INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES

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INTRODUCTION

A United States magistrate judge is a judicial officer of the United States district court. The authority that a magistrate judge exercises is the jurisdiction of the district court itself, delegated to the magistrate judge by the district judges for the court under governing statutory authority and local rules of court.

Magistrate judges serve as adjuncts to the Article III district courts and not as Article I judges. Congress has clearly provided that a magistrate judge's role is to assist Article III judge rather than serve as a lower tier court. The Judicial Conference of the United States has expressed the view that Congress should establish all causes of action in the district court and avoid mandating the reference of particular types of cases or proceedings to magistrate judges.

The statutory authority of United States magistrate judges is set forth in the Federal Magistrates Act of 1968 (Pub. L. No. 90-578), as amended. The specific provisions of the Act that govern magistrate judge authority are found at 28 U.S.C. § 636 and 18 U.S.C. § 3401. In addition, other statutory grants of authority to magistrate judges appear throughout the United States Code.

The INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES is the result of a recommendation of the Federal Courts Study Committee to Congress in1990 that a catalog of all cases relating to the authority of magistrate judges be compiled and made available to district judges and magistrate judges. This is the fourth edition of the INVENTORY, updating and replacing earlier editions published in 1991, 1995, and 1999.

Court decisions discussing various duties referred to magistrate judges are listed by circuit. There are hyperlinks to Westlaw for case, rule, and statutory citations. The INVENTORY also lists duties that have not been addressed specifically in case law or by statute that some districts are known to refer to magistrate judges.

Questions concerning the INVENTORY and magistrate judge authority in general should be addressed to the Judicial Services Office.

§ 1. COMMISSIONER DUTIES UNDER 28 U.S.C. § 636(a)(1): FELONY PRELIMINARY PROCEEDINGS

Section 636(a) of Title 28 states in relevant part:

> Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where the court may function, and elsewhere as authorized by law--
>
> (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

The Federal Magistrates Act of 1968 established the United States magistrate judge system, building upon and superseding the 175-year old United States commissioner system. A major area of responsibility for United States commissioners were preliminary proceedings in federal felony cases. Section 636(a) establishes that felony preliminary proceedings are basic duties performed by virtually all United States magistrate judges. What follows is a discussion of the various felony preliminary proceedings assigned to magistrate judges under this provision.

A. Arrest Warrants, Summonses, & Acceptance of Criminal Complaints [Fed. R. Crim. P. 3 & 4]

Federal Rule of Criminal Procedure 3 states:

> The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge, or, if none is reasonably available, before a state or local judicial officer.

Federal Rule of Criminal Procedure 4(a) further provides:

> If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it....

Together, these rules establish the authority of magistrate judges to accept criminal complaints and to issue arrest warrants and summonses on such complaints.

2d Circuit:

Martel v. Town of South Windsor, 562 F. Supp. 2d 353 (D. Conn. 2008)

A reviewing court should pay great deference to the determination of a neutral magistrate judge that probable cause existed to issue a warrant.

4th Circuit:

United States v. Doe, 564 F. Supp. 2d 480 (D. Md. 2008)

A defendant's waiver of his right to a speedy initial appearance under Fed. R. Crim. P. 5 did not relieve the government of its responsibility to bring the defendant "forthwith to the nearest magistrate judge" pursuant to the specific language of the arrest warrant signed by the magistrate judge. (Opinion by a magistrate judge.)

Emswiler v. McCoy, 622 F. Supp. 786 (S.D. W. Va. 1985)

A magistrate judge is entitled to judicial immunity for issuing an arrest warrant and certifying that a complaint for summons was filed under oath.

7th Circuit:

United States v. Hondras, 296 F. 3d 601 (7th Cir. 2002)

An arrest warrant signed by a deputy clerk was nonetheless valid where a magistrate judge made an ultimate determination of probable cause to justify issuance of the warrant.

8th Circuit:

United States v. Mims, 812 F. 2d 1068 (8th Cir. 1987)

A magistrate judge's probable cause determination is entitled to substantial deference. In applying the reasoning in *Illinois v. Gates*, 462 U.S. 213 (1983), the reviewing court must determine whether the magistrate judge had a substantial basis to support his or her decision that probable cause existed to issue an arrest warrant.

9th Circuit:

United States v. Bueno-Vargas, 383 F. 3d 1104 (9th Cir. 2004), cert. denied, 543 U.S. 1129 (2005)

A magistrate judge did not err in relying on a sworn statement faxed to the magistrate judge by law enforcement officers to determine probable cause to detain an arrested defendant. Use of a faxed sworn statement as the basis for issuing a complaint satisfied the Fourth Amendment's requirement of an "Oath or affirmation" supporting probable cause, thereby legitimizing the defendant's detention for more than 48 hours before his initial appearance.

B. Search Warrants [Fed. R. Crim. P. 41]

Federal Rule of Criminal Procedure 41(b) states:

> **(b) Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government:
>
> **(1)** a magistrate judge with authority in the district — or if none is reasonably available, a judge of a state court of record in the district — has authority to issue a warrant to search for and seize a person or property located within the district;
>
> **(2)** a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the

district when the warrant is issued but might move or be moved outside the district before the warrant is executed;

(3) a magistrate judge — in an investigation of domestic terrorism or international terrorism — with authority in any district in which activities related to the terrorism may have occurred, has authority to issue a warrant for a person or property within or outside that district; and

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both; and

(5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following:

(A) a United States territory, possession, or commonwealth;

(B) the premises--no matter who owns them--of a United States diplomatic or consular mission in a foreign state, including any appurtenant building, part of a building, or land used for the mission's purposes; or

(C) a residence and any appurtenant land owned or leased by the United States and used by United States personnel assigned to a United States diplomatic or consular mission in a foreign state.

Rule 41 establishes a basic duty of magistrate judges to issue search warrants after the review of supporting applications and affidavits. The authority to issue search and arrest warrants extends not only to criminal search warrants sought under the dictates of the Fourth Amendment, Fed. R. Crim. P. 4 and Fed. R. Crim. P. 41, but also to administrative search and inspection warrants requested under a variety of federal statutes.

As noted, Fed. R. Crim. P. 41 allows "a federal law enforcement officer or an attorney for the government" to request a search warrant. For purposes of Rule 41, a federal law enforcement officer is defined as "a government agent...who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant." (See, Fed. R. Crim. P. 41). The phrase "attorney for the government" is defined in Fed. R. Crim. P. 1.

A large number of federal agencies are authorized to seek search warrants under criminal and administrative investigation statutes. Certain agencies also have the authority to seize private property under civil and criminal forfeiture statutes. A full listing of all the statutes authorizing the use of search and seizure warrants by federal agencies is outside the scope of this study. *See* 28 C.F.R. § 60.2 and 28 C.F.R. § 60.3 for lists of the federal law enforcement officers and agencies authorized to request warrants.

1. Scope of Magistrate Judge Authority

Supreme Court:

Illinois v. Gates, 462 U.S. 213 (1983)

A magistrate judge's task is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found.

2d Circuit:

United States v. Hunter, 13 F. Supp.2d 574 (D. Vt. 1998)

In considering an application for a search warrant, a magistrate judge makes a practical, common sense decision whether under the totality of the circumstances there is a fair probability that evidence of a crime will be found in a particular place. A reviewing court should accord great deference to the magistrate judge's decision. Although the warrant issued by the magistrate judge in the case at bar, which permitted the search of all of the defendant's computers, was overbroad, it was executed in good faith and the evidence found would not be suppressed.

3d Circuit:

In re Search of Scranton Housing Authority, 487 F. Supp. 2d 530 (M.D. Pa. 2007)

A magistrate judge did not have authority under the Federal Magistrates Act to rule on a party's motion under Fed. R. Crim. P. 41 to unseal the application and affidavit in support of a search warrant and to return property seized after execution of the warrant. Such rulings did not constitute "powers and duties conferred or imposed upon United States commissioners" under 28 U.S.C. § 636(a).

United States v. Slaey, 433 F. Supp. 2d 494 (E.D. Pa. 2006)

A magistrate judge's order authorizing the government to execute a search warrant without providing copies of the attachments to the warrant to the property owner violated Fed. R. Crim. P. 41 and warranted suppression of any evidence seized pursuant to the warrant.

5th Circuit:

United States v. Davis, 226 F. 3d 346 (5th Cir. 2000), cert. denied, 531 U.S. 1181 (2001)

When the written affidavit is adequate to support issuance of the warrant, the warrant will not be invalidated because the magistrate judge elicited statements that were not recorded.

6th Circuit:

United States v. Chaar, 137 F. 3d 359 (6th Cir. 1998)

A telephonic search warrant issued by a magistrate judge under Fed. R. Crim. P. 41 was valid, even when the magistrate judge lost the tape recording of the warrant procedure mandated by the rule. The defendant could not demonstrate that loss of the recording was intentional or prejudicial.

United States v. Campbell, 525 F. Supp. 2d 891 (E.D. Mich. 2007)
A telephonic request for a search warrant was either not recorded by the magistrate judge or was lost. This violation of Fed. R. Crim. P. 41 was not, however, a basis for suppression of the evidence. The mistake was made by the magistrate judge or staff, there was no evidence of intentional evasion of the recording requirement, and there was enough extrinsic evidence to allow the reviewing court to determine that probable cause existed to issue the warrant.

United States v. Bailey, 193 F. Supp. 2d 1044 (S.D. Ohio 2002)
A package was moved from the Southern District of Ohio to the Northern District of Ohio. Upon its arrival in the Northern District, the package was examined by a canine unit, an affidavit for a search warrant was prepared, and a warrant was issued to search the package. The affiant (a postal inspector who facilitated movement of the package) did not know until after the search warrant issued that the county to which the package was originally mailed was not in the Northern District of Ohio. Furthermore, the affiant did not know of any canine unit that was locally available, and there was no factual basis to conclude that the package was moved for the purpose of forum shopping or judge selection. As a result, the search warrant was not unlawfully issued, and the property to be searched was within the district served by the issuing magistrate judge in accordance with Fed. R. Crim. P. 41.

7th Circuit:
United States v. Walker, 237 F. 3d 845 (7th Cir. 2001)
A magistrate judge's failure to place an expiration date on a search warrant for a rented vehicle did not invalidate the warrant that was executed within hours of its issuance, particularly where law enforcement officers had no reason to believe that the information in the warrant was stale.

In re Search of 3817 W. West End, First Floor Chicago, Illinois 60621, 321 F. Supp. 2d 953 (N.D. Ill. 2004)
A magistrate judge had authority to require the government to provide a written protocol describing how agents would search a seized computer before issuing the search warrant. (Opinion by a magistrate judge.)

In re Search of 4330 N. 35th St., Milwaukee, Wis., 142 F.R.D. 161 (E.D. Wis. 1992)
Under Fed. R. Crim. P. 41 and local rules, a magistrate judge not only had authority to issue a search warrant, but also had authority to rule on a defendant's motion for return of seized property without an independent civil or criminal action pending.
(Opinion by a magistrate judge.)

8th Circuit:
United States v. Mutschelknaus, 564 F. Supp. 2d 1072 (D.N.D. 2008)
A forensic analysis of the defendant's computer and electronic storage media took place within a reasonable time after execution of the search warrant and did not violate the Fourth Amendment or Fed. R. Crim. P. 41, which requires that a search warrant be executed within 10 days of its issuance. The computer and storage media were seized within

the 10-day time limit established in the search warrant, and the forensic analysis took place within the 60-day period granted by the magistrate judge.

9th Circuit:

In re Search of Yahoo, Inc., 2007 WL 1539971 (D. Ariz. 2007)

18 U.S.C. § 2703(a) authorizes a district court, located in the district where the alleged crime occurred, to issue search warrants for the production of electronically-stored evidence in another district. Fed. R. Crim. P. 41(b) does not limit the authority of a district court to issue out-of-district warrants under §2703(a) because Rule 41(b) is not procedural in nature and therefore does not apply to §2703(a). (Opinion by a magistrate judge).

11th Circuit:

United States v. McCoy, 678 F. Supp. 2d 1336 (M.D. Ga. 2009)

A district judge ruled that a magistrate judge's denial of the government's search warrant application in one district could not be used by a defendant as res judicata to justify dismissal of the defendant's indictment on obscenity charges in another district. [See Information Memorandum No. 316 for a more detailed summary of this case.]

In re Search Warrant, 2005 WL 3844032 (M.D. Fla. 2005)

A district court may issue out-of-district warrants pursuant to 18 U.S.C. § 2703(a), using the procedures described in Fed. R. Crim. P. 41 in non-terrorism-related cases. Fed. R. Crim. P. 41, because it is not procedural, does not impair the ability of a district court to issue out-of-district warrants under 18 U.S.C. § 2703(a).

2. Magistrate Judge Authority to Rule on Motion to Return Property Under Fed. Rule Crim. P. 41 Where No Underlying Criminal or Civil Case Has Been Filed in the District Court.

Federal Rule of Criminal Procedure 41(g) allows aggrieved persons to seek the return of property seized through the execution of search warrants, stating:

> **(g) Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

In the absence of an underlying criminal case or a civil forfeiture proceeding, courts have disagreed whether magistrate judges have authority under Rule 41(g) to unilaterally rule on such motions.

2d Circuit:

United States v. Douleh, 220 F.R.D. 391 (N.D.N.Y. 2003)

A district court judge adopted a magistrate judge's report and recommendation where the magistrate judge concluded he had authority to issue a report and recommendation on a defendant's motion to return property under Fed. R. Crim. P. 41 as a pretrial motion under

28 U.S.C. § 636(b) where both criminal and civil forfeiture cases were pending against the defendant and the district judge had specifically referred the motion to the magistrate judge. In dicta, the magistrate judge suggested that there might be instances where a magistrate judge could issue a dispositive final order on such a motion.

3d Circuit:

In re Search of Scranton Housing Authority, 487 F. Supp. 2d 530 (M.D. Pa. 2007)

A magistrate judge did not have authority under the Federal Magistrates Act to rule on a party's motion under Fed. R. Crim. P. 41 to unseal the application and affidavit in support of a search warrant and to return property seized after execution of the warrant where no underlying criminal or civil actions had been filed in the district court. Such rulings did not constitute "powers and duties conferred or imposed upon United States commissioners" under 28 U.S.C. § 636(a). If a separate civil action were filed for the return of the property, the magistrate judge would only have authority to rule if the parties consented to the authority of the magistrate judge under § 636(c).

6th Circuit:

In re Search of S & S: Custom Cycle Shop, 372 F. Supp. 2d 1048 (S.D. Ohio 2003)

Where no criminal proceeding existed, other than the execution of a search warrant, a magistrate judge did not have jurisdiction to rule on the plaintiff's motion under Fed. R Crim. P. 41(e) [now Rule 41(g)], which sought a purely civil remedy. In order to obtain the return of seized items and to unseal the search warrant affidavit, the plaintiff must file an independent civil action.

7th Circuit:

In re Search of 4330 N. 35th St., Milwaukee, Wis., 142 F.R.D. 161 (E.D. Wis. 1992)

Under Fed. R. Crim. P. 41 and local rules, a magistrate judge not only had authority to issue a search warrant, but also had authority to rule on the defendant's motion for the return of seized property without an independent civil or criminal action pending. (Opinion by a magistrate judge).

Matter of Search of 6731 Kennedy Ave., Hammond, Indiana, 131 F.R.D. 149 (N.D. Ind.1990)

A magistrate judge did not have authority to rule upon a motion to return property seized pursuant to a search warrant under Fed. R. Crim. P. 41 where there was no underlying criminal or civil case pending in the court. If a post-indictment Rule 41(e) [now 41(g)] motion were filed, jurisdiction may be conferred on a magistrate judge by an appropriate order of the district court entered pursuant to 28 U.S.C. § 636(b), or, it the parties consent under 28 U.S.C. § 636(c). (Opinion by a magistrate judge).

11th Circuit:

In re Search of a Single-Family Residence, 2007 WL 2114286 (M.D. Fla. 2007)

Where an individual moved for the return of property seized pursuant to a search warrant under Fed. R. Crim. P. 41, but no criminal case had yet been filed in the district court, a district judge adopted a magistrate judge's report recommending that the underlying miscellaneous case be dismissed without prejudice to the filing of an independent civil action. The magistrate judge concluded that a motion for return of property under Fed. R.

Crim. P. 41 could not be pursued in the district court unless an underlying criminal case was initiated or a separate civil case for the return of property was filed. (Opinion by a magistrate judge).

C. Initial Appearances [Fed. R. Crim. P. 5]

Federal Rule of Criminal Procedure 5 states in relevant part:

> **(a) In General.**
>
> **(1) Appearance Upon an Arrest.**
>
> **(A)** A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge ..., unless a statute provides otherwise.
>
> **(B)** A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise.

At the initial appearance, defendants are informed of their rights and the charges against them, provided counsel if necessary, released on bail or held in detention, and assigned a date for a preliminary examination. Rule 58(b)(2) of the Federal Rules of Criminal Procedure governs initial appearances in misdemeanor and petty offense cases.

2d Circuit:

United States v. Coiscou, 793 F. Supp. 2d 680 (S.D.N.Y. 2011)

A magistrate judge ruled that he had authority to dismiss a felony complaint for lack of probable cause at or after an initial appearance under Fed. R. Crim. P. 5. [See Information Memorandum No. 321 for a more detailed summary of this case.]

United States v. Turner, 367 F. Supp. 2d 319 (E.D.N.Y. 2005)

A magistrate judge ordered the government to notify alleged victims of their rights to appear at preliminary proceedings under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, after the initial appearance occurs under Fed. R. Crim. P. 5. (Opinion by a magistrate judge.)

3d Circuit:

United States v. De Graaff, 242 Fed. Appx. 828 (3d Cir. 2007)

Even though a magistrate judge failed to comply with the procedures governing initial appearances in misdemeanor cases set forth in Fed. R. Crim. P. 58, the district court's decision to affirm the defendant's conviction was not erroneous because there was a "high probability" that the error did not contribute to the conviction.

Gov. of the Virgin Islands v. Leonard A., 922 F. 2d 1141 (3d Cir. 1991)

A decision to order a pretrial psychiatric examination in a felony matter is within the magistrate judge's discretion. The court applies an abuse of discretion standard in reviewing the decision.

4th Circuit:

United States v. Doe, 564 F. Supp. 2d 480 (D. Md. 2008)

A magistrate judge ruled that a defendant's waiver of his right to a speedy initial appearance under Fed. R. Crim. P. 5 did not relieve the government of its responsibility to bring the defendant "forthwith to the nearest magistrate judge" pursuant to the specific language of the arrest warrant signed by the magistrate judge. (Opinion by a magistrate judge.)

9th Circuit:

United States v. Howard, 480 F. 3d 1005 (9th Cir. 2007)

A district-wide policy of requiring pre-trial detainees making their first appearance before a magistrate judge to wear leg shackles, which was implemented by the United States Marshal's Service after consulting with the magistrate judges, was adequately justified. Security concerns arose because of the district's practice of conducting pre-trial proceedings in a large courtroom in the presence of multiple defendants, where risks of conflict, violence, or escape were heightened; the policy was less restrictive than a prior policy that had required full restraints; and individual defendants had the option of moving the court for removal of the shackles.

United States v. Martinez-Leon, 565 F. Supp. 2d 1131 (C.D. Cal. 2008)

A magistrate judge ruled that a defendant indicted in the Eastern District of Pennsylvania, and arrested in the Central District of California would not be permitted to challenge identification testimony by a law enforcement officer through a motion to suppress at the defendant's identity hearing under Fed. R. Crim. P. 5 and Fed. R. Crim. P. 5.1. (Opinion by a magistrate judge.)

United States v. Murray, 197 F.R.D. 421 (S.D. Cal. 2000)

A magistrate judge had authority to deny a defendant's motion to conduct an initial appearance under Fed. R. Crim. P. 5 in the hospital where the defendant was admitted for treatment. (Opinion by a magistrate judge.)

D. Appointment and Assignment of Counsel [Fed. R. Crim. P. 44 & 18 U.S.C. § 3006A]

Federal Rule of Criminal Procedure 44 and 18 U.S.C. § 3006A set forth the procedures for the appointing counsel for defendants in federal criminal cases. In particular, § 3006A(b) states in relevant part:

> In every case in which a person entitled to representation under a plan approved under subsection (a) appears without counsel, the United States magistrate judge or the court shall advise the person that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the person waives representation by counsel, the United States magistrate judge or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him.

Magistrate judges accordingly have explicit statutory authority to appoint counsel for criminal defendants at the initial appearance and other proceedings. In particular, the authority of magistrate

judges to appoint counsel extends to state and federal habeas corpus proceedings under 28 U.S.C. § 2254 and 28 U.S.C. § 2255.

1st Circuit:

United States v. Coneo-Guerrero, 148 F. 3d 44 (1st Cir. 1998), cert. denied, 526 U.S. 1094 (1999)

A magistrate judge properly conducted a hearing under Fed. R. Crim. P. 44 to inquire into joint representation of multiple defendants by one attorney and to advise each defendant of his right to separate counsel.

United States v. Szpyt, 253 F.R.D. 5 (D. Me. 2008)

Pursuant to 18 U.S.C. § 3006A(f), a magistrate judge ordered a criminal defendant to reimburse the cost of court-appointed counsel after retaining successor counsel at his own expense. (Opinion by a magistrate judge.)

United States v. Dolliver, 2008 WL 1924998 (D. Me. 2008)

The defendant moved for appointment of counsel before seeking relief under 28 U.S.C. § 2255 (motion attacking sentence). The magistrate judge correctly ruled that the defendant must first file a § 2255 petition so that the court can decide whether the appointment of counsel is required in "the interests of justice" under 18 U.S.C. § 3006A(a)(2)(B).

Carmichael v. Warden, Maine State Prison, 346 F. Supp. 2d 207 (D. Me. 2004)

A magistrate judge's denial of a state habeas corpus petitioner's motion to appoint counsel was not clearly erroneous or contrary to law, even though the magistrate judge denied the motion without explanation, where the record clearly demonstrated that the petitioner was familiar with the law, and that the legal issues presented by the petition were straightforward and required no legal assistance.

5th Circuit:

United States v. Salado, 339 F. 3d 285 (5th Cir. 2003)

A magistrate judge's warnings to the defendant concerning joint representation six months before the defendant and a co-defendant appeared together before a district judge did not comply with the mandates of *United States v. Garcia,* 517 F. 2d 272 (5th Cir. 1975), and Fed. R. Crim. P. 44. Because the magistrate judge's warnings were directed to the defendant and a different co-defendant, and an explicit waiver was not obtained from the defendant, the case required remand for further proceedings.

United States v. Burraston, 178 F. Supp. 2d 730 (W.D. Tex. 2002)

During the joint representation of two defendants, counsel informed the magistrate judge that there would "probably [be] a Rule 44 problem at some point in the future." Since this was a matter of joint representation, the magistrate judge was obliged under Fed. R. Crim. P. 44 to inquire into possible conflicts of interest.

6th Circuit:

United States v. Osborne, 402 F. 3d 626 (6th Cir. 2005)

The hearing conducted by a magistrate judge concerning the defendant's purported waiver

of the right to conflict free counsel did not comply with Fed. R. Crim. P. 44(c) where the defendant was not informed of the types of conflict of interest that might arise from joint representation. In particular, the defendant was not questioned as to whether she had been fully informed by counsel of the potential concerns raised by the joint representation; the magistrate judge failed to explain the risk that counsel's representation might present; and the hearing left ambiguity concerning whether the waiver was accepted only provisionally.

United States v. Cordell, 924 F. 2d 614 (6th Cir. 1991)
The court found no violation of the defendant's Sixth Amendment right to counsel where a magistrate judge granted an attorney's motion to withdraw as counsel in a felony case and appointed the defendant new counsel who had 14 days to prepare for trial.

9th Circuit:
United States v. Hickey, 997 F. Supp. 1206 (N.D. Cal. 1998)
A magistrate judge had authority under the Criminal Justice Act to seal financial affidavits for appointment of counsel to prevent possible violation of the defendants' Fifth Amendment rights against self-incrimination. A magistrate judge also had authority to order a hearing under the CJA to determine whether the court's appointment of counsel should be terminated. (Opinion by a magistrate judge.)

E. Preliminary Hearings and Examinations [Fed. R. Crim. P. 5.1 and 18 U.S.C. § 3060]

The preliminary hearing (as identified in Fed. R. Crim. P. 5.1), or the preliminary examination (as identified in 18 U.S.C. § 3060), is an evidentiary hearing held before a magistrate judge to determine whether there is probable cause to hold a defendant who has been charged with a criminal offense by complaint for further proceedings in the district court. Federal Rule of Criminal Procedure 5.1 states in relevant part:

> **(a) In General.** If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless:
>
> **(1)** the defendant waives the hearing;
> **(2)** the defendant is indicted;
> **(3)** the government files an information under Rule 7(b) charging the defendant with a felony;
> **(4)** the government files an information charging the defendant with a misdemeanor; or
> **(5)** the defendant is charged with a misdemeanor and consents to trial before a magistrate judge.

Rule 5.1(e) further sets forth the magistrate judge's role in conducting the preliminary hearing:

> If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.

Both Fed. R. Crim. P. 5.1 and 18 U.S.C. § 3060 set forth in detail the procedural requirements for these proceedings.

1st Circuit:

United States v. Martinez-Baez, 928 F. Supp. 2d 291 (D. Mass. 2013),
A magistrate judge held that a defendant's statement at a preliminary hearing under Fed. R. Crim. P. 5.1 that he had been born in Puerto Rico did not establish probable cause that the defendant made a false claim of United States citizenship in violation of 18 U.S.C. § 911. The magistrate judge held that the Government's evidence did not establish probable cause and ordered the complaint against the defendant dismissed. Although the defendant was discharged in the instant case, the magistrate judge also ordered that the defendant might "be turned over to the authorities who have placed a detainer against the defendant with the U.S. Marshals." [See Information Memorandum No. 326 for a more detailed summary of this case.]

7th Circuit:

United States v. Rodriguez, 460 F. Supp. 2d 902 (S.D. Ind. 2006)
Under Fed. R. Crim. P. 5. 1, a magistrate judge makes a *de novo* determination of probable cause based on the facts and circumstances at the time of the preliminary hearing and for the purpose of determining only whether the accused may be held to answer at trial. The preliminary hearing does not consider whether probable cause supported the issuance of an arrest warrant or whether the officers had probable cause at the time of an arrest, inquiries for which a less-stringent standard of probable cause accommodates the different contexts of facts, circumstances, and balancing of interests that occur at the time those decisions are made. (Opinion by a magistrate judge.)

9th Circuit:

United States v. Ramirez-Cortez, 213 F. 3d 1149 (9th Cir. 2000)
The time period included in two continuances of the preliminary hearing should not have been excluded from the time limits of the Speedy Trial Act when the magistrate judge failed to make specific findings required to justify the delay.

United States v. Martinez-Leon, 565 F. Supp. 2d 1131 (C.D. Cal. 2008)
A defendant indicted in the Eastern District of Pennsylvania, and arrested in the Central District of California would not be permitted to challenge identification testimony by a law enforcement officer through a motion to suppress at the defendant's identity hearing under Fed. R. Crim. P. 5 and Fed. R. Crim. P. 5.1. (Opinion by a magistrate judge.)

United Staes v. Kang, 489 F. Supp. 2d 1095 (N.D. Cal. 2007)
A magistrate judge ruled that a defendant could not file a motion to dismiss the complaint before the expiration of the time period provided in Fed. R. Crim. P. 5.1 for a preliminary hearing or an indictment. (Opinion by a magistrate judge.)

United Staes v. Begaye, 236 F.R.D. 448 (D. Ariz 2006)
The rules of discovery in Fed. R. Crim. P. 16 were not applicable to preliminary hearings and did not contemplate the production of prosecution witness statements to the defendant at

such a proceeding. (Opinion by a magistrate judge.)

10th Circuit:

United States v. Valdez-Gutierrez, 249 F.R.D. 368 (D. N. M. 2008)

A magistrate judge should not have required reports prepared by a non-testifying author to be produced to defense counsel at a preliminary hearing where the testifying witness, was not involved in the underlying investigation and who played no role in preparing the report, even though the witness relied on the report in providing testimony.

F. Removal Proceedings [Fed. R. Crim. P. 40]

Federal Rule of Criminal Procedure 40 states in relevant part:

> **(a) In General.** A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:
>
> (i) failing to appear as required by the terms of that person's release under 18 U.S.C. §§ 3141-3156 or by a subpoena; or
>
> (ii) violating conditions of release set in another district.

Rule 40 has undergone extensive revision in recent years. In 2002, portions of former Rule 40 were relocated to Rule 5 (Initial Appearance), Rule 5.1 (Preliminary Hearing), and Rule 32.1 (Revoking or Modifying Probation or Supervised Release). In 2006, Rule 40 was amended to authorize a magistrate judge in the district of arrest to set conditions of release not only for persons who fail to appear, but also for persons who violate any other condition of their release.

2d Circuit:

United States v. Antoine, 796 F. Supp. 2d 417 (E.D.N.Y. 2011)

A district judge affirmed a magistrate judge's order of removal, finding that the magistrate judge properly applied the standard of probable cause to determine whether removal was warranted under Fed. R. Crim. P. 5 and that the government had met its burden for removal. [See Information Memorandum No. 321 for a more detailed summary of this case.]

G. Release or Detention Orders Under the Bail Reform Act [18 U.S.C. § 3141 *et seq.*]

In 1793, Congress first authorized "discreet persons learned in the law" to grant bail in federal criminal cases. Since enactment of the Bail Reform Act of 1984, 18 U.S.C. § 3141 et seq., Congress has greatly expanded magistrate judge authority to order the release or detention of criminal defendants.

1. Authority of Magistrate Judge

1st Circuit:

United States v. Zhu, 215 F.R.D. 21 (D. Mass. 2003)

A magistrate judge ruled that when a person is arrested under 18 U.S.C. § 3148(b) for violating conditions of release (other than a failure to appear) and the arrest takes place in

a district other than the district in which the arrest was ordered, the magistrate judge in the district of arrest has no power to hold a detention hearing and no power to release the defendant. Rather, the only function of the magistrate judge in the district of arrest is to hold an identity hearing, and if the person arrested is found to be the person named in the warrant, to order the defendant's removal in the custody of the U.S. Marshal to the district in which the order of arrest was issued. (Opinion by a magistrate judge.)

2d Circuit:

United States v. Havens, 487 F. Supp. 2d 335 (W.D.N.Y. 2007)

Where a defendant was charged in the Eastern District of Texas with child pornography offenses and arrested in the Western District of New York, a magistrate judge in the arresting district, reconciling seemingly contradictory decisions of the Second Circuit, ruled that 18 U.S.C. § 3142(f) conferred authority upon the magistrate judge to conduct a detention hearing prior to the defendant's removal to the prosecuting district. (Opinion by a magistrate judge.)

United States v. Carretero, 1999 WL 1034508 (N.D. N.Y. 1999)

Despite the language in 18 U.S.C. § 3143 that requires detention in certain post-plea drug cases, the district court retains the authority under Section 3145(c) to release such defendants as long as conditions exist that would preclude danger to the community or flight, and as long as exceptional reasons justify the release. Furthermore, magistrate judges are "judicial officers" who may exercise authority under Section 3145(c). (Opinion by a magistrate judge.)

4th Circuit:

United States v. McGrann, 927 F. Supp. 2d 279 (E.D. Va. 2013)

A magistrate judge held that when a defendant pleads guilty before a magistrate judge under Fed. R. Crim. P. 11, the defendant has been "found guilty," as that term is defined in the Bail Reform Act, 18 U.S.C. § 3143(a), and therefore must be immediately detained pending sentencing. [See Information Memorandum No. 326 for a more detailed summary of this case.]

United States v. Cannon, 711 F. Supp. 2d 602 (E.D. Va. 2010)

A defendant charged in one district, but arrested in another district and ordered detained by a district judge in that district, did not have a right to a detention hearing before a magistrate judge in the charging district. [See Information Memorandum No. 317 for a more detailed summary of this case.]

6th Circuit:

United States v. Fermin, 2008 WL 2741812 (E.D. Mich. 2008)

Because the magistrate judge in the arresting district entered an order of removal to another district, and not a detention order, the magistrate judge in the charging district had the authority to conduct a detention hearing.
(Opinion by a magistrate judge).

8th Circuit:

United States v. Spilotro, 786 F. 2d 808 (8th Cir. 1986), *cert. denied*, 486 U.S. 1006 (1988)
A magistrate judge of the court with original jurisdiction over the offense charged had the authority to amend the conditions of release set previously in another district by another magistrate judge. [Interpreting § 3146(e) of the Bail Reform Act of 1966.]

9th Circuit:

United States v. Peterson, 557 F. Supp. 2d 1124 (E.D. Cal. 2008)
A magistrate judge was authorized to stay her release order upon the application of the government's attorney under 18 U.S.C. § 3142(f)(2)(B), which provides that a defendant may be detained pending completion of the detention hearing. Subsection 3145(a) requires a prompt review of the motion to revoke the magistrate judge's release order, thus providing a reasonable safeguard against unduly extended detention during review.

United States v. Bibbs, 488 F. Supp. 2d 925 (N.D. Cal. 2007)
A magistrate judge ruled that the Sixth Amendment right to confront witnesses did not apply in a detention hearing under the Bail Reform Act, and that the due process clause did not require that the magistrate judge allow the defendant to subpoena the Government's witnesses for cross-examination. (Opinion by a magistrate judge.)

United States v. Cabrera-Ortigoza, 196 F.R.D. 571 (S.D. Cal. 2000)
In a detention hearing, the magistrate judge determines the weight of the proffer or whether other information, evidence or testimony, is warranted. The judicial officer presiding at the detention hearing is vested with discretion whether to allow defense counsel to call adverse witnesses. Without a proffer from the defendant that the government's proffered information is incorrect, the magistrate judge is not required to allow the defendant to cross-examine the investigators and police officers. (Opinion by a magistrate judge.)

10th Circuit:

United States v. Cisneros, 328 F. 3d 610 (10th Cir. 2003)
In accordance with 18 U.S.C. § 3145(a), a magistrate judge in the charging district had no authority to rule on the government's motion to revoke a release order issued by a magistrate judge in the arresting district. The procedural error, however, was harmless in this case because a district court judge in the district "having original jurisdiction over the offense" reviewed the detention order de novo and considered all of the evidence offered to that point.

United States v. Thurston, 2004 WL 2370696 (D. Kan. 2004)
A magistrate judge in the district of the defendant's arrest set conditions of release pertaining to federal charges filed against the defendant in Texas. In accordance with 18 U.S.C. § 3148, the magistrate judge concluded that he had authority to hold a detention hearing pertaining to charges from Texas that the defendant had violated the conditions of release set by the magistrate judge. (Opinion by a magistrate judge.)

11th Circuit:

United States v. Jeffries, 679 F. Supp. 1114 (M.D. Ga. 1988)

A magistrate judge had the discretion to control a detention hearing to prevent a pretrial matter from becoming a proceeding resembling a trial.

2. Detention of Material Witnesses

Section 3144 of Title 18 provides magistrate judges with authority to detain an individual if it is established by affidavit "that the testimony of a person is material in a criminal proceeding...." , and if it is shown that it may become impracticable to secure the presence of the person by subpoena...." The government's utilization of this statutory provision to detain material witnesses in criminal investigations has increased significantly since the terrorist attacks on the United States in September 11, 2001.

1st Circuit:

United States v. Nai, 949 F. Supp. 42 (D. Mass. 1996)

A magistrate judge ordered material witnesses from China detained after the government's affidavit established that there was a serious risk that the witnesses would flee and that no conditions of release could adequately ensure their appearance to testify, but also ordered the witnesses to be detained in a minimum security residential facility rather than in a jail. (Opinion by a magistrate judge.)

2d Circuit:

United States v. Awadallah, 349 F. 3d 42 (2d Cir. 2003), cert. denied, 543 U.S. 1056 (2005)

A magistrate judge did not err in ordering Awadallah's detention after the government moved to detain him as a material witness under 18 U.S.C. § 3144, even though no underlying criminal case had yet been filed. The material witness statute may be used to detain individuals before a criminal case is filed in federal court.

9th Circuit:

United States v. Lai Fa Chen, 214 F.R.D. 578 (N.D. Cal. 2003)

A magistrate judge ordered the depositions of detained material witnesses be taken under 18 U.S.C. § 3144 and Fed. R. Crim. P. 15 where exceptional circumstances existed justifying such depositions. (Opinion by a magistrate judge.)

10th Circuit:

United States v. Fuentes-Galindo, 929 F. 2d 1507 (10th Cir. 1991)

Depositions under 18 U.S.C. § 3144 required a party to file an affidavit establishing certain facts. A magistrate judge had no authority to implement these procedures absent such affidavits.

United States v. Lopez-Cervantes, 918 F. 2d 111 (10th Cir. 1990)

A magistrate judge had no authority under 18 U.S.C. § 3144 to detain witnesses for video depositions absent the submission of affidavits by the parties.

H. Initial Appearances and Preliminary Hearings for Defendants Where Government is Seeking Revocation or Modification of Supervised Release or Probation [Fed. R. Crim. P. 32.1]

Magistrate judges are authorized to conduct initial appearances and preliminary hearings for defendants held in custody for violating terms of probation or supervised release. Federal Rule of Criminal Procedure 32.1 states in relevant part:

> **(a) Initial Appearance.**
>
> **(1) Person In Custody.** A person held in custody for violating probation or supervised release must be taken without unnecessary delay before a magistrate judge.
>
> ***
>
> **(b) Revocation.**
>
> **(1) Preliminary Hearing.**
>
> **(A) In General.** If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.

Rule 32.1(a)(5) also sets forth detailed procedures that apply when a defendant is arrested in a district that does not have jurisdiction to conduct the final hearing to revoke supervised release or probation. Rule 32.1(a)(6) also authorizes magistrate judges to release or detain defendants under 18 U.S.C. § 3143(a) pending further proceedings.

4th Circuit:

Julian v. United States, 2007 WL 1960589 (D. S. C. 2007)

A delay of less than one month between being taken into federal custody and appearing before a magistrate judge does not violate Fed. R. Crim. P. 32.1.

5th Circuit:

United States v. Brigham, 569 F.3d 220 (5th Cir. 2009)

A district judge had authority to stay, review, and reverse a magistrate judge's order dismissing a supervised release revocation proceeding under Fed. R. Crim. P. 32.1 after the magistrate judge had determined that probable cause had not been shown that the defendant had violated the terms of his supervised release. [See Information Memorandum No. 313 for a more detailed summary of this case.]

6th Circuit:

United States v. Curtis, 237 F. 3d 598 (6th Cir. 2001)

A magistrate judge's probable cause determination in a revocation of supervised release proceeding under Fed. R. Crim. P. 32.1 constitutes a preliminary, non-dispositive matter, and

the district court must apply a clearly erroneous standard of review.

7th Circuit:
United States v. Reyes-Gutierrez, 2008 WL 3538575 (E.D. Wis. 2008)
The defendant had a right to a preliminary hearing before a magistrate judge in the Southern District of Texas, from which the arrest warrant issued for alleged violations of the conditions of supervised release that occurred in Texas, but the hearing need not be held within ten days. The court noted that the district court in Texas would have to decide if the government acted with appropriate dispatch in this case.

8th Circuit:
United States v. Pardue, 363 F. 3d 695 (8th Cir. 2004)
The requirements of Fed R. Crim. P. 32.1(a)(1) did not apply when the defendant was also being detained on state law charges of aggravated robbery and aggravated assault. Rule 32.1 serves to protect the probationer from undue federal incarceration and the probationer's ability to defend against allegations that conditions of supervised release or probation have been violated. Because of the pending state law charges, no undue federal incarceration occurred in this case. Furthermore, because the probationer appeared with counsel before a district judge or a magistrate judge three separate times without requesting a Rule 32.1 hearing, the probationer was found to have waived his right to such a hearing.

9th Circuit:
United States v. Jeremiah, 493 F. 3d 1042 (9th Cir. 2007)
A defendant waived his right to a preliminary hearing before a magistrate judge under Fed. R. Crim. P. 32.1 by failing to raise the issue with either the magistrate judge or the district judge.

10th Circuit:
United States v. Horney, 47 Fed Appx. 869 (10th Cir. 2002)
An almost four-month delay between the defendant's detention for violations of the terms of supervised release and his appearance before a magistrate judge did not warrant overturning the release revocation decision or the resulting sentence, where the defendant failed to identify any prejudice resulting from the failure to hold a more prompt hearing.

I. Other Duties

Magistrate judges currently perform a variety of other duties analogous to commissioner duties for the district courts. These duties are not described in the Federal Magistrates Act, and the statutes authorizing such duties do not specify the involvement of magistrate judges. The authority of magistrate judges to perform these duties has not been addressed in case law, but it is assumed by the courts where magistrate judges now perform such duties to be derived from the general authority of the Federal Magistrates Act and of the district court itself. This list should not be considered all-encompassing.

The Judicial Services Office recognizes that the following duties are referred to magistrate judges in various districts around the country, often under local rules. The duties are listed to suggest how

different courts have utilized magistrate judges over the last forty years.

- Orders of Entry (I.R.S. administrative proceedings.)
- Nebbia Hearings (Hearings to determine the source of bail provided on behalf of a criminal defendant.)
- Warrants to Gain Access to Telephone and Toll Records (18 U.S.C. § 2703.)
- Peace Bonds (50 U.S.C. § 23**)**
- Orders for Line-ups, Blood Samples and Fingerprints
- Orders Sealing or Unsealing Documents Filed with the Clerk of Court
- Creation and Administration of Collateral Forfeiture Plan

§ 2. EXTRADITION PROCEEDINGS AND OTHER DUTIES UNDER § 636(a)

A. Extradition Proceedings [18 U.S.C. § 3184]

Extradition proceedings are governed by 18 U.S.C. § 3181 *et seq*. Section 3184 provides that "any magistrate judge authorized to do so by a court of the United States" may conduct extradition proceedings under this statute.

1. Authority of Magistrate Judge

Courts have consistently rejected arguments that extradition proceedings must be presided over by an Article III judge.

2d Circuit:

Lo Duca v. United States, 93 F.3d 1100 (2d Cir.), *cert. denied,* 519 U.S. 1007 (1996)
A magistrate judge acting as an extradition officer under the statute does not exercise the judicial power of the United States, but acts in a "non-institutional capacity." The extradition statute provides a grant of authority to magistrate judges that is independent of the Federal Magistrates Act.

Austin v. Healey, 5 F.3d 598 (2d Cir. 1993), *cert. denied*, 510 U.S. 1165 (1994)
Authorizing a magistrate judge by local rule to conduct an extradition proceeding under 18 U.S.C. § 3184 did not violate Article III or the Federal Magistrates Act.

Germany v. United States, 2007 WL 2581894 (E.D.N.Y. 2007)
Section 3184 of Title 18 does not require a specific delegation of authority from a district judge to a magistrate judge so that the magistrate judge may conduct extradition proceedings. In the Eastern District of New York, magistrate judges are specifically empowered to conduct hearings and to consider evidence in extradition proceedings, and therefore the magistrate judge in the case at bar had jurisdiction to hear the extradition proceeding.

Gill v. Imundi, 747 F. Supp. 1028 (S.D.N.Y. 1990)
Judges performing the independent role of determining whether a certification of extradition will issue need not be appointed under Article III of the Constitution, but may be federal or state judges or magistrate judges at the federal or state level.

5th Circuit:

In re United States, 713 F.2d 105 (5th Cir. 1983)
The duty to certify in an extradition proceeding falls not upon the parties but upon the extraditing magistrate judge. While the decision to surrender the defendant rests in the discretion of the Secretary of State, action by the Secretary necessarily awaited a certification that the court failed to make.

7th Circuit:

DeSilva v. DiLeonardi, 125 F.3d 1110 (7th Cir. 1997), *cert. denied sub nom.*, *LoBue v. DiLeonardi*, 525 U.S. 810 (1998)

A certification of extradition issued by a magistrate judge was not an unconstitutional advisory opinion; it was no different from a search warrant or an order approving deportation. A federal court, including magistrate judges, had constitutional authority to certify petitioners for extradition.

In re Rodriguez Ortiz, 444 F. Supp. 2d 876 (N.D. Ill. 2006)

The statute governing extradition proceedings, 18 U.S.C. § 3184, authorizes a broad class of judicial officers to hear extradition cases. Federal magistrate judges are expressly authorized to hear and decide extradition cases if "authorized to do so by a court of the United States." 18 U.S.C. § 3184. In addition, the jurisdiction of federal magistrate judges in extradition proceedings has been upheld as being consistent with Article III of the Constitution.

9th Circuit:

Lopez-Smith v. Hood, 121 F.3d 1322 (9th Cir.1997)

The extradition statute that authorizes a magistrate judge's involvement in the extradition proceeding does not violate the separation-of-powers doctrine**.**

In re Extradition of Hernandez, 2008 WL 4567108 (S.D. Cal. 2008)

The magistrate judge who signs the provisional arrest warrant is not prohibited from rendering the decision on extraditability. (Opinion by a magistrate judge.)

In re Extradition of Strunk, 293 F. Supp. 2d 1117 (E.D. Cal. 2003)

Extradition proceedings are not Article III jurisprudential proceedings, and the magistrate judge had clear statutory authority to preside over an extradition proceeding.

In re Extradition of Orozco "N", 268 F. Supp. 2d 1115 (D. Ariz. 2003)

A magistrate judge presiding in an extradition proceeding did not have authority to quash a provisional arrest warrant. (Opinion by a magistrate judge.)

11th Circuit:

Noel v. United States, 12 F. Supp. 2d 1300 (M.D. Fla. 1998), *aff'd,* 180 F. 3d 274 (11th Cir. 1999) (Table disposition)

A magistrate judge's participation in an extradition proceeding does not violate separation-of-powers principles**.** The magistrate judge was authorized under § 636(a) of the Federal Magistrates Act and the extradition statute, 18 U.S.C. § 3184, to preside over extradition proceedings.

D.C. Circuit:

Ward v. Rutherford, 921 F.2d 286 (D.C. Cir. 1990), *cert. dismissed sub nom.*, *Ward v. Attridge*, 501 U.S. 1225 (1991)

The authorization of a magistrate judge to perform extradition hearings does not violate Article III. The court equates extradition authority with a determination of probable cause in a preliminary examination.

2. Scope of Magistrate Judge's Authority

Rule 1(a)(5) of the Federal Rules of Criminal Procedure states that the federal procedural rules are not applicable to "the extradition and rendition of a fugitive."

1st Circuit:

United States v. Kin-Hong, 110 F.3d 103 (1st Cir.), *stay denied sub nom*, *Lui v. United States*, 520 U.S. 1206 (1997)

A magistrate judge's inquiry at an extradition hearing was limited to a narrow set of issues concerning the existence of a treaty, the offense charged, and the quantum of evidence offered. The purpose of the evidentiary portion of the extradition hearing was to determine whether the United States, on behalf of the requesting government, had produced sufficient evidence to hold the person for trial. The district court here improperly overturned the magistrate judge's conclusion that the defendant should be certified for extradition.

Matter of Extradition of Koskotas, 127 F.R.D. 13 (D. Mass. 1989), *order modified*, 740 F. Supp. 904 (D. Mass. 1990), *aff'd*, 931 F.2d 169 (1st Cir. 1991)

A magistrate judge m1ay not inquire into motives behind a foreign nation's request for extradition. Such matters are properly left to the State Department. The limited nature of an extradition proceeding permits magistrate judges the discretionary authority to restrict the scope of evidence admitted on the issue of probable cause. (Opinion by a magistrate judge.)

2d Circuit:

Spatola v. United States, 925 F.2d 615 (2d Cir. 1991)

The magistrate judge's role in an extradition hearing is to make a probable cause determination that the defendant committed the acts presented. A magistrate judge is not obligated to make an independent probable cause determination where a copy of a foreign conviction is presented that demonstrates the defendant was present at a trial in a foreign country.

Matter of Mackin, 668 F.2d 122 (2d Cir. 1981)

A magistrate judge was authorized under 18 U.S.C. § 3184 to decide the validity of a party's political offense defenses to extradition. The magistrate judge's decision declining to certify extradition on grounds that the offenses charged were political offenses was not an appealable order.

In Matter of Extradition of Sandhu, 1996 WL 469290 (S.D.N.Y. 1996)
A magistrate judge refused to consider evidence of human rights abuses and due process violations in India where such evidence was beyond the scope of the magistrate judge's inquiry at the extradition hearing. (Opinion by a magistrate judge.)

3d Circuit:
Hoxha v. Levi, 465 F. 3d 554 (3d Cir. 2006)
In an extradition hearing, the court decides whether the defendant is subject to surrender to the requesting government, a determination that requires a finding as to whether probable cause supports the charges against the defendant. The magistrate judge did not abuse his discretion in excluding telephonic testimony of witnesses who had recanted their testimony.

Matter of Extradition of Lehming, 951 F. Supp. 505 (D. Del. 1996)
Where the proffer of probable cause at an extradition hearing is supported by an affidavit, a statement of sufficient underlying circumstances is essential if the magistrate judge is to perform his detached function and not serve merely as a rubber stamp. The magistrate judge concluded that there was insufficient evidence presented by the government at the extradition hearing to establish probable cause. (Opinion by a magistrate judge.)

4th Circuit:
Mironescu v. Costner, 480 F. 3d 664 (4th Cir. 2007), cert. dismissed, 128 S.Ct. 976 (2008)
In the extradition process, a district court judge or magistrate judge conducts a hearing to determine whether (1) there is probable cause to believe the fugitive has violated one or more of the criminal laws of the country requesting extradition; (2) the alleged conduct would have been a violation of American criminal law, if committed in the United States; and (3) the fugitive is the one sought by the foreign nation for trial on the charge. If these requirements are satisfied and the applicable treaty provides no other basis for denying extradition, the judge must certify to the Secretary of State that the fugitive is extraditable.

Atuar v. United States, 156 Fed. Appx. 555 (4th Cir. 2005), cert. dismissed, 548 U.S. 928 (2006)
When reviewing a petition for extradition for the purpose of certification, a magistrate judge is not barred by the due process clause from considering evidence submitted by the requesting government.

Plaster v. United States, 720 F.2d 340 (4th Cir. 1983)
A magistrate judge properly refused to entertain a claim of due process violation during an extradition certification proceeding since the claim was outside the scope of his statutory authority under 18 U.S.C. § 3184.

In re Extradition of Exoo, 522 F. Supp. 2d 766 (S.D. W. Va. 2007)
The court is limited to considering five factors in extradition proceedings, the first three of which are perfunctory: (1) whether the judicial officer is authorized to conduct extradition proceedings; (2) whether the court has jurisdiction over the defendant; (3) whether the applicable treaty is in full force and effect; (4) whether the crime for which extradition is sought is included within the terms of the treaty; and (5) whether there is probable cause to believe the crime for which the defendant's extradition is sought was committed and that the defendant participated in or committed it. (Opinion by a magistrate judge.)

In re Extradition of Mironescu, 296 F. Supp. 2d 632 (M.D.N.C. 2003)
The limited scope of extradition proceedings does not provide magistrate judges with jurisdiction to consider the human rights conditions of the country requesting extradition. The United Nations Convention Against Torture does not obligate magistrate judges, during an initial extradition hearing, to consider such conditions. This issue must be left for consideration by the Secretary of State and, after the Secretary's decision, any federal habeas corpus review the defendant can gain.
(Opinion by a magistrate judge.)

5th Circuit:
Matter of Extradition of Russell, 805 F. 2d 1215 (5th Cir. 1986)
A magistrate judge had authority under 18 U.S.C. § 3184 to issue a provisional arrest warrant and order provisional detention pending a formal extradition request. Bail should be denied in an extradition proceeding absent special circumstances.

9th Circuit:
Vo v. Benov, 447 F. 3d 1235 (9th Cir.), *cert. denied*, 549 U.S. 935 (2006)
The authority of a magistrate judge serving as an extradition judicial officer is limited to determining an individual's eligibility for extradition, which the magistrate judge does by ascertaining whether a crime is an extraditable offense under the relevant treaty and whether probable cause exists to sustain the charge. Part of determining whether an offense is extraditable is examining whether it falls within the "political offense" exception. If it does, the individual is not eligible for extradition.

Wang v. Masaitis, 416 F. 3d 992 (9th Cir. 2005)
A magistrate judge had authority to issue a report and recommendation on a fugitive's petition for habeas corpus appealing the magistrate judge's order of extradition issued pursuant to an extradition treaty between Hong Kong and United States, even though the petitioner did not consent to the referral to a magistrate judge.

Lopez-Smith v. Hood, 121 F.3d 1322 (9th Cir.1997)
A magistrate judge properly excluded evidence of alleged corruption in Mexico because it was not relevant to the issue of whether there was probable cause to believe that a crime occurred in a foreign country and that the defendant committed the crime.

In re Extradition of Velasco Hernandez, 2008 WL 4567108 (S.D. Cal. 2008)
An extradition magistrate judge does not weigh conflicting evidence and make factual determinations, but determines only whether there is competent evidence to support the belief that the accused has committed the charged offense. (Opinion by a magistrate judge.)

In re Extradition of Ang, 486 F. Supp. 2d 1193 (D. Nev. 2006)
In a proceeding seeking to extradite an individual to the Philippines for alleged violent crimes, the magistrate judge refused to apply the political offense exception to extradition where the individual failed to establish that his alleged crimes occurred within the context of a sustained and widespread degree of violence that would constitute a political uprising against the Philippine government.

Prasoprat v. Benov, 294 F. Supp. 2d 1165 (C.D. Cal. 2003), affirmed 421 F. 3d 1009 (9th Cir. 2005), cert. denied, 546 U.S. 1171 (2006)
An extradition magistrate judge did not violate the defendant's due process rights by denying his discovery motion seeking disclosure of information relating to the use of the death penalty as punishment for drug crimes in Thailand.

In re Extradition of Strunk, 293 F. Supp. 2d 1117 (E.D. Cal. 2003)
A magistrate judge in an extradition proceeding applies a standard similar to that used in a preliminary hearing, determining whether the evidence justifies holding the accused for trial, not whether the evidence may justify a conviction. The analysis is parallel to that used in determining whether the evidence demonstrates probable cause to charge the crime. (Opinion by a magistrate judge.)

In re Extradition of Orozco "N", 268 F. Supp. 2d 1115 (D. Ariz. 2003)
A magistrate judge presiding in an extradition proceeding did not have authority to quash a provisional arrest warrant. (Opinion by a magistrate judge.)

Matter of Extradition of Powell, 4 F. Supp.2d 945 (S.D. Cal. 1998)
A magistrate judge's function at an extradition hearing is to determine whether there is "any" evidence establishing reasonable or probable cause. The magistrate judge had no discretion as to extradition; if the magistrate judge finds sufficient evidence to sustain the charge, extradition "shall" be certified. The magistrate judge therefore lacked authority to hold a "*Franks*" hearing challenging the truthfulness of an affidavit in the extradition proceeding. (Opinion by a magistrate judge.)

11th Circuit:
Basso v. United States Marshal, 278 Fed. Appx. 886 (11th Cir. 2008)
The rule of non-inquiry prevents an extradition magistrate from assessing the receiving country's judicial system.

3. Magistrate Judge's Authority to Set Conditions of Release

2d Circuit:

In re Extradition of Kapoor, 2012 WL 2374195 (E.D.N.Y. June 22, 2012)

After the magistrate judge conducted an extradition hearing, ruled that the government had established probable cause for the charges against Kapoor, and granted the government's request for a certificate of extraditability, the government moved to revoke Kapoor's bond and remand her to federal custody. The magistrate judge ruled that even though Kapoor had been certified as extraditable, her detention was not mandatory under 18 U.S.C. § 3184, stating that Kapoor "demonstrated a confluence of factors, including a lack of diplomatic necessity and anticipated lengthy proceedings and appeals, that collectively constitute special circumstances, undercut the presumption against bail, and weigh[ed] in favor of her release [on bond]." Further noting that Kapoor had complied with all conditions of her release over the previous year, the magistrate judge concluded that Kapoor did not pose a flight risk and therefore denied the government's detention motion. [See Information Memorandum No. 325 for a more detailed summary of this case.]

In re Extradition of Sacirbegovic , 280 F. Supp. 2d 81 (S.D.N.Y. 2003), on reconsideration, 2004 WL 1490219 (S.D.N.Y. 2004)

The principle that bail is generally not available in extradition cases, absent special circumstances, was applicable to a detainee challenging his extradition to the Federation of Bosnia and Herzegovina on embezzlement charges. The detainee did not make an adequate showing of special circumstances to justify his release from detention pending his extradition hearing. (Opinion by a magistrate judge.)

4th Circuit:

United States v. Zarate, 492 F. Supp. 2d 514 (D. Md. 2007)

Since the information available at the time of the detention hearing indicated that the defendant had been officially exonerated of the crime underlying the extradition warrant, and since confinement for a crime of which the defendant had been acquitted would work a substantial injustice, special circumstances existed to override the presumption against bail in extradition proceedings. (Opinion by a magistrate judge.)

In re Extradition of Mironescu, 296 F. Supp. 2d 632 (M.D. N.C. 2003)

The Bail Reform Act, and the criteria governing the allowance and the amount of bail in United States criminal cases, are not applicable in an extradition proceeding, which is not a criminal case. The case law is settled that bail should not be granted in international extradition proceedings except in special circumstances.

5th Circuit:

Matter of Extradition of Russell, 805 F. 2d 1215 (5th Cir. 1986)

A magistrate judge should deny bail in an extradition proceeding absent special circumstances.

7th Circuit:

In re Extradition of Molnar, 182 F. Supp. 2d 684 (N.D. Ill. 2002)

A defendant sought for extradition to Hungary for an alleged crime of violence, but arrested only pursuant to a provisional complaint, was entitled to release on bail upon showing of special circumstances, despite the serious nature of the charge. (Opinion by a magistrate judge.)

9th Circuit:

Matter of Requested Extradition of Kirby, 106 F. 3d 855 (9th Cir. 1997)

A magistrate judge had authority to set conditions of release for a defendant whose extradition was sought by Great Britain for alleged terrorist activities in Northern Ireland where "special circumstances" were established to justify the conditions of release.

In re Extradition of Santos, 473 F. Supp. 2d 1030 (C.D. Cal. 2006)

Where Mexico sought the arrest and extradition of Santos on kidnaping and murder charges pursuant to provisional arrest warrants that were later ruled to be lacking in probable cause by Mexican courts, a magistrate judge ordered the release of the arrestee on bail, concluding that Santos had demonstrated two special circumstances weighing in favor of his release on bail: undue delay in resolution of the proceedings and a high degree of uncertainty regarding the merits of the extradition request. The magistrate judge also found that Santos had demonstrated that he was likely to appear for future proceedings, and that any risk of flight could be mitigated satisfactorily by the defendant's release. (Opinion by a magistrate judge.)

4. Review of Magistrate Judge's Decision

2d Circuit:

Spatola v. United States, 925 F.2d 615 (2d Cir. 1991)

A magistrate judge's order certifying extradition could not be reviewed on direct appeal because it was not a final decision of a district court under 28 U.S.C. § 1291.

Germany v. United States, 2007 WL 2581894 (E.D.N.Y. 2007)

An individual subject to extradition may have the extradition order reviewed by seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2241. A habeas court's review of an order of extradition is highly circumscribed.

Sandhu v. Burke, 2000 WL 191707 (S.D.N.Y. 2000).

The scope of review of the evidentiary findings of the extradition magistrate judge is quite deferential.

Matter of Extradition of Atta, 706 F. Supp. 1032 (E.D.N.Y. 1989)

Where a magistrate judge denied the first complaint for extradition, the government could file a second complaint in the district court, and the district judge could reverse the magistrate judge's denial of extradition after a de novo hearing.

3d Circuit:

Hoxha v. Levi, 465 F. 3d 554 (3d Cir. 2006)

An individual challenging an extradition order may not appeal directly because the order does not constitute a final decision under 28 U.S.C. § 1291, but may file a petition for habeas corpus. The reviewing court on habeas may consider only whether the magistrate judge had jurisdiction, whether the offense charged is within the treaty, and whether there was any evidence warranting the finding that there was a reasonable ground to believe the accused was guilty of the offense. A magistrate judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. The magistrate judge's finding of probable cause will be upheld if there is any competent evidence in the record to support it. A legal conclusion that an extradition treaty is currently in force is reviewed de novo.

4th Circuit:

Mironescu v. Costner, 480 F. 3d 664 (4th Cir. 2007), cert. dismissed, 128 S.Ct. 976 (2008)

Although a judge's certification of extraditability is not appealable, a fugitive may obtain limited collateral review of the certification in the form of a petition for a writ of habeas corpus. In considering the petition, the district court generally determines only whether the judge had jurisdiction, whether the charged offense is within the scope of the applicable treaty, and whether there is any evidence supporting the probable cause finding.

6th Circuit:

In re Extradition of Drayer, 190 F. 3d 410 (6th Cir. 1999), cert. denied, 528 U.S. 1176 (2000)

The scope of habeas review of an extradition action is limited. Habeas corpus is available only to inquire whether the magistrate judge had jurisdiction, whether the offense charged is within the extradition treaty and, by a somewhat liberal extension, whether there was any evidence warranting a finding that there was reasonable ground to believe the accused guilty.

9th Circuit:

Vo v. Benov, 447 F. 3d 1235 (9th Cir.), cert. denied, 549 U.S. 935 (2006)

The decision to certify an individual as extraditable cannot be challenged on direct appeal. Rather, a petition for a writ of habeas corpus is the only available avenue to challenge an extradition order. The district court's habeas review of an extradition order is limited to whether: (1) the extradition magistrate judge had jurisdiction over the individual; (2) the treaty was in force and the accused's alleged offense fell within the treaty's terms, and (3) there is any competent evidence supporting the probable cause determination of the magistrate judge. However, the "political offense" question is reviewable on habeas corpus as part of the question of whether the offense charged is within the treaty.

11th Circuit:

In re Extradition of Ghandtchi, 697 F. 2d 1037 (11th Cir. 1983)

A district judge had no inherent authority and no authority under the Extradition Act, the Federal Magistrates Act, or the court's local rules to review a magistrate judge's bail order in an extradition proceeding.

Ylipelkonen v. Thornburgh, 756 F. Supp. 570 (S.D. Fla. 1991)
In a habeas corpus proceeding to review a magistrate judge's extradition determination, the district judge will review de novo the magistrate judge's decision whether an offense falls within an extradition treaty.

B. Prisoner Transfer Proceedings To or From Foreign Countries [28 U.S.C. § 636(g) and 18 U.S.C. §§ 4107, 4108, and 4109]

Section 636(g) of Title 28 authorizes magistrate judges to perform "the verification function" under 18 U.S.C. §§ 4107, 4108 and 4109 for "offenders" wishing to transfer to or from incarceration in the United States. Before a prisoner can transfer to or from the United States, a magistrate judge must personally inform the offender of the conditions of the transfer and determine that the offender understands and agrees to them. The magistrate judge must then verify that the offender consents voluntarily to the transfer.

11th Circuit:
Bishop v. Reno, 210 F. 3d 1295 (11th Cir.), cert. denied, 531 U.S. 897 (2000)
After a magistrate judge conducted an international prisoner transfer proceeding to transfer the petitioner from the Bahamas to the United States to complete his prison sentence on Bahamian drug charges, the district court did not have jurisdiction to consider petitioner's petition for habeas corpus challenging his Bahamian sentence.

C. Oaths and Affirmations [Fed. R. Crim. P. 3 and 58; 5 U.S.C. § 2903]

Rule 3 of the Federal Rules of Criminal Procedure requires that the complaint be made upon an oath before a magistrate judge. Rule 58(d)(3) allows a statement under penalty of perjury to be substituted for an oath before the magistrate judge without the affiant being required to appear before the court in misdemeanor cases.

4th Circuit:
Emswiler v. McCoy, 622 F. Supp. 786 (S.D.W. Va. 1985)
A magistrate judge was entitled to judicial immunity for issuing an arrest warrant and certification that a complaint for summons was filed under oath.

D. Grand Jury Proceedings [Fed. R. Crim. P. 6]

Magistrate judges are authorized specifically to accept the return of an indictment from a grand jury and to seal the indictment under Fed. R. Crim. P. 6. Other duties involving grand jury proceedings may also be referred to a magistrate judge under 28 U.S.C. § 636(b). See Section 4, *infra*, for additional opinions on this issue.

1st Circuit:
United States v. Laliberte, 131 F.R.D. 20 (D. Mass. 1990)
A magistrate judge was authorized to seal indictments. (Opinion by a magistrate judge.)

2d Circuit:
United States v. Gigante, 436 F. Supp. 2d 647 (S.D. N.Y. 2006)
While the magistrate judge's decision to seal or not to seal an indictment will be accorded great deference, the decision must be the product of the magistrate judge's exercise of discretion, based not just on assumptions but on an actual explanation from the government of the need for sealing.

6th Circuit:
United States v. Wright, 343 F. 3d 849 (6th Cir. 2003), *cert. denied*, 541 U.S. 990 (2004)
A magistrate judge's decision to seal an indictment is accorded great deference.

8th Circuit:
United States v. Lakin, 875 F.2d 168 (8th Cir. 1989)
The sealing of an indictment is a ministerial act. Great deference is accorded to a magistrate judge's exercise of discretion.

United States v. Morse, 2007 WL 4233075 (D. Minn. 2007)
Where a defendant received only an unsigned copy of the sealed indictment, the defendant moved to dismiss the case, arguing that the magistrate judge erred by failing to order that the defendant be provided with a copy of the signed indictment. While it may have been preferable for the defendant to have been provided with a copy of the actual charging document rather than an unsigned copy, the magistrate judge in the case at bar concluded that the government had shown good cause why the signed indictment should not be provided to the defendant and the magistrate judge's decision was not clearly erroneous.

9th Circuit:
In re Search of 6783 East Soaring Eagle Way Scottsdale, AZ, 109 F. Supp. 2d 1162 (D. Ariz. 2000)
Noting that magistrate judges "have historically been actively involved in matters related to grand juries," a magistrate judge held that he had the authority under the Federal Magistrates Act to order the disclosure of federal grand jury testimony. (Opinion by a magistrate judge.)

10th Circuit:
United States v. Thompson, 287 F. 3d 1244 (10th Cir. 2002)
The requirement in Fed. R. Crim. P. 6 that the indictment be returned to a magistrate judge "in open court" mandates only that the grand jurors or the foreperson physically present the indictment in court while the magistrate judge is presiding.

§ 3. DISPOSITION OF PETTY OFFENSE AND CLASS A MISDEMEANOR CASES UNDER 28 U.S.C. § 636(a)(3) and 18 U.S.C. § 3401

Section 636(a)(3) of Title 28, United States Code, grants magistrate judges the power to conduct trials in misdemeanor cases under 18 U.S.C. § 3401. Before 1996, magistrate judges were authorized to try all misdemeanor cases where the defendant filed a written consent to trial by a magistrate judge and specifically waived trial by a district judge, and where the magistrate judges were specially designated by the district courts in which they served to exercise this jurisdiction. Under amendments to § 3401 and 28 U.S.C. § 636(a) enacted as part of the Federal Courts Improvement Acts of 1996 and 2000, the authority of magistrate judges to try and dispose of misdemeanor cases was expanded. Magistrate judges may now try and dispose of all infractions, Class C misdemeanor cases, and Class B misdemeanor cases without the defendant's consent. 18 U.S. C. § 3401(b).

In addition, although magistrate judges are authorized to try and dispose of all Class A misdemeanor cases only when the defendant "expressly consents to be tried before the magistrate judge" and "specifically waives trial, judgment, and sentencing by a district judge," the defendant's consent and waiver may be made either "in writing or orally on the record." 18 U.S.C. § 3401(b). Written consent and waiver by the defendant is no longer mandatory.

Magistrate judges may also impose sentences in misdemeanor cases under 28 U.S.C. § 636(a)(4) and 18 U.S.C. § 3401(a). The maximum term of imprisonment that may be imposed for a federal misdemeanor is one year (18 U.S.C. § 3581(b)(6)).

A. Authority of Magistrate Judge

1st Circuit:

United States v. Zenon-Encarnacion, 387 F. 3d 60 (1st Cir. 2004)
A magistrate judge had authority under 28 U.S.C. § 636(a)(4) and 18 U.S.C. § 3401(a) to try and sentence a defendant charged with a petty offense without the defendant's consent.

United States v. Rivera-Negron, 201 F.R.D. 285 (D.P.R. 2001)
The 2000 amendment to 18 U.S.C. § 3401, which eliminated the defendant's right to adjudication by an Article III judge and the requirement that a defendant must consent to magistrate judge authority in all petty offense cases, did not violate the United States Constitution. (Opinion by a magistrate judge.)

2d Circuit:

United States v. Posr, 463 F. Supp. 2d 434 (S.D.N.Y. 2006)
In a Class A misdemeanor prosecution of a defendant in the Southern District of New York for assaulting a federal officer, where the fact that the defendant had not consented to disposition of the case by a magistrate judge was not discovered until after a jury trial was concluded and the defendant had appealed his conviction to a district judge, the magistrate

judge who presided over the jury trial had authority to vacate the original judgment and to order the case re-assigned to a district judge.

4th Circuit:

United States v. Juvenile Male, 388 F. 3d 122 (4th Cir. 2004)
A magistrate judge has authority under 18 U.S.C. §3401(g) to dispose of a petty offense case involving a juvenile defendant without receiving certification from the Attorney General under 18 U.S.C. § 5032.

United States v. Bryson, 981 F. 2d 720 (4th Cir. 1992)
A magistrate judge's authority to accept a defendant's guilty plea and impose sentence in a misdemeanor case with the defendant's consent under 18 U.S.C. 3401 did not authorize the magistrate judge to subsequently entertain the defendant's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence, and enter an order dismissing the motion without obtaining further consent of the defendant under 28 U.S.C. § 636(c).

United States v. Ferguson, 778 F. 2d 1017 (4th Cir. 1985), *cert. denied*, 476 U.S. 1123 (1986)
Article III of the Constitution is not violated by the consensual referral of misdemeanor cases for trial by magistrate judge. The cases remain to some extent under the district judge's control.

5th Circuit:

Santos-Sanchez v. United States, 548 F.3d 327 (5th Cir. 2008)
A magistrate judge who sentenced an alien defendant for a misdemeanor immigration offense did not have authority to determine the defendant's petition for a writ of coram nobis challenging his conviction.

United States v. Hazelwood, 526 F.3d 862 (5th Cir. 2008)
A magistrate judge had authority to preside over an assault case as a Class A misdemeanor, even though the bill of information charging the defendant with the offense of assault under 18 U.S.C. § 111 on its face could have been construed as either a Class A misdemeanor or a felony offense. The court concluded under the circumstances of this case that the defendant was in fact charged with simple assault.

United States v. Johnson , 2009 WL1033773 (E.D. La. April 15, 2009)
Even though the defendant was convicted of two Class A misdemeanor charges of knowingly distributing and selling a restricted pesticide in violation of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq*. before a magistrate judge with the consent of the defendant under 18 U.S.C. § 3401, the magistrate judge held that he did not have authority to rule on the government's application for a writ of garnishment upon the entity administering the defendant's pension after the entry of a judgment of restitution against Johnson under the Mandatory Victims Restitution Act, 18 U.S.C. § 3613, and

therefore issued a report recommending that the writ be issued. The district judge thereafter approved and adopted the magistrate judge's report and recommendation and issued the writ of garnishment. [See Information Memorandum No. 315 for a more detailed summary of this case.]

United States v. Sanchez, 258 F. Supp. 2d 650 (S.D. Tex. 2003)
Magistrate judges are authorized to conduct trials and enter sentences in petty offense immigration cases under their own authority and jurisdiction, without the consent of the parties. Any conviction entered is not a report and recommendation to the district judge, but is a binding adjudication of guilt, and therefore a defendant may not file objections to such a misdemeanor conviction as if it were a non-binding recommendation made under 28 U.S.C. § 636(b).

6th Circuit:
United States v. Lee, 2010 WL 1425057 (E.D. Tenn. April 8, 2010)
A district judge ruled that the defendant's consent was not necessary under 18 U.S.C. § 3401(a) for the magistrate judge to have jurisdiction to try the case where Lee was charged with a petty offense by violation notice, and further that Lee did not have a right to a de novo trial before a district judge. [See Information Memorandum No. 316 for a more detailed summary of this case.]

United States v. Barnes, 732 F. Supp. 831 (E.D. Tenn. 1989)
The Code of Federal Regulations is given the force of law under 16 U.S.C. § 3. Magistrate judges are therefore authorized to sentence defendants who violate such regulations, and can order and revoke probation under 18 U.S.C. § 3561 *et seq*.

7th Circuit:
United States v. Gochis, 256 F. 3d 739 (7th Cir. 2001)
A magistrate judge's failure to inform a misdemeanor defendant of his right to trial by a district judge was harmless error that did not invalidate the magistrate judge's authority to dispose of the case under 18 U.S.C. § 3401 where the defendant signed a written consent form stating that he had waived his right to adjudication by an Article III judge.

9th Circuit:
United States v. Jenkins, 734 F. 2d 1322 (9th Cir. 1983), *cert. denied*, 469 U.S. 1217 (1985)
Although magistrate judges are not Article III judges, 28 U.S.C. § 636(a)(3), granting magistrate judges consensual trial authority in misdemeanor cases, does not violate the Constitution.

United States v. Byers, 730 F. 2d 568 (9th Cir.), *cert. denied*, 469 U.S. 934 (1984)
The consensual referral of misdemeanor cases to magistrate judges does not violate the Constitution. The court emphasized the curative effects of the parties' consent and control by Article III judges.

United States v. McCrickard, 957 F. Supp. 1149 (E.D. Cal. 1996)
The 1996 amendment to 18 U.S.C. § 3401, which eliminated the defendant's right to adjudication by an Article III judge and the requirement that a defendant must consent to magistrate judge authority in certain petty offense cases, does not violate Article III of the United States Constitution. (Opinion by a magistrate judge.)

10th Circuit:
United States v. Dobey, 751 F. 2d 1140 (10th Cir.), *cert. denied*, 474 U.S. 818 (1985)
Article III of the Constitution was not violated by the consensual referral of misdemeanor cases to magistrate judges. Consent under 18 U.S.C. § 3401 constitutes a valid waiver of the right to trial before an Article III judge.

B. Scope of Magistrate Judge Authority

2d Circuit:
Tocci v. United States, 178 F. Supp. 2d 176 (N.D.N.Y. 2001)
A magistrate judge's failure when taking a defendant's guilty plea to a Class A misdemeanor immigration offense to elicit a factual basis for the plea was not a mere technical, minor, or harmless error, but was one that denied the defendant's due process rights under the Fifth Amendment. In addition, the failure to advise the defendant of his right to appeal his conviction constituted a sufficiently significant breach of due process requirements to entitle the defendant to coram nobis relief. (Opinion by a magistrate judge.)

3d Circuit:
United States v. De Graaff, 242 Fed. Appx. 828 (3rd Cir. 2007)
Where a defendant was prosecuted in the District of New Jersey on petty offense simple assault and disorderly conduct charges, the magistrate judge's failure at the defendant's initial appearance to comply with the requirements of Fed. R. Crim. P. 58 by not informing the defendant of the charges against her, of the minimum and maximum penalties she was facing, her right to retain counsel, her right not to make a statement, and that any statement made might be used against her, constituted harmless error and did not mandate overturning the defendant's conviction.

4th Circuit:
United States v. Washington, 498 F. 3d 225 (4th Cir. 2007)
In the petty offense prosecution of a defendant in the District of Maryland for a DUI offense occurring on the Baltimore-Washington Parkway, the presiding magistrate judge did not abuse his discretion in entering into evidence at trial testimony of an expert witness concerning a blood sample taken from the defendant the night of his arrest and tested at the expert's lab, where the expert concluded that the defendant's blood contained phencyclidine ("PCP") and alcohol, and that the defendant's conduct during the night of his arrest was consistent with the presence of drugs and alcohol in his blood.

United States v. Pollard, 389 F. 3d 101 (4th Cir. 2004), *cert. denied*, 544 U.S. 912 (2005)
A defendant's right to counsel under the Sixth Amendment was not violated when a magistrate judge accepted the defendant's guilty plea to a misdemeanor DWI offense without the benefit of counsel and sentenced the defendant to a term of probation.

United States v. Steinert, 470 F. Supp. 2d 627 (E.D. Va. 2007)
A magistrate judge committed plain error when she failed to provide the defendant in a petty offense case an opportunity to allocute prior to the revocation of the defendant's supervised release and his sentencing for the supervised release violations.

United States v. James, 164 F. Supp. 2d. 718 (D. Md. 2001)
A delay of 20 months between trial of misdemeanor case before a magistrate judge and the entry of a judgment did not violate defendant's right to a speedy trial or to due process.

5th Circuit:
Santos-Sanchez v. United States, 548 F.3d 327 (5th Cir. 2008)
A magistrate judge who conducted a guilty plea proceeding under Fed. R. Crim. P. 11 for an alien defendant charged with a misdemeanor immigration offense was not required to inform the defendant of the immigration consequences of the guilty plea for the plea to be voluntary.

United States v. Johnson , 2009 WL1033773 (E.D. La. April 15, 2009)
Even though the defendant was convicted of two Class A misdemeanor charges of knowingly distributing and selling a restricted pesticide in violation of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 before a magistrate judge with the consent of the defendant under 18 U.S.C. § 3401, the magistrate judge held that he did not have authority to rule on the government's application for a writ of garnishment upon the entity administering the defendant's pension after the entry of a judgment of restitution against Johnson under the Mandatory Victims Restitution Act, 18 U.S.C. § 3613, and therefore issued a report recommending that the writ be issued. [See Information Memorandum No. 315 for a more detailed summary of this case.]

7th Circuit:
United States v. Van Fassan, 899 F. 2d 636 (7th Cir. 1990)
A defendant was not entitled to a new trial when the magistrate judge orally misstated the burden of proof during a bench trial in a misdemeanor case.

8th Circuit:
United States v. Scott, 945 F. Supp. 205 (D.S.D. 1996)
A magistrate judge had authority to suppress evidence obtained by police in a warrantless non-consensual probation search and arrest of the defendant on misdemeanor drug possession charge. (Opinion by a magistrate judge.)

9th Circuit:

United States v. Roblero-Solis, 588 F. 3d 692 (9th Cir. 2009),
District court's practice of having a magistrate judge conduct simultaneous guilty plea and sentencing proceedings for a large number of defendants charged with petty offense immigration offenses violates Fed. R. Crim. P. 11. [See Information Memorandum No. 315 for a more detailed summary of this case.]

United States v. Walker, 117 F. 3d 417 (9th Cir. 1997)
A magistrate judge did not abuse her discretion by admitting hearsay evidence during a proceeding to revoke a defendant's term of supervised release in a misdemeanor case.

United States v. Sweeney, 914 F. 2d 1260 (9th Cir. 1990)
A magistrate judge exceeded his authority under the Federal Magistrates Act when he ordered the United States attorney and the clerk of the district court not to report defendants' misdemeanor convictions for DUI offenses on federal enclaves to the state motor vehicle department.

United States v. Plascencia-Orozco, 768 F. 2d 1074 (9th Cir. 1985)
An inquiry regarding the defendant's identity at an arraignment was an element of the magistrate judge's administrative duties. The defendant could be charged under 18 U.S.C. § 1001, which criminalizes fraudulent statements made during administrative functions before a federal judge, when he gave a false name in executing a consent to trial of a misdemeanor before the magistrate judge.

United States v. Baca, 610 F. Supp. 2d 1203 (E.D. Cal. 2009)
A magistrate judge abused his discretion in denying a defendant's recusal motion, where the defendant moved to disqualify the magistrate judge for an appearance of a lack of impartiality after reading a newspaper article about the magistrate judge that included a photograph of the judge in his chambers with a hangman's noose. [See Information Memorandum No. 313 for a more detailed summary of this case.]

10th Circuit:

United States v. Okelberry, 112 F. Supp. 2d 1246 (D. Utah 2000)
A defendant's guilty plea before a magistrate judge for the misdemeanor offense of violating the Federal Eagle Protection Act, 16 U.S.C. § 668, was voluntary and proper even though the defendant was not informed by his counsel or the magistrate judge that he might lose his rights to graze cattle on federal property by pleading guilty. The defendant's counsel had no obligation to advise the defendant of the collateral consequences of his guilty plea.

1. Sentencing Authority

2d Circuit:
United States v. Mordini, 366 F. 3d 93 (2d Cir. 2004)
A magistrate judge erred in sentencing the defendant convicted of a misdemeanor offense to pay $9,741 in supervised probation costs where the maximum fine that defendant could be sentenced to pay under the sentencing guidelines for the offense was $5,000.

4th Circuit:
United States v. Carroll, 397 F. Supp. 2d 668 (D. Md. 2005)
After the defendant's conviction for Class A misdemeanor drug possession offenses, the magistrate judge improperly applied the Sentencing Guidelines by failing to group the multiple related drug possession counts together during the defendant's sentencing, thereby requiring the case to be remanded to the magistrate judge for re-sentencing.

5th Circuit:
United States v. Sanchez, 258 F. Supp. 2d 650 (S.D. Tex. 2003)
The magistrate judge did not have authority to consider a motion to vacate sentence under 28 U.S.C. § 2255 in a misdemeanor case, even though the magistrate judge had imposed the original sentence in the case.

6th Circuit:
United States v. Payne , 2009 WL 5062099 (S.D. Ohio Dec. 3, 2009)
A magistrate judge rejected a plea agreement, concluding that the district court did not have authority to order restitution in excess of $1,000 in a Class A misdemeanor case pursuant to the relevant statutes, 18 U.S.C. § 641 and 18 U.S.C. § 3663A , where the alleged property loss to the government resulting from Payne's theft as set forth in the government's information appeared to total only $66.15. [See Information Memorandum No. 316 for a more detailed summary of this case.]

9th Circuit:
United States v. McKittrick, 142 F. 3d 1170 (9th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999)
The magistrate judge who sentenced the defendant for the misdemeanor offense of unlawfully taking, possessing, and transporting a protected wolf did not adequately explain the basis for denying the defendant's request for reduction of sentence under the Federal Sentencing Guidelines based on the defendant's acceptance of responsibility, which therefore required remand.

10th Circuit:
United States v. Hanks, 2002 WL 1808767 (D. Kan. 2002)
A magistrate judge in a petty offense case did not improperly use alleged pending charges against the defendant as a basis for imposing a more severe sentence against the defendant

than had been recommended in the plea agreement, where the magistrate judge reasonably relied on information in the pre-sentencing investigative report.

2. Probation and Supervised Release

Section 3401(d) of Title 18 provides that "[t]he probation laws shall be applicable to persons tried by a magistrate judge under this section, and such officer shall have power to grant probation and to revoke, modify, or reinstate the probation of any person granted probation by a magistrate judge. In addition, § 3401(h) provides that "[t]he magistrate judge shall have power to modify, revoke, or terminate supervised release of any person sentenced to a term of supervised release by a magistrate judge.

2d Circuit:

United States v. Curtis, 245 F. Supp. 2d 512 (W.D.N.Y. 2003)
A district judge upheld a magistrate judge's decision that a defendant convicted on a misdemeanor larceny charge could not be required to submit a DNA sample under the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14132 *et seq.* as a condition of probation.

United States v. Leaphart, 98 F. 3d 41 (2nd Cir. 1996)
A magistrate judge erred in imposing a two-year term of supervised release on a defendant convicted for failing to appear to serve a 90-day incarceration sentence for misdemeanor bank theft, where the maximum term of supervised release that could be imposed for the offense was one year.

United States v. Jones, 1997 WL 706438 (S.D.N.Y. 1997)
A magistrate judge did not abuse her sentencing authority by requiring the defendant to seek employment as a condition of her probation for misdemeanor theft of public assistance funds.

United States v. Martinez, 988 F. Supp. 975 (E.D. Va. 1998)
A magistrate judge had authority to restrict a defendant's driving activities for six months as a condition of probation after the defendant pled guilty to a misdemeanor motor vehicle offense. The penalty restricting the defendant's ability to drive was reasonably related to the offense to which the defendant pled guilty.

United States v. Raynor, 764 F. Supp. 1067 (D. Md. 1991)
The sentencing power of 18 U.S.C. § 3401(a) is broad enough to provide a magistrate judge with authority to revoke supervised release in a case where a defendant consented to a misdemeanor trial before a magistrate judge.

8th Circuit:

United States v. Cervantes, 420 F. 3d 792 (8th Cir. 2005)

A magistrate judge did not err in imposing mandatory drug testing as a condition of probation for a defendant with a history of drug abuse who pled guilty to the misdemeanor offense of making a false statement with intent to defraud the Department of Housing and Urban Development.

United States v. Kilpatrick, 347 F. Supp. 2d 693 (D. Neb. 2004)

A magistrate judge did not abuse his discretion or order excessive punishment when he sentenced the defendants convicted of hunting violations on a national wildlife refuge to both fines and probation, including a condition of probation that barred the defendants from all hunting during the terms of their probation.

10th Circuit:

United States v. Berrios, 120 Fed. Appx. 218 (10th Cir. 2004)

A magistrate judge did not have authority to order a defendant in a misdemeanor case to undergo mental evaluation as a condition of pretrial release.

11th Circuit:

United States v. Burke, 1996 WL 170123 (M.D. Ala. 1996)

A magistrate judge had authority to sentence a misdemeanor defendant to a one-year term of imprisonment and to a one-year term of supervised release, even where the total sentence was greater than the statutory maximum term of imprisonment for a misdemeanor. Because sentences of imprisonment and supervised release are separate under federal law, a magistrate judge does not exceed his or her sentencing authority under the Federal Magistrates Act when imposing both sentences in a misdemeanor case.

3. Expungement of Conviction

2d Circuit:

United States v. Williams, 2012 WL 3886309 (W.D.N.Y. Sept. 6, 2012)

After Williams was convicted in 2005 in the Western District of New York for misdemeanor possession of marijuana, she moved in 2012 to have her conviction expunged. After noting that there was a "substantial question whether the Court has ancillary jurisdiction or inherent power to expunge a valid judicial record of conviction," the magistrate judge stated that the alleged hardships attributed by the defendant to her conviction, primarily her inability to pursue career opportunities, were "a routine collateral consequence of a criminal conviction" and are thus not the kind of "unusual and extraordinary hardship[s] that could justify the exercise of equitable jurisdiction to expunge the judicial record of the conviction." Acknowledging that Williams "seem[ed] to have paid her debt to society," the magistrate judge nevertheless denied her expungement motion. [See Information Memorandum No. 325 for a more detailed summary of this case.]

4th Circuit:

United States v. Harris, 847 F. Supp. 2d 828 (D. Md. 2012)

After Harris was convicted in 2004 in the District of Maryland for possession of a controlled substance in violation of 21 U.S.C. § 844, he moved in 2011 to have his conviction expunged. The presiding magistrate judge denied the motion, holding that the district court did not have ancillary jurisdiction to grant the defendant's motion for expungement and that he could not expunge the conviction based solely on equitable grounds. [See Information Memorandum No. 323 for a more detailed summary of this case.]

United States v. Steelwright, 179 F. Supp. 2d 567 (D. Md. 2004)

A magistrate judge had authority to expunge a misdemeanor conviction from a defendant's criminal record, but declined to do so under the particular circumstances of this case. (Opinion by a magistrate judge.)

8th Circuit:

United States v. Meyer, 439 F.3d 855 (8th Cir. 2006)

A magistrate judge erred in ordering expungement of a defendant's conviction for misdemeanor violation of income tax laws, where the defendant's motion to expunge criminal records was based solely on equitable grounds that did not invoke the district court's ancillary jurisdiction, thus deprived the district court of jurisdiction over the matter. Where the district court in general lacked jurisdiction to expunge the defendant's conviction, the magistrate judge did not have authority to expunge the conviction.

9th Circuit:

United States v. Vasquez, 74 F. Supp. 2d 964 (S.D. Cal. 1999)

By consenting to the magistrate judge's authority to dispose of a Class A misdemeanor case, the defendant conferred jurisdiction on the magistrate judge to rule upon defendant's motion to expunge the conviction. The magistrate judge, however, declined to exercise authority under the particular circumstances of this case. (Opinion by a magistrate judge.)

C. Sufficiency of Consent Under 18 U.S.C. § 3401(b) in Class A Misdemeanor Cases

In Class A misdemeanor cases, 18 U.S.C. § 3401(b) provides that a magistrate judge "may not proceed to try the case unless the defendant...expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge." The statute requires the magistrate judge to "carefully explain" to each defendant in a Class A misdemeanor case that "he has a right to trial, judgment, and sentencing by a district judge." Several courts have considered what constitutes adequate consent to the authority of the magistrate judge and waiver of the right to Article III adjudication under this provision.

3d Circuit:

United States v. Wright, 516 F. Supp. 1113 (E.D. Pa. 1981)

A defendant's mere consent to trial by a magistrate judge by itself was insufficient. The defendant must specifically waive his or her right to trial by an Article III judge.

4th Circuit:

United States v. Johnson, 2008 WL 227228 (E.D.N.C. 2008)

Where a juvenile defendant, charged with Class A misdemeanor offenses of marijuana possession and speeding violations, initially pleaded guilty and was sentenced to probation by a magistrate judge, and where, after the defendant's term of probation was revoked by the magistrate judge, the government conceded that the defendant had not consented to the magistrate judge's jurisdiction, that the defendant was not advised by the magistrate judge of his right to trial by a district judge or by jury, and that he had not signed a consent form, the district judge vacated the judgment of the magistrate judge.

5th Circuit:

United States v. Edgington, 727 F. Supp. 1083 (E.D. Tex. 1989), *aff'd*, 897 F.2d 527 (5th Cir.), *cert. denied*, 495 U.S. 952 (1990)

The defendant's failure to object to the reference of a misdemeanor case to a magistrate judge until after the judgment was entered constituted waiver. Under local court rules, the special designation of a magistrate judge to exercise misdemeanor jurisdiction was not necessary.

7th Circuit:

United States v. Gochis, 256 F. 3d 739 (7th Cir. 2001)

A magistrate judge's failure to inform a misdemeanor defendant of his right to trial by a district judge was harmless error that did not invalidate the magistrate judge's authority to dispose of the case under 18 U.S.C. § 3401 where the defendant signed a written consent form.

8th Circuit:

United States v. Cervantes, 420 F. 3d 792 (8th Cir. 2005)

In a case where the defendant pled guilty to a Class A misdemeanor before a magistrate judge, although the defendant's consent did not expressly appear in the record on appeal, 28 U.S.C. § 636(a)(5) did not require that the consent be in writing. In the case at bar, the docket entries showed that the case was assigned to the magistrate judge *ab initio,* all the proceedings were conducted by him, and the defendant made no objection, either in the district court or on appeal, to the magistrate judge's role as the sentencing judge. Although the appellate court found no reason to doubt that the defendant gave his consent, either expressly or by clear implication, to having the magistrate judge serve as the sentencing judge, the court urged counsel in future cases to affirmatively point out in their appellate briefs whether or not the requisite consent was in fact given where a magistrate judge performs the sentencing function under § 636(a)(5), and to include in the record on appeal the materials that show such consent.

9th Circuit:

United States v. Neville, 985 F. 2d 992 (9th Cir.), *cert. denied*, 508 U.S. 943 (1993)

A defendant could not arbitrarily withdraw his consent to trial before a magistrate judge when brought before the magistrate judge for a proceeding to revoke a term of supervised release.

10th Circuit:

United States v. Simmonds, 179 F.R.D. 308 (D. Colo. 1998)

Where the defendant was advised clearly and concisely by the magistrate judge of his right to trial before a district judge in a Class A misdemeanor case, the defendant was not entitled to later revoke his consent to trial before the magistrate judge under 18 U.S.C. § 3401.

11th Circuit:

United States v. Hines, 2007 WL 1521477 (N.D. Fla. May 22, 2007)

A defendant, charged with a misdemeanor shoplifting offense, was deemed to have consented to have a magistrate judge take her guilty plea where the record showed that the defendant, who was a college graduate and was represented by an experienced attorney at all times, was advised of, and knowingly chose to waive, her right to have the guilty plea accepted by a district judge. The magistrate judge therefore did not commit error in accepting the defendant's plea.

D. Right to Jury Trial in Class A Misdemeanor Cases

The authority granted to magistrate judges under 18 U.S.C. § 3401 and Fed. R. Crim. P. 58 includes the authority to preside over jury trials. It has long been recognized that the right to a jury trial exists for a criminal offense where the potential term of imprisonment that might be imposed exceeds six months, the federal statutory maximum incarceration term for a petty offense. *Frank v. United States*, 395 U.S. 147 (1969). Magistrate judges thus have authority to conduct jury trials in Class A misdemeanor cases with the defendant's consent and waiver of the defendant's right to adjudication by an Article III judge under 18 U.S.C. § 3401(b).

Supreme Court:

Lewis v. United States, 518 U.S. 322 (1996)

A defendant had no right to a jury trial under the Sixth Amendment when prosecuted for multiple petty offenses. The magistrate judge could preside over the case without a jury, even where the potential total imprisonment penalty exceeded six months.

1st Circuit:

United States v. Sostre Narvaez, 279 F. Supp. 2d 82 (D.P.R. 2003)

A defendant accused of a federal petty offense of failing to pay overdue child support did not have a right to a jury trial.

9th Circuit:

Rauch v. United States, 2007 WL 2900181 (E.D. Cal. 2007)

A magistrate judge held that a defendant was not entitled to a jury trial on the federal petty offense of knowingly engaging in sexual contact with another person without that person's consent which had resulted to a sentence of 36-months probation and 30 days of home confinement in lieu of incarceration, despite the additional requirement that the defendant register as a sex offender after his conviction. The magistrate judge therefore denied the defendant's petition for habeas corpus relief under 28 U.S.C. § 2255.

11th Circuit:

United States v. Chavez, 204 F.3d 1305 (11th Cir. 2000)

A defendant convicted of a Class B misdemeanor and sentenced to probation with several conditions that limited his liberty was not entitled to a jury trial.

E. Petty Offense Cases

A petty offense case is defined at 18 U.S.C. § 19 as "a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is not greater than the amount set forth for such an offense in section 3571(b)(6) or (7) in the case of an individual or section 3571(c)(6) or (7) in the case of an organization." The maximum term of imprisonment for a Class B misdemeanor is six months. 18 U.S.C. § 3581(7). Although the trial of a misdemeanor may proceed on an indictment, information, or complaint, the trial in a petty offense case may also proceed on a citation or violation notice. Fed. R. Crim. P. 58. Additional procedures applicable in petty offense cases are set forth in Rule 58.

4th Circuit:

United States v. Glover, 381 F. Supp. 1139 (D. Md. 1974)

An assistant United States attorney was not required to attend the trial of a petty offense case before a magistrate judge. There was no due process violation when a non-attorney prosecuted a petty offense case.

6th Circuit:

United States v. Lee, 2010 WL 1425057 (E.D. Tenn. April 8, 2010)

A district judge ruled that the defendant's consent was not necessary under 18 U.S.C. § 3401(a) for the magistrate judge to have jurisdiction to try the case where Lee was charged with a petty offense by violation notice, and further that Lee did not have a right to a de novo trial before a district judge. [See Information Memorandum No. 316 for a more detailed summary of this case.]

9th Circuit:

United States v. Broers, 776 F. 2d 1424 (9th Cir. 1985)

Where a magistrate judge neither conducted nor actively guided a non-attorney Forest Service agent in the prosecution of a petty offense case, the fact that the prosecutor was not an attorney did not violate due process.

United States v. Downin, 884 F. Supp. 1474 (E.D. Ca. 1995)

A magistrate judge's refusal to appoint counsel for a defendant in a petty offense prosecution for hauling untagged timber on national forest land violated the Federal Rules of Criminal Procedure, thereby requiring reversal, where there was no evidence that the magistrate judge made a pretrial determination that no sentence of imprisonment would be imposed. The use of a lay prosecutor at the petty offense trial, however, did not violate due process and, even if error, was considered harmless

F. Violation Notices and Collateral Forfeiture

Federal Rule of Criminal Procedure 58(d) governs situations where a court establishes procedures that permit a defendant receiving a violation notice to pay a fixed sum (also know as forfeiting collateral) in lieu of appearing in court. In particular, Fed. R. Crim. P. 58 states:

> (d)(1) If the court has a local rule governing forfeiture of collateral, the court may accept a fixed-sum payment in lieu of the defendant's appearance and end the case, but the fixed sum may not exceed the maximum fine allowed by law.

The issue of whether the payment of collateral in lieu of appearing in court is considered a plea of guilty and criminal conviction on a defendant's permanent record has not been resolved definitively by courts, although some courts have adopted local rules that explicitly state that the forfeiture of collateral will be considered a guilty plea in that jurisdiction.

2d Circuit:

United States v. Caruso, 2012 WL 3288654 (E.D.N.Y. Aug. 8, 2012)

After Caruso was convicted of conducting an unauthorized business operation on federal park land based on a violation notice that the government subsequently amended by letter, the defendant appealed his conviction to a district judge. The district judge affirmed the magistrate judge's ruling and conviction, concluding that (1) Caruso waived his objection to the amended violation notice by not raising it earlier; (2) the government amendment of the violation notice by letter to include an additional charge was proper; and (3) Caruso was not prejudiced by the amended charging document since the business operation charge arose "out of the same operative facts, involving the same witnesses, as the original charge." [See Information Memorandum No. 325 for a more detailed summary of this case.]

Dean v. United States, 418 F. Supp. 2d 149 (E.D.N.Y. 2006)
The defendant's 1992 arrest and payment of a fine on a violation notice in the Eastern District of New York on public lewdness charges did not constitute a guilty plea and a valid criminal conviction because the defendant was not informed of his constitutional rights, was not informed that the payment of the fine would constitute a conviction, and was not made aware of the nature of the crime of which he had been accused, thereby warranting coram nobis relief whereby the conviction was removed from the defendant's record.

United States v. Roper, 2004 WL 3214758 (E.D.N.Y. Nov. 14, 2004)
Where no collateral forfeiture amount was set forth in the summons issued to the defendant, the magistrate judge was free to impose a fine up to the maximum of $250 as set forth in the Code of Federal Regulations, subject to proper consideration of the sentencing factors set forth in 18 U.S.C. § 3553 and 18 U.S.C. § 3572. A magistrate judge was not limited by the court's outdated schedule of fines established by local rule. (Opinion by a magistrate judge.)

4th Circuit:
Scharf v. United States, 606 F. Supp. 379 (E.D. Va. 1985)
The defendant's forfeiture of collateral on a violation notice constituted a guilty plea despite the lack of notice on the ticket as to its legal effect. Collateral forfeiture for a misdemeanor offense therefore constituted a conviction for the purposes of the special assessment provision of the Victims of Crime Act of 1984.

6th Circuit:
United States v. Porter, 513 F. Supp. 245 (M.D. Tenn. 1981)
The operation of a local collateral forfeiture rule violated the constitutional rights of a defendant charged with violating a federal regulation prohibiting pet owners from bringing unleashed animals into a federal recreation area, where the rule gave an individual the option of forfeiting $15 collateral in lieu of a personal appearance before a magistrate judge, or pleading not guilty and demanding a trial, in which case he would be subject to a potential fine of $500 and up to six months' incarceration. Since the disparity between the forfeiture amount and the possible penalty faced at trial was so extreme as to nullify any assurance that a defendant who chose to mail in the forfeiture was actually guilty, the court concluded that the $150 fine levied against the defendant after his trial would be reduced to $30.

9th Circuit:
United States v. Trimble, 487 F. 3d 752 (9th Cir. 2007)
A magistrate judge violated equal protection principles under the Fifth Amendment when she ordered a defendant to pay the $25 processing fee pursuant to a new violation notice form while, at the same time, not assessing the fee against other defendants charged under an older version of the violation notice form for similar traffic offenses on the same date.

United States v. Deng, 537 F. Supp. 2d 1116 (D. Hawaii 2008)
A violation notice issued to a defendant that referred only to the defendant's alleged violation of a state traffic law that carried only civil penalties and did not mention any federal statute or regulation violated by the defendant did not provide the defendant with sufficient notice that he was facing liability for federal criminal penalties. In addition, the term "local magistrate" in 32 C.F.R. § 634.32(f) was properly interpreted to include United States magistrate judges, thereby giving the federal court jurisdiction over cases arising under that regulation.

10th Circuit:
United States v. Boyer, 935 F. Supp. 1138 (D. Colo. 1996)
A magistrate judge dismissed with prejudice the violation notice issued to a defendant for speeding on a federal enclave where the statutory notice requirements for the regulations upon which the petty offense was based were not met. (Opinion by a magistrate judge.)

11th Circuit:
United States v. Francisco, 413 Fed. Appx. 216 (11th Cir. 2011)
The charging document was not amended improperly by the presiding magistrate judge where the defendant was charged by violation notice with violating 36 C.F.R. § 4.23(a)(1), and the allegations within the violation notice established that the defendant both operated and was in physical control of the vehicle while under the influence of alcohol. Even if the violation notice had been amended by the magistrate judge, the defendant was not prejudiced by the amendment and it therefore constituted harmless error. [See Information Memorandum No. 319 for a more detailed summary of this case.]

G. Assimilative Crimes Act [18 U.S.C. § 13]

Under the Assimilative Crimes Act ("ACA"), 18 U.S.C. § 13, a defendant who commits a crime on a federal enclave or another area within federal jurisdiction that would be punishable under state law but has not been made punishable "by any enactment of Congress," may be found "guilty of a like offense and subject to like punishment" by assimilation of the state law into federal criminal law. Magistrate judges are frequently required to consider whether they have authority over state misdemeanors and petty offenses committed on federal enclaves through application of the Assimilative Crimes Act.

Supreme Court:
Lewis v. United States, 523 U.S. 155 (1998)
The purpose of the Assimilative Crimes Act is to use state law to fill the gaps in the federal criminal law for offenses committed on federal enclaves.

2d Circuit:

United States v. McAllister, 119 F. 3d 198 (2nd Cir.1997), *cert. denied*, 522 U.S.1064 (1998)

A magistrate judge improperly dismissed a misdemeanor DUI case against the defendant on double jeopardy grounds. Prosecution for driving under the influence of alcohol on an army base under the ACA, after the base commander revoked the defendant's on-base driving privileges and imposed other administrative sanctions, did not constitute double jeopardy.

4th Circuit:

United States v. Imngren, 98 F. 3d 811 (4th Cir. 1996)

A magistrate judge erred in dismissing the case against the defendant for a DUI offense on double jeopardy grounds. The administrative suspension of the defendant's driving privileges on a federal enclave and the subsequent criminal prosecution of the defendant for the same DUI offense before a magistrate judge under the ACA did not constitute double jeopardy.

United States v. Pierce, 75 F. 3d 173 (4th Cir. 1996)

A magistrate judge did not violate the ACA by sentencing a misdemeanor defendant to terms of both imprisonment and supervised release for probation violations. Although North Carolina state law did not have supervised release as a sentencing option, the state's parole option was similar enough to supervised release to constitute "like punishment" under the ACA.

United States v. McCabe, 23 F. 3d 404 (4th Cir. 1994) (Table disposition -- text available on WESTLAW)

Where the defendant violated conditions of supervised release after serving a one-year prison sentence for violating a state "impaired driving" law on a federal enclave under the ACA, the Act limited the magistrate judge's authority to sentence the defendant to no more than a total of one year in prison.

United States v. Kelly, 989 F. 2d 162 (4th Cir.), *cert. denied*, 510 U.S. 854 (1993)

A magistrate judge had authority to try a defendant in federal court on a charge of attempted theft adapted from Maryland law under the Assimilative Crimes Act, even though the maximum sentence for the offense under state law was 18-months imprisonment. The magistrate judge properly assumed jurisdiction over the case with an understanding that the maximum sentence he would impose was 12-months imprisonment.

United States v. Clark, 361 F. Supp. 2d 502 (E.D. Va. 2005)

A magistrate judge was required to impose the state mandatory minimum sentence for a DWI offense under Virginia law under the Assimilative Crimes Act.

United States v. Barber, 360 F. Supp. 2d 784 (E.D. Va. 2005)
A magistrate judge held in a misdemeanor DWI prosecution under Virginia state law assimilated in federal court under the Assimilative Crimes Act that evidence of a defendant's blood alcohol level could be established by either a chemical blood test or a chemical breath test, and that as a matter of comity the magistrate judge could exercise his discretion to impose the enhanced penalties required by the Virginia DWI statute where a defendant's blood alcohol level was shown to be 0.15 or greater. (Opinion by a magistrate judge.)

United States v. Smith, 965 F. Supp. 756 (E.D. Va. 1997)
A magistrate judge erred in convicting a DUI defendant on multiple counts derived from a single DUI incident. The ACA required the federal court to assimilate the substantive criminal law of Virginia that a defendant should only receive one conviction, rather than two, for a single DUI violation. (Opinion by a magistrate judge.)

United States v. Slatkin, 984 F. Supp. 916 (D. Md. 1995)
The trial jurisdiction of a magistrate judge under the ACA did not extend to Maryland state misdemeanor offenses having maximum terms of imprisonment longer than two years, even with an understanding that the maximum sentence the magistrate judge would impose was 12-months imprisonment. (Opinion by a magistrate judge.)

United States v. Kendrick, 636 F. Supp. 189 (E.D.N.C. 1986)
Under the ACA, a state DUI misdemeanor law with a possible two-year jail sentence may be assimilated and the case could be referred to a magistrate judge, provided the punishment imposed does not exceed one-year imprisonment or a $1,000 fine.

5th Circuit:
United States v. Teran, 98 F. 3d 831 (5th Cir. 1996)
A state law sentencing provision setting a two-year maximum penalty for a DWI offense need not be assimilated under the Assimilative Crimes Act where it conflicts with federal policy to provide magistrate judges with authority to dispose of misdemeanor cases. The magistrate judge had authority to try the case after stating that the maximum sentence he would impose was 12-months imprisonment.

6th Circuit:
United States v. Jensen, 278 Fed. Appx. 548 (6th Cir. 2008)
Where the defendant pled guilty before a magistrate judge in the Western District of Kentucky to the misdemeanor offense of complicity to commit sexual assault on a federal enclave in violation of Kentucky law as assimilated under the ACA, the magistrate judge did not err in requiring the defendant to register as a sexual offender in Kentucky as a condition of her probation.

7th Circuit:

United States v. Devenport, 131 F. 3d 604 (7th Cir. 1997)

A magistrate judge erred in denying the defendant's motion to dismiss a misdemeanor drunk driving charge where Wisconsin law governing drunk driving offenses assimilated under the Assimilative Crimes Act mandated only civil penalties for a first time offense.

9th Circuit:

United States v. Benz, 472 F.3d 657 (9th Cir. 2006)

A magistrate judge committed reversible error when taking the defendant's guilty plea in a petty offense case when the magistrate judge failed to advise the defendant of the mandatory minimum sentence of 10-days imprisonment required under California law as assimilated under the Assimilative Crimes Act for the offense of driving with a license that had been suspended for having been convicted of driving under the influence.

United States v. Sylve, 135 F. 3d 680 (9th Cir. 1998)

The magistrate judge erred in denying a misdemeanor defendant's motion requesting permission to enroll in a state "deferred prosecution" program. The state's "deferred prosecution" program was a form of punishment and thus a sentencing alternative that could be imposed as a sentence by a federal judge under the Assimilative Crimes Act.

United States v. Reyes, 48 F. 3d 435 (9th Cir. 1995)

A magistrate judge properly sentenced a misdemeanor defendant to a term of supervised release under the Assimilative Crimes Act. Supervised release under federal law and probation under Hawaii state law were "like punishments" under ACA.

United States v. Leake, 908 F. 2d 550 (9th Cir. 1990)

Although the magistrate judge properly applied the Federal Sentencing Guidelines when sentencing a misdemeanor defendant convicted under the ACA, rather than the state's sentencing scheme, the magistrate judge erred in basing an upward departure in the sentence upon an earlier criminal convictions that had no similarity to the offense for which the defendant was being sentenced.

United States v. Carlson, 900 F. 2d 1346 (9th Cir. 1990)

Because the ACA incorporates into federal law only the criminal laws of the jurisdiction within which the federal enclave exists, the magistrate judge had no authority over the defendant's case where the state law reads "a violation [of speeding laws] does not constitute a crime."

United States v. Martinez, 2008 WL 2693187 (E.D. Cal. 2008)

A magistrate judge ruled that the defendant could not be sentenced to a state pretrial diversion program under the Assimilative Crimes Act as an alternative to being sentenced to a term of imprisonment and a fine, where the defendant was charged with a federal criminal offense, not a state offense assimilated to a federal enclave under the ACA, since

neither the relevant federal statute nor Fed. R. Crim. P. 58 recognizes diversion as an available sentencing option for the charge.

10th Circuit:

United States v. Thomas, 68 F. 3d 392 (10th Cir. 1995)

A magistrate judge did not err in sentencing a misdemeanor defendant to a 90-day prison sentence after several violations of conditions of probation, even though the defendant had successfully completed a term of home detention. Home detention did not constitute imprisonment under Kansas state law assimilated under the ACA.

United States v. Talkington, 32 F. Supp. 2d 1262 (D. Kan. 1998)

A magistrate judge had authority under the Assimilative Crimes Act to try a defendant arrested for a DUI offense on a federal enclave, even when Kansas state law defined the offense as a felony.

United States v. Lewis, 1998 WL 804701 (D. Colo. 1998)

A defendant could not be tried for state law offenses of obstruction of a peace officer and resisting arrest under the Assimilative Crimes Act where these offenses were covered by a federal statute, thereby precluding assimilation under the ACA.

United States v. LeHouillier, 935 F. Supp. 1146 (D. Colo. 1996)

A defendant could be tried for a motor vehicle offense before a magistrate judge even where the violation notice used by federal law enforcement personnel did not comply with state notice requirements. The ACA assimilates state criminal law, not procedural requirements.

H. Appeal of Magistrate Judge's Decision

Section 3402 of Title 18 states:

> In all cases of conviction by a United States magistrate judge an appeal of right shall lie from the judgement of the magistrate judge to a judge of the district court of the district in which the offense was committed.

1st Circuit:

United States v. Manning-Ross, 362 F. 3d 874 (1st Cir. 2004)

The court of appeals did not have jurisdiction over an appeal of a defendant's misdemeanor conviction before a magistrate judge for a DUI offense on a military base where the defendant failed to first appeal his conviction to the district court under 18 U.S.C. § 3402.

2d Circuit:

United States v. Jones, 117 F. 3d 644 (2d Cir. 1997)

A defendant challenging a misdemeanor conviction and sentence rendered by a magistrate judge must appeal first to the district court under 18 U.S.C. § 3402. Only after the magistrate

judge's order was reviewed by the district court could the defendant appeal to the court of appeals.

United States v. Lamb, 23 F. Supp. 2d 457 (D. Vt. 1998)
An appeal lies from a judgment of conviction entered by a United States magistrate judge to a judge of the district court of the district in which the offense was committed. The scope of the appeal is the same as an appeal from a judgment of a district court to a court of appeals.

4th Circuit:
United States v. Baxter, 19 F. 3d 155 (4th Cir. 1994)
A magistrate judge's judgment of conviction and sentence of a misdemeanor defendant under § 3401 could only be appealed to the district court, not to the court of appeals.

United States v. Hazelton, 279 F. Supp. 2d 710 (E.D. Va. 2003)
A magistrate judge's ruling ordering a term of pre-judgment probation for a defendant who pled guilty to the misdemeanor possession of marijuana was not a final order that could be appealed to a district judge.

7th Circuit:
United States v. Smith, 992 F. 2d 98 (7th Cir. 1993)
The Federal Magistrates Act provides for appeal only to the district court after a misdemeanor conviction before a magistrate judge. The court of appeals did not have jurisdiction to hear a defendant's direct appeal of his misdemeanor conviction under the Migratory Bird Treaty Act.

United States v. Van Fassan, 899 F. 2d 636 (7th Cir. 1990)
The court of appeals had jurisdiction to hear an appeal from a defendant's conviction before a magistrate judge for violating the Migratory Bird Treaty Act after the district court affirmed the conviction on appeal. Dictum: The court noted that it was odd that a misdemeanor defendant gets two appeals from his conviction while a felony defendant gets only one appeal.

9th Circuit:
United States v. Lee, 786 F. 2d 951 (9th Cir. 1986)
Where a magistrate judge "remanded" a petty offense case committed by a civilian on a military base to a military court, the remand in effect was a dismissal appealable to the district court under [Fed. R. Crim. P. 58].

United States v. Wylder, 590 F. Supp. 926 (D. Or. 1984)
The district judge's scope of review of a misdemeanor case on appeal is the same as an appeal of a district judge's decision to a court of appeals. De novo review is applied to the magistrate judge's decisions on questions of law.

10th Circuit:
United States v. Pethick, 513 F. 3d 1200 (10th Cir. 2007)
Where a senior district judge presided over a defendant's misdemeanor prosecution on DUI charges on a federal enclave, including a jury trial, but then became seriously ill, resulting in a magistrate judge entering the final judgment and the sentence in the case with the defendant's consent, and where the defendant appealed the case directly to the court of appeals, the appellate court did not have jurisdiction to hear the appeal.

§ 4. NON-CASE-DISPOSITIVE MATTERS UNDER 28 U.S.C. § 636(b)(1)(A)

Section 636(b)(1)(A) states that "a [district] judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court...." All matters deemed non-case-dispositive of a claim or defense before the court may be referred to a magistrate judge under this provision. Several case-dispositive motions are excepted specifically from this provision. The excepted motions and other case-dispositive motions may be referred to magistrate judges under § 636(b)(1)(B). See Section 5, *infra*.

A. In General

Section 636(b)(1) begins with the phrase, "Notwithstanding any provision of law to the contrary." Both the House and Senate Reports to the 1976 revisions of the Federal Magistrates Act contain the following statement:

> This language is intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to "the judge" or "the court". It is not feasible for the Congress to change each of those terms to read "the judge or a magistrate". It is, therefore, intended that the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), "notwithstanding any provision of law to the contrary" referring to "judge" or "court". H.R. Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976); S. Rep. No. 625, 94th Cong., 2d Sess. 7 (1976).

This language is applicable to matters referred under both §§ 636(b)(1)(A) and (b)(1)(B).

1. Authority of Magistrate Judge

2d Circuit:
Litton Industries, Inc. v. Lehman Bros. Kuhn Loeb, Inc., 124 F.R.D. 75 (S.D.N.Y. 1989)
Although the magistrate judge may not use pressure tactics to coerce a party into settling a claim, the magistrate judge's acceleration of the deposition schedule in a pretrial discovery order in this case did not constitute undue coercion. Filing an objection to the magistrate judge's order does not serve to stay the effect of that order.

6th Circuit:
Pauley v. United Operating Co., 606 F. Supp. 520 (E.D. Mich. 1985)
Although pretrial matters were originally referred under § 636(b)(1)(A), the magistrate judge acted properly in issuing a report and recommendation when it became apparent that case-dispositive relief was sought. The district judge amended the order of reference nunc pro tunc.

9th Circuit:

Bhan v. NME Hospitals, Inc., 929 F.2d 1404 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991)
Opportunity for clearly erroneous review by a district judge is sufficient to prevent a § 636(b)(1)(A) referral to a magistrate judge from constituting an unconstitutional delegation of authority.

Ainsworth v. Vasquez, 759 F. Supp. 1467 (E.D. Cal. 1991)
The court's inherent powers, as well as its obligation and authority to achieve the rational ends of the law, are sufficiently broad to permit a magistrate judge to perform a *Neuschafer* hearing, asking the habeas corpus prisoner questions concerning unexhausted claims.

Laxalt v. McClatchy, 109 F.R.D. 632 (D. Nev. 1986)
The magistrate judge had discretion under § 636(b)(1)(A) to determine the sequence to be followed in deciding issues raised in a pretrial motion. The district court upheld an order requiring a party to argue jurisdictional issue at same time as a discovery matter.

11th Circuit:

Lancer Arabians, Inc. v. Beech Aircraft Corp., 723 F. Supp. 1444 (M.D. Fla. 1989)
The court construed the magistrate judge's order to strike a claim for punitive damages, entered under § 636(b)(1)(A), as a report and recommendation on a motion to dismiss subject to de novo determination.

D.C. Circuit:

In re Subpoena Duces Tecum Issued to Commodity Futures Trading Commission, 439 F.3d 740 (D.C. Cir. 2006)
A magistrate judge's discovery ruling in a civil case in the Eastern District of California should not be given collateral estoppel effect in a related action in the district court for the District of Columbia where a party sought production of documents held by the Commodity Futures Trading Commission through a subpoena.

Applegate v. Dobrovir, Oakes, and Gebhardt, 628 F. Supp. 378 (D.D.C. 1985), *aff'd*, 809 F.2d 930 (D.C. Cir.), *cert. denied*, 481 U.S. 1049 (1987)
While the order of reference to conduct pretrial proceedings did not specifically authorize the magistrate judge to prepare reports and recommendations on case-dispositive motions such as summary judgment motions, such duties are an inherent element of pretrial proceedings in general.

2. Procedural Requirements

Rule 72(a) of the Federal Rules of Civil Procedure and Rule 59(a) of the Federal Rules of Criminal Procedure govern non-case-dispositive motion practice before magistrate judges. Proceedings before the magistrate judge are to be conducted "promptly." Civil Rule 72(a) provides that "[a] party may serve and file objections to the order within 10 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to." Criminal Rule 59(a) provides that "[a] party may serve and file objections to the order within 10 days after being served with a copy of a

written order or after the oral order is stated on the record, or at some other time the court sets.... Failure to object in accordance with this rule waives a party's right to review."

2d Circuit:

Ehret v. New York City Dept. of Social Services, 102 F.R.D. 90 (E.D.N.Y. 1984)

Oral determinations by a magistrate judge in a discovery dispute constituted final orders under § 636(b)(1)(A).

3d Circuit:

In re Gabapentin Patent Litigation, 312 F. Supp. 2d 653 (D.N.J. 2004)

A written order by the magistrate judge ruling on a non-case-dispositive matter was not necessary to preserve review by the district judge where the magistrate judge's oral decision was clearly reflected in the transcript of the proceedings and the docketed minute entry of the same.

Delco Wire & Cable, Inc. v. Weinberger, 109 F.R.D. 680 (E.D. Pa. 1986)

The district court has the discretion to refer a non-case-dispositive pretrial matter to a magistrate judge for a report and recommendation and de novo determination.

4th Circuit:

Proa v. NRT Mid Atlantic, Inc., 608 F. Supp. 2d 690 (D. Md. 2009)

A district judge held that he was not required to refer a discovery dispute to a particular magistrate judge, and that the court's local procedure which authorized the court's chief magistrate judge to re-assign discovery matters to another magistrate judge was proper and valid. [See Information Memorandum No. 313 for a more detailed summary of this case.]

9th Circuit:

McKeever v. Block, 932 F.2d 795 (9th Cir. 1991)

A prisoner petitioner's letter in response to the magistrate judge's order to dismiss the case with leave to amend pleadings was not an adequate objection under Fed. R. Civ. P. 72.

D.C. Circuit:

CNPq-Conselho Nacional de Deseenvolvimento Cientifico e Technologico v. Inter-Trade, Inc., 50 F.3d 56 (D.C. Cir. 1995)

A three-day extension for service by mail under Fed. R. Civ. P. 6 extended the ten-day period for objections to the magistrate judge's order by three calendar days, rather than three business days.

Federal Savings & Loan Ins. Corp. v. Commonwealth Land Title Ins. Co., 130 F.R.D. 507 (D.D.C. 1990)

A motion to "reconsider" a magistrate judge's ruling that merely brings to the magistrate judge's attention documents not previously considered is not an appeal under Fed. R. Civ. P. 72 and need not be filed within ten days.

3. District Court's Supervisory Authority and Standard of Review

Section 636(b)(1)(A), Fed. R. Civ. P. 72, and Fed. R. Crim. P. 59 provide that a district judge may modify or set aside any part of a magistrate judge's order that is clearly erroneous or contrary to law. The district judge also retains general supervisory powers over the case, including the power to rehear or reconsider any matter sua sponte.

1st Circuit:

Jones v. Secord, 684 F.3d 1 (1st Cir. 2012)

The First Circuit held that a district judge was not prohibited from granting a defendant's motion for summary judgment under Fed. R. Civ. P. 56, even though there was a pending discovery dispute before a magistrate judge in the same case. Observing that "[f]ederal district courts are busy places, and judges often have crowded dockets," the appellate court further concluded that, "[i]t is not the court's responsibility to dig through the record in a particular case unsolicited and determine whether some timing problem might exist in connection with a summary judgment motion. Rather, Rule 56(d) places that responsibility squarely on the shoulders of the party opposing the motion." The court concluded that the district court did not abuse its discretion by not engaging sua sponte in an independent review of the docket, noting that to hold otherwise would be "the functional equivalent of expecting the court to do the lawyer's job." [See Information Memorandum No. 325 for a more detailed summary of this case.]

2d Circuit:

Katz v. Morgenthau, 892 F.2d 20 (2d Cir. 1989)

The district court did not err when it chose not to refer non-case-dispositive motions to a magistrate judge for more expeditious resolution.

Sheppard v. Beerman, 822 F. Supp. 931 (E.D.N.Y. 1993), *aff'd in part, vacated in part*, 18 F.3d 147 (2d Cir.), *cert. denied*, 513 U.S. 816 (1994)

The district court has the discretionary authority to withdraw from a magistrate judge pretrial case management duties that were referred originally under § 636(b)(1)(A).

Gay Men's Health Crisis v. Sullivan, 733 F. Supp. 619 (S.D.N.Y. 1989)

A magistrate judge's discovery order denying the defendant's claims of privilege was remanded by a district judge to the magistrate judge for in camera review of disputed documents.

3d Circuit:

Kiskidee, LLC v. Certain Interested Underwiters at Lloyd's of London Subscribing to Policy No. NB043060B, 2012 WL 1067918 (D.V.I. Mar.26, 2012)

A district judge ruled that he had authority to *sua sponte* review and reverse a magistrate judge's non-case-dispositive order bifurcating a bad faith claim through discovery and trial until liability and damages on the underlying breach of contract claim had been determined, even where the parties had not filed timely objections to the magistrate judge's original ruling. [See Information Memorandum No. 325 for a more detailed summary of this case.]

Grant v. Omni Health Care Systems of NJ, Inc., 427 Fed. Appx.156 (3d Cir. 2011)
A district judge may withdraw a case referred to a magistrate judge for pretrial duties under 28 U.S.C. § 636(b) for any reason without having to establish good cause or extraordinary circumstances for the withdrawal. [See Information Memorandum No. 321 for a more detailed summary of this case.]

Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir. 1992)
The district court erred when reconsidering a magistrate judge's discovery ruling under § 636(b)(1)(A) by expanding the record to consider evidence not considered by the magistrate judge. The court of appeals issued a writ of mandamus vacating the district court's discovery order that had reversed the magistrate judge's discovery ruling under the "clearly erroneous" standard.

Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169 (E.D. Pa. 2004)
A district court may only reconsider a magistrate judge's decision on a non-case-dispositive pretrial issue such as a discovery order when the magistrate judge's decision is "clearly erroneous or contrary to law." When a magistrate judge's decision is on a highly discretionary matter, other decisions of this court have determined that the clearly erroneous standard implicitly becomes an abuse of discretion standard.

Sellon v. Smith, 112 F.R.D. 9 (D. Del. 1986)
Where a party failed to raise an attorney-client privilege argument after the referral of all discovery matters to the magistrate judge, a remand by the district judge to the magistrate judge was appropriate to address issues of privilege and waiver.

4th Circuit:
Ambrose v. Southworth Products Corp., 953 F. Supp. 728 (W.D. Va. 1997)
The district court found clear error when reviewing the magistrate judge's order denying a motion to amend the complaint. The magistrate judge had failed to consider the alternate claims in the amended complaint, which were before the court in the motion papers filed but had not been raised at oral argument.

Federal Deposit Ins. Corp. v. United States, 527 F. Supp. 942 (S.D. W. Va. 1981)
The magistrate judge's failure to make sufficient findings with respect to whether a party had waived an objection concerning privilege, or had put the privileged matters at issue by its pleadings, required remand.

5th Circuit:
Resolution Trust Corp. v. Sands, 151 F.R.D. 616 (N.D. Tex. 1993)
The district court would not reverse a magistrate judge's denial of a motion for a protective order under the "clearly erroneous" standard of review where the plaintiff could only show that other magistrate judges in similar cases had decided such motions differently. The plaintiff could not show that the magistrate judge's decision was contrary to law, clearly erroneous regarding the facts of the case, or an abuse of the magistrate judge's discretion in supervising discovery in the case.

7th Circuit:

Schur v. L.A. Weight Loss Centers, Inc., 577 F.3d 752 (7th Cir. 2009)
A district judge did not err in reconsidering *sua sponte* a magistrate judge's ruling that had permitted the plaintiff to amend her complaint, even though the defendant had not objected to the magistrate judge's ruling. [See Information Memorandum No. 315 for a more detailed summary of this case.]

Phillips v. Raymond Corp., 213 F.R.D. 521 (N.D. Ill. 2003)
A district judge may reconsider a magistrate judge's ruling on a discovery matter in the absence of objections and may alter it, though it may not be clearly erroneous.

10th Circuit:

Allen v. Sybase, 468 F.3d 642 (10th Cir. 2006)
A party's failure to seek timely review of a magistrate judge's non-case-dispositive order does not strip the district court of its power to revisit the issue.

Claytor v. Computer Associates International, Inc, 211 F.R.D. 665 (D. Kan. 2003)
When reviewing a magistrate judge's order denying the plaintiff's motion to extend time for conducting discovery, the district judge would not consider circumstances that were not brought to the attention of the magistrate judge by the plaintiff, since review was under the clearly erroneous standard.

Branch v. Mobil Oil Corp., 143 F.R.D. 255 (W.D. Okla. 1992)
A party could not present additional evidence to the district judge reviewing the magistrate judge's discovery order concerning application of attorney-client privilege to documents where the evidence had not been first submitted to the magistrate judge.

Comeau v. Rupp, 762 F. Supp. 1434 (D. Kan. 1991)
The clearly erroneous standard of review under Fed. R. Civ. P. 72 requires a district judge to affirm a non-case-dispositive decision of a magistrate judge unless the court is left with the definite and firm conviction that a mistake has been made. Since magistrate judges are afforded broad discretion to resolve non-case-dispositive discovery disputes, the court will overrule the magistrate judge's determination only if such discretion is abused.

4. Failure to Appeal to District Court

Although the Federal Magistrates Act is silent concerning the possible consequences of a party's failure to object to a magistrate judge's order in a non-case-dispositive matter, Fed. R. Civ. P. 72 and Fed. R. Crim. P. 59 make review by the district judge mandatory upon a party's filing of objections "within 10 days after being served with a copy," Fed. R. Civ. P. 72, or "within 10 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets," Fed. R. Crim. P. 59. Criminal Rule 59(a) expressly provides that "[f]ailure to object in accordance with this rule waives a party's right to review." Civil Rule 72(a) provides that "[a] party may not assign as error a defect in the order not timely objected to."

Supreme Court:

Thomas v. Arn, 474 U.S. 140 (1985)

Nothing in the Federal Magistrates Act or its legislative history forbids application of the waiver rule when a party fails to file timely objections to a magistrate judge's ruling.

1st Circuit:

Surview Cond. Assoc. v. Flexel Int'l, Ltd., 116 F.3d 962 (1st Cir. 1997)

Failure to file timely objections to a magistrate judge's order on a non-case-dispositive matter precludes review by the court of appeals.

United States v. Akinola, 985 F.2d 1105 (1st Cir. 1993)

The court of appeals does not have jurisdiction to consider an appeal of a magistrate judge's ruling in a criminal case where the party did not file objections in the district court.

Pagano v. Frank, 983 F.2d 343 (1st Cir. 1993)

If a party fails to file timely objections to a magistrate judge's order in a non-case-dispositive pretrial matter (in this case, a motion to amend the complaint) and obtain district judge review, "he cannot later leapfrog the trial court and appeal the ruling directly to the court of appeals."

2d Circuit:

Caidor v. Onondaga County, 517 F.3d 601 (2d Cir. 2008)

A pro se litigant who fails to file timely objections to a magistrate judge's order on a non-case-dispositive matter waives the right to appellate review of that order even absent express notice from the magistrate judge that failure to object within ten days will preclude appellate review.

3d Circuit:

United States v. Polishan, 336 F.3d 234 (3d Cir. 2003), *cert. denied*, 540 U.S. 1220 (2004)

Although no provision in the Federal Rules of Criminal Procedure sets a time for filing objections to a magistrate judge's non-case-dispositive order, where a local rule provides a time within which objections must be filed, failure to comply with the local rule results in a waiver of a party's right to appeal the magistrate judge's ruling.

United Steelworkers of America v. New Jersey Zinc Co., Inc., 828 F.2d 1001 (3d Cir. 1987)

A party's failure to object to a magistrate judge's § 636(b)(1)(A) ruling waives appellate review.

5th Circuit:

Colburn v. Bunge Towing, Inc., 883 F.2d 372 (5th Cir. 1989)

The court of appeals does not have jurisdiction to hear an appeal where a party does not appeal the magistrate judge's non-case-dispositive order to a district judge.

7th Circuit:

United States v. Brown, 79 F.3d 1499 (7th Cir.), *cert. denied*, 519 U.S. 875 (1996)

Although the failure to challenge before a district judge a magistrate judge's pretrial rulings under § 636(b)(1)(A) waives the right to attack such rulings on appeal, this rule is not jurisdictional and thus should not be employed to defeat the ends of justice; in this case, the court excused the party's failure to object.

9th Circuit:

Cole v. United States District Court for the District of Idaho, 366 F.3d 813 (9th Cir. 2004)

Mandamus relief in the appellate court was not a proper remedy for litigants attempting to overturn a sanction ruling issued by a magistrate judge where the petitioners did not file objections to the magistrate judge's ruling in the district court.

United States v. Abonce-Barrera, 257 F.3d 959 (9th Cir. 2001)

A party in a criminal case is not required to challenge a magistrate judge's decision on a non-case-dispositive matter in the district court in order to seek appellate review of the magistrate judge's order.

Simpson v. Lear Astronics Corp., 77 F.3d 1170 (9th Cir. 1996)

A party aggrieved by a magistrate judge's order imposing discovery sanctions "forfeits" his right to appellate review if he fails to file objections with the district judge.

10th Circuit:

Pippinger v. Rubin, 129 F.3d 519 (10th Cir. 1997)

The court of appeals cannot review a magistrate judge's non-case-dispositive discovery order unless the party requesting review initially objected to the magistrate judge's order in writing in the district court within ten days of receiving a copy of the order.

11th Circuit:

United States v. Brown, 441 F.3d 1330 (11th Cir. 2006), *cert. denied,* 549 U.S 1182 (2007)

Federal Rule of Criminal Procedure 59(a) is in complete accord with circuit case law which clearly prohibits the court from considering the defendant's argument on appeal where the defendant did not first object in the district court.

5. Appellate Review

Since orders in non-case-dispositive pretrial proceedings are interlocutory, immediate appeals to the court of appeals of district judges' orders reviewing magistrate judges' non-case-dispositive decisions generally are not permitted.

3d Circuit:

State of New York v. United States Metals Refining Co., 771 F.2d 796 (3d Cir. 1985)

Because a district court's order affirming the magistrate judge's temporary protective order under Fed. R. Civ. P. 26 was not a final order or a collateral order, appellate review was not permitted.

Smith v. Bic Corp., 869 F.2d 194 (3d Cir. 1989)
A district court's order affirming a magistrate judge's denial of a motion for protective order was reviewed by the court of appeals under the collateral order doctrine.

4th Circuit:
MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116 (4th Cir.), *cert. denied*, 513 U.S. 1000 (1994)
In general, discovery orders are not immediately appealable, and the district court's order affirming the magistrate judge's order for the production of documents did not fall under the collateral order exception to the finality requirement.

5th Circuit:
Texaco, Inc. v. Louisiana Land and Exploration Co., 995 F.2d 43 (5th Cir. 1993)
On the appeal of a magistrate judge's order compelling discovery, the court noted that the circuit's general rule is that a discovery order incident to a pending action is not subject to appeal.

7th Circuit:
Richards v. Firestone Tire & Rubber Co., 928 F.2d 241 (7th Cir. 1991)
The finality doctrine in 28 U.S.C. § 1291 barred the appeal of a district court's order of dismissal without prejudice but with conditions as to refiling the case, since the purpose of the request for dismissal was to evade the magistrate judge's discovery order.

8th Circuit:
United States v. Brakke, 813 F.2d 912 (8th Cir. 1987)
Pretrial orders issued by a district court affirming discovery orders by the magistrate judge are not final orders under 28 U.S.C. § 1291 and do not fall within the collateral order exception to the final judgment rule. The court of appeals therefore had no jurisdiction over the appeal.

B. Pretrial Matters

In the 1976 amendments to the Federal Magistrates Act, Congress intended to clarify and define further the duties that may be assigned to magistrate judges under § 636(b). The pretrial matters referable under § 636(b)(1)(A) include "a great variety of preliminary motions and matters which can arise in the preliminary processing of either a criminal or a civil case." H.R. Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976); S. Rep. No. 625, 94th Cong., 2d Sess. 7 (1976).

Most pretrial motions and other matters arising under the federal rules of civil and criminal procedure are referred routinely to magistrate judges. A compilation of all such motions is beyond the scope of this study. This subsection and Section 5, *infra*, however, present cases where courts have attempted to define magistrate judge authority in pretrial matters referred under § 636(b)(1). A common issue is whether such duties are considered to be dispositive or non-dispositive of claims or defenses before the court.

1. Motions to Proceed In Forma Pauperis (28 U.S.C. § 1915)

Magistrate judges have uniformly been held to have authority to issue a final order granting a motion to proceed in forma pauperis under 28 U.S.C. § 1915 as a non-case-dispositive matter. By contrast, most, though not all, courts have concluded that the denial of a plaintiff's motion to proceed in forma pauperis under § 1915 is a case-dispositive matter analogous to a motion to dismiss for which magistrate judges must prepare a report and recommendation. See Section 5, *infra*, for cases holding that the denial of a motion to proceed in forma pauperis is a case-dispositive matter.

5th Circuit:

Wilson v. Becker, 2008 WL 81286 (E.D. La. 2008)
A district judge discussed disagreement over whether denial of a motion to proceed in forma pauperis is a non-case-dispositive or case-dispositive matter, but declined to make a final determination.

Poche v. Butler, 2007 WL 2695350 (E.D. La. 2007)
A district judge stated the view that the magistrate judge's order denying permission to proceed in forma pauperis could be reviewed under the "clearly erroneous or contrary to law" standard, but noted that the result would be the same if the magistrate judge's order were reviewed de novo.

Burks v. United States Post Office, 2008 WL 2626991 (W.D. La. 2008)
After discussing whether the denial of a motion to proceed in forma pauperis is a non-case-dispositive or case-dispositive matter, the district judge declined to make a final determination on the issue, concluding that the motion would fail under either standard.

Seaberry v. Stalder, 2006 WL 1635707 (W.D. La. 2006)
A district judge reviewed a magistrate judge's order denying a motion for in forma pauperis status under the clearly erroneous standard.

6th Circuit:

Woods v. Dahlberg, 894 F.2d 187 (6th Cir. 1990)
A magistrate judge may be referred petitions to proceed in forma pauperis under § 636(b)(1)(B). The magistrate judge may issue an order granting such a motion, but may only make a recommendation to deny such a motion.

9th Circuit:

Gamboa v. City of Fresno, 2007 WL 2069938 (E.D. Cal. 2007)
A magistrate judge may grant a motion to proceed in forma pauperis, but exceeds his authority when he denies a motion outright.

2. Motions for Leave to Amend

In most circumstances, courts have held that motions for leave to amend pleadings are non-case-dispositive matters subject to the clearly erroneous or contrary to law standard of review. See Chapter 5, *infra*, for additional opinions on this issue.

1st Circuit:

Pagano v. Frank, 983 F.2d 343 (1st Cir. 1993)

A motion to amend a complaint is a non-case-dispositive pretrial matter subject to the clearly erroneous or contrary to law standard of review. If a party fails to file timely objections and obtain district judge review, "he cannot later leapfrog the trial court and appeal the ruling directly to the court of appeals."

Jacobsen v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 594 F. Supp. 583 (D. Me. 1984)

Motions to amend pleadings, to strike joinder of nondiverse parties, and to remand for lack of diversity jurisdiction are non-case-dispositive matters.

2d Circuit:

Rubin v. Valicenti Advisory Services, Inc., 471 F. Supp. 2d 329 (W.D.N.Y. 2007)

A motion for leave to amend a pleading is properly considered a non-case-dispositive matter under § 636(b) that is reviewed under the clearly erroneous or contrary to law standard of review.

Palmer v. Monroe County Sheriff, 378 F. Supp. 2d 284 (W.D.N.Y. 2005)

A motion to amend a complaint is a non-case-dispositive matter under 28 U.S.C. § 636(b)(1)(A), and objections to the magistrate judge's order disposing of the motion are subject to review by the district court under the clearly erroneous or contrary to law standard.

Acme Electric Corp. v. Sigma Instruments, Inc., 121 F.R.D. 26 (W.D.N.Y. 1988)

A motion to amend a complaint to add a nondiverse party is a non-case-dispositive matter, even if it results in remand of the case to the state court.

4th Circuit:

Stonecrest Partners, LLC v. Bank of Hampton Roads, 770 F. Supp. 2d 778 (E.D.N.C. 2011)

A magistrate judge's order denying parties' motion for leave to amend their pleadings was a non-case-dispositive matter which was properly reviewed under the clearly erroneous or contrary to law standard, despite the parties' contention that the order disposed of claims they sought to add to their complaint. [See Information Memorandum No. 319 for a more detailed summary of this case.]

Ambrose v. Southworth Products Corp., 953 F. Supp. 728 (W.D. Va. 1997)

A motion to amend is a non-case-dispositive motion, and a magistrate judge's ruling on it is subject to reversal only upon a finding that the order is clearly erroneous or contrary to law.

5th Circuit:

Bryant v. Mississippi Power & Light Co., 722 F. Supp. 298 (S.D. Miss. 1989)

A motion to amend a complaint, resulting in remand for lack of subject matter jurisdiction, was treated as a non-case-dispositive matter.

9th Circuit:

Sana v. Hawaiian Cruises, Ltd., 961 F. Supp. 236 (D. Haw. 1997), *rev'd on other grounds*, 181 F.3d 1041 (9th Cir. 1999)

A motion to amend is a non-case-dispositive pretrial matter subject to review under the clearly erroneous or contrary to law standard of review.

3. Motions to Remand

Courts disagree over whether remand orders are dispositive of a claim or defense before the court. See Section 5, *infra*, for additional opinions on this issue.

1st Circuit:

Cok v. Family Court of Rhode Island, 985 F.2d 32 (1st Cir. 1993)

28 U.S.C. § 1447(d) bars review by the court of appeals of a district judge's order affirming a magistrate judge's remand order, whether the district judge reviewed the magistrate judge's order as a final order or as a report and recommendation to which timely objections were filed.

Delta Dental of Rhode Island v. Blue Cross & Blue Shield of Rhode Island, 942 F. Supp. 740 (D.R.I. 1996)

A motion to remand is a non-case-dispositive matter under § 636(b)(1)(A), subject to the clearly erroneous or contrary to law standard of review.

4th Circuit:

Chandler v. Cheesecake Factory Restaurants, Inc, 239 F.R.D. 432 (M.D.N.C. 2006)

A magistrate judge has authority to issue an order on a motion to remand as a non-case-dispositive pretrial matter under 28 U.S.C. § 636(b)(1)(A). (Opinion by a magistrate judge.)

Wachovia Bank v. Deutsche Bank Trust Co., 397 F. Supp. 2d 698 (W.D.N.C. 2005)

A motion to remand is a non-case-dispositive matter under 28 U.S.C. § 636(b)(1)(A) and therefore the magistrate judge had authority to enter a final order remanding the case to state court.

Young v. James, 168 F.R.D. 24 (E.D. Va. 1996)

Motions to remand are non-case-dispositive matters and are reviewable under a clearly erroneous or contrary to law standard.

Long v. Lockheed Missiles and Space Co., Inc., 783 F. Supp. 249 (D.S.C. 1992)

A magistrate judge must issue a report and recommendation for de novo review on a motion to remand, rather than an order, because a motion to remand is case-dispositive.

5th Circuit:

Dugas v. Jefferson County, 911 F. Supp. 251 (E.D. Tex. 1995)

A motion to remand is referable to a magistrate judge as a non-case-dispositive motion. (Opinion by a magistrate judge.)

Vaquillas Ranch Co., Ltd. v. Texaco Exploration & Production, Inc., 844 F. Supp. 1156 (S.D. Tex. 1994)
A motion to remand the case to state court is a non-case-dispositive matter, and the magistrate judge's decision is reviewed under the clearly erroneous or contrary to law standard.

7th Circuit:
Archdiocese of Milwaukee v. Underwiters at Lloyd's London, 955 F. Supp. 1066 (E.D. Wis.1997)
The court reviewed a magistrate judge's order granting a motion to remand under the de novo standard, but acknowledged that "[g]enerally, the court would review the magistrate [judge]'s decision only for clear error because a motion to remand is not a dispositive motion as defined by Fed. R. Civ. P. 72(b)."

8th Circuit:
Schrempp v. Rocky Mountain Holding Co., L.L.C., 2007 WL 570406 (D. Neb. 2007)
In light of the split in court decisions over whether a magistrate judge has authority to rule on a motion to remand, the magistrate judge entered a report and recommendation on the matter.

White v. State Farm Mut. Auto. Ins. Co., 153 F.R.D. 639 (D. Neb. 1993)
A district judge reviewed an appeal from the magistrate judge's order remanding the case to state court under the clearly erroneous or contrary to law standard of § 636(b)(1)(A). The opinion included the text of the magistrate judge's opinion holding that a magistrate judge has authority to remand as a non-case-dispositive pretrial matter.

Banbury v. Omnitrition International, Inc., 818 F. Supp. 276 (D. Minn. 1993)
A motion to remand the case to state court is a non-case-dispositive matter that may be referred to a magistrate judge under § 636(b)(1)(A).

9th Circuit:
MacLeod v. Dalkon Shield Claimants Trust, 886 F. Supp. 16 (D. Or. 1995)
A magistrate judge had authority to enter an order of remand as a non-case-dispositive pretrial matter under § 636(b)(1)(A), and the district judge was without jurisdiction to review it after a certified copy of the remand order had been mailed to the clerk of the state court.

11th Circuit:
Franklin v. City of Homewood, 2007 WL 1804411 (N.D. Ala. 2007)
A motion to remand is a non-case-dispositive matter and thus requires review under the "clearly erroneous or contrary to the law" standard.

Johnson v. Wyeth, 313 F. Supp. 2d 1272 (N.D. Ala. 2004)
The magistrate judge had the authority under 28 U.S.C. § 636(b)(1)(A) to rule on a motion to remand as long as an opportunity was provided for any party to request review of the magistrate judge's ruling by an Article III judge.

4. Motions to Consolidate, Bifurcate, and Sever Trials

3d Circuit:
Miller v. New Jersey Transit Auth. Rail Operations, 160 F.R.D. 37 (D.N.J. 1995)
The magistrate judge may order separate trials of claims rather than merely recommend such a procedure to the district judge. (No discussion of § 636(b)(1)(A). Opinion by a magistrate judge.)

11th Circuit:
Young v. City of Augusta, Ga., 59 F.3d 1160 (11th Cir. 1995)
The magistrate judge's denial of a motion to consolidate was reviewed by the court of appeals for abuse of discretion.

5. Motions for Jury Trial

2d Circuit:
Palmer v. Angelica Healthcare Servs. Group, Inc., 170 F.R.D. 88 (N.D.N.Y. 1997)
The magistrate judge denied a motion to strike a jury demand. (Opinion by a magistrate judge. No discussion of authority.)

8th Circuit:
Harrington v. Wilbur, 384 F. Supp. 2d 1321 (S.D. Iowa 2005)
A motion for a jury trial is a non-case-dispositive matter under 28 U.S.C. § 636(b)(1), and the magistrate judge's order ruling on the motion is subject to a "clearly erroneous or contrary to law" standard of review.

6. Motions to Intervene

Courts disagree over whether orders on motions to intervene are dispositive of a claim or defense before the court. See Section 5, *infra*, for additional opinions on this issue.

2d Circuit:
United States v. Certain Real Property, 751 F. Supp. 1060 (E.D.N.Y. 1989)
A motion to intervene is not dispositive of a claim or defense of a party under Fed. R. Civ. P. 72 and can be referred to a magistrate judge under § 636(b)(1)(A).

3d Circuit:
United States v. W.R. Grace & Co. - Conn., 185 F.R.D. 184 (D.N.J. 1999)
A magistrate judge may hear and adjudicate a motion to intervene as a non-case-dispositive pretrial motion, without the consent of the parties.

5th Circuit:
WFK & Assoc., L.L.C. v. Tangipahoa Parish, 2007 WL 1537633 (E.D. La. 2007)
A magistrate judge's denial of a motion to intervene was reviewed as a non-case-dispositive matter.

Mississippi Power & Light Co. v. United Gas Pipe Line Co., 621 F. Supp. 718 (S.D. Miss. 1985)
The denial of a motion to intervene is equivalent to an involuntary dismissal, even though the original suit remains for adjudication. A magistrate judge therefore had no authority to render a final decision on the motion.

9th Circuit:
United States v. Brooks, 163 F.R.D. 601 (D. Or. 1995)
A magistrate judge's ruling on a motion to intervene is a non-case-dispositive pretrial ruling reviewable under the clearly erroneous or contrary to law standard.

10th Circuit:
Day v. Sebelius, 227 F.R.D. 668 (D. Kan. 2005)
An order granting leave to intervene is a non-case-dispositive matter under 28 U.S.C. § 636(b)(1). (Opinion by a magistrate judge.)

D.C. Circuit:
Perles v. Kagy, 394 F. Supp. 2d 68 (D.D.C. 2005)
A district judge could refer a motion to intervene without the parties' consent and would review objections under a "clearly erroneous" standard. (Opinion by a magistrate judge.)

7. Motions to Strike Claims

1st Circuit:
Singh v. Superintending School Committee of the City of Portland, 593 F. Supp. 1315 (D. Me. 1984)
A motion to strike claims for punitive damages was properly decided by a magistrate judge under § 636(b)(1)(A) since it was not one of the pretrial motions excepted from referral to magistrate judges.

8. Discovery Motions and Orders

In most districts, discovery motions are referred routinely to magistrate judges. Matters concerning discovery are ordinarily considered to be non-case-dispositive pretrial matters subject to the clearly erroneous or contrary to law standard of review, though some districts have found certain motions regarding expert testimony to be case-dispositive.

1st Circuit:
Sunview Condo. Assoc. v. Flexel Int'l, Ltd., 116 F.3d 962 (1st Cir. 1997)
A magistrate judge's order denying a motion to compel jurisdictional discovery is non-case-dispositive and self-operating. An aggrieved party must file timely objections in the district court to receive subsequent review in a court of appeals.

Public Service Co. of N.H. v. Portland Natural Gas, 218 F.R.D. 361 (D.N.H. 2003)
The district judge reviewed a magistrate judge's order granting a motion to compel discovery under a "clearly erroneous" standard.

Holmes Products Corp. v. Dana Lighting, Inc., 926 F. Supp. 264 (D. Mass. 1996)
A magistrate judge's discovery order may be reviewed only under the clearly erroneous or contrary to law standard, and the district judge is not permitted to receive additional evidence.

In re San Juan Dupont Plaza Hotel Fire Litigation, 117 F.R.D. 30 (D.P.R. 1987)
A magistrate judge is authorized under § 636(b)(1)(A) to order compliance with a subpoena duces tecum issued in another district during multi-district litigation. (Opinion by a magistrate judge.)

2d Circuit:
Thomas Hoar Inc., v. Sara Lee Corp., 900 F.2d 522 (2d Cir.), *cert. denied*, 498 U.S. 846 (1990)
Discovery matters, including monetary sanctions under Rule 37 for failure to comply with discovery orders, are generally non-case-dispositive matters subject to the clearly erroneous or contrary to law standard of review.

Ritchie Risk-Linked Strategies Trading (Ireland), Ltd. v. Coventry First LLC, 282 F.R.D. 76 (S.D.N.Y. 2012)
A district judge held that a magistrate judge did not clearly err or act contrary to law in denying the plaintiffs' request to submit rebuttal expert reports after the date for completing discovery established in the magistrate judge's original scheduling order had passed. [See Information Memorandum No. 325 for a more detailed summary of this case.]

Highland Capital Mgmt. v. Schneider, 551 F. Supp. 2d 173 (S.D.N.Y. 2008)
The district court reviewed the magistrate judge's opinion and order on a motion to exclude proposed expert testimony under the "clearly erroneous or contrary to law" standard.

In re Rivastigimine Patent Litigation, 239 F.R.D. 351 (S.D.N.Y. 2006)
The "clearly erroneous or contrary to law" standard set forth in 28 U.S.C. § 636(b)(1)(A) governs a trial court's review of a magistrate judge's order regarding a discovery dispute.

Patton v. Thomson Corp., 364 F. Supp. 2d 263 (E.D.N.Y. 2005)
A magistrate judge had authority to order a defendant to provide names, addresses and other identifying information about putative class members in a potential class action under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*. A discovery motion was a non-case-dispositive matter, even though the issue of whether the class was properly maintained had not yet been decided. (Opinion by a magistrate judge.)

In re Natural Gas Commodities Litigation, 232 F.R.D. 208 (S.D.N.Y. 2005)
In reviewing a magistrate judge's order denying a motion to compel, the district judge applied the "clearly erroneous or contrary to law" standard under Fed. R. Civ. P. 72.

E.E.O.C. v. First Wireless Group, Inc., 225 F.R.D. 404 (E.D.N.Y. 2004)
A magistrate judge's authority in a discovery dispute in the EEOC's employment discrimination case against an employer included the authority to grant a protective order

against an employer's discovery request for information about the charging parties' allegedly illegal immigration status.

3d Circuit:

Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir. 1992)
When reviewing a magistrate judge's non-case-dispositive discovery order, a district judge is not permitted to consider additional evidence and is bound by the clearly erroneous standard when reviewing questions of fact.

New York v. United States Metals Refining Co., 771 F.2d 796 (3d Cir. 1985)
A magistrate judge is authorized to issue a protective order under Fed. R. Civ. P. 26 to prevent a party from releasing discovery information to the public. A temporary discovery order does not reach the merits of the case.

Lithuanian Commerce Corp., Ltd. v. Sara Lee Hosiery, 179 F.R.D. 450 (D.N.J. 1998)
A magistrate judge's evidentiary determinations regarding expert testimony are reviewed as non-case-dispositive orders under 28 U.S.C. § 636(b)(1)(A), even where they may ultimately affect the outcome of a claim or defense.

Scott Paper Co. v. United States, 943 F. Supp. 501 (E.D. Pa. 1996)
A district judge may overrule a magistrate judge's non-case-dispositive discovery order only if the decision is clearly erroneous or contrary to law or if the magistrate judge abused his discretion.

4th Circuit:

FDIC v. United States, 527 F. Supp. 942 (S.D. W. Va. 1981)
A magistrate judge's decision denying discovery on the basis of attorney-client privilege is a non-case-dispositive matter.

5th Circuit:

In re Terra International, Inc. 134 F.3d 302 (5th Cir. 1998)
The court of appeals issued a writ of mandamus to compel the district court to vacate its order affirming the magistrate judge's protective order sequestering fact witnesses prior to their depositions and barring witnesses from attending the depositions of other witnesses. The district judge abused his discretion in affirming the magistrate judge's order.

Newton v. Roche Laboratories, Inc., 243 F. Supp. 2d 672 (W.D. Tex. 2002)
A magistrate judge issued an order granting motions to exclude expert testimony. (No discussion of magistrate judge authority.)

Lahr v. Fulbright & Jaworski, L.L.P., 164 F.R.D. 204 (N.D. Tex. 1996)
A district judge affirmed the magistrate judge's order granting a motion for mental examination in a sexual harassment action, applying the clearly erroneous standard to the magistrate judge's fact-finding, reviewing conclusions of law de novo, and invoking the abuse of discretion standard to review "that vast area of choice that remains to the magistrate judge who has properly applied the law to fact findings that are not clearly erroneous."

6th Circuit:

Downs v. Perstorp Components, Inc., 126 F. Supp. 2d 1090 (E.D. Tenn. 1999)

A magistrate judge issued an order granting a motion to exclude expert testimony. (No discussion of magistrate judge authority.)

Mathers v. Bricklayers and Allied Craftsmen, 1991 WL 334858 (W.D. Mich. 1991)

A magistrate judge's denial of a motion to compel discovery based on attorney-client privilege is a non-case-dispositive matter.

Pauley v. United Operating Co., 606 F. Supp. 520 (E.D. Mich. 1985)

An order requiring a defendant to appear at a pretrial discovery hearing is within the magistrate judge's authority under § 636(b)(1)(A).

7th Circuit:

Westefer v. Snyder, 472 F. Supp. 2d 1034 (S.D. Ill. 2006)

In general, discovery orders are non-case-dispositive matters within the meaning of Fed. R. Civ. P. 72.

Vann v. Lone Star Steakhouse & Saloon of Springfield, Inc., 967 F. Supp. 346 (C.D. Ill. 1997)

A motion to compel disclosure of a psychotherapist's records was a non-case-dispositive motion within the magistrate judge's authority and subject to review under a clearly erroneous or contrary to law standard.

8th Circuit:

Bialas v. Greyhound Lines, Inc., 59 F.3d 759 (8th Cir. 1995)

A magistrate judge's grant of a motion to quash discovery requests is reviewable by a district judge under the "clearly erroneous or contrary to law" standard.

Benedict v. Zimmer, Inc., 232 F.R.D. 305 (N.D. Iowa 2005)

A motion for leave to provide an expert's report is a non-case-dispositive matter, even though the court's ruling on the motion obviously affects the court's order on a pending summary judgment motion.

9th Circuit:

Powers v. Eichen, 961 F. Supp. 233 (S.D. Cal. 1997)

A magistrate judge stayed discovery pending the determination of a motion for reconsideration of a ruling on a motion to dismiss in a securities fraud action. (Opinion by a magistrate judge.)

Piper v. Harnischfeger Corp., 170 F.R.D. 173 (D. Nev. 1997)

A magistrate judge ordered that a treating physician identified as an expert who was expected to testify at trial did not have to provide the expert report required under Fed. R. Civ. P. 26. (Opinion by a magistrate judge.)

Ainsworth v. Vasquez, 759 F. Supp. 1467 (E.D. Cal. 1991)
In a death penalty habeas corpus case, a magistrate judge may exercise the inherent powers of the court to issue non-case-dispositive orders setting hearings under *Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir. 1988), to determine the existence of all exhausted and unexhausted claims.

10th Circuit:
Allen v. Sybase, 468 F.3d 642 (10th Cir. 2006)
A motion to strike hearsay statements from an affidavit was referred to a magistrate judge as a non-case-dispositive matter.

Claytor v. Computer Assoc. Int'l, 211 F.R.D. 665 (D. Kan. 2003)
A magistrate judge's order on a motion to extend the discovery period will be overturned only if clearly erroneous or contrary to law.

Burton v. R.J. Reynolds Tobacco Co., 177 F.R.D. 491 (D. Kan. 1997)
A district judge reviewed a magistrate judge's order on a motion to compel under the clearly erroneous or contrary to law standard.

Bryant v. Hilst, 136 F.R.D. 487 (D. Kan. 1991)
A magistrate judge's order denying a motion for a protective order preventing ex parte communications by counsel with opposing party's witnesses is reviewed as a non-case-dispositive matter.

11th Circuit:
Featherston v. Metropolitan Life Insurance Co., 223 F.R.D. 647 (N.D. Fla. 2004)
A magistrate judge's ruling granting a protective order precluding the deposition of two witnesses was subject to review under the clearly erroneous standard.

9. Motions to Quash Subpoena

6th Circuit:
Tri-Star Airlines, Inc. v. Willis Careen Corp. of Los Angeles, 75 F. Supp. 2d 835 (W.D. Tenn. 1999)
A magistrate judge had the authority to deny the United States government's motion to quash a civil subpoena seeking access to documents seized by the FBI during an on-going criminal investigation.

8th Circuit:
United States v. Blade, 336 F.3d 754 (8th Cir. 2003)
The magistrate judge acted within his discretionary authority in refusing to issue numerous subpoenas requested by the defendant under Fed. R. Crim. P. 17.

Heuser v. Johnson, 189 F. Supp. 2d 1250 (D.N.M. 2001)
A magistrate judge's order denying a motion to enforce a subpoena was not case-dispositive; its only effect was to permit an individual to avoid having to be deposed. Such an order was

clearly non-case-dispositive and was therefore subject to the deferential standard of review set forth in Fed. R. Civ. P. 72.

9th Circuit:
Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965 (C.D. Cal. 2010)
In granting the plaintiff's motion for reconsideration of the magistrate judge's order denying a plaintiff's motion to quash the defendants' third party subpoenas in a copyright action, the district judge treated the motion to quash the subpoenas as a non-case-dispositive matter under 28 U.S.C. § 636(b)(1)(A) applying the clearly erroneous standard when reviewing the magistrate judge's findings of fact and conducting an independent review of purely legal determinations under the contrary to law standard. [See Information Memorandum No. 318 for a more detailed summary of this case.]

10. Letters Rogatory [28 U.S.C. § 1782]

Courts disagree over whether letters rogatory matters are dispositive of a claim or defense before the court. See Section 5, *infra*, for additional opinions on this issue.

3d Circuit:
In re Kasper-Ansermet, 132 F.R.D. 622 (D.N.J. 1990)
A magistrate judge's order granting a motion to quash deposition subpoenas issued under 28 U.S.C. § 1782 was affirmed as being neither clearly erroneous nor contrary to law.

6th Circuit:
In re Letter of Request From Local Court of Pforzheim, 130 F.R.D. 363 (W.D. Mich. 1989)
Letters rogatory could be assigned to a magistrate judge appointed as "commissioner" for purposes of rendering judicial assistance under 28 U.S.C. § 1782(a). A magistrate judge has discretion under § 636(b) to grant or deny a requested order for a blood sample. (Opinion by a magistrate judge.)

9th Circuit:
Four Pillars Enterprises Co., Ltd. v. Avery Dennison Corp., 308 F.3d 1075 (9th Cir. 2002)
A Taiwanese company's application to the Central District of California for assistance in conducting discovery in a foreign proceeding under 28 U.S.C. § 1782 was referred to a magistrate judge as a non-case-dispositive discovery matter, and the magistrate judge's rulings were reviewed under the clearly erroneous standard.

In re Request for Judicial Assistance from Seoul Dist. Criminal Court, Seoul, Korea, 428 F. Supp. 109 (N.D. Cal), *aff'd*, 555 F.2d 720 (9th Cir. 1977)
Only a district judge may order judicial assistance under 28 U.S.C. § 1782. A written order of reference appointing a magistrate judge as a commissioner in this matter limited the magistrate judge to administrative functions only, and the magistrate judge had no authority to deny the request for assistance. The matter was therefore treated as a report and recommendation under § 636(b)(1)(B).

11th Circuit:

In re Commissioner's Subpoenas, 325 F.3d 1287 (11th Cir. 2003)

A request for assistance, or letter rogatory, from Canadian law enforcement authorities seeking subpoenas under 28 U.S.C. § 1782 to interview individuals residing in Florida was referred to a magistrate judge as a non-case-dispositive matter, and the district court properly reviewed the magistrate judge's ruling under the clearly erroneous standard.

D.C. Circuit:

Norex Petroleum Ltd v. Chubb Insurance Group of Canada, 384 F. Supp. 2d 45 (D.D.C. 2005)

A Canadian company's petition under 28 U.S.C. § 1782 for assistance in conducting discovery in a foreign proceeding was referred to a magistrate judge as a non-case-dispositive discovery matter, and the magistrate judge's ruling was reviewed under the clearly erroneous standard.

11. Sanctions

Courts disagree over whether imposition of sanctions is dispositive of a claim or defense before the court. See Section 5, *infra*, for additional opinions on this issue.

1st Circuit:

Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1 (1st Cir. 2005)

A magistrate judge had authority to take into account an attorney's misconduct involving another related case when ordering sanctions against the attorney.

Estates of Ungar and Ungar v. Palestinian Authority, 325 F. Supp. 2d 15 (D.R.I. 2004), *aff'd*, 402 F.3d 274 (1st Cir.), *cert. denied*, 546 U.S. 1034 (2005)

A magistrate judge's determination to award attorneys' fees as a discovery sanction pursuant to Fed. R. Civ. P. 37 is a non-case-dispositive matter, and the district court reviews the magistrate judge's order under the clearly erroneous standard.

2d Circuit:

Kiobel v. Millson, 592 F.3d 78 (2d Cir.2010)

Deciding the appeal on other grounds, three judges on a panel of the Second Circuit issued separate concurring opinions setting forth disparate views on whether a magistrate judge has authority to order sanctions under Fed. R. Civ. P. 11. One judge issued an opinion concluding that magistrate judges do not have authority under the Federal Magistrates Act, 28 U.S.C. § 636, to issue a dispositive sanction order under Rule 11, while another judge issued an opinion concluding that magistrate judges do have this authority under the Act. A third judge declined to endorse either view in light of the statute's ambiguity. [See Information Memorandum No. 315 for a more detailed summary of this case.]

Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522 (2d Cir.), *cert. denied*, 498 U.S. 846 (1990)
The imposition of monetary sanctions under Fed. R. Civ. P. 37 is usually considered a non-case-dispositive matter. Some Rule 37 evidentiary sanctions may, however, be considered case-dispositive.

Carmona v. Wright, 233 F.R.D. 270 (N.D.N.Y. 2006)
Sanctions for discovery violations are generally considered non-case-dispositive matters unless the sanction employed disposes of a claim; e.g., striking pleadings with prejudice, or dismissing the case.

Arons v. Lalime, 167 F.R.D. 364 (W.D.N.Y. 1996)
A magistrate judge ordered monetary sanctions pursuant to Fed. R. Civ. P. 16 and Fed. R. Civ. P. 37. (Opinion by a magistrate judge.)

Weeks Stevedoring Co., Inc., v. Raymond Int'l Builders, Inc., 174 F.R.D. 301 (S.D.N.Y. 1997)
A magistrate judge's award of Rule 11 sanctions is reviewable under the clearly erroneous or contrary to law standard of review unless the sanction itself can be considered dispositive of a claim.

Burns v. Imagine Films Entertainment, Inc., 164 F.R.D. 594 (W.D.N.Y. 1996)
Magistrate judges can order discovery sanctions that are non-case-dispositive, including, in this copyright infringement case, resolving the issue of access to the copyrighted material, a component of the test for infringement. (Opinion by a magistrate judge, expressly leaving the district judge the option of treating it as a report and recommendation.)

Scotch Game Call Company, Inc. v. Lucky Strike Bait Works, Ltd., 148 F.R.D. 65 (W.D.N.Y. 1993)
A magistrate judge awarded attorneys fees and costs under 28 U.S.C. § 1927 as sanctions for the bad faith multiplication of proceedings. (Opinion by a magistrate judge.)

3d Circuit:
Toth v. Alice Pearl, Inc., 158 F.R.D. 47 (D.N.J. 1994)
A magistrate judge's letter opinion imposing Rule 11 sanctions was reviewed as a non-case-dispositive matter subject to the clearly erroneous or contrary to law standard of review.

Exxon Corp. v. Halcon Shipping Co., Ltd., 156 F.R.D. 589 (D.N.J. 1994)
A magistrate judge's order precluding the plaintiff's expert witness from testifying as a sanction for violation of a pretrial discovery order was reviewed under the clearly erroneous or contrary to law standard of review.

4th Circuit:

Giganti v. Gen-X Strategies, Inc., 222 F.R.D. 299 (E.D. Va. 2004)

The issue of sanctions under Fed. R. Civ. P. 11 is a non-case-dispositive matter subject to clearly erroneous review, unless the nature of the sanction imposed, such as dismissal of the offending claim or defense, is itself dispositive of the claim or defense.

Segal v. L.C. Hohne Contractors, Inc., 303 F. Supp. 2d 790 (S.D. W.Va. 2004)

When a district judge reviews a magistrate judge's ruling on a motion for sanctions, the sanction chosen by the magistrate judge, not the sanction sought by the litigant, governs the standard of review to be applied under Fed. R. Civ. P. 72. In the case at bar, the magistrate judge's decision to reject the defendants' request for the sanction of default judgment was a non-case-dispositive matter and was reviewed under the clearly erroneous standard.

Jayne H. Lee, Inc. v. Flagstaff Indus. Corp., 173 F.R.D. 651 (D. Md. 1997)

A magistrate judge granted a motion to compel and entered an order to show cause why discovery sanctions should not be imposed for failure to comply with discovery obligations. (Opinion by a magistrate judge.)

6th Circuit:

Bennett v. General Caster Services of N. Gordon Co., Inc., 976 F.2d 995 (6th Cir. 1992)

A magistrate judge does not have authority under § 636(b)(1)(A) to issue a final order for sanctions under Fed. R. Civ. P. 11.

Clark Construction Group, Inc. v. City of Memphis, 229 F.R.D. 131 (W.D. Tenn. 2005)

A magistrate judge issued an order for sanctions under Fed. R. Civ. P. 37 against a defendant for spoliation of evidence and ordered the defendant to pay fees incurred by the plaintiff in seeking sanctions, but ruled that dismissal of the action as a sanction was not appropriate. (Opinion by a magistrate judge.)

Instituform of North America, Inc. v. Midwest Pipeliners, Inc., 139 F.R.D. 622 (S.D. Ohio 1991)

The district court has the inherent power to consider the ethical conduct of attorneys and to sanction that conduct, including the power to disqualify an attorney or exclude the testimony of an attorney regarding conversations between the attorney and employees of the opposing party. (Opinion by a magistrate judge.)

8th Circuit:

Universal Cooperatives, Inc. v. Tribal Co-op. Marketing Dev. Fed. of India, 45 F.3d 1194 (8th Cir. 1995)

A magistrate judge had authority to impose sanctions when a client with settlement authority failed to attend a conference.

Temple v. WISAP USA in Texas, 152 F.R.D. 591 (D. Neb. 1993)

Rule 11 sanctions were properly imposed by a magistrate judge under § 636(b)(1)(A) because "pretrial" was understood to mean "nontrial." Section 636(b)(3) provided an alternative source of magistrate judge authority.

Jochims v. Isuzu Motors, Ltd., 144 F.R.D. 350 (S.D. Iowa 1992)
A magistrate judge imposed sanctions under Fed. R. Civ. P. 16 for failure to seek a timely amendment of the pretrial scheduling order and the untimely designation of expert witnesses. (Opinion by a magistrate judge. No discussion of magistrate judge authority.)

9th Circuit:
Simpson v. Lear Astronics Corp., 77 F.3d 1170 (9th Cir. 1996)
A party who fails to file timely objections to the magistrate judge's discovery sanctions orders, which are non-case-dispositive, forfeits appellate review.

Grimes v. City and County of San Francisco, 951 F.2d 236 (9th Cir. 1991)
A magistrate judge was authorized under § 636(b)(1)(A) to impose a final order for prospective monetary sanctions under Fed. R. Civ. P. 37 against a municipal defendant that had repeatedly failed to comply with the plaintiff's discovery requests and rulings by the magistrate judge. The appellate court upheld an $85,000 proscriptive sanction ordered by the magistrate judge to compel compliance with discovery orders.

Maisonville v. F2 America, Inc., 902 F.2d 746 (9th Cir. 1990), *cert. denied sub nom. Dombroski v. F2 America, Inc.*, 498 U.S. 1025 (1991
A magistrate judge had authority to impose Rule 11 sanctions against a party for filing a frivolous motion for reconsideration of an order denying discovery sanctions.

Smith & Green Corp. v. Trustees of the Const. Industry, 244 F. Supp. 2d 1098 (D. Nev. 2003)
A magistrate judge had authority to decide a motion for attorney's fees because case-dispositive sanctions were not sought.

10th Circuit:
Hutchinson v. Pfeil, 105 F.3d 562 (10th Cir.), *cert. denied*, 522 U.S. 914 (1997)
The court construed a motion to disqualify counsel as a motion for sanctions within the magistrate judge's authority to decide non-case-dispositive matters under § 636(b)(1)(A). Discovery sanctions under Fed. R. Civ. P. 37 are also properly determined by a magistrate judge under § 636(b)(1)(A).

Gomez v. Martin Marietta Corp., 50 F.3d 1511 (10th Cir. 1995)
A party's request for a case-dispositive sanction – in this case the entry of a default judgment – does not determine the scope of the magistrate judge's authority. If the magistrate judge does not impose a dispositive sanction, the order falls under Fed. R. Civ. P. 72 rather than 72(b).

Allstate Financial Corp. v. Steel-N-Foam-Docks, Inc., 1995 WL 7448 (D. Kan. 1995)
A magistrate judge granted a motion for sanctions (attorneys fees) under Fed. R. Civ. P. 16 against counsel for failure to comply with scheduling and pretrial orders after the district judge had accepted the magistrate judge's report and recommendation for dismissal of the action for the same violations. (Opinion by a magistrate judge.)

11th Circuit:
San Shiah Enterprise Co., Ltd. v. Pride Shipping Corp., 783 F. Supp. 1334 (S.D. Ala. 1992)
A magistrate judge is authorized to impose Rule 11 sanctions under § 636(b)(1)(A) and Fed. R. Civ. P. 72.

D.C. Circuit:
Moore v. Napolitano, 723 F. Supp. 2d 167 (D.D.C. 2010)
Magistrate judge had authority to issue final sanctions order against defendant under Fed. R. Civ. P. 37 that precluded the defendant from offering any legitimate, non-discriminatory reason to rebut any prima facie case of disparate treatment discriminatory non-promotion of the individually named plaintiffs in a discrimination class action. [See Information Memorandum No. 318 for a more detailed summary of this case.]

Collett v. Socialist Peoples' Libyan Arab Jamahiriya, 448 F. Supp. 2d 92 (D.D.C. 2006)
A magistrate judge's decision on a motion for sanctions is entitled to great deference and will not be disturbed unless found to be clearly erroneous or contrary to law.

12. Motions to Disqualify Counsel

1st Circuit
Ageloff v. Noranda, Inc., 936 F. Supp. 72 (D.R.I. 1996)
A magistrate judge's order denying a motion for admission pro hac vice and disqualifying counsel was reversed by the district court for clear error.

3d Circuit:
Mruz v. Caring, Inc., 166 F. Supp. 2d 61 (D.N.J. 2001)
A motion to revoke an attorney's pro hac vice status is a non-case-dispositive matter under § 636(b)(1)(A) that may be ruled on by a magistrate judge, subject to review by a district judge under the clearly erroneous or contrary to law standard.

Andrews v. Goodyear Tire & Rubber Co., Inc., 191 F.R.D. 59 (D.N.J. 2000)
Matters concerning the disqualification of counsel and pretrial discovery are invariably treated as non-case-dispositive pretrial motions by courts in this jurisdiction and elsewhere, and the district court may only set aside the magistrate judge's disqualification order if it is found to be clearly erroneous or contrary to law.

6th Circuit:
Affeldt v. Carr, 628 F. Supp. 1097 (N.D. Ohio 1985)
A motion to disqualify counsel is a non-case-dispositive pretrial matter properly referred to a magistrate judge under § 636(b)(1)(A).

9th Circuit:

Advanced Manufacturing Technologies, Inc. v. Motorola, Inc., 2002 WL 1446953 (D. Ariz. 2002)

A magistrate judge's authority to rule on a disqualification motion falls within the "pretrial duties" delegated to magistrate judges under the Federal Magistrates Act. Because it is a non-case-dispositive matter, it may be handled by a magistrate judge under 28 U.S.C. § 636(b)(1)(A). (Opinion by a magistrate judge.)

Coles v. Arizona Charlie's, 992 F. Supp. 1214 (D. Nev. 1998)

A district judge applied the "clearly erroneous or contrary to law" standard of review to affirm the magistrate judge's order disqualifying the plaintiff's attorney who had previously worked for the defense counsel's law firm.

Asyst Tech., Inc. v. Empak, Inc., 962 F. Supp. 1241 (N.D. Cal. 1997)

A magistrate judge granted a motion to disqualify defense counsel in a patent case in which two of the defense firm's partners had participated in obtaining the patents at issue. (Opinion by a magistrate judge.)

11th Circuit:

Estate of Jones v. Beverly Health and Rehabilitation Services, Inc., 68 F. Supp. 2d 1304 (N.D. Fla. 1999)

An order disqualifying counsel is a non-case-dispositive matter that may be handled by a magistrate judge as a pretrial duty under 28 U.S.C. § 636(b)(1)(A). (Opinion by a magistrate judge.)

13. Motions for Self-Representation

11th Circuit:

United States v. Schultz, 565 F.3d 1353 (11th Cir. 2009)

A magistrate judge had authority under 28 U.S.C. § 636(b)(1)(A) to rule on a felony defendant's motion to represent himself at trial. [See Information Memorandum No. 313 for a more detailed summary of this case.]

14. *Garcia* Hearings

11th Circuit:

United States v. Freixas, 332 F.3d 1314 (11th Cir. 2003)

A magistrate judge had authority to preside over a *Garcia* hearing in a felony case to determine whether a conflict of interest existed concerning counsel's representation of multiple defendants.

15. Sufficiency of Pleas

5th Circuit:
United States v. Rojas, 898 F.2d 40 (5th Cir. 1990)
A magistrate judge may preside over an evidentiary hearing to determine the voluntariness of a defendant's guilty plea. Although the court considered the proceeding a non-case-dispositive pretrial matter referred under § 636(b)(1)(A), in this case the district judge maintained authority over the final decision by reviewing the magistrate judge's report and recommendation concerning the plea.

16. Motions to Certify Order for Interlocutory Appeal

6th Circuit:
Vitols v. Citizens Banking Co., 984 F.2d 168 (6th Cir. 1993)
A magistrate judge did not have authority under § 636(b)(1) to issue a final order certifying a district court order for interlocutory appeal under 28 U.S.C. § 1292(b).

17. Grand Jury Proceedings

2d Circuit:
United States v. Diaz, 922 F.2d 998 (2d Cir. 1990), *cert. denied*, 500 U.S. 925 (1991)
The selection and empanelment of a grand jury is a non-substantive, ministerial task that may be referred to a magistrate judge under § 636(b)(1)(A). The limitations of the Jury Act, 28 U.S.C. 1861 *et seq.*, are overridden by the Federal Magistrates Act.

In re Grand Jury Subpoena, 118 F.R.D. 558 (D. Vt. 1987)
A motion to quash a grand jury subpoena was referred to a magistrate judge under § 636(b)(1)(A).

9th Circuit:
In re Search of 6783 East Soaring Eagle Way, 109 F. Supp. 2d 1162 (D. Ariz. 2000)
Magistrate judges may order the disclosure of grand jury testimony pursuant to their "pretrial matter" authority under 28 U.S.C. § 636(b)(1)(A) and their "additional duties" authority under § 636(b)(3).

18. Subpoenas Duces Tecum [Fed. R. Crim. P. 17]

1st Circuit:
United States v. Kloepper, 725 F. Supp. 638 (D. Mass. 1989)
A magistrate judge may exercise the court's inherent authority and rely on Fed. R. Crim. P. 17 to require an indicted defendant to provide handwriting samples, palmprints and fingerprints. Such an order should not be set aside unless an implicit finding of probable cause to order production of the evidence is clearly erroneous.

2d Circuit:
United States v. Florack, 838 F. Supp. 77 (W.D.N.Y. 1993)
The district judge reversed as contrary to law the magistrate judge's denial of defendant's ex parte motion to issue a subpoena duces tecum under Fed. R. Crim. P. 17, which had been referred to the magistrate judge under § 636(b)(1)(A).

5th Circuit:
Hodge v. Prince, 730 F. Supp. 747 (N.D. Tex. 1990), *aff'd*, 923 F.2d 853 (5th Cir. 1991)
A prisoner's motion for issuance of a subpoena duces tecum without prepayment of witness fees is a non-case-dispositive matter properly decided by the magistrate judge under 28 U.S.C. § 636(b)(1)(A).

19. Motions to Transfer Venue

Courts disagree over whether orders transferring venue are dispositive of a claim or defense before the court. See Section 5, *infra*, for additional opinions on this issue.

2d Circuit:
Shenker v. Murasky, 1996 WL 650974 (E.D.N.Y. 1996)
A magistrate judge's order transferring venue is a non-case-dispositive matter subject to the clearly erroneous or contrary to law standard of review.

3d Circuit:
Berg v. Aetna Freight Lines, 2008 WL 2779294 (W.D. Pa. 2008)
A motion to transfer venue pursuant to 28 U.S.C. § 1404(a) involves a non-case-dispositive pretrial matter that a magistrate judge may determine pursuant to 28 U.S.C. § 636(b)(1)(A). (Opinion by a magistrate judge.)

Market Transition Facility of New Jersey v. Twena, 941 F. Supp. 462 (D.N.J. 1996)
A magistrate judge denied a motion for transfer based on improper venue. (Opinion by a magistrate judge, with no discussion of authority.)

6th Circuit:
Siteworks Solutions v. Oracle Corp., 2008 WL 4415075 (W.D. Tenn. 2008)
A motion to transfer under 28 U.S.C. § 1404(a) is a non-case-dispositive pretrial matter that a magistrate judge may determine pursuant to 28 U.S.C. § 636(b)(1)(A). (Opinion by a magistrate judge.)

9th Circuit:
Paoa v. Marati, 2007 WL 4563938 (D. Haw. 2007)
A magistrate judge's order transferring venue may be rejected by the district judge only if it is clearly erroneous or contrary to law.

11th Circuit:

Silong v. United States, 2006 WL 948048 (M.D. Fla. 2006)

A motion to transfer venue is a non-case-dispositive pretrial matter that a magistrate judge may determine pursuant to 28 U.S.C. § 636(b)(1)(A). (Opinion by a magistrate judge.)

20. Conditional Class Certification

1st Circuit:

Poreda v. Boise Cascade, LLC, 532 F. Supp. 2d 234 (D. Mass. 2008)

Although magistrate judges usually cannot directly authorize final class certifications, they can resolve requests involving preliminary determinations that are not case-dispositive.

2d Circuit:

Barrus v. Dick's Sporting Goods, 465 F. Supp. 2d 224 (W.D.N.Y. 2006)

Although magistrate judges do not have jurisdiction to authorize final certification of a class, they have jurisdiction over motions seeking conditional class certification because those are only preliminary determinations and are not case-dispositive.

Patton v. Thomson Corp., 364 F. Supp. 2d 263 (E.D.N.Y. 2005)

A magistrate judge may decide a motion for leave to circulate a notice of pendency in a case brought under the Fair Labor Standards Act, since the only decision the motion presents is whether the members of the proposed class are similarly situated enough to permit discovery of their names and addresses and sending of a notice alerting them to their right to opt in to the class.

21. Settlement Conferences

7th Circuit:

G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (en banc)

A magistrate judge is authorized to issue an order under Fed. R. Civ. P. 16 requiring the parties with authority to settle the case to attend a pretrial conference.

8th Circuit:

Scott v. United States, 552 F. Supp. 2d 917 (D. Minn. 2008)

The district judge upheld, as neither clearly erroneous nor contrary to law, a magistrate judge's order compelling the personal telephonic participation of an Assistant Attorney General at a settlement conference to be conducted by the magistrate judge.

22. Competency to Stand Trial

7th Circuit:

United States v. Kasim, 2008 WL 4822291 (N.D. Ind. 2008)

Orders of competency to stand trial in criminal cases are non-case-dispositive. (Opinion by a magistrate judge.)

23. Stay of Proceedings

3d Circuit:
Delta Frangible Ammunition, LLC v. Sinterfire, 2008 WL 4540394 (W.D. Pa. 2008)
A request for a stay of proceedings is a non-case-dispositive matter.

24. Appointment of Receiver

2d Circuit:
Fleet Development Ventures, LLC v. Brisker, 2006 WL 2772686 (D. Conn. 2006)
Unlike injunctive relief, the appointment of a temporary receiver under state law is not dispositive of the rights and obligations of the parties. (Opinion by a magistrate judge.)

7th Circuit:
JP Morgan Chase Bank v. Heritage Nursing Care, Inc., 2007 WL 2608827 (N.D. Ill. 2007)
Appointment of a receiver whose duties would be monitoring the financial activities of the defendants and reporting to the court would not be dispositive of any claim or defense of any party. (Opinion by a magistrate judge.)

25. Motions Concerning Arbitration

1st Circuit:
Powershare, Inc. v. Syntel, Inc, 597 F.3d 10 (1st Cir. 2010)
A magistrate judge had authority to rule on a motion to stay litigation pending arbitration as a non-case-dispositive motion under 28 U.S.C. § 636(b)(1), and that the magistrate judge's order was subject to the "clearly erroneous or contrary to law" standard of review by the district judge. [See Information Memorandum No. 316 for a more detailed summary of this case.]

10th Circuit:
Vernon v. Qwest Communications International, Inc, 857 F. Supp. 2d 1135 (D. Colo. 2012)
A magistrate judge ruled that a motion to compel arbitration was a non-case-dispositive matter under 28 U.S.C. § 636(b)(1)(A), and therefore the magistrate judge could issue a final order ruling on the motion. [See Information Memorandum No. 323 for a more detailed summary of this case.]

26. Miscellaneous Pretrial Matters

3d Circuit:
Doe v. Hartford Life & Accident Insurance Co., 237 F.R.D. 545 (D.N.J. 2006)
On appeal, the district judge considered the magistrate judge's ruling on a motion to proceed with the case anonymously as a non-case-dispositive matter, reviewing the magistrate judge's factual findings for clear error and the magistrate judge's legal conclusions under the contrary to law standard.

6th Circuit:
Stanko v. Story, 928 F.2d 1133 (6th Cir. 1991) (Table disposition -- text available on Westlaw)
A magistrate judge is empowered by § 636(b)(1)(A) to make findings regarding exhaustion of remedies without an evidentiary hearing in a habeas corpus case under 28 U.S.C. § 2241.

Nabkey v. Hoffius, 827 F. Supp. 450 (W.D. Mich. 1993), *aff'd*, 79 F.3d 1148 (6th Cir. 1996)
A contempt sanction imposed by a district judge on a vexatious pro se litigant included a requirement that any subsequent paper presented for filing be reviewed and approved by a magistrate judge before being filed.

7th Circuit:
United States v. Scott, 19 F.3d 1238 (7th Cir.), *cert. denied*, 513 U.S. 857 (1994)
A magistrate judge's decision to reopen a suppression hearing is reviewable under the clearly erroneous standard of § 636(b)(1)(A).

9th Circuit:
McKeever v. Block, 932 F.2d 795 (9th Cir. 1991)
A magistrate judge is authorized to dismiss a complaint with leave to amend under § 636(b)(1)(A).

11th Circuit:
Young v. City of Augusta, Ga., 59 F.3d 1160 (11th Cir. 1995)
District judge properly referred a motion for hearing to present oral testimony in connection with a motion for summary judgment to a magistrate judge as a non-case-dispositive motion under § 636(b)(1)(A).

C. Postjudgment Duties

Although § 636(b)(1)(A) states that magistrate judges may be designated to "hear and determine any pretrial matter," courts sometimes utilize this provision to refer postjudgment duties to magistrate judges. Courts are divided on whether or not the use of the term "pretrial matter" in § 636(b)(1)(A) permits a court to refer postjudgment matters to magistrate judges under the provision. The referral of postjudgment matters to magistrate judges also arises under § 636(b)(1)(B) and § 636(b)(3). *See also* Sections 5 and 7, *infra*.

1. Sanctions

5th Circuit:
Merritt v. Int'l Brotherhood of Boilermakers, 649 F.2d 1013 (5th Cir. 1981)
The fact that a hearing under Fed. R. Civ. P. 37 on the issue of litigation expenses, including attorneys' fees, was not conducted by the magistrate judge until after the suit was dismissed did not affect the validity of the magistrate judge's order.

8th Circuit:
Temple v. WISAP USA in Texas, 152 F.R.D. 591 (D. Neb. 1993)
A magistrate judge could rule on a post-trial motion for sanctions under Fed. R. Civ. P. 11 since it was unconnected to the issues litigated at trial.

10th Circuit:
Bergeson v. Dilworth, 749 F. Supp. 1555 (D. Kan. 1990)
The term "pretrial" is not defined with respect to the time of trial, but rather as a matter that is unconnected to the issues litigated at trial. A Fed. R. Civ. P. 11 motion for sanctions against an attorney is a collateral matter and can properly be determined after trial and while the judgment is on appeal.

2. Discovery Orders

2d Circuit:
Denny v. Ford Motor Co., 146 F.R.D. 52 (N.D.N.Y. 1993)
The referral to a magistrate judge of a motion for post-judgment discovery (in this case, the trial judge's deposition) was proper. Although the reference was made without specifying the source of authority relied upon, the reviewing court held that the only possible source of authority was § 636(b)(3).

5th Circuit:
Merritt v. International Brotherhood of Boilermakers, 649 F.2d 1013 (5th Cir. 1981)
A magistrate judge had authority to impose Fed. R. Civ. P. 37 discovery sanctions after entry of judgment since he had expressly reserved a ruling on sanctions after the pretrial hearing.

D.C. Circuit:
Weil v. Markowitz, 108 F.R.D. 113 (D.D.C. 1985)
A magistrate judge had authority to issue a post-judgment order modifying a protective order involving a non-party witness. (Opinion by a magistrate judge.)

3. Appointment of Receiver

6th Circuit:
Bache Halsey Stuart Shields, Inc. v. Killop, 589 F. Supp. 390 (E.D. Mich. 1984)
Section 636(b)(1)(A) only prohibits the magistrate judge from issuing coercive orders compelling or prohibiting the participants' conduct and establishing rights and obligations of the parties. A magistrate judge is authorized to preside over post-judgment collection proceedings, including appointment of a receiver, under either § 636(b)(1)(A) or § 636(b)(3).

D. Other Duties

Magistrate judges currently perform a variety of duties analogous to non-case-dispositive matters for district courts. These duties are not described in the Federal Magistrates Act, and any statutes authorizing the duties do not specify the involvement of magistrate judges. The authority of magistrate judges to perform these duties may not have been addressed specifically in case law, but

it is assumed by the courts where magistrate judges now perform such duties to be derived from the general authority of the Federal Magistrates Act and of the district court itself. This list should not be considered all-encompassing.

The Judicial Services Office recognizes that the following duties are being referred to magistrate judges in various districts around the country. Such references are often made under a local rule. The duties are listed to suggest how different courts have utilized magistrate judges over the last forty years.

- Felony Pretrial Conferences (Fed. R. Crim. P. 17.1)
- Felony Omnibus Hearings
- Civil Pretrial Conferences (Fed. R. Civ. P. 16(b))
- Calendar Calls
- Status Conferences
- Writs of Habeas Corpus Ad Testificandum and Ad Prosequendum
- Final Pretrial Conferences (Fed. R. Civ. P. 16(d))
- Waivers of Indictment
- Determination of Costs of Investigation and Prosecution (21 U.S.C. § 844)
- Appointment of Persons to Serve Process (Fed. R. Civ. P. 4(c)(3))

§ 5. CASE-DISPOSITIVE MATTERS UNDER 28 U.S.C. § 636(b)(1)(B)

Section 636(b)(1)(B) states as follows:

> [A] judge may also designate a magistrate [judge] to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

The Federal Magistrates Act thus provides that magistrate judges may be designated to preside over proceedings in various matters that dispose of cases or defenses before the court. The ultimate adjudicatory power over case-dispositive motions, habeas corpus petitions, and other prisoner petitions, however, is exercised by a district judge unless the parties consent to disposition by the magistrate judge.

A. In General

1. Authority of Magistrate Judge

2d Circuit:

Jean-Laurent v. C.O. Wilkerson, 461 Fed. Appx. 18 (2d Cir. 2012)
A magistrate judge exceeded his authority under 28 U.S.C. § 636(b)(1)(A) by issuing a final order denying a pro se prisoner's motion to amend his complaint to include any state law claims, which had previously survived the defendant's motion to dismiss. [See Information Memorandum No. 323 for a more detailed summary of this case.]

Savoie v. Merchants Bank, 84 F.3d 52 (2d Cir. 1996)
Subsequent to a magistrate judge's recommendation that funds be set aside for payment of the plaintiff's attorneys fees, but before the district judge had adopted the recommendation, the defendant disbursed the funds. The appeals court affirmed the district court's order to restore the status quo ante by escrowing the funds, noting that "it has long been clear that there are circumstances in which parties ignore recommendations of the magistrate judge at their peril."

Katz v. Molic, 128 F.R.D. 35 (S.D.N.Y. 1989)
A general pretrial order referring matters to the magistrate judge did not enable the magistrate judge to consider case-dispositive motions without a specific order of reference under § 636(b)(1)(B).

Langley v. Coughlin, 715 F. Supp. 522 (S.D.N.Y. 1989)
A magistrate judge's report recommending denial of a summary judgment motion did not exceed an order of reference authorizing the magistrate judge to conduct "all pretrial matters ... except that questions relating to defendants' immunity are not included in this reference."

3d Circuit:
Beazer East, Inc. v. The Mead Corp., 412 F.3d 429 (3d Cir. 2005), *cert. denied*, 546 U.S. 1091 (2006)
The district court's referral of an equitable allocation proceeding in a CERCLA case to a magistrate judge for an evidentiary hearing and preparation of a report and recommendation was improper because an equitable allocation proceeding conducted by the magistrate judge was not a "pretrial matter." The magistrate judge did not facilitate the district court's ultimate adjudicatory function — he assumed that function, thereby making the referral improper.

Giangola v. Walt Disney World Co., 753 F. Supp. 148 (D.N.J. 1990)
The magistrate judge had no authority to reconsider his order of remand, since he had no power to issue the order in the first place.

4th Circuit:
Branning v. Morgan Guar. Trust Co. of New York, 739 F. Supp. 1056 (D.S.C. 1990)
A district judge accepted the magistrate judge's treatment of a motion to dismiss as a motion for summary judgment where the parties submitted materials outside the scope of the pleadings.

Hay v. Waldron, 834 F.2d 481 (5th Cir. 1987)
Where the magistrate judge reserved an issue for future determination, yet included findings and conclusions on that issue in the report to the district judge, the magistrate judge's findings were clearly premature and required reversal and remand to permit further proceedings on the reserved issue.

6th Circuit:
Vitols v. Citizens Banking Co., 984 F.2d 168 (6th Cir. 1993)
The power of a magistrate judge is limited to the scope of the reference. Without consent, a reference under § 636(b) is limited to non-case-dispositive pretrial matters or recommendations on case-dispositive matters. This does not include authority to issue a dispositive ruling on a motion to certify a district court order for interlocutory appeal.

7th Circuit:
United States v. Asubonteng, 895 F.2d 424 (7th Cir.), *cert. denied sub nom. Rivers v. United States*, 494 U.S. 1089 (1990)
The magistrate judge was authorized under 18 U.S.C. § 3161(h)(8)(A) to continue the case sua sponte and exclude the time of the continuance from Speedy Trial Act computation. The

court will not disturb the magistrate judge's decision absent an abuse of discretion and a showing of prejudice.

11th Circuit:
Moore v. Morgan, 922 F.2d 1553 (11th Cir. 1991)
The government defendants' failure to plead a qualified immunity defense at the first hearing constituted a waiver of the defense, despite the magistrate judge's sua sponte order granting a supplemental evidentiary hearing on the issue.

2. Procedural Requirements

Rule 72(b) of the Federal Rules of Civil Procedure and Rule 59(b) of the Federal Rules of Criminal Procedure set forth the procedural requirements for case-dispositive matters referred to magistrate judges under § 636(b)(1)(B).

1st Circuit:
Koken v. Auburn Manufacturing, Inc., 341 F. Supp. 2d 20 (D. Me. 2004)
A litigant was not permitted to supplement the record on a case-dispositive motion after the magistrate judge completed a report and recommendation, where the party had sufficient opportunity to raise all relevant arguments and evidence before the magistrate judge.

3d Circuit:
Scheafnocker v. Comm'r of I.R.S., 642 F.3d 428 (3rd Cir. 2011)
A magistrate judge's report and recommendation in one district which was subsequently vacated when the magistrate judge ordered the case transferred to another district could not serve as the law of the case governing the rulings of the district to which the case was transferred. [See Information Memorandum No. 319 for a more detailed summary of this case.]

5th Circuit:
United States v. Harris, 566 F.3d 422 (5th Cir. 2009),
The 30-day limit on excludable days for motions taken under advisement under the Speedy Trial Act, 18 U.S.C. § 3161(h)(1)(H), applies to a report and recommendation prepared by a magistrate judge, and that an additional 30-day limit on excludable days applies to the district judge's de novo review of the report and recommendation. [See Information Memorandum No. 313 for a more detailed summary of this case.]

Figgie International, Inc. v. Bailey, 25 F.3d 1267 (5th Cir. 1994)
A district judge did not commit error by refusing to admit an additional affidavit in support of a motion for summary judgment when conducting de novo determination of a magistrate judge's report and recommendation where the party failed to introduce the affidavit within the deadline set by the magistrate judge.

Archie v. Christian, 808 F.2d 1132 (5th Cir. 1987) (en banc)
It is good practice for referrals to state plainly the statutory provision under which the court is proceeding.

8th Circuit:
United States v. Almeida-Perez, 549 F.3d 1162 (8th Cir. 2008)
A magistrate judge did not commit plain error or violate Fed. R. Evid. 614(b) when he questioned witnesses during a hearing to suppress evidence referred to the magistrate judge under 28 U.S.C. § 636(b)(1)(B). [See Information Memorandum No. 313 for a more detailed summary of this case.]

United States v. Azure, 539 F.3d 904 (8th Cir. 2008)
A magistrate judge did not have authority to conduct a supervised release revocation proceeding under 18 U.S.C. § 3401(i) where there was nothing in the record to indicate that the district judge had made a designation of the proceeding to the magistrate judge. However, the failure constituted procedural error, not jurisdictional error, and it was waived when the defendant did not raise it before the district judge.

9th Circuit:
Klamath Siskiyou Wildlands Center v. United States Bureau of Land Management, 589 F.3d 1027 (9th Cir. 2009),
A favorable recommendation in a magistrate judge's report and recommendation that had not yet been adopted by a district judge did not render the plaintiffs a "prevailing party" for the purposes of awarding attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. [See Information Memorandum No. 316 for a more detailed summary of this case.]

Dawson v. Marshall, 561 F.3d 930 (9th Cir. 2009)
A district judge who was a former magistrate judge was not precluded from deciding a case in which the judge had issued a report and recommendation when he was a magistrate judge. [See Information Memorandum No. 313 for a more detailed summary of this case.]

United States v. Howell, 231 F.3d 615 (9th Cir. 2000)
A magistrate judge did not abuse his discretion in refusing to hold an evidentiary hearing on the defendant's motion to suppress, where the defendant's motion for an evidentiary hearing identified no specific facts which, if proved, would allow the court to suppress his confession. An evidentiary hearing on a case-dispositive motion need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist.

11th Circuit:
Jeffrey S. v. State Bd. of Educ., 896 F.2d 507 (11th Cir. 1990)
The referral of a matter to a magistrate judge under § 636(b)(1)(B) need not be in writing.

3. District Court's Supervisory Authority

Supreme Court:
United States v. Raddatz, 447 U.S. 667 (1980)
The district judge has broad discretion under § 636(b)(1) to accept, reject, or modify the magistrate judge's proposed findings, including discretion to conduct a hearing to resolve conflicting credibility claims.

1st Circuit:
United States v. Cadieux, 295 F. Supp. 2d 133 (D. Me. 2004)
After defendant's motion to suppress evidence was referred to a magistrate judge for a report and recommendation and the defendant moved to withdraw the designation of the magistrate judge, arguing that objections to the magistrate judge's report and recommendation were likely and would require another evidentiary hearing before the district judge, the court denied the motion, noting that a second evidentiary hearing is not required by the statute and that judicial efficiency would not be served by granting the motion.

4th Circuit:
Daye v. Orthopaedic Assoc. of Virginia, Ltd., 924 F.2d 1051 (4th Cir. 1991) (Table disposition -- text available on Westlaw)
The court of appeals had no jurisdiction, either as a final or an interlocutory appeal, to hear an "appeal" of a district court's order referring the matter to a magistrate judge.

5th Circuit:
United States v. Bartholomew, 1991 WL 40316 (E.D. La. 1991), *aff'd in part, remanded in part*, 974 F.2d 39 (5th Cir. 1992)
The court vacated a § 636(b)(1)(B) reference to a magistrate judge after determining that an evidentiary hearing was not necessary and that the claim could be dismissed.

9th Circuit:
Magee v. Rowland, 764 F. Supp. 1375 (C.D. Cal. 1991)
In a proceeding referred to a magistrate judge under § 636(b)(1)(B) for a report and recommendation, an immediate, interlocutory appeal does not lie to the district judge from an interim discovery ruling made in that proceeding. Such interlocutory review would frustrate the purpose of reference of the entire matter to a magistrate judge for a report and recommendation.

United States v. DeCoito, 764 F.2d 690 (9th Cir. 1985)
Even if the district judge received and signed the magistrate judge's report and recommendation before it was filed, or before copies were sent to the parties, there was no reversible error.

10th Circuit:
Liverman v. Committee on the Judiciary, U.S. House of Representatives, 51 Fed. Appx. 825 (10th Cir. 2002), *cert. denied,* 537 U.S. 1160 (2003)
Implicit in the district court's discretionary authority under § 636(b)(1)(B) to refer a matter to a magistrate judge is the power to withdraw a reference.

4. Time to File Objections

Section 636(b)(1)(C) provides that "[w]ithin ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court." Rule 72(b) of the Federal Rules of Civil Procedure and Rule 59(b) of the Federal Rules of Criminal Procedure govern case-dispositive motion practice before magistrate judges.

1st Circuit:
United States v. Moores, 620 F. Supp. 241 (D.P.R. 1985)
The time between the filing of pretrial motions with a magistrate judge and the prompt disposition of those motions was excludable under the Speedy Trial Act. The 10-day objection period under § 636(b)(1)(C) is also excludable. The district court has an additional excludable 30 days to review objections to the magistrate judge's report and recommendation.

2d Circuit:
Wesolek v. Canadair, Ltd., 838 F.2d 55 (2d Cir. 1988)
The district court had discretion under Fed. R. Civ. P. 6 to permit an extension of the 10-day objection period to the magistrate judge's report and recommendation. The movant must assert excusable neglect to the district court. The district court's decision is reviewed by the court of appeals under an abuse of discretion standard.

Harb v. Gallagher, 131 F.R.D. 381 (S.D.N.Y. 1990)
Requests for extensions of time to file objections to the magistrate judge's report and recommendation should be made to the district judge, not the magistrate judge.

4th Circuit:
United States v. Rice, 741 F. Supp. 101 (W.D.N.C. 1990)
Objections to reports and recommendations on case-dispositive motions must be filed within 10 days after service of the report and recommendation. Weekends and holidays are excluded under Fed. R. Crim. P. 45 and litigants are given three additional days for mail service under Rule 45(e).

5th Circuit:

Cay v. Estelle, 789 F.2d 318 (5th Cir. 1986)

The district court had discretionary authority under Fed. R. Civ. P. 6 to allow a pro se prisoner additional time to file objections to the magistrate judge's report and recommendation after the 10-day objection period had run.

6th Circuit:

United States v. Andress, 943 F.2d 622 (6th Cir. 1991)

A new period of excludable delay under § 3161(h)(1)(F) begins immediately upon the filing of the magistrate judge's report and recommendation.

Patterson v. Mintzes, 717 F.2d 284 (6th Cir. 1983)

When written objections to the magistrate judge's report and recommendation were filed more than 10 days after service, but were nonetheless considered by the district court, appellate review was not barred.

7th Circuit:

Lerro v. The Quaker Oats Co., 84 F.3d 239 (7th Cir. 1996)

When calculating the 10-day period for filing objections under Rule 72(b), Rule 6(a)'s exclusion of weekends and holidays should be applied first, and then the three extra days for service by mail provided under Rule 6(e) should be added to the time period.

United States v. Thomas, 788 F.2d 1250 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986)

The 10-day objection period under § 636(b)(1)(C) is not automatically excludable under the Speedy Trial Act.

8th Circuit:

Foss v. Federal Intermediate Credit Bank of St. Paul, 808 F.2d 657 (8th Cir. 1986)

Pro se petitioners' failure to file timely objections to the magistrate judge's report and recommendation was not a bar to appeal.

9th Circuit:

United States v. Barney, 568 F.2d 134 (9th Cir.), *cert. denied*, 435 U.S. 955 (1978)

The 10-day objection period under § 636(b) is a maximum, not a minimum, time limit. The district judge may require objections within a shorter period if calendar exigencies demand it.

11th Circuit:

United States v. Mastrangelo, 733 F.2d 793 (11th Cir. 1984)

The entire period of time between the filing of a motion and the conclusion of a hearing is excludable under the Speedy Trial Act.

5. Form of Objections

Rule 72(b) of the Federal Rules of Civil Procedure and Rule 59(b) of the Federal Rules of Criminal Procedure state that a party "may serve and file specific written objections to the proposed findings and recommendations" of the magistrate judge in case-dispositive matters.

1st Circuit:
United States v. Vega, 678 F.2d 376 (1st Cir. 1982)
A criminal defendant's motion to adopt the magistrate judge's report was an unmistakable signal to the district judge that the report and recommendation was agreed to by the defendant. Because the defendant did not file objections with the district judge, he waived the right to object to the report at the appellate level.

Entact Services, LLC v. Rimco, Inc., 526 F. Supp. 2d 213 (D.P.R. 2007)
The district judge assessed fees under state law against a party whose objection to the magistrate judge's report and recommendation and request for a rehearing before the district judge to present further evidence were "unreasonably adamant or stubbornly litigious."

Crooker v. Van Higgins, 682 F. Supp. 1274 (D. Mass. 1988)
Written objections must be specific, concise and supported by legal arguments and citations to the record. Otherwise, de novo review by the district judge may be foreclosed.

2d Circuit:
Paddington Partners v. Bouchard, 34 F.3d 1132 (2d Cir. 1994)
In objecting to a magistrate judge's report and recommendation to a district judge, a party has "no right to present further testimony when it offer[s] no justification for not offering the testimony at the hearing before the magistrate [judge]."

3d Circuit
Barna v. City of Perth Amboy, 42 F.3d 809 (3d Cir. 1994)
The court of appeals reversed the district court's dismissal of a § 1983 complaint against the defendant where the magistrate judge, although stating that he would recommend dismissal, did not file a report and recommendation to the district judge recommending the dismissal of the claims against the officer, and the plaintiffs had no document to which they could state their objections.

5th Circuit:
Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982)
Objections to the magistrate judge's report must be specific. Frivolous, conclusive, or general objections need not be considered by the district court.

6th Circuit:

United States v. Sawaf, 74 F.3d 119 (6th Cir. 1996)
Where the parties' objection to the magistrate judge's report and recommendation consisted merely of a letter stating "we object to the report and recommendation given by [the magistrate judge]. Therefore we request a hearing in this matter," the court of appeals held that although such objections would not be minimally sufficient in all circumstances, the letter here was a sufficient objection to the limited legal question on appeal.

Kelly v. Withrow, 25 F.3d 363 (6th Cir. 1994)
The court permitted a prisoner to raise only a general objection to the magistrate judge's report and recommendation in a habeas corpus proceeding where the objection referred to an earlier document raising specific arguments.

Smith v. Detroit Federation of Teachers, 829 F.2d 1370 (6th Cir. 1987)
Making some objections, but failing to raise others, will not preserve all objections a party might have made. Only specific objections to a report and recommendation are preserved for appellate review.

Mira v. Marshall, 806 F.2d 636 (6th Cir. 1986)
The district court need not provide de novo review where the objections to the magistrate judge's report and recommendation are frivolous, conclusive, or general. The parties have a duty to pinpoint the portions of the report that the district judge should consider.

Stanfield v. Horn, 704 F. Supp. 1486 (M.D. Tenn. 1988)
The district judge has authority under Fed. R. Civ. P. 12 to strike libelous, scandalous, vituperative, and impertinent objections to a magistrate judge's report and recommendation.

7th Circuit:

Lorentzen v. Anderson Pest Control, 64 F.3d 327 (7th Cir. 1995), *cert. denied,* 517 U.S. 1136 (1996)
Failure to file timely, written objections to a magistrate judge's report and recommendation waived the right to appeal all legal and factual issues addressed in the report and recommendation.

Lockert v. Faulkner, 843 F.2d 1015 (7th Cir. 1988)
Where the argument raised on appeal was not included in the objections to the magistrate judge's report, waiver of the argument on appeal was upheld.

6. De Novo Determination

28 U.S.C. § 636(b)(1)(C) provides that after a magistrate judge files proposed findings and recommendations with the district court:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

The legislative history accompanying the 1976 amendments to the Federal Magistrates Act briefly touches upon a definition of the term "de novo determination":

> The use of the words "de novo determination" is not intended to require the judge to actually conduct a new hearing on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate. In some specific instances, however, it may be necessary for the judge to modify or reject the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings. H.R. Rep. No. 1609, 94th Cong., 2d Sess. 3 (1976).

The House report also cites with approval a 9th Circuit opinion holding that if neither party contests a magistrate judge's proposed findings of fact, the district judge may assume their correctness and decide the motion on the applicable law. *Id*., citing *Campbell v. United States District Court*, 501 F.2d 196 (9th Cir.), *cert. denied*, 419 U.S. 879 (1974).

Since § 636(b)(1)(C) was enacted, many courts have discussed the meaning of de novo determination. Cases on this issue are set forth in Appendix B.

7. District Judge Authority to Overrule a Magistrate Judge's Credibility Finding in a Report and Recommendation Without Conducting a De Novo Hearing

2d Circuit:

Cullen v. United States, 194 F.3d 401 (2d Cir. 1999)

The district judge erred in rejecting a magistrate judge's report and recommendation based on the credibility of witnesses who testified at an evidentiary hearing in a federal habeas corpus proceeding without holding a separate hearing to hear the witnesses' testimony de novo.

9th Circuit:

United States v. Thoms, 684 F.3d 893 (9th Cir. 2012)

A district judge abused his discretion in not holding a de novo hearing when he rejected a report issued by a magistrate judge, where the magistrate judge had made a determination that the government's witness was credible after an evidentiary hearing and recommended denial of the defendant's motion to suppress. In so ruling, the appellate court established a

new rule requiring that in most situations a district judge should conduct a de novo hearing when a magistrate judge issues a report making a credibility determination that favors the government's witness and the district judge disagrees with the magistrate judge's recommendation concerning the witness's credibility. [See Information Memorandum No. 323 for a more detailed summary of this case.]

United States v. Ridgway, 300 F.3d 1153 (9th Cir. 2002)
A district judge could not reject a magistrate judge's credibility findings made in a report and recommendation on a motion to suppress without conducting a de novo hearing of the testimony in question.

11th Circuit:
United States v. Powell, 628 F. 3d 1254 (11th Cir. 2010)
The Eleventh Circuit held that a district judge who rejected a magistrate judge's determination of witnesses' credibility in a report and recommendation on the defendant's motion to suppress without rehearing the disputed testimony in a separate hearing violated the defendant's right to due process. [See Information Memorandum No. 318 for a more detailed summary of this case.]

United States v. Cofield, 272 F.3d 1303 (11th Cir. 2001)
The district judge erred in rejecting the credibility findings of a magistrate judge in a report and recommendation on a motion to suppress evidence without first re-hearing the disputed testimony de novo.

8. Appellate Review

In *Thomas v. Arn*, 474 U.S. 140 (1985), the Supreme Court held that the supervisory powers of appellate courts include authority to adopt a local rule imposing a "waiver" doctrine where a party fails to object to a magistrate judge's report and recommendation. Appendix 3 lists the positions of the various circuits regarding the imposition of waiver rules and exceptions to such rules.

B. Excepted Motions

The eight specific "case-dispositive" motions that may be referred to magistrate judges under § 636(b)(1)(B) are listed in § 636(b)(1)(A) as exceptions to the provisions of that section. The "excepted" motions are:

(1) motions for injunctive relief;
(2) motions for judgment on the pleadings;
(3) motions for summary judgment;
(4) motions to dismiss or quash an indictment or information;
(5) motions to suppress evidence in a criminal case;
(6) motions to dismiss or permit maintenance of a class action;

(7) motions to dismiss for failure to state a claim upon which relief can be granted; and
(8) motions to involuntarily dismiss an action.

1. Motions for Injunctive Relief

2d Circuit:
Hispanic Counseling Center v. Incorporated Village of Hempstead, 237 F. Supp. 2d 284 (E.D.N.Y. 2002)
After de novo review, the district judge adopted the magistrate judge's recommendation to grant a preliminary injunction.

3d Circuit:
Hoeber v. Inter'l Brotherhood of Elec. Workers., 498 F. Supp. 122 (D.N.J. 1980)
Even if 29 U.S.C. § 160(j) envisioned that district judges would personally hear requests for injunctive relief, the subsequently-enacted Federal Magistrates Act clearly prevails in permitting the referral of an injunction motion to a magistrate judge under § 636(b)(1)(B).

7th Circuit:
Associates Financial Services Co., Inc. v. Mercantile Mortgage Co., 727 F. Supp. 371 (N.D. Ill. 1989)
Preliminary injunctions are case-dispositive matters. Temporary restraining orders are generally non-case-dispositive sanctions which at some point can become coercive temporary preliminary injunctions.

11th Circuit:
Jeffrey S. by Ernest S. v. State Board of Education of State of Georgia, 896 F.2d 507 (11th Cir. 1990)
A motion for preliminary injunction was properly handled as a case-dispositive matter, with the magistrate judge submitting proposed findings of fact and recommended disposition, subject to de novo determination by the district judge.

Gropp v. United Airlines, Inc., 817 F. Supp. 1558 (M.D. Fla. 1993)
A magistrate judge may conduct hearings and submit proposed findings of fact and recommendations for disposition by a district judge on a motion for injunctive relief. A district judge must make a de novo determination of those portions to which objections are made. The clearly erroneous standard applies to findings by the magistrate judge to which no objections were filed.

2. Motions for Summary Judgment

2d Circuit:

Hynes v. Squillace, 143 F.3d 653 (2d Cir.), *cert. denied,* 525 U.S. 907 (1998)

The district judge had discretion to consider supplemental evidence on de novo review of the magistrate judge's recommendation to grant the defendants' motions for summary judgment.

5th Circuit:

United Farmers Agents Assoc., Inc. v. Farmers Insurance Exchange, 89 F.3d 233 (5th Cir. 1996), *cert. denied,* 519 U.S. 1116 (1997)

The court of appeals affirmed the district judge's adoption of the magistrate judge's recommendation to grant summary judgment and to dismiss the suit, noting that de novo review of the record by the court of appeals cured any asserted error that the district judge had failed to review the magistrate judge's report and recommendation de novo.

Tolbert v. United States, 916 F.2d 245 (5th Cir. 1990)

The court of appeals reviews for plain error the district judge's adoption of a magistrate judge's report and recommendation for summary judgment where the appealing party did not object to the magistrate judge's recommendation. The district judge's rejection of a summary judgment recommendation is reviewed de novo.

3. Motions to Dismiss

1st Circuit:

Transwitch Corp. v. Galazar Networks, Inc., 377 F. Supp. 2d 284 (D. Mass. 2005)

A magistrate judge appropriately treated the portion of the plaintiff's motion to amend that sought to drop a claim as a motion to dismiss, and therefore issued a report and recommendation on it.

2d Circuit:

Katz v. Molic, 128 F.R.D. 35 (S.D.N.Y. 1989), *aff'd*, 909 F.2d 1473 (2d Cir. 1990)

The magistrate judge's judicial discretion is not restricted when issuing a report and recommendation under § 636(b)(1)(B). A magistrate judge was therefore authorized to recommend dismissal under Fed. R. Civ. P. 12 for failure to state a claim, although the reference was to hear a motion for summary judgment.

Zises v. Dept. of Social Services, 112 F.R.D. 223 (E.D.N.Y. 1986)

The district court treated the magistrate judge's order as a case-dispositive report and recommendation under § 636(b)(1)(B) where the magistrate judge ordered dismissal of the case with prejudice under Fed. R. Civ. P. 37 for the plaintiff's willful and contumacious refusal to obey a discovery order.

7th Circuit:
United States v. Walker, 92 F.3d 714 (7th Cir. 1996)
Affording "special deference" to the district court's determination whether the government was negligent, the court of appeals affirmed the district judge's adoption of the magistrate judge's report recommending denial of the defendant's motion to dismiss the indictment.

Tarkowski v. Pennzoil Co., 100 F.R.D. 37 (N.D. Ill. 1983)
Although a magistrate judge cannot dismiss a party's claim for lack of prosecution, under § 636(b)(1)(B) he can recommend dismissal.

9th Circuit:
Hunt v. Pliler, 384 F.3d 1118 (9th Cir. 2004)
A motion to dismiss a habeas corpus petition as a mix of exhausted and unexhausted claims was a case-dispositive matter on which the magistrate judge should have submitted proposed findings and recommendations under § 636(b)(1)(B).

10th Circuit:
Donovan v. Gingerbread House, Inc., 106 F.R.D. 57 (D. Colo. 1985), *rev'd on other grounds*, 907 F.2d 115 (10th Cir. 1989)
A magistrate judge does not have authority to order the involuntary dismissal of a civil action. The court therefore treated the magistrate judge's order as a report and recommendation, applying de novo review.

4. Motions to Suppress Evidence in a Criminal Case

Supreme Court:
United States v. Raddatz, 447 U.S. 667 (1980)
The Federal Magistrates Act authorizes magistrate judges to handle motions to suppress evidence under § 636(b)(1)(B), provided the district judge conducts de novo determination, and due process does not require that de novo determination include a rehearing.

7th Circuit:
United States v. Jaramillo, 891 F.2d 620 (7th Cir. 1989), *cert. denied*, 494 U.S. 1069 (1990)
Although the government failed to argue that probable cause existed to arrest the defendants until after the magistrate judge suppressed the evidence obtained due to lack of defendants' consent to search, the magistrate judge's recommendation that the government's probable cause argument was waived was not binding on the district judge.

10th Circuit:
United States v. Mora, 135 F.3d 1351 (10th Cir. 1998)
The Speedy Trial Act allows an additional excludable 30-day "under advisement" period for the district judge to review the magistrate judge's report and recommendation on a motion to suppress.

5. Class Actions

2d Circuit:

Ruland v. General Electric Co., 94 F.R.D. 164 (D. Conn. 1982)

Referral of a class certification motion to a magistrate judge is constitutionally valid under § 636(b)(1)(B), as long as the district judge conducts de novo determination.

3d Circuit:

Sperling v. Hoffman-La Roche, Inc., 118 F.R.D. 392 (D.N.J. 1988), *aff'd in part, rev'd in part on other grounds*, 862 F.2d 439 (3d Cir.), *aff'd and remanded*, 493 U.S. 165 (1989)

The magistrate judge's rulings on motions in a putative class action, including the propriety of the court's notice to potential class members, class certification, communications between attorneys and class members, and discovery matters, are subject to de novo review on questions of law, even though some of these motions may not dispose of claims or defenses.

Garris v. Gianetti, 160 F.R.D. 61 (E.D. Pa. 1995)

After conducting de novo review, the district judge adopted the magistrate judge's recommendation not to certify prison inmates' civil rights case as a class action.

C. Prisoner Litigation

The 1976 amendments to the Federal Magistrates Act (Pub. L. No. 94-577) specifically superseded the decision of the Supreme Court in *Wingo v. Wedding*, 418 U.S. 461 (1974). A magistrate judge's authority in prisoner cases assigned under § 636(b)(1)(B) includes not only the power to make preliminary reviews of the cases, but also the authority to conduct hearings and to receive evidence relevant to the issues involved in these cases. *See* H.R. Rep. No. 1609, 94th Cong., 2d Sess. 11; S. Rep. No. 625, 94th Cong., 2d Sess. 9 (1976).

1. Applications for Posttrial Relief (Habeas Corpus)

Under § 636(b)(1)(B), district judges may refer "applications for posttrial relief by individuals convicted of criminal offenses" to magistrate judges for proceedings on a report and recommendation basis. District judges may refer petitions for writs of habeas corpus under 28 U.S.C. § 2241, 28 U.S.C. § 2254, and 28 U.S.C. § 2255 to magistrate judges for initial proceedings, including evidentiary hearings.

The Rules Governing Section 2254 Cases in the United States District Courts and the Rules Governing Section 2255 Proceedings for the United States District Courts refer directly to 28 U.S.C. § 636 when discussing the powers of a magistrate judge.

1st Circuit:

Gioiosa v. U.S., 684 F.2d 176 (1st Cir. 1982)

The district court erred in applying the clearly erroneous standard of review to the magistrate judge's recommendation to deny the defendant's motion to vacate his conviction.

2d Circuit:

Virella v. United States, 750 F. Supp. 111 (S.D.N.Y. 1990)

The district court adopted the magistrate judge's recommendation issued under § 636(b)(1)(B) on a prisoner petition under § 2255 to vacate the defendant's sentence. Because the defendant's allegations were patently meritless, the petition was properly dismissed without an evidentiary hearing. (No discussion of magistrate judge authority.)

3d Circuit:

Sullivan v. Cuyler, 723 F.2d 1077 (3d Cir. 1983)

Applications for posttrial relief are properly referred to a magistrate judge under § 636(b)(1)(B), including hearings to determine whether a conflict of interest existed during the petitioner's state court trial.

4th Circuit:

United States v. Bryson, 981 F.2d 720 (4th Cir. 1992)

The magistrate judge did not have authority to decide a motion to vacate a sentence under § 2255 without the parties' consent, even where the magistrate judge had accepted the defendant's guilty plea and imposed the sentence with the defendant's consent in a misdemeanor case.

5th Circuit:

Moody v. Johnson, 139 F.3d 477 (5th Cir.), *cert. denied,* 525 U.S. 940 (1998)

The court of appeals affirmed the district court's adoption of the magistrate judge's recommendation denying federal habeas corpus relief, entered after conducting an evidentiary hearing, and finding that petitioner had not overcome the presumption of correctness afforded to state court findings and that petitioner did not prove that he was incompetent to stand trial.

Jones v. Johnson, 134 F.3d 309 (5th Cir. 1998)

A magistrate judge did not have authority to issue a final order for a certificate of probable cause to appeal a habeas corpus matter.

6th Circuit:

Flournoy v. Marshall, 842 F.2d 875 (6th Cir. 1988)

The legislative history of § 636(b)(1)(B) expressly states that § 636(b)(1)(B) applies to habeas corpus petitions under § 2254. Dicta: § 636(b)(2) was not intended to enable habeas corpus matters to be referred to magistrate judges.

8th Circuit:

Patterson v. Von Riesen, 999 F.2d 1235 (8th Cir. 1993)

A magistrate judge's recommendation that a prisoner's habeas corpus petition be granted is not a final judgment unless the parties consented to the magistrate judge's authority. The prisoner's continued confinement remained valid until the district judge accepted the magistrate judge's report and ordered habeas corpus relief.

9th Circuit:

Hinman v. McCarthy, 676 F.2d 343 (9th Cir.), *cert. denied*, 459 U.S. 1048 (1982)

A magistrate judge's evidentiary hearings and report and recommendation on a habeas corpus petition did not violate the Constitution because the district judge retained final authority to decide the case.

2. Petitions Challenging Conditions of Confinement

Section 636(b)(1)(B) specifically authorizes district judges to refer "prisoner petitions challenging conditions of confinement" to magistrate judges for preparation of reports and recommendations. These cases usually arise under 42 U.S.C. § 1983.

Supreme Court:

McCarthy v. Bronson, 500 U.S. 136 (1991)

Congress intended the "conditions of confinement" language of § 636(b)(1)(B) to include cases alleging a specific episode of unconstitutional conduct. Section 636(b)(1)(B) authorizes the nonconsensual referral of all prisoner petitions to magistrate judges.

5th Circuit:

McAfee v. Martin, 63 F.3d 436 (5th Cir. 1995)

The court of appeals vacated the district court's adoption of the magistrate judge's recommendation to dismiss a § 1983 claim, holding that the plaintiff had not implicitly waived an earlier jury demand by participating without objection in an evidentiary hearing conducted by the magistrate judge.

Jackson v. Cain, 864 F.2d 1235 (5th Cir. 1989)

The parties' consent is not required for the district judge to refer a prisoner petition to a magistrate judge for a report and recommendation, including the proposed determination of a motion for summary judgment.

8th Circuit:

Gentile v. Missouri Dep't of Corrections and Human Resources, 986 F.2d 214 (8th Cir. 1993)

The magistrate judge was not authorized to conduct ex parte investigations, including interviews with witnesses, when considering in forma pauperis and summary judgment motions in prisoner civil rights cases. The magistrate judge should maintain the adversarial system rather than use inquisitional methods when conducting hearings in prisoner cases.

10th Circuit:

Clark v. Poulton, 963 F.2d 1361 (10th Cir.), *cert. denied*, 506 U.S. 1014 (1992)

Elements of petitioner's excessive force civil rights case could be referred to a magistrate judge under § 636(b)(1)(B) as a conditions of confinement matter or under § 636(b)(3).

3. Other Prisoner Motions

2d Circuit:

Wright v. Santoro, 714 F. Supp. 665 (S.D.N.Y.), *aff'd*, 891 F.2d 278 (2d Cir. 1989)
A magistrate judge may determine whether or not to appoint counsel in a pro se § 1983 action.

5th Circuit:

Donaldson v. Ducote, 373 F.3d 622 (5th Cir. 2004)
A magistrate judge did not have authority to issue a final order denying a prisoner plaintiff's motion to proceed in forma pauperis on an appeal to the court of appeals of the dismissal of the prisoner's civil rights action under § 1983.

Wesson v. Oglesby, 910 F.2d 278 (5th Cir. 1990)
A magistrate judge may conduct hearings to determine whether in forma pauperis petitions under 28 U.S.C. § 1915(d) should be dismissed as frivolous.

Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985)
A magistrate judge may be referred prisoner conditions of confinement petitions for evidentiary hearings to determine whether the suits are frivolous or to determine the factual basis of conclusory allegations, in the nature of a motion for more definite statement under Fed. R. Civ. P. 12(e). The court, however, cannot refer these matters for trial by a magistrate judge over the prisoner's objection.

6th Circuit:

Woods v. Dahlberg, 894 F.2d 187 (6th Cir. 1990)
A magistrate judge may be referred petitions to proceed in forma pauperis under § 636(b)(1)(B). The magistrate judge may issue an order granting such a motion, but may only make a recommendation to deny such a motion.

8th Circuit:

Henson v. Falls, 912 F.2d 977 (8th Cir. 1990)
Where a magistrate judge made credibility determinations in a prisoner case that was referred for a directed verdict hearing, the defendant was deprived of his right to a jury trial.

In re Wickline, 796 F.2d 1055 (8th Cir. 1986)
A plain reading of § 636(b)(1)(B) shows no statutory authority for the referral of nonconsensual prisoner jury trials to magistrate judges.

10th Circuit:

Gee v. Estes, 829 F.2d 1005 (10th Cir. 1987)
A magistrate judge may hear and issue a report and recommendation on the defendant's motion under 28 U.S.C. § 1915(d) to dismiss an in forma pauperis petition as frivolous,

provided the district judge conducts de novo determination of those portions of the magistrate judge's report and recommendation to which objections were made.

4. Appeals in Prisoner Cases

2d Circuit:
Frank v. Johnson, 968 F.2d 298 (2d Cir.), *cert. denied*, 506 U.S. 1038 (1992)
A prisoner's failure to object within 10 days of the magistrate judge's report recommending dismissal of a habeas corpus petition waived further review of the report and recommendation if the prisoner received clear notice of the consequences of failing to object.

5th Circuit:
Fitzpatrick v. Procunier, 750 F.2d 473 (5th Cir. 1985)
A prisoner's failure to allege that the presiding magistrate judge was biased until filing objections to the magistrate judge's report and recommendation constituted a waiver of the issue.

6th Circuit:
Sellers v. Morris, 840 F.2d 352 (6th Cir. 1988)
The court construed pro se objections to a magistrate judge's report and recommendation liberally, and proper statutory citations were not required.

Ivey v. Wilson, 832 F.2d 950 (6th Cir. 1987)
Prison officials waived their qualified immunity defense in the district court by failing to object to the magistrate judge's report, and appellate review was also waived.

10th Circuit:
Hardiman v. Reynolds, 971 F.2d 500 (10th Cir. 1992)
Where the magistrate judge did not include a clear warning explaining the consequences of not objecting to the magistrate judge's report and recommendation, the pro se prisoner did not waive further review of the report by failing to file objections.

Dunn v. White, 880 F.2d 1188 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990)
Although the pro se prisoner's objections to the magistrate judge's report and recommendation were filed after the ten-day limit, they were mailed in a timely manner, and the district judge considered the claims.

D. Analogous Matters

Although § 636(b)(1)(B) applies to the eight specific motions "excepted" in § 636(b)(1)(A), Congress did not intend the list to be exclusive. Courts have therefore interpreted § 636(b)(1)(B) to allow the referral of analogous case-dispositive matters to magistrate judges for proceedings on a report and recommendation basis.

1. Motions to Proceed In Forma Pauperis (28 U.S.C. § 1915)

Courts have concluded generally that the denial of a plaintiff's motion to proceed in forma pauperis under 28 U.S.C. § 1915 is a case-dispositive matter analogous to a motion to dismiss for which magistrate judges must prepare a report and recommendation. By contrast, however, magistrate judges have been held to have authority to issue orders granting in forma pauperis status under § 1915. *See* Section 4, *supra*, for additional opinions on this issue.

4th Circuit:
Gent v. Radford University, 187 F.3d 629 (4th Cir. 1999) (Table disposition)
A magistrate judge may enter a dispositive order denying a plaintiff's motion to proceed in forma pauperis only if the parties consent to the magistrate judge's jurisdiction under § 636(c).

5th Circuit:
Donaldson v. Ducote, 373 F.3d 622 (5th Cir. 2004)
A magistrate judge did not have authority to issue a final order denying a prisoner plaintiff's motion to proceed in forma pauperis on an appeal of the dismissal of the prisoner's civil rights action.

6th Circuit:
Cavender v. Seabold, 992 F.2d 1216 (6th Cir. 1993) (Table disposition)
A magistrate judge lacks authority to deny in forma pauperis status.

Woods v. Dahlberg, 894 F.2d 187 (6th Cir. 1990)
A magistrate judge may be referred petitions to proceed in forma pauperis under § 636(b)(1)(B). The magistrate judge may issue an order granting such a motion, but may only make a recommendation to deny such a motion.

9th Circuit:
Stafford v. Barbaro, 127 Fed. Appx. 354 (9th Cir. 2005)
Because there was no clear and unambiguous expression of consent by all the parties to the magistrate judge's jurisdiction, the magistrate judge lacked authority to enter a final order in the case, including ruling on the plaintiff's motion to proceed in forma pauperis.

Tripati v. Rison, 847 F.2d 548 (9th Cir. 1988)
A magistrate judge may not enter a final judgment on a motion to proceed in forma pauperis unless the parties have consented to have the magistrate judge decide the motion and enter judgment.

10th Circuit:
Lister v. Department of Treasury, 408 F.3d 1309 (10th Cir. 2005)
A magistrate judge's error in issuing an order denying the plaintiff's motion to proceed in forma pauperis, rather than issuing a report recommending denial of the application, did not

constitute reversible error where the district judge conducted de novo review of the magistrate judge's order.

Gee v. Estes, 829 F.2d 1005 (10th Cir. 1987)
A magistrate judge may issue a report and recommendation on a defendant's motion under 28 U.S.C. § 1915(d) to dismiss an in forma pauperis petition as frivolous, provided the district judge conducts de novo determination of those portions of the magistrate judge's report and recommendation to which objections were made.

2. Mental Competency Proceedings

8th Circuit:
United States v. Dallas, 461 F. Supp. 2d 1093 (D. Neb. 2006)
Acknowledging that courts in other circuits have determined that magistrate judges do not have authority under § 636(b)(1)(A) to issue a final order regarding the involuntary administration of medication to a criminal defendant, "[o]ut of an abundance of caution," the district judge considered the magistrate judge's order as a report and recommendation and conducted de novo review.

United States v. Horn, 955 F. Supp. 1141 (D. Minn. 1997)
A magistrate judge issued a report and recommendation to involuntarily transfer a prisoner to a psychiatric facility for custody and treatment. (Opinion by a magistrate judge, with no discussion of magistrate judge authority.)

9th Circuit:
United States v. Rivera-Guerrero, 377 F.3d 1064 (9th Cir. 2004)
A magistrate judge did not have authority under 28 U.S.C. § 636(b)(1)(A) to issue a final order for the involuntary medication of a defendant to render him competent to stand trial. Because the magistrate judges' involuntary medication order was case-dispositive, the district court should have treated the magistrate judge's forced medication order as proposed findings and recommendations subject to de novo review.

United States v. George, 2007 WL 1146395 (D. Ariz. 2007)
A magistrate judge held that he did not have authority under 28 U.S.C. § 636(b)(1)(A) to issue a final order determining a defendant's mental competence to stand trial in a felony case and therefore ordered the matter transferred to a district judge for final disposition.

11thCircuit:
United States v. Battle, 264 F. Supp. 2d 1088 (N.D. Ga. 2003)
A magistrate judge had the authority under 28 U.S.C. § 636(b) to conduct the competency hearing under 18 U.S.C. § 4241; further, an intensive review of the magistrate judge's recommended determination was undertaken by the district judge.

3. Social Security Cases

Supreme Court:
Mathews v. Weber, 423 U.S. 261 (1976)
A social security benefit appeal may be referred to a magistrate judge for a report and recommendation as to whether the record contained substantial evidence to support the administrative determination, subject to de novo review by the district judge.

6th Circuit:
Pope v. Harris, 508 F. Supp. 773 (S.D. Ohio 1981)
The court may refer a social security case to a magistrate judge for a report and recommendation on the issue of substantial evidence under 42 U.S.C. § 405(g).

4. Enforcement of IRS Summonses

Supreme Court
United States v. Jose, 519 U.S. 54 (1996)
A district judge's order adopting the magistrate judge's report and recommendation, which recommended imposing a notice requirement on the IRS in addition to recommending the enforcement of two summonses, was a final order for purposes of appeal to the court of appeals.

1st Circuit:
United States v. Christo, 907 F. Supp. 519 (D.N.H. 1995)
A magistrate judge may not order the enforcement of an IRS summons, but must issue a report and recommendation subject to de novo review by the district judge.

5th Circuit:
United States v. First Nat. Bank of Atlanta, 628 F.2d 871 (5th Cir. 1980)
A magistrate judge may not enter a final judgment to enforce an IRS summons under 26 U.S.C. § 7604. Although the Internal Revenue Code restricts such enforcement power to a district judge, the judge may refer a summons enforcement proceeding to a magistrate judge under § 636(b)(1)(B) for a report and recommendation.

6th Circuit:
United States v. B & D Vending, Inc., 398 F.3d 728 (6th Cir. 2004)
A magistrate judge had the authority to conduct a hearing and submit a report and recommendation on the government's complaint to enforce an IRS summons under 26 U.S.C. § 7602, even though the district judge did not formally refer the matter to the magistrate judge until after the evidentiary hearing was conducted.

5. Letters Rogatory (28 U.S.C. § 1782)

Courts disagree over whether letters rogatory matters are dispositive of a claim or defense before the court. *See* Section 4, *supra*, for additional opinions on this issue.

9th Circuit:
In re Request for Judicial Assistance from Seoul Dist. Criminal Court, Seoul, Korea, 428 F. Supp. 109 (N.D. Cal.), *aff'd*, 555 F.2d 720 (9th Cir. 1977)
Only a district judge may order judicial assistance under 28 U.S.C. § 1782. The written order of reference appointing a magistrate judge in this matter limited the magistrate judge to administrative functions only, and the magistrate judge had no authority to deny the request for assistance. The matter was therefore treated as a report and recommendation under § 636(b)(1)(B).

10th Circuit:
In re Application of Phillips v. Beierwaltes, 466 F.3d 1217 (10th Cir. 2006)
The magistrate judge did not have authority to make a final ruling on a foreign party's application for assistance in obtaining discovery from non-party witnesses under 28 U.S.C. § 1782, where there was no evidence that the parties consented to the magistrate judge's authority.

11th Circuit:
In re Request from Swiss Federal Dept. of Justice and Police, 731 F. Supp. 490 (S.D. Fla. 1990)
The district court adopted the magistrate judge's recommendation under § 636(b)(1)(B) on motions to quash a subpoena and to grant a protective order under 28 U.S.C. § 1782. (No discussion of magistrate judge authority.)

6. Pretrial Matters in Other Proceedings

1st Circuit:
United States v. Ecker, 923 F.2d 7 (1st Cir. 1991)
A magistrate judge's commitment order issued under 18 U.S.C. § 4241 must be reviewed by the district judge under § 636(b)(1) before it becomes a final appealable order reviewable by the court of appeals. (No statement as to whether the matter was referred to the magistrate judge under § 636(b)(1)(A) or (B).)

2d Circuit:
Jean-Laurent v. C.O. Wilkerson, 461 Fed. Appx. 18 (2d Cir. 2012)
A magistrate judge exceeded his authority under 28 U.S.C. § 636(b)(1)(A) by issuing a final order denying a pro se prisoner's motion to amend his complaint to include any state law claims, which had previously survived the defendant's motion to dismiss. [See Information Memorandum No. 323 for a more detailed summary of this case.]

3d Circuit:

N.L.R.B. v. Frazier, 966 F.2d 812 (3d Cir. 1992)

A proceeding to enforce a National Labor Relations Board subpoena ad testificandum should have been referred to the magistrate judge as a case-dispositive matter under § 636(b)(1)(B) subject to de novo determination by the district judge. The magistrate judge had no authority to issue a "final" order enforcing the subpoena.

6th Circuit:

United States Fidelity & Guaranty Co. v. Thomas Solvent Co., 132 F.R.D. 660 (W.D. Mich. 1990), *aff'd*, 955 F.2d 1085 (6th Cir. 1991)

A motion to realign parties was a case-dispositive motion because granting the requested relief would destroy diversity and thus disrupt the court's subject matter jurisdiction.

7th Circuit:

United States v. Residence Located at 218 3d Street, 622 F. Supp. 908 (D. Wis. 1985), *aff'd and remanded on other grounds*, 805 F.2d 256 (7th Cir. 1986)

Although a motion for return of seized property is not a pretrial matter under § 636(b)(1), the magistrate judge had implied authority under § 636(b)(1)(B) to issue a report and recommendation. If the movant was subsequently indicted, the matter would be treated like a motion to suppress.

8th Circuit:

Equal Emp't Opportunity Comm'n v. Schwan's Home Serv., 707 F. Supp. 2d 980 (D. Minn. 2010)

A district judge ruled that when a magistrate judge considers an application to enforce an administrative subpoena, where there is no other pending, underlying civil action before the court, the application should be considered a case-dispositive matter and the magistrate judge should therefore issue a report and recommendation. [See Information Memorandum No. 318 for a more detailed summary of this case.]

9th Circuit:

United States v. Rivera-Guerrero, 377 F.3d 1064 (9th Cir. 2004)

A magistrate judge did not have authority under 28 U.S.C. § 636(b)(1)(A) to issue a final order for the involuntary medication of a defendant to render him competent to stand trial. The district judge should have treated the magistrate judge's forced medication order as proposed findings and recommendations subject to de novo review.

Clark v. Inspector General of the U.S. Dep't of Agriculture, 944 F. Supp. 818 (D. Or. 1996)

The district judge adopted the magistrate judge's report recommending dismissal of a challenge to an administrative subpoena. The court reviewed the legal conclusions de novo and noted that because no objections were filed, the factual findings did not require de novo review.

Boston Safe Deposit & Trust Co. v. Motoryacht Dulcinea, 5 F.3d 535 (9th Cir. 1993) (Table disposition -- text available on Westlaw)
The denial of a motion to file a counterclaim was a case-dispositive matter under § 636(b)(1)(B) requiring submission of proposed findings of fact and recommended disposition by the magistrate judge, not a final order.

7. Motions to Transfer Juveniles to Adult Prosecution

1st Circuit:
United States v. C.J.T.G., 913 F. Supp. 63 (D.P.R. 1994)
The district judge adopted the magistrate judge's recommendation to deny the motion to transfer the juvenile to adult status, applying a de novo standard of review to the magistrate judge's legal conclusion and to the specific factual finding to which the government objected.

2d Circuit:
United States v. Juvenile Male No. 1, 47 F.3d 68 (2d Cir. 1995)
The court of appeals held that the district court did not abuse its discretion in denying a motion to transfer a juvenile defendant to adult status for prosecution, where the district judge had rejected the magistrate judge's report recommending the transfer of the juvenile to adult status.

5th Circuit:
United States v. Bilbo, 19 F.3d 912 (5th Cir. 1994)
The court of appeals affirmed the district court's order to transfer a juvenile defendant to adult status. The district judge had adopted the magistrate judge's proposed findings on five of the six factors that must be considered under 18 U.S.C. § 5032, held an evidentiary hearing on the sixth factor, and rejected the magistrate judge's recommendation not to transfer, finding that five of the six factors favored transfer.

United States v. M.H., 901 F. Supp. 1211 (E.D. Tex. 1995)
After conducting de novo review of the record, the district judge overruled the defendant's objections and adopted the magistrate judge's report and recommendation granting the government's motion to transfer the juvenile defendant to adult status for prosecution.

11th Circuit:
United States v. Wellington, 102 F.3d 499 (11th Cir. 1996)
The district court's decision adopting the magistrate judge's report and recommendation was reviewed for abuse of discretion and affirmed by the court of appeals.

8. Motions to Transfer Venue

Courts disagree over whether orders transferring venue are dispositive of a claim or defense before the court. *See* Section 4, *supra*, for additional opinions on this issue.

1st Circuit:

United States v. One Parcel of Real Property with Bldgs., Etc., 131 F.R.D. 27 (D.R.I. 1990)
Without discussing his authority to do so, a magistrate judge issued a report and recommendation on a motion to change venue. (Opinion by a magistrate judge.)

6th Circuit:

Payton v. Saginaw County Jail, 743 F. Supp. 2d 691 (E.D. Mich. 2010)
Motion to transfer venue between divisions within the district court was a case-dispositive matter under 28 U.S.C. § 636(b)(1)(A), and therefore a magistrate judge did not have authority to issue a final order on the defendant's venue transfer motion. [See Information Memorandum No. 318 for a more detailed summary of this case.]

9. Motions for Sanctions

Courts disagree over whether imposition of sanctions is dispositive of a claim or defense before the court. *See* Section 4, *supra*, for additional opinions on this issue.

1st Circuit:

Phinney v. Wentworth Douglas Hosp., 199 F.3d 1 (1st Cir. 1999)
Although a motion for sanctions premised on an alleged discovery violation ordinarily should be classified as non-case-dispositive, a departure from this rule may be necessary when a magistrate judge suggests the imposition of a sanction that fully disposes of a claim or defense.

Unlimited Holdings v. Bertram Yacht, 2008 WL 4642191 (D.V.I. 2008)
The district judge vacated a magistrate judge's order denying a motion for the sanction of dismissal with prejudice, since the motion functioned as a motion to dismiss on which the magistrate judge lacked jurisdiction to rule.

Plante v. Fleet National Bank, 978 F. Supp. 59 (D.R.I. 1997)
In the absence of circuit court precedent, the district court opined that a Rule 11 motion for sanctions, especially in a post-dismissal context, was properly characterized as a case-dispositive motion subject to de novo review. In any event, de novo review of the magistrate judge's report and recommendation was proper where the parties had not objected to the treatment of the motion as a case-dispositive matter.

Yang v. Brown University, 149 F.R.D. 440 (D.R.I. 1993)
Although motions for sanctions pursuant to Rule 37 are usually considered non-case-dispositive matters under § 636(b)(1)(A), the magistrate judge's order excluding the testimony of the plaintiff's expert witness in this case crossed the line from non-case-dispositive to case-dispositive decision-making and was "tantamount to an involuntary dismissal." The district judge therefore treated the sanction imposed as a recommendation, reviewed it de novo, and modified the ruling to impose a less severe sanction.

2d Circuit:

Kiobel v. Millson, 592 F.3d 78 (2d Cir.2010)

Three judges on a panel of the Second Circuit issued separate concurring opinions setting forth disparate views on whether a magistrate judge has authority to order sanctions under Fed. R. Civ. P. 11. One judge issued an opinion concluding that magistrate judges do not have authority under the Federal Magistrates Act, 28 U.S.C. § 636, to issue a dispositive sanction order under Rule 11, while another judge issued an opinion concluding that magistrate judges do have this authority under the Act. A third judge declined to endorse either view in light of the statute's ambiguity. [See Information Memorandum No. 315 for a more detailed summary of this case.]

Friends of Animals, Inc. v. United States Surgical Corp., 131 F.3d 332 (2d Cir. 1997)

The court of appeals found no abuse of discretion in the district court's adoption of the magistrate judge's recommendation that the action be dismissed under Rule 37(b) for repeated violations of discovery orders.

Leiching v. Consolidated Rail Corp., 1997 WL 135930 (N.D.N.Y. 1997)

The district judge adopted the magistrate judge's report recommending the imposition of monetary sanctions against counsel under 28 U.S.C. § 1927 and the court's inherent authority to sanction the dilatory conduct of defense counsel during pretrial discovery.

Hall v. Flynn, 829 F. Supp. 1401 (N.D.N.Y. 1993)

The district judge adopted the magistrate judge's report recommending dismissal of the pro se plaintiff's action due to the plaintiff's "continuing and contemptuous refusal to comply with court procedures and orders and in light of the apparent frivolous nature of the complaint...."

3d Circuit:

Nyenekor v. Kletches, 1996 WL 189920 (E.D. Pa. 1996)

The district judge reviewed de novo and adopted the magistrate judge's report recommending dismissal of the prisoner plaintiff's claims under Fed. R. Civ P. 16, Fed. R. Civ. P. 37, and Fed. R. Civ. P. 41.

Derzack v. County of Allegheny, Pa., 173 F.R.D. 400 (W.D. Pa. 1996), *aff'd*, 118 F.3d 1575 (3d Cir. 1997) (Table disposition)

Applying the de novo standard of review, the district judge rejected the magistrate judge's report recommending that the plaintiff's complaint not be dismissed for fraud upon the court.

4th Circuit:

Segal v. L.C. Hohne Contractors, Inc., 303 F. Supp. 2d 790 (S.D.W.Va. 2004)

When a party brings a motion for sanctions, the sanction chosen by the magistrate judge, rather than the sanction sought by the party, determines which section of Fed. R. Civ. P. 72 applies. The district judge therefore applied the "clear error" standard when it reviewed the magistrate judge's denial of a motion requesting the sanction of default judgment.

6th Circuit:

Bennett v. General Caster Service of N. Gorden Co., Inc., 976 F.2d 995 (6th Cir. 1992)

The magistrate judge was without authority to enter a final order awarding sanctions under Rule 11, since the purported order was dispositive of a claim for money damages. The order therefore was not a final, appealable decision of the district court.

7th Circuit:

Patterson v. Rubin, 89 F.3d 838 (7th Cir.) (Table Disposition -- text available on Westlaw), *cert. denied*, 519 U.S. 897 (1996)

A magistrate judge recommended dismissal of the plaintiff's complaint under Fed. R. Civ. P. 41 for failure to prosecute claims.

Retired Chicago Police Ass'n v. City of Chicago, 76 F.3d 856 (7th Cir.), *cert. denied,* 519 U.S. 932 (1996)

The fact that an attorney was the subject of a request for sanctions did not change the fact that resolution of a sanctions motion is a case-dispositive matter that should only be referred to a magistrate judge under § 636(b)(1)(B) or § 636(b)(3), where the district judge reviews the magistrate judge's report and recommendations de novo.

Alpern v. Lieb, 38 F.3d 933 (7th Cir. 1994)

The magistrate judge had no independent authority to award sanctions under Fed. R. Civ. P. 11. Because the parties did not consent to final disposition of the case before the magistrate judge, and a motion for sanctions under Rule 11 after a case has been dismissed on the merits is not a "pretrial matter," the magistrate judge had no authority to enter a sanction order. A district judge may refer a sanctions matter to a magistrate judge for a report and recommendation under § 636(b)(1)(B), but the magistrate judge may not make a decision with independent effect.

Cleversafe, Inc. v. Amplidata, Inc., 287 F.R.D. 424 (N.D. Ill. 2012),

A magistrate judge concluded that a motion for monetary sanctions under Fed. R. Civ. P. 37 is a case-dispositive matter under the Seventh Circuit precedent, which therefore required him to prepare a report and recommendation. Magistrate judge noted that cases in numerous other circuits have held that Rule 37 sanction motions are non-case-dispositive matters. [See Information Memorandum No. 326 for a more detailed summary of this case.]

8th Circuit:

Avionic Co. v. General Dynamics Corp., 957 F.2d 555 (8th Cir. 1992)

The district judge adopted the magistrate judge's report and recommendation to dismiss the plaintiff's case as a sanction under Fed. R. Civ. P. 37 for failure to cooperate in discovery. The motion was treated as a case-dispositive matter under § 636(b)(1)(B).

9th Circuit:

Computer Task Group v. Brotby, 364 F.3d 1112 (9th Cir. 2004)

After imposing monetary sanctions as a non-case-dispositive matter, the magistrate judge recommended granting a motion for sanctions that would terminate the case. The recommendation was adopted by the district judge and affirmed on appeal.

10th Circuit:

Jones v. Thompson, 996 F.2d 261 (10th Cir. 1993)

The court of appeals affirmed the district court's adoption of the magistrate judge's recommendation to impose sanctions on recalcitrant litigants, including dismissal of the action upon the parties' further failure to comply with the court's order.

Ocelot Oil Corp. v. Sparrow Industries, 847 F.2d 1458 (10th Cir. 1988)

A motion to strike pleadings with prejudice as a sanction under Fed. R. Civ. P. 37 was treated as a case-dispositive "motion to involuntarily dismiss an action" under § 636(b)(1)(B).

Schwartzman, Inc. v. AFC Industries, Inc., 167 F.R.D. 694 (D.N.M. 1996)

The district judge reviewed de novo the magistrate judge's recommendation that evidentiary sanctions be imposed on the Department of Justice for failure to participate in good faith in a mandatory settlement conference.

Donovan v. Gingerbread House, Inc., 106 F.R.D. 57 (D. Colo. 1985), *rev'd and remanded on other grounds*, 907 F.2d 115 (10th Cir. 1989)

A magistrate judge does not have authority to dismiss an action involuntarily as a discovery sanction under Fed. R. Civ. P. 37. The district judge treated the magistrate judge's order as a report and recommendation subject to de novo determination.

10. Motions Relating to Default Judgment

5th Circuit:

McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 925 F.2d 853 (5th Cir. 1991)

A magistrate judge is not authorized by § 636(b)(1) to hear a Fed. R. Civ. P. 60 motion to vacate a judgment, although a magistrate judge is authorized to do so under § 636(b)(3), or under § 636(c) with the parties' consent.

6th Circuit:

Victoria's Secret Stores v. Artco Equipment Co., 194 F. Supp. 2d 704 (S.D. Ohio 2002)

A motion for default judgment is a case-dispositive matter because it is substantially similar to several of the excepted motions listed in § 636(b)(1)(A).

7th Circuit:

Sims v. EGA Products, Inc., 475 F.3d 865 (7th Cir. 2007)

A district judge granted defendant's motion to set aside a default judgment, contrary to the magistrate judge's recommendation, noting that it was unlikely that the magistrate judge could have resolved the issue under Fed. R. Civ. P. 72, since default concludes the merits of the case. In any event, a district court is not obliged to give magistrate judges the maximum authority such non–Article III officers may wield.

D.C. Circuit:

Estate of Heiser v. Islamic Republic of Iran, 466 F. Supp. 2d 229 (D.D.C. 2006)

Neither the parties' due process rights nor their rights to Article III adjudication were violated where a magistrate judge was appointed under § 636(b)(1)(B) to conduct an evidentiary hearing and submit a report and recommendation on a motion for default judgment.

11. Motions to Intervene

5th Circuit:

Mississippi Power & Light Co. v. United Gas Pipe Line Co., 621 F. Supp. 718 (S.D. Miss. 1985)

The denial of a third party's motion to intervene (although allowing it amicus curiae status) was equivalent to involuntary dismissal. Although the original suit remained for adjudication, the magistrate judge was without authority to issue a final decision on such a case-dispositive matter.

12. Motions to Remand

Courts disagree over whether remand orders are dispositive of a claim or defense before the court. *See* Section 4, *supra*, for additional opinions on this issue.

1st Circuit:

Societa Anonima Lucchese Olii E. Vii v. Catania Spagna Corp., 440 F. Supp. 461 (D. Mass. 1977)

Although a motion to remand the case to state court could be referred to a magistrate judge under § 636(b)(1)(A), the district court had discretion to refer the matter under § 636(b)(1)(B) for a report and recommendation.

2d Circuit:

Williams v. Beemiller, Inc., 527 F.3d 259 (2d Cir. 2008)

A remand order under 28 U.S.C. § 1447(c) is indistinguishable from a motion to dismiss based on lack of subject matter jurisdiction for the purpose of 28 U.S.C.§ 636(b)(1)(A), and thus should be ruled on by a magistrate judge by a report and recommendation subject to de novo review.

3d Circuit:

In re U.S. Healthcare, 159 F.3d 142 (3d Cir. 1998)

The court of appeals issued a writ of mandamus to the magistrate judge directing him to vacate a remand order which, as a case-dispositive order, was beyond the magistrate judge's authority.

Giangola v. Walt Disney World Co., 753 F. Supp. 148 (D.N.J. 1990)

A magistrate judge's order remanding the case to state court was equivalent to a dismissal and was thus a case-dispositive matter. The magistrate judge thus exceeded his authority under § 636(b)(1)(B) by ordering remand sua sponte.

4th Circuit:

Long v. Lockheed Missiles and Space Co., Inc., 783 F. Supp. 249 (D.S.C. 1992)

A motion to remand the case to state court was a case-dispositive motion, requiring the magistrate judge to prepare a report and recommendation subject to de novo determination by the district judge.

5th Circuit:

Vaquillas Ranch Co., Ltd. v. Texaco Exploration and Production, Inc., 844 F. Supp. 1156 (S.D. Tex. 1994)

A motion to remand is not a case-dispositive matter since it is not listed in § 636(b)(1)(A).

6th Circuit:

Vogel v. U.S. Office Products Co., 258 F.3d 509 (6th Cir. 2001)

Motions to remand are case-dispositive matters, and a magistrate judge is therefore without authority to issue a final order of remand without the parties' consent.

National City Bank v. Aronson, 474 F. Supp. 2d 925 (S.D. Ohio 2007)

Sixth Circuit precedent mandated treatment of a motion to remand as a case-dispositive matter under § 636(b)(1)(B).

8th Circuit:

Schrempp v. Rocky Mountain Holding Co., L.L.C., 2007 WL 570406 (D. Neb. 2007)

In light of the split in court decisions over whether a magistrate judge has authority to rule on a motion to remand, the magistrate judge entered a report and recommendation on the matter.

10th Circuit:

First Union Mortgage Corp. v. Smith, 229 F.3d 992 (10th Cir. 2000)

An order to remand a case to state court is a case-dispositive matter, and therefore a magistrate judge did not have authority to issue a final remand order without the parties' consent.

13. Attorney's Fees

Rule 54(d)(2)(D) of the Federal Rules of Civil Procedure states in relevant part:

> [T]he court may refer issues concerning the value of [attorney's fees] to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

The 1993 revision of Fed. R. Civ. P. 54 resolved the issue of whether motions for attorney's fees should be treated as case-dispositive or non-case-dispositive matters. Magistrate judges must now hear motions for attorney's fees as case-dispositive matters under Rule 54 and Rule 72(b), subject to de novo determination by the district court. They may also hear such motions as special masters, with their recommendation subject to the de novo standard of review. For a further discussion of the service of magistrate judges as special masters under § 636(b)(2), *see* Section 6, *infra*.

1st Circuit:

In re Holocaust Victim Assets Litigation, 528 F. Supp. 2d 109 (E.D.N.Y. 2007)

Although the objections had been withdrawn, the district judge reviewed the magistrate judge's report and recommendation on an application for attorney's fees de novo, in consideration of the importance of the historic class action litigation and the court's fiduciary obligation to the class members.

5th Circuit:

Blair v. Sealift, 848 F. Supp. 670 (E.D. La. 1994)

The imposition of attorney's fees post-trial, and not as a discovery sanction, was a case-dispositive matter under § 636(b)(1)(B) and was therefore subject to de novo review.

6th Circuit:

Massey v. City of Ferndale, 7 F.3d 506 (6th Cir. 1993)

Motions for sanctions, fees, and costs are not to be determined by a magistrate judge because they are dispositive of claims.

Weatherby v. Sec'y of Health & Human Services, 654 F. Supp. 96 (E.D. Mich. 1987)

A motion for attorney's fees under 28 U.S.C. § 2412 may not be referred to a magistrate judge under § 636(b)(1)(A).

7th Circuit:

Rajaratnam v. Moyer, 47 F.3d 922 (7th Cir. 1995)

A magistrate judge did not have authority to enter a final order on a motion for attorney's fees under the Equal Access to Justice Act.

9th Circuit:
Estate of Connors by Meredith v. O'Connor, 6 F.3d 656 (9th Cir. 1993), *cert. denied,* 510 U.S. 1045 (1994)
A magistrate judge lacked authority to dispose of a motion for attorney's fees because it was neither pretrial nor a non-case-dispositive matter.

Bernardi v. Yeutter, 951 F.2d 971 (9th Cir. 1991)
A magistrate judge could make proposed findings of fact and a recommendation that attorney's fees be awarded against a defendant found to be in contempt of the district court's consent decree.

10th Circuit:
Insurance Co. of North America v. Bath, 968 F.2d 20 (10th Cir. 1992) (Table disposition -- text available on Westlaw)
A motion for attorney's fees, even if post-judgment, is a case-dispositive matter triggering the procedures and standard of review under § 636(b)(1)(B).

11th Circuit:
In re Holywell Corp., 967 F.2d 568 (11th Cir. 1992)
A motion to calculate an award of attorney's fees, referred to a magistrate judge after a district judge ordered a party held in contempt in a bankruptcy proceeding, was treated as a case-dispositive matter under § 636(b)(1)(B).

D.C. Circuit:
David v. District of Columbia, 252 F.R.D. 56 (D.D.C. 2008)
A magistrate judge's order granting attorney's fees was void because the magistrate judge did not have jurisdiction under Fed.R.Civ.P. 72 to issue it in the form of a final order as opposed to a recommendation.

14. Motions to Enforce Settlement

5th Circuit:
Schommer v. McKinney Towing, 1991 WL 68468 (E.D. La. 1991), *aff'd*, 952 F.2d 400 (7th Cir. 1992)
A motion to enforce a settlement agreement is a case-dispositive matter requiring de novo determination under § 636(b)(1)(B).

7th Circuit:
Schaap v. Executive Industries, Inc., 760 F. Supp. 725 (N.D. Ill. 1991)
The district judge referred a motion to enforce a settlement agreement to a magistrate judge under § 636(b)(1)(B). (No discussion of magistrate judge authority.)

D.C. Circuit:

Page v. Pension Benefit Guaranty Corp., 498 F. Supp. 2d 223 (D.D.C. 2007)

The district judge affirmed the magistrate judge's denial of a motion to close out a settlement agreement under the de novo standard without deciding whether the motion was a case-dispositive matter or a non-case-dispositive matter.

15. Stays of Proceedings

9th Circuit:

Reynaga v. Cammisa, 971 F.2d 414 (9th Cir. 1992)

A magistrate judge did not have authority to issue a "final" order staying a prisoner § 1983 case pending exhaustion of state remedies. The magistrate judge's authority was limited to submission of proposed findings of fact and a recommendation concerning disposition of the motion, subject to de novo determination by the district judge.

16. Postjudgment Motions for Contempt

9th Circuit:

Bernardi v. Yeutter, 951 F.2d 971 (9th Cir. 1991)

The district court could refer a postjudgment motion to determine if the defendant was acting in contempt of a consent decree in a class action to a magistrate judge under § 636(b)(1)(B), subject to de novo determination by the district judge.

17. Equitable Allocation Proceedings

3d Circuit:

Beazer East, Inc. v. The Mead Corp., 412 F.3d 429 (3d Cir. 2005), *cert. denied*, 546 U.S. 1091 (2006)

The district court improperly referred an equitable allocation proceeding in a CERCLA case to a magistrate judge for an evidentiary hearing and preparation of a report and recommendation. The magistrate judge did not facilitate the district court's ultimate adjudicatory function — he assumed that function, and therefore the equitable allocation proceeding conducted by the magistrate judge was not a "pretrial matter" under 28 U.S.C. § 636(b)(1).

18. Petition Under the Hague Convention on the Civil Aspects of International Child Abduction

9th Circuit:

Holder v. Holder, 392 F.3d 1009 (9th Cir. 2004)

The referral of a Hague Convention claim to a magistrate judge for a report and recommendation was firmly rooted in statutory authority and facilitated the expeditious resolution of claims mandated by the Convention.

11th Circuit:
Bekier v. Bekier, 248 F.3d 1051 (11th Cir. 2001)
A magistrate judge's report and recommendation on a Hague Convention claim was adopted in its entirety by the district court. (No discussion of magistrate judge authority.)

19. Expert Testimony

5th Circuit:
Saudi v. S/T Marine Atlantic, 159 F. Supp. 2d 512 (S.D. Tex. 2001)
The district judge applied the de novo standard of review to a magistrate judge's memorandum and recommendation on a motion to strike expert witnesses, where the affected party filed timely objections to the magistrate judge's ruling.

6th Circuit:
United States v. Pollard, 128 F. Supp. 2d 1104 (E.D. Tenn. 2001)
The district judge accepted a magistrate judge's report and recommendation allowing the testimony of an expert witness.

11th Circuit:
United States v. Henderson, 409 F.3d 1293 (11th Cir. 2005)
The district court did not abuse its discretion when it adopted the magistrate judge's report and recommendation excluding proffered polygraph evidence.

20. Motions for Leave to Amend

Courts disagree over whether orders on motions for leave to amend are dispositive of a claim or defense before the court. *See* Section 4, *supra*, for additional opinions on this issue.

1st Circuit:
Allendale Mut. Ins. Co. v. Rutherford, 178 F.R.D. 1 (D. Me. 1998)
De novo review of the defendant's motion to amend her answer to include an affirmative defense based on the statute of limitations was appropriate because the matter was dispositive of a defense of a party.

2d Circuit:
Mueller Co. v. U.S. Pipe & Foundry Co., 351 F. Supp. 2d 1 (D.N.H. 2005)
A magistrate judge's denial of a motion to amend on futility grounds is subject to de novo review.

HCC, Inc. v. R H & M Mach. Co., 39 F. Supp. 2d 317 (S.D.N.Y. 1999)
Denial of leave to amend is a case-dispositive decision at least in situations where the denial is premised on futility.

10th Circuit:

Wood v. World Wide Ass'n of Specialty Programs and Schools, 2008 WL 4065622 (D. Utah 2008)

Because the record established that it would be futile to grant leave for further amendment, the district judge considered the plaintiffs' motion for leave to amend as a case-dispositive motion and therefore applied a de novo standard of review.

21. Motions for Leave to File Reply Out of Time

10th Circuit:

Brockman v. Board of County Commissioners of County of Shawnee, 2008 WL 1743495 (D. Kan. 2008)

Because denial of a motion for leave to file a reply out of time to a motion for judgment on the pleadings would have a case-dispositive effect, the magistrate judge did not have jurisdiction to rule on the motion; consequently, the district judge reviewed the issues in the motion de novo.

22. Motions Under the Freedom of Information Act (FOIA)

2d Circuit:

New York v. Salazar, 701 F. Supp. 2d 224 (N.D.N.Y. 2010)

A magistrate judge held that he did not have authority to issue a final ruling on the plaintiffs' motion to compel the production of documents from the federal government, where the government was withholding production of the documents under provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and where the issues under FOIA constituted the merits of two underlying causes of action in the plaintiffs' lawsuit. [See Information Memorandum No. 316 for a more detailed summary of this case.]

E. Other Duties

Magistrate judges are currently performing a variety of duties analogous to case-dispositive motions in the district courts. These duties are not described in the Federal Magistrates Act, and any statutes authorizing these duties do not specify the involvement of magistrate judges. Although the authority of magistrate judges to perform these duties may not have been addressed in case law, it is assumed by the courts where magistrate judges are performing these duties that the power is derived from the general authority of the Federal Magistrates Act and of the district court itself. This list should not be considered all-encompassing.

The Judicial Services Office recognizes that the following duties are being referred to magistrate judges in various districts around the country. Oftentimes, such references are made under local rules. The duties are listed to suggest how different courts have utilized magistrate judges over the last forty years. The Division provides this list without commenting upon the propriety of such references.

- Condemnation Proceedings
- Pension Board Appeals (ERISA)
- Appeals of Administrative Denials of Licenses, Certifications and Other Privileges
- Appeals from Military Discharge Proceedings
- INS Deportation Hearings
- Other Appeals from Agency Action (5 U.S.C. § 702)
- Inquests

§ 6. DESIGNATION AS SPECIAL MASTER UNDER 28 U.S.C. § 636(b)(2)

A. In General

Section 636(b)(2) governs the appointment of magistrate judges as special masters under Fed. R. Civ. P. 53:

> A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

Rule 53(a)(1)(B)(i) provides that "some exceptional condition" must be shown before a master may be appointed. If the parties consent to appointment of a magistrate judge as special master, however, a showing of exceptional conditions is not required. Rule 53(h), as amended in 2003 and 2007, further states:

> **Appointing a Magistrate Judge.** A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

1. Consent, Notice of Designation, & Waiver of Objection to Designation

2d Circuit:
Magnaleasing, Inc. v. Staten Island Mall, 428 F. Supp. 1039 (S.D.N.Y.), *aff'd*, 563 F.2d 567 (2d Cir. 1977)
An objection to referral of a case to a special master must be made to the trial judge at or before the time of the referral, and not to the special master.

3d Circuit:
Beazer East, Inc v. The Mead Corp., 412 F.3d 429 (3d Cir. 2005), *cert. denied*, 546 U.S. 1091 (2006)
Where the appellate court concluded that the district court had improperly referred an equitable allocation proceeding to a magistrate judge under § 636(b)(1), and the plaintiff argued that the appellate court should re-characterize the lower court's referral as a designation to the magistrate judge to serve as a special master under § 636(b)(2), the Third Circuit held that designation of a magistrate judge as a special master to conduct the equitable allocation proceeding under the particular facts in this case without the parties' consent would constitute an abuse of discretion.

5th Circuit:

Hayes v. Foodmaker, Inc., 634 F.2d 802 (5th Cir. 1981)

Failure to make a timely objection to referral of a case to a special master constitutes a waiver. A magistrate judge acting as a special master gave correct advice when telling a party that objections to the referral should be made to the district judge.

Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975), *cert. denied sub nom.*, *Andrade v. Hauck*, 424 U.S. 917 (1976)

A party opposed to referral of a case to a magistrate judge sitting as a special master must object before or at the time of the referral. If this is not feasible, objection should be made to the district judge at the earliest opportunity.

6th Circuit:

Thornton v. Jennings, 819 F.2d 153 (6th Cir. 1987)

A magistrate judge may be designated as a special master only upon a showing of exceptional conditions under Fed. R. Civ. P. 53 or with the litigants' consent. Without either, there is no special master reference and the district court is required to review the magistrate judge's findings de novo.

Hawkins v. Ohio Bell Tel. Co., 93 F.R.D. 547 (S.D. Ohio 1982), *aff'd*, 785 F.2d 308 (6th Cir. 1986)

Where the parties did not object to the court's improper referral of trial on the merits to a magistrate judge under § 636(b)(1)(B) and Fed. R. Civ. P. 53, the court still made a proper § 636(b)(2) reference and will apply the clearly erroneous standard of review.

8th Circuit:

Reiter v. Honeywell, Inc., 104 F.3d 1071 (8th Cir. 1997)

Failure to object to a special master reference of a jury trial to a magistrate judge serving as special master in Title VII case did not constitute consent to the reference. The magistrate judge could not conduct the jury trial without the explicit consent of the parties. (Court did not mention authority to refer Title VII cases to magistrate judges sitting as special masters under 42 U.S.C. § 2000e-5(f)(5).)

9th Circuit:

Spaulding v. Univ. of Washington, 740 F.2d 686 (9th Cir.), *cert. denied*, 469 U.S.1036 (1984)

The parties must object to a special master referral when it is made or within a reasonable time thereafter to avoid waiver.

10th Circuit:

Green v. Brady, 45 F.3d 439 (10th Cir. 1995) (Table disposition -- text available on WESTLAW)

The plaintiff waived her objection to the appointment of a magistrate judge under 28 U.S.C.

§ 636(b)(2) and Fed. R. Civ. P. 53 to serve as a special master in her Title VII case because she failed to take issue with the appointment in a timely manner.

D.C. Circuit:

Wallace v. Skadden, Arps, Slate, Meagher & Flom, LLP, 362 F.3d 810 (D.C. Cir. 2004)

Where a magistrate judge, appointed as a special master with the consent of the parties, issued a report recommending that $25,000 in legal fees and sanctions be awarded against the plaintiff for unreasonable and vexatious filings in the case, the district court erred in failing to provide the plaintiff with sufficient notice concerning the special master appointment and the consequences of failing to object to the master's report and recommendation, thereby requiring the case to be remanded for further proceedings.

2. Standard of Review by District Court

Before 2003, courts had disagreed on the appropriate standard for reviewing decisions by magistrate judges sitting as special masters. Some circuits applied the de novo review while others applied the "clearly erroneous" standard. Federal Rules of Civil Procedure 53(f)(3) and (4), which first went into effect in 2003 and were further amended in 2007, clarified the appropriate standards of review to be applied to factual findings and legal conclusions made by masters appointed under the rule:

> **(3) Reviewing Factual Findings.** The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties, with the court's approval, stipulate with the court's consent that:
>
> **(A)** the findings will be reviewed for clear error; or
>
> **(B)** the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

> **(4) Reviewing Legal Conclusions.** The court must decide de novo all objections to conclusions of law made or recommended by a master.

5th Circuit:

Castillo v. Frank, 70 F.3d 382 (5th Cir. 1995)

The district court retains authority to review discovery rulings made by a magistrate judge after the magistrate judge has been appointed to serve as a special master under Rule 53. These rulings are reviewed under the "clearly erroneous" or contrary to law standard.

Calderon v. Waco Lighthouse for the Blind, 630 F.2d 352 (5th Cir. 1980)

Fact findings by a magistrate judge sitting as a special master were final, subject to the clearly erroneous standard of review. Legal rulings may be freely reviewed by the district judge.

6thCircuit:

Thornton v. Jennings, 819 F.2d 153 (6th Cir. 1987)

Where no exceptional conditions or litigants' consent appears in the record, the district judge cannot apply the clearly erroneous standard of review and instead must apply the de novo standard under § 636(b)(1)(C).

Brown v. Wesley's Quaker Maid, Inc., 771 F.2d 952 (6th Cir.1985), *cert. denied*, 479 U.S. 830 (1986)

The district judge committed error by reviewing the magistrate judge's Title VII decision de novo. The clearly erroneous standard must be applied where a special master referral is made under 42 U.S.C. § 2000e-5(f)(5).

Hawkins v. Ohio Bell Tel. Co., 93 F.R.D. 547 (S.D. Ohio 1982), *aff'd*, 785 F.2d 308 (6th Cir. 1986)

A special master's fact findings are reviewed under a clearly erroneous standard, but the district judge is free to exercise independent judgment regarding legal conclusions.

9th Circuit:

Bennett v. Yoshina, 98 F. Supp. 2d 1139 (D. Hawaii 2000)

Where the plaintiffs' motion for attorneys' fees was referred to a magistrate judge appointed as a special master under Rule 53, the district court declined to apply the clearly erroneous standard of review to the magistrate judge's report and recommendation, and acknowledged that the district court should never act as a "mere rubber stamp" for the findings and conclusions of a special master even under the clear error standard.

10th Circuit:

Nat. R.R. Passenger Corp. v. Koch Industries, Inc., 701 F.2d 108 (10th Cir. 1983)

Where the special master recommended a new trial after concluding that the jury reached a compromise verdict, the proper standard of review for the district judge is de novo determination.

11th Circuit:

Cooper-Houston v. Southern Railway Co., 37 F.3d 603 (11th Cir. 1994)

The district court, when reviewing a magistrate judge's findings while sitting as a special master, is bound to defer to the magistrate judge's factual findings unless they are found to be clearly erroneous.

3. Appellate Review

5th Circuit:
Trufant v. Autocon, Inc., 729 F.2d 308 (5th Cir. 1984)
The court of appeals has no jurisdiction over a magistrate judge's findings made while sitting as a special master where the parties did not consent and the district judge did not issue a final order in the case.

7th Circuit:
Provident Bank v. Manor Steel Corp., 882 F.2d 258 (7th Cir. 1989)
A party's failure to appeal the district judge's referral of the case to a special master constitutes waiver of the issue before the court of appeals. A failure to appeal issues decided by the special master to the district judge also waives appellate review.

9th Circuit:
Alaniz v. California Processors, 690 F.2d 717 (9th Cir. 1982), *appeal after remand*, 785 F.2d 1412 (9th Cir. 1986)
A magistrate judge's decision when sitting as a special master under § 636(b)(2) is not a final decision of the district court and cannot be appealed directly to the court of appeals. The parties' consent to referral of the case to the special master does not render the magistrate judge's order a final order under the civil consent provisions of § 636(c).

10th Circuit:
Oliver v. Muskogee Regional Medical Center, 931 F.2d 900 (10th Cir. 1991) (Table disposition-- text available on WESTLAW)
In cases referred to a magistrate judge sitting as a special master under § 636(b)(2) with the parties' consent, the appellate court reviews the magistrate judge's summary judgment order de novo.

B. Cases Referable to Magistrate Judge As Special Master

1. Exceptional Condition

Absent the consent of the parties, Fed. R. Civ. P. 53, amended in 2003 and 2007, provides that the district court may only appoint a master in a civil case "if appointment is warranted by: (i) some exceptional condition; or (ii) the need to perform an accounting or resolve a difficult computation of damages." Subsection C of Rule 53(a)(1) further provides that a master may only be appointed to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."

2d Circuit:
Magnaleasing, Inc. v. Staten Island Mall, 428 F. Supp. 1039 (S.D.N.Y.), *aff'd*, 563 F.2d 567 (2d Cir. 1977)
The referral of a non-jury action to a magistrate judge sitting as a special master under § 636(b)(2) and Fed. R. Civ. P. 53 was appropriate because it involved accounting and the complex computation of damages.

3d Circuit:
Prudential Ins. Co. of America v. United States Gypsum Co., 991 F.2d 1080 (3d Cir1993)
Where a magistrate judge had been performing pretrial case management duties in a complex, multi-party asbestos case for several years, the appointment of special master to hear the case over the parties' objections was not justified under the "exceptional condition" standard of Fed. R. Civ. P. 53. Congressional enactment of the Federal Magistrates Act suggests that the appointment of special masters under Fed. R. Civ. P. 53 should be disfavored and that the "exceptional condition" inquiry of Rule 53 should be made in light of the availability of magistrate judges to aid the district courts in handling pretrial matters.

6th Circuit:
McCormick v. Western Kentucky Navigation, Inc., 993 F.2d 568 (6th Cir. 1993)
"Docket congestion" and judicial vacancies in the district court did not constitute "exceptional conditions" under Fed. R. Civ, P. 53(b) justifying the appointment of a magistrate judge as a special master in a maritime tort case without the parties' consent.

2. Prisoner Cases

2d Circuit:
McCarthy v. Bronson, 906 F.2d 835 (2d Cir. 1990), *aff'd*, 500 U.S. 136 (1991)
A straightforward § 1983 prisoner action did not meet the "exceptional condition" requirement of Fed. R. Civ. P. 53, therefore the court was not allowed to refer the case to a magistrate judge sitting as a special master without the parties' consent.

6th Circuit:
Roland v. Johnson, 856 F.2d 764 (6th Cir. 1988)
The district court may not avoid the de novo standard of review imposed by § 636(b)(1)(B) by referring a prisoner case to a magistrate judge sitting as a special master.

3. Title VII Cases (42 U.S.C. § 2000e-5(f)(5))

An exception to the strict appointment requirements of Fed. R. Civ. P. 53 is set forth in 42 U.S.C. § 2000e-5(f)(5). A master may be appointed under Rule 53 in a Title VII case without a showing of some exceptional condition "[i]f such judge has not scheduled the case for trial within one hundred and twenty days after the issue has been joined." A small number of courts have adopted

local rules and procedures referring Title VII cases automatically to magistrate judges sitting as masters under Rule 53 pursuant to this provision.

5th Circuit:
Gonzalez v. Carlin, 907 F.2d 573 (5th Cir. 1990)
Neither the exceptional condition requirement of Fed. R. Civ. P. 53 nor the parties' consent is required for referral of a Title VII case to a magistrate judge as a special master.

6th Circuit:
Day v. Wayne County Bd. of Auditors, 749 F.2d 1199 (6th Cir. 1984)
The referral of Title VII cases to magistrate judges sitting as special masters does not conflict with the Federal Magistrates Act.

7th Circuit:
Morse v. Marsh, 656 F. Supp. 939 (N.D. Ill. 1987)
The limited referral of a Title VII case to a magistrate judge does not require the parties' consent. This referral did not violate Article III.

8th Circuit:
Reiter v. Honeywell, Inc., 104 F.3d 1071 (8th Cir. 1997)
A magistrate judge did not have authority under 28 U.S.C. § 636(b)(2) to conduct a jury trial without the parties' consent while presiding as a special master in a Title VII case (the court did not mention authority to refer Title VII cases to magistrate judges sitting as special masters under 42 U.S.C. § 2000e-5(f)(5)).

9th Circuit:
White v. General Services Admin., 652 F.2d 913 (9th Cir. 1981)
The language in 42 U.S.C. § 2000e-5(f)(5) that permits the referral of a Title VII case to a magistrate judge as a special master where the district judge "has not scheduled the case for trial within 120 days after the issue has been joined" did not bar a special master referral made six weeks before the government filed its motion for summary judgment.

11th Circuit:
Smith v. Beverly Health and Rehabilitation Services, Inc., 978 F. Supp. 1116 (N.D. Ga. 1997)
The court upheld its local rule and operating procedure whereby all Title VII cases filed in particular court divisions were referred at the time of filing to "full time magistrates under the authority of 42 U.S.C. § 2000e-5(f)(5) who shall, acting as special masters, hear and decide such cases in their entirety."

Richardson v. Bedford Place Housing Phase I Associates, 855 F. Supp. 366 (N.D. Ga. 1994)
A Title VII case may be referred to a magistrate judge serving as a special master even though no exceptional condition exists and the parties have not consented. Although the

magistrate judge erred in issuing an "order" denying defendants' motion to dismiss for lack of subject matter jurisdiction, the district court can treat the "order" as a special master's report, reviewing it under the clearly erroneous standard of review.

Parker v. Dole, 668 F. Supp. 1563 (N.D. Ga. 1987)
Because Congress intended to relax requirements of Fed. R. Civ. P. 53 in Title VII cases; there is no conflict with the Federal Magistrates Act.

4. Appellate Special Masters

Magistrate judges are occasionally appointed by courts of appeals to serve as special masters in contempt proceedings that arise in the appellate court. Courts of appeals have upheld such appointments by appellate courts under the Federal Magistrates Act and Fed. R. Civ. P. 53, as well as the general authority of the court of appeals to appoint masters under Fed. R. App. P. 48.

7th Circuit:
In re Bagdade, 334 F.3d 568 (7th Cir. 2003)
The court of appeals accepted a report and recommendation of a magistrate judge presiding as an appellate special master, which concluded that there was sufficient evidence to establish that the attorney in question had engaged in the unauthorized practice of law and had violated various circuit rules by acting as lead counsel and arguing appeals in two separate cases without being admitted to the circuit's bar, thereby justifying the imposition of significant disciplinary penalties against the attorney.

Reich v. Sea Sprite Boat Co., Inc., 50 F.3d 413 (7th Cir. 1995)
A magistrate judge presiding as an appellate special master had the authority to recommend significant civil sanctions against parties that had refused to comply with the appellate court's enforcement orders.

9th Circuit:
NLRB v. A-Plus Roofing, Inc., 39 F.3d 1410 (9th Cir. 1994)
Although the appellate court had authority to appoint a magistrate judge to serve as a special master in a contempt proceeding in the appellate court under the Federal Magistrates Act, the magistrate judge did not have authority to impose criminal contempt penalties without the parties' consent to the magistrate judge's criminal jurisdiction.

C. Other Duties

Magistrate judges currently perform a variety of duties analogous to special master-type duties for the district courts. These duties are not described in the Federal Magistrates Act, and any statutes authorizing these duties do not specify the involvement of magistrate judges. The authority of magistrate judges to perform these duties has not been addressed in case law, but it is assumed by the courts where magistrate judges are performing these duties to be derived from the general

authority of the Federal Magistrates Act and of the district court itself. This list should not be considered all-encompassing.

The Judicial Services Office recognizes that the following duties are referred to magistrate judges in various districts around the country. Such referrals are often made under local rules. The duties are listed to suggest how different courts have utilized magistrate judges over the past forty years.

- Condemnation Proceedings
- Court Employee Grievance Proceedings

§ 7. ADDITIONAL DUTIES UNDER 28 U.S.C. § 636(b)(3)

§ 7. ADDITIONAL DUTIES UNDER 28 U.S.C. § 636(b)(3)

A. In General

Section 636(b)(3) of Title 28, United States Code, states that, "[a] magistrate [judge] may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." This provision has been interpreted to permit courts to refer various duties not otherwise specified in the Federal Magistrates Act or in other statutes to magistrate judges.

1. Authority of Magistrate Judge

A split has long existed among courts interpreting § 636(b)(3). Some courts hold that referrals under § 636(b)(3) are limited to procedural or administrative matters. Others have held that more substantive duties, such as evidentiary hearings, could be referred to magistrate judges under the section.

This split in judicial opinion has been reflected in decisions of the Supreme Court. In *Gomez v. United States*, 490 U.S. 858 (1989), the Court held that any additional duties performed under the general authorization in the statute should bear some reasonable relation to duties specified in the Act. The Court later in *Peretz v. United States*, 501 U.S. 923 (1991), however, construed its opinion in *Gomez* narrowly, finding that the litigant's consent "significantly changes the constitutional analysis." The Court added:

> The generality of the category of "additional duties" indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen. If Congress had intended strictly to limit these additional duties to functions considered in the committee hearings or debates, presumably it would have included in the statute a bill of particulars rather than a broad residuary clause. Construing this residuary clause absent concerns about raising a constitutional issue or depriving a defendant of an important right, we should not foreclose constructive experiments that are acceptable to all participants in the trial process and are consistent with the basic purposes of the statute. *Peretz*, 501 U.S. at 932-33.

This view is also found expressly in the legislative history of the Federal Magistrates Act, where Congress stated that, "placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates." S. Rep. No. 625, 94th Cong., 2d Sess. 10; H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12 (1976). Congress went on to give examples of the duties that might be referred to magistrate judges under the "additional duties" provision:

> Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters". This subsection would permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, and accept returns of jury verdicts where the trial judge is unavailable. This subsection would also enable the court to delegate some of the more administrative functions to a magistrate, such as the appointment of attorneys in criminal cases and assistance in the preparation of plans to achieve prompt disposition of cases in the court. *Id.*

Congress later stated that the 1979 amendments to the Federal Magistrates Act, providing magistrate judges with civil consent authority under § 636(c), did "not affect the existing power of magistrates in the civil or criminal pretrial area" already covered by § 636(b). H.R. Rep. No. 287, 96th Cong., 1st Sess. 1 (1979).

Differing interpretations of § 636(b)(3) have continued since the *Peretz* decision. The debate continues to focus on whether the provision limits additional duty referrals to magistrate judges to merely ministerial and administrative duties or permits the referral of more substantive judicial duties. In light of the *Peretz* decision, many courts have focused on whether the litigant consented to the magistrate judge's participation in duties referred under § 636(b)(3) when deciding whether the magistrate judge's exercise of authority was proper.

> **1st Circuit:**
> *Rubin v. Smith,* 882 F. Supp. 212 (D.N.H. 1995)
> Dicta: An insight into the breadth of "additional duties" intended to be encompassed by § 636(b)(3) is revealed in the legislative history, wherein Congress noted that the provision enables the district courts to continue innovative experimentations in the use of this judicial officer. At the same time, placing this provision in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrate judges. Under this subsection, the district courts remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters."
>
> **2d Circuit:**
> *Denny v. Ford Motor Co.*, 146 F.R.D. 52 (N.D.N.Y. 1993)
> Section 636(b)(3) should be interpreted broadly to permit district judges to utilize magistrate judges in innovative ways.

3d Circuit:

Beazer East, Inc v. The Mead Corp., 412 F.3d 429 (3d Cir. 2005), *cert. denied*, 546 U.S. 1091 (2006)

The referral of an evidentiary proceeding to allocate liability under CERCLA among various responsible parties to a magistrate judge under § 636(b)(3) was improper. The parties' consent or lack thereof is a key factor in deciding whether a referral is authorized under § 636(b)(3). Since equitable allocation is at the very core of a CERCLA contribution action, it is therefore not a preliminary or subordinate matter that can be referred to magistrate judge under § 636(b)(3) without the parties' consent.

Government of the Virgin Islands v. Williams, 892 F.2d 305 (3d Cir. 1989), *cert. denied*, 495 U.S. 949 (1990)

The 1976 amendments to the Federal Magistrates Act enhanced the importance of the additional duties clause by moving it to a separate subsection. Congress intended to promote the magistrate judges system by providing district judges with greater flexibility to continue innovative experiments in using magistrate judges.

5th Circuit:

United States v. Underwood, 597 F.3d 661 (5th Cir. 2010)

A defendant's consent to have a magistrate judge conduct a guilty plea proceeding in a felony case under Fed. R. Crim. P. 11 and 28 U.S,C. § 636(b)(3) could be inferred from the defendant's conduct when he failed to object to the magistrate judge conducting the plea colloquy. [See Information Memorandum No. 316 for a more detailed summary of this case.]

United States v. Dees, 125 F.3d 261 (5th Cir. 1997), *cert. denied*, 522 U.S. 1152 (1998)

A magisterial duty is a proper "additional duty" under§ 636(b)(3) if it bears some relationship to the duties that the Act expressly assigns to magistrate judges. Even if Congress did not anticipate the delegation of felony guilty plea proceedings to magistrate judges, the delegation did not exceed the scope of magisterial authority contemplated by the Federal Magistrates Act.

6th Circuit:

Callier v. Gray, 167 F.3d 977 (6th Cir. 1999)

Section 636(b)(3) is a broad provision that permits the district court to refer to a magistrate judge proceedings to determine damages in a default judgment matter. Under the circumstances of the case at bar, such a referral falls within the Supreme Court's reasoning in *Gomez v. United States*, 490 U.S. 858 (1989) as bearing a particular relationship to the other specified magistrate judges duties under § 636. The appellate court, however, cautions that its interpretation of § 636(b)(3) is not to be understood as approving the wholesale reference of claims and counterclaims for damages to magistrate judges under the provision without the consent of all parties concerned.

7th Circuit:

Olympia Hotel Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363 (7th Cir. 1990)

The location of § 636(b)(3) in the middle of § 636 rather than at the end leads the court to doubt that it was intended to be as comprehensive a catch-all provision as its words literally suggest.

8th Circuit:

Harris v. Folk Const. Co., 138 F.3d 365 (8th Cir. 1998)

Absent clear and unambiguous consent of the affected parties, a district judge may not delegate, under § 636(b)(3), duties that require a final and independent determination of fact or law by the magistrate judge. However, where a magistrate judge serves as a mere intermediary in the performance of adjudicatory functions and is under constant and direct supervision of an Article III judge, such functions are freely assignable as "additional duties."

Roberts v. Manson, 876 F.2d 670 (8th Cir. 1989)

The additional duties clause seems intended to apply to matters after the trial begins. There is no valid authority in this section for a magistrate judge to conduct an evidentiary hearing and to recommend dismissal of the case with prejudice.

United States v. Trice, 864 F.2d 1421 (8th Cir. 1988), *cert. dismissed*, 491 U.S. 914 (1989)

Congress did not intend to limit the additional duties provision to specific powers delegated to magistrate judges in the past.

9th Circuit:

United States v. Colacurcio, 84 F.3d 326 (9th Cir. 1996)

A probation revocation hearing was not meant to be included as one of the duties that could be delegated to a magistrate judge. Even assuming that a probation revocation hearing could be considered a "subsidiary matter," Congress did not intend to delegate probation revocation hearings to magistrate judges as an "additional duty" under § 636(b)(3). Even if probation revocation hearings could be delegated to magistrate judges under §636(b)(3), defendant's consent would still be required to eliminate the constitutional problems that arise from having a non-Article III judge preside over a critical stage of a criminal case.

10th Circuit:

United States v. Montano, 472 F.3d 1202 (10th Cir.), *cert. denied*, 552 U.S. 896 (2007)

A magistrate judge has jurisdiction under § 636(b)(3) to conduct a plea hearing and subsequently accept a defendant's plea where the defendant consents. Where a magistrate judge conducted the felony guilty plea colloquy under Fed. R. Crim. P. 11 and accepted the defendant's guilty plea made pursuant to a plea agreement that included a provision whereby the defendant waived her right to appeal her sentence, the waiver of appeal clause in the plea agreement was enforceable, even though the district judge orally revoked the waiver of appeal provision at the defendant's sentencing hearing.

United States v. Ciapponi, 77 F.3d 1247 (10th Cir.), *cert. denied*, 517 U.S. 1215 (1996)
The court's statutory inquiry under § 636(b)(3) is whether the task referred to the magistrate judge bears some reasonable relation to the specified duties that may be assigned to magistrate judges under the Federal Magistrates Act.

11th Circuit:
Thomas v. Whitworth, 136 F.3d 756 (11th Cir. 1998)
Where consent is lacking, courts should be reluctant to construe § 636(b)(3) to include responsibilities of far greater importance than the specified duties assigned to magistrate judges under the Federal Magistrates Act. Section 636 does not permit magistrate judges, under the guise of the "additional duties" clause, to conduct the jury selection portion of a civil trial unless the parties have given their consent.

2. Procedural Requirements

Neither § 636 nor the Federal Rules of Civil Procedure specify procedures for referring additional duties to magistrate judges. In 2005, Fed. R. Crim. P. 59 was adopted which sets forth procedures applicable to all matters referred to magistrate judges in criminal cases. Courts have often been required to interpret what procedures should apply to referrals under § 636(b)(3) absent specific explanatory language in the statute.

1st Circuit:
Sackall v. Heckler, 104 F.R.D. 401 (D.R.I. 1984)
The procedural scheme of the Federal Magistrates Act requires "rifle-shot" objections to be filed to a magistrate judge's report and recommendation in a case-dispositive matter referred under § 636(b)(3). "Blunderbuss" general objections constitute no objection at all.

2d Circuit:
United States v. Brumer, 528 F.3d 157 (2d Cir. 2008)
The procedural requirements of 28 U.S.C. § 636(b)(1), that mandate preparation of a report and recommendation and provide defendants with a ten-day period to file written objections, do not apply when a magistrate judge conducts a felony guilty plea proceeding with the defendant's consent under § 636(b)(3).

5th Circuit:
McCleod, Alexander, Powel & Apffel, P.C. v. Quarles, 925 F.2d 853 (5th Cir. 1991)
A party's failure to object to a defect in referring a matter under § 636(b)(3) until after the magistrate judge issued a report and recommendation constitutes a waiver. The district judge's failure to mention the referral of the motion to the magistrate judge in its order is only a procedural error.

Parks v. Collins, 761 F.2d 1101 (5th Cir. 1985)
A magistrate judge did not have authority under § 636(b)(3) to decide a motion to set aside a default judgment because there was no record that the matter was assigned to the magistrate judge as a post-trial duty.

6th Circuit:
Brown v. Wesley's Quaker Maid, Inc., 771 F.2d 952 (6th Cir. 1985), *cert. denied*, 479 U.S. 830 (1986)
A Title VII discrimination case may not be referred to a magistrate judge for disposition under § 636(b)(3), subject to de novo review. Such a referral would be contrary to fundamental precepts of statutory construction and the legislative history of the Federal Magistrates Act. Section 636(b)(3) applies only to procedural and administrative matters.

7th Circuit:
American Motors Corp. v. Great American Surplus Lines Ins. 1988 WL 2788 (N.D. Ill. 1988)
Referral of a motion to compel production of documents under 28 U.S.C. § 636(b)(3) was a clerical error or oversight. The motion should have been referred under § 636(b)(1)(A). The citation to the wrong section of the Federal Magistrates Act could be corrected nunc pro tunc.

10th Circuit:
Derringer v. Chapel, 279 Fed. Appx. 641 (10th Cir. 2008)
Where a Chapter 13 debtor in a bankruptcy appeal referred to a magistrate judge under § 636(b)(3) failed to file a specific objection to the magistrate judge's report and recommendation concerning the award of punitive damages, the debtor waived his right to appeal a $750 award of punitive damages against creditors for violating an automatic stay in the bankruptcy proceeding, even though the debtor filed timely objections to the magistrate judge's report and recommendation. Where the debtor was specifically notified of the time period for filing objections and of the consequences of failing to do so, and he nevertheless failed to file an objection regarding the award of punitive damages, the appellate court concluded that there was no injustice in applying a firm waiver rule to debtor's appeal of the magistrate judge's report and recommendation or the issue under § 636(b)(3).

In re Griego, 64 F.3d 580 (10th Cir. 1995)
The magistrate judge's alleged lack of authority to hear a bankruptcy appeal under § 636(b)(3) was not a jurisdictional defect; thus any objection to such authority is waived if not raised in a timely fashion.

3. Standard of Review & Procedures for Review

Section 636(b)(3) does not specify the standard of review or specific procedures for review to be applied by a district judge when reviewing a magistrate judge's decision in a matter referred under that section.

Supreme Court:

Peretz v. United States, 501 U.S. 923 (1991)

The omission of a standard of review in § 636(b)(3) does not alter the Court's Article III analysis. If a defendant requests review of a magistrate judge's ruling, nothing in the statute precludes the district judge from providing the review that the Constitution requires.

Gomez v. United States, 490 U.S. 858 (1989)

Dicta: Under § 636(b)(3), a district judge retains the power to assign to magistrate judges unspecified additional duties "subject only to conditions of review that the court may choose to impose." Although jury selection is comparable to a case-dispositive matter, it is not susceptible to de novo review. The Court therefore concluded that Congress did not intend for jury selection to be referred to magistrate judges under § 636(b)(3).

1st Circuit:

Paris v. U.S. Dept. of Housing and Urban Development, 795 F.Supp. 513 (D.R.I. 1992), *reversed on other grounds*, 988 F.2d 236 (1st Cir. 1993)

A post-judgment motion for attorneys' fees may be referred to a magistrate judge under § 636(b)(3) for a report and recommendation subject to de novo review.

Sackall v. Heckler, 104 F.R.D. 401 (D.R.I. 1984)

In response to a party's unfocused, general objection to the magistrate judge's report and recommendation under § 636(b)(3), the court applies the "clearly erroneous" standard of review to the magistrate judge's report and recommendation.

2d Circuit:

United States v. Brumer, 528 F.3d 157 (2d Cir. 2008)

Where a magistrate judge conducted the felony guilty plea proceedings with the defendants' consent, the defendants did not have a right to be present when the district judge reviewed the allocution transcripts and signed the orders accepting the defendants' pleas.

United States v. Taylor, 92 F.3d 1313 (2d Cir. 1996), *cert. denied*, 519 U.S. 1093 (1997)

When the district court reviews the magistrate judge's felony voir dire decisions, as long as a party whose credibility is in question has been afforded an opportunity to be heard before the district judge on the matters decided initially by the magistrate judge, the appellate court will afford the district judge's determination substantial deference, and it will not be overturned unless clearly erroneous.

4th Circuit:
Washington Post Co. v. Hughes, 923 F.2d 324 (4th Cir.), *cert. denied*, 500 U.S. 944 (1991)
Additional duties referred under § 636(b)(3) are reviewed de novo.

5th Circuit:
McCleod, Alexander, Powel & Apffel, P.C. v. Quarles, 925 F.2d 853 (5th Cir. 1991)
The referral of a motion to vacate judgment under Fed. R. Civ. P. 60 under § 636(b)(3) is conditioned on safeguards provided by § 636(b)(1)(B), requiring the district judge to review the magistrate judge's ruling de novo.

7th Circuit:
Michelson v. Schor, 1996 WL 667803 (N.D. Ill. 1996)
A magistrate judge's decision under § 636(b)(3) in an action to enforce a judgment of the bankruptcy court was subject to de novo review. Although the plaintiffs did not object to the magistrate judge's ruling within 10 days of service, their objections were not waived because they did not have notice from the magistrate judge of the deadline for filing objections to the ruling under § 636(b)(3).

American Motors Corp. v. Great American Surplus Lines Ins. Co., 1988 WL 2788 (N.D. Ill. 1988)
The standard of review for a matter referred under § 636(b)(3) depends on which section of Fed. R. Civ. P. 72 applies. The district judge should determine if referral involves a case-dispositive or non-case-dispositive matter.

9th Circuit:
Minetti v. Port of Seattle, 152 F.3d 1113 (9th Cir.1998)
The district court did not err in refusing to permit a pro se litigant to object to a magistrate judge's report and recommendation that the litigant's application to proceed in forma pauperis be dismissed. The district judge conducted sufficient de novo review of the magistrate judge's report and recommendation under § 636(b)(3), even though the district judge adopted the magistrate judge's recommendation only one day after it was issued. No ten-day period of objection exists for case-dispositive matters referred to magistrate judges under 28 U.S.C. § 636(b)(3).

10th Circuit:
In re Griego, 64 F.3d 580 (10th Cir. 1995)
De novo review is required for referrals under either § 636(b)(3) or § 636(b)(1)(B).

Clark v. Poulton, 963 F.2d 1361 (10th Cir.), *cert. denied*, 506 U.S. 1014 (1992)
A prisoner civil rights action referred to a magistrate judge under § 636(b)(3) was subject to de novo review by the district judge.

Pettyjohn v. Sullivan, 801 F. Supp. 503 (W.D. Okla. 1992), *rev'd on other grounds sub nom.*, *Pettyjohn v. Shalala*, 23 F.3d 1572 (10th Cir. 1994)
A post-judgment motion for attorneys' fees was analogous to a motion under § 636(b)(1)(B) and could be referred to a magistrate judge under § 636(b)(3) for a report and recommendation, subject to de novo review.

11th Circuit:
Hall v. Sharpe, 812 F.2d 644 (11th Cir. 1987)
De novo review is mandated by § 636(b)(3).

4. Non-Consensual Referral of Proceedings to Magistrate Judges

Section 636(b)(3) does not require litigant consent for magistrate judges to perform additional duties. Several circuits have addressed the issue tangentially while discussing whether § 636(b)(3) referrals are limited to administrative or procedural matters. The Supreme Court's *Peretz* decision, however, emphasizes the importance of consent in distinguishing felony jury selection and matters comparable to that duty from the referral of non-consensual "subsidiary matters" under § 636(b)(1).

Supreme Court:
Peretz v. United States, 501 U.S. 923 (1991)
A defendant's consent to jury selection by a magistrate judge in a felony case eliminates the Court's concern that a general statutory authorization should not lightly be read to deprive a defendant of any important privilege.

7th Circuit:
Olympia Hotel Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363 (7th Cir. 1990)
Dicta: It might violate the Constitution to allow a magistrate judge to conduct a vital stage of a civil trial, such as voir dire, without the parties' consent.

8th Circuit:
Roberts v. Manson, 876 F.2d 670 (8th Cir. 1989)
Section 636(b)(3) does not extend to non-consensual evidentiary hearings. Dicta: Consent, combined with de novo review, might permit evidentiary matters to be referred under the provision.

9th Circuit:
NLRB v. A-Plus Roofing, Inc., 39 F.3d 1410 (9th Cir. 1994)
Section 636(b)(3) does not authorize a magistrate judge, appointed as an appellate special master, to conduct non-consensual criminal contempt trials on behalf of the court of appeals. The only statutory basis for the criminal jurisdiction of magistrate judges is 18 U.S.C. § 3401, which provides for the defendant's specific written consent.

5. Bankruptcy Matters

Several circuits differ over whether bankruptcy matters may be referred to magistrate judges. Issues include whether magistrate judges may issue final decisions in bankruptcy cases with litigant consent under § 636(c) and whether bankruptcy appeals may be referred to magistrate judges under § 636(b)(3), subject to de novo review by the district judge. See also § 8(A)(3), *infra*.

2d Circuit:

United States v. Warshay, 1998 WL 767138 (E.D.N.Y. 1998)

Referral of bankruptcy appeal to a magistrate judge for preparation of a report and recommendation under § 636(b)(3) was proper and did not violate either 28 U.S.C. § 157 (governing referrals to bankruptcy court) or § 636(b)(3). Bankruptcy appeals are analogous to appeals in social security cases, which are routinely referred to magistrate judges.

3d Circuit:

In re Continental Airlines, 218 B.R. 324 (D. Del. 1997), *aff'd*, 134 F.3d 536 (3d Cir.), *cert. denied*, 525 U.S. 929 (1998)

A district judge had authority under § 636(b)(3) to refer a bankruptcy appeal to a magistrate judge.

5th Circuit:

Bannistor v. Ullman, 287 F. 3d 394 (5th Cir. 2002)

While noting that the district court's reference of bankruptcy motions to a magistrate judge was unusual, the appellate court concluded that such references did not amount to reversible error. There is no authority that precludes the reference of motions under Fed. R. Civ. P. 59 to magistrate judges, and the appellate court had previously permitted district courts to refer motions under Fed. R. Civ. P. 60 to magistrate judges for report and recommendation under 28 U.S.C. § 636(b)(3).

Matter of Evangeline Refining Co., 890 F.2d 1312 (5th Cir. 1989)

The district court's revocation of a referral of a bankruptcy appeal to a magistrate judge for a report and recommendation corrected its improper referral. (No citation to Federal Magistrates Act.)

7th Circuit:

Michelson v. Schor, 1996 WL 667803 (N.D. Ill. 1996)

A magistrate judge was referred all "post-judgment collection proceedings" under § 636(b)(3) in an action to enforce the judgment of the bankruptcy court. The magistrate judge's decision was subject to de novo review.

8th Circuit:

In re Apex Oil Co., 146 B.R. 821 (E.D. Mo. 1992)

The district court had authority under § 636(b)(3) to refer a bankruptcy appeal to a magistrate judge to prepare a report and recommendation. Due to the complexity of bankruptcy matters, judicial economy and efficiency are aided by such referrals.

10th Circuit:

In re Carpenter, 205 F.3d 1249 (10th Cir. 2000)

The referral of a bankruptcy appeal to a magistrate for an advisory opinion is permissible. The purpose of making such a referral is to "define and focus the issues on appeal."

In re Griego, 64 F.3d 580 (10th Cir. 1995)

A district court could refer a bankruptcy appeal to a magistrate judge as long as the referral is solely to define and focus the issues on appeal, and the district court reserves for itself the final decision.

Virginia Beach Federal Sav. and Loan Ass'n. v. Wood, 901 F.2d 849 (10th Cir. 1990)

A magistrate judge is not permitted to enter a final decision in a bankruptcy appeal. A magistrate judge, however, may conduct an advisory hearing, provided the district judge signs the final order.

B. Pretrial and Trial Duties

Section 636(b)(3) is used by district courts to refer various pretrial and trial duties not specified elsewhere in the Federal Magistrates Act to magistrate judges.

1. Grand Jury Proceedings

8th Circuit:

In re Grand Jury Proceedings Julie Dzikowich, 620 F. Supp. 521 (W.D. Wis. 1985)

A magistrate judge acted within proper authority under § 636(b)(3), subject to de novo review, in denying a motion to quash a grand jury subpoena issued under 18 U.S.C. § 2518(10).

In re Grand Jury Appearance of Cummings, 615 F. Supp. 68 (W.D. Wis. 1985)

A magistrate judge is authorized to grant a witness immunity in a grand jury proceeding.

9th Circuit:

In re Search of 6783 East Soaring Eagle Way Scottsdale, AZ, 109 F. Supp. 2d 1162 (D. Az. 2000)

Magistrate judges have authority under 28 U.S.C. § 636(b)(3) to order the disclosure of federal grand jury testimony. (Opinion by a magistrate judge.)

2. Arraignments in Felony Cases [Fed. R. Crim. P. 10 &, 11]

When authorized by local rule or delegated by a district judge, magistrate judges may preside over arraignments in felony cases under § 636(b)(3).

1st Circuit:

United States v. Friel, 436 F. Supp. 2d 187 (D. Me. 2006)
The defendant was not entitled to re-arraignment and a rehearing on his detention hearing based on the fact that a magistrate judge took his not guilty plea at an arraignment under Fed. R. Crim. P. 10. There was no requirement that an Article III judge take the defendant's not guilty plea at an arraignment in a felony case.

3d Circuit:

Carter v. United States, 388 F. Supp. 1334 (W.D. Pa.), *aff'd*, 517 F.2d 1397 (3d Cir. 1975)
The "additional duties" clause of § 636(b)(1) [subsequently amended to become § 636(b)(3)] authorizes magistrate judges to conduct post-indictment arraignments and to accept pleas of not guilty in felony cases.

United States v. LaLonde, 509 F.3d 750 (6th Cir. 2007)
Magistrate judge's failure to read the indictment during the arraignment, a technical violation of Rule 10, did not constitute plain error that affected the defendant's substantial rights where the defendant was represented by counsel during the arraignment and the defendant could not identify any way in which the magistrate judge's error prejudiced his ability to defend himself.

9th Circuit:

United States v. Stephenson, 244 Fed. Appx. 166 (9th Cir. 2007)
The district court was within its discretion to delegate an arraignment to a magistrate judge over the defendant's objection. The magistrate judge may hear "any pretrial matter" with eight exceptions listed in 28 U.S.C. § 636(b)(1)(A), and Congress considered post-indictment arraignments to be a "pretrial matter" within this definition.

United States v. Smith, 424 F. 3d 992 (9th Cir. 2005), *cert. denied*, 547 U.S. 1008 (2006)
A magistrate judge may conduct the arraignment of a defendant arrested and indicted on felony charges. The district court's local rule provided that magistrate judges had the authority to handle pretrial matters in felony cases, and did not exclude an arraignment proceeding where a not guilty plea is entered.

United States v. Collins, 2008 WL 427280 (D. Nev. 2008)
Magistrate judges have authority to take a criminal defendant's initial plea of not guilty at an arraignment under Fed. R. Crim. P. 10.

3. Acceptance of Guilty Pleas in Felony Cases

In June 1994 the Magistrate Judges Committee supplemented the Long Range Plan for the Magistrate Judges System to endorse creation of a pilot program in which magistrate judges would be authorized to accept guilty pleas and conduct sentencing proceedings in felony cases with the consent of the parties. A large number of courts have authorized magistrate judges to conduct allocution proceedings to accept felony guilty pleas under Fed. R. Crim. P. 11 as an additional duty under § 636(b)(3). Some courts have further held that a magistrate judge may accept the defendant's guilty plea in a felony case after conducting the Rule 11 colloquy, while other courts have held that the magistrate judge may only submit a report recommending that the district judge accept the guilty plea.

1st Circuit:

United States v. Vega-Martinez, 425 F. 3d 15 (1st Cir. 2005)

Where the defendant was pleading guilty to drug conspiracy charges, the magistrate judge conducting the change of plea colloquy under Fed. R. Crim. P. 11 adequately determined that the defendant's guilty plea was voluntarily given. The magistrate judge was not required to perform "a more rigorous voluntariness colloquy" where defendant's son was pleading guilty as a co-defendant in the case.

2d Circuit:

United States v. Brumer, 528 F.3d 157 (2d Cir. 2008)

Where a magistrate judge conducted the felony guilty plea proceeding with the defendants' consent, the defendants did not have a right to be present when the district judge reviewed the allocution transcripts and signed the orders accepting the defendants' pleas, and that the procedural requirements of 28 U.S.C. § 636(b)(1), that mandate preparation of a report and recommendation and provide defendants with a ten-day period to file written objections, did not apply to felony guilty plea proceedings under § 636(b)(3).

United States v. Chaudry, 52 Fed. Appx. 540 (2d Cir. 2002)

A magistrate judge had authority to conduct a guilty plea proceeding in a felony case, even where the district judge did not formally refer the proceeding to the magistrate judge in writing or through a docket entry.

United States v. Williams, 23 F.3d 629 (2d Cir.), *cert. denied*, 513 U.S. 1045 (1994)

A magistrate judge may administer the allocution under Fed. R. Crim. P. 11 to accept a defendant's guilty plea in a felony case with the defendant's consent without violating Article III of the Constitution or the Federal Magistrates Act. After conducting the Rule 11 allocution with defendant's consent, the magistrate judge submits a recommendation to the district judge regarding acceptance of the guilty plea.

4th Circuit:

United States v. Benton, 523 F.3d 424, *cert. denied*, 555 U.S. 424 (4th Cir. 2008)

A magistrate judge has authority to accept a defendant's guilty plea in a felony case under Fed. R. Crim. P. 11 after conducting the guilty plea colloquy with the defendant's consent.

United States v. Osborne, 345 F.3d 281 (4th Cir. 2003)

A magistrate judge has authority to conduct a guilty plea proceeding under Fed. R. Crim. P. 11 in a felony case with the consent of the parties. The district judge is not required to conduct de novo review of the guilty plea proceeding conducted by a magistrate judge if the defendant does not object or otherwise request such review.

5th Circuit:

United States v. Underwood, 597 F.3d 661 (5th Cir. 2010)

A defendant's consent to have a magistrate judge conduct a guilty plea proceeding in a felony case under Fed. R. Crim. P. 11 and 28 U.S,C. § 636(b)(3) could be inferred from the defendant's conduct when he failed to object to the magistrate judge conducting the plea colloquy. [See Information Memorandum No. 316 for a more detailed summary of this case.]

United States v. Arami, 536 F.3d 479 (5th Cir. 2008)

A defendant has an absolute right to withdraw his guilty plea under Fed. R. Crim. P. 11 where the defendant consents to having a magistrate judge conduct the guilty plea colloquy under Rule 11 on a report and recommendation basis, but the district judge has not yet accepted the defendant's plea.

United States v. Bolivar-Munoz, 313 F. 3d 253 (5th Cir. 2002), *cert. denied*, 538 U.S. 953 (2003)

A magistrate judge had authority to conduct a guilty plea proceeding in a felony case, even when the district judge did not formally refer the proceeding to the magistrate judge until after the guilty proceeding had been conducted. Any error in referring the matter to the magistrate judge was procedural and was waived when the defendant did not object before the district judge entered judgment.

United States v. Dees, 125 F.3d 261 (5th Cir. 1997), *cert. denied*, 522 U.S. 1152 (1998)

Taking a guilty plea with the parties' consent is a permissible additional duty for a magistrate judge under § 636(b)(3), and does not threaten the exclusive Article III power of the district court to preside over a felony trial.

8th Circuit:

United States v. Torres, 258 F.3d 791 (8th Cir. 2001)

Under § 636(b)(3), a magistrate judge may conduct a proceeding to conduct a colloquy under Fed. R. Crim. P. 11 and recommend that a district judge accept a defendant's guilty plea in a felony case with the defendant's consent.

9th Circuit:

United States v. Arellano-Gallegos, 387 F.3d 794 (9th Cir. 2004)

The magistrate judge erred by failing to adequately explain the consequences of the defendant's waiver of his right to appeal during the colloquy proceeding to accept the defendant's guilty plea under Fed. R. Crim. P. 11.

United States v. Reyna-Tapia, 328 F.3d 1114 (9th Cir.), *cert. denied,* 540 U.S. 900 (2003)

Plea colloquies under Fed. R. Crim. P. 11 in felony cases are additional duties that may be delegated to magistrate judges under 28 U.S.C. § 636(b)(3) for findings and recommendations with the defendants' consent. De novo review of the magistrate judge's findings and recommendations is required if, and only if, a party files objections to the findings and recommendations.

10th Circuit:

United States v. Montano, 472 F.3d 1202 (10th Cir.), *cert. denied*, 552 U.S. 896 (2007)

Where a magistrate judge conducted a felony guilty plea colloquy under Fed. R. Crim. P. 11 with the defendant's consent and accepted defendant's guilty plea made pursuant to a plea agreement, which included a provision whereby the defendant waived her right to appeal her sentence, the waiver of appeal clause in the plea agreement was enforceable, even though the district judge orally revoked the waiver of appeal provision at the defendant's sentencing hearing.

United States v. Ciapponi, 77 F.3d 1247 (10th Cir.), *cert. denied*, 517 U.S. 1215 (1996)

A magistrate judge may conduct a proceeding to accept a guilty plea in a felony case under Fed. R. Crim. P. 11 with the defendant's consent. The magistrate judge was not required to prepare a report and recommendation, but was authorized to accept the defendant's plea after conducting the Rule 11 colloquy. A defendant's right to move for withdrawal of a plea under Fed. R. Crim. P. 32 is sufficient to protect the defendant's rights during the plea proceeding.

11th Circuit:

United States v. Woodard, 387 F.3d 1329 (11th Cir. 2004), *cert. denied*, 543 U.S. 1176 (2005)

The Federal Magistrates Act authorized a magistrate judge to take a guilty plea and to conduct a Rule 11 proceeding with the defendant's consent, and that authority to conduct such proceedings to a magistrate judge did not offend the principles of Article III.

Henry v. United States, 2010 WL 1850448 (M.D. Fla. May 7, 2010)

District judge, ruling on a petitioner's motion to vacate his conviction under 28 U.S.C. § 2255, held that it was not plain error where a magistrate judge conducted a guilty plea proceeding under Fed. R. Crim. P. 11 in a felony case and issued a report and recommendation without the petitioner's explicit consent. [See Information Memorandum No. 318 for a more detailed summary of this case.]

4. Sentencing Hearing in Felony Case

11th Circuit:

United States v. Ruiz-Rodriguez, 277 F.3d 1281 (11th Cir. 2002)

A magistrate judge did not have authority under § 636(b)(3) to conduct a sentencing hearing in a felony case, either independently or on a report and recommendation basis, without the defendant's consent.

5. Pretrial Evidentiary Hearings

3d Circuit:

Beazer East, Inc v. The Mead Corp., 412 F.3d 429 (3d Cir. 2005), *cert. denied*, 546 U.S. 1091 (2006)

The referral of an evidentiary proceeding to allocate liability under CERCLA among the various responsible parties to a magistrate judge under § 636(b)(3) was improper. The parties' consent or lack thereof is a key factor in deciding whether a referral is authorized under § 636(b)(3). Equitable allocation is at the very core of a CERCLA contribution action and is therefore not a preliminary or subordinate matter that may be referred to a magistrate judge under § 636(b)(3) without the parties' consent.

5th Circuit:

John v. State of Louisiana, 899 F.2d 1441 (5th Cir. 1990)

A magistrate judge may conduct a proceeding to determine Fed. R. Civ. P. 37 sanctions against an attorney under either § 636(b)(3)or § 636(b)(1).

Feist v. Jefferson County, 778 F.2d 250 (5th Cir. 1985)

A magistrate judge may conduct a pretrial evidentiary hearing regarding adequacy of pleadings in a prisoner civil rights case under either § 636(b)(3) or § 636(b)(1).

6. Government Applications for Electronic Eavesdropping Orders [Wiretaps]

2d Circuit:

In re United States of America, 10 F.3d 931 (2d Cir. 1993), *cert. denied sub nom., Korman v. U.S.*, 513 U.S. 812 (1994)

The court issued a writ of mandamus against a district judge to stop the referral of government applications for electronic eavesdropping orders under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.* ["Title III"], to magistrate judges. Title III and the Federal Magistrates Act do not permit the referral of wiretap applications to magistrate judges.

7. Other Pretrial & Trial Duties in Criminal and Administrative Proceedings

2d Circuit:

United States v. Construction Products Research, Inc. 73 F.3d 464 (2d Cir.), *cert. denied*, 519 U.S. 927 (1996)

A petition to enforce an administrative subpoena was referred to a magistrate judge under § 636(b)(3) for preparation of a report and recommendation.

United States v. Alvarado, 923 F.2d 253 (2d Cir. 1991)

A district judge remanded a matter to a magistrate judge to hold a *Batson* hearing to determine whether peremptory challenges in jury selection were discriminatory.

4th Circuit:

In re Application of the United States of America for an Order Pursuant to 18 U.S.C. Section 2703(d), 707 F.3d 283 (4th Cir. 2013)

Magistrate judge had authority under 28 U.S.C. § 636(b)(3) to seal an order issued under the Stored Communications Act (SCA), 18 U.S.C. § 2703(d). Treating the subscriber's appeal as a petition for a writ of mandamus, the appellate court initially determined that the magistrate judge's sealing and docketing decisions fell within the "additional duties" provision of 28 U.S.C. § 636(b)(3), and that the district judge properly applied the de novo standard of review to the magistrate judge's rulings. [See Information Memorandum No. 326 for a more detailed summary of this case.]

5th Circuit:

United States v. Krout, 56 F.3d 643 (5th Cir. 1995), *cert. denied*, 516 U.S. 1076 (1996)

The district court did not err in refusing to grant a defendant's motion for a mistrial after a magistrate judge, sometime between jury selection and resumption of the trial, excused a juror without notifying the parties, since the defendant could not demonstrate any prejudice caused by excusal of the juror.

6th Circuit:

Vitols v. Citizens Banking Co., 984 F.2d 168 (6th Cir. 1993)

A magistrate judge acting on a referral under § 636(b)(3) without litigant consent had no authority to issue a case-dispositive ruling on a motion to certify a district court order for interlocutory appeal.

7th Circuit:

Matter of Establishment Inspection, 589 F.2d 1335 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979)

A magistrate judge is authorized to issue OSHA administrative search warrants as both a commissioner duty under § 636(a) and as an additional duty under § 636(b)(3).

Matter of Skil Corp., 119 F.R.D. 658 (N.D. Ill. 1987)
A magistrate judge has authority under §§ 636(b)(3) and (e) to entertain motions to quash and motions to show cause regarding enforcement of an administrative inspection warrant. (Opinion by magistrate judge.)

In re Grand Jury Proceedings Julie Dzikowich, 620 F. Supp. 521 (W.D. Wis. 1985)
A magistrate judge's authority under § 636(b)(3) extends to deciding motions under 18 U.S.C. § 3504 (illegal surveillance claims) if the motion is raised at an appropriate time.

8th Circuit:
United States v. Miller, 609 F.2d 336 (8th Cir. 1979)
A magistrate judge is authorized to issue a proposed order enforcing an IRS summons on a report and recommendation basis, subject to de novo determination by the district judge.

9th Circuit:
United States v. Tanoue, 94 F.3d 1342 (9th Cir. 1996)
A magistrate judge issued a report and recommendation to enforce an IRS summons to compel the defendant to submit handwriting exemplars, subject to de novo determination by the district judge (no discussion of magistrate judge authority).

10th Circuit:
United States v. Lindsay, 60 F.3d 837 (10th Cir. 1995) (Table disposition -- text available on WESTLAW)
A magistrate judge did not have authority to enter a final, appealable order on an IRS petition to enforce a summons. The magistrate judge's order enforcing the IRS summons was essentially an interlocutory discovery order that could not be appealed to the court of appeals.

United States v. Mueller, 930 F.2d 10 (10th Cir. 1991)
A magistrate judge was authorized to issue a proposed order to enforce an IRS summons on a report and recommendation basis, subject to de novo determination by the district judge.

D.C. Circuit:
United States v. Hemmings, 1991 WL 79586 (D.D.C. 1991)
Dicta: Section 636(b)(3) may allow magistrate judges to rule on requests for mental competency examinations under 18 U.S.C. § 4241. (Opinion by a magistrate judge.)

8. Prisoner Cases

5th Circuit:
Jones v. Johnson, 134 F.3d 309 (5th Cir. 1998)
A district judge could not delegate to a magistrate judge under § 636(b)(3) authority to issue a final order denying a certificate of probable cause to appeal a prisoner's habeas corpus petition under the Antiterrorism and Effective Death Penalty Act of 1996.

7th Circuit:
Williams v. Bowen, 1988 WL 128676 (N.D. Ill. 1988)
A prisoner's motion for attorneys' fees under the Equal Access to Justice Act referred under § 636(b)(3) will be treated as a non-case-dispositive matter. (Opinion by a magistrate judge.)

10th Circuit:
Clark v. Poulton, 963 F.2d 1361 (10th Cir.), *cert. denied*, 506 U.S. 1014 (1992)
A prisoner civil rights action alleging excessive force during police custody could be referred to a magistrate judge under § 636(b)(3), subject to de novo determination by a district judge.

9. In Forma Pauperis Determination

9th Circuit:
Minetti v. Port of Seattle, 152 F.3d 1113 (9th Cir.1998)
District court did not err in refusing to permit a pro se litigant to object to a magistrate judge's report and recommendation that the litigant's application to proceed in forma pauperis under 28 U.S.C. § 1915 be dismissed.

10. Alternative Dispute Resolution

2d Circuit:
Ovadiah v. New York Association for New Americans, 1997 WL 342411 (S.D.N.Y. 1997)
A magistrate judge had authority under § 636(b)(3) with the parties' consent to draft a compromise letter to a state Appeals Board on behalf of the parties as part of a settlement of federal litigation. The Federal Magistrates Act does not specifically prohibit magistrate judges from presiding over arbitration proceedings, but arbitration by magistrate judges should be avoided.

3d Circuit:
Hameli v. Nazario, 930 F. Supp. 171 (D. Del. 1996)
A magistrate judge did not have authority to conduct an evidentiary hearing and enter a binding non-appealable order in an employment dispute where the federal court did not have subject-matter jurisdiction over the dispute, even where both parties consented to the magistrate judges' involvement in "alternative dispute resolution" proceeding.

7th Circuit:
DDI Seamless Cylinder v. General Fire Extinguisher, 14 F.3d 1163 (7th Cir. 1994)
Although the magistrate judge did not have authority under the Federal Magistrates Act to serve as an arbitrator, even with the consent of the parties, the appellate court held that the parties were bound by the magistrate judge's decision due to the parties' consensual agreement to be so bound.

C. Duties and Proceedings Involving Juries

There have been many cases discussing the application of § 636(b)(3) to permit magistrate judges to perform various duties and proceedings involving juries in both civil and felony cases.

1. Jury Selection

a. Felony Voir Dire

Supreme Court:
Gonzalez v. United States, 553 U.S. 242 (2008)
The express consent by defendant's counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial under § 636(b)(3).

Peretz v. United States, 501 U.S. 923 (1991)
A magistrate judge could be referred a felony voir dire proceeding as an additional duty under § 636(b)(3) with the parties' consent.

Gomez v. United States, 490 U.S. 858 (1989)
Section 636(b)(3) did not authorize a magistrate judge to conduct voir dire in a felony case as an additional duty if the defendant objected to the magistrate judge's involvement.

2d Circuit:
United States v. Taylor, 92 F.3d 1313 (2d Cir. 1996), *cert. denied*, 519 U.S. 1093 (1997)
When the district court reviews the magistrate judge's felony voir dire decisions, as long as a party whose credibility is in question has been afforded an opportunity to be heard before the district judge on the matters decided initially by the magistrate judge, the appellate court will afford the district judge's determination substantial deference, and it will not be overturned unless clearly erroneous.

b. Civil Voir Dire

6th Circuit:
Stockler v. Garratt, 974 F.2d 730 (6th Cir. 1992)
A magistrate judge did not have authority to preside over voir dire in a civil case under § 636(b)(3) where the parties objected. Because the Supreme Court's decision in *Peretz* focused on the parties' consent, the Peretz reasoning did not apply to a situation where the parties objected to the magistrate judge's involvement in civil voir dire.

7th Circuit:
Olympia Hotel Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363 (7th Cir. 1990)
Section 636(b)(3) does not authorize a magistrate judge to conduct civil voir dire over the objections of the parties. The court followed the Supreme Court's reasoning in *Gomez v. United States*, 490 U.S. 858 (1989).

11th Circuit:
Thomas v. Whitworth, 136 F.3d 756 (11th Cir. 1998)
A magistrate judge may not conduct voir dire in a civil case under § 636(b)(3) over a party's objection. The magistrate judge's selection of the jury was not harmless error and thus required a new trial.

2. Hearing Closing Argument

5th Circuit:
United States v. Boswell, 565 F.2d 1338 (5th Cir.), *cert. denied*, 439 U.S. 819 (1978)
It was harmless error to permit a magistrate judge to preside over closing argument when the trial judge was ill.

9th Circuit:
United States v. Gamba, 541 F.3d 895 (9th Cir. 2008)
After the court's original opinion was remanded by the Supreme Court for reconsideration in light of the Supreme Court's opinion in *Gonzalez v. United States*, 553 U.S. 128 (2008), the Ninth Circuit concluded that a magistrate judge could preside over the closing argument in a felony case with the consent of the defendant's counsel under 28 U.S.C. § 636(b)(3), and that the district judge's appointment of the magistrate judge to preside over the closing argument bears a close relationship to other duties that magistrate judges are specifically permitted by statute to perform.

3. Presiding Over Jury Deliberation

2d Circuit:
Morales v. United States, 294 F. Supp. 2d 174 (D. Conn. 2003)
A magistrate judge had authority under 28 U.S.C. § 636(b)(3) to preside over jury deliberations in a felony case without the defendant's prior consent as long as the judge's role in such proceedings was ministerial.

3d Circuit:
Government of Virgin Islands v. Paniagua, 922 F.2d 178 (3d Cir. 1990)
The declaration of a mistrial by the magistrate judge was an improper exercise of Article III power, but the defendant's motion for a mistrial judicially estopped him from asserting the error.

8th Circuit:

Harris v. Folk Constr. Co., 138 F.3d 365 (8th Cir. 1998)

A magistrate judge did not have authority under § 636(b)(3) to supervise the jury deliberations in a civil case and to dismiss a juror without the parties' explicit consent. District judge could not delegate duties under § 636(b)(3) that require a final and independent determination of fact or law by the magistrate judge.

United States v. Demarrias, 876 F.2d 674 (8th Cir. 1989)

A magistrate judge is permitted to preside over felony jury deliberations when the trial judge left town after instructing the jury. The district judge maintained overall control over the trial by telephone.

9th Circuit:

United States v. Carr, 18 F.3d 738 (9th Cir.), *cert. denied*, 513 U.S. 821 (1994)

A magistrate judge is authorized to preside over a read-back of witness testimony by the court reporter to the deliberating jury when the district judge was unavailable.

United States v. Saunders, 641 F.2d 659 (9th Cir.), *cert. denied*, 452 U.S. 918 (1981)

A magistrate judge is permitted to preside over felony jury deliberations where the trial judge was gone for the weekend.

10th Circuit:

United States v. Mendez-Lopez, 338 F.3d 1153 (10th Cir.), *cert. denied*, 540 U.S. 1093 (2003)

A magistrate judge had authority to preside over a deliberating jury in a felony case and to answer a juror's question where the district judge was available by phone if needed.

11th Circuit:

Saldana v. United States, 206 Fed. Appx. 843 (11th Cir. 2006), *cert. denied*, 549 U.S.C. 1358 (2007)

A magistrate judge had authority to preside over a deliberating jury in a felony case where the defendant's counsel agreed to allow the magistrate judge to answer questions from the jury and the defendant gave knowing and voluntary consent to having the magistrate judge preside over jury deliberations.

United States v. Desir, 257 F.3d 1233 (11th Cir. 2001)

A magistrate judge inappropriately exercised the authority of an Article III judge when he made a final decision regarding a deliberating jury's request for a read-back of trial testimony without consulting with the district judge and without the explicit consent of the parties.

4. Instructing Jury

5th Circuit:
United States v. De La Torre, 605 F.2d 154 (5th Cir. 1979)
The defendant is entitled to have an Article III judge rule on objections and requests to reread instructions from the jury absent waiver by counsel. It was not harmless error for the magistrate judge to preside.

6th Circuit:
Allen v. United States, 921 F.2d 78 (6th Cir. 1990), *cert. denied*, 501 U.S. 1253 (1991)
The magistrate judge performed a mere ministerial function by charging the jury with instructions provided by the district judge. The question of waiver was immaterial because the magistrate judge did not exceed the delegated authority.

United States v. Sawyers, 902 F.2d 1217 (6th Cir. 1990), *cert. denied*, 501 U.S. 1253 (1991)
A magistrate judge may be delegated duties of reading the standard *Allen* charge to a jury and of accepting the verdict in a felony trial without offending the Supreme Court's reasoning in *Gomez v. United States*, 490 U.S. 858 (1989).

8th Circuit:
Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517 (D. Minn. 1989)
The magistrate judge did not coerce the jury or issue an impermissible *Allen* charge by instructing the jury to fill in the remaining blanks on the verdict form.

9th Circuit:
United States v. Saunders, 641 F.2d 659 (9th Cir.), *cert. denied*, 452 U.S. 918 (1981)
A magistrate judge is permitted to instruct a jury to continue deliberations after dinner on a Friday night. There was no evidence that the jury was coerced into reaching its verdict.

5. Polling Jury

9th Circuit:
United States v. Gomez-Lepe, 207 F.3d 623 (9th Cir. 2000)
A magistrate judge improperly polled a jury in a felony case without first obtaining the defendant's consent.

6. Accepting Jury's Verdict

6th Circuit:
United States v. Day, 789 F.2d 1217 (6th Cir. 1986)
A magistrate judge is permitted to accept a jury's verdict where the district judge was occupied with other court business.

8th Circuit:
United States v. Johnson, 962 F.2d 1308 (8th Cir.), *cert. denied sub nom.*, *Thomas v. United States*, 506 U.S. 928 (1992)
A magistrate judge could accept a jury's verdict in a felony case when the trial judge was unavailable.

9th Circuit:
United States v. Foster, 57 F.3d 727 (9th Cir. 1995), *revs'd en banc on other grounds*, 133 F.3d 704 (9th Cir. 1998)
The acceptance of a jury verdict is a "ministerial" duty that may be assigned to a magistrate judge under § 636(b)(3).

7. Dismissing Jury

8th Circuit:
Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517 (D. Minn. 1989)
A magistrate judge had authority to dismiss a jury as an ancillary duty to his authority to accept the jury's verdict.

D. Post-Judgment Duties

Section 636(b)(3) is often used by courts as authority to refer post-trial duties to magistrate judges. While other sections of the Federal Magistrates Act make no specific reference to post-trial duties, some courts also utilize §§ 636(b)(1)(A) and (B) as the basis for referring post-judgment matters to magistrate judges.

1. Post-Judgment Dispute Among Creditors

9th Circuit:
Columbia Record Productions v. Hot Wax Records, Inc., 966 F.2d 515 (9th Cir. 1992)
A magistrate judge did not have authority under § 636(b)(3) to enter a post-judgment order assigning priorities among creditors.

10th Circuit:
Colorado Bldg. & Const. Trade Council v. B. B. Andersen Const. Co., Inc., 879 F.2d 809 (10th Cir. 1989)
Under the reasoning in *Gomez v. United States*, 490 U.S. 858 (1989), a magistrate judge is not authorized by the Federal Magistrates Act to preside over a post-judgment dispute between creditors

2. Garnishment

8th Circuit:
Loewen-America, Inc. v. Advance Distributing Co., Inc., 705 F.2d 311 (8th Cir. 1983)
The parties did not challenge the magistrate judge's authority to preside over execution and garnishment proceedings. (No discussion of magistrate judge authority.)

10th Circuit:
The Society of Lloyd's v. Bennett, 204 Fed. Appx. 728 (10th Cir. 2006)
A judgment debtor who stipulated to an extension of a writ of garnishment in proceedings brought by a judgment creditor pending discovery into his wife's interest in his brokerage account, waived any objections to the magistrate judge's authority under § 636(b)(3) to stay the release of the writ of garnishment.

3. Proceedings in Aid of Execution of Judgment

1st Circuit:
Aetna Casualty & Surety Co. v. Rodco Autobody, 965 F. Supp. 104 (D. Mass. 1996)
A district judge adopted the magistrate judge's report and recommendations concerning the judgment debtors' non-exempt interest in property and their ability to pay the judgment after the proceedings were referred to a magistrate judge under § 636(b)(3).

3d Circuit:
Hearst/ABC-Viacom Entertainment Services v. Goodway Mktg., Inc., 815 F. Supp. 145 (E.D. Pa. 1993)
A magistrate judge could preside in a proceeding under the Pennsylvania civil procedure rules to obtain relief in aid of execution of a judgment, provided the magistrate judge prepared a report and recommendation for final disposition by the district judge. (No reference made to the provision of the Federal Magistrates Act under which the reference was made.)

4th Circuit:
First Union Nat. Bank of Virginia v. Craun, 853 F. Supp. 209 (W.D. Va. 1994)
The magistrate judge, acting under § 636(b)(3), entered a post-judgment charging order against the limited partnership interests held by the defendant. (Opinion by a magistrate judge.)

Chicago Pneumatic Tool Co. v. Stonestreet, 107 F.R.D. 674 (S.D.W. Va. 1985)
A magistrate judge is authorized to preside over a deposition in aid of execution of judgment.

6th Circuit:

Bache Halsey Stuart Shields, Inc. v. Killop, 589 F. Supp. 390 (E.D. Mich. 1984)

A magistrate judge is authorized to conduct post-judgment collection proceedings under § 636(b)(3). Post-judgment proceedings are distinguishable from prohibited case-dispositive relief.

7th Circuit:

United States v. Meux, 597 F.3d 835 (7th Cir. 2010)

A magistrate judge had authority under 18 U.S.C. § 3663A and 28 U.S.C. § 636(b)(3) to rule on the government's post-judgment motion for the turnover of funds for the partial satisfaction of a restitution award in a criminal case. [See Information Memorandum No. 316 for a more detailed summary of this case.]

Michelson v. Schor, 1996 WL 667803 (N.D. Ill. 1996)

A magistrate judge was referred under § 636(b)(3) all "post-judgment collection proceedings" in an action to enforce a judgment of the bankruptcy court, subject to de novo review by a district judge. Although the plaintiffs did not object to the magistrate judge's ruling within 10 days of service, their objections were not waived because they did not have notice from the magistrate judge of the deadline for filing objections to the ruling.

4. Default Judgment Proceedings

2d Circuit:

Ferraro v. Kuznetz, 131 F.R.D. 414 (S.D.N.Y. 1990)

The court referred a motion to set aside a default judgment to a magistrate judge, requiring each side to make an evidentiary presentation and for the magistrate judge to decide whether the defendants possess a "substantial meritorious defense." The magistrate judge was also asked to determine the appropriate damages if the movant failed to assert a meritorious defense to the default judgment.

6th Circuit:

Callier v. Gray, 167 F.3d 977 (6th Cir. 1999)

Section 636(b)(3) is a broad provision that permits the district court to refer to a magistrate judge proceedings to determine damages in a default judgment matter.

7th Circuit:

King v. Ionization Int'l, Inc., 825 F.2d 1180 (7th Cir. 1987)

Dicta: The court found no statutory basis to block the referral of a post-judgment default proceeding to a magistrate judge.

5. Motions to Vacate Judgment

3d Circuit:

Perry v. Delaware River Port Authority, 208 Fed. Appx. 122 (3d Cir. 2006)

A magistrate judge did not have the authority under § 636(b)(3) to issue a final order on a party's motion under Fed. R. Civ. P. 60 to reopen judgment to void a settlement agreement. Because the party moved for reconsideration of the magistrate judge's order with the district judge, the magistrate judge's order was more properly treated as a report and recommendation by both the district court and the appellate court.

Garland v. Malinich, 181 Fed. Appx. 276 (3d Cir. 2006)

When a motion for relief from judgment under Fed. R. Civ. P. 60 is referred to a magistrate judge pursuant to § 636(b)(3), the magistrate judge is not authorized to enter judgment for the court, but instead may issue recommendations to the district court which are then subject to de novo review.

5th Circuit:

McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 925 F.2d 853 (5th Cir. 1991)

A magistrate judge can issue a report and recommendation on a motion to vacate judgment under Fed. R. Civ. P. 60, subject to de novo review.

8th Circuit:

LeGear v. Thalacker, 46 F.3d 36 (8th Cir. 1995)

A motion to vacate the judgment in a pro se prisoner civil rights case under Fed. R. Civ. P. 60 may be referred to a magistrate judge under § 636(b)(3) for preparation of a report and recommendation. The magistrate judge's decision is not a final order and may not be appealed to the court of appeals.

10th Circuit:

Nat. R.R. Passenger Corp. v. Koch Industries, Inc., 701 F.2d 108 (10th Cir. 1983)

Where a magistrate judge sitting as a special master took a jury's verdict, but recommended a new trial after concluding that the jury reached a compromise verdict, the court reviewed the magistrate judge's report and recommendation de novo under § 636(b)(3).

6. Revival of Judgment

10th Circuit:

Securities Investor Protection Corp. v. Institutional Securities of Colorado, Inc. , 37 Fed. Appx. 423 (10th Cir.), *cert. denied sub nom., Scheid v. Goldberg,* 537 U.S. 1019 (2002)

A magistrate judge did not have authority under § 636(b)(3) to issue a final order reviving a judgment.

7. Expungement of Arrest Record

11th Circuit:

United States v. Lopez, 704 F. Supp. 1055 (S.D. Fla. 1988)

Absent specific statutory authority, the magistrate judge had no authority to preside over expungement proceedings. After referring to § 636(b)(3), the court noted that the power to expunge a criminal record was neither affirmatively granted nor denied to magistrate judges. The court failed to find statutory authority or judicial precedent to support the magistrate judge's authority to expunge and interpreted the absence of an affirmative grant of authority to expunge a criminal record as a denial of such authority.

8. Revocation of Probation and Supervised Release

In 1992, 18 U.S.C. § 3401 was amended to authorize magistrate judges to conduct proceedings "to modify, revoke, or terminate supervised release of any person sentenced to a term of supervised release by a magistrate judge." 18 U.S.C. § 3401(h). In addition, a new § 3401(i) was added, providing that a district judge may designate a magistrate judge to conduct hearings to modify, revoke, or terminate supervised release, including evidentiary hearings, and to submit to the district judge proposed findings of fact and recommendations for the modification, revocation, or termination of supervised release by the district judge. Some courts have questioned whether § 3401(i) authorizes magistrate judges to conduct proceedings to revoke terms of supervised release in felony cases. Before these amendments, some courts had used § 636(b)(3) as a statutory basis for referring such proceedings to magistrate judges.

4th Circuit:

United States v. Raynor, 764 F. Supp. 1067 (D. Md. 1991)

The sentencing power of 18 U.S.C. § 3401(a) is broad enough to provide magistrate judges with authority to revoke supervised release in cases where a defendant previously consented to misdemeanor jurisdiction by a magistrate judge.

5th Circuit:

United States v. Schnitker, 281 Fed. Appx. 295 (5th Cir. 2008)

A magistrate judge had authority to preside over the defendant's final hearing to revoke his supervised release under 18 U.S.C. § 3401(i) without the defendant's express consent. The appellate court rejected the Ninth Circuit's reasoning in *United States v. Colacurcio*, 84 F.3d 326 (9th Cir. 1996) that supervised release revocation proceedings under § 3401(i) could only occur in misdemeanor cases.

United States v. Cooper, 135 F.3d 960 (5th Cir. 1998)

The defendant could not directly appeal the magistrate judge's report and recommendation that the defendant's term of supervised release be revoked. The magistrate judge's role was advisory rather than adjudicatory under § 636(b).

United States v. Rodriguez, 23 F.3d 919 (5th Cir. 1994)
A district judge improperly sentenced a defendant in absentia when it adopted a magistrate judge's report and recommendation under 18 U.S.C. § 3401(i) to revoke a term of supervised release in a felony case under 18 U.S.C. § 3583 without conducting an additional hearing. Despite the defendant's objections to the magistrate judge's report and recommendation and his request for a hearing before the district court, the district judge adopted the report without further proceedings, thereby revoking supervised release and sentencing the defendant to an additional 24-months imprisonment.

United States v. Williams, 919 F.2d 266 (5th Cir. 1990)
Section 636(b)(3) does not permit the referral of proceedings to revoke terms of supervised release to magistrate judges.

6th Circuit:
United States v. Waters, 158 F.3d 933 (6th Cir.1998)
A magistrate judge may conduct a proceeding to revoke a defendant's term of supervised release in a felony case under 18 U.S.C. § 3401(i) and 28 U.S.C. § 636(b)(3), subject to de novo review by a district judge.

Banks v. United States, 614 F.2d 95 (6th Cir. 1980)
Section 636(b)(3) does not authorize probation revocation proceedings to be referred to magistrate judges.

7th Circuit:
United States v. Curry, 767 F.2d 328 (7th Cir. 1985)
Section 636(b)(3) does not authorize probation revocation hearings to be referred to magistrate judges.

8th Circuit:
United States v. Azure, 539 F.3d 904 (8th Cir. 2008)
A magistrate judge did not have authority to conduct a proceeding to revoke a defendant's term of supervised release under 18 U.S.C. § 3401(i) where there was nothing in the record of the case to indicate that the district judge had made a designation of the proceeding to the magistrate judge. The court's failure to make a proper designation under § 3401(i), however, constituted a procedural error, not a jurisdictional error, that was waived by the defendant when it was not raised in the district court.

9th Circuit:
United States v. Sanchez-Sanchez, 333 F.3d 1065 (9th Cir. 2003)
The magistrate judge did not have authority to conduct supervised release revocation proceedings in a felony case without an order from a district judge or the defendant's consent.

United States v. Colacurcio, 84 F.3d 326 (9th Cir. 1996)
Section 636(b)(3) does not authorize a magistrate judge to conduct proceeding to revoke a probation term on a report and recommendation basis in a felony case where the defendant did not consent. Section 636(b)(3) may not be interpreted in a way that "swallows up" other provisions of the statute.

9. Habeas Corpus Petitions

5th Circuit:
Garcia v. Boldin, 691 F.2d 1172 (5th Cir. 1982)
The "catch-all" language of § 636(b)(3), as well as § 636(b)(1)(B), authorizes a magistrate judge to issue a report and recommendation on a petition for a writ to set aside a deportation order under 28 U.S.C. § 2243.

Washington v. Estelle, 648 F.2d 276 (5th Cir.), *cert. denied*, 454 U.S. 899 (1981)
The power to appoint counsel in a habeas corpus proceeding is an administrative function that may be delegated to a magistrate judge as an additional duty under § 636(b)(3).

9th Circuit:
Wang v. Masaitis , 416 F.3d 992 (9th Cir. 2005)
A magistrate judge had authority under 28 U.S.C. § 636(b)(3) to review and prepare a report and recommendation on a defendant's habeas corpus petition challenging the magistrate judge's extradition order, even though the defendant did not consent to assignment of the matter to the magistrate judge.

10. Post-Verdict Petition for Attorney's Fees & Award of Expenses

2d Circuit:
LoSacco v. City of Middletown, 71 F.3d 88 (2d Cir. 1995)
A magistrate judge's order denying review of the clerk's order taxing costs did not become final until the district judge reviewed it.

5th Circuit:
Merritt v. International Brotherhood of Boilermakers, 649 F.2d 1013 (5th Cir. 1981)
A magistrate judge is authorized to preside in a post-judgment proceeding to determine an award of expenses for improper discovery motions under Fed. R. Civ. P. 37.

7th Circuit:
Talbott v. Empress River Casino, 1997 WL 458437 (N.D.Ill. 1997)
A post-judgment petition for attorney's fees and costs was referred to a magistrate judge as an additional duty under § 636(b)(3), subject to de novo review.

11. Post-judgment Discovery Dispute

2d Circuit:
Denny v. Ford Motor Co., 146 F.R.D. 52 (N.D.N.Y. 1993)
A district judge who was the subject of a post-verdict motion to compel discovery properly referred the motion to a magistrate judge under § 636(b)(3). The magistrate judge ordered further discovery to determine the factual information possessed by the trial judge. The chief judge upheld the magistrate judge's order and ordered the parties to direct interrogatories to the trial judge.

12. Post-Verdict Motion to Unseal Court Records

11th Circuit:
United States v. Ellis, 90 F.3d 447 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997)
A magistrate judge's order unsealing the transcript of in camera proceeding concerning the defendant's application to proceed in forma pauperis in his appeal of his criminal conviction was affirmed by both the district judge and the appellate court. (No discussion of magistrate judge authority.)

13. Proceedings Under Federal Offenders With Mental Disease or Defect Statute, 18 U.S.C. § 4246

8th Circuit:
United States v. Woods, 944 F. Supp. 778 (D. Minn. 1996)
A magistrate judge has authority to order mental competency examination under 18 U.S.C. § 4246(f). (Opinion by a magistrate judge.)

14. Post-Conviction Restitution

2d Circuit:
United States v. Bengis, 2006 WL 1524496 (S.D.N.Y. June 2, 2006)
The referral of a restitution dispute to a magistrate judge under 18 U.S.C. § 3664(d)(6) and 28 U.S.C. § 636(b)(3) was consistent with the statutes and the Constitution.

E. Other Duties

Magistrate judges perform various other duties for the district courts. These duties are not described in the Federal Magistrates Act, and statutes authorizing them do not specify the use of magistrate judges. The authority to perform these duties has not been addressed in case law, but it is assumed by the courts where magistrate judges perform the duties to be derived from the general authority of the Federal Magistrates Act and of the district court itself. This list should not be considered all-encompassing.

The Judicial Services Office recognizes that the following duties are referred to magistrate judges in various districts around the country. Such references are often made under local rules. The duties

are listed to show how different courts have utilized magistrate judges over the past forty years. The Division provides this list without commenting upon the propriety of such references.

- Naturalization Proceedings
- Summary Jury Trials
- Service on Administrative Committees (Local Rules; Civil Justice Reform Act; Speedy Trial Act.)
- Factual issues under the Sentencing Guidelines
- Overseeing Affirmative Action Plans
- Administering Compliance with the Criminal Justice Act (18 U.S.C. § 3006A)
- Ordering Jail and Prison Inspections under Authority of a District Judge
- All Writs Act (28 U.S.C. § 1651)
- Determination of Costs of Prosecution (21 U.S.C. § 844)
- Appointment of Arbitrator or Umpire (9 U.S.C. § 5 and 9 U.S.C. § 6)
- Entry of Orders in Mortgage Foreclosure Proceedings in Sale of Property Financed Through Government Loans
- Exemplification of Court Records for Use in the United States
- Admission of Attorneys to the District Court Bar
- Appointment of Custodians of Vessels or Property Seized in Admiralty Proceedings
- Setting Amount of Security Under the Supplemental Rules of Admiralty Procedure
- Limitation of Liability Proceedings in Admiralty

§ 8. CIVIL CONSENT AUTHORITY UNDER 28 U.S.C. § 636(c)

A. In General

Section 636(c)(1) of Title 28, United States Code, governs the consensual civil authority of magistrate judges:

> Upon the consent of the parties, a full-time United States magistrate [judge]...may conduct any and all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

A magistrate judge may preside over all aspects of any civil case with the parties' consent and the district court's approval. In this capacity, a magistrate judge exercises case-dispositive authority and may order the entry of a final judgment.

To exercise civil consent authority, a magistrate judge must be "specially designated" by the district court under § 636(c)(1). Congress provided that the designation must be general in nature and cannot be limited to certain specific categories of civil cases. H.R. Rep. No. 287, 96th Cong., 1st Sess. 11 (1979). The civil consent authority of a magistrate judge so designated is thus limited only by the general civil jurisdiction of the district court itself. All district courts have designated their full-time magistrate judges to exercise civil consent authority.

1. Authority of Magistrate Judge

Section 636(c)(1) places no limits on a magistrate judge's authority in a civil case once the parties consent to the authority of a magistrate judge. Courts have been similarly unwilling to limit magistrate judge authority.

2d Circuit:
V.W. v. Favolise, 131 F.R.D. 654 (D. Conn. 1990)
Consent to trial before a magistrate judge includes authority to dispose of motions for summary judgment under Fed. R. Civ. P. 56. (Opinion by a magistrate judge.)

3d Circuit:
Pfizer, Inc. v. Uprichard , 422 F. 3d 124 (3d Cir. 2005)
A magistrate judge presiding in a civil case with the consent of the parties under § 636(c) exceeded his authority when he included a requirement that a party sign a settlement and release agreement when he corrected the judgment under Fed. R. Civ. P. 60.

4th Circuit:
Fiberlink Communications Corp. v. Magarity, 24 Fed. Appx. 178 (4th Cir. 2001)
Where Virginia law authorized certification of questions to the Virginia Supreme Court by "the Supreme Court of the United States, a United States court of appeals for any circuit, a

United States district court, or the highest appellate court of any state or the District of Columbia," the court opined that questions from a magistrate judge exercising jurisdiction with consent of the parties under § 636(c) should be regarded as questions from "a United States district court."

Lopez v. XTEL Construction Group, LLC, 796 F. Supp. 2d 693 (D. Md. 2011)
A magistrate judge who presided in a civil consent case held that he was not required to recuse himself under 28 U.S.C. § 455 from considering a motion to uphold a settlement agreement after having participated in settlement conferences that resulted in an oral agreement settling the case. [See Information Memorandum No. 321 for a more detailed summary of this case.]

5th Circuit:
Wright v. Robinson, 113 Fed. Appx. 12 (5th Cir. 2004)
A magistrate judge had authority under § 636(c) to dismiss a pro se plaintiff's case for failure to prosecute.

Jennings v. McCormick, 154 F.3d 542 (5th Cir. 1998)
A magistrate judge erred in disregarding a pro se prisoner's timely request for a jury trial and conducting a bench trial under § 636(c) instead, and the error was not harmless because the plaintiff's claim of use of excessive force would have withstood a motion for directed verdict.

McDonald v. Steward, 132 F.3d 225 (5th Cir. 1998)
Consent to disposition by a magistrate judge under § 636(c) is not tantamount to waiver of the right to trial by jury.

Morrow v. Harwell, 640 F. Supp. 225 (W.D. Tex. 1986)
Consent to trial before a magistrate judge includes authority to reassess earlier findings and enter a second judgment after remand from the court of appeals.

6th Circuit:
Moses v. Sterling Commerce (America), Inc, 122 Fed. Appx. 177 (6th Cir. 2005)
A magistrate judge in a civil consent case had authority to dismiss the plaintiff's case as a sanction for failure to comply with discovery orders, even where no district judge was assigned to the case after it was referred to the magistrate judge. The fact that the district judge who was originally assigned the case retired after referring the action to a magistrate judge on the parties' consent, and that no district judge was thereafter assigned to the referred case, did not deprive the magistrate judge of her authority in the referred case, up to and including ruling on dispositive motions.

United States v. Real Property Known & Numbered as 415 East Mitchell Ave., Cincinnati, Ohio, 149 F.3d 472 (6th Cir. 1998)
A magistrate judge had authority under § 636(c) to adjudicate a civil forfeiture action under 21 U.S.C. § 881(a)(7) with the consent of the parties.

Kerr v. Com'r of Social Security, 171 F. Supp. 2d 712 (E.D. Mich. 2001)
After the parties' original consent in a social security case, the magistrate judge was authorized to determine the plaintiff's motion for award of attorney fees under the EAJA without any separate authorization or designation by the district court. The separate referral of the matter to the magistrate judge was therefore unnecessary.

Miami Valley Carpenters Dist. Council Pension Fund v. Scheckelhoff, 123 F.R.D. 263 (S.D. Ohio 1988)
Consent to trial before a magistrate judge includes consent to post-trial contempt proceedings to enforce the judgment.

7th Circuit:
Petrilli v. Drechsel, 94 F.3d 325 (7th Cir. 1996)
A 37-month delay before the magistrate judge rendered a decision in a civil consent case did not constitute prejudice to the losing party that would justify reversal of the magistrate judge's decision.

DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher Corp., 14 F.3d 1163 (7th Cir. 1994)
The parties were bound by the informal "arbitration" procedure used by the magistrate judge to which they stipulated for resolving their dispute after consenting to disposition by a magistrate judge under § 636(c).

Johnson-Bey v. Lane, 863 F.2d 1308 (7th Cir. 1988)
The reference to a "judge" in a circuit remand rule must be assumed to include magistrate judges exercising civil consent authority. The court, however, refused to rule on whether the original consent remained binding upon remand, or whether the district judge could withdraw the reference to the magistrate judge at that time.

Voktas, Inc. v. Central Soya Co., Inc., 689 F.2d 103 (7th Cir. 1982)
Consent authority includes authority to deny a motion to stay the proceedings during a pendent state court action.

Minemyer v. R-Boc Representatives, Inc., 283 F.R.D. 392 (N.D Ill. 2012)
A magistrate judge presiding in a civil case on consent ruled that a defendant had waived a personal jurisdiction defense that after the completion of the jury trial in the case**,** even though the district judge originally assigned to the case had earlier denied the defendant's motion to dismiss on personal jurisdiction grounds and left open the possibility that the issue could be raised again if circumstances warranted. Describing the defendant's actions as "sandbagging, pure and simple," a practice recently condemned by the Supreme Court in *Stern v. Marshall*, 564 U.S. , 131 S.Ct. 2594 (2011), the magistrate judge concluded that the defendant's silence on the jurisdictional question during the protracted period of the preparation of the final pretrial order constituted a waiver or forfeiture of the question of

jurisdiction. [See Information Memorandum No. 325 for a more detailed summary of this case.]

8th Circuit:

Chelette v. Harris, 229 F.3d 684 (8th Cir. 2000), *cert. denied*, 531 U.S. 1156 (2001)
A magistrate judge presiding in a prisoner civil rights case under 28 U.S.C. § 636(c) had authority to certify a matter for interlocutory appeal, even though 28 U.S.C. § 1292(b) specifically provides that a "district judge" shall certify interlocutory appeals.

Foster v. Lockhart, 9 F.3d 722 (8th Cir. 1993)
A magistrate judge presiding in a habeas corpus proceeding with litigants' consent under § 636(c) had authority to issue an order releasing a prisoner on bail from a state prison after issuing a writ of habeas corpus.

Orsini v. Wallace, 913 F.2d 474 (8th Cir. 1990), *cert. denied*, 498 U.S. 1128 (1991)
Congressional intent in enacting § 636(c), combined with the Supreme Court's amendment of Rule 10, Rules Governing Section 2254 Cases in United States District Courts, authorized magistrate judges to enter judgments in habeas corpus matters.

Acuity v. North Central Video, LLLP, 468 F. Supp.2d 1071 (D.N.D. 2006)
A magistrate judge had authority in a consent case under § 636(c) to rule that the plaintiff could not appeal a discovery ruling to the district judge, but could instead treat the plaintiff's appeal as a motion for reconsideration. (Opinion by a magistrate judge.)

9th Circuit:

Hanson v. Mahoney, 433 F.3d 1107 (9th Cir. 2006)
A magistrate judge adjudicating a prisoner's state habeas corpus proceeding under 28 U.S.C. § 2254 with the consent of the parties had authority to issue a certificate of appealability pursuant to 28 U.S.C. § 2253.

Irwin v. Mascott, 370 F.3d 924 (9th Cir. 2004)
A magistrate judge presiding with consent had authority to hold a non-party liable for contempt sanctions for violating an injunction issued in a class action case arising under the Fair Debt Collection Practices Act where the named parties served as the non-party's virtual representative.

Gametech Int'l, Inc. v. Trend Gaming Systems, L.L.C., 2008 WL 4571424 (D. Ariz. 2008)
A district judge adopted a magistrate judge's report and recommendation concluding that where the parties consented to disposition of a civil case by a magistrate judge under §636(c), the magistrate judge continued to have authority over the case after appeal to and remand from the court of appeals. Once the parties consented to the magistrate judge's authority in a civil case and have not successfully withdrawn such consent, the procedural path for the case, including the appellate route, is parallel to that of a case that is in front of a district

court judge. The parties' consent to disposition by the magistrate judge thus does not end with appeal.

Arnold v. Arizona Dept. Of Public Safety, 233 F.R.D. 537 (D. Ariz. 2005)
Where all the named parties consented to disposition of the class action case by the magistrate judge, the magistrate judge had authority over all members of the class and therefore had authority to consider motions to certify the class and approve a tentative settlement agreement. (Opinion by a magistrate judge.)

10th Circuit:
McCoy v. Lafaut, 813 F. Supp. 1508 (D. Kan. 1993)
The magistrate judge had authority and the duty to determine *sua sponte* whether he had proper jurisdiction. The magistrate judge therefore did not err in concluding that the special designation authority of the magistrate judge in a consent case ended with the entry of a final judgment, and that he did not have authority to enter a post-judgment garnishment order in aid of execution of the judgment he had previously entered.

D.C. Circuit:
Perles v. Kagy, 394 F. Supp. 2d 68 (D.D.C. 2005)
A magistrate judge had authority to rule on a third party's motion to intervene in the case after the magistrate judge had entered a judgment in the case with the parties' consent under § 636(c). (Opinion by a magistrate judge.)

Am. Sec. Bank N.A. v. John Y. Harrison Realty Co., Inc., 670 F.2d 317 (D.C. Cir. 1982)
A magistrate judge acting under § 636(c) may rule on motions for post-trial discovery and costs.

a. Magistrate Judge Authority to Overrule Earlier Rulings By A District Judge

1st Circuit:
Fieldwork Boston, Inc. v. United States, 344 F. Supp.2d 257 (D. Mass. 2004)
A magistrate judge had authority to overrule an earlier ruling by a district judge after the parties had consented under 28 U.S.C. § 636(c) to have the case disposed of by the magistrate judge. (Opinion by a magistrate judge.)

2d Circuit:
Steinborn v. Daiwa Sec. America, Inc., 1995 WL 761286 (S.D.N.Y. 1995)
A magistrate judge was not barred from entering summary judgment in favor of the defendant, even when the district judge originally assigned the case had denied an earlier summary judgment motion. (Opinion by a magistrate judge.)

4th Circuit:
Pine Ridge Coal Co. v. Local 8377, United Mine Workers of America, 187 F.3d 415 (4th Cir. 1999)
A magistrate judge had authority under 28 U.S.C. § 636(c) to grant summary judgment in a civil case, even where the district judge previously assigned the case had scheduled a trial.

5th Circuit:
Cooper v. Brookshire, 70 F.3d 377 (5th Cir. 1995)
Upon assuming jurisdiction in a civil consent case under § 636(c), the magistrate judge is not bound by the district judge's earlier opinions in the case.

6th Circuit:
Taylor v. Nat. Group of Companies, Inc., 765 F. Supp. 411 (N.D.Ohio 1990)
A magistrate judge acting under § 636(c) did not have authority to reconsider and set aside or alter earlier decisions of the previously presiding district judge. (Opinion by a magistrate judge.)

7th Circuit:
Best v. Shell Oil Co., 107 F.3d 544 (7th Cir. 1997)
A magistrate judge erred in reopening the defendant's motion for summary judgment where the district judge had earlier denied the motion on the ground that there were disputed issues of fact.

Jones v. Coleman Co., Inc., 39 F.3d 749 (7th Cir. 1994) (Table disposition)
A magistrate judge presiding under § 636(c) had authority to grant a defendant's motion for leave to file a motion for summary judgment, even though a district judge had earlier denied such a motion as untimely.

9th Circuit:
Shouse v. Ljunggren, 792 F.2d 902 (9th Cir. 1986)
A magistrate judge exercising authority under § 636(c) was not bound to follow the district judge's previous denial of a motion for summary judgment in the same case. The magistrate judge's decision did not violate the doctrine of the law of the case.

b. Limited Consent to Magistrate Judge Authority

Section 636(c) of Title 28 provides that a magistrate judge may conduct "any or all proceedings" in a jury or nonjury civil matter with the consent of the parties. This provision has been interpreted to allow parties to consent to having a magistrate judges preside over and dispose of certain motions in a case without necessarily disposing of the entire case. Some district courts have adopted local rules to provide for and encourage the use of limited consent.

2d Circuit:

DiCola v. Swissre Holding (North America), Inc., 996 F.2d 30 (2d Cir. 1993)

The parties consented to have a magistrate judge render the final decision on a motion for summary judgment. (No discussion of magistrate judge authority.)

Gilbert v. St. John's Univ., 1998 WL 19971 (E.D.N.Y. 1998)

The parties consented under § 636(c) to have a magistrate judge determine the defendant's motion for summary judgment.

6th Circuit:

Holt-Orstead v. City of Dickson, 641 F.3d 230 (6th Cir. 2011)

A magistrate judge had authority under 28 U.S.C. § 636(c) to issue a final ruling on a discreet discovery motion where the parties consented to have the magistrate judge determine the motion in question. The appellate court did not have jurisdiction to entertain an interlocutory appeal of the magistrate judge's ruling, which was not a "final judgment" under 28 U.S.C. § 1291, and the magistrate judge's order did not otherwise qualify for immediate interlocutory review under the collateral order doctrine or other exceptions to the general prohibition on interlocutory appeals. [See Information Memorandum No. 321 for a more detailed summary of this case.]

7th Circuit:

Hains v. Washington, 131 F.3d 1248 (7th Cir. 1997)

The court upheld the trial court's local rule encouraging parties to consent to magistrate judge deciding case-dispositive motions in civil cases.

2. District Judge's Referral of Specific Case to Magistrate Judge

There is no provision in the Federal Magistrates Act that specifically requires a district judge to approve the referral of a particular civil consent case to a magistrate judge. Although the Act does not appear to require the individual referral of specific civil consent cases by a district judge to a magistrate judge, the words "referred," and "reference" are used several times in section 636(c). In particular, the last sentence of section 636(c)(2) provides that "Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent." In addition, while there is no statutory requirement for district judge approval of the referral of a civil consent case, a district judge may vacate a reference of a civil consent case to a magistrate judge "for good cause shown" under section 636(c)(4). These provisions, combined with the language of section 636(b)(4), ("Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.") authorize courts to promulgate local rules of procedure governing civil consent cases and therefore, by implication, contemplate the development of procedures for the referral of individual cases to magistrate judges. Accordingly, while the Act does not require that a district judge approve the referral of each civil consent case to a magistrate judge, it encourages courts to develop their own rules governing such referrals and assignments to magistrate judges.

5th Circuit:

Hill v. City of Seven Points, 230 F.3d 167 (5th Cir. 2000)

Where the form referring a civil case to a magistrate judge on consent under 28 U.S.C. § 636(c) was not signed by a district judge, and where there was no automatic referral of the case to a magistrate judge, the magistrate judge did not have jurisdiction to preside in the case, thereby depriving the court of appeals of jurisdiction to hear the appeal.

7th Circuit:

Hatcher v. Consolidated City of Indianapolis, 323 F.3d 513 (7th Cir. 2003)

Under the statute and the local rules in force in the Southern District of Indiana, there is no need for case-by-case approval of a reference to a magistrate judge.

3. Bankruptcy Matters

While one circuit has held that "core" bankruptcy matters may be referred to magistrate judges with the consent of the parties, other circuits have held that courts may not refer bankruptcy appeals to magistrate judges for final decisions under § 636(c). Questions have also arisen as to whether it is appropriate to refer bankruptcy appeals to magistrate judges for reports and recommendations subject to de novo review under § 636(b)(3). See also § 7(a)(5), *supra*.

5th Circuit:

Matter of Toyota of Jefferson, Inc., 14 F.3d 1088 (5th Cir. 1994)

A magistrate judge could preside over a bench trial in a "core" bankruptcy proceeding with the consent of the parties under § 636(c) after the reference was withdrawn from the bankruptcy court.

Matter of Nix, 864 F.2d 1209 (5th Cir. 1989)

The consensual reference of a Chapter 7 "core" bankruptcy matter to a magistrate judge under § 636(c) is permissible, but such references should only be made where compelling need is shown.

7th Circuit:

In re Elcona Homes Corp., 810 F.2d 136 (7th Cir. 1987)

The Bankruptcy Act clearly establishes two routes of appeal: Congress did not provide for magistrate judge review of bankruptcy court decisions.

10th Circuit:

Virginia Beach Fed. Sav. & Loan Ass'n. v. Wood, 901 F.2d 849 (10th Cir. 1990)

A magistrate judge is not permitted to enter a final decision in a bankruptcy appeal. A magistrate judge may conduct an advisory hearing, provided a district judge issues the final order.

4. Part-time Magistrate Judges

Section 636(c)(1) places limits on the use of part-time magistrate judges to try civil cases under the Federal Magistrates Act:

> Upon the consent of the parties, pursuant to their specific written request, any ... part-time magistrate [judge] may exercise such jurisdiction, if such magistrate [judge] meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate [judge] is not reasonably available in accordance with guidelines established by the judicial council of the circuit.

5th Circuit:
Mylett v. Jeane, 879 F.2d 1272 (5th Cir. 1989)
A party's failure to object to referral of the case to a part-time magistrate judge after the parties consented to trial before a full-time magistrate judge constitutes a waiver of any procedural defect.

10th Circuit:
Jurado v. Klein Tools, Inc., 755 F. Supp. 368 (D. Kan. 1991)
Section 636(c)(1) does not require a specific form or time of consent or even that consent be in writing, except where a part-time magistrate judge is involved.

11th Circuit:
Sinclair v. Wainwright, 814 F.2d 1516 (11th Cir. 1987)
A part-time magistrate judge is not authorized to conduct a consensual civil trial if a full-time magistrate judge is available.

5. Constitutionality of Consent Authority

The constitutionality of a magistrate judge's consensual civil authority under § 636(c) has been addressed by twelve of the thirteen courts of appeals. In general, all twelve have held that the Act does not violate Article III of the Constitution, although in 2001 the Fifth Circuit held, in *United States v. Johnston*, 258 F.3d 361 (5th Cir. 2001), that the consensual delegation of a federal prisoner's motion attacking his conviction under 28 U.S.C. § 2255 for disposition by a magistrate judge under 28 U.S.C.§ 636(c) violated the doctrine of the separation of powers set forth in Article III of the Constitution. In a more recent case, *Technical Automation Services Corp. v. Liberty Surplus Insurance Corp.*, 673 F.3d 399 (5th Cir. 2012), a panel of the Fifth Circuit reaffirmed that magistrate judges' civil consent authority under 28 U.S.C. § 636(c) did not violate Article III of the Constitution, despite the Supreme Court's holding in *Stern v. Marshall*, 564 U.S. , 131 S.Ct. 2594 (2011) that Article III of the Constitution limited the authority of bankruptcy judges to rule on certain core proceedings that involved state law claims.

Although the Supreme Court has not directly considered the constitutionality of § 636(c), its 2003 opinion in *Roell v. Withrow*, 538 U.S. 580 (2003), where the Court held that consent to disposition by a magistrate judge under § 636(c) could be inferred from the parties' conduct in certain circumstances, suggests that the Supreme Court does not have fundamental concerns about the underlying constitutionality of this provision.

For an in-depth analysis of the cases discussing the constitutionality of consensual civil trial authority of magistrate judges under § 636(c) , *see A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247 (1993), which is also available as a pamphlet published by the Magistrate Judges Division of the Administrative Office.

1st Circuit:
Goldstein v. Kelleher, 728 F.2d 32 (1st Cir.), *cert. denied*, 469 U.S. 852 (1984)

2d Circuit:
Collins v. Foreman, 729 F.2d 108 (2d Cir.), *cert. denied*, 469 U.S. 870 (1984)

3d Circuit:
Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983)

Sinde v. Gerlinski, 252 F. Supp. 2d 144 (M.D. Pa. 2003)
The consensual delegation of a federal prisoner's habeas corpus petition arising under 28 U.S.C. § 2241 for disposition by a magistrate judge under 28 U.S.C. § 636(c) did not violate Article III of the Constitution. (Opinion by a magistrate judge.)

4th Circuit:
Gairola v. Com. of Va. Dept. of Gen. Serv., 753 F.2d 1281 (4th Cir. 1985)

5th Circuit:
Technical Automation Services Corp. v. Liberty Surplus Insurance Corp., 673 F.3d 399 (5th Cir. 2012)
A three-judge panel of the Fifth Circuit held that magistrate judges' civil consent authority under 28 U.S.C. § 636(c) did not violate Article III of the Constitution. The court emphasized the narrow nature of the Supreme Court's holding in *Stern v. Marshall*, 564 U.S. , 131 S.Ct. 2594 (2011). The court further determined that it was bound by an earlier Fifth Circuit panel's ruling in *Puryear v. Ede's Ltd*, 731 F.2d 1153 (5th Cir.1984), that had held that magistrate judge civil consent authority under § 636(c) did not violate Article III. [See Information Memorandum No. 322 for a more detailed summary of this case.]

White v. Thaler, 610 F.3d 890 (5th Cir. 2010)
A magistrate judge had authority to dispose of a state habeas corpus case arising under 28 U.S.C. § 2254 with the consent of the parties under 28 U.S.C. § 636(c) and this authority did not violate the separation of powers under Article III of the Constitution. [See Information Memorandum No. 317 for a more detailed summary of this case.]

United States v. Johnston, 258 F.3d 361 (5th Cir. 2001)
The consensual delegation of a federal prisoner's motion attacking his conviction under 28 U.S.C. § 2255 for disposition by a magistrate judge under 28 U.S.C.§ 636(c) violates the doctrine of the separation of powers set forth in Article III of the Constitution.

Puryear v. Ede's Ltd., 731 F.2d 1153 (5th Cir. 1984)

6th Circuit:
Norris v. Schotten, 146 F.3d 314 (6th Cir. 1998) (state habeas corpus petition)

Bell & Beckwith v. Internal Revenue Serv., 766 F.2d 910 (6th Cir. 1985)

K.M.C. Co., Inc. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985)

7th Circuit:
Farmer v. Litscher, 303 F.3d 840 (7th Cir. 2002)
The consensual delegation of a state prisoner's habeas corpus petition arising under 28 U.S.C. § 2254 for disposition by a magistrate judge under 28 U.S.C. § 636(c) did not violate Article III of the Constitution.

Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984)

8th Circuit:
Orsini v. Wallace, 913 F.2d 474 (8th Cir. 1990), *cert. denied*, 498 U.S. 1128 (1991)

Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp., 739 F.2d 1313 (8th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985) (habeas corpus petitions)

9th Circuit:
Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir.) (*en banc*), *cert. denied*, 469 U.S. 824 (1984) ("*Pacemaker II*")
The referral of a civil case for disposition by a magistrate judge with the consent of the parties under § 636(c) does not violate Article III of the Constitution. The court *en banc* reversed the original panel's decision in *Pacemaker I* that § 636(c) violates Article III.

Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc, 712 F.2d 1305 (9th Cir. 1983) ("*Pacemaker I*")
The original panel ruling that § 636(c) violated Article III.

11th Circuit:
Sinclair v. Wainwright, 814 F.2d 1516 (11th Cir. 1987) (habeas corpus petitions)

Campbell v. Wainwright, 726 F.2d 702 (11th Cir. 1984)

D.C. Circuit:
Fields v. Washington Metro. Area Transit Auth., 743 F.2d 890 (D.C. Cir. 1984)

Federal Circuit:
D. L. Auld Co. v. Chroma Graphics Corp., 753 F.2d 1029 (Fed. Cir. 1985), *cert. denied,* 474 U.S. 825 (1986)
An appeal challenging the constitutionality of § 636(c) was "abusive of the judicial process" and grounds for an award of attorneys' fees against the party raising the issue.

B. Sufficiency of Parties' Consent

Sections 636(c)(1) and (2) do not specify what constitutes "consent of the parties" to magistrate judge authority to try civil cases. Rule 73(b) of the Federal Rules of Civil Procedure, however, requires civil litigants to "signify their consent" by requiring parties to "jointly or separately file a statement consenting to the referral." Despite the seeming mandate of Rule 73 that parties' consent under § 636(c) be in writing, courts continue to explore what constitutes adequate consent to magistrate judge civil trial authority under § 636(c) in various circumstances, including whether consent may be made orally or be construed from the parties' conduct.

In 2003, the Supreme Court ruled in *Roell v. Withrow*, 538 U.S. 580 (2003) that consent to disposition of a civil case under § 636(c) could be inferred from a litigant's conduct in certain circumstances. The Court's *Roell* decision overruled many earlier court decisions that had held that consent under § 636(c) could not be inferred from conduct, but must be clear, explicit, and on the record. Lower courts have subsequently applied the Court's reasoning in *Roell* to determine what kinds of conduct might be deemed sufficient to permit the inference of consent in different circumstances.

1. Form of Consent and Waiver of Right to Article III Judge

Supreme Court:
Roell v. Withrow, 538 U.S. 580 (2003)
The Supreme Court, in a 5-4 decision, held that a party's consent to disposition by a magistrate judge under 28 U.S.C. § 636(c) in a prisoner's civil rights cases under 42 U.S.C. § 1983 may be inferred from a party's conduct during litigation.

2d Circuit:
Yeldon v. Fisher, 710 F.3d 452 (2d Cir. 2013)
A pro se plaintiff in a prisoner civil rights case under 42 U.S.C. § 1983, who explicitly indicated on the consent form at the beginning of his case that he did not consent to disposition of his case by a magistrate judge, could not be found to have impliedly consented to the magistrate judge's authority under the reasoning of *Roell v. Withrow*, 538 U.S. 580 (2003), even though he participated in subsequent litigation before the magistrate judge. [See Information Memorandum No. 326 for a more detailed summary of this case.]

5th Circuit:

Lopez v. Holder, 563 F.3d 107 (5th Cir. 2009)

The parties' consent to disposition of a habeas corpus case arising under 28 U.S.C. § 2241 by a magistrate judge did not continue after the case was transferred back to the district court for further proceedings under the REAL ID Act and 8 U.S.C. § 1252(b)(5)(B). Accordingly, the magistrate judge did not have authority to dispose of the case where the parties did not renew their consent. [See Information Memorandum No. 313 for a more detailed summary of this case.]

Kadonsky v. United States, 216 F.3d 499 (5th Cir. 2000)

The parties' consents to a magistrate judge's authority to dispose of a civil forfeiture case were valid, even though the plaintiff did not execute the standard, commonly-used consent form.

Hill v. City of Seven Points, 230 F.3d 167 (5th Cir. 2000)

Where the form referring a civil case to a magistrate judge with the parties' consent under 28 U.S.C. § 636(c) was not signed by a district judge, and where there was no automatic referral of the case to a magistrate judge, the magistrate judge did not have jurisdiction to preside in the case, thereby depriving the court of appeals of jurisdiction to hear the appeal.

E.E.O.C. v. West La. Health Serv., Inc., 959 F.2d 1277 (5th Cir. 1992)

Where two cases are consolidated for a single trial before a magistrate judge, the judgment against a third party who did not consent to the magistrate judge's authority was invalid.

Parks v. Collins, 761 F.2d 1101 (5th Cir. 1985)

A magistrate judge had no authority to decide a motion to set aside a default judgment. The parties' assumption that their consent in the original case extended to post-trial matters was insufficient without another order of reference from the district judge.

7th Circuit:

Stevo v. Frasor, 662 F.3d 880 (7th Cir. 2011)

The parties both explicitly and implicitly consented to have their case disposed of by a magistrate judge under 28 U.S.C. § 636(c), even where the case was disposed of by a different magistrate judge than the one the parties originally consented to and the reference on consent was not docketed in the case when the case was reassigned to the second magistrate judge. [See Information Memorandum No. 321 for a more detailed summary of this case.]

Heft v. Moore, 351 F.3d 278 (7th Cir. 2003)

Following the Supreme Court's reasoning in *Roell v. Withrow*, 538 U.S. 580 (2003), the court held that the parties' consent to disposition of the case by a magistrate judge could be inferred from the parties' conduct during the litigation.

Hatcher v. Consolidated City of Indianapolis, 323 F.3d 513 (7th Cir. 2003)
Where the parties signed a written document in which they agreed that the attorneys' fees issue will be "resolved" by a magistrate judge, the document served as a reference to the magistrate judge. There is nothing in § 636(c) requiring that any specific form be filled out, nor was such a requirement found in the district's local rules. The word "resolve" can only be interpreted as a consent to the entry of a judgment dealing with the disputed issues.

American Suzuki Motor Corp. v. Bill Kummer, Inc., 65 F.3d 1381 (7th Cir. 1995)
Consent made orally on the record after the court asked all parties to clarify whether they had consented to trial before the magistrate judge was sufficient under § 636(c).

Mark I, Inc. v. Gruber, 38 F.3d 369 (7th Cir. 1994)
An attorney's vague oral statement before the court that he thought his client had consented to disposition by the magistrate judge was insufficient to establish that the party's consent was voluntary and unequivocal.

Lovelace v. Dall, 820 F.2d 223 (7th Cir. 1987)
The clear, unambiguous and explicit consent provisions of § 636(c)(1) and (2) do not require that consent be in writing. An answer of "OK" to the magistrate judge's explanation of consent procedure, however, was too ambiguous to constitute clear consent.

Jackson v. McKay-Davis Funeral Home, 2012 WL 5423739 (E.D. Wis. Nov. 6, 2012)
A case originally referred to a magistrate judge for disposition with the consent of the parties, then reassigned to a district judge when a later defendant refused to consent, would not be re-referred back to the magistrate judge, even though the non-consenting defendant had participated in the litigation before the magistrate judge for several years, where the record did not reflect that the defendant had been given sufficient notice of the need to consent to disposition by the magistrate judge. The district judge noted that the defendant's actions, appearing voluntarily before that magistrate judge for four years and having "stood silent" on two occasions when the magistrate judge "stated that they had consented to her authority," could arguably be deemed to have been implied consent under *Roell v. Withrow*, 538 U.S. 580 (2003), but concluded that the defendant's explicit refusal to consent, even at the last minute after four years of litigation before the magistrate judge, was binding in this situation because the defendant was not specifically advised of its need to execute the consent form. [See Information Memorandum No. 326 for a more detailed summary of this case.]

9th Circuit:
Wilhelm v. Rotman, 680 F.3d 1113 (9th Cir. 2012)
A prisoner plaintiff's execution of the district court's form consenting to disposition by "a United States magistrate judge" was sufficient to constitute consent to have the case disposed of by another magistrate judge after the case was reassigned from the magistrate judge who originally received the referral. In addition, the plaintiff's conduct during litigation before the second magistrate judge constituted implied consent to disposition of the case by the magistrate judge under the Supreme Court's reasoning in *Roell v. Withrow*, 538 U.S. 580

(2003), even if the consent form signed by the plaintiff was in some way defective. [See Information Memorandum No. 323 for a more detailed summary of this case.]

Anderson v. Woodcreek Venture Ltd, 351 F.3d 911 (9th Cir. 2003)
The Ninth Circuit, interpreting the Supreme Court's decision in *Roell v. Withrow*, 538 U.S. 580 (2003), held that a pro se litigant's conduct did not appear to constitute clear, unambiguous, and voluntary consent to disposition by a magistrate judge under 28 U.S.C. § 636(c), thereby requiring remand to the district court for further proceedings.

DiSibio v. Bank of Oakland, 71 Fed. Appx. 760 (9th Cir. 2003),
The Ninth Circuit, applying the Supreme Court's reasoning in *Roell v. Withrow*, 538 U.S. 580 (2003), held that parties would be presumed to have consented to a magistrate judge conducting a settlement conference by appearing and participating in the conference.

Kofoed v. International Broth. of Elec. Workers, Local 48, 237 F. 3d 1001 (9th Cir. 2001)
Where the record reflected that the parties gave express oral consent to the magistrate judge's jurisdiction under § 636(c) while they were before the magistrate judge, and before the judge made a case-dispositive ruling, the magistrate judge was acting with the parties' consent and had proper authority when he entered a final judgment.

Brodzki v. United States, 2012 WL 2361727 (N.D. Cal. January 26, 2012)
A magistrate judge ruled that a pro se plaintiff's execution of a consent form in one case, combined with his conduct before the magistrate judge in a second parallel case, was sufficient to constitute consent to disposition of the second case by the magistrate judge under the Supreme Court's reasoning in *Roell v. Withrow*, 538 U.S. 580 (2003). [See Information Memorandum No. 323 for a more detailed summary of this case.]

11th Circuit:
Chambless v. Louisiana-Pacific Corp., 481 F.3d 1345 (11th Cir. 2007)
Applying the Supreme Court's reasoning in *Roell v. Withrow*, 538 U.S. 580 (2003), the court held that the plaintiff's original consent to disposition of her Title VII case by a magistrate judge under 28 U.S.C. § 636(c), combined with her conduct during pretrial proceedings before the magistrate judge in her second, related civil rights employment case, together would be construed to constitute consent to having the magistrate judge dispose of the second case.

D.C Circuit:
Baker v. Socialist People's Libyan Arab Jama-Hirya, 810 F. Supp. 2d 90 (D.D.C. 2011)
A magistrate judge ruled that the defendants' willful default after being properly served with the plaintiffs' complaint constituted implied consent to have the magistrate judge dispose of the case under 28 U.S.C. § 636(c), including the entry of a default judgment, under the Supreme Court's reasoning in *Roell v. Withrow,* 538 U.S. 580 (2003). [See Information Memorandum No. 321 for a more detailed summary of this case.]

Warren v. Thompson, 224 F.R.D. 236 (D.D.C. 2004)
A magistrate judge held that plaintiff's acquiescence to actions of her attorney during pretrial matters and subsequent jury trial constituted voluntary consent to disposition of her Title VII case by the magistrate judge under the Supreme Court's reasoning in *Roell v. Withrow*, 538 U.S. 580 (2003).

2. Authority of Counsel to Consent On Behalf of Parties

Courts have disagreed as to whether counsel may consent on a party's behalf under § 636(c), or whether consent under § 636(c) must be made specifically by the parties themselves.

2d Circuit:
Woo v. City of New York, 1997 WL 277368 (S.D.N.Y. 1997)
A party was bound by his attorney's consent to proceedings before a magistrate judge under 28 U.S.C. § 636(c). (Opinion by a magistrate judge.)

3d Circuit:
Frank v. County of Hudson, 962 F. Supp. 41 (D.N.J. 1997)
The general rule that an attorney has authority as an agent to bind the client on actions taken within the scope of the attorney's authority applies to an attorney's consent to proceed before a magistrate judge under § 636(c).

5th Circuit:
United States v. Klat, 180 F.3d 264 (5th Cir. 1999)
The defendant was bound by his previous counsel's consent to disposition of the civil mental competency proceeding by a magistrate judge under § 636(c), even though the defendant filed a subsequent *pro se* objection to disposition of the case by the magistrate judge three days before the hearing. The magistrate judge was not required to inquire at the hearing whether the defendant personally consented to the referral because the signed consent form satisfied the requirement that consent be on the record.

7th Circuit:
Lakeside Feeders, Ltd. v. Chicago Meat Processors, Inc., 35 F. Supp. 2d 638 (N.D. Ill. 1999)
A party would be bound by its counsel's consent to disposition of the case by a magistrate judge under § 636(c), and previous counsel's alleged ignorance of the party's right to trial before a district judge was not an excuse that justified reconsideration of the district judge's denial of the motion to vacate the reference.

Mark I, Inc. v. Gruber, 38 F.3d 369 (7th Cir. 1994)
A vague oral statement by counsel that his client had consented to trial before a magistrate judge did not satisfy the standard that a party's consent be explicit and unambiguous. The magistrate judge thus lacked authority to enter a final judgment.

Williams v. Romero, 7 F.3d 239 (7th Cir. 1993) (Table disposition -- text available on WESTLAW)
An attorney's signature on the consent form made without the client's knowledge did not bind the client to disposition of the case by the magistrate judge, because the attorney lacked authority to consent on client's behalf.

9th Circuit:
Gomez v. Vernon, 255 F. 3d 1118 (9th Cir. 2001)
The warden of a prison in a prisoner civil rights case under 42 U.S.C. § 1983 was deemed to have consented to disposition of the case by a magistrate judge, even though he was not originally a named party to the case, where the original warden had consented and counsel for the prison made stipulations and otherwise acted on the warden's behalf in a manner that suggested that the warden had consented to the magistrate judge's authority.

10th Circuit:
Parker v. Bancoklahoma Mortgage Co., 113 F.3d 1246 (10th Cir. 1997)
Where the client did not deny that his attorney signed the consent form, remained silent when the matter was raised at trial, and did not establish that his attorney lacked authority to consent, the party would be bound by the magistrate judge's disposition of the case.

Jurado v. Klein Tools, Inc., 755 F. Supp. 368 (D. Kan. 1991)
An attorney may consent on behalf of the client to trial before a magistrate judge under § 636(c).

11th Circuit:
Bismark v. Fisher, 213 Fed. Appx. 892 (11th Cir. 2007)
Although the consent form signed by counsel suffered from "non-trivial irregularities," the overall circumstances established that the parties expressly consented to disposition of the case by the magistrate judge under 28 U.S.C. § 636(c). In the ordinary case, express consent should be commemorated via a filed, fully executed written consent form or by the parties' oral expression of consent during a hearing on the record.

Barnett v. General Electric Capital Corp., 147 F.3d 1321 (11th Cir.1998)
An attorney's oral statement that he would recommend to his client that she consent to disposition by a magistrate judge and that he did not foresee problems in obtaining the client's consent did not constitute clear and unambiguous consent to magistrate judge's authority under § 636(c).

General Trading Inc. v. Yale Materials Handling Corp., 119 F.3d 1485 (11th Cir. 1997)
Where the attorneys signed a consent form and the parties did not object to the magistrate judge's authority to dispose of the case when the issue of consent was raised before them at a status conference held before the magistrate judge, the parties would be bound by the magistrate judge' disposition of the case.

D.C Circuit:

Warren v. Thompson, 224 F.R.D. 236 (D.D.C. 2004)

A magistrate judge held that the plaintiff's acquiescence to actions of her attorney during pretrial matters and subsequent jury trial constituted voluntary consent to disposition of her Title VII case by the magistrate judge under the Supreme Court's reasoning in *Roell v. Withrow*, 538 U.S. 580 (2003).

Morrison v. International Programs Consortium, Inc., 205 F.R.D. 61 (D.D.C. 2002)

A joint document filed by the plaintiff's counsel and an attorney who filed an answer on behalf of the defendants stating that the parties were willing to have the case assigned to a magistrate judge did not satisfy the requirement of written consent to exercise of jurisdiction by the magistrate judge, where the attorney for the defendants had authority to file the answer, but his authority to also waive the right to trial before an Article III judge was not clear. (Opinion by a magistrate judge.)

3. Necessity of Consent by All Parties

As a general proposition, all parties must consent under § 636(c) before a magistrate judge has authority to dispose of a civil case. Nevertheless, some courts have held that there are certain circumstances where a magistrate judge may have authority to dispose of a civil case, even where some individuals or entities affected by the litigation have not consented to disposition of the case a the magistrate judge.

2d Circuit:

Stackhouse v. McKnight, 168 Fed. Appx. 464 (2d Cir. 2006)

A magistrate judge did not have authority to rule on a motion to intervene in a class action case where the parties seeking to intervene had not consented to disposition of the case by a magistrate judge.

New York Chinese TV Programs, Inc. v. U.E. Enter., Inc., 996 F.2d 21 (2d Cir. 1993)

The intervenors' consent must be obtained before a magistrate judge may enter a final decision that binds the intervening parties.

4th Circuit:

Halsey v. Sams, 37 F.3d 1493 (4th Cir. 1994) (Table disposition -- text available on WESTLAW)

Because not all the parties consented to disposition by the magistrate judge, the case was remanded to a district judge. Absent consent from all parties, the appellate court was without jurisdiction to hear plaintiff's appeal because the magistrate judge acted beyond the scope of his authority.

Cappetta v. GC Limited Services Partnership, 2009 WL 482474 (E.D. Va. Feb. 24, 2009)

Magistrate judge rules that unnamed putative class members need not affirmatively consent to magistrate judge's jurisdiction under § 636(c) in order for the magistrate judge to have

authority to rule in the class action case where the named parties may consent to disposition of case by a magistrate judge on behalf of the entire class, even when the consent occurs before class certification.

5th Circuit:

Neals v. Norwood, 59 F.3d 530 (5th Cir. 1995)

Where a prisoner plaintiff consented to disposition of his 42 U.S.C. § 1983 case by a magistrate judge under § 636(c), the defendant's consent was not needed before the plaintiff's complaint could be dismissed if the defendants have not yet been served with the complaint.

E.E.O.C. v. West La. Health Serv., Inc., 959 F.2d 1277 (5th Cir. 1992)

The consent requirements of § 636(c) were not met when two cases were consolidated for one trial before a magistrate judge, but a third party did not explicitly consent to trial before the magistrate judge.

Murret v. City of Kenner, 894 F.2d 693 (5th Cir. 1990)

The consent requirements of § 636(c) are not met where the original parties consented in writing to trial before the magistrate judge, but additional parties joined subsequently to the case did not consent.

Archie v. Christian, 808 F.2d 1132 (5th Cir. 1987)

Trial before a magistrate judge where one party failed to consent constitutes a procedural error. The failure to raise the issue on appeal, however, waives the error.

Caprera v. Jacobs, 790 F.2d 442 (5th Cir. 1986)

A magistrate judge did not have authority to conduct the trial where additional defendants added by an amended complaint did not expressly consent to the magistrate judge's authority. Consent cannot be inferred by a party's failure to object, and parties do not waive their right to Article III adjudication by remaining silent.

Altier v. Worley Catastrophe Response, L.L.C., 2012 WL 161824 (E.D. La. January 18, 2012)

A magistrate judge ruled that he had authority to issue an order denying a motion for leave to intervene in the case by five non-parties where the other parties in the class action had consented to disposition of the case by the magistrate judge under 28 U.S.C. § 636(c), even though the non-parties had not consented to the magistrate judge's authority. [See Information Memorandum No. 323 for a more detailed summary of this case.]

6th Circuit:

Jack Tyler Engineering Co. v. Colfax Corp., 2011 WL 384614 (W.D. Tenn. February 3, 2011)

A magistrate judge did not have authority under § 636(c) to rule on a motion for default judgment where the defendant had not consented to have the matter disposed of by the

magistrate judge. [See Information Memorandum No. 319 for a more detailed summary of this case.]

7th Circuit:

Heft v. Moore, 351 F.3d 278 (7th Cir. 2003)
A magistrate judge had jurisdiction over the case, even where some of the defendants who had been dismissed from the case had not formally consented to disposition of the case by the magistrate judge, where consent could be inferred from defendants' conduct prior to being dismissed from the case and where the plaintiff had essentially abandoned her claims against the defendants who had not formally consented.

Rice v. Sunrise Express, Inc., 209 F.3d 1008 (7th Cir. 2000)
A magistrate judge had authority to dispose of the case where the district court had granted a motion to sever one defendant from the case that had not consented to disposition by the magistrate judge. The district court had authority to issue a *nunc pro tunc* order after the trial to clarify the record that the trial before the magistrate judge did not resolve claims against the severed defendant, thereby establishing that the magistrate judge had authority under § 636(c) to resolve the case against the remaining defendants.

Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266 (7th Cir. 1998)
Absent class members in a class action case where the parties consented to disposition by a magistrate judge were not "parties" before the court in the sense of being able to direct the litigation. The named representative is the "party" who acts on behalf of the entire class, and has inherent authority to decide whether to proceed before a magistrate judge. The magistrate judge acting under the consent given by the named class representative therefore had authority to enjoin the further prosecution of a similar class action brought in another jursidiction by unnamed class members, even though the unnamed members did not consent to submission of their case to a magistrate judge.

Brook, Weiner, Sered, Kreger, & Weinberg v. Coreq, Inc., 53 F.3d 851 (7th Cir. 1995)
The consent to disposition by a magistrate judge by the original parties in a case was binding upon any successor party. A successor takes over without any other change in the status of the case.

Atlantic Mut. Ins. Co. v. Northwest Airlines, Inc., 24 F.3d 958 (7th Cir. 1994)
The court upheld the magistrate judge's denial of a proposed intervenor's motion to reconsider judgment after the case had been settled, even though the intervenor did not consent to the authority of the magistrate judge. Even though the court expressed doubts about a non-Article III judge making a final decision against a litigant absent the litigant's consent, it concluded that the decision was valid because proposed intervenor was not a party to the case and no valid case or controversy remained.

Jaliwala v. United States, 945 F.2d 221 (7th Cir. 1991)
In a replevin action involving foreign parties, consent must be obtained from all parties before the magistrate judge may enter final judgment enforceable against all parties.

8th Circuit:
Henry v. Tri-Services, Inc., 33 F.3d 931 (8th Cir. 1994)
A magistrate judge did not have authority to enter final default judgment where a party had not entered an appearance in the action when other parties had consented to trial before the magistrate judge.

Giove v. Stanko, 882 F.2d 1316 (8th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990)
In a plaintiff's garnishment action to enforce a default judgment, the defendant, as judgment debtor, was not considered a party to the garnishment proceeding, so his failure to appear and consent did not deprive the magistrate judge of authority.

Jones v. City of St. Louis, 217 F.R.D. 490 (E.D. Mo. 2003)
A magistrate judge granted a motion to sever a party from the litigation that had refused to appear, that had not responded to the plaintiff's pleadings, and that had not consented to the magistrate judge's authority under § 636(c). In granting the motion to sever, the magistrate judge retained jurisdiction to resolve the remaining claims against the other defendant that had consented to disposition by the magistrate judge. (Opinion by a magistrate judge.)

9th Circuit:
Irwin v. Mascott, 370 F.3d 924 (9th Cir. 2004)
A magistrate judge presiding with the parties' consent had authority to hold a non-party liable for contempt sanctions for violating an injunction issued in a class action case where the named parties served as the non-party's virtual representative.

United States v. Real Property, 135 F.3d 1312 (9th Cir. 1998)
A magistrate judge had authority to enter a default judgment in a civil *in rem* forfeiture proceeding under § 636(c), even where the property's owner did not consent to the magistrate judge's dispositional authority, because the property owner did not perfect his claim to the property when provided an opportunity to do so.

Matter of Litigation Relating to Riot of Sept. 22, 1991 at Maximum Sec. Unit of Montana State Prison, 85 F.3d 637 (9th Cir. 1996) (Table disposition -- text available on WESTLAW)
When additional parties were joined in prisoner litigation, the magistrate judge did not have jurisdiction over the entire action without the additional parties' consent.

Walston v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 2012 WL 2049451 (D. Or. June 6, 2012),
A magistrate judge in the District of Oregon ruled that the consent of the debtor and certain defendants in two state court actions related to a garnishment action in federal court were not necessary for the magistrate judge to have authority to dispose of the federal court

garnishment action under 28 U.S.C. § 636(c) because they had chosen not to intervene in the case and thus were not parties to the litigation. [See Information Memorandum No. 325 for a more detailed summary of this case.]

Arnold v. Arizona Dept. Of Public Safety, 233 F.R.D. 537 (D. Ariz. 2005)
Where all named parties had consented to disposition of the class action case by the magistrate judge, the magistrate judge had authority over all members of the class and therefore had authority to consider motions to certify the class and approve a tentative settlement agreement. (Opinion by a magistrate judge.)

Hangarter v. Paul Revere Life Ins. Co., 289 F. Supp. 2d 1105 (N.D. Cal. 2003)
After the magistrate judge denied the defendant's motion for leave to conduct discovery as an improper attempt without leave of court to amend the original complaint to add new plaintiffs after the entry of judgment, and as improper forum shopping, the magistrate judge granted the defendant's motion to reassign the case to a district judge since new claims were raised and the defendants did not consent to have the presiding magistrate judge dispose of these claims.

4. Time to File Consent

7th Circuit:
Smith v. Shawnee Library System, 60 F.3d 317 (7th Cir. 1995)
The parties' consent to disposition by a magistrate judge was valid, even when it was submitted nine years after the magistrate judge had assumed responsibility for the case and after completion of oral argument on the appeal of the magistrate judge's summary judgment order.

King v. Ionization Int'l, Inc, 825 F.2d 1180 (7th Cir. 1987)
Consent entered several weeks after the conclusion of the post-judgment proceeding was sufficient under § 636(c).

Adams v. Heckler, 794 F.2d 303 (7th Cir. 1986)
A written consent form executed on the day scheduled for the hearing is clear, unambiguous and explicit, and not intrinsically coercive. Although failure to consent would have resulted in referral of the matter to the magistrate judge for a report and recommendation under § 636(b)(1)(B), an assumption that a party would be prejudiced by magistrate judge's knowledge of their refusal to consent is unwarranted.

5. Authority to Substitute a Different Magistrate Judge Without the Parties' Consent

If the consent form signed by the parties does not specify the magistrate judge who will dispose of the case, another magistrate may be substituted without obtaining an additional consent from the

parties. Another magistrate judge may not be substituted, however, where the consent form states that a specific magistrate judge will preside.

1st Circuit:

MacNeil v. Americold Corp., 735 F. Supp. 32 (D. Mass. 1990)

Where the consent form signed by the parties stated only that the case would be referred to a magistrate judge, another magistrate judge could be substituted for the first one assigned the case. Referral of the case to another magistrate judge did not constitute "extraordinary circumstances" justifying that the referral be vacated.

2d Circuit:

Astra USA v. Bildman, 2010 WL 1731815 (D. Vt. April 30, 2010)

Where the magistrate judge to whom the parties consented to dispose of their case retired and the case was reassigned to another magistrate judge, the new magistrate judge retained authority to dispose of case where the parties' original consent form did not specify the name of the magistrate judge to whom they were consenting.

5th Circuit:

Hester v. Graham, Bright, & Smith, P.C., 289 Fed. Appx. 35 (5th Cir. 2008)

Where the plain language of the consent document signed by both parties indicated that the parties consented to have any magistrate judge preside in their case, not just the initial magistrate judge assigned the case who subsequently retired, the magistrate judge to whom the court transferred the case had authority to dispose of the case under § 636(c), even though the parties did not execute a new consent document specifically naming that magistrate judge.

Mendes Junior International Co. v. M/V Sokai Maru, 978 F.2d 920 (5th Cir. 1992)

When a civil case is assigned to a particular magistrate judge who is subsequently appointed to another judgeship, the parties must consent again before a second magistrate judge may render a final decision in the case.

O'Neal Bros. Const. Co. v. Circle, Inc., 1994 WL 658468 (E.D.La. 1994)

When the first magistrate judge assigned the case was killed, the court could refer the case to another magistrate judge where the consent form did not specify which magistrate judge would dispose of the case.

7th Circuit:

Stevo v. Frasor, 662 F.3d 880 (7th Cir. 2011)

The parties both explicitly and implicitly consented to have their case disposed of by a magistrate judge under 28 U.S.C. § 636(c), even where the case was disposed of by a different magistrate judge than the one the parties originally consented to and the reference on consent was not docketed in the case when the case was reassigned to the second magistrate judge. [See Information Memorandum No. 321 for a more detailed summary of this case.]

Hatcher v. Consolidated City of Indianapolis, 323 F.3d 513 (7th Cir. 2003)
A provision in a settlement agreement that outstanding legal fees issues would be referred to a named magistrate judge for mediation and resolution constituted an improper form of "judge shopping," requiring remand to the district court.

Kalan v. City of St. Francis, 274 F.3d 1150 (7th Cir. 2001)
Where the parties consented to disposition by a particular named magistrate judge under § 636(c), the consent does not carry over when the case subsequently was assigned to another magistrate judge.

9th Circuit:
Wilhelm v. Rotman, 680 F.3d 1113 (9th Cir. 2012)
A prisoner plaintiff's execution of the district court's form consenting to disposition by "a United States magistrate judge" was sufficient to constitute consent to have the case disposed of by another magistrate judge after the case was reassigned from the magistrate judge who originally received the referral. In addition, the plaintiff's conduct during litigation before the second magistrate judge constituted implied consent to disposition of the case by the magistrate judge under the Supreme Court's reasoning in *Roell v. Withrow*, 538 U.S. 580 (2003), even if the consent form signed by the plaintiff was in some way defective. [See Information Memorandum No. 323 for a more detailed summary of this case.]

Stokes v. Jordan, 95 F.3d 1158 (9th Cir. 1996) (Table disposition -- text available on WESTLAW)
Where the consent form stated that the case would be disposed of by "a full-time magistrate judge," the case could be referred to another magistrate judge despite the plaintiff's objection.

6. "Opt Out" Consent Procedures

In the 1990s, several courts experimented with "opt out" consent procedures for referring civil cases to magistrate judges, whereby parties were deemed to have consented to disposition of the case by the magistrate judge if they did not object to the assignment within a set period of time. The courts that considered these procedures in published opinions, however, disapproved of the practice. The Supreme Court's opinion in *Roell v. Withrow*, 538 U.S. 580 (2003), holding that a party's consent to disposition by a magistrate judge under 28 U.S.C. § 636(c) may, in some instances, be inferred from the party's conduct during litigation, appears to have encouraged at least one court to revive the use of "opt out" consent procedures.

4th Circuit:
Excel Indus., Inc. v. Eastern Express, Inc., 72 F.3d 126 (4th Cir. 1995) (Table disposition -- text available on WESTLAW)
The "opt out" procedure used in the district court to obtain the parties' consent to final disposition of the case by a magistrate judge under § 636(c) did not "protect the voluntariness of [the litigants'] consent" and was therefore improper under the Federal Magistrates Act.

9th Circuit:

Nasca v. Peoplesoft, 160 F.3d 578 (9th Cir. 1998)

"Consent by failure to object" as provided for in the district court's local rule was insufficient to clothe the magistrate judge with § 636(c) powers. Consent may not be inferred from the conduct of the parties, even where that conduct or lack of conduct may have been invited by a general local rule of the district court.

Aldrich v. Bowen, 130 F.3d 1364 (9th Cir. 1997)

A final judgment issued by a magistrate judge in a civil case assigned to him under an "opt out" consent procedure was a nullity. The magistrate judge had no jurisdiction to hear the case without the written consent from the parties under 28 U.S.C. § 636(c)(1) and Fed. R. Civ. P. 73.

Matter of Litigation Relating to Riot of Sept. 22, 1991 at Maximum Sec. Unit of Montana State Prison, 85 F.3d 637 (9th Cir. 1996) (Table disposition -- text available on WESTLAW)

A district local rule providing for an "opt out" consent procedure for civil cases referred to a magistrate judge under § 636(c) could not be invoked to presume additional defendants' consent in a multi-party case where the original parties explicitly consented to the magistrate judge's authority.

11th Circuit:

McNab v. J. & J. Marine, Inc., 240 F. 3d 1326 (11th Cir. 2001)

A district court's "opt out" procedure that provided for "consent through inaction" was invalid and insufficient to establish the "express" and "on the record" consent statutorily required to empower a magistrate judge to act under 28 U.S.C. § 636(c). The magistrate judge therefore lacked authority to issue a final disposition in this case, and the orders issued by the magistrate judge were thus not final and appealable.

Rembert v. Apfel, 213 F.3d 1331 (11th Cir. 2000)

Where a magistrate judge presided in a social security appeal assigned under an "opt out" consent procedure, the magistrate judge lacked authority to render a final judgment, and therefore the appellate court did not have jurisdiction to consider the case on appeal.

Little Bend River Co., Inc. v. Molpus Timberlands Management, L.L.C., 2005 WL 2897400 (S.D. Ala. 2005)

Citing the Supreme Court's reasoning in *Roell v. Withrow*, 538 U.S. 580 (2003), a magistrate judge held that the parties had implicitly consented to his jurisdiction under § 636(c) by failing to object to the referral of the case to a magistrate judge within the time period provided under the district's "opt out" consent procedure.

C. Vacating a Reference to Magistrate Judge

Section 636(c)(4) provides that "the court" may subsequently vacate the reference to a magistrate judge in two instances: (1) for good cause shown on the court's motion; or (2) under extraordinary

circumstances shown by any party. Fed. R. Civ. P. 73 follows the statutory language, stating that "[o]n its own for good cause - or when a party shows extraordinary circumstances - the district judge may vacate a referral to a magistrate judge under this rule." Since neither "good cause" nor "extraordinary circumstances" are defined in the Federal Magistrates Act, courts have had to interpret the provision.

1. Right of the Parties to Withdraw Consent

2d Circuit:

Fellman v. Fireman's Fund Ins. Co., 735 F.2d 55 (2d Cir. 1984)

The parties' request to withdraw their consent to trial before a magistrate judge was insufficient. Once a matter is referred to a magistrate judge, the reference can only be withdrawn by a district judge under § 636(c)(4).

Pullano v. Old Carco Liquidation Trust, 2011 WL 4498383 (W.D.N.Y. September 27, 2011)

Where a defendant sought to have consensual referral of case to a magistrate judge withdrawn by moving for reconsideration of district judge's previous referral of the case under Fed. R. Civ. P. 73, the district judge denied the motion, rejecting the argument that the referral of the civil case under Rule 73 was void *ab initio* if all parties did not explicitly consent to the referral under the rule. [See Information Memorandum No. 323 for a more detailed summary of this case.]

5th Circuit:

Sockwell v. Phelps, 906 F.2d 1096 (5th Cir. 1990)

Once a litigant's right to an Article III judge is knowingly and voluntarily waived, the litigant has no right to recant at will.

Carter v. Sea Land Serv., 816 F.2d 1018 (5th Cir. 1987)

Litigants have no absolute right to withdraw consent to trial before a magistrate judge. The court lists several factors for a district judge to consider when deciding a motion to withdraw consent under § 636(c)(4).

6th Circuit:

Forsyth v. Brigner, 156 F.3d 1229 (6th Cir. 1998) (Table disposition -- text available on WESTLAW)

Once a civil case is referred to a magistrate judge under § 636(c), a party has no absolute right to withdraw consent to trial and other proceedings before a magistrate judge.

9th Circuit:

Dixon v. Ylst, 990 F.2d 478 (9th Cir. 1993)

A party cannot simply withdraw consent at will. The court will only consider withdrawal of consent upon a party's motion with a showing of extraordinary circumstances justifying withdrawal.

10th Circuit:
Jurado v. Klein Tools, Inc., 755 F. Supp. 368 (D. Kan. 1991)
A party has no right to withdraw consent at will, but the district court may allow withdrawal upon a showing of good cause.

2. Authority of Magistrate Judge to Rule on Motion to Withdraw Consent

Although Fed. R. Civ. P. 73 specifically states that the "district judge" may vacate a reference under § 636(c), § 636(c) itself states that "[t]he court" may vacate the reference. Courts have disagreed about whether a magistrate judge has authority under the statute or Rule 73 to rule on a party's motion to withdraw a reference under § 636(c).

2d Circuit:
Fellman v. Fireman's Fund Ins. Co., 735 F.2d 55 (2d Cir. 1984)
Once a matter is referred to a magistrate judge, the reference can only be withdrawn by a district judge under § 636(c)(4).

4th Circuit:
Dowell v. Blackburn, 776 F. Supp. 283 (W.D. Va. 1991), *appeal dismissed*, 4 F.3d 984 (4th Cir. 1993)
A magistrate judge has no authority to rule on a motion to vacate a reference under § 636(c)(4). Only a district judge may rule on such a motion.

5th Circuit:
Lyn-Lea Travel Corp. v. American Airlines, Inc., 283 F.3d 282 (5th Cir. 2002)
A magistrate judge did not abuse her discretion when she denied plaintiff's motion seeking to rescind its consent to disposition by the magistrate judge, when the motion was filed almost two years after it had executed its consent to proceed before the magistrate judge.

6th Circuit:
Moses v. Sterling Commerce (America), Inc, 122 Fed. Appx. 177 (6th Cir. 2005)
The authority of a magistrate judge under § 636(c) included authority to rule on a party's motion to vacate the reference to the magistrate judge.

10th Circuit:
Rivera v. Rivera, 216 F.R.D. 655 (D. Kan. 2003)
Although a magistrate judge may permit a party to withdraw consent to proceed before a magistrate judge in a civil case, the magistrate judge does not have jurisdiction to deny a motion to withdraw consent. Fed. R. Civ. P. 73(b) specifically allows "[t]he district judge" to "vacate a reference ... to a magistrate judge," and the district judge retains "residual authority" to vacate the order of reference. (Opinion by a magistrate judge.)

3. Extraordinary Circumstances Shown by Any Party

1st Circuit:

MacNeil v. Americold Corp., 735 F. Supp. 32 (D. Mass. 1990)

Although the magistrate judge's alleged bias is a factor that may be considered in vacating a reference under § 636(c)(4), Congress did not intend this section to be used as an alternative to 28 U.S.C. § 144 and 28 U.S.C. § 455 for the disqualification of judicial officers.

Ouimette v. Moran, 730 F. Supp. 473 (D.R.I. 1990)

Habeas corpus petitions as a class of cases do not provide "extraordinary circumstances" to vacate a reference to a magistrate judge. The court lists several factors to consider in determining "extraordinary circumstances" and "good cause" for withdrawing consent to trial before a magistrate judge under § 636(c)(4).

Swallow Turn Music v. Tidal Basin, Inc., 581 F.Supp. 504 (D. Me. 1984)

Questions about the constitutionality of the Federal Magistrates Act do not constitute "extraordinary circumstances" justifying withdrawal of the reference.

3d Circuit:

Frank v. County of Hudson, 962 F.Supp. 41 (D.N.J. 1997)

A magistrate judge's alleged hostility toward the plaintiff's counsel, and other conduct and demeanor that the plaintiff believed demonstrated bias, did not constitute either "extraordinary circumstances" or "good cause" to vacate referral of the case to the magistrate judge under § 636(c)(4).

Leab v. Cincinnati Ins. Co., 1997 WL 736865 (E.D. Pa. 1997)

Friction between an attorney and a magistrate judge at trial, and disagreement with the magistrate judge's rulings, do not constitute "extraordinary circumstances" to support vacating the reference.

4th Circuit:

Smith v. Conn. Mut. Life Ins. Co., 45 F.3d 427 (4th Cir. 1995) (Table disposition -- text available on WESTLAW)

Where the plaintiff consented to disposition by a magistrate judge on the same day he received the magistrate judge's report under § 636(b)(1)(B) recommending that the case be dismissed, the plaintiff's disagreement with the magistrate judge's recommendation did not constitute extraordinary circumstances warranting withdrawal of the parties' consent.

J.S., ex rel. Duck v. Isle of Wight County School Bd., 368 F. Supp. 2d 522 (E.D. Va. 2005)

Where the magistrate judge had expressly retained jurisdiction over the case for purposes of enforcing the terms of the final order entered in an earlier case involving the same parties, and clearly had authority to do so, extraordinary circumstances did not exist to justify the

plaintiff's motion to vacate the reference of the case involving enforcement of the settlement agreement to the magistrate judge under § 636(c).

Dowell v. Blackburn, 776 F. Supp. 283 (W.D. Va. 1991), *appeal dismissed*, 4 F.3d 984 (4th Cir. 1993)
Adverse decisions by the magistrate judge on the plaintiff's pretrial motions did not constitute "extraordinary circumstances" justifying the withdrawal of the reference.

5th Circuit:
Lyn-Lea Travel Corp. v. American Airlines, Inc., 283 F.3d 282 (5th Cir. 2002)
A party's argument that its consent should be rescinded because it had expressly conditioned its consent on its right to appeal to a district judge rather than to the appellate court did not constitute extraordinary circumstances justifying vacating the referral.

Murret v. City of Kenner, 894 F.2d 693 (5th Cir. 1990)
The failure of all parties to consent to trial before the magistrate judge constituted "extraordinary circumstances" justifying withdrawal of the reference.

Nugent v. Bd. of Comm'rs of the East Jefferson Levee Dist., 1998 WL 726261 (E.D. La. 1998)
The magistrate judge's alleged lack of sympathy or compassion for the plaintiff did not constitute extraordinary circumstances justifying the plaintiff's motion to revoke her consent under § 636(c). (Opinion by a magistrate judge.)

6th Circuit:
United States v. Real Property Known & Numbered as 415 East Mitchell Ave., Cincinnati, Ohio, 149 F.3d 472 (6th Cir. 1998)
Where the magistrate judge presiding in a civil forfeiture case had previously served as the municipal court judge who issued the original warrant ordering seizure of the property at issue in the case, and the claimant was aware of this situation and did not move to have the magistrate judge recuse himself, the appellate court found no error requiring reversal, but stated that it would have been better practice for the magistrate judge to have recused himself from the case.

7th Circuit:
Allen v. Wine, 297 Fed. Appx. 524 (7th Cir. 2008)
The magistrate judge's alleged bias against the prisoner plaintiff by not appointing counsel to assist in his case did not constitute extraordinary circumstances justifying that the reference to the magistrate judge be vacated under § 636(c).

Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095 (7th Cir. 1987)
The magistrate judge's allowance of the plaintiff's motion to amend the pleadings to add a $10,000,000 damage claim did not constitute "extraordinary circumstances" justifying withdrawal of the reference to the magistrate judge.

8th Circuit:

Southern Agriculture Co. v. Dittmer, 568 F. Supp. 645 (W.D. Ark. 1983)

No extraordinary circumstances existed under § 636(c)(4) to vacate the reference where the magistrate judge had presided over the case for more than a year and withdrawal would cause substantial delay.

10th Circuit:

Rivera v. Rivera, 216 F.R.D. 655 (D. Kan. 2003)

A party's dissatisfaction with a magistrate judge's ruling in a civil consent case did not constitute evidence that the magistrate judge was partial to one party that would constitute "extraordinary circumstances" to justify vacating the civil consent reference under 28 U.S.C. § 636(c), or the magistrate judge's recusal under 28 U.S.C. § 455(a).

Jurado v. Klein Tools, Inc., 755 F. Supp. 368 (D.Kan. 1991)

Claim that the attorneys' consent to trial before a magistrate judge was not binding upon the client did not constitute "extraordinary circumstances."

D.C. Circuit:

Manion v. American Airlines, Inc., 251 F. Supp. 2d 171 (D.D.C. 2003)

A party's dissatisfaction with a ruling in a civil consent case did not constitute evidence that the magistrate judge was partial to one party that would justify either vacating the civil consent reference as "extraordinary circumstances" under 28 U.S.C. § 636(c), or recusal of the magistrate judge under 28 U.S.C. § 455(a).

Clay v. Brown, Hopkins, & Stambough, 892 F. Supp. 11 (D.D.C. 1995)

A magistrate judge's alleged bias against the plaintiff did not constitute "extraordinary circumstances" that would justify vacating the reference under § 636(c). The proper method for raising alleged bias of a magistrate judge would be a motion for recusal under 28 U.S.C. § 455 that must be raised first before the magistrate judge. The district judge refused to sanction the use of § 636(c)(4) as a "back-door" method of seeking recusal of a magistrate judge.

4. Good Cause Shown on Motion of the Court

1st Circuit:

Ouimette v. Moran, 730 F. Supp. 473 (D.R.I. 1990)

The court discusses factors to be considered by the district judge to determine if good cause exists to vacate a reference to a magistrate judge.

2d Circuit:

Fulton v. Robinson, 289 F.3d 188 (2d Cir. 2002)

It was well within a district judge's discretion to withdraw a reference to a magistrate judge under § 636(c) when case-dispositive motions were pending before the district judge and

where the plaintiff did not indicate his agreement to the reference until after the final motions for summary judgment had been argued.

Paddington Partners v. Bouchard, 950 F. Supp. 87 (S.D.N.Y. 1996)
Where the parties consented to a particular magistrate judge to dispose of their case and that magistrate judge retired, the court vacated the reference for "good cause" under § 636(c)(4).

3d Circuit:
Leab v. Cincinnati Ins. Co., 1997 WL 736865 (E.D. Pa. 1997)
The district judge's desire to perform his own work constituted good cause to vacate the reference to a magistrate judge where the district judge stated that under usual circumstances he would not have referred the case to a magistrate judge in the first place.

9th Circuit:
Gomez v. Harris, 504 F. Supp. 1342 (D. Alaska 1981)
The court found good cause to vacate the reference of a social security appeal to a magistrate judge due to questions of law and a "thicket" of procedural difficulties.

5. Authority of Magistrate Judge After Reference is Vacated

2d Circuit:
McCarthy v. Bronson, 906 F.2d 835 (2d Cir. 1990), *aff'd*, 500 U.S. 136 (1991)
The magistrate judge was "entitled to take the lesser step" of issuing a report and recommendation under § 636(b)(1)(B) in a prisoner case after the plaintiff was permitted to withdraw his consent to trial before the magistrate judge.

Gonzalez v. Rakkas, 846 F. Supp. 229 (E.D.N.Y. 1994)
A magistrate judge's ruling that entry of default judgment against defendant extinguished plaintiff's right to a jury trial on damages would be treated as a report and recommendation to be reviewed de novo by the district judge after the order referring the case to the magistrate judge was vacated.

5th Circuit:
Sockwell v. Phelps, 906 F.2d 1096 (5th Cir. 1990)
A magistrate judge has no authority to try the case and issue a report and recommendation under § 636(b)(1)(B) after allowing the party to withdraw consent. This was a jurisdictional error under *Gomez v. United States*, 490 U.S. 858 (1989), and was not harmless.

9th Circuit:
United States v. Mortensen, 860 F.2d 948 (9th Cir. 1988), *cert. denied*, 490 U.S. 1036 (1989)
The consent to trial before the magistrate judge is not automatically withdrawn by a declaration of mistrial. The magistrate judge's authority continues until the reference is withdrawn under § 636(c)(4).

D. Appeal of Magistrate Judge's Decision [Fed. R. Civ. P. 73]

In October 1996, the Federal Court Improvements Act of 1996 was enacted, thereby amending the Federal Magistrates Act to eliminate the option of appealing a magistrate judge's order in a civil consent case to the district court. In particular, sections 636(c)(4) & (5) were stricken from the statute. Section 636(c)(3) of Title 28 now states:

> Upon entry of judgment in any cases referred under [28 U.S.C. § 636(c)(1)], an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court.

Rule 73 of the Federal Rules of Civil Procedure has been amended to conform with the change to the statute. Old Rules 74 and 75 of the Federal Rules of Civil Procedure were abrogated at the same time Rule 73 was amended.

1st Circuit:
Pramco, LLC ex rel. CFSC Consortium, LLC v. San Juan Bay Marina, Inc., 435 F.3d 51 (1st Cir. 2006)
A magistrate judge's order denying the plaintiff's motion to enforce a settlement agreement in an action where the magistrate judge was presiding with the parties' consent was a final, appealable decision under Fed. R. Civ. P. 58, even though no separate judgment or order was entered, where no further proceedings were pending in the district court and none were contemplated, where the magistrate judge's ruling satisfied the purpose of Rule 58's separate judgment requirement by communicating an unambiguous message of finality to the parties, and where the timeliness of the appeal made it pointless, for the purposes of Rule 58, to remand the case merely for the entry of a formal separate judgment.

5th Circuit:
United States for Use and Benefit of Gulf State Enterprises, Inc. v. Tway, Inc., 938 F.2d 583 (5th Cir. 1991)
Where a magistrate judge tried a civil case and entered judgment with the consent of the parties under § 636(c), the appellate court reviewed the magistrate judge's judgment under the same standards used for reviewing judgments entered by district judges.

6th Circuit:
Myers v. Copper Cellar Corp. 192 F.3d 546 (6th Cir. 1999)
In an action under the Fair Labor Standards Act where a magistrate judge presided with the parties' consent, the magistrate judge's assessments of the credibility of witness testimony pertinent to key issues in the case, or any other testimony, was not subject to appellate re-evaluation.

Darnell v. Rossen, 116 F.3d 187 (6th Cir.1997)
The amendment to 28 U.S.C. § 636(c) that eliminated the right of appeal to the district court in civil consent cases applies retroactively to cases pending at the time the amendment was enacted, even where the parties had agreed to appeal to the district court.

7th Circuit:
Seymour v. Hug, 485 F.3d 926 (7th Cir. 2007)
An attorney lacked standing to appeal a ruling by a magistrate judge concerning a settlement agreement in a civil consent case where the magistrate judge sharply criticized the attorney's actions but did not impose monetary sanctions.

9th Circuit:
Gametech Int'l, Inc. v. Trend Gaming Systems, L.L.C., 2008 WL 4571424 (D. Ariz. 2008)
A district judge adopts a magistrate judge's report and recommendation concluding that where the parties' have consented to disposition of a civil cases by a magistrate judge, the magistrate judge continues to have authority over the case after appeal to and remand from the court of appeals. Once the parties have consented to the magistrate judge's jurisdiction in a civil case and have not successfully withdrawn such consent, the procedural path for the case, including the appellate route, is parallel to that of a case that is in front of a district court judge. The parties' consent to disposition by the magistrate judge does not end with appeal.

10th Circuit:
Grimsley v. MacKay, 93 F.3d 676 (10th Cir. 1996)
On appeal of a magistrate judge's judgment rendered under § 636(c), the appellate court used the standard of review that would be applied to a judgment rendered by a district judge, with the clearly erroneous standard applied to the magistrate judge's findings of fact and de novo review applied to questions of law and mixed questions of law and fact.

D.C. Circuit:
Perles v. Kagy, 394 F. Supp. 2d 68 (D.D.C. 2005)
In a civil consent case under 28 U.S.C. § 636(c), the right to appeal the magistrate judge's order denying an attorney's motion to intervene in a fee action brought by another attorney lies with the court of appeals, not with the district court.

§ 9. CONTEMPT AUTHORITY UNDER 28 U.S.C. § 636(e)

The Federal Courts Improvement Act of 2000 expanded significantly the contempt authority that magistrate judges may exercise. Section 636(e) of Title 28 was amended and completely changed by this legislation. These changes are summarized below.

A. Expanded Magistrate Judge Contempt Authority Under 28 U.S.C. § 636(e)

Section 636(e)(1) provides that magistrate judges are given the power to exercise contempt authority as set forth in the other provisions of amended § 636(e) within the territorial jurisdiction prescribed by their appointments.

Section 636(e)(2) provides magistrate judges with summary criminal contempt authority to punish any misbehavior occurring in their presence so as to obstruct the administration of justice. Summary criminal contempt authority is granted to magistrate judges to maintain order and to protect the court's dignity in response to contumacious behavior by witnesses, parties, counsel, and others present at court proceedings. When presiding over cases or proceedings as the primary judicial officer for the district court, a magistrate judge is provided appropriate immediate authority to control activity in the courtroom. The limited penalties magistrate judges may impose for summary criminal contempts are set forth in § 636(e)(5), summarized below.

Section 636(e)(3) gives magistrate judges additional criminal contempt authority in civil consent cases under 28 U.S.C. § 636(c) and in misdemeanor cases under 18 U.S.C. § 3401. The section provides magistrate judges with authority to punish misbehavior occurring outside their presence that constitutes disobedience or resistance to the magistrate judges' lawful writ, process, order, rule, decree, or command in civil consent and misdemeanor cases. Such criminal contempt authority is provided to enable a magistrate judge to enforce his or her orders and to vindicate the magistrate judge's (and the court's) authority over cases tried by a magistrate judge.

Section 636(e)(4) authorizes magistrate judges to exercise civil contempt authority in civil consent cases under 28 U.S.C. § 636(c) and in misdemeanor cases under 18 U.S.C. § 3401. In such cases, the magistrate judge may exercise civil contempt authority identical to the civil contempt authority of a district judge.

Section 636(e)(5) establishes limits on the penalties magistrate judges may impose for criminal contempts. Imprisonment for a summary criminal contempt committed in the magistrate judge's presence, or for a criminal contempt occurring in a civil consent or misdemeanor case outside the magistrate judge's presence, may not exceed 30 days incarceration (the maximum term of imprisonment for a Class C misdemeanor, set forth in 18 U.S.C. § 3581(b)(8)). A fine under this provision may not exceed $5,000 (the maximum fine that may be imposed upon an individual for a Class C misdemeanor under 18 U.S.C. § 3571(b)(6)).

Congress considered some contumacious conduct to be so egregious as to require more severe punishment. In such situations, 28 U.S.C. § 636(e)(6) retains the certification procedure that existed in § 636(e) before enactment of the Federal Courts Improvement Act of 2000. If, in the opinion of the magistrate judge, a criminal contempt occurring in the magistrate judge's presence, or a criminal contempt in a civil consent or misdemeanor case, is sufficiently serious that 30 days incarceration and/or a $5,000 fine would not be an adequate punishment, the magistrate judge has the option of certifying the facts to a district judge for further contempt proceedings. The section also provides that in any other case or proceeding referred to a magistrate judge under 28 U.S.C. §§ 636(a) or (b), or any other statute, criminal contempts that occur outside the magistrate judge's presence and civil contempt matters must be handled through the certification procedure. Under this provision, the magistrate judge would certify the facts constituting the contempt to a district judge and issue an order to show cause why that person should not be adjudged in contempt of court by the facts so certified.

Section 636(e)(7) provides that in civil consent cases under § 636(c), an appeal from a magistrate judge's contempt order is heard by the court of appeals. The appeal of any other order of contempt issued by a magistrate judge is made to the district court.

Below are cases interpreting the expanded contempt authority of magistrate judges set forth in amended 28 U.S.C. § 636(e) that was enacted in 2000.

2d Circuit:

Bowens v. Atlantic Maintenance Corp., 546 F. Supp. 2d 55 (E.D.N.Y. 2008)

In action under the Fair Labor Standards Act that was referred to a magistrate judge for pretrial case management, the plaintiff moved for an order of contempt against defendants for alleged violations of the magistrate judge's pretrial order. After conducting a lengthy evidentiary hearing, the magistrate judge issued a report and recommendation analyzing the standards for civil contempt, discussing the extent of the magistrate judge's contempt authority under 28 U.S.C.§ 636(e), and recommending that the plaintiff's motion for contempt be denied, but that sanctions be imposed against the defendants. The district judge held that the defendant had waived all objections to the magistrate judge's report and recommendation by failing to file specific objections and therefore adopted the magistrate judge's report and recommendation in full.

Hunter TBA, Inc. v. Triple V Sales, 250 F.R.D. 116 (E.D.N.Y. 2008)

Where a defendant failed to comply with the plaintiff's subpoena issued in aid of execution of a default judgment and the plaintiff moved for an order of contempt that was referred to a magistrate judge, the magistrate judge issued a report and recommendation pursuant to 28 U.S.C. § 636(e)(6)(B)(iii) and Fed. R. Civ. P. 45(e) certifying facts constituting contempt after the defendant failed to respond to the magistrate judge's order scheduling a hearing to show cause why the defendant should not be held in contempt. The magistrate judge therefore recommended that the district judge issue an order of contempt, and the district judge adopted the recommendation and issued the order of contempt.

Jones v. J.C. Penney's Dept. Stores, Inc., 228 F.R.D. 190 (W.D.N.Y. 2005)
A magistrate judge concluded that the plaintiff's attorney's substantial and willful interference with the plaintiff's deposition, in violation of deposition guidelines contained in a scheduling order, warranted punishment for civil contempt of court, and magistrate judge therefore filed a certification to the district judge assigned the case finding that the attorney's violations were acts constituting civil contempt and recommended that the attorney be held in civil contempt pursuant to 28 U.S.C. § 636(e)(6)(B)(iii).

3d Circuit:
Wallace v. Kmart Corp., 687 F.3d 86 (3d Cir. 2012)
The Third Circuit held that a magistrate judge did not have authority to issue an order for civil contempt under 28 U.S.C. § 636(e) against an attorney who allegedly failed to comply with a subpoena issued by the defendants, where the alleged contumacious behavior occurred outside the magistrate judge's presence in a proceeding where the magistrate judge was merely overseeing pretrial proceedings and the parties had not consented to have the magistrate judge dispose of the case under 28 U.S.C. § 636(c). Noting that the 2000 amendments to § 636(e) that expanded magistrate judge contempt authority did not change the existing certification procedure applicable in other contempt situations, the court concluded "the Magistrate Judge should have certified the facts of the alleged contempt to the District Judge, who in turn should have held a hearing to determine those facts." [See Information Memorandum No. 325 for a more detailed summary of this case.]

4th Circuit:
Cromer v. Kraft Foods North America, Inc., 390 F.3d 812 (4th Cir. 2004)
A magistrate judge erred in imposing both criminal and civil contempt orders against an allegedly vexatious litigant. Criminal contempt conviction was improper where the litigant was not informed of his right to counsel and where the magistrate judge "improperly assumed a prosecutorial role" by acting as both prosecutor and decision maker. Imposition of $1,500 civil contempt sanction against the litigant was also improper where the magistrate judge did not condition the civil contempt order on compliance with a court order and did not tailor the sanction to compensate the complaining party.

6th Circuit:
Dayton Newspapers, Inc. v. Teamsters Local Union No. 957, 176 F. Supp. 2d 765 (S.D. Ohio 2001)
With enactment of the Federal Courts Improvement Act of 2000 that amended § 636(e), the magistrate judge had authority to decide a party's motion for civil contempt in a civil consent case under § 636(c), thereby exercising the civil contempt authority inherent to all American courts. (Opinion by a magistrate judge.)

7th Circuit:

Federal Trade Commission v. Think Achievement Corp., 144 F. Supp. 2d 1029 (N.D. Ind. 2001)

A magistrate judge had civil contempt authority under amended § 636(e) to punish as a contempt of court a party's failure to comply with an injunctive order entered by the magistrate judge presiding under § 636(c). The magistrate judge ordered the parties who had failed to comply with the injunction incarcerated until they had purged themselves of such contempt. (Opinion by a magistrate judge.)

9th Circuit:

Alcalde v. NAC Real Estate Investments & Assignments, Inc, 580 F. Supp. 2d 969 (C.D. Cal. 2008)

In proceedings by a judgment creditor to obtain information on the assets of judgment debtors, where the judgment creditor filed a motion with the presiding magistrate judge requesting that the magistrate judge certify facts under 28 U.S.C. § 636(e)(6) that constituted contempt to a district judge and to issue an order to show cause why the judgment debtors should not be held in either civil or criminal contempt, the magistrate judge, after conducting judgment debtor examination hearings to which the judgement debtors did not appear, exercised her contempt authority under § 636(e)(6) by granting the motion.

Irwin v. Mascott, 370 F.3d 924 (9th Cir. 2004)

A magistrate judge presiding with consent had authority to hold a non-party liable for contempt sanctions for violations of an injunction issued in a class action case arising under the Fair Debt Collection Practices Act where the named parties served as the non-party's virtual representatives.

Biovail Laboratories, Inc. v. Anchen Pharmaceuticals, Inc., 463 F. Supp. 2d 1073 (C.D. Cal. 2006)

In a patent infringement case, a magistrate judge had authority under 28 U.S.C. § 636(e) to certify facts to a district judge concerning the defendant's motion for civil contempt against the plaintiff for alleged violation of a protective order, but the particular circumstances of the case did not warrant contempt sanctions. (Opinion by a magistrate judge.)

10th Circuit:

In re Contempt Order, 441 F. 3d 1266 (10th Cir. 2006)

A magistrate judge abused his discretion by entering a summary criminal contempt order against a special assistant United States attorney and fining him $50 when the attorney was five minutes late to a detention hearing before the magistrate judge.

B. Magistrate Judge Contempt Authority Under 28 U.S.C. § 636(e) Prior to the Federal Courts Improvement Act of 2000

Before the Federal Courts Improvement Act of 2000 was enacted, magistrate judges were granted more limited contempt authority under the Federal Magistrates Act. The earlier version of § 636(e) placed strict limits on this power. The section defined actions constituting contempt as:

(1) disobedience or resistance to any lawful order, process, or writ;
(2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same;
(3) failure to produce, after having been ordered to do so, any pertinent document;
(4) refusal to appear after having been subpoenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to the law; or
(5) any other act or conduct which if committed before a district judge would constitute contempt of such court.

When contemptuous behavior occurred before a magistrate judge, the earlier language of § 636(e) provided that "the magistrate [judge] shall forthwith certify the facts to a judge of the district court" and may serve upon the offending party "an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified."

Magistrate judges, therefore, had no immediate determinative authority under the Federal Magistrates Act to punish parties or others for contempt of court for disruptive behavior occurring in their presence. Several courts held prior to 2000, however, that magistrate judges wield powers similar to contempt authority through the sanction provisions in federal statutes and the Federal Rules of Civil Procedure while conducting duties under 28 U.S.C. §§ 636(a), (b) and (c). *See* §§ 4 and 5, *supra,* for further discussion of magistrate judge sanction authority.

The cases summarized below discuss magistrate judges exercising contempt authority under the earlier, more limited version of section 636(e) that existed prior to 2000.

1. Magistrate Judge Authority

2d Circuit:

Litton Sys., Inc. v. A.T. & T., 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984)
A magistrate judge did not exceed certification authority under § 636(e) when he conducted an evidentiary hearing on a motion for discovery sanctions under Fed. R. Civ. P. 37 and the final decision regarding the appropriate sanctions to be imposed was left to the district judge.

3d Circuit:

Taberer v. Armstrong World Industries., Inc., 954 F.2d 888 (3d Cir. 1992)

A magistrate judge exceeded his authority under § 636(e) by conducting what was in effect a "trial" against an attorney accused of criminal contempt without obtaining the attorney's consent. A district judge in the case must conduct a de novo hearing in a contempt proceeding involving contumacious behavior certified by a magistrate judge. The district judge at bar erred by relying solely on a transcript of the contempt proceeding before the magistrate judge when ordering the attorney held in contempt.

5th Circuit:

F.D.I.C. v. LeGrand, 43 F.3d 163 (5th Cir. 1995)

The appellate court upheld a district judge's referral of a motion for contempt to the magistrate judge under 28 U.S.C. § 636(b)(3), but vacated the court's order incarcerating the defendant for 72 hours, concluding that it was a criminal contempt order intended to punish the defendant and was therefore ordered without proper notice and hearing.

6th Circuit:

Miami Valley Carpenters Dist. Council Pension Fund v. Scheckelhoff, 123 F.R.D. 263 (S.D. Ohio 1988)

Use of the term "punish" in § 636(e) indicates that the provision was intended to apply to criminal contempt only. A litigant's consent under § 636(c) allows a magistrate judge to conduct a civil contempt proceeding. (Opinion by a magistrate judge.)

7th Circuit:

In re Skil Corp., 119 F.R.D. 658 (N.D. Ill. 1987)

A magistrate judge had authority under § 636(e) to issue an order to show cause why a party's refusal to comply with an administrative inspection warrant did not constitute civil contempt. (Opinion by a magistrate judge.)

9th Circuit:

Bingman v. Ward, 100 F.3d 653 (9th Cir. 1996), *cert. denied*, 520 U.S. 1188 (1997)

A magistrate judge did not have authority under the Federal Magistrates Act to adjudicate either civil or criminal contempts.

NLRB v. A-Plus Roofing, Inc., 39 F.3d 1410 (9th Cir. 1994)

The Federal Magistrates Act did not authorize magistrate judges to conduct non-consensual criminal contempt trials for an appellate court. 18 U.S.C. § 3401 provides the only statutory basis for the criminal jurisdiction of magistrate judges, whose criminal trial jurisdiction depends upon the defendant's specific written consent. The court found no defect in the magistrate judge's exercise of civil contempt authority on behalf of the appellate court under 28 U.S.C. § 636(b)(2) and Fed. R. Civ. P. 53.

Gomez v. Scoma's Inc., 1996 WL 723082 (N.D. Cal. 1996)
The duty of the magistrate judge under 28 U.S.C. § 636(e) is simply to investigate whether further contempt proceedings are warranted, not to issue a contempt order. The magistrate judge may conduct a hearing to determine whether certification for contempt is appropriate. In the case at bar, the magistrate judge properly refused to certify a defendant for alleged contempt in a dispute over a witness deposition.

10th Circuit:
Windsor v. Martindale, 175 F.R.D. 665 (D. Col. 1997)
Where witnesses in a prisoner civil rights action refused to comply with the prisoner plaintiff's subpoenas duces tecum, the plaintiff's remedy was to seek to hold the witnesses in contempt of court. The presiding magistrate judge was required to make initial finding under 28 U.S.C. § 636(e) as to whether the witnesses improperly failed to respond to subpoenas before certifying contempt to the district judge.

11th Circuit:
King v. Thornburg, 762 F. Supp. 336 (S.D. Ga. 1991)
Magistrate judges have authority to issue arrest warrants, but an order directing an attorney's arrest for failure to appear at a scheduled hearing is not a "normal judicial function" for magistrate judges who possess no authority to punish for contempt.

2. Misdemeanor Contempt

3d Circuit:
United States v. Gedraitis, 690 F.2d 351 (3d Cir. 1982), *cert. denied*, 460 U.S. 1071 (1983)
A magistrate judge had authority under § 636(a)(3) to try contempts referred by a district judge with the parties' consent, provided the penalties do not exceed those for a misdemeanor.

3. Certification of Facts Constituting Contempt

2d Circuit:
Blum v. Schlegel, 108 F.3d 1369 (2d Cir. 1997) (Table disposition -- text available on WESTLAW)
The district court did not abuse its discretion when it ordered dismissal of the plaintiff's action as a contempt sanction after the magistrate judge certified the plaintiff to be in contempt for wilful violation of the magistrate judge's protective order.

Nova Biomedical corp. v. i-STAT Corp., 182 F.R.D. 419 (S.D.N.Y. 1998)
Dicta: Once actions constituting contemptuous behavior under the definitions set forth in § 636(e) are committed, the magistrate judge may certify the relevant facts to a district judge to determine whether contempt authority should be applied.

Peker v. Fader, 965 F. Supp. 454 (S.D.N.Y. 1997)
The plaintiffs were properly certified for contempt when they screamed at the magistrate judge presiding at a final pretrial conference and walked out of the conference. Although incarceration or fine are standard criminal contempt penalties, dismissal of plaintiffs' lawsuit was appropriate under the circumstances of the case.

3d Circuit:
Holt Cargo Sys., Inc. v. Delaware River Port Auth., 1998 WL 150948 (E.D. Pa. 1998)
The district court denied a motion for contempt for a party's failure to comply with a magistrate judge's pretrial orders. The proper procedure for a party moving for contempt for violation of a magistrate judge's order is to file a motion with the magistrate judge, who thereby acts as fact-finder and "certifies the facts" under § 636(e) to the district judge for determination whether the facts establish a contempt of court.

4th Circuit:
Proctor v. State Gov't of North Carolina, 830 F.2d 514 (4th Cir. 1987)
The magistrate judge's certification of facts constituting civil contempt is treated as a prima facie statement of the case before the district judge. The district judge must allow parties the opportunity to submit additional evidence. The court analogizes certification procedure under § 636(e) with the contempt provisions of the Bankruptcy Act.

5th Circuit:
United States v. McCargo, 783 F.2d 507 (5th Cir. 1986)
A district judge can take judicial notice of the existence of the magistrate judge's certification of facts constituting contempt where the certification is not contained in the record.

7th Circuit:
Hecht v. Don Mowry Flexo Parts, Inc., 111 F.R.D. 6 (N.D. Ill. 1986)
After a magistrate judge in a civil consent case certified facts constituting defendant's alleged contempt to a district judge for defendant's failure to produce documents in response to a subpoena duces tecum, the district judge held that the defendant's actions did not constitute criminal contempt because of a lack of willfulness on the defendant's part. Although the district judge adjudicated the defendant's failure to comply with the subpoena as civil contempt, no sanction was imposed because the underlying civil case had been finally adjudicated.

9th Circuit:
Aldridge v. Young, 782 F. Supp. 1457 (D. Nev. 1991)
A litigant's failure to appear before a magistrate judge or to produce a requested document in post-judgment proceedings in aid of execution of a judgment constituted criminal contempt. The magistrate judge's certification of facts constituting contempt to the district judge was proper under § 636(e).

In re Kitterman, 696 F. Supp. 1366 (D. Nev. 1988)
Although the magistrate judge was not authorized to decide whether the actions that occurred before her constituted contempt, she was permitted to preside over hearing to determine whether to certify the facts of the matter for further contempt proceedings before the district judge.

10th Circuit:
Cook v. Rockwell Int'l. Corp., 907 F. Supp. 1460 (D. Col. 1995)
A magistrate judge properly certified a civil contempt matter to the district judge where the Department of Energy failed to comply with the magistrate judge's order to produce documents in litigation concerning the Rocky Flats nuclear weapons production facility.

D.C. Circuit:
Athridge v. Aetna Cas. & Sur. Co., 184 F.R.D. 181 (D.D.C. 1998)
Dicta: Consistent with § 636(e), a magistrate judge must exercise his or her discretion in deciding whether conduct has risen to the level at which he or she must certify the facts of the conduct to a district judge for contempt adjudication. (Opinion by a magistrate judge.)

4. District Court's Supervisory Authority

2d Circuit:
Nova Biomedical Corp. v. i-STAT Corp., 182 F.R.D. 419 (S.D.N.Y. 1998)
Where a magistrate judge did not certify to the district court that an individual's actions constituted contempt under § 636(e), and the defendant did not move to have the magistrate judge reconsider the decision not to certify, the defendant's motion for contempt will be denied.

3d Circuit:
Taberer v. Armstrong World Ind., Inc., 954 F.2d 888 (3d Cir. 1992)
The district judge should have conducted a de novo hearing concerning alleged contumacious behavior that occurred before a magistrate judge. The district judge erred in relying solely on a transcript of the contempt proceeding before the magistrate judge.

In re Kirk, 641 F.2d 684 (9th Cir. 1981)
To prove intent in a § 636(e) contempt action before a district judge, it must be shown that an attorney knew, in view of all the circumstances, that his or her behavior exceeded the outer limits of an attorney's proper role and was hindering rather than facilitating the search for truth.

5. Appellate Review

5th Circuit:

Castaneda v. Falcon, 166 F.3d 799 (5th Cir. 1999)

Because the magistrate judge lacked the power to adjudicate contempt proceedings under § 636(e), with only the authority to certify facts to a district judge, the court of appeals was without jurisdiction to hear a direct appeal from a magistrate judge's decision regarding contempt certification.

9th Circuit:

Heinly v. Checkcept, LLC, 68 Fed. Appx. 126 (9th Cir. 2003)

The appellate court did not have jurisdiction to consider an appeal from a magistrate judge's summary contempt order imposing monetary sanctions against an attorney who failed to appear in court as ordered. The initial appeal of the magistrate judge's summary contempt order should have been to the district court.

In re Kirk, 641 F.2d 684 (9th Cir. 1981)

The appellate standard in a contempt proceeding, viewing the evidence in the light most favorable to sustaining a conviction for criminal contempt, is whether the district judge could rationally conclude that guilt was established beyond a reasonable doubt.

C. Magistrate Judge Presiding As Contempt Special Master for the Court of Appeals

Magistrate judges occasionally have been appointed by courts of appeals to serve as special masters in contempt matters that arise in the appellate court. For additional information concerning the appointment of magistrate judges as special masters in courts of appeals, see section 6, *supra*.

7th Circuit:

Reich v. Sea Sprite Boat Co., Inc., 50 F.3d 413 (7th Cir. 1995)

A magistrate judge was appointed as a special master to conduct appellate contempt proceedings, including the oversight of discovery to compel production of evidence and to conduct evidentiary hearings.

9th Circuit:

NLRB v. A-Plus Roofing, Inc., 39 F.3d 1410 (9th Cir. 1994)

Although the appellate court had authority to appoint a magistrate judge to serve as a special master in a contempt proceeding in the appellate court, the "catch-all" provision of 28 U.S.C. § 636(b)(3) did not authorize magistrate judges to conduct non-consensual criminal contempt trials. The court found no defect in the magistrate judge's civil contempt jurisdiction under 28 U.S.C. § 636(b)(2) and Fed. R. Civ. P. 53.

APPENDIX A: STANDARDS OF REVIEW IN BAIL AND DETENTION PROCEEDINGS UNDER THE BAIL REFORM ACT

APPENDIX A: STANDARDS OF REVIEW IN BAIL AND DETENTION PROCEEDINGS UNDER THE BAIL REFORM ACT

The Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq.*, governs the release and detention of federal criminal defendants before trial. Section 3145 of the Act does not set forth specific standards of review to be applied by either the district judge reviewing a magistrate judge's release or detention order or the court of appeals reviewing the district court's release or detention order. Below are cases discussing the standards of review applied in different circuits to detention and release orders issued by magistrate judges under the Bail Reform Act.

I. Standard of Review Applied by the District Court

Courts have generally concluded that district courts should apply the de novo standard of review when review of a magistrate judge's release or detention order is sought.

1st Circuit:

United States v. Craven, 181 F. 3d 80 (1st Cir. 1998) (Table disposition)
Although the district judge's standard of review in reviewing a magistrate judge's detention orders was ambiguous, it was not overly deferential or so mistaken as to constitute prejudicial error. There also was no indication that the district judge's review of the magistrate judge's legal conclusion was other than de novo.

United States v. Tortora, 922 F.2d 880 (1st Cir. 1990)
The district judge conducts de novo review of a magistrate judge's contested detention order.

United States v. Vega Cosme, 1 F. Supp. 2d 109 (D.P.R. 1998)
The district judge is required to make a de novo review of a magistrate judge's contested detention order.

United States v. Alonso, 832 F. Supp. 503 (D.P.R. 1993)
Section 3145(b) of Title 18 requires the district judge to make a de novo review of the magistrate judge's detention order, but does not require the district judge to conduct a de novo hearing.

2d Circuit:

United States v. Leon, 766 F.2d 77 (2d Cir. 1985)
The district judge should fully reconsider the magistrate judge's denial of bail and should not simply defer to the magistrate judge's judgment. District judges should reach independent conclusions on release and detention issues.

United States v. Kantipuly, 2007 WL 463125 (W.D.N.Y. 2007)
A district judge may amend the conditions of bail subject only to the statutory standards applicable to the setting of bail, without any prior determination that the magistrate judge's order was clearly erroneous or contrary to law, and has authority to make a de novo review

of the magistrate judge's order of release, despite the fact that the district judge was not the releasing officer and regardless of whether review was sought by the defendant or the government.

United States v. Goba, 240 F. Supp 2d 242 (W.D.N.Y. 2003)
Following receipt of a timely filed motion for revocation of a detention order as provided for in 18 U.S.C. § 3145(b), the district judge must conduct de novo review of the magistrate judge's detention order. Under this review standard, the district judge will judge the issues anew, but in doing so, should utilize the factual and evidentiary record developed before the magistrate judge. However, the district judge will reach his/her own findings of fact and conclusions of law.

3d Circuit:
United States v. Delker, 757 F.2d 1390 (3d Cir. 1985)
Following the government's filing of a motion to review the magistrate judge's release order, the district judge may hold an evidentiary hearing in furtherance of the de novo review function.

United States v. Kanawati, 2008 WL 1969964 (D.V.I. 2008)
In conducting de novo review of a magistrate judge's detention order, the district judge may rely on the evidence presented before the magistrate judge. Although not required to do so, the district judge may choose to hold an evidentiary hearing if necessary or desirable to aid in the determination.

United States v. Lemos, 876 F. Supp. 58 (D.N.J. 1995)
The district judge's power to review a magistrate judge's bail determination de novo includes authority to hold a detention hearing, even if the magistrate judge below determined bail conditions without a hearing. Whether the district judge proceeds by live testimony or proffer is within his/her discretion.

Gov. of the Virgin Islands v. Clark, 763 F. Supp. 1321 (D.V.I. 1991), aff'd, 989 F. 2d 487 (3d Cir. 1993), *cert. denied*, 509 U.S. 910 (1993)
The magistrate judge's release order is reviewed de novo by the district judge. The district judge must make an independent determination of the release issue, based upon the factors set forth in 18 U.S.C. § 3142 of the Bail Reform Act.

4th Circuit:
United States v. Stewart, 19 Fed. Appx. 46 (4th Cir. 2001)
When a district judge acts on a motion to revoke or amend a magistrate judge's pretrial detention order, the district judge acts de novo and must make an independent determination of the proper pretrial detention or conditions of release.

United States v. Boyd, 484 F. Supp. 2d 486 (E.D. Va. 2007)
A district judge should review a magistrate judge's ruling on pretrial detention de novo. However, the district judge need not conduct a new detention hearing. The district judge may base his/her decision on the transcript of the original detention hearing, and any additional evidence proferred by counsel.

5th Circuit:
United States v. Nguyen, 166 Fed. Appx. 118 (5th Cir. 2006)
When the district judge acts on a motion to amend a magistrate judge's pretrial detention order, it must act de novo and must make an independent determination of the proper pretrial detention or conditions of release.

United States v. Fortna, 769 F.2d 243 (5th Cir. 1985)
A district judge must review the magistrate judge's detention or release order de novo, but the district judge should not modify the magistrate judge's order in a manner unfavorable to the defendant absent an appeal by the government.

United States v. Torres, 566 F. Supp. 2d 591 (W.D. Tex. 2008)
When prompted to review a magistrate judge's pretrial detention order, the district judge acts de novo, making an independent determination for detention or the appropriate conditions of pretrial release.

United States v. Lee, 156 F. Supp. 2d 620 (E.D. La. 2001)
A magistrate judge's order for detention may be reconsidered by the district court pursuant to 18 U.S.C. § 3145. The standard for the review is an independent review of the record to decide the appropriateness of the decision to detain.

6th Circuit:
United States v. Runnerstrand, 2008 WL 927774 (E.D. Mich. 2008)
The district judge reviews a defendant's appeal of an order of detention de novo.

United States v. Yamini, 91 F. Supp. 2d 1125 (S.D. Ohio 2000)
De novo review of the magistrate judge's detention order is the appropriate standard of review based on prior case law and the legislative history of 18 U.S.C. § 3145. In the absence of de novo review, a court of appeals may not have sufficient information to carry out its duty of prompt determination of appeals from release or detention orders in accordance with § 3145(c).

7th Circuit:
United States v. Torres, 929 F.2d 291 (7th Cir. 1991)
When the defendant's family testified before the magistrate judge at the bail hearing concerning the defendant's family ties as proof that the defendant would not abscond, the district judge on review erred when he declined to read the transcript of the hearing and

refused to permit evidence of family ties to be submitted at a subsequent detention hearing conducted by the district judge.

United States v. Rivera, 2007 WL 2531308 (N.D. Ind. 2007)
Under 18 U.S.C. § 3145(b), the district judge must conduct de novo review of a release or detention order and need not defer to the magistrate judge's findings. The district judge's review may be conducted either by reviewing the transcript, or by holding a new hearing. Although the district judge has authority to conduct a new hearing, the district judge is not required to do so.

United States v. McManus, 2006 WL 3833314 (N.D. Ind. 2006)
When reviewing a magistrate judge's detention order, the district judge must reach his/her own independent conclusions. The court must conduct what is substantially de novo review and need not defer to the magistrate judge's findings.

United States v. Messino, 842 F. Supp. 1107 (N.D. Ill. 1994)
In reviewing a magistrate judge's release order upon the motion of the government, the district judge employs the de novo standard of review and may hear additional evidence or rely on the transcript of the hearing before the magistrate judge as its source of evidence.

United States v. Jones, 804 F. Supp. 1081 (S.D. Ind. 1992)
The appropriate standard to be applied by the district judge to a release or detention order is de novo review. The district court (including a magistrate judge) can review the order of a magistrate judge of another district denying the government's motion for pretrial detention sua sponte and may amend conditions of release.

8th Circuit:
United States v. Foote, 898 F.2d 659 (8th Cir.), *cert. denied sub nom.*, *Thompson v. United States*, 498 U.S. 838 (1990)
The failure to appeal a magistrate judge's pretrial detention order under 18 U.S.C. § 3145 waives consideration of the detention order at a post-conviction appeal.

United States v. Maull, 773 F.2d 1479 (8th Cir. 1985) (en banc)
A district judge should review a magistrate judge's release order de novo. The district judge may hold a detention hearing with all the options available to the district judge that are available to the magistrate judge.

9th Circuit:
United States v. Gebro, 948 F.2d 1118 (9th Cir. 1994)
The district judge had the authority to reopen a magistrate judge's bail order on its own motion sua sponte and order the defendant's detention.

United States v. Koenig, 912 F.2d 1190 (9th Cir. 1990)
A district judge's review of a detention order under 18 U.S.C. § 3145(b) is de novo determination. Under this standard, the district judge should review the evidence before the magistrate judge and make an independent determination as to whether the magistrate judge's findings are correct, with no deference afforded to the findings of the magistrate judge. The determination of the propriety of detention is also to be decided without deference to the magistrate judge's conclusion.

United States v. Petersen, 557 F. Supp. 2d 1124 (E.D. Cal. 2008)
The district judge may hold an evidentiary hearing under the de novo review standard applicable to a magistrate judge's release order. The magistrate judge's order is entitled to no deference, and the district judge is not required to adopt any factual findings made by the magistrate judge.

10th Circuit:
United States v. Cisneros, 328 F. 3d 610 (10th Cir. 2003)
The de novo standard of review governs a district judge's review of a magistrate judge's detention or release order. It is within a district judge's authority to review a magistrate judge's release or detention order sua sponte.

United States v. Nguyen, 2008 WL 482699 (D. Kan. 2008)
The district judge's review of a magistrate judge's order of detention is de novo. The judge must make his or her own determination and must ultimately decide the issue of detention or conditions of release without deference to the magistrate judge's conclusion.

United States v. Jones, 980 F. Supp. 359 (D. Kan. 1997), aff'd, 127 F. 3d 1110 (10th Cir. 2007) (Table disposition)
The district judge must make his/her own de novo determination of the facts in reviewing a magistrate judge's release order with no deference to the magistrate judge's findings. De novo review does not require a de novo evidentiary hearing. All issues of whether or not to take additional evidence are left to the district judge's sound discretion.

11th Circuit:
United States v. King, 849 F.2d 485 (11th Cir. 1988)
Under 18 U.S.C. § 3145, a detainee may move the district court to amend or revoke a magistrate judge's detention order and the district judge must conduct an independent review. The district judge may adopt the magistrate judge's pretrial detention order if the fact findings are supported and the legal conclusions are correct.

United States v. Hurtado, 779 F.2d 1467 (11th Cir. 1985)
When considering a motion to revoke or amend a magistrate judge's detention order, the district judge must undertake an independent (de novo) review.

United States v. Megahed, 519 F. Supp. 2d 1236 (M.D. Fla. 2007)
The district judge reviews de novo a magistrate judge's pretrial release order. If the district judge concludes after a careful review of the parties' papers and the evidence presented at the hearing that the evidence supports the magistrate judge's findings of fact, and if the district judge determines the magistrate judge correctly applied the law, the district judge may then adopt the magistrate judge's release order. If necessary to the resolution of an essential fact issue, the district judge may hold an evidentiary hearing.

D.C. Circuit:
United States v. Epps, 987 F. Supp. 22 (D.D.C. 1997)
Although the magistrate judge who ordered detention made no finding to the effect that two counts of being a felon-in-possession of a firearm charged against the defendant constituted "crimes of violence" that warranted detention, the district judge in de novo review of proceedings before the magistrate judge could make such a determination.

II. Standard of Review Applied by the Court of Appeals

1st Circuit:
United States v. Gianquitto, 89 F.3d 824 (1st Cir. 1996) (Table disposition)
Cognizant of the district court's superior ability to marshal and evaluate facts in pretrial bail cases, the appellate court undertakes an intermediate level of scrutiny that is more rigorous than the abuse-of-discretion or clear-error standards, but short of plenary or de novo review. In bail cases, the appellate court necessarily gives deference to the district court's first-hand determination of fact-based issues.

United States v. Dillon, 938 F.2d 1412 (1st Cir. 1991)
The court of appeals independently reviews the lower court's detention decision, giving deference to determinations made by the trial court.

United States v. O'Brien, 895 F.2d 810 (1st Cir. 1990)
The appellate standard for reviewing pretrial detention orders is to conduct an independent review of all detention proceedings with deference to the district court's decision.

2d Circuit:
United States v. Harrison, 396 F. 3d 1280 (2d Cir. 2005)
The court of appeals held it lacked jurisdiction to review a magistrate judge's detention order when the order had not been reviewed by the district court.

United States v. Hill, 97 Fed. Appx. 350 (2d Cir. 2004)
The district court's decision to deny bail will be reviewed for clear error and will be reversed only if the record as a whole leaves the appellate court with a definite and firm conviction that a mistake has been committed.

United States v. Henderson, 57 Fed. Appx. 470 (2d Cir. 2003)
The district court's revocation of bail and its factual determination that the defendant is a flight risk is reviewed for clear error, but if the court did not formally consider the statutory factors contained in the Bail Reform Act, a more flexible standard will be applied.

United States v. Chimurenga, 760 F.2d 400 (2d Cir. 1985)
The court of appeals applies the clearly erroneous standard in reviewing a district judge's decision overruling a magistrate judge's detention determination.

3d Circuit:
United States v. Himler, 797 F.2d 156 (3d Cir. 1986)
The appellate court's review of a district court's detention order is plenary and must include an independent determination with respect to the statutory criteria for detention or release. Although the court of appeals is not free to ignore the trial court's statement of reasons for the action taken, if, after careful review of the record and of the trial court's reasoning, the appellate court independently reaches a different conclusion, it may amend or reverse the detention decision.

United States v. Perry, 788 F.2d 100 (3d Cir.), *cert. denied*, 479 U.S. 864 (1986)
The court of appeals makes an independent review of both the magistrate judge's and the district judge's decisions under 18 U.S.C. § 3145(c).

4th Circuit:
United States v. Stewart, 19 Fed. Appx. 46 (4th Cir. 2001)
The standard of review for pretrial detention orders under 18 U.S.C. § 3145(c) is one of independent review, with deference given to the determination of the district court.

United States v. Williams, 753 F.2d 329 (4th Cir. 1985)
The court of appeals applies the clearly erroneous standard to the district judge's and the magistrate judge's fact findings, with greater deference given to the conclusions of the Article III judge.

5th Circuit:
United States v. Nguyen, 166 Fed. Appx. 118 (5th Cir. 2006)
Absent an error of law, the appellate court must apply a deferential standard of review and uphold a district court detention order if it is supported by the proceedings below. On appeal, the issue becomes whether the evidence as a whole supports the conclusions of the proceedings below.

United States v. Rueben, 974 F.2d 580 (5th Cir. 1992), *cert. denied*, 507 U.S. 940 (1993)
Absent an error of law, the appellate court must uphold a district court order under the Bail Reform Act if it is supported by the proceedings below, a deferential standard of review equated

with the abuse-of-discretion standard. On appeal, the question becomes whether the evidence as a whole supports the conclusions of the proceedings below.

United States v. Aron, 904 F.2d 221 (5th Cir. 1990)
The court of appeals reviews the factual basis for ordering revocation of release under 18 U.S.C. § 3148(b) under the clearly erroneous standard. A detention order will be sustained if it is supported by the lower court proceedings.

6th Circuit:
United States v. Hinton, 113 Fed. Appx. 76 (6th Cir. 2004)
The district court's factual determinations are reviewed for clear error and mixed questions of law and fact are reviewed de novo.

United States v. Hazime, 762 F.2d 34 (6th Cir. 1985)
The court of appeals will not disturb fact findings of the district judge or the magistrate judge unless the findings are clearly erroneous. Mixed questions of law and fact and legal determinations are reviewed de novo.

7th Circuit:
United States v. Portes, 786 F.2d 758 (7th Cir. 1985)
The court of appeals will not disturb the district judge's or the magistrate judge's fact findings absent a showing that the findings are clearly erroneous. The appellate court makes an independent review of the factors under 18 U.S.C. § 3142(g).

United States v. Diaz, 777 F.2d 1236 (7th Cir. 1985)
Appellate review of the magistrate judge's and the district judge's decision under 18 U.S.C. § 3142 is highly deferential.

8th Circuit:
United States v. Abad, 350 F. 3d 793 (8th Cir. 2003)
The clearly erroneous standard of review is applied to the factual findings made by the district court. However, the district court's conclusions and reasoning relating to the ultimate questions flowing from the factual considerations, such as the determination of conditions that will reasonably assure the appearance of the defendant, should be the subject of independent review.

United States v. Maull, 773 F.2d 1479 (8th Cir. 1985) (en banc)
The court of appeals reviews the district court's factual findings under the clearly erroneous standard, but conclusions of law and articulations of reasoning why the district court detained or released the defendant must be independently reviewed by the appellate court.

9th Circuit:
United States v. Motamedi, 767 F.2d 1403 (9th Cir. 1985)
The court of appeals reviews the district court's factual findings under a deferential, clearly erroneous standard. The appellate court may make an independent examination of the findings

and record to determine whether the pretrial detention order is consistent with the defendant's constitutional and statutory rights.

10th Circuit:

United States v. Stricklin, 932 F.2d 1353 (10th Cir. 1991)

The court of appeals conducts plenary review of the district court's detention or release order with regard to mixed questions of law and fact. The court conducts an independent review, with due deference to the district court's purely factual findings.

11th Circuit:

United States v. Quartermaine, 913 F.2d 910 (11th Cir. 1990)

District court orders granting or denying detention under the Bail Reform Act present mixed questions of fact and law that are subject to plenary review on appeal. Purely factual findings will not be disturbed unless they are clearly erroneous.

United States v. Hurtado, 779 F.2d 1467 (11th Cir. 1985)

The trial court's factual determinations under the Bail Reform Act are subject to appellate review under the clearly erroneous standard. Other statutory factors that require the trial court to determine mixed questions of fact and law are subject to de novo review by the court of appeals.

APPENDIX B: DE NOVO DETERMINATION UNDER 28 U.S.C. § 636(b)(1)(C)

APPENDIX B: DE NOVO DETERMINATION UNDER 28 U.S.C. § 636(b)(1)(C)

The term "de novo determination" is not defined in the Federal Magistrates Act. Federal courts have struggled to define the district judge's responsibilities when reviewing a magistrate judge's report and recommendation under the "de novo determination" standard set forth in § 636(b)(1)(C). Below are cases that discuss the term's meaning under the Act.

I. Nature of De Novo Determination

Supreme Court:

Thomas v. Arn, 474 U.S. 140 (1985)
Although the Federal Magistrates Act does not preclude sua sponte de novo review by the district court where a party fails to file timely objections to the magistrate judge's report and recommendation, the Act does not require the district court to exercise any review when no objections are filed.

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United States v. Raddatz, 447 U.S. 667 (1980)
De novo determination language in § 636(b)(1)(C) permits whatever reliance a district judge, in the exercise of sound judicial discretion, chooses to place on a magistrate judge's report. De novo hearing is not required. Dicta: a district judge's rejection of the magistrate judge's proposed credibility findings without a hearing could give rise to due process questions.

1st Circuit:

Santiago v. Canon, USA, Inc., 138 F.3d 1 (1st Cir. 1998)
When making its de novo determination, the district judge is under no obligation to discover or articulate new legal theories for a party challenging a report and recommendation issued by a magistrate judge.

Gioiosa v. United States, 684 F.2d 176 (1st Cir. 1982)
De novo determination only applies to fact-finding, not to technical legal issues amenable to appellate-type review. The district judge's obligation to review a transcript of proceedings before the magistrate judge is substantially reduced where the magistrate judge's fact-findings are largely unchallenged.

United States v. Sherman, 344 F. Supp. 2d 223 (D. Me. 2004)
The "de novo determination" requirement of § 636 (b)(1)(C) does not mandate a de novo hearing. If the district judge decides not to hold an evidentiary hearing, he or she is required to consider the record that has been developed before the magistrate judge and give fresh consideration to those issues to which specific objections have been made.

United States v. Cadieux, 295 F. Supp. 2d 133 (D. Me. 2004)
A defendant is entitled only to de novo determination, not a mandatory hearing, when a district judge reviews a magistrate judge's proposed findings of fact and recommendation on a motion to suppress evidence under § 636(b)(1)(B).

2d Circuit:
Cullen v. United States, 194 F. 3d 401 (2d Cir. 1999)
A district judge should not reject a proposed finding of a magistrate judge that rests on a credibility determination without having the witness testify before the judge.

United States v. Rosa, 11 F. 3d 315 (2d Cir. 1993), *cert. denied*, 511 U.S. 1042 (1994)
A district judge who receives further testimony when conducting de novo determination of the magistrate judge's report and recommendation on a motion to suppress is not required to hear live evidence from all the witnesses who appeared before the magistrate judge. De novo determination under § 636(b)(1)(C) means that the district judge is free to rehear whatever testimony is deemed necessary to decide the matter.

Pan Am World Airways, Inc. v. Teamsters, 894 F. 2d 36 (2d Cir. 1990)
Litigants are not permitted to present arguments to the district judge that were not raised before the magistrate judge.

Grassia v. Scully, 892 F.2d 16 (2d Cir. 1989)
A district judge has discretion to hold a supplemental hearing sua sponte, even if neither party objects to the magistrate judge's report. The district judge is not required to give deference to the magistrate judge's findings where the district judge holds a supplemental hearing.

Duran v. Phillips, 2008 WL 3919195 (S.D.N.Y. 2008)
The district judge is required to make a de novo determination to the extent that a party makes specific objections to a magistrate judge's findings. Where a party makes only conclusory or general objections, or simply reiterates the original arguments, the district judge will review the report strictly for clear error.

Cartagena v. Connelly, 2008 WL 2169659 (S.D.N.Y. 2008)
Pro se parties are generally accorded leniency when making objections. Nonetheless, even a pro se party's objections must be specific and directed to particular findings in the magistrate judge's report and recommendation, such that no party is afforded a "second bite at the apple" by simply relitigating a prior argument.

Independent Living Aids, Inc. v. Maxi-Aids, Inc., 349 F. Supp. 2d 509 (E.D.N.Y. 2004)
Quoting from the Supreme Court's decision in *Raddatz,* the court noted that the phrase "de novo determination," as opposed to "de novo hearing," was selected by Congress to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chooses to

place on the magistrate judge's findings and recommendations. Section 636 does not require a district judge to rehear contested testimony to carry out the statutory command to make the required "determination." Rather, in making its determination, the district judge in its discretion should review the record and could hear oral argument. A district judge may, in its sound discretion, afford a degree of deference to the magistrate judge's report and recommendations.

3d Circuit:

Hill v. Beyer, 62 F.3d 474 (3d Cir. 1995)

When reviewing a magistrate judge's report and recommendation concerning a prisoner's application for post-conviction relief under 28 U.S.C. § 2254, the district judge may not reject the magistrate judge's findings of fact without an evidentiary hearing, where the finding is based on the credibility of a witness testifying before the magistrate judge and the finding is dispositive.

Sullivan v. Cuyler, 723 F.2d 1077 (3d Cir. 1983)

The district judge's de novo determination was sufficient where the judge reviewed all documents and briefs, listened to the oral argument, and addressed all objections to the magistrate judge's report in the district judge's opinion.

Garcia v. I.N.S., 733 F. Supp. 1554 (M.D. Pa. 1990)

When a magistrate judge makes a finding or ruling on a motion or issue, the ruling should become the ruling of the district judge unless objections are filed. If no objections are filed, the district judge need only review the ruling for plain error or manifest injustice.

4th Circuit:

Youngworth v. U.S. Parole Com'n, 728 F. Supp. 384 (W.D.N.C. 1990)

Failure to raise an argument before the magistrate judge does not result in waiver. The district judge can receive additional evidence to make de novo determination.

United States v. Rembert, 694 F. Supp. 163 (W.D.N.C. 1988)

A magistrate judge's report and recommendation is not self-operating. The magistrate judge's ruling is not valid, even without objections, until a final judgment is entered by an Article III judge.

5th Circuit:

Freeman v. County of Bexar, 142 F.3d 848 (5th Cir. 1998)

The district judge has wide discretion to consider and reconsider the magistrate judge's recommendation when performing de novo review. In the course of performing its open-ended review, the district judge need not reject newly-proffered evidence simply because it was not presented to the magistrate judge. Litigants may not, however, use the magistrate judge as a mere sounding-board for the sufficiency of the evidence. The district judge's

discretion in conducting de novo review should be at least as broad as the district judge's authority to determine motions for reconsideration of its own rulings.

Jordan v. Hargett, 34 F.3d 310 (5th Cir. 1994)
A district judge is required to conduct an evidentiary hearing before rejecting a magistrate judge's recommendation that habeas corpus relief be granted based on a violation of the right of a criminal defendant to testify on his own behalf at trial. The district judge has limited discretion when conducting de novo determination under § 636(b)(1)(C) to reject the magistrate judge's fact-finding where the finding is based on the credibility of the witnesses heard by the magistrate judge, and the finding is dispositive of the criminal defendant's claim.

Wesson v. Oglesby, 910 F.2d 278 (5th Cir. 1990)
The district judge abused its discretion by adopting recommended findings of the magistrate judge that were clearly based on an impermissible credibility assessments and failed to conduct adequate de novo determination when it adopted the magistrate judge's report and supplemental report apparently without benefit of a transcript or tape recording of the *Spears* hearing conducted by the magistrate judge.

United States v. Wilson, 864 F.2d 1219 (5th Cir.), *cert. denied*, 492 U.S. 918 (1989)
De novo determination is not required where the parties fail to file objections. The clearly erroneous, contrary to law, or abuse of discretion standards of review are appropriate under these circumstances.

Butler v. Bexar County, Texas, 2007 WL 3128593 (W.D. Tex. 2007)
De novo review of a magistrate judge's recommendation requires the district judge to consider the relevant evidence of record and not merely review the magistrate judge's recommendation.

6th Circuit:
United States v. Bermudez, 238 F.3d 424 (6th Cir. 2000)
A district judge normally should not reject a magistrate judge's proposed finding that rests on a credibility determination without hearing testimony from the witness.

Mira v. Marshall, 806 F.2d 636 (6th Cir. 1986)
De novo determination refers only to matters involving disputed facts.

Victoria's Secret Stores v. Artco Equipment Co., Inc., 194 F. Supp. 2d 704 (S.D. Ohio 2002)
The de novo standard of review contrasts with the "clearly erroneous" standard of review applicable to non-dispositive, pretrial matters. A de novo determination requires that fresh consideration be given to issues to which specific objections have been made by a party. The district judge should consider the record developed by the magistrate judge before making its own determination on the basis of that record.

United States v. McCrimmon, 2002 WL 31008239 (E.D. Mich. 2002)
Upon reconsideration, the district judge concluded that he erred in making dispositive credibility determinations, and thereby rejecting the magistrate judge's credibility findings, without the benefit of his own evidentiary hearing.

7th Circuit:
Delgado v. Bowen, 782 F.2d 79 (7th Cir. 1986)
De novo determination under § 636(b)(1)(C) permits the district judge to conduct de novo review at all times, but only mandates de novo determination when objections are raised.

8th Circuit:
United States v. Benitez, 244 Fed. Appx. 64 (8th Cir. 2007)
When the magistrate judge's report is based upon an evidentiary hearing, de novo review requires, at a minimum, that the district judge listen to the tape of the hearing or read the hearing transcript.

Taylor v. Farrier, 910 F.2d 518 (8th Cir. 1990)
The absence of a transcript or a tape recording of the evidentiary hearing before the magistrate judge makes de novo determination by the district judge impossible. De novo determination applies to all objections made to the report and recommendation, including objections to credibility findings by the magistrate judge.

9th Circuit:
United States v. Howell, 231 F. 3d 615 (9th Cir. 2000), *cert. denied,* 534 U.S. 831 (2001)
A district judge has the discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation. In deciding whether to consider newly offered evidence, the district judge must actually exercise its discretion, rather than summarily accepting or denying the motion. The language and legislative history of the Federal Magistrates Act, Supreme Court precedent, and practical considerations support this conclusion.

Boniface v. Carlson, 881 F.2d 669 (9th Cir. 1989)
Whether the district judge should issue a separate opinion when adopting a magistrate judge's report and recommendation is entirely within the district judge's discretion.

10th Circuit:
In re Griego, 64 F.3d 580 (10th Cir. 1996)
De novo determination required the district judge to consider the relevant evidence in the record and not merely review the magistrate judge's recommendation.

Johnson v. Rogers, 756 F.2d 79 (10th Cir. 1985)
De novo determination did not require a de novo hearing or a remand to the magistrate judge for additional fact finding.

Nat. R.R. Passenger Corp. v. Koch Industries, Inc., 701 F.2d 108 (10th Cir. 1983)
The district judge must review a transcript to conduct proper de novo determination of mixed questions of law and fact. An examination of pleadings and hearing arguments was insufficient.

11th Circuit:
Stephens v. Tolbert, 471 F.3d 1173 (11th Cir. 2006)
The district judge, in conducting de novo review of a report and recommendation by a magistrate judge, did not abuse his discretion when he considered an argument that was not raised before the magistrate judge.

In re Holywell Corp., 967 F.2d 568 (11th Cir. 1992)
Where a party objects to portions of the record before the magistrate judge, de novo determination requires only the independent review of those portions of the record by the district judge.

Diaz v. United States, 930 F.2d 832 (11th Cir. 1991)
De novo determination does not require the district judge to reiterate the magistrate judge's findings and conclusions where the district judge accepts the magistrate judge's report in its entirety.

United States v. Solomon, 728 F.Supp. 1544 (S.D. Fla. 1990)
Parties objecting to the magistrate judge's report and recommendation were not entitled to a de novo hearing before the district judge. Requiring another hearing would undermine judicial economy.

LaMarca v. Turner, 662 F. Supp 647 (S.D. Fla. 1987), *appeal dismissed*, 861 F.2d 724 (11th Cir. 1988)
Congress intended "de novo determination" to give the district judge discretion to place whatever reliance he or she chooses on the magistrate judge's findings and recommendations. The district judge should give substantial deference to the magistrate judge's credibility findings.

II. Presumption That District Judge Has Conducted De Novo Determination

It is generally presumed that the district judge has performed de novo determination mandated by the Federal Magistrates Act whenever a party has filed timely objections to a magistrate judge's report and recommendation under § 636(b)(1)(C). Several courts, however, have examined circumstances where this presumption may be challenged by litigants.

2d Circuit:

Claude v. Peikes, 534 F. 3d 801 (2d Cir. 2008)

It is presumed that the district judge made a de novo review of the magistrate judge's report and recommendation unless affirmative evidence indicates otherwise.

Murphy v. Int'l Bus. Mach. Corp., 23 F.3d 719 (2d Cir.), *cert. denied*, 513 U.S. 876 (1994)

The court of appeals would not construe the brevity of the district judge's order adopting the magistrate judge's report and recommendation as an indication that the appellant's objections to the magistrate judge's report and recommendation were not given due consideration under the district judge's de novo determination, particularly in view of the report's correctness on the merits.

4th Circuit:

Biles v. Maryland House of Correction, 151 F.3d 1028 (4th Cir. 1998) (Table disposition)

It was fair for the court of appeals to presume that the district judge knew of the requirement to conduct de novo determination under § 636(b)(1)(C) because to do otherwise would necessarily create a presumption that the district judge acted improperly.

Stickles v. Derwinski, 929 F.2d 694 (4th Cir.), *cert. denied*, 504 U.S. 929 (1992) (Table disposition)

Where a party filed timely objections to the magistrate judge's recommendation for summary judgment, and the district judge adopted the recommendation without considering the objections, the district judge committed error requiring the order to be vacated and remanded.

5th Circuit:

Bannistor v. Ullman, 287 F. 3d 394 (5th Cir. 2002)

A district judge's statement that de novo review was conducted is presumptively valid, if not dispositive. Furthermore, while the district judge may have erred by adopting the magistrate judge's report before objections were filed, the appellants suffered no prejudice because the district judge stated he had conducted de novo review, and, after the appellants nevertheless filed objections, the district judge reviewed and overruled the objections shortly thereafter.

Lara v. Johnson, 141 F.3d 239 (5th Cir. 1998)

Where the district judge adopted the magistrate judge's report and recommendation in a habeas corpus matter two days before receiving petitioner's timely objections, the appellate court would not conclude that the district judge did not perform mandated de novo review absent specific evidence to the contrary. The appellate court upheld the district judge's ruling where the district judge later stated that he reviewed the petitioner's objections and concluded that the result would have been the same even if he had received the objections earlier.

Longmire v. Guste, 921 F.2d 620 (5th Cir. 1991)
The district judge's order adopting the recommendations in the magistrate judge's report "for the reasons set forth in the magistrate's report" did not indicate a failure to conduct de novo determination. District judges are assumed to perform their statutory obligations.

Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982)
In cases where objections have been filed, a district judge cannot reject a magistrate judge's recommendation without consulting a transcript of the hearing before the magistrate judge.

6th Circuit:
Sutton v. United States Small Business Administration, 92 Fed. Appx. 112 (6th Cir. 2003)
Notwithstanding the absence of an affirmation in the district judge's order that de novo review was conducted, the court of appeals presumes that the district judge conducted de novo review when there is no persuasive indication otherwise.

7th Circuit:
Ramirez v. Turner, 991 F.2d 351 (7th Cir. 1993)
A district judge did not fulfill the statutory duty to conduct de novo determination where a transcript of the proceedings before the magistrate judge was not completed until two months after the district judge entered an order approving the magistrate judge's report and recommendation.

8th Circuit:
United States v. Benitez, 244 Fed. Appx. 64 (8th Cir. 2007)
De novo review is presumed unless there is affirmative evidence in the record indicating that the review was not conducted. When a magistrate judge's report is based on an evidentiary hearing, de novo review requires, at a minimum, that the district judge listen to a tape of the hearing or read the hearing transcript. The presumption of de novo review will be negated if: (1) the hearing transcript was not available to the district judge; (2) the district judge offers no indication that he or she listened to the tapes, and (3) the district judge did not state that he or she had reviewed the records or files.

Chatt v. Tyner, 1999 WL 34970516 (8th Cir. 1999)
The presumption of de novo review is negated where the district judge indicated only that he had received the magistrate judge's report and the objections, and that he was adopting the findings and recommendations "after careful review." Here, the full transcript of the evidentiary hearing was not filed with the district judge until after the case had been dismissed, and the judge did not indicate that he had conducted de novo review, that it had listened to a tape recording of the hearing, or that the tapes were available.

Grinder v. Gammon, 73 F.3d 793 (8th Cir.1996)
Where the district judge erroneously believed that no objections to the magistrate judge's report and recommendation had been filed and that the filing period for objections had expired, the appellant demonstrated a prima facie case that de novo determination had not been performed, overcoming the presumption that the district judge had conducted statutorily mandated review.

Jones v. Pillow, 47 F.3d 251 (8th Cir. 1995)
A presumption that proper de novo determination was conducted is not appropriate where, at the time the district judge adopted the magistrate judge's recommendations, a transcript of the proceedings before the magistrate judge had not been prepared and there was no indication in the district judge's order that the district judge listened to a tape of the proceedings.

Sumlin v. United States, 46 F.3d 48 (8th Cir. 1995)
The district judge's adoption of magistrate judge's report and recommendation before the filing period for objections had expired and in the absence of objections does not automatically warrant the presumption that the judge acted without de novo review. Where no other evidence indicating failure to perform de novo review was offered, the judge will presume proper review by the district judge.

Branch v. Martin, 886 F.2d 1043 (8th Cir. 1989)
Where a party makes specific and timely objections to the magistrate judge's findings that are based on conflicting testimony and evidence, the district judge must consider the actual testimony by listening to a tape recording or reading the transcript of the proceeding. In the case at bar, proper de novo determination was impossible absent the existence of either a tape recording or a transcript.

10th Circuit:
McCormack v. Jones, 248 Fed. Appx. 29 (10th Cir. 2007)
Where the district judge stated in his order adopting the recommendation of the magistrate judge that he reviewed the report and recommendation in light of the objections, and that he had considered the record, pleadings, and applicable law, this was sufficient to indicate that the judge had performed the required de novo review.

Northington v. Marin, 102 F.3d 1564 (10th Cir. 1996)
The district judge is presumed to know that de novo review is required. Consequently, a brief order from the district judge expressly stating that it conducted de novo review is sufficient absent other evidence showing that such review was not conducted.

In re Griego, 64 F.3d 580 (10th Cir. 1996)
The court of appeals will presume that the district judge is aware of the requirement for conducting proper de novo determination. An objecting party must offer specific evidence that the district judge did not conduct proper review to overcome this presumption.

Bratcher v. Bray-Doyle Independent School District, 8 F.3d 722 (10th Cir. 1993)
The district judge's duty in conducting de novo determination was satisfied only by considering actual testimony or other relevant evidence on the record and not by merely reviewing the magistrate judge's report and recommendation. The appellate court will presume that the district judge knows what is required for de novo determination and an express statement by the district judge that it conducted de novo determination of the record will not be disturbed absent some clear indication otherwise.

Clark v. Poulton, 963 F.2d 1361 (10th Cir.), *cert. denied*, 506 U.S. 1014 (1992)
The district judge is considered presumptively aware of an earlier court decision requiring the district judge, at a minimum, to listen to a tape recording or read a transcript of the evidentiary proceeding before the magistrate judge. The district judge is presumed to have listened to a tape of the proceeding when adopting the magistrate judge's recommendation before a transcript has been completed, absent evidence to the contrary.

Andrews v. Deland, 943 F.2d 1162 (10th Cir. 1991), *cert. denied*, 502 U.S. 1110 (1992)
The court of appeals will not look behind a district judge's express statement that it engaged in de novo determination of proceedings before a magistrate judge.

Ocelot Oil Corp. v. Sparrow Industries, 847 F.2d 1458 (10th Cir. 1988)
The district judge's statement that he had laboriously poured over the record was insufficient to show that de novo review was conducted where the judge also stated that it would not substitute its judgment for that of the magistrate judge, thereby demonstrating deference to the magistrate judge that was inconsistent with de novo review.

11th Circuit:
Jeffry S. by Ernest S. v. State Bd. of Educ., 896 F.2d 507 (11th Cir. 1990)
At a minimum, the district judge must review a transcript or tape of proceedings before the magistrate judge when conducting de novo determination. The district judge's adoption of all but one of the magistrate judge's recommendations after reviewing the magistrate judge's report for four days was insufficient to constitute proper de novo determinations where a six-day evidentiary hearing before the magistrate judge resulted in six volumes of transcripts and sixty pages of objections to the magistrate judge's report.

APPENDIX C: WAIVER UNDER 28 U.S.C. § 636(b)(1)(B)

APPENDIX C: WAIVER UNDER 28 U.S.C. § 636(b)(1)(B)

Various waiver issues arise under the Federal Magistrates Act, particularly under provisions governing the referral of case-dispositive matters to magistrate judges on a report and recommendation basis. Section 636(b)(1)(B) states that any party "may serve and file written objections" to a magistrate judge's report and recommendation "[w]ithin ten days after being served with a copy." Fed. R. Civ. P. 72 also provides that parties may file objections to a magistrate judge's report and recommendation "[w]ithin 10 days after being served with a copy of the recommended disposition." In 2005, Fed. R. Crim. P. 59 was promulgated, which sets forth similar procedures for the filing of objections to a magistrate judge's report and recommendation in a criminal case. Rule 59(b)(2) also explicitly invokes waiver, stating in relevant part, "[f]ailure to object in accordance with this rule waives a party's right to review."

Courts have disagreed on the extent to which litigants who fail to raise issues before a magistrate judge or fail to file timely objections to a magistrate judge's report and recommendation waive these objections before the district judge and, later, waive their rights to review before the court of appeals. Below are cases that discuss waiver issues in several contexts.

I. Failure to File Proper Objections: District Judge Review

Waiver issues exist at the district court level. Courts disagree on whether a party's failure to file proper objections to a magistrate judge's report and recommendation waives the right to de novo determination by the district judge or whether the district judge remains obligated to review legal issues in the report despite a party's failure to object. Most courts allow great discretion to the district judge.

Supreme Court:

Peretz v. United States, 501 U.S. 923 (1991)

Dicta: In upholding § 636(b)(1)(B) in *United States v. Raddatz*, 447 U.S. 667 (1980), the Supreme Court established that de novo determination need not be exercised unless requested by the parties.

Thomas v. Arn, 474 U.S. 140 (1985)

The Federal Magistrates Act does not preclude sua sponte review of a magistrate judge's report and recommendation by the district court. Courts may adopt local rules, however, whereby de novo review may be waived if a party fails to file timely objections to a magistrate judge's report and recommendation.

United States v. Raddatz, 447 U.S. 667 (1980)

"While the district judge alone acts as the ultimate decisionmaker, the [Federal Magistrates Act] grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings."

Mathews v. Weber, 423 U.S. 261 (1976)
"The district court is free to follow [the magistrate judge's report and recommendation] or to wholly ignore it, or, if he is not satisfied, he may conduct the review in whole or in part anew. The authority - and the responsibility - to make an informed, final determination ... remains with the judge."

A. Waiver of Issues of Both Law and Fact

Consistent with the Supreme Court's dicta in *Peretz*, several courts have held that failure to object to the magistrate judge's report and recommendation frees the district judge from any obligation to make a de novo determination of the report under § 636(b)(1)(B).

1st Circuit:
Colt Defense, LLC v. Bushmaster Firearms, 486 F. 3d 701 (1st. Cir. 2007)
Given proper notice, a party's failure to assert a specific objection to a report and recommendation irretrievably waives any right to review by either the district judge or the court of appeals.

3d Circuit:
Henderson v. Carlson, 812 F.2d 874 (3d Cir.), *cert. denied*, 484 U.S. 837 (1987)
Failure to object may waive de novo review by the district court of both fact and law findings, but does not waive appellate review.

4th Circuit:
Diamond v. Colonial Life and Accident Ins. Co., 416 F. 3d 310 (4th Cir. 2005)
In the absence of a timely filed objection, a district judge is not required to conduct de novo review of the magistrate judge's report and recommendation. The judge must only satisfy itself that there is no clear error on the face of the record in order to accept the report and recommendation.

Camby v. Davis, 718 F.2d 198 (4th Cir. 1983)
No explanation is necessary for a district court to summarily affirm the magistrate judge's report and recommendation absent objections.

5th Circuit:
Villarreal v. Smith, 201 Fed. Appx. 192 (5th Cir. 2006)
Failure to file written objections to the proposed findings and recommendations of the magistrate judge within ten days of service bars an aggrieved party of de novo review from the district court, except on the grounds of clear error or manifest injustice.

United States v. Pierce, 959 F.2d 1297 (5th Cir.), *cert. denied*, 506 U.S. 1007 (1992)
If objections are untimely, an aggrieved party is not entitled to de novo review of the magistrate judge's findings and recommendations.

Rodriguez v. Bowen, 857 F.2d 275 (5th Cir. 1988)
A party is not entitled to de novo review of a magistrate judge's finding and recommendations if objections are not raised in writing by the aggrieved party within ten days after being served with a copy of the magistrate judge's report.

6th Circuit:
Veltkamp v. Commissioner of Social Security, 528 F. Supp. 2d 716 (W.D. Mich.2007)
The failure to file timely specific objections to a magistrate judge's report and recommendation obviates not only de novo district-judge review of the report and recommendation, but all district-judge review.

8th Circuit:
United States v. Rodriguez, 484 F. 3d 1006 (8th Cir.), *cert. denied,* 552 U.S. 890 (2007)
The defendant's failure to file timely objections to the magistrate judge's report and recommendation on his motion to suppress served to waive his right to de novo review by the district judge of any portion of the report and recommendation.

9th Circuit:
United States v. Reyna-Tapia, 328 F.3d 1114 (9th Cir. 2003) (*en banc*), *cert. denied*, 540 U.S. 900 (2003)
A district judge need not conduct de novo review of a magistrate judge's findings and recommendations if no party objects. Neither the Constitution nor 28 U.S.C. 636(b)(1)(C) requires a district judge to review de novo findings and recommendations that the parties themselves accept as correct.

B. Waiver of Issues of Fact

Courts in the Eleventh Circuit have held that failure to file objections to a magistrate judge's report and recommendation constitutes only a waiver of challenges to the magistrate judge's findings of fact, but district judges are still required to review the legal conclusions made in the report and recommendation.

11th Circuit:
Garvey v. Vaughan, 993 F.2d 776 (1993)
Where a party did not file specific objections to factual findings by the magistrate judge, there was no requirement that the district court conduct de novo review of those findings.

IFG Network Securities v. King, 282 F. Supp. 2d 1344 (M.D. Fla. 2003)
In the absence of specific objections, there is no requirement that a district judge review factual findings de novo. However, regardless of whether objections are filed, a district judge must review de novo a magistrate judge's legal conclusions.

C. Sua Sponte Review

Bolstered by references to sua sponte review made by the Supreme Court in *Mathews v. Weber* and *Thomas v. Arn*, as well as the plain language of 28 U.S.C. § 636(b)(1)(B), all courts that have addressed the issue have concluded that district judges have discretionary authority under § 636(b)(1)(B) to conduct de novo determination of magistrate judges' reports and recommendations sua sponte, even where litigants fail to file timely objections.

1st Circuit:
Crooker v. Van Higgins, 682 F. Supp. 1274 (D. Mass. 1988)
Although the district court has discretion to ignore arguments not made before a magistrate judge, the court is not required to do so.

2d Circuit:
Grassia v. Scully, 892 F.2d 16 (2d Cir. 1989)
Even if neither party objects to the magistrate judge's recommendation, the district court is not bound by the magistrate judge's recommendation and may review it sua sponte.

4th Circuit:
Van Harris v. United States, 473 F. Supp. 2d 723 (S.D. W.Va. 2007)
Although neither party filed objections to the magistrate judge's report and recommendation, the district judge rejected the magistrate judge's report where he found an error of law "apparent on its face."

5th Circuit:
Equitable Life Assur. Soc. v. Mangel Stores, 691 F. Supp. 987 (E.D. La. 1988)
A court may give whatever review it deems appropriate of the magistrate judge's recommendations if objections are not filed.

7th Circuit:
United States v. Jaramillo, 891 F.2d 620 (7th Cir. 1989), *cert. denied*, 494 U.S. 1069 (1990)
A magistrate judge's decision to view an argument as waived is in no sense binding on a district judge. The decision to accept or reject such an argument is left completely to the district judge's sound discretion.

10th Circuit:
Summers v. State of Utah, 927 F.2d 1165 (10th Cir. 1991)
Adistrict court is accorded considerable discretion with respect to the treatment of unchallenged magistrate judge reports. In the absence of timely objection, the district court may review a magistrate judge's report under any standard it deems appropriate.

II. Failure to File Proper Objections: Appellate Review

Waiver issues also arise when a case originally referred to a magistrate judge for the preparation of a report and recommendation under 28 U.S.C. § 636(b)(1(B) is appealed for review by the court of appeals. Courts disagree on the extent to which a party's failure to file proper objections to a magistrate judge's report and recommendation results in a waiver of the right to appellate review. Moreover, as discussed further below courts of appeal also recognize several exceptions to this waiver rule.

Supreme Court:
Thomas v. Arn, 474 U.S. 140 (1985)
The supervisory powers of the courts of appeals include the discretion to impose waiver rules for failure to object to magistrate judges' recommendations; Article III concerns are not implicated by such waiver.

A. Waiver of Issues of Both Law and Fact

Several courts of appeals have concluded that a party's failure to make timely objections to the magistrate judge's report and recommendation in some circumstances may constitute a waiver of appellate review of both factual and legal issues.

1st Circuit:
Colt Defense, LLC v. Bushmaster Firearms, 486 F. 3d 701 (1st. Cir. 2007)

Santiago v. Canon USA, Inc., 138 F.3d 1 (1st Cir. 1998)

Henley Drilling Co. v. McGee, 36 F.3d 143 (1st Cir. 1994)

2d Circuit:
Davis v. Geren, 272 Fed. Appx. 82 (2d Cir. 2008)

F.D.I.C. v. Hillcrest Associates, 66 F.3d 566 (2d Cir. 1995)

Roldan v. Racette, 984 F.2d 85 (2d Cir. 1993)

Small v. Sec'y of Health & Human Services, 892 F.2d 15 (2d Cir. 1989)

4th Circuit:
United States v. Midgette, 478 F.3d 616 (4th Cir. 2007)

Farmer v. McBride, 177 Fed. Appx. 327 (4th Cir. 2006)

Diamond v. Colonial Life and Acc. Ins. Co., 416 F. 3d 310 (4th Cir. 2005), *cert. denied,* 546 U.S. 1091 (2006)

Wells v. Shriners Hospital, 109 F.3d 198 (4th Cir. 1997)

Snyder v. Ridenour, 889 F.2d 1363 (4th Cir. 1989)

6th Circuit:
Stockard v. Astrue, 293 Fed. Appx. 393 (6th Cir. 2008)

Miller v. Currie, 50 F.3d 373 (6th Cir. 1995)

Howard v. Secretary of Health and Human Services, 932 F.2d 505 (6th Cir. 1991)

7th Circuit:
United States v. Hall, 462 F. 3d 684 (7th Cir. 2006), *cert. denied,* 549 U.S. 1213 (2007)

United States v. Hernandez-Rivas, 248 F.3d 595 (7th Cir. 2003)

Lorentzen v. Anderson Pest Control, 64 F.3d 327 (7th Cir. 1995), *cert. denied sub nom., Carlson v. ICI Americas, Inc.,* 517 U.S. 1136 (1996)

10th Circuit:
Duffield v. Jackson, 545 F.3d 1234 (10th Cir. 2008)

Morales-Fernandez v. Immigration and Naturalization Service, 418 F.3d 1116 (10th Cir.2005)

Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992)

B. Waiver of Issues of Fact

Four courts of appeals apply a different waiver standard, holding that only issues of fact are waived by a litigant's failure to object, while issues of law are preserved on appeal.

3d Circuit:
Henderson v. Carlson, 812 F.2d 874 (3d Cir.), *cert. denied*, 484 U.S. 837 (1987)

8th Circuit:
United States v. Rodriguez, 484 F. 3d 1006 (8th Cir.), *cert. denied,* 552 U.S. 316 (2007)

Halpin v. Shalala, 999 F.2d 342 (8th Cir. 1993)

Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990)

9th Circuit:
Robbins v. Carey, 481 F. 3d 1143 (9th Cir. 2007)

Turner v. Duncan, 158 F.3d 449 (9th Cir. 1998)

F.D.I.C. v. Zook Bros. Const. Co., 973 F.2d 1448 (9th Cir. 1992)

Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991)

11th Circuit:
Tillman v. Barnhart, 144 Fed. Appx. 836 (11th Cir. 2005)

Resolution Trust Corp. v. Hallmark Builders, Inc., 996 F.2d 1144 (11th Cir. 1993)

C. Exceptions to the Waiver Rule at the Appellate Level

Courts have recognized several exceptions to appellate waiver rules.

1. Inadequate Notice to Parties

Many courts have ruled that either the local rules of court or the magistrate judge's report and recommendation must state explicitly that a party waives review of a magistrate judge's report and recommendation if timely objections are not filed. This line of cases appears to derive from *Thomas v. Arn,* 474 U.S. 140 (1985), in which the Supreme Court noted that courts of appeals may adopt rules conditioning appeal upon the filing of objections with the district court, at least when such a rule "incorporates clear notice to the litigants and an opportunity to seek an extension of time for filing objections..." Id. at 155. The absence of sufficiently specific notice has therefore been held to create an exception to the waiver rule. This exception is often invoked for pro se litigants.

1st Circuit:
United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986)

2d Circuit:
Caidor v. Onondaga County, 517 F.3d 601 (2d Cir. 2008)

United States v. Male Juvenile, 121 F.3d 34 (2d Cir. 1997)

Small v. Sec'y of Health and Human Services, 892 F.2d 15 (2d Cir. 1989)

3d Circuit:
Leyva v. Williams, 504 F. 3d 357 (3d Cir. 2007)

4th Circuit:
Wright v. Collins, 766 F.2d 841 (4th Cir. 1985)

6th Circuit:
Mattox v. City of Forest Park, 183 F.3d 515 (6th Cir. 1999)

United States v. Walters, 638 F.2d 947 (6th Cir. 1981)

7th Circuit:
Kruger v. Apfel, 214 F. 3d 784 (7th Cir. 2000)

8th Circuit:
Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990)

Messimer v. Lockhart, 702 F.2d 729 (8th Cir. 1983)

10th Circuit:
Duffield v. Jackson, 545 F.3d 1234 (10th Cir. 2008)

Halpin v. Simmons, 234 Fed. Appx. 818 (10th Cir. 2007)

Fero v. Kerby, 39 F.3d 1462 (10th Cir. 1994), *cert. denied,* 515 U.S. 1122 (1995)

Moore v. United States, 950 F.2d 656 (10th Cir. 1991)

2. "Interests of Justice," "Fundamental Error" or Plain Error

Many courts recognize an exception to the waiver rule where the court's refusal to consider the litigant's untimely or unraised objection would constitute plain error that would prejudice the party. Some courts state that this exception permitting the consideration of arguments that would otherwise be waived due to failure to file objections where to do so would be "in the interests of justice." Similarly, other courts overlook a party's failure to file timely objections where such objections were not "egregiously late" and the opposing party is not prejudiced by the late objections.

1st Circuit:
Park Motor Mart v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980)

2d Circuit:
Porter v. Potter, 219 Fed Appx. 112 (2d Cir. 2007)

United States v. Male Juvenile, 121 F.3d 34 (2d Cir. 1997)

3d Circuit:
Nara v. Franks, 488 F. 3d 187 (3d Cir. 2007), *cert. denied sub nom., Lawler v. Nara,* 552 U.S.1309 (2008)

Grandison v. Moore, 786 F.2d 146 (3d Cir. 1986)

4th Circuit:
United States v. Benton, 523 F. 3d 424 (4th Cir.), *cert. denied,* 555 U.S. 998 (2008)

Snyder v. Ridenour, 889 F.2d 1363 (4th Cir. 1989)

5th Circuit:
Douglass v. United Serv. Auto. Assoc., 79 F. 3d 1415 (5th Cir. 1996)

6th Circuit:
Gant v. Genco I, Inc., 274 Fed. Appx. 429 (6th Cir. 2008)

Gwin v. Commissioner of Social Security, 109 Fed. Appx. 102 (6th Cir. 2004)

Vaughn v. Lawrenceburg Power System, 269 F. 3d 703 (6th Cir. 2001)

Kelly v. Withrow, 25 F.3d 363 (6th Cir.), *cert. denied*, 513 U.S. 1061 (1994)

Kent v. Johnson, 821 F.2d 1220 (6th Cir. 1987)

7th Circuit:
United States v. Charles, 476 F. 3d 492 (7th Cir. 2007)

United States v. Robinson, 30 F.3d 774 (7th Cir. 1994)

Hunger v. Leininger, 15 F.3d 664 (7th Cir.), *cert. denied,* 513 U.S. 839 (1994)

8th Circuit:
United States v. Robinson, 253 F.3d 1065 (8th Cir. 2001)

Griffini v. Mitchell, 31 F.3d 690 (6th Cir. 1994)

10th Circuit:
Duffield v. Jackson, 545 F.3d 1234 (10th Cir. 2008)

Broadus v. Corrections Corporation of America, Inc., 167 Fed. Appx. 13 (10th Cir. 2006)

Morales-Fernandez v. Immigration and Naturalization Service, 418 F.3d 1116 (10th Cir.2005)

Moore v. United States, 950 F.2d 656 (10th Cir. 1991)

11th Circuit:
Resolution Trust Corp. v. Hallmark Builders, 996 F.2d 1144 (11th Cir. 1993)

III. Failure to Raise Argument Before the Magistrate Judge

Waiver issues also arise when litigants fail to raise arguments or defenses before the magistrate judge when a case-dispositive motion has been referred to a magistrate judge under § 636(b)(1)(B), but then attempt to raise the same arguments before the district judge. Courts have generally held that the district judge has broad discretionary authority to either forego de novo determination of arguments not raised first before the magistrate judge or to consider arguments not previously presented to the magistrate judge.

1st Circuit:
Fireman's Insurance Co. v. Todesca Equipment Co., 310 F. 3d 32 (1st Cir. 2002)

Santiago v. Canon, USA, Inc., 138 F.3d 1 (1st Cir. 1998)

Business Credit Leasing v. City of Biddeford, 978 F.2d 767 (1st Cir. 1992)

Paterson-Leitch v. Massachusetts Elec., 840 F.2d 985 (1st Cir. 1988)

Fonseca-Arroyo v. Puerto Rico Electric Power Authority, 367 F. Supp. 2d 198 (D.P.R. 2005)

2d Circuit:
Edwards v. Fischer, 414 F. Supp. 2d 342 (S.D. N.Y. 2006)

Pan Am World Airways, Inc. v. Teamsters, 894 F. 2d 36 (2d Cir. 1990)

3d Circuit:
Sample v. Diecks, 885 F.2d 1099 (3d Cir. 1989)

4th Circuit:
United States v. George, 971 F.2d 1113 (4th Cir. 1992)
A party was permitted to raise arguments before the district judge relevant to any issue to which proper objection was made to the magistrate judge's report and recommendation, even though some of the arguments were not raised before the magistrate judge.

5th Circuit:
Cupit v. Whitley, 28 F.3d 532 (5th Cir. 1994), *cert. denied*, 513 U.S. 1163 (1995)

6th Circuit:
Ward v. United States, 208 F. 3d 216 (6th Cir.) (Table disposition -- text available on WESTLAW), *cert. denied*, 531 U.S. 1015 (2000)

United States v. Waters, 158 F.3d 933 (6th Cir. 1998)

7th Circuit:
Runda v. Shalala, 27 F.3d 569 (7th Cir. 1994) (Table disposition -- text available on WESTLAW)

United States v. Jaramillo, 891 F.2d 620 (7th Cir. 1989), *cert. denied*, 494 U.S. 1069 (1990)
Where the government failed to raise the issue of probable cause until after the magistrate judge recommended that the evidence be suppressed, the magistrate judge's recommendation that the probable cause issue had been waived was not binding on the district judge.

9th Circuit:
United States v. Howell, 231 F.3d 615 (9th Cir. 2000)

Bolar v. Bodgett, 29 F.3d 630 (9th Cir. 1994) (Table disposition -- text available on WESTLAW)

Greenhow v. Sec. of Health & Human Services, 863 F.2d 633 (9th Cir. 1988), *overruled in part on other grounds by United States v. Hardesty,* 977 F. 2d 1347 (9th Cir. 1992) (en banc)

10th Circuit:
Cole v. New Mexico, 58 Fed. Appx. 825 (10th Cir.), *cert. denied,* 540 U.S. 832 (2003)

Shields v. Callahan, 116 F.3d 489 (10th Cir. 1997) (Table disposition -- text available on WESTLAW)

Marshall v. Chater, 75 F.3d 1421 (10th Cir. 1996)

11th Circuit:
Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009)

Stephens v. Tolbert, 471 F. 3d 1173 (11th Cir. 2006)

Lewis v. Smith, 855 F.2d 736 (11th Cir. 1988)

D.C. Circuit:
Students Against Genocide v. Department of State, 257 F.3d 828 (D.C. Cir. 2001)