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RESTRICTION CODES

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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]
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b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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EXHIBIT A

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

UNITED STATES OF AMERICA,

v. 96 Civ. 5305 SS

LOUIS MENCHACA, AMY BOISSONNEAULT, KATHRYN TRUDELL and SHERYL FITZPATRICK,

Defendants.

----------x

August 26, 1996
4:45 p.m.

Before:

HON. SONIA SOTOMAYOR,

District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
MARTIN J. SIEGEL
Assistant United States Attorney

JOHN BRODERICK
Attorney for Defendants

D E C I S I O N

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

MR. SIEGEL: No, ma'am.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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interfered with others for obtaining or providing reproductive care. On this issue, there is no dispute. Defendant in her opposition papers concedes that on April 3, 1996, at WMP, she and others took their

> accustomed places in a sitting position blocking the entrance. With reverence for life they sat down ... and devoutly awaited their arrest ... [T]hey were arrested. The clinic then opened. One-half of the women scheduled on that "abortion day" changed their minds and the clinic claims damages in this action for loss of that revenue.

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

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

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

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

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

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

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

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

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THE COURT: Including Ms. Trudell?

MR. BRODERICK: Yes, your Honor.

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

MR. BRODERICK: Yes, ma'am.

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

MR. BRODERICK: Sure.

MR. SIEGEL: The government also requested civil penalties.

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

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

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

MR. SIEGEL: Thank your Honor.

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

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

MR. SIEGEL: It will, your Honor.

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

MR. BRODERICK: I see, your Honor.

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

Thank you, counsel.

MR. BRODERICK: Thank you, your Honor.

MR. SIEGEL: Thank you.

(Record closed)

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UNITED STATES of America
v.
Nelson CASTELLANOS, Defendant.

No. S2 92 Cr. 584 (SS).

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

April 7, 1993.

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

Motion granted.

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

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

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

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

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

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

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

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

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

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

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

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

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

MEMORANDUM OPINION AND ORDER

SOTOMAYOR, District Judge.

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

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

I. Background

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

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

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

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

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

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

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

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

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

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conversation.

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

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

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

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

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

II. Discussion

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

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

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

The Handwritten Insertion

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

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

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

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

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

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

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

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

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

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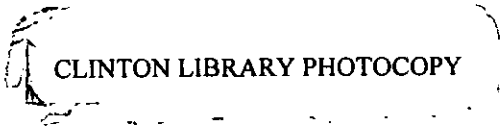

had discussed a safe in Apt. A2, but could not remember discussing anything else.

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

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

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

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

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

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L.Ed.2d 677 (1984).

*87 The "Untainted" Affidavit

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

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

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

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

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

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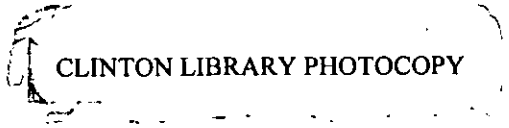

convinced by it, and did not sign it. As the Supreme Court has stated, "the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." U.S. v. Leon, at 914, 104 S.Ct. at 3416, citing Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct.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

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

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

III. Conclusion

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

SO ORDERED.

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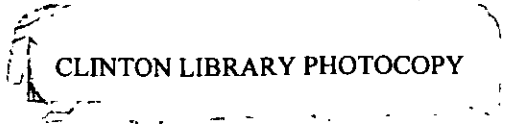

880 F.Supp. 145
24 Media L. Rep. 1139
(Cite as: 880 F.Supp. 145)

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

No. 94 Civ. 0527 (SS).

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

Jan. 5, 1995.

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

Judgment accordingly.

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

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

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

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

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

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

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

[7] RECORDS ⇐ 60
326k60

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

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

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

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

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

OPINION AND ORDER

SOTOMAYOR, District Judge.

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

FACTUAL BACKGROUND

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

A. The DOJ Press Conference

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

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

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

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

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

B. Appointment of Independent Counsel Fiske

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

C. DOJ's Denial of the FOIA Request

1. The Reports

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

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

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

2. The Note

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

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invasion of personal privacy."

D. The Cross-Motions for Summary Judgment

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

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

E. Subsequent Developments

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

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

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

DISCUSSION

I. Exemption 7(A)

A. Requirements

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

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

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

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

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

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

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

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

If the Government fairly describes the content of

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

Id.

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

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

B. Waiver

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

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

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

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

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

II. Exemption 7(C)

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

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

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

I do not doubt that making photocopies of the

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

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

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

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

CONCLUSION

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

SO ORDERED.

END OF DOCUMENT

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

No. 85 Civ. 3351 (SS).

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

Sept. 14, 1994.

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

Motion denied.

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

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

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

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

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

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

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

[8] DRUGS AND NARCOTICS ⇐ 190

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

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

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

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

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

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

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

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

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

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

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

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

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

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

***1045** OPINION AND ORDER

SOTOMAYOR, District Judge.

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

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

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

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

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

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

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

THE EVIDENCE AT TRIAL

I. The Government's Direct Case

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

A. The Government's Expert Witnesses

1. State Investigator Louis Barbaria

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

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

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

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

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

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

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

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

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

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

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

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

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2. Sergeant Terry Katz

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

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

Sergeant Katz testified as follows about the seized items:

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

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

3. Special Agent Robert Howen

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

B. The Government's Non-Expert Evidence

1. FBI Undercover Agent Kevin Bonner

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

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

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

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

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

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

*1050 2. Cooperating Witness Robert Banning

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

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

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

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

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

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

3. Other Evidence

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

II. The Probable Cause Finding

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

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

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

III. The Claimants' Case

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

A. Vernon Hartung's Deposition Testimony

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

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

Hartung Dep.Tr. 278.

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

B. Colette Alexander

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

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

C. Paul Casey

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

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

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

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

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

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

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

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

Tr. at 1667.

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

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

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

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

Tr. at 1642-43.

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

2. The NYC Chapter Rules Regarding Narcotics

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

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

Mr. Sipioria: Time period please?

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

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

A. I mean the entire building.

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

A. That would refer to commercial amounts.

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

A. No, so long as nobody was abusing.

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

A. They would be told about it.

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

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

Q. What does that mean?

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

Q. In the minutes--

A. That's an absolute.

Q. What would happen if you violated an 86?

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

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

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

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

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

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

Q. Would you operate based on an honor system?

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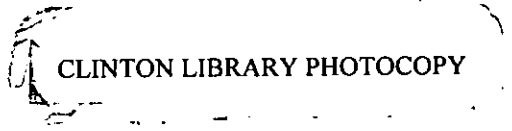

A. Absolutely.
Q. I take it from that point in time, a member would be careful not to use crank in the presence of another member?
A. I would take it from that point in time a person wouldn't use crank period, or hit the road.
Tr. at 1530-31.

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

3. The Physical Evidence Seized from His Apartment

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

4. The NYC Chapter's "Party Lifestyle"

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

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

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

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

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

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

III. The Government's Rebuttal Evidence

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

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

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

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

IV. The Jury's Verdict and the Instant Motion

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

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

DISCUSSION

I. The Motion for Judgment as a Matter of Law

A. The Rule 50(b) Standard

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

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

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

B. The Evidence Supporting the Jury's Verdict

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

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

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

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

a. Colette Alexander's Testimony

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

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

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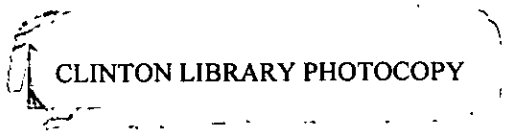

Building as a matter of law:

Q: Now, you said that after Erik's accident [in 1982] you did less visiting amongst your friends and tried to spend more time in the house, right?
A: Yes.
Q. However, the other people who lived in the building, sort of community of people, continued to visit each other as they had before, correct?
A. I really don't know. I suppose so.
Q. But you have no reason to think that any of their pattern of behavior had changed in any way up to the time of the raid?
A. Well, actually, I'm not sure what year it was, but Hope and Casey had a third child, I think his name was Michael, and ***1058** he died before his first year of infant syndrome. I know that affected them greatly also.
Q. In terms of practices of the Hells Angels community, the sharing of drugs and the partying that they occasionally did, as you said?
A. I'm sure nothing changed in pattern that way.

Tr. at 1420-21.

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

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

Q. There was nothing that occurred in 1984 to change that relationship between you and Hope; you could still freely go back and forth and say, do you have a little something, on occasion?
A. I don't know.
Q. From 1984, from 1983, from 1982, from 1985?
A. I don't know.
Q. My question is not specifically recalling an incident; did anything change your relationship with Hope?
A. Only thing in my life was my son, and my relationship with everybody had changed from that point on.
Q. After Erik's accident, you still had a relationship with Hope; you would stop in her house, she would stop in yours, you would pass crank?
A. I am sure it was.

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

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

b. Paul Casey's Testimony

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

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

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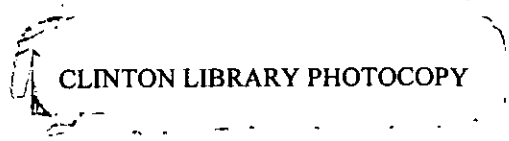

distribution of narcotics in the Building during the relevant time period. Casey testified that he did not "throw away" his stash of methamphetamine after an October 1984 Church of Angels resolution barred all HAMC members from using methamphetamine because his wife "Hope would take some now and then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

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

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

2. Sandy Alexander's Cocaine Transactions

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

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

a. The November 20, 1984 meeting in the Building

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

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

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A. Yes, he did.
Q. What did he say?
A. He told me that in terms of cocaine, that he could get cocaine, he could get any amount, from ounces to a pound of cocaine he could get for me.
Q. Did he offer to sell cocaine to you?
A. Yes.
Q. What did you say in response?
A. I told him I would be interested in purchasing cocaine from him if he got good quality cocaine, that I would purchase up to 1/2 pound the first time, I wanted to see how good the stuff would be first.
Q. Did he describe the type of cocaine he would get for you?
A. Yes, he did.
Q. How did he describe it?
A. He described it as Colombian Rock or Peruvian flake.
Q. In terms of quantity, did he represent any particular quantity that he would provide?
A. He said from ounces up to a pound.
Q. Did you discuss obtaining cocaine from him?
A. Yes, we did.
Tr. at 579-80.

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

Q. Okay. How did you arrange to meet Sandy Alexander at this apartment?
A. We made initial phone calls after the 4th of July thing, for example, kept contacting them, and Kevin Bonner and I went up to visit him. We told him we were coming up, he said stop up and see him. And I brought some stuff up for him, handkerchiefs, and Vietnam stuff, he wanted handkerchiefs. And Kevin and I went up there to see him. We had a conversation, we told him that we had been doing real good. He said I heard how you guys are doing real good right now. We said yes, we are looking to buy some heroin. He said don't be fooling with heroin, he said no club member fools with heroin, you don't want to get involved with that.
Q. This is not the conversation in his apartment?
A. Yes, this is in his apartment.
Q. Okay.
A. And he said he would give us a call sometime, if I get--he said I can get some real good stuff, you know, I don't remember the exact words word for word, and Kevin was present the whole time. I said well, we will do that. But he said don't fool around with no heroin.
We left there, there was no more conversation with Sandy pertaining to this, and I cannot recall what date it was, but we received a phone call from Sandy to come and see him, and we was going to meet him somewhere, pertaining to he can get us some cocaine, it was. And that's exactly what happened.
Hartung Dep. Tr. 135-36.

Later in his deposition, Hartung testified:

Q. Okay. When is the first time you had a conversation with Sandy about buying drugs?
A. That was the time when he had mentioned we wondered about heroin, he said no. There was another time we had talked to him, we went up, it may have been four occasions. It wasn't at the clubhouse, it was outside, I am talking about inside his apartment, and we were in New York, and he said, you know, I got a line on some good stuff. He said I will get back with you in a couple of *1061 weeks and it was approximately two weeks, it may have been three at the most, that he did get back with us. But we went back to New York to buy the drugs, and Kevin and him talked price stuff, I don't remember exactly how much it was. But we didn't meet at the clubhouse, when we went back to New York, we met in a restaurant.
Q. Where did the--the conversation that you just described--
A. In front of the clubhouse.
Q. So when he said to you, I have a line on some good stuff--
A. Yes.
Q. --that occurred outside?
A. Yes, best of my recollection, it was outside, yes.
Hartung Dep. Tr. 170-71. (Emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The Motion for a New Trial

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

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

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

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

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

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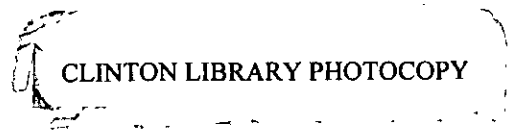

would have reached were I the trier of fact. Consequently, the Government's motion for a new trial is denied.

CONCLUSION

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

SO ORDERED.

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