

**NEW YORK
CITY BAR**

**Sixtieth Annual
National Moot Court Competition
TRANSCRIPT OF RECORD**

SUPREME COURT OF THE UNITED STATES

October Term 2009

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Docket No. 2009-372
—————

United States of America,
Petitioner,
v.
Joanie Baier,
Respondent.

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All other inquiries may be addressed:

Mariann Owens
New York City Bar Association
42 West 44th Street
New York, New York 10036-6689
(212) 382-6635 (direct)
(212) 869-2145 (fax)
mowens@nycbar.org

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THE RECORD

Background

On Election Day 2005, Marion Owens defeated incumbent Caryn Mulrooney in what many consider the tightest gubernatorial race in the history of the State of Old York. Although highly popular as a member of the Old York State Assembly, Owens was dogged by rumors throughout the campaign that he was corrupt and had engaged in numerous extramarital affairs and used Old York resources to conceal them. Indeed, it was not until the weekend before the election, amid reports by the York Area World News network (“YAWN”) that Mulrooney had tentatively agreed to sell an appointment to the very powerful Old York State Ethics Board to one of her biggest campaign contributors, that Owens edged ahead in the polls and eventually won the election.

Once elected Governor, Owens largely avoided struggle or controversy. His public approval ratings soared above 65%, and the Old York media endorsed each of his major policy objectives. As a result, Owens passed numerous pieces of legislation during his first nine months in office, the most important of which was Owens’ health care reform bill. Under this statute, the Old York state government agreed to provide free public health care to all state residents regardless of cost. In late August 2006, Governor Owens signed this bill into law. At the signing ceremony touting his

accomplishment, Owens advised the press that he would celebrate this achievement by taking a much needed vacation to clear his head.

Although Owens did not provide the public with details of his vacation plans, it was widely speculated that he was planning to go hiking in the far recesses of Old York's Misty Mountains. In reality, Owens had driven under the cover of darkness to a beach house that he owned along Old York's Argentina Beach. Prior to arriving at his house, Owens picked up Joanie Baier at her parents' house on the Admiral Foley Naval Base (the "Naval Base"). Baier was then a seventeen year-old high school student whom Owens had met a year earlier at a local youth soccer game. In the days and months that followed that soccer game, Owens and Baier remained in touch and over time developed a romantic relationship.

While the two sipped on wine, Owens sensed that Baier was upset. Baier had fallen in love with Owens and pleaded that he make their relationship public. Owens refused, explaining that his political career was far more important than any companionship Baier could provide. When Baier threatened to reveal their affair during a sensational evening press conference, Owens coolly stated that he would disavow any statements made by Baier. Having just passed a widely popular omnibus health care reform bill, Owens believed that the media would credit any statements he made denying the relationship.

Upon hearing Owens' response, Baier quickly flew into a fit of rage. Emotionally scarred by Owens' insensitivity, Baier began to shout obscenities at Owens. Owens, in turn, insisted that Baier immediately return to the Naval Base, and Owens drove her back to her parents' house.

Owens spent the next day by himself at his beach house, but that evening returned to Baier's house on the Naval Base. Owens convinced Baier to accompany him back to his beach house. Mid-way to the beach house, Owens once again indicated that their relationship needed to remain secret. Baier then pulled out a gun she purchased earlier during the day and forced Owens to go back to her parents' house. Once inside, Baier beckoned Owens to sit on the couch, aimed the gun in Owens' direction and shot the Governor twice. The first bullet grazed Owens' scalp, and the second one penetrated his chest, lodging in his spinal cord. Owens collapsed. Baier, believing Owens was dead, then stepped back and wrote a five-page letter setting out, in great detail, the history of her relationship with the Governor. Although she did not provide any explanation as to how Owens was shot, Baier expressed her deep sadness over the Governor's refusal to acknowledge their relationship.

Nearby, Baier's neighbors could hear loud noises coming from the apartment. Alarmed, they called the Military Police and asked that officers respond immediately. When the officers arrived at the scene,

they saw the Governor lying on the floor unconscious. Upon seeing Baier sitting in the corner crying, the officers took her into custody.

Within moments, news of the tragic series of events, including Owens' affair with Baier, surfaced on YAWN and numerous other local and national television stations. In the days and weeks that followed, these media outlets provided relentless coverage on all angles of the story including Owens' relationship with Baier. Reporters, bloggers, tabloids and the like hounded Baier and her family, publishing hundreds of stories on television, online and in newspapers and magazines.

Looking to capitalize on this media attention, the United States Attorney ("U.S. Attorney") for the District of Old York quickly charged Baier with several crimes, including various firearm offenses, assault with intent to kill, kidnapping and attempted murder, and vowed to seek the harshest sentence possible. Because Baier's alleged crimes occurred on the Naval Base, a federal enclave within the meaning of the Assimilative Crimes Act (18 U.S.C. § 13), the U.S. Attorney announced during an exclusive YAWN interview that he intended to seek a life sentence without the possibility of parole under Old York law.

District Court

Given all of the publicity surrounding Baier's attack on Owens, Baier's attorney requested a change of venue. Among other things, Baier's attorney argued

that because of Governor Owens' popularity, and thus the risk of pervasive prejudice against Baier, it was unlikely that Baier could receive a fair trial in Old York. The United States District Court for the District of Old York denied Baier's motion, and the jury subsequently found Baier guilty of all charges, including kidnapping and attempted murder. The District Court then sentenced Baier to life in prison without the possibility of parole.

Court of Appeals

Baier appealed to the United States Court of Appeals for the Fourteenth Circuit arguing that she should be granted a new trial because: (1) the Court applied far too rigorous a standard when denying her motion for change of venue; and (2) the Court's imposition of a life sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment. A majority of the three-judge panel ordered a new trial, ruling that: (1) the District Court applied the wrong standard when deciding Baier's motion for a change of venue; and (2) Baier's life sentence without the possibility of parole was unconstitutional.

**UNITED STATES DISTRICT COURT
DISTRICT OF OLD YORK**

Docket No. 06-090807

United States of America

v.

Joanie Baier, Defendant

MEMORANDUM AND ORDER

WIIG, Judge:

This matter comes before this Court on defendant Joanie Baier's Motion for a Change of Venue pursuant to Fed. R. Crim. P. 21(a). Upon consideration of the submissions of the parties and the relevant law, the Motion is DENIED.

RELEVANT BACKGROUND

Marion Owens ("Owens") began his political career in the Assembly of the State of Old York, representing the Upper East Side of Old York City, in 1995. He quickly made a name for himself in Old York

as an aggressive politician, and was a frequent guest on both local and national news programs to promote his legislative initiatives. Owens' major initiative in Old York was health care reform, but neither the then-governor, Caryn Mulrooney ("Mulrooney"), nor the legislative bodies supported this measure.

In November 2005, Owens was elected governor of the State of Old York. The campaign won national attention because both Owens and his opponent, Mulrooney, were accused of inappropriate behavior: Owens of being corrupt and engaging in extramarital affairs and Mulrooney of selling political appointments. When evidence surfaced on the eve of Election Day that Mulrooney had indeed taken bribes, Owens won by the narrowest margin in State history.

Owens' popularity during his first nine months in office soared above 65% and the Old York State legislature passed numerous pieces of legislation that Owens initiated. In August 2006, these successes culminated in the legislature's enactment of the health care reform bill that Owens had supported since his days in the State Assembly. Owens signed the bill during a public ceremony covered by both the local and national media. Numerous other state governors took his lead and pressed for health care reform in their own states.

At the conclusion of his bill-signing ceremony, Owens announced that he was taking his first vacation

since assuming office; it would be without his family. Although he never publicly disclosed his destination, the Old York political establishment speculated that Owens would go hiking in the Misty Mountains, an almost deserted area in the far recesses of Old York. In reality, Owens planned to vacation at the family beach home in the Argentina Beach area of Old York. And even though Owens did not take his family, he had no intention of vacationing alone.

Joanie Baier (“Baier”) was at the time a seventeen-year old girl who resided with her parents on the Admiral Foley Naval Base (the “Naval Base”) in Old York. She met Owens in the summer of 2005 at a soccer game, and the two soon thereafter developed a romantic relationship. On his way to the beach house, Owens drove to the Naval Base to pick up Baier.

After Owens and Baier arrived at the beach house, Baier allegedly told Owens that she had fallen in love with him and that they should make their relationship public. Owens purportedly refused, stating that his political career and his wife’s money were more important than the companionship they shared. Baier flew into a rage and threatened to make their relationship public. Owens allegedly responded that he would deny the affair and that no one would believe a “starry-eyed kid” over a “beloved governor” who had “the media in [his] back pocket.” After Baier continued to yell obscenities at Owens, he drove Baier back to her parents’ home on the Base.

After spending a day by himself at the beach house, Owens returned to Baier's home on the Base and convinced her to join him at the beach house; she agreed. Halfway back to the beach house, Baier once again told Owens that she loved him and wanted their relationship to be made public. Owens again refused. Baier then pulled out a gun and forced Owens to drive back to her parents' house.

Once they arrived at the Naval Base, Baier ordered Owens to sit on the couch. Owens complied but Baier fired two shots at him. The first bullet grazed Owens' scalp and the other pierced his chest, stopping only when it became lodged in his spinal cord. Owens fell to the floor; Baier believed he was dead.

Upon hearing the gunshots, Baier's neighbors called the police. When they arrived, the police found Owens lying on the floor unconscious and Baier sitting in the corner crying. On the coffee table was a five-page letter written by Baier, wherein she professed her love for Owens and detailed the history of their relationship. The police officers took Baier into custody, and an ambulance took Owens to the local emergency room. Owens survived, but the shooting rendered him paralyzed from the neck down. Although he vowed to stay in office, Owens resigned after determining that he could not balance the competing demands of the public office and his physical recovery.

Within minutes of Baier's arrest, news of Owens' affair and the shooting surfaced on both local and national television stations. In the days and weeks that followed, reporters camped outside of Baier's home, and provided all of the sordid details concerning the affair and updates on Owens' recovery. Allegations began to surface in the so-called "blogosphere" that Baier had previously been involved with several older, married, and/or prominent men from Old York. None of these allegations were ever corroborated. Baier's family, friends, classmates, and teachers were consistently approached for comment. A number of young men from Baier's high school also came forward and claimed to have been romantically involved with her.

Because the shooting occurred on a federal Naval Base, the United States Attorney for the District of Old York ("U.S. Attorney") assumed jurisdiction, and, pursuant to the Assimilative Crimes Act (18 U.S.C. § 13), charged Baier with various firearm offenses, assault with intent to kill, kidnapping, and attempted murder under Old York law. She has been held without bail since her arraignment.

Baier now moves this court for a change of venue pursuant to Federal Rule of Criminal Procedure 21(a), alleging that the media attention in Old York has contaminated the jury pool and will deny her a fair trial. The Government opposes the motion.

THE GOVERNING LEGAL STANDARD

Both the Sixth Amendment to the United States Constitution and the Federal Rules of Criminal Procedure require that defendants be tried in the district where their crime was “committed.” U.S. Const. amend. VI, Fed. R. Crim. P. 18. See also U.S. Const. art. III, §2, Cl. 3. When a crime consists of a single, non-continuing act, the proper venue is clear: The crime “is ‘committed’ in the district where the act is performed.” *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1188 (2d Cir. 1989).

There is no dispute that the act that gave rise to this case arose within the District of Old York. Indeed, it was in the District, in Baier’s house, that she allegedly shot Owens. Accordingly, the entirety of Baier’s alleged criminal act took place in this District, making this the proper venue for trial.

Federal Rule of Criminal Procedure 21 states in pertinent part:

(a) For Prejudice. Upon the defendant’s motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

Fed. R. Crim. P. 21(a). In substance, Rule 21(a) provides procedural protection against violations of a defendant's Sixth Amendment rights. "The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors." *Murphy v. Florida*, 421 U.S. 794, 799, 95 S. Ct. 2031, 2036, (1975) (citations omitted).

A motion to change venue should be granted only when it is "virtually impossible" or "impossible" for the defendant to secure a fair trial in the venue in which the charges are brought. *Goss v. Nelson*, 439 F.3d 621 (10th Cir. 2006). The United States Supreme Court has examined due process concerns stemming from pretrial publicity in the context where that publicity is so pervasive that we would "presume" prejudice in the community. *Goss*, 439 F.3d at 628. A presumption of prejudice applies when a court finds that the community has been so saturated with inflammatory pre-trial publicity that it pervades the proceedings and overrides notions of fairness in the determination of guilt or innocence. *Murphy*, 421 U.S. at 798-99, 95 S. Ct. at 2035-36; *Rideau v. Louisiana*, 373 U.S. 723, 726-27, 83 S. Ct. 1417, 1419-20 (1963). Prejudice should only be presumed where publicity "created either a circus atmosphere in the court room or a lynch mob mentality such that it would be *impossible* to receive a fair trial." *Goss v. Nelson*, 439 F.3d at 628 (citing *Hale v. Gibson*, 227 F.3d 1298, 1332 (10th Cir. 2000) (*emphasis added*)).

Considerable pre-trial media does not in and of itself dictate a change of venue. *United States v. Cattle King Packing Co.*, 793 F.2d 232 (10th Cir. 1986). This issue turns on the factual question of the extent of the coverage and the proximity to the time of trial. *United States v. Hueftle*, 687 F.2d 1305 (10th Cir. 1982). See *Beck v. Washington*, 369 U.S. 541, 556, 82 S. Ct. 955 (1962) (concluding that a lapse of nine and a half months was sufficient time for the impact of any prejudicial publicity to subside); see also *United States v. Bove*, 360 F.2d 1, 11 (2d Cir. 1966) (holding that since the publicity was twelve weeks old at the time the jury was empanelled, it was highly unlikely that it was retained in the juror's memories). Decisions on such issues are committed to this Court's sound discretion. *United States v. Maldonado-Rivera*, 922 F.2d 934, 967 (2d Cir. 1990).

BAIER'S MOTION TO CHANGE VENUE

To demonstrate prejudice the defendant must “establish that an irrepressibly hostile attitude pervaded the community. . . . Simply showing that all the potential jurors knew about the case and that there was extensive pretrial publicity will not suffice to demonstrate that an irrepressibly hostile attitude pervaded the community.” *Hale*, 227 F.3d at 1332. “The burden that a defendant bears when attempting to establish presumed prejudice is an ‘extremely heavy one.’” *Chandler v. McDonough*, 471 F.3d 1360 (11th Cir. 2006), cert. denied, 550 U.S. 943 (2007) (citing *United*

States v. Campa, 459 F.3d 1121 (11th Cir. 2006), *cert. denied*, 129 S. Ct. 2790 (2009)). Baier argues that the media coverage in the days and weeks following the shooting has contaminated the jury pool in the District to the point that she is unable to secure a fair and impartial jury here. Her argument fails to meet the required, heightened standard.

The majority of the publicity concerning the events of August 2006 ceased around Labor Day – less than a month later. The trial is currently scheduled to begin in August 2007. Given that nearly a year will have elapsed between the major media reports on the events from August 2006 and the jury selection, the jurors will not be so saturated with information that it would render it impossible for them to be fair and impartial. In fact, one would be hard-pressed to find any media coverage today, less than four months after these events took place. Even Owens, a “media-darling” since his rise to prominence in the mid-1990’s, has vanished from the public sphere since he resigned from office.

Second, the media’s primary focus was on the tawdry details of Baier’s relationship with Owens and unsubstantiated insinuations regarding her personal life. Baier does not allege, nor can this Court find, any media pundits within the District that acted as judge, jury, and executioner with respect to the allegations contained within this action. The only comments made concerning the shooting were purely factual, non-judgment

statements. See *Goss*, 439 F.3d. at 621 (holding that a total of 30 media reports that only contained factual, non-inflammatory statements between the time of the crime and the defendant’s preliminary hearing was insufficient to demonstrate the impossibility of a fair trial). Accordingly, the jury pool has not been tainted with any bias that would render a fair trial “impossible.”

Third, since the dawn of the media, criminal cases have always been in its headlines, whether in print, broadcast, or digital form. *Gardner v. Galetka*, 568 F.3d 862, 889 (10th Cir. 2009). With the advent of 24-hour cable-news coverage, the internet, and “blogs,” news is no longer local. Indeed, media coverage of the story that a now former widely-known public official, whose crusade on health care reform won national attention, was shot by his teenage girlfriend was not limited to this District. Citizens from Old York to Kaleeforneeia were exposed to the same coverage from the likes of CNN, MSNBC, and Fox News. Accordingly, if this Court accepts Baier’s argument, it would be impossible for her to obtain a fair trial in any district within this nation. See *United States v. Campa*, 459 F.3d 1121 (11th Cir. 2006), *cert. denied*, 129 S. Ct. 2790 (2009) (“if prejudice could be spread through multiple forms of media, the spread of such prejudice would not stop at district lines. . .”).

CONCLUSION

For the reasons set forth herein, defendant Joanie Baier's Motion for Change of Venue is DENIED.

**UNITED STATES COURT OF APPEALS FOR THE
FOURTEENTH CIRCUIT**

Docket No. 07- 4815162342

United States of America, Appellee

v.

Joanie Baier, Appellant

**BEFORE ADAMA, THRACE, ROSLIN, Circuit
Judges.**

ROSLIN, Circuit Judge.

Joanie Baier was indicted on October 20, 2006 for various crimes, including the kidnapping and attempted murder of Marion Owens, then the Governor of Old York. Before her trial, defendant petitioned the court for a change of venue pursuant to Federal Rule of Criminal Procedure 21(a). The District Court denied this motion. After a two-week trial, the jury needed only twenty-seven minutes to find Baier guilty on all charges. The District Court sentenced Baier to life in prison without the possibility of parole.

Baier now appeals the denial of the change of venue motion and her later conviction and sentence. At the outset, the Court finds that Baier has fallen far short of making any showing that the conviction should be overturned from an evidentiary standpoint. Nonetheless, we vacate Baier's conviction and remand this case for a new trial because: (1) the District Court applied an incorrect standard when denying Baier's motion for a change of venue; and (2) the imposition of a life sentence without possibility of parole on a juvenile offender violates the Eighth Amendment's prohibition on cruel and unusual punishment.

BACKGROUND

The factual background and procedural history of these actions are spelled out in the District Court's opinion and are not in dispute on this appeal. Accordingly, the District Court's recitation of the factual and procedural history of this action is expressly adopted by this Court.

DISCUSSION

This Court is presented with two specific questions on appeal. First, whether the District Court applied the correct standard when deciding Baier's motion for a change of venue. Second, whether the District Court's sentence imposed cruel and unusual punishment prohibited under the Eighth Amendment.

CHANGE OF VENUE

Before trial, Baier moved for a change of venue under Fed. R. Crim. P. 21(a), arguing that the media coverage about the shooting contaminated the jury pool. The District Court denied Baier's motion for a change of venue. Baier renews her challenge here on appeal.

The Supreme Court has held on numerous occasions that a defendant seeking to establish a due process violation must demonstrate either that his trial resulted in identifiable prejudice or that it gave rise to a presumption of prejudice because it "involve[d] such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes v. Texas*, 381 U.S. 532, 542-543, 85 S. Ct. 1628, 1632-1633, (1965). Fairness requires an absence of actual bias in the trial of cases, but our system of law has always endeavored to prevent even the probability of unfairness. *Estes*, 381 U.S. at 543, 85 S. Ct. 1628. The Supreme Court has stated that a defendant's due process is violated when the venue would deprive "that judicial serenity and calm to which he was entitled" (*Estes*, 381 U.S. at 536, 85 S. Ct. 1628). However, the Supreme Court has never invoked these basic principles to determine whether a particular state or district court standard for change of venue complies with the requirements of due process (see *Brecheen v. Oklahoma*, 485 U.S. 909, 910, 108 S. Ct. 1085, 1086 (1988) (Marshall, J. dissenting)). Thus, the states and district courts disagree as to which standard should be applied to

motions seeking a change of venue. Some courts have held that it must be “virtually impossible” or “impossible” for a defendant to secure a fair trial in the jurisdiction, while other courts have ruled that the defendant need only show that it is “reasonably likely” that she will not receive a fair trial in the community.

The Supreme Court has long stressed the importance of fairness for defendants at trial. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507 (1966); *Estes v. Texas*, 381 U.S. 532, 85 S. Ct. 1628, 1632-1633 (1965). A lower bar for a change of venue was recommended by the Supreme Court in *Sheppard* where the Supreme Court stated “in order to prevail on a motion under Rule 21(a), the defendant must show ‘a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial.’” *Sheppard*, 384 U.S. at 363, 86 S. Ct. at 1522, *United States v. Maldonado-Rivera*, 922 F.2d 934 (2d Cir. 1990). A trial court has the responsibility to protect its processes from outside prejudices. *Sheppard*, 384 U.S. at 363, 86 S. Ct. at 358. In order to preserve the right to due process, the accused must receive a trial by an impartial jury free from other influences. *Id.* It is essential that a court has flexibility to use its best judgment to grant a change of venue when there is a “reasonable likelihood” that such outside influences will prejudice a trial.

When deciding Baier’s motion for a change of venue, the District Court considered whether it was “virtually impossible” or “impossible” for her to receive a

fair trial within the District. This is a much stricter standard than we believe is required by the Supreme Court's due process precedent. Further, most states "have followed the well-trod course of granting motions for venue change when the totality of the circumstances establish a reasonable likelihood that in the absence of such relief, a fair trial cannot be had." *Brecheen*, 485 U.S. at 911, 108 S. Ct. at 1086 (Marshall, J. dissenting); *Martinez v. Superior Court*, 29 Cal.3d 574, 577, 629 P.2d 502 (1981) (holding that "[a] motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had"); *People v. Gendron*, 41 Ill. 2d 351, 354, 243 N.E. 2d 208 (1968) (stating the rule that "an accused is entitled to a change of venue when it appears there are reasonable grounds to believe that the prejudice alleged actually exists and that by reason of the prejudice there is a reasonable apprehension that the accused cannot receive a fair and impartial trial"); *State v. Cuevas*, 288 N.W. 2d 525, 527 (Iowa 1980) (weighing whether "a reasonable likelihood existed that a fair trial would not be had because of the media dissemination of pretrial publicity"); *McBride v. State*, 477 A.2d 174, 185 (Del. 1984) (interpreting Rule 21(a) as meriting a change of venue upon a showing that there exists a "reasonable probability" or "reasonable likelihood" of prejudice against a petitioner); *Brown v. State*, 871 P.2d 56, 62 (Okl. Cr. 1994) (rejecting more than fifteen years of precedent applying a "virtual

impossibility” test and replacing it with an examination of whether a fair and impartial trial would be “improbable”). As the California Supreme Court explained in *Martinez*, the “reasonable likelihood” of prejudice standard requires only that the defendant prove that it is “more probable than not” that she will not receive a fair trial. *Martinez*, 29 Cal.3d. at 578.

It would be an unfair imposition on defendants in a criminal trial to show that it would be “impossible” for a fair trial to occur within the district. Defendant Baier should have had an opportunity to argue her motion for a change of venue against this lower standard endorsed by the federal and state high courts. This Court remands the motion for a change of venue to the District Court and orders a reexamination of the issue of whether there is a reasonable likelihood that prejudicial news reports within the district will prevent a fair trial.

THE EIGHTH AMENDMENT

The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The provision is applicable to the States through the Fourteenth Amendment. *Furman v. Georgia*, 408 U.S. 238, 239, 92 S. Ct. 2726 (1972) vacated in part by *Mathews v. Texas*, 408 U.S. 940 (1972) (*per curiam*). Baier argues that her sentence is grossly disproportionate to her crime and is unconstitutionally “cruel and unusual.” Alternatively, Baier argues that the sentence of life

without the possibility of parole in this instance is “cruel and unusual” because she committed the crime as a juvenile.¹

The Cruel and Unusual Punishment Clause of the Eighth Amendment encompasses a “narrow proportionality principle” that “applies to noncapital sentences.” *Harmelin v. Michigan*, 501 U.S. 957, 996-97, 111 S. Ct. 2680, (1991). Though *Harmelin* offered no majority opinion, the Supreme Court followed the reasoning found in Justice Kennedy’s opinion in the later Eighth Amendment case *Ewing v. California*. See *Ewing v. California*, 538 U.S. 11, 20, 123 S. Ct. 1179 (2003). Thus when construing Baier’s argument that the imposition of a life-sentence without possibility of parole in this instance would be unconstitutional, we may limit our examination to a comparison between (a) the gravity of the crime and (b) the severity of the sentence. *Harmelin*, 501 U.S. at 1002. The Eighth Amendment does not require strict proportionality between crime and sentence, but rather forbids only extreme sentences that are grossly disproportionate to the crime. *Harmelin*, 501 U.S. at 1002.

¹ Although Baier challenges the constitutionality of a life sentence without the possibility of parole in this instance, she does not challenge the U.S. Attorney’s ability to prosecute Baier under Old York law pursuant to the Assimilative Crimes Act. Accordingly, the appropriateness of Baier’s sentence under Old York law is not before the Panel on this appeal.

This Court follows Justice Kennedy's opinion in *Harmelin* to examine the nature of Baier's crime with the sentence for an inference of gross disproportionately. Crimes of extreme premeditated violence are punished severely under our justice system. Congress has mandated harsh penalties of extended incarceration against those who commit violent acts. The crime of attempted murder is, in a sense, the second most severe criminal offense; likewise, a life sentence without hope of parole is the second most severe punishment that a state can inflict. *Harmelin*, 111 S. Ct. at 2705.

Baier's crime was in fact violent, as it involved a firearm purchased in advance for the sole purpose of killing the victim. The Supreme Court and the Federal Circuit Courts have upheld life sentences for violent acts of attempted murder, and also lesser non-violent offenses including weapons and drug crimes under recidivism statutes. See e.g. *Rummel v. Estelle*, 445 U.S. 265, 100 S. Ct. 1133 (1980); *Ewing v. California*, 538 U.S. 11, 123 S. Ct. 1179 (2003); *U.S. v. Washington*, 118 Fed Appx. 885 (5th Cir. 2005); *McGruder v. Puckett*, 954 F.2d 313 (5th Cir. 1992); *U.S. v. Marks*, 209 F.3d 577 (6th Cir. 2000); *U.S. v. Arrington*, 159 F.3d 1069 (7th Cir. 1998); *U.S. v. Farmer*, 73 F.3d 836 (8th Cir. 1996). Accordingly, we are unconvinced that the imposition of a life sentence without the possibility of parole in this instance would be grossly disproportionate to Baier's criminal act. The gravity of the offenses upon which the sentence is based appears to be proportionate.

We next turn to Baier’s argument that a life sentence without possibility of parole violates the Eighth Amendment when it is applied to juvenile offenders. In *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), the Supreme Court recognized that juvenile offenders differ from adult offenders. The Court made clear that juveniles under the age of 18 differ from adults because they: (1) have “a lack of maturity and an underdeveloped sense of responsibility” that can result “in impetuous and ill-considered actions and decisions;” (2) “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;” and (3) their personalities are not as well formed as that of an adult. *Roper*, 543 U.S. at 569; 125 S. Ct. at 1195. Accordingly, the Supreme Court determined that juveniles are less culpable for their crimes than adults, and because of these mitigating factors, juveniles should not be subjected to the death penalty. *Id.*

We deem it appropriate to use the *Roper* analysis when examining the propriety of life sentences without possibility of parole for juveniles convicted of non-homicide crimes. Unlike adults, juveniles often lack control over their surroundings and are less able to escape the negative influences of their surroundings. *Roper*, 543 U.S. at 553, 125 S. Ct. 1183. If we accept that juvenile offenders are less culpable than adults and that their personalities are not yet fixed, as the Supreme Court reasoned in *Roper*, “it is likely cruel, and certainly unusual, to impose on a child a punishment that takes

as its predicate the existence of a fully rational, choosing agent.” *Thompson v. Oklahoma*, 487 U.S. 815, 825, 108 S. Ct. 2693, n.23 (1988) (plurality op.).

The personalities of juveniles are still developing; thus they can be reformed. Justice Stevens’ dissenting opinion in *Harmelin* noted that a life sentence:

does share one important characteristic of a death sentence: The offender will never regain his freedom . . . the sentence must rest on a rational determination that the punished ‘criminal conduct is so atrocious that society’s interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator.’ The offender will never regain his freedom ... such a sentence does not even purport to serve a rehabilitative function.

Harmelin, 501 U.S. 957, 1028 (Stevens, J. dissenting). By their nature, youths will mature, and the impetuosity and recklessness that so dominate their younger years may subside. *Roper*, 543 U.S. at 570, 125 S. Ct. at 1195. To impose a life sentence without the possibility of parole on juvenile offenders, we must abandon all expectation that those offenders will ever mature and become more responsible and we must give up on the chance that they could reform as they reach adulthood. This is not a conclusion that we are prepared to reach.

In deciding that the imposition of a life sentence without possibility of parole on a juvenile offender violates the Eighth Amendment, we consider whether there is a national consensus on the matter. In *Atkins* and *Roper*, the Supreme Court noted that our nation's standards of decency had evolved and held that the execution of the mentally handicapped and juveniles, respectively, constituted cruel and unusual punishment. *Atkins, v. Virginia*, 536 U.S. 304, 314, 122 S. Ct. 2242 (2002); *Roper*, 543 U.S. at 552, 125 S. Ct. at 1183. At the time *Atkins* was decided by the Supreme Court, thirty states had already enacted laws prohibiting the execution of the mentally retarded and in states without such a law executions were uncommon. *Atkins*, 536 U.S. at 315-17, 122 S. Ct. 2242. Similarly, when *Roper* was before the Court in 2002, thirty states prohibited the juvenile death penalty, and in twenty states without formal prohibitions juveniles were rarely executed. *Roper*, 543 U.S. at 564, 125 S. Ct. at 1183.

Life sentences for juvenile offenders also appear to be extremely rare. A 2009 study from The Sentencing Project found only 6,807 juveniles serving life sentences, 1,755 without the possibility of parole. *Ashley Nellis and Ryan S. King, No Exit: The Expanding Use of Life Sentences in America* at 15, (2009). More than fifty percent of those juveniles are in only five states—California, Texas, Pennsylvania, Florida and Nevada (*id.* at 16)—and juveniles make up fewer than five percent of the life sentence population in all but sixteen states. *Id.* at 18.

In examining the petition of the applicant, we are of the opinion that life imprisonment without the benefit of parole for a seventeen-year-old offender, under all the circumstances, is intolerable to our sense of fundamental fairness. Therefore, the portion of the order imposed by the District Court imposing a life sentence without the possibility of parole, is reversed and remanded for further proceedings consistent with this decision.

THRACE, Circuit Judge, dissenting:

Despite the highest esteem with which I hold my fellow Judges, I must respectfully dissent with regard to both of the questions presented to this Court.

Change of Venue

A superficial reading of the plain language of Federal Rules of Criminal Procedure 21 convinces me that the proper standard to apply in considering a request to change venue is that enunciated by the District Court, and that discretion to grant or deny such a request should remain in the sound judgment of the District Judge. Rule 21(a) provides that “[u]pon the defendant’s motion, the court must transfer the proceeding . . . to another district if the court is satisfied that *so great a prejudice against the defendant exists* in the transferring district that the defendant cannot obtain a fair and impartial trial there.” (*emphasis added*) To me, the inclusion of the words “so great” favor the application of the so-called “virtually impossible”

standard applied by the lower court in this case, and as already adopted by our sister Circuit Courts of the Tenth and Eleventh Circuits. See *Goss v. Nelson*, 439 F.3d 621 (10th Cir. 2006); *United States v. Campa*, 459 F.3d 1121 (11th Cir. 2006), *cert. denied*, 129 S. Ct. 2790 (2009). And as a pragmatic matter, the adoption by this Court of the lower “reasonable likelihood” standard will open the floodgates to a mass of litigation on this purely procedural aspect of criminal trials, thus delaying the true pursuit of criminal justice through prompt and speedy trials.

A review of the Supreme Court’s rare findings of “presumed prejudice” against a defendant to overturn a conviction reveal that this case is clearly distinguishable. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507 (1966); *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639 (1961); *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417 (1963). Each of those cases included an aggravating or clearly prejudicial factor which simply does not exist in the case of Ms. Baier: there is no evidence here of prior convictions of the defendant, of which there are none, or that any of the jurors formed an opinion as to guilt before the trial began (*Irvin*); that the defendant’s confession was illegally obtained by law enforcement and later broadcast through the media, or that the District Judge allowed a “kangaroo court” (*Rideau*); or that the District Judge in this matter failed to implement curative measures with the jury or allowed a “carnival atmosphere” to pervade (*Sheppard*). Simply stated,

these cases—despite coming down from the highest Court in the republic—are distinguishable and are not entitled to probative weight.

In the case at bar, the defendant requested a change of venue because she believed that there was a presumption of prejudice against her due to the pre-trial publicity of the facts surrounding the criminal allegations in question. “[T]o establish a presumption of juror prejudice necessitating Rule 21 change of venue, a defendant must demonstrate that (1) widespread, pervasive prejudice and prejudicial pretrial publicity saturates the community, and (2) there is a reasonable certainty that the prejudice prevents the defendant from obtaining a fair trial.” *Campa*, 459 F.3d at 1150. In reviewing the District Court’s application of this standard, we must do so only to determine whether the District Court abused its discretion. Trial courts are “necessarily the first and best judge of community sentiment and the indifference of the prospective juror.” *Bishop v. Wainwright*, 511 F.2d 664 (5th Cir. 1975). Therefore, a review of the record and the District Court’s opinion, in application with a deferential standard of review, would lead me to uphold the District Judge’s denial of defendant’s request to change venue.

In view of the foregoing, I must respectfully dissent from the majority on this issue.

The Eighth Amendment and the Sentence Imposed

As a threshold matter, I agree with my fellow Judges that it is well-established law that a life sentence without possibility of parole for the act of attempted murder is constitutional. *Rummell v. Estelle*, 445 U.S. 265, 100 S. Ct. 1133 (1980). However, I must vehemently disagree with this Court's extension of the Supreme Court's findings in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), a case concerning the death penalty, to the case at bar, which only implicates a life sentence without parole.

As an initial matter, this Court ignores entirely the threshold inquiry in determining whether a particular punishment complies with the Eighth Amendment: whether it is one of the "modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Roper*, 543 U.S. at 609, 125 S. Ct. at 1218, n. 1 (Scalia, J., dissenting) (citing *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595 (1986)). And where it has been established that capital punishment of minors was not prohibited at the time the Bill of Rights were adopted, it follows logically that the sentence of life without parole for a minor was not barred as well. *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969 (1989) aff'd, *Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998).

Second, although I am obligated to follow the holding of *Roper* that the sentence of death against a minor violates the Eighth Amendment of the Constitution, I am under no similar obligation to extend that holding to a non-capital punishment. In fact, my sense of duty and justice dictates that I must not. Both the *Roper* Court and the majority herein rely upon an alleged “national consensus.” While I will concede that a true national consensus could weigh on the determinations of this and the Supreme Court, our determination in this matter should only “be based on objective indicia that reflect the public attitude toward a given sanction – namely – statutes passed by society’s elected representatives.” *Roper*, 543 U.S. at 609, 125 S. Ct. at 1218 (Scalia, J., dissenting) (internal quotations and citations omitted). Here, the majority has set forth no such indicia, and I suspect that any attempt to have done so would have revealed a lack of an “overwhelming opposition to [the] challenged practice, generally over a long period of time,” which the Supreme Court has required in prior cases considering an alleged national consensus. *Id.*; see, e.g., *Coker v. Georgia*, 433 U.S. 584, 593, 97 S. Ct. 2861, 2866 (1977) (observing that “[a]t no time in the last 50 years ha[d] a majority of States authorized death as a punishment for rape”); *Ford v. Wainwright*, 477 U.S. 399, 408 (1986) (holding execution of the insane unconstitutional, tracing the roots of this prohibition to the common law, and noting that “no State in the union permits the execution of the insane.”); *Enmund v. Florida*, 458 U.S. 782, 792, 102 S. Ct. 3368, 3374

(1982) (invalidating capital punishment imposed for participation in a robbery in which an accomplice committed murder, because 78% of all death penalty States prohibited this punishment).

In sum, in subscribing to the concerns of Justices Scalia and Thomas, and the departed Chief Justice Rehnquist, I respectfully dissent from the majority's inexplicable ruling on this issue, and close with the prophetic portent from their dissent in *Roper*:

We must treat these decisions just as though they represented *real* law, *real* prescriptions democratically adopted by the American people, as conclusively (rather than sequentially) construed by this Court. Allowing lower courts to reinterpret the Eighth Amendment whenever they decide enough time has passed for a new snapshot leaves this Court's decisions without any force--especially since the "evolution" of our Eighth Amendment is no longer determined by objective criteria. To allow lower courts to behave as we do, "updating" the Eighth Amendment as needed, destroys stability and makes our case law an unreliable basis for the designing of laws by citizens and their representatives, and for action by public officials. The result will be to crown arbitrariness with chaos.

Roper, 543 U.S. at 629-30 (Scalia, J., dissenting)
(*emphasis in original*).

For these reasons, I would affirm.

**Sixtieth Annual
National Moot Court Competition**

SUPREME COURT OF THE UNITED STATES

October Term 2009

Docket No. 2009-372

United States of America,

Petitioner,

v.

Joanie Baier,

Respondent.

Petition for certiorari is granted. The Court certifies the following questions:

1. What standard should the court apply when deciding a motion to change venue in which the defendant argues that she cannot receive a fair trial in the current forum? and
2. Does the imposition of a life sentence without the possibility of parole on a juvenile offender convicted of a non-homicide crime violate the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution?

**SIXTIETH ANNUAL
NATIONAL MOOT COURT COMPETITION**

COMPETITION RULES

2009 – 2010

Background

The New York City Bar’s National Moot Court Competition is an annual inter-law school event designed to promote the art of appellate advocacy. It is sponsored by the New York City Bar’s Young Lawyers Committee (“Committee”) and the American College of Trial Lawyers.

The Competition consists of Regional and National Final rounds. The United States is divided into 14 regions. Within each region, a Committee-designated regional sponsor grades briefs and conducts oral arguments for the law school teams located in that region. The winner and second place team in each region may enter the National Finals in New York City.

These Rules govern the Competition. And the Committee is the final authority on interpreting these Rules. Those interpretations and any decisions on how to administer this Competition are binding on all competitors. Although regional sponsors may supplement these rules with local procedures, those procedures must be approved annually by the Committee and be consistent with these Rules. All Rule interpretation requests should be sent to Stephen H. Broer, Chair of the Committee on Young Lawyers at ylc@nycbar.org.

Finally, the Committee holds the copyrights to all Competition materials. By entering this Competition, all agree to get the Committee's express written permission before using these materials for any purpose unrelated to actually competing in this event. Competitors also grant the Committee nonexclusive worldwide rights to reproduce and distribute any materials submitted or recorded throughout the Competition.

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Rule 1 – Competition’s Mission

The purpose of this Competition is to benefit our profession by helping law students develop the art of appellate advocacy. It is about promoting a sense of integrity, advocacy, and esteem in our noble profession. Accordingly, everyone is expected to follow the letter – as well as the spirit – of these Rules, and maintain the highest levels of professionalism throughout the Competition.

Rule 2 – Teams

- 2.1 **Teams Generally.** The Committee (or Regional Sponsor) determines how many teams may enter each regional round. Each team may consist of no more than 3 full-time or part-time (day or evening) law students. Competitors graduating after the regional rounds may still participate in the National Finals.
- 2.2 **Team Substitution.** Teams may not substitute competitors after certification and service of the briefs, except with the Committee’s written consent. The Committee will not grant competitor substitution requests **after** oral argument in the regional rounds begins. The only exception is when number of competitors falls below two.

- 2.3 **Team Selection.** Law schools may not use this year's Problem to select that law school's competitors for the Annual National Moot Court Competition. But law schools may use old copies of our materials by first obtaining the Committee's express written consent.
- 2.4 **Team Numbers.** The Committee (or Regional Sponsor) will assign each team a unique number (in the range of one to thirty) no later than October 2, 2009. This Team Number will be used to identify teams through the regional rounds. Teams advancing to the National Finals will be assigned new numbers by the Committee prior to December 23, 2009.

Rule 3 – Briefs

- 3.1 **General.** A team may submit a brief on behalf of either petitioner or respondent. Teams from the same law school must brief opposite sides of the issues. Teams entering the National Finals must use the same brief submitted for the regional rounds.
- 3.2 **Format.** Brief format generally follows the one used by the United States Supreme Court, unless otherwise directed by these Rules. No formal statement of jurisdiction is needed. Briefs must use citations as prescribed by the current edition of Harvard Law Review Association, *A Uniform System of Citation*.

All briefs must:

- 3.2.1 Be printed on 8½ x11 inch paper.
- 3.2.2 Use 12-point Arial font for all brief contents, including footnotes.
- 3.2.3 Have at least one-inch margins on all sides, and text not to exceed 6½ by 9½ inches. Page numbers, however, may be put outside these parameters.
- 3.2.4 With the exception of the table of contents, questions presented, table of authorities, appendix, footnotes and argument headings, the entire content of the brief must be double-spaced, with no more than 28 lines of double-spaced text per page.
- 3.2.5 Be firmly bound at left margin (e.g., spiral, stapled, perfect binding).
- 3.2.6 Be 35 pages or less in length. Any partially-filled page will count as a full page. This limit does not include the questions presented, table of contents, table of authorities, or appendix. Appendices may only be used to recite relevant statutory text (e.g., constitutional provisions, regulations) and material not generally available. In computing the overall length of the brief,

each inch of single-spaced text will count as two inches of text.

- 3.3 **Copies.** All brief copies submitted must be identical. Briefs may be copied using any process producing a clear black image on white paper. Briefs may be duplicated on one or both sides of a page. The copying process, however, may not reduce the character size.
- 3.4 **Identification.** Competitor and law school names only appear once: in the lower right corner of the brief's cover. Briefs must **not** be signed or in any other way identify a team or its members.
- 3.5 **Certification.** Competitors must certify that they prepared their brief in accordance with these Rules, and that it represents the work product solely of those Competitors. The certification must accompany the brief, but not bound or otherwise inserted to violate Rule 3.4. The certification states:

We certify that [insert name of law school]'s brief is solely our work product, and that we have not received any assistance in writing it.

Tom Sawyer

Huckleberry Finn

- 3.7 **No Revisions.** Once a team submits its brief, it may not revise it.
- 3.8 **Regional Brief Grading.** Regional Sponsors blind grade all properly submitted briefs, and select the “best” overall brief in that region. Regional sponsors remove identifying information before submitting briefs for scoring, and assess appropriate penalties.
- 3.9 **National Finals Brief Grading.** The Committee blind-grades all properly submitted briefs, and selects the “best” brief in the Competition. The Committee removes identifying information before submitting briefs for scoring, and assesses appropriate penalties.

Rule 4 – Service and Certifications

- 4.1 **Service on the Regional Sponsor.** Teams must serve briefs on the Regional Sponsor by 11:59 p.m. (local time, based on the location of the team’s school) on October 16, 2009. Number of brief copies (hard or electronic) should comply with the Regional Sponsor’s specific instructions. If the Regional Sponsor does not have specific instructions, teams must serve 10 hard copies of its brief consistent with Rule 4.4 below.

4.2 Service on Committee.

4.2.1 **Regional Rounds.** All teams must serve the Committee with one electronic copy of their brief (with Rule 3.5 certificate) by 11:59 p.m. (local time, based on the location of the team's school) on **October 16, 2009.**

4.2.2 **Electronic Copy Described.** Send electronic briefs to the Committee at: ylcbrief@nycbar.org. Use only PDF format. E-mail subject line must state: “[Your School Name and Team Number] Brief.” E-mail body must only contain your school name, competitor names, and team representative's complete contact information. Attach brief only as a single document.

4.2.3 **National Finals.** By **December 23, 2009**, teams competing in the national final rounds must serve the Committee with 10 hard copies (with Rule 3.5 certificate) to:

Young Lawyers Committee
Attn.: National Moot Court Competition
New York City Bar
42 West 44th Street
New York, New York 10036-6689

4.3 **Service on Opposing Teams.** Teams may serve opposing teams electronically using PDF format. Teams must serve opposing teams with hard copies of the brief:

4.3.1 **Regional Rounds.** Unless regional sponsors have other specific instructions, teams will serve 1 copy of their brief on each team competing in that region by **October 16, 2009.**

4.3.2 **National Finals.** Teams competing in the national final rounds must serve one copy of their brief on all other National Finals teams by **December 23, 2009.**

4.4 **Method and Timing of Service.**

4.4.1 **Hard-Copy (Paper) Briefs.** Service of hard-copy briefs under these Rules occurs by depositing materials by the deadline in the U.S. mail first-class postage prepaid. The postmark date operates as the official date of mailing for briefs served by U.S. mail. Service may also occur by an overnight delivery service with delivery charges paid by the sender. Materials must be sent to the proper Regional Sponsor (or Committee), and any authorized representative of opposing teams. Coaches act as official team

representatives, unless specifically stated otherwise.

- 4.4.2 **Electronic-Copy Briefs.** Service of electronic briefs under these Rules occurs by timely emailing materials in a manner consistent with Rule 4.2.2 and in accordance with any specific instructions provided by the Committee and/or Regional Sponsor. Service is complete when materials are received.

Rule 5 – Proof of Service

Teams entering the National Finals must serve on the Committee a Certificate of Compliance by **December 30, 2009**. The Certificate of Compliance must be sent under separate cover from briefs. The form of the Certificate will state:

I certify that on [Insert Date], my team caused 1 copy of our brief to be served in accordance with Rule 4 of the New York City Bar's National Moot Court Competition. My team served the following schools:

York University School of Law
42 West 44th Street
New York, NY 10036

Horatio Hornblower

Rule 6 – Law Clerks

- 6.1 **General.** Each team (or law school) is responsible for supplying its own law clerk for oral argument. As a courtesy, however, Regional Sponsors may elect to provide law clerks. During argument, law clerks track time and visibly display time cards showing remaining time to judges and competitors.
- 6.2 **Eligibility.** Anyone may serve as law clerk, except a competitor arguing in that round.
- 6.3 **Duties.** Law clerks are responsible for ensuring arguments proceed consistent with these rules. Specifically:
- 6.3.1 Petitioner’s clerk escorts judges to the courtroom.
 - 6.3.2 Petitioner’s clerk calls the Court to order with the Supreme Court’s traditional “call for silence.”
 - 6.3.3 Petitioner’s clerk tracks petitioner’s time.
 - 6.3.4 Respondent’s clerk tracks respondent’s time.
 - 6.3.5 Respondent’s clerk instructs everyone (including clerks) to exit while judges deliberate.

6.3.6 After the panel of judges has deliberated, the panel will provide the clerks with the scores it assigned to each team. Then, **both** clerks deliver the score to Competition officials to calculate the total score. That round's clerks may enter the official Competition grading room while that round's score is tabulated.

6.3.7 After Competition officials determine the winner, clerks carry scoring results to judges. Judges then announce the winner.

Rule 7 – Regional and National Final Rounds

- 7.1 **Number of Participants.** Two competitors represent each team in every argument.
- 7.2 **Time Allowed for Argument.** Each team receives up to **30** minutes for oral argument. Judges may grant additional time. Petitioner may reserve up to 5 minutes in advance for rebuttal. Only one competitor may argue rebuttal.
- 7.3. **Scoring.** A panel of judges determines oral argument scores for each team. Scores must be in the range of 1-100. Judges are **never** informed of the team's brief grade before oral argument. Overall score is computed by weighing the oral argument score 60 percent and the brief 40 percent (*Oral Argument* x .60 + *Brief Score* x .40

= *Final Score*). Scores are computed to the nearest hundredth decimal (e.g., 92.75).

7.4 **Ties.** Occasionally, a draw (or tie) may occur after computing scores. In those instances, the criteria used to determine the winner depend on the circumstances.

7.4.1 **Argument Ties.** If a tie results *after* combining the oral argument and brief scores, then the team with the higher oral argument score prevails.

7.4.2 **Ranking Ties.** If 2 teams are equally ranked because both have the same win-loss record, then the tie is broken in favor of the team with the higher aggregate point differential. If those teams have identical win-loss record *and* aggregate point differentials, then the tie is broken in favor of the team with the higher brief score.

7.4.3 **Miscellaneous.** If an unanticipated draw scenario results, the Regional Sponsor (or Committee during the National Finals) will be the final authority on how to determine the winner.

7.5 **Recordkeeping.** Regional Sponsors maintain records of the oral and brief scores throughout each round of the competition.

- 7.6 **Judicial Conflicts.** Conflicts arise when judges teach or coach at a particular law school. If a conflict occurs, judge is reassigned, unless judge and members of both teams unanimously agree to waive the conflict.

Rule 8 – Regional Rounds

The goal of the Regional Rounds is to determine the first and second place team from each region. Eligible teams then advance to the National Finals in New York City. Only a total of 28 teams may compete in the National Finals.

- 8.1 **Time and Place.** Regional Sponsors determine time and place for each argument. Teams receive at least 30 days advanced notice of the oral argument's time and place. All regional rounds must end by December 7, 2009.

- 8.2 **Team Pairings.** Regional sponsors must notify teams of pairings for the two preliminary rounds at the same time as the Rule 8.1 notice.

- 8.2.1 **Preliminary Rounds.** Pairings for two preliminary rounds are randomly scheduled. In making that schedule, no team argues the same side of the case during the two preliminary rounds. (In regions allowing two teams from each school, no two teams from the same school may argue against each other.)

8.2.2 Semi-Final Rounds. Semi-final argument pairing is determined by seeding. This means that the top seeded team argues against the last place team, the second place team argues against the second-to-last team. (See Rule 8.7).

8.3 Byes. A bye round may be necessary if an odd number of teams compete in a regional competition. In that case, the Regional Sponsor may randomly select two teams to receive “byes” in each of the two preliminary rounds. These teams will then be paired against each other and will argue at a time decided by the Regional Sponsor.

8.4 Preliminary Rounds. Teams argue at least twice before being eliminated (preliminary rounds). All teams still undefeated after the preliminary rounds advance to either the Semi-Final or “tie-breaker” rounds. If four or fewer teams are undefeated after the preliminary rounds, those undefeated teams advance to the Semi-Final round. If fewer than four teams are undefeated, the necessary number of teams with the next highest win-loss record, ranked in order of highest point differential, also advance. The goal is to narrow the group of teams to four for the Semi-Final round.

- 8.5 **Tie-Breaker Rounds.** “Tie-breaker” rounds occur only if more than four teams remain undefeated after the preliminary rounds. In that case, a “tie-breaker” round is held among all undefeated teams, and any additional teams necessary to evenly complete the bracket. For example, if there are five undefeated teams remaining after the preliminary rounds, then six teams must compete at the tie-breaker. In that case, the sixth team is the next highest seeded team (see Rule 8.7). After this round, all teams still undefeated advance to the Semi-Final round – along with the necessary number of extra teams with the highest point differential. Again, the goal of the “tie-breaker” round is to narrow the group of teams to four for the Semi-Final round.
- 8.6 **Final Round.** The two prevailing teams of the Semi-Final round advance to the Final Round. The winner here wins the Regional Competition.
- 8.7 **Seeding Explained.** Once the two preliminary rounds end, teams are paired by seeding. Seeding is established according to a team’s win-loss record during the two preliminary rounds. If any teams have the same win-loss record, the team with the highest point differential ranks higher. (See also Rule 7.4).

- 8.8 **Aggregate Point Differential.** Aggregate point differential plays a key role in determining who advances to the Semi-Final and Final rounds. For example, if *Team A* defeated its first round opponent by an aggregate differential of five points (e.g., *Team A* had a brief score of 90 (worth 40% of the round) and an oral argument score of 90 (worth 60% of the round) whereas its opponent, *Team B*, had a brief score of 85 and an oral argument score of 85), and lost its second round by two points (e.g., *Team A* had a brief score of 90 and an oral argument score of 90 whereas its opponent, *Team C*, had a brief score of 92 and an oral argument score of 92), its aggregate point difference for the two rounds is +3 (i.e., the net of the +5 point difference in its first round and the -2 point difference in its second round). Ties in win-loss record are broken in favor of the team with the highest aggregate point difference.
- 8.9 **Coin Toss.** Following the preliminary rounds, Competition officials assign case side by a coin toss. The toss will be called by the higher-seeded team before the coin is flipped. The winner of the coin toss may choose the side it will represent in the next argument.

- 8.10 **Objections.** Regional Sponsors must include in their Rule 8.1 notice other procedures to be used in that contest. Any objections must be promptly forwarded to the Regional Sponsor and the Committee within 10 days after Rule 8.1 notice is sent.
- 8.11 **Committee Notice.** Regional Sponsors must notify the Committee of prevailing teams and competitors eligible to enter the National Finals within 7 days after the end of the regional rounds.
- 8.12 **Local Rules.** Regional Sponsors may modify Rule 8 procedures for conducting regional rounds (e.g., adding a quarter-final round before advancing to the semi-finals) with the Committee's express written consent. To do so, however, Regional Sponsors must seek Committee approval annually by submitting proposed revisions (i.e., local rules) in writing at least 60 days before oral arguments begin. Local rules must always use a plain-English format and, if approved by the Committee, be made available to competitors 30 days before arguments begin (See Rule 8.1).

Rule 9 – National Final Rounds

- 9.1 **General.** The National Finals are at the New York City Bar in late January or early February. Once the Committee knows all the teams entering the National Final rounds, it will announce program details.
- 9.2. **Eligibility.** The first and second place teams from each region are eligible to enter the National Finals. But only one team from each school may compete. So if both the first and second place team are from the same school, then the third place regional team will replace the second place team as eligible to enter the National Finals.
- 9.3 **Teams Pairings.** The Committee randomly schedules the two preliminary rounds.
- 9.3.1 **Preliminary Rounds.** In making the schedule, no team argues the same side of the case during the two preliminary rounds. Also, no team from the same region may be paired against each other.

9.3.2 Top 16 Teams. After every team argues twice, the field will be narrowed to 16 teams. All teams undefeated after preliminary rounds advance to the Octo-Finals. The necessary number of teams will be added to the field based upon highest aggregate point differentials. Pairing for this “Octo-Final” Round is determined by seeding. The top seeded team argues against the 16th-seeded team, the 2nd-seeded team argues against the 15th-seeded team, and so on, with the goal that if the two highest seeds continue to advance, they will argue against each other during the final argument of the National Finals. Teams that argued against each other in the preliminary rounds may be paired against one another in later rounds.

9.4 Seeding Explained. Again, seeding is based on a team’s win-loss record during the preliminary rounds. If any teams have the same win-loss record, the team with the highest aggregate point differential ranks higher. If any teams have identical win-loss records and point differentials, brief score determines ranking. Teams will not be re-seeded after the “Octo-Final” Round. Instead, all subsequent pairings follow an elimination ladder.

- 9.5 **Argument Procedures.** After preliminary rounds end, arguments proceed on a winner-advances basis.
- 9.6 **Coin Toss.** During these elimination rounds, a coin toss determines the side competitors will represent. (Coin toss process is fully described in Rule 8.9.)
- 9.7 **Objections.** Any objections must be promptly forwarded to the Committee within ten days after the Rule 9.1 notice is sent.

Rule 10 – Assistance

- 10.1 **Briefs.** Teams may not receive any help in writing briefs. Teams within the same school may not share or compare work product. Teams may, however, generally discuss case issues with other students, and use any widely available research tools.
- 10.2 **Preparing For Oral Argument.** Once a brief is filed, competitors may participate in practice arguments. There is no limit to the number of practice arguments, except that schools entering two teams may hold no more than three practice arguments between those two teams.

- 10.3 **Counsel's Table.** Up to three competitors may sit at counsel's table. Once a round begins, competitors sitting at counsel's table may not communicate with non-competitors.

Rule 11 – No Scouting

Scouting rival teams is strictly prohibited. No competitor or coach still participating may attend oral arguments of rival teams or otherwise obtain information about other competitors. Regional Sponsors may waive this prohibition, however, to accommodate administrative concerns.

Rule 12 – Penalties

- 12.1 The Committee or Regional Sponsors may impose **any** penalty deemed reasonable and appropriate for failure to comply with these Rules.
- 12.2 All briefs within a single region will receive uniform penalties for each type of violation. Penalties may be levied in whole or fractional points.
- 12.3 Regional Sponsors keep records of any penalty imposed under these Rules for at least 6 months. The Committee may obtain copies of those records.

ACKNOWLEDGEMENTS

- Special thanks to the Committee members who selflessly contributed to creating this Record:

Stephen H. Broer, The Guardian Life Insurance Company
of America

Henninger S. Bullock, Mayer Brown LLP

Elizabeth Herman, LL.M candidate, New York
University School of Law

Argi O'Leary, Patterson Belknap Webb & Tyler LLP

Basil C. Sitaras, New York City Law Department

Laura Neish, Zuckerman Spaeder LLP

Angela R. Vicari, Kaye Scholer LLP

Daniel Wiig, Mintz & Gold LLP

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