DE NOVO DENIED: DISTRICT COURTS' RELIANCE ON *CAMARDO* IS CLEAR ERROR

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When a party objects to a magistrate judge's report and recommendations on a dispositive motion, a district court must determine which parts of the report and recommendations are reviewed de novo. Dicta in a 1992 Western District of New York case, *Camardo v. General Motors Hourly-Rate Employees Pension Plan*,[1] states that it is "improper for an objecting party to. . . rehash[]. . . the same arguments and positions taken in the original papers submitted to the Magistrate Judge."[2] This dicta has been adopted by numerous district courts in New York—particularly the Southern and Northern Districts—as well as district courts outside the Second Circuit.[3] These courts have used this dicta for the proposition that a district court need not perform a de novo review of arguments that a party makes in its objections to a magistrate judge's report and recommendations if that argument was already considered by the magistrate judge. When this dicta is used to deny such review, it deprives litigants of statutory and, possibly, constitutional rights.

It is undisputed that a district judge must "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made."[4] Whether an objection gets de novo review is very important because parts of a magistrate judge's report and recommendation that are not objected to may be either (1) approved if they free of clear error[5] or (2) not reviewed at all.[6]

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1. 806 F. Supp. 380, 381–82 (W.D.N.Y. 1992).

2. *Id.* at 382.

3. *See, e.g.*, Nelson v. Astrue, No. CV-12-06-BLG-RFC-CSO, 2012 WL 5987135, at *1 n.1 (D. Mont. Nov. 29, 2012); Marlite, Inc. v. Eckenrod, No. 10-23641-CIV, 2012 WL 3614212, at *2 (S.D. Fla. Aug. 21, 2012).

4. 28 U.S.C. § 636(b)(1); *see also* FED. R. CIV. P. 72(b) ("[A] party may serve and file specific written objections to the proposed findings and recommendations. . . . The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to.").

5. *See, e.g.*, McGrigs v. Killian, No. 08 Civ. 6238(RMB)(DF), 2009 WL 3762201, at *2 (S.D.N.Y. Nov. 10, 2009) ("The Court may adopt any portions of a magistrate judge's report to which no objections have been made and which are not clearly erroneous or contrary to law.").

6. *See* Hounddog Prods., L.L.C. v. Empire Film Grp., Inc., 826 F. Supp. 2d 619, 623–24 (S.D.N.Y. 2011) (citing Thomas v. Arn, 474 U.S. 140, 149 (1985)); *see also Thomas*, 474

Numerous district courts, especially in New York, rely on the dicta in *Camardo* to hold that an objection to a magistrate judge's report and recommendations that "merely rehashes" an argument made before a magistrate judge is reviewed for clear error.[7] In this case, "clear error" should not be the standard of review; rather, "clear error" aptly describes the *Camardo* dicta.

Camardo correctly stated that "objections to a Report and Recommendation are to be specific and are to address only those portions of the proposed findings to which the party objects."[8] However, *Camardo* went off the rails when it asserted:

> It is improper for an objecting party to attempt to relitigate the entire content of the hearing before the Magistrate Judge by submitting papers to a district court which are nothing more than a rehashing of the same arguments and positions taken in the original papers submitted to the Magistrate Judge.[9]

For this conclusion, *Camardo* cited two cases, *McCarthy v. Manson*[10] and *Park Motor Mart, Inc. v. Ford Motor Co.*[11] However, these two cases do not state that a litigant may not "rehash" arguments. Rather, they merely explain that the purpose of the Federal Magistrates Act[12] was to decrease the workload of district courts.[13] While it is obvious that an "objection"

U.S. at 149 ("The statute does not on its face require any review at all, by either the district court or the court of appeals, of any issue that is not the subject of an objection.").

7. *See, e.g.*, Rivera v. Ercole, No. 09 Civ. 5547(DAB), 2013 WL 4414863, at *2 (S.D.N.Y. Aug. 15, 2013) (citing *Sidney v. Caron*, No. 9:09-CV-1326(GTS/ATB), 2012 WL 4383092, at *3 n.6 (N.D.N.Y. Sept. 25, 2012), a case that cites *Camardo*). In *Vega v. Artuz*, the court quoted *Camardo*, cited three other cases that, in turn, cite *Camardo*, and cited one case in which the petitioner "merely assert[ed] a general objection." Vega v. Artuz, No. 97Civ.3775LTSJCF, 2002 WL 31174466, at *1 (S.D.N.Y. Sept. 30, 2002); *see also* Moskowitz v. La Suisse, Societe D'Assurances Sur la Vie, 282 F.R.D. 54, 59 (S.D.N.Y. 2012) (quoting *Vega* and *Camardo* to determine the standard of review); Combier v. New York, No. 1:09-cv-05314(RJH)(FM), 2010 WL 3835030, at *2 (S.D.N.Y. Oct. 1, 2010) (same).

8. *Camardo*, 806 F. Supp. at 381–82. *Camardo* alleged that its reasoning was based on the "the plain meaning" of Rule 30(a)(3) of the Local Rules for the United States District Court for the Western District of New York rather than Rule 72 or § 636(b)(1). *Id.* at 381. Despite this disclaimer, *Camardo* was clearly construing Rule 72 and § 636(b)(1). First, *Camardo* supports its conclusion with policy arguments, which rely on the purpose of 28 U.S.C. § 636(b)(1). *See infra* notes 10–11 and accompanying text. Second, the Local Civil Rule is hardly different from the Rule 72(b) of the Federal Rules of Civil Procedure. Finally, to the extent *Camardo* only applies the Local Civil Rule rather than § 636 and Rule 72, no other court should take it as persuasive precedent, but, as discussed above, they have. Therefore, it is clear that *Camardo* was interpreting § 636 and Rule 72, even though it claims not to have been doing so.

9. *Camardo*, 806 F. Supp. at 382.

10. 554 F. Supp. 1275, 1286 (D. Conn. 1982), *aff'd*, 714 F.2d 234 (2d Cir. 1983).

11. 616 F.2d 603, 605 (1st Cir. 1980).

12. Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 631–639 (2006)).

13. *See Park Motor Mart*, 616 F.2d at 605 ("The purpose of the Federal Magistrates Act is to relieve courts of unnecessary work."); *McCarthy*, 554 F. Supp. at 1286 ("The goal of the federal statute providing for the assignment of cases to magistrates is to 'increas[e] the overall efficiency of the federal judiciary,' while preserving for litigants the opportunity to have their claims heard by a district judge." (alteration in original) (quoting Nettles v.

that disagrees with a magistrate judge's report and recommendation without explaining why would not be "specific" enough to secure de novo review under Rule 72 of the Federal Rules of Civil Procedure,[14] an objection that makes the same arguments that were made before the magistrate judge is not necessarily or even likely to be nonspecific. Indeed, this dicta in *Camardo* is so transparently weak that even after explaining its objection to de novo review, the *Camardo* court then conducted de novo review.[15]

Camardo's reading of Rule 72 and 28 U.S.C. § 636 that disentitles a party to de novo review when that party raises the same arguments in its objections that it raised before the magistrate judge is wrong for at least five reasons:

1. The clear text of Rule 72 and § 636 only require specific and timely objections. No judicial gloss should be permitted to change the statutory standard of review.
2. The Second Circuit has never adopted the *Camardo* dicta and therefore district courts are not required to follow it.
3. Instead, the Second Circuit has recognized the rule that district courts need not consider arguments that a party did *not* raise before the magistrate judge. If a district court does not need to consider arguments that were not raised and reviews arguments already raised under a clearly erroneous standard, de novo review would be very difficult for a party to obtain.
4. To the extent that the *Camardo* dicta deprives a party of an Article III tribunal, it may be unconstitutional.
5. Finally, as noted above, the *Camardo* dicta is based on a policy argument that the Federal Magistrates Act favors efficiency. This is an awfully slender reed on which to rest its conclusion because the Act as a whole can generate efficiencies even if parties are free to raise the same arguments in their objections and receive de novo review.

First, the clear text of § 636 and Rule 72 only require "specific," timely, and "proper[]" objections. Section 636(b)(1) reads:

> Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.[16]

Wainwright, 677 F.2d 404, 406 (5th Cir. Unit B 1982)) (citing Sick v. City of Buffalo, 574 F.2d 689, 692–93 (2d Cir. 1978))); *see also Camardo*, 806 F. Supp. at 382 (quoting *McCarthy* and *Park Motor Mart* for the proposition that the purpose of the Federal Magistrates Act was to increase efficiency and decrease work).

14. *See, e.g.*, Mario v. P & C Food Mkts., Inc., 313 F.3d 758, 766 (2d Cir. 2002).
15. *Camardo*, 806 F. Supp. at 382.
16. 28 U.S.C. § 636(b)(1).

As the Third Circuit recently held, "the plain language of § 636(b)(1) . . . make[s] clear" that objections previously made to the district court should be reviewed de novo.[17]

As is relevant, Rule 72 is only different from § 636 in that Rule 72 requires the objections be "specific" and de novo review be given only for the parts of the disposition that have been "properly objected to."[18] The requirement of specificity should not force a party to object only to certain parts of a report and recommendation, but rather should ensure that the district court can distinguish which parts are objected to—and therefore are reviewed de novo—and which are the remainder, reviewed for clear error.[19] The requirement that the objections be "proper" would be a strange way for the U.S. Supreme Court or Congress to require that parties advance arguments other than those they raised before the magistrate judge.

Second, the Second Circuit has never adopted the *Camardo* dicta and therefore district courts are not required to follow it. The district court memoranda that cite the *Camardo* dicta never cite a Second Circuit opinion in support of it.[20] Indeed, the Second Circuit recently noted without comment that a district court entertained a rehashing of arguments de novo,[21] strongly suggesting that it saw that standard of review as appropriate. Moreover, the Second Circuit regularly states, like the statute and rule, that any specific objections require de novo review.[22]

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17. Brown v. Astrue, 649 F.3d 193, 195 (3d Cir. 2011). *Brown* abrogated a district court case, *Morgan v. Astrue*, that relied on several cases, including at least one that relied on the *Camardo* dicta. *See id.* at 195 (stating that *Morgan* "is not correct"); Morgan v. Astrue, No. 08-2133, 2009 WL 3541001, at *3 (E.D. Pa. Oct. 30, 2009) (citing State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada, 246 F. Supp. 2d 231, 239 (S.D.N.Y. 2002) (citing *Camardo*, 806 F. Supp. at 381–82)), *abrogated by Brown*, 649 F.3d at 193.

18. FED. R. CIV. P. 72(b).

19. *See* 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3070.1 (2d ed. 1997) ("The rule adds that the objections must be 'specific' so as to conform to the statute's requirement that the judge review those portions of the proposed findings or recommendations to which objection is made."); *see also supra* notes 5–6 and accompanying text (explaining that the parts of a report and recommendations objected to are reviewed de novo while parts not objected to are reviewed for clear error or not at all).

20. *See, e.g.*, *Camardo*, 806 F. Supp. at 381–82; Moskowitz v. La Suisse, Societe D'Assurances Sur la Vie, 282 F.R.D. 54, 59 (S.D.N.Y. 2012); Combier v. New York, No. 1:09-cv-05314(RJH)(FM), 2010 WL 3835030, at *2 (S.D.N.Y. Oct. 1, 2010); Vega v. Artuz, No. 97Civ.3775LTSJCF, 2002 WL 31174466, at *1 (S.D.N.Y. Sept. 30, 2002).

21. *See* 10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co., 634 F.3d 112, 119 (2d Cir. 2011) ("Mountain Valley filed written objections to the entire R & R making essentially the same arguments it had presented to the magistrate judge. Upon *de novo* review, the district court adopted the R & R in its entirety and without further written analysis.").

22. *See, e.g.*, Morris v. Local 804, Int'l Bhd. of Teamsters, 167 F. App'x 230, 232 (2d Cir. 2006) (summary order) ("If the parties timely exercise their right to object to those findings, the district court must conduct a *de novo* review of those portions of the report and recommendation to which the party objects." (citing Grassia v. Scully, 892 F. 2d 16, 19 (2d Cir. 1989), and FED. R. CIV. P. 72(b))); Hynes v. Squillace, 143 F.3d 653, 656 (2d Cir. 1998) ("Under 28 U.S.C. § 636(b)(1), the Magistrate Judge's Report-Recommendation was subject to *de novo* review as to those issues upon which the parties raised objections."); Beyah v. Walker, No. 96-2990, 1997 WL 786375, at *1 (2d Cir. Dec. 23, 1997) (unpublished table decision) ("Once objections are filed, the district court conducts a de novo review with respect to the disputed issues.").

Third, the Second Circuit has recognized what is essentially the opposite rule: that district courts need not consider arguments that a party did *not* raise before the magistrate judge.[23] Under such a standard, parties are limited to discussing what would be forbidden under the *Camardo* dicta: the "same arguments and positions taken in the original papers submitted to the Magistrate Judge."[24] Some district courts hold both contradictory positions—*Camardo*'s no rehashing and the Second Circuit's waiver of argument not raised before the magistrate judge—in the same case.[25] If a district court need not consider arguments that were not raised—and reviews arguments already raised—under a clearly erroneous standard, de novo review becomes very difficult to obtain. As the Third Circuit explained, "any appeal to a district court based on an objection to a Magistrate Judge's order will 'rehash arguments presented to and considered by' the Magistrate Judge. That is—by definition—the very nature of 'review.'"[26]

Fourth, to the extent that the *Camardo* dicta deprives a party of an Article III tribunal, it may run afoul of the construction of § 636 necessary to avoid constitutional problems. Indeed, the Second Circuit has noted that "[g]iven the possible constitutional implications of delegating Article III judges' duties to magistrate judges, we have generally 'avoided constitutional issues in this area by construing the Federal Magistrates Act narrowly in light of its structure and purpose.'"[27] Article III values[28] suggest that the statute should be construed to allow such review. This is especially true when, for instance, a pro se petitioner would have no reason to expect *Camardo*'s misguided dicta to contravene § 636's standard of review, and his or her habeas petition is then denied de novo review by an Article III

23. *See* McEachin v. Walker, 147 F. App'x 223, 224 (2d Cir. 2005) (summary order) (holding it was not an abuse of discretion to ignore evidence submitted after the report and recommendation); Walker v. Stinson, No. 99-0054, 2000 WL 232295, at *2 (2d Cir. 2000) (unpublished table decision) (holding that "the district court did not abuse its discretion in refusing to consider" a legal argument that defendants "failed to raise" before the magistrate judge); *see also* Pan Am. World Airways, Inc. v. Int'l Bhd. of Teamsters, 894 F.2d 36, 41 n.3 (2d Cir. 1990) ("Pan Am had no right to present further testimony when it offered no justification for not offering the testimony at the hearing before the magistrate."). *But see Hynes*, 143 F.3d at 655–56 (holding that a district court did not abuse its discretion in considering evidence submitted for the first time in support of an objection).

24. *Camardo*, 806 F. Supp. at 382.

25. *See, e.g.*, Rivera v. Ercole, No. 09 Civ. 5547(DAB), 2013 WL 4414863, at *1–3 (S.D.N.Y. Aug. 15, 2013); Gallagher v. Astrue, No. 11-Civ159MAT, 2013 WL 2528176, at *2–3 (W.D.N.Y. June 10, 2013); Adamdsu v. Ngati, No. 05-CV-2585 (RRM)(LB), 2012 WL 3930386, at *3–4 (E.D.N.Y. Sept. 9, 2012); White v. Drake, No. 9:10-CV-1034 (GTS/DRH), 2011 WL 4478921, at *4 n.4, *8 n.14 (N.D.N.Y. Sept. 26, 2011); *cf.* Garcia v. Furnia, No. 9:12-CV-0924 (GTS/ATB), 2013 WL 3243952, at *2 n.4, *3 n.6 (N.D.N.Y. June 26, 2013); United Cent. Bank v. Shree Ganesh Props., LLC, No. 10 CV 8116(VB), 2013 WL 1703875, at *2 (S.D.N.Y. Apr. 19, 2013).

26. Brown v. Astrue, 649 F.3d 193, 195 (3d Cir. 2011).

27. Williams v. Beemiller, Inc., 527 F.3d 259, 264–65 (2d Cir. 2008) (quoting *In re* United States, 10 F.3d 931, 934 n.4 (2d Cir.1993)).

28. *See* United States v. Raddatz, 447 U.S. 667, 681 (1980).

judge.[29] Without a Second Circuit or Supreme Court holding construing § 636 to require such limited de novo review, district courts should be wary of constructions of § 636 that offer more "efficiency" by limiting Article III review.[30]

Fifth and finally, as noted above, the *Camardo* dicta is based on a policy argument that the Federal Magistrates Act favors efficiency. This is an insufficient reason to read § 636 to require new arguments for de novo review because § 636 can increase efficiency even if, in some cases, parties are entitled to de novo review and choose to relitigate every issue. For example, pretrial matters in those same cases would not be reviewed de novo.[31] Even where de novo review is required, the district court need not hold a hearing,[32] and the district court has the benefit of a well-reasoned opinion on the matter from an excellent magistrate judge.[33] Moreover, merely requiring a party to object to an unfavorable decision by a magistrate judge decreases the likelihood that that party will proceed. Under *Camardo*'s reasoning, one would expect litigants to appeal every summary judgment issued by a district court simply because the losing party has a right to de novo review of such rulings.[34]

For the above reasons, courts should reject the *Camardo* dicta and openly disagree with any party that cites it or its progeny for the proposition that a party may not "rehash" arguments. A party objecting to a magistrate judge's report and recommendation need not provide new arguments in order to obtain de novo review of its objections.

29. *See, e.g.*, *Rivera*, 2013 WL 4414863, at *1–3 (concluding that a pro se petitioner's three objections were all attempts to relitigate issues brought before the magistrate judge and denying petitioner's petition for writ of habeas corpus under a clear error standard, allegedly " the appropriate level of review").

30. *Cf.* Austin v. Healey, 5 F.3d 598, 604 (2d Cir. 1993) ("Thus, the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department." (quoting *Raddatz*, 447 U.S. at 685 (Blackmun, J., concurring))).

31. 28 U.S.C. § 636(b)(1)(A) (2006).

32. *See Raddatz*, 447 U.S. at 673–84.

33. *See* Pan Am. World Airways, Inc. v. Int'l Bhd. of Teamsters, 894 F.2d 36, 40–41 n.3 (2d Cir. 1990) (stating that "reliance on [a] magistrate's recommendation is within [the] discretion of [a] district court" on de novo review (citing *Raddatz*, 447 U.S. at 674–76)); *see also, e.g.*, Pippins v. KPMG LLP, 279 F.R.D. 245, 251 (S.D.N.Y. 2012) (referring to "our excellent magistrate judges" in the Southern District of New York).

34. *See, e.g.*, *Kaytor v. Electric Boat Corp.*, 609 F.3d 537, 546 (2d Cir. 2010) ("We review the district court's grant of summary judgment *de novo*, applying the same standards that govern the district court's consideration of the motion.").