

INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES

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 of 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 judges rather than serve as a lower tier court. The Judicial Conference also has stated 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 generally is set forth in the Federal Magistrates Act of 1968 (Pub. L. No. 90-578), as revised in 1976 (Pub. L. No. 94-577) and 1979 (Pub. L. No. 96-82). The basic provisions are found at 28 U.S.C. § 636. Other statutory grants of authority to magistrate judges appear throughout the United States Code.

This Inventory is the result of a recommendation by the Federal Courts Study Committee to Congress that a catalog of all cases relating to the authority of magistrate judges be compiled and made available to district judges. Court decisions addressing the validity of various references of duties to magistrate judges are listed by circuit. The Inventory also contains references to other duties that have not been addressed specifically in case law or by statute that some districts are known to refer to magistrate judges.

§ 1. COMMISSIONER DUTIES UNDER 28 U.S.C. § 636(a)(1)

28 U.S.C. § 636(a) states in relevant part:

Each United States magistrate [judge] serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(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 judges system, building upon and superseding the 175-year old United States commissioners system. What follows is a list of the powers and duties conferred upon United States commissioners prior to enactment of the Federal Magistrates Act in 1968.

A. SEARCH WARRANTS AND ARREST WARRANTS [FED. R. CRIM. P. 4 AND 41]

A basic duty of magistrate judges is to issue appropriate search warrants and arrest 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 and Fed. R. Crim. P. 4 and 41, but also to administrative search and inspection warrants requested under a variety of federal statutes.

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 that authorize 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 60.3 for lists of the federal law enforcement officers and agencies authorized to request warrants.

For a further discussion of procedural and legal issues concerning the issuance of search warrants and arrest warrants by magistrate judges, see Chapter 4, “Search Warrants and Warrantless Searches,” and Chapter 5, “Complaint, Arrest Warrant, and Summons,” of the *Legal Manual for United States Magistrate Judges*.

1. Authority of Magistrate Judge

SUPREME COURT :

ILLINOIS V. GATES,
462 U.S. 213 (1983)

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 the defendant committed a crime.

1ST CIRCUIT :

IN RE WORKSITE INSPECTION OF QUALITY PRODUCTS, INC.,
592 F.2d 611 (1st Cir. 1979)

A magistrate judge’s authority under § 636(a)(1) includes the power to issue OSHA administrative search warrants, but the power to issue warrants does not include the authority to declare the fruits of a search inadmissible in a subsequent proceeding. Motions to suppress must be referred under § 636(b)(1)(B), subject to de novo determination.

IN RE WORKSITE INSPECTION OF S.D. WARREN, DIVISION OF SCOTT PAPER,
481 F. SUPP. 491 (D. ME. 1979)

Magistrate judge’s authority to issue administrative search warrant under § 636(a) and OSHA regulations did not include discretion to permit an employer to appear and contest issuance of OSHA inspection warrant. District court vacated magistrate judge’s order permitting counsel for employer to be present and heard when the government’s application for an OSHA inspection warrant was considered.

2ND 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 evidence found would not be suppressed.

4TH CIRCUIT :

EMSWILLER 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.

5TH CIRCUIT :

STATE FAIR OF TEXAS V. U.S. CONSUMER PROD. SAFETY COMM'N,
650 F.2D 1324 (5TH CIR.), JUDGMENT VACATED AS MOOT,
454 U.S. 1026 (1981)

To justify issuance of administrative search warrant by a magistrate judge, an agency must make showing that it has statutory authority to conduct an investigation. Probable cause in the criminal sense is not required; the agency must show inspection is reasonable under the Constitution, is authorized by the statute, and is sought under an administrative plan containing specific, neutral criteria.

STATE FAIR OF TEXAS V. U.S. CONSUMER PROD. SAFETY COMM'N,
481 F. SUPP. 1070 (N.D. TEX. 1979)

One element of administrative probable cause that must be found by a magistrate judge is the statutory authority for the inspection. An agency must be able to demonstrate its own jurisdiction before seeking the aid of the court. Magistrate judge's function includes: review of authority to inspect, the lawful limits of power to search, and a determination whether non-consensual entry onto private premises is required to enforce the statute. (See 5th Circuit decision above.)

6TH CIRCUIT :

UNITED STATES V. CHAAR,
137 F. 3D 354 (6TH CIR. 1998)

Telephonic search warrant issued by magistrate judge under Fed. R. Crim. P. 41(c)(2)(D) was valid, even when magistrate judge lost tape recording of the warrant procedure mandated by the rule. Defendant could not demonstrate that loss of recording was intentional or prejudicial to defendant.

IN RE INSPECTION OF CLEVELAND ELECTRICAL ILLUMINATING Co. ,
548 F. SUPP. 224 (N.D. OHIO 1981)

Magistrate judge had authority under § 636(a)(1) to issue administrative warrant authorizing inspection of industrial plant by OSHA.

7TH CIRCUIT :

IN RE ESTABLISHMENT INSPECTION OF GILBERT & BENNETT MFG. Co. ,
589 F.2D 1335 (7TH CIR.) , CERT. DENIED SUB NOM. ,
CHROMALLOY AM. CORP. V. MARSHALL ,
444 U.S. 884 (1979)

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).

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, magistrate judge not only had authority to issue search warrant, but also had authority to rule on defendant's motion for return of seized property without an independent civil or criminal action pending.

IN RE ESTABLISHMENT INSPECTION OF SKIL CORP. ,
119 F.R.D. 658 (N.D. ILL. 1987) , AFF'D ,
846 F.2D 1127 (7TH CIR. 1988)

Although litigation challenging the validity of previously issued administrative inspection warrants is brought usually before a district judge, magistrate judge has authority to hear motions to quash and motions for rule to show cause under 28 U.S.C. §§ 636(b)(3) and (e).

MARSHALL V. CHROMALLOY AM. CORP. ,
433 F. SUPP. 330 (E.D. WIS. 1977) , AFF'D ,
589 F.2D 1335 (7TH CIR.) , CERT. DENIED ,
444 U.S. 884 (1979)

Incorporation of the powers and duties of former commissioners and of the powers set out in the Federal Rules of Criminal Procedure provides magistrate judges with authority to issue warrants sought by federal administrative enforcement officials, including OSHA inspection warrants.

9TH CIRCUIT :

UNITED STATES V. KYLLO ,
140 F.3D 1249 (9TH CIR. 1998)

Because information in the search warrant application was obtained by law enforcement personnel through use of a thermal imaging device that violated Fourth Amendment privacy rights, magistrate judge should not have issued a search warrant based on this data.

UNITED STATES v. PRETZINGER,
542 F.2d 517 (9TH CIR. 1976)

Rule 41 of the Federal Rules of Criminal Procedure authorizes a magistrate judge to issue an order allowing a beeper or electronic tracking device to be attached to a suspect's plane.

10TH CIRCUIT:

DIMITT v. DELOACH,
1991 WL 66821 (D. KAN. APRIL 12, 1991)

Magistrate judge is entitled to absolute judicial immunity for issuing an arrest warrant.

2. Procedural Requirements

4TH CIRCUIT:

BALTIMORE SUN Co. v. GOETZ,
886 F.2d 60 (4TH CIR. 1989)

Under Fed. R. Crim. P. 41(g), a magistrate judge must file paperwork relating to a search warrant with the clerk's office within a reasonable time after the warrant is executed.

3. Summonses

Rule 4 of the Federal Rules of Criminal Procedure authorizes magistrate judges to issue summonses on complaints. In addition, Fed. R. Crim. P. 58(d)(3) authorizes magistrate judges to issue a summons in a misdemeanor case commenced by indictment, information, or complaint or, in the case of a petty offense, on a citation or violation notice. Some courts have held, however, that a magistrate judge does not have final authority to enforce an administrative summons.

5TH CIRCUIT:

UNITED STATES v. FIRST NAT'L BANK OF ATLANTA,
628 F.2d 871 (5TH CIR. 1980)

Magistrate judge cannot enter final judgment to compel attendance pursuant to summons issued under 26 U.S.C. § 7604. Statute restricts enforcement power to district court.

UNITED STATES v. WISNOWSKI,
580 F.2d 149 (5TH CIR. 1978)

It is beyond a magistrate judge's enumerated powers to conduct proceedings to enforce an IRS summons and to render a final decision where the court did not proceed under 26 U.S.C. § 7604(b).

8TH CIRCUIT:

UNITED STATES v. MUELLER,
930 F.2d 10 (8TH CIR. 1991)

Magistrate judge does not have authority to issue final order enforcing an IRS summons under 26 U.S.C. § 7604. Magistrate judge could issue report and recommendation in enforcement proceeding.

4. Bench Warrants

A bench warrant may be issued by a district judge or a magistrate judge under Fed. R. Crim. P. 4(a) or 9(a) for the arrest of a defendant or a witness who fails to appear for a proceeding before that judicial officer. Summary issuance of a warrant is also authorized under 18 U.S.C. § 3148 when a defendant on pretrial release fails to appear.

11TH CIRCUIT :

KING V. THORNBURG,
762 F. SUPP. 336 (S.D. GA. 1991)

Magistrate judge has the authority to issue bench warrants, but an order directing that an attorney be arrested for failing to appear at a hearing is not a normal judicial function for a magistrate judge possessing no independent contempt authority.

D.C. CIRCUIT :

UNITED STATES V. PADEN,
558 F. SUPP. 636 (D.D.C. 1983)

Magistrate judge does not have inherent authority to issue bench warrants, and warrant issued for failure to appear at probation revocation hearing was defective. Express authority for magistrate judges to issue bench warrants is found only under 18 U.S.C. § 3401 (arrest of misdemeanants) and § 3146 (violations of pretrial release).

5. Seizure Warrants

The authority of magistrate judges to issue warrants extends to the issuance of warrants for the seizure of property by the federal government at the commencement of forfeiture proceedings. Many federal statutes authorize federal agencies to seize private property pursuant to warrant procedures. The most prominent of these statutes is 21 U.S.C. § 881, which governs the seizure of property in drug enforcement cases.

SUPREME COURT :

UNITED STATES V. JAMES DANIEL GOOD REAL PROPERTY,
510 U.S. 43 (1993)

District court must provide property owner a hearing prior to seizure of real property subject to civil forfeiture. Magistrate judge should not conduct ex parte proceeding to seize real property absent showing by Government that exigent circumstances require seizure of property to prevent sale, destruction, or the continued illegal usage of the property.

5TH CIRCUIT:

UNITED STATES v. McCARGO,
783 F.2d 507 (5TH CIR. 1986)

Decision assumes validity of magistrate judge's order authorizing IRS agents to seize property to satisfy levy for back taxes. Magistrate judge also certified party's conduct as contempt for failure to comply with seizure order. (No discussion of magistrate judge authority.)

7TH CIRCUIT:

UNITED STATES v. A RESIDENCE LOCATED AT 218 3RD STREET,
622 F. SUPP. 908 (W.D. WIS. 1985), *AFF'D AND REMANDED,*
805 F.2d 256 (7TH CIR. 1986)

Although a motion for return of seized property is not a pretrial matter under § 636(b)(1), a magistrate judge has implied authority under § 636(b)(1)(B) to issue a report and recommendation. Upon the defendant's indictment, matter would become a motion to suppress under § 636(b)(1)(B).

6. Public Access and Authority to Seal Documents

4TH CIRCUIT:

WASHINGTON POST Co. v. HUGHES,
923 F.2d 324 (4TH CIR.), *CERT. DENIED,*
500 U.S. 944 (1991)

Whether papers are sealed when filed rests in the sound discretion of the judicial officer who issued the warrant. The district judge is in a better position to make findings whether post-indictment motions to unseal papers would result in prejudicial pretrial publicity. A magistrate judge's authority to seal or unseal derives from the general authority of the district court and not from Fed. R. Crim. P. 41(b).

BALTIMORE SUN Co. v. GOETZ,
886 F.2d 60 (4TH CIR. 1989)

Determination of whether parties have common law qualified right of access to warrant papers is under the sound discretion of judicial officer, permitting judges to file all or some papers under seal for a stated time or until issuance of a further order. Decision to seal or grant access to documents is subject to review under the abuse of discretion standard.

7TH CIRCUIT:

IN RE EYECARE PHYSICIANS OF AMERICA,
100 F.3D 514 (7TH CIR. 1996)

Magistrate judge properly sealed search warrant materials and denied defendant Eyecare's motion to unseal the materials on the ground that disclosure of the materials would breach the secrecy of grand jury testimony, impair the privacy of persons not charged with crimes, and jeopardize the government's on-going criminal investigation. After balancing parties' respective rights, neither the magistrate judge nor the district court abused their discretion in refusing to unseal the search warrant materials.

IN RE SEARCH OF RESIDENCE AT 14905 FRANKLIN DR.,
121 F.R.D. 78 (E.D. WIS. 1988)

Authority to seal application or affidavit for search warrant is not found in Fed. R. Crim. P. 41, but lies within court's inherent discretion. Magistrate judge's inherent power to unseal documents is concomitant with authority to seal. (Opinion by magistrate judge.)

9TH CIRCUIT:

IN RE SEALED AFFIDAVIT(S) TO SEARCH WARRANTS,
600 F.2D 1256 (9TH CIR. 1979)

District judge and magistrate judge both have inherent power to control papers filed with the courts within certain constitutional and other limitations. This includes power to seal affidavits to warrants.

10TH CIRCUIT:

IN RE FLOWER AVIATION OF KANSAS, INC.,
789 F. SUPP. 366 (D. KAN. 1992)

Party that is a target of search warrants has no First Amendment right of access to require the unsealing of the warrant affidavits sealed by a magistrate judge. Unsealing the affidavits was also unwarranted under common law right of access.

7. Re-submission of Application for Warrant

Courts occasionally permit law enforcement officers to present an application for a search warrant to a different magistrate judge after the first magistrate judge declines to issue the warrant. While re-submission of a warrant application is not prohibited by the Fourth Amendment, magistrate judges should use discretion in such circumstances to ensure that the application is reviewed by a "neutral and detached" judicial officer.

2ND CIRCUIT:

UNITED STATES v. DIAZ,
351 F. SUPP. 1050 (D. CONN. 1972)

There is no reason a district court may not act on a second application for an arrest warrant as an original matter under 18 U.S.C. § 3041, despite an earlier rejection of the presentment by a magistrate judge. The district court should discourage successive requests to issue a warrant.

7TH CIRCUIT:

UNITED STATES v. PACE, 898 F.2D 1218 (7TH CIR.), CERT. DENIED SUB NOM.,
CIALONI v. UNITED STATES, 497 U.S. 1030 (1990)

Fourth Amendment does not prohibit “magistrate shopping.” Concerns should be whether the second magistrate judge was “neutral and detached,” and whether probable cause existed to issue the warrant.

8. Appeal of Magistrate Judge’s Decision

2ND CIRCUIT:

UNITED STATES v. TRAVISANO,
724 F.2D 341 (2D CIR. 1983)

A probable cause finding is entitled to substantial deference, but court must examine whether the magistrate judge or other judicial officer [in this case, a state judge] acted in a neutral and detached manner when reviewing the facts.

3RD CIRCUIT:

MARTIN v. INTERNATIONAL MATEX TANK TERMINALS-BAYONNE,
928 F.2D 614 (3RD CIR. 1991)

Court of appeals gives great deference to magistrate judge’s determination of probable cause in issuing administrative search warrant.

4TH CIRCUIT:

UNITED STATES v. OLOYEDE,
982 F.2D 133 (4TH CIR. 1992)

Although the sufficiency of the search warrant and supporting affidavit will be reviewed de novo, a determination of probable cause by a neutral and detached magistrate judge is entitled to substantial deference.

5TH CIRCUIT:

UNITED STATES v. DANIEL,
982 F.2D 146 (5TH CIR. 1993)

Magistrate judge’s determination of probable cause is entitled to great deference by the court of appeals.

7TH CIRCUIT :

UNITED STATES V. PLESS,
982 F.2D 1118 (7TH CIR. 1992)

A determination of probable cause should be affirmed by the court of appeals absent clear error by the issuing magistrate judge.

8TH CIRCUIT :

UNITED STATES V. JACKSON,
898 F.2D 79 (8TH CIR. 1990)

Great deference is given to a magistrate judge's determination of probable cause that is supported by substantial evidence.

9TH CIRCUIT :

UNITED STATES V. GREANY,
929 F.2D 523 (9TH CIR. 1991)

Court of appeals reviews de novo the district court's finding that the magistrate judge's determination of probable cause was clearly erroneous.

UNITED STATES V. CASTILLO,
866 F.2D 1071 (9TH CIR. 1988)

Court of appeals will review magistrate judge's conclusion that probable cause existed to issue an arrest warrant independently without deferring to the district court's contrary conclusion. In applying the "substantial basis" test to magistrate judge's probable cause finding, the district court must give deference to magistrate judge's finding and not engage in de novo review.

10TH CIRCUIT :

UNITED STATES V. HAGER,
969 F.2D 883 (10TH CIR.), *CERT. DENIED,*
506 U.S. 964 (1992)

Court of appeals should give great deference to magistrate judge's determination of probable cause.

11TH CIRCUIT :

UNITED STATES V. GONZALEZ,
940 F.2D 1413 (11TH CIR.), *CERT. DENIED SUB NOM.,*
SANCHEZ V. UNITED STATES,
502 U.S. 1103 (1991)

Great deference is given by the court of appeals to the probable cause determination of the magistrate judge.

B. ACCEPTANCE OF CRIMINAL COMPLAINTS

[FED. R. CRIM. P. 4 AND 58 (B) (1)]

A complaint is an initial pleading that invokes the general jurisdiction of the district court in a criminal case. A criminal complaint is a charging document. A magistrate judge's acceptance of a complaint for filing initiates a criminal prosecution in the district court and supplies the necessary supporting documents for conducting preliminary proceedings in the case. In a misdemeanor case, the complaint is a sufficient pleading in itself for proceeding to trial and judgment before the magistrate judge. Courts apply the same probable cause standard for accepting criminal complaints and issuing search warrants.

SUPREME COURT :

ILLINOIS V. GATES,
462 U.S. 213 (1983)

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 the defendant committed a crime.

8TH CIRCUIT :

UNITED STATES V. MIMS,
812 F.2D 1068 (8TH CIR. 1987)

Magistrate judge's probable cause determination is entitled to substantial deference. In applying the reasoning in *Gates*, 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 arrest warrant.

10TH CIRCUIT :

ST. JOHN V. JUSTMANN,
771 F.2D 445 (10TH CIR. 1985)

A magistrate judge's determination of probable cause from complaint is entitled to substantial deference.

C. INITIAL APPEARANCES IN CRIMINAL PROCEEDINGS

[FED. R. CRIM. P. 5 AND 58]

Rule 5 of the Federal Rules of Criminal Procedure requires that a person arrested under a warrant issued upon a complaint or arrested without a warrant be brought "without unnecessary delay before the nearest available federal magistrate judge...." 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.

For further discussion of procedural and legal issues arising from initial appearances, see Chapter 6, "Initial Appearance," of the *Legal Manual for United States Magistrate Judges*.

3RD CIRCUIT:

GOVERNMENT OF THE VIRGIN ISLANDS V. A., LEONARD,
922 F.2D 1141 (3RD CIR. 1991)

Decision to order pretrial psychological examination in felony matter is within magistrate judge's discretion. Court applies abuse of discretion standard in reviewing decision.

8TH CIRCUIT:

UNITED STATES V. SIMMONS,
46 F.3D 1137 (8TH CIR. 1995)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Magistrate judge has authority to order a psychiatric examination of a defendant under 18 U.S.C. § 4241(a) and 28 U.S.C. § 636 at the time of an initial appearance.

D.C. CIRCUIT:

UNITED STATES V. HEMMINGS,
1991 WL 79586 (D.D.C. 1991)

Magistrate judge has the authority to rule on motions for mental competency examinations under 18 U.S.C. § 4241. That section and the procedural scheme of Fed. R. Crim. P. 5 and 5.1 provide the magistrate judge with authority once a judicial finding of probable cause has been made. (Opinion by magistrate judge.)

D. APPOINTMENT AND ASSIGNMENT OF COUNSEL

[FED. R. CRIM. P. 44 & 18 U.S.C. § 3006A]

During an initial appearance under Fed. R. Crim. P. 5, a magistrate judge may appoint legal counsel for indigent defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and Fed. R. Crim. P. 44. Magistrate judges also may be required to conduct an inquiry under Fed. R. Crim. P. 44(c) concerning the joint representation of defendants by one counsel. For a further discussion of procedural and legal questions concerning the appointment of counsel, see Chapter 6, "Initial Appearance," of the *Legal Manual for United States Magistrate Judges*.

1ST CIRCUIT:

UNITED STATES V. CONEO-GUERRERO,
148 F.3D 44 (1ST CIR. 1998)

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

6TH CIRCUIT :

UNITED STATES V. CORDELL,
924 F.2D 614 (6TH CIR. 1991)

Court finds no violation of the 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)

Magistrate judge had authority under the Criminal Justice Act to seal financial affidavits for appointment of counsel to prevent possible violation of defendants' Fifth Amendment rights against self-incrimination. Magistrate judge also had authority to order hearing under CJA to determine whether court appointment of counsel should be terminated. (Opinion by magistrate judge.)

E. PRELIMINARY EXAMINATIONS

[FED. R. CRIM. P. 5.1 AND 18 U.S.C. § 3060]

The preliminary examination is an evidentiary hearing held before a magistrate judge to determine whether there is probable cause to hold a defendant who has been charged by complaint for further proceedings in the district court. Rule 58(b)(2)(G) of the Federal Rules of Criminal Procedure provides that a preliminary examination will not be held in a misdemeanor case where the defendant consents to trial before the magistrate judge, unless the defendant is held in custody. Rule 58(b)(2)(G) also provides that a defendant is not entitled to a preliminary examination in a petty offense case. For a further discussion of procedural and legal issues arising at preliminary examinations, see Chapter 7, "Preliminary Examination," of the *Legal Manual for United States Magistrate Judges*.

2ND CIRCUIT :

UNITED STATES V. FAJARDO,
1997 WL 669862 (S.D.N.Y. 1997)

Where government moved for 15 consecutive continuances of defendant's preliminary examination prior to indictment without written affirmations by the government's attorneys or written factual findings being made by a magistrate judge, the defendant's indictment would be dismissed without prejudice for violating the Speedy Trial Act.

5TH CIRCUIT :

UNITED STATES V. ROACH,
590 F.2D 181 (5TH CIR. 1979)

Magistrate judge's failure to tape preliminary examination under 18 U.S.C. § 3060(f), combined with magistrate judge's failure to turn over "meager" notes until two days into defendant's trial, requires remand for new trial.

D.C. CIRCUIT:

UNITED STATES V. HEMMINGS,
1991 WL 79586 (D.D.C. 1991)

Magistrate judges have authority to rule on motions for mental competency examinations under 18 U.S.C. § 4241. That section and the procedural scheme of Fed. R. Crim. P. 5 and 5.1 provide magistrate judges with authority once a judicial finding of probable cause has been made. (Opinion by magistrate judge.)

F REMOVAL PROCEEDINGS
[FED. R. CRIM. P. 40]

Rule 40(a) of the Federal Rules of Criminal Procedure provides that a person arrested in a district other than the one where the prosecution is pending “shall be taken without unnecessary delay before the nearest available federal magistrate judge, in accordance with the provisions of Rule 5.” There is a split of authority concerning whether the district court in the district where a defendant is arrested or in the district where the arrest warrant was issued has the authority to review a pretrial detention or release order issued by a magistrate judge in a Rule 40 proceeding. For a further discussion of procedural and legal issues arising at removal proceedings, *see* Chapter 8, “Commitment to Another District (Removal Proceedings),” of the *Legal Manual for United States Magistrate Judges*.

1ST CIRCUIT:

UNITED STATES V. WEDDLETON,
143 F.R.D. 453 (D. MASS. 1992)

Magistrate judge in the district where probation violator was arrested had authority to set conditions of release before Rule 40 proceeding was conducted to remove the defendant to the district where violation occurred. (Opinion by magistrate judge.)

3RD CIRCUIT:

UNITED STATES V. THOMAS,
992 F. SUP. 782 (D.V.I. 1998)

The district court where the defendant was arrested has jurisdiction to review a pretrial detention order issued under Rule 40 by a magistrate judge within its jurisdiction, notwithstanding the fact that the charges are pending in another jurisdiction. Bail amount endorsed on a warrant issued by a magistrate judge in the charging district has no bearing on the detention or conditional release decision made by the magistrate judge conducting a Rule 40 hearing in the arresting jurisdiction.

6TH CIRCUIT:

UNITED STATES V. JOHNSON,
103 F.3D 131 (6TH CIR. 1996)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

The district court where the defendant was arrested had jurisdiction to review a pretrial detention order issued under Rule 40 by a magistrate judge within its jurisdiction, notwithstanding the fact that the charges were pending in another jurisdiction.

UNITED STATES v. STEVENS,
941 F. SUPP. 85 (W.D. MICH. 1996)

Defendant brought in on a felony complaint from another district under Rule 40 is entitled to a preliminary examination in the arresting district, and, if no probable cause is found to believe that the defendant committed the offense charged, magistrate judge shall dismiss the complaint and discharge the defendant. Magistrate judge did not have discretion to keep the complaint and warrant outstanding pending government's decision to arrest defendant again at a more convenient time. (Opinion by magistrate judge.)

9TH CIRCUIT:

UNITED STATES v. EVANS,
62 F.3D 1233 (9TH CIR. 1995)

District court in Arizona had no authority to review the magistrate judge's detention order in a Rule 40 removal proceeding involving a defendant arrested upon an arrest warrant issued by a district court in West Virginia. A magistrate judge's detention order issued in a Rule 40 removal hearing must be reviewed by the district court having original jurisdiction over the offense.

11TH CIRCUIT:

UNITED STATES v. TORRES,
86 F.3D 1029 (11TH CIR. 1996)

The plain language of 18 U.S.C. § 3145 dictates that the district court with original jurisdiction over the offense, i.e., the prosecuting district, is the only proper one to review a detention order under Rule 40.

G. EXTRADITION PROCEEDINGS [18 U.S.C. § 3184]

Extradition proceedings are governed by 18 U.S.C. § 3181 *et seq.* Magistrate judges are explicitly authorized to conduct extradition proceedings under this statute. *See, e.g.* 18 U.S.C. § 3184. Rule 54(b)(5) of the Federal Rules of Criminal Procedure states that the federal procedural rules are not applicable to "extradition and rendition of fugitives."

1. Authority of Magistrate Judge

2ND CIRCUIT:

LO DUCA v. UNITED STATES,
93 F.3D 1100 (2D CIR.), *CERT. DENIED,*
519 U.S. 1007 (1996)

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." 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.

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. The magistrate judge relied on 18 U.S.C. § 3188, permitting “any judge of the United States” to release a person committed for extradition after two months, to issue a show cause order. (No discussion of magistrate judge authority.)

7TH CIRCUIT:

DESILVA v. DILEONARDI,
125 F.3D 1110 (7TH CIR. 1997), CERT. DENIED SUB NOM.,
LOBUE v. DILEONARDI,
119 S.Ct. 42 (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 the constitutional authority to certify petitioners for extradition.

9TH CIRCUIT:

LOPEZ-SMITH v. HOOD,
121 F.3D 1322 (9TH CIR. 1997)

Extradition statute that requires a magistrate judge’s involvement in the extradition proceeding does not violate the separation-of-powers doctrine in Article III of the Constitution.

11TH CIRCUIT:

NOEL v. UNITED STATES,
12 F. SUPP. 2D 1300 (M.D. FLA. 1998)

Magistrate judge’s participation in extradition proceeding does not violate separation-of-powers principles set forth in Article III of the Constitution. Magistrate judge was authorized under § 636(a) 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)

Authorization of a magistrate judge to perform extradition hearings does not violate Article III; extradition is equated with a probable cause determination in a preliminary examination.

2. Scope of Magistrate Judge's Authority

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)

Magistrate judge's inquiry at 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.

IN RE 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)

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

2ND 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.

IN RE MACKIN,
668 F.2D 122 (2D CIR. 1981)

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

IN RE EXTRADITION OF SANDHU,
1996 WL 469290 (S.D.N.Y. 1996)

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 extradition hearing. (Opinion by magistrate judge.)

3RD CIRCUIT :

IN RE EXTRADITION OF LEHMING,
951 F. SUPP. 505 (D. DEL. 1996)

Where proffer of probable cause at extradition hearing is supported by 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.

4TH CIRCUIT :

PLASTER V. UNITED STATES,
720 F.2D 340 (4TH CIR. 1983)

Magistrate judge properly refused to entertain claim of due process violation during an extradition certification proceeding since claim was outside the scope of his statutory authority under 18 U.S.C. § 3184.

5TH CIRCUIT :

IN RE EXTRADITION OF RUSSELL,
805 F.2D 1215 (5TH CIR. 1986)

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 extradition proceeding absent special circumstances.

9TH CIRCUIT :

LOPEZ-SMITH V. HOOD,
121 F.3D 1322 (9TH CIR. 1997)

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 POWELL,
4 F. SUPP. 2D 945 (S.D. CAL. 1998)

Magistrate judge's function at extradition hearing is to determine whether there is "any" evidence establishing reasonable or probable cause. Magistrate judge had no discretion whether to certify extradition; if the magistrate judge finds sufficient evidence to sustain the charge, extradition "shall" be certified. Magistrate judge lacked authority to hold "*Franks*" hearing challenging truthfulness of affidavit in extradition proceeding. (Opinion by magistrate judge.)

IN RE EXTRADITION OF KRAISELBURD,
786 F.2D 1395 (9TH CIR.), CERT. DENIED,
479 U.S. 990 (1986)

Magistrate judge had discretionary authority in extradition proceeding to limit discovery.

11TH CIRCUIT:

MAGUNA-CELAYA V. HARO,
19 F. SUPP. 2D (S.D. FLA. 1998), REV'D AND VACATED ON OTHER GROUNDS,
172 F.3D 883 (11TH CIR. 1999)

The hearing before the extradition magistrate judge does not determine the guilt or innocence of the accused but rather represents a judgment whether there is competent evidence that would support a reasonable belief that the subject of the proceedings was guilty of the crimes charged.

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

5TH CIRCUIT:

IN RE EXTRADITION OF RUSSELL,
805 F.2D 1215 (5TH CIR. 1986)

Magistrate judge should deny bail in extradition proceeding absent special circumstances.

9TH CIRCUIT:

IN RE THE REQUESTED EXTRADITION OF KIRBY,
103 F.3D 855 (9TH CIR. 1997)

Magistrate judge had the 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 conditions of release.

4. Review of Magistrate Judge's Decision

2ND CIRCUIT:

SPATOLA V. UNITED STATES,
925 F.2D 615 (2D CIR. 1991)

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.

IN RE MACKIN,
668 F.2D 122 (2D CIR. 1981)

Magistrate judge's decision, declining to certify extradition on grounds that offenses charged were political offenses, was not an appealable order.

IN RE EXTRADITION OF ATTA,
706 F. SUPP. 1032 (E.D.N.Y. 1989)

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

11TH CIRCUIT:

IN RE EXTRADITION OF GHANDTCHI,
697 F.2D 1037 (11TH CIR. 1983)

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.

MAGUNA-CELAYA V. HARO,
19 F. SUPP. 2D 1337 (S.D. FLA. 1998), REV'D AND VACATED ON OTHER GROUNDS,
172 F.3D 883 (11TH CIR. 1999)

Once a magistrate judge had certified that an individual may be extradited, the certification could only be attacked through a petition for a writ of habeas corpus.

YLIPELKONEN V. THORNBURGH,
756 F. SUPP. 570 (S.D. FLA. 1991)

In habeas corpus petition to review magistrate judge's extradition determination, district judge will review de novo magistrate judge's decision whether an offense falls within an extradition treaty.

H. GRAND JURY PROCEEDINGS

[FED. R. CRIM. P. 6]

Magistrate judges are authorized specifically to accept the return of an indictment from a grand jury under Fed. R. Crim. P. 6(f) and to seal the indictment under Fed. R. Crim. P. 6(e)(4). Other duties involving grand jury proceedings may be referred to a magistrate judge under 28 U.S.C. § 636(b). See §§ 3(b)(9) and 6(b)(3), *infra*.

1ST CIRCUIT:

UNITED STATES V. LALIBERTE,
131 F.R.D. 20 (D. MASS. 1990)

Magistrate judge was authorized to seal indictments. (Opinion by magistrate judge.)

UNITED STATES V. LAKIN,
875 F.2D 168 (8TH CIR. 1989)

Sealing an indictment is a ministerial act. Great deference is accorded to a magistrate judge's exercise of discretion.

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 Magistrate Judges Division 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 thirty years.

- 1 Orders of Entry (I.R.S. administrative proceedings)
- 1 Nebbia Hearings (Hearings to determine the source of bail provided on behalf of a criminal defendant)
- 1 Warrants to Gain Access to Telephone and Toll Records (18 U.S.C. § 2703)
- 1 Peace Bonds (50 U.S.C. § 23 and Fed. R. Crim. P. 54(b)(3))
- 1 Orders for Line-ups, Blood Samples, and Fingerprints
- 1 Orders Sealing or Unsealing Documents Filed with the Clerk of Court
- 1 Creation and Administration of Collateral Forfeiture Plan

§ 2. OTHER § 636(a) POWERS

In addition to authorizing magistrate judges to exercise the authority of the former United States commissioners, 28 U.S.C. § 636(a) gives other specific powers to magistrate judges.

A. 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 in misdemeanor cases.

4TH CIRCUIT :

EMSWILER V. MCCOY,
622 F. SUPP. 786 (S.D.W. VA. 1985)

Magistrate judge was entitled to judicial immunity for issuing an arrest warrant and certification that complaint for summons was filed under oath.

B. RELEASE OR DETENTION ORDERS

[18 U.S.C. § 3142]

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. For a further discussion of procedural and legal issues in release and detention proceedings under the Bail Reform Act, *see* Chapter 6, “Initial Appearance,” of the *Legal Manual for United States Magistrate Judges*.

1. Authority of Magistrate Judge

8TH CIRCUIT :

UNITED STATES V. SPILOTTO,
786 F.2D 808 (8TH CIR. 1986), *CERT. DENIED*,
486 U.S. 1006 (1988)

Magistrate judge of the court with original jurisdiction over the offense charged had 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. HARRIS,
732 F. SUPP. 1027 (N.D. CAL. 1990)

Magistrate judge had authority under both 18 U.S.C. § 3041 and 28 U.S.C. § 636(a)(2) to issue a detention order.

11TH CIRCUIT:

UNITED STATES v. JEFFRIES,
679 F. SUPP. 1114 (M.D. GA. 1988)

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

2. Material Witnesses

1ST CIRCUIT:

UNITED STATES v. LI,
949 F. SUPP. 42 (D. MASS. 1996)

Magistrate judge orders material witnesses from China detained after 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 orders the witnesses to be detained in a minimum security residential facility rather than in a jail. (Opinion by 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. Magistrate judge had no authority to implement procedure absent such affidavits.

UNITED STATES v. LOPEZ-CERVANTES,
918 F.2D 111 (10TH CIR. 1990)

Magistrate judge had no authority under 18 U.S.C. § 3144 to detain witnesses for video depositions, absent affidavit by parties.

3. Bond Forfeitures and Surrender of Offenders by Sureties

Duties under the Bail Reform Act include bond forfeiture proceedings under 18 U.S.C. § 3146 and Fed. R. Crim. P. 46(e) and matters involving the surrender of an offender by a surety under 18 U.S.C. § 3149.

9TH CIRCUIT:

UNITED STATES v. ARNAIZ,
842 F.2D 217 (9TH CIR. 1988)

Court affirms magistrate judge's "order" to exonerate bond under 18 U.S.C. § 3149, making it a final appealable order. Opinion implies that court made a reference pursuant to 28 U.S.C. § 636(b)(1)(A). (No discussion of magistrate judge authority.)

UNITED STATES V. PLECHNER,
577 F.2D 596 (9TH CIR. 1978)

In a civil case arising from a prior criminal proceeding, a bond forfeiture ordered by a magistrate judge is valid if the order is adopted by the district court.

UNITED STATES V. RITTE,
558 F.2D 926 (9TH CIR. 1977)

Final order must be entered by district court. District judge must examine bond forfeiture proceeding to determine if referral is appropriate under 28 U.S.C. §§ 636(b)(1)(A) or (B).

4. Appeal of Magistrate Judge's Decision

Cases discussing the standards of review applied by both the district courts and the courts of appeals to a magistrate judge's decision under the Bail Reform Act are contained in APPENDIX A.

C. MISDEMEANOR CASES

[18 U.S.C. § 3401 AND FED. R. CRIM. P. 58]

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 specifically designated by the district courts in which they served to exercise this jurisdiction. Under amendments to § 3401 and § 636(a) that were enacted as part of the Federal Courts Improvement Act of 1996, the authority of magistrate judges to try and dispose of misdemeanor cases has been expanded. Magistrate judges may now try and dispose of all infractions, Class C misdemeanor cases, and Class B misdemeanor cases involving motor vehicle offenses without the defendant's consent. 18 U.S.C. § 3401(b).

In addition, although magistrate judges are authorized to try and dispose of Class A misdemeanor cases and Class B misdemeanor cases that do not involve motor vehicle offenses 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 magistrate judge also has authority to invoke the federal probation laws (18 U.S.C. § 3401(d)). Under a 1992 amendment to 18 U.S.C. § 3401, magistrate judges are now authorized under § 3401(h) to revoke terms of supervised release imposed by a magistrate judge in a misdemeanor case. In addition, § 3401(i) provides 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.

1. Authority of Magistrate Judge

4TH CIRCUIT :

UNITED STATES v. BRYSON,
981 F.2d 720 (4TH CIR. 1992)

Magistrate judge's authority to accept defendant's guilty plea and impose sentence in misdemeanor case with defendant's consent under 18 U.S.C. § 3401 did not authorize the magistrate judge to subsequently entertain defendant's motion under 28 U.S.C. § 2255 to vacate, set aside or correct sentence, and enter order dismissing motion without obtaining further consent of 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.

UNITED STATES v. JAMES,
440 F. SUPP. 1137 (D. MD. 1977)

Defendant was denied due process where the magistrate judge presented the government's case and became an active advocate for the government.

6TH CIRCUIT :

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 authorized to sentence violators, and can order and revoke probation under 18 U.S.C. § 3561 *et seq.*

9TH CIRCUIT :

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. Emphasis placed on curative effects of parties' consent and control by Article III judges.

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. McCrickard,
957 F. Supp. 1149 (E.D. Cal. 1996)

The 1996 amendment to 18 U.S.C. § 3401, that 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 Constitution. (Opinion by 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 is 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.

2. Scope of Authority

2ND CIRCUIT:

UNITED STATES v. LEAPHART,
98 F.3d 41 (2d Cir. 1996)

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)

Magistrate judge did not abuse her sentencing authority by requiring defendant to seek employment as a condition of her probation for misdemeanor theft of public assistance funds.

4TH CIRCUIT:

UNITED STATES v. BOWIE,
61 F.3d 901 (4th Cir. 1995)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Magistrate judge properly conducted colloquy under Fed. R. Crim. P. 11 before accepting defendant's misdemeanor guilty plea and sentencing defendant to 20-days incarceration.

UNITED STATES v. WILLIAMS,
919 F.2d 266 (5th Cir. 1990)

An explicit grant of sentencing authority in 18 U.S.C. § 3401(a) does not implicitly authorize magistrate judges subsequently to revoke terms of supervised release at a later hearing. Section 636(b)(3) also does not authorize such revocation proceedings.

UNITED STATES v. MARTINEZ,
988 F. SUPP. 975 (E.D. VA. 1998)

Magistrate judge had sentencing authority to restrict defendant's driving activities for six months as a condition of probation after defendant pled guilty to a misdemeanor motor vehicle offense. Penalty restricting defendant's ability to drive was reasonably related to the offense to which 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 cases where a defendant consented to a misdemeanor trial before a magistrate judge.

7TH CIRCUIT :

UNITED STATES v. VAN FASSAN,
899 F.2D 636 (7TH CIR. 1990)

Defendant is not entitled to a new trial when the magistrate judge orally misstates 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)

Magistrate judge had authority to suppress evidence obtained by police in warrantless non-consensual probation search and arrest of defendant on misdemeanor drug possession charge. (Opinion by magistrate judge.)

9TH CIRCUIT :

UNITED STATES v. MCKITTRICK,
142 F.3D 1170 (9TH CIR. 1998)

Magistrate judge who sentenced defendant for misdemeanor offense of unlawfully taking, possessing, and transporting protected wolf did not adequately explain basis for denying defendant's request for reduction of sentence under the Federal Sentencing Guidelines based on acceptance of responsibility, therefore requiring remand.

UNITED STATES v. WALKER,
117 F.3D 417 (9TH CIR. 1997)

Magistrate judge did not abuse her discretion by admitting hearsay evidence during a proceeding to revoke defendant's term of supervised release in a misdemeanor case.

UNITED STATES V. CRANE,
979 F.2D 687 (9TH CIR. 1992)

Magistrate judge had authority to revoke a term of supervised release of misdemeanor defendant originally tried and sentenced before the magistrate judge. Authority to revoke terms of supervised release is implicit in the authority to impose supervised release terms.

UNITED STATES V. SWEENEY,
914 F.2D 1260 (9TH CIR. 1990)

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.

11TH CIRCUIT:

UNITED STATES V. BURKE,
1996 WL 170123 (M.D. ALA. 1996)

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 is 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. Magistrate Judge Authority Under 18 U.S.C. § 3401(i) to Revoke Terms of Supervised Release in Felony Cases

Section 3401(i) was added to 18 U.S.C. § 3401 by Congress in 1992 and provides 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. Although the section makes no reference to felony cases, some courts have held that the provision was meant to give magistrate judges the authority to conduct proceedings to revoke terms of supervised release in felony cases on a report and recommendation basis. Other courts have been reluctant to adopt this interpretation. *See also* § 6, *infra*, for additional discussion of the referral of probation and supervised release revocation proceedings as additional duties that may be referred to magistrate judges under 28 U.S.C. § 636(b)(3).

5TH CIRCUIT :

UNITED STATES v. RODRIGUEZ,
23 F.3D 919 (5TH CIR. 1994)

Where a magistrate judge prepared a report under 18 U.S.C. § 3401(i) recommending that the defendant's term of supervised release be revoked and that the defendant be imprisoned for an additional 24 months, the district judge violated Fed. R. Crim. P. 43(a) and 32(a)(1)(C) when he sentenced the defendant in absentia, adopting the magistrate judge's report without an additional hearing. Under Rule 43(a), the defendant is entitled to be present when re-sentenced. The defendant also had a right to allocute under Rule 32(a)(1)(C).

6TH CIRCUIT :

UNITED STATES v. WATERS,
158 F.3D 933 (6TH CIR. 1998)

Magistrate judge could conduct a proceeding to revoke a defendant's term of supervised release in a felony case under 18 U.S.C. § 3401(i), subject to de novo review by a district judge.

4. Sufficiency of Consent

In Class A misdemeanor cases and Class B misdemeanor cases that do not involve motor vehicle offenses, 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 Class A misdemeanor cases and Class B misdemeanor cases not involving motor vehicle offenses 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.

3RD CIRCUIT :

UNITED STATES v. WRIGHT,
516 F. SUPP. 1119 (E.D. PA. 1981)

A defendant's consent to trial by a magistrate judge by itself is insufficient. Parties must specifically waive right to trial by an Article III judge.

4TH CIRCUIT :

UNITED STATES v. LANE,
1987 WL 16457 (E.D.N.C. 1987)

A conviction for a misdemeanor offense must be reversed where the defendant did not execute a written consent form waiving the right to Article III adjudication, even where defendant did not object to the magistrate judge's authority until after conviction. (Opinion by 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)

Failure to object to reference of a misdemeanor case until after the judgment is entered constitutes waiver. Under local court rules, special designation of a magistrate judge to exercise misdemeanor jurisdiction is not necessary.

9TH CIRCUIT :

UNITED STATES v. NEVILLE,
985 F.2D 992 (9TH CIR.), *CERT. DENIED*,
508 U.S. 943 (1993)

Defendant could not arbitrarily withdraw consent to trial before 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. COL. 1998)

Where 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, defendant was not entitled to later revoke his consent to trial before the magistrate judge under 18 U.S.C. § 3401.

5. Right to Jury Trial

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 consent of the defendant.

SUPREME COURT :

LEWIS v. UNITED STATES,
518 U.S. 322 (1996)

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

6. 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....” The maximum term of imprisonment for a Class B misdemeanor is

six months. 18 U.S.C. § 3581(b)(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(b)(1). 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 is not required to attend the trial of a petty offense case before a magistrate judge. There was no due process violation for a non-attorney to prosecute a petty offense case.

9TH CIRCUIT :

UNITED STATES V. BROERS,
776 F.2D 1424 (9TH CIR. 1985)

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

UNITED STATES V. DOWNIN,
884 F. SUPP. 1474 (E.D. CAL. 1995)

Magistrate judge's refusal to appoint counsel for defendant in petty offense prosecution for hauling untagged timber on national forest land violated the Federal Rules of Criminal Procedure, thereby requiring reversal. Use of a lay prosecutor at the petty offense trial, however, did not violate due process and, even if error, must be considered harmless.

10TH CIRCUIT :

UNITED STATES V. BOYER,
935 F. SUPP. 1138 (D. COL. 1996)

Magistrate judge dismissed with prejudice the violation notice issued to defendant for speeding on federal enclave where the statutory notice requirements for the regulations upon which the petty offense was based were not met. (Opinion by magistrate judge.)

7. 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.

2ND CIRCUIT :

UNITED STATES V. McALLISTER,
119 F.3D 198 (2D CIR. 1997), *CERT. DENIED*,
118 S.Ct. 729 (1998)

Magistrate judge improperly dismissed misdemeanor DUI case against 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)

Magistrate judge erred in dismissing defendant's prosecution for DUI offense on double jeopardy grounds. Administrative suspension of driving privileges on a federal enclave and subsequent criminal prosecution 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)

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 defendant violated conditions of supervised release after serving one-year prison sentence for a violation of 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)

Magistrate judge had authority to try a defendant in federal court on 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. Magistrate judge assumed jurisdiction over the case with an understanding that the maximum sentence he would impose was 12-months imprisonment.

UNITED STATES v. SMITH,
965 F. SUPP. 756 (E.D. VA. 1997)

Magistrate judge erred in convicting DUI defendant on multiple counts derived from single DUI incident. ACA required the federal court to assimilate substantive criminal law of Virginia that defendant should only receive one conviction, rather than two, for a single DUI violation. (Opinion by magistrate judge.)

UNITED STATES v. SLATKIN,
984 F. SUPP. 916 (D. MD. 1995)

The trial jurisdiction of a magistrate judge under the ACA does 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 magistrate judge.)

UNITED STATES v. KENDRICK,
636 F. SUPP. 189 (E.D.N.C. 1986)

Under the ACA, state DUI misdemeanor law with possible two-year jail sentence is assimilated and case is referable to magistrate judge, provided the punishment imposed does not exceed one-year imprisonment or \$1,000 fine.

5TH CIRCUIT :

UNITED STATES v. TERAN,
98 F.3D 831 (5TH CIR. 1996)

State law sentencing provision setting 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. Magistrate judge had authority to try the case after stating that the maximum sentence he could impose was 12-months imprisonment.

7TH CIRCUIT :

UNITED STATES V. DEVENPORT,
131 F.3D 604 (7TH CIR. 1997)

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

9TH CIRCUIT :

UNITED STATES V. SYLVE,
135 F.3D 680 (9TH CIR. 1998)

Magistrate judge erred in denying misdemeanor defendant's motion requesting permission to enroll in a state "deferred prosecution" program. The state's "deferred prosecution" program was 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)

Magistrate judge properly sentenced misdemeanor defendant to term of supervised release under the ACA. 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 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 upward departure in sentence upon 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."

10TH CIRCUIT :

UNITED STATES V. THOMAS,
68 F.3D 392 (10TH CIR. 1995)

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

UNITED STATES V. LEWIS,
1998 WL 804701 (D. Col. 1998)

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

UNITED STATES V. LEHOULLIER,
935 F. SUPP. 1146 (D. Col. 1996)

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

8. Contempt

3RD CIRCUIT:

UNITED STATES V. GEDRAITIS,
690 F.2D 351 (3RD CIR. 1982), CERT. DENIED,
460 U.S. 1071 (1983)

Magistrate judge had authority under § 636(a)(3) to try contempt cases referred to magistrate judge with proviso that penalties do not exceed those for a misdemeanor. Section 636(e) only applies to contempts committed before magistrate judges.

9. Appeal of Magistrate Judge's Decision

2D CIRCUIT:

UNITED STATES V. JONES,
117 F.3D 644 (2D CIR. 1997)

Defendant challenging misdemeanor conviction and sentence rendered by 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.

4TH CIRCUIT:

UNITED STATES V. BAXTER,
19 F.3D 155 (4TH CIR. 1994)

Magistrate judge's judgment of conviction and sentence of misdemeanor defendant under § 3401 could only be appealed to federal district court, not to the court of appeals.

UNITED STATES V. JERGE,
738 F. SUPP. 181 (E.D. VA. 1990)

District court sits as an appellate court when a magistrate judge's decision in a misdemeanor case is appealed. The evidence was sufficient to sustain a guilty verdict if the magistrate judge had a sufficient basis to find the defendant guilty beyond a reasonable doubt.

UNITED STATES v. BURGESS,
602 F. SUPP. 1329 (E.D. VA. 1985)

On the appeal of a misdemeanor case, the Federal Rules of Appellate Procedure are not controlling, but 18 U.S.C. § 3402 and [Fed. R. Crim. P. 58] do apply.

7TH CIRCUIT :

UNITED STATES v. SMITH,
992 F.2D 98 (7TH CIR. 1993)

Federal Magistrates Act provides for appeal only to the district court after a misdemeanor conviction before a magistrate judge. Court of appeals did not have jurisdiction to hear defendant's direct appeal of his misdemeanor conviction under the Migratory Bird Act.

UNITED STATES v. VAN FASSAN,
899 F.2D 636 (7TH CIR. 1990)

Court of appeals had jurisdiction to hear appeal from defendant's conviction before a magistrate judge for violating the Migratory Bird Act after district court affirmed the conviction on appeal under 18 U.S.C. § 3401. Dictum: Court noted that it was odd that a misdemeanor defendant gets two appeals from his conviction when 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(g)(2)(A)].

UNITED STATES v. WYLDER,
590 F. SUPP. 926 (D. OR. 1984)

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. CAMPBELL,
132 F.3D 43 (10TH CIR. 1997)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

District court's order remanding the magistrate judge's sentencing order of a misdemeanor defendant to the magistrate judge for further proceedings consistent with the district court's order was not a final order appealable to the court of appeals. Magistrate judge on remand was free to re-sentence the defendant de novo.

D. PRISONER TRANSFERS TO OR FROM FOREIGN COUNTRIES

[28 U.S.C. § 636 (g) AND 18 U.S.C. §§ 4107, 4108, AND 4109]

The Federal Magistrates Act was amended in 1977 (Pub. L. No. 95-144) to add § 636(g), authorizing magistrate judges to act under 18 U.S.C. §§ 4107, 4108, and 4109. 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.

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

A. IN GENERAL

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* § 4, *infra*.

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

1ST CIRCUIT:

UNITED STATES V. ECKER,
923 F.2D 7 (1ST CIR. 1991)

Commitment order by magistrate judge entered under 18 U.S.C. § 4241 must be reviewed by the district judge under § 636(b)(1) to be a final order appealable to the court of appeals. (No statement as to whether matter was referred under § 636(b)(1)(A) or § 636(b)(1)(B).)

2ND CIRCUIT:

LITTON INDUSTRIES, INC. V. LEHMAN BROS. KUHN LOEB, INC.,
124 F.R.D. 75 (S.D.N.Y. 1989)

Magistrate judge may not use pressure tactics to coerce party into settling claim. Magistrate judge’s acceleration of deposition schedule in pretrial discovery order did not constitute undue coercion.

3RD CIRCUIT:

IN RE KASPER-ANSERMET,
132 F.R.D. 622 (D.N.J. 1990)

Motion to quash deposition subpoenas, issued under 28 U.S.C. § 1782 [letters rogatory], was properly referred to a magistrate judge under § 636(b)(1)(A). (Opinion by magistrate judge adopted by court - no discussion of magistrate judge authority.)

6TH CIRCUIT:

STANKO v. STORY,
928 F.2d 1133 (6TH CIR. 1991)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Magistrate judge is empowered by § 636(b)(1)(A) to make findings regarding exhaustion of remedies in a habeas corpus case under 28 U.S.C. § 2241.

E.E.O.C. v. KECO INDUSTRIES, INC.,
748 F.2d 1097 (6TH CIR. 1984)

Magistrate judge exceeded authority by preparing a report and recommendation for summary judgment when the original referral was only “to take evidence and testimony.”

IN RE LOCAL COURT OF PFORZHEIM,
130 F.R.D. 363 (W.D. MICH. 1989)

Letters rogatory under 28 U.S.C. § 1782(a) could be assigned to a magistrate judge appointed as “commissioner” for purposes of rendering judicial assistance. Magistrate judge is authorized by § 636(b) [no further citation] to deny requested order for blood sample.

PAULEY v. UNITED OPERATING Co.,
606 F. SUPP. 520 (E.D. MICH. 1985)

Although pretrial matters were originally referred under § 636(b)(1)(A), magistrate judge acted properly in issuing a report and recommendation when it became apparent that case-dispositive relief was sought. Order of reference amended nunc pro tunc by district judge.

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 the district court 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 magistrate judge to perform a *Neuschafer* hearing, asking habeas corpus prisoner questions concerning unexhausted claims.

LAXALT v. McCLATCHY,
109 F.R.D. 632 (D. NEV. 1986)

Magistrate judge has discretion under § 636(b)(1)(A) to determine sequence to be followed in deciding issues raised in pretrial motion. Order requiring party to argue jurisdictional issue at same time as discovery matter was upheld by district court.

11TH CIRCUIT:

LANCER ARABIANS, INC. v. BEECH AIRCRAFT CORP.,
723 F. SUPP. 1444 (M.D. FLA. 1989)

Court construed magistrate judge's order to strike 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:

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 order of reference to conduct pretrial proceedings did not specifically authorize 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 governs non-case-dispositive motion practice before magistrate judges. Proceedings before the magistrate judge are to be conducted "promptly." The rule provides that "[w]ithin 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made."

2ND CIRCUIT:

KATZ v. MORGENTHAU,
892 F.2D 20 (2D CIR. 1989)

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

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).

3RD CIRCUIT:

DELCO WIRE & CABLE, INC. v. WEINBERGER,
109 F.R.D. 680 (E.D. PA. 1986)

District court has discretion to refer a non-case-dispositive pretrial matter to a magistrate judge under § 636(b)(1)(B) for a report and recommendation and de novo determination.

9TH CIRCUIT:

McKEEVER v. BLOCK,
932 F.2d 795 (9TH CIR. 1991)

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

D. C. CIRCUIT:

CNPQ-CONSELHO NACIONAL DE DESENVOLVIMENTO CIENTIFICO E TECHNOLOGICO v. INTER-TRADE, INC.,
50 F.3d 56 (D.C. CIR. 1995)

Fed. R. Civ. P. 6(e)'s 3-day extension for service by mail extended the 10-day period for objections to the magistrate judge's order by 3 calendar days, rather than 3 business days.

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

Both § 636(b)(1)(A) and Fed. R. Civ. P. 72(a) provide that a district judge may modify or set aside any portion of a magistrate judge's order where it has been found that the order 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.

2ND CIRCUIT:

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. 1994)

District court has 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)

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

DETECTION SYSTEMS, INC. v. PITTHWAY CORP.,
96 F.R.D. 152 (W.D.N.Y. 1982)

Court may reconsider discovery matters under § 636(b)(1)(A) if a magistrate judge's rulings are "clearly erroneous or contrary to law." In resolving discovery disputes, magistrate judges are afforded broad discretion, and their decisions will be overruled only if their discretion is abused.

3RD CIRCUIT:

HAINES v. LIGGETT GROUP, INC.,
975 F.2d 81 (3RD CIR. 1992)

District court erred when conducting reconsideration of magistrate judge's discovery ruling under § 636(b)(1)(A) by expanding the record to consider evidence not considered by the magistrate judge. Court of appeals issued a writ of mandamus overturning district court's discovery order that had reversed the magistrate judge's discovery ruling under the "clearly erroneous" standard.

SELLON v. SMITH,
112 F.R.D. 9 (D. DEL. 1986)

Where party failed to raise attorney-client privilege argument after referral of all discovery matters to the magistrate judge, remand by district judge to 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)

District court found clear error on review of magistrate judge's order denying motion to amend complaint. Magistrate judge had failed to consider the alternate claims that were before the court in the motion papers filed, but which had not been raised at oral argument.

FEDERAL DEPOSIT INS. CORP. v. UNITED STATES,
527 F. SUPP. 942 (S.D.W. VA. 1981)

Magistrate judge's failure to determine whether a party had waived a defense, or whether the other party had failed to raise the waiver issue, required remand.

5TH CIRCUIT:

RESOLUTION TRUST CORP. v. SANDS,
151 F.R.D. 616 (N.D. TEX. 1993)

District court would not reverse magistrate judge's denial of motion for protective order under the "clearly erroneous" standard of review where plaintiff could only show that other magistrate judges in similar cases had decided such motions differently. Plaintiff could not show that 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.

10TH CIRCUIT:

BRANCH V. MOBIL OIL CORP.,
143 F.R.D. 255 (W.D. OKLA. 1992)

Party could not present additional evidence to the district court during reconsideration of 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 in Fed. R. Civ. P. 72(a) 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 committed. 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 the 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(a) makes review by the district judge mandatory upon a party's filing of objections "within 10 days after being served with a copy of the magistrate judge's order." The rule expressly provides that "a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made." For further discussion of waiver issues, see APPENDIX C.

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 order.

1ST CIRCUIT:

SUNVIEW CONDO. 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 a court of appeals.

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 complaint) and obtain district judge review, "he cannot later leapfrog the trial court and appeal the ruling directly to the court of appeals."

3RD CIRCUIT:

UNITED STEELWORKERS OF AMERICA V. NEW JERSEY ZINC CO., INC.,
828 F.2D 1001 (3RD CIR. 1987)

Failure to object to § 636(b)(1)(A) ruling waives appellate review.

5TH CIRCUIT:

COLBURN V. BUNGE TOWING, INC.,
883 F.2D 372 (5TH CIR. 1989)

Court of appeals is without jurisdiction to hear an appeal where a party fails to appeal the magistrate judge's non-case-dispositive order to the district court.

9TH CIRCUIT:

SIMPSON V. LEAR ASTRONICS CORP.,
77 F.3D 1170 (9TH CIR. 1996)

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

10TH CIRCUIT:

PIPPINGER V. RUBIN,
129 F.3D 519 (10TH CIR. 1997)

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

5. Appellate Review

Since orders in non-case-dispositive pretrial proceedings are interlocutory, the immediate appeal to the court of appeals of a district judge's order reviewing a magistrate judge's non-case-dispositive decision generally is not permitted.

3RD CIRCUIT:

SMITH V. BIC CORP.,
869 F.2D 194 (3RD CIR. 1989)

District court's affirmance of magistrate judge's denial of motion for protective order was reviewed by the court of appeals under collateral order doctrine.

NEW YORK V. UNITED STATES METALS REFINING CO.,
771 F.2D 796 (3RD CIR. 1985)

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

4TH CIRCUIT:

MDK, INC. v. MIKE'S TRAIN HOUSE, INC.,
27 F.3d 116 (4TH CIR.), *CERT. DENIED*,
513 U.S. 1000 (1994)

Generally, 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.

7TH CIRCUIT:

RICHARDS v. FIRESTONE TIRE & RUBBER CO.,
928 F.2d 241 (7TH CIR. 1991)

Finality doctrine of 28 U.S.C. § 1291 bars appeal of district court's order of dismissal, since real dispute concerned 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 a discovery order by the magistrate judge are not final orders under 28 U.S.C. § 1291 and do not fall within collateral order exception to final judgment rule. The court of appeals 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 § 4, *infra*, however, present cases that 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 for Leave to Amend

Courts have held uniformly that motions to amend are non-case-dispositive matters subject to a clearly erroneous or contrary to law standard of review.

1ST CIRCUIT:

PAGANO V. FRANK,
983 F.2D 343 (1ST CIR. 1993)

Generally, 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, however, “he cannot later leapfrog the trial court and appeal the ruling directly to the court of appeals.”

2ND CIRCUIT:

ACME ELECTRIC CORP. V. SIGMA INSTRUMENTS, INC.,
121 F.R.D. 26 (W.D.N.Y. 1988)

Motion to amend the complaint to add non-diverse party is a non-case-dispositive matter, even if it results in remand to state court.

4TH CIRCUIT:

AMBROSE V. SOUTHWORTH PRODUCTS CORP.,
953 F. SUPP. 728 (W.D. VA. 1997)

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

YOUNG V. JAMES,
168 F.R.D. 24 (E.D. VA. 1996)

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

5TH CIRCUIT:

BRYANT V. MISSISSIPPI POWER & LIGHT Co.,
722 F. SUPP. 298 (S.D. MISS. 1989)

Motion to amend 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)

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

2. Motions to Remand

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 granting a motion to remand whether the district judge reviewed the magistrate judge's order either 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) and subject to the clearly erroneous or contrary to law standard of review.

2ND CIRCUIT:

AMALGAMATED LOCAL UNION NUMBER 55 v. FIBRON PRODS., INC.,
976 F. SUPP. 192 (W.D.N.Y. 1997)

Magistrate judge has authority to determine a motion to remand as a non-case-dispositive pretrial matter pursuant to § 636(b)(1)(A) and Fed. R. Civ. P. 72(a). (Opinion by magistrate judge.)

3RD CIRCUIT:

IN RE U.S. HEALTHCARE,
159 F.3d 142 (3rd Cir. 1998)

A remand order is dispositive for purposes of § 636(b)(1). Although 28 U.S.C. § 1447(c) generally precludes review of remand orders, the appellate court held that a writ of mandamus issued to the magistrate judge to vacate his remand order was appropriate because the magistrate judge lacked the authority to issue the final remand order.

TEMPTATIONS, INC. v. WAGER,
26 F. SUPP. 2d 740 (D.N.J. 1998)

Because an order to remand a case to state court is dispositive, a magistrate judge does not have authority to enter it without the consent of the parties.

EISENMAN v. CONTINENTAL AIRLINES, INC.,
974 F. SUPP. 425 (D.N.J. 1997)

Holding that a motion to remand is a non-case-dispositive matter subject to the clearly erroneous or contrary to law standard of review under § 636(b)(1)(A), the court noted that even if a motion to remand were case-dispositive, the standard of review in this instance would be the same because questions of law are reviewed de novo for both case-dispositive and non-case-dispositive motions.

CAMPBELL V. INTERNATIONAL BUSINESS MACHINES,
912 F. SUPP. 116 (D.N.J. 1996)

Motions to remand are non-case-dispositive matters properly disposed of by magistrate judges under § 636(b)(1)(A). (Extensive citation to authority.)

GIANGOLA V. WALT DISNEY WORLD CO.,
753 F. SUPP. 148 (D.N.J. 1990)

A motion to remand is a case-dispositive matter. Magistrate judge exceeded the authority under either §§ 636(b)(1)(A) or (B) by ordering remand sua sponte. District court must designate matter for a report and recommendation.

MCDONOUGH V. BLUE CROSS OF N.E. PENN.,
131 F.R.D. 467 (W.D. PA. 1990)

Because remand to a state court does not dispose of a party's claim or defense, a magistrate judge is authorized to issue a final order remanding the case. The district judge reviews such an order under the clearly erroneous standard.

4TH CIRCUIT:

IN RE LOWE,
102 F.3D 731 (4TH CIR. 1996)

After one magistrate judge entered a remand order for lack of subject matter jurisdiction and another magistrate judge granted a motion for reconsideration and denied the motion to remand, plaintiff petitioned for a writ of mandamus to order the district court to remand the case to state court. The appeals court issued the writ of mandamus, holding that the district court was without authority to reconsider its remand order under 28 U.S.C. § 1447(d). The court's opinion does not address specifically the magistrate judge's authority to order the remand initially.

YOUNG V. JAMES,
168 F.R.D. 24 (E.D. VA. 1996)

Motions to remand are non-case-dispositive and are reviewed 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)

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)

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

VAQUILLAS RANCH Co., LTD. v. TEXACO EXPLORATION & PRODUCTION, INC.,
844 F. SUPP. 1156 (S.D. TEX. 1994)

Motion to remand 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.

CITY OF JACKSON, MISS. v. LAKELAND LOUNGE OF JACKSON, INC.,
147 F.R.D. 122 (S.D. MISS. 1993)

Motion to remand case to state court is a non-case-dispositive motion that may be referred to a magistrate judge under § 636(b)(1)(A).

6TH CIRCUIT:

NARAGON v. DAYTON POWER & LIGHT Co.,
934 F. SUPP. 899 (S.D. OHIO 1996)

Relief sought in motion to remand is non-case-dispositive. (Opinion by magistrate judge.)

7TH CIRCUIT:

ARCHDIOCESE OF MILWAUKEE v. UNDERWRITERS AT LLOYD'S,
955 F. SUPP. 1066 (E.D. WIS. 1997)

Court reviewed magistrate judge's order granting motion to remand under a de novo standard despite acknowledging that "[g]enerally, the court would review the magistrate'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)."

JACKSON NAT'L LIFE INS. Co. v. GREYCLIFF PARTNERS, LTD.,
960 F. SUPP. 186 (E.D. WIS. 1997)

District judge set aside magistrate judge's order granting a motion to remand as contrary to law under Fed. R. Civ. P. 72(a). (Opinion does not otherwise discuss magistrate judge authority.)

8TH CIRCUIT:

WHITE v. STATE FARM MUT. AUTO. INS. Co.,
153 F.R.D. 639 (D. NEB. 1993)

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). Opinion includes text of magistrate judge's opinion holding that magistrate judge has authority to remand as non-case-dispositive pretrial matter.

BANBURY v. OMNITRITION INTERNATIONAL INC.,
818 F. SUPP. 276 (D. MINN. 1993)

Motion to remand 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)

Magistrate judge had authority to enter an order of remand as a non-case-dispositive pretrial matter under § 636(b)(1)(A), and district judge was without jurisdiction to review after a certified copy of the remand order had been mailed to the clerk of the state court.

FEDERAL CIRCUIT :

IN RE FOSTER,
52 F.3D 343 (FED. CIR. 1995)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Premature certification to state court of magistrate judge's remand order based on lack of subject matter jurisdiction precluded review by the district court.

3. Motions to Consolidate, Bifurcate, or Sever Trials

3RD CIRCUIT :

MILLER V. NEW JERSEY TRANSIT AUTH. RAIL OPERATIONS,
160 F.R.D. 37 (D.N.J. 1995)

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 magistrate judge.)

11TH CIRCUIT :

YOUNG V. CITY OF AUGUSTA, GEORGIA,
59 F.3D 1160 (11TH CIR. 1995)

Magistrate judge's denial of a motion to consolidate was reviewed for abuse of discretion.

4. Motions to Intervene

2ND CIRCUIT :

UNITED STATES V. CERTAIN REAL PROPERTY,
751 F. SUPP. 1060 (E.D.N.Y. 1989)

Motion to intervene is not dispositive of a claim or defense of a party under Fed. R. Civ. P. 72(a) and may be referred to a magistrate judge under § 636(b)(1)(A).

5TH CIRCUIT :

MISSISSIPPI POWER & LIGHT CO. V. UNITED GAS PIPE LINE CO.,
621 F. SUPP. 718 (S.D. MISS. 1985)

Denial of a motion to intervene is equivalent to involuntary dismissal, even though original suit remains for adjudication. Magistrate judge had no authority to render a final decision on the motion.

5. Motions to Strike

1ST CIRCUIT:

SINGH v. SUPERINTENDING SCHOOL COMMITTEE OF THE CITY OF PORTLAND,
593 F. SUPP. 1315 (D. ME. 1984)

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 in subsection (A) from referral to magistrate judges.

6. Discovery Motions and Orders

In many 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.

1ST CIRCUIT:

SUNVIEW CONDO. ASSOC. v. FLEXEL INT'L, LTD.,
116 F.3d 962 (1st Cir. 1997)

Magistrate judge's order denying motion to compel jurisdictional discovery is non-case-dispositive and self-operating. An aggrieved party must file timely objections with the district court to receive subsequent review in a court of appeals.

HOLMES PRODUCTS CORP. v. DANA LIGHTING, INC.,
926 F. SUPP. 264 (D. MASS. 1996)

Magistrate judge's discovery order may be reviewed only under clearly erroneous or contrary to law standard, and the district judge is not permitted to receive additional evidence.

WANG LABORATORIES, INC. v. CFR ASSOCIATES, INC.,
125 F.R.D. 10 (D. MASS. 1989)

Magistrate judge is authorized under § 636(b)(1)(A) to issue protective order to prevent disclosure of information which will cause competitive harm, and to grant motion to disqualify witness. (Opinion by magistrate judge.)

IN RE SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION,
117 F.R.D. 30 (D.P.R. 1987)

Magistrate judge is authorized under § 636(b)(1)(A) to order compliance with subpoena duces tecum issued in another district during multi-district litigation. (Opinion by magistrate judge.)

FISCHER v. MCGOWAN,
585 F. SUPP. 978 (D.R.I. 1984)

Motion to compel non-party deponent to reveal confidential sources is a non-case-dispositive pretrial discovery matter.

2ND 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.

NOVA BIOMEDICAL CORP. v. I-STAT CORP.,
182 F.R.D. 419 (S.D.N.Y. 1998)

District judge applied clearly erroneous standard of review and affirmed magistrate judge's order quashing subpoenas.

MATTHEWS v. USAIR, INC.,
882 F. Supp. 274 (N.D.N.Y. 1995)

Discovery orders are generally non-case-dispositive and are reviewed under the clearly erroneous or contrary to law standard of review.

FEDERAL INSURANCE CO. v. KINGSBURY PROPERTIES, LTD.,
1992 WL 380980 (S.D.N.Y. 1992)

A motion to vacate a magistrate judge's discovery order will be treated by the district court as objections to the discovery order; magistrate judge's order will be reviewed under the clearly erroneous or contrary to law standard.

LITTON INDUSTRIES, INC. v. LEHMAN BROS. KUHN LOEB, INC.,
124 F.R.D. 75 (S.D.N.Y. 1989)

Magistrate judges are afforded broad discretion in resolving discovery disputes. Objections to discovery orders seeking reconsideration by the district court do not stay automatically the parties' obligations under those orders.

NIKKAL INDUSTRIES, LTD. v. SALTON, INC.,
689 F. Supp. 187 (S.D.N.Y. 1988)

Motion to disqualify a witness is a non-case-dispositive pretrial discovery matter.

3RD CIRCUIT:

HAINES v. LIGGETT GROUP, INC.,
975 F.2d 81 (3rd 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 (3RD CIR. 1985)

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.

SCOTT PAPER Co. v. UNITED STATES,
943 F. SUPP. 501 (E.D. PA. 1996)

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:

FEDERAL DEPOSIT INS. CORP. v. UNITED STATES,
527 F. SUPP. 942 (S.D. W. VA. 1981)

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)

Court of appeals issued writ of mandamus to compel the district judge to vacate an 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.

LAHR V. FULBRIGHT & JAWORSKI ,
164 F.R.D. 204 (N.D. TEX. 1996)

District judge affirmed the magistrate judge's order granting a motion for mental examination in sexual harassment action, applying clearly erroneous standard to magistrate judge's fact-finding, reviewing conclusions of law de novo, and invoking 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:

MATHERS V. BRICKLAYERS AND ALLIED CRAFTSMEN ,
779 F. SUPP. 914 (W.D. MICH. 1991)

Magistrate judge's denial of a motion to compel discovery because the material is protected by 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:

G. HEILEMAN BREWING Co. v. JOSEPH OAT CORP.,
871 F.2d 648 (7TH CIR. 1989)

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

VANN v. LONE STAR STEAKHOUSE & SALOON OF SPRINGFIELD, INC.,
967 F. SUPP. 346 (C.D. ILL. 1997)

Motion to compel disclosure of 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.

9TH CIRCUIT:

POWERS v. EICHEN,
961 F. SUPP. 233 (S.D. CAL. 1997)

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

PIPER v. HARNISCHFEGER CORP.,
170 F.R.D. 173 (D. NEV. 1997)

Magistrate judge held 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(a)(2)(B). (Opinion by magistrate judge.)

AINSWORTH v. VASQUEZ,
759 F. SUPP. 1467 (E.D. CAL. 1991)

In death penalty habeas corpus cases, a magistrate judge may exercise the inherent powers of the court to issue non-case-dispositive orders setting "Neuschafer" hearings. (See *Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir. 1988): hearings are held to determine the existence of all exhausted and unexhausted claims.)

LAXALT v. McCLATCHY,
116 F.R.D. 455 (D. NEV. 1986)

District judge affirmed magistrate judge's protective orders based on irrelevancy and on statutory and common law executive privilege, applying the clearly erroneous or contrary to law standard of review.

10TH CIRCUIT:

BURTON v. R.J. REYNOLDS TOBACCO Co.,
177 F.R.D. 491 (D. KAN. 1997)

District judge reviewed 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)

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:

JOINER v. HERCULES, INC.,
169 F.R.D. 695 (S.D. GA. 1996)

Magistrate judge's order regarding discovery privileges is subject to review under the clearly erroneous standard.

D.C. CIRCUIT:

FEDERAL SAVINGS & LOAN INS. CORP. v. COMMONWEALTH LAND TITLE INS. CO.,
130 F.R.D. 507 (D.D.C. 1990)

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

7. Sanctions and Attorneys' Fees

For additional cases regarding the imposition of sanctions, *see* Section 4, *infra*.

2ND CIRCUIT:

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 be considered case-dispositive.

ARONS v. LALIME,
167 F.R.D. 364 (W.D.N.Y. 1996)

Magistrate judge ordered sanctions pursuant to Fed. R. Civ. P. 37 and 16(f). (Opinion by magistrate judge.)

WEEKS STEVEDORING CO., INC. v. RAYMOND INT'L BUILDERS, INC.,
174 F.R.D. 301 (S.D.N.Y. 1997)

Magistrate judge's award of Rule 11 sanctions is reviewed under the clearly erroneous or contrary to law standard of review unless the sanction itself can be considered dispositive of a claim.

Woo v. City of New York,
1996 WL 284930 (S.D.N.Y. 1996)

Magistrate judge imposed sanctions under Fed. R. Civ. P. 16(f) for violation of the court's scheduling order. (Opinion by magistrate judge. No discussion of authority.)

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 in plaintiff's favor. (Opinion by magistrate judge, expressly leaving district judge the option of treating as report and recommendation.)

Scotch Game Call Company, Inc. v. Lucky Strike Bait Works, Ltd.,
148 F.R.D. 65 (W.D.N.Y. 1993)

Magistrate judge awarded attorneys' fees and costs pursuant to 28 U.S.C. § 1927 as sanctions for bad faith multiplication of proceedings. (Opinion by magistrate judge.)

Novelty Textile Mills, Inc. v. Stern,
136 F.R.D. 63 (S.D.N.Y. 1991)

Magistrate judge has authority to impose sanctions under 28 U.S.C. § 1927 as a case-dispositive matter within the scope of § 636(b)(1)(A). "Judicial power to award monetary sanctions 'springs from a different source' than the contempt power"

3RD CIRCUIT :

Toth v. Alice Pearl, Inc.,
158 F.R.D. 47 (D.N.J. 1994)

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)

Magistrate judge's order precluding 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.

Klapper v. Commonwealth Realty Trust,
657 F. Supp. 948 (D. Del. 1987)

A motion for sanctions under Fed. R. Civ. P. 11 is a non-case-dispositive matter reviewed under the clearly erroneous or contrary to law standard.

4TH CIRCUIT:

JAYNE H. LEE, INC. v. FLAGSTAFF INDUS. CORP.,
173 F.R.D. 651 (D. Md. 1997)

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 magistrate judge.)

5TH CIRCUIT:

JOHN v. STATE OF LOUISIANA,
899 F.2D 1441 (5TH CIR. 1990)

Magistrate judge may preside in a proceeding to determine appropriate sanctions against attorney under either §§ 636(b)(1)(A) or (b)(3).

6TH CIRCUIT:

BENNETT v. GENERAL CASTER SERVICES OF N. GORDON CO., INC.,
976 F.2D 995 (6TH CIR. 1992)

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

PEREZ v. SEC'Y OF HEALTH AND HUMAN SERVICES,
881 F.2D 330 (6TH CIR. 1989)

Dicta: It is not clear that the referral of a 42 U.S.C. § 406(b) attorney fee matter in a social security case to a magistrate judge is proper in light of limited district court review. The reasoning in *Gomez v. United States*, 490 U.S. 858 (1989), may prevent the district court from abdicating its obligations under the statute.

INSITUFORM 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 magistrate judge.)

7TH CIRCUIT:

RETIRED CHICAGO POLICE ASSOC. v. CITY OF CHICAGO,
76 F.3D 856 (7TH CIR.), *CERT. DENIED*,
519 U.S. 856 (1996)

Whether a sanction request is pre-dismissal or post-dismissal, it is a case-dispositive matter that may only be referred to a magistrate judge for a report and recommendation pursuant to § 636(b)(1)(B) or § 636(b)(3) and reviewed de novo.

ALPERN v. LIEB,
38 F.3d 933 (7TH CIR. 1994)

District judge may refer sanctions dispute to a magistrate judge under § 636(b)(1)(B) or § 636(b)(3), but a magistrate judge may not make an independent decision regarding sanctions under § 636(b)(1)(A).

TARKOWSKI v. PENNZOIL Co.,
100 F.R.D. 37 (N.D. ILL. 1983)

Where parties attempted to “jump ship” after referral of all pretrial matters to magistrate judge by bringing discovery matters to the district judge, the court would consider sanctions under Fed. R. Civ. P. 37(a)(4).

8TH CIRCUIT:

UNIVERSAL COOPERATIVES, INC. v. TRIBAL CO-OP. MARKETING DEV. FED. OF INDIA,
45 F.3d 1194 (8TH CIR. 1995)

Magistrate judge had authority to impose sanctions for failure of a client with settlement authority to attend a conference. Court reviewed imposition of sanctions for abuse of discretion.

TEMPLE v. WISAP USA IN TEXAS,
152 F.R.D. 591 (D. NEB. 1993)

Rule 11 sanctions properly determined by magistrate judge pursuant to § 636(b)(1)(A) because “pretrial” is understood to mean “nontrial.” Section 636(b)(3) provides alternative authority.

JOCHIMS v. ISUZU MOTORS, LTD.,
144 F.R.D. 350 (S.D. IOWA 1992)

Magistrate judge imposed sanctions under Fed. R. Civ. P. 16(f) for failure to seek timely amendment of pretrial scheduling order and untimely designation of expert witnesses. (Opinion by magistrate judge. No discussion of magistrate judge authority.)

9TH CIRCUIT:

SIMPSON v. LEAR ASTRONICS CORP.,
77 F.3d 1170 (9TH CIR. 1996)

Party who fails to file timely objections to the magistrate judge’s discovery sanction orders, which are non-dispositive, forfeits appellate review.

McPHAIL’S, INC. v. CRAIGHEAD,
67 F.3d 307 (9TH CIR. 1995)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Rule 11 sanctions imposed for filing a frivolous motion are properly characterized as non-case-dispositive, and the district judge reviews the magistrate judge’s order for clear error.

TELLURIDE MANAGEMENT SOLUTIONS, INC. v. TELLURIDE INVESTMENT GROUP,
55 F.3d 463 (9th Cir. 1995)

Appellate court affirmed the magistrate judge's imposition of discovery sanctions for failure to appear at a deposition, but reversed the magistrate judge's decision to impose sanctions for filing an unsuccessful motion for reconsideration. "The magistrate judge's sanction order for the motion for reconsideration may have been proper pursuant to Rule 11, but the magistrate judge only identified Rule 37 as the basis for the sanctions."

GRIMES v. CITY AND COUNTY OF SAN FRANCISCO,
951 F.2d 236 (9th Cir. 1991)

Magistrate judge is 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 a magistrate judge. Court upheld \$85,000 sanction ordered by a magistrate judge against the City of San Francisco.

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)

Magistrate judge had authority to impose Rule 11 sanctions for filing of frivolous motion for reconsideration of denial of discovery sanctions.

TAMURA v. FEDERAL AVIATION ADMINISTRATION,
908 F.2d 977 (9th Cir. 1990)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Court assumed, without deciding, that magistrate judge had authority to impose monetary sanctions pursuant to Fed. R. Civ. P. 16(f), reviewed for abuse of discretion, and reversed magistrate judge's imposition of sanctions.

ON COMMAND VIDEO CORP. v. LODGENET ENTERTAINMENT CORP.,
976 F. Supp. 917 (N.D. Cal. 1997)

Magistrate judge had authority to impose discovery sanctions, but only a district judge may hold parties in contempt.

10TH CIRCUIT:

HUTCHINSON v. PFELL,
105 F.3d 562 (10th Cir.), *CERT. DENIED,*
118 S.Ct. 298 (1997)

Court construed a motion to disqualify counsel as a motion for sanctions within the magistrate judge's authority to decide non-case-dispositive matters pursuant to § 636(b)(1)(A). Discovery sanctions under Fed. R. Civ. P. 37 are also properly determined by a magistrate judge pursuant to § 636(b)(1)(A).

GOMEZ V. MARTIN MARIETTA CORP.,
50 F.3D 1511 (10TH CIR. 1995)

A party's request for a dispositive sanction - in this case 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(a) rather than 72(b).

ALLSTATE FINANCIAL CORP. V. STEEL-N-FOAM-DOCKS, INC.,
1995 WL 7448 (D. KAN. 1995)

Magistrate judge granted a motion for sanctions (attorneys' fees) pursuant to Fed. R. Civ. P. 16(f) 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 magistrate judge.)

11TH CIRCUIT:

ATTWOOD V. SINGLETARY,
105 F.3D 610 (11TH CIR. 1997)

District court adopted the report and recommendation of the magistrate judge in which dismissal of the action was recommended as a Rule 11 sanction for filing a false application for indigent status.

SAN SHIAH ENTERPRISE Co., LTD. V. PRIDE SHIPPING CORP.,
783 F. SUPP. 1334 (S.D. ALA. 1992)

Magistrate judge is authorized to impose Rule 11 sanctions under § 636(b)(1)(A) and Fed. R. Civ. P. 72(a).

KING V. THORNBURG,
762 F. SUPP. 336 (S.D. GA. 1991)

Dicta: It is not a "normal judicial function" for a magistrate judge to order an attorney's arrest for failure to appear at a scheduled hearing, particularly where the magistrate judge has "no authority to punish for contempt of court."

8. Motions to Disqualify Counsel

1ST CIRCUIT:

AGELOFF V. NORANDA, INC.,
936 F. SUPP. 72 (D.R.I. 1996)

Magistrate judge's order denying a motion for admission pro hac vice and disqualifying counsel was reversed for clear error.

3RD CIRCUIT:

CARDONA V. GENERAL MOTORS CORP.,
942 F. SUPP. 968 (D.N.J. 1996)

District judge reviewed magistrate judge's order disqualifying plaintiff's firm and attorney under the clearly erroneous or contrary to law standard and affirmed the magistrate judge's decision.

6TH CIRCUIT:

AFFELDT V. CARR,
628 F. SUPP. 1097 (N.D. OHIO 1985)

Motion to disqualify counsel is a non-case-dispositive pretrial matter properly referred to a magistrate judge under § 636(b)(1)(A).

9TH CIRCUIT:

COLES V. ARIZONA CHARLIE'S,
992 F. SUPP 1214 (D. NEV. 1998)

District judge affirmed the magistrate judge's order disqualifying the plaintiff's attorney who had previously worked for the defense counsel law firm.

ASYST TECH., INC. V. EMPAK, INC.,
962 F. SUPP. 1241 (N.D. CAL. 1997)

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

10TH CIRCUIT:

UNITED STATES V. TA,
938 F. SUPP. 762 (D. UTAH 1996)

Magistrate judge denied a motion to disqualify defense counsel. (Opinion by magistrate judge.)

9. Motions to Proceed In Forma Pauperis

5TH CIRCUIT:

HODGE V. PRINCE,
730 F. SUPP. 747 (N.D. TEX. 1990), *AFF'D*,
923 F.2D 853 (5TH CIR. 1991)

Prisoner's petition to proceed in forma pauperis under 28 U.S.C. §§ 1825 and 1915 and motion to issue subpoena duces tecum for production of documents are non-case-dispositive matters properly decided by the magistrate judge under § 636(b)(1)(A).

6TH CIRCUIT :

WOODS v. DAHLBERG,
894 F.2D 187 (6TH CIR. 1990)

Denial of a motion to proceed in forma pauperis is the functional equivalent of an involuntary dismissal; the magistrate judge must proceed under § 636(b)(1)(B).

9TH CIRCUIT :

TRIPAT v. RISON,
847 F.2D 548 (9TH CIR. 1988)

A magistrate judge has no authority to issue a case-dispositive order denying in forma pauperis status without consent under § 636(c).

10. Motions for Appointment of Guardian ad Litem

2ND CIRCUIT :

MCDONALD v. HAMMONS,
936 F. SUPP. 86 (E.D.N.Y. 1996), *APPEAL DISMISSED*,
129 F.3D 114 (2^D CIR. 1997), *CERT. DENIED*,
118 S. Ct. 1514 (1998)

District judge modified the magistrate judge's order appointing a guardian ad litem upon review after objections were filed. (No discussion of magistrate judge authority or standard of review.)

11. Sufficiency of Pleas

5TH CIRCUIT :

UNITED STATES v. ROJAS,
898 F.2D 40 (5TH CIR. 1990)

Magistrate judge may preside over an evidentiary hearing to determine the voluntariness of a defendant's guilty plea. Although the court considers the proceeding a non-case-dispositive pretrial matter referred under § 636(b)(1)(A), the district judge maintains authority over the final decision by reviewing the magistrate judge's report and recommendation concerning the plea.

12. Motion to Certify Order for Interlocutory Appeal

6TH CIRCUIT :

VITOLS v. CITIZENS BANKING Co.,
984 F.2D 168 (6TH CIR. 1993)

Magistrate judge did not have authority under § 636(b)(1)(A) to issue a final order certifying a district court order for interlocutory appeal under 28 U.S.C. § 1292(b).

13. Grand Jury Proceedings

2ND CIRCUIT:

UNITED STATES V. DIAZ,
922 F.2D 998 (2D CIR. 1990), *CERT. DENIED,*
500 U.S. 925 (1991)

The selection and impanelment 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)

Motion to quash a grand jury subpoena may be referred to a magistrate judge under § 636(b)(1)(A).

7TH CIRCUIT:

IN RE GRAND JURY APPEARANCE OF CUMMINGS,
615 F. SUPP. 68 (W.D. WIS. 1985)

Dicta: It is not likely that Congress intended to include matters arising in grand jury proceedings within the category of pretrial matters under § 636(b)(1)(A). (But magistrate judge's authority was upheld under § 636(b)(3); *see* § 6, *infra*.)

14. Subpoena Duces Tecum [Fed. R. Crim. P. 17]

1ST CIRCUIT:

UNITED STATES V. KLOPPER,
725 F. SUPP. 638 (D. MASS. 1989)

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.

2ND CIRCUIT:

UNITED STATES V. FLORACK,
838 F. SUPP. 77 (W.D.N.Y. 1993)

District court reversed the magistrate judge's denial of defendant's *ex parte* motion to issue a subpoena duces tecum under Fed. R. Crim. P. 17, that had been referred to the magistrate judge under § 636(b)(1)(A), as contrary to law.

15. Motions to Transfer Venue

2ND CIRCUIT :

SHENKER V. MURASKY,
1996 WL 650974 (E.D.N.Y. 1996)

A magistrate judge's order transferring venue is non-case-dispositive and subject to the clearly erroneous or contrary to law standard of review.

3RD CIRCUIT :

MARKET TRANSITION FACILITY OF NEW JERSEY V. TWENA,
941 F. SUPP. 462 (D.N.J. 1996)

Magistrate judge denied a motion for transfer based on improper venue. (Opinion by magistrate judge. No discussion of authority.)

16. Miscellaneous Pretrial Matters

2ND CIRCUIT :

PALMER V. ANGELICA HEALTHCARE SERVS. GROUP, INC.,
170 F.R.D. 88 (N.D.N.Y. 1997)

Magistrate judge denied a motion to strike jury demand. (Opinion by magistrate judge. No discussion of authority.)

6TH CIRCUIT :

NABKEY V. HOFFIUS,
827 F. SUPP. 450 (W.D. MICH. 1993), *AFF'D*,
79 F.3D 1148 (6TH CIR. 1996)

Contempt sanction imposed by a district judge on 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.

C. POST-JUDGMENT DUTIES

Although § 636(b)(1)(A) states that magistrate judges may be designated to “hear and determine any pretrial matter,” courts sometimes utilize the provision to refer post-judgment 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 post-judgment matters to magistrate judges under the provision. The referral of post-judgment matters to magistrate judges also arises under § 636(b)(1)(B) and § 636(b)(3). *See also* §§ 4 and 6, *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(a)(4) 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.

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. Fed. R. Civ. P. 11 motion for sanctions against an attorney is a collateral matter and can properly be determined after trial and while judgment is on appeal.

2. Discovery Orders

2ND CIRCUIT:

DENNY V. FORD MOTOR Co.,
146 F.R.D. 52 (N.D.N.Y. 1993)

Referral of a motion for post-judgment discovery (in this case, the trial judge's deposition) to a magistrate judge was proper. Although reference was without source of authority relied upon, reviewing court held that the only possible source of authority was § 636(b)(3).

5TH CIRCUIT:

MERRITT V. INT'L BROTHERHOOD OF BOILERMAKERS,
649 F.2D 1013 (5TH CIR. 1981)

Magistrate judge had authority to impose Fed. R. Civ. P. 37(a)(4) discovery sanctions after 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)

Magistrate judge had authority to issue post-judgment order modifying a protective order involving a non-party witness. (Opinion by magistrate judge.)

3. Default Judgments

5TH CIRCUIT:

McLEOD, ALEXANDER, POWEL, & APFFEL, P.C. v. QUARLES,
925 F.2d 853 (5TH CIR. 1991)

District judge may properly refer a motion for relief from default judgment to a magistrate judge for an evidentiary hearing and proposed findings of fact and recommendations.

4. 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 participants' conduct and establishing rights and obligations of the parties. A magistrate judge is authorized to preside over post-judgment collection proceedings under either § 636(b)(1)(A) or § 636(b)(3).

5. Claim of Exemption

9TH CIRCUIT:

BANK TEJARAT v. VARSHO-SAZ,
981 F.2d 1257 (9TH CIR. 1992)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Magistrate judge had no authority to enter a final order in a post-judgment proceeding on a claim of exemption absent the parties' consent to the magistrate judge's authority.

D. CASE-DISPOSITIVE OR "EXCEPTED" MATTERS

Although a variety of case-dispositive motions such as motions for summary judgment, motions to suppress evidence in criminal cases, and motions to dismiss are specifically excepted from 28 U.S.C. § 636(b)(1)(A), some courts have attempted to refer such matters to magistrate judges under this section. These referrals generally have been overturned on appeal as exceeding the authority granted under the Federal Magistrates Act. *See* § 4, *infra*, regarding the referral of case-dispositive motions to magistrate judges.

1. Motions for Injunctive Relief

7TH CIRCUIT:

ASSOCIATES FINANCIAL SERVICES Co., INC. v. MERCANTILE MORTG. Co.,
727 F. SUPP. 371 (N.D. ILL. 1989)

Preliminary injunctions are case-dispositive matters. Temporary restraining orders are generally non-case-dispositive matters that at some point may become coercive temporary preliminary injunctions. Magistrate judges may preside over motions for injunctive relief on a report and recommendation basis.

2. Motions for Summary Judgment

6TH CIRCUIT:

E.E.O.C. v. KECO INDUSTRIES, INC.,
748 F.2D 1097 (6TH CIR. 1984)

Magistrate judge exceeded statutory authority by preparing a report and recommendation for summary judgment when the original reference was only “to take evidence and testimony.”

9TH CIRCUIT:

LOPEZ v. FLECK,
43 F.3D 1479 (9TH CIR. 1994)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Absent the consent of the parties, the magistrate judge was not authorized to enter a case-dispositive order granting defendants’ motion for summary judgment.

11TH CIRCUIT:

YOUNG v. CITY OF AUGUSTA, GEORGIA,
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).

D.C. CIRCUIT:

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)

Although the referral order to conduct pretrial proceedings did not specifically authorize the magistrate judge to hear and issue a recommended decision in a summary judgment motion, such a motion is an authorized element of pretrial proceedings.

3. Motions to Suppress

7TH CIRCUIT :

UNITED STATES v. SCOTT,
19 F.3D 1238 (7TH CIR.), *CERT. DENIED,*
513 U.S. 857 (1994)

Magistrate judge's decision to reopen a suppression hearing is reviewed under the clearly erroneous standard of § 636(b)(1)(A).

UNITED STATES v. A RESIDENCE LOCATED AT 218 3RD STREET,
622 F. SUPP. 908 (W.D. WIS. 1985), *AFF'D AND REMANDED ON OTHER GROUNDS,*
805 F.2D 256 (7TH CIR. 1986)

Although a motion for the return of seized property is not a pretrial matter under § 636(b)(1), it is made after seizures that do not lead directly to indictment and trial. The magistrate judge is thus empowered by implication to exercise § 636(b)(1)(B) authority to issue a report and recommendation.

11TH CIRCUIT :

UNITED STATES v. SOLOMON,
728 F. SUPP. 1544 (S.D. FLA. 1990)

Motion to suppress is a non-case-dispositive matter, requiring less than de novo review under local court rules. [Note: court's decision appears directly contrary to the language of § 636(b)(1)(A).]

4. Dismissals

2ND CIRCUIT :

ZISES v. DEPT. OF SOCIAL SERVICES,
112 F.R.D. 223 (E.D.N.Y. 1986)

In a matter referred to a magistrate judge under § 636(b)(1)(A), the court will treat the magistrate judge's ruling 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 willful refusal to obey a discovery order.

8TH CIRCUIT :

ROBERTS v. MANSON,
876 F.2D 670 (8TH CIR. 1989)

Referral of pretrial duties to a magistrate judge does not extend to a trial on the merits, including dismissal with prejudice.

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).

10TH CIRCUIT:

DONOVAN v. GINGERBREAD HOUSE, INC.,
106 F.R.D. 57 (D. COL. 1985), *REV'D ON OTHER GROUNDS*,
907 F.2d 115 (10TH CIR. 1989)

Magistrate judge did not have authority to dismiss an action as a discovery sanction under Fed. R. Civ. P. 37(b)(2)(C). Court will treat magistrate judge's order as a report and recommendation, applying de novo determination standard in reviewing any objections.

DEVORE & SONS, INC. v. AURORA PACIFIC CATTLE CO.,
560 F. SUPP. 236 (D. KAN. 1983)

While § 636(b)(1)(A) prohibits magistrate judges from disposing of cases on the merits, it does not preclude Fed. R. Civ. P. 37(b) sanctions. In the case at bar, an order striking a party's counterclaim is not a decision on the merits. District court retains its responsibility for pre-trial matters through the clearly erroneous or contrary to law standard of review.

5. Class Actions

3RD 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 (3RD CIR.), *AFF'D AND REMANDED*,
493 U.S. 165 (1989)

The magistrate judge's decisions on motions in putative class action suit concerning propriety of the court's notice to potential class members, class certification, propriety of communications between attorneys and class members, and discovery are subject to de novo review on questions of law, although some matters may be non-case-dispositive.

E. OTHER DUTIES

Magistrate judges currently perform a variety of duties analogous to non-case-dispositive duties 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 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 Magistrate Judges Division recognizes that the following duties are being referred to magistrate judges in various districts around the country. Such references are often made under local rules. The duties are listed below to suggest how different courts have utilized magistrate judges over the last thirty years.

- 1 Felony Pretrial Conferences (Fed. R. Crim. P. 17.1)
- 1 Felony Omnibus Hearings
- 1 Civil Pretrial Conferences (Fed. R. Civ. P. 16(b))
- 1 Calendar Calls
- 1 Status Conferences
- 1 Writs of Habeas Corpus Ad Testificandum and Ad Prosequendum
- 1 Settlement Conferences (Fed. R. Civ. P. 16(a)(5))
- 1 Final Pretrial Conferences (Fed. R. Civ. P. 16(d))
- 1 Waivers of Indictment
- 1 Determination of Costs of Investigation and Prosecution (21 U.S.C. § 630(b)(3) and 844)
- 1 Appointment of Persons to Serve Process (Fed. R. Civ. P. 4(c)(3))

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

A. IN GENERAL

Section 636(b)(1)(B) states as follows:

[A] judge may also designate a magistrate 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 and habeas corpus and prisoner petitions, however, is exercised by a district judge unless the parties consent to the magistrate judge.

1. Authority of Magistrate Judge

2ND CIRCUIT:

KATZ v. MOLIC,
128 F.R.D. 35 (S.D.N.Y. 1989)

General pretrial order referring matters to the magistrate judge did not enable the magistrate judge to determine case-dispositive motions without a specific order of reference under § 636(b)(1)(B).

LANGLEY v. COUGHLIN,
715 F. SUP. 522 (S.D.N.Y. 1989)

Magistrate judge's report recommending denial of a summary judgment motion did not exceed an order of reference to conduct "all pretrial matters including... except that questions relating to defendant's immunity are not included in this reference."

3RD CIRCUIT:

GIANGOLA v. WALT DISNEY WORLD CO.,
753 F. SUP. 148 (D.N.J. 1990)

Magistrate judge had no authority to issue order of remand since such an order is dispositive. The magistrate judge also had no authority to reconsider his determination, 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)

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.

5TH CIRCUIT:

FIGGIE INTERNATIONAL, INC. V. BAILEY,
25 F.3D 1267 (5TH CIR. 1994)

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 when the party failed to introduce the affidavit within the deadline set by the magistrate judge.

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 court, 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. If the parties consent, the authority of the magistrate judge is plenary, but without consent a reference under § 636(b) is limited to non-dispositive pretrial matters or recommendations on dispositive matters.

8TH CIRCUIT:

THOMPSON V. NIX,
897 F.2D 356 (8TH CIR. 1990)

Clear error occurred when evidence from a different case was inadvertently included in the magistrate judge's report, even when no objections were filed; the court of appeals remanded the matter for resubmission to the magistrate judge.

11TH CIRCUIT:

MOORE V. MORGAN,
922 F.2d 1553 (11TH CIR. 1991)

Government defendants' failure to plead qualified immunity defense at the first hearing constituted a waiver of the defense, despite the magistrate judge's sua sponte order granting a second supplemental hearing to take additional evidence.

2. Procedural Requirements

Rule 72(b) of the Federal Rules of Civil Procedure sets forth the procedural requirements for case-dispositive matters referred to magistrate judges under § 636(b)(1)(B).

5TH CIRCUIT:

ARCHIE V. CHRISTIAN,
808 F.2d 1132 (5TH CIR. 1987) (*EN BANC*)

It is good practice for referrals under § 636(b)(1)(B) to state plainly the statutory provision under which the court is proceeding.

6TH CIRCUIT:

UNITED STATES V. SAWAF,
74 F.3d 119 (6TH CIR. 1996)

Parties' objection to 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 was a sufficient objection to the limited legal question on appeal.

7TH CIRCUIT:

SILBERSTEIN V. SILBERSTEIN,
859 F.2d 40 (7TH CIR. 1988)

Dicta: District court should ensure that the record includes a reference order to the magistrate judge that plainly states the statutory provision under which the court is proceeding.

9TH CIRCUIT:

REYNAGA V. CAMMISA,
971 F.2d 414 (9TH CIR. 1992)

Dicta: If the district court did not issue an order, specific or general, referring the matter to the magistrate judge, the magistrate judge was not permitted to participate in any way in the prisoner's § 1983 action.

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

4TH CIRCUIT:

DAYE v. ORTHOPAEDIC ASSOC. OF VIRGINIA, LTD.,
924 F.2D 1051 (4TH CIR. 1991)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Court of appeals has 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)

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 for reasons stated by the district judge.

COOLEY v. FOTT,
1988 WL 10166 (E.D. LA. 1988)

It is implicit in the statutory scheme and local practice that the district court has the power to withdraw a § 636(b) reference, applying the same standards used to withdraw a reference under § 636(c).

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, as if the discovery motion had been separately referred under § 636(b)(1)(A). Such interlocutory reviews would frustrate the purpose of reference of the entire matter to a magistrate judge for 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 is no reversible error.

UNITED STATES v. BARNEY,
568 F.2d 134 (9th Cir.), cert. denied,
435 U.S. 955 (1978)

The 10-day period to file objections under § 636(b)(1)(B) is a maximum, not a minimum, time limit. The district judge may require a response within a shorter period if the exigencies of the calendar demand it.

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 governs case-dispositive motion practice before magistrate judges.

1ST CIRCUIT:

COMBUSTION ENGINEERING, INC. v. MILLER HYDRO GROUP,
739 F. SUPP. 666 (D. ME. 1990), AFF’D,
13 F.3d 437 (1st Cir. 1993)

Rule 6(e) of the Federal Rules of Civil Procedure, allowing three days for mail service to extend time, applies to objections to a magistrate judge’s report and recommendation on a dispositive motion, but not to objections to a non-dispositive order.

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.

2ND CIRCUIT:

WESOLEK v. CANADAIR, LTD.,
838 F.2d 55 (2d Cir. 1988)

District court has discretion under Fed. R. Civ. P. 6(b) to permit an extension of the 10-day objection period to the magistrate judge’s report and recommendations. Movant must assert excusable neglect to the district court. District court’s decision is reviewed under an abuse of discretion standard by the court of appeals.

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 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(a) 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)

District court had discretionary authority under Fed. R. Civ. P. 6(b) 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 :

PATTERSON v. MINTZES,
717 F.2D 284 (6TH CIR. 1983)

There was no bar to appellate review when the district court exercised discretion under Fed. R. Civ. P. 6(b) to accept a pro se litigant's objections to a magistrate judge's report and recommendation filed more than 10 days after service.

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. ASUBONTENG,
895 F.2D 424 (7TH CIR.), CERT. DENIED SUB NOM. ,
RIVERS v. UNITED STATES,
494 U.S. 1089 (1990)

Magistrate judge was authorized under 18 U.S.C. § 3161(h)(8)(A) to continue the case sua sponte and exclude the continuance from Speedy Trial Act computation. Court will not disturb the magistrate judge's decision absent an abuse of discretion and a showing of prejudice.

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. Dicta: Time could be expressly excluded if the district judge overruled the magistrate judge and granted a continuance under 18 U.S.C. §§ 3161(h)(8)(A) or (h)(8)(B)(ii).

8TH CIRCUIT:

FOSS v. FEDERAL INTERMEDIATE CREDIT BANK OF ST. PAUL,
808 F.2d 657 (8th Cir. 1986)

Pro se petitioners were granted an exception to the statutory requirement and allowed to file objections 15 days after service.

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)(1)(B) is a maximum, not a minimum, time limit. The district judge may require a response within a shorter period if calendar exigencies demand it.

11TH CIRCUIT:

UNITED STATES v. MASTRANGELO,
733 F.2d 793 (11th Cir. 1984)

Entire period of time between filing of motion and conclusion of hearing is excludable under the Speedy Trial Act. The magistrate judge and the district judge each have thirty days to consider a pretrial motion under the Act.

5. Form of Objections

Rule 72(b) of the Federal Rules of Civil Procedure states 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)

Criminal defendant’s motion to adopt the magistrate judge’s report is an unmistakable signal to the district judge that the report and recommendation was agreed to by the defendant. Defendant therefore waived the right to object to the report at the appellate level.

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.

2ND CIRCUIT:

PADDINGTON PARTNERS V. BOUCHARD,
34 F.3D 1132 (2D CIR. 1994)

In objecting to a magistrate judge's recommendation to the district court, a party had "no right to present further testimony when it offer[s] no justification for not offering the testimony at the hearing before the magistrate [judge]."

3RD CIRCUIT

BARNA V. CITY OF PERTH AMBOY,
42 F.3D 809 (3RD CIR. 1994)

Court of appeals reversed the district court's dismissal of a § 1983 complaint against an officer 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:

KELLY V. WITHROW,
25 F.3D 363 (6TH CIR. 1994)

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 are preserved for appellate review.

MIRA V. MARSHALL,
806 F.2d 636 (6TH CIR. 1986)

District court need not provide de novo review where objections to the magistrate judge's report and recommendations are frivolous, conclusive, or general. Parties have a duty to pinpoint the portions of the report that the district judge should consider.

STANFIELD V. HORN,
704 F. SUPP. 1487 (M.D. TENN.), *AFF'D*,
884 F.2d 580 (6TH CIR.), *CERT. DENIED*,
493 U.S. 1002 (1989)

District judge has authority under Fed. R. Civ. P. 12(f) 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 with the district court 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 part of the objections to the magistrate judge's report, waiver of the argument on appeal will be upheld.

D.C. CIRCUIT:

POWELL V. UNITED STATES BUREAU OF PRISONS,
927 F.2d 1239 (D.C. CIR. 1991)

Dissent: Where a party filed general objections to the magistrate judge's report and the district judge adopted the report under a clearly erroneous standard of review, the district judge's order should be adopted by the court of appeals rather than remanded to the district court for a hearing on the objections.

6. De Novo Determination

After a magistrate judge files proposed findings and recommendations with the district court, 28 U.S.C. § 636(b)(1)(C) provides that:

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. Appellate Review

In *Thomas v. Arn*, 474 U.S. 140 (1985), the Supreme Court held that the supervisory powers of appellate courts include the 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 C lists the positions of the various circuits regarding the imposition of waiver rules and exceptions to such rules.

8. Jury Trials

Although 28 U.S.C. § 636(c) sets forth specific procedures for referring civil cases to magistrate judges for trial with the consent of the parties, some courts have attempted to refer civil trials to magistrate judges under § 636(b)(1)(B), sometimes without the consent of the parties. Most courts prohibit this approach. *See* § 7, *infra*, for further discussion of civil trial authority of magistrate judges.

4TH CIRCUIT :

WIMMER v. COOK,
774 F.2d 68 (4TH CIR. 1985)

Congress established the exclusive method for referring civil jury trials to magistrate judges by enacting § 636(c), but a party’s failure to object to a referral under § 636(b)(1)(B) constituted a waiver of the right to Article III adjudication.

LUGENBEEL V. SCHUTTE,
600 F. SUPP. 698 (D. Md. 1985)

Congress intended § 636(b)(1)(B) to authorize the referral of prisoner cases to magistrate judges for jury trials, even without the prisoners' consent. The jury's verdict must be included in the magistrate judge's report and recommendation to the district judge. The district judge retains complete control of the case by conducting de novo review for errors of law. The district judge would not have been able to conduct de novo review of a jury's findings of fact even if presiding over the jury trial himself.

5TH CIRCUIT:

ARCHIE V. CHRISTIAN,
808 F.2D 1132 (5TH CIR. 1987) (EN BANC)

Non-consensual jury trials cannot be referred to magistrate judges under § 636(b)(1)(B). A district judge is intrinsically incapable of conducting the required de novo review upon a jury's factual findings made before a magistrate judge.

FORD V. ESTELLE,
740 F.2D 374 (5TH CIR. 1984)

Fact findings by a jury made before a magistrate judge intrinsically cannot be reviewed de novo by a district judge.

8TH CIRCUIT:

IN RE WICKLINE,
796 F.2D 1055 (8TH CIR. 1986)

A plain reading of § 636(b)(1)(B) shows no statutory authority for the non-consensual referral of jury trials in prisoner cases to magistrate judges.

11TH CIRCUIT:

HALL V. SHARPE,
812 F.2D 644 (11TH CIR. 1987)

Language of § 636(b)(1)(B) cannot be stretched to include referral of jury trials to magistrate judges. The de novo review of a jury's factual findings by the district judge would violate the 7th Amendment. The prisoner did not waive the right to a jury trial when the case was referred to a magistrate judge.

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 include:

- (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

2ND CIRCUIT:

SAVOIE V. MERCHANTS BANK,
84 F.3D 52 (2D Cir. 1996)

Subsequent to the magistrate judge's recommendation that funds be set aside for payment of plaintiff's attorneys' fees, but before the district judge had adopted the recommendation, defendant disbursed funds. Appeals court affirmed the district court's order to restore the status quo ante by placing the funds in escrow, noting that "it has long been clear that there are circumstances in which parties ignore recommendations of the magistrate judge at their peril."

3RD CIRCUIT:

HOEBER V. INTERNATIONAL BROTHERHOOD OF ELEC. WORKERS,
498 F. SUPP. 122 (D.N.J. 1980)

Even if 29 U.S.C. § 160J 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:

WILLIAMS V. GENERAL ELEC. CAPITAL AUTO LEASE, INC.,
159 F.3D 266 (7TH Cir. 1998)

Magistrate judge presiding over a class action with the consent of the named class representatives may, following settlement, enjoin prosecution of a similar class action brought in another court by unnamed class members, even though unnamed class members had not consented to the magistrate judge's authority to dispose of the class action.

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 that at some point can become coercive temporary preliminary injunctions.

11TH CIRCUIT:

JEFFERY S. BY ERNEST S. V. STATE BOARD OF EDUCATION OF STATE OF GEORGIA,
896 F.2d 507 (11TH CIR. 1990)

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 objection is made. The clearly erroneous standard applies to findings by the magistrate judge to which no objections were filed.

2. Motions for Summary Judgment

2ND CIRCUIT:

HYNES V. SQUILLACE,
143 F.3d 653 (2ND CIR.), CERT. DENIED,
119 S. Ct. 246 (1998)

District judge had discretion to consider supplemental evidence on de novo review of the magistrate judge's recommendation to grant 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)

Court of appeals affirmed 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)

Court of appeals reviews only for plain error the district judge's adoption of magistrate judge's report and recommendation for summary judgment. A district judge's rejection of a summary judgment recommendation is reviewed de novo.

3. Motions to Dismiss

2ND CIRCUIT:

KATZ v. MOLIC,
128 F.R.D. 35 (S.D.N.Y. 1989), *AFF'D*,
909 F.2d 1473 (2^D CIR. 1990)

Magistrate judge's judicial discretion is not restricted when issuing a report and recommendation under § 636(b)(1)(B). Magistrate judge is authorized to recommend dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, although the original 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)

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:

TARKOWSKI v. PENNZOIL Co.,
100 F.R.D. 37 (N.D. ILL. 1983)

Magistrate judge must issue a report and recommendation under § 636(b)(1)(B) on a motion to dismiss a case with prejudice for lack of prosecution.

10TH CIRCUIT:

DONOVAN v. GINGERBREAD HOUSE, INC.,
106 F.R.D. 57 (D. COL. 1985), *REV'D ON OTHER GROUNDS*,
907 F.2d 115 (10TH CIR. 1989)

Magistrate judge does not have authority to order the involuntary dismissal of a civil action. The court treated the magistrate judge's order as a report and recommendation, applying de novo review.

4. Motions to Dismiss Indictments

7TH CIRCUIT:

UNITED STATES v. WALKER,
92 F.3d 714 (7TH CIR. 1996)

Affording "special deference" to the district court's determination, the court of appeals affirmed the district judge's adoption of the magistrate judge's recommendation to deny defendant's motion to dismiss the indictment.

5. 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 under § 636(b)(1)(B), provided the district judge conducts de novo determination.

7TH CIRCUIT:

UNITED STATES v. JARAMILLO,
891 F.2d 620 (7TH CIR. 1989), *CERT. DENIED*,
494 U.S. 1069 (1990)

Where the government failed to argue that probable cause existed to arrest the defendants until after the magistrate judge suppressed the warrant 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)

Speedy Trial Act allows an additional excludable 30-day "under advisement" period for district judges to review the magistrate judge's report and recommendation on a motion to suppress.

6. Class Actions

2ND CIRCUIT:

RULAND v. GENERAL ELECTRIC Co.,
94 F.R.D. 164 (D. CONN. 1982)

Referral of class certification motion to a magistrate judge is constitutionally valid under § 636(b)(1)(B), as long as district judge conducts de novo determination.

3RD CIRCUIT:

SPELING 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 (3^D CIR.), *AFF'D AND REMANDED*,
493 U.S. 165 (1989)

Magistrate judge's rulings on motions in 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, will be subject to de novo review on questions of law, even though some motions may not dispose of claims or defenses.

GARRIS v. GIANETTI,
160 F.R.D. 61 (E.D. Pa. 1995)

After 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 Post-trial 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, 2254, and 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(b)(1) when discussing the power of magistrate judges.

1ST CIRCUIT:

GIOIOSA v. UNITED STATES,
684 F.2d 176 (1st Cir. 1982)

District court erred in applying clearly erroneous standard of review to magistrate judge’s recommendation to deny defendant’s motion to vacate conviction.

2ND CIRCUIT:

VIRELLA v. UNITED STATES,
750 F. SUPP. 111 (S.D.N.Y. 1990)

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 without merit, the petition was properly dismissed without an evidentiary hearing. (No discussion of magistrate judge authority.)

3RD CIRCUIT:

SULLIVAN V. CUYLER,
723 F.2d 1077 (3RD CIR. 1983)

Applications for post-trial 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)

Magistrate judge is without authority to decide a motion to vacate sentence under § 2255 without the parties' consent, even where the magistrate judge had accepted the defendant's guilty plea and imposed the sentence with consent in the underlying misdemeanor case.

5TH CIRCUIT:

JONES V. JOHNSON,
134 F.3d 309 (5TH CIR. 1998)

Magistrate judge did not have authority to issue a final order for a certificate of probable cause to appeal a habeas corpus matter.

MOODY V. JOHNSON,
139 F.3d 477 (5TH CIR.), *CERT. DENIED*,
119 S. Ct. 359 (1998)

Court of appeals affirmed the district court's adoption of the magistrate judge's recommendation denying federal habeas corpus relief after conducting an evidentiary hearing and finding that petitioner had not overcome the presumption of correctness afforded state court findings and that petitioner did not prove that he was incompetent to stand trial.

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 remains valid until the district judge accepts the magistrate judge's report and orders habeas corpus relief.

9TH CIRCUIT :

AINSWORTH V. VASQUEZ,
759 F. SUPP. 1467 (E.D. CAL. 1991)

A magistrate judge's discovery orders in death penalty habeas corpus matters are non-case-dispositive and not contrary to law. (No discussion of magistrate judge authority in death penalty cases.)

HINMAN V. MCCARTHY,
676 F.2D 343 (9TH CIR.), *CERT. DENIED*,
459 U.S. 1048 (1982)

Magistrate judge's evidentiary hearings and report and recommendation on habeas corpus petition did not violate the Constitution because the district judge retains final decisional authority.

10TH CIRCUIT

SPARROW V. UNITED STATES,
174 F.R.D. 491 (D. UTAH 1997)

Magistrate judge denied habeas petitioner's motion for default judgment due to government's untimely response. (Opinion by magistrate judge.)

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. Such cases usually arise under 42 U.S.C. § 1983.

SUPREME COURT :

MCCARTHY V. BRONSON,
501 U.S. 136 (1991)

Congress intended the "conditions of confinement" language of § 636(b)(1)(B) to include the two primary categories of prisoner suits: habeas corpus petitions and civil rights actions for monetary or injunctive relief. Section 636(b)(1)(B) authorizes the non-consensual referral of all prisoner matters to magistrate judges.

5TH CIRCUIT:

MAGUIRK V. PHILLIPS,
144 F.3D 348 (5TH CIR. 1998)

Court of appeals affirmed the district court's adoption of the magistrate judge's report and recommendation raising and recommending sua sponte a habeas petitioner's procedural default.

McAFEE V. MARTIN,
63 F.3D 436 (5TH CIR. 1995)

Appeals court 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 the 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)

Magistrate judge is 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. Magistrate judge should maintain the adversarial system rather than use inquisitional methods in 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 magistrate judge under § 636(b)(1)(B) as a conditions of confinement matter.

3. Other Prisoner Motions

2ND CIRCUIT:

WRIGHT v. SANTORO,
714 F. SUPP. 665 (S.D.N.Y.), *AFF'D*,
891 F.2D 278 (2D CIR. 1989)

Magistrate judge may determine whether or not to appoint counsel in a pro se § 1983 action.

4TH CIRCUIT:

LUGENBEEL v. SCHUTTE,
600 F. SUPP. 698 (D. Md. 1985)

Magistrate judge is authorized by § 636(b)(1)(B) to conduct a jury trial and submit the jury's findings as part of the report and recommendation. Where petitioner chooses a jury trial, the right to have an Article III judge review fact findings is lost. [Note: Opinion may be outdated in light of *Gomez v. United States*, 490 U.S. 858 (1989).]

5TH CIRCUIT:

WESSON v. OGLESBY,
910 F.2D 278 (5TH CIR. 1990)

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)

Magistrate judge may be referred prisoner conditions of confinement petitions for determination of the factual basis of conclusory allegations, for in forma pauperis frivolity review under 28 U.S.C. § 1915(d), or for determination of a motion for more definite statement under Fed. R. Civ. P. 12(e). Court, however, cannot refer matter for trial by a magistrate judge over the prisoner's objection.

6TH CIRCUIT:

WOODS v. DAHLBERG,
894 F.2D 187 (6TH CIR. 1990)

Magistrate judges 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)

The referral of prisoner cases requesting jury trials to a magistrate judge for directed verdict hearings should be used cautiously.

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 non-consensual prisoner jury trials to magistrate judges.

9TH CIRCUIT :

AINSWORTH V. VASQUEZ,
759 F. SUPP. 1467 (E.D. CAL. 1991)

In death penalty habeas corpus cases, magistrate judge may exercise the inherent powers of the court to issue non-case-dispositive orders to set *Neuschafer* hearings. (See *Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir. 1988); hearings are held to inquire into the existence of all exhausted and unexhausted claims.)

10TH CIRCUIT :

GEE V. ESTES,
829 F.2d 1005 (10TH CIR. 1987)

Magistrate judge may hear and issue a report and recommendation on 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 objection is made.

4. Appeals in Prisoner Cases

2ND CIRCUIT :

FRANK V. JOHNSON,
968 F.2d 298 (2D CIR.), CERT. DENIED,
506 U.S. 1038 (1992)

Prisoner's failure to object within 10 days of the magistrate judge's report recommending dismissal of a habeas corpus petition waives further review of the report and recommendation if the prisoner received clear notice of the consequences of a failure to object.

5TH CIRCUIT :

FITZPATRICK V. PROCUNIER,
750 F.2D 473 (5TH CIR. 1985)

The 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)

Court will construe pro se objections to a magistrate judge's report and recommendation liberally. Proper statutory citations are not required.

IVEY V. WILSON,
832 F.2D 950 (6TH CIR. 1987)

Prison officials waived qualified immunity defense by failing to object to the magistrate judge's report; appellate review was also waived.

10TH CIRCUIT :

HARDIMAN V. REYNOLDS,
971 F.2D 500 (10TH CIR. 1992)

Where the magistrate judge did not clearly include a warning explaining the consequences of not objecting to the magistrate judge's report in the report and recommendation, 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)

Where the pro se prisoner's objections were timely mailed, but were filed after the ten-day limit, the district judge will consider claims anyway.

D. ANALOGOUS MOTIONS

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 interpreted § 636(b)(1)(B) to allow referral of analogous case-dispositive matters to magistrate judges for proceedings on a report and recommendation basis.

1. Mental Competency Proceedings

8TH CIRCUIT:

UNITED STATES v. HORN,
955 F. SUPP. 1141 (D. MINN. 1997)

Magistrate judge issued report and recommendation to involuntarily transfer prisoner to psychiatric facility for custody and treatment. (Opinion by magistrate judge - no discussion of magistrate judge authority.)

2. Social Security Cases

SUPREME COURT:

MATHEWS v. WEBER,
423 U.S. 261 (1976)

Social security benefit cases may be referred to magistrate judges for reports and recommendations on whether the record contains 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)

Court may refer a social security case to a magistrate judge for a report and recommendation on substantial evidence issue under 42 U.S.C. § 405(g).

3. Pretrial Matters in Criminal and Administrative Proceedings

SUPREME COURT:

UNITED STATES v. JOSE,
519 U.S. 54 (1996)

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 the summons, was a final order for purposes of appeal to the court of appeals.

1ST CIRCUIT:

UNITED STATES v. ECKER,
923 F.2d 7 (1st Cir. 1991)

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 that may be reviewed by the court of appeals. [No statement as to whether matter was referred under § 636(b)(1)(A) or (B).]

UNITED STATES v. CHRISTO,
907 F. SUPP. 519 (D.N.H. 1995)

Magistrate judge may not order enforcement of an IRS summons, but must issue a report and recommendation subject to de novo review by the district judge.

3RD CIRCUIT:

NATIONAL LABOR RELATIONS Bd. v. FRAZIER,
966 F.2D 812 (3RD CIR. 1992)

Proceeding to enforce a National Labor Relations Board subpoena ad testificandum should have been referred to magistrate judge as a case-dispositive matter under § 636(b)(1)(B) subject to de novo determination by the district judge. Magistrate judge had no authority to issue a “final” order enforcing the subpoena.

5TH CIRCUIT:

UNITED STATES v. FIRST NAT'L. BANK OF ATLANTA,
628 F.2D 871 (5TH CIR. 1980)

Magistrate judge cannot enter a final judgment to enforce an IRS summons under 26 U.S.C. § 7604. The Internal Revenue Code restricts such enforcement power to a district judge, who may refer summons enforcement proceedings to a magistrate judge under § 636(b)(1)(B) for a report and recommendation.

6TH CIRCUIT:

UNITED STATES FIDELITY & GUARANTEE Co. v. THOMAS SOLVENT Co.,
132 F.R.D. 660 (W.D. MICH. 1990), AFF'D,
955 F.2D 1085 (6TH CIR. 1991)

Motion to realign parties is a case-dispositive motion, subject to de novo determination by the district judge.

7TH CIRCUIT:

UNITED STATES v. A RESIDENCE LOCATED AT 218 3RD 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), a magistrate judge has implied authority under § 636(b)(1)(B) to issue a report and recommendation. If the movant were indicted, the matter would be treated like a motion to suppress.

9TH CIRCUIT:

CLARK V. INSPECTOR GENERAL OF THE U.S. DEP'T OF AGRICULTURE,
944 F. SUPP. 818 (D. OR. 1996)

District judge adopted the magistrate judge's recommendation to dismiss a challenge to an administrative subpoena. 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)

Denial of a motion to file a counterclaim is 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.

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. The magistrate judge had no authority to deny the request for assistance; the matter was treated as a report and recommendation under § 636(b)(1)(B).

11TH CIRCUIT:

IN RE REQUEST FROM SWISS FEDERAL DEPT. OF JUSTICE,
731 F. SUPP. 490 (S.D. FLA. 1990)

Court adopted magistrate judge's recommendation under § 636(b)(1)(B) on motions to quash subpoena and to grant protective order under 28 U.S.C. § 1782. (No discussion of magistrate judge authority.)

4. Motions to Transfer Juvenile to Adult Prosecution

1ST CIRCUIT:

UNITED STATES V. C.J.T.G.,
913 F. SUPP. 63 (D.P.R. 1994)

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.

2ND CIRCUIT :

UNITED STATES V. JUVENILE MALE #1,
47 F.3D 68 (2D CIR. 1995)

Court of appeals held that district court did not abuse its discretion in denying motion to transfer juvenile to adult status for prosecution. District judge had rejected the magistrate judge's recommendation to transfer the juvenile to adult status.

5TH CIRCUIT :

UNITED STATES V. BILBO,
19 F.3D 912 (5TH CIR. 1994)

Court of appeals affirmed the district court's order to transfer juvenile 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 § 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 to adult status for prosecution.

11TH CIRCUIT :

UNITED STATES V. WELLINGTON,
102 F.3D 499 (11TH CIR. 1996)

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.

5. Motions Challenging Jurisdiction

1ST CIRCUIT :

CONGDON V. JACOBSON,
131 F.R.D. 35 (D.R.I. 1990)

Magistrate judge applied state "long arm" statute in making recommendation to district judge on whether the defendant corporation was subject to federal in personam jurisdiction. (Opinion by magistrate judge.)

6. Venue Motions

1ST CIRCUIT:

UNITED STATES V. ONE PARCEL OF REAL PROPERTY WITH BLDGS. ,
131 F.R.D. 27 (D.R.I. 1990)

Without discussing authority to do so, magistrate judge issued report and recommendation on motion to change venue. (Opinion by magistrate judge.)

7. Motions for Sanctions

1ST CIRCUIT:

PLANTE V. FLEET NATIONAL BANK,
978 F. SUP. 59 (D.R.I. 1997)

District court stated that a Rule 11 motion for sanctions, especially in a post-dismissal context, is properly characterized as a dispositive motion subject to de novo review. The court held, however, that in this case, since the parties had not objected to the treatment of the motion as dispositive by the magistrate judge, de novo review of the magistrate judge's report and recommendation was proper in any event.

YANG V. BROWN UNIVERSITY,
149 F.R.D. 440 (D.R.I. 1993)

Although motions for sanctions pursuant to Rule 37 generally are within the scope of § 636(b)(1)(A) pretrial matters, the magistrate judge's order excluding the testimony of plaintiff's expert witness in this case crossed the line from non-case-dispositive to dispositive decision-making and was "tantamount to an involuntary dismissal." The district judge treated the sanction as a recommendation, reviewed it de novo, and modified the ruling to impose a less severe sanction.

2ND CIRCUIT:

FRIENDS OF ANIMALS, INC. V. UNITED STATES SURGICAL CORP. ,
131 F.3D 332 (2D CIR. 1997)

Court of appeals found no abuse of discretion in the district court's adoption of the magistrate judge's recommendation to dismiss the action pursuant to Rule 37(b) for repeated violations of discovery orders.

LEICHING V. CONSOLIDATED RAIL CORP. ,
1997 WL 135930 (N.D.N.Y. 1997)

District court adopted the report and recommendation of the magistrate judge to impose monetary sanctions against counsel pursuant to 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)

District court adopted the magistrate judge's report and recommendation to dismiss 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...."

3RD CIRCUIT:

NYENKOR V. KLETCHES,
1996 WL 189920 (E.D. Pa. 1996)

District judge reviewed de novo and adopted the magistrate judge's recommendation to dismiss the prisoner plaintiff's claims pursuant to Federal Rules 16, 37 and 41.

DERZACK V. COUNTY OF ALLEGHENY, PENNSYLVANIA,
173 F.R.D. 400 (W.D. Pa. 1996)

Applying de novo standard of review, district judge rejected the magistrate judge's recommendation not to dismiss plaintiff's complaint for fraud upon the court.

7TH CIRCUIT:

PATTERSON V. RUBIN,
89 F.3D 838 (7TH CIR. 1996)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Magistrate judge recommended dismissal of plaintiff's complaint under Rule 41(b) for failure to prosecute claims.

RETIRED CHICAGO POLICE ASSOCIATION 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 sanctions request does not change the fact that resolution of a sanctions request is a dispositive matter capable of being referred to a magistrate judge only under § 636(b)(1)(B) or § 636(b)(3), where the district judge must review the magistrate judge's report and recommendations de novo.

ALPERN V. LIEB,
38 F.3D 933 (7TH CIR. 1994)

A magistrate judge has no independent authority to award sanctions under Fed. R. Civ. P. 11. Because the parties did not consent to final disposition 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 dispute to a magistrate judge for a recommendation under § 636(b)(1)(B), but the magistrate judge may not make a decision with independent effect.

BOROWSKI v. DEPUY, INC.,
850 F.2d 297 (7TH CIR. 1988)

Defendant's motion for sanctions under Fed. R. Civ. P. 11 was heard by the magistrate judge and was treated by the district judge as a case-dispositive matter subject to de novo determination.

8TH CIRCUIT:

AVIONIC Co. v. GENERAL DYNAMICS CORP.,
957 F.2d 555 (8TH CIR. 1992)

District judge adopted the magistrate judge's report and recommendation to dismiss plaintiff's case as a sanction under Fed. R. Civ. P. 37 for failure to cooperate in discovery. Motion was treated as a case-dispositive matter under § 636(b)(1)(B).

10TH CIRCUIT:

JONES v. THOMPSON,
996 F.2d 261 (10TH CIR. 1993)

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 further failure to comply with the court's order.

OCELOT OIL CORP. v. SPARROW INDUSTRIES,
847 F.2d 1458 (10TH CIR. 1988)

Motion to strike pleading with prejudice as a sanction under Fed. R. Civ. P. 37 was treated as a dispositive "motion to involuntarily dismiss an action" under § 636(b)(1)(B).

SCHWARTZMAN, INC. v. AFC INDUS., INC.,
167 F.R.D. 694 (D.N.M. 1996)

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. COL. 1985), REV'D AND REMANDED ON OTHER GROUNDS,
907 F.2d 115 (10TH CIR. 1989)

Magistrate judge does not have authority to dismiss an action involuntarily as a discovery sanction under Fed. R. Civ. P. 37(b)(2)(C). District judge treated the magistrate judge's order as a report and recommendation, applying de novo determination.

DEVORE & SONS, INC. v. AURORA PACIFIC CATTLE CO.,
560 F. SUPP. 236 (D. KAN. 1983)

Section 636(b)(1)(A) does not preclude Fed. R. Civ. P. 37(b) sanctions, including striking a party's counterclaim. District court retains its responsibility for review under the clearly erroneous or contrary to law standard.

8. Motions to Vacate or Set Aside Judgment

5TH CIRCUIT:

MCLEOD, ALEXANDER, POWEL & APFFEL, P.C. v. QUARLES,
925 F.2D 853 (5TH CIR. 1991)

Magistrate judge is not authorized by § 636(b)(1) to hear a Fed. R. Civ. P. 60(b) 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.

9. Motions to Intervene

5TH CIRCUIT:

MISSISSIPPI POWER & LIGHT CO. v. UNITED GAS PIPE LINE CO.,
621 F. SUPP. 718 (S.D. MISS.), *AFF'D*,
760 F.2D 618 (5TH CIR. 1985)

Denial of a third party's motion to intervene (although allowing it amicus curiae status) was equivalent to involuntary dismissal. Although original suit remained for adjudication, magistrate judge was without authority to issue a final decision on such a case-dispositive motion.

10. Remand Orders

Courts disagree over whether remand orders are dispositive of a claim or defense before the court. *See* § 3(b)(2), *supra*, for additional opinions on this issue.

1ST CIRCUIT:

SOCIETA ANONIMA LUCCHESI OLII E. VII v. CATANIA SPAGNA CORP.,
440 F. SUPP. 461 (D. MASS. 1977)

Motion to remand to state court could be referred to magistrate judge under § 636(b)(1)(A), but court had discretion to refer matter under § 636(b)(1)(B) for a report and recommendation.

3RD CIRCUIT:

IN RE U.S. HEALTHCARE,
159 F.3D 142 (3RD CIR. 1998)

Court of appeals issued writ of mandamus to magistrate judge directing him to vacate a remand order which, as a dispositive order, was beyond the magistrate judge's authority.

GIANGOLA v. WALT DISNEY WORLD Co. ,
753 F. SUP. 148 (D.N.J. 1990)

Magistrate judge's order remanding case to state court was equivalent to dismissal and was thus case-dispositive. Magistrate judge thus exceeded authority under § 636(b)(1)(B) by ordering remand sua sponte. District court had not referred the case-dispositive motion to the magistrate judge for a report and recommendation.

4TH CIRCUIT:

LONG v. LOCKHEED MISSILES AND SPACE Co. , INC. ,
783 F. SUP. 249 (D.S.C. 1992)

Motion to remand 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.

11. Attorneys' Fees

On December 1, 1993, amended Fed. R. Civ. P. 54(d)(2)(D) went into effect, stating in relevant part:

[T]he court may refer issues relating to the value of [attorneys' fees] to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

The revised Fed. R. Civ. P. 54 resolved the issue of whether motions for attorneys' fees should be treated as case-dispositive or non-case-dispositive matters. Magistrate judges may now hear motions for attorneys' fees as case-dispositive matters under Rules 54 and 72(b), subject to de novo determination by a district judge. They may also hear such motions as special masters, with their recommendations subject to the clearly erroneous or contrary to law standard of review. Cases discussing the authority of magistrate judges to hear post-judgment motions for attorneys' fees also arise under § 636(b)(1)(A). *See also* § 3, *supra*. For a further discussion of the service of magistrate judges as special masters under § 636(b)(2), *see* § 5, *infra*.

5TH CIRCUIT:

BLAIR v. SEALIFT,
848 F. SUP. 670 (E.D. LA. 1994)

A post-trial motion for attorneys' fees that was not a discovery sanction, and therefore was a dispositive matter under § 636(b)(1)(B), was subject to de novo review.

6TH CIRCUIT:

WEATHERBY V. SEC'Y OF HEALTH & HUMAN SERVICES,
654 F. SUPP. 96 (E.D. MICH. 1987)

Motions for attorneys' fees under 28 U.S.C. § 2412 may not be referred under § 636(b)(1)(A).
Dicta: Hindsight suggests that there may be authority under § 636(b)(1)(A) to refer Equal Access to Justice Act matters in social security cases to magistrate judges.

7TH CIRCUIT:

RAJARATNAM V. MOYER,
47 F.3D 922 (7TH CIR. 1995)

Magistrate judge did not have authority to enter a final order on a motion for attorneys' fees under the Equal Access to Justice Act.

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 attorneys' fees, even if post-judgment, is a dispositive matter triggering the procedures and standard of review of § 636(b)(1)(B).

11TH CIRCUIT:

IN RE HOLYWELL CORP.,
967 F.2D 568 (11TH CIR. 1992)

Motion to calculate award of attorneys' fees after a district judge ordered a party held in contempt in a bankruptcy proceeding was treated as a case-dispositive motion under § 636(b)(1)(B).

12. 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)

Court referred a motion to enforce a settlement agreement to a magistrate judge under § 636(b)(1)(B). (No discussion of magistrate judge authority.)

13. Motions for Stay

9TH CIRCUIT:

REYNAGA v. CAMMISA,
971 F.2d 414 (9TH CIR. 1992)

Magistrate judge did not have authority to issue a “final” order staying a prisoner § 1983 case pending the exhaustion of state remedies. Magistrate judge’s authority is limited to submission of proposed findings of fact and a recommendation of disposition of the motion, subject to de novo determination by the district judge.

14. Post-judgment Motions for Contempt

9TH CIRCUIT:

BERNARDI v. YEUTTER,
951 F.2d 971 (9TH CIR. 1991)

District court could refer post-judgment motion to determine if the defendant was acting in contempt of consent decree in a class action to a magistrate judge under § 636(b)(1)(B), subject to de novo determination by the district judge. Magistrate judge could also make proposed findings of fact and recommendation that attorneys’ fees be awarded against the defendant found to be in contempt of district court’s consent decree.

E. OTHER DUTIES

Magistrate judges are currently performing a variety of duties analogous to case-dispositive motions for 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 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 Magistrate Judges Division recognizes that the following duties are being referred to magistrate judges in various districts around the country. Such references are often made under local rules. The duties are listed to suggest how different courts have utilized magistrate judges over the last thirty years.

- 1 Condemnation Proceedings
- 1 Pension Board Appeals (ERISA)
- 1 Appeals of Administrative Denials of Licenses, Certifications, and Other Privileges
- 1 Appeals from Civil Service Commission Adjudications
- 1 Appeals from Military Discharge Proceedings
- 1 INS Deportation Hearings
- 1 Other Appeals from Agency Action (5 U.S.C. § 702)

§ 5. 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 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 provides that “some exceptional condition” must be shown before a special 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. Under Rule 53(e)(4), moreover, the parties may stipulate that the magistrate judge’s findings of fact shall be final and that only questions of law may be reviewed on appeal.

1. Consent and Waiver of Objection to Designation

2ND 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.

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, 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 special master reference of jury trial to magistrate judge serving as special master in Title VII case did not constitute consent to the reference. Magistrate judge could not conduct jury trial without 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)

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)

Plaintiff waived her objection to appointment of magistrate judge under 28 U.S.C. § 636(b)(2) and Fed. R. Civ. P. 53(b) to serve as special master in her Title VII case because she failed to take issue with the appointment in a timely manner.

2. Standard of Review by District Court

Courts have disagreed on the appropriate standard for reviewing decisions by magistrate judges sitting as special masters. Some circuits apply de novo review while others apply the “clearly erroneous” standard.

5TH CIRCUIT:

CASTILLO V. FRANK,
70 F.3D 382 (5TH CIR. 1995)

District court retains authority to review discovery rulings made by 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.

6TH CIRCUIT:

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)

District judge committed error by reviewing 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.

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)

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)

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.

KENDALL V. DAVIS,
569 F.2D 1330 (5TH CIR. 1978)

Court of appeals has no jurisdiction over appeal until district judge enters a final judgment based on the special master's report.

7TH CIRCUIT:

PROVIDENT BANK V. MANOR STEEL CORP. ,
882 F.2D 258 (7TH CIR. 1989)

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. 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 912 (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 Conditions

Absent litigant consent, Fed. R. Civ. P. 53(b) provides that the designation of a special master in a civil case “shall be the exception and not the rule” and should only be used when “the issues are complicated” (jury trials) or “upon a showing that some exceptional condition requires it” (non-jury trials).

2ND CIRCUIT:

MAGNALEASING, INC. V. STATEN ISLAND MALL,
428 F. SUPP. 1039 (S.D.N.Y.), *AFF'D*,
563 F.2D 567 (2D CIR. 1977)

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(b) was appropriate because it involved accounting and the complex computation of damages.

3RD CIRCUIT:

PRUDENTIAL INS. CO. OF AMERICA V. UNITED STATES GYPSUM CO.,
991 F.2D 1080 (3RD CIR. 1993)

Where magistrate judge had been performing pretrial case management duties in complex, multi-party asbestos case for several years, 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(b). 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

2ND CIRCUIT:

McCARTHY v. BRONSON,
906 F.2d 835 (2d Cir. 1990), *AFF'D*,
500 U.S. 136 (1991)

Straightforward § 1983 prisoner action did not meet “exceptional condition” requirement of Fed. R. Civ. P. 53(b), therefore 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)

Court may not avoid the de novo standard of review imposed by § 636(b)(1)(B) by referring 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 requirements of Fed. R. Civ. P. 53(b) is set forth in 42 U.S.C. § 2000e-5(f)(5). A magistrate judge may be appointed as a special master under Rule 53 in a Title VII case without a showing of some exceptional condition if the case has not been scheduled for trial within 120 days.

5TH CIRCUIT:

GONZALEZ v. CARLIN,
907 F.2d 573 (5th Cir. 1990)

Neither the exceptional condition requirement of Fed. R. Civ. P. 53(b) 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)

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. (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)

Language in 42 U.S.C. § 2000(e)-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 :

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)

Congress intended to relax requirements of Fed. R. Civ. P. 53(b) in Title VII cases; there is no conflict with the Federal Magistrates Act.

4. Appellate Special Masters

Magistrate judges occasionally have been 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 courts of appeals to appoint masters under Fed. R. App. P. 48.

7TH CIRCUIT :

REICH V. SEA SPRITE BOAT CO., INC.,
50 F.3D 413 (7TH CIR. 1995)

Magistrate judge presiding as an appellate special master had authority to recommend significant civil sanctions against parties that had refused to comply with appellate court’s enforcement orders.

NATIONAL LABOR RELATIONS Bd. v. A-PLUS ROOFING, INC.,
39 F.3d 1410 (9TH CIR. 1994)

Although 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 Magistrate Judges Division 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 thirty years.

- 1 Condemnation Proceedings
- 1 Court Employee Grievance Proceedings

§ 6. 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, can 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 litigants 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 magistrate judges which may not necessarily be included in the broad category of “pretrial matters.”

2ND 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.

3RD CIRCUIT:

GOV. OF THE VIRGIN ISLANDS v. WILLIAMS,
892 F.2D 305 (3RD 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. DEES,
125 F.3D 261 (5TH CIR. 1997), *CERT. DENIED*,
118 S.Ct. 1174 (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:

HILL V. DURIRON CO., INC.,
656 F.2D 1208 (6TH CIR. 1981)

Absent litigant consent, § 636(b)(3) applies only to administrative or procedural matters.

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 may be freely assigned 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 dismiss a matter 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. 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. Courts have been required to interpret the statute absent specific explanatory language.

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.

5TH CIRCUIT:

McLEOD, 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. 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)

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.

FORD v. ESTELLE,
740 F.2D 374 (5TH CIR. 1984)

A civil jury trial may not be referred to a magistrate judge under § 636(b)(3). It is impossible to conduct de novo review of jury verdicts.

CALDERON v. WACO LIGHTHOUSE FOR THE BLIND,
630 F.2D 352 (5TH CIR. 1980)

District court may use litigant consent and de novo review by the district judge as a basis for referring a civil trial to a magistrate judge under § 636(b)(3).

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 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). Citation to the wrong section of the Federal Magistrates Act may be corrected nunc pro tunc.

9TH CIRCUIT:

COOLIDGE V. SCHOONER CALIFORNIA,
637 F.2D 1321 (9TH CIR.), *CERT. DENIED*,
451 U.S. 1020 (1981)

A civil case may be referred to a magistrate judge for trial under § 636(b)(3), provided the parties consent and the district judge conducts de novo review of the magistrate judge's decision.

10TH CIRCUIT:

IN RE GRIEGO,
64 F.3D 580 (10TH CIR. 1995)

A magistrate judge's alleged lack of authority to hear a bankruptcy appeal under § 636(b)(3) is not a jurisdictional defect. Any objection to such authority is thus waived if not raised in a timely fashion.

3. Standard of Review and 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), *REV'D ON OTHER GROUNDS*,
988 F.2D 236 (1ST CIR. 1993)

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 party's unfocused, general objection to 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.

2ND 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.

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:

MCLEOD, ALEXANDER, POWEL & APFFEL, P.C. v. QUARLES,
925 F.2D 853 (5TH CIR. 1991)

Referral of a motion to vacate judgment under Fed. R. Civ. P. 60(b) 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:

MICHAELSON v. SCHOR,
1996 WL 667803 (N.D. ILL. 1996)

Magistrate judge's decision under § 636(b)(3) in action to enforce judgment of the bankruptcy court was subject to de novo review. Although 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)

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. District judge conducted sufficient de novo review of magistrate judge's report and recommendation under § 636(b)(3), even though district judge adopted 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 § 636(b)(3).

COOLIDGE v. SCHOONER CALIFORNIA,
637 F.2D 1321 (9TH CIR.), CERT. DENIED,
451 U.S. 1020 (1981)

As long as the district judge engages in de novo review, statutory and constitutional objections to § 636(b)(3) are removed.

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)

Prisoner civil rights action referred to a magistrate judge under § 636(b)(3) is 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 1573 (10TH CIR. 1994)

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 Trials 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 non-consensual "subsidiary matters" under § 636(b)(1).

SUPREME COURT :

PERETZ v. UNITED STATES,
501 U.S. 923 (1991)

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.

5TH CIRCUIT :

PARKER v. MISSISSIPPI STATE DEPT. OF PUBLIC WELFARE,
811 F.2D 925 (5TH CIR. 1987)

Dicta: Court will not address consent issue in Title VII discrimination case. Failure to object to lack of consent waives any procedural error.

FORD v. ESTELLE,
740 F.2D 374 (5TH CIR. 1984)

Section 636(b)(3) cannot support reference of a civil action to a magistrate judge for jury trial.

HARRIS v. G & W CONST., INC.,
1997 WL 610875 (E.D. LA. 1997)

Consent to a bench trial before a magistrate judge, with the magistrate judge submitting findings and recommendation to the district judge under § 636(b)(3), was inferred from a party's failure to object to the designation at trial.

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:

NATIONAL LABOR RELATIONS Bd. v. A-PLUS ROOFING, INC.,
39 F.3d 1410 (9TH CIR. 1994)

Section 636(b)(3) does not authorize the appointment of 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

Circuits differ over whether bankruptcy appeals may be referred to magistrate judges. Most circuits have held that bankruptcy appeals may be referred to magistrate judges under § 636(b)(3), subject to de novo review by the district judge. *See also* § 7(a)(2), *infra*.

2ND 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 judges) or § 636(b)(3). Bankruptcy appeals are analogous to appeals in social security cases, which are routinely referred to magistrate judges.

IN RE TWENTY-SIX REALTY ASSOCIATES, L.P.,
1995 WL 170124 (E.D.N.Y. 1995)

Bankruptcy appeal referred to magistrate judge under § 636(b)(3) for an advisory opinion.

3RD CIRCUIT:

IN RE CONTINENTAL AIRLINES,
218 B.R. 324 (D. DEL. 1997), *AFF'D*,
134 F.3d 536 (3RD CIR.), *CERT. DENIED*,
119 S.Ct. 336 (1998)

District judge had authority under § 636(b)(3) to refer bankruptcy appeal to a magistrate judge.

5TH CIRCUIT:

IN THE MATTER OF EVANGELINE REFINING Co. ,
890 F.2D 1312 (5TH CIR. 1989)

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:

MICHAELSON v. SCHOR,
1996 WL 667803 (N.D. ILL. 1996)

Magistrate judge was referred all "post-judgment collection proceedings" under § 636(b)(3) in action to enforce 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)

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 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.

HALL v. VANCE,
887 F.2D 1041 (10TH CIR. 1989)

District court may refer a bankruptcy appeal to a magistrate judge under 28 U.S.C. § 636(b)(3) for an advisory hearing when the district court explicitly reserves for itself the final decision on appeal.

B. PRETRIAL AND TRIAL DUTIES

Section 636(b)(3) is used by district courts to refer to magistrate judges various pretrial and trial duties not specified elsewhere in the Federal Magistrates Act.

1. Social Security Appeals

SUPREME COURT :

MATHEWS V. WEBER,
423 U.S. 261 (1976)

Referral of a social security appeal for a report and recommendation by a magistrate judge on a closed administrative record falls well within permissible “additional duties” under § 636(b)(3).

2. Jury Selection

a. FELONY VOIR DIRE

SUPREME COURT :

PERETZ V. UNITED STATES,
501 U.S. 923 (1991)

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 litigants objected to the magistrate judge’s involvement.

2ND 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)

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)

Magistrate judge may not conduct voir dire in a civil case under § 636(b)(3) over a party's objection. Magistrate judge's selection of the jury was not harmless error and thus required a new trial.

3. Grand Jury Proceedings

7TH CIRCUIT :

IN RE GRAND JURY PROCEEDINGS JULIE DZIKOWICH,
620 F. SUPP. 521 (W.D. WIS. 1985)

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 THE GRAND JURY APPEARANCE OF CUMMINGS,
615 F. SUPP. 68 (W.D. WIS. 1985)

Magistrate judge is authorized to grant a witness immunity in a grand jury proceeding.

4. Arraignments and Acceptance of Guilty Pleas in Felony Cases

When authorized by local rule or delegated by a district judge, magistrate judges may preside over arraignments in felony cases under § 636(b). A growing number of courts have authorized magistrate judges to conduct allocution proceedings to accept felony guilty pleas under Fed. R. Crim. P. 11.

2ND CIRCUIT:

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.

UNITED STATES V. KHAN,
774 F. SUPP. 748 (E.D.N.Y. 1991)

Magistrate judge may be referred a proceeding to accept defendant's guilty plea under Fed. R. Crim. P. 11 on a report and recommendation basis, provided the defendant consents to the magistrate judge's involvement.

3RD CIRCUIT:

CARTER V. UNITED STATES,
388 F. SUPP. 1334 (W.D. PA.), AFF'D,
517 F.2D 1397 (3RD 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.

5TH CIRCUIT:

UNITED STATES V. DEES,
125 F.3D 261 (5TH CIR. 1997), CERT. DENIED,
118 S.Ct. 1174 (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.

9TH CIRCUIT:

UNITED STATES V. WASHMAN,
66 F.3D 210 (9TH CIR. 1995)

Fed. R. Crim. P. 11 colloquy to accept felony guilty plea conducted by magistrate judge with consent of parties (no discussion of magistrate judge authority).

10TH CIRCUIT:

UNITED STATES V. CIAPPONI,
77 F.3D 1247 (10TH CIR.), *CERT. DENIED*,
517 U.S. 1215 (1996)

Magistrate judge may conduct proceeding to accept guilty plea in a felony case under Fed. R. Crim. P. 11 with the defendant's consent. Magistrate judge was not required to prepare a report and recommendation, but was authorized to accept the defendant's plea after conducting Rule 11 colloquy. Defendant's right to move for withdrawal of plea under Fed. R. Crim. P. 32(e) is sufficient to protect defendant's rights during plea proceedings.

5. Pretrial Evidentiary Hearings

5TH CIRCUIT:

JOHN V. STATE OF LOUISIANA,
899 F.2D 1441 (5TH CIR. 1990)

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)

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

2ND CIRCUIT:

IN RE UNITED STATES OF AMERICA,
10 F.3D 931 (2^D CIR. 1993), *CERT. DENIED SUB NOM.*,
KORMAN V. UNITED STATES,
513 U.S. 812 (1994)

Court issued writ of mandamus against 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. § 2510-21, ["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 and Trial Duties in Criminal and Administrative Proceedings

2ND CIRCUIT:

UNITED STATES V. CONSTRUCTION PRODUCTS RESEARCH, INC.,
73 F.3D 464 (2^D CIR.), *CERT. DENIED*,
519 U.S. 927 (1996)

Petition to enforce administrative subpoena was referred to a magistrate judge pursuant to § 636(b)(3) for preparation of a report and recommendation.

UNITED STATES v. ALVARADO,
923 F.2d 253 (2d Cir. 1991)

District judge remanded matter to magistrate judge to hold Batson hearing to determine whether peremptory challenges in jury selection were discriminatory.

5TH CIRCUIT:

UNITED STATES v. KROUT,
56 F.3d 643 (5th Cir. 1995), *CERT. DENIED,*
516 U.S. 1076 (1996)

District court did not err in refusing to grant defendant's motion for 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 juror by the magistrate judge.

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:

IN RE ESTABLISHMENT INSPECTION,
589 F.2d 1335 (7th Cir.), *CERT. DENIED,*
444 U.S. 884 (1979)

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).

IN RE SKIL CORP.,
119 F.R.D. 658 (N.D. Ill. 1987)

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)

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)

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. TANOUÉ,
94 F.3D 1342 (9TH CIR. 1996)

Magistrate judge issued a report and recommendation to enforce an IRS summons to compel 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)

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)

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.

UNITED STATES v. SOUTHERN TANKS, INC.,
619 F.2D 54 (10TH CIR. 1980)

Magistrate judge could issue a proposed order enforcing an IRS summons on a report and recommendation basis, provided a district judge conducted de novo determination.

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 magistrate judge.)

8. Prisoner Cases

5TH CIRCUIT:

JONES v. JOHNSON,
134 F.3D 309 (5TH CIR. 1998)

District judge could not delegate to magistrate judge under § 636(b)(3) the 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.

FORD v. ESTELLE,
740 F.2D 374 (5TH CIR. 1984)

A civil jury trial in a prisoner case may not be referred to a magistrate judge under § 636(b)(3).

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 magistrate judge.)

10TH CIRCUIT:

CLARK v. POULTON,
963 F.2D 1361 (10TH CIR.), *CERT. DENIED*,
506 U.S. 1014 (1992)

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

2ND CIRCUIT:

OVADIAH V. NEW YORK ASSOCIATION FOR NEW AMERICANS,
1997 WL 342411 (S.D.N.Y. 1997)

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. Federal Magistrates Act does not specifically prohibit magistrate judges from presiding over arbitration proceedings, but arbitration by magistrate judges should be avoided.

3RD CIRCUIT:

HAMELI V. NAZARIO,
930 F. SUPP. 171 (D. DEL. 1996)

Magistrate judge did not have authority to conduct evidentiary hearing and enter 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 magistrate judge's involvement in "alternative dispute resolution" proceeding.

7TH CIRCUIT:

DDI SEAMLESS CYLINDER V. GENERAL FIRE EXTINGUISHER,
14 F.3D 1163 (7TH CIR. 1994)

Although magistrate judge did not have authority under the Federal Magistrates Act to serve as arbitrator, even with the consent of the parties, appellate court held that parties were bound by the magistrate judge's decision due to the parties' consensual agreement to be so bound.

11. 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 magistrate judge to preside over closing argument when the trial judge was ill.

12. Acceptance of Verdict

6TH CIRCUIT:

UNITED STATES V. DAY,
789 F.2D 1217 (6TH CIR. 1986)

Magistrate judge is permitted to accept 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)

Magistrate judge could accept jury's verdict in felony case when the trial judge was unavailable.

9TH CIRCUIT:

UNITED STATES V. FOSTER,
57 F.3D 727 (9TH CIR. 1995) , REV'D EN BANC ON OTHER GROUNDS,
133 F.3D 704 (9TH CIR. 1998)

Acceptance of a jury verdict is a "ministerial" duty that may be assigned to a magistrate judge under § 636(b)(3).

13. Presiding Over Jury Deliberation

3RD CIRCUIT:

GOV. OF VIRGIN ISLANDS V. PANIAGUA,
922 F.2D 178 (3RD CIR. 1990)

The reading of an *Allen* charge to the jury and the declaration of a mistrial by the magistrate judge are improper exercises of Article III power, but the motion for mistrial judicially estopped defendant from asserting the error.

8TH CIRCUIT:

HARRIS V. FOLK CONSTR. CO. ,
138 F.3D 365 (8TH CIR. 1998)

Magistrate judge did not have authority under § 636(b)(3) to supervise 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)

Magistrate judge is permitted to preside over felony jury deliberations when the trial judge left town after instructing the jury. 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)

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)

Magistrate judge is permitted to preside over felony jury deliberations where the trial judge was gone for the weekend.

14. Instructing Jury

5TH CIRCUIT:

UNITED STATES v. DE LA TORRE,
605 F.2D 154 (5TH CIR. 1979)

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)

Magistrate judge performed mere ministerial function by charging jury with instructions provided by the district judge. The question of waiver was immaterial because the magistrate judge did not exceed delegated authority.

UNITED STATES v. SAWYERS,
902 F.2D 1217 (6TH CIR. 1990), CERT. DENIED,
501 U.S. 1253 (1991)

Magistrate judge may be delegated duties of reading standard *Allen* charge to jury and of accepting 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)

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)

Magistrate judge is permitted to instruct jury to continue deliberations after dinner on a Friday night. There was no evidence that the jury was coerced into reaching verdict.

15. Dismissing Jury

8TH CIRCUIT:

KOCIEMBA v. G.D. SEARLE & Co.,
707 F. SUPP. 1517 (D. MINN. 1989)

Magistrate judge had authority to dismiss jury as an ancillary duty to his authority to accept the jury's verdict.

C. POST-JUDGMENT DUTIES

Section 636(b)(3) is often used by courts as authority to refer post-trial and post-judgment 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. *See* § 3, *supra*.

1. Post-Judgment Dispute Among Creditors

9TH CIRCUIT:

COLUMBIA RECORD PRODUCTIONS v. HOT WAX RECORDS, INC.,
966 F.2D 515 (9TH CIR. 1992)

Magistrate judge did not have authority under § 636(b)(3) to make 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)

Magistrate judge is not authorized by the Federal Magistrates Act to preside over post-judgment dispute between creditors under the reasoning in *Gomez v. United States*, 490 U.S. 858 (1989).

2. Garnishment

8TH CIRCUIT:

LOEWEN-AMERICA, INC. v. ADVANCE DISTRIBUTING Co., INC.,
705 F.2d 311 (8TH CIR. 1983)

Parties did not challenge the magistrate judge's authority to preside over execution and garnishment proceedings. (No discussion of magistrate judge authority.)

3. Proceedings in Aid of Execution of Judgment

1ST CIRCUIT:

AETNA CASUALTY & SURETY Co. v. RODCO AUTOBODY,
965 F. SUPP. 104 (D. MASS. 1996)

District judge adopted magistrate judge's report and recommendations where judgment creditor invoked state supplementary process statute to determine judgment debtors' non-exempt interest in property and their ability to pay the judgment, and proceedings were referred to magistrate judge under § 636(b)(3).

3RD CIRCUIT:

HEARST/ABC-VIACOM ENTERTAINMENT SERVICES v. GOODWAY MKTG., INC.,
815 F. SUPP. 145 (E.D. PA. 1993)

Magistrate judge could preside in proceeding under 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 to provision of the Federal Magistrates Act under which reference was made.)

4TH CIRCUIT:

FIRST UNION NAT. BANK OF VIRGINIA v. CRAUN,
853 F. SUPP. 209 (W.D. VA. 1994)

Magistrate judge, acting under § 636(b)(3), entered a post-judgment charging order against limited partnership interests held by defendant. (Opinion by magistrate judge.)

CHICAGO PNEUMATIC TOOL Co. v. STONESTREET,
107 F.R.D. 674 (S.D.W. VA. 1985)

Magistrate judge is authorized to preside over deposition in aid of execution of judgment.

7TH CIRCUIT:

MICHAELSON V. SCHOR,
1996 WL 667803 (N.D. ILL. 1996)

Magistrate judge was referred all “post-judgment collection proceedings” under § 636(b)(3) in action to enforce judgment of the bankruptcy court, subject to de novo review. Although 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

2ND 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 possessed a “substantial meritorious defense.” Magistrate judge was also asked to determine the appropriate damages if movant failed to assert a meritorious defense to the default judgment.

7TH CIRCUIT:

KING V. IONIZATION INT’L, INC.,
825 F.2d 1180 (7TH CIR. 1987)

Dicta: Court found no statutory basis to block the referral of a post-judgment default proceeding to a magistrate judge.

5. Motions to Vacate Judgment

5TH CIRCUIT:

MCLEOD, ALEXANDER, POWEL & APFFEL, P.C. V. QUARLES,
925 F.2d 853 (5TH CIR. 1991)

Magistrate judge can issue report and recommendation on motion to vacate judgment under Fed. R. Civ. P. 60(b), subject to de novo review.

8TH CIRCUIT:

LEGEAR V. THALACKER,
46 F.3d 36 (8TH CIR. 1995)

Motion to vacate judgment in pro se prisoner civil rights case under Fed. R. Civ. P. 60(b) 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 circuit court.

10TH CIRCUIT :

NAT. R.R. PASSENGER CORP. v. KOCH INDUSTRIES, INC.,
701 F.2D 108 (10TH CIR. 1983)

Where 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 reviews the magistrate judge's report and recommendation de novo under § 636(b)(3).

6. Expungement of Arrest Record

11TH CIRCUIT :

UNITED STATES v. LOPEZ,
704 F. SUPP. 1055 (S.D. FLA. 1988)

Absent specific statutory authority, magistrate judge had no authority to preside over expungement proceedings.

7. 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. There is some question 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. *See also* § 2, *supra*.

4TH CIRCUIT :

UNITED STATES v. RAYNOR,
764 F. SUPP. 1067 (D. MD. 1991)

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. COOPER,
135 F.3D 960 (5TH CIR. 1998)

Defendant could not directly appeal magistrate judge's report and recommendation that defendant's term of supervised release be revoked. 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 magistrate judge's report and recommendation under 18 U.S.C. § 3401(i) to revoke a term of supervised release in a felony case 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)

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 proceedings to be referred to magistrate judges.

9TH CIRCUIT:

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 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.

8. 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)

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).

9. Appointment of Receiver

6TH CIRCUIT:

BACHE HALSEY STUART SHIELDS, INC. v. KILLOP,
589 F. SUPP. 390 (E.D. MICH. 1984)

Magistrate judge is authorized to conduct post-judgment collection proceedings under § 636(b)(3). Post-judgment proceedings are distinguishable from prohibited case-dispositive relief.

10. Post-Verdict Petition for Attorney’s Fees and Award of Expenses

2ND CIRCUIT:

LoSACCO v. CITY OF MIDDLETOWN,
71 F.3d 88 (2D CIR. 1995)

Magistrate judge’s order denying review of clerk’s order taxing costs did not become final until district court reviewed it.

5TH CIRCUIT:

MERRITT v. INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
649 F.2d 1013 (5TH CIR. 1981)

Magistrate judge is authorized to preside in post-judgment proceeding to determine award of expenses for improper discovery motion under Fed. R. Civ. P. 37(a)(4).

7TH CIRCUIT :

TALBOTT V. EMPRESS RIVER CASINO,
1997 WL 458437 (N.D. ILL. 1997)

Post-judgment petition for attorneys' fees and costs was referred to magistrate judge as an additional duty under § 636(b)(3), subject to de novo review.

11. Post-Judgment Discovery Dispute

2ND CIRCUIT :

DENNY V. FORD MOTOR CO.,
146 F.R.D. 52 (N.D.N.Y. 1993)

District judge who was the subject of a post-judgment motion to compel discovery properly referred motion to magistrate judge under § 636(b)(3). Magistrate judge ordered further discovery to determine the factual information possessed by the trial judge. Chief judge upheld the magistrate judge's order and ordered parties to direct interrogatories to the district 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)

Magistrate judge's order unsealing transcript of in camera proceeding concerning defendant's application to proceed in forma pauperis in his appeal of his criminal conviction was affirmed by both the district court and the appellate court. (No discussion of magistrate judge authority under the Federal Magistrates Act.)

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)

Magistrate judge had authority to order mental competency examination under 18 U.S.C. § 4246(f). (Opinion by magistrate judge.)

D. 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 Magistrate Judges Division recognizes that the following duties are referred to magistrate judges in various districts around the country. Such references are often made under local rules.

- 1 Naturalization Proceedings
- 1 Jury Venire Duties (28 U.S.C. § 1865)
- 1 Summary Jury Trials
- 1 Service on Administrative Committees (Local Rules; Civil Justice Reform Act; Speedy Trial Act)
- 1 Factual Issues under the Sentencing Guidelines
- 1 Overseeing Affirmative Action Plans
- 1 Administering Compliance with the Criminal Justice Act (18 U.S.C. § 3006A)
- 1 Ordering Jail and Prison Inspections under Authority of a District Judge
- 1 All Writs Act (28 U.S.C. § 1651)
- 1 Determination of Costs of Prosecution (21 U.S.C. § 844)
- 1 Appointment of Arbitrator or Umpire (9 U.S.C. §§ 5 and 6)
- 1 Entry of Orders in Mortgage Foreclosure Proceedings in Sale of Property Financed Through Government Loans
- 1 Exemplification of Court Records for Use in the United States
- 1 Admission of Attorneys to the District Court Bar
- 1 Commitment Proceedings under Narcotics Addict Rehabilitation Act (28 U.S.C. § 2901 *et seq.*; 42 U.S.C. § 3401 *et seq.*)
- 1 Collection of Civil Penalties under the Federal Boat Safety Act of 1971 (46 U.S.C. § 1484(d))
- 1 Examination of Judgment Debtors
- 1 Appointment of Custodians of Vessels or Property Seized in Admiralty Proceedings
- 1 Setting Amount of Security Under the Supplemental Rules of Admiralty Procedure
- 1 Limitation of Liability Proceedings in Admiralty

§ 7. 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 trial 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 now 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 trial before a magistrate judge. Courts have been similarly unwilling to limit magistrate judge authority.

2ND CIRCUIT:

V.W. v. FAVOLISE,
131 F.R.D. 654 (D. Conn. 1990)

Consent to trial before magistrate judge includes authority to dispose of motions for summary judgment under Fed. R. Civ. P. 56. (Opinion by magistrate judge.)

4TH CIRCUIT:

PROCTOR v. STATE GOV'T OF NORTH CAROLINA,
830 F.2d 514 (4TH Cir. 1987)

In enacting § 636(e), Congress intended to create a distinct procedure for contempt matters apart from procedures under either § 636(b) or (c). Authority to try a civil case under § 636(c) does not include contempt authority. The district court should follow the certification procedure under § 636(e) to decide a motion to hold a party in contempt for violation of consent decree issued by magistrate judge exercising civil consent authority under § 636(c).

5TH CIRCUIT:

JENNINGS V. McCORMICK,
154 F.3D 542 (5TH CIR. 1998)

Magistrate judge erred in disregarding 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 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 magistrate judge under § 636(c) is not tantamount to waiver of right to trial by jury.

DORSEY V. SCOTT WETZEL SERVICES, INC.,
84 F.3D 170 (5TH CIR. 1996)

Magistrate judge presiding under § 636(c) may dismiss case pursuant to Fed. R. Civ. P. 41 for party's failure to prosecute.

MORROW V. HARWELL,
640 F. SUPP. 225 (W.D. TEX. 1986)

Consent to trial before magistrate judge includes the authority to reassess earlier findings and enter a second judgment after remand from the court of appeals.

6TH CIRCUIT:

UNITED STATES V. REAL PROPERTY KNOWN & NUMBERED AS 415 EAST MITCHELL AVE.,
CINCINNATI, OHIO,
149 F.3D 472 (6TH CIR. 1998)

Magistrate judge had authority under § 636(c) to adjudicate civil forfeiture action under 21 U.S.C. § 881(a)(7) with the consent of the parties.

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)

Delay of 37 months before magistrate judge rendered decision in civil consent case did not constitute prejudice to losing party that would justify reversal of magistrate judge's decision.

DDI SEAMLESS CYLINDER INT'L, INC. v. GENERAL FIRE EXTINGUISHER CORP.,
14 F.3d 1163 (7TH CIR. 1994)

Although a magistrate judge may not serve as an arbitrator under the Federal Magistrates Act, parties were bound by the informal “arbitration” procedure 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)

Reference to “judge” in a circuit remand rule must be assumed to include magistrate judges exercising civil consent authority. Court will not rule on whether the original consent remains binding upon remand, or whether the district court could vacate the reference to a magistrate judge at that time.

BUGGS v. ELGIN, JOLIET & EASTERN RAILROAD CO.,
852 F.2d 318 (7TH CIR. 1988)

Court of appeals upheld magistrate judge’s decision to amend the judgment under Fed. R. Civ. P. 60(b)(4) without addressing magistrate judge’s authority to do so. Matter remanded only for consideration of damages issue.

VOKTAS, INC. v. CENTRAL SOYA CO., INC.,
689 F.2d 103 (7TH CIR. 1982)

Consent authority includes authority to deny a motion to stay proceeding during pendent state court action.

8TH CIRCUIT:

FOSTER v. LOCKHART,
9 F.3d 722 (8TH CIR. 1993)

Magistrate judge presiding in habeas corpus proceeding with litigants’ consent under § 636(c) had authority to issue order releasing 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 Supreme Court’s amendment of Rule 10, Rules Governing Section 2254 Cases in the United States District Courts, authorizes magistrate judges to enter judgments in habeas corpus matters.

9TH CIRCUIT:

PERRIN v. FIRST INTERSTATE,
34 F.3D 1073 (9TH CIR. 1994)

(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Magistrate judge presiding under § 636(c) had authority to dismiss case under Fed. R. Civ. P. 41 where the pro se plaintiff refused to attend pretrial conferences.

10TH CIRCUIT:

MCCOY v. LAFAUT,
813 F. SUPP. 1508 (D. KAN. 1993)

Magistrate judge had authority and duty to determine proper jurisdiction sua sponte. The special designation authority of the magistrate judge in a consent case ends with entry of final judgment. Accordingly, a magistrate judge had no authority to enter post-judgment garnishment order in aid of execution of the judgment previously entered by the magistrate judge.

D.C. CIRCUIT:

AMERICAN SECURITY BANK, N.A. v. JOHN Y. HARRISON REALTY CO., INC.,
670 F.2D 317 (D.C. CIR. 1982)

Magistrate judge acting under § 636(c) may rule on motions for post-trial discovery and costs.

FEDERAL CIRCUIT:

D.L. AULD Co. v. CHROMA GRAPHICS CORP.,
753 F.2D 1029 (FED. CIR.), CERT. DENIED,
474 U.S. 825 (1985)

Argument that a magistrate judge's consent authority extends only to trial, and not to a pretrial summary judgment determination, is frivolous.

**a. MAGISTRATE JUDGE AUTHORITY TO OVERRULE
EARLIER RULINGS BY A DISTRICT JUDGE**

2ND CIRCUIT:

STEINBORN v. DAIWA SEC. AMERICA, INC.,
1995 WL 761286 (S.D.N.Y. 1995)

Magistrate judge was not barred from entering summary judgment in favor of defendant even when the district judge originally assigned to the case had denied an earlier summary judgment motion, where earlier ruling did not address directly defenses raised by the defendant. (Opinion by magistrate judge.)

5TH CIRCUIT:

COOPER V. BROOKSHIRE,
70 F.3D 377 (5TH CIR. 1995)

Upon assuming jurisdiction in civil consent case under § 636(c), magistrate judge is not bound by district judge's earlier opinions in the case.

6TH CIRCUIT:

TAYLOR V. NATIONAL GROUP OF COMPANIES, INC.,
765 F. SUPP. 411 (N.D. OHIO 1990)

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 magistrate judge.)

7TH CIRCUIT:

BEST V. SHELL OIL Co.,
107 F.3D 544 (7TH CIR. 1997)

Magistrate judge erred in reopening defendant's motion for summary judgment where 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—TEXT AVAILABLE ON WESTLAW)

Magistrate judge presiding under § 636(c) had the 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 motion as untimely.

9TH CIRCUIT:

SHOUSE V. LJUNGGREN,
792 F.2D 902 (9TH CIR. 1986)

Magistrate judge exercising § 636(c) authority was not bound to follow the district judge's previous denial of a motion for summary judgment in the same case. Magistrate judge's decision did not violate the doctrine of the law of the case.

b. PARTIAL CONSENT TO MAGISTRATE JUDGE AUTHORITY

2ND CIRCUIT:

DI COLA V. SWISSRE HOLDING (NORTH AMERICA), INC.,
996 F.2D 30 (2D CIR. 1993)

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 199771 (E.D.N.Y. 1998)

Parties consented under § 636(c) to have a magistrate judge determine the defendant's motion for summary judgment.

7TH CIRCUIT:

HAINS v. WASHINGTON,
131 F.3d 1248 (7TH CIR. 1997)

Court upholds trial court's local rule encouraging parties to consent to magistrate judge deciding case-dispositive motions in civil cases.

RIGGINS v. WALTER,
53 F.3d 333 (7TH CIR. 1995)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Court refers to use of magistrate judge under 28 U.S.C. § 636(c) to handle a case-dispositive motion in a civil case.

2. 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). This disagreement also extends to the propriety of referring bankruptcy appeals to magistrate judges for reports and recommendations under § 636(b)(3) subject to de novo review. *See also* § 6(a)(5), *supra*.

5TH CIRCUIT:

IN RE TOYOTA OF JEFFERSON, INC.,
14 F.3d 1088 (5TH CIR. 1994)

Magistrate judge presided over bench trial in a “core” bankruptcy proceeding with the consent of the parties after the reference was withdrawn from the bankruptcy court.

IN RE NIX,
864 F.2d 1209 (5TH CIR. 1989)

Consensual reference of a Chapter 7 “core” bankruptcy matter to a magistrate judge is permissible, but such references should only be made where compelling need is shown.

MINEREX ERDOEL, INC. v. SINA, INC.,
838 F.2d 781 (5TH CIR.), *CERT DENIED SUB NOM.*,
BAKER, SMITH & MILLS v. MINEREX ERDOEL, INC.,
488 U.S. 817 (1988)

Intricate scheme provided by 28 U.S.C. § 158 for bankruptcy appeals does not provide for review by a magistrate judge under § 636(c).

7TH CIRCUIT:

IN RE ELCONA HOMES CORP.,
810 F.2d 136 (7TH CIR. 1987)

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.

3. 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 may exercise such jurisdiction, if such magistrate 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 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.

4. Constitutionality of Consent Authority

The constitutionality of magistrate judges' consensual civil trial authority under § 636(c) has been addressed by twelve of the thirteen courts of appeals. All twelve have held that this provision of the Federal Magistrates Act does not violate the Constitution. To date, the Supreme Court has not considered the issue. For an in-depth discussion of the constitutionality of consensual civil trial authority of magistrate judges, see *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247 (1993), which is also available as a pamphlet from the Administrative Office.

1ST CIRCUIT:

GOLDSTEIN v. KELLEHER,
728 F.2D 32 (1ST CIR.), CERT. DENIED,
469 U.S. 852 (1984)

2ND CIRCUIT:

COLLINS v. FOREMAN,
729 F.2D 108 (2D CIR.), CERT. DENIED,
469 U.S. 870 (1984)

3RD CIRCUIT:

WHARTON-THOMAS v. UNITED STATES,
721 F.2D 922 (3RD CIR. 1983)

4TH CIRCUIT:

GAIROLA v. COMMONWEALTH OF VA. DEPT. OF GEN. SERV.,
753 F.2D 1281 (4TH CIR. 1985)

5TH CIRCUIT:

PURYEAR v. EDE'S LTD.,
731 F.2D 1153 (5TH CIR. 1984)

6TH CIRCUIT:

NORRIS v. SCHOTTEN,
146 F.3D 314 (6TH CIR.), CERT. DENIED,
119 S.Ct. 348 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:

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 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")

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)

Appeal challenging 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 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 “execute and file a joint form of consent” if the parties agree to have a magistrate judge try their case. Courts have explored what constitutes adequate consent to magistrate judge civil trial authority under § 636(c) in many decisions.

1. Form of Consent and Waiver of Right to Article III Judge

2ND CIRCUIT :

ROSMAN v. SHAPIRO,
653 F. SUPP. 1441 (S.D.N.Y. 1987)

Parties’ stipulation to refer motion to disqualify counsel to magistrate judge does not constitute explicit waiver of Article III adjudication. Court will review the motion de novo under § 636(b).

5TH CIRCUIT :

McGINNIS v. SHALALA,
2 F.3D 548 (5TH CIR. 1993), CERT. DENIED,
510 U.S. 1191 (1994)

The fact that the government’s motion to dismiss case was handled without objection by a magistrate judge rather than a district judge did not constitute consent to have the magistrate judge dispose of the case under 28 U.S.C. § 636(c). Court will not infer consent from a parties’ actions.

MENDES JUNIOR INT’L 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.

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, judgment against a third party who did not consent to the magistrate judge's authority was invalid. Consent to consolidation does not mean all parties have consented to trial before a magistrate judge.

ARCHIE v. CHRISTIAN,
808 F.2d 1132 (5TH CIR. 1987) (EN BANC)

Before trial, magistrate judge shall inquire on the record whether each party filed consent and shall receive an affirmative answer.

PARKS v. COLLINS,
761 F.2d 1101 (5TH CIR. 1985)

Magistrate judge had no authority to decide a motion to set aside default judgment. 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.

PARKS v. COLLINS,
736 F.2d 313 (5TH CIR. 1984)

The requirement of written consent is not jurisdictional. Local court rules are procedural and enacted under § 636(c) to protect the voluntariness of the parties' consent, not to restrict the court's jurisdiction.

6TH CIRCUIT:

AMBROSE v. WELCH,
729 F.2d 1084 (6TH CIR. 1984)

Court of appeals could not review a magistrate judge's final decision in a prisoner case because there was no clear and unambiguous statement in the record that the parties consented to the magistrate judge's authority under § 636(c). The court declined to infer consent from the parties' conduct during the proceeding before the magistrate judge.

7TH CIRCUIT:

AMERICAN SUZUKI MOTOR CORP. v. BILL KUMMER, INC.,
65 F.3d 1381 (7TH CIR. 1995)

Consent made orally on the record after 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)

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 party's consent was voluntary and unequivocal.

SILBERSTEIN V. SILBERSTEIN,
859 F.2D 40 (7TH CIR. 1988)

Court will not infer consent from conduct. It is essential that the clerk of court notify parties and that a copy of the notice and signed consent form appear on the record before the district judge refers the case to the magistrate judge.

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 magistrate judge’s explanation of consent procedure, however, was too ambiguous to constitute clear consent.

9TH CIRCUIT:

WARD V. UNITED STATES DEPT. OF INT.,
26 F.3D 136 (9TH CIR. 1994)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Consent to magistrate judge’s exercise of jurisdiction over petition for a temporary restraining order must be clear and unambiguous. Two vague references to consent in the record were inadequate to impute parties’ consent, particularly where parties did not file written consent form after being instructed to do so by the magistrate judge.

IN RE SAN VICENTE MEDICAL PARTNERS, LTD.,
865 F.2D 1128 (9TH CIR. 1989)

The parties’ stipulation that the case would be decided by a district judge “or by anyone” the judge appoints does not meet explicit consent requirements of § 636(c)(1).

10TH CIRCUIT:

MCCOY V. LAFAUT,
813 F. SUPP. 1508 (D. KAN. 1993)

Consent to trial by magistrate judge may not be inferred from the parties’ conduct.

11TH CIRCUIT:

FOWLER V. JONES,
899 F.2D 1088 (11TH CIR. 1990)

The consent requirement for a magistrate judge to preside at trial under § 636(c) was not circumvented when the magistrate judge served as Article III judge’s “mouthpiece” at trial, particularly where the district judge was present throughout the trial.

HALL V. SHARPE,
812 F.2D 644 (11TH CIR. 1987)

The parties’ consent to trial before a magistrate judge must be “clear and unambiguous” and cannot be inferred from the parties’ conduct.

2. Authority of Counsel to Consent On Behalf of Parties

2ND CIRCUIT:

WOO V. CITY OF NEW YORK,
1997 WL 277368 (S.D.N.Y. 1997)

Party was bound by attorney's consent to proceedings before a magistrate judge under § 636(c). (Opinion by magistrate judge.)

3RD CIRCUIT:

FRANK V. COUNTY OF HUDSON,
962 F. SUP. 41 (D.N.J. 1997)

General rule that attorney has authority as agent to bind client on actions taken within the scope of the attorney's authority applies to an attorney's consent to proceed before a magistrate judge.

7TH CIRCUIT:

MARK I, INC. V. GRUBER,
38 F.3D 369 (7TH CIR. 1994)

Vague oral statement by counsel that client had consented to trial before a magistrate judge did not satisfy the standard that a party's consent be explicit and unambiguous. Magistrate judge thus lacked authority to enter final judgment.

WILLIAMS V. ROMERO,
7 F.3D 239 (7TH CIR. 1993)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Attorney's signature on 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.

GERMANE V. HECKLER,
804 F.2D 366 (7TH CIR. 1986)

Party would be bound by consent given by her attorney where party herself was an attorney and received correspondence from her counsel stating that the case would be disposed of by a magistrate judge.

10TH CIRCUIT:

PARKER V. BANCOKLAHOMA MORTGAGE CO.,
113 F.3D 1246 (10TH CIR. 1997)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Where 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, party would be bound by 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:

BARNETT V. GENERAL ELECTRIC CAPITAL CORP.,
147 F.3D 1321 (11TH CIR. 1998)

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 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 attorneys signed a consent form and parties did not object to magistrate judge's authority to dispose of the case when the issue of consent was raised before them at a status conference held with the magistrate judge, parties would be bound by magistrate judge's disposition of the case.

3. Necessity of Consent by All Parties

2ND CIRCUIT:

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 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 parties consented to disposition by magistrate judge, case was remanded to district judge. Absent consent from all parties, appellate court was without jurisdiction to hear plaintiff's appeal because magistrate judge acted beyond the scope of his jurisdiction.

5TH CIRCUIT:

NEALS V. NORWOOD,
59 F.3D 530 (5TH CIR. 1995)

Where a prisoner plaintiff consented to disposition of the § 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 defendant had not yet been served with the complaint.

E.E.O.C. v. WEST LA. HEALTH SERV., INC.,
959 F.2d 1277 (5TH CIR. 1992)

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)

Consent requirements are not met where the original parties consented in writing to trial before the magistrate judge, but additional parties joined subsequently 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. Failure to raise the issue on appeal, however, waives the error.

CAPRERA V. JACOBS,
790 F.2d 442 (5TH CIR. 1986)

Magistrate judge had no authority to conduct the trial where additional defendants added by 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.

7TH CIRCUIT:

WILLIAMS V. GENERAL ELEC. CAPITAL AUTO LEASE, INC.,
159 F.3d 266 (7TH CIR. 1998)

Absent class members in a class action case where parties consented to disposition by a magistrate judge are not "parties" before 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 had jurisdiction to enjoin the further prosecution of a similar class action brought in another court 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)

Consent to disposition by magistrate judge by original parties in case is 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)

Court upheld magistrate judge's denial of proposed intervenor's motion to reconsider judgment after the case had been settled, even though intervenor did not consent to authority of the magistrate judge. Even though court expressed doubts about a non-Article III judge making a final decision against a litigant absent the litigant's consent, it concluded that 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.

GUESS v. CHENAULT,
108 F.R.D. 446 (N.D. IND. 1985)

Where the original parties consented to trial before a magistrate judge, a party added subsequently is not precluded from asserting the right to trial before a district judge. The court severed the subsequent party, however, and held the scheduled trial with the original parties before the magistrate judge. (Opinion by magistrate judge.)

8TH CIRCUIT:

J.C. HENRY v. TRI-SERVICES, INC.,
33 F.3D 931 (8TH CIR. 1994)

Magistrate judge did not have authority to enter final default judgment where party had not entered appearance in 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 plaintiff's garnishment action to enforce a default judgment, 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.

9TH CIRCUIT:

UNITED STATES v. REAL PROPERTY,
135 F.3D 1312 (9TH CIR. 1998)

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 property owner did not perfect his claim to the property when provided an opportunity to do so.

LAIRD V. CHISHOLM,
85 F.3D 637 (9TH CIR. 1996)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

When additional parties were joined in prisoner litigation, magistrate judge did not have jurisdiction over the entire action without the additional parties' consent.

4. Time to File Consent

7TH CIRCUIT:

SMITH V. SHAWNEE LIBRARY SYSTEM,
60 F.3D 317 (7TH CIR. 1995)

Parties' consent to disposition by 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,
825 F.2D 1180 (7TH CIR. 1987)

Consent 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), assumption that parties 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,
735 F. SUPP. 32 (D. MASS. 1990)

Where consent form signed by the parties stated only that case would be referred to a magistrate judge, another magistrate judge could be substituted for the first one assigned to the case. Referral of the case to another magistrate judge did not constitute "extraordinary circumstances" justifying that the referral be vacated.

5TH CIRCUIT:

O'NEAL BROS. CONST. CO. v. CIRCLE, INC.,
1994 WL 658468 (E.D. LA. 1994)

When the first magistrate judge assigned to the case was killed, court could refer the case to another magistrate judge where the consent form did not specify which magistrate judge would dispose of the case.

9TH CIRCUIT:

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,” case could be referred to another magistrate judge despite plaintiff’s objection.

6. “Opt Out” Consent Procedures

Several courts have experimented with “opt out” consent procedures for referring civil cases to magistrate judges, whereby parties are deemed to have consented to disposition of a civil case by the magistrate judge if they do not object to the assignment within a set period of time. The cases that have considered these procedures, however, have disapproved of the practice.

4TH CIRCUIT:

EXCEL INDUS., INC. v. EASTERN EXPRESS, INC.,
72 F.3D 126 (4TH CIR. 1995)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

“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 is 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)

Final judgment issued by a magistrate judge in a civil case assigned to the magistrate judge under an “opt out” consent procedure was a nullity. Magistrate judge had no jurisdiction to hear the case without the written consent from the parties under § 636(c)(1) and Fed. R. Civ. P. 73(b).

LAIRD V. CHISHOLM,
85 F.3d 637 (9TH CIR. 1996)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

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 jurisdiction.

C. VACATING REFERENCE TO MAGISTRATE JUDGE

Section 636(c)(4) provides that the district judge 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. 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

2ND 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).

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:

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. 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. 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 to 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 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 reference. 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 reference.

3RD CIRCUIT:

FRANK V. COUNTY OF HUDSON,
962 F. SUPP. 41 (D.N.J. 1997)

Magistrate judge's alleged hostility toward 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 reference of case to magistrate judge under § 636(c)(4).

LEAB V. THE CINCINNATI INS. CO.,
1997 WL 736865 (E.D. PA. 1997)

Friction between attorney and magistrate judge at trial, and disagreement with magistrate judge's rulings do not constitute "extraordinary circumstances" to support vacation of reference.

4TH CIRCUIT:

SMITH V. CONNECTICUT MUT. LIFE INS. CO.,
45 F.3D 427 (4TH CIR. 1995)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Where 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 consent.

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 plaintiff's pretrial motions did not constitute "extraordinary circumstances" justifying the withdrawal of the reference.

5TH CIRCUIT:

MURRET V. CITY OF KENNER,
894 F.2D 693 (5TH CIR. 1990)

Failure of all parties to consent to trial before the magistrate judge constitutes "extraordinary circumstances" justifying withdrawal of the reference.

NUGENT V. BOARD OF COMM'RS OF THE EAST JEFFERSON LEVEE DIST.,
1998 WL 726261 (E.D. LA. 1998)

Magistrate judge's alleged lack of sympathy or compassion for plaintiff did not justify plaintiff's motion to revoke her consent under § 636(c). (Opinion by magistrate judge.)

COOLEY v. FOTT,
1988 WL 10166 (E.D. LA. 1988)

Retaliatory acts by the magistrate judge amounting to personal bias constitutes “extraordinary circumstances.” Court also finds good cause to vacate the reference where the magistrate judge’s irrational conduct requires the district judge to maintain close supervision over the 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 magistrate judge presiding in 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 disqualified himself from the case. Court implied that this situation would have constituted circumstances justifying vacation of the reference to the magistrate judge.

7TH CIRCUIT :

LORENZ v. VALLEY FORGE INS. Co. ,
815 F.2D 1095 (7TH CIR. 1987)

Magistrate judge’s grant of plaintiff’s motion to amend the complaint to add \$10,000,000 damage claim does not constitute “extraordinary circumstances” justifying withdrawal of the reference to the magistrate judge.

GERAS v. LAFAYETTE DISPLAY FIXTURES,
742 F.2D 1037 (7TH CIR. 1984)

Dicta: If § 636(c)(4) were interpreted in a manner negating the district judges’ effective supervision of magistrate judges, the result might be unconstitutional.

8TH CIRCUIT :

SOUTHERN AGRICULTURE Co. v. DITTMER,
568 F. SUP. 645 (W.D. ARK. 1983)

No extraordinary circumstances existed under § 636(c)(4) to vacate reference where magistrate judge had presided over the case for more than a year and withdrawal would cause substantial delay.

10TH CIRCUIT:

JURADO V. KLEIN TOOLS, INC.,
755 F. SUPP. 368 (D. KAN. 1991)

Claim that attorneys' consent to trial before a magistrate judge is not binding upon the client does not constitute "extraordinary circumstances."

D.C. CIRCUIT:

CLAY V. BROWN, HOPKINS, & STAMBOUGH,
892 F. SUPP. 11 (D.D.C. 1995)

Magistrate judge's alleged bias against plaintiff did not constitute "extraordinary circumstances" that would justify vacation of reference under § 636(c). Proper method for raising alleged bias of magistrate judge would be a motion for recusal under 28 U.S.C. § 455 that must be raised first before the magistrate judge. District judge would not permit use of § 636(c)(4) as a "back-door" method of seeking recusal.

3. 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 reference to magistrate judge.

2ND CIRCUIT:

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 could vacate the reference for good cause under § 636(c)(4).

3RD CIRCUIT:

LEAB V. THE CINCINNATI INS. CO.,
1997 WL 736865 (E.D. PA. 1997)

District judge's desire to perform his own work constituted good cause to vacate reference to magistrate judge where district judge stated that under usual circumstances he would not have referred case to magistrate judge in the first place.

9TH CIRCUIT:

GOMEZ V. HARRIS,
504 F. SUPP. 1342 (D. AK 1981)

Court found good cause to vacate reference of social security case to magistrate judge due to questions of law and “a thicket” of procedural difficulties.

4. Authority of Magistrate Judge after Reference is Vacated

2ND CIRCUIT:

McCARTHY V. BRONSON,
906 F.2D 835 (2D CIR. 1990), *AFF'D*,
500 U.S. 136 (1991)

Magistrate judge was “entitled to 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)

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)

Magistrate judge has no authority to try the case and issue a report and recommendation under § 636(b)(1)(B) after a party was allowed 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)

Consent to trial before the magistrate judge is not automatically withdrawn by a declaration of mistrial. Magistrate judge’s authority continues until the reference is withdrawn under § 636(c)(6).

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) and (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 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.

5TH CIRCUIT:

UNITED STATES v. R.R. TWAY, INC.,
938 F.2D 583 (5TH CIR. 1991)

Where magistrate judge tried civil case and entered judgment with the consent of the parties under § 636(c), appellate court reviewed the magistrate judge's judgment under the same standards used for reviewing judgments entered by district judges.

6TH CIRCUIT:

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:

WILLIAMS v. GENERAL ELEC. CAPITAL AUTO LEASE, INC.,
159 F.3D 266 (7TH CIR. 1998)

Parties' earlier designation of district court as appellate forum for civil consent case decided by magistrate judge was superseded retroactively by the repeal of § 636(c)(4). Because the repeal of § 636(c)(4) was a jurisdictional change that did not affect substantive rights of the parties, the parties' prior designation of appeal to the district court had no effect.

10TH CIRCUIT:

GRIMSLEY V. MacKAY,
93 F.3D 676 (10TH CIR. 1996)

On appeal of magistrate judge's judgment rendered under § 636(c), appellate court uses 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.

§ 8. CONTEMPT POWERS UNDER 28 U.S.C. § 636(e)

Before the Federal Magistrates Act was enacted in 1968, several courts held that United States commissioners possessed no inherent contempt authority. Magistrate judges are now granted limited contempt authority under the Federal Magistrates Act. Section 636(e) places strict limits on this power. The section defines actions constituting contempt:

- (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 judge of the district court would constitute contempt of such court.

When contemptuous behavior occurs before a magistrate judge, “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, have 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 have held, 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 §§ 3(B)(7), 3(C)(1) and 4(D)(5), *supra*, for further discussion of magistrate judge sanction authority.

A. MAGISTRATE JUDGE AUTHORITY

2ND CIRCUIT:

LITTON SYS., INC. v. A.T. & T.,
700 F.2d 785 (2d Cir. 1983), *CERT. DENIED*,
464 U.S. 1073 (1984)

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.

HELLER V. WOFSEY, CERTILMAN, HAFT, LEBOW & BALIN,
1989 WL 79386 (S.D.N.Y. 1989)

Magistrate judge is authorized either to certify facts for contempt under § 636(e) or to issue a § 636(b)(1)(B) report and recommendation for proposed sanctions under the district court's inherent authority to control abusive litigation practices.

3RD CIRCUIT:

TABERER V. ARMSTRONG WORLD INDUS., INC.,
954 F.2D 888 (3RD CIR. 1992)

Magistrate judge exceeded his authority under § 636(e) by conducting what was in effect a "trial" against an attorney accused of criminal contempt before the magistrate judge without obtaining the attorney's consent. A district judge 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 upon a transcript of the contempt proceeding before the magistrate judge when ordering the attorney held in contempt.

4TH CIRCUIT:

PROCTOR V. STATE GOV'T OF NORTH CAROLINA,
830 F.2D 514 (4TH CIR. 1987)

In enacting § 636(e), Congress intended to create a distinct procedure apart from procedures under §§ 636(b) or (c). District judge should follow § 636(e) certification procedures to resolve a motion to hold a party in contempt for violating a consent decree issued by a magistrate judge exercising civil consent authority under § 636(c).

STOTTS V. QUINLAN,
139 F.R.D. 321 (E.D.N.C. 1991)

Magistrate judges do not have contempt authority when exercising consensual civil trial authority under § 636(c). Magistrate judges have authority under § 636(e) to certify actions that constitute contempt for further consideration by a district judge, whether or not the parties consent to the magistrate judge's authority. (Opinion by magistrate judge.)

5TH CIRCUIT:

F.D.I.C. v. LEGRAND,
43 F.3D 163 (5TH CIR. 1995)

Appellate court upheld district judge's referral of motion for contempt to the magistrate judge for a report recommendation under § 636(b)(3).

COOPER V. NOBLE,
33 F.3D 540 (5TH CIR. 1994)

Appellate court, without comment or reference to § 636(e), upheld magistrate judge's contempt order for defendant's failure to comply with a consent decree in a prisoner class action civil rights case where all parties consented to disposition by the magistrate judge under § 636(c).

RICHARDSON V. GLICKMAN,
1997 WL 382048 (E.D. LA. 1997)

Although parties consented to disposition of their civil case by magistrate judge under § 636(c), magistrate judge did not have authority to issue final order on plaintiff's motion for contempt for defendant's failure to produce requested documents. Magistrate judge's order was reviewed as a report and recommendation by the district judge.

6TH CIRCUIT:

MIAMI VALLEY CARPENTERS DIST. COUNCIL PENSION FUND V. SCHECKELHOFF,
123 F.R.D. 263 (S.D. OHIO 1988)

Use of term "punish" in § 636(e) indicates that the provision was intended to apply to criminal contempt only. Litigant consent under § 636(c) allows a magistrate judge to conduct a civil contempt proceeding. (Opinion by magistrate judge.)

7TH CIRCUIT:

IN RE SKIL CORP.,
119 F.R.D. 658 (N.D. ILL. 1987)

Magistrate judge has authority under § 636(e) to issue an order to show cause why a party's refusal to comply with an administrative inspection warrant should not constitute civil contempt. (Opinion by magistrate judge.)

9TH CIRCUIT:

BINGMAN V. WARD,
100 F.3d 653 (9TH CIR. 1996), CERT. DENIED,
520 U.S. 1188 (1997)

Magistrate judge did not have the authority under the Federal Magistrates Act to adjudicate either civil or criminal contempts.

NATIONAL LABOR RELATIONS BD. V. A-PLUS ROOFING, INC.,
39 F.3d 1410 (9TH CIR. 1994)

The Federal Magistrates Act does 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 § 636(b)(2) and Fed. R. Civ. P. 53(b).

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, magistrate judge properly refused to certify defendant for alleged contempt in dispute over a witness deposition.

IN RE KITTERMAN,
696 F. SUPP. 1366 (D. NEV. 1988)

Magistrate judge is without final authority to decide a contempt matter. Although § 636(e) does not explicitly authorize magistrate judges to hold hearings to determine whether to certify matters for contempt, the court concludes that magistrate judges may hold such hearings.

10TH CIRCUIT:

WINDSOR v. MARTINDALE,
175 F.R.D. 665 (D. COL. 1997)

Where witnesses in prisoner civil rights action refused to comply with prisoner plaintiff's subpoenas duces tecum, plaintiff's remedy was to seek to hold witnesses in contempt of court. Presiding magistrate judge was required to make initial finding under 28 U.S.C. § 636(e) as to whether 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.

D.C. CIRCUIT:

ATHRIDGE v. AETNA CAS. & SUR. Co.,
1998 WL 429661 (D.D.C. 1998)

Magistrate judges have neither civil nor criminal contempt authority. Magistrate judges have authority under § 636(e) to order a party to show cause before a district judge upon the commission of contemptuous acts or conduct. A magistrate judge therefore has authority to begin contempt proceedings although he does not have jurisdiction to adjudicate contempt. (Opinion by magistrate judge.)

B. MISDEMEANOR CONTEMPT CASES

3RD CIRCUIT:

UNITED STATES V. GEDRAITIS,
690 F.2d 351 (3rd Cir. 1982), *CERT. DENIED*,
460 U.S. 1071 (1983)

Magistrate judge has 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.

C. CERTIFICATION OF FACTS CONSTITUTING CONTEMPT

2ND CIRCUIT:

BLUM V. SCHLEGEL,
108 F.3d 1369, 1997 (2d Cir. 1997)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

District court did not abuse its discretion when it ordered dismissal of plaintiff's action as contempt sanction after magistrate judge certified 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)

Once actions constituting contemptuous behavior under the definitions set forth in § 636(e) are committed, the magistrate judge certifies the relevant facts to a district judge.

PEKER V. FADER,
965 F. SUPP. 454 (S.D.N.Y. 1997)

Plaintiffs were properly certified for contempt when they screamed and otherwise disrupted pretrial conference conducted by magistrate judge under § 636(b). Although incarceration and fine are standard criminal contempt penalties, dismissal of plaintiffs' lawsuit was appropriate under the circumstances of the case.

3RD CIRCUIT:

HOLT CARGO SYS., INC. V. DELAWARE RIVER PORT AUTH.,
1998 WL 150948 (E.D. PA. 1998)

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)

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)

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.

AXICOM, LTD. V. TACOMA INV. & HOLDINGS, INC.,
1997 WL 10931 (E.D. LA. 1997)

Magistrate judge certified to district judge under § 636(e) that defendant be held in civil contempt for failure to comply with magistrate judge's orders to appear at several scheduled court proceedings.

LINDSEY V. JACKSON,
87 F.R.D. 405 (N.D. MISS. 1980)

Magistrate judge certified facts to district judge where plaintiff filed motion for contempt after defendant refused to comply with discovery requests. District judge declined to hold defendant in contempt under these circumstances.

7TH CIRCUIT:

NLFC, INC. V. DEVCOM MID-AMERICA, INC.,
1994 WL 188478 (N.D. ILL. 1994)

Magistrate judge declined to certify plaintiff's failure to appear at a deposition as behavior constituting contempt under § 636(e) where there was no evidence that plaintiff wilfully violated a deposition subpoena. (Opinion by magistrate judge.)

HECHT V. DON MOWRY FLEXO PARTS, INC.,
111 F.R.D. 6 (N.D. ILL. 1986)

After magistrate judge in a civil consent case certified facts constituting defendant's alleged contempt to district judge for defendant's failure to produce documents in response to a subpoena duces tecum, district judge held that defendant's actions did not constitute criminal contempt because of a lack of wilfulness on the defendant's part. Although 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)

Litigant's failure to appear before magistrate judge or to produce requested document in post-judgment proceedings in aid of execution of a judgment constituted criminal contempt. 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 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 matters for further contempt proceedings before the district judge.

10TH CIRCUIT:

COOK V. ROCKWELL INT'L CORP.,
907 F. SUPP. 1460 (D. COL. 1995)

Magistrate judge properly certified civil contempt matter to district judge where the Department of Energy failed to comply with 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.,
1998 WL 429661 (D.D.C. 1998)

Consistent with § 636(e), a magistrate judge must exercise 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 magistrate judge.)

D. DISTRICT COURT'S SUPERVISORY AUTHORITY

2ND CIRCUIT:

NOVA BIOMEDICAL CORP. V. I-STAT CORP.,
182 F.R.D. 419 (S.D.N.Y. 1998)

Where 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.

3RD CIRCUIT:

TABERER V. ARMSTRONG WORLD INDUS., INC.,
954 F.2D 888 (3RD CIR. 1992)

District judge should conduct 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.

7TH CIRCUIT:

GERAS V. LAFAYETTE DISPLAY FIXTURES, INC.,
742 F.2D 1037 (7TH CIR. 1984)

Dicta: a “clear line of demarcation” between Article III judges and magistrate judges may be found in the allocation of contempt power in § 636(e). Placing this power exclusively with Article III judges limits the exercise of judicial power to persons enjoying the constitutional guarantees of judicial independence.

9TH CIRCUIT:

BINGMAN V. WARD,
100 F.3D 653 (9TH CIR. 1996), *CERT. DENIED*,
520 U.S. 1188 (1997)

Dicta: Contempt authority is an inherent power of Article III judges and implicates the authority, discretion, and dignity of Article III courts. Congress carefully avoided conferring contempt power upon magistrate judges.

IN RE KIRK,
641 F.2D 684 (9TH CIR. 1981)

To prove intent in § 636(e) contempt action before 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.

E. APPELLATE REVIEW

9TH CIRCUIT:

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.

§ 8. CONTEMPT POWERS UNDER 28 U.S.C. § 636(e)

Before the Federal Magistrates Act was enacted in 1968, several courts held that United States commissioners possessed no inherent contempt authority. Magistrate judges are now granted limited contempt authority under the Federal Magistrates Act. Section 636(e) places strict limits on this power. The section defines actions constituting contempt:

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- (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court.

When contemptuous behavior occurs before a magistrate judge, “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.”

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A. MAGISTRATE JUDGE AUTHORITY

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In enacting § 636(e), Congress intended to create a distinct procedure apart from procedures under §§ 636(b) or (c). District judge should follow § 636(e) certification procedures to resolve a motion to hold a party in contempt for violating a consent decree issued by a magistrate judge exercising civil consent authority under § 636(c).

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139 F.R.D. 321 (E.D.N.C. 1991)

Magistrate judges do not have contempt authority when exercising consensual civil trial authority under § 636(c). Magistrate judges have authority under § 636(e) to certify actions that constitute contempt for further consideration by a district judge, whether or not the parties consent to the magistrate judge’s authority. (Opinion by magistrate judge.)

5TH CIRCUIT:

F.D.I.C. v. LEGRAND,
43 F.3D 163 (5TH CIR. 1995)

Appellate court upheld district judge’s referral of motion for contempt to the magistrate judge for a report recommendation under § 636(b)(3).

COOPER V. NOBLE,
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Use of term "punish" in § 636(e) indicates that the provision was intended to apply to criminal contempt only. Litigant consent under § 636(c) allows a magistrate judge to conduct a civil contempt proceeding. (Opinion by magistrate judge.)

7TH CIRCUIT:

IN RE SKIL CORP.,
119 F.R.D. 658 (N.D. ILL. 1987)

Magistrate judge has authority under § 636(e) to issue an order to show cause why a party's refusal to comply with an administrative inspection warrant should not constitute civil contempt. (Opinion by magistrate judge.)

9TH CIRCUIT:

BINGMAN V. WARD,
100 F.3d 653 (9TH CIR. 1996), CERT. DENIED,
520 U.S. 1188 (1997)

Magistrate judge did not have the authority under the Federal Magistrates Act to adjudicate either civil or criminal contempts.

NATIONAL LABOR RELATIONS BD. V. A-PLUS ROOFING, INC.,
39 F.3d 1410 (9TH CIR. 1994)

The Federal Magistrates Act does 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 § 636(b)(2) and Fed. R. Civ. P. 53(b).

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, magistrate judge properly refused to certify defendant for alleged contempt in dispute over a witness deposition.

IN RE KITTERMAN,
696 F. SUPP. 1366 (D. NEV. 1988)

Magistrate judge is without final authority to decide a contempt matter. Although § 636(e) does not explicitly authorize magistrate judges to hold hearings to determine whether to certify matters for contempt, the court concludes that magistrate judges may hold such hearings.

10TH CIRCUIT:

WINDSOR v. MARTINDALE,
175 F.R.D. 665 (D. COL. 1997)

Where witnesses in prisoner civil rights action refused to comply with prisoner plaintiff's subpoenas duces tecum, plaintiff's remedy was to seek to hold witnesses in contempt of court. Presiding magistrate judge was required to make initial finding under 28 U.S.C. § 636(e) as to whether 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.

D.C. CIRCUIT:

ATHRIDGE v. AETNA CAS. & SUR. Co.,
1998 WL 429661 (D.D.C. 1998)

Magistrate judges have neither civil nor criminal contempt authority. Magistrate judges have authority under § 636(e) to order a party to show cause before a district judge upon the commission of contemptuous acts or conduct. A magistrate judge therefore has authority to begin contempt proceedings although he does not have jurisdiction to adjudicate contempt. (Opinion by magistrate judge.)

B. MISDEMEANOR CONTEMPT CASES

3RD CIRCUIT:

UNITED STATES V. GEDRAITIS,
690 F.2d 351 (3rd Cir. 1982), *CERT. DENIED*,
460 U.S. 1071 (1983)

Magistrate judge has 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.

C. CERTIFICATION OF FACTS CONSTITUTING CONTEMPT

2ND CIRCUIT:

BLUM V. SCHLEGEL,
108 F.3d 1369, 1997 (2d Cir. 1997)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

District court did not abuse its discretion when it ordered dismissal of plaintiff's action as contempt sanction after magistrate judge certified 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)

Once actions constituting contemptuous behavior under the definitions set forth in § 636(e) are committed, the magistrate judge certifies the relevant facts to a district judge.

PEKER V. FADER,
965 F. SUPP. 454 (S.D.N.Y. 1997)

Plaintiffs were properly certified for contempt when they screamed and otherwise disrupted pretrial conference conducted by magistrate judge under § 636(b). Although incarceration and fine are standard criminal contempt penalties, dismissal of plaintiffs' lawsuit was appropriate under the circumstances of the case.

3RD CIRCUIT:

HOLT CARGO SYS., INC. V. DELAWARE RIVER PORT AUTH.,
1998 WL 150948 (E.D. PA. 1998)

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)

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)

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.

AXICOM, LTD. V. TACOMA INV. & HOLDINGS, INC.,
1997 WL 10931 (E.D. LA. 1997)

Magistrate judge certified to district judge under § 636(e) that defendant be held in civil contempt for failure to comply with magistrate judge's orders to appear at several scheduled court proceedings.

LINDSEY V. JACKSON,
87 F.R.D. 405 (N.D. MISS. 1980)

Magistrate judge certified facts to district judge where plaintiff filed motion for contempt after defendant refused to comply with discovery requests. District judge declined to hold defendant in contempt under these circumstances.

7TH CIRCUIT:

NLFC, INC. V. DEVCOM MID-AMERICA, INC.,
1994 WL 188478 (N.D. ILL. 1994)

Magistrate judge declined to certify plaintiff's failure to appear at a deposition as behavior constituting contempt under § 636(e) where there was no evidence that plaintiff wilfully violated a deposition subpoena. (Opinion by magistrate judge.)

HECHT V. DON MOWRY FLEXPARTS, INC.,
111 F.R.D. 6 (N.D. ILL. 1986)

After magistrate judge in a civil consent case certified facts constituting defendant's alleged contempt to district judge for defendant's failure to produce documents in response to a subpoena duces tecum, district judge held that defendant's actions did not constitute criminal contempt because of a lack of wilfulness on the defendant's part. Although 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)

Litigant's failure to appear before magistrate judge or to produce requested document in post-judgment proceedings in aid of execution of a judgment constituted criminal contempt. 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 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 matters for further contempt proceedings before the district judge.

10TH CIRCUIT:

COOK V. ROCKWELL INT'L CORP.,
907 F. SUPP. 1460 (D. COL. 1995)

Magistrate judge properly certified civil contempt matter to district judge where the Department of Energy failed to comply with 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.,
1998 WL 429661 (D.D.C. 1998)

Consistent with § 636(e), a magistrate judge must exercise 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 magistrate judge.)

D. DISTRICT COURT'S SUPERVISORY AUTHORITY

2ND CIRCUIT:

NOVA BIOMEDICAL CORP. V. I-STAT CORP.,
182 F.R.D. 419 (S.D.N.Y. 1998)

Where 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.

3RD CIRCUIT :

TABERER V. ARMSTRONG WORLD INDUS., INC.,
954 F.2D 888 (3RD CIR. 1992)

District judge should conduct 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.

7TH CIRCUIT :

GERAS V. LAFAYETTE DISPLAY FIXTURES, INC.,
742 F.2D 1037 (7TH CIR. 1984)

Dicta: a “clear line of demarcation” between Article III judges and magistrate judges may be found in the allocation of contempt power in § 636(e). Placing this power exclusively with Article III judges limits the exercise of judicial power to persons enjoying the constitutional guarantees of judicial independence.

9TH CIRCUIT :

BINGMAN V. WARD,
100 F.3D 653 (9TH CIR. 1996), *CERT. DENIED*,
520 U.S. 1188 (1997)

Dicta: Contempt authority is an inherent power of Article III judges and implicates the authority, discretion, and dignity of Article III courts. Congress carefully avoided conferring contempt power upon magistrate judges.

IN RE KIRK,
641 F.2D 684 (9TH CIR. 1981)

To prove intent in § 636(e) contempt action before 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.

E APPELLATE REVIEW

9TH CIRCUIT :

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.

E 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 for courts of appeals, *see* § 5, *supra*.

7TH CIRCUIT:

REICH v. SEA SPRITE BOAT Co., INC.,
50 F.3d 413 (7TH CIR. 1995)

Magistrate judge was appointed as a special master to conduct appellate contempt proceedings, including oversight of discovery to compel production of evidence, and to conduct evidentiary hearings.

9TH CIRCUIT:

NATIONAL LABOR RELATIONS Bd. v. A-PLUS ROOFING, INC.,
39 F.3d 1410 (9TH CIR. 1994)

Although 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 § 636(b)(3) did not authorize magistrate judges to conduct non-consensual criminal contempt trials. Court found no defect in the magistrate judge’s civil contempt jurisdiction under § 636(b)(2) and Fed. R. Civ. P. 53(b).

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. 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. For further discussion of procedural and legal issues arising from detention proceedings under the Act, *see* Chapter 6, "Initial Appearance," of the *Legal Manual for United States Magistrate Judges*.

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 a magistrate judge's release or detention order is appealed.

1ST CIRCUIT :

UNITED STATES v. CRAVEN,
1998 WL 196622 (1ST CIR. 1998)

Although district court's standard of review in reviewing magistrate judge's detention orders was ambiguous, it was not overly deferential nor so mistaken as to constitute prejudicial error. There also was no indication that the district court'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)

District judge conducts *de novo* review of magistrate judge's contested detention order.

UNITED STATES v. VEGA COSME,
1 F. SUPP. 2D 109 (D.P.R. 1998)

District court is required to make a *de novo* review of magistrate judge's contested detention order.

UNITED STATES v. ALONSO,
832 F. SUPP. 503 (D.P.R. 1993)

Section 3145(b) 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.

2ND CIRCUIT:

UNITED STATES v. LEON,
766 F.2d 77 (2d Cir. 1985)

District judge should fully reconsider 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. DEFEDE,
7 F. Supp. 2d (S.D.N.Y. 1998)

Magistrate judge's detention order must be reviewed de novo by the district court.

3RD CIRCUIT:

UNITED STATES v. DELKER,
757 F.2d 1390 (3rd Cir. 1985)

District court applies de novo review; 18 U.S.C. § 3145(c) allows the district judge to hold an evidentiary hearing and order detention on an appeal from the magistrate judge's release order.

UNITED STATES v. LEMOS,
876 F. Supp. 58 (D.N.J. 1995)

District court's power to review a magistrate judge's bail determination de novo includes the authority to hold a detention hearing, even if the magistrate judge below determined bail conditions without a hearing. Whether the district court proceeds by live testimony or proffer is within its discretion.

GOV'T OF THE VIRGIN ISLANDS v. CLARK,
763 F. Supp. 1321 (D.V.I. 1991)

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.

4TH CIRCUIT:

UNITED STATES v. RAMEY,
602 F. Supp. 821 (E.D.N.C. 1985)

Upon the defendant's motion under 18 U.S.C § 3145(b) to review the magistrate judge's detention order, it is the district judge's duty to conduct a de novo hearing.

5TH CIRCUIT:

UNITED STATES v. RUEBEN,
974 F.2D 580 (5TH CIR. 1992), *CERT. DENIED*,
507 U.S. 940 (1993)

When the district court acts on a motion to amend a magistrate judge's pretrial detention order, it acts 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)

District judge reviews the magistrate judge's detention or release order de novo, but the district court should not modify the magistrate judge's order in a manner unfavorable to the defendant absent an appeal by the government.

UNITED STATES v. DERROW,
6 F. SUPP. 2D 615 (E.D. TEX. 1998)

When a defendant moves to revoke or amend a magistrate judge's pretrial detention order, the district judge reviews the order de novo and makes an independent determination of whether pretrial detention is proper.

UNITED STATES v. WATKINS,
1998 WL 231035 (E.D. LA. 1998)

The district court must make an "independent review" to determine whether the magistrate judge properly found pretrial detention necessary, but a de novo evidentiary hearing is not required.

6TH CIRCUIT:

UNITED STATES v. TRAVIS,
129 F.3D 1266 (6TH CIR. 1997)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Where magistrate judge released defendant on bail, district court had the authority to review the magistrate judge's order sua sponte and order the defendant's detention. The defendant was given proper notice of the district court's intention to act sua sponte, was given the reasons why the district court was acting on its own motion, and was afforded an opportunity to present evidence.

7TH CIRCUIT:

UNITED STATES v. TORRES,
929 F.2D 291 (7TH CIR. 1991)

When defendant's family testified before the magistrate judge at bail hearing concerning defendant's family ties as proof that defendant would not abscond, district judge on review erred when he declined to read transcript of the hearing and refused to permit evidence of family ties to be submitted at subsequent detention hearing conducted by district judge.

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 court 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)

Failure to appeal 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)

District judge should review magistrate judge's release order de novo. District judge is authorized to hold a detention hearing with all options available to magistrate judge.

9TH CIRCUIT:

UNITED STATES v. GEBRO,
948 F.2D 1118 (9TH CIR. 1994)

District court had authority to reopen a magistrate judge's bail order on its own motion sua sponte and order defendant's detention.

UNITED STATES v. KOENIG,
912 F.2D 1190 (9TH CIR. 1990)

District judge review of a detention order under 18 U.S.C. § 3145(b) is a de novo determination. The language of § 3142(f) implies that the magistrate judge plays a role analogous to § 636(b)(1)(B).

10TH CIRCUIT:

UNITED STATES V. JONES,
980 F. SUPP. 359 (D. KAN. 1997)

District court must make its 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 court's sound discretion.

UNITED STATES V. TRAMMEL,
922 F. SUPP. 527 (N.D. OKLA. 1995)

District judge reviews a magistrate judge's release order de novo.

11TH CIRCUIT:

UNITED STATES V. KING,
849 F.2D 485 (11TH CIR. 1988)

Under 18 U.S.C. § 3145, a detainee may appeal the detention order to the district court 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. ARREDONDO,
1996 WL 521396 (M.D. FLA. 1996)

Where a magistrate judge conducts a detention hearing and orders pretrial release, the government may seek prompt review by the district court. The review is de novo, and the district court must either base its decision on the record before the magistrate judge or start from scratch and render its own findings or reasoning.

D.C. CIRCUIT:

UNITED STATES V. EPPS,
987 F. SUPP. 22 (D.D.C. 1997)

Although magistrate judge who ordered detention made no finding to the effect that two counts of felon-in-possession of a weapon charged against defendant constituted "crimes of violence" warranting detention, 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—TEXT AVAILABLE ON WESTLAW)

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-bound issues.

UNITED STATES V. DILLON,
938 F.2d 1412 (1st Cir. 1991)

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 to all detention proceedings with deference to the district court's decision.

2ND CIRCUIT:

UNITED STATES V. JACKSON,
823 F.2d 4 (2d Cir. 1987)

The trial court's factual findings will normally be reviewed under the clearly erroneous standard, but where the district court does not consider the Bail Reform Act's factors in making its decisions, the court of appeals will apply a more flexible standard.

UNITED STATES V. CHIMURENGA,
760 F.2d 400 (2d Cir. 1985)

Court of appeals applies the clearly erroneous standard in reviewing a district judge's decision overruling a magistrate judge's detention determination.

3RD CIRCUIT:

UNITED STATES V. HIMLER,
797 F.2d 156 (3rd Cir. 1986)

Appellate court's review of 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 supporting 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 (3RD CIR.), CERT. DENIED,
479 U.S. 864 (1986)

Court of appeals makes an independent review of both the magistrate judge's and district judge's decisions under 18 U.S.C. § 3145(c).

4TH CIRCUIT:

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. RUEBEN,
974 F.2D 580 (5TH CIR. 1992)

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 supported by the lower court proceedings.

6TH CIRCUIT:

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. 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 ultimate decision under 18 U.S.C. § 3142 is highly deferential.

8TH CIRCUIT:

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 a 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 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)

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.

1. 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.

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 court 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.

GARCIA V. DE BATISTA,
642 F.2d 11 (1st Cir. 1981)

Where one district judge remanded the magistrate judge's first report recommending summary judgment and adopted the second report denying summary judgment, a second district judge on eve of trial cannot adopt the first report. Adoption of the second report nullifies the first report. In addition, the second district judge's failure to consider the plaintiff's objections to the magistrate judge's first report and recommendation was not proper de novo determination under § 636(b)(1)(C).

2ND CIRCUIT:

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 court that were not raised before the magistrate judge.

GRASSIA V. SCULLY,
892 F.2d 16 (2d Cir. 1989)

District judge has the 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.

3RD CIRCUIT:

HILL V. BEYER,
62 F.3d 474 (3rd 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 (3rd Cir. 1983)

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 court'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 becomes the ruling of the district court 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:

YOUNG WORTH V. UNITED STATES PAROLE COMM'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 court 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 court 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 court's discretion in conducting de novo review should be at least as broad as the district court's authority to determine motions for reconsideration of its own rulings.

JORDAN V. HARGETT,
34 F.3D 310 (5TH CIR. 1994)

A district court 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 court 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 for post-conviction relief.

WESSON V. OGLESBY,
910 F.2D 278 (5TH CIR. 1990)

District court abused its discretion by adopting recommended findings of the magistrate judge that were clearly based on impermissible credibility assessments and failed to conduct

adequate de novo determination when it adopted the magistrate judge's report and supplemental report concerning the frivolity of the action under 18 U.S.C. § 1915(d) 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.

HARRIS v. G. & W. CONSTRUCTION, INC.,
1997 WL 610875 (E.D. La. 1997)

District court is not required to review a witness' testimony by means of a de novo hearing in order to conduct a de novo determination of the magistrate judge's report and recommendation.

6TH CIRCUIT:

MIRA v. MARSHALL,
806 F.2d 636 (6th Cir. 1986)

De novo determination refers only to matters involving disputed facts.

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:

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:

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 :

UNITED STATES v. ORREGO-FERNANDEZ,
78 F.3D 1497 (10TH CIR. 1996)

Although the district court must undertake de novo review of the record if a party files objections to the magistrate judge's credibility findings, a de novo hearing with live testimony was not required if the district court adopted the recommendation of the magistrate judge.

IN RE GRIEGO,
64 F.3D 580 (10TH CIR. 1996)

De novo determination required the district court 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.

NATIONAL 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 :

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 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' objection 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 the 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.

2. 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 addressed circumstances where this presumption may be challenged.

2ND CIRCUIT:

MURPHY v. INTERNATIONAL BUS. MACH. CORP.,
23 F.3D 719 (2D CIR.), CERT. DENIED,
513 U.S. 876 (1994)

Court of appeals would not construe the brevity of the district court’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), CERT DENIED
119 S. Ct. 824 (1999)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

It was fair for the court of appeals to presume that the district court knew of its 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—TEXT AVAILABLE ON WESTLAW)

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:

LARA V. JOHNSON,
141 F.3D 239 (5TH CIR. 1998)

Where the district court adopted the magistrate judge's report and recommendation in a habeas corpus matter two days before receiving petitioner's timely objections, appellate court would not conclude that the district court did not perform mandated de novo review absent specific evidence to the contrary. Appellate court upheld the district court'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)

District judge cannot reject a magistrate judge's recommendation without consulting a transcript of the hearing before the magistrate judge.

7TH CIRCUIT:

RAMIREZ V. TURNER,
991 F.2D 351 (7TH CIR. 1993)

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:

GRINDER V. GAMMON,
73 F.3D 793 (8TH CIR. 1996)

Where 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, appellant demonstrated a prima facie case that de novo determination had not been performed, overcoming presumption that district court had conducted statutorily mandated review.

JONES v. PILLOW,
47 F.3d 251 (8TH CIR. 1995)

Presumption that proper de novo determination was conducted is not appropriate where, at the time the district court 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 court order that the district judge listened to a tape of the proceedings.

SUMLIN v. UNITED STATES,
46 F.3d 48 (8TH CIR. 1995)

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 court acted without de novo review. Where no other evidence indicating failure to perform de novo review was offered, the court will presume proper review by the district judge.

UNITED STATES v. HAMELL,
931 F.2d 466 (8TH CIR. 1991), *CERT. DENIED,*
502 U.S. 928 (1991)

In the absence of any evidence to the contrary, appellate court presumes that the district judge properly performed de novo determination under § 636(b)(1)(C).

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:

NORTHINGTON v. MARIN,
102 F.3d 1564 (10TH CIR. 1996)

The district court is presumed to know that de novo review is required. Consequently, a brief order from the district court 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 court is aware of the requirements 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 court knows what is required for de novo determination and an express statement by the district court 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. 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)

Court of appeals will not look behind a district court's express statement that it engaged in de novo determination of record before a magistrate judge.

OCELOT OIL CORP. V. SPARROW INDUSTRIES,
847 F.2D 1458 (10TH CIR. 1988)

District court's statement that it had laboriously poured over record was insufficient to show that de novo review was conducted where the court 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 :

JEFFREY 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 four days of review was insufficient to constitute proper de novo determinations where the six-day 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)

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(b) also imposes time restrictions on the filing of objections to a magistrate judge’s report and recommendation. Courts have disagreed on the extent to which waiver doctrines apply to litigants who fail to raise issues before the magistrate judge or fail to file timely objections to a magistrate judge’s report and recommendation and then appeal the report and recommendation to the district court and/or the court of appeals. Below are cases discussing waiver issues in several contexts.

I. FAILURE TO FILE PROPER OBJECTIONS: DISTRICT COURT REVIEW

Waiver issues exist at the district court level. Courts are split on whether a party’s failure to raise 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 court from any obligation to make a de novo determination of the report pursuant to § 636(b)(1)(B).

1ST CIRCUIT:

SANTIAGO V. CANON, USA, INC.,
138 F.3D 1 (1ST CIR. 1998)

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 court or the court of appeals.

3RD CIRCUIT:

HENDERSON V. CARLSON,
812 F.2D 874 (3RD 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:

CAMBY V. DAVIS,
718 F.2D 198 (4TH CIR. 1983)

No explanation is necessary for district court to summarily affirm the magistrate judge’s report and recommendation absent objections.

MITCHELL V. APFEL,
19 F. SUPP. 2D 523 (W.D.N.C. 1998)

Failure to file objections to the magistrate judge’s report and recommendation with the district court constitutes a waiver of the right to de novo review by the district court.

5TH CIRCUIT:

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 findings 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.

NETTLES v. WAINWRIGHT,
677 F.2d 404 (5TH CIR. 1982)

Failure of a party to file written objections to proposed findings and recommendations in a magistrate judge's report, filed pursuant to § 636(b)(1), barred the party from de novo determination by the district judge. (Other holdings of *Nettles* opinion overruled by *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996)).

B. WAIVER OF ISSUES OF FACT

Some courts have held that failure to file objections to a magistrate judge's report and recommendation constitutes a waiver of challenges to the magistrate judge's findings of fact, leaving district judges free to review magistrate judges' conclusions of law at their discretion.

8TH CIRCUIT:

LORIN CORP. v. GOTO & Co., LTD.,
700 F.2d 1202 (8TH CIR. 1983)

The absence of objections to the magistrate judge's report and recommendation does not relieve the district judge of his obligation to act judicially, to decide for himself whether the magistrate judge's report is correct.

9TH CIRCUIT:

LOPO v. FISCHMANN,
5 F.3d 537 (9TH CIR. 1993)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Even where no objections are filed, the district court has a duty to conduct de novo review of the magistrate judge's conclusions of law (citing *Barilla*).

BARILLA v. ERVIN,
886 F.2D 1514 (9TH CIR. 1989)

Failure to file objections relieves the district court of the burden of conducting de novo review of the magistrate judge's factual findings.

11TH CIRCUIT:

LEWIS v. SMITH,
855 F.2D 736 (11TH CIR. 1988)

Failure to object to the magistrate judge's factual findings after notice precludes a later attack on these findings.

C. EXCEPTION TO WAIVER OF DISTRICT COURT REVIEW: SUA SPONTE REVIEW

Bolstered by references to sua sponte review made by the Supreme Court in *Mathews v. Weber* and *Thomas v. Arn*, all courts that have addressed the issue have held that the district judge has discretionary authority under § 636(b)(1)(B) to conduct de novo determination of a magistrate judge's report and recommendation sua sponte, even where a litigant fails 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.

2ND 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.

3RD CIRCUIT:

HENDERSON v. CARLSON,
812 F.2D 874 (3RD CIR.), CERT. DENIED,
484 U.S. 837 (1987)

While § 636(b)(1)(C) may not require, in the absence of objections, the district court to review the magistrate judge's report before accepting it, the better practice is for the district judge to afford some level of review to dispositive legal issues raised by the report.

5TH CIRCUIT:

EQUITABLE LIFE ASSUR. SOC. v. MANGEL STORES,
691 F. SUPP. 987 (E.D. LA. 1988)

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.

9TH CIRCUIT:

BRITT v. SIMI VALLEY UNIFIED SCHOOL DIST.,
708 F.2D 452 (9TH CIR. 1983)

The court's power to "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate" exists whether objections have been filed or not. The district court must decide for itself whether the magistrate judge's report is correct. Without this judicial review, the magistrate judge's performance of the inherently judicial act of granting a motion to dismiss might be constitutionally suspect.

GOMEZ v. SCOMA'S, INC.,
1996 WL 723082 (N.D. CAL. 1996)

Even where no objections are made, the district court must decide for itself whether the magistrate judge's report is correct.

10TH CIRCUIT:

SUMMERS v. STATE OF UTAH,
927 F.2D 1165 (10TH CIR. 1991)

District 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

SUPREME COURT:

THOMAS v. ARN,
474 U.S. 140 (1985)

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

Seven of the eleven courts of appeals that have addressed the issue have held that a party's failure to make timely objections to the magistrate judge's report and recommendation constitutes waiver of appellate review of both factual and legal issues.

1ST CIRCUIT:

SANTIAGO v. CANON, USA, INC.,
138 F.3d 1 (1st Cir. 1998)

Given proper notice, a party's failure to assert a specific objection to a report and recommendation irretrievably waived any right to review by either the district court or the court of appeals.

HENLEY DRILLING Co. v. MCGEE,
36 F.3d 143 (1st Cir. 1994)

2ND CIRCUIT:

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. SECRETARY OF HEALTH & HUMAN SERVICES,
892 F.2d 15 (2d Cir. 1989)

4TH CIRCUIT:

WELLS v. SHRINERS HOSPITAL,
109 F.3d 198 (4th Cir. 1997)

SNYDER v. RIDENOUR,
889 F.2d 1363 (4th Cir. 1989)

5TH CIRCUIT:

DOUGLASS V. UNITED SERVICES AUTO. ASS'N,
79 F.3d 1415 (5TH CIR. 1996)

A party's failure to file timely objections to a magistrate judge's proposed findings, conclusions, and recommendations barred the party from attacking on appeal the unobjected - to factual findings and legal conclusions accepted by the district court (overruling *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982)).

6TH CIRCUIT:

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:

LORENTZEN V. ANDERSON PEST CONTROL,
64 F.3d 327 (7TH CIR. 1995), *CERT. DENIED*,
517 U.S. 1136 (1996)

WILSON V. GIESEN,
956 F.2d 738 (7TH CIR. 1991)

EGERT V. CONNECTICUT GENERAL LIFE INS. CO.,
900 F.2d 1032 (7TH CIR. 1990)

10TH CIRCUIT:

AYALA V. UNITED STATES,
980 F.2d 1342 (10TH CIR. 1992)

Plaintiff was barred from raising objections to the magistrate judge's report on appeal where defendant raised timely objections to the report, but plaintiff did not.

NIEHAUS V. KANSAS BAR ASS'N,
793 F.2d 1159 (10TH CIR. 1986)

B. WAIVER OF ISSUES OF FACT BUT NOT ISSUES OF LAW

Three courts of appeals apply a different waiver standard, holding that only issues of fact are waived by a litigant's failure to object, with issues of law preserved on appeal.

8TH CIRCUIT:

HALPIN V. SHALALA,
999 F.2D 342 (8TH CIR. 1993)

Mixed question of fact and law was not waived by plaintiff's failure to object to the magistrate judge's report and recommendation in a social security case.

TAYLOR V. FARRIER,
910 F.2D 518 (8TH CIR. 1990)

THOMPSON V. NIX,
897 F.2D 356 (8TH CIR. 1990)

9TH CIRCUIT:

TURNER V. DUNCAN,
58 F.3D 449 (9TH CIR. 1998)

FLATEN V. SECRETARY OF HEALTH & HUMAN SERVICES,
44 F.3D 1453 (9TH CIR. 1995)

F.D.I.C. V. ZOOK BROS. CONST. Co.,
973 F.2D 1448 (9TH CIR. 1992)

Failure to object to magistrate judge's conclusions of law does not automatically bar consideration of objection on appeal.

MARTINEZ V. YLST,
951 F.2D 1153 (9TH CIR. 1991)

Failure to object to magistrate judge's report and recommendation is a factor to be weighed in considering the issue of waiver on appeal.

11TH CIRCUIT:

RESOLUTION TRUST CORP. V. HALLMARK BUILDERS, INC.,
996 F.2D 1144 (11TH CIR. 1993)

LEWIS V. SMITH,
855 F.2D 736 (11TH CIR. 1988)

C. NO WAIVER OF APPELLATE REVIEW

The Third Circuit is the only court of appeals that holds that failure to file timely objections to a magistrate judge's report and recommendation does not waive any aspect of appellate review.

3RD CIRCUIT:

HENDERSON V. CARLSON,
812 F.2D 874 (3RD CIR.), CERT. DENIED,
484 U.S. 837 (1987)

Failure to object to magistrate judge's report and recommendation did not waive appellate review.

D. EXCEPTIONS TO THE WAIVER RULES AT THE APPELLATE LEVEL

Courts recognize several exceptions to appellate waiver rules.

1. Pro Se Litigants

Under certain circumstances, some courts permit pro se and prisoner litigants to file objections to a magistrate judge's report and recommendation after the 10-day deadline set forth in Fed. R. Civ. P. 72(b) and § 636(b)(1)(C) despite waiver rules, sometimes reasoning that such litigants are less likely to understand the implications of the waiver rule.

2ND CIRCUIT:

F.D.I.C. v. HILLCREST ASSOCIATES,
66 F.3D 566 (2D CIR. 1995)

UNITED STATES V. TORTORA,
30 F.3D 334 (2D CIR. 1994)

SMALL V. SECRETARY OF HEALTH AND HUMAN SERVICES,
892 F.2D 15 (2D CIR. 1989)

Requiring a pro se litigant to "wade through" the circuit's case law to preserve the right to appellate review is "an unreasonable burden."

3RD CIRCUIT:

HENDERSON V. CARLSON,
812 F.2D 874 (3RD CIR.), CERT. DENIED,
484 U.S. 837 (1987)

GRANDISON V. MOORE,
786 F.2D 146 (3RD CIR. 1986)

5TH CIRCUIT:

CAY V. ESTELLE,
789 F.2D 318 (5TH CIR. 1986)

6TH CIRCUIT:

KENT v. JOHNSON,
821 F.2D 1220 (6TH CIR. 1987)

PATTERSON v. MINTZES,
717 F.2D 284 (6TH CIR. 1983)

8TH CIRCUIT:

NASH v. BLACK,
781 F.2D 665 (8TH CIR. 1986)

MESSIMER v. LOCKHART,
702 F.2D 729 (8TH CIR. 1983)

10TH CIRCUIT:

DUNN v. WHITE,
880 F.2D 1188 (10TH CIR. 1989), *CERT. DENIED*,
493 U.S. 1059 (1990)

2. 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. The absence of sufficiently specific notice has been held to create an exception to the waiver rule.

1ST CIRCUIT:

UNITED STATES v. VALENCIA-COPETE,
792 F.2D 4 (1ST CIR. 1986)

2ND CIRCUIT:

UNITED STATES v. MALE JUVENILE,
121 F.3D 34 (2D CIR. 1997)

F.D.I.C. v. HILLCREST ASSOCIATES,
66 F.3D 566 (2D CIR. 1995)

UNITED STATES v. TORTORA,
30 F.3D 334 (2D CIR. 1994)

WESOLEK V. CANADAIR, LTD.,
838 F.2d 55 (2d Cir. 1988)

4TH CIRCUIT:

UNITED STATES V. GEORGE,
971 F.2d 1113 (4th Cir. 1992)

WRIGHT V. COLLINS,
766 F.2d 841 (4th Cir. 1985)

UNITED STATES V. SCHRONCE,
727 F.2d 91 (4th Cir.), cert. denied,
467 U.S. 1208 (1984)

6TH CIRCUIT:

UNITED STATES V. WALTERS,
638 F.2d 947 (6th Cir. 1981)

8TH CIRCUIT:

THOMPSON V. NIX,
897 F.2d 356 (8th Cir. 1990)

FOSS V. FEDERAL INTERMEDIATE CREDIT BANK,
808 F.2d 657 (8th Cir. 1986)

Local rule on time limits for filing objections was not clear enough to provide adequate notice.

10TH CIRCUIT:

FERO V. KERBY,
39 F.3d 1462 (10th Cir. 1994)

MOORE V. UNITED STATES,
950 F.2d 656 (10th Cir. 1991)

3. “Interests of Justice” or Plain Error

Exceptions to the waiver rule exist 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 consider arguments that would otherwise be waived due to failure to file objections where to do so would be “in the interests of justice.” In addition, other courts will overlook a 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:

UNITED STATES v. WIHBEY,
75 F.3D 761 (1ST CIR. 1996)

2ND CIRCUIT:

UNITED STATES v. MALE JUVENILE,
121 F.3D 34 (2D CIR. 1997)

4TH CIRCUIT:

SNYDER v. RIDENOUR,
889 F.2D 1363 (4TH CIR. 1989)

STEWART v. HALL,
770 F.2D 1267 (4TH CIR. 1985)

5TH CIRCUIT:

DOUGLASS v. UNITED SERVICES AUTO. ASS'N,
79 F.3D 1415 (5TH CIR. 1996)

A party's failure to file timely objections to the magistrate judge's report and recommendation waived appellate review, unless plain error was established.

6TH CIRCUIT:

KELLY v. WITHROW,
25 F.3D 363 (6TH CIR.), *CERT. DENIED,*
513 U.S. 1061 (1994)

O'NEAL v. MORRIS,
3 F.3D 143 (6TH CIR. 1993)

Court may excuse a failure to file timely objections to the magistrate judge's report "in the interests of justice."

KENT v. JOHNSON,
821 F.2D 1220 (6TH CIR. 1987)

UNITED STATES v. WALTERS,
638 F.2D 947 (6TH CIR. 1981)

7TH CIRCUIT:

UNITED STATES v. ROBINSON,
30 F.3d 774 (7TH CIR. 1994)

HUNGER v. LEININGER,
15 F.3d 664 (7TH CIR. 1994)

The deadline for filing objections to the magistrate judge's report and recommendation was not a jurisdictional requirement and could be overlooked by the court where the objections were not egregiously late and the opposing party was not prejudiced by the late objections.

VIDEO VIEWS, INC. v. STUDIO 21, LTD.,
797 F.2d 538 (7TH CIR. 1986)

8TH CIRCUIT:

GRIFFINI v. MITCHELL,
31 F.3d 690 (8TH CIR. 1994)

THOMPSON v. NIX,
897 F.2d 356 (8TH CIR. 1990)

10TH CIRCUIT:

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)

11TH CIRCUIT:

RESOLUTION TRUST CORP. v. HALLMARK BUILDERS,
996 F.2d 1144 (11TH CIR. 1993)

III. FAILURE TO RAISE ISSUE BEFORE THE MAGISTRATE JUDGE

Waiver issues also arise when a litigant fails 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). Most, but not all, courts have held that a district judge has discretionary authority to forego de novo determination of arguments not raised first before the magistrate judge.

1ST CIRCUIT :

SANTIAGO V. CANON, USA, INC.,
138 F.3D 1 (1ST CIR. 1998)

Failure to raise an argument before the magistrate judge waived any subsequent consideration of the argument by the appellate court. District court was under no obligation to discover or articulate new legal theories for a party challenging a report and recommendation issued by a magistrate judge.

BUSINESS CREDIT LEASING V. CITY OF BIDDEFORD,
978 F.2D 767 (1ST CIR. 1992)

On a motion to open a default judgment, court would not consider additional evidence that was not presented to the magistrate judge.

PATERSON-LEITCH V. MASSACHUSETTS ELEC.,
840 F.2D 985 (1ST CIR. 1988)

Litigant was not permitted to present arguments on appeal that were not raised before the magistrate judge.

3RD CIRCUIT :

SAMPLE V. DIECKS,
885 F.2D 1099 (3RD CIR. 1989)

District judge had the discretion to prohibit parties from raising matters before the district judge that they had failed to raise in pretrial proceedings before the magistrate judge.

4TH CIRCUIT :

UNITED STATES V. GEORGE,
971 F.2D 1113 (4TH CIR. 1992)

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)

By waiting until after the magistrate judge had issued his report and recommendation before claiming that petitioner in habeas corpus matter had exhausted his state remedies on all issues raised in his federal petition, State of Louisiana waived its procedural default and exhaustion doctrine objections against petitioner.

FITZPATRICK V. PROCUNIER,
750 F.2d 473 (5TH CIR. 1985)

Prisoner's failure to allege bias by presiding magistrate judge until after the report and recommendation was received constituted a waiver of the claim.

6TH CIRCUIT:

UNITED STATES V. WATERS,
158 F.3d 933 (6TH CIR. 1998)

Court acknowledged that the defendant had probably waived the argument that magistrate judge did not have authority to conduct proceeding to revoke supervised release by not raising it before the magistrate judge, but went on to hold that the argument was meritless.

7TH CIRCUIT:

RUNDA V. SHALALA,
27 F.3d 569 (7TH CIR. 1994)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Where the district court provided parties a full opportunity to raise and argue the merits of their case before the magistrate judge, it may treat as waiver the parties' failure to take advantage of that opportunity, unless the parties could show that the failure to raise arguments before the magistrate judge was the result of exceptional circumstances.

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 suppressed the warrant, the magistrate judge's recommendation that the probable cause issue had been waived is not binding on the district court.

9TH CIRCUIT:

BOLAR V. BODGETT,
29 F.3d 630 (9TH CIR. 1994)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

District court did not abuse its discretion by refusing to consider arguments that were not raised before the magistrate judge. The purpose of the Federal Magistrates Act would be frustrated if district courts were required to consider claims that were not litigated before the magistrate judge.

GREENHOW V. SECRETARY OF HEALTH & HUMAN SERVICES,
863 F.2D 633 (9TH CIR. 1988)

Arguments raised for the first time on appeal have traditionally been held to be barred, absent exceptional circumstances or a convincing explanation for the failure to present them to the court below. The district court was well within its discretion in applying this rule to matters heard in the first instance by the magistrate judge.

10TH CIRCUIT:

SHIELDS V. CALLAHAN,
116 F.3D 489 (10TH CIR. 1997)
(TABLE DISPOSITION—TEXT AVAILABLE ON WESTLAW)

Social security claimant's contentions that were not raised before the magistrate judge were deemed waived by the appellate court.

MARSHALL V. CHATER,
75 F.3D 1421 (10TH CIR. 1996)

Issues raised for the first time in the party's objections to the magistrate judge's report and recommendation in a social security appeal were deemed waived.

11TH CIRCUIT:

LEWIS V. SMITH,
855 F.2D 736 (11TH CIR. 1988)

Failure to present evidence of a defense at a hearing before the magistrate judge precluded review in the court of appeals.