seeing that the negatives were of such celebrities as Joe Lewis, he believed that they might be "worth something."

17. Morgan inquired as to whether Harris was interested in exhibiting and selling the negatives for $ 3,000.00. Harris expressed an interest.

18. Morgan did not, however, have $ 3,000.00. Consequently, he approached Williams, his uncle, concerning a loan. Specifically, Morgan asked Williams if he would "like to get involved" in the purchase and represented that he "would be glad to share with

[Williams] some of the moneys whenever [Morgan] would sell some of the materials." See Transcript, p. 526.

19. Prior to finalizing any sale, Williams visited Harris in order to ensure that Harris did, in fact, want to sell the photographs. Reassured, Williams gave Harris $ 1,500.00 as down payment, and left the photographs with Harris. Williams intended to give Harris ample time to discuss **[*6]** the sale with family members, and to be comfortable with the terms of the sale.

20. Williams returned approximately 4 - 6 weeks later. Harris agreed that Williams and Morgan could take the collection. The Defendants took the freelance collection, the vintage prints and the 16mm films. Harris contends that the vintage prints and 16mm films were only "on loan" to Morgan.

21. Williams paid the remaining $ 1,500.00 to Harris via installments. There is no dispute that Williams paid the entire $ 3,000.00 price.

(E). Morgan Meeting with Kurtik

22. In early April 1986, after having taken possession of the negatives, Morgan visited Frank Kurtik, then Photo Curator and Assistant Archivist at the University of Pittsburgh. Morgan showed Kurtik some of Harris' work, and inquired about Pitt's possible acquisition of the collection.

23. Kurtik asked about copyright ownership, but Morgan never said that he held the copyrights in Harris' images.

24. Kurtik declined Morgan's offer to purchase the collection for $ 1 million.

(F) Agreement between Morgan and Williams

25. Sometime after the meeting with Kurtik, Morgan and Williams decided to memorialize their agreement in writing. **[*7]** Specifically, they retained Nathaniel B. Smith, Esq., to draft the appropriate documents.

26. The Agreement, dated April 17, 1986 notes that Morgan borrowed the sum of $ 3,273.00 from Williams in order to purchase the negative collection.

27. The Agreement further provides that Morgan would repay the entire sum within one year, at 10% interest, and that Morgan "agreed to make payment to Jerome Williams in the amount of 25% ... of any gross profits received from the marketing, exhibiting or use in any manner of negatives contained in the collection of Charles ***Teenie Harris*** and any photographic prints derived therefrom..." See Plaintiff's Exhibit 1, P c. [1] Payment of the 25% was to continue as long as Morgan used the negatives.

28. While the Agreement stated that Morgan would have "complete control and authority in the management and marketing" of the negatives, it made no mention of copyright ownership.

[*8] 29. Williams contends that the 25% share was later modified to one third.

(G). Acknowledgment

30. After execution of the Agreement between Morgan and Williams, and at the suggestion of his attorney, Morgan asked Harris to sign an "Acknowledgment."

31. Several copies of the Acknowledgment were received into evidence. While each copy bore Harris' signature, none set forth the date upon which Harris signed. Several copies also bore Morgan's signature, and a date of April 29, 1986.

32. The Acknowledgment documents the "sale" of Harris' photographic negative collection to Morgan, in consideration of payment of $ 3,000.00. The Acknowledgment makes no mention of the 16mm film or vintage prints.

33. The Acknowledgment does not mention any revenue sharing of one third each between Morgan, Harris and Williams. Nor does the Acknowledgment contain an integration clause.

34. Finally, the Acknowledgment contains the following language:

> As further consideration for the payment which has and will be received from DENNIS MORGAN, I grant all of the copyright privileges and other legal rights and privileges which I hold in the aforementioned photographic negative collection to **[*9]** DENNIS MORGAN.

35. It is undisputed that neither Morgan nor Harris discussed the transfer of copyrights **[**1305]** at or before the Acknowledgment was signed. Indeed, Morgan testified during the hearing that he never discussed the issue of copyrights with Harris in 1986,

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[1] The original text referenced a 20% share, but handwritten notes above the text reflect a change to 25%.

and did not learn what a copyright was until 1989.

36. Like Harris, Morgan's ability to read was severely compromised.

37. Similarly, Williams was unaware in 1986 of any agreement to transfer copyrights to Morgan.

38. I find that Harris and Morgan did not contract for the transfer of copyrights as set forth in the Acknowledgment. Absent some indication that the parties understood and agreed to the terms of the Acknowledgment, there could be no "meeting of the minds" with regard to the transfer of copyright ownership.

(H) Agreement for Use of Signature

39. Morgan and Harris also executed an agreement relating to the use of Harris' signature. The agreement, dated March 3, 1987, grants to Morgan the right to use Harris' signature on various materials.

40. Morgan agreed, as consideration, to pay Harris an amount equal to 10% of the gross profits received from the marketing, exhibiting or use of any materials containing **[*10]** Harris' signature, as well as a sum equivalent to 3% of any profits, after taxes, received from the marketing of any of Harris' materials which do not contain his signature. See Plaintiff's Exhibit 9.

41. Morgan contends that this agreement was limited to the use of Harris' signature on postcards.

(I) Personal Management Agreement

42. Also on March 3, 1987, Morgan and Harris executed a Personal Management Agreement. The Management Agreement, which lasted for a period of three years, gave Morgan a power of attorney with respect to "all phases of the publicity, public education, historical presentations and appearances" in which Harris would participate.

43. The Management Agreement further granted Morgan the right to execute any contracts in Harris' behalf; to permit the use of Harris' name, signature, photograph, likeness and voice for marketing purposes; to collect and receive all gross compensation payable to Harris; to deposit or cash all checks payable to Harris and to retain any fees owing to Morgan.

44. In return for providing these services, Morgan was to receive a sum equivalent to 10% of Harris' gross compensation resulting from Harris' photographic negative **[*11]** collection.

45. The Management Agreement contains the following "Integration" clause:

> Artist and Manager acknowledge that they have had preliminary discussion concerning this Agreement. They understand that all such discussion and the hopes expressed in such discussions are not binding hereunder unless expressly stated in this Agreement. This Agreement is the only Agreement of the parties and there is no collateral agreement (oral or written) between the parties in any manner relating to the subject matter hereof. This Agreement can be amended or modified only by an instrument in writing signed both by Artist and Manager.

See Plaintiff's Exhibit 10.

46. Morgan testified that the Management Agreement was "generally ignored by the parties." See Morgan's PreHearing Brief, p. 8.

(J) Actual Division of Proceeds

47. Although none of the proffered documents memorialize such an agreement, Harris claims that Morgan agreed to give him one third of the gross profits from the sale, marketing or exhibition of the negatives. Indeed, Harris told his sons that Morgan agreed that Harris was to receive one third of the profits which Morgan generated.

48. While Morgan **[*12]** now denies ever having reached such an agreement, it is clear that he informed several other individuals that this was, in fact the arrangement.

49. Specifically, in 1986, Morgan approached Ralph Proctor about exhibiting some of Harris' work. At the time, Morgan told Proctor that, pursuant to an agreement, Harris was to receive one third of gross profits. See Transcript, p. 331-333. Proctor explained that he waived certain costs associated with exhibitions in reliance upon Morgan's representation that Harris was to receive one third of gross profits.

50. Proctor subsequently reviewed the agreements executed by Morgan and Harris, and noted that they made no mention of the one third share. Proctor testified that he asked Morgan about the apparent discrepancy, and that Morgan stated that "he was well aware of what was in the contract but that his agreement with Mr. Harris was one third, one third, one third." See

Transcript, p. 333.

51. Morgan similarly told Craig Dawson, a consultant he hired to market Harris' work, that Harris was to receive one third of the profits. On several occasions, Dawson asked Morgan for clarification on this issue. Each time, Morgan responded that **[*13]** the agreement was for Harris to receive "1/3 of **[**1306]** f the top." See Transcript, p. 215. Harris confirmed to Dawson that he was to receive one third.

52. Dawson represented to at least two customers who had inquired, that Harris was, in fact, receiving compensation from the sale of his work. See Transcript, p. 216-17.

(K) Morgan's Earnings and Payments to Harris

53. The amount Morgan earned as a result of his agreements with Harris is a matter of dispute. Morgan denies ever having made a substantial sum of money. Others contradict this denial.

54. It is clear that Morgan received revenue both from the sale of photographs at Pittsburgh's Strip District, and from direct marketing to corporations, museums and the like.

55. Morgan sold prints at the Strip District on Saturdays. While the amount of such proceeds is unclear, Dawson testified that Morgan represented that he took in approximately $ 500 a day on "a good day" at the Strip District, and $ 200 a day on a "bad day." Dawson further estimated that Morgan made $ 10,000 to $ 15,000 cash, per year between 1988 and 1991, selling Harris' photographs in the Strip District.

56. Dawson also testified that he personally generated **[*14]** for Morgan more than $ 32,000.00 in revenues from the sale and/or exhibition of Harris' work for Morgan during a three year period. When Morgan learned that Dawson had been informing Harris of the sales, Morgan fired Dawson.

57. Additionally, Morgan himself made sales to museums, individuals, antique stores and other retailers for resale. See Transcript, p. 56-60.

58. Between 1986 and February 1997, Morgan made continuous, if irregular, payments to Harris. See Transcript, p. 55-57; 571-573; 634-635; 639; and Exhibits 64, 65, 73, 77 and 78. Yet even though Morgan represented to Harris that the payments were one third of the profits, Morgan misled Harris about the actual profits, deducting expenses for items never paid (i.e., sales tax).

59. It is clear that, while Harris may have harbored some reservations concerning Morgan, he trusted Morgan enough to continue the business and personal relationship. Throughout the 1990s Harris continued to appear with Morgan in the Strip District and sign photographs. Additionally, Harris and Williams took out an advertisement in the newspaper stating that they were working with Morgan on the marketing and sale of Harris' prints. The advertisement **[*15]** was designed to respond to a suggestion in the Wall Street Journal that Morgan had taken advantage of Harris.

60. Furthermore, Harris repeatedly defended Morgan's actions to his sons, and even invited Morgan to give a toast at his 50th wedding anniversary party.

61. Eventually, in or about March of 1997, Harris became suspicious of Morgan. Harris learned of an article published in the Pittsburgh Post Gazette, in which Morgan was quoted as saying that he paid Harris far less than he deserved and that he would not pay him what he deserved until Harris signed a new management contract. Morgan admitted the truth of these statements. See Transcript, p. 274-275; 639-640.

62. Testimony elicited during the hearing revealed that Morgan discontinued making payments to Harris at or near this time.

(L) New Management Agreement

63. In 1992, Morgan presented Harris with a new Management Agreement. While the new contract obliged Morgan to pay Harris one third of revenues, it conditioned payment on the transfer of the remaining negatives to Morgan. See Plaintiff's Exhibit 38.

64. Harris refused to sign the contract. He believed it inappropriate to exhibit and market the "studio" **[*16]** photographs, and maintained that the original agreement never required him to relinquish these negatives. Harris' sons insisted that Harris would never have agreed to relinquish control of these negatives to Morgan.

65. Although Harris refused to sign the contract, he continued to demand payment of one third of revenues. Morgan apparently continued to pay, though intermittently.

(M) The Williams Litigation

66. Believing that Morgan breached their agreement,

Williams commenced suit against Morgan in the Court of common Pleas of Allegheny County, Pennsylvania. Williams sought, in part, injunctive relief to prevent the further dissipation of assets.

67. It is undisputed that Morgan has neither repaid to Williams the initial loan nor interest on the loan. Williams also charges that Morgan has not paid the agreed upon one third share of all revenues.

(N) Present Condition of the Negatives

68. Williams has stored the negatives in a secured storage unit.

69. Comparing a current photograph of the method of storage with the manner in which the negatives were stored in 1986, **[**1307]** Kurtik responded that storage was dramatically different. He explained that the negatives had been **[*17]** housed in proper archival sleeves. However the current photograph depicted negatives being paper clipped together, and possibly being exposed to acid-bearing paper. See Transcript, p. 112-113.

70. Moreover, Exhibit 55, the photograph depicting the negatives as currently stored, reveals that many of the negatives are not in boxes, but are loosely stored inside of dresser drawers. See Exhibit 55.

(O) Copyright Application

71. On or about March 26, 1998, prior to the commencement of this action, counsel for Harris filed copyright applications, covering "Selected Photographs of ***Teenie Harris*** Volume 1, Pts. I and II" and "Selected Photographs of ***Teenie Harris*** Volume II." See Exhibits 137-40. While neither he nor his sons assisted in the assembly of the volumes, I find that Harris did, in fact, authorize the filing.

72. The applications contain approximately 1,000 photographs, which constitute only a small portion of those allegedly purchased by Morgan and Williams. No copyright application was filed for these remaining photographs.

73. It is unclear whether certain of the photographs contained in the application were, in fact, taken by Harris. However, it is clear **[*18]** that many of the photographs were taken prior to 1978.

74. Morgan claimed that some of the photographs included in the application had been printed in the Courier.

CONCLUSIONS OF LAW

1. ***HN1***[↑] "The grant of injunctive relief is an extraordinary remedy ... which should be granted only in limited circumstances." *AT&T Co. v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1426-27 (3d Cir. 1994)* (quotations and citations omitted).

2. In ruling on a motion for preliminary injunction, I must consider the following factors: (1) the likelihood that the plaintiff will prevail on the merits; (2) the extent to which the plaintiff is being irreparably harmed; (3) the harm incurred by the defendant if the injunction is issued; and (4) the public interest. See *AT&T, 42 F.3d at 1427* (citations omitted).

3. "Only if the movant produces evidence sufficient to convince the trial judge that all four factors favor preliminary relief should the injunction issue." *Opticians Assoc. of America v. Independent Opticians of America, 920 F.2d 187, 192 (3d Cir. 1990)* (citations omitted).

4. To establish a likelihood of success on the merits, Harris must demonstrate a likelihood of prevailing **[*19]** upon a claim for copyright infringement. In other words, ***HN2***[↑] Harris must establish: "(1) an exclusive ownership in a valid, existing copyright, and (2) the copying or other use of the copyrighted work by the defendant without the plaintiff's approval." *Equinox Software Systems, Inc. v. Airgas, Inc., 1996 U.S. Dist. LEXIS 7096, 1996 WL 278841* at *5 (E.D. Pa. May 23, 1996) (citations and quotation marks omitted).

5. With respect to the first criterion - ownership - Harris contends that "[a] copyright registration is *prima facie* evidence of validity if it is obtained within [three] years of publication of the work." See Docket No. 82, p. 13. [2]

6. Here, Harris caused the preparation and filing of the copyright applications on or about March 26, 1998. Harris does not contend that the applications were filed within three years of the dates upon which **[*20]** the photographs were taken. The testimony elicited at the hearing, as well as the subjects of the photographs themselves, suggest that the photographs were taken decades ago. Accordingly, I do not accord the mere filing of the applications *prima facie* evidence of ownership.

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[2] While Harris initially claimed that registration had to occur within five years, he later clarified that it must be made within three years. See Letter dated October 21, 1998.

7. The applications actually recite that the "work" was completed in 1978. Yet, as stated above, clearly some of the photographs were taken in the early to mid decades of this century. This causes me pause in exercising my discretion to find the existence of a valid copyright.

8. Additionally, I am not convinced that all of the photographs included in the application were, in fact, taken by Harris. Testimony at the trial suggested that another photographer may have taken certain photographs. This further weighs against a finding of a valid copyright.

9. It is also unclear whether or not certain of the photographs had been published in the Pittsburgh Courier. Morgan testified that a number of the photographs included in the application had, in fact, appeared in the newspaper.

10. Under federal copyright law, the term of a copyright in a photograph published prior to 1964 would have expired within 28 years, **[*21]** absent a renewal. See *17 U.S.C. § 24 (1909 Act)*. A renewal term of 28 years **[**1308]** would have been available had an application been filed prior to the expiration of the initial term. Harris did not proffer any evidence of a filing under the 1909 Act, or the filing of a renewal application. Accordingly, any of the photographs published prior to 1964 in the Courier would not be entitled, in any event, to copyright protection.

11. Finally, and most fundamentally, the applications recently filed include only a small fraction (1,000 out of 100,000) of the photographs at issue in this case. ***HN3***[↑] Registration is a jurisdictional prerequisite to commencing suit for copyright infringement. See *17 U.S.C. § 101 et. seq.* Thus, I likely do not even have the jurisdiction necessary to entertain a copyright infringement claim with respect to the vast majority of the photographs at issue, much less the authority to enter a preliminary injunction.

12. Thus, without in any way meaning to denigrate Harris' substantial work, I find that I am unable to grant the extraordinary relief of a preliminary injunction. I find that Harris has not met his burden of establishing a likelihood of success on the **[*22]** merits of his copyright infringement claim. I need not address the other elements of a preliminary injunction.

ORDER OF COURT

AND NOW, this **18th** day of November, 1998, it is **ORDERED** that Harris' Motion for Preliminary Injunction (Docket #: 6) premised upon both copyright infringement and Lanham Act violations is **DENIED**. A Status Conference is scheduled before the undersigned for Friday, December 4, 1998, at 11:00 A.M.

BY THE COURT:

Donetta W. Ambrose,

U. S. District Judge

End of Document

Harris v. Morgan

United States District Court for the Western District of Pennsylvania

December 9, 1998, Decided ; December 9, 1998, Date Filed

Civil Action No. 98-639

Reporter
1998 U.S. Dist. LEXIS 21284 *

CHARLES A. HARRIS, Executor of the Estate of CHARLES "*TEENIE" HARRIS*, Plaintiff, -vs- DENNIS MORGAN, i/t/d/b/a PITTSBURGH COURIER ARCHIVES, et al., Defendants.

Disposition: [*1] Motion to Dismiss (Docket No. 32) GRANTED in that the claim for Conversion/Replevin set forth in Count 3 DISMISSED without prejudice. Motion to Dismiss (Docket No. 32) DENIED, with respect to all other claims asserted on behalf of the Corporate Defendants, and with respect to the claim for Unjust Enrichment set forth in Count 4.

Core Terms

Conversion, set forth, motion to dismiss, unjust enrichment

Case Summary

Procedural Posture
Plaintiff brought a motion to dismiss defendants' counterclaim for declaratory judgment, disparagement of title, conversion, and unjust enrichment, in an action concerning the possession and ownership of various photographs, negatives, and films.

Overview
In an action concerning the possession and ownership of various photographs, negatives, and films, defendants asserted a counterclaim for declaratory judgment, disparagement of title, conversion, and unjust enrichment. Plaintiff brought a motion to dismiss the counterclaim. The court granted the motion with respect to the count alleging conversion, finding that defendants' claim, which was based on breach of a contract, could not be converted into a tort action. Defendants were given leave to amend the counterclaim to allege a count for breach of contract. The court denied the motion in all other respects.

Outcome
The court granted plaintiff's motion to dismiss the count alleging conversion, finding that defendant was not entitled to sue in tort for damages arising out of the breach of a contract. The court granted defendant leave to amend the counterclaim to allege breach of contract. The court denied the balance of the motion.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[⬇] **Motions to Dismiss, Failure to State Claim**

In deciding a motion to dismiss, all factual allegations and all reasonable inferences therefrom must be accepted as true and viewed in the light most favorable to the plaintiff. The trial court may dismiss a complaint only if it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of his claims which would entitle him to relief. In ruling on a motion to dismiss for failure to state a claim, the trial court must look to whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer.

Contracts Law > Breach > General Overview

Torts > Intentional Torts > Conversion > General Overview

Contracts Law > ... > Sales of Goods > Breach, Excuse & Repudiation > General Overview

Contracts Law > ... > Default > Foreclosure & Repossession > General Overview

HN2 **Contracts Law, Breach**

Conversion is an act of willful interference with the dominion or control over a chattel, done without lawful justification, by which any person entitled to the chattel is deprived of its use and possession. The mere existence of a contract between the parties does not automatically foreclose the parties from raising a tort action. However, a plaintiff should not be allowed to sue in tort for damages arising out of a breach of contract. Likewise, a party cannot prevail on its action of conversion when the pleadings reveal merely a damage claim for breach of contract.

Counsel: For PLAINTIFF: CYNTHIA KERNICK ESQ, REED SMITH SHAW & MCCLAY, PITTSBURGH, PA.

For DENNIS MORGAN, DEFENDANT: WILLIAM GALLAGHER ESQ, COHEN & GRIGSBY, PITTSBURGH, PA.

For JEROME WILLIAMS, DEFENDANT: RICHARD SANDOW ESQ, JONES GREGG CREEHAN & GERACE, PITTSBURGH, PA.

Judges: Donetta W. ***Ambrose***, U. S. District Judge.

Opinion by: Donetta W. Ambrose

Opinion

MEMORANDUM OPNION

The factual and procedural history of this case are thoroughly documented in previous Opinions and need not be repeated. Suffice it to say that Harris commenced suit against Williams, Morgan and various business entities, concerning the possession and ownership of various photographs, negatives and 16mm films. Morgan filed a Counterclaim, purportedly on his own behalf, as well as on behalf of Pittsburgh Courier Archives, Pittsburgh's Black Heritage Photographic Archives, and Pittsburgh **[*2]** Courier Photographic Archives, Inc. (collectively referred to as the "Corporate Defendants"), asserting the following causes of action: Declaratory Judgment (Count 1); "Disparagement of Title" (Count 2); "Conversion and Request for Replevin" (Count 3); and "Unjust Enrichment" (Count 4).

Pending is Harris' Motion to Dismiss Counts 3 and 4 of the Counterclaim insofar as they are asserted on Morgan's behalf, and Counts 1-4 of the Counterclaim insofar as they are asserted on behalf of the Corporate Defendants (Docket No. 32). Harris contends that Counts 3 and 4 fail to state a claim upon which relief can be granted and that the Corporate Defendants waived the right to assert the claims set forth in Counts 1-4.

After careful consideration, and for the reasons set forth below, the Motion to Dismiss is granted in part and denied in part.

STANDARD

HN1 In deciding a motion to dismiss, all factual allegations and all reasonable inferences therefrom must be accepted as true and viewed in the light most favorable to the plaintiff. *Colburn v. Upper Darby Township, 838 F.2d 663, 666 (3d Cir. 1988), cert. denied, 489 U.S. 1065, 103 L. Ed. 2d 808, 109 S. Ct. 1338 (1989).* I may dismiss **[*3]** a complaint only if it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Conley v. Gibson, 355 U.S. 41, 45, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).* In ruling on a motion to dismiss for failure to state a claim, I must look to "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." *Colburn, 838 F.2d at 666.*

ANALYSIS

I. *Count 3 - "Conversion and Request for Replevin"*

Count 3 contains no separate allegations. Rather, it simply incorporates all previous allegations and requests that "the Court order Plaintiff to relinquish to Defendants possession of all materials which Plaintiff sold to Dennis Morgan." Harris surmises that the claim is "based upon the premise that Mr. Harris wrongfully failed to deliver all negatives owned by Mr. Harris purportedly purchased by Morgan." *See* Docket No. 33, p. 5. Harris argues, in part, that a claim for conversion cannot be based simply upon Harris' alleged failure to abide by the terms of a contract.

"*HN2*[↑] Conversion is an act of willful interference **[*4]** with the dominion or control over a chattel, done without lawful justification, by which any person entitled to the chattel is deprived of its use and possession." *Neyer, Tiseo & Hindo, Ltd. v. Russell, 1993 U.S. Dist. LEXIS 2738, 1993 WL 53579* at *4 (E.D. Pa. March 3, 1993), *citing, Baram v. Farugia, 606 F.2d 42, 43 (3d Cir. 1979); Welded Tube Co. v. Phoenix Steel Corp., 512 F.2d 342 (3d Cir. 1975)*; and *Stevenson v. Economy Bank of Ambridge, 413 Pa. 442, 451, 197 A.2d 721 (1964)*. "The mere existence of a contract between the parties does not automatically foreclose the parties from raising a tort action." *Neyer, 1993 WL 53579* at *4, *citing, Stout v. Peugeot Motors of America, 662 F. Supp. 1016, 1018 (E.D. Pa. 1986)*. "However, a plaintiff should not be allowed to sue in tort for damages arising out of a breach of contract." *Id.* (citations omitted). "Likewise, a party cannot prevail on its action of conversion when the pleadings reveal merely a damage claim for breach of contract." *Id.* (citations omitted).

I agree with Harris that, here, the pleadings reveal merely a damage claim for breach of contract. As in *Neyer*, the Defendants' right to the materials at issue is solely **[*5]** predicated upon the alleged contract. Again here, as in *Neyer*, if Harris caused any harm to the Defendants, "it was for breach of an obligation imposed by a contract between the parties." *Id.* Accordingly, while the Counterclaim attempts to plead a conversion/replevin claim, I simply view the claim as one for damages for breach of contract. *See also Rade v. Transition Software Corp., 1998 U.S. Dist. LEXIS 17279, 1998 WL 767455* at *8 (E.D. Pa. Oct. 30, 1998) (granting summary judgment in favor of defendant on a claim for conversion where the plaintiff sought only breach of contract damages). Consequently, I will grant Harris' Motion to Dismiss Count III. Such dismissal is, however, without prejudice to amend the Counterclaim and assert a claim for breach of contract. [1]

2. *Count 4 - Unjust Enrichment*

Count 4 contains the following allegation:

> it is denied that Plaintiff is entitled **[*6]** to recover the Harris materials from the Morgan defendants or to any other relief. However, in the event the Court determines that the Morgan Defendants must return the Harris materials to Plaintiff, Plaintiff would be unjustly enriched at Dennis Morgan's expense if he is permitted to enjoy the benefits of Dennis Morgan's labors and expenditures without compensating Mr. Morgan therefor.

See Counterclaim, P 165.

Harris contends that Count 4 "does not state a present justifiable case or controversy (the negatives having not yet been returned), and similarly, [that it] fails for want of ripeness." *See* Docket No. 33, p. 8. Harris explains that the Defendants allege, at most, a *future* claim for unjust enrichment. Accordingly, Harris concludes, the claim must be dismissed as premature.

Significantly, however, Harris does not cite to any case law supporting his assertions. As the Defendants suggest, certain claims (such as a third party claim for indemnification), which otherwise may be characterized as "premature," are allowed to proceed.

Consequently, in light of the Defendants' reasoning, and absent any substantive analysis of this issue by Harris, I will not dismiss **[*7]** the claim. Harris is, of course, permitted to raise again, and fully brief this issue in the context of a motion for summary judgment.

3. *Counts 1-4 - Defendant Corporation*

The Counterclaim purports to assert the claims set forth in Counts 1 through 4 on behalf of Pittsburgh Courier Photographic Archives, Inc. ("PCPA"). Harris notes that an earlier Counterclaim already purports to assert claims on behalf of PCPA. *See* Docket No. 20. Harris thus reasons that any claims not asserted in the earlier filing are waived.

However, Harris fails to offer any case law in support of his assertion. Moreover, the Defendants represent that Morgan is the majority shareholder in PCPA, and thus has the right to select counsel. Additionally, since June of 1998, counsel for these Defendants, rather than counsel for Williams, has been responding to any discovery requests directed to PCPA. These facts, if true, would suggest that perhaps the claims asserted on behalf of PCPA by *Williams* should be dismissed.

At any rate, I will allow the claim to go forward, given Harris' failure to cite to any persuasive authority. Harris is, of course, free to challenge this claim again at a subsequent **[*8]** procedural juncture.

ORDER OF COURT

AND NOW, this **9th** day of December, 1998, after

[1] I disagree with the Defendants' contention that Count III, as it now reads, properly sets forth a claim for breach of contract.

careful consideration, and for the reasons set forth in the Opinion accompanying this Order, it is **ORDERED** that the Motion to Dismiss (Docket No. 32) is **GRANTED** in that the claim for Conversion/Replevin set forth in Count 3 is **DISMISSED**. Such dismissal is, however, without prejudice to file an Amended Counterclaim setting forth a claim for breach of contract.

The Motion is **DENIED**, however, with respect to all other claims asserted on behalf of the Corporate Defendants, and with respect to the claim for Unjust Enrichment set forth in Count 4.

BY THE COURT:

Donetta W. Ambrose,

U. S. District Judge

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Harris v. Morgan

United States District Court for the Western District of Pennsylvania

August 20, 1998, Decided ; August 20, 1998, Date Filed

Civil Action No. 98-639

Reporter
1998 U.S. Dist. LEXIS 21283 *

CHARLES "***TEENIE" HARRIS***, Plaintiff, -vs- DENNIS MORGAN, an individual, and doing business as PITTSBURGH COURIER ARCHIVES PITTSBURGH'S BLACK HERITAGE, PITTSBURGH BLACK HERITAGE PHOTOGRAPHIC ARCHIVES, and PITTSBURGH COURIER PHOTOGRAPHIC ARCHIVES, INC., JEROME WILLIAMS, an individual, and doing business as PITTSBURGH COURIER PHOTOGRAPHIC ARCHIVES, INC., and PITTSBURGH COURIER PHOTOGRAPHIC ARCHIVES, INC., a Pennsylvania corporation, Defendants.

Disposition: [*1] Plaintiff's "Combined Expedited Motion and Supporting Memorandum for Order Holding Defendant Jerome Williams in Contempt and for Seizure for Purposes of Impoundment of Infringing Material in His Possession." (Docket No. 70) DENIED in its entirety.

Core Terms

consummate, Restraining, Infringing, permission, Contempt, Seizure, solicit, offers, prints

Counsel: For PLAINTIFF: CYNTHIA KERNICK ESQ, REED SMITH SHAW & MCCLAY, PITTSBURGH, PA.

For DENNIS MORGAN, DEFENDANT: WILLIAM GALLAGHER ESQ, COHEN & GRIGSBY, PITTSBURGH, PA.

For JEROME WILLIAMS, DEFENDANT: RICHARD SANDOW ESQ, JONES GREGG CREEHAN & GERACE, PITTSBURGH, PA.

Judges: Donetta W. ***Ambrose***, U. S. District Judge.

Opinion by: Donetta W. Ambrose

Opinion

MEMORANDUM ORDER

Pending is Plaintiff's "Combined Expedited Motion and Supporting Memorandum for Order Holding Defendant Jerome Williams in Contempt and for Seizure for Purposes of Impoundment of Infringing Material in His Possession." (Docket No. 70). Plaintiff contends that Williams attempted to sell 30 vintage prints to Louise W. Lippincott, Curator of Fine Arts for the Carnegie Museum of Art, in violation of the Temporary Restraining Order ("TRO") issued on April 8, 1998, which is to remain in full force and effect until the Court has ruled on the Motion for **[*2]** Preliminary injunction.

In response to the Motion, Williams submitted an affidavit, acknowledging that he had, in fact, contacted Lippincott. Williams believed that the sale of certain prints might allow him to raise the funds necessary to continue defending this lawsuit. His intention, he alleges, was to solicit offers and then seek Court permission to consummate the sale. "No price, terms and conditions of sale, or date of transfer," Williams assures, "was discussed at any time." Williams Affidavit, P 9. Williams further represents that:

> at no time have I engaged in any activity contrary to this Court's Order. No sale has been consummated, nor has there ever been any intention to consummate any sale without first obtaining Court relief.

Id., P 14.

I agree that Williams did not violate the plain language, spirit or intent of the TRO. The TRO restrains the Defendants from "distribution or other disposition of ... the negatives, films, and photographs," identified as ***Teenie Harris***'. The wording does not prohibit the solicitation of offers. Additionally, I have no reason to doubt Williams' representation that he intended to seek Court permission before consummating **[*3]** any sale.

Accordingly, this **20th** day of August, 1998, it is hereby **ORDERED** that the Motion (Docket # : 70) is **DENIED** in

its entirety. Williams will not be held in contempt, nor will this Court order the seizure of the allegedly infringing material.

BY THE COURT:

Donetta W. Ambrose,

U. S. District Judge

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United States v. Black

United States District Court for the Western District of Pennsylvania

July 5, 2001, Decided; July 5, 2001, Filed

Criminal No. 99-203

Reporter
2001 U.S. Dist. LEXIS 26296 *

UNITED STATES OF AMERICA, -vs- ***JOHN GARDNER BLACK***, Defendant.

Prior History: *SEC v. Black, 163 F.3d 188, 1998 U.S. App. LEXIS 31538 (3d Cir. Pa., 1998)*

Core Terms

securities, investment adviser, companies, Ineffective, Restitution, investment contract, Invested, Vacate

Counsel: **[*1]** ***JOHN GARDNER BLACK***, Defendant, Pro se, Warriors Mark, PA.

For UNITED STATES OF AMERICA, Plaintiff: Leon Rodriguez, LEAD ATTORNEY, United States Attorney's Office, Pittsburgh, PA.

Judges: Donetta W. ***Ambrose***, U.S. District Judge.

Opinion by: Donetta W. Ambrose

Opinion

MEMORANDUM OPINION and ORDER OF COURT

Pending are Petitioners Motion to Vacate, Set Aside or Correct Sentence (Docket No. 66), Petitioners Motion for Appeal Bond (Docket No. 69) and Petitioner's Motion to Suspend Restitution Payments (Docket No. 70). The Government has responded to all three (3) Motions (Docket Nos. 72, 73 and 74). Although Petitioner requests an evidentiary hearing or his immediate release from prison, I find that neither are justified after careful consideration of all submissions, including Petitioners Reply (Docket No. 76).

Turning first to Petitioners Motion to Vacate, Set Aside, or Correct Sentence (Docket No. 66), petitioner contends that this court did not have Jurisdiction over him pursuant to 15 U.S.C. §80b et seq.; that he is actually innocent; and that he received Ineffective assistance of counsel.

As to Petitioners first claim -- that this court did not have jurisdiction over him, Petitioner argues four (4) things:

> (1) that **[*2]** he and his companies did not offer clients "securities;"
> (2) that he and his companies did not offer clients "investment contracts;"
> (3) that he Is not an investment adviser; and
> (4) that his companies are not Investment companies.

I reject Petitioners jurisdictional argument for several reasons. First, Petitioner entered a plea of guilty to violations of *15 U.S.C. §§ 80b-6* and *80b-17*, fraud by an investment adviser. Thus, this Court clearly had jurisdiction over Petitioners prosecution as to the offenses charged under the investment Advisers Act. Although the court of Appeals for the Third Circuit has not held that a Defendant gives up the right to collaterally attack Jurisdictlonai defects when he has entered a guilty plea, I do agree with the Government that it is somewhat disingenuous for Black to now argue a lack of jurisdiction after he admitted to being an investment adviser at the time he entered his plea.

Moreover, I find that Petitioner was, in fact, an investment adviser. In support of his current assertions, Petitioner offers only self-serving statements which directly contradict previous declarations made under oath.

I further find that the CIAS were securities and/or investment **[*3]** contracts, as the Goverment points out, under both the Securities Act and the Exchange Act, securities are defined, among other things, as Investment contracts, investment contracts are defined as,

> (1) an Investment of money,

(2) In a common enterprise,
(3) with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.

SEC v. Infinity Group, et al., 212 F.3d 180, 187 (3d Cir. 2001)

Clearly, money was Invested in the CIAS, which were part of a pooled group of funds and from which Investors reasonably expected profits to be derived. Furthermore, the money was Invested with Petitioner and his companies for their management. Thus, there can be no question that the CIAS were securities, investment contracts.

I also find petitioners claim that neither he nor his companies were investment advisers to be without merit. The definition of "Investment adviser" in §202(a)(11) of the Advisers Act, *15 U.S.C. §80b-2(a)(11)* makes the conclusion reached above clear:

> "Any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of Investing **[*4]** in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities,...."

In this case, Petitioner admitted that his company, In which he was the sole shareholder, entered into advisory agreements with clients wherein the clients gave Petitioners company discretion to invest the clients funds. Petitioner directed the investments and was paid a fee.

Petitioner's second claim is that he is actually innocent and that, therefore, his conviction violated his due process rights. For the reasons set forth above, I find this contention to be without merit. Petitioner argues that he could not have violated the securities Act and the Exchange Act because he was not an investment adviser and the CIAS were not securities despite previous assertions under oath to the contrary. I, however, have found otherwise.

Petitioner's third claim is that he received Ineffective assistance of counsel. His argument is based first on his counsel's alleged deficiency and ineffectiveness for falling to understand and argue that he and his companies were not investment advisers and that the CIAS were not securities. As I have **[*5]** already determined that Black and his companies were investment advisers and that the CIAS were securities, I cannot and do not find that counsel was Ineffective for not arguing otherwise.

The second part of Petitioner's Ineffective assistance of counsel claim is that counsel was ineffective for falling to object to the part of his sentence ordering restitution under the Mandatory victims Restitution Act of 1996 ("MVRA"). The MVRA is applicable to alt crimes committed after April 24, 1996. At his Change of Plea Hearing, Petitioner entered a piea of guilty to ten (10) counts alleging conduct that occurred after April 24, 1996. Additionally, Petitioner entered a plea of guilty to a scheme that, although beginning before April 24, 1996, ended fifteen (15) months after Aprif 24, 1996. Thus, even though the scheme began before the effective date, it concluded after the MVRA'S effective date. *U.S. v. Bovd, 239 F.3d 471, 472 (2d Cir. 2001)*.

As to Petitioner's Motion for Appeal Bond (Docket No. 69), Petitioner claims he is entitled to such under *18 U.S.C. §3143* because of the high probability of success of his Motion to vacate, correct, or Set Aside, which, he contends, raises substantial questions **[*6]** of law. As the Government correctly points out, *18 U.S.C. §3143* applies to defendants whose cases are pending on direct, not collateral, appeal. Petitioner has not pointed to and the Court cannot find any authority for Petitioner's release while his Motion is pending.

Furthermore, I cannot find that Petitioner has a high probability of success in his appeal, having found no merit to his Motion to Vacate, Set Aside or correct.

As to Petitioner's Motion to Suspend Restitution Payments (Docket no. 70), for the reasons set forth above relating to Petitioner's claim that restitution was unconstitutionally Imposed, I find that Petitioner's Motion to be without merit and deny his request.

ORDER OF COURT

AND NOW, this 5th day of July, 2001 the following order is ENTERED:

1. The Motion to vacate Set Aside or correct Sentence (Docket No. 66) is denied.
2. The Motion for Appeal Bond (Docket No. 69) is denied.
3. The Motion to Suspend Restitution Payments (Docket No. 70) is denied.

BY THE COURT:

/s/ Donetta W. Ambrose

Donetta W. Ambrose,

U.S. District Judge

End of Document

possibility that the Trust may become insolvent. Hence, class counsel only had one real interest in negotiating the Amendment, and, accordingly, there was no conflict.

C. Justiciability

[9] Appellants make the final argument that Matrix claimants who will not be paid due to funding insufficiency should be immediately released from the Settlement so that they may pursue unrestricted actions against Wyeth in the tort system. The District Court held that the principles of justiciability prevented it from addressing the issue of what the consequences would be for the parties if the Settlement Trust were actually to become exhausted. The Court held that the parties had no standing to bring such a claim because they failed to allege harm that is "actual or imminent, not 'conjectural' or 'hypothetical.'" PTO 2778 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). The Court further pointed out that any future depletion of the Trust remains purely speculative at the moment, particularly since Wyeth could still decide to supplement the funds voluntarily in order to avoid further litigation. We agree that a funding shortfall is neither "actual" nor "imminent" here. This is particularly true given the measures currently undertaken by Trust administrators, such as auditing of Green Form claims, to ease the strain on the Trust. Considering these measures, and the fact that $2 billion still remains available to the Trust to satisfy Matrix benefits, depletion of the Settlement funds may never occur. We, therefore, reject Appellant's claim here as it is not fit for adjudication at this time.

III. CONCLUSION

For the foregoing reasons, we affirm the order of the District Court as set forth in PTO 2778, approving the Sixth Amendment to the Nationwide Class Action Settlement Agreement.

Andy MODROVICH; James Moore, Appellants

v.

ALLEGHENY COUNTY, PENNSYLVANIA.

No. 03-3571.

United States Court of Appeals, Third Circuit.

Argued March 24, 2004.

Filed Oct. 6, 2004.

Background: Atheists brought § 1983 suit challenging under Establishment Clause the display of text of Ten Commandments on plaque affixed to county courthouse. The United States District Court for the Western District of Pennsylvania, Donetta W. Ambrose, Chief Judge, entered summary judgment for county, and atheists appealed.

Holdings: The Court of Appeals, Fuentes, Circuit Judge, held that:

(1) display of plaque did not violate Establishment Clause under endorsement test, and

(2) display of plaque did not violate Establishment Clause under *Lemon* test.

Affirmed.

Gibson, Circuit Judge, filed dissenting opinion.

1. Constitutional Law ⇐84.1

Under *Lemon v. Kurtzman* test for analyzing government action challenged under the Establishment Clause, the challenged action is unconstitutional if (1) it lacks a secular purpose, (2) its primary effect either advances or inhibits religion, or (3) it fosters an excessive entanglement of government with religion. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇐84.5(11)

In cases involving religious displays on government property, endorsement test for determining violation of Establishment Clause asks whether a reasonable observer familiar with the history and context of the display would perceive the display as a government endorsement of religion. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐84.1

Establishment Clause challenge requires a fact-specific, case-by-case analysis. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇐84.5(11)

Particular context in which a basically religious display appears can alter the message of display such that it is no longer endorsing religion, but merely acknowledging it, such that reasonable observer would not perceive government endorsement of religion that violates Establishment Clause. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇐84.5(11)
Counties ⇐107

Ten Commandments plaque affixed near side entrance to county courthouse did not send a message of government endorsement of religion to reasonable observer, and thus did not violate Establishment Clause, where it had been a fixture on historical courthouse since 1918, was not highlighted or displayed prominently, and was one of several historical relics displayed on the courthouse; reasonable observer would be aware that, although plaque was donated by religious organization, county expressed secular reasons for accepting it and that county made no special effort to highlight or maintain plaque. U.S.C.A. Const.Amend. 1.

6. Constitutional Law ⇐84.5(11)
Counties ⇐107

Under *Lemon v. Kurtzman* test for Establishment Clause violations, county articulated legitimate secular purpose for refusing to remove plaque displaying Ten Commandments located near side entrance of county courthouse based on county officials' desire to preserve an historical artifact donated to county in 1918 and a view of the Commandments as being one of the bases of modern law; moreover, display did not need to be motivated wholly by secular considerations, and statements by others who were not county decision-makers were not relevant to inquiry. U.S.C.A. Const.Amend. 1.

Ayesha N. Khan, Alex J. Luchenitser (argued), Americans United for Separation of Church and State, Washington, DC, for Appellants.

Perry A. Napolitano (argued), Donna M. Doblick, P. Gavin Eastgate, Darren P. O'Neill, Reed Smith LLP, Pittsburgh, PA, Ralph A. Finizio, Kevin L. Colosimo, Houston Harbaugh, Pittsburgh, PA, for Appellee.

Before FUENTES, SMITH, and JOHN R. GIBSON,* Circuit Judges.

* The Honorable John R. Gibson, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION OF THE COURT

FUENTES, Circuit Judge.

This appeal raises the issue of whether the display of a plaque containing the text of the Ten Commandments on the Allegheny County Courthouse violates the Establishment Clause of the First Amendment of the U.S. Constitution. Appellants Andy Modrovich and James Moore seek review of the District Court's decision granting summary judgment in favor of Allegheny County and holding that displaying the plaque does not violate the Establishment Clause. Modrovich and Moore, two avowed atheists, claim to have had regular and unwelcome contact with the plaque while entering and walking past the courthouse. They argue that Allegheny County's continued display of the plaque represents a government endorsement of religion in violation of the Establishment Clause.

In *Freethought Society of Greater Philadelphia v. Chester County,* 334 F.3d 247 (3d Cir.2003) [hereinafter *"Freethought"*], we addressed a similar dispute concerning a plaque of the Ten Commandments affixed to the façade of a courthouse in Chester County, Pennsylvania. We found that a reasonable observer, aware of the history of the 82–year–old plaque, would not have viewed Chester County's refusal to remove the plaque as an endorsement of religion, and that the county had a legitimate secular purpose for continuing to display the plaque. In accordance with our decision in *Freethought,* we hold that because the Ten Commandments plaque in Allegheny County has been a fixture on an historical courthouse since 1918, is not highlighted or displayed prominently, and is one of several historical relics displayed on the courthouse, Allegheny County's refusal to remove it does not send a message of government endorsement of religion in violation of the Establishment Clause.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 1918, a bronze plaque containing the text of the Ten Commandments and other biblical passages ("the Plaque") was donated to Allegheny County Pennsylvania ("the County"). The Plaque is now affixed to the stone wall of the Allegheny County Courthouse, facing a main street (Fifth Avenue) in downtown Pittsburgh. Modrovich and Moore alleged that they have had regular, direct and unwelcome contact with the Plaque while entering the courthouse on errands and walking past it on their way to and from work. Modrovich and Moore claim to have felt "affronted and deeply offended" by the display, feeling as though the County views them as outsiders in the community because they do not adhere to the religious message of the Commandments. Complaint at ¶ 4.

In October 2000, an attorney from the Americans United for Separation of Church and State contacted the then-Chief Executive of Allegheny County (James Roddey) and then-President of the County Council (John DeFazio) on behalf of Modrovich and Moore, requesting that the Plaque be removed because its continued presence violated the Establishment Clause of the First Amendment. County officials disagreed with that assertion and refused to remove the Plaque. In addition, the County Council passed a motion on January 16, 2001, expressing its support for the efforts of Roddey and DeFazio to prevent its removal.

Modrovich and Moore filed suit in the Western District of Pennsylvania on March 27, 2001, pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983 ("Section 1983"). They claimed that their First Amendment rights were being violated under color of state law by a local

municipality. They sought a declaratory judgment that the continued presence of the Plaque violated the First and Fourteenth Amendments. They also sought a permanent injunction prohibiting the County from displaying the Plaque at the courthouse. Modrovich and Moore filed a motion for summary judgment and a motion for a permanent injunction on January 31, 2002, arguing that the Plaque had the effect of endorsing religion. The County filed a cross-motion for summary judgment on the same day, asserting that because the Plaque is one of over twenty historical, political, and cultural relics displayed at the courthouse, it has secular significance and its continued display does not amount to an unconstitutional endorsement of religion.

While these motions were pending, the Eastern District of Pennsylvania decided *Freethought,* a case involving almost identical facts and issues concerning the display of a plaque of the Ten Commandments affixed to a courthouse in Chester County. *See Freethought Soc'y v. Chester County,* 191 F.Supp.2d 589 (E.D.Pa.2002). On March 6, 2002, that court, applying the three-prong test set forth in *Lemon v. Kurtzman,* 403 U.S. 602, 612–13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), found that the plaque was only incidentally secular, and that Chester County officials intended the plaque to advance the Christian religion. The court, therefore, held Chester County's display of the plaque to be unconstitutional under the Establishment Clause. *Freethought,* 191 F.Supp.2d at 599. Chester County appealed the district court's decision to this Court. While *Freethought* was on appeal, the District Court judge in the instant case advised the parties that she would hold their motions for summary judgment in abeyance pending our decision.

On June 26, 2003, this Court, analyzing the constitutionality of the Chester County plaque under both the *"Lemon"* test and the "endorsement" test, reversed the decision of the district court in *Freethought.* The endorsement test, a modification of the *Lemon* test, was first articulated by Justice O'Connor in *Lynch v. Donnelly,* 465 U.S. 668, 687–88, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring). Under both of these approaches, this Court held that the Chester County plaque did not violate the Establishment Clause. *Freethought,* 334 F.3d at 251. We then vacated the permanent injunction issued by the district court prohibiting Chester County from displaying the plaque.

Following this precedent, the District Court in this case granted summary judgment to Allegheny County and denied summary judgment to Modrovich and Moore.

II. THE LEGAL FRAMEWORK

A. The Establishment Clause

[1] Under the Establishment Clause of the First Amendment, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Fourteenth Amendment imposes this limitation on the states as well as their political subdivisions. *Wallace v. Jaffree,* 472 U.S. 38, 49–50, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985). The Supreme Court has articulated three separate tests for determining whether governmental action violates the Establishment Clause. The first of these, the "coercion" test, is not applicable to this case. It focuses primarily on government action in public education and examines whether school-sponsored religious activity has a coercive effect on students. *See Freiler v. Tangipahoa Parish Bd. of Educ.,* 185 F.3d 337, 343 (5th Cir.1999), *cert. denied,* 530 U.S. 1251, 120 S.Ct. 2706,

147 L.Ed.2d 974 (2000). The second and third tests, however, are both relevant to this case. The second, the *"Lemon"* test, is a three-prong approach to be used when analyzing government action challenged under the Establishment Clause. *Lemon*, 403 U.S. at 612–13, 91 S.Ct. 2105. Under *Lemon*, the challenged action is unconstitutional if (1) it lacks a secular purpose, (2) its primary effect either advances or inhibits religion, or (3) it fosters an excessive entanglement of government with religion. *Id.*

[2] Finally, the "endorsement" test modifies *Lemon* in cases involving religious displays on government property. The endorsement test dispenses with *Lemon*'s "entanglement" prong and, combining an objective version of *Lemon*'s "purpose" prong [1] with its "effect" prong, asks whether a reasonable observer familiar with the history and context of the display would perceive the display as a government endorsement of religion. *Lynch*, 465 U.S. at 687, 104 S.Ct. 1355 (O'Connor, J., concurring); *see also County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (adopting the endorsement test by a majority of the Court); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 174 (3d Cir.2002) (applying the endorsement test to a government display of privately owned and maintained religious objects). The endorsement test asks whether the government action has "the effect of communicating a message of government endorsement or disapproval of religion." *Lynch*, 465 U.S. at 692, 104 S.Ct. 1355 (O'Connor, J., concurring). The endorsement test centers on the perceptions of the "reasonable observer" when viewing a religious display. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). Thus, in applying the endorsement test, we do not examine the County's motivations in displaying the Plaque, but consider the Plaque's effect on the reasonable observer, determining whether the reasonable observer would perceive it as an endorsement of religion.

B. *Freethought* and the Endorsement Test

In *Freethought*, we began our analysis of the constitutionality of the Chester County plaque by first considering which test should be applied to determine whether the plaque violated the Establishment Clause. We decided that the correct test was not *Lemon* (which the district court had applied), but the endorsement test. In arriving at this conclusion, we noted that the Supreme Court had begun to rely increasingly on the endorsement test in recent years and had criticized *Lemon* as being vague and, consequently, unpredictable in its application. *Id.* at 256–57 (citing *County of Allegheny*, 492 U.S. at 631, 109 S.Ct. 3086 (O'Connor, J., concurring)); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (Scalia, J., concurring) (criticizing *Lemon*); *Wallace*, 472 U.S. at 108, 105 S.Ct. 2479 (Rehnquist, J., dissenting); *see also Tenafly*, 309 F.3d at 144.

1. Instead of looking to the legitimacy of the County's articulated purposes, *see Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (stating that "[t]he purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion" (quotation omitted)), the purpose inquiry in the endorsement test looks to "what viewers may fairly understand to be the purpose of the display," *County of Allegheny v. ACLU*, 492 U.S. 573, 595, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (quotation omitted).

In applying the endorsement test, we identified two factors as particularly critical: first, the message that the "reasonable observer" receives from the display, i.e., whether the display sends a message of government endorsement of religion; and second, the context in which the religious display appears.

> [T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.... Nor can the knowledge attributed to the reasonable observer be limited to the information gleaned simply from viewing the challenged display....
>
> [O]ur hypothetical observer also should know the general history of the place in which the [object] is displayed.... An informed member of the community will know how the public space in question has been used in the past.

Capitol Square, 515 U.S. at 780, 115 S.Ct. 2440 (O'Connor, J., concurring in part and concurring in the judgment) (internal citations omitted). Thus, the reasonable observer is presumed to know the general history of both the religious display and the community in which it is erected. The reasonable observer is also "more knowledgeable than the uninformed passerby." *Freethought,* 334 F.3d at 259.

[3, 4] In addition, every Establishment Clause challenge requires a fact-specific, case-by-case analysis. *See Lynch,* 465 U.S. at 678, 104 S.Ct. 1355; *County of Allegheny,* 492 U.S. at 629–30, 109 S.Ct. 3086 (O'Connor, J., concurring). This is mainly due to the fact that the particular context in which a basically religious display appears can alter the message of this display such that it is no longer endorsing religion, but merely acknowledging it. *See Lynch,* 465 U.S. at 692, 104 S.Ct. 1355 (O'Connor, J., concurring). Admittedly, the text of the Ten Commandments contains an "inherently religious message." *Freethought,* 334 F.3d at 262 (citing *Stone v. Graham,* 449 U.S. 39, 41, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980)). However, posting the Commandments can still, under certain circumstances, be considered a secular display. In *Edwards v. Aguillard,* 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987), the Supreme Court stated that a prior "decision forbidding the posting of the Ten Commandments did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization." *Edwards,* 482 U.S. at 593–94, 107 S.Ct. 2573. Thus, it is well-established that the context in which an otherwise religious display appears can change the reasonable observer's perception of it. *See Lynch,* 465 U.S. at 692, 104 S.Ct. 1355 (O'Connor, J., concurring); *County of Allegheny,* 492 U.S. at 630, 109 S.Ct. 3086 (O'Connor, J., concurring) (stating that the "history and ubiquity" of a government action contributes to the context that affects the reasonable observer's perception of endorsement); *see also King v. Richmond County,* 331 F.3d 1271 (11th Cir.2003) (holding that a superior court's official seal depicting two tablets representing the Ten Commandments did not send a message of endorsement because of various contextual factors surrounding the seal's appearance and use).

Accordingly, the Court in *Freethought* considered various facts concerning the context of the plaque, including its history and age, its status as a long-standing fixture on an historic monument, and the fact that it was displayed by itself. The Court held that "the reasonable observer must certainly be presumed to know that the plaque has been affixed to the Courthouse for a long time," and would therefore view the plaque itself (rather than the text of

the Ten Commandments "in the abstract") as a reminder of historical events in Chester County rather than as an endorsement of religion by county officials. *Freethought*, 334 F.3d at 265. The Court also created a model of the reasonable observer. It found that the reasonable observer in that case would know the approximate age of the plaque, and the fact that Chester County had not moved, maintained or highlighted the plaque since it was erected in 1920. The reasonable observer would also be "aware of the general history of Chester County." *Id.* at 260.

The Court found that, based on this knowledge, the reasonable observer would conclude that the decision to leave the plaque in place was significantly motivated by a desire to preserve the plaque as an historical artifact. *Id.* at 265. Also, a reasonable observer would understand that over time additions to historic buildings such as the courthouse, which is included in the National Register of Historic Places, can become part of the monument and its history. *Id.* at 266. Considering Chester County's interest in historical preservation, and the reasonable observer's understanding of the plaque's significance to the courthouse's history, we concluded that the county's refusal to remove the plaque did not send a message of endorsing religion. Such a refusal to remove an historical artifact presents a very different scenario than, for example, attempting to install a new monument incorporating the Ten Commandments. *Id.* at 265. In the latter instance, a reasonable observer is much more likely to conclude that the government is attempting to endorse the religious message contained in the text of the Commandments because no legitimate secular motivation for erecting the monument (such as historic preservation) is apparent.

In addition, Chester County took no steps to highlight or celebrate the plaque or its contents. In fact, the entranceway nearest the plaque had been closed, making its presence less prominent, and supporting a perception that, by leaving the plaque affixed to the façade in its original historical location, Chester County was not attempting to endorse its religious content. *Id.* at 266–67. "In not changing the location of the plaque to the main entrance or otherwise actively drawing attention to the plaque, Chester County and its Commissioners' conduct indicates neutrality toward the plaque and its text." *Id.* at 270 (Bright, J., concurring). Thus, the *Freethought* Court held that the reasonable observer would not believe that Chester County commissioners were attempting to endorse religion by refusing to remove the plaque.

C. Application of the *Lemon* Test in *Freethought*

Although the Court decided the case under the endorsement test, it also applied the *Lemon* test, as the Supreme Court could still potentially review the issue under *Lemon*. *Id.* at 250. We disagreed with the district court's analysis under *Lemon* insofar as it gave relatively little weight to the actions and viewpoints of the current Chester County commissioners who declined to remove the plaque, instead focusing primarily on the motivations of the 1920 county officials who accepted the plaque. *Freethought*, 334 F.3d at 267. Thus, we concluded that the relevant government action was the decision not to remove the plaque, and, in examining the government's motivations, that courts should consider both time periods with the primary emphasis on recent events. It would have made little sense to attempt to analyze the allegedly offensive effect of the plaque on current Chester County residents, while only examining the original purpose for erecting it. *See id.*

Considering the purpose prong of *Lemon*, the Court found that Chester County had expressed a legitimate secular purpose for refusing to remove the plaque (*i.e.*, a desire to retain an historical element of an historical building). As the Court noted, the proffered reason for the decision need not be "exclusively secular," and the purpose prong only requires the reviewing court to find that the articulated secular purpose is not a "sham." *Id.* at 267 (citing *Edwards*, 482 U.S. at 585–87, 107 S.Ct. 2573). Thus, the Court accepted Chester County's reason, citing testimony from Chester County commissioners expressing their views of the plaque as having historical and secular, as well as religious, significance. *Id.* Chester County also supported these views with case law and legal treatises suggesting that the Ten Commandments "have an independent secular meaning in our society because they are regarded as a significant basis of American law and the American polity." *Id.* While the Court did not specifically consider the *Lemon* question of whether the primary effect of retaining the plaque was to advance or inhibit religion, it held that question to be encompassed in its endorsement test analysis and, therefore, concluded that Chester County's refusal to remove the plaque was constitutional under both the purpose and effect prongs of *Lemon*. Additionally, the Court noted that *Lemon*'s entanglement prong was an aspect of the effect inquiry and, as such, was also encompassed by its endorsement test analysis. *Id.* at 258 (citing *Agostini v. Felton*, 521 U.S. 203, 233, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)).

III. DISCUSSION

A. Description of the Allegheny Plaque

The Allegheny County Courthouse occupies a full city block in downtown Pittsburgh. It borders on four main roads (Grant Street, Fifth Avenue, Ross Street, and Forbes Avenue), and is built around an interior courtyard. The Courthouse complex was designed by world-renowned architect Henry Hobson Richardson and was completed in 1888. In 1968, the Pittsburgh History and Landmark Foundation designated the Courthouse an historical landmark. On March 7, 1973, it was placed on the National Register of Historic Places, and on May 11, 1976, it was named a National Historical Landmark.

The Plaque, a bronze tablet entitled "THE COMMANDMENTS," is four feet high by three feet wide. It displays the text of the Ten Commandments, largely from the King James version of Exodus and Deuteronomy. It reads:

> THOU SHALT HAVE NO OTHER GODS BEFORE ME.
>
> THOU SHALT NOT MAKE UNTO THEE ANY GRAVEN IMAGE, OR ANY LIKENESS OF ANY THING THAT IS IN HEAVEN ABOVE, OR THAT IS IN THE EARTH BENEATH, OR THAT IS IN THE WATER UNDER THE EARTH: THOUGH SHALT NOT BOW DOWN THYSELF TO THEM, NOR SERVE THEM:
>
> > FOR I THE LORD THY GOD AM A JEALOUS GOD, VISITING THE INIQUITY OF THE FATHERS UPON THE CHILDREN UNTO THE THIRD AND FOURTH GENERATION OF THEM THAT HATE ME; AND SHEWING MERCY UNTO THOUSANDS OF THEM THAT LOVE ME, AND KEEP MY COMMANDMENTS.
>
> THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN:
>
> > FOR THE LORD WILL NOT HOLD HIM GUILTLESS THAT TAKETH HIS NAME IN VAIN.

REMEMBER THE SABBATH DAY, TO KEEP IT HOLY. SIX DAYS SHALT THOU LABOR AND DO ALL THY WORK: BUT THE SEVENTH DAY IS THE SABBATH OF THE LORD THY GOD: IN IT THOU SHALT NOT DO ANY WORK, THOU, NOR THY SON, NOR THY DAUGHTER, THY MANSERVANT, NOR THY MAIDSERVANT, NOR THY CATTLE, NOR THY STRANGER THAT IS WITHIN THY GATES:

FOR IN SIX DAYS THE LORD MADE HEAVEN AND EARTH, THE SEA, AND ALL THAT IN THEM IS, AND RESTED THE SEVENTH DAY: WHEREFORE THE LORD BLESSED THE SABBATH DAY, AND HALLOWED IT.

HONOR THY FATHER AND THY MOTHER:

THAT THY DAYS MAY BE LONG UPON THE LAND WHICH THE LORD THY GOD GIVETH THEE.

THOU SHALT NOT KILL.

THOU SHALT NOT COMMIT ADULTERY.

THOU SHALT NOT STEAL.

THOU SHALT NOT BEAR FALSE WITNESS AGAINST THY NEIGHBOUR.

THOU SHALT NOT COVET THY NEIGHBOUR'S HOUSE. THOU SHALT NOT COVET THY NEIGHBOUR'S WIFE, NOR HIS MANSERVANT, NOR HIS MAIDSERVANT, NOR HIS OX, NOR HIS ASS, NOR ANY THING THAT IS THY NEIGHBOUR'S.

Below the Commandments is additional language from the Book of Matthew in the New Testament. It is headed "SUMMARY," and reads:

THOU SHALT LOVE THE LORD THY GOD WITH ALL THINE HEART, AND WITH ALL THY SOUL AND WITH ALL THY MIND.

THOU SHALT LOVE THY NEIGHBOUR AS THYSELF.

The Plaque was a gift to the County in 1918 from a religious organization, the International Reform Bureau, which was a Christian lobby whose mission was to introduce religious principles into public life. At the bottom of the Plaque, in smaller type, is a phrase noting that it was donated by this organization. At the Plaque's dedication ceremony in 1918, Judge John D. Shafer stated that, in accepting the Plaque, the County was recognizing the role of the Commandments in the formation of our laws and the sacrifices made in World War I. *See* County Br. at 4.

The Plaque hangs on a rounded wall that forms part of the entrance to the interior courtyard of the courthouse. It hangs on the Fifth Avenue side of the courthouse at approximately eye-level. On the opposite wall of the courtyard entrance is a plaque of about the same size commemorating an 18th century Polish trader, Anthony Sadowski. App. at 685–713. A public sidewalk is immediately adjacent to the walls, with metal chains separating pedestrians from the plaques. A passerby could easily read the Plaque as he approaches it. Someone walking on the other side of Fifth Avenue could see the Plaque, but would probably not be able to read its contents. In the same vicinity are administrative signs (pertaining to parking and other courthouse information). Located on the other exterior facades of the courthouse, courtyard walls and arched passages leading into the courtyard are plaques commemorating various historic events, people and organizations, for example, a victory during the French and Indian War, a Civil War protest, the Veterans of Foreign Wars association, the County's bicentennial celebration, National P.O.W.-

M.I.A. Recognition Day, the Pledge of Allegiance, and memorials for private individuals. *Id.* at 685–713, 158–63. Above the Grand Staircase of the courthouse, there is a mural depicting the Goddess of Justice and an etching referring to the courthouse as a "Temple of Justice." *Id.* at 608. Other plaques also note aspects of the County's history, such as a tablet commemorating William Pitt, for whom the City of Pittsburgh was named, and markers describing the formation of the County and the origins of Pittsburgh. Three other plaques note the courthouse's inclusion in city, state, and national historical landmark registers. *Id.* at 685–713. The Plaque was originally affixed to the main façade of the courthouse (on Grant Street), but was moved to its present location sometime before May 11, 1976, when it was entered into the registry of National Historical Landmarks. Neither party to this case has suggested a reason for this move. *See* Dist. Ct. Op. at 43.

Given the fact-specific inquiry required under both the endorsement test and the *Lemon* test, and the District Court's finding that this case is indistinguishable from *Freethought,* the factual similarities between the display of the Plaque in this case and the Chester County display are crucial to our decision. We, therefore, provide a description of the Chester County plaque. As in this case, the Chester County plaque was affixed to the exterior wall of the county courthouse, which was listed in the National Register of Historic Places. The plaque was a gift from an organization known as the Religious Education Council. Chester County commissioners accepted the plaque in 1920 in a public dedication ceremony described as having both secular and religious overtones. The Chester County plaque measures 50 inches tall by 39 inches wide (approximately the same size as the Plaque in the instant case) and contains text from the Old and New Testaments identical to that of the Plaque on the Allegheny courthouse. The Chester County plaque was hung near the original main entrance to the Chester County courthouse. In order for someone passing by to read any text other than the heading on the plaque, it would be necessary to climb the steps leading to the original entrance, which was closed in 2001. In addition to the plaque, the side of the Chester County courthouse on which it hangs contains several signs providing administrative information. Also on that façade are plaques noting the courthouse's inclusion in registers of county and national historic places. Unlike in this case, there are no other plaques containing historical, political, or philosophical images or messages on the same side of the building where the Chester County plaque hangs. However, other areas of the courthouse contain displays, including monuments to World War II and Civil War veterans, an historic Chester County marker, and a plaque with an historical description of the original courthouse that stood on the site. *Freethought,* 334 F.3d at 251–54.

B. Application of the Tests

Following our reasoning in *Freethought,* although we find the endorsement test to be the appropriate standard by which to scrutinize the Plaque, we will apply both the endorsement test and the *Lemon* test, in case a higher court prefers to apply the traditional *Lemon* test. *See Freethought,* 334 F.3d at 261.

1. The Endorsement Test

[5] It is important as an initial matter to describe the knowledge that we believe is attributable to the reasonable observer in this case. We base this description on the model for the reasonable observer set forth by Justice O'Connor in *County of*

Allegheny, and later applied by this Circuit in *Freethought.*[2]

Bearing in mind that the reasonable observer is an informed citizen who is more knowledgeable than the average passerby, the reasonable observer is deemed to know the history of the Allegheny Plaque, the general history of Allegheny County, and the fact that the Plaque has been affixed to the courthouse for many years. *Id.* at 259, 260, 265–66. With this knowledge base, the observer can glean other relevant facts about the Plaque and its history from viewing it and its surrounding context. The reasonable observer is aware that the Plaque is one of approximately twenty other historical and cultural displays erected in the courthouse over the past hundred years and that it is not given any preferential treatment over other displays. Although Allegheny County moved the Plaque at one point, the observer would recognize that it has not taken steps to maintain or restore it. *Id.* at 260. The reasonable observer is also deemed to know the history of the courthouse, its architectural significance, and its place on three state and national registers for historic landmarks. These presumptions are not unreasonable as such historical facts are actually commemorated on the courthouse walls in plaques and tablets hung alongside the Ten Commandments Plaque. As *Freethought* noted, "[a] reasonable observer must be presumed to know the history of the Courthouse," particularly since "a marker noting the historic nature of the Courthouse is actually affixed to the same east façade to which the Ten Commandments plaque is affixed." *Id.* at 266. Further, the circumstances surrounding the Plaque's donation and acceptance, including the secular motivations for its acceptance articulated by Judge Shafer on behalf of the County in 1918, are a matter of public record. *See* App. at 674 (citing *Speakers Discuss War at Tablet Dedication,* THE GAZETTE TIMES, Apr. 9, 1918, at 11–18). Thus, the reasonable observer is aware that, although the Plaque was donated by a religious organization, the County expressed secular reasons for accepting it given the social conditions at the time (i.e., wartime). We note that the District Court set forth a substantially similar description of the reasonable observer in this case and that Modrovich and Moore do not contest it here. *See* Dist. Ct. Op. at 33.

Still, Modrovich and Moore point out various context-related factors concerning the Allegheny Plaque that, they argue, would lead the reasonable observer to perceive an endorsement of religion by Allegheny County. Modrovich and Moore attempt to distinguish this case from *Freethought,* first arguing that the Plaque is displayed more prominently than the Chester County plaque. They contend that "[s]everal hundred people walk by the Allegheny Plaque, and dozens go into the Courthouse archway entrance near it,

2. Accordingly, the subjective feelings expressed by Modrovich and Moore of having been "offended" by the sight of the Plaque on the courthouse are not relevant to the endorsement analysis. "[W]e do not ask whether there is any person who could find an endorsement of religion, whether some people may be offended by the display, or whether some reasonable person might think [the State] endorses religion." *Capitol Square,* 515 U.S. at 780, 115 S.Ct. 2440 (O'Connor, J., concurring) (internal citations omitted) (emphasis and alterations in original). Rather, the endorsement analysis requires a specific, fact-based inquiry to determine if a reasonable observer, aware of various contextual factors, would be offended for the particular reason that the Plaque sends a message of government endorsement of religion. Here, we found that the reasonable observer would not view Allegheny County's retention of the Plaque as government endorsement, but as an effort to preserve an historical relic.

during a typical ninety-minute period on a regular business morning." Appellant Br. at 47. It is true that the Chester County plaque is in an unobtrusive location, next to an entrance that has been permanently closed, and that it is not legible from the sidewalk. However, we do not agree that the Allegheny Plaque is displayed any more prominently than the Chester County plaque. It does not hang in any preeminent place, but is affixed to a side entrance on Fifth Avenue (as opposed to the main courthouse entrance on Grant Street). The Plaque is not protected from the weather and hangs at street level, unprotected from potential vandalism. *See* Dist. Ct. Op. at 35. The Allegheny Plaque is no larger than the Chester Plaque, and in neither case can the text be viewed from across the street. In both cases, the text can be read when walking immediately past the plaque, with the only difference being that pedestrians are less likely to pass the Chester Plaque because it hangs at the top of a staircase near a closed entrance. We do not find this minor difference in the placement of the plaques to distinguish the cases. Even if one were to concede that the Allegheny Plaque is in a slightly more prominent location, the Allegheny Plaque's location is certainly not prominent enough to send a message to the reasonable observer that the County is endorsing religion. This is particularly true considering the other contextual factors that must be examined in addition to location under the endorsement test, including the Plaque's age, its history, and the fact that it is one of several historical plaques displayed at the courthouse.

Modrovich and Moore cite the Supreme Court's decision in *County of Allegheny,* 492 U.S. at 599–600, 109 S.Ct. 3086, and this Court's decision in *ACLU of N.J. v. Schundler,* 104 F.3d 1435, 1446 (3d Cir. 1997), to argue that the prominence of a religious display is a factor weighing against allowing the display. While, as discussed above, prominence is indeed a factor in the endorsement analysis, the facts of these cases support our view that the Allegheny Plaque was not in an especially prominent location. In *Schundler,* the display at issue was a 12 by 18 foot nativity scene located on the front lawn of City Hall in Jersey City, New Jersey. As the Court noted, the "[c]ity placed the display such that all visitors to City Hall were confronted with prominent religious symbols." 104 F.3d at 1446. Similarly, in *County of Allegheny,* a nativity scene was placed on the Grand Staircase of the county courthouse. The Grand Staircase was described as the "main," "most beautiful," and "most public" part of the courthouse, and the nativity "occupied a substantial amount of space" on the staircase. 492 U.S. at 580, 109 S.Ct. 3086. In comparison, the location of the Allegheny Plaque could not be considered prominent. It does not hang in a main part of the courthouse and, as it is at a side entrance, would never be viewed by all visitors to the courthouse as the displays in *Schundler* and *County of Allegheny* were.

Modrovich and Moore go on to assert that, unlike in Chester County, Allegheny County officials have taken actions to highlight the Plaque. In Chester County, officials had done nothing to call attention to the plaque (or taken any action whatsoever with respect to the plaque) since it was erected. In contrast, Modrovich and Moore suggest that Allegheny County's moving the Plaque from the Grant Street side of the courthouse to its current location was an effort to call attention to it because "[t]he County could have placed the Plaque in an obscure location after a reason to move it arose, but instead the County relocated the Plaque to the prominent place where it is now." Appellant Br.

at 49. We disagree with the assertion that moving the Plaque shows an effort to make its presence more prominent. Neither party offers an explanation as to why it was moved. There is no evidence in the record that the County made the move because it considered the Fifth Avenue entrance more prominent than the Grant Street entrance. Dist. Ct. Op. at 43. In fact, the Plaque's current location near a side entrance is less prominent than its previous location near the courthouse's main entrance. Furthermore, the fact that the Plaque was only moved once in nearly one hundred years supports our view that the County has made no special efforts to highlight or celebrate it. The County has not even taken action to maintain the Plaque, having neither made any effort nor expended any funds to repair, clean or polish it since 1918. Chester County showed similar inaction towards its plaque. "The fact that [Chester] County has not taken any action to highlight or celebrate the plaque since it was installed reinforces the view of the reasonable observer that the County Commissioners maintained the plaque to preserve a long-standing plaque" rather than endorse the religious message of its text. *Freethought*, 334 F.3d at 267. Furthermore, Chester County showed a neutral attitude toward the plaque by "not changing the location of the plaque to the main entrance *or otherwise actively drawing attention to the plaque.*" *Id.* at 270 (Bright, J., concurring) (emphasis added). Similarly, we believe that Allegheny County did nothing to actively draw attention to the Plaque.

Modrovich and Moore also attempt to distinguish this case from *Freethought* by pointing out that the Chester County courthouse had no plaques on its exterior walls, other than the Commandments plaque, that had "any substantive historical, political, or philosophical content." Appellant Br. at 52. As described above, the Allegheny courthouse displayed several commemorative plaques. Modrovich and Moore argue that these displays would lead a reasonable observer to conclude that the County endorses the substantive content of each of the plaques because each one contains a specific message honoring an event, person, place or text. Appellant Br. at 53. However, as discussed above, the reasonable observer is aware of the one hundred year history of the courthouse and the fact that a wide variety of events, people and philosophical tenets has been commemorated during that time through displays on its walls. As the County points out, "the reasonable observer would no more believe that [it] has endorsed the Old Testament by displaying the Plaque than he or she would believe that the County has endorsed the pantheistic religions of ancient Greece and Rome by displaying the mural of Lady Justice in the Grand Staircase." County Br. at 38.

The fact that the Chester County courthouse lacks similar displays is a weak ground on which to attempt to distinguish this case from *Freethought*. This is particularly true since the context of a religious display can alter the display's message such that a reasonable observer would not perceive it as endorsing religion. *See Lynch* 465 U.S. at 692, 104 S.Ct. 1355 (O'Connor, J., concurring) (stating that "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content"). Following this reasoning, we held that a religious display is more likely to be perceived as an endorsement of religion "where there is nothing else in the context of the display that would change the views of the reasonable observer." *Freethought*, 334 F.3d at 265. As an example of such a context, we cited "the frieze in the courtroom of the

U.S. Supreme Court, which portrays Moses carrying the Ten Commandments alongside depictions of other figures who have impacted modern law, such as John Marshall, William Blackstone, and Caesar Augustus." *Id.* (citing *County of Allegheny,* 492 U.S. at 652–53, 109 S.Ct. 3086). Further, the *Freethought* Court held that, even though the Chester County courthouse did not contain several other displays, the plaque's age and history alone provided sufficient context to prevent the reasonable observer from viewing an otherwise religious plaque as an endorsement of religion. *Id.* at 264. Thus, *Freethought* found that, *despite* the absence of additional secular displays, the Chester County plaque had a non-religious context because of its age and history. Under this reasoning, the perception that the Allegheny Plaque does not endorse religion is only strengthened by the existence of other displays on the courthouse, in addition to the Plaque's age and history.

Modrovich and Moore also contend that the inscription on the Plaque showing the name of the group that donated it distinguishes it from the Chester County plaque because this group was a "radical religious organization" and, although the Chester County plaque was also donated by a religious organization, the Chester County plaque did not contain an inscription naming its donor. Appellant Br. at 53. Modrovich and Moore assert that a reasonable observer, knowing the Plaque was donated by this Christian group, would have more reason to view the continued display of the Plaque as a government endorsement of religion. We disagree with this assertion. First, the primary focus under both the endorsement and *Lemon* tests is the events of the time at which the County refused to remove the Plaque rather than the events of 1918 when the display was erected. *Freethought,* 334 F.3d at 267. Arguing that the inscription establishes the County's endorsement improperly places the focus on the events of 1918, rather than on present events and the County's secular motivations for retaining the Plaque. Furthermore, the reasonable observer, aware of the Plaque's history, would be presumed to know the identity of the Plaque's donor (or at least that the donor was a religious organization) with or without an inscription specifically naming it. This is particularly true here since the circumstances surrounding the Plaque's donation are a matter of public record. Thus, this case cannot be distinguished from *Freethought* on the basis of an inscription on the Allegheny Plaque.

Our country's interests in historical preservation and recognizing the roots of modern law present secular goals that strongly weigh against compelling the removal of the Plaque even though its content is religious. Considering, from a practical standpoint, the remedy sought by Modrovich and Moore (removal of the Plaque), we should not be swayed by parties' subjective feelings of affront or insult at the sight of a religious display when, as here, the facts surrounding the display do not support a finding of unconstitutional endorsement by the government. Given our national interest in historical preservation, we believe we would set a dangerous precedent if we were to hold that any relic containing a religious message should be removed merely because "*any* person ... could find an endorsement of religion" or "*some* people may be offended" by it. *Capitol Square,* 515 U.S. at 780, 115 S.Ct. 2440 (O'Connor, J., concurring) (internal citations omitted) (emphasis and alterations in original). Our country's history is steeped in religious traditions. The fact that government buildings continue to preserve artifacts of that history does not mean that they necessarily support or en-

dorse the particular messages contained in those artifacts.

2. The Lemon Test

[6] The purpose prong of the *Lemon* test is discussed below. As explained, this prong simply requires that the County articulate *some* legitimate secular purpose for refusing to remove the Plaque. *See Freethought,* 334 F.3d at 267. Examining the motivations behind the decision, we are only required to find that the legitimate secular purpose articulated by the County for retaining the Plaque is not a "sham." *Edwards,* 482 U.S. at 585–87, 107 S.Ct. 2573. As *Freethought* noted, this is a "low threshold," and courts are generally deferential to the government's proffered secular purpose as long as it is legitimate. 334 F.3d at 267 (citing *Edwards,* 482 U.S. at 585–87, 107 S.Ct. 2573).

In making their argument under the endorsement test, Modrovich and Moore point out various statements made by Allegheny County officials that they claim to show endorsement of religion. However, this evidence of the County's purpose in refusing to remove the Plaque more properly goes to the purpose prong of *Lemon.* They cite, for example, a deposition statement by Chief County Executive Roddey that "the [P]laque, itself, represents an ethic and a standard for society that I believe that the people of this community would generally agree to." Appellant Br. at 49. They also argue that the statements of various County officials over a broad period of time provide a fuller picture of the County's desire to advance the religious message of the Plaque. For example, Modrovich and Moore cite a public statement made seven years before the commencement of this action by a judge on the Court of Common Pleas of Allegheny County that a lawyer in the County should "go over to the courthouse and read the Ten Commandments and follow them." *Id.* at 18. Similarly, Modrovich and Moore assert that numerous County residents expressed religious motivations for retaining the Plaque through letters written to County officials in support of its continued display.

In considering the County's purpose, our focus is on the motivations of the current County officials who have power over the decision of whether to remove the Plaque. The ultimate decision-maker here was the then-Chief Executive of Allegheny County, James Roddey. Roddey arrived at his conclusion to retain the Plaque after consulting both the County Solicitor and the President of the County Council. We agree with the District Court's conclusion that the record shows legitimate secular motivations behind Roddey's decision to retain the Plaque. These motivations stem largely from a desire to preserve an historical artifact and from a view of the Commandments as being one of the bases of modern law. As Roddey explained:

> The [P]laque was an important part of the heritage and tradition of an historic building; . . . [it] was really a part of the history of the courthouse and we thought it would be inappropriate to take it down.... [F]rom what I have read, and what I understand, the people that were responsible for putting up the [P]laque felt that [the Commandments] represented a celebration of the rule of law, and the foundation of the rule of law that was an alternative to war, and other types of national strife.

Roddey Depo. at 14, 20–21. Roddey conceded at his deposition that he had distributed a press release in which he stated his belief that the Ten Commandments represented "a single statement of values, vital to citizens at the crest of the last century and so meaningful to so many at the dawn of this new millennium." *Id.*

at 20–21. However, as he explains this statement: "They [the 1918 County officials] had just come out of ... World War I.... The principle value that I was referring to ... [w]as just general rules of civilized society." *Id.* Here, Roddey offers legitimate, secular motivations for his decision. These motivations are based in historical preservation and in a recognition of the role of the Commandments in both Allegheny County history and American law. Even if one did not accept his explanation of the statement in his press release, the purpose of the display need not be exclusively secular. *See Edwards,* 482 U.S. at 585–87, 107 S.Ct. 2573. Even if the Plaque is assumed to incorporate religious meaning or values, the County is not prohibited from displaying such symbols or required to convey only secular messages. The Supreme Court has simply required that the display not be "motivated *wholly* by religious considerations." *Lynch,* 465 U.S. at 680, 104 S.Ct. 1355 (emphasis added).[3]

Here, Roddey's statements express sufficient secular motivations for his decision. These include the fact that the Plaque is part of the heritage of an historical building, as well as Roddey's belief that the County has an obligation to respect the community's historical decision during World War I to commemorate the value of the rule of law over war. *See* Roddey Depo. at 20–21 (stating that the County has an "obligation to respect the wishes of the people that [have] gone before us, and the people of the community before us" to "keep the [P]laque as they expected it to be"). Thus, considering that a display need not be motivated by exclusively secular purposes under the *Lemon* analysis, we find that Roddey's articulations contain sufficient legitimate secular purposes to pass muster. *See Lynch,* 465 U.S. at 680, 104 S.Ct. 1355.

Additionally, we are not convinced that statements made by other County officials (such as the Court of Common Pleas judge) or by other County residents through letters are relevant to the *Lemon* purpose analysis. None of these individuals was the decision-maker for the County with respect to the Plaque. Therefore, their motivations are not relevant to the inquiry.[4] In our view, the record in this case contains sufficient evidence that Allegheny County retained the Plaque for the secular reasons of historic preservation and commemoration of the rule of law, rather than solely for the religious reasons voiced by some members of the community.

The effect and entanglement prongs of *Lemon* are encompassed by the endorsement test, and, accordingly, we incorporate our earlier discussion of the endorsement

3. Notwithstanding all of this evidence, the dissent contends that a genuine dispute of fact exists as to whether Roddey's stated secular motivations are sincere or simply a "fig leaf" to cover his religious purposes. *See* Dissent, p. 417. However, as noted, the purpose prong of *Lemon* has a "low threshold," simply requiring *a* legitimate secular purpose that is not a sham. *Freethought,* 334 F.3d at 267. We believe that no reasonable jury could find that the historical purpose articulated by Roddey was merely a sham. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). While the dissent may be correct in suggesting that Roddey's motivations are not entirely clear from the record, it is undisputed that he asserted certain secular purposes, and his asserted historical purpose clearly is not a sham, as understood in light of *Freethought.* 334 F.3d at 262 (concluding that "the *articulation* of a legitimate secular purpose for declining to remove the plaque in 2001 would satisfy the first prong of *Lemon*" (emphasis added)).

4. In addition, the record shows that most of the correspondence from County residents was actually received after Roddey's decision was made. Roddey Depo. at 71.

test. *See Freethought*, 334 F.3d at 269. Thus, we hold that the County's refusal to remove the Plaque does not violate either the endorsement test, as discussed in Part III.B.1, or the *Lemon* test.

IV. OTHER CIRCUIT COURT CASES

Several other Courts of Appeal have recently considered the issue of whether displays of the Ten Commandments on government property violate the Establishment Clause. At least two of these decisions, from the Fifth and Eleventh Circuits, support our holding here. In *Van Orden v. Perry*, 351 F.3d 173 (5th Cir.2003), the Fifth Circuit held that a Ten Commandments monument on Texas state capitol grounds did not endorse religion where the capitol grounds contained many monuments and displays pertaining to the history of Texas. These displays included, for example, an Aztec religious symbol, a Confederate plaque, a plaque commemorating the war with Mexico, and a tribute to African American legislators. The Court held that the Ten Commandments monument did not have a primary effect of advancing or inhibiting religion, as seen from the eyes of a reasonable observer, because the grounds were designated as a National Historical Landmark and contained seventeen monuments depicting symbols of Texan identity. *Id.* at 175–76. In addition, the monument's location between the Texas Supreme Court building and the capitol building was chosen to reflect the Commandments' role in the making of law. *Id.* at 181.

Similarly, in *King v. Richmond County*, the Eleventh Circuit held that a superior court's official seal depicting two tablets representing the Ten Commandments did not send a message of endorsement because of various contextual factors surrounding the seal's appearance and use. 331 F.3d at 1286. These included the fact that the seal had been used by the court for over 130 years for secular, legal documentation purposes. Other relevant contextual factors included the seal's relatively small size, the absence of text on the tablets (although they did contain Roman numerals I through X, clearly representing the Commandments), and the fact that the seal depicted a sword (a symbol of secular law) intertwined with the tablets. *Id.* at 1283–84. Thus, this decision supports our standpoint that the overall context of a basically religious depiction can affect whether a reasonable observer perceives the display as endorsing religion.

Other Circuits have held that postings of the Ten Commandments violate the Establishment Clause. However, each of these decisions is distinguishable from the instant case and is, therefore, neither persuasive nor apposite. In *ACLU of Ohio Foundation, Inc. v. Ashbrook*, 375 F.3d 484 (6th Cir.2004), the Sixth Circuit held that an Ohio Common Pleas Court judge violated the Establishment Clause by displaying a framed poster of the Ten Commandments, which he created himself on his computer, in his courtroom across from a similarly styled framed poster of the Bill of Rights, which he also created. This case is distinguishable from the instant case as it involves a new display rather than an historical artifact.

In another distinguishable case, *ACLU of Kentucky v. McCreary County*, 354 F.3d 438 (6th Cir.2003), the Sixth Circuit held that a courthouse's posting of the Ten Commandments, hung in a museum-like setting with other postings designed to display the foundations of American law, violated the Establishment Clause. The Court held that, despite the secular context, the text of the Ten Commandments sent the message of endorsing religion because the county did not make clear in the display that it was attempting to create an

exhibit concerning the origins of law. *Id.* at 448–49. Again, however, this was a new display, not an historical monument and, therefore, this decision has no persuasive effect on our holding here.

In *Adland v. Russ*, 307 F.3d 471 (6th Cir.2002), *cert. denied*, 538 U.S. 999, 123 S.Ct. 1909, 155 L.Ed.2d 826 (2003), the Sixth Circuit held that a monument displaying a "nonsectarian" version of the Ten Commandments, donated in 1971 but moved to storage in 1980, could not be placed on the state capitol grounds. Once again, this case involved a new placement, not a refusal to remove a longstanding plaque. Additionally, the proposed display in *Adland* would have been in a prominent location on state capitol grounds, unlike the Allegheny Plaque, which hangs discretely on the side of the courthouse. *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir.2000), *cert. denied*, 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1036 (2001), involved a monument similar to that in *Adland* in that it also displayed a nonsectarian version of the Commandments and was placed on the lawn in front of a local municipal building. The Seventh Circuit found this display to violate the Establishment Clause, but this decision does not influence our holding here for the same reasons that *Adland* is unpersuasive. *See also Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir.2001), *cert. denied*, 534 U.S. 1162, 122 S.Ct. 1173, 152 L.Ed.2d 117 (2002) (following *Elkhart* and holding that the state's intention to erect a monument depicting the Ten Commandments on the park-like grounds of the statehouse would violate the Establishment Clause).

Finally, in *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir.2004), the Eighth Circuit held that the city's display of a Ten Commandments monument in a public park since 1965 amounted to unconstitutional government endorsement. This case also addresses a relatively new monument, not an historical relic. Further, the *Plattsmouth* monument stands alone in a city park. It therefore lacks the kind of historical context that we believe makes the reasonable observer unlikely to perceive the Allegheny Plaque as an endorsement of religion.[5]

The Eleventh Circuit also reiterated the importance of context in *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir.2003), in which it held that a two-and-one-half ton monument of the Ten Commandments, placed in the rotunda of an Alabama State Courthouse by the Chief Justice of the Alabama Supreme Court, violated the Establishment Clause. As with the cases above, this case involved a new and far more prominent display than the Allegheny Plaque. Further, the Eleventh Circuit distinguished *Glassroth* from its holding in *King*, a case much more factually similar to the instant case, stating that "he constitutionality of a government's use of a predominantly religious symbol depends on the context in which it appears, and we concluded [in *King*] that given the context in which the pictograph of the Ten Commandments appeared on the Seal, a reasonable observer would not believe that the Seal was an endorsement of religion." *Id.* at 1298–99 (internal citations omitted).

V. CONCLUSION

For the foregoing reasons, we believe that the Ten Commandments Plaque affixed to the Allegheny County Courthouse does not constitute an endorsement of religion in violation of the Establishment Clause, nor does it violate the test first

5. Additionally, we note that *Plattsmouth* is no longer binding precedent, as the city's petition for rehearing *en banc* was granted on April 6, 2004.

articulated in *Lemon*. Thus, the District Court's grant of summary judgment to Allegheny County and denial of summary judgment to Modrovich and Moore will be affirmed.

GIBSON, Circuit Judge, dissenting.

I respectfully dissent.

In my view the decision of the district court is based upon factual findings where there is conflicting evidence, particularly with respect to the present intent of County officials. The court followed the teaching of this court's earlier decision in *Freethought Society of Greater Philadelphia v. Chester County*, 334 F.3d 247 (3d Cir.2003), but overlooks the differing procedural posture of that case. This court in *Freethought* reviewed a permanent injunction ordering the removal of the Ten Commandments Plaque based on testimony the district court found believable and the legal conclusions based upon these findings. *Id.* at 255. In contrast, the case before us is an appeal from a grant of summary judgment.

Consistently with the teaching of the Supreme Court, decisions of other circuits, and Federal Rule of Civil Procedure 56, we have stated, "Summary judgment should be granted where no genuine issue of material fact exists for resolution at trial and the moving party is entitled to judgment as a matter of law." *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1362 (3d Cir.1992). We explained:

> When deciding a motion for summary judgment ... a court's role remains circumscribed in that it is inappropriate for a court to resolve factual disputes and to make credibility determinations.... Inferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true.

Id. at 1363 (citations omitted). Relying upon *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–251, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), we stated that the summary judgment standard has been likened to the " 'reasonable jury' directed verdict standard," and "at the summary judgment stage the judge's function is not ... to weigh the evidence to determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Big Apple BMW*, 974 F.2d at 1362–63. We concluded:

> In practical terms, if the opponent has exceeded the "mere scintilla" threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent's, even if the quantity of the movant's evidence far outweighs that of its opponent. It thus remains the province of the fact finder to ascertain the believability and weight of the evidence.

Id. at 1363.

The district court, in following *Freethought*, engaged in weighing of the evidence and fact finding contrary to the teaching of *Big Apple BMW* and *Anderson*. The district court based its decision on the conclusion that officials were "sincere" when they articulated secular reasons for keeping the Plaque in place:

> With regard to the current dispute over retention of the Plaque, the reasonable observer would know that the County Executive, Mr. Roddey, with support from County Council, decided to not to [sic] remove the Plaque because he believed it represented "an important part of the heritage and tradition of an historic building" and that the Plaque commemorated the rule of law, as opposed to war.

> Based on the cumulative knowledge of the reasonable observer, I find that he or she could not conclude that continued display of the Ten Commandments Plaque reflects an intent by the current county officials to promote or favor one religion over another or indeed even to promote religion over non-religion.

The district court particularly concluded that the County Executive, James Roddey, expressed legitimate, secular reasons for refusing to remove the Plaque, "analogous to those given by the Chester County Commissioners whose explanation had satisfied the 'relatively low threshold required by the purpose prong of *Lemon [v. Kurtzman,* 403 U.S. 602, 612–13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)],' " citing *Freethought,* 334 F.3d at 267. The district court continued by observing that Roddey had consulted with the County Solicitor and President of the County Council, and their joint conclusion was that "the plaque was an important part of the heritage and tradition of an historic building; . . . [it] was really a part of the history of the courthouse and we thought it would be inappropriate to take it down." The district court observed that Roddey had conceded at his deposition that he had distributed a press release stating his belief that the Ten Commandments represented a single statement of "values" vital to citizens "at the crest of the last century and so meaningful to many at the dawn of this new millennium." At the same time, the court accepted Roddey's explanation that by "values" he meant that the people that were responsible for putting up the Plaque felt that The Commandments represented a celebration of the rule of law, and the foundation of the rule of law that was an alternative to war, and was "just general rules of civilized society." The district court then stated: "Mr. Roddey's explanations appear to be sincere and consistent with the facts pertaining to the building, its history, the age of the Plaque, and the County's intention to respect the past and preserve the artifacts for future generations."

But the record contains other statements by Roddey that cast a much different light on his motivations. In a press release Roddey stated, "Perhaps the citizens of Allegheny County place a value on the family, on the church and on religion that is vastly different than those who dwell in Washington, D.C. But my heart and my instinct tell me to keep 'The Commandments' and I intend to follow them." Presumably, the reasonable observer reads local newspapers as well as local history books, so this statement has to be entered into the mix in deciding what that observer would think. Furthermore, in his deposition Roddey stated that "the plaque, itself, represents an ethic and a standard for society that I believe the people of this community would generally agree to." This statement could be understood to amount to an adoption of official religious precepts by majority rule, thereby sending a "message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Freethought,* 334 F.3d at 260 (quoting *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 773, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995)).

And had the reasonable observer attended the Allegheny County Council meeting of January 16, 2001, he or she would have heard the debate when the Council passed a "sense of Council" motion stating, " 'The Commandments' reflect values that are important to this community today as they were in the early part of the century."

The sponsor of the motion, Vince Gastgeb,[6] stated, "There's values and traditions here in this County that people have fought for, and as elected representatives, we should fight to continue that moving forward." Gastgeb concluded his speech by stating, "We have to have faith." He later stated to the press, "I'd rather see ten religious expressions in the courthouse than none." Another Council member, Richard Olasz, stated during Council debate, "Maybe some of these people that object to [the Plaque] ought to go back and remember that there are no atheists in foxholes, and to remember the old sign on the tombstone: All Dressed Up and Nowhere to Go."

There was also in evidence a statement by the president judge of the Allegheny County Common Pleas Court that in giving an ethics seminar for the County bar association, "I told them to go over to the courthouse and read the Ten Commandments and follow them."

The district court made no reference to an expert's affidavit stating that the text of the Commandments Plaque is a particular Christian Protestant one differing in many ways from that accepted under the Jewish, Roman Catholic, and Lutheran traditions.

There is thus significant record evidence that the decision to keep the Plaque stemmed predominantly from religious impulses and would have been so perceived by a reasonable observer. Even though under the *Lemon* test, the purpose of the display does not have to be exclusively secular, in this case the evidence would support a finding that the secular purpose was a fig leaf. *See Edwards v. Aguillard*, 482 U.S. 578, 586–87, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (purpose prong of *Lemon* requires that assertion of secular purpose be "sincere and not a sham"). Moreover, the statements of religious purpose were made in public in circumstances that may well have given rise to an appearance of endorsement of religion by responsible county officials.

Perhaps the district court simply considered this case to be governed by *Freethought*.[7] Any such reliance makes even more significant the distinction in the procedural postures between *Freethought* and this case, for in *Freethought* we dealt with factual findings made after a hearing in support of an order granting preliminary injunction and here we deal with the far different standard for summary judgment. A finder of fact could well come to the same conclusion that the district court arrived at. However, the district court was not sitting as finder of fact, but was considering a summary judgment motion. These disputed fact issues should not have been decided as a question of law.[8]

6. Gastgeb said that the sense of Council motion was desirable because the Council has "control over the courthouse," which suggests an unresolved issue as to whether the Council had some authority over the decision to retain the Plaque.

7. *King v. Richmond County*, 331 F.3d 1271 (11th Cir.2003), was recognized by *Freethought*, but distinguished. 334 F.3d at 263. The county seal of Richmond County depicted a tablet with Roman numerals I–X, but without the text of the Ten Commandments. Because the text was not reproduced, the reasonable observer was therefore not "induced to read or venerate sacred text." *Id.*

8. I am aware that this court in *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538 (3d Cir.1984), *vacated on other grounds*, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986), reversed a summary judgment in a school prayer case, but carefully noted there were no material disputes of fact that would preclude consideration of the merits of the case on summary judgment. *Id.* at 542 n. 3.

In my view, we should remand for further consideration of the issues in this case.

CHARLESTON AREA MEDICAL CENTER, INCORPORATED, Plaintiff–Appellee,

and

St. Paul Fire & Marine Insurance Company, Intervenor–Plaintiff,

v.

PARKE–DAVIS, A DIVISION OF WARNER LAMBERT; Pfizer, Incorporated, its successor by merger, Defendants–Appellants,

and

Danny A. Rader, MD; Terri Miles, RN; John/Jane Doe, MD; Jane Doe, R.N.; John/Jane Doe, Pharmacist; John/Jane Doe, Pharmacy Technician; John Doe, Agency/Corporation, Third Party Defendants.

Charleston Area Medical Center, Incorporated, Plaintiff–Appellant,

and

St. Paul Fire & Marine Insurance Company, Intervenor–Plaintiff,

v.

Parke–Davis, a division of Warner Lambert; Pfizer, Incorporated, its successor by merger, Defendants–Appellees,

Danny A. Rader, MD; Terri Miles, RN; John/Jane Doe, MD; Jane Doe, R.N.; John/Jane Doe, Pharmacist; John/Jane Doe, Pharmacy Technician; John Doe, Agency/Corporation, Third Party Defendants.

Nos. 02–2264, 02–2303.

United States Court of Appeals, Fourth Circuit.

Filed: Sept. 16, 2004.

Diana Everett, Amy Marie Smith, Steptoe & Johnson, PLLC, Clarksburg, WV, for Parke-Davis, a division of Warner Lambert, and Pfizer, Inc., its successor by merger.

Shawn Patrick George, George & Lorsensen PLLC, Charleston, WV, for Charleston Area Medical Center.

Prior Report: 371 F.3d 199.

ORDER OF CERTIFICATION TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WIDENER, Circuit Judge.

This is an appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. Because the resolution of the issues presented on appeal requires resolution of a question of West Virginia law that may be determinative in the pending case, and because it appears to us that there is no controlling West Virginia appellate decision, constitutional provision, or statute, we request that the following issue be decided by the Supreme Court of Appeals of West Virginia, pursuant to West Virginia Code § 51–1A–1 *et seq.* (2000).

I.

Question of Law to be Answered

The following question of West Virginia law may be determinative in the pending

Commonwealth v. Travaglia

Supreme Court of Pennsylvania

March 10, 1983, Argued ; September 29, 1983, Decided

No Number in Original

Reporter
502 Pa. 474 *; 467 A.2d 288 **; 1983 Pa. LEXIS 682 ***

COMMONWEALTH of Pennsylvania, Appellee, v. Michael J. ***TRAVAGLIA***, Appellant.
COMMONWEALTH of Pennsylvania, Appellee, v. John Charles LESKO, Appellant

Subsequent History: [*1]** Reargument Denied December 14, 1983.

Decision reached on appeal by, Sub nomine at *Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307, 1983 Pa. LEXIS 681 (1983)*

Writ of certiorari denied ***Travaglia*** *v. Pennsylvania, 467 U.S. 1256, 104 S. Ct. 3547, 82 L. Ed. 2d 850, 1984 U.S. LEXIS 308, 52 U.S.L.W. 3907 (1984)*

Prior History: No. 37 W.D. Appeal Dkt., 1982, Review of Death Sentence imposed by the Court of Common Pleas, Criminal Division, of Westmoreland County, Pennsylvania at No. 684 C of 1980, by Order dated June 4, 1982, No. 26 W.D. Appeal Dkt., 1982, Review of Death Sentence imposed by the Court of Common Pleas, Criminal Division, of Westmoreland County, Pennsylvania at No. 681 C 1980, by Order dated April 23, 1982, Consolidated by Order of Court September 27, 1982

Core Terms

sentence, aggravating circumstances, arrest, death sentence, homicide, circumstances, charges, cases, convicted, death penalty, arraignment, guilt, identification, interrogation, killing, mitigating circumstances, outweighed, sympathy, hotel, guilty plea, admissible, shooting, Appellants', questioning, rights, sentence of life imprisonment, caliber revolver, found guilty, Suppression, aggravating

Case Summary

Procedural Posture

Appellants sought review of death sentences imposed by the Court of Common Pleas of Westmoreland County (Pennsylvania), which followed convictions of first degree murder of a police officer.

Overview

A jury convicted appellants of first degree murder and sentenced appellants to death. On direct appeal, the court affirmed, holding that exigent circumstances existed to justify a warrantless entry and arrest in appellants' hotel room; that prejudice of witness testimony was heavily outweighed by the probative value; that the prosecutor's statement to the jury of personal belief in defendants' guilt was not prejudicial in the sentencing phase; and that the prosecutor's argument was carefully tailored to demonstrate the proof of aggravating circumstances, to refute the proof of mitigating circumstances, and to correct extraneous arguments introduced by the defense. The court found that evidence supported the finding of aggravating circumstances and that the sentences were not the product of passion, prejudice, or any other arbitrary factor, pursuant to *42 Pa. Cons. Stat. § 9711(h)(3)(i), (ii)*.

Outcome
The court affirmed appellants' convictions for first degree murder, and the sentences of death, because there were exigent circumstances present to support the warrantless entry and arrest in appellants' hotel room, the evidence supported the jury's finding of an aggravating circumstance justifying the penalties, and the sentences were not the product of passion, prejudice, or any other arbitrary factor.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Stolen Property > Receiving Stolen Property > Elements

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Probable Cause

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > Personal Knowledge

Criminal Law & Procedure > ... > Warrantless Searches > Exigent Circumstances > Reasonable & Prudent Standard

Criminal Law & Procedure > ... > Accusatory Instruments > Warrants > Probable Cause

HN1 **Receiving Stolen Property, Elements**

A police officer may arrest without a warrant where there is probable cause to believe that a felony has been committed and that the arrestee is the felon. Probable cause exists where the facts and circumstances within the knowledge of the officer are reasonably trustworthy and sufficient to warrant a person of reasonable caution in believing that the arrestee has committed the offense.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exigent Circumstances

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Exigent Circumstances

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Knock & Announce Rule

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview

Criminal Law & Procedure > ... > Warrantless Searches > Exigent Circumstances > General Overview

HN2 **Search & Seizure, Exigent Circumstances**

Certain factors tend to support a finding that a warrantless arrest of a suspect in his or her home is legal. These include, inter alia, that a grave offense is involved, particularly a crime of violence; that the suspect is reasonably believed to be armed; a clear showing of probable cause, including reasonable, trustworthy information, to believe that the suspect committed the crime; and strong reason to believe that the suspect is on the premises. Although the exigent circumstances which justify failure to obtain an arrest warrant are not entirely coextensive with those exigencies which justify noncompliance with the knock and announce rule, these factors clearly demonstrate the existence of circumstances which excused compliance with *U.S. Const. amend. IV* protection as well.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > General Overview

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN3 **Self-Incrimination Privilege, Custodial Interrogation**

A suspect must have an awareness of the general nature of the transaction giving rise to the investigation, in order to make an intelligent and understanding waiver of his rights. Where the defendant is not furnished with such information so as to make him aware of the transaction involved, and a pre-trial challenge concerning the validity of a confession is made on this ground, the commonwealth must prove by a preponderance of the evidence that the defendant knew of the occasion for the interrogation.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

***HN4*[↓] Self-Incrimination Privilege, Custodial Interrogation**

The fact that interrogation follows hard upon the criminal episode, and there is no circumstance lending ambiguity to the direction and purpose of the questioning, could supply the necessary evidence that the defendant knew of the occasion for the interrogation.

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

Criminal Law & Procedure > Commencement of Criminal Proceedings > Eyewitness Identification > Photo Identifications

***HN5*[↓] Counsel, Right to Counsel**

A suspect in custody is entitled to have counsel present at a photographic identification, and the absence of counsel bars a subsequent in-court identification unless there is a showing that such identification has an independent origin.

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Criminal Law & Procedure > ... > Eyewitness Identification > Due Process Protections > Independent Reliability

Criminal Law & Procedure > Commencement of Criminal Proceedings > Eyewitness Identification > Photo Identifications

***HN6*[↓] Counsel, Right to Counsel**

If a defendant is entitled to, but does not have counsel present at the photo array, and therefore that identification is improper, it does not necessarily follow that the identification must be suppressed. The law is clear that even when an improper pre-trial identification is made, an in-court identification is nevertheless admissible if it has sufficient, independent basis.

Criminal Law & Procedure > Preliminary Proceedings > Bail > Delays in Granting of Bail

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Criminal Law & Procedure > Preliminary Proceedings > Arraignments > General Overview

***HN7*[↓] Bail, Delays in Granting of Bail**

There is a rule under which the admissibility of any statement taken while the accused is in custody before preliminary arraignment is based on the length of the delay between arrest and arraignment.

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

***HN8*[↓] Conduct Evidence, Prior Acts, Crimes & Wrongs**

Evidence of other unrelated criminal conduct of an accused is generally inadmissible to prove his commission of the crime for which he is being tried. It is equally clear, however, that evidence of other crimes is admissible where it is relevant to prove: (1) motive; (2) intent; (3) a common scheme or plan involving the commission of two or more crimes so closely related that proof of one tends to prove the other; (4) the identity of the accused as the perpetrator; or (5) the absence of mistake or accident.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

***HN9*[↓] Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

Evidence of other offenses is subject, as is all relevant evidence, to exclusion if its probative value is outweighed by the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility, or sympathy.

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

HN10 **Capital Punishment, Bifurcated Trials**

Whether the trial court in a capital case, in balancing the probative value of proffered evidence against its potentially prejudicial effect, must give separate consideration to the possible effect of the evidence at the sentencing phase, is a question which admits of no general answer. There may be circumstances where evidence, deemed admissible at trial because its relevance to the determination of guilt outweighs its possible prejudice, should nevertheless be excluded because it is so inflammatory that its relevance to determination of sentence would be outweighed by its potential prejudice.

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Legal Ethics > Prosecutorial Conduct

HN11 **Preservation of Relevant Evidence, Exclusion & Preservation by Prosecutors**

In most cases, the decision that the evidence is admissible for purposes of the guilt phase renders it, like all evidence admitted at trial, admissible for the penalty phase as part of the circumstances to be considered by the jury. As long as there is no embellishment on the facts or improper attempt by the prosecutor to dwell upon the inflammatory character of the evidence, no additional weight should be accorded to the potential for prejudice because such evidence might play a part in the sentencing determination.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

HN12 **Capital Punishment, Aggravating Circumstances**

See *42 Pa. Cons. Stat. § 9711(a)(2)*.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN13 **Capital Punishment, Aggravating Circumstances**

See *42 Pa. Cons. Stat. § 9711(d)(10)*.

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Three Strikes

HN14 **Criminal History, Three Strikes**

In interpreting a statute using the word "conviction," the strict legal meaning must be applied except where the intention of the legislature is obviously to the contrary. This "strict legal meaning," requires a verdict accompanied by sentence and is to be contrasted with statutes wherein the legislature uses the language "found guilty" to permit use of a verdict unaccompanied by a sentencing.

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Three Strikes

HN15 **Criminal History, Three Strikes**

By including offenses committed contemporaneously with the offense in issue, the legislature clearly indicated its intention that the term "convicted" not require final imposition of sentence, but cover determinations of guilt

as well. Given the practical operation of the criminal justice system, a contemporaneous offense would either be tried together with the "offense at issue" or severed and tried separately.

Governments > Legislation > Interpretation

HN16 **Legislation, Interpretation**

The legislature is not presumed to have intended the provisions of its enactments as mere surplusage.

Criminal Law & Procedure > Trials > Closing Arguments > Defendant's Failure to Testify

HN17 **Closing Arguments, Defendant's Failure to Testify**

When a defendant testifies as to a collateral matter, the prosecutor is not permitted to comment adversely upon his refusal to testify on the merits of the charge against him.

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Penalties

Evidence > Privileges > Self-Incrimination Privilege > Scope

Criminal Law & Procedure > Trials > Burdens of Proof > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Evidence > Privileges > Self-Incrimination Privilege > General Overview

HN18 **First-Degree Murder, Penalties**

The sentencing phase of the trial has a different purpose than the guilt phase, and different principles may be applicable. For example, the privilege against self-incrimination in its pure form has no direct application to a determination of the proper sentence to be imposed; the purpose of the prosecutor is not to incriminate, and the goal of the guilty defendant is not to avoid incrimination. Likewise, the presumption of innocence that accompanies the accused throughout proceedings to determine his guilt has no direct application to the sentencing determination. This is reflected in the fact that the sentencing statute, without running afoul of the federal or state constitutions, places a burden on the defendant of proving mitigating circumstances by a preponderance of the evidence.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

HN19 **Imposition of Sentence, Factors**

The demeanor of a convicted defendant, including his apparent remorse, is a proper factor for consideration by the court in fixing sentence in noncapital cases. There is no reason in policy or logic why the jury in a capital case, which is the sentencing authority, should be prevented from considering this same information.

Criminal Law & Procedure > Trials > Closing Arguments > Fair Comment & Fair Response

HN20 **Closing Arguments, Fair Comment & Fair Response**

The prosecutor's statement of his personal belief in defendant's guilt can in no way be prejudicial where guilt has already been determined.

Criminal Law & Procedure > Trials > Closing Arguments > Fair Comment & Fair Response

HN21 **Closing Arguments, Fair Comment & Fair Response**

The prosecutor is permitted, by the terms of the statute, to argue in favor of the death penalty. *42 Pa. Cons. Stat. § 9711(a)(3)*.

Counsel: Rabe F. Marsh, III, Greensburg (Court-appointed), Welsh S. White, Pittsburgh, for appellant at No. 26.

Dante G. Bertani, Public Defender, Timothy J. McCormick, Asst. Public Defender, Greensburg, for appellant at No. 37.

John J. Driscoll, Dist. Atty., Timothy J. Geary, Asst. Dist. Atty., Greensburg, for appellee at No. 37.

Marion MacIntyre, Deputy Atty. Gen., Harrisburg, for appellee at No. 26.

Judges: Roberts, C.J., and Nix, Larsen, Flaherty, McDermott, Hutchinson and Zappala, JJ. Nix, J., filed a concurring opinion. Roberts, C.J., filed a dissenting opinion.

Opinion by: ZAPPALA

Opinion

[*480] **[**291]** OPINION

We are called upon to review convictions of first degree murder, for which the **[***2]** Appellants were sentenced to death. **[*481]** Pursuant to *42 Pa.C.S. § 9711(h)*, we examine the record for errors at trial, and to determine whether the sentence of death should be affirmed or vacated.

I. BACKGROUND

In the early morning hours of January 3, 1980, Apollo Police Officer Leonard Miller was killed by two bullets from a .38 caliber hand gun, after having stopped a silver-colored Lancia sports car, containing three men, which had several times sped past his position at the Apollo Stop-and-Go convenience store. Officer Miller was found lying on the highway by police officers who were responding to his radio request for assistance. His service revolver had been drawn, and all six rounds had been fired. Police investigation turned up the Lancia, abandoned, with the windows shattered and bullet holes in it. It was established that the automobile was registered to one William Nicholls of Pittsburgh who had recently disappeared.

Prior to the Miller homicide, state police had received evidence indicating that Appellant ***Travaglia*** may have been involved in a number of armed robberies and killings which had taken place in Pittsburgh and surrounding counties. Pursuant **[***3]** to their investigation, the state police had found a vehicle, owned by a homicide victim, abandoned near a motel where ***Travaglia*** and a man named Daniel Keith Montgomery had been staying.

Pittsburgh police located Montgomery in the early evening hours of January 3, 1980 in the downtown area of Pittsburgh. While questioning him, they discovered a .38 caliber revolver on his person. Montgomery told the police that ***Travaglia*** had given him the weapon and that he (***Travaglia***) and Appellant Lesko had at that time talked about "wasting a policeman." Montgomery then told police that both Appellants Lesko and ***Travaglia*** were staying in a room at the Edison Hotel in downtown Pittsburgh. The police proceeded immediately to the Edison where they arrested Lesko and ***Travaglia***. Appellants were taken to the Public Safety Building and, after being given the standard **[*482]** *Miranda* warnings, were individually interrogated. Both gave statements implicating themselves in the killing of Officer Miller, and in the killings of William Nicholls, Peter Levato, and Marlene Sue Newcomer.

Following various delays caused by two changes of venue and a mistrial, trial commenced in Westmoreland County **[***4]** on January 21, 1981, before Westmoreland County Common Pleas Court Judge Gilfert Mihalich and a jury selected in Berks County. The jury found the Appellants guilty of the first degree murder of Officer Miller on January 30, 1981. On February 3, 1981, the jury, finding aggravating circumstances which outweighed any mitigating circumstances, imposed the penalty of death upon Appellants.

II. TRIAL ERRORS ALLEGED

A. SUPPRESSION MATTERS

Appellants claim that they were unlawfully arrested and that certain evidence should be suppressed as the fruit of the unlawful arrest. The evidence consists of **[**292]** a .22 caliber revolver taken from Lesko and a confession given by each of the Appellants.

Prior to the arrest, the police knew the following:

> Three homicides by shooting had occurred in Westmoreland County between December 29, 1979 and January 3, 1980. The December 29 shooting of Peter Levato and the January 1 or 2 shooting of Marlene Sue Newcomer were done with a .22 caliber revolver. The January 3 shooting of Leonard Miller was done with a .38 caliber revolver.
>
> During the approximate period of the killings, there had been a series of robberies of convenience stores **[***5]** in Westmoreland and Indiana Counties at which the victims were bound with

yellow electrical wire. ***Travaglia***'s father, Bernard ***Travaglia***, had told the police that a spool of yellow electrical wire and a .38 caliber revolver had been stolen from him and that he suspected ***Travaglia*** of stealing the revolver. An inspection of a truck owned by ***Travaglia*** and repossessed by a bank had revealed yellow electrical wire similar to that stolen from ***Travaglia***'s **[*483]** father and that used in the robberies. Bernard ***Travaglia*** had also told the police that his son owned a .22 caliber revolver but had told him it was confiscated by a game warden. The Pennsylvania Game Commission had contradicted the report of the confiscation.

The victims of one of the robberies had said that the perpetrators fled in a tan Dodge Ram Charger with window curtains. The body of Marlene Sue Newcomer had been discovered in such a vehicle.

On January 3, 1980, an arrest warrant was issued for ***Travaglia*** for receiving stolen property in connection with a burglary at Sonny's Lounge on Route 22 in Delmont, Westmoreland County. ***Travaglia*** was known to have been staying at the time with another individual at the Thatcher **[***6]** Motel, which was next to Sonny's Lounge. Peter Levato's car had been found abandoned on December 29, 1979, within a mile of the motel.

The police also knew that the windows of the escape vehicle used by the perpetrators of the Miller homicide had been shot out and that three men had been seen in the area hitchhiking toward Pittsburgh. A motorist, James Henderson, who gave a ride to a group of three men, had been previously acquainted with ***Travaglia*** and had identified him as one of the riders.

The police learned that Room 616 of the Edison Hotel in Pittsburgh had been rented to a Michael Simons and a Mr. Lesko. ***Travaglia*** was known to have used the alias Michael Simons. Information obtained from Daniel Keith Montgomery confirmed that Lesko and ***Travaglia*** were in Room 616 of the Edison Hotel and indicated that Lesko still had a .22 caliber revolver. A night clerk at the hotel told police that the Appellants were still in the room. At 10:20 p.m. on January 3, the clerk unlocked the room with a pass key. The police entered without announcing their identity or purpose. Lesko pointed his gun at them before surrendering.

Travaglia claims that his arrest was unlawful because **[***7]** the warrant for his arrest on the charge of receiving **[*484]** stolen goods was issued without sufficient probable cause. We need not decide that question because we find that the validity of the arrest does not depend on the validity of the warrant. ***HN1***[↑] A police officer may arrest without a warrant where there is probable cause to believe that a felony has been committed and that the arrestee is the felon. Probable cause exists where the facts and circumstances within the knowledge of the officer are reasonably trustworthy and sufficient to warrant a person of reasonable caution in believing that the arrestee has committed the offense, *Commonwealth v. Jackson, 450 Pa. 113, 299 A.2d 213 (1973)*. The officers' investigation and the information they acquired, as detailed above, gave them probable cause to believe that the Appellants were the perpetrators of the **[**293]** homicides. This allowed them to arrest the Appellants without a warrant.

The Appellants also claim that the arrests were invalid because the police acted improperly in entering the hotel room without a warrant and without announcing beforehand their identity and purpose. They base their claim on the rule prohibiting **[***8]** a warrantless entry into a suspect's dwelling without exigent circumstances, *Commonwealth v. Williams, 483 Pa. 293, 396 A.2d 1177 (1978)*; *Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)*, and on the "knock and announce" rule, *Commonwealth v. Norris, 498 Pa. 308, 446 A.2d 246 (1982)*; *Commonwealth v. Newman, 429 Pa. 441, 240 A.2d 795 (1968)*. The Appellants would treat the hotel room as a dwelling and apply the requirements of *Williams* and *Payton* to both the warrantless entry and the failure of the officers to announce their identities and purpose. *Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964)* supports the Appellants' contention that they had a reasonable expectation of privacy in their hotel room. The Court in *Stoner* held that a hotel clerk does not have authority to allow police to search a guest's room. However, we find that even if the requirements of *Williams* and *Payton* apply to hotel rooms, they do not render these arrests invalid. In *Williams*, we listed ***HN2***[↑] certain factors that would tend to support a finding that a warrantless arrest of **[*485]** a suspect in his or her home is legal. **[***9]** These include, *inter alia*, that a grave offense is involved, particularly a crime of violence; that the suspect is reasonably believed to be armed; a clear showing of probable cause -- including reasonable, trustworthy information -- to believe that the suspect committed the crime; and strong reason to believe that the suspect is on the premises. We find that these factors were present in this case and were sufficient to establish exigent circumstances so as to

justify a warrantless entry and arrest. Although the exigent circumstances which "justify failure to obtain an arrest warrant are not entirely coextensive with those exigencies which justify noncompliance with the 'knock and announce' rule," *Commonwealth v. Norris, 498 Pa. at 313 n. 2, 446 A.2d at 248 n. 2*, the facts previously recited clearly demonstrate the existence of circumstances which excused compliance with this Fourth Amendment protection as well. *See, Miller v. United States, 357 U.S. 301, 309, 78 S.Ct. 1190, 1195, 2 L.Ed.2d 1332 (1957)*; *Sabbath v. United States, 391 U.S. 585, 591, 88 S.Ct. 1755, 1759, 20 L.Ed.2d 828 (1967)*.

Lesko challenges his confession on the basis he was not told he was a **[***10]** murder suspect when given his *Miranda* warnings. He bases his claim on an allegation that on the pre-interrogation warning form which he signed, the only charges indicated were a firearms violation and resisting arrest. He argues that because homicide charges were not also included on the form, he did not possess sufficient knowledge to understand the consequences of waiving his rights and that therefore his waiver was invalid.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) does not require that in addition to the various rights enumerated a suspect must be provided information as to the crime under investigation. This Court has held, however, that ***HN3***[↑] a suspect must have "an awareness of the general nature of the transaction giving rise to the investigation," in order to make an intelligent and understanding waiver of his rights. *Commonwealth v. Dixon, 475 Pa. 17, 22, 379 A.2d 553, 556 (1977)*. *See also Commonwealth v. **[*486]** Richman, 458 Pa. 167, 320 A.2d 351 (1974)*. It was stated in *Dixon* that where "the defendant has not been furnished with such information [so as to make him aware of the transaction involved] and a pre-trial challenge **[***11]** concerning the validity of a confession is made on this ground, the Commonwealth must prove by a preponderance of the evidence that the defendant knew of the occasion for the interrogation." *475 Pa. at 23, 379 A.2d at 556*. In that case it was held that the Commonwealth had not met its burden. We found that there existed a palpable **[**294]** ambiguity as to the defendant's understanding of the reason for her interrogation before she executed the waiver of her rights. This ambiguity arose out of the fact that the defendant had defaulted in making restitution payments ordered by a justice of the peace several months earlier, a default which she had been warned would result in her arrest. Because the Commonwealth had not refuted the reasonable inference that the defendant, when she waived her rights, thought that the interrogation was to be in regard to the default, the waiver could not be said to be an intelligent and understanding one as to questioning about a homicide, and statements elicited as to the latter were suppressed.

Appellant Lesko argues for the same result here. We find the facts to be sufficiently different, however, that applying the same rule a different result **[***12]** is required. From the record of the Suppression Hearing it is unclear whether Lesko was specifically told that the questioning would cover several murders before he was given the waiver form to sign. At one point Detective Frank Amity testified: "First thing we did was read him his pre-interrogation warning form advising him of his rights, the charges against him, *what we wanted to talk to him about.*" (Suppression Hearing, p. 553, Sept. 23, 1980) (Emphasis added). Detective Amity later testified regarding what occurred *after* Lesko signed the form as follows:

> Q. After you filled out this pre-interrogation warning form, what did you do?
>
> **[*487]** A. Well, we advised him of the charges that we arrested him for.
>
> Q. What were those?
>
> A. Violation of the Uniform Firearms Act and the recklessly endangering another person. And we also told him that he was a suspect in several murders that happened and wanted to talk to him about those.
>
> Q. After you told him this, what was the next thing that happened?
>
> A. He was more willing to tell us about everything that he did.

(Suppression Hearing, p. 558, Sept. 23, 1980).

Even if we assume that prior to being given the **[***13]** waiver form Lesko was not told in words that the interrogation would include questioning as to the homicides, we cannot conclude that the listing of only the two minor charges on the form created an ambiguity in Lesko's mind as to the purpose of the interrogation. It must be recalled that the four homicides about which Lesko was questioned had occurred over the five days immediately preceding the interrogation. The most recent homicide, the case at bar, had occurred in the early morning hours the same day. Indeed, Appellants Lesko and ***Travaglia*** had handed the weapon with which Officer Miller had been shot to Daniel Montgomery less than an hour before their arrest. To find under the circumstances here present that Lesko

was unaware of the general nature of the transaction giving rise to his questioning would be tantamount to treating as fact that which is patently hypothesis and fantasy. We need not expound upon the differences which distinguish these facts from those in *Dixon.* We think it sufficient to note that in *Dixon* we recognized that ***HN4***[⬆] "the fact that interrogation follows hard upon the criminal episode and there is no circumstance lending ambiguity to the direction **[***14]** and purpose of the questioning," *475 Pa. at 23, 379 A.2d at 556*, could supply the necessary evidence that the defendant knew of the occasion for the interrogation. Viewing the entire episode in context, we must agree with the conclusion of the trial judge **[*488]** that Lesko "was, in fact, advised of the seriousness of his situation and was aware that the police were not concerned with the relatively minor charges." (Opinion, p. 44).

The Appellants claim that it was improper to admit testimony by James Henderson identifying them as two of three men he picked up and gave a ride to on January 3, 1980. The basis of this challenge is that Henderson had previously identified them from a photographic array. At the time of this photographic identification, the Appellants **[**295]** were in custody. The identification was conducted without the Appellants being represented by counsel.

In *Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970)*, we held that ***HN5***[⬆] a suspect in custody was entitled to have counsel present at a photographic identification, and that the absence of counsel would bar a subsequent in-court identification unless there was a showing that such identification **[***15]** had an independent origin. The Commonwealth contends that *Whiting* does not survive *United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973)*. It has previously been suggested that *Whiting* was "undercut considerably" by *Ash, Commonwealth v. Diggs, 260 Pa.Super. 349, 355 n. 5, 394 A.2d 586, 589 n. 5 (1978)*. It has also been suggested that to the extent *Whiting* expressed an interpretation of *federal* constitutional law, it did not survive *Ash,* although the *state* constitution, Article I, Section 9, might be given a broader sweep and require such a rule. *Commonwealth v. Ray, 455 Pa. 43, 315 A.2d 634 (1974)* (plurality opinion, Pomeroy, J.). Since the *Ash* decision, this Court has several times found it unnecessary to reach the issue whether the Pennsylvania Constitution requires that an accused be represented by counsel at a post-arrest photographic identification. *See, Commonwealth v. Holland, 480 Pa. 202, 389 A.2d 1026 (1978); Commonwealth v. Scott, 469 Pa. 258, 365 A.2d 140 (1976)*. We need not reach that issue in this case either. Assuming *arguendo* that the ***HN6***[⬆] Appellants were entitled to, but did not have counsel present **[***16]** at the photo array, and therefore that the identification was improper, it does not necessarily follow that the identification must be suppressed. **[*489]** The law is clear that even when an improper pre-trial identification is made, an in-court identification is nevertheless admissible if it has sufficient, independent basis. *Commonwealth v. Connolly, 478 Pa. 117, 385 A.2d 1342 (1978)*. Here, Henderson was with the Appellants for thirty to forty-five minutes and was previously acquainted with ***Travaglia***. This provided a sufficient, independent basis for the in-court identification.

Appellants next argue that their confessions were inadmissible because they were arraigned beyond the sixhour time limit set in *Commonwealth v. Davenport, 471 Pa. 278, 370 A.2d 301 (1977)*. Appellants were arrested at 10:20 p.m. in the City of Pittsburgh. They were immediately informed of the charges against them and given the standard *Miranda* warnings of their rights. Once again after arrival at the police station, the Appellants were advised of the possible charges against them, told their rights, and both executed written waivers of their rights to remain silent and to have counsel **[***17]** present at further questioning. Lesko's interview began within twenty minutes of his arrest and continued, with short breaks for coffee, for approximately an hour and a half. ***Travaglia*** likewise was interviewed for about an hour and a half after being detained for forty minutes in a holding cell. It is to be noted that the interviews involved discussion of at least four separate homicides, in addition to various other crimes charged, which had occurred over a period of seven days in three different counties. It is not surprising, then, that these initial interrogations spanned a relatively long period of time, Lesko's concluding at 12:20 a.m. and ***Travaglia***'s at 12:47 a.m.

After a pause of about ten or fifteen minutes, each Appellant then reiterated on tape the substance of the initial interviews as to each homicide discussed. With each of these taped statements requiring fifteen to twenty minutes, and with short breaks for food and rest, it was approximately 3:10 a.m. when the interrogations were complete. The Appellants were arraigned in front of Allegheny County District Justice Martin McTiernan at 3:50 a.m., Lesko on **[*490]** charges of homicide and conspiracy, and ***Travaglia*** **[***18]** on the same charges along with an additional count of receiving stolen property. This was five and one-half hours after their arrest. Following this arraignment, around 4:15 a.m., the

Appellants were **[**296]** returned to the Public Safety Building. They remained there until 4:35 a.m. when they were turned over to state police officers. They were arraigned in front of Westmoreland County District Justice Michael Moschetti at 5:55 a.m. in the County Courthouse in Greensburg, seven and one-half hours after their arrest.

In *Davenport*, this Court adopted ***HN7***[⬆] "a rule under which the admissibility of any statement taken while the accused is in custody before preliminary arraignment is based on the length of the delay between arrest and arraignment." *471 Pa. at 286, 370 A.2d at 306*. Although stated as mandatory and without any explicit exceptions, the rule that "[i]f the accused is not arraigned within six hours of arrest, any statement obtained after arrest but before arraignment *shall* not be admissible at trial," *Id.* (emphasis added), admits of an implicit exception "[S]ix hours provides a workable rule which can be readily complied with *in the absence of exigent circumstances* **[***19]** ." *Id.*, n. 7 (emphasis added)). Although the continuing vitality of the *Davenport* rule as a whole is subject to speculation after *Commonwealth v. Blady, 492 Pa. 285, 424 A.2d 864 (1981)* (Larsen, J., dissenting, joined by Flaherty, J.), and *Commonwealth v. Bennett, 498 Pa. 656, 450 A.2d 970, 971-972 (1982)* (Flaherty, J. concurring, joined by Hutchinson, J.) [*see also, Commonwealth v. Jenkins, 500 Pa. 144, 151, 454 A.2d 1004, 1008 (1982)* (Concurring Opinion of McDermott, J.)], it is clear that a majority of this Court has recognized the implicit "exigent circumstances qualification." *Commonwealth v. Keasley, 501 Pa. 461, 462 A.2d 216 (1983)*; *Commonwealth v. Jenkins, 500 Pa. at 150, 454 A.2d at 1007 (1982)*.

After unraveling a tangled web of criminal activity, the Pittsburgh police were able to arraign the Appellants on homicide charges in Allegheny County within the six hours allowed by *Davenport*. We may take judicial notice of the **[*491]** approximately 40-mile distance between Pittsburgh and Greensburg, where the Appellants were arraigned on the homicide charges in the case at bar. If we are to require that arraignment take place in the county **[***20]** in which jurisdiction for the crimes charged lies, it would be the height of folly to ignore the temporal and spatial realities which attend circumstances such as these, where arrest and arraignment occur a substantial distance apart. *Cf. Commonwealth v. Dreuitt, 457 Pa. 345, 321 A.2d 614 (1974)* (time necessary to transport defendant from place of arrest [Baltimore, MD] to Philadelphia not considered as part of unnecessary delay between arrest and arraignment, where defendant was advised of right to counsel and of charges against him at place of arrest) (O'Brien, J., announcing Opinion of the Court, joined by Eagen and Pomeroy, JJ.). We observe that except for the identity of the victims in the crimes charged, the Westmoreland County arraignment provided the Appellants with no more information than the Allegheny County arraignment had two hours previously. Under these circumstances, we find no error in the admission of the statements.

B. TESTIMONY AT TRIAL

Appellants allege that it was error for the trial court to allow a prosecution witness, Ricky Rutherford, to testify as to criminal acts of the Appellants, occurring just prior to the Miller homicide, which were not included **[***21]** in the crimes charged at bar.

Rutherford's testimony consisted of an account of how he had accompanied Lesko and ***Travaglia*** from the Edison Hotel in downtown Pittsburgh, where the Appellants had abducted one William Nicholls in his automobile; how ***Travaglia*** had shot Nicholls in the arm and then forced him to drive them out of town; how both Appellants had abused Nicholls along the way; how they had driven to a lake and, after Rutherford helped them find a large rock, how Appellants had taken Nicholls down to the lake and returned to the car without him. Rutherford testified that the trio then **[*492]** went to ***Travaglia***'s father's house where they stole a .38 caliber pistol, and **[**297]** returned to the house and forced Rutherford to enter the garage to get other ammunition after they found the gun contained the wrong type. Rutherford then testified to their speeding past Officer Miller several times, and to the subsequent shooting of Miller by ***Travaglia***.

The law is clear in Pennsylvania that ***HN8***[⬆] evidence of other unrelated criminal conduct of an accused is generally inadmissible to prove his commission of the crime for which he is being tried. *Commonwealth v. Styles, 494 [***22] Pa. 524, 431 A.2d 978 (1981)*; *Commonwealth v. Brown, 489 Pa. 285, 414 A.2d 70 (1980)*; *Commonwealth v. Peterson, 453 Pa. 187, 307 A.2d 264 (1973)*.

It is equally clear, however, that evidence of other crimes is admissible where it is relevant to prove (1) motive, (2) intent, (3) a common scheme or plan involving the commission of two or more crimes so closely related that proof of one tends to prove the other, (4) the identity of the accused as the perpetrator, or (5) the absence of mistake or accident. *Styles, 494*

Pa. at 525-26, 431 A.2d at 980.

These exceptions are not to be applied in a vacuum, however. ***HN9***[↑] "Evidence of other offenses is subject, as is all relevant evidence, to exclusion if its probative value is outweighed by the 'danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy.'" *Commonwealth v. Terry, 462 Pa. 595, 603, 342 A.2d 92, 96 (1975)* (dissenting opinion of Roberts, J.); *Commonwealth v. Brown, 462 Pa. 578, 594, 342 A.2d 84, 92* (concurring opinion of Roberts, J., joined by Manderino, J.). *See also, Fed.R.Evid. 403, 404(b)*; McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 185, at 438-39 (2d ed. **[***23]** E. Cleary 1972).

Our review of the record leads us to the conclusion that while the possibility of prejudice existed, it was heavily outweighed by the probative value of Rutherford's testimony. The Appellants were advancing the theory that the shooting of Officer Miller was an accident, that ***Travaglia***'s **[*493]** finger had slipped from the gun's hammer. Viewing the facts of the Miller incident in isolation, this theory would be hard to refute.

The Commonwealth introduced Rutherford's testimony to show motive and intent. The details of the incidents which occurred just a short time prior to Officer Miller's shooting were developed to show that the Appellants were not just out to harass Miller that evening, but rather that they were in a stolen car, with the victim Nicholls' personal belongings and two firearms which could connect them to the prior wrongdoing.

Taken in this context, the facts elicited from Rutherford are so heavily related to and intertwined with the circumstances of Miller's killing that their evidentiary value greatly outweighs any possible prejudice suffered by the Appellants. Therefore, the trial court correctly allowed this testimony to be admitted.

[*24]** Part of the arguments on this point merit a brief, separate discussion. According to this line of argument, the details of the Nicholls episode as testified to by Rutherford were so horrid as to inflame the passions of the jury and prejudice them against the Appellants *during the sentencing phase* of the trial and therefore were improperly admitted. ***HN10***[↑] Whether the trial court in a capital case, in balancing the probative value of proffered evidence against its potentially prejudicial effect, must give separate consideration to the possible effect of the evidence at the sentencing phase, is a question which admits of no general answer. There may be circumstances where evidence, deemed admissible at trial because its relevance to the determination of guilt outweighs its possible prejudice, should nevertheless be excluded because it is so inflammatory that its relevance to determination of sentence would be outweighed by its potential prejudice. *Cf. Commonwealth v. Zettlemoyer, 500 Pa. 16, 53 n. 21, 454 A.2d 937, 956 n. 21 (1982)* (conceivable that the reading of a "loaded" indictment to establish felony element **[**298]** of the aggravating circumstance that "the victim was **[***25]** a prosecution witness to a murder or other felony committed **[*494]** by the defendant . . .," *42 Pa.C.S. § 9711[d][5]*, could so inflame the jury that the possibility of prejudice would outweigh the evidentiary value of reading the indictment.). ***HN11***[↑] In most cases, however, the decision that the evidence is admissible for purposes of the guilt phase renders it, like all evidence admitted at trial, admissible for the penalty phase as part of the "circumstances" to be considered by the jury. As long as there is no "embellishment" upon the facts or improper attempt by the prosecutor to dwell upon the inflammatory character of the evidence, no additional weight should be accorded to the potential for prejudice because such evidence might play a part in the sentencing determination. Where facts are relevant for a proper purpose at trial, defendants may not be heard to complain about the horrid character of such facts. To find otherwise would give rise to the perverse result that a capital defendant would benefit more, the more horrible the background circumstances were.

In the present case we find that Rutherford's testimony went uncontradicted. We also find that the prosecutor **[***26]** made minimal reference to this testimony in his closing at the guilt phase, and then only to the substance of the testimony, not to the details. Furthermore, he made no reference at all to Rutherford's testimony or the details of the Nicholls episode in his argument at the penalty phase. Indeed, any reference to Nicholls during the penalty phase was made by counsel for Appellant ***Travaglia***. Upon thorough review of the record we find that the prejudicial effect of Rutherford's testimony was outweighed by its probative value in determining guilt, and was not exacerbated by its treatment in determining the sentence to be imposed.

Appellants also contend that they were prejudiced by Rutherford's testimony that their actions as to Nicholls seemed to him "like something they did all the time." In view of the record and the trial court's immediate cautionary instructions, the error, if any, was harmless beyond a reasonable doubt. *Commonwealth v. Story,*

476 Pa. 391, 383 A.2d 155 (1978).

[*495] C. SENTENCING HEARING

The Appellants raise several allegations of error during the sentencing phase of their trial which, they argue, require suspension of the death penalties and imposition **[***27]** of life sentences.

The first of these allegations is that it was error for the court to allow into evidence as an aggravating circumstance the Appellants' guilty pleas to homicide charges in Indiana County arising out of the Nicholls incident. The statute provides ***HN12***[⬆] that

> evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e). Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

42 Pa.C.S. § 9711(a)(2). One of the aggravating circumstances which may be considered is ***HN13***[⬆] that

> [t]he defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

42 Pa.C.S. § 9711(d)(10). The Appellants argue that because sentence had not been imposed by the Indiana County Court, **[***28]** the guilty pleas were not final "convictions" for purposes of the statute, and therefore should not have been considered as an aggravating circumstance. Appellants cite Commonwealth v. Zapata, 455 Pa. 205, 314 A.2d 299 (1974), as holding counsel ineffective for bringing up prior "convictions" **[**299]** where sentence had not been imposed, because such convictions were not grounds for impeachment as they were not final. They also cite Commonwealth v. Myers, 485 Pa. 519, 403 A.2d 85 (1979). There we granted Appellants a new trial where the prosecutor had manipulated the court calendar to delay sentencing of a person found guilty of perjury, in **[*496]** order to prevent that person's being ruled incompetent to testify under the Disqualification Act, 19 P.S. § 62. And the Appellants cite generally Commonwealth ex. rel. McClenachan v. Reading, 336 Pa. 165, 6 A.2d 776 (1939), wherein it was stated ***HN14***[⬆] that

> [i]n interpreting a statute using the word 'conviction' the court has held that the strict legal meaning must be applied except where the intention of the legislature is obviously to the contrary.

336 Pa. at 169, 6 A.2d at 778. This "strict legal meaning", requires **[***29]** a verdict accompanied by sentence, and is to be contrasted with statutes wherein the legislature uses the language "found guilty" to permit use of a verdict unaccompanied by a sentencing. *See, e.g.,* Rosenthall v. State Board of Pharmacy, 3 Pa.Cmwlth. 621, 284 A.2d 846 (1971).

While this argument has superficial appeal, it must fail upon closer inspection. The clear import of the first part of subsection (d)(10) is to classify the commission of multiple serious crimes as one of the bases upon which a jury might rest a decision that the crime of which the defendant stands convicted, and for which they are imposing sentence, merits the extreme penalty of death. The purpose of the second part of subsection (d)(10) just as clearly is to classify the fact that the defendant was already serving a life sentence at the time he committed the offense at issue as another basis for such a decision. The first part of the subsection allows as an aggravating circumstance the fact that "the defendant has been convicted of another Federal or State offense, committed either before *or at the time of the offense at issue,* for which a sentence of life imprisonment or death was imposable . . **[***30]** ." 42 Pa.C.S. § 9711(d)(10) (Emphasis added). The emphasized portion of the statute highlights the incongruity of the construction urged by the Appellants. ***HN15***[⬆] By including offenses committed contemporaneously with the offense in issue, the legislature clearly indicated its intention that the term "convicted" not require final imposition of sentence, but cover determinations of guilt as well. Given the practical operation of the criminal **[*497]** justice system, a contemporaneous offense would either be tried together with the "offense at issue" or severed and tried separately. In the former situation, it would be impossible for sentencing to have occurred prior to the

jury's consideration of sentence on the "offense at issue"; in the latter, the vagaries of scheduling and conducting separate trials of a single defendant, within certain time limits and amidst the ordinary operation of a court calendar, would make it virtually impossible. At best, such factors would render it completely arbitrary whether a contemporaneous offense would qualify as an aggravating circumstance under subsection (d)(10).

We cannot accept the Commonwealth's argument that use of the word "imposable" **[***31]** would have been absurd if the Legislature had intended "convicted of" to mean that a finding of guilt had been made and sentence had been imposed. The prepositional phrase "for which a sentence of life imprisonment was imposable" refers back to, and is descriptive of, the offense which if the defendant has been "convicted" thereof may be considered an aggravating circumstance. Because the phrase modifies the noun "offense" rather than the verb "convicted", by itself it sheds no appreciable light on the shade of meaning to be attributed to the latter. We note, however, that the second part of subsection (d)(10), allowing as an aggravating circumstance that "the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense," appears to be co-extensive with the situation which would exist where a defendant has been found guilty and had a life sentence **[**300]** imposed. Were we to read the first part of the statute as the Appellants suggest, the second section would be surplus verbiage. Because ***HN16***[⬆] the Legislature is not presumed to have intended the provisions of its enactments as mere surplusage, *Masland v. Bachman, 473 Pa. [***32] 280, 374 A.2d 517 (1977)*, the Appellants' position is untenable. For these reasons, we find that, as used in *42 Pa.C.S. § 9711(d)(10)*, the legislature evidenced a clear intent **[*498]** that "convicted" mean "found guilty of" and not "found guilty and sentenced." [1]

Appellants also put forward several allegations of improper argument by the prosecutor at the sentencing hearing. Lesko contends that the prosecutor exceeded the bounds of proper argument when he commented on Lesko's failure to show remorse. Lesko took the stand at the sentencing hearing and testified to details of his life history -- the orphanages at which he stayed, the schools he attended, his service record -- up until the time he first **[***33]** met ***Travaglia***. The prosecutor did not cross-examine Lesko. In his argument to the jury, the prosecutor stated:

> John Lesko took the witness stand, and you've got to consider his arrogance. He told you about how rough it was, how he lived in hell, and he didn't even have the common decency to say I'm sorry for what I did. I don't want you to put me to death, but I'm not even going to say that I'm sorry.

(N.T., p. 1697).

Although ***Travaglia*** did not take the stand, and the prosecutor made no direct comment on his failure to indicate remorse, he argues that the prosecutor's comments as to Lesko improperly implied that he, ***Travaglia***, had a burden to take the stand and show remorse.

Lesko cites cases for the proposition that ***HN17***[⬆] when a defendant testifies as to a collateral matter, the prosecutor is not permitted to comment adversely upon his refusal to testify on the merits of the charge against him. *See, e.g., Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971)*. The rationale for this rule is that such comment would run counter to the privilege against self-incrimination and the defendant's presumption of innocence. It is important to note that the argument complained **[***34]** of here was delivered **[*499]** during the sentencing phase of Appellants' trial. Lesko and ***Travaglia*** had already been tried and found guilty of first degree murder. The Commonwealth had been put to its proof and, without any infringement on the defendants' privilege against self-incrimination, the presumption of innocence had been overcome beyond a reasonable doubt. We must keep in mind that ***HN18***[⬆] the "sentencing phase" of the trial has a different purpose than the "guilt phase" and different principles may be applicable. For example, the privilege against self-incrimination in its pure form has no direct application to a determination of the proper sentence to be imposed; the purpose of the prosecutor is not to "incriminate," and the goal of the guilty defendant is not to avoid "incrimination." Likewise, the presumption of innocence which accompanies the accused throughout proceedings to determine his guilt has no direct application to the sentencing determination. This is reflected in the fact that the sentencing statute, without running afoul of the federal or state constitutions, places a burden on the defendant of proving mitigating circumstances by a preponderance of the evidence.

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[1] Appellant Lesko has, in a separate appeal, No. 41 W.D. Appeal Dkt. 1982, raised a claim of ineffective assistance of counsel in the Indiana County case based on his attorney's advice to plead guilty. This matter is treated in a separate opinion filed this day and reported at *502 Pa. 511, 467 A.2d 307*.

[*35]** It may be acknowledged that in some sense there is a "presumption of life" -- this from the fact that the prosecution is limited to specified aggravating circumstances which must be proven beyond a reasonable doubt, while a defendant is permitted great latitude in demonstrating mitigating circumstances, and then by the lesser preponderance **[**301]** of evidence standard. This presumption, if it be called such, does not, however, support the reasoning or the rule which Appellants argue for excluding comment on the failure to show remorse.

It should not go unnoticed that ***HN19***[↑] the demeanor of a convicted defendant, including his apparent remorse, is a proper factor for consideration by the court in fixing sentence in noncapital cases. We find no reason in policy or logic why the jury in a capital case, which is the sentencing authority, should be prevented from considering this same information. Had the prosecutor launched an extended tirade on this point, thereby focusing undue attention on the **[*500]** remorse factor, Appellants' claim of prejudice might have greater force. It is clear from examining the prosecutor's argument as a whole that he made only this single reference **[***36]** to remorse, which amounted to a suggestion that this was a factor which the jury should consider. We also note that the court in its charge instructed the jury that the defendants had no obligation to testify and that no adverse inference should be drawn from their failure to testify. We therefore find no error arising out of these comments.

The Appellants argue further impropriety in statements of the prosecutor which they characterize as calculated to arouse the prejudice and sympathy of the jury against them. Appellants first call attention to the prosecutor's statement:

> So I'll say this: Show them sympathy. If you feel that way, be sympathetic. Exhibit the same sympathy that was exhibited by these men on January 3, 1980. No more. No more.

(N.T., p. 1701).

It is axiomatic that a statement must be read in context in order to assess its propriety. We therefore set out at length the portion of the prosecutor's argument which immediately preceded the challenged statement:

> But I have a problem. Each one of you promised me, promised the judge, Mrs. ***Ambrose***, Mr. Bertani, Mr. McCormick, Mr. Marsh and the defendants, when we started, that you would follow the law. **[***37]** You all promised that you wouldn't become a social activist. But I can't stop that. I can't stop you from walking out into that deliberation room after the judge charges you and saying to yourself, The Commonwealth has proved one or more aggravating circumstances, and there's no mitigating circumstances here at all, and the law says I must find these defendants and sentence them to death, but I won't do that, because I feel sympathy. And I also can't stop you from saying, well, I found one or more aggravating circumstances that have been proven beyond a reasonable doubt, and although I found mitigating circumstances, the aggravating circumstances outweigh them, and the law **[*501]** says that I must return a death penalty, but I won't, I'm going to show sympathy. I just can't stop you from doing that.

Id.

It is clear from reading this argument as a whole that the prosecutor was seeking to remind the jury that sympathy was not a proper consideration, but that if they were inclined to be sympathetic they should temper their sympathy. [This, in fact, was the essence of the trial court's instruction -- that sympathy was not a factor to be considered in the jury's **[***38]** deliberations, that there was sympathy on both sides of the case. (N.T. p. 1706)]. This was not an improper argument for the prosecutor to have made.

Appellants argue further that the prosecutor erred in this statement by making reference to the victim. They cite *Commonwealth v. Lipscomb, 455 Pa. 525, 317 A.2d 205 (1974)*; *Commonwealth v. Cronin, 464 Pa. 138, 346 A.2d 59 (1975)*; and other cases wherein this Court has disapproved prosecutorial arguments which invite consideration of the murder victim. We observe that these cases all treat closing arguments made during trials for the purpose of determining guilt or innocence, where the **[**302]** defendant is still clothed with a presumption of innocence. A large part of the reason why these arguments invoking the memory of the victim were disfavored was the prosecutor's implication of his personal belief in the guilt of the accused. *See, e.g., Commonwealth v. Cronin.* [Argument that "'[T]he only way you cannot find this defendant guilty of murder of the first degree is for [the victim] to walk through that door,'" *464 Pa. at 141, 346 A.2d at 61*, disapproved as "'amount[ing] to a statement by the prosecutor **[***39]** that he was personally convinced that the appellant was guilty, and his innocence was as unlikely as the deceased's resurrection.'" *Id., 464 Pa. at 142, 346 A.2d*

at 61, quoting from *Commonwealth v. Lark, 460 Pa. 399, 404-405, 333 A.2d 786, 789 (1975)]*. We again observe that the balance of principles which results in certain rules being appropriate at the "guilt phase" of a trial, may be struck differently at a hearing to determine appropriate **[*502]** penalty. ***HN20***[⬆] The prosecutor's statement of his personal belief in the defendants' guilt can in no way be prejudicial where guilt has already been determined.

Prejudice might otherwise arise from reference to the victim if such reference has the effect of arousing the jury's emotions to such a degree that it becomes impossible for the jury to impose sentence based on consideration of the relevant evidence according to the standards of the statute. We find the statements of the prosecutor in this case to have made minimal reference to the victim. Indeed, the memory of both Leonard Miller and William Nicholls was first invoked by counsel for Appellant ***Travaglia*** ("And Leonard Clifford Miller is dead, and there's no question about **[***40]** that. Mr. Nicholls is dead; there's no question about that. If the killing of Mike ***Travaglia*** can bring back those people, then there would be a legitimate reason for killing Mike ***Travaglia***. Because then you bring back those people to their families, and you give something back; you create something from what you're doing. But you cannot do that." N.T. p. 1677).

Reading the arguments at the sentencing hearing as a whole, we find that the prosecutor's argument was carefully tailored to demonstrate the proof of aggravating circumstances, to refute the proof of mitigating circumstances, and to correct extraneous arguments introduced by the defense. We find no prejudice from the challenged statements making oblique reference to the victim.

Finally, we address Appellants' arguments that the prosecutor's final statement to the jury was inflammatory. The prosecutor stated, "Right now, the score is John Lesko and Michael ***Travaglia*** two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's your duty." Appellants characterize this statement as an improper appeal to vengeance which requires reversal of the death sentences. As we read the **[***41]** record, the arguments presented by defense counsel were to a large extent directed toward demonstrating that there was **[*503]** no rational reason for the existence of the death penalty, that it served no useful purpose. The prosecutor opened his argument by pointing out that the legislature in its lawmaking function had enacted the death penalty and had already decided that there is a rational reason and that the penalty does serve a useful purpose. He returned to this theme, and prefaced the comment complained of by requesting "I want you to remember this: We have a death penalty for a reason." N.T. p. 1701. ***HN21***[⬆] The prosecutor is permitted, by the terms of the statute, to argue in favor of the death penalty. *42 Pa.C.S. § 9711(a)(3)*. Taken in context, we find the prosecutor's comment to have been no more than permissible "oratorical flair" in arguing in favor of the death penalty. [2]

[*42]** **[**303]** III. PROPORTIONALITY REVIEW

Consistent with decisions of the United States Supreme Court, *Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)*; *Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)*; *Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)*; prior decisions of this Court, *Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982)*, *cert. denied, U.S. , 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983)*; and the sentencing statute, *42 Pa.C.S. § 9711(h)(3)(iii)*, "this Court will conduct an independent evaluation of all cases decided since the effective date of the sentencing procedures under consideration (September 13, **[*504]** 1978)." *Zettlemoyer, 500 Pa. at 62, 454 A.2d at 961*. This review "will utilize all available judicial resources and will encompass all similar cases, taking into consideration both the circumstances of the crime and the character and record of the defendant in order to determine whether the sentence of death is excessive or disproportionate to the circumstances." *Id.* [3]

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[2] The Appellants also allege other instances of error which, having carefully reviewed the record and the precedents, we must reject. Arguments that the exclusion of veniremen conscientiously opposed to the death penalty violates due process and the Appellants' right to a fair trial, and that the imposition of the death penalty is "cruel and unusual" punishment, have been previously ruled upon by this Court. *See Commonwealth v. Brown, 462 Pa. 578, 342 A.2d 84 (1975), and Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982)*, respectively. Arguments that the Appellants were denied their rights to speedy trial under the Federal and State Constitutions and Rule 1100, that the trial court erred in not quashing the information which charged both conspiracy and homicide, and that the trial court erred in not charging the jury that they could find Lesko guilty of a different degree of murder than ***Travaglia***, are without merit. No jurisprudential value would be served by further discussion of these points.

[3] We note that the United States Supreme Court has granted

[*43]** Our research indicates that three cases in which "[t]he victim was a fireman, peace officer or public servant concerned in official detention . . . who was killed in the performance of his duties," 42 Pa.C.S. § 9711(d)(1), have proceeded to jury verdict under the Act of September 13, 1978. The cases are *Commonwealth v. Benjamin Terry,* Montgomery County Court of Common Pleas, Criminal Division, No. 1563-79, docketed on appeal with this Court, 80-3-595, argued April 19, 1983; [4] *Commonwealth v. Edward McNeil,* Philadelphia County Court of Common Pleas, Criminal Division, CP 80 Nov. 969-71; and *Commonwealth v. [*505] Leslie Beasley,* Philadelphia County Court of Common Pleas, Criminal Division, CP 80 July 2175-2178.

[*44]** In *Terry,* the defendant was an inmate serving three life sentences for murder. He was found guilty of first degree murder in the bludgeoning death of a guard at the State Correctional Institution at Graterford. The jury sentenced him to death. In *Beasley,* after finding him guilty of shooting an on-duty police officer, the jury sentenced the defendant to death. In *McNeil,* the defendant shot and killed a police officer who was at the scene where the defendant had been shooting at his wife and children. **[**304]** The jury convicted the defendant of first degree murder and imposed a life sentence.

We have searched the records of these cases available to this Court for information as to the character of the defendants (e.g. intelligence, family background, psychiatric history, previous criminal record), and the circumstances, both aggravating and mitigating, of their crimes. We find that the sentence of death is not excessive or disproportionate to the penalty imposed in these similar cases. We also find that the evidence supports "the finding of an aggravating circumstance specified in subsection (d)," 42 Pa.C.S. § 9711(h)(3)(ii), and that the sentences were not **[***45]** "the product of passion, prejudice or any other arbitrary factor," 42 Pa.C.S. § 9711(h)(3)(i). [5] We therefore must affirm the sentences of death.

The first premise is that "the sentence imposed forecloses the availability of those subsequent [Post-Conviction Hearing Act] proceedings" which are available for appellants to challenge the effectiveness of counsel in "conventional" cases. Zettlemoyer, 500 Pa. at 79, 454 A.2d at 970. The authority cited for this proposition is 42 Pa.C.S. § 9711(i), paraphrased "record to be transmitted to Governor at close of this Court's review." *Id.* The full text of this section, however, reads:

> Where a sentence of death is upheld by the Supreme Court, the prothonotary of the Supreme Court shall transmit to the Governor *a* full and complete record of the trial, sentencing hearing, imposition **[***46]** of sentence and review by the Supreme Court.

42 Pa.C.S. § 9711(i) (emphasis added). Contrary to the implication of the Dissent, the statute does not require that the *official* record be transmitted to the Governor. Nor does the statute in any other way, either expressly or impliedly, remove the case from the jurisdiction of the courts or prevent further action by the courts.

It is to be noted also that the Majority Opinion in *Zettlemoyer* contains a similar conclusory statement that "due to the final and irrevocable nature of the death penalty, the appellant will have no opportunity for post-

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certiorari to the Court of Appeals for the Ninth Circuit in the case of ***Pulley v. Harris, U.S. , 103 S.Ct. 1425, 75 L.Ed.2d 787 (1983)***, decision below reported *sub nom.* Harris v. Pulley, 692 F.2d 1189 (9th Cir.1982). The questions presented for review are "(1) Does the Constitution, in addition to procedures whereby trial court and jury impose death sentence, require any specific form of 'proportionality review' by court of statewide jurisdiction prior to execution of state death judgment? (2) If so, what is the constitutionally required focus, scope, and procedural structure of review?"

[4] On appeal, this Court remanded the case for a new trial, 501 Pa. 626, 462 A.2d 676 (1983), because the lower court had improperly allowed the jury, during their deliberations, to have possession of a copy of a paraphrased, written version of the defendant's confession, a violation of Pa.R.Crim.P. 1114(a). We cannot, therefore, presently consider the case as having proceeded to jury verdict. We must note, however, that throughout much of our deliberation on the cases at bar, *Terry* was considered as a "similar case" for purposes of comparison. To the extent that our review for excessiveness or disproportionality involves determining whether or not juries generally, across the Commonwealth, find death to be an appropriate punishment for the crime, *Terry* has some limited value. Even if we remove *Terry* from consideration entirely, however, our conclusion remains unchanged.

[5] The Dissenting Opinion of Mr. Chief Justice Roberts reiterates his position in Zettlemoyer, 500 Pa. at 77-81, 454 A.2d at 969-971. That position, however, is based on two premises which, if subjected to careful analysis, must be considered faulty.

conviction relief wherein he could raise, say, an assertion of ineffectiveness of counsel . . ." *500 Pa. at 50 n. 19, 454 A.2d at 955 n. 19*. Offered in support of the rationale for relaxing the waiver rule and considering issues raised for the first time before this Court or even raised *sua sponte* by this Court, the statement is clearly dictum.

The second premise of the Dissent in *Zettlemoyer,* quoted in the present Dissenting Opinion, is that "[u]ntil a hearing on counsel's effectiveness has been held, this Court cannot fairly state that it has discharged its statutory **[***47]** duty to provide a thorough review of the judgment of sentence of death." *500 Pa. at 81, 454 A.2d at 971*. Although "thorough" is perhaps an appropriate *general* characterization of this Court's reviewing function in death penalty cases, it must not be overlooked that *42 Pa.C.S. § 9711(h)* is quite *specific* in its description of this Court's duty in reviewing a sentence of death. Thus,

> (2) In addition to its authority to correct errors at trial, the Supreme court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.
>
> (3) The Supreme Court *shall affirm* the sentence of death *unless* it determines that:
> (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;
> (ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or
> (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

(Emphasis added.) Although ineffectiveness of counsel might be classified as an "arbitrary **[***48]** factor" within subsection (3)(i), unless it is raised by the appellant or some hint of its presence is suggested by the record so as to cause this Court to raise the issue *sua sponte,* it is inconceivable how the issue can come before the Court on direct appeal.

Concur by: NIX

Concur

[*507] NIX, Justice, concurring.

I am fully in accord with the majority's affirmance of the verdicts of guilt in these appeals. My concern is directed to the majority's disposition of the objection to the allowance into evidence as an aggravating circumstance of the appellants' guilty pleas **[**305]** to the homicide charges in Indiana County (the William C. Nicholls killing). The majority focused its analysis upon whether the term "convicted" as used in *section 9711(d)(10), 42 Pa.C.S. § 9711(d)(10)*, requires the imposition of sentence before such evidence can be admissible for this purpose. [1] In my judgment the issue raised is the finality of the conviction that is being offered as an aggravating circumstance. Where as here there have been challenges to the pleas entered in Indiana County, [2] I am convinced that *section 9711(d)(10)* must be interpreted as providing for review by this Court **[***49]** of those claims prior to the execution of the judgments of sentence of death affirmed by the Court today. I therefore join in the Court's mandate **[*508]** today with the caveat that the death penalty will be carried out only after a review of those complaints by this Court and only if after such

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[1] *Section 9711(d)(10)* provides:

> (d) Aggravating circumstances. -- Aggravating circumstances shall be limited to the following:
>
> * * *
>
> (10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

[2] Appellant ***Travaglia*** filed a motion to withdraw his guilty plea to the Indiana County charge on January 23, 1981, during the trial of the instant case. That motion was denied on April 30, 1981 and ***Travaglia*** was sentenced to a term of life imprisonment. There is no indication in the record whether an appeal was taken from that judgment of sentence.

Appellant Lesko initially filed a motion to withdraw his guilty plea in the Indiana County case on December 3, 1980, prior to the trial in Westmoreland County, and filed an amended motion to withdraw on April 13, 1981. His motion, as amended, was denied on June 5, 1981. Lesko's challenge to that denial was rejected, and he was sentenced on July 17, 1981 to a term of life imprisonment. Lesko appealed to the Superior Court, which transferred the appeal to this Court. In *Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307 (1983)*, this Court affirmed the judgment of sentence. Thus as to Lesko my concern expressed here is satisfied.

review it is determined that the pleas were voluntarily and knowingly entered and the request for withdrawal was properly refused.

[*50]** In *Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)*, the United States Supreme Court painstakingly stressed the importance of the sentence-review function to be undertaken by the state's highest tribunal where the death penalty has been imposed. As noted by that Court in *Zant v. Stephens, U.S. , , 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235, 255 (1983)*: "[A]lthough not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." Surely an attack upon the validity of a guilty plea that has been used as the basis for a finding of an aggravating circumstance constitutes the type of contention that must be reviewed before the execution of the capital sentence may be allowed.

An interpretation of *section 9711(d)(10)* which provides for such a final review by this Court of a challenge of this nature is also dictated by the law of this Commonwealth. Our Constitution mandates a right of appeal in all cases. *Pa. Const. art. V, § 9*; *see Section 5105* of the Judicial Code, *42 Pa.C.S. [***51] § 5105*. Moreover, our case law has recognized the qualitative difference between death and any other permissible form of punishment by relaxing rules of waiver which would otherwise preclude review of the merits of claims where the death sentence has been imposed. *See Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), cert. denied sub nom. Zettlemoyer v. Pennsylvania, U.S. , 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983)*; *Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978)*. In light of such precedent, it would clearly create an anomaly to foreclose a challenge upon the validity of a plea of guilt where that plea constitutes the aggravating circumstance **[**306]** upon which the death sentence is predicated.

[*509] It must be recognized that the validity of each aggravating circumstance is an important consideration even where there may be more than one aggravating circumstance upon which the jury could have reached its decision. Pennsylvania's death penalty statute provides that where the jury finds the existence of both aggravating and mitigating circumstances the jury must then engage in a "weighing" process. If, after the weighing process, **[***52]** the jury determines that the aggravating circumstances outweigh the mitigating circumstances, it must return the death sentence. *42 Pa.C.S. § 9711(c)(iv)*. It is evident that this weighing process is squarely within the province of the jury and that a reviewing court cannot determine with any certainty the exact weight which the jury attached to each aggravating and mitigating circumstance. [3] **[***53]** In a case involving a decision as important as life and death we are not in a position to speculate about what decision the jury might have reached had it not considered one particular aggravating circumstance. Therefore, if the validity of even one aggravating circumstance is in dispute, [4] the death sentence should not be executed until the resolution of that dispute has become final.

[*510] Moreover, in view of our statutory responsibility to thoroughly review the record in death penalty cases, the resolution of any such dispute within the jurisdiction of this **[***54]** Commonwealth must be made by this Court. [5] **[***55]** Such disputes need not be decided within the context of the death penalty appeal; for example, appellant Lesko's guilty plea challenge, lodged initially in the Superior Court, was decided by this Court

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[3] *See Williams v. State, 274 Ark. 9, 621 S.W.2d 686 (1982), cert. denied,* ***U.S. , 103 S.Ct. 460, 74 L.Ed.2d 611 (1983)***; *Elledge v. State, 346 So.2d 998 (Fla.1977)*; *State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981)*; *State v. Moore, 614 S.W.2d 348 (Tenn.1981)*; *Hopkinson v. State, 632 P.2d 79 (Wyo.1981), cert. denied sub nom.* ***Hopkinson v. Wyo., 455 U.S. 922, 102 S.Ct. 1280, 71 L.Ed.2d 463 (1982)***.

[4] In the case of *Zant v. Stephens, U.S. , 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)*, the U.S. Supreme Court held that under a state statute which did not require this weighing process, and where no suggestion is made that the presence of more than one aggravating circumstance should be given special weight, the subsequent invalidity of one of the aggravating circumstances does not invalidate the death sentence. The court in *Zant* stated the following:

> [W]e note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

in a separately briefed and argued appeal. [6] However, where an appeal which has bearing on the validity of an aggravating circumstance relied upon in arriving at the death sentence is pending in another court of this Commonwealth at the time that sentence is reviewed by this Court, at least that portion of such appeal which affects the efficacy of the aggravating circumstance should be certified to this Court for disposition. Where a proceeding which has given rise to a finding of an aggravating circumstance is at the pre-sentencing stage, a direct appeal to this Court should be permitted upon sentencing. Until we have disposed of such related appeals this Court's statutorily mandated review of the death **[**307]** sentence is not complete, and execution of sentence should be stayed.

Dissent by: ROBERTS

Dissent

ROBERTS, Chief Justice, dissenting.

Because appellants are presently represented by the same counsel who represented them at trial and at the death penalty hearing, there has been no meaningful inquiry into whether appellants have been afforded their constitutional right to the effective assistance of counsel. In the absence **[*511]** of such an inquiry, the reasons for counsel's strategy, which do not appear of record, cannot be known, and it cannot be determined whether there existed evidence which should have been presented by counsel but was not.

Accordingly, the record **[***56]** should be remanded for the appointment of new counsel, who would be obliged to submit a petition to the court of common pleas addressing the effectiveness of trial counsel. As previously stated, "[u]ntil a hearing on counsel's effectiveness has been held, this Court cannot fairly state that it has discharged its statutory duty to provide a thorough review of the judgment[s] of sentence of death." *Commonwealth v. Zettlemoyer, 500 Pa. 16, 77, 454 A.2d 937, 971 (1982)* (Roberts, J., joined by O'Brien, C.J., dissenting).

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Id. at , 103 S.Ct. at 2750, 77 L.Ed.2d at 258.

[5] Where an aggravating circumstance such as a conviction in the court of another state or in federal court is at issue, such a dispute will be considered resolved when passed upon the highest court of that jurisdiction.

[6] *See* footnote (2), *supra*. As noted in that footnote, the status of appellant ***Travaglia***'s guilty plea remains to be established. In light of this Court's pronouncement in *Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), cert. denied sub nom.* ***Zettlemoyer v. Pennsylvania, U.S. , 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983)***; *Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978)*, a subsequent challenge to the validity of that plea may not be assumed to be waived.

REFLECTIONS ON THE WESTERN DISTRICT OF PENNSYLVANIA

Select materials on Chief Clerk of United States District Court, Robert Barth (Ret.)

LAWYERS JOURNAL

After nearly 40 years with 3rd Circuit, Bob Barth retires as clerk of court

By Tracy Carbasho

Every time the U.S. District Court in Western Pennsylvania received national accolades for its pioneering innovation during the past 15 years, there was one common denominator. And his name is Bob Barth.

"Bob's long career in the district helped our court become one of the most outstanding in the United States," said Chief Judge Joy Flowers Conti. "His time and talent have been invaluable in helping to make possible various technological advancements and in helping us commit to the Alternative Dispute Resolution process."

Barth, who will retire on July 31 after working as the clerk of court for 15 years, is regarded by the federal judges as the man behind the scenes who made their jobs easier. Conti remembers meeting Barth when she began serving on the bench in 2002.

"He invited me to meet with him and he was very friendly and accommodating," Conti recalled. "He helped me with my transition to the federal court."

Conti said her first impression of Barth was that he's a man who gets things done, and she said he repeatedly proved that to be the case.

"He has a great way about him, and he's always been willing to go the extra mile to do things that make the court look good and to help the judges, the attorneys and the litigants," she said. "He doesn't have an overblown ego and never tried to dictate to the judges. Instead, he paid attention to detail and was able to provide us with all of the information we needed to make informed decisions."

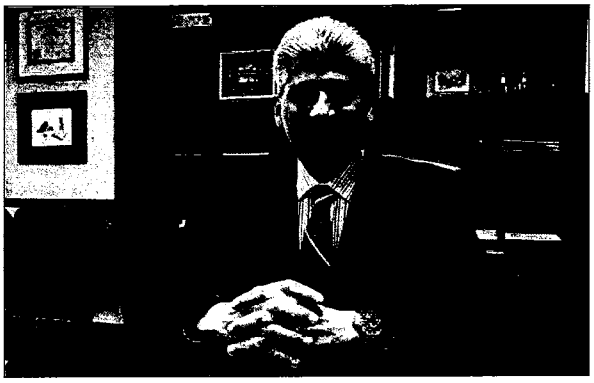

PHOTO BY MARK HIGGS

Being the only applicant to wear a suit and tie for the interview helped 17-year-old Bob Barth land the job of file clerk with the U.S. District Court in Western Pennsylvania in 1978. Thirty-nine years later, Barth is poised to retire as the clerk of the court.

In particular, Barth was a guiding force as the court entered the electronic age and left behind the days of storing records on paper. Conti said he also helped the court implement an ADR program and provided useful insight to guide the court through difficult budgetary times.

"His retirement will be a tremendous loss to the court and to me because I could rely on him," Conti said.

Barth announced his retirement on Feb. 3, which marked the 15th anniversary of his service as clerk. His overall career with the court spanned nearly four decades, going back to 1978, when he began working as a file clerk. He has enjoyed the evolution of the office over the years.

"When I began, we were using correction tape and people smoked a pack of cigarettes a day in the office. Imagine that today," he said. "Moving to electronic filing has been one of the best improvements to the judiciary. It increased the ability to locate documents and enabled incredible search functions and the capability of providing very detailed reports, which was not possible 15 years ago."

Barth was appointed clerk by a unanimous decision of the Board of Judges when D. Brooks Smith was the chief judge.

"Bob succeeded Jim Drach as clerk, so he had big shoes to fill," said Smith, who is now the chief judge of the U.S. Court of Appeals for the Third Circuit. "There was no one better suited for the position, and he has served the court well. He recognized that his role as the chief administrative official was to assist the court in very important ways and to accommodate the judges with skill and diplomacy. I couldn't list all of the ways that he has helped the court, but he was around at times of enormous technological change, and he helped the court navigate budgetary challenges."

Barth held many other positions for the court, including criminal docket clerk, magistrate coordinator, courtroom deputy clerk for Judge Glenn Mencer, administrative supervisor, operations manager and chief deputy clerk. As the clerk of court, he was responsible for overseeing the work of 58 employees. He thanks the judges and his employees – especially Chief Deputy Colleen Willison – for making his job so enjoyable.

"The most challenging part of my career was definitely working as the clerk. In addition to managing and encouraging clerk's office employees to provide the best service to the bench and bar, the challenge in responding to the judges' needs and requirements can be quite a balancing act," Barth said.

During his long service to the judiciary, Barth learned a lot about

Continued on page 6

Heading into her first full year as dean, Lally-Green outlines plans for Duquesne

By Tracy Carbasho

When Maureen Lally-Green thinks about the goals she wants to achieve as dean of the Duquesne University School of Law, she is guided by an appreciation for her own past and an understanding of the education necessary to produce skilled legal professionals.

"I am optimistic that my personal experiences can help students appreciate how critical lawyers are to society and how important it is to be an excellent lawyer with a well-grounded conscience and a context of service to others," she said. "The formation of good lawyers starts in law school by mastering the basics, including clarity and accuracy in writing, well-honed skills in research, objective and thorough analysis of an issue, critical thinking, creativity in thinking, compliance with rules, and advocacy."

Lally-Green began serving as dean of her alma mater on July 1 after serving in the position on an interim basis for a year. She is the first woman to serve as the law school's dean, succeeding Ken Gormley, who is now president of the university. Her career has included serving as a judge on the Superior Court of Pennsylvania, counsel to the Commodity Futures Trading Commission in Washington, D.C., a consultant to the justices of the Pennsylvania Supreme Court, an associate at a local law firm, and a professor at Duquesne.

Establishing objectives

Gormley and Lally-Green have discussed the importance of restructuring legal education to make it more suitable for the modern era. During the past year, they have addressed strategic planning, compliance with American Bar Association standards, the school's curricular and international programs, diversity and the need to fill two vacancies created by the retirement of faculty members.

"Our top three priorities focus on our students: continuous improvement

Maureen Lally-Green

of our 21st century curriculum, expansion of opportunities for our students to serve the community and enhanced career-related experiences that prepare our students to be ethical lawyers and leaders," Lally-Green

Continued on page 11

BOB BARTH
continued from front cover

himself. When he became chief deputy clerk at the age of 34, he couldn't wait to provide his opinion on matters.

"I became a much better listener and realized there might be a better way to do something if you take the time to listen," he said.

At the age of 56, he now has some words of wisdom for his successor, Joshua Lewis.

"Only say 'no' when you can't accomplish what is being asked," Barth advises. "Also, never put yourself in a position to do something that would reflect negatively on the court. Even when you are away from the office, you represent the court."

The judges who have worked with Barth say he has always represented the court with the greatest integrity.

"Bob provided the judges with a general sense of comfort knowing the court was in good hands," said retired Judge Gustave Diamond. "He was always pleasant and extremely knowledgeable about all aspects of the office."

Judge Nora Barry Fischer said Barth had a good rapport with the entire legal community, always searching for ways the court could make things better for practicing attorneys.

The judges are quick to call Barth someone who has become a dear friend.

"I feel very fortunate to have had his wise counsel and friendship, especially during my years as chief judge," said Senior Judge Donetta Ambrose. "A call to his office always resulted in a speedy reply and almost always a solution."

Barth received his bachelor's degree in public administration from Point Park University in 1994, graduating magna cum laude.

> " When I began, we were using correction tape and people smoked a pack of cigarettes a day in the office. Imagine that today. Moving to electronic filing has been one of the best improvements to the judiciary. It increased the ability to locate documents and enabled incredible search functions and the capability of providing very detailed reports, which was not possible 15 years ago. "
>
> *– Bob Barth*

As for retirement, he plans to take his family on vacation to Nags Head and will continue to serve as a board member for Sisters Place, a nonprofit organization that provides resources to former single-parent homeless families. ■

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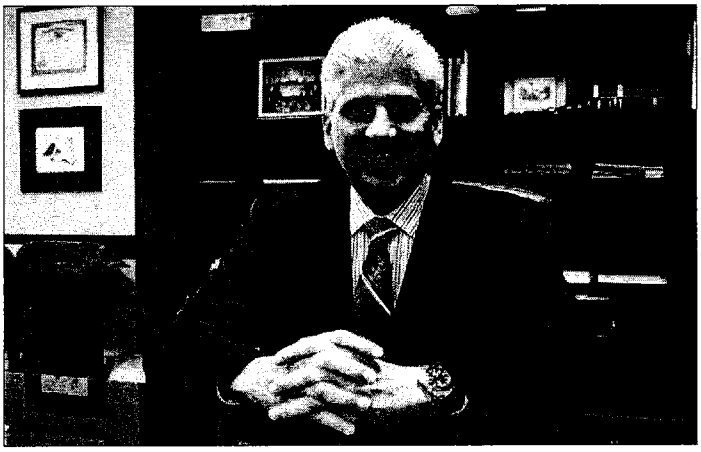

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"I am optimistic that my personal experiences can help students appreciate how critical lawyers are to society and how important it is to be an excellent lawyer with a well-grounded conscience and a context of service to others," she said. "The formation of good lawyers starts in law school by mastering the basics, including clarity and accuracy in writing, well-honed skills in research, objective and thorough analysis of an issue, critical thinking, creativity in thinking, compliance to serve as the law school's dean, succeeding Ken Gormley, who is now president of the university. Her career has included serving as a judge on the Superior Court of Pennsylvania, counsel to the Commodity Futures Trading Commission in Washington, D.C., a consultant to the justices of the Pennsylvania Supreme Court, an associate at a local law firm, and a professor at Duquesne.

Establishing objectives

Gormley and Lally-Green have discussed the importance of restructuring legal education to make it more suitable for the modern era. During the past year, they have addressed strategic planning, compliance with American Bar Association standards, the school's curricular and international

Maureen Lally-Green

of our 21st century curriculum, expansion of opportunities for our students to serve the community and

BOB BARTH
continued from front cover

himself. When he became chief deputy clerk at the age of 34, he couldn't wait to provide his opinion on matters.

"I became a much better listener and realized there might be a better way to do something if you take the time to listen," he said.

At the age of 56, he now has some words of wisdom for his successor, Joshua Lewis.

"Only say 'no' when you can't accomplish what is being asked," Barth advises. "Also, never put yourself in a position to do something that would reflect negatively on the court. Even when you are away from the office, you represent the court."

The judges who have worked with Barth say he has always represented the court with the greatest integrity.

"Bob provided the judges with a general sense of comfort knowing the court was in good hands," said retired Judge Gustave Diamond. "He was always pleasant and extremely knowledgeable about all aspects of the office."

Judge Nora Barry Fischer said Barth had a good rapport with the entire legal community, always searching for ways the court could make things better for practicing attorneys.

The judges are quick to call Barth someone who has become a dear friend.

"I feel very fortunate to have had his wise counsel and friendship, especially during my years as chief judge," said Senior Judge Donetta Ambrose. "A call to his office always resulted in a speedy reply and almost always a solution."

Barth received his bachelor's degree in public administration from Point Park University in 1994, graduating magna cum laude.

"When I began, we were using correction tape and people smoked a pack of cigarettes a day in the office. Imagine that today. Moving to electronic filing has been one of the best improvements to the judiciary. It increased the ability to locate documents and enabled incredible search functions and the capability of providing very detailed reports, which was not possible 15 years ago."

– Bob Barth

As for retirement, he plans to take his family on vacation to Nags Head and will continue to serve as a board member for Sisters Place, a nonprofit organization that provides resources to former single-parent homeless families. ■

REFLECTIONS ON THE WESTERN DISTRICT OF PENNSYLVANIA

Select materials on the creation and evolution of the United States Magistrate System

The Roles of Magistrates in Federal District Courts

Federal Judicial Center

1520 H Street, N.W.
Washington, D.C. 20005
Telephone 202/633-6011

THE ROLES OF MAGISTRATES IN FEDERAL DISTRICT COURTS

By Carroll Seron

Federal Judicial Center
December 1983

This publication is a product of a study undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the author. This work has been subjected to staff review within the Center, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

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FJC-R-83-1

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FOREWORD

The United States magistrates system has developed into a structure that responds to each district court's particular circumstances and needs, as was the intention of Congress in the original Magistrates Act passed in October 1968. Judges in each district court, constrained only by the guidelines set forth in the 1968 act and the Federal Magistrate Acts of 1976 and 1979, establish the responsibilities and duties of their magistrates. To gain a better understanding of the various tasks current magistrates have been designated to perform and to gain a better appreciation of those they are actually assigned, it is necessary to examine the work of individual magistrates in their respective courts.

This report, The Roles of Magistrates in Federal District Courts, sets forth the results of a survey of 191 full-time magistrates, located in eighty-two federal district courts, who responded to questions concerning their authority and experiences therewith, as the scope of that authority was clarified and expanded by the Federal Magistrate Act of 1976, 28 U.S.C. § 636(b), and section 2 of the Federal Magistrate Act of 1979, 28 U.S.C. § 636(c).

The 1976 act specifies that a magistrate may be designated by a court to hear and to determine nondispositive pretrial mat-

ters pending before the court. The magistrate's orders with respect to these motions are to stand unless they are clearly erroneous or contrary to law. That act also invests magistrates with the specific capacity to conduct hearings, including evidentiary hearings, and to submit proposed findings and recommendations on dispositive motions, which the court can accept, reject, or modify--in whole or in part. Also made explicit in the 1976 act is the court's ability to designate a magistrate as a special master.

The Federal Magistrate Act of 1979, an act "to improve access to the Federal Courts by enlarging the civil and criminal jurisdiction of United States Magistrates," permits a magistrate with the consent of all parties to conduct all proceedings in a jury or nonjury civil matter and to enter judgment in the case.* This legislation also sanctions a magistrate's trial of persons

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*There exists today a conflict between two circuits as to whether magistrates may constitutionally enter final judgments in consensual cases. On August 5, 1983, the United States Court of Appeals for the Ninth Circuit handed down an opinion declaring unconstitutional section 2 of the Federal Magistrate Act of 1979, 28 U.S.C. § 636(c), insofar as the act permitted magistrates to enter final judgments in civil cases conducted before them with the consent of all parties. Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 712 F.2d 1305 (9th Cir. 1983), reargued en banc, Nos. 82-3152, 82-3182 (Nov. 15, 1983) (decision pending). Contra Wharton-Thomas v. United States, No. 82-5555 (3d Cir. Nov. 23, 1983), in which the Third Circuit held that 28 U.S.C. § 636(c) does not violate Article III of the Constitution by permitting magistrates with the consent of the parties to conduct trials and enter judgments in civil cases.

The issue addressed in the Pacemaker and Wharton-Thomas cases is presently pending in several other circuits.

accused of (and also the sentencing of persons convicted of) misdemeanors committed within the judicial district to which the magistrate has been assigned, provided that the defendants have consented thereto. Magistrates may also, with consent, try cases involving juveniles and youth offenders.

Given the delineation of magistrates' broad scope of power under 28 U.S.C. § 636(b) and (c), the purpose of the following report is to describe the scope of responsibilities for which 191 magistrates have been designated, the extent to which these magistrates perform the various designated duties, and the frequency with which they perform them. The report reveals that while more than half of the responding magistrates (68 percent) have been designated to perform all duties specified in 28 U.S.C. § 636, only 15 percent indicated that they perform all these duties on a regular basis. With reference to particular duties, however, the percentage of magistrates both designated for such duties and performing them climbs quite dramatically: 94 percent (the highest degree of participation) of the responding magistrates designated for these duties had heard and ruled on nondispositive civil motions, while 49 percent (the lowest degree of participation) had presided over criminal pretrial conferences. Furthermore, as to those duties most frequently assigned to magistrates--prisoner petitions (including both habeas corpus cases and civil rights cases) and social security cases--the percentages of responding, designated magistrates handling such matters were 88 percent and 86 percent, respectively.

This report has set the stage for a second study (already in progress), which involves interviewing and surveying judges, magistrates, and members of the bar of eight prototype courts to ascertain, among other things, the rationale underlying the evolution of the magistrates' duties as described herein.

A. Leo Levin

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SUMMARY

This report presents findings from a survey of 191 full-time magistrates, located in eighty-two federal district courts. Questionnaires were sent to 210 magistrates, of whom 91 percent responded. The survey questioned magistrates on their experience with duties expanded by the Federal Magistrate Acts of 1976 and 1979, namely, conducting civil and criminal pretrial conferences; developing reports and recommendations on dispositive motions; deciding nondispositive motions; and other duties such as serving as special master and conducting civil trials "upon consent of the parties." Questions covered a wide array of topics, ranging from whether respondents have actually participated in these duties, to the way matters are assigned, to the frequency with which they are assigned.

Consistent with local rules for magistrates, the findings show that most full-time magistrates have been designated to perform duties under 28 U.S.C. § 636(b) and (c):[1] 98 percent of the

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1. Note that this report asked magistrates to describe only a part of their duties. That is, 28 U.S.C. § 636 also specifies that magistrates' jurisdiction includes "all powers and duties conferred or imposed upon United States commissioners," "the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18," and "the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section." (See 28 U.S.C. § 636(a)(1)(2)(3).) In practice, then, magistrates continue to dispose of a large number of criminal matters not encompassed by this study.

respondents, the largest proportion, indicated that they have been designated by their district courts to decide civil nondispositive motions, while 85 percent, the smallest proportion, indicated that they have been designated to perform special master duties. The proportions are smaller for actual exercise of jurisdiction over these matters: 94 percent of the designated respondents reported that they have decided civil nondispositive motions under section 636(b)(1)(A), whereas 81 percent of the designated respondents reported that they have conducted civil trials upon consent of the parties. This report focuses on the responses of those magistrates who indicated that they have performed these duties.

Because the magistrates' duties have expanded--in accordance with statute--in response to local needs, it is useful to begin by conceiving of the magistrates system as a series of subsystems, where duties performed as well as assignment procedures vary according to local practices. Thus, to develop a picture of these subsystems, we asked the magistrates to describe the procedures of assignment in their districts as well as the timing (i.e., at filing, after filing, or both) and frequency of assignment.

A working typology of five fairly distinct assignment processes was identified:[2] (1) Random assignment through the clerk's

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2. This typology was based on a survey of clerks of court regarding assignment procedures as well as the broader survey of full-time magistrates. Interestingly, there were discrepancies between clerks' and magistrates' descriptions of assignment pro-

office is the most common procedure for civil matters (especially prisoner petitions and social security matters), which, by and large, are assigned at filing. (2) Rotational assignment among magistrates, whereby an "on-duty" magistrate receives all relevant matters, is the most common procedure for criminal matters; these matters are, on the whole, assigned at filing. (3) Assignment by a chief magistrate who oversees the random allocation of matters is not a common procedure; where it is in use, assignments are usually made on request from a judge. (4) Assignment through judge-magistrate pairs, whereby a magistrate is assigned to a group of judges and works for those judges on request, is relatively common; in some districts, this procedure is established by local rule, while in others the same result occurs because there is only one magistrate to receive assignments. (5) Direct assignment by a judge at his discretion is especially common for the allocation of civil matters. It should be noted, moreover, that a sizable number of judges select magistrates of their choice even in those districts that have developed more formal practices, such as random or rotational assignment.

We also asked respondents to describe the frequency with which particular matters are assigned. Regardless of assignment procedure, magistrates reported that judges are most likely to assign prisoner petitions (both hat as corpus and civil rights)

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cedures. A partial explanation for these discrepancies may be that in some districts, assignments are apparently made directly by judges, with little input from the clerk's office.

and social security cases. Moreover, most respondents indicated that they receive these matters directly at filing for a report and recommendation.

By contrast, respondents reported that civil pretrial and settlement conferences are among the least frequently assigned matters. Here, it is useful to consider the different functions that may be served by pretrial conferences. For example, in many districts judges hold "initial" or "status" conferences for the purpose of scheduling the preliminary motions of a case and setting a date for trial. These are to be distinguished from a "final" pretrial conference, during which issues in dispute may be simplified and clarified, and from a settlement conference, during which a judicial officer works with the parties to resolve the dispute prior to trial.

As a whole, the findings suggest that magistrates' roles must be considered from two perspectives, namely, that of the district court and that of judges' practices. Examined at the level of the district court, the findings show that, by and large, magistrates agreed in their descriptions of how assignments are made; for example, magistrates within districts agreed that magistrates are rotated or that they are paired with judges. Examined from the vantage point of judges' practices, however, magistrates' descriptions of the timing and frequency of assignments often varied; for example, within the same district one magistrate might have reported that social security cases are "almost always" assigned, whereas another might have reported

that they are "occasionally" assigned. To the extent that within any one district judges' practices vary considerably, it may be premature to characterize magistrates' roles in systemic terms.

Finally, we asked magistrates to describe assignment procedures for civil trials upon consent of the parties. Overall, the findings suggest that random assignment is the most common arrangement. For statistical year 1982, magistrates received 2,448 cases upon consent of the parties; of these, the largest proportion were prisoner petitions, torts, and contracts that were disposed of without trial.

I. INTRODUCTION

The magistrates system has been in place for just over a decade. During this period, Congress has twice acted to expand the Federal Magistrates Act of 1968; in effect, these amendments have given the districts the option of significantly broadening the scope of magistrates' responsibilities. After the passage of the Federal Magistrates Act of 1968, magistrates' authority included "three basic categories of judicial duties: (1) all the powers and duties formerly exercised by the United States commissioners (largely initial proceedings in federal criminal cases); (2) the trial and disposition of minor criminal offenses; and (3) 'additional duties' to assist the judges of the district courts."[3] While some districts had established local rules that authorized magistrates to perform "additional" duties, controversy over exactly what the statute permitted judges to delegate to magistrates resulted in a number of appellate cases and conflicting circuit court decisions. A 1974 Supreme Court decision held, however, that magistrates were not, under the 1968 statute, authorized to conduct evidentiary hearings in a habeas corpus case.[4] The Chief Justice wrote a strong dissent, urging Congress

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3. McCabe, The Federal Magistrate Act of 1979, 16 Harv. J. on Legis. 343, 349 (1979). See also 28 U.S.C. § 636.

4. Wingo v. Wedding, 418 U.S. 461, 487 (1974).

to clarify its intent and expand the authority of magistrates. Acting upon the Chief Justice's dissent, the Congress passed the 1976 and 1979 Federal Magistrate Acts, giving judges the authority to expand the scope of magistrates' participation. By statute, magistrates may now hear civil and criminal nondispositive motions in a case, write reports and recommendations to a judge on dispositive motions, serve as special master in a case, and decide a civil case if the parties consent.[5]

Recognizing the tremendous differences in district courts' caseloads and case mix, and the consequent variation in the needs of judges, Congress left the implementation of the magistrates system, for all practical purposes, to the district courts. Therefore, it may be most useful to think of magistrates' roles

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5. Section 636 specifies two types of motions. In practice, these types of motions are described as dispositive and nondispositive. Some clarification is required.

A dispositive motion refers to "a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action" (28 U.S.C. § 636(b)(1)(A)). A judge may designate a magistrate to conduct hearings and write a report and recommendation on a dispositive motion. Note that a dispositive motion will usually, though not always, dispose of a case (e.g., a motion to dismiss).

A nondispositive motion includes all other motions (e.g., discovery); a judge may designate a magistrate to hear and determine a nondispositive motion, subject to reconsideration by a judge if it can be shown that the "magistrate's order is clearly erroneous or contrary to law" (28 U.S.C. § 636(b)(1)(A)).

For purposes of this report, a dispositive motion refers to all matters in which a designated magistrate may write a report and a recommendation, and a nondispositive motion refers to all matters in which a magistrate may hear and decide a motion.

as forming a series of subsystems that represent responses to relatively distinct circumstances and needs. Thus, some judges may, as a matter of common practice, request a magistrate's assistance in hearing all discovery motions, request a magistrate's assistance in scheduling and thus turn over "initial" pretrial conferences, or request a magistrate's assistance in settlement conferences. In contrast, other judges may request a magistrate's assistance on a selective (i.e., case-by-case) basis for each of these types of matters. It is the purpose of this report to provide an initial, yet systematic, description of these practices.

The Expansion of the Magistrates System: 1970 to 1982

Just as the duties of magistrates have expanded since the program's inception, so too has the number of full-time magistrates assigned to the districts. In 1970, following a pilot program in five districts, there were 61 full-time and 449 part-time magistrates; as of September 1982, there were 228 full-time and 238 part-time magistrates. In part, this change in the composition of full- and part-time magistrates reflects the original concept of the legislation that supported the development of a system of full-time judicial officers.

New magistrate positions are authorized by the Judicial Conference, subject to funding by the Congress. In authorizing these positions, the Conference considers recommendations from (1) the Administrative Office of the United States Courts, (2) the district courts, (3) the circuit councils, and (4) the Magistrates

Committee of the Judicial Conference. As part of its responsibilities, the Magistrates Division of the Administrative Office considers the needs of districts and reviews requests by the districts for new positions. Its reports are then reviewed by the Magistrates Committee for referral to the Conference. The usual practice for adding new positions is for the Judicial Conference to act upon the recommendations of the Magistrates Committee, on the basis of the work of the Magistrates Division; recommendations to the Judicial Conference can, however, be made independently by the district court or circuit council. In determining when and if new slots should be created or existing part-time positions converted to full-time ones, the Magistrates Division considers the following factors:

> (1) the caseload of the district court as a whole and the comparative need of the judges for additional assistance from magistrates; (2) the effectiveness of the existing magistrates system in the district and the commitment of the court to the effective utilization of magistrates; and (3) the sufficiency of judicial business of the sort which the judges intend to assign to magistrates to warrant the addition of a full-time position.[6]

It is the position of the division that

> [s]tatistics provide the basic foundation of the analysis and recommendations presented to the Conference. Because of the number and complexity of the factors to be considered, the variations in the sizes and caseloads of the districts, and the differences in the way magistrates are used by the courts, the Conference cannot, and should not, apply a rigid statisti-

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6. Report of the Judicial Conference of the United States to the Congress on the Federal Magistrates System 36 (Dec. 1981). More specifically, the division reviews such factors as number of judges, number of places of holding court, number of civil and criminal filings, composition of terminated cases, cases per

cal formula for the authorization of magistrate positions. Rather, the Conference reviews each position on a case-by-case basis, taking into account all relevant factors.[7]

Table 1 shows the number of full-time positions recommended by (1) the Administrative Office, on the basis of reports prepared by the Magistrates Division, (2) the district courts, (3) the circuit councils, (4) the Magistrates Committee, and (5) the Judicial Conference, for each meeting of the Judicial Conference since 1970. The Judicial Conference has generally acted upon the recommendation of the Magistrates Committee. Over the course of the decade, there are seven instances in which the Conference did not adopt, in total, the suggestions of the committee: On six occasions it approved more positions and on one occasion it approved fewer positions than the committee suggested. Consequently, the committee has recommended the addition of 170 positions since 1970, whereas the Conference has approved 177 positions. Moreover, the Magistrates Committee has not consistently adopted the recommendations of the Administrative Office: Since 1970 the Administrative Office has recommended the creation of 188 positions, whereas the committee has recommended the creation of 170. Finally, the district courts and the cir-

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judgeship, trends in the composition of the district's caseload, number and length of trials, and any special factors (e.g., the presence of a prison). In addition, the division examines the workload of magistrates, including such factors as number and composition of magistrates already in the district, composition of petty offense and misdemeanor caseload, number of preliminary criminal duties handled by magistrates, composition of "additional duties," and any special factors. See id. at n.72.

7. Id. at 37.

TABLE 1

STEPS IN APPROVAL OF NEW FULL-TIME MAGISTRATES: 1970 TO 1982

	Number of Recommended Positions					
Date	Administrative Office	District Court	Circuit Council	Magistrates Committee	Judicial Conference	Number of Authorized Positions
Spring 1970	0	26	25	8	10	61
Fall 1970	16	28	25	19	21	82
Spring 1971	1	3	1	1	1	83
Fall 1971	5	6	5	5	5	88
Spring 1972	2	7	3	2	2	90
Fall 1972	12	13	10	12	13	103
Spring 1973	1	5	1	0	0	103
Fall 1973	8	9	8	8	9	112
Spring 1974	0	0	0	0	0	112
Fall 1974	19	21	18	18	18	130
Spring 1975	3	4	3	3	3	133
Fall 1975	12	12	12	10	10	143
Spring 1976	7	9	7	7	7	150
Fall 1976	9	9	9	8	9	159
Spring 1977	5	6	7	5	5	164
Fall 1977	4	4	4	2	2	166
Spring 1978	10	13	12	10	10	176
Fall 1978	13	12	14	11	11	187
Spring 1979	11	12	12	9	9	196
Fall 1979	5	6	6	5	5	201
Spring 1980	5	6	6	3	3	204
Fall 1980	10	19	12	7	6	210
Spring 1981	8	9	9	7	7	217
Fall 1981	5	5	5	2	2	219
Spring 1982	9	13	11	3	4	223
Fall 1982	8	11	10	5	5	228
Total	188	268	235	170	177	

cuit councils have consistently recommended more slots than have been approved by the Conference: Since 1970 the district courts have recommended 268 positions and the circuit councils have recommended 235.

At the time of the survey, seven was the largest complement of full-time magistrates in a district; three districts were authorized seven positions. Ten districts had no full-time positions and twenty-five districts had one full-time position. The ratio of judges to full-time magistrates ranged from 1:1 in four districts to 5:1 in two districts. The variation in the ratio of judges to magistrates across the country suggests that expansion has indeed conformed to the intent of the original legislation, that is, in response to the individual needs and practices of the district courts.

The decentralized structure of the district courts creates a need for systematic investigation of the various ways that magistrates are actually being used. This study sheds some light on the roles magistrates are now performing. In particular, it examines whether magistrates are performing duties authorized under section 636(b) and (c), for example, whether they are participating in civil and criminal pretrial conferences, making reports and recommendations to judges, and deciding motions. The study also addresses how these matters are assigned to magistrates, at what point in the processing of a case judges are likely to request magistrates' assistance, and how frequently judges request magistrates' assistance.

This study is based on the results of a survey sent to all full-time magistrates (N = 210), located in eighty-three federal district courts. A pilot survey, using telephone interviews, was initially administered to all full-time magistrates in the Ninth

Circuit (n = 26). The instrument was slightly modified as a result of the pilot, and the remainder of the population of full-time magistrates was then contacted through mail surveys (see appendix B for a copy of this survey). Of the 210 magistrates contacted, 191 magistrates located in eighty-two districts returned surveys, representing a response rate of 91 percent.

In the discussion that follows, summary tables describing the responses of magistrates are presented. More detailed tables are presented in appendix A. Note that the findings presented represent impressions of the magistrate's role and responsibilities as described by magistrates. Thus, we are, in the current context, developing a picture of the system from the vantage point of a single, albeit important, group.

II. DESIGNATED AND EXERCISED JURISDICTION

As a result of the Federal Magistrate Acts of 1976 and 1979, magistrates may now perform a wide variety of duties, including the conduct of a civil trial upon consent of the parties. The amendments give magistrates the authority to hold hearings and to write reports and recommendations on dispositive motions, for example, motions for injunctive relief, for summary judgment, and to dismiss a case (see 28 U.S.C. § 636(b)(1)(B)). Since such motions may dispose of a case, a magistrate's responsibility is limited to the report and recommendation, which is reviewed by the presiding judge, who may reject or accept, in whole or in part, the report of the magistrate. A party may file an objection within ten days of the magistrate's action, in which case a district judge makes a de novo determination of the issues in controversy. In addition, the amendments authorize magistrates to hear and rule on nondispositive motions, such as discovery and procedural motions. In practice, when a magistrate hears a nondispositive motion, it is assumed that his determination completes the matter unless a party objects; by contrast, when a magistrate hears a dispositive motion and writes a report and recommendation, the matter is reviewed by the judge to whom the case has been assigned.

Examination of local rules reveals that most districts have

designated magistrates to perform the full range of duties under section 636. Some districts have developed elaborate rules for magistrates; in other districts, the rules guiding magistrates' practices are short, if to the point. There may, however, be considerable variation among what the current statute permits, what the local rules specify, and what matters magistrates are actually assigned. The decision to delegate responsibilities to magistrates is made by judges within a district. That is, magistrates' participation in the processing of cases may be narrower than that permitted by statute. In addition, requests for magistrates' participation may vary from judge to judge within a district.

To corroborate these perceptions, the first part of our survey asked magistrates whether they have been designated to dispose of civil and criminal matters under section 636(b) and (c). Equally important, magistrates were questioned on whether they have, to date, regularly exercised that authority.[8]

Table 2 summarizes magistrates' responses to these questions

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8. It should be noted that prior to 1979 many districts had introduced procedures, usually through local rule, whereby magistrates could perform the duties authorized by the 1976 and 1979 Magistrate Acts. After the inception of the magistrates program in 1968, there were a number of cases challenging the jurisdiction of magistrates; the 1976 and 1979 acts are, in essence, responses to this controversy (see McCabe, supra note 3). The 1976 and 1979 acts specify that each district must take formal steps to designate a magistrate to exercise jurisdiction under section 636(b) and (c); therefore, a full-time magistrate could work in a district but not be designated to dispose of certain types of matters. Some districts have allowed magistrates to exercise authority over these matters for a number of years, whereas other districts are just now beginning to expand the authority of magistrates.

TABLE 2

MAGISTRATES' DESCRIPTION OF DESIGNATED AND EXERCISED JURISDICTION

Jurisdiction	Designated Magistrates		Participating Magistrates	
	Number	Percentage	Number	Percentage[1]
Criminal matters				
Pretrial conferences	166	87%	82	49%
Nondispositive motions	174	91%	122	70%
Dispositive motions	170	89%	93	55%
Civil matters				
Pretrial conferences	180	94%	146	81%
Nondispositive motions	187	98%	175	94%
Dispositive motions	180	94%	149	83%
Social security	180	94%	155	86%
Special master	162	85%	116	72%
Prisoner petitions				
Habeas corpus	185	97%	162	88%
Civil rights	185	97%	162	88%
Civil trial upon consent	166	87%	135	81%
All matters	130	68%	20	15%

[1]Percentage of those designated who reported that they participate in the matter.

by reporting the number and percentage of magistrates who (1) have been designated and (2) once designated have regularly performed these duties.[9]

9. By requiring districts to designate magistrates' authority, the 1976 and 1979 acts imply that a judge's request to a magistrate to perform a duty is not sufficient. In fact, only one magistrate reported that he has decided a criminal motion without designation by the district court.

The findings confirm our impression that the majority of respondents have been designated to dispose of section 636(b) and (c) criminal and civil matters. Specifically, 130 respondents, or 68 percent, indicated that they have been designated to dispose of all matters under section 636. Yet only 20 respondents, or 15 percent of the designated magistrates, indicated that they have disposed of all types of matters on a regular basis. Thus, the findings suggest that there is a fairly large gap between magistrates' full designation and full participation in all currently authorized duties.

However, table 2 also shows that this gap is not nearly as great on a duty-by-duty basis. For example, 122 respondents, or 70 percent of the designated magistrates, indicated that they decide criminal nondispositive motions (91 percent of the magistrates reported that they have been designated to work on such matters). This is to be contrasted with the findings for other criminal duties: 49 percent of the designated magistrates dispose of pretrial conferences, and 55 percent of the designated magistrates regularly participate in dispositive motions.

The findings for magistrates' experience under section 636(b) indicate a greater likelihood of participation in civil duties. First, the absolute numbers of participating magistrates are greater for civil than for criminal matters: 175 magistrates reported participation in nondispositive civil motions, 155 reported participation in social security cases, and 162 reported regular participation in prisoner matters, whereas 82 reported

participation in criminal pretrials, 122 in nondispositive criminal motions, and 93 in dispositive criminal motions. Second, the reported differences between designated and exercised jurisdiction are smaller. The smallest difference occurs in nondispositive motions, where 98 percent of the respondents have been designated and 94 percent of those designated regularly perform this duty, that is, have ruled on a motion in a civil case. The largest differences occur in special master duties and civil pretrial conferences, where the percentages are 85 percent versus 72 percent and 94 percent versus 81 percent, respectively. Consistent with the findings for civil duties in general, 88 percent of the designated population participate in prisoner matters, and 86 percent participate in social security matters on a regular basis.

In addition, 135 magistrates reported that they have received civil cases upon consent of the parties. At present, parties must specify appeal to the district or the circuit court. In either instance the magistrate has authority to rule on all motions, subject, of course, to the paths for appeal that operate if an Article III judge hears the case. We return to a more detailed discussion of magistrates' participation in civil trials upon consent in chapter 6.

It thus appears that magistrates have more experience with civil matters, specifically decisions on nondispositive motions and reports and recommendations on social security cases and prisoner petitions.

Districts may further limit magistrates' participation by the practice of designating "specialists" in particular areas, whereby one magistrate, for example, would be assigned only prisoner matters and another would be assigned only general civil matters. Respondents reported, however, that this is not a common practice; 77 percent indicated that all full-time magistrates in their districts are assigned the same mix of duties.

Nevertheless, the findings do suggest variation across districts in magistrates' participation. The reasons for this variation are no doubt many, but at least two are worth considering here. The composition of a court's caseload affects the burdens placed upon judicial personnel, and the weighted caseload across district courts varies considerably; according to an Administrative Office report, the average weighted number of filings per judgeship in 1982 was 417 cases, with a range from 226 to 669 cases.[10] In addition, districts experience changes in filing rates from year to year. The 1982 average for the country was a 13.5 percent increase in filings; however, some districts experienced as much as a 38 percent decrease, whereas others experienced as much as a 77 percent increase in total filings. While magistrates' limited participation in a given area might be related to a district's reluctance to modify its practices in order to use these judicial personnel effectively, it might also be indicative of their effective use by a well-managed court in re-

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10. Administrative Office of the United States Courts, Management Statistics for the United States Courts 131 (1982).

sponse to its particular caseload demands. Moreover, until we have information on the extent of challenges to magistrates' decisions on nondispositive motions and of objections to their reports on dispositive motions, we cannot say how magistrates' participation affects a district's caseload.

Finally, the findings in table 2 do not speak to the processes or frequency of assignment of civil and criminal matters, points we turn to in the following chapters.

III. PROCESSES OF CASE ASSIGNMENT

A comparison of local rules outlining the process of case assignment to magistrates suggests that there is variation across districts: Some districts have developed relatively formal procedures for random assignment to magistrates; other districts leave assignment of matters solely to the discretion of individual judges. Moreover, individual judges within a district may develop different practices for the timing of a magistrate's entry into a case; for example, some judges may have magistrates hear all discovery motions, while others may have magistrates enter a case upon specific request. The survey of magistrates sought to shed light on these practices.

Prior to passage of the Federal Magistrates Act of 1968, criminal matters were delegated to commissioners and did not pass through the clerk's office for assignment; rather, they were handled directly by the commissioner, usually at the initiation of the arresting agent. As magistrates' responsibilities have expanded, it is important to determine if there have been modifications in the way assignments are distributed.

To what degree have districts developed assignment practices that are essentially the same for all judicial officers, that is, judges and magistrates? Although our survey did not question magistrates on how cases are allocated to judges, other sources

provide some general background.[11] The size of a district often affects assignment practices. In the twenty-three largest districts (ten or more judges), all judges usually reside at one location, and matters are assigned randomly to judges. In the sixteen smallest, often more rural, districts (five or fewer judges), where a judge may often sit alone, assignment may be by the division in which the case arises. And in the fifty-five medium districts (six to nine judges), about two-thirds of the courts have a random procedure, though there are instances in which a judge sits alone and receives cases filed in that locale. In general, most districts have some type of individual calendar by which cases are randomly allocated by the clerk's office.

We asked magistrates to describe the assignment practices for magistrates in their districts. Here we distinguished between rotational systems that alternate assignments on a regular basis and other more discretionary procedures. Specifically, we asked magistrates to indicate whether (1) duties are randomly assigned, either at filing or at a judge's request, (2) duties are rotated among magistrates, (3) magistrates are paired with a group of judges, (4) a chief or presiding magistrate makes assignments at a judge's request, or (5) judges themselves specify a magistrate of their choice as needed. We return to their responses shortly.

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11. Information describing assignment procedures in federal district courts has been assembled by the Management Review Division of the Administrative Office. Since this information was gathered in 1979, it must be read with some caution.

Assignment by Divisional Location

We also asked the magistrates if, as a first step in assigning matters, cases are allocated by divisional location within a district. Ninety-two of the 191 respondents, or 48 percent, reported that they are, as a general practice, only assigned cases arising at a specific location. Moreover, the findings in table 3 show that more than 20 percent of these 92 respondents reported that they sit alone (as a solo magistrate) and do not receive matters through one of the assignment procedures listed. (See table 31 for the districts with two full-time magistrates who sit at two different geographical locations.) In practice, then, small districts and some medium districts may develop a system of

TABLE 3

PROCEDURES OF ASSIGNMENT FOR MAGISTRATES WHO ARE ALLOCATED CASES BY DIVISIONAL LOCATION

Procedure	Criminal Matters (n = 91)	Civil Matters (n = 92)	Prisoner Petitions (n = 91)	Social Security (n = 91)
Random	12 (13%)	24 (26%)	17 (19%)	20 (22%)
Rotational	14 (15%)	7 (8%)	15 (16%)	10 (11%)
Pairs	24 (26%)	26 (28%)	21 (23%)	17 (19%)
Chief magistrate	0	1 (1%)	1 (1%)	0
Judge	12 (13%)	14 (15%)	10 (11%)	9 (10%)
Solo magistrate[1]	29 (32%)	20 (22%)	27 (30%)	35 (38%)

[1]Respondent indicated that he does not receive matters through one of the five listed assignment procedures, e.g., because he is the only full-time magistrate residing at the location.

judge-magistrate pairs, whereby a solo magistrate works for one or two judges at a particular location, a practice we consider in greater detail later in this chapter.[12]

For the sixty-three magistrates at divisional locations who are not solo magistrates, cases allocated to the divisions are assigned as shown in table 3. For example, twelve of these respondents indicated that in their division, criminal matters are assigned randomly.

Table 4 shows magistrates' descriptions of assignment practices for civil and criminal duties, reported by number of districts using each procedure. Before we turn to a discussion of these findings, however, a point is in order. Our findings show that in most instances magistrates within a district agreed on how matters are assigned in that district (e.g., by division and then by pairs, by random allocation, etc.). Thus, at this level, it is feasible to consider the district itself as a unit of analysis or comparison.[13]

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12. One of the findings from the pilot study of the Ninth Circuit was the importance of administrative divisions within districts and the role that solo magistrates play in the operation and administration of a district. Magistrates in Arizona, Eastern California, and Oregon independently emphasized that while there was more than one full-time magistrate in their district, they each worked in separate divisions and only for the judge(s) at that location. A number of these respondents indicated that their situation is, in practice, analogous to a single-judge district.

13. More detailed tables showing magistrates' descriptions of assignment procedures by specific types of 636(b) duties are contained in appendix A.

TABLE 4

ASSIGNMENT OF CIVIL AND CRIMINAL DUTIES
BY NUMBER OF DISTRICTS

Procedure	Criminal	Civil
Rotational	23	7
Random	8	24
Pairs		
By local rule	6	6
By location	13	13
Chief magistrate	2	2
Judge	5	5
Solo magistrate	25	25
Total	82	82

Random and Rotational Assignment

In districts with a rotational procedure, the "on-duty" magistrate (or magistrates) automatically receives the action and, in most instances, remains responsible for that case through disposition. In those districts with more than one full-time magistrate, rotation is the most common practice for assigning criminal matters (see table 4). In districts with a random assignment procedure, the clerk of court selects magistrates by lot, either at filing or at a judge's request. In those districts with more than one full-time magistrate, random assignment is the most common procedure for allocating civil matters (see table 4).

Rotational and random assignment systems share a common fea-

ture: In neither instance does the judge personally select the magistrate who will receive the assignment. Moreover, in districts with random or rotational systems, steps have been taken to organize the allocation of the magistrates' workload in a manner that complements the allocation of work to judges.[14]

There are also differences between rotational and random assignment systems. In a rotational system, both lawyers and judges can anticipate the cycle of on-duty magistrates and may possibly make decisions accordingly. For example, lawyers may wait to file a motion until a magistrate of their preference is sitting. A number of magistrates pointed out, in written comments to their surveys, that rotational assignment allows some forum shopping, particularly among U.S. attorneys, who may move their cases in accordance with their magistrate preferences. By contrast, such shopping should not be possible, in theory at least, in a district that assigns matters randomly.

Judge-Magistrate Pairs

Other districts have developed a procedure of judge-magistrate pairs whereby a magistrate is assigned to a group of judges and conducts proceedings upon request. Note that there are two types of pairs. In some districts, local rules specify

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14. This procedure may have an effect on the operation of the clerk's office. In addition, the 1979 Magistrate Act authorizes the establishment, on a discretionary basis upon approval by the Judicial Conference, of legal assistant positions for magistrates; in exchange, the magistrate's clerical assistant moves to the clerk's office and may then work under the supervision of the clerk.

that a magistrate be assigned to a specific group of judges and work exclusively for that group. In districts in which a magistrate sits alone at a divisional location, judge-magistrate pairs have evolved de facto. Magistrates located in thirteen districts reported assignment through de facto judge-magistrate pairs.

Assignment by a Chief Magistrate

Some districts designate a chief or presiding magistrate. Our survey sought to determine whether this officer's responsibilities include the assignment of matters to magistrates. Table 4 indicates that this procedure occurs in only two districts.

Assignment at the Discretion of a Judge

While less common than random assignment or judge-magistrate pairs, there is a procedure, in some locations, in which judges themselves select a magistrate to decide a motion or write a report and recommendation.[15] Respondents in five districts indicated that this is the primary procedure for assigning civil and criminal duties.

We also asked magistrates if, despite procedures for uniform assignment, judges continue to choose magistrates to decide motions or write reports and recommendations. The responses suggest that this practice is fairly common and that it varies with different types of requests. For example, in districts with a

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15. This procedure is to be distinguished from instances in which judges continue to select a magistrate of their choice even though the district has another procedure for assignment (e.g., random, pairs, etc.).

random or rotational assignment process, 1 percent of the respondents who consider prisoner petitions and social security cases indicated that judges continue to exercise some discretion over the assignment of these matters; 24 percent of those participating in civil duties indicated that judges continue to assign these matters; and 28 percent of those participating in criminal duties indicated that judges continue to assign these matters. (See table 28 for more detailed findings.)

Overall, then, according to the magistrates participating in section 636(b) duties, in districts with more than one full-time magistrate, criminal matters are most commonly assigned by rotation and civil matters are most commonly assigned randomly. Moreover, magistrates within a district were in substantial agreement about how matters are assigned in that district. Thus, at this level of comparison, there is consensus in the description of this decentralized system. In the following chapters, we describe magistrates' responses about more specific aspects of judges' practices, that is, the timing and frequency of judges' requests for magistrates' assistance. For example, once we know that a district pairs its magistrates with groups of judges, we must still consider when and how frequently in the processing of a case a judge is likely to call upon a magistrate. At this level of comparison, magistrates within a district often described differing practices among judges. For example, it was not unusual for some magistrates within a district to report that they are "always" given pretrial conferences and for another mag-

istrate in the same district to report that he is "occasionally" given such matters. Thus, when we begin to look at judges' practices within the various types of judge-magistrate subsystems, there appears to be a great deal of variation.

IV. TIME OF ASSIGNMENT

The timing of a magistrate's entry into a case is a function of at least two factors: (1) the nature of issues raised during the processing of a case and (2) the practices of individual judges. Accordingly, the assignment of motions to magistrates varies with individual judges' practices: Some may request that magistrates hear discovery motions as a matter of course and have such matters assigned when the case commences; others may request magistrates' participation at some point after filing; and still others may vary their requests on a case-by-case basis. We asked magistrates to describe the practices of the judges at their locations, and tables 5 through 8 summarize their responses.

Overall, the findings show that judges' practices for the timing of assignment are probably the clearest point of difference both across and within districts. This variation is particularly true for civil pretrial conferences and dispositive and nondispositive motions: Here, magistrates reported that judges within any given district may develop quite different practices for requesting their assistance. On the other hand, in districts in which magistrates are assigned social security and prisoner petitions, there appears to be a general tendency among judges to request a report and recommendation on the issues in dispute at filing.

In turning to a more detailed consideration of the findings reported in tables 5 through 8, it is important to keep in mind that the reported experience of magistrates is the appropriate unit of comparison. In chapter 3 we described variations in assignment procedures across districts because magistrates within each district tended to agree. In this chapter and in chapter 5 we describe variations in magistrates' responses because the agreement among magistrates within any one district was not as strong. For example, even in a district that decides to assign civil matters randomly, judges may develop quite different practices for when they assign discovery matters (i.e., nondispositive motions).

Table 5 shows magistrates' descriptions of the various practices of judges within their districts in requesting assistance. We asked magistrates to report whether (1) all judges request their assistance "at filing" such that the assigned magistrate handles matters as they arise, (2) all judges request their assistance on a selective basis, or (3) some judges request their assistance at filing and some request their assistance on a selective basis. Of the seventy-seven magistrates participating in criminal pretrial conferences, thirty-nine (or 51 percent) indicated that they enter the case at filing, thirty-three (or 43 percent) indicated that they enter at a judge's request at some point after filing, and five (or 6 percent) reported that judges' timing for requests may vary.

Half (51 percent) of the 121 magistrates participating in

TABLE 5

POINT OF ENTRY INTO CRIMINAL AND CIVIL MATTERS FOR MAGISTRATES WHO PARTICIPATE IN SECTION 636(b) DUTIES

Matter	At Filing	At Judge's Request	Both
Criminal			
Pretrial conferences (n = 77)	39 (51%)	33 (43%)	5 (6%)
Nondispositive motions (n = 118)	60 (51%)	49 (42%)	9 (8%)
Dispositive motions (n = 84)	27 (32%)	47 (56%)	10 (12%)
Civil			
Social security (n = 146)	84 (58%)	50 (34%)	12 (8%)
General[1] (n = 121)	33 (27%)	62 (51%)	26 (21%)
Prisoner petitions			
Habeas corpus (n = 159)	101 (64%)	42 (26%)	16 (10%)
Civil rights (n = 160)	95 (59%)	50 (31%)	15 (9%)

[1]Refers to civil pretrial conferences and nondispositive and dispositive motions.

general civil matters (i.e., pretrial conferences and nondispositive and dispositive motions) indicated that, usually, they enter a case at a judge's request; 27 percent indicated that judges assign them civil responsibilities at filing, and 21 percent indicated that the judges in their districts are inclined to do both, that is, assign pretrial matters at filing or at some point thereafter.

In contrast to general civil matters, magistrates reported relatively uniform experiences regarding the timing of judges' requests for reports and recommendations in social security cases and prisoner petitions. Accordingly, 58 percent of participating magistrates reported that they are assigned social security matters at filing. In addition, more than half of participating magistrates reported that they receive habeas corpus matters (64 percent) and civil rights petitions (59 percent) at filing. Thus, for these types of civil dispositive motions, participating magistrates are more likely to be assigned cases at filing.

What relationships emerge between magistrates' point of entry into a case and the assignment system used in the district? The discussion that follows considers these relationships for each type of matter (i.e., criminal, civil, and prisoner).

Criminal Matters

Table 6 shows the timing of judges' requests for magistrates' assistance in criminal matters by assignment procedure. As mentioned earlier, where more than one full-time magistrate sits, criminal matters are usually rotated (see table 4); however, magistrates' point of entry into a criminal case differs across various types of duties. For example, of those respondents who have conducted pretrial conferences, 18 percent work in districts with a rotational assignment system and receive such matters at filing, while 13 percent receive them on rotation but at some later point. Magistrates under other types of assignment procedures are fairly evenly divided between those who report as-

TABLE 6

PARTICIPATING MAGISTRATES' POINT OF ENTRY
INTO CRIMINAL MATTERS BY ASSIGNMENT PROCEDURE

	Pretrial Conferences (n = 77)			Nondispositive Motions (n = 118)			Dispositive Motions (n = 84)		
Procedure	At Filing	After Filing	Both	At Filing	After Filing	Both	At Filing	After Filing	Both
Random	7	4	1	2	5	2	2	5	2
Rotational	14	9	1	37	37	6	16	34	6
Pairs	7	7	1	0	1	0	0	1	0
Chief magistrate	0	0	0	0	0	0	0	0	0
Judge	3	6	1	0	0	0	0	0	0
Solo magistrate[1]	8	7	1	21	6	1	9	7	2
Total	39	33	5	60	49	9	27	47	10
Percentage	51%	43%	6%	51%	42%	8%	32%	56%	12%

NOTE: For pretrial conferences, five magistrates gave no response to the point-of-entry question; for nondispositive motions, four gave no response; for dispositive motions, nine gave no response.

[1]Respondent indicated that he does not receive matters through one of the five listed assignment procedures, e.g., because he is the only full-time magistrate residing at the location.

signment of pretrial conferences at filing and those who report assignment at some point after filing.

Magistrates who receive criminal nondispositive motions by rotation are also evenly divided in their reports of the timing of assignment of such matters (i.e., they receive them either at filing or upon a judge's request). Full-time magistrates serving

alone in a district or a divisional location more often reported that they are assigned nondispositive motions at filing. In contrast, perhaps in part because of the nature of the issue, most magistrates assigned dispositive motions by rotation reported that such matters are assigned at the request of a judge. In districts with judge-magistrate pairs, only one respondent reported that he has been requested to hear and decide motions, though fifteen respondents reported that they have been assigned pretrial conferences in criminal cases. Similarly, in districts in which matters are assigned at the discretion of a judge, none of the magistrates have been requested to handle motions; however, ten magistrates in these districts have been assigned pretrial conferences, most at some point after filing. Overall, the findings suggest that regardless of the way matters are assigned, judges differ in their practices for the timing of requests for magistrates' assistance on various types of criminal motions.

General Civil Matters

In those districts with more than one full-time magistrate, most magistrates reported that civil motions are randomly assigned by the clerk of court, though it is not uncommon for magistrates to be paired with judges or to receive assignments at the discretion of an individual judge. Table 7 reports magistrates' descriptions of judges' timing of requests by assignment procedure. These findings show that regardless of the type of assignment procedure used, more judges within a district assign civil motions and pretrial conferences after filing (51 percent)

TABLE 7

PARTICIPATING MAGISTRATES' POINT OF ENTRY INTO GENERAL CIVIL MATTERS BY ASSIGNMENT PROCEDURE

	General Civil (n = 121)[1]		
Procedure	At Filing	After Filing	Both
Random	12	19	10
Rotational	1	7	4
Pairs	8	10	5
Chief magistrate	0	4	2
Judge	3	8	3
Solo magistrate[2]	9	14	2
Total	33	62	26
Percentage	27%	51%	21%

[1] Includes pretrial conferences and nondispositive and dispositive motions.

[2] Respondent indicated that he does not receive matters through one of the five listed assignment procedures, e.g., because he is the only full-time magistrate residing at the location.

or vary their practices (21 percent) than assign at filing (27 percent). In sum, the timing of judges' requests for magistrates' assistance in civil matters is likely to vary from judge to judge within a district.

Social Security Cases and Prisoner Petitions

Social security matters are most often assigned at filing. The one exception to this pattern is the districts in which social

security matters are assigned at the discretion of a judge; here, most matters are assigned at some point after case filing (13, or 9 percent; see table 8).

As with civil matters in general, at locations with more than one full-time magistrate, prisoner petitions are most often assigned at filing regardless of the assignment procedure used. There is the continuing exception for assignment at the discretion of a judge, however, which occurs most often after filing;

TABLE 8

PARTICIPATING MAGISTRATES' POINT OF ENTRY INTO PRISONER PETITIONS AND SOCIAL SECURITY CASES BY ASSIGNMENT PROCEDURE

	Prisoner Petitions								
	Habeas Corpus (n = 159)			Civil Rights (n = 160)			Social Security (n = 146)		
Procedure	At Filing	After Filing	Both	At Filing	After Filing	Both	At Filing	After Filing	Both
Random	29	13	4	29	14	3	27	16	3
Rotational	22	0	6	19	4	3	15	4	2
Pairs	21	7	3	21	6	5	15	5	5
Chief magistrate	1	4	0	0	4	0	0	2	0
Judge	4	10	1	3	13	1	4	13	2
Solo magistrate[1]	24	8	2	23	9	3	23	10	0
Total	101	42	16	95	50	15	84	50	12
Percentage	64%	26%	10%	59%	31%	9%	57%	34%	8%

[1]Respondent indicated that he does not receive matters through one of the five listed assignment procedures, e.g., because he is the only full-time magistrate residing at the location.

and there is a substantial minority of magistrates under procedures other than rotation who receive these matters after filing.

We observe, in general, that judges' practices for the timing of assignment of social security and prisoner matters are different from their practices for other civil and criminal matters.[16]

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16. Most 1983 prisoner petitions incorporate an in forma pauperis request that legally requires immediate attention. Hence, those districts that assign prisoner petitions to magistrates are establishing a practice whereby such matters must go to these officers at filing. A number of magistrates indicated that they are only responsible for the determination of in forma pauperis and do not dispose of the case itself.

V. FREQUENCY OF ASSIGNMENT

Thus far, we have focused on magistrates' reports of how and when civil and criminal matters are assigned. Briefly, we have found that within a district, participating magistrates agree substantially on the way in which they are assigned matters (see chapter 3), but often report that judges develop varying practices in the actual timing of their requests for assistance. The findings have thus suggested that it is appropriate to compare across districts when examining procedures for assignment but that this level of analysis breaks down when examining judges' practices for requesting magistrates' assistance on various types of duties.

We may also consider the frequency with which judges request magistrates' assistance on various matters under section 636(b) and, again, whether the frequency of judges' requests is related to the various procedures for assignment. In examining this question it is important to clarify exactly what is being described. We asked the magistrates to indicate how many of the active judges in their district "always," "frequently," "occasionally," or "never" assign each of the duties under section 636(b). It is clear from the responses, however, that for the most part the magistrates were not describing practices of the entire bench of their districts. For example, the number of

practices described by a magistrate at a divisional location was invariably the same as the number of judges in that division rather than the total number in the district. In fact, many respondents added comments indicating that they were not in a position to describe the practices of all judges. A comparison of the total number of judges in a district with the numbers described by magistrates disclosed that it was rare for a magistrate's description to cover all judges. It appears, with few exceptions, that the responses we have are based on the practices of the judges with whom the respondents had direct experience.

Of course, there were a few magistrates who described the practices of all judges in a district, but the behavior is not consistent enough for us to make the observations we intended to make about district practices. Even where one magistrate in a district has described the entire bench, if two others in the district have described subsets, we cannot determine how many judges' practices have been described once, twice, or three times.

Most magistrates described, then, the practices of the judges with whom they had firsthand experience. In addition, magistrates within the same district often described quite different experiences: Some may have indicated that judges always assign a particular matter, while others reported that the same duty is occasionally assigned. At this stage, we cannot ascertain whether magistrates were describing the practices of the same group of judges who happened to treat each magistrate dif-

ferently or the practices of different judges who tended to work with different magistrates. Thus, the responses permit us only to examine how frequently judges with whom a magistrate is familiar give work to that individual magistrate. In considering this question, we are holding constant, as it were, the amount of work that judges' assignments may generate for magistrates, a point we plan to consider in the next phase of this study.[17]

In the introduction to this report, we presented the factors that are considered in requests for new full-time magistrate positions. In addition to a district's caseload, the Magistrates Division of the Administrative Office examines judges' "commitment to the effective utilization of magistrates," recognizing that numbers alone cannot provide an accurate assessment of when and if an additional position is required. As we have suggested above, the analysis of "effective utilization" by judges of magistrates is a very complex, if central, question; as a preliminary step, it may be useful to develop a baseline for examining

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17. We cannot extrapolate a description of the relative size of magistrates' workloads from these responses. For example, one magistrate may work for twelve judges who are described, on the average, as "occasional" givers of work. A magistrate at another location may work for two judges who are described, on the average, as "frequent" givers of work. Clearly, the twelve judges at the first location may generate more work for magistrates than the two judges at the second location, even though the larger group are "occasional" givers and the smaller group "frequent" givers. In this context, therefore, we are only comparing one magistrate's description of judges as "frequent" givers with another magistrate's description of judges as "occasional" givers of work; we are not comparing the amount of work this generates for each magistrate. Each magistrate's rating of judges is the unit of comparison in this phase of the study.

how frequently judges give work to magistrates. It is hoped that the findings presented in this chapter (as well as the more detailed findings by district presented in appendix A) will provide a framework for more systematic exploration of magistrates' utilization by judges.

Tables 9 to 11 present magistrates' descriptions of the frequency with which judges give work to magistrates for the various types of duties under section 636(b). The descriptions of judges' practices have been summarized into a composite score derived by assigning "always" a value of four, "frequently" a value of three, "occasionally" a value of two, and "never" a value of one. Each response was converted to a numeric value, multiplied by the appropriate number of judges, and then standardized by dividing by the number of judges whose practices the respondent described.

The findings in tables 9 through 11 are presented from the vantage points of two groups: (1) all respondents and (2) those who have participated in a particular duty. Respondents include any magistrate who answered the question on the frequency with which judges assign work to magistrates. Participants include only those magistrates who (a) have been designated, (b) have exercised a duty regularly (see chapter 2), and (c) have reported that at least one judge has given him a particular type of duty. In the previous chapter we considered the descriptions only of participants, since they are the only subgroup who can accurately describe when judges request assistance on various types of duties under section 636(b). A respondent, however, may have

insight into the question of how frequently judges give work to magistrates even though he is not a regular participant.

In the end of this chapter we return to a consideration of judges' timing of their requests and speculate about the relationship between when and how often judges give work to magistrates; there it will be useful to consider the descriptions of participants only.

Table 9 presents the descriptions of all respondents and shows the number and percentage of respondents whose descriptions translate to "almost always" (3.50 to 4.00), "frequently" (2.50 to 3.49), "occasionally" (1.50 to 2.49), "rarely" (1.01 to 1.49), or "never" (1.00) assigned a particular type of matter. (Nonrespondents to this question are omitted from the frequencies presented in table 9; hence the number of observations for each type of duty varies.) Table 10 presents the descriptions of participants and does not include the frequency "never" assigned. (According to the definitions in this study, it is inconsistent for a participant to report that he is never given a particular type of duty; a respondent, however, may never, or even rarely or occasionally, be given a particular type of matter.)

The findings in table 9 show that respondents describe quite different practices for civil and criminal matters. For criminal matters, almost half of the respondents reported that they are never given pretrial conferences (84, or 48 percent) or dispositive motions (84, or 46 percent). If we eliminate those who reported that they are never given these criminal duties,

TABLE 9

NUMBER AND PERCENTAGE OF RESPONDENTS BY FREQUENCY OF JUDGES' REQUESTS FOR ASSISTANCE ON SECTION 636(b) DUTIES[1]

Matter	Almost Always	Frequently	Occasionally	Rarely	Never
Criminal					
Pretrial conferences (n = 175)	37 (21%)	14 (8%)	26 (15%)	14 (8%)	84 (48%)
Nondispositive motions (n = 182)	57 (31%)	21 (12%)	42 (23%)	21 (12%)	41 (23%)
Dispositive motions (n = 181)	29 (16%)	20 (11%)	37 (20%)	11 (6%)	84 (46%)
Civil					
Pretrial conferences (n = 181)	40 (22%)	46 (25%)	53 (29%)	21 (12%)	21 (12%)
Nondispositive motions (n = 182)	59 (32%)	62 (34%)	50 (27%)	5 (3%)	6 (3%)
Dispositive motions (n = 179)	22 (12%)	53 (30%)	72 (40%)	15 (8%)	17 (9%)
Prisoner petitions					
Habeas corpus (n = 180)	100 (56%)	30 (17%)	26 (15%)	7 (4%)	17 (9%)
Civil rights (n = 179)	91 (51%)	37 (21%)	30 (17%)	10 (6%)	11 (6%)
Social security (n = 180)	90 (50%)	43 (24%)	16 (9%)	6 (3%)	25 (14%)

NOTE: Almost always = 3.50 to 4.00, frequently = 2.50 to 3.49, occasionally = 1.50 to 2.49, rarely = 1.01 to 1.49, never = 1.00.

[1]Includes all magistrates who answered the question on the frequency with which judges give them work; i.e., includes respondents who answered "never" (1.00) assigned. Since each respondent described judges' practices for each type of duty, the number of observations varies.

however, the findings suggest that for the remaining subgroup of respondents, judges are likely either almost always or occasionally to give them these matters. This pattern is most notable for pretrial conferences and dispositive motions; for example, of the 91 respondents who reported that they, at the least, have rarely been given a criminal pretrial matter, 41 percent (or 37 respondents) reported that they are almost always given such matters and 32 percent (or 26 respondents) reported that they are occasionally given such matters. A similar, if somewhat less pronounced, pattern holds for nondispositive and dispositive motions. Overall, the findings suggest that a proportion of the respondents have no experience with these criminal duties, particularly pretrial conferences and dispositive motions, and that for those who have some experience, it tends to be either frequent ("almost always") or occasional.

Turning to respondents' descriptions for civil matters, the findings disclose that the number who reported that they are never given such matters is much smaller than the corresponding number on the criminal side. For example, 25 respondents (or 14 percent), the largest proportion on the civil side, reported that they have never been given social security cases. In general, then, magistrates reported that they tend to be given civil matters more often than criminal matters, especially prisoner petitions and social security cases.

Table 10 presents the descriptions of regular participants in section 636(b) duties. These findings show the descriptions

TABLE 10

NUMBER AND PERCENTAGE OF PARTICIPANTS BY FREQUENCY OF JUDGES' REQUESTS FOR ASSISTANCE ON SECTION 636(b) DUTIES[1]

Matter	Almost Always	Frequently	Occasionally	Rarely
Criminal				
Pretrial conferences (n = 72)	36 (50%)	12 (17%)	18 (25%)	6 (8%)
Nondispositive motions (n = 116)	57 (49%)	18 (16%)	31 (27%)	10 (9%)
Dispositive motions (n = 85)	29 (34%)	18 (21%)	26 (31%)	12 (14%)
Civil				
Pretrial conferences (n = 139)	40 (29%)	44 (32%)	43 (31%)	12 (9%)
Nondispositive motions (n = 168)	59 (35%)	62 (37%)	44 (27%)	3 (2%)
Dispositive motions (n = 141)	21 (15%)	52 (37%)	58 (41%)	10 (7%)
Prisoner petitions				
Habeas corpus (n = 152)	95 (63%)	29 (19%)	22 (14%)	6 (4%)
Civil rights (n = 154)	87 (56%)	36 (23%)	24 (16%)	7 (5%)
Social security (n = 150)	88 (59%)	42 (28%)	15 (10%)	5 (3%)

NOTE: Almost always = 3.50 to 4.00, frequently = 2.50 to 3.49, occasionally = 1.50 to 2.49, rarely = 1.01 to 1.49.

[1]Includes only those magistrates who reported that (1) they are designated, (2) they participate regularly, and (3) at least one judge sometimes assigns them a duty (i.e., a respondent's score is equal to or greater than 1.01). Since each participant described judges' practices for each type of duty, the number of observations varies.

of the same subgroup we considered when examining judges' practices for the timing of requests for magistrates' assistance (see chapter 4). As we have seen in previous chapters, a smaller number describe themselves as regular participants in criminal matters than in civil matters.

A comparison of the findings in tables 9 and 10 shows that although there are respondents who report that judges occasionally request their assistance in a civil or criminal pretrial or motion (see table 9), they do not consider themselves to be regular participants in these duties (see table 10); this pattern is particularly clear for criminal pretrials and dispositive and nondispositive motions. This comparison also shows that a few respondents who reported that judges frequently assign civil or criminal pretrials or motions did not report themselves as regular participants in these duties. It thus appears that while most magistrates interpreted the frequency question to apply to what <u>their</u> judges assigned to them, a few interpreted it to apply to <u>all</u> judges of the court, seeing a particular activity as commonly assigned, but not to them personally.

The findings are somewhat different for prisoner petitions and social security cases. A comparison of the findings presented in tables 9 and 10 reveals that whether we examine the descriptions of respondents only (table 9) or we control for those who also described themselves as regular participants (table 10), a small proportion reported that judges only rarely or occasionally give these duties to magistrates. Put differ-

ently, both groups of magistrates described themselves as regular participants in these matters and, in turn, reported that they are given these duties on a frequent basis.

Table 11 summarizes the findings from tables 9 and 10, reporting means (averages) and medians (midpoints) for the various duties under section 636(b) and (c) for (1) all respondents to the frequency question and (2) magistrates who reported that they participate regularly in each of these duties.[18] Overall the findings disclose that respondents and participants are essentially in agreement about the frequency with which judges give them prisoner matters, social security cases, and special master duties. That is, whether we consider all respondents or we control for those who indicated regular participation, the picture of judges' practices is quite similar: On the average, judges "frequently" give magistrates prisoner petitions and social security matters, but only "occasionally" ask them to perform special master duties.

Where the mean and median are fairly close in table 11, it is reasonable to assume that there are fewer outlying cases that either inflate or deflate the average. For example, the mean (2.00) and median (2.00) for participants' descriptions of how

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18. Note that the means and medians reported for the group of all respondents include scores for those who reported that judges "always" to "never" give them a particular type of matter (i.e., the scores can range from 4.00 to 1.00), and that the means and medians for the group of participants include scores for those who reported that judges "always" to "rarely" give them a particular type of matter (i.e., the scores can range from 4.00 to 1.01).

TABLE 11

MEAN AND MEDIAN FREQUENCY OF JUDGES' REQUESTS FOR ASSISTANCE ON SECTION 636(b) and (c) DUTIES: SUMMARY OF MAGISTRATES' RESPONSES

	All Respondents[1]		Participants[2]	
Duty	Mean	Median	Mean	Median
Criminal				
Pretrial conferences	1.93	1.13	3.05	3.40
Nondispositive motions	2.40	2.00	3.04	3.38
Dispositive motions	1.91	1.30	2.76	3.00
Civil				
Pretrial conferences	2.45	2.33	2.78	2.78
Nondispositive motions	2.90	3.00	3.01	3.00
Dispositive motions	2.35	2.00	2.58	2.50
Prisoner petitions				
Habeas corpus	3.13	4.00	3.39	4.00
Civil rights	3.10	3.50	3.31	4.00
Social security	3.06	3.40	3.41	4.00
Special master	2.00	2.00	2.39	2.00
Civil trials	2.87	3.00	3.37	4.00
Settlements	2.12	2.00	NA[3]	NA[3]

NOTE: Scores can range from 4 to 1, where 4 = "always," 3 = "frequently," 2 = "occasionally," and 1 = "never." The mean and median are the average and midpoint of the scores.

[1]Includes all respondents who answered the question on the frequency of assignment (i.e., score is equal to or greater than 1.00).

[2]Includes only those respondents who reported that (1) they are designated, (2) they participate regularly, and (3) at least one judge sometimes assigns them a duty (i.e., score is equal to or greater than 1.01).

[3]Not applicable.

often judges give them special master duties are the same. On the other hand, there is some discrepancy between the mean and median for participants' descriptions of the assignment of prisoner petitions and social security cases, suggesting that there are magistrates at some locales who are given these matters with greater frequency than the average. Note that while assignment as a settlement judge is not formally authorized, magistrates reported that districts have taken steps to use them as settlement officers on occasion.

Magistrates described a somewhat different picture for other civil and criminal duties. Paralleling the findings shown in tables 9 and 10, respondents' and participants' descriptions of judges' practices for other civil and criminal duties vary. For criminal matters, if we consider the descriptions of all respondents, judges, on the average, occasionally give each of these duties to magistrates. If we control for regular participants, judges, on the average, frequently give each of these duties to them. For both groups, however, there are discrepancies between the mean and the median for each type of duty, suggesting that from either vantage point, magistrates' experiences are not uniform.

For civil matters, the disparity between the descriptions of respondents and the descriptions of participants is somewhat less pronounced, and the mean and median scores for each duty are closer than those shown for criminal duties. Both groups re-

ported that, on the average, judges frequently to occasionally give them civil duties to perform.

To understand the variation in judges' practices, it may be helpful to inquire into the relationships among magistrates' reported participation in particular matters, the various assignment procedures described, and magistrates' descriptions of the frequency with which judges request their assistance on various types of duties.

Criminal Matters

Table 12 shows the number and percentage of participants in criminal duties by type of assignment procedure and magistrates' ratings of the frequency of judges' requests. Fifty percent of those who have been designated to handle criminal pretrial conferences reported that they are "almost always" given such matters, and not surprisingly, almost half of those (i.e., 15), in turn, reported that they work in districts in which assignments are rotated. The experiences of the remainder of the population are more diverse, both in the way pretrial conferences are assigned to them and in the reported frequency with which judges request their assistance on these matters.

The findings for participants' experience with nondispositive motions in criminal cases are quite similar to those for pretrial conferences: Those participants who work in districts in which matters are rotated are more likely "almost always" to be given discovery and procedural motions in criminal cases, with others reporting much more diverse experiences. By contrast,

TABLE 12

PARTICIPATING MAGISTRATES BY ASSIGNMENT PROCEDURE AND FREQUENCY OF JUDGES' REQUESTS FOR ASSISTANCE ON CRIMINAL MATTERS

	Pretrial Conferences (n = 72)				Nondispositive Motions (n = 116)				Dispositive Motions (n = 85)			
Procedure	A	F	O	R	A	F	O	R	A	F	O	R
Random	6 8%	2 3%	1 1%	0	7 6%	2 2%	1 1%	1 1%	3 4%	4 5%	1 1%	3 4%
Rotational	15 21%	4 6%	2 3%	3 4%	19 16%	2 2%	10 9%	3 3%	8 9%	3 4%	9 11%	3 4%
Pairs	7 10%	3 4%	5 7%	0	11 9%	8 7%	5 4%	0	5 6%	7 8%	4 5%	0
Chief magistrate	0	0	0	0	0	0	0	0	0	0	0	0
Judge	2 3%	1 1%	2 3%	3 4%	5 4%	1 1%	6 5%	6 5%	4 5%	3 4%	4 5%	5 6%
Solo magistrate	6 8%	2 4%	8 11%	0	15 13%	5 4%	9 8%	0	9 11%	1 1%	8 9%	1 1%
Total	36	12	18	6	57	18	31	10	29	18	26	12
Percentage	50%	17%	25%	8%	49%	16%	27%	9%	34%	21%	31%	14%

NOTE: A = almost always, F = frequently, O = occasionally, and R = rarely.

judges' assignment practices with regard to dispositive motions are much less consistent, even within those districts in which matters are rotated. Thus, although the majority of participating magistrates are assigned criminal matters by rotation, judges' practices vary in the frequency with which they make such assignments, especially for reports and recommendations on dispositive motions. This variation in judges' practices comple-

ments earlier findings for the timing of assignment of criminal matters; on both questions participating magistrates reported that judges' practices are quite different even within the same district.

Civil Matters

The findings reported in table 13 for participants' descriptions of the frequency of assignment of civil matters reveal somewhat different patterns: Here, we see that certain procedures, notably pairs and solo magistrates (i.e., those who responded "not applicable" to the procedure question), are associated with more frequent requests as reported by participating magistrates. In examining the findings in table 13, one should keep in mind that the absolute number of respondents who have disposed of civil matters is larger than the number who have disposed of criminal matters (see table 2). Earlier, we determined that in those districts in which there is more than one full-time magistrate, random assignment is the most common procedure for allocating civil matters. The present findings suggest, however, that random assignment is not necessarily a determinant of frequent requests by judges for assistance on civil matters. In fact, participating magistrates who reported that assignments are made through a procedure of judge-magistrate pairs also reported somewhat more frequent assignment of civil matters; in like manner, those magistrates who sit alone (i.e., those who responded "not applicable") reported somewhat more frequent assignment. Earlier, we also observed that there are two types of

TABLE 13

PARTICIPATING MAGISTRATES BY ASSIGNMENT PROCEDURE AND FREQUENCY OF JUDGES' REQUESTS FOR ASSISTANCE ON CIVIL MATTERS

	Pretrial Conferences (n = 139)				Nondispositive Motions (n = 168)				Dispositive Motions (n = 141)			
Procedure	A	F	O	R	A	F	O	R	A	F	O	R
Random	14	9	14	7	17	20	14	1	7	18	16	5
	10%	6%	10%	5%	10%	12%	8%	1%	5%	13%	11%	4%
Rotational	0	2	7	1	5	2	6	0	3	1	7	0
		1%	5%	1%	3%	1%	4%		2%	1%	5%	
Pairs	13	10	7	1	17	12	4	1	4	13	8	1
	9%	7%	5%	1%	10%	7%	2%	1%	3%	9%	6%	1%
Chief magistrate	0	2	2	1	0	2	4	0	0	0	5	1
		1%	1%	1%		1%	2%				4%	1%
Judge	2	7	9	1	3	14	11	1	2	10	11	1
	1%	5%	6%	1%	2%	8%	7%	1%	1%	7%	8%	1%
Solo magistrate	11	14	4	1	17	12	5	0	5	10	11	2
	8%	10%	3%	1%	10%	7%	3%		4%	7%	8%	1%
Total	40	44	43	12	59	62	44	3	21	52	58	10
Percentage	29%	32%	31%	9%	35%	37%	27%	2%	15%	37%	41%	7%

NOTE: A = almost always, F = frequently, O = occasionally, and R = rarely.

pair arrangements, one that emerges as a result of local rules and one that emerges de facto, that is, as a result of only one magistrate's residing in a district or at a divisional location. In either situation, however, the magistrate is functionally "paired" with a group of judges. While the following point should be interpreted with caution, these findings suggest that there may be qualities in a procedure of pairs that are conducive

to more frequent assignment of civil matters to magistrates. As distinct from the random procedure, when magistrates are paired with judges, they work for the same group of judges on an ongoing basis and the two may thereby develop, it is reasonable to speculate, a better knowledge of each other's "styles." This knowledge, in turn, may lead to judges' more frequent requests for assistance on civil matters.

Prisoner Petitions

Table 14 shows the number and percentage of magistrates who have participated in prisoner petitions by type of assignment procedure and frequency of judges' requests. As indicated in table 11, prisoner petitions and social security cases are the matters most frequently given to magistrates.

Table 14 reveals that over half the participating magistrates are "almost always" assigned habeas corpus (63 percent) and civil rights (56 percent) matters. Although the largest number (28 for habeas corpus cases and 27 for civil rights cases) of participants work in districts in which matters are assigned randomly, it is clear from table 14 that prisoner petitions are most likely always to be assigned regardless of the type of assignment procedure used by the district. In those districts in which assignment is primarily at the discretion of a judge, however, magistrates are somewhat less likely to receive prisoner petitions.

Social Security Matters

By and large, the findings shown in table 15 for social

TABLE 14

PARTICIPATING MAGISTRATES BY ASSIGNMENT PROCEDURE AND FREQUENCY OF JUDGES' REQUESTS FOR ASSISTANCE ON PRISONER PETITIONS

	Habeas Corpus (n = 152)				Civil Rights (n = 154)			
Procedure	A	F	O	R	A	F	O	R
Random	28 18%	12 8%	6 4%	1 1%	27 18%	11 7%	6 4%	2 1%
Rotational	21 14%	0	0	2 1%	19 12%	1 1%	1 1%	2 1%
Pairs	23 15%	4 3%	5 3%	1 1%	22 14%	5 3%	5 3%	1 1%
Chief magistrate	0	1 1%	5 3%	0	0	1 1%	5 3%	0
Judge	3 2%	5 3%	2 1%	1 1%	2 1%	6 4%	4 3%	1 1%
Solo magistrate	20 13%	7 5%	4 3%	1 1%	17 11%	12 8%	3 2%	1 1%
Total	95	29	22	6	87	36	24	7
Percentage	63%	19%	14%	4%	56%	23%	16%	5%

NOTE: A = almost always, F = frequently, O = occasionally, and R = rarely.

security matters parallel those shown in table 14 for prisoner petitions: More than half (88, or 59 percent) of the participants reported that they "almost always" receive social security cases. Those magistrates who work in districts in which matters are assigned randomly also indicated a greater likelihood of almost always receiving these matters. And where social security

TABLE 15

PARTICIPATING MAGISTRATES BY ASSIGNMENT PROCEDURE AND FREQUENCY OF JUDGES' REQUESTS FOR ASSISTANCE ON SOCIAL SECURITY MATTERS

	Social Security (n = 150)			
Procedure	A	F	O	R
Random	23 15%	12 8%	2 1%	4 3%
Rotational	18 12%	3 2%	4 3%	0
Pairs	20 13%	8 5%	2 1%	0
Chief magistrate	0	1 1%	2 1%	0
Judge	4 3%	6 4%	3 2%	1 1%
Solo magistrate	23 15%	12 8%	2 1%	0
Total	88	42	15	5
Percentage	59%	28%	10%	3%

NOTE: A = almost always, F = frequently, O = occasionally, and R = rarely.

matters are rotated among magistrates or a system of pairs is used, it is again likely, though slightly less so, that such matters will almost always be assigned. Moreover, a sizable number of the respondents (23) indicated that they sit alone (i.e., responded "not applicable") and that they almost always receive these cases.

In sum, the frequency of assignment of prisoner matters and

social security cases is substantially independent of assignment procedures. There does, however, appear to be an exception: In districts in which assignment is at a judge's discretion, prisoner matters and social security cases are less likely to be "almost always" or "frequently" assigned.

Time and Frequency of Assignment

It may be useful to step back and reconsider the patterns that have emerged from these data. That is, what relationships are there between participating magistrates' descriptions of the way assignments are made and the timing and frequency of judges' requests?

At locations within districts in which there is more than one full-time magistrate, respondents reported that rotational assignment of criminal matters and random assignment of civil matters are the most common procedures, although others have evolved. For example, some magistrates reported that they are paired with a group of judges (in some cases, this pairing is the result of local rule and in others it is the result of location), while others reported that the chief magistrate's responsibilities include the assignment of matters. At this level, it is feasible to make comparisons across districts; for example, magistrates who work in districts with random assignment procedures or judge-magistrate pairs agree substantially about how matters are allocated. In addition, magistrates agree substantially about judges' practices regarding social security and prisoner matters, with one very important distinction: Regardless of the

type of assignment procedure used within a district, most magistrates who participate in these matters reported that they are "almost always" or "frequently" assigned these cases at filing for a report and recommendation to the judge assigned to the case.

When we examine magistrates' descriptions of when and how often judges request their assistance on other types of section 636(b) civil and criminal matters, however, we find reports of more divergent experiences both within and across districts. The range of judges' practices is particularly noteworthy on the criminal side. While participating magistrates at locations within districts with more than one full-time magistrate reported that criminal matters are usually rotated, there appears to be little uniformity among judges in terms of when in the processing of a case or how frequently they request magistrates' assistance. To the extent that magistrates within any one district report divergent experiences on these questions, it appears that the practices of judges may be the most important vantage point for a better understanding of magistrates' participation in criminal case processing.

When we turn to magistrates' descriptions of judges' practices for requesting their participation in civil matters, yet another picture emerges. Here we see that regardless of how matters are assigned, judges are most likely to request magistrates' assistance after filing, that is, after the case has been reviewed by the judge. Moreover, respondents tended to report

frequent requests in districts in which judges and magistrates are paired; this finding holds for magistrates who work in districts in which pairs are the result of local rule as well as for those who work in districts in which pairs develop de facto (i.e., because there in only one full-time magistrate in a district or at a divisional location). These findings thus suggest that the way in which civil matters are assigned to magistrates is associated with the frequency (if not with the timing) with which requests for handling these matters are made.

VI. CIVIL TRIALS UPON CONSENT

Apart from the various duties considered in previous chapters, magistrates also have the authority, under section 636(c), to try civil cases upon consent of the parties.[19] Table 2 showed that 135 magistrates, or 81 percent of the respondents, indicated that they have participated in civil trials upon consent.

Here we focus specifically on how civil trials are assigned once consent has been granted and on the kinds of cases magistrates report they are deciding.[20] The discussion that follows parallels earlier chapters; thus, we begin with magistrates' descriptions of assignment procedures, followed by their descriptions of the frequency of assignment.

Assignment Procedures

Table 16 shows the number and percentage of magistrates participating in civil cases upon consent by assignment procedure, that is, random assignment, when filed or at consent; assignment

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19. Note that while parties may stipulate to a magistrate, the case may be disposed of prior to a jury or nonjury trial. In addition, a magistrate may write a report and recommendation on a dispositive motion that is accepted without modification by the judge and, in turn, disposes of the case, without the parties having formally consented to a trial before a magistrate.

20. In most districts, it is now common procedure to notify parties at filing that they may consent to a trial before a magistrate. Forms are usually included in the papers obtained at filing. Preliminary research in the Ninth Circuit suggests that most parties do not consent upon filing a case.

TABLE 16

PARTICIPATING MAGISTRATES' DESCRIPTION OF ASSIGNMENT OF SECTION 636(c) DUTIES

	Participating Magistrates (n = 135)	
Procedure	Number	Percentage
Random		
When filed	16	12%
At consent	51	38%
Judge-magistrate pairs	28	21%
Parties' selection	8	6%
Not applicable	32	24%

by judge-magistrate pairs; or selection of a magistrate by the parties to a case.

Preliminary work in the Ninth Circuit indicated that when parties consent they usually do so at some point after filing. In fact, random allocation at consent of the parties, as distinct from random assignment to a judge and a magistrate when filed, is the most common procedure for assigning civil trials (51, or 38 percent).[21] Moreover, 67 of the 135 respondents, or 50 percent, reported that civil trials are randomly assigned, either when filed or at consent; indeed, participating magistrates reported

21. It may be that in some districts, the clerk's office informs parties of the possibility of trial by a magistrate once case processing begins. The statute clearly stipulates that parties may not in any way be coerced into consent; hence, there may, on the other hand, be some districts in which this type of practice is not considered acceptable.

that random assignment is more common for trials upon consent than it is for civil matters in general. This suggests that some districts treat trials upon consent differently from other types of civil matters. For example, in some districts, when a report and recommendation is required, judges may select a magistrate, but in the instance of a trial upon consent, the case may be randomly assigned. In addition, as a number of respondents pointed out in written comments on the survey, the point at which trials upon consent are assigned makes a difference. Thus, when cases are assigned to a magistrate and a judge at filing and the parties subsequently consent to a trial before a magistrate, they know in advance who will hear the case. To avoid this problem, magistrates indicated, some districts have adopted the practice of reassigning cases randomly should parties consent.

Earlier, we described districts in which assignments are made through a system of judge-magistrate pairs. Twenty-eight of the 135 respondents, or 21 percent, indicated that this is the procedure used for trials upon consent in their districts. As compared with other types of civil matters, therefore, a relatively smaller proportion of magistrates reported that trials upon consent are assigned in this manner. The procedure of pairs and random assignment when filed have a common feature: Parties know, in advance, which magistrate will be assigned to the case. However, in contrast to the comments of some magistrates from districts with random procedures, magistrates in districts with pairs did not indicate that cases are reassigned when parties consent.

Eight magistrates, or 6 percent of the 135 respondents, reported that, upon consent, parties select a magistrate. This is clearly the exception rather than the rule, but it is a practice worth noting.[22] Moreover, at least 4 respondents commented that it is not unusual for parties to indicate informally which magistrate they would prefer or, alternatively, who they would not accept.

Finally, almost a quarter of the respondents (32, or 24 percent) did not answer the question on how section 636(c) duties are assigned. In this regard, a number of magistrates indicated in written comments that parties' consent is not, at present, a common occurrence.[23] Many also indicated that their districts have not developed procedures for assigning trials upon consent to magistrates. In those districts that do assign trials to magistrates upon consent, several respondents indicated that when parties consent, the magistrate who has handled the pretrial work is assigned to the trial. In addition, at least seven commented that judges in their districts select a magistrate of their choice

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22. To our knowledge, the Central District of California is the only district that has authorized this procedure by local rule, but magistrates in other districts reported this practice.

23. This point was also made by many magistrates in the pilot study of the Ninth Circuit. Whether this reluctance originates with the bar, the bench, or both is a matter that will be investigated in the next phase of this study. In the District of Oregon, a district in which it is fairly common for parties to consent, judges engaged in seminars with members of the bar when the magistrates system was introduced to explain the roles that magistrates could perform; many of those interviewed in this district suggested that this played a significant part in facilitating the acceptance of the magistrates program.

when parties consent. Other respondents pointed out that judges reserve the prerogative to "veto" the parties' consent.

Frequency of Assignment

Table 17 shows the frequency with which magistrates hear civil cases upon consent. In the previous chapter, we reported magistrates' descriptions of the frequency with which judges request their assistance; in the case of civil trials upon consent, however, magistrates described the frequency with which parties request their assistance in hearing and deciding a civil case. In other words, if parties consent, the magistrate hears the case unless a judge intervenes to bar the parties' consent. Examination of respondents' written comments suggests that some interpreted this question from the standpoint of judges' willingness to permit them to hold trials should parties consent; therefore,

TABLE 17

FREQUENCY OF PARTIES' CONSENT TO MAGISTRATES IN CIVIL CASES

	Participating Magistrates (n = 123)	
Frequency	Number	Percentage
Almost always	74	60%
Frequently	22	18%
Occasionally	23	19%
Rarely	4	3%

NOTE: Almost always = 3.50 to 4.00, frequently = 2.50 to 3.49, occasionally = 1.50 to 2.49, and rarely = 1.01 to 1.49.

the figures reported in table 17 must be interpreted with some caution. With this caveat in mind, it seems reasonable to conclude that a sizable proportion of the magistrates participating in civil trials are "almost always" (60 percent) or "frequently" (18 percent) assigned to try cases when parties consent.

In considering the frequency with which magistrates hear civil cases in light of magistrates' descriptions of assignment procedures, one finds, not surprisingly, that districts with a random assignment procedure are disproportionately more likely "almost always" or "frequently" to assign civil trials upon consent (see table 18).

TABLE 18

PARTICIPATING MAGISTRATES' DESCRIPTION OF FREQUENCY OF ASSIGNMENT OF CIVIL CASES UPON CONSENT BY ASSIGNMENT PROCEDURE (n = 123)

Procedure	Almost Always	Frequently	Occasionally	Rarely
Random				
When filed	11	2	3	0
At consent	28	10	4	3
Judge-magistrate pairs	17	5	6	0
Parties' selection	4	0	1	0
Not applicable	14	5	9	1
Total	74	22	23	4
Percentage	60%	18%	19%	3%

What Kinds of Cases Are Magistrates Receiving for Trial?

Table 19 shows the composition of civil cases assigned to 141 magistrates for trial upon consent in statistical year 1982. (Note that these data were collected by the Administrative Office of the United States Courts.[24]) Collectively, these magistrates disposed of 2,448 cases, and not surprisingly, the largest proportion of these cases were prisoner petitions (677, or 28 percent), followed by torts (526, or 21 percent) and contracts (365, or 15 percent). Table 20 shows the basis of jurisdiction of these cases: 50 percent of the cases in which parties consented to trial before a magistrate raised a federal question. Table 21 shows that 33 percent, or 805 cases, were disposed of during or after trial.

Finally, the findings in table 22 provide a preliminary basis for ascertaining the amount of time magistrates spend on trials. On the average, magistrates held 5.84 trials during statistical year 1982, and the average case required 2.27 days of bench time. However, the median number of days spent on these cases was fewer, 1.45 days, suggesting that a few cases reported by magistrates elevated the average. For example, one magistrate

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24. The data reported in this section (and in tables 19-22) were collected by the Magistrates Division of the Administrative Office of the United States Courts for inclusion in its Annual Report of the Director. Note that only 135 respondents in our sample indicated that they have been designated to participate in trials upon consent, while the data collected by the Magistrates Division are based on the reports of 141 designated magistrates. This discrepancy may be a function of changes in district practices or underreporting by magistrates in our survey.

TABLE 19

CIVIL CASES ASSIGNED UPON CONSENT TO TRIAL TO 141 MAGISTRATES IN STATISTICAL YEAR 1982

Nature of Suit	Number	Percentage
Prisoner petition	677	28%
Tort	526	21%
Contract	365	15%
Nonprisoner civil rights	254	10%
Other	253	10%
Social security	170	7%
Labor	101	4%
Real property	73	3%
Forfeiture	15	.6%
Property rights	14	.6%
Total	2,448	

TABLE 20

BASIS OF JURISDICTION OF CASES ASSIGNED UPON CONSENT TO TRIAL TO 141 MAGISTRATES IN STATISTICAL YEAR 1982

Basis of Jurisdiction[1]	Number	Percentage
U.S. plaintiff	169	7%
U.S. defendant	401	17%
Federal question	1,162	50%
Diversity	591	25%
Total	2,323	

[1]This information was not reported for 125 cases.

TABLE 21

MODE OF DISPOSITION OF CIVIL CASES ASSIGNED UPON CONSENT TO TRIAL TO 141 MAGISTRATES IN STATISTICAL YEAR 1982

Disposition[1]	Number	Percentage
Without trial	1,624	67%
Nonjury trial	559	23%
Jury trial	246	10%
Total	2,429	

[1]Nineteen cases were consolidated.

TABLE 22

DESCRIPTIVE STATISTICS FOR 824 CIVIL CASES TRIED BY 141 MAGISTRATES IN STATISTICAL YEAR 1982

Days Consumed[1]	Number of Cases	Percentage of Cases
1	435	53%
2 to 7	365	44%
8 to 14	16	2%
15 to 38	8	1%

[1]The mean, median, and range of the number of days consumed are, respectively, 2.27, 1.45, and 1 to 38.

reported that a case took 38 days of trial, although 53 percent, or 435, of the cases assigned to magistrates required one day or less.

In sum, data for statistical year 1982 show that most cases heard by magistrates upon consent are prisoner petitions and tort cases and that more than 50 percent of the cases that come to trial before a magistrate take one day or less.

VII. CONCLUSION

The intent of the magistrates study is to develop a comprehensive description of the magistrates system. This survey provides a preliminary basis by systematically describing the roles currently performed by magistrates, leading to a better understanding of the allocation of work to magistrates. In conformity with the 1976 and 1979 Federal Magistrate Acts, most districts have taken steps to designate full-time magistrates to perform section 636(b) and (c) duties. Beyond this, districts have begun to develop varying strategies for using the services of these judicial officers to address needs as the courts perceive them. Magistrates are handling a wide variety of cases--most commonly, prisoner petitions and social security cases. Less generally, but still in substantial numbers, they are disposing of other civil and criminal matters, including civil cases upon consent.

Of the various types of assignment procedures that have developed across the districts--from random or rotational to judge-magistrate pairs or assignment by a judge--we found random assignment the most common procedure for civil matters and rotational assignment the most common procedure for criminal matters, where there is more than one full-time magistrate.

The development of these preliminary findings has focused attention on many questions; some will be addressed in the next

phase of this study, and others may require more extended study and consideration. The framing of specific questions is beyond the objective of this section, but we believe it useful, nevertheless, to sketch briefly three general areas that require further study.

First, how do magistrates fit into the overall operation of the district court? In this report, for example, we speculated that the development of a random or rotational system may reflect a decision on the part of the district to treat judicial officers similarly. The question remains, How has the clerk's office responded to the presence of magistrates in reorganizing the processes of court management? Beyond the clerk's office, are other court officials affected by the presence of magistrates and, if so, how? What factors have been important in local decisions concerning procedures for assigning matters to magistrates?

Second, what effect has the practicing bar had on the role of magistrates? Work in this area is crucial for a full understanding of magistrates. District judges, through local rules and other management plans, may take relatively elaborate steps to ensure the full utilization of magistrates, as described in the 1976 and 1979 Magistrate Acts. Yet, implementation of these steps ultimately depends upon the willingness of the bar to accept the decisions of magistrates. It is interesting to note, for example, that in cases involving the government it is the prerogative of the U.S. attorney in the districts to develop a

policy concerning consents to trial by magistrates;[25] thus, in some districts U.S. attorneys may authorize consents as a matter of course, whereas in others the practice may be to make a determination on a case-by-case basis. Clearly, it is reasonable to assume that variations in these practices have an effect on the kinds of matters assigned to magistrates.

Third, what contribution have magistrates made to reductions in the courts' backlogs? The findings of this study suggest that these judicial officers are, at present, playing a fairly central role in the processing of some civil matters, particularly prisoner petitions and social security cases, to the extent that many magistrates report that they are "almost always" given these matters at filing for a report and recommendation. (The largest proportion of consents for trial before a magistrate are prisoner petitions.) In other areas of the civil and criminal docket, the frequency with which magistrates are requested to decide motions and write reports and recommendations is less clear. Questions remain, however, in all areas of jurisdiction outlined by the 1976 and 1979 acts: Are magistrates' decisions on nondispositive motions being challenged and, if so, upheld by judges, or are their actions adding another layer of review to the litigation process? Are magistrates' reports and recommendations on dispositive motions accepted, without significant modification, by judges, or do they, too, add another step that, in the long run,

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25. 42 Fed. Reg. 55,470 (1977).

further delays the disposition of a case? These are very complex questions that cannot easily be resolved, but the findings of this report are a first step toward that end.

APPENDIX A

Tables Showing Magistrate Participation by District

TABLE 23

PROCEDURES OF ASSIGNMENT FOR MAGISTRATES
WHO PARTICIPATE IN CRIMINAL DUTIES

Procedure	Pretrial Conferences	Nondispositive Motions	Dispositive Motions
Random	10 (12%)	13 (11%)	13 (14%)
Rotational	26 (32%)	34 (28%)	24 (26%)
Pairs	16 (20%)	26 (21%)	18 (19%)
Chief magistrate	0	0	0
Judge	12 (15%)	20 (16%)	18 (19%)
Solo magistrate[1]	18 (22%)	29 (24%)	20 (22%)
Total	82	122	93

[1]Respondent indicated that he does not receive matters through one of the five listed assignment procedures, e.g., because he is the only full-time magistrate residing at the location.

TABLE 24

PROCEDURES OF ASSIGNMENT FOR MAGISTRATES WHO PARTICIPATE IN CIVIL DUTIES

Procedure	Pretrial Conferences	Nondispositive Motions	Dispositive Motions
Random	46 (32%)	54 (31%)	49 (33%)
Rotational	10 (7%)	13 (7%)	12 (8%)
Pairs	32 (22%)	35 (20%)	27 (18%)
Chief magistrate	6 (4%)	6 (3%)	6 (4%)
Judge	22 (15%)	31 (18%)	26 (17%)
Solo magistrate[1]	30 (21%)	36 (21%)	29 (20%)
Total	146	175	149

[1]Respondent indicated that he does not receive matters through one of the five listed assignment procedures, e.g., because he is the only full-time magistrate residing at the location.

TABLE 25

PROCEDURES OF ASSIGNMENT FOR MAGISTRATES WHO PARTICIPATE IN PRISONER PETITION AND SOCIAL SECURITY DUTIES

Procedure	Prisoner Petition[1]	Social Security
Random	51 (31%)	43 (28%)
Rotational	24 (15%)	25 (16%)
Pairs	33 (20%)	30 (19%)
Chief magistrate	6 (4%)	3 (2%)
Judge	14 (9%)	17 (11%)
Solo magistrate[2]	34 (21%)	37 (24%)
Total	162	155

[1]Respondents reported that habeas corpus and civil rights petitions are assigned in the same manner.

[2]Respondent indicated that he does not receive matters through one of the five listed assignment procedures, e.g., because he is the only full-time magistrate residing at the location.

TABLE 26

STANDARD DEVIATIONS FOR MAGISTRATES' DESCRIPTIONS OF THE FREQUENCY OF ASSIGNMENT OF SECTION 636(b) AND (c) DUTIES

Duty	All Respondents[1]	Participants[2]
Criminal		
Pretrial conferences	1.20	1.04
Nondispositive motions	1.23	1.05
Dispositive motions	1.10	1.04
Civil		
Pretrial conferences	1.03	.92
Nondispositive motions	.87	.80
Dispositive motions	.87	.78
Prisoner petitions		
Habeas corpus	1.08	.86
Civil rights	1.04	.87
Social security	1.11	.78
Special master	.91	.83
Civil trial upon consent	.90	.86
Settlement conferences	.93	NA[3]

[1]Includes all respondents who answered the question on the frequency of assignment (i.e., a respondent's score is equal to or greater than 1.00).

[2]Includes only those respondents who reported that (1) they are designated, (2) they participate regularly, and (3) at least one judge sometimes assigns them a duty (i.e., a respondent's score is equal to or greater than 1.01).

[3]Not applicable.

TABLE 27

DISTRICTS IN WHICH MATTERS ARE ASSIGNED TO MAGISTRATES ON A RANDOM OR ROTATIONAL BASIS (n = 31)

District	No. of Judges[1]	No. of Magistrates[2]	Ratio of Judges to Magistrates
Puerto Rico	7	3	2.33:1
Middle Pennsylvania	5	2	2.50:1
Western Pennsylvania	10	2	5.00:1
Northern Alabama	7	3	2.33:1
Southern Alabama	2	2	1.00:1
Northern Georgia[3]	11	4	2.75:1
Eastern Louisiana[3]	13	5	2.60:1
Middle North Carolina	3	2	1.50:1
Western Michigan	4	2	2.00:1
Northern Illinois	16	3	5.33:1
Southern Indiana	5	3	1.67:1
Western Tennessee	3	2	1.50:1
Eastern Arkansas	4	2	2.00:1
Central California	17	7	2.43:1
Southern California	7	3	2.33:1
Western Oklahoma	3.7	2	1.85:1
District of Columbia	15	3	5.00:1
Assigned by division[4]			
Massachusetts	10	4	2.50:1
Connecticut	5	3	1.67:1
Eastern New York	10	4	2.50:1
Maryland	9	5	1.80:1
Eastern North Carolina	3	3	1.00:1
Middle Florida	9	5	1.80:1
Southern Texas	13	7	1.86:1
Northern Texas	9	4	2.25:1
Western Texas	6	4	1.50:1
Southern Ohio	6	4	1.50:1
Northern Ohio	10	4	2.50:1
Western Washington	5	3	1.67:1
Oregon	5	3	1.67:1
Arizona	8	3	2.67:1

[1]As reported in Administrative Office of the United States Courts, Management Statistics for the United States Courts (1982).

[2]Number of full-time magistrate slots as of August 30, 1982.

[3]In this district, magistrates are assigned specific types of cases (e.g., criminal or civil).

[4]Includes only districts with at least three full-time magistrates in which at least two are situated at one location, with the exception of the Eastern District of North Carolina, where all judicial officers ride the district to three locations.

TABLE 28

RESPONDENTS' AND PARTICIPANTS' DESCRIPTIONS OF THE FREQUENCY OF JUDGES' REQUESTS FOR ASSISTANCE ON 636(b) AND (c) DUTIES FOR DISTRICTS WITH RANDOM OR ROTATIONAL ASSIGNMENT (n = 31)

	Criminal Matters					
	Pretrial Conferences		Nondispositive Motions		Dispositive Motions	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
Puerto Rico	3.60	3.60	4.00	4.00	3.20	3.20
Middle Pennsylvania	1.00	--	1.08	--	1.08	--
Western Pennsylvania	1.25	1.50	1.75	1.75	1.75	1.75
Northern Alabama	4.00	4.00	4.00	4.00	3.93	3.93
Southern Alabama[2]	4.00	4.00	4.00	4.00	1.00	--
Northern Georgia[2]	3.97	3.97	3.97	3.97	3.97	3.97
Eastern Louisiana[2]	1.00	--	1.33	--	1.15	1.46
Middle North Carolina	2.50	4.00	2.50	2.50	1.00	--
Western Michigan[3]	4.00	4.00	2.00	--	1.25	--
Northern Illinois[3]	2.03	3.07	2.13	1.19	2.13	--
Southern Indiana[3]	2.00	--	2.00	4.00	1.00	--
Western Tennessee	1.50	--	1.67	--	1.17	--
Eastern Arkansas[2]	1.00	--	2.00	2.00	1.20	--
Central California[2]	1.00	--	1.50	--	1.00	--
Southern California	4.00	4.00	4.00	4.00	2.14	2.21
Western Oklahoma[2]	1.00	--	1.00	--	1.00	--
District of Columbia[2]	1.00	--	1.00	--	1.00	--
Assigned by division[1]						
Massachusetts[2]	2.00	4.00	4.00	4.00	1.17	1.25
Connecticut[2,3]	1.00	--	1.57	1.57	1.57	1.57
Eastern New York[3]	1.00	--	1.07	--	1.00	--
Maryland[3]	1.00	--	1.10	1.16	1.10	1.16
Eastern North Carolina[2,3]	2.50	4.00	4.00	4.00	3.33	3.33
Middle Florida[2]	1.62	2.12	4.00	4.00	--	--
Southern Texas[2]	1.55	2.50	1.73	2.20	2.87	1.90
Northern Texas	2.00	2.00	1.60	--	1.50	--
Western Texas[2]	1.22	--	2.67	2.67	2.33	3.00
Southern Ohio[2]	1.04	1.13	1.04	1.13	1.04	1.13
Northern Ohio[2]	2.26	3.31	2.26	3.31	2.23	3.31
Western Washington[3]	1.33	2.00	2.00	2.00	2.00	2.00
Oregon[2]	4.00	4.00	4.00	4.00	4.00	4.00
Arizona	1.00	--	1.06	--	1.00	--

(table continued)

TABLE 28 (Continued)

District	Civil Matters					
	Pretrial Conferences		Nondispositive Motions		Dispositive Motions	
	Resp.	Part.	Resp.	Part.	Resp.	Part.
Puerto Rico	3.60	3.60	4.00	4.00	3.00	3.00
Middle Pennsylvania	2.00	2.00	4.00	4.00	4.00	4.00
Western Pennsylvania	1.85	1.85	1.85	1.85	1.85	1.85
Northern Alabama	1.54	--	1.86	--	1.00	--
Southern Alabama[2]	1.37	1.37	3.75	3.75	3.12	3.12
Northern Georgia[2]	1.67	2.00	2.67	2.67	2.67	2.67
Eastern Louisiana[2]	1.87	1.87	2.67	2.67	2.00	2.00
Middle North Carolina	4.00	4.00	3.33	3.33	2.33	2.33
Western Michigan[3]	2.00	--	3.00	3.00	1.00	--
Northern Illinois[3]	2.63	2.63	2.63	2.63	2.16	2.16
Southern Indiana[3]	4.00	4.00	3.00	3.00	2.00	2.00
Western Tennessee	2.50	2.33	3.33	3.67	2.33	3.00
Eastern Arkansas	1.40	--	2.40	2.40	1.20	--
Central California[2]	1.12	1.12	3.18	3.18	2.32	2.32
Southern California	3.38	3.38	4.00	4.00	2.67	3.00
Western Oklahoma[2]	1.19	1.37	2.20	2.20	2.10	2.10
District of Columbia[2]	2.57	2.57	2.64	2.64	1.36	1.36
Assigned by division[1]						
Massachusetts[2,3]	1.23	1.40	3.15	3.15	2.24	2.24
Connecticut[2,3]	2.29	2.29	3.00	3.00	3.00	3.00
Eastern New York[3]	2.40	2.40	2.40	2.40	2.13	2.13
Maryland[3]	1.07	1.20	2.05	2.05	2.05	2.05
Eastern North Carolina[2,3]	4.00	4.00	3.67	3.67	3.33	3.33
Middle Florida[2]	2.42	2.42	3.50	3.50	2.25	3.00
Southern Texas[2]	2.79	2.79	2.66	2.66	2.37	2.60
Northern Texas	1.50	2.00	2.30	2.30	1.25	--
Western Texas[2]	1.83	2.00	2.67	3.00	2.67	3.00
Southern Ohio[2]	2.57	2.57	2.17	2.17	2.17	2.17
Northern Ohio[2]	2.22	2.22	1.64	1.74	1.98	2.24
Western Washington[3]	1.67	2.00	2.33	2.33	2.33	2.33
Oregon[2]	4.00	4.00	4.00	4.00	4.00	4.00
Arizona	2.44	3.00	2.83	2.83	2.67	3.00

(table continued)

TABLE 28 (Continued)

District	Additional Civil Matters					
	Habeas Corpus Cases		Civil Rights Cases		Social Security Cases	
	Resp.	Part.	Resp.	Part.	Resp.	Part.
Puerto Rico	4.00	4.00	4.00	4.00	1.40	1.40
Middle Pennsylvania	4.00	4.00	4.00	4.00	4.00	4.00
Western Pennsylvania	3.75	3.75	3.70	3.70	3.95	3.95
Northern Alabama	4.00	4.00	4.00	4.00	--	--
Southern Alabama[2]	4.00	4.00	4.00	4.00	4.00	4.00
Northern Georgia[2]	4.00	4.00	3.00	4.00	4.00	4.00
Eastern Louisiana[2]	3.67	3.67	3.67	3.67	4.00	4.00
Middle North Carolina	4.00	4.00	4.00	4.00	4.00	4.00
Western Michigan[3]	4.00	4.00	4.00	4.00	4.00	4.00
Northern Illinois[3]	2.10	2.10	2.28	2.28	2.28	2.28
Southern Indiana[3]	4.00	4.00	4.00	4.00	3.03	3.03
Western Tennessee	3.25	3.00	3.25	3.00	3.00	3.00
Eastern Arkansas[2]	4.00	4.00	4.00	4.00	4.00	4.00
Central California[2]	4.00	4.00	4.00	4.00	4.00	4.00
Southern California[2]	1.19	1.57	1.67	2.00	1.00	--
Western Oklahoma[2]	4.00	4.00	4.00	4.00	3.50	3.50
District of Columbia[2]	1.00	--	1.14	1.14	--	--
Assigned by division[1]						
Massachusetts[2]	2.32	2.32	2.35	2.35	1.58	1.58
Connecticut[2,3]	2.71	2.71	3.00	3.00	3.00	3.00
Eastern New York	1.47	1.47	1.47	1.47	2.33	2.33
Maryland[3]	2.53	2.53	2.56	2.56	2.71	2.71
Eastern North Carolina[2,3]	3.00	3.00	3.00	3.00	3.00	3.00
Middle Florida[2]	3.75	3.75	3.67	3.00	3.58	3.58
Southern Texas[2]	4.00	4.00	4.00	4.00	3.56	3.56
Northern Texas	4.00	4.00	3.00	3.00	1.50	2.00
Western Texas[2]	3.83	3.83	3.83	3.83	3.67	3.67
Southern Ohio[2]	3.54	3.54	3.75	3.75	3.42	3.42
Northern Ohio[2]	2.88	2.88	2.83	1.97	3.44	3.44
Western Washington[3]	3.67	3.67	3.67	3.67	2.00	4.00
Oregon[2]	4.00	4.00	4.00	4.00	4.00	4.00
Arizona	4.00	4.00	4.00	4.00	2.00	4.00

(table continued)

TABLE 28 (Continued)

District	Additional Civil Matters (Continued)					
	Special Master		Civil Trials		Settlements	
	Resp.	Part.	Resp.	Part.	Resp.	Part.
Puerto Rico	2.00	2.00	1.00	--	3.60	NA[4]
Middle Pennsylvania	1.00	--	1.00	--	1.67	NA
Western Pennsylvania	1.50	1.50	4.00	4.00	1.85	NA
Northern Alabama	2.50	--	1.00	--	1.36	NA
Southern Alabama[2]	2.50	2.50	4.00	4.00	1.50	NA
Northern Georgia[2]	1.76	1.76	3.33	4.00	1.67	NA
Eastern Louisiana[2]	3.00	3.00	1.67	2.00	2.13	NA
Middle North Carolina	2.17	2.17	4.00	4.00	2.00	NA
Western Michigan[3]	1.25	--	1.00	--	1.25	NA
Northern Illinois[3]	2.28	2.28	1.19	1.19	2.63	NA
Southern Indiana[3]	2.00	3.00	4.00	4.00	3.00	NA
Western Tennessee	2.67	2.33	4.00	4.00	2.00	NA
Eastern Arkansas	1.20	--	4.00	4.00	1.00	NA
Central California[2]	1.07	--	3.00	4.00	Not collected[5]	
Southern California	2.33	2.33	4.00	4.00	Not collected	
Western Oklahoma[2]	2.00	2.00	4.00	4.00	1.00	NA
District of Columbia[2]	2.93	2.93	2.86	2.86	2.21	NA
Assigned by division[1]						
Massachusetts[2]	2.17	2.17	2.13	2.70	1.30	NA
Connecticut[2,3]	1.50	2.00	1.64	1.64	2.29	NA
Eastern New York	2.13	2.13	4.00	4.00	2.33	NA
Maryland[3]	1.29	1.43	3.27	3.27	1.30	NA
Eastern North Carolina[2,3]	2.78	3.50	4.00	4.00	3.67	NA
Middle Florida[2]	1.87	2.50	3.37	4.00	1.06	NA
Southern Texas	2.40	3.19	3.29	3.67	2.36	NA
Northern Texas	1.20	--	1.60	1.60	1.00	NA
Western Texas[2]	2.67	3.00	4.00	4.00	1.67	NA
Southern Ohio[2]	1.96	1.94	2.93	2.93	1.86	NA
Northern Ohio	1.13	1.29	3.75	3.75	1.69	NA
Western Washington	2.67	2.67	3.33	3.33	Not collected	
Oregon[3]	2.50	--	4.00	4.00	Not collected	
Arizona[2]	2.39	3.00	1.33	2.00	Not collected	

NOTE: Respondents (Resp.) include all magistrates who answered the question on the frequency of assignment (i.e., includes respondents who reported "never" (1.00) assigned). Participants (Part.) include only those respondents who reported that (1) they are designated, (2) they participate regularly, and (3) at least one judge sometimes assigns them a duty (i.e., the respondent's score is equal to or greater than 1.01).

[1]Includes only districts with at least three full-time magistrates in which at least two are situated at one location, with the exception of the Eastern District of North Carolina, where all judicial officers ride the district to three different locations.

[2]In these districts, some judges directly assign motions and conferences in civil and criminal matters.

[3]In these districts, magistrates reported that criminal matters are assigned randomly.

[4]Not applicable. Holding of settlement conferences is not a formal duty designated under section 636(b) or (c).

[5]The question on settlement conferences was added to the survey instrument after pilot interviews with magistrates in the Ninth Circuit. Therefore, these data are not available for all magistrates in this circuit.

TABLE 29

DISTRICTS IN WHICH JUDGES AND MAGISTRATES ARE PAIRED, BY LOCAL RULE OR PRACTICE (n = 6)

District	No. of Judges	No. of Magistrates	Ratio of Judges to Magistrates
New Jersey[1]	11	5	2.20:1
Eastern Pennsylvania[1]	19	5	3.80:1
Southern Florida[1]	12	5	2.40:1
Minnesota[1]	6	3	2.00:1
Eastern Michigan	13	6	2.17:1
Kansas[1]	5	3	1.67:1

[1]In these districts, magistrates are first assigned to a division and then paired with judge(s).

TABLE 30

RESPONDENTS' AND PARTICIPANTS' DESCRIPTIONS OF THE FREQUENCY OF JUDGES' REQUESTS FOR ASSISTANCE ON 636(b) AND (c) DUTIES FOR DISTRICTS IN WHICH JUDGES AND MAGISTRATES ARE PAIRED, BY LOCAL RULE OR PRACTICE (n = 6)

	Criminal Matters					
	Pretrial Conferences		Nondispositive Motions		Dispositive Motions	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
New Jersey[1]	1.75	4.00	2.00	3.00	1.25	2.00
Eastern Pennsylvania	2.07	2.33	2.35	2.35	2.15	2.43
Southern Florida[1]	3.00	3.00	4.00	4.00	3.67	3.67
Minnesota[1]	1.75	4.00	3.83	3.83	3.83	3.83
Eastern Michigan	3.07	3.48	1.44	1.88	1.69	4.00
Kansas[1]	4.00	4.00	4.00	4.00	1.00	--

	Civil Matters					
	Pretrial Conferences		Nondispositive Motions		Dispositive Motions	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
New Jersey[1]	4.00	4.00	3.50	3.50	2.50	2.50
Eastern Pennsylvania	3.13	3.13	3.09	3.09	3.04	3.04
Southern Florida[1]	1.86	2.00	3.00	4.00	3.00	4.00
Minnesota[1]	4.00	4.00	4.00	4.00	3.21	2.94
Eastern Michigan	1.87	2.40	2.55	2.55	1.99	2.19
Kansas[1]	3.78	3.78	4.00	4.00	1.00	--

	Additional Civil Matters					
	Habeas Corpus Cases		Civil Rights Cases		Social Security Cases	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
New Jersey[1]	1.75	2.50	2.50	3.00	1.25	2.00
Eastern Pennsylvania	3.59	3.59	3.59	3.59	3.29	3.29
Southern Florida[1]	4.00	4.00	4.00	4.00	4.00	4.00
Minnesota[1]	4.00	4.00	4.00	4.00	3.75	3.75
Eastern Michigan	2.03	2.03	2.60	2.72	3.83	3.83
Kansas[1]	1.17	--	1.17	--	1.00	--

	Additional Civil Matters (Continued)					
	Special Master		Civil Trials		Settlements	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
New Jersey[1]	1.75	2.50	3.00	3.33	4.00	NA[2]
Eastern Pennsylvania	1.88	2.69	3.08	3.08	3.13	NA
Southern Florida[1]	2.50	3.00	2.00	2.00	1.86	NA
Minnesota[1]	2.28	2.61	4.00	4.00	3.18	NA
Eastern Michigan	2.19	2.39	1.20	2.00	1.55	NA
Kansas[1]	1.00	--	3.00	4.00	2.78	NA

NOTE: Respondents (Resp.) include all magistrates who answered the question on the frequency of assignment (i.e., includes respondents who reported "never" (1.00) assigned). Participants (Part.) include only those respondents who reported that (1) they are designated, (2) they participate regularly, and (3) at least one judge sometimes assigns them a duty (i.e., the respondent's score is equal to or greater than 1.01).

[1]In these districts, magistrates are first assigned to a division and then paired with judge(s).

[2]Not applicable. Holding of settlement conferences is not a formal duty designated under section 636(b) or (c).

TABLE 31

DISTRICTS IN WHICH JUDGES AND MAGISTRATES ARE PAIRED DE FACTO (n = 13)

District	No. of Judges	No. of Magistrates	Ratio of Judges to Magistrates
Northern New York	3	2	1.50:1
South Carolina	8	3	2.67:1
Western Virginia	4	2	2.00:1
Southern West Virginia	4.5	2	2.25:1
Western Louisiana	5	2	2.50:1
Northern Mississippi	2	2	1.00:1
Southern Mississippi	3	2	1.50:1
Eastern Kentucky	5.5	2	2.75:1
Western Kentucky	3.5	2	1.75:1
Southern Illinois	2	2	1.00:1
Northern Indiana	4	2	2.00:1
Eastern California	6	3	2.00:1
Nebraska	3	2	1.50:1

NOTE: In some districts, there is only one full-time magistrate at a location; the judge and magistrate are thus paired de facto rather than by local rule or practice.

TABLE 32

RESPONDENTS' AND PARTICIPANTS' DESCRIPTIONS OF THE FREQUENCY OF JUDGES' REQUESTS FOR ASSISTANCE ON 636(b) AND (c) DUTIES FOR DISTRICTS IN WHICH JUDGES AND MAGISTRATES ARE PAIRED DE FACTO (n = 13)[1]

	Criminal Matters					
	Pretrial Conferences		Nondispositive Motions		Dispositive Motions	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
Northern New York	1.00	--	1.00	--	1.00	--
South Carolina	1.57	--	1.41	2.11	1.41	2.11
Western Virginia	1.10	--	1.40	1.80	1.00	--
Southern West Virginia	1.10	--	1.30	1.60	1.30	1.60
Western Louisiana	2.50	4.00	3.00	3.00	2.83	2.83
Northern Mississippi	1.00	--	4.00	4.00	1.50	2.00
Southern Mississippi	1.67	1.67	4.00	4.00	3.33	3.33
Eastern Kentucky	1.92	2.83	2.42	2.42	2.42	2.42
Western Kentucky	1.00	--	1.90	1.80	2.30	2.60
Southern Illinois	2.25	2.25	2.25	2.25	2.00	2.00
Northern Indiana	1.75	2.00	2.75	4.00	1.25	--
Eastern California	2.50	4.00	4.00	4.00	3.00	4.00
Nebraska	1.00	--	4.00	4.00	3.50	3.50

	Civil Matters					
	Pretrial Conferences		Nondispositive Motions		Dispositive Motions	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
Northern New York	1.17	--	1.00	--	1.00	--
South Carolina	1.50	2.00	1.48	2.00	1.48	2.00
Western Virginia	1.30	1.60	2.30	2.30	1.70	2.00
Southern West Virginia	1.50	2.00	2.75	2.75	1.50	2.00
Western Louisiana	1.67	1.33	3.00	3.00	2.67	2.67
Northern Mississippi	4.00	4.00	4.00	4.00	2.00	2.00
Southern Mississippi	2.67	2.67	4.00	4.00	3.00	3.00
Eastern Kentucky	2.92	2.92	2.92	2.92	2.92	2.92
Western Kentucky	1.55	1.60	2.60	2.60	2.60	2.60
Southern Illinois	2.75	3.00	2.50	2.50	2.50	2.50
Northern Indiana	3.00	3.00	3.25	3.25	3.25	3.25
Eastern California	2.50	4.00	4.00	4.00	3.00	3.00
Nebraska	3.00	4.00	3.25	3.25	2.25	2.25

	Additional Civil Matters					
	Habeas Corpus Cases		Civil Rights Cases		Social Security Cases	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
Northern New York	4.00	4.00	4.00	4.00	2.75	2.75
South Carolina	4.00	4.00	4.00	4.00	4.00	4.00
Western Virginia	2.70	2.70	2.80	2.80	3.70	3.70
Southern West Virginia	3.00	3.00	2.00	1.75	2.45	2.45
Western Louisiana	3.50	3.50	3.00	2.00	3.50	3.50
Northern Mississippi	4.00	4.00	4.00	4.00	4.00	4.00
Southern Mississippi	4.00	4.00	3.50	3.50	4.00	4.00
Eastern Kentucky	4.00	4.00	4.00	4.00	4.00	4.00
Western Kentucky	3.20	3.20	3.20	3.20	2.90	2.90
Southern Illinois	4.00	4.00	4.00	4.00	4.00	4.00
Northern Indiana	3.50	2.25	2.75	2.75	3.75	3.75
Eastern California	1.00	--	2.50	4.00	4.00	4.00
Nebraska	4.00	3.00	3.00	3.00	2.00	3.00

(table continued)

TABLE 32 (Continued)

	Additional Civil Matters (Continued)					
	Special Master		Civil Trials		Settlements	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
Northern New York	1.25	1.50	1.00	--	1.00	NA[2]
South Carolina	2.23	2.57	1.19	--	1.00	NA
Western Virginia	2.40	2.40	1.30	--	1.30	NA
Southern West Virginia	1.50	2.00	1.00	--	1.00	NA
Western Louisiana	1.50	2.00	1.50	2.00	1.17	NA
Northern Mississippi	2.00	2.00	4.00	4.00	2.50	NA
Southern Mississippi	3.00	3.00	3.50	3.50	3.00	NA
Eastern Kentucky	2.50	4.00	4.00	4.00	2.42	NA
Western Kentucky	1.60	--	3.20	3.20	1.00	NA
Southern Illinois	2.00	2.00	3.50	3.50	2.75	NA
Northern Indiana	1.50	2.00	3.75	3.75	2.50	NA
Eastern California	1.00	--	3.00	3.00	Not collected[3]	
Nebraska	1.00	--	1.50	2.00	3.25	NA

NOTE: Respondents (Resp.) include all magistrates who answered the question on the frequency of assignment (i.e., includes respondents who reported "never" (1.00) assigned). Participants (Part.) include only those respondents who reported that (1) they are designated, (2) they participate regularly, and (3) at least one judge sometimes assigns them a duty (i.e., the respondent's score is equal to or greater than 1.01).

[1]In some districts, there is only one full-time magistrate at a location; the judge and magistrate are thus paired de facto rather than by local rule or practice.

[2]Not applicable. Holding of settlement conferences is not a formal duty designated under section 636(b) or (c).

[3]The question on settlement conferences was added to the survey instrument after pilot interviews with magistrates in the Ninth Circuit. Therefore, these data are not available for magistrates in this circuit.

TABLE 33

DISTRICTS IN WHICH THE CHIEF MAGISTRATE ASSIGNS MATTERS TO MAGISTRATES (n = 2)

District	No. of Judges	No. of Magistrates	Ratio of Judges to Magistrates
Southern New York	27	7	3.86:1
Northern California	12	4	3.00:1

TABLE 34

RESPONDENTS' AND PARTICIPANTS' DESCRIPTIONS OF THE FREQUENCY OF JUDGES' REQUESTS FOR ASSISTANCE ON 636(b) AND (c) DUTIES FOR DISTRICTS IN WHICH THE CHIEF MAGISTRATE ASSIGNS MATTERS TO MAGISTRATES (n = 2)

	Criminal Matters					
	Pretrial Conferences		Nondispositive Motions		Dispositive Motions	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
Southern New York	1.03	1.08	1.05	1.13	1.01	1.04
Northern California	1.11	1.43	2.75	4.00	1.07	1.29

	Civil Matters					
	Pretrial Conferences		Nondispositive motions		Dispositive motions	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
Southern New York	2.58	2.58	2.58	2.58	2.28	2.28
Northern California	2.06	2.42	2.85	2.85	1.99	1.99

	Additional Civil Matters					
	Habeas Corpus Cases		Civil Rights Cases		Social Security Cases	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
Southern New York	2.26	2.26	1.81	1.81	2.35	2.42
Northern California	1.25	2.00	1.60	2.12	1.04	1.14

	Additional Civil Matters (Continued)					
	Special Master		Civil Trials		Settlements	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
Southern New York	1.65	1.77	3.00	3.00	1.95	NA[1]
Northern California	2.05	2.05	2.70	2.70	Not collected[2]	

NOTE: Respondents (Resp.) include all magistrates who answered the question on the frequency of assignment (i.e., includes respondents who reported "never" (1.00) assigned). Participants (Part.) include only those respondents who reported that (1) they are designated, (2) they participate regularly, and (3) at least one judge sometimes assigns them a duty (i.e., the respondent's score is equal to or greater than 1.01).

[1]Not applicable. Holding of settlement conferences is not a formal duty designated under section 636(b) or (c).

[2]The question on settlement conferences was added to the survey instrument after pilot interviews with magistrates in the Ninth Circuit. Therefore, these data are not available for magistrates in this circuit.

TABLE 35

DISTRICTS IN WHICH JUDGES ASSIGN MATTERS
TO MAGISTRATES (n = 5)

District	No. of Judges	No. of Magistrates	Ratio of Judges to Magistrates
Eastern Virginia	8	6	1.33:1
Rhode Island	2	2	1.00:1
Western Missouri	6	3	2.00:1
Eastern Missouri	5	2	2.50:1
Colorado	6	3	2.00:1

TABLE 36

RESPONDENTS' AND PARTICIPANTS' DESCRIPTIONS OF THE FREQUENCY OF JUDGES' REQUESTS FOR ASSISTANCE ON 636(b) AND (c) DUTIES FOR DISTRICTS IN WHICH JUDGES ASSIGN MATTERS TO MAGISTRATES (n = 5)

	Criminal Matters					
	Pretrial Conferences		Nondispositive Motions		Dispositive Motions	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
Eastern Virginia	1.04	1.20	1.44	1.20	1.00	--
Rhode Island	3.00	3.00	3.00	3.00	3.00	3.00
Western Missouri[1]	3.26	3.89	2.93	3.39	2.93	3.39
Eastern Missouri[1]	3.00	3.00	3.00	3.00	3.00	3.00
Colorado[1]	3.00	3.00	2.19	3.37	1.00	--

	Civil Matters					
	Pretrial Conferences		Nondispositive Motions		Dispositive Motions	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
Eastern Virginia	1.50	2.25	2.77	2.77	1.65	2.08
Rhode Island	3.50	3.50	3.50	3.50	3.50	3.50
Western Missouri[1]	2.19	2.78	2.19	2.39	2.19	2.78
Eastern Missouri[1]	3.00	3.00	3.00	3.00	3.00	3.00
Colorado[1]	2.74	2.74	2.87	2.87	1.81	2.21

	Additional Civil Matters					
	Habeas Corpus Cases		Civil Rights Cases		Social Security Cases	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
Eastern Virginia	3.00	3.67	2.99	2.98	2.67	3.08
Rhode Island	3.25	3.25	3.50	3.50	3.50	3.50
Western Missouri[1]	2.48	3.22	3.15	3.50	2.33	2.89
Eastern Missouri[1]	3.00	3.00	3.00	3.00	3.00	3.00
Colorado[1]	2.90	3.50	2.90	3.50	1.00	--

	Additional Civil Matters (Continued)					
	Special Master		Civil Trials		Settlements	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
Eastern Virginia	1.60	2.00	2.47	2.83	1.18	NA[2]
Rhode Island	3.00	3.00	1.00	--	3.50	NA
Western Missouri[1]	2.37	2.37	4.00	4.00	1.85	NA
Eastern Missouri[1]	3.00	3.00	3.00	3.00	3.00	NA
Colorado[1]	1.56	1.84	1.00	--	2.90	NA

NOTE: Respondents (Resp.) include all magistrates who answered the question on the frequency of assignment (i.e., includes respondents who reported "never" (1.00) assigned). Participants (Part.) include only those respondents who reported that (1) they are designated, (2) they participate regularly, and (3) at least one judge sometimes assigns them a duty (i.e., the respondent's score is equal to or greater than 1.01).

[1]In these districts, judges designate magistrates to handle specific types of cases (e.g., criminal, civil, or prisoner).

[2]Not applicable. Holding of settlement conferences is not a formal duty designated under section 636(b) or (c).

TABLE 37

RESPONDENTS' AND PARTICIPANTS' DESCRIPTIONS OF THE FREQUENCY OF JUDGES' REQUESTS FOR ASSISTANCE ON 636(b) AND (c) DUTIES FOR DISTRICTS IN WHICH THERE IS ONE FULL-TIME MAGISTRATE (n = 25)

	Criminal Matters					
	Pretrial Conferences		Nondispositive Motions		Dispositive Motions	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
New Hampshire	4.00	4.00	4.00	4.00	1.00	--
Western New York	1.00	--	1.67	1.67	1.33	1.33
Vermont	2.00	2.00	2.00	2.00	2.00	2.00
Delaware	1.00	--	1.25	--	1.25	--
Western North Carolina	2.00	2.00	3.00	3.00	3.00	3.00
Northern West Virginia	1.00	--	3.00	3.00	1.00	--
Middle Alabama	1.00	--	1.00	--	1.00	--
Middle Louisiana	2.00	2.00	3.50	3.50	3.50	3.50
Eastern Tennessee	1.00	--	2.00	2.00	2.00	2.00
Middle Tennessee	1.00	--	1.00	--	1.00	--
Central Illinois	--	--	2.00	2.00	2.00	2.00
Eastern Wisconsin	1.00	--	4.00	4.00	4.00	4.00
Western Wisconsin	4.00	4.00	4.00	4.00	4.00	4.00
Western Arkansas	1.75	1.75	1.00	--	1.00	--
Northern Iowa	3.00	--	3.00	3.00	2.00	2.00
Southern Iowa	4.00	--	4.00	4.00	2.00	--
Alaska	1.00	--	4.00	4.00	4.00	4.00
Nevada	2.00	2.00	4.00	4.00	4.00	4.00
Eastern Washington	1.00	--	1.00	--	1.00	--
New Mexico	1.00	--	1.00	--	1.00	--
Northern Oklahoma	2.00	2.00	2.00	2.00	2.00	2.00
Utah	1.67	1.67	2.67	2.67	2.67	--
Wyoming	1.00	--	4.00	4.00	2.00	2.00
Northern Florida	1.00	--	1.00	--	1.00	--
Southern Georgia	1.00	--	2.00	2.00	2.00	2.00

	Civil Matters					
	Pretrial Conferences		Nondispositive Motions		Dispositive Motions	
District	Resp.	Part.	Resp.	Part.	Resp.	Part.
New Hampshire	4.00	4.00	4.00	4.00	1.00	--
Western New York	2.67	2.67	2.33	2.33	1.67	1.67
Vermont	3.00	3.00	4.00	4.00	3.00	3.00
Delaware	1.00	--	1.75	1.75	1.75	1.75
Western North Carolina	2.00	2.00	2.00	2.00	2.00	2.00
Northern West Virginia	2.00	2.00	3.00	3.00	2.00	2.00
Middle Alabama	3.00	3.00	3.00	3.00	3.00	3.00
Middle Louisiana	2.00	2.00	3.50	3.50	3.50	3.50
Eastern Tennessee	4.00	4.00	4.00	4.00	4.00	4.00
Middle Tennessee	1.00	--	1.00	--	1.00	--
Central Illinois	3.00	3.00	3.00	3.00	3.00	3.00
Eastern Wisconsin	1.00	--	2.00	--	2.00	--
Western Wisconsin	3.00	3.00	2.33	2.33	2.33	2.33
Western Arkansas	3.00	3.00	3.00	3.00	3.00	3.00
Northern Iowa	4.00	4.00	4.00	4.00	2.50	--
Southern Iowa	4.00	4.00	4.00	4.00	2.00	--
Alaska	3.00	3.00	4.00	4.00	2.00	2.00
Nevada	3.00	3.00	4.00	4.00	2.00	2.00
Eastern Washington	3.00	3.00	3.00	3.00	3.00	3.00
New Mexico	4.00	4.00	4.00	4.00	2.00	2.00
Northern Oklahoma	3.00	3.00	3.00	3.00	3.00	3.00
Utah	2.33	2.33	2.67	2.67	2.67	2.67
Wyoming	4.00	4.00	4.00	4.00	2.00	2.00

(table continued)

TABLE 37 (Continued)

District	Additional Civil Matters: Habeas Corpus Cases Resp.	Habeas Corpus Cases Part.	Civil Rights Cases Resp.	Civil Rights Cases Part.	Social Security Cases Resp.	Social Security Cases Part.
New Hampshire	1.00	--	1.00	--	3.00	3.00
Western New York	1.33	1.33	1.33	1.33	1.00	--
Vermont	4.00	4.00	4.00	4.00	4.00	--
Delaware	3.67	3.67	4.00	4.00	4.00	4.00
Western North Carolina	4.00	4.00	2.00	2.00	1.00	--
Northern West Virginia	4.00	4.00	3.00	3.00	3.00	3.00
Middle Alabama	4.00	4.00	3.00	3.00	3.00	3.00
Middle Louisiana	4.00	4.00	4.00	4.00	4.00	4.00
Eastern Tennessee	1.00	--	2.00	3.00	4.00	4.00
Middle Tennessee	1.00	--	1.00	--	4.00	4.00
Central Illinois	2.00	--	2.00	--	4.00	4.00
Eastern Wisconsin	2.00	2.00	4.00	4.00	4.00	4.00
Western Wisconsin	1.33	1.33	1.33	1.33	2.00	2.00
Western Arkansas	3.75	3.75	3.75	3.75	3.00	3.00
Northern Iowa	3.00	3.00	3.00	3.00	4.00	4.00
Southern Iowa	2.00	2.00	3.00	3.00	1.00	--
Alaska	4.00	4.00	4.00	4.00	4.00	4.00
Nevada	4.00	4.00	2.00	--	4.00	4.00
Eastern Washington	--	--	--	--	3.00	3.00
New Mexico	--	--	--	--	4.00	4.00
Northern Oklahoma	2.50	2.50	2.50	2.50	3.00	3.00
Utah	4.00	4.00	4.00	4.00	2.33	2.33
Wyoming	4.00	4.00	4.00	4.00	4.00	4.00
Northern Florida	4.00	4.00	4.00	4.00	4.00	4.00
Southern Georgia	1.67	1.67	2.00	2.00	4.00	4.00

District	Additional Civil Matters (Continued): Special Master Resp.	Special Master Part.	Civil Trials Resp.	Civil Trials Part.	Settlements Resp.	Settlements Part.
New Hampshire	1.00	--	1.00	--	4.00	NA[1]
Western New York	2.00	2.00	4.00	4.00	2.67	NA
Vermont	--	--	--	--	3.50	NA
Delaware	1.00	--	--	--	1.25	NA
Western North Carolina	2.00	2.00	1.00	--	2.00	NA
Northern West Virginia	2.00	2.00	2.00	--	1.00	NA
Middle Alabama	--	--	3.00	3.00	1.00	NA
Middle Louisiana	--	--	4.00	--	2.50	NA
Eastern Tennessee	2.00	2.00	3.00	3.00	--	--
Middle Tennessee	4.00	4.00	4.00	4.00	1.00	NA
Central Illinois	1.00	--	4.00	4.00	2.00	NA
Eastern Wisconsin	1.75	1.75	4.00	4.00	1.50	NA
Western Wisconsin	1.00	--	4.00	4.00	2.33	NA
Western Arkansas	1.00	--	4.00	4.00	3.00	NA
Northern Iowa	1.00	--	4.00	4.00	1.00	NA
Southern Iowa	1.00	--	4.00	4.00	3.00	NA
Alaska	4.00	4.00	4.00	4.00	Not collected[2]	
Nevada	2.00	--	1.00	--	Not collected	
Eastern Washington	1.00	--	--	--	Not collected	
New Mexico	2.00	2.00	1.00	--	3.00	NA
Northern Oklahoma	3.00	3.00	2.00	2.00	1.00	NA
Utah	1.00	--	--	--	1.00	NA
Wyoming	2.00	2.00	2.18	2.18	1.00	NA
Northern Florida	2.00	2.00	2.00	2.00	1.00	NA
Southern Georgia	1.00	--	2.33	2.33	1.00	NA

NOTE: Respondents (Resp.) include all magistrates who answered the question on the frequency of assignment (i.e., includes respondents who reported "never" (1.00) assigned). Participants (Part.) include only those respondents who reported that (1) they are designated, (2) they participate regularly, and (3) at least one judge sometimes assigns them a duty (i.e., the respondent's score is equal to or greater than 1.01).

[1]Not applicable. Holding of settlement conferences is not a formal duty designated under section 636(b) or (c).

[2]The question on settlement conferences was added to the survey instrument after pilot interviews with magistrates in the Ninth Circuit. Therefore, these data are not available for all magistrates in this circuit.

APPENDIX B

Survey Sent to All Full-time Magistrates

FULL-TIME MAGISTRATE'S SURVEY

Magistrate's Name_____

Location_____

District_____

1. **Jurisdiction:** (A) Please describe the jurisdiction formally (i.e., as described in local orders and/or rules) authorized to you as a full-time magistrate under 28 U.S.C. § 636(b) and (c) by checking the appropriate space below. (B) Please indicate which of these activities you perform regularly.

	JURISDICTION			
	AUTHORIZED		EXERCISED	
	YES	NO	YES	NO
A. Criminal				
Pretrial Conference	___	___	___	___
Nondispositive Motion*	___	___	___	___
Dispositive Motion**	___	___	___	___
B. Civil				
Pretrial Conference	___	___	___	___
Nondispositive Motion	___	___	___	___
Dispositive Motion	___	___	___	___
Social Security	___	___	___	___
Special Master	___	___	___	___
C. Prisoner Petitions				
Habeas Corpus	___	___	___	___
Civil Rights	___	___	___	___
D. Civil Trial, on Consent	___	___	___	___

*A nondispositive motion is a motion decided with finality by a magistrate under 28 U.S.C. § 636(b)(1)(A), generally involving procedural or discovery matters.

**A dispositive motion is a motion in which the magistrate files a report and recommendation with a judge under 28 U.S.C. § 636(b)(1)(B).

2. Division of Assigned Duties: Please check the space that describes how matters arising under 28 § U.S.C. 636(b) and (c) are divided among full-time magistrates in your district.

	YES	NO
A. All magistrates receive all types of matters.	___	___
B. Assignments are divided among magistrates by subject area (e.g., one magistrate handles criminal while another handles civil matters).	___	___

3. Assignment by Division/Location: Please indicate, by checking the appropriate space, whether the procedures for assignment to magistrates are uniform across the district.

	YES	NO
A. Magistrates are assigned only matters arising at specific locations or divisions within the district.	___	___
B. If yes, are procedures for assignment at different locations the same?	___	___

4. Number of Active Judges: Please indicate the number of active judges. (In calculating this figure, include senior judges who continue to carry a full load of cases and make assignments to magistrates on a regular basis.)

A. Within your district: _____

B. At your assigned location: _____

5. Duties Assigned to Magistrates: We are interested here in ascertaining the uniformity of arrangements among judges in their assignment practices for those matters authorized by local rule. Please describe this aspect of your district's practices by indicating the number of active judges who fall into the various categories defined below for each of the duties authorized under 28 U.S.C. § 636(b) and (c).

	Frequency of Assignment			
	Always Assign	Frequently Assign	Occasionally Assign	Never Assign
Duties under 28 U.S.C. § 636(b) and (c):				
A. Criminal				
Pretrial Conference	___	___	___	___
Nondispositive Motion	___	___	___	___
Dispositive Motion	___	___	___	___
B. Civil				
Pretrial Conference	___	___	___	___
Settlement Conference	___	___	___	___
Nondispositive Motion	___	___	___	___
Dispositive Motion	___	___	___	___
Social Security	___	___	___	___
Special Master	___	___	___	___
C. Prisoner				
Habeas Corpus	___	___	___	___
Civil Rights	___	___	___	___
D. Civil Trial, on Consent	___	___	___	___

6. **Timing of Assignment:** Please check the space that best describes the point in the progress of a case at which you are assigned duties.

A. Criminal Matters under 28 U.S.C. § 636(b)

	Pretrial Conference	Nondispositive Motion	Dispositive Motion
1. I enter the procedure at filing.	—	—	—
2. I enter a case upon a judge's request.	—	—	—
3. Some judges prefer to have a magistrate enter the case at filing while others prefer to have a magistrate enter a case upon his/her request.	—	—	—

B. Civil Matters under 28 U.S.C. § 636(b)

	General Civil Matters	Social Security
1. I enter the procedure at filing.	—	—
2. I enter a case upon a judge's request.	—	—
3. Some judges prefer to have a magistrate enter the case at filing while others prefer to have a magistrate enter a case upon his/her request.	—	—

C. Prisoner Petitions

	Habeas Corpus	Civil Rights
1. I enter the procedure at filing.	—	—
2. I enter a case upon a judge's request.	—	—
3. Some judges prefer to have a magistrate enter the case at filing while others prefer to have a magistrate enter a case upon his/her request.		

7. Method of Assignment: Recognizing that various types of duties may be assigned to magistrates differently, we are interested in ascertaining the general practices followed in your court. Please check the method of assignment that best describes these general practices for criminal, civil, and prisoner cases.

	Types of Duties				
	Criminal 636(b)	Civil 636(b)	Social Security	Prisoner Habeas	Prisoner Civil Rights
A. Rotation: Cases assigned on alternating basis among magistrates (e.g., by week, month, etc.).	___	___	___	___	___
B. Random: Magistrate selected by lot.	___	___	___	___	___
C. Judge/Magistrate Pairs: Magistrates are assigned to specific judge(s) and conduct proceedings only for their assigned judge(s).	___	___	___	___	___
D. Chief Magistrate: A chief or presiding magistrate oversees the assignment or reassignment of matters.	___	___	___	___	___
E. Designation by Judge:					
(1) A judge may assign matters to a specific magistrate of his/her choice.	___	___	___	___	___
(2) In combination with system checked above ("A" through "D"), judge(s) frequently designate a magistrate on their own.	___	___	___	___	___

F. Comment: If, after reviewing the above options, the procedure(s) developed in your court are not described, please specify how cases and/or matters are assigned to you._____

_____

_____

_____

8. Civil Trials, on Consent: When parties consent to a trial before a magistrate, please indicate how the respective magistrate is assigned by checking the appropriate box.

	YES	NO
A. Random Assignment		
1. At filing	___	___
2. At consent	___	___
B. Judge/Magistrate Pairs	___	___
C. Selection by Parties	___	___

D. Other: If the above categories do not describe how magistrates are selected for trials on consent in your district, please describe the procedure that is used._____

_____

_____

_____

9. Additional Comments: If you would like to make any additional comments on your court's procedures in this area, we welcome them.

_____

_____

_____

_____

_____

_____

Thank you very much for your time and effort.

* U.S. GOVERNMENT PRINTING OFFICE: 1985-476-422:32285

THE FEDERAL JUDICIAL CENTER

The Federal Judicial Center is the research, development, and training arm of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States is chairman of the Center's Board, which also includes the Director of the Administrative Office of the United States Courts and five judges elected by the Judicial Conference.

The Center's **Continuing Education and Training Division** conducts seminars, workshops, and short courses for all third-branch personnel. These programs range from orientation seminars for judges to on-site management training for supporting personnel.

The **Research Division** undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, usually at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal court system.

The **Innovations and Systems Development Division** designs and helps the courts implement new technologies, generally under the mantle of Courtran II—a multipurpose, computerized court and case management system developed by the division.

The **Inter-Judicial Affairs and Information Services Division** maintains liaison with state and foreign judges and judicial organizations. The Center's library, which specializes in judicial administration, is located within this division.

The Center's main facility is the historic Dolley Madison House, located on Lafayette Square in Washington, D.C.

Copies of Center publications can be obtained from the Center's Information Services office, 1520 H Street, N.W., Washington, D.C. 20005; the telephone number is 202/633-6365.

Federal Judicial Center
Dolley Madison House
1520 H Street, N.W.
Washington, D.C. 20005
202/633-6011

REFLECTIONS ON THE WESTERN DISTRICT OF PENNSYLVANIA

Newspaper clippings of the various Federal Courthouses for the Western District of Pennsylvania

History

The United States District Court for the Western District of Pennsylvania

was created by an Act of Congress on April 20, 1818. The court is recognized throughout the nation for its standards of excellence, fairness and professionalism

Prior to 1818

In 1789, Congress exercised its power under the Federal Constitution to establish lower federal courts by establishing a two-tiered court system below the Supreme Court. A District Court, presided over by a district court judge, was established for each state. Circuit Courts, with both *Nisi Prius* and Appellate power, were also established. The country was divided into three judicial circuits, designated as southern, middle and eastern. Pennsylvania was in the middle district. There were no circuit judges, but Justices of the Supreme Court and District Court Judges sat on the Circuit Courts. In 1801 the number of judicial circuits was increased to six, with Pennsylvania being assigned to the Third Circuit, where it has remained ever since.

Under the Act of 1789, provision was made for sessions of the district court and of the circuit court for the district of Pennsylvania to be held both in Philadelphia and in York, but in 1796 Congress decided that the sessions should be held only in Philadelphia.

The Judiciary Act of 1801 divided Pennsylvania into Eastern and Western districts, with sessions of the Eastern District to be held in Philadelphia and those of the Western District at Bedford. This Act was repealed in 1802 and the federal circuit and district courts continued to be held only in Philadelphia, as before, until 1818.

After 1818

The Western District of Pennsylvania was established by the Act of April 20, 1818, which divided the Commonwealth into two judicial districts. The Western District consisted of the counties of Fayette, Greene, Washington, Allegheny, Westmoreland, Somerset, Bedford, Huntingdon,

Centre, Mifflin, Clearfield, McKean, Potter, Jefferson, Cambria, Indiana, Armstrong, Butler, Beaver, Mercer, Crawford, Venango, Erie and Warren. The Act provided that the residue of the State should compose the Eastern District.

The Act of 1818 also authorized the President to appoint a District Judge for the Western District of Pennsylvania and provided for a salary of $1600 per year. In addition to its jurisdiction as a District Court, the District Court for the Western District was given all the *Nisi Prius* power of the Circuit Court within the District, but appeals from the District Court of the Western District were taken to the Circuit Court in the Eastern District. This was changed by the Act of May 15,1820, which, in effect, gave the District Court for the Western District all of the powers of a Circuit Court.

Originally, the United States District Court for the Western District of Pennsylvania held sessions only in Pittsburgh, but in May 1824, Congress altered the judicial districts in Pennsylvania by adding the counties of Susquehanna, Bradford, Tioga, Union, Northumberland, Columbia, Luzerne and Lycoming to the Western District. This Act also provided that the Court should hold two sessions every year at Williamsport, in addition to the sessions held at Pittsburgh.

In 1866, Congress provided that the District Court for the Western District of Pennsylvania should also begin holding sessions in Erie, Pennsylvania. The first session of the District Court in Erie was held in January 1867, with Judge Wilson McCandless presiding.

In 1901, the Middle District of Pennsylvania was created, removing from the Western District all of the counties which had been added to it by the Act of 1824 and in addition severing Huntingdon, Centre, Mifflin and Potter counties.

Most recently, in 1989 the District Court for the Western District of Pennsylvania acted upon a longstanding Congressional authorization and announced that it would hold sessions in Johnstown, Cambria County, with Judge D. Brooks Smith presiding.

After the Western District of Pennsylvania was established in 1818, President James Monroe appointed Jonathan H.Walker to be first Judge of the United States District Court for the Western District of Pennsylvania. The Act of 1818 called for the first session of the Court to be held in June 1818, but the Court did not get organized in time and the first session was held in Pittsburgh on December 7, 1818, in the Courthouse in Pittsburgh which then occupied the western half of Market Square. All sessions of the United States Courts held in Pittsburgh until 1841 were held in the Market Square Courthouse, for it was not until 1853 that court facilities were provided for in a Federal Building in Pittsburgh.

In 1841, the Federal Courthouse moved into the new State Courthouse which had been constructed on Grant's Hill, at the corner of Grant, Fourth and Ross Streets and in which Federal Courts were given space on the Second floor, along with the Pennsylvania Supreme Court.

The first Federal Building in Pittsburgh was erected in 1853 at Fifth Avenue and Smithfield Street on the site of the present Park Building. Known variously as the "Custom House," "Pittsburgh Postoffice" and "Federal Government Building", this building was the first Federal home for the United States Courts in the Western District of Pennsylvania and sessions were held there until July 1891, when the courts were removed to the newly constructed United States Postoffice and Courthouse Building at Fourth Avenue and Smithfield Streets. Federal Courts were held at the Fourth Avenue Courthouse until November 7, 1934, when the present Courthouse at Grant Street and Seventh Avenue was opened.

The Federal Building and Post Office at Fourth Avenue and Smithfield Street has been razed, but many of the elegant decorative features and architectural details of the handsome old building have been preserved at various sites throughout the city. Much of the decorative ironwork and decorative carving that adorned the building can be seen at the headquarters of the Pittsburgh History and Landmarks Foundation location at Station Square. The collection of remnants preserved by the Foundation includes beautifully carved Federal Eagles. Granite statutes of the Goddess of Justice are also on that site, just outside the Station Square Shops. A statue has also been preserved in the courtyard adjacent to the building that was formerly the "Edge", a restaurant and motel that overlooked the city from Mt. Washington.

U.S. District Courts for the Districts of Pennsylvania: Judicial District Organization, 1818-present

	Eastern District of Pennsylvania	Middle District of Pennsylvania	Western District of Pennsylvania
April 20, 1818 3 Stat. 462	Counties of Adams, Berks, Bradford, Bucks, Chester, Columbia, Cumberland, Dauphin, Delaware, Franklin, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Montgomery, Northampton, Northumberland, Philadelphia, Pike, Schuylkill, Susquehanna, Tioga, Union, Wayne, and York.	Not yet established.	Counties of Allegheny, Armstrong, Beaver, Bedford, Butler, Cambria, Centre, Clearfield, Crawford, Erie, Fayette, Greene, Huntingdon, Indiana, Jefferson, McKean, Mercer, Mifflin, Potter, Somerset, Venango, Warren, Washington, and Westmoreland.
May 26, 1824 4 Stat. 50	Counties of Adams, Berks, Bucks, Chester, Cumberland, Dauphin, Delaware, Franklin, Lancaster, Lebanon, Lehigh, Montgomery, Northampton, Perry, Philadelphia, Pike, Schuylkill, Wayne, and York.	Not yet established.	Counties of Allegheny, Armstrong, Beaver, Bedford, Bradford, Butler, Cambria, Centre, Clearfield, Columbia, Crawford, Erie, Fayette, Greene, Huntingdon, Indiana, Jefferson, Luzerne, Lycoming, McKean, Mercer, Mifflin, Northumberland, Potter, Somerset, Susquehanna, Tioga, Union, Venango, Warren, Washington, and Westmoreland.
March 2, 1901 31 Stat. 880	Counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia, and Schuylkill.	Counties of Adams, Bradford, Cameron, Carbon, Centre, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York.	Counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland.
March 5, 1942 56 Stat. 132	The statute made no changes to the district.	Counties of Adams, Blair, Bradford, Cameron, Carbon, Centre, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York.	Counties of Allegheny, Armstrong, Beaver, Bedford, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland.

June 25, 1948 62 Stat. 888	The statute made no changes to the district.	Counties of Adams, Bradford, Cameron, Carbon, Centre, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York.	Counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland.
October 21, 1998 112 Stat. 2681-116	Counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, and Philadelphia.	Counties of Adams, Bradford, Cameron, Carbon, Centre, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York.	The statute made no changes to the district.

*Historical county information obtained from William M. Scholl Center for American History and Culture, *Atlas of Historical County Boundaries*, at The Newberry Library.

U.S. District Courts for the Districts of Pennsylvania: Meeting Places

District of Pennsylvania	
	Philadelphia, 1789-1818
	York, 1789-1790
Eastern District of Pennsylvania	
	Philadelphia, 1818-
	Easton, 1930-
	Allentown, 1970-
	Reading, 1970-
	Lancaster, 1992-
Middle District of Pennsylvania	
	Harrisburg, 1901-
	Scranton, 1901-
	Williamsport, 1901-
	Sunbury, 1913-1926
	Lewisburg, 1926-
	Wilkes-Barre, 1936-
Western District of Pennsylvania	
	Pittsburgh, 1818-
	Williamsport, 1824-1901
	Erie, 1866-
	Scranton, 1886-1901
	Johnstown, 1978-

95TH CONGRESS
2D SESSION

H. R. 12496

IN THE HOUSE OF REPRESENTATIVES

MAY 2, 1978

Mr. MURTHA introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend section 118 (c) of title 28, United States Code, to provide for the holding of court for the Western District of Pennsylvania at Johnstown, Pennsylvania.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the second paragraph of section 118 (c) of title 28, United States Code, is amended to read as follows:

"Court for the Western District shall be held at Erie, Johnstown, and Pittsburgh.".

I

4/6 A copy of H.R. 12496, a bill that provides for the Western District Court of Pennsylvania to be held in Johnstown. It was introduced by John Murtha in 1978.

to strengthen Federal programs and policies for combating international and domestic terrorism.
3302 Dirksen Building

10:30 a.m.
Judiciary
To continue hearings on S. 2252, the Alien Adjustment and Employment Act.
2228 Dirksen Building

2:00 p.m.
Appropriations
Transportation Subcommittee
To hold hearings on proposed budget estimates for FY 79 for the Minority Business Resource Center.
1224 Dirksen Building

Conferees
On S. 9, to establish a policy for the management of oil and natural gas in the Outer Continental Shelf.
Until 5:00 p.m. EF-100 Capitol

MAY 12

9:30 a.m.
Human Resources
To resume mark up of S. 1753, authorizing funds through FY 1983 for the Elementary and Secondary Education Act, and other pending calendar business.
4232 Dirksen Building

2:00 p.m.
Conferees
On S. 9, to establish a policy for the management of oil and natural gas in the Outer Continental Shelf.
Until 5:00 p.m. EF-100, Capitol

MAY 15

10:00 a.m.
*Appropriations
Transportation Subcommittee
To hold hearings on budget estimates for FY 79 for the Department of Transportation.
1224 Dirksen Building

Judiciary
Antitrust and Monopoly Subcommittee
To resume oversight hearings on ICC's price regulation in the motor common carrier industry.
2228 Dirksen Building

MAY 16

10:00 a.m.
Commerce, Science, and Transportation
Science, Technology, and Space Subcommittee
To hold hearings jointly with the Senate Banking Subcommittee on International Finance on technology exports and research and development investments.
6226 Dirksen Building

Banking, Housing, and Urban Affairs
To resume hearings on S. 2096, Right to Financial Privacy Act, and S. 2293, to modernize the banking laws with regard to the geographic placement of electronic fund transfer systems.
5302 Dirksen Building

10:30 a.m.
Judiciary
To resume hearings on S. 2252, the Alien Adjustment and Employment Act.
2228 Dirksen Building

MAY 17

9:30 a.m.
Human Resources
Health and Scientific Research Subcommittee
To resume hearings on S. 2755, the Drug Regulation Reform Act.
4332 Dirksen Building

10:00 a.m.
Banking, Housing, and Urban Affairs
Financial Institutions Subcommittee
To continue hearings on S. 2096, Right to Financial Privacy Act, and S. 2293, to modernize the banking laws with regard to the geographic placement of electronic fund transfer systems.
5302 Dirksen Building

Banking, Housing, and Urban Affairs
International Finance Subcommittee
To hold hearings in connection with restrictions employed by foreign countries to hold down imports of U.S. goods.
Room to be announced

Commerce Science and Transportation
Merchant Marine and Tourism Subcommittee
To hold hearings on S. 2873, proposed Ocean Shipping Act.
235 Russell Building

10:30 a.m.
Judiciary
To continue hearings on S. 2252, the Alien Adjustment and Employment Act.
2228 Dirksen Building

MAY 18

9.30 a.m.
Veterans' Affairs
Housing, Insurance, and Cemeteries Subcommittee
To hold hearings on S. 1643 and H.R. 4341, to eliminate the requirement for inspections of the mobile home manufacturing process by the VA and S. 1556, authorizing funds through FY 81 to assist States in establishing and maintaining VA cemeteries.
457 Russell Building

10:00 a.m.
Commerce, Science, and Transportation
Merchant Marine and Tourism Subcommittee
To continue hearings on S. 2873, proposed Ocean Shipping Act.
235 Russell Building

10:30 a.m.
Judiciary
To continue hearings on S. 2252, the Alien Adjustment and Employment Act.
2228 Dirksen Building

MAY 22

9:00 a.m.
Select Small Business
To resume hearings on the Federal government patent policy.
318 Russell Building

Select Small Business
To resume hearings on the Federal government patent policy.
318 Russell Building

10:00 a.m.
Judiciary
Antitrust and Monopoly Subcommittee
To resume oversight hearings on ICC's price regulation in the motor common carrier industry.
2228 Dirksen Building

MAY 23

9:00 a.m.
Select Small Business
To continue hearings on the Federal government patent policy.
6226 Dirksen Building

JUNE 7

9:30 a.m.
Human Resources
Alcoholism and Drug Abuse Subcommittee
To hold oversight hearings on use of the drug PCP (Angel Dust).
4232 Dirksen Building

CANCELLATIONS

MAY 3

9:30 a.m.
Environment and Public Works
To continue mark up of proposed legislation authorizing funds for those programs which fall within the committee's jurisdiction.
4200 Dirksen Building

MAY 4

9:30 a.m.
Environment and Public Works
To continue markup of proposed legislation authorizing funds for those programs which fall within the committee's jurisdiction.
4200 Dirksen Building

HOUSE OF REPRESENTATIVES—*Tuesday, May 2, 1978*

The House met at 12 o'clock noon.

Dr. Charles A. Trentham, First Baptist Church, Washington, D.C., offered the following prayer:

Ever gracious God, our Father, grant us this day purity of heart that we may see You, clarity of mind that we may comprehend what You are saying to us, and resoluteness of will to translate Your desires for Your human family into action.

Restrain us when our actions would deprive anyone of personal rights which You have desired for everyone.

Show us specific ways by which we may make life a little fuller and freer for those who depend upon us.

Forgive all our failures and sins that we may cease mourning for our past and give all our energies to making today better. Give us, O Lord, the toil and our children the better world through Christ our Saviour. Amen.

CALL OF THE HOUSE

Mr. ROUSSELOT. Mr. Speaker, under rule I, clause 1, of the rules of the House, I make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

Without objection, a call of the House is ordered.

There was no objection.

The call was taken by electronic device, and the following Members failed to respond:

[Roll No. 268]

Allen	Conyers	Heckler
Ambro	Cornwell	Holland
Andrews, N.C.	Davis	Horton
Applegate	Dellums	Howard
Archer	Dent	Johnson, Colo.
Baldus	Diggs	Jones, N.C.
Bellenson	Dingell	Kazen
Bingham	Dodd	Krueger
Bonior	Drinan	McCormack
Burke, Calif.	Edwards, Calif.	McKinney
Burleson, Tex.	Eilberg	Mann
Burton, John	Evans, Ind.	Mitchell, Md.
Carney	Fountain	Moffett
Cederberg	Frey	Mollohan
Clay	Gammage	Murphy, N.Y.
Cochran	Gudger	Nix

Statements or insertions which are not spoken by the Member on the floor will be identified by the use of a "bullet" symbol, i.e., ●

and surviving spouses receiving certain Government pensions, as recently added to title II of the Social Security Act by section 334 of the Social Security Amendments of 1977; to the Committee on Ways and Means.

By Mr. KEMP:

H.R. 12490. A bill to suspend the duty on live worms, if a product of Canada, until the close of June 30, 1981; to the Committee on Ways and Means.

By Mr. KETCHUM (for himself, Mr. ARCHER, Mr. VANDER JAGT, Mr. STEIGER, Mr. FRENZEL, Mr. MARTIN, Mr. BAFALIS, Mr. SCHULZE, Mr. GRADISON, Mr. CONABLE, Mr. SEBELIUS, Mr. BADHAM, and Mr. GREEN):

H.R. 12491. A bill to amend the Social Security Act and the Internal Revenue Code of 1954, to strengthen the financing of the social security system, to provide for a gradual increase in retirement age, to improve the treatment of women through the establishment of a working spouse's benefits and to eliminate gender-based discrimination, to provide coverage under the system for Federal employees, to increase and ultimately repeal the earnings limitation, and for other purposes; to the Committee on Ways and Means.

By Mr. LEDERER:

H.R. 12492. A bill to carry out the obligations of the United States under the International Sugar Agreement, 1977, to protect the interests of consumers of sugar and consumers and manufacturers of sugar-containing products by insuring the availability of ample supplies of sugar at fair and stable prices, to provide for the welfare of all segments of the domestic sugar industry, and for other purposes; jointly, to the Committees on Agriculture, and Ways and Means.

By Mr. LEHMAN:

H.R. 12493. A bill to amend title 13, United States Code, to authorize appropriations to carry out the provisions of such title for fiscal year 1979 and to provide that for subsequent fiscal years appropriations shall be subject to annual authorization; to the Committee on Post Office and Civil Service.

By Mr. LEHMAN (for himself, Mr. BEDELL, Mr. CLAY, Mr. FORD of Michigan, Mr. GARCIA, Mr. HANLEY, Mr. HEFTEL, Mr. LEACH, Mr. LOTT, Mr. RYAN, Mrs. SPELLMAN, Mr. UDALL, and Mr. CHARLES H. WILSON of California):

H.R. 12494. A bill to amend title 13, United States Code, to provide for the review of Federal authority for the collection of statistical information, to require certain information to be included in committee reports accompanying legislation in which there is provided Federal authority for the collection of information, and for other purposes; to the Committee on Post Office and Civil Service.

By Mr. McDONALD:

H.R. 12495. A bill to limit eligibility for appointment and admission to any U.S. service academy to male individuals; jointly, to the Committees on Armed Services, and Merchant Marine and Fisheries.

By Mr. MURTHA:

H.R. 12496. A bill to amend section 118(c) of title 28, United States Code, to provide for the holding of court for the Western District of Pennsylvania at Johnstown, Pa., to the Committee on the Judiciary.

By Mr. OTTINGER:

H.R. 12497. A bill to amend the Internal Revenue Code of 1954 to allow individuals to elect, in lieu of the deduction for charitable contributions, a credit against income tax for 50 percent of such contributions; to the Committee on Ways and Means.

By Mr. PRICE (for himself and Mr. BOB WILSON) (by request):

H.R. 12498. A bill to amend title 10, United States Code, to provide for more efficient and expeditious disposal of lost, abandoned, and unclaimed property in the custody of the military departments; to the Committee on Armed Services.

By Mr. SEIBERLING:

H.R. 12499. A bill to amend the Internal Revenue Code of 1954 to provide that a taxpayer may, with respect to any pollution control facility used in connection with a plant or other property in operation before January 1, 1971, elect a 12-month amortization of such facility or a 20-percent investment tax credit; to the Committee on Ways and Means.

By Mr. SEIBERLING (for himself, Ms. MIKULSKI, and Mr. ROE):

H.R. 12500. A bill to amend the Internal Revenue Code of 1954 to allow, as a credit against income tax, certain amounts of social security taxes paid by an employee, and to make the earned income credit permanent; to the Committee on Ways and Means.

By Mr. SEIBERLING (for himself and Mr. RUPPE):

H.R. 12501. A bill to amend the Internal Revenue Code of 1954 to encourage the modernization of manufacturing plants by providing an additional investment credit for machinery placed in service in existing manufacturing plants or in nearby plants; to the Committee on Ways and Means.

By Mr. STANTON:

H.R. 12502. A bill to extend the authority of the Secretary of the Treasury to make loans under the New York City Seasonal Financing Act of 1975 for a period of 3 years; to the Committee on Banking, Finance and Urban Affairs.

By Mr. WIGGINS (for himself, Mr. HYDE, Mr. SAWYER, Mr. HUGHES, and Mr. EVANS of Georgia):

H.R. 12503. A bill to provide procedures for determining the validity of a ratification of an amendment to the Constitution of the United States, and for other purposes; at the Committee on the Judiciary.

By Mr. CHARLES H. WILSON of California:

H.R. 12504. A bill to amend title 5, United States Code, to revise the pay structure for Federal air traffic controllers; to the Committee on Post Office and Civil Service.

By Mr. FLIPPO (for himself, Mr. TEAGUE, Mr. FUQUA, Mr. McCORMACK, Mr. WYDLER, and Mr. WINN):

H.R. 12505. A bill to provide for a research, development, and demonstration program to determine the feasibility of collecting in space solar energy to be transmitted to Earth and to generate electricity for domestic purposes; to the Committee on Science and Technology.

By Mr. BEDELL (for himself, Mr. DOWNEY, Mr. LAFALCE, Mr. CARR, and Mr. NOLAN):

H.R. 12506. A bill to amend the Internal Revenue Code of 1954 to provide graduated corporate income tax rates; to the Committee on Ways and Means.

By Mr. GRASSLEY (for himself, Mr. NOLAN, Mr. HALL, Mr. PRICE, and Mr. QUIE):

H.R. 12507. A bill to establish a separate community development program for units of general local government which have a population of 20,000 or fewer individuals and are located in nonmetropolitan areas; jointly, to the Committees on Agriculture, and Banking, Finance and Urban Affairs.

By Mr. HARRIS (for himself, Mr. SISK, Mr. EILBERG, Mr. EDWARDS of California, Mr. HALL, Mr. EVANS of Georgia, Mr. FISH, Mr. SAWYER, Mr. FRENZEL, and Mrs. FENWICK):

H.R. 12508. A bill to amend the Immigration and Nationality Act to facilitate the admission into the United States of more than two adopted children, and to provide for the expeditious naturalization of adopted children; to the Committee on the Judiciary.

By Ms. HOLTZMAN (for herself, Mr. EILBERG, Mr. HALL, Mr. HARRIS, Mr. EVANS of Georgia, Mr. FISH, and Mr. SAWYER):

H.R. 12509. A bill to amend the Immigration and Nationality Act to exclude from admission into, and to deport from, the United States all aliens who persecuted any person on the basis of race, religion, national origin, or political opinion, and for other purposes; to the Committee on the Judiciary.

By Mr. MITCHELL of Maryland:

H.R. 12510. A bill to amend the Federal Reserve Act respecting the positions of Chairman and Vice Chairman of the Federal Reserve Board; to the Committee on Banking, Finance and Urban Affairs.

By Mr. PERKINS (for himself, Mr. QUIE, Mr. FORD of Michigan, Mr. ANDREWS of North Carolina, Mr. BLOUIN, Mr. SIMON, Mr. ZEFERETTI, Mr. MOTTL, Mr. MURPHY of Pennsylvania, Mr. WEISS, Mr. HEFTEL, Mr. CORRADA, Mr. KILDEE, Mr. MILLER of California, Mr. BUCHANAN, Mr. PRESSLER, Mr. GOODLING, Mrs. PETTIS, Mr. PURSELL, and Mr. JEFFORDS):

H.R. 12511. A bill to extend for 1 year the child care food program of the National School Lunch Act and the women, infants, and children program of the Child Nutrition Act of 1966; to the Committee on Education and Labor.

By Mr. STEERS (for himself, Mr. FISHER, Mr. FAUNTROY, Mrs. HOLT, Mrs. SPELLMAN, and Mr. HARRIS):

H.R. 12512. A bill to amend the Federal Aviation Act of 1958 in order to require the Administrator of the Federal Aviation Administration to prepare and put into effect comprehensive noise abatement plans for airports operated by the Administrator; to the Committee on Public Works and Transportation.

By Mr. MATHIS:

H.R. 12513. A bill to amend the Commodity Exchange Act for the purposes of revising certain violations of such act, establishing restitution procedures with respect to such violations, and authorizing civil forfeiture proceedings with respect to such violations, and for other purposes; jointly to the Committees on Agriculture, and the Judiciary.

By Mr. MOORE (for himself, Mr. RUSSO, Mr. SATTERFIELD, Mr. SCHULZE, Mr. SKUBITZ, Mrs. SMITH of Nebraska, Mr. SNYDER, Mr. STEERS, Mr. STEIGER, Mr. TAYLOR, Mr. TRIBLE, Mr. VANDER JAGT, Mr. WALKER, Mr. WALSH, Mr. WIGGINS, Mr. WINN, Mr. WYDLER, Mr. YOUNG of Alaska, Mr. ASHBROOK, Mr. BROWN of Michigan, Mr. BURLISON of Missouri, Mr. COUGHLIN, Mr. CRANE, Mr. DERWINSKI, and Mr. DORNAN):

H.J. Res. 883. Joint resolution designating July 1, 1978, as "National Free Enterprise Day"; to the Committee on Post Office and Civil Service.

By Mr. SOLARZ:

H.J. Res. 884. Joint resolution to establish a Presidential Commission to develop plans for a memorial to the victims of the Holocaust; to the Committee on House Administration.

By Mr. YATRON:

H.J. Res. 885. Joint resolution extending the deadline for the ratification of the equal rights amendment; to the Committee on the Judiciary.

By Mr. D'AMOURS:

H. Con. Res. 600. Concurrent resolution disapproving proposed regulations of the Department of the Treasury requiring centralized registration of firearms and other matters; jointly, to the Committees on the Judiciary, and Ways and Means.

By Mr. DODD:

H. Con. Res. 601. Concurrent resolution disapproving the proposed export of low-

THE POST OFFICE—PITTSBURG.

The Pittsburgh History & Landmarks Foundation

VOLUME I NUMBER THREE

BOUQUETS AND BRICKBATS: The Fourth Avenue Post Office

This special newsletter inaugurates a new feature with us that will come to you from time to time as a Bouquets and Brickbats feature. We want you, our members and our strongest supporters, to know exactly what is going on in preservation in Pittsburgh.

We fought the good fight last spring to bring back four wooden eagles that the General Services Administration of the Federal Government had removed from our Fourth Avenue Post Office and carted off without any permission or authority from the Parking Authority of Pittsburgh, whose property the building had then become. Bouquets to the Parking Authority, who helped us retrieve them, and brickbats to the GSA who simply thought no one in Pittsburgh would care to regain the eagles.

Next we rescued a large number of marble and carved wooden ornaments from the interior, and ten of the stone Keystones from the exterior were given to us. We also retrieved and donated two other Keystones to the Borough of Oakmont to be placed in a public park. Our artifacts will be on display at the Garden Market at the Pittsburgh Garden Center in the spring.

Now we have concluded the third chapter, that of the Ladies of Stone of the Post Office. To obtain the statues we were obligated to pay the demolition company for all costs in bringing them down from the roof. These costs came to $5,977.68.

We initiated a public campaign to obtain the needed funds and we were immediately joined by the Pittsburgh Post Gazette, who ran a series of articles about the statues and our research into their past.

The history proved to be mysterious, however, and we called upon Congressman James G. Fulton, who asked the Library of Congress to join the hunt. The search through all the contracts and disbursements for the building at the Library of Congress was abortive, and the mystery remains.

Jason Flake, morning disc jockey on radio station WTAE, also joined the campaign and ran a series of pleas and anecdotes concerning the statues and requesting funds to save them.

Both the Post Gazette and WTAE worked very diligently and persuasively for the Ladies of Stone and we offer bouquets and gratitude to them.

However, the time came when the contractor had to remove the statues because of the demolition work, but not enough funds were secured. We then released our claim to the statues and expected them to be toppled. Mr. Michael Peluce, President of American Demolition Company, which was doing the work,

decided at his own risk to hire a special crane to lift the statues down and pay the bills and allow us to continue the public campaign for funds.

He in no way obligated us to paying these costs but offered to bring them down as a public service and as a gesture of faith in their value and confidence in the necessity that they remain as visual representatives of this significant government building.

Mr. Peluce is the hero of this story because without his confidence, his sense of public duty, and his time and effort, the statues would have been smashed by the headache ball.

The campaign was carried on for some weeks during which time the Allegheny County Redevelopment Authority entered into a contract with us in the form of a letter from its Executive Director offering to make up the amount of funds needed to rescue the statues that were not collected in the public subscription by a date to be mutually agreed upon. In exchange for this, the Redevelopment Authority would receive one set of statues to be placed in one of its public redevelopment projects.

Our officers accepted this contract in writing but when the campaign drew toward its conclusion, the Authority had a sudden change of heart and it repudiated its letter and backed out of the deal. A great many pleas were made to the Authority to uphold its commitment to this public enterprise but they were unavailing. Brickbats!

To us the real danger of the behavior of this agency is in the fact that if such behavior is condoned in public representatives of the people, ordinary citizens may give in without any struggle. We of the Landmarks Foundation will fight against any such apathy on the part of the citizens and we intend to go on struggling to save Pittsburgh's heritage.

Subsequently we closed our campaign with a total of $2000.00 having been raised. Bouquets to all of our members and friends who donated to the campaign.

In the meantime the statues were moved to the main gate of the Westinghouse East Pittsburgh plant, and the employees of this plant joined in the public subscription. Because of high interest there, we were asked if the employees could obtain a set of statues if they raised the funds, and we agreed. Our original intention was to ensconce one set of statues in the park that will replace the Fourth Avenue Post Office. We had no designation for the other set.

We then notified Mr. Peluce the total of the funds raised and, again acting in the best interest of the city, he requested that we pay the minimal cost of the removal of one set, $2300.00. We agreed and subsidized the purchase from our general funds.

Another unexpected change of plans occurred at this time. The Parking Authority disallowed placing the statues on the site of the Post Office because they would interfere with the parking lot that is temporarily there.

After searching for other accommodations for the set of statues, we accepted a request from The Edge, a new motel being built in Mt. Washington, for the statues. Lacking a fully public place for them and being assured that the statues would be on public view at street level, we agreed to sell the statues to The Edge under a written contract that requires the motel to sell the statues back to us if at any time in the next twenty years they decide they do not want them.

Recently we had the statues moved to the new site and they are now on full view at the eastern end of Grandview Avenue opposite the Monongahela Incline.

Here where viewers can see not only the statues but the entire city, the rivers, the mills, the hillsides with their housing and churches, the Ladies of Stone stand as emblems of the magnificent old Post Office that Pittsburghers built eighty years ago.

The execuses were for the birds, and we all cried "fowl". By now you have no doubt read the lengthy stories in the Pittsburgh Press about our rescue of four of the seven eagles from the Fourth Avenue Post Office, now being demolished. Early last fall the Pittsburgh Parking Authority generously donated the carved wooden birds to us to preserve. However, the General Services Administration of the Federal Government, which was selling the building to the Authority, barred our admission until the latter took possession. During the interval G.S.A. stripped out some of the ornaments of the building, including our eagles, and quietly shipped them off to New York. Our officers and staff flapped their wings over it, and began to probe the matter. They informed the New York and Washington offices of G.S.A. as well as the National Trust for Historic Preservation, the Pennsylvania Historical Commission, and several Congressmen. After reams of letters and hours of conversations, the battle was won, and G.S.A. returned four of the eagles -- uncrated -- to us. Now together with the Mayor we are looking for some permanent nests.

A FOWL STORY

Our bus excursion to Old Economy in May, in spite of rain, was an unusual and pleasant experience. Taken through many areas of the buildings off limits to other tour groups we were also the first group in many years to participate in a "love feast". Next on the list is a late summer bus tour to Latrobe and Greensburg, and then a spring picnic trip to Evergreen Hamlet.

TOURS

A recent letter to the Pittsburgh Press reads as follows: "We have heard Renaissance talked about so much in Pittsburgh that we believe it the only thing worth striving after here. What makes old cities attractive? All this new construction? No, it is the blending of the old and the new which captivates. This is what makes Washington so alluring: the architecture of every era of our national life is represented there -- and diligently cared for. Not so our materialistic community. Here everything that in any way smacks of old age, no matter how noble, must be done away with. We had a lovely City Hall on Smithfield Street with famous windows and staircase. We had to destroy it. In our Fourth Avenue post office we had one of the most charming edifices of its kind in the nation: the wood panelling, wrought ironwork and marble were an inspiration to look upon. Why couldn't the Mayor or the County Commissioners have converted this building into a headquarters? Do we fear the atmosphere of our great past might influence some of our officials to more enobling behavior? No, we are too much involved with tearing down, building and relegating the labor and money investment of the past to the dump heap. We have no reverence for what has gone before. Are we a people of culture who so imperturbably practice such wantonness? I think we are the only old city in the nation which does not maintain a venerable building in its Downtown as a reminder of its historic heritage. With all our money, how woefully immature we are!"

HEAR! HEAR!

IN THE ANNUAL GOLDEN QUILL AWARDS, OUR PUBLICATION LIVERPOOL STREET TIED FOR SECOND PLACE AS THE BEST SINGLE PUBLICATION IN WESTERN PENNSYLVANIA LAST YEAR. THE AWARD WAS BASED ON RESEARCH, WRITING, DESIGN, AND PRINTING.

The Fourth Avenue Post Office is now rubble. But having retrieved the eagles, we are now trying to save the "Ladies of Stone" that stood on the high pediment of the Third and Fourth Avenue elevations. It seems fitting to us that at least one set of the two groups of three be placed in the new park that will replace the Post Office. We have yet to decide what public area the other set should be ensconced in. First, however, we must raise the cost of hoisting them with a special crane: $6,977.68. A flyer enclosed explains our mission.

OLD POST OFFICE

NEW OFFICES: 906 Benedum-Trees Building, Pittsburgh, Pennsylvania 15222. 281-1627