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- b(1) National security classified information [(b)(1) of the FOIA]
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- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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**SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE
PART I, QUESTION 15(3)**

Attached are copies of all unpublished opinions referenced in Question 15(3)

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 UNITED STATES OF AMERICA,

4 v.

96 Civ. 5305 SS

5 LOUIS MENCHACA, AMY
6 BOISSONNEAULT, KATHRYN
7 TRUDELL and SHERYL FITZPATRICK,

8 Defendants.

-----x

9 August 26, 1996
10 4:45 p.m.

11 Before:

12 HON. SONIA SOTOMAYOR,

13 District Judge

14 APPEARANCES

15 MARY JO WHITE
16 United States Attorney for the
17 Southern District of New York

18 MARTIN J. SIEGEL
19 Assistant United States Attorney

20 JOHN BRODERICK
21 Attorney for Defendants

22 D E C I S I O N

23
24
25

1 THE COURT: Well, counsel, I have read the papers
2 and I'm ready to rule. If you have anything to add to the
3 papers before I do so, let me know now.

4 MR. SIEGEL: No, ma'am.

5 MR. BRODERICK: I don't, your Honor.

6 THE COURT: All right. I'll read my decision
7 into the record. I'm not usually ready to rule, but it
8 seemed as if the positions were straightforwardly set forth
9 in the papers and there wasn't much to add.

10 This action arises under the Freedom of Access to
11 Clinic Entrances Law of 1994 ("FACE") 18 U.S.C. Section 248,
12 which provides for injunctive relief and statutory monetary
13 relief against any person who

14 by force or threat of force or by physical
15 obstruction, intentionally injures, intimidates or
16 interferes with or attempts to injure, intimidate or
17 interfere with any person because that person is or has
18 been, or in order to intimidate each person or any other
19 person or any class of persons from, obtaining or providing
20 reproductive health services.

21 In its initial application filed on July 18,
22 1996, the government sought a preliminary injunction
23 enjoining the defendants from violating FACE and coming
24 within 15 feet of the Women's Medical Pavilion ("WMP") at
25 Dobbs Ferry. At a conference held in this matter on August
1, 1996, I consolidated the government's application for a
preliminary injunction with a trial on the merits under
Federal Rule of Civil Procedure 65(a)(2).

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1 The government alleges and has provided evidence
2 that the four defendants in this action have over the course
3 of six years, repeatedly hindered medical care at the WMP by
4 physically blocking patient and staff attempts to enter the
5 building. Each defendant has been arrested by Dobbs Ferry
6 police on numerous occasions, convicted, served jail
7 services, and been barred by state court orders of
8 protection from coming near the WMP. Defendant Menchaca was
9 convicted of trespass three times; defendant Boissonneault
10 has been convicted three times of disorderly conduct and
11 once of violating a permanent order of protection; defendant
12 Trudell has been convicted twice of trespass and once of
13 disorderly conduct; and defendant Fitzpatrick has been
14 convicted twice of disorderly conduct, twice for violation
15 of a permanent order of protection and once for trespass.
16 All defendants had prior arrests for trespass that resulted
17 in the charges being dismissed because the time served
18 exceeded the maximum penalty.

19 The last incident of obstruction occurred on
20 April 3, 1996, when each defendant blocked the only entry to
21 the clinic by sitting at its doorway, which is at the rear
22 of the building and which can only be reached by traversing
23 an 18-inch wide, walkway from the building's parking lot.
24 Police officers issued trespass warnings to the defendants'
25 who refused to leave and then the defendants were arrested

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1 and removed. By blocking the only entrance to the clinic,
2 patients and employees were prevented from gaining access to
3 the building and from receiving or giving reproductive care.
4 Of the twelve women scheduled for treatment, only six
5 ultimately appeared for treatment. Without protests of the
6 type conducted by defendants, the normal "no-show" rate for
7 treatment is only 10 percent and not 50 percent as occurred
8 on this date. Moreover, employees scheduled to engage in
9 counseling of patients were prevented from rendering those
10 services.

11 Now, defendants Menchaca, Boissonneault and
12 Fitzpatrick have not filed papers in opposition to the
13 government's request for a permanent injunction. Because
14 the government has amply proven that these defendants have
15 violated FACE by their obstruction of the WMP's only
16 entrance on April 3, 1996, and because there is more than
17 reasonable cause, given their past history, to believe that
18 these defendants will continue their unlawful conduct, I
19 find that issuing the injunction sought by the government
20 against these defendants is warranted. The standards for
21 injunctive relief are more than met in this case given the
22 irreparable injury presumed because of the statutory harm
23 caused by the defendants to the public's interest, and the
24 government's proof of the FACE violations by these
25 defendants.

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1 The same finding for the same reasons can be
2 applied to defendant Trudell but she has filed papers
3 opposing the preliminary injunction and moving to dismiss
4 the complaint in this action on the ground that FACE is
5 unconstitutional. For the reasons to be discussed, I reject
6 defendant Trudell's constitutional challenges to FACE.

7 The Government's Memorandum of Law in opposition
8 to defendant's Trudell's Motion to Dismiss the Complaint and
9 in Further Support of Plaintiff United States' Application
10 for a Preliminary Injunction at pages 5, 10, 11-12 and 18,
11 lists the circuit and district courts throughout the country
12 that have addressed almost all of defendants' constitutional
13 challenges to FACE. I have nothing new to add to the
14 reasoning or analysis of those courts and merely incorporate
15 those cases and their analysis by reference. Herein I am
16 merely summarizing the essence of why I do not accept
17 defendants' constitutional challenges.

18 I am aware of the deeply personal feelings that
19 have motivated defendant's actions in this matter. I am
20 also fully aware of the highly charged societal debate
21 concerning reproductive rights in our nation. I further
22 recognize the fine line between defendant's rights to
23 passive, nonviolent protest, and the conduct prohibited by
24 FACE. Nevertheless, I am compelled by Supreme Court
25 precedence, including but not limited to *Cameron vs.*

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1 *Johnson*, 390 U.S. 611, 617 (1968) and *Cox vs. Louisiana*, 379
2 U.S. 559 (1965) to conclude that FACE in the context of this
3 case does not penalize ideas or religious beliefs, but only
4 that conduct, intentional obstruction of another's property,
5 that infringes on the rights of WMP and its patients.

6 For similar reasons, I reject defendant's
7 challenge to FACE as vague. I agree with the government
8 that FACE is substantially similar to the statute upheld in
9 *Cameron vs. Johnson* 390 U.S. 611, 617 (1968), and
10 accordingly, I am bound by the *Cameron* reasoning to conclude
11 that FACE is not unduly vague.

12 With respect to the defendant's challenge to FACE
13 under the commerce clause and *United States vs. Lopez*, 115
14 S. Ct. 1624 (1995), I, like Judge Sprizzo in *United States*
15 *vs. Lynch*, 95 Civ 9223 (JES), his decision of February 23,
16 1996, have examined the extensive legislative history of
17 FACE and conclude that Congress had an ample and adequate
18 basis to conclude that the blockade of clinics and other
19 conduct examined by Congress has a likelihood of and does
20 affect interstate commerce. I make this conclusion under
21 the traditional analysis of commerce clauses set forth by
22 the Supreme Court, see *Preseault vs. Interstate Commerce*
23 *Clause*, 494 U.S. 1, 17, (1990) (courts "must defer to a
24 congressional finding that a regulated activity affects
25 interstate commerce if there is any rational basis for such

1 a finding") I too find that FACE survives a commerce clause
2 challenge to its constitutionality based on this stricture
3 by the Supreme Court.

4 Defendant's equal protection argument fails for
5 the reasons her First Amendment challenge does not survive.
6 FACE, as it relates to defendant's conduct, only regulates
7 her unlawful conduct, not expression, and FACE in any event
8 is narrowly tailored to protect the government's interest as
9 expressed by Congress.

10 Finally, defendant Trudell's Eighth Amendment
11 challenge to FACE's criminal penalties is not ripe for
12 resolution because this action is a civil, not criminal,
13 action.

14 In summary, I find that FACE withstands Trudell's
15 constitutional challenges and deny Trudell's motion to
16 dismiss the complaint in this action for the reasons I just
17 stated.

18 Trudell, however, maintains that FACE requires an
19 individual to have "discriminatory animus" towards the
20 employee or patients at reproductive service facilities
21 before an injunction can issue. Defendant contends and
22 requests that a hearing on this issue be held. I agree with
23 the government that nowhere in Section 248 of FACE is
24 discriminatory animus set forth as a requirement and that
25 FACE only requires proof that a person has intentionally

1 interfered with others for obtaining or providing
2 reproductive care. On this issue, there is no dispute.
3 Defendant in her opposition papers concedes that on April 3,
4 1996, at WMP, she and others took their
5 accustomed places in a sitting position blocking
6 the entrance. With reverence for life they sat down ... and
7 devoutly awaited their arrest ... [T]hey were arrested. The
8 clinic then opened. One-half of the women scheduled on that
9 "abortion day" changed their minds and the clinic claims
10 damages in this action for loss of that revenue.

11 This is taken from Trudell's opposition to the
12 preliminary injunction at page 12.

13 This concession leaves no dispute at issue that
14 plaintiff intentionally, albeit for deeply held personal
15 views, obstructed the clinic's entranceway with the express
16 purpose of interfering with the rights of the clinic's
17 patients to obtain reproductive services and of the clinic's
18 employees to give such services. No hearing, given
19 defendant's concessions, on the issue of intent, the only
20 requirement by FACE, is therefore necessary. Plaintiff has
21 been fully heard and the injunction in Trudell's case will
22 be issued for the same reasons it is issued against the
23 three other defendants.

24 Finally, I, like Judge Sprizzo, in the exercise
25 of my discretion, do not believe it warranted to impose
statutory damages at this time. Defendants are advised,
however, that any further conduct at WMP violating FACE will

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1 both counsel the imposition of statutory damages at that
2 time and constitute a contempt of this Court's order
3 warranting other sanctions.

4 I note that I have carefully examined the
5 description of the physical layout of this clinic and
6 conclude that given the location of its driveway and only
7 entrance, that a 15 feet injunction is the minimum amount of
8 space necessary to safeguard the First Amendment rights of
9 defendants while safeguarding the rights of persons using
10 the clinic. The government should submit an order
11 consistent with this opinion incorporating the Court's
12 rulings on the motion to dismiss and the government's
13 request for injunctive relief and statutory relief.

14 The government is warned that an injunction that
15 says "don't violate the law" is meaningless. Read the case
16 law on this issue. The injunction must specify the specific
17 conduct which the defendant is prohibited from undertaking,
18 not merely "don't violate the law." Everyone is under an
19 obligation not to violate the law with or without an
20 injunction, so set forth the specific conduct that the
21 defendants are enjoined from engaging in.

22 I am going to request that the government give a
23 copy of that order to Mr. Broderick. Mr. Broderick, you're
24 representing all the defendants?

25 MR. BRODERICK: Yes, I am, your Honor.

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1 THE COURT: Including Ms. Trudell?

2 MR. BRODERICK: Yes, your Honor.

3 THE COURT: Give a copy of the order to
4 Mr. Broderick for his review. If you have objections to the
5 order, make up a letter explaining what the objections are
6 and then submit the entire package to me. Let's get this
7 done by the end of the week.

8 MR. BRODERICK: Yes, ma'am.

9 THE COURT: Okay. Mr. Broderick, take a day to
10 review the order. No longer than a day because I don't want
11 a delay in entering this.

12 MR. BRODERICK: Sure.

13 MR. SIEGEL: The government also requested civil
14 penalties.

15 THE COURT: I thought that's what I was ruling on
16 when I said no statutory damages.

17 MR. SIEGEL: Well, the law provides both for
18 civil penalties and statutory damages.

19 THE COURT: My intent was to say no to both for
20 the reasons I indicated. I think if there's further action
21 by these defendants, then it's appropriate in the exercise
22 of my discretion. I will await their future decision on how
23 they want to proceed. They've been given due warning now --

24 MR. SIEGEL: Thank your Honor.

25 THE COURT: -- both by Congress and by me. All

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1 right. That will dismiss this case hereafter, correct, once
2 the injunction is issued and my decision?

3 MR. SIEGEL: It will, your Honor.

4 THE COURT: Thank you, counsel. Good papers on
5 both sides by the way and not unimportant issues. But I'm
6 not the one to decide them, Mr. Broderick.

7 MR. BRODERICK: I see, your Honor.

8 THE COURT: I'm bound by the Supreme Court.

9 Thank you, counsel.

10 MR. BRODERICK: Thank you, your Honor.

11 MR. SIEGEL: Thank you.

12 (Record closed)

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MANDATE

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SDNY
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

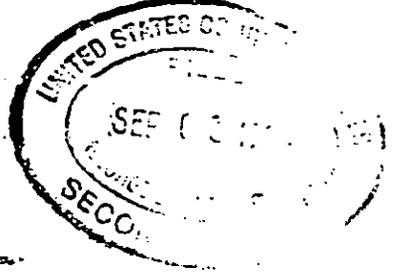
S U M M A R Y O R D E R

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THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of September one thousand nine hundred and ninety-six.

Present: HONORABLE THOMAS J. MESKILL,
HONORABLE AMALYA L. KEARSE,
HONORABLE J. DANIEL MAHONEY,
Circuit Judges.



WILLIAM ORTIZ,

Plaintiff-Appellant,

- v. -

No. 95-2584*

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appearing for Appellant: William Ortiz pro se, Bradford, Pa.

Appearing for Appellee: Nicole A. LaBarbera, Ass't U.S. Att'y, SDNY, N.Y., N.Y.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was submitted by plaintiff pro se and by counsel for defendant.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed.

Petitioner William Ortiz appeals from a judgment of the United States District Court for the Southern District of New York, Sonia Sotomayor, Judge, denying his petition pursuant to 28 U.S.C. § 2255 to vacate his sentence principally on the ground that his trial counsel provided ineffective assistance. For the reasons that follow, we affirm.

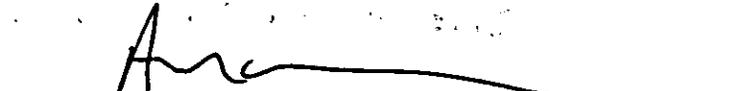
Preliminarily we address the question of appellate jurisdiction. The district court's opinion and order denying Ortiz's petition on its merits was issued in March 1995 and was entered on the docket on April 4, 1995. That order ended with the statement that "the Clerk of the Court is directed to enter judgment dismissing the petition." On August 7, 1995, Ortiz filed a notice of appeal, stating that a final judgment had been entered on July 13, 1995. If the time of appeal ran from the July 13 date (the district court docket entries do not reflect a judgment entered on that date or any other date), the present appeal was timely filed. However, in Williams v. United States, 984 F.2d 28, 31 (2d Cir. 1993), this Court held that there is no requirement that a judgment be entered in a § 2255 proceeding and that the time to appeal begins on the date of entry of the final § 2255 order. Thus, if Williams is to be applied here, Ortiz's time to appeal commenced on April 4, 1995, and the present appeal is untimely. We question whether Williams should be applied here because the district court's order stated explicitly that the clerk of the court was to enter a judgment, and Ortiz may thereby have been misled to believe that his time to appeal did not begin to run prior to entry of the judgment. In light of the court's mistaken indication in its order that a judgment should be entered, we decline to dismiss this appeal for failure to file the notice of appeal within a period measured from the entry of the order. Cf. Thompson v. INS, 375 U.S. 384 (1964) (per curiam) (reinstating appeal, which had been dismissed as untimely, because appellant had relied on district court's explicit, but erroneous, statement that appellant's motion pursuant to Fed. R. Civ. P. 52 and 59 was timely, with result that appellant delayed filing notice of appeal until beyond the period allowed from entry of judgment).

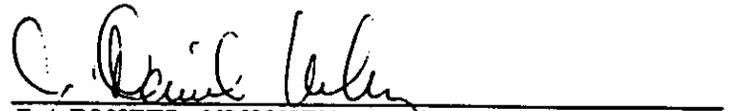
As to the merits of the appeal, we find no basis for reversal. Ortiz's petition was properly dismissed substantially for the reasons stated in Judge Sotomayor's Opinion and Order dated March 22, 1995.

We have considered all of Ortiz's arguments on this appeal and have found them to be without merit.

The order and judgment of the district court are affirmed.


THOMAS J. MESKILL, U.S.C.J.


AMALYA L. KEARSE, U.S.C.J.


DANIEL MAHONEY, U.S.C.J.

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William ORTIZ, Petitioner,
v.
UNITED STATES of America, Respondent.

92 Civ. 2491 (SS).

United States District Court, S.D. New York

March 24, 1995.

Barry C. Scheck, Cardozo Law School, New York City, for petitioner; Lawrence A. Vogelmann, Ellen Yaroshefsky, Mira Gur-Arie, of counsel.

Mary Jo White, U.S. Atty., S.D. of N.Y., for respondent; Rose A. Gill, of counsel.

OPINION AND ORDER

SOTOMAYOR, District Judge.

*1 William Ortiz ("Ortiz") petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. Ortiz seeks to vacate a judgment of conviction for conspiracy to possess with intent to distribute 2.1 kilograms of heroin in violation of 21 U.S.C. § 846 following a jury trial before the Hon. Nicholas Tsoucalas of the Court of International Trade, then sitting by designation in the United States District Court of the Southern District of New York.

In his Memorandum of Law in Support of His Habeas Petition, Ortiz maintained that habeas relief was proper because (1) he was the victim of Government entrapment as a matter of law; (2) he received ineffective assistance of trial counsel; and (3) he was denied his Sixth Amendment right to a fair trial. Ortiz requested an evidentiary hearing to review his claim of ineffective assistance of counsel and his release from prison pending the evidentiary hearing. I denied this latter request at a conference.

The Government initially opposed Ortiz's petition on two grounds. First, the Government maintained that Ortiz was procedurally barred by this Circuit's then decision in *Billy-Eko v. United States*, 968 F.2d 281 (2d Cir.1992), vacated, 113 S.Ct. 2989 (1993), from seeking collateral habeas review of his ineffective assistance of counsel claim because he had failed to assert it on direct appeal. Second, the Government argued that the evidence at trial established beyond a reasonable doubt that Ortiz was

predisposed to commit the crime charged, rendering Ortiz's claim of entrapment as a matter of law meritless and his claim of ineffective assistance of counsel irrelevant.

After the Government filed its Memorandum in Response to Ortiz's Petition, the Supreme Court vacated and remanded *Billy-Eko* with instructions to the Second Circuit to reconsider its holding in light of the position of the Acting Solicitor General before the Supreme Court that ineffective assistance of counsel claims should not be collaterally barred from habeas review. *Billy-Eko*, 113 S.Ct. 2989 (1993). A review of the Acting Solicitor General's brief and the Supreme Court's action led me to believe that a change in the Second Circuit's position was eminent; however, the parameters of the change were unclear. After reviewing Ortiz's petition, I concluded that he had made sufficiently serious allegations to call into question the competence of his trial counsel and that the allegations, in light of the Acting Solicitor General's position, warranted an evidentiary hearing. I thereafter appointed counsel for Ortiz.

Subsequent to my decision to hold a hearing, the Second Circuit in *Billy-Eko v. United States*, 8 F.3d 111, 115 (2d Cir.1993), held that most claims of ineffective assistance of counsel were not collaterally barred from review in a habeas petition except where "(1) the petitioner was represented by new appellate counsel at direct appeal, and (2) the claim is based solely on the record developed at trial." (emphasis added). The Government concedes that Ortiz's claim was not self-evident from the trial record because it involved an alleged private fee arrangement between trial counsel and a co-defendant and the interview of witnesses who were not mentioned during the trial. See Government's Post-Hearing Memorandum of Law in Response to William Ortiz's Habeas Petition (hereinafter the "Government's Post-Hearing Brief"), page 3, fn. 2. Nevertheless, relying on the principle explained in *Billy-Eko*, 8 F.3d at 115, that if a claim is known to be viable it has to be brought on direct appeal without undue delay, the Government maintains in its Post-Hearing Brief, pages 2-5, that Ortiz is nevertheless collaterally barred because he knew before his direct appeal of most of the facts that formed the basis for his ineffective assistance of trial counsel claim.

*2 As noted, at the time I decided to hold an evidentiary hearing in this matter, the Second Circuit had not reviewed its original Billy-Eko decision, 968 F.2d 281. Unsure of the direction the Second Circuit would take, I limited the evidentiary hearing to trial counsel's performance and indicated I would address Ortiz's then newly raised claim of ineffective assistance of appellate counsel if I found any substance to Ortiz's claim of ineffective assistance of trial counsel. Neither before nor at the evidentiary hearing did the Government seek to emphasize that the court's inquiry should be focused on Ortiz's appellate conduct. Only in its Post-Hearing Brief did the Government fully articulate its reasoning under the final Billy-Eko decision, 8 F.3d 111. Because Ortiz's appellate conduct was not the focus of the evidentiary hearing and because the Second Circuit's final decision in Billy-Eko was not available to Ortiz or his appellate counsel at the time of Ortiz's direct appeal, I consider the merits of Ortiz's Sixth Amendment claim as it applies to the conduct of his trial counsel but conclude, after the evidentiary hearing, that Ortiz's petition should nevertheless be denied.

BACKGROUND

The following facts are taken from the trial record and are essentially undisputed. On October 6, 1989, as part of a sting operation, agents of the Drug Enforcement Agency ("DEA") recorded a series of four telephone calls made by Ortiz to a confidential informant ("informant") in which Ortiz negotiated the purchase of three 700-gram units of heroin. Ortiz and the informant agreed to meet that evening at a McDonald's restaurant in Manhattan to complete the transaction.

Ortiz arrived at the McDonald's unaccompanied in a white Buick. Once inside the McDonald's, Ortiz met with the informant and an undercover DEA agent posing as a heroin supplier. The three men moved back outside to the parking lot where they were joined by Angel Perez ("Perez"), one of Ortiz's co-conspirators. Perez placed what appeared to be a shopping bag inside the white Buick. Ortiz and the purported heroin supplier, the DEA agent, entered the car. Ortiz opened the bag and revealed a large amount of United States currency. He told the DEA agent that the bag contained \$90,000 in cash. The agent complained to Ortiz that he was expecting \$270,000 for the three units of heroin and Ortiz then

explained that the "main guy" was going to bring the remainder of the money. Ortiz stepped out of the car, walked to a nearby pay-phone and placed a call.

Twenty minutes later, Hector Ramos ("Ramos") arrived at the parking lot and was introduced by Ortiz to the agent as the person who was purchasing the heroin. The agent then showed Ramos a package purportedly containing the three 700-gram units of heroin. Ramos stepped out of the car, placed a telephone call, returned to the car and informed the agent that the rest of the money was on its way and would arrive shortly. Ramos left the parking lot and returned with two more shopping bags full of money. Ramos and Ortiz entered the Buick with the two bags, which the agent inspected. The agent then stepped out of the car and gave a pre-arranged signal to surveillance agents, who converged on the car and arrested Ramos and Perez. Ortiz ran from the car and was arrested across the street. Three shopping bags, containing a total of \$268,790, were seized.

THE TRIAL AND APPELLATE PROCEEDINGS

*3 At trial, Ortiz maintained unsuccessfully that he had been the victim of Government entrapment. Ortiz testified that upon his release from prison, the informant had called him continuously in an effort to sell him heroin or to obtain through him someone interested in buying heroin. Ortiz claimed to have initially rejected the informant's overtures.

Eventually, however, Ortiz agreed to serve as the middleman for a heroin transaction between the informant and Perez, not because of an interest in dealing drugs, but because, Ortiz testified, of a sense of indebtedness to the informant who had provided him with protection from other inmates while Ortiz was incarcerated on a parole violation. Ortiz also claimed that he was enticed into the heroin transaction because the informant had promised to buy him a car if the deal was completed which car Ortiz needed for work.

The Government did not dispute at trial that the informant had repeatedly contacted Ortiz about the heroin transaction. Instead, the Government maintained that Ortiz was predisposed to commit the crime and that the informant had only facilitated its

commission by furnishing Ortiz with the opportunity to do so. The Government relied upon the four recorded telephone conversations between Ortiz and the informant and testimony of the events that transpired at the McDonald's parking lot to demonstrate that Ortiz, Perez and Ramos were experienced drug dealers with a substantial and well-organized drug trafficking operation interested in purchasing up to ten units of heroin if the heroin supplied by the informant turned out to be of sufficiently good quality. The Government also cross-examined Ortiz about his two prior drug convictions to establish that he was well-versed in the drug trade and that his involvement in the DEA sponsored heroin transaction was not an isolated event.

The jury returned a guilty verdict on the conspiracy charge and Ortiz was sentenced to a term of imprisonment of fifty (50) years and to a ten (10) year term of supervised release, and was assessed a fifty (50) dollar special fee.

After the trial, Ortiz moved to have his trial counsel, Raymond Aab ("Aab"), relieved. Aab joined in the motion. The trial court granted the motion and appointed new appellate counsel.

On appeal, Ortiz challenged only the propriety of the Government's cross-examination of him concerning his prior drug convictions. The Second Circuit rejected Ortiz's claim by summary order and affirmed his conviction.

THE HABEAS CORPUS PROCEEDING

Ortiz filed the present petition on March 23, 1992. On August 28, 1992, the Government responded including in its arguments the position that Ortiz's petition was collaterally barred under the 1992 Billy-Eko decision, 968 F.2d 281. On September 29, 1992, Ortiz filed a reply in which he claimed, for the first time, that he had been denied effective assistance of appellate counsel. Ortiz also moved this Court for leave to amend his habeas petition pursuant to Fed.R.Civ.P. 15(a) to include his newly asserted claim of ineffective assistance of appellate counsel. Thereafter and for the reasons previously discussed, I agreed to hold an evidentiary hearing on trial counsel's performance and appointed habeas counsel for Ortiz. I also gave counsel substantial time to familiarize himself with

the petition. On April 1, 1994, Ortiz's trial counsel, Raymond Aab, and Ortiz testified at the first day of the evidentiary hearing. On May 17, 1994, Aab gave additional testimony. Post-hearing briefs from the parties followed and were fully submitted as of October 6, 1994, when Ortiz's counsel indicated that no reply brief would be submitted to the Government's Post-Hearing Brief.

THE CLAIMS IN THE PETITION AND AT THE EVIDENTIARY HEARING

*4 The following is a distillation of the facts pertinent to Ortiz's habeas petition from his Memorandum of Law and Exhibits submitted pro se in support of his petition and from the testimony given at the evidentiary hearing.

Ortiz claims that the Government's informant improperly induced him to engage in the heroin transaction by promising to help him obtain the connections necessary to complete a tire recycling deal worth \$4 1/2 million in commissions. Ortiz maintains that even before he was released from prison, the informant started to call his mother's apartment. Following Ortiz's prison release, the informant contacted Ortiz and inquired whether he was interested in selling or buying drugs or weapons. Ortiz purportedly told the informant that he was not, but instead expressed his interest in the "marketing deal" for the recycling of rubber tires worth \$4 1/2 million in commissions. Ortiz asked the informant whether he knew anything about China, which Ortiz had heard permitted tire recycling. The informant responded in the negative and the conversation ended.

Ortiz maintains that in the days that followed, the informant intensified his efforts to convince Ortiz to agree to a drug deal. Eventually, the informant told him about Kenny, a wealthy businessman from China, who could help with the rubber deal. A meeting was arranged in which Kenny advised Ortiz that he had business associates in China in the recycling business but that he needed to get 50 kilograms of heroin for his associates so that they would "in turn give him all their work and the best account in town. A favor for a favor, that's the way it works." Ortiz claims to have told Kenny he was not interested in dealing drugs.

After this meeting, the informant's calls

nevertheless continued and finally the informant reported that Kenny would help Ortiz with the tire-recycling deal. Angel Perez and an individual identified at the evidentiary hearing as his friend, Jose Arces, accompanied Ortiz to a second meeting with Kenny. At the meeting, however, Ortiz admits that little was said about the rubber deal because the informant immediately asked Perez if he was interested in selling drugs. Perez hesitated and Ortiz again told the informant that he was not interested in drug deals.

Yet, according to Ortiz, in the days that followed, the informant called Ortiz to ask whether Perez had found someone interested in purchasing heroin. The informant advised Ortiz that he had pressured Kenny to "go through with the rubber deal" and he therefore expected Ortiz to "push" Perez to go ahead with the heroin deal. Ortiz responded that he was not interested in the drug deal and that there was nothing he could do to push Perez.

Subsequently, Kenny called Ortiz directly and asked him to meet him at a bar. At that meeting, Kenny announced that he was waiting for his associates and requested that Ortiz wait with him. A few minutes later "two American Men with Western boots and cardaroy [sic] jackets walked to us and Kenny introduced them to me as his business associates." After the two men walked away, Ortiz asked Kenny "what was going on, you told me your associates were from China?"; to which Kenny responded that they were "company representatives in New York." Ortiz also inquired about the purpose of the meeting and Kenny told him that it was a meeting to discuss the cocaine deal. At that point, Ortiz advised the two men that there had been a misunderstanding and that he was not there to talk about a drug deal. The two men told Ortiz that they had nothing to talk about and left.

*5 According to Ortiz, Perez then called him that night to tell him that Kenny was upset with him but that Kenny would still go through with the tire-recycling deal so long as Perez was willing to buy the heroin. A few minutes later, the informant called Ortiz and told him that Kenny would go through with the tire deal if Perez found someone to buy the heroin from the informant. The informant asked Ortiz to contact Perez to set up the heroin deal with Perez and requested that Ortiz call him back the following day. Ortiz claims that the informant

repeatedly directed him not to mention the tire deal during the next day's conversation. [FN1] Thereafter, the four recorded conversations between the informant and Ortiz occurred and the meeting at the McDonald's restaurant followed. Kenny was not a part of that last meeting.

After his arrest, Ortiz was represented at his arraignment by an attorney from the Federal Defender's Office. Three weeks later, Ortiz claims to have been called into a joint defense meeting at the prison with his two co-defendants, Perez and Ramos, in which three attorneys were present. Aab introduced himself as Ortiz's lawyer and Ortiz assumed, without asking, that Aab was a CJA attorney appointed to represent him. After the meeting and outside the presence of the attorneys, Ramos, who Ortiz claims he had never met before their arrest, told Ortiz that he was "taking care" of, i.e., retaining, the attorneys. Ortiz assumed Ramos was doing him a favor.

Between Ortiz's arrest in October 1989 and December 1989, he and Aab discussed Ortiz's entrapment defense and Ortiz claims to have told Aab in great detail about the informant's and Kenny's conduct. Ortiz also asserts that he directed Aab before and during the trial to speak to Ortiz's mother, sister and nephew as witnesses of the informant's repeated calls. Moreover, during the trial, Ortiz claims to have identified to Aab his friend, Jose Arces, as the individual in a surveillance photograph admitted at trial who was present at a meeting with Kenny. Arces has submitted an affirmation attached to Ortiz's Memorandum of Law in Support of his Petition, in which Arces describes a meeting with "two chinese men" and Ortiz in which Ortiz sought to discuss a marketing deal for rubber, cosmetics and chemicals but the businessmen tried to speak about drugs. Aab never interviewed Ortiz's family members and never sought out Arces who lived in the same building as Ortiz's mother.

Further, Aab never interviewed Ortiz's parole officer whose personal notes of interviews with Ortiz reflect Ortiz's expression of interest in pursuing various marketing deals. Finally, Ortiz's fiancée was apparently present while Ortiz spoke to the informant in a telephone call. Ortiz maintains that his fiancée would have explained that Ortiz's expressed lack of interest in meeting with the

informant was not a ruse to convince the informant that Ortiz had other suppliers ready to deal with him as the prosecution claimed at trial, but a genuine desire not to meet with the informant because Ortiz and his fiancée had plans to go out. Aab did not question the fiancée about the call even though she attended the trial.

*6 In or about December 1989, Ramos died and Ortiz claims that Aab told him that Ramos had only paid Aab \$14,000 and that Aab sought from Ortiz the remainder of his \$35,000 fee. Ortiz could not pay the fee and the two agreed to have Aab move to be relieved from the case. Then District Court Judge Pierre N. Leval on or about April 4, 1990, and again on or about April 23, 1990, denied the motion. Judge Leval, however, did approve the payment of expenses from Criminal Justice Act ("CJA") funds for an expert and investigator and Aab retained a psychologist to evaluate Ortiz for purposes of presenting an entrapment defense. Ultimately, the psychologist's report did not prove helpful to the defense and was not used at trial.

With respect to his testimony at trial, Ortiz maintains that Aab directed him not to testify about the tire deal until he was asked about it and to emphasize a story Aab made up about a jailhouse debt Ortiz owed to the informant for saving him from a prison attack. In short, the trial testimony concerning the genesis of his relationship with the informant was a fabrication which Ortiz agreed to tell because Aab told him it was a more believable story than the one relating to the tire deal. Because Aab at trial did not pose any questions of him concerning the tire deal and meetings with Kenny, Ortiz claims he did not volunteer those events himself. Moreover, after he finished testifying without disclosing the tire deal, Ortiz maintains that Aab assured him that he would get to the tire deal through other witnesses but never did.

Ortiz, however, did not relate Aab's failure to fully present his entrapment defense at trial in his post-trial motion to relieve Aab. (Government Ex. 3). [FN2] In that motion, Ortiz complained only about Aab's failure to transmit trial transcripts to him and to return his and his family's telephone calls. At the evidentiary hearing, Ortiz explained that he did not include Aab's failure in his post-trial motion because he was unaware of the need to do so.

At the evidentiary hearing, Aab denied ever receiving payment from Ramos. He claimed instead to have received about seven to eight hundred dollars in money orders of a twenty-five hundred retainer. At the first evidentiary hearing of April 1, 1994, Aab testified that he thought Ortiz had contacted him after getting his name from a co-defendant. At the May 17, 1994 hearing, Aab, when presented with a docket sheet in the trial case, recalled that he had first put in a notice of appearance on behalf of Ramos. Aab explained that someone had called him on behalf of Ramos and that he put in a notice of appearance, consistent with state practice, before receiving a retainer or meeting with Ramos. Another attorney was also contacted on behalf of Ramos and that attorney appeared on behalf of Ramos the next day and thereafter. In the interim, Ortiz called Aab and interviewed him. Ortiz told Aab that he had gotten the names of a number of attorneys and had met with them. Ortiz showed Aab a "writing sample" from one of those attorneys. Only three weeks later after speaking to other attorneys did Ortiz agree to have Aab represent him for a \$2500 retainer. Aab claims to have received about \$700-\$800 of the retainer in money orders. Aab kept no records of the payments.

*7 After Ortiz retained him, Aab claims to have discussed the case and potential defenses with Ortiz at length, particularly the entrapment defense. The psychologist retained by Aab, however, reported that Ortiz was a highly intelligent and assertive personality not likely to be susceptible to entrapment. Hence, the psychologist was not called at trial. With respect to the informant, Aab interviewed him and found he contradicted almost all of Ortiz's claims. After consultation with Ortiz, they decided that Ortiz's uncontroverted description of the frequent contacts by the informant was better than calling the informant as a witness. Aab had no memory of discussions with Ortiz concerning the use of his relatives as factual witnesses but did remember discussing with him the disadvantages of using them as character witnesses.

Early in his representation of Ortiz, Aab had taken notes concerning a tire deal but at the evidentiary hearing, he had no memory of the tire deal or of the deal playing any significant part in the events relayed to him by Ortiz or in the defense they developed. Aab denied counseling Ortiz to fabricate

his prison debt to the informant. Aab claimed that Ortiz generally was an active and vocal participant in his defense and called and wrote to him incessantly. In fact, Ortiz did substantial legal research and sent it on to Aab on an almost weekly basis. I note that after Aab testified on April 1 about Ortiz's penchant for legal research, Ortiz, despite being then represented by counsel, sent me on April 12 a letter containing his research on the "failure to call witnesses" portion of his claim.

Prior to representing Ortiz, Aab had appeared in only one federal criminal case. Nevertheless, he had handled hundreds of state criminal cases. He agreed to a twenty-five hundred dollar retainer because he expected the case to result in a guilty plea or cooperation. Finally, Aab was not approved for CJA payment for his fees until the conclusion of the trial. By letter declarations dated April 28, 1994, the attorneys for Perez and Hector Ramos denied ever being told that Ramos had paid Aab to represent Ortiz.

DISCUSSION

At the evidentiary hearing, Ortiz's counsel abandoned Ortiz's pro se arguments relating to the insufficiency of the evidence at trial. (Tr. April 1, 1994 Hr'g at 11). [FN3] Hence, the question remaining before me is whether Ortiz was denied effective assistance by his trial counsel Aab based on 1) Aab's actual conflict of interest arising from co-defendant Hector Ramos's alleged payment of a portion of Ortiz's retainer and from omissions made to Judge Leval in Aab's application to be relieved as counsel; 2) Aab's failure to pursue at trial Ortiz's entrapment defense based on the tire marketing deal; and 3) Aab's failure to interview or call witnesses at trial.

In order to make out a claim for ineffective assistance of counsel, a habeas petitioner must affirmatively establish both unreasonable representation by his attorney and prejudice sufficient to call into question the reliability of the trial. *Strickland v. Washington*, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984). Claimant bears the burden affirmatively to show that his attorney's representation was objectively unreasonable and that but for his attorney's errors, the result would have been different. See, e.g., *Bellamy v. Cogdell*, 974 F.2d 302, 306 (2d

Cir.1992) (en banc) (citing *Strickland*, 466 U.S. at 694), cert. denied 113 S.Ct. 1383 (1993).

*8 Where an actual, as opposed to a potential, conflict of interest exists between a defendant and trial counsel, however, the defendant need not prove the prejudice required by the *Strickland* standard but must establish that the actual conflict "adversely affected [the] lawyer's performance" or caused a "lapse in representation." *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980); *United States v. Iorizzo*, 786 F.2d 52, 58 (2d Cir.1986).

I find no actual conflict of interest in the record before me under the *Cuyler* standard. Moreover, Aab's conduct does not support a conclusion that "but for" counsel's error, defendant would have fared better at trial. *Strickland*, 466 U.S. at 687-88.

THE ACTUAL CONFLICT OF INTEREST CLAIM

With respect to the first prong of Ortiz's actual conflict argument, I do not credit Ortiz's allegation that his co-defendant Hector Ramos paid Aab a retainer. Ortiz's story was simply not credible. It is difficult to believe that Ortiz, who had been represented by another attorney at his arraignment, would have first met Aab at a joint defense meeting and not asked Aab how he had come to represent him. It is also difficult to believe that Ortiz never met or dealt with Hector Ramos prior to their arrest, but Ortiz then accepted, without question, Ramos' unsolicited generosity in retaining Aab.

After Ramos died on February 28, 1990, and even after Aab moved to be relieved on April 4, 1990, not once did Ortiz raise or mention to the trial court the alleged conflict of interest. After trial, when Ortiz sought to have Aab replaced, he complained of Aab's inaccessibility after the trial but not of the alleged Ramos retainer payment. In fact, in his affirmation in support of his motion to relieve Aab (*Government Ex. 3*), Ortiz wrote: "When I could afford to retain Mr. Aab he kept all his appointments and promises, however, since Mr. Aab has been appointed by the Court he pays no attention to me." (emphasis added). Not in his appeal but only in his Memorandum of Law in Support of His Habeas Petition, and then only in one paragraph, at pages 63-64, of a twenty-five page section dealing with his ineffective assistance of

counsel claim, did Ortiz make reference to the Ramos retainer payment. There, Ortiz claimed that Ramos never told him that he had paid Aab. At the evidentiary hearing before me, however, Ortiz testified that Ramos told him of the payment on the very day he met Aab. I do not find this to be an inadvertent error in his Memorandum of Law as Ortiz claimed at the hearing, but instead I find it reflective of Ortiz's somewhat strained creation of a story.

Ortiz is a highly articulate, intelligent man. I credit Aab's testimony that Ramos never paid him and that he was interviewed and retained for the position by Ortiz and that Ortiz simply failed to pay him the full retainer promised.

The second prong of Ortiz's actual conflict of interest claim is more amorphous because it attempts to create an actual conflict by postulating about the motivations for counsel's alleged failure to perform adequately at trial. This is not the type of proof demonstrating that an attorney "actively represented conflicting interests" recognized in *Cuyler*, 446 U.S. at 350. See *United States v. Lovano*, 420 F.2d 769, 774 (2d Cir.), cert. denied, 397 U.S. 1071 (1970) (more than a "theoretical conflict of interest" or "argument based on mere speculation" is necessary; defendant must prove that his attorney actually represented a conflicting interest).

*9 In essence, Ortiz argues that Aab created an actual conflict of interest by agreeing to a low retainer in order to gain federal experience and by adopting the erroneous presumption that the case would end in a plea and then thereafter failing to advise the trial judge of his inexperience and of his financial miscalculation. Ortiz's argument is without merit.

First, although Aab was an inexperienced federal practitioner, he did have extensive state criminal experience. There was nothing in the factual or legal underpinnings of the charges against Ortiz that were so unique to federal practice as to have rendered an inexperienced federal practitioner even arguably negligent for continuing in Ortiz's representation at trial. Therefore, there was no need or obligation on Aab's part to inform Judge Leval of his federal inexperience. [FN4] Similarly, neither was Aab's representation to Judge Leval that the case was "not a complicated case" and "unusually

straightforward" misleading. (Government Ex. 2, Aab's letter dated April 23, 1990 to Judge Leval, at page 2). The trial, including jury selection to jury verdict, took only three-and-one-half days, and even further interview of and presentation of defense witnesses at trial would not have required significantly more time.

Second, Aab fully disclosed to Judge Leval that he would not be paid for his trial work. Whatever the motivations for setting the amount of his initial retainer, the issue in the applications to be relieved was not the retainer amount owed but the defendant's inability to pay his attorney for trial work. Hence, there was no conflict created by Aab's alleged failure to disclose the presumptions underlying the original retainer amount. [FN5]

Third, Judge Leval approved the payment of expenses for a trial expert or an investigator for Ortiz from CJA funds and Aab retained a psychologist to investigate the entrapment defense. The witnesses Ortiz claims Aab failed to interview or call at trial were essentially relatives or friends present during the trial or readily available. [FN6] Thus, no conflict of interest between Aab and his client existed with respect to expenses relating to the pre-trial investigation of the case.

Fourth, neither Judge Leval nor Judge Tsoucalas ever promised Aab payment from CJA funds and never led Aab to believe that his trial performance affected the possibility of such a payment. To the extent Aab may have had a personal hope that he could later apply for such funds, that hope did not amount to a conflict between himself and his client, because Aab's performance was not contingent on any judge's response to that hope.

In short, the only potential factor supporting a finding of actual conflict was Aab's representation of Ortiz without payment. This standing alone does not create an actual conflict of interest, particularly where counsel was aware of and fully understood his ethical obligations to his client, and where the lack of payment did not influence the alleged trial errors. [FN7] Aab, as his CJA time sheets reflect (Government Ex. 3), spent significant time, including a weekend, researching and preparing for trial. Most of what Ortiz claims Aab did not do, which was interview witnesses readily available to him, was not attributable to the failure of payment

but to some other motivation. Aab claims none of the now proffered witnesses were material to the defense. Ortiz himself postulates that what he perceived from Aab was not a lack of willingness to pursue an investigation because of a lack of funds, but a disbelief by Aab of Ortiz's story:

*10 Q. I know you have been living with his case for a longtime and have thought about it a great deal. Is there anything else that you feel the judge should know that we haven't covered.

A. Yes. I basically would like to emphasize the fact that I think Mr. Aab never believed a word of the car tire deal. He just never believed it....

(Tr. April 1, 1994 Hr'g at 45, lines 14-20.)

At best, Ortiz's claim amounts to an argument that counsel made an error in judgment but not an error attributable to counsel representing an interest different from his client's. In summary, I find no actual conflict of interest in this case and hence invoke the standard set forth by Strickland in reviewing Ortiz's ineffective assistance of counsel claim.

THE TRIAL OMISSIONS

In addressing this portion of Ortiz's claim, there are certain factual determinations I must make. First, I do not credit Ortiz's claim that Aab directed him to lie about the prison favor he owed the informant or that Aab misled Ortiz into believing that he would present the tire marketing defense before the end of trial. The focus of Ortiz's testimony at trial was not the favor he owed the informant but the informant's promise of a car to aid Ortiz in his work pursuits. The promise of that car was not the lie Ortiz claims Aab directed him to tell. I see no purpose to or reason for Aab counseling Ortiz to tell the lie about a prison favor when it was not the linchpin of the defense the two were presenting.

With respect to the tire marketing deal, it is undisputable that Aab was aware of Ortiz's discussions with the informant and Kenny about the tire deal. Aab's notes dated 11/26/89 (Government Ex. 3506) set forth many of the details concerning the tire deal in Ortiz's habeas petition. It is somewhat surprising, although understandable given the passage of time, that Aab had no recollection at the evidentiary hearing of this discussion. On the other hand, Aab was certain that all decisions

concerning the defenses to be presented at trial were fully discussed with Ortiz and that Ortiz approved the strategies elected at trial.

I simply do not credit Ortiz's claim that he was unaware that the tire marketing deal would not be mentioned at trial. I find it more consistent with the events at trial and Ortiz's conduct post-trial to conclude that Ortiz knowingly and consciously accepted Aab's advice, which Ortiz admits Aab expressed, that the prison debt and car portions of the entrapment defense would be more credible to the jury:

Q. And you discussed this in advance of the trial with Mr. Aab, the story about a jailhouse incident?

A. He told me that it was very believable to say something like that, because it was typical of a jail type thing. He told me that what actually happened didn't sound right to him.

(Tr. April 1, 1994 Hr'g at 49-50).

Ortiz sat through the Government's and Aab's opening and the Government's case and knew that Aab had not mentioned the tire marketing deal. Yet, Ortiz himself in his own direct examination failed to mention the tire deal even though a multitude of responses clearly would have implicated the information. [FN8] It is simply incredible that a highly intelligent and actively involved defendant [FN9] would have believed Aab's assurances that the tire deal would be brought up on a direct question or would have left the stand, when the question was not asked, without volunteering the information. It is also difficult to believe that Ortiz would not have mentioned Aab's failure fully to pursue the entrapment defense in his post-trial motion to relieve Aab. In short, I find that the decision not to mention or develop the tire marketing deal at trial as part of the entrapment defense was a strategic choice, known and accepted by Ortiz.

*11 The failure to pursue a defense or interview witnesses can constitute ineffective assistance of counsel only when the decision not to conduct further investigation was not supported by "reasonable professional judgment." *United States v. Aguirre*, 912 F.2d 555, 560 (2d Cir.1990) (quoting *Strickland*, 466 U.S. at 690-91); see also *United States v. Matos*, 905 F.2d 30, 33 (2d Cir.1990) (a failure to "make reasonable

investigations or to make a reasonable decision that makes particular investigations unnecessary," "constitutes ineffective assistance of counsel" (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986)). Under the circumstances Ortiz claims Aab knew, however, failure to interview the witnesses proffered by Ortiz can not be said to have been unreasonable nor to have risen to the level of ineffective assistance of counsel. In addition to the inherent bias jurors would recognize in the testimony of family members and a fiancée, Aab was not told by Ortiz that any of his family members or fiancée had personal knowledge of the central issues raised by Ortiz in his papers or which were vigorously contested at trial. The available family members could only testify about the informant's repeated calls to Ortiz and not about their substance. The fiancée could only at best confirm a meeting she had scheduled with Ortiz and not that Ortiz's statements in a tape recording with the informant concerned that meeting. [FN10] Similarly, Ortiz's probation officer could have testified about Ortiz's professed interest in marketing deals but not about any of Ortiz's contacts with the informant or Kenny. To the extent Ortiz's friend, Jose Arces, was not interviewed by Aab, I note that Ortiz claims to have identified Arces to Aab only at trial and that Arces' only claimed relevant testimony would have been about the aborted tire deal meeting. [FN11]

With respect to the tire deal itself, I can not say that Aab's advice, as suggested by Ortiz, about the viability of emphasizing the tire marketing deal at trial would have been so misplaced as to exceed the reasonable bounds of professional behavior. Ortiz was a convicted felon who had just left prison, yet claimed to have had access to a tire recycling deal worth \$4 1/2 million in commissions. Ortiz proffered no witnesses concerning the availability or viability of the deal but merely offered his own testimony and that of others of his own talk of interest in the deal. Ortiz also does not credibly explain why he believed the informant would have been capable of assisting in such a venture or why after the aborted meeting with Kenny's associates, Ortiz would have continued in the heroin deal believing Kenny would deliver on his promise to assist in the tire deal. On the other hand, the promise of a car, which Ortiz admits the informant made, appears a more credible explanation of Ortiz's behavior. In summary, I find nothing in Aab's

behavior that suggests that his advice to Ortiz was outside the ken of strategic trial choice.

*12 Finally, even assuming that Aab's performance fell below the Strickland standard, Ortiz has not demonstrated that he was prejudiced by Aab's alleged unprofessional conduct. The evidence against Ortiz at trial was overwhelming. The four taped recordings between Ortiz and the informant reflected both Ortiz's willingness and eagerness to participate in the drug transaction. Ortiz's access to Ramos and Perez and capability of executing the deal were also indicative of his predisposition to commit the crime. The jury received an entrapment defense charge. They considered Ortiz's claim that his will was overborne by the informant, and the jury rejected the defense. To the extent the tire deal was to have been raised at trial, it would not have added appreciably to the jury's assessment of Ortiz's predisposition to commit the crime charged. In summary, Ortiz has not proven that absent Aab's trial failures, the result of the trial would have been different. See *Strickland*, 466 U.S. at 696 ("a verdict ... only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support"); *United States v. Simmons*, 923 F.2d 934, 956 (2d Cir.), cert. denied, 500 U.S. 919 (1991) (where evidence is overwhelming, there is "little reason to believe that alternative counsel would have fared any better").

CONCLUSION

Because of my findings herein, I need not address Ortiz's ineffective assistance of appellate counsel claim arising from appellate counsel's failure to raise the trial claim on direct appeal. For the reasons discussed, petitioner Ortiz's writ for habeas relief is denied and the Clerk of the Court is directed to enter judgment dismissing the petition.

SO ORDERED

FN1. Ortiz claims that he did attempt to bring the tire deal up during the first taped telephone conversation with the informant but that the informant diverted the topic. The relevant part of the exchange, according to Ortiz, was as follows:
ORTIZ: Have you talked to this guy? C.I.: Who?
ORTIZ: Did you ask him, he know Kenny? C.I.: Yeah, I asked him about it already. ORTIZ: Yeah,

what did he say? C.I.: (UI). ORTIZ: Don't worry we'll go. So everything is okay, alright? C.I.: Okay.

FN2. "Government Ex." refers to submissions at the evidentiary hearing before me.

FN3. Although generally a factual issue for a jury, see *Mathews v. United States*, 485 U.S. 58, 63 (1988), entrapment as a matter of law arises when no reasonable jury can find a defendant was predisposed to commit the crime charged, "prior to being approached by Government agents." *Jacobson v. United States*, 112 S.Ct. 1535, 1540 n. 2 (1992); *United States v. Williams*, 705 F.2d 603, 613 (2d Cir.), cert. denied, 464 U.S. 1007 (1983). Ortiz's argument that the evidence at trial proved entrapment as a matter of law failed woefully short of this standard. The four tape recordings between the informant and Ortiz, the testimony of the DEA agent, Valerie Dickerson, about her meetings with Ortiz and the informant and of Ortiz's actions at the McDonald's restaurant, and Ortiz's prior narcotics convictions provided ample proof, beyond a reasonable doubt, for the jury to have concluded that Ortiz was predisposed to commit the crime charged. Hence I commend Ortiz's counsel for not pursuing a factually specious argument.

FN4. I note that, albeit infrequently, attorneys with only state criminal practice experience are selected to serve as members of this Court's CJA panel.

FN5. Ortiz's argument in his post hearing brief, page 17 and fn. 7, that Judge Leval might have been misled into thinking that Aab's one-third retainer payment represented a more substantial sum because it should have included trial work is premised on sheer speculation. All judges know that retainer agreements vary depending on the lawyer and client involved. The only reasonable presumption I can draw is that if the amount of Aab's retainer fee was significant in his decision not to relieve Aab, Judge Leval would have asked Aab how much he received. In fact, I have no reason to discredit Aab's testimony that in at least one conference he disclosed how much he had received to Judge Leval.

FN6. In his Memorandum of Law in Support of His Habeas Petition, Ortiz claimed that Aab failed to interview the confidential informant or to call him at

trial. This allegation was not pressed at the evidentiary hearing or in petitioner's post-hearing brief. Aab testified at the evidentiary hearing that he in fact interviewed the informant and decided, after consultation with Ortiz, against having him testify because he contradicted Ortiz's testimony and Ortiz's testimony would then stand unchallenged at trial. I note that Aab's time records, submitted in support of his subsequent CJA application, reflect an entry on June 18, 1990 for interviewing the informant. (Government Ex. 1 at 3). I credit Aab's testimony that he met with the informant and accept that the decision not to call the informant was a strategic trial choice and not reflective of ineffective assistance of counsel. See *United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir.), cert. denied, 484 U.S. 958 (1987) (whether or not to call witnesses is within the reasonable "ambit of trial strategy").

FN7. Ortiz's misplaces his reliance upon *Walberg v. Israel*, 766 F.2d 1071 (7th Cir.), cert. denied, 474 U.S. 1013 (1985), for the proposition that the need to curry favor with a trial judge to receive nunc pro tunc CJA payments constitutes an actual conflict. The Israel court was careful to underscore the significance of the trial judge's comments and veiled threats in creating the actual conflict in that case. No such conduct is implicated by this case.

FN8. The Government's Post-Hearing Brief, at pages 17-21, cites many examples of questions posed to Ortiz at trial which gave him a fair opportunity to mention the tire deal if he intended to do so.

FN9. Aab's notes and files contained many references to Ortiz's significant involvement in his defense including review of evidence, legal research sent to Aab and directions by Ortiz to Aab on the motions and other steps that had to be taken in the litigation. See, e.g., Government Exs. 3507, 3508, 3509, and 13-14.

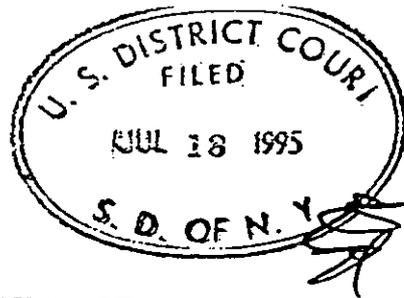
FN10. In its Post-Hearing Brief at 16, fn. 9, the Government also persuasively shows that the fiancee's proffered testimony was not relevant to the issue Ortiz asserts as significant.

FN11. I note that Arces' affirmation, attached to Ortiz's Memorandum of Law in Support of His Petition, suggests some credibility problems with

Arces' proposed testimony. Arces claims to have met with "two chinese men" and Ortiz. Yet, Ortiz claims that at the only meeting he had with Kenny and his associates, Kenny brought two non-Asian men to discuss a tire deal in China and that he became leery of Kenny bringing caucasian men to represent a purported Chinese company.

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MANDATE



SDNY
93-cv-8084
SOTOMAYOR
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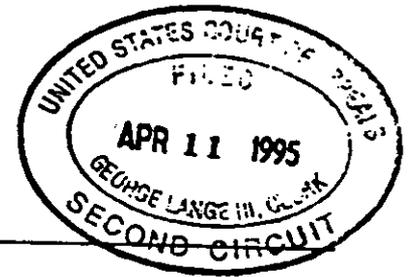
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of April, one thousand, nine hundred and ninety-five.

Present:

Honorable Wilfred Feinberg,
Honorable John M. Walker, Jr.,
Honorable José A. Cabranes,
Circuit Judges.



8/30/94

ALISON E. CLAPP,

Plaintiff-Appellant,

v.

ORDER
No. 94-9002

LeBOEUF, LAMB, LEIBY & MacRAE, DONALD J. GREENE, DONALD J. GREENE, P.C., TAYLOR R. BRIGGS, TAYLOR R. BRIGGS P.C., ALAN M. BERMAN, GEOFFREY D.C. BEST, DAVID P. BICKS, DAVID P. BICKS, P.C., CHARLES W. HAVENS, III, CHARLES W. HAVENS III, P.C., DOUGLAS W. HAWES, DOUGLAS W. HAWES, P.C., CARL D. HOBELMAN, CARL D. HOBELMAN, CHARTERED, RONALD D. JONES, RONALD D. JONES, P.C., GRANT S. LEWIS, GRANT S. LEWIS, P.C., CAMERON F. MacRAE III, CAMERON F. MacRAE, III P.C., SAMUEL M. SUGDEN, SAMUEL M. SUGDEN, P.C., collectively THE LeBOEUF, LAMB, LEIBY & MacRAE "ADMINISTRATIVE COMMITTEE", LeBOEUF, LAMB, LEIBY, & MacRAE, IRVING MOSKOVITZ, PETER N. SCHILLER, JOHN A. YOUNG, JOHN C. RICHARDSON, JOHN C. RICHARDSON, P.C., HON. DIANE A. LEBEDEFF, INDIVIDUALLY AND IN HER PAST OR PRESENT OFFICIAL CAPACITY AS JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, HON. JOSEPH P. SULLIVAN, HON. RICHARD W. WALLACH, HON. THEODORE R. KUPFERMAN, HON. DAVID ROSS, HON. BETTY WEINBERG ELLERIN, HON. FRANCIS T. MURPHY, HON. JOHN CARRO, HON. BENTLY KASSAL, HON. GEORGE BUNDY SMITH AND HON. ERNST H. ROSENBERGER, EACH INDIVIDUALLY AND IN HIS/HER PAST OR PRESENT OFFICIAL CAPACITIES AS

Docket No. 94-9002

JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT, (collectively THE "APPELLATE DIVISION", FIRST DEPARTMENT),

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Sonia Sotomayor, Judge), and was submitted after counsel for appellant in open court waived oral argument after he was notified that his Motion for Adjournment and Reassignment was denied.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Alison E. Clapp's appeal comes before us following protracted litigation in both state and federal court. Her numerous actions concern her exclusion from partnership in LeBoeuf, Lamb, Leiby & MacRae ("LLL&M") where she was a partner from 1986 until 1989, when the partnership dissolved and reconstituted on January 1, 1990. The newly formed partnership excluded Clapp and twenty-eight other attorneys.

Clapp's series of lawsuits began in federal court. After her federal claims were dismissed, Clapp v. Greene, 743 F. Supp. 273 (S.D.N.Y. 1990), aff'd, 930 F.2d 912 (2d Cir. 1991), Clapp filed two separate state court actions in New York Supreme Court, New York County, alleging that the firm's 1989 dissolution and reformation violated New York's partnership laws. The consolidated lawsuits were dismissed by summary judgment, Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No. 15586/91 (N.Y. Sup. Ct. Mar. 18, 1992) (Diane A. Lebedeff, Justice), and affirmed on appeal, Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No. 46946 (N.Y. App. Div. Dec. 15, 1992). The First Department denied Clapp's requests for leave to appeal to the Court of Appeals. Nevertheless, Clapp filed a Notice of Appeal as of right to the New York Court of Appeals, which was dismissed because "no substantial constitutional question [was] directly involved." Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No. 493 SSD 23, (N.Y. May 6, 1993).

On November 23, 1993 Clapp commenced the action now on appeal against LLL&M, its partners, Justice Lebedeff, and the judges of the Appellate Division, First Department. She alleged that: 1)

Docket No. 94-9002

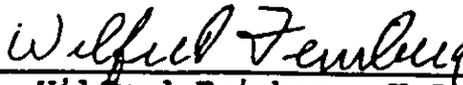
the state courts' interpretation of New York's partnership laws was erroneous, 2) the partnership laws were constitutionally invalid as applied to her, 3) LLL&M was liable under 42 U.S.C. § 1983 for constitutionally depriving her of her property by divesting her of her partnership interest, 4) LLL&M and the State defendants conspired to deprive her of that interest without due process of law, and 5) the judicial procedure in state court deprived her of a full opportunity to present her claims. As a result, Clapp sought declaratory and injunctive relief.

Defendants argued in the district court that under the doctrine established by District of Columbia Court of Appeals v. Feldman, 460 U.S. 461 (1983), and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), the district court did not have jurisdiction over appellant's claims. Nevertheless, the district court retained jurisdiction and granted defendants' motions to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). It held that Clapp had not demonstrated that the dissolution of the at-will partnership implicated a constitutionally protected liberty interest. The court added that even if such a property interest were at stake, LLL&M could not be construed as a state actor under the circumstances and the State defendants, who acted in their judicial capacities, were immune from suit by Clapp.

We assume, without deciding, that the district court did have jurisdiction. We have considered all of plaintiff-appellant's contentions advanced on this appeal, and we affirm substantially for the reasons given in Judge Sotomayor's comprehensive and well-reasoned opinion. See Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No. 93 Civ. 8084 (SS) (S.D.N.Y. Aug. 19, 1994).

Hon. José A. Cabranes did not participate in the decision in this case. Pursuant to Local Rule § 0.14, the two remaining judges decided this appeal.

N.B. THIS SUMMARY ORDER WILL NOT BE
PUBLISHED IN THE FEDERAL REPORTER
AND SHOULD NOT BE CITED OR OTHERWISE
RELIED UPON IN THE UNRELATED CASES
BEFORE THIS OR ANY OTHER COURT.



Hon. Wilfred Feinberg, U.S.C.J.



Hon. John M. Walker, Jr., U.S.C.J.

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GEORGE LANCE III, CLERK



United States Court of Appeals
for the Second Circuit

STATEMENT OF COSTS

Taxed in the amount of \$ 126.00 in favor of
Appellees, LeBoeuf, Lamb et al

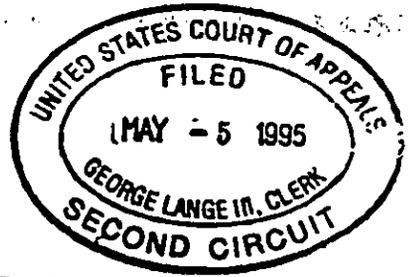
5/5/95
(Date)

FOR THE COURT,
GEORGE LANGE III, Clerk
Arthur M. Heller
Arthur M. Heller, Deputy Clerk

Alison E. Clapp,
Plaintiff-Appellant,
- against -

LeBoeuf, Lamb, Leiby-MacRae, et al.
Defendants - Appellees.

Docket No. 94-9002



Counsel for the LeBoeuf defendants-appellees
respectfully submits, pursuant to Rule 39 (c) of the Federal Rules
of Appellate Procedure the within bill of costs and requests the
Clerk to prepare an itemized statement of costs taxed against the
plaintiff-appellant and in favor of the LeBoeuf defendants-appellees
for insertion in the mandate.

Docketing Action	_____	0
Costs of printing appendix (necessary copies _____)	_____	0
Costs of printing brief (necessary copies <u>15*</u>)	_____	\$126.00
(* 42 pages x 15 copies x \$20 per page) = \$126.00		
Costs of printing reply brief (necessary copies _____)	_____	0
TOTAL		\$126.00

(VERIFICATION HERE)

Ellen Scheurer

ELLEN SCHEURER
Notary Public, State of New York
No. 31-4909859
Qualified in New York County
Commission Expires November, 9, 1995

Arthur M. Heller 4/28/95
(Signature)

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SDNY 93cv5182 Sotoma

SUMMARY ORDER

2/1/95

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of December one thousand nine hundred and ninety-five

PRESENT: HONORABLE JON O. NEWMAN
Chief Judge
HONORABLE JAMES L. OAKES,
HONORABLE JOSÉ A. CABRANES
Circuit Judges

U.S. DISTRICT COURT
FILED
SDNY

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

SAVERIO SENAPE, M.D.,
Plaintiff-Appellant,

v.

95-7274

JO ANN CONSTANTINO, Deputy Commissioner,
New York State Department of Social Ser-
vices; JOHN WRAFTER, Chief, Audit and
Quality Control, New York State Depart-
ment of Social Services; MICHAEL DOWLING,
personally, and as Commissioner, New York
State Department of Social Services, and
JAMES WHITE, current Chief, Audit and
Quality Control, New York State Department
of Social Services,
Defendants-Appellees.

APPEARING FOR APPELLANT: Saverio J. Senape, M.D., pro se,
New York, N.Y.

APPEARING FOR APPELLEES: Ronald P. Younkings, N.Y. State
Asst. Atty. Gen., New York, N.Y.

Appeal from the United States District Court for the

1-4-96

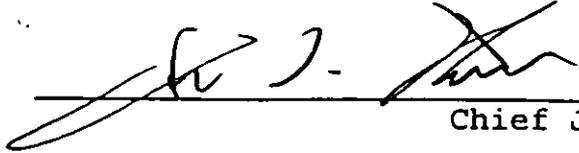
This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Saverio Senape, M.D. appeals pro se from the February 1, 1995, judgment dismissing on the pleadings his suit challenging the 1991 decision of officials of the New York State Department of Social Services to exclude him from participation as a Medicaid provider for five years and to collect \$334,205 of alleged over-billing. The administrative decision was based, among other things, on the submission of false claims and false statements. A prior decision not to re-enroll Senape as a Medicaid provider in 1988 was unsuccessfully challenged. See Senape v. Constantino, 740 F. Supp. 249 (S.D.N.Y. 1990), aff'd mem., 936 F.2d 687 (2d Cir. 1991).

Senape claims a denial of both a property and a liberty interest without due process. However, as the District Court correctly ruled, his due process rights were observed by affording him a post-deprivation administrative hearing, which has yet to be concluded. Senape himself is responsible for at least part of the delay. A pre-deprivation hearing is not required. See Interboro Institute Inc. v. Foley, 985 F.2d 90 (2d Cir. 1993); Oberlander v. Perales, 740 F.2d 116 (2d Cir. 1984). The complaint was properly dismissed.

Senape v. Constantino, et al.
Docket No. 95-7274



Chief Judge.



Circuit Judge.



Circuit Judge.

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Saverio J. SENAPE, M.D., Plaintiff,
v.
Jo Ann CONSTANTINO, Deputy Commissioner
New York State Department of Social
Services; John Wrafter, Chief, Audit and
Quality Control New York State
Department of Social Services; Michael Dowling,
Personally and as Commissioner
New York State Department of Social Services;
James White, Current Chief,
Audit and Quality Control New York State
Department of Social Services,
Defendants.

No. 93 Civ. 5182 (SS).

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

Jan. 26, 1995.

Saverio J. Senape, pro se.

Dennis C. Vacco, Atty. Gen. of State of N.Y.,
New York City (Carol Schechter, of counsel), for
defendants.

OPINION AND ORDER

SOTOMAYOR, District Judge.

*1 Saverio J. Senape, M.D., appearing pro se, alleges in this 42 U.S.C. § 1983 action that officials of the New York State Department of Social Services ("NYSDSS"), under the auspices of the Medical Assistance Program (the "Medicaid Program"), have sanctioned him, have informed others regarding his sanctions, and have attempted to collect \$335,205 plus interest in overpayment, without first providing him with an opportunity for a full evidentiary hearing. Thereby, plaintiff contends, defendants have deprived him of a protected liberty interest without due process of law in violation of the Fourteenth Amendment and several other provisions of the United States Constitution and of federal regulations. Plaintiff seeks from this Court: 1) injunctive relief enjoining defendants from enforcing any sanctions or commencing any collection efforts against him until he receives a full administrative hearing; 2) a declaratory judgment that publishing plaintiff's name on a list of persons excluded from

participation in the Medicaid Program is a deprivation of plaintiff's protected liberty interest and violates his constitutional rights; 3) an order that NYSDSS issue written retractions to clear plaintiff's name; and 4) an award of punitive and special damages.

Defendants, officials of NYSDSS, Deputy Commissioner Jo Ann Constantino, Chief of Audit and Quality Control John Wrafter, Commissioner Michael Dowling, and Current Chief of Audit and Quality Control James White (collectively "the defendants"), move for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). For the reasons discussed below, defendants' motion is granted.

Background

This action is the culmination of a long series of related disputes between the parties that have previously come before this Court and the Court of Appeals. Familiarity with *Senape v. Constantino*, 740 F.Supp. 249 (S.D.N.Y.1990); *aff'd.*, 936 F.2d 687 (2d Cir.1991), is presumed. A brief recounting of some of the prior events, however, is useful for an understanding of this action and the motion before the Court.

Plaintiff is a medical doctor who enrolled as a qualified provider under the Medicaid Program in 1979. The Medicaid Program is a joint federal and state initiative implemented to ensure that high quality medical care and services are made available to people who are indigent. NYSDSS is the sole state agency authorized to administer the Medicaid Program in New York, see 42 U.S.C. §§ 1396-1396v (1988 & Supp.V 1993), N.Y.Soc.Serv.Law §§ 363 - 363-a (McKinney 1992 & Supp.1995), and to establish regulations governing the maintenance and selection of medical service providers under the program. N.Y.Soc.Serv.Law §§ 363-a(1) and -a(2); N.Y.Comp.Codes R. & Regs. tit. 18, §§ 500-542.4 (1988) [hereinafter NYCRR].

NYSDSS screens and evaluates physician-applicants for enrollment as providers of medical services in the Medicaid Program. Prior to January 1987, NYSDSS could terminate the participation of a physician who had been accepted into the Medicaid Program only upon a specific finding that the physician had failed to comply with the

department's regulation. See 18 NYCRR § 515.2. In 1987, in order to improve its oversight functions, NYSDSS modified its procedures by implementing a requirement that all currently enrolled providers re-enroll periodically in the program. See 18 NYCRR § 504.10. NYSDSS retains the authority to terminate a provider for cause under Part 515; it may also require all providers to re-enroll and then choose only those whom it wishes to renew under Part 504.

*2 In October 1987, plaintiff was informed, pursuant to Part 504, that he was required to submit an application for re-enrollment in the Medicaid Program within sixty days. Thereafter, on March 8, 1988, NYSDSS notified plaintiff of its intention "immediately" to terminate his participation in the program pursuant to Part 515 because of various violations of NYSDSS regulations, based on NYSDSS's review of certain of plaintiff's patient charts. One week later, on March 15, 1988, NYSDSS also notified plaintiff that based on its review of plaintiff's patient charts, it had decided not to re-enroll him in the Program pursuant to the re-enrollment procedures set forth under Part 504.

Plaintiff appealed both the Part 515 and Part 504 determinations through the NYSDSS administrative process. On April 18, 1988, NYSDSS advised plaintiff that it had determined to affirm its decision to terminate him under Part 515, but indicated that the appeal of his re-enrollment denial under Part 504 was still pending. On July 29, 1988, NYSDSS informed plaintiff that his Part 504 re-enrollment appeal had also been denied and that his participation in the Program would be terminated effective August 12, 1988.

Plaintiff then initiated a suit contesting NYSDSS's actions which the District Court subsequently dismissed. *Senape v. Constantino*, 740 F.Supp. 249 (S.D.N.Y.1990), *aff'd.*, 936 F.2d 687, 689 (2d Cir.1991). The Second Circuit Court of Appeals thereafter affirmed the dismissal, holding that plaintiff lacked a sufficient property right in his continued classification as an approved provider for the Medicaid Program to sustain a § 1983 action alleging a denial of due process in his termination. *Id.*

In this action, plaintiff challenges subsequent actions of NYSDSS. On or about November 20,

1989, NYSDSS completed a review of plaintiff's Medicaid records and determined that plaintiff had overbilled Medicaid and had received overpayments on claims in the amount of approximately of \$334,000. *Mem.Law Supp.Defs.' Mot.J.Pleadings*, pp. 4-5. In a "Notice of Proposed Agency Action" dated May 8, 1991, issued pursuant to the requirements of 18 NYCRR § 515.6(a), NYSDSS informed plaintiff that it intended to exclude plaintiff from the Medicaid Program for five years and to collect restitution from him in the amount of \$334,205 plus interest. See 18 NYCRR 515.3, 518.3. The notice further advised plaintiff that he had committed the following acts in violation of 18 NYCRR § 515.2: submitted false claims; made false statements; intentionally failed to disclose or concealed information concerning unauthorized Medicaid payments; kept unacceptable records; provided excessive services; and failed to meet recognized standards. Finally, the May 8 notice advised plaintiff that he had thirty days to submit a written challenge to the agency's determination and that he had the right to appeal NYSDSS's final decision by requesting an administrative hearing. See 18 NYCRR § 515.6(a)(1). Plaintiff thereafter appears to have submitted a written challenge to the Notice. [FN1]

*3 On August 26, 1991, NYSDSS issued its final determination entitled "Notice of Agency Action," which was effective fifteen days thereafter, informing plaintiff of his exclusion from the Medicaid Program for five years and of NYSDSS's authority to proceed with the collection of the overpayment plus interest. The August 26 notice again set forth the specific grounds upon which the NYSDSS had based its determination and informed plaintiff that he would be denied payment "for any care, services or supplies furnished during the period from the effective date of this final action until he is reinstated into the program." The notice further advised that, pursuant to 18 NYCRR § 515.5(b), plaintiff's name would appear on a list, issued monthly, of persons not allowed to "order or prescribe" services reimbursed by Medicaid (the "PVR 292 list"). See 42 C.F.R. § 1002.206 (1990), revised at 57 Fed.Reg. 3345 (1992). [FN2] Finally, the notice advised plaintiff of his right to challenge this action by requesting, within sixty days, an administrative hearing, as well as plaintiff's right to request reinstatement into the Program at the end of a five-year period of exclusion.

In July 1993, almost two years after the final Notice of Agency Action, plaintiff instituted the instant law suit seeking a temporary restraining order and preliminary injunction enjoining defendants from executing the action set forth in its final, August 26, 1991 notice. At a hearing held on December 17, 1993, I denied plaintiff's request for injunctive relief. By Mandate issued September 23, 1994, the Second Circuit affirmed the denial of plaintiff's motion.

Plaintiff's administrative hearing was initially scheduled shortly after the NYSDSS notice was issued in August 1991; however, it has been adjourned several times at plaintiff's request. Plaintiff has yet to exhaust his administrative or state law remedies and has stalled completion of the NYSDSS administrative process.

Standard for Judgment on the Pleadings

Defendants' instant motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) is treated the same as a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir.1994). A court is not to dismiss a complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). On a motion to dismiss the pleadings, "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken are considered." *Samuels v. Air Transp. Local 504*, 992 F.2d 12, 15 (2d Cir.1993). The factual allegations of the complaint must be presumed to be true and any inference drawn from the facts must be construed in favor of the plaintiff. *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir.1989). Moreover, courts must liberally construe a pro se litigant's complaint. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

DISCUSSION

Plaintiff's Claim Against the Process Mandated by the State Code of Rules and Regulations

*4 Under the New York State Code of Rules and Regulations, NYSDSS is required to provide written notice when proposing either to sanction a provider

or to collect overpayment. 18 NYCRR § 515.6(a)(1). The notice must specify the "legal authority for the action, [and] the nature and amount of any overpayment determined to have been made as a result of the unacceptable practices" and must inform the provider of the opportunity to submit documents and written argument to challenge the proposed action within thirty days. *Id.*

NYSDSS thereafter is required to review the provider's submissions and issue a second Notice of Agency Action before sanctioning a provider or collecting overpayment. 18 NYCRR §§ 515.6(a)(4), (b)(1). This second notice must also provide the factual grounds and the legal authority for the action, the date the action becomes effective, the amount of the overpayment to be collected, the effect of the action upon the person's participation in the Program, the requirements and procedures for subsequent reinstatement, and the procedures by which a person may pursue his or her right to appeal the determination including the requirements and procedures to request an administrative hearing. 18 NYCRR § 515.6(b)(2).

After NYSDSS determines that a person is excluded from participation in the Medicaid Program, other participating providers will not be reimbursed for medical care, services or supplies that the excluded person orders or prescribes. 18 NYCRR § 515.5. NYSDSS prepares and distributes to Medicaid providers a monthly list, the PVR 292 list, identifying persons who have been excluded from the program and are ineligible to prescribe or order medical care or services under the Program. See 18 NYCRR § 515.5; 42 C.F.R. § 1002.206 (1990), revised at 57 Fed.Reg. 3345 (1992). NYSDSS is authorized to collect interest on amounts which it determines to be overpayments. 18 NYCRR § 518.4.

Plaintiff contends that the process provided by NYSDSS under its regulations was inadequate and not the "due process" that is required and guaranteed by federal law, particularly §§ 554 and 556(d) of the Administrative Procedure Act. 5 U.S.C. §§ 551-559 (1988 & Supp.V 1993). Plaintiff has incorrectly assumed, however, that § 554 mandates the right to a formal hearing in every administrative matter. The right to a formal hearing arises under § 554 only "in every case of adjudication required by statute to be determined on the record after

opportunity for an agency hearing ..., " 5 U.S.C. § 554 (emphasis added); in other words, only when an independent statute supplies that right. Section 556(d), in turn, is applicable if a formal hearing is required by § 554, that is, if an independent statute requires there to be a formal hearing.

The federal statute governing this matter provides that if a Medicaid provider is terminated, suspended or sanctioned from participating in the state plan, the state agency is required to notify the Secretary of the Department of Health and Human Services. 42 U.S.C. § 1396(a)(41) (1988 & Supp.V 1993); see 42 C.F.R. §§ 455.17, 1002.212 (1993). Prior to a state's exclusion of a provider, federal regulations also mandate that NYSDSS afford the provider the opportunity to submit documentation and written arguments challenging the exclusion. 42 C.F.R. § 1002.213 (1993). The federal statute governing the Medicaid Program, 42 U.S.C. §§ 1396-1396v, however, does not mandate that the adjudications "be determined on the record after opportunity for agency hearing" as required in 5 U.S.C. 554(a). Thus, the procedures detailed in §§ 554 and 556(d) of the Administrative Procedure Act are not applicable to the decisions NYSDSS took with respect to plaintiff's enrollment in the Medicaid Program.

*5 New York State, in its discretion, has established a procedure for additional appeals. Providers are entitled to notice and an opportunity for an administrative hearing to challenge final NYSDSS determinations. See 18 NYCRR § 515.6. The New York regulations do not mandate, however, that a formal hearing occur prior to the imposition of sanctions. NYSDSS provided plaintiff with complete, detailed and timely notice of its proposed action. Plaintiff was afforded the opportunity to be heard through the submission of documents and written arguments. Plaintiff received a second notice. To the extent plaintiff has not been heard on his subsequent appeal, the delay has been requested by the plaintiff.

Plaintiff has not alleged in his pleading, nor can he point to, any procedural safeguards mandated under the federal statutory and regulatory scheme which he has been denied. See 42 U.S.C. § 1396(a)(41) (1988 & Supp.V 1993); 42 C.F.R. § 455.17 (1993). All plaintiff does in his pleading is claim procedural rights he does not have. As I

indicated in my decision denying plaintiff's temporary injunctive relief, the plaintiff has not pled any facts, and cannot show that the process he received, in its entirety, is tainted to such an extent that he will not receive a fair hearing during his NYSDSS appeal. Tr. dated Dec. 17, 1993, p. 13. Thus, plaintiff has no valid claim that he was or will be denied any process mandated by federal law.

Plaintiff's Property Interest Claim,

Plaintiff alleges that defendants' exclusion of his participation in the Medicaid Program and collection of the \$334,205 in overpayment plus interest prior to a full evidentiary hearing unconstitutionally deprives him of his right to property without due process of the law. The Second Circuit has stated that "[i]n order to sustain an action for deprivation of property without due process of law, a plaintiff must 'first identify a property right, second show that the state has deprived him of that right, and third show that the deprivation was effected without due process.'" *Local 342, Long Island Pub. Serv. Employees v. Town Board*, 31 F.3d 1191, 1194 (2d Cir.1994) (quoting *Mehta v. Surles*, 905 F.2d 595, 598 (2d Cir.1990) (per curiam)). Plaintiff fails to meet his burden under this standard.

The Second Circuit in *Senape v. Constantino*, 936 F.2d at 689, has already held that plaintiff has no protected property right in continued participation in the Medicaid Program. See also *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 176 (2d Cir.) (qualified provider has no property interest in continued participation in Medicaid Program), cert. denied, 112 S.Ct. 300 (1991); *Plaza Health Lab., Inc. v. Perales*, 878 F.2d 577, 581-82 (2d Cir.1989) (structure of New York Medicaid laws suggests that a provider does not have a property interest in continued participation). *Senape's* interest in the overpayments, however, stands on a different footing.

*6 While plaintiff was enrolled as a qualified provider in the Medicaid Program, he received payment in exchange for the various medical services he performed. New York has recognized a property right in money paid for services that are performed under the Medicaid Program. *Oberlander v. Perales*, 740 F.2d 116, 120 (2d Cir.1984). Thus, plaintiff has a property interest in the money he was paid for the services he performed

while a qualified provider in the Medicaid Program. Moreover, as set forth in its agency action notices, NYSDSS determined that a portion of the money that plaintiff had received for his services was an overpayment and it has authorized the collection of said money plus interest. Thus, the state proposes to deprive plaintiff of a portion of monies he claims to have earned. Plaintiff, therefore, has sufficiently alleged the first two elements required to establish a deprivation of a property interest without due process.

The third component of the due process test examines whether the process plaintiff received satisfies constitutional standards. One requirement of due process is adequate notice, that is, "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Here, plaintiff received several notices pursuant to 18 NYCRR § 515 detailing the factual grounds and legal authority for the NYSDSS recoupment action, the date the action became effective, the amount of the overpayment to be collected, the effect of the action upon plaintiff's participation in the program, the requirements and procedures for subsequent reinstatement, and the procedures by which plaintiff could pursue an appeal of the determination including the requirements and procedures to request an administrative hearing. Plaintiff cannot, and does not, claim that he was unaware of the action against him or that he was deprived of a full opportunity to present his written objections to the agency's actions.

To evaluate the process that must be afforded to an individual prior to a deprivation of a property interest, a court, must also consider

three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Plaintiff's interest is obviously economic. Although \$334,205 is a significant sum of money, defendants have not deprived plaintiff of his livelihood and plaintiff is not rendered destitute without any means of support because of defendants' actions. [FN3] Plaintiff, moreover, has proffered no facts establishing that there is a serious risk of an erroneous deprivation in the process provided here. Defendants performed an extensive audit and review of plaintiff's records and reviewed his written submissions challenging their determination. Plaintiff was also afforded a post-deprivation hearing to appeal the determination which is an additional procedural safeguard against an erroneous deprivation.

*7 The Supreme Court has clearly stated that a pre-deprivation hearing "need not be elaborate ... [and, i]n general, 'something less' than a full evidentiary hearing is sufficient...." *Loudermill*, 470 U.S. at 545 (citing *Mathews*, 424 U.S. at 343). Plaintiff here had the opportunity to be heard through the submission of documents and written argument challenging the proposed action. Moreover, plaintiff has the right to appeal the determination as well as a right to a post-deprivation administrative hearing.

I find that defendants' interest in maintaining the financial integrity of the Medicaid Program and devoting the optimum amount of resources to the primary objective of providing health services to indigent people outweighs the financial harm to plaintiff in not having a full evidentiary hearing prior to defendants' collection of the overpayment. I further conclude that, under the process admitted by plaintiff in his pleadings, plaintiff has been afforded adequate notice and opportunity to be heard before the deprivation. Accordingly, plaintiff's due process claim against NYSDSS's procedure for collection of the overpayment cannot be sustained.

The Liberty Interest and Defamation Claims Based on the PVR 292 List

Plaintiff alleges that defendants, by publishing the PVR 292 list and informing others of his exclusion from the Medicaid Program, have portrayed his personal and professional reputation in a "false light" which has made him "unemployable." Prelim.Stmt., Am.Compl. (dated Aug. 12, 1993). He contends that the defendants have thereby

deprived him of a constitutionally protected liberty interest and defamed him. *Id.*

In several cases, the Supreme Court has considered the issue of whether a person's interest in maintaining a good name, standing and reputation in the community constitute a protected liberty interest. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), for example, the Supreme Court addressed the constitutionality of a state statute, which authorized, without prior warning or a hearing of any kind, the posting of a notice prohibiting persons, known for their propensity for violence when drinking, from purchasing or receiving gifts of liquor for one year. The Supreme Court found the statute unconstitutional and held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him [or her], notice and an opportunity to be heard are essential." *Id.* at 437. Thus, the *Constantineau* decision indicated that under some circumstances a person's reputation constituted a liberty interest requiring due process protection.

Several years later, the Supreme Court expressed concern that the Fourteenth Amendment not be construed to extend constitutional coverage to every state-law tort committed by a state official, and in *Paul v. Davis*, 424 U.S. 693 (1976), it held that defamation of a person's "reputation alone, apart from some more tangible interests such as employment" does not in every case suffice to invoke the procedural safeguards of the Fourteenth Amendment. *Id.* at 701-02.

*8 The Second Circuit has interpreted *Paul* to require "stigma plus" in order to establish a constitutional deprivation of a liberty interest in defamation-based claims. See, e.g., *Neu v. Corcoran*, 869 F.2d 662, 667 (2d Cir.) (state official who defamed a private citizen alleging a deprivation of a liberty interest granted qualified immunity), cert. denied, 493 U.S. 816 (1989). The Court in *Neu* acknowledged the ambiguous meaning of the "plus" element in its decisions and explained that "we do not think our cases have ... clearly established that defamation occurring other than in the course of dismissal from a government job or termination of some other legal right of status will suffice to constitute a deprivation of a liberty interest." *Id.*

The only defamation by defendants identified in plaintiff's complaint is the NYSDSS publication of the PVR 292 list of persons who have been excluded as providers from the Medicaid Program and for whose services pursuant to federal and state regulations, other providers will not be entitled to Medicaid reimbursement. 42 C.F.R. § 1002.207 (1990), revised at 57 Fed.Reg. 3345 (1992); 18 NYCRR § 515.5(c). The PVR 292 list does not identify the reasons a provider has been excluded from the Program. Moreover, defendants made no statement concerning plaintiff's ability as a medical doctor on either the list or in the letter which transmitted the list. Therefore, NYSDSS has not portrayed plaintiff in a "false light" through its publication and distribution of the list. Rather, as required by federal regulation, 42 C.F.R. § 1002.206(c) (1990), revised at 57 Fed.Reg. 3345 (1992), NYSDSS fulfilled its obligations under law by notifying the state licensing board and other groups that plaintiff was excluded from participation in the Medicaid Program. Thus, plaintiff's allegations concerning the defendants' statements do not as a matter of law constitute defamation.

Moreover, the Supreme Court has emphasized that "it would stretch the [liberty interest] concept too far 'to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another.'" *Bishop v. Wood*, 426 U.S. 341, 348 (1976) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 575 (1972)). See also, *Baden v. Koch*, 799 F.2d 825, 830 (2d Cir.1986) (demotion of Chief Medical Examiner of the City of New York to a lower supervisory position did not give rise to a liberty interest). While plaintiff's opportunities for employment by providers or other organizations which are reimbursed by Medicaid may be hindered by his exclusion from the Program, he has not been dismissed from a government job to which he had an entitlement, and he still retains his license to practice medicine. Unlike the plaintiff in *Valmonte v. Bane*, 18 F.3d 992 (2d Cir.1994), plaintiff herein cannot point to any specific deprivation of his opportunity to seek employment with others caused by state action. In *Valmonte*, the Court of Appeals held that a deprivation of a liberty interest existed where a New York statute mandated that individuals accused of child abuse or neglect be identified on a list that was disseminated to potential child care employers. The employers were required to consult

the list and advise the state in writing if they hired an individual named on the list. The Court held that the burden the statute placed upon employers who desired to employ an individual on the list significantly altered the individual's status and therefore, the statute violated a liberty interest under the "stigma plus" test. *Id.* at 1002.

*9 Unlike the statute in *Valmonte*, the statutory provisions in this case do not place a burden upon a potential employer who desires to hire plaintiff. The NYSDSS letter which transmits the PVR 292 list does not prohibit facilities from hiring persons named on the list, nor does it require employers to notify the state if they hire an individual named on the list. It simply states that facilities will not be reimbursed by Medicaid for activities performed by the excluded person and that documents submitted to the Program should be examined to determine whether the person's salary may be included in the facility's base costs for reimbursement. Furthermore, NYSDSS does not specifically target plaintiff's potential employers to receive the list. Although plaintiff may seek employment at a facility which participates in the Medicaid Program, and thus the facility may indeed receive a copy of the list and consider that information in deciding whether to hire the plaintiff, the list in no way forbids a facility from hiring an excluded Medicaid Program person, and no statutory burden is placed upon employers who hire plaintiff. Therefore, there is no burden on plaintiff's property interest by his placement on the PVR 292 list, particularly when plaintiff's legal status has not been altered due to NYSDSS's actions in that plaintiff has no property interest in continuing as a Medicaid provider. *Senape v. Constantino*, 936 F.2d at 689; see also, *Plaza Health Lab.*, 878 F.2d at 581-82.

For all of the reasons stated above, I find that publication and dissemination of plaintiff's name on the PVR 292 list does not establish a constitutional deprivation of a liberty interest or state a claim for defamation.

Plaintiff's Equal Protection Claim

Plaintiff further alleges that defendants' actions have denied him equal protection of the law in violation of the Fourteenth Amendment. However, plaintiff has not alleged, nor could he prove, that he received disparate treatment by virtue of his

membership in a class. Instead, plaintiff confusingly assumes that an equal protection violation can occur merely because a termination from the Medicaid Program "without cause" can preclude NYSDSS from sanctioning a provider, like him, for cause under 18 NYCRR § 515. Defendants correctly point out, however, that even though plaintiff was denied re-enrollment under Part 504, which does not apply a "for cause" standard, that denial of enrollment does not serve to exonerate him under Part 515. The state regulation governing the imposition of sanctions, 18 NYCRR § 515, does not limit the imposition of sanctions to those enrolled as providers in the Program. Pursuant to § 515.3, sanctions are authorized "upon a determination that a person has engaged in an unacceptable practice." 18 NYCRR § 515.3.

Plaintiff's conclusory allegations that he has been denied equal protection of the law without a showing that he has been treated differently than those similarly situated by virtue of his membership in a specified class is, therefore, insufficient to sustain an equal protection claim.

Plaintiff's Bills of Attainder and Ex Post Facto Law

*10 Plaintiff also alleges that the imposition of sanctions by defendants without affording him a full evidentiary hearing violates the constitutional prohibition against Bills of Attainder. This prohibition, however, applies only to legislation which imposes criminal punishment without a trial. *United States v. Lovett*, 328 U.S. 303, 315 (1946). To ascertain whether the NYSDSS sanctions are civil or criminal in nature, the intent of Congress must be considered and, where Congress has indicated an intention to establish a civil penalty, the statutory scheme must be assessed to ensure it is "not so punitive either in purpose or effect as to negate that intention." *United States v. Ward*, 448 U.S. 242, 248-49 (1980) (citing *Flemming v. Nestor*, 363 U.S. 603, 617-621 (1960)).

I find that Congress intended the sanctions imposed on plaintiff under Section 515 to be civil penalties and that neither the purpose nor the effect of the statutory scheme is punitive. The sanctions of Part 515--exclusion, suspension, collection and underpayment--are rationally and reasonably related to the losses or potential losses the Program incurs

by violation of Program regulations. The purpose of the sanctions are obvious and include, inter alia, preserving the integrity of the program and safeguarding the public interest and its resources. The purpose of the PVR 292 list is also self-evident; it ensures that qualified providers do not contract with excluded providers. Furthermore, even though the information may reach parties with the power to take other measures, the NYSDSS is mandated to provide the information pursuant to federal regulations. 42 U.S.C. § 1002.206 (1990), revised at 57 Fed.Reg. 3345 (1992). Thus, plaintiff has no viable Bills of Attainder claim for the conduct alleged in his pleading. Similarly, because sanctions under Section 515 are civil penalties, the prohibition against ex post facto laws is inapposite. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (1952).

The Defendants' Qualified Immunity Defense

Although their conduct may be subject to injunctive relief, public officials performing discretionary functions are generally protected by qualified, or good-faith immunity from liability for civil damages. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity shields public officials to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*; see also *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (absolute immunity for police officers applying for warrants rejected in favor of qualified immunity of the "Harlow standard"); *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (absolute immunity for Attorney General in national security context rejected in favor of qualified immunity). A public official is also subject to liability only if the contours of the right which was allegedly violated is "sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

*11 The success of the defendants' immunity defense in this action depends upon whether it was sufficiently clear that their actions would deprive plaintiff of a protected liberty interest or equal protection in violation of a constitutional right. See *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61 (2d Cir.1992) (state officials enforcing minority set-aside program were

granted qualified immunity where the law was unclear that their actions would be inconsistent with equal protection). For the reasons discussed previously, I have found that defendants have not violated any of plaintiff's constitutional or statutory rights. In any event, assuming that defendants had deprived plaintiff of a constitutional right, defendants were not objectively unreasonable in believing that their actions in enforcing federal and state regulations governing the Medicaid Program were legal. The defendants, therefore, in their personal capacities, are entitled to qualified immunity for damages as a matter of law.

Conclusion

After careful consideration of each of plaintiff's claims and affording his complaint the close and sympathetic reading required by *Haines v. Kerner*, 404 U.S. 519, 520 (1972), defendants have amply demonstrated that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Therefore, defendants are entitled to judgment as a matter of law. For the foregoing reasons, defendants' motion for judgment on the pleadings is granted. The Clerk of the Court is directed to enter judgment dismissing the complaint in its entirety against the defendants.

SO ORDERED.

FN1. Neither plaintiff nor defendants annexed plaintiff's challenge to the record. However, plaintiff alludes to a letter from his attorney to defendants: "On April 17, 1991 a letter confirming this intent with Errors of Fact demonstrated, strong objection to breaches of Procedural Due Process went from Senape Attorney Agee [sic] to Defendants." Pl.'s Am.Compl. (Aug. 12, 1993), pp. 8-9. Plaintiff goes on to state, "[w]ith no response to any objections, Defendants went ahead with sending Senape on August 26, 1991 an unchanged Notice of Final Agency Action...." *Id.* at 9. In their papers to the court, defendants acknowledge also that "[t]he Department advised plaintiff of his right to challenge its determination by submitting documentation and written arguments and by requesting an administrative hearing. After reviewing the entire record, including plaintiff's submissions, the Department notified plaintiff on August 26, 1991 of its final decision to exclude him...." Mem.Law Supp.Defs.' Mot.J.Pleadings,

p. 5 (emphasis added). Hence, I proceed on the assumption that plaintiff did submit a formal challenge.

FN2. Because several relevant regulations have been revised, this opinion will cite to the Code of Federal Regulations in effect at the time of the NYSDSS actions, as well as to the Federal Register for revised regulations.

FN3. In the Notice of Agency Action dated August 26, 1991, NYSDSS advised plaintiff of his "repayment options": either to pay the entire amount of \$334,205 by certified check or money order, or to enter into a repayment agreement.

END OF DOCUMENT

**SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE
PART II, QUESTION 4**

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. form	Financial Disclosure Report (4 pages)	06/18/1997	P2, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Doug Band
OA/Box Number: 12754

FOLDER TITLE:

Sonia Sotomayor [3]

2009-1007-F
db1199

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE
PART II, QUESTION 5

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. form	Financial Statement (2 pages)	06/18/1997	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Doug Band
OA/Box Number: 12754

FOLDER TITLE:

Sonia Sotomayor [3]

2009-1007-F
db1199

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE
PART III, QUESTION 1

REPORT OF THE

ADVISORY PANEL
ON INTER-GROUP RELATIONS

COMMISSIONER MARGARITA ROSA,
CHAIR

AUGUST 16, 1991

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MEMBERS OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

Luis Alvarez
President,
National Urban Fellows

Arthur Barnes
President,
New York Urban Coalition

Francesco Cantarella
Senior Vice-President, Government Relations,
Abraham & Straus

Pauline Chu
President,
Chinese American Parents Association

Andre Dawkins
Executive Director,
New York State Advisory Committee for Black Affairs

Joseph Etienne
Former Executive Director,
Haitian Centers Council

Paula Ettelbrick
Legal Director,
Lambda Legal Defense and Education Fund

Stanley Hill
Executive Director,
District Council 37

Haskell Lazere
Director, Inter-Group Relations and Social Actions,
American Jewish Committee

Grace Lyu-Volckhausen
Director, Minority Program Evaluation,
State of New York Mortgage Agency

Margarita Rosa (Chair)
Commissioner,
New York State Division of Human Rights

Sonia Sotomayor, Esq.
Partner,
Pavia & Harcourt

STATE OF NEW YORK
EXECUTIVE DEPARTMENT

DIVISION OF HUMAN RIGHTS
55 WEST 125 STREET
NEW YORK, NY 10027



August 16, 1991

Dear Governor Cuomo:

I am pleased to submit to you the Report of the Advisory Panel on Inter-Group Relations. You will recall that I convened this group of distinguished New Yorkers last year at your behest, in order to explore how the State of New York might assist in reducing tensions and fostering positive inter-group relations in New York City. The results of the panel's work, including a number of recommendations for concrete action, are enclosed. We hope that you will find them useful.

Sincerely,

Margarita Rosa
Margarita Rosa
Chair, Advisory Panel on
Inter-Group Relations

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

INTRODUCTION

In June 1990, in the wake of a sharp increase in incidents of bias-related violence in New York City, Commissioner Margarita Rosa of the New York State Division of Human Rights (DHR) convened, at the behest of Governor Mario Cuomo, an Advisory Panel on Inter-Group Relations. The membership of the panel was drawn from the full spectrum of those groups which contribute to the cultural diversity of New York City.

The Advisory Panel was convened at a time when intense media attention was being paid to racial and ethnic tensions in New York City, particularly in relation to two incidents in Brooklyn: the tragic murder of a young African-American in Bensonhurst, and the emotion-charged boycott of two Korean-American produce stores on Church Avenue. The panel's mandate was to examine ways in which the State could help to reduce tensions and foster positive inter-group relations among New York City's diverse population.

At the first two panel meetings, members engaged in vigorous discussion as to the parameters of their mission. They concluded that intervention in individual situations was not the panel's task; nor had the group been convened to explore the impact of Federal or local issues, such as allegations of police misconduct.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

Furthermore, there was a sense of frustration among Advisory Panel members that any proposals would be difficult to make in the abstract. Many public and private entities already had made specific proposals to address problems of bias violence which had yet to be implemented.

Given these discussions and mindful of its own limitations, the panel chose to define its mission as identifying major issues which contribute to inter-group discord and violence and, where possible, providing concrete recommendations as to how the State could address these issues. The panel then reached a consensus that a lack of economic opportunity, particularly in minority communities, is a major factor underlying strained inter-group relations. The panel also agreed that a lack of multicultural inclusion in the public school curriculum can lead to intolerance, and ultimately to aggressive, even violent behavior among diverse racial, ethnic, and cultural groups.

In view of these preliminary deliberations, the Advisory Panel chose to focus on two specific areas of concern: economic development and youth-related issues, especially teaching young people to respect difference. Because the backgrounds of most panel members more strongly reflected expertise in the latter set of issues, the panel concentrated its investigatory and fact-finding efforts primarily in the realm of economic development.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

SUMMARY OF RECOMMENDATIONS

The Advisory Panel on Inter-Group Relations makes the following recommendations:

- * That the State of New York institute a centralized information system that would enable aspiring entrepreneurs -- especially minority entrepreneurs -- to access, with a single telephone call or visit, information about all relevant State programs that could assist them.

- * That the State of New York institute a comprehensive strategy to facilitate ongoing communication among existing State agency programs to assist aspiring minority entrepreneurs, and to disseminate information about those programs to the target communities as quickly and effectively as possible.

- * That New York State designate a specific agency to identify and develop specific proposals to tap alternative funding sources, including Federal, corporate, and foundation monies, for community-based

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

organizations. In addition, the Advisory Panel recommends that New York State place special emphasis in its own applying for Federal funds on those programs which permit the State to re-distribute grant monies to community-based organizations.

- * That the State of New York take a leadership role in devising initiatives needed to implement educational programs which promote positive multicultural relations and stress respect and appreciation of diversity.
- * That the New York State Legislature immediately enact the Bias-Related Violence and Intimidation Act.
- * That the State Human Rights Law be amended to add sexual orientation to those bases for which discrimination in employment, housing, and public accommodations is prohibited.
- * That the Governor and relevant State agency officials press the Federal government to augment its human and civil rights programs -- specifically to pass the Civil Rights Act of 1991 -- and maintain a close and constant review of Federal activity in the civil rights arena as it affects New York State.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

The Advisory Panel also wishes to commend the following efforts:

- * The work of the Crisis Prevention Unit of the Division of Human Rights; and
- * Outreach programs instituted by prosecutors' offices which are specifically aimed at reducing inter-group tensions. Other prosecutors' offices are urged to institute similar programs.

ECONOMIC DEVELOPMENT

Having identified economic empowerment through equal opportunity as a critical component in creating and maintaining sound inter-group relations, the Advisory Panel decided to gather information on existing State efforts in this area. It established fact-finding subcommittees, and invited the following representatives of New York State government entities to deliver presentations about the efforts of their agencies toward economic development and empowerment of minority communities:

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

- * Lee Webb, Executive Vice President, New York State Urban Development Corporation (UDC);
- * Denise Pease, Deputy Superintendent, New York State Banking Department;
- * Al Bass, Assistant Director of Business Services Bureau, Department of Economic Development -- Business Services Bureau, New York State Governor's Office of Minority and Women's Business Development;
- * Armando Martinez, Special Assistant to the Commissioner for Fair Housing, New York State Division of Human Rights (DHR);
- * Grace Lyu-Volckhausen, Director of Minority Program Evaluation, State of New York Mortgage Agency (SONYMA), and a member of the panel; and
- * Anthony Dais, Deputy Commissioner for Community Services, New York State Department of Labor.

Programs to Assist Entrepreneurs

UDC's Lee Webb reported that since 1986, that agency has expanded its focus to include two new program areas: investment in economically distressed communities, and development of minority- and women-owned business. The first program area emphasizes creation of jobs by sponsoring physical improvements through grants

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

or loans for renovation or new construction. These loans can assist small business owners in the study, planning, and creation of small development projects, or help store owners with commercial facade improvements.

The second new program area for UDC emphasizes businessperson development, specifically the direct stimulation of minority- and women-owned businesses, from start-up to expansion. Over the last three-and-one-half years, loans to minority businesses have comprised the single largest number of loans by UDC.

There are four types of loans offered by UDC to aspiring minority entrepreneurs. The first type are loans to minority and female individuals who can come to UDC directly for loans ranging from \$75,000 to \$500,000 to assist their efforts to build their own businesses. The second type are loans ranging from \$20,000 to \$75,000 to countywide community-based organizations which have independent boards of directors comprised of at least half women and/or members of minority groups, and at least half of whom have banking experience. These organizations then determine actual grants to businesses.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

In the third type of loan, a "micro" loan, UDC makes deposits into community development credit unions at an interest rate of two percent. Loans from these credit unions to entrepreneurs range from \$2,000 to \$12,000. The fourth type of loan involves UDC and the New York State Department of Economic Development making grants to community organizations and technical assistance providers to provide technical assistance to aspiring entrepreneurs.

Denise Pease of the Banking Department reported to the panel on the Federal Community Redevelopment Act (CRA) under which her department monitors banks on their involvement in redeveloping the communities from which they draw their deposits. A dozen factors go into making this assessment, including participation in community and economic development efforts, mortgage lending practices, establishment of automatic teller machines, and branch locations and closings. A poor CRA rating weighs heavily against a lending institution when it applies to the department for other privileges, e.g., opening a new branch.

The Banking Department also has an assistance center that entrepreneurs can call to see who provides what service. When a bank or other lending institution rejects a minority loan applicant, the Department encourages the institution to refer the customer to UDC.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

Al Bass of the Governor's Office of Minority and Women's Business Development reported that his office serves three functions: it certifies that minority- and women-owned businesses are bona fide, so that they can participate in State contract competition; its Agency Services Bureau assists entrepreneurs in introductions to appropriate State agencies; and its Business Assistance and Development unit refers businesses that need assistance to appropriate resources, such as UDC's Minority Revolving Loan Fund and Small Business Development Centers.

The office has no grant money of its own to provide, but has compiled a database of grants and loans available from other sources. It also assists in matching businesses with appropriate financial institutions; tries to interest banks in minority community economic development; and conducts forums to introduce entrepreneurs to foreign investors.

Programs to Assist Home Buyers

In addition to the above-cited programs, which are aimed at entrepreneurs, the panel also heard presentations from two State agency representatives about efforts to assist minority home buyers.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

Armando Martinez reported that the Division of Human Rights is creating an outreach program to advise community fair housing groups about the availability of data compiled pursuant to the CRA and the Home Mortgage Disclosure Act that can indicate discriminatory lending patterns.

Grace Lyu-Volckhausen reported that her division at SONYMA serves two functions: bringing the programs of SONYMA to the attention of minority communities, and evaluating SONYMA's activities as to their effectiveness in reaching New York business communities and others in economically disadvantaged communities.

The Home Buyers Program offers a first-time home buyer mortgage money at two percent below market rate. In order to qualify for a SONYMA loan, one must meet a maximum income limit which is decided within various regions in New York State by the Federal Government. Target areas are also determined by the Federal Government, based on Census tract income data. SONYMA also has a Mortgage Insurance Program which offers mortgage insurance to housing projects when a residential, mixed residential/business, or special needs (e.g., seniors or people with AIDS) project has difficulty in obtaining mortgage insurance coverage.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

A Common Thread

Through these fact-finding presentations during its first six months of operation, the Advisory Panel learned that although there exists a battery of both public and private agency programs with the objective of empowering minorities through economic development -- some of them excellent -- these already-available services are underutilized by the targeted populations. There appear to be three concrete reasons why this occurs: 1) a lack of awareness in targeted communities about how and where to obtain information; 2) the relative inaccessibility of the pertinent information, due to its fragmented nature; and 3) the lack of coordination among the public agency programs. The Advisory Panel identified a consistent problem that leads to this situation: a lack of effective outreach to target communities, resulting in underutilization of well-intentioned programs and services.

The Multi-Service Center Concept

As an initial response to these agency presentations, members of the Advisory Panel discussed how a public/private partnership might address economic development of minority entrepreneurs. One possible result of such a partnership, it was theorized, could be a centralized multi-service center in New York City, specifically designed to serve budding minority businesspeople. Such a center

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

would be professionally staffed, and would showcase the full range of programs offered by public and private agencies which are committed to fostering the growth and economic development of minority communities.

This concept seemed to have some parallels with an existing effort by the New York State Department of Labor (DOL). To explore the similarities and differences -- and the possibility of "piggybacking" onto DOL's program, to save resources -- DOL was invited to send a representative to the panel's November 1990 meeting. In return, DOL's Deputy Commissioner Anthony Dais offered to host the meeting at that agency's 23rd Street Community Service Center in Manhattan, so that the panel might see first-hand a community service center in operation.

The panel found that DOL's community service centers do indeed facilitate economic development by providing a multitude of services and programs -- unemployment insurance, job referrals, training, counseling, computerized directories of job openings -- at one location. The focus, though, is on those looking for employment, rather than those seeking to start their own businesses.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

RECOMMENDATIONS - ECONOMIC DEVELOPMENT

In the key area of economic development, the Advisory Panel on Inter-Group Relations makes the following recommendations:

- * The Advisory Panel recommends that the State of New York institute a centralized information system that would enable aspiring entrepreneurs -- especially minority entrepreneurs -- to access, with a single telephone call or visit, information about all relevant State programs that could assist them.

There are existing models from which such a system might be derived, ranging from the City of New York's "NY-MAGIC" program to the State of New York's "GATEWAY" program. For New York State, incorporation into the Department of Labor's existing operation may be the most cost-effective and feasible method of achieving this goal -- and the Advisory Panel is most mindful of the fiscal constraints under which the State is operating. Further study is advisable to determine whether grafting the Advisory Panel's proposed system onto DOL's program would be the most effective route in terms of both cost-saving and reaching the intended audience.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

But the panel also wishes to emphasize its belief that community-based organizations (CBOs) are the most effective instrument for delivering information to targeted communities. The panel recommends that State agencies involved in minority economic empowerment provide training about the services they offer to CBOs, which would in turn provide actual staffing for a multi-service center, within DOL or elsewhere.

The ultimate goal of any such center would be to have the greatest possible number of people utilize available services. But would-be businesspeople do not automatically think of the Department of Labor when seeking assistance, and the panel's meeting with DOL made it clear that even many prospective job-seekers were not aware of that agency's programs, due to lack of resources for outreach. Clearly, without a truly effective communication strategy, any effort would be to no avail.

- * The Advisory Panel recommends that the State of New York institute a comprehensive strategy to facilitate communication among existing State agency programs to assist aspiring minority entrepreneurs, and to disseminate information about those programs to the target communities as quickly and effectively as possible.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

Public information officers of the agencies involved in minority business development should be invited to meet and talk with members of the ethnic press. An effort should be made to create a half-hour television documentary about DOL's community service centers, to get the word out to the public about the services they provide.

Funding, of course, is a constantly pressing question for the CBOs that would disseminate information about existing State programs. Here, too, the State can be of assistance.

- * The Advisory Panel recommends that New York State designate a specific agency to identify and develop specific proposals to tap alternative funding sources, including Federal, corporate, and foundation monies, for community-based organizations. In addition, the Advisory Panel recommends that New York State place special emphasis in its own applying for Federal funds on those programs which permit the State to re-distribute grant monies to community-based organizations.

Given the existence of Federal block grants to the States, New York State should make a special effort to secure those grants that allow for distribution to community-based organizations. CBOs are

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

our basic unit of community communication and economic development on the local level. If the State is unable to adequately fund their efforts with its own revenues, it should be an active participant in seeking other monies which may be available.

RECOMMENDATIONS: BIAS VIOLENCE AND INTER-GROUP RELATIONS

In addition to the economic development area, the Advisory Panel spent some time reviewing the overriding issue of inter-group violence as it relates to education and youth issues. The recent surge in youth-initiated bias violence is alarming; by some accounts, 75 percent of the perpetrators of such crimes are under the age of 25. From their own experiences, panel members have identified a failure to teach young people to respect difference, backed by a monocultural emphasis and the lack of cultural diversity awareness in the educational system, as a contributor to racial, ethnic, and other inter-group intolerance among the young.

- * The Advisory Panel recommends that the State of New York take a leadership role in devising initiatives needed to implement educational programs which promote positive multicultural relations and stress respect and appreciation of diversity.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

While there are some such efforts underway, to date they appear to be fragmentary in nature. There must be a coordinated effort from the top to reach the hearts and minds of our young people before they learn to hate others because those others are somehow different from themselves. New York can set an example by ensuring that its State University institutes such programs in its curriculum, and that such programs are a continuing component of a SUNY education.

- * The Advisory Panel recommends that the New York State Legislature immediately enact the Bias-Related Violence and Intimidation Act.

The continued failure of the Legislature to pass this measure, when in the last year alone such states as New Jersey, New Hampshire, and Iowa have done so, is a stain on New York's record as a leader among states in human and civil rights. Once violence against anyone is accepted as an expression of opposition to difference, a society's foundations are undermined. These crimes must receive special attention from government.

The inclusion of sexual orientation as a protected category in the bias bill is widely viewed as the reason why it has yet to be enacted. This focus on sexual orientation in the debate obscures

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

the fact that bias violence is affecting a broad array of groups. Violence against racial, ethnic, and religious groups is also on the rise, as the aforementioned Bensonhurst murder and escalating anti-Asian attacks, for example, illustrate.

In the context of the proposed legislation, the Advisory Panel also would like to point out a lack of consciousness concerning bias-related violence based on gender. For example, earlier this year, several women were attacked with pins or needles at Penn Station in Manhattan. Clearly these victims were singled out as women, but these acts are not being viewed as bias-related crimes. New York State's Bias-Related Violence and Intimidation Act should include gender among its protected categories.

Emphasis on the broad reach of the bias bill is not meant to minimize the problem of violence against lesbians and gay men. At the very first meeting of the Advisory Panel, members requested a special report on the subject of gay-bashing, which was presented at the July 1990 meeting by Lance Ringel, then Director of the Office of Lesbian and Gay Concerns for DHR, and by panel member Paula Ettelbrick of Lambda Legal Defense and Education Fund. The panel heard that there is an extra dimension to violence against lesbians and gay men that may not be present in other acts of bias violence -- a belief that in perpetrating these crimes, the

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

attacker is reinforcing his value system. The point must be made that those whose beliefs cause them to be intolerant of the very existence of gay people cannot be allowed to express their disapproval by acts of violence.

- * The Advisory Panel recommends that the State Human Rights Law be amended to add sexual orientation to those bases for which discrimination in employment, housing, and public accommodations is prohibited.

The silence of the law on the issue of discrimination based on sexual orientation is one part of a social construct that seems to give tacit encouragement not only to discrimination but to violence as well. Recent events in the Persian Gulf, in which the Armed Forces suspended its policy of homosexuality being incompatible with military service -- but only for the duration of hostilities -- underscored the hollowness of a position that only allows lesbians and gay men to serve their country if shooting is actively taking place.

- * The Advisory Panel commends the work of the Crisis Prevention Unit of the Division of Human Rights.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

In the absence of a bias bill, New York State has not waited to address bias violence. The Crisis Prevention Unit (CPU) of the Division of Human Rights was created in 1988 to provide an immediate response team to inter-group tension situations across the state. Despite a relatively small staff of ten people, the CPU was able to follow through in many situations, allowing the State to play a constructive role in decreasing inter-group tensions. Unfortunately, in late 1990, fiscal constraints mandated that the CPU staff be cut to six people.

As already noted, the panel is keenly aware of the fiscal realities facing the State. But the CPU gives DHR -- and the State of New York -- a unique capability not duplicated elsewhere within the government. The CPU's work with police departments across the state -- urging both police and prosecutors' offices to create distinct units for addressing bias-related crimes -- has been especially vital, coming as it does at a time when tensions between various minority communities and police are spiraling. Funds must be found to continue and enhance these kinds of efforts -- and not at the expense of the Division's regular caseload of Human Rights Law complaints.

- * The Advisory Panel commends outreach programs instituted by prosecutors' offices which are specifically aimed at

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

reducing inter-group tensions, and urges that other prosecutors' offices institute similar programs.

Frictions between minority communities and the justice system are not limited to police. Issues between groups often turn on a perception of unequal law enforcement, as witness the ongoing tensions between the Hispanic and Hasidic communities in the Williamsburg section of Brooklyn.

In such a climate, prosecutors' offices can play a critical role in improving inter-group relations. As part of its outreach to reduce inter-group tensions in Brooklyn, the Kings County District Attorney's office has created several advisory councils representing major constituencies which historically have been subject to discrimination. In addition, that office's "Adopt-A-School" program has sought to place assistant district attorneys and other staff in Brooklyn schools, where they can help to teach students about the justice system, and also serve as role models. These are low-budget programs that make excellent models for other prosecutors' offices.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

A CHANGED CLIMATE

From the time the panel was created until the submission of this final report, a pronounced change has occurred in the social climate of the United States of America. A war and an economic recession have taken place; the repercussions of both will be felt for years to come. In New York City, there constantly seem to be other explosive issues -- the question of condom distribution in schools, and the ugliness surrounding the St. Patrick's Day parade, to name but two recent examples -- that need to be watched because they create a deep divisiveness in our society.

In the area of civil and human rights, the most obvious and immediate ramification of the Persian Gulf conflict on the home front was the sad and alarming upsurge in discrimination against Arab-Americans. But the overrepresentation of people of color in the Armed Forces also became an issue -- and one which is closely tied to the economic situation.

In times of economic difficulty like those currently affecting New York City, New York State, and the country, members of historically disadvantaged communities are disproportionately losing their jobs. Public spending cuts also impact disproportionately on minorities, both as clients and as employees.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

In this context, the position of the President of the United States on the proposed Civil Rights Act of 1991 is not irrelevant to the question of inter-group relations. This act would, among other things, overturn the standard imposed by a 1989 Supreme Court decision which shifted the burden of proof in discrimination cases from the employer to the employee. In 1990, President Bush vetoed the Civil Rights Act -- and in 1991, he continues to oppose it -- on the grounds that it would promote hiring and promotion "quotas". This argument is based on ideology rather than the actual language of the proposed law -- which specifically states that nothing in the law should be construed as requiring that employers impose quotas.

The negative implications of this Federal stance for the people of New York State are profound. To the extent that there is Federal retrenchment on civil rights, the role of agencies like DHR becomes increasingly important. This State has a very progressive law. When people have less money, and cannot afford to go to court, they will come to DHR. And if people believe that they have no place to turn at all, sound inter-group relations are jeopardized.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

Minorities and women essentially have been told by the Federal government and the courts that their civil rights cannot be adequately protected. A climate has been created over the last ten years that says, "Enough's enough. Turn back the clock. It's time for the dominant culture to reassert its dominance." But a combination of social factors dictates that the President support adoption of the Civil Rights Act of 1991 -- not in diluted form, but in a form which really protects the needs of women and racial and religious minorities in this country. New York State must make itself heard more forcefully on this matter.

- * The Advisory Panel recommends that the Governor and relevant State agency officials press the Federal government to augment its human and civil rights programs -- specifically to pass the Civil Rights Act of 1991 -- and maintain a close and constant review of Federal activity in the civil rights arena as it affects New York State.

A strong statement from the State of New York on this Federal legislation is of critical importance. This is one legislative item which does not impact on the budget, and involves no appropriations at this point. There is no reason why New York State cannot lobby the Federal government on civil and human rights as it does in matters of housing and banking.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

CONCLUSION

The Governor's Advisory Panel on Inter-Group Relations has been the first entity to survey and assess the range of New York State agency programs and services relating to economic development in minority communities -- especially in terms of their effectiveness in reaching targeted communities -- in light of their impact on alleviating inter-group tensions. Coordination of and communication about existing programs must be improved in order to spread the impact of the State's limited resources in the most cost-effective manner.

The Advisory Panel wishes to commend Commissioner Margarita Rosa and the DHR staff (notably Nadia Martinez, Yvette Gaynor, and Lance Ringel, principal author of this report) for the support they have provided for our work. We thank the Governor for giving us the opportunity to review current efforts to improve inter-group relations, and to make concrete recommendations for further State actions in this critical area.

REPORT OF THE ADVISORY PANEL ON INTER-GROUP RELATIONS

Footnotes

In the inevitable interim that occurs between approval of final language by an entity like the Advisory Panel on Inter-Group Relations and submission of its final report, events occur which relate directly to the report's content, and indeed to its recommendations. Three such events occurred in this case, which should be duly noted:

1. On April 23, 1991, Governor Mario Cuomo introduced legislation to amend the State Human Rights Law to add sexual orientation as a protected category. The State Legislature adjourned in July without taking action on the bill.

2. On June 4, 1991, Governor Cuomo issued a strongly worded statement calling on President Bush and the U.S. Congress to enact into law H.R. 1, the Civil Rights Bill of 1991.

3. On June 13, 1991, a Social Studies Syllabus Review and Development Committee appointed by Commissioner Thomas Sobol of the New York State Education Department submitted a report to the Board of Regents entitled "One Nation, Many Peoples: A Declaration of Cultural Interdependence." On July 15, Governor Cuomo and Commissioner Sobol issued statements about the report, which continues to be the subject of extensive public discussion.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. form	Senate Questionnaire (7 pages)	n.d.	P2, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Doug Band
OA/Box Number: 12754

FOLDER TITLE:

Sonia Sotomayor [3]

2009-1007-F
db1199

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

CLINTON LIBRARY PHOTOCOPY

SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE
PART IV, QUESTION 10

Respond to Robert Henry, Cosby, sui juris
General Delivery
Verdi Post Office
Verdi, NV

2005659

superior court, Washoe county, Nevada

Robert Henry, Cosby, sui juris
Demandant,

Case Number P 361392678

against,

Part One

SONIA SOTOMAYOR, JUDGE, US
DISTRICT COURT

Non-Statutory Abatement

and,
RICHARD H. WALKER, REGIONAL
DIRECTOR, SECURITIES AND
EXCHANGE COMMISSION
Defendants.

Non-Statutory Abatement

By Robert Henry, Cosby, sui juris:

In the matter of: UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, COMPLAINT 95 Civ. 2951.

To All and Sundry Whom These Presents Do or May Concern

Introduction

This is a non-statutory abatement issued pursuant to common law rules applicable to such cases, against: SONIA SOTOMAYOR, PRESIDING JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK AT 500 PEARL STREET, NEW YORK, NEW YORK, AND RICHARD H. WALKER, REGIONAL DIRECTOR, SECURITIES AND EXCHANGE COMMISSION AT NORTHEAST REGIONAL OFFICE, 7 WORLD TRADE CENTER, 13TH FLOOR, NEW YORK, NEW YORK. Said agents are imposing provisions of a contract counter to public morals, in the Nature of a praemunire, and as belligerents are in violation of International Law and the Law of Nations.

Part One of this matter shall be known as **Non-Statutory Abatement** and contains the following documents titled: I. Non-Statutory Abatement, and, II. Verification

Page One of Nine

CLINTON LIBRARY PHOTOCOPY

I. NON-STATUTORY ABATEMENT
Chapter One

Return of Papers and Averments

Please find enclosed the following item: UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK, COMPLAINT 95 Civ 2951

I was not properly served this paper. This paper was received but not accepted.

These items were refused for cause without dishonor and without recourse to me, and are returned, herewith, because they are irregular and unauthorized, based on the following to wit:

Comes Now, an private Christian, grateful to Almighty God for my Liberty, and humbly Extend Greetings and Salutations to you from, Jesus the Christ and Myself by Visitation, to exercise Ministerial Powers in this Matter, to return your paper, which was not served properly but which paper was received, but not accepted.

Mark My words:

First:

Mark: Your papers do not have upon their face My Christian Appellation in upper and lower case letters, nor, do the additions in the compilation upon the items, herewith returned, apply to Me, and,

Second:

Mark: Your paper alleges violations of a law, foreign to My Venue, which, no Oath, Promise, or Law attaches Me thereto; and,

Third:

Mark: Your office is not established in the Nevada State Constitution; and,

Fourth:

Mark: Your papers have no foundation in Law; for the reason, they are not from an office recognized by the People or General Laws of the State of Nevada; and,

Fifth:

Mark: Your papers lack jurisdictional facts necessary to place or bring Me within your venue; and,

Sixth:

Mark: Your papers are unintelligible to Me; based upon the following: They are not written in Proper English, being such, they fail to appraise Me of the Nature of any matter alleged, if in fact your allegations have any foundations, and,

Seventh:

Mark: Your papers fail to affirmatively show, upon their face, lawful authority for your presence in My Venue, and,

Eighth:

Mark: Your papers fail to affirmatively show, upon their face, the necessity for your entry upon My Privacy, and,

Ninth:

Mark: Your papers fail to affirmatively show, upon their face, your authority to violate or disparage Me in any way; and,

Tenth:

Mark: Your papers have no Warrant in Law; and,

Eleventh:

Mark: Your papers are not sealed with authority recognized in the State of Nevada, and,

Twelfth:

Mark: Your papers fail to disclose any legal connection between Myself and your office; and,

Thirteenth:

Mark: Your papers fail to disclose any legal connection between Myself and the Laws of New York State; and,

Fourteenth:

Mark: Your papers fail to disclose any legal connection between Myself and the Securities and Exchange Act; and,

Fifteenth:

Mark: Your papers are incomplete and defective, upon their face, due to insufficient Law

Chapter Two

Firstly:

Whereas, pursuant to constitutional due process requirements of the General Laws of the State of Nevada, employees of the UNITED STATES OF AMERICA and THE SECURITIES AND EXCHANGE COMMISSION are not State Judicial Officers having power to issue orders or judgments of any kind, and,

Whereas, pursuant to constitutional due process requirements of the General Laws of the State of Nevada, judges of the United States District Court are not State Judicial Officers having power to issue orders or judgments of any kind; and,

Whereas, returned papers concerning an unlawfully imposed contract, imposes upon My Right and Privacy; and,

Whereas, My Privacy is a Constitutionally secured Right, and,

Therefore, returned papers concerning an unlawfully imposed contract are harassment and a public nuisance.

Secondly:

Whereas, returned papers contain extraneous number (example, April 27, 1995, July 1992, 1994, etc.), which terminology, to Me, is confusing. for the reason I reckon time in years of Our Lord Jesus, the Christ; and,

Whereas, conflicting provisions of the peoples moral law forbids Me use of said foreign way of reckoning time; and,

Therefore, returned papers contain scandalous matter all to My harm.

Thirdly:

Whereas, pursuant to the General Laws of the State of Nevada, mentioned de facto corporation is a person subject to the jurisdiction of this state, and,

Now, therefore:

I am returning all of your papers, and shall, henceforth, exercise My Right of Avoidance; for the reason: they are irregular, unauthorized, defective upon their face and utterly void, and are, herewith, abated as a public nuisance. There appear to be no factors which would warrant adjustment of the Abatement, due to a Conflict of Law.

Chapter Three

Denial of Due Process in Alleged Default Judgment

A default judgment against Demandant was allegedly issued by Judge Soma Sotomayor presiding in a UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK. The alleged judgment is not valid for reason of due process and is in violation of my Constitutional Rights as a private citizen.

The alleged judgment is void because it is irregular and unlawful based on the following to wit

Comes Now, an private Christian, grateful to Almighty God for my Liberty, and humbly Extend Greetings and Salutations to you from, Jesus the Christ and Myself by Visitation, to exercise Ministerial Powers in this Matter, to deny your right to file for a default judgment against Demandant

Mark My words:

First:

Mark: Defendants allegedly convened a meeting on the third day of the fifth month in the year of Our Lord and Savior Jesus, the Christ, nineteen-hundred ninety-six, Anno Domini, in the Two hundred and twentieth year of the Independence of America

Second:

Mark: Demandant was not represented by legal counsel during alleged meeting

Third:

Mark: Demandant did not receive Summons to appear nor was Demandant notified of alleged meeting in writing.

Fourth:

Mark: Defendants jurisdiction in this matter has no foundation in law.

Fifth:

Mark: Demandant has not been notified of the actual events of alleged meeting

Sixth:

Mark: Demandant has been slanderously accused, in the eyes of friends, relatives, and countrymen based on judgments that were issued during alleged meeting

Seventh:

Mark: Demandant has suffered severe financial losses due to the libelous actions taken in the alleged meeting

Eighth:

Mark: Defendants have allegedly issued a default judgment against Demandant without due process

Ninth:

Mark: Legal service of documents by United States Post Office is not valid unless proof of service can be produced as evidence.

Tenth:

Mark: Defendant has not provided proper service to Demandant

Chapter 4

Firstly:

Whereas, judgments, notices, statements and legal actions arising from alleged meeting have no basis in law and violate My Constitutional Right of Privacy,

Therefore, judgments, notices, statements and legal actions are harassment and a public nuisance

Secondly:

Whereas, jurisdiction of Judge Sotomayor in this case has not been properly obtained by due process of law; and,

Whereas, jurisdiction of the laws of New York state in this case has not been properly obtained by due process of law; and,

Whereas, jurisdiction of the laws of the Securities and Exchange Act in this case has not been properly obtained by due process of law,

Therefore, judgments, notices, statements and legal actions are invalid and unlawful.

Thirdly:

Whereas, meetings were held in private without proper notification to Demandant and conspiratorial in nature to the eventual harm of the Demandant's Constitutional Rights.

Therefore, threatened judgments, notices, statements and legal actions are contra bonos mores

Now, therefore:

I am notifying Defendants that judgments, notices, statements and legal actions are unlawful and defective and I shall henceforth exercise My Right of Avoidance for the reason: they are irregular, unauthorized, defective upon their face and utterly void, and are, herewith, abated as a public nuisance. There appear to be no factors which would warrant adjustment of the Abatement, due to a Conflict of Law.

Ordering Clauses:

Said UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK shall abate the matter of, COMPLAINT 95 Civ. 2951 or file a written response within ten days of the release of this Non-Statutory Abatement showing why the Abatement should not be imposed. Any and all written responses must include a detailed factual statement and supporting documentation. Any and all accusations must include, on the face therefore, the quotation of law being violated and a clear explanation of how this law pertains to action of the Demandant Failure to respond in the time prescribed, herein, will result in a Default and Default Judgment and subject Defendants to Civil and/or Criminal liabilities in pursuance of International Law and the Law of Nations.

All remittance of this instant matter should be marked with the Case number, and mailed to the following location:

Robert Henry, Cosby, sui juris
General Delivery
Verdi Post Office
Verdi, Nevada

Wherefore:

Until this Conflict of Law is resolved, I wish you to do the following, to wit;

First:

Obtain process issued, under seal, from a Court appertaining to a Nevada State Judicial Department; and,

Second:

That said process be based on sworn Oath or Affirmation from a competent Witness or Damaged Victim; and,

Third:

That said process bear My full Christian Appellation in upper and lower case letters, and in addition, thereto, sui juris, and must be handled and personally served upon Me by the Washoe County Sheriff.

There is no need for Me to communicate until my process is legally served.

I, private Christian, will, henceforth, maintain My Right or Privacy and exercise My Right of Avoidance and stand upon the grounds set out above.

II. VERIFICATION

Sealed by voluntary act of My own hand on this Twentieth day of the sixth month in the year of Our Lord and Savior Jesus, the Christ, nineteen-hundred ninety-six, Anno Domini, in the Two hundred and twentieth year of the Independence of America.

L.S.

I have the Honor of Being Private Christian

Robert Henry, Cosby
ROBERT HENRY, COSBY

Attachment:

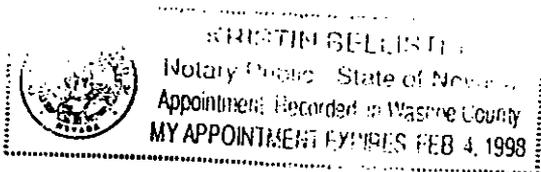
UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK,
COMPLAINT 95 Civ. 2951

State of Nevada
County of Washoe

This instrument was acknowledged before me on
June 20, 1996 by Robert Henry, Cosby.

Kristin Bellister

NOTARY PUBLIC



2005659

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WASHOE CO., NEVADA
RECORD REQUESTED BY
R Cosby
96 JUN 20 PM 12: 03

Page Nine of Nine

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COUNTY RECORDER
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SONIA SOTOMAYOR
U. S. DISTRICT JUDGE

Respond to: Robert Henry, Cosby, sui juris
General Delivery
Verdi Post Office
Verdi, NV

superior court, Washoe county, Nevada

Robert Henry, Cosby, sui juris
Demandant,

against,

SONIA SOTOMAYOR, JUDGE, US
DISTRICT COURT
and,
RICHARD H. WALKER, REGIONAL
DIRECTOR, SECURITIES AND
EXCHANGE COMMISSION
Defendants.

Case Number P 361392678

Part Two.

Non-Statutory Abatement

Notice of Default; Default
Judgment; and, Praecipe.

Non-Statutory Abatement

By Robert Henry, Cosby, sui juris:

In the matter of: UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, COMPLAINT 95 Civ. 2951.

Introduction

This is a non-statutory abatement issued pursuant to common law rules applicable to such cases, against: SONIA SOTOMAYOR, PRESIDING JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK AT 500 PEARL STREET, NEW YORK, NEW YORK, and RICHARD H. WALKER, REGIONAL DIRECTOR, SECURITIES AND EXCHANGE COMMISSION AT NORTHEAST REGIONAL OFFICE, 7 WORLD TRADE CENTER, 13TH FLOOR, NEW YORK, NEW YORK.

SONIA SOTOMAYOR, PRESIDING JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK and RICHARD H. WALKER, REGIONAL DIRECTOR, SECURITIES AND EXCHANGE COMMISSION, are imposing provisions of a contract counter to public morals, in the Nature of a praemunire, and as belligerents are in violation of International Law and the Law of Nations.

Part Two of this matter contains the following documents, titled: I. Non-Statutory Abatement Default; II. Default Judgment; and, III. Preacipe.

I. Notice of Default

To: SONIA SOTOMAYOR, PRESIDING JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK and RICHARD H. WALKER, REGIONAL DIRECTOR, SECURITIES AND EXCHANGE COMMISSION,

Take notice that demand was herein made on you that you answer or otherwise plead to the plaint on file herein, a copy of which has heretofore been served on you.

Take further notice that your failure to answer or otherwise plead in response to the foregoing notice, within the time stated, the Demandant will forthwith move to cause your default to be entered and for judgment against you personally and officially for the relief demanded on the plaint.

II. Order for Entry of Default and Default Judgment

The Non-Statutory Abatement in this action having been served on SONIA SOTOMAYOR, PRESIDING JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK AT 500 PEARL STREET, NEW YORK, NEW YORK, and RICHARD H. WALKER, REGIONAL DIRECTOR, SECURITIES AND EXCHANGE COMMISSION AT NORTHEAST REGIONAL OFFICE, 7 WORLD TRADE CENTER, 13TH FLOOR, NEW YORK, NEW YORK, the Defendants, on the fifteenth day of the seventh month in the Year of our Lord Jesus Christ, nineteen-hundred ninety-six Anno Domini, in the Two hundred and twentieth year of the Independence of America, a true copy of Proof of Service is annexed, hereto, and marked "Exhibit A", for your enjoyment, and no answer, demurrer, motion, or other pleading to the plaint having in any manner been made by said defendants;

Now on the motion of the Demandant,

It is ordered that the clerk of this Court shall be, and is hereby, directed to enter the default of said default of said Defendants, and default judgment in favor of Demandant and against Defendants for the relief demanded in the plaint.

Let judgment enter accordingly.

III. Praeceptum

The clerk of said court will please enter a default against the Defendants in the above-entitled cause because of Defendants failure to respond on the rule day of the fifteenth day of the seventh month, in the Year of our Lord Jesus, the Christ, nineteen-hundred ninety-six, Anno Domini, in the Two hundred and twentieth year of the Independence of America.

Sealed by voluntary act of My own hand on this fifteenth day of the seventh month, in the Year of our Lord Jesus, the Christ, nineteen-hundred ninety-six, Anno Domini, in the Two hundred and twentieth year of the Independence of America.

L.S.

I have the Honor of Being Private Christian

Robert Henry Cosby
Robert Henry, Cosby



Attachments: Exhibit A

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. Addressee's Address
2. Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Judge Sonia Sotomayor
 United States District Court
 500 Pearl Street
 New York, NY

4a. Article Number
 P 361 392 678

4b. Service Type

<input type="checkbox"/> Registered	<input checked="" type="checkbox"/> Certified
<input type="checkbox"/> Express Mail	<input type="checkbox"/> Insured
<input type="checkbox"/> Return Receipt for Merchandise	<input type="checkbox"/> COD

7. Date of Delivery
 JUN 28 1996

5. Received By: (Print Name)
 G. Belardi

6. Signature: (Addressee or Agent)
 X

8. Addressee's Address (Only if requested and fee is paid)

Thank you for using Return Receipt Service.

PS Form 3811, December 1994

Domestic Return Receipt

UNITED STATES POSTAL SERVICE



First-Class Mail
 Postage & Fees Paid
 USPS
 Permit No. G-10

• Print your name, address, and ZIP Code in this box •

Robert Henry, Cosby
 General Delivery
 Verdi Post Office
 Verdi, NV

JUL - 3 1996



CLINTON LIBRARY PHOTOCOPY



U.S. Department of Justice

United States Attorney
District of Nevada

100 West Liberty, Suite 600
Reno, Nevada 89501

MAILING ADDRESS:
P.O. Box 40878
Reno, Nevada 89504

(702) 784-5438
FAX (702) 784-5181

The Honorable Sonia Sotomayor
United States District Judge
United States Courthouse
Foley Square
New York, NY 10007-1581

January 2, 1997

Re: Robert Henry Cosby v. Sotomayor
Related Matter: SEC v. Softpoint, et al.
Docket# 95 Civ. 2951 (S.D.N.Y.)

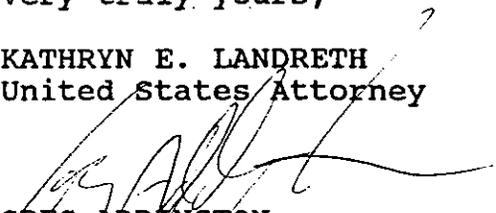
Dear Judge Sotomayor:

You will recall that this office was sent certain materials which suggested that Mr. Cosby had initiated some sort of legal action against you in Washoe County, Nevada. On September 24, 1996, I advised you that no such action had been filed in state court or federal court and that I would make further enquiry ninety days later. I have again reviewed the dockets at the state court and the federal court and have found no actions pending against you by Mr. Cosby (or anyone else). Accordingly, this office will close its file on this matter. If you have received additional materials or information which pertains to this matter or believe further action is necessary, please advise accordingly.

If you have any questions, do not hesitate to contact me.

Very truly yours,

KATHRYN E. LANDRETH
United States Attorney


GREG ADDINGTON
Assistant United States Attorney



U.S. Department of Justice

United States Attorney
District of Nevada

100 West Liberty, Suite 600
Reno, Nevada 89501

MAILING ADDRESS:
P.O. Box 40878
Reno, Nevada 89504

(702) 784-5438
FAX (702) 784-5181

September 24, 1996

The Honorable Sonia Sotomayor
United States District Judge
United States Courthouse
Foley Square
New York, N.Y. 10007-1581

Re: Robert Henry Cosby v. Sotomayor
Related Matter: SEC v. Softpoint, et al.
Docket# 95 Civ. 2951 (S.D.N.Y.)

Dear Judge Sotomayor:

The materials which you forwarded to the Administrative Office of U.S. Courts were, in turn, directed to my attention. You will recall that Mr. Cosby is a defaulted civil defendant in the above-captioned related matter. In response to Mr. Cosby's perception that his legal interests were unfairly adjudicated, he sent to you a package of materials which suggested that he had initiated some sort of legal action against you in Washoe County, Nevada. I have made suitable enquiries at the U.S. District Court in Reno, Nevada and also at the Washoe County District Court for the State of Nevada and have determined that there is no pending action against you brought by Mr. Cosby (or anyone else). You may recall that the "complaint" sent to you by Mr. Cosby, while styled (imaginatively) as a civil complaint, did not bear any docket number but rather bore the U.S. Postal Service certified mail receipt number corresponding to the mailing of the materials to you.

It is my view that no further action need be taken on your behalf regarding this matter. I will keep my file "open" for at least the next 90 days after which time I will again make enquiries at the federal court and the state court. I will advise you of the results of those enquiries and take whatever action is appropriate.

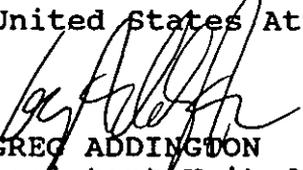
If you receive additional materials from Mr. Cosby which suggests further legal (or quasi-legal) action taken by him against you in Nevada, please advise me of same. If Mr. Cosby

becomes threatening or harrassing in any way to you (or your staff), please inform me immediately of those developments.

If you have any questions, do not hesitate to contact me.

Very truly yours,

KATHRYN E. LANDRETH
United States Attorney



GREG ADDINGTON
Assistant United States Attorney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

STANLEY WEST,

Plaintiff,

-against-

PAVIA & HARCOURT, ESQS.,
a New York Partnership,

Defendants.

AMENDED VERIFIED COMPLAINT

LEWIS and FIORE
Attorneys for Plaintiff

225 BROADWAY
NEW YORK, N. Y. 10007-3001
(212) 285-2290

To:

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated:

Attorney(s) for

PLEASE TAKE NOTICE

Dist. Appellate Div

NOTICE OF ENTRY

that the within is a (certified) true copy of a
entered in the office of the clerk of the within named Court on

19

NOTICE OF SETTLEMENT

that an Order of which the within is a true copy will be presented for settlement to the Hon.
one of the judges of the within named Court,

19 , at M.

Dated:

LEWIS and FIORE

Attorneys for

225 BROADWAY
NEW YORK, N. Y. 10007-3001

To:

CLINTON LIBRARY PHOTOCOPY

Attorney(s) for

mail 10/5/92
1/23

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

STANLEY WEST,

Plaintiff,

AMENDED
VERIFIED COMPLAINT

-against-

PAVIA & HARCOURT, ESQS.,
a New York Partnership,

Index #: 30139/91

Defendants.

-----X

Plaintiff, by his attorneys, Lewis & Fiore, complaining
of the defendant, does hereby allege as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. Plaintiff, Stanley West (hereinafter West), is a
resident of the State of New York, City of New York, and a former
client of the defendant.

2. Defendant is and was for all times mentioned herein,
upon information and belief, a New York partnership engaged in the
practice of law with offices at 600 Madison Avenue, and is made up
of a number of attorneys who are together engaged in the practice
of law under the firm name of Pavia & Harcourt.

3. Defendant was the attorney for Marcar Restaurant and
Catering Corp. d/b/a L'Hostaria del Bongustaio (hereinafter
referred to as Marcar), from January 13, 1983 through and including
November of 1988.

4. In 1988, defendant was retained by plaintiff and

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Gennaro Picone (hereinafter referred to as Picone), to represent them in the formation of a new business with the intention of forming a new corporation, acquiring a location to conduct a restaurant business and performing all other necessary legal services to protect the rights of Picone and West.

5. Defendant accepted employment on behalf of West and Picone and was paid for its services and performed a number of services for West and Picone.

6. The defendants drafted and filed a Certificate of Incorporation for the formation of a new business corporation known as Malvasia, Inc.

7. The defendants drafted a shareholders' agreement between West and Picone.

8. The defendants drafted and accepted by-laws for Malvasia, Inc.

9. The defendants served as incorporators of Malvasia, Inc.

10. The defendants prepared a Waiver of Notice of the first meeting of the Board of Directors.

11. The defendants prepared the Minutes of the first meeting of the Board of Directors of Malvasia, Inc.

12. The defendants served as an interim secretary of Malvasia, Inc.

13. The defendants prepared written consent of the Board of Directors, accepting the resignation of one of the defendant's members as secretary and appointing West as secretary of Malvasia, Inc.

CLINTON LIBRARY PHOTOCOPY

14. The defendants prepared a corporate resolution providing that Picone be the one and only signatory on the corporate bank account, and be authorized to conduct all banking business on behalf of the corporation.

15. The defendants prepared a written consent of the Board of Directors, authorizing Picone, and Picone alone, to negotiate and bind the corporation in all respects, for the purchase of the business of Marcar.

16. The defendants prepared a document indicating unanimous consent of the Board of Directors, for Picone to be the sole signatory on the Corporate bank account and to conduct all corporate business, including the obtaining of loans on behalf of the Corporation.

17. The interests of Picone and West, by virtue of their proposed roles in the Corporation, were, from the outset, different and adverse.

18. Picone was a professional chef who was intended, by the parties, to be a full time employee of the Corporation.

19. West was a novice to the restaurant business who was intended by the parties, to supply the necessary funds to form and operate the Corporation.

20. Defendant knew, or should have known, of the conflicting and diverse interests of West and Picone.

21. Defendants should not have undertaken the tasks of representing both West and Picone.

22. In any event, defendant should have made full disclosure of the actual and potential conflicts between the

CLINTON LIBRARY PHOTOCOPY

diversity of interest between West and Picone, to West, and should have advised West to retain counsel to represent his interest, as opposed to the interest of Picone.

23. Defendant failed to make disclosures of the actual and potential conflict between the interest of Picone and West, to West, and failed to advise West to seek independent counsel to represent his interest.

24. Defendants were negligent in their representation of West, failed to exercise reasonable care in their representation of West and caused West to suffer damages.

25. Defendants knew, or should have known that their professional judgment in representing both West and Picone would, by the nature of the transaction, be compromised and that they would be incapable of the proper level of independent professional judgment in their representation of West.

26. Defendant represented to West that his rights were protected by virtue of the legal services rendered and the representation rendered by the defendants.

27. West relied upon the representations of the defendant, that his rights were protected by virtue of the legal services provided by the defendants.

28. West reasonably relied upon the representations of the defendant, as described above.

29. In reasonable reliance upon the representations of the defendant, West invested substantial sums of money, by virtue of capital contribution and loans to Malvasia, Inc.

30. Defendant's failure to advise West to retain

CLINTON LIBRARY PHOTOCOPY

independent counsel to represent his interest, was grossly negligent in that West was in the process of investing substantial sums of money in Malvasia, Inc, so that independent counsel could have been retained at a relatively small cost in comparison to the large sums of money being risked by West.

31. Defendant knowingly and intentionally acting on behalf of the interest of others, failed to advise West to retain independent counsel, failed to represent West's interest in the preparation of legal documents while representing to West that his interests were protected.

32. Defendant represented Malvasia, Inc. and Picone against West in a legal action known as Stanley West v. Malvasia, Inc. and Gennaro Picone, in the Supreme Court of New York County.

33. As a result of the foregoing, West has suffered damages in the amount of \$700,000.00.

AS AND FOR A SECOND CAUSE OF ACTION

34. Plaintiff repeats each and every one of the above allegations with the same force and effect as if restated in full here.

35. The defendants performed the above described acts intentionally, for the benefit of another and against the interest of West.

36. As a result of the foregoing, Plaintiff has suffered special damages, in that his entire investment of \$700,000.00 in the business venture has been lost to him because the business has closed and is no longer functioning.

CLINTON LIBRARY PHOTOCOPY

AS AND FOR A THIRD CAUSE OF ACTION

37. Plaintiff repeats and realizes each and every allegation contained in the above paragraphs as if restated in full here.

38. As outlined above, defendant made negligent misrepresentations to West.

39. As a result of the foregoing, plaintiff has been damaged in the sum of \$700,000.00.

WHEREFORE, it is respectfully requested that plaintiff be granted judgment for damages in the amount of \$700,000.00 upon the first, second and third causes of action.

DATED: New York, New York
August 24, 1992

LEWIS & FIORE, ESQS.
Attorneys for Plaintiff
Office and P.O. Address:
225 Broadway, Suite 3300
New York, New York 10007
(212) 285-2290

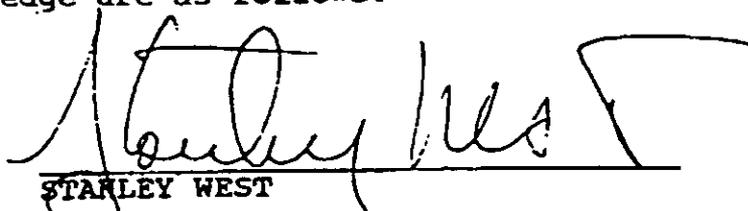
-CLINTON LIBRARY PHOTOCOPY

INDIVIDUAL VERIFICATION

STATE OF NEW YORK)
COUNTY OF ~~KINGS~~ ^{New York}) ss.:

STANLEY WEST, being duly sworn, deposes and says: deponent is the plaintiff in the within action; deponent has read the foregoing Amended Verified Complaint and knows the contents thereof; the same is true to deponent's own knowledge, except to those matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:


STANLEY WEST

Sworn to before
me this 18 day
of Sept, 1992.

Violet Squires
NOTARY PUBLIC

VIOLET SQUIRES
COMMISSIONER OF DEEDS
CITY OF NEW YORK - No. 1-662
CERTIFICATE FILED IN NY COUNTY
COMMISSION EXPIRES 10-1-95

CLINTON LIBRARY PHOTOCOPY

Final
w/o Attachments

Sotomayor Senate Questionnaire

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Sonia Sotomayor -- October 1983 to the Present.

**Sonia Sotomayor de Noonan, Sonia Maria Sotomayor de Noonan,
or Sonia Noonan, Married Names -- August 1976 to October 1983.
As part of my divorce decree, I resumed my maiden name without my
middle name.**

Sonia Maria Sotomayor -- Birth to Marriage, August 1976.

2. Address: List current place of residence and office address(es).

RESIDENCE:

New York, New York

OFFICE:

**U.S. Courthouse
500 Pearl Street, Room 1340
New York, New York 10007**

3. Date and place of birth.

**June 25, 1954
New York, New York**

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

**Divorced since October 1983. Engaged to be married to Peter White,
President of Commercial Residential and Industrial Construction
Corporation, 656 Central Park Avenue, Yonkers, New York 10704.**

Sotomayor Senate Questionnaire

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

<u>SCHOOL</u>	<u>DEGREE</u>	<u>DATES ATTENDED</u>	<u>GRADUATION</u>
Yale Law School	J.D.	1976 - 1979	June 1979
Princeton University	A.B., <i>Summa Cum Laude</i>	1972 - 1976	June 1976

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

<u>ORGANIZATION</u>	<u>ADDRESS</u>	<u>DATES OF ASSOCIATION</u>	<u>POSITION</u>
United States District Court - Southern District of New York	U.S. Courthouse 500 Pearl Street New York, NY 10007	10/92 to present	Judge
Pavia & Harcourt	600 Madison Ave. New York, NY 10022	1/88 to 10/92 4/84 to 12/87	Partner Associate
New York County District Attorney's Office	1 Hogan Place New York, NY 10013	8/79 to 3/84	Assistant District Attorney in Trial Bureau 50
Sotomayor & Associates	10 3rd Street Brooklyn, NY 11231	1983 - 1986	Counseling and consulting work for family and friends
Yale Law School Mimeo Room	127 Wall Street New Haven, CT 06520	9/78 to 5/79	Sales person
Paul, Weiss, Rifkind Wharton & Garrison	1285 Avenue of the Americas New York, NY 10019	6/78 to 8/78	Summer Associate

Sotomayor Senate Questionnaire

The Graduate, Professional Student Center	306 York Street New Haven, CT 06520	9/77 to 5/78	Sales person
Office of the General Counsel, Yale University	Woodbridge Hall New Haven, CT 06520	6/77 to 9/77	Summer Intern
The Equitable Life Assurance Society of the United States	1285 Avenue of the Americas New York, NY 10019	6/76 to 8/76	Summer Clerk
New York City Campaign Finance	40 Rector Street New York, NY 10006	1988 to 10/92	Member, Board of Directors
State of New York Mortgage Agency	260 Madison Avenue New York, NY 10016	1987 to 10/92	Member, Board of Directors
Puerto Rican Legal Defense & Education Fund	99 Hudson Street New York, NY 10013	1980 to 10/92	Member, Board of Directors
Maternity Center Association	48 East 92nd Street New York, NY 10128	1985 - 1986	Member, Board of Directors

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

I received financial assistance in the form of scholarships during my four years at Princeton University and my three years at Yale Law School. I graduated *summa cum laude*, Phi Beta Kappa, from Princeton. Princeton awarded me, as a graduating student co-winner, the M. Taylor Senior Pyne Prize, for scholastic excellence and service to the University. My senior thesis work received an honorable mention from the University's History Department.

While at law school, I served as an Editor of the Yale Law Journal and Managing Editor of the Yale Studies in World Public Order. I was also a semi-finalist in the Barrister's Union competition, a mock trial presentation.

In reverse chronological order, I have received the following awards:

Secretary of State of Puerto Rico

July 4, 1996

Award as Distinguished Woman in the Field of Jurisprudence

Latino American Law Student Association

of Hofstra University School of Law

March 15, 1996

**Award in Recognition of Outstanding Achievement
and Dedication to the Latino Community**

District Attorney - New York County

January 17, 1995

**Award for Outstanding and Dedicated Service
to the People of New York County from 8-13-79 to 3-16-84**

National Puerto Rican Coalition, Inc.

October 20, 1994

Lifetime Achievement Award

National Conference of Puerto Rican Woman

New York City Chapter

March 24, 1994

**Certificate of Excellence in Grateful Recognition of
Outstanding Achievements and Contributions to the Community**

Cardinal Spellman High School

Honors Night 1993

Excellence with a Heart Medal

Hispanic National Bar Association

Law Student Division

September 25, 1993

Lifetime Achievement Award

**Hispanic National Bar Association
September 24, 1993
Award for Commitment to the Preservation of Civil
and Constitutional Rights for all Americans**

**Bronx Community College
of the City University of New York
Paralegal Studies
June 17, 1993
Human Rights Award for Service to Humanity**

**John Jay College of Criminal Justice
May 27, 1993
Claude E. Hawley Medal for Scholarship and Service**

**The Puerto Rican Bar Association, Inc.
1993
Emilio Nunez Award for Judicial Service**

9. Bar Association: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

**Member, Budget Committee of the Southern District of New York
("S.D.N.Y."), 1996 to present.**

Member, Pro Se Committee of the S.D.N.Y., 1996 to present.

Member, Puerto Rican Bar Association, 1994 to present.

**Honorary Member, Public Service Committee of the Federal Bar Council,
1994 to the present.**

**Member, Second Circuit Task Force on Gender, Racial, & Ethnic Fairness,
1993 to present (Preliminary Draft Report Attached).**

**Member, Committee on Rules of Practice and Procedure of the S.D.N.Y.,
1993 to present.**

Member, Grievance Committee of the S.D.N.Y, 1992 to present.

Member, Hispanic National Bar Association, 1992 to present.

Member, American Bar Association, 1980 to present.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies.

None.

Please list all other organizations to which you belong.

None.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapsed membership. Give the same information for administrative bodies which require special admission to practice.

United States District Court, Eastern District of New York -- March 30, 1984.

United States District Court, Southern District of New York -- March 27, 1984.

New York -- First Department -- April 7, 1980.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Note, Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights, 88 Yale L.J. 825 (1979) (copy attached).

Sonia Sotomayor & Nicole A. Gordon, Returning Majesty To The Law and Politics: A Modern Approach, 30 Suffolk U.L. Rev. 35 (1996) (copy attached).

The speeches I have given, in reverse chronological order, are as follows:

Sonia Sotomayor, *The Genesis and Need of an Ethnic Identity*, Keynote Speech at Princeton University's Latino Heritage Month Celebration (Nov. 7, 1996).

Sonia Sotomayor, *El Orgullo y La Responsabilidad de Ser Latino y Latina*, Keynote Speech for the National Board of Governor's Reception of the Hispanic National Bar Association held at the Association of the Bar of the City of New York (May 17, 1996).

Sonia Sotomayor, *El Orgullo y La Responsabilidad de Ser Latino y Latina*, Speech at the Third Annual Awards Banquet and Dinner Dance for the Latino and Latina American Law Students Association of Hofstra University School of Law (Mar. 15, 1996).

Sonia Sotomayor, Hogan-Morgenthau Award Address (Jan. 17, 1995).

Sonia Sotomayor, *A Judge's Guide to More Effective Advocacy*, Keynote Speech at the 40th National Law Review Conference (Mar. 19, 1994).

Sonia Sotomayor, *Women in the Judiciary*, Panel Presentation at the 40th National Conference of Law Reviews (Mar. 17, 1994).

Sonia Sotomayor, *Doing What's Right: Ethical Questions for Private Practitioners Who Have Done or Will Do Public Service*, Presiskel/Silverman Speech at the Yale Law School (Nov. 12, 1993).

The drafts of these speeches are attached. I am unaware of any press reports about any of my speeches. I am aware of one press report of a panel presentation of which I was member, Edward A. Adams, *Women Litigators Discuss Battling Bias in Courtroom*, N.Y. Law Journal, April 2, 1993, at 1. This press report is also attached.

13. Health: What is the present state of your health? List the date of your last physical examination.

Good. Please note, I am a juvenile diabetic (insulin dependent since age 7). My condition is permanent and subject to continuing treatment. It does not impair my work or personal life. My last physical examination was January 1997.

14. Judicial Office: State (chronologically) any judicial office you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Appointed by President George W. Bush as a United States District Court Judge for the Southern District of New York. I commenced service on October 2, 1992. The United States District Court for the Southern District of New York includes the counties of the Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester, and, concurrently with the Eastern District of New York, the waters within the Eastern District. The jurisdiction of United States District Courts is limited to those matters permitted by Article III, Section 2 of the United States Constitution.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticisms of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(1) The following, in reverse chronological order, are ten of my most significant opinions, with citations.

1. **United States v. The Spy Factory, Inc., 951 F. Supp. 450 (S.D.N.Y. 1997).**
2. **Krueger Int'l v. Nightingale, Inc., 915 F. Supp. 595 (S.D.N.Y. 1996).**
3. **United States v. Lech, 895 F. Supp. 586 (S.D.N.Y. 1995).**
4. **Refac Int'l, Ltd. v. Lotus Development Corp., 887 F. Supp. 539 (S.D.N.Y. 1995), aff'd, 81 F.3d 1576 (Fed. Cir. 1996).**
5. **Silverman v. Major League Baseball Player Relations Committee, 880 F. Supp. 246 (S.D.N.Y.), aff'd, 67 F.3d 1054 (2d Cir. 1995).**
6. **Modeste v. Local 1199, Drug, Hospital & Health Care Employees Union, 850 F. Supp. 1156 (S.D.N.Y.), aff'd, 38 F.3d 626 (1994).**
7. **United States v. Hendrickson, 26 F.3d 321 (2d Cir. 1994) (sitting by designation).**

8. Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1994).
9. Azurite Corp., Ltd. v. Amster & Co., 844 F. Supp. 929 (S.D.N.Y. 1994), aff'd, 52 F.3d 15 (2d. Cir. 1995).
10. Flamer v. City of White Plains, 841 F. Supp. 1365 (S.D.N.Y. 1993).

(2) The following, in reverse chronological order, is a short summary of and citations for all appellate opinions where my decisions were reversed or where my judgments were affirmed with significant criticisms of my substantive or procedural rulings.

1. Hellenic American Neighborhood Action Committee v. City of New York, 933 F. Supp. 286 (S.D.N.Y.), rev'd, 101 F.3d 877 (2d Cir. 1996).

I granted a preliminary injunction on behalf of a contractor which alleged that it was barred from city procurements in violation of its due process rights under the Fourteenth Amendment. The Second Circuit reversed without addressing whether the City's alleged misconduct deprived plaintiff of protected property and liberty interests. The Court reasoned that even if there was such a deprivation, there was no failure of due process because there was an adequate remedy available to the contractor under state law.

2. Aurora Maritime Co., Ltd. v. Abdullah Mohamed Fahem & Co., 890 F. Supp. 322 (S.D.N.Y. 1995), aff'd on other grounds, 85 F.3d 44 (2d Cir. 1996).

The Second Circuit affirmed my decision denying a bank's motion to vacate various Supplemental Admiralty Rule B attachments of plaintiff's bank account. I held that "because plaintiffs obtained Rule B attachments before [the bank] exercised its set-off rights . . . plaintiffs gained a limited property interest under federal law that cannot be defeated by a subsequently executed state law set-off right." Although upholding my ruling, the Second Circuit disagreed with my conclusion "that [the bank's] set-off right and appellees' Rule B attachments d[id] not conflict." Instead, the Second Circuit reached the constitutional issue and found that the dismissal was proper because federal law preempted the bank's right, under Section 151 of state law, to the funds in the disputed account.

3. European American Bank v. Benedict, 1995 WL 422089 (S.D.N.Y. 1995), vacated, 90 F.3d 50 (2d Cir. 1996).

I affirmed a Bankruptcy Court decision rescinding its prior order which had extended the time period for a creditor to file a dischargeability complaint. I reasoned that the Bankruptcy Court did not have the discretion, under the applicable statute of limitations, to extend the time for filing a complaint, and that the Bankruptcy Court was therefore correct when it reversed its initial decision to do so. Recognizing a split of authority on the issue, the Second Circuit determined that the applicable limitations period under the Federal Bankruptcy Rules is not jurisdictional, and that it is therefore subject to waiver, estoppel, and equitable tolling. The Court proceeded to enforce the Bankruptcy Court's initial decision to extend the period for filing, because the debtor had waived its right to object to the extension by failing to raise that objection prior to the expiration of the statutory deadline.

4. Bernard v. Las Americas Communications, Inc., (no written opinion), aff'd in part, vacated in part, 84 F.3d 103 (2d Cir. 1996).

Pursuant to a jury verdict, I entered judgment in favor of plaintiff, an attorney, seeking legal fees in connection with his representation of defendant in proceedings before the Federal Communications Commission. Applying Washington, D.C. law, the Second Circuit approved of my jury instructions on the issues of proximate causation and damages, but found error with respect to my instruction on materiality. Specifically, I had instructed that a material breach "defeats the purpose of [an] entire transaction"; the Second Circuit held that D.C. law requires only that defendant prove that he received "something substantially less or different from that for which he bargained." On remand, a jury again found for plaintiff, and judgment was entered accordingly.

5. Bolt Electric, Inc. v. City of New York, 1994 WL 97048 (S.D.N.Y. 1994), rev'd, 53 F.3d 465 (2d Cir. 1995).

I granted a motion to dismiss on behalf of the City of New York (the "City") in a breach of contract action brought by plaintiff Bolt Electric, Inc. ("Bolt"). I found that because the City had undertaken to pay Bolt for general contracting services pursuant to a letter which was not filed and endorsed by the City's Comptroller, as required under New York's Administrative Code, the contract was unenforceable. The Second Circuit reversed, reasoning that compliance with the endorsement provision of the Administrative Code was not a mandatory precondition to the formation of a valid contract. In the alternative, the Court reasoned that, even if the contract was executed without proper authority, it was enforceable because the City had funds available for performance.

6. Runquist v. Delta Capital Management, L.P., 1994 WL 62965 (S.D.N.Y.), rev'd, 48 F.3d 1212 (2d Cir. 1994).

The Second Circuit reversed a decision in which I adopted a Magistrate Judge's recommendation that plaintiff's claims of securities fraud be dismissed. Before the Magistrate Judge, plaintiff failed to file a timely opposition to defendant's motion for summary judgment, and subsequently filed an affidavit which the Magistrate Judge found insufficient to raise a triable issue of fact as to the element of reliance in plaintiff's fraud claim. The Second Circuit found, however, that the affidavit was sufficient to raise an issue of material fact, and that it was error for me to have dismissed plaintiff's remaining claims on the basis of his attorney's repeated noncompliance with applicable filing procedures and deadlines.

(3) The following, in reverse chronological order, are citations for my significant opinions on federal or state constitutional issues, together with citations to appellate court rulings on such opinions.

1. Estate of Joseph Re v. Kornstein, Veisz & Wexler, 958 F. Supp. 907 (S.D.N.Y. 1997).

2. United States v. The Spy Factory et al., 951 F. Supp. 450 (S.D.N.Y. 1997).
3. National Helicopter Corp. of America v. City of New York, 952 F. Supp. 1011 (S.D.N.Y. 1997).
4. United States v. Ni Fa Yi, 951 F. Supp. 42 (S.D.N.Y. 1997).
5. Gelb v. Board of Elections, 950 F. Supp. 82 (S.D.N.Y. 1996).
6. United States of America, Louis Menchaca, 96 Civ. 5305, decision unpublished, read into the record on August 26, 1996.
7. Hellenic American Neighborhood Action Committee v. City of New York, 933 F. Supp. 286 (S.D.N.Y. 1996), rev'd, 101 F.3d 877 (2d Cir. 1996).
8. In re St. Johnsbury Trucking Co., Inc., 191 B.R. 22 (S.D.N.Y. 1996); 199 B.R. 84 (S.D.N.Y. 1996).
9. United States v. Jimenez, 921 F. Supp. 1054 (S.D.N.Y. 1995).
10. Lee v. Coughlin, 902 F. Supp. 424 (S.D.N.Y. 1995), reconsideration granted, 914 F. Supp. 1004 (S.D.N.Y. 1996).
11. Ortiz v. United States, 1995 WL 130516 (S.D.N.Y. 1995), aff'd, 104 F.3d 349 (2d Cir. 1996).
12. Senape v. Constantino, 1995 WL 29502 (S.D.N.Y. 1995), aff'd, 99 F.3d 401 (2d Cir. 1995).
13. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, 862 F. Supp. 1050 (S.D.N.Y. 1994), aff'd, 54 F.3d 765 (2d Cir.), cert. denied, 116 S. Ct. 380 (1995).
14. Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1994) (cited with approval in Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996)).

15. Flamer v. City of White Plains, 841 F. Supp. 1365 (S.D.N.Y. 1993).

16. United States v. Castellanos, 820 F. Supp. 80 (S.D.N.Y. 1993).

Copies of opinions not officially published are attached.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

1988 to 1992 -- Board of Directors, New York City Campaign Finance Board, appointed by the Mayor.

1987 to 1992 -- Board of Directors, State of New York Mortgage Agency, appointed by the Governor.

1979 to 1984 -- Assistant District Attorney, New York County, appointed by the District Attorney.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

No.

2. whether you practiced alone, and if so, the addresses and dates;

Yes, with Sotomayor & Associates, 10 3rd Street, Brooklyn, New York, 11231, from 1983 to 1986, but this work was more in the nature of a consultant to family and friends in their real estate, business, and estate planning decisions. If their circumstances required formal legal representation, I referred the matter to my firm, Pavia & Harcourt, or to others with appropriate expertise.

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3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

<u>Dates of Association</u>	<u>Organization</u>	<u>Address</u>	<u>Position</u>
4/84 to 10/92	Pavia & Harcourt	600 Madison Ave. New York, NY 10022	Partner (1/88 to 10/92) Associate
8/79 to 3/84	New York County District Attorney's Office	1 Hogan Place New York, NY 10013	Assistant District Attorney

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

See I(b)(2) below.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

From April 1984 as an associate, and from January 1988 until October 1992 as a partner, I was a general civil litigator involved in all facets of commercial work including, but not limited to, real estate, employment, banking, contract, distribution and agency law. Moreover, my practice had significant concentration in intellectual property law involving trademark, copyright and unfair competition issues. I also worked in automobile franchise law, and export commodity trading law under the North American Grain Association Contract. I conducted over fifteen arbitration hearings involving the banking, fashion, grain, and tire distribution industries. My typical clients were significant European companies doing business in the United States.

From August 1979 to March 1984, as a prosecutor in New York County, my cases typically involved "street crimes," i.e., murders, robberies, etc. I also investigated child pornography, child abuse, police misconduct, and fraud matters. I further prepared the responsive papers for five criminal appeals, two of which I argued and all of which resulted in affirmances of the convictions.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared daily in court as a prosecutor and I appeared regularly in court as a civil commercial litigator in New York with a largely federal practice.

2. What percentage of these appearances was in:

	<u>In private practice</u>	<u>As a prosecutor</u>
1. federal courts	approx. 70%	0%
2. state courts of record	approx. 20%	100%
3. other courts	approx. 10%	0%

3. What percentage of your litigation was:

	<u>In private practice</u>	<u>As a prosecutor</u>
(a) civil	99%	0%
(b) criminal	1%	100%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have tried over 23 cases to verdict. In two of the cases, I was chief counsel and in another, co-counsel. In all other cases, I was sole counsel.

5. What percentage of these trials was:

1. Jury -- 90%
2. Non-jury -- 10%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

I list the ten litigated matters in reverse chronological order.

1.

Case Name: Fratelli Lozza (USA) Inc. v. Lozza (USA) & Lozza SpA

Court: United States District Court, Southern District of New York

Index No.: 90 Civ. 4170

Judge: Then District Court Judge Fred I. Parker (sitting by designation)
Federal Building
11 Elmwood Avenue
P.O. Box 392
Burlington, Vermont 05402
(802) 951-6401

Date of Trial: March 16, 1992

Co-Counsel: Allison C. Collard, Esq.
Attorney for co-defendant Lozza (USA)
1077 Northern Blvd.
Roslyn, New York 11576
(516) 365-9802

Adversaries: Charles E. Temko
Temko & Temko
19 West 44th Street
New York, New York 10036
(212) 840-2178

Case Description: I represented the defendant Lozza SpA in this trademark infringement, trademark abandonment, unfair competition, breach of contract, and rescission action. The plaintiff, a corporation owned and operated by a former shareholder of the defendant corporation, claimed the defendant had breached an agreement with the plaintiff for the trademark use of "Lozza" in the United States, had abandoned use of its marks in the United States, and had infringed certain of the plaintiff's trademarks. I conducted the trial for the lead defendant, and secured a dismissal of all of the plaintiff's claims. The Court also issued an injunction against the plaintiff's use of the defendants' marks, and of false and misleading terms in its advertising. Findings of Fact, Conclusions of Law and Order reported at 789 F. Supp. 625 (S.D.N.Y. 1992).

2.

Administrative

Case Name: Ferrari of Sacramento, Inc. v. Ferrari North America

Agency: State of California New Motor Vehicle Board
(Appeared *pro hac vice*)

Protest No.: PR-973-88

**Administrative
Law Judges:**

Marilyn Wong
c/o New Motor Vehicle Board
1507 21st Street, Room 330
Sacramento, California 95814
(916) 445-1888

Robert S. Kendell (retired)
Contact: Michael Sabian
c/o New Motor Vehicle Board
1507 21st Street, Room 330
Sacramento, California 95814
(916) 445-1888

Dates of Hearing: 10/16/90, 10/17/90, 10/31/90, 11/1/90, and 11/2/90

Co-Counsel: Nicholas Browning, III, Esq.
Herzfeld & Rubin
1925 Century Park East, Suite 600
Los Angeles, California 90067-2783
(310) 553-0451

Adversaries: Jay-Allen Eisen
Jay-Allen Eisen Law Corporation
9A0 9th Street, Suite 1400
Sacramento, California 95814
(916) 444-6171

Donald M. Licker, Esq.
2443 Fair Oaks Boulevard
Room 340
Sacramento, California 95825
(916) 924-6600

Case Description: In or about 1988, Ferrari North America ("Ferrari") terminated the plaintiff dealer. Thereafter, the dealer filed a timely protest of the termination with the California New Motor Vehicle Board (the "Board"). At a prehearing settlement conference, Ferrari and the dealer entered into a Stipulated Settlement that permitted Ferrari to terminate the dealer, without a hearing, if the dealer failed timely to cure specified obligations under its franchise agreement with Ferrari. When the dealer breached the terms of the Stipulated Settlement, Ferrari terminated the dealer, with the Board's approval and without a hearing. The dealer then secured a writ of mandate from a California court directing the Board to hold an administrative hearing.

I had primary responsibility for representing Ferrari at the administrative hearing. The Board determined that 1) the dealer had violated the terms of

the Stipulated Settlement, 2) the violations constituted good cause for Ferrari's termination of the dealer under California's Automobile Franchise Law, and 3) the plaintiff's loss of its franchise was not an illegal forfeiture under California law.

While the hearing before the Board proceeded after issuance of the mandate, Ferrari also appealed the judgment on the writ, which judgment was reversed on appeal in an unpublished opinion. The California Court of Appeals, Third Appellate District, determined that enforcing the Stipulated Settlement and terminating the dealer, without a hearing, did not violate due process.

Although not listed as counsel for appellant's briefs, I contributed significantly to the drafting of the briefs. The appellate case was captioned Ferrari of Sacramento, Inc., Respondent v. New Motor Vehicle Board and Sam Jennings as Secretary, Appellants, and Ferrari North America, Real Party in Interest and Appellant; No. C008840 in the Court of Appeals of the State of California in and for the 3rd Appellate District; Sacramento Superior Court, Case No. 360734.

3.

Case Name: In re: Van Ness Auto Plaza, Inc., a California Corporation, d/b/a Auto Plaza Lincoln Mercury, Auto Plaza Porsche and Auto Plaza Ferrari, Debtors.

Court: United States Bankruptcy Court, Northern District of California
(Appeared pro hac vice)

Case No.: 3-89-03450-TC

Judge: Hon. Thomas E. Carlson
U.S. Bankruptcy Court Judge
235 Pine Street
San Francisco, California 94104
(415) 705-3200

Dates of Hearing: 1/22/90 and 3/19/90

Co-Counsel: Nicholas Browning, III, Esq.
Herzfeld & Rubin
1925 Century Park East, Suite 600
Los Angeles, California 90067-2783
(213) 553-0451

Adversaries: Henry Cohen, Esq.
Cohen and Jacobson
Attorneys for Debtor
577 Airport Blvd., Suite 230
Burlington, California 90067-2783
(415) 342-6601

William Kelly, Esq. (retired)
Address Unknown
Home Tel. No. (415) 641-1544

Case Description: I represented Ferrari North America ("Ferrari"), a franchisor of a bankrupt dealer, in hearings related to Ferrari's opposition to the rejection of customer contracts, assumption of the dealer's franchise agreement, and confirmation of the proposed sale of the dealer's franchise. At the time, Ferrari was introducing a limited production and valuable new car model to the marketplace. A rejection by the dealer of contracts for that model would have frustrated the expectations of customers and subjected Ferrari to potential multiple claims. After a number of hearings, the Bankruptcy Court ruled that the dealer could not reject the customer contracts, although financially burdensome, and then assume the franchise agreement with Ferrari. The case also involved alleged claims by the dealer and customers that Ferrari had violated the California automobile franchise, antitrust, and securities laws. The case settled with the sale of the dealership and resolution of claims among the bankrupt dealer, the new franchise buyer, Ferrari, and customers.

4.

Case Name: Fendi S.a.s. di Paola Fendi e Sorelle v. Burlington Coat Factory Warehouse Corp., et al.

Case No.: 86 Civ. 0671

Court: United States District Court, Southern District of New York

Sotomayor Senate Questionnaire

Judge: Hon. Leonard B. Sand
U.S. District Judge
U.S. Courthouse
500 Pearl Street
New York, New York 10007
(212) 805-0244

Co-Counsel: Frances B. Bernstein, Esq.
(Deceased)

Adversaries: Stacy J. Haigney, Esq.
Herbert S. Kasner, Esq.
Attorneys for Burlington Coat Factory Warehouse and
Monroe G. Milstein
Burlington Coat Factory Warehouse, Corp.
263 West 38th Street
New York, New York 10018
(212) 221-0010

Dennis C. Kreiger, Esq.
Esanu, Katsky, Korins & Sieger
Attorneys for Firestone Mills, Inc. and Leo Freund
605 Third Avenue, 16th Floor
New York, New York 10158
(212) 953-6000

Dates of Trial: 5/18/87 to 5/19/87

Case Description: Combined Case Description in 5 below.

5.

Case Name: Fendi S.a.s. di Paola Fendi e Sorelle v. Cosmetic World, Ltd., Loradan Imports, Inc., Linea Prima, Inc. a/k/a Lina Garbo Shoes, Daniel Bensoul, Michael Bensoul a/k/a Nathan Bendel, Paolo Vincelli and Mario Vincelli

Case No.: 85 Civ. 9666

Court: United States District Court, Southern District of New York

Judges: Hon. Leonard B. Sand
U.S. District Judge
U.S. Courthouse
500 Pearl Street
New York, New York 10007
(212) 805-0244

Hon. Joel J. Tyler
Magistrate Judge, U.S. District Court
Home address:
2 Primrose Avenue
Yonkers, New York 10710
Telephone unpublished

Co-Counsel: Frances B. Bernstein
(Deceased)

Adversary: Stanley Yaker, Esq.
Attorney for Paolo Vincelli and Mario Vincelli
Former Address:
114 East 32nd Street
Suite 1104
New York, New York 10016
(212) 983-7241
Telephone not in service. I have been unable to locate Mr. Yaker.

No attorneys appeared for the remaining defendants, who settled pro se.

**Date of Inquest
Hearing:**

1/6/88

Case Descriptions: From 1985, my former firm represented Fendi S.a.s. di Paola Fendi e Sorelle ("Fendi") in Fendi's national anticounterfeiting work. Frances B. Bernstein, a partner at Pavia & Harcourt (now deceased), and I created Fendi's anticounterfeiting program. From 1988 until the time I left the firm for the bench in 1992, I was the partner in charge of that program. I handled almost all discovery work and substantive court appearances in cases involving Fendi. This work implicated a broad range of trademark issues including, but not limited to, trademark and trade dress infringement, false designation of origin, and unfair competition claims.

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Approximately once every two months from 1989 to 1992, I, for Fendi, applied for provisional injunctive relief in district court to seize counterfeit goods from street vendors or retail stores. These applications required extensive submission of evidence documenting Fendi's trademark rights, its protection of its marks, the nature of the investigation against the vendors, and Fendi's right to ex parte injunctive relief. Generally, the street vendors defaulted but others appeared and settled pro se. Two of these cases filed in the Southern District of New York were captioned Jane Doe v. John Doe and Various ABC Companies, 89 Civ. 3122, the Hon. Thomas P. Griesa presiding (Tel. No. (212) 805-0210), and Fendi S.a.s. Di Paola Fendi e Sorelle v. Dapper Dan's Boutique, 89 Civ. 0477, the Hon. Miriam G. Cedarbaum presiding (Tel. No. (212) 805-0198).

The preceding two cases (A4 and A5) involved a trial and a damages hearing on Fendi's trademark claims against the defendants. In the first, the Burlington case, Fendi alleged that defendants knowingly trafficked in counterfeit goods and Fendi sought triple profits from the defendants and punitive damages. After extensive discovery, submission of a pre-trial order and memorandum, and Fendi's presentation of its expert at trial, the case settled. I was sole counsel present at trial. In the Cosmetic World case, the Court granted Fendi's summary judgment motion on liability and referred the matter to a magistrate judge for an inquest on damages. See 642 F. Supp. 1143 (S.D.N.Y. 1986). I conducted the contested hearing on damages before the magistrate judge who recommended an award in Fendi's favor.

6.

Case Name: Republic of the Philippines v. New York Land Co., et al. (the "Philippines Case") and Security Pacific Mortgage and Real Estate Service Inc. v. Canadian Land Company, et al. (the "Security Pacific Case").

Case Nos.: 90-7322 and 90-7398

Court: United States Court of Appeals for the Second Circuit

Panel: Hon. Thomas J. Meskill
U.S. Circuit Judge
114 W. Main Street, Suite 204
New Britain, Connecticut 06051
(203) 224-2617

Hon. Lawrence J. Pierce
U.S. Circuit Judge
c/o U.S. Courthouse
40 Foley Square
New York, New York 10007
(212) 791-0951

Hon. George C. Pratt
U.S. Circuit Judge
U.S. Courthouse
Uniondale Avenue
Hempstead Turnpike
Uniondale, New York 11553
(516) 485-6510

Co-Counsel:

David A. Botwinik, Esq.
Pavia & Harcourt
600 Madison Avenue
New York, New York 10022
(212) 980-3500

David Glasser, Esq.
Levin & Glasser, P.C.
675 Third Avenue
New York, New York 10471
(212) 867-3636

Roy L. Reardon, Esq. (455-2840)
David E. Massengill, Esq. (455-3555)
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017

Adversaries:

Jeffrey J. Greenbaum, Esq.
James M. Hirschhorn, Esq.
Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross
Attorneys for the Republic of the Philippines
Legal Center
1 Riverfront Plaza
Newark, New Jersey 07102
(201) 643-7000

Date of Argument: 6/15/90 (Argued by Roy L. Reardon, Esq. of Simpson, Thacher & Bartlett)

AND

District Court

Case Name: **Republic of the Philippines v. New York Land Co., et al.** (the "Philippines Case") and **Security Pacific Mortgage and Real Estate Service Inc. v. Canadian Land Company, et al.** (the "Security Pacific Case").

Case Nos.: The Philippines Case: 86 Civ. 2294
The Security Pacific Case: 87 Civ. 3629

Court: United States District Court, Southern District of New York

Judge: Hon. Pierre N. Leval
U.S. Circuit Judge (Then District Court Judge)
U.S. Circuit Judge
U.S. Courthouse
40 Foley Square
New York, New York 10007
(212) 857-2319

Co-Counsel: David A. Botwinik, Esq.
Pavia & Harcourt
600 Madison Avenue
New York, New York 10022
(212) 980-3500

David Glasser, Esq.
Levin & Glasser, P.C.
675 Third Avenue
New York, New York 10471
(212) 867-3636

Participating

Adversaries

Opposing Motion: Jeffrey J. Greenbaum, Esq.
James M. Hirschhorn, Esq.
Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross
Attorneys for the Republic of the Philippines
Legal Center
1 Riverfront Plaza
Newark, New Jersey 07102
(201) 643-7000

Michael Stanton, Esq.
Weil, Gotshal & Manges
Attorneys for Security Pacific
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Date of Argument: 2/12/90

Case Description: My former firm, Pavia and Harcourt, represented Bulgari Corporation of America ("Bulgari"), an international retailer of fine jewelry, who was a tenant in the Crown Building at 730 Fifth Avenue, New York, New York. The Crown Building was the subject of a foreclosure sale in the Security Pacific Action, and its beneficial ownership was in dispute in the Philippines Action. Bulgari was not a party to these actions. The district court denied Bulgari's request, by way of Order to Show Cause, to approve a rental amount it had reached with the manager of the Crown Building. I primarily drafted the papers presented to the district court and argued the motion. Bulgari's motion attempted to demonstrate that no competent evidence existed to dispute Bulgari's proof that the rental amount agreed upon was at or above fair market value and benefited the Crown Building and its claimants. Bulgari appealed the district court's denial of its approval of the rent agreement on the grounds that the denial was effectively an injunction against Bulgari's exercise of its contractual lease rights to have its rent fixed by agreement during the term of the lease, and that the district court improperly granted the injunction without a hearing. I did not argue the appeal but participated extensively in the drafting of appellant's brief and reply. The district court's Order was affirmed on appeal, without a published opinion. 909 F.2d 1473 (2d Cir. 1990).

7.

Case Name: Miserocchi & C., SpA v. Alfred C. Toepfer International, G.m.b.H.

Case No.: 85-7734

Court: United States Court of Appeals for the Second Circuit

Panel: Hon. J. Edward Lumbard
Senior Judge
U.S. Circuit Judge
U.S. Courthouse
Foley Square
New York, New York 10007
(212) 857-2300

Hon. James L. Oakes
Then-Chief Judge
U.S. Circuit Judge
U.S. Courthouse
40 Foley Square
New York, New York 10007
(212) 857-2400

Hon. George C. Pratt
U.S. Circuit Judge
U.S. Courthouse
Uniondale Avenue
Hempstead Turnpike
Uniondale, New York 11553
(516) 485-6510

Adversary: Stephen P. Sheehan
Wistow & Barylick
61 Weybosset Street
Providence, Rhode Island 02903
(401) 831-2700

Date of Argument: 9/17/84

AND

District Court

Case Name: Miserochi & C., SpA v. Alfred C. Toepfer International, G.m.b.H.

Case No.: 84 Civ. 6112

Court: United States District Court, Southern District of New York

Judge: Hon. Kevin Thomas Duffy
U.S. District Judge
U.S. Courthouse
40 Foley Square
New York, New York 10007
(212) 805-6125

Co-Counsel: David A. Botwinik, Esq.
Pavia & Harcourt
600 Madison Avenue
New York, New York 10022
(212) 980-3500

Adversary: Stephen P. Sheehan
Wistow & Barylick
61 Weybosset Street
Providence, Rhode Island 02903
(401) 831-2700

Date of Argument: 9/5/84 (argued by David Botwinik of Pavia & Harcourt)

Case Description: This action involved the bankruptcy of an Italian corporation, Miserochi & C., SpA ("Miserochi"), with affiliates in London and elsewhere. The London affiliate of Miserochi breached a grain commodity trading contract with my then client, Alfred C. Toepfer International, G.m.b.H. ("Toepfer"). Toepfer demanded arbitration of the dispute against both Miserochi and its London affiliate under the terms of the grain commodity trading agreement between the parties and a guarantee signed by Miserochi. Shortly before the arbitration hearing was to commence, Miserochi moved to stay the arbitration against it, arguing that it was not a party to the arbitration agreement. Although my partner, David A. Botwinik, argued the motion before the district court, I primarily drafted Toepfer's responsive papers to the motion to stay arbitration and the cross-motion to compel arbitration. Toepfer argued that Miserochi was

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bound to arbitrate both as an alter ego of its London affiliate and under the terms of its guarantee. After the district court ruled in Toepfer's favor, Miserocchi filed a notice of appeal and sought an expedited stay of the district court's Order denying the stay of arbitration and compelling arbitration. I argued the motion to stay. At the conclusion of the argument on the motion, the Second Circuit not only denied the motion for a stay but also dismissed the appeal. I participated extensively as co-counsel in the arbitration that followed and subsequently appeared in the post-confirmation proceedings resulting from the arbitration award rendered in favor of Toepfer. The matter settled before the hearing on appeal of the confirmation order.

8.

Case Name: **The People of the State of New York v. Clemente D'Alessio and Scott Hyman**

Indictment No.: 4581/82

Judge: Hon. Thomas B. Galligan (retired)
Then-Acting Justice, Supreme Court,
c/o Administrative Judge's Office
Juanita Newton
111 Centre Street
New York, New York 10013
(212) 374-4972

Associate Counsel: Karen Greve Milton
Director of Education Training Program
Association of the Bar of the City of New York
42 West 44th Street
New York, New York 10036-6690
(212) 382-6619

Adversaries: Steven Kimelman, P.C.
Attorney for Scott Hyman
757 Third Avenue
New York, New York 10017
(212) 421-5300

James Bernard, Esq.
Attorney for Clemente D'Alessio
150 Broadway
New York, New York 10038
(212) 233-0260

Dates of Trial: 2/2/83 to 3/2/83

Case Description: I was lead counsel in this action in which defendants were charged with selling videotapes depicting children engaged in pornographic activities. Defendant Scott Hyman dealt directly with the undercover agent and attempted to raise numerous defenses at trial based upon his alleged drug addiction. The proof against defendant Clemente D'Alessio was circumstantial and he raised a misidentification defense at trial. This action was the first child pornography case prosecuted in New York State after the U.S. Supreme Court upheld the constitutionality of New York's laws in New York v. Ferber, 458 U.S. 747 (1982). The defendants filed a plethora of motions before and during trial. The defendants' request for severance was denied, as were, after a hearing, the defendants' motions for the suppression of statements, evidence, and identification. Other issues addressed at trial included whether the trial court should or could, upon defendants' request, require the government to stipulate to the pornographic nature of the evidence, whether defendant Hyman could present expert testimony on the effects of drug addiction on mens rea, and whether defendant Hyman was entitled to jury charges on diminished capacity or intoxication. The jury convicted defendants after trial. The defendants received sentences, respectively, of 3½ to 7 years and 2 to 6 years. The convictions were affirmed on appeal. See People v. D'Alessio, 62 N.Y.2d 619, 476 N.Y.S.2d 1031 (Ct. App. 1984); People v. Hyman, 62 N.Y.2d 620, 476 N.Y.S.2d 1033 (Ct. App. 1984).

9.

Case Name: The People of the State of New York v. Richard Maddicks

Indictment No.: 886/82

Court: Supreme Court of the State of New York, County of New York

Judge: Hon. James B. Leff (retired)
Justice, Supreme Court
c/o Administrative Judge's Office
Juanita Newton
100 Centre Street
New York, New York 10013
(212) 374-4972

Lead Counsel: Hugh H. Mo, Esq.
Law Offices of Hugh H. Mo
750 Lexington Avenue
15th Floor
New York, New York 10022
(212) 750-8000

Adversary: Peter A. Furst, Esq.
100 Pine Street
Suite 2750
San Francisco, California 94111
(415) 433-2626

Dates of Trial: Almost all of January 1983

Case Description: The defendant was dubbed the "Tarzan Murderer" by the local Harlem press because he committed burglaries by acrobatically jumping or climbing from roof tops or between buildings and entering otherwise inaccessible apartments. If the defendant found a person in the apartment, he shot them. I was co-counsel on the case, and prepared and argued the motion, before Justice Harold Rothwax, that resulted in the court consolidating the trial of four murders and seven attempted murders relating to eleven of the defendant's burglaries. The consolidation was unusual in that up to that point, most New York courts had limited consolidation to crimes in which an identical modus operandi had been used. We argued successfully that the commonality of elements in the crimes, although with some variations in modus operandi, warranted consolidation. I participated extensively in preparing and presenting expert and civilian witnesses at trial. The defendant was convicted after trial, and sentenced to 67½ years to life. The conviction was affirmed on appeal. See People v. Maddicks, 70 N.Y.2d 752, 520 N.Y.S.2d 1028 (Ct. App. 1987).

10.

Case Name: The People of the State of New York v. Manny Morales a.k.a. Joey Hernandez, Joseph Pacheco, and Eduardo Pacheco

Indictment No: 4399/82

Judge: Hon. Alfred H. Kleiman (retired)
Then-Acting Justice, Supreme Court
c/o Administrative Judge's Office
Juanita Newton
100 Centre Street
New York, New York 10013
(212) 374-4972

Adversaries: Ira I. Van Leer (deceased)
(Associates present at portions of the trial: Valerie Van Leer-Greenberg
and Howard Greenberg)
Van Leer and Greenberg
Attorneys for defendant Manny Morales a.k.a. Joey Hernandez
132 Nassau Street, Suite 523
New York, New York 10038
(212) 962-1596

Lawrence Rampulla, Esq.
Attorney for defendant Edwardo Pacheco
2040 Victory Blvd.
Staten Island, New York 10314
(718) 761-3333

Stephen Goldenberg, Esq.
Attorney for defendant Joseph Pacheco
277 Broadway, Suite 1400
New York, New York 10007
(212) 346-0600

Dates of Trial: March 25, 1983 to May 12, 1983

Case Description: This multiple-defendant case involved a Manhattan housing project shooting between rival family groups. I was sole counsel in this action on behalf of the government. Prior to trial, I conducted various hearings opposing defense motions to suppress statements and identifications. This

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lengthy trial involved witnesses with significant credibility issues. The jury convicted one of the three defendants who was sentenced to 3 to 6 years for Criminal Possession of a Weapon in the Third Degree. The conviction was affirmed on appeal. See People v. Pacheco, 70 N.Y.2d 802, 522 N.Y.S.2d 120 (Ct. App. 1987).

Additional Question under Item 18: In addition, if the majority of cases you list in response to this question are older than five years, provide the name, address and phone number for 10-12 members of the legal community who have had recent contact with you, even if the contact was only an appearance before you as a judge.

I have interpreted this question to be seeking a list of individuals who are familiar with my judicial work because they are knowledgeable about some of my cases or opinions, or because they have appeared before me. If you seek only individuals who have tried cases or made other substantive appearances before me, please advise me. I list these individuals in alphabetical order.

1. Martin J. Auerbach, Esq.
Dormand, Mensch, Mandelstan, Schaeffer
747 Third Avenue
New York, New York 10017
(212) 759-3300
2. The Hon. Miriam G. Cedarbaum
United States District Court Judge
Southern District of New York
500 Pearl Street, Room 1330
New York, New York 10007
(212) 805-0198
3. Justin N. Feldman, Esq.
Kromish, Lieb, Weiner & Hellman
1114 Avenue of the Americas, 47th Floor
New York, New York 10036-7798
(212) 479-6210

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4. Leonard F. Joy, Esq.
Attorney-in-Charge
Legal Aid Society, Federal Defender Division
52 Duane Street
New York, New York 10007
(212) 285-2830
5. John Kidd, Esq.
Rogers & Wells
200 Park Avenue
New York, New York 10166-0153
(212) 878-8000
6. The Hon. John G. Koeltl
United States District Court Judge
Southern District of New York
500 Pearl Street, Room 1030
New York, New York 10007
(212) 805-0222
7. Sara Moss, Esq.
Vice-President and General Counsel
Pitney Bowes
1 Elmcroft Road
Stamford, Connecticut 06926
(203) 351-7924
8. John S. Siffert, Esq.
Lankler, Siffert & Wohl
500 Fifth Avenue, 33rd Floor
New York, New York 10110
(212) 921-8399
9. Gerard Walperin, Esq.
Rosenman & Colin
575 Madison Avenue
New York, New York 10022
(212) 940-7100

10. Mary Jo White, Esq.
United States Attorney for the Southern District of New York
U.S. Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
(212) 791-0056

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

In the last five years as a judge, my legal activities have spanned the gamut of federal jurisdiction. As part of my daily work, I have addressed many of the complex legal questions of our time in fields as diverse as the First and Fourteenth Amendments to the United States Constitution, antitrust, securities, habeas corpus, immigration, tax, intellectual property, ERISA, employment discrimination, and many other areas of law. The numerous opinions I have cited in Question Number 15 describe in detail many of these significant cases.

A great part of my litigation work while in private practice involved pre-trial and discovery proceedings for cases which were typically settled before trial. I conducted a number of preliminary injunction hearings in trademark and copyright cases, and post-motion hearings before magistrate judges on a variety of issues. My work also involved rendering advise to clients on a wide variety of legal issues, including, but not limited to, product liability, warranty, antitrust, securities, environmental, banking, real estate, patents, employment, partnership, joint venture and shareholder laws; customs, automobile and joint tire regulations; and franchising and licensing matters. I, moreover, conducted over fifteen arbitration hearings involving, predominantly, export grain commodity trading on behalf of foreign buyers but also hearings involving banking, partnership, tire, and fashion industry disputes.

Finally, in addition to my work in establishing a national anti-counterfeiting program for Fendi S.a.s. Paola Fendi e Sorelle, I participated, on behalf of Fendi, in establishing a Task Force of prominent trademark owners to change New York State's anti-counterfeiting criminal statutes. I also supervised and participated in the national dealers and customer warranty relations programs for Ferrari North America, a division of Fiat Auto USA, Inc.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

Because my former firm, Pavia & Harcourt, advises me on personal matters, I will continue to recuse myself from any matter in which my form firm or its clients, or a former client with whom I worked are involved. Similarly, I will continue to recuse myself from hearing any matter involving an issue in which I participated while a member of the Board of Directors of the non-profit organizations described in Part III, Question 1. I will further recuse myself from any matter involving a client or associate of my husband-to-be. In all matters, I will follow the dictates of 28 U.S.C. § 455 and the Code of Judicial Conduct.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

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	1996	1997
Salary - U.S.D.J.	\$133,600	\$66,800 to 5/31/97
Interest - Citibank Savings Acct.	\$ 912	\$ 373 to 6/1/97
Rent from Kings Co. Coop [\$1100 a month]	\$ 13,200	\$ 6600 to 6/1/97

My Financial Disclosure Report, A10, is attached.

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

My Net Worth Statement and Schedule is attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Before my appointment as a judge, all of the non-profit organizations with which I had been affiliated served the disadvantaged either directly or through projects I had participated in developing. The Puerto Rican Legal Defense and Education Fund, for example, promotes, through legal and educational activities, the civil and human rights of disadvantaged Hispanics. I had served, at various times, as the First Vice President of the Board of Directors of the Fund and as Chairperson of its Litigation and Education Committees.

The State of New York Mortgage Agency ("SONYMA") structures affordable housing programs for residents of the State of New York. During my service on its Board of Directors, SONYMA, among many other projects, implemented special mortgage programs for low-income families to purchase homes.

I was also a member, in 1988, of the Selection Committee for the Stanley D. Heckman Educational Trust which granted college scholarships to minorities and first generation immigrants. I had, moreover, served, in 1990-1991, as a member of New York State's Panel on Inter-Group Relations. The Report of that Panel is attached.

Finally, I had been a member of the New York City Campaign Finance Board from its inception in 1988 until 1992. This Board distributes public funds to candidates for certain elective positions in New York City when such candidates agree to limit the amount of the contributions they will accept, and expenditures they will make, during campaigns.

The time I devoted to my service to these assorted organizations varied through the years but it was never less than two hours a week and had been over eight hours a week during certain periods. I devoted an average of approximately six hours a week cumulatively to the various non-profit organizations of which I was a member.

The Code of Judicial Conduct limits my ability to provide legal service to the disadvantaged. While a judge, I nevertheless contribute my time as permitted by law to bar and law school activities. I have served as an honorary member of the Public Service Committee of the Federal Bar Council. I also serve on the selection committees for the Root-Tilden-Snow Scholarship granted to selected New York University Law School students interested in public service and the Kirkland and Ellis New York Public Service Fellowship granted to a Columbia Law School graduate to support a year's employment in public service. I serve on moot court panels and in trial advocacy courses at local law schools and for the office of the District Attorney of New York County; I also speak regularly at bar association functions on issues such as judicial clerkships for minority students and women in the law. Finally, I have lectured about trial advocacy skills at the Office of the Attorney General for the State of New York. It is difficult to quantify the time I spend on these activities because I participate in functions as my schedule permits. I estimate that I attend at least one community service function a month, and often twice a month.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interview in which you participated).

I am not aware of any selection commission which recommended me for this Circuit Court nomination. I was interviewed by the Office of the Counsel to the President in or about March of 1996 and again in March of 1997. Thereafter, the American Bar Association and the Federal Bureau of Investigations interviewed me. The President's nomination followed.

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4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

At the time I was nominated as a district court judge, I answered this question as follows:

"Our Constitution vests the right to make and administer laws in the legislative and executive branches of our government. Judges impermissibly encroach upon that right by rendering decisions that loosen jurisdictional requirements outside of the scope of established precedents and by fashioning remedies aimed at including parties not before the court to resolve broad societal problems.

Judges must provide fair and meaningful remedies for violations of constitutional and statutory rights to the parties before a court. Doing so can, at times, affect broad classes of individuals, may place affirmative burdens on governments and society and may require some administrative oversight functions by a court.

A judge's decision should not, however, start from or look to these effects as an end result. Instead, because judicial power is limited by Article III of the Constitution, judges should seek only to resolve the specific grievance, ripe for resolution, of the parties before the court and within the law as written and interpreted in precedents. Intrusion by a judge upon the functions of the other branches of government should only be done as a last resort and limitedly."

My service as a judge has only reinforced the importance of these principles. Finding and maintaining a proper balance in protecting the constitutional and statutory rights of individuals versus protecting the interest of government, financial and otherwise, is very difficult. Judges must be extraordinarily sensitive to the impact of their decisions and function within, and respectful of, the constraints of the Constitution.