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UNITED STATES of America
v.
Nelson CASTELLANOS, Defendant.

No. S2 92 Cr. 584 (SS).

United States District Court,
S.D. New York.

April 7, 1993.

Defendant charged with drug offenses moved to suppress evidence discovered during search of his apartment pursuant to warrant. The District Court, Sotomayor, J., held that: (1) affidavit used to obtain warrant contained false information, either intentionally or recklessly included by affiant, and (2) false information misled magistrate who issued warrant.

Motion granted.

[1] CRIMINAL LAW ⇐ 394.4(1)
110k394.4(1)
To deter conduct violative of Fourth Amendment, and thereby to secure and safeguard rights it guarantees, courts have developed exclusionary rule. U.S.C.A. Const. Amend. 4.

[2] SEARCHES AND SEIZURES ⇐ 191
349k191
Under some circumstances, defendant has right to challenge truthfulness of factual statements made in affidavit used to obtain search warrant issued ex parte.

[3] CRIMINAL LAW ⇐ 394.4(6)
110k394.4(6)
District court must suppress evidence obtained during execution of search warrant to same extent as if probable cause was lacking on face of affidavit used to obtain warrant if testimony at Franks hearing persuades court that allegation of perjury or reckless disregard for truth in connection with facts in affidavit is established by defendant by preponderance of evidence, and if, with affidavit's false material set aside, affidavit's remaining content is insufficient to establish probable cause.

[4] DRUGS AND NARCOTICS ⇐ 188(3)
138k188(3)
Defendant established that detective either fabricated material included in handwritten insertion, which described incident outside defendant's apartment during informant's initial meeting with defendant in which defendant placed keys in lock and informant understood that defendant would deliver narcotics inside apartment, in affidavit used to obtain search warrant for defendant's apartment or displayed reckless disregard for truth in including material, notwithstanding detective's claim that informant reminded him of material in telephone conversation on day affidavit was submitted; detective did not include material in his report to Drug Enforcement Administration (DEA) at time of initial meeting or in affidavit originally profferred to magistrate, and informant's testimony conflicted with material and with detective's testimony as to details of incident, when incident took place, and whether and when he told detective about incident.

[5] CRIMINAL LAW ⇐ 394.4(6)
110k394.4(6)
Good-faith exception to exclusionary rule does not apply where warrant affidavit contains statements made with intentional or reckless disregard for their truth.

[6] SEARCHES AND SEIZURES ⇐ 120
349k120
Information learned from illegal search cannot form basis of search warrant application.

[7] DRUGS AND NARCOTICS ⇐ 188(8)
138k188(8)
Even though magistrate's refusal to grant search warrant without false information which was added to affidavit made it unnecessary to determine whether untainted affidavit established probable cause to issue search warrant for defendant's apartment, magistrate's refusal to grant search warrant based on untainted affidavit would not have been erroneous as information in affidavit localizing narcotics activity to apartment was suspect; detective failed to reveal that he knew keys seized from defendant upon his arrest fit apartment lock only after he tested them in lock, and informant's experiences in obtaining cocaine at apartment took place nearly one year before application for warrant.

[8] CRIMINAL LAW ⇐ 394.4(6)
110k394.4(6)
False information in handwritten insertion in affidavit misled magistrate who issued search

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warrant for defendant's apartment, so that suppression was appropriate remedy; magistrate refused to issue warrant when affidavit was initially profferred and issued warrant only after insertion was made.

[9] SEARCHES AND SEIZURES ⇐ 191
349k191
Magistrate's determination of probable cause to issue search warrant must be afforded great deference.

[10] UNITED STATES MAGISTRATES ⇐ 24.1
394k24.1
District court should not substitute its own probable cause determination on issue of insufficiency of affidavit without false information where magistrate's determination with respect to untainted affidavit is on record and is clear.

*81 Roger S. Hayes, U.S. Atty., S.D.N.Y. by Allen D. Applbaum, Steven M. Cohen, for U.S.

*82 Ivan S. Fisher by Kenneth M. Tuccillo, Debra Elisa Cohen, New York City, for Nelson Castellanos.

MEMORANDUM OPINION AND ORDER

SOTOMAYOR, District Judge.

[1] The Fourth Amendment erects around each of us a barrier against governmental intrusion, shielding against "unreasonable searches and seizures" and mandating that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." To deter conduct violative of the Fourth Amendment, and thereby to secure and safeguard the precious rights that it guarantees, courts have developed the exclusionary rule. United States v. Leon, 468 U.S. 897, 906, 104 S.Ct. 3405, 3412, 82 L.Ed.2d 677 (1984), citing United States v. Calandra, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974). The case at bar is not the familiar one where, as in Leon, the constable or magistrate merely blundered, thereby permitting admission of otherwise improperly seized evidence, but rather the not-rare-enough one where a law enforcement officer not only flouted the Constitution, but intentionally misled a magistrate into issuing a search warrant that she had initially refused to grant. This type of egregious conduct must be deterred if the Fourth Amendment is to have any meaning.

Following a hearing pursuant to Franks v. Delaware, 438 U.S. 154, 155, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978), the Court concludes that false material facts were used to procure a warrant to search Apartment A2 at 200 West 109th Street in Manhattan ("Apt. A2"). The Court is also persuaded by the record that the magistrate would not have issued a warrant absent those deceptions, and therefore defers to the magistrate's own initial disposition of the probable cause inquiry. For these reasons, more fully set out below, the motion of defendant Nelson Castellanos to suppress the evidence seized in connection with the search of Apt. A2 is GRANTED.

I. Background

On July 1, 1992, defendant Nelson Castellanos was arrested in the vicinity of 200 West 109th Street and charged with conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine. Complaint, Mag.Dkt. No. 92-1324. Late that evening, Detective Stephen Guglielmo, of the New York Drug Enforcement Task Force, went with Assistant United States Attorney ("AUSA") Maxine Pfeffer to the home of Magistrate Judge Barbara A. Lee to obtain a warrant to search Apt. A2. The magistrate initially did not issue the warrant, but only did so after additional facts were inserted into the affidavit signed by Detective Guglielmo. Challenging the veracity of statements contained in that affidavit, defendant moves to suppress the evidence seized as a result of the execution of the warrant.

With the numerous disputed and inconsistent factual details set to one side, a straightforward outline of the relevant facts emerges. Detective Guglielmo was the case agent in charge of the investigation of the defendant. One of the primary goals of his investigation was to determine the "stash location" where defendant's narcotics were stored. He enlisted the assistance of a confidential informant, Jose "Tony" Vega, who began cooperating with the government in December 1991, several months after his own arrest that September. Detective Guglielmo learned from Vega that he had bought cocaine from the defendant inside Apt. A2

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on numerous occasions prior to his cooperation with law enforcement authorities. Detective Guglielmo also spoke to the local precinct that had, at some unspecified previous time, received anonymous letters concerning the drug activities at the building at 200 West 109th Street (the "building").

On February 27, 1992, Detective Guglielmo gave Vega $2,300 with which to purchase cocaine from the defendant. Vega and Castellanos met that day in front of 200 West 109th Street, and then entered the building for either a "short time" or "approximately five minutes." What actually happened while they were in the building is the subject of this hearing. There is no dispute among the witnesses, however, that defendant did not *83 deliver any drugs to Vega inside the building, but instead directed Vega to go outside the building. After Vega left the building, he went to 108th Street and Broadway, a few blocks away, where co-defendant Hector Venicio Soto, also known as Venicio, gave him a Remy Martin box containing 250 grams of cocaine. During the debriefing that followed the transaction, Vega told Detective Guglielmo that he had paid $2,300 for 125 grams of the cocaine, obtaining the rest on credit.

Detective Guglielmo prepared a Drug Enforcement Administration ("DEA") report concerning the events of February 27. The report does not include any information about where Vega and Castellanos had been when they were inside the building. It does not mention Apt. A2, the suspected stash location, in any way. It also does not mention that anyone other than defendant and Vega was inside the building, or that Hector Venicio Soto--who allegedly gave the cocaine to Vega--had been with the defendant inside the building.

Yet, at the Franks hearing, Detective Guglielmo testified that he learned from Vega during the February 27 debriefing that Vega and Castellanos had gone up to the second floor of the building and had spoken in front of Apt. A2. They "were going to go into the apartment, but another individual ... Venicio, stated that the block was hot." Detective Castellanos continued his testimony by explaining that in response to the warning that the block was "hot," defendant had directed Vega to pick up the cocaine around the corner. There, Vega met Hector Venicio Soto and obtained the cocaine from him. Out of all of this testimony, only the material in the last sentence was included in the DEA report.

On March 10, 1992, Detective Guglielmo videotaped a second meeting between Vega and the defendant in front of the building. Again, the two entered the building. At the Franks hearing, Vega distinctly recalled that on March 10 he remained with the defendant on the staircase to the second floor, adamantly denying that on that day they had approached Apt. A2. Vega also testified that he had only been inside the building twice with the defendant after he began cooperating with the government--February 27 and March 10. Although he insisted that on one of those two occasions, the defendant approached the door of Apt. A2, keys in hand, Vega would not agree that the approach to the door of Apt. A2 did occur, or had to have occurred, during their February 27 meeting.

On July 1, 1992, Detective Guglielmo and several other agents arrested Castellanos pursuant to an arrest warrant. They searched a white shopping bag that the defendant was carrying and found it to contain approximately $10,000 in cash, which consisted mostly of $1 and $20 bills. They also took custody of defendant's keys, and then went into the building and inserted the keys into the locks on the door of Apt. A2, determining that the keys fit those locks. While they were testing the keys, they heard noise or music coming from within the apartment and entered it to conduct a security sweep.

That evening, Detective Guglielmo and AUSA Pfeffer prepared a search warrant affidavit for Apt. A2 and brought it to Magistrate Judge Lee's home. AUSA Pfeffer has stipulated that she was not told about the security sweep and that the sweep was not disclosed in the affidavit or in conversation with the magistrate. Moreover, after the magistrate reviewed the affidavit, rather than issue a warrant, she asked that additional information be provided with respect to Apt. A2. In response to the magistrate's inquiry, Detective Guglielmo, without AUSA Pfeffer, went into the hallway outside of the magistrate's apartment and contacted Vega by cellular telephone. Detective Guglielmo claims that Vega reminded him of the February 27 approach to Apt. A2. During the Franks hearing, however, Vega only recalled telling Detective Guglielmo about the location of a safe inside Apt. A2 and could not recall anything else that he might have said during their telephone

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conversation.

After he completed his call with Vega, Detective Guglielmo returned to the magistrate's apartment. AUSA Pfeffer inserted into the affidavit by hand the information that Detective Guglielmo represented he had just learned from Vega. This handwritten insert in Paragraph 6 of the affidavit ("handwritten *84 insertion") relates to the February 27 meeting and reads as follows:

> After agreeing to and receiving payment for the narcotics, Castellanos took out his keys, began to place the keys in the lock of the door to Apt. A2 [Mr. Castellanos] said, in substance and in part, let's go in here. [Vega] has further informed me that [he] understood that Castellanos would deliver the narcotics inside Apartment A2 at that time.

At the hearing, Vega denied telling Detective Guglielmo that the keys had ever been placed in the lock, but he did insist that they had been moving toward the door--although he would not say on what date or during which meeting that had occurred.

Magistrate Judge Lee was again presented with Detective Guglielmo's affidavit, now containing the handwritten insertion. Upon reviewing this modified affidavit, she then issued the requested search warrant.

Castellanos has moved to suppress the evidence that was obtained during the search, attacking the validity of the warrant in light of the questionable veracity of the handwritten insertion. The Court, finding that defendant had made a sufficient preliminary showing to entitle him to a hearing pursuant to Franks v. Delaware, 438 U.S. 154, 155, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978), held a Franks hearing on February 4, 5, and 11, 1993.

II. Discussion

"[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation...." This Fourth Amendment protection would be "reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." Franks v. Delaware, 438 U.S. 154, 168, 98 S.Ct. 2674, 2682, 57 L.Ed.2d 667 (1978).

[2] A defendant in a criminal proceeding, under certain circumstances, has the right "to challenge the truthfulness of factual statements made in an affidavit" used to obtain a search warrant issued ex parte. Franks, 438 U.S. at 155, 98 S.Ct. at 2676. If the defendant's challenge is successful, the suppression of evidence may result, for "a district court may not admit evidence seized pursuant to a warrant if the warrant was based on materially false and misleading information." U.S. v. Levasseur, 816 F.2d 37, 43 (2d Cir.1987).

[3] A district court must suppress the evidence obtained during the execution of a search warrant "to the same extent as if probable cause was lacking on the face of the affidavit" if the testimony at a Franks hearing persuades the court that two conditions are met. 438 U.S. at 156, 98 S.Ct. at 2676. First, "the allegation of perjury or reckless disregard [for the truth] is established by the defendant by a preponderance of the evidence." Id. Second, "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause." Id. Each requirement is addressed in turn.

The Handwritten Insertion

The first prong of the Franks test requires that the affidavit contain information "that the affiant knew was false or would have known was false except for his reckless disregard of the truth." United States v. Leon, 468 U.S. 897, 923, 104 S.Ct. 3405, 3421, 82 L.Ed.2d 677 (1984), citing Franks. " 'Reckless disregard for the truth' means failure to heed or to pay attention to facts as [the affiant] knew them to be." Rivera v. United States, 728 F.Supp. 250, 258 (S.D.N.Y.1990), aff'd in relevant part, 928 F.2d 592 (2d Cir.1991). Thus, if the affiant "made statements which failed to take account of the facts as he knew them, or which he seriously doubted were true, that would show reckless disregard for the truth." Id.

[4] Defendant contends that the handwritten insertion in the warrant affidavit satisfies this element of the Franks test. After carefully weighing the testimony at the Franks hearing and examining the submissions of the parties regarding these disturbing allegations of a tainted affidavit, the Court must agree with defendant. For the reasons stated below, defendant has established *85 by a

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preponderance of the evidence that Detective Guglielmo either fabricated the material in the handwritten insertion, or, if during the July 1 telephone conversation Vega did indeed make the statements attributed to him, that Detective Guglielmo displayed a reckless disregard for the truth in accepting Vega's comments and including them in his affidavit.

At the outset, the Franks hearing raised doubts about Detective Guglielmo's credibility. Shortly after arresting the defendant on July 1 and confiscating his keys, Detective Guglielmo not only tested them in the lock of the door to Apt. A2 but, after hearing some noise or music coming from the apartment, made a warrantless "security sweep" of it. Detective Guglielmo claims that he told AUSA Pfeffer about the warrantless entry before they submitted the warrant application to the magistrate. Yet, the government has stipulated that Detective Guglielmo did not tell AUSA Pfeffer about the sweep and that he did not disclose the sweep to the Government until just before he took the stand in the Franks hearing.

Similarly, Detective Guglielmo testified at the hearing to a number of crucial facts that he had purportedly learned from Vega during the February 27 debriefing. He claimed to have learned that Vega and the defendant were going to enter Apt. A2 to effect their drug transaction, but were stopped when Hector Venicio Soto, one of the "guys" who worked for defendant, warned them that they should go elsewhere because the street was "hot." Yet Detective Guglielmo neglected to mention either of these two critical accomplishments in his February 27 DEA report. Although the report did mention that Vega had taken delivery from an individual later identified as Hector Venicio Soto at 108th Street and Broadway, it failed to include any mention that Soto was in the building with the defendant. These omissions are utterly inconsistent with Detective Guglielmo's claims. Even accepting Detective Guglielmo's testimony that not all pertinent information is included in DEA reports, this Court finds it inconceivable that the detective would exclude such relevant information as putting the drug deliverer, Soto, in the same location as the defendant, the suspected drug supplier, and placing both in the immediate vicinity of the suspected stash apartment. Not only the DEA report but also the affidavit originally proffered to the magistrate omitted these crucial items. [FN1]

FN1. Another suspicious omission in Detective Guglielmo's affidavit is his failure to advise the magistrate that he had learned that one "Rosa Soto" was registered with Con Edison to Apt. A2, but that a fifth floor apartment was registered to defendant's wife, Judelka Soto Castellanos, and another apartment on the second floor was registered to another Soto. Indeed, despite this knowledge, Detective Guglielmo had testified at one grand jury presentation that Apt. A2 was registered to the defendant's wife. His willingness to testify to this assumption, in light of all of the information that he had, is but one of many incidents that brings his veracity in question.

Vega's testimony is inconsistent with that of Detective Guglielmo in several respects, and the inconsistencies are troubling. The most disturbing aspect of Vega's testimony was his refusal to identify his February 27 meeting with the defendant as the date that the defendant, wielding his keys, purportedly approached Apt. A2. Vega stated numerous times that he only met with the defendant twice during the investigation, and adamantly denied that they had approached Apt. A2 during their second meeting, on March 10. Yet, as though fearing a trap, he would not agree that the episode occurred on February 27--the logical consequence of his own testimony. In this regard it is significant that Vega remembered making out a written statement to Detective Guglielmo after the February 27 meeting and that, not surprisingly, the statement did not include any information about Apt. A2 or Soto's or anyone else's presence in the building.

It is equally significant that Vega only testified that an unidentified person had come in from the outside and warned him and the defendant that the street was "hot." This is incompatible with Detective Guglielmo's testimony that Vega had identified Soto as the one inside the building who had issued the warning, and with his testimony that Vega and the defendant were the only two people to enter and exit the building while he was observing it.

*86 It is also noteworthy that Detective Guglielmo would add to his affidavit the material concerning the keys only after he had his July 1 conversation with Vega. Yet, Vega only remembered that they

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had discussed a safe in Apt. A2, but could not remember discussing anything else.

Finally, Vega's testimony about what had happened with the keys also deviates from the scenario included in the handwritten insertion. The handwritten insertion states that the defendant "took out his keys, [and] began to place the keys in the lock of the door to Apt. A2." At the hearing, Detective Guglielmo testified that Vega had told him that the keys were in the door, but Vega testified only that the defendant was "going towards the door," which Vega knew he was "about to open" because he "had keys in his hand." Vega did not testify, as Detective Guglielmo claimed, that when they were on the second floor landing in the building, the defendant had "said, in substance and in part, let's go in here." Nor did Vega testify that he "understood that Castellanos would deliver the narcotics inside Apartment A2 at that time." In short, Vega never testified to any of the items about which the handwritten insertion purports to quote him--expanding this Court's already substantial doubt that Vega told the detective, either on February 27 or on July 1, what the detective says he was told.

If on July 1 Vega did communicate to Detective Guglielmo the information that he incorporated in the handwritten insertion, Detective Guglielmo's judgment in accepting these statements was reckless. For example, Detective Guglielmo himself did not remember the details on July 1, thus necessitating the call to Vega. In view of the pivotal role of this information in linking the drug activity and Apt. A2, it is incredible that Detective Guglielmo would have forgotten these details. Given Vega's general demeanor, which suggested a savvy comprehension of what "cooperation" with the government demanded of him, Detective Guglielmo was indifferent to the truth in purportedly relying on Vega's recollection of the facts to refresh his own memory, particularly when the detective testified that he did not see anyone enter the building who could have warned the defendant and Vega, as Vega claimed had happened. [FN2]

FN2. The Court discounts the possibility that, in contradiction to his testimony, Detective Guglielmo first learned about the approach to Apt. A2 during his July 1 conversation with Vega. After all, Vega knew and understood that he was a government informant charged with the duty of obtaining and conveying information about drug transactions to Detective Guglielmo. Had he and the defendant approached Apt. A2 as indicated in the handwritten insertion, or been warned by the same person who subsequently delivered the drugs, Vega surely would have recognized the importance of that action and conveyed it to Detective Guglielmo during their February 27 debriefing. The defendant's motions were accompanied by an affidavit in which the defendant disputes the truthfulness of statements made by Detective Guglielmo and by Vega. The Court is cognizant that defendant's statement that he did not see Vega between February 27, 1992 and May 26 of that year is at odds with the weight of evidence that suggests that they met in March of 1992, particularly the March 10 videotape, which clearly shows Vega and the defendant greeting each other. In evaluating the credibility of other witnesses and in finding the relevant facts, the Court has given the defendant's affidavit the appropriate weight in light of this inconsistency.

[5] It is possible that Vega reported the information contained in the handwritten insertion to Detective Guglielmo during their debriefing on February 27, that the detective omitted it from his DEA report on the debriefing and again from his original submission to Magistrate Lee, and that Vega duly recounted the same information during the July 1 telephone conversation. Mere possibility, however, is not the standard governing the motion at bar. The Court must find only that defendant has demonstrated by a preponderance of the evidence that Detective Guglielmo knew, or, absent a reckless disregard for the truth, would have known, that the handwritten insertion was false. The aforementioned peculiarities and inconsistencies, and the Court's observation of the witnesses who testified at the hearing, convince the Court that the defendant has met this burden, [FN3] and therefore the Court turns to the second prong of the Franks test.

FN3. Consequently, the government's application for a good-faith exception to the suppression of the evidence obtained during the search can be dismissed at the outset. The good-faith exception to the exclusionary rule does not apply where a warrant affidavit contains statements made with intentional or reckless disregard for their truth. U.S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82

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L.Ed.2d 677 (1984).

*87 The "Untainted" Affidavit

[6][7] The second task confronting a district court after a Franks hearing is to examine the affidavit with the false material--herein the handwritten insertion--placed to one side. Typically, this requires a de novo review of the sufficiency of the remaining material to establish probable cause. [FN4] This *88 case is unusual in that the Court need not, and should not, even make a probable cause inquiry because the record unambiguously reflects that Magistrate Judge Lee did not issue the warrant absent the handwritten insertion. When Detective Guglielmo and AUSA Pfeffer presented Magistrate Judge Lee with the warrant affidavit at her home, she did not issue the search warrant and required that they provide additional information linking Apt. A2 with the drug activity. Only after the handwritten insertion was included in the affidavit did she conclude that there was probable cause and issue the warrant.

FN4. The sufficiency of the untainted affidavit to establish probable cause is a close call. Putting the handwritten insertion to one side, the following items pertaining to Apt. A2 remain: (1) Vega stated that on February 27, 1991, in front of the door to Apt. A2, he and "Castellanos discussed the possibility of [Vega] purchasing 125 grams of cocaine and obtaining another 125 grams of cocaine on consignment." Para. 6. Vega paid a sum of money to the defendant, who, "upon hearing ... that there might be law enforcement officers in the area," directed Vega to pick up the cocaine elsewhere. Para. 6. (2) Vega advised Detective Guglielmo that "on numerous occasions prior to cooperating with law enforcement authorities, [Vega] obtained large quantities of cocaine from [the defendant and someone else] inside of" Apt. A2, and that "quantities of cocaine were kept" in Apt. A2. Also, "in the past, Vega observed [defendant] maintain a ledger [in Apt. A2] which contained notations about the distribution of cocaine." Para. 7. (3) "Previously, [Vega] had described [Apt. A2 as] a studio apartment." This is consistent with Con Edison records. Para. 9. (4) Detective Guglielmo arrested defendant on July 1, 1992, pursuant to an arrest warrant, after observing the defendant leave the building carrying a white shopping bag, which he found to contain $10,000 in primarily small denominations. "At the time of his arrest, [defendant] was also found to be in possession of keys which fit the locks on the door to [Apt. A2]." Para. 11. The Supreme Court has set forth a "totality-of-the-circumstances" test for determining probable cause to support a search warrant. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The issuing judicial officer must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." 462 U.S. at 238, 103 S.Ct. at 2332. " '[O]nly the probability, and not a prima facie showing, of criminal activity' " is required to establish probable cause. 462 U.S. at 235, 103 S.Ct. at 2330 (quoting Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637 (1969)); see generally United States v. Wagner, 989 F.2d 69 (2d Cir.1993). Guided by these principles, the Court is troubled by two aspects of Detective Guglielmo's "untainted" affidavit, both involving how the alleged narcotics activity may be localized to Apt. A2. First, Detective Guglielmo knew that the defendant's keys unlocked the door to Apt. A2 only because he had tried the keys in that door after confiscating them from the defendant. It is well settled that information learned from an illegal search cannot form the basis of a search warrant application. Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). There is a distinct possibility that defendant's reasonable expectation of privacy in his door lock was violated when Detective Guglielmo tested the confiscated keys in the lock. There is, however, no clear Second Circuit authority on this subject and such would be essential in assessing the existence of probable cause in this case because that search was central in localizing suspected drug activity to Apt. A2. In this regard, Judge Woodlock's dissent in U.S. v. Lyons, 898 F.2d 210, 219 (1st Cir.), cert. denied, 498 U.S. 920, 111 S.Ct. 295, 112 L.Ed.2d 249 (1990), is provocative. "The penetration and manipulation--cursory or sustained, modest or substantial--of the guardian mechanisms of [locked objects] is no trivial matter for Fourth Amendment purposes." Id.; but see U.S. v. Concepcion, 942 F.2d 1170, 1172 (7th Cir.1991) (although "inserting and turning the key" in the lock to an apartment

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door is a search, since it yields "information [about] the inside of the lock, which is both used frequently by the owner and not open to public view," warrant was not necessary, because search was "reasonable," and "although a warrant may be an essential ingredient of reasonableness much of the time, for less intrusive searches it is not"); U.S. v. Lyons, 898 F.2d 210, 213 n. 2 (1st Cir.1990) ("[T]he insertion of a key into a lock, followed by the turning of its tumbler in order to determine the fit, is so minimally intrusive that it does not implicate a reasonable expectation of privacy."). Since the insertion of a key into a lock at least arguably implicates Fourth Amendment concerns, Detective Guglielmo's failure to explain to the magistrate how he had learned that defendant's keys opened Apt. A2 is disturbing. This concern may have been exacerbated had the magistrate been informed that both Vega and Con Edison records had disclosed to the detective that defendant's wife and other members of his family also had other apartments in the building. Therefore, the defendant's exiting of the building with a shopping bag did not necessarily imply that he exited from any apartment in the building, even one to which he carried keys. Had all of this information been disclosed to the magistrate, it might have given her even more pause about issuing the requested warrant. Second, Vega had not been inside Apt. A2 since prior to his arrest on September 5, 1991—almost one year before the warrant's affidavit was submitted to the magistrate. The last contact Vega had had with the defendant was on March 10, almost four months before his July 1 arrest. On that date, no drugs were given to Vega. There is thus a strong question as to whether Vega's experiences obtaining cocaine from the defendant inside Apt. A2, and his observations of a transaction ledger and drug stockpile there, are stale. The Second Circuit recently explained that although "there is no bright line rule for staleness, the facts in an affidavit supporting a search warrant must be sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search and not simply as of some time in the past." United States v. Wagner, 989 F.2d 69, 75 (2d Cir.1993). In Wagner, the Second Circuit upheld a determination that a search warrant affidavit describing the purchase of four "nickel bags" of marijuana from a co-defendant in her home six weeks earlier was stale. Nevertheless, staleness may be cured if an affidavit also "establishes a pattern of continuing criminal activity so there is reason to believe that the cited activity was probably not a one-time occurrence." Id. Moreover, "[n]arcotics enterprises are the very paradigm of the continuing enterprises for which the courts have relaxed the temporal requirements of non-staleness." Id., quoting U.S. v. Feola, 651 F.Supp. 1068, 1090 (S.D.N.Y.1987), aff'd mem., 875 F.2d 857 (2d Cir.), cert. denied, 493 U.S. 834, 110 S.Ct. 110, 107 L.Ed.2d 72 (1989). Whether or not the affidavit establishes a pattern of continuing criminal activity sufficient to overcome the staleness of the material in the affidavit is a close question which the Court need not resolve at this time. It suffices to say that it is close enough to warrant serious consideration. Even though it is not necessary to determine whether or not the "untainted" affidavit establishes probable cause, enough troubling issues infect this warrant application that the Court may conclude that, at the very least, a magistrate's decision not to grant a warrant would not have been erroneous.

[8] From this sequence of facts, the Court can only conclude that the magistrate had determined that the affidavit originally proffered by Detective Guglielmo and AUSA Pfeffer was insufficient to establish probable cause. Thus, the second prong of the Franks test is satisfied, since "[s]uppression [is] an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit" that the affiant knew or should have known was false. U.S. v. Leon, 468 U.S. 897, 923, 104 S.Ct. 3405, 3421, 82 L.Ed.2d 677 (1984) (explaining that Franks survived its decision) (emphasis added). What is relevant, therefore, is the effect of the false material—that of misleading the magistrate into finding probable cause where otherwise she would not find it.

[9][10] Ordinarily, a district court does not know whether or not the magistrate would have accepted an untainted affidavit or was misled by an affidavit and consequently must conduct its own probable cause inquiry in order to ascertain whether the false material supported the finding of probable cause. The second prong of the Franks test must have been premised on this typical uncertainty. In this unusual case, however, the magistrate's own judgment on the untainted affidavit is in the record. The magistrate read the untainted affidavit, was not

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convinced by it, and did not sign it. As the Supreme Court has stated, "the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." U.S. v. Leon, at 914, 104 S.Ct. at 3416, citing Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637 (1969). Right, wrong, or otherwise, a magistrate's determination of probable cause must be afforded great deference, United States v. Nichols, 912 F.2d 598, 602 (2d Cir.1990), and a district court should not substitute its own probable cause determination on an issue of insufficiency where that of the magistrate is on the record and is clear.

*89 To reject the magistrate's original determination in a case such as this would reward and encourage deception by giving the government and police multiple bites at the apple. Where a magistrate determined that there was not probable cause, or questioned the sufficiency of facts proffered during a warrant hearing, the applicant would be encouraged to supplement the affidavit with false information that would guarantee the issuance of a warrant. Then, the search will have occurred and the police and government would still have a de novo review of the affidavit. This result would be contrary to the basic tenets expressed by the constitutional requirements for a search warrant. If the court is always to determine de novo whether probable cause exists, even after a magistrate has determined that it does not, then there is no purpose to having a magistrate issue warrants. The police might as well conduct warrantless searches since the magistrate's review would be of no consequence. The good-faith exception in Leon was founded on the principle that the government should not be penalized for the good-faith errors of an independent magistrate. This policy, however, demands that the government insure the independence of a magistrate by not benefiting from falsehoods that directly induce a warrant. In short, if the exclusionary rule is to have any meaning, it must be applied in a situation such as this where a magistrate, right or wrong, did not issue a warrant except after a proffer of perjured testimony.

The "alternative sanctions of a perjury prosecution, administrative discipline, contempt or a civil suit are not likely" to repel the "specter of intentional falsification." 438 U.S. at 168-69, 98 S.Ct. at 2682-83. The exclusionary rule's goal of deterrence, coupled with the "solemnity and moment of the magistrate's proceeding," 438 U.S. at 166, 98 S.Ct. at 2682, and the policy of great deference to the magistrate, compel this Court's decision to adopt the magistrate's apparent determination that probable cause was not established absent the handwritten insertion. The Court must therefore suppress the evidence whose seizure directly resulted from the deceit by a law enforcement officer.

III. Conclusion

The Second Circuit recently observed that "the police must be dedicated, in our democratic society, to exercising the authority of their office in a manner that protects the constitutional rights of suspects and encourages respect for the rule of law by its proper enforcement." U.S. v. Gribben, 984 F.2d 47, 52 (2d Cir.1993). In light of this important policy, and for the reasons stated above, defendant's motion is GRANTED and the fruits of the search of Apt. A2 shall be suppressed from his trial.

SO ORDERED.

END OF DOCUMENT

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DOW JONES & COMPANY, INC. and Robert L. Bartley, Plaintiffs,
v.
UNITED STATES DEPARTMENT OF JUSTICE, Defendant.

No. 94 Civ. 0527 (SS).

United States District Court,
S.D. New York.

Jan. 5, 1995.

Action was filed seeking disclosure under Freedom of Information Act (FOIA) of reports prepared by United States Park Police and Federal Bureau of Investigation (FBI) concerning death of former deputy White House counsel, and photocopy of note he had apparently written prior to his death. On cross-motions for summary judgment, the District Court, Sotomayor, J., held that: (1) reports were exempt from disclosure under FOIA exemption for law enforcement records that would interfere with enforcement proceedings if produced; (2) in camera hearing was not required to determine whether exemption was waived; but (3) suicide note was not exempt from disclosure as law enforcement record that would invade personal privacy if produced.

Judgment accordingly.

[1] RECORDS ⇐ 54
326k54
Exemptions from Freedom of Information Act (FOIA) disclosure are narrowly construed, and agency seeking to withhold documents bears burden of proving applicability of claimed FOIA exemption. 5 U.S.C.A. § 552.

[1] RECORDS ⇐ 65
326k65
Exemptions from Freedom of Information Act (FOIA) disclosure are narrowly construed, and agency seeking to withhold documents bears burden of proving applicability of claimed FOIA exemption. 5 U.S.C.A. § 552.

[2] FEDERAL CIVIL PROCEDURE ⇐ 2481
170Ak2481
Freedom of Information Act (FOIA) cases are not immune to summary judgment, and mere disagreement between parties as to probable consequences of disclosure will not defeat adequately supported summary judgment motion. 5 U.S.C.A. § 552; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[3] RECORDS ⇐ 60
326k60
Reports prepared by United States Park Police and Federal Bureau of Investigation (FBI) concerning death of former deputy White House counsel were exempt from disclosure under Freedom of Information Act (FOIA) as law enforcement records or information that could be expected to interfere with enforcement proceedings if disclosed, where independent counsel had stated that public disclosure of information found in reports could hamper his ability to elicit untainted testimony during continuing "Whitewater" investigation. 5 U.S.C.A. § 552(b)(7)(A).

[4] RECORDS ⇐ 54
326k54
Voluntary disclosure of all or part of document may waive otherwise valid Freedom of Information Act (FOIA) exemption. 5 U.S.C.A. § 552.

[5] RECORDS ⇐ 54
326k54
Neither general discussions of topics nor partial disclosures of information constitute waiver of otherwise valid Freedom of Information Act (FOIA) exemption. 5 U.S.C.A. § 552.

[6] RECORDS ⇐ 66
326k66
In camera review was not required to determine whether Department of Justice (DOJ) had waived Freedom of Information Act (FOIA) exemption with regard to United States Park Police and Federal Bureau of Investigation (FBI) reports prepared during investigation of deputy White House counsel's death, where DOJ had disclosed portions of Park Police report dealing with death and stated that further disclosure of reports would interfere with ongoing investigation. 5 U.S.C.A. § 552(b)(7)(A).

[7] RECORDS ⇐ 60
326k60

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Suicide note written by deputy White House counsel prior to his death was not exempt from disclosure under Freedom of Information Act (FOIA) exemption for law enforcement records that would invade personal privacy if disclosed; note discussed matters touching on several events of public interest and implicated government agencies and employees in misconduct. 5 U.S.C.A. § 552(b)(7)(C).

[8] RECORDS ⇐ 60
326k60
Freedom of Information Act (FOIA) exemption for law enforcement records that could be expected to invade personal privacy if produced is applicable only if invasion of privacy that would result from release of information outweighs public interest in disclosure. 5 U.S.C.A. § 552(b)(7)(C).

[8] RECORDS ⇐ 64
326k64
Freedom of Information Act (FOIA) exemption for law enforcement records that could be expected to invade personal privacy if produced is applicable only if invasion of privacy that would result from release of information outweighs public interest in disclosure. 5 U.S.C.A. § 552(b)(7)(C).

*146 Dow Jones & Company, Inc. Legal Dept., New York City (Stuart D. Karle, of counsel), for plaintiffs.

Mary Jo White, U.S. Atty., S.D.N.Y., New York City (Steven I. Froot, of counsel), for defendant.

OPINION AND ORDER

SOTOMAYOR, District Judge.

Plaintiffs Dow Jones & Company, Inc. ("Dow Jones") and Robert L. Bartley ("Bartley") seek disclosure, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, of two reports, one prepared by the United States Park Police (the "Park Police") and the other by the Federal Bureau of Investigation (the "FBI"), concerning the death of former deputy White House Counsel Vincent W. Foster, and a photocopy of a torn-up note (the "Note"), apparently written by Foster, and found in his briefcase several days after his death. The Department of Justice ("DOJ") has refused to release portions of the Reports or copies of the Note, maintaining that 5 U.S.C. §§ 552(b)(7)(A) & 552(b)(7)(C) exempt them from disclosure. Plaintiffs move, pursuant to Fed.R.Civ.P. 56, for partial summary judgment enjoining DOJ from withholding the requested documents on the ground that DOJ waived the claimed exemptions. DOJ cross-moves for summary judgment dismissing the complaint. For the reasons discussed below, plaintiffs' motion is denied in part and granted in part, and defendant's motion is granted in part and denied in part.

FACTUAL BACKGROUND

The relevant facts, set forth in a joint Statement of Stipulated Facts, dated April 18, 1994, are not in dispute. On or about *147 July 20, 1993, then deputy White House counsel Vincent W. Foster was found dead in Fort Marcy Park, McLean, Virginia. The Park Police began an investigation into the circumstances of Foster's death. A week after Foster's death, the White House announced that a torn-up note had been retrieved from Mr. Foster's briefcase, and the following day the FBI commenced an investigation into the discovery and handling of the Note.

A. The DOJ Press Conference

At a press conference held on August 10, 1993 (the "Press Conference"), the then Deputy Attorney General announced that the Park Police and the FBI had provided him with completed reports (the "Reports") of their respective investigations. The Chief of the Park Police, Robert Langston, and the Special Agent in charge of the FBI's Washington, D.C. field office, Robert Bryant, who had both read all or part of their agencies' respective Reports, acted as agency spokespersons and discussed the investigations and the conclusions reached. Among the information disclosed at the Press Conference was that:

1. based on the condition of the scene, the medical examiner's findings and information gathered during its investigation, the Park Police had concluded that Mr. Foster's death was a suicide;
2. the FBI had completed its investigation into the handling of the Note and determined that nothing illegal or improper had occurred;
3. the White House Counsel's office had conducted the initial search of Mr. Foster's office and set aside its initial invocation of the executive privilege after discussions with DOJ, ostensibly

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prompted by discussions between the Park Police and DOJ about the privilege issue;
4. there were no fingerprints on the Note when it was turned over to the FBI, only a smudged palm print, and the Park Police could not determine who had torn up the Note;
5. Mr. Foster's widow told investigators that she had advised her husband to write a list of issues that had been troubling him;
6. only one gun was found near Mr. Foster's body, and members of the Foster family told investigators they believed the gun to be Mr. Foster's;
7. Mr. Foster had spoken with a doctor about depression, and anti-depressant medication had been prescribed, but investigators were unaware of any particular incident that might have prompted Mr. Foster to commit suicide.

Noting that the press "m[ight] want to see [the Note] so that [they] could describe what it looks like," the Deputy Attorney General informed the audience that Carl Stern of DOJ would "have a copy available and anyone who want[ed] to see it [wa]s welcome to see it." Transcript at 1. Thereafter, members of the media inspected the Note in Mr. Stern's office; plaintiff Bartley viewed the Note in October 1993.

Prior to concluding the Press Conference, Mr. Stern stated that media members who wanted to obtain copies of the Reports should submit FOIA requests to DOJ. DOJ received plaintiffs' request (the "FOIA Request") for the Reports on August 18, 1993.

B. Appointment of Independent Counsel Fiske

On January 20, 1994, Attorney General Janet Reno appointed Robert Fiske independent counsel (the "Independent Counsel") to investigate whether any individuals or entities had violated any federal laws relating in any way to the President or Mrs. Clinton's relationship to Madison Guaranty Savings & Loan, Whitewater Development Corporation or Capital Management Services. The Independent Counsel was also authorized to investigate and prosecute any other violations of federal criminal law "developed during" his investigation of the above matters "and connected with or arising out of that investigation," any violations of 28 U.S.C. § 1826, and any obstruction of justice or false testimony in connection therewith. Under this authority, the Independent Counsel's investigation has inquired into the circumstances *148 surrounding Vincent Foster's death and events occurring in the White House following his death, including the discovery and handling of the Note.

C. DOJ's Denial of the FOIA Request

1. The Reports

As of January 28, 1994, plaintiffs had received no response to their FOIA Request, and thereafter, commenced this action. By letter dated February 28, 1994, Independent Counsel Fiske informed DOJ that public disclosure of all or any part of the Reports would substantially prejudice his investigation of the events covered therein and he claimed that the Reports were exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(A) ("Exemption 7(A)"). Exemption 7(A) excludes from the FOIA's mandatory disclosure requirements:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings.

Based on Independent Counsel Fiske's assessment of the propriety of disclosing the Reports, DOJ, in its answer to the complaint, asserted that "the public release of all or any part of the records at this time would be detrimental to the investigation currently being conducted by" Independent Counsel Fiske.

2. The Note

After DOJ answered the complaint in this action, Independent Counsel Fiske advised the agency that public release of the Note would not be detrimental to his investigation, and hence, Exemption 7(A) would not bar its disclosure. DOJ reviewed the Note to determine if any other FOIA exemptions applied, and ultimately concluded, after consulting with the attorney representing the family of Vincent Foster, that it would withhold the document pursuant to 5 U.S.C. § 552(b)(7)(C) ("Exemption 7(C)"). Exemption 7(C) exempts "records or information compiled for law enforcement purposes ... to the extent that the [ir] production ... could reasonably be expected to constitute an unwarranted

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invasion of personal privacy."

D. The Cross-Motions for Summary Judgment

Both the plaintiffs and DOJ have moved for summary judgment. Plaintiffs seek partial summary judgment on the grounds that disclosures made by DOJ, the Park Police and the FBI at the Press Conference waived Exemption 7(A) to the extent it applied to the Reports. Plaintiffs, request an in camera review of the Reports for the Court to determine which segments should be released under the waiver.

DOJ in turn seeks summary judgment dismissing plaintiffs' complaint contending that no genuine issues of material fact exists as to whether Exemption 7(A) applies to withheld sections of the Reports, and that plaintiffs have not established that the exemption has been waived. DOJ further requests summary judgment as to the propriety of its withholding of the Note under Exemption 7(C).

E. Subsequent Developments

After the cross-motions for summary judgment had been fully briefed, and prior to the oral argument scheduled for July 15, 1994, Independent Counsel Fiske announced on June 30, 1994, that his investigation into the death of Vincent Foster had been completed, and he issued a written report concluding that Foster's death had been a suicide. Fiske further determined that "substantial portions" of the Park Police Report could be released without interfering with his continuing investigation. Fiske also announced that his investigation into the handling of Mr. Foster's documents by the White House immediately following Foster's death, an area of inquiry covered by the FBI Report and a portion of the Park Police Report, was in its final stages and would be completed shortly.

In a letter to the Court dated July 12, 1994, DOJ stated that it was reviewing whether any other FOIA exemptions applied to the portions of the Park Police Report that Fiske concluded could be released. On July 20, 1994, DOJ released about 91 pages *149 of the Park Police Report, from which material had been redacted pursuant to FOIA Exemptions 7(A) and 7(C). DOJ continued to withhold the redacted portions of the Park Police Report and the entire FBI Report pursuant to Exemption 7(A).

On September 8, 1994, I requested that the parties submit additional papers on the issue of whether the July 20, 1994 disclosure of portions of the Park Police Report had placed into the public domain information contained in the undisclosed portions of the Park Police Report and the FBI Report such that Exemption 7(A) would no longer apply to those undisclosed documents. DOJ submitted its brief on September 19, 1994; plaintiffs submitted their response on September 26, 1994. Appended to DOJ's response was a declaration by newly appointed Independent Counsel Kenneth W. Starr, which stated that although Independent Counsel Fiske had concluded his investigation of the death of Vincent Foster and released those portions of the Park Police Report relevant to that investigation, further release of portions of the Park Police Report and the FBI Report would interfere with Starr's ongoing investigation relating to the handling of documents in Mr. Foster's White House office immediately following his death.

DISCUSSION

I. Exemption 7(A)

A. Requirements

[1] FOIA sets a policy favoring government disclosure of documents. N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 220-21, 98 S.Ct. 2311, 2316-17, 57 L.Ed.2d 159 (1978); Department of the Air Force v. Rose, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976); EPA v. Mink, 410 U.S. 73, 79-80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973). Documents are exempt from disclosure only if they come within one of the nine exemptions specified in FOIA. 5 U.S.C. § 552(b). Exemptions from FOIA disclosure are narrowly construed, see Spannaus v. United States Dep't of Justice, 813 F.2d 1285, 1288 (4th Cir.1987), and the agency seeking to withhold documents bears the burden of proving the applicability of a claimed FOIA exemption. Carney v. United States Dep't of Justice, 19 F.3d 807, 812 (2d Cir.1994).

In their initial moving papers, plaintiffs did not challenge Exemption 7(A)'s applicability to the Reports. In subsequent papers, however, they

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asserted that genuine issues of fact existed as to the effect release of all or portions of the Reports would have on Independent Counsel Fiske's investigation. First, plaintiffs claimed that the release of the Reports "would represent little threat to Mr. Fiske's investigation given that it is unrelated to the earlier, completed FBI and Park Police probes." Pl. Mem. in Further Support of Motion for Partial Summary Judgment ("Pl. Supp. Mem.") at 11-12. Second, substantial questions existed, they argued, as to the scope of circulation of the Reports before and after Independent Counsel Fiske's appointment. Plaintiffs surmised that the Reports probably were not kept "under lock and key for the entire five month interim when no investigation was pending" (Pl. Supp. Mem. at 13), arguing that it would be "human nature" for friends and associates of Mr. Foster to seek review of the Reports. Id.

[2] Summary judgment is appropriate only when the movant demonstrates that there is no genuine issue as to any material fact and that party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). FOIA cases are not immune to summary judgment, and mere disagreement between the parties as to the probable consequences of disclosure will not defeat an adequately supported summary judgment motion. See Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d 309, 313-14 (D.C.Cir.1988) (a contrary rule would mean that "any motion for summary judgment could readily be defeated by submission of a counteraffidavit that merely draws from a single set of uncontroverted facts a conclusion different from that reached by the agency").

[3] Prior to Independent Counsel Fiske's determination that disclosure of substantial portions of the Park Police Report would not interfere with his ongoing investigation, DOJ had clearly met its burden of demonstrating that the Reports came within Exemption 7(A). An agency affidavit or declaration providing *150 reasonably detailed explanations why withheld documents fall within a claimed exemption is sufficient to sustain the agency's burden on summary judgment. Spannaus, 813 F.2d at 1289. Here, DOJ submitted declarations of Independent Counsel Fiske (collectively the "Fiske Declaration") which identified, in a general manner, the information contained in the Reports, and explained how dissemination of these documents might impede his investigation. Specifically, the Fiske Declaration averred that the Reports contained, inter alia, summaries of interviews by the Park Police and the FBI with relevant witnesses; reports of investigative steps taken by the Park Police in connection with the investigation of Mr. Foster's death; copies of documents found in Mr. Foster's possession; an autopsy report; documents obtained from the White House in connection with both investigations; and computer-generated documents. Fiske Declaration ¶ 4. The Fiske Declaration further stated that public disclosure of information found in the Reports, such as statements by interviewees and the facts gathered and the conclusions reached as to certain matters, might affect the testimony or statements of other witnesses and could severely hamper the Independent Counsel's ability to elicit untainted testimony. Id. ¶ 7.

Such potential harm has been recognized to warrant exemption from disclosure under Exemption 7(A). See Spannaus, 813 F.2d at 1289 (possible fabrication of fraudulent alibis sufficient to warrant 7(A) exemption). Certainly, plaintiffs' contrary view of the potential harm posed by disclosing the Reports did not, prior to Independent Counsel Fiske's statements of June 30, 1994, create an issue of material fact as to whether Exemption 7(A) applied to the Reports. Alyeska, 856 F.2d at 313-14 (an FOIA plaintiff's competing conclusion regarding a single set of uncontroverted facts does not defeat an agency's properly supported motion for summary judgment).

Nor did plaintiff's mere speculation that the Reports were not kept under lock and key raise an issue of material fact or otherwise cast doubt upon the credibility of the Fiske Declaration. Agency affidavits or declarations are accorded a presumption of good faith, Carney, 19 F.3d at 812, and only tangible evidence of bad faith, not mere conjecture that representations made by the agency are incredible, may overcome that presumption.

Consequently, prior to Independent Counsel Fiske's decision that disclosure of significant sections of the Park Police Report posed little threat to his investigation, DOJ had demonstrated, as a matter of law, that the Reports fell within Exemption 7(A), and thus, DOJ's entitlement to summary judgment.

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> the material withheld and adequately states its grounds for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the Government's position. The court is entitled to accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency.

Id.

DOJ's subsequent disclosure of portions of the Park Police Report, however, raised questions as to whether Exemption 7(A) applies to the withheld portions of the Park Police Report and to the FBI Report, since such disclosure may have placed in the public domain the specific information contained in the documents or excerpts DOJ seeks to withhold. Questions about the continued applicability of Exemption 7(A) were resolved by the Declaration of Independent Counsel Starr, dated September 16, 1994, submitted with DOJ's supplemental letter brief, which stated,

> The information contained in the FBI Report and the portions of the Park Police Report that have not been disclosed is central to my continuing investigation. The questions addressed in this inquiry are wholly separate and apart from those addressed in the June 30 Fiske report. Consequently, the prior release of portions of the Park Police Report relating to the issues in the Fiske report does not adversely affect this continuing investigation.

B. Waiver

[4][5] Voluntary disclosures of all or part of a document may waive an otherwise valid *151 FOIA exemption. See Mobil Oil Corp. v. EPA, 879 F.2d 698, 700 (9th Cir.1989); Afshar v. Department of State, 702 F.2d 1125, 1133 (D.C.Cir.1983); Mehl v. EPA, 797 F.Supp. 43, 47 (D.D.C.1992). "The existence and scope of a waiver depends upon the scope of the disclosure." Mehl, 797 F.Supp. at 47. Plaintiffs asserting waiver of an applicable FOIA exemption generally are required to show " 'that the withheld information has already been specifically revealed to the public and that it appears to duplicate that being withheld.' " Mobil, 879 F.2d at 701 (emphasis in original); Mehl, 797 F.Supp. at 47; United States Student Ass'n v. CIA, 620 F.Supp. 565, 571 (D.D.C.1985); see also Public Citizen, 11 F.3d at 201 (plaintiff bears initial burden of "pointing to specific information in the public domain that duplicates that being withheld," and that burden is not met by "simply show[ing] that similar information in the public domain has been released"). Specificity is the touchstone in the waiver inquiry, and thus, neither general discussions of topics nor partial disclosures of information constitute waiver of an otherwise valid FOIA exemption. Public Citizen v. Department of State, 787 F.Supp. 12, 14 (D.D.C.1992), aff'd, 11 F.3d 198 (D.C.Cir.1993); Mehl, 797 F.Supp. at 47.

[6] Plaintiffs claim that the statements made at the Press Conference waived Exemption 7(A) as to substantial portions of the facts and conclusions contained in the Reports. According to plaintiffs, the FBI and Park Police officials provided specific facts about each agency's findings at the Press Conference. In camera review, plaintiffs maintain, is required to determine which of the facts and conclusions disclosed at the Press Conference are contained in the Reports.

As plaintiffs point out, the standard for deciding whether in camera review is appropriate depends on whether it is for purposes of determining if a particular FOIA exemption applies or whether it is for purposes of assessing if an applicable FOIA exemption has been waived. In camera review is the exception, and not the rule, when the plaintiff seeks such review merely to determine if a claimed exemption applies. See Local 3, I.B.E.W. AFL-CIO v. National Labor Relations Board, 845 F.2d 1177 (2d Cir.1988) (in camera review unnecessary because agency's detailed affidavit was sufficient to provide basis for court's ruling that documents were exempt from disclosure under Exemption 6 and Exemption 5); Doherty v. United States Department of Justice, 775 F.2d 49, 52-53 (2d Cir.1985) (district court "should restrain its discretion to order in camera review" where the "Government's affidavits on their face indicate that the documents withheld logically fall within the claimed exemption and there is no doubt as to agency good faith"). In contrast, courts are more likely to conduct in camera review in those cases where the plaintiff asserts that an otherwise applicable FOIA exemption has been waived. E.g., Public Citizen v. Department of State, 782 F.Supp. 144 at 145 (D.D.C.1992); see also Mobil, 879 F.2d at 702-04 (appears that appellate court, if not district court, reviewed the contested documents).

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Originally, plaintiffs sought in camera review of both the Park Police Report and the FBI Report. DOJ's disclosure of 91 pages of the Park Police Report, along with Independent Counsel Fiske's and Independent Counsel Starr's statements that the portions of the Park Police Report dealing with Mr. Foster's death have been released and that only those portions dealing with the still on-going investigations have been retained, renders in camera review of this Report needless. Plaintiffs nevertheless urge that I conduct in camera review of the FBI Report, which covers the investigation of the handling of documents in Mr. Foster's White House office immediately following his death. I decline to do so. In light of Independent Counsel Starr's declaration that further disclosure of the Reports would interfere with his investigation of the handling of Mr. Foster's papers, I need not conduct in camera review to find, as I do find, that the FBI Report falls squarely within Exemption 7(A). Moreover, I find that plaintiff has not set forth a sufficient, specific prima facie case that the limited, general and cursory discussions during the Press Conference of the White House handling of the Foster papers *152 constituted a waiver of the 7(A) Exemption. [FN1] Therefore, I find no reasonable basis to conclude that an in camera review of the Reports is necessary.

FN1. Plaintiffs attempt to bolster their contention that DOJ waived Exemption 7(A) for the FBI Report by presenting a line-by-line comparison of released sections of the Park Police Report juxtaposed to statements made during the Press Conference, and arguing that DOJ's disclosures of the Park Police Report at the Press Conference in fact waived the 7(A) Exemption. This argument is unconvincing. I am not persuaded that DOJ waived the FOIA Exemption 7(A) for the Park Police Report. Although some of the statements made during the Press Conference are similar to information contained in the Report, I do not find the level of specificity of statements made at the Press Conference necessary to constitute waiver. See Mobil, 879 F.2d at 701. Nor do I find, as plaintiff alleged during oral argument, that statements made during the Press Conference "tracked" the Park Police Report.

II. Exemption 7(C)

[7] Although DOJ has released a transcript of the Note, and made a photocopy of the Note available for viewing in DOJ's Washington, D.C. offices, DOJ seeks to withhold the Note under Exemption 7(C), which protects "records or information compiled for law enforcement purposes ... to the extent that the [ir] production ... could reasonably be expected to constitute an unwarranted invasion of personal privacy." DOJ claims that the Foster family's privacy interests outweigh any incremental public interest that would be served by disclosure of the Note, and thus, summary judgment that the Note is exempt from disclosure under Exemption 7(C) is warranted. DOJ has submitted the declaration of Mr. Foster's widow and Acting Associate Attorney General William Bryson in support of its motion for summary judgment on the Exemption 7(C) issue.

[8] Exemption 7(C) "reflects Congress' desire to preserve confidentiality and personal privacy." Hale v. United States Dep't of Justice, 973 F.2d 894, 900 (10th Cir.1992). Exemption 7(C) is, therefore, applicable only if the invasion of privacy that would result from release of the information outweighs the public interest in disclosure. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762, 109 S.Ct. 1468, 1476, 103 L.Ed.2d 774 (1989).

The public has a substantial interest in viewing the Note. The matters discussed in the Note touched on several events of public interest, including the controversy involving the White House travel office, and implicated government agencies and employees in misconduct. Stip. Facts. ¶ 40. However, the public not only has an interest in the contents of the Note but also in viewing a photocopy of the actual document. According to statements made at the Press Conference, the Note was torn up by someone, and some of the pieces are missing. Stip. Facts ¶ 54. The missing pieces, the "look" of the handwriting, and the significance to be drawn therefrom, are, as plaintiffs note, matters of public concern. DOJ itself has implicitly recognized the public interest by making a photocopy of the Note available for viewing. I disagree with DOJ's assertion that it has fulfilled its duty to the public by making the Note available for viewing in its Washington, D.C. office. Interested persons should not be required to make a time-consuming and costly trip to the capitol in order to view the Note.

I do not doubt that making photocopies of the

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Note available on a wider scale may spark a new round of media attention toward the Foster family, and I sympathize with them for the pain they will bear as a result of any renewed scrutiny. I am not convinced, however, that any such renewed interest will be so substantial as to outweigh the important public interest in viewing the Note.

For its contention that the Note falls within Exemption 7(C), DOJ relies on New York Times v. NASA, 782 F.Supp. 628 (D.D.C.1991), which held that the audiotape of Challenger astronauts recorded immediately before their death was exempt from disclosure, even though NASA had published a transcript of the tape, since "[e]xposure to the voice of a beloved family member immediately prior to that family member's death" would cause Challenger families great pain and would not contribute to the public's understanding of the operations of government. In both the present case and New York Times, the relevant government agency produced *153 a transcript of the deceased's words, and thereby claimed that the original--the audiotape in New York Times and the Note in the present case--is exempt from production. This case is distinguishable from New York Times, however, because the Foster family's privacy interest in the Note is weaker than the deceased Challenger astronauts' families' interest in the audiotape, and because the public interest in disclosure of the Note is stronger than it was in the audiotape. In New York Times, the court held that "how the astronauts said what they did, the very sound of the astronauts' words" was such an "intimate detail" that their families could protect the tape from disclosure. New York Times, 782 F.Supp. at 631. Although Mr. Foster's suicide note may have been intensely personal, the written word is qualitatively different from an audio recording of the last words of the astronauts. As for the public interest in disclosure, the New York Times court found that the background noises and voice inflections contained in the tape would not " 'contribute significantly to public understanding of the operations or activities of the government," the purpose underlying FOIA. New York Times, 782 F.Supp. at 632 (quoting United States Dep't of Justice v. Reporters Comm., 489 U.S. 749, 775, 109 S.Ct. 1468, 1482, 103 L.Ed.2d 774 (1989)). In the present case, however, the missing pieces of the Note, and therefore the physical look of the Note, are an integral part of the public's interest.

Nor is DOJ's position for nondisclosure supported by Katz v. National Archives & Records Administration, 862 F.Supp. 476 (D.D.C.1994) (privacy interests of Kennedy family outweighed public interest in autopsy reports despite prior unauthorized disclosure of photographs of x-rays contained in the autopsy). This is not a case of partial disclosure or unauthorized prior disclosure of withheld documents.

DOJ has not met its burden of demonstrating that Exemption 7(C) applies to the Note, and its motion for summary judgment on this ground is denied and plaintiffs' cross-motion for summary judgment enjoining DOJ from withholding the Note is granted.

CONCLUSION

For the reasons discussed above, defendant's cross-motion for summary judgment pursuant to Fed.R.Civ.P. 56 to dismiss those portions of the Complaint addressed to the disclosure of the Park Police and FBI Reports is granted. Plaintiffs' motion for summary judgment is partially granted in that the Department of Justice is enjoined from withholding circulation of copies of the Foster "Note." The Clerk of the Court is directed to enter judgment on the Complaint in accordance with this Opinion.

SO ORDERED.

END OF DOCUMENT

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UNITED STATES of America, Plaintiff,
v.
REAL PROPERTY KNOWN AS 77 EAST 3RD STREET, NEW YORK, NEW YORK, Described as Block 445, Lot 47 in the Records of the Clerk of the County of New York, Defendant-in-Rem.

No. 85 Civ. 3351 (SS).

United States District Court,
S.D. New York.

Sept. 14, 1994.

Government filed forfeiture proceeding against building which served as meeting place or club house of motorcycle club. On motion for judgment as a matter of law or for new trial, the District Court, Sotomayor, J., held that although government presented sufficient evidence to establish probable cause, it did not provide substantial evidence of wide-ranging methamphetamine conspiracy operated out of building during relevant time period as required to warrant forfeiture, particularly given special care exercised by club members to shield club house from illegal activities.

Motion denied.

[1] DRUGS AND NARCOTICS ⇐ 195
138k195
In forfeiture trial, government bears initial burden of demonstrating probable cause to believe that real property at issue was used or was intended to be used to commit or facilitate commission of felony narcotics violations. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

[2] DRUGS AND NARCOTICS ⇐ 195
138k195
After court found government had shown probable cause that nonpersonal use of narcotics had occurred in building which was subject to forfeiture proceeding during relevant time period, burden of proof shifted to claimants to demonstrate either that building was not used unlawfully or that its illegal use was without claimants' knowledge or consent.

[3] FEDERAL CIVIL PROCEDURE ⇐ 2608.1
170Ak2608.1
In deciding a motion for judgment as to matter of law, court may not weigh conflicting evidence, assess credibility of witnesses or substitute its judgment for that of jury. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

[4] FEDERAL CIVIL PROCEDURE ⇐ 2610
170Ak2610
In assessing posttrial motions for judgment as matter of law, district courts apply the same standard used in assessing whether factual issues exist as used in reviewing summary judgment motions. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

[5] FEDERAL CIVIL PROCEDURE ⇐ 2608.1
170Ak2608.1
More than mere metaphysical doubt as to material facts must exist to defeat judgment as a matter of law; party opposing motion for judgment as a matter of law must offer concrete evidence from which reasonable juror could return verdict in his favor. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

[6] FEDERAL CIVIL PROCEDURE ⇐ 2608.1
170Ak2608.1
Complete failure of proof on essential element of nonmoving party's case, and on which such party bears burden of proof, renders all facts immaterial and entitles movant to judgment as matter of law. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

[7] DRUGS AND NARCOTICS ⇐ 195
138k195
Claimants to defendant building had no obligation to affirmatively disprove that alleged drug sharing occurred in building during relevant time period, as court's finding of probable cause for forfeiture was not based on any drug sharing; court discredited government witness' testimony that he witnessed drugs being shared in apartment in building, in light of dramatic conflicts in his description of apartment with other evidence, his confession to being prone to memory lapse because of past heavy drug use, his admission to being "high" on night in question and lack of corroboration, and witness who admitted sharing drugs in building did not admit that it occurred during relevant time frame.

[8] DRUGS AND NARCOTICS ⇐ 190

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138k190
Sharing of any amount of methamphetamine and cocaine constitutes "distribution" for purposes of narcotics forfeiture provision. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

See publication Words and Phrases for other judicial constructions and definitions.

[9] DRUGS AND NARCOTICS ⇐ 191
138k191
Club member's admission to distributing methamphetamine during relevant time period, without indication that it occurred in defendant's clubhouse building during relevant time, was insufficient to mandate forfeiture of building; member stated that no drug activity was allowed in the building, discussed club rule prohibiting drugs in building except for personal use, stated that most club parties occurred outside of building, and that in relevant time period only parties in building were for his children's birthdays. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

[10] FORFEITURES ⇐ 5
180k5
Claimants to building which was subject to forfeiture proceeding had no burden to affirmatively disprove contentions which government failed to establish in its probable cause showing and which were not clearly admitted in testimony on which government relied. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

[11] DRUGS AND NARCOTICS ⇐ 190
138k190
Building resident's general assurance to undercover agent and informant that he could obtain "real good" cocaine for them, without more, was not negotiation of specific drug transaction so as to warrant forfeiture of building in which conversation occurred; no specific agreement to transact cocaine sale was reached during that meeting, no price, quantity or type of cocaine was discussed and parties did not even arrange or schedule future meeting. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

[12] DRUGS AND NARCOTICS ⇐ 194.1
138k194.1
Evidence as to telephone calls from undercover agent, informant and another to resident's apartment in defendant building created jury question as to whether drug transaction occurred in building so as to require forfeiture of building; there was no explicit reference to cocaine or price or quantity in any of alleged 18 calls to arrange drug deal, many calls were innocuous or arguably related to other projects, and others at most set up meetings at which cocaine sales were arranged or occurred but did not themselves involve actual sale or arrangement of sale. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

[13] DRUGS AND NARCOTICS ⇐ 195
138k195
Forfeiture claimants adduced substantial evidence rebutting government's claim that building which was subject to forfeiture proceeding was used for commercial distribution of narcotics during relevant time period; admitted methamphetamine manufacturer's testimony that methamphetamine conspiracy ended months prior to enactment of forfeiture laws was substantiated by other evidence, he testified about unwritten club rules prohibiting drug distribution activities and stated that items found in his apartment were put to innocent uses or were left over from defunct methamphetamine conspiracy, and there was evidence contradicting expert testimony that small quantity of high purity narcotics seized in building indicated commercial drug activity in building. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

[14] FEDERAL CIVIL PROCEDURE ⇐ 2313
170Ak2313
District court has substantial discretion to grant motion for new trial, and trial judge may weigh conflicting evidence without viewing it in the light most favorable to the verdict winner. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

[14] FEDERAL CIVIL PROCEDURE ⇐ 2373
170Ak2373
District court has substantial discretion to grant motion for new trial, and trial judge may weigh conflicting evidence without viewing it in the light most favorable to the verdict winner. Comprehensive Drug Abuse Prevention and Control

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Act of 1970, § 511, 21 U.S.C.A. § 881.

[15] FEDERAL CIVIL PROCEDURE ⇐ 2339
170Ak2339
Government was not entitled to new trial in forfeiture proceeding against building used as clubhouse by motorcycle club; although government's evidence met low threshold of establishing nexus sufficient to show probable cause, it did not provide substantial evidence of wide range of methamphetamine conspiracy operated out of building during relevant time period, particularly given special care exercised by club members, confirmed by government witnesses, to shield building from illegal activities, and notwithstanding criminal activity by individual club members. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

*1044 Pamela L. Dempsey, U.S. Atty's Office, New York City, for U.S.

Nina J. Ginsberg, DiMuro, Ginsberg & Lieberman, P.C., Alexandria, VA, for Real Property Known as 77 E. 3rd St.

Merril Rubin, Mark Gombiner, New York City, for Church of Angels, Inc.

*1045 OPINION AND ORDER

SOTOMAYOR, District Judge.

Defendant-in-rem 77 East 3rd Street, New York, New York (the "Building") is a six-story building located on the Lower East Side of Manhattan. Since 1969, the Building's first floor has served as the meeting place or "club house" of the New York City ("NYC") Chapter of the Hells Angels Motorcycle Club ("HAMC"), an organization whose founding members include claimant Sandy Alexander. The Building's upper five floors contain residential apartments, the majority of which are occupied by HAMC members.

A nationwide investigation of the HAMC, launched in or about 1977 to 1985 by the Federal Bureau of Investigation (the "FBI") and other federal, state and local law enforcement agencies, revealed that HAMC, through its individual chapters, including the NYC Chapter, was conducting illegal drug transactions. As a result of the investigation, numerous HAMC members from various chapters across the country were arrested and prosecuted. On May 2, 1985, law enforcement agents raided the Building and thereafter, over a dozen members, former members and associates of the NYC Chapter of HAMC, including claimants Colette and Sandy Alexander and a trustee of claimant the Church of Angels, Inc. (the "Church of Angels"), Paul Casey, were all convicted and sentenced for narcotics-related offenses.

The federal drug forfeiture laws, 21 U.S.C. § 881, were amended by Congress on October 12, 1984, to permit forfeiture of real property used for narcotics-related activities. See 21 U.S.C. § 881(a)(7) (1994). On May 1, 1985, plaintiff United States of America (the "Government") filed a complaint against the Building alleging that it was subject to forfeiture under 21 U.S.C. § 881(a)(7) because the NYC Chapter of HAMC, on or after October 12, 1984, the effective date of the forfeiture amendment, to May 2, 1985, the date of the raid, had used the Building to commit and to facilitate the commission of felony narcotics transactions.

Sandy Alexander, his wife Colette Alexander and the Church of Angels subsequently intervened as claimants in this action. [FN1] On February 4, 1994, after an approximately five-week trial, the jury returned a verdict in favor of all of the claimants. Specifically, the jury found that the claimants had proven, by a preponderance of the evidence, that defendant-in-rem, the Building, was not used, or intended to be used, to commit, or to facilitate the commission of, a felony drug violation between October 12, 1984 and May 2, 1985.

FN1. The claimants have disputed the ownership and possessory interests of each other in the Building. Because only state law property issues were involved in the disputes among the claimants and a jury verdict in favor of or against all claimants on the forfeiture question would have obviated the need to decide the state law issues, I decided to try the forfeiture question first. The jury's verdict in favor of all claimants removed all federal claims from this action and there being no just reason to retain supplemental jurisdiction over the state law property issues among the claimants, I entered judgment on February 24, 1994, dismissing the complaint and this action.

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The Government now moves for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b), and alternatively, for a new trial under Fed.R.Civ.P. 59(a). The Government argues that during the trial, the claimants admitted using the Building to commit felony narcotics violations, namely the distribution of methamphetamine and cocaine, and failed to rebut the Government's probable cause showing. Therefore, asserts the Government, no reasonable jury could have concluded that claimants had met their burden of proving that the Building was not used to facilitate narcotics felonies. According to the Government, the "claimants' improper pleas for sympathy incited the jury to nullify the forfeiture law that th[e] Court instructed the jury to apply," and the jury's verdict, therefore, must be set aside.

I disagree with the Government's description and assessment of the evidence in this case. The Government sought at trial to portray the Building as the nerve center from which all the NYC Chapter HAMC members' illegal activities flowed. Yet, having lost its star witness, William "Wild Bill" Medeiros, a founding member of the NYC Chapter and the only Government witness who purportedly had personal knowledge of drug transactions in the Building, the Government *1046 was left with rather inconclusive, and in some instances, scanty and highly unreliable evidence tying the Building, as opposed to the individuals, to the felony narcotics violations alleged. The Government ostensibly believes that the confessed criminality of the individual members of the HAMC group, and perhaps even their unorthodox lifestyle, should have enveloped the Building in a cloud of criminality in the jurors' mind. Such, however, was not the case. Based on the evidence presented at trial, viewed in the light most favorable to the claimants, I can not conclude that the jury's decision was unreasonable in the least and find no reason in the record to grant the Government's motion for judgment as a matter of law, or its alternative motion for a new trial.

THE EVIDENCE AT TRIAL

I. The Government's Direct Case

[1] In order to assess the Government's motion, and the sufficiency of the evidence in this case, it is necessary to carefully and accurately set forth the evidence, or lack of evidence, presented at the trial of this action. At a forfeiture trial, the government bears the initial burden of demonstrating probable cause to believe that the real property at issue was used or was intended to be used to commit or facilitate the commission of felony narcotics violations. To meet its burden in this case, the Government presented three experts, an undercover agent and a cooperating witness to establish the requisite nexus between the Building and (1) Sandy Alexander's admitted cocaine sales, and (2) the alleged club-wide conspiracy to manufacture and distribute methamphetamine.

A. The Government's Expert Witnesses

1. State Investigator Louis Barbaria

The Government's first witness was New York State Police Investigator Louis G. Barbaria, Jr., a self-styled expert on outlaw motorcycle gangs, including the HAMC. His opinions about the structure and practices of HAMC and the NYC Chapter were based, in part, on intelligence gathered during the nationwide investigation known as "Operation Roughrider," and his debriefings of former HAMC members and cooperating witnesses, including William "Wild Bill" Medeiros, a founding member of the NYC Chapter of HAMC and Robert Banning, a member of the Bridgeport HAMC Chapter.

The parties to this action had stipulated that from the NYC Chapter's inception in 1969 until March 25, 1984, Sandy Alexander was the president of the Chapter. Stipulated Facts ("Stip. Facts") ¶ 6. He was succeeded by William Medeiros, who left the post four months later. Id. at ¶ 53. Paul Casey then assumed the presidency. Id. at ¶ 24. Barbaria testified that the other officers of the NYC Chapter of HAMC were the vice-president, secretary, treasurer, road captain and security officer.

"Socially [and] business-wise," the clubhouse, according to Barbaria, "was basically the hub of [HAMC] activity." Tr. [FN2] at 228. "Church meetings," mandatory weekly club meetings of HAMC members, were, according to Barbaria, the "center of Hells Angels activities." Tr. at 172. The NYC Chapter of HAMC held its weekly church meetings in the clubhouse located on the first floor of the Building. Minutes of the meetings were kept (Tr. at 172-73), and attendance was noted therein. Tr. at 176. The actual minutes of meetings from

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July 1982 to March 1985 were seized during the May 2, 1985 raid and were admitted into evidence. Tr. at 173.

FN2. "Tr." refers to the trial transcript.

Barbaria also testified about the "lifestyle" of NYC Chapter HAMC members, and described it as consisting mainly of motorcycle runs, parties and drugs. Tr. at 206-07, 465-66. According to Barbaria, very few of the members held steady jobs, and many simply loitered around the clubhouse. Tr. at 207-08. He further described the travel by members all over the country, and indeed, the world, to attend anniversary parties of HAMC chapters. Tr. at 210-11. He further testified that methamphetamine, also referred to as "crank" or "speed," was the "fiber" of the NYC Chapter of HAMC during the period October 12, 1984 to May 2, 1985, *1047 and would be passed freely at parties. Tr. at 465-66.

To finance this lifestyle of constant partying and drugs, the NYC Chapter, according to Barbaria, manufactured and distributed methamphetamine. Barbaria described the NYC Chapter's methamphetamine enterprise as follows:

> A. Well, basically, there were three people within the New York City Chapter of the Hells Angels that controlled the acquisition of, the obtaining of, the drugs and the distribution within the membership, and those three people were Mr. Sandy Alexander, who was basically the head of this drug organization, Mr. Howie Weisbrod, the vice president at the time--he distributed the drugs primarily to other members of the Hells Angels--and the third individual was Mr. Paul Casey, who is in the courtroom here also, and he was primarily the manufacturer.

Tr. at 215. The other members of the NYC Chapter, according to Barbaria, participated in the methamphetamine conspiracy "by obtaining the drugs from this organization and then [going] out and d[oing] their own distribution." Id.

Barbaria stated that the Weisbrod-Alexander-Casey run methamphetamine project began to breakdown in 1983, and "by the end of 1984, ... wasn't effective anymore ... [and] didn't operate along [the same] lines." Tr. at 216. He further testified that some members became frustrated with restrictions on methamphetamine distribution imposed by the Weisbrod-Alexander-Casey control group, and formed a "Nomad" chapter in October 1984, to distribute greater quantities of methamphetamine than was permitted in the NYC Chapter. Tr. at 451-53.

According to Barbaria, the NYC Chapter's methamphetamine manufacturing and distribution activities continued up until the time of the May 2, 1985 raid, albeit in a different manner. After the breakdown of the Weisbrod-Alexander-Casey control group, individual members distributed methamphetamine obtained from other sources. Tr. at 216. Barbaria based his conclusion that the methamphetamine conspiracy continued until the date of the raid on several factors: (1) information derived during Operation Roughrider; (2) drug purchases made by an FBI undercover agent from various members during that period; and (3) certain physical evidence seized from apartments in the Building during the May 2, 1985 raid. With respect to the physical evidence, Barbaria deemed the high purity of the .39 grams of methamphetamine found in HAMC club member Brendan Manning's apartment especially telling. Barbaria opined that the purity of those narcotics was "consistent with someone who's in the distribution end of an enterprise." Tr. at 218. He also stated that the lifestyle of parties, travel and motorcycle runs did not end with the breakdown of the Weisbrod-Alexander-Casey enterprise, and thus, the members "had to make their money from some source." Tr. at 218.

On cross-examination, Barbaria admitted that there was a "drought" in methamphetamine during the fall of 1984 to spring 1985 because Paul Casey had stopped manufacturing (Tr. at 459); that there was a club rule against discussing illegal activities during church meetings (Tr. at 337); that several members and their spouses or live-in girlfriends were employed (Tr. at 373-98); that generally a representative of a chapter, not the entire chapter, traveled to out-of-state HAMC anniversary parties or events; that the Building was not "a lap of luxury" (Tr. at 348, 418); that he could not tell when the alleged cutting agents found in Sandy Alexander's apartment had last been used (Tr. at 286-87); and that the grinder found there was not in itself indicative of a methamphetamine conspiracy. Tr. at 288.

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2. Sergeant Terry Katz

Maryland State Police Sergeant Terry Katz, an expert on drug conspiracies, offered testimony on the significance of the physical evidence seized from the Building during the May 2, 1985 raid. In the apartments of Paul Casey, Sandy Alexander, Brendan Manning and Michael Manfredonio, FBI agents found small amounts of high purity methamphetamine, and substances, such as mannitol, inositol and dextrose, which are commonly used as drug dilutants or "cut." Stipulated Facts *1048 ¶¶ 9, 26, 46, 50. The agents also retrieved from those apartments (1) small amounts of cocaine; (2) clean vials; (3) a small grinder; (4) two small spiral notebooks with handwritten notations; (5) a Bearcat scanner; (6) two telephone wire testers; (7) a hand held bug detector; and (8) a bug sweeper. In addition, FBI agents found two Ohaus triple beam balances and an Ohaus dial-a-gram balance from the third floor apartment of Martha "Marty" Grabe, a tenant in the Building who was not an HAMC member.

At trial, based on stipulated facts, the Government offered a chart listing the items seized from the various apartments, but presented no evidence as to where in the apartments the items were found. Moreover, the Government did not introduce the actual seized items into evidence. Near the end of the trial, the parties realized that certain items had been returned to the claimants after the criminal trials, and the claimants introduced some of these into evidence during Paul Casey's testimony.

Sergeant Katz testified as follows about the seized items:

(1) highly pure methamphetamine such as that found in Brendan Manning's apartment strongly suggests that the possessor is very close to the original source of the drug's manufacture (Tr. 1044, 1053);
(2) cutting agents are used by drug distributors to increase profits by increasing the weight of the drugs sold (Tr. at 1044-45);
(3) drug users do not use cutting agents because the agents dilute the product and ostensibly their effect (Tr. at 1047);
(4) inositol, mannitol, and sugars, such as dextrose and lactose, are commonly used to "cut" methamphetamine, and inositol may be used to cut cocaine as well (Tr. at 1045-47);
(5) scales are commonly used by drug distributors to weigh their products (Tr. at 1051);
(6) clean vials are commonly used by drug dealers as receptacles for their products (Tr. at 1049-50);
(7) drug dealers commonly use Bearcat scanners, telephone line testers, bug sweepers, and other such devices to maintain security over their operations and to attempt to avoid detection by law enforcement (Tr. at 1060-67);
(8) the presence of high purity narcotics, cutting agents, packaging material such as clean vials, scales, and security devices suggests drug distributions in that location (Tr. 1043-51, 1076-77).

On cross-examination, Sergeant Katz admitted that he had no idea where in the apartments the seized items were found, or their condition at the time they were seized, and that an item's location and condition is highly important in determining whether it is related to or indicative of drug activity. Tr. at 1130. He nevertheless maintained that the seized items indicated drug distribution in the Building. Tr. 1070, 1076-77.

3. Special Agent Robert Howen

Robert Howen, a special agent employed in the electronics analysis unit, testified as to the operation and use of scanners and other surveillance devices. Tr. at 931-63. He stated that these items could be purchased at electronics stores, that scanners are frequently used as entertainment, and that books containing frequencies for the police, fire department and other official agencies could be purchased over the counter. Tr. at 963. Special Agent Barbaria had previously testified that HAMC members were always concerned about security and used such devices and information to monitor and secure their operations. Tr. at 228-29.

B. The Government's Non-Expert Evidence

1. FBI Undercover Agent Kevin Bonner

Kevin Bonner, an FBI special agent, testified that from March 1983 through May 2, 1985, he worked undercover, posing as a Baltimore drug dealer interested in purchasing methamphetamine, and later, cocaine from HAMC members. Tr. at 517. Bonner explained that, working with an informant named Vernon Hartung (Tr. at 520), he purchased

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narcotics from members of nine different chapters of HAMC, including from NYC Chapter members Howie Weisbrod and *1049 Sandy Alexander. Tr. at 530-31. He also purchased over 14 pounds of methamphetamine from a Troy Chapter member, James Harwood, who purportedly obtained his methamphetamine from NYC Chapter members. Tr. at 533-34, 628-29.

Bonner and Hartung used Sandy Alexander's interest in the prisoner of war ("POW") situation in Southeast Asia, and the activities of Colonel Bo Gritz, who had made a foray into Laos to try and rescue POWS, to gain Alexander's confidence and thereby, learn firsthand about the illegal drug activities of the NYC Chapter. Tr. at 55, 638-39. Bonner testified that in his initial meeting with Sandy Alexander, he promised to try and obtain for Alexander information about Colonel Gritz and his activities. Id. Bonner also admitted that Hartung spoke to Sandy Alexander on several occasions about gathering information on Colonel Gritz and the POWs, and that on two occasions, they sent Sandy Alexander letters about Bo Gritz. Tr. at 639.

Other than Sandy Alexander acknowledging that he knew of Bonner and Hartung's methamphetamine transactions with Harwood and assuring them that he would step in if they encountered any difficulties with Harwood, Sandy Alexander's only narcotics dealings with Bonner and Hartung involved the sale of cocaine. As for the cocaine sales, Bonner testified that he and Hartung first discussed the sales with Alexander in Alexander's apartment in the Building on November 20, 1984. During that meeting, at which Colette Alexander was present, Sandy Alexander, according to Bonner, specifically offered to sell them cocaine, and stated that he could get them ounces to a pound of Peruvian Flake or Colombian Rock cocaine. Tr. at 577-80.

Bonner further testified that following that meeting, he purchased cocaine from Sandy Alexander on at least four occasions: November 30, 1984, December 19, 1984, January 26, 1985 and February 27, 1985. Tr. at 535. Each of these sales was preceded by telephone calls placed by Bonner or Hartung to Alexander at his residence in the Building for the purpose, testified Bonner, of arranging the four sales. Tr. 585-92, 598-603, 611-14, 619-21. At trial, the Government played a total of eighteen (18) tapes of conversations conducted on Alexander's telephone in the Building. GX 41-58. Fifteen of those conversations were between Bonner or Hartung and Alexander or his wife Colette Alexander. Bonner testified that all fifteen of those conversations, even those to which he was not a party, related to the scheduling of cocaine deals. Tr. 582-623. The three remaining tapes were conversations between Alexander and Jerry Buitendorp, an individual whom Bonner testified supplied Alexander with cocaine. Tr. at 590.

However, in none of the eighteen conversations were there explicit references to narcotics, nor any reference, express or in "code," to price or quantity. Tr. at 584. Bonner testified that Sandy Alexander specifically directed him not to discuss the drug transactions on the phone, but that one day he slipped and used the phrase "cassettes" referring to cocaine. Id. Bonner also testified that Alexander told him to use military time to indicate the quantity of cocaine he wanted to purchase and the date he wanted to pick it up (Tr. at 581); however, there were no references to military time in any of the taped conversations with Alexander. Tr. at 658-59. The actual specifics of the deals, including the quantity and price, were worked out in face-to-face meetings at locations outside the Building. Tr. at 593-94. The telephone calls to Alexander only set up a date and time for the parties to meet, and many of the calls did not even accomplish that. In several calls, Sandy Alexander said little more than "I'll call you back" or "call back later." Moreover, no call preceded the final cocaine sale on February 27, 1985. Bonner testified that this was because Sandy Alexander, during an anniversary party in Bridgeport, Connecticut, told Hartung not to use the telephone to arrange the next cocaine deal, but to "send a letter to him." Tr. at 618. Bonner explained that a letter, written in a code suggested by Alexander, was sent to arrange a cocaine sale for February 26, 1985 (Tr. at 618-23), but Sandy Alexander misunderstood the purported code, and thought the sale was to take place the next day. Tr. at 659-60.

*1050 2. Cooperating Witness Robert Banning

Also testifying on behalf of the Government was Robert Banning, a former member of the Bridgeport, Connecticut Chapter of HAMC and an admitted former heavy cocaine user. Tr. at 846. Banning testified that he witnessed members of the

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NYC Chapter of HAMC distributing methamphetamine in the Building during his various visits to the club. Tr. at 789, 793, 796. Particularly, he described coming to New York in April 1985 for a Willie Nelson concert and attending a party, supposedly held in Paul Casey's apartment in the Building, at which drug sharing was rampant. According to Banning, he went into a second floor apartment in the Building, the home of Paul Casey or an individual named "Ted," and asked Casey for some methamphetamine. Banning testified that Casey pulled a Ziploc bag filled with over a pound of methamphetamine from a garbage bag in the corner of the room and gave him some. Tr. at 804-05. Some NYC Chapter HAMC members also used methamphetamine that Casey had placed on a mirror on a coffee table. Tr. at 805. NYC Chapter members, according to Banning, also helped themselves to some of his cocaine. Tr. at 806.

On cross-examination, when asked to describe Paul Casey's apartment, Banning testified as follows:

> Q. Can you describe Paul Casey's apartment at 77 East 3rd Street?
>
> A. I don't believe so.
>
> Q. How many rooms did it have, do you recall?
>
> A. I walked in the door; he was sitting on a couch. I was loaded on cocaine. I didn't go no further than there and back out the door.

Tr. at 846-47. Banning also testified, however, that the first thing he saw walking through the door was a couch in front of a coffee table; that the door opened directly into a room, and that he could not remember if there was a kitchen in the apartment. Tr. at 850.

Banning's description of Paul Casey's apartment differed significantly from a photograph of the apartment taken during the May 2 raid, and from the description offered by FBI Special Agent Richard Demburger, who led the FBI team that searched Paul Casey's apartment during the raid. Agent Demburger testified that upon entering the front door of Paul Casey's apartment, you turned down a hallway, and "then you encounter[ed] this kitchen area from which you c[ould] make a left-hand turn into another broader, bigger room which is like a living room and loft bedroom area." Tr. at 1206. Banning did not mention the loft area--a prominent and conspicuous part of Casey's living room.

3. Other Evidence

The Government also presented Stipulations of Fact that eleven members of the NYC Chapter of the HAMC pled guilty to or were convicted of participating in a conspiracy to manufacture and distribute methamphetamine during the period 1982 continuously up to and including May 2, 1985. However, the Government proffered no admission by a NYC Chapter HAMC member that this methamphetamine conspiracy emanated from or was otherwise tied to the Building.

II. The Probable Cause Finding

At the close of the Government's direct case, I concluded that the Government had established probable cause to support forfeiture of the property in that the Government had demonstrated a "nexus" between the Building and narcotics felonies. See United States v. All Right, Title and Interest in Real Property and Appurtenances Thereto Known as 785 St. Nicholas Avenue and 789 St. Nicholas Ave., 983 F.2d 396, 403 (2d Cir.), cert. denied, 508 U.S. 913, 113 S.Ct. 2349, 124 L.Ed.2d 258 (1993). My determination was based on the expert testimony concerning the items seized from the Building during the May 2, 1985 raid in combination with the testimony that HAMC members of the NYC Chapter continuously used methamphetamine outside of the Building during the relevant time period, and undercover agent Kevin Bonner's description of his discussions with Sandy Alexander in the Building to arrange future cocaine sales.

*1051 I did not, however, find that the Government had shown probable cause that non-personal use of narcotics had occurred in the Building during the relevant time period, despite the Government's expert testimony that NYC Chapter HAMC members engaged in a "party lifestyle," where narcotics sharing was rampant, and indeed, integral to their lives. The only direct evidence of any drug sharing in the Building during the relevant time period came from Robert Banning, whose description of Paul Casey's apartment, where he claimed to have witnessed large quantities of methamphetamine being shared, was substantially contradicted by a photograph of the apartment and Agent Demburger's testimony. In light of these contradictions, Banning's admitted lapses in memory and intoxication on the night in question,

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and the fact that the Government offered no corroborating evidence that a Willie Nelson concert had occurred at all during the relevant time frame, I found Banning's testimony concerning the location of the drug sharing party he purportedly attended in April 1985 less than reliable, and I, therefore, discredited it.

III. The Claimants' Case

[2] After I found probable cause, the burden of proof shifted to the claimants to demonstrate either that the Building was not used unlawfully, or that its illegal use was without the claimants' knowledge or consent. See United States v. Property at 4492 S. Livonia Rd., Livonia, 889 F.2d 1258, 1267 (2d Cir.1989); 785 St. Nicholas Avenue, 983 F.2d at 403 (2d Cir.1993). To meet their burden, claimants presented deposition testimony of Vernon Hartung, the informant who, along with Kevin Bonner, purchased cocaine from Sandy Alexander, and live testimony from Colette Alexander and Paul Casey. The claimants also introduced into evidence some of the items seized from Paul Casey's apartment during the raid, namely the scale, an owner's manual for a scanner, and some of the books containing police and fire frequencies.

A. Vernon Hartung's Deposition Testimony

In contrast to Agent Bonner's testimony, Vernon Hartung testified that Sandy Alexander, in the November 20, 1984 meeting with Hartung and Bonner in Alexander's apartment, spoke only generally about cocaine.

> Q. Did you discuss drugs with Mr. Alexander in his apartment on that occasion?
> A. Yes, basically we did discuss a little bit. I am remembering back on it, and it pertained to about if we ever needed any more drugs, he could get the drugs for us.
> Q. Did he say what kind of drugs?
> A. He could get us anything, cocaine, crank, he can get us by the pound whatever we need. Let him know, he can get it.

Hartung Dep.Tr. 278.

Hartung testified, however, that no specific arrangements to purchase cocaine were made during that meeting (Hartung Dep.Tr. at 211-12), and that the actual details of the first cocaine deal were worked out at a later meeting in a restaurant in New York. Id. at 170-71. Hartung corroborated Bonner's testimony that Sandy Alexander during that the November 20 meeting told them to stay away from heroin, that Hartung had brought Alexander Vietnam handkerchiefs in which Alexander had an interest and that the three discussed several topics. Id. at 135-36.

B. Colette Alexander

Colette Alexander admitted that drugs had been a large part of her life as well as that of several members of the HAMC and their "old ladies," i.e., girlfriends or wives. Tr. at 1318-19, 1341-42. She also admitted observing HAMC members sharing methamphetamine at club parties, and to having shared methamphetamine with Paul Casey's wife, Hope Casey, in their respective apartments in the Building. Tr. at 1341-42. She claimed, however, that her narcotics use and involvement in club activities declined significantly after her son Erik was seriously injured in an accident on April 8, 1982. Tr. at 1303-07. She further testified that her life revolved around her son after his accident, and the she lost interest in drugs and in the HAMC generally. Finally, she admitted ***1052** meeting Bonner and Hartung on November 20, but denied being present during most of their discussions with her husband. Tr. at 1393-1401.

As for the items seized from her apartment during the May 2 raid, Colette stated that she used the grinder on occasion to grind rocks of cocaine, and that she believed the purported cutting agents to be Sandy Alexander's "protein" powders. Tr. at 1314-15. However, on cross-examination, the Government introduced her deposition testimony where she claimed that she occasionally used those substances to "cut" or dilute her personal stash of methamphetamine. Tr. at 1350-51.

C. Paul Casey

Paul Casey testified that he joined the NYC Chapter of HAMC in August 1970. Tr. at 1427. At that time, he worked as a journeyman carpenter and was a member of the New York Carpenters Union. Tr. at 1428. He also testified that other members of the NYC Chapter, including Sandy Alexander and Howie Weisbrod, held jobs as diverse as stuntman, motorcycle mechanic, welder, professional boxer, bodyguard, tunnel diggers,

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video shop owner and truck driver. Tr. at 1440-53.

1. The NYC Chapter's Methamphetamine Manufacturing and Distribution Enterprise

Casey admitted manufacturing methamphetamine from the middle of 1978 to the spring of 1984. Tr. at 1494-1511. According to Casey, sometime in mid-1978, Howie Weisbrod told him that he had a contact who could supply them with P2P--the main ingredient in methamphetamine. Tr. at 1495. Sandy Alexander provided Casey with a formula for manufacturing methamphetamine, and Casey began producing the drug. Tr. at 1497.

Casey described the multi-stage manufacturing process, and stated that it took him some time to perfect it. Tr. at 1497-99. He also described some of the tools he used in the process, which included a triple beam Ohaus scale, similar to one of the scales seized from 87 East 3rd Street, to weigh the various component chemicals and substances he used in manufacturing large quantities of methamphetamine. Casey denied ever having used the scale seized from his apartment in his methamphetamine production. Tr. at 1506. He stated that this scale, a rather small scale [sometimes used by dieters to weigh small portions of meat or other food] with no weight markings or gradations, was just for decoration, although it was sometimes used as an ashtray. Tr. at 1506-07.

Casey emphatically denied ever manufacturing methamphetamine in the Building (Tr. at 1502, 1567-68), and listed a series of locations in Staten Island and Connecticut where he set up his manufacturing operations. Tr. at 1502-04. Casey also denied ever storing commercial quantities of methamphetamine in the Building, but admitted maintaining personal use amounts there on occasion. Tr. at 1567-68. He did, however, state that he stored an ounce of methamphetamine in his shop at 87 East 3rd Street. Tr. at 1568.

According to Casey, half of the methamphetamine he produced went to Weisbrod's P2P supplier, and the other half to Weisbrod. Tr. at 1509-10. Weisbrod then would distribute the methamphetamine to NYC Chapter members, who then would sell it, returning some of the profits to Weisbrod. Sandy Alexander, according to Casey, did not play much of a role in the methamphetamine enterprise, other than providing the initial formula. However, Sandy Alexander was given some of the profits from the methamphetamine enterprise to help pay for his activities on behalf of the club, and to compensate him for providing the formula. Tr. at 1510. Although admitting that the methamphetamine enterprise subsidized the income of NYC Chapter HAMC members, Casey stated that he, Weisbrod and Alexander did not want the chapter involved in dealing large amounts of methamphetamine for sales greater than necessary to pay basic living expenses.

> Q. Do you recall that there was a rule imposed by the [Weisbrod-Casey-Alexander] group that members of the New York City Chapter had to come to Mr. Weisbrod in order to obtain methamphetamine during the period 1979 to '84?
> *1053 A. I wouldn't say it was a rule. It was something where we didn't want anybody--we didn't want--we were aware of the fact that methamphetamine is something you don't see in New York. It's something you don't see in the East Coast. We didn't want to see a lot of it out here.
> We didn't want to see any of it out, we just wanted enough to get our rents paid and that was it. Nobody was looking to get rich here. In reality, if a person wanted to sell methamphetamine, there was people lining up for half a mile.
> That wasn't the intent here. We purposely did not want people in the drug business per se. What went on in this case, it looks to us like Mr. Bonner went around offering people money and they went out and found the drug....

Tr. at 1667.

The NYC Chapter's methamphetamine business ended, according to Casey, in the spring of 1984. Casey testified that he stopped manufacturing the drug after Weisbrod's P2P source dried up, and personal problems took him away from New York City and the club for extended periods of time. Tr. at 1511-13. In fact, the minutes of church meetings confirm Casey's repeated absences from club meetings commencing in the spring of 1984 and thereafter.

Casey further testified that his failure to attend the April 1 run had led the NYC Chapter members to consider throwing him out of the club. Tr. at 1515-16. Indeed, according to Casey, his "patch" was

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suspended for a period of time. Tr. at 1516. Ultimately, however, Casey decided that he did not want to leave the club, moved back to New York and resumed his life as an active member of the NYC Chapter. Tr. at 1516-17. His methamphetamine production, however, ceased.

A. We were out of business. Howie had no more P2P. I really didn't particularly care for doing it anymore, even if he did.

Tr. at 1642-43.

That did not, however, prevent Casey from distributing methamphetamine. Casey testified that he sold methamphetamine to Jimmy Canestri sometime in the summer of 1984 from his shop at 87 East 3rd Street, down the street from the Building (Tr. at 1640), and admitted that he pled guilty to distributing methamphetamine to someone at his shop on or about May 2, 1985. He also admitted occasionally giving a "snort" of methamphetamine to people after he ceased manufacturing the drug in the spring of 1984. Tr. at 1641.

2. The NYC Chapter Rules Regarding Narcotics

During his testimony, Casey described the NYC Chapter's long history with the Building and the special care and attention club members paid to maintaining and repairing the Building and protecting it from association with illegal activities. Casey also testified about certain NYC Chapter HAMC rules regarding drugs, which included prohibitions against bringing commercial quantities of narcotics into the Building and sanctions for abusing drugs.

A. Well, there were club policies regarding drugs; you couldn't inject a drug.

Mr. Sipioria: Time period please?

A. That was from day one; you couldn't inject a drug. From day one, no drugs in the building; that's from day one.

Q. When you say the building, do you mean the entire building at 77 East 3rd Street?

A. I mean the entire building.

Q. Does that refer to personal use amounts or to commercial amounts?

A. That would refer to commercial amounts.

Q. There was no, I take it, club policy regarding personal use of substances in the building?

A. No, so long as nobody was abusing.

Q. What would occur if somebody in the view of the club began to abuse a substance, whether an illegal substance or alcohol?

A. They would be told about it.

Q. If they continued to abuse it, what would happen?

*1054 A. They would either be told again or be brought up to be 86'd from it.

Q. What does that mean?

A. That would mean you are forbidden to use it any longer.

Q. In the minutes--

A. That's an absolute.

Q. What would happen if you violated an 86?

A. They would kick you out. As far as the club would be concerned, you are [sic] taking that drug means more to you than membership in the Hells Angels Motorcycle Club.

Tr. at 1518-19. Casey further testified that an HAMC member could be "86'd" from using drugs or alcohol only by a vote of the membership. He described various instances, reflected in the minutes, where members had been "86'd" from using certain drugs or alcohol or where motions had been made that such action be taken. Tr. at 1519, 1520-21, 1523-28.

Casey also testified that the entire club was "86'd" from using methamphetamine in October 1984, and that the "86" was not removed prior to the raid. Tr. at 1528-30. Although the "86" on members' use of crank was enforced on an honor system, NYC Chapter members, according to Casey, took it seriously.

Q. What would happen if a member was seen by another member using crank after that point in time?

A. He would, what would be done, that person would, I don't know what an individual would do, I know what would have to be done. It would be brought up in the meeting, this guy is breaking the 86. It would be brought up to the individual, when he did it, you know; you have an 86, you have an 86. You would be brought up, thrown out of the club. Whether or not the club would throw him out, I can't say positively he would be. It would depend on the circumstances.

It's not an acceptable behavior. It's an absolute. You don't do it; it's not done. We have rules within our group that you abide by. There are not that many rules. We don't restrict people from living their own lives. There are certain rules you have to abide by.

Q. Would you operate based on an honor system?

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A. Absolutely.
Q. I take it from that point in time, a member would be careful not to use crank in the presence of another member?
A. I would take it from that point in time a person wouldn't use crank period, or hit the road.
Tr. at 1530-31.

Casey did admit, however, that this "86" did not prohibit members from distributing speed, just using it. Tr. at 1685-86.

3. The Physical Evidence Seized from His Apartment

Casey also testified that many of the items, including the scale, seized from his apartment during the May 2, 1985 raid were not used in or related to any drug activity. The small oilcan, a gift, was merely a can and did not contain a false compartment; it, according to Casey, was a false compartment only if one "look[ed] at the can as being a false can." Tr. at 1508. He denied ever having stored methamphetamine in the oilcan. Id. As for the Bearcat scanner, Casey claimed that it could not monitor any sensitive law enforcement activities, and that he used it merely for entertainment. Tr. 1565-66. He further claimed that the alleged telephone tester was a portable phone. Tr. at 1737.

4. The NYC Chapter's "Party Lifestyle"

On cross-examination, when questioned about the "party lifestyle" of the NYC Chapter of HAMC, Casey denied Barbaria's contention that methamphetamine was passed writ large at NYC Chapter parties.

Q. Well, did you see that reality there? Did you ever see members passing drugs during parties?
A. At one time or another, I'm sure I have. To tell you a date or time, that would be--it wasn't a common practice. *1055 If anybody had any speed, they didn't want to share it in the first place.
Q. Well, when you saw members passing drugs in this building, did you make any attempt to stop that activity?
A. It wasn't a common practice to pass drugs in the building and it wasn't a thing that was done on a common basis. Has it ever happened? I wouldn't doubt that it did. But, I mean, this isn't a common practice. Whether or not someone ever passed another person a joint in the course of a party and they took a puff of marijuana, I mean, let's be realistic.
Tr. at 1623. (Emphasis added).

Moreover, Casey stated that NYC Chapter parties were generally held outside the Building, and that there were no Chapter parties held in the Building during the relevant time period. Indeed, the only parties Casey remembered in the Building during the relevant time period were parties for his two children, Christopher and Cassidy, who respectively, were nine and six years old at the time of the May 2 raid. Tr. 1436, 1681.

Q. But, Mr. Casey, what I'm asking you is not whether there were parties outside, I'm asking you whether there were parties that took place in the building from the period '80 to '85?
A. Was there ever one? I'm sure there was.
Q. And there were parties in the time period '84 to '85 as well, weren't there?
A. Parties. Now we're plural. In one year period? I don't know if I would agree with you on that. You'd have the Fourth of July party took place outside. You're using you know--I'm not trying to be rude to you. Fourth of July party took place outside. That's an outside block party that we have for the people in the area and the poor kids who don't have any money that want to have fun on Fourth of July.
And what else is there? There's an anniversary party we'd have in December, and that we'd rent a place. The April 1 run we'd be off on the road. On other runs we are on the road.
Q. So--
A. You know, the day of people hanging out in the clubhouse is--that changed when everybody got their own apartments per se.
Q. So you deny that there were parties in this building, 77 East 3rd Street, during the period October '84 to the time of the raid, May '85?
A. I can't put my finger on any party in specific, although I'm sure I had a party for Chris and Cassidy, who were both born in the month of March.
Tr. 1680-81.

In the same vein, Casey had also testified:
Q. ... Were there parties in that building from '80 to '85?
A. What type of party? I mean, I've had parties

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for my children for their birthday.
Q. Parties involving members of the New York City Chapter of the Hells Angels.
A. Generally a party would take place, such as anniversary party, at a place other than the clubhouse. The clubhouse was too small.
Tr. 1679-80.

III. The Government's Rebuttal Evidence

Initially, the Government intended to call William "Wild Bill" Medeiros, a founding member of the NYC Chapter of HAMC, a past NYC Chapter president and the only witness with direct knowledge of what occurred or did not occur in the Building during the relevant time frame, to rebut the claimants' case. However, Medeiros suffered numerous heart seizures during the trial and never recovered sufficiently to testify.

Instead, the Government called Sandy Alexander, who invoked the Fifth Amendment in response to over one hundred questions, including those inquiring into the manufacture and distribution of methamphetamine by NYC Chapter HAMC members. Alexander did, however, admit that he acted as a middleman for the cocaine supplier Jerry Buitendorp in selling cocaine to FBI Agent Kevin Bonner and Vernon Hartung. Alexander admitted but recalled only three, not four, sales of cocaine to Bonner. Tr. at 2063.

*1056 Although Alexander did not deny meeting Bonner and Hartung in his apartment on November 20, 1984, he denied arranging the sale of cocaine during that meeting. Tr. at 2066. He also testified that the main topic of discussion during that meeting was the activities of Colonel Bo Gritz and POWs in Southeast Asia. Tr. 2066.

Alexander also testified that Bonner and Hartung called him incessantly, remarking that had he had a beeper, they "would [have] beep[ed] [him] to death." Tr. at 2073. He claimed that he never told the two to stop calling him at home because "they were trying to help [him] with the Prisoners of War thing." Tr. at 2070.

IV. The Jury's Verdict and the Instant Motion

I charged the jury on January 31, 1994. Four days later, on February 4, 1994, the jury returned a verdict in favor of the claimants, finding that the claimants had proven, by a preponderance of the evidence, that the Building had not been used to commit, or facilitate the commission of, a felony drug violation between October 12, 1984 and May 2, 1985. Having so found, the jury did not reach claimants' "innocent owner" defenses of lack of knowledge and lack of consent.

The Government thereafter timely filed the instant motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b) or alternatively for a new trial pursuant to Fed.R.Civ.P. 59(a).

DISCUSSION

I. The Motion for Judgment as a Matter of Law

A. The Rule 50(b) Standard

[3] In this Circuit, a district court may grant a Rule 50(b) motion for judgment as a matter of law only if, "viewed in the light most favorable to the nonmoving party, 'the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.' " Samuels v. Air Transport Local 504, 992 F.2d 12, 14 (2d Cir.1993) (citation omitted). Hence, judgment as a matter of law is inappropriate unless there is "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or ... such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [jurors] could not arrive at a verdict against [the movant]." Id. (quoting Mattivi v. South African Marine Corp., Hugvenot, 618 F.2d 163, 168 (2d Cir.1980)). In deciding a Rule 50(b) motion, a court may not weigh conflicting evidence, assess the credibility of witnesses, or substitute its judgment for that of the jury. Weldy v. Piedmont Airlines, Inc., 985 F.2d 57 (2d Cir.1993).

[4][5][6] Moreover, in assessing post-trial motions for judgment as a matter of law, district courts apply the same standard used in assessing whether factual issues exist as used in reviewing summary judgment motions under Fed.R.Civ.P. 56. Piesco v. Koch, 12 F.3d 332, 341 (2d Cir.), cert. denied, 502 U.S. 921, 112 S.Ct. 331, 116 L.Ed.2d 272.

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Consequently, more than a mere "metaphysical doubt as to the material facts" must exist to defeat judgment as a matter of law, see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); the party opposing the Rule 50 motion must offer "concrete evidence from which a reasonable juror could return a verdict in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A complete failure of proof on an essential element of the nonmoving party's case, and on which such party bears the burden of proof, renders all facts immaterial and entitles the movant to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

B. The Evidence Supporting the Jury's Verdict

The Government contends that the evidence presented at trial amply demonstrates its entitlement to judgment as a matter of law. First, the Government maintains that both Colette Alexander and Paul Casey "admitted 'sharing' or 'passing' undefined small *1057 amounts of methamphetamine and/or cocaine in the Building." Plaintiff's Memorandum of Law ("Pl.Mem.") at 12. Second, the Government argues that Sandy Alexander and his counsel in summation conceded that Alexander used his apartment in the Building, particularly his telephone, to arrange the four cocaine sales to undercover agent Bonner. Third, the Government argues that the claimants failed to rebut the "overwhelming physical evidence proving that individual tenants used the Building to sell narcotics." Pl.Mem. at 3. Each of these contentions will be addressed in turn.

1. Claimants' Purported Admissions that Narcotics were Shared or Passed in the Building during the Relevant Time Period

[7] Before addressing the purported admissions of drug sharing, I must first clarify a point the Government obscures in its brief. The claimants had no burden to prove that drug sharing did not occur in the Building during the relevant time period since my finding of probable cause was not based on any such drug sharing. In finding probable cause, I discredited Robert Banning's testimony that he witnessed methamphetamine and cocaine being shared in Paul Casey's apartment since (1) his description of Paul Casey's apartment conflicted dramatically with that of the FBI agent who raided the apartment, (2) he confessed to being prone to memory lapses because of past heavy drug use, (3) he admitted being "high" on the night in question, and (4) there was no corroborative evidence of club members attending a Willie Nelson concert in the Spring of 1985. The Government offered no other direct evidence of drug sharing in the Building during the relevant time period, and I limited my probable cause finding to the methamphetamine conspiracy the Government alleged was operated out of the Building, and Sandy Alexander's cocaine transactions which the Government claimed were facilitated by the November 20 meeting in the Building and the telephone calls to the Building. Thus, the claimants had no obligation to affirmatively disprove that drug sharing occurred.

[8] Forfeiture would have been compelled as a matter of law if, as the Government contends, the claimants admitted that methamphetamine and cocaine had been shared in the Building during the relevant time period, since the sharing of any amount of these substances constitutes a distribution. See United States v. Corral-Corral, 899 F.2d 927, 936 n. 7 (10th Cir.1990); United States v. Brown, 761 F.2d 1272, 1278 (9th Cir.1985); United States v. Ramirez, 608 F.2d 1261, 1264 (9th Cir.1979). However, none of the testimony the Government cites rises to the level of a clear admission of drug sharing in the Building during the relevant time frame of October 12, 1984 to May 2, 1985.

a. Colette Alexander's Testimony

Colette Alexander unquestionably admitted "sharing" drugs with either the wives or girlfriends of HAMC members or the members themselves in the Building. See, e.g., Tr. at 1318-19, 1341-42, 1351-52. It is also undisputed that Ms. Alexander testified she observed HAMC members sharing and passing methamphetamine in the Building. Tr. at 1356-57.

She did not, however, admit that she or others distributed, shared or passed narcotics in the Building during the relevant time frame. This critical omission is highlighted in the very testimony the Government claims mandates forfeiture of the

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Building as a matter of law:

Q: Now, you said that after Erik's accident [in 1982] you did less visiting amongst your friends and tried to spend more time in the house, right?

A: Yes.

Q. However, the other people who lived in the building, sort of community of people, continued to visit each other as they had before, correct?

A. I really don't know. I suppose so.

Q. But you have no reason to think that any of their pattern of behavior had changed in any way up to the time of the raid?

A. Well, actually, I'm not sure what year it was, but Hope and Casey had a third child, I think his name was Michael, and *1058 he died before his first year of infant syndrome. I know that affected them greatly also.

Q. In terms of practices of the Hells Angels community, the sharing of drugs and the partying that they occasionally did, as you said?

A. I'm sure nothing changed in pattern that way.

Tr. at 1420-21.

This testimony does not definitively place any drug activity by NYC Chapter HAMC community members within the relevant time period or in the confines of the Building. At most, it establishes that some drug sharing occurred, somewhere, after April 8, 1982, when Alexander's son, Erik, was injured in an accident. This certainly permits but does not compel a jury to infer that HAMC members distributed drugs in the Building during the relevant time period.

Nor does the following testimony by Alexander compel the conclusion that she and Hope Casey shared narcotics in the Building during the relevant time period:

Q. There was nothing that occurred in 1984 to change that relationship between you and Hope; you could still freely go back and forth and say, do you have a little something, on occasion?

A. I don't know.

Q. From 1984, from 1983, from 1982, from 1985?

A. I don't know.

Q. My question is not specifically recalling an incident; did anything change your relationship with Hope?

A. Only thing in my life was my son, and my relationship with everybody had changed from that point on.

Q. After Erik's accident, you still had a relationship with Hope; you would stop in her house, she would stop in yours, you would pass crank?

A. I am sure it was.

Tr. at 1342. Alexander's rather cryptic statement "I am sure it was" does not squarely place any narcotics sharing between her and Hope Casey in the relevant time period, particularly, given Alexander's inability to recall any such sharing from 1982 to 1985. Moreover, given the Government's compound question regarding her relationship with Hope Casey after Erik's accident and the passing of crank, a jury reasonably could have taken Alexander's remark as simply an affirmation that she continued to have a relationship with Hope Casey after her son's accident. The jury certainly was not compelled to conclude that Alexander and Hope Casey shared methamphetamine in the Building sometime during October 12, 1984 to May 2, 1985.

As the above portions of Colette Alexander's testimony illustrate, the Government did not, as it contends, elicit a definitive admission from her that she witnessed or participated in drug sharing in the Building during the relevant time period. Forfeiture is not, contrary to the Government's assertions, compelled on the basis of Ms. Alexander's ambiguous testimony.

b. Paul Casey's Testimony

[9] Nor does Casey's testimony, which the Government admitted at trial was the "only thing that stood between the Building and forfeiture," mandate forfeiture of the Building. Paul Casey admitted observing, "[a]t one time or another," HAMC members passing drugs during parties in the Building (Tr. at 1623), and sharing methamphetamine with his wife Hope and others in the Building prior to 1984. Tr. at 1685. Casey also admitted to distributing methamphetamine in the spring of 1985, however, those distributions occurred outside of the Building at 87 East 3rd Street. Tr. at 1788, 1797. Similarly, Casey also admitted distributing methamphetamine from 87 East 3rd Street on or about May 2, 1985, while on guard duty. Tr. at 1795-97.

However, the Government has not pointed to a single admission by Casey that establishes a

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distribution of narcotics in the Building during the relevant time period. Casey testified that he did not "throw away" his stash of methamphetamine after an October 1984 Church of Angels resolution barred all HAMC members from using methamphetamine because his wife "Hope would take some now and then if she wanted some" or *1059 "somebody else would want some." Tr. at 1803. Nothing in Casey's testimony indicates that this leftover "stash" of methamphetamine, however, was kept in the Building, or that he made any distributions of those drugs there. To the contrary, that Casey had to go to 87 East 3rd Street to distribute methamphetamine to an individual who had just completed working at the Building on May 2 suggests that he kept his leftover methamphetamine at 87 East 3rd Street and distributed it from that location.

Not only did Casey fail to admit that narcotics activity occurred in the Building during the relevant time period, he affirmatively stated that no such activity was ever allowed in the Building. Casey discussed the club rule against drugs in the building, which prohibited all drugs except those for personal use. He also stated that most club parties occurred outside the Building at restaurants or outdoors, and that in the relevant time period, the only parties in the Building he recalled were for his children's birthdays. As for the methamphetamine conspiracy, he testified that it ended in summer 1984, and that in October 1984 all members were banned from using the drug.

[10] Recognizing the ambiguous and indefinite nature of Casey's and Alexander's purported "admissions" of methamphetamine distribution in the Building during the relevant time period, the Government asserts that their "conspicuous failure to deny such distributions (and, indeed admitting the possibility that they occurred) fails to create a disputed issue of fact on this point." Pl.Mem. at 19. Nothing could be further from the truth, however, since the claimants had no burden to affirmatively disprove contentions the Government had failed to establish in its probable cause showing and which were not clearly admitted in the testimony upon which the Government relies. Therefore, the Government has not borne its initial burden of demonstrating the absence of a genuine issue of fact on the question of drug sharing in the Building during the relevant time frame.

2. Sandy Alexander's Cocaine Transactions

The Government next argues that judgment as a matter of law is compelled in this case because the claimants failed to rebut (1) Agent Bonner's testimony that Alexander agreed to sell him and Vernon Hartung cocaine in their initial meeting in Alexander's apartment on November 20, 1984; and (2) the evidence that Alexander used his phone in the Building to arrange the four cocaine sales to Bonner and Hartung. The Government also contends that counsel for the Alexanders, in her summation, conceded that Alexander offered to sell Bonner cocaine during their November 20 meeting in the Building (Tr. at 2235), and that "the calls that preceded the sales certainly had something to do with drugs." Tr. at 2307-08.

Although the Government's arguments concerning Sandy Alexander's cocaine transactions and the use of the Building to arrange them are more compelling than its drug sharing contentions, they are, nonetheless, unconvincing.

a. The November 20, 1984 meeting in the Building

Agent Bonner testified that during the November 20, 1984 meeting in Sandy Alexander's apartment, Sandy Alexander agreed to sell cocaine to him and Hartung. Specifically, Bonner stated as follows:

Q. Did you have any discussions with Mr. Alexander regarding narcotics?
A. Yes, I did.
Q. What was discussed in the area of narcotics?
A. In the area of narcotics, I told Mr. Alexander that I was having a very successful business in Baltimore selling cocaine and methamphetamine, Vernon Hartung and I were doing very lucratively in the business. I told him I was thinking we could do it with regard to drugs for the Hells Angels, to let me know, because I was in a real good financial situation at that time.
Q. What did Mr. Alexander say in response?
*1060 A. He told me he didn't want to interfere with any business Gorilla, James Harwood, and I were doing at the time.
Q. What did you say in response?
A. I told him Gorilla and I were only doing a methamphetamine business at that time and not cocaine.
Q. Did Mr. Alexander say anything in response?

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A. Yes, he did.
Q. What did he say?
A. He told me that in terms of cocaine, that he could get cocaine, he could get any amount, from ounces to a pound of cocaine he could get for me.
Q. Did he offer to sell cocaine to you?
A. Yes.
Q. What did you say in response?
A. I told him I would be interested in purchasing cocaine from him if he got good quality cocaine, that I would purchase up to 1/2 pound the first time, I wanted to see how good the stuff would be first.
Q. Did he describe the type of cocaine he would get for you?
A. Yes, he did.
Q. How did he describe it?
A. He described it as Colombian Rock or Peruvian flake.
Q. In terms of quantity, did he represent any particular quantity that he would provide?
A. He said from ounces up to a pound.
Q. Did you discuss obtaining cocaine from him?
A. Yes, we did.

Tr. at 579-80.

However, Vernon Hartung, in his deposition, cast doubt on Bonner's rendition of the conversation in Alexander's apartment on November 20, 1984. While Hartung confirmed Bonner's testimony that drugs were discussed during that meeting, he stated that cocaine was discussed only in the most general terms. Hartung testified as follows in his deposition:

Q. Okay. How did you arrange to meet Sandy Alexander at this apartment?
A. We made initial phone calls after the 4th of July thing, for example, kept contacting them, and Kevin Bonner and I went up to visit him. We told him we were coming up, he said stop up and see him. And I brought some stuff up for him, handkerchiefs, and Vietnam stuff, he wanted handkerchiefs. And Kevin and I went up there to see him. We had a conversation, we told him that we had been doing real good. He said I heard how you guys are doing real good right now. We said yes, we are looking to buy some heroin. He said don't be fooling with heroin, he said no club member fools with heroin, you don't want to get involved with that.
Q. This is not the conversation in his apartment?
A. Yes, this is in his apartment.
Q. Okay.
A. And he said he would give us a call sometime, if I get--he said I can get some real good stuff, you know, I don't remember the exact words word for word, and Kevin was present the whole time. I said well, we will do that. But he said don't fool around with no heroin.
We left there, there was no more conversation with Sandy pertaining to this, and I cannot recall what date it was, but we received a phone call from Sandy to come and see him, and we was going to meet him somewhere, pertaining to he can get us some cocaine, it was. And that's exactly what happened.

Hartung Dep. Tr. 135-36.

Later in his deposition, Hartung testified:

Q. Okay. When is the first time you had a conversation with Sandy about buying drugs?
A. That was the time when he had mentioned we wondered about heroin, he said no. There was another time we had talked to him, we went up, it may have been four occasions. It wasn't at the clubhouse, it was outside, I am talking about inside his apartment, and we were in New York, and he said, you know, I got a line on some good stuff. He said I will get back with you in a couple of *1061 weeks and it was approximately two weeks, it may have been three at the most, that he did get back with us. But we went back to New York to buy the drugs, and Kevin and him talked price stuff, I don't remember exactly how much it was. But we didn't meet at the clubhouse, when we went back to New York, we met in a restaurant.
Q. Where did the--the conversation that you just described--
A. In front of the clubhouse.
Q. So when he said to you, I have a line on some good stuff--
A. Yes.
Q. --that occurred outside?
A. Yes, best of my recollection, it was outside, yes.

Hartung Dep. Tr. 170-71. (Emphasis added).

Expressly denying that any specific arrangements to purchase cocaine were made during the November 20 meeting, Hartung further testified:

Q. There were no specific arrangements made at the time you were in Sandy's apartment?
A. No.

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Q. In fact, he didn't have any--he indicated that he did not have any at that time?
A. No, he said he would have some coming.
Q. Okay. But that's the full extent of what he said?
A. Yes. Best I can recall.
Q. Okay. And that's the only conversation about drugs you had with him on that occasion?
A. On that occasion.

Hartung Dep. Tr. 211-12; see also id. at 202 ("[t]hat was set up in the apartment, the drug deal, that he could get some stuff, but the actual meeting place and stuff was discussed over the phone, and the first one was done in a restaurant").

[11] Thus, in Hartung's version of the November 20, 1984 meeting, Sandy Alexander only generally assured them that he could obtain "real good" cocaine for them. Hartung's testimony corroborates Sandy Alexander's testimony that he did not arrange to sell cocaine to Hartung and Bonner during their November 20, 1984 meeting with him in their apartment. Tr. at 2065-66. Therefore, no specific agreement to transact a cocaine sale was reached during that meeting. Nor was price, quantity or type of cocaine discussed. Indeed, according to Hartung, the parties did not even arrange or schedule a future meeting. Sandy Alexander's general assurances that he had access to cocaine, as described by Hartung, is hardly tantamount to negotiating or arranging a specific drug transaction. Cf. United States v. Ruiz, 932 F.2d 1174, 1184 (7th Cir.1991) (defendant's comment that he could get ten kilograms of cocaine was "hardly the negotiation of a specific drug transaction" and did not demonstrate, by a preponderance of the evidence, that defendant agreed to sell ten kilograms of cocaine for purposes of sentencing).

Indeed, Alexander's assurances during that meeting are qualitatively indistinguishable from those he allegedly made in an earlier conversation with Bonner regarding methamphetamine, which I found failed to establish even a "nexus" to the Building that would justify a finding of probable cause. Bonner testified that on July 4, 1984, Sandy Alexander told him, in the clubhouse, that if James Harwood, Bonner's methamphetamine supplier was convicted on drug charges, he should come see Alexander and he would "arrange something." Tr. at 558. I rejected the Government's argument that probable cause as to the methamphetamine conspiracy could be based on that conversation alone because of the general nature of Sandy Alexander's comments. Specifically, I stated:

> It still goes in the category of ... assurances. It is not actually setting up the deal, it is not delivering on the deal, what it is is a promise, if you don't get delivery in the future from Harwood, I'll step in. There's no agreement of any kind being discussed during that meeting. There is merely a recognition that something has occurred and that I will step in if something else doesn't occur. I would not consider that a nexus sufficient to create grounds for forfeiture standing alone.

*1062 Tr. at 1228-30. Sandy Alexander's general statement, as testified to by Hartung, that he could get "good stuff", i.e. cocaine, similarly falls into the category of mere "assurances." Therefore, crediting Hartung's testimony, a reasonable jury could have concluded that Alexander's apartment did not facilitate his later cocaine sales to Bonner and Hartung, as the November 20, 1984 conversation therein was only tangentially linked to Alexander's later cocaine sales.

b. The Telephone Calls to Sandy Alexander's Residence in the Building

[12] Though they present a closer question, the telephone calls from Bonner, Hartung and Jerry Buitendorp to Alexander's residence in the Building do not, as a matter of law, require forfeiture of the Building. Before turning to the substantive legal issues raised by the phone calls, it is useful to first place the calls in context. Although the Government's brief spins a tale of numerous calls to arrange drug transactions, with the parties speaking in code to elude suspicion, the tapes themselves, which the jury heard, depict a far less compelling yarn.

First, as stated before, there was not a single explicit reference to cocaine, or price or quantity in any of the alleged 18 calls to arrange drug deals. Second, many of the calls were innocuous, or arguably related to other projects which the parties were involved in, namely obtaining information about the POWs and Colonel Gritz's operations in Southeast Asia. In seven of the calls, for example, little more was said than "I'll call you back" or "call me back later." (GX26A; GX27A; GX44A; GX45A; GX49A; GX51A; GX58A). Three other calls between Hartung and Sandy Alexander referred

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to "lobbyists," "senators" and "papers." Because Bonner was not a party to these calls, the jury reasonably could have concluded that those three calls related to Hartung's efforts to provide Alexander with information about POWs, despite Bonner's testimony that he believed Hartung and Alexander were speaking in code about aspects of a contemplated drug deal. Tr. at 638-39.

As for those limited number of calls which Alexander's counsel conceded "had something to do with drugs," [FN3] I do not agree that they compel forfeiture as a matter of law. Accepting that those calls to the Building were somehow related to the cocaine deals, I do not believe that, as a matter of law, they necessarily facilitated Alexander's cocaine sales. Those calls were one step removed from the actual sales or even arranging of the sales, since, at best, they simply set up meetings at which the sales were arranged or occurred. No specifics, such as amount or price were discussed explicitly, or in code. Hence, the arranging as well as the consummation of the cocaine sales required the privacy or inconspicuousness of some other setting; the privacy afforded by Sandy Alexander's telephone, thus, was not integral to the arranging of the cocaine sales. In fact, by purposefully not discussing specifics about drug transactions, such as price or quantity, the parties to the calls expressly declined to make use of the privacy of the telephone in their illegal activities. Under these circumstances, it was a jury question whether the use of the telephone was incidental or fortuitous to the actual drug sales.

> FN3. GX43A(11/28/84): Bonner calls Alexander, and Colette Alexander picks up. She says "Listen, he's in the tub still, uh.... Listen. He said, uh, to tell you before that, uh, he needs about 24-hour's notice and, uh, (U/I) for you to come up, and spend a day. And he'll take you over to see the producers and all that stuff."); GX44A (11/30/84: Buitendorp call to Alexander setting up meeting at the Daily Planet); GX52A (12/18/84: Buitendorp arranges to meet Alexander at "America," a New York City restaurant); GX 53A (12/18/84: Hartung arranges to meet Alexander for dinner on 12/19 at 7:30 p.m.); GX57A (1/24/85: Buitendorp tells Colette Alexander that he will be at house in 1/2 hour).

The Government contends that the phone calls were critical to the cocaine sales because it was only by calling Sandy Alexander at his residence that Bonner and Hartung could inform him that they wanted to arrange another deal. This argument ignores the fact that Bonner and Hartung could have travelled to meet Alexander outside the club as they had on other occasions. In any event, even if arranging a meeting had to be done by calling Alexander at home, the calls were still a substantial step removed from the actual arranging of the deals and the *1063 privacy of Alexander's telephone line was not necessary in arranging the actual sales. Emphasizing the privacy afforded by telephone lines generally, the Government ignores the fact that the parties did not employ this privacy in setting up the meetings where the cocaine sales were arranged or consummated since the last sale, by the Government's own evidence, was not arranged by telephone calls.

The cases cited by the Government do not suggest that a tangential link between phone calls and the actual arranging of illegal transactions suffices to compel forfeiture as a matter of law. For example, in the two telephone calls at issue in United States v. One Parcel of Real Estate Commonly Known As 916 Douglas Avenue, Elgin Illinois, 903 F.2d 490 (7th Cir.1990), cert. denied, 498 U.S. 1126, 111 S.Ct. 1090, 112 L.Ed.2d 1194 (1991), the parties entered into a specific agreement to purchase cocaine, specifying the quantity and price of the drugs to be purchased during the calls. Since the claimant had "negotiated the price and quantity of cocaine to be sold" in the calls, the Seventh Circuit held that "the connection between the underlying drug transaction and [the claimant's] property was more than incidental and fortuitous." 903 F.2d at 494. Similarly, in United States v. Lewis, 987 F.2d 1349, 1356 (8th Cir.1993), the Eighth Circuit held that the record supported the jury's finding that more than an "incidental or fortuitous contact" between the claimant's cellular phone and his criminal activity existed since, on one occasion, the claimant telephoned his cocaine supplier on the cellular phone and obtained a price quote for five kilograms of cocaine. [FN4]

> FN4. The nature of the telephone calls at issue in United States v. 9239 South Central, Oak Lawn, Illinois, 1991 WL 222180 (N.D.Ill.1991) is unclear. The government in that case contended that the parties arranged the drug transactions. The district court, however, only mentioned that in two of the

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conversations, the parties spoke of "do[ing] it," which the undercover agent testified referred to doing a cocaine deal. 1991 WL 222180 at *2. It is uncertain, then, whether more specific aspects of the deals were discussed in the telephone conversations at issue. In any event, the court's finding that the claimant's home facilitated the cocaine transactions was not based solely on the telephone conversations. The government had presented uncontradicted evidence that the agent had sold cocaine to the claimant on approximately twenty-four occasions, often delivering the drugs to the claimant's home. Although in United States v. Zuniga, 835 F.Supp. 622 (M.D.Fla.1993) the court found the claimant's home forfeitable as a matter of law based on ten phone calls placed to an undercover agent, nowhere does the opinion indicate the substance of these conversations. I assume that the actual drug transactions at issue were arranged on the phone, since the court found that "[t]he use of the telephone substantially connected the home to the offenses of which [claimant] was convicted," giving the home "more than an incidental or fortuitous connection to the offenses." 835 F.Supp. at 624.

Because the telephone calls here were one step removed from the arranging of the drug transactions, and the privacy provided by Sandy Alexander's telephone line was not used to arrange the drug deals, I do not believe that the phone calls establish, as a matter law, that the Building was used to facilitate felony narcotics violations. Whether the calls constituted facilitation was, therefore, a jury question, which a reasonable jury could have resolved in favor of the claimants.

c. The Evidence Rebutting the Government's Prima Facie Showing that the Building was Used in the Commercial Distribution of Narcotics during the Relevant Time Frame

[13] As a final argument, the Government maintains that the claimants failed to rebut its "prima facie showing that individual HAMC members used their respective apartments in the Building during the relevant time period in connection with their commercial drug-dealing." Pl. Mem. at 31-32. This prima facie showing, according to the Government was made out through the Stipulation of Facts that 12 NYC Chapter HAMC members were convicted of drug conspiracy offenses; physical evidence seized from the Building during the May 2, 1985 raid; and the expert testimony of Louis Barbaria and Terry Katz purporting to explain the significance of that evidence.

However, Paul Casey's testimony, if credited, certainly provided a basis upon which the jury could conclude that the claimants had disproved, by a preponderance of the evidence, *1064 that HAMC members operated a methamphetamine distribution network from the Building. First, Casey, the admitted manufacturer or "cooker" of methamphetamine for the club, stated in no uncertain terms that the methamphetamine conspiracy had ended months prior to the enactment of the forfeiture laws. Tr. at 1511-13. Indeed, Casey's claim was substantiated by Barbaria's testimony that there was a methamphetamine "drought" during most of the relevant time period, Tr. at 504, and that the Weisbrod-Alexander-Casey enterprise had ended by October 1984.

Second, Casey testified about certain unwritten club rules that, if believed, would suggest that the Building was never used in any illegal drug distribution activities of NYC Chapter HAMC members. He stated that commercial quantities of narcotics were never allowed in the Building, (Tr. at 1567-68, 1606), although members were allowed to maintain "personal use" amounts there. Tr. at 1518. Casey also testified, and the Government's expert Barbaria confirmed, (Tr. at 337), that illegal activities were not to be discussed, and were never discussed, during NYC Chapter HAMC "church meetings." Tr. at 1727, 1730-31.

Third, Casey testified that the items found in his apartment were put to innocent uses, had not been used at all or were leftover from the defunct methamphetamine conspiracy. As for the counter-surveillance devices, Casey claimed that he used the scanner and frequency books, like many law-abiding citizens, as entertainment, and asserted that those devices did not reveal sensitive law enforcement information. (Tr. 1735) Casey further testified that he had never operated the hand held scanner, (Tr. at 1565-66), and that he had used the telephone wire testers as a portable phone. Tr. at 1737.

The small quantity of methamphetamine found in Casey's apartment, when coupled with Casey's

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testimony about the club rule against possession of commercial quantities of narcotics in the Building (albeit with the proviso that "personal use" quantities were permitted), certainly permitted the jury to reject the expert's testimony that the small quantity of high purity of narcotics seized in the Building bespoke commercial drug activity in the Building. The jury was free to infer that the small quantities of methamphetamine found were remnants from the earlier methamphetamine conspiracy or personal use amounts derived from larger high purity stashes kept elsewhere. This is especially true given the absence of large quantities of drug dilutants in the various apartments at the time of the raid and the admitted high tolerance for methamphetamine among many NYC Chapter HAMC members.

As for the other items found in the Building, the jury was also free to reject the expert's conclusions given the absence of any evidence as to where in the various apartments these items were found--a factor one of the Government's experts, Terry Katz, admitted was highly relevant in determining whether an item was related to on-going drug activity. Tr. at 1129-31 (Sergeant Katz admits that because a wide-variety of household items might be used in drug activity, the location of such items is "very important" in determining whether they are drug-related).

II. The Motion for a New Trial

The same evidence that compels denial of the Government's motion for judgment as a matter of law also convinces me that a new trial is not warranted.

[14] "A motion for a new trial should be granted when, in the opinion of the district court, 'the jury has reached a seriously erroneous result' or ... the verdict is a miscarriage of justice." Song v. Ives Laboratories, Inc., 957 F.2d 1041, 1047 (2d Cir.1992); Smith v. Lightning Bolt Productions, Inc., 861 F.2d 363, 370 (2d Cir.1988). A district court has substantial discretion to grant a motion for a new trial, and unlike the posture required in considering motions for judgment as a matter of law, the trial judge may weigh conflicting evidence without viewing it in the light most favorable to the verdict winner. Song, 957 F.2d at 1047; Bevevino v. Saydjari, 574 F.2d 676, 684 (2d Cir.1978).

[15] I, however, decline to exercise my discretion to grant the Government's motion for a new trial because I do not believe that *1065 the jury's verdict was seriously erroneous or a miscarriage of justice. While the Government's evidentiary presentation met the low threshold of establishing a "nexus" sufficient to demonstrate probable cause, I did not, and still do not, consider that the Government provided substantial evidence of a wide-ranging methamphetamine conspiracy operated out of the Building during the relevant time period, [FN5] particularly given the special care exercised by NYC Chapter HAMC members--confirmed by the Government's own witnesses--to shield the clubhouse from illegal activities. For the reasons discussed previously, I also do not find as a matter of law that the Government established that the Building facilitated Sandy Alexander's cocaine deals.

FN5. The Government demonstrated that Alexander had sufficient time and notice before the raid to discard narcotics or other incriminating evidence. This factor does not establish, however, that drugs actually existed in the Building prior to the raid.

I do not doubt for a moment that individual HAMC members, including Sandy Alexander and Paul Casey, engaged in criminal activity, often violent and corrupt. However, it is the Building and not the general criminality of HAMC members that was on trial in this case--a point the Government sometimes lost track of. Without the testimony of William Medeiros, the Government's evidence linking the Building to felony narcotics violations was, in my estimation, rather scanty indeed. Casting the Building in the haze of the HAMC's general criminality and the unconventional lifestyle of its members might have been a potent, although improper, method of bolstering the fairly tenuous connection between the Building and drug activities during the relevant time frame. The jury, as its verdict demonstrates, did not succumb to the temptation of concluding that the individual members' admitted criminal activities engulfed every aspect of their lives, including their homes, but rather parsed through the evidence, giving it the weight they believed it merited. All in all, on this record, I can not and do not say that the jury's ultimate decision that the Building was not used to facilitate a felony narcotics violation was seriously erroneous, or even different from the conclusion I

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would have reached were I the trier of fact. Consequently, the Government's motion for a new trial is denied.

CONCLUSION

For the reasons set forth above, the Government's motion for judgment as a matter of law, or alternatively, for a new trial is DENIED.

SO ORDERED.

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HOGAN-MORGENTHAU AWARD
JANUARY 17, 1995 -- TAVERN ON THE GREEN

I AM DELIGHTED TO BE HERE TONIGHT. THIS EVENING PROVIDES ME WITH THREE PRECIOUS OPPORTUNITIES. THE FIRST IS TO BE HUMBLED BY SHARING THE HOGAN-MORGENTHAU AWARD WITH ITS MANY TALENTED AND ILLUSTRIOUS FORMER RECIPIENTS. THIS AWARD IS A TRIBUTE TO THE VALUES OF PROSECUTORIAL EXCELLENCE AND COMMITMENT TO PUBLIC SERVICE THAT EXEMPLIFIES THE LEGACIES OF FRANK HOGAN AND ROBERT MORGENTHAU. THE FORMER RECIPIENTS OF THIS AWARD, LIKE MY DISTINGUISHED COLLEAGUES ON THE BENCH JOHN KEENAN AND PIERRE LEVAL, HAVE ALL CONTRIBUTED GREATLY TO THOSE VALUES AND I AM DEEPLY PRIVILEGED TO HAVE BEEN SELECTED FOR THE HONOR OF CELEBRATING THE SIXTIETH YEAR ANNIVERSARY OF THE HOGAN-MORGENTHAU ASSOCIATION WITH THEM AND ALL OF YOU.

THE SECOND OPPORTUNITY I HAVE TONIGHT IS TO THANK THE MANY FRIENDS I WAS FORTUNATE TO HAVE MET DURING MY YEARS IN THE

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MANHATTAN DA'S OFFICE. ALL OF YOU SUPPORTED AND NURTURED ME DURING THOSE YEARS WHEN I FIRST WAS LEARNING HOW TO LAWYER. YOU SHARED WITH ME THE SOMETIMES EXHILARATING AND OTHER TIMES FRUSTRATING MOMENTS BEFORE PATIENT JUDGES LIKE JUSTICE BURTON ROBERTS AND ACCOMMODATING ADVERSARIES LIKE VERNON MASON. YOU ALL TAUGHT ME MUCH AND I AM ETERNALLY GRATEFUL FOR ALL YOU GAVE ME AND THE FRIENDSHIPS YOU CONTINUE TO SHARE WITH ME NOW.

I ALSO WANTED TO TAKE A MOMENT TO EXPRESS MY APPRECIATION TO THE THREE SUPERVISORS AND FRIENDS FROM THE DA'S OFFICE WITH WHOM I HAD THE MOST CONTACT -- JOHN FRIED, WARREN MURRAY AND RICHARD GIRGENTI. I WAS FORTUNATE TO HAVE WORKED UNDER THE BEST BOB MORGENTHAU'S OFFICE HAD TO OFFER -- INDIVIDUALS OF EXTRAORDINARY LEGAL SKILLS, INTELLIGENCE, AND INTEGRITY. ALL OF YOU CAN TAKE CREDIT FOR THE GOOD SKILLS I PICKED UP AND DISCLAIM THE BAD ONES I DEVELOPED ON MY OWN AND TO

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WHICH MANY OF THE LAWYERS WHO APPEAR BEFORE ME NOW ARE ATTESTING. TO MY MANY FRIENDS HERE TONIGHT IT IS WONDERFUL TO SEE YOU ALL AND I THANK YOU FOR SHARING THIS EVENING WITH ME.

MY THIRD OPPORTUNITY TONIGHT IS TO PUBLICLY THANK THE BOSS-- ROBERT MORGENTHAU -- FOR THE MANNER IN WHICH HE CHANGED MY LIFE FROM THE FIRST MOMENT WE MET. BOB IS UNLIKELY TO REMEMBER OUR FIRST MEETING. IT OCCURRED IN A SITUATION AND UNDER CIRCUMSTANCES WHICH I UNDERSTAND HAVE HAPPENED WITH MANY OTHERS. LIKE FOR MANY OTHERS, HOWEVER, A COMMON MOMENT FOR HIM, WAS A LIFE ALTERING MOMENT FOR ME.

I MET BOB AT OUR MUTUAL ALMA MATER, YALE. I WAS A THIRD YEAR LAW STUDENT WHO HAD BEEN STUDYING A TAX LAW TREATISE IN THE LIBRARY. CONTRARY TO POPULAR BELIEF, YALIES DO OCCASIONALLY READ BOOKS ON THE LAW INSTEAD OF ON POLICY, PARTICULARLY WHEN PROFESSORS VISITING FROM HARVARD ARE TEACHING THE COURSE.

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SOMEWHERE IN THE EARLY EVENING I TOOK A BREAK AND THE INSATIABLE APPETITE OF STUDENT LIFE HIT ME -- NO, IT WAS NOT THE PANG OF INTELLECTUAL HUNGER -- IT WAS THE HUNGER PANG FOR FOOD AND DRINK. DOWN THE HALL FROM THE LIBRARY I SAW CHEESE AND WINE IN THE BACK OF THE THIRD FLOOR CONFERENCE ROOM AND THAT WAS MORE THAN ENOUGH TO DRAW MY ATTENTION. THE ASSEMBLED SPEAKERS IN THE ROOM WERE PUBLIC INTEREST LAWYERS WHO WERE DISCUSSING THE ALTERNATIVES TO PRIVATE PRACTICE. I DON'T REMEMBER THE OTHER SPEAKERS BECAUSE BOB MORGENTHAU -- FORTUNATELY FOR ME WHO WAS ONLY THERE FOR THE NUTRIENTS IN THE ROOM -- WAS THE LAST SPEAKER BEING INTRODUCED. EQUALLY LUCKY FOR ME, BOB DECIDED HE DIDN'T WANT TO SPEAK LONG AND ANNOUNCED THAT AS THE LAST SPEAKER HE WOULD KEEP IT SHORT. I HAD HIT PAY DIRT AND DECIDED TO STAY AND LISTEN.

AFTER AFFIRMING THE MANY BENEFITS OF PUBLIC SERVICE WHICH THE OTHER SPEAKERS HAD APPARENTLY DISCUSSED, BOB DESCRIBED

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HIS OFFICE AND ITS WORK. HE INDICATED THAT A POSITION WITH HIS OFFICE DIFFERED FROM ALMOST ALL OTHER PUBLIC AND PRIVATE WORK BECAUSE ONLY IN HIS OFFICE WOULD YOU BE ACTUALLY TRYING A CASE WITHIN YOUR FIRST YEAR AND WHERE YOU WOULD HAVE SIGNIFICANT AND ULTIMATE RESPONSIBILITY IN THE DEVELOPMENT AND PRESENTATION OF YOUR CASES. AT 24-25 YEARS OF AGE, BOB EXPLAINED, YOU WOULD DO MORE IN A COURTROOM THAN MANY LAWYERS DID IN A LIFETIME.

MANY OF YOU KNOW THAT I WAS BORN AND RAISED IN THE SOUTH BRONX AND HAVE HAD A LIFE-LONG COMMITMENT TO SERVING MY COMMUNITY. MY ATTRACTION TO LAWYERING STARTED WITH WATCHING PERRY MASON -- I AM A CHILD OF TELEVISION. I MAY HAVE BEEN THE ONLY FAN OF THE SHOW WHO LIKED THE EVER LOSING PROSECUTOR, BERGER. MY LIKE FOR HIM DEVELOPED FROM ONE EPISODE IN WHICH PERRY MASON EXPRESSED SYMPATHY FOR THE FRUSTRATION BERGER HAD TO BE FEELING AFTER WORKING SO HARD ON HIS CASE AND HAVING IT

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DISMISSED. BERGER RESPONDED BY OBSERVING THAT AS A PROSECUTOR HIS JOB WAS TO FIND THE TRUTH AND THAT IF THE TRUTH LED TO THE ACQUITTAL OF THE INNOCENT AND THE DISMISSAL OF HIS CASE, THEN HE HAD DONE HIS JOB RIGHT AND JUSTICE HAD BEEN SERVED. HIS SPEECH STAYED WITH ME MY ENTIRE LIFE AND SHAPED MY PERCEPTION OF WHAT PROSECUTORS DID. EVERY ONCE IN A WHILE TELEVISION DOES A GOOD THING.

HOWEVER, DESPITE MY INVOLVEMENT IN PUBLIC SERVICE ACTIVITIES IN COLLEGE AND LAW SCHOOL, MY CAREER IN LAW SCHOOL HAD GOTTEN TRACKED ON A TRADITIONAL PATH -- FRIENDS WERE TALKING TO ME ABOUT CLERKING AND I HAD SPENT A SUMMER AT A TOP TEN MIDTOWN FIRM. I WAS INTERVIEWING AT FIRMS IN OTHER STATES BECAUSE MY THEN HUSBAND WAS APPLYING TO GRADUATE SCHOOLS THROUGHOUT THE COUNTRY. I HAD AN INTEREST IN INTERNATIONAL LAW AND HAD APPLIED TO THE DEPT OF STATE, BUT I WAS NOT CONSIDERING ANY OTHER PUBLIC

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POSITIONS UNTIL I HEARD BOB TALK. HE SPARKED BY MEMORY ABOUT WHAT I HAD THOUGHT LAW WAS ABOUT -- SEEKING JUSTICE IN A COURTROOM. I STOOD ON THE WINE AND CHEESE LINE WITH BOB AND CHATTED WITH HIM -- I MIGHT HAVE BEEN TEMPORARILY DISTRACTED FROM WHAT HAD DRAWN ME TO THAT ROOM -- FOOD AND DRINK -- BUT I NEVER PERMANENTLY FORGET MY PRIORITIES. I ASKED BOB QUESTIONS ABOUT HIS LIFE AND WHERE HE HAD BEEN AND WHAT HE LIKED ABOUT EACH POSITION. TO THIS DAY I DON'T KNOW WHY HE DIDN'T WRITE ME OFF AS COMPLETELY USELESS, I HAD NO IDEA WHO HE WAS OR WHAT HE HAD ACCOMPLISHED IN LIFE. I DID FIND OUT FAIRLY QUICKLY. DESPITE MY CLEAR IGNORANCE, BOB DIDN'T WRITE ME OFF AND HE ASKED ME TO INTERVIEW WITH HIM THE NEXT DAY, WHICH I DID.

HE IN TURN GOT MY RESUME FROM THE CAREER OFFICE AND SPOKE TO MUTUAL FRIENDS AT THE SCHOOL. BY THE TIME I GOT TO THE INTERVIEW, WE OVERSPENT OUR ALLOTTED TIME TALKING ABOUT THE

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VARIOUS ACTIVITIES I HAD BEEN INVOLVED IN AND HE SOLD ME ON VISITING HIS OFFICE. TWO OR THREE WEEKS LATER, I VISITED THE OFFICE AND SPENT A DAY WITH ANOTHER YALIE, JESSICA DE GRASSIA, TOURING, LOOKING AND ABSORBING. WHEN BOB OFFERED ME A JOB -- I SAID YES BUT HAD THE FURTHER TEMERITY TO EXPLAIN TO BOB THAT MY ACCEPTANCE DEPENDED UPON MY HUSBAND GETTING INTO A GRADUATE PROGRAM HE LIKED IN NYC. MY THEN HUSBAND'S GRADUATE PLANS DIDN'T FINALIZED UNTIL THE SUMMER, YET BOB KEPT HIS OFFER OPEN AND IN AUGUST 1979 MY LIFE IN THE DA'S OFFICE BEGAN.

I HAD HAD ONE TRIAL ADVOCACY COURSE AT YALE AND DONE BARRISTERS UNION, A MOCK TRIAL EXERCISE. MY EDUCATIONAL TRAINING IN CRIMINAL LAW WAS LIMITED TO MY FIRST YEAR COURSES. I WAS SURELY ILL TRAINED WHEN I BEGAN MY CAREER IN HIS OFFICE. YET, BOB TOOK A CHANCE AND GAVE ME AN INVALUABLE GIFT BY HIRING ME. I DON'T KNOW HOW HE SAW THE CHORD IN ME THAT RESPONDED SO STRONGLY

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TO TRIAL WORK. I LOVED LITIGATING. I LOVED BEING A PROSECUTOR. IT WAS WONDERFUL AND ENORMOUSLY GRATIFYING WORK THAT I ENJOYED TREMENDOUSLY. MOST OF ALL, HOWEVER, I LOVED BEING IN AN OFFICE SURROUNDED BY PEOPLE WHOSE VALUES I RESPECTED AND WHO TAUGHT ME SO MANY IMPORTANT LESSONS.

I WAS TAUGHT TO BE THOROUGH IN MY INVESTIGATIONS, CAREFUL IN MY FACT FINDING, METICULOUS IN MY LEGAL ARGUMENTS. ALL OF THIS WHILE I JUGGLED HUNDREDS OF CASES. I WAS TAUGHT TO APPLY FACTS TO LAW -- THE CORNERSTONE OF LAWYERING. I WAS TAUGHT TO THINK ABOUT THE NEEDS OF SOCIETY AND TO RESPOND TO THOSE NEEDS BY PROSECUTING VIGOROUSLY AND WITH PASSION. YET, MOST OF ALL, I WAS TAUGHT TO DO JUSTICE. IT IS THAT LESSON OF JUSTICE WHICH HAS STAYED WITH ME THROUGHOUT MY CAREER AND IT IS THE CALL TO DO MY WORK JUSTLY UPON WHICH I NOW ATTEMPT TO STRUCTURE MY LIFE AS A JUDGE.

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YOU SEE, IN BOB MORGENTHAU'S OFFICE I LEARNED THAT JUSTICE WAS NOT EASILY DEFINED -- THAT IT WAS BOTH A PROCESS AND A RESULT THAT RELIED UPON FAIRNESS AND INTEGRITY. PART OF THE PROCESS WAS IN INVESTIGATING THOROUGHLY AND OBJECTIVELY TO ENSURE ALWAYS THAT ONLY THE LEGALLY GUILTY WERE PROSECUTED. I REMEMBER MANY A SESSION IN JOHN FRIED'S AND THEN WARREN MURRAY'S OFFICE IN WHICH WE DISCUSSED NOT THE PROSECUTION OF CASES BUT THEIR DISMISSALS BECAUSE WE SIMPLY HAD INSUFFICIENT OR UNPERSUASIVE EVIDENCE. IN THE OFFICE I WAS A PART OF, IT WAS NEVER THE VERDICT AT THE END OF THE CASE THAT MATTERED BUT WHETHER WE HAD CAREFULLY AND FULLY INVESTIGATED ALL AVENUES OF EVIDENCE, PUT FORTH THE BEST AND THE MOST POTENT ARGUMENTS IN A SKILLED MANNER AND FAIRLY PRESENTED THE EVIDENCE TO THE JURY FOR DETERMINATION.

I ALSO REMEMBER MANY A SESSION WITH JOHN AND WARREN WHEN WE TALKED ABOUT WHAT WAS FAIR AND JUST IN THE PLEA OFFERS WE

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EXTENDED -- FAIR AND JUST IN LIGHT OF THE STRENGTH OF OUR CASE AND ITS IMPACT ON BOTH SOCIETY AND THE DEFENDANT. ALTHOUGH VIGOROUS PROSECUTION WAS IMPORTANT, SO WAS COMPASSION WHEN THE CIRCUMSTANCES WARRANTED IT.

I KNOW THAT AS THE OFFICE HAS GROWN, IT HAS ALMOST DOUBLED SINCE MY TIME THERE, AND THAT THERE HAS BEEN A GREATER BUREAUCRACY PUT IN PLACE. I WORRY THAT WITH SIZE AND THE EMPHASIS ON INCREASED LAW ENFORCEMENT IN OUR SOCIETY, THAT THOSE IN SUPERVISORY ROLES WILL LOSE SIGHT OF THE IMPORTANCE OF ENCOURAGING YOUNG PROSECUTORS TO REMEMBER THAT JUSTICE WINS WHEN WHAT THEY DO IS DONE FAIRLY AND WITH COMPASSION FOR ALL PARTICIPANTS IN THE PROCESS. VICTIMS UNQUESTIONABLY MUST BE PROTECTED BUT WE AS A SOCIETY SUFFER IRREPARABLE HARM WHEN THAT GOAL SUPERSEDES RESPECT FOR CONSTITUTIONAL PROCESSES AND OBJECTIVE AND HUMANE EVALUATION OF CASES.

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THERE IS NO EASY DEFINITION TO THE WORD JUSTICE.

BECAUSE OUR JURISPRUDENCE DEVELOPS FROM THE FACTS OF CASES, OUR JUSTICE ENCOMPASSES A COMPLEX IDEA TIED TO THE CIRCUMSTANCES OF EACH SITUATION. IN MANY RESPECTS, THE COURTS AND LAW ARE THE LEAST SUITED INSTITUTIONS TO RENDER JUSTICE BECAUSE THEY ARE NOT SYSTEMS STRUCTURED ON COMPROMISE. WE HAVE BUILT PLEA BARGAINING AND SETTLEMENTS INTO THESE INSTITUTIONS BUT WE HAVE DONE THIS BECAUSE THE END RESULT OF LEGAL PROCESS IS TO FIND A WINNER. HOWEVER, FOR EVERY WINNER THERE IS A LOSER, AND OFTEN THE LOSER IS HIM OR HERSELF A VICTIM OF THE ILLS OF OUR SOCIETY.

DESPITE THE FACT THAT THERE IS NO EASY DEFINITION TO THE WORD "JUSTICE," NOT JUST LAWYERS BUT ALMOST EVERY PERSON IN OUR SOCIETY IS MOVED BY THE WORD. IT IS A WORD EMBODIED WITH A SPIRIT THAT RINGS IN THE HEARTS OF PEOPLE. IT IS AN ELEGANT AND BEAUTIFUL WORD THAT MOVES PEOPLE TO BELIEVE THAT THE LAW IS

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SOMETHING SPECIAL. THEREFORE, DESPITE THE DIFFICULTY IN DEFINING THE WORD, THOSE OF US WHO CHOOSE THE LAW AS OUR PROFESSION ARE COMPELLED TO BE FOREVER VIGILANT IN GIVING THE CONCEPT OF JUSTICE MEANING AND IN SPENDING TIME REGULARLY IN ITS PURSUIT.

I AM MOST GRATEFUL TO BOB MORGENTHAU AND HIS OFFICE IN TEACHING ME HOW IMPORRTANT THE DEMANDS OF JUSTICE ARE. IN BOB'S OFFICE, I LEARNED TO CONSTANTLY STEP OUT OF MY ROLE AS A PROSECUTOR AND TO LISTEN TO MY ADVERSARIES AND TO RESPECT AND APPRECIATE THEIR PERSPECTIVES. IT WAS ALL TOO EASY AS A PROSECUTOR TO FEEL THE PAIN AND SUFFERING OF VICTIMS AND TO FORGET THAT DEFENDANTS, DESPITE WHATEVER ILLEGAL ACT THEY HAD COMMITTED, HOWEVER DESPICABLE THEIR ACTS MAY HAVE BEEN, WERE HUMAN BEINGS WHO HAD FAMILIES AND PEOPLE WHO CARED AND LOVED THEM. APPRECIATING THIS FACT DID NOT EXCUSE THE REPREHENSIBLE ACTS I PROSECUTED BUT IT WAS MY FIRST STEP IN UNDERSTANDING THE

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BALANCING OF HUMAN FACTORS JUSTICE REQUIRED.

EQUALLY, AS A PROSECUTOR, I ALSO LEARNED TO APPRECIATE AND RESPECT THE IMPORTANCE AND WORK OF DEFENSE ATTORNEYS AS DEFENDERS OF OUR CONSTITUTION AND ITS PROMISED RIGHTS TO INDIVIDUALS AND TO OUR SOCIETY. BOTH SIDES IN THE CRIMINAL SYSTEM ARE EQUALLY NECESSARY AND EQUALLY IMPORTANT TO DOING JUSTICE. I NEVER SAW DEFENSE ATTORNEYS AS ENEMIES, WE WERE AND ARE SOLDIERS ON THE SAME SIDE ONLY WITH DIFFERENT ROLES. THE GOAL OF THE MISSION IS THE SAME--JUSTICE. I LEARNED THAT JUSTICE DOES NOT HAVE A SIDE. IT IS A RESULT THAT DEPENDS ON A FAIR PROCESS BEING HONORED. IT IS RESPECT FOR THE INTEGRITY OF A PROSECUTOR'S WORD AND ACTION THAT TYPIFIES THE BEST OF THE HOGEN-MORGENTHAU TRADITIONS, AND IT IS THAT INTEGRITY WHICH I WAS TAUGHT AND FOR WHICH I AM GRATEFUL.

I HOPE, AND EXPECT BECAUSE IT IS BOB MORGENTHAU'S

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OFFICE, THAT THE YOUNG PROSECUTORS OF TODAY ARE ENCOURAGED TO LEARN AND HOLD SACRED THE THINGS I WAS TAUGHT. IT WAS THOSE LESSONS THAT MADE MY WORK IN BOB'S OFFICE VALUABLE. BOB -- THAT CHANCE MEETING BETWEEN US WAS THE MOST SPECIAL MOMENT OF MY LIFE. I KNOW THAT MY STORY IS VERY SIMILAR TO THAT OF MANY HERE -- IF NOT IDENTICAL IN CIRCUMSTANCE OF MEETING, AT LEAST IDENTICAL IN RESULT -- WE BECAME LAWYERS PROUD TO HAVE BEEN A PART OF YOUR OFFICE, GRATEFUL FOR THE TIME WE SPENT THERE AND INDEBTED FOR THE MANY GIFTS IT GAVE US. ON MY PERSONAL BEHALF-- THANKS TO YOU AND TO MY MANY FRIENDS HERE WHO MADE MY EXPERIENCE SO EXTRAORDINARY.

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WOMEN IN THE JUDICIARY

Panel Presentation - the 40th National Conference of Law Reviews
March 17, 1994, The Condado Plaza Hotel, Puerto Rico

When I finished law school in 1979, there were no women judges on the Supreme Court or on the highest court of my home state, New York. This past year alone there has been a quantum leap in the representation of women in the legal profession, and particularly in the judiciary. In addition to the appointment of the first female United States Attorney General, Janet Reno, and the election of the first female, and only Hispanic, President, Roberta Cooper Ramos, of the American Bar Association, an institution founded in 1878, we have seen the appointment of a second female justice on the Supreme Court, Associate Justice Ruth Bader Ginsburg, the appointment of a female chief judge, Justice Judith Kaye, to the Court of Appeals, the highest state court of New York, and the appointment to that same court of a second female judge, also not insignificantly, the first hispanic, Judge Carmen Beauchamp Ciprack.

As of 1992, women sat on the highest courts of almost all of the states and the territories including Puerto Rico, who can claim with pride the service of my esteemed co-panelist, The Honorable Miriam Naveira de Rodon, Associate Judge of the Supreme Court of Puerto Rico. One Supreme Court, that of Minnesota, has

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a majority of women justices.

As of September 1992, the total federal judiciary, consisting of circuit, district, bankruptcy and magistrate judges, was 13.4% women. As recently as 1965, the federal bench had had only three women serve. Judges who are women on the federal bench are likely to increase significantly in the near future since the New York Times reported on January 18, 1994, that 39% of President Clinton's nominations to the federal judiciary in his first year have been women and he has vowed to continue that statistical pace in his future nominations.

These figures and the recent appointments are heartwarming. Nevertheless, much still remains to happen. Let us not forget that between the appointment of Justice Sandra Day O'Conner in 1981 and Justice Ginsburg in 1992, 11 years had passed. Similarly, between Justice Kaye's initial appointment as an associate judge to the New York Court of Appeal in 1983 and Judge Ciprack's appointment this past year, 10 years had also passed. Today, there are still two out of 13 circuit courts and about 53 out of 92 districts courts in which no women sit. There are no district women judges in the federal courts in at least 22 states. Our 13.4 percentage of the federal judiciary translates to only 199 female judges of a total of 1,484 judges in all

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levels of the judiciary. Similarly, about 10 state supreme courts still have no women. Even on the courts which do have women, many have only one woman judge. Amalya Kearse, a black woman appointed in 1979, is still the only woman on the Second Circuit of New York. The second black woman to be nominated to a court of appeals. Judith W. Rogers, Chief Judge of the District of Columbia, was only recently named by President Clinton. The first hispanic female federal judges were only appointed in the fall of 1992. We had a banner year with 3 appointments -- myself in the S.D.N.Y. and two colleagues, Judges Baird and Gonzalez to districts in California. We this year will have a fourth female hispanic with the nomination and likely appointment of Martha Vasquez in New Mexico. Yet, we still have no female hispanic circuit court judges or no hispanic, male or female, US Supreme Court judge.

In citing these figure, I do not intend to engage you in or address the polemic discussion of whether the speed or number of appointments of women judges is commensurate with the fact that women have only entered the profession in any significant numbers in the last twenty years. Neither do I intend to engage in the dangerous and counterproductive discussion of whether the speed and number of appointments of

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female judges is greater or lesser than that of people of color. Professor Stephen Carter of Yale Law School in his recent book on Affirmative Action points out that we excluded people do ourselves a disservice by comparative statistics or analysis. I accept and endorse his proposition that each of our experiences should be valued, assessed and appreciated independently.

I have, instead, raised these statistics as a base from which to discuss what my colleague Judge Miriam G. Cedarbaum of the S.D.N.Y. in a speech addressing "Women on the Federal Bench" and reprinted in Vol. 73 of the Boston University Law Review [page 39, at 42], described as "the difficulty question of what the history and statistics mean?" In her speech, Judge Cedarbaum expressed her belief that the number of women on the bench was still statistically insignificant and that therefore, we could not draw valid scientific conclusions from the acts of so few.

Yet, we do have women in more significant numbers on the bench, and no one can or should ignore asking and pondering what that will mean, or not mean, in the development of the law. I can not and do not claim this issue as personally my own. In recent years there has been an explosion of research and writing in this area. For those of you interested in the topic, I commend to you a wonderful compilation of articles written on the

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subject in Volume 77 of Judicature, The Journal of the American Judicature Society for November-December 1993. This Journal is published out of Chicago, Illinois.

Judge Cedarbaum in her speech, however, expresses concern with any analysis of women on the bench which begins, and presumably ends, with a conclusion that women are different than men. She sees danger in presuming that judging should be gender or anything else based. She rightly points out that the perception of differences between men and women is what led to many paternalistic laws and to the denial to women of the right to vote because we could not "reason" or think "logically" but instead acted "intuitively".

While recognizing the potential effect of individual experiences on perceptions, Judge Cedarbaum nevertheless believes that judges must transcend their personal sympathies and prejudices and aspire to and achieve a greater degree of fairness and integrity based on the reason of law. From a person, who happens to be a women, like Judge Cedarbaum, one can easily see the genesis of her conclusions. She is a wonderful judge -- patient, kind, and devoted to the law. She is the epitome of fairness. She has been tremendously supportive of me this past year and a half and she serves as an example of what all judges

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should aspire to be.

Yet, although I agree with and attempt to work toward Judge Cedarbaum's aspirations, I wonder whether achieving the goal is possible in all, or even most cases, and I wonder whether by ignoring our differences as women, men or even people of color, if differences exist, we do a disservice both to the law and society.

Just this month, the Supreme Court in Liteky v. United States, has recognized that personal bias and partiality are inherent in the task of judging. In deciding when judges should recuse themselves from cases, the Supreme Court recognized the existence of "appropriate" bias born of reactions that develop during a case from the facts of the case and "inappropriate" bias which stems from "extrajudicial" sources like information passed on by a non-party or ex parte, or from deep seated opinions that make fair judgment impossible. Justice Kennedy in his concurring opinion, joined by three other justices -- a split in our High Court, not something new -- expresses a concern similar to that voiced by Judge Cedarbaum which is that good and bad bias are impossible to determine because they depend so much on historical context and self-perception. Therefore, Justice Kennedy advocates a return to an objective standard in which what a reasonable

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person would perceive as unbiased and impartial controls whether a judge disqualifies him or herself. I am not sure this is any less objectionable or more objective than Justice Scalia's majority approach in Liteky that presumed that a "reasonable person" could only be measured within the societal context with its current moraes.

Whatever the reasons why we may have a different perspective as women -- either as some theorists suggest because of our cultural experiences or as others postulate like Prof Carol Gilligan of Harvard University in her book entitled In a Different Voice because we have basic differences in logic and reasoning, is in many respects a small part of the larger practical questions we as women judges and society in general must address. I accept Prof Carter's thesis in his Affirmative Action book that in any group of human beings, there is a diversity of opinions because there is both a diversity of experiences and of thought. Thus, as stated by Prof. Judith Resnik in her article in Vol. 61 of the S. Cal L. Rev. 1877 (1988), entitled On the Bias: Feminist Reconsideration of the Aspirations for Our Judges:

> ...there is not a single voice of feminism, not a feminist approach, but many who are exploring the possible ways of being that are distinct from those structured in a world

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> dominated by the power and words of men. Thus, feminist theories of judging are in the midst of creation and are not (and perhaps will never inspire to be) as solidified as the legal doctrine as the legal doctrines of judging can sometimes appear to be"

No one person, judge or nominee, will speak in a feminine or female voice. Yet, because I accept the proposition that, as Prof. Resnik explains, "to judge is an exercise of power" [pg 7] and because as Prof. Martha Minnow of Harvard Law School explains, there is no "objective stance but only a series of perspectives. ... [N]o neutrality, no escape from choice" [Resnik page 10] in judging, I further accept that our experiences as women will in some way affect our decisions. In short, as aptly stated by Prof. Minnow, "Th[e] aspiration to impartiality ... is just that an aspiration rather than a description because it may suppress the inevitable existence of a perspective ... ." What that means to me is that not all women, in all or some circumstances, or me in any particular case or circumstances, but enough women, in enough cases, will make a difference in the process of judging.

The Minnesota Supreme Court has given us an example of this. As reported by Judge Wald in her article entitled Some Real-Life Observations about Judging contained in a comment in Vol. 26 of the Indiana Law Review 173 (1992), the three women on

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that court, with the two men dissenting, agreed to grant a protective order against a father's visitation rights when the father abused his child. The Judicature Journal has at least two excellent studies on how women on the U.S. Court of Appeals and on state supreme courts have tended to vote more often than their male counterparts to support claimants in sex discrimination cases and more often in cases involving euphemistically as I refer to them "underdogs" like criminal defendants in search and seizure cases. In a another real life example, in the Menendez trial in California, a jury split six men to six women on whether a lesser verdict should be returned against a son charged, with his brother, in killing their parents. For those of you law students, particularly editors on law journals, lost in the bowels of the law library and intricacies of the Uniform Book on Legal Citations, the Menendez brothers defended the homicides as an act of despair generated by years of abuse. The state prosecuted on the theory of financial gain from the rather sizeable inheritance the brothers may collect if acquitted of the charge. Although the brothers were tried together, they were tried before two separate juries because certain evidence came in against one but not the other brother. Both juries hung but the press has been fascinated by the gender split in the Eric

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Menendez verdict voting in which the women wished to acquit or at least bring in a verdict less than the highest count and the men did not.

As recognized by Professor Resnik, Judge Wald, and others, whatever the causes, not one women in any one position, but as a group, we will have an affect on the development of the law and on judging.

In private discussions with me on the topic of differences based on gender in judging, Judge Cedarbaum has pointed out to me that the seminal decisions in race and sex discrimination have come from Supreme Courts composed exclusively of white males. I agree that this is significant except I choose to emphasize that the people who argued the cases before the Supreme Court which changed the legal landscape were largely people of color and women. I recall that Justice Thurmond Marshall, Judge Constance Baker Motley from my court and the first black women appointed to the federal bench and others of the then NAACP argued Brown v. Board of Education. Similarly, Justice Ginsburg, with other women attorneys, was instrumental in advocating and convincing the court that equality of work required equality in the terms and conditions of employment. Whether born from experience or inherent physiological

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differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender makes and will make a difference in our judging.

Justice O'Connor has often been cited as saying that "a wise old man and a wise old woman reach the same conclusion" in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes the line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, if Prof. Martha Minnow is correct, there can never be a universal definition of "wise." Second, I would hope that a wise woman with the richness of her experiences would, more often than not, reach a better conclusion. What is better?

I like Professor Resnik hope that better will mean a more compassionate, and caring conclusion. Justice O'Connor and my colleague Miriam Cedarbaum would likely say that in their definition of wise, these characteristics are present. Let us not forget, however, that wise men like Oliver Wendel Holmes and Cardozo voted on cases upholding both sex and race discrimination. That until 1972, no Supreme Court case ever upheld the right of a women in a gender discrimination case. I like Prof. Carter believe that we should not be so myopic as to

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believe that others of different experiences or backgrounds are incapable of understanding the values of a different group. As Judge Cedarbaum pointed out, nine white men (or at least a majority) on the Supreme Court in the past have done so on many occasions for different issues. However, to understand takes time and effort, components not all people are willing to give. For others, their experiences limit their ability to identify. Yet others, simply do not care. In short, I accept the proposition that a difference there will be by the presence of women on the bench and that my experiences will effect the facts I choose to see as a judge. I hope that I will take the good and extrapolate it further into other areas than those with which I am familiar. I simply do not know exactly what that difference will be in my judging, but I accept there will be some based on my gender and the experiences it has imposed on me.

As pointed out by Elaine Martin in her forward to the Judicature volume:

> Scholars are well placed, numbers-wise-to begin the proposition that the presence of women judges makes a difference in the administration of justice. Yet, a new set of problems arises for such researchers. Just what is meant by difference, and how is it measure? Furthermore, if differences exist, why do they exist and will they persist over time? .... In addition to these empirical questions, there are normative ones. Are these possible gender differences good or bad? Will they improve our system of

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laws or harm it?

In summary, Prof. Martin quote informs me that my quest for answers is likely to continue indefinitely. I hope that by raising the questions today, you will start your own evaluations. For women lawyers, what does or should being a women mean in your lawyering. For men lawyers, what areas in your experiences and attitudes do you need to work on to make you capable of reaching those great moments of enlightment which other men in different circumstances have been able to reach.?

For me, since Senator Moynihan sent my name to President Bush in March of 1990, as a potential federal judicial nominee, I have struggled with defining my judicial philosophy. The best I can say now four-and-a-half years later, one-half year since I assumed my responsibilities, is that I have yet to find a definition that satisfies me. I do not believe that I have failed in my endeavor because I do not have opinions or approaches but only because I am not sure today whether those opinions and approaches merit my continuing them. Each day on the bench, I learn something new about the judicial process and its meaning. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and continuous vigilance in checking my assumptions, presumptions and

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perspectives and ensuring that to the extent my limited abilities and capabilities permit me, that I reevaluate and change them as circumstances and cases before me require. I can and do, like my colleague Judge Cedarbaum, aspire to be greater than the sum total of my experiences but I accept my limitations, I willingly accept that we who judge must not deny the differences resulting from experience and gender but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate. There is always danger in relative morality but since there are choices we must make, let us make them by informing ourselves on the questions we must not avoid asking and continuously ponder.

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A JUDGE'S GUIDE TO MORE EFFECTIVE ADVOCACY

Keynote Speech -- The 40th National Law Review Conference
March 19, 1994, The Condado Plaza Hotel, Puerto Rico

When I left New York earlier this week, the newscasts were advising us of the impending arrival of the sixteenth snow storm of the winter season. My office told me yesterday that it was snowing yet again in the City. In August, when the New York skies were blue and the vegetation lush, I did not fully appreciate how grateful I would be tonight for the invitation to speak to you. With each passing snow day, my gratitude has increased exponentially.

I join my voice to that of the other speakers tonight who have conveyed appreciation to Cecilia Duquela, Chair of this Conference, for the wonderful job she has done. She has been a delight for me and my staff to deal with and an honorable

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representative of a fine law journal and its school. I also thank all of the students of the Revista Juridica de la Universidad Interamericana de Puerto Rico and the Dean and faculty of the law school for hosting this Conference. You have provided a beautiful setting with stimulating topics of discussion and enjoyable events. I have also been delighted to have met the many distinguished guests who have spoken and attended the Conference, some of whom are here tonight. Finally, I thank you the conferees and other guests for the opportunity to share my thoughts as a recently appointed federal judge about the experience of judging and what it has taught me about effective and efficient advocacy. For reasons I will shortly discuss, I have concluded this past year that effectiveness and efficiency in advocacy are synonymous terms for persuasive advocacy.

I selected my topic for tonight in October of this past

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year, shortly after the law journal invited me to speak and as I celebrated my first anniversary on the bench. As many do with other important anniversaries, I reflected upon all that had occurred, all that I had learned, and all that remained for me to learn and do. During my nomination process, all of my future colleagues on the bench told me that I was about to be given the privilege of having "the best job in the world." A year and a half later, I join in their opinion.

In no other legal work I know of in the private or public sector is there greater variety and in depth treatment of legal issues than in judging. From the common diversity cases involving personal injury or partnership, corporate or contract disputes to the more complex cases involving antitrust, securities, habeas and other constitutional questions, I, as a federal judge, do not superficially investigate those areas of

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law but I learn them in greater depth and at a greater speed than I ever did as an advocate or as a law student in semester long courses. The greater gift, however, is not just the intellectual stimulation of the work but the opportunity I am given to do work that is not merely an academic exercise but which directly and profoundly effects individuals and our society.

In my first year alone, I presided over the class action settlement of claims of institutionalized mentally deficient patients for regular access to greater sun light. I decided a first amendment challenge to an ordinance that banned the display of fixed religious displays in a City's parks. The power of my position became a stark reality for me when I learned that the City Council and its legal staff spent days in emergency sessions considering how to approach my decision. Ultimately, they decided not to appeal my injunction and a menorah was

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displayed in the City's park during the Passover season. With a heavy heart because I believe that those charged with doing justice like the police and prosecutors have a responsibility to do their work with the highest degree of integrity, I suppressed evidence in a major narcotics case because I found that the magistrate judge had been misled into issuing a search warrant. Just last month, I presided over a civil forfeiture trial by the United States government against the twenty-five year Clubhouse building of the Hell's Angels Motorcycle Club of New York.

I have done exciting things. However, I have also addressed intellectually less weighty or fascinating matters. In fact, a good portion of my work may fall into that category. Although every case is important to the parties and I try very hard to give all my cases the same degree of care -- albeit not the same time since that is impossible and not necessary for many

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issues -- there are routine and frankly boring cases. I have tried a $35,000 sprained ankle case under the Federal Employees Liability Act. I spent weeks writing an opinion on whether non-longshoreperson harbor workers should be treated like longshore persons for purposes of negligence recovery under the Longshoreman's and Harbor Act. If you do not understand the issue or its importance to the defendant, you know now why I spent so much time trying to understand the case and the defense arguments. The Second Circuit affirmed my judgment, describing my opinion as straight forward and on point while explaining that the defense simply had a tortured argument. Here, as a new judge, I thought I was missing something and I repeatedly read the voluminous and turgid submissions of the defense until I finally decided that If I was missing something in the defense argument, I was incapable of finding it. The Second Circuit did

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not find it either but the practical lesson I took from the experience was not just that I should trust my legal instincts but that unless I spent less time on incomprehensible submissions, my docket would grind to a screeching halt.

Judge Patricia Wald of the D.C. Circuit Court and Justice Anthony Scalia of the Supreme Court have both adequately and elegantly described the frustrations and burdens of judging. If any of you are interested, Judge Wald's article is entitled "Some Real-Life Observations about Judging" and it appears in the 1992 volume 26 of the Indiana Law Review [at page 173]. Justice Scalia's remarks were delivered before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents on February 19, 1988, and a discussion of Justice Scalia's remarks can be found in an article written by Professor Judith Resnik contained in the 1988 volume 6 of the Southern

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California Law Review [at page 1877].

Perhaps because I am so new to the work, however, I have not been disillusioned or frustrated as of yet, and I hope that for the rest of my judicial career, my work remains the "best job in the world." Among my comments to my law clerks and friends as I reflected about my first year, I expressed the regret that I had not judged before I lawyered. When I practiced if I had known a fraction of what I have learned in my first year as a judge, I would have been that much better a lawyer. [As an aside, my actual statement was that I would have been invincible as a lawyer. I had to tone it down for the sake of some decorum and humility.] In some civil law countries, there are different schools for careers as a judge or a lawyer. In our legal system, however, without the experience one gathers as a lawyer, it is impossible to function as a judge and fully understand the

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nuances of legal analysis.

As new lawyers, clerking for a judge is probably the next best step to being a judge. Because many of you are editors on law journals, you will likely have this experience. But for those of you who do not and even those of you who do, I bring to your attention the following observations I now, having had the experience of judging, make about effective and, as I have said previously, efficient advocacy. My observations and recommendations are not new and very simple. All were told to me, or I read, in bits and pieces through law school and in my practice. Because most of you are graduating this year, and are just about to begin your careers, I thought it might be helpful to underscore that advise which I now as a judge have grown to more appreciate.

Judge Wald of the D.C. Circuit in her article, [page

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178], on Real-Life Judging, states, and I paraphrase in part:

> "The elegant prose, the visionary idea, the qualitative leap forward in the law [by judges has now been] cancelled by . . . practical necessit[ies] . . . ."

Judge Wald was speaking about the practical necessity of reaching consensus among circuit court panels, a difficulty described to you on Thursday by Judge Naveiro de Rodon in her panel discussion. Practical necessities, as recognized by Judge Wald in a different part of her article, however, effect all levels of the judiciary. Although district judges decide cases alone and do not have to work toward consensus, they still have the burdens of an ever burgeoning word-load. Less than 80% of the decisions of district judges are ever appealed. Of the over 100,000 opinions rendered by lower courts in a given year, the Supreme Court, with nine judges, hears slightly over 125 cases a year. When my dear friend and mentor, Judge Jose A. Cabranes of

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the United District Court for Connecticut, was asked how he felt when he was reversed by the circuit court, he responded "It does not bother me in the least, I reverse them every day." He is right. Given the almost unreviewable nature of the majority of our decisions, you, as proxies for the interests of your clients, should appreciate how important it is to ensure you capture your judge's attention. This need on your part will grow as Congress increases our burdens by continuing to federalize more crimes and passing more statutes granting remedies to ever wider groups as with the Americans with Disabilities Act. In short, we can not afford to have our dockets grind to a halt because of ineffective or inefficient advocacy.

When I started as a judge in October 1992, I had 376 civil cases reassigned to me. That number represented the average case load in my district. Unlike other districts, I did

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not have criminal cases reassigned to me but only began to have new criminal indictments assigned in rotation each week. Nevertheless, in my district, the average case load of criminal cases is about one-third the civil docket, or about 125 criminal cases. In my first year, I rendered about 70 written opinions, of varying lengths and complexity, and a number of other opinions I read into the record. I did reduce my caseload by fifty cases by the end of that first year. However, at the end of my year, three of my colleagues left the district bench -- Judge Pierre Leval to the Second Circuit, Louis Freeh to the F.B.I. and Ken Conboy back to private practice -- and with their departures, my case load in the last five months mushroomed to 428 cases despite the fact that I have rendered just over 50 opinions in that same time period and even more opinions on the record than I had the prior year. Moreover, I now have over 85 pending motions and

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over fifty criminal cases on my docket.

My burden is not unique. Judge Anne C. Conway of the United States Middle District of Florida, who took the bench at about the same time I did, had just that past winter of 1993 reported in the American Bar Association Journal on Litigation, Volume 9, that she had 570 civil cases with 1070 motions reassigned to her when she took the bench. She reduced her caseload by 100 cases and her motions to just a little over 500 by the end of her first year. Yet, she reported that despite greater efficiency, she found her motion calendar increasing. Now, her accomplishments have been reached by a herculean effort -- she starts her day at 7:00am and goes through the late evening. I admire her. I am a New Yorker and 7:00 am is a civilized hour to finish the day not start it. I can not achieve efficiency her way. If the federal bench is over burdened,

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however, take note that most state courts are in critical emergency situations. New York's lower state court judges have over 1800 cases a piece.

No judge should bear his or her work-load as a badge of honor. One human being, no matter how efficient, can not adequately do justice to all of the cases on dockets this big. Consider the situation in practical terms. There are 365 days in a year. Assuming you have a judge like me who works six days a week and takes some vacations (well, you do see me here), you are left with about 250-275 working days a year. With a case load of over 500 cases, no one case should physically, without regard to desire or dedication -- take more than half a day on a case. Yet, most trials consume at least two days, and many complicated criminal cases at least two weeks. I do not even mention the month and longer trials that are common at least in my district.

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The Hells Angel trial and another international narcotics trial each took the last two months before me. Many cases settle without the intervention of a judge. But, many cases are addressed more cursorily and summarily than anyone would want them to be and many cases are not heard at all. In the end, no one is happy -- not the judges who takes pride in their work but are forced to be less attentive than they would like, not the lawyers who labored hard in presenting their arguments and are then treated summarily or delayed for months sometimes years in receiving a decision, and not the parties who want and deserve a fair day in court but do not see it. Unfortunately, in a system this overworked, the claims of some people will not be fairly heard and we can not pretend otherwise.

In assuming my responsibilities, I have immersed myself in books and articles about efficient judging. Each day I learn

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more and my mistakes teach me more. Since I anticipate that judging is a continuous learning process, I do not see my improvements ever ending. The rest of my speech now, however, is intended to give you as lawyers some ideas about how to ensure that you, as the agent for your client's interests, get heard in the mounds of papers and cases that exists in the judicial landscape.

My first piece of advice for effective advocacy is write clearly. As it is often said, clear writing reflects clear thinking. Whether it is an unfair conclusion or not, I start with the presumption that a poorly written brief is a product of, if not poor, at least, untrustworthy lawyering because a poor writer is someone who does not care about the art and skill of their profession. As it is also often said -- and I will hereafter stop with the cliches -- there are no natural writers,

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just writers who work at developing their skills.

If you have read Strunk and White, Elements of Style, reread it every two years. If you have never read it, do so now. This book is only 77 pages and it manages, succinctly, precisely and elegantly to convey the essence of good writing.

Go back and read a couple of basic grammar books. Most people never go back to basic principles of grammar after their first six years in elementary school. Each time I see a split infinitive, an inconsistent tense structure or the unnecessary use of the passive voice, I blister. These are basic errors that with self-editing, more often than not, are avoidable. To be an advocate, you must love to argue. To argue effectively, you must communicate effectively. There are stronger writers than others. I consider myself merely an average writer. Nevertheless, every advocate should at least strive to be technically correct in

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their writing.

Because we are in Puerto Rico, it is important that I underscore that we who are bilingual often have to spend more time and energy in improving our writing. There are natural linguistics explanations for many common errors made by bilingual people. For example, adjectives in Spanish are expressed differently than in English. Descriptive nouns are structured in Spanish with the use of "of". Thus, in Spanish, we do not say "cotton shirt", we say "shirt of cotton" or "camisa de algodon" y no "algodon camisa." Well, as a result of this structure, many Spanish speaking American students often, unconsciously, use convoluted phrasing for simple adjectives. This was brought to my attention in college by a history professor, who later became my thesis advisor and a mentor, and who in my first college semester kindly pointed out to me that "authority of

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dictatorship" could more simply and accurately be stated as "dictatorial authority."

To catch many simple and complex mistakes in writing requires that you edit yourself. I am taken aback by how many briefs I receive that appear to be first drafts. I have chastised attorneys in my opinions for slip-shod written presentations. Improvements in writing do not happen magically, you have to work on them. In my chambers, I edit every opinion prepared by my clerks. The simplest opinions go through at least 2 if not 3 drafts by me. I edit more complex opinions as often as 6 to 8 times and periodically more often. Justice Kennard of the California Supreme Court, a very well respected writer, has told me that she and her five clerks, sitting together, edit every line of every opinion. I have no idea how she manages to find the time to do this but her approach should give you a clear

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idea of the importance of editing.

My second piece of advice is a collorary to the first - - keep your written submissions brief. No play on words is intended. The reason for this advise is self-evident in the context of the statistics I have given you. Overburdening a judge with every conceivable argument you have found or can conceive is counter-productive. Although most clerks to judges are thorough, every argument in a voluminous brief can not be given equal attention. I say clerks because although I read every brief, I simply do not have time to reread every brief numerous times. I read my clerk's bench memo or draft opinion, I read the briefs and I stop to reread carefully only that brief which is clearly and persuasively written. The best briefs succinctly state their argument, but also concisely summarize, explain and discount their opponent's arguments. That is the brief I turn to

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when I am editing the work of my clerks because against that brief I measure whether my clerks have addressed every pertinent argument.

As editors of law journals, you pick up one terrible habit -- string cites. Think of them as nooses you should strive always to loosen from your neck of writing. The habit of thorough and exhaustive research you have learned is absolutely essential to effective advocacy. If a proposition is truly black letter law, however, one cite is enough. Judges, within a few years on the bench, know the history of most major areas of the law. New judges and clerks may not but they do not need for you to educate them in your briefs. Just give them the cites of the one or two cases that best present a history or explanation of the law in the area at issue. Do not give us your learning process on paper, just give us the results of the best arguments

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you have found. Take judges to the issue you are addressing and explain why it is an issue at all, i.e. is the law unsettled or unclear, are the facts unclear, is this a new twist to an old problem, do you want the judge to reject existing law and reformulate it, hopefully in your client's favor.

I want to underscore, brevity is not a substitute for thoroughness. Good lawyering requires you to consider and research every conceivable argument for and against the position you are advocating. Inexperienced lawyers particularly spend hours if not days or weeks exploring multiple and innumerable legal dead-ends. Effective lawyering, however, requires you to distill your research and thinking down to its important, best and strongest points. It is heart breaking after laborious and exhaustive research to realize that what you need to say can be said in five pages. As a result, young lawyers often write

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lengthy memos or briefs which essentially recount the steps of their research. You are doing yourselves a disservice because you will not capture the attention of the person you must convince if you have lost them in the irrelevant. If you feel compelled by emotional necessity to advise the court or your partners of what you have done, do it in a short footnote.

In short and above all, you must be prepared for every contingency with complete research but your only chance of attracting the attention of harried judges, is to state the important issues of your case up front and succinctly. An efficient presentation means cutting the extraneous, summarizing the important but tangential and concentrating on the significant.

Equally as important to effective advocacy is not misleading the Court about the law or the facts of your case. Do

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not cite cases merely to have a cite or take words out of a case to give an impression of a holding when the words when used were in a different context. Before you leave law school, learn the difference between dicta and a holding. Learn what is controlling precedent for the court system you are in. It amazes me how many lawyers cite other district court cases as controlling authority. The only binding precedent upon a district judge is the Supreme Court or its circuit court. Not even the law as established by other circuits controls decisions of a district judge in another circuit. Similarly, in the New York state system, each lower court is only bound to the decisions of the highest court or of its own intermiate appellate division. Further, do not cite a legal principle, without explaining its exceptions, in a footnote at least if the exceptions are not applicable to your case. Clerks spend

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countless hours tracking down exceptions they later determine, as you obviously did because you did not mention them in your brief, are not relevant to the case. You should increase your malpractice insurance if you simply missed the exception. Obviously, if there is a case contrary to your position, even if it is a decision by a non-controlling source, cite it to the court. Your entire argument should have explained to the Court why that contrary opinion is not persuasive. If there is an argument that superficially appears applicable or an argument in a related field, bring it to the judge's attention in a footnote and explain why you do not think it is relevant to or distinguishable from your case. The worst thing a judge can ever conclude about you as a lawyer is that your are untrustworthy in your arguments. I was furious the other day when an attorney failed to tell me that the circuit had explicitly left an area of

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the law undecided and that three other of my colleagues had issued opinions on the issue contrary to counsel's argument. I know that for those lawyers who do this I rarely if ever give them the benefit of the doubt. I will reserve decision to go back and double check their arguments. If you are in a middle of a trial, that can be a devastating interruption in your presentation as an advocate and will result in long delays in your motions being decided.

There are some lawyers out there who believe that overwhelming a court with papers and documents is a good way of hiding a bad case and delaying judgment against a client. I find this particularly true in papers opposing summary judgment motions. This tactic may work periodically but the price you pay for this type of bad lawyering is that your work and arguments eventually will not be respected. In summary, face the

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weaknesses in your case directly and answer up front why the court should ignore or distinguish the weakness from existing law or on the facts.

For my third point, I turn to oral advocacy. My intent here is not to repeat the advise contained in trial advocacy courses on proper and effective opening and closing statements, direct and cross-examinations or motion or appellate arguments. There is a legend of materials on these topics and in a short speech, I could not do justice to the wealth of advise that exists. I simply wish to underscore that brevity and clarity is as important in oral as in written presentations.

Neither jurors as triers of facts nor judges like being inundated with documentary evidence. Most cases can be distilled down to less than half a dozen documents, sometimes just 1 or 2. Yet, I receive boxes and boxes of exhibits in too many cases.

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That impresses your client -- until they get your bill for the time and cost of collating and copying. In the interim, you have lost the favorable impression and potence of your valuable documents. To the extent possible, try to get stipulations of facts among counsel and cut out of your presentations all documents relating to those agreed upon facts. Also, prepare a small volume of just the critical documents so the Judge can refer to them easily or take them home without losing an arm to heavy weight. Jurors who sit side by side like sardines in jury boxes appreciate not having to fumble with heavy volumes on their laps and at their feet. Finally, all exhibits should have an index. Moreover, a topic index, listing relevant exhibits under issue headings is also very helpful. When I write my opinions I often have one or more issues about which I would like to more fully look at the evidence. A topic index is invaluable in

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assisting that process because even the best organized chronological or theme organized exhibits support or inform various different issues.

Similarly, when you give a judge deposition transcripts, it is useful to give a one page summary of what that witness proves in the deposition testimony and why it is important to your case. That way, the judge will understand why they are reading the materials. Judge Leonard Sand in an 1987 article in the ABA Journal on Litigation, also suggests that parties take one deposition transcript and bracket in different color crayons the designations each party wants in the record. This way the judge gets one transcript, and not separate sheets with each party designating a page and line in the transcript. That kind of cross-referencing to a transcript is time-consuming and frustrating.

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Finally, in oral presentations, remember that although some repetition is necessary to ensure that a point is made, less repetition is needed with a judge. Moreover, you lose both the attention and patience of judges and jurors with overly long presentations. If a long presentation is unavoidable, i.e. the witness simply has too much to cover, make sure your beginning explains what you are doing and why and that your end explains again what you have done.

In conclusion, respect the limited time judges have. With thought, the most complex case can not only be explained simply but can be presented simply. Today, effective advocacy requires that you think first and foremost -- how do I make this easy to understand and to absorb in the shortest time possible. Because of necessity, an efficient presentation has become the effective presentation and not infrequently, the winning

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presentation.

I will heed my own advise and keep my remarks brief. I hope that you take from your careers as much as I had from my own as a lawyer. I also hope and expect that some of you in the future will have the opportunity to enjoy the privilege and honor of judging. A critical part of that enjoyment in either or both roles starts and ends with doing what you do better each day. It means appreciating the art of your profession and spending time developing your skills. Seeing an effective advocate in court is a magnificent and pleasurable experience for a judge. I also hope that during what I expect will be my long tenure on the bench, I will have the opportunity to have some of you appear before me and that at the end of your presentation, I will be able to say that you have mastered your art. My wishes for successful careers to all of you. Good evening.

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El Orgullo y Responsabilidad de Ser Latino y Latina.

Speech given on March 15, 1996 at the Third Annual Awards Banquet & Dinner Dance for the Latino and Latina American Law Students Association of Hofstra University School of Law

Thank you Cynthia for the gracious introduction. I agreed to speak tonight for two reasons. The first was my desire to spend some time with law students from Hofstra. I have met some of you at various bar functions and have been impressed with your enthusiasm and interest in the law and with Latino issues. Unfortunately, your school's distance from Manhattan makes it difficult for me to attend functions that the school holds during the workday. I am grateful that this event is held at night and that you choose me to be your speaker and share in your celebration.

My second reason for coming tonight was sparked by Cynthia's invitation which told me that your event included not just students and school administrators, but your family and

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friends. Very recently, I participated in a very special event when I officiated at my cousin's wedding. She is six months younger than I and this was her second wedding. We grew up together and shared many wonderful times and have many warm memories of these times. At the ceremony, there was not a dry eye, my own included, because I recounted many fond tales of our youth, not the least was how we ended up breaking her brother's leg and how we protected each other from our parents when we first went out dating as teenagers. That ceremony underscored something very important for me. It reminded me that the essence of who I am, the Latina in me, is an ember that blazes forever and that that ember was lit by my family and our friends.

That ember reminds me of, los muchos platos de arroz y guandoles, y de piener that I have eaten at countless family functions, of pasteles at Christmas. It is also, if you have my

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adventurous taste buds, morcilla, patitas de cerdo con garbanzos, y la lengua y orejas del cuchfrito. It is coquitos y piraguas during the summer. It is the sounds of merengue at all our family parties and the incredibly long and heartwrenching Spanish love songs that my family enjoys. It is the memory of seeing Cantiflas when I was a kid with my cousins at the Saturday afternoon movies.

My Latina ember was kindled each weekend that I visited and played in abuelita's house. My playmates were my cousins and the children of our extended family that included padrinos y padrinas, suegros y suegras, their families and the people who lived next door who came over to play dominoes o la loteria-(bingo) on Saturday nights. Does anyone one of these things make me a Latina. No. It is not speaking Spanish, which I do. Instead, it is being Latina in the way I love and live my life. It is the mix in me

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that comes from a family whose very existence showed me how wonderful and vibrant life is and who through their love and support showed me that although I am an American, love my country and could achieve its opportunity of succeeding at anything I worked for, that I also have a Latina soul and heart with the magic that that carries.

I am very young but I recognize that our society has changed tremendously since I was a child. I suspect that many of the students here don't even remember Cantiflas. Cheaper airplane travel, greater public transportation and more cars alone have dispersed families across greater distances. Growing up, all of my family, except those that remained in Puerto Rico, essentially lived in the Bronx within miles of each other. It pleases me enormously that the students here who may not have had the same opportunities as I to grow up fully immersed in family and our

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culture, that you have held on to your Hispanic identities but more importantly, that you understand your obligations and responsibilities as Latinos and Latinas.

We are a group in this society that faces enormous challenges. The following are statistics taken from the 1989-90 Census as reported and analyzed by the National Council of La Raza. Latinos represent the fastest growing segment of the U.S. population. Since 1980, the Latino population has grown about five times as fast as the non-Latino population and Latinos are expected to be the largest ethnic minority in the U.S. in the 21st century. We number about 20.1 million out of 243.7 million Americans, excluding the 3.5 million people of Puerto Rico. [I exclude them because the census count excludes them only.] We are also a young population, with a median age below Blacks and other groups, and we also tend to have slightly larger families than other groups. The

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Hispanic school-age population is, as a consequence of our demographics, also rapidly growing and although today we account for 10% of public school enrollment, by the year 2000, we should constitute 1/6 of the students in the nations classrooms but one-third of the student population overall.

We remain, unfortunately, the most undereducated segment of the U.S. Population and by every statistical measurement, the gap between Hispanic and non-Hispanic communities continues to grow at alarming rates. Latinos have the highest school dropout rates of any major group. About 43% of Hispanics ages 19 years and over are not enrolled in high school and have no high school diploma. By age 16-17, almost one in five Hispanics has left school without a diploma, compared to less than one in 16 of Blacks and one in 15 of Whites. Only 10% of Hispanics over 25 years old and over have completed four or more years of college, compared to 11.3% of

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Blacks and 20.9% of Whites in the same age group. La Raza notes further that for those students in school, Hispanics share less in gifted and special talent programs and have a higher percentage of students left back or not at age and grade normed achievement levels.

Employment follows education and we should not be surprised that in income statistics, Latinos are also not faring well. Latinos have a much higher unemployment rate than non-Hispanics, 50% over the rate for Non-Hispanics, and 60% above the rates of Whites. We are less likely than non-Hispanics to have managerial and professional jobs. In a comparison none of us likes winning, only Blacks and American Indians do more poorly in gross employment numbers but Blacks do better in education measures than we do. Latinos have lower per capita incomes than either Whites or Blacks. In 1988, Hispanics had a per capita income of about $7900,

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Blacks at about $8200 and Whites at about $13,900. I note that among hispanics, La Raza reports Puerto Rican families as faring worst economically with the lowest family medians and the highest proportion of families with incomes below $10,000. I further note that our poverty rates are highest among female-headed Hispanic families.

As the National Council of La Raza has concluded, in this fast rapidly evolving technological society, unless we educate our children better and improve their opportunities, our poverty gap with the rest of society will only widen.

These statistics are terribly sobering. We have much to do. Nevertheless, an event like today should give us hope. Here are students who have not dropped out. Here are students who are achieving and have real hope of improving their economic status. Here, most importantly, are students who understand fully the

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importance of hard work in achieving success but who also understand that they have a responsibility to help change these frightening numbers.

It is important as young people to dream and to be successful. Some of you may go off to work in fairly traditional legal areas. Others of you may stay in public service careers. There is nothing wrong with either choice. Both choices enrich our community. The significant fact is remembering that whatever we do, we should not forget that we are Latinos, of rich and important cultures, and that we have a responsibility to devote time, when we can, to pro bono work, and to give support with money, when we have that, to help our community face its enormous challenges. I as many of you know that training for work is very time consuming. You don't always have time to give to other activities. That's alright. You need to develop your skills. The important thing, however, is not

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to get lost in your work forever but to make sure you take and make time to reach out and volunteer time to our community throughout your life.

I tell immigrants who I am swearing in as new citizens that I wish I could describe the United States of America to them as paradise. Everyone knows that the U.S. is not perfect. Even here, not all dreams come true and not all hopes can be realized. If nothing else, economic realities limit many dreams. Yet, the need to dream, the need to hope, the need to believe and know that we live in a land that gives us the chance to have dreams come true, that is the gift of America.

With freedom and liberty and opportunity comes, however responsibility. As citizens and member of this society, we all share the responsibility of working together within our democratic system of government -- to strengthen it -- to ensure that the

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promise of America and its freedoms comes to all people in our society.

In America, all people, no matter how rich or poor they start out or end up, no matter what their ethnic or racial or religious background may be, have shared and continue to share in creating this country. We must ensure that Latinos as a group share fully in the American dream. What your parents have done here is wonderful and provides the best that our society has to offer. They have taught you about this country, they have made you Americans but they have not let you forget about your backgrounds and your cultures. I am very honored to have been hear tonight. To congratulate your families for the wonderful way you students of Hofstra have grown up, for the fine men and women you have become and for the generosity of spirit you have shown in your good works here, especially with projects like the workplace program. Your

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families here have much to be proud of as do you students. It is wonderful to be able to say yo tengo orgullo en ser Latina o Latinio y tambien entiendo me responsabilidad a mi communidad. We need for you to continue taking pride in who you are, where you came from and to remember that you must always take time to give back to others in our community some of the benefits of what you have received. Good night and thank you again for letting me share this evening with you.

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El Orgullo y Responsabilidad de Ser Latino y Latina.

Keynote Speech given on May 17, 1996, at the Hispanic National Bar Association's National Board of Governor's Reception. Association of the Bar of the City of New York.

Thank you Barbara and Jose for the gracious introduction. In structuring a speech for tonight, I realized that anything I spoke about would be well known to the many members of the people of color bar who are present here today. I knew, however, that we would have many guests here who would not fully understand how people of color came to identify as such and who may not fully know of the needs of our communities. With that in mind, I decided to adapt for tonight a concept I addressed at a recent Dinner Dance held by the Latino and Latina American Law Students Association of Hofstra University School of Law. That concept is an attempt to define what made me a Latina and from where I got my sense of pride in being Hispanic and why I must work in helping my community reach its potential in this society. I draw upon my personal experience

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as a Latina but I suspect my experience is not dissimilar from that of the many people of color in this room. As with most people, the essence of my identity was born with and nutured by my family and the memories they created.

For me, los muchos platos de arroz y guandoles (rice and beans), y de piener (roasted pig) that I have eaten at countless family functions, and pasteles (boiled root crop paste) at Christmas, are part of my Hispanic being. It is also, if you have my adventurous taste buds, morcilla (pig intestines), patitas de cerdo con garbanzos (pig feet and beans), y la lengua y orejas del cuchfrito (pig tongue and ears). It is coquitos (coconut ices) y piraguas (shaved ice with tropical colored juices added on) during the summer. It is the sounds of merengue at all our family parties and the incredibly long and heartwrenching Spanish love songs that my family enjoys listening to. It is the memory of seeing

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Cantiflas, one of the most famous Spanish comics, when I was a kid with my cousins at the Saturday afternoon movies.

My Latina soul was nourished each weekend that I visited and played in abuelita's house. My playmates were my cousins and the children of our extended family that included padrinos y padrinas (godfathers and mothers), suegros y suegras (in-laws), their families and the people who lived next door who came over to play dominoes o la loteria on Saturday nights. Did anyone one of these things make me a Latina. No, obviously not, because each of our Carribbean and Latin American communities has their own unique foods, variations thereof and somewhat different traditions at the holidays. I have grown to love tacos only in my adulthood. I was introduced to the beautiful song "La Paloma", in college by my Mexican roommate. It has now become more popular on the East coast but it was not known here while I was growing up. Being Latina is

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also not speaking Spanish, which I do. Many of us educated here barely speak Spanish and all too many of us who do speak it, speak it poorly.

A historian or social scientist could likely provide a very academic desciption of being Latino. For example, we could describe Latinos as those people and cultures populated or colonized by Spain who maintained or adopted Spanish or Spanish creole as their language of communication. That anesceptic description, however, does not provide an adequate explanation for why individuals like us, many of us born in a completely different cultures, still identify so strongly with the communities in which our parents were born.

America, unlikely many other nations, has created a societal image that is in a constant state of tension in dealing with its ethnic identities. We as a society tout the cultural and

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racial diversity of our people yet insist that we can function and live in a race and color blind way. That tension today is being hotly debated in national discussions about affirmative action-discussions in which groups like your own will have to take a leadership role. The tension obviously leads many of us to protect our cultures and to promote their importance. Yet, that need did not create me as a Latina. I became a Latina, instead, by the way I love and live my life. It is the mix in me that comes from a family whose very existence showed me how wonderful and vibrant life is and who through their love and support showed me that although I am an American, love my country and could achieve its opportunity of succeeding at anything I worked for, that I also have a Latina soul and heart with the magic that that carries.

Our society has changed tremendously since I was a child. I suspect that many of the younger Latino professionals here don't

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even remember Cantiflas. Cheaper airplane travel, greater public transportation and more cars alone have dispersed people of color across greater distances. Growing up, all of my family, except those that remained in Puerto Rico, essentially lived in the Bronx within miles of each other. Thus, it will harder for our children to hold on to their ethnic identities. But hold on we must because Latinos and all minority groups, regardless of what part of the country we live in, face as a group in this society, enormous challenges.

The following are statistics that many of you are familar with but they are always worth repeating. The numbers are taken from the 1989-90 Census as reported and analyzed by the National Council of La Raza.

Latinos represents the fastest growing segment of the U.S. population. Since 1980, the Latino population has grown about

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five times as fast as the non-Latino population and Latinos are expected to be the largest ethnic minority in the U.S. in the 21st century. We number about 20.1 million out of 243.7 million Americans, excluding the 3.5 million people of Puerto Rico. We are also a young population, with a median age below Blacks and other groups. We also tend to have slightly larger families than other groups. The Hispanic school-age population is, as a consequence of our demographics, also rapidly growing and although today we account for only 10% of public school enrollment, by the year 2000, we should constitute 1/6 of the students in the nations classrooms but one-third of the student population overall.

We remain, unfortunately, the most undereducated segment of the U.S. Population and by every statistical measurement, the gap between Hispanic and non-Hispanic communities continues to grow at alarming rates. Latinos have the highest school dropout rates

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of any major group. About 43% of Hispanics ages 19 years and over are not enrolled in high school and have no high school diploma. By age 16-17, almost one in five Hispanic has left school without a diploma, compared to less than one in 16 of Blacks and one in 15 of Whites. Only 10% of Hispanics over 25 years old have completed four or more years of college, compared to 11.3% of Blacks and 20.9% of Whites in the same age group. La Raza notes further that for those students in school, Hispanics share less in gifted and special talent programs and have a higher percentage of students left back or not at age and grade normed achievement levels.

Employment follows education and we should not be surprised that in income statistics, Latinos are also not faring well. Latinos have a much higher unemployment rate than non-Hispanics, 50% over the rate for Non-Hispanics, and 60% above the rates of Whites. We are less likely than non-Hispanics to have

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managerial and professional jobs. In a comparison none of us likes winning, only Blacks and American Indians do more poorly in gross employment numbers but Blacks do better in education measures than we do. Latinos have lower per capita incomes than either Whites or Blacks. In 1988, Hispanics had a per capita income of about $7900, Blacks at about $8200 and Whites at about $13,900. I note that among hispanics, La Raza reports Puerto Rican families as faring worst economically with the lowest family medians and the highest proportion of families with incomes below $10,000. I further note that our poverty rates are highest among female-headed Hispanic families.

I doubt this group of lawyers needs to be reminded that although Latinos are about 10% of the general population, we are only 5.6% of the nation's law school population, and only 2.6% of the associates of the 25 largest New York law firms are Hispanic.

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We have fewer than 100 Hispanic law professors out of 5700 positions nationwide.

As the National Council of La Raza has concluded, in this fast rapidly evolving technological society, unless we educate our children better and improve their opportunities, our poverty gap with the rest of society will only widen.

These statistics are terribly sobering. We have much to do. That is why events like today are so important. Members of HBNA and members of the bench and bar of people of color in the tri-state area are among the educational elite of our communities. We have a responsibility not only to achieve success individually so that we provide role models and opportunities for others but we have a responsibility to help change these frightening numbers.

It is critical for us in our otherwise busy lives to remember that whatever we do, we should not forget that we are people of

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color, of rich cultures, and that we have a responsibility to devote time, when we can, to pro bono work, and to give support with money, when we have that, to help our communities face their enormous challenges. I as many of you know that training for work is very time consuming. You don't always have time to give to other activities. That's alright. We all need to develop our skills and business. The important thing, however, is not to get lost in our work forever but to make sure we take and make time to reach out and volunteer time to our communities throughout our lives.

We must ensure that people of color share fully in the American dream. I am proud to be a member of HBNA who is committed to the goal of addressing issues important to the Latino community. We must keep in sight, however, the overriding reality that whatever our regional differences, the results of our problems are

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affecting all of us. We need to take advantage of our common bonds and work together to our political, social and economic advantage.

It is wonderfully to be able to say Yo tengo orgullo en ser Latina pero tambien entiendo me responsabilidad a mi communidad. We as a national community need for you to continue taking pride in who you are, where you came from but also to remember that you must always take time to give back to others in your communities some of the benefits of what you have received. I wish HBNA's National Board much success this weekend in formulating HBNA's future agenda and in preparing for the next annual convention. I hope the joint committees of the various bars that are here the same success. Good night and thank you again for letting me share this evening with you.

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The Genesis and Needs of an Ethnic Identity

Keynote Speech given on November 7, 1996, at the Third World Center, Princeton University, Latino Heritage Month Celebration.

Thank you for the gracious introduction. I am delighted to be here tonight, celebrating Latino heritage month, the Third World center's 25th anniversary and Princeton's 250th anniversary. I am also celebrating my 20th year since graduating from Princeton and it is wonderful to have the opportunity to speak on campus and in a building that contain so many memories for me. Since my graduation, I have had many exciting and challenging experiences, not the least of which has been my appointment to the federal bench. My experiences have taught me much and enriched my life immeasurably. My days at Princeton, however, were the single most transforming experience I have had. It was here that I became truly aware of my Latina identity -- something I had taken for granted during my childhood when I was surrounded by my family and their friends. At Princeton, I began a lifelong commitment to identifying myself as a Latina, taking pride in being Hispanic, and in recognizing my obligation to help my community reach its fullest potential in this society.

In speaking to you tonight, I draw upon my personal experience as a Latina and my knowledge of the special needs of my community. I know, however, that my experience and my community's needs are not unlike those of the many people of color in this room.

As with many people, my identity as a Latina was forged, and closely nurtured by my family through our shared traditions. For me, a special part of my being Hispanic are the muchos platos de arroz y guandoles (rice and beans), y de piener (roasted pig) that I have eaten at countless family functions, and the pasteles (boiled root crop paste) I have consumed year after year during the Christmas holidays. My Hispanic identity also includes, because of my adventurous taste

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buds, morcilla (pig intestines), patitas de cerdo con garbanzos (pig feet and beans), y la lengua y orejas del cuchfrito (pig tongue and ears). It means eating coquitos (coconut ices) y piraguas (shaved ice with tropical colored juices added on) during the summer. It is the sound of merengue at all our family parties and the heart wrenching Spanish love songs that we enjoy. It is the memory of seeing Cantiflas, our famous comic, when I was a kid with my cousins at the Saturday afternoon movies.

My Latina soul was nourished each weekend that I visited and played in abuelita's (grandma's) house. My playmates were my cousins and the children of our extended family that included padrinos y padrinas (godfathers and mothers), suegros y suegras (in-laws), their families and the people who lived next door who came over to play dominoes o la loteria - our bingo - using chick peas as markers on Saturday nights.

Does any one of these things make me a Latina? No, obviously not, because each of our Caribbean and Latin American communities has their own unique foods and different traditions at the holidays. My family in Puerto Rico celebrates Three Kings Day, which my family in New York has not done. I learned about tacos only here at Princeton because of my Mexican first-year college roommate, Dolores Chavez, whom you honored last year. She also introduced me to the beautiful song "La Paloma" that is now popular on the East coast as well. Being Latina in America also does not mean speaking Spanish. I happen to speak Spanish fairly well, but my brother, only three years younger, like too many of us educated here, barely speaks Spanish. And even those of us who do speak Spanish, speak it poorly.

If I had pursued my career in my undergraduate history mayor, I could likely provide you with a very academic description of what being Latino means. For example, I could define Latinos as those people and cultures populated or colonized by Spain who maintained or adopted

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Spanish or Spanish Creole as their language of communication. That antiseptic description, however, does not really explain the appeal of morcilla or merengue to an American born child. It does not provide an adequate explanation for why individuals like us, many of us whom were born in this completely different American culture, still identify so strongly with the communities in which our parents were born and raised.

America has a deeply confused image of itself that is a perpetual source of tension. We are a nation that takes pride in our ethnic diversity, recognizing its importance in shaping our society and in adding richness to its existence. Yet, we simultaneously insist that we can and must function and live in a race- and color- blind way that ignores those very differences that in other contexts we laud. That tension between the melting pot and the salad bowl, to borrow recently popular metaphors in New York, is being hotly debated today in national discussions about affirmative action. This tension leads many of us to struggle with maintaining and promoting our cultural and ethnic identities in a society which is often ambivalent about how to deal with its differences.

In this time of great debate, we must remember that it is not politics or its struggles that creates a Latino or Latina identity. I became a Latina by the way I love and the way I live my life. My family showed me by their example how wonderful and vibrant life is and how wonderful and magical it is to have a Latina soul. They taught me to love America, to value its lesson that great things could be achieved if one works hard for it. Princeton, in turn, showed me that in this society, in order to achieve its promise, it is critical to accept the fact that we people of color are different from the larger society, that we must work harder to overcome the problems our communities face, and that we must work together as people of color to achieve changes.

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I underscore that in saying this I am not promoting ethnic segregation. I am promoting just the opposite: an ethnic identity and pride which impels us to work with others in the larger society to achieve advancement for the people of our cultures. You here, like me, who chose to be educated in a renown institution like Princeton, have already accepted the principal that we must work together within our society to integrate its established hierarchies and structures if we are to improve our own lives and that of our communities. Nevertheless, although we should not attempt to isolate ourselves from the larger society, we also must steadfastly refuse to lose our unique identities and perspectives in this process.

As I have described for you, I grew up in a very close knit family. My childhood friends were my cousins. The neighborhoods of my childhood were populated largely by Hispanics. Although I had some experiences with discrimination in high school, it was limited, and I was protected by my family and friends in the close cocoon we had around us. When I came to Princeton, however, that cocoon was gone. Princeton was very different from anything I had ever known. How very different I was from many of my classmates, came starkly alive here.

I grew up in the inner City. The first week at Princeton I stayed mostly in my room. Dolores, my roommate at the time, usually stayed late at the library, and I would fall asleep before she got home. That entire first week, I heard a cricket sound in my room. I became obsessed with that sound. Every night, I tore that room apart looking for the cricket. I didn't even know what one looked like except that I had seen Jimmy the Cricket in Pinnochio and figured it had to have long legs. That weekend my then boyfriend and later to be husband, who had grown up in the more country-like Westchester, came for a visit. I told him about the cricket in the room and he roared with laughter. He explained to me that the cricket was outside the room, on the tree whose leaves

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brushed up against my dorm room window. This was all new to me: we didn't have trees brushing up against windows in the South Bronx or in the projects in which I was raised.

We also didn't know about prep schools then, or take skying trips, tennis lessons or European vacations in the South Bronx. Except visits to my family in Puerto Rico, I had barely traveled outside the Bronx. I only visited Westchester, which is the first county just north of the Bronx, when I met my intended husband. How different I felt from many of my classmates for whom many of these experiences were very common. The chasm I felt between us seemed and felt enormous.

My very first day signing up for classes I sat outside the gym next to a woman from Alabama. I remember being intrigued by her very unusual and lovely accent. I began to perceive the depth of our differences when she began to describe her many family members and friends who had attended Princeton. As we sat there, Dolores, my roommate, and Theresa, a friend from Puerto Rico, approached, laughing, and as is sometimes our wont, talking very loudly. At that moment, my Alabamian classmate turned to me and told me, as she looked at the approaching Theresa and Dolores, how wonderful Princeton was that it had all these strange people. How ironic, here I thought she was the strange one.

I spent my summers at Princeton doing things most of my other classmates took for granted. I spent one summer vacation reading children's classics that I had missed in my prior education -- books like Alice in Wonderland, Huckleberry Finn, and Pride and Prejudice. My parents spoke Spanish, they didn't know about these books. I spent two other summers teaching myself anew how to write. I had had enough natural intelligence to get me through my early education but at Princeton I found out that my earlier education was not on par with that of many

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of my classmates. When my first mid-term paper came back to me my first semester, I found out that my Latina background had created difficulties in my writing that I needed to overcome. For example, in Spanish, we do not have adjectives. A noun is described with a preposition, a cotton shirt in Spanish is a shirt of cotton, una camisa de agodon, no agondon camisa. Because of this, as with my Latino students, my writing was stilted and overly complicated, my grammar and vocabulary skills weak. I wrote in my first history paper -- authority of dictatorship, instead of dictatorial authority. I spent a lot of time here filling the gaps of my earlier education.

At that time in my life, as I was meeting all these new and very different people, reading classics and relearning writing skills, Princeton was an alien land for me. I felt isolated from all I had ever known, and very unsure about how I would survive here. Accion Puertorriquena, the Puerto Rican group on campus then, and the Third World Center, the building we stand in tonight, provided me with the anchor I needed to ground myself in this new and different world. I met our alumni and upperclass members, like Manny Del Valle and Margarita Rosa who had demonstrated and taken over university buildings in order to push the University to give us the Third World Center. This very annex, Liberation Hall, was built while I was here from funds they had struggled to get from the University. It was a Chinese friend from high school who was here and the Puerto Rican students who volunteered at the admissions office who recruited me to Princeton. At that time, we had no Puerto Rican or Mexican-American professors or administrators. Frank Reed of the Chicano Organization of Princeton, and Charles Hey, another Puerto Rican student, and I, as Co-Chairpersons of Accion Puertorriquena, filed a complaint with the EEOC about Princeton's affirmative action failures. A short time later, Princeton hired its first Hispanic assistant dean of students.

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Because of my work with Accion Puertorriquena, the Third World Center, and other activities in which I participated like the University's Discipline Committee, I was awarded the Pyne Prize in my senior year. The kid who didn't know how to write her first semester, was honored for academic excellence and commitment to University service in her senior year. When accepting the Prize, I said then, and I repeat today that it was not I who earned or deserved that prize that day; it was the third world students who preceded me and those with whom I had worked that had created a place for me at Princeton.

In my years here, Princeton taught me that we people of color could not only survive here, but that we could flourish and succeed. More important, I learned that despite our differences from others at Princeton, we, as people of color with varying ethnic experiences, had become a permanent part of Princeton. It gave much to us, but we gave back to it as well. We brought the Puerto Rican Traveling Theater to Princeton and let our classmates experience its richness. We introduced courses on Puerto Rican and Mexican-American history to the Latin American Department. Princeton changed us, not just academically, but also in what we learned about life and the world. At the same time, we changed this place by our presence here. This third world center is just one concrete example among many of how a group of committed students can change a piece of our society in powerful, and permanent ways.

Your differences from the larger society and the problems you face don't disappear when you leave Princeton. I can assure you, however, that your experiences here will permit you more ably to deal with those differences in the future. The shock and sense of being an alien will never again, I suspect, be as profound for you as it has been here. But I know from personal experience that having been educated at Princeton both academically and socially, you are better

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equipped to address the very significant problems you and our communities face.

Our society has changed tremendously since I was a child. I suspect that many of you here don't even remember or know about the comedian Cantiflas. Cheaper airplane travel, greater public transportation and more cars, along with other demographic factors, have dispersed people of color across greater distances. Growing up, all of my family, except those that remained in Puerto Rico, lived in the Bronx within miles of each other. From these technological advances, our children will have more opportunities to enjoy, but it will be harder for them to hold on to their ethnic identities. But hold on to them we must because Latinos and all minority groups, despite what part of the country we live in, face enormous challenges in this society.

The following are statistics that many of you are familiar with but which are always worth repeating and remembering. The numbers are taken from the 1989-90 Census as reported and analyzed by the National Council of La Raza.

Latinos represents the fastest growing segment of the U.S. population. Since 1980, the Latino population has grown about five times as fast as the non-Latino population and Latinos are expected to be the largest ethnic minority in the U.S. in the 21st century. We number about 20.1 million out of 243.7 million Americans, excluding the 3.5 million people of Puerto Rico. We are also a young population, with a median age below African-Americans and other groups. We also have slightly larger families than other ethnic groups. The Hispanic school-age population is, because of our demographics, also rapidly growing and although today we account for only 10% of public school enrollment, by the year 2000, we will constitute 1/6 of the students in the nations classrooms, but one-third of the student population overall.

We remain, unfortunately, the most undereducated segment of the U.S. Population

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and by every statistical measurement, the gap between Hispanic and non-Hispanic communities continues to grow at alarming rates. Latinos have the highest school dropout rates of any major ethnic group. About 43% of Hispanics ages 19 years and over are not enrolled in high school and have no high school diploma. By age 16-17, almost one in five Hispanics has left school without a diploma, compared to less than one in 16 of African-Americans and one in 15 of Whites. Only 10% of Hispanics over 25 years of age have completed four or more years of college, compared to 11.3% of African-Americans and 20.9% of Whites in the same age group. La Raza notes further that for those students in school, Hispanics share less in gifted and special talent programs and have a higher percentage of students left back or not at age and grade normed achievement levels.

Because employment follows from education, we should not be surprised that in income statistics, Latinos are also not faring well. Latinos have a much higher unemployment rate than non-Hispanics, 50% over the rate for Non-Hispanics, and 60% above the rates of Whites. We are less likely than non-Hispanics to have managerial and professional jobs. In a comparison none of us likes winning, only African Americans and American Indians do more poorly in gross employment numbers. Latinos, however, have lower per capita incomes than either Whites or African Americans. In 1988, Hispanics had a per capita income of about $7900, African Americans at about $8200 and Whites at about $13,900. The New York Times reported in an article published on October 13, 1996, that last year, earnings for all Hispanic groups dropped while income for blacks and whites rose. I note that among Hispanics, La Raza reports Puerto Rican families as faring worst economically, with the lowest family medians and the highest proportion of families with incomes below $10,000. Our poverty rates are highest among female-headed Hispanic families.

As the National Council of La Raza has concluded, in this rapidly evolving

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technological society, unless we educate our children better and improve their opportunities, our poverty gap with the rest of society will only widen.

These statistics are terribly sobering. We have much to do. That is why third world centers at institutions like Princeton are so important. Princeton graduates, of any ethnic group, are among the educational elite of our communities. We have a responsibility not only to achieve success individually so that we provide role models and opportunities for others but we have a responsibility to help change these foreboding numbers. During my Pyne Prize acceptance speech, I quoted Albert Einstein's ageless words:

> Man is here for the sake of other men. ...
> Many times a day I realize how much my own outer and inner life is built upon the labors of my fellow men, both living and dead, and how earnestly I must exert myself in order to give in return as much as I have received.

It is critical for us in our otherwise busy lives, never to forget that we are people of color, of rich cultures, and that we have a responsibility to devote time, when we can, to pro bono work on behalf of our communities, and to give support with money, when we have it, to help our communities face their enormous challenges. I, as many of you, know that studying and training for work is very time consuming. You don't always have time to give to other activities. That is alright. We need to develop our skills. The important thing, however, is not to get lost in studies and personal ambitions but to make sure to take and make time to reach out and volunteer in our communities throughout our lives. Our ethnic identities give us strength. Take pride in them, take sustenance from them, but give back to our communities as well.

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We must ensure that all people of color - not just those of us fortunate enough to be educated at institutions like Princeton - share fully in the American dream. We must keep in sight the overriding reality that whatever our regional, cultural or ethnic differences as people of color, the problems of any of us are the problems of all of us. We need to take advantage of our common bonds and work together to our political, social and economic advantage.

It is wonderful to be able to say Yo tengo orgullo en ser Latina pero tambien entiendo me responsabilidad a mi communidad. Translated: I take pride in being a Latina and I also understand my responsibility to my community. We are fortunate to be a part of a great institution like Princeton. It has a glorious history, and we should take pride in being a part of it. It and its fine reputation will hold you in good stead throughout your lives. My lifetime accomplishments, as yours will be, are in no small measure attributable to my Princeton experience. Nevertheless, for the many reasons I have discussed, we need for you to continue taking pride in whom you are, where you came from, and always to remember that you must take time to give back to others in your communities some of the benefits that you have received. Good night and thank you again for letting me share this evening with you and giving me this opportunity to reminisce. I look forward to meeting as many of you as I can tonight but I expect that as your careers develop, our paths will cross again.

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