RETURN IMMEDIATELY TO CLERK'S OFFICE
ATTN: CALENDAR COORDINATOR

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

CASE ASSIGNMENT REPORT

HEARING DATE: Thursday, December 5, 1985 COURTROOM # 1

PANEL: Judges Keith, Kennedy and Unthank

CASE NO.	CASE TITLE	STUDY & OPINION	PER CURIAM	CHECK IF RULE 19	WRITING JUDGE
85-5441	United States of America v. Archie Larry Thomas		X Unpub.		Keith
84-3683) 84-3722)	Plain Dealer Publishing Co. v. City of Lakewood	X			Keith
84-3675	New York Times Company v. City of Lakewood		X Unpub.		Keith
85-1310	James W. Sisk v. Commissioner of Internal Revenue		X Publish		Keith

D.J. Keith (Presiding Judge)

December 5, 1985
(Date)

Clerk sends copies to: Panel Judges
Chief Judge

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
DAMON J. KEITH
CIRCUIT JUDGE
U. S. COURTHOUSE
DETROIT, MICHIGAN 48226

December 5, 1985

Kenneth A. Howe, Jr., Esq.
Senior Staff Attorney
U.S. Court of Appeals-Sixth Circuit
U.S.P.O. and Courthouse
Cincinnati, Ohio 45202

Re: No. 84-1498 - Kajevic v. Baer, et al.
No. 84-1198 - Heward v. United States of America
Rule 9(a) - December 5, 1985

Dear Mr. Howe:

The two above-captioned cases were submitted to Judges Keith, Kennedy and Unthank to be considered under our Court's Rule 9(a). We have initialed the proposed orders and enclose them for signature and filing by the Clerk.

Sincerely,

Damon J. Keith

DJK/gct
Enclosures

cc: Judge Kennedy
Judge Unthank

PANEL REPORT

DATE: **Tuesday, December 3, 1985 - Courtroom No. 2**

PANEL: **KEITH, MILBURN and UNTHANK**

No. 85-1378 - United States of America v. Paul D. Bero
E.D. Michigan - Churchill, J.

The panel of Keith, Milburn and Unthank determined that the above-styled case should be dismissed from the Bench pursuant to Sixth Circuit Rule 19.

DAMON J. KEITH

cc: All Judges
B. Eggemeier

PANEL REPORT

DATE: **Tuesday, December 3, 1985 - Courtroom No. 2**

PANEL: **KEITH, MILBURN and UNTHANK**

No. 85-5061 - Curley Lee Howse v. Aileen Love, Warden
M. D. Tennessee - Wiseman, J.

The panel of Keith, Milburn and Unthank determined that the above-styled case should be dismissed from the Bench pursuant to Sixth Circuit Rule 19.

DAMON J. KEITH

cc: All Judges
B. Eggemeier

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202

JOHN P. HEHMAN
CLERK

TELEPHONE
(513) 684-2953
FTS 684-2953

November 22, 1985
Date

TO: Judge Keith

RE: 84-1794, 85-1149 - Irving v. Edwards

Argued/Submitted _____ before: _____

Opinion/Order/Per Curiam filed: _____

Writing Judge: _____

SCHEDULED FOR ORAL ARGUMENT THURSDAY, DECEMBER 5, 1985, COURTROOM #1, BEFORE JUDGES KEITH, KENNEDY AND UNTHANK

Enclosed please find:

(X) Motion to remove appeals from calendar pending settlement (joint)

( ) Response of _____

( ) Bill of Cost

( ) Petition for rehearing en banc

( ) _____

Remarks: _____

Marjorie Eliason
Deputy Clerk

cc: Judge Kennedy
Judge Unthank

6CA-8

FILED

NOV 1985

JOHN P. HEHMAN, CLERK

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL IRVING,

Plaintiff-Appellee, APPEAL NOS. 84-1794
85-1149

-vs-

CALVIN R. EDWARDS,

Defendant-Appellee.

_____/

JOINT MOTION TO REMOVE APPEALS FROM
ORAL ARGUMENT CALENDAR

The parties hereto, through undersigned counsel, respectively move the court jointly to remove these appeals from the oral argument calendar pending their dismissal pursuant to a Settlement Agreement for the following reasons:

1. These appeals arise out of the administrative detention and transfer of petitioner while he was confined at the FCI-Milan (Michigan). Petitioner, through pro bono counsel, sought a petition for writ of habeas corpus and an injunction against his transfer which were denied by the district court. The appeals are scheduled for oral arguments on December 5, 1985.

2. Petitioner also filed a civil action for damages in the Eastern District of Michigan which is not before the court on these appeals. No. 84-CV-7467-AA ("the damages claim").

3. The parties have entered into a Settlement Agreement which contemplates dismissal of these appeals and the damages claim, a copy of which is attached hereto as Exhibit A.

4. The Settlement Agreement, executed on September 16, 1985, provided that the petitioner be transferred to the FCI-Phoenix after a visit to his ill mother, that the Bureau of Prison expunge all references in his files to a "disciplinary" transfer, and that he be paid $1500.00 in settlement of his damages claim after amending it to claim under the Federal Tort Claims Act and that these appeals and the damages claim be dismissed.

5. The damages claim has been amended and the pending appeals are to be dismissed with prejudice upon payment of $1500.00 to the plaintiff.

6. On October 11, 1985, the undersigned Assistant United States Attorney forwarded to the United States General Accounting Office the necessary paper work to effect payment pursuant to the Settlement Agreement. (See Exhibit B hereto). However, counsel are advised that payment of the claim may not occur before the scheduled argument before this Court on December 5, 1985.

7. In the interest of judicial economy and encouragement of settlements, we respectfully request that

the appeals be removed from the Court's oral argument calendar pending their dismissal with prejudice.

ROY C. HAYES
United States Attorney

NICHOLAS J. WITTNER
Attorney for Appellant
Michael Irving
3031 W. Grand Blvd. Room 7005
Detroit, Michigan 48202
(313) 974-1796

November 15, 1985

GARY M. MAVEAL
Assistant United States Attorney
817 Federal Building
Detroit, Michigan 48226
(313) 226-6175

November 12, 1985

SETTLEMENT AGREEMENT

RE: IRVING v. EDWARDS, Appeal Nos. 84-1794 and 85-1149 ("habeas corpus appeals") and IRVING v. EDWARDS, et al, no. 84-CV-7467-AA ("damages action")

Michael Irving, plaintiff and appellant in the above-numbered habeas corpus appeals and damages actions, through pro bono counsel, hereby stipulates with the United States Bureau of Prisons and the defendants, through their counsel, to settle the above-styled matters on the following terms and conditions:

1. The United States Bureau of prisons will transfer the plaintiff from the U.S. Penitentiary at Terre Haute to the F.C.I.-Phoenix on the next available transportation after execution of this written settlement agreement. En route to Phoenix, plaintiff will be housed at the M.C.C.-San Diego for a 1-2 day holdover so that he may be visited by his ill mother, Mrs. Delores Wynn. If the plaintiff's mother dies after execution of this agreement but before he has left the M.C.C.-San Diego, he will be allowed to attend her funeral.

2. The United States Bureau of prisons will expunge all references in the plaintiff's central file or medical file to his transfer from F.C.I.-Milan to U.S.P.-Terre Haute as "disciplinary" or transfer code "309".

3. Plaintiff will be paid $1500 under the following procedure. The amended complaint in No. 84-CV-7467-AA (the damages action) will be further amended pursuant to stipulation to drop the individual defendants and name the United States of America as the sole defendant in a claim under the Federal Tort Claims Act. Upon

PENGAD-Bayonne, N.J.
GOVERNMENT EXHIBIT
A

payment of a settlement of that claim in the amount of $1,500 pursuant to 28 U.S.C. § 2677, the second amended complaint in No. 84-CV-7467-AA and the two above numbered appeals of the habeas corpus action will be dismissed with prejudice.

The plaintiff hereby agrees to accept said sum in full settlement and satisfaction of any and all claims and demands which he or his heirs, executors, administrators, or assigns may have against the individual defendants, the United States Bureau of Prisons, the United States of America and its agents and employees on account of the incidents or circumstances giving rise to these suits.

4. This agreement shall not constitute an admission of liability or fault on the part of the defendants, the United States of America or the United States Bureau of Prisons or its agents.

Dated: September 16, 1985

Nicholas J. Wittner
Attorney For Plaintiff
Michael Irving
3044 W. Grand Blvd.
Room 15-137
Detroit, MI 48202

Dated: September 16, 1985

Gary M. Maveal
Assistant United States Attorney
United States Federal Courthouse
8th Floor Federal Building
Detroit, MI 48226

PENGAD-Bayonne, N.J. GOVERNMENT EXHIBIT A

U.S. Department of Justice

United States Attorney
Eastern District of Michigan

Federal Building and United States Courthouse
231 W. Lafayette, Eighth Floor
Detroit, Michigan 48226

October 11, 1985

U.S. General Accounting Office
Payment Branch
AFMD/Claims Group
441 G. Street N.W.
Washington, D.C. 20548

Re: Michael Irving vs. United States
Civil No. 84-CV-7467-AA
Eastern District of Michigan

Gentlemen:

Enclosed for payment is a copy of a settlement agreement in this case. All necessary approvals have been obtained and no further review of this matter will be taken. Therefore, payment may now be made in accordance with the provisions of 31 U.S.C. §1304.

All of the pertinent information to enable you to process this matter for payment is included on the attached Adverse Judgment Data Sheet.

Please send the check(s) in payment of this settlement agreement to me. I shall arrange for the delivery of the check(s) to the payee(s) upon the entry of a satisfaction of judgment or an appropriate release. If you have any

PENGAD-Bayonne, N. J.
GOVERNMENT EXHIBIT
B

questions concerning this matter, please call me on FTS 226-6175. Thank you for your cooperation.

Sincerely,

JOEL M. SHERE
United States Attorney

GARY M. MAVEAL
Assistant United States Attorney

Encl.

cc: Nicholas J. Wittner, Esq.

PENGAD-Bayonne, N. J.
GOVERNMENT EXHIBIT
B

MEMORANDUM

TO: HONORABLE G. WIX UNTHANK

RE: SISK V. COMMISSIONER OF INTERNAL REVENUE

ACTION NO. 85-1310

SCHEDULED FOR SUBMISSION ON BRIEFS, DECEMBER 5, 1985,

COURTROOM NO. 1, ROOM 607

MEMORANDUM

I. NATURE OF THE ACTION

Petitioner-Appellant, James W. Sisk, has appealed the Tax Court's decision in favor of the Respondent-Appellee, the Commissioner of Internal Revenue, in a deficiency action brought by the Commissioner.

II. STATEMENT OF FACTS

Appellant, James W. Sisk, operated a consultant firm in the taxable years 1979 and 1980. He filed no income tax returns for those years, even though he had an income of over $60,000 in each of those years.

In 1981, a federal court convicted Appellant of filing false income tax returns for the years 1975 and 1976, and of not filing returns for the years 1977 and 1978. For these violations, he served a prison term of approximately two years.

On July 29, 1982, the Commissioner sent Appellant a deficiency notice. In it, the Commissioner alleged that Appellant owed the government approximately $90,000 for deficiencies in and additions to his federal income taxes for the years 1979 and 1980. On November 3, 1982, Appellant filed a motion to dismiss for lack of jurisdiction. He argued to the court that the Commissioner's allegations were fraudulent, since they were allegedly based on evidence obtained from a federal grand jury, in violation of the Supreme

Court's decision in United States v. Baggot, 463 U.S. 476 (1983).

The Tax Court found that it had jurisdiction, and issued findings in support of the Commissioner's decision. The Court entered an Order and Decision pursuant thereto on January 9, 1985.

On appeal, Appellant argues that the Commissioner improperly used evidence developed in the course of a grand jury investigation in violation of Federal Rule of Criminal Procedure 6(e). Secondly, he argues that the Tax Court lacked jurisdiction to hear the case, since, he alleges, the required number of states never properly ratified the Sixteenth Amendment to the Constitution.

Appellant make no challenge on appeal to the correctness of the Tax Court's determination of the deficiencies in and additions to his taxes.

III. ISSUES BEFORE THE COURT

(A) WHETHER OR NOT THE TAX COURT SHOULD HAVE FOUND IN FAVOR OF APPELLANT, BASED UPON HIS ALLEGATION THAT THE COMMISSIONER IMPROPERLY USED EVIDENCE OBTAINED FROM A GRAND JURY PROCEEDING TO CALCULATE THE DEFICIENCY.

(B) WHETHER OR NOT THE COURT SHOULD HAVE FOUND THAT IT LACKED JURISDICTION BASED UPON APPELLANT'S ALLEGATION THAT THE REQUIRED NUMBER OF STATES NEVER IN FACT RATIFIED THE SIXTEENTH AMENDMENT.

IV. DISCUSSION

As illustrated by Appellee, Appellant does not appeal the Tax Court's specific finding in support of the Commissioner's determination of the taxes and additions owed by Appellant for 1979 and 1980. (See Brief of Appellee, pages 8-10.) Since Appellant does not challenge the Tax Court's finding of fraud, and since ample evidence supports the Commissioner's determination, the Tax Court's findings with respect to the deficiencies and additions should be affirmed.

Appellant does challenge the Tax Court's denial of his motion to dismiss the case pursuant to United States v. Baggot, supra. In that case, the Supreme Court construed Rule 6(e) of the Federal Rules of Criminal Procedure. That Rule imposes a general rule of secrecy over matters presented before a grand jury. Rule 6(e)(3)(C)(i) provides an exception to the general rule, allowing access to the grand jury material "when so directed by a court preliminary to or in connection with a judicial proceeding." In Baggot, the Court held that disclosure of grand jury material for use in an Internal Revenue Service audit does not fall under the exception, since the purpose of an audit is not to prepare for or conduct litigation, but to assess the amount of tax liability through administrative channels. 463 U.S. at 480-481.

Appellant states that he gave evidence to a federal grand jury about his tax liabilities for the years 1979 and 1980, and that the Commissioner made use of such evidence in his criminal trial. He further states that the Commissioner, when he made public the material in the trial, knew that he would use the same evidence in the present civil action. Such use, he argues, violates Rule 6(e) and Baggot. Appelle responds that Rule 6(e) does not apply, since the evidence depended upon in the present case was made public at the criminal trial, and was not secret grand jury material. Appellee adds that an internal audit conducted by the Internal Revenue Service prior to the grand jury investigation had developed the same material. Finally, Appellee points out that the standards relied upon by the Appellant, those announced in Baggot, should not be retroactively applied. Kluger v. Commissioner, 83 Tax Court 309, 334 (1984).

Since Appellant provides no clear proof that Appellee violated Rule 6(e), and since the Appellee denies that it secured the information it relied upon from secret grand jury material, the Circuit Court should conclude that the Tax Court properly denied Appellant's motion to dismiss. The Tax Court's decision cannot be labelled "clearly erroneous."

Appellant also argues that the Tax Court lacked subject matter jurisdiction over his case, due to the "fact" that the number of states required by Article V to ament the

Constitution never ratified the Sixteenth Amendment. Even if the Sixteenth Amendment were not part of the Constitution, however, the Tax Court would still have jurisdiction over the case. Although the holding of the Supreme Court in Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895), on rehearing, 158 U.S. 601 (1895), made the Sixteenth Amendment necessary in order to directly tax income derived from the ownership of property, the Court made it clear that taxes "on income from one's employment are not direct taxes and are not subject to the necessity of apportionment." Pollock, 158 U.S. at 635; Ficalora v. Commissioner, 751 F.2d 85, 86 (2d Cir. 1984). Furthermore, the Secretary of State's proclamation of the Sixteenth Amendment's ratification by the required number of states "is conclusive upon the courts." Leser v. Garnett, 258 U.S. 130, 137 (1922) (challeng to the ratification of the Nineteenth Amendment). The Supreme Court has held the entire ratification process to be "political," and therefore "not subject to judicial guidance, control or interference at any point." Coleman v. Miller, 307 U.S. 433, 459 (1939).

V. CONCLUSION

The Appellant's arguments on appeal are unsound, and do not show clear error on the part of the Tax Court. The Tax Court's Opinion in support of the Commissioner's determinations should be upheld by the Circuit Court.

85-5061
(CASE NO.)

COURTROOM # 2

12/3/85
(DATE)

STYLE OF CASE:

NOTICE
COUNSEL
COUNSEL HAS BEEN APPOINTED BY THE COURT TO REPRESENT THIS INDIGENT LITIGANT AND IS BEING REIMBURSED FOR HIS/HER SERVICES AND EXPENSES UNDER THE CRIMINAL JUSTICE ACT.

CURLEY LEE HOWSE — Michael L. James

Petitioner-Appellant

v.

Rule 19

AILEENE LOVE — David M. Himmelreich

Respondent-Appellee

15 Minutes Per Side
(TIME ALLOCATION)

6CA-47
4/80

CURLEY LEE HOWSE vs. AILEENE LOVE (WARDENESS)

PETITION FOR WRIT OF HABEAS CORPUS. DENIED. ON THIS APPEAL

Petitioner is a minister. He was charged and convicted with raping three infant minors.

He denies any such conduct. His main defense is that the children had gonorrehea. If he had done such acts he would have contracted the disease.

Evidence of this was presented at the trial and evidence was presented that he had made statements that he knew how to get rid of the disease if he had contacted it. The jury found him guilty.

He contends trial court erred in its instruction of expert witnesses. It advised the jury to accept such evidence with caution.

Petitioner contends that this instruction violated his state rights (which were similar to the federal right of due process. However, this wasn't presented to the state court in its federal aspect. The petition was denied and remanded for exhaustion of remedies.

This is the second writ upon the same context.

(1) Violated his due process rights by the expert witness instruciton.

(2) Ineffective assistance of counsel.

Each Partner owner + beneficiary

Co "A" Jackson

old Company

new company

Co "B" Wisconsin

Let it be

change of beneficiary

Change in what policy ?

Failure to designate beneficiary

who executed

Certified.

Has the death statute been interpreted by Michigan Courts,

84-1876

85-1043

(CASE NO.)

Charley Counsel

COURTROOM # 1

12/2/85

(DATE)

STYLE OF CASE:

COUNSEL

WISCONSIN NATIONAL LIFE INS. CO. — David G. Barnett

Defendant-Appellant
Cross-Appellee

v.

ANN MARIE CROBONS — Jack Radcliffe

Plaintiff-Appellee,
Cross-Appellant

15 Minutes Per Side

(TIME ALLOCATION)

6CA-47
4/80

MEMORANDUM

TO: JUDGE UNTHANK

FROM: RENEE

RE: Sixth Circuit Case of ANN MARIE CROBONS V. WISCONSIN NATIONAL LIFE INSURANCE, ET AL., No. 84-1876

INTRODUCTION

The present action was initiated in 1981 by Ann Marie Crobons, as the widow and personal representative of Gene Crobons; the gist of her position is that she was cheated out of the proceeds on a life insurance policy under which her husband had been the insured. The defendants, against whom judgment was sought jointly and severably, are: (1) the Wisconsin National Life Insurance Company (Wisconsin), which had issued the insurance policy, (2) Marvin K. Wyant, the owner of the policy, who had been in business with the deceased, and (3) Brian D Wyant, Marvin's son, who had been the insurance agent on the policy. Currently before the Court are appeals from: (1) Wisconsin, in view of the district court's denial of its motion for summary judgment of dismissal and the granting summary judgment on Count I of the Complaint (breach of contract) against it, and (2) the plaintiff, in view of the district court's refusal to award interest on the judgment from the date of death of the insured.

It should also be noted that Judge Albert Engle raises a additional question concerning the appealability of the case at this stage of the proceedings.

GENERAL REMARKS

My gut impression is that (1) there is some legitimate question about the appealability which bears further investigation, and (2) if substantive issues are examined,the trial court's decisions probably ought to be affirmed--even though it might be helpful to check out some of the Michigan authority cited.

FACTS

In December, 1981 defendant Marvin Wyant, as proposed owner, and

/

Gene J. Crobons, as proposed insured, submitted an application to the defendant Wisconsin for a life insurance policy in the face amount of $100,000. The application was amended on or about February 3, 1982 to designate "Ann Marie T. Crobons-wife" as the primary beneficiary under the policy. Thereafter, the policy was issued and premiums duly paid on the same.

On September 3, 1982, the insured entered the hospital, after having had a stroke, and was placed on a life support system. On or before September 12th, the physician in charge of the case, noting the continued deterioration of his patient, and the fact that the neurological findings were then "consistent with brain death," informed the family that there was "no hope" and that surgery which had originally been proposed upon admission would be futile; the doctor later testified that he had felt that the family was unwilling to accept the situation and that they delayed in making the decision to turn off the life support system. Early the next morning, an electroencephalogram was performed, with those results also being described as consistent with brain death. On September 14th, with the family's permission, life support systems were discontinued and vital functions ceased. The certificate of death listed September 14, 1985, 2:55 p.m. as the date and time of death.

A complication arose in that there exists a document which, on its face, indicates that on September 13, 1982 the owner of the policy changed the policy's listed beneficiary to himself; said change was witnessed by the son, Brian Wyant. The policy provision arguably invoked by this act provides:

> While the insured is living, the owner, subject to the written consent of all living irrevocable beneficiaries, may change the beneficiary from time to time by written notice in form agreed to by the company. No such change will take effect unless recorded by the company at its home office. When recorded the change takes effect as of the date the notice was signed, whether or not the insured is living when the change is recorded. All changes are subject to payments or actions taken by the company before recording.

Policy at p. 7 (emphasis added). The motivation behind this change of beneficiary

is hotly debated. The defendant contends that there had been an original oral agreement between the partners to have separate life insurance policies on each other's life, with the partner as the beneficiary; thus, this later change was supposedly made to correct the application misstatement. The plaintiff claims, of course, that this turn of events occured in order to cheat the deceased's family out of the insurance money, once he was essentially dead and unable to respond.

At any rate, Wisconsin received the form on September 15th, the date that the Death Certificate was actually signed. Following the requisite sixty days of investigation, in which its representative obtained a copy of the Death Certificate and the hospital discharge summary,[1] it paid out on the policy to Marvin Wyant. Apparently sometime later, the plaintiff, who had been unaware of the existence of the policy, came across a reference to payment made to Marvin Wyant.

The present action was initiated in November, 1983. Count One of the complaint deals with an alleged breach of contract by Wisconsin, by wrongful failure to make payment to the true beneficiary, in that the company knew or should have known that the insured was no longer living (within the meaning of the

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[1] The discharge summary provided, in pertinent part:

> His condition continued to deteriorate and his clinical neurological response became nil and at the family's request all of the supports were continued. On 9/13/82 the EEG was performed which was consistent with electro-cerebral silence. The family was informed about that the then they had a meeting that evening with the entire family and the next day the wife called me to discuss with her again and at that time they had made the decision that life support be discontinued as there was no hope of cerebral recovery. The respirator was discontinued at 2:55 p.m. and the patient expired.

Michigan Death Act, M.C.L.A. 333.1021, et seq.)[2] when the change of beneficiary occurred. Count Two relates to an alleged breach of an oral contract between the deceased and his business partner to provide insurance for their surviving families. Count Three relates to interference with contractual relations by the Wyants, in that they were said to conspire to make false representations to Wisconsin concerning the change in beneficiary. Count Four relates to fraud, misrepresentation and unjust enrichment by the Wyants, again by making false representations to Wisconsin. Count Five concerns the breach of good faith and duty of care by the younger Wyant as insurance agent. In her prayer for relief, the plaintiff indicated that she was seeking judgment for $100,000 along with interest, costs and attorney fees against the defendants jointly.

After all three defendants filed their answers, Wisconsin made a separate motion for summary judgment; in its motion, the defendant sought judgment on the grounds that the provision of the insurance contract relating to change in beneficiary had been complied with and that the change in beneficiary was effective as against it. The district court, however, disagreed with Wisconsin, finding that: (1) the Death Act applied to the construction of insurance policies,

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[2] M.C.L.A. 333.1021 provides, in pertinent part, that:

> A person will be considered dead if the announced opinion of a physician, based on ordinary standards of medical practice in the community, there is the irreversible cessation of spontaneous respiratory and circulatory functions. If artificial means of support preclude a determination that these functions have ceased, a person will be considered dead if in the announced opinion of a physician, based on ordinary standards of medical practice in the community, there is irreversible cessation of spontaneous brain functions. Death will have occurred at the time when relevant functions ceased.
>
> Death is to be pronounced before artificial means of supporting respiratory and circulatory functions are terminated.
>
> The means of determining death. . .shall be used for all purposes in this state, including the trials of all civil and criminal cases.

Death Act, Sections 1,2,3.

(2) that the physician's statement to the plaintiff and his notation in his progress records concerning the absence of neurological findings constituted an "announced opinion" sufficient for a conclusive inference of death under the statute, and (3) that Wisconsin had had sufficient notice of a potential dispute in this case to have made further inquiry, rather than to have relied upon the Death Certificate alone. The Court, accordingly, denied the motions for summary judgemnt and entered judgment for the plaintiff on Count One of her complaint against Wisconsin.

In a supplemental order, the court indicated that, although it did not intend to change the outcome of the previous judgment, it had made certain factual errors. Notably, the court indicated that Wisconsin could not have been charged with the knowledge that the insured had been determined to have suffered irreversible cessation of spontaneous brain functions prior to the change of beneficiary, through the knowledge of the son Wyant. Moreover, in order to "facilitate prompt resolution of the dispute over the application of the Death Act, the court granted the motions of the defendant to certify the issue to the Court of Appeals under 28 U.S.C. Section 1292(b).[3]

Subsequently, the plaintiff filed a motion for entry of judgment; specifically noted was the fact that the plaintiff was seeking inerest on the face amount of the policy at the rate of seven percent per annum from the date of the insured's death until the date of the filing of the complaint. The defendant Wisconsin had filed an objection to the portion of the proposed judgment granting interest. The court thereafter, entered judgment in the amount of $100,000 plus interest from the date of the filing of the complaint. His order recited that there

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[3]This section refers to the "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation". 28 U.S.C. Section 1292(b).

was no just cause for delay and that the judgment constituted a final judgment between the plaintiff and the defendant Wisconsin.

Application of Rule 54(b)

Judge Engel raises a question concerning the propriety of the appeal, specifically citing Rule 54(b) of the Federal Rules of Civil Procedure, which provides that:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however, designated, which adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or the form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b).

Broken down in ordinary language, the three prerequisites for the application of the rule as to judgments affecting part of the claims or parties to an action are that (1) more than one claim for relief be presented in the action, (2) the claim or claims be finally decided, and (3) there is no just reason for delaying the entry of a final judgment together with an express direction that the judgment be entered.

Under this provision, obviously, when a valid certificate is issued by the district court, such a judgment is final and appealable. However, the Court of Appeals is not bound by the trial court's determination that it had the power to grant certification and may determined for itself whether the statutory requirements have been meet. 21 Federal Procedure, L. Ed. Section 51:70.

The first question to be answered, then, is whether this is a multiple claims. Here, the focus is whether there are a number of legal rights asserted in

the same action, regardless of the number of remedies sought. 21 Federal Procedure, L. Ed. Section 51.73. There may be multiple claims even if the claims are based on the same facts; however, claims based on the same facts are not separate if they merely present various, alternate or mutually exclusive legal theories of recovery. 21 Federal Procedure, L. Ed. 51.74.

The second question is whether there has been a claim which is fully adjudicated which is before the Court. A claim is fully adjudicated when it terminates the action as to a severable or distinct matter with respect to the party therein concerned. 6 Moore's Federal Practice Paragraph 54.23(5). Stated another way, there must be a judgment in the sense that there is a decision upon a cognizable claim for relief which is final in the sense that it is an ultimate disposition upon an individual claim in the course of a multiple claim action. 21 Federal Procedure, L. Ed. Section 51.67.

Additional, the district court assessment of "just reason for delay" should strike a balance between piecemeal appeals and the need to make review available at a time best suited to the needs of the parties. 21 Federal Procedure, L. Ed. Section 51.67.

In the present case, the district court has invoked the statutory language, so that it is now a matter for examination by the Court of Appeals. Examination of the record indicates that the judgment entered against Wisconsin conclusively ends the controversy between the plaintiff and Wisconsin; the fact that Wisconsin may have some remedy against its codefendants for fraud arising out of the central fact situation is another matter. I do have a bit of a question about the "multiple claims" part of it; it is clear that the counts of the complaint all concern the same fact situation and that they merely represent alternative theories of recovery of what the plaintiff seeks--the $100,00.

Additionally, there is no question but that this case indeed does raise a unique question of law.

Substantive Issue

1. Judgment Entered Against Wisconsin

(NOTE: The only authorities cited by the parties on this issue are Michigan cases, which we obviously do not have access to. Further, there appear to have been no Michigan cases construing the pertinent issues, anyway.)

The argument of Wisconsin is that (1) the Michigan Death Act was enacted to clarify situations where a physician might later face criminal or civil malpractice actions or situations involving the donation of organs, as determined by the legislative history, (2) even under the Death Act, there was no "announcement" of death until September 14, 1985, and (3) even if both of these propositions were decided against it, the insurance company was entitled to rely on the Death Certificate.

The plaintiff, on the other hand, points out that (1) the statute as enacted indicates that the means of determining death "shall be used for all purposes in this state, including the trials of civil and criminal cases." Death Act, Section 3. and (2) that there had been an announced opinion of brain death prior to the execution of the change of beneficiary form, based on the common dictionary definition of that term. It, therefore, urges that the judgment of the district court be affirmed.

My gut impression is that the district court should be affirmed, based on the plain and simple reading of the statute and the fact that the district court, sitting in Michigan, is charged with a more ample knowledge of the forum state's law. (I'd pay attention to how your colleague from Michigan votes on this one, though.)

2. Interest Accruing Prior to the Filing of the Complaint

It is undisputed that in the present case, there is no contractual provision in the policy relating to the payment of such interest. Nevertheless, it is also true that Wisconsin paid interest from the date of death of the insured to the date of issuance of the check when it originally settled its claim with Marvin Wyant; this extra payment above the face value was apparently made pursuant to some general, voluntary practice of Wisconsin.

The defendant's argument is that this amount should not be included in the judgment since, under Whitley v. AllStte Insurance Company, 66 Mich App. 74 (1975), when there is no contractual policy relating to interest, it may be awarded from the date the company denies liability, commencing the use of the sum to its own advantage; Wisconsin indicates that since the matter was quickly settled with Marvin Wyant, there was no real time at which it denied that it owed the face value of the policy or used the sum to its own advantage. Additionally, the defendant notes that no demand, within the meaning of Amluxen v. Stephenson, Inc, 340 Mich 273 (1954), was made on the defendant until essentially immediately before the suit was filed.

The plaintiff, on the other hand, indicates that such is a matter of liquidated damages, since there is no question but that if the plaintiff had been judged to have been the beneficiary, it would have gotten the extra funds which went to Marvin Wyant. Amluxen v. Stephenson, Inc., 340 Mich 273 (1954).

It might be worthwhile to have Walker check out some of these cases. My gut impression is that the extra money might more properly be the subject of the unjust enrichment claim against Marvin Wyant, since it appears that Wisconsin voluntarily paid the sum, although under no contractual obligation to do so.

MEMORANDUM

TO: JUDGE UNTHANK

FROM: RENEE

RE: RULE 9 case of GREENWELL V. SHILLITO'S DEPARTMENT SHORE, ET AL., No. 85-5680.

This case is presented by the Sixth Circuit staff as a Rule 9(d)(3) case--one in which the questions arising are so unsubstantial as to need no further argument. Analyzing their research memorandum, as well as a more recent case I found, I agree with the recommendation.

The plaintiff, proceeding pro se, brings this action for relief under 42 U.S.C. Section 1983, against a department store and two of its store detectives. The crux of the dispute concerns an incident in which the plaintiff, who was suspected of shoplifting, was detained until the arrival of the regular police; apparently, the charges lodged against him were later dropped and he initiated this suit. No reference whatsoever is made in the complaint to a state, or employees or officials of a state, but rather the allegations are that the detectives (and the store through its failure to train and supervise) detained the plaintiff against his will, seized his property in violation of the Fourth Amendment and caused him to be arrested without probable cause.

According to an opinion of a Sixth Circuit Court of Appeals filed only on September 6, 1985 of this year:

> To state a claim under 42 U.S.C. Section 1983 the plaintiffs must alleged that the defendants (1) deprived plaintiffs of some right or privilege secured by the Constitution and laws of the United States and (2) acted under color of state law. Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922, 924. . .(1982); Flagg Brothers, Inc., v. Brooks, 436 U.S. 149, 155. . .(1978); Bier v. Fleming, 717 F.2d 308, 310 (6th Cir. 1983). The key inquiry in the instant case is the sufficiency of plaintiff's proof to support the threshold requirement of "state action." The Supreme Court has defined "state action" that infringes a consitutional right as

conduct "fairly attributable" to the State:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.
>
> Lugar, 457 U.S. at 937. . .

> Action taken by private individuals may be "under color of state law" when significant state involvement attaches to the action. Such involvement has been measured through various tests such as the public function test, see Terry v. Adams, 345 U.S. 461. . .(1953). . .; the state compulsion test, see Adickes v. S.M. Kress & Co., 398 U.S. 144. . .(1970); the joint action test, see Flagg Brothers; and the nexus test, see Jackson v. Metropolitan Edison Co., 419 U.S. 345. . .(1974). . .

Wagner, et al. v. The Metropolitan Nashville Airport Authority, et al., 772 F.2d 227 (6th Cir 1985).

As noted previously, in the present action, there has been no allegation concerning the involvement of state officers or employees in the action at the heart of the controversy. At most, the "state" connection would be the state statutory authority allowing merchants to detain shoplifters for a reasonable time. However, where it can not be said that the state is intimately involved or has coersed or encouraged the action, but rather the action is one of a private individual discharging corporate duties, there is no relief available under 1983. Bier, 717 F.2d at 311. This latter is surely the case in the present instance.

In short, no cause of action was stated by the complaint and the district court judge acted appropriately in entering summary judgment on behalf of the defendants.

85-1378
(CASE NO.)

2 minute rebuttal for

COURTROOM # 2

12/3/85
(DATE)

NOTICE

COUNSEL HAS BEEN APPOINTED BY THE COURT TO REPRESENT THIS INDIGENT LITIGANT AND IS BEING REIMBURSED FOR HIS/HER SERVICES AND EXPENSES UNDER THE CRIMINAL JUSTICE ACT.

STYLE OF CASE:

PAUL D. BERO — Kathleen M. O'Malley

Defendant-Appellant

v.

Rule 19

UNITED STATES OF AMERICA — Janet Parker

Plaintiff-Appellee

Attorneys from bench

15 Minutes Per Side
(TIME ALLOCATION)

6CA-47
4/80

U. S. VS. PAUL D. BERO.

Petition for writ of habeas corpus.. Denied/ On this appeal.

Petitioner convicted of mailing sexually explicit materials through the U. S. Mail.

Through plea bargaining he entered a plea of guilty and was given a B (2) sentence of 5 years.

Judge in imposing sentence and judgment made comment that he was agast at photo's found reflecting that petitioner had pictures of him having sex with children which had not been placed in circulation.

Petitioner contends Court violated his due process rights in considering matters not within the scope of the crime to which he entered plea.

B 2 sentence. PB could parole at any time.

Not maximum sentence. 10 year maximum

Although pictures were of matter being mailed the crime was mailing the matter. HOWEVER, can it be said for due process purposes their relationship is so far apart it violates due process.

Can't consider false

Can't Consider non-existent

matter
time > violates Due process

failure to
Consider Mitigating factors

Sole finding
of fault"

Remarded
denied motions
for new trial,
for New evidence.

~~new~~
What evidence would
have introduced
supplementary
or
new. ?

"Laying on of hands"

a) Prior Offense

b) Anger

① Retaliatory Discharge — but for

85-3232
(CASE NO.)

COURTROOM # 2

12/3/85
(DATE)

STYLE OF CASE:

COUNSEL

JOHN JACKSON

Gordon A. Senerius

Plaintiff-Appellant

v.

PEPSI COLA, DR. PEPPER BOTTLING CO.

Peter R. Casey, III

Defendant-Appellee

15 Minutes Per Side
(TIME ALLOCATION)

6CA-47
4/80

Wasn't Qualified — is - clearly erroneously.

> new finding

better qualified

TO: JUDGE

FROM: RENEE

RE: The Sixth Circuit case of Jackson v. RKO Bottlers of Toledo, Inc., 85-3232.

INTRODUCTION

The above-styled action is a suit filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq., and 42 U.S.C. Section 1981, seeking redress for alleged racial discrimination in the denial of a promotion and retaliatory treatment/discharge. Following the appeal from judgment entered for the defendant by the district court, the Court of Appeals vacated that judgment and remanded the case for further proceedings. Currently at bar of Appeals is the appeal from the decision that followed.

GENERAL IMPRESSION

My gut feeling is that this new decision of the district court is not clearly erroneous--although, given the seemingly pro-plaintiff statements contained in the last Court of Appeals review of this case, perhaps other members of the panel will not think so.

FACTS

The crux of one of the plaintiff's complaints concerns a decision made in 1978 by Robert Johnson (Johnson), the general manager of the defendant, a company which manufactures, bottles and distributes soft drinks. In June of the aforementioned year, Johnson selected Pete Kerner (Kerner), a white man who at that time functioned as warehouse manager, for promotion to replace Dan Starsky (Starsky) as Plant Superintendant. The apparent loser in this arrangement was the plaintiff, a black employee, whose title at the time was "Assistant Plant Superintendant."

On July 12, 1978, the plaintiff filed employment discrimination charges

with the Equal Employment Opportunity Commission (E.E.O.C.) and later that year commenced the present action under 42 U.S.C. Section 1981, later amending his complaint to add his Title VII promotion discrimination claim once he had received his Right-To-Sue letter from the E.E.O.C. In November, 1980, the plaintiff was discharged, after an incident with one of the defendant's hourly employees and the complaint was again amended, this time to include the charge of retaliatory dismissal.

The timetable of pertinent incidents which underlie this action can be listed as follows:

> 1951--PLAINTIFF hired as General Laborer at Varsity Club (facility later bought by defendant company). KERNER also hired at same facility as truck loading supervisor in the Warehouse, then functioned as route salesman and, finally, as Assistant Plant Superintendant (with the exception of a few months when he worked at another bottling plant).
>
> 1969--PLAINTIFF became "Line Foreman" at the new plant directly under Dan Starsky, the Plant Superintendant, for whom he worked. KERNER, who had remained at the old Varsity Club plant as "Assistant Plant Superintendant", switched over to new plant as "Night Warehouse Supervisor" in 1972, when the old plant closed.
>
> 1974--PLAINTIFF was named "Production Supervisor" at the new facility, again still working under Starsky.
>
> 1976--(Alleged incident in which the PLAINTIFF and an hourly employee came into contact and the PLAINTIFF was warned of policy against touching hourly employees.)
>
> 1978--After experimentation with a "team management" concept for a few months, Johnson appointed KERNER to replace Starsky, who had had no sales or night loading experience. PLAINTIFF initiates legal action.
>
> 1979---(Alleged incident in which the PLAINTIFF harassed female employee(s) and/or Johnson allegedly tried to get them to file such charges against the PLAINTIFF.)
>
> 1980--(Incident of contact between PLAINTIFF and hourly employee Haas.) PLAINTIFF discharged.

In its memorandum, the Court of Appeals examined the plaintiff's claims. It was held that the district court's findings of fact with respect to the

promotion discrimination claim were clearly erroneous due to the specific factual errors, since (1) the plaintiff did, indeed, meet the minimum qualifications for the position, (2) the trial court dredged up the "poor judgment" justification for the denial of promotion, even though the defendant had never claimed this, and (3) the use of "poor judgment" could not reasonably have been used anyway to justify the lack of promotion since the record did not support evidence that the plaintiff did anything more than take defensive measures against an hourly employee in 1976. Thus, Court of Appeals found that even though the trial court had stated that the plaintiff had established a prima facie case, and gone on to discuss other elements of the case, the Court felt that it was not clear whether the clear errors made with regard to the above-mentioned facts influenced the district court in its other findings.

As to the claim of retaliatory discharge, the trial court had not directly addressed the question of the prima facie case, although it might have implicitly done so. The Court held, however, that it was unclear on the record whether the court considered the plaintiff's attempt to demonstrate pretext or that the court was not influenced by the factual errors cited previously.

With regard to the claim under 1981, this Court noted that the trial court had erroneously required the plaintiff to provide direct evidence of intent and ignored evidence logically supporting the inference of that intent.

Accordingly, this Court remanded the case to the district court for further proceedings consistent with the opinion, including the taking of additional evidence.

Denying the plaintiff's motion to proffer additional evidence, the district court made the following findings of fact:

Pursuant to the Court of Appeals' opinion and findings, this Court finds that plaintiff has made a prima facie case for his Title VII claims of discriminatory denial of promotion and retaliatory discharge and for his 42 U.S.C. §1981 claim. The Court finds that the following findings are pertinent to the issue of pretext and plaintiff's ultimate burden of proving racial discrimination in defendant's refusal to promote and in defendant's decision to fire him.

1. Plaintiff, a black man, began work as a general laborer with Variety Club Beverage Company (Variety Club) on April 1, 1951. In 1966 defendant RKO Bottlers of Toledo, Inc. (RKO) purchased Variety Club including the franchise for bottling and distributing Pepsi-Cola.

2. When Variety Club was purchased by RKO in 1966, James Snyder became general manager, Daniel Starsky was the plant superintendent, and the general sales manager was Robert Johnson.

3. Following the purchase of Variety Club, a decision was made by RKO to build a new bottling and distribution facility, hereinafter known as "Hill Avenue." The new facility opened in June, 1969, and RKO operations were split thereafter into two parts, with the Variety Club operation continuing to produce flavored drinks while Hill Avenue produced only Pepsi-Cola.

4. Prior to the opening of Hill Avenue in 1969, plaintiff was a laborer with no supervisory authority, no warehousing experience other than the physical loading of trucks, and limited quality control experience.

5. Another employee of RKO, Pete Kerner, began his career as a truck loader for Joe Lyn Beverage Company, predecessor to Variety Club, when he was 12 years old. Kerner became a route saleman for approximately nine years, and then moved to the position of head checker-supervisor for the Pepsi-Cola Division of Variety Club. Following the purchase of Variety Club by RKO, Kerner accepted a position with a Pepsi-Cola bottler in Flint, Michigan. In 1966, on the recommendation of Daniel Starsky, the plant superintendent, Kerner was brought back to RKO, after some months in Flint, as assistant plant superintendent.

6. Daniel Starsky went to the Hill Avenue facility when it opened in June of 1969, and Pete Kerner was made plant superintendent of Variety Club. Although Starsky gave Kerner some guidance, he visited the Variety Club plant infrequently, and Kerner was essentially in control of the production and warehousing aspects of Variety Club.

7. Plaintiff went to Hill Avenue in 1969 as a working line foreman. Daniel Starsky did not believe that Jackson was qualified to run the Variety Club operation on his own.

8. At Hill Avenue, Jackson was responsible for one production line until 1972 when a second line was added. From 1972 to 1974 Jackson was in charge of two lines and had responsibility for bottle sorting on one line. During that period Jackson had no responsibility for quality control, which was supervised by John Turner, and he had no responsibility for the night warehousing operation. The plant was run by Starsky, and Jackson had no degree of independence of action or judgment.

9. In supervising the Variety Club operation, Pete Kerner had responsibility for production, warehousing, and quality control from 1969 to 1972. Kerner attended a Pepsi-Cola quality control school in 1978, and Variety Club won the Hires Root Beer quality control award every year until the operation closed down. Kerner did all purchasing except Pepsi concentrate. Kerner performed well in any position that he was placed in and, in the estimation of his superiors, did a fine job at Variety Club.

10. The Variety Club operation was the more difficult of the two operations. The Variety Club facility was obsolete, and the equipment was antiquated. Kerner cleaned up and modernized Variety Club. The fact that Variety Club bottled numerous flavors necessitated frequent changeovers, often

on an hourly basis. The brands also required different packaging, and quality control was more difficult.

11. When the Variety Club bottling operation was shut down in 1972, Kerner became night warehouse supervisor at the Hill Avenue facility. As warehouse supervisor, Kerner also directed any night bottling production that took place.

12. In 1974, John Jackson was made a production supervisor, a salaried position. From 1974 to 1978, he oversaw the bottling lines and the bottler sorters, but Dan Starsky remained in charge of production.

13. John Jackson did not have responsiblity or supervisory authority over quality control, and he did not, in the normal course of his activities, handle ordering or scheduling. Jackson's duties included two bottling lines, bottle sorting, scheduling of personnel, keeping track of absenteeism, filling out daily reports, and taking inventory. Starsky, however, essentially ran a one-man operation, and even when he was absent he left detailed instructions for Jackson to follow. During this period of time Jackson did not exercise independence of action or judgment.

14. In 1976 an incident occurred between an hourly employee named McGee and John Jackson, who was a salaried supervisor at that time. Jackson had given McGee instructions, and McGree started swearing at him. Jackson grabbed McGee and pushed him. The incident was observed by John McCollum, a union steward. McCollum brought the incident to the attention of Bob Johnson, who was general manager. Johnson spoke to both McGee and Jackson in McCollum's presence and heard their versions of what had occurred. Johnson told McGee that he was wrong for swearing at Jackson and told Jackson that if he ever laid hands on another hourly employee he would be terminated.

15. In early 1978 Starsky was offered the position of managing the RKO Bottling facility in Muncie, Indiana, and Johnson, as general manager, was faced with the decision as to the future operating method of the Toledo facility. Johnson decided, in April, 1978, to go to a "team management" concept. That system is used within the bottling industry and is used by the Pepsi-Cola bottling group.

16. Johnson felt that Starsky's method of "one-man" operation had caused problems. Starsky was a strong-willed individualist who did not listen to advice. He only delegated minor authority and apparently did not believe in long-term planning. Starsky tended to keep everything in his head. Johnson did

not want the plant operated in that fashion since he felt that Starsky's method had cost sales and caused interruption of loading patterns.

17. When Starsky left, Johnson felt he had to get a handle on the whole operation, and he felt the best way to do that was to use the team management concept and break up Starsky's authority into three areas. He decided to put Kerner in charge of warehousing, Jackson in charge of production, and Frank Taylor in charge of maintenance. The three were paid equally and were to function as a team. The three had equal responsibility.

18. After two months, however, Johnson did not believe that the operation was running smoothly under the team concept of management, and, since they were entering into their busiest season, Johnson felt that he had to return to a plant supervisor system.

19. The operation of the facility under the team concept was not a test or contest to see which of the three individuals would succeed Starsky as plant superintendent.

20. Johnson's choice came down to a decision between Kerner and Jackson because Taylor, although given some consideration because of his fast learning ability, had no experience in production or warehousing.

21. Johnson was familiar with Kerner because they had worked together at Variety Club prior to the opening of the Hill Avenue facility, and he knew Kerner's achievements and his responsibilities as warehouse supervisor at Hill Avenue. He was also aware of Jackson's duties and responsibilities at Variety Club and had a great deal of contact with Jackson between 1969 and 1978. Because of the relatively small size of the operation, Johnson was aware of who did what.

22. It was the company's policy to promote from within the organization whenever possible. While Johnson had no written guidelines for supervisory promotion, the primary criterion was work experience. In filling the position of plant superintendent, Johnson was looking for someone who had overall experience in the bottling industry, including production, quality control, night warehousing, and sales. He was also looking for someone qualified to supervise a relatively large group of people.

23. Johnson felt that Kerner was the more qualified to be plant superintendent because he was experienced in all phases of the business and could look at the total concept. Kerner was experienced in warehousing, and, indeed, had straightened out the warehousing situation after being brought to

Hill Avenue from Variety Club. He had sales experience, which Johnson felt was important to understanding the total scope of the operation. Kerner had supervised and had had direct involvement in quality control at Variety Club. Kerner, moreover, had successfully run the difficult Variety Club operation where he had responsibility for production, warehousing, and quality control.

24. Jackson, on the other hand, had had little or no involvement in quality control at Variety Club, other than what could be performed by any filler operator, and no direct involvement at Hill Avenue. During the period of time that Kerner was running the entire Variety Club operation, Jackson was running one line at Hill Avenue. Jackson had no night warehousing experience, and he had no sales experience. Jackson had also been criticized on occasion for his handling of employees on a day-to-day basis. He was not familiar with stock ordering, forecasts, or budgets. Johnson also felt that, during the "team concept" period of management, Jackson was trying to operate production in the same manner as Starsky, and Johnson did not wish that type of management to continue.

25. Although Starsky testified that he would have made Jackson plant superintendent had the decision been his, the Court finds that Starsky would have done so because of Jackson's personal loyalty to him.

26. Starsky believed that Kerner had more total experience in running the operations of the plant.

27. Although Johnson named Kerner plant superintendent, Jackson remained production manager, the second highest position in the plant, and he suffered no loss in pay or benefits.

28. The Court finds that Johnson's decision was based on Kerner's overall greater experience in the bottling industry, that Johnson was justified in relying on breadth of experience in making his decision, and that race did not play a part in the promotion decision.

29. On July 12, 1978, Jackson filed charges of employment discrimination based on Kerner's being named a plant superintendent, and he was subsequently notified by the EEOC that a finding of no probable cause had been made on his charges.

30. Between June 19, 1978, the date of Kerner's promotion to plant superintendent, and December 1, 1980, Jackson remained the production manager of RKO Bottlers of Toledo.

31. In May, 1979 Jackson grabbed the shoulders of a female production employee as if to kiss her, and, later that day, when the same employee requested that Jackson sign her time card, Jackson responded "for a little sugar, anything can be done around here." The employee, Carol Cowell, told another employee what had occurred. She did not go to work the following day because she was upset over the incident. The next day she told a second employee, Gary Snyder, what had occurred, and Snyder told her that he thought the company could be sued for sexual harrassment and that she probably should be talking to Mr. Johnson. Johnson subsequently called her to his office and inquired as to what had upset her. She told Johnson what had happened, and he asked if she would sign a statement concerning the incident. Cowell indicated that she did not wish to do so. Cowell told Johnson that the same sort of thing had happened to another employee, Beth Alexander. Johnson called Alexander to his office and asked her about Jackson. Alexander indicated that she had had some problems with Jackson but had handled them herself. At no time was any pressure placed upon Cowell to lodge a complaint against Jackson. Johnson told Cowell to think about it for a few days and decide what she wanted to do. Johnson also talked to Jackson and got his side of the story. Johnson had felt, as a matter of corporate policy and good business policy, that it was something that he, as general manager, had to look into. Subsequently, Cowell told Johnson that Jackson had apologized to her and that she wanted to drop the matter and forget it. Johnson did not pursue the matter further. The Court finds that Johnson's actions were not taken to harass Jackson or retaliate for his having filed discrimination charges. Cowell testified that, prior to the May, 1979 incident with Jackson, she and Jackson had hugged and kissed in a friendly fashion, but that the May, 1979 incident was not "friendly."

32. During the period following his filing of charges and before his termination at RKO, Jackson was removed from his office, production meetings were occasionally held without him, and his production schedules were occasionally changed. The actions were not systematic, were within the legitimate prerogatives of Kerner as plant superintendent, and were not related to Jackson's filing of discrimination charges.

33. In November of 1980 the RKO facility had been involved in a bitter labor dispute.

34. On Saturday, November 22, 1980, the day after the strike ended, Frank Taylor, Robert Haas, an hourly paid maintenance mechanic, and another employee had ridden to work together.

35. Television sets were set up in the plant that day so that the personnel could watch the Ohio State - Michigan football game. On previous occasions Haas and Jackson had bet with each other on football games. When Haas lost a bet it was his practice to pay Jackson the following Monday, and Jackson had never had any concern about Haas paying his debts. That Saturday Haas discussed betting on the game with Jackson, but Jackson wanted Michigan and points, and Haas refused to bet.

36. At the end of the day, and after the game, when Haas, Taylor, and the other employee were leaving the plant, Jackson asked Haas for $5.00 on his bet. Haas replied that they did not have a bet and continued out of the plant.

37. As the three got to Haas' car, Jackson came out of the plant hurriedly and asked Haas for his $5.00. Haas again replied that he did not have his $5.00 and that they did not have a bet. Jackson ran up to Haas and twice pushed his hand away from the lock as Haas was trying to open the car. At that point Jackson had Haas pinned against the side of the car with his body. Jackson then grabbed Haas in the chest area and spun him across one or two parking spaces and then pinned him against another car.

38. Taylor asked Jackson to let Haas go and also motioned for three security guards, who were sitting in a vehicle across the parking lot, to come over. As the guards approached, Taylor again asked Jackson to let go of Haas. Jackson complied. The guards said they would have to report the incident and asked Jackson his name, but Jackson refused to give it to them. Taylor gave the guards Jackson's name. Jackson then went back into the plant, and Haas, Taylor, and the other employee drove around to the front of the facility.

39. Taylor went into the office to file a report on the incident with Robert Johnson, but Johnson was not on the premises. While Taylor was inside the office, Jackson came up to the car and told Haas that he was just "funning" with him. Haas, however, did not believe that Jackson had been acting in fun. Taylor likewise considered it a serious incident and reported it to Johnson by telephone late that evening. Taylor felt he had to report the incident because Haas was one of his employees.

40. The following Monday Johnson spoke individually with Taylor, Haas, and Jackson. He also spoke with one of the guards and requested and read

the reports of the other two guards. Jackson told Johnson that the incident had been in fun, but both Haas and Taylor told Johnson that they felt that Jackson had been serious.

41. Johnson concluded that the incident had been serious in nature, and he felt that Jackson had broken the rules of good supervisory procedure since supervisors were expected to set an example for the rest of the plant community. Johnson felt that the incident was a hostile act toward an hourly employee. Johnson had in the past discussed with his supervisory personnel this type of contact with hourly employees and had told them that any physical contact with an hourly employee was absolutely forbidden. Jackson had been warned personally, after the McGee incident, that he would be terminated if he laid hands on an hourly employee again.

42. There had been two other supervisors terminated at RKO, prior to Jackson, both of whom were white. In neither case were the individuals given "hearings." In the RKO organization, salaried supervisors are not subject to the grievance or arbitration procedures mandated by the collective bargaining agreement.

43. John Jackson, in the course of the trial, produced evidence of two white hourly employees who had committed offenses which could have resulted in termination but who had received lesser penalties. Both employees, however, were hourly employees subject to the procedures and terms of the collective bargaining agreement. The defendant produced evidence of numerous black hourly employees who had committed offenses which could have resulted in termination but who were also not fired because of the union agreement. Jackson, however, was not subject to the grievance procedure.

44. Jackson was terminated, because of the incident in the parking lot, on December 1, 1980.

45. Jackson subsequently filed a charge of retaliatory discharge with the Equal Employment Opportunity Commission and the Ohio Civil Rights Commission on May 22, 1981, claiming that he was discharged because he had filed previous charges of race discrimination against RKO. The charge was dismissed by the Ohio Civil Rights Commission, with the finding of no probable cause, on July 1, 1982. The Court, having observed and heard the witnesses called to testify on the incident in the parking lot, does not credit plaintiff's testimony that he was only "playing" and finds that it was a serious breach of supervisory

conduct, of the type about which plaintiff had been previously warned on at least one occasion.

46. The Court finds that the defendant had legitimate business reasons for terminating plaintiff's employment and that the termination was not race related or done in retaliation for Jackson's having filed charges of discrimination.

47. It cannot be said that, but for the filing of charges of discrimination or Jackson's race, he would not have been discharged from his employment as a result of the incident in the parking lot.

APPLICABLE LAW

It is the settled law that once the prima facie case is made out by the plaintiff, the defendant must articulate, through admissible evidence, a legitimate, nondiscriminatory reason for the action taken.[1] United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714 (1983); Grubb v. W.A. Foote Memorial Hospital, 741 F.2d 1486 (6th Cir. 1985). If the defendant carries this burden of production, the presumption drops from the case. United Postal Service Board of Governors, 460 U.S. at 715.

If such a situation, the plaintiff must then prove, by a preponderance of the evidence, that the articulated reason for the action was pretextual and not the true reason, either by showing that a discriminatory reason was the more likely motivation, or that the articulated reason is unworthy of belief. Grubb, 741 F.2d at 1493. However,the essential factual inquiry is still whether the defendant intentionally discriminated against the plaintiff. Id. Stated another way, the factfinder must decide the ultimate factual issue of whether the defendant intentionally discriminated against the plaintiff. United States Postal Service Board of Governors, 460 U.S. at 715.

There must be evidence, however, to support the inference that the punitive action was racially motivated. A disciplinary measure against a black does not in itself justify a finding that it is wrongfully motivated; in what is essentially a claim of disparate punishment, plaintiff must introduce evidence to show that similarly situated white employees were not punished for workplace mistakes or oversights similar to that committed by the plaintiff. Nichelson v. Quaker Oats Company, 752 F.2d 1153, 1156 (6th Cir. 1985).

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[1] Although direct evidence of discriminatory intent is not part of the prima facie case, if the plaintiff has produced such evidence as part of his case, this may be held to shift to the employer the burden of proving (not merely producing, as in the normal situation) legitimate, nondiscriminatory reasons for its action. Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983).

85-5226
(CASE NO.)

COURTROOM # 2

12/3/85
(DATE)

STYLE OF CASE:

COUNSEL

MARK A. MILLER — Nan Calloway

Plaintiff-Appellant

v.

Mondy v. Heckler

SECRETARY OF HEALTH

AND HUMAN SERVICES — Michael F. Spalding

Defendant-Appellee

Salmi ???

15 Minutes Per Side
(TIME ALLOCATION)

6CA-47
4/80

MEMORANDUM TO JUDGE UNTHANK

FROM: RENEE

RE: Sixth Circuit Case of MILLER V. SECRETARY OF HEALTH AND HUMAN SERVICES, No. 85-5226

General Remarks:

This is a disability insurance benefit denial case in which the magistrate and the district court have upheld the decision of the Secretary. Significant issues are: (1) the existence of a "severe" impairment, especially in view of the recent decision in Farris v. Secretary of Health and Human Services, No. 84-5808 (6th Cir. September 18, 1985), (2) the potential disability onset date used by the ALJ, in view of prior claim denials.

My gut impression is if you wish to follow Farris, you will decide to remand this case. However, it might also be the opportunity for you to make the kind of policy decision you talk about, and decide to uphold the decision of the Secretary.

Introduction:

Mark A. Miller, a young man with work experience in a variety of jobs, had been awarded disability insurance benefits based on a 1976 Administrative Law Judge's decision; he was held to have been disabled since June, 1974 at least in part due to a mental impairment (schizophrenic reaction, paranoid type). In April of 1981, however, the agency decided that his impairments were no longer of sufficient severity to prevent substantial gainful employment; his disability was held to have ended in March of that year. In October of that same year, he filed another benefits application, alleging disability due to a mental condition and a back injury; the application was denied at the administrative level in January of

1982, a decision which was not appealed.[1]

Currently before the Court is the appeal concerning the benefits application filed on June 29, 1982, in which disability on the basis of mental and back conditions was alleged. The ALJ's negative decision was issued on April 16, 1983. Adopting the findings contained in a 1984 report by United States Magistrate W. David King, United States District Judge Edward H. Johnstone sustained the defendant's motion for summary judgment and denied a comparable motion filed by the plaintiff. The claimant has appealed from that decision.

Facts:

The following facts are taken from the administrative record.

At the administrative hearing held on March 14, 1983, the plaintiff testified about his background and physical condition. At that time, he indentified himself as a thirty year old, married man with a twelfth grade education who had no special vocational training. His last employment had been as a fork lift operator in Florida, a job which required climbing, bending and using his legs; he was discharged from the postiion in September, 1981 because of absenteeism which he said was caused by his back and knee problems. From January to September, 1979 he worked for a brewing company watching time clocks and then as a traffic controller, which required constant standing. Before that, he worked as a meter reader, which required constant walking; he professed to be unable to remember many of the details of his employment due to his poor memory. The problems which caused difficulty with his work included, as previously mentioned, knee problems; he had surgery for the condition in 1982, still wore a brace at the time of the hearing, and suffered associated pain when he stood or walked for extended periods

[1]The AlJ indicated that the period for review was that period from June, 1981 onward. Although this was the disability onset date selected by the plaintiff in his third and current application for benefits, review of this period of time would seem to have been foreclosed at least up to the date of the second application denial. This is the matter referred to in the General Remarks section.

of time. He noted that the extra strain caused by the knee instability was causing problems with his back; he felt that he could stand a half hour to an hour in one spot. He noted that he had had a drinking problem until about eight weeks before the hearing, when he joined Alcoholics Anonymous. He testified that he was seeing a psychiatrist on a regular basis and, at least in the past, had been prescribed Lithium; he noted that his eating habits and personal hygiene were the same as always, but that his "activities" were basically limited to going to AA meetings, reading, watching television and playing the guitar. Associated with his psychological condition, or perhaps related to a head injury, were "black out" periods, memory disturbance and headaches. All told, he indicated that he did not feel capable of working on a regular basis.

Following is a review of the medical records dated after January, 1982 (which I believe is the proper disability onset period available).[2]

A letter dated March 4, 1982 from Orthopedic Surgeon Michael DiCosola of Sarasota, Florida indicates that he had seen Miller at least as of that date. The doctor refers to a number of traumatic injuries and notes that the knee

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[2]Should the original choice of June, 1981 be correct, Exhibits B-29, and B-34 through B-36 must also be considered. (As indicated in the General Remarks section, this is important, especially since the ALJ specifically relied on Exhibit B-29 in connection with the mental impairment.) B-29 was a report from Dr. Gerald Bannasch indicating that he had seen the patient at least from March to November, 1981 and that the patient seemed to be suffering from a severe personality disorder and depression which had caused his recent hospitalization, and was a manipulator at times; the doctor felt that the "best thing" for his patient was to be forced to obtain work and support himself, along with outpatient therapy. B-34 consists of a letter dated May 29, 1981 from Dr. Frank Wierichs which merely referred to a toxic reaction the plaintiff had with Elavil. Exhibit B-35 is a reading of a lumbosacral spine x-ray of December, 1981 indicating the there was old anterior wedging of the body of T12. Exhibit B-36 consisted of a medical report by Dr. H. Samuels completed in that same month; the bottom line of this report was that although the plaintiff "probably" had some orthopedic problems with his knee and back, his main problem appeared to be psychiatric, possibly manic depressive psychosis or a compulsive disorder--although during the interview he was said to have related well.

instability was a real problem for the plaintiff, who also had back pain. DiCosola recommended further testing. Two months later, after that diagnostic arthrogram, he indicated that reconstructive surgery was in the offing.

In June, 1982, the plaintiff was apparently seen by or "talked to" Dr. Glenn Noss, a family practitioner in West Paducah, Kentucky. He indicated that at the time the patient was complaining of a knee rather than a back problem. The doctor noted that at the time the patient walked well and did not appear to be too limited in his activities, although he felt that a fuller evaluation of the orthopedic problems would be helpful. He indicated that, until the time of some surgery which was reportedly being planned in Florida, he would only supply Miller with pain medication.

In September, 1982, the plaintiff was admitted to a hospital in Sarasota. Dr. DiCosola apparently admitted the patient for evaluation concerning rotary instability in the patient's knee; as part of the patient history, he again noted a number of past injuries to the plaintiff's knees, back and fingers. Dr. Andrew Jesahcer examined the plaintiff, presumably in consultation in connection with upcoming surgery, and indicated that the plaintiff had no significant physical disease, other than the orthopedic problems. An operation was performed by DiCosola on the twenty-first of the month.

The record reveals that about this time, an agency medical consultant reviewed the record. On the notes contained therein, it is indicated that the consultant felt that the coorective surgery should resolve the knee condition to less than "severe" in nature and that there was felt to be no limitation regarding the old back fracture.

Miller underwent a psychiatric evaluation on October 26th by Dr. German Gutierrez. The psychiatrist found the plaintiff to exhibit overtalkativeness, pressure in his speech, suspicious facial expression with an

indication of anger, evasiveness and poor insight; he noted, however, that there was no evidence of hallucinations, delusions or memory impairment. Diagnosing the patient as having atypical impulse control disorder, unspecified alcohol abuse, probable dependence to analgesics by history and a borderline personality disorder, Gutierrex indicated that he might have an impairment in the ability to relate to coworkers and supervisors, although there was no obvious evidence of an inability to follow simple instructions.

Based on the aforementioned information, the ALJ made the following findings of fact:

> The claimant met the special earnings requirements of the Act on June 1, 1981, the date the claimant stated he became unable to work, and continues to meet them through the date of this decision.
>
> The claimant has not engaged in substantial gainful activity since June 1, 1981.
>
> The claimant has the following impairment(s): atypical impulse control disorder, borderline personality disorder, status post left knee surgery, and a history of headaches.
>
> The claimant's allegations of severe and disabling limitations resulting from the above limitations resulting from the above impairment, not being supported by the weight of the medical evidence, are found not fully credible.
>
> The claimant does not have any impairment or impairments which significantly limit his ability to perform basic work-related functions; therefore, the claimant does not have a severe impairment (20 CFR 404.1521).
>
> The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(c)).

Additional evidence which was considered by the Appeals Council, but found to provide no basis for reopening the decision was from Dr. Samuel French, an orthopedic surgeon in Paducah, Kentucky. Progress notes from November, 1982 through June, 1983 indicate that the patient's knee was being evaluated after the surgery. As of December, the patient's knee problem was continuing and his brace had to be refitted; as of June, the motion had improved, although there was some

slight anterior cruciate relaxation, the left calf was atrophied and a neuroma was developing in the lateral incision.

APPLICABLE LAW

In a recent decision, the Sixth Circuit Court of Appeals set out the following seven-step test for judicial analysis of benefit denial cases:

1. Is the claimant currently engaged in substantial gainful activity? If yes, the claimant is not disabled. If no, proceed to Step 2. See 20 CFR 404.1520(b), 416.920(b).

2. Does the claimant have any medically determinable physical or mental impairment(s)? If yes, proceed to Step 3. If no, the claimant is not disabled. See 20 CFR 404.1508, 416.908.

3. Does the claimant have any severe impairment(s)--i.e., any impairment(s) significantly limiting the claimant's physical or mental ability to do basic work activities? If yes, proceed to Step 4. If no, the claimant is not disabled. See 20 CFR 404.1520(c), 404.1521, 416.920(c), 416.921.

4. Can the claimant's severe impairment(s) be expected to result in death or last for a continuous period of at least 12 months? If yes, proceed to Step 5. If no, the claimant is not disabled. See 20 CFR 404.920(d), 416.920(d).

5. Does the claimant have any impairment or combination of impairments meeting or equalling in severity an impairment listed in 20 CFR Part 404, Subpart P, Appendix 1 (Listing of Impairments)? If yes, the claimant is disabled. If no, proceed to Step 6. See 20 CFR 404.1520(d), 404.1526(a), 416.920(d), 416.926(a).

6. Can the claimant, despite his impairment(s), considering his residual functional capacity and the physical and mental demands of the work he has done in the past, still perform this kind of past relevant work? If yes, the claimant is not disabled. If no, proceed to Step 7. See 20 CFR 404.1520(e), 416.920(e).

7. Can the claimant, despite his impairment(s), considering his residual functional capacity, age, education and past work experience, do other work--i.e., any other substantial gainful activity which exists in the national economy? If yes, the claimant is not disabled. See 20 CFR 404.1505(a), 404.1520(f)(1), 416.905(a), 416.920(f)(1).

Garner v. Heckler, 745 F.2d 383, 387 (6th Cir. 1984).

Applying this analysis, it must be remembered that the principles applicable to the judicial review of administrative agency action apply. Judicial review of the Secretary's decision is limited in scope to determining whether the findings of fact made are supported by substantial evidence and in deciding whether the Secretary employed the proper criteria in reaching her conclusion; the findings as to any fact, if supported by substantial evidence, shall be conclusive. Id. This "substantial evidence" is "such evidence as a reasonable mind shall accept as adequate to support a conclusion;" it is based on the record as a whole and must take into account whatever in the record fairly detracts from its weight. Id.

One of the detracting factors in the administrative decision may be the fact that the Secretary has improperly failed to accord greater weight to a treating physician than to a doctor who has only seen the patient once. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978). This presumes, of course, that the treating physician's opinion is based on objective medical findings. Cf. Houston v. Secretary of Health and Human Services, 736 F.2d 365, 367 (6th Cir. 1984); King v. Heckler, 742 F.2d 968, 973 (6th Cir. 1984).

Another factor to keep in mind is the manner in which an ALJ may assess allegations of pain. Although it is permissible for an ALJ to conclude that a plaintiff's testimony is not credible even if uncontradicted in the record, it is wrong for an ALJ to reject a claimant's testimony simply because of his demeanor when there is uncontraverted evidence of record which clearly corroborates his assertions of pain. Harris v. Heckler, 756 F.2d 431, 436 (6th Cir. 1985). That is to say, an ALJ may not find complaints of pain to be incredible purely because of the infamous sit-and-squirm test (i.e., the plaintiff's demeanor at the hearing). Martin v. Secretary of Health and Human Services, 735 F.2d 1008, 1010 (6th Cir. 1984).

Another issue concerns the effect of proof that an impairment may be

remedied by treatment. The Sixth Circuit has held that such an impairment will not serve as a basis for the ultimate finding of disability. Harris, 756 F.2d at 436 n. 2. However, the same result does not follow if the record is devoid of any evidence that the plaintiff would have regained his residual capacity for work if he had followed his doctor's instructions to do something, such as stop smoking, or if the instructions were merely recommendations. Id.

In applying the specific steps of the test, it is helpful to consider additional information concerning these steps.

In step three, as noted previously, the issue is whether the plaintiff has a "severe impairment." This term is defined by the regulations to mean an impairment which significantly limits one's ability to perform basic work activities, which is in turn defined as "the abilities and aptitudes necessary to do most jobs." 20 CFR 404.1521, 416.921. Examples of such activities are physical functions, the use of the special senses such as sight, use of judgment, ability to understand and carry out instructions and to respond appropriately to the work environment. Id. The Sixth Circuit has cautioned against overly restrictive interpretation of the term. Farris v. Secretary of Health and Human Services, No. 84-5808 (6th Cir. September 18, 1985). 773 F2d 85 - impairment is severe if it is expected to significantly interfere with ability to work - w/o considering age, education and work experience.

Discussion:

As I indicated in the General Remarks section, there are several issues which come to my mind when reading the case.

As far as the severe impairment stage question--if you want to follow Farris, then the case should probably be remanded, as the results here are inconsistent with that liberal decision. Here is your chance for a policy decision.

85-5481
(CASE NO.)

COURTROOM # 1

12/2/85
(DATE)

STYLE OF CASE:

COUNSEL

GENE A. SCROGGY, Warden — David W. Mossbrook

Respondent-Appellant

v.

THOMAS LEE CRUM — C. McGehee Isaacs

Petitioner-Appellee

15 Minutes Per Side
(TIME ALLOCATION)

6CA-47
4/80

Apparently no record of proceeding need to remand for finding of facts and permissible inferences arising therefrom.

84-1877
(CASE NO.)

COURTROOM # 1

12/2/85
(DATE)

STYLE OF CASE:

COUNSEL

ARMAND ALMEIDA, et al. — Deborah LaBelle

Plaintiffs-Appellants

v.

PAUL E. KINDINGER, et al. — David W. Silver
Janice Kittel Mann

Defendants-Appellees

15 Minutes For Plaintiffs
15 Minutes To Be Shared By Defendants
(TIME ALLOCATION)

6CA-47
4/80

Brought action to enjoin spraying because dangerous

Regulation permitted ejecting out.

late soon didn't spray

dismissed leave to re-instate

Atty fee..

Substantial factor -

true ? fact.

of a permanent decision

why dismissal w/o prejudice ?

catalyst !

But for versus Substantial factor

Lower judge finder ? fact.

Did she argue something before the Court of which went below

MEMORANDUM

TO: G. WIX UNTHANK, JUDGE

RE: Almeida, et al vs. Kindinger, et al

Sixth Circuit Case No. 84-1877

Scheduled for oral argument on December 2, 1985,

in Courtroom No. 1.

MEMORANDUM

I. NATURE OF THE APPEAL

The plaintiffs-appellants, residents of Hartland, Michigan, have appealed the district court's denial of their motion for attorney's fees.

II. STATEMENT OF FACTS

The plaintiffs-appellants are residents and owners of property in Hartland, Michigan.

The defendants-appellees are the United States Department of Agriculture and the Michigan Department of Agriculture.

In January 1984, the departments of agriculture of the United States (USDA) and of Michigan (MDA) proposed a cooperative program to control the spread of the gypsy moth by aerial application of Carbaryl, an insecticide, over property located in Hartland, Michigan. The local government of Hartland gave its approval of the program after a public meeting on January 17, 1984.

On March 16, 1984, the USDA issued its Final Environmental Impact Statement. The departments then scheduled the application of Carbaryl over the Hartland property for May 14, 1984.

Plaintiffs-appellants, homeowners who lived within the proposed aerial application area, were concerned with possible health risks associated with the insecticide, and

so they requested the MDA not to spray over their property. The MDA informed them that they could not "opt out" of the program, and that the application would take place between May 8 and June 8, 1984. Plaintiff-appellants contacted counsel on May 7, 1984, and on May 11, 1984, they filed a suit for declaratory judgment and injunctive relief against the defendants-appellees.

The suit requested the court to issue a preliminary injunction to halt implementation of the aerial application of the insecticide. It also alleged that the program violated several federal statutes, including the Civil Rights Act. (See Appendix, pages 1-20) Plaintiffs-appellants also requested a permanent injunction to prevent future implementation of the program.

The defendants-appellees agreed not to implement the program until the court had an opportunity to hear plaintiffs-appellants's motion for a temporary restraining order. On May 14, 1984, counsel argued the TRO motion before the Honorable James Churchill, sitting for the Honorable Stewart Newblatt. On May 15, 1984, before Judge Churchill had ruled on the motion, his law clerk discovered a provision in the Final Environmental Impact Statement that allowed private property owners to "opt out" of the program. The defendants-appellants were then informed of the opt out provision, and decided not to spray. Later on the 15th, the parties agreed, in a conference call with Judge Churchill, that the defendants-

appellee's decision not to spray mooted the issues involved in the suit, since the plaintiffs-appellants had thereby obtained the relief sought.

On July 16, 1984, Judge Newblatt ordered the defendants-appellees to notify the plaintiffs-appellants if they decided to revived the program (they have not); and he then dismissed the action without prejudice. On July 24, 1984, plaintiffs-appellants filed a motion for attorney's fees pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(b) and (d), and the Civil Rights Act, 42 U.S.C. § 1988. On October 9, 1984, Judge Newblatt entered an Order denying plaintiffs-appellant's motion, after finding that they were not the "prevailing party" within the meaning of the EAJA.

On December 10, 1984, plaintiffs-appellants filed a notice of appeal to the circuit court.

III. ISSUES PRESENTED

(1) WHETHER THE COURT PROPERLY FOUND THAT APPELLANTS WERE NOT THE PREVAILING PARTY WITHIN THE MEANING OF THE EQUAL ACCESS TO JUSTICE ACT AND THE CIVIL RIGHTS ACT.

(2) WHETHER THE FEDERAL DEFENDANT'S LITIGATION POSITION WAS "SUBSTANTIALLY JUSTIFIED" WITHIN THE MEANING OF THE EQUAL ACCESS TO JUSTICE ACT.

(3) WHETHER "SPECIAL CIRCUMSTANCES" WOULD MAKE AN AWARD OF ATTORNEY'S FEES TO APPELLANTS UNJUST WITHIN THE MEANING OF THE EQUAL ACCESS TO JUSTICE ACT.

IV. DISCUSSION

The appellants have requested attorney's fees from the defendants pursuant to the Equal Access to Justice Act and the Civil Rights Act. (It should be noted that under the terms of the Equal Access to Justice Act, the appellant cannot collect attorney's fees from the state defendant, but only from the Federal defendant.) The pertinent provisions of the EAJA, 28 U.S.C. §§ 2412(b) and 2412(d)(1)(A), provide:

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.
>
> (d) (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

The pertinent provision of the Civil Rights Act, 28 U.S.C.

§ 1988, states that:

> . . . In any action or proceeding to enforce . . . title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The same general standards of decision are applied in all cases in which Congress has authorized an award of attorney's fees to a "prevailing party." Hensley v. Eckerhart, ___U.S. ___, 103 S.Ct. 1933, 1939 n. 7, 76 L.Ed.2d, 40 (1983); Environmental Defense Fund, Inc. v. E.P.A., 716 F.2d 915, 919 n. 6 (D.C. Cir. 1983).

Under the EAJA, a party does not need to be a victor in a lawsuit that leads to a judgment on the merits to be considered a "prevailing party." Citizens Coalition for Block Grant v. City of Euclid, 717 F.2d 964, 966 (6th Cir. 1983). Parties may be considered to have prevailed when they have vindicated important rights through a consent judgment or without formally obtaining relief. Id. at 966. The fact that a party prevails through a favorable settlement rather than through litigation does not weaken its claim to fees. Johnston v. Jago, 691 F.2d 283, 285 (6th Cir. 1982).

In Johnston, supra, the Sixth Circuit endorsed a two prong test propounded by the First Circuit in Nadeau v. Helgemore, 581 F.2d 275 (1st Cir. 1978), for determining whether or not a party to settled litigation "prevailed." Under the Nadeau-Johnston test, the court must first ask whether, as a matter of fact, the plaintiff's lawsuit was a

necessary and important factor in obtaining the desired relief. Citizens Coaltion, 717 F.2d at 966; Johnston, 691 F.2d at 286. If it gives an affirmative answer to the first query, it must then determine whether the relief obtained resulted from a gratuitous act on the defendant's part or whether defendant's actions were mandated by law. Citizens Coalition, 717 F.2d at 966. If the defendant's actions, however beneficial they may be to the plaintiff, were not required by law, then defendants "must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." Nadeau, 581 F.2d at 281. A defendant who contends that the settlement resulted from a gratutious response to a lawsuit that lacked colorable merit must demonstrate the worthlessness of the plaintiff's claims and explain why he nonetheless voluntarily gave the plaintiffs the requested relief. Hennigan v. Ouachita Parish School Board, 749 F.2d 1148, 1153 (5th Cir. 1985).

Under the first prong of the Nadeau-Johnston test, the court must determine whether or not, as a matter of fact, the appellants's lawsuit was a necessary and important factor in obtaining the desired relief. The record shows that the appellees had scheduled the aerial application of insecticide over the homes of the appellants for May 14, 1984. The appellants filed suit to halt the application on May 11, 1984, after the state defendant had denied that they had the right to "opt out" of the spray program. It cannot be

denied, as a matter of fact, that appellants's suit secured the desired relief-- the cancellation of the spray program. If the appellants had not filed suit, Judge Churchill's law clerk would not have discovered the provision in the Final Environmental Impact Statement allowing private property owners to "opt out" of the program, and the appellees would then have had no reason to cancel it.

The application of the second prong of the test presents more problems. Under Nadeau, the plaintiff, to be considered the prevailing party, must have vindicated its rights through success on a "significant issue in litigation." 581 F.2d at 278-279. Such a requirement suggests that the plaintiffs in the present action cannot be considered to have prevailed, since they secured the relief sought independently of the legal arguments they presented to the district court. The Sixth Circuit, however, does not require plaintiff's claim to be fully evaluated on the merits before an award of fees. Johnston, 691 F.2d at 286. It simply requires "some minimal basis in law for the relief secured." In other words, the court must determine whether or not, as a matter of law, plaintiffs presented a frivolous, unreasonable, or groundless claim. Echols v. Nimmo, 586 F. Supp. 467, 476 (W.D. Mich. 1984).

A review of the plaintiffs-appellants's Complaint, when read together with the facts of record, demonstrates that their claims were not frivolous, unreasonable, or ground-

less. Plaintiffs-appellants have made a prima facie case of their entitlement to attorney's fees under the EAJA and the Civil Rights Act. While the court has discretion to deny such an award under the Civil Rights Act, it has no such discretion under the EAJA. The burden now shifts to defendants-appellees to demonstrate "the worthlessness of" plaintiffs's claim and to "explain why" they "nonetheless gave . . . the requested relief." Hennigan, 749 F.2d at 1152-1153.

Since the court below found that the plaintiffs were not prevailing parties within the meaning of the EAJA, it gave no consideration to the exceptions found in 28 U.S.C. § 2412(d)(1)(A). That provision provides that the court shall not award attorney's fees to a prevailing party if it finds "that the position of the United States was substantially justified or that special circumstances make an award unjust." Wynadotte Savings Bank v. N.L.R.B., 682 F.2d 119 (6th Cir. 1982).

The government has the burden of proving that its position was "substantially justified." Environmental Defense Fund, Inc. v. E.P.A., 716 F.2d 915, 920 (D.C. Cir. 1983); Wynadotte, supra, at 119. The test of whether or not the government had "substantial justification" for an action is one of reasonableness. No award shall be made where the government demonstrates the reasonableness of its position both in law and fact. Wynadotte, supra, at 120.

The circuits have split upon the definition of the

of the phrase "position of the United States" as used in the EAJA. The District of Columbia and Fourth Circuits have held that "position" refers to the position taken by the United States in litigation before the courts. The Third Circuit has held that "position" refers to and includes federal agency actions which make it necessary for a party to file suit. In Natural Resources Defense Council v. U.S.E.P.A., 703 F.2d 700 (3rd Cir. 1983), the Third Circuit presented a well-reasoned and authoritative statement of its interpretation. As noted by the Court, the definition of "position" accepted by the other circuits:

> . . . means that no matter how outrageously improper the agency action has been maintained prior to the litigation, and no matter how intransigently a wrong position has been maintained prior to the litigation, and no matter how often the same agency repeats the offending conduct, the statute has no application, so long as employees of the Justice Department act reasonably when they appear before the court.
>
> Natural Resources, supra, at 703.

Upon remand, the district court should determine whether or not the "position of the United States" was substantially justified. The fact that the United States opposed plaintiffs-appellants's suit to halt implementation of the spray program, even though they had the legal right to "opt out" under the terms of the government's own Final Environmental Impact Statement, suggests that the "position of the United States," however defined, was not "substantially justified."

The appellees argue that special circumstances make an award of attorney's fees unjust in the present case. Under the EAJA, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances . . . render such an award unjust." Hensley, 461 U.S. 424. The fact that Judge Churchill's law clerk, rather than plaintiffs's attorney, discovered the crucial provision of the Final Environmental Impact Statement, together with the fact that the settlement took place only a few days after the initiation of the suit, may be special circumstances which would render an award of attorney's fees unjust. The court also has the option, however, of adjusting the amount of the attorney's fee awarded to reflect the actual contribution of plaintiffs-appellants's council in the litigation.

V. CONCLUSION

The court below erred in finding that the plaintiffs-appellants were not "prevailing parties" within the meaning of the Equal Access to Justice Act and the Civil Rights Act. The appellants should be awarded attorney's fees from the federal government unless it "finds that the position of the United States was substantially justified or that special circumstances make an award unjust." Although the court has discretion to award or not to award attorney's fees from the state government pursuant to the Civil Rights Act, it should be required to give the plaintiffs-appellants's petition full consideration.

85-3819
3827

Π production Supervisor

1978 Kerner Plant Supt —

(1) Π met minimum qualifications
(2) Trial Court dredged up "poor judgment"
△ didn't claim this
(3) Π took defensive efforts

(1) belonged to race disparate treatment
(2) Qualified — D/Ct
(3) Rejected
(4) —

Starsky Promoted

(1) Team Concept —
2nd Johnson production mgr —
Kerner House mgr.
Taylor maintenance mgr.

dissatisfied
(3) Kerner — gets mod

filed charges
Retaliatory atty —

(1) π – racial minority

(2) Qualified & applied for pos

(3) Rejected

(4) Continued to seek appr for ~~[illegible]~~ persons of π's qualifications

(1) Not qualified

Parmley

(1)

(2)

(3)

Bero sex acts w/ other children

prior – treated by Counseling
Clergy – don't do anymore

Undue weight to other Activities
Outside the Scope of Crime charged.

18 USC 3577 – No limitation

~~102~~
B2

improper or inaccurate factors

mechanistically imposed
sentence

684 F 2d 141.

10 years ago – may have something
however this may also reflect

Impairment is severe if it is expected to interfere with ability to work w/o considering age, education and work experience.

Mohawk Stock was owned by Mrs. Parley Faye Steed,
Divorced from husband. Frank Joe
He filed claim vs:
Mohawk in Bankruptcy Court
Winchester wanted retainer fee
4, $75.00
at meeting
wife present
bills sent to Frank Joe.

No Actual K relations between
Winchester & Faye Steed
– what about Quantum Meruit

What is Argument?

Cannot permit levy

Anyway: whether K or Kt.
between wife & others

85-3187

SCHULTE vs. SCHMETZER

Plaintiff was a psychiatric nurse at a State Rehabilitation Center. The Center obtained temporary nursing service from two private employers. Kelly Health Care and Staff Builders of Akron.

In addition to her full time employment Plaintiff had a contract with both of the private employers whereby she could work as a temporary employee at the institution. (apparently plaintiff could double back and obtain extra work)

The Direcotor of Nursing at the Rehab Center allegedly told the private employers that plaintiff was not to be given temporary privileges of employment because of her work performance.

Plaintiff filed 1983 action charging that Director of Nursing acting under color of law deprived her of a liberty interest and a property interest.

Plaintiff never lost her full time nursing job at rehab cent
Plaintiff before filing of action, resigned her employment to return to school to obtain advance degree in nursing.

(1) Defendants acted under color.

Defendant Schmetzer was director of nursing. Thus State Employee. Monore v. Pape. 365 U. S. 167

Public employee acting with private persons, Staff Builder & kelly Health Care. U.S. v. Price 383 U. S. 787, Tower v. Glover 744 F 2d 22. (public Defender.

(2) Deprivation of Rights.

Must be able to articulate a federal or state created property right derived from State or Federal Statute or Rule. Flynt. 439 U. S. 438.

If it is a state right, its sufficiency must be established by State Law. Wood, 436 U. S. 341.

No damage no hearing necessary. Cleveland v. Loudermill 721 F 2d 550, 105 St. 1487.

Pre- Parrat .....Hudson v. Palmer, 757 F 2d 773, 760 F 2d 106-7. 104 S Ct. 3194.

Post Parrat.

Tennesse v. Garner, 105 Sct 1694.

City of Oklahoma v. Tuttle, 105 Sct 2427- 2433 N. 4.

Williamson v. Hamilton Bank, 105 Sct 3108.

85-3187
(CASE NO.)

COURTROOM # 1

12/2/85
(DATE)

STYLE OF CASE:

COUNSEL

JANE SCHULTE — George W. Spittal

Plaintiff-Appellant

v.

JOAN SCHMETZER — Timothy Mangan

Defendant-Appellee

15 Minutes Per Side
(TIME ALLOCATION)

6CA-47
4/80

Was derogatory remarks never de proved employment.

△ Concedes derogatory remarks ——————

but no denial of employment.

85-5042
(CASE NO.)

COURTROOM # 1

12/2/85
(DATE)

STYLE OF CASE:

COUNSEL

WINCHESTER, HUGGINS, CHARLTON,
LEAKE, BROWN AND SLATER — Stanley M. Huggins

Plaintiffs-Appellants

Judge Gibbons

v.

DARLYS FAYE STEED — David C. Doten, Jr.

Defendant-Appellee

Wants rehearing en banc by Bankruptcy Court to review husband's retirement

15 Minutes Per Side
(TIME ALLOCATION)

6CA-47
4/80

Action for attachment
vs. funds in Bankruptcy
Court.

Bankruptcy Judge held that
funds of husband may be subject
but funds of wife were not because
wife not party to K.

No privy

District Court held no K
for atty fees did not exist
between appellant and appellee

1st filed under chapter 7 by wife –

Lake Mohawk Estates, Inc.
Went into Bankruptcy, chapter 7.
wanted it changed to Chapter 11
π, appellants legal firm
represented Frank Joe Steed.

at filed an action for debt
vs. Steed and his wife in State
Court and filed a petition for attachment
in the Bankruptcy Court

Winchester received judgment
upon its claim in State Court
vs. Mr. Steed

Jowers v. Blones 464 US 813

Hudson v. Palmer 52 USLWeek 5052

Okla. City v. Tuttle 53 USLW 4639

Williamson v. Hamilton 53 USLW ~~46~~ 4969

85-5441
(CASE NO.)

COURTROOM # 1

12/5/85
(DATE)

STYLE OF CASE:

NOTICE COUNSEL

COUNSEL HAS BEEN ~~APPOINTED~~ BY THE COURT TO REPRESENT THIS INDIGENT LITIGANT AND IS BEING REIMBURSED FOR HIS/HER SERVICES AND EXPENSES UNDER THE CRIMINAL JUSTICE ACT.

ARCHIE LARRY THOMAS — Ronald P. Smith

Defendant-Appellant — Knoxville

v.

UNITED STATES OF AMERICA — Ed Schmutzer

Plaintiff-Appellee

Timing vs. Need

15 Minutes Per Side
(TIME ALLOCATION)

No abuse of discretion.

6CA-47
4/80

Who is to supervise Parole?

U. S. vs. THOMAS

Appeal of Revocation of Parole .

Upon a plea of guilty to a two count indictment, possession and cashing a stolen federal check, Hon. Robert Taylor imposed a three year sentence upon count 1. He sus pended sentence upon count 2 and placed Thomas upon probation for a period of three years after release from incarceration of sentence upon count 1.

Thomas is a weirdo, alcoholic, deviant, etc.

He served his sentence upon count 1 and time had expired thereon before being brought in for parole violation. He committed several misdemeanors and his parole officer recommended violation hearings but nothing came of this. by recom of being held in abeyance.

Subsequently court had a ~~new~~ hearing for violation and ordered him taken to Butner N. C. for observation and recommendation. Their view that he needed treatment or he could become dangerous.

Court ordered Thomas to stay at half-way house and to get counseling at a clinic.

Thomas's appearance at clinic was lackadaisal. He felt he was a victim of the system and did not need counseling. He informed the clinic that he was making these appearances because the court ordered him to. That he didn't have any problems. Thoms was being truthful...he apparently did not understand the necessity nor the benefits of such counseling.

His parole was again revoked. He appeals.

He contends:

(1) He attended the hearings. Athough everyone thought it was weekly the rules or condition did not require it to be weekly. Therefore, he did not violate any condition.

(2) The condition was vague.

(3) His condition of parole should be re-instated and the rule modified so that he could understand and comply therewith.

(4) The parole officer is prejudiced and biased against him and failed to take proper measures to assist him after being advised of the situation at the Helen Ross McNabb Clinic.

The U. S. contends.

(1) The defendant is a clear and present danger to society.

(2) He does not understand and will not comply with this rule or condition or anyother rule and condition.

(3) Although wording of rule or condition may have been more explicit, the defendant understood and deliberately failed to comply therewith. Notwithstanding on the face of it he complie with such rule.

THIS IS A PROBLEM. THE CONDITION COULD HAVE BEEN MORE SPECIFIC. THE DEFENDANT COULD HAVE BETTER COOPERATED. THE APPELLATE COURT CANNOT SUPERVISE PROBATION. REMAND AND MODIFICATION OF CONDITIONS WOULD BE SUPERVISORY.

REMAND UPON SAME CONDITIONS AND THAT HE HADN"T VIOLATED THE CONDITIONS....

MEMORANDUM

TO: JUDGE UNTHANK

FROM: RENEE

RE: Sixth Circuit RULE 9 case of LEWARD V. UNITED STATES OF AMERICA, No. 84-1198

This case is presented by the Sixth Circuit staff as a Rule 9(d)(3) case--one in which the questions arising are so unsubstantial as to need no further argument. Analyzing their research memorandum, as well as another case I found, I agree with the recommendation.

In 1983, the plaintiff/appellant filed a 1040 tax return, on which he asserted his Fifth Amendment right not to be a witness against himself, and refused to answer any questions thereon, including those relating to income.

The Internal Revenue Service determined that the taxpayer's purported return fell within the scope of the "frivolous return" penalty provision of 26 U.S.C. Section 6702, and assessed a $500 penalty against the plaintiff. Pursuant to Section 6703, the plaintiff paid fifteen percent of the penalty ($75) and filed an administrative claim for refund.

After the claim was denied, the plaintiff then brought this action in federal court for a refund of an "income tax penalty overpayment." The complaint raises the issue of (1) the denial of his Fifth Amendment rights at the administrative level, and (2) the unconstitutionality of 26 U.S.C Section 6702.

Clearly, the plaintiff's Fifth Amendment argument has no merit; a blanket assertion of the fifth amendment privilege against compulsory self-incrimination is a frivolous position. Brennan v. Commissioner, 746 F.2d 1475 (1984); Heitman v. United States of America, 746 F.2d 1477 (1984). Neither does the language of scheme set up by 26 U.S.C Section 6702 meet the standards for unconstitutional vagueness or violate due process because there is not

hearing. Id.

Thus, the district court's order concerning the granting for the motion for summary judgment should be affirmed, as suggested by the staff.

MEMORANDUM

TO: JUDGE UNTHANK

FROM: RENEE

RE: Sixth Circuit RULE 9 case of UNITED STATES OF AMERICA V. LONGO, No. 84-1878

This case is presented by the Sixth Circuit staff as a Rule 9(d)(3) case--one in which the questions arising are so unsubstantial as to need no further argument. Analyzing their research memorandum, I agree with the recommendation.

Currently before the court are a petition for appointment of counsel, a habeas corpus petition, and a Rule 35 motion to correct an illegal sentence. The memorandum by the staff attorney adequately sets out the precedent for the recommendation; upon cursory review, I was not able to find any more pertinent Sixth Circuit cases or any questionable portions fo te memorandum.

Thus, the district court's decision should be affirmed.

MEMORANDUM

TO: JUDGE UNTHANK

FROM: RENEE

RE: Sixth Circuit RULE 9 case of UNITED STATES OF AMERICA V. EMMA DUHON, No. 84-1067

This case is presented by the Sixth Circuit staff as a Rule 9(d)(3) case--one in which the questions arising are so unsubstantial as to need no further argument. Analyzing their research memorandum, as well as the briefs of the parties, I agree with the recommendation. (Although you may want to take a bit of a closer look at the rationale which was stated in the proposed order, just as a matter of preference.)

It is clear that in November, 1982 the appellant was sentenced on four criminal counts by the district court. Additionally, it is beyond dispute that the court, on December 15, 1982 modified the sentences--an action which is the subject of the present appeal. The appeal is based on the appellant's belief that the later action, done on the court's own motion, constituted a violation of Double Jeopardy.

The pertinent sentences were changed from "one year and no parole" under 18 U.S.C Section 4205(f) to "ten months, with release" under the same statute. The appellant contends that this constituted an increase in her sentence for purposes of Double Jeopardy, particularly as she would have been eligible for parole earlier under the original sentence.

The staff attorney follows the reasoning used by the district court, relying on that portion of Fed. Crim. R. 35 which relates to the reduction of

sentences for the authority that the court may modify sentences. Further, the change in sentence is said not to violate double jeopardy when the expressed period of imprisonment is shortened. United States v. Talavera, 668 F.2d 625, 633 (1st Cir. 1982).

The appellee had argued that the original sentence had been illegal by virtue of the requirements of 42 U.S.C. Section 4205(a) in that the court had indicated that there be no parole; thus, that portion of Rule 35 authority was triggered. Furthermore, a void or illegal sentence may be corrected, even if the correction may result in an increase of the sentence. Bozza v. Untied States, 330 U.S. 160, 160-167 (1947). (Under this logic, then, it is unimportant whether the second sentencing need be characterized as an increase or reduction in sentence.)

Under either logic, the district court action in modifying the sentence can not be said to violate double jeopardy.

MEMORANDUM

TO: JUDGE UNTHANK

FROM: RENEE

RE: Sixth Circuit RULE 9 case of KAJEVIC V. BAER, ET AL., No. 84-1498

This case is presented by the Sixth Circuit staff as a Rule 9(d)(3) case--one in which the questions arising are so unsubstantial as to need no further argument. Analyzing their research memorandum, as well as another case that I have found, I agree with the recommendation.

The petitioner-appellant originally convicted of all nine counts of a criminal indictment by a jury in the District Court for the Northern District of Illinois. He was sentenced to a total of twelve years' imprisonment under 18 U.S.C. Section 4205(b)(2) and began serving his sentence in June, 1979.

An initial parole hearing was conducted in August, 1981; although the petitioner had been given a salient factor score of 11 and an offense severity rating of Greatest I under the paroling policy guidelines, the panel recommended that the case be referred to the Regional Commissioner to consider whether it should be treated as a case within the "original jurisdiction" of the National Commissioners" under 28 CFR Section 2.17. That commissioner approved the recommendation for original jurisdiction and forwarded the case to the National Commissioners for a decision de novo; the national panel assigned the offense behavior to a Greatest II severity rating after finding that the petitioner was a "ringleader of a terrorist group who had plotted and conspired either to kill officials of the Yugoslavian government or to do damage to property." This decision was later affirmed by the full panel.

The petition filed his petetion for a writ of habeas corpus with the district court in July, 1983. The next year, the district court denied his petition.

On July 13, 1983, the petitioner was given a statutory interim hearing pursuant to 28 CFR Section 2.14. At that time the Commission noted that under the new parole guidelines, petitione would have a salient factor score of 10 and an offense severity rating of 8, which would not have changed the previous decision.

The arguments of the petitioner which are currently before the Court are: (1) the reliance on the false information in the presentence report, (2) an improper increase in the severity rating due to media pressure under 2 CFR Section 217, and (3) the fact that under 18 U.S.C Section 4205(b)(2), the petitioner was entitled to serious consideration for parole.

As to the first argument, it is clear that good faith reliance on information in the pre-sentence report is sufficient. Adams v. Keller, 736 F.2d 320 (6th Cir. 1984). Cf. Farkas v. United States Parole Commission, 744 F.2d 37 (6th Cir. 1984).

Authority concerning the second issue indicates that the referral to the National Commmission should be viewed as not affecting the chances for parole but merely requiring the decision be made by the Parole Commission members rather than the hearing examiners. Christopher v. United States Parole Commission, 589 F.2d 924, 932 (7th Cir. 1978). In the present case, nothing in the record suggests that there was undue media attention focused on the case, or any pressure brought to bear.

As to the third point, United States v. Addonizio, 422 U.S. 178 (1979) and its progeny have made it clear that the petitioner is only entitled to consideration and not release.

Thus, the district court's decision should be affirmed.

MEMORANDUM

TO: JUDGE UNTHANK

FROM: RENEE

RE: Sixth Circuit RULE 9 case of BARNES V. UNITED STATES PAROLE COMMISSION, No. 84-1440

This case is presented by the Sixth Circuit staff as a Rule 9(d)(3) case--one in which the questions arising are so unsubstantial as to need no further argument. Analyzing their research memorandum, I agree with the recommendation.

Currently before the court are a petition for appointment of counsel, and a challenge to the revocation of the petitioner's parole. As is pointed out in the staff attorney memorandum, the latter issue is well settled by Sixth Circuit opinions in point.

Thus, the district court's decision should be affirmed.

10/3/

To:

From

Re: 85-5481

This material was mistakenly forwarded to the Staff Attorney's office. It is an oral argument case set for 12/2/85. Does it possibly belong to Judge Welbank's?

Joe Merling
SA's office

from the order of District

ict of Kentucky granting a

on. The relevant facts are

not disputed.

BACKGROUND

The petitioner/appellee, Thomas Lee Crum, was convicted by a jury in the Jefferson, Kentucky Circuit Court of burglary in the third degree, in violation of Ky. Rev. Stat. § 511.040. Two co-defendants, Raymond Willock and Ralph Willock, were convicted of the same offense at the same trial. All three men were sentenced to two years of imprisonment for the offense. However, Crum's sentence was enhanced to five years under Kentucky's persistent felony offender statute, Ky. Rev. Stat. § 532.080.

The indictment charged Crum and the Willocks with conspiring with one another, and with acting in concert in committing the offense of burglary in the third degree by unlawfully entering the Pullman Trailmobile building with intent to commit a crime. The three were convicted on Aprile 2, 1981. Crum filed a timely notice of appeal, and the Kentucky Court of Appeals affirmed his conviction on January 8, 1982 and then denied a petition for rehearing. The Kentucky Supreme Court denied Crum's petition for discretionary review. Crum then filed a pro se habeas petition under § 2254, alleging that his conviction violated his constitutional due process rights. Judge Allen granted the petition on April 24, 1985, finding that insufficient proof

This material was mistakenly forwarded to the Staff Attorneys Office. It is an oral argument case set for 12/2/85. Does it possibly belong to Judge Markham?

Joe Merling
SA's Office

10/3/85

To: Judge

From: Elisabeth

Re: Crum v. Scroggy Ct.App.No. 85-5481

This is the state's appeal from the order of District Judge Allen of the Western District of Kentucky granting a prisoner's habeas corpus petition. The relevant facts are not disputed.

BACKGROUND

The petitioner/appellee, Thomas Lee Crum, was convicted by a jury in the Jefferson, Kentucky Circuit Court of burglary in the third degree, in violation of Ky. Rev. Stat. § 511.040. Two co-defendants, Raymond Willock and Ralph Willock, were convicted of the same offense at the same trial. All three men were sentenced to two years of imprisonment for the offense. However, Crum's sentence was enhanced to five years under Kentucky's persistent felony offender statute, Ky. Rev. Stat. § 532.080.

The indictment charged Crum and the Willocks with conspiring with one another, and with acting in concert in committing the offense of burglary in the third degree by unlawfully entering the Pullman Trailmobile building with intent to commit a crime. The three were convicted on Aprile 2, 1981. Crum filed a timely notice of appeal, and the Kentucky Court of Appeals affirmed his conviction on January 8, 1982 and then denied a petition for rehearing. The Kentucky Supreme Court denied Crum's petition for discretionary review. Crum then filed a pro se habeas petition under § 2254, alleging that his conviction violated his constitutional due process rights. Judge Allen granted the petition on April 24, 1985, finding that insufficient proof

UNITED STATES DISTRICT COURT

For the Eastern District of Michigan

133 U.S. COURT HOUSE

DETROIT, MICHIGAN 48226

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Clerk of Court
(313) 226-7060
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Ann Arbor, Michigan 48107
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has been presented against Crum at the trial to satisfy the reasonable doubt standard. Warden Scroggy now appeals from Judge Allen's ruling.

The facts presented at the trial are as follows. At approximately 11:10 in the evening on August 10, 1980, Louisville police officer Robert Hain was conducting a routine patrol of the area of 3000 Crittenden Drive in Louisville. Officer Hain testified that the noticed a parked blue station wagon with its doors open behind the Pullman Trailmobile building. He then noticed a 55 gallon drum outside the fence surrounding the building and a large red tool box just inside the fence. Suspecting a break-in, Officer Hain called for a back-up unit. Officer Tingle arrived shortly thereafter and positioned himself on the opposite side of the Pullman premises as Hain. The two policemen watched the area, and Hain called to request a canine unit. Before the canine unit arrived, Tingle saw someone trying to flee the premises. Tingle apprehended, arrested, and handcuffed the individual, who turned out to be a juvenile brother of the two Willocks.

Officer Stiff (don't the people in this case have great names? Crum, Scroggy, Tingle, Stiff . . .!) and his canine unit arrived at approximately 11:45 p.m. Officer Stiff identified a broken window as the point of entry to the Pullman building. Stiff and the dogs unsuccessfully searched the interior of the building. At approximately 12:30 p.m., Stiff and Tingle found three men hiding together under some bushes outside the Pullman bushes. The two officers identified the three men that they found in the bushes as being the two Willocks and Crum.

Officer Hain did not identify the three men at the trial, and stated he did not participate in the arrest. He did say that he found a large railroad jack in the back of the blue station wagon.

After presenting the testimony of Officers Hain, Tingle, and Stiff to establish the facts just recited, the state called James Breeding, a Pullman Trailmobile employee. Breeding testified that his company had not given Crum or the Willocks permission to be on company property. He also identified the railroad jack and red tool box as the property of Pullman Trailmobile.

The next witness was Cynthia Barrell, who worked with Raymond Willock at Barrell's husband's liquor store. Cynthia stated that the blue station wagon was the property of the liquor store, and that Raymond had access to the car for professional and personal use. She also stated over objection that she thought that she had seen Crum with Raymond Willock sometime in the previous three years, and that she had seen Crum in the liquor store.

The next three witnesses were Louisville police officers who testified to the chain of custody of fingerprints that had been taken from the scene for analysis. Fingerprints found at the broken window, the point of entry to the building, were identified as those of Ralph Willock. Fingerprints found in the station wagon were identified as those of Raymond Willock. No fingerprints of Crum were found.

The three defendants made no statements to the police. At the trial, neither Crum nor the Willocks presented any evidence. The jury convicted the three men after deliberating for an hour and a half.

DISCUSSION

The Supreme Court has discussed the standard that federal courts are to apply in their review of the sufficiency of the evidence. In In re Winship, 397 U.S. 358, 364 (1970), the Court held that the due process clause of the fourteenth amendment protects the defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The Court elaborated on the Winship standard in a case similar to the present one, Jackson v. Virginia, 443 U.S. 307 (1979). There the court examined a habeas petitioner's challenge to his state conviction on the ground that there was insufficient evidence presented at trial to support his conviction. The Court stated:

> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.[11] But this inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Woodby* v. *INS*, 385 U. S., at 282 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson* v. *Louisiana*, 406 U. S., at 362. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.[12] The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.[13]

443 U.S. at 318-19 (footnotes omitted).

Viewing the evidence in the light most favorable to the prosecution, I think that the evidence against Crum can be summarized as follows:

1. Crum was found hiding with the Willock brothers at the scene of the break-in about 45 minutes after it occurred.

2. Constant police surveillance of the area for the preceding 45 minutes makes it highly likely that Crum was at the scene when the break-in occurred. No one entered or left the Pullman property after the arrival of Officers Hain and Tingle.

3. The evidence clearly linked the Willock brothers to the break-in.

4. The wife of Raymond's employer testified that she has, in the past, seen Crum with Raymond Willock around Raymond's place of employment.

The issue, then, is whether any rational trier of fact could have found Crum guilty on the basis of the above evidence.

Two Kentucky Court of Appeals cases loom large in the opinions in this case of the Kentucky Court of Appeals and Judge Allen, as well as in the briefs submitted by both sides on appeal. The cases are Hodges v. Commonwealth, 473 S.W.2d 822 (Ky. 1971) and Brison v. Commonwealth, 519 S.W.2d 833 (Ky. 1975).

In Hodges, the court considered the breaking and entering conviction of Alonzo Hodges. A police officer responding to a burglar alarm saw an individual named James Moore emerging from the store through a hole that had been made in the side wall of the building, but Moore escaped. The officer did not see Hodges at the store at all. However, five hours later, the officer

found Hodges hiding with Moore under a log in a field approxiately 2-3½ miles from the store. The court noted:

> The evidence against Hodges, so far as breaing and entering is concerned, was entirely circumstantial. The strongest link in the circumstantial chain is his unexplained presence, with Moore, under a log on a January day. Another link is his conduct [in attempting to flee] whn Officer Shaw "hollered" at Moore and him.

473 S.W.2d at 812. The court then stated that a conviction could be based on circumstantial evidence, although it cited a case stating that a defendant cannot be convicted on circumstantial evidence that is as consistent with innocence as it is with guilt. Id. at 813 (citing Fugate v. Commonwealth, 445 S.W.2d 675 (1969)). The court concluded that the rule established by a line of "circumstantial evidence" cases is the following: "If the totality of the evidence is such that the judge can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient, albeit circumstantial." Id. at 813-14. The court then stated:

> There was evidence that Hodges was a native of the vicinity in which the crime occurred. It is obvious that strong suspicion of Hodges' involvement in the crime arises from the circumstances shown. Suspicion alone is not enough. . . .
>
> Hodges had no duty to explain why he was where the officers found him. There is nothing in the competent evidence which indicates that Hodges was at the crime scene, nor is there anything other than his being found with Moore five hours after the latter's flight from the store, tending to prove his complicity in the crime. These circumstances, suspicious though they certainly are, do not point so unerringly to Hodges' involvement as to warrant submission of the case to the jury.

Id. at 814.

In Brison, supra, Viceroy Brison, Arthur Brison, John Ballard, and Ben Thacker were jointly indicted for breaking into a farmhouse and taking numerous items, including a portable TV set. All except Ballard were found guilt. The evidence showed that the break-in had occurred sometime between 7:30 a.m. and 3:30 p.m., and that on the same day a witness recognized Thacker in a store about four miles from the Baker residence. Another witness at the storerecognized Thacker and one of the Brisons. Still another witness saw a car pulling out of the lane leading the the farmhouse and identified the passengers in the car as "colored." Viceroy Brison testified that all four of the defendants had gone rabbit hunting that day. Later on that same day, the owner of a pawn shop received the portable TV set that had been stolen from the farm from someone that he identified as Viceroy Brison.

The court found that the convictions of Arthur Ray and Ben Thacker were improper:

> We have detailed here all of the evidence connecting these two men whith the crime charged. Their only sin, whether it be of omission or commission, was the fact that on that fateful day they were with Viceroy Brison, Jr., who apparently, at least, came into possession of some of the property stolen from the Baker residence. They were convicted because of their association rather than upon evidence of the crimes charged. We have held that neither motive alone nor motive plus opportunity, or even presence at the scene of the crime, is enough to justify a conviction. Marcum v. Commonwealth, Ky., 473 S.W.2d 811 (1971). The evidence against Arthur Ray Brison and Ben Thacker did not support the submission of their case to the jury.

519 S.W.2d at 838 (emphasis added). The Marcum case, cited above, involved an odd sort of menage à trois with a farmer and his wife, and a 71 year old man who slept in the same bedroom with the couple. The 71 year old was the father of the woman's 10 month old baby,

apparently with the approval and even the urging of the farmer, the woman's husband. The farmer had undergone a vasectomy, yet wanted his wife to have another child "to put on his social security." The farmer was shot one night, and the wife and the older man were convicted of his murder. The Kentucky court of appeals reversed, finding that the only evidence against the two, they they had a motive and were present at the scene, was insufficient.

The Kentucky court of appeals, in its opinion in the present case affirming Crum's conviction, distinguished Hodges and Brison from the present case:

> Thus, in both Brison v. Commonwealth, supra, and Hodges v. Commonwealth, supra, there was evidence that the accused was with people who committed a crime but the evidence did not establish beyond a reasonable doubt that the accused was with these other presons when the crime was committed and it was therefore held insufficient to support a conviction.
>
> We have a different situation in this case. The accused was found hiding in the bushes with two other persons whose connection with a crime was established. The area in which the three were found had been under surveillance of the police officers and no one was seen entering the area after the surveillance was established, thus the possibility that appellant could have joined up with the other two after they had committed the crime is remote. They were apprehended together on premises very close to the break-in and very soon thereafter. The evidence also showed that appellant was not a stranger to the others.

Opinion at 4-5 (joint appendix at 6-7).

District Judge Allen reached a different conclusion about Hodges and Brison:

> While there are some differences between the case at bar and the cases of Brison, supra, and Hodges, supra, the Court does not believe that these differences are of such significance that they should lead to a different result than reached in those cases. As in those cases, there was no direct evidence nor any circumstantial evidence of any participation in the crime. As in those

> cases, there was evidence of petitioner's presence in the company of proven criminals. As in Hodges, supra, petitioner was concealed. The only difference that this case can perceive between Hodges, supra, and the case at bar is that petitioner was found in the company of the proven criminals within forty-five minutes after the crime was discovered.

Opinion at 5-6 (joint appendix at 12-13).

Judge Allen also cited the case of Fuller v. Anderson, 662 F.2d 420 (6th Cir. 1981), in which the Sixth Circuit affirmed Judge Feiken's granting of a habeas petition because of insufficient evidence that petitioner was guilty of felony murder. Two children were killed in a fire that resulted from the throwing of a Molotov cocktail into a house. A witness identified a person named Meadows as the one who set and threw the Molotov cocktail. The witness also testified that petitioner was standing toward the back of the house, and that he was repeatedly looking in both directions. The witness then saw Meadows and petitioner running away together after the fire had started. The Sixth Circuit, in deciding that this evidence was insufficient to convict petitioner, cited the following language from People v. Burrel, 253 Mich. 321, 323 (1931):

> Mere presence, even with knowlege that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval, sufficient, nor passive asquiescence or consent.

662 F.2d at 424. The court noted that there was no evidence that petitioner even knew that the cocktail existed. The only direct evidence supporting the State was that Fuller appeared to have acted as a lookout for Meadows, and the court found this insufficient. Id.

Another Sixth Circuit case, United States v. Webb, 359 F.2d 558 (6th Cir. 1966), is cited by Crum in his brief. Webb addressed a defendant and co-defendant who had been convicted of conspiring to transport and possess moonshine. The court reversed the ~~conspiracy~~ convictions of the defendants. As to the co-defendant, Mary Edith Stokely, the court noted that the only evidence against her was her "unexplained presence during . . . a series of suspicious events," and her association with moonshine conspirators. This was held to be insufficent to support her conviction. 359 F.2d at 562.

CONCLUSION

I recommend that the district judge be affirmed. I think that the evidence against Crum is too thin to support his conviction. However, I think that this is sort of a close call.

Alonzo HODGES, Jr., Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Court of Appeals of Kentucky.

Sept. 24, 1971.

As Modified Dec. 3, 1971.

Defendant was convicted in Barren Circuit Court, Cass R. Walden, J., of breaking and entering a storehouse with intent to steal, and he appealed. The Court of Appeals, Davis, J., held that evidence that individual was observed emerging through hole in wall of burglarized store building and that, some five hours later, defendant, who was a native of the vicinity, was found hiding with such individual under a log and that both began to run when officer "hollered" was insufficient to sustain conviction.

Reversed.

Edward P. Hill, Jr., J., dissented.

1. Criminal Law ⇐419(1)

In breaking and entering prosecution of a defendant who had been found hiding with person directly implicated in the crime, testimony of the Commonwealth's witnesses that someone in search aircraft had seen two men crawling together in the area and that some citizens had reported seeing two men in the area was inadmissible hearsay.

2. Criminal Law ⇐552(3)

If the totality of the evidence is such that the judge can conclude that reasonable minds might fairly find guilt beyond reasonable doubt, the evidence is sufficient, albeit circumstantial.

3. Criminal Law ⇐335

Defendant who was found hiding with individual who had, some five hours previously, been observed emerging from burglarized store, had no duty to explain why he was where the officers found him.

4. Burglary ⇐41(1)

Evidence that individual was observed emerging through hole in wall of burglarized store building and that, some five hours later, defendant, who was a native of the vicinity, was found hiding with such individual under a log and that both began to run when officer "hollered" was insufficient to sustain conviction for breaking and entering storehouse with intent to steal. KRS 433.190.

5. Criminal Law ⇐1188

Dismissal of prosecution without another trial is not constitutionally required upon reversal of conviction for insufficiency of the evidence at first trial.

Henry H. Dickinson, Richardson, Barrickman & Dickinson, Glasgow, for appellant.

John B. Breckinridge, Atty. Gen., James B. Wooten, Asst. Atty. Gen., Frankfort, for appellee.

DAVIS, Commissioner.

Alonzo Hodges, Jr., was found guilty of breaking and entering a storehouse with intent to steal property therefrom, as denounced by KRS 433.190. He prosecutes this appeal from the judgment imposing confinement in the penitentiary for one year and six months, contending that his motion for a directed verdict of acquittal should have been sustained because the Commonwealth failed to present sufficient evidence to warrant submission of the case to the jury. James Orville Moore was also convicted of the offense, but he has not appealed.

Shortly before 5 a. m. on January 4, 1970, the burglar alarm sounded at Smith's Country Store in Cave City. Cave City Police Officer Shaw was notified and came to the scene quickly. He stated that a hole had been made in a side wall of the store building and that he observed James Orville Moore emerging from the building through that hole. Moore ran from the scene, up a hill back of the building. Officer Shaw fired at Moore but missed him. Moore left the scene and was not apprehended until five hours later. Shaw "stayed at that hole until the sheriff got there" because he thought "there was still maybe some more inside." However, no one else was found inside, and Moore was the only person seen at or near the premises. There was a pick-up truck (which had been stolen in Hart County) parked near the hole. A tape recorder and perhaps one or two country hams which had been taken from the store were found in the truck. About thirty hams, averaging between twelve and fifteen pounds each, were found lying near the hole in the store. Apparently these hams had been carried from a rack on the opposite side of the storeroom. There was no testimony linking Moore or Hodges with the stolen truck.

A substantial posse of peace officers was quickly assembled. An airplane was obtained which circled the area in the effort to thwart an escape from the area by the culprit or culprits.

About 10 a. m. (some five hours after Officer Shaw observed Moore leaving the store building) he came upon Moore and Hodges who were hiding under a log in a field at a point variously estimated as two or three-and-a-half miles from Smith's Country Store. The actual apprehension was thus described by Officer Shaw:

"Q. 32. What did they do when they saw you?

A. Well, I hollered at them and throwed my gun on them, and they started to run, and I shot over them, and they stopped."

[1] Over objection, the court permitted the Commonwealth's witnesses to state that someone in the airplane had seen two men crawling together in the area being searched, and to relate that some citizens had reported seeing two men in the area. The evidence should not have been received, since it was hearsay. See cases collected in 8A Ky.Digest, Evidence, ⇦ 314(1). With that portion of the "evidence" omitted, it remains to determine whether the proof offered by the Commonwealth was sufficient to sustain a verdict of Hodges' guilt.

There was direct evidence showing a felonious breaking and entering of Smith's Country Store; there was direct evidence that James Orville Moore was implicated in that crime; five hours later Moore was found hiding under a log with Hodges in the general vicinity of the crime. Neither man had in his possession any property taken from the store. These men were under the log together on a Sunday morning in January, without any apparent reason for being in such an unusual position.

Obviously, the evidence against Moore was sufficient. The evidence against Hodges, so far as breaking and entering is concerned, was entirely circumstantial. The strongest link in the circumstantial chain is his unexplained presence, with Moore, under a log on a January day. Another link is his conduct in running when Officer Shaw "hollered" at Moore and him.

It is well settled that a conviction may be had upon circumstantial evidence. The expression of the rule has not been entirely consistent in the cases, which are collected in 6A Ky.Digest, Criminal Law, ⇦552(1) through key 552(4). For example, the rule

was noted in Fugate v. Commonwealth, Ky., 445 S.W.2d 675 (1969), in this language:

"It is a familiar principle that a defendant cannot be convicted on circumstantial evidence that it is as consistent with innocence as with guilt. Cf. Brown v. Commonwealth, Ky., 340 S.W.2d 471, 473 (1960)." Id. 445 S.W.2d at page 681.

In Freeman v. Commonwealth, Ky., 425 S.W.2d 575 (1967), the rule was noted in this observation:

"As has been pointed out many times before, it is well settled that circumstantial evidence is sufficient to sustain a conviction when the circumstances are so unequivocal and incriminating as to exclude every reasonable hypothesis of innocence." Id. 425 S.W.2d at page 578.

In Rose v. Commonwealth, Ky., 385 S.W.2d 202 (1964), relying upon Brown v. Commonwealth, Ky., 340 S.W.2d 471, and Baird v. Commonwealth, 241 Ky. 795, 45 S.W.2d 466, it was written:

"A conviction may be had upon circumstantial evidence, but the circumstances shown must be so unequivocal and incriminating in character as to exclude every reasonable hypothesis of the innocence of the accused." Id. 385 S.W.2d at page 204.

In Etherton v. Commonwealth, Ky., 335 S.W.2d 899 (1960), the evidence was much more incriminating than in the present case. In upholding the sufficiency of the evidence to sustain the verdict, the court stated:

"In order to sustain a conviction in a criminal case it is not necessary that the evidence should exclude every possibility of a defendant's innocence. It is sufficient if all the circumstances when considered together point unerringly to his guilt. Hendrickson v. Commonwealth, Ky., 259 S.W.2d 1; Bolen v. Commonwealth, 303 Ky. 611, 198 S.W.2d 309; Taylor v. Commonwealth, 293 Ky. 823, 170 S.W.2d 903." Id. 335 S.W.2d at page 900.

The only case cited by appellant is Young v. Commonwealth, 245 Ky. 117, 53 S.W.2d 206 (1932), wherein the rule is thus phrased:

"* * * it is sufficient to say that this court has repeatedly held that while a conviction may be had upon circumstantial evidence alone, when it is of such force as to reasonably exclude every reasonable hypothesis of the defendant's innocence, such rule is yet subject to the qualification that if the evidence be as consistent with the defendant's innocence as with his guilt, it is insufficient to support a conviction. (Citations omitted.)" Id. 53 S.W.2d at page 208.

In Cissell v. Commonwealth, Ky., 419 S.W.2d 555, the question of the sufficiency of circumstantial evidence to support a verdict in a criminal case was considered. There the court observed that the expression of the rule found in Mullins v. Commonwealth, 276 Ky. 555, 124 S.W.2d 788, 790 (1939), "probably achieves a closer approach to reality." The rule was expressed in Mullins as follows:

"When the evidence, even though it be circumstantial, affords fair and reasonable ground upon which the verdict of a jury might be rested, the case should go to the jury. It is only where the testimony in behalf of the commonwealth fails to incriminate the accused, or is wholly insufficient to show guilt, that an accused is entitled to a peremptory instruction." Id. 124 S.W.2d at page 790.

[2] Running throughout the decisions, and the slightly varying language in which the rule has been stated, the element of *reasonableness* is constant. If the totality

of the evidence is such that the judge can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient, albeit circumstantial. If the evidence cannot meet that test, it is insufficient. Cf. United States v. May (CA 6), 430 F.2d 715 (1970).

There was evidence that Hodges was a native of the vicinity in which the crime occurred. It is obvious that strong suspicion of Hodges' involvement in the crime arises from the circumstances shown. Suspicion alone is not enough. Handshoe v. Commonwealth, 195 Ky. 762, 243 S.W. 1024; Baird v. Commonwealth, 241 Ky. 795, 45 S.W.2d 466.

[3-5] Hodges had no duty to explain why he was where the officers found him. There is nothing in the competent evidence which indicates that Hodges was at the crime scene, nor is there anything other than his being found with Moore five hours after the latter's flight from the store, tending to prove his complicity in the crime. These circumstances, suspicious though they certainly are, do not point so unerringly to Hodges' involvement as to warrant submission of the case to the jury. The verdict is not supported by the evidence. Appellant insists that this court should direct a dismissal of the prosecution, without another trial. This procedure is not followed in this jurisdiction, nor is it constitutionally required. See Bryan v. United States, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335 (1950); Taul v. Commonwealth, Ky., 249 S.W.2d 45. If the evidence upon another trial is substantially the same as at the trial on appeal, the court will direct a verdict of acquittal.

The judgment is reversed for proceedings consistent with the opinion.

MILLIKEN, C. J., and NEIKIRK, OSBORNE, PALMORE, REED and STEINFELD, JJ., concur.

EDWARD P. HILL, Jr., J., dissents.

Harry ROADEN, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Court of Appeals of Kentucky.

June 25, 1971.

As Modified on Denial of Rehearing Dec. 17, 1971.

Defendant was convicted in the Pulaski Circuit Court, Lawrence S. Hail, J., of exhibiting obscene material and he appealed. The Court of Appeals, Davis, Commissioner, held that sheriff who viewed public showing of movie and concluded that it was obscene and who thereupon arrested manager of drive-in theater was authorized in seizing film shown notwithstanding that no prior adversary hearing on issue of obscenity had been held.

Affirmed.

1. Obscenity ⇐5

Sheriff who viewed public showing of movie and concluded that it was obscene and who thereupon arrested manager of drive-in theater was authorized in seizing film shown notwithstanding that no prior adversary hearing on issue of obscenity had been held.

2. Criminal Law ⇐855(3), 1174(7)

Deputy sheriff who testified in obscenity prosecution should not have been allowed to accompany jury as it proceeded to and from theater to view film, over defendant's objection, but error was harmless.

3. Criminal Law ⇐656(2)

Trial judge did not act improperly in questioning sheriff concerning his handling of allegedly obscene film when it was viewed by jury at trial.

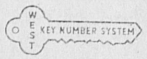
consider any loss or inconvenience of access," is not well taken, because that particular form was prescribed for the purpose of submitting the issue to the jury's determination, whereas in this case the purpose of the admonition was merely to exclude the matter from its consideration.

[4] The last and usual argument is that the verdict was excessive. It may have been, but we cannot find it so as a matter of law.

The judgment is affirmed.

PALMORE, C. J., and MILLIKEN, OSBORNE, REED, STEINFELD and STEPHENSON, JJ., sitting.

All concur.



Reubin MARCUM and Margaret Hoskins, Appellants,

v.

COMMONWEALTH of Kentucky, Appellee.

Court of Appeals of Kentucky.

June 15, 1973.

Defendants were convicted before the Clay Circuit Court, B. Robert Stivers, Special Judge, of murder, and they appealed. The Court of Appeals, Palmore, C. J., held that evidence was insufficient to support convictions of defendants even though they were present at scene of crime and had the opportunity and motive for killing victim.

Reversed.

1. Homicide ⇐7

Neither motive alone nor motive plus opportunity or presence at the scene is enough to justify a murder conviction.

2. Homicide ⇐234(1)

Evidence was insufficient to support murder convictions of defendants even though they were present at scene of crime and had the opportunity and motive for killing victim. KRS 435.010.

A. Douglas Reece, Manchester, for appellants.

Ed W. Hancock, Atty. Gen., G. Edward James, Asst. Atty. Gen., Frankfort, for appellee.

PALMORE, Chief Justice.

Reubin Marcum and Margaret Hoskins were jointly indicted, tried and found guilty of murdering Margaret's husband, Elbert "Preacher" Hoskins, and they appeal from a judgment sentencing each of them to life imprisonment. Cf. KRS 435.010.

It is our opinion that the evidence was not sufficient to support the conviction of either.

Unquestionably the victim was murdered, but there was no evidence to identify either Margaret or Reubin as the killer and, if one of them in fact committed the offense, no evidence of any complicity on the part of the other. It is almost, though not quite, the classic situation in which even though it may be certain that one of two persons committed a crime, unless the guilt of one can be established both must go free. Any other result would place the burden of proof on the innocent party.

Elbert and Margaret occupied a small dwelling in rural Clay County. They had been married for 16 years and had three sons, Frank and Charles, 13 and 14 years of age, and a baby ten months of age. Elbert was 43 and Margaret 37 years old. Elbert's 71-year-old father, Steve, also lived in the house, and Reubin Marcum, who was the same age as Steve (71), had been staying there "most of the time

sleeping in the same room with Elbert, Margaret and the baby. This rather unusual arrangement predated (and presaged) the birth of the baby; both Margaret and Reubin testified that Reubin was its father.

Evidently all of these people (except, possibly, for Reubin, who said he was "retired") were living on social security and government food stamps. Reubin had been staying with the Hoskinses for a year and a half or two years. He had a wife living at his "home place," which was somewhere in the general vicinage, but the record is silent with respect to her current role, if any, in his domestic affairs. Reubin's explanation for having moved into the Hoskins home was, "We went to church together for years," and he said the reason he slept in the room with Elbert and Margaret was that Elbert "would not agree for me to sleep no where else and had mighty little more room."

Both Margaret and Reubin testified that the more intimate aspects of their relationship existed with Elbert's consent and approval. According to Margaret, Elbert had undergone a vasectomy some years before and could not have any more children. Reubin said that Elbert told him "he wanted another baby to put on his social security." Both testified that Reubin never slept with Margaret and that no sexual intercourse between them ever took place except at Elbert's instigation, when he would take Margaret to Reubin's bed for that purpose and remain in the same bed with them until the mission was accomplished.

The room in which Elbert, Margaret, the baby and Reubin slept was one of two rooms adjoining a front porch, the other being a living room. The front door of the house entered the living room at a point close to the front bedroom wall, and the entrance to the bedroom from the living room was located toward the front, so that upon going into the house one would turn immediately in order to enter the bedroom. The bedroom was very small, seven feet wide and 11 feet deep (front to back). The Hoskinses used a double bed located in the far corner. Crosswise at the foot of this bed, toward the front window, was a "three-quarter" size bed in which Reubin slept. There was a lamp on the front porch which cast some degree of illumination into the bedroom and was left on at night so that Margaret could tend to the child, who at the time of the killing was suffering from an ailment called the "thrash." Also, as it was a hot night and Margaret did not want to use the electric fan while the baby was under the weather, the front door of the house was propped open for additional ventilation. This door swung inward and to the right and, when so opened, would partially obstruct the entrance from the living room into the bedroom.

A kitchen and another bedroom were located to the rear of the house behind the living room and front bedroom, and there was another bedroom in the basement under the kitchen. At the time of the murder the back bedroom on the main floor was occupied by Steve and Frank Hoskins and the basement room by Charles Hoskins.

On the night of July 21, 1972, Elbert, Reubin, and Charles, the oldest Hoskins boy, attended an auction sale at a nearby community and purchased two bicycles and a baby seat for the Hoskins children. After returning home they had something to eat and by midnight everyone had retired for the night. At some time around 2:30 A.M. Elbert was shot while lying on his back in bed. One .38-caliber bullet entered his right breast and lodged behind his left shoulder, and another entered his mouth and lodged in the left rear portion of his cranium. Testimony admitted over objections by the defendants indicated the presence of powder burns.

Margaret was occupying the side of the bed next to the wall, with the baby be-

tween her and Elbert. She says that she was awakened by "some kind of noise" and "jumped up" into a sitting position, following which, in her own words, "when I looked down at him I seen the blood on him and started screaming and grabbed the baby and got out of bed . . . . The foot of the bed toward Reubin's bed and I come across over his feet. You couldn't, the beds are that far apart and you couldn't get out between them hardly." She explained that she was able to see the blood on Elbert by reason of the light from the front porch. She saw no one else in the room except for the baby and Reubin.

Reubin testified that "a noise woke me and Margaret was hollering something is wrong with Preacher and she jumped out of bed and by that time I got out of bed and looked over and saw blood on his chest and we was all just mixing around. She was hollering for her boy and old man Hoskins and I went out on the porch but I never saw nobody at all. I come back in and dressed—I was undressed—and dressed and Margaret said we better go and get the law," etc.

Steve Hoskins said that he went to bed around midnight and that some time thereafter "I heard two somethings went to me like down in the basement . . . And the boy, oldest boy come running up out of the basement and come running into the foot of the bed and I slept there on the right in a room—me and the other boy, Frank—and this boy come running on his hands and feet and hollering what is a matter . . . The baby boy [Frank] sleeps behind me and jumped out over me and run in while I was getting my pants on to get in there to see what the trouble was and Margaret met me at the living room door and said, 'Get up old man, somebody shot through the house and killed Preacher.'"

Steve estimated it was "five or ten minutes" from the time he heard the "two somethings" until he reached the front bedroom. Reubin was partially dressed and Margaret had on a "shimmy."

Charles, sleeping in the basement, was awakened by his mother's screaming and was the last one to reach the front bedroom. He said that when he arrived "Mommy was standing at the door screaming and Reubin was in the living room screaming and hollering and Grandpa in there where he was and Frank in there crying."

Frank, sleeping with his grandfather, also testified that he was awakened by his mother's screaming whereupon he ran into the front bedroom and arrived just after the light had been turned on. He said that Reubin was putting his clothes on and "Mommy was standing there crying and we got her out and me and Reubin went out on the porch to see if we could see anybody."

Margaret, Reubin and Frank went to a neighbor's down the road and notified the sheriff. Steve and Charles remained at the house. Charles said that Steve went out in the yard three or four times before the officers arrived. In the course of their investigation the officers made a search for the murder weapon, but it was never found. There was no evidence that any of the people in the house owned or had ever possessed a firearm of any kind.

Steve, Elbert's father, testified that at some time within a week before the tragedy Elbert had an altercation with Margaret and that Reubin tried to intercede, whereupon Elbert told him to get out of his house and Steve hit him (Reubin) with a walking stick. According to Steve, Reubin then fetched up an axe but ran off when Steve advanced on him with his cane. Both Reubin and Margaret denied that such an event took place. Neither Charles nor Frank had witnessed any difficulty between Elbert and Reubin. In fact, Charles

said, 'They got along good.' On the other hand, Margaret and Reubin testified that Steve and Elbert had trouble a few times over the fact that the old man did not like Reubin to be there, which Steve denied, but he did acknowledge that Elbert 'jumped on me one time. He asked me the truth and I told him near the truth as I knowed and he smacked me in the face and I went to my oldest boy's where I am staying now and he come and begged me to come back to the house."

[1, 2] We have outlined the evidence at some length in order that its sufficiency or insufficiency to support the conviction may be fairly exemplified. As may be seen, it would sustain a finding of motive on the part of both defendants, but neither motive alone nor motive plus opportunity (or presence at the scene) is enough to justify a conviction. See, for example, Holman v. Commonwealth, 291 Ky. 622, 165 S.W.2d 167 (1942); Ratliff v. Commonwealth, 406 S.W.2d 728 (1966); and Hollin v. Commonwealth, 307 S.W.2d 910 (1957).

That the death wounds bore powder burns indicative of a shooting at very close range does not exclude the possibility that someone entered the room from outside and committed the murder, but even if it did, there is nothing to indicate which of the two suspects is the culprit. Assuming that either of them did the shooting, motive and presence alone could not serve to convict the other as an accomplice.

We find no error except in the denial of a peremptory instruction. If upon another trial the evidence be substantially the same the appellants will be entitled to a directed verdict of acquittal.

PALMORE, C. J., and MILLIKEN, OSBORNE, REED, STEINFELD and STEPHENSON, JJ., sitting.

All concur.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

v.

Nancy VANDERPOOL, Administratrix of the Estate of James Matt Vanderpool, Deceased, Appellee.

Court of Appeals of Kentucky.

June 15, 1973.

Action was brought against railroad arising from death of plaintiff's decedent when he was struck by train. The Whitley Circuit Court, Pleas Jones, J., entered judgment in favor of plaintiff, and railroad appealed. The Court of Appeals, Gardner, C., held that evidence that train crewmen saw decedent on tracks at time when they possibly could have stopped the train before striking him did not establish liability of the railroad under doctrine of last clear chance where decedent was in a sitting position, which indicated that he was not unconscious or immobile, so that the crewmen could not have known that he was in peril until the train was so close that it was impossible for decedent to get out of the way, at which time the train could not have been stopped in time to avoid striking him.

Reversed.

1. Negligence ⇐122(1)

The burden of proving the essential elements of the last clear chance doctrine must be carried by the party who attempts to invoke its use.

2. Negligence ⇐33(1)

The only duty one owes a trespasser is to exercise ordinary care to avoid injuring him after his position of peril is discovered.

3. Railroads ⇐390

A prerequisite to recovery for death of trespasser who was struck by train

Judge – Crum was convicted of burglary in the 3rd degree (last page). I thought that you might also like to see the 1st + 2nd degree. EBL

NOTES TO DECISIONS

Analysis

1. Distinction in degrees.
2. Dwelling.

1. Distinction in Degrees.

The drafters of the 1978 amendments to KRS 511.020, 511.030 and 511.040 meant to base the second degree/third degree distinction on the presence or absence of persons in the building at the time of the burglary, because the potential for physical injury is made greater by the presence of other persons who may be encountered in the process of the burglary. Litton v. Commonwealth, 597 S.W.2d 616 (Ky. 1980).

2. Dwelling.

The fact the victims were in the process of moving and did not stay in the house the night of the burglary did not affect the status of the house as being "usually occupied by a person lodging therein." Starnes v. Commonwealth, 597 S.W.2d 614 (Ky. 1980).

Where the evidence showed that the house which was broken into was still infrequently used as it had customarily been used, as a dwelling, and that at no time was the house abandoned or totally emptied, the defendant was properly convicted for burglarizing a "dwelling." Haynes v. Commonwealth, 657 S.W.2d 948 (Ky. 1983).

511.020. Burglary in the first degree. — (1) A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:

(a) Is armed with explosives or a deadly weapon; or

(b) Causes physical injury to any person who is not a participant in the crime; or

(c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

(2) Burglary in the first degree is a Class B felony. (Enact. Acts 1974, ch. 406, § 97; 1978, ch. 125, § 1, effective June 17, 1978; 1980, ch. 376, § 2, effective July 15, 1980.)

Kentucky Law Journal. Kentucky Law Survey, Ashdown, Criminal Law, 64 Ky. L.J. 337 (1975-76).

Kentucky Law Survey, Brice and Taylor, Criminal Law, 67 Ky. L.J. 569 (1978-1979).

Kentucky Law Survey, Malone and Malone, Criminal Law, 69 Ky. L.J. 545 (1980-81).

Kentucky Law Survey, Patterson, Juvenile Code, 70 Ky. L.J. 343 (1981-82).

Opinions of Attorney General. "Dwelling" means a building that is usually occupied by a person lodging therein, including a home, apartment, sleeping room or other shelter in which a person normally lives, whether or not a person was present at the time of entering and remaining therein. OAG 78-721, 78-458.

Cited: Wilhite v. Commonwealth, 574 S.W.2d 304 (Ky. 1978); Van Dyke v. Commonwealth, 581 S.W.2d 563 (Ky. 1979); Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981); Wiley v. Sowders, 669 F.2d 386 (6th Cir. 1982); Haymon v. Commonwealth, 657 S.W.2d 239 (Ky. 1983).

NOTES TO DECISIONS

Analysis

1. Deadly weapon.
2. Prosecutor's comments.
3. Prejudicial evidence.
4. Prima facie showing.
5. Identification of defendant.
6. Instructions.
7. Voluntary confession.
8. Waiver of rights.
9. Remaining unlawfully.
10. Dwelling.
11. Retaining stolen property.
12. Presumption from possession.
13. Identity of informant.
14. Aggravating circumstance in murder prosecution.

Collateral References

13 Am. Jur. 2d, Burglary, §§ 1-7, 9-27.
12A C.J.S., Burglary, §§ 1-8, 11-42.
Outbuildings or the like as part of "dwelling house." 43 A.L.R.2d 831.
Breaking and entering of inner door of building as burglary. 43 A.L.R.3d 1147.
What amounts to "exclusive" possession of stolen goods to support inference of burglary or other felonious taking. 51 A.L.R.3d 727.
Entry through partly opened door or window as burglary. 70 A.L.R.3d 881.
Occupant's absence from residential structure as affecting nature of offense as burglary or breaking and entering. 20 A.L.R.4th 349.

511.030. Burglary in the second degree. — (1) A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling.

(2) Burglary in the second degree is a Class C felony. (Enact. Acts 1974, ch. 406, § 98; 1978, ch. 125, § 2, effective June 17, 1978; 1980, ch. 376, § 3, effective July 15, 1980.)

Kentucky Law Journal. Kentucky Law Survey, Brice and Taylor, Criminal Law, 67 Ky. L.J. 569 (1978-1979).
Kentucky Law Survey, Malone and Malone, Criminal Law, 69 Ky. L.J. 545 (1980-81).
Opinions of Attorney General. Examples of an inhabited building within the meaning of this section include an office, warehouse, store, barn, church, tent, camper-trailer in which a person was physically present at the time of entry or during the time the offender remained. OAG 78-721.
Cited: James v. Commonwealth, 647 S.W.2d 794 (Ky. 1983).

NOTES TO DECISIONS

Analysis

1. Distinction in degrees.
2. Presence of other persons.
3. Indictment.
4. Instructions.

1. Distinction in Degrees.
The drafters of the 1978 amendments to KRS 511.020, 511.030 and 511.040 meant to base the second degree/third degree distinction on the presence or absence of persons in the building at the time of the burglary, because the potential for physical injury is made greater by the presence of other persons who may be encountered in the process of the burglary. Litton v. Commonwealth, 597 S.W.2d 616 (Ky. 1980).

2. Presence of Other Persons.
Second-degree burglary is committed only when a person or persons, other than the burglar or burglars, are present in the building at the time of the burglary. Litton v. Commonwealth, 597 S.W.2d 616 (Ky. 1980).

3. Indictment.
It was not necessary that the phrase "with intent to commit a crime" be contained in an indictment for second-degree burglary. Godsey v. Commonwealth, 661 S.W.2d 2 (Ky. Ct. App. 1983).

4. Instructions.
Where defendant in second-degree burglary prosecution admitted to taking the property belonging to the owner of the burglarized home, the evidence did not justify an instruction on the lesser included offense of criminal trespass. Godsey v. Commonwealth, 661 S.W.2d 2 (Ky. Ct. App. 1983).

Collateral References

13 Am. Jur. 2d, Burglary, §§ 1-7, 9-28.
12A C.J.S., Burglary, §§ 1-8, 11-42.
Breaking and entering of inner door of building as burglary. 43 A.L.R.3d 1147.
What amounts to "exclusive" possession of stolen goods to support inference of burglary or other felonious taking. 51 A.L.R.3d 727.
Entry through partly opened door or window as burglary. 70 A.L.R.3d 881.
Occupant's absence from residential structure as affecting nature of offense as burglary or breaking and entering. 20 A.L.R.4th 349.

511.040. Burglary in the third degree. — (1) A person is guilty of burglary in the third degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building.

(2) Burglary in the third degree is a Class D felony. (Enact. Acts 1974, ch. 406, § 99; 1978, ch. 125, § 3, effective June 17, 1978; 1980, ch. 376, § 4, effective July 15, 1980.)

Kentucky Law Journal. Kentucky Law Survey, Malone and Malone, Criminal Law, 69 Ky. L.J. 545 (1980-81).

Opinions of Attorney General. Because of the express language in KRS 511.010 (1) (a) and (b), coupled with the commentary explanation, the ordinary car or pick-up truck does not fall within the definition of "building," for purposes of prosecution for third-degree burglary. OAG 78-721.

Examples of an uninhabited building within this section are the same as second degree, except that a person was not physically present at the time of entry or during the time the offender remained. OAG 78-721.

Cited: Robinson v. Commonwealth, 572 S.W.2d 606 (Ky. Ct. App. 1978); Hubbard v. Commonwealth, 633 S.W.2d 67 (Ky. 1982).

NOTES TO DECISIONS

ANALYSIS

1. Instructions.
2. Evidence.
3. Distinction in degrees.
4. Protected space.
5. Presence of other persons.
6. Attempted burglary.

1. Instructions.

It was not error for the trial court to refuse to give an instruction on criminal trespass, because the only reasonable inference to be drawn from the evidence is that the appellant is either guilty of burglary or nothing, since the defendant never admitted being in the house. Polk v. Commonwealth, 574 S.W.2d 335 (Ky. Ct. App. 1978).

Where there was not a shred of evidence to indicate that the burglary occurred during the day or other than at night, the trial court properly refused to give the tendered instruction on third-degree burglary. Eversole v. Commonwealth, 575 S.W.2d 457 (Ky. 1978).

An indictment charging defendant with "counseling" another in the commission of several third-degree burglaries was sufficient to warn the defendant that the evidence would be introduced to show a conspiracy, and the fact that jury instructions spoke of "conspiring" rather than "counseling" was a nonprejudicial variance. Dick v. Commonwealth, 585 S.W.2d 379 (Ky. 1979).

2. Evidence.

Where there were a very limited number of questions pertaining to the record of defendant, an objection to the sole reference to the penalty was sustained, and the court gave an emphatic admonishment to the jury concerning the narrow purpose of the evidence, the admission of testimony regarding of a similar felony conviction which occurred 10 years previously had no prejudicial effect. Stiles v. Commonwealth, 570 S.W.2d 645 (Ky. Ct. App. 1978).

Witness' remark that police felt that people responsible for burglaries were from Bowling Green area was not prejudicial error where court delivered a strong admonishment and there was ample evidence of guilt. Stiles v. Commonwealth, 570 S.W.2d 645 (Ky. Ct. App. 1978).

3. Distinction in Degrees.

The drafters of the 1978 amendments to KRS 511.020, 511.030 and 511.040 meant to base the second degree/third degree distinction on the presence or absence of persons in the building at the time of the burglary, because the potential for physical injury is made greater by the presence of other persons who may be encountered in the process of the burglary. Litton v. Commonwealth, 597 S.W.2d 616 (Ky. 1980).

4. Protected Space.

Air pockets of concrete blocks are not a protected space within the meaning of this section absent some showing of something of value in the particular wall which could be the subject of the crime. Stamps v. Commonwealth, 602 S.W.2d 172 (Ky. 1980).

5. Presence of Other Persons.

Second-degree burglary is committed only when a person or persons, other than the burglar or burglars, are present in the building at the time of the burglary. Litton v. Commonwealth, 597 S.W.2d 616 (Ky. 1980).

to hold that the waiver must be put into effect at all events. That perhaps sufficiently appears already. Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

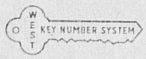
Branham v. Commonwealth, 209 Ky. 734, 273 S.W. 489 (1925); Jackson v. Commonwealth, 221 Ky. 823, 299 S.W. 983 (1927); Allison v. Gray, Ky., 296 S.W.2d 735 (1956); Tackett v. Commonwealth, Ky., 320 S.W.2d 299 (1959); Meyer v. Commonwealth, Ky., 472 S.W.2d 479 (1971); and all other cases holding that an accused may not waive a jury trial in felony cases or agree to a trial by a jury of less than 12 members are hereby overruled.

[7, 8] In determining whether a waiver of a jury trial is made understandingly, intelligently, competently, and voluntarily, the court must apply the same standards that are required on the acceptance of a guilty plea. The record made at the hearing preceding the acceptance of a waiver by the court must affirmatively set out facts which will permit an independent determination of its validity. Cf. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Raymer v. Commonwealth, Ky., 489 S.W.2d 831 (1973); Lucas v. Commonwealth, Ky., 465 S.W.2d 267 (1971); Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930).

[9] The totality of the evidence before the trial court discloses that Short was competent to stand trial and participate in his defense. This being so, it would be anomalous to say he could not waive a jury trial or his Miranda rights. (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.) Finally, there is no merit in the other errors asserted by Short.

The judgment is affirmed.

All concur.



Viceroy BRISON, Jr., et al., Appellants,

v.

COMMONWEALTH of Kentucky, Appellee.

Court of Appeals of Kentucky.

Feb. 21, 1975.

By a judgment of the Circuit Court, Trigg County, Stephen P. White, Jr., J., three of the four jointly tried defendants were found guilty of dwelling house breaking and they appealed. The Court of Appeals, Catinna, C., held, inter alia, that the prosecution's witnesses' references to an indicted individual who was not shown to be connected with the crimes charged as a thief was highly inflammatory and prejudicially erroneous, that there was no abuse of discretion in denying motion to separate witnesses or to grant a separate trial as to one defendant and that in-court identification having a basis which was independent

of allegedly suggestive showup was admissible.

Reversed.

Clayton, J., dissented.

1. Criminal Law ⇐1169.5(4)

The several references in testimony of sheriff and state detective to unindicted person who was a known thief and to such person's automobile were inflammatory and highly prejudicial to the defendants jointly tried for dwelling house breaking and constituted reversible error, although in each instance court sustained the objection and admonished jury.

2. Criminal Law ⇐562

Neither motive alone nor motive plus opportunity or even presence at scene of crime is enough to justify a conviction.

3. Burglary ⇐45

Evidence as to two of the four jointly indicted defendants for crime of dwelling house breaking which consisted merely of such defendants' association with other two defendants rather than as to their participation in crime charged was insufficient to justify submission of their cases to the jury.

4. Criminal Law ⇐665(1)

Although rule authorizes trial court, on motion of either party, to exclude from hearing or trial witnesses called to testify, exclusion of such witnesses rests within sound discretion of trial court. RCr 9.48.

5. Criminal Law ⇐665(4)

Examination of record in prosecution of four defendants jointly indicted for dwelling house breaking showed that there was no abuse of discretion on part of trial court in refusing, on motion of two of the defendants, to separate witnesses. RCr 9.-48.

6. Criminal Law ⇐1036.2

No error was preserved for appellate review with respect to asking defendant a series of repetitious questions where he did not object at trial.

7. Criminal Law ⇐339

In-court identification of defendant by witness was admissible notwithstanding claim of suggestiveness resulting from the showup procedure where evidence established that the identification was independent of confrontation at the showup.

8. Criminal Law ⇐622(2)

There was no necessary clear showing of prejudice in denying motion by one of the defendants, tried jointly with three other defendants for dwelling house breaking, for a separate trial.

Anthony M. Wilhoit, Public Defender, Kathleen McCabe, Jim R. Early, Joe Jarrell, Asst. Public Defenders, Frankfort, for appellants.

Ed W. Hancock, Atty. Gen., James M. Ringo, Asst. Atty. Gen., Frankfort, for appellee.

CATINNA, Commissioner.

Viceroy Brison, Jr.; Arthur Ray Brison, his brother; John Ballard; and Ben W. Thacker were jointly indicted for dwelling-house breaking. The jury found Viceroy Brison, Jr., guilty and fixed his punishment at five years' imprisonment; Arthur Ray Brison guilty and fixed his punishment at five years' imprisionment; Ben Thacker guilty and fixed his punishment at two years' imprisonment; and John Ballard not guilty. Viceroy, Arthur Ray, and Ben appeal from the judgment entered upon the jury verdict.

Between the hours of 7:30 a. m. and 3:30 p. m. on December 6, 1972, someone entered the residence of Stanley Baker in rural Trigg County and took numerous

items, including a portable television set and a Bulova wrist watch. On that day Stanley Baker was at work on his farm; his wife was at school, as was their child. The house had been left unlocked. Approximately five days after the break-in, the Brison brothers, Ballard, and Thacker were arrested and charged with the crime.

At the time of the incident James Mathis was the sheriff of Trigg County. From an undisclosed source he concluded that an automobile bearing a Christian County license, prefix number 214, was involved. The car was described as a 1964 to 1967 model, Pontiac or Oldsmobile. Of the 1,000 Christian County numbers bearing the prefix 214, the sheriff and a state detective concluded that the suspected automobile was licensed under the number 214-170, their reasoning being that it was descriptive of an automobile belonging to one James Green who was variously described to the jury as being under investigation, a known thief, and in the penitentiary. With this information as a "lead," the sheriff caused the arrest of the two Brisons, Ballard, and Thacker.

A proper disposition of this appeal requires a detailed examination of the evidence introduced against each man.

On December 6, 1972, Christine Bush was operating a store at Caledonia in Trigg County, about four miles from the residence of Stanley Baker. At about noon or a little after Ben Thacker and two other men came into the store, purchased some gasoline, and used the telephone. Christine recognized Thacker because he had lived and worked in the neighborhood, but she did not know the other two men. She did not see the automobile that was being used by Thacker and his friends. Her identification was limited to Ben Thacker alone.

Laura Coleman, a neighbor, arrived at the Bush store at about 12:30 p. m. Ben Thacker and the other men were already in the store. She recognized Thacker, a Charles McKinney, and one of the Brisons, who she later learned was Arthur Ray. While she was there Charles McKinney used the telephone. Upon leaving the store, she observed two other men in the back seat of a parked automobile. She described it as a blue Pontiac, model 1965 or 1966. She did not notice the license plate. (The Charles McKinney identified by Laura Coleman was described by Sheriff Mathis in his testimony as follows: "There was another fellow involved in the break-in and his name was Charles McKinney and we have sent him on to the penitentiary.")

Arthur Barber, who lives on the lane to the Riverbend Farm and the Baker residence, saw a car pulling out of the lane onto the main road. He described it as a "right new car, about a '68, green, sort of dark green," but did not know the make. He saw it pull out about "9 o'clock or 9:30 or 8 o'clock." He was unable to give the identity or number of passengers in the car.

Bob Brame lives across the road and opposite the entrance to the lane leading to the Baker residence. He testified that he saw a car come out the lane right after lunch (1 p. m.). He described it as being a "blue-green Pontiac, '62, '63, '64, or '65, or somewhere along there." He observed at least two passengers in the car but was unable to identify them other than "they were colored."

Except for testimony by Viceroy that he, Arthur Ray, John Ballard, and Ben Thacker had been together all day on December 6, 1972, and had, in fact, gone rabbit hunting along a creek a short distance back of the Bush store, the evidence above recounted is all that is in the record which purports to point a finger of guilt at Arthur Ray and John.

The position of Viceroy is complicated by further evidence concerning his misdeeds. On the afternoon of December 6, 1972, Viceroy pawned a portable television set at the Midway Pawn Shop at Fort Campbell. The owner produced a copy of

the receipt signed by Viceroy, identified him while he was in the custody of the police as the one who had pawned the television set, and again identified him at the trial, testifying further that he operated a clothing store in conjunction with the pawn shop and that he recognized Viceroy because he had been a customer in the clothing store. The television set was identified as being the one taken from the Baker residence. The watch was located by Ed Daugherty, a detective sergeant of the Kentucky State Police, at another pawn shop where a ticket had apparently been signed by Viceroy. However, no one at the shop was able to identify Viceroy.

From time to time we learn of the successful use of a so-called "red herring" to frustrate the objectives of certain persons. It would appear that here the "red herring," which happened to be a car owned by James Green, was used for the purpose of confusing everyone and thereby obtaining a conviction where evidence might not have justified the results. Ed Daugherty attempted to deliver the *coup de grace*. He testified that on December 6, 1972, although he was on vacation, the Trigg County sheriff called him in regard to the housebreaking. He was given the description of a car and the prefix numbers "214" of a license plate. James Edward "Bubber" Green, owner of a medium green 1965 Pontiac, license number 214–170, was at that time being investigated concerning a series of daytime break-ins in Christian County. With these facts at his command, Daugherty informed the sheriff that he "felt Green or some of his associates would be good suspects." At this point both his and the sheriff's testimony contains an ominously silent gap before we finally get to the four accused. We have been unable to determine what bearing the James Green car may have had on the proceeding, for there is not a shred of evidence in the record that any one of the accused was in or driving the James Green car on the day in question, or at any other time. In fact, Viceroy testified without contradiction that the car that he, his brother, Ballard, and Thacker used on December 6 was owned by a man whom he knew only as "Middy." On that day the four of them, together with "Middy," went on a hunting trip which he described in his testimony. Notwithstanding this evidence, we find the record replete with evidence in regard to the James Green car. For example, note the following question and answer by Detective Daugherty:

> "Q. Back earlier in your testimony you referred to a car with license number 214–170 and you say that you know that car was owned by James Green, is that correct?
>
> A. I know that the car was owned by James Green and the car had a bent, I believe, left front fender and I also know that James Green is a known thief."

To this answer the defendants objected and the court sustained their objection, admonishing the jury not to consider the answer. Later on, the detective was asked where the Green car was, and his answer was to the effect that it had been sitting in Green's back yard and had been sitting there since before Green went to the penitentiary.

In spite of all the detective's familiarity with James Green, his activities, his automobile, his residence, and his whereabouts, he was forced to admit that he had never seen James Green in the company of the Brisons, Thacker, or Ballard, and that he had never observed anyone but James Green operating his car. Green was not named in the indictment, and no one ever hinted that he was involved.

We are of the opinion that the insertion of James Green into this proceeding, his car, his reputation as a known thief, and the fact that he was in the penitentiary were matters entirely without the record and could serve only one purpose, and that was to prejudice the rights of each defendant to even a tollerably fair trial. As if

the testimony of the detective did not draw the noose tight enough, that of Sheriff Mathis completed the act. Upon cross-examination, we find the following questions and answers:

"Q–51 Judge, did you take Ben Thacker and have him identified at any place?

A That's correct, we did.

Q–52 Where did you take him?

A I took him by Mrs. Bush's store—Mr. and Mrs. John Bush's store for he lied to us like a dog and said that he had not been in Trigg County.

OBJECTION BY THE HON. CHAPPELL WILSON:

Objection, that is an improper remark, move that it be stricken from the record and that the jury be admonished.

THE COURT:

Yes, that's improper, Sheriff. I will SUSTAIN the objection. Just tell what you did.

A I carried him by Mrs. Bush's store and she positively identified Ben Thacker of being in her store on December 6, Wednesday, and also two other fellows with him and one of them made a phone call probably to the home of Mr. Baker to see if he was home.

OBJECTION BY THE HON. CHAPPELL WILSON:

Object on the same grounds as in the previous objection (objection following Q–52) and ask for same ruling.

THE COURT:

Yes, Judge, you can't assume what the call was about. I will SUSTAIN the objection and the jury will not consider that."

* * * * * *

"Q–68 And if there were five individuals and we have accounted for five people, where is James Green.

A There was another fellow involved in the break in and his name was Charles McKinney and we have sent him on to the penitentiary.

OBJECTION BY THE HON. CHAPPELL WILSON:

Objection, on the same grounds as previously, that is an improper remark, move that it be stricken and that the jury be admonished.

THE HON. GRADY RUFF:

Judge, he asked the question.

THE COURT:

I know, but he is going into some matters that are not applicable to this case and I admonish the jury not to consider that and I am SUSTAINING the objection."

[1] At the close of the testimony of Sheriff Mathis, counsel for the accused moved for a mistrial on the grounds that the prejudicial remarks of the sheriff, as quoted, did so affect the jury's consideration of the case as to deny them a fair trial. The court overruled the motion. We have considered this entire record and all of the evidence and have concluded that the testimony of the sheriff, which was duly objected to, and the testimony of the state detective were both inflammatory and highly prejudicial and could have served no purpose other than to create in the minds of the jury the impression that the three accused were guilty by association, if for no other reason.

While it is true that in each instance the court sustained the objection and admonished the jury, we do not think that the admonition was sufficient to serve the purpose of destroying any prejudicial atmosphere that may have been created. Pruitt v. Commonwealth, Ky., 487 S.W.2d 940

(1972). We find merit in the argument here and must therefore reverse on this ground.

[2, 3] As there will be another trial, we find it necessary to discuss other claimed errors. At the close of the evidence for the Commonwealth and again at the close of all the evidence, counsel for the accused moved for a directed verdict, which motion was overruled. Arthur Ray and Ben Thacker assert that it was error on the part of the court to overrule their motion for a directed verdict. We have detailed here all of the evidence connecting these two men with the crime charged. Their only sin, whether it be of omission or commission, was the fact that on that fateful day they were with Viceroy Brison, Jr., who apparently, at least, came into possession of some of the property stolen from the Baker residence. They were convicted because of their association rather than upon evidence of the crimes charged. We have held that neither motive alone nor motive plus opportunity, or even presence at the scene of a crime, is enough to justify a conviction. Marcum v. Commonwealth, Ky., 496 S.W.2d 346 (1973); Hodges v. Commonwealth, Ky., 473 S.W.2d 811 (1971). The evidence against Arthur Ray Brison and Ben Thacker did not support the submission of their case to the jury. If upon another trial the evidence is substantially the same, they will be entitled to a directed verdict of acquittal.

[4, 5] Ben Thacker and Viceroy Brison moved for a separation of witnesses pursuant to the requirements of RCr 9.48. They claim that the overruling of this motion was prejudicial error. Although RCr 9.48 provides that upon motion of either party the trial judge may exclude from the hearing or trial witnesses called to testify, we have held that whether such witnesses will be excluded rests within the sound discretion of the trial court. Webster v. Commonwealth, Ky., 508 S.W.2d 33 (1974). Our examination of the record, together with the court's reason for not enforcing the exclusionary rule, discloses that there was no abuse of discretion on the part of the trial court.

[6] Viceroy objects rather strenuously to the fact that there was a rather repetitious series of questions, the total effect of which was to create the impression that he, by refusing to make any statement in regard to the housebreaking, demonstrated his own guilt. While it is true that there were a number of questions in regard to statements given when one question would have been sufficient, the record discloses that Viceroy did not object and consequently did not preserve this claimed error for appellate review.

[7] Viceroy further claims that his in-court identification was so tained by a prior "show-up" procedure that it should have been excluded. While it is true that three police officers took Viceroy to the pawn shop where he was identified, the pawn broker, Frank Fennell, testified that he operated a clothing store in conjunction with the pawn shop, and that Viceroy had been a customer of the clothing store for some time. His identification at the trial was, therefore, independent of the confrontation at the pawn shop. Myers v. Commonwealth, Ky., 499 S.W.2d 277 (1973).

[8] Ben Thacker says that the court erred in denying him a separate trial. We have held on numerous occasions that the granting of a separate trial is one of the discretionary functions of the trial court, and this court will not upset its ruling unless there is a clear showing of prejudice. Edwards v. Commonwealth, Ky., 500 S.W. 2d 396 (1973). Thacker presented no such showing.

The judgment is reversed for further proceedings consistent with this opinion.

REED, C. J., and PALMORE, JONES, LUKOWSKY, STERNBERG and CLAYTON, JJ., sitting.

All concur, except CLAYTON, J., who dissents.

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CINCINNATI, OHIO 45202

October 24, 1985

TO : Judges Engel, Keith, Kennedy, Krupansky, Milburn, Guy, Brown, Unthank, Woods and Suhrheinrich

FROM : John P. Hehman, Clerk

RE : Oral Argument Calendar
December 2 through 13, 1985

Enclosed for your review and approval is the proposed oral argument calendar for December 2 through 13, 1985. Please phone in your oral approval and/or any changes to Marjorie Eliasen, Administrative Supervisor, as soon as possible.

cc: Judge Lively

MONDAY, DECEMBER 2, 1985 — COURTROOM #1 Room - 607

PARTIES	COUNSEL
85-3187 N.D. Ohio - Dowd, J.	
Jane Schulte, Plaintiff-Appellant,	George W. Spittal, Akron, Ohio
v.	
Joan Schmetzer, Defendant-Appellee.	Deborah A. Piperni, Columbus, Ohio

Plaintiff appeals the summary judgment for defendant in this civil rights action.

(15 Minutes Per Side)

84-1877 E.D. Michigan - Newblatt, J.	
Armand Almeida; Geraldine Almeida; Candace Cook; Larry Cook; Daniel Darrah; Ruth Darrah; Doris Suarez and Joseph Suarez, Plaintiffs-Appellants,	Deborah LaBelle, Detroit, Michigan
v.	
Paul E. Kindinger, Director of State of Michigan Department of Agriculture; John R. Block, Sec. United States Department of Agriculture; Harry C. Mussman, Dir. Aphis Program, U.S. Department of Agriculture; R. Max Peterson, Chief, U.S. Forest Service, U.S. Dept. of Agriculture; Glenn Wilkerson, Supt. Hartland Township, in their official capacities, Defendants-Appellees.	Henry J. Boynton, David W. Silver, Lansing, Michigan; Ellen Ritteman, Janice Kittel Mann, Detroit, Michigan

Plaintiffs appeal the order denying their motion for costs and attorney's fees under 42 U.S.C. §1988 and 28 U.S.C. §§2412(b) and (d).

(15 Minutes For Plaintiffs; 15 Minutes To Be Shared By Defendants)

85-5042 W.D. Tennessee - Gibbons, J.	
In Re: Lake Mohawk Estates, Inc., Debtor	
Winchester, Huggins, Charlton, Leake, Brown and Slater, Plaintiffs-Appellants,	David C. Shelton, Memphis, Tennessee
v.	
Darlys Faye Steed, Defendant-Appellee.	David C. Doten, Jr., Memphis, Tennessee

Plaintiffs appeal the order affirming the Bankruptcy Court's finding that no contract existed between the plaintiffs and defendant.

(15 Minutes Per Side)

85-5481 W.D. Kentucky - Allen, J.	
Thomas Lee Crum, Petitioner-Appellee.	C. McGehee Isaacs, Frankfort, Kentucky
v.	
Gene A. Scroggy, Warden, Respondent-Appellant,	David L. Armstrong, David W. Mossbrook, Frankfort, Kentucky

Respondent appeals from the district court's order granting the petition for a writ of habeas corpus.

(15 Minutes Per Side)

MONDAY, DECEMBER 2, 1985 COURTROOM #1 Room - 607

PARTIES COUNSEL

84-1876
85-1043

E.D. Michigan - Joiner, J.

Ann Marie Crobons, Individually;
Ann Marie Crobons, Personal Representative
of Gene Crobons, Deceased aka Eugene J. Crobons,
Plaintiff-Appellee,
Cross-Appellant,

Jack Radcliffe
Jackson, Michigan

(5)

v.

Wisconsin National Life Insurance Company,
Defendant-Appellant,
Cross-Appellee,

David G. Barnett
Bloomfield Hills, MI

Marvin K. Wyant, et al.,
Defendants,
Cross-Appellees.

Defendant and plaintiff appeal from partial summary judgment for the plaintiff in this insurance action.

(15 Minutes Per Side)

MONDAY, DEC. 2

TUESDAY, DECEMBER 3, 1985 — COURTROOM #1 Room - 607

PARTIES	COUNSEL

85-1339 — E.D. Michigan - DeMascio, J.

United States of America,
Plaintiff-Appellee,

Joel M. Shere
Brian M. Legghio
Detroit, Michigan

(1)

v.

Burl Glasgow,
Defendant-Appellant.

Kenneth R. Sasse (C.A.)
Detroit, Michigan

Defendant appeals from the judgment and sentence after his guilty plea to the charge of escape, 18 U.S.C. §4082(1).

(15 Minutes Per Side)

84-3898 — N.D. Ohio - Walinski, J.

Tony Arthur (Deceased), et al.,
Plaintiffs,

Peggy Arthur, on her behalf and on behalf of all others similarly situated; Janice Holloway, Barbara Richardson and Michael Webb,
Plaintiffs-Appellants,

Thomas A. Karol
Glenn G. Galbreath
Toledo, Ohio

v.

City of Toledo, Ohio; Douglas DeGood, official capacity as Mayor of City of Toledo; Gene Cook, William Copeland, Andrew Douglas, Sandra Isenberg, Ray Kest, Daniel McNamara, Raymond Nies, Leo Puccetti, in official capacities as Members of Toledo City Council; Walter Kane, official capacity City Manager of the City of Toledo; Eugene Kasper, official capacity as Director of Public Service City of Toledo, et al.,
Defendants-Appellees.

Charles A. Matuszynski
John D. Scouten
Robert G. Young
Toledo, Ohio

(2)

Plaintiffs appeal from the judgment for defendants in this class action filed under 42 U.S.C. §§1981, 1982 and 1983.

(15 Minutes Per Side)

85-1126 — E.D. Michigan - Taylor, J.

Frederick and Herrud, Inc.,
Plaintiff-Appellant,

Ronald S. Longhofer
Detroit, Michigan

v.

The Royal Bank of Canada,
Defendant-Appellee.

Robert E. Kinchen
James A. Samborn
Detroit, Michigan

(3)

Plaintiff appeals the order dismissing this action for negligence and breaches of fiduciary duty and express or implied contract on grounds of forum non conveniens and failure to join an indispensable party.

(15 Minutes Per Side)

85-5247 — W.D. Kentucky - Ballantine, J.

Joseph Odle, Jr.,
Plaintiff-Appellant,

Tamara Todd Cotton
Louisville, Kentucky

v.

Secretary of Health and Human Services,
Defendant-Appellee.

Ronald E. Meredith
James H. Barr
Louisville, Kentucky

(4)

Plaintiff appeals from a summary judgment affirming the Secretary's denial of social security disability benefits.

(15 Minutes Per Side)

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case to be submitted on briefs per Chambers #2 11-11-85

TUESDAY, DEC. 3

PARTIES COUNSEL

85-1095 W.D. Michigan - Miles, J.

D & W Food Centers, Inc.,
Plaintiff-Appellee,

v.

John R. Block, Secretary of the United States Department of Agriculture; United States of America,
Defendants-Appellants.

Leonard M. Hoffius
Douglas W. VanEssen
Grand Rapids, Michigan

Julie Ann Woods
Grand Rapids, Michigan
Virginia Strasser
Washington, D.C.

(5)

AMICUS CURIAE
National Assoc. of Meat Purveyors
James M. Goldberg
Washington, D.C.

AMICUS CURIAE
National Frozen Pizza Institute
Richard L. Frank
Dennis R. Johnson
Washington, D.C.

AMICUS CURIAE
Food Marketing Institute
Jenne M. Forch
Washington, D.C.

AMICUS CURIAE
National Grocers Assoc.
Thomas Wenning
Washington, D.C.

Defendants appeal from summary judgment for the plaintiffs in this action under the Federal Meat Inspection Act, 21 U.S.C. §606.
(15 Minutes Per Side)

TUESDAY, DECEMBER 3, 1985 — COURTROOM #2 Room - 822

PARTIES — COUNSEL

85-3819
85-3827 — N.D. Ohio - Dowd, J.

Robert E. Kennedy, Jr.;
Joyce Kennedy,
Plaintiffs-Appellees,
v.
City of Cleveland, et al.,
Defendants,

Theodore E. Meckler
Roger D. Heller
Cleveland, Ohio

William T. Hanton (85-3819),
Frank Wszelaki (85-3827),
Defendants-Appellants.

Irving Berger
Charles T. Riehl
Mary G. Balazs
Cleveland, Ohio

Defendants, chief of police and police officer, appeal from judgment in a 42 U.S.C. §1983 action, striking from the record their motions for reconsideration of earlier order denying them summary judgment.

(15 Minutes To Be Shared By Defendants; 15 Minutes For Plaintiff)

85-3232 — N.D. Ohio - Potter, J.

John Jackson,
Plaintiff-Appellant,
v.
Pepsi-Cola, Dr. Pepper Bottling Co.,
a division of RKO Bottlers of Toledo., Inc.,
Defendant-Appellee.

Dennis P. Strong
Gordon A. Senerius
Toledo, Ohio

Peter R. Casey, III
Toledo, Ohio

Plaintiff appeals, following this court's remand, from the judgment for defendant in this Title VII action for race discrimination.

(15 Minutes Per Side)

85-1378 — E.D. Michigan - Churchill, J.

United States of America,
Plaintiff-Appellee,
v.
Paul D. Bero,
Defendant-Appellant.

Michael Hluchaniuk
Bay City, Michigan

Kathleen M. O'Malley(CA)
Cleveland, Ohio

Defendant appeals the judgment and sentence after his guilty plea to using the mails to distribute pornography, 18 U.S.C. §2252(a)(1)(A).

(15 Minutes Per Side)

85-5061 — M.D. Tennessee - Wiseman, J.

Curley Lee Howse,
Petitioner-Appellant,
v.
Aileene Love, Warden,
Respondent-Appellee.

Michael L. James (C.A.)
Louisville, Kentucky

David M. Himmelreich
Nashville, Tennessee

Petitioner appeals from the order denying his petition for a writ of habeas corpus.

(15 Minutes Per Side)

85-5226 — W.D. Kentucky - Johnstone, J.

Mark A. Miller,
Plaintiff-Appellant,
v.
Secretary of Health and Human Services,
Defendant-Appellee.

Nan Calloway
Bowling Green, Kentucky
Mark D. Pierce
Paducah, Kentucky

Ronald E. Meredith
Michael F. Spalding
Louisville, Kentucky

Plaintiff appeals the judgment affirming the Secretary's denial of disability insurance benefits.

(15 Minutes Per Side)

WEDNESDAY, DECEMBER 4, 1985 COURTROOM #1 Room - 607

PARTIES	COUNSEL
85-5054	M.D. Tennessee - Wiseman, J.
United States of America, Plaintiff-Appellee, v. Nancy Garrett Carothers, Defendant-Appellant.	Joe Brown Derry Harper Nashville, Tennessee Kim L. Kirk (C.A.) Nashville, Tennessee

Defendant appeals her jury conviction for mail theft in violation of 18 U.S.C. §1708.

(15 Minutes Per Side)

83-1766	E.D. Michigan - Taylor, J.
United States of America, Plaintiff, and Wayne County Department of Health, Air Pollution Control Division, et al., Intervenors, Natural Resources Defense Council, Inc., Intervenor-Appellant, v. National Steel Corporation, Defendant-Appellee.	David G. Hawkins Washington, D.C. Douglas H. West Pamela J. Thompson Detroit, Michigan Clyde W. Armstrong Chester R. Babst, III Dean A. Calland Preston T. Scott Pittsburgh, Pennsylvania

Intervenor, Natural Resources Defense Council, appeals from the order denying attorney fees.

(15 Minutes Per Side)

85-5059	W.D. Kentucky - Johnstone, J.
Johnny Melvin Holland, Petitioner-Appellant, v. Gene A. Scroggy, Warden, Respondent-Appellee.	Trisha Zeller James (C.A.) Louisville, Kentucky David L. Armstrong David K. Martin Frankfort, Kentucky

Petitioner appeals from an order denying his petition for writ of habeas corpus filed under 28 U.S.C. §2254.

(15 Minutes Per Side)

85-1190	E.D. Michigan - DeMascio, J.
Superior Container Co., an Ohio Corporation, Plaintiff-Appellant, v. Walter Houston, Defendant, City of Detroit, a Michigan Municipal Corporation, Defendant-Appellee.	Frederick D. Steinhardt Southfield, Michigan Joseph N. Baltimore Detroit, Michigan

Plaintiff appeals the summary judgment for defendant in this civil rights action.

(15 Minutes Per Side)

WEDNESDAY, DECEMBER 4, 1985 COURTROOM #1 Room - 607

PAGE TWO

PARTIES	COUNSEL
85-5237 E.D. Kentucky - Wilhoit, J.	
Mary Salyers, Evelyn Reed, and Emil Trent, on behalf of themselves and all other persons similary situated, Plaintiffs-Appellants,	Thomas Yates William B. Mains Morehead, Kentucky
v.	
Secretary of Health and Human Services, Defendant-Appellee.	Louis DeFalaise Lexington, Kentucky Mary Beth McNamara Baltimore, Maryland Robert S. Greenspan Mark B. Stern Washington, D.C.

(5)

Plaintiffs appeals from the denial of a preliminary injunction in this civil action to review denial of social security benefits.

(15 Minutes Per Side)

WEDNESDAY, DEC. 4

THURSDAY, DECEMBER 5, 1985 COURTROOM #1 Room - 607

PARTIES	COUNSEL

85-5441 E.D. Tennessee - Jarvis, J.

United States of America,
Plaintiff-Appellee,
v.
Archie Larry Thomas,
Defendant-Appellant.

John W. Gill
Knoxville, Tennessee

Ronald P. Smith (C.A.)
Knoxville, Tennessee

Defendant appeals his conviction of probation violation for violating 18 U.S.C. §§1708 and 495, possessing a stolen U.S. treasury check and forging an endorsement.

(15 Minutes Per Side)

84-1794
85-1149 E.D. Michigan - Cook, J.

Michael Irving,
Petitioner-Appellant,
v.
Calvin Edwards; Bureau of Prisons,
Respondent-Appellee.

Nicholas J. Wittner
Michelle A. Fisher
Detroit, Michigan

Gary M. Maveal
Detroit, Michigan

Petitioner appeals the denial of his writ of habeas corpus under 28 U.S.C. §2241.

(15 Minutes Per Side)

84-3675 N.D. Ohio - White, J.

New York Times Company,
Plaintiff-Appellant,
v.
City of Lakewood,
Defendant-Appellee.

David A. Nelson
Frances Floriano Goins
Cleveland, Ohio

Henry B. Fischer
Frederick W. Whatley
John H. Gibbon
Cleveland, Ohio

Plaintiff appeals the judgment for defendant in this civil rights action challenging a city ordinance prohibiting the placing of newsboxes on city streets.

(15 Minutes Per Side)

84-3683
84-3722 N.D. Ohio - White, J.

Plain Dealer Publishing Co.,
Plaintiff-Appellant,
Cross-Appellee,
v.
City of Lakewood,
Defendant-Appellee,
Cross-Appellant.

James P. Garner
Richard R. Hollington
Karen B. Newborn
Cleveland, Ohio

Henry B. Fischer
John H. Gibbon
Frederick W. Whatley
Cleveland, Ohio

Plaintiff appeals from a judgment dismissing its civil rights action alleging restrictions on coin operated newspaper dispensing machines; defendant appeals from that part of the judgment ordering it to pay the costs of this action.

(15 Minutes Per Side)

85-1310 United States Tax Court

James W. Sisk,
Petitioner-Appellant,
v.
Commissioner of Internal Revenue,
Respondent-Appellee.

James W. Sisk (Pro Se)
Madison, Tennessee

Michael L. Paup
Carleton D. Powell
Gary D. Gray
Washington, D.C.

Defendant appeals the decision of the Tax Court in this deficiency action.

(To Be Submitted On Briefs)

THURSDAY, DECEMBER 5, 1985 COURTROOM #2 Room - 822

PARTIES	COUNSEL
84-3108 S.D. Ohio - Rice, J.	
Lucinda Turner, et al., Plaintiffs, Dorothy Willoweit; Herbert Willoweit; Fanny Finke; Mathew Finke; Inez Shubert; John Shubert; Gladys Tharp; and Harlan Tharp, Plaintiffs-Appellees, v. Margaret M. Heckler, Secretary of Health and Human Services, Defendant-Appellant, Patricia Barry, Director, Ohio Department of Human Services, Defendant-Appellee.	Michael Lang Dayton, Ohio Gerald F. Kaminski Jeri J. Simmons Dayton, Ohio David R. Smith Washington, D.C. Shelia P. Cooley Columbus, Ohio

Federal defendant appeals the preliminary injunction directing it to contribute federal financial participation with the Clark County Welfare Department while plaintiffs' benefits are being determined.

(15 Minutes For Appellant; 15 Minutes To Be Shared By Appellees)

85-1045 E.D. Michigan - Suhrheinrich, J.	
Charles R. Wilson; Eutha Wilson, Plaintiffs-Appellants, v. Allstate Insurance Company, a foreign insurance company, Defendant-Appellee.	Izetta F. Bright Lawrence C. Patrick, Jr. Detroit, Michigan Kate Brandimore Detroit, Michigan

Plaintiffs appeal the directed verdict for defendant in this diversity action alleging breach of an insurance contract.

(15 Minutes Per Side)

85-5337 85-5338 W.D. Kentucky - Allen, J.	
Gregory Arnold Murphy, Petitioner-Appellee, Cross-Appellant, v. Dewey Sowders, Superintendent, Respondent-Appellant, Cross-Appellee.	Frank W. Heft, Jr. Louisville, Kentucky David L. Armstrong Joseph R. Johnson Frankfort, Kentucky

Respondent appeals and petitioner cross appeals from a judgment granting a writ of habeas corpus.

(20 Minutes Per Side)

84-5658 M.D. Tennessee - Morton, J.	
Gwendolyn E. Jones, Plaintiff-Appellant, v. The Continental Corporation; The Continental Insurance Co.; Bud Meulemans, Nashville, District Manager; Paulette Winsett; Tommy Farmer; Carol Brown; Danny Reed; and Peggy Taylor, Defendants-Appellees.	Avon N. Williams, Jr. Russell Perkins Nashville, Tennessee C. Scott Jackson Thomas P. Kanaday, Jr. Cornelia A. Clark Nashville, Tennessee Lloyd Sutter Atlanta, Georgia

Plaintiff appeals the judgment, following a bench trial, for defendants in this action alleging racial discrimination under Title VII and 42 U.S.C. §1981.

(15 Minutes Per Side)

PARTIES / COUNSEL

85-5489 M.D. Tennessee - Morton, J.

Gwendolyn E. Jones,
Plaintiff-Appellant,

v.

The Continental Corporation;
Bud Meulemans and R. R. Barsanti,
Defendants-Appellees.

Avon N. Williams, Jr.
Richard H. Dinkins
Ronald W. McNutt
Nashville, Tennessee

(5)

Cornelia A. Clark
Nashville, Tennessee
Lloyd Sutter
Atlanta, Georgia

Plaintiff appeals the order granting attorney fees to the defendants in this employment discrimination action.

(15 Minutes Per Side)

FRIDAY, DECEMBER 6, 1985 — COURTROOM #1 Room - 607

PARTIES	COUNSEL

84-1850 — E.D. Michigan - Guy, J.

United States of America,
Plaintiff-Appellee,

v.

Eustratios Galas,
Defendant-Appellant.

Susan M. Daltuva
Maura D. Corrigan
Detroit, Michigan

Carl P. Ranno
Donald Lakind
Gregory Kudela
Birmingham, Michigan

(1)

Defendant appeals from his jury convictions of conspiracy to possess and possession with the intent to distribute heroin, and of unlawfully carrying a firearm during the commission of a felony in violation of 21 U.S.C. §846 and 841(a)(1) and 18 U.S.C. §924(c)(2).

(15 Minutes Per Side)

85-3132 — N.D. Ohio - Dowd, J.

Rufus O. Shaw,
Plaintiff-Appellant,

v.

Secretary of Health and Human Services,
Defendant-Appellee.

David T. Tarr
Canton, Ohio

Richard J. French
Michael Anne Johnson
Cleveland, Ohio

(2)

Plaintiff appeals the summary judgment affirming the Secretary's denial of social security disability insurance benefits.

(15 Minutes Per Side)

85-1321 — E.D. Michigan - Guy, J.

Joyce Ann Dixson,
Petitioner-Appellant,

v.

Denise Quarles; Frank J. Kelley,
Respondents-Appellees.

Kenneth M. Mogill
Detroit, Michigan

Edgar L. Church
Lansing, Michigan

(3)

Petitioner appeals the judgment denying her petition for a writ of habeas corpus under 28 U.S.C. §2254.

(15 Minutes Per Side)

84-3530
84-3531
84-3532 — S.D. Ohio - Spiegel, J.

Robert Merkel (84-3530),
Jacob M. Hughes (84-3531),
Michael Cain (84-3532),
Plaintiffs-Appellees,

v.

Scovill, Inc.,
Defendant-Appellant.

James B. Helmer, Jr.
Ann Lugbill
William E. Clements
Cincinnati, Ohio

Stanford G. Wilson
Robert L. Thompson
Atlanta, Georgia
Charles Weiner
Edward G. Marks
Cincinnati, Ohio

(4)

Defendant appeals the order awarding attorney's fees in these age discrimination actions.

(15 Minutes Per Side)

FRIDAY, DECEMBER 6, 1985 — COURTROOM #1 Room - 607

PARTIES	COUNSEL

83-3874
83-3875
83-3876
83-3893
83-3894
83-3895

S.D. Ohio - Spiegel, J.

Robert Merkel (83-3893),
Michael Cain (83-3894),
Jacob M. Hughes (83-3895),
Plaintiffs-Appellees,
Cross-Appellants.

v.

Scovill, Inc.,
Defendant-Appellant,
Cross-Appellee (83-3874/5/6).

James B. Helmer, Jr.
Ann Lugbill
William E. Clements
Cincinnati, Ohio

(5)

Edward G. Marks
Charles Weiner
Cincinnati, Ohio
Stanford G. Wilson
Robert L. Thompson
Atlanta, Georgia

AMICUS CURIAE - Ohio Chamber of Commerce
G. Robert King
Columbus, Ohio

Defendant appeals and plaintiffs cross appeal the judgment for plaintiffs from the order amending the judgment, following a jury trial, in this action for reinstatement, back pay and age discrimination in employment.

(15 Minutes Per Side)

HEARING DATE 12-3-85 TRANSMISSION DATE 11-14-85

COURTROOM NO. 2

( ) Lively, J.	( ) Kennedy, J.	( ) Krupansky, J.	( ) Nelson, J.	( ) Celebrezze, J.	(√) Unthank
( ) Engel, J.	( ) Martin, J.	( ) Wellford, J.	( ) Ryan, J.	( ) Peck, J.	
(√) Keith, J.	( ) Jones, J.	(√) Milburn, J.	( ) Weick, J.	( ) Brown, J.	
( ) Merritt, J.	( ) Contie, J.	( ) Guy, J.	( ) Edwards, J.	( ) En Banc	

CASE NO.	APPELLANT'S BRIEF	APPELLEE'S BRIEF	REPLY BRIEF	APPENDIX, ADM. REC. OR RECORD IN LIEU	AMICUS OR INTERVENOR BRIEF	PAPERS FOR THE COURT	INFORMATION (see key at bottom of page) A	B	C
85-5061				/					

KEY: [A] Additional copies of documents are to be furnished by counsel. They will be transmitted to you upon receipt.
[B] Some documents have not been filed with the Court. Upon filing, they will be transmitted to you.
[C] Other:

6CA-41

HEARING DATE 12/5/85

COURTROOM NO. 1

TRANSMISSION DATE 10-31-85

( ) Lively, J.	(✓) Kennedy, J.	( ) Krupansky, J.	( ) Edwards, J.	( ) En Banc
( ) Engel, J.	( ) Martin, J.	( ) Wellford, J.	( ) Celebrezze, J.	(✓) Unthank
(✓) Keith, J.	( ) Jones, J.	( ) Milburn, J.	( ) Peck, J.	
( ) Merritt, J.	( ) Contie, J.	( ) Weick, J.	( ) Brown, J.	

CASE NO.	APPELLANT'S BRIEF	APPELLEE'S BRIEF	REPLY BRIEF	APPENDIX, ADM. REC. OR RECORD IN LIEU	AMICUS OR INTERVENOR BRIEF	PAPERS FOR THE COURT	INFORMATION (see key at bottom of page) A	B	C
85-5441				1					

KEY: [A] Additional copies of documents are to be furnished by counsel. They will be transmitted to you upon receipt.
[B] Some documents have not been filed with the Court. Upon filing, they will be transmitted to you.
[C] Other: _____

6CA-48
10/82

HEARING DATE 12-2-85 TRANSMISSION DATE 10-29-85

COURTROOM NO. 1

( ) Lively, J.	( ) Kennedy, J.	( ) Krupansky, J.	( ) Edwards, J.	( ) En Banc
(√) Engel, J.	( ) Martin, J.	( ) Wellford, J.	( ) Celebrezze, J.	(√) Unthank
(√) Keith, J.	( ) Jones, J.	( ) Milburn, J.	( ) Peck, J.	
( ) Merritt, J.	( ) Contie, J.	( ) Weick, J.	( ) Brown, J.	

Judge Engel has briefs already in 85-5481 - postponed from 10/24/85 calendar

CASE NO.	APPELLANT'S BRIEF	APPELLEE'S BRIEF	REPLY BRIEF	APPENDIX, ADM. REC. OR RECORD IN LIEU	AMICUS OR INTERVENOR BRIEF	PAPERS FOR THE COURT	INFORMATION (see key at bottom of page) A	B	C
√85-3187	1	1		1					
84-1877 M	1	2		1					
√85-5042 U	1	1		1					
√85-5481 O	1	1		1					
√84-1876 85-1043 S	1	2		1					

KEY: [A] Additional copies of documents are to be furnished by counsel. They will be transmitted to you upon receipt.
[B] Some documents have not been filed with the Court. Upon filing, they will be transmitted to you.
[C] Other: _____

GCA-48
10/82

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202

JOHN P. HEHMAN
CLERK

TELEPHONE
(513) 684-2953
FTS 684-2953

October 29, 1985

Hon. G. Wix Unthank
United States District Judge
P.O. Box 278
Pikeville, Kentucky 41510

Dear Judge Unthank:

Enclosed are the briefs and appendices for the cases you will be hearing while in Cincinnati. The inventory list contains those items that have been filed with the court as of this date. If additional items are filed they will be forwarded to your resident chambers. New filings received three working days prior to oral argument will be delivered to your chambers in Cincinnati.

Should you have need of the trial record while you are in Cincinnati, please contact the Records Unit, Room 502.

When mailing items to your assigned chambers in Cincinnati do not use the room number of your chambers. Instead, please address your mail in the following manner:

Honorable G. Wix Unthank
c/o Office of the Clerk
United States Court of Appeals
for the Sixth Circuit
538 USPO & Courthouse Building
Cincinnati, Ohio 45202

Also, please use Special Delivery on your packages. Using this address and Special Delivery will insure that your mail will get to you without problem or delay.

If we can be of assistance while you are in Cincinnati, do not hesitate to contact us.

Very truly yours,
John P. Hehman, Clerk

Sandra Williams
Sandra Williams
Records Unit Supervisor

pe

HEARING DATE 12-3-85

COURTROOM NO. 2

TRANSMISSION DATE 10-29-85

( ) Lively, J.	( ) Kennedy, J.	( ) Krupansky, J.	( ) Edwards, J.	( ) En Banc
( ) Engel, J.	( ) Martin, J.	( ) Wellford, J.	( ) Celebrezze, J.	(√) Unthank
(√) Keith, J.	( ) Jones, J.	(√) Milburn, J.	( ) Peck, J.	
( ) Merritt, J.	( ) Contie, J.	( ) Weick, J.	( ) Brown, J.	

CASE NO.	APPELLANT'S BRIEF	APPELLEE'S BRIEF	REPLY BRIEF	APPENDIX, ADM. REC. OR RECORD IN LIEU	AMICUS OR INTERVENOR BRIEF	PAPERS FOR THE COURT	INFORMATION (see key at bottom of page) A	B	C
√ 85-3232	1	1	1	1					
√ 85-1378	1	1	1	1					
√ 85-5061	1	1	~~11-14-85~~	1 11-14-85				√	
M 85-1001	? 1	1		3					
√ 85-5226	1	1	1	1					

KEY: [A] Additional copies of documents are to be furnished by counsel. They will be transmitted to you upon receipt.

[B] Some documents have not been filed with the Court. Upon filing, they will be transmitted to you.

[C] Other: _____

6CA-48

HEARING DATE 12-5-85 TRANSMISSION DATE 10-29-85

COURTROOM NO. 1

( ) Lively, J.	(√) Kennedy, J.	( ) Krupansky, J.	( ) Edwards, J.	( ) En Banc
( ) Engel, J.	( ) Martin, J.	( ) Wellford, J.	( ) Celebrezze, J.	(√) Unthank
(√) Keith, J.	( ) Jones, J.	( ) Milburn, J.	( ) Peck, J.	
( ) Merritt, J.	( ) Contie, J.	( ) Weick, J.	( ) Brown, J.	

CASE NO.	APPELLANT'S BRIEF	APPELLEE'S BRIEF	REPLY BRIEF	APPENDIX, ADM. REC. OR RECORD IN LIEU	AMICUS OR INTERVENOR BRIEF	PAPERS FOR THE COURT	INFORMATION (see key at bottom of page) A	B	C
√85-5441 U	1	1						√	
~~84-1944~~ 85-1149 U	2	1	1	1					
84-3675 M	1	1	1	4					
84-3683/3722 M	1	2	1	same appendix as 84-3675 above					
84-1585	1	1	1	4	postponed + Removed from Calendar				

KEY: [A] Additional copies of documents are to be furnished by counsel. They will be transmitted to you upon receipt.
[B] Some documents have not been filed with the Court. Upon filing, they will be transmitted to you.
[C] Other: _____

6CA-48

RETURN IMMEDIATELY TO CLERK'S OFFICE
ATTN: CALENDAR COORDINATOR

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

CASE ASSIGNMENT REPORT

HEARING DATE: Tuesday, December 3, 1985 COURTROOM # 2

PANEL: Judges Keith, Milburn and Unthank

CASE NO.	CASE TITLE	STUDY & OPINION	PER CURIAM	CHECK IF RULE 19	WRITING JUDGE
85-3232	John Jackson v. Pepsi-Cola Dr. Pepper Bottling Co.	X			Keith
85-1378	United States of America v. Paul D. Bero			X	
85-5061	Curley Lee Howse v. Aileene Love			X	
85-5226	Mark A. Miller v. Secretary of Health and Human Services		x Unpub.		Keith

Damon J. Keith (Presiding Judge)

December 3, 1985
(Date)

Clerk sends copies to: Panel Judges
Chief Judge

lowing remand. This court does not reach the merits of the plaintiffs' claims.



Ronald E. STEWART, et al., Plaintiffs-Appellees,

v.

James A. RHODES, et al., Defendants-Appellants.

No. 80-3662.

United States Court of Appeals, Sixth Circuit.

Argued June 17, 1981.

Decided Aug. 12, 1981.

Rehearing and Rehearing En Banc Denied Sept. 29, 1981.

In action by several inmates of a correctional facility on behalf of all persons incarcerated at the prison, the United States District Court for the Southern District of Ohio, Robert M. Duncan, J., after entry of a consent decree, granted attorney fees to plaintiffs in the amount of $117,020.34 for approximately 1,850 hours of work. Defendants appealed the award of fees. The Court of Appeals held that the District Court, having held an extensive hearing in which it addressed all of the issues involved in the award, was not shown to have abused its discretion.

Affirmed.

Weick, Circuit Judge, dissented and filed opinion.

Civil Rights ⇐13.17

In action commenced by several prison inmates on behalf of all persons incarcerated at the prison, charging unlawful segregation by race and use of physical restraints, district court, having held extensive hearing in which it addressed all issues involved in determining appropriateness of awards of attorney fees was not shown to have abused discretion in awarding $117,020.34 for approximately 1,850 hours of work.

Allen Adler, Asst. Atty. Gen., Columbus, Ohio, for defendants-appellants.

Jean P. Kamp, Legal Aid Society of Columbus, Alvin J. McKenna/D. Michael Miller, Columbus, Ohio, for plaintiffs-appellees.

Before EDWARDS, Chief Judge, and WEICK and KEITH, Circuit Judges.

PER CURIAM.

This action was commenced by several inmates at the Columbus Correctional Facility ("CCF") on behalf of all persons incarcerated at the prison. The inmates charged CCF prison officials with: (1) the unlawful segregation of prisoners by race, and (2) the use of certain types of physical restraints on the inmates. The complainants sought declaratory and injunctive relief against the CCF prison officials for the alleged unconstitutional conditions of confinement.

On July 13, 1979, the district court issued a preliminary injunction against the further use of physical restraints and the segregation of prisoners by race. CCF then perfected an interlocutory appeal of the injunction to this court.

In December 1979, before this court entered judgment on the appeal of the preliminary injunction, the parties signed a Consent Decree which incorporated the provisions of the July 13, 1979 order. After entry of the Consent Decree, the attorneys representing the plaintiffs moved for an award of attorney's fees. The district court granted fees in the amount of $117,020.34 for approximately 1850 hours of work. The defendants then appealed the award of the fees to this court.

Both appeals, the appeal of the preliminary injunction and the appeal of the award of attorney's fees, were consolidated for the purpose of oral argument. This court dismissed as moot the appeal of the preliminary injunction in our order issued from the bench on June 17, 1980.

We now hold that the district court's award of attorney's fees did not constitute an abuse of discretion. The defendants ap-

A district court may not properly find that the defendant did not promote the plaintiff because of her race where it was undisputed but that the position duty was to oversee the work of the certain monitors on the floor, the plaintiff had no experience in the lower positions, and the persons promoted did have such experience. Nichelson, 752 F.2d at 1158-59.

This allocation of the respective burdens may also be applied in the adjudication of race discrimination claims arising under 42 U.S.C. Section 1981. Grubb, 741 F.2d at 1493.

The findings of the trial court on this issue are subject to review under the clearly erroneous standard of Fed. R. Civ. P. 52(a). Grubb. W.A. Foote Memorial Hospital, 741 F.2d 1486 (6th Cir. 1985).

DISCUSSION

As I stated previously, in the General Remarks section, I believe that the new decision of the district court not to reopen the evidence and entering a judgment for the defendant company is not clearly erroneous.

My feeling as to the promotion decision is that there is sufficient evidence of record for the court to determine that the decision was not based on racial considerations, but was actually based on an examination of the types of experience possessed by both candidates and also as to management style (i.e., Johnson believed that Jackson followed the old Starsky approach too closely).

The feeling about the retaliation charge decision by the district court is much the same, although just a bit less strong. This might be an area you might want to question counsel on during oral argument.

Clay AMBROSE, Plaintiff-Appellant,

v.

Neil WELCH, George Wilson, Stephen Smith, Dewey Sowders, J.B. Owens, F. Richardsville, Sidney McDaniels and Robert Hodge, Defendants-Appellees.

No. 82-5575.

United States Court of Appeals, Sixth Circuit.

Argued Feb. 22, 1984.

Decided March 21, 1984.

Prisoner appealed from order of a magistrate of the United States District Court for the Western District of Kentucky, W. David King, Magistrate, denying him leave to proceed in forma pauperis unless he paid a partial filing fee. The Court of Appeals held that it was without jurisdiction to review order because there was no clear and unambiguous statement in record indicating that the parties consented to exercise of plenary jurisdiction by the magistrate, and thus prisoner was required to seek review of magistrate's order in District Court before he could appeal to Court of Appeals.

Appeal dismissed.

1. Federal Courts ⇐542

Court of Appeals may raise issue of appealability sua sponte at any point in proceedings.

2. Federal Courts ⇐31

Lack of subject-matter jurisdiction is a nonwaivable defect that may be raised at any time to justify dismissal of a pending action.

3. United States Magistrates ⇐5

Unless requirements for plenary jurisdiction are satisfied, Court of Appeals is without jurisdiction to review a magistrate's order unless parties have sought review in district court. 28 U.S.C.A. §§ 631 et seq., 636(c)(1, 3).

4. United States Magistrates ⇐5

Court of Appeals lacked jurisdiction to review order of magistrate denying a prisoner leave to proceed in forma pauperis unless he paid partial filing fee, where there was no clear and unambiguous statement in the record indicating that parties consented to exercise of plenary jurisdiction by the magistrate, and thus prisoner was required to seek review of magistrate's order in district court before he could appeal to Court of Appeals. 28 U.S.C.A. §§ 631 et seq., 636(c)(1, 3).

David Murrell (argued), Louisville, Ky., for plaintiff-appellant.

Steven Beshear, Atty. Gen. of Kentucky, Barbara W. Jones (argued), Linda G. Cooper, David A. Sexton, Frankfort, Ky., for defendants-appellees.

Before LIVELY, Chief Judge, JONES, Circuit Judge, and PECK, Senior Circuit Judge.

PER CURIAM.

This case is before the Court upon Clay Ambrose's appeal from an order of the United States Magistrate denying him leave to proceed in forma pauperis unless he paid a partial filing fee. Upon consideration of the briefs and oral argument we dismiss this appeal for lack of jurisdiction.

Clay Ambrose, the plaintiff-appellant, is a prisoner at the Kentucky State Penitentiary. His complaint alleged that his life was placed in danger because of the negligence of three guards, subsequently causing him to sustain physical and emotional injuries, and that he was denied necessary medical treatment for his injuries.

Ambrose first attempted to file his civil rights action on or about December 23, 1981, at which time he also filed a motion for leave to proceed in forma pauperis. After reviewing a certified copy of the account sheets for Ambrose's institutional account, the Magistrate determined that he had sufficient financial resources to pay part of the filing fee. Accordingly, he en-

tered an order requiring Ambrose to pay $44.79 to partially cover the cost of filing the action. Upon payment of this amount, Ambrose would be permitted to proceed as a pauper. The order also provided that Ambrose could inform the court of any special circumstances which would warrant his total or partial exemption from the requirement to pay this amount.

Instead of appealing from this order, or attempting to comply therewith, Ambrose attempted to refile his complaint with the same motion for leave to proceed in forma pauperis. The Magistrate again denied leave unless and until Ambrose complied with the previous order requiring him to pay part of the filing fee.

Ambrose attempted to comply with the magistrate's order by submitting an affidavit setting forth special circumstances to relieve him of having to pay the partial filing fee. The affidavit alleged for the first time that Ambrose contributed to the support of a woman and her son. The Magistrate found this assertion "unworthy of belief" and denied the motion because the affidavit was directly inconsistent with his previous sworn declarations that he contributed no funds to the support of anyone.

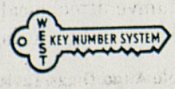
Ambrose attempted to refile his action for a third time, and again sought leave to proceed in forma pauperis. This time his declaration in support of his motion admitted that he contributed nothing to anyone else's support, but maintained that he had only $1.17 in his institutional account. The Magistrate again denied the motion and directed Ambrose to pay the partial filing fee. It should be noted that even though Ambrose alleged that he had only $1.17 in his account, he had not complied with the Magistrate's original order which required him to show the amount, payee and purpose of withdrawals from his account. From this order Ambrose appealed directly to this Court.

[1, 2] The parties to this action failed to raise before this Court the issue of the appealability of the Magistrate's order. It is well settled, however, that we may raise the issue *sua sponte* at any point in the proceedings. *See, e.g., Alexander v. Aero Lodge No. 735, International Association of Machinists*, 565 F.2d 1364, 1370 (6th Cir.1977), *cert. denied*, 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d 787 (1978); *Miller v. United States*, 403 F.2d 77, 78 (2d Cir. 1968). The lack of subject matter jurisdiction is a nonwaivable defect that may be raised at any time to justify dismissal of a pending action. *Id.*

Federal magistrates are empowered by the Federal Magistrates Act, 28 U.S.C. § 631 *et seq.* to exercise plenary civil jurisdiction when so designated by the district courts in which they serve and when the parties consent to the exercise of such jurisdiction. 28 U.S.C. § 636(c)(1). This plenary jurisdiction includes the authority to enter final judgment and, if the statutory requirements are met, either party may appeal this judgment directly to the court of appeals without seeking review in the district court. 28 U.S.C. § 636(c)(3).

[3, 4] Conversely, if these requirements are not satisfied, we are without jurisdiction to review the magistrate's order unless the parties have sought review in the district court. *United States v. Haley*, 541 F.2d 678 (8th Cir.1974). Our review of the record leads us to conclude that we lack jurisdiction to review the Magistrate's order because there is no clear and unambiguous statement in the record indicating that the parties consented to the exercise of plenary jurisdiction by the Magistrate. *Alaniz v. California Processors, Inc.*, 690 F.2d 717, 720 (9th Cir.1982). We decline to view the parties' conduct throughout the proceedings as supplying the necessary consent. *Id.* Thus, Ambrose must seek review of the Magistrate's order in the district court before he can appeal to this Court.

Accordingly, this appeal is DISMISSED for lack of appellate jurisdiction.



warrant and thus should not have been admitted into evidence.

Delay in the filing of charges in the probation revocation context has been subjected to due process scrutiny by this court. *United States v. Tyler*, 605 F.2d 851 (5th Cir. 1979). In *Tyler* this court found that claimed violations of probation which were known to the probation officer for over two years before filing could not be used in a probation revocation proceeding as the lengthy delay was fundamentally unfair to the probationer. *Id.* at 853.

[7] The case before us, however, is factually distinguishable and materially different from *Tyler*. Here, the charges filed in April of 1980 were based largely on events occurring in March, 1980. Thus, there was no initial delay in the filing of charges as occurred in *Tyler*.[5] Furthermore, Officer McGowan's petition to withdraw the warrant was not based upon any motive to delay the filing of charges or forgive the violations, but a desire to utilize the rehabilitation process rather than abandon it. Record on Appeal 7.

The withdrawal and refiling of charges more closely resembles a fact pattern examined and upheld as fair by the Court of Appeals for the Eighth Circuit in which the refiling occurred after attempts at rehabilitation failed. *Kartman v. Parratt*, 535 F.2d 450, 455 (8th Cir. 1976). The factual distinction between *Tyler* and *Kartman* was noted by this court when it stated:

> Factually Kartman is distinguishable in that the first revocation petition was withdrawn rather than proceeding to adjudication and Kartman's probation officer, unlike Tyler's, apparently did not know of the grounds alleged in the second petition when he filed the first one. Additionally, the delay between the oldest violation charged against Kartman and his revocation hearing was less than 10 months. The corresponding delay in the present case was two years and three months.

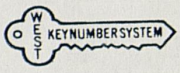
5. The allegation based on the state theft charge was premised on the March 12, 1980 conviction. The arrest and failure to notify allegations were based on an arrest occurring in March of 1980. The record does not indicate how long Officer McGowan had been aware of any employment problems but there is no evidence that he had delayed in filing this charge.

United States v. Tyler, supra at 853, n.3. Here the additional conviction of the possession of Preludin demonstrated that the further attempt at rehabilitation had not succeeded. The delay in the case before us was seven months in contrast to over two years in *Tyler*. Officer McGowan additionally investigated Brown's employment status as of December 1980. Hearing Transcript, 9, 10, Government Exhibits 4, 5. The charge of failure to secure and maintain employment, while filed initially in April, 1980, was also a current valid charge as of December, 1980. Brown has not demonstrated that he was prejudiced by, or that any fundamental unfairness occurred as a result of, the refiling.

[8] Finally, Brown, without supporting facts, concludes that because Judge Sanders rather than Judge Hughes presided at the revocation hearing, the hearing was somehow unfair. The claim is frivolous.

The order of the district court revoking probation and sentencing Brown to two years imprisonment is affirmed.

AFFIRMED.



Donald and Ronald HILL,
Plaintiffs-Appellants,

v.

The DURIRON COMPANY, INC.,
Defendant-Appellee.

No. 79–3635.

United States Court of Appeals,
Sixth Circuit.

Argued March 30, 1981.

Decided Aug. 12, 1981.

Action was instituted for alleged discriminatory discharge. The United States District Court for the Southern District of

Ohio, Carl B. Rubin, Chief Judge, entered judgment in favor of defendant on ground that findings of magistrate appointed as special master were not clearly erroneous, and plaintiffs appealed. The Court of Appeals, Lively, Circuit Judge, held that where district court, when attempting to correct its earlier referral order and designate magistrate to serve as a special master, continued to cite referral statute which clearly required de novo review of all findings and recommendations to which there were objections, and steps, including a complete trial before magistrate and filing of a detailed report with findings and recommendations, were taken with consent of parties as manifested by their failure to object to either order of reference or to any proceedings before magistrate until after his report was filed with district court, right to de novo review of referral was not waived, and since reference was to be treated as one to hear and recommend a decision on a dispositive motion, a de novo review of master's findings and recommendations by district court was required.

Vacated and remanded.

1. Federal Civil Procedure ⇐1877

First order of reference stating that reference of action for reinstatement and back pay for alleged discriminatory discharge from employment was made pursuant to statute permitting referrals to a magistrate to hear and determine pretrial matters and to conduct hearings and to submit to court those findings of fact and recommendations for disposition of certain dispositive motions was improper where purpose of order of reference was a trial and statutory provision relied upon by court did not permit a reference for that purpose. 28 U.S.C.A. § 636(b)(1)(A, B).

2. Federal Civil Procedure ⇐1877

Intent of district court was to refer discriminatory employment case to magistrate, as a special master, for purpose of conducting a trial, making findings, and submitting a proposed disposition of case to district court and, though there was showing of an exceptional condition as required for reference of a nonjury case to a special master, requirement could be disregarded on ground that magistrate was designated to serve as a special master upon consent of parties as manifested by their failure to object to either order of reference or to any proceedings before magistrate until after his report was filed with district court. 28 U.S.C.A. § 636(b)(1)(B), (b)(2); Fed.Rules Civ.Proc. Rules 53, 53(b), 28 U.S.C.A.

3. Federal Civil Procedure ⇐1875

A party who objects to a reference to a magistrate must ordinarily make his objections known either at time of reference or soon thereafter. 28 U.S.C.A. § 636(b)(1)(B), (b)(2); Fed.Rules Civ.Proc. Rules 53, 53(b), 28 U.S.C.A.

4. Federal Civil Procedure ⇐1872

The purpose of most referrals will be to enable a magistrate to assist a judge by passing on procedural matters which arise during the preliminary phases of an action, but where there is a reference of dispositive pretrial matters to a magistrate, a de novo determination of matters objected to by one of the parties is required. 28 U.S.C.A. § 636(b)(1)(B), (b)(2); Fed.Rules Civ.Proc. Rules 53, 53(b), 28 U.S.C.A.

5. Federal Civil Procedure ⇐1899

Statute permitting assignment to magistrates of such additional duties as are not inconsistent with the Constitution and laws of the United States, if read as authorizing referral of dispositive matters to a magistrate, carries with it a requirement of a de novo determination by district court of portions of magistrate's findings to which a party objects. 28 U.S.C.A. § 636(b)(3).

6. Federal Civil Procedure ⇐1896

Where district court, when attempting to correct its earlier referral order and designate magistrate to serve as a special master, continued to cite referral statute which clearly required de novo review of all findings and recommendations to which there were objections, and steps, including a complete trial before magistrate and filing of a detailed report with findings and recommendations, were taken with consent of parties as manifested by their failure to object to either order of reference or to any proceedings before magistrate until after his report was filed with district court,

right to de novo review of referral was not waived. 28 U.S.C.A. § 636(b)(1)(B, C), (b)(2); Fed.Rules Civ.Proc. Rule 53(e)(2), 28 U.S.C.A.

7. Federal Civil Procedure ⇐1896

Where reference of discriminatory employment case to magistrate, as a special master, for purpose of conducting a trial, making findings and submitting a proposed disposition of case to district court was one to hear and recommend a decision on a dispositive motion, a de novo review by district court of findings and recommendations of magistrate was required. 28 U.S.C.A. § 636(b)(1)(B, C), (b)(2); Fed.Rules Civ. Proc. Rule 53(e)(2), 28 U.S.C.A.

8. Federal Civil Procedure ⇐1899

A district court may not adopt a magistrate's findings and recommendations based solely upon a review of the findings themselves and the pleadings when a party has specifically objected to the magistrate's treatment of the evidence produced at the hearing and must review at least portions of the transcript in order to rule on the objections. 28 U.S.C.A. § 636(b)(1)(B, C), (b)(2); Fed.Rules Civ.Proc. Rule 53(e)(2), 28 U.S.C.A.

Alexander M. Spater, Columbus, Ohio, for plaintiffs-appellants.

Robert J. Brown, Smith & Schnacke, Dayton, Ohio, for defendant-appellee.

Before EDWARDS, Chief Judge, and LIVELY and JONES, Circuit Judges.

LIVELY, Circuit Judge.

This is an action seeking reinstatement and back pay for the alleged discriminatory discharge from employment of the two plaintiffs who are black. The action was brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. After the defendant had answered and a preliminary pretrial order had been entered the district court entered the following order:

> This matter is before the Court for a determination of appropriate reference to the United States Magistrate.
>
> The matter for reference involves the necessity to conduct hearings, including evidentiary hearings, and the submission of proposed findings of fact and recommendations for disposition.
>
> In accordance with 28 U.S.C. § 636(b)(1)B this matter is hereby referred to Robert A. Steinberg, United States Magistrate.

Some six weeks later the district court entered a second order of reference as follows:

ORDER OF REFERENCE

> Pursuant to 28 U.S.C. § 636(b)(1)(B) and § 1.5(1) of General Order IX of this Court, Robert A. Steinberg, United States Magistrate, is hereby appointed as Special Master in this action.
>
> The United States Magistrate is directed to hold hearings, receive evidence and report to the Court his recommended decision in this action. In the performance of this function, the United States Magistrate shall have all powers set forth in Rule 53(c) of the Federal Rules of Civil Procedure.
>
> A transcript of the proceedings and of the evidence and the original exhibits need not be filed with the Magistrate's report.

The citations of 28 U.S.C. § 636 in the orders refer to the 1976 amendments to the Federal Magistrates Act (the Act), Pub.L. 94–577.[1]

1. Section 636(b) (1976) is involved in this case: 28 U.S.C. § 636(b)(1) Notwithstanding any provision of law to the contrary—

> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate to conduct hearings, including eviden-

Shortly after the second order of reference was entered the defendant made a motion for partial summary judgment, contending that the plaintiffs had failed to comply with jurisdictional prerequisites for a suit based on Title VII of the 1964 Act. After receiving memoranda in support of and in opposition to this motion, Magistrate Steinberg filed a report and recommendation containing findings of fact and conclusions of law. The magistrate concluded that the court lacked jurisdiction to hear the Title VII action of Ronald Hill because it was filed out of time. The magistrate recommended that partial summary judgment be granted the defendant with respect to the Title VII claim of Ronald Hill and that it be denied with respect to that claim of Donald Hill. The district judge to whom the case was assigned and who had made the reference to the magistrate then entered an order adopting the report and recommendation of the magistrate in full, noting that no objections had been filed thereto.

After entering a final pretrial order, the magistrate permitted the plaintiffs to amend their complaint to set forth a claim that their discharge had constituted an act of retaliation based on race against the plaintiff Ronald Hill. A full hearing on the merits was then held before the magistrate. At no time in the one year between the first order of reference to Magistrate Steinberg and the trial or during the three and one-half months between the trial and the filing of the magistrate's report and recommended decision did the plaintiffs object in any manner to the orders of reference or the proceedings before the magistrate.

The report and recommendation of the magistrate, filed on May 10, 1979, contained 24 findings of fact, six conclusions of law and a recommendation that judgment be entered in favor of the defendant. The plaintiffs filed a motion to review the magistrate's findings. The motion contained objections to the report and a request that plaintiffs be given leave to file supplemental objections after they received a transcript of the hearing. This motion was filed ten days after notice of the filing of the magistrate's report as required by that notice. In their motion and supporting memorandum the plaintiffs contested the jurisdiction of the magistrate, contending that 28 U.S.C. § 636(b)(1)(B) under which the first order of reference was made does not permit references to a magistrate for the purpose of trial. They also contended that the second order of reference was invalid as an attempt to delegate "judicial decision making." Further, the plaintiffs argued that the district court was required to make a de novo determination with respect to their claim that the reasons given by the defendant for discharging them were pretextual. In a separate motion the plaintiffs stated that their objections to the magistrate's report and recommended deci-

tiary 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.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within 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. 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.

(2) 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.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

sion were based on the fact that he had ignored substantial parts of the record in dealing with the question of whether the plaintiffs were treated differently from white employees. The plaintiffs asserted that review of the magistrate's report by the district court would be impossible without a transcript of the hearing.

On June 13, 1978 the district court entered the following final order:

> This matter is before the Court pursuant to reference to the United States Magistrate as a special master pursuant to 28 U.S.C. § 636(b)(2), Rule 53 of the Federal Rules of Civil Procedure, and § 1.5(1) of Western Division Rule No. 1 in the United States District Court for the Southern District of Ohio. Pursuant to such reference the Magistrate held hearings at which evidence and testimony were presented and filed with this Court Findings of Fact and Recommendations for Disposition.
>
> Rule 53(e)(2) contains the following:
>
> In an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous.
>
> The term "clearly erroneous" has been defined by the Supreme Court of the United States in *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948) as follows:
>
> A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.
>
> After a review of the comprehensive findings of the Magistrate, after review of the pleadings in this matter, and after hearing in open court, this Court does determine that the Findings of Fact are not clearly erroneous, and are hereby accepted.
>
> Pursuant to the Recommendations of the Master, judgment is hereby entered in favor of the defendant.

The record does not contain a transcript of the hearing before the district court referred to in this order.

[1] On appeal the plaintiffs contend that the reference to the magistrate was improper and therefore "null and void." The two orders of reference and the statement concerning reference in the final order of the district court are not consistent. The first order of reference stated that it was made pursuant to 28 U.S.C. § 636(b)(1)(B) "to conduct hearings, including evidentiary hearings, and [for] the submission of proposed findings of fact and recommendations for disposition." Section 636(b)(1)(A) permits referral to a magistrate to hear and determine pretrial matters. Section 636(b)(1)(B) permits referral to a magistrate to conduct hearings and to submit to the court proposed findings of fact and recommendations for the disposition of certain dispositive motions, applications for post trial relief in criminal cases and prisoner petitions challenging conditions of confinement. There is no provision in § 636(b)(1) for referring a case to a magistrate for trial on the merits. Thus the reference was improper since the purpose of the referral was a trial and the provision of the Magistrates Act relied upon by the court does not permit a reference for this purpose.

The second order of reference again erroneously referred to § 636(b)(1)(B) in appointing the magistrate a special master in the action. Section 636(b)(2) is the provision which authorizes the designation of a magistrate to serve as a special master. However, in this order the district court also cited § 1.5(1) of its local General Order IX, which provides:

> **1.5 SPECIAL MASTER REFERENCES AND TRIALS BY CONSENT**
>
> (1) A magistrate may serve as a special master subject to the procedures and limitations of 28 U.S.C. § 636(b)(2) and rule 53 of the Federal Rules of Civil Procedure.

In the final order accepting the recommendations of the magistrate the district court corrected its erroneous citation of § 636(b)(1)(B) and stated that the reference to the magistrate as a special master was made pursuant to § 636(b)(2), the provision which does authorize such a reference and designation.

[2] Considering the three orders together we believe the intention of the district court was to refer the case to the magistrate, as a special master, for the purpose of conducting a trial, making findings and submitting a proposed disposition of the case to the district court. This intent should have been apparent to the parties after entry of the second order of reference despite the erroneous citation of § 636(b)(1)(B). There was no showing of an exceptional condition as required by Rule 53(b), Fed.R.Civ.P.,[2] for reference of a non-jury case to a special master. This requirement may be disregarded when a magistrate is designated pursuant to § 636(b)(2) to serve as a special master "upon consent of the parties." In this case the district court neither sought nor obtained the explicit consent of the parties.

The plaintiffs argue that since there was no finding of an exceptional condition and the parties did not consent, the attempt to designate the magistrate to serve as special master in this case was a nullity. The defendant contends that the plaintiffs waived the consent requirement of § 636(b)(2) by failing to object and acquiescing in the activities of the magistrate for 16 months.

[3] Ordinarily a party who objects to a reference to a magistrate must make his objections known either at the time of reference or soon thereafter. *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352, 354 (5th Cir. 1980); *Cruz v. Hauck*, 515 F.2d 322, 326, 330 (5th Cir. 1975), *cert. denied*, 424 U.S. 917, 96 S.Ct. 1118, 47 L.Ed.2d 322 (1976); *Avery Products Corp. v. Morgan Adhesives Co.*, 496 F.2d 254, 256 n.2 (6th Cir. 1974). *Cf. United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981). To permit such objections after the magistrate makes his findings and recommendations would certainly not serve the cause of judicial economy. Parties who did not prevail before the magistrate would routinely seek to have the reference set aside for reasons that either could have been corrected or would have stopped the proceedings if promptly brought to the referring court's attention.

The waiver question in the present case is complicated by the fact that a different standard of review is required following referrals under § 636(b)(1)(B) than under § 636(b)(2). The findings of fact of a special master must be accepted by the district court unless they are clearly erroneous. Rule 53(e)(2), Fed.R.Civ.P. On the other hand, where a magistrate appointed pursuant to § 636(b)(1)(B) files proposed findings and recommendations and a party files timely objections thereto, 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." Section 636(b)(1)(C).

[4] This court dealt with the 1976 amendments to the Act in *Banks v. United States*, 614 F.2d 95 (6th Cir. 1980). In the course of concluding that a magistrate may not conduct final probation revocation hearings the court held that a referral to a magistrate under § 636(b)(1)(B) with directions to conduct evidentiary hearings and to submit findings and recommendations for disposition carries with it the right to a de novo review by the district judge. *Id.* at 96. The court found that Congress had expressly limited the matters which may be referred to magistrates and had varied the standard of district court review. *Id.* at 97. In referring matters to magistrates the district courts are bound by the limitations which Congress has placed on this practice. The legislative history of the 1976 amendments makes it clear that the primary purpose of expanding the role of magistrates was to free district judges from the necessity of dealing personally with every pretrial issue which might arise in a given case. See statement from H.R.No. 94–1609 quoted in note 6 to the *Banks* opinion. 614 F.2d at 97. The amendments ap-

2. Rule 53

(b) **Reference.** A reference to a master shall be the exception and not the rule. In actions to be tried by jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

pear to contemplate that the purpose of most referrals will be to enable a magistrate to assist a judge by passing on procedural matters which arise during the preliminary phases of an action. However, where there is a reference of a dispositive pretrial matter to a magistrate, the Act requires de novo determination of matters objected to by one of the parties. 28 U.S.C. § 636(b)(1)(B) and (C).

[5] The defendant also argues that the reference in the present case was valid under § 636(b)(3) which permits assignment to magistrates of "such additional duties as are not inconsistent with the Constitution and laws of the United States." Again, relying on legislative history of the 1976 amendments, this court has construed § 636(b)(3), absent consent, as applying only to procedural and administrative matters. *Banks, supra*, 614 F.2d at 97. See also *Hill v. Jenkins*, 603 F.2d 1256, 1260 (7th Cir. 1979) (Swygert, J., concurring). The Fifth Circuit has held that if § 636(b)(3) may be read to authorize referral of dispositive matters to a magistrate such reference "carries with it a requirement of 'de novo determination' by the district judge of the portions of the magistrate's findings to which a party objects." *Calderon, supra*, 630 F.2d at 355.

[6] The confusion engendered by the inconsistencies in the orders of the district court has created a dilemma for this court. Even when attempting to correct its earlier order and designate the magistrate to serve as a special master, the district court continued to cite § 636(b)(1)(B) which clearly requires de novo review of all findings and recommendations to which there are objections. There has been a complete trial before the magistrate and he has filed a detailed report with findings and recommendations. We conclude that these steps were taken with consent of the parties, manifested by their failure to object to either order of reference or to any proceedings before the magistrate until after his report was filed with the district court. What we cannot infer, under the facts of this case, is a knowing waiver of the right to de novo review of a referral pursuant to § 636(b)(1)(B), twice cited by the district court. See *Muhich v. Allen*, 603 F.2d 1247, 1252 (7th Cir. 1979); *Calderon, supra*, 630 F.2d at 355–56.

[7] For the purpose of determining the standard of review then, we treat the reference in the present case as one to hear and recommend a decision on a dispositive motion. The legislative history makes clear that when such motions are referred to a magistrate a de novo determination by the judge is required:

> (2) The second amendment emphasizes and clarifies when a de novo determination must be made by the judge. The Committee believed that the S. 1283 was not clear with regard to the type of review afforded a party who takes exceptions to a magistrate's findings and recommendations in dispositive and posttrial matters. The amendment to subparagraph (b)(1)(C) is intended to clarify the intent of Congress with regard to the review of the magistrate's recommendations; it does not affect the substance of the bill. The amendment states expressly what the Senate implied: i. e. that the district judge in making the ultimate determination of the matter, would have to give fresh consideration to those issues to which specific objection has been made by a party.
>
> 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.No. 94–1609, *reprinted* in 1976 U.S. Code Cong. & Admin.News, pp. 6162, 6163.

We have not dealt with the defendant's contention that the referral in the present case was made pursuant to a provision of

Title VII which appears to permit referrals without consent of the parties. 42 U.S.C. § 2000e–5(f)(5).[3] This provision was not referred to in either order of reference. Indeed, the second order was entered 100 days after the defendant filed its answer and the court had already set a tentative trial date. Since 120 days had not elapsed after issue was joined without the case being scheduled for trial, the case does not appear to fit the prescription for referral of a Title VII case. Title VII cases are not to be referred indiscriminately for trial before masters. These important cases are to be heard by a judge except where there is a determination on the record that conditions set forth in § 2000e–5(f)(5) have not been met. *Cf. Flowers v. Crouch-Walker Corp.*, 507 F.2d 1378, 1380 (7th Cir. 1974).

In the present case it is difficult to discern how any meaningful review, much less a de novo determination, could have been made by the district court. The transcript of hearings before the magistrate had not been filed when the district court issued its order. Objections based on the magistrate's treatment of the evidence could not be properly reviewed even under the clearly erroneous standard without a review of the record. The court must review at least those portions of the transcript of evidence which are relevant to the particular findings that are under attack. *United States v. Certain Lands in City of Statesboro*, 341 F.2d 742, 744–45 (5th Cir. 1965).

In their objections to the magistrate's report the plaintiffs indicated that they had been unable to order a transcript and stated that the transcript would be indispensable to support their contention that the magistrate ignored evidence which showed the plaintiffs were treated differently from white employees and that the reasons given by the defendant for their discharges were pretextual. The plaintiffs attached to their objections a copy of their brief before the magistrate "which sets forth in detail facts relating to pretext, which the Magistrate never considered in his report." On the same day the plaintiffs filed a motion requesting permission to file supplemental objections to the report of the magistrate after the record of the trial was transcribed. The plaintiffs pointed out in their motion that their objections were based on the claim that the magistrate ignored substantial parts of the record dealing with the question of whether the reasons given for the firings were pretextual. They also contended that de novo consideration would be impossible without a transcript.

[8] The district court did not rule on this motion or refer to the transcript in any way in its order adopting the magistrate's findings and recommendations. The defendant asserts that it was proper for the district court to rule without a transcript since it was the responsibility of the plaintiffs to have the transcript prepared. However, only 34 days elapsed between the filing of the magistrate's report and the district court's ruling and the plaintiffs filed timely motions with respect to the necessity for a transcript which were never ruled upon. The transcript has been filed in this court and it contains nearly one thousand pages. We are compelled to find that the case did not receive the judicial attention which Article III of the Constitution requires. Neither the Magistrates Act nor Rule 53 permits the adoption of a magistrate's findings and recommendations based solely upon a review of the findings themselves and the pleadings when a party has specifically objected to the magistrate's treatment of the evidence produced at the hearing. A review of at least portions of the transcript was essential to rule on these objections.

The judgment of the district court is vacated and the cause is remanded for de novo review by the district judge. This will include review of those portions of the transcript covered in the previously filed objections of the plaintiffs and in any supplemental objections which may be filed fol-

3. (5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

December 4, 1985

CALENDAR CHANGE NO. 5

December 2 - 13, 1985

CASE NO.	DATE SET & COURTROOM	PANEL
84-3675	December 5, Courtroom #1	Keith, Kennedy, Unthank, JJ.
84-3683) 84-3722)	December 5, Courtroom #1	Keith, Kennedy, Unthank, JJ.

#84-3675, 84-3683 and 84-3722. Pursuant to Judge Keith's direction, the order of these cases is being switched. Corrected calendar page enclosed.

cc: Judge Lively
Judge Engel
Judge Keith
Judge Kennedy
Judge Krupansky
Judge Milburn
Judge Guy
Judge Brown
Judge Unthank

THURSDAY, DECEMBER 5, 1985 COURTROOM #1 Room - 607

PARTIES	COUNSEL

85-5441 E.D. Tennessee - Jarvis, J.

United States of America, Plaintiff-Appellee, — John W. Gill, Knoxville, Tennessee

v.

Archie Larry Thomas, Defendant-Appellant. — Ronald P. Smith (C.A.), Knoxville, Tennessee

Defendant appeals his conviction of probation violation for violating 18 U.S.C. §§1708 and 495, possessing a stolen U.S. treasury check and forging an endorsement.

(15 Minutes Per Side)

84-3683
84-3722 N.D. Ohio - White, J.

Plain Dealer Publishing Co., Plaintiff-Appellant, Cross-Appellee, — James P. Garner, Richard R. Hollington, Karen B. Newborn, Cleveland, Ohio

v.

City of Lakewood, Defendant-Appellee, Cross-Appellant. — Henry B. Fischer, John H. Gibbon, Frederick W. Whatley, Cleveland, Ohio

Plaintiff appeals from a judgment dismissing its civil rights action alleging restrictions on coin operated newspaper dispensing machines; defendant appeals from that part of the judgment ordering it to pay the costs of this action.

(15 Minutes Per Side)

84-3675 N.D. Ohio - White, J.

New York Times Company, Plaintiff-Appellant, — David A. Nelson, Frances Floriano Goins, Cleveland, Ohio

v.

City of Lakewood, Defendant-Appellee. — Henry B. Fischer, Frederick W. Whatley, John H. Gibbon, Cleveland, Ohio

Plaintiff appeals the judgment for defendant in this civil rights action challenging a city ordinance prohibiting the placing of newsboxes on city streets.

(15 Minutes Per Side)

85-1310 United States Tax Court

James W. Sisk, Petitioner-Appellant, — James W. Sisk (Pro Se), Madison, Tennessee

v.

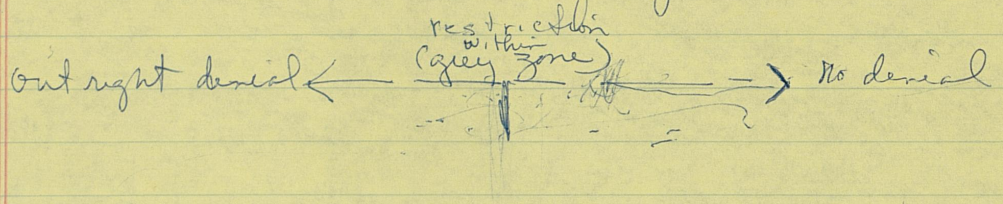
Commissioner of Internal Revenue, Respondent-Appellee. — Michael L. Paup, Carleton D. Powell, Gary D. Gray, Washington, D.C.

Defendant appeals the decision of the Tax Court in this deficiency action.

(To Be Submitted On Briefs)

(a) Const Right
(b) Class entitled to Right
(c) denial of Right

Denial of Right



Restriction burden on Distribution

Until a denial of the right has been shown

Substantial evidence evidencing a denial

a prima facie case has not been made

Distributors through
Subscription or single sales
Single sales through newsboys, Commercial establishments and Coin operated machines
Single sales account for 40%
What % does News machines occupy.

Ordinances

90.1.18(B) Newspaper dispensing devices not in residential districts

Not on public property unless licensed
(1) prior approval – discretion
(2) license fee
(3) dims.
(4) Conform w/ design & placement
Violation criminal

Def Contends:

① Boxes may not be placed on public property in residentially zoned districts of City of Lakewood

② 42 Criminal Complaints
21 violating zoning ordinances
21 permitting ordinances

Count 1.

1st & 14th Amendment U S Const
Article I, Section 11 of Ohio Const
Free speech and press
Acts unconstitutional
irreparable injury

Count 2.

Ordinance 901.181
Overbroad
irreparable injury

Count 3.

equal protection
on boxes and not on other instrumentalities of speech

Count 4.

no prior hearing before seizure - due process

Memo. of:

No Stopping permitted on Boulevard

Single Copy sales 5% of total sales

Newspaper gets 12 1/6 cents on home deliveries — 7 5/6 ¢ profit to delivery boy

Newspaper gets 16 cents on single sales — 4 ¢ to vendor.

(Newspaper makes more from single sales)

No area w/in City 1/4 mile from outlet - box on private property

City has police power

① press applied for permission to place machines along streets.

② filed suit.

public property

applications for permits to City Council.

901.181 — licensing

news boxes — also advertise.

City has duty of Public health and Safety

provisions of 901.181 are least restrictive.

Conclusions

(1) No property rights granted by 1st & 14th amendment

What about equal protection

If other person given right on public property aren't you given right —

Yes — presence — but license?

placement on newsrack is taking of property

Loretto v. Teleprompter

Western Union v. City of St Louis

Streets & Highways

public forums

Does blanket prohibition of
news boxes
(means)
business ⟷ product

~~the product has freedom~~

prior restraint
executive discretion

1st Amendment does not guarantee right to communicate one's views at all times and places or in any manner that may be desired.
15C-Con
US 2 US 647

How are public areas characterized for 1st Amendment Analysis?

1st Cat Streets and parks
held in TRUST for use of public
Public forum.

2nd Public property - place for expressive activity.

3rd Public property not by tradition a public forum.

The Court is requested to invalidate the lease of Crest Coal Company because of the default; to appoint a receiver for Crest Coal Company because it in bad financial difficulty and to prevent waste; to quiet title of its or their interest in the property as to Polan, Crest Coal Company and the Bank of New York.

What is difference between Bank vs: Arnett & Arnetts vs: Bank? (Cress is party) 83-30 83-116

Approximately, ONE MONTH LATER, 2/28/83, Boone Coal and Timber Company filed a civil action in the Magoffin Circuit Court against Crest Coal Company and the Bank of New York. The complaint alleges that it leased coal interests to Polan, who sub-leased to Crest Coal Company. Subsequently, Polan and Crest executed Mortgages and security interests to the Bank of New York. The encumbrance of its interests were without notice and consent as required by the lease. The Crest Coal Company is in arrears of royalties and the lease is in default and should be cancelled. The Court is requested to quiet title to its interest in the property.

On the 3rd day of April, 1983, The Bank of New York filed ~~a petition of removal a complaint~~ Civil Action 83-81, a complaint against Wm. J. M. Polan, et ux, Crest Coal Company, Admiral Mining, and W. J. M. P. Mining, and numerous other persons or business firms having claims against the named defendants. The complaint alleges the encumbrances, indebtedness, fraud, default, financial difficulties, and requests judgment, appointment of a receiver and that all persons having an interest be required to set forth same.

On the 4th day of April 1983, The Bank of New York filed Civil Action 83-116, a petition for removal of the Arnett action from the Magoffin Circuit Court to the U. S. District Court. It alleges that the Arnetts fraudulently joined Cress to prevent complete diversity.

On the 19th day of April, 1983, the Bank of New York filed Civil Action 83-133, a petition for removal of the Boone Coal and Timber action from the Magoffin Circuit Court to the U. S. District Court. It alleges that Boone fraudulently joined Cress to prevent Complete Diversity.

15 —
10 — min
5 —

15 — to —
(1) which
(2) — 7

On 1/25/83, CIVIL ACTION NO. 83-30 , was filed in the U. S. District Court at Pikeville, Ky. It is a complaint by the plaintiff, The Bank of New York, BONY, against the Arnetts of Magoffin County, Kentucky.

BACKGROUND

It appears, prior to this action, that the Arnetts had leased to Dr. Polan and William J. M. Polan a railroad siding and facilities for the processing and loading of coal. Subsequently William J. M. Polan acquired Dr. Polan's rights and additionally acquired mineral rights from Boone Coal and Timber Company, a West Virginia Concern, and perhaps others. William J. M. Polan, a coal entrepreneur, formed, fashioned or became a member of Crest Coal Company, Admiral Mining and W. J. M. P. Mining, which mined the premises leased by Wm. J. M. Polan and utilized his tipple and railroad siding. In the vicissitudes of mining, Wm J. M. Polan, et ux, executed promissory notes, mortgages, and security interests to the Bank of New York and other lending institutions. They also incurred indebtedness and liabilities with various and sundry equipment and supply enterprises.

In civil action no. 83-30, the complaint alleges an assignment by Polan to the Bank of New York of his interest in the railroad siding and other processing facilities. That the Arnetts were attempting to invalidate the lease because of a default by Polan. That the Bank was willing to pay the royalties in arrears, if any, in any event the Bank of New York had not been given notice of the default and thus no default. Also, a former attorney for Arnetts had agreed to accept the payment of arrears by Bank, consequently estoppel.
The issue in this action is whether or not a default in the lease on the siding. If so, is same cured by estoppel and/or tender of arrears?

FOUR (4) DAYS later, 1/29/83, the Arnetts filed an action in the Magoffin Circuit Court. The complaint was by the Arnetts against Polan solely named Crest Coal Company, Wm. J. M. Polan and the Bank of New York. It alleges the lease to Polan, a subsequent assignment to Crest Coal Company, and the encumberance created by Wm. J. M. Polan and Crest to the Bank of New York. It alleges a default by Crest Coal Company and that it was in financial difficulty.

Removal 83-116

30-116
1 actor
1.

15

Arnetts

Railroad Siding

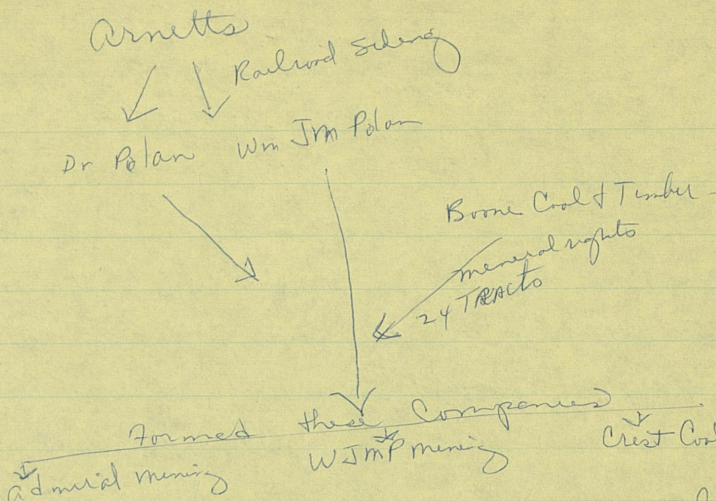
Dr Polan Wm J M Polan

Boone Coal & Timber - mineral rights

24 TRACTS

Formed these Companies

Admiral mining WJMP mining Crest Coal Co



(1) these Companies mined premises leased from Wm. J. M. Polan and utilized the R.R. Siding.

Apparently Wm. J. M. Polan got Royalty from 4 way profit leasing of Coal and Royalty for using his siding. Plus profit from being opt of mining Co

(2) To Finance Polan executed notes, mtg & Security interest to Bank of N.Y., Bank of Josephine, 1st Penn Bank, Int. Harv. Credit Corp, Westinghouse Credit Corp., Associate Commercial Corp., Hertz, Mack Finance, C.I.T.

(3) Polan defaulted on payments to Arnetts on R R Sidings

83-31

(4) Bank wants to pay Bank not given notice of default attorney for Arnetts agreed to accept Bank money they acted in reliance thereon

Receiver to preserve and protect property pending its final disposition.

(1) Must show Assets applicable to payment of claim.

(2) Irreparable injury and no adequate remedy at law.

(3) Creditors must exhaust their remedies at law before being entitled to appointment of Receivership

(4) Must be real litigation between parties for some purpose other than Receivership

(5) Receivership must be in some Court of Action.

(7) to Prevent Fraud, imminent loss of property

will not appoint for partnership but of insolvent dissolution

In no case should Court take possession of a solvent, going Corp

Existence of a State receivership

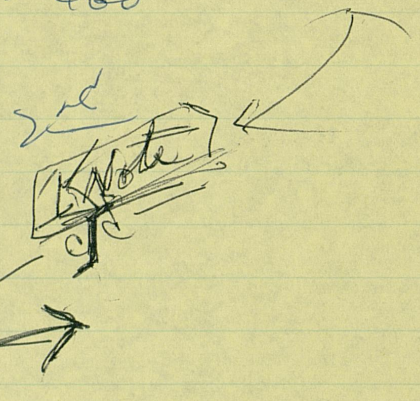
does not prevent the appointment of a receiver in Fed Court when assets exist which are not involved in State receivership which may be relinquished

1st in time has priority

Penn. Cas. Co. v. Penn.
294 U.S. 189
11 a/R 2d 460

Receivers
#18 - 65 Am Jur 2nd

Note



Motion to dismiss
pleading citizen
Parallel action in State Court
necessary parties - Ky Coal?
Fraud —
Receiver — already appointed

83-81

Arnetts vs: Crest.

arnett assigned lease of arnetts to Crest Coal Co and both of them created an encumbrance to Bank of N.Y. they did not agree thereto

① default by Polar + Crest.