IN THE SUPREME COURT OF OHIO

Mark McLeod, Guardian of the Estate of Walter Hollins, **Appellee,** **v.** **Northeast Ohio Neighborhood Health Services, Inc., Ronald Jordan, M.D., and Mt. Sinai Medical Center,** **Appellants.**	**Case No. 06-1247** **On Appeal From the Cuyahoga County Court Of Appeals, Eighth Appellate District** **Court of Appeals Case No. 85286**

REPLY BRIEF OF APPELLANTS NORTHEAST OHIO NEIGHBORHOOD HEALTH SERVICES, INC. AND RONALD JORDAN, M.D.

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Appellants Northeast Ohio Neighborhood Health Services, Inc. ("Neighborhood Health Services") and Dr. Ronald Jordan submit this reply brief.

LAW AND ARGUMENT

Proposition of Law No. 1: When counsel for the prevailing party appeals to religious, racial, and economic prejudices and deliberately misleads the jury by misstating witness testimony and suggesting events having no factual basis, a trial judge does not abuse his discretion by ordering a new trial.

A. Fieger's Biblical And Wealth-Disparity References Were Not Justified.

The trial judge determined that plaintiff's trial counsel, Geoffrey Fieger, inflamed the jurors' passions and prejudices by appealing to religious beliefs during closing argument. (R.504, Judgment Entry at 10, Appx. 82.) This determination was not an abuse of discretion; it comports with well-settled authority. (See Opening Br. at 24-25.) Appellee McLeod, in his response brief, does not even try to dispute that Fieger's argument was inflammatory and prejudicial. He asserts merely that the Court should excuse the misconduct because "the defendants had 'opened the door' to Biblical references" in opening statement. (Response Br. at 9.) The doctrine of "opening the door," however, permits a party to make only a "fair response" when its opponent uses improper evidence or argument. It does not permit a no-holds-barred free-for-all that increases, rather than neutralizes, the prejudice caused by improper argument.

In *State v. Murphy* (2001), 91 Ohio St.3d 516, 541, this Court held that one party's appeal to religion permitted the other party to make a "fair response." There, the defense attorney made "a religious appeal as a basis for mercy: '[W]e are taught in our Sunday schools that mercy is good [and] that we may hate the sin but care for the sinner. * * * Spare the life of [the defendant], and you, too, * * * will be blessed.'" Id. (alterations in original). The prosecutor responded that the defendant "'will have to ask God for' the mercy his counsel had asked of the jury." Id. The Court rejected a defense claim of misconduct because the "prosecutor's reply was

a fair response" to the defense's plea for mercy. Id.

This Court has elsewhere reinforced its "fair response" limit to the "open the door" rule. For example, in *State v. Bayless* (1976), 48 Ohio St.2d 73, 105, the Court rejected as "too broad" the appellate court's finding that defense counsel's question about where the defendant had previously lived (Columbus) opened the door for the prosecution to ask why the defendant had lived there (he was incarcerated there for an unrelated crime, evidence of which was otherwise inadmissible). Many other courts enforce the same limitation and have cautioned against extending it.[1] Accepting McLeod's "open the door" argument here would establish an unwise rule permitting parties, when their opponents have "opened the door," to "rip the door from its hinges." *State v. Richardson* (May 1, 1986), 8th Dist. No. 50424, 1986 WL 5124, at *2.

Here, during opening statement, trial counsel for Neighborhood Health Services and Dr. Jordan commented on the expected evidence and explained that an injury present at birth is not *per se* proof of malpractice in the baby's delivery:

> the pieces of this puzzle that we can put together are not going to support a claim of negligence against Dr. Jordan, and it certainly is not going to support a claim that earlier delivery would have delivered a normal child. And that's unfortunate, but that's the way mother nature and God works, and it's not ours to question.

(Jt. Supp. 1200, Tr. 431.) Fieger's religious arguments went far beyond a "fair response" to this solitary reference to "mother nature and God."

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[1] Accord, e.g., *Colorado v. Harlan* (Colo. 2005), 109 P.3d 616, 633 (holding that defense counsel's reference "to the story of Abraham and Isaac in the Old Testament" did not open the door for the jury to consider biblical passages during deliberations); *United States v. Beno* (2d Cir. 1963), 324 F.2d 582, 588-59 ("[I]t makes little sense to insist that once incompetent evidence is erroneously admitted, the error must of necessity be compounded by 'opening the door' so wide that rebutting collateral, inflammatory and highly prejudicial evidence may enter the minds of the jurors;" "a small advantage improperly obtained does not compel the exaction of a gross disadvantage in penalty, particularly where a tarnished verdict is the inevitable result.").

In Fieger's closing argument, he called defendants' alleged negligence a "sin," which only the jurors could "rectify." (Jt. Supp. 2970, Tr. 2180.) Fieger instructed the jury that they had a religious duty to side with Walter Hollins against defendants: "Scripture tell us through Isaiah that we must give a voice to the poor and justice for the oppressed." (Jt. Supp. 2950, Tr. 2160; see also Jt. Supp. 3015, 3017, Tr. 2225, Tr. 2227 (repeating the same instruction).) He repeatedly quoted Jesus' words from the Gospel of Matthew to urge the jurors to serve Jesus by awarding damages to Mr. Hollins: "Whatever you do to the least of my [(Jesus')] brothers, that you do unto me." (Jt. Supp. 2950, 3006, Tr. 2160, 2216.)

Fieger's repeated religious commands were unconnected and disproportionate to defense counsel's single reference to "mother nature and God" in opening statement to explain that babies can be born with conditions not caused by an obstetrician's negligence. The "open the door" doctrine does not excuse Fieger's inflammatory appeals to religion.

Fieger also made repeated inflammatory comments about the parties' supposed relative wealth and power, which played into his Biblical command to the jurors to "give a voice to the poor and justice to the oppressed." (See Opening Br. at 15-16.) This is misconduct. E.g., *Book v. Erskine & Sons, Inc.* (1951), 154 Ohio St. 391, 399, 400-01 (closing arguments that refer to the poverty of one party or the wealth of another are "'highly improper'" and "tend to incite the rendition of verdicts which are excessive as the result of passion or prejudice"). McLeod asks the Court to ignore this misconduct, too, because, during opening statement, Neighborhood Health Services' trial counsel explained his client's mission to serve the historically underserved minority population in the Hough neighborhood of Cleveland. (Response Br. at 32.) Fieger's response, however, was disproportionate to, and disconnected from, these background remarks.

Fieger did not merely tell the jury his client's background or refute Neighborhood Health

Services'. He told the jury that courts remarkably permitted "the poor, terribly injured African American to stand on equal footing with a powerful corporation defendants [*sic*], doctors who did this to him . . . ." (Jt. Supp. 2949, Tr. 2159.) Mr. Hollins supposedly belonged to a "marginalized and ignored" group whose rights are "denied by the powerful and the privileged." (Jt. Supp. 2950, Tr. 2160.) Fieger demonized Neighborhood Health Services for its corporate status and purported power (of which there was no evidence). He depicted defendants as oppressors and Mr. Hollins as the oppressed, and he used the Bible to exploit the jurors' emotions. This misconduct was not justified by counsel's explanation of Neighborhood Health Services' mission.

Fieger's improper appeals to religion and wealth warrant a new trial.

B. <u>Fieger Improperly Spoke For The Unborn Walter Hollins.</u>

In closing argument, Fieger purported "to give [Walter Hollins] a voice" during the alleged delay in Mr. Hollins' delivery: "Oh, please, help me. Help me be born. I'm drowning;" "Please, please, for God's sake, help me be born;" "Mommy, grandma, someone, please save me. I'm dying;" "Please, please nurses, I'm a little baby. I want to play baseball. I want to hug my mother. I want to tell her that I love her. Help me. Please help me to be born." (Jt. Supp. 2950, 2965, 2976, 2985, 2989, Tr. 2160, 2175, 2186, 2195, 2199.) McLeod and his amicus curiae sidestep this issue by focusing on the rights of the unborn (Merit Brief of Amicus Curiae Life Legal Defense Foundation In Support Of Appellee) and Fieger's right "to speak for unborn clients." (Response Br. at 19.) Those issues have no bearing on the well-settled rule that counsel are forbidden from fictionalizing events and encouraging jurors to decide a case based on a sense of drama, rather than reality. (See Opening Br. at 24-25.)

Incredibly, McLeod tries to justify Fieger's play-acting as "helping [the] jury understand technical facts" and providing "only . . . a means of enlightenment." (Response Br. at 38.) But

no facts suggest that the unborn Walter Hollins said or thought anything about baseball, his grandmother, hugging his mother, or other matters about which he was of course ignorant *in utero*. Fieger fictionalized Mr. Hollins' thoughts, verbalized them, and then pretended that a careful listener would have heard them. This dramatization had no basis in the evidence; it was inflammatory and prejudicial.

C. Fieger's Questions And Arguments Were Not All Based In Fact.

Neighborhood Health Services and Dr. Jordan's opening brief, as well as the new trial order and Judge Karpinski's dissent, detail some of the many instances in which Fieger accused defendants and their witnesses of lying and engaging in a "cover-up." (E.g., Opening Br. at 15-16; R.504, Judgment Entry at 9, Appx. 81; Dissent App. Op. at 12, 19, 21, 28-29, 35, 38, 40-41, Appx. 39, 46, 48, 55-56, 62, 65, 67-68.) Such abusive comments directed at opposing counsel and an opposing party's expert witness "should not be permitted by any court," *Pesek v. Univ. Neurologists Assn.* (2000), 87 Ohio St.3d 495, 500; accusing opposing parties of relying on a "'framed-up story'" is reversible misconduct. *Jones v. Macedonia-Northfield Banking Co.* (1937), 132 Ohio St. 341, 347. In response, McLeod contends that all of Fieger's accusations were supported by the evidence. (See, e.g., Response Br. at 29.) Not true.

As just one example that the trial judge identified in his new trial order out of many, Fieger accused defendants of "prevarications" and altering medical records because no intake triage form for Mr. Hollins' mother was produced. (R.504, Judgment Entry at 9-10, Appx. 81-82; see also Jt. Supp. 2963-64, 3099, Tr. 2173-74, 2309.) Fieger argued in closing that this supposedly covered-up information "is relevant to" defendants' alleged negligence. (Jt. Supp. 2964-65, Tr. 2174-75.) The only evidence about an intake triage form, however, established that, because Mr. Hollins' mother was a "direct admit from the doctor's office," she would never have gone through triage; she would have been sent directly to labor and delivery, where a nurse

would have been expecting her. (Jt. Supp. 1832-34, Tr. 1057-59.) Fieger's accusations about a "cover-up" regarding the triage form had no basis in evidence.

This is just one example of Fieger scurrilously attacking defenses witnesses and attorneys in his questions and arguments.[2] As detailed in defendants' briefs and Judge Karpinski's dissent, there are many others. In closing argument, for example, Fieger told the jury unqualifiedly that *all* of the defendants' medical evidence was "manufactured." (Jt. Supp. 2955, Tr. 2165.) This sweeping statement, like many other of Fieger's accusations, had no support in the evidence and therefore constitutes misconduct.

D. McLeod Concedes The Trial Court's *Sua Sponte* Duty To Stop Fieger's Misconduct.

Neighborhood Health Services and Dr. Jordan's opening brief cited authority from this Court requiring the trial judge to stop misconduct as flagrant as Fieger's, even without objection by defense counsel. (Opening Br. at 27-28; see also, e.g., *Pesek*, 87 Ohio St.3d at 501.) McLeod

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[2] McLeod's contention that "Fieger never personally attacked defense counsel in front of the jury" (Response Br. at 29) is also false. Fieger twice referred to defense counsel during closing argument and asked rhetorically "how dare they?" (Jt. Supp. 2994-95, Tr. 2204-05.) He made speaking objections accusing defense counsel of fabricating the foundation for questions asked during witness examination. (E.g., Jt. Supp. 1796, Tr. 1021.) And in closing argument, Fieger attacked defense counsel *by name*:

> "Mr. Groedel [trial counsel for Mt. Sinai] says, we did nothing wrong. . . . It's a game to him. . . . Mr. Groedel and Mr. Farchione [trial counsel for Neighborhood Health Services and Dr. Jordan] get to go back to their offices and they get to go back to their families. . . . It's a game to them, and it's a game to them about one and one thing only. They don't give a darn about this. It's about money. . . . Nothing is going to happen to them. Nobody is going to be punished.

(Jt. Supp. 3093, Tr. 2303.) The trial transcript also puts the lie to McLeod's assertion that, unlike defense counsel, Fieger "comported himself according to the [Trial] Court's instructions" (Response Br. at 39). (See Opening Br. at 11-14 (collecting examples of Fieger's repeated disregard for the trial court's instructions).) Many of McLeod's supposed examples of "interrupt[ing] witnesses and mak[ing] speaking objections" by defense counsel actually reflect Fieger's own obstreperous behavior. (See transcript pages cited in Response Br. at 39.)

does not discuss these cases or dispute that Fieger's conduct fits their mold. Instead, he ignores them and cites three appellate court cases and Rule of Evidence 103 to support his argument that defendants waived review of Fieger's misconduct by not objecting at trial. (Response Br. at 6-7.) Defendants *did*, however, frequently object.[3] Moreover, McLeod's authorities, discussed on pages six and seven of his brief, are inapposite.

In *State v. Ballard* (Nov. 15, 2001), 8th Dist. No. 78543, 2001 WL 1429387, at *1, the state consented to the trial court's dismissal of criminal charges against the defendant, but then tried to appeal the dismissal. In *Bicudo v. Lexford Properties, Inc.* (2004), 157 Ohio App.3d 509, 517, the plaintiff appealed from the trial court's entry of a JNOV, arguing that the defendant had waived inconsistencies in the jury's interrogatory answers by not objecting to them before the jury was dismissed; the appellate court found that the plaintiff had waived this waiver argument by not making it to the trial court. The language McLeod quotes from *In re Guardianship of Brunstetter* (which comes not from the opinion McLeod cites, 2002-Ohio-6940, but from an opinion in an earlier proceeding, 1998 WL 477401, at *2), concerns the waiver of arguments on appeal because the appellant failed to object to the magistrate's findings below. And Rule of Evidence 103 is, by definition, limited to waiver of objections to improper evidence. None of these authorities applies to Fieger's gross and abusive attorney misconduct.

The trial court had a duty to intervene *sua sponte* to stop Fieger's blatant misconduct. Its failure to do so preserves the issue for review whether or not defendants objected.

E. <u>The New Trial Order Was Not Void *Ab Initio.*</u>

As an apparent alternate ground for affirming the Court of Appeals' ruling, McLeod asserts that the new trial order was void *ab initio* because the trial judge, Judge Robert Lawther,

[3] E.g., Jt. Supp. 1133, 1136, 1146, 1152, 1173-74, 1176-77, 1182, 1286-87, 1307-08, 1317, 1332, 1715-16, 1918, 2301-02, Tr. 364, 367 377, 383, 404-05, 407-08, 413, 517-18, 538-39, 548, 563, 942-43, 1143, 1520-21.

committed misconduct before entering that order. This argument lacks merit.

On Friday, May 21, 2004, the jury heard closing arguments, received instructions, and was discharged for the weekend. (Jt. Supp. 2947-3133, Tr. 2157-2343.) On Saturday, May 22, the Cleveland *Plain Dealer* published a story on the front page of its "Metro" section, with the headline: "Malpractice Jury to Consider Case, Record Damages." (R. 466, Mt. Sinai Motion for New Trial, etc., Exh. A.) The article reported that "[i]f Fieger wins half of the money he asked for, it would be the largest jury award in county history. The current high-damage mark is $17 million." (Id.)

Counsel for Dr. Jordan and Neighborhood Health Services were the first attorneys to arrive at Court on Monday, May 24, for deliberation. Immediately upon their arrival – before deliberation began and before any other party's attorneys arrived – counsel "asked the presiding judge to ask the jurors if they had read the article and if so, to allow a separate voir dire to determine whether a mistrial motion would be appropriate or perhaps bringing in the alternate juror to substitute for one juror." (Id., Exh. B, P. Supp. 434, ¶ 2.) Three jurors told Judge Lawther they had read the article. (Id.) Judge Lawther, however, refused counsel's request to voir dire those jurors to determine its effect on them; he "merely told them to disregard what they had read." (R.504, Judgment Entry at 11, Appx. 83.) Counsel for Mt. Sinai arrived at Court for the deliberation soon thereafter. (R. 466, Mt. Sinai Motion for New Trial, etc., Exh. C, P. Supp. 436, ¶ 2.) Upon learning that three jurors admitted to reading the article, he joined in the request to voir dire those jurors. (Id. ¶ 4.) That request was also denied. (Id.) All of this occurred before McLeod's trial counsel arrived at court. (See id. Exhs. B & C, P. Supp. 434-37.)

One of Judge Lawther's grounds for ordering the new trial was the "irregularity" of his discussions with the jurors about the article outside of counsel's presence. (R.504, Judgment

Entry at 11-12, Appx. 83-84.) The Court of Appeals held that this ground did not justify ordering a new trial, and defendants have not appealed that ruling. McLeod, however, now insists that the *ex parte* communication between counsel and Judge Lawther gave rise to "the appearance of partiality," and Judge Lawther's failure immediately to recuse himself rendered his new trial order void *ab initio*. (Response Br. at 24-26.) McLeod is mistaken.

Defense counsel had a duty to raise the article with Judge Lawther at the earliest possible opportunity to try to prevent jurors who had read the article from infecting the other jurors' deliberations. It is beyond dispute that "the reading of newspaper articles by the jurors, prejudicial to one of the parties litigant, [can be] cause for a new trial," *Phillips v. Bd. of Educ.* (1924), 21 Ohio App. 194, 207, and that when counsel becomes aware of prejudicial newspaper publications, "[a] request to make such inquiry of the jury must be initiated by counsel" to preserve the right to request a new trial based on such publication. *Diener v. White Consol. Indus., Inc.* (1968), 15 Ohio App.2d 172, 181. McLeod's counsel's tardy arrival at court hardly transforms that duty into prohibited *ex parte* contact.

The ethical rules that McLeod relies on to establish the supposed "inappropriate *ex parte* contacts" between Judge Lawther and defendants' trial counsel (see Response Br. at 20, 24-25) expressly *permit* attorneys to alert judges about emergency matters collateral to the actual merits of a case without waiting for opposing counsel to appear. See DR 7-110(B) (permitting *ex parte* communications between attorneys and judges unrelated "to the merits of the cause"); Code of Judicial Conduct, Cannon 3(B)(7)(a) (permitting "*ex parte* communications" regarding "emergencies that do not address substantive matters or issues on the merits"). McLeod has never disputed the exigencies that required defendants' counsel to raise as soon as possible their concerns, which proved to be well-founded, that jurors may have read the newspaper article

about the case on the eve of deliberations.

Moreover, McLeod fails to explain how Judge Lawther's "impartiality might reasonably be questioned" because of these events. (Response Br. at 26.) Defense counsel approached Judge Lawther with an urgent concern about the jury. Judge Lawther questioned the jury but *denied* defense counsel's request to conduct *voir dire*. McLeod neither cites authority for nor explains his assertion that this conduct reasonably makes Judge Lawther appear partial to the defense so as to require his recusal. None of the disciplinary cases McLeod relies on involves a similar circumstance. (Response Br. at 26 (citing *Liljeberg v. Health Servs. Acquisition Corp.* (1988), 486 U.S. 847, 850 (trial judge was trustee of university whose interests were affected by judge's ruling) and *In re Bell South Corp.* (11th Cir. 2003), 334 F.3d 941, 944-45 (party retained trial judge's nephew as counsel)).) Nor does a presumption of partiality arise from the mere fact of *ex parte* communications, particularly where, as here, those communications were expressly permitted by rule. E.g., *United States v. Alcantara-Rueda* (Nov. 14, 2003), 9th Cir. No. 03-50103, 2003 WL 22701134, at *1 ("the mere fact that a[n *ex parte*] communication took place does not necessarily demonstrate that the judge's impartiality might reasonably be questioned").

Judge Lawther, a visiting judge, eventually did inform the parties that he had no "desire to participate in a re-trial," and so he recused himself. (Appellant Mark A. McLeod's Motion To Remand, Exh. 3.) But that recusal did not concede that the new trial order was void *ab initio*. To the contrary, understanding the need for McLeod not only to receive a fair re-trial but to *believe* he was receiving a fair re-trial, the trial judge recused himself "to avoid unnecessary controversy over selection of a Judge to preside over future matters involving this case . . . ." (R.512, Recusal Order.) McLeod's bald assertion that the discussions between Judge Lawther and defense counsel about the newspaper article "ultimately resulted in [the trial judge's]

recusal" (Response Br. at 1) lacks any support in the record.

McLeod's trial counsel appealed to religious, racial, and economic prejudices and misstated witness testimony and suggested events having no factual basis. The trial judge did not abuse his discretion by ordering a new trial.

Proposition of Law No. 2: Where a trial court orders a new trial based on attorney misconduct and excessive damages influenced by passion or prejudice, appellate review focuses not on the existence of evidence to support the liability verdict, but on whether the trial court's finding of misconduct and passion or prejudice was an abuse of discretion, an inquiry that requires deferring to the judge who actually tried the case.

The parts of the new trial order at issue here were granted under Rule 59(A)(2) ("[m]isconduct of the . . . prevailing party") and Rule 59(A)(4) ("[e]xcessive . . . damages, appearing to have been given under the influence of passion or prejudice"). The Court of Appeals erroneously reversed the new trial order based on its finding that the verdict "was supported by substantial competent, credible evidence . . . ." (Majority App. Op. at 10, Appx. 15.) As Neighborhood Health Services and Dr. Jordan explained in their opening brief, that standard applies only to new trials ordered under Rule 59(A)(6) ("[t]he judgment is not sustained by the weight of the evidence"). (Opening Br. at 29-32.) McLeod's brief urges this Court to repeat the appellate court's error.

McLeod asserts that the trial court abused its discretion in ordering a new trial because "substantial competent evidence" supported the jury's verdict. (Response Br. at 26; see also id. at 28 ("competent, credible evidence").) None of the cases McLeod cites, however, applies that standard to a new trial order based on Rule 59(A)(4) – excessive damages that appeared to have been influenced by passion or prejudice. To the contrary, those cases make clear that this standard does *not* apply to "passion or prejudice" new trial orders. *Knor v. Parking Co. of Am.* (1991), 73 Ohio App.3d 177, 187-88 (a "court should hesitate to . . . set aside a jury's verdict, supported by credible evidence, as excessive *in the absence of* demonstrated passion or

prejudice") (emphasis added); *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 95 (the Court's earlier discussion about "the scope of the authority of a trial court to grant a new trial on the weight of the evidence" applies to the later portion of the new trial order based on excessive damages only because that later portion "was predicated upon the authority of paragraph (F) of R.C. 2321.17, and *is not limited by* the 'passion and prejudice' language of paragraph (D) of that statute") (emphasis added).

This Court has clearly articulated the appropriate standard: "to determine whether an excessive verdict was . . . influenced" by passion or prejudice, a reviewing court must "consider not only the amount of damages returned . . . but [also] ascertain whether the record discloses that the excessive damages returned were induced by (a) admission of incompetent evidence, or (b) by misconduct on the part of . . . counsel . . . ." *Fromson & Davis Co. v. Reider* (1934), 127 Ohio St. 564, 569. Here, the trial court and the unanimous Court of Appeals panel found the verdict to be excessive. (R.504, Judgment Entry at 3-8, Appx. 75-80; Majority App. Op. at 12-14, Appx. 17-19; Dissent App. Op. at 3-7, Appx. 30-34.) McLeod now effectively concedes this; he has not cross-appealed the Court of Appeals' finding and affirmatively asserts that remittitur of his damages is "proper." (See Response Br. at 40-41 ("The Court Of Appeals' Order Of A Remittitur Was The Proper Remedy") (emphasis omitted).) As explained above, the record amply supports the trial court's discretionary determination that the excessive verdict was influenced by Fieger's misconduct. As explained below, the record also supports the trial court's discretionary determination that the excessive damages were induced by the admission of incompetent evidence. Under the appropriate standard of review, the Court of Appeals should have affirmed the trial court's new trial order.

McLeod asserts, with no supporting authority, that "any doubt as to the existence of

prejudicial effect should be resolved in the non-moving party's favor." (Response Br. at 28.) This misstates the Court's settled precedent. In considering whether "a new trial is warranted, [this Court is] guided by the principle that if 'there is room for doubt, whether the verdict was rendered upon the evidence, or may have been influenced by improper remarks of counsel, *that doubt should be resolved in favor of the defeated party*'" at trial. *Pesek*, 87 Ohio St.3d at 502 (emphasis added) (quoting *Warder, Bushnell & Glessner Co. v. Jacobs* (1898), 58 Ohio St. 77, 85). This Court has also repeatedly held that "the *trial judge* [i]s in the best position to determine whether the award . . . was manifestly excessive or influenced by passion and prejudice" and "[t]hat determination is entitled to deference." *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 655 (emphasis in original). Thus, "the abuse of discretion standard" applied to a new trial order "requires a reviewing court to 'view the evidence favorably to the trial court's action rather than to the original jury's verdict.'" *Malone v. Courtyard by Marriott L.P.* (1996), 74 Ohio St.3d 440, 448 (quoting *Rohde*, 23 Ohio St.2d at 94).[4]

The Court of Appeals applied the wrong standard of review to the new trial order. Under the correct standard, the new trial order should have been affirmed.

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[4] McLeod's amicus curiae cites an appellate case, *Murray v. Long* (Ohio Ct. App. 1968), 256 N.E.2d 225, that applies a different rule. (Merit Brief of Amicus Curiae Life Legal Defense Foundation In Support Of Appellee at 8.) But that case was decided two years before this Court's decision in *Rohde*. And the only authority cited in *Murray* for that rule is the old, second edition of Ohio Jurisprudence. 256 N.E.2d at 228. The current, third edition of Ohio Jurisprudence no longer contains the language quoted in *Murray*; it tracks the Court's holding in *Rohde*. 5 O. Jur.3d, Appellate Review § 493 (1999) ("In addition, where the appeal is from the granting of a motion for a new trial, and the trial court's decision on the motion involves questions of fact, the appellate court should view the evidence favorably to the trial court's action rather than to the original jury's verdict.").

Proposition of Law No. 3: When the jury renders an excessive verdict after hearing surprise testimony suggesting damages exceeding those supported by plaintiff's expert reports, and after a trial and closing argument pervaded by attacks on the defendants and appeals to religion, race and economics, a trial judge does not abuse his discretion by concluding that the verdict is influenced by passion or prejudice requiring a new trial rather than remittitur.

A. McLeod Concedes That The Damages Are Excessive, And His Effort To Justify Them Lacks Evidentiary Support.

The Court of Appeals majority concluded that "[i]t does appear . . . that the jury's damages award is subject to remittitur." (Majority App. Op. at 12, App. 17.) Remittitur is appropriate only when, among other things, "a damages award is manifestly excessive . . . ." (Id.) Upon finding that the awarded damages were greater than the evidence supported (Majority App. Op. at 13, Appx. 18), the Court of Appeals "remand[ed] for remittitur." (Majority App. Op. at 14, Appx. 19.) McLeod did not appeal or cross-appeal this ruling. To the contrary, by repeatedly asserting that remittitur is "proper," he effectively concedes that his damages were excessive. Nevertheless, in various parts of his brief, McLeod insists that the damage award was supported by the evidence. (Response Br. at 11-15, 39-40.) The Court should not permit McLeod's contradictory argument that challenges a ruling that he has not appealed or cross-appealed. If, however, the Court does consider McLeod's argument that his damages are not excessive, the Court should reject that argument as inaccurate.

Neighborhood Health Services and Dr. Jordan disproved McLeod's argument at length on pages nine through nineteen of their opening appellate brief filed in the Eighth District on April 14, 2005. Just a few highlights from that discussion suffice to expose ruinous flaws in McLeod's supposed justification for his damages. First, McLeod tries to support his damages based on a "$25 per hour figure" for Walter Hollins' attended care. (Response Br. at 15.) But the life-care plan prepared by McLeod's expert witness George Cyphers, which supplied the medical care and costs that were "plug[ged] in" to the formula used by McLeod's economist

witness, Dr. Rosen (Jt. Supp. 2300-01, Tr. 1519-20), provided only $18 per hour for this cost (except on holidays). (Jt. Supp. 470 (last row), 471 (first row).) Cyphers prepared that life-care plan for Mr. Hollins after consulting with McLeod's other expert witnesses and Hollins' own treating doctor. (Jt. Supp. 1734-36, Tr. 961-63.) McLeod's medical experts agreed that the $18 per hour figure in Cyphers' life-care plan was "appropriate in terms of [Mr. Hollins'] needs." (Jt. Supp. 1337, Tr. 568).[5] Thus, $18 per hour for attended care is the most that the evidence will support. Applied over twenty-four hours a day, seven days a week, fifty-two weeks a year, for over fifty years, the difference between $25 and $18 per hour is several million dollars.

Second, McLeod contends that the bulk of the damage award can be supported by the calculation for Hollins' attended care costs of "$139,536 x 56.5 years = $7,833,784" (the first calculation on page thirteen of McLeod's response brief). This calculation misrepresents the contents of Cyphers' report. The $139,536 annual amount that McLeod uses in this calculation is not the amount that Cyphers supplied for each year of Hollins' lifetime care; it is an amount Cyphers supplied for the yearly cost of Hollins care *only between the ages of 16 to 22.* (Jt. Supp. 470 (last row).) After age 22, Cyphers supplied an amount thousands of dollars less ($133,920). (Jt. Supp. 471 (first row).)

Third, McLeod's straight multiplication of that incorrect amount over 56.5 years violates the rule that "future damages must be reduced to present value . . . ." *Galayda v. Lake Hosp. Sys., Inc.* (1994), 71 Ohio St.3d 421, 425. According to McLeod's own economist, the present value of the $133,920 annual future cost of Mr. Hollins' adult attended care is only $101,064 in

[5] McLeod's assertion that defendants "failed to raise the 'reasonable and necessary' issue in the Court of Appeals" (*i.e.*, that McLeod cannot seek to recover for "the best care money can buy" but, rather, only for the care that medical testimony establishes as "reasonable and necessary") is false. (Response Br. at 40.) The defendants raised this issue with the Court of Appeals on pages ten and eleven of their opening appellate brief.

year 20 and $75,148 in year 40. (Appx. 679-80.) Thus, McLeod's calculation to justify his damages misstates the evidence and misapplies Ohio law.

Fourth, McLeod mischaracterizes the record regarding defense objections to the damages testimony. Defendants did not stipulate to the amount of damages in Cyphers' life-care plan; they merely stipulated to the plan's admission as an exhibit in McLeod's case. (Jt. Supp. 2392-94, Tr. 1611-13.) Defense counsel vigorously cross-examined Cyphers about the contents of his plan. (Jt. Supp. 1724-36, Tr. at 951-63.) Defense counsel objected when Fieger asked Cyphers to make new calculations based upon Dr. Gabriel's trial testimony of attended care at $15-$25 per hour. (Jt. Supp. 1715-16, Tr. 942-43.) The Trial Court *sustained* this objection because these costs were not found in Cyphers' life-care plan submitted as his expert report. (Id.)

When Fieger asked Rosen to calculate the future cost of Mr. Hollins' care based on 24-hour higher-cost nursing-level care, which was not included in Cyphers' plan, defendants objected and moved to strike the evidence. (Jt. Supp. 2301-02, Tr. 1520-21.) The objections and motion to strike were overruled. (Id.) This objected-to testimony is the very testimony that Judge Lawther held should have been excluded and contributed to the jury's excessive damages. (R. 504, Judgment Entry at 4-5, Appx. 76-77.)

B. <u>The Trial Judge Used Objective Criteria To Confirm The Verdict's Excessiveness.</u>

McLeod argues that Judge Lawther's new trial order was an abuse of discretion because it rests on Judge Lawther "***personal opinion*** about the value of [Walter Hollins'] life" (Response Br. at 22 (emphasis in original)), which, according to McLeod, is tainted by Judge Lawther's supposed racial bias. (Id. at 9 n.4.) In fact, the new trial order is neither subjective nor biased.

To explain "[i]n [what kind of case] a verdict in the amount of $30,000,000 or more might well be justified," Judge Lawther identified several factual elements that would be present. One was "the Plaintiff is severely injured, facing a lifetime of constant pain and disability,

permanently bedridden . . . ." (R.504, Judgment Entry at 5, Appx. 77.) Another was that the plaintiff is "deprived of a large income enjoyed before the malpractice, with a family he can no longer support and facing daily exorbitant costs of special medical care." (Id.) These factors are directly and logically connected to the amount of damages a plaintiff should recover for economic and non-economic damages.

Contrary to McLeod's loaded accusation, Judge Lawther did not subjectively "link[ ] Walter's race to the damage issue given the demographic correlation between race and income." (Response Br. at 9 n.4.) The factual elements that Judge Lawther identified – "permanently bedridden," "deprived of a large income enjoyed before the malpractice," "a family he can no longer support" – could be met by a plaintiff from any racial group. But this particular plaintiff, Walter Hollins, simply does not meet them. The evidence showed that Mr. Hollins is not in constant pain and bedridden; according to his family, he is "always laughing," he swims, and he plays ball. (Jt. Supp. 2346, 2251, 2355-56, Tr. 1565, 1472, 1574-75.) Mr. Hollins was not deprived of a pre-injury income and has no dependents. His economic needs consist largely of supervision, transportation, and "routine medical care." (Jt. Supp. 476.)

Judge Lawther's discretionary determination that the damages were excessive is supported by reasonable, objective criteria that are rooted in the evidence.

C. Whether Defendants Appealed "Liability" Is Irrelevant To Whether The New Trial Order Should Be Reinstated.

One reason for the Court of Appeals' majority's erroneous decision to reverse the new trial order and remand for remittitur was its misguided conclusion that "liability was not the focus of the defense's appeal before [that] court. Their arguments were specific to the amount of damages awarded." (Majority App. Op. at 14, Appx. 19.) McLeod presses the same point to this Court. (Response Br. at 2-4.) This argument is wrong for four reasons.

First, neither the Court of Appeals' majority nor McLeod cites any authority to contradict the plain language of Rule 59(A)(4) that makes excessive damages influenced by passion or prejudice, by themselves, grounds for a new trial. Thus, even if defendants had raised appellate issues regarding only excessive damages influenced by passion or prejudice, this would still support (indeed, require) reinstating the new trial order as to all issues. E.g., *Larrissey v. Norwalk Truck Lines, Inc.* (1951), 155 Ohio St. 207, 218 ("If a verdict is excessive and appears to have been given under the influence of passion or prejudice the only recourse is the granting of a new trial, since the prejudice resulting cannot be corrected by remittitur."). See also, Civ. R. 59, 1970 Staff Notes ("[I]n jury actions partial new trials are rarely granted because of the intertwining of the issues; if a new trial is granted, the new jury should be exposed to all of the issues.").

Second, in this Court and in the Court of Appeals, the defendants have unmistakably asserted that Fieger's misconduct at trial tainted the jury's verdict. Much of Fieger's misconduct – including his appeals to religion – had the potential to influence the jurors' liability decision, not just damages. *Blust v. Lamar Advertising Co.* (2004), 157 Ohio App.3d 787, 797 ("When passion or prejudice infects a jury's award of damages, a trial court reasonably may infer that the same passion or prejudice likely tainted the finding of liability as well.").

Third, defendants moved for a new trial, and their motion was granted. As the *prevailing* parties, they could not appeal from the *grant* of their motion. (See Opening Br. at 43.) McLeod was the appellant with respect to the new trial motion. Thus, the Court of Appeals' majority's assertion that "liability was not the focus of the *defense's appeal* before this court" (Majority App. Op. at 14, Appx. 19 (emphasis added)) misconstrues the posture of the appeal.

Fourth, McLeod's assertion that defendants could have cross-assigned error under R.C.

2505.22 to preserve their liability-based challenges to the jury verdict is off-base because the trial judge did not *reject* these challenges. Rather, he said they "have much merit," but chose not to reach them because he was granting the motion on other grounds. (R.504, Judgment Entry at 13, Appx. 85.) Moreover, defendants did raise these undecided issues as grounds for affirming the new trial order (see defendants' opening appellate brief at 38), but the Court of Appeals ignored them.

D. McLeod's Attack On The Integrity Of This Court And Defendants Is Improper And Factually Insupportable.

After insisting that his lawyers never bullied anyone at trial, followed all the rules, and never made a comment or asked a question that was not supported by facts, McLeod attacks the integrity of both this Court and defendants. The six shrill, accusatory pages that close McLeod's brief give the Court a sense of the inflammatory rhetoric, bullying tactics, and disregard for rules[6] that were on display throughout the trial of this matter. This closing salvo has nothing to do with the merits of this case. It says nothing about the facts or the applicable law. Rather, it seeks to intimidate this Court into deciding the case based on something *other than* the facts and applicable law. Defendants are confident that this Court – elected by the citizens of Ohio and sworn to uphold the Constitution – will not be intimidated by these wild accusations.

The members of the Court are in the best position to evaluate the accusations made against them. The accusations against Neighborhood Health Services and Dr. Jordan are entirely without merit. McLeod insists that their refusal to settle and confidence in their appeal should offend this Court. (Response Br. at 46-47.) But, as these defendants explained in more detail in their response to McLeod's recusal motion, McLeod has never made a proper, separate

[6] See, e.g., Ethical Consideration 8-6 (prohibiting attorneys from "unrestrained and intemperate statements" impugning the integrity of judicial officials).

settlement demand of them. And two of the four judges that have reviewed Fieger's trial conduct (Judges Lawther and Karpinski, who are from different political parties) agree that a new trial is warranted. These defendants' position has nothing to do with politics and everything to do with the merits of their case and McLeod's failure to hold proper settlement discussions.

The trial judge determined that Fieger subverted the jury process by inflaming the jurors' passions and prejudices. Authority from this Court dating back over 100 years holds that this determination is entitled to deference. See *Jacobs*, 58 Ohio St. at 85. Justices of this Court of all political stripes have faithfully enforced this authority for decades. If, as McLeod says he wants, this case is decided under "the rule of law" without regard to any other factors (Response Br. at 48), then the Court's precedent compels reversing the appellate court's ruling and reinstating the new trial order.

CONCLUSION

For these reasons, the Court should reverse the decision of the Court of Appeals' majority and reinstate the Trial Court's order granting a new trial.

DATED: March 1, 2007

Respectfully submitted,

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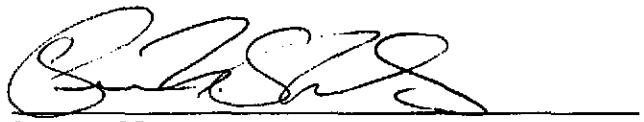
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellants Northeast Ohio Neighborhood Health Services, Inc. and Ronald Jordan, M.D. was served by ordinary U.S. mail, postage prepaid, upon Jack Beam, Esq., BEAM & RAYMOND ASSOCIATES, 2770 Arapaho Road, Suite 132, PMB 135, Lafayette, Colorado 80026, Andrew S. Muth, Esq., MUTH & SHAPERO, L.C., Society Bank Building, 301 W. Michigan Avenue, Suite 302, Ypsilanti, Michigan 48197, Geoffrey Fieger, Esq., FIEGER FIEGER KENNEY & JOHNSON, 19390 W. Ten Mile Road, Southfield, Michigan 48075, and Sandra J. Rosenthal, Esq., 75 Public Square, Suite 1300, Cleveland, Ohio 44113, attorneys for plaintiff-appellee, upon Irene C. Keyse-Walker, Esq., TUCKER ELLIS & WEST LLP, 925 Euclid Avenue, Suite 1150, Cleveland, Ohio 44115 and Marc W. Groedel, Esq., and Marilena DiSilvio, Esq., REMINGER & REMINGER CO., L.P.A., 1400 Midland Building, 101 Prospect Avenue, W., Cleveland, Ohio 44115, attorneys for Mt. Sinai Medical Center, upon Lori Fuhrer, Esq., KEGLER BROWN HILL & RITTER, Capitol Square, Suite 1800, 65 East State Street, Columbus, Ohio 43215-2494, attorney for *amicus curiae* Ohio Association for Community Health Centers, upon Anne Marie Sferra, Esq., BRICKER & ECKLER LLP, 100 South Third Street, Columbus, Ohio 43215, attorney for *amici curiae* Ohio Hospital Association, Ohio State Medical Association, and American Medical Association, and upon Brett Wood, Esq., and Deborah Berliner, Esq., WOOD & BERLINER PLLC, 1320 G. Street, SE, Washington, D.C. 20003, on this 1st day of March, 2007.



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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Trumbull County.

In the Matter of the GUARDIANSHIP OF MILFORD H. BRUNSTETTER.
No. 97-T-0089.

Aug. 7, 1998.

Civil Appeal from the Court of Common Pleas Probate Division.

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Atty. Patricia L. Spencer, 410 Mahoning Avenue, N.W., P.O. Box 1429, Warren, OH 44482(Guardian)
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Hon. JUDITH A. CHRISTLEY, P.J., Hon. WILLIAM M. O'NEILL, J., Hon. JOSEPH E. O'NEILL, J., Ret., Seventh Appellate District, sitting by assignment.

OPINION

O'NEILL, JOSEPH E., J., Ret.

***1** This is an appeal from a judgment of the Trumbull County Court of Common Pleas, Probate Division, finding appellant, Milford H. Brunstetter, incompetent and appointing Attorney Patricia L. Spencer guardian over his estate.

***1** Mr. Brunstetter suffered a debilitating stroke on May 23, 1996, which required that he be hospitalized. On June 11, 1996, Mr. Brunstetter's daughter, Arlene Kinkade, removed him from the hospital against doctor's recommendations and took him to her home to live. Professional assistance was obtained from private organizations due to the severity of Mr. Brunstetter's incapacity. That same day, June 11, 1996, Ms. Kinkade apparently transferred ownership of all of Mr. Brunstetter's assets into her name.

***1** On September 24, 1996,FN1 Mr. Brunstetter executed a durable power of attorney over his assets and a durable power of attorney for health care in favor of Ms. Kinkade.FN2 These powers of attorney gave Ms. Kinkade absolute control over Mr. Brunstetter's financial affairs and any health care decisions that would need to be made in the event he should become incapacitated.

FN1. Some of the documents in the record refer to an earlier durable power of attorney executed on June 5, 1996, but this document does not appear in the record.

FN2. These documents included the essential language that their validity would not be affected by any disability of Mr. Brunstetter, thus making them *durable* powers of attorney. R.C. 1337.09.

***1** On October 4, 1996, Mr. Brunstetter's son, appellee John Brunstetter, filed an application for the appointment of a guardian over Mr. Brunstetter's person and estate, claiming he was incompetent due to a mental and physical disability caused by his recent stroke. He requested that the probate court appoint him as his father's guardian. The court initiated an investigation that ultimately recommended an independent expert be appointed to examine Mr. Brunstetter and opine as to his capacity to care for himself and his financial affairs. The court appointed Dr. J. Terence Kavanaugh to this task who opined that, as a result of Mr. Brunstetter's state of dementia, the court should appoint a guardian. Also, two other physicians reported that a guardianship was necessary.

***1** The matter was referred to a magistrate who conducted a brief *in camera* interview with Mr. Brunstetter on April 17, 1997. On April 22, 1997, the magistrate filed his decision concluding a guardianship over Mr. Brunstetter's *estate* was necessary because his incompetence to manage his financial affairs was established by clear and convincing evidence. He based his decision on "[t]he Medical Reports." The same day, the trial court filed its judgment entry finding Mr. Brunstetter "incompetent by reason of mental disability * * * [rendering him] incapable of taking

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proper care of his property" and appointed Attorney Patricia L. Spencer guardian over his estate; the court did not appoint a guardian over his person. FN3 No objections were filed to the magistrate's decision, but a request for findings of fact and conclusions of law was made to the trial court on April 30, 1997. The court did not issue them until January 21, 1998. Mr. Brunstetter appealed, raising five assignments of error for our consideration:

FN3. The court did not appoint a guardian over appellant's person likely because he was living with and being cared for by his daughter, Arlene Kinkade. Also, in the court's findings of fact, it indicated the application had been orally amended to request a guardianship over Mr. Brunstetter's estate only.

***1** "[1.] The Court Erred in Failing to Issue Findings of Fact and Conclusions of Law.
***2** "[2.] The Court Erred in Declaring that Milford H. Brunstetter Is Incompetent.
***2** "[3.] The Court Erred in Appointing Patricia L. Spencer as Guardian of the Estate of Milford H. Brunstetter.
***2** "[4.] The Court Erred in Failing to Name a Guardian over the Person of Milford Brunstetter.
***2** "[5.] The Trial Court Erred in Declaring the Power of Attorney Null and Void."

***2** Ms. Kinkade also filed a notice of appeal, but did not file a brief. As such, her appeal has not been conscientiously prosecuted and, thus, is dismissed pursuant to App.R. 18(C).

***2** For his first assignment of error, appellant contends that the probate court erred in failing to issue findings of fact and conclusions of law pursuant to his request of April 30, 1997. Appellee responded by claiming the probate court's failure to file these findings and conclusions leaves this court without jurisdiction to hear the appeal because appellant has not presented us with a final appealable order. We agreed, and on January 7, 1998, we remanded the case to the probate court for findings and conclusions, which the court rendered by virtue of a judgment entry dated January 21, 1998. Appellant's notice of appeal was prematurely filed on May 22, 1997, and will be considered as being filed on January 21, 1998, the date the probate court's judgment became a final appealable order. App.R. 4(C). Thus, by these proceedings, appellant's first assignment of error has been rendered moot.

***2** Appellant's remaining assignments of error challenge the probate court's finding of incompetence and appointment of Patricia L. Spencer as guardian over his estate. We are unable to reach the merits of appellant's contentions, however, because he did not preserve these issues for appeal by filing objections to the magistrate's decision.

***2** It is axiomatic that, to preserve a claim or objection for appeal, the appellant is required to first bring that claim or objection to the trial court's attention. *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43, 322 N.E.2d 629. Failure to do so operates as a waiver of the claim or objection for appeal. *Id.*

***2** With respect to matters referred to a magistrate, Civ.R. 53(E)(3)(b) provides, in pertinent part:
***2** " * * * A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule."

***2** Thus, according to the rule, if a party has failed to file objection(s) to the magistrate's decision in accordance with Civ.R. 53, he may not then raise the objection(s) to the appellate court for review. See, *e.g.*, *Haas v. Haas* (Dec. 31, 1997), Geauga App. No. 96-G-2034, unreported, at 11, and *Larson v. Larson* (Mar. 7, 1997), Portage App. No. 96-P-0217, unreported, at 4.

***2** In this case, no objections were filed to the magistrate's decision. Although the probate court's judgment entry adopting the magistrate's decision was filed the same day, appellant could have filed his objections within fourteen days of the filing of the magistrate's decision, which would have operated to suspend the probate court's judgment entry until it ruled on the objections. He filed a request that the trial court issue findings of fact and conclusions of law explaining the basis for its decision to adopt the magistrate's decision, but did not file objections to the decision. When the probate court, upon remand from this court, prepared and filed the required findings of fact and conclusions of law, again appellant failed to object to the findings of the magistrate. Thus, the errors he claims to have

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been made in the appointment of a guardian over his estate have been waived. Civ.R. 53(E)(3)(b).

*3 Matters pertaining to the appointment of guardians are left to the sound discretion of the probate court whose decision will not be reversed absent a finding of an abuse of that discretion. *In re Estate of Bednarczuk* (1992), 80 Ohio App.3d 548, 551, 609 N.E.2d 1310.

*3 In view of the failure of objections to the magistrate's report to the probate judge, it is beyond us to perceive any abuse of discretion in the court's finding that Mr. Brunstetter was incompetent to manage his affairs. We further cannot find an abuse of discretion in the appointment of Attorney Spencer. The durable power of attorney, which the appellant claims nominates his daughter as his guardian, does not, in fact, do so, nor was the probate court required to obtain his consent to his guardian when his incompetence is due to mental impairment. See *In re Guardianship of Gallagher* (1981), 2 Ohio App.3d 218, 220, 441 N.E.2d 593.

*3 The appellant argues that the probate court should have appointed his daughter, Arlene Kinkade, to be his guardian. But, in our review of the record of the probate court, we do not find that Arlene Kinkade ever filed an application to be considered for appointment.

*3 Upon our review of the appellant's assignments of errors, we find them to be without merit and the judgment of the probate court is affirmed.

Ohio App. 11 Dist.,1998.
Guardianship of Brunstetter
Not Reported in N.E.2d, 1998 WL 477401 (Ohio App. 11 Dist.)

END OF DOCUMENT

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State v. BallardOhio App. 8 Dist.,2001.Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.

STATE of Ohio, Plaintiff-appellant,
v.
Donnie BALLARD, Defendant-appellee.
No. 78543.

Nov. 15, 2001.

Criminal appeal from the Court of Common Pleas, Case Nos. CR-382743, CR-386439, CR-387291.

William D. Mason, Esq., Cuyahoga County Prosecutor, by Aaron L. Phillips, Esq., Cleveland, OH, for Plaintiff-Appellant.
R. Brian Moriarty, Esq., R. Brian Moriarty, L.L.C., Cleveland, OH, for Defendant-Appellee.

JOURNAL ENTRY AND OPINION
ANN DYKE, J.
*1 This is an appeal by the state from the judgment of the trial court which, on its own motion, dismissed the case against Defendant-Appellant Donnie Ballard (defendant). For the reasons set forth below, we affirm.

*1 Defendant was indicted on January 27, 2000 for possession of drugs in violation of R.C. 2925.11 in an amount of less than five grams. On November 19,1999, the defendant was arrested for allegedly possessing cocaine residue and two crack pipes. Defendant pleaded not guilty to the charges.

*1 On August 7, 2000, the matter proceeded to a bench trial. At trial, the court, on its own motion, dismissed the case without prejudice. It is from this ruling that the state now appeals.

*1 The state asserts a sole assignment of error:
*1 THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING CASE NUMBER CR-386439 POSSESSION OF COCAINE.

*1 It is well settled that a party cannot raise new issues for the first time on appeal and that a reviewing court will not consider issues not raised and/or objected to in the trial court. *Stores v. Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 322 N.E.2d 629; *City of Maple Heights v. Lazar,* 1999 Ohio App. LEXIS 1444; *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc.* (1993), 87 Ohio App.3d 613, 622 N.E.2d 1093. The claimed error must be preserved by an objection, proffer, or ruling on the record when the issue is actually reached during trial or the matter will be deemed waived by a reviewing court. *State v. Montgomery,* 2000 Ohio App. LEXIS 2478.

*1 The transcript from the proceedings in the case sub judice reads as follows:
*1 The Court: Okay, we're in chambers.
*1 Mr. Philips: The State's witnesses have no objection to the Court's motion, your Honor. [Emphasis added].
*1 The Court: * * *in Case Number 386439 the defendant is charged with possession of cocaine. Actually residue. Right?
*1 Ms. Tylee: That's correct.
*1 The Court: The defendant on this case has been incarcerated for some 8 months.FN1 The Court on its own motion is going to dismiss the case in Case Number 386439, the charge of possession of drugs in violation of 2925.11. * * *

FN1. Pursuant to R.C. 2925.11(1)(b) possession of a drug in the amount of less than five grams is a felony in the third degree with a presumption for a prison term for the offense. Pursuant to R.C. 2929.14, the prison term shall be one, two, three, four or five years. It is unclear based on the record before us whether the trial court dismissed the case because it determined the defendant already served a conviction or because of the defendant's speedy trial rights.

*1 Mr. Philips: Thank you, your Honor.
*1 Ms. Tylee: Thank you, your Honor.
*1 Mr. Hildebrand: Thank you, your Honor.

*1 The transcript clearly indicates that the state did not object to the trial court's motion to dismiss the case against the defendant on the possession of drugs in violation of R.C. 2925.11. Not only did the state fail to object to preserve an appeal, but the prosecuting attorney imparted his approval regarding the dismissal when he stated to the judge, The State's witnesses have no objection to the

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Court's motion, your Honor. In not objecting to the court's motion to dismiss the case, the state waived any right to assert error in the trial court's decision on appeal. The state was obligated to raise their objection if it wanted to preserve for appeal any error arising from such issue. Therefore, the state's sole assignment of error is without merit. Judgment affirmed.

***1** It is ordered that appellee recover of appellant its costs herein taxed.

***2** The Court finds there were reasonable grounds for this appeal.

***2** It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

***2** A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, P.J., and JAMES J. SWEENEY, J., concur.
***2** N.B. This entry is an announcement of the court's decision. See App.R.22(B), 22(D) and 26(A) ; Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App. R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist.,2001.
State v. Ballard
Not Reported in N.E.2d, 2001 WL 1429387 (Ohio App. 8 Dist.)

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State v. RichardsonOhio App.,1986.Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.

STATE of Ohio, Plaintiff-Appellee,
v
Reginald D. RICHARDSON, Defendant-Appellant.
No. 50424.

May 1, 1986.

Criminal appeal from Common Pleas Court, No. CR-197393

John T. Corrigan, Cuyahoga County Prosecutor, Cleveland, Ohio, for plaintiff-appellee.
Michael E. Murman, Lakewood, Ohio, for defendant-appellant.

JOURNAL ENTRY and OPINION
JACKSON, Judge.
*1 Appellant Reginald Richardson appeals from his convictions on two counts of rape and one count of corruption of a minor.

*1 The victim, Warren McNeil, testified that he had lived on the same street as appellant in the summer of 1981. At that time, appellant was in his mid-twenties and McNeil was nine years old. One day that summer McNeil visited appellant's house. Appellant allegedly pulled down McNeil's pants and performed an act of anal sex on him. McNeil did not discuss this incident with anyone.

*1 In the months and years that followed, according to McNeil, appellant had anal sex with him several times. McNeil testified that he tried to break off the relationship, but appellant allegedly threatened to "get rid of" appellant's brothers; and that appellant once showed McNeil a long knife and said he carried it with him. As a result McNeil indicated that he continued his role as appellant's catamite.

*1 The incident which resulted in appellant's arrest and indictment occurred on January 2, 1985. Appellant was visited by McNeil, then thirteen years old, and Lamel Wade, a friend of McNeil. While Wade watched television in the living room, appellant and McNeil went into the bedroom and closed the door. Appellant then performed anal sex on McNeil and, for the first and only time, also put his mouth on McNeil's penis. After McNeil and appellant emerged from the bedroom, appellant gave the boys some coins and they left.

*1 When the two boys returned to McNeil's house, Wade persuaded McNeil to tell his mother what had happened. As a result, Mrs. McNeil called the police.

*1 McNeil was examined by a doctor on January 18, 1985. None of the usual indications of rectal rape was discovered at that time. The attending physician stated that the results of the physical examination were not conclusive as to whether or not there had been any type of sexual activity.

*1 Appellant was arrested on January 30, 1985, and charged with seven counts of rape and three counts of corruption of a minor, all involving Warren McNeil.

*1 Pursuant to a defense motion for acquittal, the trial court dismissed one rape count and two corruption of a minor counts. At the close of all the evidence, the jury found appellant not guilty on four of the remaining rape counts, and guilty on count one (rape, summer 1981), count seven (rape, January 2, 1985), and count ten (corruption of a minor, January 2, 1985).

*1 Appellant assigns three errors for review by this court.

I.

*1 "THE TRIAL COURT ERRED IN PERMITTING EVIDENCE OF A PRIOR CONVICTION OF APPELLANT OCCURRING MORE THAN TEN YEARS PREVIOUSLY, IN VIOLATION OF RULE 609 OF THE RULES OF EVIDENCE."

*1 Evid.R. 609(A) permits the use of certain criminal convictions for the purpose of attacking credibility. The admissibility of such evidence is limited under Evid.R. 609(B), which provides:

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*1 "(B) Time Limit. *Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement, or the termination of probation, or shock probation, or parole, or shock parole imposed for that conviction, whichever is the later date,* unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence." (Emphasis added.)

*2 The case at bar was on trial from May 28 to May 31, 1985. Appellant complains that the trial court improperly admitted evidence of a shoplifting conviction after more than ten years had elapsed.

*2 Appellant had several other prior convictions, which were discussed at trial without objection. The first mention of the particular shoplifting conviction implicated on appeal was made by appellant himself, in response to a question from defense counsel:
*2 "Q. Would you tell the ladies and gentlemen of the jury what you have been convicted of?
*2 "A. When I was about 16 or 17 I went to Gold Circle in Willowick, my cousin and myself, and I stole a belt and a jacket, and I can't remember what the Judge fined me or gave me at that time.
*2 " * * * * " (Tr. 221.)

*2 On cross-examination, the state's attorney developed this topic further.
*2 "Q. Now, regardless of your prior record, let's tell the ladies and gentlemen of the jury that you were arrested in November of '74 for shoplifting as an 18-year-old, right, not as a minor? 1974 you were already 18 years old. Your birthday is 2-25-56; isn't that correct?
*2 "A. Uh-huh.
*2 "Q. So in 1974 when you were arrested in Willoughby you were not a 16-year-old juvenile?
*2 MR. CLIFFORD: Objection
*2 "Q. You were an 18-year-old adult; isn't that true?
*2 "A. I think I was 17 turning 18.
*2 THE COURT: Objection overruled.
*2 "Q. Your arrest was in November of 1974. How old would you be in November of '74?
*2 "A. I would be 18.
*2 "Q. That was shoplifting; is that correct?
*2 "A. Yes.
*2 "Q. You were convicted of that?
*2 "A. Yes.
*2 "Q. Then we move on to 1977, * * *." (Tr. 314-315.)

*2 It is evident that appellant "opened the door" to this line of inquiry, FN1 and that the follow-up by the state's attorney was confined to clarification and correction of the matter already raised on direct examination. See *State v. Pollard* (1970), 21 Ohio St.2d 171, at 174: FN2
*2 "The defendant can not complain about the prosecutor cross-examining him concerning his past convictions under state law of Ohio and other states because he volunteered this information upon direct examination by his own counsel."

*2 This court recognizes a limited privilege to elicit complete and accurate information, once the party opponent has irrefutably "opened the door." We conclude, therefore, that the trial court did not abuse its discretion in permitting the assistant prosecutor's inquiries.

*2 We would, however, caution trial courts and attorneys that where a party opponent has "opened the door" to questions on a subject, opposing counsel need not be permitted to rip the door from its hinges. The privilege to reply that we have referred to above is a limited one, and it should not be misconstrued as carte blanche. As Judge Weinstein has observed:
*2 "This concept of 'opening the door' or 'invited error' has been widely used to justify ignoring rules of evidence. Often it results in extremely prejudicial and time consuming inquiries. Attorneys may, as a tactical matter, fail to object to a line in order to have the door opened to their own equally objectionable inquiries. The court ought to intercede to prevent this kind of gamesmanship when it can be foreseen. Control of the trial should not be dissipated on the theory that two wrongs neutralize each other unless the court is convinced that there is no other practicable way to protect the parties while avoiding the dreadful waste of a

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mistrial." 1 Weinstein, Evidence (1985) 103-15 to 103-16, Section 103[02].

*3 The first assignment of error is overruled.

II.

*3 "APPELLANT'S CONVICTION FOR RAPE AND CORRUPTION OF A MINOR RESULTING FROM THE SAME SET OF FACTS CREATED A CUMULATIVE PREJUDICIAL EFFECT WHICH DEPRIVED APPELLANT THE DUE PROCESS OF LAW."

*3 We find appellant's argument to be unclear; it is not supported by any citations to relevant law. Appellant contends at one point that "multiple charging exposed appellant to greater jeopardy from a single event * * *." Appellant's brief at 9. We will, therefore, attempt to analyze this assignment of error in terms of the "multiple counts" statute, R.C. 2941.25, which provides:
*3 "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
*3 "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

*3 Count seven of the indictment (rape) alleged that appellant had, on January 2, 1985, engaged in sexual conduct with Warren McNeil by purposely compelling him to submit by the use of force or threat of force. In count ten of the indictment (corruption of a minor) it was alleged that on January 2, 1985, appellant engaged in sexual conduct with Warren McNeil, knowing that McNeil was over the age of twelve but not over fifteen years of age, or was reckless in that regard.

*3 The victim in this case testified that the defendant compelled him to submit by threat of force to anal intercourse and fellatio on January 2, 1985. At that time, the defendant knew that the victim was between twelve and fifteen years of age, or was reckless in that regard. Thus, each act described by the victim for that date could constitute either rape or corruption of a minor.

*3 Two types of sexual conduct, as defined in R.C. 2907.01(A), can support convictions on two counts of rape. See *State v. Barnes* (1981), 68 Ohio St.2d 13, 14 ("In Ohio, either vaginal intercourse or fellatio constitutes separate sexual conduct, each punishable as rape under R.C. 2907.01(A)."). Likewise, two types of sexual conduct can support convictions for one count of rape and one count of corrupting a minor. The jury found the defendant guilty on both those charges, as counts seven and ten.

*3 We should not speculate why the prosecutor charged the two acts differently. The defendant benefitted from the state's decision not to charge both offenses as rape. He is not entitled to benefit further by eliminating the jury's conviction for the lesser offense. The evidence supported each conviction, and the verdicts were entirely consistent for the charges submitted to the jurors.

*3 The second assignment of error is overruled.

III.

*4 "THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

*4 At trial, McNeil testified that appellant had, on several occasions, engaged in sexual conduct with him. Appellant insisted that McNeil was lying. Other evidence was generally inconclusive. The jury was required to decide whom to believe.

*4 It is axiomatic that issues of credibility are primarily for the jury. See *State v. Ferrette* (1985), 18 Ohio St.3d 106, 110. Because we cannot say that McNeil's testimony is inherently unbelievable, we decline to reverse on manifest weight. The third assignment of error is overruled.

*4 The judgment of the trial court is affirmed.

*4 It is ordered that appellee recover of appellant his costs herein taxed.

*4 The court finds there were reasonable grounds

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for this appeal.

*4 It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

*4 A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARKUS, P.J., and KRUPANSKY, J., concur.
*4 N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

FN1. See, generally, McCormick, Evidence (2 Ed. Cleary Ed.1972), Sections 56-57.

FN2. For variations on the same theme, compare *State v. Lancaster* (1971), 25 Ohio St.2d 83, 88-90; *State v. Williams* (1982), 7 Ohio App.3d 160, 162; *State v. Cox* (1958), 107 Ohio App. 297, 300 ("Having opened the door wide upon direct examination by the defense witness we do not believe that the defendant can successfully complain when the state merely sought to further develop the same subject.").
Ohio App.,1986.
State v. Richardson
Not Reported in N.E.2d, 1986 WL 5124 (Ohio App. 8 Dist.)

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Briefs and Other Related Documents
U.S. v. Alcantara-RuedaC.A.9 (Cal.),2003.This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

United States Court of Appeals,Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Rogelio ALCANTARA-RUEDA, Defendant-Appellant.
No. 03-50103.
D.C. No. CR-02-02807-GT.

Argued and Submitted Nov. 5, 2003.
Decided Nov. 14, 2003.

Defendant pled guilty and was convicted in the United States District Court for the Southern District of California, Gordon Thompson, Jr., J., of assaulting a federal officer. Defendant appealed. The Court of Appeals held that: (1) ex parte communication between judge and prosecuting attorney did not require judge to recuse himself; (2) defendant's Sixth Amendment rights were not violate by ex parte communication between judge and prosecuting attorney; and (3) failure to provide defendant with notice of the district court's basis for sentencing him pursuant to the aggravated assault guideline required remand.

Vacated and remanded.

Berzon, Circuit Judge, filed opinion concurring in part and dissenting in part.

West Headnotes

[1] Judges 227 ⚷ 49(1)

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Ex parte communication between judge and prosecuting attorney did not require judge to recuse himself from sentencing defendant after defendant pled guilty to assaulting a federal officer, where there was no indication that the judge received information that could, or did, affect the sentence imposed.

[2] Criminal Law 110 ⚷ 636(9)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k636 Presence of Accused
110k636(9) k. Proceedings After Verdict. Most Cited Cases

Defendant's Sixth Amendment rights were not violate by ex parte communication between judge and prosecuting attorney prior to judge sentencing defendant for assaulting a federal officer, where nature of communication did not indicate that defendant's presence would have made any difference to sentence imposed and defendant had be apprised fully of the communication. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 ⚷ 1181.5(8)

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(8) k. Sentence. Most Cited Cases

Sentencing and Punishment 350H ⚷ 935

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)1 In General
350Hk932 Advice and Notice
350Hk935 k. Requisites and Sufficiency. Most Cited Cases

Failure to provide defendant with notice of the district court's basis for sentencing him pursuant to the aggravated assault guideline, after defendant pled guilty to assaulting a federal officer by pushing him into traffic, required remand; although defendant was on notice that district court was considering sentence based upon use of a vehicle as a dangerous weapon, had defendant known of other possible basis he could have explained the facts

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regarding the pushing, the traffic, and how defendant's intoxication fit into these facts. U.S.S.G. §§ 2A2.2, 6A1.3(a), p.s., 18 U.S.C.A.

204** Appeal from the United States District Court for the Southern District of California;205** Gordon Thompson, Jr., Senior Judge, Presiding.

Stephen R. Cook, San Diego, CA, for Plaintiff-Appellee.
Kasha Pollreisz, Fed. Public Defender, San Diego, CA, for Defendant-Appellant.

Before PREGERSON, FERNANDEZ, and BERZON, Circuit Judges.

MEMORANDUM FN*

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

****1** Rogelio Alcantara-Rueda appeals his sentence after a guilty plea to a charge of assaulting a federal officer. *See* 18 U.S.C. § 111. We vacate the sentence and remand.

****1** [1] (1) Alcantara first claims that his sentence must be set aside because the district judge had an ex parte communication about the case with an Assistant United States Attorney. We do not agree. Ex parte communications between judges and attorneys are to be frowned upon to say the least. *See United States v. Van Griffin,* 874 F.2d 634, 637 (9th Cir.1989); *United States v. Alverson,* 666 F.2d 341, 348-49 (9th Cir.1982). However, the mere fact that a communication took place does not necessarily demonstrate that the judge's impartiality might reasonably be questioned. *See Willenbring v. United States,* 306 F.2d 944, 946 (9th Cir.1962) (recusal not required). *Cf. United States v. Wolfson,* 634 F.2d 1217, 1221-22 (9th Cir.1980) (communication in question did require recusal); *United States v. Reese,* 775 F.2d 1066, 1076-78 (9th Cir.1985) (same). In this case, while he engaged in an exceedingly poor practice, there is no indication that the judge received information that could, or did, affect the sentence. Thus, he did not abuse his discretion when he refused to recuse himself. *See United States v. Wilkerson,* 208 F.3d 794, 797 (9th Cir.2000).

****1** [2] By the same token, Alcantara's Sixth Amendment rights were not violated. Given the nature of the communication in question, we hold that there is no hint that his presence could have made one whit of difference. *See United States v. Wheat,* 813 F.2d 1399, 1404-05 (9th Cir.1987). We note that we have not the slightest reason to doubt that Alcantara has been made aware of the sum total of the ex parte communication, and, thus, there can be no real claim that he has been kept in the dark. *See United States v. Hackett,* 638 F.2d 1179, 1188 (9th Cir.1980); *cf. Guenther v. Commissioner,* 939 F.2d 758, 761 (9th Cir.1991) (we remand where information was not given to the defense); *United States v. Thompson,* 827 F.2d 1254, 1261 (9th Cir.1987) (same).

****1** [3] (2) Alcantara then complains that he did not have sufficient notice of the district court's basis for sentencing him pursuant to the aggravated assault guideline. *See* USSG § 2A2.2.FN1 We agree. A failure to give notice can require resentencing. *See* USSG § 6A1.3(a); *United States v. Williams,* 291 F.3d 1180, 1192-93 (9th Cir.2002); *United States v. Brady,* 928 F.2d 844, 847 n. 3 (9th Cir.1991); *United States v. Rafferty,* 911 F.2d 227, 230 (9th Cir.1990). The defendant was on notice that the district court was considering a sentence based upon use of a vehicle as a dangerous weapon, but focus was upon use of a single automobile.FN2 The flow ***206** of traffic on an interstate highway can also be highly dangerous, and there was no dispute over the fact that Alcantara had, indeed, pushed a government officer toward traffic traveling on an interstate highway. Still and all, there are vast factual differences between directing one's automobile at a government officer and pushing an officer into oncoming traffic. Alcantara was entitled to know that the latter was under consideration. Among other things, he and the government could have more particularly explained the facts regarding the pushing, the traffic, and how Alcantara's intoxication fit into those.

FN1. All references to the Sentencing Guidelines are to the November 1, 2002, version.

FN2. *See United States v. Dayea,* 32 F.3d 1377, 1379 (9th Cir.1994) (a single automobile can be a dangerous weapon).

****2** VACATED and REMANDED.FN3

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FN3. We see no need, and we decline, to order this matter transferred to a different judge for resentencing.BERZON, J., concurring in part and dissenting in part.

**2 I concur in the remainder of the disposition, but not in the conclusion that the district court properly declined to recuse himself after engaging in ex parte communications with the attorney for the government. There was, to my mind, an appearance of impropriety requiring recusal, not because of the content of the conversation between the judge and the government's lawyer but because the judge instigated the conversation at all.

**2 The government had agreed to a sentence of which the district judge evidently disapproved, as evidenced by his later refusal to follow the government's recommendation against use of the aggravated assault guideline. *See* USSG § 2A2.2. The judge's law clerk had called the government lawyer to ascertain which witnesses the government would have available for the sentencing hearing and what they would testify to, and obtained that information. *Then* the district judge got on the line to speak with the government lawyer. By doing so, without any later explanation for the necessity of doing so, the district judge engaged in behavior open to the appearance that he was attempting, through his actions if not his words, to convey his discontent with the government's position and urge the government to take an active role at the sentencing hearing. Otherwise, why did he get on the telephone? It is apparent from the later sentencing hearing that the district judge was indeed annoyed with the government for refusing to put on witnesses itself regarding the aggravated assault guideline.

**2 I would order the district judge recused and remand for a new sentencing hearing before a different judge.

C.A.9 (Cal.),2003.
U.S. v. Alcantara-Rueda
81 Fed.Appx. 204, 2003 WL 22701134 (C.A.9 (Cal.))

Briefs and Other Related Documents (Back to top)

. 2003 WL 22753744 (Appellate Brief) Appellant's Reply Brief (Jul. 30, 2003) Original Image of this Document (PDF)

. 2003 WL 21634509 (Appellate Brief) Appellant's Opening Brief (2003)

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