

NLWJC-Sotomayor-Box0003-Folder00003

# FOIA MARKER

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**Subgroup/Office of Origin:** Counsel Office

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**OA/ID Number:** 12689

**FolderID:**

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**Folder Title:**

Sotomayor Miscellaneous [3]

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# Withdrawal/Redaction Sheet

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. bio	re: Sonia Sotomayor (1 page)	n.d.	P2
001b. bio	re: Update on Opinions (4 pages)	n.d.	P2

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**COLLECTION:**

Clinton Presidential Records  
 Counsel's Office  
 Doug Band  
 OA/Box Number: 12689

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**FOLDER TITLE:**

Sotomayor - Miscellaneous [3]

2009-1007-F  
jp1576

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### 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]

**CLINTON LIBRARY PHOTOCOPY**

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**CLINTON LIBRARY PHOTOCOPY**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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UNITED STATES OF AMERICA

v.

92 Cr. 584 SS

DANIEL GONZALEZ,

Defendant.

-----x

July 12, 1993  
4:45 p.m.

Before:

HON. SONIA SOTOMAYOR,

District Judge

APPEARANCES

MARY JO WHITE  
United States Attorney for the  
Southern District of New York,

STEVEN COHEN  
Assistant United States Attorney

LEE GINSBERG  
Attorney for defendant

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1 (Case called)

2 THE COURT: Mr. Ginsberg, I have received your  
3 letter request for an adjournment in this case pending the  
4 Second Circuit's review, I believe, of its decision in the  
5 Martinez case.

6 MR. GINSBERG: Yes, your Honor. That matter has  
7 now been resolved. The government has determined not to  
8 file -- they were given additional time to request a  
9 rehearing or an en banc hearing and they made a  
10 determination not to follow up that matter. So the decision  
11 as reported by the Second Circuit in that case is the law  
12 now.

13 THE COURT: Assuming, as I must, that the  
14 Martinez case is the law in this circuit, please tell me why  
15 it is applicable to this case. I will start with why I  
16 don't believe it is, Mr. Ginsberg -- Mr. Gonzales, you may  
17 have a seat, please.

18 Mr. Ginsberg, Martinez on its facts was limited  
19 to a case in which a defendant joined a conspiracy, either  
20 in the midst or near its end -- doesn't matter when, but the  
21 issue before the court was whether conduct that had occurred  
22 prior to the defendant's joining the conspiracy should be  
23 attributed to that defendant. The court in the Second  
24 Circuit held not.

25 In this case, however, I don't think the issue is

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1 whether or not the defendant is being charged with or  
2 sentenced for conduct that he was not a part of, but instead  
3 he is being charged with conduct for which he may have  
4 received a small amount of money but in which he  
5 nevertheless was involved; i.e., by his own admissions to  
6 the Probation Department and on allocution, I believe,  
7 before the court, he admitted that he was receiving \$250 a  
8 week to pass on the keys to the apartment at issue to  
9 potential buyers of drugs.

10 By my reading of that admission, he is  
11 responsible for those drug transactions, and for whatever  
12 amounts occurred in that apartment, whether or not he had  
13 specific knowledge of the exact amount being irrelevant. He  
14 had knowledge that drug transactions were occurring in that  
15 apartment. Hence I believe he is responsible for whatever  
16 amount has been proven by the government.

17 That is my reading of this situation in light of  
18 the Martinez case. Why am I wrong?

19 MR. GINSBERG: Your Honor, I think your Honor is  
20 correct that the primary holding of Martinez related to the  
21 specific facts in that decision, and your Honor is also  
22 correct that the defendant admitted his culpability in this  
23 matter and the facts that were set forth by your Honor are  
24 correct. I think that there is more expansive reading of  
25 Martinez.

1           It struck me, and I read that case many times  
2           because it potentially applied to a lot of situations, that  
3           beyond the primary holding of that case, the court was also  
4           saying that the guidelines have been established through a  
5           long process to set forth a more equitable manner of  
6           sentencing defendants and a manner in which defendants  
7           across the country in federal courts do not have sentences  
8           that have wider ranges of disparity, and therefore we are  
9           establishing, said the guidelines commission at the  
10          direction of Congress, we are establishing essentially a set  
11          of rules that should now be used in determining sentences  
12          for all kinds of cases.

13                 My reading of Martinez is that the court finds a  
14          problem in sentencing defendants based on the mandatory  
15          minimums under the statutes -- in this case we are dealing  
16          with a five-year mandatory minimum -- when the guideline  
17          range, taking into account the amount of drugs and the  
18          conduct of Mr. Gonzalez in this particular case, falls below  
19          the statutory minimum. I think there is language in  
20          Martinez that clearly suggests that in those circumstances,  
21          whether it is a conspiracy situation -- I don't think we  
22          should completely forget that this conduct of Mr. Gonzalez  
23          arose out of this conspiracy. He pled guilty to a  
24          substantive crime, but it arose out of his participation in  
25          the conspiracy.

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1 I think the language in Martinez is suggesting  
2 directing that some recognition be given to the fact that  
3 the guidelines effectively supersede the statutory minimums  
4 in those cases where a defendant's conduct as calculated by  
5 the guidelines falls below the mandatory minimum on the  
6 count that the defendant may be convicted of, whether by  
7 plea or trial. That is why I suggested to the court in my  
8 letter and I still suggest to the court that arguably Mr.  
9 Gonzalez's case falls into that situation.

10 I understand perfectly well that the particular  
11 specific holding came out of that case as to that defendant  
12 in this case but the language went beyond that, and that is  
13 why I believe that it may well be applicable to Mr. Gonzalez  
14 as well.

15 THE COURT: Mr. Ginsberg, even assuming I accept  
16 your argument that the Second Circuit was considering a much  
17 more expansive concept -- and one, frankly, that has been  
18 disavowed by every other circuit -- that the guideline range  
19 can trump the statute, in fact the reverse has been held by  
20 every other circuit, which is that the statute always  
21 controls above the guidelines.

22 But putting that issue aside, let's assume the  
23 Second Circuit was suggesting that the courts should take a  
24 closer look at a particular defendant's relevant conduct in  
25 assessing whether or not they should be held liable for or

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1 responsible to serve the minimums required by law. I still  
2 don't see how that gives an escape to your particular  
3 defendant, since the quantities for which I am finding that  
4 he was responsible certainly fall within the minimum  
5 statutory requirement; i.e., he was guarding this apartment  
6 that had drugs -- I don't remember the exact number of kilos  
7 but they were very substantial -- over a period of time. So  
8 I am not quite sure how this argument assists you in any  
9 real respect in this particular case.

10 MR. GINSBERG: The presentence report suggests  
11 that but for the mandatory minimum that is applicable here,  
12 the guideline range would be below the five-year level.  
13 That is, the guideline range here would be 46 to 57 months,  
14 and that is why I believe it is applicable.

15 THE COURT: That was for how many kilos, Mr.  
16 Cohen, that, and it was only one instance, was it not?

17 MR. COHEN: That is correct. There were 600  
18 grams of cocaine seized from the apartment and that became  
19 the basis of the plea and that is reflected in both the  
20 presentence report and the guideline stipulations.

21 THE COURT: But he was charged be being part of  
22 broader part of the conspiracy, one of drugs being sold out  
23 of the apartment over a particular period of time, is that  
24 right?

25 MR. COHEN: I believe that the apartment that

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1 this particular quantity of drugs was seized out of was not  
2 reflected -- let me take a step back. There were two other  
3 apartments involved. This was the third apartment that this  
4 particular amount of cocaine was seized out of. So I am not  
5 sure it is correct to say that the drugs are found to be in  
6 an apartment that he had custody and control over except for  
7 the amount in this particular count that he pled to.

8 THE COURT: Then I stand corrected. I mistook  
9 the apartments, Mr. Ginsberg.

10 MR. GINSBERG: In any event, taking the facts for  
11 the moment, that is why I would argue that to your Honor.  
12 If the more expansive reading is correct, it would be more  
13 applicable to Mr. Gonzalez's position because his guideline  
14 range would fall below the 5-year mandatory minimum, and as  
15 I suggest, the calculation is 46 to 50 months -- if the  
16 statute applies and there is no escaping the statute, he is  
17 facing a 60-month mandatory minimum regardless of any other  
18 argument that might be made as to the guideline calculation.

19 Therefore I raised that issue in my letters to  
20 the court and I raise it again today, so that whatever your  
21 Honor's ruling is, if your Honor seems to rule against me,  
22 my client's rights are preserved, should my argument be  
23 correct and win the day at some point on some level.

24 THE COURT: I appreciate that.

25 Mr. Cohen, your position?

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1 MR. COHEN: Yes, your Honor. Obviously for many  
2 of the reasons your Honor has already articulated, it is the  
3 government's position that Martinez is not applicable to  
4 this case. Martinez dealt with a situation where a  
5 defendant was charged and convicted in a conspiracy. Here  
6 the defendant was convicted of a substantive count involving  
7 600 grams of cocaine. Martinez makes clear that the circuit  
8 has time and again recognized almost a notion of strict  
9 liability with respect to substantive offenses. Martinez  
10 then goes on to consider the circumstances where the total  
11 quantity involved in a conspiracy may not be foreseeable to  
12 a particular defendant and essentially the Second Circuit  
13 there says that the guidelines analysis of foreseeability  
14 may apply rather than strict liability notion. But again,  
15 that was a situation where you were dealing with a  
16 conspiracy.

17 This case is also different in terms of the  
18 specific facts. As your Honor pointed out, here we have a  
19 situation where the defendant had dominion and control over  
20 an apartment and it can be found that he possessed  
21 constructively at least 600 grams of cocaine. That is the  
22 amount that is in the guidelines stipulation. There is no  
23 dispute about that. There is a stipulation between the  
24 parties.

25 Admittedly, had there not been a mandatory

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1 minimum here, perhaps Mr. Gonzalez's guideline range might  
2 have been lower. But Mr. Gonzalez's guideline range, by  
3 operation of the guidelines themselves, is the mandatory  
4 minimum. There is no issue of bringing the guidelines into  
5 some type of harmony with the mandatory minimums because the  
6 guidelines themselves say -- it is Section 5G1.1C -- where  
7 you have the situation where the mandatory minimum is above  
8 the otherwise applicable sentencing guideline range, the  
9 mandatory minimum is the applicable sentencing guideline  
10 range.

11 So it really does no good for Mr. Ginsberg to  
12 speak about what the guideline range is or should be,  
13 because it is 60 months.

14 Accordingly, it is the government's position, as  
15 I have stated, that the defendant's guideline range is 60  
16 months. I would also note that is exactly what the  
17 guideline stipulations that the parties entered into states  
18 and that is what the court advised Mr. Gonzalez of at the  
19 time of his plea.

20 THE COURT: Mr. Ginsberg, for the reasons  
21 explained by Mr. Cohen, and my own analysis of the case, I  
22 am not prepared to depart from the statutory minimum. I  
23 don't believe that the Martinez case is applicable to this  
24 type of situation. You may be right about its expansive  
25 language, but I don't believe its intent was to suggest that

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1 the guideline range can in any respect supersede a  
2 substantive count statutory minimum. Hence I note your  
3 objection but I feel that I am bound by the statutory  
4 minimum in this case.

5 MR. GINSBERG: I understand, your Honor.

6 THE COURT: Outside of the one objection noted by  
7 you, Mr. Ginsberg, which I have now addressed, I assume that  
8 you have had a full opportunity to review the report with  
9 Mr. Gonzalez.

10 MR. GINSBERG: Yes, your Honor.

11 THE COURT: Are there any other objections that  
12 you wish to note at this time?

13 MR. GINSBERG: There are none, your Honor. I  
14 should be clear, I had originally sent a letter to the court  
15 indicating that the defendant is entitled to a reduction for  
16 his role in the offense and when I did so I had overlooked,  
17 unfortunately, the strictures of the plea agreement, and  
18 then I wrote to your Honor indicating that I was not in a  
19 position to do so.

20 THE COURT: I understood, and I did receive that  
21 and I appreciate the fact that you abided by your agreement  
22 with the government.

23 MR. GINSBERG: Beyond that, your Honor, there are  
24 no objections that I am aware of to the presentence report.

25 THE COURT: Mr. Cohen?

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1 MR. COHEN: No objections, your Honor.

2 THE COURT: I am prepared to impose sentence. As  
3 is my practice, I intend to advise you what my thinking on  
4 sentence to be, Mr. Gonzales, so you can address my intended  
5 sentence.

6 I believe that the statutory minimum applies here  
7 and I will impose the 60 months required by statute. That  
8 is the absolute minimum that I can give you, Mr. Gonzalez.  
9 If I had been permitted to sentence you under the guidelines  
10 I probably would have given you a different sentence given  
11 your background, but I don't believe that I am legally  
12 entitled to.

13 I will also impose the four years supervised  
14 release. No fine because there are no resources here. And  
15 a special assessment of \$50.

16 Mr. Cohen, does the government wish to speak to  
17 the sentence?

18 MR. COHEN: No, your Honor.

19 THE COURT: Mr. Ginsberg?

20 MR. GINSBERG: Yes, your Honor. It does make it  
21 a little easier knowing what the court has in mind and given  
22 the fact that the court has ruled on the Martinez issue. I  
23 recognize that the 60-month sentence is the lowest that the  
24 court feels it is permitted to give out in this case, but I  
25 would briefly point out what it is apparent that your Honor

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1 is aware of, and that is, it appears from all circumstances  
2 that it is truly an aberrant situation in Mr. Gonzales's  
3 history.

4 I can clearly advise the court that in dealing  
5 with Mr. Gonzalez during the period of time that he was in  
6 custody and that he was released until a short while after  
7 he entered his plea and in dealing with his family, he comes  
8 from a situation of a very strong, supportive family. They  
9 have been actively involved in assisting him in this case.  
10 They are present en masse today. They have been in my  
11 office on numerous occasions. They have called my office on  
12 many occasions. Mr. Gonzalez has been actively involved in  
13 attempting to find any way that his sentence can be lowered,  
14 primarily so that he can be with his family, not so much for  
15 his own particular benefit, although I am sure there is some  
16 self-interest. He was very concerned about the remaining  
17 members of his family, how this entire episode is affecting  
18 them.

19 I think your Honor may also be aware that he is  
20 facing a potential deportation situation here. There is  
21 also some irony in the case, and that is -- and I spoke to  
22 Mr. Cohen prior to the sentencing -- given the scope of the  
23 conduct in the case of the other defendants, it appears  
24 likely that Mr. Gonzalez will be receiving a sentence  
25 mid-range of all the defendants when it appears all the

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1 others', except for one, involvement in the case far  
2 surpasses Mr. Gonzalez's involvement. However, I think the  
3 circumstances of the guidelines and the mandatory minimum  
4 end up putting Mr. Gonzalez in that situation, in addition  
5 to his own personal conduct.

6 I would just like to put these factors that I  
7 have stated on the record so that the court is fully aware  
8 of his background and circumstances. I know that he has  
9 made attempts while incarcerated to better himself through  
10 some programs that are available in the jail. I hope that  
11 this is the last time Mr. Gonzalez will appear before a  
12 court.

13 I also fully believe that Mr. Gonzalez wishes to  
14 address the court to some extent on his own behalf, and I  
15 thank your Honor for listening to my comments today.

16 THE COURT: Thank you, Mr. Ginsberg.

17 Mr. Gonzalez.

18 THE DEFENDANT: Thank you. First of all, I  
19 believe that the time that I have spent here I have been  
20 responsible with the government of the United States, and,  
21 as my attorney has said, I have participated in programs and  
22 in studies while I have been in jail. I think my conduct  
23 has been exemplary, and if I pleaded guilty it was because I  
24 was aware of the activities, not because I had actually done  
25 that.

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1 I would like you to please take into  
2 consideration what I have done, and I promise that I will  
3 never have my family suffer the way they have been suffering  
4 now.

5 Thank you.

6 THE COURT: Mr. Gonzales, I am a judge, but  
7 unfortunately part of that responsibility requires me to  
8 follow the law, even when I may myself personally disagree  
9 with it. I accept yours and Mr. Ginsberg's representations  
10 to me, because I have seen it in your Probation Department  
11 report and I have seen it in the letters from your family,  
12 that this truly is an aberration in your life, and it is in  
13 some respects a great tragedy for our country that instead  
14 of permitting you to serve a lesser sentence and rejoin your  
15 family at an earlier time I am required by law to give you  
16 the statutory minimum specified by it.

17 Hence, only because I am required to -- and I do  
18 accept defense counsel's position in this case that  
19 otherwise the court would be predisposed to grant a lesser  
20 sentence -- I will and do impose a sentence of 60 months,  
21 followed by four years of supervised release, with the  
22 standard conditions of supervised release and in addition  
23 requiring you, Mr. Gonzalez, to abide by whatever INS  
24 regulations are required of you.

25 I am waiving the requirement of a fine or the

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1 payment of any cast costs for incarceration because pursuant  
2 to the report I find that this defendant does not have the  
3 assets to pay such a cost. I do impose, however, the \$50  
4 special assessment.

5 Mr. Gonzalez, I do hope that you continue your  
6 work in prison and that your family will appreciate that we  
7 all understand that you were in part a victim of the  
8 economic necessities of our society, but unfortunately there  
9 are laws that I must impose.

10 MR. COHEN: Your Honor, pursuant to the plea  
11 agreement at this time, I would move to dismiss Count 1 of  
12 the indictment.

13 THE COURT: Mr. Ginsberg, I assume you have no  
14 objection.

15 MR. GINSBERG: No objection, your Honor.

16 THE COURT: Granted.

17 THE DEFENDANT: May I say something else?

18 THE DEFENDANT: If you are able, would you  
19 recommend a nearby prison so that my family can go and visit  
20 me? Thank you.

21 THE COURT: Unfortunately, I cannot do that. The  
22 circumstances simply don't exist for me to do that. I have  
23 very little control over the prison system, Mr. Gonzalez,  
24 although this sentence will be a part of your report, and if  
25 it can be done, I will certainly ask the prison officials to

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1 take it into consideration.

2 THE DEFENDANT: Thank you.

3 (Proceedings adjourned)

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

UNITED STATES OF AMERICA

v.

92 CR.584 (SS)

LOUIS GOMEZ and  
VICTOR GOMEZ

Defendants.

-----x

New York, N. Y.  
July 26, 1993

Before:

HON. SONIA SOTOMAYOR,

District Judge

APPEARANCES

MARY JO WHITE,  
United States Attorney for the  
Southern District of New York,  
BY: STEVEN COHEN  
Assistant United States Attorney

CALVIN D. GARBER  
Attorney for defendant Louis Gomez

LYNNE STEWART  
Attorney for defendant Victor Gomez

1 (Case called)

2 THE COURT: I apologize to the family and friends  
3 of the Gomez family for the delays this afternoon. I know a  
4 sentencing is always emotionally difficult for a family. I  
5 try to schedule them when there is no conflict.  
6 Unfortunately, the trial came up as a last minute matter,  
7 and there were out of town witnesses. I do apologize.

8 Ms. Stewart I don't know if Mr. --

9 MS. STEWART: With all due respect, may I  
10 interrupt for one moment? The interpreter has graciously  
11 agreed, if it is all right with the Court, that some of the  
12 family members that are Spanish-speaking might be supplied  
13 with earphones so they might understand the proceedings.

14 THE COURT: If she has agreed, I am more than  
15 grateful.

16 MR. GARBER: Calvin Garber, for the defendant,  
17 Louis Gomez.

18 Judge, we did the allocution on the plea partly  
19 in English and partly in Spanish. I don't recall if you  
20 recall that he is fluent in English, but I will just ask  
21 that the headset be left with him; and if he needs the  
22 interpretation done, he will use it, but we will proceed in  
23 English.

24 THE COURT: Please do not hesitate to put them  
25 on, and if you need to stop us to ask for something to be

1 repeated, please do so.

2 Ms. Stewart, at the last meeting, at which you  
3 were not present -- I apologize for that -- I took the  
4 opportunity to ask Mr. Garber to pass you a message about my  
5 concern relating to your client's guideline calculation. I  
6 had asked Mr. Cohen before today's sentencing to write to me  
7 setting forth why there had not been an increase in your  
8 client's range because of my reading of the presentence  
9 report that suggested he might be a manager or supervisor of  
10 more than five individuals.

11 Mr. Cohen, I did not receive anything from you.

12 MR. COHEN: Your Honor, I hand-delivered this  
13 morning a letter to the Court. In fact, I also faxed it to  
14 Ms. Stewart. So the record is clear, I had written Ms.  
15 Stewart a letter last week enclosing a copy of the  
16 transcript from our last appearance before your Honor, and I  
17 have a copy of today's letter.

18 THE COURT: I would be very grateful.

19 I thought I made it clear that I wanted the  
20 letter before the date of sentencing.

21 MR. COHEN: I apologize.

22 THE COURT: Obviously, something happened in my  
23 office, and I will find out why, but I had hoped to receive  
24 this much earlier so Ms. Stewart would have had further  
25 opportunity to respond to it.

1 Let me take a look at it.

2 (Pause)

3 THE COURT: Well, Ms. Stewart, I guess you don't  
4 have to respond to it.

5 MS. STEWART: When I received Mr. Cohen's fax, I  
6 contacted him and spoke with him, and he verbally told me  
7 what the letter contained. At that point, I know when it is  
8 necessary to respond and not to respond, so we will rely  
9 upon the government's response.

10 THE COURT: Thank you.

11 It is my practice to tell the parties what I am  
12 thinking with respect to sentencing, so that when they  
13 address me at sentencing, they can address my concerns.

14 To both Victor and Louis Gomez: My hands are  
15 tied. Unfortunately, I simply do not see any legal basis or  
16 legal authority for me to depart from the statutory minimum.

17 I must tell you I have looked high and low to see  
18 if there was a way within my power to do so, particularly  
19 for Mr. Louis Gomez, not for Mr. Victor Gomez; so I make the  
20 record exceedingly clear.

21 Louis Gomez, yours is the tragedy of our laws and  
22 the greatest one that I know.

23 MR. GARBER: If you would repeat that, he is  
24 going to use the head sets.

25 Sorry. Thank you.

1                   THE COURT: Mr. Louis Gomez, yours is the story  
2 that is the greatest tragedy of our laws, the one our  
3 congressmen never thought about and don't think about.  
4 Yours is the story of an individual whose life has been  
5 devoted to his family and has been essentially, outside of  
6 this incident, law-abiding.

7                   It is no comfort to you for me to say that I am  
8 deeply, personally sorry about the sentence that I must  
9 impose; I must, because the law requires me to do so.  
10 Even if I tried not to do so, I would just be overruled. I  
11 have no choice.

12                  I hope that yours will be one among the many that  
13 will convince our new president and Congress to change these  
14 minimums. The only statement I can make is this is one more  
15 example of an abomination being committed before our sight.  
16 You do not deserve this, sir. I am deeply sorry for you and  
17 your family, but the laws require me to sentence you to the  
18 five-year minimum, and I have no choice.

19                  Mr. Victor Gomez, on the other hand, you are a  
20 young man who has not only taken your life down the drain  
21 but your uncle's and affected not only yourself, personally,  
22 but your entire family in a way that I find atrocious. What  
23 you have done is inexcusable.

24                  I do not believe, frankly, that it is enough to  
25 warrant an upward departure, but I think it is enough to

1 warrant the full range of what the guidelines permit me to  
2 give you, which is 63 months. You have a supportive family  
3 and people who care about you, and it is one thing to make  
4 choices for yourself but to have involved your uncle in the  
5 manner you did is simply not right.

6 I believe, Ms. Stewart, my understanding was that  
7 he made use of his uncle's apartment. And that that is how  
8 his uncle has become involved in this. Am I incorrect about  
9 that?

10 MR. GARBBER: That's correct, your Honor.

11 MS. STEWART: We have tried to do everything in  
12 this case to keep the rancor that, of course, must  
13 necessarily be involved in a case such as this from  
14 happening, but I will say to your Honor very  
15 straightforwardly, Mr. Louis Gomez is a man of some years.  
16 This is a very young man, and for this very young man to  
17 have convinced this older man took some doing, it would seem  
18 to me.

19 It was never my understanding that this was  
20 something where someone's will was overborne, and this is a  
21 very young man, who also has ruined his life for all future  
22 time and may not have as much to fall back upon as his uncle  
23 does, being the holder of a GED diploma and not much else;  
24 but in order to spare any rancor within this family since  
25 this is his uncle as well as his father's brother, we

1 purposely chose not to indulge in finger-pointing or saying  
2 it's his fault or it's your fault but rather to rely upon  
3 the Court understanding this was indeed a series of events  
4 where people became involved, and no one did so against  
5 their will, Judge.

6 THE COURT: Ms. Stewart your words are taken and  
7 I don't think it changes my mind. I am required by law to  
8 give your client the five-year minimum. I believe, however,  
9 that his conduct, being second in command to Mr. Castellano,  
10 warrants the imposition of the higher end of the guideline.

11 As I indicated, I do not intend to depart from  
12 the guideline range, but I will give him the high end of  
13 that range.

14 Having spoken, Mr. Cohen, have you reviewed the  
15 presentence report?

16 MR. COHEN: Yes, your Honor.

17 THE COURT: Any objections thereto?

18 MR. COHEN: No, your Honor.

19 THE COURT: Do you wish to add anything at this  
20 time of sentencing?

21 MR. COHEN: No, your Honor.

22 THE COURT: Ms. Stewart, have you reviewed the  
23 report? Do you have any objections?

24 MS. STEWART: I reviewed it and reviewed it with  
25 my client, Judge. Aside from -- I don't wish to quibble,

1 but I will say the tone of the report is -- I would hope  
2 that probation officers had a little more evenhanded  
3 approach to things than they seem to. I see no reason for  
4 Ms. Bernhard to have told my client's wife of his other  
5 personal dealings which he had prior.

6 But aside from that, I would ask the Court to  
7 include the letters, all turned over to Ms. Bernhard, which  
8 are alluded to in paragraph 830 but not included as part of  
9 the report. It was our understanding she would include  
10 those letters, and, Judge, I would just ask that they be  
11 included. They are from a wide range of persons supporting  
12 the notion, indeed, that Victor Gomez, aside from this  
13 incident and indeed following this incident, while not the  
14 most perfect person by any means, by means of what he did  
15 get involved in, did not indulge past that date in any more  
16 ill dealings, and, indeed, is someone who should be  
17 guaranteed some kind of a future.

18 THE COURT: What do they speak to?

19 MS. STEWART: They speak to his prior dealings  
20 with people. I ask those be included.

21 THE COURT: I will have Mr. Chino ask the  
22 Probation Department to have a slip or additions be made to  
23 the report and I will endorse that.

24 Mr. Victor Gomez, would you like to address the  
25 Court before you are sentenced, sir?

1 DEFENDANT VICTOR GOMEZ: Yes, your Honor.

2 Your Honor, being as young as I am -- I won't say  
3 young because at my age you are supposed to have been more  
4 mature about these matters and know the consequences of what  
5 I faced in the near future. Don't think, your Honor, that  
6 I'm not fully aware of what was going on. I am fully aware  
7 of everything, especially what I am faced with today before  
8 sentencing. I am addressing you and telling your Honor that  
9 I am sorry. I am sorry for the delinquency or whatever I  
10 did wrong.

11 But I can tell your Honor I didn't just make my  
12 own decision. I made my own decision as a man and I think  
13 other people make their own decision as a man. What I am  
14 facing now is the hurt on my family and my wife and daughter  
15 who is in court. Not only have they suffered through this  
16 ordeal, but I wish the day I am released from prison there  
17 could be something to show for the support and not to say  
18 thank you for being somebody else.

19 Thank you.

20 THE COURT: Thank you.

21 Mr. Gomez, I have heard what you have said. I,  
22 too, pray when you are released from prison you can go back  
23 to your family and continue with your life.

24 As I have indicated, I have very little  
25 discretion in the sentence today. The mandatory minimum

1 requires a sentence of 63 months. I believe your relative  
2 role in this transaction however requires me to sentence you  
3 to the slightly higher maximum of your range of 63 months.

4 I will sentence you to that 63 months, with a  
5 four-year supervised release time after your release from  
6 prison, under the standard terms and conditions of  
7 supervised release. In addition, however, I will state that  
8 you cannot possess any firearms or dangerous weapons and  
9 that if you own a pistol, you turn it in to your local  
10 precinct or sell it legally.

11 I am waiving the imposition of any fine, given  
12 the report by the probation office that you do not have the  
13 resources to pay one. I am assessing the one hundred  
14 dollars special assessment, \$50 per count, to be paid  
15 immediately.

16 What is the government's position with respect to  
17 permitting this defendant to voluntarily surrender?

18 MR. COHEN: Your Honor, the government would seek  
19 at this time to have the defendant remanded.

20 THE COURT: Ms. Stewart.

21 MS. STEWART: I will make the application to  
22 permit him to surrender at the institution to which he is  
23 designated. Aside from all the very practical reasons, it  
24 also affords him, first of all, an opportunity to attend a  
25 Family Court matter involving his other child, involving

1 payment of support and visitation, pending and due in August  
2 and will allow him to have a final visit at  
3 Columbia-Presbyterian where he is an ongoing patient by  
4 reason the rod inserted in his leg.

5 He has been a faithful participant in pretrial  
6 services and has not missed reporting to them. His entire  
7 family's financial future -- not his immediate family but  
8 his father and extended family -- are tied up in his bail  
9 package. I don't think he would ever abuse that trust they  
10 have placed in him.

11 He also has a period, as I understand it, of very  
12 dead time when one is placed either in MCC or Otisville.  
13 One does not work or cannot be involved in any programs  
14 because one is not designated to those institutions.  
15 However, upon surrender, when a designation is made, one  
16 goes in and one immediately gets into whatever one's future  
17 will hold at the institution.

18 I think the Court can trust Mr. Victor Gomez to  
19 be there at the designated institution or at the marshal's  
20 office, whichever designation is made, at the appointed  
21 time, and I would ask the Court to give him that  
22 consideration.

23 THE COURT: When is his Family Court matter?

24 MS. STEWART: The 12th of August.

25 THE COURT: Doctors Hospital?

1 MS. STEWART: I believe that is the 20th. 23rd,  
2 I'm sorry.

3 THE COURT: Mr. Cohen, the Probation Department  
4 has indicated to me that Mr. Gomez is a good risk for  
5 voluntary surrender. I recognize the dictates of the law  
6 which generally command the remand in situations of this  
7 kind. However, in light of the unresolved matters in this  
8 prisoner's life, particularly his Family Court matter, and  
9 the fact that a child is involved and the welfare of that  
10 child in the future while he is in prison being of  
11 significance to this Court, I think that factor warrants his  
12 release or at least giving him the opportunity to  
13 voluntarily surrender. In that interim, you might as well  
14 save the taxpayer some of the difficulty of assessing his  
15 medical situation and let him have his physical at  
16 Columbia-Presbyterian.

17 Mr. Gomez, you are to report to the probation  
18 --to the Pretrial Services Department every three days by  
19 telephone. And if they require you to report in person, you  
20 will do so.

21 You are directed to turn yourself in on August  
22 24th at 9 a.m., at the U.S. Marshal's Office.

23 Mr. Gomez, as the time draws nearer, it will get  
24 harder and harder for you and your family. It is with a  
25 great deal of reluctance that I agree to give you this

1 opportunity. Understand, sir, if you do not turn yourself  
2 in, you are subjecting yourself to facing another potential  
3 criminal charge, and if you are convicted of that charge,  
4 your sentence will be in addition to the sentence you have  
5 received here.

6 It will also affect you if you are ever caught  
7 again, and you will be, sir. Your family is intimately tied  
8 to the United States; you have children and relatives here.  
9 In the short term you may think you will never come back,  
10 but you will want to, sir, and you will be caught.

11 What you will suffer will be tenfold what your  
12 going to suffer now. In the short term, I encourage you and  
13 your family to give deep thought to that and remember.

14 I will permit it on the terms and conditions I  
15 have just stated.

16 MS. STEWART: Thank you very much.

17 THE COURT: Mr. Garber.

18 MR. GARBER: I will not echo what you have  
19 already said. I think you said it better, I must admit,  
20 than I have often said it as far as the specific hand-tying  
21 that is subjecting you to give the mandatory minimum  
22 sentence to Mr. Gomez.

23 What I am going to ask you to do, based on what  
24 you have already said, is that if in fact there is a change  
25 in the law, that a recommendation is submitted to you for

1 Mr. Gomez to be included within the changing of the  
2 mandatory minimum sentencing structure of the guidelines,  
3 that he be eligible for that situation. I would ask you  
4 consider that either by stating it on the record now that  
5 you would no have no objection to it, or if you saw fit to  
6 recommend it if he became eligible for that status.

7 THE COURT: I obviously cannot dictate or even  
8 know what the changed law will provide for, but clearly from  
9 the tenor of my remarks today, if the laws change and he  
10 becomes eligible for an application, this Court will  
11 seriously consider it.

12 MR. GARBER: Thank you, your Honor.

13 Certainly, Judge, I have already submitted to the  
14 Court and to Mr. Cohen, a stack of letters. That stack  
15 spans from his family, his friends, his employers, his  
16 coworkers. There is no question that Mr. Gomez has led a  
17 very, very solid citizen's life. He has been a citizen of  
18 the United States for 19 years, saw fit only six years after  
19 he entered this country to become a citizen, worked hard  
20 here and has been a good hard-working citizen and family  
21 man.

22 You will note that in the presentence report, on  
23 page 10, he admits that he in fact sold the cocaine to an  
24 undercover officer, in fact admits that he knew the cocaine  
25 was being stored in his apartment, made no attempt to deny

1 or hide that act, acknowledges his guilt.

2 I don't have to say for him this is the most  
3 unfortunate incident in his life. He is about to pay for it  
4 and he feels sorry for it. I have gotten to know Louis very  
5 well. If he is unable to say it to you, he apologizes to  
6 you, the Court and to the government, and he is prepared to  
7 pay the price for what he did.

8 I thank you for what you said, Judge. On his  
9 behalf and on my behalf, I appreciate it. I am going to  
10 similarly ask you to permit him to surrender at some  
11 subsequent date, whatever date is fixed by you or by the  
12 marshals, so he may finish up whatever affairs he has and  
13 save the government whatever expense is incurred by being  
14 held in the MCC and/or Otisville, whatever temporary  
15 detention facility there might be, and he be able to  
16 surrender at a permanent facility.

17 The people that signed his quarter of a million  
18 dollar bond are here today, not to make sure he came to  
19 court, but because they thought he might be sent away, they  
20 wanted to say goodbye.

21 THE COURT: Mr. Cohen, I don't know if I gave you  
22 an opportunity to speak with respect to this defendant.

23 MR. COHEN: Your Honor, we have no objections to  
24 the presentence report.

25 THE COURT: Your position with respect to

1 releasing him?

2 MR. COHEN: Your Honor, pursuant to the statute,  
3 in a way, I am somewhat constrained and take the position  
4 the defendant be remanded at this time.

5 THE COURT: Mr. Gomez, is there anything further  
6 you wish to add?

7 MR. GARBER: So the record is clear, he received  
8 the report. Mr. Gomez and I have gone over it, and I have  
9 given him a copy of it, and we have no objection to it.

10 THE COURT: Mr. Gomez, is there anything you wish  
11 to add, sir?

12 DEFENDANT LOUIS GOMEZ: You have heard what my  
13 lawyer says. It is true completely, everything. I don't  
14 have much to say.

15 THE COURT: Thank you Mr. Gomez.

16 Mr. Gomez, I am constrained by law to sentence  
17 you to five years imprisonment and that I must do.

18 I am sentencing you to three years supervised  
19 release upon your service of imprisonment. That supervised  
20 release to be under the standard terms and conditions set  
21 forth. To the standard terms and conditions, I add also  
22 that you not be permitted to possess or own any firearms, and  
23 if you have any pistols, that you turn them in to the local  
24 Police Department or you legally sell them.

25 I am waiving the imposition of a fine since the

1 Probation Department report indicates you do not have the  
2 resources to pay the fine. I impose the one hundred dollars  
3 special assessment, \$50 per count, to be paid immediately.

4 MR. GARBER: Judge, can you hold that, stay that  
5 until tomorrow? The bank is closed today.

6 THE COURT: Yes.

7 MR. GARBER: Thank you.

8 THE COURT: Mr. Cohen, I am aware of the  
9 statutory dictates on the remand, but it's the one area I  
10 have some discretion in, and I am choosing to exercise it  
11 and also give this defendant the opportunity to voluntarily  
12 surrender.

13 It is not my custom to do so, Mr. Gomez, but in  
14 light of the letters that I received, the endorsements from  
15 your employer, the support of your family and friends, I  
16 believe that you are an exceptionally good risk to return  
17 and serve your time. Your words today confirm that to the  
18 Court. I will give you an opportunity to do so and set the  
19 same terms that I did for Victor Gomez.

20 You must report to the Pretrial Services  
21 Department by telephone or personal visit, whichever they  
22 choose, every three days.

23 You are to surrender on August 24th. I will  
24 leave it to them to decide whether you surrender to the U.S.  
25 Marshals or to the prison of your choice. There may be a

1 difference -- actually, I will do the same for Mr. Victor  
2 Gomez. There may be a difference that affects the facility  
3 that you are housed in long-term depending on where you  
4 voluntarily surrender. I will permit the Pretrial Services  
5 Department to designate which is the better place of  
6 surrender.

7 Mr. Cohen, if you could arrange that with them  
8 and just specify it so both defendants clearly understand  
9 where they are to turn themselves in on the 24th, at 9  
10 o'clock.

11 The same words I said to your nephew, I say to  
12 you. This will be very difficult for your family, but the  
13 risks to you are too great to suffer. There is not just the  
14 loss of security but the loss completely of any life you may  
15 ever have in the United States.

16 Gentlemen, unfortunately, there is no discretion  
17 in these sentences. This is what the law requires. I  
18 understand the choices that you face in your lives, but this  
19 is the price that your lives extract for the choices you  
20 make. I wish you both luck.

21 MR. COHEN: Your Honor, one final matter with  
22 respect to Mr. Victor Gomez.

23 At this time, the government would move to  
24 dismiss Counts One and Three in both the second superseding  
25 indictment and the first superseding indictment and Count

1 One in the original indictment against Mr. Victor Gomez.

2 And against Louis Gomez, the government would  
3 move to dismiss Count One in the second superseding  
4 indictment, Counts One, Three and Four in the first  
5 superseding indictment, and Count One in the original  
6 indictment.

7 THE COURT: That's pursuant to the plea  
8 agreement, and the Court accepts that.

9 MS. STEWART: I don't know whether you are  
10 inclined to or whether it is your practice, but I would ask  
11 -- and I am sure Mr. Garber joins me -- that you recommend  
12 that the Bureau of Prisons place both men somewhere as close  
13 as possible to the New York vicinity. They have such an  
14 extended family, all of whom wish to remain in touch and  
15 serve in that most valuable resource to rehabilitation, a  
16 strong family.

17 THE COURT: I do not recommend it as a mandatory  
18 statement. The most I put in, which I agree to put in their  
19 judgment of conviction, is that the department give it due  
20 consideration. I do not make a mandatory requirement.

21 MS. STEWART: Thank you.

22 MR. GARBER: Thank you. I likewise make that  
23 application.

24 THE COURT: I will do so for both.

25 \* \* \*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
UNITED STATES COURTHOUSE  
500 PEARL STREET  
NEW YORK, NEW YORK 10007-1312

CHAMBERS OF  
SONIA SOTOMAYOR  
UNITED STATES DISTRICT JUDGE

March 2, 1998

Hon. Orrin G. Hatch, Chairman  
Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Mr. Chairman:

I enclose a further supplement to Part I Biographical Information, Questions 15(2) and 15(3), of my Senate Questionnaire.

Very truly yours,

  
Sonia Sotomayor

cc: Sen. Leahy  
encls.

**SONIA SOTOMAYOR FURTHER SUPPLEMENTAL RESPONSE TO  
SENATE QUESTIONNAIRE  
PART I BIOGRAPHICAL INFORMATION, QUESTION 15(2)**

The following is a short summary of and citations for an appellate opinion which has reversed in part one of my decisions since my last Supplement to my Senate Questionnaire:

1. **National Helicopter Corp. of America v. The City of New York, et al.**, 952 F. Supp. 1011 (S.D.N.Y. 1997), aff'd in part, rev'd in part, \_\_\_ F. 3d \_\_\_, 1998 U.S. App. Lexis 2209 (2d Cir. Feb. 17, 1998).

The City of New York had imposed seven new restrictions on the operator of a heliport in the City. The Second Circuit affirmed my determination that two of the conditions were reasonable and that three other restrictions were preempted by the Federal Aviation Act. The Circuit Court reversed two of my findings that the City had exercised its proprietary authority in an arbitrary fashion in the manner it had selected and imposed two other conditions involving the elimination of weekend operations and the reduction of business operations by 47%.

1ST CASE of Level 1 printed in FULL format.

**NATIONAL HELICOPTER CORP. OF AMERICA, Plaintiff-Appellee-Cross-Appellant, v. THE CITY OF NEW YORK; THE COUNCIL OF THE CITY OF NEW YORK; THE CITY PLANNING COMMISSION OF THE CITY OF NEW YORK; THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, Defendants-Appellants-Cross-Appellees.**

Docket Nos. 97-7082, 97-7142

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

1998 U.S. App. LEXIS 2209

September 8, 1997, Argued

February 17, 1998, Decided

**PRIOR HISTORY:** [\*1] Defendants-Appellants-Cross-Appellees City of New York, Council of the City of New York, City Planning Commission of the City of New York, and New York City Economic Development Corporation appeal from the judgment of the United States District Court for the Southern District of New York (Sotomayor, J.) entered January 7, 1997, in part granting and in part denying plaintiff-appellee-cross-appellant's motion for permanent injunctive relief.

**DISPOSITION:** Affirmed in part, reversed in part, and remanded.

**COUNSEL:** ELLEN S. RAVITCH, New York, New York (Jeffrey D. Friedlander, Acting Corporation Counsel of the City of New York, Stephen J. McGrath, Deborah Rand, New York, New York, of counsel), for Defendants-Appellants-Cross-Appellees.

**DONALD W. STEVER**, New York, New York (Janis M. Meyer, Dewey Ballantine, Clarke Bruno, Daniel Altman, New York, New York, of counsel), for Plaintiff-Appellee-Cross-Appellant.

Steven A. Mirmina, Washington, D.C. (Timothy M. Biddle, Lorraine B. Halloway, Crowell & Moring LLP, Washington, D.C., of counsel), filed a brief for Amicus Curiae Helicopter Association International in support of Plaintiff-Appellee-Cross-Appellant.

**JUDGES:** Before: WINTER, Chief Judge, NEWMAN, [\*2] and CARDAMONE, Circuit Judges. JON O. NEWMAN, Circuit Judge, concurring in part and dissenting in part.

**OPINIONBY:** CARDAMONE

**OPINION:**  
CARDAMONE, Circuit Judge:

This case concerns Manhattan's East 34th Street Heliport (Heliport or facility). In May 1996 New York City's Economic Development Corporation (Economic Development Corporation or Corporation), the agency responsible for administering the City's heliports, issued a Request for Proposals (Request) seeking a new fixed-base operator for the Heliport. The Request imposed certain restrictions on the use of the Heliport based on City law. Plaintiff National Helicopter Corporation of America (National Helicopter or National), which had been the Heliport's fixed-base operator for the past 20 years, filed an action in the United States District Court for the Southern District of New York, challenging the validity of those restrictions on the grounds that the regulation of airports is a field preempted by federal law. On January 7, 1997 Judge Sonia Sotomayor granted in part and denied in part National Helicopter's motion seeking permanent injunctive relief. The defendant City of New York, its Council, Planning Commission, and Economic [\*3] Development Corporation, appeal from that judgment. National Helicopter cross-appeals.

**BACKGROUND**

Developers desiring to make use of City land must comply with New York City's Zoning Resolution, which "regulates and restricts the location of trades and industries and the location of buildings designed for specific uses within the City of New York, and for such purposes divides the City into districts." New York City Zoning Resolution § 11-01. Certain uses, "whose loca-

tion or control requires special consideration," are permitted only if they have been granted a special permit by the City Planning Commission (Planning Commission). *Id.* § 74-01. The construction and operation of a heliport is one such use requiring a special permit. *Id.* § 74-66. An applicant seeking to obtain a special permit must work through layers of agencies, departments, commissions and corporations that comprise the City bureaucracy. Such work is no sport for the short-winded.

When the City planned to develop a heliport on land it owned along the East River and adjacent to the F.D.R. Drive and 34th Street, it (through the Department of Marine and Aviation) applied for and in 1971 obtained from the [\*4] Planning Commission a special permit to operate the Heliport for a term of five years. The facility, one of four public heliports in Manhattan, opened in 1972. National became its fixed-base operator in 1973 when it entered into a lease with the Department of Marine and Aviation for an initial term of 10 years. n1 National subsequently renewed its lease and remained the fixed-base operator until August 1997 when it was legally evicted, although it remains entitled to use the Heliport for helicopter flights.

n1 The lease was actually executed between the Department of Marine and Aviation and Island Helicopters, Inc., a wholly-owned subsidiary of National Helicopter. For the sake of simplicity, we refer to actions taken by both Island Helicopters and National Helicopter as having been taken by National Helicopter.

#### Prior Disputes Between the Parties

National's 20-plus-year relationship with the City has been far from harmonious. Each time a dispute has arisen, the parties have reached a settlement agreement [\*5] committing National to perform certain obligations in exchange for continued permission to remain the Heliport's operator. Several of these settlement agreements are relevant to the issues now on appeal. The first agreement was executed in 1985, following a 1982 action brought by the City for National's failure to pay rent. The 1985 agreement required National to apply to the Planning Commission for a new special permit to allow for the continued operation of the Heliport because the City's original permit to operate the facility had expired in 1976. The City, in return, allowed National to renew its lease retroactively, enabling it to continue as the Heliport's fixed-base operator for a second period of ten years, effective October 4, 1983. In a subsequent 1989 settlement stipulation, the City agreed to ex-

tend National Helicopter's fixed-base operator lease until October 1995 and, in exchange, National Helicopter agreed to an 11 p.m. to 7 a.m. curfew of its operations.

Pursuant to the 1985 settlement agreement and as part of the special permit application process, National was required to prepare an Environmental Impact Statement (EIS) to assess the Heliport's effect on its surrounding [\*6] environment. National hired Young Environmental Services to do this work, but Young had failed to complete the project by 1993. Following another rent dispute, the Economic Development Corporation (successor to the Department of Marine and Aviation and its successor, the Department of Ports and Trade), as the current agency in charge of administering the City-owned heliports, assumed responsibility for completing the EIS. National agreed to reimburse the City for its costs.

Another rent dispute developed in 1993, causing the City to serve a notice of termination of National's fixed-base operator lease because National had not made the agreed-upon rental payments spelled out in a prior settlement. In response, National filed an action against the City in New York State Supreme Court seeking a stay of eviction. The parties resolved this dispute in a series of settlements commencing on January 10, 1994. The final such settlement, entered on February 13, 1996, provided that the City would allow National to continue its occupancy of the Heliport on a month-to-month basis until July 31, 1996 at which time the City could eject National pursuant to an executed Order of Ejectment. National [\*7] Helicopter further agreed to waive any claims that were or could have been raised in its state court action against the City.

#### The Special Permit Application

Meanwhile, on June 29, 1995 the Economic Development Corporation and the Department of Business Services, as co-applicants, filed with the Planning Commission an application for a special permit to allow for the continued operation of the Heliport. The agencies' application discussed their proposal to attain the City's goals of redistributing sightseeing flights away from the Heliport to other City heliports by restricting tourist operations to Saturday and Sunday flights only and limiting the number of flights to a maximum of four per hour during a 12-hour operating day. The agencies hoped that these restrictions would reduce total operations at the Heliport by 47 percent.

Under New York City law, before the Planning Commission may award a special permit, the affected community boards, the borough president, the New York City Council, and the public must review the signifi-

cant land use decision. See New York City Charter § 197-c. Pursuant to this review procedure, the Planning Commission certified the agencies' [\*8] application, including a draft EIS, as complete on August 7, 1995. The Planning Commission referred the application to Manhattan Community Board 6 and the Manhattan borough president for consideration. Both opposed the application unless various conditions -- including a curfew and the prohibition of weekend sightseeing operations -- were met. On November 29, 1995 the City Planning Commission conducted a public hearing to consider comments from the affected community board, representatives of New York University's medical facilities located near the Heliport, and other community members.

The final EIS, issued on December 27, 1995, evaluated noise data measured at seven receptor sites surrounding the Heliport. It considered the impact of a 47 percent reduction in operations, as discussed in the application for the special permit, and concluded that the proposed reduction would decrease noise levels, both in magnitude and significant impact.

On January 9, 1996 the City Planning Commission recommended awarding the special permit to the Economic Development Corporation and the Department of Business Services for a period of ten years and subject to a variety of restrictions. On March [\*9] 6, 1996 following a public hearing addressing the City Planning Commission's recommendations, the City Council enacted Resolution 1558, approving the issuance of the special permit, subject to the following conditions: (1) the restriction of weekday operations to between 8 a.m. and 8 p.m.; (2) the restriction of weekend operations to between 10 a.m. and 6 p.m.; (3) the phasing out of weekend operations entirely; (4) the reduction of operations by a minimum of 47 percent overall; (5) the barring of Sikorsky S-58Ts, or helicopters of a similar size, from use of the Heliport for sightseeing operations; (6) the prohibition of sightseeing flights over Second Avenue and the requirement that such flights heading north and south fly only over the East and Hudson Rivers; and (7) the requirement that helicopters using the Heliport be marked for identification from the ground. The Economic Development Corporation incorporated these conditions into its May 6, 1996 Request seeking a new fixed-base operator for the facility.

On May 15, 1996 National filed its first amended complaint in the district court seeking to enjoin the conditions imposed by the City Council's Resolution 1558. Although National [\*10] originally moved for a preliminary injunction, the parties consented to stay the en-

forcement of Resolution 1558 and suspend the Request until the court rendered a final judgment on the merits.

#### The District Court's Decision

In an opinion entered January 7, 1997 Judge Sotomayor permanently enjoined the City from enforcing all but two of Resolution 1558's provisions. *National Helicopter Corp. v. City of New York*, 952 F. Supp. 1011 (S.D.N.Y. 1997). She first determined that National had not waived its right to challenge conditions adopted in connection with the Council's special permit when it signed the February 1996 stipulation. *Id.* at 1021-22. Next, the district court, although generally recognizing federal preemption over the regulation of aircraft and airspace, observed that municipalities that are proprietors of local airports -- like the City with respect to this Heliport -- may regulate an airport's noise levels in a "reasonable, nonarbitrary and non-discriminatory" manner. *Id.* at 1026 (quoting *British Airways Bd. v. Port Auth. of N.Y. and N.J.*, 558 F.2d 75, 84 (2d Cir. 1977) (Concorde I)). With that standard in mind, the district judge upheld the weekday [\*11] and weekend curfews (conditions # 1 and # 2) as reasonable regulations of noise at the Heliport. Conversely, she determined that the other conditions exceeded the scope of the City's authority pursuant to the proprietor exception, and permanently enjoined their enforcement. 952 F. Supp. at 1026-32.

#### ANALYSIS

##### I Threshold Matters

##### A. Standing

Before turning to the merits, we must first dispose of two threshold matters: standing and waiver. The City maintains that National does not have standing to challenge the conditions imposed in Resolution 1558 and the Request. It also maintains that even if appellant has standing to challenge the Resolution's conditions, it has waived its rights to challenge them.

We address the standing issue first. The basis for the City's standing argument is that because National does not have a valid expectation of becoming the Heliport's next fixed-base operator, it lacks sufficient interest in the controversy regarding the City regulation to challenge it. See *Sierra Club v. Morton*, 405 U.S. 727, 731, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972) (explaining that standing addresses the question "whether a party has a sufficient stake in an otherwise [\*12] justiciable controversy to obtain judicial resolution of that controversy"). National's interest, as the district court recognized, extends beyond its status as a fixed-base provider; it may operate as a user of the Heliport in the

future. 952 F. Supp. at 1019-20. The conditions of the City's Resolution, if enforced, would seriously impact National's business, both as an operator and as a user.

We are unable to agree with the City's view of the Request to the extent it asserts that certain conditions, i.e., the ban on the Sikorsky S-58T helicopter, the sightseeing route restriction, and the markings requirement, only apply to a fixed-base operator. The Request states that those conditions apply to "all sightseeing helicopter service providers based at the [Heliport]" and defines such providers as companies that have subcontracted with the fixed-base operator to base their operations at the Heliport. National Helicopter, even if it was not granted fixed-base operator status, could subcontract with the fixed-base operator to base its operations at the facility. Thus, National has a sufficient stake in the resolution of this controversy to give it standing.

#### B. Waiver

Turning [\*13] to the alleged waiver, the City asserts that National is precluded from challenging Resolution 1558's conditions because it bargained away that right when it executed the February 13, 1996 stipulation. The stipulation contained a clause in which National waived any and all claims with respect to the Economic Development Corporation's "acts or omissions regarding the EIS . . . , the [land use review] application, or any conditions relating to the special permit required under the City's Zoning Resolution."

A release freely entered into that clearly waives a right to pursue a cause of action is binding. See *National Union Fire Ins. Co. v. Woodhead*, 917 F.2d 752, 757 (2d Cir. 1990); *Bank of America Nat'l Trust & Sav. Assoc. v. Gillaizeau*, 766 F.2d 709, 713 (2d Cir. 1985). But a release should not be read to include matters of which the parties had no intention to dispose. *Lefrak SBN Assocs. v. Kennedy Galleries, Inc.*, 203 A.D.2d 256, 257, 609 N.Y.S.2d 651 (2d Dep't 1994); see also *Gettner v. Getty Oil Co.*, 226 A.D.2d 502, 503, 641 N.Y.S.2d 73 (2d Dep't 1996) (stating that the "meaning and coverage of a release depends on the controversy being settled"); *East 56th Plaza, Inc. v. Abrams*, 91 A.D.2d 1129, 1130, 458 N.Y.S.2d 953 (3d Dep't 1983) ("This intent must be clearly established and cannot be inferred from doubtful or equivocal . . . language, and the burden of proof is on the person claiming the waiver of the right.").

Reading the waiver language in its entirety, and considering the controversy being settled, it is far from evident that National intended to release the City for claims regarding conditions that may have been imposed upon the special permit the City Council had not yet

granted. The waiver that plaintiff signed concerned only claims regarding the requirement of a special permit and the manner in which the Economic Development Corporation pursued it. National therefore could not challenge the application process undertaken by the Economic Development Corporation as improper under City law, i.e., the Zoning Resolution and the City Charter, but it could pursue a substantive claim that the conditions ultimately imposed by the City Council violate federal law. Cf. *Summit School v. Neugent*, 82 A.D.2d 463, 468, 442 N.Y.S.2d 73 (2d Dep't 1981) (requiring the narrow interpretation of waivers where matters of public policy are concerned). [\*15]

#### II The Proprietor Exception

We now address the merits of the controversy. National contends that the conditions imposed under Resolution 1558 and the Request are defective because they are preempted by federal law. The City, on the other hand, avers that it carefully assessed and imposed all the conditions pursuant to its power as the proprietor of the Heliport.

The Supremacy Clause of the United States Constitution invalidates state and local laws that "interfere with or are contrary to, the laws of congress." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 67 L. Ed. 2d 258, 101 S. Ct. 1124 (1981) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 211, 6 L. Ed. 23 (1824)). Congress preempted state and local regulations "related to a price, route or service of an air carrier" when it passed § 1305(a) of the Airline Deregulation Act, now recodified at 49 U.S.C. § 41713(b)(1) (1994). Cf. *id.* § 40101, et seq. (1994) (Federal Aviation Act); *id.* § 44715 (1994) (Noise Control Act); *id.* § 47521, et seq. (1994) (Airport Noise and Capacity Act) (acts implying preemption of noise regulation at airports).

In enacting the aviation [\*16] legislation, Congress stated that the preemptive effect of § 1305(a) did not extend to acts passed by state and local agencies in the course of "carrying out [their] proprietary powers and rights." *Id.* § 41713(b)(3). Under this "cooperative scheme," Congress has consciously delegated to state and municipal proprietors the authority to adopt rational regulations with respect to the permissible level of noise created by aircraft using their airports in order to protect the local population. See *Concorde I*, 558 F.2d at 83-84 (discussing the 1968 amendment to Federal Aviation Act and Noise Control Act legislative history in which Congress specifically reserved the rights of proprietors to establish regulations limiting the permissible level of noise at their airports); S. Rep. No. 96-52, at 13 (1980),

reprinted in 1980 U.S.C.C.A.N. 89, 101 (proclaiming that the Aviation Safety and Noise Abatement Act was not "intended to alter the respective legal responsibilities of the Federal Government and local airport proprietors for the control of aviation noise"); cf. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 635-36 n.14, 36 L. Ed. 2d 547, 93 S. [\*17] Ct. 1854 (1973) (acknowledging that while the federal government has "full control over aircraft noise, pre-empting state and local control" under their police power, the "authority that a municipality may have as a landlord is not necessarily congruent with its police power").

Hence, federal courts have recognized federal preemption over the regulation of aircraft and airspace, subject to a complementary though more "limited role for local airport proprietors in regulating noise levels at their airports." *City and County of San Francisco v. F.A.A.*, 942 F.2d 1391, 1394 (9th Cir. 1991). Under this plan of divided authority, we have held that the proprietor exception allows municipalities to promulgate "reasonable, nonarbitrary and non-discriminatory" regulations of noise and other environmental concerns at the local level. *Concorde I*, 558 F.2d at 84 (regulations of noise levels); see also *Western Air Lines, Inc. v. Port Auth. of N.Y. and N.J.*, 658 F. Supp. 952, 957 (S.D.N.Y. 1986) (permissible regulations of noise and other environmental concerns), aff'd, 817 F.2d 222 (2d Cir. 1987).

National does not dispute the viability of the proprietor exception. It maintains [\*18] instead that the City, in enacting Resolution 1558, did not act in its proprietary capacity, but rather under its police power, and therefore is not entitled to rely on the proprietor exception. As a result, the conditions the resolution imposed, it continues, are presumptively invalid. See *City of Burbank*, 411 U.S. at 633, 635-36 n.14 (invalidating curfew on airport operations imposed pursuant to city's police power); *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1315 n.22 (9th Cir. 1981) (listing cases invalidating curfews imposed pursuant to municipalities' police power).

The Economic Development Corporation, acting in a proprietary capacity, was extensively involved in the permit application process and issued the Request. It proposed to change operations at the Heliport by reducing operations by 47 percent and imposing a curfew. Since there was participation by a number of different City agencies in the permit process, some acting as owner, e.g., the Economic Development Corporation, some as protectors of the public, e.g., the City Planning Commission, we think the City acted in both a proprietary and a police capacity when it imposed the conditions [\*19] upon the special permit. The proprietor

exception is accordingly applicable to our evaluation of Resolution 1558 and the Request. See *United States v. State of New York*, 552 F. Supp. 255, 264 (N.D.N.Y. 1982) (reasoning that a curfew imposed by the State of New York pursuant to its police and proprietary powers was entitled to analysis under the proprietor exception), aff'd per curiam on other grounds, 708 F.2d 92 (2d Cir. 1983).

### III The Reasonableness of the Restrictions

As a proprietor, the City, as noted, has the power to promulgate reasonable, nonarbitrary and non-discriminatory regulations. Those regulations must avoid even the appearance of irrational or arbitrary action. See *British Airways Bd. v. Port Auth. of N.Y. and N.J.*, 564 F.2d 1002, 1005 (2d Cir. 1977) (Concorde II). Further, the City may regulate only a narrowly defined subject matter -- aircraft noise and other environmental concerns at the local level. See *Western Air Lines*, 658 F. Supp. at 957.

The City asserts that all seven of the conditions imposed upon the special permit fall within its power under the proprietor exception. It contends the district court erred when it permanently enjoined [\*20] five of those conditions (conditions # 3-7). National counters that it was error not to strike all seven conditions. We review orders granting or denying injunctive relief for an abuse of discretion. See *Nikon Inc. v. Ikon Corp.*, 987 F.2d 91, 94 (2d Cir. 1993) ("Abuse of discretion can be found if the district court relied upon a clearly erroneous finding of fact or incorrectly applied the law."). With this in mind, we analyze in order the conditions imposed.

#### Weekday and Weekend Curfews (Conditions # 1 and # 2)

We agree with the district court that the weekday and weekend curfews imposed should be upheld. The protection of the local residential community from undesirable heliport noise during sleeping hours is primarily a matter of local concern and for that reason falls within the proprietor exception. See *Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F. Supp. 927, 938-39 (C.D. Cal. 1979), aff'd, 659 F.2d 100 (9th Cir. 1981); see also *Concorde I*, 558 F.2d at 83 ("It is perhaps more important . . . that the inherently local aspect of noise control can be most effectively left to the operator, as the unitary local authority who controls airport access."). [\*21]

We note that at least two district court decisions in this Circuit have enjoined curfews. See *United States v. County of Westchester*, 571 F. Supp. 786, 797 (S.D.N.Y. 1983) (enjoining curfew on all night flight op-

erations at airport imposed regardless of accompanying emitted noise as unreasonable, arbitrary, discriminatory and overbroad); *State of New York*, 552 F. Supp. at 265 (enjoining night-time curfew on all aircraft, regardless of decibel level emitted by individual aircraft, as "overbroad and constitutionally impermissible in view of federal pre-emption of regulations concerning noise and planes in flight"). To the extent that these decisions have stricken curfews for their failure to target the noisiest aircraft or the noisiest times of operation, they have since been overturned by our opinion in *Global Int'l Airways Corp. v. Port Auth. of N.Y. & N.J.*, 727 F.2d 246, 251 (2d Cir. 1984), which permits proprietors to reduce cumulative noise levels, as opposed to only targeting peak noise levels or the noise level produced by an individual aircraft.

#### Elimination of Weekend Operations (Condition # 3)

We are unable to sustain the district court's enjoining of [\*22] condition # 3, which eliminated weekend operations at the Heliport, for reasons similar to those just stated with respect to conditions # 1 and # 2. The regulation requiring the facility's operator to phase out operations on Saturdays and Sundays is based on the City's desire to protect area residents from significant noise intrusion during the weekend when most people are trying to rest and relax at home. We agree with those courts that have held such reasoning as ample justification for the application of the proprietor exception. See *Santa Monica Airport Ass'n*, 481 F. Supp. at 939 (recognizing that "the interest being protected, the minimization of noise during the weekend hours when the need for leisure and rest in the residential community is the highest, is a matter of peculiar local concern" and upholding a weekend ban on touch-and-go, stop-and-go and low approach operations).

We find such a restriction to be reasonable and not arbitrary. See *Concorde I*, 558 F.2d at 84. The fact that the Economic Development Corporation's proposal, on which the EIS is based, contemplated shifting sightseeing operations from weekdays to the weekend does not alter this conclusion. The Corporation [\*23] determined, and the EIS confirmed, that the Heliport was a source of excessive noise. That is a sufficient basis on which a proprietor may impose a weekend curfew.

#### The Reduction of Operations by 47 Percent (Condition # 4)

The City conditioned the continuation of operations at the Heliport on an overall 47 percent reduction in those operations, despite the fact that the specific percentage reduction was based on a scenario different from the one envisioned by the Economic Development Corporation

when it filed the permit application and proposed the 47 percent reduction. In its application, the Corporation proposed limiting flights to four per hour, operating only a 12-hour day, and ceasing tourist flights during the work week. Those changes, the Corporation estimated, would reduce operations at the Heliport by 47 percent. By the time the application emerged from the land use review process, however, the permit required the cessation of sightseeing operations during the weekend instead of during the work week, but still mandated a reduction in operations of 47 percent.

The district court held that the 47 percent reduction was arbitrary and unreasonable because, based in part on [\*24] the shift in approach, there was no evidence that it was "in any way calibrated to achieve any particular noise based result." 952 F. Supp. at 1029. While we agree that the mandated 47 percent reduction in operations was not backed by any study reflecting the appropriate scenario or demonstrating that such specific percentage of noise reduction was the ideal, we also believe that the proprietor was entitled to eliminate a portion of the Heliport's operations upon reaching a conclusion that a problem of excessive noise existed. Based on the EIS' conclusion that a 47 percent reduction in operations would result in a substantial noise reduction at the Heliport, we believe that, in this case, the relevant condition was reasonable.

In *Western Air Lines*, 658 F. Supp. at 953, the court evaluated the "perimeter rule" that the New York and New Jersey Port Authority had imposed at LaGuardia Airport, forbidding airlines from conducting nonstop flights beyond 1,500 miles in and out of the airport. The Port Authority had conducted a study of LaGuardia's capacity, circulated questionnaires to interested parties (e.g., airlines, the Federal Aviation Administration, the Department of Transportation), [\*25] and determined that the perimeter rule was necessary to combat the airport's congestion problem. *Id.* at 959-60. The district court upheld the Port Authority's action as reasonable. *Id.* at 960 ("This Court will not second guess the actions of the Port Authority as long as they are reasonable.").

Just as the evidence supported LaGuardia's "perimeter rule," the EIS prepared by the City supports the proposition that the elimination of 47 percent of the Heliport's operations will result in a significant reduction in the noise emitted from it. We do not believe the change in the approach for reducing the facility's operation alters such a conclusion. Recognizing there was too much noise at the Heliport, the City determined that curtailing a significant portion of its operations would reduce noise levels. It is unrealistic to insist that a proprietor justify by some scientific method a specific percentage

reduction in operations in order to achieve the general result of a reduction of excessive noise.

Moreover, we find it difficult to imagine how whatever percentage that is chosen -- whether it is 15, 25, or 47 percent -- would not be considered arbitrary. Thus, we believe the EIS [\*26] adequately supports the conclusion that a 47 percent reduction in operations will improve the environmental quality of the Heliport's surrounding areas, however that reduction may be determined. For example, it may be pursuant to a curfew, a per hour limit, or a curtailment of operations, and so long as the mandated reduction is nonarbitrary and sufficiently reasonable a court may uphold the City's power to enforce such restriction. See *Global Int'l Airways Corp.*, 727 F.2d at 251 (affirming a restriction targeting cumulative noise level based on the "reasonable prospect of a beneficial effect").

We also reject National's argument that the restrictions adopted pursuant to the EIS are unreasonable because of the EIS' flawed nature. We do not require that studies offered as empirical support for a proprietor's actions be conducted pursuant to any one specific methodology, accepted in scientific communities as the most appropriate way of conducting an analysis. Rather, the test is one of reasonableness. The EIS at issue was prepared by an environmental sciences company, initially hired by National, with experience in heliports, assessing environmental impacts, and planning airport [\*27] noise compatibility. Its noise analysis was based on data received from seven receptor sites surrounding the Heliport. We conclude that the empirical support for the relevant conditions contained in the EIS is reasonable and therefore sufficient for preemption analysis purposes. The district court consequently abused its discretion when it enjoined the enforcement of condition # 4.

#### Prohibition on Certain Helicopters (Condition # 5)

The City urges that the prohibition on Sikorsky S-58Ts and other helicopters of a similar size is reasonable because they are the noisiest aircraft using the Heliport. Although the proprietor exception allows reasonable regulations to protect against excessive noise, that power may not be used to discriminate. See *Concorde II*, 564 F.2d at 1012-13 (dissolving ban on flights of supersonic jet Concorde). In this case, the City placed restrictions on certain aircraft because of their size -- not the noise they make -- despite evidence that larger helicopters are not necessarily noisier than smaller ones. A regulation purporting to reduce noise cannot bar an aircraft on any other basis. See *City and County of San Francisco*, 942 F.2d at 1398 (analyzing [\*28] Concorde I and Concorde II and holding that airport proprietor's regulation ban-

ning retrofitted aircraft from operating at airport was unjust discrimination). The City's ban on the Sikorsky S-58T and other helicopters of that size is unreasoned discrimination on account of an aircraft's size. Hence, the district court's enjoining of this condition was not an abuse of its discretion. Because this condition of the Resolution must be stricken on preemption grounds, we need not reach or decide National's equal protection argument.

#### Restrictions on Sightseeing Routes (Condition # 6)

The City claims the invasive nature of helicopter noise justifies the condition restricting sightseeing routes to the East River and the Hudson River. This argument, as the trial court recognized, evidences a misunderstanding of federal aviation law. Congress, the Supreme Court, and we have consistently stated that the law controlling flight paths through navigable airspace is completely preempted. See, e.g., *Concorde I*, 558 F.2d at 83 ("Legitimate concern for safe and efficient air transportation requires that exclusive control of airspace management be concentrated at the national [\*29] level."); *City of Burbank*, 411 U.S. at 626-27 (recognizing the federal government's possession of exclusive national sovereignty in U.S. airspace); 49 U.S.C. § 40103(a)(1) (stating that the federal government has "exclusive sovereignty of airspace of the United States"). The proprietor exception, allowing reasonable regulations to fix noise levels at and around an airport at an acceptable amount, gives no authority to local officials to assign or restrict routes. As a result, the City unlawfully intruded into a preempted area when it curtailed routes for the flights of certain Heliport aircraft. This condition was properly enjoined.

#### The Markings Requirement (Condition # 7)

Because we affirm the district court's injunction of the route mandate, the condition that helicopters using the facility be marked for identification from the ground, which exists solely to enforce the route requirement, becomes moot. Moreover, the condition interferes with the Federal Aviation Administration's duty to "prescribe air traffic regulations . . . for . . . identifying aircraft." 49 U.S.C. § 40103(b)(2). The district court did not abuse its discretion when it enjoined the markings requirement. [\*30]

#### IV The Commerce Clause

Finally, we turn to National's declaration that the conditions in Resolution 1558 and the Request violate the Commerce Clause of the U.S. Constitution. Congress approved the proprietor exception. Consequently, any action the City properly conducted pursuant to its powers

as a proprietor cannot violate the Commerce Clause. See *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213, 75 L. Ed. 2d 1, 103 S. Ct. 1042 (1983) ("Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce.").

#### CONCLUSION

For the foregoing reasons, the City may not be enjoined from imposing weekday and weekend curfews. Insofar as the judgment appealed from refused to enjoin these curfews, it is affirmed. Insofar as the judgment appealed from enjoined the City from enforcing the designation of sightseeing routes, markings requirement, and prohibition of Sikorsky S-58T and other similar sized aircraft, it is also affirmed. Insofar as the judgment appealed from enjoined the elimination of weekend operations and the 47 percent mandatory reduction in operations, [\*31] it is reversed and the injunction vacated.

Accordingly, the judgment appealed from is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

CONCURBY: JON O. NEWMAN (In Part)

DISSENTBY: JON O. NEWMAN (In Part)

#### DISSENT:

JON O. NEWMAN, Circuit Judge, concurring in part and dissenting in part:

I concur in all aspects of the Court's opinion except the approval of the condition of the special permit that requires a 47 percent reduction in the operations of the East 34th Street Heliport. As to that condition, I agree with the District Court that the 47 percent figure, indisputably derived from circumstances no longer applicable, is arbitrary and unreasonable, and that the condition requiring this percentage reduction should be enjoined.

We all agree with the legal proposition that local airport proprietors are entitled to promulgate "reasonable" and "nonarbitrary" regulations to reduce noise levels. See *British Airways Board v. Port Authority of New York and New Jersey*, 558 F.2d 75, 84 (2d Cir. 1977). We also agree with the factual proposition that a 47 percent reduction in operations will reduce noise levels. For the Court, those two propositions [\*32] are the end of the matter; for me, they are only the beginning. The fact that a selected percentage of reduced operations will result in reduced noise levels cannot possibly be sufficient to establish that the particular percentage was selected in a reasonable and nonarbitrary manner. For example,

if the decision-makers picked the percentage number by throwing a dart at a display of numbers from 1 to 100, use of the particular number hit would be manifestly arbitrary, despite the resulting lowering of noise levels from reduced operations. So would a number derived from the average of the ages of the decision-makers.

Of course, the arbitrariness of a percentage selected on a demonstrably arbitrary basis, i.e., one with no rational relationship to the regulatory purpose, does not necessarily mean that a percentage is reasonable only if supported by scientific analysis. Though an analysis of decibel levels, actual or potential injuries to eardrums, and degree of harm likely to be avoided by particular degrees of reduction in operations would provide an especially reasonable basis for selecting a required percentage reduction, I agree with the Court that a scientific study is not [\*33] required for a reasonable decision. When dealing with something as intangible as annoyance from aircraft noise, regulators are entitled to exercise their judgment, on some reasonable basis, in determining the degree of noise reduction they choose to require.

Moreover, though a reasonably selected percentage reduction in noise level would be preferable, I am willing to assume, at least for the argument, that a city acts reasonably when it requires a reasonable reduction in aircraft operations in the expectation that the reduction in operations will result in reduction in noise level. See *Global International Airways Corp. v. Port Authority of New York and New Jersey*, 727 F.2d 246, 251 (2d Cir. 1984) (regulation upheld because of "reasonable prospect" that it would have beneficial effect on noise level). n1 But the selection of the percentage of reduction in operations must nonetheless be reasonable. If the number selected here, 47, were viewed in isolation, the inference would be available, if not irresistible, that the number was selected arbitrarily, at least in the absence of some indication of a reasonable basis for selecting that number. n2 But in this case, the record [\*34] indisputably reveals the source of the number 47. It is the percentage by which operations would have been reduced if, as contemplated by the permit application, sightseeing flights from the East 34th Street Heliport were prohibited during weekdays. However, the City's final requirements dropped the prohibition on weekday sightseeing flights and replaced it with a prohibition on weekend sightseeing flights. Nevertheless, the City required the same 47 percent reduction in operations that would have resulted from a prohibition that is no longer applicable. The number is the expected result of an abandoned proposal; it is not the product of the exercise of any judgment on the part of the City decision-makers.

n1 The relationship between the regulation of operations and the resulting reduction in noise level was far more direct in *Global* than in the pending case. In *Global*, the regulation specified percentages of "noise compliant airplanes" that operators of heavy subsonic jets must use in each calendar quarter. See *Global*, 727 F.2d at 249-50. In the pending case, there is only a percentage reduction of all operations.

[\*35]

n2 Though the issue does not arise on this appeal, I think there would be a plausible argument that the selection of a number representing a familiar fraction, e.g., 50 percent for one half, or 33 1/3 percent for one third, would be reasonable since it would represent the decision-makers' intuitive guess as to the general degree of reduction (whether of noise or operations) they wished to require. But it cannot be seriously maintained that the decision-makers arrived at the number 47 by making even an intuitive guess.

The majority properly notes that "the proprietor was entitled to eliminate a portion of the Heliport's operations upon reaching a conclusion that a problem of excessive noise existed." F.3d at . It then states, "Based on the EIS's conclusion that a 47 percent reduction in

operations would result in a substantial noise reduction at the Heliport, we believe that, in this case, the relevant condition was reasonable." *Id.* With deference, I do not believe that the EIS's conclusion provides a proper basis for the Court to determine that the 47 percent figure remains reasonable, [\*36] once the factual predicate on which it was based (banning weekday sightseeing flights) has been abandoned.

The EIS was entitled to conclude that a 47 percent reduction in operations would result in a "substantial" noise reduction. It would have been equally entitled to conclude that an operations reduction of 46, 48, or 49 percent (or likely any number above 10, or perhaps 20) would also have resulted in a "substantial" noise reduction. But the undeniable fact is that the City decision-makers have required use of the 47 percent figure for no reason other than its equivalence to the percentage of operations reduction that would have resulted from a now abandoned prohibition. Upholding use of the 47 percent figure because it, like many other numbers, will yield a substantial noise reduction replaces reasoned decision-making with coincidence. The record provides no reasoned explanation as to why the 47 percent number remains reasonable, and demonstrably reveals why its selection is unreasonable.

For these reasons, I respectfully dissent in part.

**M.T. MEHDI and Ghazi Khankan, Plaintiffs,**  
v.  
**UNITED STATES POSTAL SERVICE, Marvin  
Runyon, Postmaster General, and Bob  
Fearnley, Director of Consumer Affairs,**  
Defendants.

No. 96 CIV. 5658(SS).

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

Dec. 23, 1997.

M.T. Mehdi, Ph.D., New York, NY, for Plaintiff  
Pro Se.

U.S. Department of Justice, United States Attorney,  
New York, NY, Jeffrey Oestericher, Assistant United  
States Attorney, for Defendant.

#### OPINION AND ORDER

SOTOMAYOR, D.J.

\*1 This case presents an issue not uncommon in a pluralistic society such as ours. Plaintiffs M.T. Mehdi and Ghazi Khankan are Muslims who object to the fact that, during the winter holiday season, some post offices are decorated with symbols primarily associated with the Christmas and Chanukah celebrations--specifically, Christmas trees and menorahs--yet there is no similar recognition of Muslim celebrations also taking place during December. The plaintiffs allege that they have asked the Postal Service to correct this situation and have either been ignored or refused. They have turned to this Court seeking injunctive relief in the form of an order requiring the Postal Service to display the Muslim Crescent and Star in conjunction with other holiday decorations or, alternatively, to remove any sectarian symbols from its holiday displays. The defendants argue that their display policy is violative neither of the plaintiffs' First Amendment nor Fifth Amendment Due Process rights, and have moved for judgment on the pleadings or, in the alternative, summary judgment. For the reasons to be stated, the defendants' motion is granted.

#### BACKGROUND

Except where otherwise noted, the following facts are taken from the amended complaint. Plaintiffs Mehdi and Khankan are American Muslims. Dr. Mehdi is, or at least was at the time of filing the complaint, the

secretary-general of the National Council on Islamic Affairs. He has worked, successfully in many cases, to persuade the operators of various public buildings and facilities to display the Crescent and Star, "secular symbol of the Muslim people" (Complaint ¶ 9), during the month of December along with Christmas and Chanukah displays (Complaint ¶ 4; Ex. 2). The display of the Crescent and Star is in celebration of USA Muslims Day, a holiday falling on the third Friday of December in which American Muslims are urged to host parties, exchange gifts and cards, inculcate their children with Islamic ideals, and "express appreciation for the bounty we enjoy in our new country and to express pride in Islam's contributions to the human civilization." (Complaint Ex. 1).

The defendant United States Postal Service ("USPS") is an independent agency within the Executive Branch of the United States, see 39 U.S.C. § 201, charged with providing postal service to the nation, see 39 U.S.C. § 101(a). According to plaintiffs, the USPS has at times displayed Christmas trees and Chanukah menorahs in its post offices, including the Manhattan General Post Office on Eighth Avenue and Thirty-third Street, without also displaying the Crescent and Star. (Complaint ¶ 28). Other post offices around the nation have done the same. (Complaint ¶ 4). The plaintiffs have written to these post offices individually as well as to the Postmaster General requesting the addition of the Crescent and Star whenever the Christmas tree and menorahs are displayed, but have uniformly been refused. *Id.*; see also Decl. of Patricia M. Gibert, Vice-President, Retail, USPS, ¶ 10 (USPS unaware of any postmaster which has displayed Crescent and Star on post office property).

\*2 Plaintiffs then filed this pro se action in this Court, [FN1] asking for injunctive relief in the form of an order to the USPS "to decorate its headquarters, all its branches, their lobbies and other facilities with the Crescent and Star as it decorates those facilities with the Christmas tree and Hanukkah Menorah" or, alternatively, "to order removal of all sectarian symbols which create different classes of citizens." (Complaint p. 11). The plaintiffs have not clearly articulated the constitutional or statutory provisions alleged to be violated by the USPS's refusal to display the Crescent and Star, but the Court construes the complaint to raise claims under the Free Speech and Establishment Clauses of the First Amendment, and under the equal protection component of the Fifth Amendment Due Process Clause.

## DISCUSSION

Summary judgment [FN2] is required when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "The moving party has the initial burden of 'informing the district court of the basis for its motion' and identifying the matter 'it believes demonstrate[s] the absence of a genuine issue of material fact.'" *Liebovitz v. Paramount Pictures Corp.*, 948 F.Supp. 1214, 1996 WL 733015, \* 3 (S.D.N.Y. Dec.18, 1996) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Once the movant satisfies its initial burden, the nonmoving party must identify "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). In assessing the parties' competing claims, the Court must resolve any factual ambiguities in favor of the nonmovant. See *McNeil v. Aguilos*, 831 F.Supp. 1079, 1082 (S.D.N.Y.1993). It is within this framework that the Court must finally determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Preliminarily, the Court begins by noting that although this case is ultimately about speech, the complaint could be read in two ways, depending upon just who is doing the speaking. On the one hand, the claims raised could be understood to be a complaint about Postal Service restrictions on the plaintiffs' speech--namely, that the plaintiffs wish to display the Muslim Crescent and Star in post offices but are being forbidden access to that forum in contravention of their Free Speech rights. Alternatively, the complaint could be read to assert plaintiffs' objection to the Postal Service 's speech--i.e., that by putting up Christmas and Chanukah displays but not displaying the Muslim Crescent and Star, the Postal Service is favoring Christians and Jews but disfavoring Muslims in violation of the Establishment Clause. See *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 765-66, 115 S.Ct. 2440, 2448, 132 L.Ed.2d 650 (1995)(plurality opinion) (distinguishing between "government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." )(quoting *Board of Educ. of Westside Community Schools (Dist.66) v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372, 110 L.Ed.2d 191 (1990)(O'Connor, J., concurring)).

[FN3] Although the complaint sounds primarily in the Establishment Clause interpretation (for example, the plaintiffs seek an injunction from this Court either to "order the [defendants] to decorate ... its branches ... with the Crescent and Star" or to "order removal of all sectarian symbols"), the Court will, consistent with its obligation to read pro se litigants' complaints liberally, see, e.g., *Branham v. Meachum*, 77 F.3d 626, 628 (2d Cir.1996), consider both of the above interpretations to be asserted. In addition, both interpretations are amenable to analysis under the Equal Protection component of the Fifth Amendment Due Process Clause. [FN4]

\*3 As a further matter, although the complaint does note at least one specific instance in which a post office displayed Christmas and Chanukah decorations without displaying the Muslim Crescent and Star, and also alleges several other instances in which post offices declined a request by plaintiffs to display the Muslim symbols, the plaintiffs' challenge is in the nature of a facial attack--that is, plaintiffs allege a blanket policy by the Postal Service of excluding the Crescent and Star and seek to have this Court issue injunctive relief against the Postal Service in its entirety. The plaintiffs have furnished this Court with no evidence of specific post office configurations, nor of specific holiday displays that are alleged to be unconstitutional. Plaintiffs are, in effect, asking this Court to rule that for post offices to display Christmas trees and menorahs without either displaying the Muslim Crescent and Star or allowing interested parties to do so is per se unconstitutional. In making such a broad attack, the plaintiffs have assumed a heavy burden. They must demonstrate that "no set of circumstances exists" under which the Postal Service policy--if indeed it has one--of displaying Christmas trees and menorahs but not the Crescent and Star "would be valid." See *Davidson v. Mann*, 1997 U.S.App. Lexis 30892, at \*3 (2d Cir.1997).

### I. Free Speech

A First Amendment claim that the government is impermissibly restricting a speaker's access to government property is controlled by the now-familiar tripartite forum analysis. See *General Media Communications, Inc. v. Cohen*, 1997 U.S.App. Lexis 33869, at \*13-16 (2d Cir.1997). Under this analysis, government property falls into one of three classifications: (1) traditional public fora, consisting of " 'places which by long tradition or by government fiat have been devoted to assembly and debate,' " id. at \*14 (quoting *Cornelius v. NAACP Legal Defense*

(Cite as: 1997 WL 793048, \*3 (S.D.N.Y.))

& Educ. Fund, 473 U.S. 789, 802 (1985)); (2) designated public fora, places "not traditionally open to assembly and debate" but "which the State has opened for use by the public as a place for expressive activity," *id.* (quoting *Cornelius*, 473 U.S. at 802, and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)); and (3) nonpublic fora, consisting of "all remaining public property." *Id.* at \*15. "The extent to which the Government can control access depends on the nature of the relevant forum." *United States v. Kokinda*, 497 U.S. 720, 726, 110 S.Ct. 3115, 3119, 111 L.Ed.2d 571 (1990) (plurality opinion).

Governmental intent is the "touchstone" for determining into which category a particular property falls. *General Media*, 1997 U.S.App. Lexis at \*15. Generally speaking, "when the state reserves property for its 'specific official uses,' it remains nonpublic in character." *Id.* (quoting *Capitol Square*, 515 U.S. at 761, 115 S.Ct. at 2446 (1995)). In addition, "dedication of property to a commercial enterprise is 'inconsistent with an intent to [create] a public forum.'" *Id.* at \*15-16 (quoting *Cornelius*, 473 U.S. at 804, 105 S.Ct. at 3450).

\*4 There is little question that the Postal Service is essentially a commercial enterprise--delivering mail and packages for its customers in return for payment. See *Kokinda*, 497 U.S. at 732 ("Congress has directed the Service to become a self-sustaining service industry ...."). Its facilities are, in the main, reserved for the specific purpose of "accomplish[ing] the most efficient and effective postal delivery system." *Id.*; see 39 U.S.C. § 403(b)(3) (responsibility of Postal Service is to maintain post offices "of such character" that customers will have "ready access to essential postal services"); 39 U.S.C. § 101(g) (Postal Service policy regarding new postal facilities must emphasize, *inter alia*, "a maximum degree of convenience for efficient postal services"). Plaintiffs have pointed to no evidence that suggests that the Postal Service intent with regards to its facilities is to accomplish any other purpose than effective delivery of the mails.

Moreover, in *Longo v. United States Postal Service*, 983 F.2d 9 (2d Cir.1992), the Second Circuit held that a walkway in the interior of a post office in Torrington, Connecticut was a nonpublic forum. Expressly adopting the analysis of the plurality opinion in *Kokinda*, the *Longo* court held that because the walkway was used "solely for the purpose of assisting patrons of the post office to get from the

parking lot to the front door of the post office," it was therefore a nonpublic forum. *Id.* at 11. Although the *Longo* holding involved only a particular post office, and mindful that the inquiry into intent is "inherently factual," *General Media*, 1997 U.S.App. Lexis 33869, at \* 18, if a walkway whose sole purpose is to allow access to the post office is a nonpublic forum, it follows virtually a fortiori that the post offices themselves are nonpublic fora. See also *United States v. Belsky*, 799 F.2d 1485, 1489 (11th Cir.1986) (ingress and egress walkways to post office are a nonpublic forum); *United States v. Bjerke* (3d Cir.1986) (same).

The plaintiffs attempt to distinguish *Longo* on the grounds that unlike the walkway in *Longo*, here the government is speaking--namely, through displays of Christmas and/or Chanukah symbols which might be put up in post offices pursuant to the seasonal display policy. This distinction is unavailing. Forum analysis turns on the access which the government provides to the public for expressive activity. See, e.g., *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3449 (government creates public forum "only by intentionally opening a nontraditional forum for public discourse")(emphasis added). The fact that the government is speaking does not turn an otherwise nonpublic forum into a public one. See, e.g., *Greer v. Spock*, 424 U.S. 828, 838 n. 10, 96 S.Ct. 1211, 1217 n. 10, 47 L.Ed.2d 505 (1976) (government's invitation of speakers "did not of itself serve to convert Fort Dix into a public forum"); *United States Postal Service v. Council of Greenburgh Civic Assocs.*, 453 U.S. 114, 130 n. 6, 101 S.Ct. 2676, 2685 n. 6, 69 L.Ed.2d 517 (1981) (rejecting contention that "simply because an instrumentality is used for the communication of ideas or information it thereby becomes a public forum"); cf. *Rust v. Sullivan*, 500 U.S. 173, 194, 111 S.Ct. 1759, 1773, 114 L.Ed.2d 233 (1991) (government's choice to promote one viewpoint does not require it to fund opposing viewpoints). This is consonant with the principle that in a nonpublic forum, the state's actions are "most analogous to that of a private owner." *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir.1991). If the government's speech on its own property by itself turned that property into a public forum, virtually all government facilities would become public fora open for a wide range of expressive activity. The First Amendment does not require this. See *International Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 678, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) ("[I]t is also well settled that the government need not permit all forms

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of speech on property that it owns and controls."); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304, 94 S.Ct. 2714, 2718, 41 L.Ed.2d 770 (1974) (plurality opinion) ("Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.").

\*5 The Court again notes that the facial nature of this challenge does not require this Court to find that all Postal Service facilities are necessarily nonpublic fora, nor could the Court do so based on the evidence presented. There may very well be, for example, individual post offices in this nation which have long been used for public debate so as to become traditional public fora, or that the Postal Service has devoted some areas to some form of public debate so as to turn them into designated or limited public fora. What the Court does reject, however, is the plaintiffs' contention that post offices are necessarily public fora; Longo, and the principles of forum analysis, foreclose such a possibility.

In nonpublic fora, the government has wide latitude in regulation of speech, it may even be, as here, content-based as long as it is "reasonable" and "not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *General Media*, 1997 U.S. App. Lexis 33869, at \*15. In other words, in a nonpublic forum, content regulation is judged by a reasonableness standard, while viewpoint discrimination is "subject to much more exacting constitutional scrutiny." *Id.* at \*22.

The Postal Service's seasonal display policy, on its face, does not discriminate amongst speakers based on viewpoint. Rather, it prohibits the public from posting any seasonal display, regardless of the holiday. See *Postal Operations Manual (POM)* 124.55, 124.57. [FN5] Plaintiffs have adduced no evidence suggesting, nor do they even allege, that the Postal Service is allowing the public to display Christmas trees and Chanukah menorahs on its premises. At most, then, the Postal Service is engaging in content regulation (e.g., the public may conduct political discourse on the exterior of postal premises, see *POM* 124.54(b), but may not put up seasonal displays), which is subject only to a test of reasonableness.

To be constitutional then, the seasonal display policy must only be "reasonable in light of the purpose of

the forum and reflect a legitimate government concern." *General Media*, 1997 U.S. App. Lexis 33869, at \*27. It need not be narrowly tailored, see *Cornelius*, 473 U.S. at 809, 105 S.Ct. at 3452, nor the "most reasonable or only reasonable limitation." *General Media*, at \*27.

Defendants have devoted most of their argument to discussing the rationale for displaying symbols traditionally associated with the holidays of Christmas and Chanukah and not for USA Muslims Day--namely, that the former holidays have substantial impact on Postal Service business while the latter does not. As briefed, this argument is, however, largely irrelevant to the Free Speech analysis. It is undisputed that any seasonal displays in the post offices are put there by the postmasters; therefore this rationale seeks to explain why the government as speaker chooses to express certain ideas but not others--a concern not of the Free Speech clause but rather of the Establishment Clause, if at all. The Free Speech analysis centers on the reason why the Postal Service prohibits the plaintiffs (and the public in general) from certain expressive activity--i.e., seasonal displays.

\*6 Implicit, however, in the Postal Service's explanation is the idea that the Postal Service views the decoration of its facilities as a means of promoting its business, and that its business can best be promoted by adorning its facilities with symbols of holidays which generate increased business. It follows, if by nothing more than "common sense," see *Kokinda*, 497 U.S. at 734-35 (plurality) (sufficient, under reasonableness review, to uphold regulation banning solicitation in post offices based on "common sense" description of disruption caused by solicitation), that opening up post offices to seasonal displays by the public would interfere with the Postal Service's own use of decoration to further its business. This reasoning is more than sufficient to meet the low threshold of reasonableness.

In sum, most if not all Postal Service facilities would be considered nonpublic fora, and the Postal Service's prohibition of seasonal displays by the public is a reasonable restriction designed to further its business. The plaintiffs have failed to produce any evidence suggesting the contrary, and summary judgment for the defendants on the Free Speech claim is thus proper.

## II. Establishment Clause

The Court now turns to the second view of the

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plaintiffs' case: that the Postal Service, not the plaintiffs, is the speaker. Plaintiffs complaint is that the Postal Service, by displaying Christmas and Chanukah symbols, is expressing favoritism for these holidays--and by implication, the religions of Christianity and Judaism--while disfavoring Muslims and their religion of Islam. This assertion implicates the Establishment Clause of the First Amendment. [FN6].

The "principle at the heart of the Establishment Clause" is "that government should not prefer one religion to another, or religion to irreligion." Board of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 114 S.Ct. 2481, 2491, 129 L.Ed.2d 546 (1995). To pass Establishment Clause muster a state-sponsored display must, at a minimum, pass the "endorsement test": "Would a reasonable observer of the display in its particular context perceive a message of governmental endorsement or sponsorship of religion?" Elewski v. City of Syracuse, 123 F.3d 51, 53 (2d Cir.1997). This hypothetical observer "must be deemed aware of the history and context of the community and forum in which the religious display appears." Creatore v. Town of Trumbull, 68 F.3d 59, 61 (2d Cir.1996)(quoting Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 773-74, 779-80, 115 S.Ct. 2440, 2452, 2455, 132 L.Ed.2d 650 (1995)).

On the issue of display of religious symbols during the holiday season, this Court is not writing on a clean slate. It is bound by Supreme Court precedent which, while not a model of clarity, is nonetheless dispositive of the plaintiffs' claim.

In County of Allegheny v. ACLU, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), the Supreme Court, in a badly fractured decision, held that the display by municipal authorities of Pittsburgh and Allegheny County of a Christmas tree and menorah together did not violate the Establishment Clause. No clear rationale emerged from the Court. Justices Blackmun and O'Connor applied the endorsement test--"whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices,'" id. at 597, 109 S.Ct. at 3103 (Blackmun, J.)(quoting School District of Grand Rapids v. Ball, 473 U.S. 373, 390, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (1985))--and determined that no endorsement or disapproval was indicated. Justice

Blackmun reasoned that Christmas and Chanukah have "attained a secular status in our society." Allegheny, 492 U.S. at 616, 109 S.Ct. at 3113 (Blackmun, J.) and that "the overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season, id. at 620, 109 S.Ct. at 3115 (Blackmun, J.). Justice O'Connor on the other hand found that, although both symbols are religious, the combination of the two "conveyed a message of pluralism and freedom of belief during the holiday season." Id. at 635, 109 S.Ct. at 3123 (O'Connor, J.). Justice Kennedy, writing for himself and three other Justices, also allowed the display but rejected the endorsement test, instead relying on the fact the display fell well within "the government accommodation and acknowledgment of religion that has marked our history from the beginning," id. at 663, 109 S.Ct. at 3138 (Kennedy, J.), and did not represent "proselytizing" by the government. Id. at 660, 109 S.Ct. at 3136 (Kennedy, J.).

\*7 Extending Allegheny to other contexts is not an easy task. As noted above, the endorsement test is the law of this circuit, however tenuous its status might be at the Supreme Court level. Of the Justices in Allegheny who applied the endorsement test, however, only two (Blackmun and O'Connor) found the combination Christmas tree and menorah to pass, and given Justice Kennedy's attack on the endorsement test as invalidating practices which he believed permissible under the Establishment Clause, it is not clear that Justice Kennedy would have reached the same result had he applied the test. However, the specific holding of Allegheny--that at least in some instances the state-sponsored display of a Christmas tree and menorah together does not violate the Establishment Clause--garnered a majority of the Court and is therefore binding precedent.

That holding is sufficient to defeat the plaintiffs' claim in this case. The Postal Service seasonal display policy in question allows postmasters to display, inter alia, "evergreen trees bearing nonreligious ornaments" and "menorahs (when displayed in conjunction with other seasonal matter)." POM 124.57(c). This policy was no doubt crafted by the Postal Service with Allegheny in mind. Whether the policy is in all cases constitutional is impossible to determine; one can certainly imagine a case in which the "other seasonal matter" displayed with a menorah served to enhance the religious aspects of the menorah rather than diminish them. The Court need not decide that issue, however, because the facial nature of the

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plaintiffs' challenge requires only that the Court find some applications of the policy to be constitutional, and *Allegheny* forecloses a finding to the contrary. The plaintiffs' claim under the Establishment Clause must therefore also fail.

### III. Equal Protection

Finally, the plaintiffs assert an Equal Protection claim--namely, that the Postal Service policy impermissibly discriminates against Muslims and/or Arabs. The Court first notes that a claim that the Postal Service is discriminating against Muslims by refusing to display the Crescent and Star would seem to collapse into the Establishment Clause claim. The plaintiffs have asserted, and adduced evidence to the Court, that the Crescent and Star are not themselves part of Islam, and for purposes of this summary judgment motion the Court must accept that as true. Plaintiffs assert, however, that they are symbols of the Muslim people. "Muslim" is defined as "an adherent of or believer in Islam," Webster's Third New International Dictionary (1986), and plaintiffs have not suggested to this court an alternative definition. To discriminate against Muslims qua Muslims would thus seem to fall squarely within the Establishment Clause's injunction that "government ... may not discriminate among persons on the basis of their religious beliefs and practices." *Allegheny*, 492 U.S. at 590, 109 S.Ct. at 3099. The Court, however, has already rejected a claim that the Postal Service policy violates the Establishment Clause.

\*8 However, the Court is willing, for purposes of this motion, to accept that Muslims could be considered a cultural or quasi-ethnic group that is defined other than by adherence to Islam, much as one might (although this is subject to debate) consider being Jewish as an ethnic or quasi-ethnic identity distinct from Jews as adherents of Judaism. Cf. *Allegheny*, 492 U.S. at 585, 109 S.Ct. at 3097 (noting that "some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity, and 'as a cultural or national event, rather than as a specifically religious event.'"). The Court will thus assume that discrimination against Muslims is distinct from government disapproval of Islam, and that therefore the Establishment Clause analysis is not dispositive of this claim.

Like the First Amendment claims already addressed, this Equal Protection claim can be viewed in two lights. First, the plaintiffs could be claiming that the Postal Service is preventing the plaintiffs from putting

up the Crescent and Star in post offices while allowing other groups to display their symbols. However, this claim fails because, as noted, the Postal Service prohibits all displays by the public of seasonal symbols, and plaintiffs have not produced any evidence suggesting the contrary. In order to prove a claim of discrimination in violation of Equal Protection, "a plaintiff must show not only that the state action complained of had a disproportionate or discriminatory impact but that also the defendant acted with the intent to discriminate." *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir.1987). At the very least, to survive summary judgment on this claim, plaintiffs would have to produce evidence suggesting that the Postal Service has allowed other, non-Muslim or non-Arab members of the public to erect seasonal displays in post offices. Plaintiffs have not even alleged these facts in their complaint, and thus summary judgment for defendants is appropriate.

Alternatively, plaintiffs claim could be that the Postal Service, by erecting displays celebrating non-Muslim cultural traditions but failing to similarly treat Muslim heritage, is implicitly making a statement that Muslims are, in the plaintiffs' words, "second-class citizens." (Complaint ¶ 29.) It is important to distinguish this injury from that constituted by the previous characterization. In the former claim, the plaintiffs seek to proclaim and celebrate their heritage yet are prevented from doing so by act of the government. The harm is palpable, direct and concrete--plaintiffs lose the opportunity to speak in their chosen forum and to add their voices to the holiday celebrations of others.

The alternative reading--i.e., the Postal Service is refusing to celebrate Muslim heritage on equal footing with non-Muslim--asserts a very different claim. The harm alleged flows from the fact that the voice of the government--uniquely authoritative as the voice of the people--is expressing the idea that Muslim heritage is less worthy of celebration, or that Muslims are somehow inferior persons. It is a purely dignitary injury.

\*9 The Court does not for a moment suggest that such a harm is not every bit as serious as the more "concrete" injury asserted by the first Equal Protection claim. On the contrary, to the plaintiffs, who have clearly worked extensively to promote the inclusion of Muslim heritage and culture at many different public venues where non-Muslim holidays are celebrated, this dignitary harm is no doubt precisely what troubles them most. Nevertheless,

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Supreme Court precedent compels the conclusion that the plaintiffs lack standing to raise this claim. [FN7]

Standing is essentially an inquiry into whether a plaintiff is the proper party to invoke the jurisdiction of the federal courts. See *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute ...."). "[S]tanding is not merely a prudential inquiry into whether a court should exercise jurisdiction, but is rooted in Article III's 'case' or 'controversy' requirement and reflects separation of powers principles." *In re U.S. Catholic Conference*, 885 F.2d 1020, 1023 (2d Cir.1989). To have standing, a plaintiff must demonstrate that (1) "they have suffered an injury in fact that is both concrete in nature and particularized to them," (2) "the injury [is] fairly traceable to the defendants' conduct," and (3) the injury [is] redressable by the removal of defendants' conduct." *Id.* at 1023-24. The plaintiffs in this case fail to satisfy the first prong of this test.

In *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), the parents of African-American school children whose districts were undergoing desegregation sued the Internal Revenue Service for failing to carry out the IRS's obligation to deny tax-exempt status to private schools which discriminated on the basis of race. The Court distinguished between two claims made by the parents: (1) that plaintiffs were "harmed directly by the mere fact of government financial aid to discriminatory private schools," *id.* at 752, 104 S.Ct. at 3325, a claim characterized by the Court as "a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race," *id.* at 754, 104 S.Ct. at 3326, , and (2) that the federal tax exemptions "impair[ed] their ability to have their public schools desegregated." *Id.* at 752-53. The latter claim was held to satisfy the injury prong of standing, while the former did not. [FN8]

Addressing the first claim, the Court asserted that while the stigmatizing injury caused by discrimination "is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing," *id.* at 755, 104 S.Ct. at 3326, "such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Id.* (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-40, 104 S.Ct. 1387, 79

L.Ed.2d 646 (1984)). Like the plaintiffs in *Allen*, the plaintiffs in this case "do not allege a stigmatic injury suffered as a direct result of having personally been denied equal treatment," *Id.* at 755, 104 S.Ct. at 3327, and thus have not stated a judicially cognizable injury.

\*10 The Court noted in *Allen* that "if the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating .... All such persons could claim the same sort of abstract stigmatic injury ...." *Id.* at 755-56, 104 S.Ct. at 3327. Plaintiffs' claim in this case is precisely the same: if the harm of having the Postal Service refuse to display the star and crescent is cognizable, every Muslim in the nation would have standing to sue. No less so than in *Allen*, "recognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Id.* at 756, 104 S.Ct. at 3327 (quoting *United States v. SCRAP*, 412 U.S. 669, 687, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)).

The Supreme Court recently reaffirmed this principle in *United States v. Hays*, 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995). In *Hays*, the plaintiffs were citizens of Louisiana who alleged that the state legislature had violated the Equal Protection clause by creating a majority-minority congressional district--but, critically, not the district in which plaintiffs resided. The Court dismissed their complaint for lack of standing, relying on *Allen*, and specifically rejecting the contention that all voters in the state had standing. *Id.* at 2435-36. The Court reiterated that to have standing, a plaintiff must assert more than "a generalized grievance against government conduct of which he or she does not approve," *id.* at 2436, but rather must allege injury "as a direct result of having personally been denied equal treatment." *Id.* at 2437 (quoting *Allen*, 468 U.S. at 755, 104 S.Ct. at 3327). Plaintiffs in this case have not alleged a personal denial of equal treatment, and thus any claim that the Postal Service has denied the plaintiffs equal protection by refusing to put up the Muslim Crescent and Star must be dismissed for want of standing. [FN9]

#### CONCLUSION

For the reasons discussed above, defendants' motion to dismiss is GRANTED. The Clerk of the Court is directed to enter judgment dismissing this action in its

entirety in accordance with this Opinion and Order.

SO ORDERED.

FN1. Plaintiffs filed their first complaint on November 30, 1995, but in an order dated July 29, 1996, Chief Judge Thomas Gricsa directed the plaintiffs to file an amended complaint which alleged specific instances in which the USPS had displayed Christmas trees and Chanukah menorahs but had refused to display the Crescent and Star. Plaintiffs filed their amended complaint on September 23, 1996.

FN2. Because the Court refers to matters outside the pleadings in determining this motion with respect to some of the plaintiffs' claims, the Court will treat the motion as one for summary judgment as to all claims, even for those where judgment on the pleadings would be appropriate. See Fed.R.Civ.P. 12(c). The defendants' motion was clearly denominated as one inviting summary judgment in the alternative, so plaintiffs were on notice that the Court might go beyond the pleadings; moreover, plaintiffs submitted additional evidence in their reply and in fact agreed that summary judgment was in order (Pl. Opp. Mem. at 4). See *Feaser v. City of New York*, 1997 U.S. Dist. Lexis 18269, at \*7 (S.D.N.Y.1997) (where motion asks for summary judgment in the alternative and opposing party submits additional evidence, proper to convert motion for judgment on pleadings without further notice to parties).

FN3. Plaintiffs specifically disclaim that the Crescent and Star have any religious significance themselves, see Complaint ¶ 19, and thus the Court does not construe the complaint to assert a claim that the USPS has "burdened [plaintiff's] exercise of religion," *Genas v. State of New York*, 75 F.2d 825, 831 (2d Cir.1996), in violation of the Free Exercise Clause.

FN4. The Due Process Clause of the Fifth Amendment has been interpreted to impose a duty of Equal Protection on the federal government identical to that imposed upon the states by the Fourteenth Amendment. See *Nicholas v. Tucker*, 114 F.3d 17, 19-20 (2d Cir.1997).

FN5. POM 124.55(e) does allow the public to post "secular holiday decorations" on bulletin boards in post office lobbies, including "evergreen trees (provided that only nonreligious ornaments are used)" and "menorahs." Plaintiffs have not alleged that they attempted to place a Muslim star and crescent on a post office bulletin board and were denied that opportunity, and the Court thus does not

address the issue of whether such a denial would constitute viewpoint discrimination. Rather, plaintiffs' complaint is directed at the large-scale lobby and building decorations. See Complaint ¶ 4 (referring to Christmas tree as "usually 20 feet high" and the Menorah as "10 to 15 feet"); ¶¶ 11, 24, 25, 30 (referring to displays in lobbies of post offices).

FN6. The Court notes that there is some question as to whether plaintiffs have standing to maintain this claim at all. As discussed in the Equal Protection analysis, *infra*, the plaintiffs would not have standing qua Muslims to challenge the purely dignitary harm of the USPS's alleged favoring of other religions over Islam. However, plaintiffs do have standing as taxpayers to challenge government expenditures, made pursuant to Congress's taxing and spending power, as violative of the Establishment Clause. See *Bowen v. Kendrick*, 487 U.S. 618-20, 108 S.Ct. 2579-80 (1988); *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

The Second Circuit in *In re U.S. Catholic Conference*, 885 F.2d 1020, 1027-28 (1989), held that taxpayers did not have standing to challenge the IRS administration of a congressional tax exemption program because there was no assertion that the congressional enactment itself was an Establishment Clause violation, a holding which would arguably apply in this case because plaintiffs do not contend that the congressional authorization of USPS spending is itself unconstitutional. However, the Circuit subsequently held in *Lamont v. Woods*, 948 F.2d 825, 829-31 (1991) that taxpayers did have standing to challenge how an agency spent funds authorized to it by Congress, even though Congress did not mandate that the agency spend it in the manner alleged to violate the Establishment Clause. *Catholic Conference* was distinguished on the grounds that there the IRS was alleged to be acting *ultra vires* its congressional grant of authority. *Id.* at 831. Because there is no allegation here that the USPS is acting beyond its statutory authority, the Court believes that *Lamont* controls and that the plaintiffs have standing as taxpayers.

The Court also notes that plaintiffs have not specifically alleged in their complaint that they are taxpayers. Given the *pro se* status of the plaintiffs, and given the Court's disposition of the Establishment Clause on the merits, however, the Court will assume they pay taxes to entitle them to standing.

FN7. Although defendants did not raise the standing issue in their motion papers, it was asserted as an affirmative defense in their answer. (Answer p. 8). In any event, because standing is an element of subject matter jurisdiction, the Court is required to raise the issue *sua sponte*. See *United States v. Hays*, 515 U.S. 737, 115 S.Ct. 2431, 2435, 132 L.Ed.2d 635 (1995).

FN8. The Court actually went on to hold that the plaintiffs lacked standing to assert the second claim because they had not satisfied the "fairly traceable" requirement. *Allen*, 468 U.S. at 756, 104 S.Ct. at 3327.

FN9. It may go without saying, but the fact that plaintiffs have asked the Postal Service to put up a Crescent and Star and have been refused does not constitute the "personal" denial of equal treatment

required to support standing. The plaintiffs in *Allen* were not required to achieve standing by first asking the IRS to stop the practices complained of; such an interpretation would improperly turn standing into nothing more than a quasi-administrative exhaustion hurdle. Instead, *Allen* held that mere dignitary harm resulting from the government's actions, without more, is not enough to confer standing upon a plaintiff.

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**SONIA SOTOMAYOR FURTHER SUPPLEMENTAL RESPONSE TO  
SENATE QUESTIONNAIRE  
PART I BIOGRAPHICAL INFORMATION, QUESTION 15(3)**

15(3). The following, in reverse chronological order, are citations for significant opinions on federal or state constitutional issues, that I have issued since filing my last Supplement to the Senate Questionnaire.

1. Alexander v. Keane, \_\_\_ F. Supp. \_\_\_, 1998 WL 17737, 1998 U.S. Dist. Lexis 350 (Jan. 14, 1998).
2. Rodriguez v. Artuz, \_\_\_ F. Supp. \_\_\_, 1998 WL 9377, 1998 U.S. Dist. Lexis 131 (Jan. 8, 1998).
3. Mehdi v. United States Postal Service, \_\_\_ F. Supp. \_\_\_, 1997 WL 793048, 1997 U.S. Dist. Lexis 20668 (Dec. 23, 1997).

**Alfredo RODRIGUEZ, Petitioner,**  
v.  
**Christopher ARTUZ, Superintendent, Green  
Haven Correctional Facility,**  
**Respondent.**

No. 97 CIV. 4694(SS).

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

Jan. 8, 1998.

OPINION

SOTOMAYOR, D.J.

\*1 Respondent moves to dismiss this habeas petition on the ground that the claims asserted by petitioner are barred by the one-year limitations period of § 101 of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. 104-132, 110 Stat. 1217 (April 24, 1996), codified at 28 U.S.C. § 2244(d). Petitioner mailed his petition to the Court over one year after the effective date of the AEDPA, and almost ten years after exhausting his state remedies. For the reasons to be discussed, I grant respondent's motion to dismiss this habeas petition as untimely.

BACKGROUND

Petitioner was convicted on November 13, 1985, following a jury trial in New York State Supreme Court, Bronx County, of Murder in the Second Degree (New York Penal Law § 125.25(1)). Petitioner was sentenced to an indeterminate prison term of twenty-five years to life. Petitioner is currently incarcerated at Green Haven Correctional Facility.

Petitioner appealed his conviction to the Supreme Court of the State of New York, Appellate Division, First Department, on the grounds that the judge improperly charged the jury regarding reasonable doubt, conflicting testimony, and intent. On January 22, 1987, the Appellate Division affirmed petitioner's conviction. *People v. Rodriguez*, 126 A.D.2d 994, 510 N.Y.S.2d 958 (1st Dep't 1987). On March 11, 1987, the New York State Court of Appeals denied petitioner leave to appeal. *People v. Rodriguez*, 69 N.Y.2d 885, 515 N.Y.S.2d 1034, 507 N.E.2d 1104 (1987). Petitioner did not file a petition for certiorari with the United States Supreme Court, nor has he made any state collateral attacks on his conviction.

On May 9, 1997, the Pro Se Office of this court

received petitioner's instant petition for a writ of habeas corpus under 28 U.S.C. § 2254, which was dated April 28, 1997. Respondent submitted its motion to dismiss on September 22, 1997, and petitioner opposed the motion on October 10, 1997. Respondents submitted an affidavit in reply on November 10, 1997, and petitioner submitted a supplemental reply on or about December 1, 1997.

DISCUSSION

Petitioner filed this petition after April 24, 1996, the effective date of the AEDPA. The AEDPA amended the habeas corpus statute to require that habeas petitions "be filed no later than one year after the completion of state court review." 28 U.S.C. § 2244(d)(1)(A) (1997). However, "[t]ime during which a properly filed state court application for collateral review is pending is excluded from the one year period." *Reyes v. Keane*, 90 F.3d 676, 679 (2d Cir.1996); see 28 U.S.C. § 2244(d)(2). The Second Circuit in *Peterson v. Demskie*, 107 F.3d 92, 93 (2d Cir.1997), recognized that it would be unfair to deny access to the federal courts to prisoners who did not have notice of the new time limits of the AEDPA. Although other circuits have ruled that "habeas petitioners should have a full year after the effective date of the AEDPA to file their petitions in federal district court," *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir.1996) (en banc), rev'd on other grounds, --- U.S. ---, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); *United States v. Simmonds*, 111 F.3d 737 (10th Cir.1997); *Calderon v. United States District Court for the Central District of California (Beeler)*, 112 F.3d 386, 389 (9th Cir.1997), this Circuit has held that "a habeas corpus petitioner is entitled to a 'reasonable time' after the effective date of the AEDPA to file a petition." *Peterson*, 107 F.3d at 92. Furthermore, "in circumstances ... where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA." *Peterson*, 107 F.3d at 93.

\*2 The instant petition, challenging a conviction that was final prior to the effective date of the AEDPA, was dated and mailed April 28, 1997, see Pet. Mem. Opp. at 1, more than one year after the effective date, and is therefore time-barred. [FN1] *Peterson* held that where, as here, the application of the AEDPA time limits would have cut off the ability to file immediately upon the AEDPA's taking effect, petitioners would be allowed a reasonable time thereafter in which to file. What *Peterson* did not

(Cite as: 1998 WL 9377, \*2 (S.D.N.Y.))

specifically state is that "a reasonable time" cannot be longer than a year, but that is Peterson's clear implication. To hold otherwise would be to place those whose convictions became final before the effective date of the AEDPA in a better position than those whose convictions became final after the effective date--to whom the AEDPA statute of limitations indisputably applies. Taking the instant petition as an example, if petitioner's conviction had become final on April 28, 1996, the Peterson reasonableness inquiry would be irrelevant, and the petition (dated April 29, 1997) would be unquestionably time-barred under the one-year statute of limitations imposed by the AEDPA. Clearly, the fact that petitioner has had even longer to file cannot serve to extend the limitations period. Because the instant petition was filed more than one year after the effective date of the AEDPA, it is time-barred under Peterson. Accord *Montalvo v. Portuondo*, No. 97 Civ. 3336, 1997 U.S. Dist. Lexis 752728, at \*5, 1997 WL 752728, at \*2 (S.D.N.Y. Dec. 4, 1997).

## II. Suspension Clause

However, petitioner asserts that application of the statute of limitations to deny hearing his first federal petition is unconstitutional, relying upon *Rosa v. Senkowski*, No. 97 Civ. 2468, 1997 U.S. Dist. Lexis 11177, 1997 WL 436484 (S.D.N.Y. Aug. 1, 1997) ("Rosa I"), certified for interlocutory appeal, 1997 U.S. Dist. Lexis 18310, 1997 WL 724559 (S.D.N.Y. Nov. 19, 1997) ("Rosa II"), appeal docketed, No. 97-2974 (2d Cir. Dec. 31, 1997). In *Rosa*, Judge Robert W. Sweet held that the imposition of time limitations "is an unconstitutional 'suspension' of the writ of habeas corpus." *Rosa I*, 1997 U.S. Dist. Lexis 11177, at \*19, 1997 WL 436484, at \*7. To the extent that *Rosa* decides that the AEDPA's one-year statute of limitations is in all cases an unconstitutional suspension of the writ, the Court respectfully declines to follow Judge Sweet's holding. [FN2] Unlike Judge Sweet, this Court does not find that a statute of limitations applied to habeas petitions per se "deprives [petitioners] of the ability to obtain any collateral review in a federal court of the merits of [their] claim[s]." *Rosa I*, 1997 U.S. Dist. Lexis 11177, at \*19, 1997 WL 436484, at \*7.

The Suspension Clause states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." U.S. Const. art. I, § 9, cl. 2. The insistence of the framers on including this provision in Article I is testament to the belief that the

Great Writ "has been for centuries esteemed the best and only sufficient defense of personal freedom." *Lonchar v. Thomas*, 517 U.S. 314, ---, 116 S.Ct. 1293, 1299, 134 L.Ed.2d 440 (1996) (quoting *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95, 19 L.Ed. 332 (1869)).

\*3 The Court first notes that there is considerable debate as to whether the "privilege of the writ" which may not normally be suspended includes the power of federal courts to issue the writ on behalf of state prisoners, or whether federal habeas for state prisoners is wholly statutory. See *Rosa I*, 1997 U.S. Dist. Lexis 11177, at \*30-34, 1997 WL 436484, at \*10-11 (summarizing debate); see also *Steiker*, supra note 4. Moreover, there is a question as to whether the scope of the habeas writ as known to the Framers was limited only to questions of jurisdiction and inquiries into extrajudicial detention, see *Fay v. Noia*, 372 U.S. 391, 399-414, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) (Brennan, J.); *id.* at 449-455 (Harlan, J., dissenting); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 *Harv. C.R.-C.L. L.Rev.* 579 (1982); Paul A. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 *Harv. L.Rev.* 441 (1963); and if so, whether the expansion of the scope of inquiry available under habeas beyond the more narrow confines known in 1789 falls within the Suspension Clause's sweep. See, e.g., *Swain v. Pressley*, 430 U.S. 372, 384-86, 97 S.Ct. 1224, 1231-32, 51 L.Ed.2d 411 (1977) (Burger, C.J., concurring). Given the disposition of this case, the Court need not, and does not, address this issue, see *Felker v. Turpin*, --- U.S. ---, ---, 116 S.Ct. 2333, 2340, 135 L.Ed.2d 827 (1996), and will focus instead on the question of whether the statute of limitations found in the AEDPA "suspends" the privilege of the writ.

The meaning of the Suspension Clause is not clearly defined in case law. Because Congress first expanded habeas to state prisoners in 1867 and, until the passage of the AEDPA in 1996, had placed few statutory limitations upon the writ, the courts have seldom been called upon to adjudicate the clause's contours. The Supreme Court has made its most significant pronouncements on the Suspension Clause in two cases.

In *Swain*, the Court considered a challenge to a provision of the District of Columbia Code which barred federal habeas for prisoners within the District of Columbia system in favor of a motion in the D.C. courts; the statute was expressly patterned after 28

(Cite as: 1998 WL 9377, \*3 (S.D.N.Y.))

U.S.C. § 2255, which substitutes a motion proceeding in the sentencing court for habeas corpus for federal prisoners. The D.C. provision, like § 2255, allowed for federal habeas if the motion remedy was "inadequate or ineffective to test the legality of [the applicant's] detention." D.C.Code. Ann. § 23-110(g) (1997). The Court held that "substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Id.* at 381, 97 S.Ct. at 1230; see also *United States v. Hayman*, 342 U.S. 205, 223, 72 S.Ct. 263, 274, 96 L.Ed. 232 (1951) (28 U.S.C. § 2255 not shown to be inadequate so Court would not reach Suspension Clause issue).

In *Felker* the Supreme Court addressed the contention that the limits on second and successive habeas petitions found in § 106 of the AEDPA, 28 U.S.C. § 2244(b) constituted an impermissible suspension of the writ. The Court first noted that "judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker*, --- U.S. at ---, 116 S.Ct. at 2340 (quoting *Lonchar*, 517 U.S. at ---, 116 S.Ct. at 1298). Second, the Court noted that the limits on second petitions fell "well within the compass of [the] evolutionary process" of the abuse of the writ doctrine and were therefore not a suspension in violation of Article I. *Id.* at 2340.

\*4 This Court does not believe that *Felker* can be read for the proposition that Congress has plenary power over habeas corpus. Congress may very well have that power, but *Felker* did not so decide, because in *Felker* it was unnecessary completely to define the boundaries of Congress's power over habeas. What the Court did hold was that as long as the provisions enacted by Congress fall within the evolving scope of habeas doctrine, as defined by statute, rule, and precedent, they are not an unconstitutional suspension, leaving open the question of whether, and to what extent, Congress may go even farther.

Unlike the provisions limiting successive petitions found constitutional in *Felker*, however, the one-year statute of limitations is a much more radical departure from the Supreme Court's own shaping of the habeas remedy. The "abuse of the writ" doctrine, the evolving scope of which *Felker* held to encompass the successive-petition limitations of the AEDPA, is a "modified *res judicata*" doctrine which has only applied to the problem of successive petitions; it has never encompassed time limits applicable to first petitions. See *McCleskey v. Zant*, 499 U.S. 467,

477-89, 111 S.Ct. 1454, 1461-67, 113 L.Ed.2d 517 (1991) (recounting history of abuse of the writ doctrine). Thus *Felker*, without more, is not dispositive of the question of whether the AEDPA statute of limitations violates the Suspension Clause.

Throughout the evolving limitations on habeas corpus, neither the Supreme Court nor Congress had ever seen fit to place a strict statute of limitations on the availability of the writ prior to the AEDPA. See *Lonchar*, 517 U.S. at ---, 116 S.Ct. at 1301. The only previous time consideration comes under Habeas Rule 9(a), which gives a court the option of dismissing a habeas petition if the state can show that it has been prejudiced by delay in filing without a showing of good cause by the petitioner. [FN3] Rule 9(a) essentially embodies the equitable doctrine of laches, see Advisory Committee Notes to Rule 9 ("[Rule 9(a)] is not a statute of limitations. Rather, the subdivision is based on the equitable doctrine of laches."), and in accordance with its equitable nature, it is applied flexibly in the court's discretion in order to meet its purpose--namely, to prevent a petitioner from unfairly disadvantaging the state by delaying adjudication of his habeas claims until witnesses are unavailable, memories stale, and evidence difficult to produce. The ultimate concern of this rule is that adjudications under a habeas petition be fair and accurate. See Advisory Committee Notes to Habeas Rule 9(a) (when claims are delayed, "both the attorney for the defendant and the state have difficulty in ascertaining what the facts are").

The statute of limitations in the AEDPA, on the other hand, serves a different purpose. Compared with the balancing required by Rule 9(a), its concern is not the accuracy of the proceeding or the fairness to the state's ability to defend its judgment--even if it were uncontroverted that the state had not been prejudiced and that a completely accurate hearing could be had on the merits, a time-barred petition must still be dismissed. Its overriding purpose, particularly considering the relatively short time period and in light of the limitations on second and successive petitions, is one of speed and finality. See, e.g., 142 Cong. Rec. S3462 (daily ed. Apr. 17, 1996) (statement of Sen. Heflin) ("Reform of the habeas corpus process will speed up the imposition of sentences ...."); 141 Cong. Rec. S7877 (daily ed. June 7, 1995) (statement of Sen. Dole) ("[T]hese landmark reforms will go a long, long way to streamline the lengthy appeals process and bridge the gap between crime and punishment in America."); 141 Cong. Rec. S7657 (daily ed. June 5, 1995)

(statement of Sen. Dole) ("If we really want justice that is 'swift, certain, and severe' ... then we must stop the endless appeals and endless delays that have done so much to weaken public confidence of our system of criminal justice."); 141 Cong. Rec. S7679 (daily ed. June 5, 1995) (statement of Sen. Hatch) ("By passing these provisions, we ensure that those responsible for killing scores of U.S. citizens will be given the swift penalty that we in society exact upon them).

\*5 The Court does not question that these are valid and legitimate goals for Congress to pursue. The Supreme Court has recognized that the development of habeas procedural doctrine has been properly concerned with "avoiding serious, improper delay ... and interference with a State's interest in the 'finality' of its own legal process." *Lonchar*, 517 U.S. at ----, 116 S.Ct. at 1298. However, these goals have never been the only concern of habeas procedures; rather, these goals are balanced against the need to "maintain the courts' freedom to issue the writ, aptly described as the 'highest safeguard of liberty.'" *Id.* (quoting *Smith v. Bennett*, 365 U.S. 708, 712, 81 S.Ct. 895, 898, 6 L.Ed.2d 39 (1961)). In *Lonchar*, in fact, the Supreme Court expressly disapproved the lower court's dismissal of a delayed habeas petition where the state had shown no prejudice resulting from the delay, reasoning that "the prejudice requirement represents a critical element in the balancing of interests undertaken by Congress and the framers of the Rule." *Lonchar*, 517 U.S. at ----, 116 S.Ct. at 1300. This was of particular concern to the *Lonchar* Court where, as here, a first federal habeas petition is involved, because dismissal of a first petition "denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.* at 1299.

Given the history of the habeas writ, both as shaped by Congress and by the Supreme Court, this Court believes that the time limitations of the AEDPA, if applied strictly, cannot be said to fall "well within the compass of this evolutionary process," *Felker*, --- U.S. at ----, 116 S.Ct. at 2340, and therefore cannot conclude on the reasoning of *Felker* alone that the Suspension Clause has not been violated. On this point, Judge Sweet and I agree. See *Rosa I*, 1997 U.S. Dist. Lexis 11177, at \*21-22, 1997 WL 436484, at \*7. This conclusion does not end the inquiry, however. *Felker* did not hold, and this Court should not be construed as holding, that Congress may do no more to shape the habeas remedy than codify prior judicial holdings. Habeas is still a statutory remedy,

and "within constitutional constraints ... the "balancing of objectives ... is normally for Congress to make." *Lonchar*, 517 U.S. at ----, 116 S.Ct. at 1298.

The Court must therefore turn to the more basic inquiry of *Swain*: does the time limitation of the AEDPA render the habeas remedy "ineffective or inadequate to test the legality of detention"?

Unfortunately, the phrase "inadequate or ineffective to test the legality of detention" does not by itself significantly advance the inquiry into whether there has been a suspension of the writ. In *Swain*, the Court expressly declined to elaborate on what facts would be necessary to make a showing of inadequacy. See *Swain*, 430 U.S. at 383 n. 20, 97 S.Ct. at 1230 n. 20. Nor have the federal courts, in applying the identical language found in 28 U.S.C. § 2255, had much cause to elaborate on its meaning. See *Triestman v. United States*, 124 F.3d 361, 377 (2d Cir.1997) ("While there have been hundreds of cases reciting this statutory provision, courts have yet to articulate its scope and meaning.").

\*6 The Second Circuit has recently addressed the "inadequate or ineffective" language of 28 U.S.C. § 2255 in *Triestman*. Although the Second Circuit was interpreting a statute, not the Suspension Clause, and care must be taken in transplanting interpretation of the former into the latter, the fact that *Triestman* was interpreting § 2255 in part to avoid running afoul of the Suspension Clause, see *id.* at 377, leads this Court to find the exposition in *Triestman* helpful.

One holding of *Triestman* was a rejection of the United States' argument that "inadequate or ineffective" referred only to practical considerations, such as difficulty in obtaining the movant's presence at a § 2255 hearing. See *id.* at 376; accord *In re Dorsainvil*, 119 F.3d 245, 250 (3d Cir.1997). *Triestman* also noted, however, that the mere fact that a federal prisoner "faces a substantive or procedural barrier" to relief does not render § 2255 inadequate or ineffective. *Triestman*, 124 F.3d at 376. In addition, it seems fairly clear from case law, and also as a matter of logical necessity, that the denial of relief on the substantive merits, as opposed to a procedural bar, does not render the remedy inadequate. See *Williams v. United States*, 481 F.2d 339, 344 (2d Cir.1973) ("Lack of success in the chosen forum, of course, does not make the [ § 2255] remedy inadequate or ineffective."); *Rigler v. Keller*, No. 96-CV-0588, 1997 U.S. Dist. Lexis 348, at \*3 n. 1, 1997 WL

17654, at \*1 n. 1 (N.D.N.Y. Jan. 14, 1997) ("[A] remedy is not 'inadequate or ineffective under section 2255 merely because the sentencing court denied relief on the merits.' ") (quoting *Tripati v. Henman*, 843 F.2d 1160, 1162 (9th Cir.1988)). The Court believes that the meaning of "inadequate or ineffective" for purposes of the Suspension Clause, as the Second Circuit found the identical language in § 2255 did, lies somewhere between mere practical considerations and "the full set of cases" in which the habeas remedy is "unavailable or unsuccessful." *Id.* at 377. The question is, where?

Unfortunately, it is at this point that *Triestman*'s usefulness to our inquiry reaches an end. Because *Triestman* was expounding the "safety valve" of § 2255 allowing petitioners to resort to the traditional habeas remedy under § 2241, the *Triestman* court was able to hold that 28 U.S.C. § 2255 is "inadequate or ineffective," and therefore petitioners could still resort to habeas corpus, whenever "failure to allow for collateral review would raise serious constitutional questions." *Id.* There is, however, no such safety valve in 28 U.S.C. § 2244, which appears to apply to all habeas petitions submitted by state prisoners: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). If failure to allow for collateral review under the AEDPA's statute of limitations "raises serious constitutional questions" under the Suspension Clause, there is no statutory alternative to resort to; this Court must squarely face those questions.

\*7 The question, then, is this: in what subset of cases in which a petitioner is procedurally barred from obtaining a writ of habeas corpus does the procedural bar render the habeas remedy "inadequate or ineffective"? Cases falling outside of this subset meet the test of *Swain* and are therefore not violations of the Suspension Clause. (Cases within this subset are not necessarily violations, because the more difficult question of the applicability of the Suspension Clause to federal habeas for state prisoners would then have to be answered.)

As a first cut, one can say this: Habeas is not rendered ineffective or inadequate in a particular instance merely because a procedural bar has fallen into place. This is, after all, the outcome of any number of procedural decisions by the Supreme Court on habeas--many petitioners have been procedurally denied the opportunity to present a first petition for

hearing on the merits. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 757, 111 S.Ct. 2546, 2568, 115 L.Ed.2d 640 (1991) (barring habeas claims for failure to appeal in state courts); *McCleskey*, 499 U.S. at 503, 111 S.Ct. at 1475 (barring consideration of claim based on abuse of the writ doctrine). Although the Court has not directly addressed a Suspension Clause claim in any of those cases, *Felker* strongly suggests that any procedural bars created by the Supreme Court in the evolution of its habeas jurisprudence are per se not suspensions of the writ. See *Felker*, --- U.S. at ---, 116 S.Ct. at 2340.

On the other hand, courts have often expressed concern that cases in which a petitioner could never have raised his or her claim create, or at least implicate, grave constitutional issues. See, e.g., *Martinez-Villareal v. Stewart*, 118 F.3d 628, 632 (9th Cir.1997) (interpreting AEDPA's gatekeeping provisions to bar all review of competency to be executed claims would create "strong indications" of a "serious constitutional problem" under the Suspension Clause); cf. *Lonchar*, 517 U.S. at ---, 116 S.Ct. at 1299 ("Dismissal of a first federal petition is a particularly serious matter, for that dismissal denies the petitioner the protection of the Great Writ entirely, risking injury to an important interest in human liberty."); *Triestman*, 124 F.3d at 378- 79 & n. 21 (inability of petitioner to ever raise actual innocence claim collaterally raises serious questions under Due Process Clause and Eighth Amendment; reserving whether serious Suspension Clause issue raised). In most of these cases, the courts have found reasonable statutory readings that enabled them to avoid reaching the constitutional issues. Nevertheless, the Court is persuaded that, for purposes of this case, we may assume that a procedural bar which prevents a petitioner from ever raising a federal claim in habeas would render habeas ineffective and inadequate so that *Swain* would not be satisfied. Nor does this Court believe that strict impossibility of filing a claim exhausts this subset of cases. If a procedural bar creates an unreasonable burden upon petitioners, the Court believes that such a bar would render habeas no less ineffective and inadequate than strict impossibility.

\*8 Finally, the Court notes that other courts have stated, at least in interpreting the language of 28 U.S.C. § 2255, that if a petitioner can show he is actually innocent of the crime for which he is convicted, "such a circumstance inherently results in a complete miscarriage of justice" which would render § 2255 inadequate and ineffective. In *re Dorsainvil*,

119 F.3d 245, 250-51 (3d Cir.1997) (quoting *Davis v. United States*, 417 U.S. 333, 346-47, 94 S.Ct. 2298, 2304-05, 41 L.Ed.2d 109 (1974)); cf. *Triestman*, 124 F.3d at 378-80 & n. 21 (barring a claim of actual innocence previously unavailable would raise "serious Eighth Amendment and due process questions"; reserving question of whether Suspension Clause would be implicated). Because no claim of actual innocence has been raised by the petitioner, nor does it appear from the face of the petition that he could make the "substantial showing" necessary for such a claim, see *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 868, 130 L.Ed.2d 808; *id.* (petitioner must "persuade[] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt"), this Court needs not decide whether procedural bars to habeas where actual innocence could be shown rises to the level of a Suspension Clause violation.

Thus, the Court is prepared to say the following: at least where no claim of actual or legal innocence has been raised, as long as the procedural limits on habeas leave petitioners with some reasonable opportunity to have their claims heard on the merits, the limits do not render habeas inadequate or ineffective to test the legality of detention and, therefore, do not constitute a suspension of the writ in violation of Article I of the United States Constitution. See *Steiker*, supra note 2, at 918 ("[T]he notion that [habeas] should be perpetual must be abandoned.... [A] more sensible understanding of the guarantee against 'suspension' is that it obligates Congress to provide one meaningful, nondiscretionary opportunity to secure federal review of federal claims.").

The AEDPA's statute of limitations does not create an unreasonable barrier preventing state prisoners from petitioning the federal courts for habeas relief. The writ is still available, but Congress has required that prisoners act expeditiously to take advantage of federal review--within one year of the time when the right to petition for habeas accrues. This Court finds no grounds on which to hold that it is per se unreasonable to expect petitioners to file their federal habeas within one year; accordingly, the statute of limitations in the AEDPA does not on its face render habeas "ineffective or inadequate to test the legality of detention" and is therefore not, at least in general, an unconstitutional suspension of the writ.

As applied to prisoners whose right to petition for habeas "accrued" prior to the AEDPA, the Second Circuit in *Peterson* has afforded those petitioners a

"reasonable time" after the enactment of the AEDPA to file their petitions. Almost by definition, this grace period affords petitioners reasonable opportunity to test the legality of their detention.

\*9 The Court declines to decide whether in some cases the one-year provision of the AEDPA might render the habeas remedy "ineffective or inadequate to test the legality of detention." The AEDPA has several provisions which have the effect of resetting the one-year clock, see 28 U.S.C. § 2244(d)(1) (statute of limitations runs one year from the latest of (A) conclusion of direct review; (B) removal of illegal state impediment to filing; (C) date of Supreme Court holding creating new constitutional right applicable on collateral review; or (D) discovery of factual predicate of claims); these provisions have only begun to be construed by the courts. The myriad of possible fact patterns which might arise is vast; it is certainly conceivable at this point that in the rare case one year would in fact be insufficient, cf. *Calderon v. United States Dist. Ct. for the Central Dist. of Calif.* (Beeler), 1997 WL 671283 (9th Cir.1997) (AEDPA statute of limitations is subject to equitable tolling), or that such injustice would flow from a strict application, that the question of whether the Suspension Clause forbade application in that case would be squarely presented.

Such a case is not presented here, however. *Rodriguez* has had almost ten years to file his federal petition. He was afforded a reasonable time after the enactment of the AEDPA to file. He has pointed the Court to no facts which explain why it was unreasonable for him to file his petition within this time. Therefore, as applied to the petitioner, the Court finds that the statute of limitations does not constitute a suspension of the privilege of the writ as defined by Article I.

At bottom, this Court's disagreement with *Rosa* depends upon what one takes Judge Sweet to have decided. At its broadest, *Rosa* could be read to assert that the Suspension Clause entitles every incarcerated person one opportunity to have his federal claims heard on the merits in federal habeas. This Court's holding, while not passing on this question, is not to the contrary. What this Court takes issue with is the suggestion that a first federal petition must therefore always be decided on the merits and not barred procedurally. See *Rosa I*, 1997 U.S. Dist. Lexis 11177, at \*19, 1997 WL 436484, at \*7 ("The application of the time limit to *Rosa's* first federal habeas petition effectively deprives him of the ability

to obtain any collateral review in a federal court of the merits of his claim that his confinement violates his constitutional rights. Such a deprivation constitutes an unconstitutional 'suspension' of the writ of habeas corpus."). Such a rationale simply cannot be squared with the numerous Supreme Court cases barring first federal petitions as abusive, successive, or procedurally defaulted.

A more narrow reading of *Rosa* is that procedural bars are not necessarily problematic, but that time limits are because the history of the federal habeas writ has never included such limits. See *Rosa I*, 1997 U.S. Dist. Lexis 11177, at \*24-29, 1997 WL 436484, at \*8-\*10. As noted above, this Court agrees that the AEDPA statute of limitations is sufficiently new to habeas corpus that reliance cannot be placed solely on *Felker* to uphold its constitutionality. However, as also noted above, *Felker*'s holding, that congressional limitations within the evolving scope of prior habeas jurisprudence do not violate the Suspension Clause, in no way implies that only such limitations are constitutional.

\*10 Nor does this Court find persuasive the numerous cases cited in *Rosa* in which the Supreme Court demonstrated a willingness to adjudicate constitutional claims despite the passage of many years since conviction. See *Rosa I*, 1997 U.S. Dist. Lexis 11177, at \*24-25, 1997 WL 436484, at \*8-9 (discussing *Chessman v. Teets*, 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d 1253 (1957); *Herman v. Claudy*, 350 U.S. 116, 76 S.Ct. 223, 100 L.Ed. 126 (1956); *Palmer v. Ashe*, 342 U.S. 134, 72 S.Ct. 191, 96 L.Ed. 154 (1951); and *Uveges v. Pennsylvania*, 335 U.S. 437, 69 S.Ct. 184, 93 L.Ed. 127 (1948)). The fact that the Supreme Court, in exercising its certiorari jurisdiction, chose to reach the merits of cases many years after conviction may say something about the Court's view of the wisdom or justice of time limits, but it in no way implies that the Court felt constitutionally constrained to hear those cases. Moreover, as there were no congressional statutes purporting to place time limits of any kind whatsoever on federal habeas, these cases say nothing about Congress's power to do so or the constitutional implications thereof (if any). [FN4]

Finally, the narrowest reading of *Rosa* is that time limits are not per se unconstitutional, but that the AEDPA's limits are insufficient to give a meaningful opportunity for federal review. See *Rosa I*, 1997 U.S. Dist. Lexis 11177, at \*28 n. 3, 1997 WL 436484, at \*9 n. 3 ("[I]t may be that even if a more

generous limitations period would not violate the Suspension Clause, a one-year period would be unreasonably brief to protect the privilege of the writ and thus violate Due Process."). The Court simply cannot agree that one year is insufficient to file a federal habeas petition, particularly where a petitioner, like *Rodriguez*, is making the same arguments presented during his state proceedings, and considering that the period is tolled while state collateral relief is sought, see 28 U.S.C. § 2244(d)(2), and that the one-year period "resets" upon the removal of illegal state impediments to filing, see 28 U.S.C. § 2244(d)(1)(B), or a new Supreme Court rule of constitutional law made retroactive on collateral review, see 28 U.S.C. § 2244(d)(1)(C), or the diligent discovery of new evidence, see 28 U.S.C. § 2244(d)(1)(D). As noted above, there may well be cases in which these provisions do not leave a reasonable opportunity to file, but this Court sees no reason why in general this should be the case, nor does *Rosa* provide any such reason.

In summary, I find that a filing of a habeas petition over one year after the effective date of the AEDPA to be "unreasonable" as that term was set forth by the Second Circuit in *Peterson*, and that application of this time limit is not a violation of the Suspension Clause of the United States Constitution.

#### CONCLUSION

For the reasons discussed, defendant's motion to dismiss is granted. The petition for a writ of habeas corpus is denied and dismissed.

SO ORDERED.

FN1. The timeliness of a prisoner filing is measured from the date the papers were given to prison authorities for mailing. See *Peterson*, 107 F.3d at 93.

FN2. In the opinion certifying his ruling for interlocutory appeal, Judge Sweet also held that the statute of limitations is a violation of the Due Process Clause of the Fourteenth Amendment. See *Rosa II*, 1997 U.S. Dist. Lexis 18310, at \*9, \*12-13, 1997 WL 724559, at \*3, \*5; see also *Montalvo*, 1997 U.S. Dist. Lexis 19288, at \*5-7, 1997 WL 752728, at \*2 (Sweet, J.) (confirming that *Rosa* opinions rest on both Suspension Clause and Fourteenth Amendment Due Process Clause). It is somewhat unclear what the rationale for Judge Sweet's Due Process holding is. This Court understands Judge Sweet in *Rosa I* to be using the Fourteenth Amendment primarily as a means of answering the

objection that the Suspension Clause only prohibits suspension of the federal writ for federal prisoners. The theory employed by Rosa I is that the Fourteenth Amendment incorporates the privilege of federal habeas corpus against unconstitutional state detention, much in the way that most of the Bill of Rights, intended originally as a check on federal power, has been incorporated via the Fourteenth Amendment as a limitation on state power as well. See Rosa I, 1997 U.S. Dist. Lexis 11177, at \*31-34, 1997 WL 436484, at \*10-11 ("Although the original Constitution did not prohibit suspension of the federal writ as to state prisoners, the Fourteenth Amendment 'incorporated' the privilege of the writ against the states, extending the federal courts' protection of federal prisoners to state prisoners ...."); see also Jordan Steiker, "Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?," 92 Mich. L.Rev. 862, 899-912 (1994); *id.* at 912 ("In sum, the Suspension Clause, viewed through the lens of the Fourteenth Amendment, affords state prisoners a constitutional right to federal review of constitutional claims in the lower federal courts."). As noted *infra*, the Court's holding in this case does not require it to pass upon the issue of whether the Suspension Clause protects federal habeas for state prisoners and as such, assuming this understanding of Judge Sweet's ruling is correct, this Court need not address his Due Process holding.

FN3. In fact, as originally proposed, Habeas Rule 9(a) contained what would have been the closest thing to a time limitation heretofore seen in habeas--a rebuttable presumption that a petition filed more than five years after conviction prejudiced the state's

ability to respond. However, Congress expressly rejected this provision in adopting the rules. See Lonchar, 517 U.S. at ----, 116 S.Ct. at 1300.

FN4. This Court also notes that it is simply incorrect to say that in these cases "the Supreme Court has ruled that lower courts were obliged to hear habeas corpus petitions, even when they were filed many years after a prisoner's conviction became final." Rosa I, 1997 U.S. Dist. Lexis 11177, at \*24-25, 1997 WL 436484 at \*8. In all four of these cases, the lower courts had denied the petitions on the merits; the issue of the propriety of hearing these cases due to untimeliness was not before the Court. Moreover, three of these cases--Herman, Palmer, and Uveges--were Supreme Court reviews of state habeas proceedings, so the timeliness of the petitions would have been questions of state law, presumably unreviewable by the Supreme Court. Similarly, petitioner's citations to *Heflin v. United States*, 358 U.S. 415, 420, 79 S.Ct. 451, 454, 3 L.Ed.2d 407 (1959) (Stewart, J., concurring, joined by four other Justices) (in § 2255, "as in habeas corpus, there is no statute of limitations ...."), and to *United States v. Smith*, 331 U.S. 469, 475, 67 S.Ct. 1330, 1333, 91 L.Ed. 1610 (1947) ("[H]abeas corpus provides a remedy for jurisdictional and constitutional errors at the trial without limit of time"), are unavailing. The dicta cited in both of these cases merely recount the fact that there was no statute of limitations on federal habeas--obviously an accurate statement of pre-AEDPA law, but of no bearing on the constitutional issue presented now before this Court.

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**Matthew ALEXANDER, Petitioner,**  
v.  
**John KEANE, Superintendent, Sing Sing  
Correctional Facility, Respondent.**

No. 97 Civ. 2526(SS).

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

Jan. 14, 1998.

Matthew Alexander, Sing Sing Correctional Facility,  
pro se.

Robert T. Johnson District Attorney, Bronx County  
New York, City, Nancy D. Killian, for respondent.

#### MEMORANDUM OPINION AND ORDER

SOTOMAYOR, J.

\*1 Respondent moves to dismiss this habeas petition on the ground that the claims asserted by petitioner are barred by the one-year limitations period of § 101 of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. 104-132, 110 Stat. 1217 (April 24, 1996), codified at 28 U.S.C. § 2244(d). The petitioner filed this petition approximately eleven months after the effective date of the AEDPA, and over six years after exhausting state direct review of his conviction. For the reasons to be discussed, I grant respondent's motion to dismiss the habeas petition as untimely.

#### BACKGROUND

Petitioner was convicted on June 15, 1988, following a jury trial in New York State Supreme Court, Bronx County, of Murder in the Second Degree (N.Y. Penal Law § 125.25(3)) and Robbery in the First Degree (N.Y. Penal Law § 160.15(3)). Petitioner was sentenced to an indeterminate prison term of twenty years to life on the murder count and a term of from eight and one-third to twenty five years on the robbery count. Petitioner is currently incarcerated at Sing Sing Correctional Facility

Petitioner appealed his conviction to the Supreme Court, Appellate Division, First Department, on the grounds that 1) the prosecution failed to establish his guilt beyond a reasonable doubt, 2) the evidence did not corroborate the accomplice testimony, 3) the trial court erred in failing to give a circumstantial evidence charge, and 4) the trial court's sentence was

excessive. On August 10, 1989, the Appellate Division affirmed petitioner's conviction. See *People v. Alexander*, 153 A.D.2d 507, 544 N.Y.S.2d 595 (1st Dep't 1989). On May 3, 1990, the New York State Court of Appeals affirmed. See *People v. Alexander*, 75 N.Y.2d 979, 556 N.Y.S.2d 508, 555 N.E.2d 905 (1989). Petitioner did not file for certiorari with the United States Supreme Court.

On May 11, 1991 petitioner filed a motion in the trial court, pursuant to N.Y.Crim.Proc.Law § 440.10, to vacate the conviction on the grounds of ineffective assistance of trial counsel; this motion was denied on July 16, 1991, and the Appellate Division denied leave to appeal on September 26, 1991. See *People v. Alexander*, No: M-4181, 1991 N.Y.App.Div. Lexis 12470 (1st Dep't Sept. 26, 1991). Finally, on March 11, 1992, petitioner filed in the Appellate Division for a writ of error coram nobis, raising the same grounds as his unsuccessful § 440.10 motion. The petition was denied on May 14, 1992, see *People v. Alexander*, 183 A.D.2d 1110, 592 N.Y.S.2d 542 (1st Dep't 1992), and the Court of Appeals denied leave to appeal on August 5, 1992. See *People v. Alexander*, 80 N.Y.2d 900, 588 N.Y.S.2d 826, 602 N.E.2d 234 (1992).

On March 31, 1997, this Court received the instant petition, dated March 21, 1997, for a writ of habeas corpus under 28 U.S.C. § 2254. Respondent submitted its motion to dismiss on July 29, 1997, and petitioner opposed the motion on September 18, 1997. Respondent submitted a reply on November 6, 1997, and the petitioner submitted a sur-reply on November 9, 1997.

#### DISCUSSION

\*2 Petitioner filed this petition after April 24, 1996, the effective date of the AEDPA. The AEDPA amended the habeas corpus statute to require that habeas petitions "be filed no later than one year after the completion of state court review." 28 U.S.C. § 2244(d)(1)(A) (1997). However, "[t]ime during which a properly filed state court application for collateral review is pending is excluded from the one year period." *Reyes v. Keane*, 90 F.3d 676, 679 (2d Cir.1996); see 28 U.S.C. § 2244(d)(2). The Second Circuit in *Peterson v. Demskie*, 107 F.3d 92, 93 (2d Cir.1997), recognized that it would be unfair to deny access to the federal courts to prisoners who did not have notice of the new time limits of the AEDPA. Although other circuits have ruled that "habeas petitioners should have a full year after the effective

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date of the AEDPA to file their petitions in federal district court, "Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir.1996) (en banc), rev'd on other ground, --- U.S. ---, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); United States v. Simmonds, 111 F.3d 737 (10th Cir.1997); Calderon v. United States District Court for the Central District of California (Beeler), 112 F.3d 386, 389 (9th Cir.1997), this Circuit has held that "a habeas corpus petitioner is entitled to a 'reasonable time' after the effective date of the AEDPA to file a petition." Peterson, 107 F.3d at 92. Furthermore, "in circumstances ... where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA." Peterson, 107 F.3d at 93.

Following Peterson, district courts in this circuit have found petitions filed near the end of the year following the enactment of the Act to be untimely. See Rashid v. Khulmann, No. 97 Civ. 3037, 1998 U.S. Dist. Lexis ---, at \*---, 1998 WL ---, at \*--- (S.D.N.Y. Jan. 8, 1998) (collecting cases). The Second Circuit in Peterson also cautioned, however, that "we do not think that the alternative of a 'reasonable time' should be applied with undue rigor." Peterson, 107 F.3d at 93. Accordingly, courts in this circuit have found petitions filed after the effective date of AEDPA to be timely where the petition was filed well before the conclusion of the one year period following the effective date of the Act or soon after state review concluded. See *id.*

The Second Circuit in Peterson provided little guidance as to what factors should be considered in determining whether a petition is filed within a reasonable time after the effective date of the AEDPA, except to say that "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year ...." Peterson, 107 F.3d at 93. The implication of this statement is that the length of time since conviction is a factor to be considered, with more recently convicted petitioners afforded longer time, perhaps even up to one full year. See Morillo v. Crinder, No. 97 Civ. 3194, 1997 U.S. Dist. Lexis 18295, at \*5-6, 1997 WL 724656, at \*2 (S.D.N.Y. Nov. 17, 1997) (petition filed 350 days after AEDPA timely because, *inter alia*, petitioner who filed 370 days after conviction "did not have years to contemplate bringing his petition"); Jones v. Artuz, No. CV 97-2394, 1997 U.S. Dist. Lexis 15581, at \*2-3 (E.D.N.Y. Sept. 13, 1997) (petition filed 357 days after AEDPA not untimely where filed only

fourteen months after conviction).

\*3 In addition to this factor, the district courts applying Peterson have relied on a number of common factors in making their analysis: (1) whether the federal petition merely restates claims made to the state courts, and thus does not require extensive additional preparation, see *Avincola v. Stinson*, No. 97 Civ. 1132, 1997 U.S. Dist. Lexis 17078, at \*6, 1997 WL 681311, at \*2 (S.D.N.Y. Oct. 29, 1997) (petition filed 266 days after AEDPA untimely because, *inter alia*, "[t]he claims raised here are identical to those raised in state court"); *White v. Garvin*, No. 97 Civ. 3244, 1997 U.S. Dist. Lexis 15577, at \*5, 1997 WL 626396, at \*2 (S.D.N.Y. Oct. 7, 1997) ("Because petitioner raised the same claims in his prior appeals, he did not have to do much, if any, legal research or writing to complete his petition.") (petition filed 341 days after the AEDPA untimely); *Berger v. Stinson*, 977 F.Supp. 243, 245 (W.D.N.Y.1997) ("[I]t is difficult to see why an extended period of time was necessary to prepare and file a habeas corpus petition based on the same facts" as a previous state collateral motion); (2) whether the petitioner is proceeding pro se or is represented by counsel, see *Morillo*, 1997 U.S. Dist. Lexis 18295, at \*6, 1997 WL 724656, at \*2 (filing pro se "can substantially increase the time involved in preparation of court documents") (petition timely); *Rivalta v. Artuz*, 1997 U.S. Dist. Lexis 10282, at \*2 n. 1, 1997 WL 401819, at \*1 n. 1 (S.D.N.Y.1997) (petition filed six months after AEDPA timely "in light of the ... liberal treatment traditionally conferred by this Circuit on pro se parties"); but see *Rosa v. Senkowski*, No. 97-2468, 1997 U.S. Dist. Lexis 11177, at \* 10-11, 1997 WL 436484, at \*4 (S.D.N.Y. Aug. 1, 1997) ("[T]o allow the absence of counsel to extend the filing period would render the 'reasonable' time limitations imposed by the Second Circuit void in the substantial number of pro se habeas corpus petitions brought in this district."); (3) whether the petitioner was pursuing state collateral relief during the post-AEDPA period, see *Newton v. Strack*, No. CV 97-2812, 1997 U.S. Dist. Lexis 17511, at \*6-7, 1997 WL 752348, at \*2 (E.D.N.Y. Oct. 15, 1997); *Johnson v. Kelly*, No. CV 97-1298, 1997 U.S. Dist. Lexis 15580, at \*6-7 (E.D.N.Y. Sept. 12, 1997); and (4) the difficulty or complexity of the issues raised by the petition, see *Carmona v. Artuz*, No. 96 Civ. 8045, 1997 U.S. Dist. Lexis 15791, at \*15 (S.D.N.Y. Oct. 3, 1997) (magistrate judge report and recommendation). Generally speaking, petitions filed within a month or two of the one-year anniversary of the AEDPA have been presumed untimely absent

(Cite as: 1998 WL 17737, \*3 (S.D.N.Y.))

compelling explanation. See *Pacheco v. Artuz*, No. 97 Civ. 3171, 1997 U.S. Dist. Lexis, at \*5, 1997 WL 724774, at \*2 (S.D.N.Y. Nov. 17, 1997); *Garcia v. New York State Dep't of Corrections*, No. 97 Civ. 3867, 1997 U.S. Dist. Lexis 17079, at \*7, 1997 WL 681313, at \*2 (S.D.N.Y. Oct. 28, 1997).

\*4 In this case, petitioner's application is not timely. The petition was filed, at the earliest, on March 21, 1997 [FN1]--almost eleven months after the effective date of the AEDPA, and over six years after his conviction had become final. [FN2] The claims raised in this petition are essentially the same as petitioner raised in his state court proceedings. Petitioner is not raising any new claims of unusual difficulty or magnitude. Petitioner offers no compelling explanation as to why the petition could not have been filed much earlier. The petition is therefore untimely under Peterson.

Petitioner's arguments that the AEDPA statute of limitations should not be applied retroactively have been addressed by the Second Circuit in Peterson and in *Reyes v. Keane*, 90 F.3d 676 (2d Cir.1996), and are therefore foreclosed. To the extent that petitioner's arguments raise a claim under the Ex Post Facto Clause, U.S. Const. art I., § 9, cl. 3, this Court addressed that claim in a recent opinion, see *Rashid*, 1997 U.S. Dist. Lexis ----, at \*---- 1997 WL ----, at \*----, and rejected it for essentially the reason that the AEDPA statute of limitations does not " 'retroactively punish[ ] as a crime an act previously committed, which was innocent when done,' 'make more burdensome the punishment for a crime, after its commission,' or 'deprive [ ] one charged with crime of any defense available according to law at the time when the act was committed.' " *Doe v. Pataki*, 120 F.3d 1263, 1272 (2d Cir.1997) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S.Ct. 68, 68- 69, 70 L.Ed. 216 (1925)).

Likewise, petitioner's argument that the respondent's motion to dismiss is actually raised under Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"), and that prejudice must therefore be shown, is incorrect. The respondent is not invoking Habeas Rule 9(a), but rather 28 U.S.C. § 2244(d). There is no requirement of prejudice in the AEDPA statute of limitations.

In *Rosa v. Senkowski*, No. 97 Civ. 2468, 1997 U.S. Dist. Lexis 11177, 1997 WL 436484 (S.D.N.Y. Aug. 1, 1997), certified for interlocutory appeal, 1997 U.S. Dist. Lexis 18310, 1997 WL 724559 (S.D.N.Y.

Nov. 19, 1997), appeal docketed, No. 97-2974 (2d Cir. Dec. 31, 1997), Judge Robert J. Sweet refused to dismiss a petition that was time-barred under Peterson on grounds that the statute of limitations in the AEDPA violates the Suspension Clause, see U.S. Const. art. I, § 9, cl. 2, and the Due Process Clause of the Fourteenth Amendment, see U.S. Const. amend. XIV, § 1. See also *Montalvo v. Portuondo*, No. 97 Civ. 3336, U.S. Dist. Lexis 19288, 1997 WL 752728 (S.D.N.Y. Dec.4, 1997) (Sweet, J.) (reaffirming *Rosa* holding). In a recent opinion, this Court declined to follow Judge Sweet's holding. See *Rodriguez v. Artuz*, No. 97 Civ. 4694, 1998 U.S. Dist. Lexis ----, at \* ----, 1998 WL ----, at \*---- (S.D.N.Y. Jan. 8, 1998).

\*5 In *Rodriguez*, this Court stated that "at least where no claim of actual or legal innocence has been raised, as long as the procedural limits on habeas leave petitioners with some reasonable opportunity to have their claims heard on the merits, the limits do not render habeas inadequate or ineffective to test the legality of detention and, therefore, do not constitute a suspension of the writ in violation of Article I of the United States Constitution." *Id.* Furthermore, this Court held that in general Peterson afforded petitioners such a reasonable opportunity. *Id.*

In *Rodriguez*, however, this Court did not need to pass upon the question of whether a claim of "actual innocence" could override the AEDPA's statute of limitations--or, more precisely, whether the dismissal of a claim of actual innocence as time-barred would be a violation of the Suspension Clause--because no claim of actual innocence was raised in that case, nor did it appear from the face of the petition that the claims *Rodriguez* raised were sufficient in any case to make such a claim. The petitioner here, however, does appear to assert such a claim. See Pet. Mem. in Opp., at 18-19 ("This petitioner is innocent of the crime in which he is presently unlawfully imprisoned in violation of his constitutional rights.... [T]he state seeks to convince this Court to merely dismiss this action as a means of dispensing with justice. This is not what Congress intended when drafting of federal habeas review.... Nor would the framers of the United States Constitution sanction the outright summary dismissal of this petitioner's cause...."). While not expressly stating that the Suspension Clause requires an actual innocence exception to a statute of limitations, this Court believes that a fair reading of petitioner's argument, construed liberally as required when a pro se petitioner is involved, requires this Court to more fully explore the issue it left open in

Rodriguez.

"Actual innocence" in habeas jurisprudence refers to a means by which petitioners can avoid certain procedural bars to having their habeas petitions considered on the merits. As described by the Supreme Court, the type of actual innocence claim asserted by petitioner in this case "is 'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" *Schlup v. Delo*, 513 U.S. 298, 314, 115 S.Ct. 851, 861, 130 L.Ed.2d 808 (1995) (quoting *Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 862, 122 L.Ed.2d 203 (1993)). [FN3] The Court has usually allowed actual innocence to serve as a substitute for showing "cause and prejudice," the usual standard for overcoming procedural bars in habeas cases. See *Schlup*, 513 U.S. at 314, 115 S.Ct. at 861. The availability of the actual innocence gateway has been reiterated in cases where petitions would be barred for state procedural defaults, see *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991); *Murray v. Carrier*, 477 U.S. 478, 495- 96, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986); or where they would be barred as abusive, see *McCleskey v. Zant*, 499 U.S. 467, 494, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991); or where they would be barred as successive, see *Kuhlmann v. Wilson*, 477 U.S. 436, 454, 106 S.Ct. 2616, 2617, 91 L.Ed.2d 364 (1986) (plurality opinion); *id.* at 471 n. 5, 106 S.Ct. at 2636 n. 5 (Brennan, J., dissenting); *id.* at 476, 106 S.Ct. at 2639 (Stevens, J., dissenting). In *Schlup*, the Court simply described the petitioner as facing "various procedural bars" to which the actual innocence exception would apply, which at least suggests that any procedural bar may be overcome by meeting the actual innocence test.

\*6 However, the Supreme Court has never addressed whether actual innocence (or even cause and prejudice) is available to overcome the procedural bar of a statute of limitations, because prior to the enactment of the AEDPA there was no statute of limitations affecting habeas petitions. Moreover, the Supreme Court has never had to address whether the actual innocence exception is constitutionally required, because it has always been applied either to overcome procedural hurdles of the Court's own making, see, e.g., *Coleman*, 501 U.S. at 729-32, 111 S.Ct. at 2554-55 (procedural default rules created by Court in interests of comity and federalism); or as a means of giving content to a discretionary power

vested in the courts by statute, see, e.g., *Kuhlmann*, 477 U.S. at 448-52, 106 S.Ct. at 224-26 (under version of 28 U.S.C. § 2244(b) then in effect, courts "need not entertain" successive or abusive petitions; "permissive language" gives court discretion to consider claims of innocence). Prior to the AEDPA, there had never been a provision in the habeas statutes which strictly prevented a court from issuing the writ on behalf of a person "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2241(c)(3), except for the provision that required exhaustion of remedies, see 28 U.S.C. § 2254(b) ("An application for a writ of habeas corpus ... shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state....") (emphasis added). Even then, this provision only postponed the possibility of federal relief. The Supreme Court has always been able to fit an exception for actual innocence comfortably into the statutes, and thus the constitutional nature of the exception has never been squarely presented.

Similarly, the Second Circuit, in the recent decision of *Triestman v. United States*, 124 F.3d 361 (2d Cir.1997), was able to avoid directly addressing the issue of whether federal habeas must be available, at least at some point, [FN4] to adjudicate a claim of actual innocence, because the language of 28 U.S.C. § 2255 contains a "safety valve,"--namely, that the writ of habeas corpus under 28 U.S.C. § 2241 is still available to federal prisoners if "the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of [the prisoner's] detention." 28 U.S.C. § 2255. By holding that the procedural bars on *Triestman's* claim rendered § 2255 "inadequate and ineffective," and that therefore habeas corpus relief under § 2241, to which the gatekeeping procedures do not apply, remained open to him, the Second Circuit was able to avoid directly addressing the extent to which federal habeas is constitutionally required. See *Triestman*, 124 F.3d at 380.

For purposes of this petition, however, what *Triestman* does confirm is that procedurally barring a claim of actual innocence raises serious constitutional issues. See *id.* at 378-79. [FN5] Moreover, *Triestman* also confirms that the concern that habeas be available to hear claims of actual innocence is not necessarily limited to capital cases, because *Triestman* was not under a sentence of death for his crime. See *Triestman*, 124 F.3d at 379 (noting "the distinct possibility that the continued incarceration of an innocent person violates the Eighth Amendment"); see also *Borrego v. United States*, 975 F.Supp. 520,

525 (S.D.N.Y.1997) (actual innocence exception extends to noncapital sentencing issues).

\*7 It must be noted, however, that *Triestman* differs from the instant case in a potentially significant way. The *Triestman* court found that *Triestman* "could not have raised his claim of innocence ... in an effective fashion at an earlier time." *Triestman*, 124 F.3d at 379. The petitioner here, however, is not in such a situation--he does not rely on any newly discovered evidence or new legal rulings, and this Court's finding that his filing was unreasonable under *Peterson* virtually forecloses a finding that he did not have sufficient opportunity to raise his claim. The issue before this Court is therefore slightly different from *Triestman*: not, as in that case, whether the Constitution requires Congress to provide (at least) one meaningful opportunity for federal review of an innocence claim, but whether the federal habeas doors must, in effect, remain perpetually open to such a claim, at least until the claim has been adjudicated on the merits. Although *Triestman* did not address this issue, this Court believes that the concerns of that court, as well as a consistent line of Supreme Court jurisprudence, also indicate that procedural bars to hearing actual innocence claims--even if there was some prior opportunity (but not a prior federal rejection of the merits)--raise serious constitutional concerns.

The *Triestman* court noted, for instance, that "[i]t is certainly arguable ... that the continued imprisonment of an actually innocent person would violate just such a fundamental principle." *Id.* It also noted that "serious due process questions would arise if Congress were to close off all avenues of redress in such cases, especially when the prisoner could not have raised his claim of innocence ... in an effective fashion at an earlier time." *Id.* (emphasis added). The fair implication of this last statement is that "such cases" refers to more than just those in which the actual innocence claim could not have been effectively raised earlier.

This is confirmed by the Supreme Court's decision in *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). In *Carrier*, the Court held that, although failure to raise a claim on direct appeal constituted procedural default which would normally bar federal habeas review, the default could be overcome by a showing of "cause and prejudice." The Court specifically noted that "a showing that the factual or legal basis for a claim was not reasonably available to counsel ... would constitute cause ..." and

also that "[i]neffective assistance of counsel ... is cause for a procedural default." *Id.* at 488, 106 S.Ct. at 2645. The Court then went on to state the following:

"[i]n appropriate cases" the principles of comity and finality that inform the concepts of cause and prejudice "must yield to the imperative of correcting a fundamentally unjust incarceration." We remain confident that, for the most part, "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.

\*8 *Id.* at 495-96, 106 S.Ct. at 2649 (quoting *Engle v. Isaac*, 456 U.S. 107, 135, 102 S.Ct. 1558, 1576, 71 L.Ed.2d 783 (1982)). Any case in which a claim of actual innocence could not have been raised earlier would obviously meet the "cause" standard set out above (factual or legal basis not reasonably available). Cf. *Triestman*, 124 F.3d at 367-69 (prior to AEDPA, district courts would have been able to reach merits of claim that could not have been raised earlier but was now viable due to intervening change in law). Clearly, this does cover most actual innocence claims, because they are normally based on new evidence that was either unavailable earlier or was omitted due to ineffective assistance of counsel. However, that the *Carrier* Court felt this did not exhaust the universe of cognizable actual innocence claims strongly suggests that the prior availability of an actual innocence claim does not necessarily remove it from the universe of "fundamentally unjust incarcerations." See also *Kuhlmann v. Wilson*, 477 U.S. 436, 452, 106 S.Ct. 2616, 2626, 91 L.Ed.2d 364 (1986) (plurality opinion) ("Even where ... the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.") (holding that federal habeas court may hear claim previously litigated in federal habeas if prisoner makes a "colorable showing of factual innocence.").

The Supreme Court has long noted that the "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup*, 513 U.S. at 324,

115 S.Ct. at 866; see also *O'Neal v. McAninch*, 513 U.S. 432, 442, 115 S.Ct. 992, 997, 130 L.Ed.2d 947 (1995) (describing as "basic purpose[ ] underlying the writ" the correction of an error "that risks an unreliable trial outcome and the consequent conviction of an innocent person"). In fact, the Supreme Court has often justified pruning back the scope of federal habeas review by cutting away those aspects which do not bear on actual innocence. See, e.g., *Teague v. Lane*, 489 U.S. 288, 312-13, 109 S.Ct. 1061, 1076-77 (1989) (retroactivity on collateral review limited to those new rules of constitutional law which either "place[ ] 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe' or are designed to eliminate 'procedure[s] which create an impermissibly large risk that the innocent will be convicted'" (quoting *Mackey v. United States*, 401 U.S. 667, 692, 91 S.Ct. 1160, 1180, 28 L.Ed.2d 404 (1971) (opinion of Harlan, J.) and *Desist v. United States*, 394 U.S. 244, 262, 89 S.Ct. 1030, 1041, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting)); *Kuhlmann*, 477 U.S. at 454, 106 S.Ct. at 2627 (federal court may entertain successive habeas petitions only where colorable showing of actual innocence is made); *Stone v. Powell*, 428 U.S. 465, 491 n. 31, 96 S.Ct. 3037, 3051 n. 31, 49 L.Ed.2d 1067 (1976) (Fourth Amendment claims not cognizable in federal habeas because petitioner "is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration" and does not remove a "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty").

\*9 The point of the above discussion is this: If there is any core function of habeas corpus--any constitutionally required minimum below which the scope of federal habeas may not be reduced--it would be to free the innocent person unconstitutionally incarcerated. Thus, the question which began this inquiry--does the Suspension Clause require that an exception for actual innocence be made to the AEDPA statute of limitations?--translates into the more basic question: Does the Suspension Clause require Congress to provide any federal habeas relief for state prisoners whatsoever?

This is an extremely difficult question, implicating as it does some of the most fundamental and fiercely contested issues of constitutional law--relations among the three branches of the federal government, relations between the federal and state governments, and the balancing of individual liberty interest against society's need for a criminal justice system that at

some point rests in its adjudication of guilt. The Supreme Court itself avoided these questions in *Felker v. Turpin*, --- U.S. ---, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996), when it simply assumed, for purposes of decision, that the Suspension Clause protects the federal writ for state prisoners "as it exists today." *Id.* at 2340. When such momentous issues are involved, particularly where, as here, no clear guidance can be found from higher courts, this Court is mindful of the longstanding maxim of judicial restraint that it is " 'our duty to avoid deciding constitutional questions presented unless essential to proper disposition of the case.' " *Dean v. Superintendent, Clinton Correctional Facility*, 93 F.3d 58, 61 (2d Cir.1996) (quoting *Harmon v. Brucker*, 355 U.S. 579, 581, 78 S.Ct. 433, 434-35, 2 L.Ed.2d 503 (1958)). Thus, the Court turns to petitioner Alexander's claims to see whether, assuming an "actual innocence" exception to the statute of limitations exists, he could take advantage of it to have this Court hear his petition on the merits notwithstanding its being time-barred.

This Court is mindful that it is undertaking the difficult task of applying an unclear standard--the colorable factual showing of actual innocence which would be necessary to overcome a statute of limitations. This Court, however, is not without guidance. The Supreme Court has defined two standards for actual innocence in the habeas context, and this Court believes that, because the basic question in all of these cases, including this petition, is the threshold showing necessary to overcome a procedural bar to adjudication on the merits, one of these two standards is applicable.

In *Carrier*, the Supreme Court defined actual innocence as a showing by an otherwise-barred petitioner that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Carrier*, 477 U.S. at 496, 106 S.Ct. at 2639. Subsequent to *Carrier*, however, in *Sawyer v. Whitley*, 505 U.S. 333, 348, 112 S.Ct. 2514, 2523, 120 L.Ed.2d 269 (1992), the Court held that "actual innocence" in the capital sentencing context required that the petitioner show "by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty...." *Id.* (emphasis added). No explanation was given for the apparent increase in the burden placed on petitioners. In *Schlup*, the Court clarified its earlier cases, and held that in a habeas petition challenging a conviction, the *Carrier* standard applied, while in a challenge to capital sentencing, the *Sawyer*

standard applied. See Schlup, 513 U.S. at 323-27, 115 S.Ct. at 865-67.

\*10 Schlup cited two reasons for distinguishing between the two standards. First, it noted that claims of actual innocence of the crime are much less likely to be successful than a challenge to a capital sentence, and thus "[t]he threat to judicial resources, finality, and comity posed by claims of actual innocence ... is significantly less than that posed by claims relating only to sentencing." Id. at 324, 115 S.Ct. at 866. Second, the Court felt that the injustice of executing (or incarcerating) one innocent of the crime is greater than imposing a too-severe sentence upon one who is factually guilty, and therefore "the overriding importance of this greater individual interest merits protection by imposing a somewhat less exacting standard of proof ...." Id. at 325, 115 S.Ct. at 826. This reasoning would be no less applicable in overcoming a statute of limitations here than in overcoming the various procedural bars in Schlup, and thus this Court will evaluate the instant petitioner's claims under the Carrier standard, as explicated in Schlup.

Under Schlup, "the petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id. at 327, 115 S.Ct. at 867. The Court emphasized that this is a question of actual innocence, and thus "the district court is not bound by the rules of admissibility that would govern at trial" but instead "must make its determination ... 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'" Id. at 327-28, 115 S.Ct. at 867 (quoting Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 160 (1970)).

The Schlup burden, it should be noted, is not whether no reasonable juror could find petitioner guilty, and is therefore less than the insufficiency of evidence standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). See Schlup, 513 U.S. at 330, 115 S.Ct. at 868. It is, however, a significantly higher burden than showing prejudice, which only requires a reasonable probability that the factfinder would have reasonable doubt, and moreover is evaluated only in light of the evidence that should have properly been before the factfinder. See id. at 332-33, 115 S.Ct. at 870 (O'Connor, J., concurring).

In order to pass through the actual innocence gateway, a petitioner's case must be "truly extraordinary." Id. at 327, 115 S.Ct. at 867.

The instant petition is not such a case. To begin with, the Court notes the admonition in Schlup that "to be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence ... that was not presented at trial." Id. at 324, 115 S.Ct. at 865; see also id. at 329, 115 S.Ct. at 868 ("a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonable, would have voted to find him guilty beyond a reasonable doubt") (emphasis added). This Court does not understand "new" evidence to be limited to evidence that was unavailable at trial, see id. at 328, 115 S.Ct. at 867 (court must evaluate "in light of ... evidence tenably claimed to have been wrongly excluded or to have become available only after the trial"), but that a claim of actual innocence must at least present evidence that the original factfinder did not consider to be cognizable. Accord *Embrey v. Hershberger*, --- F.3d ----, 1997 U.S.App. Lexis 35624, at \*6-9, 1997 WL 773359, at \*3-4 (8th Cir.1997) (en banc). Given the probabilistic standard of Schlup, a claim without new evidence unseen by the jury, to be successful, would put the court in the position of asserting that none of the jurors acted reasonably. Accordingly, petitioner's claims that the trial evidence was insufficient to convict and of ineffective assistance of counsel on direct appeal will not be considered.

\*11 The only claims asserted by petitioner which raise "new evidence" are that (1) the jury should have been allowed to visit the site where a key eyewitness, Ertha Lee, viewed petitioner enter and leave the crime scene, and that this visit would have revealed that it was impossible for the witness to have seen the petitioner, and (2) a prosecution witness, Beverly Eason, testified that she had not been originally charged with the murder for which petitioner was convicted (and was testifying pursuant to a cooperation agreement), and when defense counsel presented records to the contrary and asked the prosecution to stipulate to their accuracy, the prosecutor "merely mouthed the word 'agreed' " rather than "correct the falsity of the trial testimony." Pet. Opp. Mem., at 5. These claims do not come close to meeting the Schlup standard.

As to the first claim, the site visit could have at most cast doubt on the credibility of this one witness. As

noted by the Appellate Division in Alexander's direct appeal, there was significant other evidence at trial. Eason testified that she planned the robbery which led to the murder along with Alexander, took part making sure the victim was alone and witnessed the petitioner at the crime scene, and that the petitioner confessed the robbery to her the following day. Moreover, in addition to the testimony the petitioner challenged here, Ms. Lee testified that she had witnessed the petitioner near the crime scene shortly before the crime, wearing a jacket that was similar to one found by the victim's body. See *People v. Alexander*, 153 A.D.2d 507, 507-08, 544 N.Y.S.2d 595, 596-97 (1st Dep't 1989). Under these circumstances, petitioner's complaint about the jury visit is hardly sufficient to cause this Court to find that no reasonable juror would have found petitioner guilty.

As to the second claim, it is barely "new evidence" at all. Petitioner agrees that his trial counsel got evidence in, with the prosecutor's stipulation, of Eason's falsehood on whether she was originally charged in the case. Petitioner only complains that the prosecutor was not more forceful in disavowing Eason's testimony on this point. Significantly, petitioner does not assert that Eason's testimony was perjurious on the most damning evidence. Actual innocence must be based on much stronger evidence than this. Accordingly, this Court finds that petitioner has not made a colorable showing of actual innocence, and therefore does not need to reach the difficult constitutional issues raised above. The petition must therefore be dismissed as time-barred.

### CONCLUSION

For the reasons discussed, respondent's motion to dismiss is granted. The petition for a writ of habeas corpus is denied and dismissed.

### SO ORDERED

FN1. The timeliness of a prisoner filing is measured from the date the papers were given to prison authorities for mailing. See *Peterson*, 107 F.3d at 93.

FN2. Alexander's conviction was affirmed by the New York Court of Appeals on May 3, 1990. Adding the 90-day period during which a petition for certiorari could have been filed, see Sup.Ct.R. 13, the conviction became final on August 1, 1990. See & 28 U.S.C. § 2244(d)(1)(A) (for AEDPA statute of limitations, conviction becomes final "by the conclusion of direct review or the expiration of the

time for seeking such review"), cf. *Caspari v. Bohlen*, 510 U.S. 383, 114 S.Ct. 948, 953-54, 127 L.Ed.2d 236 (1994) (for Teague retroactivity analysis, state conviction becomes final "when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied").

Although not necessary for the disposition of this case, the Court rejects the respondent's argument that the statute of limitations begins to run from the time the Court of Appeals affirmed the conviction without adding the ninety days in which a petition for certiorari could have been filed. See *Albert v. Strack*, No. 97 Civ. 2978, 1997 U.S. Dist. Lexis ----, at \*---- n. 2, 1997 WL ----, at \*---- n. 2 (S.D.N.Y. Jan. 8, 1998).

FN3. In *Herrera*, the Supreme Court was faced with a claim that execution of an actually innocent person would in itself be unconstitutional--i.e., even if no constitutional error infected the adjudication of his guilt. Petitioner's claim here is not a *Herrera* claim, but rather, as in *Schlup*, an attempt to have the Court look past a procedural bar to reach the merits of his claims of constitutional errors at trial.

FN4. *Triestman* involved a petitioner who was attempting to file a second motion under 28 U.S.C. § 2255, raising the claim that his 1992 plea to using a firearm in connection with a drug trafficking offense, see 18 U.S.C. § 924(c), should be overturned because the Supreme Court's subsequent decision in *Bailey v. United States*, --- U.S. ----, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), made it clear that his conduct did not violate § 924(c) and that therefore he was actually innocent of the offense. The *Triestman* court first found that the "gatekeeping" provisions of the AEDPA, under which the Court of Appeals may authorize a second § 2255 motion only if there is newly discovered evidence going to actual innocence or a new Supreme Court rule of constitutional law, see 28 U.S.C. § 2255, barred *Triestman* from filing his § 2255 motion. See *Triestman*, 124 F.3d at 372. However, because *Triestman* had a petition for certiorari pending in the Supreme Court at the time *Bailey* was decided, and because the Supreme Court denied certiorari only two days before the AEDPA took effect, the *Triestman* court held that, "as a practical matter, [*Triestman*] would not have been able to raise this fundamental claim of actual innocence any sooner." *Id.* at 369.

FN5. The *Triestman* court stated only that serious constitutional issues arose under the Eighth Amendment and the Fifth Amendment Due Process clauses, and specifically declined to address whether the barring of an actual innocence claim raised issues under the Suspension Clause serious enough to

render § 2255 inadequate and ineffective. See *Triestman*, 124 F.3d at 378 n. 21. The court's reasoning for differentiating between Suspension Clause and the Eighth Amendment and Due Process Clauses stemmed from the question of whether the Suspension Clause protected the writ "as it exists today, rather than the very limited habeas jurisdiction that existed at the time of the ratification of the Constitution." *Id.* As this Court did in *Rodriguez*, and as the Supreme Court did in *Felker v. Turpin*, --- U.S. ----, ----, 116 S.Ct. 2333, 2340, 135 L.Ed.2d 827 (1996), there is no need to address this issue because this Court finds no violation in any case. This issue to one side, then, this Court believes that the concerns raised by *Triestman* under the Fifth and Eighth Amendments are equally applicable to the Suspension Clause.

In fact, it is probable that only the Suspension Clause is implicated (if at all); note that *Triestman* concerned federal relief for federal prisoners--hence, the court was dealing with a situation in which the federal government had imposed punishment on an (allegedly) innocent person and was denying access to its own courts for relief. It is not clear how either

the Eighth Amendment or the Fifth Amendment (or, for that matter, the Fourteenth Amendment Due Process Clause) applies when, as here, a state is imposing the punishment but it is access to the federal courts that is sought. For example, assuming (under *Triestman*'s analysis) that the state incarceration of an innocent person raises significant constitutional concerns, those would not be issues under the Eighth Amendment itself but only as it is incorporated through the Fourteenth Amendment; yet, it is difficult to see how the Fourteenth Amendment, directed as it is against the states, can serve to restrict Congress's ability to limit access to federal habeas. It is only the Suspension Clause that could possibly cover such a situation, and it is for that reason that this Court considers the actual innocence issue raised by the instant petition to be a concern of the Suspension Clause and not, as in *Triestman*, the Fifth and Eighth Amendments. See *Martinez-Villarreal v. Stewart*, 118 F.3d 628, 632 (9th Cir.), cert. granted, --- U.S. ----, 118 S.Ct. 294, 139 L.Ed.2d 226 (1997).

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