Report on District Court Review of Magistrate Judge's Reports and Recommendations: Should Arguments Not Previously Made to the Magistrate Judge Be Considered

Prepared by the Commercial and Federal Litigation Section Committee on Federal Procedure

A. Introduction

This report addresses the issue of whether a party objecting to a magistrate judge's report and recommendation ("Report & Recommendation") may raise in the district court a legal argument that could have been, but was not, raised before the magistrate judge. This issue has not been addressed by the Second Circuit Court of Appeals. Other circuit courts have reached differing conclusions, as have district court judges within the Second Circuit.

B. Summary

The Commercial and Federal Litigation Section of the New York State Bar Association (the "Section") has concluded that whether a party objecting to a magistrate judge's Report & Recommendation may raise before the district court an argument that was not raised before the magistrate judge, even though it could have been, should be a matter of district court discretion, as a number of courts have held. The Section does not agree with the position of the Fourth Circuit that a district must consider such arguments. It also does not agree with the decisions of other courts that indicate that a district court cannot consider such arguments.

C. The Federal Magistrates Act, Rule 72 and General Principles Governing District Court Review of a Magistrate Judge's Order or Report & Recommendation

The Federal Magistrates Act, as amended in 1976, divides pretrial matters into two categories. Under 28 U.S.C. § 636(b)(1)(A), a judge may designate a magistrate judge to hear and determine any "pretrial matter" with the exception of eight listed pretrial motions. Those eight listed motions are incorporated by reference into Section 636(b)(1)(B), under which a judge may designate a magistrate judge "to conduct hearings, including evidentiary hearings" and

submit "proposed findings of facts and recommendations for the disposition" of the matter to the district judge. *See generally* 12 C. Wright, A. Miller & R. Marcus, Fed. Prac. & Proc.: Civil 2d, § 3068.2, p. 332 (1997) ("Wright & Miller Civil 2d"). Under Section 636(b)(1)(C), the magistrate judge's proposed findings and recommendations under subsection 636(b)(1)(B) are to be filed and served.

Fed. R. Civ. P. 72, which implements Section 636(b)(1), also divides pretrial matters into two categories, but does not track the language of the statute. Instead, it categorizes pretrial matters into those that are "not dispositive of a claim or defense of a party" (Rule 72(a)) and those that are "dispositive" of such a claim or defense (Rule 72(b)). Rule 72(a) implements Section 636(b)(1)(A), although the language of the two provisions differs. See 12 Wright & Miller, Civil 2d, § 3068.2, pp. 332-33; § 3069, p. 346.

Rule 72(b) implements Section 636(b)(1)(B) & (C), with the language of the statute and the Rule differing in certain respects. See 12 Wright & Miller, Civil 2d, § 3070, pp. 356-58. How courts have dealt with the language differences between Section 636(b)(1) and Rule 72(a) & (b) is discussed in 12 Wright & Miller, Civil 2d, § 3068.2. As noted above, Rule 72(b) applies when a magistrate judge is assigned, "without the consent of the parties," to hear a pretrial matter "dispositive of a claim or defense." Under Rule 72(b)(1), a magistrate judge "must promptly conduct the required proceedings when assigned…. A record must be made of all evidentiary proceedings…. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact." Fed. R. Civ. P. 72(b)(1).

Determinations by a magistrate judge under Section 636(b)(1)(A) are subject to review by the district court, which "may reconsider any pretrial matter where it has been shown that the magistrate judge's order is **clearly erroneous or contrary to law**." 28 U.S.C. § 636(b)(1)(A)

(emphasis added). Rule 72(a) provides that a district court judge must consider timely objections to a magistrate judge's order under Rule 72(a) and modify or set aside any part of the order that is "clearly erroneous or contrary to law."

The standard for district court review of a magistrate judge's Report & Recommendation is governed by Section 636(b)(1)(C) and Rule 72(b) and is different from the standard of review applicable to a magistrate judge's order. Within 14 days after being served with a copy of the Report & Recommendation, a party may serve and file written objections to such proposed findings and recommendations. 28 U.S.C. § 636(b)(1)(C). The district court "shall make a **de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made**." *Id*. (emphasis added). "The judge of the court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id*. "The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions." *Id*. Rules 72(b)(2) & (3) are in accord with the foregoing.

In *Thomas v. Arn*, 474 U.S. 140, 149-150 (1985), the Supreme Court had to determine whether a Court of Appeals could validly promulgate a rule that the failure to object to a Report & Recommendation waived the right to appeal from a district court's judgment adopting the Report & Recommendation. After noting that the Federal Magistrates Act does not require any review in the absence of an objection, *id*. at 149, the Supreme Court stated in dictum with respect to district court review:

> "Petitioner first argues that a failure to object waives only *de novo* review, and that the district judge must still review the magistrate's report under some lesser standard. However, § 636(b)(1)(C) simply does not provide for such review. This omission does not seem to be inadvertent, because Congress provided for a 'clearly erroneous or contrary to law' standard of review of a magistrate's disposition of certain pretrial matters in § 636(b)(1)(A)." (Citation omitted.)

Id. at 149-50.

The Supreme Court further stated:

> "Petitioner also argues that, under the Act, the obligatory filing of objections extends only to findings of fact. She urges that Congress, in order to vest final authority over questions of law in an Article III judge, intended that the district judge would automatically review the magistrate's conclusions of law. We reject, however, petitioner's distinction between factual and legal issues. Once again, the plain language of the statute recognizes no such distinction. We also fail to find such a requirement in the legislative history.
>
> It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings. The House and Senate Reports accompanying the 1976 amendments do not expressly consider what sort of review the district court should perform when no party objects to the magistrate's report."

Id. at 150.

The Supreme Court concluded:

> "There is no indication that Congress, in enacting § 636(b)(1)(C), intended to require a district judge to review a magistrate's report to which no objections are filed. It did not preclude treating the failure to object as a procedural default, waiving the right to further consideration of any sort."

Id. at 152.

The Fourth Circuit has similarly stated that parties must make a proper objection "to establish the right to district court review." *In re Search Warrants Served On Home Health & Hospice Care, Inc*., 121 F.3d 700, 1997 WL 545655, at *11 (4th Cir. Sept. 5, 1997) (unreported decision); *but see Wimmer v. Cook*, 774 F.2d 68, 72 (4th Cir. 1985) ("although the statute permits the district court to give to the magistrate's proposed findings of fact and recommendations such weight as [their] merit commends and the sound discretion of the judge warrants (citation omitted), that delegation does not violate Article III as long as the ultimate decision is made by the district court' ").

Contrary to the dictum in *Thomas v. Arn*, the Advisory Committee and various court decisions have concluded that when no timely objection is made to a Report & Recommendation, the district court need only satisfy itself that there is no clear error on the face of the record in order to accept the Report & Recommendation. *See, e.g.*, Rule 72, 1983 Advisory Committee Notes, Subdivision (b); *Machicote v. Ercole*, 2011 WL 3809920, at *1 (S.D.N.Y. Aug. 25, 2011); *Martinez v. Connelly*, 2011 WL 5252749, at *1 (S.D.N.Y. Nov. 3, 2011); *United States v. Riesselman*, 708 F. Supp.2d 797, 807 (N.D. Iowa 2010); *but see, e.g.*, *Talamantes v. Berkeley Cty. School Dist*., 340 F. Supp.2d 684, 689 (D. S.C. 2004) (district court need not review any findings or recommendations not objected to; failure to object constitutes acceptance of the findings and recommendations). Wright & Miller has concluded that there is no agreed upon answer to whether, in the absence of an objection, the district court must review a Report & Recommendation at least for clear error before accepting it. 12 Wright & Miller, Civil 2d, § 3070.1, pp. 371-72. That issue is beyond the scope of this Report.

In the absence of an objection, the district court is free to review the Report & Recommendation *de novo*, if it so chooses. *See Thomas v. Arn*, 474 U.S. at 154; *Delgado v. Bowen*, 782 F.2d 79, 82 (2d Cir. 1985); *Riesselman*, 708 F. Supp.2d at 806 (N.D. Iowa). As indicated above, Section 636(b)(1) and Fed. R. Civ. P. 72(b)(3) each explicitly permits the district court to receive additional evidence as part of its review. *See Amadasu*, *supra*, 2012 WL 3930386, at *4.

However, there is no provision in either Section 636 or Rule 72 regarding whether the district court, in reviewing a magistrate judge's Report & Recommendation, may consider legal arguments made for the first time to the district court, but which could have been made to the magistrate judge.

D. The Circuit Courts Differ Regarding District Court Consideration of a Legal Argument Not Raised Before the Magistrate Judge

The circuit courts differ regarding district court consideration of a legal argument not raised before the magistrate judge when the district court reviews a magistrate judge's Report & Recommendation. The Second Circuit has not addressed the issue. See *Amadasu v. Ngati*, 2012 WL 3930386, at *5 (E.D.N.Y. Sept. 9, 2012) and discussion below.

The Fourth Circuit has held that, in reviewing an objection to a Report & Recommendation, the district must consider all legal arguments relating to the subjects of the objection, regardless of whether they were raised before the magistrate judge. *United States v. George*, 971 F.2d 1113, 1117-1118 (4th Cir. 1992); *accord In re Search Warrants Served on Home Health & Hospice Care, Inc.*, 1997 WL 545655, at *11 (4th Cir. Sept. 5, 1997); *see Weber v. Aiken-Partain*, 2012 WL 489148, at *5 (D.S.C. Feb 15, 2012).

The First, Fifth, Eighth, and Tenth Circuits have held that a district court may not consider new legal arguments. See *Paterson-Leitch Co. v. Massachusetts Municipal Wholesale Electric Co*., 840 F.2d 985, 990-91 (1st Cir. 1988) ("an unsuccessful party is not entitled as of right to *de novo* review by the judge of an argument never seasonably raised before the magistrate."); *Borden v. Secretary of Health & Human Servs*., 836 F.2d 4, 6 (1st Cir. 1987) (to the same effect); *Cupit v. Whitley*, 28 F.3d 532, 535 & n.5 (5th Cir. 1994) (holding that a party waived a legal argument by failing to raise it before the magistrate judge); *Ridenour v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 679 F.3d 1062, 1066-1067 (8th Cir. 2012) (objecting party waived legal argument when he did not raise it before the magistrate judge); *Madol v. Dan Nelson Auto. Group*, 372 F.3d 997, 1000 (8th Cir. 2004); *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996) ("[i]ssues raised for the first time in objections to the magistrate judge's recommendation are deemed waived").

The Eleventh Circuit has adopted a middle ground under which the district court may, **in its discretion**, consider an objecting party's legal argument when that argument was not presented to the magistrate judge. *See United States v. Franklin,* 694 F.3d 1, 6 (11th Cir. 2012) (district court does not abuse its discretion by accepting an argument not raised before the magistrate judge); *Williams v. McNeil*, 557 F.3d 1287, 1292 (11th Cir. 2009) ("[t]he district court has broad discretion in reviewing a magistrate judge's report and recommendation and therefore, the district court did not abuse its discretion in declining to consider Williams's timelines argument that was not presented to the magistrate judge"); *Stephens v. Tolbert*, 471 F.3d 1173, 1174, 1177 (11th Cir. 2006) (district court did not abuse its discretion by considering an argument that was not presented to the magistrate judge; declining to decide whether a district court must consider an argument that is not presented to the magistrate judge and leaving that issue to "be resolved another day in the event that a district court declines to consider a new argument").

The law in the Ninth Circuit is not clear. In *Farquhar v. Jones*, 141 Fed. Appx. 539, 540 (9th Cir. 2005), the Court of Appeals held that the district court properly declined to address a legal issue not raised before the magistrate judge, citing *Greenhow v. Sec'y of Health & Human Servs*., 863 F.2d 633, 638-39 (9th Cir. 1988), *overruled on other grounds by United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (*en banc*). In *Greenhow*, the Ninth Circuit held that the district court had properly ruled that issues raised for the first time in objections to the magistrate judge's Report & Recommendation had been waived. *In Bolar v. Blodgett*, 29 F.3d 630 (Table of Decisions), 1994 WL 374194 (9th Cir. July 18, 1994) (unpublished decision), the Ninth Circuit held that, "although the district court had the discretion to consider Bolar's allegation raised for the first time in his October 22 objections, it did not abuse that discretion

when it declined to consider the new claim. The purpose of the Magistrates Act would be frustrated if we were to require a district court to consider a claim presented for the first time after the party has fully litigated his claims before the magistrate judge and found they were unsuccessful", citing *Greenhow*. *Id*. at *1.

In *Jones v. Wood*, 207 F.3d 557 (9th Cir. 2000), the Ninth Circuit stated that "[f]ailure to object to a magistrate judge's recommendation waives all objections to the judge's findings of fact. (Citation omitted) However, in this circuit, failure to object generally does not waive objections to purely legal conclusions. (Citation omitted)." *Id*. at 562 n.2. In *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998), the Ninth Circuit similarly stated "[f]ailure to object to a magistrate judge's recommendation waives all objections to the magistrate judge's findings of fact. (Citations omitted.) While in most other circuits, failure to object also waives any objection to purely legal conclusions (citations omitted), that is ordinarily not the case in this circuit. (Citation omitted) Rather, a failure to object to such a conclusion 'is a factor to be weighed in considering the propriety of finding a waiver of an issue on appeal.' " *Id*. at 455.

None of the Ninth Circuit decisions address conflicting language in other Ninth Circuit cases or attempt to reconile the various cases.

The Sixth Circuit has stated that the failure to assert a claim before the magistrate judge was "apparent waiver," but then rejected the claim on the merits. *United States v. Waters*, 158 F.3d 933, 936 (6th Cir. 1998). In *Murr v. United States*, 200 F.3d 895 (6th Cir. 2000), the Sixth Circuit held that while the Federal Magistrate Act "permits *de novo* review by the district court if timely objections are filed, **absent compelling reasons**, it does not allow parties to raise at the district court stage new arguments or issues that were not presented to the magistrate," citing cases. *Id*. at 902 n.1 (emphasis added.) The court held that the petitioner's failure to raise a

claim before the magistrate judge constituted waiver. *Id*. Thus, the language in *Murr* indicates there may be circumstances under which a district court in the Sixth Circuit may consider a legal argument not presented to the magistrate judge.

Later, in *Glidden Co. v. Kinsella*, 386 Fed. Appx. 535 (6th Cir. 2010), the Sixth Circuit stated:

> "This Court has not squarely addressed whether a party may raise new arguments before a district judge that were not presented to the Magistrate Judge. In *Murr v. United States*, the Court indicated that a party's failure to raise an argument before the Magistrate Judge constitutes a waiver. 200 F.3d 895, 902 n.1 (6th Cir. 2000). Other circuits are split regarding this issue [citing cases]."

Id. at 544 n.2.

The Sixth Circuit held in *Glidden Co*. that, because the party failed to raise the legal argument before the magistrate judge and the district judge declined to consider the argument on that basis, the legal argument was not properly before the Court of Appeals. *Id*. at 544. " 'This Court's review is limited to issues "presented to and considered by the district court unless review of an issue is necessary in order to prevent manifest injustice, promote procedural efficiency, or correct clear errors or omissions.' " *Id*. at 544. Thus, it is not clear what the rule is in the Sixth Circuit.

E. <u>District Court Judges in the Second Circuit Also Differ</u>

District court judges in the Second Circuit also differ on the issue. Some judges have held that it is a matter of district court discretion whether to consider a legal argument presented to the district court which was not presented to the magistrate judge, even though it could have been. *See, e.g., Amadasu, supra*, 2012 WL 3930386, at *5-7 (E.D.N.Y.) (Mauskopf, J.); *Machicote, supra*, 2011 WL 3809920, at *6-7 (S.D.N.Y.) (Batts, J.); *Wells Fargo Bank, N.A. v. Sinnott*, 2010 WL 297830, at *2-5 (D. Vt. Jan. 19, 2010) (Reis, J.).

Many district court judges have held that legal arguments that could have been raised before the magistrate judge, but were not, cannot be advanced in the district court, without indicating that the district court has discretion in the matter. *See, e.g., Shonowsky v. City of Norwich*, 2011 WL 4344039, at *1, (N.D.N.Y. Sept. 14, 2011) (McAvoy, J.) ("a party may not advance new theories that were not presented to the magistrate judge in an attempt to obtain the second bite at the apple"); *Martinez, supra*, 2011 WL 5252749, at *5 (S.D.N.Y.) (Seibel, J.) (Petitioner's attempt to present a new legal argument in his objections failed "both because new arguments raised for the first time in objections and not presented to the Magistrate Judge cannot be considered (citation omitted)" and because his arguments were essentially conclusory); *Fisher v. O'Brien*, 2010 WL 1286365, at *2-3 (E.D.N.Y. Mar. 30, 2010) (Amon, J.) ("Defendants may not now raise new arguments that the magistrate judge did not have an opportunity to consider"); *Gonzalez v. Garvin*, 2002 WL 655164, at *2 (S.D.N.Y. Apr. 19, 2002) (Scheindlin, J.) ("Petitioner's second objection must also be dismissed because it offers a new legal argument that was not presented in his original petition, nor in the accompanying Memorandum of Law"); *Grant v. Shalala*, 1995 WL 322589, at *2 (W.D.N.Y. May 15, 1995) (Elfvin, J.). *See also Abu-Nassar v. Elders Futures, Inc.*, 1994 WL 445638, at *4 n.2 (S.D.N.Y. Aug. 17, 1994) (Leisure, J.) (arguments not raised before the magistrate judge and not submitted as objections but as new arguments are untimely); *Pierce v. Mance*, 2009 WL 1754904 (S.D.N.Y. June 22, 2009) (Supplemental Report & Recommendation of Fox, M.J.) ("rule 72(b) does not provide that new claims may be raised in objections to a report and recommendation"). None of these decisions, on the other hand, explicitly addressed the issue of whether new legal arguments can never, under any circumstances, be considered.

Other district court judges in the Second Circuit have also refused to consider legal arguments not presented to the magistrate judge, but the wording of their decisions suggests that there may be circumstances under which new legal arguments could be considered. Those decisions do not identify the circumstances or discuss whether it is a matter of district court discretion. In refusing to consider new legal arguments, these judges have said district courts "generally" or "ordinarily" do not, or "should not", entertain new arguments. *See, e.g., Schwartzbaum v. Emigrant Mtge. Co.*, 2010 WL 2484116, at *1 (S.D.N.Y. June 16, 2010) (Robinson, J.) ("district courts '**generally** should not entertain new grounds for relief or additional legal arguments not presented to the magistrate' ") (emphasis added); *Green v. City of New York*, 2010 WL 148128, at * 4 (E.D.N.Y. Jan. 7, 2010) (Townes, J.) (" 'new claims…presented in the form of, or along with, 'objections…' **should** be dismissed' ") (emphasis added); *Calderon v. Wheeler*, 2009 WL 2252241, at *1 n.1 (N.D.N.Y. July 28, 2009) (Suddaby, J.) ("a district court will **ordinarily** refuse to consider arguments, case law and/or evidentiary material that could have been, but was not, presented to the Magistrate Judge in the first instance") (emphasis added); *Ortiz v. Barkley*, 558 F.Supp.2d 444, 451 (S.D.N.Y. 2008) (Holwell, J.) ("a district court **generally** should not entertain new grounds for relief or additional legal arguments not presented to the magistrate") (emphasis added).

F. Legislative History of the Federal Magistrates Act and Advisory Committee Notes to Rule 72

There is nothing in the legislative history of the Federal Magistrates Act or the Advisory Committee Notes to Rule 72 addressing whether, in reviewing a magistrate judge's Report & Recommendation, the district court may or must consider legal arguments not presented to the magistrate judge.

As originally enacted in 1968, the Federal Magistrates Act did not provide for *de novo* review by the district court of a magistrate judge's Report & Recommendation. Congress added that requirement in 1976 when it extensively amended Section 636. See Pub. L. No. 94-577, § 1, 90 Stat. 2729 (1976). The requirement of "*de novo*" review was not included in the Senate version of the bill, but was added in the House version. See H.R. Rep. No. 1609, 94th Cong, 2d Sess. 3 (1976) ("H.R. Rep. No. 94-1609"); *United States v. Raddatz*, 447 U.S. 667, 674-75 (1980) ("The bill as reported out of the Senate Judiciary Committee did not include the language requiring the district court to make a *de novo* determination. * * * The House Judiciary Committee added to the Senate's bill the present language of the statute, providing that the judge shall make a "de novo determination" of contested portions of the magistrate's report upon objection by any party").

H.R. Rep. No. 94-1609, p. 3, states with respect to the *de novo* review requirement that:

> "The second amendment emphasizes and clarifies when a de novo determination must be made by the judge. The Committee believed that the S. 1283 was not clear with regard to the type of review afforded a party who takes exceptions to a magistrate's findings and recommendations in dispositive and post-trial motions. The amendment to subparagraph (b)(1)(C) is intended to clarify the intent of Congress with regard to the review of the magistrate's recommendations: it does not affect the substance of the bill. The amendment states explicitly what the Senate implied; i.e. that **the district judge in making the ultimate determination of the matter, would have to give fresh consideration to those issues to which specific objections has been made by a party**." (Emphasis added.)

The House Report further discusses the "*de novo* review" requirement in the context of whether the district court would be required to conduct a new hearing on contested issues:

> "The use of the words 'de novo determination' is not intended to require the judge to actually conduct a new hearing on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate. In some specific instances, however, it may be necessary for the judge to modify or reject

> the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings."

H.R. Rep. No. 94-1609, p. 3. The foregoing language is quoted with approval by the Supreme Court in *Raddatz, supra*, 447 U.S. at 675, immediately after the Court stated: "The Report goes on to state, quite explicitly, what was intended by 'de novo determination'…."

According to the House Report, the "approach of the Committee as well as that of the Senate, is adopted from a decision of the United States Court of Appeals for the Ninth Circuit in *Campbell v. United States District Court for the Northern District of California*, 501 F.2d 196 (9th Cir.), *cert. denied*, 419 U.S. 879 (1974)." H.R. Rep. No. 94-1609, p. 3.

> "The clarifying amendment merely draws upon the language of the Campbell decision to a greater extent:
>
> In carrying out its duties the district court will conform to the following procedure: If neither party contests the magistrate's proposed findings of fact, the court may assume their correctness and decide the motion on the applicable law.
>
> The district court, on application, shall listen to the tape recording of the evidence and proceedings before the magistrate and consider the magistrate's proposed findings of fact and conclusion of law. The court shall make a de novo determination of the facts and the legal conclusions to be drawn therefrom.
>
> The court may call for and receive additional evidence. * * *
>
> Finally, the court may accept, reject or modify the proposed findings or may enter new findings. It shall make the final determination of the facts and the final adjudication…. (501 F.2d 206)."

H.R. Rep. No. 94-1609, p. 3.

The Supreme Court similarly stated in *Raddatz, supra*, 447 U.S. 667:

> "It should be clear that on these dispositive motions, the statute calls for a *de novo* determination, not a *de novo* hearing. We find nothing in the legislative history of the statute to support the contention that the judge is required to rehear the contested testimony in order to carry out the statutory command to make the required 'determination.' "

447 U.S. at 674.

Tracing the legislative history of the 1976 amendment of Section 636, the Supreme Court explained:

> "The bill as reported out of the Senate Judiciary Committee did not include the language requiring the district court to make a *de novo* determination. Rather, it included only the language permitting the district court to "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." Yet the Senate Report which accompanied the bill emphasized that the purpose of the bill's language was to vest "ultimate adjudicatory power over dispositive motions' in the district court while granting the 'widest discretion" on how to treat the recommendations of the magistrate. S. Rep., at 10."

447 U.S. at 675.

The Supreme Court then addressed the *de novo* determination requirement added in the House version of the amendment:

> "The House Judiciary Committee added to the Senate bill the present language of the statute, providing that the judge shall make a 'de novo determination' of contested portions of the magistrate's report upon objection by any party. According to the House Report, '[the] amendment states expressly what the Senate implied': i.e. that the district judge in making the ultimate determination of the matter, would have to give fresh consideration to those issues to which specific objection has been made by a party.' The Report goes on to state, quite explicitly, what was intended by '*de novo* determination;'
>
> > The use of the words '*de novo determination' is not intended to require the judge to actually conduct a new hearing on contested issues*. * * * H. R. Rep., at 3."

447 U.S. 674-75 (italics in original.)

The Advisory Committee Notes to the 1983 Addition to Rule 72, Subdivision (b), merely state that "[t]he term "de novo" signifies that the magistrate's findings are not protected by the clearly erroneous doctrine, but does not indicate that a second evidentiary hearing is required. See *United States v. Raddatz*, 417 [447] U.S. 667 (1980)."

G. Reasons Given for Requiring the District Court to Consider Legal Arguments Not Presented to the Magistrate Judge

In United States v. George, supra, 971 F.2d 1113, the Fourth Circuit held that the district court must consider legal arguments not raised before the magistrate judge in reviewing properly made objections. *Id*. at 1117-1118. The Fourth Circuit based its decision on the requirement in Section 636(b)(1) that the district court "shall make a **de novo determination** of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id*. at 1118 (emphasis added.) As the Fourth Circuit explained:

> **"We believe that as part of its obligation to determine *de novo* any issue to which proper objection is made, a district court is required to consider all arguments directed to that issue, regardless of whether they were raised before the magistrate. By definition, *de novo* review entails consideration of an issue as if it had not been decided previously. It follows, therefore, that the party entitled to *de novo* review must be permitted to raise before the court any argument as to that issue that it could have raised before the magistrate.** The district court cannot artificially limit the scope of its review by resort to ordinary prudential rules, such as waiver, provided that proper objection to the magistrate's proposed finding or conclusion has been made and the appellant's right to *de novo* review by the district court thereby established. Not only is this so as a matter of statutory construction; any other conclusion would render the district court's ultimate decision at least vulnerable to constitutional challenge. *See United States v. Raddatz*, 447 U.S. 667, 683, 65 L. Ed.2d 424, 100 S. Ct. 2406 (1980) (holding that 'delegation' to a magistrate 'does not violate Art. III so long as the ultimate decision is made by the district court' (emphasis added)); *cf. United States v. Shami*, 754 F.2d 670, 672 (6th Cir. 1985) ('*De novo* review of a magistrate's report is both statutorily and constitutionally required.'); *United States v. Elsoffer*, 644 F.2d 357, 359 (5th Cir. 1981) ('The authority to grant or deny a motion to suppress must be retained by a judge appointed pursuant to Article III of the Constitution.')."

Id. at 1118 (emphasis added).

H. Reasons Given for Not Permitting the District Court to Consider Legal Arguments Not Presented to the Magistrate Judge

Three reasons are given for why a party should not be permitted to raise in the district court legal arguments that were not presented to the magistrate judge. First, it would circumvent the Federal Magistrates Act and defeat its purpose, which is to ease the burdens on the district courts. Second, it would be unfair. Third, it would undermine the authority of the magistrate

judge by allowing litigants the option of waiting until a Report & Recommendation is issued to advance additional arguments.

In *Ridenour v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 679 F.3d 1062 (8th Cir. 2012), the Eighth Circuit held that the party objecting to a magistrate judge's Report & Recommendation waives its right to make a legal argument when it does not raise the argument before the magistrate judge. *Id*. at 1066. As the court explained:

> "a claimant must present all his claims squarely to the magistrate judge, that is, the first adversarial forum, to preserve them for review." (citations omitted) We have held that the "purpose of referring cases to a magistrate for recommended disposition would be contravened if parties were allowed to present only selected issues to the magistrate, reserving their full panoply of contentions for the trial court."

Id. at 1067 (citations omitted). *See Grant v. Shalala*, *supra*, 1995 WL 322589, at *2 (W.D.N.Y.) ("were this Court to consider the plaintiff's Objections, the Magistrates Act would essentially be circumvented. Such circumvention would allow every party to simply decline to present his or her case before a Magistrate Judge, await the result of that adjudication and, thereafter and only if necessary, expend the resources needed to file objections in the District Court").

The *Ridenour* court cited, among other cases, *Borden v. Secretary of Health & Human Servs*., 836 F.2d 4 (1st Cir. 1987), in which the First Circuit stated that because the purpose of the Federal Magistrates Act is to relieve the district courts of unnecessary work, it "would defeat this purpose if the district court was required to hear matters anew on issues never presented to the magistrate." *Id*. at 6. As the First Circuit further stated in *Borden*:

> "Appellant was entitled to a de novo review by the district court of the *recommendations to which he objected*, however he was not entitled to a de novo review of an argument never raised. 'The purpose of the Federal Magistrate's Act is to relieve courts of unnecessary work.' It would defeat this purpose if the district court was required to hear matters anew on issues never presented to the magistrate. Parties must take before the magistrate, 'not only their 'best shot' but all of their shots.' "

Id. at 6. (Citations omitted; italics in original).

As the First Circuit explained in *Paterson-Leitch Co., Inc., supra*, 840 F.2d 985:

> "The role played by magistrates within the federal judicial framework is an important one. They exist 'to assume some of the burden imposed [on the district courts] by a burgeoning caseload.' The system is premised on the notion that magistrates will 'relieve courts of unnecessary work.' Systemic efficiencies would be frustrated and the magistrate's role reduced to that of a mere dress rehearser if a party were allowed to feint and weave at the initial hearing, and save its knockout punch for the second round. In addition, it would be fundamentally unfair to permit a litigant to set its case in motion before the magistrate, wait to see which way the wind was blowing, and -- having received an unfavorable recommendation -- shift gears before the district judge."

Id. at 991 (internal citations omitted). *Accord Grant, supra*, 1995 WL 322589, at *2 (W.D.N.Y) (" 'the purpose of the Federal Magistrate's Act is to relieve courts of unnecessary work.' It would defeat this purpose if the district court was required to hear matters anew on issues never presented to the magistrate. Parties must take before the magistrate, 'not only their 'best shot' but all of their shots.' "); *see* H. Rep. No. 1629, 90th Cong., 2d Sess. 12 (1968) (the purpose of enacting the Federal Magistrates Act in 1968 was to help relieve the burdens on district judges).

The court in *Paterson-Leitch* rejected the argument that the requirement of a *de novo* determination permits a party to present to the district court theories which it failed to raise with the magistrate judge. As the court stated: "Appellant tells us that Rule 72(b)'s requirement of a "*de novo* determination" by the district judge "means that an entirely new hand is dealt when objection is lodged to a recommendation. That is not so. At most, the party aggrieved is entitled to a review of the bidding rather than to a fresh deal. The rule does not permit a litigant to present new initiatives to the district judge. We hold categorically that an unsuccessful party is not entitled as of right to de novo review by the judge of an argument never seasonably raised before the magistrate." *Id*. at 990-91.

In *Green, supra*, 2010 WL 148128 (E.D.N.Y.), at *4 and *Gonzalez, supra*, 2002 WL 655164, at *2 (S.D.N.Y.), the courts stated that it "would undermine 'the authority of the Magistrate Judge by allowing the litigants the option of waiting until a Report is issued to advance additional arguments.' "

I. Reasons Given for the District Court to Have Discretion Whether to Consider Legal Arguments Not Presented to the Magistrate Judge

In *Stephen, supra*, 471 F.3d 1173, the Eleventh Circuit held that a district court did not abuse its discretion when it considered a legal argument that had not been raised before the magistrate judge. "When a district court refers a dispositive motion to a magistrate judge for a report and recommendation, the district court retains, as a statutory and a constitutional matter, broad discretion over the report and recommendation." *Id*. at 1176. The court rejected the notion that the district court was barred, outside of exceptional circumstances, from considering an argument not raised before the magistrate judge. *Id*. at 1176-77.

In *Williams, supra*, 557 F.3d 1287, the Eleventh Circuit held that the district court "has broad discretion in reviewing a magistrate judge's report and recommendation, and, therefore, the district court did not abuse its discretion in declining to consider Williams's timeliness argument that was not presented to the magistrate judge." *Id*. at 1291. In reaching its conclusion, the court first referred to the Supreme Court's discussion of the Federal Magistrates Act in *Raddatz, supra*, 447 U.S. at 675, and *Thomas v. Arn, supra*, 474 U.S. at 153:

> "[T]he Supreme Court noted that the purpose of the Act's language 'was to vest 'ultimate adjudicatory power over dispositive motions' in the district court while granting the 'widest discretion' on how to treat the recommendations of the magistrate.' *Raddatz*, 447 U.S. at 675, 100 S. Ct. at 2412 (quoting S. Rep. No. 94-625, at 10 (1976)). 'Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations.' *Id*. at 676, 100 S. Ct. at 2413. It is clear, however, that the Article III judge must retain final decision-making authority. *See Raddatz*, 447 U.S. at 681-82, 100 S. Ct. at 2415. The district court

> must retain 'total control and jurisdiction' of the entire process if it refers dispositive motions to a magistrate judge for recommendation. *Thomas v. Arn*, 474 U.S. 140, 153, 106 S. Ct. 466, 474, 88 L. Ed.2d 435 (1985) (quoting *Raddatz*, 447 U.S. at 681, 1000 S. Ct. at 2415)."

557 F.3d at 1291.

The court in *Williams* then noted that the circuit courts had differed on the meaning of *de novo* review and whether the district court was required to consider all legal arguments, even those that had not been presented to the magistrate judge. *Id*. at 1291-92. The court in *Williams* did not set forth any test or standard for determining whether, in the exercise of discretion, a district court should consider a legal argument not raised before the magistrate judge.

In *Wells Fargo Bank, supra*, 2010 WL 297830, the district court of Vermont predicted that the Second Circuit would adopt the same standard that the Eleventh Circuit had adopted in *Williams* -- that a district court, as a matter of discretion, may consider a legal argument not raised before the magistrate judge. *Id*. at *2. As the district court explained:

> "This approach allows an Article III judge to retain final decision-making authority 'while granting 'the widest discretion' on how to treat the recommendations of the magistrate.' *Raddatz*, 447 U.S. at 675, (quoting S. Rep. No. 94-625, at 10 (1976)). In contrast, a *per se* rule that either prohibits or requires a district court to consider an argument not raised before the magistrate judge undermines the 'total control and jurisdiction' the district court retains when it refers dispositive motions to the magistrate judge for recommendation. *See Thomas v. Arn*, 474 U.S. 140, 153, 106 S. Ct. 466, 88 L.Ed.2d 435 (1985) (quoting *Raddatz*, 447 U.S. at 681). It is also contravenes the plain language of § 636(b)(1) which permits the district court to "reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."

Id. at *2.

The district court in *Wells Fargo Bank* adopted the following six-part test for determining whether a district court, in the exercise of its discretion, should consider or decline to consider a legal argument not raised before the magistrate judge:

> "[T]he court concludes that an exercise of discretion, in this case, should be guided by the following factors: (1) the reason for the litigant's previous failure to

> raise the new legal argument; (2) whether an intervening case or statute has changed the state of the law; (3) whether the new issue is a pure issue of law for which no additional fact-finding is required; (4) whether the resolution of the new legal issue is not open to serious question; (5) whether efficiency and fairness militate in favor or against consideration of the new argument; and (6) whether manifest injustice will result if the new argument is not considered."

Id. at *4. *See Amadasu, supra*, 2012 WL 3930386, at *5 (E.D.N.Y.) and *Machicote, supra*, 2011 WL 3809920 at *6 (S.D.N.Y.), holding that the decision is a matter of district court discretion and adopting the *Wells Fargo Bank* six-factor test. Applying those factors, the judges in *Wells Fargo, Amadasu* and *Machicote* refused to consider legal arguments not made before the magistrate judge.

The court in *Wells Fargo Bank* based its six-part test on the Second Circuit's standard for considering new legal arguments raised for the first time in the district court on a motion for reconsideration and its standard for whether new evidence should be considered on a review of an objection to a Report & Recommendation, stating:

> "The failure to raise legal argument until a motion for reconsideration is not dispositive:
>
> 'Although generally this Court 'will not consider an argument on appeal that was raised for the first time below in a motion for reconsideration[,][t]his 'waiver' rule is one of prudence…and [is] not jurisdictional.' This Court retains 'broad discretion to consider issues not timely raised below.' This is especially the case 'where the issues not addressed below involved purely legal questions.' (citations omitted.)

Id. at *3. *See Official Committee of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 159 (2d Cir. 2003) ("Generally we will not consider an argument on appeal that was raised for the first time below in a motion for reconsideration. (citation omitted)… We retain 'broad discretion' to consider issues not timely raised below. (citation omitted.) In determining whether to consider such issues, we are more likely to exercise our discretion when either (1) 'consideration of the issue is necessary to avoid manifest injustice' or

(2) 'the issue is purely legal and there is no need for additional factfinding' "); *Amadasu*, *supra*, 2012 WL 3930286, at *6 (E.D.N.Y.) (in deciding whether to consider an argument raised for the first time below on a motion for reconsideration, the Second Circuit looks to whether the argument is a "purely legal question for which there is no need for additional factfinding" and generally confines consideration of a new argument to a legal issue whose "proper resolution is beyond any doubt").

As to Second Circuit precedent regarding when new evidence should be considered when a district court reviews an objection to a magistrate judge's Report & Recommendation, the court in *Wells Fargo Bank* quoted the following language from *Hynes v. Squillace*, 143 F.3d 653 (2d Cir. 1998):

> "Considerations of efficiency and fairness militate in favor of a full evidentiary submission for the Magistrate Judge's consideration, and we have upheld the exercise of the district court's discretion in refusing to allow supplementation of the record upon the district court's *de novo* review. *See e.g., Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137-38 (2d Cir. 1994) (finding no abuse of discretion in court's refusal to consider supplemental evidence); *Pan American World Airways, Inc. v. International Bhd. of Teamsters*, 894 F.3d 36, 40 n. 3 (2d Cir. 1990) (holding that district court did not abuse its discretion in denying plaintiff's request to present additional testimony where plaintiff 'offered no justification for not offering the testimony at the hearing before the magistrate'); *see also Wallace v. Tilley*, 41 F.3d 296, 302 (7th Cir. 1994)('It is not in the interests of justice to allow a party to wait until the Report and Recommendation or Order has been issued and then submit evidence that the party had in its possession but chose not to submit. Doing so would allow parties to undertake trial runs of their motion, adding to the record in bits and pieces depending upon the rulings or recommendation they received.')."

Id. at *3-4, quoting 143 F.3d at 656 (internal quotation marks and internal citation omitted). The district court did not refer to the fact that 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) expressly authorize the district court to receive evidence not presented to the magistrate judge.

J. The Analogous Issue of Whether a Circuit Court of Appeals Will Consider on Appeal a Legal Argument Not Raised in the District Court

An analogous issue is whether, on appeal, a Circuit Court of Appeals may consider a legal argument that the appellant did not raise in the district court. In *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), the Supreme Court stated: "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, *see Turner v. City of Memphis*, 369 U.S. 350 (1962), or where 'injustice might otherwise result.' *Hormel v. Helvering*, 312 U.S., at 557." The Supreme Court further stated that the foregoing examples were not intended to be exclusive. *Id*. at 121 n.8.

It is well-settled in the Second Circuit that on appeal the Court of Appeals has discretion to consider a legal argument that the appellant did not raise below. *See Magi XXI, Inc. Stato Della Cita Del Vaticano*, __ F.3d __, 2013 WL 1799485, at * 6 (2d Cir. Apr. 30, 2013); *Bogle-Assegai v. State of Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006). As the Second Circuit stated in *Magi XXI*:

> "[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." However, this rule is "prudential, not jurisdictional," and we have exercised our discretion to hear otherwise waived arguments, "where necessary to avoid manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding."

2013 WL 1799485, at *6 (internal citations and internal quotation marks omitted). *See Bogle-Assegai*, 470 F.3d at 504 ("Nonetheless, the circumstances normally 'do not militate in favor of an exercise of discretion to address…new arguments on appeal' where those arguments were 'available to the [parties] below' and they 'proffer no reason for their failure to raise the arguments below.' ").

In the First Circuit it "is well-settled that, 'absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal.' " *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 114 (1st Cir. 2009). The court in *River Street* further stated that it had the discretion to apply the plain-error doctrine and consider issues not adequately raised below. *Id*. at 114 n.5. "We are 'particularly cautious in exercising [this] discretion and do so only when 'error is plain and the equities heavily preponderate in favor of correcting it.' " *Id*. In *Curet-Velazquez, supra*, 656 F.3d 47, the First Circuit stated, " 'It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal.' There is nothing sufficiently compelling about this case to warrant relaxation of such a fundamental rule." *Id*. at 53 (citations omitted).

The Fifth Circuit has held that "we ordinarily do not consider issues that have not been presented to the court of first instance." *Long v. McCotter*, 792 F.2d 1338, 1345 (5th Cir. 1986). *See also Vardas v. Estelle*, 715 F.2d 206, 208 (5th Cir. 1983) (since appellant did not present a legal argument to the district court "it is not properly before us on appeal"). In the Sixth Circuit, "[i]n general, this court will not review issues raised for the first time on appeal. (citations omitted)…The court will consider an issue not raised below only when the proper resolution is beyond doubt or a plain miscarriage of justice might otherwise result." *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918, 922 (6th Cir. 2006). *See Glidden Co., supra*, 386 Fed. Appx. at 544 ("This Court's review is limited to issues 'presented to and considered by the district court unless review of an issue is necessary in order to prevent manifest injustice, promote procedural efficiency, or to correct clear errors or omissions").

In the Ninth Circuit, although the court of appeals is "not barred from considering a new argument on appeal, we generally take care to avoid the unfairness inherent in deciding cases on

bases not raised or passed upon in the tribunal below." *Thompson v. Runnels*, 2013 WL 263909, at *8 (9th Cir. Jan. 24, 2013). *Accord AlohaCare v. Hawaii*, 572 F.3d 740, 744-45 (9th Cir. 2009) (" 'Absent exceptional circumstances we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so.' (citation omitted) We may exercise this discretion '(1) to prevent a miscarriage of justice; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law.' "

In the Tenth Circuit "[g]enerally, an appellate court will not consider an issue raised for the first time on appeal." *Tele-communications, Inc. v. Commissioner of Internal Revenue*, 104 F.3d 1229, 1232 (10th Cir. 1997). In the Eleventh Circuit, "except when we invoke the 'plain error doctrine,' which rarely applies in a civil case, we do not consider arguments raised for the first time on appeal." *Ledford v. Peeples*, 657 F.3d 1222, 1258 (11th Cir. 2011); *see also Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1332 (11th Cir. 2004) ("we recognize that a circuit court's power to entertain an argument raised for the first time on appeal is not a jurisdictional one; thus we *may* choose to hear the argument under special circumstances", identifying five such circumstances) (italics in original).

Wright & Miller states:

> "Ordinarily a party may not present a wholly new legal issue in a reviewing court. In exceptional cases, however, in order to avoid a miscarriage of justice, an appellate court may consider questions of law neither pressed by the parties nor passed upon at the trial by the district court. Some courts of appeals also are willing to consider an issue of law that was not raised below if the issue is ' 'purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.' ' "

9 Wright & Miller, Civil 3d, § 2588, at 440-442 (2008).

K. Conclusion

The Section has concluded that it should be a matter of district court discretion whether a district court, in reviewing an objection to a magistrate judge's Report & Recommendation,

should consider a legal argument that could have been, but was not, presented to the magistrate judge. Permitting district courts to exercise their discretion is consistent with the purpose of the Federal Magistrates Act and the broad discretion it vests in the district court. It is also consistent with Courts of Appeals exercising discretion in deciding whether to consider a legal argument raised by the appellant that was not raised before the district court or that was first raised on a motion for reconsideration in the district court. Nothing in the Federal Magistrates Act or Rule 72 precludes the matter from being one of district court discretion and there is no constitutional impediment to that.

The Section has further concluded, for the reasons courts have given for not considering new legal arguments, see pp. 16-18, above, that district court consideration of a new legal argument should be the exception, not the rule. It would be contrary to fundamental notions of fairness and would defeat the purpose of the Federal Magistrates Act if district courts routinely considered legal arguments not presented to the magistrate judge. The Section has concluded that the six-part test articulated in *Wells Fargo*, see p. 20, above, is an appropriate test for district courts to apply in determining how to exercise their discretion, but district courts should be free to consider any factors they deem appropriate.

The Section does not believe that a *per se* rule either requiring a district court to consider new legal arguments, or prohibiting a district court from considering such arguments, is required or appropriate. Neither *per se* rule is consistent with the broad discretion that the Federal Magistrates Act vests in the district court. And a rule requiring consideration of new arguments is not necessary to avoid constitutional issues.

A *per se* rule requiring the district court to consider new legal arguments would also undermine the purpose of the Federal Magistrates Act by eliminating efficiencies gained through

the assignment of dispositive motions to a magistrate judge to hear and report and would unfairly benefit litigants who could change their tactics after issuance of the magistrate judge's Report & Recommendation. *See Williams v. McNeil, supra*, 557 F.3d at 1291-92; *Paterson-Leitch Co., supra*, 840 F.2d at 990-91; *United States v. Howell, supra*, 231 F.3d at 622.

Furthermore, a *per se* rule prohibiting consideration of a new legal argument would appear to be inconsistent with the principle that even where no timely objection has been made to portions of the Report & Recommendation, those portions should not be adopted if there is clear error on the face of the record. *See* authorities on p. 5, above; *but see Thomas v. Arn, supra*, 474 U.S. 140 (indicating in dictum that no district court review is required in the absence of an objection). If the new argument raises the possibility of clear error, presumably it has to be considered. We have not, however, seen a case addressing that issue.

In *George, supra*, 971 F.2d 1113, the Fourth Circuit cited no authority for its conclusion that if a party is entitled to *de novo* review of an issue, it is entitled to raise before the reviewing court any argument with respect to that issue that it could have raised, but did not raise, before the magistrate judge. To say that because *de novo* review "entails consideration of an issue as if it had not been decided previously" does not inexorably lead to that conclusion. *De novo* review has been described in various ways. *See Raddatz*, 447 U.S. at 675 (*de novo* review of a magistrate judge's Report & Recommendation means that a district court " 'give[s] fresh consideration to those issues to which specific objection has been made' ", quoting H.R. Rep. No. 94-1609, at 3); *accord Riesselman*, 708 F. Supp.2d at 806-07 (N.D. Iowa). *See also Freeman v. DirectTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006) ("review the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered"); *Solis v. Laborer's Int'l Union of North America, Local 368*, 775 F. Supp.2d 1191, 1202 (D.

Hawaii 2010) (under *de novo* review, the district court "must arrive at its own independent conclusions").

De novo review means that deference does not have to be shown to the magistrate judge's conclusion. *See Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) ("When *de novo* review is compelled, no form of appellate deference is acceptable"); *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168 (2d Cir. 2001) ("*De novo* review is review without deference"); *Ditto v. McCurdy*, 510 F.3d 1070, 1075 (9th Cir. 2007) (under *de novo* review, no deference is given to the district judge's determination); *Raddatz, supra*, 447 U.S. at 676 (the phrase "*de novo* determination" in Section 636(b)(1) was selected by Congress "to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations"); Black's Law Dictionary (Seventh Ed.) (*de novo* review is "[a]n appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings"); *see United States v. Zuckerman*, 88 F. Supp.2d 9, 11-12 (E.D.N.Y. 2000) ("the District Judge may also, in his sound discretion, afford a degree of deference to the Magistrate Judge's Report and Recommendation").

Moreover, adopting the reasoning of the Fourth Circuit as to what *de novo* review requires would mean that a Circuit Court of Appeals has to hear arguments made by an appellant on appeal that were not made in the district court whenever Court of Appeals review is *de novo*. However, it is well-settled that the issue of whether a Court of Appeals should hear such arguments is a matter of court discretion, not a right of the appellant. See Point J, above.

Similarly, the Section does not agree with the Fourth Circuit's conclusion that not requiring the district court to hear a legal argument that could have been, but was not, made before the magistrate judge would raise a constitutional issue under Article III. The district court

would still be making the ultimate decision when it reviewed the magistrate judge's Report & Recommendation, particularly if it had discretion to consider a new argument. District courts may constitutionally assign magistrate judges to work on dispositive motions as long as the district judge (the Article III judge) retains final decision-making authority. *See Raddatz*, *supra*, 447 U.S. at 681-82. "Case law has emphasized that under the Federal Magistrates Act the judge always retains authority to make the final determination." *Delgado*, 782 F.2d at 82 (2d Cir.). As H.R. Rep. No. 94-1609 states:

> "The judge is given the widest discretion to 'accept, reject or modify' the findings and recommendations proposed by the magistrate…. [T]he ultimate adjudicatory power over dispositive motions… is exercised by a judge of the court after receiving assistance from and the recommendation of the magistrate."

H.R. Rep. No. 94-1609 at 11.

In *Thomas v. Arn*, 474 U.S. 140, the Supreme Court held that a Court of Appeals, in the exercise of its supervisory powers, may establish a rule that the failure to file objections to a magistrate judge's Report & Recommendation waives the right to appeal from a district court's judgment adopting a magistrate judge's Report & Recommendation. *Id*. at 142. In the course of its opinion, the Supreme Court addressed the argument that the waiver of appellate review violated Article III of the Constitution. *Id*. at 153-154. **The petitioner had argued that the Court of Appeals' rule permitted a magistrate judge to exercise Article III judicial power because the rule foreclosed meaningful review of a magistrate judge's Report & Recommendation at both the district and appellate levels if no objections were filed. *Id*. at 153. The Supreme Court found that argument "untenable." *Id*.** "Although a magistrate is not an Article III judge, this court has held that a district court may refer dispositive motions to a magistrate for a recommendation so long as 'the entire process takes place under the district court's total control and jurisdiction, *United States v. Raddatz*, 447 U.S. 667, 681, 100 S. Ct.

2406, 2415 65 L. Ed. 2d 424 (1980), and the judge 'exercise[s] the ultimate authority to issue an appropriate order' ". 474 U.S. at 153.

The Supreme Court then explained:

> "The waiver of appellate review does not implicate Article III, because it is the district court, not the court of appeals, that must exercise supervision over the magistrate. **Even assuming, however, that the effect of the Sixth Circuit's rule is to permit both the district judge and the court of appeals to refuse to review a magistrate's report absent timely objection, we do not believe that the rule elevates the magistrate from an adjunct to the functional equivalent of an Article III judge. The rule merely establishes a procedural default that has no effect on the magistrate's or the court's jurisdiction.** The district judge has jurisdiction over the case at all times. He retains full authority to decide whether to refer a case to the magistrate, to review the magistrate's report, and to enter judgment. Any party that desires plenary consideration by the Article III judge of any issue need only ask. Moreover, while the statue does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard. * * * The Sixth Circuit's rule, therefore, has not removed ' 'the essential attributes of the judicial power'.' "

Id. at 153-154 (emphasis added)

If a party can waive district court review of a magistrate judge's Report & Recommendation without raising Article III issues, as the Supreme Court stated in *dictum* in *Arn*, *a fortiori* precluding a party, based on the theory of waiver, from raising a legal argument in the district court when the argument could have been, but was not, presented to the magistrate judge cannot raise an Article III issue. Permitting a district court to not consider a new legal argument, in the language of *Arn*, "merely establishes a procedural default that has no effect on the Magistrate's or the court's jurisdiction."

If, contrary to the Supreme Court's dictum in *Arn*, the district court, before approving a Report & Recommendation, must review it for clear error in the absence of an objection (see p. 5, above,), there would also be no Article III issue. If the newly raised argument in the district court indicates there may be clear error, the district court presumably would have to consider the

argument. We have not, however, seen any case addressing that situation. If the new argument did not raise the possibility of clear error, it could be ignored, yet there still would have been district court review under the clear error standard. Hence, there would not be an Article III issue.

Indeed, in *In re Search Warrants Served on Home Health & Hospice Care, Inc., supra,* 121 F.3d 700, 1997 WL 545655, the Fourth Circuit held that a party's failure to object to a portion of the magistrate judge's legal conclusion waived the party's right to a review of that determination. The Court held that its decision in *George* did not compel a contrary result. 1997 WL 545655, at *12-13.

In *Wells Fargo Bank, supra,* 2010 WL 297830, the district court concluded that permitting a district court to have discretion as to whether or not to consider a legal argument that could have been, but was not, presented to the magistrate judge, "allows an Article III judge to retain final decision-making authority 'while granting 'the widest discretion' on how to treat the recommendations of the magistrate.' *Raddatz*, 447 U.S. at 675, quoting S. Rep. No. 94-625, at 10 (1976). In contrast, a *per se* rule that either prohibits or requires a district court to consider an argument not raised before the magistrate judge undermines the 'total control and jurisdiction' the district court retains when it refers dispositive motions to the magistrate judge for recommendation." *Id*. at *2.

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