MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT MOTHER

Phyllis Emerick
Christopher Erickson
Monroe County Public Defender
Bloomington, Indiana

ATTORNEYS FOR APPELLANT FATHER

Patrick M. Schrems
Quinton M. White
Monroe County Public Defender
Bloomington, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Robert J. Henke
Assistant Section Chief, Civil Appeals
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Termination of the Parent-Child Relationship of:

N.K., Me.K., and Mi.K. (Minor Children), and S.K. (Mother) and W.K. (Father),

Appellants-Respondents,

v.

March 9, 2022

Court of Appeals Case No. 21A-JT-2111

Appeal from the Monroe Circuit Court

The Honorable Stephen R. Galvin, Judge

Trial Court Cause Nos.
53C07-2010-JT-599
53C07-2010-JT-600
53C07-2010-JT-601

Indiana Department of Child Services,
Appellee-Petitioner.

Brown, Judge.

[1] S.K. ("Mother") and W.K. ("Father" and together with Mother, "Parents") appeal the involuntary termination of their parental rights to their children, N.K., Me.K., and Mi.K. Parents raise four issues which we consolidate and restate as:

I. Whether the trial court abused its discretion in denying Mother's motion for change of judge;

II. Whether the Department of Child Services ("DCS") violated Parents' due process rights; and

III. Whether the trial court erred in terminating their parental rights.

We affirm.

Facts and Procedural History

[2] On March 1, 2018, DCS filed a petition alleging that N.K., who was born on October 12, 2010, and Me.K. and Mi.K., who were born on February 18, 2013,

were children in need of services ("CHINS").[1] DCS alleged the children were interviewed on November 30, 2017, and disclosed ongoing and significant domestic violence between Parents and extensive physical abuse by Father including being hit with various objects and being locked in bedrooms. DCS also alleged that: Mi.K. was observed with a bruise on her cheek and she disclosed that it came from Father hitting her; Mother had a black eye and the children reported seeing Father hit her in the face; Father was arrested and charged with domestic battery in the presence of a child; home conditions were below minimum standards; there were known drug users living on the property; N.K. had never attended school while in Parents' care; there was a substantiated history of substance abuse and physical abuse; there was a prior CHINS case; Father submitted to drug screens which returned positive for methamphetamine, amphetamine, and hydrocodone on or around November 30, 2017, and methamphetamine and amphetamine on or around December 19, 2017, and February 19, 2018; and Mother submitted to drug screens which returned positive for methamphetamine, amphetamine, and hydrocodone on or around November 30, 2017.

[3] On March 21, 2018, the court entered a protective order preventing the children's grandmother, Colleen Grubb, as well as Kim Grubb and Jimmy

[1] The petition also related to two of Mother's other children which are not included in the trial court's termination order.

Grubb, from having contact with the children due to allegations that Colleen abused a child.

[4] On July 9, 2018, the court entered an order finding that the children were CHINS. That same day, the court entered a dispositional order that required Parents to: complete a substance abuse assessment and parenting assessment and follow through with recommended services; attend all scheduled visits with children; contact the family case manager every week; refrain from using any illegal controlled substances; ensure the home was kept clean and appropriate; keep all appointments with service providers; assist in the formulation and put in place a protection plan; participate in services; and submit to random drug/alcohol screens. The court also ordered Father not to commit any acts of domestic violence.

[5] On October 29, 2020, DCS filed petitions for the involuntary termination of the parent-child relationship between Parents and the children. On June 28 and 29, 2021, the court held a hearing. At the beginning of the hearing, the court stated: "Before we begin, Court does need to address one issue. The Court was informed that [Mother] did enter the Justice Building, [and] she had a joint, marijuana cigarette." Transcript Volume II at 3. The court noted "this occurred outside the courtroom and in this Court's opinion is not subject to direct contempt because of that." *Id.* at 4. Mother's counsel stated she believed that the court had received ex parte communications about Mother that had been prejudicial, stated the court had assumed Mother committed a criminal offense, and asked the court to recuse. The court stated:

> [T]he information provided is provided by the Bailiff, and it deals with [Mother's] actions while in the Justice Building. I do note that the information is only that it maybe [sic] marijuana, not that it is marijuana but that the Court did order that item to be seized so that we do not have a question about there being controlled substances in the courtroom and [Mother] would be subject to as I note, a potential finding of contempt if that were to enter the courtroom. Under the circumstances, I will deny your motion.

Id. at 4-5.

[6] At one point later, the court addressed the issue of whether Mother had been in possession of marijuana on entering the building. Upon questioning by the court, Robert Thomas, the supervising bailiff, testified that he believed the item confiscated from Mother was marijuana, he knew "exactly what it smells like," he was familiar with CBD oil, and it does not have the same basic smell as marijuana. *Id.* at 148. Upon questioning by Mother's counsel, Bailiff Thomas indicated that the item had not been tested in any way. The court stated: "[T]he Court doesn't know whether this [is] marijuana or not . . . your client has testified that she's using CBD oil, um do you have objection to the Court simply instructing that this be destroyed, without further action?" *Id.* at 150. Mother's counsel renewed her earlier motion to recuse "based upon the Court's exploration of this issue" and indicated she did not "have a problem with it being destroyed." *Id.* The court stated:

> Alright under the circumstances, I note that um, return this to Bailiff to have it destroyed. I note these things come up as part and parcel of our daily routine here in Court and under the

> circumstance . . . I do note for the record, that the Court's not finding that this is marijuana, that there's now [sic] test that has been done on this, demonstrating that it is marijuana, but under the circumstances then we're simply going to provide this to the Bailiff's [sic] and by agreement of the parties, it can be destroyed.

Id. The court heard testimony from multiple witnesses including Parents, Nicole White, a caseworker at Ireland Home Based Services, Charessa Brewer, a therapist, Christi Ryan, a clinical supervisor and home-based therapist, Bridgette Lemberg, the lab director and toxicologist at Forensic Fluids Laboratory, Family Case Manager Dorian Villanueva ("FCM Villanueva"), Susan Robinson, a therapist, A.P., the children's foster mother, Rachel Orton, a recovery coach, and Court Appointed Special Advocate Julie Schaefer ("CASA Schaefer").

[7] On August 26, 2021, the court entered a twenty-page order terminating Parents' parental rights. It found that there was a reasonable probability that the conditions which resulted in the removal of the children or the reasons for placement outside the home of Parents would not be remedied, the continuation of the parent-child relationship posed a threat to the well-being of the children, and termination of the parent-child relationships was in the best interest of the children. The court also found adoption was a satisfactory plan for the care and treatment of the children and noted that the children were "clearly adoptable," E.M. and C.M. wished to adopt them, the current foster parents were willing to adopt the children if E.M. and C.M. did not adopt

them, and L.G., the children's great aunt, was also interested in adopting them. Appellant's Appendix Volume II at 71.

Discussion

I.

[8] The first issue is whether the trial court abused its discretion in denying Mother's motion for change of judge. A judge's decision about whether to recuse is reviewed for an abuse of discretion. *L.G. v. S.L.*, 88 N.E.3d 1069, 1071 (Ind. 2018). An abuse of discretion occurs when the judge's decision is against the logic and effect of the facts and circumstances before it. *Id.* "Adverse rulings and findings by a trial judge are not sufficient reason to believe the judge has a personal bias or prejudice." *Id.* at 1073. "Further, Indiana courts credit judges with the ability to remain objective notwithstanding their having been exposed to information which might tend to prejudice lay persons." *Id.* "The law presumes that a judge is unbiased and unprejudiced." *Id.* "To overcome this presumption, the moving party must establish that the judge has personal prejudice for or against a party." *Id.* "Such bias or prejudice exists only where there is an undisputed claim or the judge has expressed an opinion on the merits of the controversy before him." *Id.* "[T]he mere appearance of bias and partiality may require recusal if an objective person, knowledgeable of all the circumstances, would have a rational basis for doubting the judge's impartiality." *Bloomington Mag., Inc. v. Kiang*, 961 N.E.2d 61, 64 (Ind. Ct. App. 2012).

[9] Ind. Trial Rule 79(C) provides: "A judge shall disqualify and recuse whenever the judge . . . (4) is associated with the pending litigation in such fashion as to require disqualification under the Code of Judicial Conduct or otherwise." Canon 1 of the Ind. Code of Judicial Conduct commands: "A Judge Shall Uphold and Promote the Independence, Integrity, and Impartiality of the Judiciary, and Shall Avoid Impropriety and the Appearance of Impropriety." Ind. Code of Judicial Conduct Rule 1.2 provides that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." (Asterisks omitted). Canon 2 of the Ind. Code of Judicial Conduct commands: "A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently." Ind. Code of Judicial Conduct Rule 2.11 governs disqualification of judges and provides in part that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." (Asterisk omitted).

[10] The trial court noted that the information it had was "only that it maybe [sic] marijuana, not that it is marijuana . . . ." Transcript Volume II at 5. Under the circumstances, we cannot say that an objective person, knowledgeable of all the circumstances, would have a rational basis for doubting the judge's impartiality. We find no abuse of discretion.

II.

[11] The next issue is whether Parents were denied due process. Parents argue that their procedural due process rights were violated because DCS failed to follow statutory requirements and created barriers to reunification. They appear to argue that DCS was required to work toward reunification, placed the children some distance away from them, failed to timely consider family placement with L.G., had a large number of family case managers, allowed the children to be taken across state lines for several months without completing the requirements laid out in the Interstate Compact on the Placement of Children ("ICPC"), and failed to follow up with Mother's service provider.

[12] To the extent Parents assert on appeal that DCS did not afford them due process, we note that Parents acknowledge that they did not raise the argument before the trial court. Accordingly, their argument is waived. *See In re S.P.H.*, 806 N.E.2d 874, 877-878 (Ind. Ct. App. 2004) (father who appealed termination of parental rights waived claims concerning DCS's alleged failures to comply with CHINS statutory requirements when he raised them for the first time on appeal). Waiver notwithstanding, reversal is not warranted.

[13] It has been established that, as a matter of statutory elements, DCS is not required to provide parents with services prior to seeking termination of the parent-child relationship. *In re T.W.*, 135 N.E.3d 607, 612 (Ind. Ct. App. 2019), *trans. denied*. However, parents facing termination proceedings are afforded due process protections. *Id.* We have discretion to address such due process claims even where the issue is not raised below. *Id.* CHINS and termination of parental rights proceedings "are deeply and obviously intertwined to the extent

that an error in the former may flow into and infect the latter," and procedural irregularities in a CHINS proceeding may deprive a parent of due process with respect to the termination of his or her parental rights. *Id.* (citing *Matter of D.H.*, 119 N.E.3d 578, 588 (Ind. Ct. App. 2019), *aff'd in relevant part on reh'g*, *trans. denied*). *See also In re J.K.*, 30 N.E.3d 695, 699 (Ind. 2015) (holding "when the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process") (quoting *In re G.P.*, 4 N.E.3d 1158, 1165 (Ind. 2014) (alteration and internal quotation marks omitted)).

[14] "Due process requires 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *In re K.D.*, 962 N.E.2d 1249, 1257 (Ind. 2012) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893 (1976)). The Indiana Supreme Court has held that "the process due in a termination of parental rights action turns on balancing three *Mathews* factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure." *Id.* (citing *In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011)). "In balancing the three-prong *Mathews* test, we first note that the private interest affected by the proceeding is substantial – a parent's interest in the care, custody, and control of her child." *In re C.G.*, 954 N.E.2d at 917. "We also note the countervailing *Mathews* factor, that the State's *parens patriae* interest in protecting the welfare of a child is also substantial." *Id.* Thus, we turn to the risk of error created by DCS's actions and the trial court's actions. *See id.*

[15] To the extent Parents argue that DCS placed the children in New Albany some distance away from them in Bloomington, FCM Villanueva answered in the negative when asked if there was a huge pool of foster parents who could take three children with traumatic issues in Bloomington. She also testified that it is not easy to place three children together.

[16] As for the children's trips to Kentucky to visit E.M. and C.M., when asked if she was aware of any travel requests made by DCS that allowed the foster parents to send the children to Kentucky to visit E.M. and C.M., CASA Schaefer answered:

> Well I know that [E.M. and C.M.] are approved foster parents and that they provided approved respite care and that every time the children went to stay with [E.M. and C.M.] it was approved, and any time that they traveled with [E.M. and C.M.] or with the [current foster family], that [E.M. or C.M.] or the [current foster family] requested an approval from DCS.

Transcript Volume III at 201. She also indicated that DCS approved the trips. The court found that the ICPC investigation was initiated in March 2021. When asked why DCS had not asked for a modification of placement to E.M. and C.M., FCM Villanueva testified that DCS was "currently waiting for the ICPC to come through." *Id.* at 49.

[17] With respect to whether DCS failed to consider L.G., the children's great aunt, as a relative placement, FCM Villanueva indicated that DCS looked at L.G. as well as J.N. as relative placements. CASA Schaefer also testified that she considered L.G. as a relative placement.

[18] As for DCS's provision of services, CASA Schaefer testified that Mother "did not mention anything that she needed that wasn't satisfied." *Id.* at 194. When asked if Father said that he needed anything extra, she answered in the negative and mentioned that one barrier for Father was difficulty doing drug screens sometimes or "getting to therapy" and they brainstormed what he could do and talked about it in the meetings. *Id.* at 195. She testified that she believed proper reunification services had been offered to Parents. When asked what she did to help Parents obtain visitation again, CASA Schaefer answered that she met with them consistently the first year of the case, attended child family team meetings, and helped remove three barriers to testing during the first year. She also stated Parents did not test consistently despite the removal of the barriers. White, the caseworker, testified that the frequency of the meetings diminished due "mainly because of the lack of engagement and the lack of consistent direction" and "[m]ore about frustration with DCS and what not." Transcript Volume II at 91. When asked why she felt her time as a home-based case manager with Parents was unsuccessful, she answered in part that Parents were not fully engaged with the program, failed to show up, canceled sessions, ended visits early, and failed to communicate.

[19] Under these circumstances, we cannot say that Parents' due process rights were violated. *See In re B.D.J.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000) ("[A] parent may not sit idly by without asserting a need or desire for services and then successfully argue that he was denied services to assist him with his parenting").

III.

[20] The next issue is whether the trial court erred in terminating Parents' parental rights. Parents challenge the trial court's conclusions that there was no reasonable probability that the conditions resulting in removal would be remedied, the continuation of the parent-child relationships pose a threat to the well-being of the children, and termination was in the children's best interest.

[21] In order to terminate a parent-child relationship, DCS is required to allege and prove, among other things:

> (B) that one (1) of the following is true:
>
> > (i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.
> >
> > (ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.
> >
> > (iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;
>
> (C) that termination is in the best interests of the child; and
>
> (D) that there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2). If the court finds that the allegations in a petition described in Ind. Code § 31-35-2-4 are true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8(a).

[22] A finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence. Ind. Code § 31-37-14-2. We do not reweigh the evidence or determine the credibility of witnesses but consider only the evidence that supports the judgment and the reasonable inferences to be drawn from the evidence. *In re E.M.*, 4 N.E.3d 636, 642 (Ind. 2014). We confine our review to two steps: whether the evidence clearly and convincingly supports the findings, and then whether the findings clearly and convincingly support the judgment. *Id*. We give due regard to the trial court's opportunity to judge the credibility of the witnesses firsthand. *Id*. "Because a case that seems close on a 'dry record' may have been much more clear-cut in person, we must be careful not to substitute our judgment for the trial court when reviewing the sufficiency of the evidence." *Id*. at 640.

[23] In determining whether the conditions that resulted in a child's removal will not be remedied, we engage in a two-step analysis. *See E.M.*, 4 N.E.3d at 642-643. First, we identify the conditions that led to removal, and second, we determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* at 643. In the second step, the trial court must judge a parent's fitness as of the time of the termination proceeding, taking into consideration evidence of changed conditions, balancing a parent's recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* We entrust that delicate balance to the trial court, which has discretion to weigh a parent's prior history more heavily than efforts made only shortly before termination. *Id.* Requiring

trial courts to give due regard to changed conditions does not preclude them from finding that a parent's past behavior is the best predictor of future behavior. *Id.* The statute does not simply focus on the initial basis for a child's removal for purposes of determining whether a parent's rights should be terminated, but also those bases resulting in the continued placement outside the home. *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013). A court may consider evidence of a parent's drug abuse, history of neglect, failure to provide support, lack of adequate housing and employment, and the services offered by DCS and the parent's response to those services. *Id.* Where there are only temporary improvements and the pattern of conduct shows no overall progress, the court might reasonably find that under the circumstances the problematic situation will not improve. *Id.*

[24] To the extent Parents do not challenge the court's findings of fact, the unchallenged facts stand as proven. *See In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (failure to challenge findings by the trial court resulted in waiver of the argument that the findings were clearly erroneous), *trans. denied*.

[25] The record reveals that Mother was screened seventy-two times and seventeen of those were positive including nine for methamphetamine, six for marijuana, four for buprenorphine,[2] two for hydrocodone, and one for barbiturate. One positive result occurred in 2017, two in 2018, four in 2019, eight in 2020, and

[2] FCM Villanueva testified that Mother was prescribed buprenorphine.

two in 2021. The most recent positive result was collected on February 2, 2021, and was positive for methamphetamine. FCM Villanueva testified that Mother's recent test was concerning because of her continued denial of substance use and the effect of drug use on parenting skills. Father had twenty-four drug screens and seven of those were positive including "five methamphetamine positives, and marijuana positive, two hydrocodone from Vicodin positives and a phentermine positive." Transcript Volume II at 216. Father had two positive tests in 2017, two in 2018, and one each in 2019, 2020, and 2021.

[26] FCM Villanueva testified that she had not seen any evidence that would lead her to believe that the conditions that led to the removal of the children in March 2018 would be remedied in the future. CASA Schaefer testified that she did not see any significant improvement in Parents with respect to their parenting or ability to parent the children. When asked if it was fair to say that the reasons for removal and continued placement outside the home had not been remedied, she answered affirmatively. When asked if there was any evidence that Parents would remedy the conditions that resulted in the removal of the children, White, the caseworker, answered in the negative. When asked to describe Father's participation in services to address his substance abuse issues, FCM Villanueva answered that "really there . . . hasn't been any participation for them." *Id.* at 246. She indicated that Father has never admitted that he has a substance abuse problem, has tested positive for illegal

substances throughout the life of the case, and was supposed to take weekly drug screens but had only submitted one in 2021.

[27] In light of the unchallenged findings and the evidence set forth above and in the record, we cannot say the trial court clearly erred in finding a reasonable probability exists that the conditions resulting in the children's removal and the reasons for placement outside Parents' care will not be remedied.

[28] While the involuntary termination statute is written in the disjunctive and requires proof of only one of the circumstances listed in Ind. Code § 31-35-2-4(b)(2)(B), we note the trial court also found that the continuation of the parent-child relationships posed a threat to the well-being of the children. "Clear and convincing evidence need not reveal that 'the continued custody of the parents is wholly inadequate for the child's very survival.'" *In re G.Y.*, 904 N.E.2d 1257, 1261 (Ind. 2009) (quoting *Bester v. Lake Cty. Office of Family & Children*, 839 N.E.2d 143, 148 (Ind. 2005) (quoting *Egly v. Blackford Cty. Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1233 (Ind. 1992))), *reh'g denied*. "Rather, it is sufficient to show by clear and convincing evidence that 'the child's emotional and physical development are threatened' by the respondent parent's custody." *Id.* (quoting *Bester*, 839 N.E.2d at 148 (quoting *Egly*, 592 N.E.2d at 1234)).

[29] FCM Villanueva testified that continuing the parent-child relationship posed a threat to the children's well-being "[d]ue to the trauma responses that we've seen from the kids that were part of the reason for requesting visit suspension." Transcript Volume III at 21. Robinson, the children's therapist, testified that

she believed that there was a reasonable probability that the continuation of the parent-child relationship posed a threat to the well-being of the children. CASA Schaefer testified that she believed placing the children with Parents would be a threat to the well-being of the children because she was not confident that Parents were not using drugs and did not feel that Colleen's home would be an "environment for them." *Id.* at 196. When asked if she believed that this was a case where leaving the children with Parents could be detrimental to their whole future, CASA Schaefer answered affirmatively. We conclude that clear and convincing evidence supports the trial court's determination that there is a reasonable probability that the continuation of the parent-child relationships poses a threat to the children's well-being.

[30] To the extent Parents challenge the trial court's finding that termination of the parent-child relationship is in the best interests of the children, we note that in determining the best interests of a child, the trial court is required to look to the totality of the evidence. *McBride v. Monroe Cty. Office of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). The court must subordinate the interests of the parent to those of the child. *Id.* The court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. *Id.* The recommendation of a case manager and child advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests. *A.D.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1158-1159 (Ind. Ct. App. 2013), *trans. denied*.

[31] FCM Villanueva testified that termination of parental rights was in the children's best interest. Robinson, the children's therapist, testified that returning the children to Parents would have a negative impact on them. CASA Schaefer recommended termination based upon the situations involving housing and drug screens, their impact on Parents' ability to parent, and Parents' failure to work on substance abuse and parenting. Based on the totality of the evidence, including the recommendations of FCM Villanueva and CASA Schaefer, we conclude the trial court's determination that termination is in the children's best interests is supported by clear and convincing evidence.

[32] To the extent Parents argue that DCS does not have a satisfactory plan for the care and treatment of the children, we note that adoption is a "satisfactory plan" for the care and treatment of a child under the termination of parental rights statute. *In re B.M.*, 913 N.E.2d 1283, 1287 (Ind. Ct. App. 2009). This plan need not be detailed, so long as it offers a general sense of the direction in which the child will be going after the parent-child relationship is terminated. *In re Termination of Parent-Child Relationship of D.D.*, 804 N.E.2d 258, 268 (Ind. Ct. App. 2004), *trans. denied*. FCM Villanueva testified that the plan for the children was adoption, a potential adoption placement had been identified with E.M. and C.M., E.M. and C.M. had provided "respite for the children," and the children identified them as some of the people with whom they feel safe. Transcript Volume III at 19. She stated that she believed that was a satisfactory plan for the children going forward and the children would thrive in that

environment. CASA Schaefer testified that she met E.M. and C.M. and that the children seemed to be doing "really well" when she talked to them while they were at E.M. and C.M.'s home. *Id.* at 191. We conclude that clear and convincing evidence supports the trial court's determination that adoption is a satisfactory plan for the care and treatment of the children.

[33] For the foregoing reasons, we affirm the trial court.

[34] Affirmed.

May, J., and Pyle, J., concur.