

UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

Patty Shwartz  
Formerly Patty Shwartz-Dorsey

2. **Position**: State the position for which you have been nominated.

United States Circuit Judge for the Third Circuit

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

Frank R. Lautenberg Post Office and Courthouse  
2 Federal Square  
Newark, New Jersey 07101

4. **Birthplace**: State year and place of birth.

1961; Paterson, New Jersey

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

1983 – 1986, University of Pennsylvania Law School; J.D., 1986

1979 – 1983, Rutgers College, Rutgers – The State University of New Jersey; B.A. (with highest honors), 1983

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

2003 – Present  
United States District Court for the District of New Jersey  
Frank R. Lautenberg Post Office and Courthouse  
2 Federal Square  
Newark, New Jersey 07101  
United States Magistrate Judge

2009 – Present  
Fordham University School of Law  
140 West 62nd Street  
New York, New York 10023  
Adjunct Professor

1989 – 2003  
United States Attorney's Office for the District of New Jersey  
970 Broad Street  
Newark, New Jersey 07102  
Assistant United States Attorney (1989 – 2003)  
Deputy Chief, Criminal Division (1995 – 1999)  
Chief, Criminal Division (1999 – 2001; 2002 – 2003)  
Executive Assistant U.S. Attorney (2001 – 2002)

1987 – 1989  
United States District Court for the District of New Jersey  
Frank R. Lautenberg Post Office and Courthouse  
2 Federal Square  
Newark, New Jersey 07101  
Law Clerk to Judge Harold A. Ackerman

1986 – 1987  
Pepper, Hamilton & Scheetz (now Pepper Hamilton LLP)  
3000 Two Logan Square  
Philadelphia, Pennsylvania 19103  
Associate

Summer 1985  
Pitney, Hardin, Kipp & Szuch (now Day Pitney LLP)  
One Jefferson Road  
Parsippany, New Jersey 07054  
Summer Associate

1985 – 1986  
University of Pennsylvania Law School  
3400 Chestnut Street  
Philadelphia, Pennsylvania 19104  
Research Assistant to Paul Shechtman (unpaid)

1984 – 1985

National Center for Educational Testing (no longer exists at this address)  
1622 Chestnut Street  
Philadelphia, Pennsylvania 19103  
LSAT Instructor

Summer 1984

Margolis, Edelstein, Scherlis, Sarowitz & Kraemer (now Margolis Edelstein)  
The Curtis Center  
170 South Independence Mall West  
Suite 400 E  
Philadelphia, Pennsylvania 19106  
Summer Law Clerk

Summer 1983

University of Pennsylvania  
Department of Regional Science  
3718 Locust Walk  
Philadelphia, Pennsylvania 19104  
Research Assistant to Steve Weiss Wik

Summer 1983

Temporary employment agency (I believe it was Manpower, but I cannot confirm this)  
Temporary employee

1981 – 1983

Rutgers University  
School of Communication and Information  
4 Huntington Street  
New Brunswick, New Jersey 08901  
Teaching and Research Assistant to Stella Ting-Toomey, William Gudykunst, Brent Ruben, Katherine Yost, and William Todd-Mancillas (unpaid)

Other affiliations (uncompensated):

2010 – Present

Federal Magistrate Judges Association  
P.O. Box 267  
Scranton, Pennsylvania 18501  
Board of Directors, representing the Third Circuit

2007 – Present  
Association of the Federal Bar of New Jersey  
P.O. Box 172  
West Allenhurst, New Jersey 07711  
Advisory Board Member

2000 – Present  
Historical Society of the United States District Court for the District of New Jersey  
Office of the Clerk  
50 Walnut Street  
Newark, New Jersey 07102  
Board of Advisors (2003 – present)  
Board of Directors (approximately 2000 – 2003)

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I have not registered for selective service.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

**Professional:**

Sustained Superior Performance Award (2002)

Special Achievement Awards from the Department of Justice (1991, 1993, 1994 and 1998)

Special Act Award from the Department of Justice (1997)

Director's Award for Superior Performance as an Assistant U.S. Attorney (1997)

Commendations and recognition from federal agencies, including the Federal Bureau of Investigation (1991, 1992, 1996, 1997, 2000, 2001, 2002), Drug Enforcement Administration (1992, 2000), Immigration and Naturalization Service, U.S. Customs Inspection Service (1990, 1995), U.S. Postal Inspection Service (1993), Department of Justice – Office of the Inspector General (1998), Department of the Army (1993), and the Federal Bureau of Prisons (1998).

At the time of my departure from the United States Attorney's Office in 2003, I also received recognition from several agencies, including the Federal Bureau of Investigation, Drug Enforcement Administration, Internal Revenue Service, United States

Secret Service, United States Postal Inspection Service, United States Pretrial Services, United States Probation Office, United States Customs Inspection Service, and United States Immigration and Naturalization Service.

Academic:

Editor, University of Pennsylvania Law Review

Outstanding Woman Law Graduate of the Class of 1986

Who's Who Among American Law Students

Rutgers College Honors Graduate

Henry Rutgers Scholar

Graduated with Highest Distinction in Major

9. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

American Bar Association

American Judicature Society

Association of the Federal Bar of New Jersey  
Advisory Board Member (2007 – present)

Federal Magistrate Judges Association  
Board of Directors, representing the Third Circuit (2010 – present)

Historical Society of the United States District Court for the District of New Jersey  
Board of Advisors (2003 – present)  
Board of Directors (approximately 2000 – 2003)

John C. Lifland Inn of Court

Judicial Council for the Court of Appeals for the Third Circuit Magistrate Judge  
Committee

New Jersey Bar Association

Pennsylvania Bar Association

Phi Delta Phi Gibson – Alexander Inn, University of Pennsylvania, Student Inn member

Philadelphia Bar Association

United States District Court for the District of New Jersey

Patent Rules Committee

Criminal Law & Probation Committee

Education Committee

10. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

New Jersey, 1986

Pennsylvania, 1986 (out-of-state active)

There have been no lapses in membership.

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Third Circuit, 1987

United States District Court for the District of New Jersey, 1986

United States District Court for the Eastern District of Pennsylvania, 1986

There have been no lapses in membership.

11. **Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

River Renaissance Condominium Association (1994 – present)

Rutgers Alumni Association (1989 – present)

United States Attorney's Office for the District of New Jersey Alumni Association (2003 – present)

University of Pennsylvania Law School Alumni Society (1986 – present)

- b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

To the best of my knowledge, none of the organizations listed in response to Question 11a currently discriminates or previously discriminated on the basis of race, sex, religion, or national origin.

**12. Published Writings and Public Statements:**

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

*Thoughts from our Magistrate Judges*, Nunc Pro Tunc, February 2008. Copy supplied.

*The United States Attorney . . . A Brief History*, Nunc Pro Tunc, January 2005. Copy supplied.

*An Analysis of Perceived Similarity and Perceived Confirmation in the Context of Socially Penetrated Relationships*, Henry Rutgers Honors Thesis, December 1982. Copy supplied.

I am credited for research conducted while in law school in the following article: Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee, and David Hubbert, *Fairness and Formality: Minimizing Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. Rev. 1359 (1985).

- b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

To the best of my recollection, I have not prepared any reports, memoranda, or policy statements on behalf of any bar association, committee, conference or organization of which I was or am a member. As a member of the Board of

Directors of the Federal Magistrate Judges Association, however, I was asked if I concurred in recommendations from our rules committees concerning proposed amendments to the Federal Rules of Criminal Procedure. Along with the other directors, I concurred in the recommendation, which was presented to the Administrative Office of the Courts. A copy of the February 8, 2011 letter embodying the recommendation is supplied.

I am quoted in a May 30, 2011 letter signed by one of my fellow Magistrate Judges submitted in support of the nomination of the Hon. John C. Lifland (retired) for recognition by the American Inn of Courts. A copy of the letter is supplied.

I am also a member of the Patent Rules Committee of the United States District Court for the District of New Jersey. The Committee recommended Local Patent Rules that govern the management of patent cases filed in the District of New Jersey. Copies of the 2008 and 2011 Local Patent Rules are supplied.

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

To the best of my recollection, I have not given testimony, made official statements, or engaged in communications relating, in whole or in part, to matters of public policy or legal interpretation, to public bodies or public officials.

- d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

I have not kept a comprehensive list of the presentations I have made. The following list is compiled from my calendars and other sources and is my best effort to recreate my history of speaking engagements. It is possible I have omitted presentations for which I did not retain records.

October 3, 2011: Ceremonial Swearing-In of the Hon. Donna Gallucio, New Jersey Superior Court, Passaic County. Served as Master of Ceremonies. Remarks supplied.

September 22, 2011: Federation of Defense and Corporate Counsel Eighth Annual Corporate Counsel Symposium, Electronic Discovery: Where Are We Now and Where Are We Headed? Notes supplied.

July 26, 2011: NJ LEEP (Law and Education Empowerment Project) high school students visited the United States District Court to discuss the court system and legal careers. I have no notes, transcripts, or recordings. The address for NJ LEEP is Seton Hall Law School, Room 425A, One Newark Center, Newark, New Jersey 07102.

July 15, 2011: Luncheon recognizing George Graves' departure from the Newark Field Division of the Federal Bureau of Investigation. Remarks supplied.

July 11, 2011: Fordham University Law School, William Hughes Mulligan Memorial Moot Court Competition Judge (preliminary round). I have no notes, transcripts, or recordings. The address for Fordham University Law School is 140 West 62nd Street, New York, New York 10023.

June 22 – 23, 2011: ALI-ABA Environmental Litigation Course. Discussed discovery in environmental litigation and in limine motions, and presided over a mock preliminary injunction hearing. DVD supplied.

June 13, 2011: John C. Lifland Inn of Court. Presided over mock oral argument. I have no notes, transcripts or recordings. The Inn does not have a physical address.

June 9, 2011: United States District Court for the District of New Jersey, Bedminster School Fifth Grade Visit. Spoke about the court system and lawyers. I have no notes, transcripts, or recordings. The address for the United States District Court for the District of New Jersey is 50 Walnut Street, Newark, New Jersey 07101.

May 20, 2011: Pompton Lakes High School Career Day. Spoke to high school students about my career path and careers in the law. I have no notes, transcripts, or recordings. The address for Pompton Lakes High School is 44 Lakeside Avenue, Pompton Lakes, New Jersey 07442.

May 12, 2011: Association of Criminal Defense Lawyers of New Jersey, Administration of the Oath of Office to its Officers and Board of Trustees. I have no notes, transcripts, or recordings. The address for the Association of Criminal Defense Lawyers is P.O. Box 180, West Allenhurst, New Jersey 07711.

March 24, 2011: Association of the Federal Bar of New Jersey, Everything You Wanted to Know about the Practice of Law in the United States District Court for the District of New Jersey in 2011. Transcript supplied.

February 23, 2011: Dinner recognizing George Leone's Departure from the United States Attorney's Office for the District of New Jersey. Remarks supplied.

January 10, 2011: John C. Lifland Inn of Court. Master Presentation on Pretrial Conference Procedures. Notes supplied.

December 1, 2010: Golda Och Academy, West Orange, New Jersey, Voters of Tomorrow. Spoke to high school students about the courts and government. Notes supplied.

November 17, 2010: Association of the Federal Bar of New Jersey, Practice Tips on Practicing Law in the Federal Courts in New Jersey. Notes supplied.

November 12, 2010: New Jersey Association for Justice, Pretrial Practice in the Federal Courts – Thriving and Surviving. DVD supplied.

November 3, 2010: Rutgers Law School – Newark, Nathan Baker Mock Trial Competition Judge (preliminary round). I have no notes, transcripts, or recordings. The address for Rutgers Law School – Newark is 123 Washington Street, Newark, New Jersey 07102.

October 25, 2010: New York Intellectual Property Law Association Young Lawyer's Committee, IP Litigation: Perspective on the Practice. Outline supplied.

July 22, 2010: Luncheon recognizing Robert Klotz's retirement from the United States Attorney's Office for the District of New Jersey. I have no notes, transcripts, or recordings. The address for the United States Attorney's Office for the District of New Jersey is 970 Broad Street, Newark, New Jersey 07102.

June 21, 2010: John C. Lifland Inn of Court. Presided over mock oral argument. I have no notes, transcripts or recordings. The Inn does not have a physical address.

June 14, 2010: United States District Court for the District of New Jersey in association with the Sedona Conference Institute, Electronic Information in Criminal Actions. Transcript supplied.

April 22, 2010: United States District Court for the District of New Jersey's Office of the Clerk, Attorney Electronic Case Filing Program. Notes supplied.

April 21, 2010: Federal Executive Board of Metropolitan Northern New Jersey, Professional Development Seminar for Support Staff. Notes supplied.

February 18, 2010: Dinner recognizing Charles B. McKenna's departure from the United States Attorney's Office for the District of New Jersey. Remarks supplied.

January 18, 2010: John C. Lifland Inn of Court, Master Presentation on Rule 16 Conferences and Rule 26 Disclosures. I have no notes, transcripts or recordings. The Inn does not have a physical address.

December 11, 2009: New York Intellectual Property Law Association, The District of New Jersey's Local Patent Rules and Their Impact on Pharmaceutical Patent Litigation. Notes supplied.

December 2009: United States District Court's Service Award Ceremony recognizing Amparo Andersonn. I have no notes, transcripts, or recordings. The address for the United States District Court for the District of New Jersey is 50 Walnut Street, Newark, New Jersey 07101.

November 11, 2009: Association of the Federal Bar of New Jersey, Principles of Cross Examination in Federal Courts, Testimony From the Masters. Remarks supplied.

June 15, 2009: John C. Lifland Inn of Court. Presided over mock oral argument. I have no notes, transcripts or recordings. The Inn does not have a physical address.

March 9, 2009: New Jersey Intellectual Property Law Association Patent Litigation Seminar, Operating Under the New Local Patent Rules of the New Jersey District Courts. I have no notes, transcripts, or recordings. The address for the New Jersey Intellectual Property Law Association is P.O. Box 693, Westfield, New Jersey 07091.

February 4, 2009: New Jersey State Bar Association – Federal Practice and Procedure Section, Perspectives on Best Practices Before a Magistrate Judge. Notes supplied.

December 2008: United States District Court's Service Award Ceremony recognizing Iris Liriano. I have no notes, transcripts, or recordings. The address for the United States District Court for the District of New Jersey is 50 Walnut Street, Newark, New Jersey 07101.

October 6, 2008: John C. Lifland Inn of Court, Master Presentation, Preparing a Pretrial Order. I have no notes, transcripts, or recordings. The Inn does not have a physical address.

June 9, 2008: John C. Lifland Inn of Court. Presided over mock oral argument. I have no notes, transcripts or recordings. The Inn does not have a physical address.

May 6, 2008: United States District Court for the District of New Jersey Arbitrator's Workshop. I have no notes, transcripts, or recordings. The address for the United States District Court for the District of New Jersey is 50 Walnut Street, Newark, New Jersey 07101.

April 24, 2008: Bergen County Bar Association Seminar on Federal Practice. Notes supplied.

March 29, 2008: Seton Hall Law School, John J. Gibbons Criminal Procedure Moot Court Competition Judge (final round). I have no notes, transcripts, or recordings. The address for Seton Hall Law School is One Newark Center, Newark, New Jersey 07102.

January 16, 2008: New Jersey Institute of Continuing Legal Education Practice Before U.S. Magistrate Judges. CD supplied.

November 19, 2007: Association of the Federal Bar of New Jersey, Navigating in the Federal Courts in the Age of Technology: From E-Discovery to E-Trial. Notes supplied.

September 28, 2007: United States Pretrial Services 12th Annual Training Conference. Notes supplied.

September 17, 2007: John C. Lifland Inn of Court, Master Presentation on Ethics. Notes supplied.

June 12, 2007: Legal Services of New Jersey, Basic Federal Practice Training. Materials supplied.

June 11, 2007: John C. Lifland Inn of Court. Presided over mock oral argument. I have no notes, transcripts or recordings. The Inn does not have a physical address.

March 30, 2007: United States District Court for the District of New Jersey, Girl Scout Troop 2086 visit. Spoke about the court system and our historic courthouse. I have no notes, transcripts, or recordings. The address for the United States District Court for the District of New Jersey is 50 Walnut Street, Newark, New Jersey 07101.

March 21, 2007: Essex County Bar Association, E-Discovery in 2007 and Beyond. Notes supplied.

January 10, 2007: New Jersey Institute for Continuing Legal Education, Practice Before U.S. Magistrate Judges. CD supplied.

December 1, 2006: IQPC Securities Litigation, Perspectives from the Court. Notes supplied.

November 15, 2006: Association of the Federal Bar of New Jersey, Nuts and Bolts of Federal Practice. A view from District Court Judges, Magistrates and Lawyers. Notes supplied.

October 17, 2006: John C. Lifland Inn of Court, Master Presentation: Final Pretrial Conferences. Notes supplied.

September 20, 2006: American Bar Association, Section of Litigation, Regional CLE Workshop: Contamination Examination, Discovery the New Frontier: Discovery Management in the Age of New Science and New Legal Theories. Notes supplied.

September 13, 2006: United States District Court for the District of New Jersey, New Law Clerk Orientation, Newark Vicinage. I have no notes, transcripts, or recordings. The address for the United States District Court for the District of New Jersey is 50 Walnut Street, Newark, New Jersey 07101.

June 12, 2006: John C. Lifland Inn of Court. Presided over mock oral argument. I have no notes, transcripts or recordings. The Inn does not have a physical address.

April 27, 2006: Association of Trial Lawyers of America – New Jersey, Women Litigators' Luncheon, The Voice of Women on the Bench, the Judge's Perspective. The organization is now known as the New Jersey Association for Justice. Notes supplied.

March 30, 2006: Drug Enforcement Administration, New Jersey Division, Making a Difference – Women in Leadership. Notes supplied.

March 23, 2006: Association of the Federal Bar of New Jersey, Trying a Civil Case in the District of New Jersey, The Do's and Don'ts of Jury Trials, Bench Trials, Orders to Show Cause Hearings. Transcript supplied.

February 9, 2006: Luncheon recognizing Joyce Ingram's departure from the United States Attorney's Office for the District of New Jersey. Notes supplied.

January 11, 2006: Essex County Bar Foundation, Prosecuting and Defending Federal Public Corruption Cases. Notes supplied.

November 16, 2005: New Jersey Institute for Continuing Legal Education, Practice Before Federal Magistrate Judges. CD supplied.

November 14, 2005: John C. Liffand Inn of Court, Introduction of the Essentials of a Rule 16 Conference. Notes supplied.

November 9, 2005: Rutgers Law School – Newark, Nathan Baker Mock Trial Competition Judge (preliminary round). I have no notes, transcripts, or recordings. The address for Rutgers Law School – Newark is 123 Washington Street, Newark, New Jersey 07102.

October 2005: Administrative Office of the United States Courts. Appeared in a video regarding a program to gather Magistrate Judge workload statistics, entitled “MJStar: It Really Works.” DVD supplied.

June 14, 2005: John C. Liffand Inn of Court. Presided over mock oral argument. I have no notes, transcripts or recordings. The Inn does not have a physical address.

May 20, 2005: New Jersey State Bar Association Annual Conference on Federal Practice and Procedure. I have no notes, transcripts, or recordings. The address for the New Jersey State Bar Association is One Constitution Square, New Brunswick, New Jersey 08901.

May 18, 2005: Bergen County Bar Association Seminar on Federal Practice. Notes supplied.

April 2005: United States District Court for the District of New Jersey. Spoke with the children of attorneys from McElroy, Deutsch, Mulvaney, and Carpenter about the court system. I have no notes, transcripts, or recordings. The address for the United States District Court for the District of New Jersey is 50 Walnut Street, Newark, New Jersey 07101.

February 28, 2005: Association of the Federal Bar of New Jersey, Welcome to the Federal Court. I have no notes, transcripts, or recordings. The address for the Association of the Federal Bar of New Jersey is P.O. Box 172, West Allenhurst, New Jersey 07711.

February 3, 2005: Association of the Federal Bar of New Jersey, Welcome to the Federal Court, Initial Conference and Discovery. I have no notes, transcripts, or recordings. The address for the Association of the Federal Bar of New Jersey is P.O. Box 172, West Allenhurst, New Jersey 07711.

November 29, 2004: Pompton Lakes High School Class of 1979 25th Class Reunion. Remarks supplied.

November 10, 2004: Association of the Federal Bar of New Jersey, Welcome to the Federal Court Workshop. I have no notes, transcripts, or recordings. The

address for the Association of the Federal Bar of New Jersey is P.O. Box 172, West Allenhurst, New Jersey 07711.

October 14, 2004: Georgetown University Law Center, Continuing Legal Education, Litigating Employment Cases – Views from the Bench, Discovery Strategies & Techniques. Notes supplied.

August 19, 2004: Luncheon recognizing Bradley Orsini's departure from the Newark Field Division of the Federal Bureau of Investigation. I have no notes, transcripts, or recordings. The address for the Federal Bureau of Investigation's Newark Office is Claremont Tower, 11 Centre Place, Newark, New Jersey 07102.

June 14, 2004: John C. Lifland Inn of Court. Presided over mock oral argument. I have no notes, transcripts or recordings. The Inn does not have a physical address.

April 22, 2004: New Jersey Institute for Continuing Legal Education, Practice Before U.S. Magistrate Judges. Notes supplied.

March 24, 2004: St. John's University School of Law, 2004 Judicial Clerkship Panel & Reception. I have no notes, transcripts, or recordings. The address for St. John's University School of Law is 8000 Utopia Parkway, Jamaica, New York 11439.

November 15, 2003: New Jersey Institute for Continuing Legal Education, Introduction to Federal Practice. I have no notes, transcripts, or recordings. The address for the New Jersey Institute for Continuing Legal Education is One Constitution Square, New Brunswick, New Jersey 08901.

November 11, 2003: John C. Lifland Inn of Court, Essentials of the Rule 16 Conference. Notes supplied.

October 27, 2003: Luncheon recognizing Carolyn Murray's departure from the United States Attorney's Office for the District of New Jersey. Remarks supplied.

September 15, 2003: United States District Court for the District of New Jersey, Overview of the American Criminal Justice System for delegation of Russian judges. I have no notes, transcripts or recordings. The address for the United States District Court for the District of New Jersey is 50 Walnut Street, Newark, New Jersey 07101.

June 11, 2003: John J. Gibbons American Inn of Court (now known as the John C. Lifland Inn of Court). Presided over mock oral argument. I have no notes, transcripts, or recordings. The Inn of Court does not have a physical address.

April 10, 2003: Ceremonial Swearing-In as a United States Magistrate Judge. DVD supplied.

March 27, 2003: Seton Hall Law School, Eugene Grossman Appellate Moot Court Competition Judge (preliminary round). I have no notes, transcripts, or recordings. The address for Seton Hall Law School is One Newark Center, Newark, New Jersey 07102.

March 25, 2003: Luncheon recognizing Iris Liriano's departure from the United States Attorney's Office for the District of New Jersey. I have no notes, transcripts, or recordings. The address for the United States Attorney's Office for the District of New Jersey is 970 Broad Street, Newark, New Jersey 07102.

February 19, 2003: Remarks at a dinner marking my departure from the U.S. Attorney's Office. Notes supplied.

2001: Luncheon recognizing Jane Myers's departure from the United States Attorney's Office for the District of New Jersey. I have no notes, transcripts, or recordings. The address for the United States Attorney's Office for the District of New Jersey is 970 Broad Street, Newark, New Jersey 07102.

January 22, 2000: New Jersey Institute for Continuing Legal Education, Second Annual Criminal Justice Act Forum. I have no notes, transcripts, or recordings. The address for the New Jersey Institute for Continuing Legal Education is One Constitution Square, New Brunswick, New Jersey 08901.

January 6, 2000: Remarks Celebrating Judge Harold A. Ackerman's Twentieth Year on the Federal Bench. Transcript supplied.

February 20, 1999: New Jersey Institute for Continuing Legal Education, First Annual Criminal Justice Act Forum. I have no notes, transcripts, or recordings. The address for the New Jersey Institute for Continuing Legal Education is One Constitution Square, New Brunswick, New Jersey 08901.

1999: Dinner recognizing Martin Cronin's departure from the United States Attorney's Office for the District of New Jersey. I have no notes, transcripts, or recordings. The address for the United States Attorney's Office for the District of New Jersey is 970 Broad Street, Newark, New Jersey 07102.

February 3, 1998: United States District Court Historical Society Ceremony recognizing the senior judges. I have no notes, transcripts, or recordings. The address for the United States District Court for the District of New Jersey is 50 Walnut Street, Newark, New Jersey 07101.

January 10, 1998: Bergen County Bar Association Federal Criminal Practice Seminar. Notes supplied.

December 15, 1997: Bergen County Bar Association, Federal Criminal Practice for Both Novice and Expert. I have no notes, transcripts, or recordings. The address for the Bergen County Bar Association is the George W. Newman Law Building, 15 Bergen Street, Hackensack, NJ 07601.

November 16, 1995: Rutgers University Administration of Justice Program, Law & Criminal Justice Career Forum, Rutgers University. I have no notes, transcripts, or recordings. The address for the Rutgers University Administration of Justice Program is 33 Livingston Avenue, New Brunswick, New Jersey 08901.

May 4, 1993: United States Probation Office for the District of New Jersey, training for new officers. I have no notes, transcripts, or recordings. The address for the United States Probation Office for the District of New Jersey is 50 Walnut Street, Newark, New Jersey 07101.

December 1991: Seton Hall Law School Moot Court Competition. I have no notes, transcripts, or recordings. The address for Seton Hall Law School is One Newark Center, Newark, New Jersey 07102.

May 19, 1986: University of Pennsylvania Law School Commencement. Remarks supplied.

May 1983: National Undergraduate Honors Conference, Memphis, Tennessee. Presented a synopsis of my honors thesis entitled, "An Analysis of Perceived Similarity and Perceived Confirmation in the Context of Socially Penetrated Relationships." Copy of thesis supplied in response to 12a.

April 1983: Eastern Communication Association, Ocean City, Maryland. Presented a synopsis of my honors thesis entitled, "An Analysis of Perceived Similarity and Perceived Confirmation in the Context of Socially Penetrated Relationships." Copy of thesis supplied in response to 12a.

December 1982: Rutgers University, Department of Communication, Colloquium, New Brunswick, New Jersey. Oral presentation of my honors thesis entitled, "An Analysis of Perceived Similarity and Perceived Confirmation in the Context of Socially Penetrated Relationships." Copy of thesis supplied in response to 12a.

On October 3, 2003, March 11, 2008 and November 18, 2009, I met with foreign prosecutors and/or government officials visiting the United States for the purpose of learning about the federal criminal justice system. Their visits were coordinated through the Department of Justice and United States Attorney's Office. The October 2003 event involved visitors from Latvia, and the March 2008 and November 2009 events involved visitors from Russia. I have no notes, transcripts, or recordings. The address for the United States Attorney's Office for the District of New Jersey is 970 Broad Street, Newark, New Jersey 07102.

On March 18, 2008, September 23, 2008, March 10, 2009, October 6, 2009, February 23, 2010, October 19, 2010, March 22, 2011 and September 20, 2011, I was a guest lecturer at Judge Michael Chagares' Advanced Civil Practice Class at Seton Hall Law School. Notes supplied.

Throughout my time as a judge, I also have sworn-in various people for admission to practice law in New Jersey state and federal courts and to serve as United States Pretrial Service and Probation officers or assistants. When I knew the individual personally (such as law clerks or former interns), I made an effort to personalize the occasion. I do not have a comprehensive list of the individuals I administered the oath to or the dates on which I administered it. Based upon a review of calendars and other records, I have identified the following dates on which I administered such oaths: July 14, 2003 (Probation Officer Assistant), December 17, 2003 (former intern from the United States Attorney's Office), January 26, 2006 (law clerk), December 27, 2007 (law clerk), September 25, 2008 (Pretrial Services Officers), November 25, 2008 (former court intern), November 13, 2009 (law clerk to Judge Ackerman and the law clerk's wife), May 27, 2010 (law clerk), and November 19, 2010 (former court intern).

As an Assistant U.S. Attorney, I participated in the annual training for U.S. Pretrial Services and Probation Offices. In addition, I spoke to members of the New Jersey American Correctional Association, the Office of the Chief Medical Examiner of New York County, Federal Bureau of Investigation, Drug Enforcement Administration, Internal Revenue Service, United States Postal Inspection Service, United States Customs Inspection Service, Immigration and Naturalization Service, and the Bureau of Alcohol Tobacco and Firearms. In addition, in about 1999, I was on a panel of professional women discussing advancement in the workplace. I have no notes, transcripts, or recordings of these events and do not have a recollection of the specific date or location of the sessions.

- e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Joe Ryan, *Harold Ackerman, Federal Judge in Newark who Presided over Lucchese Crime Family Trial, Dies at 81*, The Star-Ledger, Dec. 3, 2009. Copy supplied.

Rosemary Feitelberg, *Furrier Harold Shwartz Dead at 87*, Women's Wear Daily, Dec. 26, 2006. Copy supplied.

George Berkin, *Claudia Flynn, 52, Champion of Justice*, The Star-Ledger, Oct. 28, 2006. Copy supplied.

Robert Rudolph, *Justice Dept. Green-Lights Appeal in Faison Case*, The Star-Ledger, Aug. 29, 2001. Copy supplied.

Wayne Parry, *U.S. Attorney to Appeal Overturning of Cops' Convictions*, Associated Press, Aug. 28, 2001. Copy supplied.

Bob Braun, *An Officer's Truth Lies in a Tangled Tale*, The Star-Ledger, Nov. 15, 2000. Copy supplied.

Robert Rudolph, *Mounds of Phony 20s Filling the Tills in Jersey*, The Star-Ledger, Jan. 28, 1999. Copy supplied.

Russell Ben-Ali and Robert Rudolph, *Massive Smuggler Network Smashed*, The Star-Ledger, Nov. 21, 1998. Copy supplied.

Metro News Briefs, *Four Crewmen Charged in Immigrant Smuggling*, New York Times, Sept. 5, 1998. Copy supplied.

*Illegal Immigrants Held in Bahamas Return to China*, Associated Press, Aug. 4, 1998. Copy supplied.

Adam Geller, *Bahamas Flies Chinese Illegal Immigrants Home; 21 Were Part of Group Bound for a Landing on Jersey Shore*, The Record (Bergen County, N.J.), Aug. 4, 1998. Copy supplied.

Larry Lewis, *3 Prison Workers Plead Guilty to Bribery*, Philadelphia Inquirer, Jan. 31, 1998. Copy supplied.

Associated Press, *Fort Dix Prison Workers Accused of Taking Bribes*, Press of Atlantic City, Dec. 16, 1997. Copy supplied.

Terry Pristin, *New Jersey Daily Briefing; Man Convicted in Carjacking*, New York Times, Dec. 12, 1996. Copy supplied.

Tina Traster, *2 Ex-School Officials Get Prison Time; Judge Turns Down Appeals for Leniency*, The Star-Ledger, June 19, 1996. Copy supplied.

Terry Pristin, *Man Convicted in Carjacking*, New York Times, Dec. 12, 1996. Copy supplied.

Henry Gottlieb, *Happy Clients Don't Help an Imposter*, N.J. Law Journal, Feb. 6, 1995. Copy supplied.

Richard Pliskin, *Imposter Lawyer Pleads Guilty to Fraud*, N.J. Law Journal, Aug. 29, 1994. Copy supplied.

Henry Gottlieb, *The Not-So-Great Imposter*, N.J. Law Journal, Mar. 14, 1994. Copy supplied.

Joe Tyrrell and Bill Gannon, *Bogus Practice Disbarred Attorney Charged for Using Alias*, The Star-Ledger, Mar. 3, 1994. Copy supplied.

Associated Press, *Ocean County Publisher Indicted in Embezzlement*, Philadelphia Inquirer, Apr. 14, 1993 [re-printed in multiple outlets]. Copy supplied.

13. **Judicial Office:** State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I was appointed as a United States Magistrate Judge for the District of New Jersey by the District Judges of the United States District Court for the District of New Jersey in 2003 and continue to serve in that position. As a Magistrate Judge, I am authorized to handle cases pursuant to 28 U.S.C. § 636.

In the District of New Jersey, civil actions (with limited exceptions) are automatically assigned to a United States District Judge, who serves as the presiding judge, and a Magistrate Judge, who serves as the referral judge. The assigned Magistrate Judge is responsible for managing all aspects of the pretrial process. This includes convening scheduling conferences, resolving discovery disputes, ruling on other nondispositive motions, holding settlement conferences, and presiding over final pretrial conferences. In addition, a Magistrate Judge may be asked to prepare Reports and Recommendations on dispositive motions (e.g., motions to dismiss, motions for summary judgment, motions for class certification). I have been designated as the referral judge in more than 4000 civil cases. In addition, parties have consented to my jurisdiction in whole or in part in more than 70 civil cases. In consent cases, I serve as the presiding judge and thus have the authority to render case-dispositive rulings and preside over trials. I have presided over ten civil jury trials and three civil bench trials.

I also handle criminal cases that are presented when I am serving as the criminal duty judge. In addition to presiding over preliminary proceedings in felony cases, I have handled more than 20 misdemeanor cases with the consent of the parties, including one criminal jury trial. In addition, United States District Judges have referred more than 185 felony guilty plea proceedings to me for Reports and Recommendations.

- a. Approximately how many cases have you presided over that have gone to verdict or judgment? 14

i. Of these, approximately what percent were:

jury trials:	79%
bench trials:	21%
civil proceedings:	93%
criminal proceedings:	7%

b. Provide citations for all opinions you have written, including concurrences and dissents.

The Clerk's Office's electronic filing and case management system reflects that I issued 55 written opinions and 34 Reports and Recommendations. These items are set forth on the attached list. This is not the universe of dispositions memorialized in writing. I issue hundreds of orders each year. Some of these orders embody the opinions explaining the reasons for the ruling. The Clerk's electronic case filing system does not have a tool to distinguish orders containing the opinions from among the hundreds of orders I have issued. In addition, there may be opinions that have been filed but not docketed in a fashion that would cause them to be captured in the electronic filing system's report.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

For each case, the addresses listed for counsel reflect their last known business address.

1. *Stillman v. Staples*, Civ. No. 07-849

This was a collective action under the Fair Labor Standards Act filed on behalf of employees who held the position of assistant store sales manager. I presided over the case with the consent of the parties. After a six-week trial, the jury returned a verdict against the defendant and in favor of the more than 300 members of the collective action. After the judgment was entered, the Judicial Panel on Multi-District Litigation ["MDL"] transferred cases from other jurisdictions to a United States District Judge in the District of New Jersey. As part of the MDL case, the parties have sought approval of a settlement that would also resolve the *Stillman* case. As a result, the appeal of the *Stillman* judgment has been dismissed on the joint motion of the parties. The motion for final approval for a settlement class and a class settlement was referred to me and my recommendation concerning the motion was adopted, but final disposition regarding the attorney fee award is pending before the United States District Court Judge. The following are citations of opinions from *Stillman*: *Stillman v. Staples*, Civ. No. 07-849, 2007 WL 7261450 (D.N.J. July 20, 2007); *Stillman v. Staples*, Civ. No. 07-849, 2008

WL 1843998 (D.N.J. Apr. 22, 2008); *Stillman v. Staples*, Civ. No. 07-849, 2009 WL 1437817 (D.N.J. May 15, 2009).

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2. *Araoz v. United States*, Civ. No. 06-2149

This was a medical malpractice action under the Federal Tort Claims Act. I presided over the case with the consent of the parties. I resolved several in limine

applications and presided over a five-day bench trial that included testimony from several witnesses, such as competing expert obstetricians and pediatric neurologists. Based upon the evidence, there was a finding of no cause for action on the part of the plaintiff. *Araoz v. United States*, Civ. No. 06-2149, 2008 U.S. Dist. LEXIS 23495 (Mar. 24, 2008). The verdict was affirmed. *Araoz v. United States*, 337 F. App'x 207 (3d Cir. 2009).

Counsel for the Plaintiff:

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3. *United States v. Hartman*, Civ. No. 07-3843

In this case, defendant Hartman was alleged to have failed to pay estate taxes and several co-defendants were accused of receiving real estate on which the government placed estate tax liens. Certain defendants filed third-party and fourth-party complaints against real estate and legal professionals involved in the real estate transactions. I presided over the case with the consent of the parties. All parties, except the United States and defendant Hartman, reached resolution without trial, and defendant Hartman proceeded to trial. After a six-day trial, the jury returned a verdict in favor of the plaintiff and against the defendant.

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4. *United States v. Rucci*, Mag. No. 07-3163

This was a criminal tax case against an accountant who failed to file his tax returns despite having earned over \$250,000 during a four-year period. I presided over this case with the consent of the parties, made in limine rulings and addressed disputes concerning the jury charge. After a four-day trial, the jury returned a guilty verdict and, thereafter, the defendant was sentenced to a term of incarceration. The conviction and sentence were affirmed. *United States v. Rucci*, Crim. No. 08-665, 2009 U.S. Dist. LEXIS 37981 (D.N.J. May 1, 2009).

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5. *O'Connor v. Great Northern Insurance Co.*, Civ. No. 07-4388

This was a diversity action in which the plaintiff sought payment pursuant to his homeowner's insurance policy for damage due to a fire. The defendant denied coverage, in part, based upon the arson exclusion. I presided over the case with the consent of the parties. During the trial, and with counsel's consent, the jury was permitted to submit written questions of each witness for the Court to ask on the jury's behalf. After a four-day trial, the jury returned a verdict in favor of the defendant and against the plaintiff.

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6. *Mastrolia v. Potter*, Civ. No. 08-5967

This was a Rehabilitation Act case in which the plaintiff alleged discrimination and retaliation for his complaints of discrimination. I presided over the case with the consent of the parties. I resolved the motion for summary judgment, which limited the number of claims for the jury to consider. *Mastrolia v. Potter*, Civ. No. 08-5967, 2010 WL 1752531 (D.N.J. Apr. 27, 2010). After a six-day trial, the jury returned a verdict in favor of the defendant and against the plaintiff.

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7. *Morano v. New Jersey Transit*, Civ. No. 07-2407

This was a claim under the Federal Employee Liability Act in which the plaintiff alleged that his work on the railroad caused tinnitus. I presided over the case with

the consent of the parties, which involved a defense of contributory negligence based upon the plaintiff's alleged failure to avail himself of safety equipment. After a four-day trial, the jury returned a verdict in favor of the plaintiff.

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8. *Harold v. Black & Decker*, Civ. No. 04-2427

This was a diversity case alleging that a rotary hammer was defective and injured the plaintiff's hand. I presided over the case with the consent of the parties and resolved several in limine and post-trial applications. After a ten-day trial, the jury returned a verdict in favor of the plaintiff and against the defendant. The verdict was reversed based upon an evidentiary ruling. *Harold v. Black & Decker*, 295 F. App'x 530 (3d Cir. 2008). The appellate court noted that at the time of trial, the trial court did not have the benefit of an appellate ruling governing the evidentiary issue. After remand, a second jury was empanelled and the case settled.

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9. *Linz v. Great Atlantic & Pacific Tea Co. et al.*, Civ. No. 04-785

This patent case involved a claim that the defendants infringed the plaintiff's patent on an item used to dispense cans of soup. I addressed motion practice, which resulted in allowing the defendants to assert antitrust and common law tortious interference counterclaims. During the discovery period, the plaintiff asserted that he had shared his idea for this dispensing device with representatives of one of the defendants and, as a result, sought and obtained an order that permitted him to inspect items in one of the defendants' archives. I presided over the case with the consent of the parties. The case settled.

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10. *Rosario v. Carson*, Civ. No. 06-1287

This diversity action arose from allegations of sexual abuse of two minors. I presided over the case with the consent of the parties. The defendant was incarcerated for these actions and was amenable to a settlement. Hurdles arose concerning marshalling assets and securing the position of the victims' biological, noncustodial mother regarding the proposed settlement. Following an evidentiary hearing, the settlement was approved.

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- d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

1. *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546 (D.N.J. 2010).

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2. *Newman v. Gen. Motors*, slip. op. (D.N.J. Mar. 24, 2005), *aff'd*, slip. op., (D.N.J. Mar. 30, 2006), *aff'd*, 228 F. App'x 245 (3d Cir. 2007). Copy supplied.

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3. *Ngai v. Old Navy*, Civ. No. 07-5653, 2009 WL 2391282 (D.N.J. July 31, 2009).

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4. *Nycomed v. Tolmar*, Civ. No. 10-2635, 2011 WL 1675027 (D.N.J. Apr. 28, 2011).

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5. *Beye v. Horizon Blue Cross & Blue Shield*, Civ. Nos. 06-5337, 06-6219, 2007 WL 7403210 (D.N.J. Oct. 30, 2007), *reconsideration denied as modified*, 2007 WL 7393489 (D.N.J. Dec. 14, 2007).

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6. *Big M, Inc. v. Dryden Advisory Group*, Civ. No. 08-3567, 2009 WL 1905106 (D.N.J. June 30, 2009).

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*7. Solid Waste Servs., Inc. v. Morris County Mun. Utils. Auth.*, Civ. No. 08-327, 2008 WL 5046715 (D.N.J. Nov. 20, 2008).

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8. *In re Neurontin Antitrust Litig.*, MDL Doc. 1479, Civ. No. 02-1390, 2011 WL 253434 (D.N.J. Jan. 25, 2011) (corrected opinion), *aff'd*, 2011 WL 2357793 (D.N.J. June 9, 2011).

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9. *Transweb, LLC v. 3M Innovative Props.*, Civ. No. 10-4413, 2011 WL 2181189 (D.N.J. June 1, 2011).

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10. *Mayer v. Gottheiner*, 382 F. Supp. 2d 635 (D.N.J. 2005).

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- e. Provide a list of all cases in which certiorari was requested or granted.

I know of no cases in which certiorari was requested or granted.

- f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

In the cases in which the parties consented to magistrate judge jurisdiction, I was reversed one time. In *Harold v. Black & Decker*, 295 F. App'x 530 (3d Cir. 2008), the Court of Appeals for the Third Circuit reversed an oral ruling that barred the defendant from offering evidence of the absence of any complaints about the allegedly defective product. The Court of Appeals noted, however, that I did not have the benefit of a ruling that it had rendered after the trial. A copy of the order is supplied.

In all other cases, appeals of a Magistrate Judge's decision are filed with the presiding United States District Judge. The Clerk's Office Electronic Filing system has reports of appeals to the extent the appellant properly docketed the appeal. Based upon searches of electronic databases and my recollection, the following are cases in which decisions I made were reversed or a report and recommendation was not adopted:

*BCI Comm's, Inc. v. Nat'l Grid Wireless Holdings, Inc.*, Civ. No. 07-2143, slip op. (D.N.J. Feb. 6, 2008), *declined to adopt*, slip op. (D.N.J. May 20, 2008). The United States District Judge declined to adopt a Report and Recommendation to compel the parties to participate in contractual arbitration. The decision of the District Judge was appealed to the Court of Appeals for the Third Circuit but the case settled before the appeal was decided. Copies of the opinions are supplied.

*Beye v. Horizon Blue Cross & Blue Shield*, Civ. Nos. 06-5337, 06-6219, slip op. (D.N.J. May 6, 2008), *rev'd in part*, 2008 WL 3064757 (D.N.J. July 29, 2008). This case involved a challenge to an insurance company's decision not to pay health benefits. Certain plaintiffs were covered by ERISA plans and others were covered by non-ERISA plans. I permitted similar discovery to occur without regard to whether a plaintiff's plan was subject to ERISA. A copy of the Order is supplied. The United States District Judge reversed the portion of the discovery

ruling that permitted discovery from individuals who were covered by ERISA plans.

*Boyd v. John Doe Doctor*, Civ. No. 07-769, slip op. (D.N.J. Nov. 16, 2009), *rev'd*, slip op. (D.N.J. Feb. 3, 2010). I entered an order denying the pro se plaintiff leave to file a Second Amended Complaint to substitute certain individuals for fictitiously named defendants because the plaintiff had not provided a copy of the proposed pleading as required by the Local Rules and because the Final Pretrial Order made no mention of these individuals. After the order was entered, the United States District Judge reopened discovery for defendants named in the First Amended Complaint and vacated the Final Pretrial Order. As a result, the procedural posture of the case changed. In addition, the pro se plaintiff attached a copy of the proposed pleading to his appeal papers. Based on these subsequent events, the District Judge vacated the order and permitted the pro se plaintiff to file the Second Amended Complaint. Copies of the orders are supplied.

*Cataldo v. Moses*, Civ. No. 02-2588, slip op. (D.N.J. May 11, 2004), *declined to adopt in part*, 361 F. Supp. 2d 420 (D.N.J. Nov. 3, 2004). The United States District Judge adopted all aspects of the recommendation granting summary judgment in favor of the defendants except for a part concerning the New Jersey Tort Claim Act in light of the new rulings from the New Jersey Supreme Court. These decisions were issued after the Report and Recommendation was filed, and dictated a result different from the one recommended. A copy of the Report and Recommendation is supplied.

*Chevra Kadisha of Bobov, Inc. v. Washington Cemetery Mgmt. Corp.*, Civ. 06-5473, slip op. (D.N.J. Jan. 24, 2007), *rev'd*, slip op. (D.N.J. Mar. 28, 2007). I denied a motion for intervention filed by an entity and three individuals. The proposed intervenors appealed. In an oral ruling, the United States District Judge reversed the order denying the entity and certain individuals permission to intervene. The Court's order reflects that, after my order was entered, a third-party complaint was filed against the intervenors, which gave them a separate basis to be parties. Copies of the orders are supplied.

*E-Beam Services, Inc. v. AECL Techs.*, Civ. No. 02-2256, slip op. (D.N.J. July 1, 2003), *vacated*, slip op. (D.N.J. July 10, 2003). I imposed monetary sanctions against a party for knowingly disclosing information in a public filing that had been subject to a mediation confidentiality agreement. The United States District Judge entered an order vacating the sanction in conjunction with a consent order dismissing the case.

*Franco v. Connecticut General Life*, Civ. No. 07-6039, slip op. (D.N.J. Sept. 20, 2010), *rev'd*, slip op. (D.N.J. Dec. 22, 2010). In an oral ruling, the United States District Judge reversed an order denying an extension of the deadline to raise discovery disputes arising from requests for information from nonparties. Copies of the orders are supplied.

*In re Gabapentin Patent Litig.*, MDL 1384, Civ. No. 00-2931, slip ops. (D.N.J. Oct. 8, 2010), *rev'd in part*, slip op. (D.N.J. Jan. 25, 2011). In an oral ruling, the United States District Judge reversed orders that struck a surreply expert report and limited the testimony of another expert concerning late-disclosed data. The Court concluded that the testimony may aid the jury and disagreed with a finding concerning whether actions of the party demonstrated bad faith sufficient to warrant preclusion of evidence. Copies of the orders are supplied.

*Kounelis v. Sherrer*, Civ. No. 04-4714, slip op. (D.N.J. Oct. 4, 2007), *rev'd in part*, 529 F. Supp. 2d 503 (D.N.J. 2008). After a hearing, I found that the defendants had failed to preserve a video tape that would have recorded an area where an alleged assault occurred. I imposed certain spoliation sanctions, which included a payment to the pro bono fund, but declined to impose an adverse inference instruction or award the plaintiff's pro bono counsel attorney's fees. A copy of the Order is supplied. The United States District Judge affirmed the decision on sanctions but reversed the instruction, pro bono fund payment, and fee ruling and awarded plaintiff's pro bono counsel attorney's fees, vacated the pro bono fund payment in light of the fee award, and granted the request for an adverse instruction.

*Lee v. Krieg*, Civ. No. 06-278, slip op. (D.N.J. June 22, 2006), *adopted*, 2006 U.S. Dist. LEXIS 58486 (D.N.J. Aug. 21, 2006), *vacated and remanded*, 227 Fed. App'x 146 (3d Cir. 2007). The United States District Judge adopted the recommendation that the Complaint be dismissed as it involved the same claims as those pending in an earlier case that had been closed. The recommendation did not specify whether the dismissal should be with or without prejudice. The District Judge dismissed the Complaint with prejudice. The Court of Appeals for the Third Circuit vacated the order that dismissed the case with prejudice, stating that the District Court did not consider measures less drastic than dismissal with prejudice, such as dismissal without prejudice to the plaintiff's filing a motion to reopen the earlier case. A copy of the Report and Recommendation is supplied.

*Louis v. NCR*, Civ. No. 06-422, slip op. (D.N.J. Oct. 20, 2006), *adopted in part, declined to adopt in part*, 2006 WL 3419834 (D.N.J. Nov. 27, 2006). As a result of the plaintiff's failure to provide responses to discovery and failure to appear for a court-ordered settlement conference, I issued an order directing him to show cause in writing by a specific deadline why sanctions should not be imposed. The order to show cause specifically notified him that if he failed to respond, I would recommend to the United States District Judge that the complaint be dismissed. He provided no response and I recommended dismissal. The United States District Judge adopted the recommendation to impose sanctions, but chose to impose monetary sanctions instead of adopting the recommendation to dismiss the complaint based upon explanations provided to the District Judge as to why the plaintiff failed to appear at the settlement conference and the representation that a deposition had occurred after the recommendation had been issued that enabled

the defendant to obtain discovery and thereby ameliorate the prejudice that the defendant suffered from the absence of the written discovery from the plaintiff. A copy of the Report and Recommendation is supplied.

*Ngai v. Old Navy*, Civ. No. 07-5653 slip op. (D.N.J. May 21, 2009), *partially vacated*, slip op. (D.N.J. May 27, 2009). The United States District Judge vacated a portion of an order directing that a deposition occur on a particular date based upon a representation made to the District Judge that the witness retained counsel. Copies of the orders are supplied.

*Patterson v. City of Perth Amboy*, Civ. No. 06-4780, slip op. (D.N.J. June 29, 2007), *rev'd in part*, 2007 WL 3054939 (D.N.J. Oct. 11, 2007). I barred plaintiff from serving two expert reports because they were untimely. A copy of the order is supplied. The United States District Judge affirmed the ruling as to one of the experts, but reversed the ruling as to the other expert based upon the Court's view of the significance of the expert's opinion on an issue in the case.

*Richards v. Johnson & Johnson, Inc.*, Civ. No. 05-3663, slip op. (D.N.J. Nov. 21, 2006), slip op. (D.N.J. Dec. 29, 2006), *reconsideration denied*, slip op. (D.N.J. Jan. 4, 2007) *rev'd*, 2007 WL 2123697 (D.N.J. July 20, 2007). In this employment discrimination case, I precluded the plaintiff from obtaining discovery concerning the employee ratings of individuals who held the same positions as plaintiff as well as other positions that he sought but did not obtain and denied the request to reconsider this decision. Copies of the orders are supplied. The United States District Judge found that the discovery might reveal how similarly situated employees were treated under the employee rating system and remanded to enable the defendant to develop a record concerning the burden of producing such information and to enable the plaintiff to make arguments concerning whether a uniform employee evaluation system for all employees existed.

*Sery v. Fed. Bus. Ctrs.*, Civ. No. 06-1026, slip op. (D.N.J. May 7, 2007), *set aside and remanded*, slip op. (D.N.J. July 20, 2007). In this case, I precluded the plaintiff from offering an expert report because it was untimely. The United States District Judge set aside the order and remanded for further findings on whether or not the plaintiff flagrantly disregarded the scheduling order and whether the defendant would be prejudiced by the untimely report. Copies of the orders are supplied.

*United States ex rel. Anthony Kite v. Besler Consulting*, Civ. No. 05-3066, slip op. (D.N.J. Sept. 2, 2008), *rev'd*, slip op. (D.N.J. Nov. 3, 2008). I administratively terminated a motion to sever a defendant based upon a claim of improper joinder without prejudice to refile at a later time, explaining that coordinated pretrial proceedings advanced judicial economy and would conserve resources. The United States District Judge vacated the termination order because the Court believed it lacked a full explanation addressing the movant's arguments of

prejudice and efficiency. On remand, I issued an order denying the motion without prejudice to it being renewed as part of the final pretrial process. The movant appealed. The United States District Judge affirmed and agreed with the view I expressed both before and after remand that pretrial case management supported consolidated pretrial proceedings for all defendants. Copies of the orders are supplied.

*Wachtel v. Guardian Life Ins. Co.*, Civ. No. 01-4183, and *McCoy v. Health Net, Inc.*, 03-1801, slip op. (D.N.J. July 28, 2005), *rev'd in part*, 239 F.R.D. 376 (D.N.J. 2006). The United States District Judge affirmed several discovery rulings but reversed one decision that barred plaintiffs from supplementing their expert report. A copy of the order is supplied.

*Wachtel v. Guardian Life Ins. Co.*, Civ. No. 01-4183, and *McCoy v. Health Net, Inc.*, 03-1801, slip op. (D.N.J. Sept. 28, 2005), *rev'd in part*, 2006 WL 2506771 (D.N.J. Aug. 29, 2006). I issued an order barring plaintiff from making in limine motions not listed in the final pretrial order. The United States District Judge reversed the order based on additional evidence disclosed at hearings before the Court. The evidence was not disclosed at the time the final pretrial order was signed. The District Judge also reversed based upon logistical issues that were contemplated to occur during trial. A copy of the order is supplied.

*Worthy v. City of Newark*, Civ. No. 05-2115, slip op. (D.N.J. Aug. 22, 2007), *rev'd in part*, 2008 WL 413309 (D.N.J. Feb. 13, 2008). The United States District Judge reversed a ruling that partially granted a motion to quash a subpoena served upon the plaintiff's former criminal defense counsel. The decision to quash was based upon the assertion of privilege. A copy of the order is supplied. The District Judge found that the plaintiff had waived the privilege based upon the plaintiff's disclosure of privileged information in a brief filed in a state court proceeding.

- g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

As a Magistrate Judge, I issue orders on nondispositive matters that range from discovery disputes, motions to amend pleadings, motions to extend discovery schedules, motions to disqualify, and other motions and applications. I issue hundreds of such orders each year. If the issue is dispositive and the parties have not consented to magistrate judge jurisdiction, then the orders must be done in the form of a Report and Recommendation to the presiding United States District Judge. If the parties consent to the jurisdiction of the magistrate judge, then I issue orders addressing both dispositive and nondispositive motions and applications. Very few of the opinions and orders that I issue are published, although I file all of my orders, written opinions, and written reports and recommendations on the Court's electronic filing system. In addition, to facilitate

the expeditious resolution of disputes, I frequently prepare opinions that I dictate into the record. Although orders memorializing the ruling are electronically filed, these oral opinions are not captured on the Clerk's electronic filings. If a party or the Court orders the transcript of the opinion, then it may be filed as part of the docket but, to my knowledge, there is no electronic filing report that keeps track of these transcripts. Other than the few opinions that I have designated for publication or requested to be transcribed, I have no control over which opinions and orders are published on Westlaw or Lexis Nexis or which dictated opinions are transcribed.

- h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

*Mayer v. Gottheiner*, 382 F. Supp. 2d 635 (D.N.J. 2005)

- i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not sat by designation on a federal court of appeals.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

- a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;
- b. a brief description of the asserted conflict of interest or other ground for recusal;
- c. the procedure you followed in determining whether or not to recuse yourself;
- d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

The Clerk of the Court has a system that randomly assigns civil cases to pairs of United States District Judges and Magistrate Judges. Before final assignment is made, the Clerk reviews a list of persons or entities whose presence automatically causes a recusal. At present, I own no stock and have no financial interests that

require automatic recusal. When a case is assigned to me, I review the parties, counsel, and facts to ensure there are no conflicts or other grounds for recusal. I have recused from certain cases the Clerk has automatically assigned to me based upon my former duties as an Assistant U.S. Attorney and the current role of my significant other as an Assistant U.S. Attorney, and I have identified such cases on the attached list.

I also receive assignments of criminal cases and matters when I serve as the week's criminal duty judge. The duty assignment rotates approximately every six weeks. When a case or matter is presented, my staff immediately asks if the case or matter was pending in the United States Attorney's Office before March 10, 2003. If the case or matter was pending before that date, I recuse because of the breadth of my former duties at that Office. In addition, I recuse from all cases that are assigned to Assistant U.S. Attorneys in the division that my significant other supervises as well as any cases that he handles or handled. I do not have a list of case or matters that have triggered these immediate recusals.

Listed below are cases from which I recused based upon my relationship with either a lawyer or a party:

*Unum Life Ins. Co. v. Estate of Morabito*, Civ. No. 09-4320; *Metro. Life Ins. Co. v. Delrusso*, Civ. No. 10-1250: At the initial conference, I notified the parties that I had worked with defense counsel when he was an Assistant U.S. Attorney and met his client during at least one social event. At plaintiff's request, I recused.

*Trelease v. Metro. Life Ins. Co.*, Civ. No. 07-3841: A childhood friend served as defense counsel and, at her request, I recused.

*N.Y. Susquehanna v. Campbell*, Civ. No. 05-4010: I recused because a party was a relative of my significant other.

Listed below are cases in which a party sought or discussed my recusal:

*N.J. Sand Hill Band of Lenape & Cherokee Indians v. New Jersey*, Civ. No. 09-683, 2011 U.S. Dist. LEXIS 36874 (D.N.J. Mar. 31, 2011): Plaintiffs sought recusal of both the United States District Judge and me based upon disagreement with certain rulings. The movant also generally asserted that the District Judge and I were biased and prejudiced. The District Judge found that the plaintiffs had presented no facts showing either prejudice or bias. The motion was denied.

*Goldberg v. County of Essex*, Civ. No. 04-3901: At the early stage of the case, I notified the parties that I once worked with one of the defendants, who was named in her official capacity. The plaintiff initially submitted a letter suggesting recusal may be warranted. The plaintiff was instructed to file a formal motion if he decided to seek recusal. The plaintiff did not pursue the issue.

*Abdel-Whab v. Middlesex County Jail*, Civ. No. 04-1846: The pro se plaintiff sought recusal based upon his disagreement with an adverse ruling. There were no facts showing bias or partiality. The motion was denied.

*Jones v. Green*, Civ. No. 02-6029: The pro se plaintiff sought recusal based upon my judicial decisions. There were no facts showing bias or partiality. The motion was denied.

*Jones v. Zara*, Civ. No. 03-3947: The pro se plaintiff sought recusal based upon a claim that improper telephone conversations had transpired between the Court and defense counsel. The plaintiff was notified that no such conversations occurred and the motion was denied.

**15. Public Office, Political Activities and Affiliations:**

- a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have not held any public office other than judicial office. I have had no unsuccessful candidacies or elective office or unsuccessful nominations for appointed office.

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have not held any office in or rendered services to any political party or election committee. I have not held a position or played a role in a political campaign.

**16. Legal Career:** Answer each part separately.

- a. Describe chronologically your law practice and legal experience after graduation from law school including:
  - i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

1987 – 1989; I served as a law clerk to Judge Harold A. Ackerman, United States District Court for the District of New Jersey.

- ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced alone.

- iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

1986 – 1987

Pepper, Hamilton & Scheetz (now Pepper Hamilton LLP)  
3000 Two Logan Square  
Philadelphia, Pennsylvania 19103  
Associate

1987 – 1989

United States District Court for the District of New Jersey  
Frank R. Lautenberg Post Office and Courthouse  
2 Federal Square  
Newark, New Jersey 07101  
Law Clerk to Judge Harold A. Ackerman

1989 – 2003

United States Attorney's Office for the District of New Jersey  
970 Broad Street  
Newark, New Jersey 07102  
Assistant United States Attorney (1989 – 2003)  
Deputy Chief, Criminal Division (1995 – 1999)  
Chief, Criminal Division (1999 – 2001; 2002 – 2003)  
Executive Assistant U.S. Attorney (2001 – 2002)

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I never served as a private mediator or an arbitrator.

b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

After law school graduation, I joined the labor department of Pepper, Hamilton & Scheetz (now Pepper Hamilton LLP) and received assignments ranging from responding to discovery to drafting in limine motions and client letters. I also had the opportunity to appear before a state court judge and seek a temporary restraining order. I left the firm to

begin my District Court clerkship. At the conclusion of my clerkship, I joined the United States Attorney's Office and was assigned to the Criminal Division, where I handled violent crime, drug, and white collar cases. After several years in the Criminal Division, I was assigned to the Special Prosecutions Division, which focuses on public corruption cases. After a brief tenure in that division, I was promoted to Deputy Chief of the Criminal Division, where I supervised dozens of Assistant U.S. Attorneys. In February 1999, I was appointed Chief of the Criminal Division. I served in that position until August 2001, when I was appointed Executive Assistant U.S. Attorney. In that role, I supervised the Criminal, Civil and Fraud Divisions. I returned as Criminal Chief in January 2002 and remained in that position supervising an expanded and reorganized division until my appointment as a United States Magistrate Judge in March 2003.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

While working at Pepper, Hamilton, & Scheetz, I was assigned to the labor department. It represented parties in both traditional labor matters and employment discrimination cases. While working for the United States Attorney's Office, I represented the United States in federal criminal cases.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

My entire career has involved federal litigation, and I have appeared in court frequently. That frequency, however, decreased as my supervisory duties increased. To the best of my recollection, I appeared before New Jersey state judges less than five times, and I appeared with a client while in private practice before a representative on the National Labor Relations Board one time.

- i. Indicate the percentage of your practice in:
  - 1. federal courts: 99.9%
  - 2. state courts of record: .09%
  - 3. other courts: 0%
  - 4. administrative agencies: .01%

- ii. Indicate the percentage of your practice in:
  - 1. civil proceedings: .01%
  - 2. criminal proceedings: 99.99%

- d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather

than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have tried more than 15 cases to verdict in the United States District Court. In each case, I was either sole or chief counsel. I also served in a supervisory capacity at trials with relatively junior Assistant U.S. Attorneys who were handling their first trials.

- i. What percentage of these trials were:
  - 1. jury: 100%
  - 2. non-jury: 0%

- e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not practiced before the Supreme Court of the United States.

17. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;
- b. the name of the court and the name of the judge or judges before whom the case was litigated; and
- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Listed below are ten cases in which I was sole or chief counsel for the United States before the United States District Court. I was responsible for the case throughout its entire investigation and prosecution. Any appeals were handled by other Assistant U.S. Attorneys assigned to the Office's Appeals Division. Certain defendants may have had post-conviction proceedings after I became a Magistrate Judge and, accordingly, I had no role in those proceedings. The addresses for the attorneys are the most recent business addresses I could locate.

- I. *United States v. Smith*, Crim. No. 00-399, before the Hon. John C. Lifland, United States District Court for the District of New Jersey.

The defendants were five police officers who were convicted of violating the civil rights of an individual whom the officers had wrongly suspected of having murdered a fellow police officer. The individual died as a result of the defendants' acts of police brutality. The trial lasted more than two months, and involved dozens of fact witnesses and several medical experts. I delivered the opening statement and rebuttal summation, handled numerous witnesses and motions as well as the charge conference. The jury returned guilty verdicts on all counts. The United States District Judge granted the post-trial motion for acquittal on the conspiracy count. The Court of Appeals of the Third Circuit reinstated the conviction on the conspiracy count. *United States v. Smith*, 294 F.3d 473 (3d Cir. 2002). The defendants were sentenced after I became a Magistrate Judge.

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2. *United States v. Nunes*, Crim. No. 96-231, before the Hon. William H. Walls, United States District Court for the District of New Jersey.

A jury convicted the defendant of carjacking an employee of the Federal Bureau of Investigation. The defendant brutally assaulted her both physically and sexually. There was no fingerprint, DNA or other forensic evidence. Rather, the case rested on eyewitness testimony, corroboration of statements that the defendant made to the victim during their encounter that confirmed his identity as the perpetrator, and other-act evidence admitted under Fed. R. Evid. 404(b). Specifically, the investigation revealed that the defendant had engaged in similar violent conduct against other women. The conviction was affirmed. *United States v. Nunes*, 135 F.3d 767 (3d Cir. 1997) (table).

Counsel for the Defendant:

Paul B. Brickfield  
Brickfield & Donahue  
70 Grand Avenue, Suite 102  
River Edge, NJ 07661  
(201) 258-3984

3. *United States v. Pollard*, Crim. No. 91-210, before the Hon. Garrett E. Brown, Jr., United States District Court for the District of New Jersey.

Two defendants were charged with conspiring to transport, transporting, and kidnapping minor boys for the purpose of engaging in illegal sexual activities with them. The defendants used various lures to convince the boys to travel with them, including telling them that they ran a modeling agency and that they could get the boys jobs as models. Some of the victims reported that they were offered something to drink which caused them to pass out and that upon awakening they were partially disrobed and in pain. One defendant entered a guilty plea. Because of my role from the outset of the investigation, I handled all of the victims who testified and many of the law enforcement witnesses as well as all of the jury addresses, many motions, and the charge conference. Following an approximately one-month trial, involving multiple youthful victims who were asked to recount sensitive details, a jury convicted the remaining defendant. The jury verdict was affirmed. *United States v. Pollard*, 986 F.2d 44 (3d Cir. 1993).

Co-counsel for the United States:

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Counsel for the Defendants:

Jerome Ballarotto  
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(609) 581-8556

James Weinberg  
deceased

4. *United States v. Santtini*, Crim. No. 91-443, before the Hon. Dickinson R. Debevoise, United States District Court for the District of New Jersey.

The defendants were involved in the manufacture of cocaine at a clandestine cocaine conversion laboratory in New York. The chemical conversion process polluted the property and resulted in its placement on the New York Superfund list of hazardous sites. Another noteworthy portion of the case involved an emergent petition to the Court of Appeals for the Third Circuit seeking review of the trial court's order precluding the execution of a lawfully issued arrest warrant for a fugitive residing outside of the United States. The Third Circuit ruled that the doctrine of separation of powers prevents the court from interfering with the power of the executive branch to arrest fugitives pursuant to a valid warrant. *United States v. Santtini*, 963 F.2d 585 (3d Cir. 1992). Three defendants entered guilty pleas. Following a trial that lasted several weeks, in which I handled multiple witnesses, motions, jury addresses, and the charge conference, a jury convicted the remaining defendant.

Co-counsel for the United States:

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Bank of New York Mellon Corp.  
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5. *United States v. Vitacco*, Crim. No. 95-132, before the Hon. Harold A. Ackerman, United States District Court for the District of New Jersey.

These defendants were, respectively, the superintendent of schools and the business administrator for the Board of Education in Lincoln Park, New Jersey. Together with my co-counsel, we conducted a grand jury investigation, which resulted in the return of a multiple count indictment charging each defendant with tax evasion and fraud associated with the manipulation of their vacation and sick time. In the midst of trial preparation, the defendants pleaded guilty to felony tax offenses embodied in the indictment filed against them.

Co-counsel for the United States:

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300 Quarropas Street  
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(914) 993-1900

Counsel for the Defendants:

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(973) 633-8700

Michael D'Alessio, Jr.  
Walder, Hayden & Brogan  
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Roseland, NJ 07068  
(973) 992-5300

6. *United States v. D.T.*, Crim. No. 99-65, before the Hon. Nicholas H. Politan, United States District Court for the District of New Jersey.

The defendant was a juvenile offender charged with bank robbery. Because of his lengthy and increasingly violent juvenile record, the defendant was transferred for prosecution as an adult. Very strict procedural protections are accorded to juveniles and to ensure that these protections were satisfied, the agent and I

closely examined both the offense and the criminal, educational, and social history of the offender to ensure that a request to transfer him to adult status was warranted. He entered a guilty plea to bank robbery.

Counsel for the Defendant:

Michael N. Pedicini  
60 Washington Street  
Morristown, NJ 07960  
(973) 285-1555

7. *United States v. Redmond*, Crim. No. 92-270, before the Hon. H. Lee Sarokin, United States District Court for the District of New Jersey.

The defendant committed a series of bank robberies. Because forensic evidence was not recovered from each bank, other means were used to identify the perpetrator, including a live line-up. Working with law enforcement, we brought together individuals who resembled the defendant and allowed the defense counsel to challenge those he did not believe to sufficiently resemble his client. The defendant was ultimately identified as the robber of more than a dozen banks. After he was charged, the defendant provided law enforcement with information concerning how he selected his targets and this information helped law enforcement educate banks about ways to protect themselves from robberies. He entered a guilty plea to multiple bank robberies.

Counsel for the Defendant:

Donald McCauley  
Federal Public Defender  
1002 Broad Street  
Newark, NJ 07102  
(973) 645-6347

8. *United States v. Williams*, Crim. No. 01-490, before the Hon. William G. Bassler, United States District Court for the District of New Jersey.

The defendant was under investigation for committing automobile lease fraud. During the investigation, law enforcement approached the defendant while he was driving one of the fraudulently obtained vehicles. Instead of complying with their requests to exit the vehicle, the defendant accelerated and struck two federal agents. Following a jury trial, during which I handled multiple witnesses, jury addresses, and the charge conference, the defendant was convicted of fraud and assault on federal agents. The jury verdict was affirmed. *United States v. Williams*, 157 F. App'x 537 (3d Cir. 2005).

Co-counsel for the United States:

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(609) 292-4925

Counsel for the Defendant:

Muhammad Ibn Bashir  
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Elizabeth, NJ 07201  
(908) 965-2033

9. *United States v. Londono*, Crim. No. 90-241, before the Hon. John C. Lifland, United States District Court for the District of New Jersey.

The defendant was involved in an international drug trafficking organization that distributed multiple kilograms of cocaine. Following a several week trial, which involved multiple witnesses and motions, a jury convicted the defendant for violating the federal drug laws. The conviction was affirmed. *United States v. Londono*, 998 F.2d 1006 (3d Cir. 1993).

Counsel for the Defendant:

Mark W. Catanzaro  
Blason Iv Suite 208  
513 South Lenola Road  
Moorestown, NJ 08057  
(856) 235-4266

10. *United States v. Barkerswoode*, Crim. No. 93-309, before the Hon. Joseph H. Rodriguez, United States District Court for the District of New Jersey.

The defendants were convicted for their role in a multinational drug trafficking organization following a wiretap investigation. Among the members was a professional soccer player from Ghana. To facilitate resolution of the case, my co-counsel and I made presentations to almost every defendant and his counsel that highlighted the evidence, including readings of portions of wiretapped conversations that implicated the particular defendant in the conspiracy. All defendants entered guilty pleas to drug offenses. One defendant appealed his

sentence. The sentence was affirmed. *United States v. Barkerswoode*, 103 F.3d 114 (3d Cir. 1996) (table).

Co-counsel for the United States:

Joan Thomas  
Herrick, Feinstein LLP  
104 Carnegie Center  
Princeton, NJ 08540  
(609) 452-3800

Counsel for the Defendants:

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(212) 363-6969

18. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Most of my career has been spent in public service and my legal work has been in the federal trial court. More specifically, as an Assistant and Supervisory Assistant U.S. Attorney, my work was almost exclusively focused on federal criminal law. I personally investigated, prosecuted, and supervised hundreds of cases. In addition, I was responsible for several special matters, including coordinating the United States Attorney's Office's investigative support in the aftermath of September 11, 2001.

Outside of court, I have devoted my time to training. As a Supervisory Assistant U.S. Attorney, I developed an in-house training program for new Assistant U.S. Attorneys, lectured Assistant U.S. Attorneys on various topics, including ethics and plea bargaining, and provided training to law enforcement officers on various aspects of federal criminal law and procedure. In my current position, I have participated in continuing legal education through participation on panels and teaching. I also assisted the Administrative Office of the United States Courts with a video regarding a program to gather Magistrate Judge workload statistics. A copy of the DVD is supplied in response to question 12d. In addition, I serve on several court governance committees, including the Patent Rules committee, which recommended Local Patent Rules that govern the management of patent cases filed in the District of New Jersey. A copy of the Rules is supplied as part of my response to Question 12b.

I have performed no lobbying activities.

19. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

In the Spring of 2009, 2010, and 2011, I taught an evening course entitled “Discovery and the Pretrial Process” at Fordham University Law School. This is a “skills” class focused on pretrial federal civil litigation. A copy of the 2011 syllabus is supplied.

20. **Deferred Income/ Future Benefits:** List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

Upon retirement, I am eligible to receive benefits from the Federal Employee Retirement System. Otherwise, I do not expect to receive any deferred income or future benefits.

21. **Outside Commitments During Court Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

Subject to the approval of the Chief Judge of the Circuit, I am scheduled to teach one evening class at Fordham Law School in the Spring of 2012. I have no other commitments to pursue outside employment.

22. **Sources of Income:** List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth statement.

24. **Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

My significant other supervises one division of the United States Attorney's Office and, if confirmed, I would continue to recuse myself from all matters he handles or supervises and would recuse from any cases in which he has a financial

interest. In addition, because of the various supervisory positions I held, I would continue to recuse myself from any matters pending in the United States Attorney's Office before March 10, 2003.

Other than those situations, I am not aware of any conflicts in the categories described, but in any event, I would review each case to determine if any conflict existed, and if it did, I would recuse myself from the case.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would continue to follow and carefully apply the Code of Conduct for United States Judges as well as other ethical canons and statutory provisions.

25. **Pro Bono Work:** An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

As a judicial law clerk, Assistant U.S. Attorney, and Magistrate Judge, I have been limited in the type of pro bono work that I can do. While I was an Assistant United States Attorney, the Code of Federal Regulations prevented all Assistant U.S. Attorneys from undertaking the type of pro bono representation required of New Jersey bar members and Assistant United States Attorneys were granted an exemption from the requirement of accepting such pro bono appointments. Consistent with the limitations of my positions, I have attempted to fulfill Canon 2 through teaching and speaking to various groups, including bar associations, law enforcement groups, and students.

In addition, I organized and managed the summer intern programs at both the United States Attorney's Office and the United States District Court, participated in our law clerk orientation program, participated in the "Take Your Child To Work Day" events, and have met with elementary, high school, college, and law students to educate them about careers in the law, our government, and public service. During the academic year 2006 – 2007, I also served as a workplace mentor for a high school senior participating in the Senior Experience Internship from the Bergen Academy, Hackensack, New Jersey.

26. **Selection Process:**

- a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department

regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

To my knowledge, there is no selection commission for appointments to this court. Since July 26, 2011, I have spoken with attorneys at the White House Counsel's Office. On August 4, 2011, I was notified that my name was being forwarded to the Department of Justice for vetting for a potential nomination. Since August 4, 2011, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On September 8, 2011, I interviewed with officials from the White House Counsel's Office and the Department of Justice in Washington, DC. I have also interviewed with Senator Frank Lautenberg and Senator Robert Menendez. On October 5, 2011, the President submitted my nomination to the Senate.

- b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

AFFIDAVIT

I, Patty Shwartz, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

October 4, 2011

(DATE)

Patty Shwartz

(NAME)

John Kevin Stone

(NOTARY)

JOHN KEVIN STONE  
NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires ~~June 2, 2014~~  
SEP. 13, 2015

January 3, 2013

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

I have reviewed the Senate Questionnaire I previously filed in connection with my nomination on October 5, 2011, to be United States Circuit Judge for the Third Circuit. Incorporating the additional information below and any information provided during my hearing, I certify that the information contained in that document is, to the best of my knowledge, true and accurate.

**Question 9:**

I no longer serve on the United States District Court for the District of New Jersey Criminal Law & Probation or Education Committees.

**Question 12d:**

October 16, 2012: Professionalism Day Program, Panel Presentation: Uses and Abuses of Social Media, A Lawyer's Ethical & Professionalism Obligations, Newark, New Jersey. Notes supplied.

September 24, 2012: John C. Liffand Inn of Court, Ethics and Civility Panel Presentation, Tigers in the Courtroom, Ethics Gone Wild, New Brunswick, New Jersey. I have no notes, transcripts, or recordings. The Inn has no physical address.

September 21, 2012: New Jersey Corporate Counsel Association Tenth Annual Full Day ICLE Conference, Panel Presentation on Effective Protocols for Reducing Electronic Discovery Costs, Whippany, New Jersey. Notes supplied.

September 13, 2012: United States District Court for the District of New Jersey Law Clerk Orientation. Presentation welcoming the new law clerks and describing the importance of the law clerk experience. I have no notes, transcripts, or recordings. The program was held at the United States District Court for the District of New Jersey, Martin Luther King, Jr., Federal Building & Courthouse, 50 Walnut Street, Newark, New Jersey 07102.

September 10, 2012: Guest Lecturer at Judge Jose Linares' Advanced Criminal Trial Practice class at Seton Hall Law School, discussing the federal criminal process. I have no notes, transcripts, or recordings. The Law School is located at One Newark Center, Newark, New Jersey 07102.

June 26, 2012: United States Attorney's New AUSA Orientation, Practice before the United States Magistrate Judges. I have no notes, transcripts, or recordings. The presentation was held at the United States District Court for the District of New Jersey, Frank R. Lautenberg Post Office & Courthouse, 2 Federal Square, Newark, New Jersey 07101.

June 18, 2012: New Jersey Attorney General's Advocacy Institute, A Practical Guide to Federal Pretrial Practice. I have no notes, transcripts, or recordings. The address for the New Jersey Attorney General is Richard J. Hughes Justice Complex, 25 Market Street, Trenton, New Jersey 08625.

May 18, 2012: Pompton Lakes High School Career Day. Spoke to high school students about my career path and careers in the law. I have no notes, transcripts, or recordings. The address for Pompton Lakes High School is 44 Lakeside Avenue, Pompton Lakes, New Jersey 07442.

March 23, 2012: Lincoln Elementary School. Spoke to fifth grade students about judges and the courts. I have no notes, transcripts, or recordings. The address for Lincoln Elementary School is 18 Crane Street, Caldwell, New Jersey 07006.

March 20, 2012: U.S. Department of Homeland Security Training, Presentation on Reflections of a Former AUSA and the role of the Magistrate Judge. I have no notes, transcripts, or recordings. The program was held at Kean College, which is located at 1000 Morris Avenue, Union, New Jersey 07083.

March 20, 2012 and November 6, 2012: Guest lecturer at Judge Michael Chagares' Advanced Civil Practice Class at Seton Hall Law School, Newark, New Jersey. Notes supplied.

January 19, 2012: United States Attorney's Alumni Association, Panel on Multiple Representation, Newark, New Jersey. Notes supplied.

December 6, 2011: United States District Court for the District of New Jersey, Patent Seminar, Panel on Case Management Issues under the New Jersey Local Patent Rules. I have no notes, transcripts, or recordings. The program was held at the United States District Court for the District of New Jersey, Clarkson S. Fisher Federal Building and U.S. Courthouse, 402 East State Street, Trenton, New Jersey 08608.

November 21, 2011: Girl Scout Troop 1589 Out-Reach Panel on Careers. I have no notes, transcripts, or recordings. The program was held at the Nut Swamp Elementary School, 925 Nut Swamp Road, Middletown, New Jersey 07748.

In addition, on February 12, 2012 and June 15, 2012, respectively, I swore-in my current law clerk and a former colleague from the United States Attorney's Office for admission to practice law in the New Jersey state and federal courts. I have no notes, transcripts, or recordings. The ceremonies were held at the United States District Court for the District of New Jersey, Frank R. Lautenberg Post Office & Courthouse, 2 Federal Square, Newark, New Jersey 07101.

**Question 13a:**

I have presided over one civil jury trial that had gone to verdict.

**Question 13b:**

The Clerk's Office's electronic filing and case management system reflects that I have issued written additional opinions and reports and recommendations, which are set forth on the attached lists. In addition, I have issued orders and opinions that have not been docketed in a fashion that would cause them to be captured in the electronic filing system's report.

**Question 13c:**

*Stillman v. Staples* was settled as part of an MDL case and the *Stillman* appeal was dismissed.

**Question 13d:**

The judgment in *Dewey v. Volkswagen*, 728 F. Supp. 2d 546 (D.N.J. 2010), was reversed and remanded. *Dewey v. Volkswagen of Am.*, 681 F.3d 170 (3d Cir. 2012). Final Fairness Hearings on the new settlement have been held and judgments were issued approving the new settlement and certifying the settlement class. *Dewey v. Volkswagen*, Civ. No. 07-2249, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 6586511 (D.N.J. Dec. 14, 2012).

**Question 13f:**

In *Dewey v. Volkswagen of Am.*, 681 F.3d 170 (3d Cir. 2012), the Court of Appeals for the Third Circuit reversed a judgment granting class certification and remanded the case to address a single structural issue concerning the adequacy of the named plaintiffs to represent all class members. Upon remand, the parties addressed the adequacy issue through an adjustment to the settlement agreement, which was approved on December 14, 2012. *Dewey v. Volkswagen*, Civ. No. 07-2249, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 6586511 (D.N.J. Dec. 14, 2012).

In *United States v. Cox*, Crim. No. 11-99, 2011 WL 5023499 (D.N.J. Oct. 19, 2011), a district judge considered a motion to dismiss an Indictment based upon a violation of the Speedy Trial Act. The Court found that an Order I entered could not be used as a basis to exclude time under the Speedy Trial Clock because it was based upon inaccurate information that the Government had provided to me. Copies of the Order and Opinion are supplied.

**Question 14:**

I recused from one civil case based upon my prior duties at the United States Attorney's Office. I also recused from *Desmond v. Siegel*, Civ. No. 10-5562. The case was reassigned to me when the assigned Magistrate Judge was elevated to the United States District Court. Months before the case was reassigned to me, counsel for one of the parties had an appearance in that case before the former Magistrate Judge, paid a social visit to my Chambers, and described the case that had brought them to the courthouse that day. Out of an abundance of caution, I asked to

have the case reassigned. I have also continued applying my recusal procedures in criminal cases.

**Question 19:**

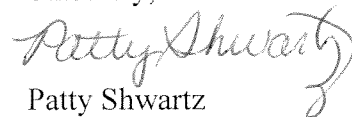
In the Spring of 2012, I taught an evening course entitled "Discovery and the Pretrial Process" at Fordham University Law School together with the Hon. Mark Falk. A copy of the 2012 syllabus is supplied.

**Question 21:**

With the approval of the Chief Judge of the Circuit, I am scheduled to teach one evening class at Fordham University Law School with the Hon. Mark Falk in Spring 2013.

I am also forwarding an updated Net Worth Statement and Financial Disclosure Report as requested in the Questionnaire. I thank the Committee for its consideration of my nomination.

Sincerely,

A handwritten signature in cursive script that reads "Patty Shwartz". The signature is written in dark ink and is positioned above the printed name.

Patty Shwartz

cc: The Honorable Charles Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

ITEMS REFERRED TO IN RESPONSE TO QUESTION 12D

10/16/2012

As this Is a Panel on Professionalism and Ethics,  
(And of Course You Want to Be Sure You Get  
Your Full 2 Ethics Credits) We Need to ~~of~~  
~~Course~~ Mention the Applicable Rules of  
Professional Conduct....

The Brave New Cyberworld Has Sprung up  
Around Us and as Competent Lawyers We Need  
to Understand What it Is and What it Can Do and  
How it Impacts Our Work...

Why?

Because **RPC 1.1** mandates that an attorney  
provide competent representation, which requires  
legal knowledge, skill, thoroughness and  
preparation.

In a nutshell, a competent lawyer today needs  
to understand the e-world and the social network  
world within which the clients and jurors operate  
and how this intersects with a lawyer's duties.

**RPC 1.3** requires an attorney to act with reasonable diligence and promptness in their representation.

This requires counsel to review the information that his or her client may have that may be discoverable....whether the information is on a social media site, an email or voice mail, or a file cabinet

**RPC 1.4** requires an attorney to confer with his or her client so that the attorney can ensure he or she complies with her legal obligations.

In this context, it means counseling your client to tell you everywhere information may exist, including social media sites, and ensuring that relevant information is preserved and knowing how it will be retrieved

**RPC 1.6** requires that you preserve client confidences...

In this context, and which you will hear <sup>more</sup> about ~~later in the panel~~, it requires thinking about how your associates may share information, how your firms may store information, and how your client can waive privilege by blogs/emails/posts, etc.

**RPC 3.4** imposes the duty of fairness

In the context of this portion of our panel discussion, fairness in the discovery process, it requires fairness, from preservation to ensuring you and your client have searched for responsive information in paper and cyberspace, as well as is being reasonable in your requests and your objections....

Indeed this requirement is imposed upon counsel in the **Fed R Civ P. 26**

Rule 26 has the certification requirement, which requires counsel to sign every Rule 26 disclosure and discovery request, response or objection and notifies counsel that his or her signature constitutes a certification:

--that the disclosure is complete

---that the discovery request or response thereto is consistent with the rules and law or a nonfrivolous argument to extend, modify or reverse existing law and not interposed to harass, delay or increase the costs of litigation.

It is in this area I just want to spend a few moments discussing ethics, professionalism, and the Rules of Civil Procedure in the context of discovery of social media:

Courts have begun to confront discovery demands directed at social media.

The cases show that some of the demands for

information contained in social media are drafted as if social media falls outside the normal discovery rules and the responses given to the demands act as if the social media is exempt from discovery.

Competent, prepared counsel, mindful of the rules, know that seeking discovery, in whatever form it may exist, is subject to the same boundaries whether the information sought is contained in a file cabinet or cyberspace.

Professionalism requires counsel apply and not ignore the rules and the precedent that requires the requesting party to seek only information that is relevant to a claim or defense or if good cause exists, the subject matter involved in the action.

Professionalism, which includes a knowledge of the rules, like **Rule 34(b)(1)** requires you to ensure that your demands are reasonably particular so the responding party knows what to look for.

Just because the information is in cyberspace does not mean that the entire “container” in which it appears is subject to disclosure...

Think of it this way:

if you sought information that is contained in a file cabinet, would that mean the adverse party is required to produce the entire file cabinet?

Would it mean the cabinet is subject to unrestricted inspection by the adverse party?

Why should the obligation of an officer of the Court to review <sup>places where responsive information is located</sup> information and then produce it change when the information is in cyberspace?

~~Why shouldn't the same obligations of counsel to review and produce apply and why should the information residing in cyberspace permit or require the adversary to gain the entirety~~

of the container in which the information is kept?

Lawyers remain officers of the court and their duties remain the same.

Similarly, why would the fact a party has information in cyberspace permit it to object simply because of where the information is located or object simply because the person who placed the information therein placed it in a place they designated as private?

Could a responding party object to producing information in a file folder simply because the folder has the word “private” on it?

Would an item be <sup>automatically</sup> immune from discovery simply because it was put in a place a reasonable person thought was private?

Would a response that says) <sup>I want respond because of the information</sup> “~~it~~ is in a private place” be consistent with the precedent that requires the production of information that is relevant even if it was not shared in public forum?

If you think about the discovery demands you make and receive and the responses you offer or receive from these perspectives, and how these demands and responses would be viewed if they involved information in the “paper world”, you will likely be less frustrated in the discovery process.

So, what’s the take away?

First, knowing the rules and remembering that they apply to things recorded on paper or electronically stored will lessen the frustration you feel when you receive a discovery demand you believe is onerous or receive a response that looks evasive.

When counsel aren't frustrated, the <sup>they are more civil +</sup> pretrial process moves more smoothly and with less stress, less cost, and maybe a few more laughs.

**Second**, whether you seek something in cyberspace or a file cabinet, or whether you are tasked with searching/preserving information in cyberspace or a file a cabinet, the rules are the same...

And Professionalism includes ensuring that you:

(a) understand the changing technology, educate your client about their duties to preserve and protect confidences that they have with you,

(b) tailor your requests (whether the information seeks social media or a piece of paper) to what Rule 26 allows you to obtain, and

(C) search for responsive information, regardless of the medium in which it may exist, or the privacy setting your client may have affixed to it...as the rules of engagement on terra firma and cyberspace are the same.

**Finally**, if you are ever unsure how to address a demand for information that may be located in cyberspace, think about it this way:

What would I do in the paper world when confronted with the issue, whether it is crafting a demand for information or providing a response?

It is likely that the response to this question will give you the parameters for addressing discovery demands directed at items located in cyberspace.

With that in mind, buckle up as Matt takes us on a tour through cyberspace.

226...upplies to paper + other



Other cells to save expenses  
502

Sampling

2012 WL 1446534  
November 4/26/12

Shelvin Phoenix

2012 WL 1446534  
Not always  
6/1/12

Cost shifting

- court has discretion
- some only shift if discovery undue burden or expense

- Key Q:

how important is sought after info compared to cost of prodn (Lidake 247 FR)

- D Del  
 - Model order  
 - N.J. 26.1  
 - Patent claim  
 - not needed  
 - not  
 - anguished  
 - how coming in  
 - at trial  
 - how would you  
 - regard it served  
 - with some delay  
 - fast service  
 - available?

- is request to go to discoverer relevant info

- available from alt sources? Is it cumulative?

- total cost of prodn vs amt in controversy

- total cost of prodn compared to producing parties resources

- ability + incentive of requesting party to control cost

## XI FPTO & FPTC + Settlement

- Revised Rule 16(e) + 26(a)(3)
- what is purp of FPTO/FPTC?
- No surprises in Fed System
  - from the automatic disci oblign
    - disci how clients keep elec records
    - limited objns that can be lodged during depts
    - consequences of non-disci = predict

- thru the FPTO!

joy of spontaneity + surprise is  
for TV; not Fed Ct!

- The order is the road map for  
trial yet covered in a sentence in  
FR CrP 16(d)

- How is it made <sup>unpredictable</sup> concrete?

- In DNJ: Form of order selective

- cons for nonparties per 16(f) -

Sanctions  
incl precl  
evidence

(1) Celis Case

- Purp of conf - id legal issues

- facts

- ws/exhib

- when is it held? - After all disc

- sometimes after resolution  
of msj, but depends on judge

Note Author mistaken about timing p. 380

How is it held? on records is off record  
in court on conference  
↓  
detailed review +  
valuing conf

Components of circles - derit use wing form - It is more than form used

1. General - Kontzept

↳ mit no

B full notice

④ Step facts are the most  
⑤ Principles, can  
be used to justify

④ Dependent

(6)  $\pi / \Delta \omega$  = "the relative frequency width"

(D) Export + long gestations

(5) 11/13 def- as a. a. π

(1) H/A was - failure to use new ver. - don't include  
(2) H/A was - failure to use new ver. - don't include

(10) A/s Legation, Superintendence

### Process of preparation

-note Rule 26 has time frames for disclosures but this is likely superseded by 1st order of local Rule

- Hakenbrück to PTS

- Jtly prepared - each controls their section

Burden in IT to deliver

~~The Editor~~  
~~Take~~

ignoring  
current  
to ensure  
accuracy

Statement  
sprinted with  
ev. i  
Rutledge v. U.  
C. p. 522

### Wh: a hypothesis conference

- depends on ridge

all new products - 5, 12, 15, 20, 25, 30, 35, 40, 45, 50, 55, 60, 65, 70, 75, 80, 85, 90, 95, 100, 105, 110, 115, 120, 125, 130, 135, 140, 145, 150, 155, 160, 165, 170, 175, 180, 185, 190, 195, 200, 205, 210, 215, 220, 225, 230, 235, 240, 245, 250, 255, 260, 265, 270, 275, 280, 285, 290, 295, 300, 305, 310, 315, 320, 325, 330, 335, 340, 345, 350, 355, 360, 365, 370, 375, 380, 385, 390, 395, 400, 405, 410, 415, 420, 425, 430, 435, 440, 445, 450, 455, 460, 465, 470, 475, 480, 485, 490, 495, 500, 505, 510, 515, 520, 525, 530, 535, 540, 545, 550, 555, 560, 565, 570, 575, 580, 585, 590, 595, 600, 605, 610, 615, 620, 625, 630, 635, 640, 645, 650, 655, 660, 665, 670, 675, 680, 685, 690, 695, 700, 705, 710, 715, 720, 725, 730, 735, 740, 745, 750, 755, 760, 765, 770, 775, 780, 785, 790, 795, 800, 805, 810, 815, 820, 825, 830, 835, 840, 845, 850, 855, 860, 865, 870, 875, 880, 885, 890, 895, 900, 905, 910, 915, 920, 925, 930, 935, 940, 945, 950, 955, 960, 965, 970, 975, 980, 985, 990, 995, 1000, 1005, 1010, 1015, 1020, 1025, 1030, 1035, 1040, 1045, 1050, 1055, 1060, 1065, 1070, 1075, 1080, 1085, 1090, 1095, 1100, 1105, 1110, 1115, 1120, 1125, 1130, 1135, 1140, 1145, 1150, 1155, 1160, 1165, 1170, 1175, 1180, 1185, 1190, 1195, 1200, 1205, 1210, 1215, 1220, 1225, 1230, 1235, 1240, 1245, 1250, 1255, 1260, 1265, 1270, 1275, 1280, 1285, 1290, 1295, 1300, 1305, 1310, 1315, 1320, 1325, 1330, 1335, 1340, 1345, 1350, 1355, 1360, 1365, 1370, 1375, 1380, 1385, 1390, 1395, 1400, 1405, 1410, 1415, 1420, 1425, 1430, 1435, 1440, 1445, 1450, 1455, 1460, 1465, 1470, 1475, 1480, 1485, 1490, 1495, 1500, 1505, 1510, 1515, 1520, 1525, 1530, 1535, 1540, 1545, 1550, 1555, 1560, 1565, 1570, 1575, 1580, 1585, 1590, 1595, 1600, 1605, 1610, 1615, 1620, 1625, 1630, 1635, 1640, 1645, 1650, 1655, 1660, 1665, 1670, 1675, 1680, 1685, 1690, 1695, 1700, 1705, 1710, 1715, 1720, 1725, 1730, 1735, 1740, 1745, 1750, 1755, 1760, 1765, 1770, 1775, 1780, 1785, 1790, 1795, 1800, 1805, 1810, 1815, 1820, 1825, 1830, 1835, 1840, 1845, 1850, 1855, 1860, 1865, 1870, 1875, 1880, 1885, 1890, 1895, 1900, 1905, 1910, 1915, 1920, 1925, 1930, 1935, 1940, 1945, 1950, 1955, 1960, 1965, 1970, 1975, 1980, 1985, 1990, 1995, 2000, 2005, 2010, 2015, 2020, 2025, 2030, 2035, 2040, 2045, 2050, 2055, 2060, 2065, 2070, 2075, 2080, 2085, 2090, 2095, 2100, 2105, 2110, 2115, 2120, 2125, 2130, 2135, 2140, 2145, 2150, 2155, 2160, 2165, 2170, 2175, 2180, 2185, 2190, 2195, 2200, 2205, 2210, 2215, 2220, 2225, 2230, 2235, 2240, 2245, 2250, 2255, 2260, 2265, 2270, 2275, 2280, 2285, 2290, 2295, 2300, 2305, 2310, 2315, 2320, 2325, 2330, 2335, 2340, 2345, 2350, 2355, 2360, 2365, 2370, 2375, 2380, 2385, 2390, 2395, 2400, 2405, 2410, 2415, 2420, 2425, 2430, 2435, 2440, 2445, 2450, 2455, 2460, 2465, 2470, 2475, 2480, 2485, 2490, 2495, 2500, 2505, 2510, 2515, 2520, 2525, 2530, 2535, 2540, 2545, 2550, 2555, 2560, 2565, 2570, 2575, 2580, 2585, 2590, 2595, 2600, 2605, 2610, 2615, 2620, 2625, 2630, 2635, 2640, 2645, 2650, 2655, 2660, 2665, 2670, 2675, 2680, 2685, 2690, 2695, 2700, 2705, 2710, 2715, 2720, 2725, 2730, 2735, 2740, 2745, 2750, 2755, 2760, 2765, 2770, 2775, 2780, 2785, 2790, 2795, 2800, 2805, 2810, 2815, 2820, 2825, 2830, 2835, 2840, 2845, 2850, 2855, 2860, 2865, 2870, 2875, 2880, 2885, 2890, 2895, 2900, 2905, 2910, 2915, 2920, 2925, 2930, 2935, 2940, 2945, 2950, 2955, 2960, 2965, 2970, 2975, 2980, 2985, 2990, 2995, 3000, 3005, 3010, 3015, 3020, 3025, 3030, 3035, 3040, 3045, 3050, 3055, 3060, 3065, 3070, 3075, 3080, 3085, 3090, 3095, 3100, 3105, 3110, 3115, 3120, 3125, 3130, 3135, 3140, 3145, 3150, 3155, 3160, 3165, 3170, 3175, 3180, 3185, 3190, 3195, 3200, 3205, 3210, 3215, 3220, 3225, 3230, 3235, 3240, 3245, 3250, 3255, 3260, 3265, 3270, 3275, 3280, 3285, 3290, 3295, 3300, 3305, 3310, 3315, 3320, 3325, 3330, 3335, 3340, 3345, 3350, 3355, 3360, 3365, 3370, 3375, 3380, 3385, 3390, 3395, 3400, 3405, 3410, 3415, 3420, 3425, 3430, 3435, 3440, 3445, 3450, 3455, 3460, 3465, 3470, 3475, 3480, 3485, 3490, 3495, 3500, 3505, 3510, 3515, 3520, 3525, 3530, 3535, 3540, 3545, 3550, 3555, 3560, 3565, 3570, 3575, 3580, 3585, 3590,

Relative weight + sign

Sometimes waiting

needed

+ female tolerant by nature  
in the 11; no factor - just a variation in the brain

Was ist das?

Producing a good  
+ a good product. Manifesting a team's # good cause

## OUTLINE FOR JANUARY 10, 2011 INN PRESENTATION ON FINAL PRETRIAL CONFERENCE

### 1. A. What is the FPTO? Trial plan

People complain, but in fact every trial lawyer knows that the information that gets addressed as part of the Order is what one does to prepare for trial.

### B. What are the Rules? Rules: 16(e) and 26(a)(3).

#### Rule 16(e) Final Pretrial Conference and Orders.

The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

#### This applies if there is not order: Rule 26(a)(3) Pretrial Disclosures.

1. (A) *In General*. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(I) the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections*. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made — except for one under Federal Rule of Evidence 402 or 403 — is waived unless excused by the court for good cause.

## 2. How the conference gets scheduled

Order from MJ sets date

Sometimes set only after motions are decided

Sometimes set and proceeds even if motions are pending

## 3. What happens among counsel

Each side is responsible for its submission, but usually plaintiff takes lead

Make sure you know the proper form

Explain that DJS who use same form may still have different expectations

Note that differences in form has substantive consequences (waivers for omitted items if the item was to be listed)

Ask Masters: what part do folks attack first

what do you do if you have an inexperienced adversary - *face to face*

What do you do if you have an uncooperative adversary

*intentionally  
effort to get  
assistance*

## 4. Submission to MJ

Timing

Why is it required several days before conference

Method

Why not efiled

Why not sealed

Common Mistakes

lack of stip facts ~~show~~ failure to even try to create a trial plan

Understanding ~~how~~ stip facts are used: read to jury by either side

Failure to use admissions from Request for admissions as part of the FPTO

Contested fact sections that pose questions rather than the facts the party intends to prove for which there is no stipulation

Efforts to reserve/supplement on facts, witnesses, exhibits

In limine motions: failing to distinguish the objection one makes when testimony comes in versus motions that need to be resolved before opening or before a specific witness testifies

Not understanding that the legal issues section is the section to list issues the fact finder is to make at trial, like a verdict sheet

#### **5. Final Pretrial Conference**

some in chambers followed by on the record

some on the record

sometimes handwritten rulings on proposed joint final pretrial order

sometime the order must be resubmitted

as to in limine motions: all discovery issues to be resolved

MJ will try to cajole resolution of evidentiary motions or try to narrow issues by way of offers of proof or asking parties to state whether or not they are actually intending to offer the evidence, etc.

Sometimes DJ will refer in limine motions to MJ

#### **6. Life after the Final Pretrial Conference**

can you change the order? Manifest Injustice requirement

The loss of a witness

how do you obtain relief?

Confer with adversary

joint letter?

Motion?

#### **7. Ask DJS, how do you use the order at trial or for other purposes.**

Fed. R. Civ. P. 16:

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

Fed. R. Civ. P. 26(a)

*(3) Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by **Rule 26(a)(1)** and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under **Rule 32(a)** of a deposition designated by another party under **Rule 26(a)(3)(A)(ii)**; and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under **Rule 26(a)(3)(A)(iii)**. An objection not so made—except for one under **Federal Rule of Evidence 402** or **403**—is waived unless excused by the court for good cause.

THIS FORM IS TO BE RETYPED IN FULL (INCLUDING ALL INSTRUCTIONS) AND ALL MATERIAL INSERTED IN PROPER SEQUENCE AND NOT BY MEANS OF ATTACHED RIDERS EXCEPT AS PROVIDED BELOW.

(PLEASE NUMBER ALL PAGES)

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

	:	
	:	Hon. Faith S. Hochberg
Plaintiff,	:	
	:	
-v-	:	
	:	
	:	Civil Action No.
	:	
Defendant.	:	FINAL PRETRIAL ORDER

This matter having come before the Court for a pretrial conference pursuant to Fed.R.Civ.P. 16; \_\_\_\_\_ having appeared for plaintiff(s) and \_\_\_\_\_ having appeared for defendant(s); and counsel all having been notified that:

(1) a \_\_\_\_\_ trial in this matter has been scheduled before Hon. Faith S. Hochberg on \_\_\_\_\_;

(2) the pretrial submissions detailed in ¶¶ 2, 18 and 19 below are to be submitted no later than \_\_\_\_\_ or they will be deemed waived; and

(3) a pretrial housekeeping conference is scheduled before Hon. Faith S. Hochberg on \_\_\_\_\_;

the following Final Pretrial Order is hereby entered:

1. JURISDICTION (Set forth specifically)
2. PENDING/CONTEMPLATED MOTIONS/TRIAL BRIEFS (Set forth all pending or

contemplated motions, whether dispositive or addressed to discovery or the calendar. Also set forth the nature of the motion and the return date. If the Court indicated that it would rule on any matter at pretrial, summarize that matter and each party's position. NOTE: ALL REMAINING PRE-TRIAL MOTIONS INCLUDING DAUBERT AND IN LIMINE MOTIONS SHALL BE FILED NO LATER THAN \_\_\_\_\_, and any response shall be submitted no later than \_\_\_\_\_. Only those motions listed herein will be entertained prior to trial.)

3. STIPULATION OF FACTS (Set forth in narrative form a comprehensive listing of all uncontested facts, including all answers to interrogatories and admissions, to which there is agreement among the parties.)

4. JUDICIAL NOTICE

A. Plaintiff requests that the Court take judicial notice of the following facts:

B. Defendant objects to the taking of judicial notice for the following reasons:

5. JUDICIAL NOTICE

A. Defendant requests that the Court take judicial notice of the following facts:

B. Plaintiff objects to the taking of judicial notice for the following reasons:

6. PLAINTIFF'S CONTESTED FACTS (Stated separately for each defendant. Proof shall be limited at trial to the matters set forth below. Failure to set forth any matter shall be deemed a waiver thereof.)

A. Plaintiff intends to prove the following contested facts with regard to liability:

B. Plaintiff intends to prove the following contested facts with regard to damages:  
(This must include each item of damages, the amount of each item, the factual basis for each item and, if punitive damages are claimed, the facts upon which plaintiff will rely to establish punitive damages.)

7. DEFENDANT'S CONTESTED FACTS (Stated separately for each plaintiff. Proof shall be limited at trial to the matters set forth below. Failure to set forth any matter shall be deemed a waiver thereof.)

A. Defendant intends to prove the following contested facts with regard to liability:

B. Defendant intends to prove the following contested facts with regard to damages:  
(This statement must include the factual basis for each defense against plaintiff's claims for damages.)

8. PLAINTIFF'S WITNESSES (Aside from those called for impeachment purposes, only the witnesses whose names and addresses are listed below will be permitted to testify at trial.)

A. On liability plaintiff intends to call the following witnesses who will testify in accordance with the following summaries:

B. On damages plaintiff intends to call the following witnesses who will testify in accordance with the following summaries:

C. Defendant objects to the following witnesses for the reasons stated:

9. DEFENDANT'S WITNESSES (Aside from those called for impeachment purposes, only the witnesses whose names and addresses are listed below will be permitted to testify at trial.)

A. On liability defendant intends to call the following witnesses who will testify in accordance with the following summaries:

B. On damages defendant intends to call the following witnesses who will testify in accordance with the following summaries:

C. Plaintiff objects to the following witnesses for the reasons stated:

10. EXPERT AND SPECIALIZED LAY OPINION WITNESSES (No expert or specialized lay opinion witness offering scientific, technical or other specialized knowledge will be permitted to testify at trial unless listed below. A summary of the expert's qualifications and a copy of his/her report must be provided for the Court's review at the pretrial conference. Said summary shall be read into the record at the time he/she takes the stand, and no opposing counsel shall be permitted to question his/her qualifications unless the basis of the objection is set forth herein.)

A. Plaintiff's expert and specialized lay opinion witnesses are:

B. Defendant's objections to the qualifications of plaintiff's experts and specialized lay opinion witnesses are:

C. Defendant's expert and specialized lay opinion witnesses are:

D. Plaintiff's objections to the qualifications of defendant's experts and specialized lay opinion witnesses are:

11. PLAINTIFF'S DEPOSITIONS (List, by page and line, all deposition testimony to be offered into evidence. All irrelevant and redundant matters and all colloquy between counsel must be eliminated, unless ruled relevant. Deposition testimony to be used solely for impeachment purposes need not be listed.)

A. On liability plaintiff intends to read into evidence the following:

B. On damages plaintiff intends to read into evidence the following:

C. Defendant objects to the deposition testimony set forth above for the reasons stated:

12. DEFENDANT'S DEPOSITIONS (List, by page and line, all deposition testimony to be offered into evidence. All irrelevant and redundant matters and all colloquy between counsel must be eliminated, unless ruled relevant. Deposition testimony to be used solely for impeachment purposes need not be listed.)

A. On liability defendant intends to read into evidence the following:

B. On damages defendant intends to read into evidence the following:

C. Plaintiff objects to the deposition testimony set forth above for the reasons stated:

13. PLAINTIFF'S EXHIBITS (Except for exhibits the need for which could not reasonably have been foreseen or which are used solely for impeachment purposes, only the exhibits set forth on the exhibit list attached hereto may be introduced at trial. Any objection to an exhibit, and the reason for said objection, must be set forth below or it shall be deemed waived. All parties hereby agree that it will not be necessary to bring in the custodian of any exhibit as to which no such objection is made.)

A. Plaintiff intends to introduce into evidence the exhibits listed on the attached exhibit list (list by number with a description of each exhibit):

B. Defendant objects to the introduction of plaintiff's exhibits (set forth number of exhibit and grounds for objection):

14. DEFENDANT'S EXHIBITS (Except for exhibits the need for which could not reasonably have been foreseen or which are used solely for impeachment purposes, only the exhibits set forth on the exhibit list attached hereto may be introduced at trial. Any objection to an exhibit, and the reason for said objection, must be set forth below or it shall be deemed waived. All parties hereby agree that it will not be necessary to bring in the custodian of any exhibit as to which no such objection is made.)

A. Defendant intends to introduce into evidence the exhibits listed on the attached exhibit list (list by number with a description of each exhibit):

B. Plaintiff objects to the introduction of defendant's exhibits (set forth number of exhibit and grounds for objection):

5

E. Counsel shall jointly submit to the Court a single proposed special verdict sheet.

F. Three copies of a joint exhibit list and two joint bench books of trial exhibits shall be submitted to the Court.

G. Counsel shall provide the Court with a copy of the jury instructions and proposed verdict sheet on a computer disk in a WordPerfect readable format.

19. NON-JURY TRIALS - The following shall be submitted to the Court no later than \_\_\_\_\_  
\_\_\_\_\_:

A. Each side shall submit to the Judge and opposing counsel a trial brief or memorandum in accordance with Local Civil Rule 7.2 with citation to authorities and arguments in support of its position on all disputed issues of law. In the event a brief shall not be filed, the delinquent party's complaint or defense shall be stricken.

B. Each side shall submit to the Judge and other counsel proposed written findings of fact and conclusions of law. There is reserved to counsel the right to submit additional proposed findings of fact and conclusions of law during the course of the trial on those matters that cannot reasonably be anticipated.

C. If any hypothetical questions are to be put to an expert witness on direct examination, they shall be submitted to the Judge and opposing counsel.

D. Counsel shall provide the Court with a copy of its proposed findings of fact and conclusions of law on a computer disk in a WordPerfect readable format.

20. TRIAL COUNSEL (List the names of trial counsel for all parties.)

21. BIFURCATION (Where appropriate, the issues relating to liability shall be severed and tried to verdict. Thereafter, all issues relating to damages shall be tried. The issues of liability and damages SHALL/SHALL NOT be tried separately.)

22. ESTIMATED LENGTH OF TRIAL

\_\_\_\_ days for liability and \_\_\_\_ days for damages.

AMENDMENTS TO THIS PRETRIAL ORDER WILL NOT BE PERMITTED UNLESS THE COURT DETERMINES THAT MANIFEST INJUSTICE WOULD RESULT IF THE AMENDMENT IS DISALLOWED. THE COURT MAY FROM TIME TO TIME SCHEDULE CONFERENCES AS MAY BE REQUIRED EITHER ON ITS OWN MOTION OR AT THE REQUEST OF COUNSEL.

---

(Attorney for Plaintiff)

---

(Attorney for Defendant)

Dated:

---

PATTY SHWARTZ  
United States Magistrate Judge

(EXHIBIT LIST FOLLOWS)



In accordance with Judge Hochberg's Trial Practices and Procedures, parties preparing for trial are required to submit a Joint Exhibit List as part of the final pretrial order.

The “Description of Document” should include the type of document (i.e., letter, agenda, contract), the date of the document, who the document is to/from, and a brief description of its relevancy to the case. Example: March 24, 2005 Contract between Plaintiff (Name) and Defendant (Name) setting forth the purchase price (etc.) of the construction project.

Under “Objections” the parties should set forth the basis of any objection each has to the introduction of the exhibit at trial.

Under “Prior Rulings” the parties should set forth any rulings by Judge Hochberg or Magistrate Judge Shwartz regarding the admissibility of the exhibit.

[illegible]

January 19, 2012 Panel on Multiple Representation - Section on Constitutional Law and Court's process for addressing same.

**PS: Constitutional Standard:**

Sixth Amendment guarantees: right to assistance of counsel

Case law requires that the right to choice of counsel

that counsel is effective

That counsel maintains confidences (Moscony)

that counsel is conflict free/undivided loyalty

Presumption favoring respect for choice of counsel overcome if counsel has a conflict or there is a serious potential a conflict exists (Wheat)

Counsel has divided loyalty if ne/she has an obligation or personal interest that would lead to a strategy choice that is not the most favorable to the defendant

Strategies that may be impacted includes not calling/calling a witness or cross examining on all possible topics, engaging/not engaging in plea nego with cooperation, not arguing comparative roles at sentencing

Circumstances presenting conflicts: joint representation, former/successive representations, book deals, job opportunities.

**JF: What is counsel's obligation?**

Counsel has the duty to avoid conflicts of interest (adv committee note to Rule 44) and weigh the possibility his/her judgment may be impaired or loyalties divided

Counsel has the obligation to disclose conflicts to the Court (Holloway)

Steps counsel is to take to ensure no conflicts and if one is found, steps counsel is to follow

**What does a court do?**

Courts are not required to tolerate conflicts because do so would violation the defendant's 6<sup>th</sup> amendment right, ethical rules, and the integrity of the Court process (Moscony)

If a conflict is brought to the Court's attention, or the Court knows or should reasonably

know of a conflict, it must inquire about the conflict. (Cuyler)

There is no obligation on the court to inquire if the conflict is vague or unspecified.

If the conflict is not brought to the attention of the trial court, then a defendant post conviction must show there was an actual conflict and that the actual conflict impacted effective representation (Cuyler)

**PS: What happens if there is concurrent joint representation?**

Joint representation is inherently suspect, ~~whether it is concurrent representation or if there is former/successive representation~~ (Mickens)

Rule 44© obligates the Court to inquire if jointly charged defendants are represented by a single attorney and advise each defendant of the right to effective assistance of counsel and separate counsel. Thus, this may be a scenario where court will conduct inquiry sua sponte.

*Jhn's page*  
**JF: How should counsel present the conflict issue to the Court?**

Confer with adversary first to see if there will be a withdrawal *or*  
If you seek court intervention, know if you want disqualification, an inquiry to see if waiver of conflict and prepare evidence for court to review. Remember the Court will not have all of the facts unless the advocates tell the Court.

**PS: What happens when either the court sees a joint representation or counsel raises it?**

Courts approach these issues balancing issues of judicial administration against the right to counsel of choice. The judicial administration issues include the :

- (1) need to protect the truth seeking process (Stewart)  
which is enhanced with an advocate who is unrestricted by competing loyalties in pursuing argument and examination
- (2) protecting fairly rendered verdicts from collateral attack

Courts need a factual record upon which to determine if an actual or potential conflict exists. A hearing is not required so long as there are facts in affidavit or exhibits. (Voight). In camera presentations may also be permitted to preserve attorney client/work product concerns (R44 adv com. Notes)

*JFS page 5*  
**JF: Factors when evaluating the request for relief:**

Matters that may prevent defendant from receiving effective, conflict free assistance (ie prior client will be a witness, etc)

The relationship between the clients (ie rep of client and a witness, rep of corp officer)

and a witness who testified about corp activities that implicate the defendant)

The duration and extent of the representation

Source of compensation to counsel

The existence of a joint defense agreement during the relationship

Whether the competing loyalties impact strategy choices such that it may lead to a strategy other than one that is most favorable to the client (obligation to one client may cause counsel not to call a witness, not to vigorously examine a witness, not advise a client about benefits of cooperation, not arguing comparative responsibility between clients at sentencing).

**PS: What are the remedies if conflict or potential conflict is found?**

Remedies:

Disqualification (Dolan)

- requiring new counsel (this ensures to advance the admin of justice and saves costs that may be expended on post conviction proceedings and retrials if conflict were ignored)

Waivers (Wheat/Dolan)

(Charles is tasked to address when conflicts can and cannot be waived)

Wheat Court allows the court to reject waivers both in the case of actual conflicts and where there is a potential for conflict because of difficulty of predicting the trial strategy that needs to be pursued given the vagaries of trial

Court also seeks to ensure the finality of fairly reached verdicts and protect them from collateral attack.

Also, court wants to preserve the defendant's right to conflict free of counsel so that counsel can pursue all avenues for his client to challenge the evidence and thereby enhances the truth finding process

Conflict free counsel also preserves respect for the court by enforcing the ethical rules

Stand by counsel to pursue cross (Treffinger)

Risky as it doesn't address how counsel will handle the evidence adduced during the cross in other parts of the trial or summation.

Severance in the case of codefendants

Suggested in Rule 44 notes and reviewed in district court opinion. But

this remedy doesn't address the confidentiality restrictions that may impact counsel.

ITEMS REFERRED TO IN RESPONSE TO QUESTION 13B

## Reports and Recommendation – Criminal

USA v. Chambers, Crim. No. 11-372(FSH) filed 9/9/11  
USA v. Ovchinnikov, Crim. No. 11-597(FSH) filed 9/9/11  
USA v. Kasatkin, Crim. No. 11-598(FSH) filed 9/9/11  
USA v. Chichian, Crim. No. 11-614(FSH) filed 9/13/11  
USA v. Arpaio, Crim. No. 11-248(FSH) filed 10/11/11  
USA v. Park, Crim. No. 11-755(KSH) filed 11/1/11  
USA v. Jang, Crim. No. 11-756(KSH) filed 11/1/11  
USA v. Ko, Crim. No. 11-786(KSH) filed 11/15/11  
USA v. Lee, Crim. No. 11-803(KSH) filed 11/18/11  
USA v. Lopez, et al. Crim. No. 11-352(FSH) filed 11/22/11  
USA v. Seo, Crim. No. 11-812(KSH) filed 11/29/11  
USA v. Yang, Crim. No. 11-813(KSH) filed 11/29/11  
USA v. Lee, Crim. No. 11-847(KSH) filed 12/8/11  
USA v. Kim, Crim. No. 11-848(KSH) filed 12/9/11  
USA v. Yu, Crim. No. 12-24(KSH) filed 1/9/12  
USA v. Dolick, Crim. No. 12-25(FSH) filed 1/10/12  
USA v. Lopez, et al. Crim. No. 11-352(FSH) filed 1/18/12  
USA v. Lopez, et al. Crim. No. 11-352(FSH) filed 1/18/12  
USA v. Halas, Crim. No. 11-290(FSH) filed 1/23/12  
USA v. Sung, Crim. No. 12-70(KSH) filed 1/25/12  
USA v. Wayne, Crim. No. 12-71(KSH) filed 1/25/12  
USA v. Hinton, Crim. No. 11-472(FSH) filed 1/30/12  
USA v. Scholz, Crim. No. 12-77(FSH) filed 1/30/12  
USA v. Turakaeva, Crim. No. 12-106(FSH) filed 2/6/12  
USA v. Rodriguez-Negrin, Crim. No. 12-107(FSH) filed 2/6/12  
USA v. Lopez, et al., Crim. No. 11-352(FSH) filed 2/7/12  
USA v. Ko, et al., Crim. No. 12-108(KSH) filed 2/8/12  
USA v. Chong, Crim. No. 12-109(KSH) filed 2/8/12  
USA v. Ko, Crim. No. 12-108(KSH) filed 2/10/12  
USA v. Song, Crim. No. 12-124(KSH) filed 2/10/12  
USA v. Medina-Hernandez, Crim. No. 11-814(FSH) filed 3/9/12  
USA v. Andriolo, Crim. No. 12-201(FSH) filed 3/21/12  
USA v. Villafuerte, Crim. No. 12-208(FSH) filed 3/23/12  
USA v. Grzan, Crim. No. 12-209(FSH) filed 3/23/12  
USA v. Courtney, Crim. No. 12-266(FSH) filed 4/18/12  
USA v. Chan, Crim. No. 12-344(KSH) filed 5/15/12  
USA v. Muhammad, Crim. No. 12-345(FSH) filed 5/15/12  
USA v. Koltyga, Crim. No. 12-360(FSH) filed 5/22/12  
USA v. Senyurt, Crim. No. 12-361(FSH) filed 5/22/12  
USA v. Gordon, Crim. No. 12-370(KSH) filed 5/24/12  
USA v. Freeman, Crim. No. 12-454(FSH) filed 7/3/12  
USA v. Pederson, Crim. No. 12-502(FSH) filed 7/26/12  
USA v. Faccenda, Crim. No. 12-536(FSH) filed 8/8/12  
USA v. Owoeeye, Crim. No. 08-429(KSH) filed 8/9/12

USA v. Perez, Crim. No. 12-594(FSH) filed 9/7/12  
USA v. Macon, Crim. No. 12-595(FSH) filed 9/7/12  
USA v. Holloway, Crim. No. 12-347(FSH) filed 9/21/12  
USA v. Burke, Crim. No. 12-679(FSH) filed 10/9/12  
USA v. Lee, Crim. No. 12-814(FSH) filed 12/6/12

#### Written Opinions – Criminal

USA v. Taylor, Crim. No. 07-57 filed 7/13/12  
USA v. Hicks, Mag. No. 12-3015 filed 8/14/12

#### Reports and Recommendation – Civil

Life Med. Tec., Inc. v. Zigmend, Inc., et al. Civ. No. 10-1969, 2012 US Dist Lexis 145068, filed 10/8/12

#### Written Opinons - Civil

Williams v. The CBE Group, Civ. No. 11-3680, filed 7/16/12  
O'Brien v. Brain Research Labs, LLC, Civ. No. 12-204, 2012 WL 3242365, filed 8/9/12  
DeMartino v. New Jersey, Civ. No. 12-3849, 2012 U.S. Dist. Lexis 168442, filed 11/21/12  
Dewey v. Volkswagen, et al., Civ. Nos. 07-2249 & 07-2361, filed 12/17/12

ITEMS REFERRED TO IN RESPONSE TO QUESTION 13F

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA : Hon. Patty Shwartz  
v. : Mag. No. 10-3201  
ANDREW COX : ORDER FOR CONTINUANCE

This matter having come before the Court on the application of Paul J. Fishman, United States Attorney for the District of New Jersey (Jane H. Yoon, Assistant U.S. Attorney, appearing), for an order granting a continuance of the proceedings in the above-captioned matter for a period of 30 days to allow for the additional time necessary to transfer the defendant from the Southern District of Ohio to the District of New Jersey, and for good cause shown,

IT IS THE FINDING OF THIS COURT that this action should be continued for the following reasons:

(1) The charges in this case are pending against a defendant who was arrested in the Southern District of Ohio and taken into the custody of the U.S. Marshals on or about December 2, 2010; subsequent to his initial appearance in that district on December 3, 2010, the defendant was ordered to be transferred to the District of New Jersey;

(2) The defendant has not yet been transferred to the District of New Jersey and the U.S. Marshals have advised that the defendant cannot be transported by air to this district until the week of January 3, 2011 at the earliest;

(3) As the defendant has not yet appeared in this district, no counsel has been appointed to represent the defendant, and no counsel has informed the Government or this Court that they have been retained to represent the defendant in connection with these proceedings;

(4) In the absence of a continuance allowing the U.S. Marshals additional time to transport the defendant to the District of New Jersey, the 30-day deadline by which an information or indictment must be filed pursuant to 18 U.S.C. § 3161(b) may lapse prior to the defendant's arrival to the district; and *and the continuance will provide defendant an opportunity to secure counsel and confer with counsel before the case is presented to*

(5) As a result of the foregoing, pursuant to Title 18, United States Code, Section 3161(h)(7), the ends of justice served by granting the continuance outweigh the best interest of the public and the defendant in a speedy trial. *the grand jury*

IT IS, therefore, on this *23rd* day of December, 2010,

ORDERED that this action be, and hereby is, continued for a period of 30 days from December 23, 2010 through January 22, 2011; and it is further

ORDERED that the period from December 23, 2010 through January 22, 2011 shall be excludable in computing time under the Speedy Trial Act of 1974.

*It is further ordered that the United States shall request an initial appearance for the defendant upon his arrival in this District.*

*Patty Shwartz*  
HON. PATTY SHWARTZ  
United States Magistrate Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiffs,

v.

ANDREW COX,

Defendant.

Criminal Action No.: 11-99 (JLL)

**AMENDED OPINION**

**LINARES**, District Judge.

The Court issues this Amended Opinion to correctly reflect the content of Magistrate Judge Schwartz's Continuance Order as issued on this docket at Docket Entry No. 6. That Order included handwritten findings clearly supplementing as an additional basis for her "ends-of-justice" determination that "the continuance will provide defendant an opportunity to secure counsel and confer with counsel before the case is presented to the grand jury." See infra pp. 14-15.

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This matter comes before the Court by way of Defendant's Omnibus Motion [Docket Entry No. 40] seeking to: 1) dismiss the indictment for violations of the Speedy Trial Act and issue a ruling on the "gilded indictment"; 2) dismiss based on an invalid and unconstitutional warrant; 3) suppress search and seizure of items found pursuant to the search warrant because the warrant lacked probable cause; 4) dismiss for lack of venue; 5) bar the Government evidence under Federal Rules of Evidence 803(6) and 902(11); 6) request in camera review of consent forms for use of the Cooperating Witness ("CW")'s e-mail account and warrants issued

regarding it; and 7) request production of Grand Jury minutes. In its Opposition to Defendant's Omnibus Motion, the Government also filed a Cross-Motion for Reciprocal Discovery [Docket Entry 43]. A previous Order by this Court issued subsequent to oral argument on September 26, 2011 denied the Government's motion for reciprocal discovery as moot, and resolved the final two issues of the Defendant's motion by ordering the Government to provide any *Jencks* material in its possession to the Defendant in a timely fashion as well as to review the Grand Jury Transcript and cooperating witness materials requested by Defendant for any *Giglio* or *Brady* materials [Docket Entry No. 56]. Any such materials were ordered to either be turned over to the Defendant or submitted to the court for an in camera review [*Id.*]. The Court will thus only be considering in this Opinion and accompanying Order the first five claims filed in Defendant's Omnibus Motion.

## **I. BACKGROUND**

On December 1, 2010, a criminal complaint was filed in the District Court of New Jersey, charging Defendant Andrew Cox with one count of knowingly distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) on or about October 4, 2010, and incorrectly stating that the CW allegedly received a package from Defendant at a New Jersey rather than a Pennsylvania address. An arrest warrant was also filed on December 1, 2010, in the District of New Jersey, and Defendant was arrested on December 2, 2010 in Columbus, Ohio. Defendant appeared before Magistrate Judge Preston Deavers of the United States Court for the Southern District of Ohio on December 3, 2010, where he waived his rights to an identity hearing and a preliminary hearing. Pursuant to the Government's motion to detain Defendant pending transfer to the District of New Jersey, and upon hearing argument from counsel, Magistrate Judge Deavers

ordered Defendant detained pending said transfer. Gordon Hobson, Esq., the Assistant Federal Public Defender in Ohio, was appointed for the purposes of representing Defendant at his initial appearance, and on or about December 7, 2010, Mr. Hobson e-mailed the Assistant U.S. Attorney in the Southern District of Ohio, following Defendant's request, to negotiate a potential cooperation agreement. The Assistant U.S. Attorney from the District of New Jersey responded to Mr. Hobson on or about December 10, 2010, indicating that the Government would be amenable to meeting with Defendant upon his arrival in the District.

Between December 16, 2010 and January 4, 2011, Defendant was moved through six distinct facilities before being brought before the District of New Jersey on January 4, 2011. Specifically, he was moved from the Butler County Jail in Ohio through Cincinnati, Ohio and Blue Grass, Indiana to arrive at the Federal Transfer Center in Oklahoma City, Oklahoma on December 16, 2010. He was moved from Oklahoma City to Harrisburg, Pennsylvania, and from Harrisburg to Philadelphia, Pennsylvania on December 20, 2010. On December 21, 2010, Defendant was transferred from Philadelphia to Brooklyn, New York, where he remained until his appearance on January 5, 2010 before the District of New Jersey (Def.'s Omnibus Motion, Ex. P, "Form 106").

Dennis Maitland, the father of Defendant's fiancée Shannon Maitland, alleges that he called the office of United States Magistrate Judge Patty Schwartz four times between December 20, 2010 and December 22, 2010 to bring Defendant's case to the Magistrate's attention. Mr. Maitland further indicates that on December 20, 2010, he spoke with a member of Magistrate Judge Schwartz's staff, and informed her that Defendant was in fact in Philadelphia and asked if he was scheduled on the docket. The staff member allegedly responded that Defendant was not on the docket as of that point and requested that Mr. Maitland call back after 11:00am the next

day. (Def.'s Omnibus Mot. Br., "Certification of Dennis E. Maitland," Ex. J, at ¶ 4; "Dennis Maitland Phone Records," Ex. K). On December 21, 2010, Mr. Maitland asserts that thereafter he called after 11:00am and spoke with Magistrate Judge Schwartz's judicial assistant. The assistant stated that she did not know if Defendant was on the docket, and would have another staff member return his call. (Id., at ¶ 5; Ex. K). The staff member returned Mr. Maitland's call later that day, and Mr. Maitland informed her that Defendant was then in Brooklyn. (Id.). Mr. Maitland claims that he confirmed with her that Defendant was near Newark, and asked if Defendant was on the docket, but was informed that he was not. (Id.). On December 22, 2010, Mr. Maitland called a member of Magistrate Judge Schwartz's staff and asked again if Defendant was on the docket, and was again informed that he was not. Mr. Maitland asked the staff member whether the court would be in session on December 23 and 24 before Christmas, and she confirmed that the court would be in session on those days. (Id., at ¶ 6; Ex. K).

On or about December 23, 2010, the Government contacted the United States Marshal Service ("USMS") in the District of New Jersey, and were advised that: (1) the Defendant had not arrived in the District of New Jersey; and (2) Defendant's transfer was not scheduled until the next airlift for the District of New Jersey after the first of the year. (Gov't Opp'n to Def.'s Omnibus Mot. Br., at 4; Jerry Sanseverino, Deputy United States Marshal for the USMS, Affidavit ("Sanseverino Affidavit"), at 3 [Docket Entry No. 54]). On the same day, Assistant U.S. Attorney Jane Yoon telephoned Gordon Hobson, Esq. to notify him of the status of Defendant's transfer and to seek Defendant's counsel's consent for a continuance due to transportation problems. Mr. Hobson informed her that while he represented Defendant at his initial appearance in Ohio, he no longer represented him. In a Telephone Conference held by this Court on October 6, 2011, Mr. Hobson indicated to this Court that, during the same

conversation with U.S. Attorney Yoon, he refused to consent to a waiver of the thirty-day clock between arrest and indictment to which Defendant was entitled under the Speedy Trial Act. [Telephone Conference with Gordon Hobson, AFPD, Ohio Office of the Federal Public Defender on Oct. 6, 2011; Docket Entry No. 58]. In that Telephone Conference, Mr. Hobson also stated that while he notified the U.S. Attorney that he no longer represented the Defendant, he did not recall whether or not he remained attorney of record as of the date of the U.S. Attorney's call. Thereafter, the Government submitted a request to Magistrate Judge Schwartz for a thirty-day continuance, providing a courtesy copy to Mr. Hobson (Gov't Opp'n to Def.'s Omnibus Mot. Br., Ex. 6). On December 23, 2010, Magistrate Judge Schwartz granted a continuance pursuant to 18 U.S.C. § 3161(h)(7) in the interests of justice, based on the Government's representations to Judge Schwartz that the "defendant has not yet been transferred to the District of New Jersey and [that] the U.S. Marshals [had] advised that the defendant [could not] be transported by air to this district until the week of January 3, 2011 at the earliest," and that "the Government contacted Mr. Hobson, who advised that he no longer represented Cox." (Id.). The Continuance Order notes that "defendant has not yet appeared in this district, no counsel has been appointed to represent the defendant, and no counsel has informed the Government or this Court that they have been retained to represent the defendant in connection with these proceedings." (Id.). The continuance therefore ordered the exclusion of the period from December 23, 2010 through January 22, 2011 for the purposes of computing time under the Speedy Trial Act.

On December 30, 2010, the Government filed a Superseding Criminal Complaint, charging Defendant with knowingly distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) and 18 U.S.C. § 2 from in or around April 2010 through in or around October

2010. The supporting affidavit to the complaint lists distributions on May 10, 2010, based on the CW's receipt of an e-mail from "armyltcox@yahoo.com" indicating that DVDs requested from the CW would be shipped on the same date, and providing the United States Postal Service 20-digit tracking number associated with the shipment. The supporting affidavit also detailed circumstances surrounding a later alleged distribution on September 29, 2010 received by the CW on October 4, 2010, and incorrectly listed the address of the CW's receipt of a package alleged to be from Defendant as a New Jersey rather than a Pennsylvania address.

On January 3, 2011, the Government contacted the USMS and was advised that Defendant was in the Metropolitan Detention Center in Brooklyn, and would be brought before the District of New Jersey on January 5, 2011. Defendant was arrested on January 5, 2011 on the single count charged in the Government's Superseding Complaint, and he made his initial appearance at the District of New Jersey before Magistrate Judge Schwartz. Defendant was appointed Assistant Federal Public Defender K. Anthony Thomas as his counsel, and on January 7, 2011, pursuant to a detention hearing, Defendant was ordered released into the custody of Dennis Maitland, pursuant to certain conditions of release. This release occurred thirty-six (36) days after his December 2, 2010 arrest.

On February 9, 2011, a Grand Jury returned an Indictment charging Defendant with one count of knowingly distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) on or about May 10, 2010. The Indictment did not charge Defendant with the distribution that was the subject matter of the original complaint for which he was arrested on December 2, 2010 pertaining to the October 4, 2010 distribution. On March 16, 2011, Defendant was arraigned before Magistrate Judge Schwartz and a bail revocation hearing was held where the conditions of Defendant's release were modified. On March 29, 2011, pursuant to a joint application of the

Government and Defendant, a scheduling and continuance order was entered, excluding the period of April 25, 2011 to August 22, 2011 for the purposes of computing time under the Speedy Trial Act. On April 15, 2011, the bail revocation hearing was continued before Magistrate Judge Schwartz and an order of revocation was entered, ordering Defendant's detention pending trial. On June 8, 2011, a bond hearing was held before Magistrate Judge Schwartz pursuant to Defendant's application for a bail review, and an order affirming the April 15, 2011 bail revocation order was entered.

On June 15, 2011, a Grand Jury returned a Superseding Indictment charging Defendant with six counts of knowingly distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) on May 10, 2010; May 14, 2010; June 9, 2010; June 16, 2010; June 25, 2010; and June 29, 2010. The Superseding Indictment did not include the charge from the original Criminal Complaint that Defendant knowingly distributed child pornography on October 4, 2010. On July 7, 2011, Defendant was arraigned before this Court. On July 12, 2011, this Court granted a continuance, excluding the period from July 8, 2011 through September 26, 2011 for the purposes of computing time under the Speedy Trial Act. On August 1, 2011, this Court confirmed Magistrate Judge Schwartz's Revocation of his Conditions of Release, denying Defendant's motion for reconsideration of his bail revocation.

## **II. DISCUSSION**

### **1. Violation of the Speedy Trial Act**

The Sixth Amendment to the United States Constitution guarantees that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The Speedy Trial Act, 18 U.S.C.S. §§ 3161-3174, requires that the Government issue an

indictment within thirty days of a defendant's arrest. 18 U.S.C.S. § 3161(b). If an indictment is not filed within that time, the complaint must be dismissed under 18 U.S.C.S. § 3162(a)(1).

Section 3162(a)(1) leaves to the court's discretion whether the dismissal should be granted with or without prejudice, and sets forth factors for the court to consider in guiding its decision: 1) the seriousness of the offense; 2) the facts and circumstances of the case which led to the dismissal; and 3) the impact of a reprosecution on the administration of the Speedy Trial Act and on the administration of justice.

Defendant argues that, since he was indicted more than thirty days following his arrest, all six counts of the Superseding Indictment must be dismissed pursuant to the Speedy Trial Act. Defendant argues that all six counts in the Superseding Indictment are identical to those set forth in the complaint. Defendant does not specify whether he is referring to the Criminal Complaint filed on December 1, 2010 or the Superseding Criminal Complaint filed on December 30, 2010. The Government argues that the Speedy Trial clock may only apply to the original December 1, 2010 complaint, where Defendant was charged with distribution of child pornography on or about October 4, 2010. The Government also asserts that, since a continuance order was granted excluding days from December 23, 2010 through January 22, 2011, and since Defendant was indicted on February 9, 2011, there was no violation of the requisite thirty-day period to indict.

#### A. Counts in the Indictment Subject to Dismissal

A District Court may only dismiss those charges in an indictment that were included in the complaint, not other charges for which the defendant was indicted. United States v. Watkins, 339 F.3d 167, 169 (3d Cir. 2003); see also United States v. Oliver, 238 F.3d 471, 473 (3d Cir. 2001)("[T]he Speedy Trial Act requires the dismissal of only those charges that were made in the original complaint that triggered the thirty-day time period"); United States v. Mosquera, 95 F.3d

1012, 1013 (11th Cir. 1996)("The Speedy Trial Act does not guarantee that an arrested individual indicted within thirty days of his arrest must, in that thirty-day period, be indicted for every crime known to the government, failing which he may never be charged"); United States v. Giwa, 831 F.2d 538, 541 (5th Cir. 1987) ("every circuit . . . has adopted a narrow interpretation of section 3162(a)(1), holding that if the Government fails to indict a defendant within thirty days of arrest, the Act requires dismissal of only the offense or offenses charged in the original complaint"); United States v. Miller, 23 F.3d 194, 199 (8<sup>th</sup> Cir. 1994)("A defendant's arrest on one charge does not necessarily trigger the right to a speedy trial on another charge filed after his arrest"); United States v. Deroose, 74 F.3d 1177, 1182-83 (11th Cir. 1996); United States v. Antonio, 705 F.2d 1483, 1486 (9th Cir. 1983). In United States v. Archer, a case similar to the one before this Court, a defendant was arrested based on a complaint charging one count of knowing and intentional possession with intent to distribute over 50 grams of cocaine, but was indicted seventy-five days later on six counts of criminal activity, including four separate counts of distributing cocaine on different dates, one count of possession with intent to distribute cocaine, and one firearm charge. 984 F. Supp. 321, 322 (E.D. Pa. 1997). The Eastern District of Pennsylvania held that only one count of distribution from the six-count indictment was subject to dismissal when the Speedy Trial Act was violated since it was the only count based on conduct that served as the basis of the original complaint. Id. at 324-25.

The only exception to this rule on dismissal is the "gilding exception." Under the "gilding exception," "subsequent prosecution may be barred if it is based on an indictment which merely 'gilds' an earlier charge. . . ." Watkins, 339 F.3d at 176, citing United States v. Napolitano, 761 F.2d 135, 138 (2d Cir. 1985). While the Third Circuit has yet to definitively endorse the "gilding exception," it adopted the "same-elements" test as a means of assessing

whether or not uncharged offenses are “gildings” of a charged offense, rejected the “same-transaction” and “same-proofs” tests. Id. at 176-78. Under the “same-elements” test, “different charges will be construed as the same if they contain the same elements.” Id. at 176.

The Court must now determine: 1) which of the two filed criminal complaints triggered the thirty-day period in which the Government was required to indict the Defendant under the Speedy Trial Act, and which charges in the governing Superseding Indictment found in the triggering complaint are subject to dismissal should a violation of the Speedy Trial Act be found; and 2) whether any charges not subject to dismissal merely “gild” the charge in the triggering complaint.

**1) The “Triggering” Complaint and Charges Subject to Dismissal in the Superseding Indictment**

In determining which charges are included in the complaint, a complaint and affidavit are to be read in conjunction with one another. See Fed. R. Crim. P. 4(a) (“If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it.”). This Court accordingly reads the filed criminal complaints in conjunction with the affidavits attached thereto. The first Criminal Complaint against Defendant was filed in the District of New Jersey on December 1, 2010, and contained this statement of the offense:

On or about October 4, 2010, in the District of New Jersey, and elsewhere, defendant ANDREW COX: did knowingly distribute child pornography, as defined in Title 18, United States Code, Section 2256(8)(A), that has been mailed, and using any means and facility of interstate and foreign commerce shipped and transported in and affecting interstate and foreign commerce by any means, including by computer, in violation of Title 18, United States Code, Section 2252A(a)(2)(A).

The sworn affidavit by Postal Inspector Eduardo Gonzalez accompanying this complaint details Defendant's activities beginning with an original communication between the Defendant and the CW on September 28, 2010, and ending with the October 4, 2010 receipt of a package by inspectors allegedly sent by Defendant. An arrest warrant was issued on the basis of this complaint on December 1, 2010, amended on December 2, 2010, and Defendant appeared before Magistrate Judge Deavers on December 3, 2010. On December 4, 2010, the clock began running for Defendant to be indicted on this first complaint. Neither the original Indictment nor the Superseding Indictment include an October 4, 2010 charge, and neither reference the activities surrounding the specific alleged distribution on which said charge is based. Accordingly, the October 4, 2010 charge will not be considered as subject to dismissal as there is no charge to be dismissed. The Speedy Trial Act is inapplicable to an indictment charging a defendant with a different offense from that charged in the original complaint. There can therefore be no violation of the Speedy Trial Act if the December 1, 2010 complaint is the triggering complaint.

The second, Superseding Criminal Complaint against Defendant was filed in the District of New Jersey on December 30, 2010, and has the following statement of the offense:

From in or around April 2010 through in or around October 2010, in the District of New Jersey, and elsewhere, defendant ANDREW COX: did knowingly distribute child pornography, as defined in Title 18, United States Code, Section 2256(8)(A), that had been mailed, and using any means and facility of interstate and foreign commerce shipped and transported in and affecting interstate and foreign commerce by any means, including computer, in violation of Title 18 United States Code, Section 2252A(a)(2)(A) and Title 18, United States Code, Section 2.

The accompanying affidavit by Postal Inspector Eduardo Gonzalez includes the same details surrounding the October 4, 2010 distribution as the original complaint's affidavit, but adds Defendant's alleged activities on April 30, 2010, May 8, 2010, May 10, 2010 and May 25, 2010. Specifically, the affidavit states that on or about May 10, 2010, the CW received an e-mail from

“armyltcox@yahoo.com” indicated that requested DVDs would be shipped on that date, and providing a United States Postal Service 20-digit tracking number associated with that shipment. Inspectors recovered the package from the CW’s residence in New Jersey in July 2010. On January 5, 2011, Defendant was arrested on the basis of the Superseding Criminal Complaint, and appeared before Magistrate Judge Schwartz on the same date. On January 6, 2011, the clock began running for Defendant to be indicted on the Superseding Complaint.

The return of the Indictment on February 9, 2011 stopped the clock for the purposes of computing a Speedy Trial Act violation. That Indictment charges,

On or about May 10, 2010, in the District of New Jersey, defendant ANDREW COX did knowingly distribute child pornography, as defined in Title 18, United States Code, Section 2256(8), that was mailed, and using a means and facility of interstate and foreign commerce, shipped and transported in and affecting interstate commerce and foreign commerce by any means, including by computer. In violation of Title 18, United States Code, Section 2252A(a)(2)(A) and Section 2.

On June 15, 2011, a Superseding Indictment was returned including one count of unlawfully distributing child pornography on or about May 10, 2010, but also including five additional counts of unlawful distribution of child pornography on May 14, 2010, June 9, 2010, June 16, 2010, June 25, 2010, and June 29, 2010. Neither complaint includes the five additional charges of unlawful distribution, nor do they reference the activities surrounding the alleged distributions on the named dates following May 10, 2010. Therefore, since the five additional charges are neither charged in the original Criminal Complaint nor in the Superseding Complaint, the Speedy Trial Act is inapplicable to them and they are not subject to dismissal.

The only applicable complaint in which the May 10, 2010 charge can be found is the December 30, 2010 Superseding Complaint. The clock began to run on January 6, 2011 to indict Defendant on that complaint, and since the Indictment was only returned on February 9, 2011, the Government exceeded its thirty-day limit to indict by four days unless any exclusions under

18 U.S.C. § 3161(h) are applicable. If the December 23, 2010 Continuance Order is valid, the dates from January 6, 2011 to January 22, 2011 are excludable from the speedy trial clock under 18 U.S.C. § 3161(h)(7), and the Government would not be in violation of the Speedy Trial Act as it would have returned an indictment within eighteen countable days from Defendant's arrest.

Defendant argues that the December 23rd Continuance Order is invalid since it was filed *ex parte*, and when it was requested and obtained, the Government knew the reason given for the requested continuance—transportation problems—was factually fraudulent and baseless. The Government argues that the continuance was valid since the Continuance Order set forth sufficient reasons on the record to justify an “ends-of-justice” determination, and “the ends of justice served by taking such action outweigh[ed] the best interest of the public and the defendant in a speedy trial” under 18 U.S.C. § 3161(h)(7)(A).

The standard of review of a decision to grant a continuance is abuse of discretion. United States v. Stradford, 394 Fed. Appx. 923, 925 (3d Cir. 2011). The Speedy Trial Act requires that “when a . . . court grants an ends-of-justice continuance, it must ‘[s]et forth, in the record of the case, . . . its reasons’ for finding that the ends of justice are served and they outweigh other interests.” United States v. Zedner, 547 U.S. 489, 506-07 (2006)(citing 18 U.S.C. § 3161(h)(8)(A)).

In seeking the December 23, 2010 continuance, the Government represented that they were seeking a continuance only based on the need for additional time to transport the Defendant:

Given the additional time that will be necessary to transport the defendant Andrew Cox . . . from the Southern District of Ohio to this district, the interests of justice served by granting the requested continuance outweigh the best interest of the public and the defendant in a speedy trial.

...

The interest of justice served by granting a continuance from December 23, 2010 through January 22, 2011 to allow additional time to transport the defendant to this district outweigh the interest of the public and the defendant in a speedy trial.

No mention was made by the Government in its letter request to Magistrate Judge Schwartz of the need to allow time for the Defendant to obtain counsel as per 18 U.S.C. § 3161(h)(7)(B)(iv), the only mention of Defendant's counsel in the Government's submission to Magistrate Judge Schwartz is in a footnote stating that "the Government contacted Mr. Hobson, who advised that he no longer represented COX." (Gov't Opp'n to Def.'s Omnibus Mot., Ex. 6). The Government apparently also did not indicate to Judge Schwartz that Mr. Hobson refused to consent to a waiver of the Speedy Trial clock during that conversation, as Mr. Hobson stated to this Court during its October 6 Telephone Conference. [Docket Entry No. 58]. In this Court's previous Opinion, dated October 17, 2011, this Court erroneously quoted from Exhibit H of Defendant's Omnibus Motion as well as Exhibit 6, p. 7 of the Government's Opposition to Defendant's Omnibus Motion. Those Exhibits omitted the handwritten additions made by Magistrate Judge Schwartz to Paragraph 4 of its findings, where the Court clearly indicated that it had considered the appointment of counsel in her "ends-of-justice" determination. In fact, the Order thus filed on the docket states:

This matter having come before the Court on the application of Paul J. Fishman, United States Attorney for the District of New Jersey . . . for an order granting a continuance of the proceedings . . . for a period of 30 days to allow for the additional time necessary to transfer the defendant from the District of Ohio to the District of New Jersey . . .

...  
It is the FINDING OF THIS COURT that this action should be continued for the following reasons:

- (1) The charges in this case are pending against a defendant who was arrested in the Southern District of Ohio and taken into the custody of the U.S. Marshals on or about December 2, 2010; subsequent to his initial appearance in that district on December 3, 2010, the defendant was ordered to be transferred to the District of New Jersey;
- (2) The defendant has not yet been transferred to the District of New Jersey and the U.S. Marshals have advised that the defendant cannot be transported by air to this district until the week of January 3, 2011 at the earliest;

- (3) As the defendant has not yet appeared in this district, no counsel has been appointed to represent the defendant, and no counsel has informed the Government of this Court that they have been retained to represent the defendant in connection with these proceedings;
- (4) In the absence of a continuance allowing the U.S. Marshals additional time to transport the defendant to the District of New Jersey, the 30-day deadline by which an information or indictment must be filed pursuant to 18 U.S.C. § 3161(b) may lapse prior to the defendant's arrival to the district, and **the continuance will provide defendant an opportunity to secure counsel and confer with counsel before the case is presented to the grand jury**; and
- (5) As a result of the foregoing, pursuant to Title 18, United States Code, Section 3161(h)(7), the ends of justice served by granting the continuance outweigh the best interest of the public and the defendant in a speedy trial.<sup>1</sup>

(Id.) (emphasis added). The Order states as bases for granting the continuance allowing additional time for Defendant's transport to this District as well as allowing the Defendant the opportunity to secure and confer with counsel. However, Defendant's whereabouts at the time the continuance was issued as well as representations by Defendant's former counsel, Gordon Hobson, to the Government denying his consent to a waiver of Defendant's Speedy Trial clock indicate that Magistrate Judge Schwartz was led to rely on erroneous information provided by the Government regarding the Defendant's whereabouts and the lack of consent by his former attorney to the granting of a continuance.<sup>2</sup> The "ends of justice" finding was thus in part based on erroneous information that the Government did not investigate with appropriate due diligence. Furthermore, in light of the alleged communications between Dennis Maitland and Magistrate Judge Schwartz's staff regarding the whereabouts of Defendant, and his purported arrival in Brooklyn, the factual findings regarding the Defendant's location in the substance of the Order

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<sup>1</sup> The Continuance Order appears to be a proposed form of order prepared and submitted to Magistrate Judge Schwartz by the Government for her signature, upon which Judge Schwartz specifically made handwritten findings regarding providing the Defendant an opportunity to secure and confer with counsel.

<sup>2</sup> We also note Mr. Hobson's representations to this Court in the October 6, 2011 Telephone Conference that he did not recall whether or not he continued to be Defendant's attorney of record at the time he was called by the U.S. Attorney.

do not seem to be substantiated. As a result, this Court finds the Continuance Order invalid for the purposes of excluding the dates between January 6, 2011 and January 22, 2011.

While the dates covered in the December 23, 2011 Continuance Order are not excludable, Defendant's motion to hold a bond hearing was decided within the thirty-day period, so the days from January 6, 2011, the date the hearing was held, through January 7, 2011, the date the motion was decided, are excluded from Defendant's Speedy Trial clock under 18 U.S.C. § 3161(h)(1)(D). While this Court was closed on January 12, 2011 (inclement weather), January 16, 2011 (Martin Luther King, Jr. Holiday), and January 27, 2011 (inclement weather) the Supreme Court has confirmed that, for the purposes of computing time, weekend days and holidays are not to be excluded from the requisite thirty-day period, at least for the purposes of the § 3161(h)(1)(F) transport exclusion. Although 18 U.S.C. § 3161(h) does not incorporate Federal Rule of Criminal Procedure 45, the Court notes the rule's instruction that weekend days and holidays are to be counted when calculating all time periods, including statutory time periods for which no alternative method of computing time is specified. See United States v. Tinkelberg, 131 S. Ct. 2007, 2017 (2011); Fed. R. Crim. P. 45. Further, the exceptions in 18 U.S.C. § 3161(h) are exclusive, so no exclusions based on inclement weather are permissible from the thirty-day requirement unless a valid continuance is granted on the grounds that inclement weather would make proceedings impossible. See United States v. Carrasquillo, 667 F.2d 382, 388 (3d Cir. 1981); United States v. Paschall, 988 F.2d 972 (9<sup>th</sup> Cir. 1993)(the "ends-of-justice" clause can be invoked by courts to exclude delays caused by a major snowstorm that impaired the government's ability to prepare for trial). The Government thus exceeded the statutory requirements by two days with respect to the May 10, 2010 charge. For this reason, Count One

of the Superseding Indictment, the May 10, 2010 charge, must be dismissed from the Superseding Indictment.

## **2) Applicability of the “Gilding Exception”**

Defendant cites to United States v. Brown to support his argument that a “gilded” charge exists where a subsequent accusatory instrument merely “gilds” the initial charge filed against an individual, and the different accusatorial dates between events are mere ornamentation. 335 F. Supp. 2d 146 (D. Me. 2004). Defendant insists that both indictments allege the same charge of unlawful distribution with the only difference being “gilded” material added prior to law enforcement involvement that gave additional details as to the same charge alleged in the first complaint. Further, Defendant states that the Government had sufficient information to include offenses that occurred prior to October 4, 2010 at the time of filing the complaint, but only included those offenses later to protect themselves from a Speedy Trial Act violation and indictment dismissal. The Government, however, argues that the Grand Jury’s return of the Indictment and Superseding Indictment effectively constituted a dismissal of the original and superseding criminal complaints, and that the Superseding Indictment does not contain the distribution charge included in the original criminal complaint. Since the charge in the Indictment is not the same charge as that in the original complaint, and since the date of the charged offenses is a different element that the Government must prove, the charges in the Superseding Indictment are different offenses, making the “gilding” exception inapplicable.

In the case cited by Defendant, United States v. Brown, the District Court of Maine was asked to find that a superseding indictment merely “gilded” the original indictment when it varied from the original indictment by adding sentencing allegations that, if found by a jury

beyond a reasonable doubt, would support Guideline sentencing enhancements. Id. at 147. The court found that the superseding indictment did not fit the gilding definition “because the different accusatorial dates here are ‘reasonably explicable’” due to an intervening Supreme Court decision and the district court’s application of that decision to the sentencing guidelines. Id. at 148-49. Brown thus does not serve as a strong example of why a variance of accusatorial dates can be viewed as “mere ornamentation” since, on the contrary, it finds the different accusatorial dates between the two charges made against defendant “reasonably explicable.” Clearly, a prosecutor has the discretion to charge a defendant with only those charges about which he or she has secured sufficient evidence to convince a jury beyond a reasonable doubt that a given defendant is culpable. “Judicial intrusion into executive discretion of such high order [as the decision to prosecute] should be minimal.” Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010), citing Hartman v. Moore, 547 U.S. 250, 263 (2006).

Neither the Superseding Complaint nor its accompanying affidavit mention any alleged acts by Defendant on the five dates listed in the Superseding Indictment: May 14, 2010, June 9, 2010, June 16, 2010, June 25, 2010, and June 29, 2010. The circumstances surrounding any alleged distributions known to the Government following May 10, 2010 are entirely absent from the Superseding Complaint. These distinct dates on which unlawful distributions are charged in the Superseding Indictment allege different substantive offenses, each of which the Government must show, beyond a reasonable doubt, as involving distinct acts of unlawful distribution. Therefore, Counts Two through Six in the Superseding Indictment do not merely gild Count One, and they are not subject to dismissal under the Speedy Trial Act.

#### B. Dismissal of Count One of the Superseding Indictment With or Without Prejudice

The remedy for a Speedy Trial Act violation is dismissal of the charge in the complaint under 18 U.S.C. § 3162(a). That provision places within the discretion of the court whether said dismissal should be granted with or without prejudice, listing the following factors for the court to consider: “the seriousness of the offense; the facts and circumstances of the case which led to dismissal; and the impact of a reprosecution on the administration of this chapter [18 U.S.C. §§ 1361 et seq.] and on the administration of justice.” 18 U.S.C. § 3161(a)(1). Prejudice to the defendant should also be considered before barring reprosecution, but it is not dispositive. United States v. Taylor, 487 U.S. 326, 334 (1988). “Congress did not intend any particular type of dismissal to serve as the presumptive remedy for a Speedy Trial Act violation.” Id. The Supreme Court has further clarified that analysis of factors to determine whether or not to dismiss with or without prejudice is “designed to promote compliance with the [Speedy Trial] Act without needlessly subverting important criminal prosecutions.” Zedner, 547 U.S. at 498 (2006). After weighing the relevant factors, this Court finds that the May 10, 2010 unlawful distribution of child pornography charged against Defendant is dismissed without prejudice.

### **1) Seriousness of the Charge**

While Defendant argued in his Brief in Support of his Omnibus Motion that the one count of unlawful distribution of child pornography in the original Indictment was not serious, Defendant’s counsel conceded the seriousness of the charge in oral argument before this Court. (September 26, 2011 Motion Hearing, Docket Entry No. 55, Tr. 38: 4-6). Each count in violation of 18 U.S.C. § 2252A(a)(2)(A) carries a statutory minimum sentence of five years in prison and a statutory maximum sentence of up to twenty years in prison for a convicted individual with no prior convictions. 18 U.S.C. § 2252A(b)(1). Distributors of child pornography receive direct financial benefits from the sexual exploitation of children and further

encourage both the production and consumption of materials based on such exploitation.

Further, distributing child pornography affects its victims directly as the continued existence of the materials “causes the child victims continuing harm by haunting the children for years to come.” Osborne v. Ohio, 495 U.S. 103, 111 (1990), citing New York v. Ferber, 458 U.S. 747, 759 (1982). “The distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. . . .

While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties for persons selling, advertising, or otherwise promoting the product.” New York v. Ferber, 458 U.S. at 759-60. This Court thus finds a violation of 18 U.S.C. 2252A(a)(2)(A) to be a serious offense weighing in favor of dismissal without prejudice.

## **2) Facts and Circumstances Which Led to Dismissal**

Defendant argues that the reason for the delay rests solely with the Government and not Defendant, and the Government conceded this. (September 26, 2011 Motion Hearing, Docket Entry No. 55, Tr. 47: 15-16). Though the validity of the December 23, 2010 Continuance Order is not relevant for the purposes of computing time under the Speedy Trial Act for Count One of the Indictment, this Court notes the significant negligence of the Government in ordering the Defendant detained and failing to monitor his whereabouts for close to three weeks in December 2010. In Deputy Marshal Sanseverino’s Affidavit, he confirmed that the Assistant U.S. Attorney knew after December 23, 2010 that “Defendant may have been moved to Brooklyn.” (“Sanseverino Affidavit,” ¶ 14). The Court also notes the diligent efforts on the part of

Defendant's family to communicate with Government agents and inform court officials in the District of New Jersey regarding the Defendant's whereabouts.

However, the Court does not find, nor does Defendant claim, that the Government acted in bad faith. (September 26, 2011 Motion Hearing, Docket Entry No. 55, Tr. 38: 21). The District of New Jersey has held that a "dismissal with prejudice should be reserved for cases in which there are regular and frequent indications of negligence, or evidence of an intent to delay with the purpose of gaining a strategic or tactical advantage." United States v. Arias-Ruiz, 2009 U.S. Dist. LEXIS 20727 (D.N.J., Mar. 16, 2009), at \*6; citing United States v. Mancia-Perez, 331 F.3d 464, 467 (5<sup>th</sup> Cir. 2003); United States v. Cano-Silva, 402 F.3d 1031, 1035 (10<sup>th</sup> Cir. 2005). Under Third Circuit law, sanction of dismissal without prejudice is appropriate where nothing is presented showing that the government's failure to timely file was a result of anything more than mere negligence. Government of the Virgin Islands v. Francis, 98 F.R.D. 626, 632 (3d Cir. 1983).

In this case, there is no evidence that, in not securing knowledge of Defendant's whereabouts, the AUSA was attempting to gain a strategic or tactical advantage. First, the AUSA was explicitly told on December 23, 2010 by the USMS that Defendant would be arriving in Newark only after the first of the year. ("Sanseverino Affidavit," ¶ 12). Additionally, upon further inquiry by the USMS into the circumstances surrounding Defendant's transfer, the Newark USMS determined that it never received a copy of the itinerary generated by the Justice Prisoner Alien Transportation System ("JPATS") regarding Defendant's transport from Philadelphia to Brooklyn. (Id., ¶ 16). While this still demonstrates fault and even negligence on the part of the Government, it suggests lack of intent to delay on the part of the AUSA for their own advantage. The Government also attempted to contact Defendant's initial attorney, Gordon

Hobson, and informed Magistrate Judge Schwartz of the need to schedule an initial appearance for Defendant upon his arrival in the District. Further, in the Continuance Order issued by Magistrate Judge Schwartz, an explicit order is made “that the United States shall request an initial appearance for the defendant upon his arrival in this District.” Finally, the length of the delay with respect to this specific Speedy Trial Act violation—exceeding the thirty-day requirement by two days—is minimal, and the length of delay must be considered as one of the circumstances surrounding the dismissal of a case. United States v. Miller, 23 F.3d at 197-98. For these reasons, while the facts and circumstances surrounding the delay are not propitious for the Government, they more strongly support inadvertence and negligence than bad faith and malicious intent.

### **3) Impact of Reprosecution on the Administration of the Speedy Trial Act and the Administration of Justice**

Defendant argues that administration of justice warrants dismissal with prejudice, focusing on the prejudice to Defendant in being held for over a month pending his first appearance in New Jersey. This hampered his ability to defend and prepare his case as he had no access to counsel and was only able to communicate through his family. Defendant claims he was further prejudiced by the Government’s ex parte application for a continuance. The Government argues that reprosecution weighs in favor of dismissal with prejudice due to the public interest involved in combating criminal distribution of child pornography and the efficiency with which it believes it can conduct a speedy trial on the counts charged. Finally, the Government asserts that Defendant has not suffered prejudice. It presents two factors which weigh in favor of finding a lack of prejudice: 1) whether the delay prejudiced the defendant’s trial preparation due to the loss of evidence or fading of witness memories, see, e.g., United States v. Abdush-Shakur, 465 F.3d 458, 464 (6<sup>th</sup> Cir. 2006); and 2) whether there have been

additional restrictions on the defendant's liberty as a result of the Speedy Trial Act violation. Taylor, 487 U.S. at 341. Since Defendant doesn't claim any harm to evidence or witness unavailability resulting from the delay, the Government argues that Defendant was not significantly prejudiced. While Defendant's detention was prejudicial, the physical restriction alone does not warrant dismissal with prejudice. United States v. Etwaroo, 2008 U.S. Dist. LEXIS 105208, at \*3 (E.D.N.Y., Dec. 31, 2008)("although 28 days is not an insubstantial period of time, courts have generally reserved dismissal with prejudice for more egregious delays").

This Court agrees with the Government that the limited delay did not lead to prejudice against the Defendant with respect to preparation for trial or loss of evidence that hindered his ability to lodge a defense to the crimes charged. The Court also agrees that the limited extent of the delay favors dismissal without prejudice. See United States v. Saltzman, 984 F.2d 1087, 1094 (10<sup>th</sup> Cir. 2002)(holding that a near seven-month delay, by itself, is insufficient to compel dismissal with prejudice). Defendant was certainly prejudiced during his detention of over one month between December 2, 2010 and January 7, 2011, the date of his release on bail. However, Defendant's demonstrated disregard for the conditions of his release on bail, and the circumstances surrounding his bail revocation present legitimate public interest concerns. These concerns outweigh the prejudicial effects on Defendant of his detention after his bail revocation on April 15, 2011.

Having balanced the relevant factors in determining whether dismissal with or without prejudice is appropriate, this Court finds that the seriousness of the distribution charge, the lack of bad faith and malicious intent on the part of the Government, and the impact of reprosecution on the administration of justice favor dismissal of the May 10, 2010 charge of unlawful distribution of child pornography without prejudice.

## **2. Validity and Constitutionality of Arrest Warrant**

Defendant moves to dismiss based on a violation of the U.S. Constitution's Fourth Amendment requirement that an issued arrest warrant "particularly describ[e] . . . the persons or things to be seized." U.S. Const. Amend. IV. Federal Rule of Criminal Procedure 4(c)(1) provides that a warrant "shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be described with reasonable certainty." The Defendant does not specify exactly what remedy he seeks for the alleged invalid warrant, but since: 1) this Court does not find the arrest warrant to be defective; and 2) the challenged arrest warrant has been rendered moot as it pertained to the October 4, 2010 charge for which Defendant is no longer charged, this Court declines to either vacate the original and amended arrest warrants of December 2010 or to suppress any evidence seized from defendant or his home on the date of the arrest.

For an arrest warrant to be valid, Federal Rule of Criminal Procedure 4 provides that it must:

- (A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty;
- (B) describe the offense charged in the complaint;
- (C) command that the defendant be arrested and brought without unnecessary delay before a magistrate judge, before a state or judicial officer; and
- (D) be signed by a judge.

Fed. R. Crim. P. 4(b)(1). Defendant only contests the validity of the arrest warrant as to Fed. R. Crim P. 4(b)(1)(A) since the original arrest warrant named "Richard Rowley" as the individual to be arrested rather than "Andrew Cox." Yet, because the Court finds the mistaken name on the face of the warrant to be a technical error, that the body of the warrant described Defendant with "reasonable certainty," and that the arresting officers were certain of Defendant's identity based

on personal experience in the case and the issuance of a “Search Warrant Operation Plan” in advance of the arrest, it does not find the arrest warrant invalid.

Under Third Circuit law, a “mere technical error does not automatically invalidate the warrant.” United States v. Carter, 756 F.2d 310 (3d Cir. 1985)(holding that inaccuracy in the date of the offense in a criminal complaint is not a material or critical variance). The key inquiry is “whether there has been such a variance as to ‘affect the substantial rights’ of the accused.” Id. at 313, quoting Cromer v. United States, 142 F.2d 697 (D.C. Cir. 1944). Such affects would occur if: 1) the accused is not informed as to the charges against him so as to enable him to present his defense and not be taken by surprise by the evidence offered at trial; and 2) the accused is not protected against another prosecution for the same offense. Cromer, 142 F.2d at 698. When a defendant alleges warrant invalidity, he must prove that “the misstatement was made intentionally or with reckless disregard for the truth.” Carter, 756 F.2d at 313; see Franks v. Delaware, 438 U.S. 154 (1978).

Defendant does not contest that he was made aware of the charges against him, and has not demonstrated how the error on the face of the warrant affected his substantial rights in any way. The face of the warrant also contained a caption stating “United States v. Andrew Cox,” thus clearly indicating that he was the defendant charged with the child pornography distribution. In addition, the body of the warrant stated his correct name, correct address, date of birth, social security number and sex, identifying him with “reasonable certainty.” Defendant also fails to show any intentional misstatement or reckless disregard as required, particularly in light of the Government’s amendment of the arrest warrant to substitute “Andrew Cox” for “Richard Rowley” before his arrest on December 2, 2010. Finally, Brian Wittig, the lead U.S. Postal Inspector of the investigation, was certain of Defendant’s identity and was present at Defendant’s

residence to execute the arrest warrant along with other postal inspectors who had received a detailed Search Warrant Operation Plan identifying Andrew Cox as the “target” and “suspect,” and containing his photograph, date of birth, and estimated height and weight. Since there is abundant evidence of Defendant’s identity in the body of the arrest warrant and the arresting officers could identify the Defendant with “reasonable certainty,” this Court finds the arrest warrant valid under the Fourth Amendment.

### **3. Validity of Search Warrant**

Defendant argues that the search warrant issued to search his home lacked probable cause with respect to items searched and seized in his home since no justification was given that Defendant mentioned child pornography in his e-mails to the CW or had used any items found at his home during any alleged distribution of child pornography. Defendant makes a separate claim that the search warrant lacked probable cause and/or was “stale” because the arresting offense was based on activity that took place in October, 2010, and the materials seized were for materials sent between May and June. The Magistrate Judge did not have a “substantial basis” for determining that probable cause existed for a continuing enterprise or prior distributions since the age of the information supporting the warrant application was recent, and the materials seized exceeded the scope of what a “substantial basis” determination could afford. Defendant argues the good faith exception does not apply since the officer’s did not rely on the issued warrant in good faith. Finally, he claims that requests were made for a copy of the search warrant, but the warrant was not produced to anyone at the apartment during the arrest, and that some of the items seized were not listed in the evidence list and were outside the scope of the search warrant.

He thus moves to suppress all evidence and material seized from his home as “fruit of the poisonous tree.”

The Government argues that the standard of reviewing a search warrant issued by a magistrate judge is very high under Illinois v. Gates, requiring the reviewing court to assess the sufficiency of the search warrant affidavit with “great deference” to the initial probable cause determination made by the judge. 462 U.S. 213, 236-38 (1983). A reviewing court must uphold the warrant as long as the issuing judge had a “substantial basis” for concluding by “a fair probability” that contraband or evidence of a crime would be found at a defendant’s residence, United States v. Conley, 4 F.3d 1200, 1205 & n.2 (3d Cir. 1993), and they argue that Magistrate Judge Deavers did have that basis under the substantive and detailed allegations in the supporting affidavit. In the alternative, the Government claims, the fruits of the search warrant are admissible due to the agent’s good faith reliance on the Magistrate Judge’s finding of probable cause.

Under the Fourth Amendment of the U. S. Constitution, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. “[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.” Gates, 462 U.S. at 235. In its probable cause determination, a court must consider the totality of the circumstances, first determining the relevant information within the affidavit, and then evaluating the credibility and reliability of that information. See Gates, 462 U.S. at 236-40; United States v. Williams, 3 F.3d 69, 72 (3d Cir. 1993); Conley 4 F.3d at 1206. If reasonable inferences can be drawn from the credible

information provided in the affidavit so as to support a conclusion that there exists a fair probability that contraband or evidence of a crime will be found at the designated location, the court should defer to the Magistrate Judge's finding of probable cause. See Gates, 462 U.S. at 238.

In this case, the Magistrate Judge had a "substantial basis" for concluding by "a fair probability" that contraband or evidence of unlawful distribution of child pornography would be found at Defendant's residence. The Search Warrant Affidavit states that, aside from the October 2010 distribution, the CW had previously "purchased nudism form an individual online with address "T'N'S Inc., P.O. Box 261071, Columbus, OH 43226," and had been sent a "catalog via e-mail containing a list of videos Andrew had for sale." (Def.'s Omnibus Mot. Br., Ex. N, "Search Warrant and Affidavit"). The Postal Inspector directly participated in the October 2010 controlled purchase of DVDs containing child pornography through the CW, and the Affidavit details the circumstances and excerpts some of the communications that resulted in that distribution, linking Defendant with the e-mail address and physical address from which the distribution was made. Further, based on the expertise of the Postal Inspector's law enforcement background investigating unlawful distribution of child pornography, he states in his affidavit:

Based upon the conduct of individuals involved in the collection of child pornography set forth [above] . . . namely, that they tend to maintain their collections at a secure, private location for long periods of time, and that forensic evidence of the downloading, saving, and storage of such evidence may remain on the computers or digital media for months or even years even after such images and videos have been deleted from the computers or digital media, there is probable cause to believe that evidence of the offenses of receiving and possessing child pornography is currently located at the SUBJECT PREMISES [Cox's residence].

(Id., ¶ 38). Finally, the alleged facts demonstrate the internet activity associated with distribution-related e-mail correspondence and PayPal activity traced back to Defendant's residence (Id., ¶¶ 31-34). Given the amount of detailed information linking the charged

distribution with both Defendant and his residence, this Court finds that the Magistrate Judge based her issuance of the search warrant on sufficient probable cause based on credible information and inferences supporting the existence of a fair probability that contraband or evidence of distribution of child pornography would be present in Defendant's residence. Therefore, this Court finds no Fourth Amendment violation to warrant suppression of evidence seized at Defendant's residence and need not consider whether the arresting agent's good faith reliance on the Magistrate Judge's finding of probable cause made proper the seizure of said evidence.

#### **4. Proper Venue**

Defendant claims that, since the alleged substantive offense occurred entirely in Ohio, there is a lack of venue in the District of New Jersey and the counts in the Superseding Indictment should be dismissed. However, this Court finds that venue in the District of New Jersey is proper and denies Defendant's motion to dismiss for lack of venue.

Under Federal Rule of Criminal Procedure 18, venue lies "in a district where the offense is committed. Fed. R. Crim. P. 18. Under federal statute, proper venue exists as follows:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

18 U.S.C. § 3237(a). The statute prohibiting the distribution of child pornography, 18 U.S.C. § 2252A(a)(2)(A), does not expressly provide a separate provision to determine venue, so section

3237(a) applies to Defendant's charged offenses. Proper venue thus rests not only in Ohio for Defendant's alleged distributions, but to any district through or to which his distributions were directed. While the original complaint misrepresented the fact that the package allegedly sent by Defendant reached a P.O. Box in New Jersey when it had been sent to Pennsylvania, the Superseding Indictment, the governing charging document before this Court, charges Defendant only with distributions purchased by a New Jersey resident and mailed to his New Jersey address. Since the charged offenses were continued through and completed in New Jersey, venue is proper in this district.

**5. Introduction of Government Evidence under Federal Rules of Evidence 803(6) and 902(11)**

Finally, Defendant argues that any business records and the packages recovered by the Government in its controlled purchase of DVDs containing child pornography be barred under Federal Rules of Evidence 803(6) and 902(11) due to their having been altered during the course of the investigation, were not handled by all parties in the regular course of business, or were not accompanied by the appropriate certification from the custodian of records. Since the trial of this matter has not yet commenced, the Court finds this motion premature. Defendant's motion to exclude business records and the packages recovered will thus be denied without prejudice to the raising of appropriate objections regarding admissibility of documents at trial.

**IV. CONCLUSION**

For the foregoing reasons, the Court **GRANTS** Defendant's motion to dismiss Count One of the Superseding Indictment **WITHOUT PREJUDICE** for the Government's violation of the Speedy Trial Act. Defendant's motion to dismiss Counts Two, Three, Four, Five and Six in

the Superseding Indictment is **DENIED**. The Court also **DENIES** Defendant's motion to dismiss based on an invalid and unconstitutional arrest warrant. Defendant's motion to suppress search and seizure of items found pursuant to the court-issued search warrant is also **DENIED**. Since this Court finds proper venue exists in the District of New Jersey, Defendant's motion to dismiss for lack of venue is also **DENIED**. Defendant's motion to bar the introduction of evidence under Federal Rules of Evidence 803(6) and 902(11) is **DENIED** without prejudice to the raising of appropriate objections to the admissibility of specific documents at trial. An appropriate order accompanies this opinion.

DATED: October 18, 2011

/s/ Jose L. Linares  
United States District Judge

ITEM REFERRED TO IN RESPONSE TO QUESTION 19

DISCOVERY AND THE PRETRIAL PROCESS  
 SPRING 2012  
 INSTRUCTORS: MARK FALK & PATTY SHWARTZ  
 Text: T. Mauet, Pretrial (7<sup>th</sup> ed. 2008)

Lecture	Mauet Reading	Rules	Electronically Available Reading	Oral/Written Assignment
Lecture 1: 1/17 Intro & Overview of Civil Case	None	None	None	None
Lecture 2: 1/24 Local Rules & Overview of Discovery Tools	3-53	Fed. R. Civ. P. 26, 27, 30, 33, 34, 35, 36, 45, & 83  Fed. R. Evid. 702 & 703	Assigned Case File	Assigned Students conduct client interviews
Lecture 3: 1/31 Oral Presentations on Elements & Lecture: So you have a case?	83-113, 185-216, 254-257, 431-433	Fed. R. Civ. P. 11, 16, & 26	D.N.J. L. Civ. R.16.1 & 26.1 <sup>1</sup>	Assigned Students Present Elements of the Claims & Defenses for the Two cases

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<sup>1</sup>The Local Rules are part of the Lecture 3 materials.

Lecture 4: 2/7 Lecture on Paper & Electronic Discovery	217-268, 311- 320, 434-445, 462-464	Fed. R. Civ. P. 5, 16, 26, 28, 33, 34, 36, 44, & 45 Fed. R. Evid. 501 & 502	D.N.J. L. Civ. R. 26.1, 28.1, 33.1, 34.1, 36.1  28 U.S.C. § 1781  <u>Thayer v.</u> <u>Chiczewski</u> , Civ. No. 07-1290, 2009 WL 2957317 (N.D. Ill. Sept. 11, 2009)  <u>Pansy v. Borough</u> <u>of Stroudsburg</u> , 23 F.3d 772 (3d Cir. 1994) Sample Discovery Confidentiality Order  Sample General Objections  Sample Subpoena	Submit Draft Rule 26 disclosures
Lecture 5: 2/14 Lecture on Depositions	269-307, 446-458	Fed. R. Civ. P. 26, 27, 28, 30, 31, 32, 43, & 45  Fed. R. Evid. 103 & 615	D.N.J. L. Civ. R. 26.1, 27.1  <u>Hall v. Clifton</u> <u>Precision</u> , 150 F.R.D. 525 (E.D. Pa. 1993)  WDNY Dep. Rules	
Court Visit on selected date in lieu of Class on 2/28				

Lecture 6: 3/6 Lecture on Rule 16 Conferences & Meet & Confer Exercise	200-205	Fed. R. Civ. P. 16 & 26 D.N.J. L.Civ. R. 16.1 & 26.1	Rule 16 Order & Joint Discovery Plan  Pretrial Scheduling Order	Meet & Confer Exercise & Submit Joint Discovery Plan At Conclusion of Class
Lecture 7: 3/20 Rule 16 Exercise & Lecture on Experts and Rule 35 Exams	114, 188, 192- 194, 196- 200, 207-208, 213- 217, 307-311, 466	Fed. R. Civ. P. 16, 26, & 35 Fed. R. Evid. 702, 703, & 705		Submit 5 Interrogatories, 5 Document Demands, & 5 Requests for Admissions, & 1 Subpoena & explain reasons for the discovery demands & Assigned Students Participate in a Rule 16 conference
Exercise: 3/27 Deposition Exercise		Fed. R. Civ. P. 26, 30, 32, & 45  Fed. R. Evid. 103		Assigned Students Conduct Depositions

Lecture 8: 4/3 Oral Presentation on Local Rules governing discovery disputes & Lecture on Discovery Disputes, Protective Orders & Sanctions	266-267, 320-330, 459-461	Fed. R. Civ. P. 37	L. Civ. R. 5.3 & 37.1  <u>Blank v. Ronson</u> , 97 F.R.D. 744 (S.D.N.Y. 1983)  <u>Pension Committee v. Banc</u> , 685 F. Supp. 2d 456 (S.D.N.Y. 2010)  Sample Discovery Dispute Letters	Assigned Students to Present Overview of Selected Local Rules governing discovery disputes
Lecture 9: 4/10 Pretrial Dispositive Motions	146-152, 331-340, 356-370	Fed. R. Civ. P. 12 & 56	L. Civ. R. 7.1 & 7.2	Assigned Students Argue Discovery Disputes
Lecture 10: 4/17 Lecture on Attorney Client Privilege & Work Product Rule	87-95, 189-190, 198-200, 253, 268	Fed. R. Civ. P. 26 Fed. R. Evid. 501 & 502	D.N.J. L. Civ. R. 33.1, 34.1, 36.1, & 103.1  RPC 3.1, 3.2, 3.4, 4.2, 4.3, & 4.4  <u>Hickman v. Taylor</u> , 329 U.S. 495 (1947)  <u>Upjohn v. U.S.</u> , 449 U.S. 383 (1981)  <u>Maldonado v. N.J.</u> , 225 F.R.D. 120 (D.N.J. 2004)  Sample Privilege Log	

Lecture 11: 4/24 Lecture on Final Pretrial Conference & Settlement & Guest Speaker: Tips for the Litigator	379-422, 467-470, 208	Fed. R. Civ. P. 16(e) & 26(b)(3) Fed. R. Evid. 408	Sample Final Pretrial Order Instructions	<b>SUBMIT FINAL ASSIGNMENT</b>
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