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S. HRG. 118–38

REVIEW OF FEDERAL JUDICIAL ETHICS PROCESSES AT THE JUDICIAL CONFERENCE OF THE UNITED STATES

HEARING

BEFORE THE

SUBCOMMITTEE ON FEDERAL COURTS, OVERSIGHT, AGENCY ACTION, AND FEDERAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

MAY 17, 2023

Serial No. J–118–17

Printed for the use of the Committee on the Judiciary

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REVIEW OF FEDERAL JUDICIAL ETHICS PROCESSES AT THE JUDICIAL CONFERENCE OF THE UNITED STATES

WEDNESDAY, MAY 17, 2023

UNITED STATES SENATE,
SUBCOMMITTEE ON FEDERAL COURTS, OVERSIGHT,
AGENCY ACTION, AND FEDERAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2 p.m., in Room 226, Dirksen Senate Office Building, Hon. Sheldon Whitehouse, Chair of the Subcommittee, presiding.

Present: Senators Whitehouse [presiding], Hirono, Kennedy, and Lee.

Also present: Chair Durbin.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Chair WHITEHOUSE. Let me call to order this hearing of the Judiciary Committee's Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights. We'll proceed with opening remarks from myself, from Ranking Member Kennedy, and we have the good fortune that the Chairman of the full Committee, Senator Dick Durbin is with us, and he will offer opening remarks after Senator Kennedy. We'll then proceed to the comments that you have prepared, Judge Wolf, and your full statement and exhibits attached to it will be made a part of the record, so you don't need to concern yourself with that. And then we'll have question and answers with the Committee Members. So let me welcome you and get underway.

One month ago, Congressman Hank Johnson and I wrote to the Judicial Conference of the United States asking it to look at recent reports that Justice Clarence Thomas violated the Ethics in Government Act by failing to disclose gifts of travel and luxury vacations provided by a right-wing billionaire. The Judicial Conference's responsibilities under that law are quite clear. If there is, and I quote, "Reasonable cause to believe," close quote, that Justice Thomas willfully failed to file, then it must refer him to the Justice Department for further investigation.

The Judicial Conference is a statutory body and the Ethics in Government Act is a Federal statute. So this is all very much Congress' business. The Judicial Conference has a Committee on Financial Disclosure. Our request about the recent Thomas allega-

tions was sent there. I've urged that committee to act with dispatch and to provide us information to understand how the process is handled. This is not a first. Believe it or not, we've been in nearly this exact situation before.

Back in 2011, the nonprofit group Common Cause uncovered that Justice Thomas hadn't reported years of his wife's income paid by a right-wing, dark-money group. The New York Times reported that Justice Thomas also had not disclosed gifts of free private jet and yacht travel from the same right-wing billionaire. The same kinds of undisclosed gifts from the same right-wing billionaire that were revealed last month.

Then, as now, the Ethics in Government Act required Justice Thomas to report these things. And then, as now, the question was whether there was reasonable cause to believe that Justice Thomas' omissions were willful. In which case, then, as now, referral to the Attorney General is required by law.

So the Judicial Conference actions then, are the prequel to what is in front of it now. More than a decade later, we're just now getting answers to important questions. Over the past few weeks, I've asked the Judicial Conference, "Who was on that committee? What was its process and rationale? What kind of evidence did it consider? And what were the rules and procedures under which all of this took place?"

The Judicial Conference's recent response, and I will enter the Judicial Conference's response and the three letters of mine to which it was responsive, into the record, is a helpful start.

[The information appears as submissions for the record.]

Chair WHITEHOUSE. But there is more that we need to know about those events. We'll hear today from someone who can help us with pertinent insight into what the Judicial Conference and its Committee on Financial Disclosure did back in 2011. Judge Mark Wolf was a member of the Judicial Conference in 2011 and 2012, and his experience on the Judicial Conference provides special insight into its normal operations and how the Conference handled the incidents involving Justice Thomas.

Congress has a role in making sure that our courts are administering Federal ethics laws fairly and as intended. If they aren't, we need a robust record of what has gone wrong and what new laws might be needed to fix it. Judge Wolf's testimony will help us build that thoughtful record, and we are grateful to him for appearing today. Senator Kennedy, then Senator Durbin.

OPENING STATEMENT OF HON. JOHN KENNEDY, A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator KENNEDY. Thank you, Mr. Chairman. The assault comes in waves. The current assault on the United States Supreme Court as an institution started on May 4th, 2020. I remember it like it was yesterday. It started on the steps of the United States Supreme Court. The Democratic Leader of the United States Senate said, and I quote, "I want to tell you Gorsuch, I want to tell you Kavanaugh, you have released the whirlwind," the Democratic Leader of the United States Senate said, "And you will pay the price. You won't know what hit you if you go forward with these awful decisions."

Now, we're supposedly here today to hear the latest chapter in the fairy tale of Supreme Court corruption. As I implied, this is a continued effort to undermine a United States Supreme Court that isn't ruling the way that some of my Democratic colleagues want. How do we know today's outrage is unjustified? Well, at least four of my Democratic colleagues, and I suspect many Republicans on this Committee, have done exactly what Justice Thomas did: amend their financial disclosures.

I'm willing to stipulate that, like Justice Thomas, my colleagues have done nothing wrong intentionally. Amendments are pretty commonplace. According to the Judicial Conference, about which you will probably hear a lot today from this witness, Justice Thomas in 2011, immediately amended his financial disclosures to include his wife's employers for a number of years. That's it. That's all, folks. That's what this is all about. Of course, everybody knew at the time that Mrs. Thomas worked in politics, and everybody knew at the time that Mrs. Thomas works in policy.

So it's pretty unclear what the bombshell is here. Maybe because there isn't one. Justice Thomas either misunderstood or misinterpreted, I don't know, the disclosure obligations.

[Poster is displayed.]

Senator KENNEDY. And so in 2011, he filed an amendment, which the law calls for, to tell us what we already knew. The Judicial Conference has a Committee on Financial Disclosure. The Judicial Conference's Committee on Financial Disclosure cleared Justice Thomas. Did I mention they cleared him?

[Poster is displayed.]

Senator KENNEDY. They found no evidence. None. Zero. Nada. Zilch. They found no evidence that he acted willfully or improperly.

[Posters are displayed.]

Senator KENNEDY. And as the Judicial Conference told our Chairman just two days ago, the Conference's Committee on Financial Disclosure cleared Justice Thomas not once, not twice, not three times, but four times at four separate points under the leadership of two different judges who served as chairman of that committee. Now, that ought to be the end of the story. But it turns out that for the last dozen years, a lone Federal judge who is with us today has been obsessed with complaining that the Judicial Conference got it wrong. Obsessed. Perhaps he thinks they are crooks, too.

A few data points on our witness today, Judge Wolf.

[Poster is displayed.]

Senator KENNEDY. Number one, as a sitting Federal judge, he wrote in 2021 for NBC News in support of H.R. 1. This was the partisan Democratic bill to Federalize elections, to remove them from State and local government. Are Federal judges supposed to advocate for policy changes to current law? No. But Judge Wolf did.

Number two, the Associated Press has reported that, quote—I'm going to quote now, these are AP's words, not mine, "A longtime FBI informant believed that Wolf had leaked information to the mob when he worked for the U.S. Attorney's Office," end quote. Then, as a judge, he refused to recuse himself in a case involving the mob.

Number three, a few years later, Federal prosecutors accused Judge Wolf of entertaining a defense witness in a murder trial—are you kidding me? A highly unethical move, that's an understatement—at Martha's Vineyard, which led to his recusal to avoid the potential for appearing biased after he'd been 15 years into the case. Talk about an inefficient use of scarce judicial resources. Now, this is the Judge Wolf whom we're going to hear from today. A self-described nonpartisan interested in fair judicial administration.

The proceedings of the Judicial Conference are highly confidential. The proceedings of its Financial Disclosure Committee are confidential, too. Multiple advisory opinions and even the Judicial Code of Conduct say that a sitting judge should only testify before a partisan body if they are an expert. And yet Judge Wolf is going to tell us all about them, even though he didn't even sit on the committee that investigated Justice Thomas.

As the Judicial Conference emphasized, professional, nonpolitical career staff of the Judicial Conference's Financial Disclosure Committee viewed Justice Thomas' amended disclosure and called it what it was, routine. But the judgment from nonpartisan staff and from the committee's Democrat, not Republican, but Democrat-appointed head didn't satisfy Judge Wolf. He continued on, and he eventually tried to force a vote at the Judiciary Conference.

Obsessed. Why? For the same reason that some Democrats keep holding public smear campaigns like this one. Judge Wolf wasn't getting his way from the head of the Judicial Conference or from Chief Justice Roberts himself. Ethics experts and fellow judges agreed that there was no there, there. But maybe the press, maybe the press could be convinced that even when there's no smoke, there's fire. We've never seen that happen in Washington. Apparently, someone, someone convinced the press to swallow Judge Wolf's line.

As of 2 weeks ago, you can read the play-by-play of how Judge Wolf repeatedly and unsuccessfully pressed the Judicial Conference to bend to his will in a Bloomberg article written more than a decade after the fact. By the way, the Judicial Conference says that, quote, "Judges should not discuss pending or impending cases, confidential information, or controversial matters with the media."

The media revelation is interesting, not because it demonstrates any wrongdoing on the part of either Justice Thomas or Chief Justice Roberts, none. But because it implies wrongdoing on the part of its possible source—possible source. The information leaked to this reporter is highly confidential, and if, if it was leaked by a sitting judge, it was unethical. In other words, this hearing—we're here to focus on potential ethical lapse. Could it be that this hearing is only possible because of a clear ethical lapse?

I wish some of my Democratic friends, and they are my friends, and Judge Wolf were as concerned about this leak as they are about routine and proper disclosure amendments. And, by the way, anyone who wonders why appropriate confidentiality can be so crucial to our legal system and to the safety of the men and women on the bench, can give Justice Kavanaugh a call. Just ring him up. Leaking confidential information to affect an outcome or get your way is always wrong, and sometimes it's dangerous.

So why does the nauseously woke left continue to employ these tactics? That's a fair question. We got the answer in New York Magazine. New York Magazine told us 2 days after the Bloomberg piece on Judge Wolf's advocacy was published. I want to read to you the magazine's advice, quote, "It is therefore in the interest of the progressive movement to undermine the Court's legitimacy. It makes sense for progressives to publicize Thomas' obscene indulgences. But I think it's true that the end goal of doing so isn't to secure ethics reforms that will render the Supreme Court less vulnerable to perceptions of corruption. The point is, or at least it should be, to promote the perception of judicial corruption," end quote.

If you can't control it, you burn it down. Like others, Judge Wolf's goal seems to me to be political. This hearing has been entirely structured around him—entirely—who has, as a supposedly nonpartisan Federal judge, endorsed partisan legislation, and has been the catalyst and the only witness for a partisan hearing. Is this witness, is Judge Wolf planning on launching a Super PAC next?

So let me sum it up. More than 10 years ago, Justice Thomas amended his financial disclosures to include facts that everyone already knew, which he had inadvertently, I shouldn't say inadvertently, I don't know, omitted. People file amendments all the time. Both Democrats and Republicans on this Committee have repeatedly done the same thing. I don't hold that against them. I don't hold that against them, and neither should anyone here.

This routine amendment resulted in a bureaucratic knife fight that Judge Wolf instigated against a Supreme Court Justice and the Judicial Conference. He lost resoundingly four times. Did I mention that? He lost four times. And here he is, a dozen years later to tell us all about it. Even when the facts vindicate the accused, the nauseously woke left can't help but sling mud, especially when it comes to the Supreme Court. If we can't control it, let's burn it down. Forget innocent until proven guilty. The loon wing of the left insists that good Justices are guilty even after they've been found innocent, four times. And that's the perpetual political carousel that brings us here today. It makes me want to gag.

Chair WHITEHOUSE. I thank the Ranking Member for his colorful remarks and turn to Chairman Durbin.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chair DURBIN. Thank you, Mr. Chairman, and thank you to Senator Kennedy for holding this important hearing today. I want to thank Judge Wolf for his willingness to testify about the role the Judicial Conference Committee on Financial Disclosure plays, or fails to play, when it comes to overseeing Supreme Court Justices' compliance with the Ethics in Government Act.

I'd like to start by saying that Senator Kennedy, my friend, has identified May 4th, 2020, as the kickoff date for this so-called political exercise. I would like to show to my colleague and put in the record a copy of the letter which I sent, signed by Senator Leahy, Senator Whitehouse, and others, to Chief Justice John Roberts,

dated February 13th, 2012—February 13th, 2012—8 years before this date in 2020.

And what were we asking or making inquiry on? We were asking about information on the Code of Ethics and the Code of Conduct and the ethical behavior of the Supreme Court Justices, in particular, one whose situation had come to light, who had been receiving some gifts of some sort, and his wife had been receiving some income, which was not properly reported. So to say this all started on May 4th, 2020, is just plain wrong. I've got the letter here to prove it, and I ask consent to enter it into the record.

Chair WHITEHOUSE. Without objection.

[The information appears as a submission for the record.]

Chair DURBIN. Let me go further and say that for more than a decade since sending this letter and before, I've been calling on Supreme Court Justices to be held, at a minimum, at a minimum, to the same ethical standards as every other Federal judge. That's the outrage that precipitated the comments by the Ranking Member, the notion that the Supreme Court Justices, all nine of them, would be held to the same ethical standards. As I mentioned, I started that in February 2012.

I want to commend the Chairman, Senator Whitehouse, who has really done yeoman's duty in pursuing this issue long before the current publication by ProPublica of information that brings us here today. I thank him for his leadership in that, and I think he is appropriately chairing this Subcommittee on the Courts at a moment in history when he's needed now more than ever.

I again urged Chief Justice Roberts, after the recent ProPublica revelations about luxury vacations and travel given to the Supreme Court Justice by billionaire Harlan Crow. I invited the Chief Justice on behalf of the Committee, Democrats in the Committee, to testify on this issue. He declined. I'm sorry that he did. I then called on him to rescue the reputation of the Court by simply taking action to respond to this well-documented outrage.

For anyone, including my colleagues in the Senate, on both sides of the aisle, to believe that this is normal, acceptable conduct for an elected official, Supreme Court Justice, Senator to be receiving hundreds of thousands of dollars' worth of gifts and vacations, to have your mother's home purchased by an individual so she doesn't have to pay a mortgage any longer. The list just goes on and keeps moving on. And the American people don't understand this.

Judge Wolf, I read your statement this morning, and I'm not going to quote it because maybe some elements that you want to quote yourself in your opening statement. But what this Court has to rely on is the confidence of the American people in the integrity of Justices when they hand down decisions. If they hand down controversial decisions and the American people don't like them, they can at least say, "Well, that's the Court. They go their own way." But if there is any question about the integrity and character of these Justices, it really undermines the institution of the Court.

That's why I appealed directly to Chief Justice Roberts. This is the Roberts' Court. This is his Court in history. And what he chooses to do by way of ethics is going to be remembered for generations. I believe he can, and I hope he will, step up, raise his hand, and say, "That's the end of the special treatment for Supreme Court

Justices. They will be held to the same ethical standards as every other Federal judge." That's not too much to ask. It's the very least we should ask.

I thank you, Judge Wolf, for being here today. I read your testimony in its entirety this morning. I'm looking forward to asking you a few questions after you've had an opening statement. Thank you, Mr. Chairman.

Chair WHITEHOUSE. Thank you. I will now introduce our witness. But before I do, let me say that Judge Wolf, the personal character of the various assertions and insinuations that the Ranking Member has made, I think, entitles you to an opportunity to respond. The proper way to do that, I think, rather than deflect the course of this hearing, is to allow you to respond as if those were questions for the record, so that after the hearing is concluded, you will have a week to offer such responses you feel is appropriate, or none, if you feel that is appropriate.

But I would prefer not to have the course of the hearing, which is an inquiry into the procedures and processes of the Judicial Conference, deflected by those assertions and insinuations.

Judge Wolf is a Senior United States District Court Judge for the District of Massachusetts. Judge Wolf was appointed to the Federal bench in 1985 by President Ronald Reagan, and from 2006 to 2012, Judge Wolf served as the Chief Judge for the District of Massachusetts. From 2010 to 2012, Judge Wolf was a member of the Judicial Conference of the United States, where he chaired the Committee on District Judges and was a member of the Judicial Conference's Committees on Codes of Conduct, Criminal Law, and Rules of Criminal Procedure.

Before his appointment, Judge Wolf was a Deputy U.S. Attorney and chief of the Public Corruption Unit in the District of Massachusetts. He also served as special assistant to Deputy Attorney General Laurence Silberman and as a special assistant to Attorney General Edward Levi. Judge Wolf, you're recognized for your opening statement. As I said before, your complete testimony and exhibits will be made a matter of record.

STATEMENT OF HON. MARK L. WOLF, SENIOR U.S. DISTRICT JUDGE FOR THE DISTRICT OF MASSACHUSETTS, BOSTON, MASSACHUSETTS

Judge WOLF. Senator, thank you. I have, as requested, prepared a little less than 10 minutes of remarks, and I know I'm not in my courtroom, so I don't set the procedures. I'm very sorry that Senator Kennedy has left, but I hope that I can today, in whatever time might have been ceded to him if he remained, address some of the inaccurate statements he made, rather than doing that exclusively in writing, if time permits.

But I do thank you for requesting my testimony about how the Judicial Conference of the United States in the past discharged its responsibility. Under the 1978 Ethics in Government Act that applies to all Federal judges, including Supreme Court Justices, I am testifying as an individual, not as a representative of the Judicial Conference or the Federal Judiciary. I would like to highlight some of my lengthy written testimony in a further effort to be helpful to you and to the Judicial Conference.

The Act codifies the belief that sunlight is the best of disinfectants. Transparency of financial information of a Justice or a judge and his immediate family encourages Justices and judges to decide cases impartially, as we are sworn to do, and encourages reasonable people to believe that we are doing so. The Act creates criminal and civil penalties for willfully falsifying information, or willfully failing to file required information.

In addition, 18 United States Code Section 1001 makes it a crime punishable by up to 5 years' imprisonment to willfully falsify or conceal information. The Act defines a specific and limited role for the Conference. It provides that the Judicial Conference shall refer to the Attorney General, the name of any individual it has reasonable cause to believe has willfully failed to file a report, or has willfully falsified, or willfully failed to file required information.

Reasonable cause is analogous to probable cause. It's more than bare suspicion, but less than by a preponderance of the evidence. It is not the Conference's duty under the Act, to determine whether a Justice or judge has violated the statute. The Conference is to decide whether there is reasonable cause to believe a willful violation occurred. If reasonable cause exists, the Conference must refer the Justice or judge involved to the Attorney General. This division of responsibilities is wise and important.

I was a Conference member in 2011 and 2012. Thus I shared responsibility for assuring the Act was properly implemented and enforced. In 2011, the Conference received five letters, and the Supreme Court received one, in part alleging that from 2003 to 2009, Justice Clarence Thomas did not make the required disclosure that the Heritage Foundation employed his wife. I believe, for many years, he checked that her employment was none.

The Justice evidently knew of the requirement because he had previously disclosed his wife's employment, including in his early years as a Justice. Although the Act does not require disclosure of the amount of compensation, the letters stated her compensation was substantial. The first letter was sent in January 2011 and was referred to the Conference's Committee on Financial Disclosure.

Justice Thomas promptly amended his reports stating that he misunderstood the Act's requirements and that the errors were inadvertent. Nevertheless, the Conference still had a duty to decide if there was reasonable cause to believe his omissions were willful, and if so, refer him to the Attorney General. Policy of the Conference required that committees' reports to the Conference include all their activities since the last biannual Conference meeting.

This information ensured that each Conference member had the knowledge and ability to require discussion and possible decision by the full Conference. However, the Financial Disclosure Committee's reports for the March and September 2011 Conference meetings did not reference the issues concerning Justice Thomas or any related committee activity. The rest of the letters to the Conference amplified earlier allegations, questioned whether Justice Thomas' omissions actually were inadvertent, and raised other concerns, including allegations that Justice Thomas had failed to report travel on Harlan Crow's jet and yacht.

Those letters were sent on or after the date of the September 13, 2011, Conference meeting. In early 2012, I found some of the 2011

letters on the internet. I told Judge Thomas Hogan, Secretary of the Conference, that I was concerned that other Conference members and I had not been informed of the letters in their request to refer Justice Thomas to the Attorney General. I suggested that the matter be discussed at the March 2012 meeting. He told me that he had referred the letters to the Financial Disclosure Committee and asked me to wait until the committee chair, Judge Joseph McKinley, responded to him.

Judge Hogan subsequently gave me Judge McKinley's February 23, 2012, response. I spoke with Judge McKinley and became concerned that in 2011, the committee may have done nothing after Justice Thomas amended his reports and had not addressed the question of whether reasonable cause existed. Judge McKinley told me that the staff had not referenced the letters in the last three reports to the committee because they regarded them as routine. He also said, however, that this was the only time Members of Congress or the public had ever requested a referral to the Attorney General.

There was also no reference to the letters in the committee's report for the September 2012 Conference meeting. Judge Hogan told me he had received on April 17, 2012, revised version of Judge McKinley's February response, and he wrote to the letters' authors on April 30th to inform them that the committee had decided against referral. I asked Judge David Sentelle, chair of the Conference Executive Committee, to put the matters concerning Justice Thomas on the September 12 Conference agenda. The Executive Committee denied my request.

I then exercised my right to move the committee report to the discussion calendar. I told Judge Hogan that I would send a memorandum to Conference members before the meeting explaining my concerns. He urged me not to include the two letters from Judge McKinley describing the committee's actions. I acquiesced and did not attach them to my memorandum. At the September 11, 2012, meeting, I moved to disapprove the committee's report and require revision of the prior three reports.

Chief Justice Roberts allowed me to speak briefly about the deficient process and whether the Conference was properly performing its important but limited role of determining whether reasonable cause to refer to the Attorney General existed. I hoped to generate discussion. When I concluded, the Chief Justice immediately recognized Judge Sentelle. Judge Sentelle successfully moved that the issues be returned to the committee for a report at a future meeting in which he knew I would not be present because my term as a Conference member was ended.

It is unfortunately relevant to consider these events now. The Act only serves its vital purpose if the Conference understands and properly performs its role. I believe that in 2011 and 2012, it did not.

First, despite Congress and the public raising serious allegations, and the Conference referring them to the committee, it appears that the committee did little to nothing for at least a year. The committee should have, at the very least, addressed the allegations at the March 2012 committee meeting.

Second, the committee's process was opaque. In 2011, likely through inaction, then in 2012 by insistence, the committee did not disclose to members of the Conference the allegations, the actions, if any, it took, and the reasons for any decisions.

Third, the statutory mandate for the Conference, and by delegation to the committee, was to determine whether there was reasonable cause to refer, not the ultimate merits of whether the Justice's violations were willful.

However, in conversations, letters and reports, the committee repeatedly framed its inquiry using the wrong standard. As I frequently tell my law clerks, if you address the wrong question, you are likely to get the wrong answer. Thank you.

[The prepared statement of Judge Wolf appears as a submission for the record.]

Chair WHITEHOUSE. Thank you very much, Your Honor. It sounds to me like the nutshell version of your testimony is that the wrong question was answered, i.e. willfulness rather than reasonable cause. It was answered in the wrong venue, to wit, a committee or subcommittee, or perhaps individual determination, instead of Judicial Conference, as the statute suggests, with the result that the deliberations were, to use your word, "opaque," they took place out of public view. Is that a fairly accurate summary?

Judge WOLF. Yes, with the caveat that, it appears to me, having revisited this and having more information, in some respects than I had in 2012, it appears to me that no decisions and possibly no action was taken in 2011. And that's another concerning matter.

Chair WHITEHOUSE. The one place where there is an opportunity for public awareness of what is happening in this process is at the Judicial Conference. Correct?

Judge WOLF. Well, that's not completely correct either, because I have scoured the Guide to Judicial Policy, which is not a public document, and the judiciary's description of the Judicial Conference and its committees. There is nothing in there that says that a judge or Justice can't talk about what transpired. However——

Chair WHITEHOUSE. I'm asking a bit of a different——

Judge WOLF. Well, I know, but no—but however, I expect that some of you at least have attended those meetings. The public is not allowed to observe, to see the proceedings. They're allowed to see this hearing. They can judge my credibility if they're interested in my motives. But that kind of transparency doesn't exist in the Judicial Conference.

And there are certainly things that should properly be discussed confidentially and maintained as confidential, particularly before decisions are made, the essence of the deliberative process privilege, predecisional. But striking the right balance between transparency and accountability is, I think, for the Judicial Conference, like every branch of government, important.

Chair WHITEHOUSE. The one thing that is made public is the report of each Judicial Conference after the meeting. Correct?

Judge WOLF. A report of the proceedings.

Chair WHITEHOUSE. Yes.

Judge WOLF. Which is a summary.

Chair WHITEHOUSE. And the report of the proceedings would tend to include reports to the Conference from its committees. So

the one way that any of this would become public is only if the determination that was made here was actually referred by the Financial Disclosure Committee to the Judicial Conference, and then that would be reported in the summary of the Judicial Conference's activity. Correct?

Judge WOLF. Yes.

Chair WHITEHOUSE. And that did not happen in this case?

Judge WOLF. The reports of the Judicial Conference—I'm sorry, the reports of the Financial Disclosure Committee were, under Judicial Conference policy, required to include everything that the committee had discussed and decided since the last Conference meeting, even if no recommendation for Conference action was being made. The four reports, starting in March 2011, of the Financial Disclosure Committee to the Conference contained no reference, no hint, that any letters had been sent or any issues had been raised concerning Justice Thomas.

Chair WHITEHOUSE. The only disclosure that the Judicial Conference provides any record of in these matters is the April 30 letters from the Judicial Conference that summarily say, "Nothing has been presented to support a determination that Justice Thomas' failure to report the source of his spouse's income was willful, or that Justice Thomas willfully or improperly failed to disclose information concerning travel reimbursements." That is it that has been public. Correct?

Judge WOLF. As far as I know, yes.

Chair WHITEHOUSE. As far as I know, too. I think as the—the convention is to go to the leading Republican. That, Senator Lee, is you right now, and then Chairman Durbin.

Senator LEE. Mr. Chairman, I'd note at the outset, I'm concerned by the tone and tenor of this hearing. It feels an awful lot like a political witch hunt. Political witch hunt which may be in the process of being aided and abetted by a member of the judiciary. After reading the letters from Senator Whitehouse, the responses from the Administrative Office of the Courts, and news articles, this appears certainly like sour grapes, or perhaps some combination of sour grapes and a political witch hunt.

We've got people who are trying desperately to make a lot out of something that isn't there. And I'd like to offer into the record, Mr. Chairman, a letter from the Secretary of the Financial Disclosure Committee indicating that two iterations of the committee and two subcommittees found that there was no willful violation by Justice Thomas.

Chair WHITEHOUSE. Is this the May 15th letter?

Senator LEE. Yes. It's the May 15th letter.

Chair WHITEHOUSE. It's already on the record.

Senator LEE. Thank you.

Judge WOLF. I'm sorry, what letter is that, please?

Chair WHITEHOUSE. A letter dated May 15th to me from the Honorable Roslynn R. Mauskopf answering letters that I had sent April 21st, 27th, and May 5th.

Senator LEE. Judge Wolf, how was the press, and specifically Bloomberg News reporter Zoe Tillman able to review your August 2012 letter to a group of Judicial Conference colleagues. How did that happen?

Judge WOLF. I do not know. She sent me an email asking if I would speak to her, and I communicated that I decline.

Senator LEE. Doesn't the timing of this seem a little odd? I mean, this is something that occurred 11 years ago, and days before this hearing, it magically appears. Did you leak a copy of the letter——

Judge WOLF. No.

Senator LEE [continuing]. To Ms. Tillman? Did you leak it to anyone else who may have given it to Ms. Tillman?

Judge WOLF. No. And actually, of course, I've thought about that question, too, and you'll excuse me if I say something that may be supportive of all of you. I had not given those letters to any Senator, any member of his or her staff. The Administrative Office would have these records.

Senator LEE. Who did you give them to?

Judge WOLF. Nobody.

Senator LEE. No one?

Judge WOLF. Correct. And Mr. Lee, I worked closely with your father when he was the Assistant Attorney General, Civil Division, and I was Attorney General Levi's liaison to him. I think your father would have been very disturbed by the matters that I've addressed, A, and B, and I would have thought that Members of the Senate from both parties would be concerned about whether the judiciary and anybody else was properly interpreting——

Senator LEE. Seriously? Seriously? You're going to bring up my dad? You're here—you're here attacking a member of the United States Supreme Court on grounds that are frivolous, on grounds that have been rejected by two different iterations of the Judicial Committee that you're talking about, twice rejected. And you have the audacity to come in here and invoke the memory of my late father? Shame on you, sir.

Okay, look, you submit a statement to this Committee. It's a lengthy statement, contains 122 footnotes. On page 2, you state that you're testifying, quote, "as an individual and not as a representative of the Judicial Conference of the United States or the Federal Judiciary," close quote. Did your law clerks help you draft this?

Judge WOLF. Yes.

Senator LEE. Who else helped you draft it? Who else was involved in the drafting of it?

Judge WOLF. Just my law clerks. Although I did consult one of my colleagues about it.

Senator LEE. Okay. So you're not here on behalf of the Conference, and yet you use judicial resources to do it, and you consulted one of your colleagues to do it, and you're speaking solely in your capacity as someone who served on the committee, and so you're purporting to speak for the committee——

Judge WOLF. No, I'm not. I said I'm speaking—when I was invited first to be interviewed, I thought by Senator Kennedy, who declined to meet with me, but I did meet with his staff. And then when I was invited to testify, I immediately informed the Administrative Office of the United States Courts. I was familiar with the guidance, again, not public, that judges are free to speak. The Canon 4, as you saw when you read my piece, encourages judges

to speak on matters relating to the administration of justice when they have experience or expertise.

And the only thing that the Administrative Office said to me was be sure to point out that you're testifying as an individual, which I had already done, and what I was drafting, and if I wanted any ethical guidance, it mentioned who to call. But Canons——

Chair WHITEHOUSE. Senator Durbin.

Judge WOLF [continuing]. I'm sorry—are vividly clear, and there wasn't any open issue on which to consult.

Senator LEE. Yes. And yet——

Chair WHITEHOUSE. Senator Durbin.

Senator LEE [continuing]. Yet you're here speaking in that capacity, based on your service on that committee, notwithstanding the fact that your motion to have it considered by the full Conference as to your suggestion that Justice Thomas' disclosures were willfully wrong was rejected.

Chair WHITEHOUSE. Senator Durbin.

Chair DURBIN. Judge Wolf, I've been surprised, in a way, at the reaction of my Republican counterparts to this issue. Just last year, there was a bipartisan effort by two Members of this Committee, one Democrat, one Republican, to establish the standard of disclosure when it came to stock ownership by Federal judges, when they had before them a case that might involve that same stock or company. And it struck me that there was a true bipartisan spirit that this was a reasonable ethical standard and should be submitted for the judiciary to live by that standard.

Yet when we had a hearing about 3 weeks ago on issues related to Justice Clarence Thomas and his disclosure standards, it really broke on party lines. And the same thing has happened today, which comes as a disappointment to me as much as a surprise. This notion that anyone in public office at a level of Senator or Supreme Court Justice can receive hundreds of thousands of dollars' worth of gifts in travel and hospitality and not disclose it and argue that, "Well, that was inadvertent," is to ignore the obvious.

The American public takes a look at that and said, "What is this judge doing? How can we trust his judgment if one Texas billionaire has such a large part of his life in terms of his attention?" What's your response to that?

Judge WOLF. Essentially, I think you've characterized accurately, based on what I hear, just being a citizen, may be the reaction of the man in the street. However, as I wrote in my testimony, I think—the Ethics in Government Act emerged after the Watergate scandal for good reasons. Greater transparency of financial activities of public officials, not just judges, was understood to be very important to assuring, among other things, the impartiality of judges.

And I think that Act struck, as it's written, a very appropriate balance. It gives the Judicial Conference the opportunity and the obligation to determine whether there's reasonable cause to believe there's been a willful violation. It doesn't permit them, the Judicial Conference, to make the ultimate determination of whether there was.

If the Judicial Conference makes a referral to the Justice Department, it should diminish the potential and the perception that the

Justice Department has launched a witch hunt against judge or Justice. But members of the Judicial Conference don't—are not all impartial. There are friendships, there are professional relationships, there are interests that——

Chair DURBIN. That goes to the heart of the issue before us, and that is, the fact that the Supreme Court of the United States of America has not established code of conduct and ethical standards that in and of themselves are trustworthy. And when this matter came before this Committee several weeks ago, there were dissenters on the other side, on the Republican side, as to whether or not this was even worthy of talking of. They accused us of smear and harassment to even raise the facts brought up by ProPublica.

And I also want to say, their second argument we've just addressed here and that's separation of powers. Do we have any business, as Congress, when it comes to the ethics of the Court? Well, I thought that we did until we received a response from Chief Justice Roberts. And let me read it to you. This response was from the 2011 Year-End Report on the Federal Judiciary.

Chief Justice Roberts wrote, "In addition to establishing Judicial Conference, Congress has enacted legislation addressing a number of specific ethical matters. In particular, Congress has directed Justices and judges to comply with both financial reporting requirements and limitations on the receipt of gifts and outside earned income." Then, he says, "The Court has never addressed whether Congress may impose these requirements on the Supreme Court. The Justices nevertheless comply with these provisions."

In other words, I think he's going to the heart of the question as to whether anyone can raise a question about the ethical standards or establish ethical standards, even those embraced by the rest of the Federal Government. That, to me, gets to the heart of why we need to enact legislation. Senator Whitehouse has a bill on the subject. Others do. And I'm sure this Committee is going to address it. This is not a witch hunt. This is not a smear. This is not a harassment. This is to try to rescue the reputation of the Court from some very sordid facts that have been disclosed and proven.

Judge WOLF. And, as you know, because you read it beginning on page 4 of my testimony, written testimony, I considered not just whether it was encouraged that I come, but whether I come and testify today would be inconsistent with the independence of the judiciary or separation of powers. Again, emerging from President Nixon's administration, is Supreme Court jurisprudence that says, sensibly, that the three branches are not each in a silo. We've divided power so there'll be checks and balances.

And if Congress is taking action that doesn't unduly—well, it doesn't impact the performance of the Court's core function, that's not a separation of powers violation. In fact, the D.C. Circuit case decided that in a case in 1994 concerning Congressman Rose, no separation of powers problem. And the core function of the courts is to decide cases impartially. Independence can be helpful to that. But independence is not an end in itself. An independent judge or an independent judiciary could be a dishonest judge or a dishonest judiciary.

And therefore, a delicate balance has to be struck between the interests of independence in assuring that judges, like every public

official and every citizen in the country, is somehow accountable. And the financial disclosure statute that you enacted and the Judicial Conference has a responsibility to properly implement is an important and appropriate element of that accountability.

Chair WHITEHOUSE. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman. Judge Wolf, does the Supreme Court have a code of ethics that applies to it?

Judge WOLF. No.

Senator HIRONO. Is there a code of ethics that applies to the Federal district and circuit courts?

Judge WOLF. Yes.

Senator HIRONO. Is there any reason that the Supreme Court should not have a code of ethics that applies to them as it applies to every other Federal judge?

Judge WOLF. As I wrote in the article that was consistent with the Code of Conduct in 2021, I think it would be beneficial if the Supreme Court had a code of conduct. But, if I could say, as I wrote in my testimony, because I continue to think about these things, I think that the discussion of enacting a statute that would require the Supreme Court to adopt a code of conduct is distracting from the more important issue about the enforceability—well, the way existing statutes are being enforced or implemented.

Because if there was a code of conduct for the Court and it was the ultimate arbiter of whether a Justice was complying with the code of conduct, you'd have, I predict, enforcement problems that are similar to the problems that I've identified——

Senator HIRONO. Well, excuse me, Judge Wolf——

Judge WOLF [continuing]. With regard to the Ethics Act.

Senator HIRONO [continuing]. The enforcement of a code of conduct is, I think, a separate issue that we would need to address. But really, the bottom-line question is should they have a code of conduct as applicable to them as to every other Federal judge? And your answer is, yes, we can figure out how to do it.

For example, in Hawaii, our constitution requires the Supreme Court to establish a process where it will abide by a code of conduct. And we established—there is established a commission that does not have any judges, and if that commission determines that there needs to be a further referral, then it does go to the Supreme Court. But the judge—Justice who is involved would have to recuse himself. So there are ways that we can do the enforcement part.

Judge WOLF. I'm sorry to interrupt you, Senator, but I'd actually like to say something to support you. We have the same thing in Massachusetts. After I worked for Attorney General Levi, I was the young junior co-counsel to the former president of the American Bar Association. In the Massachusetts Supreme Judicial Court, we prosecuted the chief judge of the State trial court for ethical violations, including alleged perjury.

Senator HIRONO. So there are ways that we can determine how the enforcement will occur, so that doesn't get away from the really bottom-line question. And to the public, when they see articles that say that we have a Supreme Court Justice who received over half a million dollars' worth of airfare or whatever it is, I think common sense says that something is wrong here, that this was not dis-

closed, and there's some kind of a loophole that enabled this Justice to think that he did not have to disclose this.

And now we have a Supreme Court telling us that they do have practices and principles that applies to them. And I'm just wondering, why is it that they are so reluctant to impose a high ethical standard to itself? They are the highest court of the land. And when I listen to my friends on the other side of the aisle, it really seems like, to me, when they attack you, they are attacking the messenger. And really the message is, Should they not have a code of ethics? I think that's such a simple thing. You know, my gosh. They doth protest too much. Thank you. Mr. Chairman.

Chair WHITEHOUSE. Before we wrap up, you asked for 5 minutes to respond to the various accusations and insinuations of the Ranking Member. And I think, based on what I saw here, that is appropriate. So I will yield you 5 minutes.

Senator LEE. Do we have time?

Chair WHITEHOUSE. Probably not. We have a vote we need to get to. Proceed.

Judge WOLF. Well, I guess I would say two things, and I'd have to look more closely at my notes——

Chair WHITEHOUSE. This does not hold back your opportunity to write a response as a QFR in the week that follows the hearing.

Judge WOLF. I'm not here as part of a witch hunt. I'm here because I hope to contribute to reframing some of the important issues and prompting, maybe naively, a more civil, sensible discussion of them. I do think, as I said earlier, that all of you in the Senate should and do have an interest in whether legislation your predecessors enacted after Watergate is being properly implemented.

When Senator Kennedy says the committee found four times that there was no violation, no willful violation. First, although I have read Judge Mauskopf's letter, which I got yesterday, based on that and other information available to me, I don't believe that that is correct. And again, I mean this respectfully, Senator Lee. I don't mean to be provocative, and I'd be happy to talk to you about this afterwards if you don't get more time. It's not up to the Judicial Conference to determine whether a violation occurred.

If it's to determine whether there's a reasonable cause to believe that one may have occurred, and then to refer it, it's comparable to the grand jury process and the trial process. And as I said, if the Judicial Conference has arrogated it to itself authority that you didn't give it, that's not proper, and I thought would be a matter of concern to all of you. There are a number of things that Senator Kennedy pulled out of the media that are not true.

But, for example, he was talking about a death penalty case where there was a motion to recuse me because at a time—it's called *United States v. Sampson*, I looked at it this morning. At a time when a professor was not on the witness list as an expert, although he had, for an earlier case, been on the witness—an earlier iteration of this case been on the witness list, I moderated a program about a film where he was one of the speakers. I had never met him before. As soon as I learned that he was going to be a witness at the retrial, I told the parties, and I told them they could ask me any questions.

I told them what occurred, and they sent out the FBI, the Massachusetts State Police, the Internal Revenue Service to investigate the veracity of what I told them. And I gave them the film, the video of the event, and they all said—the Government said I wasn't prejudiced, but a reasonable person could question my impartiality, the standard under 18 United States Code 455(a) that applies to judges and Justices. I considered that seriously. I wrote a 53-page decision, and I found that a reasonable person could not question my impartiality, and therefore, I had a duty to continue to sit, which is what the jurisprudence is.

Evidently, the Solicitor General didn't authorize an appeal. That wasn't appealed. I didn't recuse myself. I did transfer the case long after to one of my colleagues because of other responsibilities that I had. But I didn't recuse myself, and I didn't leak any information to the FBI. You can read a 661-page decision that I wrote, Senator Kennedy, that starts by saying, "Everything secret degenerates, even the administration of justice." That's a decision I wrote after 9 months of hearings that exposed massive corruption in the FBI in connection with Whitey Bulger.

It's organized—it's top echelon organized crime informant and his sidekick, Stevie "The Rifleman" Flemmi. In that decision, I describe in detail the pattern of the FBI putting false—or a particular FBI agent—putting false information in informant files to direct attention from real culprits. That was put in there at a time when I was a prosecutor investigating a leak in a case against—that compromised a case against a State representative. That's only one of the many statements.

Chair WHITEHOUSE. Well, I'll leave you to continue to respond as you see fit to the allegations.

Judge WOLF. I'm going to stop there. But could I say one more thing, please? I see that I've got 1 minute, 3 seconds and I think this is important, and it relates to some things that come up. I've explained why I'm here today. Some people I respect advised me not to do this, even though it was permissible, appropriate that I would be subject to various unfair attacks. It's just the toxic political environment. And I thought about that, and I'd like to tell you why I did it.

I did it because so many of my colleagues on the bench are deeply disturbed themselves. We work—I'm a senior judge, I don't get paid. I would get my salary for life if I were fully retired. But so many of us work so hard to give integrity to the ideal of impartial equal justice under law, and now that ideal is beleaguered. I do it because my friend, Dr. Jim O'Connell, the head of—founder of Boston Health Care for the Homeless, who's with me today, and others, you know, tell me, "What are we going to tell our children about their ability to respect the courts?"

I do it for my law clerks. My law clerks are here. The Code of Conduct and the ethical opinion says that I can't use them for anything that's substantial. I told them they didn't need to work on this. They asked to. This is their vacation. I paid to bring them here. They wanted to do it, and they've thanked me for doing it, because they come into the profession the way you and I did, with ideals. And all this controversy is generating skepticism and hope-

fully not cynicism, because our profession needs ideals. And I'm——

Chair WHITEHOUSE. That's a good tone to end on. So let me leave it there. Let me just remind everybody that the hearing is titled, "Review of Federal Judicial Ethics Processes at the Judicial Conference of the United States." As a result of this effort, we have received a very significant document, perhaps the most complete response from the Judicial Conference ever about its processes. We have a fact witness who was present to see these processes in action, who has testified about what he saw in that time.

And I believe my opening statement and my questioning have all been very factual and calm, as I think is appropriate in these circumstances. And what we've heard is that this hearing has the tone of a witch hunt, that we're attacking a member of the Supreme Court. There has been both interrupting and shouting taking place. There has been mocking and insinuating taking place. And it just seems to me that I'd like to get this work done without all that drama. I think there are real questions that need to be answered, and I intend to continue to pursue them. And with that, the hearing is adjourned.

[Whereupon, at 3:15 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

APPENDIX

Additional Material Submitted for the Record

Witness List
Hearing before the
Senate Committee on the Judiciary
Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

"Review of Federal Judicial Ethics Processes at the Judicial Conference of the United States"

Wednesday, May 17, 2023
Dirksen Senate Office Building, Room 226
2:00 p.m.

The Honorable Mark L. Wolf
Senior U.S. District Judge for the District of Massachusetts
Boston, MA

WRITTEN TESTIMONY OF SENIOR JUDGE MARK L. WOLF
FOR THE MAY 17, 2023 HEARING OF THE SENATE COMMITTEE
ON THE JUDICIARY, SUBCOMMITTEE ON FEDERAL COURTS,
OVERSIGHT, AGENCY ACTION, AND FEDERAL RIGHTS
HEARING ON REVIEW OF FEDERAL JUDICIAL ETHICS PROCESSES
AT THE JUDICIAL CONFERENCE OF THE UNITED STATES

Submitted May 15, 2023

I. INTRODUCTION

Chairman Whitehouse, Ranking Minority member Kennedy, and members of the Subcommittee, thank you for requesting that I testify today on certain matters concerning the administration of justice with which I have personal experience - the manner in which the Judicial Conference of the United States has discharged its duties under the Financial Disclosure statutes Congress and the President have enacted.[1] I hope my testimony will be helpful to you as you consider whether those laws have been properly implemented, whether they should be revised and strengthened, and more broadly whether other legislation is necessary to promote public confidence in the integrity of federal Justices and judges without infringing on their independence in deciding cases.

I am testifying as an individual and not as a representative of the Judicial Conference of the United States or the federal judiciary.

II. BACKGROUND

My name is Mark L. Wolf. I am a Senior United States District Judge in the District of Massachusetts. Prior to my appointment in 1985, in addition to practicing law in Washington, D.C. and Boston, Massachusetts, I served in the Department of Justice as: a Special Assistant to Deputy Attorney General Laurence H. Silberman (1984);

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[1] 5 U.S.C. §§ 13101–13111.

a Special Assistant to Attorney General Edward H. Levi (1975-77); and Deputy United States Attorney and Chief of the Public Corruption Unit in the District of Massachusetts (1981-85).

Since 1985, in addition to my work as a trial judge, I have been actively involved in the governance of the judiciary. I have served as Chief Judge of the United States District Court for the District of Massachusetts (2006-12); as a member of the Judicial Conference of the United States (2010-12); as Chair of the group of District Judge members of the Judicial Conference (2012); and as a member of the Judicial Conference Committees on Criminal Law, Codes of Conduct, and Criminal Rules.[2]

III. THE CODE OF CONDUCT FOR UNITED STATES JUDGES AND SEPARATION OF POWERS

In deciding whether to testify, I have considered: (1) whether my testimony is permissible under the Code of Conduct for United States Judges; and (2) whether my testimony would be incompatible with the principles of separation of powers and the importance of preserving the independence of judges in deciding cases.

A. Code of Conduct

My appearance today is permitted and, indeed, encouraged by the Code of Conduct for United States Judges. Canon 4(A)(2) of the Code states that:

> [a] judge may consult with or appear at a public hearing before an executive or legislative body or official: (a)

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[2] A more complete biography is attached as Exhibit 1.

> on matters concerning the law, the legal system, or the administration of justice; (b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area.[3]

The Commentary to Canon 4 states, in pertinent part, that "[a]s a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law . . . . [T]he judge is encouraged to do so . . . ."[4] These principles are reiterated and amplified in published Advisory Opinions of the Judicial Conference Committee on Codes of Conduct.[5]

B. Separation of Powers

While federal judges are permitted and generally encouraged to testify concerning matters involving the administration of justice, I have considered whether doing so now with regard to the whether the Judicial Conference has properly complied with its statutory duties under the Financial Disclosure laws, and possible related legislation, would be inconsistent with the principle of

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[3] U.S. CTS., CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4(A)(2) (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

[4] Id. Canon 4 Commentary.

[5] See 2 GUIDE TO JUDICIARY POLICY § 220, Advisory Ops. 50 and 93, at 63-65, 154-58 (ADMIN. OFF. OF THE U.S. CTS. 2009), https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02_0.pdf.

separation of powers and the importance of preserving the independence of the judiciary. I have concluded that it is not.

Every United States Justice and judge takes an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich" and to "faithfully and impartially discharge and perform all the duties" of his or her office.[6] As this oath demonstrates, it is the fundamental duty of each Justice and judge to decide cases impartially. Protecting federal judges from potential improper influence in performing this judicial function is important to their ability and willingness to decide impartially, based solely on the evidence and the law, whether legislation enacted by Congress is unconstitutional, whether the President has exceeded the powers delegated to his or her office, and whether even despised individuals or groups are entitled to prevail in court. Constitutional provisions that protect federal judges from being punished for making unpopular decisions – epitomized by the constitutional guarantee of life tenure[7] –

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[6] 28 U.S.C. § 453 (emphasis added).

[7] U.S. CONST. art. III § 1; see also THE FEDERALIST No. 78 (Alexander Hamilton) (concerning life tenure and explaining that "nothing can contribute so much to [the judiciary's] firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security").

promote judicial independence and encourage judges to perform their judicial duties impartially.

However, independence is not an end in itself. An independent judiciary is not necessarily an impartial judiciary. It could be a dishonest, unaccountable judiciary. Therefore, there must be means of determining whether a Justice or judge is capable of deciding a particular case impartially and whether reasonable, well-informed people can be confident that he or she is doing so. There must also be means of holding Justices and judges accountable if they violate their duties to, among other things, be honest and impartial.

In the United States we seek to balance the interests of independence and accountability of Justices and judges in a range of ways. Except for Supreme Court Justices, a judge's decisions can be reviewed and reversed on appeal.

In addition, with rare exceptions, judicial proceedings must be open to the public and media. The Supreme Court has recognized the historic importance of openness to the proper functioning of the courts, explaining that openness "gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality."[8] This principle of

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[8] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980).

transparency is important "to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system."[9]

Moreover, every Justice and judge is, by statute, obligated to disqualify himself or herself if a reasonable person might question his or her impartiality in a particular case even if the Justice or judge is not actually biased or prejudiced.[10] In part to assure that litigants and the public have the information necessary to have confidence that a Justice or judge is capable of performing impartially in a particular case Congress and the President enacted legislation that requires federal Justices and judges to make certain financial disclosures annually.[11]

These requirements are not a violation of separation of powers. Our Constitution is based on Lord Acton's famous insight that "power tends to corrupt, and absolute power corrupts absolutely."[12] Therefore, federal power is divided between the Legislative, Executive, and Judicial branches of government.[13] In

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[9] In re Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984); see also F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987) (same).

[10] See 28 U.S.C. § 455(a).

[11] See S. Rep. No. 95-170, at 21-22 (1977); see generally 5 U.S.C. §§ 13101–13111.

[12] JOHN EMERICH EDWARD DALBERG-ACTON, FIRST BARON ACTON, HISTORICAL ESSAYS & STUDIES 504 (John Neville Figgis & Reginald Vere Laurence eds., 1907).

[13] See U.S. CONST. art. I; id. art. II; id. art. III.

our system of government, each branch serves as a check on the potential abuses of authority by the other branches.[14] The Supreme Court has "squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches."[15] "[I]n determining whether [a statute] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents [one branch] from accomplishing its constitutionally assigned functions."[16]

The core constitutionally assigned function of the judiciary is to decide cases impartially. The Financial Disclosure statutes do not injure the ability of Justices and judges to do so.[17] They only require that Justices and judges file accurate and complete annual reports of, among other things, their income, assets, gifts, travel, and certain financial information concerning their spouses.[18] Therefore, the statutes promote the likelihood that

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[14] THE FEDERALIST Nos. 47, 51 (James Madison).

[15] Nixon v. Adm'r Gen. Servs., 433 U.S. 425, 443 (1977) (citing United States v. Nixon, 418 U.S. 683, 703 (1974)).

[16] Id.

[17] In a case involving a member of Congress, the District of Columbia Circuit held that authorizing the Department of Justice to investigate and prosecute possible violations of the Act does not "offend[] the separation of powers doctrine." United States v. Rose, 28 F.3d 181, 190 (D.C. Cir. 1994). Rather, in investigating whether to bring a civil action against the member of Congress, the Department of Justice "was fulfilling its constitutional responsibilities, not encroaching on Congress's." Id.

[18] See generally 5 U.S.C. § 13104.

Justices and judges will perform their core function properly, without bias, prejudice, or undue influence, and that reasonable people will not doubt that they are doing so.

Several years ago, I published an article supporting legislation that would require the Supreme Court to promulgate a Code of Conduct for itself.[19] I now believe that issue is distracting from consideration of more important questions.

As Senator John N. Kennedy said at a May 2, 2023 Senate Judiciary Committee hearing concerning Supreme Court ethics reform, "federal law already requires recusal in certain circumstances, like bias or financial interest . . . . The Justices are also subject to strict financial disclosure rules, just like my colleagues . . . ."[20] In my view, the more important questions concern whether the existing Financial Disclosure statutes are adequate to serve their intended purpose and whether the Judicial

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[19] Mark L. Wolf, House Anti-Corruption and Supreme Court Ethics Vote Helps Restore U.S. Credibility, THINK (Mar. 4, 2021, 4:45 AM), https://www.nbcnews.com/think/opinion/house-anti-corruption-supreme-court-ethics-vote-helps-restore-u-ncna1259514.

[20] Supreme Court Ethics Reform: Hearing Before the S. Comm. on the Judiciary, 117th Cong. 39:24-30 (May 2, 2023) (statement of Sen. John Neely Kennedy, Ranking Minority Member of the S. Subcomm. on Fed. Cts., Oversight, Agency Action, & Fed. Rights), https://www.judiciary.senate.gov/committee-activity/hearings/supreme-court-ethics-reform; see also Press Release, Sen. John Neely Kennedy, Some Democrats on Crusade to Undermine Supreme Court's Legitimacy (May 2, 2023), https://www.kennedy.senate.gov/public/press-releases?ID=D4D040AE-D434-4E0D-835E-165A7EF8B2D0.

Conference of the United States has properly discharged its statutory duties concerning them.

Congress has a legitimate interest in examining these questions. You have asked me to assist in that examination by testifying based on my relevant personal experience and the insights resulting from it. As explained earlier, federal judges are encouraged to testify in Congress on matters relating to the administration of justice. We are also required to "maintain and enforce high standards of conduct" for the federal judiciary.[21] Therefore, I have accepted your request to testify today.

IV. THE ETHICS IN GOVERNMENT ACT

In 1978, the Ethics in Government Act (the "Act") became law in the aftermath of the Watergate scandal that resulted in the resignation of President Richard Nixon in the midst of hearings in the House of Representatives to determine whether he should be impeached.[22] The legislation is essentially a codification of Justice Louis D. Brandeis' belief that "sunlight is . . . the best of disinfectants."[23] Among other things, the Act includes

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21 U.S. Cts., supra note 3, Canon 1.

22 See Judith Rosenbaum & Steven Lubet, Financial Disclosure by Judges: Functional Analysis and Critique, 40 U. Fla. L. Rev. 241, 248 (1988); see also S. Rep. No. 95-170, at 21 (1977).

23 Louis D. Brandeis, What Publicity Can Do, Harper's Wkly., Dec. 20, 1913, at 10.

provisions (the "Financial Disclosure statutes")[24] that make mandatory public disclosure of financial and certain other information of federal public officials and members of their immediate family[25] in order to reduce the risk that those officials will be improperly enriched and influenced in the performance of their duties.[26]

The Act applies to all judicial officers, including the Chief Justice and Associate Justices of the Supreme Court.[27] The Act requires a Justice or judge to file an annual report that includes, among other things, a full and complete statement of: his or her income;[28] the source of all gifts with a value of more than $480 other than "food, lodging, or entertainment received as personal hospitality;"[29] any transaction in real property exceeding $1,000

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[24] The Financial Disclosure statutes are now codified at 5 U.S.C. §§ 13101—13111. At all times relevant to this testimony, the Financial Disclosure statutes were codified at 5 U.S.C. App. §§ 101-111. On December 27, 2022, the statutes were transferred without change to their meaning or effect to their present location in the U.S. Code. See Revisions in Title 5, United States Code and Technical Amendments to Improve the United States Code, Pub. L. No. 117-286 (2022). For the sake of clarity and consistency, this testimony cites to the current codification.

[25] See generally 5 U.S.C. § 13104.

[26] See S. Rep. No. 95-170, at 21-22 (1977).

[27] 5 U.S.C. §§ 13101(10), 13103(f)(11).

[28] Id. § 13104(a).

[29] See id. § 13104(a)(2)(A); id. § 7342(a)(5) (authorizing the Administrator of General Services to redefine the "minimal value" at 3 year intervals); GEN. SERVS. ADMIN., GSA BULLETIN FMR B-52 FOREIGN GIFT AND DECORATION MINIMAL VALUE (Mar. 6, 2023) (setting the minimal value effective January 1, 2023).

other than a transaction involving the personal residence of the official or his or her spouse;[30] and the name of any individual or organization that paid for or reimbursed the Justice or judge for travel, meals, or lodging.[31] In addition, the Act requires annual disclosure of the source of income a Justice or judge's spouse received from a third party, other than the government, in an amount greater than $1,000.[32]

The Act also provides that it is unlawful for any person – including a Justice or judge – to knowingly and willfully falsify any information required to be reported, or to fail to file or report any information required to be reported.[33] To act knowingly and willfully in the context of the Act means to "intentionally disregard[] the statute" or to be "indifferent to its requirements."[34]

The Act makes the knowing and willful filing of false information a crime punishable by up to one year in prison, a fine

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30 5 U.S.C. § 13104(a)(5)(A).

31 Id. § 13104 (a)(2)(B), (a)(6)(B).

32 Id. § 13104(e)(1)(A).

33 Id. § 13106(a)(2)(A)(i-ii).

34 United States v. Gant, 268 F. Supp. 2d 29, 33 (D.D.C. 2003) (quoting United States v. Tarver, 642 F. Supp. 1109, 1111 (D. Wyo. 1986)); see also United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987) (defining willfulness in the context of federal regulatory statutes as "a disregard for the governing statute and an indifference to its requirements") (collecting cases).

under title 18 – the United States Criminal Code – or both.[35] A knowing and willful failure to file or to report required information is a crime punishable by a fine under title 18.[36] In addition, any official who knowingly and willfully either falsifies information required to be disclosed or fails to report such information may be subject to a civil penalty of up to $71,316.[37] Moreover, 18 U.S.C. § 1001 also makes it a crime to knowingly and willfully falsify, conceal, or cover up a material fact.[38] The penalty for doing so under that statute includes imprisonment for up to five years.[39]

The Act defines a specific and limited role for the Judicial Conference of the United States (the "Judicial Conference" or "Conference") concerning possible violations. It states that:

> [T]he Judicial Conference . . . shall refer to the Attorney General the name of any individual which [it]

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[35] 5 U.S.C. § 13106(a)(2)(B)(i).

[36] Id. § 13106(a)(2)(B)(ii). The penalty for "knowingly and willfully" failing to "file or report" required information is a fine "under title 18." Id. Title 18's fine provisions are provided in subchapter C, see 18 U.S.C. § 3551(b)(2), which grades fines according to an offense's classification, see id. U.S.C. § 3571(b). Because 5 U.S.C. § 13106(a)(2)(B)(ii) has no incarceration penalty it is classified as an infraction. See 18 U.S.C. § 3559(a)(9). The fine for an infraction is "not more than $5,000." 18 U.S.C. § 3571(b)(7).

[37] See 5 U.S.C. § 13106(a)(1) (as adjusted by 5 C.F.R. § 2634.701). For violations occurring prior to November 3, 2015, the penalty is $50,000. 5 C.F.R. § 2634.701.

[38] 18 U.S.C. § 1001(a)(1).

[39] Id. § 1001(a).

> has reasonable cause to believe has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported.[40]

"Reasonable cause" is closely analogous to, if not less than, probable cause.[41] "Probable cause is an objective standard 'to be met by applying a totality-of-the-circumstances analysis.'"[42] "Probable cause is more than bare suspicion but is less than beyond a reasonable doubt and, indeed, is less than a preponderance of the evidence."[43] Probable cause is determined based upon the "practical considerations of everyday life on which reasonable and

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[40] 5 U.S.C. § 13106(b) (emphasis added).

[41] See Brown v. Dep't of Just., 715 F.2d 662, 667 (D.C. Cir. 1983) (holding that reasonable cause to believe that an employee had committed a work-related crime existed because the employee had already been indicted based upon probable cause); Angelex, Ltd. v. United States, 907 F.3d 612, 618 (D.C. Cir. 2018) (holding that because the court had been given "no basis for distinguishing" between reasonable cause and probable cause, a showing of probable cause was sufficient to satisfy reasonable cause); Hackley v. Roudebush, 520 F.2d 108, 150 n.172 (D.C. Cir. 1975) (noting in dicta that "the 'reasonable cause' standard is considerably lower than the 'preponderance of the evidence' standard"); Hatch v. Dep't for Child., Youth & Their Fams., 274 F.3d 12, 21 (1st Cir. 2001) (noting that a reasonable cause standard "borders on an obligatory showing of probable cause (or something fairly close to probable cause)"); see also Reasonable Cause, BLACK'S LAW DICTIONARY (10th ed. 2014) ("See PROBABLE CAUSE (1).").

[42] United States v. Burnett, 827 F.3d 1108, 1114 (D.C. Cir. 2016) (quoting United States v. Vinton, 594 F.3d 14, 21 (D.C. Cir. 2010)).

[43] Id.; see also United States v. Cardoza, 713 F.3d 656, 660 (D.C. Cir. 2013) ("[P]robable cause does not require certainty, or proof beyond a reasonable doubt, or proof by a preponderance of the evidence.").

prudent men, not legal technicians, act."[44] It "is a reasonable ground for belief."[45]

Accordingly, pursuant to the Act, it is not the responsibility of the Judicial Conference to determine whether a Justice or judge has violated the Financial Disclosure Statutes and should be sanctioned. Rather, it is the duty of the Judicial Conference to decide whether there is reasonable cause to believe a willful violation occurred.[46] If such reasonable cause exists, the Judicial Conference must refer the Justice or judge involved to the Attorney General for possible investigation,[47] including potentially a grand jury investigation, and a possible criminal prosecution or a civil suit.

In my view, this division of duties is wise and important. It appropriately allocates these duties if the Judicial Conference properly performs its limited role. If the Judicial Conference properly considers a matter and refers it to the Attorney General, the referral will reduce the risk of there being a well-founded claim that an investigation of a Justice or judge is an improperly motivated, unjustified attack on the independence of the

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44 Brinegar v. United States, 338 U.S. 160, 175 (1949).

45 Id. (quoting Carroll v. United States, 267 U.S. 132, 161 (1925)).

46 5 U.S.C. § 13106(b).

47 Id.

judiciary. Making the Department of Justice, rather than the Judicial Conference, the ultimate arbiter of whether a Justice or judge should be prosecuted or sued and, if a charge is proven, sanctioned, diminishes the risk that friendships, professional relationships, a desire to protect colleagues, or an interest in protecting the reputation of the judiciary will result in the Act not being properly enforced concerning a Justice or judge.

V. REQUESTS TO THE JUDICIAL CONFERENCE IN 2011 TO REFER JUSTICE CLARENCE THOMAS TO THE ATTORNEY GENERAL AND RELATED MATTERS

The Judicial Conference is comprised of the Chief Justice of the Supreme Court, the Chief Judges of each Circuit, and a District Judge from each Circuit, who serves a three year term. As indicated earlier, from 2010 through 2012, I was the representative of the First Circuit District Judges on the Judicial Conference.

I now know that in 2011, many members of Congress and two public interest organizations – Common Cause and Alliance for Justice – sent letters to the Judicial Conference, Chief Justice John Roberts, and the Supreme Court describing specific ways in which Justice Clarence Thomas had allegedly committed willful violations of the Financial Disclosure statutes, and in some instances, expressly urging the Judicial Conference to find reasonable cause and refer Justice Thomas to the Attorney General. There were also media reports relating to the issues raised by the

letters. The public record now includes the following information concerning the letters, which are included in Exhibits 2 and 3.

On **January 21, 2011**, Common Cause emailed a letter to James Duff, the Director of the Administrative Office of the United States Courts and as such, the Secretary of the Judicial Conference. It stated the following: Justice Thomas' wife, Virginia Thomas, was employed by the Heritage Foundation from 2003 to 2007 and at Liberty Central in 2009.[48] Both organizations compensated Mrs. Thomas for her work.[49] Justices are required to disclose their spouse's sources of income in excess of $1,000 pursuant to 5 U.S.C. § 13104.[50] However, on his Financial Disclosure Reports from 2003 to 2009 "Justice Thomas checked the box for 'None' for 'Spouse's Non-Investment Income.'"[51] Common Cause requested that the Judicial Conference consider the omission, make a determination under 5 U.S.C. § 13106, and, if it found reasonable

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48 Letter from Bob Edgar, President & CEO of Common Cause, to James C. Duff, Sec'y to the Jud. Conf. of the U.S. (Jan. 21, 2011), https://www.commoncause.org/resource/letter-to-james-duff-on-virginia-thomas-income/, included in Exhibit 3.

49 Id.

50 See 5 U.S.C. § 13106.

51 Letter from Bob Edgar to James C. Duff, supra n. 48.

cause, "refer the matter to the Attorney General."[52] Mr. Duff brought the matter to Justice Thomas' attention.[53]

On **January 22, 2011**, the Financial Disclosure Office of the Administrative Office of the United States Courts received seven letters from Justice Thomas, each dated January 21, 2011, amending his reports to include information concerning Mrs. Thomas' employment.[54] The letters stated that he had "inadvertently omitted" his wife's employment "due to a misunderstanding of the filing instructions."[55] He amended his reports by adding the following employment for Mrs. Thomas: (a) for 2009, he added Hillsdale College; (b) for 2008, he added The Heritage Foundation and Hillsdale College; and (c) for 1998 to 2007, he added The Heritage Foundation.[56]

On **January 24, 2011**, Mr. Duff wrote to Common Cause that the matter had been brought "to Justice Thomas' attention and he immediately amended his reports."[57] Mr. Duff further advised that

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52 Id.

53 See Exhibit 2.A, Letter from James C. Duff, Dir. of the Admin. Off. of the U.S. Cts., to Bob Edgar, President & CEO of Common Cause (Jan. 24, 2011).

54 Exhibit 2.B, Letters from Justice Clarence Thomas to Comm. on Fin. Disclosure (Jan. 21, 2011), https://fixthecourt.com/wp-content/uploads/2023/04/thomas-clarence-amendments.pdf.

55 Id.

56 Id.

57 Exhibit 2.A, Letter from James C. Duff to Bob Edgar, supra n. 53.

he had "forwarded [Common Cause's January 21, 2011 letter] to the appropriate Judicial Conference committee."[58] That was the Committee on Financial Disclosure (the "Committee"), which was then chaired by Judge Bobby Baldock.

On **February 14, 2011**, Common Cause sent a letter to William Suter, Clerk of the Supreme Court, questioning a reimbursement Justice Thomas reported on his 2008 Financial Disclosure Report.[59] It stated that Justice Thomas reported reimbursement from the Federalist Society "for four days in Palm Springs, January 26-29, 2008."[60] Common Cause questioned whether Justice Thomas properly characterized this as a reimbursement or whether the payment to him was instead a gift.[61] It also questioned whether Justice Thomas was actually in Palm Springs for a Koch Industries event and if some organization or individual other than the Federalist Society had paid his expenses.[62] A Supreme Court spokesperson had previously said that Justice Thomas spoke at a Federalist Society event and "then dropped by one of the separate Koch meeting

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58 Id.

59 Exhibit 2.C, Letter from Bob Edgar, President & CEO of Common Cause, to William Suter, Clerk of the U.S. Sup. Ct. (Feb. 14, 2011), https://www.commoncause.org/resource/letter-to-the-clerk-of-the-supreme-court/.

60 Id.

61 Id.

62 Id.

sessions" but "was not a participant."[63] Common Cause stated that, when asked, Federalist Society staff could not recall an event that corresponded with the dates on Justice Thomas' Financial Disclosure Report.[64] Common Cause noted that Koch Industries had a history of holding its semi-annual strategy and fundraising session in Palm Springs.[65]

On **March 15, 2011,** the Judicial Conference met.[66] Its Report of the meeting concerning the Committee's activities did not include any reference to the allegations concerning Justice Thomas in Common Cause's letters.[67] The Committee made no reference to any matters concerning Justice Thomas in its Report to the Judicial Conference.[68]

On **June 18, 2011,** the New York Times published an article regarding Justice Thomas' association with Harlan Crow.[69] The

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[63] Id.

[64] Id.

[65] Id.

[66] See JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Mar. 15, 2011), https://www.uscourts.gov/sites/default/files/2011-03.pdf.

[67] See id. at 16.

[68] See COMM. ON FIN. DISCLOSURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON FINANCIAL DISCLOSURE (Mar. 2011), which is now available to the public upon request to the Administrative Office of the United States Courts.

[69] Mike McIntire, Friendship of Justice and Magnate Puts Focus on Ethics, N.Y. TIMES (June 18, 2011), https://www.nytimes.com/2011/06/19/us/politics/19thomas.html.

article noted that Mr. Crow had recently financed a museum in Pin Point, Georgia Justice Thomas' birthplace.[70] It also stated that "[t]ravel records for Mr. Crow's planes and yacht . . . suggest[ed] that Justice Thomas may have used them in recent years."[71] However, there were not corresponding reports of any travel on Mr. Crow's plane or yacht in Justice Thomas' Financial Disclosure Reports.[72]

On **September 13, 2011**, Common Cause and Alliance for Justice sent a letter to Mr. Duff noting the allegations in the June 18, 2011 New York Times article.[73] They also referenced Common Cause's January 21, 2011 letter on Justice Thomas' failure to report properly his wife's sources of income.[74] Common Cause "request[ed] that the Judicial Conference make a public determination as to whether Justice Thomas' failure to report his wife's income, and or failing to disclose travel reimbursements" established "'reasonable cause' under [§ 13106]" to "refer the matter to the Department of Justice."[75]

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[70] Id.

[71] Id.

[72] Id.

[73] Letter from Bob Edgar, President & CEO of Common Cause and Nan Aron, President of All. for Just., to James Duff, Dir. of Admin. Off. of the U.S. Cts. (Sept. 13, 2011), https://web.archive.org/web/20130128054142/https://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773617&ct=11216445, included in Exhibit 3.

[74] Id.

[75] Id.

The Judicial Conference met on September 13, 2011.[76] Its report of the meeting did not include any reference to: (1) the allegations raised in Common Cause's January 21, 2011 letter, Common Cause's February 14, 2011 letter to the Clerk of the Supreme Court, Common Cause and Alliance for Justice's September 13, 2011 letter, or the June 2011 New York Times article; or (2) any Committee or Conference activity related to those allegations.[77] The Committee made no reference to matters concerning Justice Thomas in its report to the Judicial Conference for the September 13, 2011 meeting.[78]

On **September 29, 2011**, members of the House of Representatives sent Mr. Duff a letter regarding Justice Thomas' failure to disclose his wife's employment with the Heritage Foundation and the allegations in the June 18, 2011 New York Times article.[79] The letter urged the Judicial Conference to "refer the matter . . . to the Department of Justice."[80]

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[76] See JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Sept. 13, 2011), https://www.uscourts.gov/sites/default/files/2011-09.pdf.

[77] See id.

[78] See COMM. ON FIN. DISCLOSURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON FINANCIAL DISCLOSURE (Sept. 2011).

[79] Letter from Rep. Louise M. Slaughter et al. to James C. Duff, Sec'y to the Jud. Conf. of the U.S. (Sept. 29, 2011), https://justfacts.votesmart.org/public-statement/643438/letter-to-james-c-duff-secretary-to-the-judicial-conference-of-the-united-states, included in Exhibit 3.

[80] Id.

On **October 5, 2011**, Common Cause and Alliance for Justice sent another letter to Mr. Duff and George Reynolds, counsel for the Committee.[81] They stated that after sending their September 13, 2011 letter they had learned two new facts.[82] First, "Justice Thomas correctly disclosed his wife's income for as many as ten years before he began to file inaccurate disclosure forms."[83] They expressed their view that this information "call[ed] into question Justice Thomas' explanation that his omissions were due to a misunderstanding of the filing instructions."[84] Second, they had discovered that Mrs. Thomas' income for the years that Justice Thomas failed to report her employment exceed $1.6 million.[85] Once again, they asked that the Judicial Conference make a public determination of whether there was reasonable cause to "refer the matter to the Department of Justice."[86]

On **October 14, 2011**, Jill Sayenga, Acting Director of the Administrative Office of the United States Courts, responded to

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81 Letter from Nan Aron, President of All. for Just., and Bob Edgar, President & CEO of Common Cause, to James Duff, Dir. of Admin. Off. of the U.S. Cts., and George Reynolds, Counsel for Comm. on Fin. Disclosure (Oct. 5, 2011), https://www.commoncause.org/wp-content/uploads/2018/03/thomas-non-disclosure.pdf, included in Exhibit 3.

82 Id.

83 Id.

84 Id.

85 Id.

86 Id.

the September 29, 2011 letter from the members of Congress, stating that she had "forwarded [their] letter to the [Committee]."[87] On October 14, 2011, Ms. Sayenga also responded to Common Cause and Alliance for Justice's October 5, 2011 letter, writing that she had "forwarded [their] letter to the [Committee]."[88]

On **November 18, 2011,** 52 Members of the House of Representatives wrote to Chief Justice Roberts, as Presiding Officer of the Judicial Conference.[89] They advised him that since sending their September 29, 2011 letter they had learned from Common Cause and Alliance for Justice that Justice Thomas accurately included his wife's income on his Financial Disclosure Reports "for as many as 10 years" before he stopped reporting it.[90] This, they asserted, made it "very difficult for Justice Thomas to make a credible argument that he understood the filing instructions for ten years but then misunderstood them for the next thirteen years."[91] The members of Congress reiterated their

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87 Letter from Jill C. Sayenga, Acting Dir. of Admin. Off. of the U.S. Cts., to Rep. Louise M. Slaughter et al. (Oct. 14, 2011), included in Exhibit 3.

88 Exhibit 2.D, Letter from Jill C. Sayenga, Acting Dir. of Admin. Off. of the U.S. Cts., to Bob Edgar, President & CEO of Common Cause, and Nan Aron, President of All. for Just. (Oct. 14, 2011).

89 Letter from Rep. Louise M. Slaughter et al. to Chief Just. John Roberts, Presiding Officer of the Jud. Conf. of the U.S. (Nov. 18, 2011), included in Exhibit 3.

90 Id.

91 Id.

request that the Conference review the facts and refer Justice Thomas to the Attorney General.[92]

On **December 22, 2011**, Judge Thomas Hogan, who had recently become the Acting Director of the Administrative Office and Secretary of the Judicial Conference, responded to the members of Congress' November 18, 2011 letter, advising that their letter had been "referred" to him.[93] Judge Hogan stated that he had "forwarded [their] letter to the [Committee]."[94]

In the Fall of 2011, I saw an article in the media reporting that a letter had recently been sent to the Judicial Conference alleging that Justice Thomas had failed to include for several years in his Financial Disclosure Reports the required information that his wife had been employed by the Heritage Foundation. Not then knowing of the Judicial Conference's statutory duty to refer matters to the Attorney General in certain circumstances, I wondered why the letter was sent to the Conference.

On about January 1, 2012, I read an article about Chief Justice Roberts' 2011 Year-End Report on the Federal Judiciary.[95]

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92 Id.

93 Exhibit 2.E, Letter from Hon. Thomas F. Hogan, Sec'y of the Jud. Conf. of the U.S., to Rep. Louise M. Slaughter et al. (Dec. 22, 2011).

94 Id.

95 See generally CHIEF JUST. JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2011) https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

In that Report, the Chief Justice explained his view that a Code of Conduct for Supreme Court Justices was not necessary or appropriate in part because the Justices, as well as other federal judges, file a statutorily required Financial Disclosure Report annually.[96] He also noted that Justices are subject to 28 U.S.C. § 455, the statute requiring a Justice or Judge's recusal in certain circumstances, but asserted that the principles of recusal "can differ due to the unique circumstances of the Supreme Court."[97] The Chief Justice concluded that his colleagues were "jurists of exceptional integrity and experience" and, therefore, a Code of Conduct applicable to them was not needed.[98]

In February 2012, I found on the internet some, but not all, of the series of letters, beginning in January 2011, to the Judicial Conference from members of Congress, Common Cause, and Alliance for Justice that raised questions concerning whether Justice Thomas had repeatedly, knowingly, and willfully failed to disclose, or misrepresented information required to be included in, his Financial Disclosure Reports. As indicated earlier, some of the letters urged the Conference to refer the matter to the Attorney General pursuant to 5 U.S.C. § 13106. I then realized that I had not received the letters, or seen any reference to them

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96 Id. at 5-7.

97 Id. at 7.

98 Id. at 10.

or the issues that they raised, in the materials for the March 13, 2012 meeting of the Judicial Conference.

This concerned me because the issues raised by the letters were serious. Pursuant to established Conference policies and procedures, if the Committee had considered the letters, my colleagues on the Judicial Conference and I should have been informed of them in its Reports to the Conference, even if the Committee was not recommending any action by the Conference. Such information would have afforded me and the other members of the Conference the opportunity to discuss and decide whether there was reasonable cause to believe Justice Thomas had willfully violated the Act and, if so, to make the required referral to the Attorney General.

Therefore, on February 15, 2012, I spoke to Judge Hogan, the Acting Director of the Administrative Office of United States Courts and as such Secretary to the Judicial Conference.[99] I inquired about the status of the letters. I also expressed concern that the members of the Conference had not been given notice of the letters and the opportunity to have the issues they raised put on the agenda for discussion and decision. I indicated that I might ask that the matter be discussed at the Conference's March 13,

[99] The date of this discussion and many of the following facts are included in August 29, 2012 letters I sent to Judge Hogan and Judge David Sentelle, the Chair of the Executive Committee of the Judicial Conference, included in Exhibit 3.

2012 meeting. Judge Hogan thanked me for reminding him of this issue, told me that the matter was not ripe for possible discussion at the March 13, 2012 meeting of the Conference because he had not received a response to the reference of the September 29, 2011 letter from members of Congress to the Committee. He said he would speak to the new Chair of the Committee, Judge Joseph McKinley,[100] and then to me again.

Judge Hogan subsequently told me that the Committee had decided that referring Justice Thomas to the Attorney General was not justified. He said that he had received a February 23, 2012 letter from Judge McKinley explaining the Committee's process and reasoning, which he would send me. He encouraged me to consider the letter and to speak to Judge McKinley as well.

I read the letter and spoke to Judge McKinley. I expressed to him my concern that the members of the Conference had not been informed of the issues concerning Justice Thomas and provided an opportunity to discuss the matter. I thought an opportunity was warranted because these issues were serious and important. Judge McKinley told me that the Committee's staff had not included the matters in the March 2011, September 2011, or March 2012 Committee reports to the Conference because the staff felt they were "routine." He also informed me, however, that issues of whether

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[100] In 2012, Judge McKinley succeeded Judge Bobby Baldock as the Chair of the Financial Disclosure Committee.

there had been a willful failure to include required information in a Financial Disclosure Report were very rare, and the matter involving Justice Thomas was evidently the first and only time that members of Congress or anyone else had requested that the Conference refer a matter to the Attorney General pursuant to the statute.

I subsequently told Judge Hogan that while I appreciated the opportunity to speak to with Judge McKinley, our talk had not eliminated my concerns and that I might ask that the matter be placed on the Discussion Calendar for the September 2012 meeting of the Conference. Judge Hogan told me that he would be requesting a revised letter from the Committee.

In reviewing the materials for the September 11, 2012 meeting of the Conference, I saw that again no reference was made to issues concerning Justice Thomas in the Committee's report or elsewhere. I spoke again to Judge Hogan, who informed me that he had received an April 17, 2012 letter from Judge McKinley and, on April 30, 2012,[101] written to members of Congress that the Committee had determined that a reference to the Attorney General was not justified. Judge Hogan also told me that he had received no response to his letter to Congress.

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[101] Letter from Hon. Thomas F. Hogan, Sec'y of the Jud. Conf. of the U.S., to Rep. Louise M. Slaughter et al. (Apr. 30, 2012), included in Exhibit 3.

Nevertheless, I believed that the Conference should discuss at its September 12, 2012 meeting whether there was reasonable cause to refer Justice Thomas to the Attorney General. I communicated this to Judge Hogan.

The proposed agenda for Conference meetings was developed by the Conference Executive Committee. Chief Justice Roberts had appointed as Chair of the Executive Committee David Sentelle, the Chief Judge of the District of Columbia Circuit. The Executive Committee developed and distributed proposed Consent and Discussion Calendars concerning committee reports. Reports on the Consent Calendar could and would not be discussed by the Conference. Committee reports were almost always on the proposed Consent Calendar. The Committee Report for the September 2012 meeting was placed on the Consent Calendar on the Executive Committee's proposed agenda for the September 11, 2012 meeting of the Conference.

I still wanted the Conference to discuss the range of issues raised by the letters sent to it concerning Justice Thomas, including the fact that, contrary to Conference requirements, members were not informed of those letters in the Reports of the Committee. I also hoped for an opportunity to discuss with my colleagues the merits of whether there was reasonable cause to believe Justice Thomas had repeatedly willfully failed to disclose

that his wife was employed by the Heritage Foundation, and falsified or omitted other information required to be disclosed.

I spoke to Judge Sentelle about this and, on August 8, 2012, sent him a letter stating:

> As we discussed, I am writing to request that the Executive Committee put on the Discussion Calendar for the September 11, 2012 meeting of the Judicial Conference of the United States the process by which the Conference should discharge its duty, under 5 U.S.C. [§ 13106(b)], to determine whether there is reasonable cause to believe that a judge or justice has willfully failed to disclose, or willfully misrepresented, information required to be included in an Annual Financial Disclosure Report and, therefore, whether to refer the matter to the Attorney General. My concerns about the present process for discharging the Conference's statutory duties are prompted by the manner in which issues have been addressed on behalf of the Conference in response to a series of letters, beginning in January, 2011, from more than 50 members of Congress and several organizations, regarding Financial Disclosure Reports filed by Justice Clarence Thomas.
>
> The letters allege primarily that the Justice willfully omitted certain information from his Financial Disclosure Reports for many years and request that the Conference refer the matter to the Attorney General pursuant to [§ 13106(b)]. The letters were referred to the Committee on Financial Disclosure. The members of the Conference, however, have not been informed of the letters or of the issues that they raise which require resolution under the statute. Nor have any of the four reports to the Conference of the Committee on Financial Disclosure since January, 2011 mentioned the letters, the issues they raise, or the Committee's position on whether a reference to the Attorney General is required under the statute.
>
> I understand that the Conference often acts through its Committees. However, their reports are regularly relied upon to inform members of the Conference of the

> material activities of a Committee in order to provide an opportunity for members of the Conference to put a matter on the Discussion Calendar and to request a decision concerning it by the full Conference. It is particularly important that this practice be followed where the matter at issue involves a statutory duty of the Conference.
>
> I believe that the matter involving Justice Thomas raises issues that the Judicial Conference should discuss promptly. These issues include, but may not be limited to, whether the rare questions that arise under [§ 13106(b)] should continue to be delegated to the Committee on Financial Disclosure and, if so, whether that Committee should be required to report the existence of the issue and the proposed resolution of it to the full Conference so there can be an opportunity for discussion and possibly decision by the full Conference before the duty imposed by [§ 13106(b)] is considered discharged. I, therefore, request that this matter be put on the Discussion Calendar for the September 11, 2012 meeting.
>
> I will, of course, be pleased to speak to your colleagues on the Executive Committee and you about this request.[102]

Judge Sentelle subsequently told me that the Executive Committee had decided to deny my request to add the matters concerning Justice Thomas to the agenda for the September 2012 Conference meeting. He also sent me a copy of an August 21, 2012 letter he had sent to Judge McKinley requesting the views of the Committee on the issues raised in my August 8, 2012 letter.[103] I

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[102] Letter from Hon. Mark L. Wolf to Hon. David Bryan Sentelle, Chair of the Exec. Comm. of the Jud. Conf. of the U.S. (Aug. 8, 2012), included in Exhibit 3.

[103] Letter from Hon. David Bryan Sentelle, Chair of the Exec. Comm. of the Jud. Conf. of the U.S., to Hon. Joseph H. McKinley, Chair of the Comm. on Fin. Disclosure (Aug. 21, 2012), included in Exhibit 3.

had discussed those issues with Judge McKinley in February 2012, knew he had discussed them with Judge Hogan, and assumed he had discussed them with his colleagues on the Committee. Therefore, I assumed he would be prepared to discuss the issues fully at the September 11, 2012 Conference meeting.

As the Executive Committee did not grant my request to place matters relating to Justice Thomas on the agenda for that meeting, I exercised my right to move the Committee Report from the Consent Calendar to the Discussion Calendar in an August 29, 2012 letter to Judge Hogan.[104] In addition, I reiterated and amplified the concerns I expressed in my August 8, 2012 letter to Judge Sentelle in an August 29, 2012 letter to Judge Sentelle.[105]

On September 8, 2012, I sent a memorandum to the members of the Judicial Conference.[106] Attached to this memorandum, among other things, were my August 8, 2012 letter to Judge Sentelle, my

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[104] Letter from Hon. Mark L. Wolf to Hon. Thomas F. Hogan, Sec'y of the Jud. Conf. of the U.S. (Aug. 29, 2012), included in Exhibit 3.

[105] Letter from Hon. Mark L. Wolf to Hon. David Bryan Sentelle, Chair of the Exec. Comm. of the Jud. Conf. of the U.S. (Aug. 29, 2012), included in Exhibit 3.

[106] Exhibit 3, Memorandum of Hon. Mark L. Wolf to Members of the Jud. Conf. of the U.S. (Sept. 8, 2012) (all attachments are public documents or written by me, and the non-public Judicial Conference documents attached to the original are omitted).

August 29, 2012 letters to Judge Sentelle and Judge Hogan,[107] and the November 18, 2011 letter to Chief Justice Roberts as Chair of the Judicial Conference, from 52 members of Congress. As described earlier, the November 18, 2011 letter referenced prior letters recounting Justice Thomas' failure to disclose his wife's employment for many years, including by the Heritage Foundation and Hillsdale College, after having disclosed her employment in prior reports.[108] As also explained earlier, in that letter, the members of Congress asserted that the Judicial Conference was required to refer the matter to the Attorney General.[109]

I wrote in my memorandum that my concerns arose out of the manner in which the series of letters from many members of Congress and others concerning Justice Thomas, involving a statutory duty to refer a Justice or judge to the Attorney General if there was reasonable cause to believe that he or she had willfully falsified or failed to report information required to be included in his Financial Disclosure Reports, had evidently been decided by the Committee without any notice of the issues to members of the Conference. I noted that members of the Conference might not know,

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[107] Letter from Hon. Mark L. Wolf to Hon. David Bryan Sentelle, supra n. 102, included in Exhibit 3; Letter from Hon. Mark L. Wolf to Hon. David Bryan Sentelle, supra n. 105, included in Exhibit 3.

[108] Letter from Rep. Louise M. Slaughter et al. to Chief Justice John Roberts, supra n. 89, included in Exhibit 3.

[109] Id.

as I did not know until I became involved in this matter, of that duty. I expressed my view that "[b]ecause of the series of material omissions [in the Committee Reports], members of the Conference have been deprived of the opportunity to decide whether to exercise their right to have the matter [of whether a referral to the Attorney General was required] placed on the Conference agenda for discussion and possible decision by the full Conference."[110]

I acknowledged that the Executive Committee had solicited the views of the Committee on the issues raised in my August 8, 2012 letter to Judge Sentelle.[111] As indicated earlier, I expected the Committee's views would be explained and discussed at the September 11, 2012 Conference meeting. I concluded my memorandum by saying that "I appreciate your consideration of this matter and will look forward to discussing it with you."[112]

The September 11, 2012 meeting of the Judicial Conference was not open to the public. Judge McKinley presented the Committee Report, which like the other three since the January 2011 letter from Common Cause made no reference to the information the Judicial Conference had been provided concerning Justice Thomas or the multiple requests that the Judicial Conference refer him to the

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[110] Exhibit 3, Memorandum of Hon. Mark L. Wolf to Members of the Jud. Conf. of the U.S., supra n. 106.

[111] Id.

[112] Id.

Attorney General. I do not recall Judge McKinley mentioning matters concerning Justice Thomas in his oral remarks concerning the Report.

I then moved to disapprove the Committee Report and the motion was seconded. After I had spoken for a few minutes to explain my concerns in the hope of generating a discussion of what I believed - and still believe - were serious issues, the Chief Justice asked if I was finished. I said I was not, but would be soon. I concluded a few minutes later. The Chief Justice immediately called on Judge Sentelle, who moved to postpone consideration of my motion until the Committee reported back to the Conference on the issues I raised. Judge Sentelle's motion was seconded, promptly voted upon, and passed. That ended the opportunity to have any discussion of the issues I had raised at the September 2012 meeting, which, as at least Judge Sentelle and Judge Hogan knew, would be my last because my three-year term as a member of the Conference was ending.

The public Report of the Proceedings of the September 11, 2012 Judicial Conference meeting concerning the Committee states in pertinent part:

> **DISCHARGE OF STATUTORY DUTY UNDER 5 U.S.C. [§ 13106(b)]**
>
> A Judicial Conference member sought to have the Conference discuss the issue of how the Conference discharges its statutory duty, under 5 U.S.C. [§ 13106(b)], to determine whether an individual has willfully failed to file a financial disclosure report

> or has willfully falsified or failed to include required information in such a report. On the Conference floor, the member moved to disapprove the most recent report of the Committee on Financial Disclosure and require the Committee to file amended reports that provide information about Committee actions taken pursuant to the authority delegated to it by the Conference to carry out duties under 5 U.S.C. [§ 13106(b)]. The Judicial Conference decided to postpone consideration of the motion so that the Committee may first consider the matter and report back to the Conference.[113]

This Report made no reference to Justice Thomas or the issues I had raised concerning whether the Judicial Conference was required to refer him to the Attorney General. Significantly, it misstated the question the Judicial Conference was, by statute, empowered and obligated to decide. It stated that its statutory duty under § 13106(b) is "to determine whether an individual has willfully falsified or failed to include required information in [his or her] report." As explained earlier, the statute, for good reasons, does not make judges the ultimate arbiters of whether a fellow Justice or judge should be prosecuted or sued for violating the law. Rather, the role of the Judicial Conference is limited to determining whether there is "reasonable cause" to believe a violation has occurred. If so, the Judicial Conference must refer the matter to the Attorney General.

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[113] JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Sept. 11, 2012) (emphasis added), https://www.uscourts.gov/sites/default/files/2012-09.pdf.

My term as a member of the Judicial Conference did end on December 31, 2012. I was subsequently invited to explain my concerns to the Committee and did so in a teleconference on, I believe, January 8 or 9, 2013.

On January 29, 2013, I was copied on an email to the members of the Judicial Conference transmitting a January 28, 2013 letter from Judge McKinley to Judge Sentelle, with attachments, marked "CONFIDENTIAL." The letter and attachments related to the issues I raised.

The Committee submitted a Report for the March 2013 Judicial Conference meeting. It states that I "sought to have the Conference discuss how it discharges its statutory duty under 5 U.S.C. [§ 13106(b)] to determine whether an individual has willfully failed to file a financial disclosure report, or has willfully falsified or failed to include required information in a report."[114] As explained earlier, determining whether a willful violation has occurred is not the question the statute authorizes the Judicial Conference to decide. Rather, it is the Conference's duty to decide if there is reasonable cause to believe a willful violation occurred and, if so, to refer the Justice or judge to the Attorney General.

The Committee Report for the March 2013 Conference meeting

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[114] COMM. ON FIN. DISCLOSURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON FINANCIAL DISCLOSURE 4 (Mar. 2013) (emphasis added).

also stated that in the future the Committee "will report to the Conference the number and nature of any written public allegations of willful misconduct received and the action taken with respect to such allegations."[115]

The Report of the Proceedings of the Judicial Conference on March 12, 2013, mentions no discussion of matters relating to Justice Thomas or the issues concerning how questions regarding possible referrals to the Attorney General had been or would be addressed.[116]

VI. CONCLUSION

In 1861, Lord Acton less famously wrote, "[e]very thing secret degenerates, even the administration of justice . . . ."[117] I have explained my view that the Financial Disclosure statutes enacted by Congress and the President, as applied to Justices and judges, serve a vital public purpose. They require transparency concerning the financial affairs of Justices and Judges in part to deter them from accepting payments and other valuable benefits that have the purpose or effect of compromising their impartiality in deciding

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[115] Id. at 7.

[116] See JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Mar. 12, 2013), https://www.uscourts.gov/sites/default/files/2013-03.pdf.

[117] JOHN EMERICH EDWARD DALBERG-ACTON, LORD ACTON AND HIS CIRCLE 166 (Abbot Gasquet ed., 1st ed., 1906); United States v. Salemme, 91 F. Supp. 2d 141, 148 (D. Mass. 1999).

cases, and to help assure that they administer justice equally to the poor and to the rich.

When properly implemented and enforced, those statutes should also provide litigants and the public with some of the information necessary to develop informed views concerning whether a Justice or judge has a statutory duty not to participate in a particular case because he or she is actually biased, prejudiced, or personally interested in a case, or because a reasonable person could question his or her impartiality.[118]

Public confidence in the integrity of Justices and judges is crucial in our democracy. Judges do not have armies to enforce our orders.[119] Rather, we rely on the willingness of the American people to accept peacefully even deeply disappointing decisions that affect their fates and fortunes. They will do that only if they have the faith that they are principled decisions, rendered by impartial judges who have not been improperly influenced financially or in any other way.

If properly implemented and enforced the current laws should encourage and sustain public confidence in the integrity of the judiciary. They provide a role for the Judicial Conference by

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[118] 28 U.S.C. § 455 (a), (b).

[119] THE FEDERALIST No. 78 (Alexander Hamilton) ("The judiciary . . . has no influence over either the sword or the purse . . . and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

giving it the opportunity to decide whether there is reasonable cause to believe a Justice or judge has willfully failed to accurately and completely disclose certain relevant information. However, it is challenging for judges – like other human beings – to evaluate impartially the truthfulness of colleagues, who may at times be friends, and understandably difficult for reasonable members of the public to believe they are doing so. Therefore, in enacting the Financial Disclosure statutes, Congress and the President only empowered the Judicial Conference to decide whether there is reasonable cause to believe a willful violation has occurred. If so, the Conference must refer the Justice or judge to the Attorney General to decide whether investigation and prosecution or a civil suit is justified.

The manner in which the Judicial Conference has interpreted and implemented the Financial Disclosure statutes has been shrouded in secrecy. The concerns I expressed about the way in which the Judicial Conference was discharging its duty to decide if a referral to the Attorney General was required were stated on the assumption that the Committee was improperly keeping important information from the members of the Conference and thus depriving them of the opportunity to make the reasonable cause determination themselves.

In preparing this testimony, I reviewed more 2011 letters to the Conference and the Supreme Court concerning Justice Thomas

than I had found in 2012. I have also read materials available to me as a judge but not to the public. I now wonder if any of the letters sent to the Conference were discussed in 2011 by the members of the Committee to which they were referred.

Additional issues have now arisen concerning whether Justice Thomas has since 2012 willfully failed to make required disclosures.[120] The Judicial Conference is again called upon to decide if there is reasonable cause to believe that occurred and, if there is, to refer Justice Thomas to the Attorney General.

You, as members of the Senate, have a legitimate interest in examining how the Judicial Conference in 2012 interpreted and discharged its duties as you consider whether existing legislation concerning financial disclosures should be strengthened and supplemented, and whether the recusal statute that applies to Justices, 18 U.S.C. § 455, is adequate and being properly implemented as well. These important issues deserve thoughtful attention by Congress and by the Judicial Conference. They involve

[120] Joshua Kaplan et al., Clarence Thomas and the Billionaire, PROPUBLICA (Apr. 6, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow; Justin Elliott et al., Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice Didn't Disclose the Deal., PROPUBLICA (Apr. 13, 2:20 PM), https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus; Joshua Kaplan et al., Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition., PROPUBLICA (May 4, 2023, 6:00 AM), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus.

considerations of comity among the two branches of government. They require weighing legitimate interests served by transparency against legitimate interests served by confidentiality.[121] They demand respect for the American people whose confidence in the integrity of the judiciary is necessary to sustain our democracy.

I hope that this hearing and my testimony will prove to be part of a constructive colloquy between two branches of government that share responsibility for assuring the integrity of the judiciary and the public confidence in it.[122]

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[121] See generally Edward H. Levi, Government Confidentiality and Individual Privacy, in RESTORING JUSTICE: THE SPEECHES OF ATTORNEY GENERAL EDWARD H. LEVI 125-39 (Jack Fuller ed., 2013).

[122] At times, the Congressional oversight and the potential for legislation impacting the judiciary has contributed to the Judicial Conference taking action that may diminish the need for statutory reform. For example, the Judicial Conference has recently clarified its view on the distinction between "personal hospitality," which the Act does not require to be reported, and a "gift" which must be disclosed. Letter from Hon. Roslynn R. Mauskopf, Dir. Admin. Off. of the U.S. Cts., to Sen. Sheldon Whitehouse (Mar. 23, 2023), https://www.whitehouse.senate.gov/imo/media/doc/Response%20to%20Senator%20Whitehouse's%20Letter%20of%202-21-2023%20(Final).pdf; see also COMM. ON FIN. DISCLOSURE & ADMIN. OFF. OF THE U.S. CTS., FILING INSTRUCTIONS FOR JUDICIAL OFFICERS AND EMPLOYEES (AO-10) 25 (Mar. 2023), https://www.uscourts.gov/sites/default/files/financial_disclosure_filing_instructions.pdf.

Exhibit 1

Judge Mark L. Wolf

Mark L. Wolf was appointed to the United States District Court for the District of Massachusetts in 1985, served as its Chief Judge from 2006 through 2012, and is now a Senior Judge. He has previously served as a member of the Judicial Conference of the United States and Chair of the Committee of District Judges on the Judicial Conference, and on the Judicial Conference Committees on Criminal Law, the Federal Rules of Criminal Procedure, and Codes of Conduct.

Judge Wolf also previously served in the Department of Justice as a Special Assistant to the Deputy Attorney General of the United States (1974) and the Attorney General of the United States (1975-1977), and as Deputy United States Attorney for the District of Massachusetts and Chief of the Public Corruption unit in that office (1981-1985). He was also in private practice in Washington, D.C. (1971-1974) and in Boston (1977-1981).

Judge Wolf is the Chair of Integrity Initiatives International, an international NGO whose mission is to strengthen the enforcement of criminal laws to punish and deter leaders who are corrupt and regularly violate human rights. He is also the Chair Emeritus of the John William Ward Public Service Fellowship, the Chairman Emeritus of the Albert Schweitzer Fellowship, and the past Chair of the Judge David S. Nelson Fellowship.

Among other honors, Judge Wolf received a Certificate of Appreciation from President Gerald Ford for his work in the resettlement of Indochinese refugees (1976), the Attorney General's Distinguished Service Award (1984), an honorary degree from Boston Latin School (1990), the Boston Bar Association's Citation for Judicial Excellence (2002 and 2007); similar citations from the Boston Chapter of the Federal Bar Association (2009) and the Massachusetts Bar Association (2012); and the International Conference of Chief Justices of the World Mother Teresa Award (2021).

A graduate of Yale College and the Harvard Law School, Judge Wolf has taught courses on the role of the judge in American democracy at the Harvard, Boston College, New England and University of California - Irvine Law Schools. He is or has recently been: an Adjunct Lecturer in Public Policy at the Harvard Kennedy School, where he has taught a seminar on Combatting Corruption Internationally; a Senior Fellow of the Harvard Carr Center for Human Rights; a member of the Council on Foreign Relations; and a Distinguished Non-Resident Fellow of the Woodrow Wilson International Center for Scholars. He has spoken on the role of the judge in a democracy, human rights issues, and combatting corruption in many countries, including Russia, China, Ukraine, Turkey, the Czech Republic, Slovakia, Slovenia, Romania, Hungary, Egypt, Cyprus, Panama, Colombia, Mexico, Norway, the United Kingdom, the Netherlands, Belgium and at the Vatican.

May 2023

Exhibit 2

Exhibit 2.A

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

January 24, 2011

Mr. Bob Edgar
President and CEO
Arn H. Pearson, Esq.
Vice President for Programs
Common Cause
1133 19th Street, N.W., 9th Floor
Washington, D.C. 20036

Dear Messrs. Edgar and Pearson:

Thank you for your letter of January 21, 2011, which I received late Friday afternoon by email concerning Justice Clarence Thomas' Financial Disclosure Reports. We brought the matter to Justice Thomas' attention and he immediately amended his reports. I have forwarded your letter to the appropriate Judicial Conference committee.

Sincerely,

James C. Duff
Director

Exhibit 2.B

January 21, 2011

Committee on Financial Disclosure
One Columbus Circle, NE, Suite 2-301
Washington, DC 20544

SELF INITIATED AMENDMENT

Re: Calendar Year 2009 Financial Disclosure Report

To Whom it May Concern:

It has come to my attention that information regarding my spouse's employment required in Part III B. of my financial disclosure report was inadvertently omitted due to a misunderstanding of the filing instructions. Please amend my report to add "2009 – Hillsdale College" in Part III B.

Sincerely,

Clarence Thomas

RECEIVED
2011 JAN 22 P 12:22
FINANCIAL DISCLOSURE

January 21, 2011

SELF INITIATED AMENDMENT

Committee on Financial Disclosure
One Columbus Circle, NE, Suite 2-301
Washington, DC 20544

Re: Calendar Year 2008 Financial Disclosure Report

To Whom it May Concern:

It has come to my attention that information regarding my spouse's employment required in Part III B. of my financial disclosure report was inadvertently omitted due to a misunderstanding of the filing instructions. Please amend my report to add "January-October, 2008 – The Heritage Foundation," and "October-December, 2008 – Hillsdale College" in Part III B.

Sincerely,

Clarence Thomas

RECEIVED
2011 JAN 22 P 12: 22
FINANCIAL DISCLOSURE

January 21, 2011

SELF INITIATED AMENDMENT

Committee on Financial Disclosure
One Columbus Circle, NE, Suite 2-301
Washington, DC 20544

Re: Calendar Year 2007 Financial Disclosure Report

To Whom it May Concern:

It has come to my attention that information regarding my spouse's employment required in Part III B. of my financial disclosure report was inadvertently omitted due to a misunderstanding of the filing instructions. Please amend my report to add "2007 – The Heritage Foundation" in Part III B.

Sincerely,

Clarence Thomas

RECEIVED
2011 JAN 22 P 12:22
FINANCIAL DISCLOSURE

January 21, 2011

SELF INITIATED AMENDMENT

Committee on Financial Disclosure
One Columbus Circle, NE, Suite 2-301
Washington, DC 20544

Re: Calendar Year 2006 Financial Disclosure Report

To Whom it May Concern:

It has come to my attention that information regarding my spouse's employment required in Part III B. of my financial disclosure report was inadvertently omitted due to a misunderstanding of the filing instructions. Please amend my report to add "2006 – The Heritage Foundation" in Part III B.

Sincerely,

Clarence Thomas

RECEIVED
2011 JAN 22 P 12:22
FINANCIAL DISCLOSURE

January 21, 2011

SELF INITIATED AMENDMENT

Committee on Financial Disclosure
One Columbus Circle, NE, Suite 2-301
Washington, DC 20544

Re: Calendar Year 2005 Financial Disclosure Report

To Whom it May Concern:

It has come to my attention that information regarding my spouse's employment required in Part III B. of my financial disclosure report was inadvertently omitted due to a misunderstanding of the filing instructions. Please amend my report to add "2005 – The Heritage Foundation" in Part III B.

Sincerely,

Clarence Thomas

RECEIVED
2011 JAN 22 P 12:22
FINANCIAL DISCLOSURE

January 21, 2011

SELF INITIATED AMENDMENT

Committee on Financial Disclosure
One Columbus Circle, NE, Suite 2-301
Washington, DC 20544

Re: Calendar Year 2004 Financial Disclosure Report

To Whom it May Concern:

It has come to my attention that information regarding my spouse's employment required in Part III B. of my financial disclosure report was inadvertently omitted due to a misunderstanding of the filing instructions. Please amend my report to add "2004 – The Heritage Foundation" in Part III B.

Sincerely,

Clarence Thomas

RECEIVED
2011 JAN 22 P 12:22
FINANCIAL DISCLOSURE OFFICE

January 21, 2011

SELF INITIATED AMENDMENT

Committee on Financial Disclosure
One Columbus Circle, NE, Suite 2-301
Washington, DC 20544

Re: Calendar Year 1990-2003 and Nomination Financial Disclosure Reports

To Whom it May Concern:

It has come to my attention that information regarding my spouse's employment required in Part III B. of my financial disclosure report was inadvertently omitted due to a misunderstanding of the filing instructions. Please amend my reports to reflect my spouse's employment as noted below:

cT January 1989 - January 1993 – U.S. Department of Labor

January 1993 - January 1995 – U.S. House of Representatives, House Republican Conference (Rep. Dick Armey)

January 1995 - December 1998 – U.S. House of Representatives, House Majority Leader (Rep. Dick Armey)

December 1998 - December 2003 – The Heritage Foundation.

Sincerely,

Clarence Thomas

RECEIVED
2011 JAN 22 P 12:22
FINANCIAL DISCLOSURE OFFICE

Exhibit 2.C

Common Cause

Letter to the Clerk of the Supreme Court

02.14.2011

William Suter

Clerk of the Supreme Court

Supreme Court of the United States

One First Street, NE

Washington, DC 20543

Dear Mr. Suter,

Common Cause submitted a letter to the Department of Justice on January 19th raising questions about whether Justices Thomas or Scalia had attended closed-door strategy and fundraising sessions sponsored by Koch Industries. According to the Los Angeles Times, the Court's response was as follows:

Supreme Court spokesperson Kathy Arberg said that Justices Thomas and Scalia had traveled to Indian Wells, California to address a Federalist Society dinner sponsored by Charles and Elizabeth Koch but did not actively participate in the separate Koch strategy and policy meetings. Justice Scalia spoke about international law at the January 2007 meeting of the quasi-academic Federalist Society and did not attend the separate political and strategy meeting hosted by the Kochs, she said. Justice Thomas spoke to the Federalists at the same location in January 2008 about his recently published book. Thomas then dropped by one of the separate Koch meeting sessions. "It was a brief drop by," Arberg said. "He was not a participant."

Unfortunately, the Court's response raises more questions than it answers.

On his financial disclosure forms for 2008, Justice Thomas reported reimbursement from the Federalist Society for "transportation/meals and accommodations" for four days in Palm

Springs, January 26-29, 2008.

This is problematic when matched against the Court's response. If Justice Thomas received a four-day all-expenses-paid trip to Palm Springs in January 2008 just to give a speech at a dinner, the bulk of his expenses should have been reported as a gift. Under the Ethics in Government Act, a "gift" covers any payment or any thing of value "unless consideration of equal or greater value is received by the donor." 5 U.S.C App. 109(5). Receiving three nights' accommodations plus meals in a popular resort area far exceeds the value of speaking at a dinner, and is inappropriate for a "reimbursement."

Furthermore, a review of the Federalist Society's extensive on-line archives produces no record of any Federalist Society event in Palm Springs on those dates. When Common Cause called the Federalist Society to inquire further, staff members could not recall any corresponding event.

With all due respect, if Justice Thomas's trip to Palm Springs on January 26-29, 2008 was not a gift from the Federalist Society, it is incumbent on the Court to provide the public with a full accounting of what events Justice Thomas was being reimbursed to attend and whether he stayed in the same resort where the Koch Industries conference was held.

Koch Industries has been holding its semi-annual strategy and fundraising sessions in Palm Springs for the past eight years, and Justice Thomas's trip to Palm Springs appears to precisely align with the profile set by this year's 4-day session on the last weekend of January.

Common Cause respectfully requests further clarification on this matter.

Sincerely,

Bob Edgar

President and CEO

Arn H. Pearson, Esq.

Vice President for Programs

cc: Kathleen Arberg

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Exhibit 2.D

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JILL C. SAYENGA
Acting Director

WASHINGTON, D.C. 20544

October 14, 2011

Ms. Nan Aron
President
Alliance for Justice
11 Dupont Circle, 2nd Floor
Washington, DC 20036

Mr. Bob Edgar
President and CEO
Common Cause
1133 19th Street, NW, 9th Floor
Washington, DC 20036

Dear Ms. Aron and Mr. Edgar:

Thank you for your letter of October 5, 2011, to former Administrative Office of the U.S. Courts Director James Duff providing additional information concerning Justice Clarence Thomas' financial disclosure reports. I have forwarded your letter to the Judicial Conference Committee on Financial Disclosure, which is responsible for implementing the disclosure provisions of the Ethics in Government Act and addressing allegations of errors or omissions in the filing of financial disclosure reports.

Sincerely,

Jill C. Sayenga
Acting Director

Exhibit 2.E

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

December 22, 2011

Honorable Louise M. Slaughter
United States House of Representatives
Washington, DC 20515

Dear Representative Slaughter:

I write in response to your letter of November 18, 2011, which has been referred to me in my capacity as Secretary of the Judicial Conference of the United States. I have forwarded your letter to the Judicial Conference Committee on Financial Disclosure, which is responsible for implementing the disclosure provisions of the Ethics in Government Act and addressing allegations of errors or omissions in the filing of financial disclosure reports.

If we may be of other assistance to you, please do not hesitate to contact our Office of Legislative Affairs at (202) 502-1700.

Sincerely,

Thomas F. Hogan
Secretary

Identical Letter Sent to: Honorable Earl Blumenauer

cc: Honorable Robert Andrews
Honorable Karen Bass
Honorable Bruce L. Braley
Honorable Kathy Castor
Honorable David N. Cicilline
Honorable Yvette D. Clarke
Honorable James E. Clyburn
Honorable Steve Cohen
Honorable Gerald E. Connolly
Honorable John Conyers Jr.
Honorable Peter A. DeFazio
Honorable Theodore E. Deutch
Honorable Lloyd Doggett
Honorable Donna F. Edwards
Honorable Keith Ellison
Honorable Anna G. Eshoo
Honorable Sam Farr
Honorable Bob Filner
Honorable Barney Frank
Honorable Gene Green
Honorable Raúl M. Grijalva
Honorable Alcee L. Hastings
Honorable Maurice D. Hinchey
Honorable Michael M. Honda
Honorable Jesse L. Jackson Jr.
Honorable Henry C. "Hank" Johnson Jr.
Honorable Barbara Lee
Honorable John Lewis
Honorable Ben Ray Luján
Honorable Carolyn B. Maloney
Honorable Jim McDermott
Honorable James P. McGovern
Honorable Brad Miller
Honorable Gwen Moore
Honorable James P. Moran
Honorable Christopher S. Murphy
Honorable Jerrold Nadler
Honorable John W. Olver
Honorable William L. Owens
Honorable Frank Pallone Jr.
Honorable Chellie Pingree
Honorable Jared Polis
Honorable Steven R. Rothman
Honorable Janice Schakowsky
Honorable Robert Scott
Honorable Jackie Speier
Honorable Fortney Pete Stark
Honorable Betty Sutton
Honorable Paul Tonko
Honorable Lynn C. Woolsey
Honorable John A. Yarmuth

Exhibit 3

From: Honorable Mark Wolf/MAD/01/USCOURTS

To: [redacted]

Cc: [redacted]

Date: 09/08/2012 03:48 PM

Subject: Judicial Conference Discussion Calendar Item Concerning the Committee on Financial Disclosure Report

TO: The Members of the Judicial Conference
of the United States

FROM: Chief Judge Mark L. Wolf

DATE: September 8, 2012

RE: Discussion Calendar Agenda Item E-10

I objected to the proposed approval of the Report of the Committee on Financial Disclosure (the "Report") by acclamation and asked that the Report be placed on the Discussion Calendar. At our meeting on September 11, 2012, I will ask that the Report not be approved in its present form and that the Judicial Conference direct that it be promptly amended to comply with the established requirements for reports to the Conference. The background concerning this matter is described in my August 8 and August 28, 2012 letters to David Sentelle, the Chair of the Executive Committee, and the related materials previously distributed to members of the Conference. In essence, my concerns arise out of the manner in which a series of letters from many members of Congress, and others, relating to a statutory duty of the Conference has been addressed without notice to members of the Conference. Since writing my letters I have reviewed the Conference's established standards and procedures, and considered their implications for the issues I have raised. As my views have evolved, and the time for discussion may be short, I am writing to update my letters.

As you know, every judge and justice is required to file annually a Financial Disclosure Report accurately and completely disclosing certain information. See 5 U.S.C. App. 4, §§101(f)(11), 102, 109 (10). You may not know, as I did not know, that 5 U.S.C. App.4 §104(b) provides that "the Judicial Conference . . . shall refer to the Attorney General the name of any individual which [it] has reasonable cause to believe has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported."

The practices and procedures of the Judicial Conference are described in "The Judicial Conference of the United States and Its Committees" (October 2011). They include the following. All matters to go before the Judicial Conference are ordinarily considered by a Committee. See §II.A. Such matters include statutory requirements concerning financial disclosure. Id. "Committee reports to the Judicial Conference should include discussion of all committee activities since the prior Conference session, whether or not the committee met during the time. This includes items for action by the Conference, as well as matters discussed by the committee on which no action is sought." Id., §II.C.4. "[A]ny Conference member may, by giving notice to the Conference Secretary, move an item from the consent to the discussion calendar. In addition, items presented in a committee report for information may be moved to the discussion calendar if a member believes that action and/or discussion by the Conference is appropriate." Id., §II.C.5.

Matters concerning the Judicial Conference's statutory duties with regard to Financial Disclosure Reports are within the jurisdiction of the Committee on Financial Disclosure. In February, 2012, I discovered that since January, 2011, the Conference has received a series of letters from more than 50 members of Congress and several organizations, concerning the accuracy and completeness of many annual Financial Disclosure Reports

filed by Justice Clarence Thomas. The Conference has been asked to find that there is reasonable cause to believe that the Justice willfully failed to disclose or misrepresented specified information and, therefore, to make the referral to the Attorney General required by §104(b). The letters were referred to the Committee on Financial Disclosure. The actions of the Committee are described in February 23, 2012 and April 17, 2012 letters from the Chair of the Committee, Judge Joseph McKinley, to Judge Thomas Hogan, Secretary of the Conference, which were written after I inquired about this matter and were given to me by Judge Hogan. Among other things, the letters state that the issue of a possible referral to the Attorney General was discussed by the full Committee in January, 2012; the Committee decided that such a referral was not justified; and in April, 2012 Judge Hogan so informed the members of Congress and others who had initiated the matter.

However, the Reports of the Committee on Financial Disclosure for the last four meetings of the Judicial Conference have not mentioned the letters or the issues that they raise. As a result, I doubt that many, if any, members of the Conference knew that the Conference has the statutory duty established by §104(b). I also doubt that many members of the Conference knew that members of Congress, and others, had raised an issue involving that duty concerning Justice Thomas. In my view, under the Conference's established practices and procedures this matter should have been disclosed and discussed in several of the Reports of the Committee on Financial Disclosure, including the Report for the September 11, 2012 meeting of the Conference. Because of the series of material omissions, members of the Conference have been deprived of the opportunity to decide whether to exercise their right to have the matter placed on the Discussion Calendar for discussion and possible action by the full Conference.

The failure of a committee to report required information to the Conference is to me particularly serious when, as here, the discharge of a statutory duty is involved. Therefore, I now intend to ask that the Conference require that the pending Report of the Committee on Financial Disclosure be amended promptly, rather than approved at the September 11, 2012 meeting.

On August 8, 2012, I wrote Judge Sentelle that:

> I believe that the matter involving Justice Thomas raises issues that the Judicial Conference should discuss promptly. These issues include, but may not be limited to, whether the rare questions that arise under §104(b) should continue to be delegated to the Committee on Financial Disclosure and, if so, whether that Committee should be required to report the existence of the issue and the proposed resolution of it to the full Conference so there can be an opportunity for discussion and possibly decision by the full Conference before the duty imposed by §104(b) is considered discharged.

The Executive Committee has referred these issues to the Committee on Financial Disclosure. It now appears to me, however, that it may be

sufficient for the Conference to simply require that the Committee on Financial Disclosure and its staff, which I understand drafts its reports, comply in the future with the already existing policy concerning what must be included in a committee report before any issue of a possible referral to the Attorney General is deemed decided.

Attached are the documents referenced in this memorandum, except for the letters from Judge McKinley to Judge Hogan, which Judge Hogan prefers I not distribute.

I appreciate your consideration of this matter and will look forward to discussing it with you.

(See attached file: Agenda E-10 materials previously distributed.pdf)
(See attached file: JCUS&Comm.pdf)(See attached file: Delegation of Authority.pdf)

(See attached file: Common Cause.pdf)(See attached file: Congress Letters.pdf)

Letter from Chief Judge David Bryan Sentelle to
Chief Judge Joseph H. McKinley, Jr.,
dated August 21, 2012

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

DAVID BRYAN SENTELLE
CHAIRMAN, EXECUTIVE COMMITTEE

(202) 216-7330
(202) 273-0174 FAX
david_sentelle@cadc.uscourts.gov

August 21, 2012

Honorable Joseph H. McKinley, Jr.
Chief Judge
United States District Court
Federal Building
423 Frederica Street, Room 423
Owensboro, KY 42301-3013

Dear Chief Judge McKinley:

As you know, a member of the Judicial Conference, Chief Judge Mark L. Wolf, recently wrote to me in my capacity as chair of the Conference's Executive Committee (see enclosure), concerning the procedures for discharging the Conference's responsibility, under 5 U.S.C. app. 4, § 104(b), to determine whether an individual has willfully failed to file a financial disclosure report, or has willfully falsified or failed to include required information in such a report. Judge Wolf has asked that the Conference consider whether authority should continue to be delegated to the Committee on Financial Disclosure to address issues that arise under § 104(b), and if so, whether that committee should be required to advise the Conference of any decisions it makes on such issues before the Conference's statutory responsibility is considered discharged.

Following a discussion at its August 2012 meeting, the Executive Committee decided to seek the views of the Financial Disclosure Committee on the issues raised in Judge Wolf's letter before they are considered by the Judicial Conference. Therefore, we are asking your committee to consider these issues and then report to the Conference on what action, if any, should be taken in response to Judge Wolf's inquiry. If you have any questions about this matter, please let me know.

Sincerely,

David B. Sentelle

Enclosure

cc: Members, Executive Committee
Honorable Mark L. Wolf

Letter from Chief Judge Mark L. Wolf to
Chief Judge David Bryan Sentelle, dated August 29, 2012,
with attachments

United States District Court

Boston, Massachusetts 02210

MARK L. WOLF
CHIEF JUDGE

August 29, 2012

Honorable David Bryan Sentelle, Chair
Executive Committee of the Judicial
Conference of the United States
One Columbus Circle, NE
Washington, D.C. 20544

Dear Chief Judge Sentelle:

Thank you for sending me a copy of your August 21, 2012 letter to Chief Judge Joseph McKinley, Jr., referring to the Committee on Financial Disclosure the issues raised in my attached August 8, 2012 letter to you requesting that the question of how the Judicial Conference discharges its statutory duty under 5 U.S.C. App. 4 §104(b) be put on the Discussion Calendar for the September 11, 2012 meeting of the Conference. However, as I said when you called, I continue to believe that the members of the Conference should be promptly informed of this matter and that it should be discussed at the September 11, 2012 meeting. Therefore, I have sent the attached August 29, 2012 letter to Judge Thomas Hogan, the Secretary of the Conference, asking that the Report of the Committee on Financial Disclosure be put on the Discussion Calendar for that meeting because I object to the approval of that Report by acclamation.

It may be helpful if I amplify the reasons for this request. As we discussed, I doubt that many, if any, members of the Conference know that the Conference has a statutory duty to make a reference to the Attorney General if there is reasonable cause to believe that a judge or justice has willfully failed to disclose, or misrepresented, information required to be included in an annual Financial Disclosure Report. I also doubt that many members of the conference know that since January, 2011 the Conference has been sent a series of letters from more than 50 members of Congress and two organizations, asking that it make such a referral concerning Justice Clarence Thomas.[1]

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[1] The attached November 18, 2011 letter from the members of Congress is representative and includes some of the alleged facts

In February, 2012, I found some of the letters on the internet and learned from them of the Conference's statutory duty. I then realized that I had not received the letters or seen any reference to them, or the issues that they raise, in the materials for the March 13, 2012 meeting of the Judicial Conference.

Therefore, I spoke to Judge Hogan about this matter on February 15, 2012. I inquired about the status of the matter, and expressed concern that the members of the Conference had not been given notice of it and the usual opportunity to have it put on the Discussion Calendar. I indicated that I might ask that the matter be discussed at the Conference's March, 2012 meeting. Judge Hogan thanked me for reminding him of this issue, told me that the matter was not ripe for possible discussion at the March 13, 2012 meeting of the Conference because he had not received a response to the reference of it to the Committee on Financial Disclosure, and said he would speak to the new Chair of the Committee, Judge Joseph McKinley, and then to me again.

Judge Hogan subsequently told me that the Committee on Financial Disclosure had decided that a reference to the Attorney General concerning Justice Thomas was not justified, and that he had received a February 23, 2012 letter from Judge McKinley explaining the Committee's process and reasoning, which he would send me. He encouraged me to consider the letter and to speak to Judge McKinley as well.

I did read the letter and speak to Judge McKinley. I expressed to him my concern that the members of the Conference had not been informed of the issue concerning Justice Thomas and provided an opportunity to have the matter put on the Discussion Calendar. Judge McKinley told me that the Committee's staff had not included the matter in the past three Committee reports to the Conference because the staff felt it was "routine." He also informed me, however, that issues of whether there has been a willful failure to include required information in a Financial Disclosure Report were very rare, and the matter involving Justice Thomas was evidently the first and only time that members of Congress or anyone else had requested that the Conference refer a matter to the Attorney General pursuant to the statute.

I subsequently told Judge Hogan that while I appreciated the opportunity to speak to Judge McKinley, our talk had not eliminated my concerns and that I might ask that the matter be placed on the Discussion Calendar for the September, 2012 meeting of the Conference. Judge Hogan told me that he would be requesting a revised letter from the Committee on Financial Disclosure.

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that the Conference has been asked to consider.

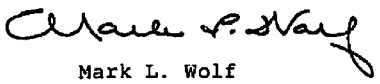
In reviewing the materials for the September 11, 2012 meeting of the Conference, I saw that again no reference was made to the issue concerning Justice Thomas in the Committee's report or elsewhere. I spoke to Judge Hogan, who informed me that he had received an April 17, 2012 letter from Judge McKinley and, on April 30, 2012, written to the members of Congress and others that the Committee on Financial Disclosure had determined that a reference to the Attorney General was not justified.[2] Judge Hogan also told me that he had received no response to his letters.

Nevertheless, I continue to be concerned about the process by which the issues presented to the Conference have been addressed on its behalf. Chief Judge McKinley's letters to Judge Hogan explain that process and provide a basis for the Conference to at least begin a discussion of the issues at our September 11, 2012 meeting. I believe that the response of the Committee on Financial Disclosure to the reference of my letter to it would be valuably informed by that discussion.

Therefore, I have sent the attached August 29, 2012 letter to Judge Hogan to request that the Report of the Committee on Financial Disclosure be placed on the Discussion Calendar for the September 11, 2012 meeting of the Conference. If necessary, I will appreciate the Executive Committee's further consideration of this request.

With best wishes,

Sincerely yours,



Mark L. Wolf

cc: Members, Executive Committee
Honorable Thomas F. Hogan
Honorable Joseph McKinley, Jr.

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[2] A representative April 30, 2012 letter to Honorable Louise M. Slaughter is attached.

United States District Court
Boston, Massachusetts 02210

MARK L. WOLF
CHIEF JUDGE

August 8, 2012

Honorable David Bryan Sentelle, Chair
Executive Committee of the Judicial
Conference of the United States
One Columbus Circle, NE
Washington, D.C. 20544

Re: Discussion Calendar for September 11, 2012
Meeting of the Judicial Conference

Dear Chief Judge Sentelle:

As we discussed, I am writing to request that the Executive Committee put on the Discussion Calendar for the September 11, 2012 meeting of the Judicial Conference of the United States the process by which the Conference should discharge its duty, under 5 U.S.C. App. 4 §104(b), to determine whether there is reasonable cause to believe that a judge or justice has willfully failed to disclose, or willfully misrepresented, information required to be included in an Annual Financial Disclosure Report and, therefore, whether to refer the matter to the Attorney General.[1] My concerns about the present process for discharging the Conference's statutory duties are prompted by the manner in which issues have been addressed on behalf of the Conference in response to a series of letters, beginning in January, 2011, from more than 50 members of Congress and several organizations, regarding Financial Disclosure Reports filed by Justice Clarence Thomas.

The letters allege primarily that the Justice willfully omitted certain information from his Financial Disclosure Reports for many years and request that the Conference refer the matter to

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[1]Every judge and justice is required to file annually a Financial Disclosure Report accurately and completely disclosing certain information. See 5 U.S.C. App. 4 §§101(f)(11), 102, 109(10). 5 U.S.C. App. 4 §104(b) provides that "the Judicial Conference . . . shall refer to the Attorney General the name of any individual which [it] has reasonable cause to believe has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported."

the Attorney General pursuant to §104(b). The letters were referred to the Committee on Financial Disclosure. The members of the Conference, however, have not been informed of the letters or of the issues that they raise which require resolution under the statute. Nor have any of the four reports to the Conference of the Committee on Financial Disclosure since January, 2011 mentioned the letters, the issues they raise, or the Committee's position on whether a reference to the Attorney General is required under the statute.

I understand that the Conference often acts through its Committees. However, their reports are regularly relied upon to inform members of the Conference of the material activities of a Committee in order to provide an opportunity for members of the Conference to put a matter on the Discussion Calendar and to request a decision concerning it by the full Conference. It is particularly important that this practice be followed where the matter at issue involves a statutory duty of the Conference.

I believe that the matter involving Justice Thomas raises issues that the Judicial Conference should discuss promptly. These issues include, but may not be limited to, whether the rare questions that arise under §104(b) should continue to be delegated to the Committee on Financial Disclosure and, if so, whether that Committee should be required to report the existence of the issue and the proposed resolution of it to the full Conference so there can be an opportunity for discussion and possibly decision by the full Conference before the duty imposed by §104(b) is considered discharged. I, therefore, request that this matter be put on the Discussion Calendar for the September 11, 2012 meeting.

I will, of course, be pleased to speak to your colleagues on the Executive Committee and you about this request.

With best wishes,

Sincerely yours,

Mark L. Wolf

cc: Honorable Thomas F. Hogan
Honorable Joseph H. McKinley, Jr.

Congress of the United States
Washington, DC 20515

November 18, 2011

Chief Justice John Roberts
Presiding Officer
Judicial Conference
One Columbus Circle, NE
Washington, D.C. 20036

Dear Mr. Chief Justice:

We write you today in your capacity as Presiding Officer of the Judicial Conference. We call your attention to the letter sent to the Conference by members of the House of Representatives on September 29, 2011, requesting an investigation of possible violations by Justice Clarence Thomas of the Ethics in Government Act of 1978.

Evidence that Justice Thomas failed for 13 years to accurately disclose his wife's employment has been submitted to the Conference and we believe the Conference is required by law to refer the matter to the Department of Justice for further investigation.

In January, Common Cause and Alliance for Justice alerted the Judicial Conference to Justice Thomas's repeated failure to make accurate financial disclosures as required under the Ethics Act. Justice Thomas then amended 21 years of his financial disclosure forms, explaining that he had, "misunderstood the reporting instructions."

Since we sent our September 29 letter, important new information concerning this matter has come to our attention. Disclosure forms obtained by Common Cause and Alliance for Justice show that Justice Thomas accurately filed his financial disclosure forms, including his wife's employment, for as many as 10 years beginning in 1987 when he was Chair of the Equal Employment Opportunity Commission.

Justice Thomas continued to file accurate disclosure forms concerning his wife's employment when he was a judge on the United States Court of Appeals for the District of Columbia. He also accurately filed his financial disclosure forms regarding his wife's employment for the first five years he was a Justice of the Supreme Court.

In 1997 however, Justice Thomas stopped disclosing his wife's employment on his annual form, instead marking the box labeled "NONE," to indicate his wife had no employment that year. Other public documents show that Justice Thomas's wife was employed in 1997 by the Office of the U.S. House Majority Leader.

Justice Thomas continued to omit his wife's employment from his disclosures for the next 12 years, marking the 'NONE' box on his annual forms. Other publicly available documents indicate that Justice Thomas's wife did have employment in every one of those twelve years.

PRINTED ON RECYCLED PAPER

Her employers included the Office of the U.S. House Majority Leader, the Heritage Foundation and Hillsdale College.

Documents obtained by Common Cause and Alliance for Justice show that Justice Thomas's wife earned over $1.6 million from these sources. We understand that Justice Thomas is not required to disclose those earnings but we include the number here to show that his wife's earnings were very substantial and that their omission is unlikely to have been a mere oversight.

It is very difficult for Justice Thomas to make a credible argument that he understood the filing instructions for ten years but then misunderstood them for the next thirteen years.

Section 104(b) of the Ethics in Government Act of 1978 requires the Judicial Conference to refer to the Attorney General any judge whom the Conference "has reasonable cause to believe has willfully falsified or willfully failed to file information required to be reported."

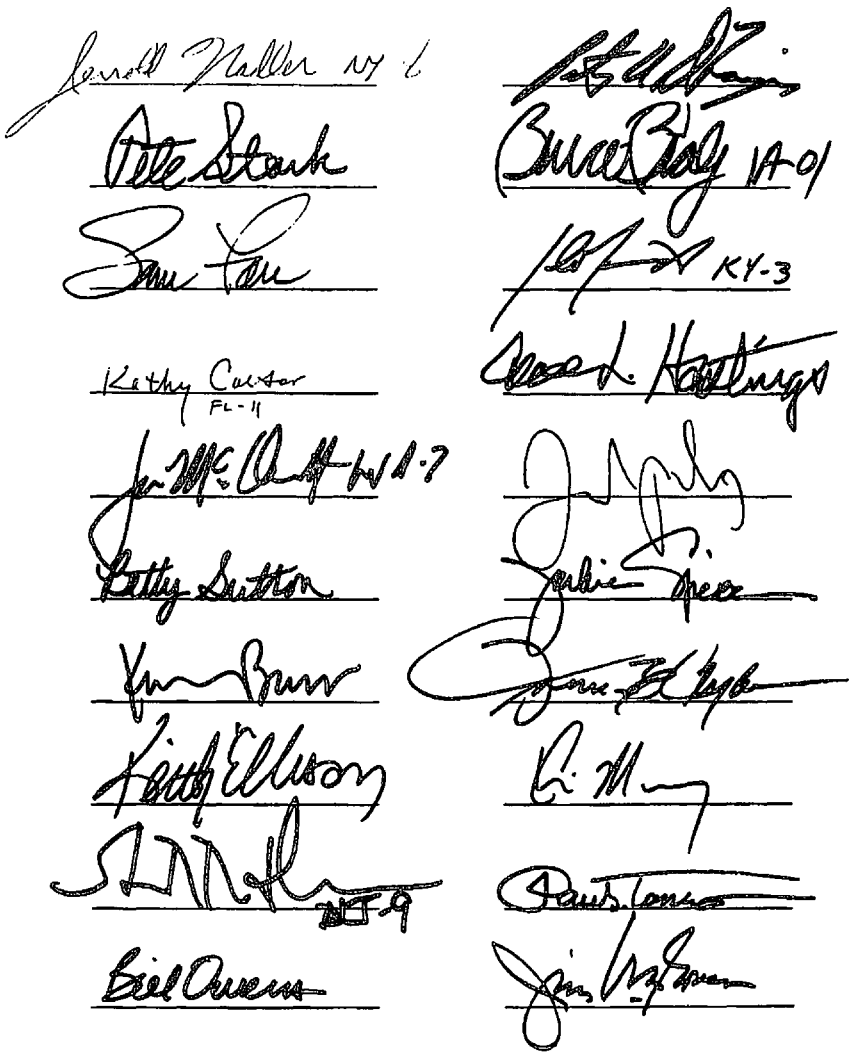
We believe these facts easily establish reasonable cause and therefore reiterate the request of September 29, 2011, and urge you to review these facts and make the appropriate referral to the Attorney General for further investigation.

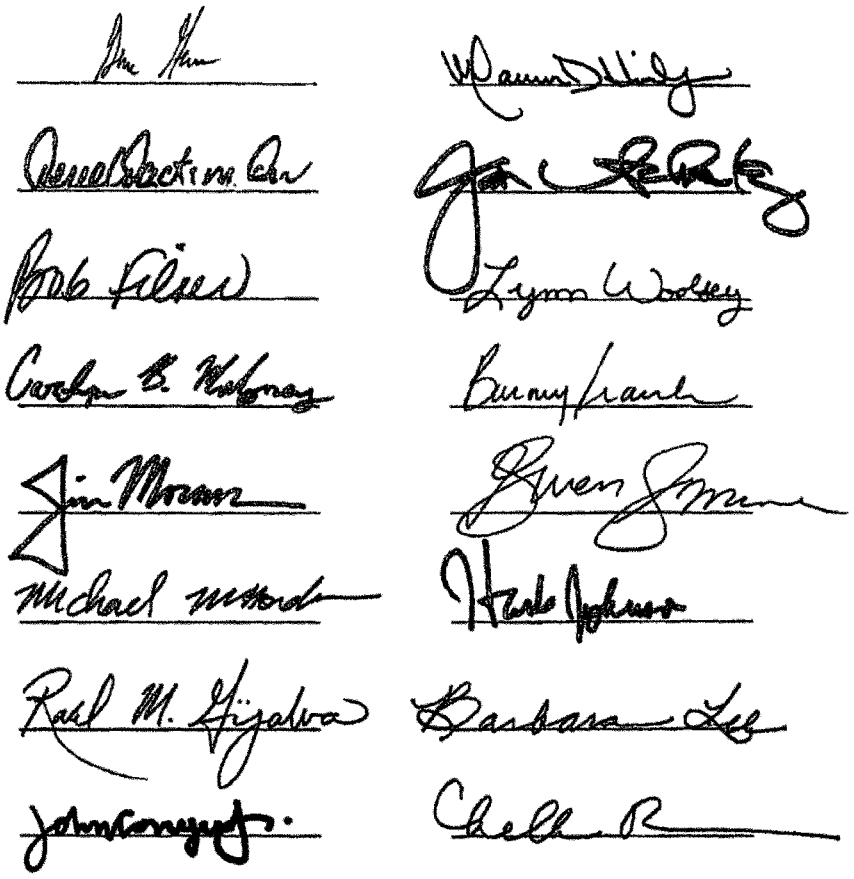
Sincerely,

Louise M. Slaughter
Member of Congress

Earl Blumenauer
Member of Congress

Cc: Jill C. Sayenga


Kathy Castor
FL-11
KY-3



Signed:

1. Robert Andrews, Member of Congress
2. Karen Bass, Member of Congress
3. Earl Blumenauer, Member of Congress
4. Bruce L. Braley, Member of Congress
5. Kathy Castor, Member of Congress
6. David N. Cicilline, Member of Congress
7. Yvette D. Clarke, Member of Congress
8. James E. Clyburn, Member of Congress
9. Steve Cohen, Member of Congress
10. Gerald E. Connolly, Member of Congress
11. John Conyers Jr., Member of Congress
12. Peter A. DeFazio, Member of Congress
13. Theodore E. Deutch, Member of Congress
14. Lloyd Doggett, Member of Congress
15. Donna F. Edwards, Member of Congress
16. Keith Ellison, Member of Congress
17. Anna G. Eshoo, Member of Congress
18. Sam Farr, Member of Congress
19. Bob Filner, Member of Congress
20. Barney Frank, Member of Congress
21. Gene Green, , Member of Congress
22. Raúl M. Grijalva, Member of Congress
23. Alcee L. Hastings, Member of Congress
24. Maurice D. Hinchey, Member of Congress
25. Michael M. Honda, Member of Congress
26. Jesse L. Jackson Jr., Member of Congress
27. Henry C. "Hank" Johnson Jr. , Member of Congress
28. Barbara Lee, Member of Congress
29. John Lewis, Member of Congress
30. Ben Ray Luján, Member of Congress
31. Carolyn B. Maloney, Member of Congress
32. Jim McDermott, Member of Congress
33. James P. McGovern, Member of Congress
34. Brad Miller, Member of Congress
35. Gwen Moore, Member of Congress
36. James P. Moran, Member of Congress
37. Christopher S. Murphy, Member of Congress
38. Jerrold Nadler, Member of Congress
39. John W. Olver, Member of Congress
40. William L. Owens, Member of Congress
41. Frank Pallone Jr., Member of Congress
42. Chellie Pingree, Member of Congress
43. Jared Polis, Member of Congress
44. Steven R. Rothman, Member of Congress
45. Janice D. Schakowsky, Member of Congress
46. Louise M. Slaughter, Member of Congress
47. Jackie Speier, Member of Congress
48. Fortney Pete Stark, Member of Congress
49. Betty Sutton, Member of Congress
50. Paul Tonko, Member of Congress
51. Lynn C. Woolsey, Member of Congress
52. John A. Yarmuth, Member of Congress

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

April 30, 2012

Honorable Louise M. Slaughter
United States House of Representatives
Washington, DC 20515

Dear Representative Slaughter:

I write in response to your September 29, 2011, letter to James Duff, former Director of the Administrative Office of the U.S. Courts, and your November 18, 2011, letter to Chief Justice John Roberts regarding Justice Clarence Thomas's financial disclosure report.

This matter has been reviewed by the Committee on Financial Disclosure of the Judicial Conference of the United States. It has concluded that nothing has been presented to support a determination that Justice Thomas's failure to report the source of his spouse's income was willful, or that Justice Thomas willfully or improperly failed to disclose information concerning travel reimbursements.

If we may be of any further assistance to you, please do not hesitate to contact our Office of Legislative Affairs at (202) 502-1700.

Sincerely,

Thomas F. Hogan

Thomas F. Hogan
Secretary

ING-143

Identical Letter Sent to: Honorable Earl Blumenauer

cc: Honorable Robert Andrews
Honorable Karen Bass
Honorable Bruce L. Braley
Honorable Kathy Castor
Honorable David N. Cicilline
Honorable Yvette D. Clarke
Honorable James E. Clyburn
Honorable Steve Cohen
Honorable Gerald E. Connolly
Honorable John Conyers Jr.
Honorable Peter A. DeFazio
Honorable Theodore E. Deutch
Honorable Lloyd Doggett
Honorable Donna F. Edwards
Honorable Keith Ellison
Honorable Anna G. Eshoo
Honorable Sam Farr
Honorable Bob Filner
Honorable Barney Frank
Honorable John Garamendi
Honorable Gene Green
Honorable Raul M. Grijalva
Honorable Alcee L. Hastings
Honorable Maurice D. Hinchey
Honorable Michael M. Honda
Honorable Jesse L. Jackson Jr.
Honorable Henry C. "Hank" Johnson Jr.
Honorable Barbara Lee
Honorable John Lewis
Honorable Ben Ray Lujan
Honorable Carolyn B. Maloney
Honorable Jim McDermott
Honorable James P. McGovern
Honorable Brad Miller
Honorable Gwen Moore
Honorable James P. Moran
Honorable Christopher S. Murphy
Honorable Jerrold Nadler
Honorable John W. Olver
Honorable William L. Owens
Honorable Frank Pallone Jr.
Honorable Ed Perlmutter
Honorable Chellie Pingree
Honorable Jared Polis
Honorable Steven R. Rothman
Honorable Janice Schakowsky
Honorable Robert Scott
Honorable Jackie Speier
Honorable Fortney Pete Stark
Honorable Betty Sutton
Honorable Paul Tonko
Honorable Peter Welch
Honorable Lynn C. Woolsey
Honorable John A. Yarmuth

Letter from Chief Judge Mark L. Wolf to
Judge Thomas F. Hogan, dated August 29, 2012

United States District Court

Boston, Massachusetts 02210

MARK L. WOLF
CHIEF JUDGE

August 29, 2012

Honorable Thomas F. Hogan
Secretary of the Judicial Conference
of the United States
One Columbus Circle, NE
Washington, DC 20544

Dear Judge Hogan:

I am writing in response to your August 23, 2012 memorandum to the Members of the Judicial Conference to request that the Report of the Committee on Financial Disclosure be moved to the Discussion Calendar of the September 11, 2012 meeting of the Conference rather than kept on the Consent Calendar for approval by acclamation at that session. As we have discussed, I believe that the Report of the Committee on Financial Disclosure for the September 11, 2012 meeting, like its Reports for the previous three meetings of the Conference, omits what is at least an important information item concerning how the Conference discharges its statutory duty under 5 U.S.C. App. 4 §104(b). The significant issues of process and governance raised by this series of material omissions are described in my attached August 8 and 29, 2012 letters to Chief Judge David Sentelle. As I wrote Chief Judge Sentelle, I believe that it will be valuable for the Conference to begin a discussion of these issues on September 11, 2012. In any event, I object to the Report of the Committee on Financial Disclosure being approved by acclamation.

I will look forward to hearing whether the Report of the Committee on Financial Disclosure will, as I request, be placed on the Discussion Calendar. I would be pleased to speak with Chief Judge Sentelle and/or you about how the matter should be presented.

With best wishes,

Sincerely yours,

Mark L. Wolf

cc: Honorable David B. Sentelle, Chair
Members, Executive Committee
Honorable Joseph H. McKinley, Jr.

Congress of the United States
Washington, DC 20515

September 29, 2011

James C. Duff
Secretary to the Judicial Conference of the United States
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, DC 20544

Dear Mr. Duff:

Widespread reporting, including a recent report in *The New York Times* titled "Friendship of Justice and Magnate Puts Focus on Ethics," raise grave concerns about the failure of Justice Clarence Thomas to meet various disclosure requirements under the Ethics in Government Act of 1978. Based upon the multiple public reports, Justice Thomas's actions may constitute a willful failure to disclose, which would warrant a referral by the Judicial Conference to the Department of Justice, so that appropriate civil or criminal actions can be taken.

Due to the simplicity of the disclosure requirements, along with Justice Thomas's high level of legal training and experience, it is reasonable to infer that his failure to disclose his wife's income for two decades was willful, and the Judicial Conference has a non-discretionary duty to refer this case to the Department of Justice.

Throughout his entire tenure on the Supreme Court, Justice Thomas checked a box titled "none" on his annual financial disclosure forms, indicating that his wife had received no income, despite the fact that his wife had in fact earned nearly $700,000 from the Heritage Foundation from 2003-2007 alone.

Furthermore, an investigation conducted by *The New York Times* has revealed that Justice Thomas may have, on several occasions, benefited from use of a private yacht and airplane owned by Harlan Crowe, and again failed to disclose this travel as a gift or travel reimbursement on his federal disclosure forms as required by the Ethics in Government Act of 1978.

Justice Thomas's failure to disclose his wife's income for his entire tenure on the federal bench and indications that he may have failed to file additional disclosure regarding his travels require the Judicial Conference to refer this matter to the Department of Justice.

Section 104(b) of the Ethics Act requires the Judicial Conference to refer to the Attorney General of the United States any judge who the Conference "has reasonable cause to believe has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported." If the Judicial Conference finds reasonable cause to believe that Justice Thomas has "willfully falsified or willfully failed to file information to be reported," it must, pursuant to §104, refer the case to the Attorney General for further determination of possible criminal or civil legal sanctions.

Particularly as questions surrounding the integrity and fairness of the Supreme Court continue to grow, it is vital that the Judicial Conference actively pursue any suspicious actions by Supreme Court Justices. While we continue to advocate for the creation of binding ethical standards for the Supreme Court, it is important the Judicial Conference exercise its current powers to ensure that Supreme Court Justices are held accountable to the current law.

As a result, we respectfully request that the Judicial Conference follow the law and refer the matter of Justice Thomas's non-compliance with the Ethics in Government Act to the Department of Justice. We eagerly await your reply.

Sincerely,

Louise M. Slaughter
Member of Congress

Earl Blumenauer
Member of Congress

John Conyers, Jr.
Member of Congress

Donna F. Edwards
Member of Congress

Keith Ellison
Member of Congress

Anna G. Eshoo
Member of Congress

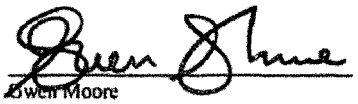
Bob Filner
Member of Congress

John Garamendi
Member of Congress

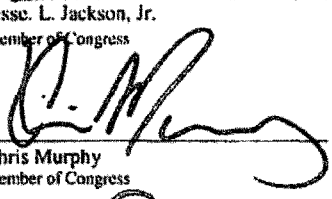
Raúl M. Grijalva
Member of Congress

Mike Honda
Member of Congress

Jesse L. Jackson, Jr.
Member of Congress

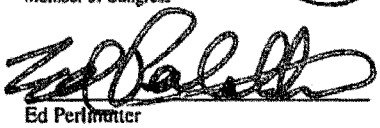


Gwen Moore
Member of Congress

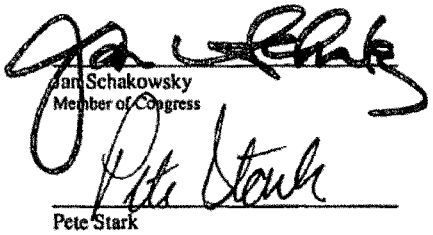


Chris Murphy
Member of Congress

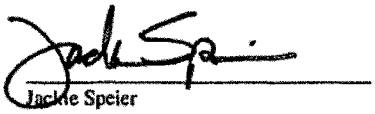
John W. Olver
Member of Congress



Ed Perlmutter
Member of Congress

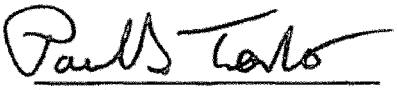


Jan Schakowsky
Member of Congress



Jackie Speier
Member of Congress

Pete Stark
Member of Congress



Paul D. Tonko
Member of Congress

Peter Welch
Member of Congress

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JILL C. SAYENGA
Acting Director

WASHINGTON, D.C. 20544

October 14, 2011

Honorable Louise M. Slaughter
United States House of Representatives
Washington, DC 20515

Dear Representative Slaughter:

Thank you for your letter of September 29, 2011, to former Administrative Office Director James Duff concerning your request that the Judicial Conference make a determination as to whether Justice Clarence Thomas' actions with respect to his financial disclosure reports give rise to "reasonable cause" under section 104 of the Ethics in Government Act of 1978 (5 U.S.C. app. § 104) that would require referral of the matter to the Department of Justice. I have forwarded your letter to the Judicial Conference Committee on Financial Disclosure, which is responsible for implementing the disclosure provisions of the Ethics in Government Act and addressing allegations of errors or omissions in the filing of financial disclosure reports.

If we may be of additional assistance to you, please do not hesitate to contact our Office of Legislative Affairs at (202) 502-1700.

Sincerely,

Jill C. Sayenga
Acting Director

Identical letter sent to:

Honorable Earl Blumenauer
Honorable John Conyers, Jr.
Honorable Donna F. Edwards
Honorable Keith Ellison
Honorable Anna G. Eshoo
Honorable Bob Filner
Honorable John Garamendi
Honorable Raúl M. Grijalva
Honorable Mike Honda
Honorable Jesse L. Jackson, Jr.
Honorable Gwen Moore
Honorable Chris Murphy
Honorable John W. Olver
Honorable Ed Perlmutter
Honorable Jan Schakowsky
Honorable Jackie Speier
Honorable Pete Stark
Honorable Paul D. Tonko
Honorable Peter Welch

COMMON CAUSE
Holding Power Accountable

January 21, 2011

James C. Duff
Secretary to the Judicial Conference of the United States
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, DC 20544

Dear Mr. Duff:

It has come to our attention that Justice Thomas has failed to disclose the non-investment income of his spouse, Virginia Thomas, for her employment at the Heritage Foundation in 2003-2007, and at Liberty Central in 2009.

According to the Heritage Foundation's Form 990s filed with the Internal Revenue Service, Ms. Thomas earned a salary in excess of $120,000 each year between 2003 and 2007. In 2009, Ms. Thomas became the founding CEO of a new 501(c)(4) organization, Liberty Central. The current CEO, Sarah Field, told the *New York Times* that Ms. Thomas was compensated for her work at Liberty Central at a salary set by the board.

Nonetheless, for each year from 2003 to 2009, Justice Thomas checked the box for "None" for "Spouse's Non-Investment Income" on his annual disclosure forms. (See attached table and links.)

The Ethics in Government Act of 1978 requires federal officials, including Supreme Court justices, to disclose their spouse's income. *See* 5 U.S.C. § 102(e)(1)(A). The statute requires the Judicial Conference to refer to the Attorney General the name of any federal judge that it "has reasonable cause to believe has...willfully falsified or willfully failed to file information to be reported." 5 U.S.C. § 104.

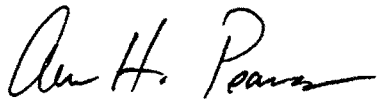
Common Cause respectfully requests that the Judicial Conference make such a determination in the case of Justice Thomas, and if reasonable cause is found, to refer the matter to the Attorney General.

Without disclosure, the public and litigants appearing before the Court do not have adequate information to assess potential conflicts of interest, and disclosure is needed to promote the public's interest in open, honest and accountable government.

Thank you for your attention to this important matter.

Sincerely,

Bob Edgar
President and CEO



Arn H. Pearson, Esq.
Vice President for Programs

Common Cause Letters

September 13, 2011

James Duff
Director
Administrative Head of the United States Courts
One Columbus Circle NE
Washington, DC 20544

Dear Mr. Duff,

Common Cause and Alliance for Justice write jointly to request that you investigate whether Justice Clarence Thomas's apparent violations of the Ethics in Government Act necessitate referral to the Department of Justice under the Act. This issue was previously brought to the Judicial Conference's attention in a January 21, 2011, letter from Common Cause. Since then, new information has come to light that increases the need for Judicial Conference to resolve this issue.

Between 1997-2007, Justice Thomas checked the box "none" for spousal income on his annual financial disclosure forms, despite the fact that Virginia Thomas earned nearly $700,000 from the Heritage Foundation from 2003-2007 alone. Shortly after this failure was noted, Justice Thomas amended his forms and stated that he had misunderstood the reporting requirement.

More recently, a June 19, 2011, New York Times article raised questions as to whether Justice Clarence Thomas may have also failed to disclose or misreported travel reimbursements. The New York Times story indicates that Justice Thomas may have, on several occasions, benefitted from use of Harlan Crow's jets to travel to speaking engagements and other events, yet on two of those occasions Justice Thomas' forms indicate a different source of reimbursement, and on one occasion there is no reimbursement reported.

Section 104(b) of the Act requires the Judicial Conference to refer to the Attorney General any judge whom the Conference "has reasonable cause to believe has willfully falsified or willfully failed to file information required to be reported."

We respectfully request that the Judicial Conference make a public determination as to whether Justice Thomas' failure to report his wife's income, and or failing to disclose travel reimbursements, give rise to "reasonable cause" under §104, and refer the matter to the Department of Justice if appropriate.

Sincerely,

Bob Edgar
President and CEO
Common Cause

Nan Aron
President

Alliance for Justice

Common Cause Letters

October 5, 2011

James Duff
Director
Administrative Head of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

George Reynolds
Counsel
Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, NE
Washington, DC 20544

Dear Mr. Duff and Mr. Reynolds:
This letter is to follow-up on the Common Cause and Alliance for Justice letter dated September 13, 2011, requesting that the Judicial Conference take action on Justice Clarence Thomas's apparent violations of the Ethics in Government Act. The letter was forwarded to the Judicial Conference Committee on Financial Disclosure on September 26, 2011. Since then, new information has come to light that makes more clear and compelling the Judicial Conference's statutory obligation to refer the matter to the Department of Justice.

As we detailed in our previous letter, between 1997-2007 Justice Thomas checked the box "none" for spousal income on his annual financial disclosure forms, despite the fact that Virginia Thomas earned income from several organizations during this time period, including the Heritage Foundation. When the inaccurate disclosures were made public, the Justice amended his forms and stated that he had misunderstood the reporting requirement.

Since last we wrote, our organizations have learned that Justice Thomas correctly disclosed his wife's income for as many as ten years before he began to file inaccurate disclosure forms. Our newly discovered evidence shows that Justice Thomas properly filled out his forms and accurately disclosed his wife's income as early as 1987, while the Chair of the EEOC, continuing as a judge on the DC Circuit Court of Appeals, and for five years as a Justice on the Supreme Court. These revelations call into question Justice Thomas' explanation that his omissions were due to a misunderstanding of the filing instructions.

Additionally, we have since learned that the amount earned by Virginia Thomas during the years that Justice Thomas failed to report her income exceeds $1.6 million. Both of these newly discovered facts increase the gravity of the situation and make more urgent the Judicial Conference's need to take action.

Section 104(b) of the Act requires the Judicial Conference to refer to the Attorney General any judge whom the Conference "has reasonable cause to believe has willfully falsified or willfully failed to file information required to be reported." Given that Justice Thomas correctly disclosed his wife's income for a decade while serving in three federal positions before

beginning to report inaccurately in 1997, we believe that Justice Thomas' omissions meet that standard.
We respectfully request that the Judicial Conference make a timely and public determination that Justice Thomas' misreporting of his wife's income, gives rise to "reasonable cause" under §104, and refer the matter to the Department of Justice.

Sincerely,

Nan Aron
President
Alliance for Justice
Bob Edgar
President and CEO
Common Cause

Click for the press release

United States District Court

Boston, Massachusetts 02210

CHAMBERS OF
MARK L. WOLF
DISTRICT JUDGE

June 1, 2023

Honorable Sheldon Whitehouse, Jr.
Chairman, Subcommittee on Federal Courts,
Oversight, Agency Action, and Federal Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Whitehouse:

In response to your invitation to supplement the record of my testimony on May 17, 2023, attached are the text of my oral opening statement, and information and documents relevant to some of the inaccurate statements made concerning my conduct:

1. I did not recuse myself in the United States v. Sampson capital case. Attached are the decisions explaining the reasons for my denial of the government's motion for my disqualification, which the government did not appeal. See United States v. Sampson, 148 F.Supp.3d 75 (D. Mass. 2015); United States v. Sampson, No. CR 01-10384-MLW, 2015 WL 13333677 (D. Mass. Nov. 13, 2015).

2. The claim that while a prosecutor in the 1980's I leaked information to the "Mob" related to a report that was written by FBI Special Agent John Connolly and inserted in the file of Top Echelon Organized Crime Informant Stephen Flemmi, which was discovered in a RICO prosecution of Flemmi, his partner James "Whitey" Bulger, and others. The report was not true, and the government and the defendants repeatedly characterized it as untrue. See United States v. Salemme, 164 F.Supp.2d 49, 62-64, 79 (D. Mass. 1999); United States v. Salemme, 164 F.Supp.2d 86, 96-98 (D. Mass. 1999) (attached). The report, which had been sealed at the request of the government, was disclosed in telephone calls to a reporter in January 1999 in a manner that would cause "a reasonable person [to] infer that the calls probably were made by someone who hoped to disrupt, if not abort, the proceedings about which the prosecutors were [then] complaining." Salemme, 164 F.Supp.2d at 98.

Also attached is my lengthy September 1999 decision in Salemme, 91 F.Supp.2d 141 (D. Mass 1999), in which I found egregious misconduct by the FBI. Among other things, I referenced

instances in which Connolly put false information that Flemmi did not provide in Flemmi's informant file "in an effort to make it more difficult to discern and demonstrate improper conduct by Connolly." Id. at 258. Connolly was subsequently convicted and sentenced to ten years in prison for attempting to obstruct the Salemme hearings. See United States v. Connolly, 341 F.3d 16 (1st Cir. 2003). He was also sentenced to 40 years in prison for, as I found, Salemme, 91 F.Supp.2d at 178, 208-13, conspiring with Flemmi and Bulger to commit murder. See Connolly v. State, 172 So. 3d 893 (Fla. Dist. Ct. App. 2015).

3. Canon 4 of the Code of Conduct for United States Judges and its Commentary authorizes and encourages judges to publish concerning the administration of justice. My March 4, 2021 article, which in part discusses the one of many sections in a proposed bill that concerned the Supreme Court, titled by NBC which published it, "House Anti-Corruption and Supreme Court Ethics Vote Helps Restore U.S. Credibility," was referenced at the hearing and is attached.

With best wishes,

Sincerely yours,

Mark L. Wolf

2015 WL 13333677
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

UNITED STATES of America
v.
Gary Lee SAMPSON

Cr. No. 01-10384-MLW
|
Filed 11/13/2015

Attorneys and Law Firms

Dustin Chao, Zachary R. Hafer, Mark T. Quinlivan, United States Attorney's Office, George W. Vien, Donnelly, Conroy & Gelhaar, LLP, Boston, MA, Michael S. Warbel, U.S. Department of Justice, Washington, DC, for United States of America.

Brenna M. Egan, Peter G. Dickos, William E. McDaniels, Jennifer G. Wicht, Williams & Connolly LLP, Washington, DC, Danalynn Recer, Attorney at Law, Houston, TX, Michael N. Burt, Law Office of Michael Burt, San Francisco, CA, Miriam Conrad, Elizabeth L. Prevett, J. Martin Richey, Federal Public Defender Office, Boston, MA, Matthew Rubenstein, District of Oregon, Portland, OR, for Gary Lee Sampson.

MEMORANDUM AND ORDER
REGARDING RECONSIDERATION

MARK L. WOLF, UNITED STATES DISTRICT JUDGE

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I. SUMMARY

On July 16, 2015, the government moved for my recusal pursuant to 28 U.S.C. § 455(a) (the "Motion for Recusal"). In its supporting memorandum (the "Recusal Memorandum"), the government acknowledged that I am not actually biased. However, it argued that a reasonable person could question my impartiality because of my conduct concerning a July 27, 2014 program on the film The Life and Mind of Mark DeFriest (the "DeFriest program"). That program included as a panelist Dr. James Gilligan, who defendant Gary Sampson decided in June 2015 to retain as a possible expert witness at the retrial to determine Sampson's sentence in this capital case. Sampson opposed the Motion for Recusal.

For the reasons explained in a 114-page Memorandum and Order, on September 8, 2015, I denied the government's motion for my recusal pursuant to § 455(a) (the "Recusal Decision"). I ordered that the government report, by October 13, 2015, whether it intended to seek a writ of mandamus from the First Circuit. Id. at 114. On October 13, 2015, the government instead filed a motion for reconsideration and a supporting memorandum (the "Motion for Reconsideration" and the "Reconsideration Memorandum"). The government, which did not request a hearing on its original Motion for Recusal, see Docket No. 2024, requested oral argument on the Motion for Reconsideration. On October 28, 2015, Sampson, who opposed the original Motion for Recusal, submitted his opposition to the Motion for Reconsideration and the government's request for oral argument. The government filed a reply and Sampson submitted a sur-reply.

As explained in the Recusal Decision, before the Motion for Recusal was filed, I provided the government with the opportunity to conduct an extensive investigation of the facts I disclosed in June 2015. Both the Motion for Recusal and the Motion for Reconsideration have been fully briefed. Having considered all eight of the submissions

carefully, I do not find that oral argument is necessary or potentially helpful to deciding the merits of the Motion for Reconsideration. Therefore, I am exercising my discretion to deny the government's request for a hearing.

The strict requirements for obtaining reconsideration have not been met. It would have been permissible and appropriate to deny the Motion for Reconsideration summarily. Nevertheless, I have reconsidered whether my recusal pursuant to § 455(a) is justified in light of the government's recent submissions. I again find that it is not. The Recusal Decision continues to provide the reasons for this conclusion. This Memorandum should not be construed to alter the fuller discussion in the Recusal Decision.

In essence, the Motion for Reconsideration does not present arguments that were not previously presented, fully considered, and found to be unmeritorious. More specifically, there is no new evidence that is helpful to the government's claim for recusal. There has been no intervening change in the law. In addition, the government has not shown that my denial of the Motion for Recusal was based on an error of law. The government has also not shown that the decision to deny its Motion for Recusal is unjust. Rather, rejecting the request for my disqualification serves the interests of justice.

***2** As explained in the Recusal Decision, more than two months were devoted to the government's investigation, the parties' briefing, and my deciding the government's Motion for Recusal. This disrupted the intensive schedule for submissions, hearings, and decisions in August and September 2015, to prepare for a September 2015 retrial before a judge the parties each acknowledge is actually impartial. The unmeritorious Motion for Reconsideration has further impeded the progress of this case.

I understand that the Solicitor General of the United States must authorize the filing in the First Circuit of a petition for a writ of mandamus to remove me from this case. The government has had more than two months to seek such authorization. The government is now being ordered to report, by 12:00 noon on December 1, 2015, whether it intends to petition the First Circuit for a writ of mandamus. If so, it shall propose a time by which it should be ordered to file its petition.

II. THE APPLICABLE STANDARDS

A. Oral Argument

"District courts have considerable discretion in deciding whether or not to allow oral argument on a [ ] motion." Jones v. Secord, 684 F.3d 1, 7 (1st Cir. 2012) (quoting Domegan v. Fair, 859 F.2d 1059, 1065 (1st Cir. 1988)); see also Jensen v. Phillips Screw Co., 546 F.3d 59, 68 (1st Cir. 2008) ("Whether to entertain oral argument and/or convene an evidentiary hearing remains within the informed discretion of the district court."); LR, D. Mass. 7.1(e) ("If the court concludes that there should be a hearing on a motion, the motion will be set down for hearing at such time as the court determines.").

In exercising this discretion, the court should consider whether the party requesting oral argument had an adequate opportunity to present its position, whether the issues were fully briefed, and whether the moving party would be prejudiced by the denial of an opportunity for oral argument. See Jones, 684 F.3d at 7 (" 'Absent a showing of serious prejudice, it is not an abuse of discretion to deny oral argument on a summary judgment motion.' " (quoting Bratt v. Int'l Bus. Machs. Corp., 785 F.2d 352, 363 (1st Cir. 1986))); Arrieta-Gimenez v. Arrieta-Negron, 859 F.2d 1033, 1042 (1st Cir. 1988) ("[D]istrict court had extensive briefs from the parties and was well within its discretion when it decided the case without oral argument.").

B. Reconsideration

"[D]istrict courts have the inherent authority to reconsider their interlocutory orders outside the sentencing context." United States v. Bravo-Fernandez, 790 F.3d 41, 61 n.14 (1st Cir. 2015). The First Circuit has articulated a three-part test to be employed by district courts in deciding motions to reconsider. A district court may grant a motion for reconsideration "if the moving party presents newly discovered evidence, if there has been an intervening change in the law, or if the movant can demonstrate that the original decision was based on a manifest error of law or was clearly unjust." United States v. Cintron, 724 F.3d 32, 36 n.5 (1st Cir. 2013) (quoting United States v. Allen, 573 F.3d 42, 53 (1st Cir. 2009)); see also Nov. 14, 2014 Transcript ("Tr."), at 51-52 (Docket No. 1680) (applying this standard previously in this case).

To justify reconsideration based on newly discovered evidence, the moving party must show that the evidence in question "could not 'in the exercise of due diligence' have been presented earlier." Cintron, 724 F.3d at 36 n.5 (quoting Emmanuel v. Int'l Bhd. Of Teamsters, Local Union No. 25, 426 F.3d 416, 422 (1st Cir. 2005)). Motions for reconsideration should not be granted based on new evidence

when "[a]ll of the evidence [offered in support of the motion for reconsideration] was available to [the movant] at the time the original motion was filed." Allen, 573 F.3d at 54.

***3** In addition, to warrant reconsideration, any new evidence must be capable of causing the court to alter its original decision. See Melendez v. Autogermana, Inc., 622 F.3d 46, 56 (1st Cir. 2010) (affirming denial of reconsideration where movant "failed to point to any newly discovered evidence capable of altering [the original] conclusion"); Bennett v. Saint-Gobain Corp., 507 F.3d 23, 35 (1st Cir. 2007) (affirming denial of reconsideration where new "evidence would not have affected the bottom-line result"); United States v. Persico, 645 F.3d 85, 109 (2d Cir. 2011) (affirming denial of reconsideration where two newly discovered facts were "relevant, but neither are exculpatory, nor do they serve to impeach the credibility of any of the government's key witnesses").

Similarly, to justify reconsideration on the basis of an intervening change in law, the moving party must show some material change in law that would affect the original ruling. See Moran Vega v. Cruz Burgos, 537 F.3d 14, 18-19, 21 (1st Cir. 2008) (affirming denial of reconsideration where district judge concluded that new First Circuit case supported original ruling); Millipore Corp. v. Travelers Indem. Co., 115 F.3d 21, 28-29, 34 (1st Cir. 1997) (finding error in denial of reconsideration because new Supreme Judicial Court decision discussed in motion for reconsideration was significant change in relevant Massachusetts law that could have altered original ruling).

Essentially, "[m]otions for reconsideration are not to be used as 'a vehicle for a party to ... advance arguments that could and should have been presented to the district court prior to judgment.' " Allen, 573 F.3d at 53 (quoting Iverson v. City of Boston, 452 F.3d 94, 104 (1st Cir. 2006)); see also Moran Vega, 573 F.3d at 18 n.2 ("A district court is entitled to disregard arguments made in a [motion for reconsideration] that 'could, and should, have been made before judgment issued.' " (quoting ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 55 (1st Cir. 2008))). Therefore, to justify reconsideration on a claim that the decision at issue involved a manifest error of law or was clearly unjust, the moving party must present new arguments that could not have been made originally.

Summarizing these standards, the First Circuit has written:

> The granting of a motion for reconsideration is "an extraordinary remedy which should be used sparingly." 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995). Unless the court has misapprehended some material fact or point of law, such a motion is normally not a promising vehicle for revisiting a party's case and rearguing theories previously advanced and rejected. See In re Sun Pipe Line Co., 831 F.2d 22, 24-25 (1st Cir. 1987). To obtain relief, the movant must demonstrate either that newly discovered evidence (not previously available) has come to light or that the rendering court committed a manifest error of law. See Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 7 n.2 (1st Cir. 2005).

Palmer v. Champion Mortgage, 465 F.3d 24, 30 (1st Cir. 2006).

The First Circuit has also held, in a separate line of cases, that "[w]hen faced with a motion for reconsideration, district courts should apply an interests-of-justice test." United States v. Siciliano, 578 F.3d 61, 72 (1st Cir. 2009); see also United States v. Roberts, 978 F.2d 17, 21 (1st Cir. 1992); Greene v. Union Mut. Life Ins. Co., 764 F.2d 19, 23 (1st Cir. 1985). With regard to this interests of justice test, the First Circuit has written that "[j]ustice is an ideal that defies precise definition," and that it is "impossible to list a series of integers that will necessarily dominate the interests-of-justice equation in every case." Roberts, 978 F.2d at 21. Therefore, if this test is employed the court must consider the unique facts of the particular case and revise its original decision if it would be unjust to maintain it. In essence, the interests of justice test overlaps with the prong of the three-part test that provides for revision of a decision shown to be "clearly unjust." Cintron, 724 F.3d at 36 n.5 (quoting Allen, 573 F.3d at 53).

III. ANALYSIS

A. Oral Argument

***4** The government's request for a hearing on its Motion for Reconsideration is being denied because the government has had ample opportunity to present its arguments and I discern no issue on which oral argument would be helpful to my decision.

As explained in the Recusal Decision, § 455 "requires full disclosure [of the relevant facts concerning possible recusal] by the judge, but does not contemplate or provide for discovery in connection with a § 455(a) issue." Docket No.

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2073 at 89 (citing Ricci v. Key Bancshares of Maine, 111 F.R.D. 369, 373 & n.4 (D. Me. 1986)). Nevertheless, after disclosing and discussing the relevant facts at three hearings in June, 2015:

> I provided more than an opportunity for discovery, in which Sampson's counsel would have had a right to participate. I gave the government several weeks to have an investigation conducted unilaterally by the United States Attorney's Office and investigators from the FBI, the Internal Revenue Service, and the Massachusetts State Police.

Id.; see also id. at 9, 61-62. The government's investigation confirmed the facts I had disclosed.

The government did not request oral argument in its Motion for Recusal. See Docket No. 2024. I allowed the government's motion to file a reply to Sampson's opposition. See Docket No. 2059. The government did not request oral argument in its reply. See Docket No. 2060.

After the issues were fully briefed, I carefully considered the parties' submissions. For the reasons described in detail in the Recusal Decision, I found that my recusal is not justified.

The Motion for Reconsideration has also been fully briefed and carefully considered. As the government was permitted to develop and fully present its arguments before the original decision, the Motion for Reconsideration has been fully briefed, and I discern no issue on which oral argument would be helpful to my decision concerning recusal, the request for oral argument is being denied. See Jones, 684 F.3d at 7; Arrieta-Gimenez, 859 F.2d at 1042.

B. Reconsideration

As indicated earlier and explained below, the government has not met the strict standards for reconsideration. Nevertheless, I have considered the merits of the government's Motion for Recusal again in the context of the submissions concerning its Motion for Reconsideration. For the reasons stated in the Recusal Decision, as reiterated in this Memorandum, I again find that my recusal under § 455(a) is not justified. See Roberts, 978 F.2d at 21 ("rather than denying the motion to reconsider ... the court below granted the motion to reconsider but then affirmed its original ruling"); United States v. Gorski, 36 F. Supp. 3d 256, 264 (D. Mass. 2014) ("Under the circumstances, the [ ] prudent approach is to consider the government's motion to reconsider on the merits, in order to reach the underlying issues."); United States v. Salemme, 978 F. Supp. 364, 366-67 (D. Mass. 1997) (allowing reconsideration, but concluding that original decision was correct).

Although I have considered each of the government's arguments, I am not required to discuss all of them. See Siciliano, 578 F.3d at 74 (characterizing as "hopeless" the contention that "a court denying a motion for reconsideration must offer a reasoned explanation of its disposition of every argument made in the motion"). The government substantially repeats arguments that it previously presented and were found to be unmeritorious. Nevertheless, there are several issues that I am addressing further. However, as indicated earlier, the discussion in this Memorandum is not intended to alter in any way the Recusal Decision, which is more complete and provides necessary context for any references to it in this Memorandum.

1. Newly Discovered Evidence

***5** The government argues that the notes I made before the DeFriest program as possible "talking points" are newly discovered evidence that requires reconsideration and recusal. I was not able to locate these notes in June 2015, when I disclosed and discussed with the parties the DeFriest program. I provided them to the parties on September 8, 2015 and addressed them in the Recusal Decision issued the same day. In this sense, the notes are "new evidence." However, the notes largely contain information I disclosed to the parties in June 2015, in part by obtaining and providing the video recording of most of the DeFriest program. To the extent the notes contain new information, it is information that was fully considered and addressed in the Recusal Decision. Therefore, the notes may not constitute newly discovered evidence for purposes of reconsideration.[1] The parties did not, however, previously have the opportunity to address my notes. Therefore, I have deemed it most appropriate to consider fully the government's arguments that this evidence, in combination with the other facts of this case, requires my recusal under § 455(a). I conclude that it does not.

More specifically, in June 2015, I told the parties that I began the DeFriest program by stating that my participation should not be construed as an expression of my views on any points made in the movie or by the panelists. See June 19, 2015 Tr. at 6-7; June 26, 2015 Tr. at 3-4. [2] I informed the parties that my staff and I had searched for, but not found, the notes I made in preparation for the DeFriest program. See June 23, 2015 Tr. at 23; June 26, 2015 Tr. at 4.

In its Recusal Memorandum, the government asserted that there were similarities between Sampson and DeFriest that required my recusal under § 455(a). The government also argued that I was aware of these similarities at the time of the DeFriest panel and noted that "[t]he court ... emphasized at various points [in the panel] that it was not taking a position regarding any particular point raised in the film, nor was it necessarily agreeing with all of the views expressed by [the panelists]." Docket No. 2025 at 23. Therefore, the argument presented in support of the Motion for Reconsideration is not new.

In July 2015, my staff found the notes I prepared as possible "talking points" for the DeFriest program. See Docket No. 2073 at 49 n.15. On September 8, 2015, I made my notes part of the public record. See Docket No. 2074, ¶ 3 & Ex. C. The notes reflect my intention to begin the program with a "disclaimer," or explanation, that I was not expressing views on any points made in the film or by the panelists. See id. The notes also refreshed my memory of a detail I did not recall in June 2015. In addition to these statements, I believe I said that my participation in the program should not be construed as a comment by me concerning any other case or issue, including the death penalty. [3]

***6** The government now argues that my notes indicate that, in July 2014, I recognized that there were similarities between some of the issues relating to DeFriest and some of the issues in the instant case. This is true. However, I acknowledged and analyzed this fact in deciding that my recusal under § 455 (a) is not justified. For example, in the Recusal Decision I wrote that I "recognized that the film dealt with issues that emerge in my cases, including this one." Docket No. 2073 at 45. After referencing two other cases, I added that "I recognized that issues of competence and mental illness [which are discussed in the film in the context of DeFriest] have been raised in this case." Id. at 46.

I analyzed the implications of these similarities for § 455(a) purposes and found that they could not cause, or contribute to causing, a reasonable person to question my impartiality. See id. at 11-12, 70-71. I wrote that "[t]he issues in the film were related to Sampson's case at only a very high level of generality, and I repeatedly explained that I was not endorsing the views of the film or the panelists, and was not expressing my own." Id. at 70. While there were high-level similarities between DeFriest and Sampson, I wrote, "whether DeFriest is mentally ill, has brain damage, or was abused by guards or other inmates, is not relevant to whether Sampson is mentally ill, has brain damage, or was abused by guards or other inmates." Id. at 71. I noted that the DeFriest program "did not include any discussion of how mental illness, brain damage[ ], or abuse in prison might operate as mitigating factors in a capital case." Id. I explained that a reasonable person would understand my statements concerning my role on the panel as "the effort of a prudent judge to assure that his conduct and comments were not misconstrued as he participated in an educational program." Id. at 73. I concluded that "[a]s the DeFriest panel did not include discussion of evidence specific to Sampson or of capital sentencing, a reasonable person could not question my impartiality based on my role in it." Id. at 71.

My notes are evidence that in July 2014, I recognized that the DeFriest film dealt with issues that emerge in my cases, including this one. They are consistent with my statement in the Recusal Decision that "the issues in the film were related to the Sampson case at only a very high level of generality." Id. at 70. The notes are additional evidence confirming the facts I disclosed in June 2015. I have carefully considered the government's arguments that the notes require, or contribute to requiring, my recusal under § 455(a). I again find that they do not.

2. Intervening Change in Law

In the Reconsideration Memorandum, the government cites for the first time two cases that it asserts support its claim for recusal under § 455 (a), United States v. Zavala-Marti, 715 F.3d 44, 56-57 (1st Cir. 2013), and United States v. Craven, 239 F.3d 91, 103 (1st Cir. 2001). See Docket No. 2094 at 12-13; see also Docket No. 2101 at 3. More specifically, the government argues that:

> As the First Circuit stated in remanding a case for resentencing before a different judge because the original judge was exposed to ex parte information, "it would be 'difficult, if not impossible, for a judge, no matter how

> sincere, to purge [ex parte] information from her mind—and, equally, to maintain the perception of impartiality."

Docket No. 2094 at 12-13 (alteration in original) (quoting Zavala-Marti, 715 F.3d at 56-57; Craven, 239 F.3d at 103).

In its reply to Sampson's opposition to the Motion for Reconsideration, the government again cites Zavala-Marti. It also cites for the first time Canon 3(A)(4) of the Code of Conduct for United States Judges (the "Code"), which states in pertinent part that, with certain exceptions, "a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers." This provision of the Code and the newly cited cases existed when the government filed its Motion for Recusal. They do not constitute "intervening change[s] in the law." [4] Cintron, 724 F.3d at 36 n.5 (quoting Allen, 573 F.3d at 53).

***7** Rather, the government now relies on cases and a provision of the Code that could have been cited in support of its original Motion for Recusal. The court is not required to consider them in deciding the Motion for Reconsideration because "[m]otions for reconsideration are not to be used as 'a vehicle for a party to ... advance arguments that could and should have been presented to the district court prior to judgment.' " Allen, 573 F.3d at 53 (quoting Iverson, 452 F.3d at 104); see also Moran Vega, 537 F.3d at 18 n.2 ("A district court is entitled to disregard arguments made in a [motion for reconsideration] that 'could, and should, have been made before judgment issued.' " (quoting ACA Fin. Guar. Corp., 512 F.3d at 55)).

More significantly, the facts in both Zavala-Marti and Craven were materially different than those in the instant case. In Zavala-Marti, the judge received ex parte from a probation officer information about the defendant. See 715 F.3d at 48-50. Without giving the defendant notice and an opportunity to be heard, the judge relied on that information in sentencing him to life in prison. See id. Similarly, in Craven, the judge spoke ex parte to an expert about the defendant, did not give the government an opportunity to challenge the information she received, and relied on it to depart downward in sentencing him. See 239 F.3d at 95-96, 103.

In contrast, in the instant case it is undisputed that I did not discuss Sampson or this case with Dr. Gilligan or any other participant in the program at any time, and there was no discussion of Sampson or this case during the DeFriest program. [5] In addition, as explained in the Recusal Decision:

> No party participated in organizing the presentation of the DeFriest film or the panel discussion of it. Sampson did not provide funds for the program, did not send Dr. Gilligan to participate, and had no knowledge of it.

Docket No. 2073 at 92-93 (comparing the instant case with In re School Asbestos, 977 F.2d 764 (3d Cir. 1992), and stating that "in contrast to the asbestos conference, a reasonable person could not perceive the DeFriest program as an effort by a party to influence my decisions in this case"). Therefore, the DeFriest program did not involve any ex parte communication concerning this case. Thus, neither Canon 3(a)(4), Zavala-Marti, nor Craven are relevant to whether § 455(a) requires my recusal. [6]

3. Manifest Error of Law

The government also asserts that I "conflated the objective test under § 455(a) with the subjective test under § 455(b)," which addresses cases in which a judge actually has a personal bias or prejudice, or personal knowledge of relevant disputed evidentiary facts. Docket No. 2094 at 14; see also Docket No. 2101 at 4 ("[T]he Court incorrectly held itself to a subjective standard, rather than the required objective standard."). This contention is based largely on a misstatement of one sentence in the Recusal Decision and, in any event, is not correct.

***8** At the June 26, 2015 hearing to discuss whether Dr. Gilligan's recent status as a possible witness might require my recusal under § 455(a), I stated my understanding that § 455(a) issues are decided under "an objective test." June 26, 2015 Tr. at 21. In doing so, I referenced my 2014 decision in this case denying the government's suggestion that I recuse myself under § 455(a) because of my association with Zachary Hafer, the Assistant United States Attorney who had become the lead prosecutor. Id. (discussing United States v. Sampson, 12 F. Supp. 3d 203, 205-07 (D. Mass. 2014)). That decision also references the objective standard for deciding § 455(a) issues. See 12 F. Supp. 3d at 206. On June 26, 2015, the government agreed that my understanding that an objective

test must be employed in deciding § 455(a) issues was correct. See June 26, 2015 Tr. at 21.

In section II of the Recusal Decision, I described the standards that apply in deciding a motion for recusal under § 455 (a). See Docket No. 2073 at 17-25. The discussion of the applicable standards begins by distinguishing § 455(b) cases, in which the judge's subjective state of mind is at issue, from § 455(a) cases, in which a judge who is actually impartial must disqualify himself because "his impartiality might reasonably be questioned" in the particular circumstances of the case. Id. at 17-19 (quoting § 455(a)); see also id. at 2-4.

The description of the applicable standards in the Recusal Decision recognizes that § 455(a) issues must be analyzed from the perspective of a reasonable person, fully informed of all of the facts, and that this is an objective standard. Id. at 19-20; see also id. at 3. [7] I referenced and employed the correct objective, reasonable person standard throughout the Recusal Decision. See, e.g., id. at 67, 70-73, 79, 80-83, 86-90, 92-94.

Nevertheless, the government asserts that:

> In denying the government's motion for recusal, the Court conflated the objective test under § 455 (a) with the subjective test under § 455(b), asking whether a reasonable person would believe that, "I would now, because of the DeFriest program, begin to violate my oath, be biased, and not faithfully apply the law...." Recusal Mem. at 100-01. That misstates the inquiry under § 455 (a), however, under which the question is solely whether a reasonable person might harbor doubts about a judge's impartiality, not whether that person necessarily would believe that the judge is biased or would violate his or her oath. See Home Placement Service, Inc. v. Providence Journal Co., 739 F.2d 671, 676 (1st Cir. 1984). Thus, in In re Bulger, 710 F.3d 42, 46 (1st Cir. 2013), the First Circuit made clear that the § 455 (a) analysis is not whether a reasonable person would believe that a judge is actually biased or would violate his oath. Id. ("a reasonable person may question impartiality without the presence of any evidence that a judge is subjectively biased"). Here, by demanding a showing that a reasonable person would believe that the Court would "be biased" and would "violate my oath," the Court answered the wrong question under § 455 (a).

Docket No. 2094 at 14-15 (emphasis added); see also Docket No. 2101 at 4-5.

This contention is incorrect for several reasons. First, the government's characterization of what I wrote is incomplete and misleading. The government writes that I asked whether a reasonable person "would believe that, 'I would now, because of the DeFriest program, begin to violate my oath, be biased, and not faithfully apply the law[.]' " Docket No. 2094 at 14 (emphasis added). While the language the government quoted is in the Recusal Decision, the language the government paraphrases alters my exact words in one significant respect —changing the word "could" to "would." In the Recusal Decision, I asked whether a reasonable person "could believe I would now, because of the DeFriest program, begin to violate my oath, be biased, and not faithfully apply the law [.]" Docket No. 2073 at 100-01 (emphasis added). In full context, I wrote:

> ***9** A reasonable person would know that in affirming the death sentence I imposed in 2008, the First Circuit wrote that "the sentencing proceedings in this case were conducted fairly and with scrupulous attention to the process required by law." Sampson, [486 F.3d 52, 52 (1st Cir. 2007)]. Nevertheless, the government asserts, in effect, that as a result of my role in the DeFriest program, a reasonable person would believe that I now have a " 'disposition of a kind that a fair-minded person could not set aside when judging [this] dispute.' " See [United States v.] Snyder, 235 F.3d [42, 48 (1st Cir. 2000)] (quoting Liteky [v. United States], 510 U.S. [540, 557-58 (1994)] (Kennedy, J., concurring)); In re United States, [158 F.3d 26, 34 (1st Cir. 1998)] (same). In essence, it claims that a reasonable person could believe I would now, because of the DeFriest program, begin to violate my oath, be biased, and not faithfully apply the law in any decisions I must make concerning Dr. Gilligan's proposed testimony and the testimony of correction officers the government intends to present concerning Sampson's dangerousness while on death row. See D.N. 2060 at 15-18. I find that a reasonable person could not have such doubts.

Docket No. 2073 at 100-01 (emphases added). Therefore, the government's contention that I improperly used a test requiring that a reasonable person "necessarily would believe" that I "would 'be biased' and would 'violate my oath' " is factually incorrect.

Moreover, as I noted previously in this case, "[i]n addition to using the statutory language 'might reasonably be questioned,' the First Circuit in In re Bulger[, 710 F.3d at 43, 46,] also, essentially interchangeably, employed the standard of whether a reasonable person 'would' question

the judge's impartiality." Sampson, 12 F. Supp. 3d at 205. The First Circuit has similarly used the term "would," rather than "could," in other cases. See In re United States, 158 F. 3d at 31 (objective standard is "whether a reasonable person, fully informed of all the facts, would doubt [the judge's] impartiality"); In re Allied-Signal Inc., 891 F. 2d 967, 970 (1st Cir. 1989) ("[D]isqualification is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality[.]" (internal quotation marks omitted)); United States v. Voccola, 99 F.3d 37, 42 (1st Cir. 1996) (the § 455(a) standard is " '[w]hether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality' " (quoting United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976))); Recusal Decision, Docket No. 2073 at 19-20 (collecting cases).

As I understand it, however, "[t]he phrase 'might reasonably be questioned' [in § 445 (a)] recognizes that reasonable people might differ in their view as to whether a judge's impartiality should be questioned in a particular set of circumstances." Sampson, 12 F. Supp. 3d at 205. Therefore, in deciding the Motion for Recusal, I found it most appropriate to decide whether a reasonable person "could" question my impartiality and employed this standard throughout the Recusal Decision. See Docket No. 2073 at 64 ("My role concerning the DeFriest panel could not cause a reasonable person to question my impartiality[.]"), 79 ("The added fact that Dr. Gilligan had submitted an affidavit in 2010 could not cause a reasonable person to question my impartiality[.]"), 84 ("The added fact that Dr. Gilligan is a prospective witness at the retrial could not cause a reasonable person to question my impartiality[.]"); see also id. at 1, 2, 3, 8, 9, 10, 11, 12, 13, 16, 36, 56, 67, 68, 69-70, 71, 79-80, 83, 85, 86, 87, 90, 92, 94, 100-01, 101, 109, 112. [8]

***10** As indicated earlier, the government also states that:

> [I]n In re Bulger, 710 F.3d [at 46], the First Circuit made clear that the § 455 (a) analysis is not whether a reasonable person would believe that a judge is actually biased or would violate his oath. Id. ("a reasonable person may question impartiality without the presence of any evidence that a judge is subjectively biased.").

Docket No. 2094 at 14-15. The government suggests I erred in not recognizing and applying this statement from Bulger. See id. This suggestion is not correct. Indeed, I quoted this precise language in the Recusal Decision, writing that "[s]ection 455(a) is based on the premise that in some circumstances 'a reasonable person may question impartiality without the presence of any evidence that a judge is subjectively biased.' " Docket No. 2073 at 18 (quoting In re Bulger, 710 F.3d at 46). I applied this understanding in my analysis throughout the Recusal Decision.

To the extent that the government suggests that In re Bulger stands for the proposition that recusal under § 455(a) is permissible in the absence of evidence establishing facts that could cause a reasonable person to believe that the judge might actually be biased, the government's position is incorrect. In re Bulger does not alter the long line of cases that require a factual basis for a mistaken but reasonable doubt concerning the judge's impartiality. See, e.g., In re Allied-Signal, 891 F.2d at 970; Voccola, 99 F.3d at 42; Cowden, 545 F.2d at 265; In re United States, 158 F.3d at 30; see also Recusal Decision, Docket No. 2073 at 19-20 (citing cases), 73 n.28 (citing cases). Rather, the First Circuit confirmed this principle in In re Bulger, stating that "[t]he point under § 455(a) is not the judge's actual state of mind at a particular time, but the existence of facts that would prompt a reasonable question in the mind of a well-informed person about the judge's capacity for impartiality." 710 F.3d at 46 (emphasis added). In essence, while "evidence that a judge is subjectively biased" is not required under § 455(a), there must be evidence that proves facts which could cause a reasonable person to question the judge's impartiality. For the reasons explained in the Recusal Decision and reiterated in this Memorandum, no such facts exist here.

It is not clear whether the government is arguing that it was improper to have at times framed the relevant question as whether a reasonable person could "believe I would begin to violate my oath, be biased, and not faithfully apply the law," as an alternative to whether a reasonable person could "question my impartiality." Docket No. 2073 at 100-01. In any event, any such contention would be incorrect. As explained in the Recusal Decision, the Second Circuit has held that there is a " 'presumption ... that a judge will put personal beliefs aside and rule according to the laws as enacted, as required by his or her oath. ' " [9] Docket No. 2073 at 22-23 (quoting In re Aguinda, 241 F.3d 194, 204 (2d Cir. 2001)); see also First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 988 (9th Cir. 2000) ("[J]udges ... are presumed to be impartial and to discharge their ethical duties faithfully so as to avoid the appearance of impropriety."); In re Executive Office of President, 215 F.3d 25, 25 (D.C. Cir. 2000) (per curiam) (finding that

judge hearing case involving President who appointed him would not create appearance of bias, particularly in view of a judge's oath). As indicated in the Recusal Decision, Docket No. 2073 at 100-01, the Second Circuit's statement of the issue is comparable to the First Circuit's holding that recusal under § 455 (a) was not justified when no reasonable person could believe that the relevant circumstances "would be of the weight necessary to cause a judge to jettison his impartiality and, in open court day after day, to violate his deepest professional and ethical commitments as a judge." In re United States, 666 F.2d 690, 696 (1st Cir. 1981). [10]

4. Interests of Justice

***11** The government makes an additional argument that is appropriate to address under the broader interests of justice test. The government asserts that reconsideration and reversal of the denial of its Motion for Recusal is required because I "repeatedly stated that [my] denial of the government's motion was based in large measure on ensuring that '§ 455 (a) is not abused, and does not reasonably appear to have been abused, by a party to manipulate the system to replace an impartial judge with one it prefers.' " Docket No. 2101 at 2-3 (quoting Recusal Decision, Docket No. 2073 at 104). [11] Once again, the government mischaracterizes the reasoning of the Recusal Decision.

As should have been clear to the government from the Recusal Decision, and as further explained below, a high standard must be met to justify recusal. This high standard has been established, in part, to protect against the injurious perception that § 455 (a) can be abused to obtain the replacement of an impartial judge. Based on an extensive analysis of my role in the DeFriest panel, Docket No. 2073 at 64-79, Dr. Gilligan's role in this case, id. at 79-90, the facts of this case compared to the facts in other cases on recusal, id. at 90-101, and the effect of the interest of heightened reliability in capital cases, id. at 101-04, I found that high standard was not met in this case. I found, therefore, that my recusal is not justified. I then explained that denying the Motion for Recusal "also serves the interest of assuring that § 455(a) is not abused, and does not reasonably appear to be abused, by a party to manipulate the system to replace an impartial judge with one it prefers." Docket No. 2073 at 100 (emphasis added).

More specifically, as I recognized and wrote in the Recusal Decision, the First Circuit has stated that under § 455 (a), " 'disqualification is appropriate only if the facts would provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality.' " Docket No. 2073 at 19 (quoting In re Allied-Signal, 891 F. at 970). The Supreme Court and the First Circuit have held that this creates a "high threshold" for recusal under § 455 (a). Id. at 23 (quoting In re United States, 158 F.3d at 34); Liteky v. United States, 510 U.S. 540, 557-58 (1994) (Kennedy, J., concurring). "Thus, under § 455 (a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair minded person could not set aside when judging the dispute." Id. at 22 (quoting Liteky, 510 U.S. at 557-58); see also Snyder, 235 F.3d at 48; In re United States, 158 F.3d at 34.

As I also wrote in the Recusal Decision, the First Circuit has explained why it is important that judges not recuse if this high standard is not met:

> ***12** "[I]n the real world, recusal motions are sometimes driven more by litigation strategies than by ethical concerns.... [C]ourts cannot afford to spawn a public perception that lawyers and litigants will benefit by undertaking such machinations." In re Cargill, 66 F.3d [1256, 1262-63 (1st Cir. 1995)]. Therefore, as then-Judge Breyer wrote:
>
> > [W]hen considering disqualification, the district court is not to use the standard of Caesar's wife, the standard of mere suspicion. This is because "the disqualification decision must reflect not only the need to secure public confidence through proceedings that appear to be impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.
>
> In re Allied-Signal, 891 F.2d at 967; see also In re Bulger, 710 F.3d at 47 (quoting In re Allied-Signal, 891 F. 2d at 970); In re United States, 441 F.3d 44, 67 (1st Cir. 2006) (same); Cigna Fire Underwriters Co., 86 F.3d at 1270 (same).

Docket No. 2073 at 23-24.

The Recusal Decision reflects my understanding that a judge should not recuse under § 455(a) if the established, high standard has not been met. I engaged in an intensive analysis of whether my recusal is required and explained in detail why a reasonable person could not question my impartiality. See id. at 64-101. I next explained why the interest of

heightened reliability in a capital case does not make my recusal necessary or appropriate. Id. at 101-04.

I then wrote:

> In view of the foregoing, I find that § 455(a) does not require my recusal. This conclusion also serves the interest of assuring that § 455 (a) is not abused, and does not appear to be abused, by a party to manipulate the system to replace an impartial judge with one it prefers.

Id. at 104 (citing In re Bulger, 710 F.3d at 47) (emphasis added). In essence, I found that the high standard for recusal under § 455(a) was not met and that declining to disqualify myself in the circumstances of this case would serve an important interest of justice repeatedly recognized by the First Circuit.

The government also claims that reconsideration and recusal is required in part because I misstated the facts concerning the indictment of James "Whitey" Bulger in a second case rather than the original case against him assigned to me. See Docket No. 2094 at 6-8. Once again, the government's argument is based on a mischaracterization of the Recusal Decision. I did not suggest that a reasonable person could believe that the government engaged in "judge-shopping" by charging Bulger in a second case. See Docket No. 2073 at 107-08. Rather, I wrote that: "I denied Bulger's request [to consolidate the second case with my case] in meaningful measure because my taking the case from [the judge in the second case] would have encouraged the perception that Bulger had successfully manipulated the system to select a judge he preferred." Id. at 107 n.38 (emphasis added).

In view of the foregoing, I continue to find that as my recusal is not justified under § 455(a), declining to disqualify myself also "serves the interest of assuring that § 455(a) is not abused, and does not appear to be abused, by a party to manipulate the system to replace an impartial judge with one it prefers." Docket No. 2073 at 104 (citing In re Bulger, 710 F.3d at 47).

***13** In addition, my recusal would be adverse to the interests of justice in other ways. As discussed in the Recusal Decision, the First Circuit has admonished judges not to use § 455(a) to avoid sitting on difficult or controversial cases, or to avoid appellate review. See Docket No. 2073 at 24 (citing Snyder, 235 F.3d at 45; In re United States, 666 F.2d at 694-95). Recusal in the circumstances of this case would be incompatible with these admonitions.

IV. CONCLUSION

As described earlier, "the granting of a motion for reconsideration is an extraordinary remedy which should be used sparingly." Palmer, 465 F.3d at 30. In this case, the standards for obtaining this extraordinary remedy have not been met. The government's Motion for Recusal was carefully considered and my reasons for finding it unmeritorious were explained in detail. In its two submissions concerning its Motion for Reconsideration, the government has not identified any new information helpful to its position or material to my reasoning in the Recusal Decision. There has been no intervening change of law. In interpreting and applying the § 455(a) standard, I did not make any error of law. I have nevertheless again considered the government's arguments for my recusal and again find that my disqualification pursuant to § 455(a) is not justified. Denying the request for my recusal is not unjust. Rather, doing so serves the interests of justice. Therefore, the request for my recusal is again being denied.

If the government wishes to continue to seek my recusal, it must petition the First Circuit for a writ of mandamus. I understand that "[t]he decision to file a petition for mandamus is not a local decision.... It requires the authorization of the Solicitor General of the United States." In re United States, 441 F.3d 44, 49 n.2 (1st Cir. 2006); see also United States Attorneys' Manual, Title 2: Appeals, § 2-2.124 ("The authorization of the Solicitor General is required for the filing of petitions in appellate courts for the issuance of extraordinary writs."). The government has had since September 8, 2015, to seek such approval. See Recusal Order at 113-14.

As explained in the Recusal Decision and reiterated earlier, the months that were devoted to the government's investigation and motion for my recusal disrupted the intensive schedule for submissions, hearings, and decisions in August and September 2015, to prepare for a retrial of this case in September 2015, before a judge the parties each acknowledge is actually impartial. Id. at 113. A new schedule cannot be established until the Motion for Recusal is finally resolved. Therefore, the government is being ordered to report, by December 1, 2015, at 12:00 noon, whether it

intends to petition the First Circuit for a writ of mandamus removing me from this case. If so, it shall propose a date by which it should be ordered to file its petition.

V. ORDER

In view of the foregoing, it is hereby ORDERED that:

1. The government's Motion for Reconsideration of the Court's Recusal Decision (Docket No. 2093) is ALLOWED to the extent that it requests reconsideration of the merits of the Motion for Recusal Under 28 U.S.C. § 455(a) (Docket No. 2024) and DENIED to the extent that it requests my recusal. The government's request for oral argument on this motion is also DENIED.

2. The government shall, by 12:00 noon on December 1, 2015, report whether it intends to petition the First Circuit for a writ of mandamus and, if so, propose a date by which it should be ordered to file the petition.

All Citations

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Footnotes

1 As indicated earlier, the First Circuit has generally required that a party moving for reconsideration "point to [ ] newly discovered evidence capable of altering [the original] conclusion." See Melendez, 622 F.3d at 56; see also Bennett, 507 F.3d at 35 (affirming denial of reconsideration where new "evidence would not have affected the bottom-line result").

2 On June 19, 2015, I described the July 27, 2014 panel as follows:

> I made some introductory remarks after [the film] and I said, you know, I'm a federal judge. I am not commenting on the movie or the points made in the movie, and you shouldn't infer that my presence here is an endorsement of anything in the movie or anything the other speakers are going to say.

June 19, 2015 Tr. at 6-7.

On June 26, 2015, after seeing my comments on the video of the part of the program that was recorded, I provided further information on my introductory remarks:

> Evidently, the beginning of the discussion which I moderated was not filmed. In any event, the video does not include any of my opening remarks in which I stated in effect that my participation in the program should not be construed as an expression of my views on particular points made in the movie or anything the panelists might say. There are, however, two references to that unrecorded statement in the video[.]

June 26, 2015 Tr. at 3-4.

3 As I wrote in the Recusal Decision, the notes include the following: " 'Disclaimer—MLW # [meaning not] endorsing commenting or [expressing] view (i.e., on DP).' 'DP' is an abbreviation for the death penalty." See Docket No. 2073, at 49 n.15 (alteration in original).

4 In its reply, the government asserts that it "has demonstrated not only that reconsideration is in the interests of justice, it has also satisfied all of the circumstances in which reconsideration is proper." Docket No. 2101 at 4. It does not explain why it believes it has shown an intervening change in law, but—except for cases specific to the standard for reconsideration—Zavala-Marti, Craven, and Canon 3(A) (4) are the only legal authority the government cites in its Reconsideration Memorandum that it did not cite in its Recusal Memorandum.

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5 As explained in the Recusal Decision, Sampson was not discussed at the July 27, 2014 dinner or program. See Docket No. 2073 at 6 (dinner), 7 (panel), 11-12 (panel), 43 ("supper or at any other time"), 47 (no discussion of Sampson with Mr. Paradise), 71 (panel), 86 (film and panel), 89 (no discussion of Sampson with Dr. Gilligan and others generally), 93 (Dr. Gilligan did not mention Sampson).

6 The government does not cite Zavala-Marti or Craven as support for a claim that I made an error of law by overlooking binding precedent. See Docket No. 2094 at 12-13; Docket No. 2101 at 3. In any event, because of the material differences between those decisions and the instant case, they do not justify reconsideration and reversal of the Recusal Decision because of an error of law.

7 The statements in this Memorandum regarding some elements of the applicable § 455(a) standards should not be construed as altering the more comprehensive description of the § 455(a) standards in the Recusal Decision.

8 At several points in the Recusal Decision, I discussed what a reasonable person would know as part of the analysis of whether a reasonable person could question my impartiality. For example, on page 71 I concluded that "a reasonable person could not question my impartiality based on my role concerning" the DeFriest panel. Docket No. 2073 at 71 (emphasis added). "This conclusion is confirmed," I wrote, "when the film, and my role in organizing and moderating the panel are, as they must be, viewed in the context of everything of which a reasonable, fully informed person would be aware." Id. at 72 (emphasis added).

9 Each federal judge takes an oath to, among other things, "faithfully and impartially discharge and perform all the duties incumbent upon [him] under the Constitution and laws of the United States." 28 U.S.C. § 453.

10 On June 17, 2015, I found that the government was correct in arguing that in a capital case, under both the Constitution and 18 U.S.C. § 3592, a mitigating factor must relate to either the defendant or his crime. See June 17, 2015 Tr. 87-97; June 26, 2015 Order, 54 (Docket No. 1992). This narrowed the definition I used in 2003, when, in deciding whether evidence of proportionality could be admissible, I defined "mitigating factor" more broadly. See United States v. Sampson, 335 F. Supp. 2d 166, 193-98 (D. Mass. 2004). On June 19, 2015, I learned that Sampson had the previous week decided to retain Dr. Gilligan as a possible replacement for another expert who had become unavailable. See Recusal Decision, Docket No. 2073 at 59, 84.

In requesting reconsideration and recusal, the government argues that a reasonable person could believe that I adopted the definition of mitigating factor it advocated to "narrow, if not preclude entirely, any general testimony by Dr. Gilligan (not directly linked to Sampson)," and, therefore, question my impartiality. Docket No. 2094 at 13. This argument was made briefly, among many others, in the government's original Motion for Recusal. See Docket No. 2025 at 26. As it is not new, it does not provide a proper basis for reconsideration. See Palmer, 465 F.3d at 30 ("[A] motion [for reconsideration] is normally not a promising vehicle for revisiting a party's case and rearguing theories previously advanced and rejected.").

It is also not meritorious. As stated earlier, I learned that Sampson wished to retain Dr. Gilligan as an expert witness on June 19, 2015. Two days earlier, I explained to the parties that in 2003, the definition of mitigating factor "did not, as I recall it, receive the focused attention it's now receiving." June 17, 2015 Tr. at 51 (Docket No. 2014). In 2003, "I didn't have this kind of briefing [ ] or the benefit of later decisions like the en banc decision in Gabrion, or the decision in Williams." Id. I explained my decision to narrow the definition to the parties that same day. A reasonable person could not believe that my decision on June 17, 2015 was motivated by information I did not receive until June 19, 2015.

11 The issue of "judge-shopping" is not new. It was raised in Sampson's opposition to the Motion for Recusal. See Docket No. 2041, at 4 (discussing concern that § 455 (a) could be used by a party to "manipulate the system for strategic reasons, perhaps to obtain a judge more to their liking" (quoting Sampson, 12 F. Supp. 3d

at 212)), 11 (discussing "the need to prevent parties from too easily obtaining the disqualification of a judge ... for strategic reasons" (quoting Sampson, 12 F. Supp. 3d at 205)). The government could have addressed this issue in its reply. Therefore, it is not a proper ground for finding reconsideration justified. See Allen, 573 F.3d at 53 ("Motions for reconsideration are not to be used as 'a vehicle for a party to ... advance arguments that could and should have been presented to the district court prior to judgment.' " (quoting Iverson, 452 F. 3d at 104)).

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451 F.Supp.2d 273, 276–77 (D.Mass. 2006)(While Court will construe *pro se* litigant's pleadings liberally, "the Court is not the plaintiff's advocate and will not 'conjure up implied allegations,' in order . . . to state an actionable claim." (internal citations and citation to quoted case omitted)). In addition, even assuming that Phaneuf did not receive copies of the motion to dismiss and the Court's order allowing the same, Phaneuf has a duty to periodically check the Court's docket. Under these circumstances, Phaneuf has failed to establish that the Court's dismissal of his claims was a manifest error of law. For that reason, is motion to re-open the case is ***denied.***

Conclusion

Plaintiff's motion to re-open this action (Docket No. 15), is ***denied***.

UNITED STATES of America

v.

Gary Lee SAMPSON

Cr. No. 01-10384-MLW

United States District Court,
D. Massachusetts.

Signed September 8, 2015

Background: Following affirmance of death sentence for two counts of carjacking resulting in death, 486 F.3d 13, defendant moved to vacate sentence. The District Court, 820 F.Supp.2d 151, granted the motion in part, based on juror misconduct. Government appealed. The Court of Appeals, 724 F.3d 150, dismissed the appeal and ordered a new sentencing hearing. Government moved for recusal.

Holdings: The District Court, Wolf, Senior Judge, held that:

(1) knowledgeable, reasonable person could not question impartiality of judge on basis that he had organized, promoted, and moderated panel discussing issues concerning prisons in context of particular prisoner that were of public concern;

(2) knowledgeable, reasonable person could not question impartiality of judge on basis that he had moderated panel discussing issues concerning prisons which included person who had been guest in his home and who had filed affidavit four years earlier in support of defendant;

(3) knowledgeable, reasonable person could not question impartiality of judge on basis that he had moderated panel discussing issues concerning prisons which included person who would testify in support of defendant; and

(4) recusal could not be allowed because of judge's association with defense expert who might testify.

Motion denied.

1. Judges ⇐53

A party may waive a ground for recusal when the issue is only one of an appearance of partiality. 28 U.S.C.A. §§ 455(a), 455(e).

2. Judges ⇐53

A party may not waive a ground for recusal when the issue is actual judicial bias or prejudice. 28 U.S.C.A. §§ 455(b), 455(e).

3. Judges ⇐49(1)

On a motion for recusal, issues of judicial impartiality must be analyzed from the perspective of an objective, knowledgeable member of the public, rather than

from the perspective of a person involved in or directly affected by the case; the test asks whether a reasonable person, fully informed of all of the facts, would doubt the judge's impartiality. 28 U.S.C.A. § 455(a).

4. Judges ⇐49(1)

Recusal is required even when the judge lacks actual knowledge of facts that would cause a reasonable person to question his impartiality if that reasonable person, knowing all of the circumstances, would expect the judge knew those facts. 28 U.S.C.A. § 455(a).

5. Judges ⇐51(4)

On a motion for recusal, it is presumed that a judge will impartially apply the law, as required by his or her oath. 28 U.S.C.A. § 455(a).

6. Judges ⇐49(1)

The "high threshold" for disqualification due to a reasonable question of judicial impartiality is necessary because the disqualification decision must reflect both the need to promote public confidence in judicial proceedings and also the need to prevent even the appearance that parties can too easily obtain the disqualification of an impartial judge to get a preferable judge; this standard also seeks to assure that judges will not misuse recusal to avoid presiding in difficult or controversial cases, or to avoid possible appellate review. 28 U.S.C.A. § 455(a).

7. Judges ⇐51(4)

The presiding judge, rather than another judge, has the duty to decide whether his disqualification is required. 28 U.S.C.A. § 455(a).

8. Judges ⇐49(1)

The standard for determining a motion for disqualification for partiality is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion, but rather in the mind of the reasonable man; therefore, the disqualification issues must be analyzed from the perspective of an objective, knowledgeable member of the public, rather than from the perspective of a person involved in, or directly affected by, the case. 28 U.S.C.A. § 455(a).

9. Judges ⇐49(1)

When deciding a recusal motion on a claim of lack of impartiality, a judge's actual lack of knowledge of potentially disqualifying facts is not the end of the inquiry; rather, recusal is required even when a judge lacks actual knowledge of the facts indicating his bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge. 28 U.S.C.A. § 455(a).

10. Judges ⇐51(4)

The conduct that has prompted the motion for recusal on the basis of a lack of impartiality is not to be considered in isolation; rather, the record as a whole must be considered. 28 U.S.C.A. § 455(a).

11. Judges ⇐51(4)

When the issue on a recusal motion on a claim of lack of impartiality involves the judge's participation in an educational program, matters that provide important context for the challenged aspects of the judge's remarks also must be considered; that context includes everything the judge said during the program, and the judge's role in other programs with other perspectives also is among the facts that should be considered in determining whether a reasonable person would question his impartiality. 28 U.S.C.A. § 455(a).

12. Judges ⇐51(4)

When deciding a motion to recuse on a claim of lack of impartiality, the district court is not to use the standard of mere suspicion. 28 U.S.C.A. § 455(a).

13. Judges ⇐51(4)

A judge should not grant a recusal motion simply because a claim of partiality has been given wide-spread publicity. 28 U.S.C.A. § 455(a).

14. Judges ⇐49(1)

Knowledgeable, reasonable person could not question impartiality of judge on basis that he had organized, promoted, and moderated panel discussing issues concerning prisons in context of particular prisoner that were of public concern, and thus recusal was not required; issues discussed by panel were related only at high level of generality to death penalty case over which judge presided, and he repeatedly stated that he was not expressing his own opinions and that he did not agree with everything panelists said; even if panel was one-sided, judge was equally available to address other litigation constituency. 28 U.S.C.A. § 455(a).

15. Judges ⇐49(1)

Knowledgeable, reasonable person could not question impartiality of judge on basis that he had moderated panel discussing issues concerning prisons which included person who had been guest in his home and who had filed affidavit four years earlier in support of defendant in capital murder case over which judge was presiding, and thus recusal was not required; judge never referenced or relied upon that affidavit and that person did not have any further involvement in case and judge repeatedly stated that he was not expressing his own opinions and that he did not agree with everything panelists said. 28 U.S.C.A. § 455(a).

16. Judges ⇐51(4)

Where a presentation concerns issues material to the disposition of litigation or involves parties, witnesses, or counsel in particular actions, the recusal calculus will differ, albeit without an applicable mechanical standard. 28 U.S.C.A. § 455(a).

17. Judges ⇐45

A judge's friendship with prospective witnesses does not require a judge's recusal; this is the general rule because it is recognized that the public understands that judges are usually longstanding members of the community in which they serve and although they will inevitably encounter witnesses with whom they, or people close to them, have had positive or negative experiences, judges can and will ordinarily ignore those experiences and decide the matters before them impartially. 28 U.S.C.A. § 455(a).

18. Judges ⇐49(1)

Knowledgeable, reasonable person could not question impartiality of judge on basis that he had moderated panel discussing issues concerning prisons which included person who would testify in support of defendant in capital murder case over which judge was presiding, and thus recusal was not required; although judge had characterized that person as one of world's leading experts on prisons, that praise was generous hyperbole common to moderators, panel discussion was not preview of testimony in case, judge's participation on panel was not endorsement of expert's views, and judge's role regarding expert's testimony was only to determine whether corrections officers had admissible testimony concerning defendant. 28 U.S.C.A. § 455(a).

19. Judges ⇐51(1)

Although the recusal statute requires full disclosure by the judge, it does not

contemplate or provide for discovery. 28 U.S.C.A. §§ 455(a), 455(e).

20. Judges ⇐51(4)

Interest of heightened reliability in capital case did not make recusal necessary or appropriate. 28 U.S.C.A. § 455(a).

21. Judges ⇐45, 46

Recusal could not be allowed because of judge's association with defense expert who could testify in capital case over which judge was presiding; reasonable, fully informed person would know that judge's association with lead prosecutor was greater than his association with expert, and recusal would have encouraged reasonable public perception that justice system could be manipulated to obtain preferable judge. 28 U.S.C.A. § 455(a).

22. Judges ⇐49(1)

Litigants are entitled to a judge who is, and to a reasonable person appears to be, impartial; however, they are not entitled to a judge of their own choosing. 28 U.S.C.A. § 455(a).

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MEMORANDUM AND ORDER REGARDING RECUSAL

WOLF, UNITED STATES DISTRICT JUDGE

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I. SUMMARY

The government has moved for my recusal because, on July 27, 2014, I moderated a panel that included Dr. James Gilligan. In June 2015, I learned that defendant Gary Sampson had recently decided to retain Dr. Gilligan as a potential expert witness at the retrial to determine Sampson's sentence in this capital case. I immediately began discussing with the parties whether there is a proper basis for my recusal under 28 U.S.C. § 455. The government acknowledges that despite my association with Dr. Gilligan, I remain impartial and that my recusal is not required by § 455(b)(1). The government argues, however, that a reasonable person could question my impartiality and, therefore, my recusal is necessary under § 455(a). It does not wish to waive that alleged ground for recusal as permitted by 28 U.S.C. § 455(e). Sampson opposes the government's motion for my disqualification.

For the reasons summarized below, and discussed in detail in this Memorandum, I find that a reasonable person aware of all the relevant facts could not question my impartiality. Therefore, the government's motion is being denied.

[1, 2] As discussed more fully in § II, infra, 28 U.S.C. § 455(a) requires that a judge "disqualify himself in any case in which his impartiality might reasonably be questioned." Because the issue is only one of an appearance of partiality, a party may waive a ground for recusal under § 455(a). See 28 U.S.C. § 455(e). In contrast, a party may not waive a ground for recusal under § 455(b), which requires disqualification in all cases in which the judge is actually biased or prejudiced. See 28 U.S.C. § 455(e).

[3, 4] Section 455(a) issues must be analyzed from the perspective of an objective, knowledgeable member of the public, rather than from the perspective of a person involved in or directly affected by the case. The test asks whether a reasonable person, fully informed of all of the facts, would doubt the judge's impartiality. Under § 455(a), recusal is required even when the judge lacks actual knowledge of facts that would cause a reasonable person to question his impartiality if that reasonable person, knowing all of the circumstances, would expect the judge knew those facts.

[5] With regard to § 455(a), the presumption is that a judge will impartially apply the law, as required by his or her oath. Therefore, the First Circuit has explained:

> § 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings .... [A] high threshold is required to satisfy this standard. Thus, under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

In re United States, 158 F.3d 26, 34 (1st Cir.1998) (emphasis added) (quoting Liteky v. United States, 510 U.S. 540, 557–58, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (Kennedy, J., concurring)).

[6] The "high threshold" for disqualification under § 455(a), id. is necessary because the disqualification decision must reflect both the need to promote public confidence in judicial proceedings and also the need to prevent even the appearance

that parties can too easily obtain the disqualification of an impartial judge to get a preferable judge. See In re Bulger, 710 F.3d 42, 47 (1st Cir.2013). This standard also seeks to assure that judges will not misuse § 455(a) to avoid presiding in difficult or controversial cases, or to avoid possible appellate review.

In this case, a fully informed, reasonable person would know the following. In 2004, I sentenced Sampson to death pursuant to a jury verdict. In affirming that sentence, the First Circuit wrote that I had "handled the case patiently and sensitively." United States v. Sampson, 486 F.3d 13, 51 (1st Cir.2007). It concluded that I had conducted the sentencing proceedings "fairly and with scrupulous attention to the process required by law." Id. at 52.

In 2011, I vacated Sampson's sentence because of juror misconduct. In 2013, the First Circuit affirmed that decision. This case was returned to me for a new proceeding to determine Sampson's sentence.

In July 2014, while on vacation, I helped organize and moderated a program on a film concerning a prisoner in Florida, The Life and Mind of Mark DeFriest, which had been produced by a young friend, Gabriel London. As discussed in § IV.A.1, infra, my role in the DeFriest program was not a manifestation of a special interest in issues relating to prisons and prisoners. Rather, it was an example of the wide range of programs I have organized or participated in, often with young people.

I arranged for Professor Alan Dershowitz, with whom I had taught at Harvard Law School, to be a panelist. I also agreed to Mr. London's request to include Dr. Gilligan on the panel. I did not then realize that Dr. Gilligan had, in 2010, filed an expert affidavit as part of a voluminous Amended Petition for a new sentencing trial for Sampson.[1] However, for the purpose of the motion for my recusal, I assume that a knowledgeable reasonable person could believe I knew that he had done that. However, such a person would also know that, as of July 2014, Dr. Gilligan had not been retained by Sampson to testify as an expert at the retrial.

The DeFriest film is about the experience of a particular prisoner. The film essentially seeks to make a case for DeFriest's parole. It depicts him as allegedly having a mental illness, possibly caused by brain damage, exacerbated by prolonged solitary confinement and violence in prison, including by prison guards. The film does not mention Sampson or this case. However, Sampson proposes to introduce at retrial evidence from several experts that he is mentally ill, has brain damage, and has been subject to violence in prison.

I invited Mr. London and Dr. Gilligan to have supper with my wife and me at our rental home before the film and program on July 27, 2014. In the approximately one hour that Dr. Gilligan, Mr. London, and I were together, the talk was almost exclusively social. I did, however, tell Mr. London and Dr. Gilligan about the organization of the panel, and asked Dr. Gilligan how he would like to be introduced. There was no discussion of Sampson, this case, or the death penalty.

On July 27, 2014, not realizing that Dr. Gilligan had filed an affidavit in 2010, I nevertheless wanted to ensure that my role in moderating the panel would not be misunderstood. Therefore, after the film was shown, I began the program by ex-

1. The Amended Petition, in which Dr. Gilligan was referenced, was 252 pages. It was supported by more than 1100 pages of exhibits. Dr. Gilligan's affidavit was, in effect, the 194th exhibit. I did not reference or rely upon Dr. Gilligan's affidavit in deciding to grant a new trial on the issue of juror misconduct to which Dr. Gilligan's affidavit did not relate.

plaining that I was a federal judge and my participation should not be construed as an endorsement of the case for DeFriest's parole, as an expression of my views on any of the issues raised by the film, or as a comment by me on any other case or issue, including the death penalty, as to which DeFriest makes a brief, pejorative reference in the film.

Dr. Gilligan spoke about how the United States prison and mental health systems are "broken." He expressed the view that violence in prisons, including violence by guards, is out of control and makes inmates more prone to violence. Dr. Gilligan also said that treatment in the right environment can end the pattern of violence by even prisoners with a long history of violence. He also criticized politicians for lacking the will to deal with these issues. Professor Dershowitz joined in that criticism. Neither Dr. Gilligan nor anyone else made any reference to Sampson or this case.

Before taking questions from the audience, I noted that the panelists had expressed "strong views." I added that I did not "mean to sound timid, but it was not my role as moderator to express my own." I stated that I did not necessarily agree with everything that Professor Dershowitz or Dr. Gilligan had said, but it was valuable for citizens in our democracy to hear about the issues being discussed.

I concluded the program by asking the audience to applaud Mr. London for making the film; the panelists, "Alan" and "Jim," who were "literally like the two world's leading experts on this issue"; and the other members of the audience for spending part of the i r vacation watching a film about a prisoner.

In October 2014, I discovered that Dr. Gilligan had filed an affidavit in 2010. In reviewing Sampson's budget submissions, I learned that Sampson did not plan to have Dr. Gilligan testify at the retrial. After consulting another judge, I decided that a reasonable person could not possibly question my impartiality because of my limited association with Dr. Gilligan in 2014. Therefore, I did not discuss the DeFriest program with the parties. Instead, after Sampson's counsel confirmed that they did not intend to call Dr. Gilligan as a witness, I continued to focus on hearing Sampson's motions to dismiss and addressing the innumerable other matters to be resolved before the retrial, which was then scheduled for February 2015.

I subsequently granted Sampson's motion for a continuance and rescheduled the retrial for September 16, 2015. On June 19, 2015, I learned that Sampson was seeking funding to have Dr. Gilligan testify as an expert in place of another witness who had become unavailable. I immediately disclosed and began discussing the implications of the DeFriest program with the parties. The following week, I obtained and provided to the parties the DeFriest film and a video of the panel that did not include all of my opening remarks, and conducted two hearings. The government agreed that I was not biased or prejudiced and, therefore, that my recusal was not required under § 455(b). It requested and received several weeks to investigate whether my recusal was required by § 455(a). The government asserted that it would never waive any such ground for recusal under § 455(e).

The government's investigation—by the First Assistant United States Attorney, the Federal Bureau of Investigation ("FBI"), the Internal Revenue Service, and the Massachusetts State Police—confirmed the facts that I had disclosed concerning the DeFriest program. On July 16, 2015, the government reiterated that it does not allege that I am actually biased or prejudiced. However, it moved for my re-

cusal under § 455(a), arguing that a reasonable person could question my impartiality. Sampson has opposed that motion.

After careful consideration, I find that a reasonable person fully informed of the relevant facts could not question my impartiality in this case based on my participation in the DeFriest program. Judges are encouraged to engage in activities to educate the public on issues relating to the administration of justice as long as those endeavors do not interfere with their duty to be, and reasonably appear to be, impartial. See Code of Conduct for United States Judges, Canon 4 & cmt. (U.S. Courts Mar. 2014) ("Code of Conduct "). The issues concerning prisons that are raised by the DeFriest film in the context of a particular prisoner are of public concern.

As discussed in § IV.A.1, a reasonable, fully informed person could not question my impartiality based on my role in the program concerning the DeFriest film. The film makes no reference to Sampson. The issues discussed in the film and by the panel are related to Sampson's case only at a high level of generality. I acted only as a moderator of the panel. I repeatedly stated that I was not expressing my own opinions on DeFriest, or any case or subject, and that I did not agree with everything the panelists said. In light of these facts, a reasonable person could not question my impartiality because I organized, promoted, and moderated the panel.

The additional fact that Dr. Gilligan had been previously involved in this case does not alter this conclusion, as explained in § IV.A.2. At the time of the program, I did not realize that Dr. Gilligan had filed an affidavit in connection with Sampson's Amended Petition for a new trial. However, assuming for present purposes that I was fully informed and knew that Dr. Gilligan had been involved in this case previously, based on the record in July 2014 I also would have known that he had not been retained to testify at the retrial. During the DeFriest program, Dr. Gilligan made general statements about prison violence that are similar to statements contained in his 2010 affidavit. However, he did not mention Sampson, either at my house or during the panel. Furthermore, I expressly stated during the program that my role was to moderate the discussion, and that my participation should not be construed as an expression of my views on any of the issues raised by the film, or as a comment on any other case or issue. In July 2014, a knowledgeable, reasonable person could not have questioned my impartiality because I moderated the DeFriest panel, which included a person who had, four years earlier, filed an affidavit and would have no further involvement in this case.

As explained in § IV.A.3, the fact that Dr. Gilligan has recently become a potential witness also does not alter this conclusion.[2] I am now acquainted with Dr. Gilligan, have participated in the DeFriest program with him, and have characterized him as one of the "two world's leading experts." While Dr. Gilligan and I are merely acquainted and are not friends, ordinarily even a judge's friendship with a prospective witness does not require a judge's recusal under § 455 (a). See United States v. Salemme, 164 F.Supp.2d 86, 92–93 (D.Mass.1998) ("Salemme II"); Unit-

2. I am, for present purposes, assuming that Dr. Gilligan will be a witness at retrial. However, as discussed in § III, infra, in response to a June 27, 2015 Order, Sampson's counsel did not "categorically commit[ ]" to calling him to testify. D.N. 2011 at 1. Rather, they have stated that "at this time Dr. Gilligan continues to be a witness Mr. Sampson may seek to present at the trial of this matter." Id.

ed States v. O'Brien, 18 F.Supp.3d 25, 34–35 (D.Mass.2014). Dr. Gilligan discussed some issues that may be of general relevance to mitigating factors on which Sampson intends to present evidence, but neither he nor anyone else discussed Sampson. Therefore, I did not receive a preview of what would have to be the heart of any admissible testimony that Dr. Gilligan may have—evidence about Sampson himself. Furthermore, during the program I stated that I did not necessarily agree with everything that Dr. Gilligan had said. A fully informed, reasonable person who is aware of these facts could not believe that, as a result of the DeFriest program, I "harbor [ ] an aversion, hostility, or disposition of a kind that a fair-minded person could not set aside" in any decision I must make concerning Dr. Gilligan's proposed testimony or any other matter. See United States v. Snyder, 235 F.3d 42, 48 (1st Cir.2000) (quoting Liteky, 510 U.S. at 557–58, 114 S.Ct. 1147 (Kennedy, J., concurring)). Rather, such a reasonable person would believe that I will continue to obey my oath to apply the law impartially in deciding matters in this case. Therefore, the "high threshold" for recusal under § 455(a) has not been met. See In re United States, 158 F.3d at 34 (quoting Liteky, 510 U.S. at 557–58, 114 S.Ct. 1147 (Kennedy, J., concurring)).

This conclusion is not altered by the need for heightened reliability in capital cases. As discussed in § IV.C, infra, the First Circuit, among others, has noted that vacating an unbiased judge's decisions is not likely to be appropriate even if it is later determined that there was a reasonable appearance that he was not impartial. See In re Bulger, 710 F.3d at 49 n. 3; In re Allied–Signal Inc., 891 F.2d 967, 972–73; In re Sch. Asbestos Litigation, 977 F.2d 764, 786–87 (3d Cir.1992). Accordingly, I conclude that my recusal is not required.

Recusal in these circumstances, where the government has not shown that a reasonable person could question my impartiality, could encourage the reasonable, and harmful, appearance that a party can successfully convert § 455(a) into a vehicle for judge shopping. As then-Judge Stephen Breyer explained:

> [In judging a motion for recusal under § 455(a),] the district court is not to use the standard of "Caesar's wife," the standard of mere suspicion. In re United States, 666 F.2d [690,] 695 n.*[(1st Cir. 1981)]. That is because the disqualification decision must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.

In re Allied–Signal, 891 F.2d at 970; see also In re Bulger, 710 F.3d at 47 ("The recusal standard must be more demanding" to prevent parties from judge shopping.).

Several aspects of the history of this case implicate this interest of not encouraging a reasonable public perception that parties will benefit by too easily obtaining the disqualification under § 455(a) of an admittedly impartial judge.

The government's inconsistent position regarding recusal issues in this case could suggest strategic motivations. A reasonable, fully informed person would know that my association with the lead prosecutor in this case, Zachary Hafer, is greater than my association with Dr. Gilligan. I attended Mr. Hafer's wedding, hosted him and his wife in my home, successfully recommended both of them for jobs (including Mr. Hafer's present position as a federal prosecutor), and publicly praised Mr. Haf-

er as having experience and qualities comparable to some of the finest prosecutors with whom I had worked. In 2010, when Mr. Hafer first appeared in this case, the government represented that my recusal was not required under § 455(a) because no reasonable person could question my impartiality and, in any event, waived any ground for my recusal under § 455(e).

It was not until I vacated Sampson's death sentence and the First Circuit affirmed that the government suggested I should recuse myself because of my association with Mr. Hafer. See United States v. Sampson, 12 F.Supp.3d 203, 212 (D.Mass. 2014). I declined to disqualify myself in part because recusal could encourage the reasonable perception that § 455(a) can be abused to have an impartial judge replaced for strategic reasons. Id.[3]

The government's present motion also implicates the interest of not encouraging a reasonable public perception that parties can succeed in using § 455(a) to engage in strategic judge-shopping. As described earlier, in finding that the 2003 trial to determine Sampson's sentence was fair, the First Circuit wrote that I "handled the case patiently and sensitively." Sampson, 486 F.3d at 51. It concluded that "the sentencing proceedings in this case were conducted fairly and with scrupulous attention to the process required by law." Id. at 52. As I said when I sentenced Sampson to death in 2003, providing that fair trial "required making decisions that I understand were painful to the victims' families, but which were legally necessary and appropriate." United States. v. Sampson, 300 F.Supp.2d 275, 277 (D.Mass.2004).

Nevertheless, at Sampson's sentencing in 2003, the father of one of Sampson's victims expressed "outrage" at my conduct of the trial. See Jan. 29, 2004 Tr. at 7 (D.N. 775). This outrage was reported to have been expressed again when I vacated Sampson's sentence because misconduct by a juror had violated Sampson's constitutional right to a fair trial. See O'Ryan Johnson and John Zaremba, Judge blasted for killer flip, Boston Herald, Oct. 21, 2011 (D.N. 2046-3 at 18-19). In 2014, after I discussed the possibility of ordering that Sampson's competency to stand trial be evaluated, the media reported that the same individual called my "actions 'infuriating' and said he was trying to take steps to have the judge removed from the Sampson case." See Chris Burrell, Families of murderer Gary Sampson's victims distressed by latest ruling from judge, The Milford Daily News, Mar. 19, 2014 (D.N. 2046-6 at 1-2). This desire for my disqualification has recently been reiterated. See Milton Valencia, Recusal call clouds Gary Sampson case, Boston Globe, August 31, 2015, at A1.[4]

3. In addition, as described in § IV.A.1, infra, in 2010, I participated in a program at the Boston Police Academy with John Wortmann, Jr., who was then the lead prosecutor in this case. In addition, in 2010, Mr. Wortmann served on a committee I chaired to plan a program on gang violence in Boston. Neither I, Mr. Wortmann and his colleagues, nor anyone else raised a question of whether these activities required my recusal under § 455(a) in this case or any other.

4. Relatives of Sampson's victims may understandably be frustrated by the complicated process that the law requires in every capital case and by the ponderous progress of this one. I recognize and respect the right of Sampson's victims to have and express their views, including to the media. Ordinarily, there would be no reason for me to reference criticism of my judicial conduct and I would not do so. However, such criticism is relevant to whether my recusal could encourage the reasonable perception that § 455(a) can be abused to replace an impartial judge with another that a party may prefer.

For the reasons described in detail in this Memorandum, after careful consideration I have concluded that no reasonable person could believe that as a result of my participation in the DeFriest panel I now have a "disposition of a kind that a fair-minded person could not put aside when judging" in this case. Snyder, 235 F.3d at 48 (quoting Liteky, 510 U.S. at 557–58, 114 S.Ct. 1147 (Kennedy, J., concurring)). Recusal in the current circumstances would be incompatible with my duty to be sensitive to the "need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking." In re Allied–Signal, 891 F.2d at 970. It would also be inconsistent with my duty not to misuse § 455(a) to avoid presiding in a difficult and controversial case.

The parties and I have devoted much of the past two years to preparing for what Sampson represents would have been the fastest retrial of a federal capital case in history. I had established an intensive schedule for submissions, hearings, and decisions in August and September 2015 to prepare for a September 16, 2015 retrial. More than two months have now been devoted to the government's investigation, the parties' briefing, and my deciding the government's motion for my recusal, rather than to resolving the many other pretrial issues that were on the agenda. Therefore, it will not be possible to begin the retrial as scheduled before a judge the parties each acknowledge is actually impartial.

While I have been obligated to decide the government's motion, I may not be the ultimate arbiter of its merit. I am providing the government until October 13, 2015, to state whether it intends to seek review of my decision by the First Circuit. It will not be possible to establish a new schedule for the retrial until the motion for my recusal is finally resolved.

II. THE APPLICABLE STANDARDS

As explained earlier, the government has repeatedly stated that it does not assert that I am actually biased or prejudiced as a result of my role in the program concerning The Life and Mind of Mark DeFriest. See, e.g., D.N. 2025 at 28 ("The government wishes to emphasize once again that it is not suggesting that the Court actually harbors any bias or prejudice based on the events of July 2014."). The government also does not contend that I have any personal knowledge of disputed evidentiary facts relating to Sampson as a result of my role in that program. Therefore, it has not moved for my disqualification under 28 U.S.C. § 455(b)(1), which prohibits a judge from presiding in a case if "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

Rather, the sole basis for the government's motion is 28 U.S.C. § 4 55 (a), which states that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Section 455(a) is based on the premise that in some circumstances "a reasonable person may question impartiality without the presence of any evidence that a judge is subjectively biased." In re Bulger, 710 F.3d at 46.

[7] It is the duty of the presiding judge, rather than another judge, to decide whether his disqualification is required by § 455(a). See In re Martinez–Catala, 129 F.3d 213, 220 (1st Cir.1997). As the First Circuit has explained:

> It might seem odd that recusal issues should be decided by the very judge whose recusal is in question. But there are other considerations at work, includ-

ing a desire for expedition and a concern to discourage judge shopping.

Id.; see also Salemme II, 164 F.Supp.2d at 92–93.

In 1989, then-Judge Stephen Breyer wrote with regard to a motion to disqualify under § 455(a) that:

> We draw our legal standards for review of a district judge's decision not to disqualify himself from [ ]In re United States, 666 F.2d [690]. We there held (1) that "a charge of partiality must be supported by a factual basis," (2) that "disqualification is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality," and (3) that this court of appeals will allow the district judge "a range of discretion" in making these determinations. Id. at 695 (emphasis in original). Only if the district court's decision to sit "cannot be defended as a rational conclusion supported by reasonable reading of the record" will we insist upon disqualification. Id. (emphasis added).

In re Allied–Signal, 891 F.2d 967, 970 (1st Cir.1989).

[8] The standard for determining a motion for disqualification under § 455(a) is "[w]hether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. § 455, but rather in the mind of the reasonable man." United States v. Voccola, 99 F.3d 37, 42 (1st Cir.1996) (quoting United States v. Cowden, 545 F.2d 257, 265 (1st Cir.1976)). Therefore, the disqualification issues must be analyzed from the perspective of "an objective, knowledgeable member of the public," rather than from the perspective of a person involved in, or directly affected by, the case. El Fenix de Puerto Rico v. M/Y JOHANNY, 36 F.3d 136, 141 (1st Cir.1994) (quoting In re United States, 666 F.2d at 695).

This test asks "whether a reasonable person, fully informed of all the facts, would doubt [the judge's] impartiality." In re United States, 158 F.3d at 31 (emphasis added); see also United States v. Vazquez–Botet, 532 F.3d 37, 48 (1st Cir.2008); El Fenix de Puerto Rico, 36 F.3d at 141; Home Placement Service, Inc. v. Providence Journal Co., 739 F.2d 671, 676 (1st Cir.1984). The proper perspective has been described as that of "the reasonable man on the street ... who knows the full facts even if those facts are not known on the street." Ricci v. Key Bancshares of Maine, Inc., 111 F.R.D. 369, 374 (D.Me.1986) (Aldrich, J., sitting by designation).

[9] In deciding a § 455(a) motion, a judge's actual lack of knowledge of potentially disqualifying facts is not the end of the inquiry. Rather," [u]nder section 455(a) [ ], recusal is required even when a judge lacks actual knowledge of the facts indicating his ... bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860–61, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) (quoting Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796, 802 (5th Cir.1986)).

[10] The conduct that has prompted the motion for recusal is not to be considered in isolation. Rather, the record as a whole must be considered. See In re Cargill, Inc., 66 F.3d 1256, 1260 (1st Cir.1995) (reviewing recusal in light of "careful perscrutation of the record"); In re Allied–Signal, 891 F.2d at 972 (noting role of clerks whose brothers were plaintiffs' counsel "in bringing Phase One to trial");

cf. United States v. Ayala–Vazquez, 751 F.3d 1, 23 (1st Cir.2014) ("[W]hen a defendant claims he has been prejudiced through a trial judge's interventions at trial, '[c]harges of partiality should be judged not on an isolated comment or two, but on the record as a whole[.]'" (quoting United States v. Polito, 856 F.2d 414, 418 (1st Cir.1998))).

[11] In addition, when, as here, the issue involves the judge's participation in an educational program, "matters that provide important context for the challenged aspects of the Judge's remarks" must also be considered. United States v. Pitera, 5 F.3d 624, 626–27 (2d Cir.1993); cf. In re Charges of Judicial Misconduct, 404 F.3d 688, 694 (2d Cir.2005) (discussing allegations of judicial misconduct against Circuit Judge). That context includes everything the judge said during the program. See Pitera, 5 F.3d at 626–27. The judge's role in other programs with other perspectives is also among the facts that should be considered in determining whether a reasonable person would question his impartiality. Id.; cf. In re Charges of Judicial Misconduct, 404 F.3d at 694; Judicial Conference of the United States, Committee on Codes of Conduct, Adv. Op. No. 105: Participation in Private Law-Related Training Programs (September 2010) ("When speaking to an audience that predominantly includes attorneys or clients on one side of litigation, a judge ... must be equally available to address the other litigation constituency.").

[12] In deciding a motion to recuse under § 455(a), "the district court is not to use the standard of 'Caesar's wife,' the standard of mere suspicion." In re Allied–Signal, 891 F.2d at 970; see also In re Bulger, 710 F.3d at 47 (same); Cigna Fire Underwriters Co. v. MacDonald & Johnson, Inc., 86 F.3d 1260, 1271 (1st Cir.1996) (same). Rather, as Justice Anthony Kennedy has written, and the First Circuit has reiterated:

> [Section] 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings. I think all would agree that a high threshold is required to satisfy this standard. Thus, under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

Liteky, 510 U.S. at 557–58, 114 S.Ct. 1147 (Kennedy, J., concurring in the judgment); see also Snyder, 235 F.3d at 48 (quoting Liteky, 510 U.S. at 557–58, 114 S.Ct. 1147 (Kennedy, J., concurring in the judgment)); In re United States, 158 F.3d at 34 (same). In essence, "the presumption is that a judge will put personal beliefs aside and rule according to the laws as enacted, as required by his or her oath." In re Aguinda, 241 F.3d 194, 204 (2d Cir.2001).[5] However, the First Circuit has explained that "doubts ordinarily should be resolved in favor of recusal." In re United States, 158 F.3d at 30.

The "high threshold" required for recusal under § 455(a) recognizes certain realities. Id. at 34 (quoting Liteky, 510 U.S. at 557–58, 114 S.Ct. 1147 (Kennedy, J., concurring)). As the First Circuit has stated, "[i]n the real world, recusal motions are sometimes driven more by litigation strat-

5. See also First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 988 (9th Cir.2000) ("[J]udges ... are presumed to be impartial and to discharge their ethical duties faithfully so as to avoid the appearance of impropriety.").

egies than by ethical concerns. [C]ourts cannot afford to spawn a public perception that lawyers and litigants will benefit by undertaking such machinations." In re Cargill, 66 F.3d at 1262–63. Therefore, as then-Judge Breyer wrote:

> [W]hen considering disqualification, the district court is not to use the standard of Caesar's wife, the standard of mere suspicion. This is because "the disqualification decision must reflect not only the need to secure public confidence through proceedings that appear to be impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.

In re Allied–Signal, 891 F.2d at 967; see also In re Bulger, 710 F.3d at 47 (quoting In re Allied–Signal, 891 F.2d at 970)); In re United States, 441 F.3d 44, 67 (1st Cir.2006) (same); Cigna Fire Underwriters Co., 86 F.3d at 1270 (same).

[13] In addition, because "litigants have an incentive to judge-shop, [ ] a judge should not grant a recusal motion simply because a claim of partiality has been given wide-spread publicity." In re Aguinda, 241 F.3d at 206; see also In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1309 (2d Cir.1988). Because it is important not to allow, or appear to allow:

> litigants or third parties [the power] to exercise a negative veto over the assignment of judges ... [the] inquiry cannot stop with the questions: have a number of people thought or said that a judge should not preside over a given case? has the judge's failure to recuse himself been a subject of unfavorable comment in the media? or, would the judge have avoided controversy and the need for appellate review if he had stepped aside?

In re United States, 666 F.2d at 694–95.

Moreover, § 4 55 (a) "should not be used by judges to avoid sitting on difficult or controversial cases." Snyder, 235 F.3d at 45 (quoting H.R. Rep. No. 1453, 93d Cong., 2d Sess., 1974 U.S. Code Congo & Admin. News 6351, 6355); see also Salemme II, 164 F.Supp.2d at 94.

Where, as here, the only basis for a motion for disqualification is § 455(a), the parties agree that the judge is actually impartial and the only issue is one of perception. Therefore, after full disclosure of the facts by the judge, on the record, the parties are permitted to waive a § 455(a) ground for recusal under 28 U.S.C. § 455(e), but not a ground under § 455(b), which addresses actual impediments to the judge's ability to preside impartially.[6] See, e.g., In re Cargill, 66 F.3d at 1261 ("The relevant statute, 28 U.S.C. § 4 55 (e), plainly contemplates that a party may waive an appearance-of-impropriety ground for disqualification."); Salemme II, 164 F.Supp.2d at 93–94. Such waivers permit a case to proceed without interruption or delay.

III. THE FACTS

The facts and other relevant matters that a fully informed, reasonable person would know include, but are not limited to, the following.[7]

6. 28 U.S.C. § 455(e) states: "No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

7. Additional relevant facts that such a person would know are included in the discussion of certain issues, infra.

A. The Pretrial Proceedings, Trial, and Sentencing

An indictment charging Sampson with two counts of carjacking resulting in the murders of Phillip McCloskey and Jonathan Rizzo, in violation of 18 U.S.C. § 2119, was returned on October 24, 2001. After he murdered Mr. McCloskey and Mr. Rizzo, Sampson also murdered Robert Whitney in New Hampshire. The case was randomly assigned to me. The Attorney General subsequently authorized the United States Attorney, Michael Sullivan, to seek the death penalty for each alleged offense.

Prior to trial, I denied Sampson's challenges to the constitutionality of the Federal Death Penalty Act, 18 U.S.C. § 3591 et seq. See United States v. Sampson, 245 F.Supp.2d 327 (D.Mass.2003); United States v. Sampson, 275 F.Supp.2d 49 (D.Mass.2003).

Sampson pled guilty on September 9, 2003. Jury selection as to sentencing began September 18, 2003, with potential jurors answering 77 questions in writing under oath. Individual questioning of jurors not excused based on their written responses was conducted over 16 days.

The trial to determine Sampson's sentence began on November 5, 2003. The government was represented by Assistant United States Attorneys Frank Gaziano, George Vien, and John Wortmann, Jr. The trial took six weeks. I made numerous rulings on issues not addressed by First Circuit precedent or, in some instances, by any other jurisprudence. See United States v. Sampson, 335 F.Supp.2d 166 (D.Mass.2004).

After deliberating for three days, the jury returned special findings and jury verdicts on December 23, 2003. As required under 18 U.S.C. § 3593(e) for a death sentence to be imposed, it unanimously found that Sampson should be executed.

I subsequently denied Sampson's motions for a new trial, among other things. See United States v. Sampson, 332 F.Supp.2d 325 (D.Mass.2004). The law concerning the motion for a new trial required me to consider the credibility of the witnesses and to express my evaluation of their testimony on certain matters. See, United States v. Wilkerson, 251 F.3d 273, 278 (1st Cir.2001). Based in part on a juror's post-verdict statement to the media, Sampson had argued that the jury evidently misunderstood my instructions in unanimously finding that Sampson did not have a mental illness when he murdered Mr. McCloskey and Mr. Rizzo. See Sampson, 332 F.Supp.2d at 330–31.[8] With regard to that claim, I wrote:

> Where, as here, the court is deciding a Rule 33 motion for a new trial, it may, and indeed must, consider its own evaluation of the credibility of the evidence and it may, in certain limited circumstances, grant a new trial if it disagrees with the jury's judgment. In this case, if the decision were to be made by the court rather than the jury, the court would have found that Sampson at least had a mental illness, bipolar disorder.

Id. (citations omitted). Nevertheless, concluding that reasonable people could differ on this issue, I denied the motion for a new trial. Id. at 330–32.

On January 29, 2004, I sentenced Sampson to be executed. Before imposing sentence, I said, among other things, to Sampson that:

8. Mental illness was one of 17 alleged mitigating factors that the jury was required to consider.

I have made my best effort to give you a fair trial. That required making decisions that were painful to the victims' families, but which were legally necessary and appropriate.

Id. at 277.

Sampson appealed his sentence. On May 7, 2007, the First Circuit affirmed the decision that he be executed. See Sampson, 486 F.3d at 52. Among other things, the First Circuit stated that, "[a]lthough this was an emotion-laden trial, the district court appears to have gone the extra mile to ensure the jury remained focused on the evidence and free from extraneous influences." Id. at 47. It also wrote that "[t]he district court handled the case patiently and sensitively." Id. at 51. The First Circuit concluded that: "We are persuaded that the sentencing proceedings in this case were conducted fairly and with scrupulous attention to the process required by law." Id. at 52.

B. The § 2255 Proceedings

On June 25, 2008, as required by 28 U.S.C. § 2255 and 18 U.S.C. § 3599, I appointed new counsel to represent Sampson in the post-conviction proceedings. Sampson filed a lengthy petition for a new trial under § 2255 on May 11, 2009.[9] That petition was amended on March 29, 2010 (the "Amended Petition").

The Amended Petition was 252 pages. It was supported by about 200 exhibits, totaling more than 1100 pages. The exhibits included at least 43 affidavits from fact witnesses and seven affidavits from six expert witnesses. An affidavit of Dr. Gilligan was, in effect, the 194th exhibit, preceded by 863 pages of other exhibits.[10] See D.N. 1035-200 (Dr. Gilligan's affidavit) (Under Seal); D.N. 1035-201 (appendices to the affidavit) (Under Seal).

The Amended Petition asserted approximately 21 grounds for a new trial. Dr. Gilligan's affidavit was filed in support of Claim III(E), which alleged that Sampson's original counsel were ineffective by failing to adequately investigate and present evidence that Sampson had been abused while in prison before committing the crimes at issue in this case. See D.N. 1040 at 103-36. Dr. Gilligan was mentioned or cited on some 15 of the 250 pages of the Amended Petition. See D.N. 1040 at 105, 106, 113, 115-117 & n.27, 119-22 & n.28, 125, 128-31. He was mentioned and cited in the affidavits of two other experts as well. See D.N. 1035-206 at 3 (Lebowitz Decl. part I) (Under Seal); D.N. 1035-207 at 32, 33, 45 (Lebowitz Decl. part II) (Under Seal); D.N. 1035208 at 7, 15, 16, 18, 23 (Woods Decl.) (Under Seal); D.N. 1035209, app. B at 1 (records reviewed by Dr. Woods) (Under Seal).

The government filed a 273-page motion for summary dismissal of the Amended Petition. See D.N. 1055 (Under Seal). Dr. Gilligan's name was included on 8 pages of

9. Dr. Gilligan was mentioned on one page in the original petition. See D.N. 969 at 61 (Under Seal). He was not mentioned in any exhibits. He was mentioned once in the government's motion to dismiss the original petition. See D.N. 1007-2 at 80 n.39. He was not mentioned in Sampson's opposition or the government's reply. See D.N. 1034 (Under Seal), 1050 (Under Seal).

Dr. Gilligan was mentioned on only one page of Sampson's budget requests during the several years of the § 2255 proceedings. Specifically, he was listed as a mental health professional who might be consulted. See D.N. 925 at 4 (Ex Parte and Under Seal). No Criminal Justice Act request for compensation was submitted by Dr. Gilligan or approved by me.

10. The Amended Petition included 193 numbered exhibits in Volumes I through IV, followed by lettered exhibits in Volume V. Dr. Gilligan's affidavit was identified as Exhibit A, making it, in effect, the 194th exhibit.

that submission. See id. at 90-91 n. 44, 106, 114, 116-19 & n.54, 56, 121. The government stated that "[t]here is no indication that Dr. Gilligan ever treated Sampson, had any professional dealings with him whatsoever (the government is aware of no records mentioning Gilligan), or even knew who he was before Sampson was arrested for his 2001 killing spree." Id. at 90-91 n.44.

Sampson filed a 72-page opposition to the government's motion for summary dismissal of the request for a new trial. Dr. Gilligan was mentioned twice. See D.N. 1060 at 2, 44-45 n. 32. In a footnote, Sampson stated that "Dr. Gilligan is an expert witness, not a fact witness." Id. at 44-45 n.32.[11]

The government filed a 50-page reply to Sampson's opposition. See D.N. 1066 (Under Seal). Dr. Gilligan was mentioned once. See id. at 3.

I held hearings on the motion to summarily dismiss the Amended Petition on August 30 and 31, and September 1, 2010. Dr. Gilligan was not mentioned in those hearings and, therefore, his name does not appear in the nearly 500 pages of transcripts of them.

On August 31, 2010, I denied the government's request to dismiss summarily Sampson's request for a new trial based on the alleged failure of three jurors to answer questions truthfully during the jury selection process. See United States v. Sampson, 820 F.Supp.2d 151, 160–61 (D.Mass.2011). The litigation then focused almost exclusively on the claim of juror misconduct, which was Claim IV of the Amended Petition. Id. I heard testimony on this claim on November 18, 2010, March 18, 2011, and August 8, 2011. Id. at 161.

I subsequently found that one juror had repeatedly lied, under oath, in response to important questions concerning her ability to be impartial in this case, and would have been d is qualified from serving if she had been honest or if her dishonesty had been discovered before the verdict in 2003. See id. at 181–97. Therefore, I vacated the death sentence. Id. at 202. In summarizing the reasons for this decision, I wrote:

> In essence, despite dedicated efforts by the parties and the court to assure the trial would be fair and the verdict final, it has now been proven that perjury by a juror resulted in a violation of Sampson's constitutional right to have the issue of whether he should live or die decided by 12 women and men who were each capable of deciding that most consequential question impartially.
>
> * * *
>
> It has now been proven that Sampson did not receive the fair process that the Constitution guarantees every man no matter how despicable his conduct.

Id. at 159–60.

On October 20, 2011, I also issued a second lengthy decision, granting the government's motion to summarily dismiss some of Sampson's claims for a new trial and denying it with regard to others. See United States v. Sampson, 820 F.Supp.2d 202 (D.Mass.2011). Among the claims I did not dismiss were the assertions that Sampson's original counsel were ineffective because they failed to adequately investigate

11. Sampson's § 2255 petitions, the government's motions for summary dismissal, Sampson's oppositions, and the government's reply concerning the original § 2255 petition were included in the record relating to Claim IV of Sampson's Amended Petition, which alleged that three jurors failed to answer questions truthfully during the jury selection process. See D. N. 1181. The court released the record to the public on April 15, 2011. It is nearly 3900 pages.

possible brain damage, id. at 242–45, and failed to request an evaluation of whether Sampson was competent to stand trial, id. at 245–47. Dr. Gilligan was not mentioned in that decision.

On May 10, 2012, over Sampson's objection, I exercised my discretion to authorize an immediate appeal of my decision vacating Sampson's death sentence. See United States v. Sampson, 58 F.Supp.3d 136 (D.Mass.2012).

On July 12, 2013, the First Circuit affirmed that decision. See United States v. Sampson, 724 F.3d 150 (1st Cir.2013). It wrote that, "[t]he district court's meticulous fact finding brought to light a litany of lies told by [the juror] during voir dire." Id. at 161. The First Circuit characterized this case as "a stark reminder of the consequences of juror dishonesty." Id. at 169. It held that "we conclude—as did the district court—that the death sentence must be vacated and a new penalty phase hearing undertaken." Id.

C. The Proceedings to Prepare for a Second Sentencing Hearing

On November 15, 2013, the First Circuit returned this case to the district court. On November 29, 2013, I ordered the parties to confer and report on various issues before a scheduling conference was held. See D.N. 1255. I explained that, in view of Sampson's claim that his original counsel were ineffective because they did not move to have his competency to stand trial evaluated in 2003, I intended to address whether it was appropriate to have his competency evaluated before the retrial. Id. at 3-4.

By 2013, two of the three prosecutors who had tried this case in 2003 had left the United States Attorney's office. On December 2, 2013, the government filed an assented-to motion to withdraw of the third, Mr. Wortmann, because of family health issues. See D.N. 1257. Mr. Wortmann had, in effect, been serving as lead counsel for the government in the § 2255 proceedings. As more fully described in § IV.A, infra, Mr. Wortmann and I had both spoken at a December 7, 2010 training program at the Boston Police Academy. See September 8, 2015 Order Concerning Evidence Referenced in Memorandum and Order Regarding Recusal, Ex. F ("Add'l Evid. Order"). Mr. Wortmann had also served on a committee that I chaired to develop a June 15, 2010 program, which I moderated, at the courthouse on "Rwanda, Darfur, and Youth Violence in Boston." See id. Ex. E.

The motion concerning Mr. Wortmann stated that "the government [would] continue to be represented by [Assistant United States Attorneys] Zachary Hafer and other members of [the United States Attorney's Office]." See D.N. 1257 at 1.

Mr. Hafer had filed an appearance in this case in 2010. On August 23, 2010, I issued a Memorandum and Order: describing my relationship with him; expressing the tentative view that my recusal was not required by 28 U.S.C. § 455(a), as interpreted in In re Allied-Signal; and requesting the advice of the parties on this issue. See Sampson, 12 F.Supp.3d 203 (D.Mass. 2014); D.N. 1070, 1075-1. As I wrote in 2010:

> Mr. Hafer is married to [NAME REDACTED]. [HIS WIFE'S] father, [NAME REDACTED], and I practiced law together in the firm of Sullivan and Worcester from 1977 to 1981. We have remained friends. I met Mr. Hafer in 2002, when I spoke at a class at the University of Virginia Law School in which [HIS WIFE] and he were enrolled. In about 2003 or 2004, at the invitation of the [WIFE'S] family, I attended Mr. Hafer's wedding, and my

wife and I undoubtedly gave the couple a gift. I have also occasionally given [HIS WIFE] and Mr. Hafer, among many others, career advice, including concerning their respective interests in becoming prosecutors. In response to a question from the United States Attorney and/or one of his Assistants, I recommended Mr. Hafer's appointment as an Assistant United States Attorney. Pursuant to my usual practice as Chief Judge, I presided at the ceremony at which Mr. Hafer was sworn-in as an Assistant United States Attorney. I may have also supported [HIS WIFE'S] appointment as an Assistant District Attorney [IN MASSACHUSETTS], following her service as a prosecutor in Manhattan. In addition, in about June, 2010, I recommended [MR. HAFER'S WIFE] for a part-time teaching position at [A LOCAL LAW SCHOOL] and am informed that she has been given that position.

D.N. 1075-1 at 1-2 (redactions in original); Sampson, 12 F.Supp.3d at 209–10.

When I swore Mr. Hafer in as an Assistant United States Attorney, I said, in part, that he had "qualities that characterize[d] some of the fine prosecutors I worked with, like Bob Mueller, the present Director of the Federal Bureau of Investigation, Bob Cordy, now a distinguished judge of the Massachusetts Supreme Judicial Court ..., and John Pappalardo, a former acting United States Attorney ..." See Add'l Evid. Order, Ex. G at 8-9. In January 2014, Mr. Hafer reminded me that he and his wife had also come to my home in about 2008 to discuss career opportunities for his wife. See Sampson, 12 F.Supp.3d at 210 n. 4.

On August 23, 2010, the day I issued my Memorandum and Order concerning Mr. Hafer, the government filed a written response, stating that: it did not believe that my recusal for actual bias or prejudice was required under 28 U.S.C. § 455(b); it did not believe that a reasonable person could question my impartiality, and, therefore, it did not believe that recusal was justified under § 455(a); and, in any event, it waived any objection under § 455(e). See D.N. 1073. On August 25, 2010, Sampson responded by agreeing with the views stated by the government and also waiving any objection to my participation under § 455(e). See D.N. 1077.

Nevertheless, on December 7, 2013, the government suggested that I should recuse myself, in part because Mr. Hafer had become the lead prosecutor and in part because it interpreted In re Bulger as substantially expanding the circumstances in which recusal is required under § 455(a). See D.N. 1263 at 7-9; see also Sampson, 12 F.Supp.3d at 204–05.

On January 21, 2014, after discussion with counsel, I explained my view that In re Bulger did not alter the jurisprudence concerning § 455 (a), a reasonable person would not question my impartiality based on my association with Mr. Hafer, and my recusal was not justified. See Sampson, 12 F.Supp.3d at 205–13. However, because these views were developed without the benefit of briefing by the parties, I offered them an opportunity to file a motion seeking my recusal. Id. at 212–13. Neither party did so. See id. at 213 n. 7.

As requested by the government, pursuant to § 455(e), Sampson, through counsel and personally, waived any objection to my continued participation in this case based on my relationship with Mr. Hafer. See D.N. 1077; D.N. 1268 at 2-4; D.N. 1345-1; D.N. 1758 at 9-12.

After deciding that my recusal was not justified, and receiving an affidavit from

Mr. Wortmann, I allowed him to withdraw his appearance. See D.N. 1293.[12]

On January 15, 2014, Sampson's counsel filed, ex parte and under seal, a 54-page Proposed Pretrial Litigation Budget, with more than 40 pages of exhibits. See D.N. 1271 (Under Seal). The proposed budget requested authority to pay about 12 experts, and mitigation specialists and attorneys as well. On page 46, the proposed budget requested five hours of funding for Dr. Gilligan to consult with another expert Sampson intended to use at trial instead of Dr. Gilligan. See D.N. 2001-1 at 4. As explained earlier, in 2010 Sampson had stated that Dr. Gilligan was solely an expert witness and, therefore, it was necessary for the court to approve funding for his services pursuant to 18 U.S.C. § 3599(f) and (g). In the January 15, 2014 submission, he was also characterized as a fact witness. Id. Dr. Gilligan was mentioned on three other pages of the proposed budget. See D.N. 1271 at 44 (stating that "Dr. Gilligan is a prison trauma expert [from] the 2255 proceeding who gave a supporting declaration"), 45 (stating that another doctor will "build upon" Dr. Gilligan's work"), 52 (including, in a chart, the number of hours requested for Dr. Gilligan, his hourly rate, and the total cost to retain him).

At a January 21, 2014 conference with Sampson's counsel, I declined to approve the proposed budget because it was too general. See D.N. 1295, at 11 (Ex Parte and Under Seal); see also D.N. 1275, Instead, I ordered that proposed budgets be provided for the case in phases. Dr. Gilligan was not mentioned at that conference.

In early 2014, the government requested a February 17, 2015 date for the commencement of the retrial to determine Sampson's sentence. Sampson's counsel argued that it would be impossible for them to be prepared for trial by that date. They asserted that it was premature to set any trial date and requested, in any event, that the retrial not begin before the fall of 2015. On March 18, 2014, I scheduled the retrial to begin on February 17, 2015, and stated that I would extend that date if despite industrious efforts it would not be fair or feasible to begin then. See United States v. Sampson, 68 F.Supp.3d 233, 236–37 (D.Mass.2014); D.N. 1329 at 89.

At the March 18, 2014 hearing, I also discussed the possibility of ordering that Sampson's competency to stand trial be evaluated promptly in order to get the issue, which had been raised in the Amended Petition for a new trial, resolved far in advance of the February 2015 trial date.

In 2014, I issued many orders, received many submissions, and conducted many hearings with a view toward preparing the case for a retrial to determine Sampson's sentence as soon as reasonably possible.

Sampson made so many lengthy filings that the government in November 2014 moved to deny his counsel fees for "the unnecessary and meritless motions and pleadings they have filed since the commencement of this retrial." See D.N. 1633 at 1. More specifically, the government wrote:

> To date, Sampson's unreasonable filings have included, but are not limited to: (i) over 25,000 pages of "constitutional" motions, memoranda, and attachments, comprising over 850 entries on the docket, in which Sampson has comprehensively briefed settled issues of law and filled the docket with irrelevant documents; (ii) over 400 pages of legal memo-

12. I subsequently met with Mr. Wortmann. We did not discuss the Sampson case. However, he told me about a book his son had written and I bought a copy.

randa, accompanied by many hundreds more pages in attachments, in which Sampson has claimed he does not have enough time to meet court-imposed deadlines; and (iii) motions unsupported by any factual or legal basis, often characterized by extensive "cutting and pasting" from prior filings, such as Sampson's motion to disqualify government team members.

Id. at 2. On June 23, 2015, Mr. Hafer correctly characterized the record of this case as "beyond voluminous." See D.N. 1984 at 13.

Among Sampson's lengthy submissions was an April 11, 2014 52 page proposed budget, with about 30 pages of exhibits, which, on page 50, mentioned Dr. Gilligan once. See D.N. 2001-1 at 4. The proposal indicated that Dr. Gilligan would not be a witness at the retrial, stating that, "Dr. [A] will require some time to consult with Dr. Gilligan to build upon his work...." Id.

On May 28, 2014, Sampson filed a motion to disqualify the government trial team, arguing, in part, that the prosecutors were impermissibly aware of information presented in the Amended Petition for a new trial, which, as explained earlier, was 250 pages and supported by more than 1100 pages of exhibits. Many investigators and experts were referenced in Sampson's 19-page memorandum, which was supported by approximately 14 pages of exhibits. See D.N. 1357 and 1357-1. Dr. Gilligan was mentioned once in the Memorandum, see D.N. 1357 at 4, and once in the exhibits attached to it, see D.N. 1357-1 at 7.

On June 6, 2014, I issued four orders memorializing decisions I made orally at a June 4, 2014 hearing. See D.N. 1362, 1363, 1364, 1365. Three of them related to my decision to direct the Bureau of Prisons to evaluate Sampson's competency to stand trial. See D.N. 1362, 1364, 1365. In one Order I directed that testimony, reports, and/or affidavits of eight experts in the 2003 trial and § 2255 proceedings, and other information, be provided to the Bureau of Prisons Examiner. See D.N. 1365. Dr. Gilligan's affidavit was among those referenced. Id. at 3.

A review of all of the criminal and civil cases assigned to me indicates that from May 1 to June 30, 2014, I issued about 304 orders. Fifteen of them were orders in this case.

D. The July 27, 2014 Program

On June 12, 2014, I went to Los Angeles, California for the birth of my grandson. While there, my wife and I met with good friends from Washington, D.C., who we rarely saw, Paul London and Paula Stern. They were with their son Gabriel London and his family. Mr. London's mother had by email invited us, among many others, to the Los Angeles premiere of Mr. London's film about a state prisoner in Florida, The Life and Mind of Mark DeFriest. In response to a mass e-mail sent by Mr. London's parents, on December 26, 2011, I had contributed $50 to a "Kickstarter" campaign for the film.[13] I did not, however, attend the premier.

Mr. London was excited about the premier and told me that he was trying to find additional venues to show his film. I said that if he could arrange a showing at the non-profit Martha's Vineyard Film Society in July, while I would be there on vacation, I would ask my friends Harvard

13. I have also contributed to Kickstarter campaigns for films by or about other young friends. For example, I contributed $50 to Rebecca Parrish's Radical Grace. I also contributed $100 to Lost Child: Sayon's Journey, which is a film about Sayon Soeun, a former child soldier in Cambodia whose wedding I performed.

Law School Professors Alan Dershowitz and Charles Ogletree to participate in a discussion I would moderate after the film.

Mr. London wrote to the head of the Film Society, Richard Paradise. I successfully encouraged him to show the film on July 27, 2014. I also arranged for Professor Dershowitz to participate on the panel following it. In addition, I contacted the local newspaper, The Vineyard Gazette, which interviewed Mr. London and published an article describing the panel that would follow the film, including a reference to me as Judge Mark Wolf. See D. N. 2026-6. I also permitted the Film Society to use my picture and biography to publicize the July 27, 2014 event. See D.N. 2026-5.

When Professor Ogletree proved to be unavailable, Mr. London asked me if he could invite another family friend, Dr. Gilligan, to participate in the program following the film. I did not realize that Dr. Gilligan had filed an affidavit in this case. After consulting Professor Dershowitz, I agreed to Mr. London's request.

I invited Mr. London and Dr. Gilligan to join my wife and me for a light supper at our rental house before the July 27, 2014 program. We were together there for about an hour. The conversation was primarily social. We also briefly discussed the organization of the panel and I asked Dr. Gilligan how he would like to be introduced.

Dr. Gilligan was interviewed by the government on July 13, 2015. He reported the following, among other things. On July 27, 2014, he recalled he had filed an affidavit on behalf of Sampson in about 2010, and knew that I was then the presiding judge. D.N. 2026-2 at 26-28. He had not been retained to do any further work in this case and did not know he would become involved in it again. Id. at 26, 34. Dr. Gilligan did not tell Mr. London or me of his prior involvement. Id. at 28; D.N. 2026-1 at 65-66. He did not know if I was still involved in this case. D.N. 2026-2 at 28.

Dr. Gilligan stated this case was not discussed by us at supper or at any other time. Id. at 28, 52-53. Mr. London confirmed this in his interview with the government on July 8, 2015. See D.N. 2026-1 at 69, 86, 99-100. It is correct that I did not discuss this case with Dr. Gilligan at supper or at any other time. Nor did we discuss the death penalty, which is not the subject of Mr. London's film.[14]

The Life and Mind of Mark DeFriest is about an inmate in the Florida State prison system. It was described on the Film Society website, in pertinent part, as follow:

> The Life and Mind of Mark DeFriest is a hybrid of documentary film and animation. The film | | chronicle[s] Mark's life—from his childhood through a modern day parole story—while the animation reveal[s] the hyperactive world of h is mind—from planning ingenious escapes to the sci-fi prison universe he in habits.
>
> Mark DeFriest's life is living history. At age 19, his original sentence was for a nonviolent property crime, but because of additional punishment for escapes, he has spent his entire adult life behind

14. In their interviews with the government, Dr. Gilligan, Mr. London, and Mr. Paradise each made some statements which were, in some respects, inaccurate. However, their descriptions of relevant matters are consistent with the facts I disclosed in June 2015, as amplified in this Memorandum. I have not attempted to correct every inaccuracy in their statements. I am citing accurate information they provided, and correcting some in accuracies, such as the statements by Mr. London and Mr. Paradise that I did not communicate with The Vineyard Gazette about the film.

bars. DeFriest has survived 31 years in prison, most of it in longterm solitary confinement in a custom cell above the electric chair at Florida State Prison. He has been raped, beaten, shot and basically left for dead, but he has somehow lived to tell the tale. When he was sent to prison in 1981, five out of six doctors declared that he was mentally incompetent to be sentenced. They warned the judges that Mark couldn't learn better behavior and needed treatment. Instead, he was allowed to plead guilty, even at one point to a Life Sentence. The documentary brings this story to life.

See D.N. 2026-5.

In his interview with the government, Mr. London explained that:

> [T]his film has always been about the life of a single prisoner. So, I've always maintained that it is not purely a human rights film.... We've been excluded from many grants because it was about an individual and not about a topic.... [A] lot of what my work has been tied up in is in the storytelling of an individual. But knowing full well that individual was in this dark prison world.
>
> * * *
>
> [S]omebody in one of the Boston articles wrote that the film was about guard abuse and it is just so not about guard abuse .... Just like it is not about prisoner rape. It is not about solitary confinement. It is not about mental illness behind bars. It is about all those things in a way, because, it is his life, but, that's it.

See D.N. 2026-1 at 39-40.

I watched the film for the first time shortly before July 27, 2014. I recognized that the film sought to make the case for DeFriest's parole and I did not want my involvement in the panel to appear to be an endorsement of that effort. Therefore, as I was driving Mr. London from my home, I told him that in moderating the panel I would explain that my participation should not be construed as an endorsement of his advocacy for DeFriest.

I also recognized that the film dealt with issues that emerge in my cases, including this one. For example, I mediated and, in 2012, approved a settlement in a case concerning the effects of prolonged solitary confinement on the mentally ill. See Disability Law Center v. Mass. Dep't of Correction, 960 F.Supp.2d 271 (D.Mass.2012). Similarly, in 1995 and 1996, I tried a case in which the jury found that officers of the New Bedford, Massachusetts Police Department had beaten a prisoner to death and then tried to cover up their culpability. See Gonsalves v. City of New Bedford, 939 F.Supp. 921 (D.Mass.1996); Gonsalves v. City of New Bedford, 939 F.Supp. 915 (D.Mass.1996).

In addition, I recognized that issues of competence and mental illness have been raised in this case. Therefore, I told Mr. London that I would also make clear that my participation in the program should not be interpreted as a comment by me on any other case or as an expression of my views on any of the issues raised in DeFriest's case.

As Mr. London said when interviewed by the government, I did not discuss with him Gary Sampson, this case, the question of competency to stand trial, or the death penalty. See D.N. 2026-1 at 69, 85-88, 99-100. After being provided information by the First Assistant United States Attorney concerning the Sampson case, Mr. London said that I told him I wanted to be cautious because "there is a case that I'm dealing with where there's issues of abuse, and maybe head injuries, maybe something like that." Id. at 91-92 (internal quotation marks omitted). I question whether this is correct. I believe that I told Mr.

London that I was presiding in a capital case, but that I did not mention issues of abuse or head injuries. I know that I did not discuss Sampson or this case with Mr. London. However, any differences in our recollections are not material. I did, as Mr. London told the government, communicate to him that I wanted to assure that it did not appear that my participation on the panel concerning his film was a comment on a case in which I was presiding, meaning this case, without referencing it by name.

Similarly, as Mr. Paradise, the Director of the Film Society, told the government, I did not mention or discuss Sampson or this case with him. See D.N. 2026-3 at 68. I did, however, inform Mr. Paradise that I would tell the audience that by moderating the panel I was not endorsing the case for DeFriest's parole or commenting on any other case. Id. at 35-36. I believe Mr. Paradise was correct when he told the government that I let him know that I did not want my participation to involve, or appear to involve, a comment by me on any of my cases. Id. at 36. In doing so, I had in mind this case, as well as others.

Mr. London and Mr. Paradise each expressed interest in having the panel videotaped. I had proposed doing a panel to help Mr. London present his film to a limited audience. I had not anticipated being involved in anything else. Therefore, I told Mr. London and Mr. Paradise that the panel could be filmed, but the video could not be used for any purpose without my permission. They agreed to that condition.

As I recall, about 100 to 175 people saw the film. Some, but not all, of the people who watched the film stayed for the panel. Some members of the audience were friends invited by my wife and me. I know that Professor Dershowitz and his wife also invited some of their friends, who attended.

Mr. Paradise regarded the well-known Professor Dershowitz as the "marquee" attraction—the "bigger name." See D.N. 2026-3 at 47-48. In his view, neither Dr. Gilligan nor I carried much "marketability." Id. at 52. In any event, the proceeds of the sale of tickets at $9 and $12 each went to the non-profit Film Society. My wife and I paid for her ticket. Although I was not required to buy a ticket, my wife and I joined the Film Society for the first time, so my participation in the event cost us about $112.

On July 27, 2015, I drove Mr. London to the Film Society. I saw some of my friends, including a Senior United States District Judge who is not from Massachusetts. She was accompanied by a United States District Judge I had not met before.

I sat with my wife to watch the film. Dr. Gilligan did not sit with us.

As described earlier, Mr. London's movie is about a man who was sentenced to serve four years in Florida for a nonviolent property crime, but because of multiple escapes has been in prison for decades. Unless paroled, he will be incarcerated for the rest of his life. The film is not about Sampson, the evidence concerning him in this case, or the death penalty. However, DeFriest does speak briefly about prisoners on death row, and characterizes executed individuals as being "barbecued." See Add'l Evid. Order, Ex. D, at about 1 hr., 24 min.

The film includes discussion of whether DeFriest was competent to be sentenced. It also explores whether he is mentally ill, and how prolonged solitary confinement and violence in prison, including by prison guards, might have affected any mental illness he may have. It also includes some discussion of whether Mr. DeFriest had a childhood brain injury.

Mr. Paradise made some remarks before the film was shown. He may also have spoken briefly after the film. As moderator, I opened the discussion.

The interns operating the camera did not film the beginning of my remarks. In the unrecorded portion, I stated that I was a federal judge and my participation should not be construed as an endorsement of the case for DeFriest's parole, or an expression of my views on any of the issues raised in the film, or as a comment on any other case or issue, including the death penalty.[15] Although the film is not about Sampson or the death penalty, I wanted to assure that nobody construed my participation in the panel as an endorsement of DeFriest's brief, pejorative reference to the death penalty.[16] Mr. London confirmed that I made such a disclaimer. See D.N. 2026-1 at 51 (Mr. London stating that Judge Wolf started the panel discussion and "mentioned that he was appearing, but not endorsing the material in the film"); see also D.N. 2026-3 at 3536 (Mr. Paradise stating Judge Wolf said "'I'm not endorsing any particular viewpoint'"); D.N. 2026-2 at 22 (Dr. Gilligan stating that Judge Wolf "said it to the audience that he was the moderator, he was not presenting his own opinions about the film").

At the beginning of the remaining approximately 50 minutes of the panel that was filmed, I stated that, "as I said, without taking a position with regard to Mark DeFriest or any particular point raised in the movie, it's really commendable that Gabriel has done this movie." See Add'l Evid. Order, Ex. B.

After introducing Professor Dershowitz and Dr. Gilligan, I asked them what, if anything, was significant about the film. Professor Dershowitz responded that it was important because it demonstrated that many sentences are too long, and that prison sentences often result in inmates being raped and beaten. See Add'l Evid. Order, Ex. A.

Dr. Gilligan stated that the film was "extremely important" because it illustrates that our nation's mental health system is broken, our prison system is broken, and both need fundamental repairs. Id. at 6. Among other things, Dr. Gilligan asserted that violence in prison is "out of control" and "correction officers are committing murders of inmates for which they are very seldom prosecuted or convicted, often because of the wall of silence." Id. at 6-7. He added that:

> I've worked with the most violent people our society produces and found that these men who have been repeatedly violent, and I mean homicidally violent, if they're put in the right kind of environment and offered treatment, education and are not subjected to violence themselves, completely stop their pattern of violence, despite a lifetime of it." Id. at 7-8. Dr. Gilligan then stated that "we have lacked ... the political will to make the fundamental changes in our prison system and our mental health system....

Id. at 8.

Before soliciting questions from the audience, I said:

15. While I was on vacation in July 2015, my staff found the 2 pages of notes I made as talking points for the film. See Add'l Evid. Order Ex. C. Point 1 states "Disclaimer—MLW ≠ [meaning "not"] endorsing commenting or [expressing] view (i.e., on DP)." "DP" is an abbreviation for the death penalty.

16. In it s submission, the government does not argue that my participation in the program would be regarded reasonably, or even unreasonably, as an expression of a personal view on capital punishment.

> You're hearing [ ] the expression of strong views. I don't mean to sound timid on this. It's not my role to really express my own, except to say that I think all of this is extremely valuable to expose judges, who are encouraged to do things that will enhance the understanding of the administration of justice.
>
> I do not necessarily agree with every single thing that Alan said or every single thing that Jim said. I will say that these are issues that emerge in our cases, and how they're dealt with is substantially determined by the democratic process.

Id. at 11.

In the question and answer period, both Professor Dershowitz and Dr. Gilligan discussed the effect of politics on policies concerning the administration of justice, particularly the fear of elected officials of being labelled "soft on crime." Professor Dershowitz said, in part:

> [T]he fault is with liberal Democrats. Let there be no mistake about that. We know where the conservatives are going to vote. The fault is with liberal Democrats. Liberal Democrats don't have the guts to stand up to the law-and-order people. They are the worst.

Id., Ex. B at 2-3.

In response to another question, Dr. Gilligan said:

> I spoke earlier about how much of the violence in prisons is committed by correction officers or prison guards, but I didn't mean by that to damn them all. Some of the most dedicated and humane people I I've found have also been prison guards, so there's a range among them.
>
> The problem I think in our prisons in general is that there is kind of a subculture of violence that prison officers are subjected to, whether or not they personally, you know, on their own, would commit serious violence. We've done a lot of research on this, and we find that prison officers themselves, if you talk to them individually, usually have much more humane attitudes than they think their fellow officers do.

Id. at 8.

Dr. Gilligan also noted that the United States is "the only Western democracy that still has the death penalty. That's where we have both legal and illegal violence in our prison system." See Add'l Evid. Order, Ex. A at 7.

At the end of the program, I encouraged the audience to applaud: Mr. London for making the film; the panelists, "Alan and Jim," who were "literally, like the two world's leading experts on this issue"; and the other members of the audience for spending part of their vacation watching a film about a prisoner, because "if people are ignorant of the issues raised in this film, there's no way that our democracy on this issue or these range of issues can properly function." Id. at 14.

After the program, I spoke briefly with the two federal judges who had come to the event. Understanding that judges are not permitted to participate in partisan political activity, and having Professor Dershowitz's criticism of liberal Democrats primarily in mind, I said to them, rhetorically rather than because of any serious concern, that I hoped that my participation in the program would not be regarded as improper. They each confirmed that it would not. [17]

17. On June 19, 2015, immediately after I learned that Sampson had recently decided he wanted to retain Dr. Gilligan as an expert witness, I told the parties that I said to the other two judges, "I hope ... certainly nothing I said or did could be regarded as calling

On July 16, 2015, in response to a question from the government, Mr. Paradise said that he did not find it "strange" to have a federal judge on a panel concerning the DeFriest film. See D.N. 2026-3 at 70. He added that he "did not feel like [Judge Wolf] had a preconceived notion of what ... the film was about, or that he was either pro or anti what was in the film." See id. Mr. Paradise also said that he thought "the Judge ... was more neutral and more balanced" than the panelists, particularly Professor Dershowitz. Id. at 70-71.

E. The Matters Following the July 27, 2014 Panel

In mid-August 2014, Mr. London emailed me that he had made a five-minute excerpt of the panel. The excerpt began with my asking Professor Dershowitz if the film was "significant." The remainder was Professor Dershowitz's praise of the film, including his statement that every judge, prosecutor, and defense lawyer should watch it. Mr. London told me that he had forgotten to ask my permission to use the clip, which was posted on an "unlisted" "Vimeo" page.[18]

I was disappointed that Mr. London had not asked my permission before doing anything with the video of the panel. I told him that I did not believe that the clip, or whole panel discussion, would raise any reasonable question about the propriety of my participation in the program. I said, however, that I was very busy and could not devote any more time to questions concerning the film. Therefore, I was not authorizing the Film Society, or Mr. London, to make any public use of the video of the panel. I did, however, tell Mr. London he could put the clip of Professor Dershowitz praising his film on his website. To my knowledge, the clip was "tweeted," but not put on Mr. London's website. See DeFriest Film (@defriestfilm), Twitter (Aug. 13, 2014, 10:29 a. m.).[19]

In September and October 2014, many issues were being intensively litigated in this case. Among those were substantial disputes concerning the evaluation of Sampson's current competency to stand trial. See United States v. Sampson, 82 F.Supp.3d 502, 519–23 (D.Mass.2014). I had received, ex parte, the Bureau of Prisons Examiner's report. In reading it in early October 2014, I saw that the Examiner had reviewed, and summarized, Dr. Gilligan's 2010 affidavit.[20] I then realized that I had participated in a program with someone who had been involved with this case.

It was, at most, then uncertain whether Dr. Gilligan would have any further involvement in this case. As explained earlier, in 2010, Sampson's counsel had represented that Dr. Gilligan was solely a potential expert witness and not a fact witness. See D.N. 1060 at 44-45 n.32. Although I had approved budgets that provided funding for many proposed expert witnesses to prepare to testify at the re-

my impartiality into question, and they said, Oh, no, everything was fine." See D.N. 1978 at 14. On reflection, I now believe that the statement of my question in the text above is more accurate. However, there is not, in my view, a material difference between them.

18. It appears that the clip has since been removed. See https://vimeo.com/103264915.

19. Available at https://mobile.twitter.com/defriestfilm/status/499608799012192257?p=v.

20. On June 23, 2014, I said that I discovered Dr. Gilligan's involvement in this case in September 2014. See D.N. 1984 at 46. I now know that I reviewed the Examiner's report and discovered Dr. Gilligan's involvement in October 2014. This, however, is not material to the question of recusal.

trial, I had not been asked to approve funding for Dr. Gilligan to prepare to testify.

More specifically, the January 15, 2014 proposed budget, which I read in pertinent part in October 2014, asked only for funding for five hours of Dr. Gilligan's time to facilitate a transition to another expert to testify at the retrial. See D.N. 2001-1 at 4. Similarly, the April 11, 2014 budget did not seek funding for Dr. Gilligan, but mentioned him only because it was proposed that the other expert be funded to build upon his work. See id.

Therefore, in October 2014, I realized that I had participated on a panel with an expert whose opinions had not been relied upon, or even referenced, in any of my decisions. The recent budget submissions indicated that he was not likely to be a witness at the retrial. I consulted another judge on how I should deal with this matter. Following that discussion, I decided that a reasonable person knowing the foregoing facts could not possibly question my impartiality, that it would be appropriate to continue to focus on deciding the many matters that had to be resolved before the February 17, 2015 trial date, and to discuss Dr. Gilligan with the parties if he ever became a proposed witness.

At a November 14, 2014 conference with Sampson's counsel to discuss, ex parte, a pending budget request, I noted that no funding had been requested for Dr. Gilligan and asked if he was a potential witness. Id. at 4-5. Counsel confirmed that Dr. Gilligan had not been retained and no decision had been made as to whether he would testify. Id.

I continued to give highest priority to preparing this case to begin the retrial on February 17, 2015. This involved conducting many hearings and making many decisions. Nevertheless, on December 23, 2014, I granted Sampson's motion for a continuance and set a new trial date of September 16, 2015, which was sooner than Sampson requested. In summarizing the reasons for that ruling, I wrote:

> When, on March 18, 2014, the court scheduled the retrial for February 17, 2015, it stated that it expected that the parties would work industriously to prepare properly by that date. It also stated that it would postpone the retrial if the evolution of events demonstrated that it would not be fair or feasible for it to begin on February 17, 2015.
>
> The court recognizes that a continuance will prolong the agony and uncertainty of the retrial for the families and friends who loved and lost the people Sampson murdered. Their interest is substantial and the most significant factor weighing against granting a continuance. The interests of the government, which has worked hard to make a February 17, 2015 trial date feasible, also weigh against a continuance. In addition, the court has given the highest priority to this case and organized its docket to devote up to four months to retrying it beginning in February 2015.
>
> However, unforeseen circumstances since March 18, 2014—some but not all of which were beyond Sampson's attorneys' control—have injured the ability of his attorneys to prepare for a retrial. Most significantly, contrary to the representations made to the court by the Bureau of Prisons, Sampson's attorneys, investigators, and experts had only limited access to him in the approximately four months Sampson was in North Carolina at FMC-Butner to have h is competency to stand trial evaluated. In addition, the failure of Sampson's counsel, particularly Danalynn Recer, Esq., to prioritize and present properly to the court the most significant issues has contributed to their plight.

> The court now finds that it would not be fair or feasible to require that Sampson's counsel begin the retrial on February 17, 2015. Rather, a continuance for a reasonable period of time is justified. Therefore, the retrial is being rescheduled to begin on September 16, 2015. [T]his will still be the fastest retrial of a federal capital case in history.
>
> In essence, the court concludes that despite the significant interests of the victims' families, and the interests of the government and the court, a reasonable continuance until September 16, 2015 is justified to as sure that the retrial to determine whether Sampson should be executed will be fair and, hopefully, final.

United States v. Sampson, 68 F.Supp.3d at 234–35 (footnote omitted).

This case continued to receive my highest priority in 2015. This included reviewing and, to the extent appropriate, approving Sampson's request for funding for experts.

In an April 27, 2015 budget update concerning experts, Sampson wrote, in part, that "the defense wants to reserve the possibility of using Dr. James Gilligan regarding the psychological effects of prison trauma." See D.N. 2001-1 at 5. I discussed this statement with Sampson's counsel on May 1, 2015. They confirmed that they were not seeking funding to employ Dr. Gilligan and "just didn't want to waive the possibility." See id. at 6.

On page 19 of a May 22, 2015 budget submission, without explanation, Sampson requested funding for 15 hours for Dr. Gilligan, who was characterized in a chart as a "prison expert." I first saw this submission in the late afternoon of June 19, 2015, after several days of hearings and rulings concerning various issues in this case. In response to one of my questions, at what was initially an ex parte conference, Sampson's counsel explained that they had intended to use another expert, but he had become unavailable. Id. at 7. Therefore, they had met with Dr. Gilligan the previous week and decided to employ him. Id. In response to another of my questions, Sampson's counsel said they had told Dr. Gilligan that I was the judge and he mentioned that he had had a meal with me. See D.N. 2001-3 at 5. I said it would be necessary to include the prosecutors in a discussion about the implications of the emergence of Dr. Gilligan as a potential witness.

I then explained the circumstances of the DeFriest program to all counsel. See D.N. 2001-3 at 9-15. I told them that as Dr. Gilligan had just become a possible witness, a § 455 (a) analysis should be done, and the parties should consider whether they wished to waive any possible grounds for my recusal based on my participation on a panel with Dr. Gilligan. Id. at 14. I provided the government with an opportunity to question Sampson's counsel and me, and said I would have a transcript prepared promptly and made part of the public record. Id. at 16-21. This was done. See June 22, 2015 Memo. and Order (D.N. 1984).

On June 22, 2015, I offered the parties an opportunity for a further hearing on the issue, see D.N. 1978 at 3, which the government requested. That hearing was held on June 23, 2015.

On June 19, 2015, among other things, I had stated that, if I had known Dr. Gilligan had filed an affidavit in this case, I would have told Mr. London that he could have one of us on the panel and suggested he choose Dr. Gilligan. See D.N. 2001-3 at 18. As I explained on June 23, 2015:

> [W]hen I was speaking on [June 19, 2015], which was necessarily quickly, I wasn't saying that a reasonable person

> would question my impartiality because Dr. Gilligan and I have been on the same program. I'm saying it was foreseeable that I would have to disclose it. There would have to be attention devoted to it. It would be an unfortunate distraction.

See D.N. 1984 at 12. I also said on June 23, 2015, that "I just generally try to avoid these issues." Id. at 32.

At the June 23, 2015 hearing, Mr. Hafer stated that the government was not asserting that I am biased or prejudiced as a result of my interaction with Dr. Gilligan or anything else. Id. at 18-19. Rather, the question was whether a reasonable person would question my impartiality if fully informed. Id.

I offered to try to obtain as soon as possible the DeFriest film and video of the panel, which the government wanted to review. Id. at 22-23, 34. I stated I wished to assure that a well-informed decision would be made on the § 455(a) issue. Id. at 24. I also noted that I did not know if the retrial could begin in September 2015 if the issue of my possible recusal distracted us from the many other matters scheduled to be addressed in hearings and decided before then. Id.

On June 23, 2015, I obtained from Mr. London the video that was made of most of the panel. I provided it to the parties the next day. See D.N. 1983. On June 25, 2015, I obtained from Mr. London the film and immediately gave it to the parties. See D.N. 1985.[21]

Another hearing was held on June 26, 2015. The government requested an opportunity to investigate the program concerning Mr. London's film. Mr. Hafer stated that "the inquiry has to be undertaken without any regard to the trial date." D.N. 2002 at 10. He also indicated that the government would never be in a position to waive any § 455(a) objection under § 455(e). Id. at 12. I provided the government more time than it initially requested on June 26, 2015, to conduct its investigation. See D.N. 2023.

On June 27, 2015, I issued an Order directing Sampson to confer with Dr. Gilligan and state whether he continued to be a witness Sampson would seek to present at the retrial. See D. N. 1997. In doing so, I noted that, in 2014, Judge Dennis Saylor IV had granted a motion to recuse under § 455(a) based on the representation that Judge Timothy Hillman would be a witness at trial, but that Judge Hillman was never called. Id. (citing O'Brien, 18 F.Supp.3d 25); see also § IV.D, infra. I wrote that:

> The court does not wish to interfere with Sampson's right to present witnesses of his choice who want to participate in this case. However, in view of the recent experience in O'Brien and the present posture of this case, it is now prudent and appropriate to determine whether Dr. Gilligan intends to participate in the retrial to determine Sampson's sentence.

D.N. 1997 at 1-2. Sampson's counsel reported that they had conferred with Dr. Gilligan and that "[w]hile the defense is not categorically committing that it will call Dr. Gilligan to testify, the defense confirms that at this time Dr. Gilligan continues to be a witness Mr. Sampson may seek to present at the trial of this matter." D.N. 2011 at 1.

The government—including the FBI, Internal Revenue Service, Massachusetts

21. In response to a request from Mr. London, I sent him two newspaper articles about this matter, and the June 22, 2015 Order, which had attached to it the transcript of the June 19, 2015 discussion of this matter. See D.N. 1978.

State Police, and First Assistant United States Attorney—investigated this matter for several weeks. After being granted a brief extension, it moved for my recusal on July 16, 2015. See D.N. 2024. Sampson filed his opposition on July 31, 2015. The government submitted a reply on August 7, 2015. Sampson filed a sur-reply on August 13, 2015. The government also filed a motion requesting that I not make any substantive rulings in this case until the question of my recusal is resolved. See D.N. 2037.

The motion for my disqualification caused the cancellation of the hearings scheduled to resume on August 10 and 24, 2015, as well as the granting of motions for relief from deadlines established in anticipation of jury selection commencing on September 16, 2015. See D.N. 2049, 2051, 2057, 2063.

IV. ANALYSIS

In moving for my recusal under § 455(a), the government argues that my role in promoting and participating in the DeFriest program would require my recusal even if Dr. Gilligan were not involved in this case. It further asserts that Dr. Gilligan's roles as an affiant in 2010, as a panelist, and now as a prospective witness reinforce that conclusion. For the reasons explained in this Section, these contentions are not correct.

This ruling has been reached by considering the totality of all of the relevant facts of which a reasonable person would be informed. However, it is valuable to consider whether my role in the program alone would, as the government suggests, raise a reasonable question concerning my impartiality, and then consider the implications of the additional facts that Dr. Gilligan was on the panel and Sampson has recently requested funding to retain him to testify as an expert at the retrial.

A. My Recusal is Not Required

1. My Role Concerning the DeFriest Panel Could Not Cause a Reasonable Person to Question My Impartiality

[14] I have long understood that "a judge should not participate in extrajudicial activities that interfere with the performance of the judge's official duties [or] reflect adversely on the judge's impartiality." Code of Conduct, Canon 4. However, the Code of Conduct recognizes that "[c]omplete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives." Id., Canon 4 cmt. Therefore, judges are encouraged to contribute to the public understanding and improvement of the administration of justice, and engage in other civic, charitable, and educational endeavors, if the activity would not reflect adversely on the judge's impartiality. Id., Canon 4 & cmt.[22]

22. Canon 4 of the Code of Conduct states, in part, that: "A judge may engage in extrajudicial activities, including law-related pursuits ... and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that reflect adversely on the judge's impartiality...."

The commentary to that rule states:

> Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar asso-

There is a proud history of judges being involved in educational endeavors. For example, then-Harvard Law School Professor Felix Frankfurter wrote in 1920 to Judge Learned Hand that Justice Louis D. Brandeis "cares about educating and in fact he cares more than anything else for the processes of education which will enable our modern democracy to understand what public matters are about and then act upon such understanding." Letter to Learned Hand from Felix Frankfurter (June 28, 1920), in Reason and Imagination: The Selected Correspondence of Learned Hand: 1897-1961, 93 (Constance Jordan ed., 2013).

A fully informed member of the public would know that I share Brandeis's view. See, e.g., Aging gracefully: Judge Wolf takes senior status, Boston Globe Oct. 19, 2012, at A16 (Judge Mark L. Wolf "used his perch as chief judge to educate students about legal issues, and advance the cause of human rights[.]"); Milton Valencia, Wolf to step down as chief U.S. judge, Boston Globe, Oct. 17, 2012, at B1 ("A longtime supporter of charitable efforts and community organizing, Wolf has prioritized the development of seminars for lawyers and programs for inner-city schools."). The DeFriest program was not a manifestation of a special interest in issues relating to prisons and prisoners, but rather an example of the wide range of programs I have organized or participated in, often with young people.

The value of promoting public understanding of the issues depicted in the DeFriest film is evidenced by President Obama's recent attention to them. For example, in a July 14, 2015 speech, President Obama—who does not share with judges a duty to appear impartial—said:

> [W]e should not tolerate conditions in prison that have no place in any civilized country.... We should not be tolerating gang activity in prison. We should not be tolerating rape in prison.... Do we really think it makes sense to lock so many people alone in tiny cells for 23 hours a day, sometimes for months or even years at a time?

See Press Release, White House Office of the Press Secretary, Remarks by the President at the NAACP Conference (July 14, 2015)[23]; see also Press Release, White House Office of the Press Secretary, Remarks by the President after Visit at El Reno Federal Correctional Institution (July 16, 2015).[24], [25]

If, as I find, my conduct could not raise a reasonable question concerning my impartiality in this or any other case, the

ciation, judicial conference, or other organization dedicated to the law.

Id., Canon 4 cmt. (emphasis added).

23. Available at https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference.

24. Available at https://www.whitehouse.gov/the-press-office/2015/07/16/remarks-president-after-visit-el-reno-federal-correctional-institution.

25. I made similar comments on the DeFriest panel:

> We have the Eighth Amendment of the Constitution, which the founding fathers decided to make impermissible cruel and unusual punishment. Part of cruel and unusual punishment is extrajudicial punishment, punishment beyond what the judge prescribed, five years in prison, punishment from prison guards. The whole jurisprudence of the Eighth Amendment is [the question], "is this inconsistent with the norms of a civilized society?"
>
> So we, from the beginning of our nation, essentially have had ideals and aspirations that are inconsistent with what is depicted in this film. And it's in the nature of ideals and aspirations that they won't be fully or permanently realized.

See Panel Tr. II at 13-14.

program on the DeFriest film is the type of activity in which the Code of Conduct encourages judges to engage. As the government implicitly recognizes, the fact that I watched the DeFriest film would not cause, or contribute to causing, a knowledgeable, reasonable person to question my impartiality in this case. As the Second Circuit has explained, "the acquisition of general information is vital to judges." In re Aguinda, 241 F.3d at 205. Consistent with this, it has been stated that a judge's "methods of informing himself as to a given area of the law, do not constitute grounds for recusal unless they come within some other, specific grounds for recusal." United States v. Bonds, 18 F.3d 1327, 1329 (6th Cir.1994). Issues that generally relate to cases assigned to other judges and me, including this one, are often discussed in the media. See, e.g., Michael Schwirtz and Michael Winerip, After 2 Killers Fled, New York Prisoners Say, Beatings Were Next, N.Y. Times, Aug. 12, 2015, at A1. This reported claim of the beating of prisoners by guards is comparable to events depicted in the DeFriest film. Yet it could not be correctly argued that the fact that I read the article caused, or contributed to causing, a reasonable question concerning my impartiality in this case.[26]

26. At the June 23, 2015 hearing, the government asserted that literary references I have made in the course of this case, "amplify[ ]" the reasons that an objective person would question my impartiality. D. N. 1984 at 19. It claimed that the only such references were to what it views as anti-death penalty literature—Albert Camus's Reflections on the Guillotine, Robert Burt's Death is that Man Taking Names, and the Czech dissident author Ivan Klima's Judge on Trial. Id. at 19-20. The government also suggested that such questions would be reinforced by my friendship with Mr. Klima. Id. at 20.

However, as the government itself wrote in 2010, "[t]here is nothing at all improper about citing literary works in responding to a legal claim—even in [ ] capital cases—and that heretofore unremarkable proposition is evidenced by the fact that numerous courts have done so, including the Supreme Court." See Gov's Reply in Support of Request for Summary Dismissal of First Amended 2255 Petition at 2-3 (D.N. 1069) (citing cases). Indeed, in rejecting mere suspicion as a proper basis for recusal under § 455(a), Judge Frank Coffin wrote that, "[i]n this respect, the standard for disqualification is not quite on the same plane as the standard for judging Caesar's wife" and discussed Plutarch's The Lives of Noble Grecians and Romans. See In re United States, 666 F.2d at 695 n.*.

In any event, the government's claim that I have in the past 14 years only referenced literature adverse to its interests is incorrect. Alexander Bickel's Morality of Consent provided a framework for my remarks in sentencing Sampson to death. See Sampson, 300 F.Supp.2d at 278 ("[I]n our nation there is another morality that governs judges. It is sometimes called the 'morality of consent.' See Alexander M. Bickel, The Morality of Consent (Yale Univ. Press 1975)."). Similarly, Robert Cover's Justice Accused provided a framework for my analysis in denying Sampson's motion to dismiss because the grand jury was not informed that its findings would make this a capital case, and the book was quoted in support of that conclusion. See D.N. 1818 at 77-78. In addition, Camus's Reflections on the Guillotine was referenced by me to illustrate the historic nature of the issue when I decided that evidence of "botched executions" was not relevant to a mitigating factor, as properly defined, and could not be introduced in this case. See D.N. 2014 at 56-57.

The government's comments about some of what I have read and referenced could have a chilling effect on what judges read and thus injure their ability to perform their judicial duties wisely and well. In 1913, Justice Oliver Wendell Holmes characterized judges as "naif, simple-minded men ... [who] need education in the obvious—to learn to transcend our own convictions." Justice Oliver Wendell Holmes, Law and the Court: Speech at a Dinner of the Harvard Law School Association of New York, Feb. 15, 1913, in The Occasional Speeches of Oliver Wendell Holmes 168, 172 (Mark DeWolfe Howe ed., 1962). Judges continue generally to be fortunate, successful people, chosen from the

The facts that I promoted the program concerning the DeFriest film by recommending it to the Film Society, encouraged The Vineyard Gazette to write about it, recruited Professor Dershowitz for the panel, allowed my participation to be publicized,[27] and moderated the panel also could not cause, or contribute to causing, a knowledgeable, reasonable person to question my impartiality in this case. The issues in the film were related to Sampson's case at only a very high level of generality, and I repeatedly explained that that I was not endorsing the views of the film or the panelists, and was not expressing my own.

The DeFriest film discusses, in the context of a particular prisoner, some general issues on which Sampson proposes to introduce evidence in his effort to prove some of the many mitigating fact or she hopes to present to the jury. More specifically, the film depicts violence in prison and its effect on a man who is allegedly mentally ill, perhaps as a result of brain damage. Some of these issues were discussed by the panelists, who stated that they perceived such problems to be widespread. These issues generally relate to this case, and to some others in which I have previously presided. See, e.g., Disability Law Center, 960 F.Supp.2d 271 (concerning the effect of segregation (i.e., solitary confinement) on mentally ill prisoners); Gonsalves, 939 F.Supp. 921 (concerning killing of detainee by police officers); Gonsalves, 939 F.Supp. 915 (same). In addition, the panelists were critical of the United States prison system and sentencing laws.

Among the 308 mitigating factors on which Sampson now proposes to introduce evidence at retrial are the alleged facts that he suffers from a mental illness and brain damage, and that he was assaulted in prison. However, whether DeFriest is mentally ill, has brain damage, or was abused by guards or other inmates, is not relevant to whether Sampson is mentally ill, has brain damage, or was abused by guards or other inmates. The film and panel also did not include any discussion of how mental illness, brain damages, or abuse in prison might operate as mitigating factors in a capital case. Therefore, the panel discussion did not involve discussion of the particular issues to be decided by the jury at retrial.

mainstream of society. We are often called upon to exercise judgment in matters concerning unfortunate, unsuccessful people with very different backgrounds and experiences. Books, including literature, can expand a judge's knowledge and provide an empathetic understanding of the people affected by his or her decisions.

Recognizing this, the Federal Judicial Center ("FJC"), which trains judges, offers a seminar on "Literary Perspectives on Justice and Law." This seminar is designed to "help deepen an understanding of the greater human questions and consequences of [a judge's] work." See Add'l Evid. Order, Ex. H. At my request as Chief Judge, the FJC presented such a program for my colleagues and me in 2010.

27. Contrary to the government's contention, I do not believe that promoting the DeFriest film program constituted the use of the prestige of my judicial office to advance the private interests of Mr. London. See Code of Conduct, Canon 2B. Mr. London was not being paid or reimbursed for his expenses by the non-profit Film Society. I was engaging in an effort to educate the public on a matter concerning the administration of justice, as federal judges are encouraged to do by our Code of Conduct, as long as the activity would not raise a reasonable doubt about the judge's ability to decide any issue impartially. Id., Canon 4 & cmt. Similarly, in 2006, as Chief Judge, I organized and moderated a program at the courthouse in which Abby Ginzberg, the producer of the film Soul of Justice: Thelton Henderson's American Journey, participated. See Add'l Evid. Order, Ex. I. Neither I, nor, evidently, anyone else perceived that I was using the prestige of my judicial office to advance Ms. Ginzberg's private interests.

As the DeFriest panel did not include discussion of evidence specific to Sampson or of capital sentencing, a reasonable person could not question my impartiality based on my role concerning it.

This conclusion is confirmed when the film, and my role in organizing and moderating the panel are, as they must be, viewed in the context of everything of which a reasonable, fully informed person would be aware. See Pitera, 5 F.3d at 626–27. What I said during the program is particularly important. Id.

A reasonable, fully informed person would know that I was the moderator of the panel discussion. As moderator, my role was to facilitate an orderly discussion of the issues raised by the film. I stated at the outset of the program that my participation should not be construed as an endorsement of the case for DeFriest's parole, as an expression of my views on the issues raised in the film, or as a comment on any other case or issue, including the death penalty. See, e.g., Add'l Evid. Order, Ex. A at 2. I later stated that I did not necessarily agree with everything Professor Dershowitz or Dr. Gilligan had said. See id. Ex. A at 11. I added that the issues depicted in the film emerge in federal cases and "how they're dealt with in this country is substantially determined by the democratic process." Id. I concluded the program by congratulating the audience members for attending the film and panel because if people are ignorant of the issues raised by the film, there is no way our democracy can properly function concerning them. Id. Ex. B at 14.

I believe that a reasonable person would understand that my statements were not, as the government suggests, expressions of consciousness of conduct incompatible with the requirements of § 455(a). Rather, a reasonable person would understand my statements to be the effort of a prudent judge to assure that his conduct and comments were not misconstrued as he participated in an educational program of public importance.[28]

The evidence indicates that my statements about my role had their intended effect. Mr. Paradise, the Director of the Film Society, told the government that he did not perceive that I "was either pro or anti what was in the [DeFriest] film." See D.N. 2026-3 at 70. Rather, I "was more neutral and more balanced" than the panelists. Id. at 70-71. Similarly, although they, like me, did not then know that Dr.

28. The government repeatedly argues that "the average person on the street might not know and believe" certain facts as I have described and discussed them, including my statements on July 27, 2014, in my role as moderator of the DeFriest panel. See D. N. 2060 at 6-11. For example, the government argues that an "average person on the street would not necessarily believe that Dr. Gilligan's participation in the panel discussion was a matter of 'pure happenstance,'" as Sampson characterizes it. However, the First Circuit has emphasized that "a charge of partiality must be supported by a factual basis ...." In re Allied–Signal, 891 F.2d at 970. "Compulsory recusal must require more than subjective fears, unsupported accusations, or unfounded surmise." In re United States, 158 F.3d at 30. In this case, when interviewed by the government, Dr. Gilligan and Mr. London confirmed that Mr. London alone arranged for Dr. Gilligan's participation in the program. Many of the government's other arguments about what a reasonable person might believe are similarly flawed.

As explained in § II, supra, and discussed in § IV.A.2, infra, I recognize that my actual lack of knowledge of relevant facts is not the proper focus for recusal analysis. Rather, I must decide what a reasonable person, knowing all the circumstances, would expect I actually knew. See Liljeberg, 486 U.S. at 860–61, 108 S.Ct. 2194. Therefore, I have assumed, without finding, that a reasonable person could believe I was aware of Dr. Gilligan's involvement in this case in 2010, for example.

Gilligan was involved in this case, the two other federal judges who saw the film and the panel did not perceive any issue concerning the propriety of my participation. See D.N. 1978 at 14.

The government argues that the "unbalanced" or "one-sided" nature of the panel would cause, or contribute to causing, a reasonable person to question my impartiality. This position conflicts with the practice of the Department of Justice in inviting federal judges to train Assistant United States Attorneys and Department of Justice lawyers at its National Advocacy Center. For example, the National Advocacy Center offers a Criminal Appellate Advocacy Seminar in which prosecutors are "required to participate in mock oral arguments before faculty and a circuit judge." See U.S. Dep't of Justice Offices of the U.S. Attorneys, Course Offerings: FY-2016 Course Descriptions (Aug. 25, 2015) (emphasis added).[29] The National Advocacy Center also offers a seminar on Motion Practice and Brief Writing for Civil Attorneys which "culminate[s] in videotaped oral argument before federal judges." Id. (emphasis added). Evidently, and correctly, the Department of Justice does not believe that such "one-sided" programs for prosecutors only raise issue s under § 455(a). Like many federal judges, many years ago, I taught federal prosecutors at the National Advocacy Center.

As explained in § II, supra, it is permissible for a judge to speak to a group representing one side of litigation if he or she is "equally available to address the other litigation constituency." Judicial Conference of the United States, Committee on Codes of Conduct, Adv. Op. No. 105: Participation in Private Law-Related Training Programs (Sept. 2010). Therefore, it is important to consider other events in which I have participated. See Pitera, 5 F.3d at 626–27; see also In re Charges of Judicial Misconduct, 404 F.3d at 694. A knowledgeable, reasonable person would know that I have participated in some programs solely for prosecutors and law enforcement officers, as well as engaging in many activities for the criminal defense bar, and in joint programs for prosecutors and criminal defense lawyers as well.

For example, in 2010, while he was the lead prosecutor in this case, Mr. Wortmann and Assistant United States Attorney Theodore Heinrich served on the Planning Committee that I chaired for a June 15, 2010 program of the District Court, at the courthouse, on "Rwanda, Darfur, and Youth Violence in Boston." See Add'l Evid. Order, Ex E. The participants included a representative of the Boston Police Department, whose officers often testify before me. However, neither I nor, evidently, the government or anyone else perceived that my collaboration with Mr. Wortmann, or my participation in the program, raised a question concerning my possible recusal in any of the many cases in which Mr. Wortmann regularly appears before me, including this one. [30]

29. Available at http://www.justice.gov/usao/training/courseofferings/course-descriptions-2016.

30. Following my usual practice, I also included a young person, Taisha Sturdivant, in the program. Taisha had worked in my chambers as a Fellow in the Judge David S. Nelson program for Boston students that I chaired for the District Court for many years. Taisha's contribution to the "Rwanda, Darfur, and Youth Violence in Boston" discussion led to her being given an opportunity to write a series of guest columns for the Boston Globe from the perspective of a young black woman. See Charles B. Fancher, Jr., God Bless the Child That's Got Her Own, B.C. Law Sch. Mag., Summer 2015, at 40, 43, available at http://lawmagazine.bc.edu/2015/06/god-bless-the-child-thats-gother-own/. Taisha wrote one of her columns on the Boston Future Stars

Similarly, on December 7, 2010, I spoke at the dedication of a courtroom, to be used for training, at the Boston Police Academy. Mr. Wortmann and First Assistant United States Attorney Jack Pirozzolo also spoke at that event. See Add'l Evid. Order, Ex. F. At the Academy, I emphasized the importance of law enforcement officers writing reports accurately and testifying truthfully. I said that I viewed the courtroom that was being dedicated as a symbol of the Boston Police Department's commitment to law enforcement that will be fair and more effective.

In my remarks at the Academy, as in my remarks at the Film Society, I did not discuss the Sampson case. However, my remarks at the Academy did have general relevance to it. In 2003, Sampson alleged as a mitigating factor that he had called the FBI in an attempt to surrender on bank robbery charges before murdering Mr. McCloskey and Mr. Rizzo, but the FBI never came to arrest him. See D.N. 654 at 8; 654-2 at 8. In the retrial, 16 of Sampson's 308 mitigating proposed mitigating factors relate to his attempt to surrender. See D.N. 1868. In a case assigned to me, in 2003, an FBI employee admitted to repeatedly lying in denying that he had received that telephone call from Sampson. See United States v. Anderson, 249 F.Supp.2d 60, 61–62 (D.Mass.2003). This failure of a member of law enforcement to provide accurate information almost deprived Sampson of important evidence of a mitigating factor that eight jurors found to be proven in 2003. See D.N. 654-2 at 8.

Therefore, my remarks at the Academy generally related to an issue in this case in a way that is similar to the discussion on the DeFriest panel of prisoners alleged to be mentally ill or abused by prison guards generally related to issues in this case. Nevertheless, neither Mr. Wortmann, the First Assistant United States Attorney, nor I thought that my participation with them, or my remarks, at the ceremony at the Academy raised an issue that should have been disclosed or discussed concerning whether a reasonable person would question my impartiality in this case or any other.

Like the judge in Pitera, I have also participated in many matters involving the criminal defense bar. For example, I chaired the committee which, in 1993, reformed the District Court's Criminal Justice Act Plan, including the way in which counsel for indigent defendants are appointed. I also twice chaired the First Circuit committee to advise on the reappointment of the Federal Public Defender. In addition, I have participated in many programs exclusively for members of the Criminal Justice Act panel. I have also initiated or participated in many joint programs for prosecutors and defense lawyers. See, e.g., United States v. Jones, 620 F.Supp.2d 163, 185 (D.Mass.2009) (ordering joint Brady training); United States v. Jones, 686 F.Supp.2d 147 (D.Mass.2010) (discussing the effects of joint Brady training).[31]

camp, discussed in footnote 31, infra, where she was working that summer, and mentioned that speakers at the camp had included Boston Police Commissioner Edward Davis, Suffolk County District Attorney Dan Conley, and me. See Taisha Sturdivant, Boston needs more safe havens for kids, Boston Globe, Aug. 16, 2010, at All.

31. I have also been involved in other efforts to educate the public on matters relating to the administration of justice, including contributing to programs for young people at risk of becoming involved in the criminal justice system. For example, in 1998, I helped my son, who was a high school student, start the Red Auerbach Future Stars camp to keep Cambodian and Hispanic youth in Lowell, Massachusetts out of violent street gangs by introducing them to sports and other constructive activities. The Lowell Police Super-

In view of the foregoing, I find that a reasonable person could not question my impartiality in this case based solely on my role in the DeFriest program.

2. The Added Fact that Dr. Gilligan Had Submitted an Affidavit in 2010 Could Not Cause a Reasonable Person to Question My Impartiality

[15, 16] I understand that "where a presentation concerns issues material to the disposition of litigation or involves parties, witnesses, or counsel in particular actions, the recusal calculus will differ, albeit again without an applicable mechanical standard." In re Aguinda, 241 F.3d at 206.

As explained earlier, the DeFriest film focuses on a particular prisoner, explores whether he is mentally ill, and what the effects of his experience in prison have been on him. None of these issues are material to the disposition of this case.

However, the fact that Dr. Gilligan had been involved in Sampson's case prior to participating on the panel must also be considered in evaluating whether a reasonable person could question my impartiality in this case. In July 2014, I did not realize that Dr. Gilligan was, among many other experts, mentioned in the Amended Petition and had filed one of many affidavits in support of the request for a new trial. Nevertheless, I understand that "[u]nder section 455(a), ... recusal is required even when a judge lacks actual knowledge of the facts indicating his ... bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." Liljeberg, 486 U.S. at 860–61, 108 S.Ct. 2194 (internal quotation marks omitted). My reference to Dr. Gilligan's 2010 Affidavit, among other materials, in a June 6, 2014 Order concerning the Bureau of Prisons competency evaluation makes it appropriate to assume, without necessarily finding, that a reasonable person could believe I knew that he had been involved in this case. See id.

However, again, the information in the record as a whole must also be considered. See, e.g., Pitera, 5 F.3d at 626–27; In re Cargill, 66 F.3d at 1260; In re Allied–Signal, 891 F.2d at 972. In July 2014, an informed, reasonable person would have known that Dr. Gilligan had not been retained by Sampson to testify at the retrial.[32] Therefore, in addition to the facts

intendent, Edward Davis, became a virtual partner in the camp, at which I spoke annually and met Superintendent Davis. After Mr. Davis became the Boston Police Commissioner in 2006, he prompted my son to start a second camp in Boston, at which I also spoke annually. These programs, including at times my role, were reported on in the media. See, e.g., Brian R. Ballou, Camp teaches peaceful solutions, Boston Globe, Aug. 16, 2008, at B4; Peter Gelzinis, Wolf working wonders for our kids, Boston Herald, May 2, 2008, at 6; Matthew P. Collette, Judge's son honored for work with at-risk teens, Boston Globe, May 1, 2008, at B3; Peter Gelzinis, Learning leadership at Dorchester Camp, Boston Herald, Aug. 3, 2007, at 19; Camp Steers Kids Away from Violence: Program Gives At-Risk Kids More Choices, TheBostonChannel.com, July 30, 2007; Peter Gelzinis, Summer camp sheds light on new top cop's vision, Boston Herald, Nov. 19, 2006, at 4; Monica Rhor, Haven from life's hard lessons, Boston Globe, July 19, 2004, at A1; Christopher Cox, Weston man takes on gang violence in Lowell, Boston Herald, Aug. 6, 2001, at 6. I have nevertheless presided without any § 455(a) question being raised in innumerable drug and gun cases involving youthful defendants from Boston and Lowell. Many of those cases have been prosecuted by Mr. Wortmann.

32. The January 2014 budget submission characterized Dr. Gilligan as a fact witness as well as an expert. See 2001-1 at 4. This statement, however, was contradicted by Sampson's earlier representation that Dr. Gilligan was only an expert witness, see D.N. 1060 at 44-45 n. 32. The correctness of this characterization was confirmed by Dr. Gilligan's affidavit, in which he stated that he had been retained as

relating to the film and the panel discussed in § IV.A.1, supra, in July 2014 a reasonable person would have known that I entertained in my home a person who had filed an affidavit in this case, which I never referenced or relied upon, and that I moderated the panel on which he spoke.

On that panel, Dr. Gilligan made comments that were comparable to some of the general statements about violence in prison that are in his 2010 affidavit. See D.N. 1035-200 and 2. He did not, however, say anything about Sampson or this case. In moderating the panel, I stated that my participation should not be construed as an endorsement of the case for DeFriest's parole, or an expression of my views on any of the issues raised by the film, or as a comment on any other case or issue, including the death penalty. Once again, I believe a reasonable person would understand and accept these statements as true.

[17] I do not believe that the added fact that I invited Dr. Gilligan to my rented home and gave him a light supper would cause, or contribute to causing, a reasonable person to question my impartiality. Dr. Gilligan and I are now acquainted, but are not friends. Even if Dr. Gilligan and I were friends, my recusal would not ordinarily be required. See O'Brien, 18 F.Supp.3d at 34–35 (citing cases).[33] As I wrote in 1998:

> Generally, familiarity—or even a judge's friendship with prospective witnesses—does not require a judge's recusal under § 455(a). See, e.g., Parrish v. Board of Comm'rs of Ala. State Bar, 524 F.2d 98, 103–04 (5th Cir.1975) (en banc); United States v. Mavroules, 798 F.Supp. 61, 63 (D.Mass.1992); Hirschkop v. Virginia State Bar Ass'n, 406 F.Supp. 721, 724–25 (E.D.Va.1975). This is the general rule because it is recognized that the public understands that judges are usually longstanding members of the community in which they serve and although they will inevitably encounter witnesses with whom they, or people close to them, have had positive or negative experi-

an expert, see D.N. 1035-200, ¶1 (Under Seal), and in which he reports no contact with Sampson except as an expert in the § 2255 proceedings, see D.N. 1035-200, 1035-201; see also D.N. 2001-3 (Sampson's counsel stating that Dr. Gilligan did not have contact with Sampson decades ago while Sampson was at Bridgewater but did meet with him during the § 2255 proceeding). In any event, when he was interviewed by the government, Dr. Gilligan said that in July 2014, he was not involved in this case and did not know that he would become involved later. See D.N. 2026-2 at 26, 34.

33. In O'Brien, 18 F.Supp.3d at 34–35, Judge Saylor wrote:

> The mere fact that a witness, especially a minor witness, might be a friend or colleague of the judge does not normally require recusal. See, e.g., In re Beyond Innovation Technology Co., Ltd., 166 Fed.Appx. 490, 491 (Fed.Cir.2006) (holding that recusal was not required where the expert damages witness in a patent case was "a close personal friend" of the judge); United States v. Kehlbeck, 766 F.Supp. 707, 712 (S.D.Ind.1990) (noting that "judges may have friends without having to recuse themselves from every case in which a friend appears as counsel, party, or witness"); M.K. Metals, Inc. v. Nat'l Steel Corp., 593 F.Supp. 991, 996 (N.D.Ill.1984) (noting that "friendship between judges and trial actors other than parties, untainted by any financial interests, should not generally justify recusal"); In re Jim Slemons Hawaii, Inc., 2013 WL 980115, at *12 (9th Cir. BAP Mar. 13, 2013) (noting that "[s]ocial acquaintances, friendships or associational relationships are rarely grounds for recusal"); United States v. Nelson, 2010 WL 2629742, at *7 (E.D.N.Y. June 28, 2010) (noting that "[m]any opinions have discussed the impact of a judge's 'friendship' with a litigant or 'interested party' on the decision to disqualify under § 455(a). In few cases, however, has disqualification been deemed required.").

ences, judges can and will ordinarily ignore those experiences and decide the matters before them impartially. See In re United States, 666 F.2d at 696–97. Salemme II, 164 F.Supp.2d at 104–05.[34]

Accordingly, I find that the additional facts that Dr. Gilligan submitted an affidavit in 2010, and was given supper by me before the DeFriest program, could not cause a reasonable person to question my impartiality. Therefore, my recusal under § 455(a) is not justified.

This conclusion is not contradicted by my statement on June 19, 2015 that if I had known Dr. Gilligan had filed an affidavit in this case, I would have told Mr. London that he could have one of us on the panel and suggested he choose Dr. Gilligan. See D.N. 2001-3 at 18. As I explained on June 23, 2015, after Dr. Gilligan became a proposed witness:

> [W]hen I was speaking on [June 19, 2015], which was necessarily quickly, I wasn't saying that a reasonable person would question my impartiality because Dr. Gilligan and I have been on the same program. I'm saying it was foreseeable that I would have to disclose it. There would have to be attention devoted to it. It would be an unfortunate distraction.

See D.N. 1984 at 12. As I also said on June 23, 2015, "I just generally try to avoid these [§ 455(a)] issues." Id. at 32. I believe that a reasonable person would understand that on June 23, 2015, I was seeking to explain that I was trying to be careful to avoid activities that might possibly raise questions that might need to be analyzed under § 455(a), rather than expressing the view that doing the DeFriest program with an affiant would require recusal under § 455(a). In any event, I have now considered this question more thoroughly and find that it does not.

3. The Added Fact that Dr. Gilligan is a Prospective Witness at the Retrial Could Not Cause a Reasonable Person to Question My Impartiality

[18] On June 19, 2015, I learned that Sampson had recently decided to retain Dr. Gilligan as an expert witness to replace an expert who would not be available for the retrial scheduled to begin in September 2015. Therefore, for the first time, this case involved my association with a potential witness, which could cause the recusal calculus to change. See In re Aguinda, 241 F.3d at 206. Having carefully considered this, in addition to all of the other relevant facts, I conclude that a reasonable person could not now question my impartiality in this case.

Sampson has indicated that he will seek to have Dr. Gilligan testify to the matters discussed in his 2010 affidavit. See D.N. 2041 at 16 & n. 7, 24; D.N. 2061 at 10 (Under Seal). In that affidavit, Dr. Gilligan stated that he had "been retained as an expert on prison conditions, the psychological effect of adverse conditions of confinement on inmates (including those with preexisting vulnerabilities), and specifically the effects of those conditions on Gary Lee Sampson." D.N. 1035-200, ¶1. As a result of my participation on the panel, I heard Dr. Gilligan discuss his opinion of the psychological effects of adverse conditions of

34. See also In re Beyond Innovation Tech., 166 Fed.Appx. at 491 (finding that the trial judge did not clearly abuse his discretion in denying a motion to recuse under § 455(a) where the witness at issue was the judge's "close personal friend" and "personal accountant"); Hadler v. Union Bank and Trust Co. of Greensburg, 765 F.Supp. 976, 978 (S.D.Ind.1991) ("To conclude that this judge or any judge would ignore the law and his solemn oath in order to favor the testimony of a witness merely because of friendship with that witness one would have to engage in 'speculation.' ").

confinement, including violence, on prisoners, including those with mental illness. During the panel, I noted that the panelists were expressing "strong views" and that I did not necessarily agree with everything Dr. Gilligan had said. I had previously stated that my participation as moderator of the panel should not be misconstrued as a comment by me on any case or issue. I did, however, end by characterizing Professor Dershowitz and Dr. Gilligan as "literally, [ ] the two world's leading experts" on the issues discussed.

Dr. Gilligan's remarks on the panel were more general than his 2010 affidavit, which included background information not concerning Sampson specifically. I believe a reasonable person would understand that the relevance of any testimony concerning the general matters Dr. Gilligan discussed on the panel, and the weight to be given to any such evidence if it is credible, will depend on its linkage to Sampson specifically. As explained earlier, however, neither the DeFriest film nor the discussion that followed it referred to Sampson. Therefore, I did not, in July 27, 2015, get a "pre-screening" of what would be the essential part of any admissible testimony Dr. Gilligan may have. Accordingly, as explained in § IV.B, infra, the facts of this matter are materially different than those in In re School Asbestos, 977 F.2d at 782, on which the government heavily relies.

I recognize that an informed, reasonable person would know that I had characterized Dr. Gilligan as one of the world's leading experts on some matters that may provide background for any admissible testimony he may have concerning Sampson specifically. A reasonable person would likely recognize this praise to be the sort of generous hyperbole common to moderators on similar occasions. In any event, I do not believe that my statement, in the context of all of the other relevant facts, could cause, or contribute to causing, a reasonable person to believe that I have "an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging" the merits of any issue relating to the admissibility of Dr. Gilligan's proposed testimony. See Snyder, 235 F.3d at 48 (internal quotation marks omitted) (quoting Liteky, 510 U.S. at 557–58, 114 S.Ct. 1147 (Kennedy, J., concurring)); In re United States, 158 F.3d at 34 (same).

The government also argues that a reasonable person would question my impartiality with respect to the corrections officers the government intends to call as witnesses at the retrial because of Dr. Gilligan's characterization of many, but not all, prison guards as violent. However, again, a reasonable person would understand that my participation on the panel was not an endorsement of Dr. Gilligan's views on prison guards generally and, in any event, that he did not say anything about the guards who may be witnesses in this case. In addition, my role at the retrial will only be to determine whether the corrections officers have admissible testimony concerning Sampson that is not outweighed by the risk of unfair prejudice. See 18 U.S.C. § 3593(c). The jury will decide whether each is credible and, if so, what weight to give to his testimony.

The manner in which I have dealt with the DeFriest program is also relevant to whether a reasonable person could question my impartiality. In the two cases cited by the government in which recusal was found to be required, the judges had not disclosed the relevant facts to the parties. See Liljeberg, 486 U.S. at 866, 108 S.Ct. 2194 (in finding recusal required by § 455(b)(4) because of judge's service as a trustee of a university that profited by millions of dollars as a result of his decision, and by § 455(a) as well, the Supreme

Court stated that it was "remarkable—and quite inexcusable" that the judge did not disqualify himself as soon as he learned of the university's interest in the case or disclose the facts to the parties); In re School Asbestos, 977 F.2d at 780 (six months of "hard-fought" litigation was required for defendants to discover details of ex parte presentations by 13 of plaintiffs' experts on key, contested issues).

I did not discuss the DeFriest program with the parties in October 2014, when I realized Dr. Gilligan had filed an affidavit in 2010, because I did not believe that any possible issue was raised by my association with an expert who had, in 2010, filed an affidavit which I neither referenced nor relied upon, and who was not expected to be a witness at the retrial. In addition, I wanted to sustain the focus on preparing for the retrial scheduled to begin in February 2015. This analysis was unchanged by Sampson's reference to Dr. Gilligan in the April 2015 budget update concerning experts, as Sampson's counsel indicated that they "just didn't want to waive the possibility" of later retaining Dr. Gilligan. See id. at 6. However, I disclosed the matter instantly and candidly when I learned that Sampson had recently decided to retain Dr. Gilligan to serve as an expert witness at the retrial. These facts would contribute to a fully informed, reasonable person having confidence in my impartiality.

[19] I also provided the government several weeks to investigate the matter, which is not a right provided by § 455. Section 455(e) authorizes the waiver of a possible ground for disqualification under § 455(a) "provided it is preceded by a full disclosure on the record of the basis for disqualification." The statute, therefore, requires full disclosure by the judge, but does not contemplate or provide for discovery in connection with a § 4 55 (a) issue. See, e.g., Ricci v. Key Bancshares of Maine, 111 F.R.D. 369, 373 & n. 4 (D.Maine 1986) (noting that the district judge denied a request for discovery in connection with a motion to disqualify him made pursuant to § 4 55 (a)). In this case, I provided more than an opportunity for discovery, in which Sampson's counsel would have had a right to participate. I gave the government several weeks to have an investigation conducted unilaterally by the United States Attorney's Office and investigators from the FBI, the Internal Revenue Service, and the Massachusetts State Police.

That investigation confirmed the facts that I had disclosed. I did not discuss Sampson or this case with Dr. Gilligan or anyone else associated with the DeFriest program. Nor was there any meaningful discussion of the film at my rental home. There was no reference to Sampson or the case in the film or on the panel. At the unrecorded outset of the program, I explained that my participation should not be misconstrued as an expression of a view by me on DeFriest's case, any other case, or any issue. Although I did characterize Dr. Gilligan as one of the world's leading experts, I also stated I did not agree with everything he said.

I find that a reasonable person could not believe that, as a result of my participation on the DeFriest program with Dr. Gilligan, I would now disregard my oath to be impartial and to faithfully apply the law in this case. Therefore, I am denying the government's motion for my recusal under § 455(a).

B. Comparison with Other Cases

This conclusion is confirmed by the following comparison of this case with other relevant cases. As the First Circuit has explained, "[t]ypically, cases implicating section 455 (a) are fact-specific, and thus sui generis." In re United States, 158 F.3d

at 31. The instant case validates the view that every case is unique. Nevertheless, the facts and reasoning of the cases on which the parties primarily rely are consistent with the conclusion that my recusal is not justified in this case.

The government relies most heavily on In re School Asbestos in contending that my recusal is required. In that case, the judge had been presiding in four consolidated suits for about eight years, and the cases were almost ready for trial. In re Sch. Asbestos, 977 F.2d at 771–72. In holding that the judge's recusal was required by § 455(a), the Third Circuit described some of the relevant facts, by stating that the judge:

> [A]ttended a predominantly pro-plaintiff conference on a key merits issue; the conference was indirectly sponsored by the plaintiffs, largely with funding that [the judge] himself had approved; and his expenses were largely defrayed by the conference sponsors with those same court-approved funds. Moreover, he was, in his own words, exposed to a Hollywood-style "pre-screening" of the plaintiffs' case: thirteen of the eighteen expert witnesses the plaintiffs were intending to call gave presentations very similar to what they expected to say at trial. We need not decide whether any of these facts alone would have required disqualification, for ... we believe that together they create an appearance of partiality that mandates disqualification.

Id. at 782. The Third Circuit also noted that the promotional Literature for the conference "trumpeted the appearance of the judges" at the conference. Id. at 780.

As indicated earlier, the judge did not disclose the foregoing facts to the parties even after the plaintiffs filed a list of 18 prospective expert witnesses that included the 13 who spoke at the conference. Id. When, after six months of "hard-fought" litigation, the defendants discovered the details about the conference, the judge initially decided to exclude the 13 experts from testifying and subsequently limited their testimony solely to factual matters. Id. at 780–81. The judge himself stated that "some people could reasonably suspect a taint" and stated that "had he known of the connections between the plaintiffs and the conference, he would not have attended." Id. at 783.

There are some analogies between the instant case and In re School Asbestos. Although I did not authorize funding for the program at issue, I did participate in organizing it, allowed the Film Society to publicize my participation, and moderated the program. The three DeFriest panelists were generally critical of the United States prison system and the program was, in this sense, "one-sided." However, I repeatedly stated that I was not endorsing their views and, as described earlier, I have participated in many other programs that might be characterized as "one-sided"—some for prosecutors and law enforcement officers, others for defense lawyers.

Like the judge in In re School Asbestos, I have stated that if I had known that Dr. Gilligan had filed an affidavit in this case I would not have participated on the program with him. However, again, that was not because I believed that doing so could have caused a reasonable person to question my impartiality, but rather because I would have wanted to avoid the risk of even an unreasonable question concerning my impartiality. See D.N. 1984 at 12.

Most importantly, the instant case is materially different from In re School Asbestos with regard to the facts emphasized by the Third Circuit. See 977 F.2d at 782. No party participated in organizing the presentation of the DeFriest film or the panel discussion of it. Sampson did not

provide funds for the program, did not send Dr. Gilligan to participate, and had no knowledge of it. Therefore, in contrast to the asbestos conference, a reasonable person could not perceive the DeFriest program as an effort by a party to influence my decisions in this case.

The asbestos conference involved thirteen of plaintiff's eighteen expert witnesses on a key merits issue, and it was foreseeable that there would be intense litigation concerning the proposed testimony that was previewed at the conference. See id. at 782. In contrast, the DeFriest panel involved only one of Sampson's many potential expert witnesses. While Dr. Gilligan discussed some issues that are generally relevant as background for any admissible testimony he may have concerning Sampson, he did not mention, let alone express an opinion, on Sampson. Therefore, he did not give a "pre-screening" of what would be the most important part of any admissible trial testimony-testimony concerning Sampson himself. In essence, unlike the asbestos conference, the DeFriest panel had no direct connection to Sampson or his particular mitigation case.[35]

Another case discussed by the parties, In re Aguinda, 241 F.3d at 203–04, 206, addressed, among other things, the implications of a judge attending a program of "unbalanced" presentations. Aguinda was a case brought by foreign plaintiffs who claimed that Texaco polluted rainforests in their countries. The District Judge dismissed the suit. Id. at 197. After the dismissal, he attended an expense-paid seminar sponsored by a nonprofit entity, FREE, that discussed issues relating to the environment and pollution. Id. at 198–99. The program, which was "unbalanced," allegedly presented a pro-development, anti-environmental point of view. Id. at 202–04. Texaco, a defendant in Aguinda, had provided some funding for the FREE program, and the former CEO of Texaco was a speaker. Id. at 199, 202. The dismissal was subsequently reversed and the case was remanded. The plaintiffs moved for the recusal of the judge, who denied the motion.

The Second Circuit affirmed, holding that recusal was not permissible under § 455(a) because no reasonable person could have questioned the judge's impartiality. Id. at 206–07. The Second Circuit found that, although "unbalanced," the presentation at the FREE seminar did not relate to legal issues material to the disposition of a claim or defense in the remanded case. Id. at 202, 204. It wrote that, "[e]ven if a judge were persuaded by the FREE seminar that our environmental laws are on balance harmful in many respects, the presumption is that a judge will put personal beliefs aside and rule according to the laws as enacted, as required by his or her oath." Id. at 204. It added that "the imbalance of a seminar involves no more of an objective appearance of partiality than does that appearance created by the fact that every judge inevitably has opinions on the controversies of the day." Id.

35. In In re School Asbestos, the Third Circuit may have applied a lower standard for finding recusal under § 455(a) is required than the First Circuit applies. The Third Circuit reasoned, in part, that, "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." In re Sch. Asbestos, 977 F.2d at 782. In contrast, the First Circuit has repeatedly stated that "mere suspicion" is not sufficient to justify recusal." See, e.g., In re Bulger, 710 F.3d at 47; In re Allied–Signal, 891 F.2d at 971; Cigna Fire, 86 F.3d at 1271; In re United States, 666 F.2d at 695 n.*. In any event, as described above, this case is materially different than In re School Asbestos.

The instant case is comparable to Aguinda to the extent that the DeFriest panel involved discussion of issues generally implicated in this case, as well as others. However, it did not include any discussion of Sampson, this case, or any legal issue to be decided in this case. Therefore, like Aguinda, the panel did not include discussion of issues material to the disposition of this case. Thus, the Second Circuit's reasoning in Aguinda concerning the implications of an "unbalanced" presentation is relevant. However, I again recognize that this case presents the additional issues a r is in g from Dr. Gilligan's participation analyzed previously.

United States v. Bonds, 18 F.3d 1327, is another case cited by the parties in which recusal under § 4 55 (a) was found to be unjustified. In Bonds, a Court of Appeals judge denied a motion to disqualify him from participating in a rehearing en bane. Id. at 1328. A significant issue was whether blood found at a crime scene was the defendant's. Id. The judge had attended a seminar at which the speakers included several FBI forensic analysts who had testified at an evidentiary hearing concerning the admissibility of DNA testimony in the trial of the defendant and his co-defendants. Id. at 1328–29; see also United States v. Bonds, 12 F.3d 540, 552 (6th Cir.1993). One of them spoke substantially about his testimony at the evidentiary hearing, and discussed new data not mentioned in his testimony. Bonds, 18 F.3d at 1329. The program was one-sided. Id. Some of the panelists attacked Bonds's attorneys, who were present. Id. The judge was seen conversing with a trial witness from the FBI's forensic laboratory. Id.

Nevertheless, the judge denied the request to recuse, in part because, in contrast to the instant case, the evidence he would be considering was already "frozen into the record sometime before." Id. at 1330. The judge analogized his attendance at the conference to acquiring information from a book or article. Id. at 1330–31. He concluded that:

> |A| reasonable person would not doubt my impartiality. An unreasonable person could focus on one aspect or another of things I have read or said, persons to whom I have talked, or articles in which I have been credited. However, a reasonable person, looking at all of the facts, would say that I am interested in the subject matter area, and no more.

Id. at 1331. Similarly, the DeFriest panel would encourage a reasonable person to believe that I am interested in educating the public concerning issues regarding prisons and prisoners, but not that I would violate my oath to be impartial in this, or any other, case.

In Da Silva Moore v. Publicis Groupe, a magistrate judge denied a motion to recuse under § 455(a) after he participated in a conference regarding e-discovery issues that arose in a case before him. Id. 868 F.Supp.2d 137, 156–57, 159–60 (S.D.N.Y.2012). Defense counsel in that case spoke on two panels with him. Id. at 160. The magistrate judge mentioned the case in which they were all participating, but not by name. Id. at 157.

The magistrate judge denied the request for his disqualification for several reasons. Among other things, he did not have any ex parte communications with defense counsel about the case. Id. at 160. In contrast to In re School Asbestos, supra, he had not received a "'pre-screening'" of the defendants' case because "the panel discussions only covered the subject of computer-assisted review in general." Id. at 162. Therefore, the magistrate judge concluded that his disqualification would be inconsistent with the Code of Conduct, which, as explained earlier, encourages

judges to participate in programs to educate members of the bar and the public concerning matters relating to the administration of justice if doing so would not raise a reasonable question concerning their impartiality. Id. at 163–64. The instant matter is analogous to Da Silva in these respects.

Pitera is also an illuminating case. There, the judge was presiding in a drug case in which the death penalty was sought for murder in furtherance of a continuing criminal enterprise. See Pitera, 5 F.3d at 626. Seven months before trial, the judge gave a lecture to the local federal Organized Crime Drug Enforcement Task Force, which "included advice to the assembled agents and prosecutors about steps they might take to increase the prospects for conviction in narcotics cases and urged them to take such steps." Id. The judge did not, however, mention the Pitera case. Id. She later denied the defendant's motion to recuse under § 455(a) in what the Second Circuit called a "carefully considered oral decision." Id.

The Second Circuit affirmed that decision. Id. at 626–27. As described earlier, it explained that the judge's comments had to be viewed in the context of "significant matters" of which "a reasonable person, knowing all the facts," would be aware. Id. at 626 (emphasis in original). In Pitera, this information included the fact that the lecture had also included criticisms of prosecutors and that the judge "commendably lecture[d] to a variety of trial practice seminars." Id. at 626–27. Therefore, the Second Circuit was "satisfied that a reasonable person knowing all the facts would not think that the Judge's impartiality might reasonably be questioned." Id. at 627.

Similarly, in the DeFriest program, the Sampson case was not mentioned. I stated, among other things, that I did not necessarily agree with everything any panelist had said. I too participate in many programs for members of the bar and the public, including some that are exclusively for prosecutors and law enforcement officers. In essence, the argument for recusal is less strong in this case than in Pitera because a reasonable person would not believe that I was expressing my own views or endorsing Dr. Gilligan's.

In summary, with regard to the cases the parties discuss, this case is different in material respects from In re School Asbestos. It is more analogous to cases like In re Aguinda and Pitera, where recusal was not required.

Although, again, each case is unique, I have dealt with comparable issues before. In Salemme I, denied the government's motion to recuse based in part on my association with witnesses. See Salemme II, 164 F.Supp.2d at 104–07. As discussed in Salemme II, id. at 101, 105–06, in In re United States, 666 F.2d at 691–97, the First Circuit held that the district judge's recusal was not required under § 455(a) in a public corruption case when two trial witnesses had testified about corruption in a Governor's administration when the judge was his Chief Counsel, and the defendant, a State Senator, had supported the Governor. With regard to the defendant, the First Circuit wrote:

> [I]t is beyond contemplation that [any] gratitude would be of the weight necessary to cause a judge to jettison his impartiality and, in open court day after day, to violate his deepest professional and ethical commitments as a judge.
>
> * * *
>
> [Finding recusal to be required] would reflect a more jaundiced view as to when there should be a reasonable doubt

about a judge's impartiality than accords with the public perception.

In re United States, 666 F.2d at 696–97.

Similarly, the questions the government asserts a reasonable person would have about my impartiality concerning Dr. Gilligan and issues discussed on the DeFriest panel are rooted in too "jaundiced" a view of reasonable people. A reasonable person would know that in affirming the death sentence I imposed in 2008, the First Circuit wrote that "the sentencing proceedings in this case were conducted fairly and with scrupulous attention to the process required by law." Sampson, 486 F.3d at 52. Nevertheless, the government asserts, in effect, that as a result of my role in the DeFriest program, a reasonable person would believe that I now have a " 'disposition of a kind that a fair-minded person could not set aside when judging [this] dispute.' " See Snyder, 235 F.3d at 48 (quoting Liteky, 510 U.S. at 557–58, 114 S.Ct. 1147 (Kennedy, J., concurring)); In re United States, 158 F.3d at 34 (same). In essence, it claims that a reasonable person could believe I would now, because of the DeFriest program, begin to violate my oath, be biased, and not faithfully apply the law in any decisions I must make concerning Dr. Gilligan's proposed testimony and the testimony of correction officers the government intends to present concerning Sampson's dangerousness while on death row. See D.N. 2060 at 15-18. If in d that a reasonable person could not have such doubts.

C. The Interest of Heightened Reliability in a Capital Case Does Not Make Recusal Necessary or Appropriate

[20] The conclusion that my recusal under § 455(a) is not necessary or appropriate is not affected by the fact that heightened reliability is required in determining whether a death sentence is justified in a capital case. See Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality op.). As explained previously, the government agrees that I am actually impartial and has moved for my recusal only under § 455(a), claiming that a reasonable person would question my impartiality. Because it is undisputed that I am actually impartial, there should be no question about the integrity, and therefore reliability and finality, of the decisions I have made, and may make, in this case.

In ordering Judge Richard Stearns's recusal under § 455(a) in Bulger, the First Circuit noted the distinction between cases involving actual bias or prejudice that required is qualification under § 455(b) and those in which recusal is required based only on an appearance of partiality under § 455(a). It wrote:

> Nor does our own ruling require that Judge Stearns's March 4 order [on the issue of immunity] (or any other, save the one under review) be vacated. The defendant is free to respond to that order as he sees fit, but nothing we decide here necessarily requires reploughing the ground, given the absence of any allegation that Judge Stearns is actually biased.

In re Bulger, 710 F.3d at 49 n. 3 (emphasis added). Similarly, in In re Allied–Signal, 891 F.2d at 972–73, the First Circuit explained in extensive dictum that a violation of § 455(a) would not have required a retrial of a long and complicated case.

Relying in part on In re Allied–Signal, 891 F.2d at 972–73, after ordering recusal under § 455(a) in In re School Asbestos, 977 F.2d at 786–87, the Third Circuit wrote that, "we do not believe that leaving [the district judge's] orders in place will cause any serious injustice to the parties in this case." In Pitera, which as explained earlier was a capital case, the Second Cir-

cuit did not refer to the need for heightened reliability when the death penalty is sought and applied the customary § 455(a) standard to find that the trial judge's recusal was not required as a result of her lecture to prosecutors and law enforcement officers on issues related to that case. See Pitera, 5 F.3d at 626–27.[36]

Moreover, Sampson, advised by experienced counsel, including counsel experienced in capital cases, has ardently argued that my recusal is not required under § 455 (a). It is likely that, if asked, he would, under § 455(e), waive any objection relating to the DeFriest program, as he has repeatedly waived any § 455(a) ground for my recusal based on my association with Mr. Hafer. It is, as the government argues, conceivable that if Sampson is again sentenced to death, successor counsel may assert that his current counsel are performing ineffectively with regard to the issue of recusal. It is, however, not conceivable that they could satisfy the " 'highly demanding' " and " 'heavy burden' " to justify relief based on ineffective assistance of counsel. See Knight v. Spencer, 447 F.3d 6, 15 (1st Cir.2006) (quoting Williams v. Taylor, 529 U.S. 362, 394, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)); see also Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To find recusal to be justified in this capital case, when it would not be in a non-capital case, would be inconsistent with the principle that a motion for recusal should not be granted simply because claims of partiality have been highly publicized. See, e.g., In re Aguinda, 241 F.3d at 201–02, 206; In re Drexel Burnham, 861 F.2d at 1309; see also In re United States, 666 F.2d at 694–95. It would also be incompatible with the requirement that in deciding whether to recuse under § 455(a), "the district court is not to use the standard of 'Caesar's wife,' the standard of mere suspicion." In re Allied–Signal, 891 F.2d at 970; see also In re Bulger, 710 F.3d at 47 (same); Cigna Fire, 86 F.3d at 1271 (same). Moreover, recusing in a capital case when disqualification would not be justified in a conventional case would contravene the direction that § 455 (a) "should not be used by judges to avoid sitting on difficult or controversial cases." Snyder, 235 F.3d at 45 (internal quotation marks omitted).

D. Recusal Could Encourage the Reasonable Public Perception that the System Can Be Manipulated to Obtain a Preferable Judge

[21] In view of the foregoing, I find that § 455(a) does not require my recusal. This conclusion also serves the interest of assuring that § 455(a) is not abused, and does not reasonably appear to have been abused, by a party to manipulate the system to replace an impartial judge with one it prefers. See In re Bulger, 710 F.3d at 47. Events in other cases in this District make it particularly important that any such perception not be encouraged now.

[22] Litigants are entitled to a judge who is, and to a reasonable person appears to be, impartial. However, they are not entitled to a judge of their own choosing. See In re Drexel Burnham Lambert, Inc., 861 F.2d at 1312. In enacting § 455(a):

36. In Liljeberg, the Supreme Court found that the judge learned he had a fiduciary interest in the case and, therefore, that his disqualification was required under § 455(b) (4), as well as § 455 (a). See Liljeberg, 486 U.S. at 866–67, 108 S.Ct. 2194. The violation of § 455(b) (4) contributed to the Court's holding that vacatur of the judge's decision benefiting the University on whose board he served "was an appropriate remedy." Id. at 867, 108 S.Ct. 2194. Liljeberg is the only case cited by the parties that ordered vacatur of prior decisions as well as recusal.

Congress expressed concern over abusive invocation of the statute by parties as a means of judge shopping, stating:

> Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

United States v. Cooley, 1 F.3d 985, 993 (10th Cir.1993) (quoting H. Rep. No. 1453, 93d Cong., 2d Sess. 1 (1974)).

The First Circuit has written that "[i]n the real world, recusal motions are sometimes driven more by litigation strategies than by ethical concerns" and "courts cannot afford to spawn a public perception that lawyers and litigants will benefit by undertaking such machinations." In re Cargill, 66 F.3d at 1262–63.

Therefore, again, with regard to motions for recusal under § 455(a), the First Circuit has repeatedly and recently reminded that:

> the disqualification decision must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.

In re Bulger, 710 F.3d at 47 (internal quotation marks omitted) (quoting In re Allied–Signal, 891 F.2d at 970)).[37]

The judges of this District Court have long been concerned about the damaging effect that the reasonable perception that the assignment of cases can be manipulated has on the public confidence in the administration of justice. Concern about this issue has increased as a result of certain recent events.

For example, in 2001, Rule 40.1(E) of the Local Rules of the United States District Court for the District of Massachusetts was amended to provide that, "[c]riminal cases shall be assigned to that division in which the most significant criminal conduct related to the alleged violation occurred within the District of Massachusetts." Nevertheless, in 2012, the government indicted in Worcester a RICO case against the Commissioner of the Massachusetts Probation Office, who was based in Boston, and two of his deputies. See O'Brien, 18 F.Supp.3d at 27–28. "Essentially, the government contend[ed] that defendants engaged in a scheme to defraud involving the process of hiring probation officers, in which individuals who were 'sponsored' by state legislators would be hired in return for favorable appropriations and other legislation." Id. at 28. The Legislature, like the Commissioner of Probation, is based in Boston, which is in the Eastern Division of the District of Massachusetts. The fact that the indictment was obtained in Worcester could have reasonably encouraged the perception that the government was seeking to evade the random assignment of cases that occurs in the Eastern Division, which in 2012 had about eleven judges, and select the one judge then based in Worcester, Judge Saylor.

37. In neither its memorandum in support of its motion for recusal, see D.N. 2025, nor its reply brief, see D.N. 2060, does the government discuss the First Circuit's repeated statements that the disqualification decision must reflect both the need for proceedings that appear to be impartial and also the need to prevent the appearance that a party can manipulate the system to obtain a judge it prefers.

The defendants subsequently moved for Judge Saylor's recusal, primarily relying on the claim that they intended to present as a witness at trial Judge Timothy S. Hillman, who as the Magistrate Judge sitting in Worcester had worked closely with his friend Judge Saylor, including on the O'Brien case. Id. at 28–30. Judge Saylor granted that motion. Id. at 37–38. However, Judge Hillman was never called to testify.

The two cases against James "Whitey" Bulger raised comparable concerns. Bulger had been a fugitive from charges in a case assigned to me in 1995. He was subsequently charged in a second case before Judge Stearns.[38] In the 1980s, Judge Stearns held several managerial positions in the Criminal Division of the United States Attorney's Office in the District of Massachusetts. Bulger moved for Judge Stearns's recusal under § 455(a). See In re Bulger, 710 F.3d at 44–45. He argued that a reasonable, fully informed person would question Judge Stearns's impartiality because of his responsibilities in the Criminal Division, his continuing friendship with the former Chief of the Criminal Division and then-Director of the FBI, Robert S. Mueller, III, and the fact that Mr. Mueller and Judge Stearns would be called as material witnesses concerning Bulger's immunity defense. Id. The First Circuit found that Judge Stearns's recusal was required by § 455 (a). Id. at 48–49. However, after the case was reassigned, Bulger did not call Mr. Mueller or Judge Stearns to testify to the judge on the immunity issue or to the jury on any other issue.[39]

Bulger and O'Brien reasonably suggest that § 455(a) can be misused to have an impartial judge replaced with another judge a party might prefer. As indicated earlier, several aspects of the history of this case implicate the interest of not encouraging a reasonable public perception that parties will benefit by too easily obtaining the disqualification under § 455(a) of an admittedly impartial judge.

The government's inconsistent position regarding recusal issues in this case could suggest strategic motivations. As described earlier, a reasonable, fully informed person would know that my association with the lead prosecutor in this case, Mr. Hafer, is greater than my association with Dr. Gilligan. I attended Mr. Hafer's wedding, hosted him and his wife in my home, successfully recommended both of them for jobs (including Mr. Hafer's present position as a federal prosecutor), and publicly praised Mr. Hafer as having experience and qualities comparable to some of

38. I denied Bulger's motion to consolidate the case before Judge Stearns with my case pursuant to Federal Rule of Criminal Procedure 8 and Local Rule 40.1 (J). See United States v. Bulger, No. 94cr–10287, 2011 WL 2600996 (D.Mass. June 30, 2011). As explained at a June 30, 2011 hearing, I denied Bulger's request in meaningful measure because my taking the case from Judge Stearns would have encouraged the perception that Bulger had successfully manipulated the system to select a judge he preferred.

39. I have, for present purposes, assumed that Dr. Gilligan will be a witness at retrial. However, as explained earlier, Sampson's counsel have not "categorically committ[ed]" to calling Dr. Gilligan to testify. D.N. 2011 at 1. Rather, they have stated that "at this time Dr. Gilligan continues to be a witness Mr. Sampson may seek to present at the trial of this matter." Id. Dr. Gilligan was selected by Sampson to replace an expert witness who was unavailable to testify at a retrial beginning on September 16, 2015. The retrial is being postponed. It is possible that the expert that Sampson preferred will be available for the retrial or that Dr. Gilligan will not be called by Sampson to testify for some other reason. Although the risk that Dr. Gilligan will not be called to testify has not affected my analysis of the § 455(a) issue, it should be recognized that it exists.

the finest prosecutors with whom I had worked. In 2010, when Mr. Hafer first appeared in this case, the government represented that my recusal was not required under § 455(a) because no reasonable person could question my impartiality and, in any event, waived any ground for my recusal under § 455(e).[40]

It was not until I vacated Sampson's death sentence and the First Circuit affirmed that the government suggested I should recuse myself because of my association with Mr. Hafer. See Sampson,12 F.Supp.3d 203, 212 (D.Mass.2014). I declined to disqualify myself in part because recusal would encourage the reasonable perception that § 455(a) can be abused to have an impartial judge replaced for strategic reasons. Id. [41]

The interest of not encouraging a reasonable public perception that parties will benefit by too easily obtaining the disqualification under § 455(a) of an admittedly impartial judge is also implicated by the government's present motion. As described earlier, in finding that the 2003 trial to determine Sampson's sentence was fair, the First Circuit wrote that I "handled the case patiently and sensitively." Sampson, 486 F.3d at 51. It concluded that "the sentencing proceedings in this case were conducted fairly and with scrupulous attention to the process required by law." Id. at 52. As I said when I sentenced Sampson to death in 2003, providing that fair trial "required making decisions that I understand were painful to the victims' families, but which were legally necessary and appropriate." Sampson, 300 F.Supp.2d at 277.

Nevertheless, at Sampson's sentencing in 2003, the father of one of Sampson's

40. Similarly, as discussed earlier, the government did not suggest that my recusal was required under § 455(a) because of the two programs in which Mr. Wortmann, who was the lead prosecutor in the case, and I collaborated in 2010.

41. As I explained in 2014, my concern about the injurious public perception that a party can without justification influence the judge who will preside in it s case is long-standing. See Sampson, 12 F.Supp.3d at 212.

> In 1994, the United States attorney's Office took the position in United States v. Sawyer, Cr. No. 94-10168MLW, that my disqualification under 28 U.S.C. § 455(a) was neither necessary nor appropriate, where the prosecutor had been my part-time personal assistant in the United States attorney's Office, I later successfully recommended him for employment in that office, and I had recently officiated his wedding. In Sawyer, the government offered to replace the lead prosecutor, if necessary, to keep me as the judge in the case.
>
> In a September 2, 1994 Memorandum and Order, I ruled that, under In re Allied–Signal, it would be permissible for me to preside in the Sawyer case. However, in view of the confluence of several unique factors, I recused myself. Among those factors was my desire not to encourage the public perception that the United States Attorney could influence which judge would preside in a criminal case by its selection of a particular person to prosecute it. See United States v. Sawyer, Cr. No. 9410168-MLW, slip op. at 12 (D. Mass. Sept. 2, 1994). In Sawyer, the prosecutor had a long history with the case and I had none. In Sampson, the situation [with regard to Mr. Hafer] is essentially the reverse. Id.
>
> Id.
>
> Similarly, in the original case against Bulger and others in 1998, I denied the government's motion for my recusal under § 455 based in part on matters it had previously stated would not cause a reasonable person to question my impartiality, including my friendship with former colleagues in the United States Attorney's office, and, in any event, had twice waived as grounds for my disqualification. See United States v. Salemme, 164 F.Supp.2d 49, 84–85 (D.Mass.1998) ("Salemme I"); Salemme II, 164 F.Supp.2d at 94–96. I denied the government's request to withdraw its waivers and rejected the government's request for my recusal in part because of concerns about the perception of judge shopping. See Salemme II, 164 F.Supp.2d at 94–96.

victims expressed "outrage" at my conduct of the trial. See Jan. 29, 2004 Tr. at 7 (D.N. 775). This outrage was reported to have been expressed again when I vacated Sampson's sentence because misconduct by a juror had violated Sampson I s constitutional right to a fair trial. See O'Ryan Johnson and John Zaremba, Judge blasted for killer flip, Boston Herald, Oct. 21, 2011 (D.N. 2046-3 at 18-19). In 2014, after I discussed the possibility of ordering that Sampson's competency to stand trial be evaluated, the media reported that the same individual called my "actions 'infuriating' and said he was trying to take steps to have the judge removed from the Sampson case." See Chris Burrell, Families of murderer Gary Sampson's victims distressed by latest ruling from judge, The Milford Daily News, Mar. 19, 2014 (D.N. 2046-6 at 1-2). This desire for my disqualification has recently been reiterated. See Milton Valencia, Recusal call clouds Gary Sampson case, Boston Globe, August 31, 2015, at A1.

For the reasons described in detail in this Memorandum, after careful consideration I have concluded that no reasonable person could believe that, as a result of my participation in the DeFriest panel, I now have a "disposition of a kind that a fair-minded person could not put aside when judging" matters in this case. Snyder, 235 F.3d at 48 (quoting Liteky, 510 U.S. at 557–58, 114 S.Ct. 1147 (Kennedy, J., concurring)). Recusal in the current circumstances would be incompatible with my duty to be sensitive to the "need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking." In re Allied–Signal, 891 F.2d at 970. As indicated earlier, it would also be inconsistent with my duty not to misuse § 455(a) by recusing myself to avoid presiding in a difficult and controversial case. See Snyder, 235 F.3d at 45.

V. CONCLUSION

For the forgoing reasons, the government's motion for my recusal under § 455(a) is being denied.

The parties and I have devoted much of the past two years to preparing for what Sampson represents would have been the fastest retrial of a federal capital case in history. I had established an intensive schedule for submissions, hearings, and decisions in August and September 2015 to prepare for a September 16, 2015 retrial. More than two months have now been devoted to the government's investigation, the parties' briefing, and my deciding the government's motion for recusal, rather than to resolving the many other pretrial issues that were on the agenda. Therefore, it will not be possible to begin the retrial as scheduled before a judge the parties each acknowledge is actually impartial.

Nor can a new schedule be established until the motion for my recusal is finally resolved. The government may wish to petition the First Circuit for a writ of mandamus reversing the denial of its motion for my disqualification. Such a writ is sought under the All Writs Act, 28 U.S.C. § 1651, which provides no time limit for seeking review. See Cheney v. U.S. Dist. Ct. for Dist. of Columbia, 542 U.S. 367, 378, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004). Pursuant to Federal Rule of Appellate Procedure 4(b)(1)(B), the government usually has 30 days to file a notice of appeal in a criminal case. I am providing the government until October 13, 2015, to state whether it will seek a writ of mandamus.

VI. ORDER

In view of the foregoing, it is hereby ORDERED that:

1. The government's Motion for Recusal (D.N. 2025) is DENIED.

2. The government shall report, by October 13, 2015, whether it in t ends to seek a writ of mandamus from the First Circuit regarding the Motion for Recusal.

3. Sampson's Motion to Seal Exhibits to Recusal Response (D.N. 2046) is DENIED and the exhibits (D.N. 2046-1 to -7) are UNSEALED.

4. An ex parte order authorizing Sampson to retain Dr. James Gilligan as an expert witness shall be issued.

UNITED STATES of America

v.

Gary Lee SAMPSON

Cr. No. 01-10384-MLW

United States District Court,
D. Massachusetts.

Signed December 2, 2015

Background: In capital prosecution, defendant moved to preclude, on constitutional grounds, the death penalty as a sentencing option. The District Court, Mark L. Wolf, J., denied motions. Defendant moved for clarification and/or reconsideration.

Holdings: The District Court, Mark L. Wolf, J., held that:

(1) clarification of decision denying motion to preclude death penalty, on constitutional grounds, was warranted, but

(2) clarification of statistics relating to decline in number of death sentences being imposed by jurors did not alter District Court's prior conclusions.

Motion allowed in part, and denied in part.

1. Criminal Law ⇐632(3.1)

District courts have the inherent authority to reconsider their interlocutory orders outside the sentencing context.

2. Criminal Law ⇐632(3.1)

A district court may grant a motion for reconsideration if the moving party presents newly discovered evidence, if there has been an intervening change in the law, or if the movant can demonstrate that the original decision was based on a manifest error of law or was clearly unjust.

3. Criminal Law ⇐632(3.1)

Motions for reconsideration should not be granted based on new evidence when all of the evidence offered in support of the motion for reconsideration was available to movant at the time the original motion was filed; in addition, any new evidence must be capable of causing the court to alter its original decision.

4. Criminal Law ⇐632(3.1)

A motion for reconsideration should be granted if the court has made an error not of reasoning but of apprehension of a party's arguments or evidence.

5. Sentencing and Punishment ⇐1748

Clarification of District Court's prior decision, denying defendant's motion to preclude, on constitutional grounds, the death penalty as a sentencing option was warranted, and decision would be amended to include updated statistics relating to decline in number of death sentences being imposed by jurors, where less than perfect citation work by defense counsel had resulted in inconsistencies between defendant's briefing and his sources, and an incomplete evidentiary record.

2. The defendants shall, by February 26, 1998, address the same issues and respond to the government's submission.

3. If necessary to resolve the question of my possible recusal, a hearing will be held on March 3, 1998, at 9:30 a.m.

UNITED STATES of America

v.

Francis P. SALEMME, et al.

United States of America

v.

John Martorano.

Nos. CR. 94–10287, CR. 97–10009.

United States District Court,
D. Massachusetts.

March 30, 1998.

On recusal issues in criminal case, a federal judge was asked by government to analyze issues concerning possibility of recusal. After the court analyzed the issues, 164 F.Supp.2d 49, and asked the parties for their opinions as to whether recusal was warranted, the government requested leave to withdraw its waivers as to recusal. The District Court, Wolf, J., held that: (1) no factual basis to doubt judge's impartiality had been shown; (2) defendants' factual submission played no role in judge's decision not to recuse himself; (3) government could not withdraw previous waivers of objections to judge's decision not to recuse himself; (4) reasonable person would not think that FBI informant's prior suspicions of judge would cause judge to be unfair or suggest that judge had personal knowledge of disputed issues in case; (5) reasonable person would not question judge's impartiality as to former FBI agents; (6) reasonable person would not believe that judge, as Deputy United States Attorney, had participated in application for wiretap; and (7) judge's past associations with law enforcement witnesses would not cause reasonable person to question judge's impartiality.

Ordered accordingly.

See also 91 F.Supp.2d 141.

1. Judges ⇐49(1)

Presiding judge has duty to decide whether fully informed, reasonable person would question his impartiality because of matters at issue; in answering this question, judge must keep in mind that a decision on disqualification must reflect not only need to promote public confidence by assuring appearance of impartiality, but also need not to permit the reasonable perception that disappointed litigants can prompt disqualification of a fair judge in hope of obtaining another judge more to their liking. 28 U.S.C.A. § 455(a).

2. Judges ⇐50

Judge is obligated to continue to preside unless reasonable factual basis to doubt his impartiality or fairness is shown by probative evidence. 28 U.S.C.A. § 455(a).

3. Judges ⇐49(1)

Properly informed, reasonable people would not question judge's impartiality, and so judge did not recuse himself; no reasonable factual basis to doubt judge's impartiality had been shown by probative evidence. 28 U.S.C.A. § 455(a).

4. Records ⇐32

Defendants' request for unsealing of their factual submission in support of motion to dismiss, which they asserted strengthened position that judge should not be disqualified, was denied; submission did not play role in judge's decision not to recuse himself. 28 U.S.C.A. § 455(a).

5. Judges ⇐49(1)

Issue of whether judge should be disqualified from a case on basis that his continuing to sit presents mistaken appearance of unfairness or impropriety must be analyzed from perspective of an objective, knowledgeable member of the public. 28 U.S.C.A. § 455(a).

6. Judges ⇐51(4)

It is the duty of the presiding judge, rather than another judge, to decide whether his disqualification, grounded on facts that would create a reasonable doubt concerning the judge's impartiality in the mind of a reasonable person, is required. 28 U.S.C.A. § 455(a).

7. Judges ⇐53

Parties may waive objections based on judge's decision not to disqualify himself from case on ground that his continuing to sit presents mistaken appearance of unfairness or impropriety. 28 U.S.C.A. § 455(a, e).

8. Judges ⇐40

Statute which mandates disqualification of judge when his continuing to sit in case presents mistaken appearance of unfairness or impropriety from perspective of an objective, knowledgeable member of the public, is intended to promote public confidence in integrity of the judicial process. 28 U.S.C.A. § 455(a).

9. Judges ⇐49(1)

Trial judge must hear case unless some reasonable factual basis to doubt his impartiality or the fairness of the tribunal is shown by some kind of probative evidence; decision to disqualify may not properly be based on mere speculation, suspicion, or erroneous information published as fact in the newspapers. 28 U.S.C.A. § 455(a).

10. Judges ⇐51(2)

Party seeking disqualification of judge must do so at earliest moment after knowledge of facts demonstrating basis for such disqualification. 28 U.S.C.A. § 455.

11. Judges ⇐53

Grounds for recusal on basis that judge's continuing to sit in case presents mistaken appearance of unfairness or impropriety, when waived previously by party, are not revived by the discovery of new possible grounds for disqualification; such reconsideration abets perception that law regarding disqualification can be used as tactic to jettison an impartial judge whose slant on a case jeopardizes party's chances for ultimate success. 28 U.S.C.A. § 455(a, e).

12. Judges ⇐53

Government could not, by raising new issues, withdraw its previous waivers of objections to judge's continuing to sit in case in which government had expressly waived grounds for recusal on basis of mistaken appearance of unfairness or impropriety; emergence of new issues did not operate to permit further consideration of the grounds that were waived. 28 U.S.C.A. § 455(a, e).

13. Judges ⇐49(1)

Report to government suggesting suspicion that judge had leaked information about an investigation, made by defendant who was FBI informant, would not cause a reasonable person to think that judge would violate duty to be fair to defendant, and therefore recusal was not warranted;

even defendant did not seek judge's disqualification, and government had raised no objection until after judge made rulings adverse to government. 28 U.S.C.A. § 455(a).

14. Judges ⇐49(1)

Recusal was not warranted for judge on basis that possible introduction of document, in which defendant had reported suspicion that judge, when in office as Deputy United States Attorney, might have leaked information about an investigation, might cause reasonable person to believe that judge had personal knowledge of disputed evidentiary fact; only information judge had about the document had been obtained during the course of the case and so was not knowledge gained from an extrajudicial source, such as would require disqualification. 28 U.S.C.A. § 455(b)(1).

15. Judges ⇐49(1)

A judge's knowledge of disputed facts requires his disqualification only if the knowledge has an extrajudicial source. 28 U.S.C.A. § 455(b)(1).

16. Judges ⇐49(1)

Recusal was not warranted for judge on basis that judge, when in office as Deputy United States Attorney, might have known that person was government informant who might have been involved in compromising another investigation, such as might cause reasonable person to believe that judge had personal knowledge of disputed evidentiary fact; no evidence indicated that informant had anything to do with leak that compromised investigation, nor that judge knew that witness was informant, and so judge had no knowledge gained from an extrajudicial source, such as would require disqualification. 28 U.S.C.A. § 455(b)(1).

17. Judges ⇐53

Previous waivers by government of objections to judge's continuing to sit, on ground that his impartiality might reasonably be questioned, were not binding as to information discovered since issuance of waivers. 28 U.S.C.A. § 455(a, e).

18. Judges ⇐51(4)

Judge is not compelled automatically to accept as true allegations made by party seeking judge's recusal; rather, judge may contradict the factual allegations in an affidavit with facts drawn from his own personal experience. 28 U.S.C.A. § 455.

19. Judges ⇐51(4)

To the extent that facts are in dispute in motion to recuse, factual determinations are made by judge whose recusal is in question. 28 U.S.C.A. § 455.

20. Judges ⇐49(1)

Comments made by possible witness which contradicted judge's memory of what had been said would not cause, nor contribute to causing, a reasonable person to question judge's ability to be fair to parties, such as would warrant recusal to avoid appearance of unfairness or impropriety. 28 U.S.C.A. § 455(a).

21. Judges ⇐49(1)

Recusal was not warranted on basis that judge might be biased against two former FBI agents, possible witnesses in trial, who had been suspected of compromising investigation during time when judge had been Deputy United States Attorney in overall charge of investigation; reasonable person would not question impartiality of judge on basis of unfounded suspicions from years before. 28 U.S.C.A. § 455(a).

22. Judges ⇐45

Familiarity, or even a judge's friendship with, prospective witnesses does not

require a judge's recusal under statute requiring disqualification if a reasonable person would question judge's ability to be fair to parties, to avoid appearance of unfairness or impropriety. 28 U.S.C.A. § 455(a).

23. Judges ⇐45

Recusal was not warranted where judge had had limited and ordinary professional interactions, but not friendships, with two FBI agents; agents were not parties in trial but only witnesses, and were not likely to be asked about events concerning their previous association with judge. 28 U.S.C.A. § 455(a).

24. Judges ⇐47(1)

Recusal was not warranted, on ground of possible appearance of unfairness and impropriety based on extrajudicial knowledge by judge of disputed evidentiary fact, where a well-informed, reasonable person would not believe that judge, at time when he was Deputy United States Attorney, participated in preparation of application for electronic surveillance which was involved in case; judge did not recall being involved, in his position such was not generally his job, people doing such surveillance did not generally report to him, and government files concerning that surveillance did not make any reference to judge. 28 U.S.C.A. § 455(a).

25. Judges ⇐49(1), 53

Fact that former high-ranking law enforcement officials might be questioned about defendants' status as FBI informants did not require judge's recusal, despite judge's former position as Deputy United States Attorney; judge had not been "similarly situated" to witnesses, defendants themselves were not concerned that judge might be biased against them because of past law enforcement associations, and both parties had previously waived this possible ground for recusal. 28 U.S.C.A. § 455(a).

26. Judges ⇐49(1)

Possibility that new recusal issues might emerge in future was not proper basis for judge's disqualification. 28 U.S.C.A. § 455.

27. Judges ⇐47(1)

Possibility that judge might be required to be material witness concerning disputed issue at trial was not enough to require recusal; possibility was nothing more than unsubstantiated speculation which no knowledgeable, reasonable person would find likely. 28 U.S.C.A. § 455(b)(5)(iv).

MEMORANDUM AND ORDER

WOLF, District Judge.

Upon careful consideration of the presentations of the parties and independent analysis, I have decided that my recusal from further participation in this case is neither necessary nor appropriate. In view of the implications of this question for this case, the reasons for this decision are described in detail in the instant Memorandum and Order and in the Memorandum and Order issued on February 13, 1998.[1]

I. *Summary*

In the February 13, 1998 Memorandum and Order, I informed the parties that I

1. I issued the February 13, 1998 Memorandum and Order in response to a request by the government that I analyze the issues concerning my possible recusal before the parties were required to do so formally. The instant Memorandum and Order should be read in the context of the factual and legal analysis in the February 13, 1998 Memorandum and Order.

did not then believe that my recusal was required by 28 U.S.C. § 455(b), which mandates disqualification if, among other things, a judge: is actually biased or prejudiced against a party; has personal knowledge of an evidentiary fact which is disputed in the pending proceeding; as a government lawyer participated in, or expressed an opinion about the merits of, the particular case in controversy; or is likely to be a material witness in the proceeding. I also expressed the view that my recusal is not appropriate pursuant to 28 U.S.C. § 455(a), which requires disqualification if a reasonable person, fully informed of the relevant facts, would question my impartiality unless the parties waive this ground for recusal pursuant to 28 U.S.C. § 455(e). I explained that the views expressed remained preliminary and ordered the parties to respond to the analysis in the February 13, 1998 Memorandum and Order.[2]

The parties each requested and were allowed additional time to file their responses. In the process, the parties were reminded of the obligation of all litigants to submit affidavits if they wished to supplement the factual record. *See* February 18, 1998 Memorandum and Order; Rule 7.1(B)(1) of the Local Rules of the United States District Court for the District of Massachusetts.

After studying the parties' submissions, on March 23, 1998, I held a hearing to permit them to address further the issue of my continued participation in this case.

In their submissions, the parties agreed that my disqualification is not required by § 455(b). *See* Government's Submission Regarding Recusal (March 2, 1998) at 1, 3; Defendants' Memorandum of Law Regarding Recusal (March 16, 1998) at 2. In the instant case this means that: (1) neither the government nor the defendants assert that I am actually biased or prejudiced with regard to any party; (2) neither the government nor the defendants claim that I have personal knowledge of any disputed material fact; (3) neither the government nor the defendants contend that while in the United States Attorney's Office from November 1981 to April 1985, I ever participated in, or expressed an opinion about the merits of, this case, which was not indicted until 1994; and (4) neither the government nor the defendants suggest that I am likely to be called as a witness in this case.

At the hearing on March 23, 1998, the government reiterated that it does not question my actual ability to be impartial. *See* March 23, 1998 Transcript ("Tr.") at 48. Thus, it should be recognized that the parties and I agree that there is no imped-

2. The Order stated:

1. The government shall, by February 19, 1998:

(a) With regard to 28 U.S.C. § 455(b), state whether it believes my recusal is required and, if so, describe with specificity the reasons for that belief, including, if applicable, any disputed evidentiary fact of which it is believed I have personal knowledge.

(b) With regard to 28 U.S.C. § 455(a), state whether (i) it believes a reasonable person could question my impartiality; (ii) it believes that reasonable minds could differ on this issue and, therefore, I have the legitimate discretion to decide it either way; (iii) if so, how I should exercise that discretion; and (iv) in any event, whether it wishes to waive again, pursuant to § 455(e), any claim that I should disqualify myself because a reasonable person would question my impartiality.

(c) File a memorandum in support of its position if it is advocating my disqualification.

2. The defendants shall, by February 26, 1998, address the same issues and respond to the government's submission.

3. If necessary to resolve the question of my possible recusal, a hearing will be held on March 3, 1998, at 9:30 a.m.

iment to my ability to give each of them—the government and the defendants—a fair trial and to decide the matters I must determine on the basis of the evidence presented in court, rather than as a result of any information I acquired before I became a judge in 1985.[3]

The parties disagree, however, on the § 455(a) question of whether a reasonable person, fully informed of the relevant facts, would *mistakenly* question my impartiality. The government in effect asserts that I should recuse myself because this error would be made. The defendants disagree. Moreover, the defendants are again willing to waive, pursuant to § 455(e), any claim that they arguably may have for my disqualification under § 455(a).

The government does not wish to waive this possible ground for recusal. Rather, the government contends that the new issue regarding recusal that I raised on January 21, 1998, and at least one other matter, provide a valid basis for it to withdraw the § 455(e) waiver that it provided on December 4, 1997 following what it admits was full disclosure of my relationship with some of the prospective witnesses in the now suspended proceedings. *See* March 23, 1998 Tr. at 14. This appears to be an unprecedented request. As explained in § III, *infra*, it is, in any event, not meritorious.

There are, however, two matters that have been raised since December 4, 1997 as to which there has been no valid § 455(e) waiver. These are the December 21, 1984 memorandum of my conversation, as Deputy United States Attorney, with Assistant Attorney General Stephen Trott and my October 15, 1984 memorandum concerning the prosecution of Vincent Piro. *See* February 13, 1998 Memorandum and Order, Exhibits A and B. I address these matters respectively in §§ VI and V, *infra*. In addition, I have considered further, in § IV, *infra*, the August 8, 1983 FBI 209 report of statements made about me by defendant Stephen Flemmi (the "Flemmi 209").

In analyzing the individual and cumulative effect of these matters I have applied the relevant legal principles, as they are described in the February 13, 1998 Memorandum and Order and amplified in this decision. *See* § II, *infra*. These principles include the following.

[1] As the presiding judge, it is my duty to decide in the first instance whether a fully informed, reasonable person would question my impartiality because of the matters now at issue. In answering this question, I must keep in mind that a decision on disqualification must reflect not only the need to promote public confidence by assuring the appearance of impartiality, but also the need not to permit the reasonable perception that disappointed litigants can too easily prompt the disqualification of a fair judge in the hope of obtaining another judge more to their liking.

[2] In deciding this matter, I recognize that no judge is indispensable. If I cannot properly continue to preside, some other judge will. I am obligated, however, to continue to preside unless some reasonable factual basis to doubt my impartiality or fairness is shown by some kind of probative evidence. "Were less required, a

3. In the series of conferences I held after suspending the hearings on defendants' motion to suppress on January 21, 1998, the government consistently foreshadowed its formal position by reiterating that it perceived no basis for mandatory recusal under § 455(b), which among other things requires disqualification for bias or prejudice concerning a party. *See* January 28, 1998 Tr. at 6, 9, 21–22; February 4, 1998 Tr. at 4, 11, 28; February 27, 1998 Tr. (under seal) at 7; March 2, 1998 Tr. (under seal) at 11.

judge could abdicate in difficult cases at the mere sound of controversy or a litigant could avoid adverse decisions by alleging the slightest factual basis for bias." *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).

[3, 4] As indicated earlier, the parties agree that I can and will continue to preside fairly in this case. I have faith in the common sense of the people of this community. I find that properly informed,[4] reasonable people would not question my impartiality. Thus, for the reasons described in the February 13, 1998 Memorandum and Order, as amplified in the instant Memorandum and Order, I will not recuse myself pursuant to § 455(a).

However, if an authorized representative of the government requests a stay and states that the government intends to file promptly with the Court of Appeals for the First Circuit a petition for a writ of mandamus to compel my recusal, I will stay this case to provide the Court of Appeals whatever time it needs to act on that petition.

II. *The Legal Standards*

[5] 28 U.S.C. § 455(a) states that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." "The case law fleshes out the bare-bone words of the statute." *United States v. Voccola*, 99 F.3d 37, 42 (1st Cir.1996). "The test in [the First Circuit] for determining whether a judge's impartiality might reasonably be questioned is long established." *Id.* It is:

> "[w]hether the charge of lack of impartiality is grounded on facts that *would* create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. § 455, but rather in the mind of the reasonable man."

Id. (*quoting United States v. Cowden*, 545 F.2d 257, 265 (1st Cir.1976), *cert. denied*, 430 U.S. 909, 97 S.Ct. 1181, 51 L.Ed.2d 585 (1977)) (emphasis added). Thus, the disqualification issue must be analyzed from the perspective of " 'an objective, knowledgeable member of the public.' " *El Fenix de Puerto Rico v. M/Y JOHANNY*, 36 F.3d 136, 141 (1st Cir.1994) (quoting *In re United States*, 666 F.2d at 695).

[6] It is the duty of the presiding judge, rather than another judge, to decide whether his disqualification is required by § 455(a). *See In re Martinez–Catala*, 129 F.3d 213, 220 (1st Cir.1997). As the Court of Appeals for the First Circuit has explained:

> It might seem odd that recusal issues should be decided by the very judge whose recusal is in question. But there are other considerations at work, including a desire for expedition and a concern to discourage judge shopping.

Id.

In any event, as Supreme Court Justice Anthony Kennedy has written:

4. In considering what a knowledgeable, reasonable person would know, I have not found it necessary or appropriate to consider the information in the Factual Submission in Support of Defendants' Motion to Dismiss, which was filed under seal on October 6, 1997. Defendants believe that their submission strengthens their claim that I should not be disqualified in this case and request that it be unsealed. *See* Defendants' Memorandum of Law Regarding Recusal at 16–17. However, because that submission did not play a role in the decision not to recuse myself, and the reasons for continued impoundment that I described in my December 29, 1997 Memorandum and Order persist, *United States v. Salemme*, 1997 WL 810057, *7–8 (D.Mass. December 29, 1997), the defendants' request to unseal that submission is being denied. *See United States v. Salemme*, 985 F.Supp. 193, 194–95 (D.Mass. September 10, 1997).

> [Section] 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause [there to be] reasonable grounds to question the neutral and objective character of a judge's rulings or findings. I think all would agree that a high threshold is required to satisfy this standard. Thus, under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

Liteky v. United States, 510 U.S. 540, 557–58, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (Kennedy, J., concurring). *See also United States v. Conforte*, 624 F.2d 869, 881 (9th Cir.) (Kennedy, J.), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980).

Consistent with this, several courts have held that recusal is appropriate only where a knowledgeable, reasonable person would have a "significant" doubt concerning the judge's impartiality. *See Hook v. McDade*, 89 F.3d 350, 354 (7th Cir.1996) ("Section 455(a) asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits."), *cert. denied*, 519 U.S. 1071, 117 S.Ct. 718, 136 L.Ed.2d 637 (1997); *United States v. Chandler*, 996 F.2d 1073, 1104 (11th Cir.1993) ("The test under Section 455(a) is whether an objective, disinterested, lay observer fully informed of the facts on which recusal was sought would entertain a significant doubt about the judge's impartiality."), *cert. denied*, 512 U.S. 1227, 114 S.Ct. 2724, 129 L.Ed.2d 848 (1994); *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir.1992) (the test under § 455(a) is: "Would a reasonable person, knowing all the facts, conclude that the trial judge's impartiality could reasonably be questioned? Or phrased differently, would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done absent recusal?"). *See also In re Allied–Signal, Inc.*, 891 F.2d 967, 972 (1st Cir.1989) (finding that parties' lack of objection for more than two years to law clerks' relationship to lawyers involved in the case "helps to support the district court's conclusion that a 'knowledgeable' objective observer would not have seen in the relationship a significant indication of partiality"), *cert. denied sub nom. ACW Airwall, Inc. v. United States District Court for District of Puerto Rico*, 495 U.S. 957, 110 S.Ct. 2561, 109 L.Ed.2d 744 (1990).

[7] Where, as here, only § 455(a) is implicated, there is no question that the judge is actually able to preside fairly. Section 455(a) "attacks the appearance of bias." *United States v. Chantal*, 902 F.2d 1018, 1023 (1st Cir.1990).

> [I]f a judge proceeds in a case when there is (only) an appearance of impropriety in his doing so, the injury is to the judicial system as a whole and not to the substantial rights of the parties. The parties in fact receive a fair trial, even though a reasonable member of the public might be in doubt about its fairness, because of misleading appearances.

United States v. Balistrieri, 779 F.2d 1191, 1204–05 (7th Cir.1985), *cert. denied sub nom. DiSalvo v. United States*, 475 U.S. 1095, 106 S.Ct. 1490, 89 L.Ed.2d 892 (1986). *See also United States v. Murphy*, 768 F.2d 1518, 1540 (7th Cir.1985) ("Section 455(a) is concerned with perceptions rather than actual defects in the administration of justice."), *cert. denied*, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986). That is why the parties may waive a § 455(a) ground for disqualification, but not a ground under § 455(b), which addresses actual impediments to the judge's

ability to preside properly. *See Murphy*, 768 F.2d at 1540; *Chantal*, 902 F.2d at 1023.

[8] Section 455(a) is intended to promote public confidence in the integrity of the judicial process. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858 n. 7, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) (citing S.Rep. No. 93–419, p. 5 (1973); H.R.Rep. No. 93–1453, p. 5 (1974)). As the Court of Appeals for the First Circuit has explained, the reasonable public perception that lawyers or litigants can benefit from using § 455(a) "as a tactic to jettison an impartial judge whose slant on a case, as evidenced by his rulings, jeopardizes a party's chances for ultimate success" is, like the appearance of a biased judge, injurious to public confidence in the judicial process. *In re Cargill, Inc.*, 66 F.3d 1256, 1263 (1st Cir.1995), *cert. denied*, 517 U.S. 1156, 116 S.Ct. 1545, 134 L.Ed.2d 648 (1996). *See also In re Allied–Signal*, 891 F.2d at 970. Therefore:

> [W]hen considering disqualification, the district court is *not* to use the standard of "Caesar's wife," the standard of mere suspicion. That is because the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.

In re Allied–Signal, 891 F.2d at 970 (citations omitted) (emphasis in original). *See also In re United States*, 666 F.2d at 695.

Thus, the judge "must tread cautiously, recognizing, on the one hand, the great importance to the judicial institution of avoiding any appearance of partiality, while simultaneously remaining aware of the potential injustices that may arise out of unwarranted disqualification." *In re Allied–Signal*, 891 F.2d at 970. The February 13, 1998 Memorandum and Order and the instant Memorandum and Order represent part of my effort to do this.

[9] Generally, "[a] trial judge must hear cases unless some reasonable factual basis to doubt his impartiality or fairness of the tribunal is shown by some kind of probative evidence." *Blizard v. Frechette*, 601 F.2d 1217, 1221 (1st Cir.1979). This means, among other things, that a decision to disqualify may not be properly based on mere speculation, suspicion, or "erroneous information published as fact in the newspapers." *In re United States*, 666 F.2d at 695. *See also United States v. Cooley*, 1 F.3d 985, 993 (10th Cir.1993); *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir.1986) (per curiam).

In enacting § 455(a), Congress stated that its standards "should not be used by judges to avoid sitting on difficult or controversial cases" such as this case. H.R.Rep. No. 1453, 93d Cong., 2d Sess., 1974 U.S.Code Cong. & Admin. News 6351, 6355. Thus, I must focus on the facts as established by the probative evidence, rather than on information that is erroneous, incomplete, or speculative, and decide whether those facts would cause a reasonable person to question my impartiality.

III. *The Prior Waivers*

There is a threshold question regarding the scope of the matters which should be considered in deciding whether a reasonable person would question my impartiality. As described in the February 13, 1998 Memorandum and Order, at 8 n. 2, 21–27 and 31–37, it has been my practice to raise promptly any issue I perceive concerning my possible disqualification because I do not wish to preside if my participation is

impermissible and also to minimize the risk that a disappointed litigant will later have a reasonable basis for claiming that decided issues should be reopened because my participation was improper. Consistent with this, on December 4, 1997, I explained to the parties my associations with a number of the prospective witnesses in the forthcoming hearings on the motions to suppress and dismiss. *See id.* at 32–35. Later that day, the government filed a statement which said, in part, that while it believed that a reasonable person might question my impartiality because of the matters discussed, it waived any grounds to request my disqualification under § 455(a). *Id.* at 36–37. The government reaffirmed that waiver on December 11, 1997. *Id.* at 37.[5]

The government acknowledges that my association with a number of prospective witnesses was adequately disclosed before it provided its § 455(e) waiver on December 4, 1998. *See* March 23, 1997 Tr. at 14–16. The government, however, now contends that the emergence of other § 455(a) questions should permit it to withdraw its prior waivers. I have previously explained the reasons for my preliminary view that such a withdrawal is neither permissible nor in the interests of the administration of justice. February 13, 1998 Memorandum and Order at 70–71. This view has not changed.

[10] The government has found no precedent for its position. *See* March 23, 1998 Tr. at 15–16. It is well-established, however, that a party "seeking disqualification of the judge must do so at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification." *United States v. Kelly*, 519 F.Supp. 1029, 1049 (D.Mass.1981), *aff'd sub nom. In re United States*, 666 F.2d 690 (1st Cir.1981). *See also El Fenix*, 36 F.3d at 141 n. 6 (citing 7 James W. Moore et al., *Moore's Federal Practice* ¶ 63.07 [2.–2] (2d ed. 1993) ("[A] litigant who is aware of a potential ground of recusal should not be permitted to 'sandbag' that ground, hoping for a satisfactory resolution, but retaining a ground of attack on the judge's rulings.")); *In re Cargill*, 66 F.3d at 1261–62; *United States v. Yu-Leung*, 51 F.3d 1116, 1119–20 (2d Cir. 1995); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992); *United States v. Nobel*, 696 F.2d 231, 236 (3rd Cir.1982) (en banc), *cert. denied*, 462 U.S. 1118, 103 S.Ct. 3086, 77 L.Ed.2d 1348 (1983); *In re International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir.1980); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 976 F.Supp. 84, 88 (D.Mass.1997).

As the Court of Appeals for the First Circuit has noted, this principle is rooted in the recognition that courts "cannot permit a litigant to test the mind of the trial judge like a boy testing the temperature of the water in the pool with his toe and, if found to his liking, decides to take a plunge." *In re Cargill*, 66 F.3d at 1263 (quoting *In re United Shoe Mach. Corp.*, 276 F.2d 77, 79 (1st Cir.1960)). These principles apply even more powerfully when, as here, an explicit waiver has been given.

[11] In the present case, following December 4, 1997, the court made a series of rulings with which the government deeply disagreed, at times in an unprofessional

5. On December 4, 1997, the defendants each stated that they did not believe that my recusal was required by § 455(a) or (b), and also waived any arguable § 455(a) ground for my recusal. February 13, 1998 Memorandum and Order at 35–36; December 4, 1997 Tr. at 64–76. The defendants reaffirmed their waivers on December 11, 1997. February 4, 1998 Memorandum and Order at 7; December 11, 1997 Tr. at 4–5.

manner. *See, e.g.,* Note 6, *infra;* February 13, 1998 Memorandum and Order at 41–43. The evolution of this case now presents several new § 455(a) issues. To permit those issues to serve as a reason to allow the government to rely on grounds for recusal previously waived would abet at least the reasonable perception that the law regarding disqualification can "be used as a tactic to jettison an impartial judge whose slant on a case, as evidenced by his rulings, jeopardizes a party's chances for ultimate success." *In re Cargill,* 66 F.3d at 1263. Indeed, the fact that the government now urges my disqualification in part on grounds that it previously expressly waived may affect "the calculus of public perception." *Id.* at 1264. *See also* February 13, 1998 Memorandum and Order at 70–71.

[12] The principle that grounds for recusal waived previously are not revived by the discovery of new possible grounds for disqualification was applied by then Judge Anthony Kennedy in *Conforte, supra.* In *Conforte,* the defendant knew before trial that the presiding judge had rejected his application to join a bridge club. 624 F.2d at 879. Because he did not object to the judge's participation in the case on this basis before trial, he was deemed to have waived it, despite the post-trial discovery by the defendant of additional issues concerning recusal which the Court of Appeals addressed on their merits. *Id.* at 881. In the present case, the government expressly waived certain grounds for my possible recusal under § 455(a) and, as in *Conforte,* the emergence of new issues does not operate to permit further consideration of the grounds that were waived.

IV. *The August 8, 1983 Flemmi 209*

An August 8, 1983 FBI 209 report states that Flemmi told FBI Special Agent John Connolly that he was concerned that, as Deputy United States Attorney, I might be a leak regarding the investigation of La Cosa Nostra ("LCN") member Gennaro Angiulo in which Flemmi was an important informant. *See* February 13, 1998 Memorandum and Order at 23. That report also stated that Flemmi trusted Jeremiah O'Sullivan, the Chief of the Organized Crime Strike Force. *Id.* The Flemmi 209 was brought to my attention by the government on June 25, 1997. *Id.* at 23. It was discussed with the parties on June 27, 1997, when the parties prevailed upon me to revise my initial view and to conduct that discussion in a proceeding that was closed to the public rather than in open court. *Id.* at 23–25.

On June 27, 1997, the parties each stated that they did not believe that I was actually biased or prejudiced as a result of the statements contained in the Flemmi 209 or that a reasonable person would question my impartiality based on it. *Id.* at 24–25. *See also* June 27, 1997 Tr. at 108–11. Pursuant to § 455(e), the defendants also waived expressly any claim that they may have had that a reasonable person would question my impartiality because of the statements in the Flemmi 209. February 13, 1998 Memorandum and Order at 25. *See also* June 27, 1997 Tr. at 110–11.

Nevertheless, the FBI subsequently investigated the allegation that I had leaked information concerning the Angiulo case. *See* February 13, 1998 Memorandum and Order at 26. Despite finding no substantiation, the Department of Justice included me on the list of "possible law enforcement leaks" in the Executive Summary of its report to the Attorney General concerning the issues raised by Flemmi's claims of government misconduct. *Id.* at 27.

On September 17, 1997, in an *ex parte* session with the government that was convened for other purposes, I mentioned this

entry in the Executive Summary and stated that if the government had revised its view and then felt that Flemmi's allegations merited my recusal, that issue should be dealt with before we resumed lengthy evidentiary hearings. *Id.;* September 17, 1997 Tr. at 12–13. Assistant United States Attorney Fred Wyshak assured me that I was not under investigation. September 17, 1997 Tr. at 15. Rather, I was told that there was no change in the government's view as to whether there was an issue concerning my continued participation in this case based on the Flemmi 209. *Id.* at 18–19.

As described more fully in the February 13, 1998 Memorandum and Order, at 39–41, on December 29, 1997 I granted Flemmi's request for an evidentiary hearing on his motion to dismiss to the extent that it relied on a claim of immunity; on January 5, 1998 I unsealed two Flemmi affidavits, which included many specific and sensational charges concerning the conduct of the FBI; and on January 6, 1998 I began the evidentiary hearings on defendants' motions to suppress and to dismiss.

By January 8, 1998, the government was complaining vehemently about the fairness of my rulings relating to those hearings. *Id.* at 42–43. Indeed, at one point after Assistant United States Attorney Brian Kelly, who was responsible for the witness, made an objection to the admission of a document based on relevance which I overruled, Wyshak interrupted and complained so loudly and persistently that, for the first time in more than 12 years as a judge, I felt compelled to raise the prospect of holding an attorney in contempt for the nature of his conduct in court. *Id.* at 42; January 8, 1998 Tr. at 167–69.[6]

I subsequently received a letter from a reporter seeking unsuccessfully to interview me and stating that on January 9, 1988, two employees of the *Boston Herald* editorial department received telephone calls informing them that there was "an FBI 209" in which Flemmi named me as "a source of information for the mob." *See* February 13, 1998 Memorandum and Order at 43–44. The newspaper subsequently received additional telephone calls stating I had been informed of the Flemmi 209. Thus, it appears that the telephone calls to the *Boston Herald* were made by someone with knowledge of the Flemmi 209 and of the proceedings that the parties persuaded me to close on June 27, 1998.

I do not know who called the *Boston Herald* about the Flemmi 209. I do not suspect that the prosecutors were involved.[7] However, particularly when

6. The following are some examples of the government's complaints. Wyshak: "I think what we're trying to do is get a fair hearing here." January 8, 1998 Tr. at 264. Herbert: "[T]he reason this [hearing] is so substantively unfair to the government apart from the fact that procedurally it shouldn't be happening . . . ." *Id.* at 277. Wyshak, after an objection on relevancy grounds was overruled, "You might as well put in the whole file. Why don't you just put the whole file in." *Id.* at 168. Wyshak, after an objection was overruled, "Well, of course, its overruled. Every objection is overruled." January 13, 1998 Tr. at 91. Wyshak: "This is an unfair proceeding, your Honor, to make those kinds of rulings." *Id.* at 142. *See also* Defendants' Memorandum of Law Regarding Recusal, at 23–27 (citing other transcript references).

7. The prosecutors have at times not been informed of matters very significant to this case. For example, because the FBI refused a 1992 request by the United States Attorney Wayne Budd to confirm or deny Bulger's status, the prosecutors conducted the grand jury investigation that resulted in the January 10, 1995 First Superceding Indictment without knowing that Bulger and Flemmi had been FBI informants. *See* January 15, 1998 Tr. at 46; January 20, 1998 Tr. at 9; February 2, 1992 Memorandum from Special Agent in Charge Thomas A. Hughes, submitted to the defendants as Gianturco Jencks material. Nor did

viewed in the context of the genesis of the recusal issue relating to the Piro case discussed in § V, *infra*, a reasonable person would infer that the calls probably were made by someone who hoped to disrupt, if not abort, the proceedings about which the prosecutors were complaining.

In any event, I informed the parties of the inquiry I had received from the *Boston Herald* concerning the Flemmi 209 and told them of my renewed preference for unsealing the proceedings concerning it. January 14, 1998 Tr. at 10–14, 21. I also expressed the hope that the question of a possible leak concerning the Flemmi 209 would not distract anyone from the hearings being conducted or disrupt those hearings. *See id.* at 15, 20–21. This hope, however, was not realized. The government told me that it was investigating whether O'Sullivan had known about the Flemmi 209 and discussed it with me on August 11, 1983. *See* February 13, 1998 Memorandum and Order at 44; January 15, 1998 Tr. at 20–21.[8]

The government has presented no evidence that O'Sullivan or anyone else discussed the Flemmi 209 with me before the prosecutors informed me of it on June 25, 1997. The government now contends, however, that because of the disparaging remarks about me in the Flemmi 209 a reasonable person would question my ability to be fair to Flemmi in this case.

More specifically, in its most recent submission, which was signed by Assistant United States Attorney Wyshak, the government writes:

> It is indisputable that an objective observer *might* question whether the Court could be impartial if the defendants chose to use a document in which the defendant Flemmi accused the Court of being a leak to certain members of organized crime .... [T]his assessment need not be based upon the validity of Flemmi's claim nor upon an accurate assessment of the Court's ability to remain impartial. Surely, the Court cannot believe that such a reaction by an objective observer would be unreasonable.

Government's Submission Regarding Recusal at 20 (emphasis in the original). On June 27, 1997, however, Wyshak said just the opposite. When asked whether the government thought that a reasonable person would question my impartiality because of the statements in the Flemmi 209, Wyshak responded, "No, your Honor." June 27, 1997 Tr. at 109.

In view of the government's position on June 27, 1997, and its statement on September 17, 1997 that there was no change

the prosecutors know when they obtained the RICO indictments of Bulger and Flemmi, which rely in meaningful measure on their alleged involvement with the LCN, that the FBI's Principal Legal Adviser in Boston had reviewed Flemmi's informant file and concluded that he was "at least tacitly authorized" by the FBI to engage in "LCN policymaking." *See United States v. Salemme*, 978 F.Supp. 343, 354 n. 6 (D.Mass. 1997); Government's Response to Magistrate Judge Cohen's Order Dated August 23, 1995, at 6 n. 2; Affidavit of Paul E. Coffey, Esq. dated November 13, 1995, ¶ 7 n. 1.

In addition, for more than two years neither I nor Flemmi's co-defendants were told of Bulger and Flemmi's history as FBI informants—matters highly relevant to issues being litigated in these proceedings. *See United States v. Salemme*, 978 F.Supp. at 354 (May 22, 1997 Memorandum and Order).

8. It was this representation relating to O'Sullivan that caused me to access my personal copies of letters and memoranda I wrote while in the United States Attorney's Office. Those documents contained no reference to the Flemmi 209, but did include the December 21, 1984 memorandum concerning my conversation with Assistant Attorney General Trott. *See* February 13, 1998 Memorandum and Order at 45.

in the government's view as to whether there was an issue concerning my participation in this case based on the Flemmi 209, September 17, 1997 Tr. at 13, the government may not now rely on this ground for my recusal. *See Kelly*, 519 F.Supp. at 1049–50. *See also El Fenix*, 36 F.3d at 141 n. 6; *In re Cargill*, 66 F.3d at 1261–62; *United States v. Yu–Leung*, 51 F.3d 1116, 1119–20 (2d Cir.1995); *E. & J. Gallo Winery*, 967 F.2d at 1295; *Nobel*, 696 F.2d at 236; *Conforte*, 624 F.2d at 880; *In re International Business Machines*, 618 F.2d at 932; *Rosenberg*, 976 F.Supp. at 88.

United States v. Yu–Leung is a particularly instructive case. There the judge was told by the government that the defendant had allegedly threatened the judge's life. 51 F.3d at 1119. The judge did not regard the threat as serious. *Id.* The defendant "failed to file a timely disqualification motion before [the judge] 'at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim.'" *Id.* (quoting *Polizzi v. United States*, 926 F.2d 1311, 1321 (2d Cir.1991)). The judge never made any statements, or otherwise acted in a way, indicating any bias against the defendant. *Id.* at 1120. Thus, the Court of Appeals found that there was no basis for requiring the judge's recusal. *Id.*

[13] Similarly, in the present case, an informed, reasonable person would know that I found, and find, the remarks about me in the Flemmi 209 to be laughable. No one claims that I have since learning of them exhibited any bias or prejudice concerning Flemmi. Flemmi does not seek my disqualification under § 455(a) or (b). The government raised no § 455(a) objection for six months, and then did so only after a series of adverse rulings as to which it expressed extreme displeasure. In these circumstances, even if this ground for my possible recusal had not been waived, the statements about me in the Flemmi 209 would not cause a reasonable person to think that I would violate my duty to be fair to Flemmi and somehow punish him for the statements he reportedly made about me 14 years ago.

[14] At the March 23, 1998 hearing, the defendants indicated for the first time that Flemmi might offer the 209 into evidence if necessary to rebut a possible claim that he recently contrived his alleged understanding that O'Sullivan knew that he was an informant and participated in providing some or all of the immunity Flemmi contends he was given. March 23, 1998 Tr. at 59, 85–86. Even if the Flemmi 209 is offered and introduced for this purpose, it would not cause a reasonable person to believe that I have personal knowledge of a disputed evidentiary fact.

Once again, there is no evidence that I knew about the Flemmi 209 before it was disclosed to me in the course of this case. There is no factual basis for finding that a reasonable person would doubt this. Thus, it is true, and also appears to be true, that the only information I have indicating that Flemmi trusted O'Sullivan was acquired by me in the performance of my judicial duties. Similarly, the only information I have that Flemmi distrusted me was obtained in the course of this case.

[15] It is well established that generally "[k]nowledge of disputed facts requires disqualification only if the knowledge has an extrajudicial source." *United States v. Widgery*, 778 F.2d 325, 328 (7th Cir.1985). *See also In re Martinez–Catala*, 129 F.3d at 219; *United States v. Kelley*, 712 F.2d 884, 889–90 (1st Cir.1983); *United States v. Coven*, 662 F.2d 162, 168 (2d Cir.1981), *cert. denied*, 456 U.S. 916, 102 S.Ct. 1771, 72 L.Ed.2d 176 (1982). As the Supreme Court has explained, "Opinions formed by

the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or prejudice motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). It is not claimed, let alone shown, that this standard has been met in this case.

I do know that Flemmi's reported fear that I was a leak to the LCN was unfounded. That, however, is irrelevant to the sincerity of any views he may have had in 1983 concerning whether O'Sullivan or I was trustworthy. Neither the government nor the defendants contend that the inaccuracy of Flemmi's information about me has actually injured my ability to judge him, and any testimony he may give, fairly. Once again, I believe a properly informed, reasonable person would not question my ability to do so either.

V. *The Piro Matter*

Another issue concerning my possible disqualification arises out of my tenure as Chief of the Public Corruption Unit in the United States Attorney's Office during the investigation and prosecution of State Representative Vincent Piro. This issue too was generated by a report in the media which was evidently based on information obtained from an unnamed source regarded as having reliable information about documents allegedly contained in confidential FBI files.

On December 18, 1997, the *Boston Globe* reported that a local television station (WCVB, Channel 5) had reported the night before that an internal FBI document reflected that former FBI Special Agent John Connolly had informed Bulger of an undercover operation in which Representative Piro took $5000 to influence legislation and that Representative Piro returned the money days after Bulger learned of the "sting." *See* February 13, 1998 Memorandum and Order at 48. The prosecutors read this story when it was published, but raised no question about it until January 21, 1998. March 23, 1998 Tr. at 35–36.

As I supervised the Public Corruption Unit while some of its members were investigating the Piro case, the media reports raised questions concerning whether I had while in the United States Attorney's Office known that Bulger was an informant and/or participated in an effort to determine whether he had been involved in compromising the Piro investigation. Either or both of these questions would, if true, have arguable, though uncertain, implications for my continued participation in this case.

As I told the parties on January 21, 1998, I recalled no suspicion that Piro was tipped off because of a relationship between the FBI and Bulger. January 21, 1998 Tr. at 56. At my suggestion, the government interviewed John Pappalardo, the lead prosecutor in the Piro case. February 13, 1998 Memorandum and Order at 49. Pappalardo stated that he never associated the possible disclosure of information to Representative Piro with Bulger. *Id.* at 511. *See also* February 5, 1997 letter from government to court, transmitting FBI 302 report regarding interview of John Pappalardo dated January 23, 1998.

Although not voluntarily disclosed by the government, in response to inquiries from the court the government acknowledged that it has over the past two months done additional investigation and found no evidence that Bulger was mentioned or implicated in the investigation of a possible leak in the Piro case. *See* February 27, 1998 Tr. (under seal) at 20–21; March 23, 1998 Tr. at 36. The government has had unique access to the official records re-

garding the Piro case and to at least some of the potential witnesses. When questioned by the court, the government admitted that: (1) it has reviewed the Piro files and found no reference to Bulger, February. 27, 1998 Tr. (under seal) at 20–21; March 23, 1998 Tr. at 36; and (2) it has interviewed various witnesses and none said that Bulger was discussed in connection with a possible leak to Piro, March 23, 1998 Tr. at 36–38. The government also confirmed that if it had found any such evidence, it would have disclosed it to support its suggestion that I disqualify myself. February 27, 1998 Tr. (under seal) at 20–21.

It is illuminating to compare and contrast the instant case to *United States v. Kelly,* 519 F.Supp. 1029 (D.Mass.1981), *aff'd sub nom. In re United States,* 666 F.2d 690 (1st Cir.1981). In *Kelly,* the then United States Attorney, Edward Harrington, moved, pursuant to § 455(a), to disqualify Judge Joseph Tauro from presiding in the retrial of State Senator James Kelly based upon two newspaper reports about a purported link between Senator Kelly and Judge Tauro 15 years before, when the judge was Chief Counsel to Governor John Volpe and the Senator was allegedly helpful to the Governor in a legislative committee's investigation of allegations of misconduct by the Governor and his "kitchen cabinet." *Kelly,* 519 F.Supp. at 1040–41. The FBI conducted an investigation of this allegation and the government appended the reports of *all* of its interviews to its motion to disqualify the judge. *Id.* at 1033 n. 8, 1040. Based in part on those reports, Judge Tauro found that "the United States Attorney's own F.B.I. investigation failed to produce any evidence of any link between Kelly and me, either at the time of the Senate hearing or during the last fifteen years." *Id.* at 1042. *See also id.* at 1031. Thus, Judge Tauro found that the erroneous newspaper reports of his link to Senator Kelly did not create or contribute to a proper basis for his disqualification under § 455(a). *Id.* at 1031.

The Court of Appeals for the First Circuit affirmed. *In re United States,* 666 F.2d at 698. In doing so, it stated that:

> a judge considering whether to disqualify himself must ignore rumors, innuendos, and erroneous information published as fact in the newspapers. To find otherwise would allow an irresponsible, vindictive or self-interested press informant and/or an irresponsible, misinformed or careless reporter to control the choice of judge.

Id. at 695 (citations omitted).

[16] In contrast to *Kelly,* in the current case the United States Attorney did not submit for the record all of the relevant information his investigation developed. This much, however, is clear. The government's investigation has generated no evidence that Bulger was suspected or discussed as involved in a possible leak in the Piro case. Nor is there any other evidence that I knew or suspected that Bulger was an informant. As I have said previously, I have no recollection of suspecting that Bulger was an informant, or participating in any investigation concerning him, while I was in the United States Attorney's Office. January 21, 1998 Tr. at 56; February 13, 1998 Memorandum and Order at 49. In the circumstances, a properly informed, reasonable person would not believe that I have any extrajudicial knowledge of Bulger's status as an FBI informant or of any related, disputed evidentiary fact.

The media reports about Bulger's connection to the Piro case, however, led to another issue which must be addressed. After the government brought the December 18, 1997 *Boston Globe* article to my

attention, I found an October 15, 1984 memorandum which I wrote regarding the Piro case that suggests that I was aware of suspicions that FBI Special Agent John Morris gave former FBI Special Agent Dennis Condon information that compromised the Piro investigation. *See* February 13, 1998 Memorandum and Order at 49–51. The memorandum also indicates that there were other suspected reasons why Piro returned the money he had taken from the FBI undercover agent. *Id.* I gave the memorandum promptly to the parties. *Id.* at 50. Prior to finding the October 15, 1984 memorandum, I had no recollection of Morris or Condon being involved in the Piro case. Indeed, I still have no independent memory of this. Nevertheless, for purposes of this recusal analysis, I will assume that in 1984 and 1985 I had unconfirmed suspicions that Morris and Condon may have been responsible for compromising the investigation of the Piro case, which was not successfully prosecuted. *See Liljeberg,* 486 U.S. at 861, 108 S.Ct. 2194.

In addition, although I have no independent recollection of the events, memoranda I have since found indicate that as Deputy United States Attorney I also dealt with Morris with regard to several matters. *See* February 13, 1998 Memorandum and Order at 34 n. 10, 59; March 2, 1998 Order (unsealing two Memoranda dated March 10, 1982).[9] One of those matters involved Condon providing information to Morris for use in an investigation being conducted by an Assistant United States Attorney. *See* March 2, 1998 Order (unsealing March 10, 1982 Memorandum to John C. Doherty).

[17] As the involvement of Morris and Condon in the Piro matter was not recalled, and therefore not disclosed, by me when I discussed each of them prior to obtaining the government's waiver on December 4, 1998, I do not view that waiver as binding with regard to them. *See Potashnick v. Port City Construction Co.,* 609 F.2d 1101, 1114–15 (5th Cir.), *cert. denied,* 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980). Thus, it is necessary to address the question whether my prior association with Morris and/or Condon would cause a reasonable person to question whether I will be fair to each of the parties—the United States and the four defendants—in this case.

In his affidavits, Flemmi makes a number of claims concerning Morris, including a claim that Morris told Bulger and Flemmi that because they were valuable informants they would be protected by the FBI for anything that they did except committing murder. Affidavit of Stephen Flemmi dated June 25, 1997, ¶ 2. Condon has been mentioned previously mainly in connection with two matters relating to Flemmi. Flemmi asserts that following his return to Boston after being a fugitive from state

9. As the document clearly reflects, in footnote 5 of the Government's Submission Regarding Recusal the prosecutors mischaracterize the March 10, 1982 memorandum that I wrote to the "Files." In the case addressed, a defendant committed a crime, and was caught, and was being interrogated by the FBI. He then began to cooperate with the FBI. By March 10, 1982, he had been indicted and his trial was scheduled for the very near future. On March 10, 1982, Morris was informing me of the indictment and asking if the United States Attorney's Office would offer to enter into a plea agreement to recommend no term of incarceration so the defendant could continue to cooperate. In 1982, five years before there were Sentencing Guidelines, the government had unfettered discretion with regard to the sentence it could properly recommend. I agreed to the recommendation Morris requested on the condition that the Probation Department be informed of the defendant's status as an informant and agree to waive its practice of prohibiting probationers from operating as informants.

charges of attempted murder, Condon told him that the federal fugitive charges against him had been dismissed. Affidavit of Stephen Flemmi dated December 22, 1997, ¶ 8. In addition, there is a FBI 302 which reports that Condon said that on one occasion he met Bulger and Flemmi at Morris' house. *See* August 25, 1997 letter from government to defense counsel, transmitting FBI 302 report regarding interview of Dennis Condon dated July 17, 1997, among other things. Connolly reportedly called Condon in April 1997 to inquire whether he recalled Morris telling Bulger and Flemmi that they could do just about anything they wanted short of killing someone. *Id.* Condon reportedly said he did not hear that statement. *Id.*

[18, 19] In addition, on March 2, 1998, the government submitted an affidavit from Condon which contradicts a portion of my description of his interview of me on June 9, 1997—before I had any reason to foresee that Condon might be a witness in this case—as part of a background investigation being conducted in connection with Governor William F. Weld's prospective nomination to be Ambassador to Mexico. *See* February 13, 1998 Memorandum and Order at 35; Affidavit of Dennis Condon dated February 26, 1998, attached as Exhibit A to Government's Submission Regarding Recusal ("Condon Affidavit"). I am not legally obligated to accept Condon's version of our discussion as correct. More specifically, "under section 455, a judge is not compelled automatically to accept as true the allegations made by a party seeking recusal." *In re Martinez–Catala*, 129 F.3d at 220. *See also Greenough*, 782 F.2d at 1558 ("Section 455 does not require the judge to accept allegations by the moving party as true. If a party could force recusal of a judge by factual allegations, the result would be a virtual 'open season' for recusal."); *Selfridge v. Gynecol, Inc.*, 564 F.Supp. 57, 58 (D.Mass. 1983); 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3550 (2d ed. 1984) ("If a party does move under § 455, and the motion is supported by an affidavit . . ., the court is not required to accept the factual statements as true."). Rather, a judge "may contradict [the factual allegations in an affidavit in support of a motion to recuse] with facts drawn from his own personal knowledge." *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 872 F.Supp. 1346, 1349 (E.D.Pa.1994). "To the extent that facts are in dispute, factual determinations are made by the judge whose recusal is in question . . . ." *In re Martinez–Catala*, 129 F.3d at 220.

[20] As discussed below, I believe that to the limited extent that our accounts differ, my memory of what I said is more accurate than Condon's. However, I have analyzed the issue of my possible disqualification by assuming, without finding, that Condon is correct in his description of my statements. I conclude that such comments would not cause, or contribute to causing, a reasonable person to question my ability to be fair to the parties in this case.

As I recall, Condon called my chambers the week before Monday, June 9, 1997—rather than calling on June 9, 1998 as he states, Condon Affidavit at ¶ 3—to try to arrange an interview of me concerning Governor Weld. I was not able to see Condon that week, largely because I was absorbed in matters leading to the issuance of the June 6, 1997 Memorandum and Order in this case, which publicly disclosed for the first time that Bulger and Flemmi had been FBI informants. *See United States v. Salemme*, 978 F.Supp. 364 (D.Mass. June 6, 1997). That disclosure generated massive media attention over

the weekend, much of which was critical of the FBI. *See, e.g.,* Ralph Ranalli, *Judge Blows Lid of FBI's Use of Mob Snitches,* Boston Herald, June 7, 1997; Kevin Cullen, *Use of Bulger Raises Questions for FBI,* Boston Sunday Globe, June 8, 1997.

On June 9, 1997, my secretary called Condon to arrange for him to interview me at 12:00 noon that day. In the past 25 years I have been interviewed many times in the course of background investigations for prospective federal appointees. In every prior instance, the interview has been conducted by a member of the FBI. Thus, I expressed surprise when Condon told me that he was employed by the Department of State. I do not, however, believe that I used the words Condon attributes to me in his affidavit, "You're not with the State Department." Condon Affidavit at ¶ 3. In any event, Condon told me that there were so many background investigations to be conducted carefully that the Department of State now hired former FBI agents like himself, among others, to do them, and he offered to show me his credentials. I said that was not necessary. He did, however, give me his business card.

I responded to Condon's questions regarding Governor Weld. At the end of the interview, with a smile, Condon inquired whether there was anything I wanted to ask him. *See* February 13, 1998 Memorandum and Order at 35 n. 11. While I have at the end of other interviews for prospective appointees at times been asked a general question about whether there was anything else I would like to *say* about the candidate, no interviewer has ever before inquired whether there was anything I wanted to *ask* him. Knowing Condon was a former FBI agent, I inferred that he was inquiring whether I had any questions for him about this case, but felt that he was being humorous. *Id.* I recall responding "no." *Id.* Condon says I responded that "you would not want to hear the questions I'd have for you." Condon Affidavit at ¶ 4.

[21] The government suggests that, if true, Condon's version of our discussion would indicate to a reasonable person that I am biased against Condon, whose credibility I may have to judge in deciding the pending motions to suppress and dismiss, and therefore I should recuse myself. *See* Government's Submission Regarding Recusal at 23–26. However, even looking at the purported facts in the light most favorable to the government, the question is whether a reasonable person would doubt that I would be fair to the parties—the United States and the four defendants—because of unconfirmed suspicions 14 years ago in the Piro case and Condon's version of our conversation on June 9, 1997. In essence, it is necessary to determine whether a reasonable person would have a significant concern that I would violate my duty as a judge and decide the motions to suppress and/or the motion to dismiss in favor of the defendants, who are accused of crimes including murder and blowing-up a lawyer, not on the merits, but because of some hostility I harbor to Condon and/or Morris. I find that a reasonable person would not have this concern. The relevant case law is consistent with this conclusion.

[22] Generally, familiarity—or even a judge's friendship with prospective witnesses—does not require a judge's recusal under § 455(a). *See, e.g., Parrish v. Board of Comm'rs of Ala. State Bar,* 524 F.2d 98, 103–04 (5th Cir.1975) (en banc), *cert. denied sub nom. Davis v. Board of School Comm'rs of Mobile County,* 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976); *United States v. Mavroules,* 798 F.Supp. 61, 63 (D.Mass.1992); *Hirschkop v. Virginia State Bar Ass'n,* 406 F.Supp. 721, 724–25 (E.D.Va.1975). This is the

general rule because it is recognized that the public understands that judges are usually longstanding members of the community in which they serve and although they will inevitably encounter witnesses with whom they, or people close to them, have had positive or negative experiences, judges can and will ordinarily ignore those experiences and decide the matters before them impartially. *See In re United States*, 666 F.2d at 696–97.

[23] There are, however, cases in which a judge's association with a witness will justify his recusal under § 455(a). The cases the government cites for this proposition are those that I brought to the parties' attention on December 4, 1997. December 4, 1997 Tr. at 31–34. I have considered those cases and find them to be distinguishable from the instant case. In *Hadler v. Union Bank and Trust Co. of Greensburg*, 765 F.Supp. 976, 978 (S.D.Ind. 1991), the judge disqualified himself because he was a close friend of a witness, who was an officer and stockholder of, and thus had a financial interest in, the defendant; the trial would be non-jury; the friend's credibility was likely to be pivotal in determining the issue of liability; and both parties agreed that his recusal was reasonable. Thus, after emphasizing that he would not have disqualified himself if the case only presented the issue of a friend appearing as a witness, *id.* at 977, the judge disqualified himself. Similarly, in *United States v. Ferguson*, 550 F.Supp. 1256, 1260 (S.D.N.Y.1982), the judge disqualified himself because the case required him to evaluate the credibility of a former law clerk with whom his relationship was very close and for whom his esteem was "high."

In contrast, the history of my contacts with Morris and Condon is limited and included ordinary, professional interactions which no one seems to remember. In addition, I was aware of unconfirmed suspicions that Morris and Condon may have played a role in compromising the Piro investigation.

Once again, the *Kelly* case provides very valuable guidance. At most, Condon and Morris are similarly situated to the Masiello brothers, who had testified before a special commission concerning alleged criminal conduct by members of Governor Volpe's "kitchen cabinet" that purportedly occurred during the period that Judge Tauro was the Governor's Chief Counsel. *In re United States*, 666 F.2d at 696. In affirming Judge Tauro's decision that a reasonable person would not question his impartiality, the Court of Appeals for the First Circuit emphasized that the Masiellos were not parties to the trial with any stake in the evidentiary rulings and, in any event, would not be repeating their previous testimony about members of the Volpe administration. *Id.* Similarly, neither Condon nor Morris are parties in this case and the court does not expect that they will be asked about the Piro matter.

Moreover, the Court of Appeals' analysis of whether recusal was required, in whole or in part, because of Judge Tauro's purported link with a party, Senator Kelly, in the course of the earlier legislative investigation, is also instructive here. Indulging all inferences favorable to the government, the Court of Appeals assessed "whether the judge's awareness of Kelly's favorable conduct fifteen years ago would prompt a reasonable observer to believe that the judge would be partial toward Kelly in a current criminal trial." *Id.* In finding that this assumed fact did not cause or contribute to a requirement that Judge Tauro be recused, the Court of Appeals wrote:

> Whether or not [Kelly did] enough to generate a reasonable expectation of gratitude in the months immediately following the hearing, it surely lacks the

> significance to endure a decade and a half. Even, however, if one may assume the survival of some residue of gratitude after such a period, it is beyond contemplation that such gratitude would be of the weight necessary to cause a judge to jettison his impartiality and, in open court day after day, to violate his deepest professional and ethical commitments as a judge.

Id.

Thus, after considering the matters of the judge's possible partiality to the defendant and possible hostility to two key witnesses, the Court of Appeals concluded that finding recusal to be required "would reflect a more jaundiced view as to when there should be a reasonable doubt about a judge's impartiality than accords with the public perception." *Id.* at 697.

The Court of Appeals for the First Circuit's decision in *In re United States* is consistent with the rulings in many comparable cases involving § 455(a). For example, in *Schurz Communications, Inc. v. Federal Communications Commission*, 982 F.2d 1057, 1059 (7th Cir.1992), Judge Richard Posner found that his disqualification was not required under § 455(a) in an antitrust case even though he had, 15 years earlier, filed an affidavit as an expert witness in another antitrust case on behalf of one of the litigants, CBS. There, Judge Posner said:

> Would a reasonable person suppose that gratitude to a network for asking me to file an affidavit fifteen years ago, or dogmatic adherence to statements made in that affidavit and long forgotten, would prevent me from judging impartially in a much different kind of case though one with undoubted thematic affinities to the case in which I filed my affidavit? I believe not . . . .

Id. at 1062.

Similarly, in *Cipollone v. Liggett Group, Inc.*, 802 F.2d 658, 659 (3rd Cir.1986), *cert. denied*, 479 U.S. 1043, 107 S.Ct. 907, 93 L.Ed.2d 857 (1987), the judge who wrote a decision for the Court of Appeals for the Third Circuit had, 15 years before, represented the American Tobacco Company "in a case involving a similar products liability claim." In finding that the judge's recusal was not required under § 455(a), another panel of the Court of Appeals wrote:

> Even if American Tobacco Company were a party to the *Cipollone* case, the long passage of time since [the judge's] last representation of that Company requires the conclusion that no reasonable person could question his impartiality.

Id. See also Rosenberg, 976 F.Supp. at 86.

In *United States v. Hurst*, 951 F.2d 1490, 1503 (6th Cir.1991), *cert. denied*, 504 U.S. 915, 112 S.Ct. 1952, 118 L.Ed.2d 556 (1992), the Court of Appeals for the Sixth Circuit held that it was "satisfied that a reasonable person would consider the trial judge to be impartial" when he presided in a criminal fraud trial involving a defendant against whom, as a private lawyer, the judge had filed a suit alleging fraud.

David v. City and County of Denver, 101 F.3d 1344, 1348–50 (10th Cir.1996), *cert. denied*, 522 U.S. 858, 118 S.Ct. 157, 139 L.Ed.2d 102 (1997), involved civil rights claims against a police chief and a number of police officers. The presiding judge, in a non-jury trial, had represented the police chief 20 years before. *Id.* at 1350. The judge also knew several of the law enforcement witnesses in the case, and had recently spoken to some of them, including the police chief, in connection with an investigation of the murder of the judge's son. *Id.* In affirming the judge's decision not to recuse himself under § 455(a), the Court of Appeals for the Tenth Circuit wrote:

> Although the test in this circuit is one of reasonableness, it is reasonableness tempered with a knowledge of the relevant facts. It is hardly possible for a judge with criminal jurisdiction to have no knowledge of some personnel in law enforcement. We must examine the judge's discretionary decision not to recuse both in light of the judge's duty to decide cases fairly and his duty to avoid impropriety, determined from an informed, reasonable viewpoint. "There is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." *Hinman*, 831 F.2d at 939. Our review of these matters leads us to conclude that the trial judge did not abuse his discretion in denying Officer David's motion for disqualification pursuant to 28 U.S.C. § 455(a).

Id. at 1351.

Finally, on this point, Justice Kennedy's decision for the Court of Appeals for the Ninth Circuit in *Conforte, supra*, is also illuminating. *Conforte*, like *David, supra*, involved a non-jury trial. 624 F.2d at 872, 881. From his experience in the community, the presiding judge knew that the defendant in the criminal tax fraud case ran a legal house of prostitution. *Id.* at 881. He also knew from information acquired in his official capacity that the defendant was a twice-convicted felon. *Id.* The judge had urged the University of Nevada not to accept a contribution from the defendant. *Id.* In these circumstances, then Judge Anthony Kennedy held that recusal was not required under § 455(a) or (b) because:

> We find no reasonable grounds for questioning the judge's impartiality because of bias or prejudice. While bias or prejudice may spring from many sources, often extrajudicial in their origin, the negative bias or prejudice of the kind alleged here will disqualify only if it is an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes.

Id.

In view of the foregoing, I conclude that a reasonable person would not question my impartiality in this case based on any matters relating to Morris or Condon, even if Condon's version of my statements to him on June 9, 1997 is, contrary to my memory, assumed to be true.

Moreover, it cannot properly be suggested that I should now be disqualified because I might be, or be perceived to be, hostile to Condon for furnishing his affidavit. The Court of Appeals for the First Circuit has recently held that a party has a right to criticize a judge,:

> [b]ut it is not her right, by doing so, to cause the disqualification of the judge. "A party cannot force disqualification by attacking the judge and then claiming that these attacks must have caused the judge to be biased against [her]." 13A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice and Procedure* § 3542 at 577–78.

Federal Deposit Ins. Co. v. Sweeney, 136 F.3d 216, 1998 WL 56351, *4 (1st Cir.1998) (per curiam). This principle is even more compelling where, as here, only the statements of a witness, who is not a party, are involved.

VI. *The December 21, 1984 Memorandum*

As described more fully in the February 13, 1998 Memorandum and Order, at 45–47 and 56–58, on January 21, 1998 I suspended the hearings on defendants' motions to suppress and to dismiss after I discovered the memorandum that I wrote concerning a telephone call I received on December

21, 1984, from Assistant Attorney General Stephen Trott, when he was unable to reach the United States Attorney, William F. Weld. *See* February 13, 1998 Memorandum and Order, Exhibit A. The memorandum indicates that before calling the United States Attorney and speaking to me, Assistant Attorney General Trott had decided to authorize the application for the 1984–85 electronic surveillance which is now subject to a motion to suppress in this case. He neither solicited nor received any advice on its merits from me. The memorandum is captioned "Gary Crossen." As the caption reflects, the Assistant Attorney General was calling to discuss the Assistant United States Attorney who had drafted the application and to complain about the style of the draftsmanship. I suspended the hearings, however, to consult the parties concerning whether the December 21, 1984 memorandum indicated that I should be recused under § 455(b) because I had personal knowledge of a disputed evidentiary fact and was likely to be called as a material witness in the pending proceedings. *See* February 13, 1998 Memorandum and Order at 47; January 21, 1998 Tr. at 12–13.

[24] In the February 13, 1998 Memorandum and Order, at 55–59, I analyzed this issue and expressed my preliminary view that the December 21, 1984 memorandum did not require my recusal under § 455(b). More specifically, I reiterated that I continue to believe that I did not participate in the process of preparing the application for the 1984–85 electronic surveillance, *id.* at 56, and could discern no disputed evidentiary fact of which my conversation with the Assistant Attorney General, or any possible follow-up that I did not recall, would give me personal knowledge, *id.* at 57–58. I did, however, order the parties to respond to my preliminary views and, particularly, to describe with specificity any disputed evidentiary fact of which it was claimed that I have personal knowledge. *Id.* at 72–73; *see* Note 2, *supra.*

The government requested and received an extension of time to respond to the February 13, 1998 Memorandum and Order in part because it wanted to "interview or reinterview numerous witnesses." *See* Government's Motion Requesting Additional Time (February 17, 1998) at 1; February 18, 1998 Order. In its submission, the government expresses its view that my recusal is not required under § 455(b). Government's Submission Regarding Recusal at 1, 3. The defendants concur. Defendants' Memorandum of Law Regarding Recusal at 2.

This means that the government, the defendants, and I agree that I do not have any personal knowledge of a disputed evidentiary fact concerning the 1984–85 electronic surveillance. Similarly, neither party has expressed a desire, or a basis, to call me as a witness in the pending proceedings. The question under § 455(a), therefore, is whether a well-informed, reasonable person would nevertheless mistakenly believe that I have personal knowledge of a disputed evidentiary fact or am likely to be required to testify in this case. I find that a reasonable person would not make such an error.

As no party has stated either an intention or a reason to attempt to call me as a witness in this case, there is no factual basis for finding that a reasonable person would expect that I will be one.

Similarly, a reasonable person, knowing all of the relevant facts, would not believe that I participated in the preparation of the application for the 1984–85 electronic surveillance to the court. I do not recall being involved. *See* February 13, 1998 Memorandum and Order at 56; June 17, 1997 Tr. at 15. As Deputy United States

Attorney I generally did not review applications for electronic surveillance. Moreover, the Organized Crime Drug Enforcement Task Force did not, as a practical matter, report to the United States Attorney through me. February 13, 1998 Memorandum and Order at 10. By December 1984, I had been nominated to be a judge and my activities in the United States Attorney's Office were then generally limited to supervising the Special Investigations Unit and writing an appellate brief. *Id.*

Although, once again, the government did not include it in its submission urging my recusal, the government's investigation has produced considerable information that is consistent with the conclusion that I did not participate in the preparation of the application for the 1984–85 electronic surveillance. For example, there is no reference to me in the Department of Justice's official file concerning the 1984–85 electronic surveillance. *See* February 13, 1998 Memorandum and Order at 56–57; January 21, 1998 Tr. at 29.

The applicant for that electronic surveillance, Crossen, was interviewed at least twice. As the government disclosed in response to a direction from me, *see* February 27, 1998 Tr. (under seal) at 23, in a recent interview Crossen reported that he believes that I "did not ordinarily handle Title III matters." February 27, 1998 letter from the government to defense counsel (the "February 27, 1998 letter") at 1. In any event, Crossen has no memory of discussing the 1984–85 electronic surveillance with me. *See* FBI 302 report regarding interview of Gary Crossen dated July 25, 1997. Nor does he recall discussing the December 21, 1984 memorandum with me. *See* February 27, 1998 letter at 1.

Similarly, the government has interviewed Governor Weld on at least two occasions. As with Crossen, only one interview report has been provided to the defendants and the court. Governor Weld reportedly told the FBI that in view of the nature of my duties, I was not likely to have been involved in any discussions regarding the 1984–85 electronic surveillance. *See* FBI 302 report regarding interview of William F. Weld dated July 29, 1997. Governor Weld also told the government that he "does not recall ever discussing the merits of the 1984–85 [Drug Enforcement Administration ('DEA')] electronic surveillance with [me]." February 27, 1998 letter at 2. Nor does he recall any discussion with me concerning the December 21, 1984 memorandum. *Id.* at 1. He believes that he referred it to the former Chief of the Criminal Division in his office, Robert Mueller. *Id.* at 2.

The government also interviewed Mueller at least once. Although no report of such discussion(s) has been provided, the government's letter indicates that Mueller recalls neither the 1984–85 electronic surveillance, nor my December 21, 1984 memorandum. *See id.* at 2. Thus, he provides no basis for anyone to believe that I participated in the preparation of the application for the 1984–85 electronic surveillance.

In addition, the government interviewed Janis Berry, who, as the Chief of the Organized Crime Drug Enforcement Task Force, was Crossen's supervisor. The December 21, 1984 memorandum indicates that a copy of it was sent to Berry. While she recalls the issue, Berry has no memory of talking to me about it. *Id.* at 2. Nor does the government claim that she provided any information indicating that I participated in the 1984–85 electronic surveillance. *See id.*

Finally, the government has stated that neither the affiant, DEA Special Agent Stephen Boeri, nor the Special Agent in Charge of DEA in Boston, Robert Stutman, recall speaking to me about the 1984–

85 electronic surveillance. *See* February 13, 1998 Memorandum and Order at 56–57; January 21, 1998 Tr. at 8.

Thus, I conclude that a reasonable person, aware of the foregoing information, would not mistakenly believe that I participated in the preparation of the application for the 1984–85 electronic surveillance for submission to the court.

Nor is there a factual basis that would permit a reasonable observer to conclude that I have personal knowledge of any disputed material fact concerning that electronic surveillance. More specifically, as described in detail in § V, *supra*, there is no evidence that would cause a reasonable person to believe that in December 1984 I knew, or even suspected, that Bulger or Flemmi were FBI informants.[10]

[25] Finally, the government asserts that my recusal is required because certain former high-ranking law enforcement officials may be questioned about what they knew, or as a result of rumors should have known, about Bulger and Flemmi's status as FBI informants, and "an objective observer might believe that the Court would not be impartial because the Court might implicate itself in the very wrongdoing that the defendants allege against other similarly situated members of the government." Government's Submission Regarding Recusal at 23. There are several valid responses to this claim.

First, for the reasons previously described, I was not "similarly situated" to the witnesses in this matter and a properly informed, objective person would recognize this. Second, the government's argument suggests that it appears that I will be unfair to the defendants because I am biased in favor of former law enforcement officials with whom I worked. The defendants, however, have not taken this position. Moreover, on December 4 and 11, 1997, they expressly waived this possible ground for my recusal, among others that they might arguably have had. December 4, 1997 Tr. at 68–76; December 11, 1997 Tr. at 5. Most significantly, the government's present contention is merely a reiteration of a concern about appearances that it recognized on December 4 and 11, 1997, and itself waived. February 13, 1998 Memorandum and Order at 36–37; December 11, 1997 Tr. at 5. For the reasons stated in § III, *supra*, this purported basis for my recusal cannot be revived now.

VII. *Conclusion*

For the foregoing reasons, I find that the matters relating to my possible recusal

10. Moreover, because there is no evidence that I was involved in the process of preparing the application for the 1984–85 electronic surveillance for submission to the court and there is no suggestion that I was insulated from that process in order to keep material information from the court, any knowledge or suspicion I might conceivably have had that Bulger and Flemmi were informants may, as a matter of law, be irrelevant. *See United States v. Salemme,* 1997 WL 810057 at *4–5 (December 29, 1997 Memorandum and Order); *United States v. Sullivan,* 586 F.Supp. 1314, 1319 (D.Mass.1984) (denying suppression because "[t]here is no evidence in this case that the government intentionally concealed information from the court [by choosing an ignorant applicant]. If such a showing had been made, we would have a different case."); *United States v. Tufaro,* 593 F.Supp. 476, 485 (S.D.N.Y.1983) (holding that a subordinate's knowledge would be attributed to the affiant, who was his supervisor), *aff'd,* 762 F.2d 991 (2d Cir.), *cert. denied,* 474 U.S. 826, 106 S.Ct. 84, 88 L.Ed.2d 69 (1985). *See also United States v. Donovan,* 429 U.S. 413, 435 n. 23, 97 S.Ct. 658, 50 L.Ed.2d 652 (1977) (stating that "[t]here is no suggestion in this case that the Government agents knowingly failed to identify [all of those likely to be heard in incriminating conversations] for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case.").

under § 455(a) would not, individually or cumulatively, cause a reasonable person to question my impartiality. *See, e.g., In re United States*, 666 F.2d at 696–98 (despite Judge Tauro's possible reason to be grateful to the defendant and arguable motive to mistreat key witnesses, recusal was not required). As in *In re United States*, to reach the opposite "result would reflect a more jaundiced view as to when there should be a reasonable doubt about a judge's impartiality than accords with the public perception." *Id.* at 697.

The government makes two additional arguments, however, that I will address briefly. At the March 23, 1998 hearing, the government argued that I should disqualify myself now because there will "inevitably ... be additional evidence that bears on the recusal issue," March 23, 1998 Tr. at 25, and "although no one has indicated the need to call the Court as a witness, there are possibilities that the Court could become a witness in this case as this proceeding evolves," *id.* at 29–30. It is not, however, "inevitable" that additional recusal issues will arise in the future. It appears that the government has been investigating such possible issues since at least July 1997. It may reasonably be expected that the foreseeable issues have been fully presented by now.

[26] I accept, however, that it is possible that new recusal issues will emerge in the future. This possibility, however, is not a proper basis for my disqualification. As described earlier, "[a] trial judge must hear cases unless some reasonable factual basis to doubt his impartiality ... is shown by some kind of probative evidence." *Blizard*, 601 F.2d at 1221. Mere speculation or innuendo is not enough. *In re United States*, 666 F.2d at 695; *Cooley*, 1 F.3d at 993; *Greenough*, 782 F.2d at 1558.

[27] Similarly, "unsubstantiated speculation" about the possibility that the judge will be required to be a material witness concerning a disputed issue is not enough to require recusal. *Murray v. Sevier*, 929 F.Supp. 1461, 1467–68 (N.D.Ala.1996). *See also* February 13, 1998 Memorandum and Order at 58, 60. The government's remark at the March 23, 1998 hearing is no more than such "unsubstantiated speculation." No knowledgeable, reasonable person would now expect that I am likely to be a witness in this case.

At the March 23, 1998 hearing the government also claimed that the "mere fact the Court would find it necessary to write a 73–page opinion on [the recusal questions] ... bears witness to the fact that there is a substantial issue." March 23, 1998 Tr. at 47. This is a curious contention. It suggests that if I had merely written that "there is no reason for my disqualification," the issue would be unmeritorious.

As indicated earlier, in deciding questions of disqualification, judges are instructed to "tread cautiously, recognizing, on the one hand, the great importance to the judicial institution of avoiding any appearance of partiality, while simultaneously remaining aware of the potential injustices that may arise out of unwarranted disqualification." *In re Allied–Signal*, 891 F.2d at 970. The February 13, 1998 Memorandum and Order and the instant Memorandum and Order are part of my effort to heed that injunction.

In the circumstances of this case, there is no proper basis for my disqualification. My unwarranted recusal, however, would be unjust. Transferring this complex case to another judge would undoubtedly further delay the progress of the proceedings. The public, as well as the parties, however, has a legitimate interest in seeing this case progress with all deliberate speed.

This case is more than three years old. Four superceding indictments have been returned. As a result, the defendants are facing a fifth set of charges. Those charges cover crimes allegedly committed over 30 years.

It took more than two years before the court learned, and compelled the government to disclose, that Bulger and Flemmi were FBI informants who, according to the Principal Legal Adviser to the Boston FBI office, were "at least tacitly authorized" to engage in "LCN policymaking"—which is, in essence, one of the charges against them in this case. *See United States v. Salemme,* 978 F.Supp. at 354 n. 6 (May 22, 1998 Memorandum and Order); Government's response to Magistrate Judge Cohen's Order Dated August 23, 1995, at 6 n. 2; Affidavit of Paul E. Coffey, Esq. dated November 13, 1995, ¶ 7 n. 1. The government for several months opposed the defendants' efforts to compel disclosure of the status of Bulger and others as FBI informants. *United States v. Salemme,* 978 F.Supp. at 345 (May 22, 1997 Memorandum and Order). When that effort failed, however, the government promptly stated that "[t]he United States does not dispute that disclosure is appropriate in the case of Bulger" as part of an effort to resist other disclosures. *See* Government's Motion for Reconsideration of the Court's May 22, 1997 Order (June 3, 1997) at 2. Similarly, after I decided the issue, the government "concede[d] that: the defendants [had] made a substantial showing that Mercurio was a government informant and may have been in possession of information about the location of the so-called induction ceremony prior to entry of the roving order by Judge Nelson on October 27, 1989." *Id.* at 7–8; *United States v. Salemme,* 978 F.Supp. 364, 367 (D.Mass. June 6, 1997).

In addition, the evidence that the government proposes to use in this case requires the litigation of motions to suppress many electronic surveillances, conducted over more than 15 years, by federal and state law enforcement agencies. It took the government several months to produce the documents to which the defendants are entitled in connection with the lengthy evidentiary hearings that are still required on those motions.

The defendants, who under our Constitution are presumed to be innocent, have been detained for several years pending trial. Two defendants, George Kaufman and Frank Salemme, Jr., who were not detained, have died since being indicted. If not dismissed, this case is still far from what may be as many as four separate trials. As more time passes, witnesses may also become unavailable. It would be an injustice to the defendants, and to the public, if the progress of this case were impeded by my unjustified recusal.

My disqualification would also injure public confidence in the administration of justice by suggesting both that a litigant can prompt the disqualification of a fair judge by alleging only the slightest factual basis for a claim of bias, and that judges will "abdicate in difficult cases at the mere sound of controversy." *In re United States,* 666 F.2d at 695. *See also In re Cargill,* 66 F.3d at 1263; *In re Allied–Signal,* 891 F.2d at 970.

Accordingly, I intend to continue to preside in this case. The hearings which were suspended on January 21, 1998 will, therefore, resume on April 13, 1998. As indicated earlier, however, if an authorized representative of the government requests a stay and expresses an intention to file promptly with the Court of Appeals for the First Circuit a petition for a writ of mandamus seeking to compel my recusal, I will stay this case in order to provide the

Court of Appeals for the First Circuit whatever time it needs to act on that petition.

VIII. *Order*

In view of the foregoing, it is hereby ORDERED that:

1. The government's requests to withdraw its waiver under 28 U.S.C. § 455(e) and that I recuse myself under 28 U.S.C. § 455(a) are DENIED.

2. As I have not relied on the Defendants' October 6, 1997 Factual Submission in rendering this decision, their request to unseal it is DENIED.

3. If the government intends to file promptly with the Court of Appeals for the First Circuit a petition for a writ of mandamus seeking to compel my recusal and, therefore, wishes to request a stay of this case, it shall so inform me and the defendants as soon as possible, but in any event by April 6, 1998.

4. The defendants shall, by April 6, 1998, inform the government and the court of the next witnesses it intends to call in the hearings which are now scheduled to resume.

5. The parties shall confer concerning any scheduling or discovery issues concerning those witnesses.

6. A status conference will be held on April 8, 1998, at 3:00 p.m.

7. Unless otherwise ordered, the hearings suspended on January 21, 1998 will resume on April 13, 1998, at 9:00 a.m.

Andrew W. KILBURN,

v.

Michael T. MALONEY.

No. CIV. A. 98–12156–RGS.

United States District Court,
D. Massachusetts.

July 31, 2001.

Following affirmance of his conviction for murder, 426 Mass. 31, 686 N.E.2d 961, state prisoner filed petition for writ of habeas corpus. On petitioner's motion to stay proceedings, the District Court, Dein, United States Magistrate Judge, held that petitioner was entitled to stay habeas proceedings on exhausted claim pending resolution of unexhausted, but potentially meritorious, claim.

Motion granted.

1. Habeas Corpus ⇐603

Application for federal habeas corpus review does not toll one-year statute of limitations for filing for federal habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C.A. § 2244(d)(2).

2. Habeas Corpus ⇐351, 679

Petitioner was entitled to stay habeas proceedings on exhausted state claim pending state court resolution of unexhausted, but potentially meritorious, claim, contingent on petitioner's prompt return to federal court upon exhaustion of state remedies; merits of claim raised by original habeas petition had not been briefed, new matter presented fairly straightforward issue, and petitioner initially sought review within limitations period. 28 U.S.C.A. § 2254(b).

and act upon their pending application.[1] Rather, the claim made is that the board's decision to apply the amendments retroactively is a final, reviewable act. The Court disagrees. Although Plaintiff's application is apparently complete, the Kittery Zoning Board has not denied that application. Since there has been no final action for the Superior Court to review, there is no basis upon which this Court could abstain.

Accordingly, the Court **ORDERS** that Plaintiffs' Motion to Remand be, and it is hereby, **DENIED.**

UNITED STATES of America

v.

Francis P. SALEMME, et al.

United States of America

v.

John Martorano.

Nos. CR. 94-10287, CR. 97-10009.

United States District Court,
D. Massachusetts.

Feb. 13, 1998.

On recusal issues in criminal case, the District Court, Wolf, J., held that (1) he was able to impartially reach decisions in the case despite his earlier involvement as Deputy United States Attorney, but (2) parties were requested to give their views before judge reached final decision.

Ordered accordingly.

See also 164 F.Supp.2d 86 and 91 F.Supp.2d 141.

1. Judges ⇐47(1), 49(1)

A judge may not preside in a case and must disqualify himself, even if parties agree it would be desirable for him to continue, if judge (1) participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning merits of the particular case in controversy, (2) has personal knowledge of disputed evidentiary facts concerning the proceeding, or (3) knows he is likely to be a material witness in the proceeding. 28 U.S.C.A. § 455(b).

2. Judges ⇐49(1)

Disqualification of a judge on ground that his impartiality might reasonably be questioned is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality. 28 U.S.C.A. § 455(a).

3. Judges ⇐49(1)

Judge in criminal case had no bias or prejudice against any defendant such as would disqualify him on that basis; fact that court visited issue of contempt with regard to outburst by prosecutor did not manifest any bias or prejudice against him. 28 U.S.C.A. § 455(b)(1).

4. Judges ⇐47(1)

Statute requiring disqualification of judge who, during previous tenure as government employee, participated as counsel,

1. The Court notes that Plaintiffs' application has been pending for almost 15 months, but Plaintiffs have not requested that their application be placed on the Board's agenda. Response to Plaintiffs' Supplemental Memorandum Regarding Pending Motion to Remand Certain Claims (Docket No. 12) Ex. A Affidavit of Russell White ¶ 8. Therefore, the Court concludes that there has been no refusal to act by the Board.

adviser or material witness concerning a proceeding, or expressed an opinion concerning the merits of a particular case in controversy, did not apply where neither investigation leading to case, nor the case, nor hearings on motions to dismiss or suppress were pending when judge was Deputy United States Attorney. 28 U.S.C.A. § 455(b)(3).

5. Judges ⇐49(1)

A judge's personal knowledge concerning a proceeding, such as would require recusal, must be of a disputed evidentiary fact. 28 U.S.C.A. § 455(b)(1).

6. Judges ⇐49(1)

Provision requiring judge to recuse himself in a proceeding if he has personal knowledge of disputed evidentiary facts concerning the proceeding, is directed toward knowledge of disputed evidentiary facts, that is, matters underlying the cause of action; statutory language is not directed toward routine judgments of credibility. 28 U.S.C.A. § 455(b)(1).

7. Judges ⇐49(1)

Judge had no personal knowledge of any disputed evidentiary fact, as would require his recusal from criminal case, based on his involvement process of reviewing for submission to the court application for electronic surveillance. 28 U.S.C.A. § 455(b)(1).

8. Judges ⇐47(1)

Purpose of statute requiring recusal if judge is, to the judge's knowledge, likely to be a material witness in the proceeding, is to assure that a judge does not have to pass on competence and veracity of his own testimony given with respect to a matter presently in controversy before him; unsubstantiated speculation about possibility that judge will be required to be a material witness concerning a disputed issue is not enough to require recusal. 28 U.S.C.A. § 455(b)(5)(iv).

9. Judges ⇐45

Judge was able to impartially judge testimony, if any, of potential witnesses in case before him, and thus was not required to recuse himself, even though judge had dealt with witnesses professionally on other matters at time when judge was employed as Deputy United States Attorney. 28 U.S.C.A. § 455(b).

10. Judges ⇐49(1)

Judge was not required to recuse himself from case based on fact that one defendant had previously reported that judge, in previous position as Deputy United States Attorney, had leaked information regarding another matter; judge felt that the report had not caused him to be biased or prejudiced against defendant, and that the report would not be considered in assessing defendant's truthfulness or reliability unless the report itself were to be offered and accepted into evidence. 28 U.S.C.A. § 455(b).

11. Judges ⇐49(1)

Knowledge by a judge of disputed facts in a case before him requires judge's disqualification only if the knowledge has an extrajudicial source. 28 U.S.C.A. § 455(b).

12. Judges ⇐49(1)

There are circumstances in which disqualification of a judge may be required even though he is not actually biased or prejudiced, and has no extrajudicial knowledge of disputed evidentiary facts, such as in a proceeding in which his impartiality might reasonably be questioned. 28 U.S.C.A. § 455(a).

13. Judges ⇐53

Where there is no actual impediment, based on bias, prejudice, or extrajudicial

knowledge of disputed evidentiary facts, to a judge providing a fair trial, disqualification, on ground that judge's impartiality might reasonably be questioned, can be waived by the parties. 28 U.S.C.A. § 455(a, e).

14. Judges ⇐40

Purpose of statute requiring that judge disqualify himself in any proceeding in which his impartiality might reasonably be questioned, is to promote public confidence in the integrity of the judicial process and avoid even the appearance of partiality. 28 U.S.C.A. § 455(a).

15. Judges ⇐49(1)

Issue of whether a judge must disqualify himself, on ground that his impartiality might reasonably be questioned, is to be viewed from perspective of a reasonable person, and the test is an objective one. 28 U.S.C.A. § 455(a).

Randolph Gioia, Boston, MA, Anthony M. Cardinale, Cardinale & DiMauro, LLC, Boston, MA, for Robert P. DeLuca.

MaryEllen Kelleher, Law Office of Richard Egbert, Boston, MA, John Mitchell, Law Office of John Mitchell, New York City, Anthony M. Cardinale, Cardinale & DiMauro, LLC, for Francis P. Salemme.

Richard M. Egbert, Boston, MA, Kenneth J. Fishman, Fishman, Ankner & Horstman, LLP, Boston, MA, Kimberly Homan, Sheketoff & Homan, Boston, MA, for Stephen J. Flemmi.

Sean E. Curran, Manchester, NH, for George Kaufman.

MEMORANDUM AND ORDER

WOLF, District Judge.

I. *Summary*

[1] Federal law requires that a presiding judge not have a personal bias or prejudice concerning any party. 28 U.S.C. § 455(b)(1). It also requires that a judge decide matters based solely on the evidence presented in judicial proceedings. This means, among other things, that a judge may not preside if he: (a) "participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy," § 455(b)(4); (b) has "personal knowledge of disputed evidentiary facts concerning the proceeding," § 455(b)(1); or (c) knows he or she is "likely to be a material witness in the proceeding," § 455(b)(5)(iv). If any of these circumstances exist, the judge must disqualify himself even if the parties agree that it would be desirable for him to continue to preside. *United States v. Chantal*, 902 F.2d 1018, 1023 (1st Cir. 1990).

[2] In addition, a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." § 455(a). " 'Disqualification [under § 455(a)] is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a *reasonable* basis for doubting the judge's impartiality.' " *In re Allied–Signal, Inc.*, 891 F.2d 967, 970 (1st Cir.1989), *cert. denied sub nom. ACW Airwall, Inc. v. United States District Court for District of Puerto Rico*, 495 U.S. 957, 110 S.Ct. 2561, 109 L.Ed.2d 744 (1990) (quoting *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981)) (emphasis in original).

> [Section] 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have a reasonable grounds to question the neutral and objective character of the judge's rulings or findings ... a

high threshold is required to satisfy this standard. Thus, under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility, or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

Liteky v. United States, 510 U.S. 540, 557–58, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (Kennedy, J., concurring).

"The task of applying the objective standard to the facts grants a judge a degree of discretion in disqualification decisions under section 455(a) that is not present in section 455(b) decisions." S. Hoekema, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)*, 60 Temp. L.Q. 697, 727 (1987) (footnotes omitted). Accordingly, the Court of Appeals for the First Circuit allows the district judge "a range of discretion" in deciding whether a reasonable, objective person would question his impartiality and reviews that decision only for abuse of discretion. *In re Allied–Signal*, 891 F.2d at 970.

There are competing considerations which at times must be weighed by a presiding judge in deciding whether to recuse himself under § 455(a). As the Court of Appeals for the First Circuit has stated:

> [W]hen considering disqualification, the district court is *not* to use the standard of "Caesar's wife," the standard of mere suspicion (citation omitted). That is because the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.
>
> * * * * * *
>
> [Therefore,] the judge must ... tread cautiously, recognizing, on the one hand, the great importance to the judicial institution of avoiding any appearance of partiality, while simultaneously remaining aware of the potential injustices that may arise out of unwarranted disqualification.

In re Allied–Signal, 891 F.2d at 970 (emphasis in original).

If the only basis for recusal is an appearance of partiality under § 455(a), the parties may, after "full disclosure on the record of the basis for disqualification," waive this ground for recusal. § 455(e). The government and the defendants provided such waivers with regard to the information I described in detail on December 4, 1997, including my work in the United States Attorney's Office from 1981 to 1985, and my resulting association with a number of the witnesses in the pending hearings on defendants' motions to dismiss and suppress.

As described below, the evolution of events in this case caused me on January 21, 1998 to raise the question whether I should now recuse myself under § 455(a) or (b) because of a December 21, 1984 memorandum concerning a conversation I had with then Assistant Attorney General Stephen Trott (Exhibit A hereto), which I discovered the night before. I have since found an October 15, 1984 memorandum relating to the prosecution of Vincent Piro (Exhibit B hereto), which is also relevant to this inquiry.

Beginning on January 21, 1998, I have at several conferences consulted the parties concerning the questions raised relating to my possible recusal.[1] That discussion has

1. The government initially suggested the possibility of asserting a deliberative process

been helpful, but not decisive. The defendants have stated that they believe that my disqualification is not necessary or appropriate under either § 455(a) or (b), and that they will again waive any possible ground for recusal under § 455(a).

The government has not expressed a definitive view on the pending recusal issues. It has described a number of possible concerns. The government has also encouraged me to consider the issues in the first instance and to require the government to declare whether it requests my recusal only if it is not clear to me whether my disqualification is appropriate. This memorandum is written in response to that request.

In summary, the recusal questions, particularly the issue of whether I should be disqualified under § 455(a), must be analyzed in the context of the long history of this case, and with an understanding of the issues to be litigated and of my prior employment by the Department of Justice. Section II of this memorandum describes what I perceive to be the relevant facts.

Section III describes what I understand, without the benefit of briefing by the parties, to be the applicable legal standards and my present, still preliminary, views on how they apply in this case. As described in detail, I do not believe that I have any personal bias or prejudice against any party. Thus, my disqualification is not required under that prong of § 455(b)(1). *See* § III. A.

In contrast to my visceral reaction, expressed to the parties on January 21, 1998, I am not now inclined to believe that the December 21, 1984 memorandum requires my recusal under § 455(b). *See* § III. B. More specifically, that memorandum indicates that, when he spoke to me, the Assistant Attorney General had already decided to authorize the application for the 1984–85 electronic surveillance now subject to defendants' motion to suppress. He did not solicit or receive advice on its merits from me. Rather, he was calling to complain about the Assistant United States Attorney who prepared the application and the quality of his draftsmanship. Thus, it does not now appear to me that I have personal knowledge of a disputed evidentiary fact concerning the 1984–85 electronic surveillance. Nor has any party stated that I am likely to be called to testify with regard to my conversation with the Assistant Attorney General or the memorandum concerning it.

Similarly, at this time it appears to me that the October 15, 1984 memorandum regarding the Piro prosecution does not indicate that I have personal knowledge of a disputed evidentiary fact in this case. *See* § III. C. I now realize that I dealt with Federal Bureau of Investigation ("FBI") Special Agent John Morris when I was the Deputy United States Attorney, from 1981 to 1985, and discussed with colleagues the suspicion that he had said something to former FBI Special Agent Dennis Condon that may have compromised the Piro investigation. I believe, however, that this information does not impair my ability to assess, if necessary, the credibility of any testimony Messrs.

privilege, or some other privilege, which would bar public disclosure of the documents which present the pending recusal questions. Both the government and the defendants requested that discussions of those documents be conducted in proceedings closed to the public until the issues of possible privilege could be resolved. I agreed and so stated in a public session on January 21, 1998. The government has now decided not to assert any possible privilege concerning the documents, at least in connection with the proceedings relating to my possible recusal. The government, the defendants, and I agree that this issue should now be addressed in public proceedings.

Morris or Condon may provide in this case. Moreover, I do not recall any suspicion of defendant James "Whitey" Bulger concerning the Piro matter. Nor, according to the FBI's interview report, does John Pappalardo, who was the lead prosecutor in the Piro case.

Finally, with regard to § 455(b), the FBI 209 report of statements made by defendant Stephen Flemmi on August 8, 1983, (Exhibit C hereto) does not cause me to be biased or prejudiced against Mr. Flemmi. Nor, as I now perceive it, does the 209 give me personal knowledge of any disputed evidentiary fact. *See* § III. D.

In addition, at this time, it appears to me that with regard to § 455(a), the waivers provided by the government and defendants in December 1997 were valid and binding with regard to the matters then disclosed, and that the appropriate focus now is on the recent disclosures. *See* § III. E. In any event, even if a broader view is taken, it now seems to me that it may be debatable whether a reasonable person, fully informed of all of the relevant facts, would question my impartiality, but this question is at least within the range of my discretion to decide. I am preliminarily inclined to find that such a reasonable person would not question my impartiality. If this is a permissible and appropriate conclusion, I am inclined to continue to preside in order to facilitate the progress of this case, rather than to recuse myself as I often do when a legitimate issue of possible disqualification is raised at the outset of a case.

I am, however, interested in the parties' views on these § 455(a) issues, among others. If the parties agree that this is a close question on which I have legitimate discretion, I wish to have their advice as to how I should exercise that discretion. I also want to know whether if the only issue is a possible appearance of partiality—rather than any § 455(b) actual impediment to my ability to continue to preside fairly—they again wish to waive this ground for my disqualification.

Accordingly, it will be necessary for the parties to state and explain their positions on the relevant issues before I decide whether to continue to preside in this case. I am now ordering the parties to address the questions concerning my possible disqualification in the context of the following facts and legal considerations, as well as any others they deem appropriate. After their submissions are received, a hearing will, if necessary, be held concerning my possible recusal.

II. *Factual History*

As the parties have known since the inception of this case, and as I have discussed on the other occasions on which I have raised questions concerning my possible recusal,[2] prior to becoming a judge I served in the Department of Justice. In 1974, I was a Special Assistant to the Deputy Attorney General. From 1975 to 1977 I was a Special Assistant to the Attorney General. From November 1981 to April 1985 I was the Deputy United States Attorney for the District of Massachusetts and the Chief of the Special Investigations Unit in that office, which was responsible for the prosecution of political corruption

2. As this case has developed, I have raised issues concerning my possible recusal as soon as I have discerned them because I do not want to preside in this, or any case, if my participation is impermissible or inappropriate, and I also want to minimize the risk that a disappointed litigant will later have a reasonable basis for claiming that decided issues should be reopened because my participation was improper. *See, e.g.,* December 4, 1997 Tr. at 58.

cases (the "SIU" or "Public Corruption Unit").

While I was Deputy United States Attorney, William F. Weld was the United States Attorney. Jeremiah O'Sullivan was the Chief of the Organized Crime Strike Force (the "Strike Force"), as well as a recent predecessor of mine as the head of the Political Corruption Unit. In that period, the Strike Force, and its attorneys, were not part of the United States Attorney's Office. The Strike Force and the United States Attorney's Office did, however, interact at times.

After beginning work together in November 1981, Mr. Weld and I received joint briefings on many matters, including some Organized Crime matters. In addition, initially we often worked on matters together. As the FBI reports Mr. Weld stated when interviewed on July 29, 1997, that as Chief of the Strike Force, Mr. O'Sullivan generally dealt directly with Mr. Weld as United States Attorney, rather than reporting to him through me as Deputy United States Attorney. In addition, over time, my joint activities with the United States Attorney diminished as I increasingly focused on supervising the Public Corruption Unit and personally conducting grand jury investigations and prosecutions.

As I explained on December 4, 1997, I did discuss certain public corruption matters with Mr. O'Sullivan, who had recently headed the SIU. December 4, 1997 Tr. at 45–6. In addition, I played a role in developing an investigation of possible corruption in the Boston Police Department which was transferred from the SIU to the Strike Force. Assistant United States Attorney Robert Cordy and Strike Force Attorney Diane Kottmyer were primarily responsible for any necessary coordination concerning that investigation. The summaries of Mr. O'Sullivan's logs and calendar entries furnished to me and defense counsel by the government on February 5, 1998 [3] indicate that he and I also discussed that investigation on several occasions. Such discussions would have been consistent with our relative roles and I assume that they occurred. I also assume for present purposes that the other occasional telephone conversations and meetings reflected on Mr. O'Sullivan's records occurred.[4]

The Organized Crime Drug Enforcement Task Force ("OCDETF") was established during my tenure in the United States Attorney's Office. It was located in the District of Massachusetts, but its jurisdiction covered several states. Its Coordinator did not, as a practical matter, report to the United States Attorney through me as Deputy United States Attorney. I did not participate in reviewing any applications for electronic surveillance prepared by the OCDETF to the best of my recollection.

In August 1984, I was informed that I had tentatively been selected to be nominated by the President for appointment to the United States District Court. That process consumed a great deal of my time and attention. I was nominated in October 1984, but not confirmed prior to the

3. As stated orally at the conference on February 4, 1998, these documents are subject to ¶ 9 of the June 26, 1997 Order (the "June 26, 1997 Protective Order") as modified by the December 29, 1997 Order at ¶ 4.

4. Mr. O'Sullivan's telephone logs reflect that we spoke on the telephone 23 times in the approximately three and a half years that I worked in the United States Attorney's Office. His calendar entries reflect that we met 33 times in that period, including several times for lunch and once for a Celtics game. *See also* December 4, 1997 Tr. at 46–47.

Presidential election in November. The issue of my renomination and, particularly, my potential confirmation required my attention after the 1984 election. My selection to become a member of the District Court also limited the appropriate range of my activities on behalf of the United States Attorney's Office. Thus, after my selection, my activities on behalf of the United States Attorney's Office were largely devoted to supervising the work of the Public Corruption Unit and writing an appellate brief. My nomination was confirmed in April 1985, and I left the United States Attorney's Office that month. My working files remained in the United States Attorney's Office. I did, however, retain a personal, monthly chronological file of letters and memoranda that I wrote.

When I became a judge, it was my practice not to preside in any case that was indicted or under investigation while I was in the United States Attorney's Office. Those cases were generally identified by the United States Attorney's Office when indictments were returned and they were not assigned to me. Over time, the cases requiring my recusal based generally on my service as Deputy United States Attorney diminished in number and then disappeared. There continued, however, to be cases which raised questions concerning my possible disqualification based on particular facts, which I addressed on their individual merits.[5] When this case was indicted, the government did not identify it as one that was being investigated while I was Deputy United States Attorney.

The nature and dimensions of the charges in this case were dramatically different when it was originally indicted than they are today. The original indictment was returned on October 25, 1994, against one defendant, Robert DeLuca. In five pages it charged DeLuca with conspiring to violate the Travel Act, 18 U.S.C. § 1952, and with a substantive violation of that statute based upon his alleged attendance at a Mafia induction ceremony held at 34 Guild Street, Medford, Massachusetts on October 29, 1989. The timing of the indictment was evidently influenced by the fact that the five year statute of limitations on these offenses was about to expire. *See* 18 U.S.C. § 3282. The DeLuca case was randomly assigned pursuant to the District Court's established procedures. It was drawn to me.

On January 10, 1995, the government obtained a 91–page superceding indictment. This First Superceding Indictment added six defendants—Bulger, Flemmi, George Kaufman, Francis P. Salemme, Francis P. Salemme, Jr., and James Martorano; John Martorano was not then named as a defendant. The First Superceding Indictment also radically altered the charges in the case. The new charges included, among others, an alleged RICO conspiracy lasting more than 30 years and a lengthy conspiracy to extort bookmakers

5. For example, in *United States v. McCallion,* Cr. No. 95–10243, the government disclosed that I had questioned a prospective witness in a grand jury proceeding that led to an indictment of his father-in-law, which I personally prosecuted. Neither the government, the defendants, nor I viewed my disqualification as necessary or appropriate in that case.

However, over the government's objection, at the outset of the matter, I did disqualify myself in a case being prosecuted by an Assistant United States Attorney whose wedding I had recently performed. *See United States v. Sawyer,* Cr. No. 94–10168–MLW (D. Mass. September 2, 1994 Memorandum and Order). In the process, I declined the government's request that I allow the prosecutor to be replaced and continue to preside myself because, although that was a permissible option, I did not want to "abet the mistaken public perception that the government can in Massachusetts influence who will preside in a particular case." *Id.* at 15.

and drug dealers. DeLuca was named in only a fraction of the alleged racketeering acts and substantive charges. The new charges against DeLuca and his codefendants could have been brought as a separate indictment, which would have been randomly assigned to a member of the District Court. However, as those charges were brought in a superceding indictment in an existing case, they were, in accordance with the District Court's standard and well-known practice, assigned to me.

Prior to January 1995, I had presided in several cases against alleged members of the Patriarca Family of La Cosa Nostra ("LCN") in which the government obtained convictions and, in almost all instances, the imposition of the sentences it requested. Most notably, as a result of random assignments, I presided in two cases involving the prosecutions of LCN members Raymond J. Patriarca, Joseph Russo, Vincent Ferrara, Robert Carrozza, Dennis Lepore, Carmen Tortora, Biagio DiGiacomo, Antonio Spagnolo, Joseph Gioacchini and an LCN Associate, Pasquale Barone. All except Patriarca and Barone received the sentences to which the government and the defendant had agreed in Fed.R.Crim.P. 11(e)(1)(C) binding plea agreements. *See, e.g., United States v. Carrozza*, 807 F.Supp. 156, 157–58 (D.Mass.1992), *aff'd in part, vacated in part*, 4 F.3d 70 (1st Cir.1993), *cert. denied*, 511 U.S. 1069, 114 S.Ct. 1644, 128 L.Ed.2d 365 (1994). After a trial, Barone was sentenced to life in prison. Patriarca, who had not been finally sentenced as of January 1995, ultimately received a ten-year sentence, which although representing an upward departure under the Sentencing Guidelines was significantly less than the life sentence the government was seeking. *See United States v. Patriarca*, 912 F.Supp. 596 (D.Mass.1995).

In addition, in the prosecution of Patriarca and his codefendants, I had issued a then unprecedented decision finding the "roving bug" provisions of 18 U.S.C. § 2518(11)(a) to be constitutional, and denied a motion to suppress the tape-recorded evidence of the Mafia induction ceremony that was intercepted at 34 Guild Street, on October 29, 1989. *See United States v. Ferrara*, 771 F.Supp. 1266, 1319 (D.Mass. 1991). My factual findings and analysis were adopted by the District Court in Connecticut in *United States v. Bianco*, and were affirmed by the Court of Appeals for the Second Circuit in that case. 998 F.2d 1112, 1119–28 (2d Cir.1993), *cert. denied*, 511 U.S. 1069, 114 S.Ct. 1644, 128 L.Ed.2d 364 (1994). The government planned to offer the tape recording of the Mafia induction ceremony as evidence in this case. In January 1995, the government had good reason to believe that it could predict how I would rule on the foreseeable motion to suppress that evidence in this case.[6]

On August 1, 1995, the government obtained a Second Superceding Indictment that added John Martorano as a defendant.[7] John Martorano had been a fugitive from RICO charges brought in 1979 against Howard Winter, himself, and others relating to horse race-fixing scheme which was, in effect, alleged to be a racketeering act of a RICO enterprise known as

6. The disclosure that Angelo Mercurio was a government informant when he attended the induction ceremony is a fact that was not known to me when I denied the motion to suppress in 1991. Defendants contend that it is a material development which entitles them to suppression of the evidence of that ceremony in this case. This is one issue to be litigated in the pending proceedings.

7. The Second Superceding Indictment also deleted as defendants George Kaufman and Francis P. Salemme, Jr., each of whom had died.

the Winter Hill Gang. After he was apprehended, John Martorano's case was assigned to District Judge Reginald Lindsay. On July 24, 1995, over the government's objection, Judge Lindsay dismissed the case against John Martorano, without prejudice, because of a violation of the Speedy Trial Act, 18 U.S.C. § 3161. Rather than attempting to reinstitute the dismissed charges, the government brought new charges against Martorano in this case, including allegations that he participated in the race-fixing scheme on behalf of a different RICO enterprise, the amalgamation of the Winter Hill Gang and the Patriarca Family charged here. Thus, I became responsible for presiding in the case against John Martorano.

On May 21, 1996, the government obtained what it called a Third Superceding Indictment, with two parts, one of which included only the charges against John Martorano. The government characterized this as a "bifurcation" of the Second Superceding Indictment. Neither counsel nor the court was familiar with any precedent for such a severance of charges by a grand jury within a single indictment. I, therefore, deemed the charges against John Martorano to constitute a separate indictment, and had it given a separate case number. I did not, however, have that indictment randomly reassigned. With the consent of the parties, in the interest of efficiency, I consolidated for pretrial purposes the case against John Martorano and the case against his former codefendants.

After I indicated that motions to dismiss the Third Superceding Indictment for failure to allege properly certain elements of a RICO offense might be meritorious, on July 2, 1996, the government obtained a Fourth Superceding Indictment, which was intended to cure the alleged defects in pleading. I subsequently conducted lengthy hearings on some of defendants' many remaining motions to dismiss and to suppress.

As of March 1997, I had denied the defendants' motion to dismiss the Fourth Superceding Indictment and many of the alleged Racketeering Acts. *See United States v. Salemme*, 1997 WL 37530, *1–6 (D.Mass. January 13, 1997). I also orally announced my decision denying the motion to suppress certain electronic surveillance conducted by the Massachusetts State Police although I found that the government had violated state law by obtaining in the wrong county the court order authorizing that electronic surveillance, January 29, 1997 Tr. at 1–7, 26, and had not had the resulting tape recordings sealed in the time required by federal law. February 18, 1997 Tr. at 3–52.

In addition, on several occasions I informed the parties of my inclination to exclude the testimony of Hugh Shields and other evidence concerning the 1967 murders of Edward, Walter, and William Bennett, and Richard Grasso, which were charged for the first time in the Third Superceding Indictment as racketeering acts of Flemmi and Salemme, because the government had misused the grand jury to obtain evidence to strengthen the RICO charges previously alleged. This issue may have significant practical consequences for this case. If Flemmi and/or Salemme are convicted but not held accountable at sentencing for any of the four murders, it appears that the Guideline ranges for their sentences may be reduced from life imprisonment to as little as ten to thirteen years for Flemmi and eight to ten years for Salemme. As I have told the parties, however, I have not issued a decision on this matter, which I have intended to be the subject of a written memorandum and order.

In March 1997, the defendants moved for evidentiary hearings on their motions to suppress certain electronic surveillance and for disclosure of whether certain individuals, including Bulger and Mercurio, had been FBI informants at the time that they were treated as targets or individuals expected to be intercepted in the applications for court orders authorizing the electronic surveillance at issue. In the course of the hearings on these motions, I realized that Flemmi had been an FBI informant and also named, with Bulger and Kaufman, as a target of electronic surveillance conducted by the Drug Enforcement Administration ("DEA") and the FBI from December 1984 to March 1985. *See United States v. Salemme*, 978 F.Supp. 343, 350–51 & n. 3 (D.Mass. 1997). After Flemmi confirmed this fact, which had been known by the prosecutors since 1995, it was disclosed to his codefendants. *Id.*

The government strenuously opposed the motions for evidentiary hearings and the request that it be required to confirm or deny whether Bulger, Mercurio and others had been FBI informants. *Id.* at 345. Because the motions involved issues relating to the confidentiality of informants and it was uncertain how they would be decided, at the request of the parties, the submissions concerning them were sealed and several hearings closed to the public were conducted. *Id.*

On May 22, 1997, I issued a Memorandum and Order deciding that:

> [T]he defendants are entitled to evidentiary hearings on their motions to suppress electronic surveillance: (a) jointly conducted in 1984 and 1985 by the Drug Enforcement Administration ("DEA") and Federal Bureau of Investigation ("FBI"), which targeted Bulger, Flemmi, and George Kaufman, among others; (b) conducted on October 29, 1989, by the FBI, at 34 Guild Street, Medford, Massachusetts; and (c) conducted on December 11, 1990, by the FBI, at the Hilton Hotel in East Boston, Massachusetts. In connection with these hearings, the defendants are entitled to discovery concerning whether Angelo "Sonny" Mercurio, Robert Donati, Bulger, Flemmi, Anthony St. Laurant, Kenneth Guarino, and perhaps others were at relevant times secretly providing information to the government.

Id. at 345–46. Because I was told that the government might dismiss the case rather than confirm or deny the existence of a cooperating individual, or ask that it be held in civil contempt so that it could appeal the Order, the May 22, 1997 decision was temporarily sealed. *Id.* at 346.

The government subsequently confirmed that Bulger, who was and remains a fugitive, was an FBI informant during the period he is charged in this case with committing serious crimes; conceded that there was a proper basis for the court to have ordered evidentiary hearings on the defendants' motions to suppress electronic surveillance; at the direction of the Acting Deputy Attorney General declined to obey the Order that it confirm or deny whether anyone but Bulger was an informant; and asked for reconsideration of that Order. *See United States v. Salemme*, 978 F.Supp. 364, 365 (D.Mass. June 6, 1997). The May 22, 1997 Memorandum and Order was unsealed and public proceedings on these issues commenced. *Id.* at 366.

In brief summary, the motion to reconsider was denied. *Id.* The Acting Deputy Attorney General initially declined to obey the order to disclose the status of anyone other than Bulger. *Id.* The defendants moved to have him held in civil contempt and incarcerated. *Id.* at 365. The Acting Deputy Attorney General asked that I instead enter an order of conditional exclusion of the electronic surveillance evidence

so the government could attempt to appeal. *See United States v. Salemme,* 978 F.Supp. 375, 376 (D.Mass. June 13, 1997). I found that the government had not satisfied the requirements for a conditional order of exclusion. *Id.* at 376–77. In an effort to cut the Gordian Knot, however, I ordered Mercurio to appear in court to be questioned concerning whether he was an FBI informant when he attended the Mafia induction ceremony on October 29, 1989. *Id.* at 379. I also required the other individuals at issue, except Donati who was dead, to appear to respond to similar questions. *Id.*

On June 18, 1997, Mercurio testified that he was cooperating with the government in connection with the October 29, 1989 LCN induction ceremony. *United States v. Salemme,* 978 F.Supp. 379, 381 (D.Mass. June 19, 1997). In response to a renewed Order, *id.* at 385, the Acting Deputy Attorney General revised his refusal to address Donati's status and represented that he had not been an informant. *United States v. Salemme,* 978 F.Supp. 390, 391 (D.Mass. June 27, 1997). I decided to defer addressing the motion to suppress the December 11, 1991 electronic surveillance conducted at the Hilton Hotel and thus took no action on defendants' motion to hold the Acting Deputy Attorney General in civil contempt to the extent that it related to that electronic surveillance. *Id.*

On June 25, 1997, Flemmi filed an affidavit intended to respond to certain representations made by the government concerning his status as an informant. Among other things, Flemmi asserted that FBI Supervisory Special Agent Morris had told him and Bulger that they could be involved in any criminal activities short of murder and would be protected by the FBI. He also claimed that as part of his continuing relationship with the FBI he was specifically informed of the date his indictment in this case was to be returned so he could flee if he chose to do so.[8] Flemmi had previously asserted that in 1991 Mercurio had been given prior notice of his indictment so he could flee.[9] *See* April 27, 1997 Flemmi Affidavit, ¶ 4.

On June 26, 1997, I ordered that the government produce certain documents and information which was relevant to the forthcoming evidentiary hearings on the motions to suppress and to Flemmi's charges. *United States v. Salemme,* 978 F.Supp. 386 (D.Mass. June 26, 1997). The required discovery included, among other things: virtually all of Flemmi's FBI informant file, *id.* at 387; the documents relied upon by FBI Special Agent John Michael Callahan, Chief Division Counsel for the Boston Division of the FBI, in concluding that "Flemmi's control agents were obviously aware over the years from what Flemmi reported that he was engaged in illegal gambling and LCN policymaking" and that such agents " 'at least tacitly authorized [his] participation,' " *id.* (citations omitted); comparable records regarding Bulger, *id.;* and documents and informa-

8. Flemmi was arrested on January 5, 1995, five days before he was indicted. Evidently an arrest warrant was obtained because the government feared Flemmi was about to flee. Although warrants for their arrest were also obtained prior to the January 10, 1995 indictment of Salemme and Bulger, the FBI was unable to find either of them until Salemme was apprehended in Florida in August 1995. As indicated earlier, Bulger remains a fugitive.

9. The evidence to date indicates that Mercurio was in Massachusetts on November 14, 1991, the day before his indictment, when he spoke to at least one FBI Special Agent. He was not arrested when he was indicted. Rather, he was a fugitive until he was arrested in Georgia on state drug charges in 1995.

tion tending to show that Department of Justice and/or FBI regulations had not been complied with concerning Flemmi, Bulger, or Mercurio, *id.* at 387–88. The next day the government repeatedly objected to the scope of the discovery order. *See, e.g.,* June 27, 1997 Tr. at 18, 20–21, 24, 28, 36. Generally, the objections were overruled.

The evolution of the case prompted me to inform the parties of possible recusal issues that I discerned. More specifically, in an April 16, 1997 discussion of the 1984–85 electronic surveillance targeting Bulger and Flemmi, I pointed out that: I was then the Deputy United States Attorney; the applicant, Assistant United States Attorney Gary Crossen, would have been under me on the organization chart; I did not then have a role in reviewing applications for electronic surveillance; and that I was not "personally involved" in that electronic surveillance. April 16, 1997 Tr. at 19–20. I said that I had understood that no one thought that my service as Deputy United States Attorney was a reason for me to be disqualified, but stated that if someone felt the foregoing had implications for my participation, the issue should not be overlooked; rather we should deal with it. *Id.* No one pursued this subject.

Similarly, on April 16, 1997, the defendants indicated that they might ask me to reconsider the accuracy of an affidavit submitted by former FBI Special Agent James Ring in the 1991 litigation concerning the intercepted Mafia induction ceremony. *Id.* at 75. I then informed the parties that while in the United States Attorney's Office I worked with Mr. Ring in a public corruption case and in 1995 had appointed him as the monitor of an order I had issued in a civil case—a capacity in which he was, and is, still employed. *Id.* at 76. John Mitchell, Esq., counsel for Salemme, responded that these facts "raise[d] no problem for the defense." *Id.* The government said nothing. *Id.*

Nevertheless, on June 17, 1997, I raised again with the parties my prior association with Mr. Ring, Mr. Crossen, and several other individuals involved in this case. June 17, 1997 Tr. at 10–23. I asked them to consider the implications of those associations for my possible recusal. Most significantly for present purposes, I described again the nature of my activities in the United States Attorney's Office in 1984, and stated that I was "quite certain that I did not review Mr. Crossen's application for electronic surveillance." *Id.* at 14–15. Assistant United States Attorney Fred Wyshak reminded me that the wiretaps at issue commenced in December 1984. *Id.* at 21. I reiterated that "I was not reviewing matters" at that time, and expressed my appreciation to Mr. Wyshak for bringing that date to my attention. *Id.* After making these disclosures, I told the parties to consider the matter overnight rather than state their positions regarding my possible recusal at that time. *Id.* at 21–22.

On June 18, 1997, I asked the parties whether, on reflection, "anybody had any questions, concerns, or objections about my participation ... in the case." June 18, 1997 Tr. at 5. No one asked any questions. *Id.* Defense counsel stated that their clients had no objection to my participation. *Id.* The government said the same. *Id.*

On June 27, 1997, I again raised the issue of my possible recusal with the parties because of a document brought to my attention on June 25, 1997. In preparing to produce Flemmi's FBI informant file to him in discovery, the government found an FBI 209 report of a conversation with Flemmi on August 8, 1983. In essence, the 209 states that Flemmi said that I was leaking information concerning an investigation of Gennaro Angiulo and other mem-

bers of the Patriarca Family to an unknown Jewish male, who was married to the sister of Bruce Swerling, and who told everything to someone named Howie Rubin, who told Angiulo. The document also states that Flemmi said that he trusted Mr. O'Sullivan of the Strike Force.

Upon receiving the report, I told the prosecutors that they had done the right thing in bringing it to my attention promptly. June 25, 1997 Tr. at 5. I stated that the allegations were untrue. *Id.* at 4. I asked the government to give the document to the defendants immediately so that everyone could consider it, ask me any questions, and express their views of its implications for my possible recusal. *Id.* at 4–5. I also stated that ultimately this matter should be discussed in a proceeding open to the public. *Id.* at 4.

Issues relating to the report of Flemmi's statements on August 8, 1983 were discussed in the late morning of June 27, 1997, and pursued after lunch. I reiterated my desire to have the report and its implications for my recusal discussed publicly. June 27, 1997 Tr. at 57–58, 63. The defendants and Mr. Wyshak, who was designated to speak for the government, urged me to conduct the discussion in a closed proceeding. *Id.* at 95. Assistant United States Attorney James Herbert expressed some concern about proceeding in a closed session, but deferred to Mr. Wyshak. *Id.* at 99–100. I decided to conduct the colloquy in the lobby, reserving the right to summarize what occurred publicly, or to release the transcript. *Id.* at 100–01.

The government said that although it did not believe § 455(b)(1) was applicable, conceivably someone could claim that I had personal knowledge of a disputed evidentiary fact, particularly the credibility of Flemmi or FBI Special Agent John Connolly, the "handling agent" for Flemmi who wrote the report. *Id.* at 57, 62–63, 66–67. Defense counsel suggested that the government's comments were intended to prompt my recusal after I had made a series of rulings adverse to it. *Id.* at 60. The government responded that it was not trying to engineer a recusal issue, but only seeking to assure that the defendants would not have a basis for attacking any conviction by claiming that I should have been disqualified. *Id.* at 60, 62.

I offered the parties an opportunity to ask me any questions. *Id.* at 103. None were raised. *Id.* I expressed my belief that I had no personal knowledge of any disputed evidentiary fact. *Id.* at 103–04. I also stated that I had no personal bias or prejudice concerning Flemmi or anyone else. *Id.* at 104.

Flemmi and his counsel stated that they were not concerned that I would be biased against him. *Id.* at 108, 110–11. All of the defendants, in essence, agreed, and also stated that they did not believe a reasonable person would question my impartiality. *Id.* at 108–11. In any event, the defendants each waived any objection to my participation in the case on the latter ground. *Id.* at 110–11.

On behalf of the government, Mr. Wyshak stated that I had demonstrated that I was impartial, and the government did not believe a reasonable person would question my impartiality, based on the report. *Id.* at 109. He also expressed the view that I had adequately demonstrated concern for the defendants' rights. *Id.*

Mr. Herbert also stated that the government then saw no reason for my recusal, although it might wish to study the law further. *Id.* at 102. He did not indicate that the government intended to investigate my conduct while serving as Deputy United States Attorney. *Id.* at 102–03.

I decided to wait until after a planned break of a month in the proceedings to

decide whether to unseal the transcript of the colloquy I had just conducted. *Id.* at 113–14. I did this to avoid making a possible error in haste regarding unsealing, *id.*, and to protect the government from the possible public inference that by bringing the report to my attention, it was seeking to prompt the disqualification of a judge who had recently made rulings with which it deeply disagreed, *id.* at 101. Thus, I said I would decide the question of unsealing at some point in the future. *Id.* at 114. Everyone agreed that this was appropriate. *Id.*

On June 27, 1997, I scheduled the evidentiary hearings on the motions to suppress to begin on August 11, 1997.

In July 1997, the Attorney General established a task force comprised of prosecutors and many FBI agents to investigate the issues generated by the revelations that Flemmi, Bulger, and Mercurio had been FBI informants. In August 1997, the parties agreed that I should read the Executive Summary of the results of that investigation, in part to determine whether it had produced documents and information which should be furnished to the defendants.

The Executive Summary and related documents that I read indicated that, among other things, the FBI had investigated factual matters that might require or prompt my recusal. For example, the FBI reported that Mr. Weld stated that I was not likely to have been involved in any discussion relating to the 1984–85 electronic surveillance targeting Bulger and Flemmi. Consistent with this, Mr. Crossen reportedly told the FBI that he did not recall discussing that matter with me.

In addition, Mr. Weld reportedly told the FBI that Mr. O'Sullivan reported directly to him on Strike Force matters rather than through me. The interview report indicates that Mr. Weld also said that he had no recollection of discussing the Angiulo prosecution memorandum with me, although I would have had access to it.

The FBI also interviewed the woman who was referenced in Flemmi's August 8, 1983 complaint about me. She said that the "unknown Jewish male" Flemmi was describing was her partner Stephen Ricci, who was not Jewish. She did not, according to the report of her interview, list me as among Ricci's friends. The report does not state that she was asked about me, although Flemmi's allegations concerning me were the evident reason for the interview. The Executive Summary, however, informed the Attorney General that her task force had found that it was "apparent that these FBI informants [Flemmi and Bulger] had their own network of sources in law enforcement." The list of "possible law enforcement leaks" included the following:

> 15. Then AUSA (now U.S. District Judge) Mark Wolf and a female who works for the USAO.
>
> On August 8, 1993, a CI advised that leaks were coming from Howie Rubin's girlfriend, who worked for the USAO and AUSA Mark Wolf. The source advised that Wolf is very close to an unknown Jewish male and this unknown Jewish male was identified as Stephen Ricci. Ricci died in August of 1993.

This entry does not identify Flemmi as the "CI" or "source." Although the prosecutors in this case were consulted by the task force on various matters, and participated in some of the interviews, the Executive Summary does not disclose or describe the June 25 and 27, 1997 colloquies concerning Flemmi's statements.

On September 17, 1997, in an *ex parte* session with the government that was convened for other purposes, I mentioned this entry in the Executive Summary and stat-

ed that if the government had revised its view and now felt that Flemmi's allegations merited my recusal, that issue should be dealt with before we resumed lengthy evidentiary hearings. September 17, 1997 Tr. at 12–13. Mr. Wyshak assured me that I was not under investigation. *Id.* at 15. Rather, I was told that there was no change in the government's view as to whether there was an issue concerning my continued participation in this case based on the Flemmi 209. *Id.* at 18–19.

In any event, when proceedings resumed in August 1997, the question whether the transcript of the June 27, 1997 colloquy should be unsealed had been eclipsed by more urgent matters. Despite earnest efforts, the government had not yet located or reviewed all of the documents and information required to be produced by the June 26, 1997 Order. There were disputes between the parties concerning what the government was required to produce. In addition, there was some information and certain documents that the government asked me to review *in camera* to determine whether production was necessary. There were also questions whether the Department of Justice task force had developed documents and information to which the defendants were entitled. Thus, at the request of all parties, the commencement of the evidentiary hearings concerning the motions to suppress was postponed.

In August 1997, the government also requested that the evidentiary hearings on the motions to suppress not be conducted until the defendants filed a notice, pursuant to Fed.R.Crim.P. 12.3(a)(1), of any intent that they had to assert a public authority defense, and motions to dismiss the Fourth Superceding Indictment based on claims of immunity and other grounds. I granted the government's motion. *See* August 11, 1997 Order at ¶ 2.

On September 3, 1997, the defendants filed under seal their motion to dismiss, a 63–page memorandum, and a supporting affidavit of Anthony Cardinale, Esq., who was then counsel for Salemme and DeLuca. The grounds for the motion to dismiss included the contentions that: the government had engaged in systematic, outrageous misconduct in connection with the investigation of this case and thus violated defendants' rights to due process; dismissal was required as an exercise of the court's supervisory powers; there had been gross abuse by the government in failing to inform the grand jury of Flemmi and Bulger's status and activities as informants; that immunized testimony had been improperly presented to the grand jury; and illegally obtained electronic surveillance evidence had been presented to the grand jury. *See* Memorandum of Law in Support of Defendants' Motion to Dismiss All Pending Indictments.

Mr. Cardinale's affidavit charged that Special Agent Connolly had attempted to foment violence by telling him in 1989 that Frank Salemme was planning to kill his then client Vincent Ferrara. In addition, Flemmi filed a notice that as part of his defense he would assert that he was authorized by the FBI to engage in the acts now charged as crimes. The defendants submissions were, despite the government's objection, unsealed on September 10, 1997. *United States v. Salemme*, 985 F.Supp. 193, 193–95 (D.Mass. 1997).

On October 6, 1997, the defendants filed, under seal, an 85–page Factual Submission in Support of Defendants' Motion to Dismiss. This Factual Submission referenced and analyzed information defendants had received in discovery.

On October 22, 1997, the government filed, under seal, a 99–page Opposition to Defendants' Motion to Dismiss All Pending Indictments, and attachments. The mem-

orandum thoroughly addressed the law relating to virtually all of defendants' claims except Flemmi's contention that he had been provided immunity for acts with which he is now charged. The theme of the government's submission was, in essence, that the defendants were not entitled to a pretrial evidentiary hearing on their motion to dismiss and that their claims would at trial be proven to be unmeritorious.

At a hearing on October 29, 1997, the merits of the motion to dismiss were argued preliminarily. Most of the discussion focused on defendants' claim that the case should be dismissed because of outrageous government misconduct. I expressed the view that outrageous government misconduct might not be a legally viable basis for pursuing dismissal. October 29, 1997 Tr. at 45, 58. I also said, however, that defendants' supervisory powers claim might be legally viable if certain facts were proven. *Id.* at 45–46.

In addition, I pointed out that First Circuit jurisprudence and other cases indicated that a claim of immunity was to be decided by the court, rather than a jury. *Id.* at 47–48 (citing *United States v. McLaughlin*, 957 F.2d 12, 16 (1st Cir. 1992)). I said, however, that it was not clear to me whether Mr. Flemmi was claiming he was promised immunity or merely asserting authorization, an issue to be decided by a jury. *Id.* at 47. If there was an immunity claim, I noted that it would also relate to the motion to dismiss for grand jury abuse. *Id.* at 48. Finally, I indicated an inclination to start the evidentiary hearings with the motion to suppress the 1984–85 electronic surveillance, which also relates to the motion to dismiss for grand jury abuse. *Id.*

Also on October 29, 1997, following a trial, I found Mr. Cardinale not guilty of criminal contempt charges I had instituted against him after documents produced to defendants in discovery pursuant to the June 26, 1997 Protective Order limiting their dissemination were discovered in the Norfolk County Jail cell of reputed Patriarca Family member Frederick Simone. *Id.* at 14. These proceedings occupied much of October 1997.

It was then necessary to litigate whether DeLuca, Flemmi, and Salemme were entitled to appointment of counsel under the Criminal Justice Act, 18 U.S.C. § 3006A, because they claimed that they were each financially unable to retain counsel privately any longer. *See United States v. Salemme*, 985 F.Supp. 197, 199–200 (D.Mass. 1997). The government raised questions concerning the propriety of this request. After several hearings, on November 14, 1997, I allowed the defendants' requests and appointed their private counsel to continue to represent them under the Criminal Justice Act. *See* November 14, 1997 Order.

Also on November 14, 1997, I disclosed to defendants, under seal, certain documents and information I had reviewed in camera, and certain information from the Executive Summary of the Department of Justice investigation. I then expected the evidentiary hearings would commence in early December 1997. The defendants, however, requested a continuance.

On December 4, 1997, I held a hearing to address matters concerning the forthcoming evidentiary hearings. These matters included questions I wished to raise concerning my possible recusal which were presented by the witness list for the first phase of the hearings. I had worked with a number of the 32 witnesses identified by the defendants. Once again, I had and expressed two concerns. First and foremost, I did not wish to continue to preside if it was impermissible or inappropriate for me to do so. *See* December 4, 1997 Tr. at

58. Second, recognizing that any party might become unhappy with my future decisions, I wanted to minimize the risk that a disappointed litigant would have a reasonable basis for seeking to disrupt or reopen proceedings based on my participation in them. *Id.* at 58–59.

Thus, with regard to the possible issues concerning recusal that I discerned, I told the parties my tentative view of the applicable law, *id.* at 24–34; described what I perceived to be the relevant facts; offered the parties repeated opportunities to ask me questions; required them to reflect on what I had said; and with regard to defendants, required them to consult their counsel before expressing any view on the propriety of my continued participation. *Id.* at 34–77. I emphasized any views I expressed were "tentative," and I wanted the question of my possible recusal to be "resolved in a thoughtful, considered way." *Id.* at 17. I also recognized, however, that legal proceedings are dynamic, something unforeseen could emerge, and therefore while I wanted to achieve as much finality as possible on the recusal question, perhaps true finality was not possible. *Id.* at 22.

Among other things, I said that, "I recall[ed] no involvement in any matters pertaining to this case, including the 1984–85 electronic surveillance." *Id.* at 20. I also said that: "I don't recall working on any case related matters with Mr. Crossen. And I had no involvement with Mr. Crossen regarding any matter pertaining to this case." *Id.* at 40. I noted that the FBI reports of the July 1997 interviews of Messrs. Weld and Crossen indicated that their recollections were consistent with mine with regard to the 1984–85 electronic surveillance. *Id.* at 20.

In response to an invitation by me, Mr. Wyshak raised the concern that possibly an argument could be made that as Deputy United States Attorney I suspected Bulger and/or Flemmi were informants and had a duty to disclose my suspicions concerning them to the officials actively participating in the 1984–85 electronic surveillance. *Id.* at 21. I stated that while I may have heard of Bulger and Flemmi when I was a prosecutor, they were not individuals I had encountered in the work I was doing, and had no reason to wonder whether they were informants. *Id.* at 22. Mr. Wyshak reiterated that he was not suggesting that I be disqualified, but only was concerned about a possible post-conviction attack by defendants on this basis. *Id.* at 23.

I went on to describe in detail my professional and personal relationship with Mr. Weld, including the dinner I had in his home in March 1997. *Id.* at 34–37. I also discussed my associations with former Assistant Attorney General Trott, *id.* at 38–39, and his colleague Frederick Hess, who reviewed the application for the 1984–85 electronic surveillance on behalf of Mr. Trott, *id.* at 39–40. After discussing other witnesses, I reiterated and amplified my prior disclosures concerning Mr. Ring. *Id.* at 45–46.

I then reviewed my association with Mr. O'Sullivan. *Id.* at 46–47. In essence, I described that as the Chief of the Strike Force, Mr. O'Sullivan reported directly to Mr. Weld, rather than through me and that he and I had early in my tenure discussed public corruption matters. *Id.* The summary of Mr. O'Sullivan's calendar entries produced by the government on February 5, 1997, has an entry indicating that he spoke to Mr. Weld and me about the "Angiulo T–3, etc." on November 12, 1981. I understand this to be a reference to the FBI's electronic surveillance of Angiulo and others. While I have no specific memory of this discussion, Mr. Weld and I had then just begun work at the United

States Attorney's Office and were receiving joint briefings from many sources, so I assume for present purposes that it occurred.

After discussing my association with other individuals on the witness list, including former FBI Special Agents in Charge in Boston Lawrence Sarhartt and James Greenleaf, I addressed former FBI Special Agents Morris, Connolly, and Condon. With regard to Mr. Morris, I said that I may have met him, but did not remember having done so. *Id.* at 44–45. I also said that we did not work together because the Organized Crime Unit he headed worked with the Strike Force, which was separate from the United States Attorney's Office. *Id.* at 45.[10]

With regard to Mr. Connolly, I said I may have met him, but had no recollection of having done so. *Id.* at 49. I also said we did not work on anything together. *Id.*

Finally, for present purposes, I discussed Mr. Condon. I said that I thought I met Mr. Condon in some context when I was Deputy United States Attorney, but I had no memory of where we encountered each other. *Id.* at 52. I also described Mr. Condon's June 9, 1997 brief interview with me as part of a background investigation he was employed to conduct for the Department of State concerning Mr. Weld's then proposed appointment to be Ambassador to Mexico. *Id.* at 52–53. As I noted, as of June 9, 1997, I had not seen any document that suggested that Mr. Condon had any connection with this case. *Id.* at 52. It was not discussed at all. *Id.* at 52–53.[11]

Following my disclosures I encouraged the parties to think about the issues concerning my recusal at least overnight, and longer if they wished, and to do any research they felt was appropriate. *Id.* at 54–55, 58–60. After a break, however, the defendants insisted that they were ready to respond. They and their counsel stated that they did not believe that my recusal was required by any provision of § 455(a) or (b). *Id.* at 64–67. More specifically, they said they did not believe that I was biased or prejudiced concerning any party, or that I had knowledge of any disputed evidentiary fact. *Id.* at 65. In addition, they stated that with regard to § 455(a), they did not believe that a reasonable person would question my impartiality. *Id.* Nevertheless, the defendants waived any right to object to my participation on this basis in any post-conviction proceeding or otherwise. *Id.* at 68–76.

10. The information and materials obtained by the government from Mr. O'Sullivan and furnished to me and the defendants on February 5, 1997, include a March 24, 1982 letter from me to Mr. Morris transmitting, at Mr. O'Sullivan's suggestion, a letter with unopened enclosures from the Office of the Attorney General of Massachusetts to Mr. Weld concerning what the Attorney General's office called the "Patriarca Tapes," which were subject to "an old federal court order of impoundment."

In the process of locating my copy of the March 24, 1982 letter, I also found two memoranda, each dated March 10, 1982, indicating that Mr. Morris and I had met on professional matters. I am furnishing them under seal to the government in redacted and unredacted form. If there is no objection to the disclosure of the redacted version, they will be provided to defendants. After hearing from the parties, I will decide whether the memoranda should be made part of the public record.

11. At the conclusion of his questioning of me about Mr. Weld, Mr. Condon did inquire whether there was anything I wanted to ask him. I had on June 6, 1997 unsealed my May 22, 1997 Memorandum and Order and the government's response, which together identified Bulger and Flemmi as informants. These disclosures were highly publicized. I inferred Mr. Condon was asking whether I had any questions for him regarding this case, but felt he was only being humorous. I said "no" and the brief interview of me concluded.

The prosecutors requested and received an opportunity to consult their colleagues. Later on December 4, 1997, they submitted the following statement:

> The Court has instructed the United States to state the government's position regarding the applicability of Title 28, United States Code, §§ 455(a), 455(b)(1) and 455(b)(3) in the case at bar. The government's position, based upon information provided by the Court to the parties on this date and on prior occasions, is that mandatory disqualification is not applicable in this case.
>
> Particularly, the fact that the Court was Deputy United States Attorney and Chief of the Public Corruption Unit during the period that certain electronic surveillance in this case was planned and implemented does not, in and of itself, require disqualification as a matter of law pursuant to §§ 455(b)(1) or 455(b)(3). Based upon the information currently known to the government, § 455(b)(3) is not implicated.
>
> Further, the government does not believe that the Court has a personal bias or prejudice concerning any party in this case. Nor is the government aware that the Court has personal knowledge of disputed evidentiary facts concerning the proceeding. *See* § 455(b)(1).
>
> The government does believe, however, that based upon the nature of the past relationships between the Court and several prospective witnesses in this case, the Court's impartiality might reasonably be questioned. *See* § 455(a). However, pursuant to § 455(e), the government waives any motion to disqualify the Court based upon the grounds set forth in § 455(a).

Accordingly, on December 5, 1997, I issued an Order stating that I found that "it was permissible for me to continue to preside in this case," and "in view of my intense involvement in this complex matter for more than two years, and the value to the parties and the administration of justice of having this case proceed on an informed and efficient basis, I would do so." December 5, 1997 Order at 3–4. I also wrote, however, that:

> As stated in court, the parties, particularly the defendants, are encouraged to continue to consider the issues relating to my possible disqualification and to inform the court when hearings resume on December 11, 1997, if they have any further questions or, upon reflection, wish to object to my continued participation in this case for any reason.

Id. at 3 n. 6.

On December 11, 1997, in response to my inquiry, the government and the defendants stated that they neither had any further questions to ask me nor any objection to my continued participation in the case. December 11, 1997 Tr. at 4–5. They also said that they did not wish to withdraw their waivers of any claim that I should be disqualified under § 455(a). *Id.* at 5.

On December 11, 1997, Flemmi clarified and confirmed that he was as part of his motion to dismiss contending that he had been promised immunity by the FBI. *Id.* at 6–7. I pointed out that the government had correctly contended that defenses of authorization, lack of criminal intent, and entrapment by estoppel presented issues for a jury to decide. *Id.* at 9. I reiterated my understanding, based on a series of cases I cited, that an issue of immunity, however, was to be decided by the court and could be addressed pretrial in the context of a motion to suppress or dismiss. *Id.* at 9–10.

As I anticipated that the testimony of former Special Agents Morris and Connolly would be important to the issue of im-

munity, and that they might assert a Fifth Amendment right not to testify, I had invited their counsel to attend the December 11, 1997 hearing. Robert Popeo, Esq., counsel for Mr. Connolly, indicated that his client did not have access to the information and documents that the parties had and, therefore, there were foreseeable issues concerning whether Mr. Connolly would testify unless compelled to do so. *Id.* at 34–55. William Kettlewell, Esq., concurred with regard to Mr. Morris, his client. *Id.* at 48.

The government indicated that it did not then know whether it would seek an immunity and compulsion order, pursuant to 18 U.S.C. § 6002 *et seq.*, for Mr. Connolly and/or Mr. Morris. *Id.* at 55. That would depend on the scope of the hearings because the government continued to contend that their testimony was not relevant. *Id.* at 55–56.

The defendants, however, asserted that the testimony of Mr. Connolly and Mr. Morris was central to the issues to be litigated. *Id.* at 56–57. Thus, they expected to request that I compel the government to immunize them, pursuant to *United States v. Angiulo*, 897 F.2d 1169 (1st Cir.), *cert. denied*, 498 U.S. 845, 111 S.Ct. 130, 112 L.Ed.2d 98 (1990), and *United States v. Castro*, 129 F.3d 226 (1st Cir. 1997).

Accordingly, I encouraged the parties to speak with counsel for Messrs. Connolly and Morris about the foreseeable issues. *Id.* at 59–60. Other issues relating to the forthcoming hearings were then discussed, including the scope of the government's duty to disclose statements of witnesses.

I provided the parties an opportunity to supplement their submissions on the immunity and discovery issues, among others. In response, the government filed a lengthy memorandum on December 15, 1997.

Further hearings were conducted on December 18 and 23, 1997. On December 18, 1997, the government argued strongly that there was not a proper basis for an evidentiary hearing on Flemmi's claim of immunity, December 18, 1997 Tr. at 31–32, 41; that Flemmi should be required to be the first witness at any evidentiary hearing, *id.* at 39–40, 55; and the next witnesses should be Mr. Crossen and DEA Special Agent David Boeri, the applicant and affiant respectively concerning the 1984–85 electronic surveillance, *id.* at 22–23. The defendants disagreed. Flemmi, however, did undertake to file a supplementary affidavit concerning his claim of immunity. *Id.* at 51–52. He did so, under seal, on December 22, 1997.

At a hearing, on December 23, 1997, I informed the parties that I had decided that Flemmi was entitled to an evidentiary hearing on his claim of immunity. December 23, 1997 Tr. at 8. I also described the manner in which I intended to resolve other disputed issues, and discussed some others.

On December 29, 1997, I issued an Order memorializing and to some extent amplifying the decisions I described on December 23, 1997. *See United States v. Salemme*, 1997 WL 810057 (D.Mass. December 29, 1997). Many of my decisions were contrary to the government's position.

More specifically, I allowed Flemmi's request for an evidentiary hearing on his motion to dismiss to the extent that the motion asserted that he was promised immunity from prosecution in return for his cooperation with the FBI. *Id.* at *1–3. I did not require Flemmi to testify first, or otherwise instruct on the order of the defendant's witnesses. *See id.* at *4. I found that the government was required to disclose to defendants, pursuant to Fed.

R.Crim.P. 12(i), the statements of all present and former law enforcement agents called by defendants. *Id.* at *4–6. In addition, despite the objections of the government, I decided to make part of the public record the affidavits Flemmi had filed, under seal, on September 10, 1997 and December 22, 1997, as well as the government's October 22, 1997 opposition to the motion to dismiss. *Id.* at *7. Consistent with the government's objection, however, I decided to maintain under seal at least temporarily defendants' October 6, 1997 Factual Submission because it related in part to aspects of the motion to dismiss as to which an evidentiary hearing had not been granted. *Id.* at *8.

On January 5, 1998, I unsealed Flemmi's two remaining affidavits and the government's opposition to the motion to dismiss. January 5, 1998 Order. In the September 10, 1997 affidavit Flemmi asserted, among other things, that: in 1969 his "handler," FBI Special Agent Paul Rico, told him to flee because he was about to be indicted for the attempted murder of John Fitzgerald, an attorney representing an FBI informant, Joseph Barboza; in 1979, an FBI agent said that the FBI had gone to Mr. O'Sullivan to assure that Bulger and Flemmi would not be indicted in the race-fixing scheme; Flemmi and Bulger were told that John Martorano would be indicted and they warned him so he could flee; Flemmi was advised of various pending investigations so he could avoid being caught in them; Flemmi and Bulger got together frequently with FBI agents at the agents' homes; and on one occasion Mr. Morris requested and received $5000 from Flemmi and Bulger.

In the December 21, 1997 affidavit intended to provide evidence of the alleged promise of immunity, Flemmi stated, among other things, that: Mr. Rico told Flemmi that as long as he was an FBI informant he should not be concerned about being arrested or prosecuted; Mr. Rico told Flemmi in 1974 to return to Boston and the Fitzgerald attempted murder charge against him would be dismissed; Flemmi returned and this occurred; Mr. Condon later told Flemmi that the federal fugitive charges against him had been dismissed; the FBI had gone to Mr. O'Sullivan to ensure Flemmi and Bulger would not be prosecuted in the race-fix case; the FBI also arranged to keep Flemmi out of a prosecution of John Baharian and Steve Puleo; and, when in the mid–1980's Bulger and Flemmi told the FBI that they intended to stop engaging in the activities that provided them information valuable to the FBI, the FBI strongly urged them to continue.

The evidentiary hearings began on January 6, 1998. I do not wish to summarize or comment substantively on the evidence received between January 6 and 21, 1998, when the hearings were suspended. However, initially the government complained about the fairness of the hearings and expressed its frustration when I overruled its objections to some of the evidence that the defendants were offering.[12] Indeed, at one point, after Assistant United States Attorney Brian Kelly, who was responsible for the witness, made an objection to the admission of a document based on rele-

12. The following are some examples of the government's complaints. Mr. Wyshak: "I think what we're trying to do is get a fair hearing here." January 8, 1998 Tr. at 264. Mr. Herbert: "[T]he reason this [hearing] is so substantively unfair to the government apart from the fact that procedurally it shouldn't be happening . . ." *Id.* at 277. Mr. Wyshak, after an objection was overruled, "Well, of course, its overruled. Every objection is overruled." January 13, 1998 Tr. at 91. Mr. Wyshak: "This is an unfair proceeding, your Honor, to make those kinds of rulings." *Id.* at 142.

vance which I overruled, Mr. Wyshak interrupted and complained so loudly and persistently that for the first time in more than 12 years as a judge I felt compelled to raise the prospect of holding an attorney in contempt for the nature of his conduct in court. January 8, 1998 Tr. at 167–69.

In addition, on January 8, 1998, the government objected to any further questioning of witnesses by counsel for any defendant other than Flemmi. *Id.* at 126, 242, 252–54. The government explained that its previous representation that it was, in its view, permissible for other counsel to question witnesses was based on the mistaken assumption that only one attorney would question each witness. *Id.* at 242, 247, 253. On January 9, 1998, I found tentatively that Martin Weinberg, Esq., counsel for John Martorano, had standing to question witnesses because Mr. Martorano was intercepted during the 1984–85 electronic surveillance. January 9, 1997 Tr. at 96–97. After a hearing on the issue on January 15, 1998, I held that counsel for Salemme, DeLuca, and Martorano had standing to question witnesses on relevant subjects at the pending hearings based on their motion to dismiss as an exercise of the court's supervisory powers and in order to permit me to consider the evidence being received in deciding the foreseeable possible trial issue of whether Flemmi's statements would be admissible against them as coconspirator hearsay. January 15, 1997 Tr. at 67–77; January 20, 1998 Order at ¶ 1.

On January 9, 1998, Ralph Ranalli, a reporter for the *Boston Herald*, called my Deputy Clerk. Mr. Ranalli said that two members of the *Boston Herald* editorial department had received calls informing them of "the existence of an FBI '209' in which defendant Stephen Flemmi names [me] as a 'source of information for the mob.'" January 12, 1988 letter from Mr. Ranalli to the Court. Mr. Ranalli asked to speak to me about this. On Sunday, January, 11, 1998, I responded by telephone to an Assistant United States Attorney who was trying to reach me to give me a "heads-up" on the fact that the Special Agent in Charge of the FBI, Barry Mawn, had received a similar inquiry from Mr. Ranalli, to which he made no comment.

On Monday, January 12, 1998, I instructed my clerk to have Mr. Ranalli put his request in writing. He did so. I also began assembling the transcripts relating to the June 27, 1997 colloquy concerning the 209 of Flemmi's statements on August 8, 1983, and later, related materials.

I discussed Mr. Ranalli's inquiry with the parties, in a closed session, on January 14, 1998. I reiterated the desire that I had expressed on June 27, 1997 to make the 209 and the colloquy concerning it a matter of public record. January 14, 1998 Tr. (under seal) at 21. The defendants again opposed unsealing. *Id.* at 21–22. I asked the parties to think about the matter, which I said we would revisit. *Id.* at 22–23.

On January 15, 1998 the government said it was developing heightened concern about whether it might at some point be argued that I have personal knowledge of a disputed evidentiary fact. January 15, 1998 Tr. (under seal) at 13–14, 16–18. The government stated that Mr. O'Sullivan had been interviewed, and his calendar reflected that he spoke to me on August 11, 1983 about "Angiulo." *Id.* at 15. Mr. Herbert said that the government was not at that time requesting my recusal, but did wish to talk to Mr. O'Sullivan about that entry. *Id.* at 20–21. The government also expressed concern about a possible post-conviction attack by the defendants based on the 209. *Id.* at 6–7, 21.

On the evening of Friday, January 16, 1998, Mr. Ranalli told my Deputy Clerk that others at the *Boston Herald* had received additional calls in which it was claimed that I had known about the Flemmi 209 for a year.

I discussed this matter again with the parties when we reconvened on January 20, 1998. Defense counsel said that their clients continued to believe that the 209 did not provide a basis for my recusal and opposed its unsealing. January 20, 1998 Tr. (under seal) at 8–9. The government had not yet spoken to Mr. O'Sullivan. *Id.* at 24–25. In response to my inquiry, the government said that it was not then asking for my recusal on any of the prongs of § 455. *Id.* at 6. The government agreed with me that the June 27, 1997 colloquy and certain related matters should be made part of the public record. *Id.* at 14–15, 30. I issued an Order doing that on the afternoon of January 20, 1998.

The government's reference to the entry in Mr. O'Sullivan's calendar concerning a meeting with me on August 11, 1983 caused me to wonder whether I had any document regarding such a meeting. As described earlier, when I left the United States Attorney's Office I took my personal, monthly chronological files of letters and memoranda that I wrote. I knew that those files were in an area of my basement that was not easily accessible because of boxes and furniture also stored there. I had perceived no need to consult those files previously. On the evening of January 20, 1998, however, I found the files.

I first reviewed the files for August and September, 1983, and found nothing relevant. Then, out of what I regarded as an abundance of caution, I reviewed the file for December 1984. I was surprised, indeed shocked, to find the December 21, 1984 memorandum from me to Mr. Weld, captioned "AUSA Gary Crossen," memorializing a conversation that I had that day with Assistant Attorney General Trott. Although I have no independent memory of the conversation, the memorandum states that on the Friday before Christmas Mr. Trott called for Mr. Weld and, in his absence, spoke to me.

The memorandum states:

> In your absence, I took a telephone call on December 21, 1984, from Steve Trott, Assistant Attorney General in charge of the Criminal Division. He asked me about Gary Crossen's background. He then told me that he was reading an affidavit Gary had prepared in connection with a Title III in the Winter Hill case which he and Fred Hess, his expert in this area, consider the worst they have ever seen. He said that initially the affidavit was 138 pages long and much of the information in it was superfluous. When Hess discussed it with Crossen, Crossen was combative. The affidavit was reduced and revised, but Trott said that it remained "awful," with ten words often being used when one would do. He also said that the affidavit had been prepared for the signature of Assistant Attorney General Lowell Jensen. Trott said the approach to drafting the affidavit seemed to be to include everything possible in the hope that the court would feel there must be something of substance in there somewhere, but that he felt the effect would be just the opposite. He said that in view of the apparent urgency of this matter, he would approve the Title III, but he did want to to [sic] know of this problem.
>
> I told Steve that the Task Force had been stretched out working on Title III's and other matters, but that I was sure you would agree that there was no excuse for substandard legal work. I thanked him for calling and assured him

that we would address the matter seriously.

A copy of the memorandum was sent to AUSA Janis M. Berry, the OCDETF Coordinator.

I was disturbed to find the memorandum because I had previously stated that I recalled no involvement in matters pertaining to this case, including the 1984–85 electronic surveillance. *See* December 4, 1997 Tr. at 20. Mr. Trott, however, had plainly talked to me about the quality of Mr. Crossen's work on the application. I decided to bring the memorandum to the parties' attention immediately. I regretted that it would add another complication to an already complicated case.

Rather than continuing the testimony I was hearing on January 21, 1998, I met with counsel and the defendants in a session closed to the public. I gave them the memorandum. I expressed three views: first, my visceral reaction that I should disqualify myself under § 455(b) because I had personal knowledge of a disputed evidentiary fact or because I might be a witness, January 21, 1998 Tr. (under seal) at 12–13; second, that I should not make that decision based on my visceral reaction, but only after hearing from the parties and taking time to reflect, *id.* at 13–14; and third, that the memorandum and issues it raised should be promptly placed on the public record, *Id.* at 14.

The parties stated, however, that the matter should not be immediately placed on the public record. *Id.* at 24–25, 27. Indeed, the government expressed the view that the confidentiality of the memorandum might be protected by the deliberative process privilege. *Id.* at 32. Thus, I agreed to maintain its confidentiality at least temporarily. *Id.* at 30. I did, however, state in public session that the public hearings would be suspended for at least two weeks because I had "very recently discovered information relating to my tenure as Deputy United States Attorney that may bear on the question of whether I have knowledge of a disputed evidentiary fact regarding one aspect of the current hearings." January 21, 1998 Tr. (public session) at 7. I noted that the information might be privileged and at the request of the parties I would seal it at least temporarily. *Id.* at 7–8. I said, however, that if issues concerning my possible recusal were to be litigated, I intended to do that on the public record. *Id.* at 8.

I then resumed the lobby conference with counsel and the defendants. Among other things, I urged them to question me about the memorandum, associated issues, or anything else that might bear on the matter of recusal. January 21, 1998 Tr. (under seal) at 50, 52. There was discussion of the possible implications of the memorandum. *Id.* at 51, 58–59. In addition, the government asked me questions arising from recent media reports regarding the 1984 and 1985 prosecution of Vincent Piro. *Id.* at 53, 56.

More specifically, the prosecutors referenced, and later that day gave me, a December 19, 1997 *Boston Globe* article, which said in its most pertinent parts:

> An FBI agent reportedly told gangster James "Whitey" Bulger about an undercover operation that targeted former state representative Vincent S. Piro in 1983, according to a report on WCVB (Channel 5) last night.
>
> WCVB reported that days after Bulger learned of the sting, Piro returned $5,000 he had taken from another agent posing as developer. The TV report said information about the leak to Bulger is contained in an internal FBI document.
>
> * * * * * *

WCVB reported that Bulger learned of the sting from John Connolly.

Matthew Taylor, *Report Says FBI Tip Foiled Piro Sting,* Boston Globe, December 19, 1997. Mr. Connolly and his lawyer, Mr. Popeo, who had also represented Mr. Piro, were reported to have denied the allegations. *Id.*

I explained that I recalled that Mr. Piro was a state senator from Somerville; had taken $10,000 from an FBI undercover operative; and later returned the same amount of money, but not the same bills. The case was prosecuted by Assistant United States Attorneys John Pappalardo, Michael Tracy, and Thomas Curley, who were members of the Public Corruption Unit when I was its Chief. January 21, 1997 Tr. (under seal) at 54–55. We suspected that Mr. Piro was somehow tipped off, but I had no knowledge of who, if anyone, did that. *Id.* at 55. In response to a question from the government, I stated that I did not recall any suspicion that Mr. Piro was tipped off because of a relationship between the FBI and Bulger. *Id.* at 56. I suggested, however, that the government might wish to ask Mr. Pappalardo that question. *Id.* at 57.

In addition, that evening I again accessed my chronological files to see if I could find anything relevant to the Piro issue the government had brought to my attention. In the file for October 1984, which consisted substantially of matters relating to my nomination to the District Court that month, I found a memorandum concerning the Piro case. The first Piro trial had ended with a hung jury. Mr. Pappalardo and his colleagues were preparing to prosecute Piro again, and also for the anticipated trial of Lawrence Bretta, the former Mayor of Somerville who had served as the head of the General Services Administration in this region. On October 15, 1984, I wrote the prosecutors a memorandum which stated in pertinent part:

> I would like to get together in the near future to do a "post-mortem" on the Piro case with a view to perfecting the next Piro prosecution and seeing what lessons can be profitably learned with regard to Bretta. The following are some points which occurred to me over the weekend which I would like to include in the discussion.
>
> * * * * * *
>
> 5. *Evidence regarding return of the money.* We should carefully prepare every form of evidence tending to demonstrate that something caused Piro to change his mind, either because he was tipped off or had another motive. The Dennis Conden [sic] and John Morris matter should be fully developed and prepared for possible use at trial; if Morris has relevant testimony nothing should be allowed to stand in the way of presenting it. We should also recall that [*Boston Globe* journalists] David Farrell and Bill Doherty made inquiries about a possible undercover investigation concerning Piro around the time of the return of the money. The mere fact of these inquiries is evidence that there were at least rumors of an undercover operation at the time. Although the Department of Justice requires that the Attorney General personally authorize subpoenas to newsmen, we would in this case not necessarily be interested in the source which prompted inquiries, but rather might be satisfied to show that the rumors generally existed. Thus we might be able to get any necessary authorization. In addition, it is possible that Farrell and Doherty would willingly testify.
>
> We should also recall that the *Globe*'s Spotlight team was during the relevant time period doing a series on the legisla-

ture which included investigation of Piro. Testimony concerning this could also indicate that Piro got nervous and changed his mind about keeping the money, rather than lacking any "criminal intent" when took the money.

A copy of this memorandum was also sent to Mr. Weld and the attorneys in the Public Corruption Unit.

I provided this memorandum to the parties on January 23, 1998.[13] I told them that I had no independent recollection of Mr. Condon or Mr. Morris being discussed, but some discussion obviously occurred and the memorandum indicates that there was a concern about whether a leak came from them. January 23, 1998 Tr. (under seal) at 29–30. I noted that I recalled speculation at the time that the FBI undercover operative may have been identified as a government agent when he attended a Bruins hockey game with known FBI agents, as well as speculation about a possible FBI leak. *Id.* at 30–31.

The government informed me and the defendants that the FBI had already interviewed Mr. Pappalardo, who said that he never associated the possible disclosure of information to Mr. Piro with Bulger. *Id.* at 31–32. The government stated, however, that Mr. Pappalardo recalled that Mr. Morris had said that after Mr. Piro returned the money, Mr. Morris told Mr. Condon about the undercover agent, and Mr. Condon told Mr. Popeo, for whom he was providing investigatory services. *Id.* at 32. I was told Mr. Pappalardo believed he discussed this with me. I said I would be surprised if Mr. Pappalardo learned this information before Mr. Piro was acquitted at his retrial, because I did not recall having heard this before. *Id.* at 32–33. In any event, I reiterated that I had no memory of any discussion concerning Bulger. *Id.* at 33. I was then told by the government that it was Mr. Connolly who had gone to the Bruins game with the undercover agent. *Id.*

I met again with the parties on January 28, 1998 to discuss further the implications of the memoranda I had found and other issues concerning my possible recusal. The government informed me that Mr. O'Sullivan's calendar indicates that I asked him to attend a meeting with the FBI to discuss how Piro knew. January 28, 1998 Tr. (under seal) at 12. I do not recall any such meeting, but it certainly may have occurred.

With regard to the Flemmi 209, I had previously been told by the government, on January 21, 1998, that Mr. O'Sullivan said he had never seen the document and it does not appear that Mr. Ring, who as Mr. Connolly's supervisor would have reviewed the 209, told Mr. O'Sullivan about it. January 21, 1998 Tr. (under seal) at 39–40. I was also told that Mr. O'Sullivan and Mr. Ring never had any concern that I was a source of any leaks regarding the Angiulo case. *Id.* at 38. In any event, I was not told that either Mr. O'Sullivan or Mr. Ring believed they discussed the Flemmi 209 or the information it contained with me. *Id.* at 38–40.

I met again with the parties on February 4, 1998. The government informed me and the defendants that it would, if necessary, grant Mr. Morris immunity, either informally or pursuant to 18 U.S.C. § 6002 *et seq.*, and he therefore would be a witness in the pending hearings. February 4, 1998 Tr. (under seal) at 19. The government added that it had not yet decided

13. Although this memorandum would probably be protected by the deliberative process privilege, the government promptly agreed that it should be furnished to the defendants and the parties now agree that it should be part of the public record.

whether to grant Mr. Connolly immunity. *Id.* at 22.

On February 4, 1998, I also attempted to determine whether any clear consensus had emerged on the issue of my recusal. As I encouraged the parties to be candid in working with me to explore the issues preliminarily, I will not describe the details of the views expressed. As indicated earlier, however, the defendants stated that they did not consider my disqualification to be necessary or appropriate, and would waive any possible ground for disqualification under § 455(a). *Id.* at 37–39. The government did not express a definitive view on the issue of my disqualification. *Id.* at 34. Rather, it addressed again certain concerns it felt should be considered and encouraged me to reflect on them further before requiring the government to take a position on my recusal. *Id.* at 28–30, 35. I agreed to do so. *Id.* at 35.

This Memorandum and Order represents my response to the government's request.

III. *The Legal Standards*

The following is some discussion of the relevant legal standards and my present, still preliminary, view of how they apply in the circumstances of this case.

A. *Disqualification for Actual Bias or Prejudice Concerning A Party.*

[3] A judge must disqualify himself if he actually "has a personal bias or prejudice concerning a party . . ." 28 U.S.C. § 455(b)(1). The present parties to this case are the United States, Stephen Flemmi, Francis Salemme, Robert DeLuca, and John Martorano. I do not believe I have a personal bias or prejudice concerning any party. The parties have previously agreed on this point. If a party now has a different view, I will not take offense if it is expressed so that the issue can be addressed.

More specifically, as discussed in § III. D. *infra*, the statements concerning me in the August 8, 1983 209 do not cause me to be biased or prejudiced against Mr. Flemmi.

Similarly, the fact that I raised, but was not required to pursue, the issue of contempt with regard to an outburst by Mr. Wyshak on January 8, 1998 does not manifest any bias or prejudice against him. Mr. Wyshak and his colleagues have, over the past three years, almost always been professional and respectful in their dealings with me. I believe that professionalism and respect have been reciprocated.

The Supreme Court has indicated that an extrajudicial source is, as a practical matter, almost always required to establish a disqualifying bias or prejudice. *Liteky v. United States,* 510 U.S. 540, 553–56, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). There could, however, be a case in which a judge's conduct in court is "so extreme as to display clear inability to render fair judgment." *Id.* at 551, 114 S.Ct. 1147. The government has not in our discussions since January 20, 1998 suggested that this is such a case. I am confident that it is not.

Moreover, as the Court of Appeals for the First Circuit has stated, "[a] court's disagreement—even one strongly stated—with counsel over the propriety of trial tactics does not reflect an attitude of personal bias against the client." *In re Cooper,* 821 F.2d 833, 841 (1st Cir.1987). Consistent with the Court of Appeals for the First Circuit's approach in *Cooper,* issues of a judge's relationship with counsel have typically been analyzed under § 455(a) rather than § 455(b)(1). *See, e.g., United States v. Murphy,* 768 F.2d 1518, 1536–40 (7th Cir.1985); *Henderson v. Department*

of Public Safety and Corrections, 901 F.2d 1288, 1295–96 (5th Cir.1990).

Similarly, issues regarding a judge's relationship with, or possible attitude concerning, prospective witnesses are usually analyzed under § 455(a) rather than § 455(b)(1). *See, e.g., In re United States*, 666 F.2d 690, 695–98 (1st Cir.1981); *Parrish v. Board of Commissioners of Ala. State Bar*, 524 F.2d 98, 103–04 (5th Cir. 1975) (en banc); *Hirschkop v. Virginia State Bar Ass'n*, 406 F.Supp. 721, 724–25 (E.D.Va.1975). In any event I also believe that I can, to the extent necessary, impartially evaluate the testimony of all of the witnesses. Once again, however, the parties should not hesitate to raise any question they may have about this so that it can be resolved.

B. *Disqualification Under § 455(b) Based on the December 21, 1983 Memorandum*

[4] Three provisions of § 455(b) have been discussed concerning the December 21, 1983 memorandum regarding my conversation with Mr. Trott. Section 455(b)(3) requires the disqualification of a judge, "[w]here he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." Neither the investigation leading to this case, nor the case or the present hearings on the motions to dismiss or suppress were pending when I was Deputy United States Attorney. Thus, I question whether § 455(b)(3) is applicable here.

[5, 6] More relevant for purposes of analysis, however, is the portion of § 455(b)(1) which requires recusal if a judge has "personal knowledge of disputed evidentiary facts concerning the proceeding." This requirement exists because "such personal knowledge vitiates the carefully constructed rules of procedure and evidence that ensure deliberate, unbiased finding." *United States v. State of Alabama*, 828 F.2d 1532, 1546 (11th Cir. 1987) (holding that judge was disqualified in case in which he was required to make factual findings about partisan events concerning desegregation of state universities in which he was actively involved as a state senator and private lawyer), *cert. denied sub nom. Board of Trustees of Ala. State Univ. v. Auburn Univ.*, 487 U.S. 1210, 108 S.Ct. 2857, 101 L.Ed.2d 894 (1988). A judge's personal knowledge must be of a disputed *evidentiary* fact to require recusal. Thus, one judge declined to disqualify himself when his own prior testimony to a regulatory agency would be introduced in a case before him, but only as "background" evidence. *In re Wyoming Tight Sands Antitrust Cases*, 726 F.Supp. 288, 291–93 (D.Kan. 1989). In any event, as I understand it, this § 455(b)(1) "disqualification provision is directed toward knowledge of disputed evidentiary facts, that is, matters underlying the cause of action . . . the statutory language [is not] directed toward routine judgments of credibility." *Plechner v. Widener College, Inc.*, 569 F.2d 1250, 1263 (3rd Cir.1977). *See also Parrish*, 524 F.2d at 104 ("Credibility choices are not disputed facts.").

[7] I continue to believe that I did not participate in the process of reviewing for submission to the court the application for the 1984–85 electronic surveillance. As described earlier, the recollections of Messrs. Weld and Crossen are reportedly consistent with mine. In addition, on January 21, 1998, the government informed me and the defendants that there is no reference to me in the Department of Justice's official file concerning the 1984–85 electronic surveillance, and that neither the affiant, DEA Special Agent Boeri, nor

the Special Agent in Charge of DEA in Boston, Robert Stutman, recall speaking with me about the matter. January 21, 1998 Tr. (under seal) at 8, 29.

Nevertheless, I did have the telephone conversation with Mr. Trott described in the December 21, 1984 memorandum. It now appears to me, however, that the memorandum indicates that Mr. Trott had decided to authorize the application before calling me. He neither solicited nor received any advice on its merits from me. Rather, as the caption to my memorandum reflects, he wished to discuss Mr. Crossen and complain about the style of the documents he had drafted.

I note again that I wrote, "[Mr.] Trott said the approach to drafting the affidavit seemed to be to include everything possible in the hope that the court would feel that there must be something of substance in there somewhere, but that he felt the effect would be just the opposite." On January 21, 1998, I expressed the thought that this statement might arguably bear on the materiality of the alleged omissions from the affidavit submitted in support of the application. January 21, 1998 Tr. (under seal) at 17–18. This is an issue in dispute in the current proceedings. *See Salemme*, 978 F.Supp. at 349, 351–52. On reflection, however, it appears to me that Mr. Trott was not saying that he had approved an application he viewed as legally insufficient. Rather, he was suggesting that a judge might reject the application because the information it contained was not presented clearly.

In any event, the application as approved by Mr. Trott was filed the next business day, Monday, December 24, 1984, and a court order issued. Although I have no memory or record of it, I may have discussed Mr. Trott's call and complaint with Mr. Weld or others. It is not now clear to me, however, of what disputed evidentiary fact any such a discussion would give me personal knowledge. No such fact has yet been identified by the parties.

[8] The third prong of § 455(b) implicated by the December 21, 1983 memorandum is the provision which requires recusal if the judge, "is to the judge's knowledge likely to be a material witness in the proceeding." § 455(b)(5)(iv). The purpose of this provision is to assure that a judge does not have "to pass on the competence and veracity of his own testimony given with respect to a matter presently in controversy before him." *In re Continental Vending Mach. Corp.*, 543 F.2d 986, 995 (2d Cir.1976). As the language plainly states, it must actually be "*likely*" that the judge will be called upon to evaluate his own testimony for this provision to prompt disqualification. § 455(b)(5)(iv). "Unsubstantiated speculation" about the possibility that the judge will be required to be a material witness concerning a disputed issue is not enough to require recusal. *Murray v. Sevier*, 929 F.Supp. 1461, 1467–68 (N.D.Ala.1996).

In the sessions since January 20, 1998, neither the defendants nor the government has expressed an intention to call me as a witness to testify concerning my conversation with Mr. Trott. Thus, at present, I doubt that my recusal under § 455(b)(5) is necessary or appropriate. Nevertheless, I remain interested in the parties' positions concerning all of the possible § 455(b) questions raised by the December 21, 1983 memorandum, including whether I am a likely, material witness.

C. *Disqualification Under § 455(b) With Regard To The October 15, 1994 Piro Memorandum*

[9] Based on the government's representation on February 4, 1998, I under-

stand that the uncertainty it expressed on December 11, 1997 has been resolved, and the government will, if necessary, obtain an order compelling and immunizing Mr. Morris' testimony. Thus, I assume he will be a witness in this case. It remains uncertain, however, whether Mr. Connolly will testify. Mr. Condon is on the witness list and I have not been given any information concerning whether or not he will testify. In the circumstances, I believe that it is prudent and appropriate to assume for present purposes that he will be a witness.

I now realize that I dealt with Mr. Morris while I was Deputy United States Attorney and he was the head of the FBI's Organized Crime Squad. The March 1982 correspondence and memoranda (now under seal) regarding those dealings reflect regular, professional interactions. The October 15, 1984 memorandum, however, indicates that I then had suspicions that Mr. Morris may have jeopardized the Piro case by discussing its investigation with Mr. Condon.

Nevertheless, I continue to believe that I can and will, if necessary, impartially judge the testimony of Messrs. Morris, Condon, and Connolly if I continue to preside and they actually appear as witnesses. Once again, if the parties wish to question this, they should let me know.

In addition, the October 15, 1998 memorandum does not indicate to me that I have personal knowledge of any disputed evidentiary fact. I recall no discussion or suspicion of Bulger in connection with the Piro matter. According to the FBI's report, neither does Mr. Pappalardo.

Moreover, neither the government nor the defendants have indicated that I am likely to be called to testify about the Piro matter in the pending proceedings. Indeed, no one has indicated an intention to attempt to offer any evidence of the Piro matter in this case. If such an attempt were made, I would have to decide whether any testimony on that matter would be allowed before facing any issue of whether I am a likely witness. *See, e.g., United States v. Rivera*, 802 F.2d 593, 601 (2d Cir.1986) (holding that judge was not required to disqualify himself because he would be a material witness where judge found that factual allegations were insufficient to justify an evidentiary hearing); *United States v. Pollard*, 959 F.2d 1011, 1031 (D.C.Cir.) (holding that district judge did not err in denying defendant's motion for disqualification on ground that judge would be a material witness at a hearing collaterally attacking defendant's sentence because judge did not abuse his discretion in denying an evidentiary hearing on that motion), *cert. denied*, 506 U.S. 915, 113 S.Ct. 322, 121 L.Ed.2d 242 (1992).

Accordingly, at present I do not perceive that the October 15, 1984 Piro memorandum requires my recusal under § 455(b), but wish to have the parties' views on this issue as well.

D. *Disqualification Under § 455(b) Regarding The August 8, 1983 Flemmi 209*

[10] As a result of the discussions since January 20, 1998, I have considered further the implications of the August 8, 1983 Flemmi 209 for my participation in this case. As described earlier, the government has informed me that neither Mr. O'Sullivan nor Mr. Ring, who would have read the 209 shortly after it was written, had any concerns in 1983 that I was leaking information about the Angiulo matter. Nor is there any indication that any such concern was brought to my attention. Rather, I learned of this matter in the course of this case on June 25, 1997.

I continue to feel comfortable that the information in the August 8, 1983 209 has not caused me to be biased or prejudiced against Flemmi. Nor will it be considered by me in assessing Flemmi's truthfulness or reliability unless it is offered *and* admitted for those purposes. No one to date has stated an intention to offer the 209.[14]

[11] Indeed, the defendants have represented that they do not intend to attempt to introduce the August 8, 1983 209 for any purpose. However, even if it were offered and admitted as evidence that, as stated, in 1983 Flemmi trusted Mr. O'Sullivan, it does not appear that its admission would require my recusal under § 455(b). I have no personal knowledge of whether Mr. Flemmi trusted Mr. O'Sullivan. I only know what the 209 says. I acquired that information in the course of this case. However, "knowledge of disputed facts requires disqualification only if the knowledge has an extrajudicial source." *United States v. Widgery*, 778 F.2d 325, 328 (7th Cir.1985). *See also United States v. Coven*, 662 F.2d 162, 168 (2d Cir.1981), *cert. denied*, 456 U.S. 916, 102 S.Ct. 1771, 72 L.Ed.2d 176 (1982).

I do, of course, know that Flemmi's reported belief that I was leaking information concerning the Angiulo investigation is not true. This, however, is not, as I understand it, a disputed evidentiary fact in the pending proceedings.

Thus, at this point, subject to hearing further from the parties, it does not appear to me that my recusal is required under § 455(b) based upon the Flemmi 209.

E. *Disqualification Based on § 455(a)*

[12, 13] As noted earlier, § 455(a) states that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This means that there are circumstances in which disqualification may occur even though the judge is not actually biased or prejudiced, and has no extrajudicial knowledge of disputed evidentiary facts. *Chantal*, 902 F.2d at 1018. However, since § 455(a) is implicated when there is no actual impediment to the judge providing a fair trial, disqualification under it can be waived by the parties pursuant to § 455(e). *See Murphy*, 768 F.2d at 1540.

[14, 15] As the Supreme Court has explained, the purpose of § 455(a) is "to promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). More specifically, "[t]he goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists ...." *Id.* (quoting *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir.1986)). As these statements indicate, the issue under § 455(a) is to be viewed from the perspective of a reasonable person and the test is an objective one. *In re Allied–Signal*, 891 F.2d at 970.

To reiterate what was written earlier, Justice Anthony Kennedy, who concurred in *Liljeberg*, has more recently stated that:

14. In view of all the other evidence likely to be available to attempt to challenge Mr. Flemmi's credibility and reliability, it is questionable whether the 209 would have sufficient probative value to be admitted for any purpose in any event. *See, e.g.*, Fed.R.Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by ... considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

§ 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of the judge's rulings or findings. I think all would agree that a high threshold is required to satisfy this standard. Thus, under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

Liteky v. United States, 510 U.S. at 557–58, 114 S.Ct. 1147 (Kennedy, J., concurring). *See also United States v. Kelly*, 888 F.2d 732 (11th Cir.1989) (stating that "[t]he standard for recusal under section 455(a) is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality" (citations and internal quotations omitted)).

As indicated earlier, the Court of Appeals for the First Circuit provided meaningful guidance concerning the operation of § 455(a) in *In re Allied–Signal*, where it explained:

> We draw our legal standards for review of a district judge's decision not to disqualify himself [under § 455(a)] from an analogous case, *In re United States*, 666 F.2d at 690. We there held (1) that "a charge of partiality must be supported by a factual basis," (2) that "disqualification is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a *reasonable basis* for doubting the judge's impartiality," and (3) that this court of appeals will allow the district judge "a range of discretion" in making these determinations. *Id.* at 695 (emphasis in original). Only if the district court's decision to sit "*cannot be defended as a rational conclusion supported by reasonable reading of the record*" will we insist upon disqualification. *Id.* (emphasis added). *See United States v. Giorgi*, 840 F.2d 1022, 1034 (1st Cir. 1988) ("The decision to grant or to deny a motion for disqualification is committed largely to the discretion of the trial court, and we review it solely to evaluate whether the decision below amounted to an abuse of discretion.")

891 F.2d at 970 (emphasis in original).

The Court of Appeals then went on to emphasize the competing considerations which may need to be weighed in deciding questions of recusal under § 455(a) stating:

> [W]hen considering disqualification, the district court is *not* to use the standard of "Caesar's wife," the standard of mere suspicion. *In re United States*, 666 F.2d at 695 n. *. That is because the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking. *See, e.g., In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir.1988) ("A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when he is."), *cert. denied, sub. nom. Milken v. SEC*, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989); *In re United States*, 666 F.2d at 694; *United States v. Bray*, 546 F.2d at 851, 857 (10th Cir. 1976); *Alvarado Morales v. Digital Equipment Corp.*, 699 F.Supp. 16, 19 (D.P.R.1988) ("[I]t has been wisely observed that each judge must be alert to

> avoid the possibility that those who would question his impartiality are in reality seeking to avoid the consequences of his expected adverse decision ...."); H.R.Rep. No. 1453, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Admin. News 6351, 6355 ("Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice."). Even though § 455 was intended to do away with the formal "duty to sit" doctrine, *see Blizard v. Frechette*, 601 F.2d 1217, 1220 (1st Cir.1979); H.R.Rep. No. 1453, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Admin. News 6351, 6355, the judge must still tread cautiously, recognizing, on the one hand, the great importance to the judicial institution of avoiding any appearance of partiality, while simultaneously remaining aware of the potential injustices that may arise out of unwarranted disqualification.

Id. (emphasis in original).

In *In re Allied–Signal*, the Court of Appeals for the First Circuit also identified several factors that may be relevant to determining whether an appearance of partiality requiring disqualification should be found. *Id.* at 971–72. First, it noted that, "the more common a potentially biasing circumstances and the less easily avoidable it seems, the less that circumstance will appear to a knowledgeable observer as a sign of partiality." *Id.* at 971. At this point, it appears to me that this factor is relevant in this case and militates against finding a reasonable appearance of partiality.

There are now eleven active, district judges sitting in Boston. Six have served either as the United States Attorney or as an Assistant United States Attorney during the period relevant to this case: Chief Judge Tauro, and Judges Harrington, Woodlock, Stearns, Saris, and myself. Judge Harrington also served as the Chief of the Organized Crime Strike Force during the relevant period and has already been mentioned in the testimony as an individual who worked closely with former Special Agent Rico, whose credibility is at issue. Chief Judge Tauro was the United States Attorney in 1972. Judge Woodlock was a member of the Public Corruption Unit when Mr. O'Sullivan and I were its Chiefs, and prosecuted a case for Mr. O'Sullivan's Strike Force before returning to private practice. As Mr. Crossen reportedly told the FBI, Judge Stearns was one of his superiors at the time he applied for the 1984–85 electronic surveillance. Judge Saris was the Chief of the Civil Division when Mr. Weld was the United States Attorney. In varying degrees, all of these judges probably would, like me, have at least some association with some prospective witnesses in this case and perhaps other issues concerning their ability to preside.

It is, of course, possible that if this case were randomly reassigned it would be drawn by a judge who did not serve in the United States Attorney's Office. When faced with a similar issue in *In re Allied–Signal*, where the judge's law clerks each had brothers in law firms involved in a complex mass tort case, the Court of Appeals for the First Circuit said:

> We do not say that the relationship is unavoidable; we simply say that it arises out of a common circumstance. And, a knowledgeable objective observer is therefore more likely to see the relationship as implicit in the special circumstances rather than as an odd coincidence the failure to avoid which might suggest bias.

Id. at 971–72. This observation also seems to also be applicable to this case.

The Court of Appeals for the First Circuit went on to state that, "the greater the extent to which the potentially disqualifying circumstance facilitates the just and efficient resolution of the case, the less likely a knowledgeable observer will consider it a sign of judicial partiality." *Id.* at 972. I understand that if my disqualification is required, it would be improper not to recuse myself because of a concern that reassignment would impede the process of this case. *See In re School Asbestos Litigation*, 977 F.2d 764, 784–85. (3rd Cir. 1992).

However, in many cases the question whether a judge should recuse himself under § 455(a) is within the range of his discretion. *In re Allied–Signal* at 970. When I am faced with such a discretionary decision at the outset of a case, absent some countervailing consideration, I usually recuse myself because the case can be easily reassigned and proceed efficiently before some judge as to whom no legitimate issue has been raised. *See, e.g., Sawyer, supra* at n. 5. If I recuse myself in this case under § 455(a), it is uncertain whether my prior rulings would be vacated or whether the case would resume where it was suspended. *Compare Liljeberg*, 486 U.S. at 862–870, 108 S.Ct. 2194 (holding that remedy for an improper failure to recuse under § 455(a) is discretionary and finding in particular circumstances that the judgment should be vacated) *with Widgery*, 778 F.2d at 328 ("Disqualification for the appearance of impropriety runs prospectively only; even a successful motion does not vitiate actions taken before the motion was filed."), *and Murphy*, 768 F.2d at 1539 ("In cases decided under § 455(a), disqualification runs from the time the motion was made or granted."). *See also In re Allied–Signal*, 891 F.2d at 973.[15] It is clear, however, that it would, at a minimum, be challenging and time-consuming for another judge to become familiar with the three-year history of this case and the hundreds of decisions I have made in it. The defendants would probably remain detained during the pendency of the learning process.

In these circumstances, at this time it appears to me that if the issue of recusal under § 455(a) is within the range of my discretion, a decision not to disqualify myself would most likely be properly perceived as a manifestation of my commitment to the administration of justice, rather than as evidence of bias or prejudice. *See In re Allied–Signal*, 891 F.2d at 972 (finding that "the court's need for the clerks was somewhat special and likely to have been seen as such").

15. The government has repeatedly represented that it has raised possible issues relating to recusal to protect any convictions it may obtain from later attack by defendants on the grounds that I should not have presided, rather than from a desire to remove me from the case. The defendants have adamantly denied that this is their strategy. Indeed, they have represented that, to the maximum extent legally permissible, they wish to waive any right to challenge a conviction on this ground.

I note that a finding that a judge improperly failed to disqualify himself under § 455(b) may require that prior proceedings be reopened. *See Widgery*, 778 F.2d at 327. However, if the only basis for disqualification is under § 455(a):

> [I]n determining whether a judgment should be vacated . . . it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

Liljeberg, 486 U.S. at 847, 108 S.Ct. 2194. The above-cited decisions in *Widgery, Murphy*, and *In re Allied–Signal* suggest that in the circumstances of this case it may be difficult, if not impossible, for the defendants to have these proceedings reopened if I continue to preside and the only error later found is a failure to recuse under § 455(a).

Finally, in *In re Allied–Signal*, the Court of Appeals for the First Circuit stated that, "the parties' own words and deeds may help determine the extent to which a knowledgeable observer would see, in a particular circumstance, a sign of partiality." *Id.* Some of those words and deeds have been recited earlier in this memorandum.

My colloquy with the parties since January 20, 1998 suggests that there may be a question of what circumstances should now be considered in determining whether a reasonable person would question my impartiality. As described earlier, on several occasions—most recently and extensively on December 4, 1997—I described the facts I regarded as relevant to the issue of my possible recusal, including my prior associations with various witnesses, and encouraged the parties to ask me any questions they wished. After deliberating, the government informed me that it believed a reasonable person would, in the circumstances, question my impartiality, but the government waived any objection to my participation on this ground.

A valid waiver requires full disclosure of the basis for disqualification. § 455(e). This means, however, that "[a] judge is required merely to disclose the basis for disqualification, not 'every incident or factual detail which might contribute to the overall impression of partiality.'" *Hall v. Small Business Admin.*, 695 F.2d 175, 180 (5th Cir.1983) (quoting *United States v. Conforte*, 457 F.Supp. 641, 655 (D.Nev. 1978)). *See also United States v. Nobel*, 696 F.2d 231, 236 (3rd Cir.) (finding waiver where judge made full disclosure of the relevant facts), *cert. denied*, 462 U.S. 1118, 103 S.Ct. 3086, 77 L.Ed.2d 1348 (1983). I tried, and believe I succeeded, in making an adequate disclosure of the facts as I knew them on December 4, 1997, including those relating to my relationship with Mr. O'Sullivan. This is, however, one of the issues the parties are welcome to address.

With regard to matters that were adequately disclosed as of December 4, 1997, I am inclined to believe that it would be inappropriate to permit the government to withdraw its waiver. I did offer all parties this option on December 11, 1997, as part of an effort to get the recusal issue authoritatively resolved before I had to make a series of decisions that I anticipated would be disappointing to someone.

If parties were permitted to withdraw valid waivers after judicial decisions have been made both the efficacy of the judicial process and public confidence in it would be injured. Regrettably, it is a fact of life that "[i]n the real world, recusal motions are sometimes driven more by litigation strategies than by ethical concerns." *In re Cargill, Inc.*, 66 F.3d 1256, 1262 (1st Cir. 1995). As described earlier, in December 1997 I explored the question of my possible disqualification primarily to determine if I could properly continue to preside in this case. I was, however, also seeking to minimize the risk that there would later be an opportunity for any party to use a recusal motion "as a tactic to jettison an impartial judge whose slant on a case, as evidenced by his rulings, jeopardize[d] a parties' chances for ultimate success," *id.* at 1263, or even to appear reasonably to be doing so. The withdrawal of valid waivers, and subsequent recusals and reassignments, would obviously, at a minimum, inject inefficiency into the administration of justice. Moreover, if judges felt that valid waivers of disqualification could be withdrawn after they made difficult decisions, they might be inhibited in making the honest judgments their office requires. If the public understood that this could occur, its confidence in the administration of justice would be impaired. Thus, I continue to believe that generally the dis-

covery of a new fact regarding possible recusal should not operate to revive grounds for recusal that have been waived.

The defendants, however, may have a stronger argument for withdrawing their waivers than the government. On December 4, 1997, they first stated that my disqualification was not required under § 455(a) because they believed that a reasonable person would not question my impartiality. Accordingly, in their view, no waiver was necessary. Nevertheless, they provided the waivers I viewed as prudent to solicit. Thus, they might conceivably contend that when the information previously disclosed is added to the recent disclosures, there is now, for the first time, a situation in which a reasonable person would question my impartiality and, therefore, argue that this is the first time that a waiver can be properly received from them.

In view of the defendants' representations, I doubt it will be necessary for me to decide this issue. However, if any of the parties wish to make any arguments concerning the validity or implications of their prior waivers, I will consider them seriously.

In any event, the disclosures I have made since January 20, 1988 present new information for the parties and me to consider. I have, as requested by the government, thought further about this matter and issued this memorandum to present my more considered, but not final views.

At this point it appears to me that it may be debatable whether a reasonable person, fully informed of all of the relevant facts, would question my impartiality, but that this issue is at least within the range of my discretion to decide. I am inclined to find that a reasonable person would not question my impartiality. If this is a permissible and appropriate conclusion, I am inclined to continue to preside in order to facilitate the efficient progress of this case, rather than to recuse myself as I often, but not always, do when a legitimate issue of disqualification is raised at the outset of a case.

As stated earlier, I am interested in the parties' positions on these issues, among others. If the parties view this as a close question on which I have legitimate discretion, I want their advice on how to exercise that discretion. I also want to know whether if the only issue is a possible appearance of partiality—rather than any actual impediment to my ability to preside fairly—they again wish to waive this ground for my disqualification.

IV. *Order*

Accordingly, it is hereby ORDERED that:

1. The government shall, by February 19, 1998:

(a) With regard to 28 U.S.C. § 455(b), state whether it believes my recusal is required and, if so, describe with specificity the reasons for that belief, including, if applicable, any disputed evidentiary fact of which it is believed I have personal knowledge.

(b) With regard to 28 U.S.C. § 455(a), state whether (i) it believes a reasonable person could question my impartiality; (ii) it believes that reasonable minds could differ on this issue and, therefore, I have the legitimate discretion to decide it either way; (iii) if so, how I should exercise that discretion; and (iv) in any event, whether it wishes to waive again, pursuant to § 455(e), any claim that I should disqualify myself because a reasonable person would question my impartiality.

(c) File a memorandum in support of its position if it is advocating my disqualification.

2. The defendants shall, by February 26, 1998, address the same issues and respond to the government's submission.

3. If necessary to resolve the question of my possible recusal, a hearing will be held on March 3, 1998, at 9:30 a.m.

UNITED STATES of America

v.

Francis P. SALEMME, et al.

United States of America

v.

John Martorano.

Nos. CR. 94–10287, CR. 97–10009.

United States District Court,
D. Massachusetts.

March 30, 1998.

On recusal issues in criminal case, a federal judge was asked by government to analyze issues concerning possibility of recusal. After the court analyzed the issues, 164 F.Supp.2d 49, and asked the parties for their opinions as to whether recusal was warranted, the government requested leave to withdraw its waivers as to recusal. The District Court, Wolf, J., held that: (1) no factual basis to doubt judge's impartiality had been shown; (2) defendants' factual submission played no role in judge's decision not to recuse himself; (3) government could not withdraw previous waivers of objections to judge's decision not to recuse himself; (4) reasonable person would not think that FBI informant's prior suspicions of judge would cause judge to be unfair or suggest that judge had personal knowledge of disputed issues in case; (5) reasonable person would not question judge's impartiality as to former FBI agents; (6) reasonable person would not believe that judge, as Deputy United States Attorney, had participated in application for wiretap; and (7) judge's past associations with law enforcement witnesses would not cause reasonable person to question judge's impartiality.

Ordered accordingly.

See also 91 F.Supp.2d 141.

1. Judges ⇐49(1)

Presiding judge has duty to decide whether fully informed, reasonable person would question his impartiality because of matters at issue; in answering this question, judge must keep in mind that a decision on disqualification must reflect not only need to promote public confidence by assuring appearance of impartiality, but also need not to permit the reasonable perception that disappointed litigants can prompt disqualification of a fair judge in hope of obtaining another judge more to their liking. 28 U.S.C.A. § 455(a).

2. Judges ⇐50

Judge is obligated to continue to preside unless reasonable factual basis to doubt his impartiality or fairness is shown by probative evidence. 28 U.S.C.A. § 455(a).

3. Judges ⇐49(1)

Properly informed, reasonable people would not question judge's impartiality, and so judge did not recuse himself; no reasonable factual basis to doubt judge's impartiality had been shown by probative evidence. 28 U.S.C.A. § 455(a).

ministrators of Tulane Educ. Fund, 500 U.S. 72, 82–83, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979); *United States v. United Mine Workers of America*, 330 U.S. 258, 275, 67 S.Ct. 677, 91 L.Ed. 884 (1947); *Galvan v. Federal Prison Industries*, 199 F.3d 461, 467 (D.C.Cir. 1999). This rule of construction has particular force where, as here, it is "decidedly awkward" to construe "person" as including the sovereign. *See International Primate*, 500 U.S. at 83, 111 S.Ct. 1700. Nevertheless, there is "'no hard and fast rule of exclusion,' ... and much depends on the context, the subject matter, legislative history, and executive interpretation." *Wilson*, 442 U.S. at 667, 99 S.Ct. 2529; *see also International Primate*, 500 U.S. at 83, 111 S.Ct. 1700. In this case, Mr. Al Fayed has pointed to, and the court is aware of, nothing in the "context, ... subject matter, legislative history, [or] executive interpretation" of section 1782 that would mitigate against the application of the general canon that "person" does not include the sovereign.

Accordingly, the court holds that the term "person," as used in section 1782, does not include a federal agency, such as the CIA.[3]

III. Conclusion

For the foregoing reasons, the court concluded that it did not have subject-matter jurisdiction under section 1782 to issue a subpoena to the CIA. Consequently, the subpoena was quashed.

3. In so holding, the court expresses no opinion as to whether the term "person" includes a federal officer, as distinct from a federal agency.

UNITED STATES of America

v.

Francis P. SALEMME, et al.

United States of America

v.

John Martorano

Nos. Cr. 94–10287–MLW, Cr. 97–10009–MLW.

United States District Court, D. Massachusetts.

Sept. 15, 1999.

Clerical Corrections, December 23, 1999.

Defendant, a longstanding FBI informant, filed a motion to dismiss an indictment charging him with multiple charges of racketeering and extortion, among other crimes based on an alleged agreement that he would not be prosecuted. Defendant, and a codefendant filed motions to suppress electronic surveillance evidence. The District Court, Wolf, J., held that: (1) defendant did not have either an express immunity agreement or an agreement implied in fact that he would not be prosecuted so as to be entitled to dismissal of charges; (2) defendant had an enforceable agreement that precluded the use and derivative use against him of any intercepted evidence; (3) hearing was necessary to determine whether case would be dismissed because defendant's due process rights were violated because intercepted evidence was presented to the grand juries that indicted defendant in violation of promises of confidentiality; (4) suppression of electronic surveillance evidence against codefendant was required for failure to make the full and complete statement concerning necessity required by statute; and (5) codefendant lacked standing to maintain seek

suppression of electronic surveillance at premises where he was overheard and tape-recorded while participating in a "La Cosa Nostra" induction ceremony.

Motions denied.

1. Criminal Law ⇐739(1)

A claim of an enforceable promise of immunity which prohibits a particular prosecution presents an issue to be decided by the court rather than the jury.

2. Criminal Law ⇐42

If an individual is compelled to testify pursuant to immunity statute, he is granted use immunity that is coextensive with his Fifth Amendment privilege and, therefore, the individual is protected from prosecution through the use of the immunized testimony or evidence derived from that testimony. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 6002 et seq.

3. Criminal Law ⇐42

In exchange for his cooperation the government may grant an individual varying degrees of immunity in an informal agreement.

4. Criminal Law ⇐42

Government may, in entering into an informal immunity agreement, promise that an individual will not be prosecuted at all in exchange for his cooperation, which is generally called "transactional immunity."

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

5. Criminal Law ⇐42

Government may agree to provide use and derivative use immunity coextensive with that granted by operation of immunity statute, or only that an individual's statements will not be used directly against him. 18 U.S.C.A. § 6002 et seq.

6. Criminal Law ⇐42

With regard to informal immunity, a defendant's rights are determined by the terms and conditions of the bargain as found by the court.

7. Constitutional Law ⇐257.5, 265.5

Due process requires the government to adhere to the terms of any plea bargain or immunity agreement it makes. U.S.C.A. Const.Amend. 5.

8. Criminal Law ⇐42

Informal grants of immunity may be oral as well as written.

9. Criminal Law ⇐42

An informal immunity agreement may be express or implied from the conduct of the parties.

10. Constitutional Law ⇐257.5

With regard to immunity agreements, due process requires that generally applicable principles of contract law be modified if necessary to assure fundamental fairness. U.S.C.A. Const.Amend. 5.

11. Criminal Law ⇐273.1(2)

Rule requiring compliance by the government with promises made during plea bargaining and analogous contexts generally requires that the agent be authorized to make the promise.

12. Principal and Agent ⇐14(2), 99

Existence of implied or incidental actual authority of agent depends on whether the principal's actions would create the belief in a reasonable person that the principal had bestowed authority on agent. Restatement (Second) of Agency §§ 7, 35.

13. Constitutional Law ⇐253(1)

There are circumstances in which due process may require that the government perform a promise made by an agent who exceeded his actual authority. U.S.C.A. Const.Amend. 5.

14. Criminal Law ⇐42

Under the Self-Incrimination Clause of the Fifth Amendment, evidence of guilt induced by a government promise of immunity is "coerced" evidence and may not

be used against the accused. U.S.C.A. Const.Amend. 5.

15. Criminal Law ⇐42

When the government obtains evidence as a result of a formal or informal grant of use and derivative use immunity, and it appears that such evidence may have been misused to secure the defendant's indictment, the case against him must be dismissed unless the government proves by a preponderance of the evidence that it had a legitimate, independent source for the information presented to the grand jury or, if the government cannot disprove taint, that the error was harmless beyond a reasonable doubt; however, if statements were made involuntarily as a result of an unauthorized promise of immunity and used, directly or indirectly, to secure the defendant's indictment, the remedy is suppression at trial rather than dismissal of the case.

16. Criminal Law ⇐42

Although FBI agents primarily responsible for dealing with defendant, by word and deed, promised defendant protection in return for his service as an informant, defendant did not have either an express immunity agreement or an agreement implied in fact that he would not be prosecuted so as to be entitled to dismissal of charges; furthermore, although defendant rendered very valuable service to the government for 30 years, he did not rely to his detriment on an unfulfilled promise that he would not be prosecuted.

17. Witnesses ⇐216(4)

Mere fact that an individual is an FBI informant does not mean that nothing he says to the FBI may be used against him as a matter of law; only the identity of the informer is privileged, and content of the communication is not privileged unless it would tend to reveal the identity of the informer.

18. Criminal Law ⇐42

FBI's promise to maintain the confidentiality of defendant's service as an FBI informant constituted an enforceable promise not to use statements he made against him if disclosure of those statements would, as a practical matter, reveal that defendant had been an informant; however, if defendant relied at trial on some of his communications with the FBI, government would be permitted to offer other statements of defendant to FBI in order to assure that jury was presented with an appropriate record on which to decide fairly the merits of his defenses. Fed.Rules Evid.Rules 106, 611, 28 U.S.C.A.

19. Criminal Law ⇐42

FBI agents had actual authority to promise defendant, a longstanding FBI informant, that any evidence obtained if certain premises was bugged would not be used against him; thus, defendant, who performed his part of the bargain and rendered a very valuable service to the government by providing information that was significant for the feasibility of the bugging and that was used to establish issuance of the warrant, had an enforceable express and implied in fact agreement that precluded the use and derivative use against him of any of the intercepted evidence.

20. Criminal Law ⇐42

If the government informally promises that statements will not be used against a defendant, it is also precluded from using the statements to uncover other incriminating evidence, unless the agreement expressly provides otherwise.

21. Attorney General ⇐6

District and Prosecuting Attorneys ⇐8

Attorney General and the United States Attorney each have the implied actual authority to enter into plea bargains and comparable agreements, including

agreements to grant immunity informally, without the participation of the other.

22. Criminal Law ⇐42

Failure of defendant, an FBI informant, to provide FBI with accurate and complete information concerning his own criminal activity did not constitute fraudulent concealment rendering unenforceable government's agreement that any evidence obtained from bugging of certain premises would not be used against him; defendant was under no obligation to disclose to the FBI all of his criminal activity.

23. Criminal Law ⇐42

Defendant, an FBI informant who had an enforceable express and implied in fact agreement that precluded the use and derivative use against him of any of evidence intercepted from a certain premises, had an equally valid agreement implied in fact that the evidence intercepted at two other locations would not be used against him in any way; conduct of the parties manifested the meeting of the minds necessary to infer a valid, tacit understanding in fact.

24. Criminal Law ⇐42

Hearing was necessary to determine whether case would be dismissed because defendant's due process rights were violated because intercepted evidence was presented to the grand juries that indicted defendant in violation of promises of confidentiality; at that hearing, government would have burden of proving that the information it presented to secure the indictments of defendant was not tainted by showing that it had an independent, legitimate source for that evidence, and if government failed to prove that all of the evidence presented to the grand juries was untainted, the case against defendant would be dismissed unless government proved that its error was harmless beyond a reasonable doubt. U.S.C.A. Const. Amend. 5.

25. Federal Courts ⇐3.1

Court's supervisory powers must be exercised sparingly.

26. Federal Courts ⇐3.1

Court's supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of clear rules to ensure the integrity of the grand jury's functions.

27. Indictment and Information ⇐144.1(3)

Except in certain circumstances, remedy for presenting to a grand jury evidence obtained directly or indirectly as a result of a grant of immunity is dismissal of the indictment.

28. Grand Jury ⇐36.8

Principle that the government may not present to the grand jury that indicted a defendant information obtained, directly or indirectly, as a result of a grant of immunity is not limited to cases involving formal immunity provided by operation of immunity statute; it is equally applicable to informal promises of immunity, including oral promises. 18 U.S.C.A. § 6002 et seq.

29. Criminal Law ⇐393(1)

Protection against self-incrimination is violated whenever the prosecution presents a witness whose testimony is shaped, directly or indirectly, by immunized information regardless of how or by whom the witness was exposed to that information. U.S.C.A. Const.Amend. 5.

30. Criminal Law ⇐42

Information obtained as a result of a grant of immunity may not be used as an "investigatory lead."

31. Criminal Law ⇐412.1(1)

A defendant's incorrect perception that he is providing testimony under a grant of immunity does not make his statement involuntary, unless the perception was reasonable.

32. Criminal Law ⇐394.3

Suppression of electronic surveillance evidence was not required where literal

requirements of statute requiring high ranking Justice Department official to authorize an application for a warrant to conduct electronic surveillance were met, but purpose of statute was subverted when Assistant Attorney General who authorized application was deprived of information that was vital to making the "informed" judgment contemplated by the statute. 18 U.S.C.A. § 2516(1).

33. Criminal Law ⇐394.3

Government's submissions in support of wiretap application were not only false and misleading with regard to the need for electronic surveillance to assist the FBI in developing a prosecutable case against defendants, but were drafted in a convoluted and confusing manner which obscured the fact that there was not probable cause to believe that evidence of any Title 21 drug offense would be intercepted if a warrant was issued; thus, under either *Franks* or *Giordano*, suppression of electronic surveillance evidence was required for failure to make the full and complete statement concerning necessity required by statute. 18 U.S.C.A. § 2518(1)(c).

34. Criminal Law ⇐394.3

In order to demonstrate that government has acted with reckless disregard for the truth in submitting wiretap application, a defendant seeking suppression must prove that those acting for the government did not believe a representation to be true or that they in fact entertained "serious doubts" as to the truth of the matter asserted. 18 U.S.C.A. § 2518(1)(c).

35. Criminal Law ⇐394.6(4)

That government acted with reckless disregard for the truth in submitting wiretap application can be proven inferentially from circumstances presenting obvious reasons to doubt the veracity of the allegations at issue; reckless disregard can be inferred from, among other things, the failure to provide the court information that any reasonable person would understand the court would want to know. 18 U.S.C.A. § 2518(1)(c).

36. Telecommunications ⇐516

Where FBI was participating in a joint investigation with Drug Enforcement Administration (DEA) when wiretap application was submitted, the full and complete statement concerning necessity mandated by statute required inclusion of the relevant information possessed by those participating in the matter on behalf of the FBI, as well as DEA. 18 U.S.C.A. § 2518(1)(c).

37. Telecommunications ⇐530

In general, reviewing courts are instructed to read affidavits submitted in support of wiretap applications in a practical and commonsense manner, rather than in a hypertechnical manner, when their sufficiency to establish probable cause or necessity is at issue. 18 U.S.C.A. § 2518.

38. Telecommunications ⇐514.1

It is appropriate to focus on the force of an affidavit submitted in support of wiretap application as a whole when false and misleading representations and omissions permeate the government's submission. 18 U.S.C.A. § 2518.

39. Telecommunications ⇐515

In order to issue a warrant for a wiretap, court must find both that (1) there is probable cause to believe that an individual has committed, or is committing a designated offense, and (2) there is probable cause to believe that "particular communications concerning that offense will be obtained" if the warrant is issued. 18 U.S.C.A. § 2518(3)(a, b).

40. Criminal Law ⇐394.4(5.1)

When warrants are involved, good faith exception to the exclusionary rule relies substantially on the efficacy and integrity of the warrant procedure. U.S.C.A. Const.Amend. 4.

41. Criminal Law ⇐394.1(1)

Good faith exception to the exclusionary rule is available only when the govern-

ment has properly performed its duty of disclosure to the court. U.S.C.A. Const. Amend. 4.

42. Criminal Law ⇐394.3

Once electronic surveillance evidence has been suppressed, that evidence cannot contribute directly or indirectly to a conviction. 18 U.S.C.A. § 2515.

43. Criminal Law ⇐394.5(2)

Although he was named as a person expected to be overheard in the application for the warrant to bug premises, defendant was not an "aggrieved person" with standing to challenge validity of electronic surveillance conducted there; defendant was not intercepted and had no possessory interest or other basis for claiming a reasonable expectation of privacy concerning location where electronic surveillance evidence was obtained. U.S.C.A. Const. Amend. 4; 18 U.S.C.A. § 2510(11).

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

44. Searches and Seizures ⇐161

As a general rule, Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. U.S.C.A. Const. Amend. 4.

45. Searches and Seizures ⇐162

An individual has a Fourth Amendment right that may have been violated only if the person or something in which he has a legitimate expectation of privacy has been the subject of a search. U.S.C.A. Const.Amend. 4.

46. Criminal Law ⇐394.5(2)

Defendant, who was not an overnight visitor and who engaged solely in business discussions, did not have a reasonable expectation of privacy at premises where he was overheard and tape-recorded while participating in a "La Cosa Nostra" induction ceremony; thus, defendant's conversation did not constitute an "oral communication" within the meaning of Title III, and therefore, defendant was not an "aggrieved person" with standing to maintain motion to suppress the electronic surveillance. 18 U.S.C.A. § 2510(2, 11).

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

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MEMORANDUM AND ORDER

WOLF, District Judge.

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In 1861, Lord Acton wrote that, "[e]very thing secret degenerates, even the administration of justice." John Emerich Edward Dalberg Acton, *Lord Acton and His Circle* 166 (Abbot Gasquet, ed., 1968). This case demonstrates that he was right.

I. SUMMARY

1. *The Facts Concerning Defendant Stephen Flemmi's Motion to Dismiss Based on Immunity*

On January 5, 1995, defendant Stephen Flemmi was arrested on a criminal complaint which charged him, James "Whitey" Bulger, and George Kaufman with conspiring to extort money from a bookmaker, Burton Krantz. Five days later, on January 10, 1995, Flemmi, Bulger, Kaufman, and four other defendants were indicted on multiple charges of racketeering and extortion, among other crimes. A complaint authorizing Flemmi's arrest prior to indictment was obtained by the prosecutors because they were concerned that Bulger and Flemmi would be informed of their imminent indictment and flee. This fear was well founded.

Beginning in 1965, Flemmi secretly served as a very valuable and valued confidential informant for the Federal Bureau of Investigation (the "FBI" or "Bureau"). In the thirty years prior to his arrest, Flemmi was, among other things, instrumental in the FBI's successful and acclaimed effort to incarcerate three generations of the leadership of the Patriarca Family of La Cosa Nostra (the "LCN" or "Mafia"). Flemmi had also assisted the FBI in obtaining a warrant that was used to intercept, for the first time, an LCN induction ceremony. § II.30.

In 1976, the FBI played a pivotal role in forging a formidable, enduring partnership

between Flemmi and Bulger, who had in 1975 also become an FBI informant. The FBI made Bulger and Flemmi, who were previously acquainted but not close, a perfect match. In Boston, Flemmi and Bulger uniquely shared an antipathy for the LCN, a desire to profit criminally from its destruction, and, most notably, the promised protection of the FBI. § II.5.

As described in detail in this Memorandum, and as summarized below, many members of the FBI participated in honoring the promise to protect Flemmi and Bulger. Prominent among them was John Connolly, who from 1975 until his retirement in 1990 was their FBI "handler." Although retired in 1995, Connolly remained in contact with his close friends and former colleagues on the Organized Crime squad in the Boston office of the FBI. As a result, he learned that Bulger and Flemmi were scheduled to be indicted on about January 10, 1995. Connolly shared this information with Bulger, who, as Connolly expected, became a fugitive and also warned Flemmi so that he could flee. Flemmi, however, miscalculated. Not expecting to be charged and subject to arrest so soon, Flemmi was still in Boston when the criminal complaint against him was issued on January 4, 1995. § II.32.

Flemmi's arrest represented a radical departure from his historic relationship with the government. At the urging of Attorney General Robert Kennedy, in the mid–1960's a previously reluctant FBI became committed to combatting the LCN. FBI Special Agent H. Paul Rico recruited Flemmi to serve as an asset in that effort, which has since the mid–1960's been the FBI's highest national priority. Flemmi was, among other things, known to Rico as a member of the Winter Hill Gang, which was in the midst of a violent gang war, and as a reputed murderer. Flemmi then had close contact with key members of the Patriarca Family, in meaningful measure because of his partnership with his present codefendant Francis Salemme. Although rightly regarded as a potential member of the Patriarca Family, Flemmi did not share Salemme's unequivocal enthusiasm for the LCN. Thus, Flemmi was responsive to the relationship that Rico proposed. § II.2.

Because of Flemmi's ability to provide information concerning leaders of the LCN, Rico caused the FBI to designate him as a Top Echelon informant, the highest status a Bureau source can achieve. Flemmi, however, was never told that he was opened or closed administratively as an informant. Nor was Flemmi advised that any of the information that he was providing was being memorialized in writing. Rather, instead of treating Flemmi as a criminal to be dealt with cautiously, Rico successfully sought to cultivate in Flemmi the sense that he was an ally in a common cause, primarily a war against the LCN. § II.2. This is a sense that was later nurtured by Connolly, when he succeeded Rico as Flemmi's handler, despite the fact that Connolly too understood that Flemmi had committed many serious crimes, including murder. §§ II.5, II.33.

As the alliance between the FBI and Flemmi and Bulger developed, Flemmi and Bulger were invited to dine periodically with members of the FBI engaged in investigating the LCN, including Connolly, several of his colleagues on the Boston Organized Crime squad, Connolly's supervisors, John Morris and James Ring, and Joe Pistone, an FBI agent from New York who had become famous for his undercover infiltration of the LCN as "Donnie Brasco." The timing of these dinners suggests that they were often arranged to celebrate milestones in the FBI's relationship with Bulger and Flemmi, such as the successful bugging of the LCN's Boston headquarters at 98 Prince Street in 1981, and the frustration of an investigation of Bulger and Flemmi that had been led by the Drug Enforcement Administration (the "DEA") in 1984–85. At these dinners, the agents, Bulger, and Flemmi at times exchanged gifts. Although FBI procedures required that all contacts with informants be docu-

mented, there is only one, 1979 report reflecting matters discussed at these dinners. There is no record of the gifts exchanged. §§ II.10, II.11, II.16, II.17, II.18.

Rico made several promises to Flemmi in the course of developing him as an informant. Among other things, Rico promised Flemmi that his cooperation would be confidential and that his service as a source would not be disclosed to anyone outside of the FBI. This was a customary assurance that the FBI has provided to its informants at least since 1965. It is a promise that Rico and the many other past and present members of the FBI agents who testified in this case regarded as "sacred." §§ II.2, II.8.

There was good reason for agents of the FBI to believe in the importance of the promise of confidentiality that is regularly made by the Bureau to its informants. As the Supreme Court has recognized, providing potential sources reasonable assurances regarding the confidentiality of their cooperation encourages them to provide information and protects their safety. *Roviaro v. United States*, 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). Moreover, the FBI Manual has long instructed agents to exercise constant care to assure that an informant's identity not be disclosed to anyone, intentionally or inadvertently. §§ II.6 and III.1.D(3). Strictly adhering to this principle, unless authorized by the informant, the FBI has regularly refused to identify its sources even to prosecutors and other Department of Justice officials with a legitimate need to know whether, among other things, subjects of investigations were cooperating with the FBI and, therefore, might assert, or indeed have, certain foreseeable defenses to prosecution, including that they had been promised immunity or authorized to commit acts that would otherwise be criminal. §§ II.2, II.17, II.20, II.30, II.32, II.33.

Officials of the Department of Justice have historically accepted the fact that the FBI would refuse any request to confirm or deny that an individual was an informant. For example, William F. Weld, a former United States Attorney in Boston and a former Assistant Attorney General in charge of the Criminal Division, testified that he expected that if he asked the FBI to identify an informant, he would be told to "go pound sand." §§ II.17, III.1.D(3). As a formal reflection of this attitude, in 1976, when the Attorney General first issued Guidelines for the FBI to use in exercising its discretion with regard to dealing with informants, the Guidelines provided no role for the United States Attorney or the Department of Justice in authorizing an informant to engage in what would otherwise be criminal activity. They were later revised to require consultation with the United States Attorney before the FBI authorized an informant to engage in criminal activity that involved a significant risk of violence, but stated that any such consultation be conducted in a manner that would not reveal the identity of the source. § II.6.

It was the understanding of the present and former members of the FBI who testified in this case that information which Flemmi or any other informant provided the FBI could not properly be used against him or, in any event, that it would not be used against him. Thus, it was the consistent practice of the FBI not to use information received from an informant to investigate him.[1] Nor would the Bureau

1. The FBI did at times utilize information provided by a source in an application for a warrant to conduct electronic surveillance and also name that source as a purported target of that investigation in an effort to mask the identity of the informant. In such cases, the FBI had no intention of using any intercepted evidence against the source. This technique was employed with regard to Flemmi and Bulger in the application for a warrant to bug the storeroom at Vanessa's Restaurant. To protect the confidentiality of their status as sources, however, the FBI did not inform the Assistant Attorney General who authorized the application or the Assistant United States Attorney who filed it of the

disclose information provided by a source to any other agency or any prosecutor investigating him. §§ II.2, II.8, II.14, II.16, II.20, II.21, II.33, III.1.D(2)-(3).

While the repeated promises of confidentiality which Flemmi received were customary and generally regarded as appropriate, Rico also made Flemmi a promise that was irregular, but not unique. He promised Flemmi that if he served as an FBI informant, the Bureau would protect him. § II.2. This is a promise that was expressly reiterated and amplified by Connolly and Morris. §§ II.5, II.11, II.18. As summarized below, the assurance that Flemmi would be protected by the FBI was also communicated by the conduct of Rico, Connolly, and Morris, and was confirmed by the actions of many, but not all, of their colleagues in the FBI.

Flemmi, however, was never told that the protection that he was promised included immunity from prosecution. The word "immunity" was never mentioned. §§ II.2, II.5, II.16. Flemmi understood that it was permissible for agencies other than the FBI, or FBI agents ignorant of his relationship with the Bureau, to investigate him. He also knew that he could properly be prosecuted if any such investigation succeeded despite the best efforts of his FBI handlers to protect him. §§ II.2, II.9, II.17, II.32, III.1.C.

Relying upon the promises made to him by the FBI, and on the repeated performance of those promises, Flemmi rendered exceptional service in the Bureau's war against the LCN and other matters. In the 1960's, Flemmi regularly provided information, that Rico rated as "excellent," regarding the activities of Raymond L.S. Patriarca, and other members and associates of the Family that bore his name, including Gennaro Angiulo, Illario Zannino, who was also known as Larry Baione, and Salemme. Flemmi was also instrumental in Rico's successful effort to develop LCN member Joseph Barboza into a cooperating witness. Barboza's testimony led to the convictions of Patriarca and several of his associates, and earned him national renown. In addition, in the mid–1960's, Flemmi furnished Rico with an appreciated warning of a threat to the life of Suffolk County District Attorney Garrett Byrne. § II.2.

In 1969, Rico told Flemmi that he and Salemme would soon be indicted for the attempted murder of Barboza's lawyer, John Fitzgerald, and suggested that they flee. Flemmi and Salemme acted on that advice. While a fugitive, Flemmi stayed in touch with Rico. Rico, however, did not tell the agents responsible for the Flemmi fugitive investigation that he had spoken to him. It appears that after separating from Salemme because of a series of disagreements, Flemmi told the FBI where Salemme could be found. Thus, Connolly was able to apprehend Salemme in New York. §§ II.2, II.3.

After Salemme was convicted of the Fitzgerald bombing and incarcerated to serve a lengthy sentence, at Rico's request Flemmi returned to Boston in 1974. As Rico promised, Flemmi was immediately released on bail and the charges against him were dropped. § II.3.

In 1975, with assistance from Bulger, Connolly revived Flemmi's relationship with the Bureau. Flemmi promptly proved his continued value as a source. After Barboza was murdered in 1976, Flemmi provided information that permitted Connolly to convert a coconspirator into a cooperating witness who identified Patriarca Family member Joseph Russo as Barboza's killer. In 1992, Russo pled guilty to that charge and was sentenced by

charade. Nor were these officials advised of the fact that Bulger and Flemmi had been told of the planned bug at Vanessa's and, therefore, were not, as represented in the application, expected to be intercepted there. As a result, an application concerning Vanessa's that the FBI knew was false and misleading with regard to Flemmi and Bulger was submitted to the court. § II.20.

this court to what turned out to be life in prison. § II.7.

In 1980, Flemmi provided Connolly with information concerning the assassination of federal Judge James Wood by a group of major drug dealers. Connolly later advised his superiors that he believed that the contacts Flemmi had made at his direction in that investigation may have created the false impression that Flemmi was involved in narcotics. § II.11.

In 1980, Flemmi and Bulger made a critical contribution to the FBI's ambitious and ultimately successful effort to bug Angiulo's headquarters at 98 Prince Street. The location was viewed as virtually impenetrable. Connolly and Morris asked Flemmi and Bulger to visit 98 Prince Street and obtain information important to the physical feasibility of the proposed bugging. Bulger justifiably feared that he and Flemmi might be killed if they went to that location. Flemmi expressed the additional concern that the bugging of 98 Prince Street would likely result in the interception of information concerning criminal activity in which he and Bulger were engaged. Morris and Connolly, however, assured Flemmi and Bulger that the 98 Prince Street tapes would not be a problem for them; they would be protected for anything intercepted at 98 Prince Street rather than prosecuted. Thus, Flemmi reasonably understood that if he assisted the FBI, none of the evidence intercepted at 98 Prince Street would be used against him, directly or indirectly. §§ II.11, III.1.D(3).

As a result of the promises made by Morris and Connolly, Flemmi went with Bulger to 98 Prince Street, and returned with a diagram of the premises and the other information that the FBI had requested. Subsequently, Bulger and Flemmi were two of the informants relied upon in the application for the warrant which was issued authorizing the installation of a bug at 98 Prince Street. *Id.*

In 1991, Morris assessed for his superiors Flemmi's value as an informant, writing that the information Flemmi provided had been utilized in six successful applications for electronic surveillance, involving, among other things, the two highest priority Organized Crime investigations in Boston. The 98 Prince Street investigation, Morris wrote, "is one of the highest priority organized crime cases in the FBI today and involves what has been characterized by [FBI Headquarters] officials as one of the most important and successful Title IIIs to have been conducted by the FBI in the past ten years." *Id.*

In 1985, at a dinner at Morris' home, in Connolly's presence, Morris again told Flemmi and Bulger that they would not be prosecuted for anything on the 98 Prince Street tapes. In addition, Morris told them, "you can do anything you want as long as you don't 'clip' anyone." § II.18.

Morris' 1981 assessment of the value of the 98 Prince Street tapes to the FBI proved to be accurate. With continued assistance from Flemmi and Bulger, the FBI used the evidence intercepted there to develop a case which secured the convictions, in 1986, of Angiulo, Zannino, and much of the rest of the leadership of the LCN in Boston. §§ II.12, II.20.

Following those convictions, Flemmi quickly contributed to the FBI's effort to incarcerate the next generation of the leadership of the LCN in Boston, including Russo, Vincent Ferrara, and Robert Carrozza. Flemmi reported that the emerging leaders of the LCN were meeting regularly in a storeroom at Vanessa's Restaurant, which was owned by Angelo "Sonny" Mercurio, who had recently been released from prison. § II.20.

The FBI targeted Vanessa's for electronic surveillance. Once again, Flemmi was tasked to obtain vital logistical information and performed his mission. Flemmi and Bulger were later two of the three sources relied upon in the application for a warrant to bug Vanessa's. Before being discovered in 1987, the bug intercepted, among other things, a dramatic extortion

of two elderly bookmakers, "Doc" Sagansky and Mo Weinstein, which Flemmi had told the FBI was being planned. As a result, the Bureau developed a powerful case against Ferrara, Carrozza, Mercurio, and a number of their confederates. *Id.*

At Connolly's request, in 1988, Flemmi began to provide information again on Salemme, who had recently been released after serving fifteen years in prison for the Fitzgerald bombing. Raymond J. Patriarca had by then succeeded his deceased father as Boss of the Family. In early June 1989, Flemmi reported that Patriarca had given his "blessing" to Salemme to assume leadership of the LCN in Boston when, as anticipated after a search warrant was executed at Vanessa's, Russo, Ferrara, and their crew were indicted. Flemmi also kept Connolly up to date on the substantial and escalating risk that the Russo faction of the LCN might soon try to murder Salemme. §§ II.28, II.29. In addition, Flemmi contributed to the FBI's successful effort to target Salemme for electronic surveillance at the Busy Bee restaurant. § II.28.

Flemmi and Bulger also contributed to the recruitment of Mercurio as a Top Echelon informant.[2] As they explained to Connolly, Mercurio was disenchanted with the LCN, close to Bulger and Flemmi, and planning to flee rather than return to prison as a result of the bugging of Vanessa's. Employing a profile provided by Flemmi and Bulger, Connolly and Ring developed Mercurio into a very valuable source, who, among other things, made it possible for the FBI to bug the LCN induction ceremony conducted on October 29, 1989, at 34 Guild Street in Medford, Massachusetts. §§ II.29, II.30.

Connolly retired from the FBI in 1990. As a result, without their knowledge, Flemmi and Bulger were closed administratively as FBI informants. Flemmi, however, was then characterized as having "furnished the Boston Division [of the FBI] very valuable information through the years regarding LCN activities." Ex. 44. The Bureau did not want to lose Flemmi and Bulger as sources when Connolly retired and, therefore, reported that it was considering options to reopen them. Although not assigned a new handler, Flemmi continued to provide, through Connolly, information that the FBI was seeking concerning the LCN. That information included the numbers of the telephones used by Salemme's brother Jack, which the Bureau wished to tap as part of its investigation of Salemme. § II.32.

As indicated earlier, Rico, Connolly, and Morris each told Bulger and Flemmi that he would be "protected" in return for serving as an informant. §§ II.2, II.5, II.18. The conduct of Rico, Connolly, Morris, and many but not all of their colleagues at the FBI, expressed even more clearly than

2. In early June 1989, Mercurio confirmed Flemmi's report that Russo and his faction of the Patriarca Family were hoping to murder Salemme before they were indicted, in part because they believed Salemme was planning to kill Ferrara. Connolly improperly provided to Shelley Murphy of *The Boston Herald* information on the imminent indictments and of Patriarca's "blessing" of Salemme's move to seize power in Boston. On June 13, 1989, *The Boston Herald* published an article by Murphy headlined, "Ex-con seen as Hub Mob's heir apparent," which consisted mainly of information that closely tracks the reports Connolly prepared concerning the information that he had received from Flemmi and Mercurio. Three days later, on June 16, 1989, Salemme was shot and Patriarca Family Underboss William Grasso was murdered. § II.29.

In view of the potential for imminent violence that Flemmi and Mercurio had described, it appears that the leak to *The Boston Herald* may have had the foreseeable effect, if not purpose, of provoking the attempt to murder Salemme. If Salemme had been murdered by the Russo faction of the Patriarca Family, the FBI would have been spared the necessity of developing a prosecutable case against him. In addition, Flemmi and Bulger would again have received one of the benefits of their bargain with the Bureau—an enhanced opportunity to profit from the vacuum created by the decimation of the LCN in Boston. *Id.*

their words the FBI's agreement to protect Flemmi.

Rico told Flemmi about other individuals who were cooperating with law enforcement so that Flemmi could be careful around them. § II.14. As described previously, in 1969, Rico advised Flemmi that he and Salemme would soon be indicted and suggested that they flee promptly. § II.2. In addition, as Rico promised, Flemmi was immediately released on bail and the fugitive charges against him were dismissed when Flemmi followed Rico's advice and returned to Boston in 1974. § II.3.

Connolly and Morris, individually and in tandem, also acted repeatedly to protect Flemmi. In 1977 or 1978, Connolly intimidated executives of National Melotone from pursuing their complaint that Bulger and Flemmi were extorting the vending machine company's customers. § II.7. In early 1979, with their sources' consent, Morris and Connolly told Strike Force Attorney Jeremiah O'Sullivan that Flemmi and Bulger were valuable informants and persuaded him, with the agreement of Thomas Daly, the FBI agent who was leading the investigation, not to indict them in a race-fix case, in part so that Bulger and Flemmi could contribute to the FBI's effort to bug 98 Prince Street. § II.9. In 1979, Morris received reports from informants that Bulger and Flemmi were shaking down bookmakers, but no investigation was conducted. § II.10.

In 1980, Connolly informed Bulger and Flemmi that the Lancaster Street Garage had been bugged as part of a Massachusetts State Police investigation or confirmed that fact for them. Also in 1980, Flemmi and Bulger were told when the bug at 98 Prince Street was installed and when it was removed so that they would not be intercepted. § II.11.

In 1982, Morris caused Connolly to tell Flemmi and Bulger that Brian Halloran was cooperating with the FBI and had implicated them in the murder of Roger Wheeler, the President of World Jai Lai. About two weeks later, Halloran was killed.[3] Morris believed that Bulger and Flemmi were responsible for Halloran's death, but did not disclose to the agents investigating it that they had been told that Halloran was cooperating with the Bureau. § II.13.[4]

3. The files relating to the Wheeler murder, and the FBI's handling of them, exemplify recurring irregularities with regard to the preparation, maintenance, and production in this case of documents damaging to Flemmi and Bulger. First, there appears to be a pattern of false statements placed in Flemmi's informant file to divert attention from his possible crimes and/or FBI misconduct. §§ II.2, II.13.

Second, contrary to the FBI's usual policy and practice, all but one of the reports containing Halloran's allegations against Bulger and Flemmi were not indexed and placed in an investigative file referencing their names. Thus, those documents were not discoverable by a standard search of the FBI's indices. Similar irregularities in indexing and, therefore, access occurred with regard to information that the FBI received concerning an extortion by Bulger of Hobart Willis and from Joseph Murray concerning the murder of Brian Halloran, among other things. §§ II.13, II.23, II.25.

Third, when documents damaging to the FBI were found by the Bureau, they were in some instances not produced to the defendants or the court at the time required by the court's Orders. For example, some documents relating to Halloran's charges against Bulger and Flemmi that should have been produced earlier were not disclosed until Rico, who was working for World Jai Lai when Wheeler was murdered, and Morris had finished testifying. The FBI agent who had discovered the documents, however, had previously given the documents to the FBI's Special Agent in Charge ("SAC") in Boston, Barry Mawn, and the Assistant Special Agent in Charge ("ASAC"), Mike Wolf, because the information that they contained "was obviously highly singular and sensitive." § II.13. Similarly, there was delayed disclosure of documents relating to John McIntyre which impeded defendants' ability to question relevant witnesses. §§ II.14, II.22, II.23.

4. About a month after Halloran's murder, Morris solicited and received through Connolly $1000 from Bulger and Flemmi. Morris used the money to buy an airplane ticket for his secretary, with whom he was romantically

In an effort to protect Bulger and Flemmi, Morris and Connolly also identified for them at least a dozen other individuals who were either FBI informants or sources for other law enforcement agencies. One of them may have been John McIntyre. McIntyre disappeared about six weeks after he told the FBI and several other law enforcement agencies that Bulger was engaged in illegal activity, and that Bulger's associate Patrick Nee was involved with the Valhalla, a ship that was captured running guns to the Irish Republican Army. McIntyre was planning to meet with Nee the night that he disappeared. § II.14.

In 1984, Connolly received reliable information that Bulger and Flemmi were engaged in an ongoing extortion of Stephen and Julie Rakes to obtain control of a liquor store that came to be known as the South Boston Liquor Mart. Connolly neither recorded the information nor conducted any investigation. He did, however, share the information that he had received with Bulger. § II.15.

As summarized more fully below, in 1984, Connolly also warned Flemmi and Bulger of an investigation targeting them that was being led by the DEA. He subsequently told them that as part of that investigation a wiretap had been placed on the telephone of their colleague Kaufman. § II.17.

In 1986, after tasking Flemmi to acquire information vital to the FBI's effort to bug Vanessa's, Connolly told him when the bug was installed so that Flemmi would not be intercepted. Connolly later told Flemmi when the bug had been removed. § II.20.

In 1988, Connolly advised Flemmi that a Boston Police Lieutenant, James Cox, would be wired and would attempt to engage Flemmi in incriminating conversation. § II.26.

Also in 1988, Morris had Connolly warn Flemmi and Bulger to stay away from John Bahorian, whose telephone was about to be tapped by the FBI in an effort to acquire evidence against Flemmi, among others. Morris also told Connolly to tell Bulger and Flemmi not to do anything to Bahorian because he "did not want another Halloran." Morris later reiterated both of these warnings directly to Bulger and Flemmi. He also told Flemmi that he could keep him out of any indictment arising from the Bahorian electronic surveillance. Although Bahorian and others were ultimately indicted, Flemmi was not. *Id.*[5]

involved, so she could visit him in Georgia, where Morris was receiving advanced training. § II.13.

5. By the time Morris told Flemmi and Bulger of the Bahorian investigation he had taken an additional $6000 from Bulger and Flemmi and felt "completely compromised" and vulnerable. §§ II.17, II.18, II.27. Morris feared that if Flemmi or Bulger were prosecuted, the nature of his relationship with them would be revealed. Therefore, Morris decided to try to eliminate Bulger and Flemmi as a threat to him. § II.27.

To accomplish this, Morris told Gerard O'Neill, a reporter for *The Boston Globe,* that Bulger was an FBI informant. Morris expected that the newspaper would publish this fact, while protecting Morris as its source. Morris also calculated that such a story would prompt the LCN to murder Bulger and probably prove fatal to Flemmi as well. *Id.*

When the FBI learned of the proposed article, Daly, who had been the lead agent in the race-fix case, called Kevin Cullen, a reporter working with O'Neill. Daly falsely denied that Bulger was an informant and that he had been protected in the race-fix case because he was an FBI source. Daly attempted to intimidate Cullen and his colleagues from reporting that Bulger was an informant by indicating that Bulger was a very dangerous person, who would not hesitate to kill anyone who wrote such a story. Daly noted that Cullen would be at particular risk because it was well known that he, like Bulger, lived in South Boston. *Id.*

The Boston Globe took the threat seriously, but was undeterred. On September 20, 1988, it published an article reporting that Bulger had a special relationship with the FBI, which had provided him protection in many investigations. Perhaps unwittingly, James Ahearn, the SAC in Boston, denied that Bulger was being protected by the FBI. *Id.*

The FBI subsequently investigated whether Morris had leaked the fact that Bulger was an

In 1988 or 1989, Connolly told Bulger that Timothy Connolly was cooperating with the FBI and would try to record conversations with Bulger and Flemmi. Bulger passed this warning on to Flemmi. § II.28.

After providing Connolly information to assist in the FBI's effort to recruit Mercurio as an informant, Flemmi was told when that initiative had succeeded. § II.29.

Following his retirement in 1990, Connolly used his continuing connections with his close friends and former colleagues on the Organized Crime squad to obtain information concerning investigations that might have resulted in charges against Bulger and Flemmi. Connolly regularly shared the information he acquired with them, including the scheduled date for the indictment of Bulger and Flemmi in this case. § II.32.

While Rico, Morris, and particularly Connolly were at the hub of the protection promised and provided to Flemmi, many of their colleagues and superiors in the FBI also contributed by their conduct to that promise and to its fulfillment.[6]

In 1977, Daly and Special Agent Rod Kennedy were told by Francis Green that Bulger and Flemmi had threatened to kill him in connection with their attempt to collect a debt, but no effort was made to develop the reluctant Green as a witness against them. § II.7. As described earlier, in 1979, Daly later joined O'Sullivan in agreeing not to charge Bulger and Flemmi in the race-fix case. § II.9.

In 1982, the Boston FBI agents aware of Halloran's cooperation did not tell their colleagues in Oklahoma City, who had expressed interest in him, that Halloran was available to be interviewed. When agents from Oklahoma City sought to interview Bulger and Flemmi, ASAC Robert Fitzpatrick successfully opposed this request, in part by falsely claiming that he had interviewed Bulger about the matter. § II.13.

In 1984, Sean McWeeney, the Chief of the Organized Crime Section at FBI Headquarters, told Connolly that the DEA

informant. Morris repeatedly lied under oath in that investigation. He remained with the Bureau until 1995, when he retired as Chief of the Training and Administrative Section at the FBI Academy in Quantico, Virginia, following a menacing telephone call that he received from Bulger, who was then a fugitive. §§ II.27, II.33.

6. The protection Bulger and Flemmi received from their FBI handlers was not unique. Like Flemmi and Bulger, Mercurio was alerted to his imminent indictment and, as expected, became a fugitive. § II.30. While he was a fugitive, Mercurio stayed in contact with Connolly. When Edward Quinn, the Supervisor of the Organized Crime squad, learned on July 5, 1991 that Mercurio was known by the FBI to be in Boston, was expected to be on a boat on Rowes Wharf on July 7, 1991, and was also understood by Salemme to have assisted the FBI in bugging the LCN induction ceremony, Quinn secretly asked Connolly, who had retired, to get a warning to Mercurio of the dangers to him. Connolly did so. As a result, Mercurio promptly fled Boston again and was not at Rowes Wharf when FBI agents went to apprehend him on July 7, 1991. § II.31.

In the course of this case the court also received convincing evidence that another informant was told by his FBI handler (who was not Rico, Connolly, Morris, or James Ring) about investigations concerning him, including wiretaps on his telephone. The court intends to provide this information to the Attorney General for whatever action, if any, she deems appropriate.

In addition, the court notes that there are striking similarities between the relationship Flemmi and Bulger had with their FBI handlers and the relationship that Top Echelon informant Gregory Scarpa, Sr. had with his FBI handler, Supervisory Special Agent R. Lindley Delvecchio, which is depicted in *Orena v. United States*, 956 F.Supp. 1071, 1085–90, 1101–04 (E.D.N.Y.1997). In *Orena*, it was found to be "likely" that "Delvecchio ... 'paid' Scarpa by passing along information, creating a two-way street for communications that was dangerous and unauthorized." *Id.* at 1087, 1090. For example, the evidence indicated that Delvecchio protected Scarpa by alerting him to investigations, advising him of electronic surveillance, identifying individuals cooperating with law enforcement, and warning him of imminent arrests. *Id.* at 1071, 1085–90, 1101–04.

was leading an investigation targeting Bulger and Flemmi. Connolly shared this information with his sources. § II.17.

In 1988, Rod Kennedy, John Newton, their supervisor Bruce Ellavsky, and ASAC Larry Potts provided Bulger and Flemmi protection concerning an ongoing extortion of Raymond Slinger. Although Slinger was willing to wear a recording device and testify against Flemmi and Bulger, after Ellavsky consulted Potts, the information that he provided was neither documented nor investigated. Instead, Bulger was told that Slinger had spoken to the FBI. § II.22.[7]

Bulger and Flemmi were also protected by the FBI in the successful investigation of drug dealer Hobart Willis and others. Although in 1986 and 1987, Ellavsky and James Blackburn, Jr. received increasingly specific information that Bulger was extorting Willis, after Connolly was consulted no investigation of Bulger was conducted. Nor was the information that the FBI had received concerning Bulger shared with the other agencies involved in the joint investigation of Willis. § II.23.

Similarly, in 1987, when James Lavin obtained photographs and other information indicating that City of Boston employees had illegally erected guardrails on the private property of the South Boston Liquor Mart, he consulted Connolly. After being advised that Bulger was a valuable informant, Lavin made no record of the information he had received and conducted no investigation. § II.24.

In 1989, Joseph Murray, an incarcerated drug dealer understood to be closely connected with Bulger, alleged that Connolly and Newton were selling information about electronic surveillance to Bulger and Flemmi. Murray also claimed to know of a witness who saw Bulger participate in the Halloran murder. However, when interviewed by Edward Quinn and Edward Clark in 1989, Murray was either not asked about his allegations concerning Connolly and Newton or his responses were not recorded in the notes and FBI report of the interview. ASAC Dennis O'Callahan, however, subsequently prepared a memorandum, which Ahearn sent to FBI Headquarters, stating that Murray's allegations were unsubstantiated. In addition, Murray evidently was not questioned in detail about the information he indicated that he had concerning Bulger's role in the Halloran murder. Moreover, the information Murray did provide was not given to the FBI agents responsible for the Halloran murder investigation or indexed in a way that would permit them to find it. Nor was any effort made to employ the willing Murray as a source of information to be used against Flemmi, Bulger, or anyone else. § II.25.

Finally, as indicated earlier, members of the Organized Crime squad kept Connolly advised of at least some developments in the investigation of Flemmi and Bulger

7. The government did not produce at the time required by this court's Orders the documents developed in an Internal Revenue Service ("IRS") investigation relating to Slinger. When they were belatedly furnished for the court's *in camera* inspection, the government argued that the defendants should not be provided the information indicating that Slinger had told the FBI that he was being extorted by Bulger, but the FBI conducted no investigation, in part because no FBI report of his interview had been located and, despite an assiduous effort, the FBI could find no agent who had interviewed Slinger. Thus, the government suggested that Slinger had not told authentic FBI agents about being extorted by Bulger. When the court ordered disclosure to the defendants of the Slinger matter, the government argued, for the same reasons, that the court should not permit evidence to be introduced concerning it. § II.22.

However, at defendants' request, the court asked John Newton, who had served on the squad which would have had responsibility for investigating the Slinger matter, and who was waiting to resume his testimony, if he was familiar with Slinger. Newton promptly acknowledged that he had participated in the interview of Slinger and understood that despite Slinger's willingness to cooperate, Newton's superiors had decided that no further investigation would be conducted because Bulger was a valuable FBI informant. *Id.*

that was initiated after Connolly retired. Connolly used that information to honor his promise to protect Bulger and Flemmi. § II.32.[8]

After Connolly retired, in about 1992, the United States Attorney's Office began a grand jury investigation of Bulger and Flemmi. Agents from the FBI Organized Crime squad participated in the investigation. At least six of the agents who testified before the grand jury knew that Bulger and Flemmi had been FBI informants. Several of them had read all or parts of Flemmi's and Bulger's informant files before testifying. In addition, contrary to the promises made to Flemmi explicitly concerning 98 Prince Street and implicitly concerning 34 Guild Street, evidence intercepted at those locations was presented to the grand juries which indicted him. § II.32.

In 1992, the FBI refused a request by the then United States Attorney Wayne Budd, and his assistants, to confirm that Bulger was an informant or to permit them to review Bulger's informant file. The prosecutors were concerned about the implications for their investigation if Bulger was, or had been, an FBI informant. Among other things, they wished to address the foreseeable issues of immunity and authorization now raised by Flemmi, whose history as an informant would have been revealed if Bulger's had been disclosed. *Id.*

On October 25, 1994, the original indictment in this case was returned against defendant Robert DeLuca. It charged him with participating in the October 29, 1989 LCN induction ceremony. The indictment was evidently obtained because the five-year statute of limitations was about to expire. DeLuca was not immediately given notice of the indictment. Rather, it was sealed and randomly assigned to this court. *Id.*

On about December 22, 1994, in anticipation of the imminent, additional charges in this case, the United States Attorney's Office again asked the FBI if Bulger was an informant, emphasizing its need to know because the government would soon have to disclose exculpatory information to Bulger and his codefendants. Once again, the FBI resisted this request. The Boston Office of the Bureau urged FBI Headquarters to continue to support its opposition to telling the United States Attorney that Bulger had been an informant. It argued that it was not expected that the issue of Bulger's informant status would be raised by Bulger or his codefendants and, in any event, that no judge would compel disclosure of his status if the issue were raised. *Id.*

However, the FBI's Principal Legal Adviser in Boston, John Michael Callahan, examined the Bulger and Flemmi files with a view to determining if they contained information which would be exculpatory in the context of their forthcoming indictment. Callahan focused on the issues raised by the United States Attorney's Office, including whether Bulger and Flemmi had been authorized to engage in conduct which would otherwise be criminal, whether they had been explicitly or implicitly promised any form of immunity, and whether Bulger and Flemmi "had provided information to the FBI which would undercut a central theme of the indictment, namely, that there was a close working relationship between La Cosa Nostra

8. It should also be recognized that agents of the FBI in Boston were not uniform in their conduct concerning Bulger and Flemmi. James Knotts earnestly sought information to support the effort of the Massachusetts State Police to bug the Lancaster Street Garage. § II.11. Leo Brunnick, Gerald Montanari, and Brendan Clearly genuinely attempted to investigate whether Flemmi and Bulger were responsible for the murders of Wheeler, Halloran, and Callahan. § II.13. SAC James Greenleaf sincerely attempted to insulate Connolly from knowledge of the DEA–FBI joint investigation of Flemmi and Bulger. § II.17. Robert Jordan and Stanley Moody truly targeted Flemmi as part of the Bahorian investigation. § II.26.

and the Winter Hill Gang." Ex. 271; § II.32.

After completing his review, Callahan concluded that Flemmi had been "at least tacitly authorized" by the FBI to participate in "illegal gambling" and "LCN policymaking." The FBI recognized that the Flemmi and Bulger informant files contained information that would be exculpatory in the context of the imminent charges. The Bureau also realized that the failure to tell the United States Attorney that Bulger and Flemmi had been informants, and to provide the prosecutors with relevant materials, "could wreck the proposed organized crime indictments scheduled to be returned on January 9, or January 10, 1995." *Id.*

Accordingly, on January 9, 1995, the FBI told United States Attorney Donald Stern, and two of his assistants who were not directly involved in the investigation, that Bulger and Flemmi had been informants. The FBI also provided what Callahan characterized as a "quick general overview of the kind of information" that he had discovered. *Id.* Stern did not, however, insist that the prosecutors handling the case, or anyone else outside the FBI, review the Bulger and Flemmi informant files before the indictment previously prepared was presented to the grand jury. Nor did Stern share the information that he had received with the prosecutors who were presenting the case to the grand jury, evidently because he recognized the risk that their disqualification might be required if they were exposed to information acquired from Bulger or Flemmi as a result of any promise of immunity. *Id.*

Thus, the indictment that was previously prepared and approved was presented to the grand jury on January 10, 1995, by prosecutors who "did not know that Bulger and Flemmi had been informants or of any assessment of the information in their informant files." Ex. 269; § II.32. Those charges were brought against six more defendants in a ninety-one-page Superceding Indictment of the original charges against DeLuca. Therefore, pursuant to the District Court's well-known procedures concerning superceding indictments, the greatly expanded case was not randomly drawn, but rather was assigned to this court. Thus, the government exercised what was in effect an option offered by the District Court's rules to select this court to preside in the case against Bulger, Flemmi, and their original codefendants, Francis Salemme, Francis Salemme, Jr., Robert DeLuca, George Kaufman, and James Martorano. § II.32.[9]

The First Superceding Indictment charged the defendants with, among other things, from 1969 to January 1995, engaging in a conspiracy to violate, and violating, the RICO statute. They were also charged with conspiring to extort, and extorting, bookmakers, from 1979 to 1994. § II.33.

With regard to the RICO charges, the alleged enterprise was neither the Patriarca Family of La Cosa Nostra nor the Winter Hill Gang, organizations that have, in effect, been proven to be RICO enterprises in prior prosecutions. Rather, the defendants were alleged to have been part of a unique association-in-fact enterprise made up of individuals who joined together to use their respective relationships with either the Patriarca Family or the Winter Hill Gang to, among other things, facilitate the unlawful activities of the enterprise and coordinate the activities of the Patriarca Family and the Winter Hill Gang. *Id.*

In view of the roles of Bulger and Flemmi as Top Echelon informants utilized to provide, and in some instances tasked to obtain, information for the FBI concerning the LCN, there is now a serious question presented concerning whether they were authorized to engage in the conduct alleged to be criminal and are, therefore, not guilty as charged. There are also questions relevant to all of the defendants regarding whether the alleged conspiracies

9. Francis Salemme, Jr. and George Kaufman have each died since being indicted.

and enterprise genuinely existed, because an agreement with someone acting as an agent of law enforcement is not a criminal conspiracy. These questions, however, must be addressed at trial. §§ II.33, III.1.A. It is the issue of immunity that the court must decide in these pretrial proceedings. §§ III.1.B, C, D(1)-(5).

All of these issues, however, present serious impediments to the successful prosecution of this case. If the United States Attorney and other officials of the Department of Justice had been properly informed before the proposed indictment of Bulger and Flemmi was presented to the grand jury, perhaps Bulger and Flemmi would not have been charged at all, or different, more narrow charges might have been fashioned in an effort to reduce the risk that their indictment would prove to be fatally flawed. It is inconceivable to this court, however, that the case against Flemmi and Bulger as indicted in January 1995, would have been brought by any reasonable prosecutor who was properly informed of their relationship with the FBI.

The pending charges against Flemmi and Bulger were brought without anyone outside the FBI reviewing Flemmi and Bulger's informant files or considering carefully the issues that they raised. It was not until July 1995, that a member of the United States Attorney's staff first read those files. The prosecutors in this case were subsequently told that Bulger and Flemmi had been FBI informants. They were not, however, then provided with any additional information because of an enduring fear that if they knew more, their disqualification would be requested, if not required. § II.33.

In August 1995, the government advised the magistrate judge, *ex parte*, that Flemmi had made potentially relevant statements to the FBI in the context of a confidential relationship over the course of many years. The government reported that Department of Justice officials would review the relevant files and would seek guidance from the magistrate judge concerning the government's discovery obligations. Although in September 1995, this court told the parties that it understood that there were no matters pending before the magistrate judge and would decide all future issues itself, the government continued to secretly seek rulings from the magistrate judge relating to the implications for discovery of Flemmi's service as an informant. *Id.*

In the fall of 1995, representatives of the Department of Justice and of the United States Attorney's Office who were not then on the prosecution team for this case, informed the magistrate judge, in sealed *ex parte* submissions, that Callahan had concluded that the FBI had "at least tacitly authorized [Flemmi's] participation" in "illegal gambling and in LCN policymaking," but that "very little in the Flemmi and Bulger files is even arguably *Brady* material." The magistrate judge agreed with this erroneous assessment. Nevertheless, the government recognized that Flemmi was entitled to certain documents that were in his informant file. As requested by the government, in December, 1995, the magistrate judge ordered that those documents be furnished to Flemmi directly, rather than to his attorney. *Id.*

The government, however, did not comply with this Order. Flemmi did not receive any of the documents the government had been directed to produce to him. If those documents had been promptly provided to Flemmi, he would, in 1995 or early 1996, have learned for the first time that the FBI had documented some of the information that he and Bulger had furnished. *Id.*

During 1995 and 1996, this court decided many pretrial matters. Among other things, Flemmi was denied bail; the government was allowed to obtain another superceding indictment to address defects identified by defendants' motion to dismiss; charges against an additional defendant, John Martorano, were brought in the

Flemmi case and later alleged instead in what the court deemed to be a separate indictment; and motions to suppress the electronic surveillance conducted at the Busy Bee restaurant were denied, after evidentiary hearings, despite proven defects in obtaining the warrants and in sealing the tapes. *Id.*[10]

In March 1997, the defendants moved for evidentiary hearings on their motions to suppress certain electronic surveillance evidence, including the electronic surveillance conducted jointly by the DEA and FBI in 1984–85, and by the FBI at 34 Guild Street in 1989. In connection with these motions, each of the defendants, with the significant exception of Flemmi, moved for disclosure of whether Bulger, Mercurio, Robert Donati, and other individuals were FBI informants. Flemmi joined in all of the motions except for the request concerning Bulger. *Id.*

With the agreement of the parties, because the motions implicated the safety of suspected informants, the submissions and hearings on the motions were initially closed to the public. The government strenuously opposed the requests for evidentiary hearings on the motions to suppress and the related requests to confirm or deny that Bulger, Mercurio and/or Donati were informants. In the course of the proceedings the court discovered the sealed submissions indicating that Flemmi and Bulger had been informants. With the consent of all counsel, the court consulted Flemmi privately. Flemmi immediately decided to disclose to his attorney and his codefendants that he had been an FBI informant. *Id.*

On May 22, 1997, the court issued a decision granting the requests for evidentiary hearings on the motions to suppress and ordering that the government reveal whether Bulger, Mercurio, and/or Donati were informants. At the request of the government, the decision was sealed to permit the Acting Deputy Attorney General to decide whether the government would comply with the Order concerning Bulger, Mercurio, and Donati, dismiss the case, or be held in civil contempt in an effort to render the decision appealable. *Id.*

It was then foreseeable that, if the government did not dismiss this case, Flemmi's history as an informant would soon be disclosed publicly and that Bulger's status as a source would be revealed by Flemmi or, since they were virtual Siamese twins, be easily inferred. In response to the May 22, 1997 Memorandum and Order, the government, in a sealed submission, confirmed that Bulger had been an informant and, contrary to its previous position, conceded that there was a proper basis for the court to have ordered evidentiary hearings on the motions to suppress the electronic surveillance conducted in 1984–85 and at 34 Guild Street. *Id.*

Demonstrating again the Department of Justice's traditional deference to the FBI in matters concerning the confidentiality of its sources, however, the Acting Deputy Attorney General declined to obey the Order to confirm or deny whether Mercurio and/or Donati were informants who had

10. The court also informed the parties of its tentative decision to exclude the testimony of Hugh Shields and other evidence concerning the 1967 murders of Edward, Walter, William Bennett, and Richard Grasso. These murders were charged for the first time in the Third Superceding Indictment as Racketeering Acts of Flemmi and Salemme. The court tentatively concluded that the government had impermissibly used the grand jury primarily or exclusively to obtain evidence to strengthen the RICO charges previously alleged by obtaining an immunity order, pursuant to 18 U.S.C. § 6001 *et seq.*, to compel the otherwise unavailable testimony of two witnesses who were essential to charging the murders as Racketeering Acts and to strengthening the evidence of the alleged enterprise. § II.33.

Although this decision is subject to possible change pending the preparation and issuance of a written memorandum and order, it may have significant practical consequences. If Flemmi and/or Salemme are convicted in this case, but not held responsible for any of the four murders, the Guideline ranges for their sentences may be reduced from life in prison to 10 to 13 years for Flemmi and eight to 10 years for Salemme. *Id.*

assisted the government concerning the electronic surveillance conducted at 34 Guild Street. At that point the May 22, 1997 Memorandum and Order was unsealed.[11] *Id.*

The defendants moved to have the Acting Deputy Attorney General held in civil contempt. Thus, he was at risk of being incarcerated until he complied with the court's Order concerning Mercurio and Donati. Nevertheless, he repeatedly refused to do so. When questioned by the court, however, Mercurio acknowledged that he had been an informant. The Department of Justice subsequently represented that the deceased Donati had not been a source. Thus, the motion to hold the Acting Deputy Attorney General in contempt became moot. *Id.*

In connection with the pending motions to suppress, Flemmi filed several increasingly specific affidavits describing promises of protection that he had received from the FBI and instances of those promises being performed. Flemmi alleged, among other things, that Morris had told him and Bulger that they could be involved in any criminal activities short of murder and would be protected by the FBI; that he had been tipped off to the indictment in this case so that he could flee if he wished to do so; and that Mercurio had also been given prior notice of his indictment and, therefore, had been able to become a fugitive. *Id.*

In late June 1997, the court ordered that the government disclose to the defendants information relating to the pending motions. Thus, a great many documents which the FBI expected would never be seen by anyone outside the Bureau were produced and, in many instances, made part of the public record.[12] *Id.*

In addition, pursuant to Federal Rule of Criminal Procedure 12.3(a)(1), Flemmi was required to provide notice of his intention to assert as a defense at trial that conduct alleged to be criminal was actually authorized by the FBI. At the government's request, the defendants were also ordered to file their foreseeable motions to dismiss and supporting affidavits, so that any hear-

11. After the May 22, 1997 Memorandum and Order was issued, but before it was made public, the FBI announced for the first time that it was offering a $250,000 reward for Bulger's capture. § II.33. However, the evidence in this case raises questions concerning whether the FBI has consistently made its best efforts to apprehend Bulger.

In 1995, after Bulger fled, Charles Gianturco was put in charge of the Bulger fugitive investigation. *Id.* In 1978, Bulger had warned Connolly of the planned, imminent murder of Charles Gianturco's brother, Nick, who was then operating as an FBI undercover agent. Bulger was later credited with saving Nick Gianturco's life. Nick Gianturco dined with Bulger and Flemmi on several occasions, and was among the FBI agents who exchanged gifts with them. § II.7.

Bulger had returned to the Boston area in late January 1995 to drop off his companion Theresa Stanley. Although it was widely known that she had been traveling with Bulger and was back in Boston, the FBI did not contact her until April 1996, fifteen months after her return. When finally interviewed, Stanley provided considerable information concerning her travels with Bugler, but that information was dated and of diminished value. § II.33.

Connolly was not interviewed in the Bulger fugitive investigation until March 21, 1997, more than two years after Bulger fled. Connolly made several statements that should have been included in the report of that interview. Connolly reported that Morris had told Bulger and Flemmi "that they were so good, he could get them off for anything short of murder." Connolly also said that he hoped that "Bulger was never caught." Charles Gianturco did not, however, record these statements in his report of Connolly's interview. *Id.*

Several weeks before the issuance of this Memorandum and Order, in August 1999, the FBI for the first time placed Bulger on its list of Ten Most Wanted fugitives.

12. As indicated earlier, however, the FBI also failed to produce certain damaging documents in a timely manner, including documents concerning Halloran's statements implicating Bulger and Flemmi in the Wheeler murder, documents relating to McIntyre's allegations regarding Bulger and Flemmi, and documents relating to Slinger. §§ II.13, II.14, II.22.

ings granted on those motions could be conducted in conjunction with the hearings on the related motions to suppress. The court allowed Flemmi's request for an evidentiary hearing on his motion to dismiss because of purported promises of immunity. It denied, without prejudice to later consideration, the defendants' request for evidentiary hearings on their motions to dismiss on other grounds, including alleged outrageous government misconduct constituting a denial of their rights to Due Process.

The hearings ordered were held throughout 1998. They generated over 17,000 pages of transcripts and 276 exhibits. The court's findings of fact are detailed in this Memorandum. Its conclusions of law are also described in detail, and are summarized below.

2. *The Motion to Dismiss Based on Immunity*

Flemmi's motion to dismiss based on an alleged promise of general immunity from prosecution is not meritorious. § III.1.C. Further proceedings will be required, however, to determine whether Flemmi is entitled to dismissal because evidence that he was properly promised would not be used against him was presented to the grand juries which returned the indictments in this case. § III.1.D.(2)-(4). As summarized below, it would also have been illegal for evidence derived from the 1984–85 electronic surveillance to have been presented to those grand juries. Future proceedings will also be required to determine whether this occurred. If evidence derived from the 1984–85 electronic surveillance was presented to the grand juries that indicted Flemmi, the court will have to decide if that unlawful use of intercepted evidence requires, or contributes to requiring, dismissal of the case against Flemmi. § III.2.F. In addition, the further hearings will permit the court to identify the evidence which must be excluded at trial if the case against Flemmi is not dismissed.

Flemmi did not have an agreement that he would not be prosecuted in return for his service as an FBI informant. The FBI agents primarily responsible for dealing with Flemmi, by word and deed, for thirty years, promised Flemmi protection in return for the valuable information that he was providing. The conduct of many other members of the FBI, including at least three ASACs, and the Chief of the Organized Crime Section at FBI Headquarters, contributed to creating, communicating, and performing the promise of protection to Flemmi. Flemmi reasonably relied on the FBI's promise of protection and, in return for it, provided very valuable assistance to the government in its war against the LCN and other matters. § III.1.C.

Flemmi was not, however, explicitly or implicitly promised immunity from prosecution. The term immunity was never used in conversation with him. More importantly, Flemmi did not understand that the government, or any of its agents, had agreed that he would not be investigated by the FBI, or any other law enforcement agency, or not be prosecuted. Rather, he expected that the FBI would overlook some of his criminal activity, provide him information concerning any investigations that were conducted, and warn him of any imminent charges against him of which it learned. The FBI performed its part of the bargain. Thus, it is not necessary or appropriate to decide if the agents entering into this agreement were authorized to do so, or whether the agreement was not valid because it violated public policy or because it attempted to provide immunity for future criminal conduct. *Id.*

In addition, the mere fact that Flemmi was an informant does not mean that nothing that he said to the FBI could be used against him in any way. § III.1.D(1). However, the FBI's promise to maintain the confidentiality of the fact that Flemmi was a source also constitutes an enforceable promise not to use statements he made against him if disclosure of those statements would, as a practical matter,

reveal that Flemmi had been an informant. § III.1.D(2).

Therefore, Flemmi's statements that would identify him as an informant could not have properly been presented to the grand juries which indicted him. It is doubtful that any such statements were used in this fashion. However, further evidence will be required to resolve this question. *Id.*

In addition, in the absence of a defense of public authority, or any other defense requiring introduction by Flemmi of some of his communications with the FBI, his statements to its agents that would identify Flemmi as an informant would not be admissible at trial. However, if this case is tried and, as represented, Flemmi relies on some of his communications with the FBI, the court will, pursuant to Federal Rules of Evidence 106 and 611, permit the government to offer other statements of Flemmi to the Bureau in order to assure that the jury is presented with an appropriate record on which to decide fairly the merits of his defenses. *Id.*

Flemmi was expressly and implicitly promised that in return for his contributions to the bugging of 98 Prince Street nothing intercepted there would be used to prosecute him. This promise is enforceable. § III.1.D(3).

The Attorney General has the authority to investigate crime. As part of that power, he has the authority to utilize informants and to provide them promises of immunity informally, rather than conferring it by the process established by statute. *Id.*

The Attorney General's power to investigate violations of federal law has been generally delegated to the FBI. This authority inherently includes the power to develop and utilize informants. As a corollary of this, the Bureau has been delegated the power to promise informants both confidentiality and informal immunity. *Id.*

There is no statute, regulation, order, or other legal limitation that prohibits the FBI from promising a source that any information that he provides will not be used against him, directly or indirectly. When the Attorney General wished to restrict the power of prosecutors and investigators to promise cooperating witnesses entry into the Witness Protection Program, he issued a public order that expressly stated that they were not authorized to do so. That restriction has been enforced by the courts. The Guidelines developed by the Attorney General and incorporated in the FBI Manual do not constitute a comparable prohibition. The Guidelines are neither public documents nor legally enforceable. In addition, while they have at relevant times stated that the FBI "should not" promise its informants immunity, they did not provide that it could not do so. §§ II.6, III.1.D(3).

Moreover, the Attorney General has not directed that the FBI consult a prosecutor before promising an informant immunity. To do so would be inconsistent with the long recognized right and obligation the FBI has to maintain the secrecy of its sources.[13] *Id.*

According to the testimony of the present and former members of the FBI, including its former Acting Deputy Director Potts and former SAC Greenleaf, the supervisor of an informant's handler was generally the FBI's chief decisionmaker regarding informants. The SACs general-

13. The cases in which informal promises of immunity made by agents without the involvement of any prosecutor have been held to be unenforceable are distinguishable from the instant case in decisive respects. They each involved individuals who were under active investigation or arrest and asked to cooperate in a discrete matter, rather than persons, like Flemmi, approached and cultivated to serve as long term informants. In addition, in those cases relief was denied in part because the government did not use the defendants' statements against him, directly or indirectly. Thus, in contrast to Flemmi, it was found that the defendant had not relied to his detriment on the law enforcement agent's promise. § III.1.D(3).

ly relied completely on the informant's handler and his supervisor for making all decisions and recommendations regarding the informant, including those for which the SAC was responsible under the Guidelines. In Potts' experience, FBI Headquarters never reversed a recommendation from a field office that an individual be used, or continued, as an informant. Moreover, there is no evidence that FBI Headquarters ever inquired about what promises had been made to informants generally or to Flemmi particularly. §§ II.6, II.16, III.1.D(3).

In these circumstances, Morris and Connolly had implied, actual authority to promise Flemmi that if he assisted the FBI's effort to bug 98 Prince Street, nothing intercepted there would be used against him.[14] Therefore, it was impermissible for the government to present evidence intercepted at 98 Prince Street, or any information derived from that evidence, to the grand juries that indicted Flemmi. *Id.*

Similarly, Flemmi had an enforceable agreement, implied in fact from the promise concerning 98 Prince Street and the conduct of the government, that there would be no direct or indirect use against him of the intercepted evidence that he helped the FBI obtain at Vanessa's and 34 Guild Street.[15] Therefore, it was improper for the government to present evidence intercepted at 34 Guild Street to the grand juries which indicted Flemmi. It would also have been improper to provide to those grand juries any evidence derived indirectly from the interceptions at 34 Guild Street or Vanessa's. *Id.*

The conclusion that Flemmi had received enforceable promises of immunity concerning the electronic surveillance conducted at 98 Prince Street, Vanessa's, and 34 Guild Street is not qualified by the fact that the FBI may not have been aware of all of his criminal activity. The Bureau did not generally ask an informant about his own criminal activity and did not expect him to divulge the details of it. The FBI was not misled, however, with regard to the nature of Flemmi and Bulger's crimes, including the fact that they were likely murderers. Indeed, on three occasions Morris attempted to obtain the assistance of reluctant individuals by sending them the message that they would be in danger of being murdered by Bulger if they did not cooperate with the FBI.[16] §§ II.4, II.16, II.33, III.1.D(3).

In addition, the fact that Morris accepted $7000 from Bulger and Flemmi does not render the immunity promised to Flemmi concerning the electronic surveillance conducted at 98 Prince Street, Vanessa's, and 34 Guild Street unenforceable as violative of public policy. An agreement to provide immunity in exchange for information does not inherently, or typically, involve a cooperative violation of the law. No payments were made to Morris before the initial promise concerning 98 Prince Street. Nor were any later payments directly related to the promises at issue. § III.1.D(3).

14. If, contrary to this court's conclusion, the FBI generally, and Morris and Connolly particularly, lacked the authority to promise Flemmi the immunity at issue here, it would be necessary for the court to decide whether their improper promises of immunity induced Flemmi to involuntarily make statements that the government proposes to use to achieve his conviction. If such statements were involuntary, neither they nor any evidence derived from them would be admissible at trial against Flemmi. However, Flemmi would not be entitled to any remedy for the misuse of such statements before the grand jury. § III.1.D(5).

15. Because Flemmi was neither intercepted at Vanessa's nor had a possessory interest in the premises, he is not an "aggrieved person" with standing to litigate a claim that the electronic surveillance conducted at Vanessa's violated Title III.

16. The three incidents involved Eddie Miani, Buckey Barrett, and an innocent individual who was erroneously suspected of kidnapping 11-year-old Sara Pryor. § II.4

The court does not by any means suggest that the payments to Morris were proper or should be condoned. However, the FBI's bargain with Flemmi and Bulger was based on the very valuable assistance that they provided to the government. The payments that Bulger and Flemmi made to Morris were only incidental to a relationship that was important to the FBI for valid, professional reasons. Moreover, they were an expression of the sense of a friendship between the FBI and its sources which the Bureau deliberately created and cultivated. In the circumstances, it would be fundamentally unfair to deprive Flemmi of the immunity that he was legitimately promised, and on which he reasonably relied, because of the payments Morris initially sought and ultimately received. *Id.*

Accordingly, further hearings are necessary to determine if the indictment of Flemmi must be dismissed because it was impermissibly secured based upon the direct and possibly indirect use of information Flemmi provided pursuant to promises of immunity. In order to avert dismissal, the government will be required to prove that the information that it presented to the grand juries to obtain the indictments of Flemmi was not tainted by showing that the government had an independent, legitimate source for that evidence. If this burden is not borne, the case against Flemmi will have to be dismissed unless the government proves that its errors were harmless beyond a reasonable doubt. If the government is able to satisfy its heavy, but not necessarily insurmountable, burden of proving that the grand jury proceedings were not fatally infected, the court will have to decide if Due Process nevertheless requires dismissal in order to provide Flemmi fundamental fairness concerning the express and implied promises that he would not be prosecuted based on evidence intercepted at 98 Prince Street, Vanessa's, or 34 Guild Street, and also decide if Flemmi is entitled to dismissal as an exercise of the court's supervisory powers. § III.1.D(4).

In connection with the further hearings, it is likely, but not certain, that it will be necessary for the government to produce to the defendants and the court the transcripts of the grand jury proceedings that resulted in the indictments of Flemmi so that the effect of evidence improperly presented can be assessed. As indicated earlier, issues to be addressed in those hearings will not be limited to the influence of the direct use of the evidence intercepted at 98 Prince Street and 34 Guild Street. Questions of the possible indirect use of that evidence, and of the evidence intercepted at Vanessa's, will also have to be considered. Those questions include whether the monitored conversations produced investigative leads that generated evidence which was presented to the grand juries, and whether the testimony of FBI witnesses who read the informant files of Flemmi, and perhaps Bulger, was shaped by information that the FBI acquired as a result of a promise of immunity. The court may also be required to decide whether the present prosecutors, who have now been exposed to tainted evidence, may participate in the preparation and conduct of Flemmi's trial if the case against him is not dismissed. *Id.*

3. *Flemmi's Motion to Suppress the 1984–85 Electronic Surveillance*

Flemmi has moved to suppress the evidence resulting from the 1984–85 electronic surveillance targeting him and Bulger. The facts relating to this motion are set forth in § II.17. Although the law is not clear as to the standard that should be applied in deciding Flemmi's motion to suppress, that uncertainty is not material. § III.2.B–D. Under either of the arguably applicable standards, Flemmi's motion is meritorious. § III.2.E.

Accordingly, although evidence intercepted as a result of 1984–85 electronic surveillance was not presented to the grand juries that indicted Flemmi, further

proceedings are necessary to determine whether the case against him must be dismissed, in whole or in part, because evidence derived from that electronic surveillance was utilized to secure his indictment. Those proceedings will also permit the court to identify the evidence relating to the 1984–85 electronic surveillance which must be excluded if the case against Flemmi is tried. § III.2.F. The factual and legal basis for the resolution of the motion to suppress the 1984–85 electronic surveillance is summarized as follows.

In 1984 and 1985, the DEA and the FBI were authorized by a series of court orders to engage jointly in electronic surveillance targeting Bulger and Flemmi. The investigation was initiated by the DEA. The agents involved preferred not to collaborate with the FBI, primarily because they, and the Assistant United States Attorney working with them, believed that Flemmi and Bulger were FBI informants and that the Bureau would compromise the confidentiality of the investigation to protect its sources. The Bureau preferred not to participate because it viewed the endeavor as doomed to fail and expected that, as with the Lancaster Street Garage investigation, the FBI would be blamed. The two agencies became reluctant collaborators, however, when it was recognized that the FBI's participation was essential if judicial authorization to conduct electronic surveillance was to be sought and received because most of the information to be relied upon in the applications to establish probable cause involved gambling and loansharking—crimes that the FBI rather than the DEA had the federal responsibility to investigate. §§ II.17, III.2.E.

The applications for the court orders authorizing the electronic surveillance of Bulger, Flemmi, Kaufman, and others not only relied heavily on the evidence cited to establish that there was probable cause to believe that they were committing offenses within the investigatory jurisdiction of the FBI. They also clearly conveyed the impression that the FBI would utilize any evidence obtained to attempt to develop prosecutable cases concerning matters within its jurisdiction. The Bureau, however, had no intention of doing so. The FBI was well aware, from information provided by Bulger, Flemmi, and others, that Bulger and Flemmi were engaged in illegal gambling, loansharking, and extortion. The FBI considered such criminal conduct to be essential to maintaining the credibility necessary for Bulger and Flemmi to continue to obtain and provide vital information on the LCN and others. The FBI was committed to honoring its promise of confidentiality to Flemmi and Bulger by not disclosing that they were sources, explicitly or implicitly. Explaining to the DEA, the prosecutors, or the court that the Bureau was not interested in obtaining or using any intercepted evidence of their criminal conduct would have effectively confirmed they were informants. *Id.*

Ring, who had primary responsibility for the matter at the FBI, felt that Flemmi and Bulger had no immunity and would be "on their own" if the DEA could develop a prosecutable narcotics case against them based on the electronic surveillance. Armed with information provided by colleagues, however, Connolly contributed to assuring that the DEA's efforts would not succeed by alerting Bulger and Flemmi to the investigation generally and to the electronic surveillance particularly. *Id.*

Blinded by its determination not to confirm for the United States Attorney's Office or the DEA the accuracy of their understanding that Bulger and Flemmi were FBI informants, the FBI recklessly disregarded the government's legal obligation of candor to the court when applying for authority to conduct electronic surveillance in what was represented to be a joint investigation. At the same time, believing that Bulger and Flemmi were FBI informants, but accepting that the FBI would not confirm or discuss their status, the DEA and the United States Attorney's Office recklessly disregarded their legal obligation to seek from the FBI informa-

tion that, if shared with them, would have resulted in the applications for electronic surveillance now at issue not being filed, let alone approved by the court. The DEA and United States Attorney's Office also acted with reckless disregard for the truth when they filed applications for warrants that in effect represented that electronic surveillance was necessary to obtain evidence that the FBI would use in a Title 18 investigation of Bulger, Flemmi, and others because the prosecutor who was the applicant and the DEA agent who was the affiant did not believe that the FBI would attempt to do so. Rather, they understood that Bulger and Flemmi were FBI informants who the Bureau wished to protect rather than prosecute. *Id.*

As a result, the applications for the 1984–1985 electronic surveillance targeting Bulger and Flemmi failed to include the "full and complete statement" describing the necessity for electronic surveillance that was required by 18 U.S.C. § 2518(1)(c). More specifically, the applications should have included certain material facts about the targets, including the following. As informants Bulger and Flemmi had made statements about their illegal gambling and loansharking that the government now claims can be used as evidence against them. A review of their files would indicate to the FBI that they were tacitly authorized to engage in such activities. Therefore, the conduct which the government was seeking authority to utilize a wiretap to investigate may not have been criminal. In any event, the FBI did not intend to use any evidence generated by the electronic surveillance in an attempt to develop a prosecutable case against its sources or any of the other named targets, including Kaufman. Moreover, the FBI agent who was most knowledgeable believed that Bulger and Flemmi were not involved in narcotics crimes, but may have mistakenly given that impression while seeking information for the Bureau. No reasonable judge would have granted any request to target Bulger and Flemmi based on an application containing this information. *Id.*

In fact, if properly informed, the Assistant Attorney General would not have authorized the filing of the application for a warrant at all.[17] The Department of Justice would not have allowed the submission to the court of an application that it knew was false and misleading. Nor would it have, over the FBI's inevitable objection, permitted disclosure to the court, and possibly to potential defendants, of the fact that Bulger and Flemmi were FBI informants. The testimony of DEA SAC Robert Stutman, among other things, indicates that if the DEA had been candidly consulted, it would have deferred to the FBI's interest in Bulger and Flemmi, and abandoned its investigation. *Id.*

17. 18 U.S.C. § 2516(1) requires that the Attorney General or certain other high ranking officials of the Department of Justice, including the Assistant Attorney General in charge of the Criminal Division, authorize an application to the court for a warrant to conduct electronic surveillance. This provision is solely statutory in origin and is central to the electronic surveillance statute. The Supreme Court has held that § 2516(1) requires the "informed judgment" of a high ranking official before an application is filed in order to be "doubly sure" that electronic surveillance is employed with restraint. *United States v. Giordano,* 416 U.S. 505, 515, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974); § III.2.B.

Flemmi correctly contends that the Assistant Attorney General was deprived of the information necessary to perform his statutory function properly and, as a result, an application which would not have been authorized if the Assistant Attorney General had been fully informed was submitted to the court. Existing jurisprudence, however, suggests that there is not a judicial remedy for such a subversion of Title III. Instead, it has been held that the prospect of political accountability, evidently including Congressional oversight, is expected to provide sufficient deterrence and potential structural remedies if § 2516(1) does not operate as intended. While the reasoning of such decisions is questionable in the circumstances of this case, the court has not relied upon § 2516(1) in finding Flemmi's motion to suppress to be meritorious. § III.2.B.

If, however, an application had been filed seeking authority to intercept Bulger and Flemmi to obtain evidence of drug offenses only, the request concerning Bulger would have been obviously unmeritorious because there was no evidence to establish probable cause to believe that he would be intercepted discussing anything on Kaufman's telephone. In addition, the request concerning Flemmi would have been denied because there was not probable cause to believe that Flemmi would be discussing narcotics matters on Kaufman's telephone. Nor was there probable cause to believe that Kaufman would be discussing drug offenses with anyone.

In view of the foregoing, Flemmi's motion to suppress is meritorious regardless of whether it is decided pursuant the standard that the Supreme Court enunciated in *United States v. Giordano*, 416 U.S. 505, 515, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), for violations of central provisions of 18 U.S.C. § 2510 *et seq.* ("Title III"), or pursuant to the judicially crafted exclusionary rule for violations of the Fourth Amendment established in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). In *Franks*, the Supreme Court held that when constitutionally required probable cause is in question in a case not involving Title III, a defendant must make two showings to obtain suppression based upon possible government misconduct: first, that the information at issue was known by the government to be false or was presented with reckless disregard for its truth; and second, that the information was material to the decision to issue the warrant. 438 U.S. at 156, 98 S.Ct. 2674; § III.2.C.

The *Franks* standard is easier for the government to meet than the standard applied by the Supreme Court in deciding the motion to suppress electronic surveillance evidence in *Giordano*. In *Giordano*, the Supreme Court held that:

> Congress intended to require suppression where there is failure to satisfy any of those statutory requirements [of Title III] that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.

416 U.S. at 527, 94 S.Ct. 1820. Such provisions were characterized as "central" to the Title III statutory scheme. *Id.* at 528, 94 S.Ct. 1820. Section 2518(1)(c) concerning the necessity of electronic surveillance is a central provision of Title III. §§ III.2.C and E.

If a central provision of Title III is ignored or otherwise violated, suppression must be ordered unless the government proves that the purpose which the particular procedure was designed to accomplish has been satisfied in spite of the error. *Id.* Thus, in *Giordano*, the Supreme Court in effect found legislative intent to require suppression without regard to the reason for the violation if certain statutory provisions of Title III not rooted in the requirements of the Fourth Amendment are not satisfied. In contrast, under *Franks*, even a material error would not justify suppression unless it is proven that the government filed the false or misleading application for a warrant intentionally or with reckless disregard for its truth. *Id.*

Since *Franks* was decided, the Court of Appeals for the First Circuit has on several occasions, without analysis or explanation, employed the *Franks* standard to decide motions to suppress electronic surveillance evidence alleging failures to meet either the probable cause or necessity requirements of Title III or its Massachusetts counterpart. However, at other times, the First Circuit has stated or indicated that the judicially crafted exclusionary rule does not apply in Title III cases. Some, but not all, other courts have utilized the *Franks* test to decide attacks on warrants for electronic surveillance, including the necessity requirements of § 2518(1)(c). *Id.*

In 1991, in *United States v. Ferrara*, 771 F.Supp. 1266, 1298–1319 (D.Mass.1991), this court applied the *Franks* standard in denying the motion to suppress the tape-recording of the LCN induction ceremony that was intercepted at 34 Guild Street. This approach was predicated on the premise that the judicially crafted exclusionary rule is applicable to provisions of Title III that codify requirements of the Fourth Amendment and that § 2518(1)(c) is such a provision. § III.2.C.

This court continues to find that § 2518(1)(c) is constitutional in origin. § III.2.D. However, the court is now persuaded that the statutory exclusionary rule, as interpreted in *Giordano* and its progeny, rather than the *Franks* test should be applied when a central provision of Title III has been violated. § III.2.C. Nevertheless, the court has analyzed the motion to suppress the 1984–85 electronic surveillance under both the *Franks* and *Giordano* standards.

Suppression of the 1984–85 electronic surveillance is required under *Franks* because the government filed a series of materially false and misleading applications with at least reckless disregard for the truth. Suppression is also necessary pursuant to *Giordano* because § 2518(1)(c), a central provision of Title III, was violated and the purpose of that provision was not satisfied in spite of the violation. § III.2.E.

As described earlier, further proceedings will be necessary to decide the implications of the meritorious motion to suppress the 1984–85 electronic surveillance for Flemmi's motion to dismiss and, if the case is not dismissed, to determine the evidence that must be excluded at Flemmi's trial. § III.2.F.

4. *DeLuca's Motion to Suppress Concerning the LCN Induction Ceremony*

Defendant Robert DeLuca was overheard and tape-recorded participating in the LCN induction ceremony conducted at 34 Guild Street on October 29, 1989. Prior to the Supreme Court's December 1, 1998 decision in *Minnesota v. Carter*, 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998), the government did not contend that DeLuca lacked standing to seek to suppress the evidence at 34 Guild Street. Thus, the evidentiary hearing was conducted on the premise that the court would have to decide the merits of DeLuca's motion to suppress that evidence.

The facts relating to the application for the warrant authorizing "roving" electronic surveillance which was used to bug 34 Guild Street were also relevant to the merits of Flemmi's motion to dismiss. As indicated earlier, Flemmi was one of the four sources relied upon in that application. In addition, the manner in which Ring and Connolly dealt with Mercurio concerning 34 Guild Street was sufficiently distinctive to be probative of Flemmi's claim that he was promised and provided protection as well.

The facts concerning the electronic surveillance of 34 Guild Street are summarized as follows. When Mercurio became an informant, with his consent, the FBI and the Department of Justice successfully sought to have his parole terminated early in part to permit him to be released on bail when he was indicted with other members of Russo faction of the LCN. § II.29.

In the summer of 1989, Connolly and Ring learned from Mercurio and others that there would soon be an LCN induction ceremony. The FBI was very interested in intercepting that ceremony. Ring and Connolly expected that Mercurio would be vital to any effort to do so. §§ II.29, II.30, II.31.

At about the same time, reliable informants advised the FBI that Mercurio had set Salemme up to be shot. Under the Attorney General's Guidelines, this information should either have been provided by the Boston office of the FBI to state and local law enforcement officials, or have been submitted to officials at FBI Head-

quarters and to the Assistant Attorney General. If the Guidelines had been followed, the Assistant Attorney General would have had the responsibility of deciding whether Mercurio would be continued as a Top Echelon informant or closed and subject to investigation and prosecution. The Guidelines, however, were ignored and neither disclosure nor consultation occurred. *Id.*

In the fall of 1989, Mercurio was providing increasingly specific information concerning the forthcoming LCN induction ceremony. The FBI recognized that intercepting such a ceremony for the first time would be of immense value in future prosecutions and Congressional hearings. Ring very much wanted to obtain a warrant to bug that ceremony, but not at the risk of revealing Mercurio's status as an informant—a risk that would have been created if the application for the warrant had mentioned either the ceremony or its location because so few members of the LCN would have had access to that information. § II.30.

To resolve this dilemma, Ring wished to seek a warrant to conduct roving electronic surveillance of oral communications at multiple, unidentified locations. Title III requires that to obtain a warrant for a roving bug the government must submit to the court "a full and complete statement as to why [it] is not practical to specify the place to be bugged." 18 U.S.C. § 2518(11)(a)(ii). If it is shown that it is impractical to specify where the roving authority will be employed, the place or places to be bugged need not be described in the application or the warrant. *Id.*

Ring engaged Strike Force Chief Diane Kottmyer, who knew that Mercurio was an informant because of the Strike Force's role in having his parole terminated early, and agent Walter Steffens, Jr. to prepare the necessary application and supporting affidavit. However, Ring consistently withheld from them certain information that he and Connolly were receiving from Mercurio. That information that would have provided Kottmyer and Steffens clear notice that it was false and misleading for the government to represent on the evening of October 27, 1989, that a warrant for a roving bug was necessary because it was impractical to specify the location to be bugged. In addition, Ring did not tell Kottmyer and Steffens that, contrary to the claim in the documents they were drafting, the FBI did not intend to utilize the warrant that it was seeking more than once. *Id.*

Because Ring and others were not candid with Kottmyer and Steffens, on October 27, 1989, a false and misleading application and affidavit were submitted in a successful effort to obtain a warrant for a roving bug. That warrant was used to intercept the LCN induction ceremony at 34 Guild Street on October 29, 1989. *Id.*

If an honest and accurate application had been filed, it would have revealed the following. At all times prior to October 29, 1989, the FBI, personified by Ring, knew that there would be at least one informant, Mercurio, at the ceremony. The FBI sought a warrant for a roving bug that could be used at multiple, unidentified locations, rather than authorization to bug 34 Guild Street alone, in order to protect the identity of its sources. The FBI had no intention of using that warrant to intercept conversations more than once. Rather, at the time the application was drafted the FBI intended to arrest the participants immediately after the ceremony. The FBI had substantial, corroborated, "rock solid" information that the ceremony would be held at 34 Guild Street several hours before Kottmyer and Steffens met with the judge to obtain the warrant authorizing roving surveillance based upon the representation that it was then "impractical" to identify the location to be bugged. *Id.*

The FBI made no effort to obtain the testimony of Mercurio about the induction ceremony. Nor did the FBI ask him to record the ceremony, which would have

obviated the need for a court ordered bug. The FBI did not try to persuade Mercurio to cooperate in this fashion by threatening him with possible prosecution for his role in the Salemme shooting, as well as the Sagansky–Weinstein extortion and other criminal activity intercepted at Vanessa's. Instead, Ring and Connolly confirmed Mercurio's understanding that the Mafia induction ceremony had been bugged. In addition, they caused him to understand that his indictment was imminent and permitted him to flee, as they expected he would. *Id.*

As a result, the FBI was relieved of the recognized risk that the prosecution of Russo, Ferrara, Carrozza, and their codefendants would be jeopardized by the issues that would have been presented as a result of Mercurio's dual status as a codefendant and an FBI source concerning the induction ceremony, among other things. Mercurio's flight also masked for many years the violation of the Attorney General's Guidelines committed by Ring and his colleagues when they unilaterally decided to continue Mercurio as an informant despite what they believed to be his involvement in the Salemme shooting. *Id.*

The foregoing facts would present serious questions for the court to resolve if DeLuca had standing to litigate his motion to suppress the electronic surveillance conducted at 34 Guild Street. Among other things, it might make a difference whether *Franks* or *Giordano* establishes the applicable standard for deciding that motion. However, following the December 1, 1998 decision in *Carter,* the government argued for the first time that DeLuca lacks the standing necessary to maintain his motion to suppress. Upon careful consideration of the parties' supplemental submissions and oral arguments on this novel issue, the court finds that the government's position is correct. § III.4.

In essence, *Carter* indicates that the bugging of the LCN induction ceremony did not violate DeLuca's Fourth Amendment rights because as a visitor to 34 Guild Street, who did not stay over night, and who engaged in only business discussions, he did not have an expectation of privacy that society would today deem to be justified. In addition, although the matter is not perfectly clear, the court finds that when Title III was enacted it was intended that evolving, contemporary conceptions of reasonable expectations of privacy be applied in deciding whether an intercepted conversation constitutes an "oral communication" as defined in 18 U.S.C. § 2510(2). In view of the decision in *Carter,* the court is compelled to find that DeLuca did not at 34 Guild Street have a justified expectation that he would not be intercepted and, therefore, did not engage in what the statute defines as an "oral communication." Thus, DeLuca is not an "aggrieved person" as defined in § 2510(11). Accordingly, he does not have standing, under § 2518(10)(a), to seek suppression for an alleged violation of Title III concerning the electronic surveillance conducted at 34 Guild Street. Therefore, his motion to suppress must be denied.

As DeLuca's motion to suppress is being denied for lack of standing, it is not necessary for the court to address the merits of the issues he has sought to litigate. If this court's decision concerning standing is appealed and reversed, the Court of Appeals for the First Circuit, or the Supreme Court, may in the process also clarify whether the standards of *Franks* or *Giordano* should be employed in deciding DeLuca's motion to suppress. Therefore, it is most appropriate for this court to decline to analyze the merits of DeLuca's motion at this time. The court will issue the additional necessary findings of fact and conclusions of law if its decision concerning DeLuca's lack of standing is reviewed and this case is remanded.

5. *Conclusion of Summary*

In view of the foregoing, Flemmi's motion to dismiss based on a purported promise of immunity from prosecution is being denied. DeLuca's motion to suppress the

electronic surveillance conducted at 34 Guild Street is also being denied.

Flemmi's motion to suppress the 1984–85 electronic surveillance is meritorious. He was also properly promised that if he assisted the FBI none of the evidence intercepted at 98 Prince Street, Vanessa's, or 34 Guild Street would be used against him, directly or indirectly. At least with regard to 98 Prince Street and 34 Guild Street, that agreement was violated.

Further proceedings are required to determine the remedies to which Flemmi is entitled as a result of his meritorious motions, including whether dismissal of the case against him is required. These proceedings will be conducted before the court enters any Order that may be appealable by the United States pursuant to 18 U.S.C. §§ 2510(10)(b) or 3731.

* * * * * *

This case has been pending for almost five years. The defendants' motions to dismiss and to suppress have been the subject of intensive litigation for more than two years. Nevertheless, the merits of Flemmi's motion to dismiss cannot yet be decided. Thus, the present posture of this case may be disappointing to the parties and to the public, as it is, frankly, to the court. However, it should be recognized how this case has come to this point and the spirit in which it will proceed if it must be litigated to a conclusion.

Often the investigation of crime must be secret in order to be effective. This is particularly true when that investigation targets a dangerous and highly secretive organization like the LCN.

Informants are valuable, if not vital, assets in combatting serious crime. The government's ability to promise an informant confidentiality is often important to securing his cooperation and protecting his safety. In recognition of this, the FBI has historically been permitted to operate its sources in secret, even from officials of the Department of Justice.

However, as Attorney General Harlan Fiske Stone, who later became the Chief Justice of the United States, warned in 1924, when he established the FBI:

> There is always the possibility that a secret police may become a menace to free government and free institutions because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood.[18]

In the mid–1970's, it was discovered that such abuses by the FBI had occurred over many years. They included FBI efforts to "neutralize" Dr. Martin Luther King as an effective civil rights leader and " 'dangerous and degrading tactics' " to disrupt lawful political activity of American citizens.[19]

As information about these abuses began to emerge, FBI Director Clarence Kelly realized that even he had been deceived by subordinates seeking to cover-up misconduct. "Admitting [in 1976] that some FBI activities had been 'clearly wrong and quite indefensible,' he declared that the Bureau should never again occupy the 'unique position that permitted improper activity without accountability.' " [20]

Anticipating the wisdom of this observation, in 1975, Attorney General Edward H. Levi began the development of Guidelines for the FBI's use of informants, among other things. As indicated earlier, those Guidelines did not limit the FBI's authority to promise informants immunity informally and unilaterally. The Guidelines did, however, direct that the FBI not take any action to conceal a crime by one of its informants. If the FBI learned that one of its informants had committed a serious

18. Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* 153 (1956) (quoting *N.Y. Times,* May 10, 1924); § II.6.

19. John T. Elliff, *The Reform of FBI Intelligence Operations* 5–6 (1979) (quoting *Report of Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities*); § II.6.

20. *Id.*

crime and did not wish to disclose that information to the appropriate law enforcement officials, the Bureau was directed to inform the Department of Justice. It was intended that the Department would then decide whether exceptional circumstances justified continuing the informant as a source or whether he should instead be closed and subject to investigation and prosecution. § II.6.

The evidence in this case indicates that the Attorney General's Guidelines were routinely ignored with regard to Top Echelon informants generally. As the government acknowledges, it is clear that they were regularly disregarded concerning Flemmi and Bulger. § II.6.

While the Department of Justice has historically respected the right of the FBI to maintain the secrecy of its sources from other agencies and federal prosecutors, courts have recognized their duty to compel disclosure of an informant's identity when it has been demonstrated that such information is relevant or helpful to the defense of an accused or essential to the fair determination of a case.[21] In 1997, this court found that the defendants in the instant case had proved that they were entitled to know whether Bulger, Mercurio, and Donati were informants.[22] The court continues to believe that this conclusion was correct.

That decision, however, opened the proverbial "Pandora's Box." As a result, many serious issues emerged. In order to decide them, the court has made an earnest effort to find the true facts and to apply the law to those facts without fear or favor.[23]

In 1940, Attorney General, and future Supreme Court Justice, Robert Jackson urged federal prosecutors, and by implication federal investigators, to "seek[ ] truth and not victims." [24] This, however, is a challenging task for those charged with investigating and prosecuting dangerous criminals who, by definition, do not themselves "play fair." Thus, in our democracy, we do not rely solely on the self-restraint of federal prosecutors and investigators to assure that crime is investigated lawfully.

Instead, we ultimately rely on judges, who take an oath to be impartial, to decide whether the government has violated the law and, if so, to determine whether a defendant's rights have been so irreparably injured that he is entitled to a remedy that may be as drastic as the dismissal of the case against him. Courts are not in-

21. *Roviaro,* 353 U.S. at 60–61, 77 S.Ct. 623.

22. *United States v. Salemme,* 978 F.Supp. 343, 349–52, 356–58 (D.Mass.1997).

23. The record from which the facts described in detail in this Memorandum have been found includes many documents and the testimony of many witnesses. It should be recognized, however, there were several potentially important witnesses who were unavailable. Bulger is a fugitive. As the parties agreed, because of his medical condition, O'Sullivan was unable to testify. Connolly asserted his Fifth Amendment right not to testify, the government declined to compel his testimony by granting him immunity, and the court found there was not a proper basis for it to order the government to do so. § II.33.

In addition, no party called John Martorano to testify. However, within the past week, on September 9, 1999, the government filed a plea agreement with John Martorano which provides for his cooperation in future proceedings. In view of the decisions concerning Flemmi's claims of immunity described in this Memorandum, it is inevitable that if this case is not dismissed Flemmi will assert that Martorano should not be permitted to testify against him because Martorano's cooperation was obtained as a result of the government's breach of its agreement to maintain the secrecy of Flemmi's service as an FBI informant and because the government's questioning of Martorano was impermissibly influenced by information that Flemmi provided to the FBI pursuant to certain enforceable promises of immunity. §§ III.1.D(2)-(4). The court will decide the challenging question of whether Martorano should be permitted to testify against Flemmi if and when it becomes necessary to do so.

24. Robert H. Jackson, "The Federal Prosecutor," 24 *J. Am. Judicature Soc'y* 18, 20 (June 1940).

vested with this power and responsibility because we are a nation that is solicitous of criminals. Rather, this duty has been delegated by the people to the courts because we recognize that, as Justice Felix Frankfurter wrote, "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." [25]

We live in a nation which, above all, seeks justice. As reflected in the words of Louis D. Brandeis that are engraved in the entrance of the United States Courthouse in Boston, we believe that, "Justice is but Truth in Action." [26] This court will continue to strive to assure that this case is conducted with fidelity to this principle.

II. FINDINGS OF FACT

1. *The Standards Applied*

Forty-six witnesses testified over eighty days in the hearings on the motions to suppress and dismiss now being addressed. The court also received 276 exhibits and several stipulations. The evidence presented placed certain facts in question. The testimony of different witnesses conflicted on various points. In addition, the import of many documents, and the implications of the absence of records, was also often disputed. Thus, the court has been required to determine the credibility of many witnesses and much other evidence.

In doing so, the court has performed as juries are generally instructed with regard to determining credibility and finding the facts. *See, e.g., First Circuit Pattern Jury Instructions—Criminal* §§ 1.05, 1.06 (West 1998). The court has considered both the direct and circumstantial evidence. *Id.* § 1.05. In view of the substantial evidence that members of the FBI engaged in improper, if not illegal, conduct and thus had a motive to tailor, by omission or distortion, the written records that they reasonably expected would never be seen by others with the knowledge necessary to dispute their accuracy or completeness, at times circumstantial evidence has been particularly important in resolving issues of credibility and in finding the facts.

In judging the believability of witnesses, the court has applied the conventional criteria. *Id.* § 1.06. These include, importantly, the manner of the witness while testifying; whether the witness had a bias, prejudice, or other motive to lie; the consistency of the witness's testimony with his or her prior statements and other evidence; and the reasonableness of the witness's testimony when considered in the light of the credible other evidence. *Id.*

The court has also recognized that witnesses at times testify honestly and accurately about some matters, but not all matters. *Id.* Thus, in certain instances, the court has credited some but not all of a witness's testimony. For example, the court is persuaded that Flemmi testified truthfully in claiming that he was regularly tipped-off by the FBI regarding investigations and impending indictments. He was not, however, always candid in identifying the source of the information he received. Rather, he at times attributed information received from Connolly to other agents of the FBI in an evident effort to protect Connolly and to strengthen his own claim to an enforceable promise of immunity from prosecution.

Applying the foregoing principles, the court finds the following facts have been proven by a preponderance of the credible evidence.[27]

25. *United States v. Rabinowitz,* 339 U.S. 56, 69, 70 S.Ct. 430, 94 L.Ed. 653 (1950) (Frankfurter, J., dissenting).

26. Louis D. Brandeis, *Interlocking Directorates,* in *LVII Annals of American Academy of Political and Social Science* 45, 45 (Clyde L. King ed., 1915).

27. Citations to the record are included for virtually all of the facts found. However, since this matter has required making many credibility determinations and drawing rea-

2. *Rico and Flemmi*

In the early 1960's, Flemmi began exchanging information with the FBI. Ex. 31, ¶ 3. In November 1965, FBI Special Agent H. Paul Rico targeted Flemmi for development as a Top Echelon informant—the highest status a source can achieve in the FBI. Ex. 20. At that time, a Top Echelon informant was defined as an individual who "could provide a continuous flow of quality criminal intelligence information regarding the leaders of organized crime." Jan. 9, 1998 Tr. at 39 (Under Seal).

In 1965, Flemmi was involved in a major gang war among several criminal groups in Boston. Various of the warring factions were led by Flemmi, Howard Winter, Thomas Callahan, and Joseph Barboza. Ex. 20. The gang war had already resulted in several murders. Ex. 20; Flemmi Aug. 25, 1998 Tr. at 26. Flemmi understood that he was in danger of being killed. *Id.;* Flemmi Aug. 25, 1998 Tr. at 26–28.

Flemmi is Italian–American. In the 1960's he had an ambivalent relationship with the LCN, at different times viewing its members as enemies and allies. Ex. 21. Flemmi's association with the LCN was initially linked to his long partnership with Francis Salemme, who was, evidently, unequivocal in his enthusiasm for the LCN. Flemmi and Salemme were particularly close to Ilario Zaninno, also known as Larry Baione, a Boston member of the Patriarca Family of the LCN. *Id.*

In November 1965, Flemmi provided Rico with valuable information about the possibility that Baione would become actively involved in the ongoing gang war, as well as intelligence about past and potential murders. Ex. 20. In Rico's view, if Flemmi survived the gang war, he would become "a very influential individual in the Boston criminal element" and "be in a position to furnish information on LCN members in [the Boston] area." Ex. 20. For the next twenty-five years, the FBI provided considerable assistance to Flemmi which helped make both of these predictions prophetic.

Since the mid–1960's, the development of Top Echelon informants has been a very high priority for the FBI. The successful development of informants generally, and therefore Top Echelon Informants particularly, has also been regarded as an important achievement for an FBI agent, with the potential to affect significantly the progress of that agent's career. Morris Apr. 29, 1998 Tr. at 44–45 *See also* Ex. 274 (Under Seal), FBI Manual of Instructions (hereinafter "Manual") § 137–2(3) (4–2–79). Thus, agents have been ambitious to develop Top Echelon informants.

The urgency and importance of developing Top Echelon informants in the mid–1960's was particularly pronounced because of the then recent metamorphosis of the FBI's attitude toward Organized Crime during Robert Kennedy's tenure as Attorney General, from 1961 to 1964. More specifically:

> When Kennedy arrived, [FBI Director J. Edgar] Hoover did not believe there was such a thing as a national crime syndicate. In 1962 he stated that "no single individual or coalition of racketeers dominates organized crime across the nation." When Kennedy left, Hoover was taking credit for the discovery of La Cosa Nostra. In September of 1963, he wrote in the FBI's *Law Enforcement Bulletin* that the sensational [Joseph] Valachi disclosures [concerning the LCN] merely "corroborated and embellished the facts developed by the FBI as early as 1961 which disclosed the makeup of the gangland hordes." "At first it was like pulling teeth to get the Bureau to enter these areas," recall[ed] a Kennedy assistant, "but by 1963 all that had changed."

sonable inferences from a great volume of evidence, it is not feasible to cite all of the evidence which the court has considered and assessed. The citations to the record that are included are intended to be helpful, but do not describe completely the evidence on which the court has relied in drawing inferences and finding facts.

Victor S. Navasky, *Kennedy Justice* 8–9 (1968).

Rico was an agent who enthusiastically embraced the FBI's new crusade against the LCN. As part of his effort to make Flemmi an asset in that campaign, Rico made Flemmi a clear and customary promise. Rico promised that he would not tell anyone outside the FBI that Flemmi was an informant, and would only disclose that fact to those within the FBI who Rico felt had a need to know it. Rico Jan. 14, 1998 Tr. at 155–59. Rico made this promise to all of his informants. *Id.* at 158–59. To Rico, this promise was "sacred." *Id.* at 156. The promise was to him the "heart" of the agreement between the FBI and its informants. *Id.* at 63–64. Rico's view that an individual's status as an informant should virtually never be disclosed to anyone outside the FBI was, and remains, a sacred article of faith within the FBI. *See, e.g.,* Morris Apr. 24, 1998 Tr. at 130; Gianturco Jan. 20, 1998 Tr. at 131; Darcy Sept. 28, 1998 Tr. at 24.

To Rico, the promise of confidentiality meant, among other things, that information provided by an informant would not be used against him, at least directly, because to do so would necessarily disclose that the individual had been cooperating with the FBI. Rico Jan. 14, 1998 Tr. at 157–58. In fact, Rico understood that, as a matter of law, such statements could not be used against Flemmi or any other informant because no *Miranda* warnings had preceded them. Rico Jan. 13, 1998 Tr. at 126.

Rico consistently honored his promise of confidentiality to Flemmi, among others. Information from informants is recorded on an FBI Form 209 (a "209"). Ex. 274 (Under Seal), Manual § 108(F)(5) (2–15–65); Ring June 15, 1998 Tr. at 59–60. Rico never disclosed information provided by an informant, or any of a source's 209s, to a prosecutor, either to prompt an investigation of the informant or to strengthen a prosecution of him. Rico Jan. 14, 1998 Tr. at 158. For example, when Flemmi told him that he had badly beaten Peter Fiumara in connection with an illegal debt, Rico did not share this information with any prosecutor, agent, or agency that might have investigated Flemmi. Rico Jan. 13, 1998 Tr. at 21–22. As a result of this practice, even after Flemmi was charged with the attempted murder of John Fitzgerald, Rico did not give the prosecutor, his good friend District Attorney John Droney, the statements Flemmi had made to Rico relating to that matter. As far as Rico was concerned, the promise of confidentiality made to Flemmi or any other informant would endure even if Rico learned that the informant had broken the law. Rico Jan. 14, 1998 Tr. at 159.

While FBI agents have long routinely promised sources confidentiality, Rico did not rely on this assurance alone to cultivate informants. Rico characterized his approach to developing informants as "unique." Rico Jan. 13, 1998 Tr. at 119–20. This case demonstrates that while his methods were unorthodox, they were not singular. In any event, as Rico testified, he "did not always conform 100%" to what the FBI policies and procedures required. Rico Jan. 14, 1998 Tr. at 143.

Using his personal style, Rico sought to realize Flemmi's potential as a source by not treating him like a criminal who should be used with caution to obtain valuable information. Rather, Rico created a sense that he and Flemmi were allies in a common cause, primarily a war against the LCN. This is a sense that Rico's successors as Flemmi's "handlers" successfully sought to perpetuate and strengthen. Morris Apr. 22, 1998 Tr. at 15. Significantly, by word and deed, and with increasing clarity over time, Rico promised Flemmi more than confidentiality. Flemmi Aug. 20, 1998 Tr. at 22–26, Aug. 25, 1998 Tr. at 22–23, Aug. 24, 1998 Tr. at 88–89, 140–43. Rico promised Flemmi "protection," *id.*, and he honored that promise. Flemmi was receptive to the alliance with the FBI that Rico proposed. The arrangement offered him an opportunity to

use the FBI to disable his enemies, enhance his safety, and, with the competition diminished and the protection of the FBI, make his own criminal activities more profitable. Flemmi Aug. 25, 1998 Tr. at 25–34.

From 1965 to 1967, Rico found his relationship with Flemmi to be productive. In that period Flemmi provided information which Rico regarded as reliable and valuable. Rico Jan. 13, 1998 Tr. at 58; Exs. 214, 215, 222, 245. For example, Flemmi reported that Stevie Hughes "had been marked for a hit." Exs. 26, 218, 222. Soon after, Hughes was murdered. Ex. 26.

More importantly, Flemmi proved to be able to give Rico what he most wanted—reliable information concerning the leaders of the LCN in New England. Flemmi regularly gave Rico information regarding Raymond L.S. Patriarca, the Boss of the New England Family of the LCN, and Baione. *See, e.g.*, Exs. 245, 214. Flemmi reported, among other things, that Edward "Wimpy" Bennett had told Patriarca that he would remain neutral in a violent feud between the Patriarca Family and Barboza's crew. Ex. 245. As reflected in a 209 rated "Excellent" by Rico, on February 2, 1967, Flemmi reported on a meeting that he had with Baione at which they agreed to settle any disagreements they might have peacefully, and at which Baione made statements indicating that Baione was responsible for the recent murder of Wimpy Bennett. Ex. 214. Beginning with the Third Superceding Indictment (the "3SI") in this case, Flemmi and Salemme have been charged with murdering Wimpy Bennett as part of their alleged pattern of racketeering activity. *See* 3SI, Racketeering Act ("RA") 21.[28]

Flemmi's report that Baione made statements indicating that he was responsible for Wimpy Bennett's murder may be an early instance of a pattern of false statements placed in Flemmi's informant file to divert attention from his crimes and/or FBI misconduct. For example, as discussed in § II.14, *infra*, in 1982, Morris caused Connolly to tell Flemmi and Bulger that Brian Halloran was providing the FBI information that implicated them in the murder of Roger Wheeler. Halloran was murdered soon after. Morris believed Bulger and Flemmi were responsible. When Halloran was murdered, Connolly prepared a 209 stating that Flemmi had reported that "the wise guys in Charlestown" had heard that Halloran was cooperating with the Massachusetts State Police and, therefore, had a motive to murder him. Ex. 225. Similarly, shortly before John Callahan, another associate of Bulger and Flemmi implicated in the Wheeler investigation, was murdered in Miami in 1983, Connolly prepared a 209 stating that Flemmi had reported that Callahan was trying to avoid a "very bad" Cuban group. Ex. 226. As explained *infra*, Flemmi and Bulger remain suspects in the still open Wheeler, Halloran, and Callahan murder investigations.

In any event, on February 8, 1967, six days after Flemmi provided information indicating that Baione was responsible for Bennett's death, Rico designated Flemmi a Top Echelon informant. Ex. 21. In doing so, Rico vouched for Flemmi's reliability, stating that:

> Informant has furnished information that has proven through investigation or through other sources to be true, and there is no information provided by the informant that has proven to be false.

Id.

With regard to Flemmi's past activities, Rico wrote:

28. As the parties have been informed orally, the court has tentatively decided to grant the motions to dismiss Racketeering Acts 21–24, which relate to the alleged murders of Wimpy Bennett, his two brothers, and Richard Grasso, that were first alleged in the Third Superceding Indictment, because the government improperly used the grand jury to strengthen the previously alleged RICO charges against Flemmi and Salemme. *See, e.g., United States v. Beasley*, 550 F.2d 261, 266 (5th Cir.1977); *United States v. Gibbons*, 607 F.2d 1320, 1328 (10th Cir.1979); *In re Santiago*, 533 F.2d 727, 730 (1st Cir.1976).

> Through informants of this office, it has been established that this individual enjoys a reputation of being a very capable individual and that he will now be the leader of the group formerly headed by Edward "Wimpy" Bennett, who according to informants, had been murdered and buried around 1/19/67.
>
> *Informant also has been engaged in bookmaking, shylocking, robberies, and is suspect of possibly being involved in gangland slayings.*

Id. (emphasis added).

The record does not reflect what information Rico had from other sources about Flemmi's possible participation in murders. Flemmi would have been circumspect about reporting on his own involvement in murder. Moreover, Rico had an incentive not to document accurately or completely information about Flemmi's possible involvement in serious crimes because he might lose the authority to utilize Flemmi as an informant if Rico's superiors decided that Flemmi deserved to be targeted for possible prosecution rather than employed as a source. However, a glimpse of Rico's reason at least to suspect that Flemmi was involved in murder can be gleaned from the records of Flemmi's own statements. For example, as Rico wrote to the Director of the FBI:

> [Flemmi] advised on 6/1/66 that Cornelius Hughes, who was murdered on 5/25/66 in Revere, Mass, had previously been around Dearborn Square, Roxbury, Mass, obviously in an effort to try to set him [Flemmi] up for a "hit" and that the fact that Connie is now deceased is not displeasing to him.
>
> Informant was asked if he had any idea of who committed the murder, and he advised that "he had an excellent idea who committed the murder" but it would be better if he did not say anything about the murder.

Ex. 26 (quoting Ex. 222).

In any event, suspicions that Flemmi was a murderer did not deter Rico and the FBI from making him a Top Echelon informant and an ally in pursuing their highest priority, the LCN.[29] As Rico explained it:

> Efforts have been made to develop this informant, by the writer, since 11/3/65. The informant was originally furnishing information on LCN members whom he considered as his enemies. Since the death of Edward "Wimpy" Bennett, Raymond Patriarca has indicated friendship towards this informant, and Larry Baione has met with the informant as he has now been accepted as an ally of theirs.
>
> In view of the informant's excellent reputation and his present friendship with the hierarchy of the LCN in this area, he eventually could be brought in as a member of this organization.

Ex. 21.

Thus, viewed as a potential member of the LCN, Flemmi became a Top Echelon informant. Rico was his "handler." Rico's partner, Dennis Condon, was designated Flemmi's alternate agent—the person Flemmi was to contact if he could not reach Rico. Ex. 220; Condon May 5, 1998 Tr. at 31. Flemmi, however, was never told that he was either open or closed administratively as an informant in the files of the FBI. Flemmi Aug. 20, 1998 Tr. at 32–33; Morris Apr. 28, 1998 Tr. at 23, Apr. 30, 1998 Tr. at 72; Quinn Aug. 19, 1998 Tr. at 112–13. Nor did Flemmi know that the FBI was documenting some of the information that he was providing. Flemmi Aug. 27, 1998 Tr. at 56; Morris Apr. 21, 1998 Tr. at 34.

29. In 1967, murder was not a federal offense. The federal law prohibiting murder in aid of racketeering activity, 18 U.S.C. § 1959, was not enacted until 1984. The federal RICO statute, 18 U.S.C. § 1961 *et seq.*, under which murder may be prosecuted as a racketeering act, was enacted in 1970.

Flemmi quickly validated his perceived potential to provide valuable information concerning the highest levels of the LCN. Within weeks of becoming a Top Echelon informant, he reported on a recent meeting that he and Salemme had with Patriarca in which Patriarca indicated an interest in making Flemmi a member of the LCN. Ex. 215.

For the next two years, Flemmi provided Rico with a steady flow of information concerning the hierarchy of the LCN in which Rico was very interested. Rico Jan. 13, 1998 Tr. at 70. Flemmi's information included, among other things, reports concerning Patriarca, Baione, Gennaro Angiulo, a leader of the LCN in Boston, and Salemme, which Rico regularly rated either very good or excellent. *Id.* at 67–70. *See also* Exs. 23, 24, 217, 219, 221. Flemmi also provided Rico with other valuable information, including intelligence on a threat to the life of the Middlesex County District Attorney Garrett Byrne. Rico Jan. 14, 1998 Tr. at 68; Ex. 27.

In addition, Flemmi was able to provide Rico with certain information and assistance that Rico especially prized. In 1966 and 1967, Rico and Condon were actively attempting to persuade Barboza to become a government witness in connection with an investigation they were conducting, with state officials, of the 1965 murder of Teddy Deegan and other matters. Rico Jan. 9, 1998 Tr. at 72, Jan. 13, 1998 Tr. at 80. They then properly perceived that Barboza had the potential to provide powerful testimony against leading members of the LCN. Rico Jan. 9, 1998 Tr. at 72–73. Rico and Condon were seeking information to use to persuade Barboza to become a witness. Rico Jan. 10, 1998 Tr. at 80. Flemmi provided Rico with such information and through his unwitting brother, Jimmy Flemmi, also provided a valuable means for Rico to communicate information to Barboza that he hoped would cause Barboza to be receptive to Rico's effort to recruit him. *Id.* at 79–83. For example, Flemmi told Rico about Patriarca's plans to kill some of Barboza's associates and used his brother to convey that information to Barboza. Ex. 245. Thus, Flemmi materially assisted the FBI's successful effort to develop Barboza as a witness. *Id.*

After Barboza agreed to become a government witness, Flemmi's links to the LCN became even more valuable to Rico. Flemmi reported that Patriarca and his colleagues realized that Barboza had become a "rat." Ex. 237 (209 dated 6/27/67). Flemmi reported that Patriarca had embarked on an aggressive effort to determine what Barboza was telling the government and was seeking to diminish the effectiveness of Barboza's anticipated testimony, in part by murdering potential witnesses who might corroborate Barboza's claims and killing Barboza's lawyer, John Fitzgerald. Exs. 23, 34, 219, 221, 237 (209s dated 6/27/67, 7/19/67, 9/1/67, 11/13/67, 12/8/67, 9/20/68). In 1967 and 1968, Flemmi constantly provided information on these efforts to Rico. *Id.;* Rico Jan. 13, 1998 Tr. at 81–85. This information enhanced the FBI's ability to utilize Barboza effectively.

Barboza's cooperation proved to be extremely valuable to the government. Rico Jan. 13, 1998 Tr. at 81. It resulted in a successful federal prosecution of Patriarca. *Id.* It also contributed to the conviction of several Patriarca associates for the murder of Teddy Deegan. *Id.*

By 1969, Barboza was the most important witness Rico had ever developed. Rico Jan. 9, 1998 Tr. at 87. Indeed, Barboza became nationally renowned as a witness against the LCN. Thus, by 1969, Flemmi had, as an informant, made a special contribution to the progress of the FBI's highest priority—combating the LCN. Rico, however, never tried to convert Flemmi into a cooperating witness who would testify for the government. Rico Jan. 13, 1998 Tr. at 71–72.

Rather, Rico continually encouraged Flemmi to maintain and increase his con-

tacts with the LCN, and report back to Rico. Rico Jan. 14, 1998 Tr. at 110; Flemmi Aug. 20, 1998 Tr. at 22–24, Aug. 24, 1998 Tr. at 61, 87. Having designated Flemmi as a Top Echelon informant in 1967, it was particularly important to Rico that Flemmi produce with regard to the LCN.

At the same time, Flemmi became concerned that his increasingly visible involvement with the LCN would enhance the risk that he would be prosecuted as a result of investigations being conducted by the many law enforcement agencies that were beginning to focus on him as part of their pursuit of the LCN, including the Massachusetts State Police and the Organized Crime Unit of the Boston Police Department. Ex. 31, ¶¶ 3–4; Flemmi Aug. 20, 1998 Tr. at 22–24, Aug. 24, 1998 Tr. at 87. Flemmi expressed his concern to Rico. *Id.*

Rico told Flemmi that he should not worry. Ex. 31, ¶ 4; Flemmi Aug. 20, 1998 Tr. at 23, Aug. 24, 1998 Tr. at 61, 88. More specifically, Rico told Flemmi that as long as Flemmi was furnishing him information on the LCN, Flemmi would be "protected." Flemmi Aug. 24, 1998 Tr. at 61, 88–89, 140, Aug. 25, 1998 Tr. at 8, 21, 22–23, 35, 94; Ex. 92, ¶ 2. Rico never used the word "immunity" in speaking to Flemmi. Flemmi Aug. 25, 1998 Tr. 22–23. In addition to promising "protection," however, Rico said, in various ways, that Flemmi would not be prosecuted for crimes he was committing while serving as an informant. Ex. 31, ¶ 3; Flemmi Aug. 20, 1998 Tr. at 23–24, Aug. 24, 1998 Tr. at 61, 141.

Both Flemmi and Rico knew that Flemmi had to be engaged in criminal activity to have access to, and credibility with, the LCN. Flemmi Aug. 24, 1998 Tr. at 61. Rico told Flemmi that this would not be a problem for Flemmi. Flemmi Aug. 24, 1998 Tr. at 162. Rico caused Flemmi to understand that the FBI would overlook Flemmi's criminal activity as long as he was providing information on the LCN. Flemmi Aug. 25, 1998 Tr. at 27–28.

Flemmi understood that his deal with the FBI would not prevent other agencies from investigating him, but Rico assured Flemmi that he could take care of any issues that might arise. Flemmi Aug. 25, 1998 Tr. at 32–33, 38. Thus, Flemmi expected, for example, that Rico would intercede with District Attorneys John Droney and Garrett Byrne, who Rico characterized as good friends, to prevent any state charges from being brought against him. Flemmi Aug. 24, 1998 Tr. at 165–66, Aug. 25, 1998 Tr. at 32–33, 35–36, 38, Aug. 27, 1998 Tr. at 61–62.

Although never discussed with Rico, Flemmi assumed that there was some limit to the protection that Rico and the FBI could provide him and, therefore, did not think that his status as an informant would protect him from being prosecuted if he committed a murder. Flemmi Aug. 27, 1998 Tr. at 140, Aug. 25, 1998 Tr. at 11–12, 21–24, 19. Rico led Flemmi to believe, however, that as long as Flemmi did not kill anyone, the FBI would protect him from prosecution for his criminal activity because of the valuable information Flemmi was providing on the LCN. Flemmi Aug. 25, 1998 Tr. 21–25.

Nevertheless, Flemmi became especially anxious in 1969, when he learned the IRS was investigating him as part of its intensified focus on the LCN. Exs. 25, 31; Flemmi, Aug. 20, 1998 Tr. at 24, Aug. 24, 1998 Tr. at 156–57. Flemmi discussed this problem with Rico. *Id.* Rico reiterated that Flemmi should not be concerned, he would not be prosecuted. *Id.* After that discussion, the IRS investigation "fizzled out." Flemmi Aug. 24, 1998 Tr. at 157. Flemmi inferred that Rico had, as promised, taken care of it. *Id.;* Flemmi Aug. 20, 1998 Tr. at 24.

The government now contends that from 1967 to 1969, Flemmi repeatedly engaged in murder while simultaneously serving as a Top Echelon informant for the FBI. More specifically, it is alleged that in addition to other crimes, in 1967

Flemmi participated in the murders of Wimpy Bennett, his brothers Walter and William Bennett, and Richard Grasso. *See* Fourth Superceding Indictment ("4SI") Count One, RAs 20–24. Although Rico and his FBI colleagues often worked closely with state investigators and prosecutors in organized crime matters, there is no evidence that they contributed to any investigation of Flemmi regarding the murders of the Bennetts or Grasso.

The present indictment also alleges that Flemmi and Salemme attempted to murder Barboza's lawyer, John Fitzgerald. 4SI, Count One, RA 20. Fitzgerald was crippled, but not killed, by a bomb that exploded as he started his car on January 30, 1968. On January 4, 1968, Flemmi had told Rico that Patriarca was incensed with Fitzgerald, who Patriarca had thought would be helpful in his effort to discredit Barboza. Ex. 221. The next day, Fitzgerald was warned that his life was in danger, but he declined the protection offered by the Suffolk County District Attorney's Office. *Id.* On January 25, 1968, Flemmi told Rico that Fitzgerald was still definitely going to be "whacked out." Ex. 34. Several days later, Fitzgerald's car exploded.

The Middlesex County District Attorney took primary responsibility for investigating the Fitzgerald bombing. The record does not reflect the role, if any, of Rico and the FBI in that effort. In 1968, Flemmi learned that he and Salemme were being investigated as possible participants in the attempted murder of Fitzgerald. Flemmi Aug. 24, 1998 Tr. at 137; Exs. 237, 22. Flemmi did not then flee.

In September 1969, however, Flemmi received a telephone call from Rico. Ex. 30, ¶ 6; Flemmi Aug. 20, 1998 Tr. at 27, Aug. 24, 1998 Tr. at 136. Rico told Flemmi that "indictments were coming down" and suggested that Flemmi and "his friend," Salemme, "leave town" promptly. *Id.* Flemmi followed Rico's advice. *Id.* He and Salemme fled together. A few days later, on September 11, 1969, Flemmi and Salemme were indicted in Middlesex County for the Fitzgerald bombing and in Suffolk County for the William Bennett murder as well. *Id.* From Flemmi's perspective, Rico had honored his promise to protect him. Flemmi Aug. 24, 1998 Tr. at 137. In doing so, Rico aided and abetted the unlawful flight of a fugitive, in violation of 18 U.S.C. §§ 1073 and 2.

In view of Flemmi's motive to lie about whether Rico told him that Flemmi was about to be indicted and encouraged him to flee, the court has considered this contention with particular care. However, in the context of all of the credible evidence directly relating to Rico's relationship with Flemmi, Rico's denial of Flemmi's claim is not persuasive.[30]

The court notes that if Flemmi had been prosecuted in 1969 for the Fitzgerald bombing or the William Bennett murder, his role as an FBI informant might have been disclosed, and its legal implications might have been examined, three decades ago. Flemmi's successful flight to avoid that prosecution spared Rico and the FBI the risk of the embarrassment and controversy that disclosure of Flemmi's dual status as an FBI informant and an alleged murderer has recently entailed. Rico had reason to be concerned about embarrassment to the FBI. He was not permitted to open any informant unless he represented to FBI Headquarters that he was "convinced that the potential informant [could] be operated without danger of embarrassment to the Bureau." Ex. 274 (Under Seal), Manual § 108 (9–13–63). By honoring his promise to protect Flemmi, Rico also promoted the possibility that Flemmi would in the future again become a valuable FBI informant.

The conclusion that Rico facilitated Flemmi's flight is reinforced by the fact that the instant case is not the first time that Rico has been found in a judicial

30. The government does not dispute the court's finding that Rico told Flemmi of the forthcoming indictments so that he could flee. Apr. 14, 1999 Tr. at 164–66.

proceeding to have engaged in criminal conduct, including perjury, with regard to one of his LCN informants. In *Lerner v. Moran*, 542 A.2d 1089 (R.I.1988), Ex. 259, the Supreme Court of Rhode Island found, among other things, that Rico had urged one of his informants to lie under oath, in part to mask another of Rico's informant's role in a murder. *Lerner*, 542 A.2d at 1090. More specifically, the Rhode Island Court found that in the trial of Patriarca Family member Luigi Manocchio, Rico's informant, John Kelley:

> admitted that during Lerner's trial [for murder], at the direction of Special Agent Rico, he testified falsely in certain matters relating to the factual circumstances surrounding the murders. For example, during Lerner's trial Kelley testified that he had personally "cut down" the shotgun used in the murders. However, during the Manocchio trial, Kelley stated that his armorer had actually "cut down" the shotgun. Kelley said that Special Agent Rico had directed him not to mention the armorer's role in the murders. *It appears that the armorer was a valuable FBI informant that Special Agent Rico wanted to keep on the streets.*

Id. (emphasis added). The Rhode Island Supreme Court credited this testimony by Kelley. *Id.* at 1090–91.

The Court found that Rico had also caused Kelley to lie about the promises that Rico had made to obtain his cooperation. *Id.* at 1091. In addition, it stated that, "Kelley's [perjurous] testimony [at the Lerner trial] was then corroborated in all material aspects by Special Agent Rico." *Id.* The Court also noted Kelley's explanation of why he had lied under oath: "Agent Rico told me ... that I should just do as he said, and everything would come out all right." *Id.* Thus, although arrived at independently, this court's conclusion concerning Rico's misconduct in 1969 regarding Flemmi is consistent with the misconduct in which the Supreme Court of Rhode Island found that Rico had engaged concerning other informants in 1970.

In any event, on September 15, 1969, Flemmi was closed administratively as an informant of the FBI and a federal fugitive warrant was issued for his arrest for his unlawful flight to avoid prosecution. Ex. 28. Flemmi was not told, however, that he had been administratively closed as a source. Flemmi Aug. 20, 1998 Tr. at 32–33.

3. *Flemmi as a Fugitive*

Although the FBI was conducting an investigation to find Flemmi and Salemme, Flemmi stayed in contact with Rico. Ex. 30, ¶ 7; Flemmi Aug. 20, 1998 Tr. at 27–32. In about March 1970, Flemmi called Rico. *Id.* Flemmi identified himself as "Jack from South Boston." *Id.* This was the code name that Flemmi and Rico had previously devised to identify each other. *Id.;* Rico Jan. 13, 1998 Tr. at 6–7.

Flemmi told Rico that he had relocated. Flemmi Aug. 20, 1998 Tr. at 28–29. Rico did not ask him where he was and Flemmi did not tell him. *Id.* Flemmi inquired about what was happening and asked how long Rico expected it would take to work out his problems. *Id.* Rico said it would take considerable time, and that Flemmi should be patient and stay away from Boston. *Id.* FBI policy requires that all contacts with informants be recorded. *See, e.g.,* Ex. 274 (Under Seal), Manual § 108(F)(5) (2–15–65); Ring June 15, 1998 Tr. at 59–60. Rico, however, made no record of this conversation, or any other that he had with Flemmi while he was a fugitive. Nor did he tell the agents responsible for searching for Flemmi that he had spoken to him.

In April 1970, Rico was reassigned to the Miami, Florida office of the FBI. Rico Jan. 14, 1998 Tr. at 94. His partner, Condon, remained in Boston and participated in the fugitive investigation of Flemmi and Salemme. Ex. 260; Condon May 5, 1998 Tr. at 165–81. Condon had been Flemmi's alternate agent and knew that Flemmi had

been an informant of Rico's. Condon May 5, 1998 Tr. at 168; Rico Jan. 14, 1998 Tr. at 176; Ex. 94.

The files of the FBI indicate that beginning in September 1969, Condon periodically asked at least one source if he had any information concerning the location of Flemmi and Salemme. Ex. 260. Usually, Condon's source(s) had no such information. *Id.* Beginning in November 1970, however, Condon received information that Flemmi and Salemme were in New York City, where they had been meeting with Manocchio, who was reportedly living in the vicinity of Central Park. *Id.* (209s of contacts on 11/23/70, 12/3/70, 12/23/70, 1/5/71). In October 1971, Condon was first advised that Flemmi and Salemme had separated. *Id.* (209 of 10/7/91). Eventually, these reports became more specific, indicating that Flemmi and Salemme had a falling out. *Id.* (209s of contacts on 2/10/72, 12/12 and 22/72). Reportedly, Flemmi "got sick of being ordered around by Salemme." *Id.* (209 of contacts on 10/9/73 and 10/26/73). Condon was told by one informant that if Flemmi and Salemme had serious problems with each other, Flemmi would be the "loser" because Salemme was closer to Baione. *Id.* (209 of contact on 2/10/72).

Although Condon was not in charge of the fugitive investigation, after receiving reports that Flemmi and Salemme had split up, he contacted a young FBI agent from South Boston who was working in New York, John Connolly, in an effort to "spark [them] up." Condon May 5, 1998 Tr. at 165. Connolly and Condon had been introduced by Edward Walsh, the Deputy Superintendent of the Boston Police Department, just as Connolly was joining the FBI. *Id.* at 163, 177–78. Although he was not working on the fugitive investigation, Connolly was receptive to Condon's call. Condon gave Connolly some general information and sent him several photographs. Condon May 5, 1998 Tr. at 165.

Connolly put the photographs to good use. In November 1972, Connolly arrested Salemme in New York City. Condon May 5, 1995 Tr. at 153. According to Condon, Connolly claimed that he was just "strolling down" the street at lunch time with several other agents, recognized Salemme, and arrested him. *Id.* at 171.

After Salemme's arrest, Condon continued to receive reports regarding the serious rift between Flemmi and Salemme. Ex. 260 (209 of contacts on 12/12 and 22/72, 1/18/73, 10/9 and 26/73). However, the recorded instances of Condon's efforts to get information about Flemmi's location diminished after Salemme's arrest. Ex. 260; Condon May 5, 1998 Tr. at 40–42.

Both Flemmi and Condon deny that Flemmi provided the FBI with information that led to Salemme's arrest. Flemmi Aug. 25, 1998 Tr. at 110; Condon May 5, 1998 Tr. at 172. In the context of all of the credible evidence in this case, it appears that this claim is not correct.

In any event, Salemme's arrest and subsequent prosecution for the Fitzgerald bombing proved to be beneficial to Flemmi. In 1970, Hugh Shields, a codefendant in the Bennett murder case, had been tried and acquitted. Ex. 253; Condon May 5, 1998 Tr. at 47. In 1973, Salemme was tried on the Fitzgerald bombing charge. Robert Daddeico, who was being protected by the government, was an important witness. May 1, 1998 Tr. at 67 (Stipulation). Daddeico testified that Salemme had participated in the Fitzgerald bombing. Daddeico claimed, however, that he had lied previously when he had said that Flemmi was also involved. Ex. 260. Salemme was convicted and, as a result, spent the next fifteen years in prison.

Flemmi monitored Salemme's trial from Canada. Ex. 260; Flemmi Aug. 25, 1998 Tr. at 80–81. He did not, however, return to Boston in 1973, when Daddieco exculpated him with regard to the Fitzgerald bombing.

Flemmi did stay in touch with Rico. Ex. 30, ¶ 7; Ex. 31, ¶ 7; Flemmi Aug. 20, 1998 Tr. at 29–30. In 1974, Flemmi called Rico

at the Miami office of the FBI. Flemmi Aug. 20, 1998 Tr. at 29–30. Rico told Flemmi that he should return to Boston and his legal problems would be favorably resolved. Ex. 31, ¶ 7; Flemmi Aug. 20, 1998 Tr. at 31–32. Because of the seriousness of the charges against him, and the fact that Flemmi was living comfortably in Canada, Flemmi had some reservations about following Rico's advice. *Id.* Rico, however, assured Flemmi that when he returned he would be released on bail and all of the charges against him would be dismissed. *Id.* Once again, Rico's representations to Flemmi proved to be reliable.

As arranged by Rico, on May 6, 1974, Flemmi returned to Boston and met in Park Square two Boston Police Detectives, at least one of whom had worked with Condon. *Id.;* Condon May 5, 1998 Tr. at 145. Despite the fact that he had for five years been a fugitive from charges of murder and attempted murder, Flemmi was promptly released on bail by the Middlesex and Suffolk Superior Courts. *Id.* The federal flight charges were dismissed on the same day. Ex. 96. The Fitzgerald bombing charges against Flemmi were subsequently dismissed. Ex. 253; June 25, 1999 Government's Submission Pursuant to 6/21/99 Court Order. On November 13, 1974, the Bennett murder charges concerning Flemmi were dismissed, as they had been against Salemme previously. Ex. 253. Flemmi was a free man.

4. *The Development of Bulger as an Informant*

As of at least 1971, the FBI was trying to develop Bulger as an informant. Bulger had been incarcerated at Alcatraz, among other places, as a result of an investigation led by Rico. In 1971, the violent gang war was continuing. Ex. 97 (209 dated 7/21/71). Bulger was associated with Donald Kileen, a leader of a South Boston gang. *Id.* (209 dated 6/14/71). A close colleague of Bulger's, William O'Sullivan, was murdered. *Id.* (Memorandum dated 6/14/71). Bulger understood that he too had been targeted to be killed. *Id.*

Bulger later claimed that he was inclined to help the FBI because of the favorable treatment that his family had received from Rico when Bulger was in prison. Ex. 1. Bulger also felt that he shared with the FBI a hatred of the LCN. *Id.*

As indicated earlier, by 1971, Rico had been reassigned to Miami. His former partner Condon, however, sought to develop Bulger as an FBI informant. Ex. 97; Condon May 1, 1998 Tr. 76–79. This effort was endorsed by FBI Headquarters. Ex. 97 (Teletype dated 9/10/71); Condon May 1, 1998 Tr. at 78. Bulger provided some meaningful information concerning the continuing gang war, and additional information concerning Francis Salemme's brother Jack, among others. *Id.* After several months, however, Condon decided that Bulger was not being sufficiently productive and closed him administratively as a potential informant. Ex. 97 (209 dated 8/4/71); Condon May 1, 1998 Tr. at 77.

In 1972, John Morris was transferred to Boston and assigned to the Organized Crime squad on which Condon also served. Morris Apr. 21, 1998 Tr. at 12. Morris and Condon became friendly and, until about 1976, usually commuted to work together. *Id.* at 60. In about 1974, Connolly was transferred to Boston and also assigned to the Organized Crime squad. Condon May 1, 1998 Tr. at 47.

In 1974 and 1975, Morris and Connolly participated in a loansharking investigation in which the alleged victim was Peter Pallotta. Morris Apr. 23, 1998 Tr. at 49–51, 67–72. Bulger was a subject of the investigation. *Id.* At least seven individuals were prosecuted as a result of that investigation, including James Martorano and Brian Halloran. *Id.* at 49. Bulger was not indicted. *Id.* at 50–51.

In the course of the Pallotta investigation, Connolly decided to approach Bulger and attempt to make him an informant.

Id. at 67–72. Connolly had known Bulger since they were both children growing up in South Boston. *Id.* at 70; Ex. 1. Bulger became a source for Connolly and was administratively designated an FBI informant on September 30, 1975. Ex. 68. Bulger later explained to FBI SAC Lawrence Sarhatt that he became an FBI informant in part because he had:

> a close feeling towards SA John Connolly because they both grew up in the same neighborhood in Boston and had mutual childhood problems, as well as a deep hatred for La Cosa Nostra.

Ex. 1.

The written record of what the FBI knew about Bulger in 1974 is sparse and neither Bulger nor Connolly have testified in this case. At a minimum the FBI recognized that Bulger was deeply involved in a violent gang war. Ex. 97. The FBI had also been advised that Bulger was involved in extorting money from shylocks and bookmakers. Ex. 100. Morris' actions, however, make it vividly clear that the FBI was well-aware that Bulger was widely regarded as brutally violent when Connolly sought his cooperation.

More specifically, in 1974 or 1975, Morris hoped to obtain the testimony of Eddie Miani in a pending investigation. Morris Apr. 21, 1998 Tr. at 89, Apr. 27, 1998 Tr. at 52–53. In an effort to do so, Morris planted a fake bomb under Miani's car. *Id.* at 89–92; Ex. 30, ¶ 17. Morris then anonymously called the local police or fire department and alerted it to the "bomb." *Id.* After the device was disabled, Morris met with Miani. *Id.* In the hope of scaring him into cooperating, Morris told Miani that Bulger had planted the bomb, and offered Miani the protection of the FBI if he would become a cooperating witness. *Id.* Miani expressed fear for his life, but declined Morris' offer. *Id.* at 96. Morris testified that the Miani matter was one of three instances in which he unsuccessfully attempted to exploit Bulger's reputation for violence in an effort to get information for the FBI. Morris Apr. 28, 1998 Tr. at 97–98, Apr. 29, 1998 Tr. at 110, Apr. 30, 1998 Tr. at 98–101, 203–10.[31]

On February 4, 1976, several months after being officially designated an informant, Bulger was up-graded to Top Echelon status because of his "demonstrated ability to produce information regarding the highest levels of organized crime ...." Ex. 68. As set forth below, that assessment may have been based on Bulger's new partnership with Flemmi, which was in meaningful measure forged by the FBI.

5. *The FBI Forges the Flemmi–Bulger Partnership*

One of Bulger's earliest contributions to Connolly's efforts was to assist in reestablishing Flemmi's alliance with the FBI. When released after his return to Boston in 1974, Flemmi and two partners, George Kaufman and James Martorano, rented a garage in Somerville, Massachusetts from Howard Winter, the head of the Winter Hill Gang. Flemmi Aug. 25, 1998 Tr. at 101. Bulger, among other alleged criminals, frequented the garage. *Id.* Bulger and Flemmi had met socially once or twice in the 1960's, but did not really know each other previously. *Id.*, Flemmi Sept. 1, 1998 Tr. at 203.

31. Morris and Connolly told Buckey Barrett, in an effort to intimidate him, that Bulger and Flemmi would be seeking from him a share of the proceeds of the Medford Depositors Trust robbery, but that the FBI would protect him if he cooperated in its investigation of that crime. Morris Apr. 21, 1998 Tr. at 97–98, Apr. 29, 1998 Tr. at 110, Apr. 30, 1998 Tr. at 98–101.

In the late 1980's, an 11–year old girl, Sara Pryor, was kidnapped. A recently arrested individual from South Boston was suspected to be the kidnapper. Morris Apr. 30, 1998 Tr. at 203–10. Morris, Connolly, and another agent, brought Bulger, who was then an informant, to the jail and suggested to the suspect that Bulger would deal with him if he did not confess. *Id.* The suspect, who was later recognized by the FBI to be innocent, did not confess. *Id.*

In the six months that the Bennett murder case remained pending, Flemmi generally tried to maintain a low profile. *Id.* at 115, 154. When all of the charges against him were dismissed in late 1974, he began to become more actively involved in criminal activity, particularly gambling and loansharking. *Id.* at 189. This led to the resumption of Flemmi's contacts with the LCN. *Id.* at 115.

In early 1975, Bulger asked Flemmi whether he would be willing to meet with Connolly. Flemmi Aug. 20, 1998 Tr. at 33–35, Aug. 25, 1998 Tr. at 95–96, 102–06. Bulger had previously told Flemmi that Connolly had approached him and wanted to talk. Flemmi Aug. 25, 1998 Tr. at 106. It was clear to Flemmi that Bulger knew at least generally of his prior relationship with the FBI. *Id.* He told Bulger that talking to the FBI "was a good idea." *Id.* Knowing that Bulger was aware of his prior relationship with the FBI and was talking with Connolly himself, Flemmi was sufficiently comfortable with Bulger's suggestion to agree to meet with Connolly. *Id.* at 102–06, Aug. 20, 1998 Tr. at 35–36.

Soon after, Flemmi met with Connolly and Condon at a coffee shop in Newton, Massachusetts for what Flemmi regarded as an "introductory" meeting. Flemmi Aug. 20, 1998 Tr. at 35–36. Rico was discussed. *Id.* At the meeting, Connolly articulated what Flemmi understood when he was invited—that the FBI was interested in receiving information from him again. Flemmi, Aug. 25, 1998 Tr. at 183.

Following the Newton meeting Flemmi began passing information about the LCN to Connolly through Bulger. *Id.* at 115. Later in 1975, or in early 1976, Flemmi and Bulger had the first of a long series of meetings with Connolly, this one at Bulger's home. *Id.* at 158.

At that meeting, Connolly made clear to Flemmi that he wanted to reestablish the relationship that Rico had with him and regularly receive information from Flemmi about the LCN. *Id.* at 185. Having no prior experience with Connolly, Flemmi wanted to know what he would get in return for his cooperation. *Id.* Connolly assured Flemmi that he and Bulger would be "protected" for the criminal activity they engaged in while furnishing information to the FBI. *Id.* at 185–86, 202, 206–09; Flemmi Aug. 20, 1998 Tr. at 37–38. Connolly never used the term "immunity," but on various occasions reiterated that the FBI would "protect" Bulger and Flemmi. Flemmi Aug. 20, 1998 Tr. at 211.

Connolly, and his FBI colleagues, understood that only serious criminals would be in a position to provide meaningful information on the LCN. Flemmi Aug. 25, 1998 Tr. at 188–89; Morris Apr. 22, 1998 Tr. at 122–23, Apr. 27, 1998 Tr. at 18–19. Top Echelon informants were, by definition, members of an organized crime group who could furnish information on the highest levels of organized crime groups of national significance. Ex. 274 (Under Seal), Manual § 108.L (1964–77); § 137–12 (1978–80); § 137–16 (1981–83); § 137–15 (1974–87). *See also* Potts May 22, 1998 Tr. at 30–35; Blackburn May 22, 1998 Tr. at 30–35, 75–78. Such informants are difficult to develop. Thus, agents were instructed that, "[t]he success of the Top Echelon Criminal Informant Program depends on a dynamic and imaginative approach in developing quality sources who can assist the Bureau in meeting its investigative responsibilities." Ex. NN (Under Seal), Manual § 108 pt. III(B) (1–12–77); § 137–12(2) (4–12–79).

In the course of telling Connolly about the criminal activities of others, directly and through Bulger, Flemmi initially referred to his own illegal gambling and loansharking activities. *Id.* at 153, 188–89. From the outset, and increasingly over time, however, Connolly was not under the illusion that gambling and loansharking were the only, or most dangerous, crimes in which Flemmi and Bulger were likely involved. Rather, as Connolly recently explained:

> We knew what these guys were. They did not have a paper route when we first met them. All of them, Top Echelon Informants, are murderers. The government put me in business with murderers.

Oct. 23, 1998 Tr. at 43 (quoting R. Ranalli, "Agent hoped Bulger eluded feds," *Boston Herald*, Aug. 11, 1998, at 6.) [32]

By February 1976, when Bulger was elevated to Top Echelon informant status, the FBI had been instrumental in the formation of what is now alleged to have been an enduring and formidable criminal partnership between Bulger and Flemmi. The FBI made Bulger and Flemmi a perfect match. By 1976, in Boston, Flemmi and Bulger uniquely shared an antipathy for the LCN, a desire to profit from its destruction, and—most notably—the promised protection of the FBI.

6. *Attorney General Levi's Memorandum on FBI Informants*

Connolly was reiterating and reaffirming Rico's promise of FBI protection to Flemmi at a time when the Attorney General of the United States, Edward H. Levi, was working to develop Guidelines relating to the FBI's handling of its informants. Those Guidelines were part of a larger effort by the Attorney General and others to establish standards and procedures aimed at ending a series of serious abuses by the FBI, which had long been masked by the secrecy in which the FBI historically operated.

A book published by the Police Foundation in 1979 described the situation during the Levi administration of the Department of Justice (1975–77) as follows:

> Watergate unleashed a torrent of revelations about questionable FBI intelligence activities, going far beyond abuses tied to the Nixon Administration. In his first appearance before a congressional committee after taking office in 1975, Attorney General Edward H. Levi confirmed the existence of previously undisclosed files maintained by former Director J. Edgar Hoover and containing derogatory information on public figures. Levi also presented the results of an inquiry by outgoing Deputy Attorney General Laurence Silberman and the FBI Inspection Division into misuse of the Bureau to gather political intelligence for administrations of both parties and to discredit the FBI's critics.
>
> In reaction to these disclosures, Congress and the legal profession began looking more closely at the FBI, particularly at its internal security operations. Select Committees of the House and Senate included FBI abuses in their investigations of intelligence activities, and the House Judiciary Committee asked the General Accounting Office (GAO) to review FBI domestic intelligence policies and procedures. The American Bar Association set up a Special Committee to Study Federal Law Enforcement Agencies. Within the Justice Department, Attorney General Levi established a committee to draw up guidelines for FBI investigations.
>
> The FBI, under Director Clarence M. Kelley, worked with the Attorney General and with congressional investigators

32. The Federal Rules of Evidence are not applicable in hearings on motions to suppress. *See* Fed.R.Evid. 1101(d)(1). Nor do they apply with regard to the preliminary factfinding necessary to decide a motion to dismiss under Fed.R.Crim.P. 12(e). *See* Jan. 14, 1998 Tr. at 7–9 (citing 1A Charles A. Wright, *Federal Practice & Procedure, Criminal 2d* § 194, at 715–16; Salzburg, *Federal Rules of Evidence Manual* (6th ed.), Vol. III at 1793). Nevertheless, the court generally applied the Federal Rules of Evidence in deciding whether proferred information was sufficiently reliable to be considered in the pending proceedings.

As discussed in § II.33, *infra*, after denying Flemmi's motion to compel the government to grant Connolly immunity in order to obtain his testimony, the court admitted parts of several of Connolly's public statements, pursuant to Fed.R.Evid. 804(b)(3), as statements against interest by an unavailable declarant. *See* Oct. 23, 1998 Tr. at 34–47.

to assess what had gone wrong in the past and what should be done in the future. The new revelations were sometimes shocking, especially the details of FBI efforts to "neutralize" Dr. Martin Luther King, Jr., as an effective civil rights leader during the 1960s. Former top officials of the FBI and CIA had acted on the assumption that they could disregard the normal legal rights of domestic groups because their work was so important to the national security that they were not governed by legal and constitutional standards applying to the rest of the law enforcement community. They made this claim in defense of opening mail, breaking into homes and offices without a warrant, and using what the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities (the Church committee) found to be "dangerous and degrading tactics" to disrupt and discredit lawful domestic political activities of Americans.

Even after the congressional committees issued their reports and Attorney General Levi adopted his first FBI guidelines in 1976, Director Kelley discovered that some of his subordinates had "deceived" him by not revealing FBI breakins that had taken place in 1972–1973. This information triggered still another inquiry—a criminal investigation by the Justice Department leading to indictments of former FBI officials in 1977–1978. *Director Kelley summed up the problems in a landmark address at Westminster College in May 1976. Admitting that some FBI activities had been "clearly wrong and quite indefensible," he declared that the Bureau should never again occupy the "unique position that permitted improper activity without accountability."*

John T. Elliff, *The Reform of FBI Intelligence Operations* 5–6 (1974) (emphasis added).

As Director Kelley indicated, the ability of the FBI to act in secrecy, even from the Attorney General, and thus without any accountability, was a major reason that such abuses were possible. There are, of course, often legitimate reasons for confidentiality. Secrecy, however, also inherently entails risks that were foreseeable, and indeed foreseen, when the FBI was established.

The modern FBI was created in 1924, by Attorney General and future Chief Justice Harlan Fiske Stone, to succeed the corrupt Bureau of Investigation, which Stone characterized as " 'lawless, maintaining many activities which were without any authority in federal statutes, and engaging in many practices which were brutal and tyrannical in the extreme.' " Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* 153 (1956) (quoting Stone to Jack Alexander, Sept. 21, 1937). On the day Stone appointed J. Edgar Hoover as the acting Director of the FBI, Stone warned of a danger that he anticipated. He said:

> There is always the possibility that a secret police may become a menace to free government and free institutions because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood; ... it is important ... that its agents themselves be not above the law or beyond its reach.

Id. at 153 (quoting *N.Y. Times*, May 10, 1924). The problems Levi confronted, and those disclosed by this case, demonstrate the wisdom of Stone's warning.

That warning, however, long went unheeded. The FBI is part of the Department of Justice and formally subject to oversight and direction by the Attorney General. *See* 28 U.S.C. §§ 503, 531–33. However, as Levi testified in 1975, even recognizing that "the Bureau must have considerable autonomy," there were "times ... when the supervision [of the FBI] by Attorneys General ha[d] been sporadic, practically non-existent, or ineffective." Statement of Attorney General Edward H.

Levi to the Senate Select Committee on Intelligence Activities (Dec. 11, 1975) at 6.

In March 1976, Levi issued Guidelines regulating and limiting the FBI's authority to conduct domestic security investigations and dealing with civil disorders. *See* Elliff, *supra*, at 203–09. The Attorney General also then published draft Guidelines addressing the relationship between the White House and the FBI. *Id.* at 210–14. On December 15, 1976, about a month before leaving office, the Attorney General issued a memorandum to the Director of the FBI that described basic standards and procedures for the FBI's use of informants in Domestic Security, Organized Crime, and Other Criminal Investigations. *Id.* at 215–19 (the "Levi Memorandum"). The Levi Memorandum was incorporated in the FBI's Manual of Instructions on January 12, 1977. *See* Ex. 274 (Under Seal), Manual § 108 pt. IV at 13 (1–12–77).

The Guidelines for FBI informants established by the Levi Memorandum were intended, in part, to diminish the perceived need for legislation to regulate and restrict the FBI's use of informants and also to provide guidance if legislation was to be enacted. As Attorney General Levi testified in 1976:

> I would like to [suggest] a few considerations that should be taken into account in deciding what statutory changes should be made to define more clearly the areas of the Bureau's jurisdiction and the means and methods which the Bureau is permitted to use in carrying out its assigned tasks.
>
> First, there is a temptation to resort to having the courts make many difficult day-to-day decisions about investigations. When a Fourth Amendment search or seizure is involved, of course, recourse to a court for a judicial warrant is in most circumstances required. But the temptation is to extend the use of warrants into areas where warrants are not constitutionally required. *For example, as you know it has been suggested that the FBI ought to obtain a warrant before using an informant.* Extending the warrant requirement in this way would be a major step toward an alteration in the basic nature of the criminal justice system in America. It would be a step toward the inquisitorial system in which judges, and not members of the executive, actually control the investigation of crimes. This is the system used in some European countries and elsewhere, but our system of justice keeps the investigation and prosecution of crime separate from the adjudication of criminal charges. The separation is important to the neutrality of the judiciary, a neutrality which our system takes pains to protect.
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> * * * * * *
>
> In drafting statutory changes, it must be remembered that rigid directions governing every step in the investigative process could sacrifice the flexibility that is necessary if an investigative agency is to adapt to the diverse factual situations it must face. Rigid statutory provisions would invite litigation at every step in the investigative process. Such litigation could very well be used by clever individuals to frustrate legitimate law enforcement efforts without achieving the measure of control for which the statutes were enacted.

Testimony of the Honorable Edward H. Levi, Attorney General of the United States, Before the Subcommittee on Civil and Constitutional Rights, Committee on Judiciary, House of Representatives (Feb. 11, 1976) at 3–5 (emphasis added).

The Guidelines concerning informants described in the Levi Memorandum, among other things, contributed to keeping legislation from being enacted, and regulations from being promulgated, concerning the FBI's use of informants. In contrast to laws or regulations, those Guidelines did not impose any legally enforceable obligations on the FBI or create any rights that are legally enforceable by

defendants. This fact was made explicit in a 1981 amendment to the Guidelines in which the Attorney General stated:

> N. *Reservation* These guidelines on the use of informants and confidential sources are set forth solely for the purpose of internal Department of Justice guidance. *They are not intended to, do not, and may not be relied upon to create any rights,* substantive or procedural, *enforceable at law by any party in any matter,* civil or criminal, *nor do they place any limitations on otherwise lawful investigative and litigative prerogatives of the Department of Justice.*

Ex. 274 (Under Seal), Manual § 137–17(N)(1–12–81) (emphasis added). Thus, the Guidelines did not operate to remove from the FBI authority that it otherwise had to promise its informants immunity.

Prior to the issuance of the Levi Memorandum, the Department of Justice did not have any institutionalized role in the FBI's use of informants. It appears, however, that the FBI occasionally sought legal advice from the Department of Justice on issues relating to them. For example, from at least 1961 until the issuance of the Levi Memorandum the FBI's Manual of Instructions stated that:

> On 7–10–52 the Department furnished an opinion regarding the question whether an informant could be prosecuted for technically violating the law while attempting to obtain evidence regarding a Federal violation. The Department stated "... If the intent throughout was to assist the government agents in the enforcement of the law, and not to violate or to 'cover-up' for a violation of the law, it is not believed a case for prosecution could be made against such an informer ...."
>
> *The procedures to be followed by informers working under the supervision of your agents in the aid of enforcing the statutes coming within your jurisdiction largely rests upon your sound discretion .... It is not believed that an informer would be otherwise immune from prosecution for actions which would subject a Federal enforcement officer to prosecution.*

Id. § 108(K) (10–13–61) (emphasis added). Prior to the promulgation of the Levi Memorandum, the Manual of Instructions also included the direction that:

> *Care must be exercised in attempting to persuade individuals to act as informants to avoid any allegations of undue influence. An individual who is in custody* and who offers to furnish information generally does so in the hope that he will receive some consideration in return. *Bureau agents cannot promise any immunity* or any reduction in sentence *to a criminal* who furnishes information and they must not put themselves in a situation where they might subsequently be accused of having done so.

Id. § 108(D)(4)(11–29–55 through 5–13–76) (emphasis added).

Read together, these provisions, among other things, indicate that prior to the Levi Memorandum the procedures to be employed in dealing with informants were at all times in the sole discretion of the FBI. Consultation with Department of Justice attorneys was not required. Indeed, such consultation with regard to an identified individual would have been inconsistent with the historic direction to FBI agents that: "Constant care must be exercised to avoid any disclosure *to anyone* which might permit identification of a criminal informant or even cast suspicion on a criminal informant." *Id.* § 108(I)(8) (12–11–59) (emphasis added). FBI agents were particularly advised, but not ordered, not to promise immunity or a reduction of sentence to "criminals" *in custody* whose cooperation was being sought. The FBI could, however, authorize informants who were not incarcerated to engage in what would otherwise be criminal activity without the involvement of Department of Justice attorneys. *Id.* § 108(K) (10–13–61).

In addition, the FBI alone could decide if an informant should be targeted for investigation and possible prosecution rather than continued as a source. As a practical matter, if an FBI agent made and honored a promise to protect an informant, the Attorney General and Department of Justice prosecutors would, under then established standards and procedures, virtually never know. It was in this environment that Connolly, in late 1975 or early 1976, repeated the promise of protection to Flemmi that Rico had made and kept.

In the December 15, 1976 Levi Memorandum, the Attorney General described the risks—realized in this case with regard to Bulger and Flemmi—that the operation of informants involves. Levi wrote:

> Courts have recognized that the government's use of informants is lawful and may often be essential to the effectiveness of properly authorized law enforcement investigations. However, *the technique of using informants to assist in the investigation of criminal activity, since it* may involve an element of deception and intrusion into the privacy of individuals or *may require government cooperation with persons whose reliability and motivation may be open to question, should be carefully limited.* Thus, while it is proper for the FBI to use informants in appropriate investigations, *it is imperative that special care be taken* not only to minimize their use but also *to ensure that* individual rights are not infringed and *that the government itself does not become a violator of the law. Informants as such are not employees of the FBI, but the relationship of an informant to the FBI imposes a special responsibility upon the FBI when the informant engages in activity where he has received, or reasonably thinks he has received, encouragement or direction for that activity from the FBI.*

Id. § 108 pt. IV (1–12–77) (emphasis added). Among other things, this statement expresses the understanding of the Attorney General that it was the FBI alone that had the power, and therefore the responsibility, for making promises to informants. Thus, the Attorney General encouraged the Bureau to be careful in doing so.

The Levi Memorandum provided explicit factors to be weighed by the FBI in deciding whether to utilize someone as an informant. *Id.* at 14. These included "the potential value of the information he may be able to furnish in relation to the consideration he may be seeking from the government for his cooperation." *Id.* § 108 pt. IV(A)(5) (1–22–77). The initial decision whether to utilize an individual as an informant, however, was left solely to the FBI.

The Levi Memorandum resulted in the deletion from the FBI Manual of the previously quoted § 108(D)(4) concerning granting immunity to informants. The Levi Guidelines included certain unqualified prohibitions, such as the provision stating that, "No active military personnel *can* be developed as informants." *Id.* § 108 pt. I(C)(5)(d) (1–12–77) (emphasis added). However, with regard to immunity, the new Guidelines stated, in language that endured at least until 1984, that:

> Agents *should not* exercise *undue influence* in developing informants *including promising immunity* or reduction of sentence to criminals who furnish information.

Id. § 108(I)(C)(6) (1–12–77); § 137–3(6) (1–31–78); § 137–3(6) (4–2–79); § 137–5(4) (1–12–81); § 137–5(4) (9–20–82); § 137–5(4) (3–28–84) (emphasis added). This provision of the Guidelines did not state that FBI agents were not authorized to promise immunity to informants. Rather it only stated that they *should* not do so. Thus, the FBI was discouraged, but not prohibited from promising immunity to informants. This advice was expressly premised on the principle that any such promise would be a form of "undue influence."

If the Attorney General intended to restrict the authority of the FBI to promise an informant immunity, he could and would have said so plainly. For example, on January 10, 1975, the Attorney General issued an Order, available to members of the public, that expressly stated that "*Investigative Agents and Attorneys are not Authorized* to make representations to witnesses regarding funding, protection, or relocation." Department of Justice Order OBD 2110.2, P 7(d) (Jan. 10, 1975) (emphasis in original). The Order also provided that such promises could be made "by authorized representatives of the U.S. Marshals Service only." *Id.* This legal limitation on the authority of prosecutors and investigators was recognized and respected by the courts. *Doe v. Civiletti*, 635 F.2d 88, 90 (2d Cir.1980) (holding that oral representations of a Strike Force attorney and DEA agent did not commit the Marshals Service with regard to placing someone in the Witness Protection Program). Similarly, the United States Attorneys Manual ("USAM") clearly states that "'No U.S. Attorney or [Assistant United States Attorney] has the authority to negotiate regarding an extradition or deportation order in connection with any case.'" *San Pedro v. United States*, 79 F.3d 1065, 1070 n. 4 (11th Cir.1996) (citing USAM § 9–16.020).

In contrast, neither the Levi Guidelines nor their successors stated that FBI was not authorized to promise immunity. Nor were FBI agents directed to consult a Department of Justice attorney if a promise of immunity, or anything that might be construed as a promise of immunity, was being discussed.

Rather, as indicated earlier, from at least 1977 through 1980, agents were instructed that, "[t]he success of the Top Echelon informant program depends on a dynamic and imaginative approach in developing quality sources who can help the Bureau in meeting its investigatory responsibilities." Ex. NN (Under Seal), Manual § 108 pt. III(B) (1–12–77); § 137–12(2) (4–12–79). This direction could understandably have been interpreted by agents as permitting, if not encouraging, informal promises of immunity to potential informants.

Moreover, the Levi Guidelines indicated that the FBI could, without consulting any prosecutor, authorize what would otherwise be criminal conduct by an informant. More specifically, those Guidelines provided that:

> The FBI shall instruct all informants it uses in ... organized crime and other criminal investigations that in carrying out their assignments they shall not:
>
> ...(4) participate in criminal activities of persons under investigation, *except insofar as the FBI* determines that such participation is necessary to obtain information needed for purposes of federal prosecution.

Ex. 274 (Under Seal), Manual § 108 pt. IV(B)(4) (emphasis added). Consistent with this the Attorney General stated that, "[t]he FBI may not use informants ... for acts ... which *the FBI* could not authorize for its undercover agents." Id. § 108 pt. IV at 13 (emphasis added). Thus, in 1977, the Levi Memorandum expressly treated the issue of authorization as solely within the province of the FBI. As the instant case reflects, immunity and authorization are distinct, but closely related concepts.

In extending the traditional exclusion of Department of Justice attorneys from the process of providing promises to FBI informants in order to obtain information, the Levi Guidelines were consistent with the unaltered provision of the Manual which continued to state that:

> Constant care should be exercised to avoid any disclosure to *anyone* which might result in the identification of an informant or cast suspicion upon an informant.

Id. § 108 pt. I(C)(7) (emphasis added). Moreover, FBI agents were also instructed that:

> At the earliest possible date all informants should be advised that the FBI will take all possible steps to maintain the full confidentiality of the informant's relationship with the FBI.

Id. § 108 pt. I(C)(9)(d).

Although the Levi Memorandum and related Guidelines did not provide Department of Justice attorneys a role regarding the promises that might be made to an FBI informant, they did for the first time establish a role for the Department of Justice when it later appeared that an FBI informant may have committed a crime. Id. § 108 pt. IV(C). First, the Attorney General directed that, "[u]nder no circumstances shall the FBI take any action to conceal a crime by one of its informants." *Id.* § 108 pt. IV(C)(1). As described in this Memorandum, this direction was regularly disregarded concerning Flemmi and Bulger.

In addition, if the FBI learned that one of its informants had violated the law in furtherance of his assistance to the FBI, it was expected that "ordinarily" the FBI would promptly inform the appropriate law enforcement or prosecutive authorities, and the FBI would decide whether the continued use of the informant was justified. Id. § 108 pt. IV(C)(2). If there were "exceptional" circumstances that caused the FBI to believe that such notification was "inadvisable," the FBI was required to inform the Department of Justice. *Id.* The Department would then decide whether law enforcement or prosecutive authorities should be notified and whether the FBI should continue to use the informant. *Id.* The Levi Memorandum also established the same procedures where the FBI had "knowledge" that one of its informants had committed a "serious" crime "unconnected with his FBI assignment." *Id.* § 108 pt. IV(C)(3). As described in this Memorandum, these requirements too were regularly ignored with regard to Bulger and Flemmi.

The December 15, 1976 Memorandum and the related Guidelines incorporated in the FBI Manual on January 12, 1977, were intended to provide guidance to the FBI before Attorney General Levi left office. They contemplated the development of additional Guidelines.

The Levi Guidelines recognized that FBI informants may need to engage in criminal activity to obtain important information. *See* Ex. 274 (Under Seal), Manual § 108 pt. I(D)(5) (1–12–77). In 1981, the Guidelines were revised to clarify this point and to provide more explicitly that informants may, if necessary and appropriate, be authorized to participate in a particular criminal act or "a specified group of otherwise criminal activities." *Id.* § 137–17(F)(2) (1–12–81).

In addition, for the first time, Department of Justice officials were given a role in certain authorization decisions. More specifically, since 1981, "ordinary criminal activity" is to be authorized by an FBI field office supervisor or higher FBI official. *Id.* "Extraordinary criminal activity," including conduct involving a "significant risk of violence," is to be authorized by the SAC with the approval of the United States Attorney. *Id.* § 137–17(F)(2) & (3) (1–12–81). The SAC is not, however, permitted to disclose the informant's identity to the United States Attorney. *Id.* § 137–17(F)(3). Both FBI Headquarters and the Assistant Attorney General in charge of the Criminal Division are to be immediately informed of any authorization of extraordinary criminal activity, although, once again, the identity of the informant is not to be disclosed to the Assistant Attorney General. *Id.* All such authorizations are to be memorialized in writing. *Id.* § 137–17(F)(2).

In 1981, the Guideline provisions regarding the instructions to be given to informants were also revised and implicitly indicated that informants should not be told that Department of Justice attorneys might play a role concerning them. Rather, the 1981 version of the Guidelines provided that each informant:

> shall be advised that his relationship with the FBI will not protect him from arrest or prosecution for any violation of Federal, State, or local law, *except where the FBI has determined* pursuant to these guidelines that his association in specific activity, which otherwise would be criminal, is justified for law enforcement . . .

Id. § 137–17(E)(1) (1–12–81) (emphasis added).

In 1981, the instructions to be given informants were also revised to state that they should be told that:

> Informant's relationship with the FBI will not protect him /her from arrest or prosecution for any violation of Federal, state, or local law, *except* insofar as a *field supervisor or SAC determines* pursuant to appropriate Attorney General's Guidelines that the informant's criminal activity is justified.

Id. § 137–3.4(1)(k) (1–12–81) (emphasis added). Thus, if the required warnings were given to an informant, he would reasonably understand that the FBI, without the involvement of any prosecutor, had the authority to decide if the informant would be protected from arrest and prosecution.

The Attorney General's Guidelines for the FBI's use of informants recognize that difficult decisions often must be made to strike a balance between effective law enforcement and providing benefits to criminals who are seeking to help themselves. The Guidelines in certain respects employ the principle that the weighing of these competing interests should be done by informed, but relatively disinterested officials, rather than by agents who have developed a personal relationship with the informant and have a vested interest in the outcome of the investigations to which the informant may be able to contribute. In this sense, although no judicial officer is involved, the Guidelines are similar in their approach to the warrant requirement of the Fourth Amendment, which requires that decisions concerning whether to authorize invasions of privacy be made by neutral magistrates rather than by those engaged in the competitive business of law enforcement, who do not have sufficient objectivity to be trusted to assess correctly the relative strength of the interests which must be weighed. *See, e.g., Steagald v. United States,* 451 U.S. 204, 212, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981).

Attorney General Levi, however, recognized that there were limits to what formal standards and procedures alone could accomplish. As he testified:

> No procedures are fail-safe against abuse. The best protection remains the quality and professionalism of the members of the Bureau and of the Department.

Statement of the Honorable Edward H. Levi, Attorney General of the United States, Before the Senate Select Committee on Intelligence Activities (Dec. 11, 1975) at 13. This case demonstrates that the enduring potential for abuse that Levi perceived was quickly realized.

The evidence in this case indicates that at least with regard to Organized Crime matters, the Guidelines were ignored from the outset. There were no special seminars or major training concerning the Guidelines that was received by the witnesses in this case. Morris Apr. 22, 1998 Tr. at 28–33; Ring Sept. 22, 1998 Tr. at 43–44; Darcy Sept. 28, 1998 Tr. at 66–67. Morris apparently did not read the new informant Guidelines when they were issued. Morris Apr. 22, 1998 Tr. at 28–33. The informant Guidelines were discussed occasionally in more general training sessions, but the Organized Crime squad supervisors in Boston did not get answers to any questions that they had. Ring Sept. 22, 1998 Tr. at 44.

In general, Morris and his successor as the supervisor of the Organized Crime squad, Ring, viewed the Attorney General's Guidelines as inconsistent with the Top Echelon informant program and utterly unrealistic. Morris Apr. 22, 1998 Tr. at 122–24, Apr. 27, 1998 Tr. at 18–19; Ring

Sept. 22, 1998 Tr. at 17. Thus, they felt the Guidelines did not apply to Organized Crime matters. *Id.* In their view, Top Echelon informants were, by definition, members of Organized Crime, who had to be involved in serious criminal activity. Morris Apr. 22, 1998 Tr. at 122–24, 128; Ring Sept. 22, 1998 Tr. at 17. Thus, Morris and Ring ignored provisions of the Attorney General's Guidelines that required authorization of criminal activity and reporting of unauthorized crimes committed by informants. *Id.*

The views of the supervisors of the Organized Crime squad were especially important. As described in this Memorandum, the SACs generally relied completely on the informant's handler and his supervisor for making decisions and recommendations for which the SACs were responsible under the Guidelines. Greenleaf Jan. 8, 1998 Tr. at 136–40. As Larry Potts, who served in many field FBI Offices and as Acting Deputy Director of the Bureau, put it, the supervisor of the handling agent was the "chief decisionmaker" regarding whether or not an individual should be continued as an informant. Potts May 22, 1998 Tr. at 7.

With regard to Flemmi and Bulger, at least, the requirements of the Guidelines were either ignored or treated as a bureaucratic nuisance. For example, Connolly filled out forms representing that he gave the required warnings to Flemmi that his relationship with the FBI would not protect him from arrest or prosecution unless a supervisor or SAC authorized his conduct pursuant to the Guidelines. Ex. 43; Gianturco Jan. 20, 1998 Tr. at 151–53. Those representations, however, were false. Flemmi Aug. 28, 1998 Tr. at 133.

The evidence also indicates that FBI Headquarters did not effectively supervise the implementation of the Guidelines. Potts could recall no instance in which a field office's recommendation that an individual be designated an informant was ever reversed. Potts May 22, 1998 Tr. at 6–8.

Moreover, while FBI Headquarters periodically audited the Boston office's informant files, no deficiencies with regard to the handling of Bulger or Flemmi were noted, despite the fact that those files were replete with information indicating that Bulger and Flemmi were involved in serious criminal activity that had not been authorized in writing, investigated by the FBI, reported to other law enforcement agencies, or reported to the Assistant Attorney General for the Criminal Division as required by the Guidelines. Indeed, when on the eve of the indictment of this case the FBI Principal Legal Advisor in Boston, John Michael Callahan, reviewed the Bulger and Flemmi files, he concluded that the FBI in Boston knew a great deal about their criminal activity and, in his opinion, had tacitly authorized at least some of it, including participation in illegal gambling and LCN policy making. Ex. 271. Any serious, earlier review of the files concerning information provided by Flemmi and Bulger in order to determine compliance with the Guidelines would have made clear that the requirements relating to authorization were being ignored. A proper review of the information about Bulger and Flemmi being provided by other informants, some of which is described in this Memorandum, would have made this conclusion even more clear.

Thus, at least with regard to Bulger and Flemmi, the FBI as an institution essentially disregarded the carefully calibrated standards and procedures that were developed by Attorney General Levi and his successors for continuing to use informants after the FBI had decided to employ them. The Department of Justice was apparently ignorant of, or indifferent to, these violations. There is no evidence that the Department of Justice did any review of its own to determine if the Guidelines were being followed. Rather, it seems to have relied solely on the good faith of the FBI.

As a result, it is not disputed that the Guidelines were not obeyed at least with regard to Flemmi and Bulger. As Assistant United States Attorney James Herbert stated:

> We don't dispute ... the Court's conclusion that the theory behind the Guidelines and the FBI's policies and procedures was to remove from the line agent the responsibility and the authority to make difficult decisions with respect to criminal informants ... that is what they were designed to do and I don't think they were followed in connection with Mr. Bulger and Mr. Flemmi in the manner they were designed to.

Nov. 19, 1998 Tr. at 94. Herbert's remark to the court echoed an earlier public statement by United States Attorney Donald Stern, who said:

> The FBI and attorney general informant guidelines, together with FBI administrative controls, are intended to provide the necessary checks and balances and to ensure that often difficult decisions are made at the appropriate level, based on complete and accurate information. While admittedly no system is foolproof, clearly those objectives were not met here, at least in certain critical respects.

Mitchell Zuckoff, "Bulger Case sparks probe in U.S. House," *The Boston Globe*, July 24, 1998, at A12.

7. *Bulger and Flemmi Begin to Perform as a Team*

As indicated earlier, Bulger was designated a Top Echelon informant on February 4, 1976, because of his "demonstrated ability to produce information regarding the highest levels of organized crime." Ex. 68. Flemmi was not officially reopened as a source until September 1980. Exs. 4, 82. Flemmi, however, continued to provide information to Connolly through Bulger and directly, often during meetings with Bulger and Connolly. In the circumstances, it is likely that Flemmi was, directly or indirectly, the source of some of the information attributed to Bulger in the FBI files for the periods that Bulger was open as an informant and Flemmi was not.

Some of the information Bulger and Flemmi provided in 1976 and 1977 was very valuable to the FBI's organized crime effort. Most notably, Barboza was murdered in February 1976. Ex. 5. In May 1976, Bulger reportedly informed Connolly that Jimmy Chalmas had set Barboza up and that the LCN intended to kill Chalmas to keep him quiet. *Id.* Connolly and Condon used this information to persuade Chalmas to admit his guilt and become a cooperating witness. *Id.;* Condon May 1, 1998 Tr. at 130. Connolly predicted that Chalmas' testimony would permit the FBI to obtain the conviction of Joseph Russo, who was regarded as "the # 3 member of the LCN in the Boston Division." Ex. 5. Although Russo was for many years a fugitive, in 1992, after becoming the Consigliere of the Patriarca Family, he was sentenced by this court for participating in the Barboza murder, among other things. *See United States v. Carrozza*, 807 F.Supp. 156, 159 (D.Mass.1992), *aff'd*, 4 F.3d 70 (1st Cir.1993).

The FBI files also record Bulger as the source of other highly valued information. For example, FBI records indicated that in 1977, Bulger warned Connolly that Special Agent Joseph Butchka, who was operating undercover, had been identified and targeted to be killed. Ex. 5. The FBI acted to secure Butchka's safety and Bulger was reportedly successful in preventing the prospective hitmen from acting on their threat against him. *Id.*

Similarly, in 1978, Bulger told Connolly about the planned imminent murder of Nick Gianturco, the FBI undercover agent in an investigation of truck hijacking known as "Operation Lobster." Ex. 5; Morris Apr. 21, 1998 Tr. at 81–84; Gianturco Apr. 20, 1998 Tr. at 10–11. Once again, the FBI took effective steps to protect its undercover agent. *Id.* Bulger was later credited with helping save Gianturco's life. Ex. 5.

Connolly reciprocated by providing Bulger and Flemmi the protection that he had promised. For example, in 1977, Bulger was told to alert Flemmi that a cleaning company had been "wired," in an effort to obtain evidence of Flemmi's loansharking. Ex. 30, ¶ 9. As a result, Flemmi avoided that location and was not intercepted. *Id.*

Similarly, in 1977 or 1978, several officials of National Melotone, a vending machine company, tried to prompt an FBI investigation of Flemmi, Bulger, and their associates for using threats of violence to have National Melotone's vending machines replaced with machines from Flemmi and Bulger's National Vending Company. Flemmi Aug. 20, 1998 Tr. at 112–17; Ex. 30, ¶ 14. Rather than pursue this information, report it to local law enforcement, or advise anyone other than perhaps Morris, who had become the Chief of the Organized Crime squad in December 1977, Connolly successfully sought to protect Flemmi and Bulger. More specifically, Connolly claimed that if an investigation of their allegations was conducted the executives of National Melotone and their families would be in great danger, requiring their participation in the federal Witness Protection Program and relocation. *Id.* This advice exploited what Connolly knew were the frightening reputations for violence that Flemmi and Bulger had acquired. It dissuaded the representatives of National Melotone from pursuing their charges. *Id.* Connolly did, however, tell Bulger and Flemmi about the problem. *Id.* To alleviate the pressure for an investigation, Flemmi and Bulger gave National Melotone back the locations in dispute. Flemmi Aug. 20, 1998 Tr. at 114.

Similarly, in October 1977, FBI Special Agents Thomas Daly and Peter Kennedy, who were then members of the Organized Crime squad, interviewed Francis Green. Exs. 261 and 262. An informant had reported that Bulger and Flemmi were threatening Green. Ex. 163. Green confirmed that Bulger, Flemmi, and John Martorano had approached him about a debt he owed to Colony Finance. *Id.* Bulger told Green that the money Green had been lent belonged to him and his colleagues, and that if it was not promptly repaid "they would positively kill him, that they would cut his ears off and stuff them in his mouth, that they would gouge his eyes out." Ex. 261. Green told the agents he was unwilling to testify, however. *Id.*

It is common for victims of threats to be reluctant to testify initially. Usually, the FBI tries to overcome this reticence. Ring Sept. 22, 1998 Tr. at 34. As Ring put it: "Nobody wants to testify in these types of cases .... You don't just turn around and walk away. If we did that we'd never make an organized crime case." *Id.* Green later became an important government witness in a public corruption case investigated by the IRS. *See United States v. Tracey,* 675 F.2d 433, 436 (1st Cir.1982). The FBI, however, never sought to develop Green as a witness against Bulger and Flemmi.

8. *Morris Becomes Chief of the Organized Crime Squad*

As indicated earlier, in December 1977, Morris was promoted to Chief of the Boston Organized Crime squad. Pursuing the LCN remained the FBI's "number 1 priority." Morris Apr. 22, 1998 Tr. at 127; Ex. 50. Morris regarded Bulger and Flemmi as vital assets in that effort.

Morris understood that Bulger and Flemmi viewed the LCN as "mortal enemies." *Id.* at 18. At the same time, Flemmi, particularly, was one of the very few sources who could provide the FBI with "information at the policy making level of the LCN." Ex. 8; Morris Apr. 22, 1998 Tr. at 15.

Connolly urged Morris not to treat Flemmi and Bulger like informants. Morris Apr. 24, 1998 Tr. at 156. Morris agreed and with Connolly cultivated the sense that Bulger and Flemmi were allies of the FBI. For example, Morris initially

met Bulger and Flemmi at a dinner held at his home, which Connolly also attended. Morris Apr. 21, 1998 Tr. at 103–04. This was the first in a series of such meetings with Bulger and Flemmi, which, as discussed *infra*, would come to include Nick Gianturco, Special Agent Michael Buckley, Supervisory Special Agent James Ring, Dennis Condon, Jules Bonovolenta, the ASAC in New York, and Joe Pistone, then a former New York FBI agent who had become famous for his undercover work as "Donnie Brasco." Gianturco Jan. 15, 1998 Tr. at 125–26, 154–55. Neither Morris nor Ring ever had similar, ostensibly social meetings with any other source. Morris Apr. 21, 1998 Tr. at 107; Ring June 10, 1998 Tr. at 94–95.

It was evident to Morris that the attempt to cause Flemmi and Bulger to feel that they were valued allies of the FBI rather than disreputable "rats" was successful. Morris correctly sensed that Flemmi never realized that he and Bulger had been officially opened as informants or that some of the information that they provided was being documented in its files. Morris Apr. 21, 1998 Tr. at 34.

In fact, all contacts with informants were required to be documented on FBI Forms 209. *See, e.g.,* Ex. 274 (Under Seal), Manual § 108 (10–13–60 to 7–13–76); § 108 pt. I(E)(3) (1–12–77); § 137–6(3) (1–31–78); § 137–8(2)(c–d) (1–12–81); Ring June 15, 1998 Tr. at 59. Morris' view of such 209s and the information that they contained was similar to Rico's and also shared by Morris' colleagues in the FBI's Boston office.

More specifically, Morris understood and expected that informants would be told that their relationship with the FBI was confidential and would not be disclosed to anyone outside the FBI. Morris Apr. 24, 1998 Tr. at 130; Apr. 29, 1998 Tr. at 47. During Morris' tenure at the FBI it continued to be the Bureau's routine and practice to maintain the confidentiality of its relationship with an informant as "sacred." Morris Apr. 24, 1998 Tr. at 130. Morris believed that the FBI would be violating its confidentiality agreement with its informants if it disclosed information provided by an informant to anyone seeking to investigate or prosecute him. Morris Apr. 24, 1998 Tr. at 130. Thus, Morris never told Bulger or Flemmi that information they were giving could be used against them. Morris Apr. 30, 1999 Tr. at 73. Morris did not believe that it could.

Morris correctly understood the FBI's position on this issue. For example, his view was shared by former Supervisory Special Agent James Darcy, whom the government called to testify as an expert concerning the handling of FBI informants. Darcy Sept. 29, 1998 Tr. at 81. Consistent with this, Potts, the former Acting Deputy Director of the FBI, knew of no instance in which information furnished by an informant had been used to assist an investigation or prosecution of him. Potts May 23, 1998 Tr. at 66. Nor did Morris. Morris Apr. 30, 1999 Tr. at 110.

9. *The Race–Fix Case*

In 1978 and 1979, Flemmi, Morris, and Connolly each understood that Flemmi and Bulger could properly be investigated by other agents or agencies, and be prosecuted if sufficient evidence were developed. This understanding was manifest in their conduct concerning an investigation of a race-fixing scheme being conducted by Daly, who was then working in the Lawrence or Lowell, Massachusetts office of the FBI, and Jeremiah O'Sullivan, a prosecutor in the Boston Organized Crime Strike Force. Morris Apr. 21, 1998 Tr. at 147–56.

The investigation focused on the payment of bribes to fix horse races by Howard Winter and his associates. *See United States v. Winter,* 663 F.2d 1120 (1st Cir. 1981). The key witness was Anthony Ciulla, who provided evidence that Bulger and Flemmi, among many others, participated in the race-fix scheme. Morris Apr. 21,

1998 Tr. at 112–14, 152. Bulger and Flemmi were aware of the investigation and were concerned about being indicted.

On January 27, 1978, Bulger was closed administratively as an informant because he was a primary subject of the race-fix investigation and might be indicted. Exs. 65, 68. Bulger was not informed that he had been administratively closed as an informant. Morris Apr. 22, 1998 Tr. at 66–67. Indeed, to have done so would have been inconsistent with the FBI's approach of trying to make Bulger and Flemmi feel they were colleagues rather than informants. In any event, Connolly continued his contact with Bulger and Flemmi, but did not document those contacts or the information they provided.

Among other things, Bulger and Connolly discussed the prospect that Bulger and Flemmi would be indicted. Bulger and Flemmi did not, of course, want to be charged. Connolly spoke to Morris. They agreed that they did not want to lose Bulger and Flemmi at a time when their services as informants were particularly important. Morris Apr. 22, 1998 Tr. at 57–58. Thus, after consulting Bulger, who received the concurrence of Flemmi, in about January 1979, Morris and Connolly met with O'Sullivan to discuss the situation. Morris Apr. 21, 1998 Tr. at 145–58; Flemmi Aug. 26, 1998 Tr. at 210, Aug. 28, 1998 Tr. at 59.

Morris and Connolly told O'Sullivan that Flemmi and Bulger were FBI informants. Morris Apr. 21, 1998 Tr. at 154–55. This disclosure to O'Sullivan violated FBI policy because it had not been authorized by FBI Headquarters. *Id.* at 159.

Nevertheless, Morris and Connolly told O'Sullivan that Bulger and Flemmi had the ability to continue to provide valuable assistance regarding the highest priority that the FBI and O'Sullivan shared—combatting the LCN. *Id.* at 154. They emphasized that Bulger and Flemmi were "crucial" to the ambitious plan they and O'Sullivan were developing to bug 98 Prince Street, the headquarters of Gennaro Angiulo, then the leader of the LCN in Boston. Morris Apr. 27, 1998 Tr. at 67, 72.

Thus, Morris and Connolly asked O'Sullivan not to include Bulger and Flemmi in the forthcoming race-fix indictment. Morris Apr. 21, 1998 Tr. at 147, 154–55. O'Sullivan consulted Daly, and subsequently agreed not to charge Bulger and Flemmi in the race-fix case. *Id.* at 32.

Bulger told Flemmi that the discussions with O'Sullivan had been successful and that they would not be indicted. Flemmi Aug. 28, 1998 Tr. at 63, 65. Flemmi asked Bulger to have Connolly thank O'Sullivan for him. Flemmi Aug. 20, 1998 Tr. at 46, 51–52.

About a month later, a RICO indictment relating to the race-fix scheme was returned against thirteen defendants, including Winter, James Martorano, and John Martorano. Flemmi Aug. 28, 1998 Tr. at 63; *Winter*, 663 F.2d at 1124. Bulger and Flemmi were named as unindicted coconspirators. Morris Apr. 22, 1998 Tr. at 59. After a forty-six-day trial with Ciulla as the vital, "star witness," all of the defendants who had not pled guilty or fled were convicted. *Winter*, 663 F.2d at 1124, 1127, 1137.

Flemmi did not in 1979 claim that he had an enforceable agreement with the FBI that provided him immunity from prosecution in the race-fix case. Rather, he recognized that he could have been indicted. Thus, he was grateful that Connolly and Morris had persuaded O'Sullivan to exercise his discretion not to indict him in order to permit Flemmi to continue to provide valuable information concerning the LCN.

In May 1979, the FBI in Boston requested and received from the Director of the FBI approval to reopen Bulger as an informant. Exs. 66, 67, 68. Bulger was characterized as a source who had "provided consistently excellent information," Ex. 66, with the "demonstrated ability to pro-

duce information regarding the highest levels of organized crime." Ex. 68. The Director was reminded that Bulger had been closed because he had become a "principal subject" of the race-fix investigation. *Id.* The Director was told, however, that "no prosecutable case developed against [Bulger] in the opinion of the Strike Force Attorney handling the matter." This was not true. Rather, Bulger and Flemmi were not prosecuted in the race-fix case because Connolly, Morris, and O'Sullivan had decided that their value as informants outweighed the importance of prosecuting them. In any event, the Director was told that "Boston is of the opinion that [Bulger] has been, and will be once again, one of the most highly placed and valuable sources of this Division." *Id.*

10. *The FBI Does Not Investigate Bulger or Flemmi*

At the time that the FBI officially reopened Bulger as an informant, Connolly and Morris were well-aware that he and Flemmi remained involved in a range of criminal activity, based on information being provided by other informants and statements made by Bulger and Flemmi themselves. The FBI neither investigated nor disclosed such information to any other law enforcement agency because Connolly and Morris were "very anxious" to continue to receive the "valuable" assistance of Bulger and Flemmi in the investigation of the Mafia to which Morris had by then dedicated every member of his Organized Crime squad. Morris Apr. 21, 1998 Tr. at 123–29.

For example, in July 1979, Morris received reports from informants that Bulger and Flemmi were "shaking down" independent bookmakers. Exs. 60, 63; Morris Apr. 22, 1998 Tr. at 28. In the instant case the alleged conspiracy to extort bookmakers, by Bulger, Flemmi and others, is alleged to have begun in 1979. *See* 4SI, Count 3. The FBI, however, made no effort to investigate this matter when it received information concerning it two decades ago. Morris Apr. 22, 1998 Tr. at 22–29.

Similarly, in 1979 and early 1980, the FBI received information from informants that Bulger and Flemmi were involved in other criminal activity, including illegal gambling and trafficking in cocaine. Exs. 63, 68. These allegations too were not investigated. Morris Apr. 21, 1998 Tr. at 123–29, Apr. 22, 1998 Tr. at 22–29.

In 1979, Bulger was providing Connolly with information concerning his own criminal activities and that of some of his associates. For example, in May 1979, Bulger described himself as a person who ran "the South Boston Irish Mafia" and identified several "extremely dangerous" people who were associated with him. Ex. 71. Bulger also related that his Winter Hill Gang and the LCN had agreed to change the illegal sports betting line. Ex. 40.

In addition, Bulger told Connolly that his associate John Martorano, who was a fugitive in the race-fix case, was in Miami, Florida. Ex. 41. Similarly, he reported that Joe Macdonald and Jimmy Sims, two of his other associates who were fugitives, would be back in Boston in a few days. Ex. 78. It was Morris' standard practice to review the 209s generated by members of his squad. Morris Apr. 29, 1998 Tr. at 8. There is no evidence, however, that the FBI made any effort to act on the information Bulger provided concerning himself or his associates.

Rather, in June or July 1979, Connolly, Bulger, Flemmi, and Gianturco met for the first time at Gianturco's home. Gianturco Jan. 15, 1998 Tr. at 88, 94. Meeting informants in an agent's home was highly unusual. *Id.* at 126–28. However, Bulger and Flemmi appeared to Gianturco to have a very friendly and trusting relationship with Connolly. *Id.* at 98–99. Gianturco felt comfortable with them because of the information they had given Connolly to help save his life. *Id.* at 93–95.

It appears that at this meeting Bulger and Flemmi provided information on the

criminal activities of the Patriarca Family, Myles Connor, and others. Ex. 35. This meeting occurred at about the time that the race-fix case was being tried, suggesting that it may also have been, in part, a celebration of Connolly's success in keeping Bulger and Flemmi from being indicted.

In any event, Gianturco later became the alternate agent for Flemmi. Gianturco Jan. 15, 1998 Tr. at 102–03. There were a series of dinner meetings at Gianturco's home. *Id.* at 106. At some of those meetings gifts were exchanged. *Id.* at 105–06, Apr. 20, 1998 Tr. at 18–24. Gianturco, for example, received from Bulger and Flemmi a toy truck to commemorate Operation Lobster, a glass statue, and a leather briefcase. *Id.* Gianturco gave Bulger an Alcatraz belt buckle. *Id.* at 21. The June or July 1979 meeting, however, is the only one from which information provided by Bulger or Flemmi is reflected in the FBI's files. There is no record of the gifts.

11. *The Lancaster Street Garage and 98 Prince Street*

In 1980, it became necessary for the FBI to provide Bulger and Flemmi more than passive protection in the form of not investigating them in order to preserve their potential to assist the FBI's plan to bug 98 Prince Street. In 1980, the FBI contributed to frustrating a Massachusetts State Police investigation of criminal activity of Bulger, Flemmi, and many others occurring at the Lancaster Street Garage, which was owned by Kaufman.

The Massachusetts State Police had determined that "virtually every organized crime figure in the metropolitan area of Boston, including both LCN and non-LCN (Winter Hill) organized crime figures frequented the premises and it was apparent that a considerable amount of illegal business was being conducted at the garage." Ex. 2. Flemmi and Bulger were among those targeted by the Massachusetts State Police. The Massachusetts State Police consulted O'Sullivan to discuss obtaining authority for electronic surveillance of the Garage. *Id.;* Ex. 3. The Massachusetts State Police insisted, however, that the FBI not be told about the plan because it believed that Flemmi and Bulger were informants, working with Morris, who might compromise the investigation if he knew about it. Ex. 2. Nevertheless, Morris discerned that the Massachusetts State Police was conducting electronic surveillance at the Lancaster Street Garage, in part because another FBI agent, James Knotts, had consulted him in an earnest effort to obtain information that could be used by the Massachusetts State Police to establish the probable cause necessary to obtain a warrant to bug that location. Morris Apr. 22, 1998 Tr. at 135–38.

The Massachusetts State Police installed a microphone in the Lancaster Street Garage on July 24, 1980. Ex. 2. It was "extremely productive" for about two weeks. *Id.* It then became evident to the Massachusetts State Police that the targets had been tipped off concerning the electronic surveillance. *Id.* The Massachusetts State Police suspected Morris had learned about the investigation and compromised it. *Id.;* Ex. 10.

The Massachusetts State Police's perception that its targets had been tipped off concerning the Lancaster Street Garage electronic surveillance was correct, although Morris may not have been involved. Flemmi initially received information about the bug, through an associate, John Naimovitch, a Massachusetts State Police Trooper. Flemmi Aug. 20, 1998 Tr. at 108–09, Aug. 25, 1998 Tr. at 242–45. Flemmi discussed this with Connolly. Flemmi claims that Connolly consulted Morris and O'Sullivan. Flemmi Aug. 20, 1998 Tr. at 104–08, Aug. 25, 1998 Tr. at 240–42. The court questions whether this is correct, particularly with regard to O'Sullivan. In any event, Connolly was somehow able to confirm for Flemmi and Bulger that the Lancaster Street Garage was bugged. Flemmi Aug. 20, 1998 Tr. at 103–05, Aug. 25, 1998 Tr. at 242–43.

Flemmi and Bulger advised some of their associates, including Kaufman, and the discussion of criminal activity at the Lancaster Street Garage ceased. Ex. 9; Flemmi Aug. 26, 1998 Tr. at 93–94.

Realizing that the investigation of the Lancaster Street Garage had been compromised, Colonel O'Donovan, the head of the Massachusetts State Police, complained to the FBI and made it clear that the Massachusetts State Police was convinced that Bulger and Flemmi were FBI informants. Exs. 2, 9, 10. The fact that Bulger and Flemmi's status as FBI sources had been recognized and discussed in the context of a promising criminal investigation was a matter of concern for Sarhatt, who had recently became the SAC in Boston. Ex. 10. The situation had the potential to embarrass the FBI in several ways. First, a belief in the criminal community that Bulger and Flemmi were informants could have caused them to be killed, thus placing in doubt the FBI's ability to protect its sources. Second, Sarhatt recognized that Bulger and Flemmi might be prosecuted for committing serious crimes. Their prosecution would have raised within the FBI, and perhaps more widely, questions concerning the Bureau's decision to work with them rather than investigate them. Thus, Sarhatt wondered whether the FBI should target Bulger and Flemmi for investigation rather than continue them as sources. Sarhatt Jan. 7, 1998 Tr. at 60, 64–66. Finally, Sarhatt was concerned that it might be true that one of his agents had disclosed the Massachusetts State Police investigation to two of its targets. Exs. 2, 9. Sarhatt acted on each of these concerns.

Morris was questioned about whether he had contributed to compromising the Lancaster Street Garage investigation. In response, Morris gave Sarhatt false information about some of his activities and was cleared. Ex. 69; Morris Apr. 22, 1998 Tr. at 154–55, Apr. 23, 1998 Tr. at 38.

Sarhatt also considered whether the FBI should keep Bulger and Flemmi open as informants or target them for investigation. Sarhatt Jan. 7, 1998 Tr. at 60, 64–66. Connolly and Morris urged him to continue them as informants. Connolly wrote memoranda reviewing the history of exceptional service that Bulger and Flemmi had rendered as sources, which Morris endorsed and amplified. In addition, with regard to Flemmi, who had been reopened as an informant in September 1980, Exs. 7, 4, Connolly wrote on December 2, 1980, that:

> Information from this source is currently being utilized in the preparation of an affidavit in support of a Title III application targeting [98 Prince Street], which is the highest priority organized crime investigation in Headquarters City [Washington, D.C.]. In addition to the Angiulo case, this informant is one of the two primary informants who will furnish the majority of probable cause for a Title III application targeting Illario Zannino (# 2 man in the Boston LCN).

Ex. 8. With regard to Flemmi, Morris added:

> I concur with the observations and evaluations of SA Connolly, and recommend continued contacts with captioned source. This source is one of very few sources who can furnish information at the policymaking level of the LCN and has been consistently rated as very good by the reviewing Inspector. *Continuing information from the informant is considered to be a critical factor in Boston's overall Organized Crime Program.*

Id. (emphasis added).

Connolly described in the same terms Bulger's importance to the affidavits being prepared to obtain electronic surveillance of 98 Prince Street and of Zannino. Ex. 5. Morris again agreed with Connolly and added that:

> [Bulger] is one of the most highly placed and valuable informants in the Boston Division. [He] was last rated as excellent by the reviewing Inspector in 1976. *The closing of an informant of this cali-*

ber would deal a serious blow to the [Organized Crime Program] of the Boston Division.

Id. (emphasis added).

In essence, Connolly and Morris advised Sarhatt that Flemmi and Bulger were of vital importance to the plan to bug 98 Prince Street, in which the FBI had a great investment on which it hoped to capitalize imminently, and to the Boston Office's Organized Crime program generally. Thus, they felt strongly that Bulger and Flemmi should not be closed as informants.

Sarhatt also consulted O'Sullivan, who had become the Chief of the Boston Organized Crime Strike Force, with regard to whether Bulger should be continued as an informant. Ex. 3; Sarhatt Jan. 7, 1998 Tr. at 43–49. This was highly unusual because it involved identifying, or confirming the identity of, a confidential source to a prosecutor. O'Sullivan, however, was already aware that Bulger and Flemmi were informants, and also knew that the Massachusetts State Police had concluded that they were sources for the FBI. Exs. 2, 3. According to Sarhatt's memorandum, O'Sullivan urged him to continue Bulger as an informant. Ex. 3; Sarhatt Jan. 7, 1998 Tr. at 53. More specifically, Sarhatt wrote that O'Sullivan told him that:

> it is crucial that the FBI continue this source [Bulger] inasmuch as the information he is currently furnishing is crucial to a Title III application of LCN members in Boston.
>
> Mr. O'Sullivan stated that he did not feel there was any improper conduct on the part of the FBI by continuing the Informant relationship with [Bulger]. He stated that there was sufficient justification for continuing him regardless of his current activities to be able to eventually prosecute LCN members.

Ex. 3.[33]

On November 25, 1980, Sarhatt also took the unusual step of meeting with Bulger himself as part of his effort to determine whether the FBI had compromised the Massachusetts State Police's Lancaster Street Garage investigation and whether Bulger and Flemmi should be continued as informants. Exs. 1, 87; Sarhatt Jan. 2, 1998 Tr. at 14. It was at this meeting that Bulger expressed his appreciation for Rico's courtesy and explained his warm feelings for Connolly, based on their common roots and shared "deep hatred for La Cosa Nostra." Ex. 1. At this meeting, Bulger also falsely claimed that he had not been given any information about the Lancaster Street Garage investigation by the FBI. *Id.* In doing so, Bulger was protecting Connolly.

Sarhatt was also interested in confirming that Bulger understood that the Massachusetts State Police was "fully aware of his Informant role with the FBI" and "his life could be in danger," and in documenting Bulger's response. *Id.* Sarhatt record-

33. The court notes that Sarhatt did not furnish a copy of his memorandum to O'Sullivan. *See* Ex. 3. This, among other things, suggests that the memorandum was written in meaningful measure for the protection of the FBI and raises questions concerning whether O'Sullivan would dispute Sarhatt's characterization of his comments. Exhibit 3 may be an example of what has been characterized as "Bureau-speak." It has been written that:

> The Bureau employs two separate languages. The first, for internal and interdepartmental communications, may be called Bureau-speak. It is cryptic, telegraphic and routine and its purpose is less to communicate than to anticipate, to make a record for future protection. "You can have a conversation with an agent," says Edwin O. Guthman, [Attorney General] Kennedy's press secretary, "and when it is over he will send a memo to the files. Any relation between the memo and what was said in the conversation may be purely coincidental. You would think you were at different meetings."

Navasky, *supra*, at 16. While the court wonders whether O'Sullivan's comments were as strong and unequivocal as described by Sarhatt, it does find that Sarhatt consulted O'Sullivan and O'Sullivan supported the continuation of Bulger as an informant.

ed that Bulger acknowledged that his status as an FBI informant was being widely discussed, but said that:

> [Bulger] was not concerned with his personal safety because no one would dare believe that he is an informant. It would be too incredible. Notwithstanding this notoriety, he indicated ... that he wants to continue the relationship with the FBI.

Ex. 1. This echoed what Bulger and Flemmi had previously told Connolly. Ex. 10. In essence, Bulger explained to Sarhatt that he was confident that the idea of a partnership between the FBI and a criminal of his stature was too extraordinary to be believed.

Bulger included in his interview high praise for the FBI. As Sarhatt recorded it, Bulger said:

> With respect to his association with Colonel O'Donovan ... he has met him on some occasions especially one in which he made very disparaging and derogatory statements about the professionalism of FBI personnel to which he took great umbrage, inasmuch as his association with the FBI has been nothing but the most professional in every respect.

Id.

Thus, with the encouragement of Bulger, O'Sullivan, Morris, and Connolly, Sarhatt in December 1980 decided to continue Bulger and Flemmi as informants, rather than target them for investigation, and to review their status again after March 30, 1981. Exs. 5, 8.

In November and December 1980, when Sarhatt was considering whether to continue Bulger and Flemmi as informants, Connolly and Morris had substantial reason to appreciate what Bulger and Flemmi had contributed to their work, and compelling cause to want to avoid any change in their status. For example, in the midst of the Lancaster Street Garage controversy, on September 11, 1980, Flemmi told Connolly that the Patriarca Family had been quietly making new members, including Salemme and Vincent Ferrara. Ex. 237, (209 dated 9/11/80). The next day, Flemmi was reopened as an informant because his "past legal problems [had] been resolved" and he had been "recontacted and has provided information of value and continues to be in a position to do so in the future." Ex. 4; *see also* Ex. 82. In the next month Flemmi gave Connolly Jack Salemme's telephone numbers, Ex. 237 (209 dated 9/23/80), and information relating to the murder of federal Judge James Wood. Exs. 8, 231.

Most significantly, however, Flemmi and Bulger had by December 1980 made a critical contribution to the effort to bug 98 Prince Street. In October 1980, Morris and Connolly gave Bulger and Flemmi an assignment. Morris Apr. 20, 1997 Tr. at 12, Apr. 27, 1998 Tr. at 11–12. Bulger and Flemmi were told that the FBI wanted to bug 98 Prince Street. Flemmi Aug. 20, 1998 Tr. at 125–26, Aug. 26, 1998 Tr. at 178–79; Morris Apr. 28, 1998 Tr. at 104–05. Morris and Connolly asked Bulger and Flemmi to obtain information that was important to the feasibility of that effort. They asked them to go to 98 Prince Street, look carefully at the premises, and provide the FBI everything possible concerning the doors, locks, and any security devices. Morris Apr. 27, 1998 Tr. at 11–13; Flemmi Aug. 26, 1998 Tr. at 126.

Bulger and Flemmi expressed two concerns when confronted with the request. Bulger particularly was reluctant to go to 98 Prince Street because he did not trust the LCN and was afraid he and Flemmi might be killed. Morris Apr. 21, 1998 Tr. at 29–30, Apr. 24, 1998 Tr. at 43–45. *See also* Ex. 78. Morris and Connolly felt this fear was well-founded. Flemmi Aug. 20, 1998 Tr. at 43. Indeed, in about December 1980, Morris played for Bulger and Flemmi a tape of still undetermined origin on which Zannino and another member of the Patriarca Family, Domenic Isabella, discussed looking for the right opportunity

to kill Flemmi and Bulger. Flemmi Aug. 20, 1998 Tr. at 52–55.

Flemmi expressed another concern. He recognized that if 98 Prince Street were bugged, discussion of some of his and Bulger's criminal activity was likely to be intercepted. Flemmi Aug. 26, 1998 Tr. at 184–86, 189–91, Aug. 20, 1998 Tr. at 43–45. Flemmi wanted to know what would be done with any such evidence. *Id.* Morris and Connolly assured Bulger and Flemmi that the 98 Prince Street tapes would not be a problem for them. *Id.* They would be protected for any thing picked up on those tapes, rather than prosecuted. *Id.* Thus, Flemmi understood that nothing on the tapes would be used against him. Flemmi Aug. 26, 1998 Tr. at 189–90.[34] That understanding was reasonable. In addition, but for the assurance received from Morris and Connolly, Flemmi and Bulger would not have assisted the FBI in its effort to bug 98 Prince Street.

With this assurance, Flemmi and Bulger went to 98 Prince Street. They returned with the information that the FBI had requested, including a diagram of the premises. Ring June 11, 1998 Tr. at 135–36. The subsequent bugging of 98 Prince Street, which was generally viewed as a virtually impenetrable location, was considered a remarkable technical feat for the FBI. Bulger and Flemmi made a unique contribution to that achievement.

On January 9, 1981, the government applied for, and received, a warrant to bug 98 Prince Street. Aff. of Paul E. Coffey, Apr. 9, 1997 ("Coffey Aff., Apr. 9, 1997"), ¶ 3A. Bulger and Flemmi were two of the sources whose information was used to establish the legally required probable cause. *Id.* Information that they provided was also included in some, but not all, of the periodic requests for extensions. *Id.* In addition, Bulger was a source whose information was used to get a warrant to bug Zannino's premises at 51 North Margin Street. *Id.*

Bulger and Flemmi were told when the bug had been installed in January and when it was removed in April 1981. Flemmi Aug. 20, 1998 Tr. at 126–27; Morris Apr. 28, 1998 Tr. at 105–06. Accordingly, neither of them went to 98 Prince Street when it was bugged. Thus, neither was recorded on the 98 Prince Street tapes.

It was highly irregular for sources to be told why the FBI was requesting certain information or that a particular location was being electronically monitored. FBI agents are generally instructed that: "Care must be exercised in handling informants to ensure that they are provided no information other than that necessary to carry out their assignments." Ex. 274 (Under Seal), Manual § 137–5(10) (3–28–84). As Ring explained, criminal sources may be very helpful, but are usually regarded as not completely trustworthy. Ring June 10, 1998 Tr. at 68–69. Thus, it is generally unduly risky to tell them about the FBI's intentions or activities. *Id.*

Connolly and Morris, however, had full faith in Flemmi and Bulger. Morris Apr. 28, 1998 Tr. at 105–06, Apr. 27, 1998 Tr. at 14. They were confident that their sources would not betray them. *Id.* Thus, they treated Bulger and Flemmi as colleagues rather than informants in explaining the FBI's plan to bug 98 Prince Street and letting them know when the electronic surveillance was operating.

Indeed, in about January 1981, Flemmi, Bulger, Connolly, and Morris gathered in Morris' home in Lexington, Massachusetts for what Flemmi characterized as a belated Christmas celebration. Flemmi Aug. 20, 1998 Tr. at 55–56. The timing of this first meeting at Morris' home suggests it

34. The issue of the representations made to Bulger and Flemmi concerning the use of the 98 Prince Street tapes was raised for the first time in Flemmi's testimony, rather than in his affidavits, which did not purport to be exhaustive. *See, e.g.,* Ex. 30, ¶ 4. The government recalled Ring to refute many of Flemmi's claims. The government did not recall Morris to address the 98 Prince Street immunity issue.

may also have been a celebration of the successful bugging of 98 Prince Street. In any event, Bulger and Flemmi brought wine and a champagne bucket for Morris. *Id.* Morris reciprocated by giving Flemmi, a Korean War veteran, a painting from Korea. *Id.*

12. *Sarhatt Extends Bulger and Flemmi As Informants*

As described earlier, in December 1980, when Sarhatt authorized Morris and Connolly to continue Bulger and Flemmi as informants, rather than target them for investigation, he planned to reevaluate Bulger and Flemmi's status after March 30, 1981. Exs. 5, 8. He subsequently had his new ASAC, Robert Fitzpatrick, who had come to Boston in January 1981, meet with Bulger to assist in that assessment. Fitzpatrick Apr. 17, 1998 Tr. at 47–49, 59. Fitzpatrick testified that he had misgivings about continuing Bulger and Flemmi as informants. More specifically, he stated that he was concerned that Bulger and Flemmi were not being sufficiently productive, and were engaged in serious crime, including crimes of violence and collecting "tribute" from drug traffickers. Fitzpatrick Apr. 17, 1998 Tr. at 53–59. There is no written record indicating that Fitzpatrick ever expressed such concerns to Sarhatt, however.

In any event, in memoranda dated April 1, 1981, Connolly and Morris strongly urged that Bulger and Flemmi be continued as informants based on their invaluable contributions to the bugging of 98 Prince Street and 51 North Margin Street, and their potential to assist in the development of cases those tapes might generate and other organized crime matters. Exs. 50, 51. More specifically, with regard to Flemmi, Morris wrote that:

> information provided by this informant has been utilized in six successful affidavits in support of six applications for court authorized electronic surveillance pursuant to the provisions of Title III. These affidavits are in connection with two of the highest priority organized crime matters under investigation in the Boston Division. *One of these two cases, [98 Prince Street] is one of the highest priority organized crime cases in the FBI today and involves what has been characterized by [FBI Headquarters] officials as one of the most important and successful Title IIIs to have been conducted by the FBI in the past ten years.*

Ex. 50 (emphasis added). Morris reiterated these remarks in endorsing Bulger's continuation as an informant.

In addition, Morris wrote that Bulger and Flemmi were each:

> a highly placed and valuable informant. Informants such as [Bulger and Flemmi] take years to develop and form the nucleus of any viable long range Organized Crime Program. [Each] informant should not only continue to be contacted but in fact targeted for ever increasing productivity.

Exs. 50, 51.

Fitzpatrick reviewed and initialed each memorandum without dissent. Sarhatt agreed to continue Bulger and Flemmi as informants. Exs. 50, 51.

Bulger and Flemmi quickly validated Morris and Connolly's assessment of their potential to continue to contribute to the FBI's organized crime efforts. For example, in April or May 1981, Morris arranged to meet Bulger and Flemmi at the Hotel Colonnade. Flemmi Aug. 20, 1998 Tr. at 60–63. Morris played for them a tape of a conversation intercepted at 98 Prince Street on which Angiulo and Zannino discussed killing their associate Nick Gizo's girlfriend, Liz McDonough. *Id.;* Ex. 210; Morris Apr. 27, 1998 Tr. at 104–05. Morris asked for Bulger and Flemmi's assessment of the threat. Flemmi Aug. 20, 1998 Tr. at 63. Flemmi said that he felt the threat was real. *Id.*

In the course of this meeting, the three drank wine. *Id.* Morris had so much that Bulger decided to drive him home. *Id.* Flemmi kept the tape. *Id.;* Ex. 210.

Subsequently, Bulger and Flemmi began referring to Morris as "Vino." Flemmi Aug. 20, 1998 Tr. at 63.

In addition to assisting with interpreting the tapes, Flemmi promptly provided the FBI valuable assistance in its ongoing effort to develop a strong case against Angiulo and his associates. Among other things, Flemmi told the FBI that the LCN believed Angiulo's office had been bugged. Ex. 237 (209 dated 5/14/81). He also identified an individual Flemmi felt would testify against Angiulo if targeted by the FBI. *Id.* (209 dated 5/14/81). In addition, Flemmi reported on meetings he had with Angiulo at 98 Prince Street and elsewhere. *Id.* (209 dated 9/18/81); Ex. 79.

Flemmi also advised the FBI that: the LCN planned to murder several suspected informants, Ex. 237 (209 dated 12/15/81); Joe Russo, who was "on the lam," had returned to visit Zannino, *id.* (209 dated 7/12/82); and the FBI agents and Strike Force attorneys preparing the Angiulo case should be alert to possible violence against them. *Id.* All of this information was highly valued by the FBI as it prepared the Angiulo case.

Bulger and Flemmi also gave the FBI information concerning the drug dealing of Salvatore Michael Caruana and his claim to have been closely connected with Patriarca. Ex. 223. In addition, they reported on the unsolved Blackfriar's murder case. Ex. 7.

Without any apparent concern that the information would be used against him or his associates, Bulger told the FBI about the $200,000 his Winter Hill Gang borrowed from the Angiulos to deal with the financial difficulties they were having due to illegal gambling losses. Ex. 73. Bulger also reported on some of the activities of his Winter Hill associates. Ex. 127.

At the same time the FBI was receiving, but not investigating, reports from informants regarded as reliable concerning criminal activity in which Bulger and Flemmi were engaged. For example, in 1981 and 1982, the FBI was told that Bulger and Flemmi were involved in cocaine distribution with Brian Halloran. Exs. 88, 89. The Bureau was also advised that bookmakers were required to pay Bulger and Flemmi to operate in South Boston. Exs. 89, 91. These allegations were not investigated by the FBI. Rather, with regard to Flemmi's reported drug activity, Connolly wrote that "source's contacts, at my direction, with individuals thought to possess information regarding [Judge Wood's] murder, may have resulted in the false belief that source is involved in narcotics." Ex. 8.

13. *The Wheeler, Halloran, and Callahan Murders*

A serious threat to the ability of the Boston office of the FBI to continue to benefit from Bulger and Flemmi as sources arose on March 27, 1981, when Roger Wheeler was murdered in Tulsa, Oklahoma. Based on descriptions provided by witnesses, Bulger, Flemmi, and John Martorano, who was a fugitive, became prime suspects. The FBI in Boston, however, succeeded in keeping agents from other offices and local law enforcement officials from speaking to Bulger and Flemmi. In addition, when Brian Halloran became a potential witness against Bulger and Flemmi in the Wheeler homicide investigation, Morris told Connolly. As Morris anticipated, Connolly told Bulger and Flemmi. Several weeks later Halloran was murdered.

Wheeler owned World Jai Lai, which had facilities, known as "frontons," in Florida and Connecticut, where it was legal to gamble on Jai Lai matches. Initially, Callahan, an accountant and associate of Halloran's, was the President of the business. Morris Apr. 27, 1998 Tr. at 127–28. Rico, who had retired from the FBI in 1975, served as its Director of Security.

Wheeler suspected that Callahan was skimming money from World Jai Lai for members of the Winter Hill Gang, including Halloran, Bulger, and Flemmi. Morris

Apr. 27, 1998 Tr. at 128. Thus, he fired Callahan, put some of his own people in key positions, and began an audit. *Id.* Before it was concluded, however, Wheeler was shot and killed as he left his golf club in Tulsa. Sketches prepared on the basis of descriptions provided by witnesses, among other things, caused the FBI and others to suspect that Bulger had murdered Wheeler. Fitzpatrick Apr. 16, 1998 Tr. at 96, 114, Apr. 17, 1998 Tr. at 42–43, 175–76. Flemmi was also a suspect. Ex. 55. In addition, it was believed that John Martorano may have been involved.

The FBI in Oklahoma City was interested in exploring Callahan's relationship with Halloran, and in investigating Bulger and Flemmi. Morris Apr. 27, 1998 Tr. at 127. The FBI's Boston Organized Crime squad opened an investigation to support Oklahoma City's effort to solve the Wheeler murder. Morris Apr. 27, 1998 Tr. at 120. *See also* Aff. of Special Agent Stanley Moody, Apr. 29, 1998 ("Moody Aff., Apr. 29, 1998"). In 1981, at Morris' request, Connolly interviewed Callahan as part of that investigation. Morris Apr. 27, 1998 Tr. at 127–30. The Boston investigation was then quickly closed. *Id.*

In January 1982, Halloran, who was facing a state murder charge, began to cooperate with the FBI in Boston. Morris Apr. 24, 1998 Tr. at 78, Apr. 27, 1998 Tr. at 115. Special Agents Leo Brunnick and Gerald Montanari, two members of the Boston FBI's Labor and Racketeering squad, were assigned to work with Halloran. Morris Apr. 24, 1998 Tr. at 78, Apr. 27, 1998 Tr. at 112–13. Among other things, Halloran told Brunnick and Montanari that he had met Bulger and Flemmi at Callahan's apartment and was asked if he was willing to murder Wheeler. Morris Apr. 22, 1998 Tr. at 112, Apr. 27, 1998 Tr. at 114.

Brunnick consulted Morris, as the supervisor of the Organized Crime squad, to get his assessment of Halloran's reliability as a potential witness. *Id.* at 78–80. Brunnick told Morris about Halloran's allegations concerning Bulger and Flemmi. Morris Apr. 24, 1998 Tr. at 83, Apr. 27, 1998 Tr. at 113–14, 127, 130. Morris realized that Halloran's allegations threatened their futures as FBI informants, among other things, because it was the Bureau's practice to close sources that it was investigating. Morris Apr. 24, 1998 Tr. at 74–77. Morris and Connolly did not want to lose their prize sources, who were important to their investigations, and to their own status and future careers in the FBI. *Id.* Morris told Brunnick that Halloran was untrustworthy and unstable, and would not be a believable witness. *Id.* at 78–83.

The FBI in Oklahoma City had expressed interest in Halloran. *Id.* at 87. However, no evidence was introduced indicating that any of its agents were informed of Halloran's discussions with the FBI in Boston.

Morris, however, told Connolly that Halloran was speaking with Brunnick and Montanari, and of the information he was providing about Bulger and Flemmi. *Id.* at 79, 87–88, Apr. 22, 1998 Tr. at 112, 118. Morris expected that Connolly would tell Bulger and Flemmi about Halloran's charges. Morris Apr. 22, 1998 Tr. at 112–13, 117. Morris knew that doing so would endanger Halloran. Morris Apr. 24, 1998 Tr. at 92. Connolly told Bulger and Flemmi about Halloran's cooperation and claims. Morris Apr. 22, 1998 Tr. at 115–16, 118; Flemmi Aug. 20, 1998 Tr. at 20–21 (Lobby, Under Seal), Aug. 26, 1998 Tr. at 81–84, Sept. 1, 1998 Tr. at 88–90; Bocri May 15, 1998 Tr. at 73, May 18, 1998 Tr. at 69–77; Ex. 41.

In early May 1982, the FBI denied Halloran's request to be placed in the Witness Protection Program and told him that his relationship with the FBI was terminated. Morris Apr. 30, 1998 Tr. at 8. *See also* Aff. of Supervisory Special Agent William Chase, Apr. 29, 1998 ("Chase Aff., Apr. 29, 1998"). On May 11, 1982, Halloran was murdered as he emerged from a restau-

rant in South Boston. No one has ever been convicted of that murder. Morris, however, believed that Bulger and Flemmi were responsible. The next time that Morris asked Connolly to tip Flemmi off to an investigation, he added that he "did not want another Halloran"—meaning another murder. Morris Apr. 22, 1998 Tr. at 121.

Morris did not, however, hesitate to capitalize on the extraordinary disclosure of highly confidential information that he had caused Connolly to make to Bulger and Flemmi. At some point prior to Halloran's murder Connolly had told Morris that Bulger and Flemmi "really liked him," and hoped that Morris would let them know if he ever needed anything. Morris Apr. 23, 1998 Tr. at 135–36, 140, Apr. 24, 1998 Tr. at 97–99. Several weeks after Halloran's murder Morris was sent to Glencoe, Georgia for drug training. Ex. 240. At that time, although married, Morris was romantically involved with his secretary. *Id.;* Deborah Morris Sept. 22, 1999 Tr. at 148.

While in Georgia, Morris decided that he would enjoy a visit from her. Morris Apr. 23, 1998 Tr. at 136. Recalling the offer communicated through Connolly, he asked Connolly if Bulger and Flemmi would provide the funds necessary to buy his secretary a plane ticket. *Id.* at 136, 139.

Connolly subsequently gave Morris' secretary an envelope containing $1000 cash, which Morris understood had come from Bulger and Flemmi. *Id.;* Deborah Morris Sept. 22, 1998 Tr. at 150. Flemmi denies that this payment was made. Flemmi Aug. 26, 1998 Tr. at 104–05. Nevertheless, the court finds that Morris' understanding was correct. Connolly, however, told the secretary that Morris had saved the money and wanted her to use it to visit him in Georgia. Morris Apr. 23, 1998 Tr. at 136–37; Deborah Morris Sept. 22, 1998 Tr. at 150–51. She took the money and made the trip. *Id.*

Morris knew that the fact that Bulger and Flemmi had been told by Connolly of Halloran's effort to cooperate with the FBI would be relevant to any investigation of Halloran's murder, but he never provided this information to anyone in the FBI. Morris Apr. 24, 1998 Tr. at 94–97. Nor did he tell the Suffolk County District Attorney's Office, which conducted an investigation and obtained an indictment, but not a conviction, of Jimmy Flynn for the Halloran murder. *Id.*

The Halloran murder presented a dilemma for the FBI. It precipitated a May 25, 1982 meeting at FBI Headquarters to grapple with Bulger and Flemmi's dual status as valuable FBI informants and also suspects in the investigations of the Wheeler and Halloran murders. Ex. 54; Fitzpatrick Apr. 16, 1998 Tr. at 94–102, Apr. 17, 1998 Tr. at 179. Representatives of the FBI offices in Boston, Oklahoma City, and Miami met with FBI Headquarters officials, including Sean McWeeney, Chief of the Organized Crime Section, and Jeff Jamar, the Informant Coordinator. *Id.*

At the May 25, 1982 meeting, the Miami, Oklahoma City, and Boston offices of the FBI agreed to coordinate their investigations of the Wheeler and Halloran homicides. Ex. 54. It was also agreed that O'Sullivan, as the Organized Crime Strike Force Chief in Boston, and the United States Attorney in Oklahoma would discuss where any grand jury investigation should be conducted. *Id.;* Fitzpatrick Apr. 16, 1998 Tr. at 90, Apr. 17, 1998 Tr. at 181.

In addition, a decision was made to keep Bulger and Flemmi open as sources unless and until "substantiated information" implicating them in the murders was received. Ex. 54; Fitzpatrick Apr. 17, 1998 Tr. at 180. It does not appear that there was any discussion of whether Bulger and Flemmi had immunity that would protect them from possible prosecution for the Wheeler or Halloran murders. Nor does it appear that the implications of the Attorney General's Guidelines concerning informants were considered. More specifi-

cally, there was evidently no discussion of whether local law enforcement authorities in Boston or Oklahoma, which were conducting investigations, should be advised of the information Halloran had provided concerning Bulger and Flemmi or of whether the Assistant Attorney General should have been consulted.

On August 4, 1982, the body of John Callahan was found in the trunk of his car in Miami, Florida. Apr. 17, 1998 Tr. at 184. He had evidently been dead for several weeks.

On September 23, 1982, Flemmi was administratively closed as an informant. Ex. 83. Connolly and Morris told FBI Headquarters that they were closing Flemmi because he was being targeted for possible prosecution in the 98 Prince Street and 51 North Margin investigations. *Id.;* Morris Apr. 28, 1998 Tr. at 15–20. This was not true. Morris Apr. 28, 1998 Tr. at 20; Ring June 10, 1998 Tr. at 40.

As in the past, Flemmi was not told he had been administratively closed as a source. Morris Apr. 28, 1998 Tr. at 23; Flemmi Aug. 29, 1998 Tr. at 33. In any event, Flemmi continued to provide information regularly to the FBI. Exs. 224, 265. Indeed, the records reflect forty-six contacts between Flemmi and the FBI between February 1983 and May 1986, a period when Flemmi was administratively closed as a source. *Id.* There was no diminution in Bulger's official status as an informant. Rather, as discussed *infra,* in February 1983, Bulger was elevated to Top Echelon status. Ex. 11.

Nevertheless, Montanari attempted to investigate whether Bulger and/or Flemmi played a role in the Wheeler homicide and related matters. Pursuant to standard practice, the files of his investigation were kept in an area that was accessible to other agents. Montanari, however, suspected that Connolly was surreptitiously reviewing those files and furnishing information about his investigation to Bulger and Flemmi. Fitzpatrick Apr. 16, 1998 Tr. at 103–05, Apr. 17, 1998 Tr. at 191–92. He complained to Fitzpatrick, who was sufficiently concerned that he locked the files in his own office. *Id.*

While Fitzpatrick secured the files in an effort to keep the information Montanari was developing away from Connolly, he did not want anyone outside of the Boston office of the FBI to have access to Bulger and Flemmi. In April 1983, the FBI in Oklahoma City sought authority from the Director of the FBI to interview Bulger and Flemmi. Ex. 53. Fitzpatrick strongly and successfully opposed this request. *Id.;* Fitzpatrick Apr. 17, 1998 Tr. at 184–86. In doing so, Fitzpatrick claimed that he had interviewed Bulger concerning the Wheeler and Callahan murders, and that Bulger had denied being involved. *Id.* As Fitzpatrick testified, this was not true. Fitzpatrick Apr. 17, 1998 Tr. at 47, 184–86. Fitzpatrick had never questioned Bulger on these subjects. *Id.* at 184–86. Although he himself did not trust Connolly fully, Fitzpatrick also argued that Oklahoma City should not be allowed to interview Bulger and Flemmi in part because Connolly was in continual contact with them and was disseminating all relevant information that he received regarding the Wheeler and Callahan murders. *Id.;* Ex. 53. In essence, the Boston office of the FBI was determined to control the information, and therefore the decisions to be made, concerning its prize informants.

In May 1983, shortly after Fitzpatrick prevented FBI agents from Oklahoma City from interviewing Bulger and Flemmi, Connolly urged the SAC to reopen Flemmi as an informant because he was continuing "to voluntarily furnish sensitive information of an extremely high quality." Ex. 55. Thus, Connolly argued that if Flemmi was not going to be indicted imminently as a result of the Wheeler, Callahan, or 98 Prince Street investigations, he should be restored to Top Echelon informant status. *Id.* The timing of this memorandum suggests that it may have been, in part, an attempt by Connolly to determine

whether there was a threat that Flemmi would soon be charged as a result of the Halloran and Callahan murder investigations.

The FBI in Boston did not, however, immediately act on Connolly's request. Rather, Ring, the new supervisor of the Organized Crime squad, ordered that Bulger and Flemmi come in to the Boston office to be photographed, as requested by the FBI in Oklahoma, and to be interviewed by Montanari. Ring June 18, 1998 Tr. at 46–48. Ring told Montanari, however, that he did not want to be told anything about the progress of his investigation, but when it was concluded he hoped Montanari would give him his opinion on whether Bulger and Flemmi were involved in the Wheeler and Callahan murders. Ring June 18, 1998 Tr. at 48.

Although Connolly resisted Ring's request by claiming that he did not believe that Bulger and Flemmi were involved in the homicides, Ring did not relent. *Id.* at 52–53. As a result, in November 1983, Bulger and Flemmi were interviewed together by Montaneri and Brendan Cleary. *Id.;* Exs. 75 (Under Seal), 227.

It was highly unusual for two subjects of an investigation to be interviewed together. Bulger and Flemmi denied any involvement in the Wheeler and Callahan murders. Exs. 75 (Under Seal), 227. They refused, however, to take a polygraph examination and objected to being photographed. *Id.* Ring recalls that the FBI did photograph them. Ring June 10, 1998 Tr. at 50. No such photographs, however, were produced in discovery or introduced as evidence.

No one has ever been charged with committing the Wheeler and Callahan murders. Officially, those investigations remain open. The FBI in Boston, however, departed from the Bureau's standard procedures to render the information that it had received from Halloran regarding Bulger and Flemmi virtually inaccessible to others who might wish to review or evaluate it.

More specifically, in 1982 and 1983, FBI reports containing allegations against an individual were to be indexed by that individual's name and placed in an investigative file. *See* Moody Aff., Apr. 29, 1998, ¶ 5. With one exception, however, the many reports containing Halloran's charges against Bulger and Flemmi were not properly indexed with a reference to their names. *Id.* at ¶ 5–6; Apr. 17, 1998 Tr. at 8, Apr. 24, 1998 Tr. at 20–21, Apr. 30, 1998 Tr. at 4–10. Thus, these documents were not found or considered by the Department of Justice officials who were assigned, in July 1997, as a result of this case to review allegations that had been made by informants and witnesses against Bulger and Flemmi. *See* Chase Aff., Apr. 29, 1998.

Nor, when found by the Boston office of the FBI, were the documents promptly produced to the defendants as required by this Court's June 26, 1997 Order and other rulings. June 26, 1997 Order, ¶ 4(c); Moody Aff., Apr. 29, 1998; May 5, 1998 Tr. at 2–12 (Lobby, Under Seal). If the documents had been produced in a timely manner, Rico and Morris could have been questioned about them. None of the documents, however, were provided to the defendants at the time Rico testified in January 1998. In addition, some documents relating to Halloran's charges against Flemmi and Bulger that should have been produced in connection with Morris' appearance were not disclosed until his lengthy testimony was complete. However, Special Agent Moody, who had found the Halloran documents, had provided them long before to Boston ASAC Mike Wolf and SAC Barry Mawn to review because the information that they contained "was obviously highly singular and sensitive." Moody Aff., Apr. 29, 1998, ¶ 4, Aff. of Special Agent Stanley Moody, May 5, 1998 ("Moody Aff., May 5, 1998"), ¶ 2; May 1, 1998 Tr. at 3–8.

Both Flemmi and the government had reasons to hope that Halloran's allegations

against Flemmi and Bulger would not be fully exposed or resolved in this case. From Flemmi's perspective, a thorough exploration of the Halloran charges might prove that he participated in murder. From the FBI's perspective, exposure of its agents' conduct had the foreseeable potential to reveal an extraordinary effort to protect Bulger and Flemmi that involved serious impropriety, if not illegality. In any event, neither Morris nor Rico was recalled as a witness.

As a result of the delayed disclosure of the Halloran documents by the government and of the failure of the adversary system to operate fully and effectively on this issue, questions remain regarding the role, if any, played by Flemmi and Bulger in the Wheeler, Halloran, and Callahan murders, and the full degree to which the FBI in Boston has, from 1981 until recently, attempted to keep any such role from being discerned and demonstrated.

14. *The FBI Identified Other Informants for Flemmi and Bulger*

Halloran was not the only informant that the FBI identified for Bulger and Flemmi. Flemmi Aug. 20, 1998 Tr. at 16–17, 134–36, Aug. 20, 1998 Tr. at 2–23 (Lobby, Under Seal). Rico disclosed the identity of several informants to Flemmi. Flemmi Aug. 20, 1998 Tr. at 14–21 (Lobby, Under Seal). Connolly identified for Bulger and Flemmi at least a dozen individuals who were either FBI informants or sources for other law enforcement agencies. Flemmi Aug. 20, 1998 Tr. at 2–23 (Lobby, Under Seal). These disclosures were usually made so that Bulger and Flemmi could avoid making any unnecessary, incriminating statements to other informants. Flemmi Aug. 20, 1998 Tr. at 16–17, Aug. 20, 1998 Tr. at 10–11 (Lobby, Under Seal).

The evidence raises a question of whether Connolly also told Bulger and Flemmi about John McIntyre, who was providing information about them and their associates, and who disappeared about six weeks after the FBI learned of his allegations. This question cannot, however, be resolved on the present record, in part because of the delayed disclosure of documents by the government and in part because, as with Halloran, it evidently was not in either the interest of Flemmi or of the FBI to have this issue fully developed in this case.[35]

In mid-October 1984, McIntyre began cooperating with Richard Bergeron of the Quincy Police Department. Bergeron June 4, 1998 Tr. at 24–26. McIntyre reported, among other things, that he worked for Joseph Murray, initially in drug dealing. *Id.;* Ex. 257. McIntyre also revealed that he was the engineer on a ship named the Valhalla, which had been used in an attempt to deliver guns and ammunition from Massachusetts to the Irish Republican Army (the "IRA") in Ireland. Bergeron June 2, 1998 Tr. at 113–24, June 4, 1998 Tr. at 24–26. McIntyre said that Murray secretly owned the Valhalla. Bergeron June 2, 1998 Tr. at 115. McIntyre also explained that Murray was closely connected to Bulger and that Bulger, through his associates Kevin Weeks and Patrick Nee, was involved in the Valhalla arms shipment. Bergeron June 2, 1998 Tr. at 117–18, 123, June 4, 1998 Tr. at 17–18, 24–25. Flemmi was also mentioned. Bergeron June 2, 1998 Tr. at 116, June 4, 1998 Tr. at 128.

McIntyre was willing to cooperate with law enforcement, but seemed to Bergeron to be too "petrified" of the people that he was discussing to be a potential witness

35. Flemmi's counsel stated that he and his client were "certainly not" arguing that the FBI leaked information about McIntyre's cooperation and that Bulger and Flemmi were responsible for his murder. June 22, 1998 Tr. at 117. Rather, the defendants contend that the information McIntyre provided and his disappearance involved matters within the FBI's investigative jurisdiction, which were not pursued as part of the FBI's performance of its promise to protect Bulger and Flemmi from prosecution. June 2, 1998 Tr. at 133–34.

whose cooperation would be publicly disclosed. Bergeron June 4, 1998 Tr. at 25, 35–36. Bergeron realized that the information McIntyre was providing would be significant to several federal law enforcement agencies. *Id.* at 24–25. Thus, he immediately arranged for agents of the DEA and the United States Customs Service ("Customs") to participate in the debriefing of McIntyre.

In addition, Bergeron told FBI Special Agent Roderick Kennedy that McIntyre was cooperating and, among other things, of McIntyre's charges against Bulger and his associates. Bergeron June 2, 1998 Tr. at 113, 116, June 4, 1998 Tr. at 25, 28. Kennedy was the FBI's operational liaison with other agencies concerning narcotics matters.

At the time Bergeron contacted him, Kennedy knew that Bulger and Flemmi were Connolly's informants. Kennedy Apr. 14, 1998 Tr. at 26, 115–16, 121, 144. In fact, in 1983, Connolly told Kennedy that Bulger had disclosed that he had extorted $60,000–$90,000 in "rent" from Murray because Murray was storing marijuana in a warehouse in South Boston, which was part of Bulger's territory. *Id.* at 62–63, 79, 115, 121–29.

Kennedy had participated with the DEA in a raid of that warehouse. *Id.* at 100–15. Kennedy did not, however, share the information he received from Connolly with the DEA, with which he was conducting an ongoing joint investigation, or with the prosecutors working on the case. *Id.* at 111–14, 121–29, 130–32. Nor did he use that information in any of the FBI's independent efforts. *Id.* at 133–34.

Kennedy knew that Connolly expected confidentiality concerning the information Bulger had provided. *Id.* at 123. Like his colleagues going back to Rico, Kennedy understood implicitly that an informant's statements could not properly be used against him. In any event, Kennedy was willing to subordinate the interests of investigations in which he was involved to the interest that Connolly and the FBI had in Bulger and Flemmi as sources.

Although he did not disclose that Bulger and Flemmi were FBI informants, Kennedy, with a Customs Agent, interviewed McIntyre on October 17, 1984. Exs. 257, 258. With regard to drugs, McIntyre told Kennedy that "an individual named WHITEY who operates a liquor store in South Boston [had become] partners with JOE MURRAY." Ex. 257. Kennedy recognized this as a reference to Bulger who, as discussed in § II.15, *infra*, was at that time an owner of the South Boston Liquor Mart. McIntyre also recounted the story of the Valhalla, including the role of Bulger's associate Patrick Nee, who had traveled to Ireland to meet the shipment of guns. Ex. 258. Kennedy reported the information that he received from McIntyre to the SAC. Exs. 257, 258.

It is not clear whether Kennedy also discussed McIntyre's charges with Connolly. The reports of his interview with McIntyre, Exs. 257, 258, were not, as required by the court's June 26, 1998 and December 27, 1998 Orders, and the government's practice concerning "Jencks" materials, produced before Kennedy testified. June 5, 1998 Tr. at 4–5, June 22, 1998 Tr. at 117–19, Oct. 23, 1998 Tr. at 113–20. Rather, the documents were produced only after the court ordered that the FBI search for them. June 2, 1998 Tr. at 134–35. No party recalled Kennedy to testify about the McIntyre matter or questioned him concerning it when the court directed that he appear to be interrogated concerning Raymond Slinger, as described *infra*.

Kennedy had earlier acknowledged, however, that he and Connolly often exchanged information. Kennedy Apr. 14, 1998 Tr. at 26. In addition, the evidence concerning Murray's warehouse and the Slinger matter indicate that Kennedy on other occasions participated in protecting Bulger and Flemmi from investigation and possible prosecution. Thus, there is circumstantial evidence to suggest that Ken-

nedy may have told Connolly about McIntyre's cooperation and claims and, in view the Halloran matter, reason to be concerned that Connolly may have told Bulger and Flemmi. These issues cannot, however, be resolved on the present record.

In any event, despite the obvious potential for McIntyre's cooperation to result in several significant, if not sensational, cases, no evidence has been presented that the FBI conducted any investigation based on McIntyre's charges concerning Bulger and Flemmi, or discussed with DEA or Customs deferring to any investigation that they might conduct. Bergeron June 2, 1998 Tr. at 133–34. Several years later, there was a prosecution of a number of people involved with the Valhalla. Reilly May 20, 1998 Tr. at 46. The FBI did not in the course of its investigation ask the DEA whether it had any evidence linking Bulger or Flemmi to the Valhalla. *Id.* at 46. If asked, the DEA could have reported that the electronic surveillance it conducted jointly with the FBI in 1984 and 1985, discussed in § II.17, *infra*, "showed that Bulger and Flemmi shipped guns and ammunition to the IRA in Ireland." Ex. 145. More specifically, the electronic surveillance recorded that upon seeing a news report that the Valhalla had been seized, Bulger exclaimed: "That's our shipment. That's ours." *Id.* at 74–75. Bulger and Flemmi were not, however, charged in the Valhalla case.

On December 6, 1984, the Quincy Police realized that McIntyre had disappeared. Ex. 155; Bergeron June 2, 1998 Tr. at 139. Only Kennedy and a Customs agent were informed immediately. *Id.* It was assumed that McIntyre had been killed. Neither he nor his body has ever been found.

Bergeron suspected that Bulger might have been involved in McIntyre's murder, in part because McIntyre's father reported that his son was going to meet Patrick Nee on the night that he disappeared. Bergeron, June 2, 1998 Tr. at 39. Bergeron had heard rumors that Bulger and Flemmi were FBI informants, but did not believe them. Bergeron June 2, 1998 Tr. at 152–55. Bergeron knew that Bulger and Flemmi had been linked to several murders. *Id.* at 154. Validating the view that Bulger had expressed several years before to Sarhatt, Bergeron testified that he "didn't think that somebody at that level, doing what they [Bulger and Flemmi] were doing, could be informants for the FBI." *Id.*

15. *The South Boston Liquor Mart*

In about January 1984, Connolly received very reliable information concerning an ongoing extortion by Bulger and Flemmi. In violation of FBI policy and practice, Connolly did not record the information or disclose it to his Supervisor as required by the FBI Guidelines. Nor did he try to obtain the testimony of the victims or conduct any other investigation. Instead, he told Bulger of the charges.

In January 1984, Joseph Lundbohm was a Boston Police Detective. Lundbohm Sept. 29, 1998 Tr. at 112–18. Lundbohm's niece, Julie Rakes, and her husband Stephen had recently bought a liquor store in South Boston. *Id.* at 116.

Bulger and Flemmi evidently decided that the store would be an excellent hub for their activities. They, and Kevin Weeks, visited the Rakes and said they wanted to buy the liquor store. *Id.* The Rakes told them that it was not for sale. *Id.* Flemmi responded by pulling out a gun, commenting on how lovely the Rakes' young child was, and reiterating that they were going to buy the liquor store. *Id.* at 116–17.

The Rakes sought Lundbohm's assistance, telling him what occurred. *Id.* at 116. Lundbohm knew that Bulger and Flemmi were reputed to be dangerous members of organized crime. *Id.* at 138. He felt that the FBI would be the most appropriate law enforcement agency to investigate the ongoing extortion. *Id.* at 134. He did not know that Bulger and

Flemmi were FBI informants, or that Connolly was their handler. *Id.* at 123, 145.

Lundbohm was acquainted with Connolly professionally, knew that he was involved in investigating organized crime and, with the Rakes' consent, decided to speak with Connolly in an effort to prompt an FBI investigation. *Id.* at 118. Lundbohm related to Connolly what the Rakes had told him. *Id.* at 119. Connolly asked whether the Rakes would "wear a wire" to record conversations with Bulger, Flemmi, and Weeks. *Id.* at 119, 126. Lundbohm indicated that he would advise them not to do so. *Id.* Connolly responded that he would take the information, but did not feel that there was much that the FBI could do. *Id.*

Connolly made no record of the information Lundbohm had provided to him. Nor did he disclose it to Ring, who had become the Acting Supervisor of the Organized Crime squad in January 1983. Ring June 4, 1998 Tr. at 44.

Connolly did, however, tell Bulger of his conversation with Lundbohm. Bulger subsequently urged the Rakes to "back off." Lundbohm Sept. 29, 1998 Tr. at 122. Lundbohm correctly inferred that Bulger had learned that the Rakes had been trying to generate an FBI investigation of him. *Id.* at 122, 139–40.

The FBI did not investigate the extortion of the Rakes in any way. More specifically, Connolly did nothing to attempt to obtain the testimony of Mr. and Mrs. Rakes. Nor did he do anything else to acquire evidence of the effort of Bulger and Flemmi to frighten them into selling their liquor store.

In any event, the extortionate scheme succeeded. The Rakes reluctantly sold their liquor store to Bulger and Flemmi. *Id.* at 117. It was re-named the South Boston Liquor Mart, and in the near future became a focus of the investigative efforts of several law enforcement agencies, not including the FBI.

16. *Greenleaf Becomes SAC and Ring Becomes Supervisor of the Organized Crime Squad*

In November 1982, James Greenleaf became the FBI SAC in Boston. Greenleaf Jan. 8, 1998 Tr. at 7. He served in that capacity until December 1986. *Id.* While the SAC, Greenleaf delegated the responsibility for recommending the opening and closing of informants to the agent who was his handler. *Id.* at 171–72. The handler, acting in concert with his supervisor, was also given the responsibility for any review of the informant's status that became necessary. *Id.* As described earlier, in this period the Attorney General's Guidelines, which had been incorporated in the FBI's Manual, required that the SAC himself make certain decisions, including, after consultation with the United States Attorney, whether to authorize extraordinary criminal activity involving a "serious risk of violence," and "reviewing all such criminal activity at least every 90 days." Ex. 274 (Under Seal), Manual § 137 F.(2) and (3) (1–12–81). Greenleaf's approach, however, had the practical effect of delegating these responsibilities, among others, to an informant's handler and his supervisor.

While SAC, Greenleaf knew that Bulger was an FBI informant. Greenleaf Jan. 8, 1998 Tr. at 136–38. He also knew that although Flemmi may have been technically closed as an informant, he was constantly in the company of Bulger and was regularly providing information to the FBI. *Id.* Greenleaf was well aware that Connolly was the handler for both Bulger and Flemmi. *Id.* Consistent with his usual practice, Greenleaf generally relied on Connolly and his supervisor to deal with Bulger and Flemmi, and with any matters relating to them. *Id.* at 136–40.

In January 1983, Greenleaf made James Ring the Supervisor of the Organized Crime squad. Ring June 4, 1998 Tr. at 44. Ring held that position until he retired in 1990. *Id.* When replaced by Ring, Morris became the FBI Supervisor of the new, interagency Organized Crime Drug En-

forcement Task Force ("OCDETF"). Morris Apr. 21, 1998 Tr. at 14.

In the course of the transition, Morris spoke with Ring about Bulger and Flemmi. Morris Apr. 29, 1998 Tr. at 65–66; Ring June 10, 1998 Tr. at 34–36. Morris told Ring that, in his opinion, Bulger and Flemmi "had outlived their usefulness." Morris Apr. 29, 1998 Tr. at 66, Apr. 30, 1998 Tr. at 91. Morris recognized that Bulger and Flemmi "looked like they were going to do a pretty good number on the LCN" and would, as a result, become more powerful in the criminal community. Morris Apr. 29, 1998 Tr. at 66. Thus, Morris suggested that Ring terminate Bulger and Flemmi as sources. *Id.*[36]

Ring did not, however, seek to have Bulger closed as an informant. Rather, on February 23, 1983, he approved a memorandum, prepared by Connolly, to FBI Headquarters recommending that Bulger be elevated to Top Echelon informant status. Ex. 11; Ring June 11, 1998 Tr. at 22–24. Although the memorandum was captioned as coming from the SAC, pursuant to his normal practice of relying on subordinates with regard to informant matters, Greenleaf did not see it. Greenleaf Jan. 8, 1998 Tr. at 140.

The memorandum characterized Bulger as "one of the most highly placed and valuable informants in the Boston Division." Ex. 11. The memorandum then explained that:

> [Bulger] is the titular head of the Winter Hill Mob and as such sits as an equal at the policy making level with major Boston LCN figures, to include Gennaro Angiulo, Underboss of Raymond Patriarca, and Boston Capo Illario Zannino, a/k/a Larry Baione. To date, this source has been utilized in six (6) successful affidavits in support of six (6) applications of court authorized electronic surveillances under the provisions of Title III. These electronic surveillances involved matters targeting the LCN at the policy making level. One of the two cases in which electronic surveillance has been utilized has been characterized by FBIHQ officials as "one of the most important and successful Title III's conducted by the FBI in the past ten years." Information provided by source has run the gamut from identifying individuals who have been marked for execution by the LCN, allowing law enforcement to advise these individuals of their status, to providing information on policy changes in the Boston–Providence LCN structure to include the recruiting of new LCN members.
>
> UACB, captioned source will be converted to [Top Echelon] status and will continue to be targeted for ever increasing productivity.

Ex. 11.

On May 26, 1983, Connolly wrote a memorandum to "SAC Boston (ATTN Acting Supervisor J.A. Ring)," requesting a determination of whether Flemmi would imminently be indicted as a result of the Wheeler–Callahan investigations or in the case arising from electronic surveillance at 98 Prince Street. Ex. 55. Connolly based his request on the fact that Flemmi "continues to voluntarily furnish sensitive information of an extremely high quality." *Id.*

As indicated earlier, no action was taken immediately on Connolly's request. Nevertheless, Connolly was correct in contending that Flemmi was continuing to provide very valuable information to the FBI.

For example, on February 1, 1983, Flemmi told Connolly that Gennaro Angiulo could normally be found at Francesco's Restaurant on Monday, Tuesday, and Friday nights. Exs. 79, 172. Flemmi also furnished a drawing that he had made of

36. In 1988, SAC James Ahearn asked Morris if he ever recommended that Bulger and Flemmi be closed as informants because they had "outlived their usefulness." Morris Apr. 30, 1998 Tr. at 89–90, 111–12. Morris now admits that he lied when he denied he had done so. *Id.*, Morris Apr. 28, 1998 Tr. at 82.

the restaurant, including the back room where Angiulo sat. Ex. 172. In addition, he reported on eleven people who met with Angiulo at Francesco's, including, according to the 209, Flemmi himself, who was described as being with "a young, good looking girl." Exs. 79, 172. Angiulo was indicted in September 1983. *See United States v. Angiulo*, 755 F.2d 969 (1st Cir. 1985). The FBI arrested him at Francesco's.

On February 1, 1983, Flemmi also told Connolly that Zannino regularly met members of his regime and others on Monday and Tuesday evenings at the Bella Napoli restaurant. Ex. 171. Once again, Flemmi provided a diagram of the restaurant, indicating where Zannino sat to conduct business. *Id.* Flemmi reported, however, that Zannino had become more careful about discussing criminal matters, but still did so freely in Domenic Isabella's automobile. *Id. See also* Ex. 237 (209s dated 2/23/83 and 5/17/83). Both Flemmi and Bulger were used as sources in the successful August 1983 application for a warrant to conduct electronic surveillance of Isabella's car. Coffey Aff., Apr. 9, 1997, ¶ 3.C.

In the fall of 1983, Connolly and Morris had dinner with Bulger and Flemmi at Flemmi's parents' home in South Boston. Flemmi Aug. 20, 1998 Tr. at 97–98. The LCN was, as always, discussed. Flemmi Aug. 20, 1998 Tr. at 64. The timing of the meeting suggests that the occasion was a celebration of the Angiulo indictments.

If that meeting was a celebration of the Angiulo indictments, Ring, who was then the head of the Organized Crime squad and Connolly's supervisor, was not invited. This may have been because Ring had criticized Connolly for bringing him to another meeting at Flemmi's parents' home. Ring June 10, 1998 Tr. at 94–97.

By the fall of 1983, Ring had met Bulger and Flemmi twice. Flemmi Aug. 20, 1998 Tr. at 80–84. The first time Ring went with Connolly to Bulger's apartment. *Id.* at 81–82. The second meeting involved a dinner that Connolly arranged at Flemmi's parents' home. *Id.* at 82–84.

Ring used these occasions, in part, to observe and evaluate Connolly's interaction with Bulger and Flemmi, and did not like what he saw. Ring June 10, 1998 Tr. at 87–100. Ring considered the meeting at Flemmi's parents' home to be "extraordinary," "stupid," and "not an appropriate way to be dealing with informants." *Id.* at 94–95. Ring particularly felt that it was improper for FBI agents to meet with sources in the presence of third parties. This feeling was heightened when Bulger's brother, William, who was the President of the Massachusetts Senate and lived next door to the Flemmis, came to visit while Ring and Connolly were there. *Id.* at 92–93.

Ring perceived that Connolly was treating Bulger and Flemmi like "friends" or "consultants" rather than as informants. Ring June 22, 1998 Tr. at 51–52. For example, Connolly was giving Bulger and Flemmi information and asked Ring to do the same. *Id.* Ring expressed to Connolly his concern about what he had observed, and his view that the meeting at Flemmi's parents' home was particularly inappropriate. Ring June 10, 1998 Tr. at 95–97, June 22, 1998 Tr. at 51–52.

Ring did not, however, discipline Connolly or alter his responsibilities concerning Bulger and Flemmi. June 10, 1998 Tr. at 96. Nor did Ring then advise the SAC of what had occurred and the problems that he perceived. *Id.* at 98. Moreover, while it was generally Ring's practice to require agents under his supervision to obey the requirement, set forth in the FBI Manual, that all contacts with an informant be recorded promptly on a 209 even if no positive information was received, there is no 209 relating to the meeting that Ring attended at Flemmi's parents' home. Ring June 15, 1998 Tr. at 59–60, June 10, 1998 Tr. at 97–98. In addition, Ring did not make a record of his admonitions to Connolly. Ring June 10, 1998 Tr. at 97–98.

In 1983 and 1984, Ring knew that Bulger and Flemmi were engaged in "a whole host of criminal activities." Ring June 11, 1998 Tr. at 24. Indeed, Ring expected them, and other informants, to be involved in criminal activity. *Id.* at 92. Ring felt that the Informant Section at FBI Headquarters was well aware, from the opening teletypes, of the range of criminal activity in which Bulger and Flemmi were involved and their status in the criminal community. Ring Sept. 22, 1998 Tr. at 42–45. Headquarters asked no questions and Ring did not perceive a need to provide updated information on Bulger and Flemmi's criminal activities. *Id.*

Shortly after becoming Supervisor of the Organized Crime squad, Ring considered the implications of the Attorney General's Guidelines for Organized Crime informants. Ring June 19, 1998 Tr. at 134. He also discussed this subject with Morris. *Id.* at 135. Ring felt that the Guidelines process for providing authorization to an informant to commit crimes was not feasible for Organized Crime informants, in part because utilizing it would, as he understood it, require discussion and disclosure of the informant's identity. *Id.* at 134–37. Morris told Ring that seeking authorization for criminal activity of Organized Crime informants was not "worth the aggravation." *Id.* at 135. Ring agreed. *Id.*

In Ring's view, the FBI knew its informants were engaged in criminal activity, but they were not authorized to commit crimes. *Id.* Thus, if someone caught them, they were subject to prosecution. *Id.* Ring did not interpret the Guidelines as requiring that he report information he learned about crimes committed by informants for the Organized Crime squad to other, interested law enforcement agencies, or to FBI Headquarters and the Assistant Attorney General. Rather, he believed that he was only required to tell Headquarters if an informant was arrested, indicted, or targeted in an order authorizing electronic surveillance. Ring June 22, 1998 Tr. at 17–18.

Although Ring did not regard his squad's informants as authorized to engage in criminal activity, he believed that it would have been unfair and improper for the government to attempt to use information that a source provided against him. Ring June 22, 1998 Tr. at 46–52. He also felt that it would be unwise, because if an informant perceived that the FBI might use information he provided against him, he would quickly cease serving as a source. *Id.* at 49–50. In any event, Ring never participated in any discussion in which Bulger and Flemmi were told that the information that they were providing could be used against them. *Id.* at 50. Nor did he see any document indicating that they had been given such a warning. *Id.*

As indicated earlier, the record does include documents certifying that at various times Connolly gave Bulger and Flemmi the annual warnings required by the Attorney General's Guidelines, including the warning that they were not protected from prosecution for any criminal activity unless it was authorized by the SAC or a Supervisor. Ex. 43; Gianturco Jan. 20, 1998 Tr. at 151–53. Flemmi denies that he ever received any such warning. Flemmi Aug. 28, 1998 Tr. at 133. The compelling evidence of the FBI's enduring, assiduous effort to cultivate in Bulger and Flemmi the sense that they were "friends," "consultants," and allies rather than informants, among other things, persuades the court that Flemmi's contention is correct.

Bulger and Flemmi never discussed with Ring whether their relationship with the FBI would afford them any protection or immunity. Ring Sept. 18, 1998 Tr. at 126–29. Ring did not tell them that they had immunity or would be protected. *Id.* Nor did he express to them his view that if they were caught engaging in crime, they were "on their own," meaning subject to prosecution. Ring June 19, 1998 Tr. at 144. The protection that the FBI would provide its valuable sources was an issue

that Rico, Connolly, Morris, Flemmi, and Bulger were comfortable discussing with each other. This was not true, however, with regard to Ring, Bulger, and Flemmi.

After having some experience as the Supervisor of the Organized Crime squad, Ring recommended to Greenleaf that a new, Non–Traditional Organized Crime squad be established. Ring June 11, 1998 Tr. at 98, June 22, 1998 Tr. at 54–55. Greenleaf agreed and formed the new squad.

From Ring's perspective, the new squad had several advantages. It made it proper for him to focus his squad's work exclusively on the LCN. Ring June 22, 1998 Tr. at 54–55. It also removed responsibility for investigations of Bulger and Flemmi from his squad, which Ring felt would insulate him and the FBI from the criticism that their handlers could not be trusted to investigate Bulger and Flemmi, but rather would compromise the investigations of their informants of which they became aware. *Id.*

While Ring believed that it was not proper for Bulger and Flemmi's handlers to be investigating them, he felt it was permissible for others in the FBI to do so. Ring June 22, 1998 Tr. at 47. As a practical matter, however, the creation of the new squad did not imperil Bulger and Flemmi. Instead, as set forth below, when members of that squad received reliable information about criminal activity in which Bulger and Flemmi were engaged, they regularly consulted Connolly and then did not pursue any investigation. Among those who participated in the process of consulting Connolly and then deferring to the commitment he had made to protect Bulger and Flemmi were: ASAC Larry Potts, Supervisory Special Agent Bruce Ellavsky, Rod Kennedy, and John Newton concerning the extortion of Raymond Slinger; James Blackburn regarding the extortion of a drug dealer; and James Lavin regarding guard rails constructed by the City of Boston on the property of the South Boston Liquor Mart. As described below, contrary to FBI policy and practice, the important information provided by Slinger was never documented and Lavin did not place the evidence he had received in the FBI's files. Ring, however, never knew of any of this. Ring June 11, 1998 Tr. at 98–100, June 22, 1998 Tr. at 54–57.[37]

17. *The 1984–85 Electronic Surveillance*

In 1984 and 1985, the DEA and the FBI were authorized by a series of court orders to engage jointly in electronic surveillance targeting Bulger and Flemmi. The investigation was initiated by the DEA. The DEA agents involved preferred not to collaborate with the FBI, primarily because they, and the Assistant United States Attorney working with them, believed that Flemmi and Bulger were FBI informants and that the Bureau would compromise the confidentiality of the investigation to protect its sources. The Bureau preferred not to participate because it viewed the endeavor as doomed to fail and expected that, as with the Lancaster Street Garage investigation, the FBI would be blamed. The two agencies became reluctant collaborators, however, when it was recognized that the FBI's participation was essential if judicial authorization to conduct electronic surveillance was to be sought and received because most of the information to be relied upon in the applications to establish probable cause involved gambling and loansharking—crimes that the FBI

37. The Non–Traditional Organized Crime squad did not initiate any investigations of Bulger and Flemmi. As described in § II.26, *infra*, the Non–Traditional Organized Crime squad did continue an investigation targeting Flemmi, among others, that was begun by agents who were under Ring's supervision and who were later transferred. That investigation of Flemmi, however, was frustrated when Morris, who was then the supervisor of the Non–Traditional Organized Crime squad, and Connolly tipped Flemmi off concerning it.

rather than the DEA had the federal responsibility to investigate.

The applications for the court orders authorizing the electronic surveillance of Bulger, Flemmi, George Kaufman, and others not only relied heavily on the evidence cited to establish that there was probable cause to believe that they were committing offenses within the investigatory jurisdiction of the FBI, but also clearly conveyed the impression that the FBI would utilize any evidence obtained to attempt to develop prosecutable cases concerning matters within its jurisdiction. The Bureau, however, had no intention of doing so. The FBI was well aware, from information provided by Bulger, Flemmi, and others, that Bulger and Flemmi were engaged in illegal gambling, loansharking, and extortion. The FBI considered such criminal conduct to be essential to maintaining the credibility necessary for Bulger and Flemmi to continue to obtain and provide vital information on the LCN and others. The FBI was committed to honoring its promise of confidentiality to Flemmi and Bulger by not disclosing that they were sources, explicitly or implicitly. Explaining to the DEA, the prosecutors, or the court, that the Bureau was not interested in obtaining or using any intercepted evidence of their criminal conduct would have effectively confirmed that they were informants.

Ring, who was at the hub of the matter for the FBI, felt that Flemmi and Bulger had no immunity and would be "on their own" if the DEA could develop a prosecutable narcotics case against them based on the electronic surveillance. Armed with information provided by colleagues, however, Connolly contributed to assuring that DEA's efforts would not succeed by alerting Bulger and Flemmi to the investigation generally and to the electronic surveillance particularly.

As described in detail below, the FBI, blinded by its determination not to confirm for the United State Attorney or the DEA the accuracy of their understanding that Bulger and Flemmi were FBI informants, recklessly disregarded the government's legal obligation of candor to the court when applying for authority to conduct electronic surveillance in what was represented to be a joint investigation. At the same time, believing that Bulger and Flemmi were FBI informants, but accepting that the FBI would not confirm or discuss their status, the DEA and the United States Attorney's Office recklessly disregarded their legal obligation to seek from the FBI information that, if shared with them, would have resulted in the applications for electronic surveillance now at issue not being filed, let alone approved by the court. The DEA and United States Attorney's Office also acted with reckless disregard for the truth when they filed an application for a warrant that in effect represented that electronic surveillance was necessary to obtain evidence that the FBI would use in a Title 18 investigation of Bulger, Flemmi, and others because the prosecutor who was the applicant and the DEA agent who was the affiant did not believe that the FBI would conduct any such investigation. As a result, the applications for the 1984–1985 electronic surveillance targeting Bulger and Flemmi failed to include the "full and complete statement" describing the necessity for its use that was required by Title III.

More specifically, if submitted by a properly informed applicant, the applications should have included certain material facts about the targets, including the following. As informants Bulger and Flemmi had made statements about their illegal gambling and loansharking that the government now claims can be used as evidence against them. A review of their files would indicate to the FBI that they were tacitly authorized to engage in such activities and, therefore, the conduct which the government was seeking to investigate may not have been criminal. In any event, the FBI did not intend to use any evidence generated by the electronic surveillance in an attempt to develop a prosecutable case

against its sources or any of the other named targets, including George Kaufman. Moreover, the FBI agent who was most knowledgeable believed that Bulger and Flemmi were not involved in narcotics crimes, but may have mistakenly given that impression while seeking information for the Bureau. No reasonable judge would have granted any request to target Bulger and Flemmi based on an application containing this information.

The DEA honestly and earnestly wished to conduct an investigation that it hoped would result in the successful prosecution of Bulger and Flemmi for narcotics offenses. The Department of Justice would not have allowed the submission to the court of an application that it knew was misleading. Nor would it have, over the FBI's inevitable objection, permitted disclosure to the court, and possibly to potential defendants, of the fact that Bulger and Flemmi were FBI informants. If, however, an application were filed seeking authority to intercept Bulger and Flemmi to obtain evidence of drug offenses only, the initial request concerning Bulger would have been obviously unmeritorious because there was not probable cause to believe that he would be intercepted discussing anything on Kaufman's telephone. In addition, the request concerning Flemmi would have been denied as well because there was not probable cause to believe that Flemmi would be discussing narcotics matters on Kaufman's telephone. Nor was there probable cause to believe that Kaufman would be discussing drug offenses with anyone.

Thus, but for the material omissions caused by the government's reckless disregard for the truth and for the obligations imposed by Title III and the Constitution, the warrants for the 1984–85 electronic surveillance would not have issued. The facts on which this conclusion rests are set forth below.

By 1984, Bulger and Flemmi were considered by the Boston law enforcement community to be "well known organized crime figures." Ex. 140. With the LCN diminished by the indictments of Angiulo, Zannino, and their colleagues, Bulger and Flemmi were also regarded as increasingly powerful and dangerous. Thus, in late 1983, the DEA decided to attempt to develop the information, and obtain the resources, necessary to conduct electronic surveillance of Bulger and Flemmi. Reilly May 19, 1998 Tr. at 114.

Stephen Boeri and Albert Reilly were designated as the DEA case agents for the investigation. Boeri May 14, 1998 Tr. at 28–29, 39–40. Assistant United States Attorney Gary Crossen was later assigned to work with them. Crossen had recently become an Assistant United States Attorney after serving as an Assistant District Attorney for Suffolk County. Crossen May 11, 1998 Tr. at 132.

Boeri, Reilly, and Crossen shared a genuine interest in investigating Flemmi and Bulger. Crossen May 11, 1998 Tr. at 143, May 12, 1998 Tr. at 131. It was not clear, however, whether they could obtain the necessary resources or judicial authorization for electronic surveillance, which was an essential part of their plan. Stutman Apr. 14, 1998 Tr. at 12. The government must invest considerable manpower and money for a prolonged period of time to conduct electronic surveillance. Stutman Apr. 15, 1998 Tr. at 68; Reilly May 19, 1998 Tr. at 143–46. In this case, it was initially expected that the investigation would take at least a year. Stutman Apr. 14, 1998 Tr. at 69. The approval of DEA Headquarters was needed to conduct such a lengthy investigation with uncertain prospects. *Id.* If approved, resources would have to be found and committed to fund it. Reilly May 19, 1998 Tr. at 133–34. Moreover, many months would have to be devoted to attempting to obtain the information necessary to receive authorization from the Department of Justice to apply for a judicial warrant to conduct electronic surveillance, and to make a compelling case for the issuance of such an order.

At the outset of their investigation, Boeri and Reilly were convinced that Bulger and Flemmi were FBI informants. Stutman Apr. 15, 1998 Tr. at 36–37; Reilly May 19, 1998 Tr. at 123; Kennedy Apr. 14, 1998 Tr. at 143–44. Crossen also believed that Bulger and Flemmi were "in the FBI stable of informants." Crossen May 11, 1998 Tr. at 149–50. Crossen, Boeri, and Reilly had all been told about the Lancaster Street Garage experience. Crossen May 12, 1998 Tr. at 114; Boeri May 14, 1998 Tr. at 67–70; Reilly May 19, 1998 Tr. at 123–24; Ex. 146. This contributed to their belief that Bulger and Flemmi were not only FBI sources, but informants that the FBI wished to protect. They felt, however, that serving as an informant did not prevent an individual from being investigated and prosecuted if he were also committing crimes. Crossen May 13, 1998 Tr. at 28–29; Boeri May 14, 1998 Tr. at 70.

Their belief that Bulger and Flemmi were highly valued FBI informants presented Crossen, Boeri, and Reilly with a dilemma. In planning their investigation they hoped to develop sufficient evidence that Bulger and Flemmi were involved in gambling and extorting money from drug dealers to obtain a warrant for electronic surveillance targeting them in order to acquire evidence of those crimes, as well as narcotics offenses. Crossen May 11, 1998 Tr. at 151–52, May 13, 1998 Tr. at 52–53; Boeri May 14, 1998 Tr. at 41, 64. Crossen believed that the investigation generally, and any effort to obtain a court order to conduct electronic surveillance particularly, would have to include a law enforcement agency with the authority to investigate for possible prosecution gambling and other, relevant non-narcotics offenses because evidence of such offenses was expected to be overheard. Crossen May 13, 1998 Tr. at 90–91. *See* 18 U.S.C. § 2516(1) (1994) ("judge may grant ... an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made ...").

It was also understood by Crossen, the DEA agents, and their SAC, Robert Stutman, that the DEA did not have the authority or federal responsibility to investigate non-narcotics offenses. Crossen May 13, 1998 Tr. at 151–53; Boeri May 14, 1998 Tr. at 61–63; Stutman Apr. 15, 1998 Tr. at 14. Rather, the FBI was the federal agency that had the jurisdiction and responsibility to investigate gambling, loansharking, extortion, and other conduct constituting federal crimes under Title 18 of the United States Code. *Id.* Crossen and his colleagues recognized, however, that the Massachusetts State Police were also empowered to investigate gambling, loansharking, and extortion, which are crimes under the laws of Massachusetts as well as federal offenses. Crossen May 11, 1998 Tr. at 152.

Boeri and Reilly had a strong preference for working with the Massachusetts State Police rather than the FBI. In 1984, the FBI and DEA had an unhappy history as rivals. Ahearn May 11, 1998 Tr. at 117–19; Crossen May 13, 1998 Tr. at 813. The FBI, particularly, had traditionally been unwilling to share information or otherwise collaborate with other federal law enforcement agencies. *Id.;* Reilly May 19, 1998 Tr. at 123. This culture had generated difficulties and tensions between the FBI and the DEA, among others. Ahearn May 11, 1998 Tr. at 117–18; Stutman Apr. 18, 1998 Tr. at 85. Thus, Boeri and Reilly were generally reluctant to attempt to work jointly with the FBI. Reilly May 19, 1998 Tr. at 123. This predilection was strongly reinforced by their fear that if the FBI was told of their investigation, the Bureau would seek to subvert it by informing Bulger and Flemmi. Reilly May 19, 1998 Tr. at 125, May 20, 1998 Tr. at 115–16.

Shortly before 1984, however, the FBI had been given jurisdiction concurrent with the DEA's to investigate drug offenses. Ahearn May 11, 1998 Tr. at 118.

In connection with this, the Department of Justice was actively promoting greater cooperation between the FBI and the DEA. McCurnin Sept. 15, 1998 Tr. at 79–80. Stutman Apr. 15, 1998 Tr. at 85; Boeri May 14, 1998 Tr. at 70–71. Francis Mullen, a former FBI official, was made the Administrator of the DEA. McCurnin Sept. 15, 1998 Tr. at 98. John McCurnin, who had formerly been Sean McWeeney's deputy in the Organized Crime Section of the FBI, served as Mullen's Executive Assistant and was responsible for coordinating major matters with the FBI, particularly with McWeeney. *Id.* at 79–80. The Organized Crime Drug Enforcement Task Force was established to institutionalize the new policy of cooperation. Crossen May 13, 1998 Tr. at 83. The United States Attorney, William F. Weld, and the FBI and DEA SACs, Greenleaf and Stutman, were committed to the effort to enhance cooperation. Stutman Apr. 15, 1998 Tr. at 85–86.

Reilly, however, urged Stutman not to try to involve the FBI in the investigation of Bulger and Flemmi. Reilly May 19, 1998 Tr. at 123–25; Stutman Apr. 14, 1998 Tr. at 85. Reilly argued that the FBI would not share information, its technical expertise in installing bugs was not essential, and there was an unacceptable risk that DEA's efforts would be undermined because the FBI would compromise the investigation to protect its informants. *Id.* Nevertheless, Stutman saw the investigation of Bulger and Flemmi as an opportunity for the collaboration between the DEA and the FBI that was being encouraged. *Id.*

Stutman discussed the situation with Weld. Weld May 26, 1998 Tr. at 23–31. It was Weld's understanding that Bulger and Flemmi had served as sources for the FBI, and had provided some of the information necessary to obtain the court orders for electronic surveillance of 98 Prince Street and 51 North Margin Street. *Id.* at 21–22. He had also heard that the FBI, particularly Connolly, was suspected of having told Bulger and Flemmi of the bug at the Lancaster Street Garage. *Id.* at 22–23, 34–35. Weld understood, however, that the FBI's "official line" was to deny that Bulger and Flemmi were informants. *Id.* at 21.

Stutman and Weld discussed two issues. First, Stutman wanted to know if the United States Attorney would support the DEA's effort to investigate Bulger and Flemmi, and to utilize electronic surveillance as a key component of that investigation. *Id.* at 29. Weld said he would "back [DEA] up" and that the investigation could proceed with his support. *Id.*

Second, Stutman and Weld discussed whether the FBI should be involved in the electronic surveillance that was being planned or whether the Bureau was so close to the targets that there would be an unacceptable risk that the investigation would be compromised if it was included. *Id.* at 25. Weld knew that his prosecutors shared the DEA agents' deep doubts about working with the FBI in any investigation of Bulger and Flemmi. *Id.* at 28. Weld and Stutman agreed, however, that Greenleaf should be asked to have the FBI participate in the investigation and, particularly, in the hoped for electronic surveillance. *Id.* at 30.

In about April 1984, Stutman met with Greenleaf and explained that the DEA planned to conduct a major investigation, including electronic surveillance, of Bulger and Flemmi in which it wanted the FBI to participate because it was expected that the investigation would develop information concerning crimes that were within the jurisdiction of the FBI rather than the DEA. Stutman Apr. 14, 1998 Tr. at 10–18, 22, 82; Greenleaf Jan. 8, 1998 Tr. at 37–38, 66–69, 195–96. Stutman provided Greenleaf with detailed information about the investigation to date, including a description of the information that he felt should be of active interest to the FBI. Greenleaf Jan. 8, 1998 Tr. at 125, 195; Stutman Apr. 14, 1998 Tr. at 12. Stutman would have given Greenleaf any additional information

that he requested. Stutman Apr. 14, 1998 Tr. at 90. Greenleaf did not, however, ask for more details or immediately respond to Stutman's request.

At about the same time, Weld also met with Greenleaf. Weld May 26, 1998 Tr. at 31. Weld too asked Greenleaf if the FBI would participate in the investigation and any electronic surveillance of Bulger and Flemmi. *Id.* at 33. Greenleaf said he would have to get back to Weld. *Id.* In view of Greenleaf's usual enthusiasm for major investigations, Weld found his response to be so "odd" that it strengthened his sense that Bulger and Flemmi may have been FBI informants. *Id.*

About a week later, Greenleaf told Weld that the FBI would not be able to participate in the investigation of Bulger and Flemmi. *Id.* at 37–40. Weld was surprised. *Id.* at 45. Although the conversation was brief, Weld inferred that Greenleaf had consulted FBI Headquarters and determined that the FBI did not want to participate because of the risk that its involvement would result in the disclosure of the fact that Bulger had been an FBI informant and a source for the electronic surveillance that targeted Angiulo and Zannino. *Id.* at 40. Greenleaf did not, however, discourage Weld from pursuing the investigation of Bulger and Flemmi. Weld May 27, 1998 Tr. at 71.

Weld told Stutman of Greenleaf's response. Weld May 26, 1998 Tr. at 46. They discussed the possibility that Bulger and Flemmi were FBI sources. Stutman Apr. 14, 1998 Tr. at 71–72. Neither Weld nor Stutman, however, ever asked Greenleaf if either or both were informants, and Greenleaf did not tell them. Stutman Apr. 14, 1998 Tr. at 73; Weld May 26, 1998 Tr. at 133; Greenleaf Jan. 8, 1998 Tr. at 195. Rather, Weld and Stutman simply accepted the fact that the FBI would not identify its informants, even to trusted colleagues in the Department of Justice with a legitimate need to know. Stutman did not ask Greenleaf if Bulger and Flemmi were FBI informants because Stutman knew that, "it would have required [Greenleaf] either lying about it or saying 'I can't tell you.'" Stutman Apr. 14, 1998 Tr. at 73. Similarly, Weld never asked the FBI to identify an informant because, if he did, he "would have expected [the FBI] to tell [him] to go pound sand." Weld May 26, 1998 Tr. at 133.

When approached by Stutman and Weld, Greenleaf immediately recognized that the investigation of Bulger and Flemmi, particularly any electronic surveillance, would present problems for the FBI because Bulger was still open as an informant and both were providing information. Greenleaf Jan. 8, 1998 Tr. at 69–71. Greenleaf consulted several colleagues before deciding how to respond. One was Fitzpatrick, who was the ASAC with responsibility for relations with the DEA. Fitzpatrick May 16, 1998 Tr. at 114–16. In addition, Greenleaf had a meeting which included Ring, in his capacity as chief of the Organized Crime squad, Rod Kennedy, who had been assigned to work with the DEA and knew prior to the meeting that the DEA was attempting to target Bulger and Flemmi, and Kennedy's supervisor on the Drug Squad, who was then Morris. Kennedy Apr. 14, 1998 Tr. at 32–39; Morris Apr. 21, 1998 Tr. at 14, Apr. 23, 1998 Tr. at 123.

The meeting focused on the DEA's interest in electronic surveillance targeting Bulger and Flemmi and whether the FBI should participate in that effort. Kennedy Apr. 14, 1998 Tr. at 32–33, 36–37. Each of the participants knew that Bulger and Flemmi were FBI sources.

Ring did not want the FBI to become involved in the investigation for several reasons. Greenleaf Jan. 8, 1998 Tr. at 74; Ring June 10, 1998 Tr. at 74; Ring June 10, 1998 Tr. at 144–49, 153–55, Sept. 22, 1998 Tr. at 122–28. Ring believed that any suspicion that Bulger and Flemmi were involved in narcotics trafficking was not well-founded, in part because no FBI informant had, to his knowledge, reported

such criminal conduct and in part because Connolly asserted that they would never deal drugs or even allow them in South Boston. Ring June 10, 1998 Tr. at 153–54, Sept. 22, 1998 Tr. at 123–24; Ex. 13. Ring believed that Bulger and Flemmi were engaged in gambling, loansharking, and, perhaps, murder. Ring Sept. 22, 1998 Tr. at 126–27. However, he felt that the DEA's effort was doomed because too many investigators knew about it, and Bulger and Flemmi may have already realized that they were being targeted. Ring June 19, 1998 Tr. at 151–53; Ex. 13. Ring argued that if the FBI agreed to participate, it would be blamed if the investigation failed and, particularly, if it appeared that its confidentiality had been compromised. Greenleaf Jan. 8, 1998 Tr. at 73–74.

Greenleaf decided that the FBI would not join the investigation of Bulger and Flemmi, but would offer technical support and make Kennedy the liaison with the DEA for the purposes of the investigation. Ex. 8; Kennedy Apr. 14, 1998 Tr. at 18, 37. Greenleaf also decided to "compartmentalize" the information that the FBI had received about the investigation. Kennedy Apr. 14, 1998 Tr. 37–38, 46; Greenleaf Jan. 8, 1998 Tr. at 71–72. In essence, Greenleaf wanted the information the FBI received about the investigation of Bulger and Flemmi to be maintained with "a very high level of integrity and security." Greenleaf Jan. 8, 1998 Tr. at 2. As set forth below, this effort failed.

On April 12, 1984, Greenleaf sent FBI Headquarters a teletype concerning Bulger and Flemmi that he designated as "Priority." It said:

> SAC, DEA, Boston, has advised that his office currently has requested a special enforcement operation proposal of DEAHQ, which is targeted at a large scale cocaine and marijuana trafficking area. This proposal is a joint investigative effort of DEA and the Quincy, Massachusetts Police Department.
>
> Primary targets in this investigative probe are captioned sources [Bulger and Flemmi] whom DEA alleges are individuals who control this narcotic trafficking group.
>
> DEA anticipates extensive investigation to include surveillances and pen registers to develop need[ed] probable cause for electronic microphone of principals involved in this investigation.
>
> FBI, Boston is not a participant in this investigation, however, SAC, Boston has offered technical assistance to DEA when and if desired and liaison has been established between FBI and DEA in this matter.
>
> As FBIHQ is aware, [Flemmi] is presently closed. At this time, Boston does not feel that [Bulger] should be closed due to past, present and future valuable assistance to the FBI. In addition, at present time DEA allegations are unsubstantiated and DEA has furnished no specific information relative to the involvement of [Bulger] in criminal activities. Boston will follow and advise FBIHQ of pertinent developments.

Ex. 12. Notably, the teletype did not include the information Stutman had provided Greenleaf concerning the gambling, loansharking, and other Title 18 offenses that Bulger and Flemmi were believed to be committing. Nor did it reflect that the FBI had declined a request to join the investigation.

Although FBI Headquarters was informed of the issue of whether Bulger should have been kept open as an informant, the Assistant Attorney General for the Criminal Division, Stephen Trott, was not. As described below, the failure to inform the Assistant Attorney General of the dilemma posed by the information Stutman provided Greenleaf, or indeed of Bulger's earlier admission that he was extorting money from at least one narcotics trafficker, Murray, violated the Attorney General's Guidelines. *See* Ex. 274 (Under Seal), Manual § 137–17(G)(1 & 2) (1–12–81); § 137–16(G)(1 & 2) (3–28–84).

While the Assistant Attorney General was being kept in the dark, Connolly soon learned of the information in the April 12, 1984 teletype. As Bulger's handler, he may have received a copy for Bulger's file. In any event, Ring told Connolly that Bulger and Flemmi might be under investigation by other agencies, but would give him no further details. Ex. 13. He also warned Connolly to be prepared to take a polygraph in the event that there was ever a claim that the confidentiality of any such investigation had been compromised. *Id.*

In addition, McWeeney, the Chief of the Organized Crime Section at FBI Headquarters, who was involved in the issues presented by the Wheeler, Halloran, and Callahan murders, received a copy of Greenleaf's teletype. Ex. 233; Kennedy Apr. 14, 1998 Tr. at 27–34, 40–43, 195. Despite Ring's effort to limit Connolly's knowledge of the DEA's plans, McWeeney told Connolly that the DEA was trying to obtain a wiretap targeting Bulger and Flemmi. Kennedy Apr. 14, 1998 Tr. at 30–34, 40–43.

It is also likely that Morris told Connolly about the investigation targeting Bulger and Flemmi. He had previously disclosed Halloran's allegations about them to Connolly. As discussed, in § II.26, *infra*, he would in 1986 again use Connolly as a conduit to alert Flemmi to a bug aimed at intercepting him. There is no reason to believe that he would have behaved any differently in 1984. Rather, circumstantial evidence suggests that Morris did tell Connolly about the investigation. Morris received his first payment of $1000 from Bulger and Flemmi in June 1982, shortly after causing Connolly to tell them of Halloran's allegations. Morris Apr. 23, 1998 Tr. at 136, 139. He received a second $1000 payment from them, and a case of wine, about two years later, in the spring of 1984. Morris Apr. 29, 1998 Tr. at 65. The timing of this payment suggests that it may have been an expression of Bulger and Flemmi's appreciation for Morris' assistance concerning the DEA investigation.

It is also likely that Kennedy discussed the DEA investigation with Connolly. Beginning in 1984, Kennedy on several occasions discussed with Connolly what would happen if Bulger and Flemmi were ever arrested. Kennedy Apr. 14, 1998 Tr. at 94–99. Kennedy repeatedly told Connolly that he believed that if Bulger or Flemmi were arrested they would divulge their relationship with Connolly and the FBI. *Id.* at 97–98. Connolly regularly responded that he did not have to worry because they were too smart to get caught. *Id.* at 99.

Connolly was relying on more than Flemmi and Bulger's cunning when he told Kennedy that he did not have to be concerned about the problems that would be generated if Bulger or Flemmi were arrested. Connolly knew he would protect them, and himself, by furnishing Bulger and Flemmi any information he could obtain that might help them avoid arrest and prosecution.

The court finds that, consistent with this, Connolly told Bulger and Flemmi that the DEA investigation had been initiated and advised them of the information he obtained concerning its progress. Flemmi admits some, but not all of this.

Flemmi acknowledges that the FBI warned him and Bulger that they were under investigation. Flemmi Aug. 24, 1998 Tr. at 20. Flemmi claims that in February 1984, he and Bulger "started noticing things" that made them aware that they were under active investigation by the DEA. Flemmi Aug. 20, 1998 Tr. at 84. Flemmi asserts that in 1984 Ring attended some of their meetings with Connolly and told them the DEA was investigating them. *Id.* at 84–87, Aug. 24, 1998 Tr. at 19. Flemmi also claims that in December 1984, Ring called to tell him that a wiretap was about to be placed on George Kaufman's telephone and on his own. *Id.* at 86–87. Ring denies that he told Flemmi about the prospective DEA

wiretaps. Ring Sept. 22, 1998 Tr. at 28–29.

This is a matter on which the court finds that Flemmi's testimony is in part accurate and in part false. More specifically, the credible direct and circumstantial evidence proves that Bulger and Flemmi were told of the investigation generally and of the electronic surveillance particularly. It was, however, Connolly not Ring who gave them this information.

On February 7, 1984, as part of his early investigation, Reilly asked the National Crime Information Center ("NCIC"), which is run by the FBI in Washington, D.C., for a copy of Bulger's criminal record. Ex. 137; Ring June 16, 1998 Tr. at 101–03. At that time, if the subject of such a request was an FBI informant, the Informant Section at FBI Headquarters would be advised of the inquiry, and send notification of it to the informant's handler and his supervisor for inclusion in the informant's file. Ring June 16, 1998 Tr. at 101–05. This practice was followed with regard to Reilly's inquiry concerning Bulger. Ex. 137; May 15, 1998 Tr. at 43. Thus, in February 1984, Connolly learned that the DEA was focusing on Bulger. Based in part on Connolly's previous and future practice, the court infers that he told Bulger and Flemmi about the DEA investigation. It is, therefore, not surprising that in February 1984, they "started noticing things." Flemmi Aug. 20, 1998 Tr. at 84.

In addition, recognizing they were under surveillance, Bulger and Flemmi ceased meeting Connolly at Bulger's apartment in Quincy. Flemmi Aug. 24, 1998 Tr. at 84–85. Instead, they began meeting at Connolly's home in South Boston and later at the apartment of his colleague, John Newton. *Id.;* Newton May 22, 1998 Tr. at 126–27, June 2, 1998 Tr. at 77, 80.

In 1984, Flemmi maintained regular contact with Connolly and continued to provide valuable information concerning the LCN. For example, he reported that: Raymond J. Patriarca would soon be named to succeed his deceased father as Boss; Joe Russo, who was a fugitive as a result of the Barboza murder was living in Montreal, but being urged by Zannino to return to Boston, where the LCN was being depleted; and Frank Salemme had a potentially violent dispute with Joe "Black" LaMattina, a member or associate of the Patriarca Family. Exs. 19, 237 (209 dated 7/16/84).

Ring did meet with Connolly, Bulger, and Flemmi several times in 1984. Exs. 13, 178. Beginning at some time prior to April 1984, Bulger and Flemmi reported that they were aware that they were under investigation and surveillance. Exs. 13, 14. They also indicated that they had observed intensified law enforcement attention to them in the summer of 1984. Ex. 14.

Flemmi's reaction to the joint DEA, Massachusetts State Police, and Quincy Police Department investigation is significant. Flemmi did not complain to Connolly or Ring that his agreement with the FBI gave him immunity from being investigated by other agencies or from being prosecuted if that investigation were successful. Flemmi Aug. 24, 1998 Tr. at 24–25. This was not Flemmi's understanding. Rather, Flemmi understood that it would be legally permissible for him to be prosecuted as a result of the investigation that was being conducted in 1984 by the DEA, the Massachusetts State Police, and the Quincy Police Department. *Id.* at 24–26, Aug. 25, 1998 Tr. at 246.

Flemmi believed that the FBI was obligated to protect him by providing him information about investigations that he could use to frustrate them, one way or another. Flemmi Aug. 24, 1998 Tr. at 22–26, Aug. 25, 1998 Tr. at 247. Flemmi now believes that in 1984 and 1985, the FBI provided him with the protection that he had been promised by warning him of the pending investigation and of the electronic surveillance that was part of it. Flemmi Aug. 24, 1998 Tr. at 20, 22–24. According

to Flemmi, the warnings that he received concerning the 1984–85 investigation of him were part of both the FBI's promise to him and of its fulfillment. For example, he testified:

> A. [Ring] advised us that there was a telephone tap on my phone. That was in a sense telling me that we were being protected. We were aware of the investigation that was ongoing.
>
> Q. And in your mind was that the FBI's obligation to you?
>
> A. Yes, absolutely. They're notifying me that there's an investigation going on. To me, it says I'm getting protected. I can't think of any other way.

Id. at 23–24.

In any event, after Greenleaf declined to have the FBI become a formal participant in the joint investigation in April 1984, the FBI provided some advice and assistance to the DEA. Fitzpatrick discussed the DEA investigation with his counterpart, DEA ASAC Paul Brown. Fitzpatrick Apr. 14, 1998 Tr. at 117. Brown frequently told Fitzpatrick that he knew that Bulger and Flemmi were FBI informants, and claimed that Greenleaf had told Stutman of their status. *Id.* at 124–25. Fitzpatrick regarded Bulger and Flemmi's status as FBI informants as "the worst kept secret in the world." *Id.* at 117. Fitzpatrick told an official at FBI Headquarters that McCurnin, the former FBI official who was the Executive Assistant to the Administrator of the DEA, knew that Bulger was an FBI informant. Ex. 233; McCurnin Sept. 15, 1998 Tr. at 85, 89. Nevertheless, Fitzpatrick joined Greenleaf in urging that Bulger not be closed as an informant. Ex. 233.

Kennedy, who was the FBI's liaison agent to the DEA in Boston, also discussed the ongoing DEA investigation with his counterparts, Boeri and Reilly. They too said they believed Bulger and Flemmi were FBI informants. Kennedy May 14, 1998 Tr. at 143–44. Kennedy, however, did not confirm this. *Id.* at 160.

The DEA agents asked Kennedy for any information which the FBI had that would support the application for electronic surveillance of Bulger and Flemmi that was being prepared. *Id.* at 102–04, 119, 208. Kennedy told them that there were two FBI sources who said that Bulger and Flemmi were extorting money from drug traffickers. *Id.* at 208; Ex. 45. Both sources, he said, reported that Hobart Willis and Joseph Murray, who controlled the recently raided South Boston warehouse in which fifteen tons of marijuana were seized, were associated with Bulger. Ex. 45. Kennedy also advised that one source stated that Willis and Murray were not required to pay Bulger, but that "every other 'bookie' and drug dealer in the Boston area [was] paying 'tribute' to [him]." *Id.* As described earlier, however, Kennedy did not tell the DEA agents that Bulger himself had told Connolly that he had received $60–90,000 in drug money from Murray. *Id.*; Kennedy Apr. 14, 1998 Tr. at 62–63, 79, 115, 121–29.

In November 1984, several FBI agents with specialized, technical expertise in installing microphones came to Boston to advise the DEA on installing a bug in Bulger's automobile, and condominium, each of which had sophisticated alarms. Ex. 146; Reilly May 20, 1998 Tr. at 10–12, 35–36. The FBI experts, however, reported that it was not possible to bug either Bulger's vehicle or residence. *Id.* This reinforced Reilly's view that the FBI was determined to protect its informants. Reilly May 20, 1998 Tr. at 37. Although they had no specialized training, Reilly and Boeri later installed listening devices in Bulger's home and automobile. *Id.* at 12, 37.

Prior to October 17, 1984, Greenleaf provided Stutman with information that the FBI was receiving from Bulger and Flemmi indicating their awareness of the investigation targeting them. Exs. 13, 146; Ring June 10, 1998 Tr. at 129–36; Reilly May 20, 1998 Tr. at 35–36, 71; Boeri May 15, 1998 Tr. at 50–51. Greenleaf did not,

however, tell Stutman that Bulger and Flemmi were the sources of the information. Greenleaf Jan. 8, 1998 Tr. at 201–09.

By at least mid-October 1984, the DEA and United States Attorney's Office realized that they faced a difficult dilemma. Boeri May 14, 1998 Tr. at 134–35. They had invested almost a year in conducting an investigation intended to lead to electronic surveillance targeting Bulger and Flemmi. It appeared, however, that the potential for their investigation to succeed in developing prosecutable cases had been seriously diminished because Bulger and Flemmi were well aware that they had been targeted. *Id.;* Ex. 18. It was decided to try to resolve this dilemma by continuing the investigation of Bulger and Flemmi, while attempting to give them the impression that it had been aborted. Reilly May 20, 1998 Tr. at 113–14.

More specifically, the DEA's effort to have the investigation targeting Bulger and Flemmi designated as an Organized Crime Drug Enforcement Task Force case succeeded on November 7, 1984. Ex. 140; Reilly May 19, 1998 Tr. at 143–45. The Organized Crime Drug Enforcement Task Force designation constituted recognition that the investigation of Bulger and Flemmi was a major matter and provided the "big money" necessary to continue it. *Id.* Bulger and Flemmi were the sole named targets of the investigation. Exs. 140, 146. The investigation would not have been authorized or sustained in the hope of merely developing a case against anyone else, including George Kaufman. The DEA believed that "[t]he success of the . . . investigation relie[d] upon the successful installation of a 'car bug' in the BULGER vehicle, and the installation of a 'room bug' in the BULGER residence." Ex. 146. A wiretap on Kaufman's telephone was being contemplated only as a means of obtaining the probable cause necessary to obtain warrants to bug Bulger's car and home. *Id.* The DEA would not have sought authority to tap Kaufman's telephone if Bulger and Flemmi were not the targets of that effort.

At the same time, it was decided that in view of the information about Bulger and Flemmi's awareness of the investigation that Stutman had received from the FBI, it was important to reduce the number of people who knew about the investigation in an effort to minimize the risk of leaks and, particularly, to try to give Bulger and Flemmi the impression that it had been ended. Reilly May 20, 1998 Tr. at 113–14; Boeri May 14, 1998 Tr. at 40–41, 90–91. Accordingly, it was decided that the Massachusetts State Police would be cut out of the investigation on the pretext that the effort was being abandoned. *Id.*

As a result, the DEA lost the partner in the joint investigation that had both the authority and experience to investigate gambling and loansharking. Boeri May 18, 1998 Tr. at 40. As described earlier, Crossen believed that any effort to obtain a warrant to conduct such electronic surveillance would require the participation of an agency with the authority to investigate gambling, loansharking, and other nonnarcotics offenses that there was probable cause to believe would be discussed during any electronic surveillance of Bulger and Flemmi. Crossen May 13, 1998 Tr. at 90–91. Crossen also believed that the DEA lacked such authority. Thus, at some point between October and December 1984, the FBI was again asked to participate in the investigation and the proposed electronic surveillance. Boeri May 14, 1998 Tr. at 44–45, 61–65, 72, May 18, 1998 Tr. at 40; Reilly May 19, 1998 Tr. at 118–19.

This time Greenleaf agreed. He assigned the matter to the Organized Crime squad and directed Ring to provide two agents from that squad to work with the DEA on the investigation, including the electronic surveillance. Ring June 10, 1998 Tr. at 117–18, 130.

Ring was not pleased with the arrangement because he continued to be concerned that the FBI would be blamed if, as

he expected, the investigation did not succeed. Carter Aug. 17, 1998 Tr. at 98. Ring decided to discharge his new responsibilities in a way that would minimize the potential for fair criticism of the FBI if and when the investigation failed. Ring assigned two agents who were new to Boston and the Organized Crime squad, Richard Carter and Brian Rossi, to work with the DEA on the electronic surveillance targeting Bulger and Flemmi. Ring June 10, 1998 Tr. at 118, Sept. 22, 1998 Tr. at 106–08, 112; Carter Aug. 17, 1998 Tr. at 47, 97. Neither agent knew that Bulger or Flemmi was an FBI informant. Carter Aug. 17, 1997 Tr. at 97, 101–12. Thus, there was no risk that either would divulge that Bulger and Flemmi were FBI sources.

Ring told Carter and Rossi to stay away from the FBI while they were working with the DEA. *Id.* at 97. Ring also directed them not to tell any member of the FBI what evidence or information was being gathered in the joint investigation. Ring June 10, 1998 Tr. at 117–19, June 19, 1998 Tr. at 154. As these instructions demonstrate, Ring, and the FBI that he represented, had no intention of using evidence obtained by the electronic surveillance in any investigation or prosecution of Flemmi, Bulger, Kaufman, or anyone else for any Title 18 offense, including gambling, loansharking, or extortion. Carter and Rossi obeyed Ring's order and did not provide him with any of the information they acquired while participating, on behalf of the FBI, in the investigation of Bulger and Flemmi. Ring June 10, 1998 Tr. at 119, June 19, 1998 Tr. at 153–54.

Although representatives of the United States Attorney's Office, the DEA, and the FBI were all involved in the decision to have the FBI join the investigation of Bulger and Flemmi, nobody considered the implications of the Bureau's involvement for the necessity portion of the application for a warrant authorizing electronic surveillance targeting Bulger and Flemmi that would soon be filed. Crossen May 12, 1998 Tr. at 29–35; Greenleaf Jan. 8, 1998 Tr. at 227–28; Ring June 22, 1998 Tr. at 81–83; Boeri May 14, 1998 Tr. at 36–37; Reilly May 20, 1998 Tr. at 118. Crossen and Boeri were primarily responsible for preparing the application and the affidavit on which it relied. In December 1984, however, Crossen had no prior experience with federal applications and Boeri had never served as the case agent or affiant in an investigation involving electronic surveillance. Crossen May 12, 1998 Tr. at 21; Boeri May 14, 1998 Tr. at 29–30. Reilly and Boeri did consult O'Sullivan to get advice concerning the procedures to be followed to obtain a warrant for electronic surveillance. Ex. 254. Nevertheless, central requirements of Title III were utterly overlooked or ignored.

More specifically, Title III requires, among other things, that each application for an order authorizing electronic surveillance establish that: there is probable cause to believe that a particular offense is being committed; there is probable cause to believe that the proposed wiretap or bug will intercept evidence of that crime; and electronic surveillance, which is an especially intrusive investigative technique, is necessary. *See* 18 U.S.C. § 2518(1)(b),(c) and (3)(a)(b) and (c). With regard to necessity, the statute states that the application must include:

> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

18 U.S.C. § 2518(1)(c) (1994).

As the Court of Appeals for the First Circuit explained in *United States v. Mastroianni*, a decision rendered on October 30, 1984, § 2518(1)(c) requires that the affiant in an application for an order authorizing electronic surveillance obtain relevant information from "all agencies involved in the investigation ..." before representing that electronic surveillance is necessary. *United States v. Mastroianni*,

749 F.2d 900, 910 (1st Cir.1984). As discussed in the Conclusions of Law, § III.2.E, *infra*, the *Mastroianni* decision was not novel. *See, e.g. Franks*, 438 U.S. at 164 n. 6, 98 S.Ct. 2674; *United States v. Dorfman*, 542 F.Supp. 345, 366 n. 18 (N.D.Ill.1982), *aff'd sub nom. United States v. Williams*, 737 F.2d 594 (7th Cir. 1984); *United States v. Tufaro*, 593 F.Supp. 476, 485–86 (S.D.N.Y.1983). Moreover, as a practical matter, in 1984, participants in joint investigations routinely shared relevant information with the DEA without even being asked. Stutman Apr. 15, 1998 Tr. at 146–47, 164.

In this case, however, Crossen, who had a practice of reading First Circuit decisions in criminal cases and should have read the *Mastroianni* decision, did not direct the DEA to consult the FBI concerning the necessity for electronic surveillance targeting Bulger and Flemmi. Crossen May 12, 1998 Tr. at 29–35, May 13, 1998 Tr. at 87–89; Reilly May 20, 1998 Tr. at 6, 116–17; Boeri May 14, 1998 Tr. at 133–34. He essentially relied on Boeri and Reilly to collect the legally required information. Crossen May 13, 1998 Tr. at 85–88.

The DEA, however, relied on the United States Attorney's Office for direction regarding legal requirements. Reilly May 20, 1998 Tr. at 118–19; Boeri May 14, 1998 Tr. at 37. Neither Reilly nor Boeri was aware of the *Mastroianni* decision or of the requirement that all participating agencies be consulted concerning the necessity for electronic surveillance. Reilly May 20, 1998 Tr. at 118–19; Boeri May 14, 1998 Tr. at 36–37. Nor was Stutman. Stutman Apr. 15, 1998 Tr. at 167. The DEA agents asked that FBI indices be checked to determine whether there had been any prior applications for electronic surveillance targeting Bulger or Flemmi, as required by 18 U.S.C. § 2518(1)(e). Reilly May 19, 1998 Tr. at 134–35. However, no inquiry was addressed to the FBI regarding the requirements of § 2518(1)(c) concerning the necessity for electronic surveillance. Boeri May 14, 1998 Tr. at 118; Reilly May 20, 1998 Tr. at 5–6. Boeri did not believe that it was required that he do so. Boeri May 14, 1998 Tr. at 95–96.

Similarly, the FBI did not recognize or discharge its obligation to furnish for inclusion in the application the significant information it had concerning the necessity of electronic surveillance targeting Bulger and Flemmi. Greenleaf had neither training nor experience regarding the requirements of Title III. Greenleaf Jan. 8, 1998 Tr. at 227. He was generally aware that an applicant was obligated to make a full and complete statement concerning why conventional investigatory techniques were insufficient, but did not think about this in the context of the investigation that the FBI had joined. *Id.* at 228–29.

Ring also gave no consideration to this issue. Ring June 22, 1998 Tr. at 81–82. Consistent with the effort to compartmentalize the information that Bulger and Flemmi were being targeted for electronic surveillance, Ring did not discuss with the FBI's Principal Legal Adviser or anyone else the legal requirements of Title III or the implications for the proposed electronic surveillance of Bulger and Flemmi's relationship with the FBI. *Id.* at 81–83. Thus, no consideration was given by the FBI to the requirements of § 2518(1)(c) or the ruling in *Mastroianni*.

Determined not to acquire any additional information about the joint investigation, Ring also did not review the application for the order authorizing electronic surveillance of Bulger and Flemmi, or the Boeri affidavit on which it relied. Ring June 19, 1998 Tr. at 154–55. Nor did Greenleaf. Greenleaf Jan. 8, 1998 Tr. at 229–30.

In essence, with regard to the 1984–1985 electronic surveillance, the DEA and the FBI were necessary, but reluctant partners. The FBI was determined not to violate the sacred promise of confidentiality that it made to all of its informants, including Bulger and Flemmi. The prosecutors and members of the DEA believed

that Bulger and Flemmi were FBI sources, but accepted the fact that the Bureau would not divulge or discuss their status. In the circumstances, the prosecutors and DEA agents sought to minimize the information about the investigation that was disclosed to the FBI in order to limit the risk that the confidentiality of their investigation would be compromised. Ring sought to insulate everyone at the FBI except Rossi and Carter from the investigation in order to avoid blame if the investigation failed. In the process the government recklessly disregarded its legal obligation to include in its application the legally required "full and complete statement" concerning the necessity for electronic surveillance.

The FBI also ignored the essential point of the Attorney General's Guidelines, which required consultation with the Assistant Attorney General for the Criminal Division when the Bureau learned that an informant had engaged in criminal activity, but wished to continue to utilize the informant rather than share the pertinent information with another law enforcement agency. *See* Ex. 274 (Under Seal), Manual § 137–17(G)(1 & 2) (1–12–81); § 137–16(G)(1 & 2) (3–28–84). This violation of the Guidelines contributed to a violation of Title III as well.

The Supreme Court has held that Title III, "plainly calls for the prior, informed judgment" of prosecutors, rather than investigators, before an application for electronic surveillance may be filed. *Giordano*, 416 U.S. at 515, 94 S.Ct. 1820. The exercise of such judgment by, in this case the Assistant Attorney General for the Criminal Division, "is interposed as a critical precondition to any judicial order." *Id.* at 516, 94 S.Ct. 1820.

In the instant case, if the facts necessary for an informed judgment to have been made had been disclosed by the FBI, or if the well-known issue of Bulger and Flemmi's status as sources had even been discussed with the FBI, no application for authority to conduct electronic surveillance targeting them would have been filed in 1984. If, however, an application with the required "full and complete statement" concerning the necessity for electronic surveillance had been submitted, the request for a warrant would have been denied.

Mere discussion with the FBI of the implications of Bulger and Flemmi's status as sources for the investigation that the DEA was leading and for the proposed electronic surveillance would, in 1984, have probably caused the termination of the investigation and, in any event, would have prevented any application for electronic surveillance from being made. More specifically, the DEA agents and the prosecutor primarily responsible for the investigation each now acknowledges that if he had been told officially that Bulger and Flemmi were FBI informants, a high level decision, involving officials of the Department of Justice, would have had to be made concerning whether to continue that investigation. Boeri May 14, 1998 Tr. at 96–97; Crossen May 13, 1998 Tr. at 11–16. They also recognize that if Bulger and Flemmi were valuable sources for the FBI, there was a good chance that they would not have been allowed to proceed with their investigation. Crossen May 13, 1998 Tr. at 11–16.

Their understanding is accurate. Indeed, if Stutman had received confirmation that Bulger and Flemmi were FBI informants and were able to talk to Greenleaf about it, he would have abandoned the investigation. Stutman Apr. 15, 1998 Tr. at 169–71. Stutman would have asked Greenleaf whether the FBI was aware of the criminal activity in which Bulger and Flemmi were engaged; whether Bulger and Flemmi were involved in any of the activity under investigation in connection with their relationship with the FBI; whether the FBI was going to compromise any continuing investigation; and, most importantly, whether the DEA's investigation would interfere with the FBI's efforts. *Id.* Candid responses would have been "yes" to each of these questions. More-

over, the FBI would have undoubtedly emphasized the great value of Bulger and Flemmi to the Bureau in its war against the LCN. In the circumstances, Stutman would have deferred to the FBI rather than invest a great deal of time and money in investigating Bulger and Flemmi. *Id.* This decision would have been supported, if not dictated, by DEA Headquarters, where McCurnin would have had the responsibility to work out any conflict with his former boss, McWeeney. McCurnin Sept. 15, 1998 Tr. at 79–80.

If, however, Crossen were somehow permitted to submit an application for electronic surveillance targeting Bulger and Flemmi, he would have insisted on sharing with the judge the information that he had received from the FBI, including their status as informants, any information suggesting that they may have been authorized to commit any of the possible crimes referenced in the application, and the fact that the government did not intend to use any intercepted evidence of possible Title 18 offenses in an investigation or prosecution of Bulger or Flemmi. *Id.*

Similarly, Weld would not have knowingly permitted a false or misleading affidavit to be filed in support of an application for electronic surveillance. Weld May 27, 1998 Tr. at 108–09. Nor would Assistant Attorney General Trott, who had to authorize the application. Rather, Trott would have required that the court be provided with accurate and complete information in the possession of any agency involved in the joint investigation, including the FBI. Indeed, Trott, now a judge of the Ninth Circuit Court of Appeals, recently participated in a decision which recognized and described this responsibility. *See United States v. Aviles*, 170 F.3d 863, 867 (9th Cir.1999), *petition for cert. filed* (U.S. June 9, 1999)(No. 9705).

It is clear to the court that if the matter had been discussed, the FBI would have ardently argued that Bulger and Flemmi were invaluable informants, whose status had to be maintained as confidential even if it meant abandoning the investigation or the proposed electronic surveillance. Its conduct in the instant case indicates that the Department of Justice would have given great weight to the importance of honoring the FBI's promise of confidentiality to Bulger and Flemmi. For example, as discussed in § II.33, *infra*, in 1997, the Acting Deputy Attorney General accepted a serious risk that this court would hold him in civil contempt rather than confirm that Angelo "Sonny" Mercurio, who had been already prosecuted and imprisoned, was an FBI informant. The Department of Justice would have been even more strongly supportive of Bulger and Flemmi in 1984, when disclosure that they were FBI sources could have complicated the pending prosecution of Angiulo and his colleagues. *See* Ex. 176.

The FBI's determination not to confirm that Bulger and Flemmi were informants or to discuss the implications of their status for the pending investigation, and the acceptance by the DEA and the United States Attorney's Office of the FBI's position, caused the applications for electronic surveillance now at issue to be submitted with reckless disregard for their accuracy and completeness and, as a result, with materially misleading omissions and misstatements. More specifically, at 12:30 p.m. on December 24, 1984—the verge of Christmas Eve—Crossen submitted to United States District Judge W. Arthur Garrity, Jr. an Application, incorporating a 104–page affidavit of Boeri, and a proposed Order authorizing electronic surveillance. Exs. 133, 138, 139. The Order was, without modification, promptly issued. Ex. 139.

The government now claims that there was not a joint DEA–FBI investigation prior to the issuance of the December 24, 1984 Order by Judge Garrity. *See* Government's Post–Hearing Brief in Opposition to Defendants' Motions to Dismiss Indictment and to Suppress Electronic Surveillance Evidence (Jan. 29, 1999) ("Gov. Post–Hearing Brief") at 319–23.

As described earlier, this contention is, as a matter of a fact, incorrect. It is also clearly inconsistent with the representations that the government made to three United States District Judges in 1984 and 1985.

The application for electronic surveillance submitted to Judge Garrity on December 24, 1984 cited Bulger and Flemmi as the first two named targets. Ex. 138, ¶ 3. This was compatible with their status as the "top"—indeed indispensable—targets of the investigation. Crossen May 11, 1998 Tr. at 142–43; Exs. 140, 146. Relying on the Boeri affidavit, the Application asserted that there was probable cause to believe that Bulger and Flemmi were engaged in conduct constituting drug offenses in violation of various provisions of Title 21 of the United States Code and in activities constituting an illegal gambling business in violation of several provisions of Title 18 of the United States Code. Ex. 138, at 3–4 (¶ 5(a) and (c)). The Application also asserted that there was probable cause to believe the wiretap of George Kaufman's telephone being proposed would cause the interception of "admissible evidence" of both Title 18 and 21 offenses. *Id.* Thus, the Application requested authority for the DEA and the FBI to wiretap Kaufman's telephone. *Id.* at 8.

With regard to the FBI, the Boeri's affidavit explained that:

> Because of the information supporting a finding of probable cause regarding Title 18 offenses as specified herein and in the accompanying Application of Assistant U.S. Attorney Gary C. Crossen, Special Agents of the Federal Bureau of Investigation *have been* assigned to work in conjunction with other agents previously working on this investigation.[38] Authorization is therefore also sought for the assigned FBI agents to participate in the authorized interceptions.

Ex. 133 at 104 (emphasis added). *See also* Reilly May 20, 1998 Tr. at 117. Reaffirming the original representation that FBI agents had been assigned to work on the joint investigation before the initial Application was submitted, the February 1, 1985 request for a renewal and expansion of the first Order, which was presented to Judge Joseph Tauro, stated that:

> This investigation *remains* a joint investigation participated in by Special Agents of the Drug Enforcement Administration, ... Special Agents of the Federal Bureau of Investigation ..., and detectives of the Quincy Police Department ... and troopers of the Massachusetts State Police and coordinated by the United States Department of Justice, New England Narcotics Task Force.

Ex. 135 at 2 (emphasis added). The March 1, 1985 request for another extension, which was submitted to Judge A. David Mazzone, reiterated that, "this investigation *remains* a joint investigation participated in by" the DEA, the FBI, and the Quincy Police Department, and coordinated by the Task Force. Ex. 136 at 2 (emphasis added). The Massachusetts State Police, were for the first time, not included.

Consistent with the representation that the FBI was involved in the investigation, the December 24, 1984 Boeri affidavit in support of the Application included information that came from the FBI and, in some instances, was attributed to FBI sources. *United States v. Salemme,* 978 F.Supp. 343, 348 (D.Mass.1997); May 15, 1998 Tr. at 6–7; Exs. 45, 133 at 47 (¶ 75), 79 (¶ 108).

As described earlier, the DEA considered only Bulger and Flemmi to be the "subjects of this investigation." Ex. 146. The DEA agents felt that bugging Bulger's automobile and residence would be

38. The Boeri Affidavit previously stated that the investigation had initially been conducted jointly by the DEA, the Quincy Police Department and the Massachusetts State Police. Ex. 133 at 22. It did not explain that the State Police had been dropped from the investigation. *Id.*

essential if the investigation were to succeed. *Id.* The December 24, 1984 Application, however, sought only authority to wiretap Kaufman's telephone. Ex. 138. As described earlier, the evidence convinces the court that no application for authority to wiretap Kaufman's telephone would have been made except as part of the DEA's effort to develop cases against Bulger and Flemmi. As required by law, however, the application also identified other individuals who were expected to be overheard engaging in criminal conversation with Kaufman. *See* 18 U.S.C. § 2518(1)(b) (1994); *Ferrara*, 771 F.Supp. at 1300.

The December 24, 1984 Boeri affidavit in support of the Application rambles over 104 pages. Ex. 133. It was not organized to identify clearly the probable cause to believe that any named target was involved in specific criminal activity or, particularly, that he would be overhead discussing any such activity over Kaufman's telephone. *Id.*

The failure of the Boeri affidavit to summarize the particular "probable cause" relating to each named target obscured key facts. Most importantly, the form of the affidavit made it very difficult, if not impossible without extraordinary effort, to discern that there was no evidence to establish probable cause that Bulger would be intercepted speaking to Kaufman about anything, and only slight evidence to suggest that Flemmi might discuss any narcotics offense on Kaufman's telephone.

More specifically, the Boeri affidavit includes over thirty pages of charts and other information derived from pen registers indicating the telephone numbers dialed by the eight individuals purportedly expected to be overheard on the Kaufman telephone. Ex. 133 at 69–100. At the conclusion of this detailed portion of his affidavit, Boeri stated, among other things, that, "Kaufman has ... telephonic contact ... with ... Bulger." *Id.* at 100 (¶ 127). Boeri acknowledged in his testimony, however, that the mass of information generated from many months of pen registers on various telephones used by Bulger does not include a single call from Bulger to Kaufman's telephone, or from Kaufman to Bulger. *Id.* at 69–100; Boeri May 18, 1998 Tr. at 14–16. Thus, contrary to the contentions in Crossen's Application and Boeri's affidavit, there was no probable cause to believe that Bulger would be intercepted discussing anything on Kaufman's telephone. Ex. 133 at 3 and 4 (¶ 7(b) and (d)); 138 at 3–5 (¶ 5(b) and (d)). The statement that such probable cause existed was clearly made with at least reckless disregard for its truth and, the court infers, knowledge that it was not true.

The pen registers did indicate that Flemmi and Kaufman spoke often by telephone. Ex. 133 at 69–100. Boeri's 104–page, 136–paragraph affidavit, however, contained only several paragraphs that included, among other things, any informant information that Flemmi was involved with drug dealers. *Id.* at 7–8 (¶ 12), 8 (¶ 13), 39 (¶ 62(k),(*l*),(m)), 40–41 (¶ 62(v),(x)), 44 (¶ 68(d)).[39] The essence of this information was that Flemmi was, with Bulger, extorting money from Frank Lepere and other, unnamed drug dealers, who had to pay Bulger and Flemmi if they wished to stay in business. *Id.* Extortion is a Title 18 offense. *See* 18 U.S.C. § 1951 (1994).

In contrast to the skimpy information associating Flemmi with conduct criminalized by Title 21 of the United States Code, the Boeri affidavit contained information that was both more extensive and detailed concerning Flemmi's and Bulger's possible involvement in illegal gambling and loansharking, which are Title 18 offenses. *See, e.g.*, Ex. 133 at 11–20 (¶¶ 21 and 22), 28 (¶ 46(a)), 36–41 (¶ 62), 41–43 (¶ 64), 44–45 (¶ 68), 46–47 (¶¶ 72, 73). Much of this

39. There is also a reference to an informant in Florida stating that the "Howie Winter organization" and Baione were receiving marijuana and cocaine from Florida by truck. Ex. 133 at 43 (¶ 66).

information was derived from the 1980 electronic surveillance of the Lancaster Street Garage. *Id.* at 11–19 (¶ 21). Massachusetts State Trooper John Naimovitch, who had tipped Flemmi to the Lancaster Street Garage bug, was the source of some of the additional Title 18–related information on which Boeri relied. *Id.* at 15–16 (¶ 21(B)), 17 (¶ 21(D)), 44–45 (¶ 68), 46 (¶ 72).

The Boeri affidavit contained ample evidence to establish that Flemmi and Kaufman spoke often by telephone, but provided virtually no basis to believe that they discussed any narcotics offenses. The few paragraphs of the Boeri affidavit which the government contends establish probable cause to believe that Bulger and Flemmi were committing narcotics offenses contain no reference to Kaufman. *See* Gov. Post–Hearing Brief at 347–49. Moreover, the informant characterized as CS–4, who was represented to be "personally acquainted" with Kaufman, characterized him as being "close to Flemmi in the illegal gaming and loansharking business," a "front man" for Bulger and Flemmi in the "hot car" business, and a person they use for their more difficult sports betting. Ex. 133, § 68(h),(i),(k). CS–4 did not claim Kaufman was involved in narcotics activity with Flemmi, Bulger, or anyone else.[40]

Read closely, the 104–page Boeri affidavit contains only two references to Kaufman's possible involvement with narcotics. More specifically, Kaufman's telephone number was found in an address book seized from a fugitive from drug charges, Salvatore Caruana. Ex. 133, ¶ 41 (at 27). Although pen registers were utilized for more than eight months, however, the Boeri affidavit does not indicate that Caruana ever called Kaufman or was expected to do so. Ex. 133. The pen registers did indicate that Joseph Murray's telephone was called six times from Kaufman's home. *Id.* at 108. The affidavit did not claim, however, that a wiretap was being sought because there was probable cause to believe Kaufman and Murray would be intercepted discussing any drug offense. *Id.* Nor did the court make such a finding. Ex. 139.

The Application and Boeri affidavit stated that Assistant Attorney General Trott had authorized the Application. Ex. 138 at 1 (¶ 2). In addition, it was expressly represented that the requested electronic surveillance was necessary to obtain admissible evidence of the Title 18 and Title 21 offenses that Crossen and Boeri claimed there was probable cause to believe Bulger and Flemmi would be discussing on Kaufman's telephone. Ex. 133 at 4 (¶ 8), 101 (¶¶ 129–133); Ex. 138 at 5.

As indicated earlier, Judge Garrity issued the proposed Order authorizing the wiretap of Kaufman's telephone shortly after receiving the Application, and the lengthy, convoluted Boeri affidavit, on the afternoon before Christmas. Viewing the government's submission in a common sense manner, as a reasonable judge, he would have received the following messages. The Assistant Attorney General had made an informed and considered decision to authorize the Application. The Application had as its primary targets Bulger and Flemmi, two notorious, reputed organized crime figures. The FBI was genuinely involved in the investigation and was interested in developing a prosecutable case against Bulger, Flemmi, Kaufman, and others for engaging in illegal gambling and other Title 18 offenses. The DEA was hopeful of generating a prosecutable narcotics case against them as well. Electronic surveillance was necessary to obtain admissible evidence to be used to prosecute Bulger, Flemmi, Kaufman, and others for illegal gambling and other Title 18 offenses. Although there did not appear to be adequate evidence to establish probable cause to believe that conversations con-

40. In its Post–Hearing Brief, at 349, the government edited the quotations ascribed to CS–4 to obscure the fact that the informant expressly linked Kaufman only to Title 18 offenses, none of which related to narcotics activity.

cerning any Title 21 narcotics offense would be intercepted by a wiretap of Kaufman's telephone, it was not necessary to rely on the Title 21 information because there was sufficient evidence that conversation concerning conduct that was criminal under Title 18 of the United States Code would be overheard.

The submission of the Application and Boeri affidavit communicating these messages was made with reckless disregard for the truth because they conveyed a message that was inconsistent with the facts as Boeri and Crossen understood them. Boeri and Crossen had obvious reasons to doubt the veracity of the message that they were communicating to the judge and, indeed, did not believe that it was true. More specifically, neither Boeri nor Crossen expected that the FBI would use any evidence generated by the proposed electronic surveillance to try to develop a prosecutable Title 18 case against Bulger or Flemmi. To the contrary, they believed that Bulger and Flemmi were valued informants that the FBI would seek to protect rather than prosecute. Similarly, Boeri and Crossen did not expect the FBI to try to develop a prosecutable Title 18 case against Kaufman, who had been targeted by the DEA for electronic surveillance because he was a close colleague of Flemmi and Bulger.

If Ring had reviewed Boeri's affidavit on behalf of the FBI, he would have recognized that it sent a false and misleading message. More particularly, he would have recognized that it falsely indicated that the FBI wished to investigate Bulger, Flemmi, Kaufman, and others in order to develop a prosecutable case concerning illegal gambling and other Title 18 offenses, and that the requested electronic surveillance was necessary to the success of that investigation. He also would have seen representations that Bulger and Flemmi were engaged in drug trafficking that he seriously doubted were true and that Connolly believed were not true. However, motivated by a desire to minimize the risk that the FBI could be blamed for compromising the investigation if it failed, Ring, on behalf of the FBI, completely and recklessly, disregarded the question of whether false and misleading representations were being made in the Boeri affidavit.

As a result of the foregoing, the Application and Boeri affidavit did not include the "full and complete statement" concerning the necessity for electronic surveillance required by Title III. If it had, neither Judge Garrity nor any other reasonable judge would have granted the request.

The government in this case did far more than fail to inform the issuing judge that Bulger and Flemmi were FBI informants. If the required disclosures had been made, they would have revealed the following.

Bulger and Flemmi were longstanding FBI informants. The FBI had for many years known of their involvement in gambling, loansharking, extortion, and other Title 18 offenses. *See, e.g.*, Ex. 271. Some of this information came from Bulger and Flemmi themselves. Exs. 40, 45, 46, 60, 70, 71, 72, 73, 74, 171, 271. For example, beginning prior to 1970, Flemmi had "told the FBI that he was engaged in illegal gambling and other illegal activity of a non-violent nature." Ex. 271. The government believes that it would be legally permissible to use Bulger and Flemmi's statements against them. Nov. 12, 1998 Tr. at 141–43; Apr. 13, 1999 Tr. at 154–55; Gov. Post–Hearing Brief at 110–23. The FBI, however, would not provide those statements to any prosecutor for use in a grand jury or judicial proceeding. Nor would the FBI use evidence generated by the electronic surveillance being requested to investigate any Title 18 offense Bulger, Flemmi, or Kaufman might be committing. Rather, the FBI regarded its sources' involvement in criminal activity as critical to their maintaining the credibility necessary for them to continue to obtain and provide the FBI important information concerning members of the LCN and other criminals.

Moreover, if fully informed, a reasonable judge would have considerable doubts about whether the activity of Bulger and Flemmi alleged in the Boeri affidavit were criminal at all, rather than authorized by the FBI. More specifically, the judge would have been informed that a review of the FBI files by the FBI's Principal Legal Adviser in Boston would indicate that:

> [There were] some [documents regarding information provided by the informant], primarily in the files pertaining to [Flemmi] which pertain to information which clearly reflected that this informant was engaged in illegal gambling activity at a very high level within the Winter Hill Gang. Moreover, it showed that this informant had a close working relationship with the LCN in making policy decisions regarding illegal gambling in the Boston area, which both the Winter Hill group and the LCN agreed to abide by. The serials disclosing this kind of information were dated in the middle 1980's. Similar information from this informant was also found in the file prior to 1980. The information in the file prior to 1970 indicated that this informant told the FBI that he was engaged in illegal gambling activities and other illegal activity of a non-violent nature. In one instance, source advised that he was involved in administering a severe beating to an organized crime figure who had stepped out of line. Because these serials were in [Flemmi's] file, *there was a clear indication that FBI Agents were aware of his involvement in illegal activity (primarily illegal gambling activity) and at least had tacitly authorized his participation in such activity.* Nowhere in the files pertaining to [Flemmi] was there any express authorization to commit criminal activity from any FBI Agent.

Ex. 271 (emphasis added).

In addition, a fully informed judge would also have doubted whether Bulger, Flemmi, or their colleague Kaufman were genuinely engaged in any narcotics offenses. More specifically, the judge would have known that Ring felt that any indication that Bulger and Flemmi were involved with drugs was "not consistent with [the FBI's] intelligence" regarding them, Ex. 13, and that their handler, Connolly, was concerned that Flemmi's "contacts, at [Connolly's] direction ... may have resulted in the false belief that [Flemmi] is involved in narcotics," Ex. 8.

If given the foregoing information, no reasonable judge would have entered the Order that Judge Garrity issued on December 24, 1984. It was issued, however, and Bulger and Flemmi quickly learned of the wiretap.

More specifically, soon after December 24, 1984, Connolly, Bulger, and Flemmi were discussing the Kaufman wiretap and other elements of the ongoing investigation. As described earlier, Flemmi acknowledges that he was told by the FBI of the Kaufman wiretap, and the court concludes that it was Connolly, rather than Ring as Flemmi claims, who provided the tip. Flemmi Aug. 24, 1998 Tr. at 86–87. This conclusion is reinforced by the fact that in late 1984 or early 1985, Connolly began meeting with Bulger and Flemmi at Newton's apartment, rather than at Bulger's home or his own, because Connolly needed a new, secure location. Newton May 22, 1998 Tr. at 126–27. It is also likely that Flemmi had access to any information known to Naimovitch, who, in 1980, had alerted him to the bug at the Lancaster Street Garage, and was later convicted on charges of corruption.

Among other things, Connolly reported that on December 26, 1984, he discussed with Bulger and Flemmi the physical surveillances being conducted against them. Ex. 14. (Memorandum dated 12/28/84). This meeting would have provided an occasion for him to discuss the Kaufman wiretap as well. In an ostensible effort to be helpful, Connolly provided Ring and Greenleaf detailed information about the surveillance vehicles Bulger and Flemmi had identified as part of the investigation

of them. *Id.*[41] Greenleaf forwarded this information to Stutman. *Id.* While Greenleaf was motivated by a desire to be genuinely cooperative, the practical effect of telling the DEA that Bulger and Flemmi were alert to its investigation could have been to discourage further efforts.

The DEA was not deterred by the information Greenleaf had furnished. On February 1, 1985, Crossen submitted to Judge Tauro a ninety-five-page affidavit from Boeri seeking renewal of the wiretap on Kaufman's telephone and additional authority to bug Bulger's automobile and residence as well. Ex. 135. The request for authority for a wiretap and two bugs in a single application may have been unlawful. *See* Feb. 6, 1997 Tr. at 5–6, 16–27. In any event, it made the affidavit confusing on the issues of probable cause, among other things, by obscuring key facts.

The February 1, 1985 Boeri affidavit incorporated his earlier affidavit. *Id.* at 2 (¶ 5). It stated that the FBI was part of the continuing joint investigation. *Id.* at 2 (¶ 6). The government acknowledges that the FBI was part of the joint investigation by February 1, 1985. *See* Gov. Post–Hearing Brief 319–23; Dec. 2, 1998 Tr. at 122–23. There was no indication in Boeri's affidavit that the FBI was not receiving the information being generated by the electronic surveillance for use in its purported investigation of Bulger and Flemmi for possible prosecution on Title 18 charges. Crossen May 13, 1998 Tr. at 76.

In his affidavit Boeri asserted that there was probable cause to believe that "wire communications" of Bulger would be obtained if the wiretap on Kaufman's telephone were reauthorized. Ex. 135 at 3 (¶ 7(b)). This representation was not true and, indeed, was made with at least reckless disregard for the truth. As described earlier, the pen registers had disclosed no calls between Bulger and Kaufman prior to December 24, 1984. Ex. 133 at 69–100; Boeri May 18, 1998 Tr. at 14–16. The initial wiretap of Kaufman's telephone did not intercept any conversations with Bulger either. Boeri May 18, 1985 Tr. at 23, 26–27.

Flemmi continued to call Kaufman in an effort to mask the fact that he had been tipped off to the tap, but engaged only in innocuous conversation. Flemmi Aug. 26, 1998 Tr. at 99–100. John Martorano, who was still a fugitive, was also intercepted. Jan. 8, 1998 Tr. at 96.

Boeri's February 1, 1985 affidavit also claimed that there was probable cause to believe that if the requested electronic surveillance was authorized, Bulger, Flemmi, Kaufman, and the other named targets would be intercepted discussing the distribution of marijuana and cocaine. Ex. 135 at 3 (¶ 7(a) and (b)). As Boeri now acknowledges, the prior month of intercepts, however, had provided no evidence that Bulger and Flemmi would discuss drug activity on Kaufman's telephone. Boeri May 15, 1998 Tr. at 23–24. Moreover, the ninety-five-page affidavit includes only two references to drugs at all. In one instance Kaufman said that a bookmaker, who Boeri in the affidavit stated had no connections with Bulger, Flemmi, Kaufman, or the Winter Hill Gang, also sold "junk"—meaning drugs. Ex. 135 at 14–15 (¶¶ 24 and 25); Boeri May 15, 1998 Tr. at 18–23. In the other instances, Kaufman asked an unknown male if an individual named "Allen" was in the "junk" business and was told "yes." *Id.* at 70 (¶ 128). If Boeri's affidavit had been presented in support of a request for authority to conduct electronic surveillance for the purpose of developing only a Title 21 narcotics prosecution, it would have been obviously insufficient to justify an extension or expansion of the original order. Thus, the false and misleading message, conveyed by the affidavit, that the FBI was conducting a genuine Title 18 investigation of Bulger, Flemmi,

41. The fact that he was providing such information could have been an element of his defense if Connolly were ever accused of undermining the DEA's investigation.

Kaufman, or anyone else was, again, highly material.

Judge Tauro issued the requested order authorizing the continued wiretap on Kaufman's telephone and the bugging of Bulger's automobile and residence as well. For the reasons described earlier, neither he nor any other reasonable judge would have done so if the required full and complete statement concerning necessity had been made.

While the wiretap on Kaufman's telephone did not intercept Bulger, it did result in Zannino being overheard. Ex. 176. O'Sullivan was informed and alarmed because the interception had the potential to complicate the pending prosecution of Zannino. *Id.* O'Sullivan consulted Ring. *Id.* To prevent further problems, at some point prior to February 7, 1985, Ring was asked to remove Carter and Rossi from the work they were doing with the DEA, and to instruct them not to discuss the statements Zannino had been overheard making with anyone at the FBI or to introduce them into the FBI's files. *Id.* The court concludes that this was done.

Not surprisingly, there was a "stunning lack of success" from the bugging of Bulger's home and automobile. Crossen May 12, 1998 Tr. at 153. Indeed, the government has represented that it does not wish to offer any evidence from these bugs in its case in chief. Gov. Post–Hearing Brief at 316–17; Nov. 20, 1998 Tr. at 113. The bug in Bulger's car, however, did intercept Flemmi telling Bulger that Connolly had become "a little ... nervous." Ex. 136 at 18 (¶ 21); Crossen May 12, 1998 Tr. at 149–50.

On March 1, 1985, Crossen presented to Judge A. David Mazzone a forty-page affidavit of Boeri seeking authority to extend the bugs in Bulger's home and automobile, but not the wiretap on Kaufman telephone. Ex. 136. The prior applications and affidavits were incorporated in that request. *Id.* at 2 (¶¶ 5 and 6). As indicated earlier, Boeri again represented that the FBI was part of the joint investigation and that there was probable cause to believe that evidence concerning illegal gambling, as well as narcotics offenses, would be intercepted. *Id.* at 2 (¶ 7) 3–5 (¶ 8). Boeri again claimed that electronic surveillance was necessary to obtain evidence of these offenses. *Id.* at 5 (¶ 10).

However, it appears that the representation that the FBI was still involved in the joint investigation was false because, as directed by O'Sullivan, Rossi and Carter were no longer participating. In any event, contrary to the message communicated by the affidavit, the FBI continued to have no intention of utilizing evidence obtained from the electronic surveillance in any investigation of Bulger or Flemmi. Not knowing this, or any of the other material information that the required full and complete statement concerning necessity would have included, Judge Mazzone entered the government's proposed order.

The extended authorization for the bugs, however, was of no value to the investigation. On March 11, 1985, Bulger found the bug in his car. Ex. 142. Just before he pulled it out, Boeri and Reilly, who were monitoring the bug, heard Bulger say: "He's right. They did put a bug in the car." Ex. 145; Reilly May 20, 1998 Tr. at 16. That statement reinforced Reilly's belief that Bulger and Flemmi were FBI informants. Reilly May 20, 1998 Tr. at 16.

As the electronic equipment cost $15–20,000, Boeri and Reilly rushed into the garage to recover it. Ex. 142; Weld May 26, 1998 Tr. at 69. Bulger expressed surprise that they were able to bug his automobile. Ex. 142. Bulger also told the agents: "We're all good guys here. You're the good good guys, and we're the bad good guys." Boeri May 18, 1998 Tr. at 81–83; Weld May 26, 1998 Tr. at 69. Bulger did not, however, claim to have immunity from investigation by the DEA or prosecution if a case against him could be developed. Ex. 142.

Two days later, on March 13, 1985, Bulger approached Boeri, who was conducting a physical surveillance him. Ex. 141.

Bulger knew Boeri's name and the location of the supposedly secret site where the monitoring of the wiretaps and bugs had been conducted in an effort to maintain the confidentiality of the investigation. *Id.*

At this point, the DEA and the United States Attorney's Office accepted that the confidentiality of the investigation generally, and the electronic surveillance particularly, had been compromised. Ex. 145; Reilly May 20, 1998 Tr. at 16; Weld May 26, 1998 Tr. at 68. Although the DEA made some follow-up efforts, its lengthy and expensive investigation was deemed unsuccessful and was eventually closed. Reilly May 20, 1998 Tr. at 119; Weld May 26, 1999 Tr. at 70; Ex. 145. The DEA shared with the IRS some of the information concerning Bulger and Flemmi that it had developed. Ex. 145; Reilly May 20, 1998 Tr. at 119. Believing that the FBI had compromised their investigation and would not itself investigate Bulger and Flemmi, the DEA agents did not offer the FBI any evidence that they had obtained relating to potential Title 18 offenses, including information concerning the Valhalla. Reilly May 20, 1998 Tr. at 119. Nor did the FBI ever ask for any such evidence. *Id.* at 46–47.

In an attempt to give some redeeming value to his futile investigation, Boeri decided to try to recruit Flemmi and Bulger as informants for the DEA. Boeri May 11, 1998 Tr. at 111. Boeri sent Flemmi and Bulger cards congratulating them on frustrating the DEA's investigation and a box of cigars. Boeri May 18, 1998 Tr. at 109–12. He also gave Flemmi, a former paratrooper, a tape of army motivational marching chants. *Id.* Boeri's efforts were unavailing, however. Bulger and Flemmi evidently recognized that they had a good deal with the FBI and were not interested in working with the DEA.

18. *Morris Tells Bulger and Flemmi That They Can Do Anything They Want as Long as They Do Not "Clip" Anyone*

In April 1985, Connolly, Morris, Condon, Bulger, and Flemmi met for dinner at Morris' home in Lexington, Massachusetts. Flemmi Aug. 20, 1998 Tr. at 5; Condon May 1, 1998 Tr. at 108–10. The dinner was held several weeks after Bulger found the bug in his car and it had become obvious that the investigation led by the DEA would not succeed. Bulger and Flemmi brought a bottle of wine and, for the first time, also a bottle of champagne. Flemmi Aug. 20, 1998 Tr. at 10.

The dinner was evidently planned to celebrate the failure of the effort to investigate Bulger and Flemmi. Ring was not invited to attend. Meetings with Ring, Flemmi had found, were "strictly business." Flemmi Aug. 27, 1998 Tr. at 64, Aug. 28, 1998 Tr. at 5–6. Condon, however, was included. He was then serving as the Undersecretary of Public Safety for the Commonwealth of Massachusetts. Condon May 1, 1998 Tr. at 108–10. The Massachusetts State Police was one of several agencies he shared responsibility for supervising. *Id.* at 92–94.

Condon spent about an hour eating dinner and participating in the discussion before leaving. Condon May 1, 1998 Tr. at 117. The conversation then turned to the Angiulo wiretaps. Flemmi Aug. 20, 1998 Tr. at 14–15, Aug. 26, 1998 Tr. at 153–56. Flemmi and Bulger knew that they had been discussed in some of the intercepted conversations. *Id.* They again expressed concern about whether the information on those tapes might be used against them in an investigation or prosecution. *Id.* Morris and Connolly told them not to worry because they would not be prosecuted for anything on those tapes. *Id.* Morris went on to say to Bulger and Flemmi, "[y]ou can do anything you want as long as you don't 'clip' anyone." *Id.*; Ex. 92, ¶ 2; Condon May 1, 1998 Tr. at 122–25; Newton May 28, 1998 Tr. at 140–41. Morris was not inebriated when he made this statement. Flemmi Aug. 20, 1998 Tr. at 10, Aug. 27, 1998 Tr. at 72; Morris Apr. 23, 1998 Tr. at 88–90.

Morris' comment contributed to Flemmi's understanding that the FBI would protect him from investigation of and possible prosecution for any crime he might be a threat to commit other than murder—although, as described previously, in the Halloran matter the Bureau had done even that. Ex. 92.

Morris testified that he did not recall telling Bulger and Flemmi that they could do anything they wanted as long as they did not "clip" anyone and doubted that he did so. Morris Apr. 29, 1998 Tr. at 90–91. Nevertheless, the court finds that the statement, as related by Flemmi, was made.

It is possible that Morris merely forgot a comment that he made thirteen years before his testimony. If the matter does not involve a failure of recollection, however, Morris has again lied. Morris acknowledges that he has a long history of lying to protect himself. Morris Apr. 27, 1998 Tr. at 151, 163, Apr. 30, 1998 Tr. at 90. He lied to his superiors about his conduct concerning the Lancaster Street Garage investigation. Morris Apr. 30, 1998 Tr. at 85. Morris also lied to SAC Ahearn when he denied that he had advised Ring to close Bulger as an informant. *Id.* at 91–92. In addition, as discussed in § II.27, *infra*, after telling a *Boston Globe* reporter that Bulger was an FBI informant, Morris lied in claiming that he was not the source of that and other leaks in interviews with agents from the FBI's Office of Professional Responsibility ("OPR") and later in two written, sworn statements, although he knew that his conduct was criminal. Morris Apr. 27, 1998 Tr. at 151–56, 163, Apr. 30, 1998 Tr. at 93. In each instance Morris was motivated by a desire to protect himself and to avoid possible prosecution. Morris Apr. 27, 1998 Tr. at 51.

Morris had the same incentive to lie about whether he in fact or in effect told Bulger and Flemmi, in 1985, that they could do anything they wanted, as long as they did not kill anyone, and would be protected. Flemmi's claim that this statement was made contributed to the court's decision to grant his motion for an evidentiary hearing on the issue of immunity. Ex. 92. When Morris made his proffer it was evident that he might not be given immunity by the prosecutors in exchange for his testimony if he corroborated Flemmi's claim on this point. His concern was not only understandable, it was well-founded. As discussed in § II.33, *infra*, the court has since determined that the government's refusal to grant Connolly immunity was motivated in part by genuine interest in investigating him for possible prosecution, and also in part by "a desire not to facilitate the introduction of evidence that the government expects would substantially corroborate Flemmi and might hurt its case, as well as embarrass the government." Oct. 16, 1998 Tr. at 23.

Although the court need not decide whether Morris' failure to acknowledge the now controversial statement that he made to Bulger and Flemmi in April 1985 is an innocent failure of memory or another willful lie, the court does find Flemmi's characterization of that statement to be correct.

In addition, at the April 1985 meeting Morris and Connolly told Bulger and Flemmi about sources that the FBI and other law enforcement had who were members or associates of the LCN. Flemmi Aug. 20, 1998 Tr. at 16–17. Bulger and Flemmi were encouraged to stay away from those individuals in order to protect themselves. *Id.*

Shortly before they left Morris' home, Bulger told Flemmi that he wanted to loan Morris $5000 to help him out with financial problems Morris was having. *Id.* at 19–21; Ex. 30, ¶ 16. Flemmi gave Bulger $3000. *Id.* Morris was having financial difficulties due to medical problems in his family. Morris Apr. 23, 1998 Tr. at 142–43. Bulger told Morris that he wanted to help him out and gave Morris $5000 in cash. *Id.* at 142–44, Apr. 29, 1998 Tr. at 56–57, 67; Ex. 30, ¶ 16; Flemmi Aug. 20, 1998 Tr. at 19–

21, Aug. 28, 1998 Tr. at 35; Newton June 2, 1998 Tr. at 7–8.

Morris never returned or repaid the $5000. Morris Apr. 23, 1998 Tr. at 144; Ex. 30, ¶ 16; Flemmi Aug. 20, 1998 Tr. at 20. Nor was he ever asked to do so by Flemmi or Bulger. Flemmi Aug. 20, 1998 Tr. at 20.

19. *Dining with "Donnie Brasco"*

In June 1985, the trial of Gennaro Angiulo and several of his codefendants began. Kottmyer Aug. 13, 1998 Tr. at 165, Aug. 14, 1998 Tr. at 139; Flemmi Sept. 15, 1998 Tr. at 35, Nov. 20, 1998 Tr. at 63–64. It culminated in Angiulo's conviction in February 1986. Nov. 20, 1998 Tr. at 63–64.

With Connolly's assistance, Bulger and Flemmi had evaded the DEA's efforts to have them prosecuted and continued to be highly valued allies in the FBI's war against the LCN. The character and quality of this alliance was exemplified by a dinner that Bulger and Flemmi had with Connolly, Nick Gianturco, Jules Bonovolenta, and Joe Pistone.

At about the time of the Angiulo trial, Bonovolenta and Pistone, who were from New York, were in Boston to review some documents in preparation for possibly testifying as experts in the Angiulo case or some other LCN prosecution. Gianturco Jan. 15, 1998 Tr. at 125–26, 156–57, Apr. 20, 1998 Tr. at 26, 35. Bonovolenta was the ASAC in New York City, who was in charge of the FBI's Organized Crime Division. Gianturco Jan. 20, 1998 Tr. at 83–84. Pistone, who had recently left the FBI, was renowned for having, as "Donnie Brasco," infiltrated the LCN in New York City and for testifying in many successful Mafia prosecutions. *Id.* at 82, Gianturco Jan. 20, 1998 Tr. at 130–31, Apr. 20, 1998 Tr. at 26–30, 34. As a result, it was understood that there was a $500,000 "contract" out on Pistone's life. Gianturco Apr. 20, 1998 Tr. at 28–29. Thus, precautions were being taken to assure the secrecy of Pistone's location and activities. *Id.*

Gianturco had worked with Bonovolenta and Pistone in New York. Gianturco Jan. 15, 1998 Tr. at 125. With Connolly's concurrence, when his friends were in Boston, Gianturco invited them to his home for dinner with Bulger and Flemmi. *Id.* at 159–60. Gianturco had complete confidence that Bulger and Flemmi would do nothing to endanger Pistone. Gianturco Apr. 20, 1998 Tr. at 30. Pistone had recently received the Attorney General's Award for Distinguished Service. *Id.* at 28. By being invited to dine with Pistone and Bonovolenta, Flemmi and Bulger could also rightly regard themselves as honored members of the government's team combatting the LCN.

Bulger and Flemmi soon validated again their value to the FBI by making an indispensable contribution to the successful effort to incarcerate Angiulo's successors in the Boston LCN—Joe Russo, Vincent Ferrara, and Robert Carrozza. Indeed, ultimately Flemmi particularly contributed to the successful prosecution of Raymond J. Patriarca, who had, as Flemmi reported, succeeded his father as Boss of the Family.

20. *Vanessa's*

By mid–1986 Angiulo and his codefendants had been convicted and Zannino, who was ill, was incapacitated while awaiting trial. The LCN in Boston was diminished and in disarray. This created a temporary vacuum which, according to their plan, Flemmi and Bulger sought to fill by expanding their own criminal activities.

More specifically, Flemmi understood that he and Bulger had formed a partnership with the FBI, which had "taken down" the LCN in Boston. Flemmi Aug. 28, 1998 Tr. at 119–20. This provided an opportunity for Bulger and Flemmi to take over criminal activities in Boston that had previously been controlled by the LCN. *Id.* With the protection of the FBI, Bulger and Flemmi could operate very profitably. *Id.*, Aug. 25, 1998 Tr. at 31. Basically, Flemmi had been led to reasonably under-

stand that he could "extort people, earn a living as a criminal, and not get prosecuted if [he gave] information to the FBI." *Id.* This was an important benefit of his bargain with the FBI because, for Flemmi, making money was "the name of the game." *Id.*

After Angiulo was convicted, the FBI's conduct continued to be consistent with Flemmi's understanding of his arrangement with the Bureau. For example, one of Morris' informants reported that bookmakers who were "with" Angiulo were receiving very little direction from the remnants of his regime; Flemmi was challenging the LCN by "taking over" its bookmakers and numbers agents; and the LCN was unable to do anything to stop him. Ex. 61. Yet the FBI made no effort to investigate these allegations.

Initially, the LCN sought to deal with the situation described by Morris' informant by proposing to make Flemmi a member. Ex. 123. Flemmi, however, remained uninterested in the offer. As an informant told Connolly:

> Flemmi would not want membership inasmuch as he is an independent person and would not want to be subject to the rules of the Mafia ... Flemmi does not need the headaches and he, along with Whitey Bulger, are "their own bosses with their own things going for them."

Id.; Ahearn May 7, 1998 Tr. at 139.

The LCN was not, however, the only organization interested in formalizing its relationship with Flemmi. In July 1986, the Bureau in Boston requested authority from FBI Headquarters to reopen Flemmi as an informant. *Id.* at 89–90; Ex. 110. The request described Flemmi as a proposed member of the LCN, who "remains in a position to provide valuable information at the policymaking level of the Boston LCN." *Id.*[42]

Connolly, Ring, and their colleagues were very interested in targeting and immobilizing Angiulo and Zannino's successors. As predicted in the request that he be reopened, Flemmi proved to be an invaluable asset in that effort.

Beginning in April 1986, Flemmi reported to Connolly on the activities of Russo and Ferrara, who were emerging as the new leaders of the LCN in Boston, and their colleagues, Carrozza, Mercurio, Dennis Lepore, and Biagio DiGiacomo. Exs. 16, 17, 18, 117, 118, 128. He also provided information concerning LCN members in Providence, including Patriarca, Matthew Gugliametti, and Anthony St. Laurant. Exs. 117, 211.

As Flemmi explained to Connolly, the LCN in Boston wanted to establish a cooperative relationship with Bulger and him in order to minimize the threat that they posed. Ex. 117. Mercurio, who was already friendly with Bulger and Flemmi, took a leading role in this effort. *Id.* Flemmi also reported that Mercurio, who had recently been released from prison, was bitter toward the Angiulos. *Id.*

Flemmi told Connolly that the LCN wanted to meet with Bulger and him to discuss the payoff on the illegal numbers and other gambling issues. Ex. 117. The FBI was very interested in the information such meetings would generate.

Flemmi subsequently met several times with members of the Boston LCN in a storeroom of Vanessa's, a restaurant owned by Mercurio. Exs. 16, 17, 118. Flemmi told Connolly about at least some of the meetings in advance. Exs. 117, 118. As requested by Connolly, he also reported on what was discussed. Flemmi Aug.

42. The request that Flemmi be reopened as an informant also explained that he had been closed on September 23, 1982 because of purported, pending investigations arising from the interceptions at 98 Prince Street and 51 North Margin Street. Exs. 83, 110. As described in § II.11, *supra,* Flemmi had not been targeted for investigation relating to that electronic surveillance. Morris Apr. 23, 1998 Tr. at 20; Ring June 10, 1998 Tr. at 40. Rather, when closed as an informant in September 1982, Flemmi was a subject in the investigation of the Wheeler, Halloran, and Callahan murders.

29, 1998 Tr. at 91–95; Exs. 16, 17, 118. Among other things, Flemmi described the LCN's plans concerning: illegal football cards; changing the payoff odds on the illegal numbers; the extortion of bookmakers generally; and, particularly, a scheme to obtain money from "Doc" Sagansky, who was a major bookmaker. Exs. 16, 17, 118.

The FBI promptly decided to target Vanessa's for electronic surveillance. In addition to utilizing Flemmi and Bulger to obtain information necessary for the application for a warrant, Flemmi was asked to obtain valuable logistical information concerning Vanessa's. Flemmi Aug. 20, 1998 Tr. at 95. For example, at Connolly's request, Flemmi reported that participants accessed the storeroom by taking a service elevator, and that the storeroom had an alarm system which was not operative. Exs. 16, 17. At Ring's request, Flemmi provided the FBI with a detailed diagram of the storeroom. Flemmi Aug. 20, 1998 Tr. at 94–95; Carter Aug. 17, 1998 Tr. at 55; Ex. 209.

As a result of these requests, Flemmi correctly understood that the FBI was planning to bug Vanessa's. Flemmi Aug. 20, 1998 Tr. at 95; Ring June 15, 1998 Tr. at 17–18. Connolly told Flemmi when the bug was installed. *Id.* at 95–96. As a result, Flemmi and Bulger stayed away from Vanessa's and, as with 98 Prince Street, neither was intercepted. *Id.;* Carter Aug. 8, 1998 Tr. at 56, 106.

In contrast to 98 Prince Street, however, there is no evidence there was any discussion of whether any evidence acquired by the bug at Vanessa's would be used against Bulger or Flemmi. However, Flemmi believed that because the FBI had asked him to obtain information concerning Vanessa's, as it had asked him to obtain information about 98 Prince Street, he would have the same protection with regard to any evidence intercepted at Vanessa's as he had concerning the evidence intercepted at 98 Prince Street. Flemmi Aug. 27, 1998 Tr. at 70. This understanding was reasonable.

The application for the warrant to bug Vanessa's was filed on October 31, 1986. Ex. 153. The supporting affidavit was submitted by Carter. *Id.* Most, if not all, of the information contained in the affidavit was provided to Carter by Connolly, who reviewed the affidavit. Flemmi and Bulger were two of the three confidential sources relied upon in the affidavit. Carter Aug. 18, 1998 Tr. at 33; Coffey Aff., Apr. 9, 1997, at 3; Ex. 109. The court concludes that but for the information provided by Flemmi and Bulger, the government could not have obtained the warrant to bug Vanessa's. Carter Aug. 17, 1998 Tr. at 47–48, 51–52, 54, 105; Ex. 207.

Ring generally supervised the preparation of the affidavit. Ring June 15, 1998 Tr. at 14. In addition, the affidavit was reviewed at FBI Headquarters. Carter Aug. 17, 1998 Tr. at 107–09.

At some point in 1985, Carter had been told that Bulger and Flemmi were FBI informants. *Id.* at 102. He understood that they were two of the three sources who had supplied much of the information for his affidavit. *Id.* at 51–52, Aug. 18, 1998 Tr. at 33; Coffey Aff., Apr. 9, 1997, at 3. For example, Carter knew that Flemmi was the source of the diagram of Vanessa's that he included in his affidavit. *Id.* at 105. It was Carter's understanding that Flemmi's statements to Connolly could not be used against him, at least directly. *Id.* at 164–65. The affidavit was sent to FBI Headquarters in a manner that revealed that Bulger and Flemmi were both two of the named targets and two of the three referenced sources. *Id.* at 107–09.

Morris testified that it was a common practice for the FBI to name sources who had provided information for an affidavit as targets in applications seeking authority to conduct electronic surveillance in an effort to mask their status as informants. Morris Apr. 30, 1998 Tr. at 171–72. This practice was followed with regard to Bulger and Flemmi in Carter's affidavit con-

cerning Vanessa's.[43] In the process, the FBI intentionally, and with reckless disregard for the truth, prepared an affidavit that was false and misleading with regard to Flemmi and Bulger, and caused it to be authorized for filing and submitted by attorneys in the Department of Justice who were not informed of its deceptive character. Carter Aug. 17, 1998 Tr. at 110; Weld May 27, 1998 Tr. at 109–12.

For example, the application and Carter affidavit represented that there was probable cause to believe that Bulger and Flemmi, among others, were conspiring with Russo, Ferrara, and their associates to conduct an illegal gambling business and a RICO enterprise. Ex. 153. The submissions also stated that Flemmi and Bulger were expected to be intercepted if the request to bug Vanessa's was allowed. *Id.* The application and affidavit represented that the requested electronic surveillance was necessary with regard to Bulger and Flemmi, among others. *Id.* The clear import of the submissions was that the FBI would employ any evidence that it intercepted to try to develop a prosecutable case against Flemmi and Bulger, as well as the other named targets.

Based on the collective knowledge of the participants, the FBI well knew that none of this was true. There was no reason to believe that Flemmi or Bulger would visit Vanessa's while it was bugged and be intercepted. Carter certainly did not expect that they would. Carter Aug. 18, 1998 Tr. at 166. Moreover, in view of their close cooperation with the FBI concerning Vanessa's, it was doubtful that any conversation in which Flemmi and Bulger might engage there could properly be deemed criminal activity rather than conduct authorized by the government. In any event, with regard to necessity, the FBI had relevant statements by Bulger and Flemmi that it now claims are not immunized. Nov. 12, 1998 Tr. at 141–43; Apr. 13, 1999 Tr. at 154–56; Gov. Post–Hearing Brief at 110–123. In addition, the FBI had no intention of investigating Flemmi or Bulger based on any information generated by the bugging of Vanessa's.

While the FBI knew that the submissions seeking authority to bug Vanessa's were deceptive, the Department of Justice attorneys who were involved in the matter did not. Honoring the FBI's promise of confidentiality to Bulger and Flemmi, Carter did not tell the Strike Force Attorney with whom he was working, Jane Serene, that Flemmi and Bulger were FBI informants. Carter Aug. 17, 1998 Tr. at 110. Thus, he did not discuss with her the legality of including them as both sources and purported targets in the application and affidavit. *Id.* Nor did he discuss this issue with anyone at the FBI. *Id.*

In October 1986, Weld became the Assistant Attorney General in charge of the Criminal Division. Weld May 26, 1998 Tr. at 5. As such, he authorized the application for the Vanessa's bug. Ex. 153. Weld reviewed the application before authorizing its submission. Weld May 27, 1998 Tr. at 50. His prior experience in Boston, including the unsuccessful 1984–85 electronic surveillance targeting Bulger and Flemmi, provided reason for him to question the FBI's representations concerning them, but Weld did not. Weld May 27, 1998 Tr. at 92, 97–98. Nor was Weld told that Bulger and Flemmi were two of the informants relied upon in the affidavit, as well as named targets. *Id.* at 51–52.

If Weld had understood that Bulger and Flemmi were informants, he would have seriously questioned the necessity for the proposed electronic surveillance. *Id.* at

43. This conclusion is reinforced by the statement in Carter's affidavit that the informants relied on in the affidavit:

> [H]ave provided information in other investigations. Some of this information resulted in the identification and conviction of a number of criminals. Use of informant testimony, even if compelled by a grant of immunity, would seriously jeopardize if not totally destroy their continued usefulness in other investigations.

Ex. 153, Carter Aff., at 28.

67–68, 88, 110–13. Even if they were reluctant to testify voluntarily, Weld would have considered seeking an order providing them immunity and compelling them to do so. *Id.* at 87. In any event, Weld would not have permitted the application and affidavit which were false and misleading with regard to Bulger and Flemmi to be filed. *Id.* at 110–13.

Weld understood that deliberately providing false information in an application for a warrant could constitute perjury and, in any event, would "undercut the entire process that Congress enacted ... to hedge ... the ... authorization of electronic surveillance." *Id.* at 108–09. Thus, if properly informed, Weld would have insisted that all of the false and misleading statements in the proposed affidavit be corrected or deleted, or that the application not be submitted to the court. *Id.* at 87–88, 109–12.

In essence, if Weld had requested or received all of the relevant information regarding Bulger and Flemmi, a politically accountable official would have made the informed judgment concerning the propriety of the proposed application that Title III contemplates. The FBI's determination both to honor its promise not to disclose to anyone outside the Bureau that Bulger and Flemmi were informants and to perpetuate their ability to serve as sources prevented that informed judgment from being made with regard to Vanessa's.

The Application and Carter affidavit were submitted on October 31, 1986, and approved by Judge William Young the same day. Ex. 153; Coffey Aff., Apr. 9, 1997, at 3. The government received a series of extensions and the storeroom of Vanessa's was bugged until June 1987. Flemmi and Bulger provided information relied upon in some, but not all, of the requests for extensions. Coffey Aff., Apr. 9, 1997, at 3. The electronic surveillance of Vanessa's was terminated after Mercurio secretly found the bugs, and reported to Bulger that he, Ferrara, and others had begun making exculpatory statements in an effort to help themselves. Ex. 175.

Before it was discovered, the electronic surveillance of Vanessa's was very productive. Among other things, the bug intercepted the successful extortion of $250,000 from Sagansky and his colleague Mo Weinstein that Flemmi had predicted. Ring June 4, 1998 Tr. at 108–09; Kottmyer Aug. 12, 1998 Tr. at 61. That evidence was eventually used as a cornerstone of the successful prosecution of Russo, Ferrara, Mercurio, and other members of the Boston LCN. *See Carrozza*, 807 F.Supp. at 156. In addition, as described in § II.29, *infra*, after Vanessa's was searched pursuant to a warrant issued in the spring of 1987, the fruits of the bug gave the FBI powerful leverage in its successful effort to convert Mercurio promptly into an informant. Ring June 15, 1998 Tr. at 45; Ex. 113. As Flemmi reported, the Russo faction knew that the Sagansky–Weinstein extortion was a big problem for them and Mercurio did not want to return to prison. Ex. 165.

21. *Flemmi Becomes A Top Echelon Informant Again*

In November 1986, James Ahearn became the SAC in Boston. Ahearn May 7, 1998 Tr. at 67. Two months earlier, Larry Potts became an ASAC in Boston, with responsibility for matters relating to the Organized Crime squad, among other things. Potts May 21, 1998 Tr. at 9. Potts ultimately went on to hold several of the highest positions in the FBI, serving as the Assistant Director in charge of the Criminal Division from 1992 to 1995, and as Acting Deputy Director in 1995. *Id.* at 9–10.

Soon after Ahearn became SAC, Potts told him that, "Morris proposed that Whitey Bulger was no longer providing information of sufficient value to maintain his relationship as an FBI informant and should be considered as a subject of investigation rather than as a confidential source." Ex. 134; Ahearn May 11, 1998

Tr. at 110–11; Ahearn May 7, 1998 Tr. at 92–94; Potts May 22, 1998 Tr. at 12, 26. In response, Ahearn asked Potts to conduct a "suitability review" of Bulger and Flemmi. Ahearn May 7, 1998 Tr. at 93; Potts May 21, 1998 Tr. at 28–29, 133.

At that time, the FBI Manual established criteria that were to be taken into consideration in conducting a suitability review. Ex. 111 (3/28/84, § 137–3.1.1.); Ahearn May 7, 1998 Tr. at 95–98; Potts May 22, 1998 Tr. at 5. Among the factors to be weighed in deciding whether to utilize someone as an informant were:

> (a) the nature of the matter under investigation and the importance of the information being furnished as compared to the seriousness of past and contemporaneous criminal activity of which the informant may be suspected.
>
> * * * * * *
>
> (e) any record of conformance by the informant to FBI instructions and control in past operations; how closely the FBI will be able to monitor and control the informant's activities insofar as he/she is acting on behalf of the FBI.

Id.

In conducting his review, Potts did not consider the range of factors prescribed by the FBI Manual. Potts May 21, 1998 Tr. at 118, 133. He understood that Bulger and Flemmi were engaged in criminal activity. Potts May 22, 1998 Tr. at 9. Potts, however, sought merely to evaluate their productivity, rather than to weigh it against the seriousness of the threat posed by the crimes Bulger and Flemmi were understood to be committing. Potts May 21, 1998 Tr. at 118, 133.

Potts reviewed the files of inserts reflecting information that Bulger and Flemmi had provided, and spoke to Morris, Ring, Connolly, and Nick Gianturco. Potts May 21, 1998 Tr. at 34–37; Ahearn May 7, 1998 Tr. at 93. He did not review the administrative portion of their files, or information provided by other sources concerning Bulger and Flemmi's criminal activity. Potts May 21, 1998 Tr. at 35–37.

Ring and Connolly told Potts that Bulger and Flemmi were providing information that was very significant to the organized crime program. Potts May 21, 1998 Tr. at 31, 54. Referring in part to Vanessa's, they emphasized Bulger and Flemmi's ability to support successful applications for electronic surveillance. *Id.* at 31, 56. As the Organized Crime squad then had another agent, Vincent Delamontaigne, operating undercover in an attempt to infiltrate the LCN, their potential to help protect him was particularly important. *Id.* at 31. *See also United States v. DiGiacomo*, 746 F.Supp. 1176 (D.Mass.1990).

Thus, Potts advised Ahearn that "the information in [Bulger's informant] file was of substantial value and in his opinion Whitey Bulger should be maintained as an informant rather than a target." Ex. 134; Ahearn May 7, 1998 Tr. at 92–93, 103. Potts evidently made the same recommendation regarding Flemmi. Ahearn concurred in Potts' recommendations.

At that time the FBI Manual also required that FBI Headquarters review at least annually the determination by a field office that an individual was suitable to serve as an informant. Potts May 22, 1998 Tr. at 5–6; Ex. 274 (Under Seal), Manual § 137–16(1)(D)(5) (3–28–84). Potts' advice to Ahearn was given orally. Potts May 21, 1998 Tr. at 33–34. Ahearn's decision to continue Bulger and Flemmi as informants was not memorialized in writing at that time. Thus, it was never reviewed by FBI Headquarters.

This deviation from the requirements of the Manual was, however, immaterial. In Potts' vast experience, FBI Headquarters had never reversed a field office's decision that an individual was suitable to serve as an informant. Potts May 22, 1998 Tr. at 6–8. Essentially, the supervisor of the informant's handler was the "critical," "chief decision maker" regarding whether or not an informant should be opened or continued. *Id.* at 8. In Potts' experience,

the SACs, ASACs, and FBI Headquarters all relied on the squad supervisors to comply with the Guidelines and Manual provisions concerning informants, including the reporting requirements regarding unauthorized criminal conduct by informants. *Id.* at 809.

Moreover, in Potts' extensive experience no informant had ever been targeted for investigation based on statements he had made to the FBI. Potts May 22, 1998 Tr. at 24–25, 48–49, 64–65. Potts knew of no instance in which an informant's statements to the FBI had been used against him directly or to obtain electronic surveillance targeting him. *Id.* at 28–29, 48. Nor did Potts know of any instance in which a 209 including information that an informant had furnished to the FBI was provided to another law enforcement agency to prompt or facilitate an investigation of the Bureau's source. *Id.* at 25, 27, 65.

In any event, following Potts' review and Ahearn's decision, on February 2, 1987, the Boston office of the FBI informed Headquarters that a suitability inquiry had been conducted, that Ring, as Connolly's supervisor, had certified that Flemmi was an appropriate candidate, and that Flemmi was being opened as an informant. Ex. 15. The report noted that Flemmi "has been active in gambling and loansharking." *Id.* It emphasized his significant contribution to the bugging of Vanessa's and to a police corruption investigation as well. *Id.*

Following the conclusion of the electronic surveillance of Vanessa's, in December 1987, Flemmi was designated a Top Echelon informant. Exs. 109, 268. In the request that he be elevated to that status, Flemmi was described as the Winter Hill Gang's liaison with the Mafia, a source of valuable information leading to the electronic surveillance of Vanessa's, and a person who would continue to provide high quality information. Ex. 109. In approving the request, FBI Headquarters congratulated the Boston office for developing such a fine informant. Ex. 268. Thus, Flemmi regained the title of Top Echelon informant that he had relinquished when, after being warned of his impending indictments by Rico, he became a fugitive in 1969.

22. *Raymond Slinger*

As described earlier, Ahearn had asked Potts to evaluate whether Bulger "should be considered as a subject of investigation *rather than* as a confidential source." Ex. 134; Ahearn May 11, 1998 Tr. at 110–11 (emphasis added). Potts' conducted his review and reported that "Bulger should be maintained as an informant *rather than* a target." *Id.* (emphasis added). As Ahearn's formulation of the question and Potts' answer indicate, the FBI generally viewed the roles of FBI informant and target of FBI investigation to be mutually exclusive. Indeed, as explained in § II.9, *supra*, that is why Bulger was closed as an informant when he became a primary subject of the race-fix investigation. The lengths to which the FBI would go to protect Bulger and Flemmi because of their value as Top Echelon informants, rather than target them for prosecution, is vividly demonstrated by the manner in which it dealt with Raymond Slinger in 1987.

At that time Slinger was a real estate broker in South Boston. Slinger Sept. 23, 1998 Tr. at 71. In 1986, he was introduced to Bulger and Flemmi, by Kevin O'Neil, to discuss real estate in South Boston. *Id.* Slinger knew that Flemmi and Bulger were reputed to be violent criminals. *Id.* at 88–89.

In early 1987, O'Neil asked Slinger to come to Triple O's, a bar that O'Neil owned. *Id.* at 72. There, in a private room on the second floor, Slinger was reintroduced to Bulger. *Id.* at 72–73. Bulger told Slinger that he had been hired to kill him, but that Slinger could avoid that fate if he paid Bulger instead. *Id.* at 73–74. Bulger scornfully rejected Slinger's offer of $2000, saying that his boots cost more than that, and demanded $50,000. *Id.*

After leaving Triple O's, Slinger called his friend, Boston City Councilor James Kelly. *Id.* at 132–37. Slinger told Kelly that Bulger and O'Neil were shaking him down, and gave Kelly the details. *Id.* Kelly indicated that he knew Bulger and O'Neil, and would speak to them. *Id.* Kelly said that he would try to help Slinger. *Id.* at 75, 127, 132–37. Kelly subsequently told Slinger that he had spoken to someone, who Slinger understood to be Bulger or O'Neil, and that Slinger should have no further problems, but if he did, Slinger should call "the authorities." *Id.*

A week or two later, in March 1987, O'Neil again called Slinger and told him that Bulger wanted to see him at Triple O's. *Id.* at 75–78, 95, 97. This time Slinger took with him his assistant, Arlene Lehane, and a hidden handgun. *Id.* At Triple O's, Slinger was separated from Lehane and again taken to the second floor. *Id.* There, Bulger, O'Neil, and Kevin Weeks found the handgun, beat Slinger badly, and berated him for talking about the shakedown. *Id.* Bulger then put Slinger's loaded gun to the top of Slinger's head, said that if he shot him from that angle there would be no blood shed, and ordered Weeks to get a body bag. *Id.* Bulger subsequently said, however, that he would give Slinger another chance to get the $50,0000 quickly. *Id.* Slinger agreed to do so. *Id.*

Slinger left with Lehane, who had remained downstairs. *Id.* at 78, 125–26. He was badly swollen and his shirt was ripped. *Id.* On the ride back to his office, he told Lehane what had happened. *Id.* at 79.

In March 1987, Slinger borrowed money from his sister and wife, and made an initial $10,000 payment to O'Neil. *Id.* at 79. He then made weekly payments to O'Neil of about $2000 each, amounting to a total of $25,000 by about May 1987. *Id.* at 79, 82, 98. The time for the payments was arranged by telephone and they were made, in cash, in O'Neil's automobile. *Id.*

Although he does not now admit it, it appears that in about May 1987, Slinger called the FBI. *Id.* at 82; Newton May 28, 1998 Tr. at 64; Ellavsky June 1, 1998 Tr. at 21. *See also* May 28, 1998 Tr. at 13–14 (Lobby, Under Seal). In any event, the squad responsible for non-traditional organized crime matters, whose supervisor was Bruce Ellavksy, was informed of the ongoing Slinger extortion. Ellavsky June 1, 1998 Tr. at 17, 21. Rod Kennedy was assigned to interview Slinger. *Id.* at 22; Newton May 28, 1998 Tr. at 6, 8–9. He asked Newton to accompany him. *Id.* at 9.

Kennedy and Newton interviewed Slinger at his office in South Boston. Slinger Sept. 23, 1998 Tr. at 98. Slinger told Kennedy and Newton exactly what had occurred and about the continuing payments that he was making. *Id.* at 98–100. Although Slinger expressed concern for himself and his family, he said that he was willing to testify. Newton May 28, 1998 Tr. at 22, 34, 45.

Newton thought that the Slinger matter "looked like a great case." *Id.* at 44–45. His squad had the jurisdiction to investigate the "Irish Mob," and Bulger was then viewed as its highest member. *Id.* at 54. There was no pending investigation of Bulger and his colleagues. *Id.* Slinger was the first of Bulger's victims to provide Newton with any information. *Id.* at 54–55. Slinger was not only willing to testify, but would "wear a wire" to record incriminating conversations as well. *Id.* at 55; Ellavsky June 1, 1998 Tr. at 59, 145. In addition, the FBI had the opportunity to interview Lehane, to record O'Neil's telephone conversations with Slinger, and to conduct physical surveillances. Ellavsky June, 1, 1998 Tr. at 52. Ordinarily, the United States Attorney's Office would have been promptly consulted to obtain authority to consensually record Slinger's conversations. *Id.* at 46, 48.

Newton, however, knew that Bulger was a Top Echelon informant, who was being handled by Connolly and Morris. Newton May 28, 1998 Tr. at 57–58, 61. Newton

understood that because Bulger was an informant, supervisors would have to be consulted and something would "have to be worked out." *Id.* More specifically, he knew that a high level decision would have to be made concerning whether to investigate Bulger. *Id.* If no effort to develop a case was to be made, Newton expected that something would be done to protect Slinger. *Id.* Newton was right about all of this.

Newton and Kennedy told Ellavsky what Slinger had said. *Id.* at 36–37; Ellavsky June 1, 1998 Tr. at 29–30. Ellavsky understood that Slinger was willing to wear a wire and testify. Ellavsky June 1, 1998 Tr. at 59, 145–46. Ellavsky also knew, however, that Bulger was an FBI informant. *Id.* at 21–22, 195.

Thus, Ellavsky consulted the ASAC who was then his "boss," Potts. *Id.* at 30–31, 141, 192. Following that discussion, several striking things occurred.

Slinger's allegations and willingness to testify provided, under the Attorney General's Guidelines, a quintessential case for either referring Slinger's allegations to state or local law enforcement, or reporting the desire not to do so to FBI Headquarters and the Assistant Attorney General. The Guidelines, however, were utterly ignored. Instead Potts and Ellavsky evidently decided that no further investigation would be conducted. The FBI did not speak with Slinger again. *Id.* at 103. Nor was Lehane ever interviewed by the FBI.

Moreover, contrary to both the requirements set forth in the FBI's Manual and standard the FBI practice, no FBI Form 302 (a "302") or other written record was made of the interview of Slinger. Newton May 28, 1998 Tr. at 34–36; Kennedy May 28, 1998 Tr. at 80; Ellavksy June 1, 1998 Tr. at 26. This dereliction of duty minimized the risks that Slinger's information would ever be used against Bulger and that those responsible for protecting him would ever be held accountable for arrogating to themselves the decision to do so.

As Newton had recognized, however, there was plainly a problem presented by the continuing extortion of Slinger. The FBI apparently decided to deal with that problem in the manner that it dealt with the National Melotone matter a decade before—by telling Bulger to "lay off." Slinger testified that in an effort to protect himself, he promptly told O'Neil that he had been visited by the FBI. Slinger Sept. 23, 1998 Tr. at 82. If this occurred, it would not alone have been enough to deter Bulger, who had for many years been consistently protected by the FBI. Rather, the court infers that Bulger was advised by Connolly to desist. The day after the FBI interview of Slinger, O'Neil told him that he would not have to pay the remaining $25,000 that he owed. *Id.* at 82, 137.

In 1996, Slinger was interviewed by IRS agents who were investigating the Rakes extortion concerning the South Boston Liquor Mart. *Id.* at 106; May 8, 1998 Government's Ex Parte, In Camera Motion for Protective Order (the "Motion for Protective Order"). Slinger told them, in detail, about his own experience with Bulger. *Id.* In September 1996, he testified about this matter before the grand jury, where he was questioned by James Herbert and Brian Kelly, two of the prosecutors in this case. *Id.*

The IRS interview report and Slinger's grand jury transcript should have been promptly produced in discovery pursuant to the June 26, 1997 Order. *See United States v. Salemme*, 978 F.Supp. 386, 387–88 & n. 5 (D.Mass.1997). That Order stated, in part, that the government was required to produce to counsel for each defendant, by July 18, 1997:

> c) Any document or record that tends to show that Department of Justice and/or FBI regulations or guidelines were, in any way, not complied with concerning Flemmi and/or Bulger. The documents and records covered by this subparagraph include, but are not limited to, materials indicating that: (i) re-

> quired records were not prepared or maintained; ...(iv) established procedures for seeking authorization or guidance concerning the participation of an informant in criminal activity were not followed; and/or (v) any required notification to appropriate authorities of unauthorized criminal activity by Flemmi and/or Bulger was not made.

Id. at 387–88. The court in that Order warned the government that:

> If government agents failed to follow required or customary procedures to record accurately communications with informants relevant to this case, the court will consider the possibility of ordering the government, in the discharge of its *Brady* obligations, to conduct appropriate interviews as part of its "duty to learn of any favorable evidence known to others acting on the government's behalf." *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490 (1995); *see also, United States v. Hanna*, 55 F.3d 1456, 1460–61 (9th Cir. 1995) (holding that government, as part of its duty under *Kyles*, was required in particular circumstances to inquire about oral, unrecorded statements between police officers); *United States v. Van Nuys*, 707 F.Supp. 465, 470 (D.Colo. 1989) (holding that deliberate failure to prepare DEA 6 reports of witness interviews constituted a violation of the duty to preserve evidence that deprived defendant of right to a fair trial).

Id. at n. 5.

Nevertheless, although the government submitted, *ex parte*, many documents for *in camera* consideration by the court to decide whether they should be produced to the defendants, the Slinger documents were not disclosed to the court prior to the commencement of the evidentiary hearings in January 1998. The government did file a motion for a protective order concerning them on May 8, 1998. In seeking authorization not to produce them, the government relied in part on the possibility that providing the documents to the defendants might endanger Slinger and also in part on the assertion that Slinger's "claim" that he was "allegedly visited" by two FBI agents could not be corroborated because there was no 302 concerning an interview of him and the government had "never been able to identify" the agents who reportedly conducted the interview and "did not know in fact whether or not they were FBI agents." Motion for Protective Order at 1–2; May 12, 1999 Tr. at 7–8 (Under Seal).

The court held a series of *ex parte, in camera* conferences concerning this matter. *See* May 12, 1998 Tr. (Under Seal); May 13, 1998 Tr. (Under Seal); May 27, 1998 Tr. (Under Seal); May 28, 1998 Tr. (Under Seal). The court informed the government that in view of the defendants' constitutional right to certain discovery, the IRS report of Slinger's allegations, but not the grand jury transcript, would have to be disclosed and, if necessary and appropriate, steps should be taken to provide Slinger protection. May 12, 1998 Tr. at 10 (Under Seal); May 13, 1998 Tr. at 4–5 (Under Seal); May 28, 1998 Tr. at 4–6 (Under Seal). The defendants were given the IRS report on May 28, 1998.[44] May 28, 1998 Tr. at 12–13.

The government promptly reiterated its contention that the Slinger matter should not be deemed admissible because the government had not been able to find any 302 indicating that he had been interviewed, and neither the FBI nor the OPR team that had conducted an investigation in July 1997 had been able to identify any FBI agent who interviewed him. *Id.* at 16–18. Thus, the government questioned whether

44. The court also ordered disclosure to defendants of a 1991 302 stating that a witness had reported that, in 1991, John Connolly was telling certain individuals to be cautious in dealing with Slinger. May 28, 1998 Tr. at 13 (Under Seal). The witness also reported that Bulger and Flemmi had made contingency plans to escape if indicted and "would know in advance of their indictment, and would run." *Id.* at 13–14. Neither the government nor the defendants, however, called that witness to testify.

the individuals who visited Slinger "were really FBI agents." *Id.* at 16. The court expressed skepticism about this argument, based in part on the FBI's handling of the evidence concerning Bulger provided by Joseph Runci, which is discussed in § II.24, *infra*. *Id.* at 17. Defense counsel suggested that Newton, who was during the relevant period a member of the squad responsible for investigating non-traditional organized crime and was waiting to resume his testimony, be questioned in the lobby about the Slinger matter. *Id.* at 25–26. The prosecutors and the court agreed. *Id.* at 26. It took only three questions by the court for Newton to acknowledge that he and Kennedy had interviewed Slinger. *Id.* at 29.

23. *Bulger and Flemmi Are Protected From Investigation In the Hobart Willis Case*

The FBI's handling of the Slinger matter was not an aberration. In 1980, Ellavsky joined the squad, known as C–2, which came to have responsibility for non-traditional organized crime investigations, as well as drug cases. Ellavsky June 1, 1998 Tr. at 17–18, 55. He succeeded Morris as the supervisor of that squad in March 1987, and held the position for several years. *Id.* at 16–17. Although Ellavsky's squad was responsible for investigating nontraditional organized crime groups such as the Winter Hill Gang, no investigation of Bulger or Flemmi was conducted during Ellavsky's tenure on that squad. *Id.* at 54–55, 110–11; Blackburn May 7, 1998 Tr. at 27. Indeed, rather than investigate Bulger and Flemmi, Ellavksy and his colleagues protected them from investigation in the Hobart Willis case.

James Blackburn was a member of Ellavsky's squad. *Id.* at 19; Blackburn May 4, 1998 Tr. at 7. In late 1986 or 1987, Blackburn was working with the DEA and other law enforcement agencies in a joint investigation of reputed drug dealer Hobart Willis and others. Blackburn May 4, 1998 Tr. at 8, 22, 29, 45, May 7, 1998 Tr. at 27; Ellavsky June 1, 1998 Tr. at 96. Blackburn received information that Willis was paying "tribute" to Bulger. Blackburn May 4, 1998 Tr. at 9, 31, 34.

Blackburn understood that Bulger was an informant for Connolly. Blackburn May 6, 1999 Tr. at 35, 37. Nevertheless, he promptly spoke to Connolly about the joint investigation of Willis generally and about the allegation that he was paying "tribute" to Bulger particularly. *Id.* at 36–38, May 7, 1998 Tr. at 47–48. Among other things, Blackburn told Connolly that electronic surveillance of Willis was planned. Blackburn May 4, 1998 Tr. at 37. When that electronic surveillance was conducted, Bulger was not intercepted. *Id.* at 37–38.

Connolly told Blackburn that Bulger's practice was to extort money from bookmakers, drug dealers, loansharks, and others who could not complain to the police without incriminating themselves. *Id.* at 18, 43. However, Connolly expressed the view that although Willis was a drug dealer in South Boston, Bulger was not extorting him. *Id.* at 17, 39. Following his conversation with Connolly, Blackburn never pursued any investigation concerning whether Bulger was indeed receiving payments from Willis. *Id.* at 45, May 7, 1998 Tr. at 48–49.

The FBI's refusal to investigate Bulger's connection to Willis persisted despite increasingly specific information that Blackburn and Ellavsky received from their informants. Exs. 102, 103, 104, 105. For example, in September 1986, Ellavsky was told that "Willis is tired of having to pay Whitey Bulger $2000 per month to operate his narcotics business in South Boston." Ex. 104; Ellavsky June 1, 1998 Tr. at 73–76. In April 1987, Ellavsky's informant reported that Willis was "paying Whitey Bulger and Stevie Flemmi $4000–$6000 per month to operate in South Boston." Ex. 105. Blackburn testified, however, that he was not given this information for his use in the Willis investigation, even after Ellavsky reviewed a July 1, 1988 302

from one of Blackburn's informants stating that "Willis continues to pay Whitey Bulger a "tax" of $1000 to $3000 per month to operate his cocaine business." Ex. 102; Blackburn May 4, 1998 Tr. at 25, 58, May 6, 1998 Tr. at 7, May 7, 1998 Tr. at 60. The court questions Blackburn's claim that Ellavsky did not provide him with the information from his sources.[45]

In any event, the 209s reflecting the information that the FBI's sources were providing concerning the extortion of Willis by Bulger and Flemmi were not used by the FBI to investigate Bulger or Flemmi; *Id.* at 14; Ellavsky June 1, 1998 Tr. at 101–04; Blackburn May 7, 1998 Tr. at 27. Nor were the 209s indexed in a way that would make them accessible to any FBI agent searching for source information about Bulger and Flemmi. May 4, 1998 Tr. at 60–66. In addition, the information was not shared with the other agencies or prosecutors involved in the joint investigation of Willis, or used by the FBI in that investigation. *Id.;* Ellavsky June 1, 1998 Tr. at 97; Blackburn May 7, 1998 Tr. at 26.

On August 5, 1990, one of Blackburn's sources reported that Willis expected to be indicted with Bulger within two weeks. Ex. 103; Blackburn May 6, 1998 Tr. at 22, 24. Willis and a number of other drug dealers in South Boston were soon indicted. May 5, 1998 Tr. at 183; Blackburn May 4, 1998 Tr. at 95; Ellavsky June 1, 1998 Tr. at 86–87. Bulger, however, was not charged.

24. *The Guard Rails at the South Boston Liquor Mart*

It was not only the Organized Crime squad and the squad responsible for investigating non-traditional crime that declined to investigate Bulger and Flemmi in order to perpetuate them as informants. The Public Corruption squad did so as well.

Joseph Runci was a *Boston Globe* reporter and photographer, who also served as an FBI informant handled by James Lavin, an agent on the Public Corruption squad. Ex. 144; Runci May 19, 1998 Tr. at 43. Runci observed City of Boston workers erecting guard rails on the private property of the South Boston Liquor Mart, which he understood was owned by Bulger, a reputed member of organized crime. Runci May 19, 1998 Tr. at 53–56. Runci photographed the workers and their City truck. Ex. 101. Runci May 19, 1998 Tr. at 43. In December 1987, Runci told Lavin what he had seen and provided him the photographs, as well as some additional documents suggesting that Bulger had bought another liquor store through a "straw." *Id.;* Lavin May 6, 1998 Tr. at 22–30.

Lavin recognized Bulger as a well-known member of organized crime. *Id.* at 40. He perceived the potential for a promising public corruption investigation of Bulger and indicated to Runci that he was very interested in pursuing the matter. *Id.* at 82–87, 85; Runci May 19, 1998 Tr. at 56. Indeed, he told Runci that he should expect to be called to testify before a grand jury. Runci May 19, 1998 Tr. at 58–59.

Following his usual practice, Lavin reported what he had learned and received to his supervisor, John Morris. Lavin May 6, 1998 Tr. at 23, 25, 31. Morris told him to "run it by" Connolly. *Id.* at 32, 58. Lavin understood that he was given this instruction because Bulger was rumored to be an informant being handled by Connolly. *Id.* at 34, 39, 86.

Lavin met with Connolly and related to him the information Runci had furnished. *Id.* at 36, 62. Connolly confirmed that Bulger was an informant and told Lavin that he had provided valuable information. *Id.* This conversation occurred while the electronic surveillance of Vanessa's was being conducted and Connolly's character-

45. Blackburn initially claimed that he had not seen the 209s which are Exhibits. Blackburn May 7, 1998 Tr. at 62–63. It was later disclosed he had prepared those 209s. *Id.*

ization of Bulger's contributions was true. Connolly suggested that Lavin not conduct any investigation. *Id.* at 76.

Lavin complied with Connolly's suggestion. Contrary to the requirements of the FBI Manual and his uniform practice, Lavin did not prepare a 209 or any other written record of the information Runci had provided. *Id.* at 24, 26–27, 32, 38, 40, 63, 80–81. Nor did he conduct any investigation. *Id.* at 60. Rather, he placed the materials in his desk, where they could not be discovered or accessed by anyone who might become interested in investigating Bulger. *Id.* at 38, 40.

Shortly after Lavin spoke to Connolly, Runci called and told Lavin that the guard rails had been removed. *Id.* at 43, 62; Runci May 19, 1998 Tr. at 57–58. Lavin inferred that Bulger may have been tipped off to the information that the FBI had received by Connolly or Morris. *Id.* at 43–46. The court concludes that Bulger was, once again, told by the FBI of the allegations concerning him and of potential for an investigation. Lavin knew that if this had occurred, it was wrong, and he was concerned. *Id.* at 46. Thus, Lavin discussed the matter with his colleague and friend John Michael Callahan. *Id.* After speaking with Callahan, however, Lavin continued to keep the materials he had received from Runci in his desk. *Id.*

In 1997, after the claim that the FBI had improperly protected Bulger and Flemmi became public in this case, Callahan reminded Lavin of the Runci matter. *Id.* at 52–54. They agreed that the foregoing information should be provided to the OPR team that was investigating the allegations that had emerged. *Id.* That was done. *Id.*

25. *Joseph Murray*

In 1988, Joseph Murray, who was then in federal prison, alleged, among other things, that Connolly and Newton were selling information to Bulger and Flemmi concerning electronic surveillance. The FBI assumed responsibility for investigating Murray's charges. Although Murray was interviewed by agents in the FBI's Boston office, he was either not asked about his claim that Connolly and Newton had tipped Bulger and Flemmi off to electronic surveillance or the information that he provided was not included in the 302 of his interview. Nevertheless, the Boston office characterized that charge as "unsubstantiated" and the administrative inquiry of Connolly and Newton was quickly terminated. The evidence presented in the instant case, however, demonstrates that Murray's claim was correct.

More particularly, beginning in January 1988, Weld's secretary at the Department of Justice received a series of increasingly specific telephone calls from an individual, who asked that the information being provided not be passed on to Boston authorities because of the people involved. Ex. 148; Weld May 26, 1998 Tr. at 78–115. The caller initially claimed that Connolly and Boston Police Deputy Ed Walsh "sell information to Whitey Bulger and Stevie Flemmi—and that's how they find wiretaps." Ex. 147. *See also* Ex. 148. The source later alleged that Newton was "another agent besides John Connolly who fed Bulger, Flemmi, Nee and Weeks information." Ex. 160.

Weld took these allegations seriously. Weld May 26, 1998 Tr. at 93. Based on his knowledge and experience in Boston, he felt there might be a "weak link" between Connolly and Bulger. *Id.* at 94. Initially, he referred the matter to his Deputy, Jack Keeney, with a note saying "I know all this. So this [source] is on the up and up." *Id.* at 92; Ex. 147.

The source also claimed to have information that Bulger and Pat Nee had murdered Halloran and Bucky Barrett. Exs. 149, 150. The source subsequently said that there was an eyewitness to the Halloran shooting who might come forward, and elaborated that: "there is a person named John, who claims he talked to Whitey and Nee as they sat in the car waiting for

Halloran on Northern Avenue. He sits in a bar and talks about it. He saw the whole operation." Exs. 149, 152. The source added that the person providing the information to the source "will be willing to talk to you (authorities) soon." Ex. 152. On February 3, 1988, Weld directed Keeney to have the information that he had received sent to the United States Attorney in Boston, Frank McNamara, and to the Strike Force Chief, O'Sullivan. Ex. 151. Weld added that: "Both O'Sullivan and [Assistant United States Attorney] Bob Mueller are well aware of the history, and the information sounds good." *Id.*

At some point, it was determined that the ultimate source of the information being communicated to Weld was Joseph Murray, who was then in federal prison. Ex. 156. His allegations were referred to the Boston office of the FBI. Ex. 156; Clark June 3, 1998 Tr. at 28. These allegations included the claim that "FBI Agents John Connolly, Jr. and John Newton were selling information regarding wiretaps, to Whitey Bulger and Stevie Flemmi." Ex. 156.

Dennis O'Callahan, the ASAC who had succeeded Potts, was charged with directing an administrative inquiry of Murray's claims concerning Connolly and Newton. Clark June 13, 1998 Tr. at 106, 116. In June 1989, O'Callahan assigned Edward Clark, the supervisor of the Bank Robbery squad, to interview Murray. *Id.* at 29. Edward Quinn, a member of the Organized Crime squad who had then worked with Connolly for thirteen years and characterized Connolly as a "close friend," accompanied Clark to witness the interview. *Id.* at 39; Quinn Aug. 19, 1998 Tr. at 13–14.

Clark and Quinn were briefed and given the documents reflecting the information that Weld had received. *Id.* at 29–31. Clark testified that they were instructed to focus on the allegations of misconduct against Connolly and Newton in their interview of Murray. *Id.* at 31, 61–62.

Clark and Quinn spoke to Murray at the Strike Force's office in the federal courthouse in Boston, on June 14, 1989—more than a year and a half after the initial call to Weld. Ex. 156. Murray was fully cooperative. Clark reported that:

> Murray was asked if he would furnish information regarding the above matters and what he wanted as a *quid pro quo*. Murray said that Whitey Bulger and Stevie Flemmi have a machine and that the Boston Police and the FBI have a machine and he cannot survive against those machines. He is willing to furnish information and wants nothing in return. The information he furnished now will help save the life of a friend or a loved one in the future.

Id.

Clark and Quinn each knew that Bulger and Flemmi were informants handled by Connolly. *Id.* at 85–86; Quinn Aug. 19, 1998 Tr. at 19. Although the purported primary purpose of the interview was to explore Murray's claim that Bulger and Flemmi were paying Connolly and Newton for information concerning electronic surveillance, there is no reference to this allegation in either the notes Clark made at the interview or in the 302 that he later prepared. Exs. 151, 158; Clark June 3, 1998 Tr. at 89. The court concludes that either Murray was not asked about his allegations concerning Connolly and Newton or that the information that he provided concerning them was not recorded. Similarly, although Murray reiterated that Bulger and Nee had murdered Halloran, neither Clark nor Quinn asked him about the individual named "John" who Murray had previously asserted witnessed the killing. Exs. 151, 158; Clark June 3, 1998 Tr. at 80, 114–15.

Clark discussed the interview with O'Callahan and gave him the 302, which included information linking Bulger and Flemmi to the Halloran and Barrett murders. Ex. 156; Clark June 3, 1998 Tr. at 65. Clark was not asked to do anything further. *Id.* at 64.

Two months later, however, O'Callahan prepared a memorandum from the SAC, Ahearn, to the Director of the FBI, reporting that Murray had been interviewed and that, "[T]he allegations that SSA Connolly and SA Newton are disclosing information regarding investigations being conducted by this Division to criminal elements are unsubstantiated by specific facts ..." Ex. 157. The administrative inquiry was then terminated in Boston and, evidently, the matter was not pursued by FBI Headquarters, the United States Attorney's Office, the Strike Force or the Department of Justice, which Weld had left in March 1988. Weld May 26, 1998 Tr. at 5.

Moreover, although Clark viewed it as significant, the information that Murray provided implicating Bulger and Flemmi in the Halloran and Barrett murders was not provided to any agents responsible for investigating those matters or indexed so that it could be accessed by such agents. Clark June 3, 1998 Tr. at 66–67, 116–18. Similarly, while Clark felt Murray would make a "terrific" informant, there is no evidence that any effort was made to utilize him as a source despite his demonstrated willingness to provide information. *Id.* at 118–23. Accordingly, Murray was effectively eliminated as a threat to the symbiotic relationship between the FBI and Bulger and Flemmi.

26. *John Bahorian*

Prior to Ring becoming the Supervisor of the Organized Crime squad in 1983, two agents on that squad, Robert Jordan and Stanley Moody, became involved in an investigation of payoffs to members of the Boston Police Department. Ring Sept. 18, 1998 Tr. at 131. The investigation continued after Ring became supervisor. In the course of that investigation, Jordan and Moody obtained the cooperation of a Boston Police Lieutenant, James Cox. After consultation with O'Sullivan, it was decided to have Cox attempt to record conversations with Flemmi and Bulger, among others. Ring June 15, 1998 Tr. at 6–12, June 19, 1998 Tr. at 118, 129–30, 155–57.

Flemmi claims that Ring told Bulger that Cox would be wearing a wire and approaching him. Flemmi Aug. 20, 1998 Tr. at 70, Aug. 28, 1998 Tr. at 103–04. Bulger passed this information on to Flemmi. *Id.* Ring denies that he tipped off Bulger and Flemmi to Cox's cooperation. Ring Sept. 3, 1998 Tr. at 134. The court finds this denial credible.

It is true, however, that Flemmi was forewarned about Cox. Ex. 30, ¶ 11; Flemmi Aug. 20, 1998 Tr. at 70–73. Connolly had asked Morris, and perhaps others, whether Cox was "wired." Morris Apr. 21, 1998 Tr. at 36–37, Apr. 23, 1998 Tr. at 80. The court infers that Connolly is the person who told Bulger and Flemmi that Cox was cooperating with the FBI.

About a week later, on September 5, 1988, Cox approached Flemmi and they spoke briefly. Morris Apr. 23, 1998 Tr. at 64; Ring June 15, 1998 Tr. at 6–12; Flemmi Aug. 20, 1998 Tr. at 70. Flemmi was circumspect and said nothing suspicious or incriminating. Connolly subsequently told Flemmi that the FBI had listened to the tape and considered it "unproductive." *Id.* at 73–75, Aug. 28, 1998 Tr. at 111.

Flemmi's informant file includes an insert stating that on October 29, 1986, Flemmi told Connolly that "the word around the Boston Police is that a cop by the name of Cox is wired up on other cops." Ex. 229. Flemmi did not, however, provide this information to Connolly. Flemmi Aug. 20, 1998 Tr. at 71–72, Aug. 28, 1998 Tr. at 105–09. Rather, the court concludes that this insert is another document containing false information in an effort to make it more difficult to discern and demonstrate improper conduct by Connolly.

Soon after the encounter between Cox and Flemmi, Jordan, Moody, and their investigation were transferred to the White Collar Crime squad in an effort to distribute the "good investigations" more equally.

Ring June 15, 1998 Tr. at 12, June 19, 1998 Tr. at 157–58, Sept. 18, 1998 Tr. at 132; Morris Apr. 23, 1998 Tr. at 62, Apr. 29, 1998 Tr. at 73–74. Morris was then the supervisor of the White Collar Crime squad. Morris Apr. 22, 1998 Tr. at 97–101.

As the investigation evolved, it came to focus on John Bahorian, a bookmaker believed to be making payments to Flemmi. Morris Apr. 22, 1998 Tr. at 101, Apr. 29, 1998 Tr. at 69–70. In the spring of 1988, Moody and Jordan were preparing an application for electronic surveillance of Bahorian, which targeted Flemmi as well. Morris Apr. 22, 1998 Tr. at 101–02.

Morris was afraid that the electronic surveillance would lead to Flemmi's arrest and indictment. Morris Apr. 29, 1998 Tr. at 68, 70. Morris was concerned that if that occurred, the nature of his relationship with Bulger and Flemmi would be revealed. *Id.* Thus, Morris asked Connolly to tell Flemmi and Bulger to stay away from Bahorian. *Id.* at 67, Apr. 22, 1998 Tr. at 120–21. Morris also asked Connolly to tell Bulger and Flemmi not to do anything to Bahorian because Morris "did not want another Halloran." Morris Apr. 22, 1998 Tr. at 121–22. Morris believed that Bulger and Flemmi had been involved in the Halloran murder. *Id.* His directions to Connolly in 1988 were both a reminder and performance of his 1985 promise that Bulger and Flemmi would be protected as long as they did not murder anyone. *Id.*

Connolly delivered Morris' message to Bulger and Flemmi. *Id.* He later reported to Morris that they wanted to meet with him to discuss the Bahorian matter. *Id.* at 103, 121.

Thus, in the spring of 1988, prior to the inception of the electronic surveillance of Bahorian, Bulger, Flemmi, and Connolly met with Morris at his home. *Id.* at 103, 105, 109, 121; Flemmi Aug. 20, 1998 Tr. at 76, Aug. 28, 1998 Tr. at 115. Morris told Bulger and Flemmi about the planned electronic surveillance and warned them to stay away from Bahorian. *Id.* at 103–04. Morris also said that he could keep Flemmi out of any indictment arising out of the Bahorian electronic surveillance. Flemmi Aug. 20, 1998 Tr. at 78.

As in the past, neither Bulger nor Flemmi claimed that he had immunity and could not properly be investigated or prosecuted. Nor did Morris believe that they were immune from prosecution. Rather, Morris felt that by warning Bulger and Flemmi he was engaging in an illegal obstruction of justice. *Id.* at 104, Apr. 30, 1998 Tr. at 102.

Bahorian's telephone was wiretapped from June 22 to September 25, 1988. Apr. 29, 1998 Tr. at 113. Flemmi was named as a target in the application for that electronic surveillance. Morris Apr. 22, 1998 Tr. at 102. The wiretap produced evidence that led to the indictment of Bahorian and others. *Id.* at 101–02, 109. Because he was warned, however, Flemmi was neither intercepted nor charged. *Id.*

27. *The Leak and the Threat to The Boston Globe*

After telling Flemmi and Bulger about the imminent Bahorian wiretap, Morris was "very upset." Morris Apr. 29, 1998 Tr. at 123. He felt "completely compromised" and vulnerable. *Id.* at 67. As described earlier, Morris was afraid that if Flemmi or Bulger were prosecuted, the nature of his relationship with them would be revealed. *Id.* at 68, 70. Morris decided that he was "going to do whatever [he] could to stop Bulger and Flemmi short of admitting [his] crimes." *Id.* at 125.

Morris had previously told Ring that Bulger had "outlived [his] usefulness," but he had not been closed as an informant. Morris Apr. 29, 1999 Tr. at 66, Apr. 30, 1999 Tr. at 91. Now Morris wanted to "destroy the relationship between the FBI and [Bulger and Flemmi]" himself. Morris Apr. 29, 1998 Tr. at 124. Thus, Morris took an extraordinary step calculated to terminate the threat that Bulger and Flemmi presented to him in a manner that minimized the risk that his role in doing so

would be exposed. In essence, he attempted to provoke "another Halloran."

More specifically, in about June 1988, Morris spoke to Gerard O'Neill, a reporter for *The Boston Globe's* investigative unit, the "Spotlight Team." Ex. 85; Morris Apr. 28, 1998 Tr. at 74–76. Morris understood that as a responsible journalist, O'Neill would protect the confidentiality of Morris as his source. Morris told O'Neill that Bulger was an FBI informant. Morris Apr. 27, 1998 Tr. at 154–57, Apr. 28, 1998 Tr. at 31, 74–75, Apr. 29, 1998 Tr. at 74–75, 80–81. Morris also indicated that Flemmi was an FBI informant. Morris Apr. 28, 1998 Tr. at 74–75. Morris did not say that the conversation was "off the record" and understood that *The Boston Globe* would likely publish at least that Bulger was an FBI informant. Morris Apr. 29, 1998 Tr. at 78, 80–81.

Morris was well aware that an article reporting that Bulger was an informant could cause him to be killed by the LCN, among others. Morris Apr. 28, 1998 Tr. at 77–78. More specifically, as Morris later put in an affidavit in which he falsely swore under oath that he had not deliberately told O'Neill that Bulger was an informant:

> [T]he consequences of individuals being identified as informants, regardless of the accuracy of the information, could be serious.... a human life [is] a human life, be that person criminal, informant, or both.... the criminal element would not need proof or documentation to take action, so, such statements as inferences could be deadly.

Ex. 85; Morris Apr. 28, 1998 Tr. at 76–77, Apr. 30, 1998 Tr. at 93.

Morris also knew that public disclosure that Bulger was an informant could be fatal to Flemmi. As Morris testified concerning the possible closure by the FBI of Bulger as an informant, it "would have been the end of Flemmi too ... [b]ecause they were so closely tied together." Morris Apr. 28, 1998 Tr. at 79.

Morris' call prompted *The Boston Globe* Spotlight Team to plan to write a series of articles that would address, among other things, the events and information indicating that Bulger was a source for the FBI, who was being protected from investigation and prosecution. Among the matters of interest to the Spotlight Team were the race-fix case in which Bulger was not indicted, the Lancaster Street Garage investigation, and the 1984–85 investigation led by the DEA. As part of its research, a member of the Spotlight Team, Richard Lehr, directed a letter to Ciulla, the "star witness" in the race-fix case, who was then being protected by the government. Cullen Oct. 15, 1998 Tr. at 38, 47.

On July 19, 1988, Daly, who was the lead FBI agent on the race-fix case, called Kevin Cullen, another member of the Spotlight Team. *Id.* at 131. Daly and Cullen had talked several times before, but were not friends. *Id.* at 44–45. Daly indicated that he knew about the letter to Ciulla and expressed regret that Cullen had not called him first. *Id.* at 47.

Cullen told Daly that the Spotlight Team was preparing an article that would report that Bulger was an FBI source and, as a result, had been protected by the FBI in the race-fix case, among others. *Id.* at 133–55, 159. Daly denied that Bulger was an informant. *Id.* at 104–07, 133–35. He also denied that Bulger was protected from prosecution in the race-fix case because he was an FBI source. *Id.* at 50–51. As described previously, both of these assertions were false.

Daly proceeded to tell Cullen that as Ciulla had purportedly told Daly, Bulger was a very dangerous man who would think nothing of "clipping" anyone who wrote the sort of story Cullen described. *Id.* at 48, 50, 160; Ex. 242. Daly emphasized that, in his opinion, Cullen was especially vulnerable because it was well-known that he lived in South Boston. Cullen Oct. 15, 1998 Tr. at 50, 164.

Cullen believed that Bulger was a violent person and, indeed, a killer. *Id.* at 65–67. Cullen also believed that Daly's comments constituted a threat intended to discourage *The Boston Globe* from publishing the story it was planning. *Id.* at 52, 74, 75, 138–39, 146–47; Ex. 242. Cullen was correct. Daly made no written record of his call to Cullen, as he would have if it had been intended as an official warning by the FBI to a potential victim of violence. Cullen Oct. 15, 1998 Tr. at 178.[46]

The SAC, Ahearn, subsequently spoke on the record to the Spotlight Team, which reported that:

> James F. Ahearn, special agent in charge of the FBI in Boston, was unequivocal when asked last month if Bulger had relations with the FBI that have left him free of its scrutiny.
>
> "That is absolutely untrue," said Ahearn. "We have not developed anything of an evidentiary nature that would warrant it and, if we ever do develop anything of an evidentiary nature, we will pursue it. We specifically deny that there has been any special treatment of this individual."

Ex. 243. Whether he knew it or not, Ahearn's statement was utterly incorrect.

In any event, Cullen discussed Daly's call with his colleagues. Cullen Oct. 15, 1998 Tr. at 52–53, 119. They too interpreted Daly's comments as a threat intended to intimidate them from publishing the series of articles that they were planning. *Id.*; Morris Apr. 30, 1998 Tr. at 178. Nevertheless, the reporters and *The Boston Globe* were undeterred.

The Boston Globe did, however, take the threat to Cullen seriously. Prior to publication of the article concerning Bulger, the newspaper paid to have Cullen and his wife relocated. *Id.* at 57–58, 123. Although still uneasy, after about a week Cullen returned to his home in South Boston. *Id.* at 123.

On September 20, 1988, *The Boston Globe* published its article on Whitey Bulger. *Id.* at 131; Ex. 243. The article reported that the FBI had "for years had a special relationship with Bulger" and reviewed the events suggesting that the FBI was protecting him, including the race-fix case, the Lancaster Street Garage investigation, and the investigation led by the DEA in 1984–85. *Id.*

At Ahearn's request, the FBI conducted an administrative inquiry focusing primarily on whether Morris had leaked the fact that Bulger was an informant and other confidential information to *The Boston Globe*.[47] Ex. 134. Morris repeatedly lied under oath during the course of that investigation by suggesting that he may have, at most, perhaps inadvertently confirmed that Bulger was a source. Morris Apr. 28, 1998 Tr. at 64–73, Apr. 30, 1998 Tr. at 93; Exs. 84, 85. Morris refused to take a polygraph test. Ex. 84. His deception succeeded. Morris emerged from the investigation with a censure and fourteen days of unpaid leave. Morris Apr. 28, 1998 Tr. at 72. These sanctions did not prevent Morris from progressing through the hierarchy of the FBI until 1995, when he became Chief of the Training and Administrative Section at the FBI Academy in Quantico, Virginia.

46. Although Daly continues to serve as an FBI agent in Boston, the government decided not to call him as a witness following Cullen's testimony. Cullen Oct. 15, 1998 Tr. at 184.

47. Morris had also leaked to *The Boston Globe* the fact that the FBI and United States Attorney's Office had reopened a public corruption investigation of William Bulger relating to a building known as 75 State Street. Morris Apr. 27, 1998 Tr. at 163, Apr. 28, 1998 Tr. at 31–34. In an interview and two sworn statements, Morris lied in denying this leak as well. Morris Apr. 27, 1998 Tr. at 163, Apr. 28, 1998 Tr. at 64–73; Exs. 84, 85. Ironically, Morris had previously improperly assisted William Bulger concerning the 75 State Street investigation by telling Connolly to advise the Senate President to submit to an interview because the case against him was not very strong and an interview would put an end to the matter. Morris Apr. 28, 1998 Tr. at 34–35.

28. *Flemmi and Salemme*

The Boston Globe article was upsetting to Bulger and Flemmi, who felt betrayed and endangered. Flemmi Aug. 21, 1998 Tr. at 96–99; Ex. 159. On or about October 6, 1988, several weeks after the article was published, they met with Connolly and Morris, who was still the alternate agent for handling Flemmi. Ex. 42; Flemmi Aug. 20, 1998 Tr. at 78, Aug. 28, 1998 Tr. at 115–19. This was the last meeting or discussion that Flemmi had with Morris. Flemmi Aug. 21, 1998 Tr. at 86, 103, Aug. 28, 1998 Tr. at 115–16.

Connolly told Bulger and Flemmi that because of the articles, others in the FBI wanted to distance themselves from them. Flemmi Aug. 21, 1998 Tr. at 78–79, Aug. 28, 1998 Tr. at 116–18. Flemmi sensed that Connolly might be under some pressure to terminate their relationship. Flemmi Aug. 28, 1998 Tr. at 118. Connolly, however, disagreed and urged Bulger and Flemmi to "hang in." Flemmi Aug. 20, 1998 Tr. at 97, Aug. 28, 1998 Tr. at 116–18.

Among other things, Connolly said he was very concerned about Salemme, who had completed his sentence for the Fitzgerald bombing and been released from prison in the past year. Flemmi Aug. 20, 1998 Tr. at 97; Ex. 237 (209 dated 1/24/98). Salemme had reestablished contact with Flemmi. Ex. 237 (209 dated 1/24/98). Connolly had asked Flemmi to report to him on Salemme's activity and Flemmi had been doing so. Flemmi Aug. 20, 1998 Tr. at 98; Ex. 237 (209s dated 1/24/88 and 7/15/88). Ultimately, after Bulger had spoken again to Connolly, he and Flemmi agreed to follow Connolly's advice and continue their alliance. Flemmi Aug. 21, 1998 Tr. at 102–03, Aug. 28, 1998 Tr. at 116–18.

Subsequently, Bulger told Flemmi that he suspected Morris was the source of the leaks to *The Boston Globe*. Flemmi Aug. 21, 1998 Tr. at 93–94. In view of their relationship, it is likely that Bulger was echoing views expressed by Connolly while the FBI was focusing unsuccessfully on Morris as the source of those leaks.

The Boston Globe article contributed to Bulger and Flemmi's decision to withdraw from some of their most obvious criminal activity in an effort to insulate themselves from effective investigation and prosecution. As Mercurio described it when he became an informant, Bulger and Flemmi were "backing away from illegal activity" in part because "they had more than adequate ... legitimate businesses," including real estate, that they may have acquired illegally. Mercurio Aug. 5, 1998 Tr. at 116–17, 121–22; Exs. KKK, LLL. In this sense, the timing of *The Boston Globe* article was fortuitous. In 1988 and 1989, without the knowledge of the FBI in Boston, the DEA conducted another investigation involving electronic surveillance, targeting Bulger and Flemmi, which led to many indictments, but no charges against the FBI's prize sources. Ex. 126; Blackburn May 7, 1999 Tr. at 41.

Flemmi continued to provide Connolly with the information that the FBI wanted concerning the LCN generally and Salemme particularly. Flemmi had previously told Connolly that Salemme was "extremely paranoid" about the Boston faction of the LCN and that he had allied himself with Patriarca, who viewed Salemme as a valuable, direct link to Flemmi and the Winter Hill Gang. Ex. 237 (209 dated 7/15/88). Flemmi subsequently reported that Salemme was frequently meeting with Patriarca and also that he was holding meetings at the Busy Bee restaurant, which the government later obtained a warrant to bug. Exs. 36 (209 dated 4/11/90), 237 (209s dated 3/7/99 and 3/20/99); Flemmi Aug. 20, 1998 Tr. at 100–01.

Importantly, Flemmi kept Connolly informed of the rising tension between Salemme and the Boston faction of the LCN. Most notably, on June 6, 1989, Flemmi reported that, with Patriarca's "blessing," Salemme was "moving all over the city to consolidate his power in anticipation of

imminent federal indictments which will cripple the North End 'Outfit' people, allowing Salemme to step into the vacuum left by their arrests." Ex. 37 (209 dated 6/6/89). Flemmi explained that Russo, Ferrara, Carrozza, Mercurio, and others in the Boston faction of the LCN were furious with Salemme and might kill him if they had time to do so before their anticipated indictments. *Id.* As discussed in § 11.29, *infra*, ten days later, on June 16, 1989, Salemme was shot, but not killed, and William Grasso, another Patriarca ally, was murdered in Connecticut. June 5, 1998 Tr. at 5. As also discussed, in § 11.29, *infra*, the FBI understood that Salemme had been set up by Mercurio, who, with Flemmi and Bulger's assistance, Connolly had recruited as a Top Echelon informant. *Id.* at 5–6; Flemmi Aug. 20, 1998 Tr. at 136–37; Ring June 15, 1998 Tr. at 18–21.

Connolly appreciated the important information that Flemmi was furnishing and continued to provide Bulger and Flemmi with the protection that he had promised. For example, in 1988 or 1989 Connolly told Bulger that Timothy Connolly, who is alleged to have been a victim of extortion in the instant case, was cooperating with the FBI and would attempt to record conversations with Bulger and Flemmi. Ex. 30, ¶ 11; Flemmi Aug. 20, 1998 Tr. at 139–45, Aug. 28, 1998 Tr. at 113; 4SI, RA 56. Bulger shared this warning with Flemmi. Ex. 30, ¶ 11; Flemmi Aug. 20, 1998 Tr. at 139–45, Aug. 28, 1998 Tr. at 113.

29. *Mercurio as an Informant*

In the late 1980's, Flemmi not only continued to provide the FBI with valuable information that he had obtained concerning the LCN. He and Bulger also assisted in recruiting Mercurio, a made member of the LCN, as a Top Echelon informant.

Mercurio had been released from prison in 1986. Mercurio Aug. 4, 1998 Tr. at 73. As he explained in one of his earliest encounters with Connolly, Mercurio was then "disenchanted with the mafia because no one in the mafia did anything for him while he was away." Exs. 113, 181. Mercurio reported that, in contrast, he "remain[ed] close to James "Whitey" Bulger and Stevie Flemmi who sent his girlfriend $100 a week while he was in the 'can.'" *Id. See also* Flemmi Sept. 1, 1998 Tr. at 52–53.

As described previously, Mercurio knew that Vanessa's had been bugged. Mercurio Aug. 5, 1998 Tr. at 61; June 5, 1998 Tr. at 5 (Under Seal). He also knew that the Sagansky–Weinstein extortion had been intercepted and that he would be prosecuted. *Id.* at 65; Ex. 165. Bulger reported this to Connolly and advised that "Mercurio [would] go on the 'lam' before he goes to prison again." Ex. 165; Flemmi Sept. 1, 1998 Tr. at 50–52; Ring June 8, 1998 Tr. at 103. This was indeed Mercurio's plan. Mercurio Aug. 5, 1998 Tr. at 123–24.

Ring and Connolly decided to try to exploit Mercurio's discontent with the LCN and fear of returning to prison to recruit him as an informant. Ring June 15, 1998 Tr. at 18–21. Connolly consulted Flemmi and Bulger to develop a "profile" of Mercurio that he could employ in this effort. Flemmi Aug. 20, 1998 Tr. at 137–38. Flemmi and Bulger proved to be very knowledgeable about Mercurio. Ring June 19, 1998 Tr. at 140.

Armed with the information Bulger and Flemmi provided, and as directed by Ring, Connolly approached Mercurio. Ex. 200; Ring June 15, 1998 Tr. at 18. In about October 1987, Mercurio began providing information to the FBI and was soon opened as an informant. Ex. 200; Ring June 8, 1998 Tr. at 24–25; June 6, 1998 Tr. at 5–6 (Under Seal). Connolly told Bulger and Flemmi that he had developed Mercurio as an informant. Flemmi Aug. 20, 1998 Tr. at 137–38.

Mercurio testified that he never had any conversations with Connolly or Ring concerning what he would receive in return for his cooperation. Mercurio Aug. 5, 1998 Tr. at 23. Mercurio contends that he became an informant after Connolly threat-

ened to tell Ferrara and Russo that Mercurio had revealed that they had a source in law enforcement who tipped them off to the search of Vanessa's. *Id.* at 113–14, 120. Mercurio's testimony on this issue, among others, is not credible. Rather, the court infers that in the process of recruiting him, the FBI indicated to Mercurio that he would be alerted when he was about to be indicted so that he could flee. As discussed, in § 11.30, *infra*, this promise was honored.

Mercurio was upgraded to a Top Echelon informant in May 1988. Ring June 9, 1998 Tr. at 99, June 15 Tr. at 22, 31. He was then on parole until 1993. *Id.;* Ex. 234. One of the conditions of his parole was that he not serve as an informant for any law enforcement agency. Ring June 15, 1998 Tr. at 23. In addition, there was a threat that the publicized search of Vanessa's would prompt the Parole Commission to revoke Mercurio's release and that he would, therefore, be lost to the FBI as a Top Echelon informant. *Id.* at 44; Ex. 235.

Mercurio testified that he never discussed the issue of the early termination of his parole with the FBI. Mercurio Aug. 5, 1998 Tr. at 27–28. This assertion is not correct. Although he may have initially been reluctant to have his cooperation disclosed, he ultimately told Connolly that he wanted the FBI to seek the early termination of his parole. Ring June 15, 1998 Tr. at 33, 46; Ex. 234. Ring and Mercurio also discussed this issue. Ring June 15, 1998 Tr. at 25, 34, 46. Ring explained to Mercurio that the request for early termination of his parole would involve generating documents describing his status and value as an informant, which would be maintained outside of the FBI. *Id.* at 33–35. Nevertheless, Mercurio told Ring that he wanted the request made. *Id.;* Ex. 200. Accordingly, Mercurio authorized Ring to discuss the dilemma posed by his parole status with O'Sullivan, and to have the FBI and Department of Justice ask the Parole Commission to terminate his parole early. Ring June 15, 1998 Tr. at 33–55, 44–55.

O'Sullivan sent a letter dated October 31, 1998 to Benjamin Baer, the Chairman of the Parole Commission, requesting that Mercurio's petition for early termination of his parole be allowed because of "the extremely valuable services that Mr. Mercurio [had] rendered to the Federal Bureau of Investigation." Ex. 182. The letter was based on information that O'Sullivan had received from Connolly. Ring June 15, 1998 Tr. at 32. In support of his request O'Sullivan wrote:

> It is the very strong desire of the Federal Bureau of Investigation that Mr. Mercurio be rewarded with early termination of his parole because of the extremely valuable information that Mr. Mercurio has provided and continues to provide to the F.B.I. concerning the activities of the leadership element of La Cosa Nostra in the Boston area. Information provided by Mr. Mercurio has allowed the F.B.I. to identify newly made members of the Patriarca L.C.N. Family, as well as learning about the restructured leadership of the Family. Even more importantly, the information provided by Mr. Mercurio has been used in affidavits in support of court authorized electronic surveillance directed at the L.C.N. Information gathered in this electronic surveillance is the basis upon which a R.I.C.O. indictment will soon be returned in the District of Massachusetts against the restructured leadership of the Patriarca Family.
>
> Because of the extremely sensitive nature of the information contained in this letter, I request that this letter be maintained by you in a secure file and receive only the most limited circulation. If you have any questions of me, please feel free to contact me.

Thank you for your personal attention to this matter. Ex. 182. The claim that Mercurio had provided information used to support applications for electronic surveillance is, as far as Ring knows, not true.

Ring June 15, 1998 Tr. at 33. In any event, in about February 1989, Diane Kottmyer, who was about to succeed O'Sullivan as the head of the Strike Force, was told of Mercurio's status as an FBI informant and of O'Sullivan's letter to the Parole Commission. Kottmyer Aug. 13, 1998 Tr. at 83–88.

O'Sullivan's letter alone was not sufficient to persuade Baer that Mercurio's parole should be terminated. Exs. 234, 235. Rather, Baer requested that the FBI provide a letter supporting O'Sullivan's request. *Id.*

Accordingly, on December 6, 1988, Ring sent to FBI Headquarters a memorandum and draft letter, for signature by Assistant Director Floyd Clarke, endorsing the request that Mercurio's parole be terminated. Ex. 234. On January 5, 1989, an addendum to those documents was prepared by Dennis Maduro, who worked in the Organized Crime Section of FBI Headquarters, evidently after speaking to Ring or Connolly. Ex. 234; Summerford Sept. 15, 1998 Tr. at 102–05. The addendum stated in part that:

> Mercurio will be indicted along with other Patriarca La Cosa Nostra Family members in the near future. *Early termination of Mercurio's parole will ensure that at the time of his arraignment, Mercurio is afforded bail* and not otherwise remanded to the federal Metropolitan Correction Center which would jeopardize his physical safety.

Ex. 234 (emphasis added).

The materials, including the addendum, were forwarded to James Summerford, who was the Chief of the FBI's Informant Unit. Summerford Sept. 15, 1998 Tr. at 100, 125. Summerford discussed the materials by telephone with Ring on January 6, 1989. *Id.* at 105–13; Ex. 234. In response to issues raised by Summerford, Ring explained that Mercurio would only be charged with crimes committed before he became an informant. Ex. 234; Summerford Sept. 15, 1998 Tr. at 110–13, 119. This issue was important because if it were contemplated that Mercurio might be charged with crimes committed while he was serving as an FBI source, a substantial question would be presented concerning whether he could be continued as an informant. Summerford Sept. 15, 1998 Tr. at 111–13. In such circumstances, the FBI in Boston, the Strike Force, the Organized Crime Section of FBI Headquarters, the Organized Crime Section of the Department of Justice, and the Parole Commission would all have had to participate in deciding whether sustaining Mercurio as an informant was appropriate. *Id.*

Ring also told Summerford that when Mercurio was indicted, "[h]is cooperation would be made known to the court." *Id.* at 113, 119; Ex. 234. In addition, after speaking with Ring, Summerford understood that one reason that the FBI in Boston was requesting the early termination of Mercurio's parole was to ensure that when he was arrested, he would be released on bail. Summerford Sept. 15, 1998 Tr. at 117–24.

Following his conversation with Ring, Summerford prepared a memorandum to the Criminal Division of the Department of Justice and a letter to Baer, each of which were sent by Clarke in support of the request for the early termination of Mercurio's parole. *Id.;* Ex. 235. The memorandum stated, in part, that:

> Mr. Mercurio will be indicted in the near future for extortion and conspiracy to commit extortion in connection with gambling activities involving the New England Region La Cosa Nostra (LCN). These criminal acts were perpetrated prior to his current cooperation with the FBI. His past criminal activities have given him direct access to individuals who are responsible for policy making at the highest levels of the LCN in New England. The FBI believes that Mr. Mercurio will continue to cooperate and provide invaluable information that will have significant impact in countering LCN activity in New England and that

the benefits of his continued cooperation far outweighs any drawbacks that can be foreseen or reasonably anticipated. *The FBI will make a factual presentation to the sentencing judge concerning his cooperation to date. Early termination of Mr. Mercurio's parole will help ensure that he is not sent to jail for violating his parole where his safety could be in danger.* Approval of this request will also mean his continued freedom which will enable him to continue to work for the FBI.

Ex. 235 (emphasis added).

Both Ring and Mercurio persuasively deny that there was ever any discussion with Mercurio about bringing his cooperation to the attention of a judge. Ring June 19, 1998 Tr. at 161–62; Mercurio Aug. 5, 1998 Tr. at 27; Kottmyer Aug. 13, 1998 Tr. at 85. The FBI in Boston did not expect that Mercurio's cooperation would ever be disclosed and, therefore, there would not have been any foreseeable risk to him if he were detained pending trial.

The claim of such a risk was, however, used as a reason to try to assure that when indicted and arrested, Mercurio would be released on bail. Ex. 234; Summerford Sept. 15, 1998 Tr. at 117–24. Kottmyer testified that she was never told that the FBI did not want Mercurio detained after he was indicted. Kottmyer Aug. 13, 1998 Tr. at 86–88. However, on September 1, 1989, she wrote to her superior in Washington that O'Sullivan had written to the Parole Commission to do something for Mercurio as an act of good faith, to avoid parole revocation, and to decrease the likelihood of pretrial detention when Mercurio was indicted. June 15, 1998 Tr. at 18–19 (Under Seal).

With Clarke's letter, the effort to secure the early termination of Mercurio's parole succeeded. His parole was terminated in about February 1989. Mercurio Aug. 4, 1998 Tr. at 158–61.

On February 10, 1989, about the time that his parole was terminated, Mercurio told Connolly that he, Ferrara, Carrozza, and Lepore planned to "take off" before being indicted. Ex. 166. Ring reviewed the 209 that included this information. Ring June 8, 1998 Tr. at 104. Mercurio's report of his intention to flee confirmed the information that Bulger had provided in September 1987. Ex. 165.

The inserts in Mercurio's informant file indicate that in early 1989 he was frequently furnishing information to Connolly, including reports on information that was being provided by Anthony Cardinale, Ferrara's attorney. *See, e.g.*, 209s dated 1/25/89 and 2/14/89.[48] When she became Chief of the Strike Force in February 1989, Kottmyer expressed to the FBI concern about the possibility that Mercurio would report on defense strategy, and about other issues, including whether Mercurio might assert an authorization defense. Kottmyer Aug. 13, 1998 Tr. at 66–70.

By May 1989, Ring realized that when Mercurio was indicted his dual status as an informant and defendant would present a difficult dilemma for the government. Ex. 170; Ring June 9, 1998 Tr. at 52–58, 91–99. As Ring understood it, Mercurio's involvement with his codefendants after their indictment would implicate their Sixth Amendment rights to the confidentiality of joint discussions of defense strategy, and dealing with this issue would entail the risk of disclosing that Mercurio was cooperating with the government. *Id.* Ring discussed this matter with Kottmyer and the Boston FBI's Principal Legal Ad-

48. After the court reviewed the Mercurio informant file *in camera*, some, but not all, of the inserts that it included were produced to the defendants. The two cited inserts may not have been produced. In any event, they were not admitted as exhibits. While not essential to the court's analysis, reference to the information concerning the advice that the putative defendants were receiving from Cardinale which Mercurio gave the FBI provides context for understanding Ring's concern about Mercurio's potential dual status as an informant and defendant.

viser, John Michael Callahan. *Id.* They decided that, in order to minimize the risks that they recognized, Mercurio should be closed as an informant before he was indicted and instructed not to contact the FBI unless he learned of planned violence or potential corruption of the judicial process. *Id.*

Prior to May 8, 1989, Ring and Connolly told Mercurio of the prospective dilemma and the proposed plan for dealing with it. Ex. 170; Ring June 9, 1998 Tr. at 97. At that time Ring expected to close Mercurio as an informant in about two weeks and to tell him that had occurred. Ex. 170; Ring June 9, 1999 Tr. at 64, 97–98, June 22, 1998 Tr. at 71.

On May 8, 1989, Ring wrote a memorandum to the SAC, Ahearn, describing the issue posed by Mercurio's potential dual status as informant and defendant, and the proposed plan for dealing with it that he had discussed with Kottmyer, Callahan, Connolly, and Mercurio. Ex. 170. Ring did not, however, receive a response to his recommendations from Ahearn before Ring left for vacation at the beginning of June 1989. Ring June 9, 1998 Tr. at 64. Thus, he did not before departing close Mercurio as an informant or tell Mercurio that he had done so. Ring June 22, 1998 Tr. at 71–72.

Ring did, however, tell his colleagues, including Connolly, that he felt that the tensions in the LCN might soon explode into violence. Ring June 19, 1998 Tr. at 196. Ring's instinct was right.

On June 5, 1989, Mercurio told Connolly that he, Russo, Carrozza, Ferrara, and "Spucky" Spagnoulo felt under pressure because of their anticipated indictments and were angry at Salemme, who was poised to take over after they were indicted, and Charlie Quintina, who had allied himself with Patriarca and Salemme. Ex. 185. Mercurio added that it was believed that Salemme, Quintina, and Grasso would kill Ferrara if they could set him up. *Id.* Thus, Mercurio explained, the Boston LCN was hoping to murder Salemme and those associated with him first. *Id.* As described in § 11.28, *supra*, Flemmi provided Connolly with essentially the same information the next day. Ex. 37 (209 dated 6/6/89).

On June 13, 1989, *The Boston Herald* published an article by Shelley Murphy headlined "Ex-con seen as Hub Mob's heir apparent." Ex. TTT;[49] Ring June 19, 1998 Tr. at 200–04. The article cites "law enforcement sources" and consists mainly of information that closely tracks the information that is included in 209s prepared by Connolly based on his discussions with Mercurio and Flemmi. *Id.;* Exs. 37 (209s dated 3/20/89 and 6/6/89), 185, 195.

More specifically, the article reported accurately that "local Mob leaders" Russo, Carrozza, Lepore, and Mercurio would soon be indicted. Ex. TTT. As Mercurio had told Connolly, the article stated that Salemme had been "made" a member of the Patriarca Family. *Id.;* Exs. 188, 191 (*See also* Mercurio 209 dated 8/18/88, # 60 in Mercurio informant file). The article went on to explain that Salemme was meeting frequently with Patriarca and, using the precise term that Connolly ascribed to Flemmi a week earlier, had Patriarca's "blessing" to take over the Boston LCN's loansharking and gambling activities when the expected indictments were issued. Ex. TTT; Ex. 37 (209 dated 6/6/89). Moreover, the article reported that, as Mercurio had told Connolly, Salemme had also aligned himself with Quintina. Ex. TTT; Exs. 185, 188, 191. In addition, the article contained the accurate information that the FBI had recently

49. The court initially sustained the government's objection to admission of the article on the grounds of relevance and marked it Ex. TTT for identification only. June 19, 1998 Tr. at 201–03. In the course of writing this decision, the court has discerned the relevance of the document, not for the truth of the matters reported, but as context for understanding evidence that was admitted concerning Flemmi's motion to dismiss. Thus, this Memorandum refers to the text of the article, as well as to the testimony concerning it.

made Salemme the subject of a separate investigation. Ex. TTT; Ex. 185. In view of the foregoing, and the fact that the article was written while Ring was away from Boston on vacation, the court is persuaded that Connolly was a source for the article.

The Boston Herald article may have inflamed the volatile and potentially violent situation that Mercurio and Flemmi had recently reported to Connolly. On June 16, 1989, three days after it was published, Salemme was shot, but not killed, and Grasso was murdered in Connecticut. June 5, 1998 Tr. at 5. In view of the government's objection that the issue of whether the FBI prompted the attempt on Salemme's life related only to the defendants' motion to dismiss based on outrageous government misconduct on which the court had not granted an evidentiary hearing, the court did not permit questioning concerning the motive for what the court now recognizes to be the leaking of highly confidential and provocative information by the FBI. Ring June 19, 1998 Tr. at 201–03. This ruling may have been a mistake. If Salemme had been murdered by the Boston faction of the LCN, the FBI would have been spared the necessity of developing a prosecutable case against him, and Flemmi and Bulger would have again received one of the benefits of their bargain with the Bureau—an enhanced opportunity to profit from the vacuum created by the decimation of the LCN in Boston. Flemmi Aug. 25, 1998 Tr. at 31.

On June 27, 1989, Mercurio told Connolly that the Salemme shooting and the Grasso murder were planned and carried out by the Russo faction of the LCN. Ex. 187. Mercurio reported that Russo, Ferrara, and Carrozza had handled most of the details of the Salemme "hit." *Id.* The 209 records no reference to Mercurio's role in the shootings. *Id.*

Ring returned from his vacation after the Fourth of July. Ring June 9, 1998 Tr. at 92, June 19, 1998 Tr. at 18. He then found that on June 9, 1998 Ahearn and ASAC O'Callahan had approved his recommendation that Mercurio be closed as an informant. Ex. 170; Ring June 22, 1998 Tr. at 72. The Grasso murder and Salemme shooting, however, caused Ring to revise his view on whether Mercurio should be closed immediately. Ring June 29, 1998 Tr. at 65–66, June 22, 1998 Tr. at 73. Maintaining Mercurio as a source had become especially important in view of the potential for more violence, among other things. Ring, June 9, 1998 Tr. at 66, June 19, 1998 Tr. at 19, June 22, 1998 Tr. at 73–74. Thus, after consulting Ahearn and O'Callahan, Ring decided to postpone closing Mercurio as an informant, although he still intended to do so shortly before Mercurio was indicted. Ex. 170; Ring June 9, 1998 Tr. at 64, June 19, 1998 Tr. at 20, June 22, 1998 Tr. at 73.

On August 2, 1989, another informant who Ring regarded as highly reliable advised that Mercurio played a central role in the Salemme shooting. Exs. 188, 194, 237, 246; Ring June 16, 1998 Tr. at 55. The informant stated, among other things, that Mercurio had fled after the shooting because he had lured Salemme to the meeting at which the attempt on his life was made. Exs. 188, 194, 234, 246. The informant stated that Ferrara, Russo, Carrozza, and Mercurio were seeking to "finish off" what they started before they were indicted. *Id.* In addition, the informant reported that while Patriarca was urging Russo and Salemme to settle their problems peacefully, Mercurio was opposing that effort. *Id.* Ring believed that this information was true and that Mercurio had previously failed to inform the FBI of plans for imminent violent activity in which he was involved. Ring June 19, 1998 Tr. at 20, 254; June 6, 1998 Tr. at 6 (Under Seal); Ex. 164. Ring also recognized that there was an enduring threat of additional violence about which Mercurio would be knowledgeable because of his involvement. Ring June 19, 1998 Tr. at 19.

As discussed, in § II.6, *supra*, in 1989, the Attorney General Guidelines, which

were incorporated in the FBI Manual, required a special review process if an FBI field office wanted to keep an informant open after it learned that he had participated in a serious act of violence or any other serious crime. Ex. 274 (Under Seal), Manual § 108, pt. IV(C) (1–12–77); § 137–13(1)(C) (1–31–78); § 137–17(1)(G) (1–12–81); § 137–16(1)(G) (3–28–84); Summerford Sept. 16, 1998 Tr. at 62–67. In essence, the Guidelines required either that state or local law enforcement authorities be informed of the evidence concerning the informant's crime or that FBI Headquarters and the Assistant Attorney General be promptly consulted. *Id.* Murder and attempted murder are serious acts of violence. Summerford Sept. 16, 1998 Tr. at 65, 67. FBI Headquarters and the Assistant Attorney General should have been advised of the credible information that had been received concerning Mercurio's involvement in the Grasso murder and Salemme shooting. *Id.* at 157–58; Summerford Sept. 16, 1998 Tr. at 18. The Boston FBI, however, did not provide the required notification to Headquarters or the Department of Justice. Summerford Sept. 15, 1998 Tr. at 157–58. Rather, it arrogated to itself the decision to continue to utilize Mercurio as an informant despite the fact that it was believed that he had, while an FBI informant, been involved in murder and attempted murder.

When Kottmyer later learned of the reliable report of Mercurio's involvement in the Salemme shooting she asked Ring whether it presented a problem under the Attorney General's Guidelines. Kottmyer Aug. 14, 1998 Tr. at 180–81. Ring told her that it did not. *Id.*

30. *The LCN Induction Ceremony*

On October 29, 1989, the Patriarca Family conducted a ceremony at 34 Guild Street, Medford, Massachusetts, to induct new members as part of an effort to make peace between its Boston faction and Patriarca's loyalists, including Salemme, who was not present. The FBI bugged 34 Guild Street and recorded that ceremony. It was the first time that the FBI had ever overheard an LCN induction ceremony. The interception was perceived and later proven to be of vast value to the government in prosecuting members of the LCN and in publicizing the success of that effort.

Flemmi and Mercurio were two of the four informants relied upon in the application for the court order that authorized the "roving" bug that was employed at 34 Guild Street. As described in the Conclusions of Law, § III.4, *infra*, although defendant DeLuca was among those intercepted at 34 Guild Street, the Supreme Court's recent decision in *Minnesota v. Carter*, 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998), persuades the court that he does not have standing to litigate whether the electronic surveillance was obtained in violation of Title III or involved a violation of the Fourth Amendment.

The recording of the LCN induction ceremony was, however, played for the grand juries which returned the indictments against Flemmi in the instant case. Dec. 18, 1997 Tr. at 35. Thus, the court has been required to decide whether that use of this evidence that Flemmi helped obtain violated any enforceable agreement which he had with the government. As described in § III.1.D.(3), *infra*, it does. In addition, the manner in which Connolly and Ring dealt with Mercurio concerning the ceremony is sufficiently distinctive to be probative of Flemmi's claims that he and Bulger, like Mercurio, were generally protected by Connolly and the FBI in return for their services as informants and, as part of that protection, were alerted to their imminent indictment so they could flee.

In *United States v. Ferrara*, 771 F.Supp. 1266 (D.Mass.1991), this court made findings of fact relating to the electronic surveillance conducted at 34 Guild Street. Those findings were based on a limited record. Kottmyer was the only witness, and the court accepted an affida-

vit from Ring. *Ferrara*, 771 F.Supp. at 1275–81. In addition, in 1991, the court did not require the government to respond to questions that might disclose the identity of any informant. Aug. 12, 1998 Tr. at 43.

In the instant case, Mercurio's role as an FBI informant and person present at the ceremony has for the first time been revealed; many more documents have been reviewed, including at least one, Exhibit 164, that the government acknowledges should have been disclosed in 1991; and many more witnesses have testified. As a result, the court is now persuaded that in 1989, Ring, among others, did not share significant information with Kottmyer, the applicant, or Special Agent Walter Steffens, Jr., the affiant, regarding the then proposed electronic surveillance that captured the Mafia induction ceremony. This was part of a larger effort intended to assure that information that might suggest that Mercurio was an informant would not be disclosed to any judge. Because she was incompletely informed, although honest as to her understanding, Kottmyer's 1991 testimony was not reliable in certain, important respects.

Because of the more accurate and complete information now available, the findings of facts in this case differ in some, but not all, respects from those made in 1991. Among other things, the court now finds the following.[50]

At all times prior to October 29, 1989, the FBI, personified by Ring, knew that there would be at least one informant, Mercurio, at the ceremony.[51] The FBI sought a warrant for a "roving" bug that could be used at multiple, unidentified locations, rather than authorization to conduct electronic surveillance at 34 Guild Street alone, in order to protect the identity of its sources. The FBI had no intention of using that warrant to intercept conversations more than once. Rather, at the time the application was drafted, the FBI intended to arrest the participants immediately after the ceremony. The FBI had substantial, corroborated "rock solid" information that the ceremony would be held at 34 Guild Street several hours before Kottmyer and Steffens met with the judge to obtain the warrant authorizing roving surveillance based upon the representation that it was then "impractical" to identify the location to be bugged.

The FBI made no effort to obtain the testimony of Mercurio about the induction ceremony. Nor did the FBI ask him to record the ceremony, which would have obviated the need for a court ordered bug.

50. As described in the Conclusions of Law, § III.4, *infra*, because the court has found that DeLuca lacks standing to challenge the admissibility of the evidence intercepted at 34 Guild Street, the court is not now addressing the merits of the issues presented by his motion to suppress, including whether, if applicable, *Franks* requires suppression. Thus, the court has, among other things, not now made some of the factual findings required by *Franks*. If, however, the court's conclusion concerning DeLuca's lack of standing is reviewed and reversed on appeal, the court will on remand make the legally required findings, which with regard to at least the first prong of the *Franks* test may depend in meaningful measure on assessments of credibility.

51. As defendants were advised on August 14, 1998, at the request of the government and pursuant to the procedure suggested in *United States v. Higgins*, 995 F.2d 1, 3 (1st Cir.1993), the court questioned *ex parte* the informant described as CS–3 in the Steffens affidavit and certain FBI agents to determine whether the defendants' request that CS–3 be identified and required to testify was meritorious. Aug. 14, 1998 Tr. at 2–4 (Under Seal). Based on that inquiry, the court found that disclosure of the informant's identity was not justified under the standards established by *Roviaro*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 and its progeny. *Id.* More specifically, the court found that CS–3 did not know the location at which the October 29, 1989 induction ceremony would be held. *Id.* at 3. Although he was never asked if he would testify, if asked, CS–3 would have refused to do so, even if presented with an immunity and compulsion order issued pursuant to 18 U.S.C. § 6001 *et seq.* *Id.* In addition, assuming, without finding, that CS–3 could have attended the ceremony, he would have refused to utilize a device to record it. *Id.*

Instead of seeking to persuade Mercurio to cooperate in this fashion by threatening him with possible prosecution for his role in the Salemme shooting, as well as the Sagansky–Weinstein extortion and other activities intercepted at Vanessa's, Ring and Connolly alerted Mercurio to the bugging of the Mafia induction ceremony and, as previously contemplated, permitted him to flee the indictment that they caused him to understand was imminent.

As a result, the FBI was relieved of the risk that the prosecution of Russo, Ferrara, Carrozza, and their co-defendants would be jeopardized by the issues that would have been presented by Mercurio's dual status as a defendant and an FBI source concerning the induction ceremony, among other things. Mercurio's flight also masked for many years the violation of the Attorney General's Guidelines committed by Ring and his colleagues when they decided to continue Mercurio as an informant, despite his perceived involvement in the Salemme shooting, without consulting FBI Headquarters and, particularly, the Assistant Attorney General.

More specifically, after the Grasso murder and the Salemme shooting, the government understood the potential for additional violence involving the Patriarca and Boston factions of the LCN. Kottmyer Aug. 12, 1998 Tr. at 12. In the summer of 1989, various informants kept the FBI advised of developments in the Patriarca Family. Among other things, they reported the following.

Russo and Ferrara believed that Patriarca had received information indicating that Ferrara was trying to make a deal with the FBI, causing Patriarca to want to have Ferrara murdered. Ex. 248. Thus, they made a preemptive strike against Salemme and Grasso. *Id.* After the shootings, Patriarca feared that Russo's crew would try to kill all of his allies. Mercurio Aug. 14, 1998 Tr. at 16–17; Exs. 162, 188, 191, 192, 247, 248. In an effort to promote peace, Patriarca made Russo Consigliere of the Family. *Id.* Russo insisted that about fifteen new members of the Family be made, including three or four immediately. *Id.* Patriarca indicated that he was agreeable, but was reportedly actually stalling in the hope that the anticipated federal indictments would remove the Boston faction as a threat and eliminate the necessity of making new members loyal to it. *Id.* Beginning in June 1989, Mercurio was among those telling the FBI that there might soon be a ceremony to make new members of the Patriarca Family. Mercurio Aug. 4, 1998 Tr. at 16–17.

During the summer of 1989, informants also reported that Russo and other members of the LCN were meeting at a variety of new locations and would at times talk while walking outside. Exs. 191, 196, 188 (at 57–66). Physical surveillances conducted by the FBI confirmed this. Ex. 188 (at 57–64).

Ring did several things in response to this situation. He had Kottmyer draft criminal complaints concerning Russo and his colleagues. Kottmyer Aug. 12, 1998 Tr. at 65; Ring June 9, 1998 Tr. at 133–37. He and Kottmyer wanted the complaints to be immediately available if it proved necessary to make arrests promptly. *Id.*

The information he had received concerning the potential for violence, the possibility of an induction ceremony that could be bugged, and the uncertainty as to where that ceremony would be held also prompted Ring, in July 1989, to assign Steffens to begin drafting an affidavit to support an application for a warrant for a roving bug. Ring June 22, 1998 Tr. at 12–13. Ring also discussed with Kottmyer in about July 1989 the possibility of getting a roving warrant. Ring June 19, 1998 Tr. at 32.

Title III permits the government in certain limited circumstances to obtain an order authorizing the interception of particular conversations at one or more unspecified locations, notwithstanding the particularity clauses of the Fourth Amendment. 18 U.S.C. § 2518(11)(a)(ii)

(1994). More specifically, as this court has previously written:

> The Fourth Amendment requires that searches and seizures be reasonable and establishes certain requirements for the issuance of warrants. Among these is the requirement that any warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. As originally enacted, Title III implemented the particularity clauses of the Fourth Amendment by requiring: (1) that each application concerning electronic surveillance include "a particular description of ... the place where the communication is to be intercepted," 18 U.S.C. § 2518(1)(b)(ii), and (2) that the judge find that "the place where, ... communications are to be intercepted [is] being used, or [is] about to be used," in the commission of a specified offense, § 2518(3)(d).
>
> In enacting Title III, Congress expressed the belief that electronic surveillance was indispensable to investigating and prosecuting organized crime. Subsequently, many cases in Massachusetts and elsewhere showed this conviction to be correct. As the ability of the government to intercept criminal conversations became manifest, however, sophisticated criminals began structuring their communications to frustrate efforts to intercept them.
>
> In recognition of this, Title III was amended in 1986 to add "roving intercept [bug]" and "roving wiretap" provisions, 18 U.S.C. § 2518(11) (1988). With regard to the roving intercept provision at issue in the instant case, subsection 11 provides that the usual particularity requirements of Title III, § 2518(1)(b)(ii) and (3)(d), do not apply if a judge finds such specification is not practical, based upon an application by the government containing:
>
> > *a full and complete statement as to why such specification is not practical* and identif[ying] the person committing the offense and whose communications are to be intercepted.
>
> § 2518(11)(a)(ii).
>
> In essence, the roving intercept provision replaces the usual practice that the place to be searched be identified in a warrant by an address with a description of that place as the location at which an identified person is engaging in identified criminal conversation. Thus, a roving intercept order gives executing officers less specific direction, and more discretion, concerning the place to be searched than a conventional warrant.

Ferrara, 771 F.Supp. at 1270–71 (emphasis added).

When he received his assignment to draft an affidavit to support an application for a roving bug, Steffens had no training or experience concerning the requirements of Title III. Steffens Aug. 6, 1998 Tr. at 64–67. He viewed the assignment as a good opportunity for on the job training. *Id.*

When he received his assignment, Steffens did not seek legal advice from Kottmyer or any other Strike Force attorney. *Id.* at 71. Rather, he consulted the Boston FBI's Principal Legal Advisor, Callahan, and several more experienced FBI agents. *Id.* at 68–69.

Callahan gave Steffens an annotated form to be used as a guide for the preparation of an affidavit in support of an application for authorization to intercept either wire communications or oral communications. Steffens Aug. 10, 1998 Tr. at 138–39; Ex. 197. Callahan told Steffens that he would want to review any affidavit before it was filed. Steffens Aug. 6, 1998 Tr. at 65–66. However, after consulting Ring, Steffens did not provide Callahan with a copy of the affidavit that he filed on October 27, 1989. *Id.*

As indicated earlier, in order to receive authorization for a roving *bug* to be used to intercept oral communications, the government is required to submit to the court "a full and complete statement as to why

[it] is not practical" to specify the place to be bugged as is generally required by 18 U.S.C. § 2518(1)(b)(ii) and 3(d). The statutory standard for obtaining a roving *wiretap* order, however, is somewhat different. To obtain a warrant authorizing wiretapping at an unspecified location, the government was in 1989 required to identify the person committing the alleged offense and make "a showing of a purpose, on the part of that person, to thwart interception by changing facilities." 18 U.S.C. § 2518(11)(b)(ii) (1989).[52]

> Thus, while the roving intercept and roving wiretap provisions were apparently similarly motivated, they include somewhat different, and potentially confusing, standards. More specifically, the roving intercept provision requires a "full and complete statement;" the roving wiretap provision does not. Similarly, the roving intercept provision requires a showing that it is impractical to satisfy the usual specification requirements of Title III; [in 1989] the roving wiretap provision require[d] a demonstration that the individual to be targeted [was] attempting to evade interception.

Ferrara, 771 F.Supp. at 1289.

The annotated form that Callahan gave Steffens recognized the difference in the requirements for obtaining authorization for roving bugs and roving wiretaps. Ex. 197. It stated, in pertinent part, that:

> When requesting a *roving wire* interception, *you must establish that the specifically targeted subject(s) uses various and changing facilities for the purpose of avoiding electronic surveillance* (2518(11)(b)(ii)). This purpose may be evinced either by informant information (e.g., the subject's past or current statements to that effect) or by the subject's actions over a period of time (e.g., physical surveillance establishing that the subject travels from phone to phone to call other coconspirators). Roving wiretaps will be authorized for public telephones only, and only when it is clear that the telephones cannot be identified in advance, and the subject's intent to avoid electronic surveillance is manifested clearly.
>
> In *roving oral* interceptions (2518(11)(a)(ii)), *you must establish probable cause that it is not practical to specify the place where the oral communications of the targeted individual(s) are to be intercepted.* Once again, a roving oral interception will be authorized only for public facilities, vehicle, hotel rooms, or similar locations, and a pattern of activity demonstrating the impracticability of naming specific premises must be established.

Ex. 197 (emphasis added).

In 1989, Steffens knew that there was some distinction between what was required to obtain a warrant for a roving bug and a roving wiretap. Steffens Aug. 6, 1998 Tr. at 70–71. Nevertheless, he believed that to obtain a warrant for a roving bug it was only necessary to show the use of various and changing locations. *Id.* This view was mistaken. Section 2518(a)(ii) requires not only an effort to evade surveillance, but a *successful* effort which renders it "impractical" to identify the place to be bugged at the time the warrant is issued. *Ferrara*, 771 F.Supp. at 1309.

Throughout the summer and early fall of 1989, Steffens collected information for his draft affidavit. At the same time, Ring was working hard to prevent the attorneys who would prosecute the Russo faction from knowing that Mercurio was an informant and from reviewing his FBI file.

52. In 1998, § 2518(11)(b)(ii) was amended to delete the requirement of "a showing of a purpose ... to thwart interception" and to replace that standard with the requirement "that there is probable cause to believe that the person's actions could have the effect of thwarting interception from a specified facility ...." Pub.L. No. 105–272, Title VI, § 604, 112 Stat. 2413. Section 2518(11)(a)(ii) concerning roving bugs was not amended in 1998.

Jeffrey Auerhahn and Gregory Sullivan were the Strike Force attorneys presenting the case against Mercurio, Russo, and others to the grand jury. Kottmyer Aug. 13, 1998 Tr. at 64–65. When they learned that Mercurio's parole had been terminated early, they suspected corruption and wanted to investigate. *Id.* Kottmyer knew that Mercurio was an FBI informant and discussed the matter with Ring. *Id.* at 66; Ex. 200. Kottmyer felt that it was essential that Auerhahn and Sullivan be advised of Mercurio's status, and be permitted to review his FBI informant file to determine whether it contained any exculpatory information or evidence to support an authorization defense, or raised any possible issues concerning whether Sixth Amendment rights had been violated because an informant was reporting putative defendants' discussions with their attorneys, among other things. Kottmyer Aug. 13, 1998 Tr. at 66; Ex. 200.

On several occasions, Kottmyer presented her position that her assistants must view Mercurio's informant file to Ring, the SAC, Ahearn, and the ASAC, O'Callahan. Kottmyer Aug. 13, 1998 Tr. at 66–69, Aug. 14, 1998 Tr. at 169–70. She also explained to them her concerns about possible exculpatory information, evidence of authorization, and Sixth Amendment issues that only the attorneys working on the case could properly assess. *Id.* The United States Attorney, Wayne Budd, supported Kottmyer's requests. June 6, 1998 Tr. at 6 (Under Seal). Nevertheless, Ring and his colleagues refused to permit Auerhahn and Sullivan to be told that Mercurio was an informant or to review his file. Ex. 200.

On September 1, 1989, Kottmyer sent a memorandum to David Margolis, the Chief of the Organized Crime and Racketeering Section of the Criminal Division of the Department of Justice, seeking support for her insistence that Auerhahn and Sullivan be permitted to review Mercurio's informant file. June 6, 1998 Tr. at 5–7 (Under Seal); June 15, 1998 Tr. at 18–19 (Under Seal). Kottmyer told Margolis that a proposed RICO indictment of Mercurio and others would soon be submitted. *Id.* She also advised him that O'Sullivan had requested the early termination of Mercurio's parole in part to decrease the likelihood of pretrial detention when Mercurio was indicted. June 15, 1998 Tr. at 18–19 (Under Seal). Kottmyer explained her concerns about exculpatory information, the possible authorization defense Mercurio might assert based in part on the successful effort to have his parole terminated, and foreseeable Sixth Amendment issues that could arise when Mercurio was charged. *Id.;* June 6, 1998 Tr. at 5–7 (Under Seal). Kottmyer also told Margolis that the FBI was in possession of reliable information, which it believed to be true, that Mercurio had set up the June 19, 1989 attempted murder of Salemme. June 6, 1998 Tr. at 6 (Under Seal).

The proposed indictment of Mercurio, Russo, and their colleagues was submitted to the Department of Justice later in September 1989. Kottmyer Aug. 12, 1998 Tr. at 68, 73. On September 28, 1989, Kottmyer wrote to Margolis again to reiterate and amplify her contention that it was essential that Auerhahn and Sullivan be allowed to review Mercurio's informant file. June 6, 1989 Tr. at 7 (Under Seal). Margolis was persuaded and, without the authorization of the FBI, decided to tell Auerhahn and Sullivan of Mercurio's status. Ex. 200.

On October 4, 1989, Ring sent a memorandum to Ahearn reciting the history of his dispute with Kottmyer; explaining his view that the prosecutors had no need to know that Mercurio was an informant; and recording his previously expressed concern that if the prosecutors were told of Mercurio's status, it might be disclosed in court, thus endangering Mercurio. *Id.* Kottmyer, however, had asserted that no indictments would be returned unless and until Auerhahn and Sullivan reviewed Mercurio's informant file. *Id.* Ring urged

that any review of Mercurio's file be done only by FBI personnel and that the SAC go to Washington if necessary to support his position. *Id.* The next day, however, Kottmyer reaffirmed to Ahearn that Auerhahn and Sullivan would have to review Mercurio's file before any proposed indictment would be presented to the grand jury. June 6, 1998 Tr. at 7 (Under Seal).

The FBI's battle to keep Auerhahn and Sullivan from reviewing Mercurio's informant file continued throughout October 1989. Ex. 168. It was finally resolved by an agreement between high level officials of the Department of Justice and FBI in Washington, D.C. *Id.* On October 25, 1989, it was agreed that Sullivan would be allowed to review Mercurio's informant file in the presence of an FBI agent, but could not take notes or copy any document. *Id.* The information Sullivan acquired could only be disclosed to Kottmyer, Auerhahn, and the attorneys at the Department of Justice who already knew that Mercurio was an informant. *Id.* In addition, the Department of Justice agreed to the FBI's condition that Mercurio's "relationship with the FBI ... not be disclosed without the prior approval of the FBI." *Id.* Subject to the foregoing conditions, Sullivan read Mercurio's informant file on October 26, 1989. June 6, 1998 Tr. at 8–9 (Under Seal).

The determined effort by Ring and the FBI to keep the prosecutors from knowing that Mercurio was an informant, in part to minimize the risk that his status would be disclosed to the court and possibly others in future litigation, illuminates the motivation for many other decisions made in September and October 1989. In late September or early October Mercurio told the FBI that Vincent Federico, Richard Floramo, Carmen Tortora, and Robert DeLuca would soon be made new members of the Patriarca Family. Mercurio Aug. 4, 1998 Tr. at 15–17, 79–80. Mercurio related that Ferrara had told him that the ceremony would have to be conducted while Federico, who was in prison, was on furlough. *Id.* at 79, 82–83, Aug. 5, 1998 Tr. at 82. Mercurio also reported that the ceremony would be held somewhere in the vicinity of the Howard Johnson's restaurant at Wellington Circle, Medford, Massachusetts. Mercurio Aug. 4, 1998 Tr. at 95–98. Mercurio said that he had been designated to drive participants from Wellington Circle to the site of the ceremony. *Id.*

Ring and Connolly continuously asked Mercurio to provide them more information concerning the ceremony. *Id.* at 91, 102. Mercurio provided the information he received promptly to Connolly or Ring. *Id.* There are, however, no 209s reflecting the information Mercurio furnished to the FBI about a month before the ceremony.

Mercurio's reports prompted the FBI to seek information about the forthcoming induction ceremony from other sources. Some information was obtained from a source in Rhode Island. Kottmyer Aug. 12, 1998 Tr. at 15–16, Aug. 13, 1998 Tr. at 27. In addition, after receiving the information that Mercurio provided in late September or early October 1989, Connolly told Flemmi about the anticipated ceremony and asked him to try to find out about it. Ex. 92; Flemmi Sept. 1, 1998 Tr. at 61, 63–65, 68–69. Flemmi agreed and tried, but failed, to get helpful information for Connolly. Flemmi Sept. 1, 1998 Tr. at 64–65.

About a week before the ceremony, Ferrara told Mercurio that Federico had received a furlough for Sunday, October 29, 1989, and that the induction ceremony would be held then. Mercurio Aug. 4, 1998 Tr. at 98, Aug. 5, 1998 Tr. at 39. Mercurio promptly reported this to the FBI and said that the ceremony was a "definite go" for October 29, 1989. Mercurio Aug. 4, 1998 Tr. at 19–20, 26–27, 87–88, Aug. 5, 1998 Tr. at 38. Mercurio still did not have the address of the ceremony. Mercurio Aug. 4, 1998 Tr. at 48. However, as one who would be driving participants to the ceremony, he and the FBI expected that he would be told it in ad-

vance of the event. Mercurio Aug. 5, 1998 Tr. at 40.

On Friday, October 20, 1989, Kottmyer met with Ahearn, O'Callahan, and Ring. Kottmyer Aug. 12, 1998 Tr. at 5–6, 45. They told Kottmyer that the Patriarca Family would be conducting an induction ceremony in the near future. Kottmyer Aug. 12, 1998 Tr. at 15. Kottmyer understood that Mercurio was one source of the FBI's information about the ceremony and that his information had catalyzed the meeting in which she was participating. *Id.* at 15–16. Information emanating from Rhode Island was also discussed with Kottmyer. *Id.* at 15–16, 40, Aug. 13, 1998 Tr. at 27–28. Therefore, she knew that Mercurio was not the FBI's sole source of information about the ceremony. *Id.*

The representatives of the FBI indicated that they wanted to seek a warrant that would permit them to intercept and record the anticipated ceremony. Kottmyer was told, however, that few people knew about the induction ceremony and if information about it were included in an application for a warrant, it could lead to the identification of the FBI's source or sources. Kottmyer Aug. 12, 1998 Tr. at 59. Thus, Kottmyer was told that information concerning the ceremony was regarded as "singular" by the FBI and that the Bureau would not allow it to be used in any submission to the court for fear that doing so would have the effect of identifying one of its informants. *Id.* at 44–45; Ring June 11, 1998 Tr. at 141–42, June 6, 1998 Tr. at 8.

Kottmyer believed that once the FBI told her that the information was singular, she could not lawfully use that information in an application for a warrant because she did not, under the pertinent provisions of the Code of Federal Regulations, have the authority to disclose an informant's identity. Kottmyer Aug. 12, 1998 Tr. at 45–46, 52–57. At the time, the relevant regulations provided that ordinarily no disclosure of an informant's identity could be made unless the informant and the agency utilizing him did not object. 28 C.F.R. § 16.26(b)(4). However, any such objection would be trumped if the Deputy Attorney General or Associate Attorney General "determine[d] that the administration of justice require[d] disclosure." 28 C.F.R. § 16.26(c).

Everyone present on October 20, 1989 wanted to intercept the anticipated ceremony. Electronic surveillance of Russo, who had not been previously intercepted, would strengthen the proposed case against him. Kottmyer Aug. 12, 1998 Tr. at 47, Aug. 13, 1998 (P.M.) Tr. at 5–6. In addition, the FBI had never succeeded in recording a Mafia induction ceremony. Ring June 5, 1998 Tr. at 45. As Ahearn wrote on October 30, 1989, "[t]he Bureau had an outstanding opportunity for the first time ever, of overhearing and recording an LCN induction ceremony, which would be invaluable for years to come at other LCN trials and Congressional hearings." Ex. 183.

Thus, Kottmyer was presented with the question whether an application for a warrant to conduct electronic surveillance that would be used to intercept the forthcoming induction ceremony could lawfully be presented without reference to that ceremony. Kottmyer Aug. 12, 1998 Tr. at 45–47, 56–57. As long as the information concerning the ceremony remained singular, Kottmyer felt there were two options—foregoing the application for electronic surveillance or submitting it without any reference to the ceremony if it were legally permissible to do so. *Id.*

The FBI definitely wanted to proceed with the application, without including the information that it deemed singular. *Id.* at 47. Thus, Kottmyer was asked to review all of the available information to determine whether there was sufficient, current probable cause to support an application for roving electronic surveillance that could be filed without any reference to the induction ceremony. *Id.* at 47–48. At the conclusion of the meeting, Kottmyer was given the draft affidavit intended to

support an application for a roving bug or wiretap that Steffens had been preparing. *Id.* at 48.

However, in what would become a pattern in the following week, the FBI did not provide Kottmyer with the detailed information that Mercurio had furnished concerning the forthcoming induction ceremony. More specifically, Kottmyer was not told that Mercurio had identified the four people who would be inducted; that the ceremony would be conducted while Federico was on furlough; that Wellington Circle in Medford would be a meeting place for at least some of the participants; or that Mercurio would be driving people from there to the ceremony. *Id.* at 37–39.

Kottmyer had never prepared an application for roving electronic surveillance before. Kottmyer Aug. 13, 1993 (P.M.) Tr. at 26. She was, however, generally familiar with the statutory provisions concerning roving bugs and wiretaps. *Id.* at 27. Over the weekend, she did some research on the roving bug provisions of Title III, which had been enacted in 1986. Kottmyer Aug. 13, 1998 Tr. at 116, Aug. 13, 1998 (P.M.) Tr. at 26, Aug. 14, 1998 Tr. at 160. She read the statute and a treatise. *Id.* She also reviewed the applications and affidavits utilized to apply for warrants for both roving and conventional, fixed electronic surveillance in another case, *United States v. David.* Kottmyer Aug. 14, 1998 Tr. at 160, 167. Kottmyer did not that weekend, or at any other time, discuss with anyone at the Department of Justice whether 18 U.S.C. § 2518(11)(a)(ii), which required a "full and complete statement" as to why it was "impractical" to identify the place to be bugged, meant that reliable information concerning the address at which the ceremony would be held had to be included if it were obtained before the application was filed. *Id.* at 159.

During the weekend Kottmyer decided that she could comply with the statutory requirements for a roving bug without including any reference to the induction ceremony in the application because there was current probable cause to support the application based on electronic surveillance that had been conducted in Connecticut and physical surveillances. Kottmyer Aug. 12, 1998 Tr. at 56. In Kottmyer's view, an application for a roving bug was appropriate if specification of the place to be bugged was not feasible, and therefore was impractical, because the targets were using changing locations to conduct their criminal business. Kottmyer Aug. 14, 1998 Tr. at 166. She recognized, however, that it might in certain circumstances be practical, and therefore necessary, to identify the place to be bugged even if targets were frequently changing locations in an effort to thwart electronic surveillance. *Id.* at 167. In such a case, the government could apply for separate warrants authorizing conventional and roving electronic surveillance. *Id.* Indeed, this was done in the *David* case. *Id.*

With regard to the duty of disclosure to the court, Kottmyer believed that the statutory requirements were the same for a "full and complete statement" regarding probable cause and regarding the impracticality of identifying the place to be bugged when an order for roving bug was at issue. Kottmyer Aug. 13, 1998 Tr. at 123, Aug. 13, 1998 Tr. (P.M.) at 9–12. This understanding was incorrect.

> With regard to establishing that there is probable cause for the issuance of a warrant, the government must make "a full and complete statement of the facts and circumstances *relied upon by the applicant,* to justify his [or her] belief that an order should be issued." § 2518(1)(b) (emphasis added). Thus, the government has some discretion to rely upon and disclose less than all of its evidence tending to establish probable cause, as long as there is no effort to mislead the court into approving a warrant which might otherwise not have been issued.
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> * * * * * *

> In contrast to the requirements concerning probable cause, the government's obligation to make a "full and complete statement" concerning the practicality of specifying the place or places to be bugged is unqualified; the government is obligated to inform the court of all of its information relating to this issue.

Ferrara, 771 F.Supp. at 1306–07 (emphasis added).

Thus, with regard to establishing probable cause, the government generally has legitimate discretion not to rely on singular information that could lead to the identification of a source and, therefore, to omit such information from the section of its application for a warrant that seeks to establish probable cause. With regard to an application for a roving bug, however, if such singular information also relates to whether it is impractical to specify the location to be bugged, the government does not have the discretion to withhold it from the court.

As Kottmyer knew, the Department of Justice and the courts had authorized the use of sealed, supplemental submissions as a means of advising judges of singular information that the government believed could not be safely included in the application and affidavits that would ultimately be disclosed to defendants. Kottmyer Aug. 14, 1998 Tr. at 162–65.[53] Kottmyer, however, had misgivings about this approach, in part because the government could not control whether the information would be disclosed in the future and in part because of concerns about the propriety of litigating the admissibility of evidence obtained by court ordered electronic surveillance without a defendant knowing all of the information on which the court relied in issuing the warrant. *Id.* at 164–65. Thus, Kottmyer did not consider this approach in October 1989. *Id.*

By Monday, October 23, 1989, Kottmyer had decided that it was permissible and appropriate to ask the Department of Justice to give expedited authorization for an application for a roving bug. Kottmyer Aug. 12, 1998 Tr. at 7–8. The FBI's strategy with regard to the application was explained by Ahearn in an October 30, 1989 memorandum to the Director of the FBI. Ex. 183. He wrote:

> Within the last week, information was developed by Boston that a major sit down was to be held in Boston on Sunday, October 29, 1989 at which time new members would be inducted and the internal dispute settled.
>
> As FBIHQ is aware, the Boston Division immediately submitted for approval affidavits in support of two separate MISURS [microphone surveillance] installations which were intended to intercept conversations in a vehicle and at a meeting of the hierarchy of the Patriarca Family, on Sunday, 10/29/89. Expected to be in attendance at the meeting were RAYMOND PATRIARCA, the Boss; NICKY BIANCO, the Underboss, J.R. RUSSO, the Consigliere, and all nine Capos. *Although four sources of the Boston Division have provided the probable cause to support application for these MISURS, in an attempt to continue to protect their identities Boston utilized transcripts from a New Haven Division intercept.* These transcripts had been provided to Boston previously by New Haven for use in an affidavit prepared and submitted by the Springfield RA with full knowledge of New Haven.
>
> *It was also the Boston Division's intention to effect the arrests of RUSSO,*

53. With regard to Vanessa's, Weld testified that if he had been fully informed and somehow persuaded to submit an application characterizing Bulger and Flemmi as targets, when they were really sources who were not expected to be overheard or investigated, he would "at a minimum . . . have sought . . . an off balance sheet proceeding with the judge." Weld May 27, 1998 Tr. at 113. This is an approach that has been judicially endorsed both before and after 1986. *United States v. Strini*, 658 F.2d 593, 595 n. 2 (8th Cir.1981); *United States v. Falls*, 34 F.3d 674, 682 (8th Cir.1994).

VINCENT FERRARA, and ROBERT CARROZZA at the conclusion of the meeting. Top echelon informants have advised that these three subjects are expecting to be indicted, and intend to flee the area as soon as they believe the indictment is about to be returned. Historically, Boston has experienced little success in preventing indictments from leaking prematurely, and therefore opted to seek complaints and warrants just prior to indictment. More importantly, the potential for additional violence within the family increases daily. RUSSO, CARROZZA, and FERRARA were responsible for planning and approving the murder of former Underboss BILLY GRASSO, and the attempted murder of FRANK SALEMME. The attempt on SALEMME was made with automatic weapons being fired from a moving vehicle in a crowded shopping center with total disregard for the safety of innocent bystanders. As SALEMME ran from his attackers, they sprayed the area with automatic weapons fire.

Id. (emphasis added).

Ahearn's memorandum indicates that neither he nor Ring had any intention or desire to use the warrant that they were seeking for a roving bug more than once, to intercept the forthcoming induction ceremony. As discussed, *infra*, until overruled by FBI Headquarters on October 27, 1989, they intended to use the complaints previously drafted to arrest Russo, Ferrara, and Carrozza after the ceremony. Ahearn did not inform the Director that Mercurio had also expressed his intention to flee. As subsequent documents, among other things, confirm, the FBI did not intend to arrest Mercurio on a complaint to prevent his flight.

Kottmyer and Steffens worked hard on October 23, 1989 to finalize his affidavit. Steffens Aug. 6, 1998 Tr. at 39, 139; Kottmyer Aug. 12, 1998 Tr. at 77. Ring controlled and limited the access that they had to information from informants that could be included in the affidavit. Steffens Aug. 6, 1998 Tr. at 36, Aug. 10, 1998 Tr. at 97. Mercurio was one informant relied on in the affidavit, but neither Kottmyer nor Steffens had the opportunity to review his full informant file. Steffens Aug. 10, 1998 Tr. at 98–99, 108–09, 121. Rather, they relied on the limited information provided by Ring. *Id.*

Ring gave Steffens informant information for his affidavit for the first time on October 23, 1998. *Id.* at 108; Exs. 192, 194. That information was not included in the draft affidavit that Kottmyer was furnished on October 20, 1989. *Id.* The informant information that Ring gave Steffens included no references to the forthcoming induction ceremony. Exs. 192, 194; Ring June 19, 1998 Tr. at 39–40. Initially, Ring refused to allow Steffens to see the 209s which contained the information Ring had summarized for inclusion in the affidavit, but acquiesced when Kottmyer insisted that Steffens review them. *Id.* at 109. Ring never told Steffens the identity of any informant. Aug. 6, 1998 Tr. at 29–30. Ring did, however, emphasize to Steffens that information about the induction ceremony was singular and had to be maintained as confidential. Steffens Aug. 6, 1998 Tr. at 62.

Pursuant to Ring's instructions, the affidavit that Steffens and Kottmyer drafted named Russo, Carrozza, and Ferrara as targets. Exs. 188 (Under Seal), 190 (Under Seal); Ring June 19, 1998 Tr. at 252–55. It was expected that Mercurio would be overheard as well. Ring June 19, 1998 Tr. at 252–55. Pursuant to 18 U.S.C. § 2518(1)(b)(iv), Mercurio was required to have been named as a target "if the Government ha[d] probable cause to believe that [he was] engaged in the criminal activity under investigation and expect [ed] to intercept [his] conversations." *United States v. Donovan*, 429 U.S. 413, 428, 97 S.Ct. 658, 50 L.Ed.2d 652 (1977); *see also Ferrara*, 771 F.Supp. at 1314–15. In this case, however, the failure to name Mercurio as a target was consistent with the FBI's intent to treat him as a protected

source rather than as subject to prosecution for his participation in the induction ceremony. In any event, Mercurio was identified as "CS–1" in the Steffens Affidavit. June 10, 1998 Tr. at 100.

Flemmi was "CS–2" in the Steffens Affidavit. Coffey Aff., Apr. 9, 1997, at 3–4. With regard to his qualifications, Steffens stated that Flemmi had provided reliable information for more than seven years and that:

> Information provided by this informant has led to the arrest and conviction of more than eight individuals for the crimes of illegal gambling and loansharking in connection with a major LCN criminal enterprise. Information provided by this informant has been utilized in prior Title III intercepts authorized by United States District Court. During the course of this informant's confidential relationship with law enforcement authorities, information he provided has been corroborated by independent investigation, other reliable informants and information obtained from court authorized electronic surveillance. CS–2 has stated [that] he will not testify against the subjects due to fear of reprisals.

Ex. 188 (Under Seal).

On October 21, 1989, Flemmi left Boston on an International Association of Airborne Veterans parachute jumping trip to Asia. Ex. 250. He did not return until October 31, 1989. *Id.* Thus, he was not available to provide the FBI with any emerging information about the ceremony in the week before it occurred.

Flemmi was not among those intercepted at 34 Guild Street on October 29, 1989. Nor did he have a possessory interest or other relationship with the premises. Therefore, the issues of whether it was proper to present the evidence of the intercepted Mafia induction ceremony to the grand juries which returned indictments against him and whether it is permissible to use such evidence against Flemmi in any trial must be analyzed in the context of his claim to have an enforceable agreement with the government rather than under Title III. *See* § III.1.D(3), *infra*.

In any event, the affidavit to which both Mercurio and Flemmi contributed employed the approach required by Ring. Ex. 188. Russo, Ferrara, and Carrozza were the only named targets. *Id.* It was stated that there was also probable cause to believe that evidence concerning Patriarca, Nicholas Bianco, Matthew Gugliametti, Jr., Gaetano Milano, Louis Failla, John Castegna, John Farrell, and Frank Pugliano would be intercepted. *Id.* Mercurio was not described as a person as to whom evidence was expected to be acquired. *Id.*

The section of the affidavit concerning probable cause focused on the rift in the Patriarca Family and, especially, the Grasso murder and Salemme shootings. *Id.* It emphasized information indicating that Russo, Ferrara, and Carrozza used various and changing locations to meet and talk. *Id.*

The affidavit did not disclose that those directing matters for the FBI intended to use the authority for a roving bug only once, to intercept a Mafia induction ceremony at a location they expected to know in advance. *Id.* Nor did the affidavit disclose that at least one informant would be at the ceremony. *Id.*

The affidavit did represent that all of the informants had stated that they would not testify because of fear of reprisals. *Id.* at 13, 16, 17, 18. Although not known to Steffens and Kottmyer, who were relying on information provided by Ring, this statement was not accurate. Neither Flemmi nor Mercurio was asked to testify or said that he would not for fear of reprisal. Mercurio Aug. 4, 1998 Tr. at 85, 104; Flemmi Sept. 5, 1998 Tr. at 23–25. It was, however, true that if asked, both Mercurio and Flemmi would have said that they did not wish to testify because they did not want to be revealed as informants. Mercurio Aug. 15, 1998 Tr. at 28, 85, 120.

The affidavit also stated that the issuance of orders granting immunity and compelling testimony were likely to be unavailing. Ex. 188 at 69. With regard to Mercurio, this may not have been true. Ring knew that Mercurio did not want to return to prison and could, in October 1989, have been fairly threatened with the possibility of prosecution for the Salemme shooting, with a potential life sentence, as well as for the Sagansky–Weinstein extortion and other criminal activity intercepted at Vanessa's. As Ring explained, witnesses in Organized Crime cases are often reluctant to testify initially, but at times change their minds when the FBI is persistent in pursuing them. Ring Sept. 22, 1998 Tr. at 120–22, 138–40. This approach was not employed with regard to Mercurio. If tried, it might have succeeded. According to the government's expert, James Darcy, informants in LCN cases have become cooperating witnesses when faced with the prospect of lengthy sentences in RICO cases. Darcy Sept. 28, 1998 Tr. at 136. In the instant case, in 1997, Mercurio acknowledged that he had been an FBI informant and testified after perceiving the prospect of being held in civil contempt. *See United States v. Salemme*, 978 F.Supp. 379, 381 (D.Mass. June 19, 1997).

Steffens' affidavit did truthfully state that the four sources utilized had provided valuable information in other cases. Ex. 188 (Under Seal). Thus, Steffens accurately reported that one reason that the government did not try to compel its sources to testify was that, "use of informant testimony, even if compelled by a grant of immunity, would seriously jeopardize, if not destroy, the future usefulness of those informants in other investigations." *Id.* at 68.[54]

On October 23, 1989, Ring spoke to Maduro, who was still working in the Organized Crime Section at FBI Headquarters, to advise him that Steffens would soon deliver his affidavit and a request for expedited authorization to apply for a warrant. Ex. 195.[55] As a result of this conversation, on October 24, 1989, Maduro wrote the following back to Boston:

> In furtherance of investigative objectives in the Salemme case, Boston is preparing an affidavit in support of an application for emergency title III electronic surveillance (ELSUR) of *a meeting* between members of the Patriarca LCN Family (representing the Patriarca LCN "dissident faction") which is scheduled to occur on or about Sunday, 10/29/89, at a presently unknown location in Boston. Reliable and singular top echelon informant information indicates that the purpose of this meeting is to make new Patriarca LCN members. *Boston will be in a position to identify the precise location of this meeting and upon receipt of same will immediately provide these details to the OCS [Organized Crime Section] for incorporation into their Title III Affidavit.*
>
> As of 10/23/89, prospective Title III principals include the following Patriarca LCN Family members: Joseph "J.R." Russo, Consigliere, Vincent "Vinny" Ferrara, Capo and Robert "Bobby" Carrozza, Capo.
>
> On 10/23/89, SSA Jim Ring telephonically advised the OCS that *should it not be ultimately feasible to effect installation*

54. The affidavit also did not indicate that the FBI had a cooperating witness who was meeting with several prime suspects in the Salemme shooting, and was willing to record conversations with them and to testify. Ex. 189; Steffens Aug. 6, 1998 Tr. at 116–17. The limited evidence presented does not indicate that the cooperating witness was meeting with Russo, Ferrara, and Carrozza. *Id.*

55. Exhibit 195 should have been maintained in the files of the FBI's Boston office and produced prior to August 1998. It was not produced, however, until August 1998, after Assistant United States Attorney Herbert found a copy at FBI Headquarters and furnished it to the defendants. Aug. 10, 1998 Tr. at 10. Thus, the document was not available when Ring testified over many days in June 1998.

of emergency court ordered ELSUR, Boston will interrupt this meeting and effect arrests based upon complaints of subject Russo, Ferrara and Carrozza. These individuals, who are also subjects in the concurrent Boston "Jungle Mist" investigation (along with Patriarca LCN Soldier Anthony Mercurio) will subsequently be indicted in Boston pursuant to information already presented before the "Jungle Mist" Special Grand Jury.

Id. (emphasis added).

Maduro's teletype confirms three things with regard to Ring's state of mind on October 23, 1989. First, the warrant to conduct roving electronic surveillance being sought was intended to be used only one time, to intercept "a" meeting. *Id.* Second, Ring expected to know the location of that meeting soon enough to incorporate it in the application for electronic surveillance if necessary. *Id.* Third, Ring discussed having Russo, Ferrara, and Carrozza arrested, but intended to leave Mercurio free at least until he was indicted. *Id.*

Steffens, however, was not given Maduro's teletype or the information that it contained. Steffens Aug. 10, 1998 Tr. at 9. Nor was Kottmyer then told that the FBI expected the ceremony to be held on October 29, 1989 or that the FBI expected to be able to identify the location of the ceremony before the application for a warrant to bug it was filed. Kottmyer Aug. 12, 1998 Tr. at 86–89, Aug. 13, 1998 Tr. at 139–40.

On October 25, 1989, Ring was away from Boston, attending an Organized Crime conference. Ring June 4, 1998 Tr. at 63. Special Agent Robert Walthers served as Supervisor of the Organized Crime squad in Ring's absence. June 8, 1998 Tr. at 4–5. In that capacity, he wrote a memorandum for Steffens to carry to FBI Headquarters with his affidavit. *Id.* at 6–7. It stated, in pertinent part that:

> The enclosed application/affidavit for "roving" Title III coverage of RUSSO, FERRARA, and CARROZZA has been drafted with the goal of obtaining authorization to direct electronic surveillance techniques at any meeting site utilized by the these subjects; such tactics are deemed necessary to counter the LCN's practice of meeting at various and changing locations. *Such authorization will also help to protect the identity of any confidential sources, who otherwise might be revealed if singular information (in this case, the location of sensitive LCN meeting) provided by the source was incorporated into the affidavit of a traditional Title III application.*

Ex. 164 (emphasis added).

This memorandum makes explicit that, contrary to this court's finding in *Ferrara*, 771 F.Supp. at 1279, one motive, if not the sole motive, for seeking authorization for a roving bug was a determination not to risk revealing the FBI's sources of information concerning the induction ceremony. Although this memorandum was maintained in the files of the FBI's Boston Office, it was not produced during the *Ferrara* litigation. Nor was it produced in this case until after the court issued its May 22, 1997 decision granting defendants' motion for an evidentiary hearing on the motion to suppress the electronic surveillance of 34 Guild Street, and noted its prior finding that the failure of the government to make the full and complete statement required by § 2518(11)(a) "was not motivated by the desire to protect the identity of any informant." *Salemme*, 978 F.Supp. at 356 (citing *Ferrara*, 771 F.Supp. at 1279). Rather, the government produced the October 25, 1989 Walthers memorandum on June 3, 1997 and acknowledged that it should have been disclosed in 1991, in the *Ferrara* litigation. June 3, 1997 Tr. at 10; June 19, 1997 Order at 8 n.4.

On October 25, 1989, Steffens delivered the package of documents to Moody, the head of the FBI's Organized Crime Section, Steffens Aug. 6, 1998 Tr. at 49. Moody told Steffens that the Boston Office

was going to have to add information to the affidavit that might reveal that Mercurio was an informant. *Id.* at 49–51. Moody was evidently referring to information regarding the location to be bugged when Mercurio furnished it. Steffens, however, disagreed. *Id.* He explained that because the targets were using various and changing locations, this would not be necessary. *Id.* He felt that Moody did not understand the roving statute. *Id.* Steffens, however, was wrong.

On October 26, 1989, Mercurio again told Ring that the induction ceremony would be held on October 29, 1989, in the vicinity of Wellington Circle, Medford, and that Federico was scheduled to attend. Ex. 161; Ring June 4, 1998 Tr. at 85–88. Kottmyer was told that day that the ceremony would be held on October 29, 1989, near Wellington Circle. Kottmyer Aug. 12, 1998 Tr. at 87–88, Aug. 13, 1998 Tr. at 141. She was not told Federico was expected to be there. Aug. 13, 1998 Tr. at 141.

As indicated earlier, on October 25, 1989, it was agreed that Sullivan could review Mercurio's informant file on certain conditions. Ex. 168. That review was conducted on October 26, 1989. June 6, 1998 Tr. at 8–9 (Under Seal). In the course of that review, Ring told Sullivan and Kottmyer that Mercurio had not been promised that he would not be prosecuted. *Id.*

As the review she had demanded had occurred, there was from Kottmyer's perspective no longer any impediment to pursuing indictments of Russo, Mercurio, and their colleagues. Kottmyer Aug. 12, 1998 Tr. at 73–76. Thus, on October 27, 1989 Kottmyer sent Ahearn a memorandum. June 6, 1998 Tr. at 9 (Under Seal); June 15, 1998 Tr. at 20–21; Kottmyer Aug. 12, 1998 Tr. at 73–76, Aug. 13, 1998 Tr. at 95. Kottmyer wrote that indictments against the current leadership of the LCN would be returned in the near future. *Id.* Therefore, as previously discussed, Mercurio's status as an informant would have to cease when he or any of his putative codefendants were arrested. *Id.* Kottmyer directed the FBI to tell Mercurio that he should not contact the Bureau except to report a threat of violence or a planned obstruction of justice. Kottmyer Aug. 13, 1998 Tr. at 95–98. Kottmyer understood that these principles had been generally discussed with Mercurio previously and that the FBI would soon implement them. *Id.*

In addition, Kottmyer wrote that, "[i]n accordance with Bureau policy, all contacts between informant and FBI will be documented so that a full and complete record of the relationship between the informant and the Bureau exists." June 15, 1998 Tr. at 20–21 (Under Seal). This policy was not, however, followed with regard to Mercurio, either before or after Kottmyer's October 27, 1989 memorandum.

Knowing that Federico was scheduled to attend the October 29, 1989 induction ceremony, Delamontaigne caused one of the FBI's employees, George Hurley, to obtain Federico's furlough application. Hurley Aug. 17, 1998 Tr. at 19. By the early morning of October 27, 1989, Ring had received and reviewed that application. Ring June 19, 1998 Tr. at 64–65; Steffens Aug. 6, 1998 Tr. at 54–55; Ex. 205. The application indicated that on October 29, 1989, Federico was planning to go to 34 Guild Street, Medford, which was near Wellington Circle. Ex. 205. Ring knew that prior surveillances had shown that Federico had gone to the destination listed on his furlough application in the past. Ring June 5, 1998 Tr. at 16–17; Kottmyer Aug. 12, 1998 Tr. at 182.

Accordingly, Ring sent several agents to conduct surveillance of that address. Ring June 5, 1998 Tr. at 17; Steffens Aug. 6, 1998 Tr. at 54. He also told Kottmyer that Federico's furlough application listed 34 Guild Street as his destination. Kottmyer Aug. 12, 1998 Tr. at 110.

On the morning of October 27, 1989, knowing that it was Friday and there was a great deal of information to review, Kott-

myer provided a draft of the application and Steffens affidavit to District Judge David S. Nelson. Kottmyer Aug. 13, 1998 Tr. at 95. However, at about the same time, a major impediment to proceeding with the application arose. Ring June 4, 1998 Tr. at 65–78, June 5, 1998 Tr. at 29–30, 45; June 22, 1998 Tr. at 57–60.

By the morning of October 27, 1989, Ring had informed the Organized Crime Section at FBI Headquarters that he intended to arrest Russo, Ferrara, and Carrozza at the conclusion of the forthcoming induction ceremony. *Id.* at 68. Ring and his colleagues believed that immediate arrests were important to avert a repetition of violence comparable to the Salemme shooting and to eliminate the risk of flight. Ring June 4, 1998 Tr. at 68, June 15, 1998 Tr. at 165; Ex. 183. As the head of the Organized Crime Section, however, Moody was concerned that those arrests would result in the prompt disclosure of the Steffens affidavit and, therefore, revelation of the ongoing electronic surveillance being conducted in Connecticut. *Id.* Moody was unwilling to jeopardize the electronic surveillance in Connecticut. *Id.* Thus, he refused to provide his required approval for the application for the Boston warrant unless Ring abandoned his plan to make immediate arrests. *Id.* Later that morning, Ring reluctantly acquiesced in this demand. *Id.* As a result, Ring expected that the FBI and Department of Justice would soon authorize the application for the warrant for a roving bug. Ring June 5, 1998 Tr. at 45.

On October 30, 1989, Ahearn wrote to the Director of the FBI about the dispute with Moody. Ex. 183. Among other things, Ahearn stated that:

> In the [October 27, 1989 telephone calls], Section Chief MOODY advised SAC, Boston that the New Haven Division objected to the arrest plan, in that it could expose their wire. MOODY then advised that Boston would have to "compromise," and could either effect the arrests, or make the interceptions, but the affidavits would not be approved if Boston insisted on the arrests. MOODY was informed that Acting Strike Force Chief DIANE KOTTMYER, whose office also covers the New Haven Division, had discussed New Haven's concern, and both she and the Strike Force Attorney responsible for New Haven's interception were confident that a protective order could be secured to prevent any disclosure for at least six months.
>
> The Bureau had an outstanding opportunity for the first time ever, of overhearing and recording an LCN induction ceremony, which would be invaluable for years to come at other LCN trials and Congressional Hearings. Forced to choose, SAC, Boston decided that he would delay arrests and proceed with the interception which, if accomplished, could have a major effect on the Bureau's national strategy against the LCN. Faced with this unfortunate, and avoidable dilemma, SAC, Boston informed FBIHQ that responsibility for injury or death to any individuals, either LCN members or innocent citizens, rested entirely on the shoulders of FBIHQ.

Id. This memorandum was written because on October 30, 1989, Ring and his colleagues were still seeking authority from Headquarters to make arrests as soon as possible. Ring June 19, 1998 Tr. at 57. As it indicates, on and after October 27, 1989, neither Ring nor Ahearn wished to delay arrests in an attempt to conduct additional electronic surveillance after the induction ceremony was intercepted.

At about 12:50 p.m. on October 27, 1989, several FBI agents observed Russo, Ferrara, and Mercurio arrive at 34 Guild Street, with a person who proved to be its owner, Stephen DiStefano. Steffens Aug. 10, 1998 Tr. at 76. They promptly reported this to Steffens and Ring. *Id.*, Aug. 6, 1998 Tr at 54–55; Ring June 4, 1998 Tr. at 136–37, June 5, 1998 Tr. at 18–19, 21. The surveillance agents were excited. Steffens Aug. 6, 1998 Tr. at 54–55. Steffens also

understood that the information was significant, in part because Steffens knew that Federico was expected to be at the ceremony and had stated that he would be at 34 Guild Street on the morning of October 29, 1989. Steffens Aug. 6, 1998 Tr. at 54, 57. Ring told Kottmyer about the observations at 34 Guild Street by about 2:00 p.m. on October 27, 1989. Kottmyer Aug. 12, 1998 Tr. at 111.

After leaving 34 Guild Street, Mercurio returned to the vicinity of Vanessa's and called Ring. Ring Sept. 22, 1998 Tr. at 131; Mercurio Aug. 4, 1998 Tr. at 29–30. Ring memorialized their conversation in a 209, which stated:

> On 10/27/89, [Mercurio] advised that VINNIE FEDERICO will go to 34 Guild Street, Medford, the residence of his brother-in-law, on Sunday 10/29/89, and that the LCN making ceremony will take place at the location around 11:00 a.m. FEDERICO's brother-in-law and sister will vacate the house on Saturday afternoon as the sister knows nothing about the use of the house but the brother-in-law does.

Ex. 161; Ring June 4, 1998 Tr. at 138–39. Mercurio told Ring that he was "sure" that the ceremony would be held at 34 Guild Street. Mercurio Aug. 14, 1998 Tr. at 100. Ring told Mercurio that the FBI had observed him at 34 Guild Street. Mercurio Aug. 4, 1998 Tr. at 30, Aug. 5, 1998 Tr. at 54–55.

Neither Kottmyer nor Steffens was told on October 27, 1989 that Mercurio had spoken to Ring or that he had provided additional information identifying the location of the induction ceremony. Kottmyer Aug. 12, 1998 Tr. at 114; Steffens Aug. 6, 1998 Tr. at 100; Ring June 19, 1998 Tr. at 74. Thus, neither Kottmyer nor Steffens knew before applying for the warrant for a roving bug that Mercurio had confirmed that the induction ceremony would be held at 34 Guild Street. *Id.* at 114, 116. In essence, Ring provided Kottmyer with relevant information from other sources, particularly Federico's furlough application and the surveillance of 34 Guild Street, but did not share with her before the application for a roving bug was filed the information provided by Mercurio that strongly reinforced the fact that on the afternoon of October 27, 1989, it was practical to specify the location that would be bugged to achieve the FBI's sole goal—the interception of the induction ceremony. *Id.* The failure to provide this information to Kottmyer prevented her from considering on a fully informed basis whether it continued to be legally permissible to omit any reference to the ceremony from the application, which had not yet been approved by the Department of Justice or formally submitted to the court.

On the afternoon of October 27, 1989, it was not too late to revise the documents that had been submitted for approval to FBI Headquarters and the Department of Justice. At times, the Department of Justice "had compressed the entire normal review process into a few hours in appropriate situations." Ex. HHHH; Kottmyer Aug. 14, 1998 Tr. at 169. Moreover, Kottmyer had faxed changes in proposed applications to the Department of Justice in the past. *Id.* at 71. She knew that she could always fax proposed changes to the Department. *Id.* at 91.

In the late afternoon of October 27, 1989, Connolly, who had been out of town on business, returned to Boston. Ex. 249. After closing Vanessa's at 5:00 p.m., Mercurio met Connolly and Ring in a hotel room. Mercurio Aug. 4, 1998 Tr. at 33; Kottmyer Aug. 14, 1998 Tr. at 160–62. They spoke for twenty to thirty minutes. Mercurio Aug. 4, 1998 Tr. at 38, Aug. 5, 1998 Tr. at 93. Mercurio reaffirmed that the ceremony was a "definite go" for 34 Guild Street, on October 29, 1989. Mercurio Aug. 4, 1998 Tr. at 36. As Ring testified, Mercurio was not asked if he would wear a device to record the ceremony or testify about it. Ring June 19, 1998 Tr. at 94–95, Sept. 22, 1998 Tr. at 136–37. Contrary to FBI policy and practice, neither Ring nor Connolly prepared a 209 or any

other written record of this meeting with Mercurio.

Mercurio understood from his conversation with Ring and Connolly that the FBI would try to bug the ceremony. Mercurio Aug. 5, 1998 Tr. at 94. He thought that this would be difficult because he expected that Russo or Ferrara would be at 34 Guild Street after the DiStefanos left. *Id.*

Late in the afternoon of October 27, 1989, Kottmyer received by fax the approval of the Department of Justice to submit her application for a roving bug to Judge Nelson. Kottmyer Aug. 14, 1998 Tr. at 71. She and Steffens met with the judge, who entered the government's proposed order at 6:25 p.m. on October 27, 1989. Ex. 204 (Under Seal).

As previously described, at the time that the application incorporating Steffens' affidavit was formally filed, it was not accurate for the government to represent that it was "impractical" to identify the location where the proposed bug would be employed. The government had substantial, reliable, corroborated information indicating that the ceremony would be held at 34 Guild Street and no information that the ceremony would be held any place else in Massachusetts. Kottmyer Aug. 12, 1998 Tr. at 174.

Kottmyer testified that if she had been fully informed of the information Mercurio had previously provided to Ring, and was not concerned about singularity, she would have filed an application for a conventional warrant for 34 Guild Street and another application for a warrant authorizing a roving bug. Kottmyer Aug. 14, 1998 Tr. at 177–79. As described earlier, concerns about singularity do not justify a failure to make the full and complete statement required by § 2518(11)(a)(ii). If, however, two applications had been filed, the judge would have been properly presented with the issue of whether, in the circumstances, the issuance of anything more than a conventional warrant to bug 34 Guild Street was appropriate. *See* 18 U.S.C. § 2518(3) (1994) ("[T]he judge may enter an *ex parte* order, as requested or as modified . . .").

As indicated earlier, the judge was not informed that the warrant he was being asked to issue would be used to intercept a forthcoming Mafia induction ceremony, in which at least one FBI informant would participate. Thus, he was deprived of the opportunity to question whether any form of court ordered electronic surveillance was really necessary at all. *See* 18 U.S.C. § 2518(2) (1994) ("The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.").

On the afternoon of Saturday, October 28, 1989, surveillance agents observed the DiStefanos pack their suitcases in their car and leave home, as Mercurio had said they would. Kottmyer Aug. 12, 1998 Tr. at 172–75, Aug. 14, 1998 Tr. at 9–10. The warrant that had been issued required that, if possible, Kottmyer inform the judge in advance of any surreptitious entry. Ex. 204. Thus, after the DiStefanos departed it was necessary for Ring to persuade Kottmyer to attempt to reach the judge to inform him that a bug was going to be installed. *Id.* at 130–31, 174; Ex. 204. Accordingly, on the afternoon of October 28, 1989, Ring told Kottmyer about his discussions and meeting with Mercurio the day before. Kottmyer Aug. 12, 1998 Tr. at 130–31. More specifically, Ring then told Kottmyer for the first time that Mercurio had the day before identified 34 Guild Street as the location for the ceremony. Kottmyer Aug. 12, 1998 Tr. at 115–16, 130. Ring characterized this information as "rock solid." *Id.* at 130. As indicated earlier, this information could and should have been shared with Kottmyer on the afternoon of October 27, 1989.

Kottmyer tried unsuccessfully on Saturday, October 28, 1989, to reach the judge. *Id.* at 64. The entry and necessary installation at 34 Guild Street was made that evening. Ring June 5, 1998 Tr. at 102–03. Kottmyer eventually spoke to the judge on

the morning of Sunday, October 29, 1989, and told him that the entry had been made. Kottmyer Aug. 12, 1998 Tr. at 64.

On October 29, 1989, events developed precisely as Mercurio had said they would. Mercurio drove some of the participants from Wellington Circle to 34 Guild Street. Mercurio Aug. 4, 1998 Tr. at 126. There, Federico, DeLuca, Floramo, and Tortora were inducted as members of the Patriarca Family. Ex. 203 (Under Seal). As Kottmyer explained in her report to the judge:

> Interception of oral communications at [34 Guild Street] commenced at 9:47 a.m., October 29, 1989, after Vincent M. Ferrara and Joseph A. Russo were observed entering the house. Interception was terminated at 4:32 p.m. when Ferrara and Russo were observed leaving the house. The recorded communications memorialize a meeting of approximately seventeen known members of the Patriarca Family of La Cosa Nostra ("LCN") held for the purpose of inducting or "baptizing" four additional individuals into the Patriarca Family. In addition to Russo, Ferrara and Carrozza, the following Patriarca Family members were present: Raymond J. Patriarca, Matthew L. Gulielmetti, Jr. and Pasquale Gallea from Providence, Rhode Island; Louis Failla and Dominic "Slats" Marangelli from Connecticut; Gaetano Milano from Springfield, Massachusetts; and a number of LCN members from the Boston area, including Biagio Digiacomo and Charles Quintina.
>
> The intercepted communications establish that Patriarca is the Boss of the Patriarca Family, Russo is Consigliere to the Family and Ferrara, Carrozza, Guglielmetti, DiGiacomo, and Quintina are Capo Regimes. Following introductory remarks by Patriarca in which he referred to past "problems" which he stated that he and Russo had resolved, individual ceremonies were held at which Vincent Federico, Robert DeLuca, Carmen Tortora and Richard Floramo were "baptized" as Soldiers in the Family. Each took an oath swearing, among other things, that he would abide by "omerta," the code of silence. On at least two occasions, the inductee promised to kill without hesitation any police informant posing a threat to the Family, even if the informant were his son or brother. During the ceremony, each inductee was required to identify the finger with which he pulls "the trigger" which was then apparently cut to draw blood for use in the ritual.
>
> Following the induction, an explication of some of the rules of La Cosa Nostra was given by Russo, Ferrara, DiGiacomo and others. Among the rules discussed was each Soldier's obligation to obey his Capo Regime and his obligation not to disclose that he was a "Friend of Ours," *i.e.*, a member of La Cosa Nostra, to another person unless that person had been formally introduced to him by another member as a "Friend of Ours." Russo instructed each inductee that in the event of a disagreement with his Capo Regime, he should bring the matter to the attention of Russo who, as Consigliere, would render a decision.

Id. Thus, as Ahearn characterized it the next day, "[t]he Bureau ... for the first time ever, ... overhear[d] and record[ed] an LCN induction ceremony, which would be invaluable for years to come at other LCN trials and Congressional Hearings." Ex. 183.

On the evening of October 29, 1989, Mercurio called Ring. Ring June 15, 1998 Tr. at 154–55. There had been a television on for part of the ceremony, which interfered with the bug's ability to record clearly what was being said. Ex. 203. Mercurio told Ring that he had turned the television down. *Id.* at 163. Ring understood that Mercurio was indicating that he knew that the ceremony was bugged and had tried to facilitate the recording of it. *Id.* Ring knew that if he acknowledged that he was aware that the television had been turned down, he would be confirming

that the ceremony had been bugged. *Id.* at 148. Ring also knew that if he confirmed that the ceremony had been bugged, Mercurio would understand that his indictment was imminent and would flee. *Id.* at 149. Nevertheless, Ring told Mercurio that he was aware that Mercurio had turned the television down, and admonished him not to mention the matter to anyone else because it could jeopardize Mercurio's safety. *Id.* at 148–49.

At some time prior to November 17, 1989, possibly in the October 29, 1989 telephone conversation with Ring, Mercurio was, as directed by Kottmyer, also told not to contact the FBI again except to report a threat of violence or an effort to obstruct justice. Ex. 169. This too signaled to Mercurio that it was time to "disappear." Mercurio Aug. 5, 1998 Tr. at 127.

At the end of their conversation on October 29, 1989, Ring believed that Mercurio was saying goodbye and that he would not hear from Mercurio again. Ring June 15, 1998 Tr. at 147–48, June 22, 1998 Tr. at 66. Ring, however, prepared no 209 or other written record of that conversation. Ring June 15, 1998 Tr. at 154; Ex. 161. Nor did Ring then initiate any efforts to find Mercurio. Ring June 22, 1998 Tr. at 66.

On October 30, 1989, Mercurio spoke to Connolly. Mercurio Aug. 4, 1998 Tr. at 40, Aug. 5, 1998 Tr. at 75. In response to a question, Connolly confirmed that Mercurio had been tracked by airplane while driving to 34 Guild Street. *Id.* Mercurio and Connolly also discussed the television being turned down. *Id.* Following his conversation with Connolly, Mercurio left Boston in an effort to "lay low." Mercurio Aug. 4, 1998 Tr. at 135, Aug. 5, 1998 Tr. at 78.

Mercurio's departure from Boston at about the time of Flemmi's return from Asia on October 31, 1989, causes the court to doubt Flemmi's claim that Mercurio told him that the FBI had tipped Mercurio off to his imminent indictment. Flemmi Sept. 1, 1998 Tr. at 24–25. If Flemmi were aware that this occurred, it is more likely that he and Bulger were told by Connolly. *Id.*; Flemmi Aff., Apr. 27, 1998. In any event, the court concludes that Mercurio was alerted by the FBI that it was time for him to act on his previously expressed intention to become a fugitive, and he did so.

Although they had frequently requested meetings in the past, neither Ring nor Connolly sought to meet with Mercurio after October 29, 1989. Mercurio Aug. 4, 1998 Tr. at 143, 156. However, between October 30 and November 14, 1989, the FBI was able to contact Mercurio by leaving messages at Vanessa's. Mercurio Aug. 4, 1998 Tr. at 136. On November 10, 1989, Mercurio told Ring that Russo and Ferrara had returned to Boston from Atlantic City. Ex. 161; Ring June 15, 1998 Tr. at 153.

On November 13, 1989, Mercurio told Ring that Russo, Ferrara, and Carrozza were all in the Boston area. Ex. 161; Ring June 15, 1998 Tr. at 151. Mercurio, however, was not in Massachusetts. Mercurio Aug. 4, 1998 Tr. at 57. Nor did Ring expect him to be in Massachusetts because Ring knew that Mercurio would not stay around to be arrested. Ring June 15, 1998 Tr. at 152.

After the conversation on November 13, 1989, a memorandum that was reviewed, if not written, by Ring was sent to FBI Headquarters, stating that:

> Based upon previous review by the Boston Division PLA and discussion with the Boston Division Organized Crime Strike Force Chief, Boston is closing contact with [Mercurio] effective 11/13/89.
>
> This informant has been instructed to initiate no further contact with the FBI unless a) there is a threat to life or physical well being; b) information as to corruption of the judicial process. Any contact for these limited purposes will be with other than the primary contact or alternate contact agent.

Ex. 169; Ring June 9, 1998 Tr. at 50–51.

Like Ring, Kottmyer knew that Mercurio was not in Boston in mid-November

1989. On November 14, 1989, after consultation with Ring, Kottmyer obtained from a magistrate complaints authorizing the arrest of Russo, Ferrara, Carrozza, Mercurio, and Lepore. Ex. 201. She understood at the time, however, that Mercurio and Lepore could not then be located. *Id.*

In fact, Connolly and Ring could have contacted Mercurio by calling Vanessa's. Mercurio Aug. 4, 1998 Tr. at 136. Mercurio had always returned Connolly's calls, and met with him and Ring whenever asked. Mercurio Aug. 5, 1998 Tr. at 135. The FBI, however, made no effort to contact, meet with, or arrest Mercurio. Ring June 22, 1998 Tr. at 64–66. Ring established separate teams to arrest Russo, Ferrara, and Carrozza. Ring June 15, 1998 Tr. at 165–66, June 22, 1998 Tr. at 64–66. No team was established to try to find and arrest Mercurio, who was then in Florida. *Id.*; Mercurio Aug. 5, 1998 Tr. at 81.

On November 13, 1989, Judge Nelson was advised that Russo, Ferrara, and Carrozza would soon be arrested and, therefore, there would be no further effort to employ the roving bug he had authorized. Kottmyer Aug. 14, 1998 Tr. at 20; Ex. 203. In fact, consistent with the FBI's original intent, there had been no genuine effort to do so after the induction ceremony was intercepted on October 29, 1989.

Accordingly, Mercurio received the benefit of his bargain with the FBI—an opportunity to become a fugitive. Because Mercurio was not present for the proceedings concerning his codefendants, the FBI and the government did not in the Russo case have to grapple with the vexing issues arising from Mercurio's service as an informant about which—as the instant case vividly demonstrates—Kottmyer had been so correctly concerned.

31. *Mercurio as a Fugitive*

The conduct of the FBI concerning Mercurio when he was a fugitive is instructive with regard to Flemmi's claim that Bulger and he were informed of the imminent indictment in this case so that they could flee. Indeed, it is important to understanding the relationship between Quinn and Connolly, which is relevant to that claim.

On November 16, 1989, Russo, Mercurio, and others were initially indicted. *See Ferrara*, 771 F.Supp. at 1281. The original indictment did not include any reference to the October 29, 1989 induction ceremony and, therefore, presented no threat of prematurely disclosing the continuing electronic surveillance being conducted in Connecticut. *Id.* On March 22, 1990, a superceding indictment was returned which included charges relating to that ceremony. *Id.*

A fugitive investigation concerning Mercurio, and a related file, were opened shortly after November 16, 1989. Carter. Aug. 17, 1998 Tr. at 67. Carter, the case agent for the Russo prosecution, was in charge of the Mercurio fugitive investigation. *Id.* at 67; Quinn Aug. 19, 1998 Tr. at 16–17. Carter knew that Mercurio was an informant who had provided important information that led to the interception of the Mafia induction ceremony at 34 Guild Street. Carter Aug. 17, 1998 Tr. at 58. He also knew that Connolly and Ring were Mercurio's handlers. *Id.* at 65.

Carter and Connolly were "close friends" as well as colleagues. *Id.* Nevertheless, Carter did not ask Connolly to help him find Mercurio. *Id.* at 94–95. Connolly and Ring told Carter that they did not know where Mercurio was. *Id.* at 143. They did not tell Carter that they had always been able to contact Mercurio through Vanessa's or that he had attended meetings whenever asked to do so. *Id.* at 69–70.

After becoming a fugitive, Mercurio called Connolly every several months. Mercurio Aug. 4, 1998 Tr. at 60, 63, Sept. 16, 1998 Tr. at 86. This practice continued after Connolly retired from the FBI in December 1990. *Id.* The fact that Mercu-

rio was calling Connolly would have been significant information for Carter to receive. Carter Aug. 17, 1998 Tr. at 144. Connolly, however, never told Carter about Mercurio's calls. *Id.* at 71, 144.

It appears that Connolly also did not tell Carter's supervisors that he was in contact with Mercurio. Quinn Aug. 19, 1998 Tr. at 28. Ring retired from the FBI in the summer of 1990. Ring June 4, 1998 Tr. at 45. He was succeeded as the supervisor of the Organized Crime squad by Quinn, who served in that capacity for the next five years. Quinn Aug. 19, 1998 Tr. at 9. Quinn and Connolly had worked together for more than fifteen years and were, according to Quinn, also "close friends." *Id.* at 14–15. Connolly should have told his supervisors about Mercurio's calls. Ring June 19, 1998 Tr. at 105. Quinn and Ring each testified, however, that Connolly did not tell them that Connolly was speaking to Mercurio during the time that Mercurio was a fugitive. *Id.*; Quinn Aug. 19, 1998 Tr. at 28.

In 1991, the FBI, the DEA, and other agencies were conducting a joint drug investigation of Mercurio's brother Michael, Anthony D'Amore, and others. Hobbs Aug. 11, 1998 Tr. at 13. Special Agent Joseph Hobbs was the lead FBI agent in the joint investigation. Michael Cunniff was his DEA counterpart.

On July 3, 1991, Sonny Mercurio also became a target of the joint investigation. Ex. 199; Cuniff Aug. 11, 1998 Tr. at 11, 28. More specifically, an investigation targeting him was then opened because Ronald Jacobson, a reliable cooperating witness, had reported that Sonny Mercurio, Michael Mercurio, and others were planning to smuggle in excess of 2000 kilograms of marijuana into Massachusetts. Ex. 199. On July 4, 1991, it was further reported that Sonny Mercurio was in Massachusetts, but was planning to go to California to purchase marijuana and drive it back to Massachusetts. Ex. 208; Cuniff Aug. 11, 1998 Tr. 11, 28. All of this information was provided to Hobbs, who knew that Sonny Mercurio was a fugitive. Cuniff Aug. 11, 1998 Tr. at 21–22; Hobbs Aug. 11, 1998 Tr. at 13.

On July 4, 1991, Jacobson attended a barbecue at Michael Mercurio's home in Woburn, Massachusetts. Ex. 256; Hobbs Aug. 11, 1998 Tr. at 26–27, 33–34, 29–30, 43. Sonny Mercurio was present. Mercurio Sept. 16, 1998 Tr. at 78. Immediately after the barbecue, Jacobson met with Hobbs and reported that:

> CW [Jacobson] was at a party given by MICHAEL MERCURIO at 30 Squanto Road, Woburn, MA on July 4, 1991. While attending the party, CW was told by MICHAEL MERCURIO and ANTHONY DAMORE that "SONNY" MERCURIO was in the house. CW was later pointed out to an individual and told that was Sonny. CW described this individual as having short crew-cut cropped gray hair, bushy eyebrows, white/gray mustache, heavy set. CW stated SONNY was with an individual named RICHIE (LNU), who had served some time with Sonny in the past. RICHIE (LNU) had three sons who were also at the party.
>
> CW learned from ANTHONY DAMORE and MICHAEL MERCURIO that Sunday July 7, 1991, a boat was going to be rented or charted and leave from the wharf where the Marriott is located. There was going to be an all day long party on the boat which would be leaving around 9:45 a.m. SONNY, MICHAEL, DAMORE and others would be on the boat, along with several "girls." [56]

56. Prior to Mercurio's testimony on August 4, 1998, in the course of *ex parte* proceedings not involving the defendants, the court discerned that an FBI informant had in July 1991 been credited with saving Mercurio's life by providing information that kept Mercurio from being on a boat as previously planned. Aug. 17, 1998 Tr. at 1–5 (Under Seal). In response to a question from the court, Mercurio testified that he was in New York in July 1991. Mercurio Aug. 5, 1998 Tr. at 128–29. The court subsequently ques-

Ex. 256.[57]

On July 5, 1991, Quinn, who was then the supervisor of the Organized Crime squad, received two important reports concerning Mercurio. More specifically, Quinn received a telephone call from another FBI agent who reported information that he had just received from an informant Quinn knew to be reliable. Quinn Aug. 19, 1998 Tr. at 23–31. Quinn was told that Salemme[58] and others in the LCN had determined that Mercurio was an FBI informant and the source for the bugging of 34 Guild Street, in part because an unidentified FBI agent had disclosed this to an unnamed fireman. *Id.* Therefore, it was expected that Mercurio would be killed if Salemme or his associates could find him. *Id.*

Quinn knew that Mercurio was an informant who was instrumental to the bugging of 34 Guild Street. *Id.* at 17–19. He regarded the threat to Mercurio as a serious and urgent matter. *Id.* at 33, 116.

In addition, on July 5, 1991, Hobbs gave Quinn and Carter the information about Sonny Mercurio that he had received from Jacobson the day before. Hobbs Aug. 11, 1998 Tr. at 34–39; Quinn Aug. 19, 1998 Tr. at 40–43; Carter Aug. 17, 1998 Tr. at 74–83, 94. Carter told Hobbs, among other things, that an attempt to arrest Mercurio at the wharf would be made on July 7, 1991. Hobbs Aug. 11, 1998 Tr. at 73, 90. Hobbs told Cuniff that the FBI's Organized Crime squad would make that effort and pursue any other leads relating to Sonny Mercurio. Cuniff Aug. 11, 1998 Tr. at 23, 31.

Carter understood that the individual named "Richie" who was with Mercurio on July 4, 1991 was Richard Floramo. Carter Aug. 17, 1998 Tr. at 81–82. Quinn undoubtedly understood this as well. As Floramo had been made a member of the Patriarca Family on October 29, 1989, Quinn would also have recognized that because Floramo knew where Mercurio was on July 4, 1989, Mercurio might be in imminent danger of being killed.

If standard practice and procedure had been followed, Quinn would have immediately told Carter about the information that he had received concerning the threat to Mercurio's life. Quinn Aug. 19, 1998 Tr. at 44–45; Carter Aug. 17, 1998 Tr. at 50, 61. Ordinarily, it would have been Carter's responsibility to try to warn Mercurio by telling his family about the threat. *Id.* Quinn did not, however, tell Carter about the information regarding the threat to Mercurio. Carter Aug. 19, 1998 Tr. at 55–57, 60–61; Quinn Aug. 19, 1998 Tr. at 135.

Instead, Quinn called Connolly. Quinn Aug. 19, 1998 Tr. at 21. Quinn told Connolly that Salemme and others had determined that Mercurio was an FBI source for the interception of the Mafia induction ceremony, in part because an FBI agent had disclosed this to a fireman. Quinn Aug. 19, 1998 Tr. at 50–52. Among other things, common sense compels the court to conclude that Quinn also told Connolly that

tioned Quinn *in camera*. Aug. 11, 1998 Tr. (Under Seal). The court later told the defendants of the information that it had received *ex parte*, without identifying the source. Aug. 17, 1998 Tr. at 1–5 (Under Seal). Carter and Quinn publicly testified about the boat matter on August 17, 18, and 19, 1998. On September 16, 1998, Mercurio appeared again and testified that he had been in Massachusetts, rather than New York, on July 4, 1991, and, indeed, had at that time been in Massachusetts for several months. Mercurio Sept. 16, 1998 Tr. at 77–78, 87.

57. Hobbs prepared the 302, which is Ex. 256, on July 11, 1991. Ex. 256. A copy was sent to Carter. *Id.*; Hobbs Aug. 11, 1998 Tr. at 48–49, 84. The 302 should have been maintained in the Mercurio fugitive file. *Id.* at 91; Carter Aug. 17, 1998 Tr. at 122; Quinn Aug. 19, 1998 Tr. at 62. It was not. Carter Aug. 17, 1998 Tr. at 122.

58. Quinn testified that he recalled that he was told that it was Manacchio who believed that Mercurio was an FBI informant. Quinn Aug. 19, 1998 Tr. at 50. The source who prompted the conversation with Quinn had reported that Salemme had determined that Mercurio was an informant. The court infers that Quinn was accurately informed of this fact.

it had been reliably reported that Mercurio was then in the Boston area, was known to be planning to get on a boat near the Marriott on July 7, 1991, and, therefore, was in particular danger. Quinn asked Connolly to find a way to inform Mercurio of the situation. *Id.* at 28, 50–52. Connolly said that he would contact Frank Pagano, a friend of the Mercurio brothers, and ask him to convey the message promptly to Michael Mercurio. *Id.*

Quinn made no written record of his discussion with Connolly. *Id.* at 163. Nor did he ever tell Carter about it. Carter Aug. 17, 1998 Tr. at 66–67, 145.

Quinn expected that if Sonny Mercurio received the message being sent to him through Connolly, he would leave Boston immediately. Quinn Aug. 19, 1998 Tr. at 54, 56, 117–18, 121. Thus, Mercurio would not, as previously planned, be at the wharf for the boat trip on July 7, 1991. *Id.* Quinn's expectation was accurate.

Mercurio promptly received Connolly's message. On July 6, 1991, Michael Mercurio told D'Amore that he had received a call from a "friend," evidently Pagano, who had warned him that the "feds" knew that his brother was in the Boston area. D'Amore Oct. 1, 1998 Tr. at 85–86, 141–43, 151–52. As a result, Michael Mercurio said Sonny Mercurio had to leave town immediately. *Id.* at 86. Sonny Mercurio did leave Boston and went to California. Mercurio Sept. 16, 1998 Tr. at 80. As he testified, Mercurio "got word" from "somebody" that an agent had said that if he talked to Mercurio he should tell him that Mercurio was on Salemme's "hit list" and was going "to get himself killed." Mercurio Aug. 4, 1998 Tr. at 62. Mercurio called Connolly to discuss this. *Id.* at 62–63. Connolly confirmed that Mercurio's life was in danger. *Id.*

On July 7, 1991, Carter led a team of FBI agents to the wharf where it had been reported that Mercurio was planning to be. Carter Aug. 17, 1998 Tr. at 83, 94; Quinn Aug. 19, 1998 Tr. at 44. Typically, as the supervisor of the Organized Crime squad, Quinn would have been present if it were expected that a fugitive might be arrested. Quinn Aug. 19, 1998 Tr. at 56. Quinn did not, however, join Carter on July 7, 1991. *Id.*

Carter and his colleagues observed Michael Mercurio at the wharf on July 7, 1991. Carter Aug. 17, 1998 Tr. at 83–84. Sonny Mercurio, however, was not there. *Id.* Carter reported this to Quinn and Hobbs. Carter Aug. 17, 1998 Tr. at 47; Hobbs Aug. 11, 1998 Tr. at 42. Although a written record of this surveillance should have been made, none was prepared. *Id.* at 62; Quinn Aug. 19, 1998 Tr. at 59–60; Carter Aug. 17, 1998 Tr. at 88.

Quinn subsequently spoke to the agent whose informant had on July 5, 1991 reported the threat to Mercurio's life. Quinn Aug. 19, 1998 Tr. at 89–91. As a result, on July 24, 1991, an entry was made in the informant's file which stated that, "[s]ource furnished information concerning LCN knowledge of subject's identity as source for FBI and planned hit saving source's life." *Id.* at 123. The informant was told that Mercurio was planning to go on a boat, but did not because of the information he had provided and, as a result, Mercurio's life had been saved. *Id.* at 124. Carter, however, was never given this information. Carter Aug. 17, 1998 Tr. at 69–70, 72, 122, 124, 126.

Following July 7, 1991, there were several obvious avenues of investigation that were not pursued as part of the Mercurio fugitive investigation. Although Mercurio was known to have been at his brother's home in Woburn on July 4, 1991, no surveillance of that location was conducted. Quinn Aug. 19, 1998 Tr. at 63. Nor was Jacobson interviewed as part of the Mercurio fugitive investigation. *Id.* at 64. Similarly, the information that the FBI had indicating that Mercurio would be in Los Angeles in connection with the contemplated marijuana deal should have caused Carter to contact the FBI's Los Angeles office, but this was not done. *Id.*

at 72, 152; Ex. 209. However, the marijuana delivery to Jacobson that had been planned to occur shortly after July 4, 1991, which Cuniff hoped would result in Sonny Mercurio's arrest and prosecution, was never made. Cuniff Aug. 11, 1998 Tr. at 18–20.[59]

In August 1991, Carter heard a "rumor" that Mercurio's life was in danger. Carter Aug. 17, 1998 Tr. at 50–51, 90, 123, Aug. 18, 1998 Tr. at 90–91. Carter promptly approached Michael Mercurio to convey that information and to ask him to encourage his brother to turn himself in. *Id.* This effort was unavailing. *Id.*

Mercurio was eventually arrested in Georgia, on state drug charges, in 1994. Mercurio Aug. 4, 1998 Tr. at 51–54. Soon after, he was visited by FBI agent Michael Buckley and a colleague. *Id.* Mercurio told them that if the state charges were not dismissed, he preferred to be sentenced in Georgia before returning to Boston to deal with the federal charges against him. *Id.* Buckley then gave Mercurio the telephone number of an FBI agent in Atlanta to call if Mercurio needed anything. *Id.*

Before returning to Boston, Mercurio, through his attorney, began negotiating a plea agreement concerning the federal charges against him. *See United States v. Mercurio,* 89–CR–289–MLW, Government's Submission Concerning Sentencing (Sept. 6, 1996) at 9. On July 31, 1995, after Mercurio had returned to Boston, the government informed Magistrate Judge Lawrence Cohen, who was handling pretrial discovery matters, that Mercurio had served as an FBI informant and requested authority to disclose certain statements previously made by Mercurio to him directly, rather than through his lawyers. *Salemme,* 978 F.Supp. at 357 n. 9. The magistrate judge granted the request, and impounded the motion and Order. *Id.* Neither the magistrate judge nor the government informed this court, to which Mercurio's case was assigned, of these matters or of Mercurio's status as an informant. *Id.*

FBI agents did, however, promptly meet with Mercurio. Mercurio Aug. 4, 1998 Tr. at 53–54. Mercurio said that he did not want copies of his statements to be provided to him or his attorney. Mercurio Aug. 5, 1999 Tr. at 99. Thus, the documents that would have disclosed that Mercurio was an informant were not included in the discovery provided to his attorney on August 1, 1995. *See United States v. Mercurio,* 89–CR–289–MLW Docket Entry No. 1187.

When Mercurio fled in 1989, he believed that if he were ever apprehended, he would be dealt with more leniently than if he had been arrested with his codefendants. Mercurio Aug. 5, 1998 Tr. at 137–38. Mercurio was correct. Russo, Ferrara, Carrozza, Lepore, and Tortora received sentences of between thirteen and twenty-two years in prison. *Carrozza,* 807 F.Supp. at 158–59. The government, however, entered into a binding plea agreement with Mercurio, pursuant to Fed. R.Crim.P. 11(e)(1)(C), and persuaded the court to depart downward and impose the agreed-upon 110–month sentence, which in accordance with the government's plea agreement was to be served concurrently with Mercurio's Georgia sentence. *Salemme,* 978 F.Supp. at 357. Thus, in 1996, Mercurio received little, if any, punishment for his federal offenses, while his role as an informant, and its implications for the legality of the bugging of 34 Guild Street, remained masked from this court.

32. *The Investigation of Flemmi and Bulger*

As indicated earlier, Ring retired in the summer of 1990. Ring June 4, 1998 Tr. at

59. In the period of April through August 1991, DEA agents and other law enforcement officials told Hobbs that they believed Mercurio was an FBI informant. Hobbs Aug. 11, 1998 Tr. at 87–92. Hobbs attempted to determine if this was true by asking Nick Gianturco, who was the head of the Informant Coordinating Unit. *Id.* at 91–92. Gianturco would not confirm that Mercurio was an informant. *Id.*

45. He was, in about November 1990, succeeded as the supervisor of the Organized Crime squad by Connolly's "close friend," Quinn. Quinn Aug. 19, 1998 Tr. at 9.

In about December 1990, Connolly retired on short notice. Exs. 38, 39. By this time, Connolly had enjoyed a very successful career as an FBI agent, based largely on his handling of Top Echelon informants, and at times received unusually favorable treatment by the Bureau. For example, Ahearn successfully sought to have FBI Headquarters make Connolly a Supervisory Special Agent even though he had not been recommended by the Career Board for promotion. Morris Apr. 27, 1998 Tr. at 143–48. This was, to Morris' knowledge, unprecedented. *Id.*

As a result of Connolly's retirement, Flemmi and Bulger were administratively closed as informants on December 3, 1990. Exs. 38, 39. In a subsequent request for funds to reimburse Connolly for certain expenses, Nick Gianturco, the Informant Coordinator, wrote that Flemmi had "furnished Boston Division [of the FBI] very valuable information through the years regarding LCN activities." Ex. 44; Gianturco Jan. 20, 1998 Tr. at 156. The FBI did not want to lose Flemmi and Bulger as sources and, therefore, reported to Headquarters when Connolly retired that "Boston Division is considering options to reopen" each of them "in the future." Exs. 38, 39. Consistent with prior practice, Flemmi was not told that he had been closed as a source or that his relationship with the FBI had been altered. Flemmi Aug. 29, 1998 Tr. at 33; Quinn Aug. 19, 1998 Tr. at 108–13; Ex. 92.

By 1992, however, the United States Attorney's Office had begun a grand jury investigation targeting Bulger and Flemmi, among others. Ex. 269. Agents from the Organized Crime squad participated in the investigation, including John Gamel, who served as the case agent. Quinn Aug. 19, 1998 Tr. at 107. The government has represented that five of the agents who testified before the grand jury—Quinn, Gamel, Steffens, Walther, and Buckley—knew that Bulger and Flemmi were informants. Oct. 31, 1997 Letter to the court, *ex parte* and Under Seal;[60] *United States v. Salemme*, 1997 WL 810057, at *8 (D.Mass. Dec.29, 1997); Dec. 18, 1997 Tr. at 58–59. The government also represented that Daly "knew that Bulger was an informant, but was unaware that Flemmi was an informant at the time he testified." Oct. 31, 1997 Letter to the court, *ex parte* and Under Seal. As described previously, however, Daly had been told in 1979 that Flemmi was an informant when the decision was made not to indict him or Bulger in the race-fix case. In any event, the government represents that before testifying to the grand jury, Gamel had reviewed Bulger's informant file, Buckley had reviewed Flemmi's informant file, and Walther had reviewed parts of both files. *Id.*

Although the FBI was participating in the investigation of Bulger and Flemmi, despite multiple requests, the Bureau refused until the eve of their indictment to tell the United States Attorney or his assistants whether Bulger was ever an FBI informant. Ex. 269; Gianturco Jan. 20, 1998 Tr. at 5–13. As with Mercurio, the United States Attorney and his colleagues, who were not called as witnesses, were evidently concerned about the implications for their investigation if Bulger was, or had been, an FBI informant. These included the foreseeable issues of immunity and authorization now raised by Flemmi, whose status as an informant would have been revealed if Bulger's had been disclosed.

60. This Memorandum includes some information contained in the October 31, 1997 letter to the court which was not disclosed previously to the defendants because it is relevant to foreseeable issues concerning whether this case should be dismissed for grand jury abuse.

More specifically, in February 1992, United States Attorney Wayne Budd and two of his top assistants, A. John Pappalardo and Robert Ullman, met with the SAC, Thomas Hughes, ASAC O'Callaghan, and Gianturco, the Informant Coordinator. *Id.* The prosecutors asked for confirmation that Bulger was an informant and for an opportunity to review his file. Gianturco Jan. 20, 1998 Tr. at 7. They were told that pursuant to the Attorney General's Guidelines and Bureau policy, the FBI would not confirm or deny Bulger's status. *Id.* at 9. Budd and his colleagues indicated that they would, like Kottmyer concerning Mercurio, seek relief from the Department of Justice. *Id.* Gianturco contacted the Informant Section at FBI Headquarters as part of an effort to combat that request. *Id.* at 10.

Despite repeated attempts by the United States Attorney, the requests for information concerning Bulger's relationship with the FBI were rebuffed until January 9, 1995, four days after Flemmi's arrest, and the day before he and Bulger were indicted. Exs. 269, 271. Thus, in contrast to the Mercurio matter, the FBI succeeded in the bureaucratic battle concerning the confidentiality of Bulger and Flemmi's status as informants.

While the United States Attorney could not obtain information that he was seeking from the FBI, Connolly, who was no longer employed by the Bureau, was able to monitor the progress of the grand jury investigation and keep Bulger and Flemmi advised concerning it. Flemmi Aug. 21, 1998 Tr. at 103–09, Sept. 1, 1998 Tr. at 126–28. Connolly knew that Bulger and Flemmi were targets of the grand jury investigation and often discussed it with each of them, particularly Bulger. *Id.* Among other things, Connolly told Bulger and Flemmi not to be concerned. Flemmi Aug. 21, 1998 Tr. at 106–07.

Connolly, Bulger, and Flemmi also discussed the bugging of the Rotary Variety Store, which was in the vicinity of the South Boston Liquor Mart that Flemmi and Bulger owned. Flemmi Aug. 20, 1998 Tr. at 153, Aug. 24, 1998 Tr. at 34–43. Connolly also spoke with members of the Organized Crime squad about this matter. *Id.*

No FBI witness admitted to giving Connolly information concerning the investigation of Bulger and Flemmi. As described earlier, however, Quinn ignored established procedures to provide Connolly rather than Carter highly confidential information that he knew would prompt Mercurio's further flight and probably frustrate efforts to apprehend him, without making a record of that irregular, if not illegal, communication.

The evidence also indicates that Buckley provided Connolly confidential information concerning Bulger and Flemmi after Connolly had retired from the FBI. Buckley Sept. 23, 1998 Tr. at 8–14, 22–28. Buckley too characterized Connolly as a "close friend," as well as a colleague for fourteen years. *Id.* at 8. Buckley acknowledged that in about 1993, he told Connolly that William Icrardi had accused Bulger and Flemmi of being involved in the Blackfriars massacre, in which five or six people were murdered, and later failed a polygraph examination on this subject. *Id.* That information had not been publicly disclosed. *Id.* at 23.

The foregoing examples concerning Quinn and Buckley, among other things, cause the court to conclude that Connolly's enduring relationships with members of the Organized Crime squad gave him access to some information concerning the ongoing investigation of Bulger and Flemmi. As explained below, that information was at times not complete or fully reliable. However, Connolly used the information that he received to honor his promise to protect the sources who had contributed so much to his success.

Flemmi too continued to perform as an ally of the FBI, particularly with regard to its interest in Salemme, who had become the Boss of the Patriarca Family. Flemmi

Aug. 20, 1998 Tr. at 150. For example, in about 1993, Connolly asked Flemmi if he could get the telephone numbers used by Frank Salemme's brother, Jack. *Id.* Flemmi made some inquiries and gave Connolly the information that he requested. *Id.* Buckley subsequently gave Jack Salemme's telephone numbers to Steffens, who included them in a successful application for wiretap warrants. *Id.* at 14–22; Steffens Sept. 18, 1998 Tr. at 90–115.

From 1992 to 1995, Flemmi spoke to Connolly "constantly" concerning the ongoing grand jury investigation. Flemmi Aug. 21, 1998 Tr. at 104–06. In 1993, as a result of discussions with Connolly, among other things, Flemmi thought that he would soon be indicted along with Joseph Yerardi. *Id.* at 103–09. Thus, he left Boston in an effort to avoid being arrested. *Id.* Flemmi was not, however, included in the Yerardi indictment and returned to Boston. *Id.* at 105.

Flemmi did not in 1993 assert to Connolly or anybody else that it was improper for the government generally, or the FBI particularly, to target him because he had been granted immunity from prosecution. *Id.* at 103–09. Rather, his conduct is consistent with the conclusion that he had been promised "protection," which included being tipped off to forthcoming charges so that he could flee.

In addition to his direct contacts with Connolly, Flemmi received frequent reports concerning the progress of the grand jury investigation from Bulger, who was in even more regular contact with Connolly. Flemmi Sept. 1, 1998 Tr. at 121–36. Bulger and Flemmi knew that the grand jury would, unless extended or succeeded, expire in mid-September 1994, because several witnesses who had been held in contempt and been incarcerated expected to be released in mid-September. *Id.* at 122, 124, Aug. 21, 1998 Tr. at 56. In about August 1994, Bulger told Flemmi that "John says the indictment will be coming down." *Id.* at 127. *See also id.* at 122–23. The court concludes that Bulger was then referring to Connolly. Bulger told Flemmi that "it was time to take a vacation." *Id.* at 121–24. Flemmi understood that he was being advised to flee to avoid arrest and prosecution. *Id.* at 128. Thus, he went to Montreal for several months. Flemmi Aug. 21, 1998 Tr. at 62.

Once again, Flemmi did not then say to Bulger, or anyone else, that they were immune from prosecution by virtue of their agreement with the FBI. *Id.* at 129. Rather, Flemmi viewed the tip about his possible indictment as part of the protection that he had been promised. *Id.* at 131.

In August 1994, Bulger also told Theresa Stanley, with whom he had been romantically involved for thirty years, that they too would take "a vacation." Stanley Sept. 17, 1998 Tr. at 83–84. On August 29, 1994, they visited Graceland, Elvis Presley's home, in Memphis, Tennessee. Ex. 251; Stanley Sept. 18, 1998 Tr. at 14. In the next several months they also traveled to Dublin, London, Rome, and throughout the United States, including New York, New Orleans, California, and the Grand Canyon. Stanley Sept. 17, 1998 Tr. at 84–86, Sept. 18, 1998 Tr. at 14.

From September 1994 to January 1995, despite their distant and disparate locations, Flemmi and Bulger were in frequent contact Flemmi Sept. 1, 1998 Tr. at 133. Their "beepers" permitted them to stay in close touch. *Id.* at 134. When they spoke, Bulger told Flemmi that he was staying "on top of things." *Id.* at 135. Flemmi knew from their conversations that Bulger was continuing to get information concerning the possible indictment of them. *Id.* Bulger undertook to keep Flemmi up to date and did so. *Id.* at 135–36.

On October 25, 1994, the original indictment in this case was returned, against one defendant, Robert DeLuca. In five pages it charged DeLuca with conspiring to violate the Travel Act, 18 U.S.C. § 1952, and with a substantive violation of the statute based upon his alleged attendance

at a Mafia induction ceremony held at 34 Guild Street, Medford, Massachusetts on October 29, 1989. At the government's request, the indictment was sealed and DeLuca did not immediately receive notice of it. The timing of the indictment was evidently influenced by the fact that the five-year statute of limitations on the offenses charged was about to expire. *See* 18 U.S.C. § 3282. The DeLuca case was randomly assigned pursuant to the District Court's established procedures. It was drawn to this court.

Bulger and Stanley returned to Boston prior to Christmas, 1994. Stanley Sept. 18, 1998 Tr. at 81. They stayed for a few days before leaving for another "trip." *Id.*

By January 1995, Flemmi too had returned to Boston. About a week before January 10, 1995, Flemmi received a telephone call, at his mother's home, from Bulger. Flemmi Aug. 20, 1998 Tr. at 154–55, Aug. 21, 1998 Tr. at 82–85, Sept. 1, 1998 Tr. at 144–46, Sept. 2, 1998 Tr. at 107–08. Bulger told Flemmi that there was a prosecution memorandum that had been sent to Washington, D.C., recommending their indictment. Flemmi Aug. 20, 1998 Tr. at 154–55, Aug. 28, 1998 Tr. at 138, Sept. 1, 1998 Tr. at 145–46. Bulger said that he understood that they would be indicted in about a week, or around January 10, 1995. Flemmi Aug. 20, 1998 Tr. at 154–55, Aug. 21, 1998 Tr. at 83–84, Sept. 1, 1998 Tr. at 144–46, Sept. 2, 1998 Tr. at 107–08.

Flemmi claims that in their telephone conversation Bulger said that he had received this tip from "Vino," meaning Morris. Flemmi Aug. 20, 1998 Tr. at 154–55, Sept. 1, 1998 Tr. at 145. This claim is not credible. The relationship between Bulger and Morris was chilled by *The Boston Globe* 1988 article reporting that Bulger was an FBI source. According to Morris, he met with Bulger and Flemmi shortly after that article was published and did not speak with Bulger again until Bulger called him angrily in October 1995. Morris Apr. 28, 1998 Tr. at 87–88, Apr. 29, 1998 Tr. at 140–41.

At some point during Morris' tenure as the supervisor of the Organized Crime squad, Connolly told him that what Flemmi and Bulger wanted from their relationship with the FBI was a "head start." Morris Apr. 22, 1998 Tr. at 80–82, 85–86. Morris did not object to this arrangement. *Id.* at 87–90, 96–97. The court concludes that in early January 1995, Connolly, who remained close to Flemmi and, particularly, Bulger, had been monitoring the grand jury investigation in part through his contacts in the FBI, and was in constant communication with Bulger and Flemmi about the investigation, was the source of the tip to Bulger concerning the indictments expected to be returned on or about January 10, 1995.

The information Bulger received and shared with Flemmi was accurate, but from Flemmi's perspective materially incomplete and misleading. In early January 1995, indictments charging him and Bulger were scheduled to be returned on January 9 or 10, 1995. Ex. 271. Being told this on about January 3, 1995, evidently lulled Flemmi into believing he did not need to flee immediately. Flemmi apparently did not realize, however, that by not leaving promptly he ran the risk of being arrested on a complaint before he was indicted—the procedure that had been used to capture Russo, Ferrara, and Carrozza because of the government's well-founded concern about leaks that would prompt the putative defendants to flee before the then forthcoming indictments were issued. Flemmi Sept. 1, 1998 Tr. at 145; Ex. 201.

On January 5, 1995, Flemmi was arrested on a criminal complaint charging him, Bulger, and Kaufman with conspiring to extort a bookmaker, Burton Krantz. Crim. Compl. No. 95–M0001–LPC, Jan. 4, 1995. Flemmi Sept. 1, 1998 Tr. at 145. Flemmi felt he had been arrested "prematurely," before he "even had a chance to

exercise [his] feelings" and flee. Flemmi Aug. 28, 1998 Tr. at 138.

When Flemmi was arrested, Bulger and Stanley were driving back to Boston. Stanley Sept. 18, 1998 Tr. at 16–21, 85. Stanley had told Bulger that she wanted to go home. *Id.* Bulger was planning to drop her off and leave again. *Id.* While in Connecticut, Bulger and Stanley heard on the car radio that Flemmi had been arrested. *Id.* Bulger turned around immediately and went to New York. *Id.*

In anticipation of the imminent indictment of Bulger, on or about December 22, 1994, the United States Attorney's office again asked the FBI whether he was an informant because it was anticipated that the government would soon have to disclose exculpatory information to Bulger and his codefendants. Ex. 269. The Boston office of the FBI did not wish to comply with this request.

In seeking support for its continued resistance to telling the United States Attorney whether Bulger was an informant:

> On December 28, 1994, the Boston Division of the FBI expressed the view to FBI Headquarters that there was no reasonable expectation that [Bulger] or his co-defendants would raise the issue of his former informant status, nor was there any evidence to suggest that if issues concerning the informant's prior cooperation were raised that the presiding judge would not accept affidavits submitted by the Boston Division's Principal Legal Advisor or a representative from the FBI's Legal Counsel Division.

Id. The fact that Bulger and Flemmi were about to be alerted to their imminent indictments and thus provided an opportunity to flee suggests that the view that the issue of Bulger's, and implicitly Flemmi's, informant status would not be raised may have been premised, in part, on the expectation that they, like Mercurio, would not be present to participate in the proceedings involving their codefendants. In any event, in late December 1994, the FBI in Boston believed that even if asked, no judge would compel the disclosure of Bulger and Flemmi's relationship with the FBI.

Nevertheless, the FBI's Principal Legal Adviser in Boston, John Michael Callahan, was on January 3, 1995 directed by Richard Swensen, the SAC, to review the Bulger and Flemmi informant files for possible exculpatory information. Ex. 271. As Callahan wrote, in a January 10, 1995 memorandum that was not shared with the United States Attorney's office:

> On 1/3/95, SAC SWENSEN instructed the PLA to contact AUSA JAMES FARMER and obtain copies of a 250–page prosecution memo and an 85–page indictment concerning captioned individuals and other organized crime subjects. Moreover, SAC instructed the PLA to obtain guidance from AUSA FARMER with respect to reviewing the files pertaining to captioned individuals. *The purpose of the proposed file reviews was to determine whether or not the informant files pertaining to captioned persons contained information which might include Brady material. If Brady material were located, the SAC intended to give consideration to disclosing the identities of captioned individuals to the U.S. Attorney's Office because of the fact that their indictment was imminent.* It should be noted that the SAC had not admitted that captioned persons were informants at this point and had not confirmed the existence of pertinent informant files.
>
> On 1/4/95, *PLA contacted AUSA JAMES FARMER and was informed that in addition to carefully reviewing the prosecution memo and the indictment, which would be provided, he suggested that the PLA examine any files that might be relevant, to determine if any persons named in the proposed indictment had received any authorization to commit any of the crimes set forth in the proposed indictment by or from any FBI Agent. Moreover, he ad-*

vised that the files should be reviewed to determine whether or not there were any express or implied promises to any of the prospective indictees from the FBI which would have included assurances that anything any of them told the FBI would not be used against them. Finally, he suggested that the review focus on whether or not any of the proposed indictees had provided information to the FBI which would undercut a central theme of the indictment, namely, that there was a close working relationship between La Cosa Nostra (LCN) and the Winter Hill Gang. AUSA Farmer asked that the file reviews commence immediately due to the fact that arrests were expected in the case early in the following week and the Grand Jury was expected to return an indictment against several organized crime figures early in the following week.

Id.[61] (emphasis added).

In essence, Farmer, who was a supervisor of the prosecutors primarily responsible for this case, had recognized the potentially important issues of whether Bulger and Flemmi were authorized to commit the acts being presented to the grand jury as criminal, whether they had been expressly or implicitly promised use or transactional immunity, and whether their possible service as informants was inconsistent with the existence of the enterprise to be alleged in this case—a criminal cartel consisting of members of the LCN and of the Winter Hill Gang. These are serious questions which, despite the government's opposition, contributed to this court's decision to compel disclosure of Bulger's history as an FBI informant. *Salemme*, 978 F.Supp. at 346–47, 353–54.

Callahan went on to write that:

AUSA FARMER sent a copy of the prosecution memo and the indictment to the PLA and both of these documents were reviewed on January 4, 1995. On January 5, 6, and 9, 1995, the PLA reviewed the informant files pertaining to [Flemmi and Bulger]. Each file was reviewed in its entirety. These file reviews disclosed numerous informant reports from both informants in which information was provided against LCN members. Some of the information furnished by both informants was used in at least six Title III affidavits for electronic surveillance against the Mafia. *In addition, the PLA discovered some serials, primarily in the files pertaining to [Flemmi] which pertain to information which clearly reflected that this informant was engaged in illegal gambling activity at a very high level within the Winter Hill Gang. Moreover, it showed that this informant had a close working relationship with the LCN in making policy decisions regarding illegal gambling in the Boston area, which both the Winter Hill group and the LCN agreed to abide by.* The serials disclosing this kind of information were dated in the middle 1980's. Similar information from this informant was also found in the file prior to 1970. The information in the file prior to 1970 indicated that this informant told the FBI that he was engaged in illegal gambling activities and other illegal activity of a nonviolent nature. In one instance, source advised that he was involved in administering a severe beating to an organized crime figure who had stepped out of line. *Because these serials were in [Flemmi's] file, there was a clear indication that FBI Agents were aware of his involvement in illegal activity (primarily*

61. Exhibit 271 was disclosed to defendants and admitted after the court overruled the government's claim that it was protected by the deliberative process privilege and as work-product. Dec. 14, 1998 Tr. at 4–17. For the purposes of this decision, however, the court has not considered the opinion which Callahan expressed, in Exhibit 271, that Flemmi had been "at least tacitly authorized" to engage in illegal activity, including gambling and LCN policymaking, for the truth of whether Flemmi was indeed authorized, but primarily for the purpose of placing in context what occurred subsequently.

illegal gambling activity) and at least had tacitly authorized his participation in such activity. Nowhere in the files pertaining to [Flemmi] was there any express authorization to commit criminal activity from any FBI Agent.

There was also a small number of serials in the informant files pertaining to [Bulger] from which an inference could be drawn that he was also involved in illegal gambling activities. The inference was less clear in the case of [Bulger] because he never placed himself actually in the criminal activity. Nonetheless, he reported on certain illegal gambling activity by the Winter Hill group and from this, an inference can be drawn that he was personally involved. This is true because it was well known that this informant was one of the leaders of the Winter Hill group during the time these reports were made.

Ex. 271 (emphasis added).

Thus, as John Coffey, the Chief of the Organized Crime and Racketeering Section of the Criminal Division of the Department of Justice later advised a magistrate judge, four days after Flemmi was arrested, "Callahan had concluded that Flemmi's control agents were obviously aware over the years from what Flemmi reported that he was engaged in illegal gambling and in LCN policy making" and "(by receiving this information and not arresting Flemmi) at least tacitly authorized (his) participation." Aff. of Paul E. Coffey, Esq., Nov. 13, 1995 ("Coffey Aff., Nov. 13, 1995"), at 4 n.1; *Salemme*, 978 F.Supp. at 354, n. 6.

As Callahan also wrote on January 10, 1995:

Upon completion of the file reviews, this information was brought to the attention of the SAC, ASAC O'CALLAGHAN, and SSA EDWARD M. QUINN. Upon being briefed by the PLA regarding the information discovered, *SAC SWENSEN made a decision to disclose the identities of captioned informants to the U.S. Attorney because of the likelihood that the information discovered was indeed Brady material that could not be withheld from the U.S. Attorney's Office. Failure to disclose this material to the U.S. Attorney could wreck the proposed organized crime indictments which were scheduled to be returned on January 9, or January 10, 1995.*

On January 9, 1995, SAC SWENSEN, ASAC O'CALLAGHAN, SSA QUINN, and the PLA attended a meeting in the U.S. Attorney's Office with U.S. ATTORNEY DONALD STERN, AUSA JAMES FARMER, and AUSA JONATHAN CHIEL. During that meeting, the SAC disclosed to the three representatives of the U.S. Attorney's Office the identity of the two captioned informants [Flemmi and Bulger] and requested that their identities not be disclosed beyond the three individuals in the room plus one representative of their selection from their office who would pursue the matter further with the PLA. The U.S. Attorney, on behalf of the other two AUSAs, agreed to this request. *The SAC then instructed SSA QUINN, and the PLA to give the representatives from the U.S. Attorney's office a quick general overview of the kind of information discovered during the PLA's file review. This was done in a general way and no specific information was provided. The U.S. Attorney requests that the PLA be available at some future time to discuss the kind of specific information that he learned through the file reviews with a designated AUSA who is not involved in the prosecution or decision making regarding the prospective indictments. SAC SWENSEN agreed to make the PLA available for this purpose.*

Ex. 271 (emphasis added).

In striking contrast to Kottmyer's conduct concerning Mercurio, in 1994 the United States Attorney, Stern, did not insist that the prosecutors presenting the case, or indeed anyone outside of the FBI, review the Bulger and Flemmi informant files before indictments were sought. *Id.*

Stern's decision to insulate the prosecutors handling the case from even the limited information that he had received was evidently based on the concern Farmer had previously expressed about possible promises to Bulger and Flemmi that their statements and/or evidence that they helped obtain would not be used against them, and the foreseeable possible claim that the prosecutors' disqualification would be required if they were exposed to evidence provided pursuant to a promise of immunity.

The information concerning Bulger and Flemmi that Stern and his colleagues received on January 9, 1995, did not cause them even to pause in their pursuit of indictments against Bulger and Flemmi. Rather, the proposed indictments that had been prepared and approved previously were presented to the grand jury the next day by prosecutors who "did not know that Bulger and Flemmi had been informants or of any assessment of the information in their informant files." Ex. 269.

It would be almost seven months before any member of the United States Attorney's Office would ask to review Flemmi and Bulger's informant files. *Id.* When made, that request was promptly granted. *Id.*

33. *The Indictment of Bulger and Flemmi and Its Aftermath*

On January 10, 1995, the government obtained a ninety-one page superceding indictment of the earlier charges against DeLuca. The First Superceding Indictment (the "1SI") added six defendants—Bulger, Flemmi, George Kaufman, Francis P. Salemme, Francis P. Salemme, Jr., and James Martorano. The First Superceding Indictment also radically altered the charges in the case. The new charges included, among others, an alleged RICO conspiracy lasting more than thirty years and a lengthy conspiracy to extort bookmakers and drug dealers. DeLuca was named in only a fraction of the alleged racketeering acts and substantive charges.

The new charges against DeLuca and his codefendants could have been brought as a separate indictment, which would have been randomly assigned to a member of the District Court. However, as those charges were brought in a superceding indictment in an existing case, they were, in accordance with the District Court's standard and well-known practice, assigned to this court. Thus, the government exercised what was in effect an option offered by the District Court's procedures to select this court to preside in this case against Bulger, Flemmi, and the other defendants added to the original DeLuca case.

The First Superceding Indictment charged the defendants with, among other things, from 1969 to January 1995, engaging in a conspiracy to violate, and violating, the RICO statute, 18 U.S.C. § 1961 *et seq.* (1994). *See* 1SI Counts 1 and 2. They were also charged with conspiring to extort, and extorting, bookmakers, from 1979 to 1994. *See* 1SI, Counts 3–17.

With regard to the RICO charges, the alleged enterprise was neither the Patriarca Family of La Cosa Nostra nor the Winter Hill Gang, organizations that have, in effect, been proven to be RICO enterprises in prior prosecutions. *See, e.g., United States v. Angiulo*, 897 F.2d 1169, 1175 (1st Cir.1990) (Patriarca Family); *United States v. Angiulo*, 847 F.2d 956, 960, 969–70 (1st Cir.1988) (Patriarca Family); *United States v. Winter*, 663 F.2d 1120, 1127–28 (1st Cir.1981) (Winter Hill Gang). Rather, the defendants were alleged to have been part of a unique association-in-fact enterprise made up of individuals who joined together to use their respective relationships with either the Patriarca Family or the Winter Hill Gang to, among other things, facilitate the unlawful activities of the enterprise and coordinate the activities of the Patriarca Family and the Winter Hill Gang. 1SI, ¶ 1(k); Feb. 14, 1997 Bill of Particulars; Nov. 15, 1995 Government's Response to

Magistrate Judge Cohen's Order dated Aug. 23, 1995, filed *ex parte* and Under Seal, at 4.

In view of Bulger and Flemmi's roles as Top Echelon informants utilized to provide and, in some instances tasked to obtain, information for the FBI concerning the LCN, there are serious issues presented concerning whether they were authorized to engage in the conduct alleged to be criminal and are, therefore, not guilty as charged. *See United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1368 n. 18 (11th Cir.1994), *cert. denied*, 119 S.Ct. 2365 (1999); *United States v. Johnson*, 139 F.3d 1359, 1365–66 (11th Cir.1998), *cert. denied*, — U.S. —, 119 S.Ct. 2365, 144 L.Ed.2d 770 (1999); *United States v. Light*, 64 F.3d 660, 1995 WL 507241 at *2 (4th Cir. Aug. 28, 1995); *United States v. Achter*, 52 F.3d 753, 755 (8th Cir.1995). There are also questions relevant to all of the defendants regarding whether the conspiracies and enterprise alleged in the First Superceding Indictment genuinely existed because an agreement with someone acting as an agent of law enforcement is not a criminal conspiracy. *See Salemme*, 978 F.Supp. at 353–54 (citing *United States v. Duff*, 76 F.3d 122, 127 (7th Cir.1996) and *United States v. Nason*, 9 F.3d 155, 161 n. 2 (1st Cir.1993)). As explained in § III.1.A, *infra*, however, these issues must be addressed at trial. It is the question of immunity that the court can and must decide in these pretrial proceedings. *Salemme*, 1997 WL 810057 at *1–3 (D.Mass. Dec.29, 1997).

On January 17, 1995, the magistrate judge conducted a detention hearing concerning Flemmi. As Flemmi was leaving the courtroom he saw Quinn. Flemmi Aug. 20, 1998 Tr. at 155, Aug. 21, 1998 Tr. at 50–51. Flemmi knew that Quinn was aware of his valuable service as an informant concerning the LCN. Flemmi Aug. 20, 1998 Tr. at 156–57. Flemmi thought that Quinn would at least do something to facilitate his release on bail. *Id.* Thus, Flemmi said to Quinn, "How about a break on bail." Flemmi Aug. 20, 1998 Tr. at 155, Aug. 21, 1998 Tr. at 50–51. However, Assistant United States Attorney Kelly, who was with Quinn, told Flemmi that Quinn could not speak to him because Flemmi's attorney would object. Flemmi Aug. 29, 1998 Tr. at 156–57.

After Bulger's indictment on January 10, 1995, the FBI opened a fugitive investigation of him. Charles Gianturco was put in charge of it. Steffens Aug. 10, 1998 Tr. at 24; Walther Oct. 1, 1998 Tr. at 166. He is the brother of Nick Gianturco, who, as described earlier, understood that Bulger had helped save his life when Gianturco was an undercover agent in Operation Lobster, and had subsequently dined and exchanged gifts with Bulger and Flemmi.

On about January 23, 1995, Bulger returned to the Boston area briefly to drop off Stanley. Stanley Sept. 18, 1998 Tr. at 40–41, 47, 84, 85. It was widely known that Stanley had been traveling with Bulger and was back in Boston. *Id.* at 63. Yet the FBI did not contact her until April 1996, about fifteen months after she had returned. *Id.* at 42–43, 53; Walther Sept. 10, 1998 Tr. at 166–67.

When approached, Stanley was cooperative. Among other things, she told FBI agents Charles Gianturco and Walther that during their trip prior to his indictment Bulger had driven a Grand Marquis, used the alias "Tom Baxter," and stayed with the Matos family in Selden, New York, with whom she and Bulger had stayed before. Stanley Sept. 19, 1998 Tr. at 11–13. Stanley had not, however, heard from Bulger since he returned her to the Boston area. *Id.* at 48–54. Thus, by the time that she was interviewed by the FBI, the information that Stanley could provide was dated and of diminished value. Nevertheless, the FBI paid Stanley $1000 in November 1996. Walther Sept. 10, 1998 Tr. at 169.

In late June 1995, Assistant United States Attorney Stephen Heymann asked to review Bulger and Flemmi's FBI infor-

mant files. Ex. 269. He did so on July 3, 1995. *Id.* As a result, the United States Attorney's Office evidently decided that it was essential that the prosecutors presenting the case be informed that Bulger and Flemmi had been FBI informants. This was done at some time prior to August 23, 1995. *See* Aug. 23, 1995 Government's *Ex Parte*, In Camera Motion for Protective Order.

On August 1, 1995, the government obtained a Second Superceding Indictment that added John Martorano as a defendant. As described previously, John Martorano had, in 1979, become a fugitive from RICO charges in the race-fix case against Winter, himself, and others, which was, in effect, alleged to be a racketeering act of a RICO enterprise known as the Winter Hill Gang. *See Winter*, 663 F.2d at 1127–28. After he was apprehended, John Martorano's case was assigned to District Judge Reginald Lindsay. On July 24, 1995, over the government's objection, Judge Lindsay dismissed the case against John Martorano, without prejudice, because a violation of the Speedy Trial Act, 18 U.S.C. § 3161. Rather than attempting to reinstate the dismissed charges, the government brought new charges against Martorano in this case. Thus, this court became responsible for presiding in the case against John Martorano.

On August 23, 1995, Assistant United States Attorney Herbert filed, under seal, with Magistrate Judge Lawrence Cohen, the Government's *Ex Parte*, In Camera Motion for a Protective Order concerning documents to be produced in discovery to Flemmi and his counsel. Herbert stated that Flemmi had made "potentially relevant" statements to the FBI "in the context of a confidential relationship over the course of many years." *Id.* at 1. Herbert explained that trial counsel had not read or been informed of the statements in order to avoid any arguable claim that the statements had been used improperly in investigating Flemmi. *Id.* at 2 n. 1. The government noted that Flemmi had not requested his statements and, therefore, the government had no obligation to produce them pursuant to Fed.R.Crim.P. 16(a)(1)(A) or Rule 116.1 of the Local Rules of the United States District Court for the District of Massachusetts. *Id.* at 3. The government requested confirmation of this view. *Id.*

The government also represented that it recognized that it had an independent and continuing obligation to produce exculpatory information pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny. *Id.* at 4 n. 3. Thus, the government expressed the intention to have the documents reviewed by a senior official of the Department of Justice "to determine whether they contain any information that must be disclosed to the defendant Flemmi or any of his codefendants on constitutional grounds." *Id.*

The motion concluded with the representation that, "if the Court determines that the statements or their existence should be disclosed to defendant Flemmi, the government would request an *ex parte* conference with the Court on the record to determine the proper mechanism for disclosure." *Id.* at 4–5.

In 1995, Flemmi did not realize that the FBI had memorialized, in writing, some of the statements he made to several of its agents over more than twenty-five years. Flemmi Aug. 27, 1998 Tr. at 56; Morris Apr. 21, 1998 Tr. at 34. In any event, as set forth below, when the magistrate judge eventually ordered that certain of the 209s containing Flemmi's statements be provided to him, the government neither requested an *ex parte* conference to discuss the appropriate procedure for disclosure nor produced the documents.

The magistrate judge responded to Herbert's August 23, 1995 motion the same day. *See* Aug. 23, 1995 Order (Under Seal). He agreed that Fed.R.Crim.P. 16(a)(1)(A) and Local Rule 116.1 did not require immediate disclosure of Flemmi's statements. *Id.* Apparently assuming the

outcome of the government's proposed review, he gave the government until October 20, 1995, to file an affidavit representing that Flemmi's file contained no information subject to disclosure before conviction under *Brady*. *Id.* Indeed, he opined that, "it appears highly unlikely—even from the vantage point of not having reviewed the matters sought to be protected—that the information protected herein is exculpatory as to the trial stage of this case." *Id.* This was simply incorrect. *See, e.g., Salemme*, 978 F.Supp. at 353–54; *United States v. Salemme*, 978 F.Supp. 386, 386–87 (D.Mass. June 26, 1997). The magistrate judge did, however, recognize that Flemmi's statements as an informant would be relevant to his punishment if he pled guilty or were convicted. *Id.* To deal with this foreseeable possible development, he ordered the prosecutors to seek guidance from him, rather than from this court, if either of those events occurred. *Id.*

On September 15, 1995, this court conducted a hearing to address a number of pending matters. The court began the hearing by stating that: "There have been developments since I saw some of you in June of 1995, and I want to see if I have an accurate and complete understanding of where matters are." Sept. 15, 1995 Tr. at 4. At the conclusion of the lengthy proceeding, the court stated that: "I am going to take this [case] I think from Judge Cohen. There is nothing in front of him and I will just deal with it directly." *Id.* at 75. The prosecutors did not then, or later *ex parte*, inform this court that the magistrate judge had been advised that Flemmi was an informant and had established a schedule to deal with the implications of that fact himself. Rather, the government continued to address that issue with the magistrate judge, while this court dealt with all other matters in this case.

More specifically, on or about October 20, 1995, the government responded to the magistrate judge's August 23, 1995 Order by filing an affidavit from Coffey and a related memorandum signed by Assistant United States Attorney James Rehnquist, who was not a member of the prosecution team. Aff. of James H. Herbert, Oct. 22, 1997 ("Herbert Aff., Oct. 22, 1997").[62] It was in these sealed submissions that the government noted that Callahan had concluded in January 1995 that the FBI had "at least tacitly authorized [Flemmi's] participation" in "illegal gambling and LCN policymaking." Nov. 15, 1995 Government's Response to Magistrate Judge Cohen's Order Dated Aug. 23, 1995 at 6 n.2; Coffey Aff., Nov. 13, 1995, at 4 n.1. Nevertheless, the government represented that Coffey had found that "very little in the Flemmi and Bulger files is even *arguably Brady* material." Government's Response at 7 (emphasis added).

In a sealed November 14, 1995 Order, the magistrate judge directed the government to submit a proposed protective order for him to enter. On December 12, 1995, he adopted the government's proposal and entered an Order which stated, in part, that:

> The government shall disclose to the defendant Stephen J. Flemmi Inserts 1–7 of the Appendix to the Affidavit of Paul E. Coffey, Esquire, previously filed. The government shall disclose those materials directly to the defendant Stephen J. Flemmi in person, without providing a copy of the same to his counsel, and without further notification to his counsel.

Dec. 12, 1995 Order (Under Seal). The magistrate judge also held that the government was not required to disclose any additional information to Flemmi or his codefendants. *Id.*

62. The government withdrew the October 22, 1995 filings and replaced them with revised versions on November 15, 1995. *See* June 23, 1997 Order (Under Seal). This court has ordered the government to produce the original October 22, 1995 submissions, but has not received them.

The magistrate judge did, however, order that the matter of Flemmi's status as an informant be brought to this court's attention at least thirty days before trial. *Id.* At that time, this court had presided in cases against nine members of the Patriarca Family, each of which resulted in guilty pleas. *See Carrozza,* 807 F.Supp. at 157; *United States v. Patriarca,* 776 F.Supp. 593 (D.Mass.), *remanded,* 948 F.2d 789 (1st Cir.1991); *DiGiacomo,* 746 F.Supp. 1176. Thus, it was foreseeable that by virtue of the December 12, 1995 Order, the government might never be required to disclose to this court that Flemmi had been an FBI informant.

As indicated earlier, the government did not, as it had previously represented, seek a hearing to determine how to implement the magistrate judge's December 12, 1995 Order. Nor did it comply with the Order by providing Flemmi with the documents that the magistrate judge directed that he receive.

The three prosecutors primarily responsible for this case have represented that Assistant United States Attorney Rehnquist, who was not on the prosecution team, had worked with Coffey in making the subsequent submissions to the magistrate judge and neither Rehnquist nor Coffey told the FBI about the Order. Herbert Aff., Oct. 22, 1997. The government contends that the "FBI was waiting for confirmation that the order had been issued before attempting to make arrangements to deliver the documents to the defendant Flemmi." *Id.* Thus, Herbert represented that, "however regrettable the delay in complying with Magistrate Judge Cohen's Order of December 12, 1995, the failure to comply with the order more promptly was inadvertent rather than intentional." *Id.*

However, on June 21, 1996, Callahan wrote a memorandum reciting the history of the submissions to the magistrate judge and stating that, "Judge Cohen ultimately ruled, with respect to the government's request for instructions regarding its discovery obligations, that the government only had to disclose certain limited documents to meet its discovery obligations ...." Ex. 272. Thus, it is evident that the FBI was well aware of the magistrate judge's December 12, 1995 Order and, with Coffey and Rehnquist, simply ignored it.

Although Flemmi did not receive the documents that the magistrate judge ordered be furnished to him, he was anticipating assistance from Connolly and the FBI. Flemmi Aug. 21, 1998 Tr. at 46–47. This court reviewed Flemmi's detention and, on June 13, 1995, again denied his request to be released on bail. *See* June 13, 1995 Order. At that point, Flemmi asked Weeks to speak to Connolly about the assistance he had expected to receive. *Id.* at 40–52. Weeks reported to Flemmi that he had talked several times to Connolly, who said that he was very upset that Bulger and Flemmi had been indicted and that the FBI had evidently abandoned them. *Id.* at 40–41. Flemmi shared this view. *Id.* at 42.

Nevertheless, Flemmi had faith that Bulger would "contact somebody" and get their problems "squared away." Flemmi Aug. 20, 1998 Tr. at 157–58, Aug. 21, 1998 Tr. at 21–22. Flemmi planned to persevere quietly until that occurred. Flemmi Aug. 20, 1998 Tr. at 158. He felt that he had been required to be a fugitive for more than four years before Rico succeeded in protecting him with regard to the charges concerning the Bennett murders and the Fitzgerald bombing. *Id.* He intended to wait out this matter too, rather than reveal that he and Bulger had been informants, and thus endanger Bulger. *Id.* at 157–58.

As Flemmi expected, Bulger did attempt to get their problems "squared away." On October 13, 1995, Bulger called Morris. Ex. 86; Morris Apr. 28, 1998 Tr. at 85, Apr. 29, 1998 Tr. at 30. Morris had by then been promoted to Chief of the Training Administration Section of the FBI Academy at Quantico, Virginia, where Bul-

ger called him. Morris Apr. 28, 1998 Tr. at 85.

Bulger reminded Morris that he had taken money from Bulger, asserted that he had witnesses, and "said that if he went to jail, he was taking [Morris] with him." Ex. 86; Apr. 28, 1998 Tr. at 88–90. Morris testified that Bulger demanded that Morris use his "Machiavellian mind" to devise a story to tell *The Boston Globe* to persuade its reporters that his previous statements that Bulger was an informant were not true. *Id.* Morris asserts that Bulger did not ask him to do anything to resolve the charges against him and Flemmi. *Id.* The court finds that this contention is not credible.

Morris prepared a 302 of his telephone conversation with Bulger which he claims, falsely, was accurate and complete. Ex. 86; Morris Apr. 28, 1998 Tr. at 90, Apr. 29, 1998 Tr. at 32–33. Morris sent copies of the 302 to the Organized Crime Section and Office of Professional Responsibility at FBI Headquarters, and to Swensen, the SAC in Boston. Morris Apr. 30 1998 Tr. at 196–97.

In the 302 Morris stated, in part, that Bulger had "accused [Morris] of accepting money from him and said that if went to jail, he was taking [Morris] with him. He claimed he had witnesses." Ex. 86. The 302 also contained Morris' rendition of his response, that this was "an outright lie." *Id.* Morris subsequently received a telephone call from Gamel, who inquired about the Training Academy's capacity to track in-coming calls. Morris Apr. 30, 1998 Tr. at 91. However, prior to December 1997, when Morris made the proffer which persuaded the government to grant him immunity in the pending proceedings, the FBI never asked Morris about Bulger's claim that he had made payments to Morris. Morris Apr. 28, 1998 Tr. at 91–92, Apr. 30, 1998 Tr. at 198.

In any event, Bulger's call to Morris was unavailing. This case continued.

On May 21, 1996, the government obtained what it called a Third Superceding Indictment (Docket No. 359), with two parts, one of which included only the charges against John Martorano. The government characterized this as a "bifurcation" of the Second Superceding Indictment. Neither counsel nor the court was familiar with any precedent for such a severance of charges by a grand jury within a single indictment. The court, therefore, deemed the charges against John Martorano to constitute a separate indictment, and had it given a separate case number. As many motions in which John Martorano had joined were pending, with the consent of the parties, in the interest of efficiency, the court consolidated for pretrial purposes the case against John Martorano and the case against his former codefendants. Jan. 9, 1997 Tr. at 8–9.

In the Third Superceding Indictment (the "3SI"), Bulger and Flemmi were charged with participating in the race-fixing scheme as one of their alleged racketeering acts. (3SI, Count One, RA 3). As described in § 11.9, *supra*, this was the matter for which Connolly, Morris, Daly, and O'Sullivan decided, in 1979, that Bulger and Flemmi should not be charged in order to permit them to assist in the FBI's important effort to bug Angiulo's headquarters at 98 Prince Street. As also described previously, Bulger and Flemmi made unique contributions to the ultimate success of that effort.

At hearings in June 1996, the court indicated that motions to dismiss the Third Superceding Indictment for failure to allege properly certain elements of a RICO offense, including the description of the alleged enterprise, might be meritorious. On July 2, 1996, the government obtained a Fourth Superceding Indictment, which was intended to cure the alleged defects in pleading. *See Salemme*, 978 F.Supp. at 346. The court subsequently conducted lengthy hearings on some of defendants' many remaining motions to dismiss and to suppress.

As of March 1997, the court had denied the defendants' motion to dismiss the Fourth Superceding Indictment and many of the alleged Racketeering Acts. *See United States v. Salemme*, 1997 WL 37530, *1–6 (D.Mass. Jan.13, 1997). In doing so, however, the court emphasized the foreseeable difficulty the government might have in proving the enterprise alleged. More specifically:

> After subsequent hearings, the court held that the Fourth Superseding Indictment adequately alleged the existence of an enterprise, but that the government would, among other things, have to prove that the alleged Enterprise had an ascertainable structure separate and apart from the pattern of racketeering activity in which it engaged. *See United States v. Salemme*, 1997 WL 37530, *1 (D.Mass. January 13, 1997). The court also held that, " '[t]he function of coordinating the commission of several different offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.' " *Id.* (quoting *United States v. Console*, 13 F.3d 641, 651 (3rd Cir.1993)).
>
> The court did, however, order that the government submit a bill of particulars concerning the purported structure of the alleged Enterprise. *Id.* In response to that filing, the defendants have renewed their motion to dismiss.

Salemme, 978 F.Supp. at 346–47.

As of March 1997, the court had also orally announced its decision denying the motion to suppress certain electronic surveillance conducted by the Massachusetts State Police, although the court found that the government had violated state law by obtaining the warrant authorizing that electronic surveillance in the wrong county, Jan. 29, 1997 Tr. at 1–7, 26, and had not had the resulting tape recordings sealed in the time required by federal law. Feb. 18, 1998 Tr. at 3–52.

In addition, on several occasions the court informed the parties of its tentative decision to exclude the testimony of Hugh Shields and other evidence concerning the 1967 murders of Edward, Walter, and William Bennett, and Richard Grasso, which were charged for the first time in the Third Superceding Indictment as racketeering acts of Flemmi and Salemme, because the government had used the grand jury primarily or exclusively to obtain evidence to strengthen the RICO charges previously alleged by obtaining an immunity order, pursuant to 18 U.S.C. § 6001 *et seq.*, to compel the otherwise unavailable testimony of two witnesses essential to charging the murders as racketeering acts and to strengthening the evidence of the alleged enterprise. *See, e.g., Beasley*, 550 F.2d at 266; *Gibbons*, 607 F.2d at 1328; *Santiago*, 533 F.2d at 730.

This issue may have significant practical consequences for this case. If Flemmi and/or Salemme are convicted, but not held accountable at sentencing for any of the four murders, it appears that the Guideline ranges for their sentences may be reduced from life imprisonment to as little as ten to thirteen years for Flemmi and eight to ten years for Salemme. As the court has told the parties, however, its decision is tentative pending the preparation and issuance of a written memorandum and order.

On March 21, 1997, Nick Gianturco and Steffens interviewed Connolly as part of the Bulger fugitive investigation. Steffens Aug. 10, 1998 Tr. at 23, 25. Connolly said that he had not seen or heard from Bulger. *Id.* at 28; Ex. 222. In fact, according to the 302 that Gianturco prepared, "Connolly stated that he has not seen or heard from Bulger since December of 1989." Ex. 222. If said by Connolly, this was untrue. If not said, the statement, which tends to exculpate Connolly with regard to any suggestion that he had abetted Bulger's flight, should not have been included in the 302 Gianturco prepared.

In any event, Connolly also told Gianturco and Steffens that he had known Bulger

since they were both boys and Bulger had bought him an ice cream cone. Aug. 10, 1998 Tr. at 30. Connolly added that he hoped that "Bulger was never caught." *Id.* at 31. Connolly also said that at a party at Morris' house, Morris was "in his cups" and told Flemmi and Bulger "that they were so good, he could get them off for anything short of murder." *Id.* at 31, 53, 149. Connolly also indicated that he knew that Bulger had called Morris since becoming a fugitive. *Id.* at 32. This had not been publicly disclosed at that time. *Id.* at 52.

Steffens regarded Connolly's statement that he hoped Bulger would not be caught as "startling." *Id.* at 33. However, it was not included in the 302 that Gianturco belatedly prepared on May 7, 1997, and that Steffens reviewed. *Id.* at 26, 34; Ex. 222. Nor did the 302 include Connolly's report of Morris' statement that he could get Bulger and Flemmi off for anything short of murder. *Id.* at 34; Ex. 222. Steffens did, however, tell one of the prosecutors, Kelly, about this statement. Steffens Aug. 10, 1998 Tr. at 35, 151–52.

On March 21, 1997, before Connolly was interviewed, the defendants moved for evidentiary hearings on their motions to suppress certain electronic surveillance evidence, including the electronic surveillance conducted jointly by the DEA–FBI in 1984–85 and the FBI's 1989 34 Guild Street interceptions.[63] Steffens Aug. 10, 1998 Tr. at 22. In connection with these motions, each of the defendants, with the significant exception of Flemmi, moved for disclosure of whether Bulger, Mercurio, Robert Donati, a deceased, former close associate of Ferrara, and certain other individuals were FBI informants; Flemmi joined in all of the motions except the request concerning Bulger. *See Salemme*, 978 F.Supp. at 350–51 & n. 3.

In the process of addressing these motions, the court discovered for the first time the submissions made to the magistrate judge which disclosed that Bulger and Flemmi had been FBI informants. *Id.* at 351 n. 3. Knowledge of Flemmi's status prompted the court to seek and receive permission to question him privately. *Id.;* Apr. 16, 1997 Tr. at 118–22 (Under Seal). As a result, Flemmi immediately decided to disclose to his attorney, Kenneth Fishman, and his codefendants that he had been an FBI informant. *Id.*[64]

Following a conference with the court in which Flemmi, Fishman, and Coffey participated, Coffey spoke briefly to Flemmi and Fishman. Flemmi Aug. 24, 1998 Tr. at 50–54. Coffey told Flemmi that because of his past services to the government Coffey would like to assist Flemmi, and requested his cooperation with the government in the prosecution of the instant case. *Id.* Flemmi responded by stating that, "[i]f I was so valuable to you,

63. The defendants also moved to suppress the electronic surveillance conducted on December 11, 1991, by the FBI, at the Hilton Hotel in East Boston, Massachusetts. *Salemme*, 978 F.Supp. at 346–47. In connection with this motion, the defendants sought an order compelling the government to disclose whether Anthony St. Laurent and/or Kenneth Guarino were FBI informants. *Id.* The court granted the motion for an evidentiary hearing concerning the Hilton Hotel intercepts. *Id.* at 346–47, 358–61, 363. The court also initially ordered the government to disclose whether St. Laurent and/or Guarino were informants. *Id.*

The government subsequently moved for reconsideration of the court's decision regarding St. Laurent and Guarino. The court agreed to decide that request and address the motion to suppress concerning the Hilton Hotel intercepts separately from the issues concerning the 1984–85 and 34 Guild Street interceptions. *United States v. Salemme*, 978 F.Supp. 379, 380 n. 1 (D.Mass. June 19, 1997). Thus, this Memorandum contains no further reference to the Hilton Hotel motion and related matters, except to note that they will have to be decided before Flemmi's motion to dismiss is resolved.

64. Flemmi also stated to the court: "Your honor, you're getting to the core of the matter. There's no doubt about that. You're right there. If you go a little further, you could get the whole complete story." Apr. 16, 1997 Tr. at 122 (Under Seal).

what am I doing being indicted," and the conversation ended. *Id.* at 53.

The government strenuously opposed the requests for evidentiary hearings on the motions to suppress and the related request that it be required to confirm or deny whether Bulger, Mercurio, and/or Donati were informants. *Salemme*, 978 F.Supp. at 345. The court conducted a series of hearings, over several months, in an effort to address the motions carefully. *Id.* Because the motions involved allegations that specified individuals had secretly served as informants, the court recognized that they implicated the generally recognized interest of the government in maximizing the confidentiality of its sources to encourage the free flow of information from informants and the interest of particular possible informants in their own safety. *Id.* Thus, at the request of the parties, the court temporarily sealed all of the submissions concerning the motions, received some *ex parte* filings by the government, and conducted several hearings that were closed to the public. *Id.*

On May 22, 1997, the court issued its Memorandum and Order finding that the defendants were entitled to evidentiary hearings on their motion to suppress the electronic surveillance jointly conducted in 1984 and 1985 by the DEA and FBI which targeted Bulger and Flemmi, and the electronic surveillance conducted on October 29, 1989, at 34 Guild Street. *Id.* at 345, 363. The court also ordered the government to disclose whether Bulger, Mercurio, and/or Donati were informants. The decision was temporarily sealed to permit the government to decide whether to obtain the authorization of the Acting Deputy Attorney General, Seth Waxman, to comply with the Order, or to decide instead either to dismiss the case or to be held in civil contempt in an effort to render the decision appealable. *Id.* at 346.

Prior to the unsealing of the May 22, 1997 Memorandum and Order, the FBI announced for the first time that it was offering a $250,000 reward for Bulger's capture. *See* Patricia Nealon, "FBI offers $250,000 for Whitey Bulger's arrest," *The Boston Globe*, May 30, 1997, at B1. At the press conference announcing the reward, the SAC, Barry Mawn, reportedly stated that he "was very satisfied that there was an all out effort by the Boston FBI to find Whitey Bulger" and that he wanted to "clear up any perception that may exist that the FBI is not aggressively pursuing [him]." *Id.*

At that point it was foreseeable that if the case was not dismissed by the government, Flemmi's history as an informant would soon be disclosed publicly, and that Bulger's status as a source could be revealed by Flemmi and, in any event, easily be inferred because of their close association. In response to the May 22, 1997 Memorandum and Order the government confirmed that Bulger had been an informant and, contrary to it previous position, conceded that there was a proper basis for the court to have ordered evidentiary hearings on the motions to suppress electronic surveillance conducted in 1984–85 and at 34 Guild Street. *See United States v. Salemme*, 978 F.Supp. 364, 365 (D.Mass. June 6, 1997).

Demonstrating again the Department of Justice's traditional deference to the FBI in matters concerning the confidentiality of its sources, however, the Acting Deputy Attorney General declined to obey the Order to confirm or deny whether Mercurio and/or Donati were informants in connection with the electronic surveillance at 34 Guild Street. *Id.* Rather, reconsideration of that Order was requested. *Id.* The May 22, 1997 Memorandum was then unsealed and public proceedings on these issues commenced. *Id.* at 366.

The motion to reconsider was denied. *Id.* The Acting Deputy Attorney General continued to decline to obey the direction to disclose the status of anyone other than Bulger. *Id.* The defendants moved to have him held in civil contempt and incarcerated. *Id.* at 365. The Acting Deputy

Attorney General asked that the court instead enter an order of conditional exclusion of the 34 Guild Street electronic surveillance evidence so the government could attempt to appeal. *See U.S. v. Salemme*, 978 F.Supp. 375, 376 (D.Mass. June 13, 1997). The court found, however, that the government had not satisfied the requirements for a conditional order of exclusion. *Id.* at 376–77. The Acting Deputy Attorney General did not immediately relent and, therefore, faced the risk of being held in civil contempt and incarcerated until he complied with the court's Order.

However, in an effort to cut the Gordian Knot, the court required Mercurio to appear to be questioned concerning whether he was an FBI informant when he attended the Mafia induction ceremony on October 29, 1989. *Id.* at 379. On June 18, 1997, Mercurio testified that he was cooperating with the government in connection with that ceremony. *United States v. Salemme*, 978 F.Supp. 379, 381 (D.Mass. June 19, 1997). In response to a renewed Order, *id.* at 385, the Acting Deputy Attorney General revised his refusal to address the status of Donati and represented that he had not been an informant. *United States v. Salemme*, 978 F.Supp. 390, 391 (D.Mass. June 27, 1997). Thus, the motion to hold the Acting Deputy Attorney General in civil contempt for failure to confirm or deny whether Mercurio and/or Donati was an informant was rendered moot. *Id.*

On June 25, 1997, Flemmi filed an affidavit intended to respond to certain representations made by the government concerning his status as an informant. Ex. 92. Among other things, Flemmi asserted that Morris had told him and Bulger that they could be involved in any criminal activities short of murder and would be protected by the FBI. *Id.* He also claimed that as part of his continuing relationship with the FBI he was specifically informed of the date his indictment in this case was to be returned so he could flee if he chose to do so. *Id.* Flemmi had previously asserted that in 1991 Mercurio had been given prior notice of his indictment so he could flee. Ex. 213.

On June 26, 1997, the court ordered that the government produce certain documents and information which was relevant to the forthcoming evidentiary hearings on the motions to suppress and to Flemmi's charges. *United States v. Salemme*, 978 F.Supp. 386 (D.Mass. June 26, 1997). The required discovery included, among other things: virtually all of Flemmi's FBI informant file, *id.* at 387; the documents relied upon by FBI Special Agent John Michael Callahan, Chief Division Counsel for the Boston Division of the FBI, in concluding that "Flemmi's control agents were obviously aware over the years from what Flemmi reported that he was engaged in illegal gambling and in LCN policymaking" and that such agents " 'at least tacitly authorized [his] participation,' " *id.* (citations omitted); comparable records regarding Bulger, *id.;* and documents and information tending to show that Department of Justice and/or FBI regulations or guidelines had not been complied with concerning Flemmi, Bulger, or Mercurio, *id.* at 387–88. The next day the government repeatedly objected to the scope of the discovery order. *See, e.g.,* June 27, 1997 Tr. at 18, 20–21, 24, 28, 36. Generally, the objections were overruled. *Id.; United States v. Salemme*, 978 F.Supp. 386 (D.Mass. June 26, 1997).

In late June 1997, the Attorney General established a task force of Department of Justice and FBI personnel to investigate the allegations of misconduct raised by Flemmi and the motions to suppress. That task force conducted its investigation in July and early August 1997, and issued a confidential report to the Attorney General. With the agreement of the government, the court reviewed the Executive Summary of that report and some of the documents that the investigation generated in order to decide certain issues concerning discovery to be produced in connection with the motions to suppress. Sept. 12, 1997 Tr. at 14–16.

In August 1997, the government requested that the evidentiary hearings on the motions to suppress not be conducted until the defendants filed a notice, pursuant to Fed.R.Crim.P. 12.3(a)(1), of any intent that they had to assert a public authority defense, and motions to dismiss the Fourth Superceding Indictment based on claims of immunity and other grounds. The government's motion was granted. Aug. 11, 1997 Order at ¶ 2.

On September 3, 1997, the defendants filed under seal their motion to dismiss, a sixty-three page memorandum, and two supporting affidavits of Anthony Cardinale, Esq., who was then counsel for Salemme and DeLuca. The grounds for the motion to dismiss included the contentions that: the government had engaged in systematic, outrageous misconduct in connection with the investigation of this case and thus violated defendants' rights to Due Process; dismissal was required as an exercise of the court's supervisory powers; there had been gross abuse by the government in failing to inform the grand jury of Flemmi and Bulger's status and activities as informants; that immunized testimony had been improperly presented to the grand jury; and illegally obtained electronic surveillance evidence had been presented to the grand jury. *See* Memorandum of Law in Support of Defendants' Motion to Dismiss All Pending Indictments (Sept. 2, 1997).

Cardinale's affidavit charged that Connolly had attempted to foment violence by telling him in 1989 that Salemme was planning to kill his then client Ferrara. Aff. of Anthony Cardinale, Sept. 3, 1997 ("Cardinale Aff., Sept. 3, 1997"). In addition, Flemmi filed a notice that as part of his defense he would assert that he was authorized by the FBI to engage in the acts now charged as crimes. Defendant Flemmi's Notice Under Fed.R.Crim.P. 12.3 (Docket No. 696). The defendants submissions were, despite the government's objection, unsealed on September 10, 1997. *United States v. Salemme*, 985 F.Supp. 193 (D.Mass. Sept.10, 1997).

On October 6, 1997, the defendants filed, under seal, an eighty-five page Factual Submission in Support of Defendants' Motion to Dismiss. This Factual Submission referenced and analyzed information defendants had received in discovery. The court did not grant the defendants' requests to unseal this document. Oct. 6, 1997 Order.

On October 22, 1997, the government filed, under seal, a ninety-nine page Opposition to Defendants' Motion to Dismiss All Pending Indictments, and attachments. The memorandum thoroughly addressed the law relating to virtually all of defendants' claims except Flemmi's contention that he had been provided immunity. The theme of the government's submission was, in essence, that the defendants were not entitled to a pretrial evidentiary hearing on their motion to dismiss and that their claims would at trial be proven to be unmeritorious.

Over the next several months, the court held a series of hearings concerning the motions to dismiss and other matters.[65] The court expressed the view that the defendants' claim that the case should be dismissed because of outrageous misconduct might not be viable as a matter of law, but their supervisory powers claim might be valid if certain facts were proven. Oct. 29, 1997 Tr. at 45–46, 58.

The court also provided the parties with the opportunity to supplement their submissions concerning Flemmi's suggestion

65. These other matters included a criminal contempt trial at which Cardinale was found not guilty of violating the protective order issued concerning the documents produced to defendants in discovery. *See* Oct. 29, 1997 Tr. at 14. In addition, the court conducted hearings before allowing defendants' motion to have their counsel appointed to continue to represent them at public expense, under the Criminal Justice Act, because the defendants no longer had the resources to retain them privately. *See* Nov. 14, 1997 and Dec. 29, 1997 Memoranda and Orders.

that the case against him be dismissed because he had been promised immunity. Flemmi confirmed that he was asserting an immunity defense. On December 15, 1997, the government filed a lengthy memorandum opposing Flemmi's motion for an evidentiary hearing on his motion to dismiss based on immunity. On December 22, 1997, Flemmi filed another affidavit in support of his immunity claim. Ex. 31.

After additional hearings on December 18 and 23, 1997, the court granted Flemmi's motion for an evidentiary hearing on his motion to dismiss based on immunity. *See United States v. Salemme*, 1997 WL 810057 at *1–3 (D.Mass. Dec.29, 1997). As the issues presented are integrally related, the court decided that the hearings on the motions to suppress and the motion to dismiss based on immunity would be conducted concurrently. *Id.* at *3. The court did not grant the defendants' request for an evidentiary hearing on the other grounds of their motions to dismiss.

The evidentiary hearings began on January 6, 1998. On January 20, 1998, they were suspended for three months while the court addressed and denied the government's suggestion that it be disqualified, pursuant to 28 U.S.C. § 455(a), because, although the government acknowledged that the court was actually unbiased, a reasonable person would question its impartiality. *See* Feb. 13, 1998 and Mar. 30, 1998 Memoranda and Orders.

The testimony was completed on October 30, 1998. The documentary record was completed on December 14, 1998. Several days of closing arguments were held. Nov. 12, 1998 Tr.; Nov. 16, 1998 Tr.; Nov. 17, 1998 Tr.; Nov. 18, 1998 Tr.; Nov. 19, 1998 Tr.; Nov. 20, 1998 Tr.; Nov. 23, 1998 Tr. In all, more than 17,000 pages of transcripts were generated in the evidentiary hearings. The parties' initial, voluminous post-hearing submissions were completed by January 29, 1999. The court ordered and received on April 6 and 30, 1999, additional, lengthy memoranda on certain electronic surveillance issues. Further hearings were held on April 13 and 14, 1999. Additional submissions followed. As a result, more than 1000 pages of briefs were filed.

The findings of facts detailed in this Memorandum are based on the direct and circumstantial evidence that this court found to be credible. Implicit in those findings are decisions that contradictory evidence was not credible. There is, however, one witness whose testimony deserves further reference.

Over the defendants' objection, the court permitted the government to question former FBI Supervisory Special Agent James Darcy as an expert witness. Sept. 24, 1998 Tr. at 12. Darcy had been the supervisor of the Organized Crime squad in the Atlantic City, New Jersey office of the FBI. Darcy Sept. 28, 1998 Tr. at 14. His testimony included the following.

Darcy generally would not have targeted an informant for investigation for engaging in the type of criminal activity that was known to the FBI when he was opened. Darcy Sept. 29, 1998 Tr. at 6–7. On two or three occasions, Darcy employed the procedures established by the Attorney General's Guidelines, and included in the FBI Manual, to authorize an Organized Crime informant to engage in what would otherwise be a criminal act. *Id.* at 28–31. Usually, however, it was simply understood and accepted that Organized Crime informants had to be engaged in unauthorized criminal activity to obtain the information that the FBI wanted concerning the highly secretive LCN, which was the Bureau's highest priority for many years. Darcy Sept. 28, 1998 Tr. at 42–44.

Darcy confirmed that it was the practice of the FBI to do everything possible to maintain the confidentiality of the fact that an individual was serving as an FBI informant. Darcy Sept. 29, 1998 Tr. at 75. Consistent with this, Darcy never provided an informant's self-incriminatory statements to anyone outside the FBI. *Id.* at

80–84. To have done so would have exposed the informant's relationship with the FBI and violated the Bureau's confidentiality agreement with him. *Id.*

Nor did Darcy, or the FBI to his knowledge, ever use an informant's statements against him. *Id.* Darcy's experience is consistent with that of Potts, the former Acting Deputy Director of the FBI. Potts May 22, 1998 Tr. at 25–28, 64–66.

Darcy did not expect an informant to report to the FBI concerning his own criminal activity. Darcy Sept. 29, 1998 Tr. at 26. Like Ring, Darcy did not ask informants about their own criminal activity. *Id.;* Ring June 22, 1998 Tr. at 44–49.

Darcy was never involved in any matter in which the FBI used information provided by an informant to obtain a warrant for electronic surveillance and later used against the informant the intercepted evidence that he had helped obtain. Darcy Sept. 29, 1998 Tr. at 82. In this respect Darcy's experience was consistent with Ahearn's. Ahearn May 11, 1998 Tr. at 51–52. In addition, Darcy had never listed an informant as a target in an application for a warrant to conduct electronic surveillance in order to conceal the informant's identity. *Id.* at 25.

As Darcy explained, in some instances the FBI found a person to be more valuable as a continuing informant than as a cooperating witness whose ability to obtain information would vanish when his relationship with the FBI was disclosed. Darcy Sept. 28, 1998 Tr. at 135–36.

Finally, there were several potentially meaningful witnesses who were not available to testify. The parties agreed that a heart attack and a stroke that O'Sullivan suffered during the pendency of these proceedings rendered him unavailable. Oct. 6, 1998 Order.

In addition, the court did not receive the testimony of Connolly. The defendants sought to question Connolly. Connolly Apr. 30, 1998 Tr. at 11–13, Oct. 30, 1998 Tr. at 5–6. However, Connolly properly invoked his Fifth Amendment privilege not to answer any substantive questions because his responses might tend to incriminate him. Connolly Apr. 30, 1998 Tr. at 12–13, Oct. 30, 1998 Tr. at 5–6.

After Connolly declined to testify, the defendants asked the court to direct the government to request an immunity and compulsion order concerning Connolly, under 18 U.S.C. § 6001 *et seq.*, or to dismiss the case. Although such orders are rare, the request presented a serious issue in this case. Oct. 16, 1998 Tr. at 6. Upon consideration of the parties' submissions, and after several hearings, the defendants' motion was denied. *Id.* at 4–30.

In summary, the court found Connolly had made many public statements which, if repeated under oath, would corroborate meaningful aspects of Flemmi's testimony. *Id.* at 8–9; Ex. DDDDD. More specifically, the court assumed that if immunized and compelled to testify, Connolly would state that:

> [He] was the FBI handling agent for Mr. Flemmi and James Bulger from about 1975 to 1990, that Flemmi and Bulger were Top Echelon informants. The FBI understood that Bulger and Flemmi were engaged in a wide range of criminal activity, possibly including murder. Flemmi and Bulger were extremely valuable confidential informants who provided vital information [regarding] the government's successful efforts to investigate and prosecute La Cosa Nostra in New England, the Department of Justice's top priority here. Mr. Connolly regarded Bulger and Flemmi as the two most valuable sources the FBI in Boston had.
>
> The FBI as an organization, ... rather than isolated aberrant agents, authorized Bulger and Flemmi to engage in loansharking, gambling, and related activities in order to permit them to perform as confidential informants. The FBI promised that Flemmi and Bulger's identity as confidential informants would

never be disclosed, and that if necessary cases would be dismissed to avoid doing so . . . .

John Morris told Bulger and Flemmi that they could do anything short of murder, and they would be protected by the FBI.

After Connolly retired, the government failed to honor the promises that were made to Flemmi and Bulger. The indictment in this case . . . is inconsistent with the promises that the government made to Bulger and Flemmi.

Oct. 16, 1998 Tr. at 8–9.

The court, however, found that it could, as a matter of law, issue the requested order only if it decided that the government was refusing to grant Connolly immunity *solely* to distort the factfinding process and thus deprive Flemmi of Due Process. *Id.* at 9–16. The decision was based on precedent that indicates that under the Due Process theory, the court may order the government to request an immunity and compulsion order only if the government's decision not to immunize is motivated solely by a desire to distort the factfinding process to the detriment of a defendant. *Id.* at 5 (citing *Angiulo*, 897 F.2d at 1192; *United States v. Mackey*, 117 F.3d 24, 27 (1st Cir.), *cert. denied*, 522 U.S. 975, 118 S.Ct. 431, 139 L.Ed.2d 331 (1997); *United States v. Castro*, 129 F.3d 226, 232 (1st Cir.1997), *cert. denied*, 523 U.S. 1100, 118 S.Ct. 1569, 140 L.Ed.2d 803 (1998)).

As the court explained, in the instant case the government had a mixture of motives for deciding not to immunize Connolly. One motive was a good faith desire not to injure the investigation of Connolly that had been initiated and his possible criminal prosecution for, among other things, aiding and abetting Bulger's flight to avoid prosecution, which would be a violation of 18 U.S.C. § 1073 that had occurred within the statute of limitations. Oct. 16, 1998 Tr. at 17–19, 24. The government's decision concerning Connolly was also motivated in part by a desire to keep information that might be helpful to Flemmi out of the record. *Id.* at 19–24.

Thus, the court held that because the government had one valid motive for its refusal to immunize Connolly, its conduct did not violate Flemmi's right to Due Process. *Id.* at 24–25. Therefore, his motion to compel the government to immunize Connolly or dismiss the case was denied. *Id.* at 29.

Connolly subsequently made certain public statements which caused the court to wonder whether he had become willing to testify without immunity. Oct. 27, 1998 Tr. at 32. Thus, the defendants were allowed to subpoena him again. Oct. 27, 1998 Tr. at 34. However, Connolly again properly asserted his Fifth Amendment privilege with regard to all substantive questions. Connolly Oct. 30, 1998 Tr. at 5–6.

As Connolly was unavailable to testify, the defendants moved to have some of Connolly's public statements admitted as evidence. *See* Ex. EEEEE (Defendants' Proffer of Declarations Against Penal Interest of Potentially Unavailable Witness John Connolly). Although the court was not required to apply the Federal Rules of Evidence in this proceeding, it utilized Rule 804(b)(3), and the related jurisprudence, including *Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994), as a guide in deciding this motion. Oct. 23, 1998 Tr. at 33–38. As a result, Flemmi's motion was allowed in part and denied in part. More specifically, the court admitted the following public statements because they tended to expose Connolly to criminal liability and were adequately corroborated to be deemed sufficiently trustworthy to be considered. *Id.* at 36.

According to Connolly, the "FBI knew what [Flemmi and Bulger] were. They didn't have a paper route when [the FBI] first met them. All . . . Top Echelon informants are murderers. The government

put [Connolly] in business with murderers." *Id.* at 43.

Bulger and Flemmi "were guaranteed that they could run a gambling and loansharking operation." *Id.* at 38. Bulger and Flemmi "were indicted for things they were guaranteed they would not be indicted for." *Id.* at 46. The indictment in this case "charging Bulger and Flemmi with gambling and loansharking was a betrayal of the promises made to [them]." *Id.* at 44–45. However, "the minute [Connolly] told [the government] that [he] would testify to the fact that these people were authorized to run a gambling and loansharking business, the [government] did not want to hear from [him]." *Id.* at 42.

Connolly "hoped that Bulger was never caught." *Id.* at 43. "At least he kept his end of the bargain." *Id.* at 45. With regard to the government Connolly wondered, "What ever happened to keeping your word." *Id.* at 46.

III. CONCLUSIONS OF LAW

1. *Flemmi's Motion to Dismiss or Suppress Based on Immunity*

A. *The Court is Now Considering Only the Issue of Immunity*

[1] On December 29, 1997, the court allowed Flemmi's request for an evidentiary hearing on his motion to dismiss to the extent that the motion asserted that he was promised immunity from prosecution in return for his cooperation with the FBI. *See Salemme*, 1997 WL 810057, at *1 (Dec. 29, 1997). As the court wrote:

> Federal Rule of Criminal Procedure 12(e) directs a court to decide a pretrial motion prior to trial unless there is good cause to defer a decision. In addition, Federal Rules of Criminal Procedure "12(e) and (g) clearly envision that a district court may make preliminary findings of fact necessary to decide the questions of law presented by a pre-trial motion so long as the court's findings on the motion do not invade the province of the ultimate finder of fact." *United States v. Jones*, 542 F.2d 661, 664–65 (6th Cir.1976). *See also* 24 James Wm. Moore et al., *Moore's Federal Practice*, § 612.07[1] (3rd ed.1997). Moreover, a district court must decide a pretrial motion prior to trial if deferring a decision would adversely affect a party's right to appeal. *See* Fed.R.Crim.P. 12(e).
>
> A claim of an enforceable promise of immunity which prohibits a particular prosecution presents an issue to be decided by the court rather than the jury. *See, e.g., United States v. McLaughlin*, 957 F.2d 12, 16 (1st Cir.1992)(holding that district court did not err in concluding, after an evidentiary hearing, that the immunity agreement between defendant and the government did not extend to the charge being prosecuted); *United States v. Rodman*, 519 F.2d 1058, 1059–60 (1st Cir.1975) (*per curiam*) (affirming a pretrial order dismissing an indictment because of bad faith of Securities and Exchange Commission ("SEC") official in promising to recommend no prosecution of defendant). *See also* Charles Alan Wright, *Federal Practice and Procedure* § 193 (2d ed. 1982) ("The third class of matters contemplated by Rule 12(b) are defenses and objections capable of determination without trial of the general issue.... These include ... immunity."). Thus, Flemmi's claim of immunity can be properly decided, by the court, prior to trial. Indeed, a pretrial ruling may be required to preserve the government's right to appeal pursuant to 18 U.S.C. § 3731 because in some circumstances a motion to dismiss granted at trial may constitute an acquittal for double jeopardy purposes. *See* 24 Moore, *supra*, at §§ 612.07[1] and 629.23. *See also United States v. Barletta*, 644 F.2d 50, 51–59 (1st Cir.1981) (discussing interaction of Fed.R.Crim.P. 12 and 18 U.S.C. § 3731).

Id. at *1–2.

[2, 3] With regard to immunity, if an individual is compelled to testify pursuant

to § 6002 *et seq.*, he is granted use immunity that is coextensive with his Fifth Amendment privilege and, therefore, protects the individual from prosecution through the use of the immunized testimony or evidence derived from that testimony. *See* 18 U.S.C. § 6002 (1994); *Kastigar v. United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). However, in exchange for his cooperation the government may also grant an individual "varying degrees of immunity in an informal agreement." *United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir.1995).

[4–6] Therefore, the government may in entering into an informal immunity agreement promise that an individual will not be prosecuted at all in exchange for his cooperation, which is generally called "transactional immunity." *Id.* at 1468; *United States v. McHan*, 101 F.3d 1027, 1034 (4th Cir.1996); *United States v. Eliason*, 3 F.3d 1149, 1152 (7th Cir.1993); *Rowe v. Griffin*, 676 F.2d 524, 526–27 (11th Cir.1982); *United States v. Harvey*, 869 F.2d 1439, 1443 (11th Cir.1989). Similarly, the government may agree to provide use and derivative use immunity coextensive with that granted by operation of § 6002, or only that an individual's statements will not be used directly against him. *United States v. Plummer*, 941 F.2d 799, 803–04 (9th Cir.1991); *United States v. Lyons*, 670 F.2d 77, 80 (7th Cir.1982). With regard to informal immunity, "[a] defendant's rights are determined by the terms and conditions of the bargain as found by the court." *United States v. McLaughlin*, 957 F.2d 12, 16 (1st Cir.1992).

It is the question of alleged immunity that the court is now addressing. It may be valuable to recognize, however, the related issues that are not now before the court, but which may have to be decided at trial, by a jury if there is sufficient evidence for the government to survive a motion for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29.

The court is not now considering Flemmi's intended public authority, or authorization, defense, "which may come into play when a defendant undertakes certain acts, reasonably relying on the statements of a government agent cloaked with actual authority." *United States v. Holmquist*, 36 F.3d 154, 161 n. 7 (1st Cir.1994). In essence, "[a]ctions properly sanctioned by the government are not illegal." *Baptista–Rodriguez*, 17 F.3d at 1368 n. 18.

Nor is the court now evaluating Flemmi's foreseeable defense of entrapment by estoppel, which:

> is predicated upon fundamental notions of fairness embodied in the Fifth Amendment's due process clause. Whether the prosecution of a defendant violates his due process rights depends not solely upon whether he was incorrectly informed or misled by a government official, but upon the totality of the circumstances surrounding the prosecution.

United States v. Smith, 940 F.2d 710, 714 (1st Cir.1991). *See also United States v. Ellis*, 168 F.3d 558, 561 (1st Cir.1999).

In addition, it is premature for the court to consider the merits of the defendants' foreseeable claim that the government has not proven the particular enterprise or precise conspiracies alleged in the Fourth Superseding Indictment. More specifically, as indicated earlier,

> In this case, the government must prove the precise RICO conspiracy, RICO Enterprise, and conspiracy to extort bookmakers and drug dealers which are at the heart of the Fourth Superseding Indictment. *See* 4SI counts 1 and 3. Any material variance in the proof of those charges should result in the defendants' acquittal. *United States v. Glenn*, 828 F.2d 855, 858–60 (1st Cir. 1987) (Breyer, J.) (dismissing drug conspiracy conviction due to variance between indictment and proof at trial); *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir.1986) ("Variances which create a substantial likelihood that a de-

fendant may have been convicted of an offense other than charged by the grand jury ... are considered per se prejudicial."), *cert. denied*, 484 U.S. 815, 108 S.Ct. 68, 98 L.Ed.2d 32 (1987); *United States v. Snider*, 720 F.2d 985, 989–90 (8th Cir.1983) (reversing convictions due to variance between number of conspiracies charged and proven), *cert. denied*, 465 U.S. 1107, 104 S.Ct. 1613, 80 L.Ed.2d 142 (1984).

The Fourth Superseding Indictment charges that Bulger and Flemmi were integral members of each of the conspiracies alleged; indeed, they are two of the five named coconspirators. *See* 4SI, Count 1, ¶ 2 and Count 3. They are also two of the five named members of the alleged RICO Enterprise, one purpose of which, the government contends, was to coordinate the activities of the Patriarca Family and the Winter Hill Gang. *See* 4SI Count 1, ¶¶ 1(b)(2), 1(k); February 14, 1997 Bill of Particulars.

If informed that Bulger, as well as Flemmi, was cooperating with the government during the relevant period, it is foreseeable that the other defendants are likely to argue at trial that Flemmi and Bulger were government agents; that, therefore, they were not members of the conspiracies or RICO Enterprise alleged in the indictment, *see, e.g., United States v. Duff*, 76 F.3d 122, 127 (7th Cir.1996) ("[A]n agreement with an agent of the police is not a criminal conspiracy."); *United States v. Nason*, 9 F.3d 155, 161 n. 2 (1st Cir.1993) (citing *United States v. de Bright*, 742 F.2d 1196, 1198–1200 (9th Cir.1984)); and, thus, that the conspiracies and substantive RICO offenses charged in the indictment have not been proven. This defense may be particularly promising with regard to the RICO charges on which the government will be required to prove both the existence of the Enterprise alleged and its on-going effort to coordinate the activities of the Patriarca Family and the Winter Hill Gang, which Bulger and Flemmi are alleged to have led. Similarly, if Bulger and Flemmi were informants, their codefendants are likely to contend that their statements may not be admitted under Federal Rule of Evidence 801(d)(2) because they were not truly coconspirators. *See United States v. Eisenberg*, 596 F.2d 522, 527 (2d Cir.1979) (holding that declarations of individuals acting as government informants may not be admitted on the theory that they are agents of defendants.).

Moreover, it is foreseeable that if both Bulger and Flemmi were secretly providing information to the government during the period relevant to this case, the defendants may contend that they have been entrapped or otherwise victimized by government misconduct.

Salemme, 978 F.Supp. at 353–54 (footnotes omitted).

Finally, the court is, of course, not now addressing the implications of Flemmi's valuable service to the government for the sentence that should be imposed if he is convicted. If that contingency occurs, the facts described in this Memorandum will undoubtedly generate a claim that Flemmi's case is not within the "heartland" contemplated by the Sentencing Commission when it promulgated its Guidelines and that Flemmi is entitled to a downward departure from the ordinarily applicable Guideline range. *See* 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0.

B. *The Applicable Standards Concerning Immunity*

"Since ... immunity-in-exchange-for-cooperation agreements are in the nature of contracts, their scope and effects are strongly influenced by contract law principles." *McLaughlin*, 957 F.2d at 16. Courts, however, "are not obliged to follow blindly the law of contracts in assessing ... cooperation agreements." *United States v. Carrillo*, 709 F.2d 35, 36 n. 1 (9th Cir.1983). *See also Plummer*, 941 F.2d at 802. Rather, as the Court of Appeals for

the Fourth Circuit said concerning plea agreements, in terms also applicable to immunity agreements in which individuals, among other things, relinquish Fifth Amendment rights:

> [T]he courts have recognized that [the rules relating to private contracts] have to be applied ... with two things in mind which may require their tempering in particular cases. First, the defendant's underlying "contract" right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law. *See Mabry v. Johnson*, 467 U.S. at 509, 104 S.Ct. at 2548 (broken government promise that induced guilty plea implicates due process clause because it impairs voluntariness and intelligence of plea). Second, with respect to federal prosecutions, the courts' concerns run even wider than protection of the defendant's individual constitutional rights—to concerns for the "honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government." *United States v. Carter*, 454 F.2d 426, 428 (4th Cir.1972).

United States v. Harvey, 791 F.2d 294, 300 (4th Cir.1986). *See also United States v. Streebing*, 987 F.2d 368, 372 (6th Cir.1993) (for the purposes of deciding whether to enforce a promise "a cooperation agreement is analogous to a plea bargain agreement.").

[7] Thus, "[d]ue process requires the government to adhere to the terms of any plea bargain or immunity agreement it makes." *Harvey*, 869 F.2d at 1443. *See also United States v. Thompson*, 25 F.3d 1558, 1562 (11th Cir.1994); *United States v. Lua*, 990 F.Supp. 704, 709 (N.D.Iowa 1998). This principle is not disputed. Rather, the government represents that:

> The United States recognizes that Due Process requires that it adhere to the terms of any plea bargain or immunity agreement that it makes. *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) (plea agreement); *Bemis v. United States*, 30 F.3d 220, 221 (1st Cir.1994) (plea agreement); *Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982) (immunity).

Gov. Post–Hearing Brief at 50–51. In essence, Due Process means that generally applicable principles of contract law must be applied, and if necessary modified, to assure that an individual is "not deprived of his liberty in any fundamentally unfair way." *Mabry v. Johnson*, 467 U.S. 504, 510, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984).

As indicated earlier, with regard to alleged immunity agreements, the court must first determine if a bargain was made. *Lua*, 990 F.Supp. at 710. If an agreement exists, a "defendant's rights are determined by the terms and conditions of the bargain as found by the court." *McLaughlin*, 957 F.2d at 16. *See also United States v. Hogan*, 862 F.2d 386, 388 (1st Cir.1988); *Plummer*, 941 F.2d at 805; *Dudden*, 65 F.3d at 1467.

[8–10] Informal grants of immunity may be oral as well as written. *McLaughlin*, 957 F.2d at 16; *Harvey*, 869 F.2d at 1439;[66] *Lua*, 990 F.Supp. at 709. In addi-

66. The government does not contend that any immunity agreement that Flemmi had is not enforceable because it was not in writing and therefore is unenforceable under the statute of frauds, M.G.L. ch. 259, § 1, which requires that "an agreement not to be performed within one year" be memorialized in a writing and signed by, or on behalf of, the party to be charged. Any such contention would be unmeritorious for two reasons.

First, Flemmi claims, in effect, that he was promised that if he served the FBI as an informant he would not be prosecuted for crimes that he might commit. Flemmi's agreement to assist the government was of indefinite duration. It could have been performed in less than a year. Thus, even if the statute of frauds were deemed applicable, it would not require that Flemmi's agreement with the government be in writing. *See, e.g., Boothby v. Texon, Inc.*, 414 Mass. 468, 479, 608 N.E.2d 1028 (1993) ("The Statute of Frauds 'applies only to contracts which by their terms cannot be performed within the

tion, an informal immunity agreement may be express or implied from the conduct of the parties. More specifically:

> While a contract is made when the parties verbally express their mutual assent to its essential terms, it may also be implied when the parties' conduct manifests their agreement. *See* 1 *Restatement (Second) of Contracts* § 19 (1979).

McHan, 101 F.3d at 1034. *See also Lva*, 990 F.Supp. at 709. As the Supreme Court has explained:

> An agreement implied in fact is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."

Hercules Inc. v. United States, 516 U.S. 417, 424, 116 S.Ct. 981, 134 L.Ed.2d 47 (1996) (quoting *Baltimore & Ohio R. Co. v. United States*, 261 U.S. 592, 597, 58 Ct.Cl. 709, 43 S.Ct. 425, 67 L.Ed. 816 (1923)). Among other things, "[a]n implied-in-fact contract arises from '[c]onduct that would lead a reasonable person in the other party's position to infer a promise in return for performance or promise ....'" *Prescott v. Morton Int'l, Inc.*, 769 F.Supp. 404, 410 (D.Mass.1990) (quoting E.A. Farnsworth, *Contracts* § 3.10 at 124 (1982)).

[11] "'The rule requiring compliance by the government with promises made during plea bargaining and analogous contexts generally requires that the agent be authorized to make the promise.'" *Margalli–Olvera v. Immigration and Naturalization Serv.*, 43 F.3d 345, 353 (8th Cir. 1994) (quoting *Thomas v. Immigration and Naturalization Serv.*, 35 F.3d 1332, 1338 (9th Cir.1994)). *See also San Pedro*, 79 F.3d at 1068.

> In the law of agency, actual authority takes two forms: (1) express authority, and (2) authority that is implied or incidental to a grant of express authority. W. Edward Sell, *Sell on Agency* 25–31 (1985).

Thomas, 35 F.3d at 1338. *See also San Pedro*, 79 F.3d at 1068; *Margalli–Olvera*, 43 F.3d at 353.

[12] Implied or incidental actual authority is derived from the express powers given to the agent. Generally, "authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it." *Restatement (Second) of Agency* § 35 (1957). Actual authority is "created by acts of a principal ... that would *reasonably lead another* ... to believe that the other was authorized to act for the principal." *United States v. Greene*, 995 F.2d 793, 800 (8th Cir.1993) (citing *Restatement (Second) of Agency* § 7 at 28, § 7 cmt. c at 29–30, § 26 at 100, § 26 cmt. a at 101, § 26 cmt. b at 101–02 (1957)).[67] Thus, the existence

year. It does not apply to contracts which may be performed within, although they may also extend beyond, that period.'"); *Dunne v. Fall River*, 328 Mass. 332, 334, 104 N.E.2d 157 (1952); *Meng v. Trustees of Boston Univ.*, 44 Mass.App.Ct. 650, 652, 693 N.E.2d 183 (1998); Caroline N. Brown, 4 *Corbin on Contracts* § 19.3 (Joseph M. Perillo, ed., Rev.ed. 1997); E. Allen Farnsworth, *Contracts* § 6.4 (1990); *Restatement (Second) of Contracts* § 130, cmt. a. (1979).

> More significantly, as stated previously, with regard to immunity agreements Due Process requires that generally applicable principles of contract law be modified if necessary to assure fundamental fairness. It is reasonable and consistent with usual practice to require that certain commercial contracts be embodied in signed, written documents. However, the government's agreements with its informants are highly confidential and are not ordinarily written. A requirement that such agreements be in writing could discourage many potential sources from cooperating with the government. In the circumstances, depriving Flemmi of the benefit of any bargain he may have with the government because of the lack of a written agreement would be fundamentally unfair.

67. Implied actual authority is different than apparent authority, which focuses on actions that create a reasonable belief *in a third person* that the putative agent has the authority to act for the principal. *See Hinchey v. NYNEX Corp.*, 144 F.3d 134, 141 (1st Cir. 1998).

of implied or incidental actual authority depends on whether the principal's actions would create the belief in a reasonable person that the principal had bestowed authority on that person. "Authority 'is generally implied when such authority is considered to be an integral part of the duties assigned to a[g]overnment employee.'" *Thomas*, 35 F.3d at 1340 (quoting *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed.Cir.1989)).

[13] There are, however, circumstances in which Due Process may require that the government perform a promise made by an agent who exceeded his actual authority. As the Court of Appeals for the First Circuit has noted:

> courts on occasion have specifically enforced promises that would encroach on the jurisdiction of independent entities. *See, e.g., Palermo v. Warden*, 545 F.2d 286, 296 (2d Cir.1976).

Bemis v. United States, 30 F.3d 220, 221 n. 1 (1st Cir.1994). In general, those decisions are rooted in the principle that, "fundamental fairness and public confidence in government officials require that [the government] be held to 'meticulous standards of both promise and performance.'" *Palermo v. Warden*, 545 F.2d 286, 296 (2d Cir.1976) (quoting *Correale v. United States*, 479 F.2d 944, 947 (1st Cir.1973)). Thus, as the Court of Appeals for the First Circuit has written, for the purposes of determining whether an individual has been deprived of Due Process, "'the crucial question is not whether the Government had the authority to carry out the promise which [petitioner] claims he understood it to make, but whether it did in fact make such a promise.'" *Bemis*, 30 F.3d at 222 (quoting *United States v. Cook*, 668 F.2d 317, 320 (7th Cir.1982)).

This principle has been applied to informal immunity agreements, which, as previously described, have been regularly analyzed pursuant to the same principles as plea agreements. *See, e.g., United States v. Rodman*, 519 F.2d 1058, 1059–60 (1st Cir.1975) (dismissing on grounds of fairness indictment of defendant based on unfulfilled promise of Securities and Exchange Commission attorney to recommend strongly no prosecution, where defendant made self-incriminatory statements, but there was no finding that they had been used against him directly or indirectly); *Carrillo*, 709 F.2d at 36–37 (enforcing promise by DEA agents that defendant would not be prosecuted if he cooperated in their investigation despite apparent lack of participation of a prosecutor in the promise or any evidence provided by defendant being used against him).

[14] In addition, "under the self-incrimination clause of the fifth amendment, evidence of guilt induced by a government promise of immunity is 'coerced' evidence and may not be used against the accused." *Rowe*, 676 F.2d at 527. *See also Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 347–48, 83 S.Ct. 448, 9 L.Ed.2d 357 (1963); *United States v. Walton*, 10 F.3d 1024, 1028–31 (3rd Cir.1993); *United States v. Rogers*, 906 F.2d 189, 190–91 (5th Cir. 1990); *United States v. Swint*, 15 F.3d 286, 290 (3rd Cir.1994); *United States v. Conley*, 859 F.Supp. 830, 835–37 (W.D.Pa. 1994). If it is proven that a defendant was induced to make statements to the FBI because its agents caused him to have a reasonable, but erroneous belief that he had a valid immunity agreement with the government, a constitutional violation has been established and neither his statements nor any evidence derived from them may be used against him. *Oregon v. Elstad*, 470 U.S. 298, 305, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985); *United States v. Byram*, 145 F.3d 405, 409 (1st Cir.1998).

[15] When the government obtains evidence as a result of a formal or informal grant of use and derivative use immunity, and it appears that such evidence may have been misused to secure the defendant's indictment, the case against him must be dismissed unless the government proves by a preponderance of the evidence

that it had a legitimate, independent source for the information presented to the grand jury or, if the government cannot disprove taint, that the error was harmless beyond a reasonable doubt. *Kastigar*, 406 U.S. at 460; *United States v. Schmidgall*, 25 F.3d 1523, 1530–31 (11th Cir.1994) ("*Schmidgall I*"); *United States v. Schmidgall*, 25 F.3d 1533, 1538 (11th Cir. 1994) ("*Schmidgall II*"); *United States v. Bartel*, 19 F.3d 1105, 1112 (6th Cir.1994); *United States v. Palumbo*, 897 F.2d 245, 251 (7th Cir.1990); *United States v. Poindexter*, 951 F.2d 369, 377 (D.C.Cir.1991). If, however, statements were made involuntarily as a result of an unauthorized promise of immunity and used, directly or indirectly, to secure the defendant's indictment, the remedy is suppression at trial rather than dismissal of the case. *United States v. Calandra*, 414 U.S. 338, 345, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

C. *Dismissal of This Case Is Not Now Justified Because Flemmi Was Not Promised Immunity From Prosecution*

[16] Flemmi claims that he had an enforceable, unwritten agreement that he would not be prosecuted in return for his service as an FBI informant. Thus, he contends that this case should be dismissed for violating the immunity conferred on him by that agreement. As indicated earlier, this claim requires that the court initially determine, from the credible direct and circumstantial evidence, whether Flemmi and the government entered into any agreement and, if so, the terms of their bargain.

The court finds that the FBI agents primarily responsible for dealing with Flemmi, by word and deed, for thirty years, promised Flemmi protection in return for his service as an informant. The conduct of many other members of the FBI, including at least three ASACs, and the Chief of the Organized Crime Section at FBI Headquarters, contributed to creating, communicating, and performing the promise of protection to Flemmi. Flemmi reasonably relied on the FBI's promise of protection and, in return for it, provided very valuable assistance to the government in its war against the LCN, among other things.

Flemmi was not, however, explicitly or implicitly promised immunity from prosecution. The term immunity was never used in conversation with him. More importantly, Flemmi did not understand that the government, or any of its agents, had agreed that he would not be investigated, by the FBI or any other law enforcement agency, or prosecuted. Rather, he expected that the FBI would overlook some of his criminal activity, provide him information concerning any investigations that were conducted, and warn him of any imminent charges against him of which it learned. As set forth in this Memorandum, the FBI performed its part of the bargain. Thus, it is not necessary or appropriate to decide if the agents entering into this agreement were authorized to do so, or whether the agreement was not valid because it violated public policy or because it attempted to provide immunity for future criminal conduct.

More specifically, as described in detail in this Memorandum, Rico, Connolly, and Morris each told Flemmi that he would be "protected" in return for serving as an informant. §§ II.2, II.5, II.18, *supra*. Only Morris qualified this promise in any way by telling Flemmi, in effect, that he would be protected "as long as he did not clip anyone." § II.18, *supra*. As Flemmi testified, neither Rico nor Connolly ever used the word "immunity." §§ II.2, II.5, *supra*. Nor did Morris. § II.18, *supra*.

The conduct of Rico, Connolly, Morris, and many but not all of their colleagues at the FBI, expressed even more clearly than their words the FBI's agreement to protect Flemmi. Rico told Flemmi about other individuals who were cooperating with law enforcement so that Flemmi could be careful around them. § II.14, *supra*. In 1969, Rico advised Flemmi that he and

Salemme would soon be indicted and suggested that they flee promptly. § II.2, *supra*. In addition, as Rico promised, Flemmi was released on bail and the fugitive charges against him were dismissed when Flemmi followed Rico's advice and returned to Boston in 1974. § II.3, *supra*.

Connolly and Morris, individually and in tandem, also acted repeatedly to protect Flemmi. In 1977 or 1978, Connolly intimidated executives of National Melotone from pursuing their complaint that Bulger and Flemmi were extorting the company's customers. § II.7, *supra*. In early 1979, with their sources' consent, Morris and Connolly told O'Sullivan that Flemmi and Bulger were valuable informants and persuaded him, with the consent of Daly, not to indict them in the race-fix case, in part so they could contribute to the FBI's effort to bug 98 Prince Street. § II.9, *supra*. In 1979, Morris received reports from informants that Bulger and Flemmi were shaking down bookmakers, but no investigation was conducted. § II.10, *supra*.

In 1980, Connolly informed Bulger and Flemmi that the Lancaster Street Garage was bugged or confirmed this fact for them. § II.11, *supra*. In 1980, in a further effort to obtain needed assistance, Morris and Connolly told Flemmi and Bulger that any evidence intercepted at 98 Prince Street would not be a problem for them. *Id.* Bulger and Flemmi, they said, would be protected, rather than prosecuted, for anything captured by the bug the FBI hoped to place at 98 Prince Street. *Id.* Flemmi and Bulger were subsequently told when the bug at 98 Prince Street was installed and when it was removed so that they would not be intercepted. *Id.*

In 1982, Morris caused Connolly to tell Flemmi and Bulger that Halloran was cooperating with the FBI and had implicated them in the Wheeler murder. § II.13, *supra*. In an effort to protect Bulger and Flemmi, Morris and Connolly also identified for them at least a dozen other individuals who were either FBI informants or sources for other law enforcement agencies. § II.14, *supra*. McIntyre may have been among them. *Id.*

In 1984, Connolly received reliable information that Bulger and Flemmi were engaged in an ongoing extortion of the Rakes concerning the South Boston Liquor Mart, but neither recorded the information nor conducted any investigation. § II.15, *supra*. He did, however, share the information that he had received with Bulger. *Id.*

In 1984, Connolly also warned Flemmi and Bulger of the investigation, being led by the DEA, targeting them. § II.17, *supra*. He subsequently told them of the wiretap that had been placed on Kaufman's phone. *Id.*

In April 1985, at a dinner that may have been held to celebrate the success of the effort to protect Bulger and Flemmi by frustrating what had become a joint DEA–FBI investigation of them, Morris reiterated that they would not be prosecuted for anything on the 98 Prince Street tapes. § II.18, *supra*. He also said to them, in Connolly's presence, that "you can do anything you want as long as you don't clip anyone." *Id.*

In 1986, after tasking Flemmi to acquire information vital to the FBI's effort to bug Vanessa's, Connolly told him when the bug was installed so that Flemmi would not be intercepted. § II.20, *supra*. Connolly later told Flemmi when the bug had been removed. *Id.*

In 1988, Connolly advised Flemmi that Cox would be wired and would attempt to engage Flemmi in incriminating conversation. § II.26, *supra*. Also in 1988, Morris had Connolly warn Flemmi and Bulger to stay away from Bahorian, whose telephone was about to be tapped in an effort to acquire evidence against Flemmi, among others. *Id.* Morris later reiterated this warning directly to Bulger and Flemmi. *Id.* He also told Flemmi that he could keep him out of any indictment arising from the Bahorian electronic surveillance. *Id.* Although Bahorian and others were ultimately indicted, Flemmi was not. *Id.*

In 1988 or 1989, Connolly told Bulger that Timothy Connolly was cooperating with the FBI and would try to record conversations with Bulger and Flemmi. § II.28, *supra*. Bulger passed this warning on to Flemmi. *Id.*

After providing Connolly information to assist in the FBI's effort to recruit Mercurio as an informant, Flemmi was told when that initiative had succeeded. § II.29, *supra*.

Following his retirement in 1990, Connolly used his enduring connections with Quinn and other former friends and colleagues on the Organized Crime squad to obtain information concerning investigations that might have resulted in charges against Bulger and Flemmi. § II.32, *supra*. Connolly regularly shared the information he acquired with them. *Id.* In early January 1995, Connolly accurately advised Bulger that he and Flemmi would be indicted on about January 10, 1995. *Id.* This warning, which Bulger shared with Flemmi, facilitated Bulger's flight to avoid prosecution and would have done the same for Flemmi if he had acted on Connolly's advice immediately. *Id.*

While Rico, Morris, and particularly Connolly were at the hub of the protection promised and provided to Flemmi, many of their colleagues and superiors in the FBI also contributed by their conduct to that promise and to its fulfillment.

In 1977, Daly and Kennedy were told by Green that Bulger and Flemmi had threatened to kill him in connection with their attempt to collect a debt, but no effort was made to develop the reluctant Green as a witness against them. § II.7, *supra*. In 1979, Daly later joined O'Sullivan in agreeing to leave Bulger and Flemmi out of the race-fix indictment. § II.9, *supra*.

In 1982, the Boston FBI agents aware of Halloran's cooperation did not tell their counterparts in Oklahoma City, who had expressed interest in him, that Halloran was available to be interviewed. § II.13, *supra*. When agents from Oklahoma City sought to interview Bulger and Flemmi, ASAC Fitzpatrick successfully opposed this request, in part by falsely claiming that he had interviewed Bulger about the matter. *Id.*

In 1984, McWeeney, then the Chief of the Organized Crime Section at FBI Headquarters, told Connolly that the DEA was leading an investigation targeting Bulger and Flemmi. § II.17, *supra*. Connolly shared this information with his sources. *Id.*

In 1988, Rod Kennedy, Newton, their supervisor Ellavsky, and ASAC Potts provided Bulger and Flemmi protection concerning the on-going extortion of Slinger. § II.22, *supra*. Although Slinger was willing to wear a wire and testify against Flemmi and Bulger, after Ellavsky consulted Potts, the information that he provided was neither memorialized nor investigated. *Id.* Instead, Bulger was told that Slinger had spoken to the FBI. *Id.*

Bulger and Flemmi were also protected by the FBI in the successful investigation of Willis and others. § II.23, *supra*. Although in 1986 and 1987, Ellavsky and Blackburn received increasingly specific information that Bulger was extorting Willis, after Connolly was consulted no investigation of Bulger was conducted. *Id.* Nor was the information the FBI had received concerning Bulger shared with the other agencies involved in the joint investigation of Willis. *Id.*

Similarly, in 1987, when Lavin obtained photographs and other information indicating that City of Boston employees had illegally erected guardrails on the private property of the South Boston Liquor Mart, he consulted Connolly. § II.24, *supra*. After being advised that Bulger was a valuable informant, Lavin made no record of the information he had received and conducted no investigation. *Id.*

When Murray was interviewed by Quinn and Clark in 1989, he was either not asked about his allegations that Connolly and Newton were selling information concern-

ing electronic surveillance to Bulger and Flemmi or his responses were not recorded in the notes or 302 of the interview. § II.25, *supra*. ASAC O'Callahan, however, subsequently prepared a memorandum which the SAC, Ahearn, sent to FBI Headquarters stating that those allegations were unsubstantiated. *Id.* In addition, Murray evidently was not questioned in detail about the information he indicated that he had concerning Bulger's role in the Halloran murder, or Bulger and Flemmi's roles in the murder of Barrett. *Id.* Moreover, the information Murray did provide was not given to the FBI agents responsible for those murder investigations or indexed in a way that would permit them to find it. *Id.* Nor was any effort made to utilize the willing Murray as a source of information to be used against Flemmi, Bulger, or anyone else. *Id.*

Finally, the evidence indicates that members of the Organized Crime squad kept Connolly advised of at least some developments in the investigation of Flemmi and Bulger that was initiated after Connolly retired. § II.32, *supra*. Quinn, the supervisor of that squad, provided Connolly with highly confidential information concerning a threat to Connolly's former source Mercurio, and may have done the same regarding Flemmi and Bulger. *Id.* In any event, some member(s) of the FBI told Connolly the date that indictments in this case were expected. Connolly used that information to honor his promise to protect Bulger and Flemmi.

It should also be recognized, however, that agents of the FBI in Boston were not uniform in their conduct concerning Bulger and Flemmi. Knotts earnestly sought information to support the effort of the Massachusetts State Police to bug the Lancaster Street Garage. § II.11, *supra*. Brunnick, Montanari, and Cleary were genuinely attempting to investigate whether Flemmi and Bulger were responsible for the Callahan, Halloran, and Wheeler murders. § II.13, *supra*. Greenleaf sincerely attempted to insulate Connolly from knowledge of the joint investigation of Flemmi and Bulger. § II.17, *supra*. Jordan and Stanley Moody targeted Flemmi as part of the Bahorian investigation. § II.26, *supra*.

Although advised by members of the FBI of virtually all of these investigations, and many others, Flemmi never claimed that they were improper because he had an agreement with the FBI that provided him with immunity from investigation by the FBI or any other agency, or from prosecution. Rather, when informed of the forthcoming indictments in the Fitzgerald bombing and Bennett murder cases, Flemmi fled. § II.2, II.3, *supra*. Twenty-five years later, Flemmi fled again when he was advised that he might soon be indicted with Yerardi. § II.32, *supra*. When told that O'Sullivan had agreed to leave him out of the race-fix case, Flemmi expressed gratitude, rather than assert that it would have been impermissible for him to have been indicted. § II.9, *supra*. As Flemmi testified, he viewed the tip that there was a wiretap on Kaufman's telephone as both a manifestation of the FBI's promise of protection and as part of the performance of that promise. § II.17, *supra*.

As Flemmi's conduct indicates, and as his testimony confirms, he always understood that his status as an FBI informant did not mean that he could not be investigated or prosecuted. §§ II.2, § II.9, § II.17, *supra*. Rather, he only expected the sort of protection that Rico, Connolly, Morris, and many of their colleagues regularly provided to him for thirty years. That protection permitted Flemmi and Bulger to survive repeated efforts by various law enforcement agencies to investigate them and allowed them to profit from their contribution to the FBI's campaign to destroy the LCN. As Flemmi testified, the potential for such profit was valuable consideration for his services. § II.20, *supra*.

Accordingly, the court finds that Flemmi did not have either an express agreement

or an agreement implied in fact that he would not be prosecuted. It is, therefore, not necessary or appropriate to determine if the agents who, expressly and/or through their actions, promised Flemmi protection were authorized to do so. Nor, for the purposes of deciding the motion to dismiss must the court decide whether any such agreement would be void and unenforceable as against public policy because it was inherently "an agreement to achieve mutual benefit from the parties' cooperative violation of the law." *Kiely v. Raytheon*, 105 F.3d 734, 736 (1st Cir.1997).

Finally, although Flemmi rendered very valuable service to the government for thirty years, he did not rely to his detriment on an unfulfilled promise that he would not be prosecuted. He was promised protection and that protection was provided until January 1995. Thus, his motion to dismiss based on an alleged promise of immunity generally is being denied.

D. *The Issues of Use and Derivative Use Immunity*

As an alternative to his motion to dismiss for a violation of his alleged agreement with the FBI that he would not be prosecuted, Flemmi asserts that he is entitled to direct and derivative use immunity concerning his statements to the FBI. With regard to this claim, the court concludes that Flemmi does not have immunity with regard to everything that he said to the FBI. However, the FBI's promise to maintain the confidentiality of Flemmi's service as an FBI informant also constitutes an enforceable promise not to use statements he made against him if disclosure of those statements would, as a practical matter, reveal that Flemmi had been an informant.

Therefore, Flemmi's statements that would identify him as an informant could not have properly been presented to the grand juries which indicted him. Circumstances suggest that it is doubtful that any such statements were used in this fashion. However, additional evidence will be required to resolve this question.

In addition, in the absence of a defense of public authority, or any other defense requiring presentation by Flemmi of some of his communications with the FBI, his statements to its agents that would identify Flemmi as an informant would not be admissible at trial. However, if, as represented, Flemmi relies at trial on some of his communications with the FBI, the court will, pursuant to Federal Rules of Evidence 106 and 611, permit the government to offer other statements of Flemmi to the Bureau in order to assure that the jury is presented with an appropriate record on which to decide fairly the merits of his defenses.

The promise of confidentiality that Flemmi received and reasonably relied upon does not alone preclude the government from making derivative use of his statements to the extent that such indirect use does not necessarily entail disclosure of Flemmi's informant status. However, as set forth in § III.1.D(3), *supra*, Flemmi does have an enforceable agreement that made it improper for the government to present the 98 Prince Street and 34 Guild Street interceptions, and any evidence derived from them, to the grand juries that indicted him. Although the Vanessa's interceptions were not presented to those grand juries, if any evidence derived from them was introduced, that too was improper. In this case, several witnesses before the grand jury read some or all of Flemmi's informant file. Thus, their testimony may have been impermissibly influenced by statements Flemmi made pursuant to valid promises of immunity. In addition, such statements may have been improperly utilized as investigatory leads, to identify witnesses or shape the questioning of them.

In the circumstances, a further hearing will be required to determine whether the case against Flemmi must be dismissed because the grand jury was exposed to evidence presented in violation of the promises of immunity to Flemmi. At this hearing the government will be required to

prove that the information it presented to secure the indictments of Flemmi was not tainted by showing that it had a legitimate, independent source for that evidence. If it cannot satisfy this burden, to avoid dismissal the government will have to prove that its error was harmless beyond a reasonable doubt. The required hearing will probably necessitate the production to Flemmi of the full transcripts of the grand jury proceedings.

Moreover, as discussed in § III.1.D(5), *supra*, there is substantial evidence suggesting that if, contrary to this court's conclusion, Flemmi does not have an enforceable agreement prohibiting the direct and indirect use against him of the statements that he made which the government used to obtain the warrants used to bug 98 Prince Street, Vanessa's, and 34 Guild Street, those statements were not voluntary, and their use against him, directly or indirectly, would therefore violate his constitutional rights under the self-incrimination and Due Process clauses of the Fifth Amendment. If this is true, neither Flemmi's statements nor any evidence derived from them may be used against him at trial. In addition, it may be appropriate for the court to decide whether this is one of the rare instances in which a case should be dismissed as an exercise of its supervisory powers or to afford the defendant the fundamental fairness to which he is entitled as a matter of Due Process. The parties have not, however, adequately addressed these issues, which have come into clear focus only as a result of the facts found in this Memorandum. Thus, the court will provide them an opportunity to present their views on these issues before deciding them.

(1) *Flemmi Does Not Have An Agreement Providing Use Immunity Generally For His Statements to the FBI*

[17] The mere fact that an individual is an informant does not mean that nothing he says to the FBI may be used against him as a matter of law. As Flemmi recognizes, to the extent that the courts have, in other contexts, recognized a common law "informant's privilege," it relates to protecting the informant's identity rather than the content of the informant's communication with law enforcement agents. Flemmi's Post–Hearing Memorandum in Support of Motion to Dismiss Indictment Based on Promise of Immunity at 40 n.15 (citing *Irons v. Federal Bureau of Investigation*, 880 F.2d 1446, 1450 (1st Cir.1989)). As the Court of Appeals for the District of Columbia Circuit wrote in *Westinghouse Elec. Corp. v. City of Burlington, Vt.*, 351 F.2d 762, 768 (D.C.Cir.1965), *Roviaro*, *supra*, establishes that: "Only the identity of the informer is privileged. The content of the communication is not privileged unless it would tend to reveal the identity of the informer."

In this case, the general question of whether what Flemmi said to the FBI could be used against him was never discussed with him. The term "immunity" was never used. In 1979, Flemmi was sufficiently concerned about what would be done with any evidence that might be intercepted at 98 Prince Street to ask about this issue. §§ II.11, *supra*, III.1.D(3), *infra*, This indicates that he did not believe that he had been previously promised use immunity generally.

As described in detail in this Memorandum, it was the practice of the FBI not to use an informant's statements against him, §§ II.2, II.5, II.8, II.16, II.20, II.21, II.33, *supra*, and this practice was followed with regard to Flemmi. This practice alone, however, did not establish an agreement that none of Flemmi's statements would ever be used against him, directly or indirectly. Thus, the motion to suppress all such statements and any evidence derived from them is not meritorious.

(2) *The Promise of Confidentiality Means Statements to the FBI Which Have the Effect of Identifying Flemmi as an Informant Cannot Be Used Against Him Unless His Defense Makes Them an Issue*

[18] As the government recognizes, "the evidence adduced during the hearing

indicated that there was an understanding between Flemmi and the FBI that his status as an informant would be confidential." Apr. 6, 1999 Government's Submission Pursuant to Court's Mar. 28, 1999 Order at 65. Indeed, the evidence establishing that Flemmi was promised confidentiality is unequivocal and overwhelming. As each of the relevant witnesses beginning with Rico testified, the promise of confidentiality is at the "heart" of the FBI's relationship with all of its informants. It is an assurance that the Bureau regards as "sacred." Thus, as demonstrated by the matters described in this Memorandum concerning Flemmi, Bulger, Mercurio, Donati, and others, the FBI will rarely, if ever, disclose the identity of an informant even to Department of Justice attorneys without the source's consent.

Inherent in the promise of confidentiality is the assurance that no statement that would as a practical matter disclose the fact that the speaker is an FBI informant will be disclosed to any law enforcement officer or prosecutor. As statements directly or indirectly identifying an informant may not be disclosed, it necessarily follows that they may not be presented against him in any grand jury investigation or prosecution.

The promise of confidentiality made to an informant, however, does not alone assure him that no other use against him will be made of the information that he provides. To the extent that the use of information provided by an informant masks its source, that use is not inconsistent with the assurance of confidentiality.

The FBI was authorized to promise an informant confidentiality expressly and, therefore, to assure him implicitly that nothing he said would be used against him in a manner that would identify him as an FBI source. In essence, the Attorney General is authorized to appoint officials "(1) to detect and prosecute crimes against the United States; ... and (3) to conduct such other investigations regarding official matters under the control of the Department of Justice ..." 28 U.S.C. § 533 (1994). The FBI is in the Department of Justice. 28 U.S.C. § 531 (1994). The Attorney General has formally delegated to the Bureau the authority to "[i]nvestigate violations of the laws, including the criminal drug laws, of the United States and collect evidence in cases in which the United States is or may be a party in interest, except in cases in which such responsibility is by statute or otherwise specifically assigned to another investigative agency." 28 C.F.R. § 0.85(a) (1999).

The use of informants is a traditional and important means of detecting crime and developing the evidence necessary to prosecute criminals successfully. Confidentiality is recognized as critical to developing informants. *See, e.g., Roviaro v. U.S.*, 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.Ed.2d 639 ("[B]y preserving their anonymity" citizens are encouraged to communicate their knowledge of crimes to law enforcement officials and thus promote the public interest in effective law enforcement.). Therefore, the FBI's authority to investigate crime naturally entails the power to develop and utilize informants.

There is no statute, regulation, or order that restricts the FBI's right to promise informants confidentiality. To the contrary, the Attorney General's Guidelines and other provisions of the FBI Manual expressly recognize that the FBI has that authority. As described more fully in § II.6, *supra*, FBI agents have long been instructed to advise every informant that the Bureau would "take all possible steps to maintain the full confidentiality of the informant's relationship with the FBI." Ex. 274 (Under Seal), Manual § 108 pt. I(C)(9)(d) (1–12–77). In addition, FBI agents have historically been instructed that "constant care should be exercised to avoid any disclosure to anyone which might result in identification of an informant or cast suspicion on an informant." *Id.* § 108 pt. I(C)(7) (1–12–77).

The FBI, as a practical matter, has delegated to an informant's handler and his supervisor the authority to make all decisions regarding the informant. § II.6, *supra*. Even since the issuance of the Attorney General's Guidelines in 1977, the handler and his supervisor have made the decisions and recommendations for which the SAC was, on paper, responsible. §§ II.6, II.21, *supra*. Thus, an agent, at least with the approval of his supervisor, could properly promise an informant confidentiality and, in the process, implicitly assure him that nothing he told the FBI would be used against him if doing so would disclose his cooperation with the FBI.

Flemmi understood that his relationship with the FBI would not be disclosed to anyone outside the Bureau without his consent. As described with particularity in this Memorandum, he was treated by the representatives of the FBI with whom he dealt primarily as a friend and ally rather than as an informant. He did not realize that he was ever opened or closed as an informant. Nor did he know that any of the information that he provided the FBI was being memorialized in writing. Flemmi was never told that anything he said to the FBI could be used against him.

The FBI's promise to Flemmi that his status as an informant would be kept confidential established an agreement that nothing that he said would be used against him if such use would entail identifying Flemmi as an FBI source. In return for this promise, among other things, Flemmi rendered very valuable services to the government. Therefore, it would have been a violation of that agreement for the government to have presented statements that could identify Flemmi as an FBI source to the grand juries that indicted him. As indicated earlier, additional evidence will be necessary to determine whether this was done and, if so, what remedy, if any, is required.

Ordinarily, it would also violate Flemmi's agreement with the government to permit any of his statements that might identify Flemmi as an informant to be admitted against him at trial, notwithstanding the fact that his relationship with the FBI is no longer confidential. In general, such statements would be inadmissible hearsay except for the fact that they were made by Flemmi himself. *See* Fed. R.Evid. 801(d)(2)(A).

In the instant case, Flemmi's history as an informant is now known. Flemmi did not, however, initiate the revelation that he was an informant. Having obtained Flemmi's indictment, the government disclosed his status to the magistrate judge in the process of seeking guidance concerning its discovery obligations. This court eventually found the sealed submissions and Orders relating to that request. Thus, the court asked Flemmi privately if he was willing to have his counsel and codefendants told that he was an informant. *See Salemme*, 978 F.Supp. at 351 n. 3; Apr. 16, 1997 Tr. at 118–22 (Under Seal). In the circumstances, an issue exists concerning whether Flemmi's acknowledgment that he was an informant can properly be characterized as a voluntary waiver of the rights that he had under his agreement with the FBI that his status would be kept confidential and statements attributable to him would not be used against him. *Cf. Roviaro*, 353 U.S. at 60, 77 S.Ct. 623 (with regard to the informer's privilege, "once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.").

It is, however, not necessary to decide this question now. It is not clear whether the government will seek to introduce any of Flemmi's statements on the theory that he had voluntarily waived his right to confidentiality. More importantly, Flemmi has expressed his intention to contend at trial that his conduct now alleged to be criminal was authorized by the FBI. It is also foreseeable that he will rely on a claim of entrapment by estoppel, which like his authorization defense will require Flemmi

to present evidence of some of his communications with the FBI.

If Flemmi offers some of the written records of his statements to the FBI, the government will be entitled to introduce "any other part [of a particular document] or any other writing or recorded statement which ought in fairness to be considered . . ." Fed.R.Evid. 106. Thus, the government may introduce additional documents reflecting Flemmi's statements if " 'necessary to qualify' " the documents, or portions, of them introduced by Flemmi. *United States. v. Branch*, 91 F.3d 699, 728 (5th Cir.1996) (quoting *United States v. Pendas–Martinez*, 845 F.2d 938, 944 (11th Cir.1988)).

"While Rule 106 by its terms applies only to writings and recordings, the principle of completeness embodied in the Rule has been applied to the introduction of oral out-of-court statements as well." 1 S. Saltzburg, *Federal Rules of Evidence Manual* (7th ed.1998) at 99. In essence, Federal Rule of Evidence 611(a) "imposes an obligation for conversations similar to what Rule 106 does for writings." *Branch*, 91 F.3d at 728 (citing *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir.1993) and *United States v. Castro*, 813 F.2d 571, 576 (2d Cir.1987)). Accordingly, as the Court of Appeals for the Second Circuit said in *Castro:*

> whether we operate under Rule 106's embodiment of the rule of completeness, or under the more general provision of Rule 611(a), we remain guided by the overarching principle that it is the trial court's responsibility to exercise common sense and a sense of fairness to protect the rights of the parties while remaining ever mindful of the court's obligation to protect the interest of society in the "ascertainment of the truth." Fed.R.Evid. 611(a).

813 F.2d at 576.

Accordingly, although Flemmi may otherwise have a right to preclude his statements to the FBI that could disclose his status as an informant from being offered against him at trial, if he persists in his intention to introduce some of those statements himself, the government will be permitted to offer any of his other statements that are necessary to the fair "ascertainment of truth."

(3) *Flemmi Had an Enforceable Agreement Relating to 98 Prince Street, Vanessa's, and 34 Guild Street*

[19] Flemmi also contends that he was, expressly and implicitly, promised that in return for his contributions to the bugging of 98 Prince Street that none of the evidence intercepted there would be used against him, directly or indirectly, and this promise is enforceable. As set forth below, this contention is correct. In addition, Flemmi asserts that he had an agreement implied in fact from the promise concerning 98 Prince Street and the conduct of the government that there would be no direct or indirect use against him of the intercepted evidence that he helped the FBI obtain at Vanessa's and 34 Guild Street. This assertion is also accurate.

Contrary to the government's claim, the FBI agents who dealt with Flemmi had the actual authority to grant the immunity promised to him. As described in detail below, the cases in which promises of informal immunity made by agents without the involvement of any prosecutor have been held to be unenforceable are distinguishable from the instant case in decisive respects. More specifically, they each involved individuals who were under active investigation or arrest and asked to cooperate in a discrete matter rather than persons, like Flemmi, approached and cultivated to serve as long term informants. *See, e.g., United States v. Kettering*, 861 F.2d 675, 676 (11th Cir.1988) (indicted defendant); *United States v. Hudson*, 609 F.2d 1326, 1327 (9th Cir.1979) (individual under arrest); *Streebing*, 987 F.2d at 371 (target of investigation).

In addition, in the foregoing cases, relief was denied in part because the govern-

ment did not use the defendant's statements directly or indirectly against the defendant, either in presenting the case to the grand jury or in prosecuting the case at trial, and it was, therefore, found that he had not relied to his detriment on the law enforcement agent's promise. *Kettering,* 861 F.2d at 678–80; *Hudson,* 609 F.2d at 1329; *Streebing,* 987 F.2d at 372–73. In contrast, evidence intercepted at 98 Prince Street and 34 Guild Street was presented to the grand juries which indicted Flemmi. Derivative use of that evidence, and of the evidence intercepted at Vanessa's, may also have been made to secure Flemmi's indictment. Moreover, the government proposes to introduce the interceptions from 98 Prince Street, Vanessa's, and 34 Guild Street against Flemmi at trial.

As described in § II.11, *supra,* when Morris and Connolly asked Flemmi and Bulger to go to 98 Prince Street to acquire information on the layout of the premises, including the doors, locks, and security devices, in order to assess the feasibility of installing a bug, Flemmi and Bulger expressed two concerns. One was a well-founded fear for their safety. The other concern was about what would be done with any evidence intercepted at 98 Prince Street regarding Bugler and Flemmi.

As described in § II.11, *supra,* Morris and Connolly assured Bulger and Flemmi that the 98 Prince Street tapes would not be a problem for them. Flemmi Aug. 26, 1998 Tr. at 184–86, Aug. 20, 1998 Tr. at 43–45. They said Bulger and Flemmi would be protected for anything picked up on those tapes, rather than prosecuted. *Id.* These assurances were not qualified in any way.

Thus, Flemmi understood that nothing on the 98 Prince Street tapes would be used against him. Flemmi Aug. 26, 1998 Tr. at 189–90. This understanding was reasonable. *Hogan,* 862 F.2d at 388. Flemmi relied on it in going to 98 Prince Street to obtain the logistical information that the FBI requested and in providing additional information that the government used to obtain the warrant to bug 98 Prince Street.

[20] Moreover, in view of what Flemmi was told, and the fact that neither Morris nor Connolly said that indirect use of the evidence intercepted at 98 Prince Street would be made against him, it was fair for Flemmi to understand that if he helped the FBI in its effort to bug 98 Prince Street, he would not be harmed in any way, including by the derivative use of evidence intercepted there. This conclusion is reinforced by the principle that:

> *The common understanding of "use immunity" in the criminal justice world is that it encompasses derivative use immunity.* Although, the Supreme Court's thorough discussion of use immunity in *Kastigar* carefully distinguishes between use immunity and the broader derivative use immunity, 406 U.S. at 442, 450, 453, 92 S.Ct. at 1655, 1659, 1661, the two now almost always arise together in federal courts; statutory immunity, requiring both use and derivative use immunity, 18 U.S.C. § 6002, is much more common than informal immunity. Consequently, it is not uncommon for courts to define use immunity as including derivative use immunity even when informal, rather than statutory, immunity is involved. *See, e.g., United States v. Pelletier,* 898 F.2d 297, 302 (2d Cir.1990) ("The specific terms of these agreements contemplated use, rather than transactional, immunity and thus prohibited the government's direct or derivative use of the immunized testimony."); *United States v. Harvey,* 869 F.2d 1439, 1444 (11th Cir.1989) ("Use immunity prohibits the use of compelled testimony, or any evidence derived directly or indirectly from that testimony, against the witness in a criminal prosecution."). Even Special Agent Gary F. Deak, who participated in the interview of Mr. Plummer, testified that in five years experience he had "never been involved with an immunity that allowed for the use of the

fruits of the leads. So I wouldn't even have any occasion to consider that."

Plummer, 941 F.2d at 804 (emphasis added). Therefore, as the Court of Appeals for the Ninth Circuit has stated, "if the government informally promises that ... statements will not be used against the defendant, it is also precluded from using the statements to uncover other incriminating evidence, unless the agreement expressly provides otherwise." *Dudden*, 65 F.3d at 1467.

The promise made to Flemmi and Bulger, in 1980, concerning the interceptions at 98 Prince Street was reaffirmed in 1985. § II.18, *supra*. At the April 1985 dinner at Morris' home, Flemmi and Bulger, knowing that they had been discussed in some of the conversations intercepted at 98 Prince Street, again questioned whether the information on those tapes might be used against them in any investigation or prosecution. Flemmi Aug. 20, 1998 Tr. at 14–15, Aug. 26, 1998 Tr. at 153–56. Once again, Morris and Connolly told them not to worry because they would not be prosecuted for anything on the tapes. *Id.* Morris went on to tell Bulger and Flemmi, "you can do anything you want as long as you don't clip anyone." *Id.*; Ex. 92, ¶ 2.

[21] The FBI generally, and Morris and Connolly particularly, had implied actual authority to make the foregoing promise of immunity to Flemmi and Bulger. The authority to grant immunity is shared, rather than vested solely in the United States Attorney. A statutory grant of immunity may be sought by the United States Attorney only with the approval of the Attorney General or another, specified high official of the Department of Justice. 28 U.S.C. § 6003 (1994). The Attorney General and the United States Attorney each have independent statutory authority to prosecute federal crimes. *Thomas*, 35 F.3d at 1339; 28 U.S.C. §§ 515(a), 547 (1994). Incidental to that, each also has the implied actual authority to enter into plea bargains and comparable agreements, including agreements to grant immunity informally, without the participation of the other. *Id.*

As described in § III.1.D(2), *supra*, the Attorney General's power to investigate and prosecute criminal activity is delegable to agencies within the Department of Justice. 28 U.S.C. §§ 510, 533 (1994). The power to investigate violations of federal law generally has been delegated to the FBI. 28 C.F.R. § 0.85 (1999). The authority to investigate federal crime inherently entails the power to develop and utilize informants.

As indicated in § II.6, *supra*, there is no statute that prohibits the Attorney General from delegating to the FBI his power to informally promise use immunity, among other things, to informants. Nor is there any statute that prohibits the FBI from receiving or exercising such authority.

In addition, there is no regulation, having the force of law, which prohibits the FBI from properly promising an informant use immunity to obtain or maintain his services. This contrasts with the power of the Attorney General to admit individuals to the Witness Protection Program which, during the relevant period, by regulation, was expressly and exclusively delegated to the United States Marshals Service. *See* 28 C.F.R. § 0.111(C) (1979); Department of Justice Order OBD 2110.2 P 7(d) (Jan. 10, 1975); *Civiletti*, 635 F.2d at 90; *Thomas*, 35 F.3d at 1339. As the Court of Appeals for the Ninth Circuit has said:

> *Doe v. Civiletti*, 635 F.2d 88, 90 (2d Cir.1980), holds that the oral representations of a Strike Force Justice Department attorney and a DEA agent did not commit the Marshals Service with regard to the Witness Protection Program. Their lack of authority was express, under an Attorney General's order that attorneys and others "are not authorized" to make such commitments, which were to be made by "authorized representatives of the U.S. Marshals Service only." *Id.* No comparable order or oth-

er express restriction of authority has been shown to us in this case.

Thomas, 35 F.3d at 1339. Similarly, no comparable order or express restriction on the Attorney General's power to delegate to the FBI the authority to grant informants immunity informally has been shown in the instant case.

This conclusion is not qualified by the existence of the Levi Guidelines, which were part of the FBI Manual in 1980 when Morris and Connolly promised Flemmi that the information intercepted at 98 Prince Street would not be used against him. "[T]he Supreme Court [has] held that intra-office manuals, unlike official regulations, have no legal force." *Kugel v. United States*, 947 F.2d 1504, 1507 (D.C.Cir.1991) (citing *Schweiker v. Hansen*, 450 U.S. 785, 789, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981)). Consistent with this principle, the Guidelines did not have the force of law. Rather, as was understood when they were issued in 1976, and as expressly clarified in 1981, the Guidelines did not "create any rights ... enforceable at law" or "place any limitations on otherwise lawful investigative and litigative prerogatives of the Department of Justice," including the FBI. Ex. 274 (Under Seal), Manual § 137–17(N) (1–12–81). *See also Kugel*, 947 F.2d at 1507.

As described in § II.6, *supra*, prior to the issuance of the Levi Memorandum, the Department of Justice did not have any institutionalized role in the FBI's use of informants. It appears, however, that the FBI occasionally sought legal advice from the Department of Justice on issues relating to them. For example, from at least 1961 until the issuance of the Levi Memorandum the FBI's Manual of Instructions stated that:

> On 7–10–52 the Department furnished an opinion regarding the question whether an informant could be prosecuted for technically violating the law while attempting to obtain evidence regarding a Federal violation. The Department stated "... If the intent throughout was to assist the government agents in the enforcement of the law, and not to violate or to 'cover-up' for a violation of the law, it is not believed a case for prosecution could be made against such an informer ...."
>
> *The procedures to be followed by informers working under the supervision of your agents in the aid of enforcing the statutes coming within your jurisdiction largely rests upon your sound discretion .... It is not believed that an informer would be otherwise immune from prosecution for actions which would subject a Federal enforcement officer to prosecution.*

Id. § 108(K) (10–13–61) (emphasis added); Ex. 275 (Under Seal). Prior to the promulgation of the Levi Memorandum, the Manual of Instructions also included the direction that:

> *Care must be exercised in attempting to persuade individuals to act as informants to avoid any allegations of undue influence. An individual who is in custody* and who offers to furnish information generally does so in the hope that he will receive some consideration in return. *Bureau agents cannot promise any immunity* or any reduction in sentence *to a criminal* who furnishes information and they must not put themselves in a situation where they might subsequently be accused of having done so.

Id. § 108(D)(4)(11–29–55 through 5–13–76) (emphasis added).

Read together, these provisions, among other things, indicate that prior to the Levi Memorandum the procedures to be employed in dealing with informants were at all times in the sole discretion of the FBI. Consultation with Department of Justice attorneys was not required. Indeed, such consultation with regard to an identified individual would have been inconsistent with the historic direction to FBI agents that: "Constant care must be exercised to avoid any disclosure *to any-*

one which might permit identification of a criminal informant or even cast suspicion on a criminal informant." *Id.* § 108(I)(8)(12–11–59). FBI agents were admonished not to promise immunity or a reduction of sentence to "criminals" *in custody* whose cooperation was being sought. The FBI could, however, authorize informants who were not incarcerated to engage in what would otherwise be criminal activity without the involvement of Department of Justice attorneys. *Id.* § 108(K) (10–13–61).

The Levi Guidelines also recognized that the handling of FBI informants remained solely the responsibility of the FBI. More specifically, the Levi Memorandum stated that:

> Informants as such are not employees of the FBI, but the relationship of an informant to the FBI *imposes a special responsibility upon the FBI* when the informant engages in activity where he has received, or reasonably thinks he has received, encouragement or direction from the FBI.

Id. § 137–17(N)(1–12–77) (emphasis added). As this statement reflects, the Attorney General understood that the Department of Justice had no role or responsibility in giving FBI informants direction or in providing the assurances that might be necessary to influence informants to follow those directions. That was solely the responsibility of the FBI, which was advised by the Attorney General to be careful in exercising its authority.

Consistent with the Attorney General's understanding, the Levi Guidelines provided no role for Department of Justice attorneys with regard to FBI informants. The FBI alone retained the power to decide whether to use someone as an informant. *Id.* § 108 pt. IV(A)(5)(1–12–77)

Similarly, the Levi Guidelines indicated that the FBI alone—without the involvement of any prosecutor—could authorize informants to engage in criminal activity. More specifically, the Levi Guidelines provided that informants be instructed that:

> in carrying out their assignments they shall not:
>
> (4) participate in criminal activities of persons under investigation, *except insofar as the FBI determines* that such preparation is necessary to obtain information needed for purposes of federal prosecution.

Id. § 108 pt. IV(3)(4) (emphasis added). *See also Kentucky v. Long,* 837 F.2d 727, 732–33 (6th Cir.1988) (Chief of FBI Criminal Informant Unit testifies that one instruction in the Levi Guidelines was "that the informant is to be told that he or she is not to engage in any illegal activity *unless they are authorized to do so by the FBI.*") (emphasis added).

Moreover, after the issuance of the Levi Guidelines the FBI Manual continued to advise agents to "avoid any disclosure to *anyone*"—including prosecutors—"which might result in the identification of an informant . . ." Ex. 274 (Under Seal), Manual § 108 pt. I(C)(7) (1–12–77) (emphasis added). As reflected throughout this Memorandum, the FBI as an institution and each of its agents was dedicated to not disclosing an informant's identity to any prosecutor without the source's consent. Department of Justice attorneys accepted the fact that the FBI would not disclose or discuss its informants with them unless authorized to do so by the informant. As Weld, the former United States Attorney and Assistant Attorney General, most colorfully put it: "In general, if I as a political appointee had gone to the Bureau and said, 'Tell me who your informants are,' I would have expected them to tell me to 'go pound sand.'" Weld May 26, 1998 Tr. at 133.

As a practical matter, a prosecutor could not, and would not, participate in granting a person immunity without knowing that individual's identity. Thus, implicit in the acceptance by the Attorney General and his subordinates of the principle that the FBI was never required to disclose to

them the identity of an informant was recognition that the FBI was not required to consult them concerning informal promises of immunity made to its sources. Indeed, the government has in at least one other case implicitly acknowledged that FBI agents have the authority to promise potential cooperating individuals immunity. *Conley*, 859 F.Supp. at 859 n. 6. As the court in *Conley* stated, "[T]he Government has not argued or attempted to prove that [FBI Special Agent] Donnelly's promise was not authorized by a prosecutor. The Court notes the impracticality that could be visited upon potential agent-informant relationships absent promises such as [FBI Special Agent] Donnelly's promise." *Id.*

The Levi Guidelines did attempt to provide guidance to the FBI concerning the exercise of its power to confer immunity. They did not, however, require that prosecutors be consulted if a promise of immunity were contemplated. Rather, they indicated that agents were discouraged, but not prohibited, from promising immunity themselves. More specifically, the Levi Guidelines stated, in language that endured at least until 1984, that:

> Agents *should not* exercise undue influence in developing informants including promising immunity or reduction of sentence to criminals who furnish information.

Ex. 274 (Under Seal), Manual § 108(I)(C)(6) (1–12–77); § 137–3(6) (1–31–78); § 137–(3)(6) (4–2–79); § 137–5(4) (1–12–81); § 137–5(4) (9–20–82); § 137–5(4) (3–28–84) (emphasis added). *Compare, id.* § 108(D)(4) ("No active military personnel *can* be developed as informants") (emphasis added). As the analysis in § III.1.D(5), *infra*, indicates, the Attorney General's admonition concerning a promise of immunity constituting a form of "undue influence" was wise. It did not, however, operate to limit legally the FBI's power to promise an informant immunity.

If the Attorney General intended to entrust the FBI with the authority and discretion to develop informants, but prohibit the FBI from promising them use immunity if necessary to secure their valuable services, he could and should have done so clearly in a public, legally binding regulation or Order. As indicated earlier, such an Order was employed to prohibit United States Attorneys from promising admittance to the Witness Protection Program and to put interested individuals on notice that prosecutors lacked that authority. *See* Department of Justice Order OBD 2110.2, P 7(d) (Jan. 10, 1975). In contrast, the Levi Guidelines, which the government has insisted remain under seal in this case, were neither legally binding nor generally available to the public. Moreover, as indicated earlier, they did not even state to agents that the FBI lacked the authority to promise its informants immunity.

These features of the Levi Guidelines were not inadvertent oversights or the result of inartful drafting. Rather, as described in § II.6, *supra*, the FBI has traditionally operated with great independence from the Attorney General. It has been particularly fierce in protecting its prerogatives concerning informants. While the Levi Guidelines were an initial effort to provide guidance to the FBI in exercising its authority, they did not impose any legal limitations on the Bureau's power to promise long term informants immunity.

Virgil Young, the Assistant Section Chief and Unit Chief of the Criminal Informant and Witness Security Programs Unit of the FBI, testified in another case that from the FBI's perspective, "the Levi Guidelines were unclear in many respects, with the result that a great deal of discretion was given to individual agents." *Long*, 837 F.2d at 732. As an example of this Young cited the fact that the Levi Guidelines did not "say that a particular agent can authorize [an informant's participation in illegal activity] or can't authorize it, nor does it say that authorization [is] required by a special agent in charge or any other specific individual." *Id.* at 732–33. Thus, at least from 1977 to 1981, the

FBI interpreted the Levi Guidelines to allow any agent or his supervisor to authorize an informant to participate in otherwise illegal activity. *Id.* at 733.

The evidence in this case demonstrates that Connolly and Morris had comparable, implied actual authority to promise Flemmi immunity. §§ II.6, II.16, II.21. As Potts, the former Acting Deputy Director of the FBI, testified, the supervisor of the handling agent was generally the FBI's "chief decision maker" regarding informants. Potts May 22, 1998 Tr. at 7. As Greenleaf testified, the SACs generally relied completely on the informant's handler and his supervisor even for making decisions and recommendations for which SACs were responsible under the Guidelines. Greenleaf Jan. 8, 1998 Tr. at 136–40. In Potts' experience, Headquarters never reversed recommendations from a field office that an individual be used, or continued, as an informant. Potts May 22, 1998 Tr. at 6–8. Nor is there any evidence that FBI Headquarters ever inquired about what promises had been made to informants generally or to Flemmi and Bulger particularly.

As described earlier, the FBI urged agents and their supervisors to use "a dynamic and imaginative approach in developing" the Top Echelon informants necessary to combat Organized Crime. Ex. NN (Under Seal), Manual § 108 pt. III(B) (1–12–77); § 137–12(2) (4–12–79). In 1980, Morris and Connolly would have reasonably understood that they had, even under the Levi Guidelines, the power to authorize Flemmi and Bulger to engage in criminal activity in connection with their service as informants. When Bulger and Flemmi sought assurance that any evidence that might be obtained if 98 Prince Street was successfully bugged would not be used against them, it was, in view of all of the relevant circumstances, reasonable—and indeed correct—for Morris and Connolly to believe that they also had the actual authority to promise that immunity in order to obtain the critical assistance they were seeking from Flemmi and Bulger. *Restatement (Second) of Agency* § 35 (1957); *Greene,* 995 F.2d at 800; § III.1.B, *supra.*[68]

The conclusion that Morris and Connolly had actual authority to promise the FBI's longstanding informants, Flemmi and Bulger, that any evidence obtained if 98 Prince Street was bugged would not be used against them is not inconsistent with the cases on which the government relies. Those cases are distinguishable from the instant case in material respects. Indeed, the analysis employed in those cases concerning both authority and detrimental reliance reinforces this court's conclusion concerning the enforceability of the agreement regarding 98 Prince Street, and the importance of the issues of Due Process and involuntariness discussed, in § III.1.D(5), *infra.*

The government has long relied primarily on *Streebing, supra,* and *Kettering, supra. See, e.g., Salemme* 1997 WL 810057 at *2 (Dec. 29, 1997). *Kettering* involved an indicted defendant rather than an informant. 861 F.2d at 676. The defendant and his attorney met with a DEA agent to discuss Kettering's case. *Id.* The information that he provided was never recorded in a DEA report. *Id.* Kettering's attorney gave the DEA a proposed letter agreement pursuant to which Kettering would plead guilty not to the indictment against him, but to a single count information involving no mandatory minimum sentence. *Id.* The DEA agent consulted the Assistant United States Attorney handling the case concerning the proposed plea agreement. *Id.* The prosecutor felt that the proposed sentence was too low and promptly informed Kettering's attorney that the proposed agreement was unacceptable. *Id.*

68. Morris testified that he did not believe that he had the power to confer immunity. Morris Apr. 29, 1998 Tr. at 48–50. The court finds that this testimony is not credible.

Kettering subsequently claimed, however, that the discussions with the DEA agent had generated an enforceable plea agreement. *Id.* at 676–77. The District Court held that the defendant had failed to establish that the DEA agent had the authority to enter into a plea agreement, despite his mistaken belief that he could do so. Thus, the District Court denied the motion to dismiss. *Id.*

The Court of Appeals for the Eleventh Circuit treated the issue of authority as a factual question and found that the District Court's finding of a lack of authority was not clearly erroneous. *Id.* This was one ground for affirming its decision. *Id.* at 677–78. The Eleventh Circuit observed, however, that "if the defendant's cooperation was induced by the misrepresented plea agreement, the court could determine whether the statements were involuntary and, if so, exclude them at trial." *Id.* at 679 (citing *United States v. Coon*, 805 F.2d 822, 824–25 (8th Cir.1986)). This principle as applied to Flemmi is addressed in § III.1.D(5), *infra.*

In *Kettering,* the Eleventh Circuit also stated that, "all attorneys (prosecutors and defense counsel) and government agents should exercise great care in making certain that defendants are apprised of limitations in authority and the rules surrounding such negotiations." *Id.* at 678 n. 2. In the instant case, Flemmi did not have an attorney and neither Morris nor Connolly suggested that there was any limitation on their authority to promise that any evidence intercepted at 98 Prince Street would not be used against him.

In addition, and significantly, in *Kettering* the Eleventh Circuit did not rely solely on the agent's lack of authority in refusing to find that an enforceable agreement existed. Rather, the court also relied on the fact that the defendant had failed to establish any prejudicial reliance because neither his statements nor any fruits of them were used against him. *Id.* at 678–79 & n. 3. As the court wrote, "The United States Supreme Court in *Mabry v. Johnson,* 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 . . .(1984) stated that as long as the defendant is not in a worse position, there is no detrimental reliance." *Id.* at 680. The Eleventh Circuit held that "[a]ny statements [Kettering] made while cooperating with [the DEA agent] could be excluded in subsequent proceedings." *Id.* Thus, his cooperation "did not place him in a position where restoration of the status quo ante would be impossible." *Id.* at 679.

In contrast, Flemmi relied on the assurance that any evidence intercepted at 98 Prince Street would not be used against him. He performed his part of the bargain and rendered a very valuable service to the government by providing information that was significant for the feasibility of bugging 98 Prince Street and that was used to establish that the issuance of a warrant to do so was appropriate. Nevertheless, evidence intercepted at 98 Prince Street, and perhaps information derived from it, was presented to the grand juries that indicted Flemmi, and the government proposes to introduce the 98 Prince Street tape-recordings at trial. Thus, Flemmi's case is not comparable to Kettering's.

Similarly, *Streebing* involved statements to FBI agents by an individual who knew that he was the target of their investigation. *Streebing,* 987 F.2d at 371. The defendant claimed that the agents promised that he would not be prosecuted if he spoke to them. *Id.* The court, however, found that no such promise was made. *Id.* Rather, the defendant was told explicitly that a prosecutor would have to decide if he would be indicted. *Id.* at 371–72. In addition, the government represented that none of the defendant's statements had been presented to the grand jury and stipulated that none would be used at trial. *Id.* at 372.

Accordingly, Streebing's motion to dismiss the charges against him as an exercise of the court's supervisory powers was denied because he was not promised that he would not be prosecuted; the FBI

agents lacked the actual or apparent authority to make such a promise; and the defendant did not rely to his detriment on the purported promise. *Id.* at 372–73. Essentially, for the reasons described with regard to Kettering, Flemmi's claim concerning 98 Prince Street is distinguishable from Streebing's claim.

The other cases that the government relies on for the purported proposition that as investigatory agents Morris and Connolly lacked authority to promise Flemmi that evidence obtained from the bugging of 98 Prince Street are inapposite for similar reasons. None involves an individual who, like Flemmi, served as an FBI informant long before being indicted or targeted for investigation by the FBI. *See, e.g., Hudson,* 609 F.2d at 1327 (arrested defendant); *United States v. Williams,* 780 F.2d 802, 803 (9th Cir.1986) (target of investigation); *Johnson v. Lumpkin,* 769 F.2d 630, 632 (9th Cir.1985) (convicted individual); *Lua,* 990 F.Supp. at 707 (individual offered brief opportunity to be a witness rather than a defendant in a murder case). As explained previously, the FBI has been granted exclusive authority to recruit informants from the general population and to provide them the assurances necessary to obtain their services. The courts have understandably found that law enforcement agents do not have the same, unqualified authority when the judicial process has been invoked and government attorneys are already involved in the matter or must be imminently. *Hudson,* 609 F.2d at 1327–28; *Williams,* 780 F.2d at 803; *Johnson,* 769 F.2d at 632; *Lua,* 990 F.Supp. at 706.

Accordingly, the court finds that Morris and Connolly were authorized to promise Flemmi that any evidence intercepted would not be used against him if he assisted in the FBI's effort to bug 98 Prince Street. Flemmi performed his part of the bargain. Nevertheless, the government claims that it should not be required to provide Flemmi the benefit of that bargain.

[22] More specifically, the government contends that any agreement that Flemmi had with the government is invalid because Flemmi committed many serious crimes, including murder, but did not candidly disclose to the FBI all of his criminal activity. Thus, the government now claims that Flemmi breached any agreement he had with the government by not providing the FBI with accurate and complete information concerning his own criminal activity.

From the outset, however, the FBI was under no illusions about the nature of Flemmi's criminal activity. When Rico wrote to FBI Headquarters to recommend that Flemmi be opened as an informant, he described Flemmi as the leader of the gang previously headed by Wimpy Bennett and as a person who had "been engaged in bookmaking, shylocking, robberies, and is suspect of possibly being involved in gangland slayings." Ex. 21. As described in § II.2, *supra,* Rico had good reason to suspect Flemmi had participated in murder. Similarly, Connolly has stated that: "All Top Echelon informants are murderers. The government put me in business with murderers." Oct. 23, 1998 Tr. at 43; § II.33. As described in § II.4, *supra,* Morris not only knew from the outset that Flemmi and Bulger were frightening figures, but attempted to exploit their reputations for violence by urging Miani and Barrett to cooperate with the FBI in order to obtain protection from them. Ring too was aware that Flemmi and Bulger engaged in many serious crimes, perhaps including murder. § II.17. Potts knew that they were serious criminals as well. § II.21.

Flemmi was under no obligation to disclose to the FBI all of his criminal activity and, therefore, his failure to do so did not constitute fraudulent concealment. *See, e.g., Kasuri v. St. Elizabeth Hosp. Med. Ctr.,* 897 F.2d 845, 852 (6th Cir.1990).[69]

69. Moreover, as the FBI received the valuable benefits of its bargain, a breach of the pur-

The FBI did not know the details of all of Flemmi's criminal activity in meaningful measure because its agents did not ask. As Ring explained, it was understood that Top Echelon informants were necessarily involved in serious criminal activity; they had to be in order to have the intimate knowledge of the LCN that the FBI was seeking. The FBI regarded it as inappropriate and counterproductive, however, to ask an informant for the details of his own criminal activity because to do so might suggest that the FBI was investigating him and, therefore, cause him to cease serving as a source. § II.17.

In essence, the government's present position boils down to a claim that any immunity agreement is invalid because the FBI agents who dealt with Flemmi and Bulger were dimwits who were duped by their sources. In view of the facts described in this Memorandum, this contention is utterly unconvincing. *See United States v. Brown*, 763 F.Supp. 1518, 1526–28 (D.Ariz.1991), *aff'd*, 979 F.2d 1380 (9th Cir.1992). In summary, the FBI's highest priority was combating the LCN. Agents were encouraged to be imaginative in recruiting Top Echelon informants, who by definition were involved in serious criminal activity themselves. It was natural that such informants would seek protection from the FBI, particularly including immunity for information they provided or helped obtain. It was also foreseeable that Top Echelon informants would be given such assurances by their handlers, and their handlers' supervisors, in order to secure their services. Rico, Connolly, Morris, Ring, and their colleagues knew the character of Flemmi and Bulger's criminal activity. They were not defrauded in deciding to make them allies in the FBI's war against the LCN generally or in promising them immunity concerning 98 Prince Street particularly.

For the foregoing reasons, Flemmi had an enforceable express and implied in fact agreement that precludes the use and derivative use against him of any of the evidence intercepted at 98 Prince Street. He also had an equally valid agreement implied in fact that the evidence intercepted at Vanessa's and 34 Guild Street would not be used against him in any way.

[23] In contrast to 98 Prince Street, Flemmi did not discuss with the FBI whether any of the evidence intercepted at Vanessa's or 34 Guild Street would be used against him. However, as described in § III.1.B, the conduct of the parties may manifest the meeting of the minds necessary to infer a valid, tacit understanding in fact. *Hercules*, 516 U.S. at 424, 116 S.Ct. 981; *Baltimore & Ohio R. Co.*, 261 U.S. at 597, 43 S.Ct. 425; *McHan*, 101 F.3d at 1034; *Lua*, 990 F.Supp. at 709. Such an agreement existed with regard to Vanessa's and 34 Guild Street.

As described in § II.20, *supra*, the facts relating to Vanessa's are similar to those involving 98 Prince Street. In 1986, Flemmi told Connolly about his visits to the storeroom at Vanessa's and his discussions there with members of the LCN concerning illegal gambling, among other things. Connolly made it clear that the FBI wanted to bug Vanessa's. Flemmi was tasked to acquire information relating to the premises that would be important to the feasibility of installing a bug. He provided that information, including a diagram of Vanessa's. He and Bulger were also two of the three informants relied upon in the affidavit used to obtain the warrant to bug Vanessa's. But for their information, the government could not have obtained the warrant to bug Vanessa's.

Flemmi understood that in return for his services regarding Vanessa's, he would have the same protection concerning any evidence intercepted there that he had been promised concerning 98 Prince

ported, but unproven, obligation of Flemmi to provide the FBI the details of his own criminal activity would be immaterial and, therefore, not provide a ground for rescinding the agreement at this time. *United States v. Castaneda*, 162 F.3d 832, 837–39 (5th Cir.1998).

Street. This belief was reasonable. Rico and Connolly had each promised Flemmi protection. Being provided immunity for information that Flemmi furnished or helped obtain was consistent with that promise. Morris and Connolly had twice expressly assured Flemmi and Bulger that they would be protected, rather than prosecuted, with regard to matters intercepted at 98 Prince Street. By 1986, that promise had been honored. Angiulo and his allies had been prosecuted. As with the race-fix case, Bulger and Flemmi were not charged.

After the 98 Prince Street experience, no one told Flemmi that the ground rules had changed. Therefore, based on the foregoing, it was reasonable for Flemmi to believe that he had an agreement with the government that any evidence intercepted at Vanessa's would not be used against him directly or indirectly.

The court recognizes that following the bugging of 98 Prince Street Morris and Connolly also engaged in improper conduct in order to provide Flemmi and Bulger protection. Morris caused Connolly to tell Bulger and Flemmi that Halloran was cooperating with the FBI. Connolly tipped them off to the 1984–1985 joint DEA–FBI investigation. If Flemmi had relied primarily or exclusively on such improper conduct in concluding that he had an immunity agreement with the government, that reliance would have been unreasonable and the court would not enforce the purported agreement. *Kiely*, 105 F.3d at 737. However, in the instant case there were ample, legitimate reasons for Flemmi to reasonably believe that the immunity he had been promised and provided concerning 98 Prince Street also extended to Vanessa's. As he relied on this reasonable belief, that agreement implied in fact will be enforced.

The government has represented that the Vanessa's recordings were not presented to the grand juries that indicted Flemmi. Gov. Submission Pursuant to 6/21/99 Court Order, ¶ 5. As discussed in § III.1.D(4), *infra*, Flemmi correctly contends, however, that it would have been impermissible for any evidence derived from the Vanessa's intercepts to have been presented to those grand juries. In addition, the agreement implied in fact on which Flemmi relied precludes use of the Vanessa's intercepts, or any evidence derived from them, at trial.

The analysis and conclusion concerning Vanessa's is equally applicable to the evidence intercepted at 34 Guild Street, which was presented to the grand juries which indicted Flemmi. *Id.* Once again, prior to providing the FBI information used to obtain the warrant used to bug 34 Guild Street, Flemmi was not told that the ground rules had changed. In 1989, there remained a substantial, legitimate basis for Flemmi to have reasonably believed that if he assisted the FBI in its effort to intercept the forthcoming Mafia induction ceremony neither that evidence nor any evidence derived from it would be used against him. Any misconduct by the FBI to protect Flemmi after 1986, does not alter this fact. Flemmi relied on the reasonable belief that he would be protected rather than prosecuted if he helped the FBI bug such a ceremony in performing his part of the bargain. Thus, the use of the 34 Guild Street interceptions to secure Flemmi's indictment violated his agreement with the government. Whether any remedy for that violation is required remains to be determined. The government may not, however, use the evidence intercepted at 34 Guild Street, or any evidence derived from it, against Flemmi at trial.

The court has considered whether the conclusion that Flemmi had an immunity agreement concerning the evidence intercepted at 98 Prince Street, Vanessa's, and 34 Guild Street is qualified by the principle that agreements that require the commission of an illegal act are not enforceable. It is not.

The Court of Appeals for the First Circuit has held that an "alleged contract . . .

to achieve mutual benefit from the parties' cooperative violation of the law .... even if explicitly agreed to by both parties, is void and unenforceable as against public policy .... It would have been unreasonable for [plaintiff] to rely on such an illegal contract." *Kiely*, 105 F.3d at 736–37. *See also Restatement (Second) of Contracts* § 178 (1979). As the court explained during the hearings in this case, if a violation of the promise of protection—including a promise to tip off Flemmi to investigations and imminent indictments—were proven, a serious question would be presented concerning whether any or all of that agreement should be deemed enforceable. However, for the reasons described in § III.1.D(1), *supra*, the facts do not place this issue before the court.

An agreement providing immunity in exchange for cooperation does not inherently, or typically, involve a cooperative violation of the law. The power to make such promises is important to effective law enforcement. Thus, the government may informally grant an individual immunity. *Harvey*, 869 F.2d at 1443. Ordinarily, Due Process requires that such promises be honored rather than abrogated. *Id.*

As described in §§ II.13, II.17, and II.18, *supra*, Morris accepted three payments, totaling $7000, and several gifts from Bulger and Flemmi. Therefore, the court has particularly considered whether Flemmi's immunity agreement, or any element of it, should not be enforced.

When Morris and Connolly promised Flemmi and Bulger immunity concerning 98 Prince Street in 1980, no payment had been made to Morris. That promise was not the product of any bribe or corrupt conduct proven in this case. The first $1000 payment to Morris was made, at his request, in June 1982. § II.13, *supra*. As described previously, this payment was sought and received about a month after Halloran was murdered. *Id.* Thus, there is a question, that cannot be answered on the present record, of whether the initial $1000 payment was an illegal gratuity given for Morris' tip concerning Halloran's cooperation. *See* 18 U.S.C. § 201(c)(1)(A) (1994); *United States v. Sun–Diamond Growers of Cal.*, 526 U.S. 398, 119 S.Ct. 1402, 1407, 143 L.Ed.2d 576 (1999).[70] That payment was not, however, made in connection with the immunity promised concerning 98 Prince Street, Vanessa's, or 34 Guild Street.

The second $1000 payment, delivered by Connolly to Morris with a case of wine, was made in the spring of 1984. § II.17, *supra*. As described previously, the timing of this payment raises a question whether it was an expression of appreciation for any assistance Morris may have rendered Bulger and Flemmi concerning the investigation then being led by the DEA. *Id.* However, it too was not a payment relating to the immunity promised to Flemmi concerning 98 Prince Street, Vanessa's, or 34 Guild Street.

The third payment of $5000, which was characterized as a "loan," was made to Morris, by Bulger, in April 1985, at the dinner at Morris' home that may have been held to celebrate the failure of the 1984–1985 joint investigation of Bulger and Flemmi. § II.18, *supra*. Prior to the payment being made, Morris and Connolly did reaffirm that Bulger and Flemmi would not be prosecuted for anything on the 98 Prince Street tapes and Morris went on to tell Bulger and Flemmi that, "you can do anything you want as long as you don't clip anyone." *Id.* At that point, however, Flemmi and Bulger had already

70. In addition to the open issue concerning the motivation for the payment there is a question whether the tip concerning Halloran's cooperation constituted an "official act," which must be implicated to trigger the applicability of § 201(c)(1)(A). *See United States v. Singleton*, 165 F.3d 1297, 1302 n. 2 (10th Cir.1999), *cert. denied*, — U.S. —, 119 S.Ct. 2371, 144 L.Ed.2d 775 (1999) ("It is inconceivable that any court would hold that a prosecutor who pays for the false testimony of a witness is carrying out an official function of the government" as required by § 201).

relied on the earlier, untainted promise that any evidence intercepted at 98 Prince Street would not be used against them and the government had already derived great benefit from the services that they rendered in reasonable reliance on that promise. There was also, by then, a history of the agents and their sources exchanging gifts. The $5000 "loan" was an extension of this practice. In the circumstances, it would be unfair and improper to deprive Flemmi of the benefit of his bargain with the government concerning 98 Prince Street because of the payments made to Morris.

There were no payments made to Morris after 1985. Nor, as described earlier, was the issue of immunity concerning Vanessa's or 34 Guild Street discussed. In the circumstances, the payments to Morris cannot be deemed to be a bribe paid to obtain that immunity. *See Sun-Diamond Growers of Cal.*, 119 S.Ct. at 1406 ("[F]or bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act.").

The court does not suggest that the payments from Bulger and Flemmi to Morris were appropriate or that the acceptance of payments by an FBI agent from informants should be condoned. However, as explained in this Memorandum, the FBI's interest in Bulger and Flemmi was founded on the invaluable assistance that they provided in the FBI's war against the LCN, among other things. The payments to Morris were not material. Rather, they were incidental to a relationship that was important to the FBI for valid, professional reasons. The government derived great benefit from the services Flemmi rendered regarding 98 Prince Street, Vanessa's, and 34 Guild Street. In the circumstances, it would be fundamentally unfair to deprive Flemmi of the immunity that he was expressly and implicitly promised because of the payments initially sought, and ultimately received, by Morris.

(4) *A Hearing Will Be Necessary to Determine If This Case Must Be Dismissed and, If Not, Whether Any Evidence Must be Excluded at Trial*

[24] In view of the foregoing, Flemmi had an enforceable agreement concerning the evidence intercepted at 98 Prince Street, Vanessa's, and 34 Guild Street. Flemmi was expressly promised that he would be protected rather than prosecuted if he helped the FBI bug 98 Prince Street, and had the same agreement implied in fact concerning Vanessa's and 34 Guild Street. Nevertheless, evidence intercepted at 98 Prince Street and 34 Guild Street was presented to the grand juries that indicted Flemmi, and evidence derived from all three bugs may have been used to secure the charges against him. Thus, there is an issue of what, if any, remedy is required in the circumstances.

Flemmi contends that this case should be dismissed as against him. In essence, he argues that he, like every other citizen, is entitled to Due Process and that dismissal is necessary to provide the performance of his agreement with the government that fundamental fairness requires. Flemmi analogizes the instant case to *Rowe*, in which the Court of Appeals for the Eleventh Circuit stated with regard to an agreement not to prosecute:

> as a matter of fair conduct, the government ought to be required to honor such an agreement when it appears from the record that: (1) an agreement was made; (2) the defendant has performed on his side; and (3) the subsequent prosecution is directly related to offenses in which the defendant, pursuant to the agreement, either assisted with the investigation or testified for the government.

Rowe, 676 F.2d at 527–28. The instant case, however, is distinguishable from *Rowe* because it does not involve an agreement not to prosecute at all. Nevertheless, Flemmi's Due Process argument requires continued consideration.

[25, 26] Flemmi's Due Process claim is reinforced by the related issue of whether the case against him should be dismissed as an exercise of the court's supervisory powers. Such powers must be exercised sparingly. *United States v. Stokes*, 124 F.3d 39, 45 (1st Cir.1997), *cert. denied*, 522 U.S. 1139, 118 S.Ct. 1103, 140 L.Ed.2d 156 (1998); *United States v. Santana*, 6 F.3d 1, 10 (1st Cir.1993). However, as the Supreme Court wrote in *United States v. Williams*, 504 U.S. 36, 46, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992):

> *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988), makes clear that the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those "few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions," *United States v. Mechanik*, 475 U.S. 66, 74, 106 S.Ct. 938, 943, 89 L.Ed.2d 50 (1986) (O'Connor, J., concurring in judgment).

The Supreme Court identified as two of those few clear rules, 18 U.S.C. §§ 6002 *et seq.*, the federal immunity statute, and 18 U.S.C. § 2515, which prohibits grand jury use of unlawfully intercepted communications. *Id.* at n. 6, 112 S.Ct. 1735. In this case, Flemmi's rights are not rooted in those statutes, but he was promised protection that is more expansive than that provided by § 6002 *et seq.*, and evidence obtained by electronic surveillance was used against him in violation of that promise. Thus, the implications of *Williams* for this case in its present posture must also be addressed by the parties and considered by the court.

It is not now clear whether dismissal should be ordered as necessary to provide Flemmi Due Process or as an exercise of the court's supervisory powers. In *United States v. Gallo*, 859 F.2d 1078, 1084 (2d Cir.1988), the Court of Appeals for the Second Circuit declined to dismiss a case in which the defendant was granted immunity pursuant to 18 U.S.C. § 6002, his immunized testimony was included in a successful application for a wiretap warrant, and evidence intercepted by that wiretap was inadvertently presented to the grand jury that indicted him. In *Gallo*, the court found that the wiretap would have been obtained even without the immunized information provided by the defendant and deemed the errors made to be "harmless." *Id.* at 1083.

The extent to which the facts of the instant case are analogous to *Gallo* is not now evident. At a minimum, however, the promise made to Flemmi—that he would be protected rather than prosecuted if he helped the FBI in its effort to bug 98 Prince Street, Vanessa's, and 34 Guild Street—is broader than the use immunity at issue in *Gallo*. This may have implications for the result in this case even if *Gallo* is regarded as rightly reasoned.

It would, however, be premature to decide now whether this case should be dismissed to afford Flemmi Due Process or as an exercise of the court's supervisory powers. At a minimum, Flemmi is entitled to a hearing to determine whether this case should be dismissed against him because tainted evidence was presented to the grand juries that indicted him and this error was not harmless. The resolution of this issue may present another, or an alternative, ground for ordering the dismissal that Flemmi requests.

More specifically, in *Kastigar*, 406 U.S. at 461, 92 S.Ct. 1653, the Supreme Court held that testimony compelled by a grant of immunity pursuant to § 6002 "can in no way lead to the infliction of criminal penalties." Thus, an individual compelled to testify pursuant to § 6002 is provided with use and derivative use immunity. *Id.* at 453, 92 S.Ct. 1653. Such immunity "prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the

testimony cannot lead to the infliction of criminal penalties on the witness." *Id.*

It has been generally held that, "the logic of *Kastigar*—that 18 U.S.C. section 6002 should be sufficiently broad to protect an individual from being compelled to testify against himself—applies to grand jury proceedings as well as to trials." *Palumbo*, 897 F.2d at 249. *See also United States v. North*, 920 F.2d 940, 947–49 (D.C.Cir.1990)(en banc) ("grand jury may not consider immunized testimony or evidence derived from it"); *In re Grand Jury Proceedings Kinamon v. United States*, 45 F.3d 343, 347 (9th Cir.1995) ("prohibition against the use of immunized testimony covers such use at grand jury proceedings as well as at trial"); *Schmidgall II*, 25 F.3d at 1536–37 ("focus on the evidence actually used by the government in obtaining the indictment is a correct application of *Kastigar*"); *United States v. Pelletier*, 898 F.2d 297, 301 (2d Cir.1990) ("A challenge to an indictment on the basis that it was improperly obtained through the use of immunized testimony is timely under rule 12(b)"); *United States v. Tormos–Vega*, 656 F.Supp. 1525, 1535 (D.P.R.1987).

[27] Except in certain circumstances, discussed below, the remedy for presenting to a grand jury evidence obtained directly or indirectly as a result of a grant of immunity is dismissal of the indictment. *North*, 920 F.2d at 947–49; *Poindexter*, 951 F.2d at 377; *Schmidgall II*, 25 F.3d at 1538–39; *Pelletier*, 898 F.2d at 303; *United States v. Holloway*, 74 F.3d 249, 253 (11th Cir.1996); *Tormos–Vega*, 656 F.Supp. at 1535–37. As the Court of Appeals for the District of Columbia Circuit explained in *North*, there is a distinction between presenting to a grand jury evidence that has been wrongfully obtained in violation of a defendant's constitutional rights and a violation of a legally permissible promise of immunity. 920 F.2d at 948–49. While, pursuant to *Calandra*, 414 U.S. at 354, 94 S.Ct. 613, suppression at trial is deemed to be a sufficient and appropriate remedy if illegally obtained evidence has been presented to the grand jury, it is not adequate if information that has been legally obtained as a result of a promise of immunity is presented to the grand jury. *Id. See also United States v. North*, 910 F.2d 843, 868–70 (D.C.Cir.1990), *vacated in part, superseded in part*, 920 F.2d 940 (D.C.Cir.1990); *United States v. Garrett*, 797 F.2d 656, 661 (8th Cir.1986); *United States v. Hampton*, 775 F.2d 1479, 1489 (11th Cir.1985); *United States v. Beery*, 678 F.2d 856, 860 (10th Cir.1982).[71]

[28] The principle that the government may not present to the grand jury that indicted a defendant information obtained, directly or indirectly, as a result of a grant of immunity is not limited to cases involving formal immunity provided by operation of § 6002. It is equally applicable to informal promises of immunity, including oral promises. *See, e.g., Holloway*, 74 F.3d at

71. In *United States v. Rivieccio*, 919 F.2d 812, 816 (2d Cir.1990), the court in effect applied the *Calandra* standard in a case involving the presentation of immunized evidence to the grand jury. This approach was inconsistent with the Court of Appeals for the Second Circuit's then recent decision in *Pelletier*, which held that "[i]f the government used the [defendants'] immunized testimony to secure indictment ... the district court should dismiss the indictment, unless the immunized testimony presented was so minimal or of such inconsequential nature in light of the other evidence before the grand jury as to constitute harmless error." *Pelletier*, 898 F.2d at 303. More recently, the Court of Appeals for the Second Circuit has stated:

> [I]f the government has presented immunized evidence to the grand jury, the indictment should be dismissed unless the government establishes that the grand jury would have indicted even absent that testimony. *See, e.g., Rivieccio*, 919 F.2d at 816 n. 4; *Pelletier*, 898 F.2d at 303.

United States v. Nanni, 59 F.3d 1425, 1433 (2d Cir.1995). Thus, it appears that the relevant law in the Second Circuit is now generally consistent with the standard this court understands to be correct. However, to the extent that *Rivieccio* suggests a different standard, this court respectfully disagrees.

252 (oral assurance that there would be no criminal prosecution if defendant testified in a civil deposition); *Schmidgall I*, 25 F.3d at 1526 (oral promise of use and derivative use immunity); *Schmidgall II*, 25 F.3d at 1535 (same); *Palumbo*, 897 F.2d at 248 (informal grant of immunity).

As indicated earlier, the pertinent promises to Flemmi included the assurance that information that he provided to assist the FBI in its efforts to bug 98 Prince Street, Vanessa's, and 34 Guild Street, and any information directly or indirectly derived from that information, would not be used against him. The Court of Appeals for the Second Circuit has characterized the use of information obtained as a result of a promise of immunity in an application for court authorization to obtain evidence against the witness as a "direct use" that "is plainly a violation of the witness's Fifth Amendment rights." *Nanni*, 59 F.3d at 1431 (citing *Pelletier*, 898 F.2d at 303; *Gallo*, 859 F.2d at 1082). It appears to this court that such a use might be more properly characterized as "indirect." However, whether deemed "direct" or "indirect" use, the presentation of evidence intercepted at 98 Prince Street and 34 Guild Street to the grand juries which indicted Flemmi alone requires a hearing to determine whether this case must be dismissed.

In addition, as described in § II.32, *supra*, at least two witnesses before the grand juries were exposed to information recorded by the FBI that Flemmi had provided, raising the question of whether their testimony was tainted by exposure to information obtained as a result of a promise of immunity. More specifically, the government has represented that Buckley read all of Flemmi's informant file and Walther reviewed part of it. In addition, Gamel read Bulger's informant file, which may have included information provided by Flemmi when he and Bulger were meeting with the FBI during periods when Flemmi was administratively closed as an informant.

[29] "The protection against self-incrimination is violated whenever the prosecution presents a witness whose testimony is shaped—directly or indirectly—by immunized [information] regardless of how or by whom the witness was exposed to that [information]." *Schmidgall I*, 25 F.3d at 1528. *See also North*, 920 F.2d at 942, 949; *United States v. Byrd*, 765 F.2d 1524, 1529 (11th Cir.1985). Thus, the fact that grand jury witnesses were exposed to Flemmi's informant file, which contains information that he provided after receiving promises including use and derivative use immunity, is another reason that a *Kastigar* analysis is required to decide Flemmi's motion to dismiss. *North*, 920 F.2d at 948–49 n. 9; *North*, 910 F.2d at 866–67.

[30] In addition, information obtained as a result of a grant of immunity may not be used as an "investigatory lead." *Kastigar*, 406 U.S. at 460, 92 S.Ct. 1653; *Schmidgall II*, 25 F.3d at 1537. This means, among other things, that such information may not be used to identify potential witnesses or shape the questioning of them. *Schmidgall II*, 25 F.3d at 1537. The question whether this occurred must also be addressed in the instant case.

Accordingly, an adversary hearing to address the foregoing issues is necessary. *United States v. Zielezinski*, 740 F.2d 727, 734 (9th Cir.1984) ("The government cannot simply provide transcripts to the court, *in camera*, and assume that it has met its *Kastigar* burden. Only a hearing can convincingly establish that the command of the Fifth Amendment has been satisfied.") At that hearing, the government will have the burden of proving, most likely by a preponderance of the evidence, that the information it presented to secure the indictments of Flemmi was not tainted by showing that it had an independent, legitimate source for that evidence. *Kastigar*, 406 U.S. at 460, 92 S.Ct. 1653; *Schmidgall I*, 25 F.3d at 1530–31; *Bartel*, 19 F.3d at 1112; *Palumbo*, 897 F.2d at 251; *Hampton*, 775 F.2d at 1485–86; *United States v.*

Romano, 583 F.2d 1, 7 (1st Cir.1978); *United States v. McGee*, 798 F.Supp. 53, 55 n. 3 (D.Mass.1992); *United States v. Serrano*, 680 F.Supp. 58, 62 (D.P.R.1988), *aff'd*, 870 F.2d 1 (1st Cir.1989).

If the government fails to prove that all of the evidence presented to the grand juries that indicted Flemmi was untainted, the case against Flemmi must be dismissed unless the government proves that its error was harmless beyond a reasonable doubt. *Poindexter*, 951 F.2d at 377 ("unless the [Independent Counsel] proves on remand that the evidence received by the grand jury was untainted, or that any taint was harmless beyond a reasonable doubt, the indictment must be dismissed."); *Schmidgall II*, 25 F.3d at 1538 ("Dismissal of the indictment is not required when use of the immunized testimony was 'harmless beyond a reasonable doubt.' "); *Gallo*, 859 F.2d at 1082–84; *Byrd*, 765 F.2d at 1529 n. 8.

Thus, at this point the burden on the government is "heavy." *Kastigar*, 406 U.S. at 461–62, 92 S.Ct. 1653; *Palumbo*, 897 F.2d at 251. It is not, however, necessarily insurmountable. *Compare e.g. Palumbo*, 897 F.2d at 251 (ordering dismissal of case because government failed to satisfy its burden); *Hampton*, 775 F.2d at 1490–91 (same) *and Schmidgall II*, 25 F.3d at 1539 (affirming conviction because presentation of immunized evidence to grand jury was "harmless beyond a reasonable doubt.").

In order to determine whether this case must be dismissed because of misuse of information that Flemmi provided after being given enforceable assurances that included use and derivative use immunity for the information that he provided to assist the FBI in its efforts to get warrants used to bug 98 Prince Street, Vanessa's, and 34 Guild Street, it will be necessary to "focus on the evidence actually used by the government in obtaining the indictment[s]" of Flemmi. *Schmidgall II*, 25 F.3d at 1536. Thus, it is likely, but not certain, that the government will be ordered to produce that evidence to the defendants.[72] *Zielezinski*, 740 F.2d at 734; *Schmidgall II*, 25 F.3d at 1537–39 (analyzing evidence before grand jury); *Hampton*, 775 F.2d at 1486–90 (same). *See also United States v. Vest*, 842 F.2d 1319, 1333 (1st Cir.1988) ("grand jury minutes are not part of the record on appeal, and thus [defendant] has presented no basis on which [Court of Appeals] can even begin to consider whether the district court erred" in deciding defendant was not prejudiced by presentation of illegally obtained tape-recording to grand jury). *Cf. Byrd*, 765 F.2d at 1532 ("courts have in fact considered *in camera* evidence when claims of *Kastigar* violations are raised prior to trial").

If this case is not dismissed because of the presentation of any tainted evidence to the grand juries that indicted Flemmi, such evidence will be excluded from use at trial. Thus, the hearing to be conducted will also serve to identify any such evidence.

It may also be necessary for the court to determine whether the present prosecutors, who have now been exposed to the information in Flemmi and Bulger's informant files, and thus may have been exposed to tainted evidence, may participate in Flemmi's trial if this case is not dismissed against him. *Byrd*, 765 F.2d at 1532 n. 11 ("In a *Kastigar* setting, we are of the firm opinion that it would be unwise to permit an attorney familiar with the immunized testimony to participate in the trial or preparation of the case"); *Palumbo*, 897 F.2d at 251 (quoting *Byrd*); *Tormos–Vega*, 656 F.Supp. at 1531–32 (case dismissed in part because prosecutor was exposed to immunized testimony). *But see United States v. Serrano*, 870 F.2d 1, 18 (1st Cir.1989) ("[W]e reject the notion that

72. The court previously denied, with limited exceptions, the defendants' motion for production of the evidence presented at to the grand jury. *See United States v. Salemme*, 1997 WL 810057 at *5 (D.Mass. Dec.29, 1997).

the mere exposure to immunized testimony or the mere possibility of nonevidentiary use automatically results in the dismissal of the indictment.") As described in § II.33, *supra*, recognition of the risk that exposure to Bulger and Flemmi's informant files might require their disqualification caused the prosecutors presenting this case not to read them in connection with the government's successful effort to obtain a protective order concerning discovery from the magistrate judge. However, the court may have to decide this issue if this case is not dismissed as against Flemmi.

(5) *If Morris and Connolly Were Not Authorized to Promise Flemmi that the Evidence Intercepted at 98 Prince Street, Vanessa's, and 34 Guild Street Would Not Be Used Against Him, Flemmi's Statements to the FBI Relating to Those Interceptions May Have Been Involuntary and, In Addition, Use of Any Evidence Intercepted At Those Locations May Violate Flemmi's Right to Due Process*

In the interest of completeness, it should be recognized that even if Morris and Connolly were not authorized to promise Flemmi that the evidence intercepted at 98 Prince Street, Vanessa's, and 34 Guild Street would not be used against him, their conduct may have violated his Fifth Amendment right not to incriminate himself and his related right to Due Process. The parties have not, however, addressed these questions. The court will afford them the opportunity to do so before deciding their implications for this case. To facilitate their work, the essence of these issues is set forth below.

As indicated earlier, it has been held that there are circumstances in which Due Process may require that the government perform a promise made by an agent who exceeded his actual authority. As the Court of Appeals for the First Circuit has noted: "courts on occasion have specifically enforced promises that would encroach on the jurisdiction of independent entities. *See, e.g., Palermo v. Warden*, 545 F.2d 286, 296 (2d Cir.1976)." *Bemis*, 30 F.3d at 221 n. 1.

In *Palermo*, the Court of Appeals for the Second Circuit ordered the release of a prisoner who had been denied parole by the Parole Board because a prosecutor, who had exceeded his authority, promised in a plea agreement that Palermo would be paroled. 545 F.2d at 296. In doing so, the Court of Appeals for the Second Circuit stated:

> [F]undamental fairness and public confidence in government officials require that prosecutors be held to "meticulous standards of both promise and performance." *Correale v. United States*, 479 F.2d 944, 947 (1st Cir.1973). Thus, the courts have afforded relief where prosecutors have made specific sentencing promises which were unfulfillable, since sentencing lies totally within the court's discretion, *United States v. Hammerman*, 528 F.2d 326 (4th Cir.1975); *Harris v. Superintendent, Va. State Penitentiary*, 518 F.2d 1173 (4th Cir.1975); *Correale v. United States, supra*, or where one federal prosecutor promised immunity from federal prosecution outside his own jurisdiction, *United States v. Carter*, 454 F.2d 426 (4th Cir.1972) (en banc), *cert. denied*, 417 U.S. 933, 94 S.Ct. 2646, 41 L.Ed.2d 237 (1974). *Geisser v. United States*, 513 F.2d 862 (5th Cir.1975) involved breach of a Department of Justice plea bargain which entailed, in part, a promise of parole after three years imprisonment. On appeal, the Department argued that the district court usurped the exclusive power of the Parole Board by ordering release. The Court of Appeals, although it remanded the case for a determination of what the Parole Board would do when informed of the bargain, concluded that such a bargain "fits well within the realm of enforceable constitutional rights ...." 513 F.2d at 869 n. 11. We agree and hold

> that where a defendant pleads guilty because he reasonably relies on promises by the prosecutors which are in fact unfulfillable, he has a right to have those promises fulfilled.

Id. at 296 (footnotes omitted).

In *Bemis*, the Court of Appeals for the First Circuit was confronted with a claim that prosecutors had reneged on a promise that a defendant would ultimately be admitted to the Witness Protection Program. 30 F.3d at 221. The government argued that the United States Attorney's Office lacked the authority to make such a promise and it was, therefore, unenforceable. *Id.* The Court of Appeals for the First Circuit, however, rejected this as a general proposition stating that for the purposes of determining whether the petitioner had been deprived of Due Process, " 'the crucial question is not whether the Government had the authority to carry out the promise which [petitioner] claims he understood it to make, but whether it did in fact make such a promise.' " *Id.* at 222 (quoting *Cook*, 668 F.2d at 320).

In *Palermo*, the Court of Appeals for the Second Circuit affirmed a decision to enforce an unauthorized promise of parole because the petitioner had reasonably relied on that promise and "specific performance of the plea bargain would constitute the only meaningful relief in the context of the case." 545 F.2d at 296. For the reasons described previously, Flemmi understandably argues that he relied to his detriment on the promises Morris and Connolly made, expressly or implicitly, that any evidence intercepted at 98 Prince Street, Vanessa's, and 34 Guild Street would not be used against him and, at this time, Due Process requires specific performance of those promises even if Morris and Connolly exceeded their authority in making them.

There are cases in which promises of immunity not involving any prosecutor have been enforced even in the absence of detrimental reliance by the defendant. *See Rodman*, 519 F.2d at 1059–60 (dismissing on grounds of fairness indictment of defendant based on unfulfilled promise of Securities and Exchange Commission attorney to recommend strongly no prosecution, where defendant made self-incriminatory statements, but there was no finding that they had been used against him directly or indirectly); *Carrillo*, 709 F.2d at 36–37 (enforcing promise by DEA agents that defendant would not be prosecuted if he cooperated in their investigation despite apparent lack of participation of a prosecutor in the promise or any evidence provided by defendant being used against him).

If Due Process is deemed to require performance of the promises made to Flemmi by Morris and Connolly, even if they exceeded their authority, it appears that, at a minimum, the appropriate remedy would be to preclude any use or derivative use, before the grand jury and at trial, of the evidence intercepted at 98 Prince Street, Vanessa's, and 34 Guild Street because that was part of the promise that Morris and Connolly made to Flemmi.

In *Palermo*, the Court of Appeals for the Second Circuit rested its ruling requiring specific performance of an unauthorized promise in meaningful measure on the fact that "the voluntariness of a plea induced by unfulfillable promises is, of course, open to grave doubt." 545 F.2d at 296. The facts found by the court in this case present a similar substantial question of whether, if the promise of immunity made to Flemmi was not valid for lack of authority, the statements that he made which the government utilized in successfully seeking the warrants used to bug 98 Prince Street, Vanessa's, and 34 Guild Street were involuntary. However, the defendants have cited only one district court case on this issue and the government has not addressed it at all. The court will, therefore, provide the parties an opportunity to address this issue too.[73]

73. Flemmi may also contend that all of his statements to the FBI were involuntary based

More specifically, as indicated earlier, statements induced by a government promise of immunity are coerced and both the Self–Incrimination Clause of the Fifth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments bar use and derivative use at trial of such statements against a defendant. *Swint*, 15 F.3d at 288–89. As the Supreme Court has held:

> It is of course a constitutional principle of long standing that the prosecution 'must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.' *Rogers v. Richmond*, 365 U.S. 534, 541, 81 S.Ct. 735, 739, 5 L.Ed.2d 760 (1961). We have no hesitation in saying that this principle also reaches evidence of guilt induced from a person under a governmental promise of immunity, and where that is the case such evidence must be excluded under the Self–Incrimination Clause of the Fifth Amendment.... Evidence so procured can no more be regarded as the product of a free act of the accused than that obtained by official physical or psychological coercion.

Shotwell Mfg. Co., 371 U.S. at 347–48, 83 S.Ct. 448 (citations omitted).

Consistent with this principle, it has been found that promises of immunity have in certain cases induced statements which were, therefore, deemed involuntary. *See Walton*, 10 F.3d at 1030; *Swint*, 15 F.3d at 290; *Conley*, 859 F.Supp. at 839; *Quartararo v. Mantello*, 715 F.Supp. 449, 461 (E.D.N.Y.1989), *aff'd*, 888 F.2d 126 (2d Cir.1989). Indeed, as described earlier, the FBI *Manual* has long cautioned agents that promises of immunity may constitute a form of "*undue influence*" Ex. 274 (Under Seal), Manual § 108(D)(4) (11–29–55 through (5–13–76); § 108(I)(C)(6) (1–12–77); § 137–3(6) (1–31–78); § 137(3)(6)(4–2–79); § 137–5(4) (1–2–81); 137–5(4) (9–20–82); § 137–5(4) (3–28–84) (emphasis added)).

However, the mere fact:

> That a law enforcement officer promises something to a person suspected of a crime in exchange for the person's speaking about the crime does not automatically render inadmissible any statement obtained as a result of that promise. Despite some language in early Supreme Court cases such as *Bram v. United States*, 168 U.S. 532, 542–43, 18 S.Ct. 183, 187, 42 L.Ed. 568 (1897) (indicating that a confession cannot be obtained by " 'any direct or implied promises, however slight, nor by the exertion of any improper influence' "), it is clear that the voluntariness of a confession does not depend solely upon whether it was made in response to promises. Instead, we must determine voluntariness by judging the totality of the circumstances. *See Arizona v. Fulminante*, 499 U.S. 279, 284–85, 111 S.Ct. 1246, 1251, 113 L.Ed.2d 302 (1991) (noting that the above-quoted passage of *Bram*, "which under current precedent does not state the standard for determining the voluntariness of a confession," was itself part of a totality of the circumstances test). *See also Miller v. Fenton*, 796 F.2d 598, 604 (3d Cir.1986). "The question in each case is whether the defendant's will was overborne when he confessed." *Id.* The burden is on the government to establish, by a preponderance of the evidence, that a challenged confession was voluntary. *Id.*

Walton, 10 F.3d at 1028. *See also Byram*, 145 F.3d at 407–08.

As the court in *Walton* went on to write, however, "given the uniquely influential nature of a promise from a law enforce-

upon the explicit promises of "protection" that he received from Rico, Connolly, and Morris and the FBI's conduct over three decades. The principles discussed in this Memorandum concerning 98 Prince Street, Vanessa's, and 34 Guild Street would also be generally applicable in analyzing any broader claim for suppression based on involuntariness.

ment official not to use a suspect's inculpatory statement, such a promise may be the most significant factor in assessing the voluntariness of an accused's confession in light of the totality of the circumstances." *Walton*, 10 F.3d at 1030. *See also Streetman v. Lynaugh*, 812 F.2d 950, 957 (5th Cir.1987) (noting, while analyzing defendant's claim of ineffective assistance of counsel, that "certain promises, if not kept, are so attractive that they render a resulting confession involuntary. A promise of immediate release or that any statement will not be used against the accused is such a promise." (citation omitted)).

Statements induced by a promise made by a person lacking actual authority to grant immunity have been held to be involuntary. For example, state and local law enforcement officials generally lack authority to make promises that bind the federal government. *See, e.g., United States v. Fuzer*, 18 F.3d 517, 520 (7th Cir.1994); *United States v. Cordova–Perez*, 65 F.3d 1552, 1554 (9th Cir.1995). However, statements induced by such promises have been held to be both involuntary and inadmissible in federal proceedings. *Swint*, 15 F.3d at 290; *Rogers*, 906 F.2d at 192. The principle that unauthorized promises may render statements involuntary was also addressed in *Conley*, a case involving a promise of use immunity made to an informant by an FBI agent. *Conley*, 859 F.Supp. at 839 n. 6. In *Conley*, the court stated:

> the Government has not argued or attempted to prove that [FBI Special Agent] Donnelly's promise was not authorized by a prosecutor. The Court notes the impracticality that could be visited upon potential agent-informant relationships absent promises such as [FBI Special Agent] Donnelly's promise . . . . [I]t is the making of the promise in this case that is relevant to the voluntariness inquiry, rather than the question of whether the promise was, or should be, within the lawful authority of S.A. Donnelly.

Id.

[31] For the purposes of the voluntariness inquiry, the question whether Flemmi was promised immunity must be examined from his perspective. *Walton*, 10 F.3d at 1029. However, a "defendant's perception that he is providing testimony under a grant of immunity does not make his statement involuntary, unless the perception was reasonable." *Cahill*, 920 F.2d at 427. *See also Walton*, 10 F.3d at 1029 ("the appropriate inquiry is whether the defendant reasonably perceived the alleged promise as he asserts.").

One factor to be considered in determining the reasonableness of Flemmi's belief that any information that he provided to assist the FBI's efforts to bug 98 Prince Street, Vanessa's, and 34 Guild Street would not be used against him is the understanding of FBI agents experienced in such matters. *Walton*, 10 F.3d at 1029 (perception that statements defendant made would not be used against him was reasonable in part because agents with whom he spoke had the same understanding). In this case, Flemmi can cite the testimony of a series of FBI agents to support the reasonableness of his reliance on the promises Morris and Connolly made to him, explicitly and implicitly, concerning 98 Prince Street, Vanessa's, and 34 Guild Street. For example, Rico believed that, as a matter of law, an informant's statements generally could not be used against him because no *Miranda* warnings had been given. Rico Jan. 13, 1998 Tr. at 126; § II.2. Darcy, the government's expert, was never involved in a matter in which the FBI used information provided by an informant to obtain a warrant for electronic surveillance and later used against him any of the intercepted evidence that he helped obtain. Darcy Sept. 29, 1998 Tr. at 82; § II.33. Darcy's experience was consistent with Ahearn's. Ahearn May 11, 1998 Tr. at 51–2; § II.3. Carter, who was the affiant concerning Vanessa's, believed

that the statements Flemmi made to Connolly which Carter included in his affidavit could not be used against Flemmi at least directly. Carter Aug. 18, 1998 Tr. at 164–65; § II.20.

Another factor that would weigh in favor of finding that Flemmi reasonably believed that the government would not use against him the information that he provided which helped secure the warrants to bug 98 Prince Street, Vanessa's, and 34 Guild Street is the manner in which the FBI, over several decades, cultivated the sense that he was a friend and ally, rather than a potential target for prosecution. It has been held that, " '[e]xcessive friendliness on the part of an interrogator can be deceptive ... and thereby prompt admissions that the suspect would ordinarily make only to a friend, not to the police.' " *Walton*, 10 F.3d at 1030 (quoting *Miller v. Fenton*, 796 F.2d 598, 607 (3rd Cir.1986)). Thus, in finding a promise of immunity rendering the defendant's statements involuntary, the court in *Walton* found it "significant" that the agent making the promise had reminded the defendant of their long, prior relationship. *Id.* Similarly, in *Conley*, the court suppressed statements after finding that an FBI agent's "promise to speak off the record and his friendly manner combined to overcome Conley's reticence about making statements to the FBI." 859 F.Supp. at 837. As described in detail in this Memorandum, Flemmi has a substantial basis for making a similar argument in this case concerning the promises made to him relating to 98 Prince Street, Vanessa's, and 34 Guild Street.

If the government fails to prove that Flemmi voluntarily made the statements that were included in the applications for the warrants used to bug 98 Prince Street, Vanessa's, and 34 Guild Street, those statements and any evidence derived from them should not have been presented to the grand juries which indicted Flemmi and may not be used against him at trial. *Byram*, 145 F.3d at 409 (where statement is coerced "evidence derived directly from the [statement] can also be excluded as involuntary under a doctrine similar to the 'fruits of the poisonous tree' doctrine"); *Biller v. Lopes*, 834 F.2d 41, 46 (2d Cir. 1987); *Pilotti v. Superintendent Great Meadow Correctional Facility*, 759 F.Supp. 1031, 1037 (S.D.N.Y.1991). In *Quartararo*, the court applied this concept in the context of a promise of leniency which was deemed to be a promise of immunity. 715 F.Supp. at 461. After finding the defendant's initial confession to have been coerced by the promise of immunity, the court suppressed his subsequent statements as directly produced by the existence of the earlier statements. *Id.*

Accordingly, if after hearing from the parties the court finds that the statements Flemmi made that were included in the applications for the warrants used to bug 98 Prince Street, Vanessa's, and 34 Guild Street were not voluntary, it will be necessary to determine what, if any, remedy is appropriate.

The Supreme Court has held that an indictment is not subject to challenge because the grand jury acted on the basis of information provided involuntarily and, therefore, in violation of a defendant's Fifth Amendment privilege against self-incrimination. *Calandra*, 414 U.S. at 345, 94 S.Ct. 613. Thus, dismissal would not be required if statements made by Flemmi involuntarily, or evidence derived from them, was presented to the grand juries that indicted him. *Id.*

Nevertheless, if the statements Flemmi made that were included in the applications for the warrants to bug 98 Prince Street, Vanessa's, and 34 Guild Street were involuntary, it appears that such statements, and any evidence derived from them, would not be admissible at his trial. *Id.* Thus, it would be necessary to conduct a hearing to identify any such evidence.

2. *The Motion to Suppress the 1984–85 Electronic Surveillance*

A. *Summary*

Flemmi and John Martorano were intercepted during the 1984–85 wiretap of George Kaufman's telephone. Thus, each is an "aggrieved person," who has standing to request suppression of the evidence intercepted by that wiretap and any evidence derived from it. *See* 18 U.S.C. §§ 2510(1), (11), 2515, 2518 (1994). They have moved to do so and their motion to suppress is meritorious.

Initially, defendants assert that the 1984–85 electronic surveillance evidence should be suppressed because § 2516(1) was violated. Section 2516(1) requires that the Attorney General or another, specified high ranking official of the Department of Justice, including the Assistant Attorney General in charge of the Criminal Division, authorize the filing of an application for a warrant to conduct electronic surveillance.[74] The Supreme Court has held that the purpose of this provision is "to make doubly sure" that electronic surveillance is necessary and appropriate by making the "mature" and "informed" judgment of a high ranking, politically accountable official a "critical precondition to any judicial order." *Giordano*, 416 U.S. at 515, 94 S.Ct. 1820.

In the instant case the application for the warrant to conduct the 1984–85 electronic surveillance was authorized by the Assistant Attorney General in charge of the Criminal Division. Thus, the literal requirements of § 2516(1) were met. However, the purposes of that provision were subverted because the Assistant Attorney General was deprived of vital information which, if disclosed, would have caused him to decline to authorize the application. Thus, the informed judgment of a politically accountable official was not rendered in this matter.

Only one reported case directly addresses the question of whether suppression is required when the official of the Department of Justice who has authorized the application was denied material information by his associates. *United States v. Williams*, 565 F.Supp. 353, 368–69 (N.D.Ill.1983), *aff'd*, 737 F.2d 594. In another context, however, the Court of Appeals for the First Circuit has agreed with other courts which "have uniformly held that once the proper official is found to have authorized a wiretap application, his authorization is not subject to further judicial review." *United States v. O'Malley*, 764 F.2d 38, 41 (1st Cir.1985). The reasoning of such cases is questionable, particularly as applied to the instant case. However, in view of the broad language in *O'Malley* and the fact that the motion to suppress the 1984–85 electronic surveillance is meritorious for other reasons, this court is not allowing that motion based upon the purported violation of § 2516(1).

Rather, the motion to suppress the 1984–85 electronic surveillance is being allowed because: the initial application was filed with at least reckless disregard for the truth; it was materially false and misleading because the requested electronic surveillance was not necessary to acquire evidence to be used by the FBI in an effort to develop a Title 18 prosecution against Flemmi, Bulger, Kaufman, or anyone else; there was not probable cause to believe that the requested wiretap of Kaufman's telephone would result in the interception of any evidence of a Title 21 drug offense; and the purpose of § 2518(1)(c), which requires that an application include a full and complete statement as to why electronic surveillance is necessary, was not satisfied.

The parties disagree on the standard to be applied in deciding whether suppression for a violation of § 2518(1)(c) is required. More specifically, as set forth below, the

74. It is actually the interaction of §§ 2516(1) and 2518(1)(a) that together require that a specified, politically accountable official authorize an application for electronic surveillance. The court, however, refers only to § 2516(1) as a sort of simple shorthand.

parties dispute whether this court was correct in finding in *Ferrara*, 771 F.Supp. at 1298–1304, that the judicially crafted exclusionary rule is applicable to deciding motions to suppress electronic surveillance involving a violation of a provision of Title III that codifies a requirement of the Fourth Amendment. Defendants contend that the stricter standard of § 2515, as interpreted by the Supreme Court in *Giordano, supra*, is applicable in all Title III cases. They also assert that, in any event, the necessity provision of Title III, 18 U.S.C. § 2518(1)(c), is not a codification of a constitutional requirement. In addition, defendants argue that if a judicially fashioned exclusionary rule is to be applied, the *Franks* standard, which was developed to address questions concerning probable cause, is not appropriate when necessity is at issue.

As discussed below, the defendants raise serious legal issues which ultimately make no difference with regard to the outcome of the motion to suppress the 1984–85 electronic surveillance. The motion to suppress is meritorious under both the *Franks* and *Giordano* standards.

If the *Franks* test is utilized, defendants have proven that the application for the warrant to tap George Kaufman's telephone involved false and misleading statements and omissions that were material, and were made with at least reckless disregard for the truth. If the *Giordano* standard is applied, the government violated a "central" provision of Title III in failing to make the required "full and complete statement" concerning necessity and the purposes of that provision were not satisfied. Rather, the government's violation of the law caused a warrant to be issued that would not have been obtained if the requirements of Title III had been met.

The facts on which the analysis rests are described in detail in § II.17, *supra*, and referenced in the following analysis. In brief summary, in applying for a warrant to tap Kaufman's telephone, the government relied on a lengthy and confusing affidavit of DEA Agent Boeri that was false and misleading in many important ways, and which was submitted with at least reckless disregard for its truth.

More specifically, the application and affidavit represented that the investigation was a joint DEA–FBI endeavor and that there was probable cause to believe that Bulger, Flemmi, and Kaufman would discuss illegal gambling, loansharking, and other Title 18 offenses on Kaufman's telephone. It was also represented that the requested wiretap was necessary to the FBI's effort to develop a Title 18 prosecution of Bulger, Flemmi, Kaufman, and others. The FBI, however, had no intention of using any intercepted evidence to develop such a case. Neither Boeri nor Crossen, the affiant and applicant, believed that the FBI would attempt to do so. Rather, they understood that Bulger and Flemmi were FBI informants who the Bureau wished to protect rather than prosecute.

Accepting that the FBI would not confirm that Bulger and Flemmi were informants or discuss the implications of their status for the proposed electronic surveillance, Boeri and Crossen recklessly disregarded their obligation to obtain from the FBI the information required to provide the court with the legally mandated full and complete statement concerning the necessity for electronic surveillance. Acting for the FBI, Ring intentionally withheld that information from the DEA, the United States Attorney, and the court. In addition, Crossen and Boeri acted with reckless disregard for the truth when they filed applications for warrants that in effect represented that electronic surveillance was necessary to obtain evidence that the FBI would use in a Title 18 investigation of Bulger, Flemmi, and others because they did not believe that the FBI would attempt to do so.

As a result, the issuing judge was deprived of important information which, if disclosed, would have caused the request

for a warrant to be denied. More particularly, the required full and complete statement would have included the following information. As informants, Flemmi and Bulger had made statements about their illegal gambling and loansharking activities which the government now claims can be used against them. A review of their files, however, would indicate to the FBI that they were tacitly authorized to engage in such activities and, therefore, the conduct which the government was seeking authority to utilize a wiretap to investigate may not have been criminal. In any event, the FBI did not intend to use any evidence generated by the electronic surveillance to investigate Flemmi, Bulger, Kaufman, or anyone else. Indeed, the FBI agents assigned to participate in the joint investigation were instructed not to disclose the information being intercepted to anyone else employed by the FBI.

The DEA also did not intend to conduct any investigation concerning potential Title 18 violations. Rather, its representatives believed that the FBI was the sole federal agency with the authority to do so. The prosecutor and DEA agents involved were genuinely interested in trying to develop a drug case for which Flemmi and Bulger could be prosecuted. There was, however, no evidence to establish probable cause to believe Bulger would be intercepted by a wiretap on Kaufman's telephone. While there was a basis to expect Flemmi and Kaufman would be overheard, there was not probable cause to believe that they would be discussing any drug offense, or that Kaufman would be discussing such an offense with anyone. Indeed, the FBI agent who was most knowledgeable did not believe that Bulger and Flemmi were involved in narcotics crimes and felt that their work for the Bureau may have created the mistaken impression that they were.

If, as the court now believes, *Giordano* rather than *Franks* provides the applicable standard, § 2518(1)(c) is a "central" provision of Title III because it "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Giordano*, 416 U.S. at 527, 94 S.Ct. 1820. The government failed to make the legally required full and complete statement concerning necessity and the statutory purpose of that requirement was not nevertheless achieved. Rather, a warrant that was not justified was issued.

In the circumstances, the motion to suppress the 1984–85 electronic surveillance is meritorious. The intercepts were not presented to the grand juries that returned the indictments in the instant case. However, it is necessary to determine whether any evidence derived from them was provided to those grand juries and, if so, whether such use of illegally obtained evidence requires, or contributes to requiring, dismissal of this case. In addition, the 1984–85 intercepts, and any evidence derived from them, may not be used in the government's case-in-chief at trial. Further proceedings will be necessary to identify any such derivative evidence.[75]

B. *Suppression is Not Justified Based on the Alleged Violation of 18 U.S.C. § 2616(1)*

[32] Flemmi asserts that the 1984–85 electronic surveillance evidence should be suppressed because of an alleged violation of 18 U.S.C. § 2516(1). Section 2516(1) provides that the Attorney General or certain other high ranking officials of the Department of Justice, including the Assistant Attorney General in charge of the Criminal Division, must authorize an application to the court for a warrant to conduct electronic surveillance. This require-

75. The government has intended to use in its case-in-chief only the interceptions obtained from the wiretap of Kaufman's telephone, rather than the interceptions from Bulger's automobile and apartment. Gov. Post–Hearing Brief at 316–17.

ment is solely statutory in origin, going beyond any duty established by the Constitution. *Giordano,* 416 U.S. at 526, 94 S.Ct. 1820.

The Supreme Court has classified § 2516(1) as "central" to the statutory scheme established by Title III. *Id.* at 528, 94 S.Ct. 1820. Therefore, generally, suppression must be ordered if the statutory purpose of § 2516(1) is not satisfied. *Id.; United States v. Cunningham,* 113 F.3d 289, 293–94 (1st Cir.), *cert. denied,* 522 U.S. 862, 118 S.Ct. 165, 139 L.Ed.2d 109 (1997).

Title III requires that a senior official of the Department of Justice authorize an application for a warrant to conduct electronic surveillance in order "to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." *Giordano,* 416 U.S. at 515, 94 S.Ct. 1820. In other words, in enacting Title III, Congress and the President did not intend to rely on the courts alone to limit the use of electronic surveillance. Rather, it was expected that the requirement that applications be authorized by a senior official of the Department of Justice "would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use." *Id.* at 527, 94 S.Ct. 1820.

As the Supreme Court has stated, Title III:

> plainly calls for the prior, *informed* judgment of enforcement officers desiring court approval for intercept authority, and investigative personnel may not themselves ask a judge for authority to wiretap or eavesdrop. The *mature judgment* of a particular, responsible Department of Justice official is interposed as a critical precondition to any judicial order.

Id. at 515, 94 S.Ct. 1820 (emphasis added). The legislative history of Title III explains that the authority to apply for warrants to conduct electronic surveillance is limited to officials "responsive to the political process" so if " 'abuses occur, the lines of responsibility lead to an identifiable person.' " *Id.* at 520 (quoting S.Rep. No. 1097, 90th Cong., 2d Sess., 96–97 (1968)).

In this case the literal requirements of § 2516(1) were met because the application for the warrants to conduct the 1984–85 electronic surveillance were authorized by Trott, the Assistant Attorney General in charge of the Criminal Division. Flemmi asserts, however, that suppression is required because the purpose of § 2516(1) was subverted when the Assistant Attorney General was deprived of information that was vital to making the "informed" judgment contemplated by Title III and if he had been properly informed no application would have been filed. Flemmi is correct as a matter of fact. The existing jurisprudence, however, suggests that he is not entitled to suppression based on a violation of § 2516(1).

As described in § II.17, *supra,* if the FBI, DEA, and United States Attorney's Office in Boston had engaged in candid discussions concerning Bulger and Flemmi's relationship and value to the FBI, the DEA would have abandoned its investigation. If it did not, the Department of Justice would have aborted the investigation to maintain the confidentiality of Flemmi and Bulger's status as informants. In any event, if the Assistant Attorney General had been told that Bulger and Flemmi were FBI informants and that the FBI had no intention of investigating them, or anyone else, based on evidence of Title 18 offenses intercepted by the proposed electronic surveillance, he would not have authorized the filing of the initial application to tap Kaufman's telephone because it was fundamentally false and misleading. Trott, however, was deprived of this information and, therefore, of the opportunity to exercise the informed judgment contemplated by § 2516(1).

The existing jurisprudence indicates that the foregoing is not a basis for ordering suppression. As the Court of Appeals for the First Circuit has observed, "courts have uniformly held that once the proper official is found to have authorized a wiretap application, his authorization is not subject to further judicial review." *O'Malley*, 764 F.2d at 41 (citing cases).

More specifically, in declining to consider "the adequacy of the Assistant Attorney General's examination procedure and thought processes," the Court of Appeals for the First Circuit noted that the Ninth Circuit had held that:

> Once a proper authorizing officer is properly identified ... thereby fixing on him responsibility for a particular authorization, *the basis on which*, or the method by which, he gave the authorization is not, in our judgment, subject to review for compliance with § 2516(1). Rather, *it is presumed* that the officer has properly exercised the judgment called for by the statute when he affixes his signature to an order authorizing the application.

Id. (quoting *United States v. Turner*, 528 F.2d 143, 151 (9th Cir.1975)) (emphasis added). *See also United States v. United States Dep't. of Probation and Parole*, 536 F.2d 179, 183–84 (7th Cir.1976) (reversing decision to suppress on ground that Attorney General who authorized application was not given sufficient information because "the statute does not state what the Attorney General must review.").

These principles were applied in the sole reported case directly addressing the question of whether suppression is required when the authorizing official of the Department of Justice has been denied material information by his subordinates. *See Williams*, 565 F.Supp. at 368–69. In *Williams*, the court held that:

> Congress intended that beyond ensuring that the authorization was given, courts engage in no review of the authorization decision. The purpose of the statute was to have an official high enough in the Department of Justice to be subject to political checks and balances go on the line by authorizing the application. *See Giordano*, 416 U.S. at 520, 94 S.Ct. at 1829. Congress intended the political process, and not the courts, to hold the authorizing official responsible for his decision and to review that decision. Thus, § 2516(1) depends on political and not judicial review.

Id. See also Turner, 528 F.2d at 150–51; *United States v. Edmond*, 718 F.Supp. 988, 990 n. 5 (D.D.C.1989) (if officials regularly signed authorizations without exercising the " 'mature judgment' " contemplated by the statute, "the structure of § 2516(1) would come into play: the 'publicly responsible official subject to the political process' would be held accountable.").

This court, however, questions the foregoing analysis. Political accountability and judicial review are not mutually exclusive. As the Supreme Court has held, § 2516(1) is of "central" importance to the Title III statutory scheme. *Giordano*, 416 U.S. at 528, 94 S.Ct. 1820. The law contemplates a careful, informed evaluation by a senior official of the Department of Justice as part of the effort to be "doubly sure" that use of electronic surveillance is both permissible and appropriate. *Giordano*, 416 U.S. at 515.

Such careful and reliable scrutiny by the Department of Justice is important. There are inherent limitations on the court's ability to recognize applications for warrants that are false and misleading. *Franks*, 438 U.S. at 169, 98 S.Ct. 2674. As the Supreme Court wrote with regard to requests for warrants generally:

> The pre-search proceeding is necessarily *ex parte*, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence. The usual reliance of our legal system on adversary proceedings itself should be an indication that an *ex parte* inquiry is likely to be less vigorous. The magistrate has no acquain-

tance with the information that may contradict the good faith and reasonable basis of the affiant's allegations. The pre-search proceeding will frequently be marked by haste, because of the understandable desire to act before the evidence disappears; this urgency will not always permit the magistrate to make an extended independent examination of the affiant or other witnesses.

Id. See also United States v. Ailemen, 986 F.Supp. 1228, 1246 (N.D.Cal.1997).

"Federal district courts annually approve over 500 requests for authorization to tap ... telephones .... Requests are very rarely denied." *Aviles*, 170 F.3d at 869 (citations omitted). Indeed, since January 1985, courts have denied only seven of 11,889 applications for orders authorizing the interception of wire, oral, or electronic communications. *See* Administrative Office of the U.S. Courts, *Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications (Wiretap Report)*, (1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992); Administrative Office of the U.S. Courts, *Wiretap Report* (1993, 1994, 1995, 1996, 1997). Since January 1989, courts have denied only one of the 8934 applications they have received. *See id.* These statistics do not reflect the number of times that courts have required the submission of additional information or modified proposed Orders. Nor do they indicate the number of times a Department of Justice official has refused a request to authorize an application for fear that it would be denied by the court. Nevertheless, these statistics do suggest that in evaluating applications judges implicitly rely, in part, on the premise that a senior official of the Department of Justice has made a fully informed and deliberate decision that there is a proper basis for electronic surveillance and that the application fairly presents all of the legally required information.

It may ordinarily be appropriate to "presume[ ] that the officer has properly exercised the judgment called for by the statute when he affixes his signature to an order authorizing the application." *O'Malley*, 764 F.2d at 41. This presumption is not, however, valid when FBI informants are purported targets of electronic surveillance. As the facts of this case, among other things, demonstrate, the Department of Justice generally does not require the Bureau to disclose the identity of its informants even to the highest officials of the Department. *See also* Ex. 274 (Under Seal), Manual § 137–17(F)(3) (1–12–81), § 137–16(F)(3) (3–28–84, 5–26–89)(notice of FBI's authorization of informants to engage in extraordinary criminal activity must be forwarded to the Assistant Attorney General "in a form suitable to protect the identity of the informant"); *id.* § 137–17(G)(3) (1–12–81), § 137–16(G)(3) (3–28–84, 5–26–89) (records of informants' participation in serious acts of violence shall be maintained by FBI Headquarters and be subject to review by a designee of the Deputy Attorney General "in a form suitable to protect the identity of the informants ..."). Thus, the Department of Justice official authorizing the application will almost always be unaware of the type of issues presented in the instant case.

The dimensions of the problem posed by requests for wiretaps purportedly targeting informants are difficult to discern because officials of the Department of Justice and judicial officers will only rarely later learn that they have been misled. There is, however, reason to be concerned that the § 2516(1) question presented with regard to the 1984–85 electronic surveillance is not an isolated or aberrant occurrence. Morris testified that it was the practice of the FBI to mischaracterize informants as targets of proposed electronic surveillance in an effort to protect the confidentiality of their status. This happened at least twice concerning Flemmi and Bulger without the knowledge of the Assistant Attorney General who authorized applications for warrants targeting them: Trott with regard to the 1984–85 electronic surveillance and

Weld with regard to Vanessa's. It has also been discovered to have occurred in at least one other Title III case. *See Falls*, 34 F.3d at 681. *See also Strini*, 658 F.2d at 594–95 (cooperating witness falsely characterized as a suspect in application for search warrant).

The foregoing suggests that the threat of judicial review and suppression might prompt the Department of Justice to take the steps necessary to assure that the purposes of § 2516(1) have been satisfied when informants are purported targets of electronic surveillance. Evidentiary hearings could be limited to cases in which a substantial preliminary showing is made that the authorizing Department of Justice official was deprived of material information. "The requirement of a substantial preliminary showing would suffice to prevent the misuse of a[ ] hearing for purposes of discovery or obstruction." *Franks*, 438 U.S. at 170, 98 S.Ct. 2674. As Judge James Carr has written in his treatise:

> An examination of the review of surveillance applications would not be wholly without precedent. [citing *United States v. Kerrigan*, 514 F.2d 35, 37 (9th Cir.) *cert. denied*, 423 U.S. 924, 96 S.Ct. 266, 46 L.Ed.2d 249 (1975).] The government conceded the reviewability of such criteria with reference to warrantless national security eavesdropping in its brief in *United States v. United States District Court*, [407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972)]. In view of the emphasis placed on the importance of § 2516(1) in *Giordano*, commentators have recommended that courts examine the quality of the authorization official's review of electronic surveillance applications. [citing Pulaski, "Authorizing Wiretap Applications Under Title III: Another Dissent to Giordano and Chavez," 123 *U. Pa. L.Rev.* 750, 814 n. 272 (1975)].
>
> James Carr, *The Law of Electronic Surveillance* § 4.3(a)(1), at 4–19 (1998).

However, in view of the facts that: the literal requirements of § 2516(1) were in the instant case satisfied because the Assistant Attorney General authorized the application for the 1984–85 electronic surveillance; the Court of Appeals for the First Circuit had stated, in a different factual context, that in such circumstances further judicial review is not appropriate, *O'Malley*, 764 F.2d at 41; and the motion to suppress the 1984–85 electronic surveillance is meritorious for other reasons, the court does not intend to grant the motion to suppress based on the alleged violation of § 2516(1). Indeed, perhaps the best reason for not permitting further judicial review if a proper official has authorized an application is the fact that the court is ultimately responsible for deciding whether a requested warrant is justified. *See, e.g., United States Dep't. of Probation and Parole*, 536 F.2d at 183–84 ("We find nothing in the statutes or the cases to indicate that the Attorney General must make a totally independent 'probable cause' determination or that he cannot rely on his subordinate to summarize applications for him or make recommendations to him concerning their merits. The probable cause determination is made by the judge who authorizes the wiretap."); *United States v. Acon*, 403 F.Supp. 1189, 1194 (W.D.Pa. 1975) ("A specifically named officer could determine the policy [of whether to file an application]; the administration of that policy in accordance with the statute in the individual case ... [is] a judicial function."). If it can be demonstrated that the senior official of the Department of Justice was materially misled in authorizing an application, suppression is likely to be justified because the application itself did not satisfy the requirements of Title III. Thus, it would arguably be unnecessarily redundant to provide a judicial remedy when the purposes of § 2516(1) have been subverted because the Department of Justice official authorizing an application has been misinformed.

C. *The Standards to be Applied in Deciding Whether to Suppress for a Failure to Satisfy the Requirements of 18 U.S.C. § 2518(1)(c) Concerning the Necessity for Electronic Surveillance*

As indicated earlier, the parties dispute the standard to be applied in deciding whether suppression is required because the government failed to make the full and complete statement concerning the necessity for electronic surveillance required by § 2518(1)(c). Although not outcome determinative with regard to the motion to suppress the 1984–85 electronic surveillance conducted jointly by the DEA and FBI, the court believes that analysis of this issue may contribute to the clarification of an important and confused area of the law.[76]

In *Ferrara*, this court noted that there was "some uncertainty concerning the standards to be utilized" in deciding the motion to suppress the electronic surveillance evidence intercepted at 34 Guild Street and characterized this as "the most vexing of the many challenging issues presented by defendants' motion to suppress." 771 F.Supp. at 1298. This court concluded that "analysis indicates that for the provisions of Title III which address requirements of the Fourth Amendment, the evolving constitutional law concerning suppression is applicable." *Id.* That law was deemed to include the standards established by *Franks*. *Id.*

Title III as originally enacted in 1968 contained provisions intended to meet the requirements of the Fourth Amendment as then recently interpreted in *Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967) and *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). *See Ferrara*, 771 F.Supp. at 1287–88. It also contained many additional provisions to regulate the interception of communications that were not constitutionally compelled. *Id.*

Since its enactment in 1968, 18 U.S.C. § 2515 has provided that intercepted wire communications are not admissible at "any trial, hearing, or other proceeding ... if the disclosure of that information would be in violation of [Title III]." Section 2518(10)(a)(i) has since 1968 provided for suppression of any wire communication that was "unlawfully intercepted."

When enacted in 1968, §§ 2515 and 2518(10)(a)(i) were coextensive with search and seizure law generally. *Ferrara*, 771 F.Supp. at 1299. "At that time, there was no good faith or other exception to the judicially crafted exclusionary rule applicable to violations of the Fourth Amendment." *Id.* As described in detail in *Ferrara*, 771 F.Supp. at 1299–1304, in the 1970's the Supreme Court issued a pair of decisions involving motions to suppress electronic surveillance which suggested, without holding, that the evolving law concerning the exclusionary rule in Fourth Amendment cases was applicable to provisions of Title III which codified constitutional requirements and the static, statutory standard for suppression contained in Title III was applicable to violations of provisions which were solely statutory in origin. *See Giordano*, 416 U.S. at 524, 527, 548, 558, 94 S.Ct. 1820; *United States v. Donovan*, 429 U.S. 413, 427 n. 15, 432–33, 97 S.Ct. 658, 50 L.Ed.2d 652 (1977).

In 1978, the Supreme Court decided *Franks* and, in the process, altered the previously existing exclusionary rule for Fourth Amendment cases not involving Title III. In *Franks* the Supreme Court held that when constitutionally required probable cause is in question in a case not involving Title III, a defendant must make two showings to obtain suppression based

76. In addition, if on any appeal it should be decided that, contrary to this court's conclusion, § III.4, *infra*, the interceptions at 34 Guild Street did involve "oral communications" as defined by 18 U.S.C. § 2510(2) and, therefore, DeLuca is, within the meaning of § 2510(11), an "aggrieved person" who has standing to maintain a motion to suppress, the standard to be applied might make a difference to the ruling on that motion.

upon possible government misconduct: first, that the information at issue was known by the government to be false or was presented with reckless disregard for its truth; and second, that the information was material to the decision to issue the warrant. 438 U.S. at 156, 98 S.Ct. 2674.

The *Franks* standard is easier for the government to meet than the standard applied by the Supreme Court in deciding the motion to suppress electronic surveillance evidence in *Giordano*. In *Giordano*, the Supreme Court held that:

> Congress intended to require suppression where there is failure to satisfy any of those statutory requirements [of Title III] that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.

416 U.S. at 527, 94 S.Ct. 1820. Such provisions were characterized as "central" to the Title III statutory scheme. *Id.* at 528, 94 S.Ct. 1820. If a central provision of Title III is ignored or otherwise violated, suppression must be ordered unless the government proves that the purpose which the particular procedure was designed to accomplish has been satisfied in spite of the error. *Id.* at 524–28, 94 S.Ct. 1820; *United States v. Chavez*, 416 U.S. 562, 573–74, 94 S.Ct. 1849, 40 L.Ed.2d 380 (1974); *Cunningham*, 113 F.3d at 293–94.

Thus, in *Giordano*, the Supreme Court in effect found legislative intent to require suppression without regard to the reason for the violation if certain statutory provisions of Title III not rooted in the requirements of the Fourth Amendment are not satisfied. In contrast, under *Franks*, even a material error would not justify suppression unless it is proven that the government filed the false or misleading application for a warrant intentionally or with reckless disregard for its truth.

After *Franks* was decided, the Court of Appeals for the First Circuit on several occasions, without analysis or explanation, employed the *Franks* standard to decide motions to suppress electronic surveillance evidence alleging failures to meet either the probable cause or necessity requirements of Title III or its Massachusetts counterpart. *See United States v. Southard*, 700 F.2d 1 (1st Cir.1983) (probable cause); *United States v. Mastroianni*, 749 F.2d 900, 908–09 (1st Cir.1984) (necessity); *United States v. Cole*, 807 F.2d 262, 267 (1st Cir.1986) (necessity). Other courts also utilized the *Franks* test to decide attacks on warrants for electronic surveillance. *See Ferrara*, 771 F.Supp. at 1302 n. 11 (citing cases).

This court wrote in *Ferrara*, 771 F.Supp. at 1304:

> In 1986, Title III was amended in a manner which again recognizes that there is a distinction between violations of constitutional and non-constitutional provisions of that statute, and between the exclusionary rules applicable to each. To respond to the development of new technology, Congress in 1986 amended Title III to cover electronic as well as wire and oral communications. In doing so, § 2518(10)(c) was added to the statute. It provides:
>
> > The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications. (emphasis added).
>
> The "remedies and sanctions" in Title III include subsection (10)(a), which was not explicitly amended to cover electronic as well as oral and wire communications.
>
> The reference in subsection (10)(c) to "non-constitutional" violations indicates it is the contemporary understanding of Congress and the President that the judicially crafted exclusionary rule governs conduct which violates both the Fourth Amendment and the provisions of Title III which implement its require-

ments. The legislative history reinforces this view. The House Report states:

> In the event that there is a violation of law of a constitutional magnitude the court involved in a subsequent criminal trial will apply the existing constitutional law with respect to the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643, 652 [81 S.Ct. 1684, 1690, 6 L.Ed.2d 1081] (1961); *Massachusetts v. Sheppard*, [468 U.S. 981], 104 S.Ct. 3424 [82 L.Ed.2d 737] (1984); *United States v. Leon*, [468 U.S. 897], 104 S.Ct. 3405, [82 L.Ed.2d 677] (1984).

H.R. No. 99–647, 99th Cong., 2d Sess., 48 (1986), 1986 U.S.C.C.A.N. 3555; 1986 Leg.Hist. 3555, at 3577.

In *Ferrara*, this court viewed the foregoing, 1986 amendment as implicitly clarifying that the judicially crafted exclusionary rule was always intended to apply to violations of the provisions of Title III which codify requirements of the Fourth Amendment.

Further reflection in this case causes this court to believe that its interpretation in *Ferrara* of § 2518(10)(c) and the related legislative history was not correct. The 1986 amendments to Title III concerning electronic communications authorized civil and criminal penalties, but not suppression, as a remedy for conduct that violated Title III, but did not also violate the Fourth Amendment. *Compare* § 2511(4) (providing criminal penalties for illegal interception of wire, oral, or electronic communications), § 2520 (providing civil penalties for illegal interception of wire, oral, or electronic communications) *and* § 2518(10)(a) (providing for suppression for illegal interception of oral and wire communications, but not of electronic communications). The statement in the legislative history that the judicially crafted constitutional exclusionary rule would apply to violations of Title III involving electronic communications that also violated the Constitution appears to be a recognition that Congress and the President do not have the power to eliminate by statute the authority of the courts to provide a remedy for a violation of the Constitution, or at least that the courts should be allowed to protect the integrity of judicial proceedings by excluding evidence obtained as a result of a violation of the Constitution.

Nevertheless, in his treatise, Judge James Carr has written:

> As a result of the amendment of § 2518(10) in 1986, whereby subsection (c) was added to that section, Congress has incorporated the good faith exception for violations of a constitutional magnitude.

Carr, *supra*, § 6.3A, at 6–84.4.[77]

In addition, in *United States v. Bianco*, the district court addressed a motion to suppress the electronic surveillance conducted at 34 Guild Street and adopted this court's findings of fact and conclusions of law in *Ferrara* in their entirety. *See United States v. Bianco*, 998 F.2d 1112, 1119–

77. Although the defendants do not agree that Congress and the President intended that the judicially crafted exclusionary rule ever be applied in any Title III case, they argue that Judge Carr's commentary indicates that the statutory exclusionary rule was applicable prior to the 1986 amendments and, therefore, should be employed to resolve the motion to suppress the 1984–85 electronic surveillance. Defs.' Mem. in Supp. of Mot. to Suppress at 60, 62. The government contends that even if the judicially fashioned exclusionary rule were not incorporated in Title III for certain cases prior to 1986, the 1986 amendment should be applied retroactively and utilized to decide the motion to suppress the 1984–85 electronic surveillance. Government's Submission Pursuant to Court's March 28[sic], 1999 Order and Opposition to Defendant Flemmi's Motion to Suppress the Fruits of Electronic Surveillance at Vanessa's Restaurant (April 6, 1999) at 35–37. Because the motion to suppress is meritorious under both the *Franks* and *Giordano* standards, it is not necessary to decide the question of retroactivity if the constitutionally crafted exclusionary rule was in 1986, as Judge Carr indicates, for the first time made applicable to violations of Title III which also violate the constitution.

20 (2d Cir.1993). In affirming the denial of the motion to suppress, the Court of Appeals for the Second Circuit rejected the defendants' contention that "the court should look directly to the exclusionary rule of the statute, rather than to focus on fourth-amendment considerations or a *Franks* analysis." *Id.* at 1125. The Court of Appeals for the Second Circuit explained that several courts had "applied a *Franks* analysis to alleged falsehoods or omissions in wiretap affidavits and applications under Title III." *Id.* at 1126 (citing *United States v. Ferguson*, 758 F.2d 843, 848 (2d Cir.1985); *Mastroianni*, 749 F.2d at 908–09; *United States v. Leisure*, 844 F.2d 1347, 1357 (8th Cir.1988); *United States v. Ippolito*, 774 F.2d 1482, 1485 (9th Cir.1985)). The Second Circuit added that:

> Use of the *Franks* standard is consistent with the purposes of § 2515, which are "not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.'" *Gelbard v. United States*, 408 U.S. 41, 51, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972) (citation omitted).

Bianco, 998 F.2d at 1126.

This court's 1991 *Ferrara* decision was not appealed because the defendants pled guilty. *See Carrozza*, 807 F.Supp. at 156. In addition, the Court of Appeals for the First Circuit has not applied *Franks* to a request for a warrant to conduct electronic surveillance since its 1989 dicta in *United States v. Ashley*, 876 F.2d 1069, 1073 (1st Cir.1989), indicating that *Franks* is applicable. Many other courts, however, have since 1989 applied *Franks* to such issues, once again without analysis. *See, e.g., United States v. Miller*, 116 F.3d 641, 664 (2d Cir.1997), *cert. denied*, 524 U.S. 905, 118 S.Ct. 2063, 141 L.Ed.2d 140 (1998) (probable cause); *United States v. Muldoon*, 931 F.2d 282, 286 (4th Cir.1991) (probable cause); *United States v. Guerra–Marez*, 928 F.2d 665, 670–71 (5th Cir. 1991) (necessity); *United States v. Jackson*, 65 F.3d 631, 635–36 (7th Cir.), *vacated on other grounds sub nom., Lamb v. United States*, 516 U.S. 1156, 116 S.Ct. 1038, 134 L.Ed.2d 186 (1996) (probable cause); *Falls*, 34 F.3d at 681 (probable cause); *Aviles*, 170 F.3d at 868–69 (necessity); *United States v. Green*, 175 F.3d 822, 827 (10th Cir.1999), *petition for cert. filed* (U.S. June 7, 1999) (No. 98–9775) (necessity).

Nevertheless, defendants present several cogent criticisms of the decisions, including *Ferrara*, which apply *Franks* to Title III issues. In essence, they argue the following. Section 2518(10)(a) provides for suppression of oral or wire communications that have been "unlawfully intercepted." An interception that results from a violation of Title III is "unlawful." The statute itself does not provide that the state of mind of the individuals acting for the government in violating any of the provisions of Title III is germane to the issue of suppression. Thus, the application of at least the first prong of the *Franks* test to motions to suppress electronic surveillance is a rewriting of Title III which constitutes an abuse of judicial power. If Congress and the President intend that the judicially crafted exclusionary rule for Fourth Amendment violations be applied when any or all of the provisions of Title III are at issue, they can and should express this intention plainly. This is particularly true if the standards of *Franks* rather than *Giordano* are to be applied when Fourth Amendment rights are implicated because it is anomalous to provide more protection for purely statutory rights than for rights that are both constitutional and statutory.

There is support for the contention that the judicially crafted exclusionary rule for Fourth Amendment violations does not apply in any cases involving Title III. In 1995, the Deputy Attorney General testified on behalf of an amendment to Title III that would provide a "good faith exception

to [the] Title III exclusionary rule," stating:

> Current law [Title III] contains a statutory exclusionary rule which dates back to 1968. Thus, constitutional law in the area of wiretaps has been frozen at a point in time thirty years ago. We agree that the wiretap statute ought to be strictly construed and a high standard of review maintained. However, there is no public purpose of maintaining standards that are inapplicable elsewhere in the law.
>
> The current statute should be amended to require suppression of evidence only where the law enforcement agent acted in bad faith in obtaining the evidence.[78]

Clinton Administration Proposals on Counterterrorism Intelligence Gathering: Hearings on S.761 Before the Sen. Comm. on the Judiciary, 104th Cong. 146 (1995) (statement of Jamie S. Gorelick, Deputy Attorney General).

Defendants contend that the Court of Appeals for the First Circuit expressed a similar view in *United States v. Vest*, 813 F.2d 477 (1st Cir.1987) ("*Vest I*"). In *Vest I*, the Court of Appeals for the First Circuit addressed the question whether a tape-recording made by a private individual could be introduced by the government in a criminal prosecution. In affirming the exclusion of the tape-recording from the government's case-in-chief in a perjury case, the court stated:

> The government argues that we should read into section 2515 the exception to the fourth amendment exclusionary rule for evidence falling into the government's hands after a private search and seizure .... (citations omitted). *But the fourth amendment exclusionary rule is a judicially-fashioned rule serving different purposes than the congressionally-created rule of section 2515—a rule that we are here limited to interpreting rather than modifying.*
>
> * * * * * *
>
> Because we and other courts have recognized an exception to the fourth amendment exclusionary rule permitting the use of unlawfully-seized evidence in perjury prosecutions, (citation omitted), the government argues that the same exception should be incorporated in section 2515. We disagree, for the following reasons.
>
> First, we note that Congress, acting in 1968, specified its intent not to "press the scope of the suppression rule [sic] beyond present search and seizure law" ... the government has cited no case decided before or during 1968 that recognized an exception to the fourth amendment exclusionary rule for perjury prosecutions; ... *[W]e believe that if Congress had intended to commit to the courts general authority to create exceptions to section 2515 in the same manner as the courts might develop future exceptions to the fourth amendment exclusionary rule, Congress could certainly have said so more clearly. We therefore agree with the district court's conclusion that Congress did not intend to confer such discretion on the courts.*
>
> Second, a full reading of the quoted passage in the Senate Report demonstrates that Congress carefully considered which aspects of the fourth amendment exclusionary rule would and would not [apply] .... In view of Congress' careful consideration of these matters, *we are reluctant to conclude that Congress intended ... [to provide] a blank check to the courts to incorporate into section 2515 every change in the scope of*

78. The Deputy Attorney General also noted, however, that "several judicial circuits have already extended the good faith exception to certain situations under Title III. The proposed amendment would make such a good faith exemption applicable to all Title III cases." *Id.*

the fourth amendment exclusionary rule.

Id. at 481–82 (emphasis added).

The decision in *Vest I,* however, is not necessarily inconsistent with the Court of Appeals for the First Circuit's use of the Frank's standard in *Southard, Mastroianni,* and *Cole. Vest I* involved a tape-recording made by a private party, rather than a government search and seizure. Thus, neither the Fourth Amendment nor any provision of Title III rooted in it was involved in the case. *See United States v. Curzi,* 867 F.2d 36, 45 n. 8 (1st Cir.1989) ("we were not dealing [in *Vest I*] with the Constitution"). Nevertheless, the expansive language used by the First Circuit in *Vest I* lends support to defendants' argument that the judicially crafted exclusionary rule does not apply in Title III cases.

The most recent relevant decision of the Court of Appeals for the First Circuit employs a hybrid approach to deciding a motion to suppress electronic surveillance because of a failure, due to clerical errors by the government, of the application and resulting warrant to describe with the particularity required by the Fourth Amendment and Title III the place to be searched and the conversation to be seized. *Cunningham,* 113 F.3d at 289. In *Cunningham,* the application and warrant mistakenly referred to the interception of both wire and oral communications, although the applicant, the executing officer, and the court all knew that only a bug to intercept oral communications at a particular location was being sought. *Id.* at 293–94. While the defects related to the particularity clauses of the Fourth Amendment and associated provisions of Title III, the court applied the standard established by *Giordano,* rather than *Franks,* but also relied on Fourth Amendment jurisprudence developed after the enactment of Title III in 1968, in denying the motion to suppress. *Id.* In doing so, the court stated:

> Title III is designed to protect privacy interests similar to those reflected in the Fourth Amendment. Whether or not *Leon* 's good faith exception should be interpolated into the statute—an issue we do not decide—Fourth Amendment precedent is highly relevant in deciding whether ... a defect in wording is of a kind that threatens the central interests sought to be protected.

Id. at 294. However, in dicta, the Court of Appeals for the First Circuit indicated that *Franks* would be applied if the truthfulness of the affidavit were at issue. *Id.* at 295 ("it would be the defendant's burden [of proof] if the warrant were facially valid but sought to be impugned by proof of perjury.").

Accordingly, there is a meaningful question regarding the standard that should be employed to decide the motion to suppress the 1984–85 electronic surveillance. If this court were writing on a clean slate, it would now hold that the statutory standard of § 2518(10)(a)(i), as interpreted by *Giordano* and its progeny including *Cunningham,* is applicable to all violations of Title III unless the provision of the statute at issue codifies a requirement of the Fourth Amendment *and* the evolving, judicially crafted exclusionary rule provides subjects of electronic surveillance more protection than the statute. In other words, if conduct violates both Title III and the Constitution, and the judicially crafted exclusionary rule would provide the defendant a remedy for the constitutional violation, Title III should not be interpreted to deprive him of that remedy. As discussed in § III.4, *infra,* although the judicially crafted exclusionary rule could have evolved in a way that provides subjects of electronic surveillance more protection than Title III, it has not done so to date. Thus, it appears most appropriate that the higher *Giordano* standard be applied in the instant case. However, as indicated earlier, and as set forth below, the motion to suppress the 1984–85 electronic surveillance is meritorious under both the *Franks* and *Giordano* tests.

D. *The Necessity Provision of Title III, § 2518(1)(c), is Constitutional in Origin*

The defendants correctly contend that in seeking the warrant to wiretap Kaufman's telephone the government failed to make the full and complete statement concerning necessity required by 18 U.S.C. § 2518(1)(c). They assert that § 2518(1)(c) is a solely statutory provision. Thus, defendants claim that *Giordano* rather than *Franks* provides the standard applicable to deciding their motion to suppress the 1984–85 electronic surveillance even if the judicially crafted exclusionary rule applies to violations of provisions of Title III that reflect constitutional requirements.

In litigating *Ferrara*, the government in 1990 agreed with defendants' present position, stating that "the necessity requirement of Title III is not of constitutional dimension .... The requirement that the applicant demonstrate that other investigative techniques have been exhausted or are unavailable is imposed by the Title III statute and not the Constitution. *See Berger, supra.*" Government's Response to Defendant Patriarca and Ferrara's Motions to Suppress All Evidence Derived from Oral Intercept Order in M.B.D. 89–1015 and to Dismiss the Indictment (Dec. 31, 1990) at 17 n.8. The government now asserts that § 2518(1)(c) is "rooted in the Fourth Amendment," but also states that "the constitutional derivation of the necessity clause is not beyond dispute." Government's Submission Pursuant to Court's March 28[sic], 1999 Order and Opposition to Defendant Flemmi's Motion to Suppress the Fruits of Electronic Surveillance at Vanessa's Restaurant (Apr. 6, 1999) at 37. *See also* Apr. 13, 1999 Tr. at 135 (government characterizes issue of whether a violation of § 2518(1)(c) is also a violation of the Fourth Amendment as "not clear-cut").

In *Ferrara*, this court found that § 2518(1)(c) was constitutional in character. 771 F.Supp. at 1288. As set forth below, the court finds that the jurisprudence since *Ferrara* supports this conclusion.

The Fourth Amendment states that:

> [1] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and [2] no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons and things to be seized.

U.S. Const. amend. IV.

In *Ferrara*, this court wrote that:

> To obtain a warrant to intercept communications the government must make a "full and complete statement of the facts and circumstances relied upon" to satisfy several constitutional criteria. § 2518(1)(b), (c), (d). These include a "full and complete statement as to whether or not other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." § 2518(1)(c). This showing of necessity reflects the Fourth Amendment requirement that searches and seizures be "reasonable" and addresses the related statements in *Berger*, 388 U.S. at 57, 87 S.Ct. at 1882, and *Katz*, 389 U.S. at 355–56, 88 S.Ct. at 513–14, that courts should authorize "no greater invasion of privacy ... than [is] necessary under the circumstances." *See also* Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J.Crim.L. & Criminology 1, 126 (1983).

771 F.Supp. at 1288. Thus, based on the previously described analysis, and following the predominant practice of the Court of Appeals for the First Circuit, the court applied the judicially crafted *Franks* test in deciding whether to suppress the evidence intercepted at 34 Guild Street because of the violation of § 2518(1)(c) that was proven. *Id.* at 1304–11.

Once again, defendants present thoughtful criticism of this court's reasoning in *Ferrara*. *See* Memorandum of Law in Support of the Defendants' Motion to Suppress Electronic Surveillance Conducted in this Case (Jan. 29, 1999) ("Defs.' Mem. in Supp. of Mot. to Suppress") at 81–94. First, defendants argue that the necessity provision of Title III is not rooted in the Fourth Amendment because, as they correctly note, there is nothing in the Fourth Amendment, or in traditional search and seizure law, which requires that law enforcement personnel exhaust or otherwise attempt other investigative procedures before resorting to an application for a conventional search warrant. *See* W. LaFave & J. Israel, *Criminal Procedure* § 1.2(h) (1984).

In addition, the defendants accurately observe that the Senate Report concerning Title III identifies expressly several provisions as intended to conform to the requirements of the constitution as interpreted in *Berger* and *Katz*, including § 2518(1)(b) which relates to particularity. *See* S.Rep. No. 90–1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2190. However, there is no reference to *Berger*, *Katz*, or the Fourth Amendment in the analysis of the necessity provision. *See id.*

Defendants recognize the argument, discussed below, that the necessity provision of Title III is a component of a constitutionally compelled substitute for pre-search notice. They argue, however, that the Supreme Court implicitly rejected this claim in stating that: "In [*U.S. v. Donovan*, 429 U.S. 413, 429 n. 19, 97 S.Ct. 658, 50 L.Ed.2d 652], we held that Title III provided a constitutionally adequate substitute for advance notice by requiring that once the surveillance operation is completed the authorizing judge must cause notice to be served on those subjected to surveillance. *See* 18 U.S.C. § 2518(8)(d)." *Dalia v. United States*, 441 U.S. 238, 248, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979).

Defendants also argue that the mere fact that § 2518(1)(c) is intended to limit the use of electronic surveillance does not mean that it is not solely statutory in origin. The requirement that a high ranking official of the Department of Justice authorize an application for a warrant for electronic surveillance is intended to serve the same purpose and has been recognized by the Supreme Court to be statutory rather than constitutionally based. *Giordano*, 416 U.S. at 527–28, 94 S.Ct. 1820.

Defendants point out that the Court of Appeals for the First Circuit has referred to § 2518(1)(c) as a "statutory preference for less intrusive techniques" than wiretapping. *Ashley*, 876 F.2d at 1072. In addition, in at least one other Circuit the *Giordano* test rather than the *Franks* test has been employed in granting a motion to suppress for a violation of § 2518(1)(c). *See United States v. Mondragon*, 52 F.3d 291, 294 (10th Cir.1995).

Defendants' arguments that § 2518(1)(c) is solely statutory in origin are thought provoking. They are not, however, persuasive.

The showing of necessity mandated by § 2518(1)(c) is constitutionally compelled because requiring the government to persuade a court that conventional methods of investigation are not likely to succeed or are too dangerous requires a showing of a form of the "exigent circumstances" that must be made to render a search "reasonable" in the absence of the pre-search notice to the target that is ordinarily required by the Fourth Amendment. This is a specific application of the principle that in performing their constitutional function of protecting people from unreasonable searches and seizures judges should authorize "no greater invasion of privacy ... than [is] necessary under the circumstances." *Berger*, 388 U.S. at 57, 87 S.Ct. 1873; *Katz*, 389 U.S. at 355–56, 88 S.Ct. 507.

Electronic surveillance must be conducted secretly to be effective. *Berger*, 388 U.S. at 60, 87 S.Ct. 1873. It is obvious that if a target is given prior notice that he

will be subject to electronic surveillance on a particular telephone or at a particular place, incriminating conversation is unlikely to be intercepted. *Katz*, 389 U.S. at 356 n. 16, 88 S.Ct. 507.

However, when the Fourth Amendment was enacted prior notice had long been regarded as an essential element of a reasonable search unless certain, exceptional circumstances were demonstrated. *Wilson v. Arkansas*, 514 U.S. 927, 931–34, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995); *Ker v. California*, 374 U.S. 23, 38–40, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). *See also* Charles L. Black, Jr., "Foreword: 'State Action,' Equal Protection, and California's Proposition," 81 *Harv. L.Rev.* 69, 190 (1967) ("It has been held at common law for over 300 years that in executing a search warrant the officer must give notice of his aim and authority before entering."). Thus, there is a tension between what the Fourth Amendment usually demands and an inherent requirement of electronic surveillance as an investigative technique.

These conflicting considerations are not irreconcilable, however. "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable." *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). *See also Wilson*, 514 U.S. at 931, 115 S.Ct. 1914; *Ferrara*, 771 F.Supp. at 1290–91. In *Wilson*, the Supreme Court made clear that whether prior notice was given to the subject of a search "is an element of the reasonableness inquiry under the Fourth Amendment." 514 U.S. at 934, 115 S.Ct. 1914. It is not, however, an inflexible requirement. *Id.* Rather, "countervailing ... law enforcement interests" may render a search reasonable even if prior notice had not been given. *Id.* at 936, 115 S.Ct. 1914. Thus, a search may be conducted in compliance with the Fourth Amendment without giving prior notice if doing so "would be dangerous or futile, or ... would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997).

The fact that the Fourth Amendment usually requires pre-search notice was recognized by the Supreme Court in *Berger*. In *Berger*, the Court held that a New York electronic surveillance statute had a series of defects which caused it to violate the Fourth and Fourteenth Amendments. 388 U.S. at 44, 87 S.Ct. 1873. In doing so, the Court stated that:

> the statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits uncontested entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized.

Id. at 60, 87 S.Ct. 1873.[79] *See also United States v. Mesa–Rincon*, 911 F.2d 1433, 1442 (10th Cir.1990).

Defendants understand that § 2518(1)(c) was included in Title III to address the pre-search notice issue presented by *Berger*. *See* Defs.' Mem. in Supp. of Mot. to Suppress at 87–89. This understanding is correct.

79. Contrary to defendants' contention, the discussion in footnote 16 of *Katz*, 389 U.S. at 355 n. 16, 88 S.Ct. 507, is not inconsistent with this court's interpretation of *Berger* as requiring a showing of necessity as a form of exigent circumstances as a component of a constitutionally sufficient substitute for pre-search notice. *Katz* cites *Ker*, 374 U.S. at 37–41, 83 S.Ct. 1623, an early case in which the Court found that exigent circumstances may constitutionally justify a search without notice to the target. Footnote 16 of *Katz*, however, does not address the issue now presented as directly as *Berger* and the other authorities discussed in this Memorandum.

The legislative history of Title III includes a statement by Professor Robert Blakey, who took a leading role in drafting the statute, that:

> [S]uch a showing of 'special facts' or 'exigent circumstances' [as enunciated in *Berger*] would unquestionably be met by a legislative requirement that judicial authorization for the use of electronic surveillance techniques be conditioned on a showing that 'normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried.' This is the English standard now for the use of wiretapping by the Home Secretary's warrant. (Devlin, The Criminal Prosecution in England 65–69 (1958)).

Controlling Crime Through More Effective Law Enforcement, Hearings Before The Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary of the United States Senate 90th Cong., 1st Sess., at 935, 977 (1967).

In addition, the Senate Report cites *Read v. Case*, 4 Conn. 166 (1822) as a source for the requirement that the government make a full and complete statement concerning whether normal investigative techniques have been tried and failed, are likely to be futile if employed, or would be too dangerous. *See* S.Rep. No. 90–1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2190. *Read* is a case dealing with the question of whether notice is required before an officer enters a home and whether exceptional circumstances may vitiate the need for pre-search notice. *Read*, 4 Conn. at 170.

Accordingly, this court agrees that:

> The legislative history of these provisions make it ... clear that 18 U.S.C. § 2518(1)(c) and (3)(c) were enacted to satisfy the "special facts" or "exigent circumstances" requirement of *Berger*. U.S.Code Cong. and Adm.News 2112, 2113, 2161–63, 2190–91 (1968); *see also* Blakey and Hancock, "A Proposed Electronic Surveillance Control Act", 43 *N.D.Law* 657, 673–74 f.n. 35 (1968). Moreover, subsequent lower court decisions have linked the requirements of *Berger* with those provisions. *United States v. Forlano*, 358 F.Supp. 56, 58 (S.D.N.Y.1973) and *United States v. Leta*, 332 F.Supp. 1357, 1361 f.n. 5 (M.D.Pa.1971); *see also United States v. Ford*, 553 F.2d 146, 151 (D.C.Cir.1977). Thus, the "necessity" requirement of § 2518(1)(c) and (3)(c) has both a constitutional and statutory basis.

United States v. Costello, 610 F.Supp. 1450, 1465 (N.D.Ill.1985), *aff'd sub nom., United States v. Olson*, 830 F.2d 195 (7th Cir.1987).

Contrary to defendants' contention, the conclusion that § 2518(1)(c) is rooted in the requirements of the Fourth Amendment is not inconsistent with the Supreme Court's decisions in *Donovan* and *Dalia*. In *Donovan*, the Court stated that the provisions of 18 U.S.C. § 2518(8)(d), regarding mandatory and discretionary post-search notice to individuals who have been intercepted, "satisfy *constitutional* requirements." 429 U.S. at 429 n. 19, 97 S.Ct. 658 (emphasis added). Similarly, in *Dalia* the Court wrote that in *Donovan*, "we held that Title III provided a *constitutionally* adequate substitute for advance notice by requiring that once the surveillance operation is completed the authorizing judge must cause notice to be served on those subjected to surveillance. *See* 18 U.S.C. § 2518(8)(d)." *Dalia*, 441 U.S. at 248, 99 S.Ct. 1682 (emphasis added). Thus, *Donovan* and *Dalia* each treat the usual requirement of pre-search notice as a constitutional consideration.

As is implicit in *Donovan* and explicit in *Dalia*, the fact that § 2518(8)(d) addresses the constitutional question of whether a search without prior notice is reasonable does not mean that § 2518(1)(c) does not also address this concern. In *Donovan*, 429 U.S. 413, 97 S.Ct. 658, 50 L.Ed.2d 652, it evidently was not disputed that the government had made the required full and complete statement concerning necessity

in applying for the warrant at issue. Thus, its holding that post-search notice was a constitutionally adequate substitute for pre-search notice was implicitly premised on the understanding that the judge, in issuing the warrant, had made a properly informed decision that the use of less intrusive, conventional investigative techniques would be inadequate. This point was made more clearly in *Dalia*, in which the Court held that the "Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment," 441 U.S. at 248, 99 S.Ct. 1682, and went on to state, in part, in a supporting footnote:

> [I]n issuing the Title III order, the court found that "[n]ormal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used." And in his opinion denying petitioner's subsequent suppression motion, the same judge stated: "The affidavits which supported the application for the warrant in question indicated that resort to electronic surveillance, to overhear meetings at Dalia's office and conversations on Dalia's telephones, was required to identify the sources of Dalia's stolen goods, those working with him to transport and store stolen property, and the scope of the conspiracy. Oral evidence of this criminal enterprise was only available inside Dalia's business premises." The District Court, therefore, concluded that the circumstances required the approach used by the officers ....

Id. at 248 n. 8, 99 S.Ct. 1682 (internal citations omitted). Thus, the holding in *Dalia* that post-entry notice was constitutionally adequate in an electronic surveillance case was expressly premised on the understanding that the government had made the full and complete statement concerning necessity mandated by § 2518(1)(c).

In his treatise, Judge Carr agrees that § 2518(1)(c) has a constitutional origin. Carr, *supra*, § 4.4(d), at 4–65–67. He too finds that, "[o]ne constitutional basis for § 2518(1)(c) is the Supreme Court's determination in *Berger v. New York* that the New York eavesdropping statute was defective on its face in part because it contained no requirement for notice, while failing to 'overcome this defect by requiring some showing of special facts.' " *Id.* at 4–65 (quoting *Berger*, 388 U.S. at 60, 87 S.Ct. 1873). Judge Carr also states that "[a] second constitutional origin for the necessity requirement is the doctrine that intrusions under the Fourth Amendment are limited to the justification upon which they are based." *Id.* at 4–66. Other commentators generally agree that § 2518(1)(c) is rooted in the requirements of the Fourth Amendment. Michael Goldsmith, "Criminal Law: The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance," 74 *J.Crim. L. & Criminology* 1, 126 (1983); Daniel F. Cook, "Electronic Surveillance, Title III, and the Requirement of Necessity," 2 *Hastings Const. L.Q.*, 571, 577–86 (1975); *Cf.* Clifford S. Fishman & Anne T. McKenna, 1 *Wiretapping and Eavesdropping* 8–96 n. 35 (2d ed. 1995) (" 'The "other investigative procedures" requirement may be constitutional, as well as statutory' " (quoting Cook, "Electronic Surveillance," 2 *Hastings Const. L.Q.* at 577–86)).

Therefore, in essence, the Fourth Amendment usually requires pre-search notice. If the government wishes to employ electronic surveillance, it must persuade a neutral judge that it is reasonable to dispense with pre-search notice, and rely instead on post-search notice, because conventional investigatory techniques that would provide a subject pre-search notice are inadequate or too dangerous. The Constitution and Title III require that the government provide to the court a full and complete statement concerning the necessity for electronic surveillance in order to permit the court to perform its function properly. This requirement was not satisfied in this case.

E. *The Motion to Suppress the 1984–85 Surveillance is Meritorious*

[33] As indicated earlier, the motion to suppress the 1984–85 electronic surveillance is meritorious under any of the arguably applicable standards. The government's best chance of prevailing would be based on the argument that § 2518(1)(c) concerning necessity and § 2518(1)(b) concerning particularity each codifies a constitutional requirement; the judicially crafted exclusionary rule applies to violations of such provisions; therefore, the two-prong *Franks* test should be applied to decide the motion to suppress the 1984–85 electronic surveillance. This formulation of the issue is most favorable to the government because it requires proof that the government intentionally, or with reckless disregard for the truth, submitted a materially false or misleading application. *Franks*, 438 U.S. at 171–72, 98 S.Ct. 2674. Thus, even evidence intercepted as a result of a materially false and misleading application may be saved if the defendant does not prove the requisite state of mind. *Id.*

Defendants assert that even if a judicially crafted exclusionary rule, rather than § 2515 as interpreted in *Giordano*, should be applied, the *Franks* standard is not appropriate where necessity rather than, as in *Franks*, probable cause is at issue. *See Franks*, 438 U.S. at 155–56, 98 S.Ct. 2674. In order to obtain a conventional search warrant the government must only provide the court with information sufficient to demonstrate that there is probable cause to believe (a) that a crime has been, or is being, committed and (b) that the proposed search will produce evidence of that crime. *Dalia*, 441 U.S. at 255, 99 S.Ct. 1682; *United States v. Feliz*, 182 F.3d 82, 86 (1st Cir.1999); *United States v. Zayas–Diaz*, 95 F.3d 105, 110–11 (1st Cir. 1996). The government is, therefore, not required to provide the court all of the information which it has that would tend to establish or strengthen the required showing of probable cause. Thus, with regard to probable cause, the government has the legitimate discretion to withhold information from an application for a conventional search warrant in an effort to protect the confidentiality of the identity of an informant, among other things. *Rivera v. United States*, 928 F.2d 592, 604–05 (2d Cir.1991).

This principle is codified in Title III. With regard to establishing that there is probable cause for the issuance of a warrant to conduct electronic surveillance, the government must make "a full and complete statement of the facts and circumstances *relied upon by the applicant*, to justify his [or her] belief that an order should be issued." 18 U.S.C. § 2518(1)(b) (1994) (emphasis added). "Thus, the government has some discretion to rely upon and disclose less than all of its evidence tending to establish probable cause, as long as there is no effort to mislead the court into approving a warrant which might otherwise not have been issued." *Ferrara*, 771 F.Supp. at 1306–07.

As described previously, however, § 2518(1)(c), which requires that the government persuade the court that electronic surveillance is necessary, does not codify a generally applicable common law requirement, but rather is part of the statute's scheme to provide a constitutionally sufficient substitute for pre-search notice. In contrast to the statutory requirements concerning probable cause, the government's obligation to make a "full and complete statement" concerning necessity is unqualified. *See* 18 U.S.C. § 2518(1)(c) (1994). The government is not permitted to disclose only the information that it wishes to rely upon. Rather, the government is obligated to inform the court of all of the relevant information that the agencies participating in the investigation possess concerning necessity. *Mastroianni*, 749 F.2d at 908–10; *Aviles*, 170 F.3d at 866.

Defendants argue that the first prong of the *Franks* test, which makes the government's state of mind relevant to the suppression inquiry, may be reasonable with

regard to the issue of probable cause on which the government has some legitimate discretion concerning what it discloses in an application for a warrant. They contend, however, that in enacting § 2518(1)(c) Congress and the President decided that the government must make full disclosure of relevant information in its effort to persuade a judge that electronic surveillance is necessary. Therefore, they assert that it is an impermissible form of "judicial legislation" for the court to permit intercepted evidence to be utilized where this statutory requirement has not been satisfied. In essence, they suggest that even if the judiciary does have the discretion to craft an exclusionary rule for a violation of § 2518(1)(c), it should adopt the *Giordano* test.

There is no reported case that addresses the defendants' argument, which this court finds to be logical and reasonably compelling. However, as noted earlier, cases in many circuits, including the First Circuit, have applied the *Franks* standard in deciding motions to suppress for alleged violations of § 2518(1)(c). *See, e.g., Mastroianni,* 749 F.2d at 908–10 (1st Cir.); *Cole,* 807 F.2d at 267 (1st Cir.); *Miller,* 116 F.3d at 664 (2d Cir.); *United States v. King,* 991 F.Supp. 77, 89–90 (E.D.N.Y.1998); *Guerra–Marez,* 928 F.2d at 669–71 (5th Cir.); *United States v. Gruber,* 994 F.Supp. 1026, 1041, 1048–50 (N.D.Iowa 1998); *Aviles,* 170 F.3d at 868–69 (9th Cir.); *United States v. Homick,* 964 F.2d 899, 904 (9th Cir.1992); *Ippolito,* 774 F.2d at 1485 (9th Cir.); *Green,* 175 F.3d at 828 (10th Cir.). Accordingly, the court deems it prudent and appropriate to analyze the issue concerning the 1984–85 electronic surveillance as if *Franks* applied to violations of § 2518(1)(c). The subsequent *Giordano* analysis, however, would be equally applicable if the court were to accept defendants' argument that *Giordano* should be deemed an appropriate standard even if § 2518(1)(c) is constitutional in origin and subject to a judicially crafted exclusionary rule.

As indicated earlier, *Franks* provides for suppression when the government has [1] "intentionally, or with reckless disregard for the truth," submitted an application that is [2] materially false or misleading. *Franks,* 438 U.S. at 155–56, 171–72, 98 S.Ct. 2674. "Intentionally" means "[t]o do something purposely, and not accidentally." *Black's Law Dictionary* 810 (6th ed.1990).

With regard to "reckless disregard," in *Franks* the Supreme Court stated that:

> "[W]hen the Fourth Amendment demands a factual showing ... the obvious assumption is that there will be a truthful showing." .... *"truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.*

438 U.S. at 164–65, 98 S.Ct. 2674 (quoting *United States v. Halsey,* 257 F.Supp. 1002, 1005 (S.D.N.Y.1966)) (emphasis added). *See also United States v. Clapp,* 46 F.3d 795, 800 (8th Cir.1995) ("Courts, including our own, that have attempted to define reckless disregard for the truth have looked to what the affiant, 'believed or appropriately accepted' as true ....") (citing cases).

[34, 35] In order to demonstrate reckless disregard, a defendant must prove that those acting for the government did not believe a representation to be true or that they in fact entertained "serious doubts" as to the truth of the matter asserted. *Clapp,* 46 F.3d at 799–801; *United States v. A Residence Located at 218 Third St., New Glarus, Wis.,* 805 F.2d 256, 258–59 (7th Cir.1986); *United States v. Williams,* 737 F.2d 594, 602 (7th Cir.1984); *United States v. Castellanos,* 820 F.Supp. 80, 84 (S.D.N.Y.1993); *Dorfman,* 542 F.Supp. at 368–69, *aff'd sub nom., United States v. Williams,* 737 F.2d 594. Reckless disregard can be proven inferentially from circumstances presenting obvious reasons to doubt the veracity of the allegations at issue. *Clapp,* 46 F.3d at 799–801; *A Residence Located at 218 Third St., New Glarus, Wis.,* 805 F.2d at 258–59;

Williams, 737 F.2d at 602; *Castellanos*, 820 F.Supp. at 84; *Dorfman*, 542 F.Supp. at 368–69. Reckless disregard can be inferred from, among other things, the failure to provide the court information that any reasonable person would understand the court would want to know. *United States v. Jacobs*, 986 F.2d 1231, 1234–35 (8th Cir.1993); *United States v. Vigeant*, 176 F.3d 565, 572 (1st Cir.1999)(finding reckless disregard because of numerous, material omissions and false statements).

At times, the failure to discover information in the possession of a participating investigative agency has contributed to a finding of reckless disregard. *See United States v. Chesher*, 678 F.2d 1353, 1361 (9th Cir.1982) ("unexplained failure" of experienced affiant asserting target of proposed search was a Hell's Angel to discover four-year-old report relating to target's expulsion from gang "tends to support a claim of recklessness"); *United States v. Fox*, 790 F.Supp. 1487, 1494 (D.Nev.1992) (where experienced agent had reason to doubt veracity of his representations, "failure to discover . . . information [in a file he could have read] reflected a reckless disregard for the truth."), *aff'd sub nom., United States v. Austin*, 8 F.3d 30 (9th Cir. 1993).

[36] Where, as here, the FBI was participating in a joint investigation with the DEA when the application was submitted on December 24, 1984, the full and complete statement concerning necessity mandated by § 2818(1)(c) required inclusion of the relevant information possessed by those participating in the matter on behalf of the FBI, most particularly Ring. *Mastroianni*, 749 F.2d at 909–10; *Aviles*, 170 F.3d at 867. Indeed, the government recognizes that because the court has found that the Bureau was involved in the joint investigation when the application was submitted, the "'FBI knowledge' is also relevant and important to the validity of the [December 24, 1984] electronic surveillance order. . . ." Gov. Post–Hearing Brief at 331 n.109.

The government's obligation in this matter was described in *Aviles*, a recent decision of the Court of Appeals for the Ninth Circuit, in which Trott, now a federal judge, joined. In *Aviles*, the FBI and DEA were jointly engaged in a narcotics investigation, but not fully cooperating. 170 F.3d at 866. A motion to suppress evidence derived from a wiretap alleged that the government had violated § 2518(1)(c) by failing to include in the affidavit submitted by an FBI agent, Allen, information that a participating DEA agent, Tse, had withheld from him. *Id.* In finding that a violation of the first prong of the *Franks* test had been proven, the Court of Appeals for the Ninth Circuit wrote:

> The reason Allen did not say more about Tse's investigation of Barrenechea was that Tse had been closemouthed about it, even at a meeting on April 15, 1992 with Allen and AUSA Canepa where Tse was informed that a wiretap application was being considered. Tse was closemouthed to protect his own investigation. As Allen testified, such things are not common, but they do occur. They are the bane of government—agencies charged with overlapping tasks sometimes more zealous in protecting their turf than in achieving the common objective.
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> * * * * * *
>
> *Agent Tse knew that Allen, a fellow task force member, was preparing an affidavit in support of an application for court-ordered electronic surveillance. An agent in Agent Tse's position has an obligation to disclose to a fellow task force member all information material to such an application. Tse's failure to discharge this obligation was an error. It is as a representative of the government that an applicant for a wiretap authorization applies to the court. The government cannot so compartmentalize its activities that it hides from the*

court information that might be relevant.

Tse's duty, if he had material facts, was enforceable by AUSA Canepa going to Tse's superiors in the DEA and obtaining reports she must have known he would have made. The sanction for failure to get these reports and for Tse's silence is the risk that the wiretap application be held invalid. *Tse's failure to disclose reports in his possession was intentional on Tse's part, and his intention is attributable to Agent Allen. See United States v. Jacobs*, 986 F.2d 1231, 1234 (8th Cir.1993); *see also United States v. Wood*, 57 F.3d 733, 737 (9th Cir.1995) (for Brady purposes, prosecutor charged with knowledge of material known to FDA). Tse's motive in withholding material information would have been irrelevant.

Id. at 866–67 (emphasis added).

The principle applied in *Aviles* is not novel. Indeed, less than two months before the December 24, 1984 application was filed, the Court of Appeals for the First Circuit emphasized, in a District of Massachusetts case, the requirement that affidavits contain up-to-date information concerning the necessity for electronic surveillance that is in the possession of all agencies participating in a joint investigation. *Mastroianni*, 749 F.2d at 908–10. *Mastroianni*, which was decided on October 30, 1984, involved a joint DEA–Massachusetts State Police investigation. *Id.* at 908. A State Trooper, McGreal, filed an affidavit in support of a state wiretap application which represented that "[a]s of this date" efforts to penetrate the targeted organization had failed. *Id.* Five days earlier, however, a member of the organization, Cellilli, had agreed to cooperate with a DEA agent, O'Brien, who was participating in the joint investigation. *Id.*

Although the Court of Appeals for the First Circuit held that the district court did not abuse its discretion in finding that the affidavit did not contain reckless misrepresentations, it held that, "McGreal should have made a final check with all agencies involved in the investigation before submitting his affidavit." *Id.* at 909–10. The court went on to provide a warning to the government, stating:

> [W]e wish to express our concern about delayed communications between government investigators in a case such as this. It is our view that O'Brien was unwise in failing to notify McGreal earlier of his meeting with Cellilli, no matter how uncertain O'Brien might have been about the extent of Cellilli's cooperation. The state police were bearing the primary responsibility and this meeting would seem to have been a major development. Whether or not the challenged statement in the affidavit was untrue in light of this meeting, the magistrate should have been informed of the new development in the case. It may be that in other circumstances, a five-day delay in transmitting such information would be too long to avoid a finding of recklessness.

Id. at 910. The court also noted that it had "serious reservations about whether a magistrate would have approved the wiretap application when he did if he had been aware of Cellilli's apparent decision to cooperate." *Id.* at 909 n. 6.

The requirement that all participating agencies contribute to the full and complete statement concerning necessity mandated by § 2518(1)(c) is a particular application of the Supreme Court's statement in *Franks* that "police could not insulate one officer's deliberate misstatement merely by relaying it through an officer—affiant personally ignorant of its falsity." 438 U.S. at 164 n. 6, 98 S.Ct. 2674. This is a principle that has been applied in the Title III context in cases decided both before and after *Mastroianni*. *See e.g. Dorfman*, 542 F.Supp. at 366 n. 18; *United States v. Tufaro*, 593 F.Supp. 476, 485–86 (S.D.N.Y. 1983); *Cole*, 807 F.2d at 264–65, 267–68. *See also* Carr, *supra*, § 6.2(d)(1)(A), at 6–61 ("The 'fellow officer rule' may be applied, so that information known to one

investigator, but not communicated to the affiant, may be attributed to the affiant regardless of his actual ignorance .... Given the care with which surveillance applications and affidavits are prepared, it is appropriate to demand that all available information be communicated to the officer preparing the application.").

As described in detail in § II.17, *supra*, despite the then recent ruling in *Mastroianni*, neither the United States Attorney's Office, the DEA, nor the FBI considered its implications for the 1984–85 electronic surveillance or obeyed its holding. Like Agent Tse in *Aviles*, Ring, representing the FBI, knew that the DEA and United States Attorney's Office would have to prepare an application and affidavit seeking a warrant to conduct electronic surveillance in an investigation in which the FBI would participate. On behalf of the FBI, Ring had an obligation to disclose to the affiant and applicant "all information material to such an application." *Aviles*, 170 F.3d at 867. Motivated by a determination not to discuss or disclose the status of Flemmi and Bulger as FBI informants to the DEA, the United States Attorney's Office or the court,[80] and by a desire to minimize the risk that the FBI would be blamed if the investigation was compromised, Ring ignored that obligation and did not even read the Boeri affidavit. If Ring had done so, it would have been obvious to him that the affidavit was fundamentally false and misleading in communicating to the court that the proposed electronic surveillance was necessary to obtain evidence that the FBI wished to use to develop a prosecutable case against Bulger, Flemmi, Kaufman, and others for illegal gambling and other Title 18 offenses. As explained in detail earlier, the FBI had no intention of even considering the evidence that might be intercepted. Rather, the FBI agents assigned to work with the DEA were instructed not to share the information they acquired with anyone else at the FBI.

Similarly, the applicant and affiant, Crossen and Boeri, each recklessly disregarded the legal obligations imposed by § 2518(1)(c) and the truth of their submissions to the court. Notwithstanding the Court of Appeals for the First Circuit's recent admonition in *Mastroianni*, they failed to consult the FBI, which they properly characterized as a participant in the

80. This court recognizes that the government is faced with a dilemma when there is a conflict between its duty to be candid with the court in its applications for warrants and its desire to protect the identity of its informants. In the rare cases in which the government has been caught after mischaracterizing the role of its informants in applications for warrants, this practice has been properly condemned. *Strini*, 658 F.2d at 598; *Falls*, 34 F.3d at 681–82. In *Strini*, the Court of Appeals for the Eighth Circuit stated that:

> We emphasize that we do not condone the masking of the identity of the informant to the court. We cannot sanction any attempt to mislead the court. We point out that there are alternative procedures open to the government to protect the name of an informant and they should be used in the future.

Strini, 658 F.2d at 598.

This direction, however, has not always been followed. *Falls*, 34 F.3d at 682 n. 6. In *Falls*, in an attempt to keep a witness's cooperation from being discerned, the prosecutor whose deceptive conduct was criticized in *Strini* mischaracterized the cooperating witness as an individual who was continuing to commit crimes. *Falls*, 34 F.3d at 681–82 and n. 6. In response, the court wrote:

> [W]e expressly disapprove of the government's failure to inform the issuing judge that C/W–1 was Thelma Wyant. We are not unsympathetic to the need to ensure the safety of cooperating witnesses in this type of situation. However, safety concerns are not compromised by sworn testimony before the issuing judge fully disclosing the fact of and the reason for masking the witness's identity in the affidavit.

Id. at 682 (citations omitted).

This court agrees with the Court of Appeals for the Eighth Circuit that neither the Fourth Amendment nor Title III permit the government to make false or misleading representations to the court in order to protect the confidentiality of its informants. Rather, the government must candidly provide required information, in a form acceptable to the court, and assume any inherent risk that the identity of its informants will be discovered by others, or forego the opportunity for electronic surveillance in order to avoid that risk.

joint investigation, concerning the necessity for electronic surveillance. This failure contributes to the conclusion that they, as representatives of the government, acted with reckless disregard for the truth of their statements to the court. *See, e.g., United States v. Namer*, 680 F.2d 1088, 1094 (5th Cir.1982) (failure of applicants to obtain a formal, expert opinion caused statement that instruments were "classified as securities" to be found to have been made with reckless disregard for the truth); *United States v. Alvarez*, 127 F.3d 372, 374–75 (5th Cir.1997) (failure to consult attorney contributes to finding that incorrect characterization of conduct as "sexual" was made with reckless disregard for the truth).

Moreover, the affiant and applicant did not believe a central message of their submission to the court on December 24, 1984—that the requested electronic surveillance was necessary to the FBI's effort to develop a prosecutable case against Bulger, Flemmi, Kaufman, and others for illegal gambling and other Title 18 offenses. Rather, Boeri and Crossen believed that Flemmi and Bulger were FBI informants whom the Bureau would seek to protect rather than prosecute. They, for good reasons and correctly, did not expect the FBI to conduct an investigation of Bulger, Flemmi, or their colleagues. Yet, with at least reckless disregard for the truth, Crossen and Boeri filed an application and supporting affidavit which communicated this fundamentally misleading message.

The false and misleading representations and omissions in the December 24, 1984 application and Boeri affidavit were material. Thus, defendants have also satisfied the second prong of the *Franks* test.

More specifically, under *Franks*, once reckless disregard for the truth is established, the remaining question is whether the excluded information was necessary to the required findings of probable cause or necessity, or whether the remaining content of the affidavit was sufficient. *Franks*, 438 U.S. at 156, 98 S.Ct. 2674. The Court of Appeals for the First Circuit has stated that information is not "material" if a warrant would have "necessarily, nevertheless, have issued" if the court had been properly informed. *Cole*, 807 F.2d at 268. For present purposes, the court assumes that, as the government contends, false or misleading information is "material" under *Franks* if it was essential to establishing probable cause or necessity. *See United States v. Colkley*, 899 F.2d 297, 301 (4th Cir.1990).[81]

[37, 38] In general, reviewing courts are instructed to read affidavits in a "'practical and commonsense manner,'" rather than in a "hypertechnical manner," when their sufficiency to establish probable cause or necessity is at issue. *United States v. Santarpio*, 560 F.2d 448, 452–53 (1st Cir.1977) (quoting *United States v. Scibelli*, 549 F.2d 222, 226 (1st Cir.1977)). This standard is often invoked by the government in response to efforts by defen-

81. In *Ferrara*, this court noted that in *Ippolito*, 774 F.2d at 1486–87, the Court of Appeals for the Ninth Circuit held that if a reasonable judge "could have denied" the application if fully informed, the information at issue was material. *Ferrara*, 771 F.Supp. at 1305. Thus, this court stated "material information" could be deemed "to be information which reasonably might have prompted a district judge being asked to issue the warrant to have denied the request. If a reasonable judge either might or might not have authorized the requested electronic surveillance if fully informed, the information at issue is material, and its omission requires suppression." *Id.* This statement was premised on the understanding that there may be matters on which reasonable judges would differ and if the government intentionally or with reckless disregard for the truth filed a false or misleading application, in order to deter such misconduct, suppression should be granted if any reasonable judge would have declined to authorize the warrant. In *Ferrara* and in the instant case the government argued that this formulation of "materiality" is more favorable to the defendants than the standard established by *Franks*. Because it ultimately makes no difference to the outcome in the instant case, as in *Ferrara, id.* at 1305–06, the court has employed the standard for defining materiality advocated by the government.

dants to dissect affidavits and detract from their "force as a whole." *Leisure*, 844 F.2d at 1354–55. It is equally appropriate to focus on the force of an affidavit as a whole when, as here, false and misleading representations and omissions permeate the government's submission. Indeed, the Court of Appeals for the First Circuit, among other courts, has taken this approach in affirming the suppression of evidence based on a series of defects when, "[u]nlike a warrant application in which the falsehood can be traced to one sentence or paragraph that can be isolated easily and deleted, [the application at issue] suffered from the cumulative effect of its multiple problems." *Brock v. Brooks Woolen Co., Inc.*, 782 F.2d 1066, 1072 (1st Cir.1986). *See also Ailemen*, 986 F.Supp. at 1241 ("Due to the large number of misrepresentations and the deceptive conduct of the government throughout the wiretap application and review process, the suppression motion now before the court is not amenable to a piecemeal analysis.").

The propriety of considering the December 24, 1984 application and affidavit as a whole, in a commonsense manner, is reinforced by the reality recognized by the Supreme Court in *Franks:* applications for warrants are presented *ex parte* and are often acted on in haste because of the perceived urgent need for a court order. 438 U.S. at 169, 98 S.Ct. 2674. Accordingly, judicial officers being asked to issue warrants may frequently consider applications as a whole and decide whether to grant them based on an overall impression of whether the requirements of Title III have been met.

The nature of the review process, and the obligation that it imposes on the government, was recently described by the district court in *Ailemen*, in the course of granting a motion to suppress for failure to make the full and complete statement concerning necessity required by § 2518(1)(c). 986 F.Supp. at 1246. In *Ailemen*, the court wrote:

> There is one additional set of considerations that must be borne in mind by judges who are addressing the kinds of issues raised here and by law enforcement agents who are drafting affidavits for wiretaps. The district judges to whom these kinds of affidavits are presented face, at least in many urban courts, pressing and diverse demands on their clearly limited resources. Many (unlike Judge Jensen) have no background in criminal law. Many will not have a refined understanding of the subtleties of the necessity requirement. And in many instances, the government will present the affidavit the same day it hopes to begin the wiretap. Judges, of course, are not required to complete their reviews on a timetable set by the investigators, but many judges feel constrained to try to respond promptly to what they assume is a real law enforcement need.
>
> Given these foreseeable facts of judicial life, it is wholly unrealistic to expect most district judges to spend hours and hours of assertive analytical effort dissecting and probing affidavits like this. It is reasonable to expect reviewing judges to be conscientious, and to read the affidavits carefully, but the affidavits must be crafted in a way that will permit a conscientious district judge to understand all the essential elements of the investigatory situation without committing an unreasonable number of hours to the effort. This means that the affidavits must be straightforward (clear, direct, and succinct) about the matters that are most important to the necessity determination. They must be drafted to communicate clearly and quickly the actual state of the investigation and of the government's knowledge. In short, the foreseeable circumstances in which many district judges will be reviewing these kinds of affidavits place a real premium on quality and honesty in drafting. Knowing that a wiretap can threaten core values in our society and that a reviewing district judge will be

> forced to rely heavily on the product of their work, the government's agents and lawyers should make extra efforts to be sure their affidavits fulfill Congress' expectations.

Id.

As described previously, the December 24, 1984 Boeri affidavit was not only false and misleading with regard to the need for electronic surveillance to assist the FBI in developing a prosecutable Title 18 case against Bulger, Flemmi, and others. It also was drafted in a convoluted and confusing manner which obscured the fact that there was not probable cause to believe that evidence of any Title 21 drug offense would be intercepted if a warrant to tap Kaufman's telephone was issued.

More specifically, reading the affidavit as a whole, in a commonsense manner, a reasonable judge would have perceived that there was probable cause to believe that Flemmi and Kaufman would be intercepted discussing illegal gambling and other Title 18 offenses that the FBI was investigating with a view to developing a prosecutable case. If he or she focused carefully on parsing the confusing Boeri affidavit, a reasonable judge would have doubted that there was probable cause to believe that evidence of any Title 21 offense would be intercepted if the requested wiretap on Kaufman's telephone were authorized. Acting with the usual sense of urgency, perhaps magnified by the approach of Christmas eve, a reasonable judge would have felt it was unnecessary to focus or rely on the Title 21 information because an ample showing had been made concerning both the probable cause and necessity for the wiretap for the investigation of Title 18 offenses that the FBI was conducting.

As described previously, the message communicated by the Boeri affidavit was fundamentally misleading. "Orders authorizing interceptions of either wire or oral communications may be entered only after the court has made specific determinations concerning the likelihood that the interception will disclose evidence of *criminal* conduct." *Dalia*, 441 U.S. at 249, 99 S.Ct. 1682 (emphasis added). Thus, the government has an obligation to advise the court if it has information indicating that the conduct it is investigating is not criminal at all. For example, in *Brock*, the Court of Appeals for the First Circuit affirmed the invalidation of a search warrant in part because conduct described in the application as a violation of Occupational Health and Safety Administration regulations had been authorized in a prior settlement agreement. 782 F.2d at 1072. *See also Namer*, 680 F.2d at 1091, 1094 (suppression granted where loan commitments were recklessly mischaracterized as "securities" and, therefore, there was no probable cause to believe securities laws were violated); *Alvarez*, 127 F.3d at 374–75 (motion to suppress granted where affidavit recklessly mischaracterized conduct as "sexual" within the meaning of the penal code).

In the instant case, there is a substantial question whether the involvement of Flemmi in gambling and related activities described in the Boeri affidavit was criminal because, as the FBI's Principal Legal Adviser in Boston later concluded, Flemmi's informant file provided "a clear indication that FBI Agents were aware of his involvement in illegal activity (primarily illegal gambling activity) and at least had tacitly authorized his participation in such activity." Ex. 271. This information should have been disclosed in the December 24, 1984 application. *Brock*, 782 F.2d at 1072; *Namer*, 680 F.2d at 1091, 1094; *Alvarez*, 127 F.3d at 374–75.

As described earlier, if this requirement had been recognized, the application would not have been submitted. If, however, this information and Flemmi's status as an FBI informant had been disclosed to the court, any reasonable judge would have questioned the necessity of the proposed wiretap. In any event, whether he asked or not, the judge should also have been informed that Bulger and Flemmi had

made statements to the FBI concerning their gambling and other activities, which the government now claims can be used against them in a criminal prosecution. "Any reasonable person would have known that this is the kind of thing the judge would wish to know" in deciding whether the requested wiretap was necessary. *Jacobs*, 986 F.2d at 1235.

Even more importantly, the court should have been informed that the proposed electronic surveillance was not needed to facilitate any investigation of any Title 18 offense by the FBI. Rather, the Bureau did not intend to consider the intercepted evidence at all. This alone would have been fatal to any effort to obtain a warrant based on the information in the Boeri affidavit relating to possible Title 18 offenses because, "those seeking a warrant must demonstrate to the [judge] their probable cause to believe that 'the evidence sought will aid in a particular apprehension or conviction' for a particular offense." *Dalia*, 441 U.S. at 255, 99 S.Ct. 1682 (quoting *Warden v. Hayden*, 387 U.S. 294, 307, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967)).

Accordingly, all of the information in the Boeri affidavit suggesting that a tap on Kaufman's telephone was necessary to facilitate investigation of Title 18 offenses must be disregarded. *Franks*, 438 U.S. at 156, 98 S.Ct. 2674. The court is required, therefore, to assess whether the remaining content of the affidavit relating to drug offenses being investigated by the DEA was sufficient to justify issuance of the requested warrant. It was not.

[39] More specifically, the application failed to satisfy the probable cause requirements of the Fourth Amendment and Title III. In order to issue a warrant for a wiretap, the court must find both that (1) there is probable cause to believe that an individual has committed, or is committing a designated offense, and (2) there is probable cause to believe that "particular communications concerning that offense will be obtained" if the warrant is issued. § 2518(3)(a) and (b). This is a codification of the requirements imposed by the Fourth Amendment generally.

The Court of Appeals for the First Circuit has recently addressed the meaning of these requirements, stating:

> A warrant application must demonstrate probable cause to believe that (1) a crime has been committed—the "commission" element, and (2) enumerated evidence of the offense will be found at the place to be searched—the so-called "nexus" element. *See United States v. Zayas–Diaz*, 95 F.3d 105, 111 (1st Cir. 1996). With regard to the "nexus" element, the task of a magistrate in determining whether probable cause exists is "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). In order to establish probable cause, the facts presented to the magistrate need only "warrant a man of reasonable caution" to believe that evidence of a crime will be found. *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (plurality opinion). The probable cause standard "does not demand showing that such a belief be correct or more likely true than false." *Id.*

Feliz, 182 F.3d at 86.

The government argues that the Court of Appeals for the First Circuit has also at times made the general statement that reviewing courts should "accord 'considerable deference' " to a magistrate's determination that information in a particular affidavit establishes probable cause. *Id.; Zayas Diaz*, 95 F.3d at 111; *United States v. Taylor*, 985 F.2d 3, 6 (1st Cir.1993). These statements, however, were not made in cases involving a claim under *Franks* that material information had been intentionally or recklessly omitted from an application. Rather, they merely ad-

dressed the sufficiency of the showing of probable cause. Thus, the prescribed deference is implicitly premised on the assumption that the judicial officer issuing the warrant was fully and clearly informed and, therefore, should not be reversed if his judgment was reasonable although, upon reflection by a reviewing court, perhaps not right.

This assumption is not valid in the instant case. First, Boeri's affidavit was replete with Title 18 information that must now be disregarded, but which would have frustrated any effort by the issuing judge to analyze the probable cause issues relating to the purported Title 21 offenses. *See Ailemen*, 986 F.Supp. at 1235–36. Once again, in view of the ample information concerning the purported Title 18 offenses, a reasonable judge would have recognized that there did not appear to be adequate evidence to support the issuance of the warrant on Title 21 grounds alone, but, acting with a sense of urgency, would have felt that it was neither necessary nor appropriate to ask for more information or deny the warrant for this reason.

Moreover, in the instant case the issuing judge was denied information possessed by the FBI that would have undermined the assertion that there was probable cause to believe that Bulger and Flemmi would be intercepted discussing any drug offense on Kaufman's telephone. Crossen, Stutman, Boeri, and Reilly each believed that Bulger and Flemmi were FBI informants. As Stutman testified, it was natural for them to wonder whether Bulger and Flemmi were involved in any of the activity under investigation—including the narcotics related activity of interest to the DEA—in connection with their relationship with the FBI. Stutman Apr. 15, 1998 Tr. at 169–71; § II.17. As the FBI was participating in the joint investigation for which electronic surveillance was sought, the FBI could and should have been asked this question, among others. *See Mastroianni*, 749 F.2d at 909–10; *Aviles*, 170 F.3d at 867; *Chesher*, 678 F.2d at 1360; *Fox*, 790 F.Supp. at 1494. A candid response to this question would have disclosed that Connolly had written in a document available to Ring that, "[Flemmi's] contacts, at [Connolly's] direction ... may have resulted in the false belief that [Flemmi] is involved in narcotics," Ex. 8, and that Ring himself felt that any indication that Bulger and Flemmi were involved with drugs was "not consistent with [the FBI's] intelligence." Ex. 13.

Perceived bureaucratic imperatives prevented the United States Attorney's Office and the DEA from obtaining this information, evaluating it, and disclosing it to the court. In the circumstances, the deference accorded to the decision of the judge who issued the warrant when only the sufficiency of the showing of probable cause is in question is not appropriate. *See Vigeant*, 176 F.3d at 572 n. 8; *United States v. Ricciardelli*, 998 F.2d 8, 16 (1st Cir.1993). However, even under that standard, the necessary showing of probable cause to believe that evidence of any Title 21 offense would be intercepted by a wiretap on Kaufman's telephone has not been made.

The evidence supporting the claim that there was probable cause to believe that a wiretap on Kaufman's telephone would result in the interception of evidence of any Title 21 drug offense is addressed in detail in § II.17, *supra*. In summary, Boeri's representation that Kaufman had telephonic contact with Bulger is simply false. As Boeri acknowledged in his testimony, the mass of information generated from many months of pen registers on various telephones used by Bulger and Kaufman did not disclose a single call between them. Thus, on December 24, 1984, there was no probable cause to believe that Bulger would be intercepted discussing anything on Kaufman's telephone. Consistent with this, Bulger was not intercepted when the wiretap was instituted.

The Boeri affidavit contained ample evidence to establish probable cause that Flemmi and Kaufman would be intercepted by a tap on Kaufman's telephone.

There was, however, virtually no basis to believe that they had discussed any narcotics offenses or would do so. The few paragraphs of the Boeri affidavit which the government contends establish probable cause to believe that Bulger and Flemmi were committing drug offenses contain no reference to Kaufman. Moreover, the informant characterized as CS–4, who was represented to be "a personal acquaintance" of Kaufman, characterized him as being close to Flemmi in the illegal gaming and loansharking business, a "front man" for Bulger and Flemmi in the "hot car" business, and a person they use for their more difficult sports betting. Ex. 133, ¶¶ 62(h),(i), and (j). CS–4 did not claim Kaufman was involved in narcotics activity with Flemmi, Bulger, or any one else.

As described previously, the 104–page Boeri affidavit contained only two references to Kaufman's possible involvement with narcotics. His telephone number was found in an address book seized from Caruana, who was a fugitive from drug charges. The Boeri affidavit did not, however, assert that Caruana and Kaufman had called each other during the DEA's investigation or were expected to do so. The Boeri affidavit did contain information indicating that Kaufman had spoken, on his telephone, to Joseph Murray. However, the government did not even assert, and the issuing judge did not find, that there was probable cause to believe that Kaufman and Murray would be intercepted discussing a drug offense or anything else if the requested warrant was issued. Exs. 133 (Under Seal), 138 (Under Seal), 139 (Under Seal).

As Judge Garrity, or any other reasonable judge, would have recognized if the Boeri affidavit had been presented without the false and misleading references to Title 18 offenses, there was not probable cause to believe that the wiretap being sought would result in the interception of Kaufman discussing a Title 21 drug offense with Flemmi, Bulger, or anyone else.

Nevertheless, the government argues that the motion to suppress should be denied because there was probable cause to believe that Kaufman would be intercepted discussing Title 18 offenses. Gov. Post Hearing Brief at 340. This may be true. However, Boeri and Crossen did not believe that the DEA had the authority to investigate Title 18 offenses and, in any event, the DEA did not intend to do so. In addition, the FBI did not intend to use any intercepted evidence to investigate Kaufman for committing any Title 18 offense, and Boeri and Crossen did not expect the Bureau to do so. This information would plainly have been material to any judge assessing the necessity for electronic surveillance to develop a Title 18 case against Kaufman. The failure to include it in the application involved at least reckless disregard for the truth of the representations relating to Kaufman. *Jacobs*, 986 F.2d at 1234.

There is also a more fundamental reason that the application for the 1984–85 electronic surveillance should not be saved from suppression based on the alleged adequacy of the Title 18 information it contained concerning Kaufman. A wiretap on Kaufman's telephone was requested solely because the DEA was hoping to obtain evidence sufficient to justify electronic surveillance of Bulger's home and automobile, which it had been unable to acquire in its previous year of investigation. The government would not have sought a warrant to tap Kaufman's telephone to develop a case against him. Thus, this court would have to engage in a fantastic and transparent fiction in order to deny the motion to suppress on the basis that the government suggests. To do so would be contrary to the purposes of the judicially crafted exclusionary rule and the related provisions of Title III.

The *Franks* test is premised on the principle that the exclusion of evidence is necessary in certain circumstances to deter violations of Fourth Amendment rights. *Franks*, 438 U.S. at 169–71, 98 S.Ct. 2674.

In addition, with regard to motions to suppress electronic surveillance, the *Franks* standard serves, in a fashion, the purposes of § 2515, which are " 'not only to protect the privacy of communications, but also to ensure that the courts do not become partners in illegal conduct' " and " 'to protect the integrity of court ... proceedings.' " *Bianco*, 998 F.2d at 1126 (quoting *Gelbard v. United States*, 408 U.S. 41, 51, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972) (citation omitted)). Indulging in the fictions necessary to treat the December 24, 1984 application and Boeri affidavit as a genuine effort to develop a Title 18 prosecution of Kaufman would deeply implicate the courts in government's illegal conduct and pollute the future proceedings in this case.

[40] The Court of Appeals for the First Circuit has not decided whether the good faith exception to the exclusionary rule relating to Fourth Amendment violations is ever applicable in a Title III case. *Cunningham*, 113 F.3d at 294. However, as the Supreme Court explained in *United States v. Leon*, when warrants are involved, the good faith exception relies substantially on the efficacy and integrity of the warrant procedure. *United States v. Leon*, 468 U.S. 897, 913–14 & n. 12, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Thus, *Leon* indicated that a warrant that violates *Franks* is not subject to the good faith exception to the exclusionary rule that it created. *Id.; Jacobs*, 986 F.2d at 1235; *Colkley*, 899 F.2d at 300; *Ferrara*, 771 F.Supp. at 1298. The Court of Appeals for the First Circuit has consistently applied this principle in non-Title III cases. *Vigeant*, 176 F.3d at 572; *Ricciardelli*, 998 F.2d at 16–17; *United States v. Fuccillo*, 808 F.2d 173, 178 (1st Cir.1987).

[41] The government acknowledges that the good faith exception to the exclusionary rule is available only when the government has properly performed its duty of disclosure to the court. *See* Apr. 13, 1999 Tr. at 162. Accordingly, even assuming, without finding, that *Leon* might apply in some Title III cases, it would not operate to save the 1984–85 electronic surveillance from suppression because a *Franks* violation has been established.

If, as this court now believes, § 2515, as interpreted in *Giordano* and its progeny including *Cunningham*, provides the proper standard for deciding the motion to suppress the 1984–85 electronic surveillance, the analysis is more straightforward. The requirement of § 2518(1)(c) that the application contain a full and complete statement concerning necessity is by its terms one of the "statutory requirements that directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Giordano*, 416 U.S. at 527, 94 S.Ct. 1820. *See also Mondragon*, 52 F.3d at 293. Thus, suppression is required where the requirements of § 2518(1)(c) have not been satisfied. *Giordano*, 416 U.S. at 527, 94 S.Ct. 1820; *Cunningham*, 113 F.3d at 293–94.

The government failed to make the required full and complete statement concerning necessity with regard to the December 24, 1984 application. The government has also failed to " 'demonstrate[ ] to the court's satisfaction that the statutory purpose has been achieved despite the violation.' " *Cunningham*, 113 F.3d at 293–94 (quoting *United States v. Johnson*, 696 F.2d 115, 121 (D.C.Cir.1982)). Rather, as a result of the violation of § 2518(1)(c), a warrant was issued that would not otherwise have been authorized.

F. *A Hearing is Necessary to Identify the Evidence Which Must be Suppressed Because of the Government's Unlawful Conduct Concerning the 1984–85 Electronic Surveillance and to Determine if Any Other Remedy is Required*

For the foregoing reasons, the December 24, 1984 Order authorizing the wiretap

on Kaufman's telephone was unlawfully obtained. The motion to suppress the evidence obtained as a result of that Order is meritorious. Accordingly, neither the communications intercepted pursuant to that Order, nor any evidence derived from them, may be used at trial. 18 U.S.C. § 2515 (1994).

[42] "Once surveillance evidence has been suppressed, that evidence cannot, under § 2515, contribute directly or indirectly to a conviction." Carr, *supra*, § 6.4, at 6–84.6. The fatally flawed December 24, 1984 Boeri affidavit was expressly incorporated in his February 1, 1985 affidavit, which resulted in the issuance of a warrant extending the tap on Kaufman's telephone and also authorizing bugs for Bulger's automobile and apartment. Ex. 135, ¶ 5. Both of his prior affidavits were expressly incorporated in Boeri's March 1, 1985 affidavit, which prompted the issuance of a warrant authorizing the continued bugging of Bulger's automobile and apartment. Ex. 136, ¶ 5. Thus, suppression is required of all of the evidence intercepted as a result of the tap on Kaufman's telephone and the bugs in Bulger's automobile and apartment.

The government represents that it did not present any of the evidence intercepted on Kaufman's telephone or in Bulger's automobile or apartment to the grand juries which returned the indictments in this case. It would, however, have been improper for the grand jury to have received any evidence derived from those interceptions or for the government to have otherwise indirectly used the evidence illegally intercepted to develop its presentation to the grand jury. 18 U.S.C. § 2515 (1994). It is not possible on the present record to determine whether this occurred. Therefore, further proceedings will be necessary to decide if the government made derivative use of the evidence being suppressed in its presentation to the grand jury and, if so, what remedy, if any, is required.

It is also now necessary to determine whether any evidence was derived from the 1984–85 interceptions being suppressed in order to assure that such evidence is excluded at trial. 18 U.S.C. § 2515 (1994). In addition, the court must decide if any other remedy, including dismissal, is required. *Nardone v. United States*, 308 U.S. 338, 339–41, 60 S.Ct. 266, 84 L.Ed. 307 (1939); *Alderman v. United States*, 394 U.S. 165, 183, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969).

In § III.1.D(4), *supra*, the court has addressed the issues presented by the misuse of information that Flemmi provided after being assured, among other things, of use and derivative use immunity if he assisted the FBI in its efforts to obtain warrants used to bug 98 Prince Street, Vanessa's, and 34 Guild Street. The same issues must also be addressed concerning the 1984–85 electronic surveillance. *See also* Carr, *supra*, § 6.4, at 6–84.6 to 6–104; Fishman & McKenna, *supra*, §§ 23.17–23.26, at 23–37 to 23–65.

The effect of all of the evidence that will be suppressed will have to be assessed cumulatively. It appears that if Flemmi can prove that "a substantial portion of the case against him" is, for one reason or another, the "fruit of the poisonous tree," he will be entitled to have the case dismissed. *Nardone*, 308 U.S. at 341, 60 S.Ct. 266. However, before deciding how to proceed, the court will provide the parties with an opportunity to address the issues generated by the finding that the motion to suppress the 1984–85 electronic surveillance is meritorious.

3. *Flemmi is Not an "Aggrieved Person" With Standing to Seek Suppression of the Interceptions at Vanessa's Under Title III*

[43] As described in § III.1.D(3) *supra*, Flemmi is entitled to suppression of the evidence intercepted at Vanessa's, and any evidence derived from it, under his agreement with the government. Flemmi asserts that he also has standing to seek suppression of that evidence under Title

III because he was named as a person expected to be overheard in the application for the warrant to bug Vanessa's even though, having been told of the installation of the bug, he was not intercepted. This contention is incorrect. *United States v. Ruggiero*, 928 F.2d 1289, 1303 (2d Cir. 1991); *United States v. Charles*, No.Crim. 97–10107–PBS, 1998 WL 204696, at *11 (D.Mass. Jan.13, 1998).

[44, 45] As a "general rule ... Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman*, 394 U.S. at 174, 89 S.Ct. 961. Thus, to have Fourth Amendment rights an individual must have been a " 'victim of an invasion of privacy.' " *Id.* at 173, 89 S.Ct. 961 (quoting *Jones v. United States*, 362 U.S. 257, 261, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)). More specifically, an individual has a Fourth Amendment right that may have been violated only if the person or something in which he has a legitimate expectation of privacy has been the subject of a search. *Id.; United States v. Salvucci*, 448 U.S. 83, 92–93, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); *Rakas v. Illinois*, 439 U.S. 128, 147–48, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Therefore, as Flemmi was not intercepted, and had no possessory interest or other basis for claiming a reasonable expectation of privacy concerning Vanessa's, he is not a person who may challenge the electronic surveillance conducted there as a violation of the Fourth Amendment.

Flemmi claims, however, that Title III establishes standing to litigate alleged violations of the statute which is broader than standing under the Fourth Amendment and includes those, like him, who have been named in a warrant as a target of the electronic surveillance. More specifically, Flemmi argues that pursuant to § 2518(10)(a) any "aggrieved person" may move to suppress wire or oral communication intercepted pursuant to Title III. The statute states that:

> "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication *or* a person against whom the interception was directed.

18 U.S.C. § 2510(11) (1994) (emphasis added). Flemmi asserts that as a named target of the electronic surveillance at Vanessa's he was "a person against whom the interception was directed" and, therefore, has standing to seek suppression relating to Vanessa's based upon alleged violations of Title III.

The meaning of the phrase "person against whom the interception was directed" is, however, ambiguous. If intended, § 2510(11) could have clearly stated that a person has standing if he is identified in a warrant as expected to be overheard engaging in incriminating conversation. The Massachusetts counterpart of Title III does this by defining an "aggrieved person" as:

> any individual who was a party to an intercepted wire or oral communication *or who was named in the warrant authorizing the interception*, or who would otherwise have standing to complain that his personal or property interest or privacy was invaded in the course of an interception.

Mass. Gen. Laws Ann. ch. 272, § 99(B)(6) (West 1990) (emphasis added). Section 2510(11) not only fails to include such a clear expression of legislative intent, its phrase "person against whom the interception was directed" has been interpreted to be:

> synonymous with the Supreme Court's language in *Alderman* conferring standing upon one whose premises are the subject of electronic surveillance. That is, one against whom an interception is directed is one whose premises have been surveilled by means of an electronic listening device ....

United States v. Ahmad, 347 F.Supp. 912, 933 (M.D.Pa.1972), *modified on other grounds sub nom., United States v. Berrigan*, 482 F.2d 171 (3rd Cir.1973).

In view of the ambiguity concerning the meaning of the statutory language on which Flemmi relies, it is appropriate to consider the legislative history of § 2510(11). It states, in pertinent part, that the statutory definition of "aggrieved person" "is intended to reflect existing law." Sen. Rep. No. 90–1097, at 2169 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2180.

The first case cited in the legislative history with regard to "existing law" was the Supreme Court's decision in *Jones*, 362 U.S. 257, 80 S.Ct. 725, which is the origin of the language now at issue. *Id.* As the Supreme Court noted in *Alderman*, it had held in *Jones* that:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, *one against whom the search was directed*, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.
>
> * * * * * *
>
> Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy.

Alderman, 394 U.S. at 173, 89 S.Ct. 961 (quoting *Jones*, 362 U.S. at 261, 80 S.Ct. 725) (emphasis added). The Supreme Court has stated that:

> The above-quoted statement from *Jones* suggests that the [underlined] language was meant merely as a parenthetical equivalent of the previous phrase "a victim of a search or seizure." To the extent that the language might be read more broadly, it is dictum which was impliedly repudiated in *Alderman v. United States*, *supra*, and which we now expressly reject.

Rakas, 439 U.S. at 135, 99 S.Ct. 421. Accordingly, in *Rakas* the Supreme Court rejected the claim that a person's Fourth Amendment rights were violated because a search was "directed" against him, although he was not a "victim" of the search. *Id.* at 132–38, 99 S.Ct. 421.

In view of the foregoing, the court finds that Judge Carr has persuasively written that:

> In the context of the *Jones* decision, the clause, "one against whom the search was directed," appears to be adjectival, descriptive of an attribute of one who was searched himself or whose premises were searched. This language, incorporated in § 2510(11), is therefore a limitation, or at most a restatement of the preceding clause in *Jones*, rather than an expansion of the class of persons endowed with standing.
>
> * * * * * *
>
> In § 2510(11), however, this language is used in the disjunctive: one has standing if he was either a party "or a person against whom the interception was directed." Nonetheless, in view of the specific intention to conform § 2510(11) to existing principles, Congress did not intend to expand standing doctrines
>
> . . . .

Carr, *supra*, § 6.2(b)(3), at 6–36.6 to 6–37.

The only reported cases directly addressing Flemmi's contention that he should be deemed to have standing because he was named as a target in the Vanessa's warrant agree implicitly with Judge Carr's analysis.[82] The Court of Ap-

82. The court recognizes that, as Flemmi argues, there are cases finding no standing that have stated that "a defendant has standing to challenge electronic surveillance only if he can 'show that it was directed at him, that the Government intercepted his conversations or that the [intercepted] communications occurred at least partly on his premises.'" *United States v. Gambale*, 610 F.Supp. 1515, 1521 (D.Mass.1985) (Keeton, J.) (quoting *United States v. Williams*, 580 F.2d 578, 583 (D.C.Cir.1978)); *United States v. Mavroules*,

peals for the Second Circuit has stated that the standing requirements of Title III are " 'to be construed in accordance with the standing requirements usually applied to suppression claims under the fourth amendment' " and, therefore, held that named targets of electronic surveillance who were not actually intercepted lacked standing to move to suppress. *Ruggiero*, 928 F.2d at 1303 (quoting *Gallo*, 863 F.2d at 192). Another judge of this District Court has agreed. *Charles*, 1998 WL 204696, at * 11 (Saris, J.).

In view of the legislative history concerning § 2510(11), this court also concurs with the conclusion reached by the Court of Appeals for the Second Circuit in *Ruggiero*. Accordingly, Flemmi lacks standing to litigate his claim that the electronic surveillance at Vanessa's violated Title III.

4. *DeLuca Does Not Have Standing to Move to Suppress the Evidence Intercepted at 34 Guild Street For a Violation of Title III Because the 1998 Supreme Court Decision in Minnesota v. Carter Indicates That Although His Conversation was Intercepted, It Did Not Constitute an "Oral Communication" As Defined in the Statute, and DeLuca's Fourth* Amendment *Rights Were Not Violated*

[46] Defendant Robert DeLuca was overheard and tape-recorded participating in the LCN induction ceremony conducted at 34 Guild Street on October 29, 1989. Prior to the Supreme Court's December 1, 1998 decision in *Carter*, 525 U.S. 83, 119 S.Ct. 469, the government did not contend that DeLuca lacked standing to move to suppress the evidence intercepted at 34 Guild Street. In its January 29, 1999 submission, however, the government argued for the first time that in light of *Carter*, the discussion at 34 Guild Street did not constitute an "oral communication" within the meaning of Title III and, therefore, DeLuca is not an "aggrieved person" with standing to maintain his motion to suppress.

The court provided the defendants an opportunity to brief the implications of *Carter* for the instant case, held a hearing on this question, and received from the parties additional memoranda addressing issues that came into sharper focus at the hearing. Upon careful consideration of the novel issue of the meaning of the decision in *Carter* for Title III cases, the court finds the government's position to be correct. *Carter* indicates that the bugging of the LCN induction ceremony did not violate DeLuca's Fourth Amendment rights. In addition, although the matter is not perfectly clear, the court finds that when Title III was enacted it was intended that evolving, contemporary conceptions of reasonable expectations of privacy be applied in deciding whether an intercepted conversation constitutes an "oral communication" subject to suppression under Title III. In view of the decision in *Carter*, the court finds that DeLuca did not at 34 Guild Street engage in what the statute defines as an "oral communication" and, therefore, DeLuca is not an "aggrieved person." Thus, his motion to suppress must be denied for lack of standing.

More specifically, 18 U.S.C. § 2518(10)(a) provides that a motion to suppress for a violation of Title III may be brought by "[a]ny aggrieved person." As indicated earlier, § 2510(11) defines an "aggrieved person" as:

> a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed . . .

18 U.S.C. § 2510(11) (1994). Section 2510(4) defines "intercept" as the "aural or other acquisition of the contents of any wire, electronic, or oral communication

813 F.Supp. 115, 117 (D.Mass.1993) (Collings, Mag. J.) (quoting *Gambale, supra*). These statements are, however, dicta in decisions that did not address, let alone analyze, the issue presented in the instant case.

through the use of any electronic, mechanical, or other device." The terms "wire communication" and "oral communication" are each separately defined in Title III.

> There is an important distinction between the definition of wire communications in § 2510(1) and oral communications in § 2510(2), whereby it is illegal to intercept an oral communication only when the communication is "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." There need be no showing by the government that the victim had a justifiable expectation of conversational privacy in a telephone conversation.

Carr, *supra*, § 8.1(a)(3) at 8–5 (quoting § 2510(2)).[83]

The Court of Appeals for the First Circuit has stated the statutory provision that a statement be made with the subjective expectation that it will not be intercepted "under circumstances justifying such expectation" "require[s] that the speaker have an expectation of *privacy* that is objectively reasonable." *United States v. Rose*, 669 F.2d 23, 25 (1st Cir.1982) (emphasis added). As discussed more fully below:

> According to the legislative history of Title III, this definition [of "oral communication"] was intended to parallel the "reasonable expectation of privacy" test created by the Supreme Court in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). *See* S.Rep. No. 1097, 90th Cong.2d Sess., *reprinted in* 1968 U.S.Code Cong. & Admin.News 2112–2274. *See also United States v. Harrelson*, 754 F.2d 1153 (5th Cir.1985). Thus, Congress limited its protection of "oral communications" under Title III to those statements made where "first, a person [has] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring).

In the Matter of John Doe Trader Number One, 894 F.2d 240, 242 (7th Cir.1990). *See also In re High Fructose Corn Syrup Antitrust Litig.*, 46 F.Supp.2d 819, 827 (C.D.Ill.1999) ("the case law in this and other circuits is clear that the definition of 'oral communication' in § 2510(2) is intended to parallel the reasonable expectation of privacy test set forth in *Katz*.").

The reasoning of the Court of Appeals for the Seventh Circuit in *John Doe Trader Number One* is consistent with the conclusions explicitly and implicitly reached in the decisions relied upon by the Court of Appeals for the First Circuit in *Rose*. For example, in deciding that the bugging of an apartment to which the defendants gained entry by making false representations to the landlord did not require a warrant because the defendants' conversation there did not constitute "oral communication" as defined in § 2510(2), the Court of Appeals for the Second Circuit stated:

> As we have been advised, "the Fourth Amendment protects people, not places," *Katz v. United States*, *supra*, 389 U.S. at 351, 88 S.Ct. at 511, and the statutory definition of an "oral communication" tracks this constitutional concept. The question we have before us is whether the subjective expectation of privacy violated by the allegedly illegal intrusion is one society is prepared to recognize as "'justifiable.'"

United States v. Pui Kan Lam, 483 F.2d 1202, 1206 (2d Cir.1973) (footnote omitted). *See also United States v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir.1978) ("The legislative history behind § 2510(2) reflects Congress's intent that *Katz* ... serve as a guide to define communications that are

83. Section 2510(2) states in full that:
> "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication ...

uttered under circumstances justifying an expectation of privacy"); *Holman v. Central Ark. Broad. Co.*, 610 F.2d 542, 544 & n. 3 (8th Cir.1979) (deciding that no "oral communication" was intercepted because speaker had no reasonable expectation of privacy.).

The highest courts of several states, interpreting the federal statute or state statutory provisions that were identical or substantially similar to § 2510(2), have also concluded that the justifiable expectation that conversation will not be intercepted test is synonymous with the *Katz* justifiable expectation of privacy test. For example, the Supreme Court of Pennsylvania has held that:

> In determining whether the expectation of non-interception was justified under the circumstances of a particular case, it is necessary for a reviewing court to examine the expectation in accordance with the principles surrounding the right to privacy, for one cannot have an expectation of non-interception absent a finding of a reasonable expectation of privacy.

Agnew v. Dupler, 553 Pa. 33, 717 A.2d 519, 523 (1998). *See also Commonwealth v. Look*, 379 Mass. 893, 909–10, 402 N.E.2d 470 (1980) ("[T]he Federal statute requires that a speaker have a justifiable expectation of privacy with regard to 'oral communications.' 18 U.S.C. § 2510(2) (1976). In determining what is a justified expectation of privacy for purposes of § 2510, we must look to traditional Fourth Amendment law"); *Wilks v. Commonwealth*, 217 Va. 885, 889, 234 S.E.2d 250 (1977) ("the justifiable expectation of noninterception contained in the statutory definition of the term 'oral communication' is equivalent to the constitutional expectation of privacy.").

Nevertheless, DeLuca argues that § 2510(2) does not, as it could have, employ the "reasonable expectation of privacy" language of *Katz* and asserts that the terms of the statute manifest the intention of Congress and the President to provide protection against bugging in some circumstances in which conventional searches and seizures would be permissible. There appears to be no reported decision in a criminal case that supports this contention. There are, however, several civil cases in which it has been held that a reasonable expectation of privacy and a reasonable expectation that conversation will not be surreptitiously broadcast or recorded are not equivalent. For example, the Court of Appeals for the Eleventh Circuit has held that a postal employee might have a reasonable expectation that conversation at his work space would not be bugged and overheard by his employer in another part of the building even though he knew that the workers with whom he was conversing could hear him. *Walker v. Darby*, 911 F.2d 1573, 1578–79 (11th Cir.1990). *See also Wesley v. WISN Div.-Hearst Corp.*, 806 F.Supp. 812, 814 (E.D.Wis.1992) (discussing *Walker*). Similarly, it has been held that whether a person had a justified belief that she would not be recorded was an issue of fact to be decided by a jury where the plaintiff in a civil case alleged that she had agreed to be interviewed by television journalists, but was secretly videotaped and recorded despite her refusal to appear on camera. *Boddie v. American Broad. Cos.*, 731 F.2d 333, 335, 338–39 (6th Cir.1984). *See also Bianco v. American Broad. Cos.*, 470 F.Supp. 182, 185 (N.D.Ill.1979); Fishman & McKenna, *supra*, § 2.15 at 2–19 to 2–20 n.58 and § 6.37 at 6–79 to 6–81.

The foregoing civil cases, however, each involved suits between private parties and, therefore, did not implicate the Fourth Amendment, which imposes limitations only on the government. It is possible, therefore, that the decisions in those cases can be reconciled with the substantial precedent in criminal cases equating the standard of § 2510(2) with the standard of the Fourth Amendment by recognizing that there may be circumstances in which society would deem the government's interest in effective law enforcement sufficient to render unreasonable an individual's expec-

tation that he would not be intercepted by the government, but society would consider such an expectation justified with regard to interception by a private party.

In any event, the weight of authority indicates that the "expectation that [a] communication is not subject to interception" test was not, as DeLuca claims, chosen to express an intent to provide protection against bugging by the government when conventional forms of search and seizure would be permissible. Rather, the terms of § 2510(2) reflect the understanding that there are circumstances in which an individual might know that he can be seen, and in this sense has no general right to privacy, but would nevertheless reasonably expect that he will not be overheard. In essence, it appears that § 2510(2) was drafted to capture the distinction made in *Katz* when the Supreme Court stated that:

> The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen.

389 U.S. at 352, 88 S.Ct. 507. *See also* Fishman & McKenna, *supra*, § 2.15 n.56 at 2–19; Carr, *supra*, § 3.2(b) at 3–14.

Prior to the 1998 decision in *Carter*, the question whether the reasonable expectation of privacy standard should be employed in interpreting § 2510(2) was not viewed by the parties or the court as having any significance in the circumstances of the instant case. However, this has now become an issue that is material to the question of whether DeLuca has standing to maintain his motion to suppress the electronic surveillance conducted at 34 Guild Street.

In *Ferrara*, the government did not contend that the defendants who were intercepted at 34 Guild Street lacked standing to maintain their motion to suppress based on Title III. Nor did the government base its claim that no Fourth Amendment violation had occurred on the assertion that the defendants who were intercepted did not have a justifiable expectation of privacy with regard to their discussion at that location. Thus, with regard to Title III the court simply held that, "[e]ach of those [defendants] intercepted is an 'aggrieved person' with standing to litigate this motion to suppress. *See* §§ 2510(11) and 2518(10)(a)." *Ferrara*, 771 F.Supp. at 1281.

With regard to the question of whether the Order authorizing the roving bug was unconstitutional as applied, this court in *Ferrara* found that defendants lacked standing to assert that the entry to install listening devices injured their rights because they "had no possessory interest or reasonable expectation of privacy concerning 34 Guild Street before they arrived there on October 29, 1989." *Id.* at 1292. The court added that:

> The Fourth Amendment does, however, apply to the defendants' conversations while at 34 Guild Street because individuals legitimately expect that their conversations while in the homes of others will be private and society is prepared to recognize such expectations as reasonable. *See Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 1687, 109 L.Ed.2d 85 (1990); *Katz*, 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring).

Id. However, in finding that the search and seizure at issue was "reasonable," as required by the Fourth Amendment, the court noted that the "activity at issue ... did not involve an invasion of any defendant's home or office" and, therefore, "in balancing the competing considerations to determine reasonableness, the value to be attributed to defendants' expectation of privacy is diminished." *Id.* at 1293 (citing

United States v. Torres, 751 F.2d 875, 883 (7th Cir.1984)).

In *Bianco*, the Court of Appeals for the Second Circuit reached the same results. First, the court cited *Gallo*, 863 F.2d at 192, for the proposition mentioned in § III.3, *supra*, that "Title III suppression provisions [are] to be construed in accordance with [the] standing requirements of [the] Fourth Amendment ...." *Bianco*, 998 F.2d at 1122. The Second Circuit then found that none of the defendants had standing to assert that the entry to 34 Guild Street to install listening devices injured their rights, but that the defendants who were intercepted had standing to seek suppression of the evidence recorded by those devices. *Id.*

As indicated earlier, the government did not during the lengthy evidentiary hearing in the instant case assert that, although intercepted at 34 Guild Street, DeLuca lacked standing to maintain his motion to suppress. The government did, however, raise this defense after the Supreme Court issued its decision in *Carter* on December 1, 1998.

In *Carter*, "the Supreme Court effectively heightened the burden for a defendant claiming a reasonable expectation of privacy in a dwelling other than his own home, when the defendant's presence in the dwelling is for a commercial or business purpose." *United States v. Gordon*, 168 F.3d 1222, 1226 (10th Cir.), *cert. denied*, — U.S. —, 119 S.Ct. 2384, 144 L.Ed.2d 786 (1999). In the process, the Supreme Court indicated that while Justice Harlan's two-part test for determining whether a Fourth Amendment violation has occurred remains valid, Katz would not be found to have satisfied the requirement that his subjective expectation of privacy be regarded by society as justified if his case were presented to the Supreme Court for the first time today.

Katz had made a call from a public telephone booth. *Katz*, 389 U.S. at 348, 88 S.Ct. 507. He could be seen speaking in the telephone booth, but could not ordinarily have been overheard. *Id.* at 352, 88 S.Ct. 507. Without obtaining a warrant, and without penetrating the telephone booth, FBI agents attached an electronic listening and recording device to the outside of the structure and recorded Katz's part of the telephone conversation. *Id.* at 348–49, 88 S.Ct. 507. The Supreme Court found that this constituted an unreasonable search and seizure because no warrant authorizing it had been issued. *Id.* at 358–59, 88 S.Ct. 507. Therefore, it held that the Fourth Amendment had been violated. *Id.*

In explaining its decision, the Supreme Court described the evolutionary nature of Fourth Amendment law and explained that it was overruling its prior precedents. *Id.* at 353, 88 S.Ct. 507. As the Court stated, "[i]t is true that the absence of such [physical] penetration [of a structure] was at one time thought to foreclose further Fourth Amendment inquiry, *Olmstead v. United States*, 277 U.S. 438, 457, 466, 48 S.Ct. 564, 72 L.Ed. 944 [(1928)]; *Goldman v. United States*, 316 U.S. 129, 134–36, 62 S.Ct. 993, 86 L.Ed. 1322 [(1942)], for that Amendment was thought to limit only searches and seizures of tangible property." *Id.* at 352–53, 88 S.Ct. 507. The Court noted, however, that its subsequent decisions had "departed from the narrow view on which [*Olmstead*] rested" and had held that the Fourth Amendment applied not only to tangible items but also to the recording of oral statements overheard without any trespass. *Id.* at 353, 88 S.Ct. 507 (citing *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)). Thus, the Supreme Court wrote:

> We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling.

Id. See also id. at 362 & n.*, 88 S.Ct. 507 (Harlan, J., concurring).

Instead, the Court emphasized that "the Fourth Amendment protects people, not places." *Id.* at 351, 88 S.Ct. 507. As Justice Harlan elaborated in his concurrence:

> [T]he rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

Id. at 361, 88 S.Ct. 507 (Harlan, J., concurring). Implicitly applying this test, the Court in *Katz* stated that:

> No less than an individual in a business office, *in a friend's apartment*, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

Id. at 352, 88 S.Ct. 507 (emphasis added)(footnotes omitted). *See also id.* at 361, 88 S.Ct. 507 (Harlan, J., concurring) (telephone booth "is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable.").

In a footnote in *Katz*, the Supreme Court cited *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), for the proposition that an individual has a justifiable expectation of privacy in a friend's apartment. *Id.* at 352 n. 11, 88 S.Ct. 507. In *Jones*, the defendant who had a key to his friend's apartment, where he kept a suit and shirt and may have slept a night in the past but not recently, was found to have standing to maintain a motion to suppress the fruits of a search of the apartment in part because "anyone legitimately on premises where a search occurs may challenge its legality . . . ." 362 U.S. at 259, 267, 80 S.Ct. 725.

Katz was decided in 1967, and was considered by Congress and the President when Title III was enacted in 1968. *See, e.g.*, S.Rep. No. 90–1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153. Since *Katz* was decided, Justice Harlan's two-part expectation of privacy test has been consistently employed by the Supreme Court in Fourth Amendment cases. *See, e.g., Rakas*, 439 U.S. at 143, 99 S.Ct. 421; *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979); *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984); *California v. Greenwood*, 486 U.S. 35, 38, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988); *Minnesota v. Olson*, 495 U.S. 91, 96–97, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990); *Carter*, 119 S.Ct. at 473. However, the places in which individuals have been deemed to have a justifiable expectation of privacy have become fewer than suggested by the expansive language of *Katz* quoted earlier. *See Katz*, 389 U.S. at 352, 88 S.Ct. 507.

In *Rakas*, the Supreme Court held that passengers did not have a justifiable expectation of privacy, and therefore no Fourth Amendment right, with regard to the search of an automobile despite the fact that they were, like the defendant in *Jones*, "legitimately on the premises." 439 U.S. at 141–42, 150, 99 S.Ct. 421. Thus, *Rakas* narrowed the definition of the scope of Fourth Amendment protection as it had been described eighteen years earlier in *Jones*.

In reaffirming the applicability of the legitimate expectation of privacy test in determining whether Fourth Amendment rights are implicated, the court in *Rakas* wrote:

> [I]t would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of

> privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law *or to understandings that are recognized and permitted by society.*

Id. at 143 n. 12, 99 S.Ct. 421 (emphasis added). There are civil cases and criminal prosecutions in which juries, as representatives of the community, decide whether an expectation of privacy is regarded as justified by society. *See e.g., Boddie,* 731 F.2d at 338–39; *Duncan,* 598 F.2d at 849–50. In such cases, it is true that judges are not the arbiters of what expectations of privacy society regards as reasonable. There are, however, also many exclusionary rule cases in which judges do make that decision. *See, e.g., United States v. Fultz,* 146 F.3d 1102, 1105 (9th Cir.1998)(holding that homeless person enjoyed reasonable expectation of privacy in closed cardboard box in garage of residence in which he kept his belongings); *United States v. Shanks,* 97 F.3d 977, 980 (7th Cir.1996) (holding that defendant lacked reasonable expectation of privacy in garbage located outside curtilage of home); *United States v. Gooch,* 6 F.3d 673, 677 (9th Cir.1993) (holding that defendant had reasonable expectation of privacy in his tent pitched on public campground); *United States v. Cardona–Sandoval,* 6 F.3d 15, 21 (1st Cir.1993) (holding that captain has reasonable expectation of privacy in all areas of his ship). In any event, for the purpose of defining the scope of the protection afforded by the Fourth Amendment, at least in cases involving factual situations not precisely addressed in prior precedents, juries and judges have the discretion to apply contemporary conceptions of what expectations should be deemed justified.

This has been done by the Supreme Court in Fourth Amendment cases decided since *Katz.* For example, in 1979, in *Rakas,* the court expressly overruled the holding in *Jones* that a person "legitimately on the premises" had standing to allege a violation of his Fourth Amendment rights. 439 U.S. at 142, 147–48, 99 S.Ct. 421.

In 1990, in *Olson,* the Supreme Court held that an individual's status "as an overnight guest [in another person's home] is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." 495 U.S. at 96–97, 110 S.Ct. 1684. The decision in *Olson* was rooted in what the court characterized as the "longstanding social custom" of "staying overnight in another's home." *Id.* at 98, 110 S.Ct. 1684. The Court stated that, "[f]rom the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside." *Id.* at 99, 110 S.Ct. 1684. The Court also noted that the host was "willing to share his house and his privacy with his guest." *Id.* Thus, Olson's status as an overnight guest was found to provide him with a Fourth Amendment right which could be violated by a search of the home in which he was staying. *Id.* at 100, 110 S.Ct. 1684.

It was the then recent decision in *Olson* that influenced the government to concede, and this court to hold, in *Ferrara* that those intercepted at 34 Guild Street were entitled to maintain motions to suppress based on alleged violations of both the Fourth Amendment and of Title III. *Ferrara,* 771 F.Supp. at 1281, 1292. However, in 1998, in *Carter,* the Supreme Court addressed a situation in which the defendants had met for several hours, with their unindicted host in her apartment, to engage in a purely commercial transaction. 119 S.Ct. at 471, 473–74. The defendants had not been to the apartment previously and did not stay overnight. *Id.* at 473–74. Although the defendants and their host were bagging cocaine, the government acknowledged that "the illegality of the host-guest conduct ... would not alter the

[Fourth Amendment] analysis." *Id.* at 483 (Ginsburg, J., dissenting).

The majority in *Carter* employed the two-part expectation of privacy test enunciated by Justice Harlan in *Katz*. *Id.* at 472–74. It stated that:

> If we regard the overnight guest in *Minnesota v. Olson* as typifying those who may claim the protection of the Fourth Amendment in the home of another, and one merely "legitimately on the premises" as typifying those who may not do so, the present case is obviously somewhere in between. But the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder, all lead us to conclude that respondents' situation is closer to that of one simply permitted on the premises. We therefore hold that any search which may have occurred did not violate their Fourth Amendment rights.
>
> Because we conclude that respondents had no legitimate expectation of privacy in the apartment, we need not decide whether the police officer's observation constituted a "search."

Id. at 474.

In his concurrence in *Carter*, Justice Scalia, joined by Justice Thomas, criticized the use of the two-part *Katz* test, stating:

> the only thing the past three decades have established about the *Katz* test (which has come to mean the test enunciated by Justice Harlan's separate concurrence in *Katz*, *) see* [*Katz*] at 360, 88 S.Ct. 507 ... is that, unsurprisingly, those "actual (subjective) expectation[s] of privacy" "that society is prepared to recognize as 'reasonable,'" (citation omitted), bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.

Id. at 477 (Scalia, J., concurring) (quoting *Katz*, at 361, 88 S.Ct. 507). Justices Scalia and Thomas urged abandoning the *Katz* test and adopting a more literal adherence to the text of the Fourth Amendment, which they characterized as having the "obvious meaning ... that each person has the right to be secure against unreasonable searches and seizures in his own person, house, papers, and effects." *Id.* at 475.

Four Justices disagreed with the majority's decision that the defendants' Fourth Amendment rights were not implicated in the circumstances of the *Carter* case. *See id.* at 480 (Breyer, J., concurring on other grounds, but "agree[ing] with Justice Ginsburg that respondents can claim Fourth Amendment protection"), and 481 (Ginsburg, J., with whom Stevens, J. and Souter, J. joined, dissenting). The dissent did not, however, urge a restoration of the "legitimately on the premises" standard stated in *Jones* and subsequently abandoned. *Id.* at 481. Rather, the dissenters reasoned that:

> when a homeowner or lessor personally invites a guest into her home to share in a common endeavor, whether it be for conversation, to engage in leisure activities, or for business purposes licit or illicit, that guest should share his host's shelter against unreasonable searches and seizures.

Id. In the view of the dissenters, the "logic of [*Olson*] extends to shorter term guests as well. *See* 5 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.3(b), at 137 (3d ed. 1996) ('[I]t is fair to say that the *Olson* decision lends considerable support to the claim that shorter-term guests also have standing.')." *Carter*, 119 S.Ct. at 482.

The dissenters in *Carter* also stated that the "Court's decision in this case veers sharply from the path marked in *Katz*." *Id.* at 483. This court agrees with this observation and further finds that *Carter* actually indicates that the result in *Katz* would be different if the same facts were, for the first time, presented to the Supreme Court today.

Katz spent a few moments in a public telephone booth, which was no one's home, and engaged in commercial conversation. *Katz*, 389 U.S. at 348, 88 S.Ct. 507. The defendants in *Carter* spent several hours in their host's home and engaged in commercial conduct and, presumably, some conversation. As described earlier, in *Katz*, the Court reasoned that an individual in a telephone booth—like a person in a business office, taxicab, or friend's apartment—had a legitimate expectation that what he said there would not be broadcast to the world. *Katz*, 389 U.S. at 352, 88 S.Ct. 507.

If the expectation of privacy validated in *Katz* remained legitimate today, it would logically follow that it is at least equally true that one who is invited to another's home, and conducts and discusses business with his host, for several hours, behind closed doors also has a justifiable expectation of privacy. Yet *Carter* recently held that he does not. Although *Katz*, 389 U.S. at 352, 88 S.Ct. 507, referred to the "vital role [of] . . . the public telephone in private communication," this court does not believe that reasonable members of contemporary American society would say that a person has a more legitimate expectation that he or she will not be overheard in a public telephone booth, where there is a foreseeable risk of rude intrusion, than behind locked doors in another's home. Thus, this court believes that the rulings in *Katz* and *Carter* are only reconcilable if it is candidly acknowledged that the expectations that the Supreme Court finds society deems justifiable have changed since *Katz* was decided in 1967, and Title III was enacted in 1968.

The lower courts have, as they must, faithfully followed the Supreme Court's decision in *Carter*. Thus, individuals briefly in someone else's apartment or motel room, for the purpose of conducting business, have recently been found not to have Fourth Amendment rights which could have been violated by a search of the premises. *United States v. Flores*, 172 F.3d 695, 699 (9th Cir.1999) (apartment); *Gordon*, 168 F.3d at 1226–27 (motel room of another person for which defendant had a key). However, after *Carter* an individual has been deemed to have a reasonable expectation of privacy concerning a warehouse he did not own or rent, but for which he had the only key, "giving him a measure of control and ability to exclude others," and in which he kept personal and business papers. *United States v. Chaves*, 169 F.3d 687, 690–91 (11th Cir.1999).

DeLuca has the burden of proving that he had a Fourth Amendment right that may have been violated by the electronic surveillance conducted at 34 Guild Street in order to maintain his motion to suppress on constitutional grounds. *Rakas*, 439 U.S. at 132 n. 1, 99 S.Ct. 421; *United States v. Mancini*, 8 F.3d 104, 107 (1st Cir.1993). *Carter* and its emerging progeny demonstrate that he has not satisfied that burden.

First, the government suggests that DeLuca lacks standing even under the "legitimately on [the] premises test" enunciated in *Jones*, which, as described earlier, was valid precedent when Title III was enacted, but later overruled. More specifically, the government claims that DeLuca has failed to bear his burden of proving that he was lawfully at 34 Guild Street. Rather, the government contends that the evidence indicates that DeLuca had never met the DiStefanos, let alone visited their home, and therefore should not be deemed to be an invitee or otherwise legitimately present at 34 Guild Street. If the factual issue of his status at 34 Guild Street was ultimately material to this court's decision concerning whether DeLuca has standing to litigate his motion to suppress, the court would provide him an opportunity to supplement the record because he did not during the lengthy evidentiary hearing have fair notice that his standing was in dispute. This issue is not, however, outcome determinative in any event. Thus, in view of the fact that DiStefano authorized Russo, Ferrara, Mercurio, and Federico to

use his home, and there is no proof that he restricted their right to invite others to join them, the court assumes for present purposes that DeLuca was lawfully at 34 Guild Street.

Similarly, the court assumes, without finally finding, that DeLuca had a subjective expectation that his conversation at 34 Guild Street would not be intercepted. The precautions that were taken to protect the secrecy of the location of the ceremony suggest that DeLuca may have feared that the government would try to bug the LCN induction ceremony in which he was participating. They also indicate, however, that DeLuca would have known that 34 Guild Street had been selected in an effort to assure that any such effort would not succeed. It is highly doubtful that DeLuca would have participated in the ceremony if he had actually believed that it was being bugged. In the circumstances, it is most appropriate to assume that DeLuca had a subjective expectation that he would not be intercepted rather than reopen the hearings to receive additional evidence on this issue. *Duncan*, 598 F.2d at 850 & n. 6 (person who merely suspects the possibility of interception may still have an actual expectation that he will not be intercepted); Fishman & McKenna, *supra*, § 2.22 at 2–30 to 2–31.

However, even drawing inferences from the facts in a manner most favorable to DeLuca, he was only an invitee to 34 Guild Street. DiStefano was not present to host DeLuca and share with him DiStefano's personal, legitimate expectation of privacy. DeLuca was only at 34 Guild Street for several hours and did not stay overnight. The purpose of his visit was purely business. In the circumstances, *Carter* compels the conclusion that any expectation of privacy that DeLuca had while at 34 Guild Street was not one that society would deem justified. *Carter*, 119 S.Ct. at 474; *Flores*, 172 F.3d at 698–99; *Gordon*, 168 F.3d at 1226–27. Thus, the electronic surveillance conducted at 34 Guild Street did not violate his Fourth Amendment rights.

There remains, however, the critical question of whether DeLuca is nevertheless an "aggrieved person" with standing to seek suppression under Title III. DeLuca in effect contends that if this matter had arisen in 1968, when Title III was enacted, he would for Fourth Amendment purposes have been deemed to have had a justified expectation that his conversation at 34 Guild Street would not have been intercepted, and also asserts that the statute codified and froze the then existing law regarding such justifiable expectations. This court concludes that DeLuca is correct concerning his characterization of the state of the law in 1968, but that in incorporating in § 2510(2) the two-part test for defining rights protected by the Fourth Amendment, Congress and the President recognized the dynamic nature of Fourth Amendment jurisprudence and intended that the definition of "oral communication" evolve in tandem with the future development of the law concerning the Fourth Amendment.

As described previously, when Title III was enacted in 1968, the Supreme Court's decision in *Jones*, which was favorably cited in *Katz*, provided standing to litigate a Fourth Amendment claim to anyone who was "legitimately on [the] premises." *Jones*, 362 U.S. at 267, 80 S.Ct. 725; *Katz*, 389 U.S. at 352 n. 11, 88 S.Ct. 507. As described in § III.3, *supra*, the legislative history of § 2510(11) states that the definition of "aggrieved person" "is intended to reflect existing law" and cites *Jones* as the first example of "existing law." *See* S.Rep. No. 90–1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2179–80. Moreover, *Katz* held that a person briefly using a public telephone booth for commercial conversation had a justified expectation of privacy. Thus, the court agrees that if this matter were being addressed in 1968, DeLuca, as a person legitimately at 34 Guild Street, and otherwise similarly situated to Katz, would have been deemed to have had a justified expectation that his conversation there would not be intercepted and, there-

fore, would have had standing as an "aggrieved person" to litigate his claim that the electronic surveillance conducted at 84 Guild Street violated Title III. *See United States v. Carroll*, 337 F.Supp. 1260, 1263 (D.D.C.1971) ("it appears evident that the factual situation presented in [*Katz*] was the model of a situation which [Title III] was designed to prohibit. And in *Katz*, it is apparent that the federal agents were unable to overhear the recorded conversations without a bugging device.").

However, in 1968, Congress and the President were also on clear notice of the dynamic quality of the law relating to the Fourth Amendment. As described earlier, the Supreme Court in *Katz* traced the changing interpretation of the Fourth Amendment from its decision in *Olmstead*, which was expressly overruled. Thus, when Title III was enacted it was foreseeable that the law concerning the Fourth Amendment would continue to evolve.

It is not clear from the text of § 2510(2) whether in addition to codifying the two-part *Katz* test, Title III also intended to freeze permanently the then current conception of the circumstances that would justify an expectation that a person would not be intercepted. The legislative history of § 2510(2) is, however, illuminating on this issue.

The section by section analysis of the statute which relates to § 2510(2) states:

> Paragraph (2) defines "oral communication" to include any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. *The definition is intended to reflect existing law. See Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Compare United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944) with Lee v. Florida, 191 So.2d 84 (1966), cert. granted, 389 U.S. 1033, 88 S.Ct. 762, 19 L.Ed.2d 820 (1968) Term.* The persons's subjective intent or the place where the communication is uttered is not necessarily the controlling factor. Compare *Linnell v. Linnell*, 249 Mass. 51, 143 N.E. 813 (1924), with *Freeman v. Freeman*, 238 Mass. 150, 130 N.E. 220 (1921). Nevertheless, such an expectation would clearly be unjustified in certain areas; for example, a jail cell (*Lanza v. New York*, 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384 (1962)) or an open field (*Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924)). Ordinarily, however, a person would be justified in relying on such expectation when he was in his home (*Silverman v. United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)) or office (*Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967)), but even there, his expectation under certain circumstances could be unwarranted, for example, when he speaks too loudly. *See State v. Cartwright*, 246 Or. 120, 418 P.2d 822 (1966), *cert. denied* 386 U.S. 937, 87 S.Ct. 961, 17 L.Ed.2d 810 (1967). The person's expectation that his communication is or is not subject to "interception," defined in paragraph (4), discussed below, is thus to be gathered and evaluated from and in terms of all the facts and circumstances.

S.Rep. No. 90–1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2178 (emphasis added). The foregoing statement that the "definition [of oral communication] is intended to reflect existing law," citing *Katz*, does not alone clarify whether the statute only intended to adopt Justice Harlan's two-part test or whether it is also intended to freeze the law concerning legitimate expectations as it was applied in *Katz*.[84]

84. In *Alderman*, the Supreme Court, in dicta, noted that in enacting Title III Congress could have extended the right to litigate a motion to suppress an alleged violation of the statute to persons who did not have standing to allege a Fourth Amendment violation, but did not do so. 394 U.S. at 175–76 & n. 9, 89 S.Ct. 961. The Court recognized that only an "aggrieved

However, the subsequent direction to "compare" *South–Eastern Underwriters Association* with *Lee* provides some meaningful guidance.

In 1968, the current version of *A Uniform System of Citation* (the "Bluebook") stated that the signal "Compare ... with" meant that the "[a]uthorities cited, taken together, offer some support for statement in text." Harvard Law Review Ass'n, *A Uniform System of Citation* 87 (11th ed.1967). With regard to the pertinent portion of the legislative history of Title III, *South–Eastern Underwriters Association* is the first cited case. It stands for the proposition that in enacting legislation Congress and the President may choose not to freeze its meaning at the time of enactment, but rather may intend that the statute be interpreted and applied in light of future judicial decisions. 322 U.S. at 556–58, 64 S.Ct. 1162.

More specifically, *South–Eastern Underwriters Association* addressed the question of whether the Sherman Act applied to the insurance industry. *Id.* at 535–36, 64 S.Ct. 1162. When the Sherman Act was enacted in 1890, the Supreme Court had held that insurance was not commerce and, therefore, only the states had the power to regulate the insurance industry. *Id.* at 533–34, 64 S.Ct. 1162. By 1944, when *South–Eastern Underwriters Association* was decided, the law concerning the Commerce Clause had evolved to the point where it was permissible for the federal government to regulate insurance. *Id.* at 552–53, 64 S.Ct. 1162. Thus, the question before the Court was whether the Sherman Act should be interpreted to apply to the insurance industry. In deciding that the Sherman Act was in 1944 applicable to the insurance industry, the Court stated:

> Appellees argue that the Congress knew, as doubtless some of its members did, that this Court had prior to 1890 said that insurance was not commerce and was subject to state regulation, and that therefore we should read the Act as though it expressly exempted that business. But neither by reports nor by statements of the bill's sponsors or others was any purpose to exempt insurance companies revealed. And we fail to find in the legislative history of the Act an expression of a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power. *Cf. Helvering v. Griffiths*, 318 U.S. 371, 63 S.Ct. 636, 87 L.Ed. 843; *Parker v. Motor Boat Sales*, 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184. We have been shown not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power. On the contrary, all the acceptable evidence points the other way. That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements such as the indictment here charges admits of little, if any, doubt. The purpose was to use that power to make of ours, so far as Congress could under our dual system, a competitive business economy.

Id. at 556–59, 64 S.Ct. 1162. Thus, the citation to *South–Eastern Underwriters Association* indicates an understanding that Congress and the President had the power to link the scope of a statute's applicability to future judicial decisions and intended to exercise that power in crafting the definition of "oral communication" employed in § 2510(2).

person" may move to suppress the contents of an oral communication for a violation of Title III and stated that the "Act's legislative history indicates that 'aggrieved person' ... should be construed in accordance with existent standing rules." *Id.* This court believes that the dicta in *Alderman* essentially presents the same issue as the legislative history of § 2510(2) concerning the meaning of "existing law," and does not indicate how that issue should be resolved.

The import of the citation to *Lee* in the legislative history of Title III is less clear. In the cited decision in *Lee*, the District Court of Appeals of Florida traced successive decisions of the Florida courts regarding the right of the government to overhear and record conversations on what the intercepted speakers knew were party lines. 191 So.2d at 85–86. Taken together, however, *South–Eastern Underwriters Association* and *Lee* support the conclusion that § 2510(2) was intended to assure that Justice Harlan's two-part standard for determining standing would be employed in Title III cases and that relevant future judicial decisions interpreting the Fourth Amendment be employed in applying that standard.

The legislative history of § 2510(11), defining "aggrieved person," also reflects the understanding of Congress that the law concerning standing to allege a violation of the Fourth Amendment was evolutionary in character and that this dynamic quality was an element of existing law. S.Rep. No. 90–1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2179–80. As indicated earlier the legislative history states that the definition of "aggrieved person" "is intended to reflect existing law" and cites *Jones* as the first case that represents existing law. *Id.* The last case cited is *United States ex rel. Deforte v. Mancusi*, 379 F.2d 897 (2d Cir.1967). In *Mancusi*, the Court of Appeals for the Second Circuit described "the law's evolution on [Fourth Amendment] 'standing.'" *Id.* at 902. It also stated with regard to *Jones* that:

> while [Jones] informs us as to what is not required to confer standing, the Supreme Court has avoided formulating, and perhaps deliberately, any specific rules for determining what is required. The Court apparently recognized that sweeping legal pronouncements which are meaningful are difficult to articulate because the individual's right to privacy in the particular case often conflicts with and must be balanced against society's need for efficient and vigorous police protection. It appears that a proper balance can be struck only on a 'case-by-case basis.'

Id. Thus, the reference to *Mancusi* in the legislative history of § 2510(11) reinforces the view that the framers of Title III intended and expected that future judicial decisions would be employed in deciding the threshold standing issue of when a subjective expectation that a conversation would not be intercepted would be deemed justifiable.

Utilizing post-Title III decisions in Fourth Amendment cases regarding reasonable expectations of privacy is consistent with the Court of Appeals for the First Circuit's observation that because "Title III is designed to protect privacy interests similar to those reflected in the Fourth Amendment ... Fourth Amendment precedent is highly relevant" in deciding some Title III issues. *Cunningham*, 113 F.3d at 294 (applying post–1968 Fourth Amendment precedent to deciding Title III issue).[85] It is also compatible with the Court of Appeals for the Second Circuit's observation that the definition of "aggrieved person" "is to be construed in accordance with standing requirements usually applied to suppression claims under the fourth amendment." *Gallo*, 863 F.2d at 192 (citing *Alderman*, 394 U.S. at 175–76 & n. 9, 89 S.Ct. 961). *See also Bianco*, 998 F.2d at 1122.

Moreover, there was a logical reason for Congress and the President to incorporate in the definition of "oral communication" the foreseeably evolving constitutional law regarding violations of the Fourth Amendment. Title III was intended to "con-

85. In the instant case the government has indicated that in light of *Carter*, if *Cunningham* were to arise now it would argue that the defendant did not have a justifiable expectation of privacy concerning the conversations in a tavern at issue in *Cunningham*, 113 F.3d at 290, and, therefore, was not an "aggrieved person" with standing to move to suppress the interception of those conversations. Apr. 13, 1999 Tr. at 67.

form[ ] to the constitutional standards set out in" *Berger* and *Katz* and, therefore, to be a statute that would pass constitutional muster. *See* S.Rep. No. 90–1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2113. If, as DeLuca argues, the statute froze the jurisprudence concerning justifiable expectations of privacy in 1968 and, as might have then been predicted based on the trajectory of the law from *Olmstead* to *Katz*, future decisions provided more protection for personal privacy than *Katz*, in some circumstances warrantless electronic surveillance might now be permissible under Title III, but nevertheless violate the Fourth Amendment. In such cases Title III would be unconstitutional as applied. Thus, prosecutions would be imperilled in cases in which the government had complied with the statute. By incorporating future judicial decisions concerning justifiable expectations of privacy for Fourth Amendment purposes in the definition of "oral communication[s]" protected by Title III, the framers of the statute would have prevented such cases from ever arising.

In summary, courts, including the Court of Appeals for the First Circuit in *Rose*, have uniformly stated in criminal cases that a person has a justifiable expectation that he will not be intercepted within the meaning of § 2510(2) if he has a justifiable expectation of privacy for Fourth Amendment purposes. In the context of Title III "privacy" relates only to being overheard rather than to being seen. When Title III was enacted, Congress and the President knew that Fourth Amendment law was evolutionary. The relevant legislative history of Title III indicates that it was intended that future Fourth Amendment decisions concerning reasonable expectations of privacy be employed in interpreting § 2510(2)'s definition of "oral communication" and § 2510(11)'s definition of "aggrieved person." *Carter* represents the present state of the relevant Fourth Amendment law. The decision in *Carter* compels the conclusion that DeLuca did not have a reasonable expectation of privacy at 34 Guild Street. Thus, he did not have a Fourth Amendment right that could have been violated by the bugging of that location. Accordingly, his conversation at 34 Guild Street did not constitute an "oral communication" within the meaning of § 2510(2). Therefore, DeLuca is not an "aggrieved person" with standing to maintain his motion to suppress the electronic surveillance conducted there.

This decision would perhaps be surprising to some of those who participated in the enactment of Title III. In 1968, the direction of the law from *Olmstead* to *Katz* would probably have suggested that the future evolution of Fourth Amendment jurisprudence would, if anything, provide even more protection for personal privacy than *Katz*. As described in this decision, the Fourth Amendment as interpreted in *Carter* provides less protection for privacy in 1999 than it did as interpreted in *Katz* in 1967.

It might be argued that if this development had been anticipated, Congress and the President would not have linked the statutory definition of "oral communication" to the evolving Fourth Amendment law concerning reasonable expectations of privacy because they wished to preclude electronic surveillance in some circumstances in which conventional searches and seizures were permissible. Congress and the President had the authority to do this. *Alderman*, 394 U.S. at 175, 89 S.Ct. 961. Indeed, they could have provided standing to litigate an alleged violation of Title III to anyone whose conversation was intercepted by a bug just as they provided, in § 2510(1), standing to anyone overheard speaking on a telephone that was tapped. The statute and its legislative history, however, do not manifest the intent to do this. In the circumstances, this court lacks the legitimate authority to, in effect, rewrite the statute based on a hypothesis concerning possible, unarticulated motives or expectations of the framers of Title III. *See United States v. Constantine*, 296 U.S. 287, 299, 56 S.Ct. 223, 80 L.Ed. 233 (1935)

(Cardozo, J., dissenting) ("There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body . . ."); Felix Frankfurter, "The Reading of Statutes," in *Of Law and Men* 60–61 (1956).

Nevertheless, the court confesses that the decision that DeLuca lacks standing to maintain his motion to suppress raises some disturbing questions. DeLuca argues that this decision suggests that the government may engage in electronic surveillance without a warrant in many circumstances in which it has been previously understood that court authorization was required. This concern may be well founded. As indicated earlier, the government has in this case suggested that it could properly place a bug at a table in a tavern without a warrant because its patrons do not have a justified expectation that their conversation in such a place will not be overheard. Apr. 13, 1999 Tr. at 67. Therefore, the government has indicated that it could have argued, and the Court of Appeals for the First Circuit should have found, that the defendant in *Cunningham*, 113 F.3d 289, lacked standing to litigate his motion to suppress. DeLuca also contends that if this court's decision concerning his lack of standing is correct, the government may often have the right to engage in roving electronic surveillance without making the showings required by 18 U.S.C. § 2511(11)(a), and obtaining a warrant, because Title III would not be applicable if it were impractical to specify the place to be bugged because the target was planning to meet others, but not stay overnight, at a location that was not his own home or office, and which he had not used before for other purposes.

The troublesome hypothetical questions that DeLuca raises are not now before the court and, therefore, need not be decided. In general, however, this court believes that it would be prudent and appropriate for the government to continue to seek warrants even in circumstances in which it might later be able to argue successfully that no "oral communication" was intercepted. *See United States v. Harrelson*, 754 F.2d 1153, 1171 (5th Cir.1985). It appears, however, that the government has more discretion in this area than it imagined until recently.

If the decision concerning DeLuca's lack of standing in this case is of concern to Congress and the President, they can, of course, amend Title III. In this case the court has been required to decide many issues regarding the proper interpretation of Title III which would benefit from being clarified by Congress and the President. These include whether the judicially crafted *Franks* test should be utilized when Title III has been violated, § III.2.B, *supra*, and whether a judicial remedy exists for the failure of the Department of Justice official authorizing an application for a warrant to make the informed judgment contemplated by § 2616(1), § III.2.A, *supra*. With regard to the question of standing, Congress and the President might decide that more protection should be afforded concerning the interception of conversations than is provided by the Fourth Amendment with regard to conventional searches and seizures, perhaps because electronic surveillance is conducted without pre-search notice, § III.2.C, *supra*, or because they decide that special weight should be given to protecting the confidentiality of communications, *see* 5 Walter LaFave, *Search and Seizure*, (3d ed.1996) § 2.2(e) at 443–44. However, these are decisions concerning the scope of statutory law which are to be made by the political branches of our government.

In addition, the holding that DeLuca and those similarly situated lack standing to litigate alleged violations of Title III might prompt higher courts, including the Court of Appeals for the First Circuit, to revise their prior decisions that uniformly state in criminal cases that a person does not have a justifiable expectation that he will not be intercepted for the purposes of § 2510(2) if he does not have a reasonable expectation of privacy with regard to being

overheard for Fourth Amendment purposes. It could, for example, be reasoned that *Katz* held that the Fourth Amendment protects people not places, and that a person has the right in a telephone booth, and by implication in a private home, to exclude the "uninvited ear." *Katz*, 389 U.S. at 352, 88 S.Ct. 507. Arguably, the import of the previously quoted legislative history concerning § 2510(2) is simply that an individual has a legitimate expectation that he will not be intercepted by a listening device if he has a reasonable expectation that he will not be overheard by the naked ear. *See Walker*, 911 F.2d at 1579; *Carroll*, 337 F.Supp. at 1263.

The decisions in cases such as *Rose* and *John Doe Trader Number One* would not have been different if this standard had been employed. For example, in *Rose* the Court of Appeals for the First Circuit found that any subjective expectation of privacy the defendants may have had was not reasonable because they "were broadcasting on the ham radio frequency, commonly known to be a means of communication to which large numbers of people have access as receivers." 669 F.2d at 26. Similarly, in *John Doe Trader Number One*, the tape-recording at issue was made by an FBI agent who was "clearly present only a few feet from Doe and was able to overhear and record each of Doe's statements." 894 F.2d at 243. Accordingly, the statements in *Rose* and *John Doe Trader Number One* equating the statutory right not to be intercepted with the Fourth Amendment right to privacy are, arguably, unnecessarily broad.

Moreover, it might be found that this court's reliance on the references in the legislative history of Title III to *South–Eastern Underwriters Association* and *Mancusi* in discerning statutory intent to have the meaning of § 2510(2) follow the evolution of Fourth Amendment jurisprudence is inconsistent with the Court of Appeals for the First Circuit's statement in *Vest I* that, "Congress clearly intended that the provisions of section 2518(10)(a), which defines the class entitled to make a motion to suppress, rather than the judicially-developed notions of 'standing,' would control the question of who could bring such a motion." 813 F.2d at 482. This court, however, does not believe that it has disregarded applicable First Circuit precedent because the quoted statement in *Vest I* was only dicta. It did not emerge from any consideration of the issue presented in the instant case.[86]

For the reasons set forth previously, this court finds that the weight of existing case law, which is supported by the pertinent legislative history, indicates that DeLuca lacks standing to maintain his motion

86. It might also be reasoned that Title III recognizes that there are circumstances in which a person knows that he is being overheard, but justifiably expects that he will not be recorded, because 18 U.S.C. §§ 2511(2)(c) and (2)(d), which authorize the consensual recording of conversations in certain circumstances, would otherwise be superfluous with regard to oral communications because when Title III was enacted the Supreme Court had held that an individual did not for Fourth Amendment purposes have a legitimate expectation that someone to whom he was speaking in person would not record his statements. *See United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971); *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). *See also In re High Fructose Corn Syrup Antitrust Litig.*, 46 F.Supp.2d at 825–26. As has been noted in rejecting this reasoning, however, §§ 2511(2)(c) and (2)(d) also apply to "wire and electronic types of communication, which, at least in the case of wire communications, are protected against interception regardless of the speaker's reasonable expectation of privacy." *In re High Fructose Corn Syrup Antitrust Litig.*, 46 F.Supp.2d at 827. Absent § 2511(2)(c) and (2)(d), consensual monitoring of telephone conversations would not be permitted. It appears to this court that although redundant in view of the definition of "oral communication" in § 2510(2), oral communications were included in §§ 2511(2)(c) and (2)(d) to make clear that the statute authorized consensual monitoring of person to person discussions as well as telephone conversations. The failure to include oral communications in those provisions could have given the mistaken impression that consensual monitoring of such discussions was not permitted.

to suppress the electronic surveillance conducted at 34 Guild Street. Although this is a challenging issue on which judges might differ, it is not clear to this court that the Court of Appeals for the First Circuit, or indeed the Supreme Court, would, in effect, revise existing jurisprudence to find that DeLuca does have standing. Thus, his motion to suppress is being denied. *See United States v. Salvucci*, 599 F.2d 1094, 1098 (1st Cir.1979) ("Until the Supreme Court rules on this question, we are not prepared to hold that the automatic standing rule of *Jones* has been implicitly overruled by *Simmons*. That is an issue which the Supreme Court must resolve."), *rev'd*, 448 U.S. 83, 95, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980).

As DeLuca's motion to suppress is being denied for lack of standing, it is not necessary for the court to decide the merits of the issues he has sought to litigate. If this court's decision concerning standing is appealed and reversed, the Court of Appeals for the First Circuit may in the process also clarify whether the standards of *Franks* or *Giordano* should be employed in deciding DeLuca's motion to suppress. *See* § III.2.B, *supra*. Thus, it is most appropriate for this court to decline to address the merits of DeLuca's motion at this time. The court will issue the additional necessary findings of fact and conclusions of law if its decision concerning DeLuca's lack of standing is reviewed and this case is remanded.

IV. CONCLUSION

In view of the foregoing, Flemmi's motion to dismiss this case against him based on an alleged agreement that he would not be prosecuted in exchange for his service as an FBI informant is being denied. In addition, he lacks standing to maintain his motion to suppress the electronic surveillance conducted at Vanessa's on Fourth Amendment or Title III grounds. Similarly, DeLuca lacks standing to maintain his motion to suppress the electronic surveillance conducted at 34 Guild Street.

As also explained, however, several of Flemmi's motions are meritorious. He has proven that suppression of the 1984–85 electronic surveillance, and any evidence derived from it, is required. In addition, Flemmi has demonstrated that he had an enforceable agreement that, in return for his assistance to the FBI, none of the evidence intercepted at 98 Prince Street, Vanessa's, or 34 Guild Street would be used against him directly or indirectly. It was, therefore, improper for the government to present evidence intercepted at 98 Prince Street and 34 Guild Street to the grand juries which returned indictments against Flemmi. It is not possible to decide on the present record whether evidence derived from the 1984–85 electronic surveillance, 98 Prince Street, Vanessa's, and/or 34 Guild Street was presented to those grand juries.

Additional hearings will be necessary to decide this question and to determine whether the improper presentation of evidence to the grand juries which returned indictments against Flemmi requires that the case against him be dismissed. In addition, the parties must address, and the court may have to decide, the related issues of whether the case against Flemmi should be dismissed to vindicate his constitutional right to Due Process or as an exercise of the court's supervisory powers. The additional hearings to be conducted will also permit the court to identify the evidence which will be ordered excluded at trial if the case against Flemmi continues, including evidence that may be excluded on the possible alternative ground that if unauthorized promises of immunity were made, Flemmi's statements concerning 98 Prince Street, Vanessa's, and 34 Guild Street were involuntary.

In essence, the record for deciding Flemmi's motions to dismiss and suppress is incomplete. Therefore, the court will hold the hearings necessary to determine whether this case must be dismissed and, if not, the scope of the evidence to be excluded at trial before entering any Order that may be appealable by the United

States pursuant to 18 U.S.C. §§ 2518(10)(b) or 3731.[87]

V. ORDER

Accordingly, it is hereby ORDERED that:

1. Flemmi's motion to dismiss based on an alleged agreement that he would not be prosecuted is DENIED.

2. Flemmi's motion to suppress the electronic surveillance conducted at Vanessa's Restaurant because of alleged violations of the Fourth Amendment and Title III is DENIED.

3. DeLuca's motion to suppress the electronic surveillance conducted at 34 Guild Street is DENIED.

4. A hearing to plan the future proceedings required by the decisions described in this Memorandum, and to address related issues including discovery, will be held on October 19, 1999, at 9:30 a.m.

SYSTEM MANAGEMENT, INC., Forget Me Not Services, Inc., Jose Cruz, Victor Laboy, Juan Ayala and Juan Ortega, on their own behalf and that of similarly situated contract cleaning companies, employees, and former employees, Plaintiff,

v.

Kenneth LOISELLE, Defendant.

No. Civ.A. 99-10744-WGY.

United States District Court,
D. Massachusetts.

March 9, 2000.

Corporations engaged in the business of providing janitorial and custodial services throughout Massachusetts and four individuals who had been employed as janitors or custodians at various locations within Massachusetts brought action against contractor under civil remedies provisions of Racketeer Influenced and Corrupt Organizations Act (RICO). Upon contractor's motion to dismiss, the District Court, Young, Chief Judge, held that: (1) contractor's alleged transportation of illegal aliens within the United States did not constitute a predicate act under RICO; (2) contractor's execution and mailing to college a addendum to cleaning services contract and repeated mailing of invoices and receipt of payments constituted acts of mail fraud which could serve as predicate acts for civil RICO claim; (3) corporate competitors adequately pleaded causation element of civil RICO claim; and (4) actual reliance was not a requirement of a mail fraud claim used as a predicate act for a civil RICO claim.

Motion granted in part and denied in part.

1. Racketeer Influenced and Corrupt Organizations ⇐26

While two predicate acts are required, they may be insufficient to support a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim if they do not establish a pattern. 18 U.S.C.A. § 1962(a, c).

2. Racketeer Influenced and Corrupt Organizations ⇐28

To prove a pattern of racketeering activity so as to support a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim, the predicate acts must be related and constitute or pose a threat of continued criminal activity. 18 U.S.C.A. § 1962(a, c).

87. The court also intends to decide the motion to suppress the evidence intercepted at the Hilton Hotel on December 11, 1991, prior to deciding the motion to dismiss because if that motion to suppress is meritorious, it has implications for the merits of the motion to dismiss.

district court did not address this argument. On remand, the court should consider the federal defendants' motion to dismiss anew, focusing on the arguments it has not yet addressed.

III.

The district court's order dismissing plaintiffs' Title VII claims with prejudice is ***vacated*** and the case is ***remanded*** for entry of an order of dismissal consistent with this opinion as to the MVM defendants, and for reconsideration of the federal defendants' motion to dismiss.

UNITED STATES, Appellee,

v.

John J. CONNOLLY, Jr., Defendant, Appellant.

No. 02-2201.

United States Court of Appeals, First Circuit.

Heard May 9, 2003.

Decided Aug. 14, 2003.

Following jury trial, defendant, a former Federal Bureau of Investigation (FBI) agent, was convicted in the United States District Court for the District of Massachusetts, Joseph L. Tauro, J., of racketeering under the Racketeer Influenced and Corrupt Organizations Act (RICO), obstruction of justice, and making false statements. Defendant appealed. The Court of Appeals, Lipez, Circuit Judge, held that: (1) finding of enterprise was supported by sufficient evidence; (2) finding of pattern of racketeering activity was supported by sufficient evidence; (3) defendant was not entitled to fact-finding as to underlying offense that would determine applicable sentencing guideline range; and (4) defendant was not entitled to inquiry into alleged juror misconduct.

Affirmed.

1. Criminal Law ⇐1139, 1144.13(3, 5), 1159.2(7)

In evaluating a claim of insufficiency of the evidence, Court of Appeals reviews the record de novo, and Court will affirm the conviction if, after assaying all the evidence in the light most amiable to the government, and taking all reasonable inferences in its favor, a rational factfinder could find, beyond a reasonable doubt, that the prosecution successfully proved the essential elements of the crime.

2. Criminal Law ⇐1144.13(3), 1159.2(7)

To uphold a conviction challenged for insufficiency of the evidence, the Court of Appeals need not believe that no verdict other than a guilty verdict could sensibly be reached; rather, the operative inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

3. Criminal Law ⇐1159.2(2)

Court of Appeals will give considerable deference to a jury's assessment of the evidence and will disturb the jury's verdict based on alleged insufficiency of evidence only if it is premised upon evidentiary interpretations and illations that are un-

lems with this approach, all claims except the Title VII claims are now gone from the case because plaintiffs abandoned those issues by declining to argue them on appeal.

reasonable, insupportable, or overly speculative; Court will reverse only if the verdict is irrational.

4. Racketeer Influenced and Corrupt Organizations ⇐25, 35

An "enterprise," under the Racketeer Influenced and Corrupt Organizations Act (RICO), is an entity comprising a group of persons associated together for a common purpose of engaging in a course of conduct; the "pattern of racketeering activity" is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C.A. §§ 1961(4, 5), 1962(c).

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

5. Racketeer Influenced and Corrupt Organizations ⇐26, 35, 95

An enterprise, under the Racketeer Influenced and Corrupt Organizations Act (RICO), is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit, while a pattern of racketeering activity is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise; while the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. 18 U.S.C.A. §§ 1961(4, 5), 1962(c).

6. Racketeer Influenced and Corrupt Organizations ⇐93

In a prosecution under the Racketeer Influenced and Corrupt Organizations Act (RICO), the existence of an enterprise at all times remains a separate element which must be proved by the Government. 18 U.S.C.A. § 1962(c).

7. Racketeer Influenced and Corrupt Organizations ⇐36

To constitute an "enterprise" under Racketeer Influenced and Corrupt Organizations Act (RICO), an organization need not be formal or have an ascertainable structure; to the contrary, it need only be a group of persons associated together for a common purpose of engaging in a criminal course of conduct. 18 U.S.C.A. §§ 1961(4), 1962(c).

8. Racketeer Influenced and Corrupt Organizations ⇐95

Ongoing nature of alleged enterprise under Racketeer Influenced and Corrupt Organizations Act (RICO) was supported by sufficient evidence, despite jury's finding that several alleged racketeering acts were unproven beyond a reasonable doubt; government introduced significant evidence of existence of enterprise apart from specified racketeering acts, and specified acts may have been unproven for reasons unrelated to existence of association-in-fact enterprise. 18 U.S.C.A. §§ 1961(4), 1962(c).

9. Racketeer Influenced and Corrupt Organizations ⇐39

Association-in-fact allegedly dedicated to protection of its members and furtherance of members' criminal activities was sufficiently organized to constitute "enterprise" and support conviction of member, who was former Federal Bureau of Investigation (FBI) agent, under Racketeer Influenced and Corrupt Organizations Act (RICO), even if most members of such enterprise were also members of separate criminal organization; group was cohesive over time, membership shared resources and revenues, and group had discernable structure. 18 U.S.C.A. §§ 1961(4), 1962(c).

10. Racketeer Influenced and Corrupt Organizations ⇐26, 28

It is not the number of predicates that determines whether alleged predicate acts constitute a pattern of racketeering activi-

ty under Racketeer Influenced and Corrupt Organizations Act (RICO); rather, it is the relationship that they bear to each other or to some external organizing principle, and the two factors most pertinent to this determination are relatedness and continuity. 18 U.S.C.A. §§ 1961(5), 1962(c).

11. Racketeer Influenced and Corrupt Organizations ⇐29

Because Racketeer Influenced and Corrupt Organizations Act (RICO) was intended by Congress to apply only to enduring criminal conduct, predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy continuity requirement for establishing a pattern of racketeering activity. 18 U.S.C.A. §§ 1961(5), 1962(c).

12. Racketeer Influenced and Corrupt Organizations ⇐28

Alleged predicate acts had sufficient continuity to constitute "pattern of racketeering activity," in violation of Racketeer Influenced and Corrupt Organizations Act (RICO), as at least three different episodes were independently planned and executed over period of years, and acts involved threat of future criminal conduct, in that acts were part of an ongoing criminal enterprise undertaken to facilitate future criminal acts by other members of the enterprise. 18 U.S.C.A. §§ 1961(5), 1962(c).

13. Criminal Law ⇐1042

Defendant's challenge to trial court's application of sentencing guidelines would be reviewed for plain error, where defendant raised such objection for first time on appeal.

14. Criminal Law ⇐1042

On plain error review of defendant's challenge to application of sentencing guidelines, defendant bore burden of proving (1) an error, (2) that was plain, and (3) that affected substantial rights; if he could make such showing, defendant had to then demonstrate that the error seriously impaired the fairness, integrity, or public reputation of judicial proceedings.

15. Sentencing and Punishment ⇐761

District court was not required to conduct any fact-finding as to what constituted underlying offense for which defendant obstructed justice, in determining sentence of defendant for violation of Racketeer Influenced and Corrupt Organizations Act (RICO), as there was no risk as to over- or under-charging of indictment, and there was no genuine dispute that obstruction was targeted to prosecution that included charges of first-degree murder. 18 U.S.C.A. § 1962(c); U.S.S.G. §§ 2E1.1, 2J1.2(c), 2X3.1, 18 U.S.C.A.

16. Criminal Law ⇐1042

Even if fact-finding inquiry was warranted as to what constituted underlying offense for which defendant obstructed justice, for purpose of sentencing defendant for violation of Racketeer Influenced and Corrupt Organizations Act (RICO), district court's failure to conduct such inquiry did not constitute plain error. 18 U.S.C.A. § 1962(c); U.S.S.G. §§ 2E1.1, 2J1.2(c), 2X3.1, 18 U.S.C.A.

17. Criminal Law ⇐868

Defendant was not entitled to inquiry into alleged juror misconduct that consisted of taking notes outside of trial and relying on such notes during deliberations, despite court's admonition to jurors that they could not take notes during trial; alleged note-taking was not actually inconsistent with court's instructions, and defendant could not specify any prejudice resulting from potential use of notes during deliberations. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

18. Criminal Law ⇐1155

Court of Appeals reviews the district court's response to an allegation of juror misconduct only for abuse of discretion.

19. Criminal Law ⇐957(2)

Rule prohibiting admission of juror testimony to impeach a jury verdict is based on significant policy considerations, including finality, maintaining the integrity of the jury system, encouraging frank and honest deliberations, and the protection of jurors from subsequent harassment by a losing party. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

20. Criminal Law ⇐868

A court should only conduct an inquiry into whether extraneous prejudicial information was improperly brought to jury's attention when reasonable grounds for investigation exist, i.e., there is clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant. Fed. Rules Evid.Rule 606(b), 28 U.S.C.A.

21. Criminal Law ⇐957(2)

Intrinsic influences on a jury's verdict are not competent to impeach a verdict.

Andrew Nathanson, with whom Tracy A. Miner, John J. Tangney, Jr., and Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. were on brief, for appellant.

William J. Nardini, with whom John H. Durham and Michael J. Sullivan, United States Attorney, were on brief, for appellee.

Before LIPEZ, Circuit Judge, PORFILIO, Senior Circuit Judge,* HOWARD, Circuit Judge.

LIPEZ, Circuit Judge.

At the conclusion of a three week trial, a federal jury found former Federal Bureau of Investigation ("FBI") agent John J. Connolly, Jr., guilty of one count of racketeering under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), two counts of obstruction of justice, 18 U.S.C. § 1503, and one count of making false statements, 18 U.S.C. § 1001. The district court subsequently imposed a sentence of 121 months of imprisonment, followed by a two-year period of supervised release. Connolly now appeals his RICO conviction, arguing that he is entitled to a judgment of acquittal on the RICO charge because the government failed to prove two critical elements of its RICO charge—participation in an "enterprise," and a "pattern of racketeering activity." *See id.* § 1961(4), (5) (defining "enterprise" and "pattern of racketeering activity").[1]

Connolly also appeals his sentence, arguing that the district court erred in its calculation of the applicable offense level pursuant to sections 2E1.1, 2J1.2, and 2X3.1 of the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines"). Finally, Connolly argues that the district court erred when it denied his request to convene a post-verdict evidentiary hearing to inquire into the propriety of alleged note-taking by jurors. He asks that we remand the case to the district court for an inquiry into possible juror misconduct.

Finding no reason to disturb Connolly's conviction or sentence or to remand to the district court, we affirm.

* Of the United States Court of Appeals for the Tenth Circuit, sitting by designation.

1. Connolly does not appeal his convictions for obstruction of justice and making a false statement.

I.

We provide some general background facts here, saving our more detailed discussion of the evidence for our assessment in Part II of Connolly's claims of evidentiary insufficiency. Connolly joined the FBI in 1968; from 1973 until 1990 he served as an agent in the Bureau's Boston office. During his tenure, he was responsible for handling several high-ranking, confidential informants with connections to two criminal syndicates—the Winter Hill Gang, and the New England branch of La Cosa Nostra. According to the government, the Winter Hill Gang is a "clandestine criminal organization engaged in multiple crimes, including murder, bribery, extortion, loan sharking, and illegal gambling in the greater Boston, Massachusetts area." La Casa Nostra—a considerably larger, better known, and more established criminal organization—similarly engages in illegal activities in and around Boston. Despite the fact that the Winter Hill Gang and La Cosa Nostra were often rivals, members of the two groups frequently cooperated in criminal undertakings.

Two of the informants for whom Connolly was responsible, James Bulger and Stephen Flemmi, were members of the Winter Hill Gang. Bulger and Flemmi reported on the activities of both the Gang and La Cosa Nostra for over a decade. Shortly after Connolly retired from the FBI in 1990, however, Bulger and Flemmi were "closed" as FBI informants—i.e., the FBI no longer desired their services.

After Bulger and Flemmi ceased to serve as informants, their involvement with the Gang's criminal activities nonetheless continued. For example, at some point in the early 1990s, Flemmi, working with the "boss" of La Cosa Nostra's Boston family, Frank Salemme, ran an illegal "numbers" operation in the Boston area. On January 10, 1995, a federal grand jury indicted Bulger, Flemmi, Salemme, and several other persons for multiple counts of illegal gambling, extortion, assault, bribery, obstruction of justice, loansharking, and RICO violations. *See United States v. Salemme*, No. 94–CR–10287–MLW–2 (D.Mass. Jan. 10, 1995) (indictment). Flemmi was quickly arrested and taken into custody. Bulger and Salemme, however, forewarned of the pending indictment, disappeared a few days before its issuance. The authorities apprehended Salemme eight months later. Bulger remains at large.

The instant criminal proceeding began in December 1999, when another federal grand jury indicted Flemmi and Connolly on charges of racketeering, obstruction of justice, and conspiracy.[2] A superceding indictment was filed in October 2000 with additional charges of obstruction of justice and making a false statement. According to the superceding indictment, Connolly had led a double-life for over two decades. While serving as an FBI agent, Connolly had been intimately involved in the criminal activities of the Winter Hill Gang and its members, receiving and making bribes from and on behalf of members of the Gang. Even after his retirement from the Bureau, Connolly allegedly continued to exploit his connections within the Bureau to become privy to confidential information that he would then pass along to members of the Winter Hill Gang.

Specifically, the superceding indictment included nine counts, which we summarize as follows:

2. The indictment also named Bulger as a defendant on one count. That count was ultimately dismissed on the government's motion after the issuance of the superceding indictment (which did not name Bulger as a defendant).

Counts 1 & 2—RICO and Conspiracy to Violate RICO, alleging that Connolly had, through a pattern of racketeering activity, participated in the affairs of an association-in-fact enterprise whose members included Bulger, Flemmi, himself, and unidentified others. The purpose of the enterprise was to protect Bulger, Flemmi, and their associates (including Salemme and members of the Winter Hill Gang) from arrest and prosecution, and to facilitate their criminal activities. The two counts detail fourteen different "racketeering acts," including allegations of bribery, extortion, and obstruction of justice.

Count 3—Conspiracy to Obstruct Justice, alleging that Connolly and Flemmi, together with others, had conspired to obstruct justice in the prosecution of Bulger, Flemmi, and Salemme in *United States v. Salemme.*

Count 4—Obstruction of Justice, alleging that Connolly had informed Salemme of the pending indictment in *United States v. Salemme.*

Count 5—Obstruction of Justice, alleging that Flemmi had also provided Salemme with news of the pending indictment.

Count 6—Obstruction of Justice, alleging that Connolly had caused an anonymous letter to be sent to Judge Mark Wolf who was presiding over *United States v. Salemme.* The letter purported to come from three unnamed Boston Police Officers and credited certain claims made by the defense.

Counts 7 & 8—Obstruction of Justice, alleging that Connolly had persuaded Flemmi to give false testimony in *United States v. Salemme.* Specifically, Connolly persuaded Flemmi to testify that another FBI agent—and not Connolly—had alerted him and Bulger to the pending indictment.

Count 9—False Statement, alleging that Connolly had lied to an FBI agent when he told the agent that he had not been in contact with the defense team in *United States v. Salemme.*

Flemmi ultimately pleaded guilty to Counts 3 and 5 (the only two counts in which he was named) and was sentenced to 41 months of imprisonment.

In May 2002, the trial against Connolly began on Counts 1, 4, 6, 7, and 9.[3] At the close of the government's case and at the close of all of the evidence, Connolly moved for a judgment of acquittal pursuant to Fed.R.Crim.P. 29. The court denied the motions. The jury returned guilty verdicts against Connolly on four of the five counts at issue—Counts 1, 6, 7 and 9—and acquitted on Count 4. Connolly renewed his Rule 29 motion after the verdict, and the court once again denied it.

On September 16, 2002, the district court sentenced Connolly to a term of incarceration of 121 months followed by a two-year period of supervised release. The district court denied Connolly's request for release on bail pending appeal, and we denied a similar, subsequent application. We now address Connolly's arguments of error by the trial court.

II.

Connolly claims that he is entitled to a judgment of acquittal on the RICO count because the government failed to present sufficient evidence to prove beyond a reasonable doubt two essential elements of the RICO charge: (1) Connolly's partic-

3. The remaining counts against Connolly were severed prior to trial and ultimately dismissed on the government's motion.

ipation in an "enterprise," and (2) a "pattern of racketeering activity," as defined by statute and applicable case law. *See* 18 U.S.C. § 1961(4), (5).

[1, 2] In evaluating a claim of insufficiency of the evidence, we review the record de novo, and "[w]e will affirm the conviction if, 'after assaying all the evidence in the light most amiable to the government, and taking all reasonable inferences in its favor, a rational factfinder could find, beyond a reasonable doubt, that the prosecution successfully proved the essential elements of the crime.'" *United States v. Boulerice*, 325 F.3d 75, 79 (1st Cir.2003) (quoting *United States v. O'Brien*, 14 F.3d 703, 706 (1st Cir.1994)). We "need not believe that no verdict other than a guilty verdict could sensibly be reached." *United States v. Gomez*, 255 F.3d 31, 35 (1st Cir.2001) (quoting *United States v. Echeverri*, 982 F.2d 675, 677 (1st Cir.1993)). Rather, the operative inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (original emphasis).

[3] To that end, a reviewing court must play "a very circumscribed role in gauging the sufficiency of the evidentiary foundation upon which a criminal conviction rests." *United States v. Blasini-Lluberas*, 169 F.3d 57, 62 (1st Cir.1999). We will give considerable deference to a jury's assessment of the evidence, and we will disturb the jury's verdict only if it is premised upon "evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative." *United States v. Czubinski*, 106 F.3d 1069, 1073 (1st Cir.1997). That is to say, we will reverse only if the verdict is irrational. *See United States v. Berrios*, 132 F.3d 834, 843 (1st Cir.1998) ("[W]e must consider the evidence in the light most favorable to the verdict and reverse only if no rational trier of fact could have found him guilty.").

The RICO count alleged a violation of 18 U.S.C. § 1962(c), which provides in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise ... to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The meaning of "enterprise" and "pattern of racketeering activity" is explicated in § 1961:

> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

The Supreme Court has repeatedly indicated that courts should take a "natural and commonsense approach" in assessing the elements of a RICO violation. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989); *see Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993); *United States v. Turkette*, 452 U.S. 576, 580–81, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981); *see also United States v. Boylan*, 898 F.2d 230, 250 (1st Cir.1990) ("In the absence of any pat formula, the Court has instructed us to use a flexible approach ... 'deriv[ing] from a

common-sense, everyday understanding of RICO's language and Congress' gloss on it.' ") (quoting *H.J. Inc.*, 492 U.S. at 241, 109 S.Ct. 2893). Against this backdrop, we now turn to Connolly's specific claims.

A. "Enterprise"

1. The Charge

Count 1 of the superceding indictment alleged that Connolly, Bulger, Flemmi, and others were members of an "enterprise," that is to say, "a group of individuals associated in fact," 18 U.S.C. § 1961(4), and that this enterprise,

> through its members and associates, acted to protect James Bulger, Stephen Flemmi and their associates, including Francis P. Salemme and those in the Winter Hill Gang, from arrest and prosecution for criminal activities including murder, loan sharking, illegal gambling, extortion, obstruction of justice, and bribery; and it acted to facilitate those criminal activities of Bulger, Flemmi, and their associates.

The indictment further alleged that the enterprise protected and fostered its members' criminal activities by

> (1) providing Bulger and Flemmi with confidential law enforcement information regarding Grand Jury investigations, court-authorized electronic surveillance, and other investigative efforts; (2) deflecting and squelching prosecutions and criminal investigations of their crimes; and (3) improperly preserving their status as FBI informants through the filing of misleading official reports and by failing to report information relating to Bulger and Flemmi which was material to the investigation of criminal activity.

The indictment distinguishes this association-in-fact enterprise from the Winter Hill Gang and La Cosa Nostra, though individual affiliations do overlap. The indictment also alleges that members of the enterprise committed fourteen different "racketeering acts," which included several acts of bribery, obstruction of justice, and extortion.

2. The Evidence

Kevin Weeks, who identified himself as Bulger's "right-hand man," was the government's star witness and provided substantial testimony regarding the existence of the enterprise. For example, Weeks testified that a special fund was created from some of the proceeds of Bulger's and Flemmi's criminal activities, and that Connolly received cash payments from that fund in exchange for a regular flow of information about law enforcement activities that might affect the group. Additionally, Weeks testified that Connolly was the enterprise's contact in the FBI, and that Bulger had given Connolly money in return for protecting the enterprise. According to Weeks, Bulger told him that Connolly was "one of ours." John Martorano, a member of the Winter Hill Gang, corroborated Weeks's testimony regarding Connolly's repeated receipt of gratuities in exchange for information. Salemme likewise testified that he and Flemmi had twice set aside $5000 from the proceeds of their numbers racket to pay Connolly for the information he provided.

In return for these payments, Connolly provided a wealth of sensitive information, often with dire consequences. For example, Martorano testified that Connolly told Bulger that an informant named Richard Castucci had provided the FBI with information regarding the whereabouts of two fugitive Winter Hill members. Bulger told Martorano of the leak, and Martorano in turn murdered Castucci in order to silence him. Martorano also testified that Connolly had told Bulger and others that another informant, Brian Halloran, had implicated Martorano in the murder of a recalcitrant

associate, Roger Wheeler. Weeks testified that Bulger, upon learning from Connolly of Halloran's betrayal, ambushed Halloran as he got into a car outside a Boston restaurant, and fatally shot both Halloran and the driver, Michael Donahue.

Martorano also testified that Connolly told Bulger and Flemmi that the FBI agents who had been working with Halloran were going to put pressure on another associate, John Callahan, to come clean about the Wheeler murder. According to Martorano, Connolly told Bulger and Flemmi that they were "all going to go to jail for the rest of our life if something doesn't happen to John Callahan." Worried about the possibility of a breach, Bulger and Flemmi convinced Martorano that Callahan had to be silenced. In an effort to deflect any attention away from the ongoing Boston investigation, Martorano lured Callahan to Florida where, with another associate, he murdered Callahan.

Weeks also testified that he and Bulger had extorted a person named Stephen Rakes into selling them a South Boston liquor store. After Weeks had forcibly acquired ownership of the store, Rakes's wife went to her uncle, Joseph Lundbohm, who was a detective in the Boston Police Department. Lundbohm testified that he, in turn, went to Connolly with the problem, and Connolly stated that nothing could be done unless Rakes agreed to wear a recording device. Lundbohm, out of fear for the safety of his niece and her husband, told Connolly that wearing a wire would be unacceptable. Connolly did not take any action to stop the extortionate takeover, nor did he report the incident to his superiors.

As for Connolly's efforts to derail the *United States v. Salemme* prosecution, Weeks testified that on December 23, 1994, Connolly came to the South Boston liquor store that Weeks and Bulger had extorted from the Rakes, looking for Bulger. Only Weeks was on the premises, however, and Connolly led him to the inside of the walk-in refrigerator at the back of the store where electronic surveillance would be difficult. There, Connolly told Weeks that he had just learned that federal indictments were pending against Bulger and Flemmi and that agents planned to make arrests over the holidays. Even though Connolly no longer worked at the FBI, he told Weeks that he was certain of this information because it had come from then-FBI Assistant Special Agent in Charge Dennis O'Callaghan. Connolly also indicated that only four people in the FBI knew about the pending indictment. Connolly instructed Weeks to pass along the information to Bulger and Flemmi immediately. Weeks did so. Flemmi, in turn, passed along the information to Salemme. Bulger and Salemme both skipped town and managed to avoid arrest. Salemme was ultimately arrested eight months later. Bulger's whereabouts remain unknown.

Weeks also testified that he and Connolly had worked together to compose a letter that they submitted anonymously to Judge Mark Wolf, the United States District Judge presiding over the *United States v. Salemme* case. The letter, printed on Boston Police Department letterhead, claimed to be from three disgruntled Boston Police Officers, and stated that the wiretaps the government was planning to use in its prosecution had been illegally obtained. Judge Wolf testified that the letter had caused him to order the parties to submit briefs, to hold a number of pretrial hearings, and to hear testimony on the contents of the letter. Weeks testified that Connolly eventually told him the identities of the confidential informants who had worn the concealed recorder, and

Weeks passed along this information to Flemmi and Salemme in jail.

Finally, Weeks testified that Connolly feared that Flemmi would divulge Connolly's involvement in the enterprise and name him as the person who had leaked the news of the indictments. Connolly, through Weeks, convinced Flemmi to testify that Connolly's former FBI supervisor, John Morris, had tipped him off about the indictments. However, Morris had been transferred out of Boston in 1991, long before the indictment issued. According to Weeks, Connolly advised Weeks that Flemmi should testify that Morris had learned of the impending indictments through what is known as a "pros memo" (i.e., prosecution memo) that Morris had seen while in Washington. Flemmi ultimately testified to that effect during hearings before Judge Wolf.

3. The Legal Requirements for an Enterprise

[4–7] As the Supreme Court indicated in *Turkette*, the government is required to prove both the existence of an "enterprise" and a "pattern of racketeering activity."

> The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

Turkette, 452 U.S. at 583, 101 S.Ct. 2524 (citation omitted). As this passage makes clear, an enterprise is not merely a related assortment of criminal activities. Rather, there must be some goal—"a purpose of engaging in a course of conduct"—beyond the isolated benefit that can redound from the commission of each criminal act, and there must be an "ongoing organization" with "associates function[ing] as a continuous unit." *Id.* The organization need not be formal or have an "ascertainable structure." *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir.2001). To the contrary, it need only be a "group of persons associated together for a common purpose of engaging in a criminal course of conduct." *United States v. Owens*, 167 F.3d 739, 751 n. 6 (1st Cir.1999) (quoting *United States v. Doherty*, 867 F.2d 47, 68 (1st Cir.1989)) (modification omitted).

4. Connolly's Arguments

a. Continuity

[8] Connolly argues that the evidence failed to demonstrate "that the members of the alleged enterprise had functioned as an *ongoing* organization" (original emphasis). In pressing this claim, he focuses on the fourteen racketeering acts alleged in the indictment.[4] These fourteen acts were

4. Racketeering Acts 1 through 10 allegedly took place during Connolly's tenure as an FBI agent. Act 1 alleged that Connolly took a bribe from Bulger and Flemmi. Acts 2 through 5 alleged that Connolly paid bribes to Morris on behalf of Bulger and Flemmi. Act 6 pertained to Connolly's involvement in the extortion of Rakes. Acts 7 through 9 con-

submitted to the jury for a determination of "proven beyond a reasonable doubt" or "not proven beyond a reasonable doubt." Of the fourteen, the jury found nine of them "not proven beyond a reasonable doubt." Of the racketeering acts found by the jury to be "proven beyond a reasonable doubt," one was an act of bribery in 1982 or 1983, and the other were four acts of obstruction of justice in the mid- to late-1990s in connection with the *United States v. Salemme* prosecution.

Connolly cites these findings to argue that the government had failed to prove "continuity" in the enterprise, i.e., that the enterprise had functioned as an ongoing organization over the period of time alleged, from September 1975 to September 1998. Since the jury found that all but one of the alleged racketeering acts dating from the 1970s and 1980s had not been proven beyond a reasonable doubt, Connolly argues that there was an insufficient basis for the jury to conclude that Connolly was part of an *ongoing* criminal enterprise. *See, e.g., United States v. Pelullo,* 964 F.2d 193, 212 (3d Cir.1992) (noting that RICO enterprises should be "distinguished from individuals who associate for the commission of sporadic harm").

We reject this argument for two reasons. First, the government introduced significant evidence of the existence of the enterprise apart from the specified racketeering acts. For example, Weeks, Martorano, and Salemme testified about several payments made to Connolly over the period in question that do not appear in the alleged racketeering acts. They also testified that these payments were made to guarantee the flow of confidential law enforcement information from Connolly to members of the enterprise. This testimony provided evidence of an ongoing criminal relationship between Connolly and members of the enterprise, and supported the jury's ultimate finding regarding Connolly's participation in an ongoing association-in-fact.

Second, as the government correctly argues, simply because the jury found a specified racketeering act as "unproven beyond a reasonable doubt" does not mean that the jury found the evidence relating to that act unpersuasive, in combination with other evidence in the case, on the existence of an association-in-fact enterprise. Rather, it may only mean that the government did not prove a requisite element of the underlying crime alleged as a racketeering act. For example, the district court instructed the jury that in order to prove Act 1—that Connolly had accepted a bribe—the government had to demonstrate that Connolly had "demanded, sought, or received a thing of value as a quid pro quo, or in return for a promise, implicit or stated, to do or omit to do a

cerned Connolly's sharing of confidential law enforcement information that led to the killings of Castucci, Callahan, and Halloran. Act 10 alleged that Connolly, working with Morris, had informed Bulger and Flemmi of a court-authorized wiretap and an ongoing grand jury investigation into illegal gambling activity. Racketeering Acts 11 through 14 allegedly took place during the period 1994 to 1998, after Connolly had retired from the FBI. All four involved obstruction of justice surrounding the *United States v. Salemme* case and are discussed in more detail in Part II.B below.

Several of the Acts were broken down into subparts, each one having the same factual basis. For example, the indictment divided the sixth Racketeering Act into Act 6A and 6B, "either one of which alone constitutes Racketeering Act 6." As described on the verdict sheet, Act 6A accused Connolly of "aiding and abetting the extortion of Julie and Stephen Rakes," while 6B accused him of "aiding and abetting a conspiracy to extort Julie and Stephen Rakes."

particular act in violation of his lawful duty." In returning a finding of "unproven," the jury could have concluded that the evidence underlying Act 1, while failing to demonstrate this requisite quid pro quo, nevertheless demonstrated a corrupt gratuity evidencing the existence of an illegal enterprise.

Likewise, Racketeering Act 7, as described on the verdict sheet, alleged that Connolly had committed obstruction of justice by "alerting Bulger that Richard Castucci was an informant." The district court instructed the jury that in order to prove obstruction of justice, the government had to demonstrate that Connolly had knowingly endeavored to obstruct or impede a pending judicial proceeding. The court also instructed the jury that "[a] judicial proceeding is pending once a grand jury, for example, begins its investigation or when an indictment has been returned." The jury might have concluded, however, that Connolly leaked information regarding Castucci for the purpose of frustrating an FBI investigation, and not to obstruct the grand jury proceedings.

Hence, the fact that nine of the fourteen enumerated racketeering acts were found "unproven" does not compel a finding of no continuity in the enterprise. The evidence relating to those acts remained available to the jury in its evaluation of the enterprise element of the RICO charge. *Cf. United States v. Vastola*, 899 F.2d 211, 222 (3d Cir.) (holding that findings of not guilty on three of four alleged predicate racketeering acts do not mandate judgment of acquittal on RICO count), *vacated on other grounds*, 497 U.S. 1001, 110 S.Ct. 3233, 111 L.Ed.2d 744 (1990). That being so, the inquiry on appeal is whether the jury, in light of the totality of the evidence, was presented with sufficient evidence of "continuity" to support a conviction. *See United States v. Powell*, 469 U.S. 57, 67, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984). Given the testimony of Weeks, Martorano, and others recounting a regular course of criminal conduct over two decades, we have no difficulty in concluding that the government satisfied its burden on this point.

b. Organization

[9] Connolly next argues that the government failed to adduce sufficient evidence demonstrating "that the members of the alleged enterprise had functioned as a continuing *unit*" (original emphasis). Rather, as Connolly characterizes it, the evidence demonstrated, at most, "the sporadic occurrence of [criminal racketeering] activity" by a group that had "no name, no regular business or activities, no cohesion over time, no sense of membership or ongoing association, no sharing of resources or revenues, [and] no systemic linkage or coordination of activities." Hence, according to Connolly, there were "no indicia of an organization" and, therefore, no "enterprise."

We disagree with Connolly's appraisal of the evidence, as well as his reading of the term "enterprise." The evidence showed that Connolly, Bulger, Flemmi, Salemme, and others worked together in an association-in-fact enterprise over a period of almost two decades, joining forces to protect themselves from prosecution and to further other criminal activities—some alleged in the indictment, and others not specifically alleged. There was cohesion in the group over time; the membership shared resources and revenues; there was, in fact, a sense of membership.

As for the meaning of "enterprise," there is no requirement under RICO that an enterprise have an "ascertainable structure." *Patrick*, 248 F.3d at 19. Indeed, as the Supreme Court noted in *Turkette*, "[t]here is no restriction upon the associations embraced by the [statute's] defini-

tion," *Turkette*, 452 U.S. at 580, 101 S.Ct. 2524, and "Congress has instructed us to construe RICO 'liberally ... to effectuate its remedial purposes.'" *United States v. London*, 66 F.3d 1227, 1243 (1st Cir.1995) (quoting Pub.L. No. 91–452, § 904(a), 84 Stat. 922, 947 (1970) (*reprinted in note following* 18 U.S.C. § 1961)). Hence an "enterprise" need only be "a group of persons associated together for a common purpose of engaging in a criminal course of conduct." *Owens*, 167 F.3d at 751 n. 6; *see also Boylan*, 898 F.2d at 242 ("What counts is whether it can be said, on the totality of the evidence, that all of the alleged coconspirators directed their efforts towards the accomplishment of a common goal ....") (internal quotation marks omitted).

Construing the term "enterprise" broadly, as we must, we have no difficulty in concluding that the association-in-fact alleged in the indictment was sufficiently "organized" to support a RICO conviction, and that the government had adequately proved the existence of that enterprise to sustain a conviction. Indeed, there was a discernable structure to the enterprise, with members playing designated roles in keeping the enterprise functioning as a viable unit. For example, Martorano could be considered the head of the enterprise's enforcement division, executing individuals who could prove to be a liability. Connolly's role was that of information officer, i.e., an intelligence conduit from law enforcement. Weeks, as Bulger's "right-hand man," managed special funds and functioned as an intermediary between Bulger and others.

Connolly insists, however, that Bulger, Flemmi, and others were actually members of the Winter Hill Gang, and that this somehow forecloses the possibility of membership in another enterprise. We fail to follow this logic. As the indictment makes clear, the alleged enterprise in this case—while perhaps overlapping in membership and some criminal activities with the Winter Hill Gang and even La Cosa Nostra—was a separate entity, distinguishable from both of these other criminal organizations. Membership in the Winter Hill Gang does not, ipso facto, preclude membership in another criminal enterprise. While the evidence demonstrated that Bulger, Flemmi, and others were associates of the Winter Hill Gang, it also demonstrated that they were members of a separate enterprise dedicated to their own protection and the advancement of their own criminal activities. Moreover, evidence was presented suggesting that the enterprise was distinct (if not totally separate) from the Winter Hill Gang. For example, the jury heard testimony that part of the money that the enterprise's members extorted or otherwise illegally procured was used to pay bribes necessary to ensure the enterprise's survival. Moreover, Bulger told Weeks that Connolly, who was not a member of the Winter Hill Gang, was nevertheless "one of ours." The jury could therefore have readily inferred the existence of a continuing unit which included Connolly and was distinct from the Winter Hill Gang.

B. "Pattern of Racketeering Activity"

1. The Predicate Acts

Racketeering Acts 11 and 12 occurred in late 1994 or early 1995 and concerned Connolly's tip-offs to Bulger, Flemmi, and Salemme regarding their indictment. Racketeering Act 13 occurred in March 1997 and concerned the fraudulent, anonymous letter that Connolly sent to Judge Wolf purporting to be from three police officers. Racketeering Act 14 occurred in 1998 and concerns the false testimony that Flemmi

gave after being coached and directed by Connolly.[5]

2. The Legal Requirements for a Pattern

[10] While the RICO statute does not define in absolute terms what constitutes a "pattern of racketeering activity," it does set a minimum requirement: proof of a pattern of racketeering activity "requires [proof of] at least two acts of racketeering activity" within a ten-year period. 18 U.S.C. § 1961(5). The Supreme Court, interpreting RICO, has stated that "while two acts are necessary, they may not be sufficient." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). "It is not the *number* of predicates" that determines whether they constitute a pattern of racketeering activity; rather, it is "the *relationship* that they bear to each other or to some external organizing principle." *H.J. Inc.*, 492 U.S. at 238, 109 S.Ct. 2893 (emphasis added). The two factors most pertinent to this determination, according to the Court, are relatedness and continuity. *See id.* at 239, 109 S.Ct. 2893 ("It is this factor of *continuity plus relationship* which combines to produce a pattern.") (original emphasis) (citation omitted).

[11] Continuity, according to the Supreme Court, can refer "either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241, 109 S.Ct. 2893. We have previously indicated that it is " 'difficult to formulate in the abstract any general test' for the continuity required for a pattern." *Apparel Art Int'l v. Jacobson*, 967 F.2d 720, 722 (1st Cir.1992) (quoting *H.J. Inc.*, 492 U.S. at 241, 109 S.Ct. 2893); *see also Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d 12, 15 (1st Cir.2000) ("We have more than once remarked upon the difficulty of articulating concrete guidelines for this 'continuity plus relationship' standard for identifying a pattern."). In *H.J. Inc.* the Supreme Court noted that Congress chose not to define "pattern of racketeering activity" with any degree of specificity in the RICO statute. Hence, the Court instructed lower courts to adopt a flexible approach to RICO claims, employing a "commonsense, everyday understanding of RICO's language and Congress' gloss on it." *H.J. Inc.* 492 U.S. at 241, 109 S.Ct. 2893. Lower courts, in turn, have repeatedly looked to one guidepost contained in *H.J. Inc.*: "A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time," or by evidence that the acts "include a specific threat of repetition extending indefinitely into the future." *Id.* at 242, 109 S.Ct. 2893. Because RICO was intended by Congress to apply only to enduring criminal conduct, "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." *Id.*; *Efron*, 223 F.3d at 15; *Apparel Art*, 967 F.2d at 723.

5. In evaluating Connolly's argument regarding the "pattern of racketeering activity" element, we do not rely on the "unproven" Racketeering Acts (1 through 3 and 5 through 10) described in note 4, *supra*. The Third Circuit, however, has indicated that a reviewing court need not be constrained by the jury's findings regarding the individual racketeering acts in determining whether the evidence, taken as a whole, supports an ultimate finding of guilt through a "pattern of racketeering activity." *See Vastola*, 899 F.2d at 222–23. Since the "proven" racketeering acts (11 through 15) establish the requisite pattern, we need not consider whether other evidence adduced at trial supports such a finding.

3. Connolly's Argument

[12] Connolly concedes that the four racketeering acts at issue are sufficiently related for RICO purposes. Each act served to protect members of the enterprise. Connolly insists, however, that the four racketeering acts simply constituted a "single criminal episode," that they did not present the threat of ongoing conduct, and that they therefore were not a pattern of racketeering activity. We disagree.

While we have previously indicated that "[w]e can be reasonably certain" that the pattern requirement "does *not* encompass a single criminal episode, a single 'crime' (in the ordinary, nontechnical sense of that word)," *Apparel Art*, 967 F.2d at 722 (original emphasis), we have also indicated that a "single criminal episode" is something narrow in scope and purpose, for example, a single interstate bank robbery. As we explained in *Apparel Art*, a bank robbery could include several different "crimes" (in the technical sense of the word)—such as gun possession, threatening a teller, stealing a getaway car, and eventually lying about one's participation—but they nevertheless do not add up to a "pattern of racketeering activity." *See id.* The instant case, however, is altogether different. Here, there were at least three different "episodes"—the disclosing of the indictment, the fabricated letter, and the perjured testimony—each planned and executed independently of the others over a period of years, and each the result of detailed planning and scheming by members of a criminal enterprise seeking to impede the criminal prosecutions of their cohorts. This is precisely the kind of activity that RICO was intended to forestall. *See H.J. Inc.*, 492 U.S. at 247–48, 109 S.Ct. 2893.

As for the threat of future criminal conduct, the racketeering acts at issue were part of an ongoing criminal enterprise undertaken to facilitate future criminal acts by other members of that enterprise. The enterprise sought to insure that its members would never be brought to justice, and indeed, one of them is still at large. As the government describes it, the enterprise engaged in a "do-whatever-is-necessary" long-term pattern of criminal activity that threatened ongoing criminal conduct of the sort that RICO was designed to prevent.[6] In short, there was ample evidence supporting the jury's conclusion that the government had satisfied the "pattern of racketeering activity" element of the crime.

III.

In sentencing Connolly, the district court relied upon the Pre–Sentence Report ("PSR") prepared by the U.S. Probation Office. The PSR calculated the appropriate sentence after navigating through a series of cross-references as follows (with the cross-referenced subject matter *underlined* for the reader's convenience):

- Under U.S.S.G. § 2E1.1, the base offense level for a RICO conviction is the greater of either (i) 19, or (ii) the offense applicable to the *underlying*

6. The Second Circuit has noted that courts have been quicker to find RICO violations "in cases where the acts of the defendant or the enterprise were inherently unlawful, such as murder or obstruction of justice, and were in pursuit of inherently unlawful goals." *United States v. Aulicino*, 44 F.3d 1102, 1111 (2d Cir.1995). We agree with the common-sense conclusion that in such situations, there is a greater threat of future criminal conduct. Of course, as explained in the text, there is no hard and fast rule, and the fact that there may be "inherently unlawful" conduct underlying the RICO charge would not prevent us from concluding that there was nevertheless no pattern of racketeering activity. *See, e.g., Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 45–46 (1st Cir.1991).

racketeering activity, i.e., obstruction of justice.

- As for the *underlying racketeering activity,* under U.S.S.G. § 2J1.2, the base offense level for obstruction of justice is 12. Subsection (c), however, indicates that if the obstruction of justice interfered with the investigation or prosecution of a criminal offense, the court should look to § 2X3.1 (*accessory after the fact*) with respect to the criminal offense obstructed, provided that the corresponding offense level is greater than 12.
- Section 2X3.1 provides that the base offense level for being an *accessory after the fact* is 6 levels lower than the offense level for the *underlying offense,* but in no event less than 4, or more than 30.
- The PSR identified first-degree murder as the *underlying offense* because (1) Connolly's racketeering activities concerned the obstruction of the prosecution of *United States v. Salemme,* and (2) the most serious of the underlying offenses charged in the *Salemme* indictment was *first-degree murder.*
- Under § 2A1.1, the base offense level for *first-degree murder* is 43.

Under § 2X3.1, however, the maximum base offense level for accessory after the fact is 30. The Probation Office therefore recommended a base offense level of 30. The PSR determined that no adjustment was necessary for the multiple counts, or for any other reason, and that Connolly should be placed in Criminal History Category I. The corresponding sentencing range for Category I, when combined with an offense level of 30, is 97 to 121 months.

At sentencing, Connolly challenged the calculation of the offense level, arguing that he was not "subjectively aware" of the more serious charges alleged in the *Salemme* indictment, and that first-degree murder should therefore not be considered the "underlying offense" under U.S.S.G. § 2X3.1. The district court properly overruled Connolly's objection. *See United States v. McQueen,* 86 F.3d 180, 184 (11th Cir.1996) ("Neither § 2J1.2(c)(1) nor § 2X3.1 requires such knowledge as a prerequisite to application of the offense level for the 'underlying offense.' "). It then adopted the factual findings and the Guidelines calculation contained in the PSR, and sentenced Connolly to the maximum of the applicable range, i.e., 121 months.

[13, 14] On appeal, Connolly abandons his subjective knowledge argument and presses a new argument that the district court made a "basic mistake" in sentencing when it referenced the murder guideline "without conducting any fact-finding" as to what exactly constitutes the "underlying offense." Since Connolly raises this objection for the first time on appeal, we review for plain error only. *United States v. Henderson,* 320 F.3d 92, 102 (1st Cir.2003); *see United States v. Grant,* 971 F.2d 799, 803 (1st Cir.1992) (noting that "as a general rule, appellant may not 'switch horses mid-stream' and raise new legal arguments not made the basis for objections in the district court"). Accordingly, Connolly "bears the burden of proving (1) an error, (2) that is plain, and (3) that affects substantial rights." *United States v. Downs-Moses,* 329 F.3d 253, 263 (1st Cir.2003). Assuming he can meet this high hurdle, Connolly must then demonstrate that the error "seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *United States v. Matos,* 328 F.3d 34, 43 (1st Cir.2003).

[15] The plain language of the applicable sections of the Guidelines does not support Connolly's argument. The obstruction of justice guideline, § 2J1.2(c), provides that:

> If the offense involved obstructing the investigation or *prosecution of a criminal offense*, apply § 2X3.1 (Accessory After the Fact) in respect *to that criminal offense*, if the resulting offense level is greater than that determined above.

(emphasis added). We fail to see how this language obliges an evidentiary inquiry into the substance of "that criminal offense." Moreover, the commentary to section 1B1.5 (governing the interpretation of cross-references) indicates that,

> A reference may direct that, if the conduct involved another offense, the offense guideline for such other offense is to be applied.... Where there is more than one such offense, the most serious such offense ... is to be used.

U.S.S.G. § 1B1.5, comment. (n.1). The PSR followed these directives to the letter. The jury found that Connolly had obstructed the prosecution in *United States v. Salemme* at various times from late 1994 to mid–1998, including *after* the grand jury had returned a superceding indictment charging Flemmi, Bulger, Salemme, and others with a number of crimes, including first-degree murder. The Probation Office reasonably looked to the most serious offense contained in the superseding indictment, and, as explained above, calculated the base offense level at 30.

This is not to say that a factual inquiry into the underlying offense would never be appropriate. For example, if a defendant were convicted of obstruction of justice for lying in a grand jury proceeding, a sentencing court would be justified in probing deeper into the nature of the underlying offense. Otherwise, the perjurer, through his false testimony, could cause an indictment for a minor (instead of a serious) crime to issue, and then gain the benefit of his perjury if the court were to rely solely on the indictment in determining the underlying offense. The converse, of course, is also true—an overzealous prosecutor could seek to enhance the perjurer's sentence by spuriously convincing a grand jury to increase the counts in an indictment. Hence, the Fourth Circuit has held that, in such a situation, a factual inquiry into what constitutes the underlying offense would not be inappropriate. *See United States v. Dickerson*, 114 F.3d 464, 467–68 (4th Cir.1997). The Ninth Circuit, citing *Dickerson*, indicated in *United States v. Arias*, 253 F.3d 453 (9th Cir. 2001), that a factual inquiry into the underlying offense would be appropriate only if there were a "*genuine* dispute" as to its substance. *Id.* at 461 (emphasis added).

[16] Connolly relies unpersuasively on *Dickerson* and *Arias* in pressing his claim. Unlike Dickerson, Connolly did not perjure himself before a grand jury, and there was therefore no risk of over- or undercharging of the indictment. And unlike *Arias*, there is no *genuine* dispute in this case as to the underlying offense. When Connolly wrote the fraudulent letter to Judge Wolf, and when he instructed Flemmi on how to lie on the witness stand, the *Salemme* prosecution included charges of first-degree murder. Moreover, Weeks testified during the trial that Connolly's goal was to get the entire case against Flemmi "tossed out," and substantial evidence adduced at trial supports that conclusion. Finally, even assuming that an inquiry into the underlying offense would be appropriate in this case, and assuming it was error for the district court not to undertake that inquiry *sua sponte*, any such error would be far from "plain," i.e., "clear, in the sense that it was obvious." *United States v. Geronimo*, 330 F.3d 67, 74–75 (1st Cir.2003) (internal quotation marks omitted). Indeed, the fact that Connolly, who was ably represented by counsel below, only belatedly turns to this argument, and cites only two cases from

other jurisdictions, belies any claim that the error was truly "obvious."

Since Connolly has failed to demonstrate that the district court committed any error—plain or otherwise—when it determined that first-degree murder was the "underlying offense" for purposes of U.S.S.G. § 2J1.2(c) and § 2X3.1, we affirm the sentence imposed by the district court.

IV.

[17] On the first day of trial, when the jury first entered into the courtroom, the district court judge noticed that one of the jurors was carrying a notebook. Without prompting from counsel, the judge informed the jury as follows:

> I noticed one of you came in with a notebook. I just want to alert you that I do not permit note taking. I want you to just sit and listen to the evidence and then use your collective memories as you deliberate at the conclusion of the case. Some very, very fine judges, colleagues, friends of mine, they do permit note taking. I don't. I want you to just sit back and pay attention. So that is the way we will proceed.

Connolly did not object to this instruction, nor did he seek clarification or modification of it. The parties do not recall seeing any jurors taking notes in the courtroom over the course of the trial.

Almost a month after the trial had ended, an article appeared in the *Boston Globe* which stated, in pertinent part:

> Although the judge had prohibited jurors from taking notes during the trial, some jurors went home and jotted down testimony they had heard that day, according to [two jurors]. "A couple of jurors took notes at night, which was very helpful [during deliberations]," [one juror] said.

(second modification in original). Arguing that the jury may have relied on "extraneous prejudicial information" during deliberations, Connolly filed a motion for an evidentiary inquiry into whether jurors had, in fact, taken notes during trial and whether they had considered any such notes during their deliberations. In a brief order, the district court denied the request:

> On the first day of trial I told the jurors I did not permit note taking during trial.... I did not, however, forbid the jurors from making notes of their impressions of the evidence when not in court. Indeed, writing material was provided to the jurors in their deliberating room. It was expected that jurors would make notes and use them during their deliberations. There is no occasion for the inquiry requested by Defendant. Defendant's Motion, therefore, is DENIED.

Connolly now assigns error to this decision,[7] asking that we remand the case for further inquiry into this purported juror "misconduct."

[18] We review the district court's response to an allegation of juror misconduct only for abuse of discretion. *See United*

7. Connolly unsuccessfully renewed this claim in his successive applications for release pending appeal. The district court, denying the request for release, concluded that "no prejudice to the Defendant resulted from the jurors' considering notes they may have taken at night." In our order denying the same, we noted the article's ambiguity with respect to whether the alleged notes actually made their way into the jury room, and, citing *United States v. Bassler,* 651 F.2d 600, 601–02 (8th Cir.1981), we indicated that "[e]ven assuming that the jurors consulted these notes during deliberations, it is far from clear that prejudice should be presumed in the absence of a cautionary instruction [regarding the proper use of notes during deliberations]."

States v. Ortiz–Arrigoitia, 996 F.2d 436, 442 (1st Cir.1993) (indicating that district court has broad discretion to "determine the nature and extent of its inquiry" into juror improprieties); *Mahoney v. Vondergritt*, 938 F.2d 1490, 1492 (1st Cir.1991) (noting that district court judges have "broad discretion in determining how to respond to allegations of extraneous influence on jurors"); *Boylan*, 898 F.2d at 258 ("[T]he district court has broad discretion to determine the type of investigation which must be mounted.").

[19, 20] Federal Rule of Evidence 606(b) codifies the "near-universal and firmly established common-law rule" that prohibits the admission of juror testimony to impeach a jury verdict. *Tanner v. United States*, 483 U.S. 107, 117, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987). There are significant policy considerations underlying such a rule, including finality, maintaining the integrity of the jury system, encouraging frank and honest deliberations, and the protection of jurors from subsequent harassment by a losing party. *See McDonald v. Pless*, 238 U.S. 264, 267–68, 35 S.Ct. 783, 59 L.Ed. 1300 (1915). Rule 606(b) does, however, create an exception to the common-law rule in situations where "extraneous prejudicial information [is] improperly brought to the jury's attention." Fed.R.Evid. 606(b). Despite this exception, we have nevertheless warned that "[c]ourts generally 'should be hesitant[ ] to haul jurors in after they have reached a verdict . . . to probe for potential instances of bias, misconduct, or extraneous influences.' " *Neron v. Tierney*, 841 F.2d 1197, 1205 (1st Cir.1988) (quoting *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983)). A court should only conduct such an inquiry when "reasonable grounds for investigation exist," i.e., "there is clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant." *Moon*, 718 F.2d at 1234 (citation omitted). Connolly cannot meet this high standard.

The *Boston Globe* article indicated that two jurors made notes at home some evenings regarding that day's in-court testimony. We agree with the district court that this note-taking, assuming it actually happened, was not inconsistent with the court's instructions. The judge told the jurors that he wanted them to focus on the testimony, not in-court note-taking: "I want you to just sit back and pay attention." Such a prescript did not foreclose the possibility of note-taking outside of court. Indeed, as the district judge noted, the jurors were provided with writing materials in the jury room from the outset of trial. Hence, the note-taking described in the *Globe* article did not constitute juror misconduct.

[21] Moreover, assuming that any notes actually made their way into the jury room during deliberations,[8] the notes cannot be considered an "extraneous" or "extrinsic" influence. In *Bassler*, the district court instructed the jury at the beginning of the trial that note-taking was not permitted. Like the two jurors in Connolly's trial, one of the *Bassler* jurors understood this instruction to mean that "no notes should be taken during the actual trial time but could be taken during recess or other times outside actual trial time." *Id.* at 602. The juror therefore took notes at the end of each day, and these notes eventually found their way into the jury room during deliberations. The *Bassler* court held that the juror's daily notes could not be considered an improper "extrinsic influence" because they were, in fact, *intrinsic*. We agree, and "[i]ntrinsic influences on a

8. We have previously noted the *Globe* article's ambiguity on this point. *See supra* note 7.

jury's verdict are not competent to impeach a verdict." *Id.* Hence Connolly cannot rely on the notes to demonstrate prejudice. *Cf. United States v. Balsam*, 203 F.3d 72, 86 (1st Cir.2000) (indicating that sharing of notes in open court by jurors does "not raise the same specter of prejudice as improper *outside* influences upon the jury") (emphasis added).

Even if the notes could, somehow, be considered "extrinsic," Connolly falls far short of providing specifics regarding any prejudice. Instead, he only insists that the district court should have conducted "an inquiry." Tellingly, he does not suggest what form this inquiry should take. Rather, he simply asks that we remand with instructions to the district court to "do what has to be done to ferret out the truth." He does not identify any witnesses he would call at an evidentiary hearing, or what the substance of any testimony could possibly be. Indeed, Connolly has made no proffer of *any* evidence other than the *Boston Globe* article. Instead, there is only speculation, and mere speculation can hardly be considered "clear, strong, substantial and incontrovertible evidence." *Moon*, 718 F.2d at 1234.

We have repeatedly said that courts should respond to allegations of juror impropriety in a manner appropriate to the facts and circumstances at hand. *See Ortiz–Arrigoitia*, 996 F.2d at 443 ("The trial judge is not ... shackled to a rigid and unyielding set [of] rules and procedures that compel any particular form or scope of inquiry."); *Boylan*, 898 F.2d at 258 ("We abjure imposition of a rigid set of rules for the conduct of inquiries into the presence or extent of extrinsic influences."); *see also Moon*, 718 F.2d at 1234 ("[E]ach situation in this area is *sui generis*."). Since we agree with the district court's conclusion that its instructions to the jury did not preclude note-taking outside the courtroom, and since Connolly has failed to make any substantial evidentiary showing regarding prejudicial impropriety, the district court properly exercised its discretion in denying Connolly's motion for further inquiry.

V.

For the foregoing reasons, the judgment of conviction entered on the jury's verdict and the sentence of the district court are ***AFFIRMED.***

SO ORDERED.

Anthony W. RICHARDS, Plaintiff, Appellant,

v.

RELENTLESS, INC., Defendant, Appellee.

Greg Bray, Defendant.

No. 02–2337.

United States Court of Appeals, First Circuit.

Heard June 6, 2003.

Decided Aug. 14, 2003.

Injured seaman sued owner of fishing vessel, alleging violations of Jones Act and warranty of seaworthiness, and seeking recovery for maintenance and cure. Following jury trial, the United States District Court for the District of Rhode Island, Mary M. Lisi, J., entered judgment for vessel owner. Seaman appealed. The Court of Appeals, Lipez, Circuit Judge,

failure to park the Maserati in the garage, because there was evidence that the theft would have occurred even if it had been parked in his garage. *Id.* at 524. In rejecting this argument, the Eleventh Circuit (applying Florida law) observed that prejudice had been shown:

> Here, even if parking the Maserati in the garage ultimately would not have prevented the theft, Oretsky's failure to do so certainly increased the danger of theft.

Id. at 525.

[3] In the instant case, the record is largely devoid of facts reflecting whether Depositors was prejudiced by CC & C's failure to provide notice of the suspension or impairment of its alarm monitoring contract.[2] Accordingly, we reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

EDWARDS, J. and MALTZ, H.M., Associate Judge, concur.

John J. CONNOLLY, Jr., Appellant,

v.

The STATE of Florida, Appellee.

No. 3D09–280.

District Court of Appeal of Florida, Third District.

July 29, 2015.

Background: Defendant, a former FBI agent, was convicted in the Circuit Court, Miami–Dade County, Stanford Blake, J., of second degree murder with a firearm as a lesser included offense of first degree murder. Defendant appealed.

Holdings: On motion for rehearing en banc, the District Court of Appeal, Rothenberg, J., held that:

(1) defendant failed to preserve for review claim that his second degree murder charge could not be reclassified to the non-time-barred offense of second degree murder with a firearm based on a deficiency in the charging document;

(2) reclassification was not fundamental error;

(3) jury verdict was sufficient to support reclassification, even though no special interrogatory was answered by jury; and

(4) defendant's possession of his service weapon during discussions with codefendants regarding their plan to kill victim supported conviction and reclassification.

Affirmed.

Suarez, C.J., filed dissenting opinion, in which Shepherd and Lagoa, JJ., concurred.

Emas, J., concurred in part, dissented in part, and filed opinion, in which Suarez, C.J., and Shepherd and Lagoa, JJ., concurred in part.

1. Criminal Law ⇐1030(1), 1043(2)

To preserve error for appellate review, a contemporaneous, specific objection must be made during trial.

2. CC & C argues that by relying almost exclusively on the argument that "prejudice need not be shown," Depositor's waived the issue of whether it was prejudiced by the lack of notice regarding the suspension of the alarm monitoring contract between CC & C and FirstWatch. We reject this argument. It was CC & C's burden on its motion for partial summary judgment to prove that based on the undisputed material issues of fact, it was entitled to summary judgment as a matter of law.

2. Criminal Law ⇐1032(5)

Defendant convicted of second degree murder as a lesser included offense of first degree murder failed to preserve for review claim that his time-barred second degree murder charge could not be reclassified to the non-time-barred offense of second degree murder with a firearm based on a deficiency in the charging document; defendant's objection to all lesser included offenses was general, the only specific objection made to the lesser included offenses of first degree murder was that they were time-barred, defendant conceded that second degree murder with a firearm was not time-barred because it was a life felony, and defendant did not claim or argue that the second degree murder could not be reclassified based on a defect in the indictment. West's F.S.A. § 775.087(1).

3. Indictment and Information ⇐196(1)

The failure to object to a technical deficiency in the charging document constitutes a waiver, and the time to raise a challenge to the charging document is prior to the jury's verdict so the deficiency can be cured, not after the verdict is rendered.

4. Criminal Law ⇐1043(2)

For an issue to be preserved for review, the specific argument or legal ground raised on appeal must have been raised and argued below.

5. Criminal Law ⇐1032(5)

Reclassification of time-barred second degree murder charge to the non-time-barred offense of second degree murder with a firearm was not fundamental error, notwithstanding any defect in charging document; omitted allegation of carrying or use of a firearm was not an essential element of the crime charged, charging document referenced firearm reclassification statute, providing notice that conviction could subject him to a reclassification, evidence supported jury finding that defendant possessed a firearm during the commission of the offense, defendant did not claim surprise, lack of notice or prejudice, and reclassified second degree murder was not greater in degree or penalty than the charged first degree murder. West's F.S.A. § 775.087.

6. Criminal Law ⇐1032(5)

Indictment and Information ⇐60

An indictment that wholly omits an essential element of a crime is a fundamental defect that may be raised at any time because the indictment fails to charge a crime when an essential element is omitted.

7. Homicide ⇐545

Sentencing and Punishment ⇐139

Use or possession of a firearm is not an essential element of second degree murder, but rather, may serve to allow for a reclassification of the second degree murder from a first degree felony to a life felony or as an enhancement of the sentence imposed. West's F.S.A. § 775.087.

8. Criminal Law ⇐1044.1(2)

Where the information is merely imperfect or imprecise, the failure to timely file a motion to dismiss waives the defect and it cannot be raised for the first time on appeal. West's F.S.A. RCrP Rule 3.190(c).

9. Criminal Law ⇐1032(5)

Indictment and Information ⇐110(3)

If the information recites the appropriate statute alleged to be violated, and if the statute clearly includes the words whose omission is alleged to have rendered the charging instrument defective, it cannot be said that the imperfection of the information prejudiced the defendant in his defenses, and thus does not constitute fundamental error.

10. Criminal Law ⇐1167(1)

The test for granting relief based upon a defect in the charging document is actual prejudice.

11. Indictment and Information ⇐189(8)

Second degree murder is a necessary lesser included offense of first degree premeditated murder.

12. Sentencing and Punishment ⇐66

A lesser included offense of the crime alleged in the charging document can be reclassified. West's F.S.A. § 775.087.

13. Criminal Law ⇐1038.1(1), 1137(3)

Where defense counsel fails to object to an improper instruction or where he takes affirmative action, such as requesting the improper instruction, he waives any defects.

14. Criminal Law ⇐796

In the context of felony reclassification, it is generally advisable for the trial court to instruct the jury to indicate whether the defendant was armed with a firearm during the commission of the offense via a special interrogatory. West's F.S.A. § 775.087.

15. Sentencing and Punishment ⇐79

Jury's verdict, finding defendant guilty of second degree murder with a firearm, as a lesser included offense of first degree murder, was sufficient to support reclassification of second degree murder conviction from a first degree felony to a life felony; although no special interrogatory was answered by jury, the firearm reclassification was included as an essential element of second degree murder in both the jury instructions and the verdict form based on defendant's specific request, and verdict form specifically required jury to find that defendant personally carried a firearm during the acts he committed which caused the death of victim. West's F.S.A. § 775.087.

16. Homicide ⇐1146
Sentencing and Punishment ⇐323

Evidence that defendant, an FBI agent, had his service weapon on his person at all times he discussed with codefendants their plan to "take care of" victim, supported conviction for second degree murder with a firearm, and reclassification of second degree murder conviction, as a principal, from a first degree felony to a life felony, even though defendant and his weapon were approximately 1,400 miles away from the scene at the time of codefendant's ultimate shooting of victim. West's F.S.A. §§ 775.087(1), 777.011, 782.04(2).

17. Sentencing and Punishment ⇐81

Defendant's conviction for second degree murder could not be reclassified to a life felony based on a codefendant's carrying or use of a weapon or firearm during the commission of the murder. West's F.S.A. § 775.087(1).

18. Sentencing and Punishment ⇐79, 81

Statute governing reclassification of a felony based on murder defendant's personal carrying or use of a firearm does not require possession of the actual murder weapon; a defendant's sentence may be enhanced or reclassified if the defendant carried any firearm during the commission of the homicide, and the defendant need not be the actual shooter. West's F.S.A. § 775.087(1).

19. Sentencing and Punishment ⇐79, 81

If two men enter a business with the intent to rob and murder the owner, and both are armed with firearms, the State may seek reclassification of both perpetrators' convictions based on their respective possession of a firearm, even if only one of the perpetrators shoots and kills the victim; reclassification of the shooter's convictions would be based on his possession and use of the murder weapon, while the re-

classification of the co-perpetrator's convictions would be based on his possession of a second firearm during the commission of the offense even though he only "carried" and did not use or threaten the victim with his firearm. West's F.S.A. § 775.087.

20. Criminal Law ⇐59(2, 3)

Under Florida law, those who actually commit the offense and those who aid, abet, or procure the commission of an offense are treated the same regardless of their role in the commission of the offense or whether they are present at the scene during the final acts of the offense. West's F.S.A. § 777.011.

21. Sentencing and Punishment ⇐81

Application of statute governing felony reclassification based on the carrying or use of a firearm does not depend on a defendant's status as an "actual perpetrator" or an aider and abettor. West's F.S.A. §§ 775.087(1), 777.011.

22. Criminal Law ⇐59(2)

"Actual perpetrator" and aiders and abettors are treated the same regardless of their roles in the offense; they are all principals in the first degree. West's F.S.A. § 777.011.

23. Sentencing and Punishment ⇐79, 80

Application of statute governing felony reclassification based on the carrying or use of a firearm does not require that the firearm the defendant was carrying be temporally and spatially related to the offense, nor does it require any coincidence of purpose with the underlying offense. West's F.S.A. § 775.087(1).

24. Sentencing and Punishment ⇐79, 80

Application of statute governing felony reclassification based on the carrying or use of a firearm was intended to be as broad as possible, but tempered by prosecutorial discretion; the ambit of the statute is to allow harsher sentencing for defendants who in any way associate with a weapon while engaging in felonies. West's F.S.A. § 775.087(1).

25. Sentencing and Punishment ⇐81

Statute governing reclassification of a felony based on defendant's personal carrying or use of a firearm does not require that the defendant, a principal to second degree murder, be present when the "last act," i.e., the shooting of the victim, was committed. West's F.S.A. § 775.087(1).

26. Sentencing and Punishment ⇐79, 81

If a principal is armed during the commission of the felony, his offense may be reclassified, whether or not he is present. West's F.S.A. § 775.087(1).

27. Sentencing and Punishment ⇐79, 80

The word "during," in statute governing reclassification of a felony based on defendant's personal carrying or use of a firearm, contemplates the carrying of a weapon at any point, i.e., while committing any element, in the course of the offense. West's F.S.A. § 775.087(1).

28. Homicide ⇐571

The statutes establishing the elements of second degree murder and the law governing principals and accomplices specifically contemplate that the acts committed by a co-defendant during the commission of the felony may be committed at any time and any place; there is no requirement that a principal to second degree murder be present or that he commit the last act that led to the victim's demise. West's F.S.A. §§ 777.011, 782.04(2).

29. Criminal Law ⇐59(5)

The principal statute holds the defendant legally responsible as a principal, whether or not he is present when the crime is committed, if he did some act or said some word which was intended to and which did incite, cause, encourage, assist,

or advise the other person or persons to actually commit or attempt to commit the crime. West's F.S.A. § 777.011.

30. Sentencing and Punishment ⇐81

There is no requirement that a defendant convicted of second degree murder as a principal commit the last act that caused the victim's death, that he be present during this last act, or that he possessed the weapon used during the last act that caused the victim's death for his murder conviction to be reclassified. West's F.S.A. § 775.087(1).

31. Sentencing and Punishment ⇐77

The decision as to whether to seek enhancement or reclassification of an offense when the firearm at issue was merely incidental to the commission of the offense lies within the State's discretion. West's F.S.A. § 775.087.

32. Homicide ⇐545

Procurement, planning, and an overt act or acts that do not cause the death of the victim, do not satisfy the requisite elements of second degree murder. West's F.S.A. § 782.04(2).

33. Homicide ⇐545

Second degree murder does not require a specific act, such as shooting or stabbing the victim; second degree murder only requires that the defendant commit some act, any act, that is imminently dangerous to another evincing a depraved mind regardless of human life and which ultimately causes the victim's death. West's F.S.A. § 782.04(2).

Carlos J. Martinez, Public Defender, and Manuel Alvarez, Assistant Public Defender, for appellant.

Pamela Jo Bondi, Attorney General, and Linda Katz, Assistant Attorney General; Katherine Fernandez Rundle, State Attorney, and Joel D. Rosenblatt and Michael Von Zamft, Assistant State Attorneys, for appellee.

Before SUAREZ, C.J., and WELLS, SHEPHERD, ROTHENBERG, LAGOA, SALTER, EMAS, FERNANDEZ, LOGUE and SCALES, JJ.

ON MOTION FOR REHEARING EN BANC

ROTHENBERG, J.

Based on the State of Florida's ("the State") motion for rehearing/rehearing en banc, we grant rehearing en banc, withdraw this Court's opinion issued on May 28, 2014, and issue the following en banc opinion affirming John J. Connolly, Jr.'s ("the defendant") conviction for second degree murder with a firearm in its stead.

As the State correctly noted in its opening statement at the en banc oral argument before this Court, and which is supported by the record:

> John Connolly [was] not an innocent FBI Agent sitting at his desk a thousand miles away from the murder. John Connolly [was] the primary mover who started the murder in action. It was his phone call to Whitey Bulger telling him that the FBI [was] going to question—[was] looking for John Callahan—going to squeeze him—if they squeeze him he will talk, if he talks we will all go to jail. You gotta get Johnny Martorano and have him take care of him. That was the initial act which caused the death of the victim.... Defendant's act as an aider and abettor, an accessory before the fact, became a crime once the crime was committed here in Florida.

The defendant and his co-defendants were charged with first degree premeditated murder (Count I) and conspiracy to

commit first degree murder (Count II). The defendant and co-defendants were tried separately, and the jury convicted the defendant of second degree murder with a firearm as a lesser included offense of first degree murder. The second degree murder conviction was reclassified from a first degree felony to a life felony pursuant to section 775.087(1), Florida Statutes (1981), based on the jury's specific finding that the defendant was armed with a firearm during the acts giving rise to his liability for second degree murder.

The defendant does not dispute the sufficiency of the evidence relied on by the jury in finding him guilty of second degree murder, nor does he dispute that he carried a firearm on his person during the acts he committed as a principal to the murder. The evidence as to both his participation in the murder and his possession of a firearm during his participation is overwhelming. Rather, the defendant disputes the legality of the reclassification of the second degree murder from a first degree felony to a life felony even though the reclassification was based on his actual possession of a firearm. The reclassification issue is dispositive, as it is undisputed that the indictment was filed in 2005 and the homicide was committed in 1982. Thus, without the reclassification from a first degree felony to a life felony, the defendant's conviction must be vacated due to the expiration of the four-year statute of limitations for first degree felonies pursuant to the law that was in effect in 1982.[1] § 775.15(2)(a), Fla. Stat. (1981).

The defendant contends that the firearm reclassification was error because: (1) there was a defect in the charging document; (2) the jury verdict was insufficient to subject him to reclassification; (3) reclassification cannot be based on a co-defendant's use of a firearm during the commission of the offense; and (4) there was no evidence that the defendant carried a firearm during the commission of the murder.

As will be detailed herein: (1) the defendant failed to raise an objection to any defect in the charging document and therefore waived his objection to the indictment, and no fundamental error has been demonstrated; (2) his argument regarding the verdict form was also not raised and therefore waived, and it is completely without merit; (3) reclassification of the second degree murder was based on the defendant's personal possession of a firearm during the commission of the homicide, not on the vicarious possession of a firearm by a co-defendant; and (4) there was abundant evidence that the defendant personally carried a firearm during the commission of the homicide.

SUMMARY OF THE CASE

The 2005 indictment charged the defendant and his co-defendants in Count I as follows:

Count I

> [T]hat on or between the 31st day of July, 1982, and the 2nd day of August, 1982, within the Counties of Miami-Dade and Broward, State of Florida, JAMES J. BULGER, STEPHEN J. FLEMMI, JOHN V. MARTORANO and JOHN J. CONNOLLY, JR., did unlawfully and feloniously kill a human being, to wit: JOHN B. CALLAHAN, from a premeditated design to effect the death of the person killed or any human being, by shooting the said JOHN B. CALLAHAN with a firearm, in violation of s. 782.04(1), s. 775.087 and s. 777.011, Florida Statutes, to the evil example of

1. Presently, a prosecution for "a felony that resulted in a death may be commenced at any time." § 775.15(1), Fla. Stat. (2014).

all others in like cases offending and against the peace and dignity of the State of Florida.

To understand the murder of John B. Callahan ("Callahan") and the defendant's involvement in Callahan's murder, a summary of the evidence established at trial is necessary. The evidence at trial revealed that Callahan's murder was the last of several murders committed by and/or for the benefit of James "Whitey" Bulger, Stephen Flemmi, John Martorano, and the Winter Hill Gang, an organized crime organization working out of Boston, Massachusetts. The chain of events that led to Callahan's murder began in 1973.

In 1973, the defendant, an agent working for the Federal Bureau of Investigation ("FBI"), was transferred to the Boston office of the FBI where he was assigned to the organized crime division. In 1975, the defendant recruited Bulger and Flemmi to work as FBI informants, and over time, the defendant became corrupted by his relationship with Bulger, Flemmi, and the Winter Hill Gang. Although he provided some of the information he obtained from Bulger and Flemmi to the FBI, the defendant also submitted false and misleading information and reports to the FBI to protect Bulger and Flemmi, and he provided Bulger and Flemmi with confidential FBI and law enforcement information, which enabled Bulger and Flemmi to avoid arrest and prosecution by federal, state, and local law enforcement.

Flemmi testified that the defendant was considered a member of their criminal organization and that he was essentially on their payroll. In exchange for the defendant's services (providing misleading and false information to the FBI and giving Bulger and Flemmi confidential law enforcement information), the defendant was paid large sums of money. Bulger and Flemmi also used the defendant as a conduit for the delivery of cash and gifts from Bulger and Flemmi to other FBI agents. Thus, the defendant was working both sides and profiting from each. He benefited professionally by providing organized crime information to the FBI, and he benefited personally and financially by assisting Bulger and Flemmi.

The jury learned about some of the confidential information the defendant provided to Bulger and Flemmi. For example, in 1976, the defendant warned Bulger and Flemmi that Richard Castucci, another FBI confidential informant, had given the FBI the location of two Winter Hill Gang members who were federal fugitives. Based on the information provided to them by the defendant, Bulger and Flemmi warned the two fugitives, and they, along with Martorano, murdered Castucci for his disclosures to the FBI. In 1978, the defendant also warned Bulger and Flemmi that they were about to be indicted in a federal racketeering case, but the defendant told them that if they agreed not to kill Anthony "Tony" Ciulla, who was cooperating with the government as a witness against members of their criminal organization, Bulger and Flemmi would not be indicted. Additionally, the defendant warned Bulger and Flemmi that Martorano was going to be indicted. As a result, Martorano went into hiding in Miami.

In 1978, Callahan, the victim in the instant case, was the owner and president of World Jai Alai. When Callahan learned that the authorities in Connecticut had discovered his ties to the Winter Hill Gang and other organized crime figures in Boston, he sold World Jai Alai to Roger Wheeler ("Wheeler"). Four years later, when Callahan decided that he wanted to repurchase World Jai Alai from Wheeler, but Wheeler refused to sell, Callahan solicited Bulger, Flemmi, and Martorano to murder Wheeler. On May 27, 1981, Mar-

torano shot and killed Wheeler at a country club in Tulsa, Oklahoma.

During its investigation of the Wheeler murder, the FBI began searching for members of the Winter Hill Gang to cooperate with the FBI. Brian Halloran ("Halloran"), a member of the Winter Hill Gang who had been indicted for an unrelated murder in Boston, agreed to cooperate with the FBI in the Wheeler murder investigation in order to obtain leniency in his pending case.

When the defendant learned from his supervisor, Special Agent John Morris, that Halloran was cooperating with the FBI and that Halloran had implicated Bulger and Flemmi in the Wheeler murder, the defendant warned Bulger and Flemmi. After this initial warning, the defendant contacted Bulger and Flemmi again to warn them that the FBI had outfitted Halloran with a body wire and had directed Halloran to meet with Callahan. After being alerted by the defendant, Bulger and Flemmi warned Callahan that Halloran intended to inform on him, and Bulger, with the help of other Winter Hill Gang members, murdered Halloran.

Because the Halloran murder was committed on a public street in Boston, the investigation intensified. In an effort to deflect suspicion away from Bulger, Flemmi, and the Winter Hill Gang, the defendant prepared and submitted a series of false reports suggesting that other organized crime factions in Boston were responsible for Halloran's murder. Despite the defendant's efforts, the FBI continued to believe that Bulger and Flemmi were involved in the Wheeler and Halloran murders, and its investigation focused on locating Callahan to obtain his cooperation. When the defendant learned that the FBI was looking for Callahan, the defendant contacted Bulger and Flemmi and told them that Callahan would likely cooperate and implicate Bulger, Flemmi, and Martorano in the Wheeler murder, and the defendant suggested that they contact their hit man, Martorano, to "handle it" so none of them would be caught.

Thereafter, Bulger and Flemmi met with Martorano, informed him what the defendant had told them, and Martorano agreed to kill Callahan before the FBI could locate him, specifically agreeing to kill Callahan in Florida because of the "heat on them" in Boston. After meeting with Martorano, Bulger and Flemmi met with the defendant and told the defendant that Martorano and his associate, Joe MacDonald, were going to "take care of" Callahan. Flemmi testified that the defendant clearly knew that "tak[ing] care of" Callahan meant they were going to have Callahan killed based on the information the defendant had given them—that the FBI would find Callahan, who would likely cooperate with the FBI and implicate Bulger, Flemmi, and Martorano in Wheeler's murder. On July 31, 1982, Martorano met Callahan at the Fort Lauderdale Airport, shot Callahan in the back of the head, put Callahan in the trunk of a car, and left the car and body at the Miami International Airport.

In anticipation of Callahan's murder, the defendant filed false reports with the FBI in an effort to mislead the FBI and to protect Bulger and Flemmi. In these reports, the defendant provided alibis for Flemmi and Bulger for both the Halloran murder and the planned Callahan murder, and the defendant also falsely reported that Callahan had a falling-out with a group of Cuban drug dealers in Miami in order to deflect the FBI's attention away from Flemmi, Bulger, and Martorano.

After Callahan was murdered, the FBI and other law enforcement agencies redoubled their efforts into the investigation, and the defendant continued to manipulate the system to protect Bulger, Flemmi, and

himself. However, in 1990, after the defendant had retired from the FBI, Bulger and Flemmi became the subjects of a federal grand jury investigation. The defendant, who had maintained his relationship with other FBI agents, kept Bulger and Flemmi informed as to the progress being made in the FBI's investigation of Bulger and Flemmi, and, when the defendant learned Bulger and Flemmi were about to be indicted by the federal grand jury and arrested, he warned them. Bulger went into hiding, while Flemmi, who did not react quickly enough, was arrested.

After Flemmi was arrested, the defendant wrote a letter to the presiding federal judge in an effort to have Flemmi's case dismissed. Many of the statements he made in this letter were false. The defendant also provided sensitive FBI information and documents to Flemmi's defense attorney, and he counseled Flemmi to falsely testify that the defendant's supervisor, Special Agent Morris, warned Bulger about the federal indictment rather than the defendant.[2] Ultimately, however, Flemmi and others agreed to cooperate with the FBI and other law enforcement agencies, and an amended indictment was filed in 1995 charging the defendant, along with the previously-charged co-defendants (Bulger, Flemmi, and Martorano), with Callahan's murder. The defendant was tried, and on November 6, 2008, the jury found the defendant guilty of the reclassified lesser included offense of second degree murder with a firearm.

ISSUES RAISED ON APPEAL

I. *The indictment*

The defendant argues that the indictment failed to provide him with sufficient notice that if he was convicted of a lesser included offense of first degree murder, the lesser included offense could be reclassified based on the defendant's personal possession of a firearm during the commission of the murder. However, because the defendant did not raise a challenge or an objection to the indictment or otherwise challenge the reclassification before submitting the reclassification issue to the jury, the defendant has waived the right to contest that issue unless he can demonstrate fundamental error. Specifically, the defendant did not claim that the second degree murder could not be reclassified due to a defect in the indictment or based on the evidence presented until one month after the jury's verdict, and even then, he did not claim surprise or the lack of due process. Thus, he has failed to preserve any objection to the reclassification of his second degree murder conviction based on a defect in the indictment, and therefore, he must establish fundamental error on this claim to obtain a reversal.

The defendant cannot demonstrate fundamental error because possession of a firearm is not a necessary element of second degree murder; the indictment charges that the second degree murder was committed with a firearm; the indictment references section 775.087, the firearm reclassification/enhancement statute, in both the heading and in the body of the indictment; the State specifically informed the defendant that it intended to prove that he personally carried a firearm during the commission of the murder; the defendant has never claimed surprise or that he was prejudiced in the preparation or presentation of his defense by the reclassification of the homicide offense under section 775.087; and the reclassified second de-

2. Morris and other FBI agents received money and gifts from Bulger and Flemmi while the defendant was still employed by the FBI. The defendant served as an intermediary to deliver the money and gifts to these agents. Morris, who testified at the defendant's trial, admitted that the defendant delivered money and gifts to him from Bulger and Flemmi.

gree murder was not greater in degree or penalty than the charged first degree premeditated murder.

A. *The defendant failed to preserve the alleged defect in the indictment and therefore waived that issue.*

[1] To preserve error for appellate review, a contemporaneous, specific objection must be made during trial. *Jackson v. State*, 983 So.2d 562, 568 (Fla.2008); *Gore v. State*, 964 So.2d 1257, 1265 (Fla.2007). The Florida Supreme Court has explained that "[t]his requirement is 'based on practical necessity and basic fairness in the operation of a judicial system.' " *Insko v. State*, 969 So.2d 992, 1001 (Fla.2007) (quoting *Castor v. State*, 365 So.2d 701, 703 (Fla.1978)).

[2] At no time prior to the jury's verdict did the defendant raise a challenge or an objection to the reclassification of the murder charged in Count I based on the sufficiency of the indictment. He did not claim the indictment was imprecise, imperfect, or defective. At the charge conference, when the State sought reclassification of the homicide based on the defendant's personal possession of a firearm during the acts the defendant committed as a co-perpetrator (principal in the first degree) to the homicide, the defendant did not claim surprise, lack of due process, or that the second degree murder could not be reclassified due to a defect in the indictment. In fact, the first time the defendant challenged the sufficiency of the indictment to permit reclassification of the homicide was one month after the jury's verdict in his untimely filed motion for arrest of judgment, and even to this day, he has not claimed surprise or prejudice in the preparation of his defense. At the charge conference, the defendant generally objected to the jury being instructed on all of the lesser included offenses of first degree premeditated murder because they were time-barred, but the defendant conceded that second degree murder with a firearm was not time-barred because it was a life felony, and he did not claim or argue that the second degree murder could not be reclassified based on a defect in the indictment.

[3, 4] The case law is clear: The failure to object to a technical deficiency in the charging document constitutes a waiver, and the time to raise a challenge to the charging document is prior to the jury's verdict so the deficiency can be cured, not after the verdict is rendered. *State v. Burnette*, 881 So.2d 693, 693–94 (Fla. 1st DCA 2004). Additionally, the specific argument or legal ground raised on appeal must have been raised and argued below. *Bertolotti v. Dugger*, 514 So.2d 1095, 1096 (Fla.1987) ("[T]o preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court."); *see also Tolbert v. State*, 679 So.2d 816, 818 (Fla. 4th DCA 1996) (en banc) (finding that, although a necessary element of the lesser included offense was not alleged in the information, the defendant's objections were not specific enough to preserve the issue for appellate review); *Wilson v. State*, 383 So.2d 670, 671 (Fla. 5th DCA 1980) (finding that the defendant cannot claim error on appeal where he did not assert the State's failure to allege the necessary elements of a permissive lesser included offense as a ground for his objection).

A general objection to all lesser included offenses, the same objection made by the defendant in the instant case, has been found by Florida courts to be insufficient to apprise the trial court of the specific reason for the defendant's objection. For example, in *Tolbert*, 679 So.2d at 818, the Fourth District Court of Appeal, sitting en

banc, declined to address the defendant's claim on appeal that the charging document did not sufficiently allege the elements of the lesser included offense for which the defendant was convicted because the defendant failed to raise this specific ground before the trial court. Specifically, the Fourth District stated:

> We agree with the state that this issue was not preserved for appeal because appellant's general objections to instructions on any lesser included offenses did not apprise the trial court of the ground now relied upon by the appellant, i.e., that an element of aggravated battery was not alleged in the information. It is well settled that in order to preserve an issue for appellate review, the specific legal ground or argument relied upon for appeal must have been presented to the trial court.

Id.

Similarly, in *Courson v. State*, 414 So.2d 207, 209 (Fla. 3d DCA 1982), this Court found that Courson's objection to all lesser included offenses was not sufficient to put the trial court on notice of his specific objection. This Court held that "a defendant must state distinctly the matter to which he objects and the grounds of his objection" to preserve his objection for appellate review. *Id.*

In the instant case, the defendant generally objected to all lesser included offenses. The only specific objection he made to the lesser included offenses of first degree murder was that they were time-barred. The defendant therefore failed to preserve the specific ground upon which his appeal is now based-that second degree murder could not be reclassified to the non-time-barred offense of second degree murder with a firearm based on a deficiency in the charging document. Thus, any defect or deficiency as to Count I in the indictment was waived, unless the defendant can demonstrate fundamental error.

B. *The alleged defect in the charging document does not constitute fundamental error.*

Because the defendant did not object to the reclassification of second degree murder under section 775.087(1) based on a deficiency in the indictment, he must demonstrate that fundamental error occurred. *See Jackson*, 983 So.2d at 568 ("Errors that have not been preserved by contemporaneous objection can be considered on direct appeal only if the error is fundamental." (citing *Goodwin v. State*, 751 So.2d 537, 544 (Fla.1999))); *see also* § 924.051(3), Fla. Stat. (2008) ("An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error.").

[5] A review of the indictment, the case law, and the record demonstrates that Count I was not fundamentally defective because: (1) the indictment did not omit an essential element of the charged offense; (2) the indictment referenced section 775.087 in the heading and the body of the charges; (3) the defendant had notice that the State would be seeking a reclassification of his conviction under section 775.087 based on the defendant's personal possession of a firearm during the commission of the homicide; (4) at no time during the years of postconviction litigation has the defendant claimed surprise or prejudice in the preparation or presentation of his defense; and (5) the reclassified second degree murder was not greater in degree or penalty than the charged first degree murder.

(1) *Count I of the indictment did not omit an essential element of the crime.*

[6, 7] Under Florida law, technical defects in a charging document are treated

differently than the failure to allege an essential element of the crime. An indictment that wholly omits an essential element of a crime is a fundamental defect that may be raised at any time because the indictment fails to charge a crime when an essential element is omitted. *State v. Gray,* 435 So.2d 816, 818 (Fla.1983). Use or possession of a firearm, however, is not an essential element of second degree murder,[3] but rather, it may serve to allow for a reclassification of the second degree murder from a first degree felony to a life felony or as an enhancement of the sentence imposed. *See* § 775.087.

[8, 9] Because the defect was not the omission of an essential element of the crime, the defect is fundamental only if the defendant demonstrates that he was denied due process. In other words, because the defendant did not specifically and timely object to reclassification based on a defect in the indictment, and the defect was not the omission of an essential element, he has waived the defect unless he can demonstrate that he had no notice that a conviction for second degree murder could subject him to a reclassification under section 775.087(1) if the jury found he carried a firearm during the commission of the felony. *See Delgado v. State,* 43 So.3d 132, 133 (Fla. 3d DCA 2010) ("An information is fundamentally defective only where it totally omits an essential element of the crime or is so vague, indistinct or indefinite that the defendant is misled or exposed to double jeopardy."); *State v. Wimberly,* 459 So.2d 456, 458–59 (Fla. 5th DCA 1984) ("There is a difference between an information that completely fails to charge a crime and one where the charging allegations are incomplete or imprecise. The former is fundamentally defective. However, where the information is merely imperfect or imprecise, the failure to timely file a motion to dismiss under Rule 3.190(c) waives the defect and it cannot be raised for the first time on appeal.... If the information recites the appropriate statute alleged to be violated, and if the statute clearly includes the omitted words, it cannot be said that the imperfection of the information prejudiced the defendant in his defenses." (citations omitted) (quoting *Jones v. State* 415 So.2d 852, 853 (Fla. 5th DCA 1982))); *Brewer v. State,* 413 So.2d 1217, 1221 (Fla. 5th DCA 1982) (en banc) (finding no fundamental error where the deficiency of the charging document was not a total omission of an essential element of the crime); *Kane v. State,* 392 So.2d 1012, 1013 (Fla. 5th DCA 1981) (same); *State v. Cadieu,* 353 So.2d 150, 151 (Fla. 1st DCA 1977) ("The law does not favor a strategy of withholding attack on the information until the defendant is in jeopardy, then moving to bar the prosecution entirely.").

In the instant case, it is undisputed that the indictment properly charged all of the elements of second degree murder, and, as will be discussed in the following sections, the indictment did not mislead the defendant because he had notice that a conviction as to Count I could subject him to a reclassification of the offense based on his personal possession of a firearm during the commission of the offense.

(2) *There was no fundamental error because the indictment referenced section 775.087 in the heading and the body of the charge.*

In *Mesa v. State,* this Court, relying on binding Florida Supreme Court precedent, noted that even where the charging docu-

3. The elements of second degree murder are: (1) the victim is dead; (2) the death was caused by the criminal act of the defendant; and (3) there was an unlawful killing of the victim "by any act imminently dangerous to another and evincing a depraved mind regardless of human life...." § 782.04(2), Fla. Stat. (1981).

ment fails to include an essential element of a crime, the defendant's failure to file a pretrial motion to dismiss the indictment or information constitutes a waiver if the charging document references the specific criminal code the defendant is charged with violating. 632 So.2d 1094, 1097–98 (Fla. 3d DCA 1994) (citing *DuBoise v. State*, 520 So.2d 260, 265 (Fla.1988)). Applying this standard, this Court held that where the information charging Mesa with attempted second degree murder failed to allege that Mesa possessed a firearm during the commission of the felony, **the information was not fundamentally defective because it referenced section 775.087 as one of the statutes the defendant had allegedly violated;** the jury found the defendant guilty of possessing a firearm during the commission of the offense; and there was competent evidence to support the jury's finding. *Id.* at 1097–98; *see also Baker v. State*, 4 So.3d 758, 760–61 (Fla. 1st DCA 2009) (holding that the defendant must establish fundamental error because he did not raise an objection to a defect in the information prior to trial and noting that, even where the charging document omits an essential element of the crime, the charging document may still withstand challenge if it references the specific section of the code that details the elements of the offense).

In the instant case, section 775.087 was referenced in both the heading and the body of Count I of the indictment; the jury found the defendant guilty of carrying a firearm during the commission of the homicide; and there was competent evidence to support the jury's finding. Thus, no fundamental error has been demonstrated.

(3) *There was no fundamental error because the defendant has not claimed or demonstrated prejudice.*

[10] " 'The test for granting relief based upon a defect in the charging document is actual prejudice.' " *Delgado*, 43 So.3d at 133 (quoting *Gray*, 435 So.2d at 818). In the instant case, no actual prejudice has been alleged or shown. The defendant has never claimed surprise or prejudice in the preparation or presentation of his defense. He did not claim surprise, lack of notice, or prejudice at the charge conference when the State requested that the jury be instructed on the firearm reclassification of second degree murder, and he has not asserted that he was surprised or prejudiced in his post-trial motions, appellate briefs, or arguments before this Court.

The record sheds light on why no such claim has been made by the defendant. First, on February 15, 2006, two and a half years prior to trial, the defendant filed and litigated a motion to dismiss Count II, the conspiracy charge, on the basis that the statute of limitations had run on that count prior to the filing of the indictment. In his motion, the defendant argued that conspiracy to commit murder was subject to a four-year statute of limitations, and **even if this limitations period *could* be extended for the homicide if the defendant committed the homicide with a firearm, the State would *also* be required to prove that the defendant was armed with a firearm at the time he conspired with others to commit the homicide in order to permit reclassification of the conspiracy.** This argument clearly shows that the defendant recognized the potential for reclassification upon a conviction of the homicide.

In its response to the defendant's motion to dismiss the conspiracy count, the State readily acknowledged that the jury must find that the defendant actually carried a firearm during the charged offense in order for the defendant to be subject to reclassification under section 775.087(1) and that, although one of the co-defen-

dants actually shot the victim, the defendant could also be eligible for reclassification based on his own personal possession of a firearm during his actions giving rise to liability for the offense. The State explained that section 775.087(1) provides for the reclassification of a first degree felony to a life felony if the defendant ***"carried"*** ***"any"*** (emphasis in the original) weapon during the commission of the felony. The State not only bolded and underlined "carried" and "any," the State also specifically told the defendant in its response that it intended to prove at trial that the defendant **carried** a firearm within the meaning of section 775.087(1) during the relevant time periods alleged in the indictment.

Additionally, the trial court's order denying the defendant's motion to dismiss Count II put the defendant on notice that a conviction in Count I could also result in a reclassification of that offense. The trial court's order specifically found that a first degree felony could be reclassified to a life felony under section 775.087(1), and there is no statute of limitations for a life felony. The trial court's order also put the defendant on notice that the State intended to seek a reclassification of the conspiracy to commit first degree murder charge because (1) conspiracy was designated as a life felony in the caption of the indictment; (2) section 775.087 was referenced in the heading of the indictment and in the body of each count of the indictment; and (3) the State alleged in the body of the conspiracy count that the conspiracy was committed with a firearm. Although the defendant's motion and the State's response were directed to the conspiracy charge, these pleadings and the trial court's order put the defendant on notice that Count I could also be reclassified because the indictment also referenced section 775.087 in the heading and in the body of the murder charge in Count I, and it also alleged that the homicide was committed with a firearm.

[11] Additionally, because first degree murder cannot be further enhanced or reclassified, the only purpose in referencing section 775.087 in the heading and in the body of Count I was to put the defendant on notice that a conviction for a lesser included offense in that count could subject him to an enhancement and/or a reclassification of the lesser offense. Second degree murder is a **necessary** lesser included offense of first degree premeditated murder, *see State v. Montgomery,* 39 So.3d 252, 259 n. 4 (Fla.2010) (citing Fla. Std. Jury Instr. (Crim.) 7.2), and second degree murder with a firearm is not barred by the statute of limitations because it is a life felony. § 775.15(1), Fla. Stat. (1981).

[12] It is well-established Florida law that a lesser included offense of the crime alleged in the charging document can be reclassified under section 775.087(1). *See Miller v. State,* 460 So.2d 373, 374 (Fla. 1984). The defendant was therefore put on notice that section 775.087(1) could be used to reclassify second degree murder to a life felony if the State proved and the jury found that the defendant carried, displayed, used, threatened, or attempted to use a firearm during the commission of the homicide. Because second degree murder is a **necessary** lesser included offense of first degree premeditated murder, and second degree murder with a firearm was not barred by the statute of limitations, the defendant was on notice that the jury would be charged with considering second degree murder as a lesser included offense. Thus, the indictment was not fundamentally defective.

(4) *There was no fundamental error because the reclassified second degree murder was not greater in degree or penalty than the charged first degree murder.*

[13] In *Ray v. State,* the Florida Supreme Court cautioned the appellate

courts to exercise their discretion concerning fundamental error " 'very guardedly,' " 403 So.2d 956, 960 (Fla.1981) (quoting *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla. 1970)), and "only in the rare cases where jurisdictional error appears or where the interests of justice present a compelling demand for its application," *id.* The Court also noted that "[t]he failure to object is a strong indication that, at the time and under the circumstances, the defendant did not regard the alleged fundamental error as harmful or prejudicial." *Id.* Further, the *Ray* Court stated: " 'It is well-established law that where the trial judge has extended counsel an opportunity to cure any error, and counsel fails to take advantage of the opportunity, such error, if any, was invited and will not warrant reversal.' " *Id.* (quoting *Sullivan v. State*, 303 So.2d 632, 635 (Fla.1974)). Additionally, where defense counsel fails to object to an improper instruction or where he takes affirmative action, such as requesting the improper instruction, he waives any defects. *Id.* at 961.

Applying these principles in *Ray*, the Florida Supreme Court held that it was not fundamental error to convict the defendant of an erroneous lesser included offense when the defendant failed to object if: (1) the offense is lesser in degree and penalty than the main offense, or (2) defense counsel requested or relied on the charge or took other affirmative action. *Id.* **"Failure to timely object precludes relief from such a conviction."** *Id.* (emphasis added).

Relying on *Ray*, this Court concluded in *Mitchell v. State*, 689 So.2d 1118, 1120 (Fla. 3d DCA 1997), that no fundamental error had occurred in the reclassification of Mitchell's manslaughter conviction from a second degree felony to a first degree felony under section 775.087(1), the weapon reclassification statute, where Mitchell did not object to the jury instructions or verdict form, the jury found the offense was committed with a firearm, and Mitchell was not convicted of an offense greater in degree or penalty than the charged offense. *See also Diaz–Gonzalez v. State*, 932 So.2d 528, 529–30 (Fla. 3d DCA 2006) (citing *Ray* and declining to address on appeal the alleged defect in the charging document where the defendant failed to raise the issue at trial).

In the instant case, although the defendant had ample time to object to the indictment and to the reclassification of the lesser included offense of second degree murder under section 775.087(1) before trial and at the charge conference before the jury was instructed, he failed to do so.[4] Although defense counsel objected to the trial court instructing the jury on any less-

4. While the defendant objected at the charge conference to the trial court instructing the jury on conspiracy with a firearm (Count II), he specifically limited his objection regarding reclassification under section 775.087(1) to the conspiracy count:

> **Defense Counsel:** I object to the instruction with a firearm because it is not charged in the indictment. This goes back to an argument that was made a while ago with regard to our motion to dismiss because the statute of limitations has run. If we look at Count 2.
>
> **The State:** Count 1 or 2?
>
> **Defense Counsel:** If we look at Count 2, what is charged is a conspiracy to commit the crime of first degree murder with a firearm. What should be charged is armed conspiracy to commit first degree murder with a firearm and the way it is charged it is not the substantive charge of conspiracy is not charged with a firearm [sic]. Therefore, I object to this instruction and renew my motion to dismiss Count 2 because the statute of limitations has run.

The defendant's only objection to Count I, the homicide count, was his objection to second degree murder as a lesser induced offense because second degree murder was time barred.

er included offenses because they were barred by the statute of limitations, he **conceded** that second degree murder with a firearm was not similarly barred, and he never argued that the State could not seek reclassification of the second degree murder under section 775.087(1) because the firearm reclassification was not properly charged in the indictment. Instead, **defense counsel affirmatively requested** the trial court **to include the firearm reclassification as a necessary element of second degree murder when charging the jury** because second degree murder with a firearm was the only lesser included offense of first degree murder that was not time barred. The State agreed, and the jury was instructed as the defendant requested. Thus, the jury was instructed that the lesser included offense of first degree premeditated murder was second degree murder with a firearm, and the jury instruction included **four** elements: the three statutory elements for second degree murder **and** the possession of a firearm, all of which the State was required to prove beyond a reasonable doubt.

The defendant did not demonstrate fundamental error because he did not object to the reclassification of the second degree murder under section 775.087(1); he took affirmative action by requesting that the reclassification be made an element of second degree murder; there was abundant evidence that the defendant carried a firearm during the commission of the murder; and second degree murder with a firearm is an offense lesser in degree and penalty than first degree premeditated murder.

II. *The jury's verdict*

[14–16] The defendant's second contention is that the jury's verdict was insufficient to subject him to reclassification under section 775.087(1). While the defendant is correct that it is generally advisable for the trial court to instruct the jury to indicate whether the defendant was armed with a firearm during the commission of the offense via a special interrogatory, no special interrogatory was requested by the defendant. Further, a special interrogatory was not required in this case because, based on the defendant's specific request, the firearm reclassification was included as an essential element of second degree murder in both the jury instructions and the verdict form.

Specifically, the jury was instructed that the only lesser included offense of first degree premeditated murder it could consider was second degree murder **with a firearm,** not simply second degree murder. The jury was also instructed that before it could find the defendant guilty of second degree murder with a firearm, as a lesser included offense of first degree murder, they must find beyond a reasonable doubt that the **defendant personally carried a firearm during the commission of the murder.** Specifically, the jury was instructed as follows:

> To prove the crime of **Second Degree Murder, with a Firearm,** as a lesser included offense the State must prove the following four elements beyond a reasonable doubt:
>
> 1. JOHN CALLAHAN is dead.
> 2. The death was **caused by the criminal act of JOHN J. CONNOLLY, JR.**
> 3. There was an unlawful killing of JOHN CALLAHAN by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life.
> 4. During the **"act" the defendant John Connolly carried a firearm.**
>
> An "act" includes a series of related actions arising from and performed pursuant to a single design or purpose.
>
> An act is "imminently dangerous to another and demonstrating a depraved

mind" if it is an act or series of acts that:

1. a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, and

2. is done from ill will, hatred, spite or an evil intent, and

3. is of such a nature that the act itself indicates an indifference to human life.

In order to convict of Second Degree Murder with a Firearm, it is not necessary for the State to prove the defendant had an intent to cause death.

(emphasis added).

The State also clarified its theory of prosecution, the trial court's instructions, and the verdict form in its closing arguments. The State explained to the jury, **without any objection by the defendant,** that there was no dispute that the defendant was not physically present when Martorano killed Callahan, but that the defendant need not be present when the killing took place so long as the defendant committed some act or said some word which was intended to incite, cause, encourage, assist, or advise the other person or persons who actually committed the murder under the law regarding principals and accomplices.

The State then explained that there were two relevant guns in this case: the gun Martorano used to actually shoot and kill Callahan and the gun carried by the defendant when he committed the acts that made him a principal to the murder. The State specifically went over the jury instructions for second degree murder and the evidence that had been presented regarding the defendant's possession of a firearm during his role in Callahan's murder.

The State also told the jurors that before they could find the defendant guilty of second degree murder with a firearm, as a lesser included offense of first degree premeditated murder, the State had to prove **four** elements beyond a reasonable doubt. When addressing the fourth element, that during the "act" the defendant carried a firearm, the State explained:

And the fourth, which is a unique act element, which applies to this and the criminal conspiracy as well, is that **during the act the defendant, John Connolly, carried a firearm.**

Now what does that mean? It does not mean that John Connolly had to have a gun and shoot Callahan. **It meant and it means that during the time John Connolly is advising, discussing, assisting and conspiring with Flemmi, Bulger and ultimately Martorano that he had a gun.**

And how do you know he had a gun? Because he's an FBI agent, and all the witnesses told you that as an FBI agent he's required to carry his gun.

He carried his gun. He had his gun. Flemmi saw it when they met. And if you—when he's meeting with his informants every agent says, you don't meet with an informant without a gun.

And he's an FBI agent. And, you know, he was carrying his gun. He doesn't have to have used his own gun, just had to have had it at the time he's discussing it with them.

And the act includes a series of related actions arising from and performed pursuant to a single design or purpose. And in this case, it's the murder of John Callahan.

(emphasis added).

Lastly, the verdict form specifically required the jury to find that the defendant personally carried a firearm during the acts he committed which caused the death of Callahan in order to convict the defendant of second degree murder with a firearm. Notably, while the firearm language

was not included in the verdict form for first degree murder, it **was** included in the verdict form for second degree murder with a firearm.

VERDICT–COUNT I

We the jury, in Miami–Dade County, Florida, this *6* day of NOVEMBER, 2008, find the defendant, JOHN J. CONNOLLY, JR.,

COUNT 1 (check only one):

☐ GUILTY of FIRST DEGREE MURDER AS CHARGED IN COUNT 1 OF THE INDICTMENT.

☑ GUILTY of SECOND DEGREE MURDER, WITH A FIREARM, AS A LESSER–INCLUDED OFFENSE OF FIRST DEGREE MURDER.

☐ NOT GUILTY

Because the firearm reclassification was treated as an element of second degree murder, and based on the State's arguments to the jury, the trial court's instructions to the jury that it must find that the defendant carried a firearm during the acts he committed as a principal to Callahan's murder as a necessary element of second degree murder with a firearm, and the jury's verdict reflecting that the State proved the firearm element beyond a reasonable doubt, the jury's verdict sufficiently supports the firearm reclassification of the second degree murder.

III. *The reclassification of second degree murder was based on the defendant's personal possession of a firearm, not on a co-defendant's use of a firearm during the commission of the homicide*

[17] We agree with the defendant that his conviction for second degree murder could not be reclassified under section 775.087(1) based on a co-defendant's possession or use of a weapon or firearm during the commission of the murder. The dissent's assertion that we conclude otherwise is therefore misplaced. Florida law is well-settled that section 775.087(1) does not permit vicarious enhancement. *See State v. Rodriguez,* 602 So.2d 1270, 1271 (Fla.1992) (holding that "section 775.087(1) does not, by its terms, allow for vicarious enhancement because of the action of a codefendant"); *Chase v. State,* 74 So.3d 1138, 1139 (Fla. 2d DCA 2011) (reversing the reclassification of the defendant's conviction for aggravated battery where there was no evidence that the defendant possessed or used a weapon during the commission of the offense); *Campbell v. State,* 935 So.2d 614, 618 (Fla. 3d DCA 2006) (finding that it was error to reclassify Campbell's conviction for conspiracy to traffic in cocaine under section 775.087(1) where there was no evidence that Campbell had actual physical or personal possession of a weapon at any time during the conspiracy); *Parker v. State,* 906 So.2d 1273, 1273 (Fla. 5th DCA 2005) (noting that enhancement under section 775.087(1) is impermissible unless the defendant actually possesses a weapon during the commission of a crime); *Betancourt v. State,* 767 So.2d 557, 557 n. 1 (Fla. 3d DCA 2000) (noting that the State properly conceded below that the reclassification of the kidnapping conviction was error where the co-defendant, not the defendant, possessed the firearm).

We fully agree that the defendant's conviction could not have been reclassified due to Martorano's use of a firearm. However, the defendant's second degree murder conviction in the instant case was **not** reclassified based Martorano's possession or use of a firearm during the commission of the murder. Rather, the reclassification was based solely on the defendant's own actual and personal possession of a totally separate firearm during his involvement in the commission of the homicide.

The defendant was convicted as a principal of the second degree murder of Callahan, *see* § 777.011, Fla. Stat. (2005) [5] (making those who actually commit or aid, abet, or procure the commission of a felony principals in the first degree), and the jury found that the defendant was personally armed with a firearm during the commission of the second degree murder. There was ample evidence at trial to support this finding as several witnesses testified that the defendant had a firearm at all the meetings where he met with Bulger and Flemmi. Thus, there was no vicarious enhancement, only a proper reclassification based on the defendant's personal possession of a firearm.

IV. *Reclassification under section 775.087(1) does not require possession of the murder weapon*

[18] Section 775.087(1) does not require, as the dissent claims, the defendant's use or possession of the actual murder weapon. Rather, section 775.087(1) allows for reclassification of an offense if the defendant carries **any** weapon or firearm at any time during the commission of the felony.

The dissent's position to the contrary is based on its misreading of *Rodriguez*. In *Rodriguez*, the Florida Supreme Court once again addressed the impropriety of vicarious enhancement or reclassification—as we recognized above—and reiterated that a defendant's sentence may not be enhanced based on a co-defendant's possession of a weapon: "We have jurisdiction and answer the question in the negative, finding in accordance with the district court decision, that section 775.087(1) does not, by its terms, allow for vicarious enhancement because of the action of a codefendant." 602 So.2d at 1271 (footnote omitted). The Florida Supreme Court further held that because the defendant was charged with **use** of the weapon during the commission of the felony and the State did not prove that Rodriguez had personal possession of the weapon used during the commission of the offense, enhancement was improper. *Id.* at 1272. Importantly, however, the Florida Supreme Court noted that **"Rodriguez's sentence could have been enhanced under the statute if the State had charged him with the commission of a felony while *carrying* the pistol that was found on his person after the chase."** *Id.* (emphasis added).

[19] Thus, contrary to the dissent, a defendant's sentence may be enhanced or reclassified if the defendant carried any firearm during the commission of the homicide. The law does not require that the defendant be the actual shooter. Indeed, such a holding would entirely negate all the language in section 775.087 except for "use" of a weapon. Thus, if two men enter a business with the intent to rob and murder the owner, and both are armed with firearms, the State may seek reclassification of both perpetrators' convictions based on their respective possession of a firearm, even if only one of the perpetrators shoots and kills the victim. Reclassification of the shooter's convictions would be based on his possession and use of the murder weapon, while the reclassification of the co-perpetrator's convictions would be based on his possession of a second firearm during the commission of the offense even though he only "carried" and did not use or threaten the victim with his firearm. *See Andrade v. State*, 564 So.2d 238, 239 (Fla. 3d DCA 1990) (finding no error in enhancement of Andrade's convictions for three counts of attempted murder

5. Although the murder occurred in 1982, we cite to section 777.011, Fla. Stat. (2005), as that is the principal instruction that was agreed to by the parties and instructed by the trial court.

and the imposition of three-year minimum mandatory sentences as to each conviction where there was evidence that established that Andrade possessed a firearm during the criminal episode); *Junco v. State*, 510 So.2d 909, 913 (Fla. 3d DCA 1987) (affirming Junco's and his co-defendant's convictions for second degree murder with a firearm, attempted second degree murder, robbery with a firearm, trafficking in cannabis, and the enhancement of their sentences where it was established that each possessed a firearm when participating in the criminal offense).

In this case, during the commission of the homicide the defendant committed acts as a principal in the first degree, and while committing these acts, he indisputably carried a firearm. Thus, section 775.087(1) was correctly applied to reclassify the offense.

Section 775.087(1) provides in relevant part as follows:

> (1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant **carries,** displays, uses, threatens to use, or attempts to use **any weapon or firearm,** or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified....

(emphasis added).

The statute is clear and unambiguous. "Use" of "the" firearm (or weapon) during the commission of the felony is simply not required, and the dissent's narrow reading of the reclassification statute has no basis in Florida law. It is merely one of many options from which the State can choose to reclassify an offense. Here, the jury found that the defendant carried a firearm during the acts he committed during the commission of, and which subjected him to his conviction for, the second degree murder. If a defendant "carries" "any" weapon during the commission of the felony, section 775.087(1) is applicable.

V. *Florida law does not treat actual perpetrators and aiders and abettors differently, and application of section 775.087(1) does not rely on the role each plays during the commission of the offense*

[20, 21] Under Florida law, those who actually commit the offense and those who aid, abet, or procure the commission of an offense are treated the same regardless of their role in the commission of the offense or whether they are present at the scene during the final acts of the offense. *State v. Dene*, 533 So.2d 265, 266–69 (Fla.1988); *Potts v. State*, 430 So.2d 900, 901–02 (Fla. 1982). In 1957, the Florida Legislature eliminated these distinctions.

Prior to 1957, Florida law provided different classifications for perpetrators depending on their level of participation in the offense. Those who actually committed the offense were treated as principals in the first degree; those who were present when the crime was being committed and aided and abetted the commission of the crime were treated as principals in the second degree; those who were not present while the crime was being committed but procured, counseled, commanded, or abetted another to commit the crime were treated as accessories before the fact; and those who knew a felony had been committed and then assisted the felon afterward were treated as accessories after the fact. *Potts*, 430 So.2d at 901.

In 1957, the Florida Legislature retained the category of accessories after the fact but eliminated the distinctions between principals in the first degree (the actual perpetrator), principals in the second degree, and accessories before the fact

and now treats them the same, referring to perpetrators and accomplices alike as "**principal[s] in the first degree.**" Ch. 57–310, §§ 1–2, at 608, Laws of Fla.; *Dene*, 533 So.2d at 267 (concluding that "[t]he effect of this law was that the traditional definitions of principal in the first degree, principal in the second degree, and accessory before the fact were all combined within the statutory definition of **principal in the first degree**") (emphasis added).

Since 1957, actual perpetrators, as well as aiders and abettors, whether before or during the offense and whether present or not present at the scene, are all "principals in the first degree," and they are treated the same and are equally culpable under the law. *Staten*, 519 So.2d at 624 (Fla. 1988); *see also* § 777.011, Fla. Stat. (2005) (renumbered in 1977 from section 776.011 to section 777.011). Section 777.011 provides as follows:

> Whoever **commits** any criminal offense against the state, whether felony or misdemeanor, **or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree** and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.

(emphasis added).

The Florida Legislature specifically stated the following in Chapter 57–310 of the Laws of Florida when it abolished the distinctions between perpetrators (principals in the first degree), principals in the second degree, and accessories before the fact:

> WHEREAS, the legal distinctions between accessory before the fact, principal in the first degree and principal in the second degree serve no useful purpose; and
>
> WHEREAS, these distinctions serve only as technicalities which impede the orderly administration of justice for the benefit of those charged with crimes, and as such should be abolished....

Ch. 57–310, at 608, Laws of Fla. And, as the Florida Supreme Court recognized in *Dene*, "The legislative intent could not have been clearer." 533 So.2d at 266.

The dissent, however, takes the position that reclassification of the murder in this case under section 775.087(1) is only permissible for what it calls the "actual perpetrator," i.e., the person who shot the victim in the head. Thus, based on the dissent's position, even if another individual ("Perp.# 2") held the victim at gunpoint while his accomplice ("Perp.# 1") shot and killed the victim, only Perp. # 1 would be subject to reclassification. The dissent's position is contrary to section 777.011 (the law of principals) and section 775.087(1) (the law regarding reclassification of offenses). Section 777.011 mandates that perpetrators and aiders and abettors are all "principals" and "may be charged, convicted and punished as such." Florida law does not identify some of the participants of the offense as "perpetrators" and others as "principals." They are all "principals" if they actually committed, aided, abetted, counseled, hired, or procured such offense to be committed. And section 775.087(1) provides, in pertinent part that "Whenever **a person** is charged with a felony ... and during the commission of such felony the defendant **carries,** displays, uses, threatens to use, or attempts to use **any weapon or firearm** ... the felony for which the person is charged shall be classified as follows...."

It now no longer matters whether the defendant hired (procured) a hit man, turned to his mob friends to murder Callahan, served as a lookout, provided the gun, or pulled the trigger himself, he is a principal in the first degree. *See Staten*, 519 So.2d at 624 ("Under our law, both the actor and those who aid and abet in the commission of a crime are principals in the first degree.... Clearly, the getaway driver who has prior knowledge of the criminal plan and is 'waiting to help the robbers escape,' falls into this category and is, therefore, a principal." (footnote and citations omitted) (quoting *Enmund v. State*, 399 So.2d 1362, 1370 (Fla.1981), *rev'd on other grounds*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982))). As long as the State proves that the act the defendant committed was "imminently dangerous to another and evincing a depraved mind regardless of human life" and the act caused the victim's death, § 782.04(2), the defendant is guilty as a principal for the second degree murder of Callahan. And because the defendant was armed with a firearm when he committed these acts, reclassification under section 775.087(1) was lawful.

[22] Thus, contrary to the dissent's position, for nearly sixty years, Florida has treated the "actual perpetrator" and aiders and abettors the same regardless of their roles in the offense (they are all principals in the first degree), and section 775.087(1) provides for reclassification of the offense if during the commission of the offense the defendant carries, displays, etc. a firearm. Section 775.087(1) does not limit its application to "the actual perpetrator," nor would it make sense to do so since actual perpetrators and aiders and abettors are all "principal[s] in the first degree." § 777.011. As the Florida Legislature specifically noted, such distinctions "serve no useful purpose." Ch. 57–310, at 680, Laws of Fla.

VI. *Reclassification of the second degree murder was lawful because the State presented evidence and the jury found that the defendant personally carried a firearm during his role as a "principal in the first degree" to second degree murder*

[23] Lastly, the defendant suggests, and the dissenting opinion and the concurring in part and dissenting in part opinion (which for purposes of addressing this argument will be referred to collectively as "the dissenters") conclude that reclassification under section 775.087(1) may only occur if the firearm the defendant was carrying was both temporally and spatially related to the homicide. Thus, the dissenters contend that because the defendant was hundreds of miles away in Boston when the victim was shot in Miami, it was fundamental error to reclassify his second degree murder conviction. This argument is based, in part, on the premise that, unlike certain on-going or continuing offenses (such as conspiracy, theft, and trafficking), the homicide was committed only at the precise moment the trigger was pulled. As will be discussed below, the Florida Legislature has not engrafted such a requirement into the reclassification statute; the death of the victim was the result of a series of acts, not the sole act of the shooter; the acts committed by the defendant were imminently dangerous demonstrating a depraved mind without regard for human life; these acts caused the victim's death; and during the acts committed by the defendant, the defendant was armed with (carried) a firearm. Thus, the defendant was properly convicted of second degree murder with a firearm, and reclassification of his murder conviction was not error, much less fundamental error.

A. *"During the commission of" does not require spatial proximity*

The relevant language in section 775.087(1) provides that "whenever a person is charged with a felony ... and **during the commission of** such felony the defendant carries, displays, uses, threatens to use, or attempts to use any weapon or firearm, ... the felony for which the person is charged shall be reclassified." (emphasis added). The phrase "during the commission of" is not expressly defined in the statute, likely because these words need no further explanation when given their plain and ordinary meaning. *See Daniels v. Fla. Dep't of Health*, 898 So.2d 61, 64 (Fla.2005) (holding that if the language is plain and unambiguous it is unnecessary to resort to statutory construction).

The Merriam–Webster Dictionary defines "during" as "**at some time in the course of** (something)." (emphasis added). The evidence presented in this case clearly established that the defendant carried a firearm "at some time in the course of" committing this second degree murder.

Second degree murder is the unlawful killing of the victim "by an act" that is "imminently dangerous to another and evincing a depraved mind regardless of human life...." § 782.04(2), Fla. Stat. (1981). Florida's standard jury instruction on second degree murder defines an "act" as "a series of related actions arising from and performed pursuant to a single design or purpose." Fla. Std. Jury Instr. (Crim.) 7.4. The same instruction explains that:

> An act is "imminently dangerous to another and demonstrating a depraved mind" if it is an act or series of acts that:
>
> 1. a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, and
> 2. is done from ill will, hatred, spite or an evil intent, and
> 3. is of such a nature that the act itself indicated an indifference to human life.
>
> In order to convict of Second Degree Murder, it is not necessary for the State to prove the defendant had an intent to cause death.

The jury found that the acts the defendant committed—counseling members of the Winter Hill Gang to "take care of" Callahan—were imminently dangerous to another evincing a depraved mind because the defendant knew that when he told Bulger and Flemmi that the FBI was trying to locate Callahan to obtain his cooperation and also told them to contact Martorano to "handle it," he was signing a death warrant for the murder of Callahan. When the defendant provided similar information to Bulger and Flemmi in the past, they murdered or procured the murder of the cooperating witnesses. For example, when the defendant warned Bulger and Flemmi that Castucci was cooperating with the FBI, Bulger, Flemmi, and Martorano murdered Castucci. When the defendant warned Bulger and Flemmi that Halloran was cooperating with the FBI, Bulger, Flemmi, and other Winter Hill Gang members murdered Halloran. Thus, when the defendant told Bulger and Flemmi that the FBI was looking for Callahan and that he believed Callahan would likely cooperate with the FBI and implicate Bulger, Flemmi, and Martorano, the defendant knew the result: Callahan would be murdered.

This act was done from ill will and an evil intent, and indicated an indifference to human life. The defendant wanted to protect Bulger, Flemmi, Martorano, **and himself** from criminal prosecution. He believed that once the FBI located Callahan and implicated Callahan in Wheeler's mur-

der, Callahan would cooperate with the FBI for a reduced sentence, and Callahan's cooperation would implicate Bulger, Flemmi, Martorano, and the defendant in the Wheeler murder and other killings. The defendant therefore knew that Callahan needed to be silenced, and the way in which Bulger, Flemmi, and Martorano would silence Callahan was in the same way they silenced Castucci, Wheeler, and Halloran—by murdering him.

The State also proved that during this act the defendant was armed with ("carried") a firearm. Thus, during the commission of the second degree murder (the unlawful killing of the victim by an act of the defendant that was imminently dangerous to another demonstrating a depraved mind without regard for human life), the defendant carried a firearm and the defendant's conviction was lawfully reclassified pursuant to section 775.087(1).

[24] The dissenters seek to engraft a requirement into the text of section 775.087(1) that is not present—that the carrying of the firearm must be "both temporally and spatially related to the crime committed." However, the wording of the statute itself and a comparison to similar legislation demonstrates that the Florida Legislature did not include such a requirement and it intended that the reach of section 775.087 be as broad as possible, but tempered by prosecutorial discretion.

The relevant language in section 775.087(1) provides that "whenever a person is charged with a felony ... and **during the commission of such felony** the defendant carries, displays, uses, threatens to use or attempts to use any weapon or firearm ... the felony for which the person is charged shall be reclassified." (emphasis added). Compare the emphasized language in 775.087(1) to a similar federal provision, 18 U.S.C. § 924(c)(1)(A), which provides that:

> "[A]ny person who, **during and in relation to any crime of violence or drug trafficking crime** ... uses or carries a firearm, or who, **in furtherance of any such crime,** possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime [be sentenced to a minimum mandatory sentence to run consecutive to the underlying sentence.]"

(emphasis added).

When comparing section 775.087 (under any of its subsections) to the Federal Code, it becomes glaringly apparent that the reach of section 775.087 of the Florida Statutes is substantially broader than that of section 924(c)(1)(A) of the Federal Code because the word "during" (at some time in the course of) in the Florida statute contemplates only a temporal relationship to the underlying crime, whereas the terms "during and in relation to" and "in furtherance of" in the Federal Code necessarily require a substantial nexus between the weapon carried and the charged offense. *See, e.g., U.S. v. Gonzalez,* 528 F.3d 1207, 1212 (9th Cir.2008) (concluding that under Federal law, the determination of whether the " 'in furtherance' requirement is met is a 'fact-based inquiry into the nexus between possession of the firearm and the drug crime[,]' including such factors as 'proximity, accessibility and strategic location of the firearms in relation to the locus of drug activities' ") (alteration in original) (quoting *United States v. Hector,* 474 F.3d 1150, 1156–57 (9th Cir.2007))). *United States v. Guidry,* 456 F.3d 493, 508 (5th Cir.2006) ("To be carried 'in relation to' an offense under this section, a gun must have 'some purpose or effect with respect to the crime of violence.' " (internal quotation marks omitted) (quoting *United States v. Polk,* 118 F.3d 286, 293 (5th Cir.1997))). Florida's statute, section 775.087, however, does not include the "in relation to" or "in furtherance of" language

contained in its federal counterpart. Unlike the Federal Code, Florida's statute does not require any "functional" or spatial nexus for the carried firearm as the dissenters assert, nor does it require any coincidence of purpose with the underlying offense. It merely requires that the defendant carry a weapon during the commission of the felony, and in this case it was proven, and the jury found, that during the acts the defendant committed during the commission of the homicide, he carried a firearm.

We must assume that the Florida Legislature chose its words carefully when drafting section 775.087, and it clearly chose to use very broad language to encompass a wide variety of factual permutations. Not only does section 775.087(1) require reclassification when the weapon is utilized "during the commission of [the] felony," it also allows the offense to be reclassified if the defendant "carries, displays, uses, threatens to use, or attempts to use" any weapon during the commission of the felony. It is clear that the ambit of section 775.087 is to allow harsher sentencing for defendants who in any way associate with a weapon while engaging in felonies. Thus, any person who carries any weapon while engaged in a felony is subject to harsher sentencing under section 775.087.

B. *Section 775.087 does not require that a principal be present when the "last act" was committed*

[25] Besides attempting to add this "spatial and temporal proximity" language to section 775.087(1), which does not appear in the statute under any of its provisions, the dissenters conclude that second degree murder is a "discrete offense," and because the defendant was not present when the "last act" to the murder was committed (the shooting of the victim), his conviction for second degree murder cannot be reclassified pursuant to section 775.087(1). This conclusion rests on the premises that: (1) application of section 775.087(1) differs between "actual perpetrators" and aiders and abettors; and (2) second degree murder is a "discrete offense" that is only committed upon the completion of the crime—in other words, when the victim was shot and he died—and the defendant must have been present and armed when this last act occurred.

[26] The first premise is wrong because as previously explained, the Florida Legislature eliminated the disparate treatment between "actual perpetrators" and aiders and abettors nearly sixty years ago. Perpetrators, who were always statutorily referred to as "principals in the first degree," and aiders and abettors are now **all** "principal[s] in the first degree," and section 777.011 provides that each may be "charged, convicted, and punished" the same. Section 775.087(1) does not alter this general principal of law, and thus, all principals are treated alike. If a principal is armed during the commission of the felony, his offense may be reclassified under section 775.087(1) whether or not he is present. "Whoever commits any criminal offense against the state, ... or aids, abets, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offenses." § 777.011.

[27] The second premise is wrong because, while it is true that the offense committed by Bulger, Flemmi, Martorano, and the defendant did not become a second degree murder until the victim died, *see* § 782.042(2) (requiring that a human be "kill[ed]" before the defendant can be charged with second degree murder), a defendant need not be present at the scene

("spatial and temporal proximity") when the **last element** of the second degree murder occurred to permit reclassification of the murder for the defendant's possession of a firearm during the commission of the offense. The dissenters essentially argue that the defendant must carry a weapon during every element of a particular crime, but the word "during" contemplates the carrying of a weapon at any point (while committing any element) in the course of the offense.

The fallacy of this interpretation of "during the commission of" can easily be demonstrated in the following hypothetical. Defendants # 1, # 2, and # 3 decide to murder the victim. Defendant # 1's assigned role in the homicide is to pick up the victim at Miami International Airport and to deliver him to Defendant # 2 at a warehouse in Hialeah. Because the victim weighs 265 pounds, is a reputed enforcer for the mob, and may not willingly get into Defendant # 1's car, Defendant # 1 arms himself with a firearm. Everything, however, goes smoothly, and Defendant # 1, who is armed with a firearm, delivers the victim to Defendant # 2, and Defendant # 1 promptly leaves the warehouse and begins driving to Atlanta, Georgia, where he lives. While at the warehouse, Defendant # 2 decides to extract information from the victim before shooting him and accordingly keeps the victim in the warehouse for two days where he tortures the victim. Two days later, while Defendant # 1 is in Atlanta, Defendant # 2 finally shoots the victim, as planned, and calls Defendant # 3 to dispose of the body. Defendant # 3 arrives shortly thereafter. He too is armed with a firearm. Defendant # 3 picks up the victim, who is still breathing; puts the victim in his car; places his revolver on the seat next to him as a precautionary measure; and dumps the victim in an isolated field. The victim lingers for over twelve hours, but he eventually dies.

Under this scenario, if we applied the "last act" requirement as suggested by the dissenters, even though each of the defendants was armed during his role in the homicide, only Defendant # 3, who committed the last act—dumping the victim's body at a deserted location where he could not seek help and where he ultimately died—would be subject to reclassification under section 775.087(1). Although Defendant # 2 shot the victim and both Defendants # 1 and # 3 were principals in the first degree to the murder, because neither Defendant # 1 nor Defendant # 2 was present during the last act that caused the victim's death, under the dissenters' interpretation of section 775.087(1), their offenses could not be reclassified even though each was armed with a firearm when they carried out their agreed-upon roles in the homicide. What the dissenters fail to recognize is that all three perpetrators were principals in the first degree to the homicide; section 777.011 requires that they all be treated the same ("may be charged, convicted, and punished as such"); and section 775.087(1) permits reclassification of each of the principal's convictions if he personally used, threatened to use, carried, etc. a weapon during his participation in the commission of the felony.

[28] The dissenters' "last act" argument is also defeated by the very language chosen by the Florida Legislature when drafting the statutes defining second degree murder and principals. The statutes establishing the elements of second degree murder and the law governing principals and accomplices specifically contemplate that the acts committed by a co-defendant during the commission of the felony may be committed at any time and any place. Neither section 777.011, the statute pertaining to principals, nor section 782.04(2), the statute pertaining to second degree

murder, requires that the defendant be present or that he commit the **last act** that led to the victim's demise.

[29] Section 777.011, the principal statute, holds the defendant legally responsible as a principal, whether or not he is present when the crime is committed, if he "**did some act**"—not the last act—"or said some word which was intended to and which did incite, cause, encourage, assist, or advise the other person or persons to actually commit or attempt to commit the crime." *See also State v. Dene*, 533 So.2d at 270 (holding that, pursuant to section 777.011, a principal does not have to be at the scene of the crime); *State v. Lowery*, 419 So.2d 621, 623–24 (Fla.1982) (holding that Lowery was as equally culpable as a principal under section 777.011, as his co-felon who actually did the killing, although he was not present when his co-felon murdered the victim).

Similarly, for the defendant to be properly convicted of second degree murder, the State was required to prove that the victim's death was caused by **any criminal act** of the defendant that was imminently dangerous to another and demonstrated a depraved mind without regard for human life, not the last act. The jury instructions on second degree murder further explain that:

> An "act" includes a series of related actions arising from and performed pursuant to a single design or purpose.
>
> An act is "imminently dangerous to another and demonstrating a depraved mind" if it is an act or series of acts that:
>
> (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, and
>
> (2) Is done from ill will, hatred, spite or evil intent, and
>
> (3) Is of such a nature that the act itself indicates an indifference to human life.

The defendant does not dispute that there was competent substantial evidence to support his conviction for second degree murder. It is equally clear that neither section 777.011 nor section 782.04(2) requires the defendant to be present when the shooting occurs or during the "last act" that caused the victim's demise. The defendant and the dissenters, however, would impose such a requirement for reclassification under section 775.087(1) despite the Legislature's failure to add such language to section 775.087(1).

C. *Second degree murder can be an on-going crime*

[30] Despite the Florida Legislature's failure to include a "last act" requirement for imposition of section 775.087(1), the defendant and the dissenters encourage this Court to judicially impose a "last act" requirement for the crime of second degree murder. In doing so, they attempt to distinguish the crime of second degree murder from other crimes where there is case law specifically upholding the reclassification of the offense. They argue that while some crimes may be "continuing crimes," second degree murder can **never** be a continuing crime; and unless the crime is a continuing crime, the defendant must be present when the last act was committed to have his sentence reclassified. The dissenters therefore conclude that because the acts the defendant committed occurred prior to the actual shooting—the last act that caused Callahan's death—his conviction for second degree murder could not be reclassified even though he was armed with a firearm when he committed those acts. We disagree. As we have already shown, there is no requirement under Florida law that the defendant commit the last act that caused the victim's death, that he be present during this last act, or that he possessed the weapon used during the last act that

caused the victim's death for his murder conviction to be reclassified. And there are numerous scenarios where second degree murder may be an on-going crime.

This Court's opinion in *Junco v. State*, 510 So.2d 909 (Fla. 3d DCA 1987), which is in fact a second degree murder and attempted second degree murder case, clearly illustrates this point. In *Junco*, this Court affirmed the enhancement of Junco's robbery conviction and the imposition of consecutive three-year minimum mandatory sentences for his possession of a firearm during the commission of the second degree murder of two warehouse guards and the attempted second degree murder of another man even though Junco was not the shooter and was not present when the two guards were shot and killed and the third man was shot and injured. *Id.* This Court found that enhancement of the two second degree murders and the attempted second degree murder sentences pursuant to section 775.087 was proper, even though Junco was not present when the actual homicides and the attempted homicide were committed, because there was evidence that Junco was a principal to these offenses and he was in possession of a firearm while aiding and abetting the commission of the crimes. *Id.* This Court reached the same conclusion for Junco's co-defendant, R. Esquivel, who also did not shoot any of the victims but was armed with a firearm during the commission of the offenses. *Id.* at 911–13.

The fallacy of the dissenters' "last act" argument and their conclusion that second degree murder can never be an on-going or a continuing crime can also be illustrated by applying common logic. Consider the following two hypotheticals. In the first hypothetical, a homicide was committed by poisoning the victim. The victim's husband and son decide to murder the victim, and the husband begins lacing the victim's food with a deadly poison. While the husband is out of town on a business trip, the son uses the last of the poison they were feeding the victim, so the son obtains another bottle of the lethal substance, and, after the son administers two more doses from the bottle he obtained, the victim finally dies. It is undisputed that the husband was not present when the son administered the last dose of poison from the bottle he obtained. Although the weapon (poison) used by the son during the "last act" was not the same weapon used by the husband, it seems clear that both are criminally liable for the murder and that each was armed with a weapon (the poison) during the acts they committed that were imminently dangerous to another and evincing a depraved mind without regard for human life. Clearly both are guilty of at least second degree murder with a weapon. The dissenters' rationale would not allow the husband's sentence to be reclassified because he was not present and did not administer the last dose of poison to the victim, while the son's conviction could be reclassified—an absurd result. This hypothetical also illustrates how, under certain circumstances, a homicide may be a continuing or an on-going offense. The victim did not die from the doses of poison from the first bottle. She died from the accumulation of the doses administered over time, and, while she did not die until the last dose of poison was administered, each act of poisoning was an act imminently dangerous to the victim without regard for human life, and these acts caused her death. During each act of poisoning, a principal to the murder was armed with a deadly weapon.

In the second hypothetical, Bob the Burglar and Security Sam have a long-standing relationship whereby Sam, using his contacts and the information he obtained by working as a security guard, provides Bob the Burglar with confidential information regarding homes to burglarize. Over

the course of this relationship, Bob the Burglar has, on occasion, been confronted by a homeowner or a security guard during the burglary, and during such confrontations, he has killed the occupant. The "job" that results in their undoing is a home on E–Z Street. Sam tells Bob that there is a large quantity of cash, jewelry, and drugs at that location, but also informs him that the homeowner is usually at home and the property is guarded by a hired security guard who Sam knows quite well. Sam tells Bob that he will help Bob commit the burglary by luring the security guard off the property, and it is understood that Bob will do whatever is necessary (i.e., kill the homeowner) if confronted by the homeowner during the burglary.

On the night of the burglary, Sam lures the security guard away from the property, and they go into town for a drink. However, when the security guard begins to get suspicious and tries to return to his post on the property, Sam forces the guard at gunpoint back into the car, hits him on the head with the firearm, and takes the unconscious security guard to a deserted area where he tries to decide what to do next. Meanwhile, while committing the burglary, Bob is confronted by the homeowner. The homeowner activates a silent alarm, Bob shoots the homeowner, and the police arrive while Bob is still burglarizing the house. Although the homeowner dies moments after the police arrive, he is able to tell the police that he has surveillance cameras all throughout his property, explain that a security guard was supposed to be guarding the property, and gives them the security guard's cell phone number. From this information, the police observe Sam on the surveillance tapes luring the guard into a car, and they are able to track the security guard's location through the guard's cell phone. The police locate Sam and the unconscious but otherwise unharmed security guard, and they arrest Sam. Sam was armed with a firearm throughout his participation as a principal to the burglary and the homicide.

Based on these facts, it is clear that both Bob and Sam are guilty of armed burglary and, at a minimum, second degree murder. Because both Bob and Sam were armed with firearms during the commission of the acts that make them guilty of second degree murder, their convictions for second degree murder may be reclassified under section 775.087(1). Just like the defendant in our case, Sam committed acts that caused the death of the victim. The acts he committed were done from ill will, hatred, spite, or evil intent; were imminently dangerous to the victim; demonstrated a depraved mind; and indicated an indifference to human life, which a person of ordinary judgment would certainly know was reasonably certain to cause the death of the victim or cause serious bodily injury to another. Thus, just like the defendant in our case, Sam is guilty of second degree murder because the evidence establishes each and every element of second degree murder; and Sam aided, incited, encouraged, and otherwise assisted Bob in committing the offenses, even though Sam was not present when the shooting occurred and he did not pull the trigger. Additionally, both the burglary and the homicide where on-going crimes. Although Sam was not present when Bob entered the house or shot the victim, he was armed when he committed the acts as a principal to both offenses. Thus, because Bob and Sam in this hypothetical, and the defendant in our case, were armed with firearms during the acts they committed and which caused the death of the victims, their convictions for second degree murder shall be reclassified to life felonies under section 775.087(1).

As these hypotheticals and this Court's prior opinion in *Junco* demonstrate, the homicide in the instant case was an on-

going offense, and the defendant was armed while he committed acts which were intended to and did in fact incite, cause, encourage, assist, or advise his partners in crime (Bulger, Flemmi, and Martorano) to commit the murder, acts that pre–1957 would have made the defendant an accessory before the fact, but since 1957 make him for all purposes a principal in the first degree to the murder. The acts the defendant committed were also acts that were imminently dangerous to the victim, demonstrating a depraved mind without regard for human life, and these acts caused the death of the victim. Thus, whether relying on the language regarding principals or the language of second degree murder itself, the reclassification of the defendant's conviction for second degree murder was lawful. In short, the murder began when the defendant told Bulger and Flemmi to "take care of" Callahan, and it ended when Callahan was actually shot and killed. Possession of a weapon at any point in the interim was "during the commission of the felony."

In 1999, the Florida Legislature specifically addressed the application of subsections (2) and (3) of section 775.087, regarding the imposition of minimum mandatory prison terms for criminals who possess firearms during the commission of an offense. In section 27.366, Florida Statutes (1999), the Florida Legislature specified that whenever a criminal offender meets the criteria in sections 775.087(2) and (3), and a minimum mandatory sentence is not imposed, the State Attorney must explain why the minimum mandatory sentence was not imposed in writing and maintain that explanation in the case file. While expressing its "zero tolerance" for those who possess firearms during the commission of an offense, the Florida Legislature recognized that "prosecutors should appropriately exercise their discretion in those cases in which the offenders' possession of the firearm is incidental to the commission of the crime and not used in furtherance of the crime, used in order to commit the crime, or used in preparation to commit the crime." *Id.*

Section 27.366 reads in full as follows:

> It is the intent of the Legislature that convicted criminal offenders who meet the criteria in s. 775.087(2) and (3) be sentenced to the minimum mandatory prison terms provided herein. It is the intent of the Legislature to establish zero tolerance of criminals who use, threaten to use, or avail themselves of firearms in order to commit crimes and thereby demonstrate their lack of value for human life. It is also the intent of the Legislature that prosecutors should appropriately exercise their discretion in those cases in which the offenders' possession of the firearm is incidental to the commission of a crime and not used in furtherance of the crime, used in order to commit the crime, or used in preparation to commit the crime. For every case in which the offender meets the criteria in this act and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney.

[31] Although section 27.366 is directed to subsections (2) and (3) of section 775.087, because section 775.087(1) does not include the "related to" or the "in furtherance of" language, and the Florida Legislature has expressed its zero tolerance for those who possess firearms during the commission of a crime, we reject the notion that section 775.087(1) should only apply to principals who are present when the last act or last element of a crime is committed, or when the firearm is used in furtherance of the crime. To do so violates the clear and unambiguous language of sections 777.011 (the principal

statute), 775.087(1) (the reclassification statute), and 782.04(2) (the second degree murder statute). As the Florida Legislature has clearly stated, the decision as to whether to seek enhancement (or in this case a reclassification) of an offense when the firearm was incidental to the commission of the offense, lies within the State's discretion. And that discretion is further tempered by the jury's pardon powers. If the Legislature granted prosecutors the discretion whether to seek enhanced sentences under section 775.087 "in those cases in which the offender's possession of a firearm is incidental to the commission of a crime and not used in furtherance of a crime, used in order to commit a crime, or used in preparation to commit a crime," then obviously prosecutors may exercise their discretion, as they did in this case, whether to seek a reclassification of the offense.

VII. *Miscellaneous arguments raised in the concurring in part and dissenting in part opinion*

Lastly, we address the concurring in part and dissenting in part opinion's characterization of the defendant's role in the homicide as an "aider and abettor," whose acts were simply part of "the planning and preparation for the murder," and the opinion's discussion regarding attempts, solicitation, and other criminal statutes. The concurring in part and dissenting in part opinion proclaims that the defendant's acts merely "consisted of planning and preparation, [ ] which are insufficient to establish commencement of the crime," and for a crime to be committed, "[t]here must be proof of an overt act beyond mere preparation." While this is a correct statement of the law regarding attempts, this case does not involve an attempt. The defendant's acts occurred during the commission of the completed crime of second degree murder. Rather than addressing whether the defendant was armed during the commission of the sum total of the elements he committed to make him guilty of second degree murder, the dissenters separate the elements and ultimately conclude that the defendant must have been armed with a firearm when one or all of the elements was satisfied in order for reclassification to occur under section 775.087(1).

As stated earlier, second degree murder is the unlawful killing of a human being by any act that is imminently dangerous to another and evincing a depraved mind regardless of human life. § 782.04(2). While it is true that there must be an overt act beyond mere preparation for an **attempted murder,** we are not discussing whether the defendant could have been convicted of attempted second degree murder if Martorano did not shoot Callahan. The crime the defendant and his co-defendants committed went past mere planning and preparation. They picked Callahan up at the airport, shot him in the head, and left his dead body in the trunk of a car in the parking garage at Miami International Airport.

Thus, the concurring in part and dissenting in part's discussion of "attempt" cases such as *Arias v. State,* 593 So.2d 260 (Fla. 3d DCA 1992), *Morehead v. State,* 556 So.2d 523 (Fla. 5th DCA 1990), *State v. Coker,* 452 So.2d 1135 (Fla. 2d DCA 1984), and *Robinson v. State,* 263 So.2d 595 (Fla. 3d DCA 1972), sheds no light on the issue in this appeal. The issue in this appeal is whether the defendant's conviction for the **completed crime** of second degree murder was lawfully reclassified under section 775.087(1) where the jury found that the defendant committed an act or acts that were imminently dangerous to another and which caused the death of Callahan, the jury found the defendant carried a firearm during these acts, and there was evidence to support the jury's findings.

Additionally, the defendant did not simply participate in the planning and preparations of the murder, although if that was all he had done, he would still have been equally and legally responsible as a principal in the first degree to the murder. The defendant actually initiated and procured the murder of Callahan, and he did so not only to protect Bulger, Flemmi, and Martorano, but to protect himself. He needed Callahan to be silenced so everyone's acts, which included several murders in which Connolly was involved, would not be exposed. And the defendant was armed with a firearm when he procured, planned and prepared for the murder of Callahan. Callahan would not have been murdered but for the defendant's initiation of, and participation in, the commission of the murder.

The concurring in part and dissenting in part opinion also boldly asserts that the acts committed by the defendant while he was armed with a firearm were not acts that were imminently dangerous to the victim. The jury, however, found that they were. Moreover, the defendant does not dispute that he was lawfully convicted of second degree murder, which required the State to prove beyond a reasonable doubt that the **defendant** committed a criminal act that was imminently dangerous to another and demonstrating a depraved mind without regard for human life and this act **caused** the death of Callahan.

[32] We do agree with the concurring in part and dissenting in part opinion that the completed crime of second degree murder differs from solicitation, conspiracy, and possessory offenses. Each of these crimes becomes a completed crime when the solicitation, conspiracy, or possession occurs. Second degree murder differs in many respects. Procurement, planning, and an overt act or acts that do not cause the death of the victim, do not satisfy the requisite elements of second degree murder. That does not mean, however, that the defendant must possess a firearm during the commission of all of the elements of second degree murder. Section 775.087(1) imposes no such requirement. Section 775.087(1) provides that "whenever a person is charged with a felony ... and during the commission of such felony the defendant carries ... any weapon or firearm ... the felony for which the person is charged shall be reclassified...." And as the Merriam–Webster Dictionary clearly concludes—"during" means "at some time in the course of." Because the jury found, and the evidence established, that the defendant carried a firearm during his role in the commission of Callahan's murder, his conviction was properly reclassified under section 775.087(1).

[33] Second degree murder is also a rather unique crime. Most crimes require a specific act or acts to give rise to criminal liability. For example, to commit the crime of robbery, an example relied on in the concurring in part and dissenting in part opinion, the defendant or defendants must take the property from the person or custody of the person with force, violence, assault, or by putting the victim in fear during the course of the taking. § 812.13. Second degree murder does not require a specific act, such as shooting or stabbing the victim. Second degree murder only requires that the defendant commit some act—any act—that is imminently dangerous to another evincing a depraved mind regardless of human life and which ultimately causes the victim's death. § 782.04(2). The defendant committed such acts, his acts caused the victim's death, and he was armed with (carried) a firearm during these acts. These findings would have allowed the defendant to be convicted of second degree murder wholly apart from accomplice liability or the principal statute, i.e., the defendant is the "ac-

tual perpetrator" as well. Thus, his conviction was properly reclassified pursuant to section 775.087(1).

The concurring in part and dissenting in part opinion erroneously relies on *Lemus v. State,* 33 So.3d 774 (Fla. 4th DCA 2010). In *Lemus,* the Fourth District Court of Appeal addressed whether under section 775.087(2)(a)2. (the "10/20/Life" statute), the trial court could impose twenty-year minimum mandatory sentences for each of the separate aggravated assaults committed by the defendant based on his discharge of a firearm during his standoff with the police. The Fourth District Court of Appeal correctly held that based on the facts of that case, the twenty-year minimum mandatory sentences could not be imposed for the aggravated assaults. *Id.* at 776.

Section 775.087(2)(a)2. provides in pertinent part that any person who is convicted of a qualifying offense (including an aggravated assault) "and during the course of the commission of the felony such person discharged a 'firearm' ... shall be sentenced to a minimum term of imprisonment of 20 years." Although the defendant discharged his firearm during his standoff with the police, because he did not discharge his firearm during the commission of either of the aggravated assaults (when he came outside the house and pointed his firearm at the police), the Fourth District Court of Appeal correctly held that section 775.087(2)(a)2. could not be used to impose twenty-year minimum mandatory sentences for the aggravated assaults. The aggravated assaults were wholly committed when Lemus pointed his weapon at the officers and cause fear. Thus, the entire commission of those aggravated assaults took mere seconds, and the defendant did not discharge a weapon during that time. In the instant case, the defendant may have carried his firearm during other criminal acts, but his second degree murder conviction was reclassified based solely on the firearm the defendant carried during the commission of the murder, and not some other offense. Further, unlike the defendant in *Lemus,* he carried his weapon while the crime of second degree murder was ongoing.

CONCLUSION

Because the defendant did not timely object to the reclassification of second degree murder based on a defect in the indictment, he must demonstrate fundamental error to obtain a reversal of his conviction and sentence to second degree murder with a firearm. The defect in the indictment was not a failure to charge an element of the crime; the defendant had notice that the State intended to prove that he carried a firearm during his role as a principal to the murder and that the State would seek a reclassification of the murder charge; the defendant has not claimed surprise or prejudice; and the reclassified second degree murder was not greater in degree or penalty than the charged offense. Therefore, no fundamental error has been shown, and we cannot reverse on that basis.

The jury's finding was also legally sufficient to permit reclassification of the second degree murder. The defendant specifically requested, and the trial court instructed the jury, that the firearm reclassification of second degree murder was to be treated as an element of second degree murder. Therefore, the jury was instructed that the lesser included offense of first degree murder was **second degree murder with a firearm.** The jury was instructed that it must find the defendant not guilty unless it concluded that the State proved beyond a reasonable doubt that the defendant carried a firearm when he committed an act or acts that were imminently dangerous to anoth-

er and evincing a depraved mind regardless of human life, and that these acts caused Callahan's death. Thus, it cannot be disputed that the jury found that the defendant carried a firearm during the commission of the second degree murder.

Lastly, reclassification under section 775.087(1) does not require use of the weapon that actually killed the victim, the defendant's physical presence during the last act that resulted in the victim's death, or that the firearm carried by the defendant be used in furtherance of the crime. Thus, because the reclassification of the defendant's conviction for second degree murder was based on his personal possession of a firearm during the acts he committed during the commission of the murder—acts that were imminently dangerous and evincing a depraved mind regardless of human life and which caused the death of Callahan—the reclassification of the second degree murder was not fundamental error.

Affirmed.

WELLS, SALTER, FERNANDEZ, LOGUE and SCALES, JJ., concur.

SUAREZ, C.J. (dissenting).

I respectfully dissent. The majority decision has established an entirely new standard for the application of section 775.087(1), Florida Statutes,[6] governing the reclassification of certain crimes, not only in direct conflict with Florida Supreme Court precedent interpreting that statute, but also precedent out of every Florida district court of appeal including our own. The majority's overbroad interpretation of the reclassification statute contravenes the long-held rule of statutory construction that "when the language [of the criminal statute] is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), Fla. Stat. (1981) (providing the rules of construction for the provisions of that statute, which includes reclassification, section 775.087(1)).[7]

The statutory construction at issue in the language of section 775.087(1) is whether the words "carries, displays, uses ... **any weapon** or firearm **during the commission of**" the offense refers to the weapon charged in the indictment and directly related to or available for use in the charged offense; or, as the majority now holds, that language refers to any weapon—charged or not—in the possession of a co-defendant, no matter how remote in time and geographical location from the actual charged crime. Up until today, section 775.087(1) has been interpreted throughout the state to require the defendant to have carried, displayed, used, threatened or attempted to use the weapon actually used or available for use in com-

6. Section 775.087(1), Florida Statutes (1981) (emphasis supplied) provides,

> Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, **and during the commission of such a felony the defendant carries, displays, uses, threatens, or attempt to use any weapon or firearm,** or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged **shall be reclassified** as follows: (a) In the case of a felony of the first degree, to a life felony ...

7. *See, Kasischke v. State,* 991 So.2d 803, 814–15 (Fla.2008) (observing in regard to ambiguous criminal statute that we "cannot simply choose our preferred construction" and "In Florida, the rule [of lenity] is not just an interpretive tool, but a statutory directive"); *Lambert v. State,* 545 So.2d 838, 841 (Fla. 1989) ("In construing [penal] statutes, we begin with the principle that, where criminal statutes are susceptible to differing constructions, they must be construed in favor of the accused.").

mission of the felony. In this case, that weapon is co-perpetrator Martorano's own gun that Martorano used to murder Callahan.

Even appellate counsel for the State conceded at oral argument there is no case law in the entire jurisprudence of this state, or in the entire country so far as we can discern, to support today's interpretation and application of section 775.087(1) to reclassify based on 1) a co-defendant's carrying, using, displaying, etc., a weapon not charged or mentioned in the indictment or information; 2) where that weapon was not the weapon used or available for use in the commission of the crime, and; 3) the defendant was remote in time and place from the commission of the crime. Case authority in Florida up to the present leads to only one conclusion: that Connolly's conviction for second-degree murder as a principal was not subject to being reclassified under the statute. Because reclassification is inapplicable, the statute of limitation for the underlying offense has expired and the conviction should be vacated.

Let me be clear: Connolly's conviction for second-degree murder is *not* the issue before us on appeal. Connolly's participation in egregious acts and culpability as a principal should not enter into our analysis of the very specific and circumscribed legal issue raised by the parties in this appeal: whether section 775.087(1) allows reclassification of Connolly's conviction of the lesser included offense of second-degree murder as a principal where Connolly was not present during the commission of the offense, and never carried the firearm used and charged in the indictment and referred to in the verdict.

At the outset, we must recognize the unusual procedural posture of this case. In 2005, the State of Florida decided to charge Connolly with murder in the first degree, as well as conspiracy to commit first-degree murder, although the criminal events occurred twenty-three years earlier, in 1982. The statute of limitation had run on the lesser included felony of second-degree murder, and any such conviction would have to be vacated.[8]

After trial, the jury acquitted Connolly of both conspiracy and first-degree murder, but found him guilty of the lesser included offense of second-degree murder as a principal. This result put the State between a rock and a hard place: the State wanted Connolly incarcerated and had risked a great deal to achieve a conviction, but everyone knew that the statute of limitation had run on the crime of second degree murder, and Connolly would have to be released. There was only one way for the State to repurpose the conviction, and that was to argue that Connolly's conviction for second-degree murder should be reclassified to a life felony pursuant to section 775.087(1), as there is no statute of limitation on a life felony. Connolly would then be exposed at sentencing to a term of years up to life in prison. The problem the State faced is that years of case law had interpreted section 775.087 to require the defendant to have been in actual possession of (carried, displayed, etc.) the weapon during commission of the crime, in order for a conviction to be reclassified. The State then pursued a novel theory to justify reclassification: the State argued that a literal reading of section 775.087(1) required only that the defendant possess "any" weapon or firearm. Thus, the State proposed, if during the commission of the crime the defendant carried "any weapon or firearm," that defendant's conviction could be reclassified pursuant to section

8. *See* § 775.15(2)(a), Fla. Stat. (1982) ("A prosecution for a felony of the first degree must be commenced within 4 years after it is committed.")

775.087(1). Connolly, though in Boston at the time of the murder, was obligated to wear his FBI-issued service weapon and thus, argued the State, he "carried" a firearm "during the commission of the felony," referring to the language of section 775.087(1). The State got a verdict that, superficially at least, appeared to allow reclassification on this basis.

Two questions emerge from this case: What time period is encompassed by the language "during the commission of the offense," and, as among multiple defendants, to what weapon does the statutory phrase "any weapon or firearm" refer? The controversy over how this specific language within section 775.087(1) should be applied to the facts before us is the crux of this appeal.[9] My analysis of the issue on appeal has not changed: the "during the commission" of the murder refers to the discrete and time-limited act of shooting the victim with a firearm; the "any weapon or firearm" refers to one that was used or available for use during commission of that offense. Without the erroneous application of reclassification, Connolly's conviction for second-degree murder as a lesser included offense of first-degree murder was barred by the applicable statute of limitation, and his sentence should be vacated.[10]

BACKGROUND

In 2005, former FBI agent Connolly was charged by indictment, as a principal,[11]

9. In yet another procedural twist, one month after the trial Connolly filed a motion in arrest of judgment on grounds that the second-degree murder conviction could not be reclassified to a life felony and was therefore barred by the statute of limitation. The trial court agreed with Connolly that the second-degree murder conviction could not be reclassified as Connolly did not personally carry the murder weapon and was in Boston during the commission of the offense. The trial court rejected the State's argument that, as Connolly always carried his firearm while on duty, this constituted "possession" of a weapon. The trial court noted that,

> This argument fails to take into account that the Defendant having a weapon three weeks prior to the murder does not change the fact that [he] had to have possessed the actual murder weapon at the time of the murder for the reclassification of second degree murder with a firearm under §§ 775.087 and 777.011, Fla. Stat., to apply.

The trial court was nonetheless compelled to deny Connolly's motion, correctly ruling that as defense counsel filed the motion more than ten days after rendition of the verdict, the court had lost jurisdiction as the motion was untimely filed pursuant to Florida Rules of Criminal Procedure 3.610(c) and 3.590(a).

10. *See Toussie v. United States,* 397 U.S. 112, 114–115, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970):

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose.' "

See also Mead v. State, 101 So.2d 373, 375 (Fla.1958) ("The appellant was not required to raise the question of the statute of limitations as the statute must be construed liberally in favor of defendants and need not be pleaded in bar. It was incumbent on the state not only to prove that the appellant perpetrated the crime but that he did so within [the statute of limitation period] of the filing of the information on which he was being tried.").

11. § 777.011, Fla. Stat. (1981), Principal in the first degree; *see also* fn. 17, infra.

with co-defendants James Bulger, Stephen Flemmi and John Martorano, with first-degree murder (Count 1) [12] and conspiracy to commit first-degree murder (Count 2).[13] The indictment alleged that Connolly, while actively employed as an FBI agent, participated in a scheme to murder businessman John Callahan in South Florida on or about July 31, 1982. The State submitted evidence at trial that Connolly met a few times with co-defendants Bulger, Flemmi and Martorano in New York and/or Boston over several weeks preceding the murder. This evidence comprised the basis for the State's charge of conspiracy to commit first-degree murder. The State's evidence at trial also indicated that the scheme to murder Callahan occurred during these meetings. Further, the State's evidence indicated Connolly wore his FBI-issued service weapon while he was at these meetings and, by implication, over the time period Callahan was murdered. However, the State's evidence also showed that at the time of the actual murder, which occurred somewhere between Broward and Miami–Dade Counties, Florida, Connolly and his service weapon were both approximately 1,400 miles away in Boston, Massachusetts. It was undisputed that co-defendant Martorano used his own gun to shoot Callahan, and that Connolly never carried, displayed, used, or threatened to use the murder weapon.

In 1982, when the murder occurred, the statute of limitation for a first-degree felony was four years. § 775.15(2)(a), Fla. Stat. (1981). Thus, by the time Connolly was indicted in 2005, the four-year statute of limitation had expired some nineteen years earlier for the first-degree felonies of conspiracy to commit first-degree murder, section 777.04(4)(b), Florida Statutes (1981), and second-degree murder, section 782.04(2), Florida Statutes (1981).[14] Any conviction on those charges was thus barred by the four-year statute of limitation in effect at the time of the 1982 murder. The trial court denied Connolly's motion to dismiss the charge in Count 2 of conspiracy to commit first-degree murder with a firearm. Connolly did not move pre-trial to dismiss Count 1, first-degree murder with a firearm, based on the State's failure to charge him with possession of a separate firearm because reclassification was not an issue: first-degree murder in 1982, and at present, was a capital felony and cannot be reclassified to a higher offense.

At the conclusion of the trial, during the jury instruction conference, the discussion turned to lesser included offenses. The trial court pointed out that, were Connolly to be convicted of second-degree murder *without* a firearm, the statute of limitation would be found to have run and Connolly would be discharged. The defense re-

12. Count 1 of the indictment states that four co-perpetrators, Bulger, Flemmi, Martorano, and Connolly:

> did unlawfully and feloniously kill a human being, to wit: JOHN B. CALLAHAN, from a premeditated design to effect the death of the person killed or any human being, by shooting the said JOHN B. CALLAHAN with a firearm, in violation of s. 782.04(1), s. 775.087, and s. 777.011, Florida Statutes....
>
> "did unlawfully and feloniously agree, conspire, combine, or confederate [with one another] to commit a criminal offense, to wit: Murder in the first degree with a firearm upon JOHN B. CALLAHAN, in violation of s. 782.04(1), s. 777.04(3), s. 775.087, and s. 777.011, Florida Statutes...."

13. Count 2 states that the same four co-defendants.

14. "It is firmly established law that the statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed." *State v. Miranda,* 793 So.2d 1042, 1044 (Fla. 3d DCA 2001).

peatedly objected to inclusion of any lesser included offenses. The State requested the jury be instructed on second-degree murder with a firearm as a lesser included offense of first-degree murder. The State argued if Connolly were so convicted, it would seek reclassification of that first-degree felony to a life felony pursuant to section 775.087(1), and that a life felony was not barred by the four-year statute of limitation.

The trial court granted the State's request over defense counsel's objection, adding "carrying a firearm," as a fourth element to the second-degree murder instructions. The jury was thus instructed that to find Connolly guilty of second-degree murder they must find the following four elements beyond a reasonable doubt: 1) Callahan is dead; 2) His death was caused by the criminal act of Connolly; 3) There was an unlawful killing of Callahan by an act imminently dangerous to another and demonstrative of a depraved mind without regard for human life; and 4) During the act, Connolly carried a firearm.

The jury acquitted Connolly of Count 2, conspiracy to commit first-degree murder with a firearm, as well as Count 1, first-degree murder, but found him guilty of the lesser included offense subsumed within Count 1 of second-degree murder with a firearm. The verdict form simply stated, "Guilty of second-degree murder, with a firearm, as a lesser included offense of first-degree murder." Based on the jury's verdict that found Connolly guilty of second-degree murder "with a firearm," the trial court reclassified the conviction to a life felony pursuant to section 775.087(1) and sentenced Connolly to forty years in prison.

ANALYSIS

1) Count 1 of the indictment failed to provide Connolly with notice that a conviction for a lesser included offense as a principal could be reclassified based on his own weapon, where Connolly was not present during the commission of the offense, and his weapon was unrelated to the commission of the offense.

It is pure sophistry to argue that the general reference to section 775.087 in Count 1 of the indictment put Connolly on notice that his service weapon—an uncharged [15] firearm completely unrelated to the murder, located in an entirely different state at the time of the offense, could later be the basis for reclassifying a time-barred conviction of a lesser included offense to a non-time-barred life felony, for committing the offense "with a firearm." [16] Due process of law requires the State to allege every essential element when charging a violation of law to provide the accused with sufficient notice of the allegations against him. Art. I, § 9, Fla. Const.; *M.F. v. State*, 583 So.2d 1383, 1386–87 (Fla.1991). In this case, there has been a fundamental denial of due process because the Defen-

15. When I refer to an "uncharged," weapon in this dissent, I mean that the firearm used as the basis to reclassify the conviction is not the one specifically referred to in the charge of first-degree murder in Count 1 of the Indictment. Count 1 only specifically mentions the firearm used to murder Callahan and no other weapon. Connolly's firearm is thus "uncharged."

16. The State cites to *Miller v. State*, 460 So.2d 373 (Fla.1984), to support its argument that reclassification was proper. It is true that the primary charge in an indictment or information includes all lesser included offenses, for purposes of reclassification, but I cannot agree that *Miller* supports reclassification pursuant to section 775.087(1) based on a weapon uncharged and unrelated to the commission of the offense. *Miller*, in addition, involved one defendant, not multiple co-defendants, and it was clearly established that Miller had actually used the handgun during the commission of the crime.

dant's conviction was erroneously reclassified based on a charge not made in the information or indictment. *See Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940);[17] *compare Inmon v. State*, 932 So.2d 518, 520 (Fla. 4th DCA 2006) (holding that State's failure to specifically reference the subsection within section 775.087 in the information renders notice of the particular enhancement sought against the defendant insufficient).

Count 1 of the indictment alleged the four co-perpetrators killed Callahan "by shooting the said JOHN B. CALLAHAN with a firearm," but does not allege Connolly personally possessed, used, or carried a firearm, either the murder weapon or Connolly's FBI-issued firearm, during the commission of the murder. The only weapon implied by "shooting ... JOHN B. CALLAHAN" is the murder weapon. The State acknowledges it was uncontested the only gun used to shoot the victim was possessed and discharged by co-defendant Martorano and Connolly is not the person who effected "the death of [the victim] by shooting [the victim] with a firearm."[18] Further, the phrase "with a firearm" is clearly singular, and refers to the manner in which John Callahan was killed: it is clearly a reference to the only firearm used. From the language of Count 1, no reasonable person could conclude that the State was planning to apply section 775.087(1), upon possible conviction for a lesser included offense, to an unmentioned firearm that had nothing to do with the murder.

The State argues that Connolly's failure to challenge the sufficiency of the indictment by motion to dismiss constituted a waiver and should have precluded his ability to raise the issue at a later time. The State's arguments on the issue of waiver are entirely unpersuasive. First, Connolly had no reason to seek to dismiss the first-degree murder charge in Count 1 of the indictment because it is a capital felony, punishable by death, and is not subject to reclassification or enhancement as there is no higher punishment level. Further, the charging document failed to place Connolly on notice that conviction on a lesser included offense would subject him to reclassification pursuant to section 775.087(1) because the language of Count 1 did not expressly single him out, as one of the four equally charged co-defendants, with actually possessing, carrying, using or discharging a *second* firearm, i.e., his FBI-issued sidearm. Martorano's firearm, the murder weapon, was the *only* weapon charged in Count 1. As this was a multi-defendant case and only one of the defendants, Martorano, used the gun to shoot the victim, Connolly would have no reason to conclude that the general reference in Count 1 to section 775.087 pertained to him rather than the actual shooter.[19] Connolly's only

17. "A conviction on a charge not made by the indictment or information is a denial of due process" and an indictment or information that "wholly omits to allege one or more of the essential elements of the crime" cannot support a conviction for that crime. *State v. Gray*, 435 So.2d 816, 818 (Fla.1983). This is a deficiency that can be raised at any time. *Id.* The Florida Supreme Court has consistently applied these principles. *See, e.g., Jaimes v. State*, 51 So.3d 445, 448 (Fla.2010) ("It is a fundamental principle of due process that a defendant may not be convicted of a crime that has not been charged by the state."); *Price v. State*, 995 So.2d 401, 404 (Fla.2008) (reiterating that the failure to allege an essential element of a crime may be raised in a habeas petition).

18. See fn. 7, *supra*.

19. At the time of the indictment and trial, case precedent interpreted the language of section 775.087 to apply only to the defendant who actually possessed, carried, displayed, etc. the actual weapon used in commission of the offense. Connolly never possessed, used, displayed, or even had knowledge of the gun used to kill Callahan and, additionally, was approximately 1,400 miles away when the murder occurred.

avenue of relief was to object to the inclusion of any lesser included offenses, which the record clearly shows his defense counsel strenuously and continuously did.

The State relies on *Mesa v. State*, 632 So.2d 1094 (Fla. 3d DCA 1994), to support its contention that Connolly's failure to object prior to trial to the charging document as flawed amounts to waiver. But *Mesa* is pointedly distinguishable in several ways. First, and most important, *Mesa* involved only *one defendant* and *one gun*, the gun used in the crime. There was no opportunity for confusion regarding who committed the crime and used the weapon. Thus, the general reference to section 775.087 in Mesa's charging document was enough to put him on notice that the prosecution was seeking reclassification under subsection (1) and/or enhancement for possession of a firearm under subsection (2) because he was the only defendant, and there was only one weapon involved. Further, the reference in the indictment that Mesa "did shoot" the victim put him on notice that, as he was the only perpetrator, he was charged with actually using a firearm in the crime. In addition, the jury specifically found that Mesa actually used a firearm via a special verdict form, to which he did not object. Thus, there was a clear jury finding that Mesa personally used the weapon. Finally, I note that Mesa was charged in the information with second-degree murder, not first-degree murder. Mesa was thus aware that his conviction could be reclassified as a higher degree felony.

Contrary to the facts in *Mesa*, Connolly was not the sole defendant, but was one of four co-perpetrators equally charged with first-degree murder; that crime cannot be reclassified to a higher offense; Connolly did not shoot Callahan; Connolly did not carry, display, possess, use or threaten to use, the murder weapon; and Connolly was miles from the murder at the time it was committed. *Mesa* and progeny are inapplicable to the specific facts presented in this case.[20] [21]

The State asserts that Connolly cannot claim that he was not on notice of the possibility of reclassification because, as early as two years prior to trial, Connolly had actual notice that the State was seeking to reclassify a lesser charge on the specific basis of Connolly's possession of a firearm during the Count 2 conspiracy offense. As we explain below in this opinion, upon conviction of a lesser included offense to Count 2 *conspiracy*, reclassification based on Connolly's firearm—which he carried during the conspiratorial meetings—would have been legally permissible had Connolly not, in fact, been acquitted of that charge. In that context, Connolly was appropriately charged with carrying his service weapon during the commission of the crime of conspiracy because it is an ongoing offense taking place over a period

20. Connolly does not challenge the language in Count 1 of the indictment as defective, as the State persistently argued, but rather that the statutory basis for reclassification upon conviction for a lesser included offense was not charged, i.e., carried, displayed, used, threatened or attempted to use, a *second* weapon during the commission of the felony.

21. The State correctly notes that the test for granting relief based on a defect in a charging document is actual prejudice, and argues that there was no prejudice to Connolly because first-degree murder and the lesser included offense of second degree murder both carry a maximum penalty of life, citing to *State v. Gray*, 435 So.2d 816 (Fla.1983), and *Delgado v. State*, 43 So.3d 132 (Fla. 3d DCA 2010). I find no greater "actual prejudice," however, than the facts presented by Connolly's case: conviction for a first-degree felony alone would have resulted in discharge under the applicable statute of limitation, but reclassification based on uncharged and unproven "carrying" of a weapon completely unrelated to the charged offense resulted in a forty-year sentence.

of time. *See generally, Rosen v. State*, 757 So.2d 1236 (Fla. 4th DCA 2000) (explaining application of statute of limitation to continuing, as contrasted with discrete, offenses). During the conspiracy, Connolly met with his co-defendants and the evidence indicated that, while participating in these meetings, Connolly wore his service weapon. Reclassification for carrying a weapon during an ongoing offense is legally supported. Section 5, *infra*. Connolly was, however, **acquitted of the Count 2 conspiracy charge,** rendering moot the merit of his pretrial motion to dismiss that count. As I discussed above, the State's assertion that Connolly was on actual notice of the applicability to him of the reclassification statute upon conviction of any lesser included offense within the **Count 1 first-degree murder charge** is untenable. Let us not confuse these two counts or the statutory elements necessary to prove those two entirely separate criminal offenses.

The State concedes there is no case law to support its unprecedented theory that reclassification upon conviction of a lesser included offense to first-degree murder could be accomplished where the co-defendant was not present during the offense, and did not actually carry, display, use or threaten to use, the actual firearm used by his co-defendant in the commission of the felony. The established case law at time of trial and at present is that, in a felony involving the use of a weapon, a defendant's sentence may only be reclassified upon a showing that the defendant had personal possession of the weapon during the commission of the felony. *State v. Rodriguez*, 602 So.2d 1270 (Fla.1992). The State's theory justifying reclassification, that Connolly carried his FBI-issued firearm during talks with his co-conspirators weeks prior to the murder is, as everyone agrees, an issue of first impression and Connolly cannot be said to have either anticipated or waived the issue. Where the State failed to allege in Count 1 that Connolly carried, displayed, used, threatened to use or attempted to use a second, unrelated firearm during the commission of the homicide, I conclude reclassification pursuant to section 775.087(1), given the facts in this case, was improper. The case controlling application of section 775.087(1) is the Florida Supreme Court case of *State v. Rodriguez*, 602 So.2d 1270 (Fla.1992). Between the holding of *Rodriguez* and the language of section 775.087(1) lies "language susceptible of differing construction." § 775.021(1).

2) It was error to reclassify based on a conviction as a principal for vicariously possessing the only weapon charged in count 1 and actually used in the murder.

Connolly could properly have been convicted as a principal of the lesser included offense of second-degree murder pursuant to section 777.011, Florida Statutes (1981).[22] But a defendant's conviction may not be reclassified for a co-defendant's possession of a firearm during a felony. *Rodriguez*, 602 So.2d at 1270.

In *Rodriguez*,[23] the Florida Supreme Court construed the language of section

22. Section 777.011 reads:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

23. *Rodriguez* actually arose out of our court. *State v. Rodriguez*, 582 So.2d 1189 (Fla. 3d DCA 1991). In that case, the police attempted to pull Rodriguez's car over and a high speed chase ensued. During the chase, a passenger in Rodriguez's car picked up a rifle from the car seat and shot at the police. At

775.087(1) and answered this certified question in the negative: "Does the enhancement provision of subsection 775.087(1), Florida Statutes (1983), extend to persons **who do not actually possess the weapon but who commit an overt act in furtherance of its use by a coperpetrator?**" *Id.* at 1271. The Court focused on the language of subsection 775.087(1), which requires that *the defendant* carry, display, use, threaten, or attempt to use any weapon or firearm. *Id.* [emphasis in original]. The Court held that when a defendant is charged with a felony involving the "use" of a weapon, his or her sentence cannot be enhanced [reclassified] under section 775.087(1) without evidence establishing that the defendant had personal possession of the weapon during the commission of the felony. *Id.* at 1272. The Court explicitly rejected the idea that a defendant could be subject to reclassification under subsection 775.087(1) as a principal, i.e., **where the defendant did not personally possess the weapon used during the commission of the offense.** *Id.*

In the case before us, Count 1 of the indictment refers only to the murder weapon used by co-defendant Martorano and does not charge Connolly with possession or use of a second weapon (his own) in the commission of that offense. The evidence is undisputed that Connolly never possessed, carried, displayed or used the firearm used by Martorano to kill Callahan. Pursuant to *Rodriguez*, Martorano's firearm cannot be viewed as constructively possessed by Connolly for purposes of reclassification to avoid the statute of limitation on first-degree felonies. *See id.* Further, the verdict form did not include any interrogatory regarding Connolly's actual possession of the firearm alleged in Count 1, nor did the jury, by its verdict, make any finding that Connolly personally possessed the firearm used to shoot the victim. In *Rodriguez*, the firearm described in the information as the one used during the attempted murder "was at no time carried, displayed, used, or attempted to be used" by the defendant. 602 So.2d at 1271–72. The *Rodriguez* Court reached its holding despite the plain language of the statute indicating "any" weapon, not "the" weapon was "carried, displayed, used," etc.

3) It was error to reclassify based on carrying a weapon remote in time and unrelated to the charged offense.

The State proposes that a finding of "any" weapon on a principal co-defendant, however remotely situated, is enough to ground reclassification. This is contrary to the holding of *Rodriguez* and its related cases because the *Rodriguez* Court also noted in its opinion that the defendant's sentence could have been "enhanced" (more accurately, reclassified) under section 775.087(1) if the State had charged him with the commission of a felony while carrying the pistol that was found on his person after the chase. "**The failure of the State to properly charge Rodriguez precludes it from enhancing his sentence under the carrying portion of the statute.**" 602 So.2d at 1272 (emphasis added). In the case before us, Connolly was not charged in Count 1 with carrying,

trial, Rodriguez's conviction was reclassified pursuant to section 775.087(1). Upon post-trial motions, the trial court agreed the reclassification was illegal as Rodriguez never possessed the rifle that that was fired by the co-perpetrator during the chase. On appeal, this court agreed. **This court has previously ruled that "the enhancement provisions of section 775.087(1), Florida Statutes (1977), . . . requires that the defendant personally possess the weapon during the commission of the crime involved."** *Id.* at 1190 (citing to *Postell v. State*, 383 So.2d 1159, 1162 (Fla. 3d DCA 1980)) (emphasis supplied).

displaying, using, etc., his service revolver during the commission of the murder, nor was that uncharged weapon at all related to the murder offense. *See, e.g., Arnett v. State*, 128 So.3d 87 (Fla. 1st DCA 2013) (holding that 775.087 enhancement was improper where the grounds for enhancement were not clearly charged in the information, and a jury finding that the appellant actually possessed a firearm does not cure the charging defect). The same conclusion as arrived by the Florida Supreme Court in *Rodriguez* applies here. Consequently, the trial court's reclassification was fundamentally erroneous.

The majority's legal conclusion contradicts years of case authority interpreting section 775.087(1) as requiring that the defendant must personally possess the weapon used in the commission of the crime so charged. *See e.g., Chase v. State*, 74 So.3d 1138 (Fla. 2d DCA 2011) (holding that defendant's conviction for aggravated battery should not have been reclassified from a second-degree felony to a first-degree felony based on use of a weapon pursuant to section 775.087(1), where the evidence showed that only the co-defendant possessed or used a weapon during the offense); *Alusma v. State*, 939 So.2d 1081 (Fla. 4th DCA 2006) (reversing reclassification under section 775.087(1) where the defendant was convicted as a principal with his co-defendant, and the verdict did not reflect that the defendant was in actual possession of the firearm during the offense); *Parker v. State*, 906 So.2d 1273 (Fla. 5th DCA 2005) (noting that reclassification under section 775.087(1) is impermissible unless the defendant actually possesses a weapon during the commission of the crime); *Porter v. State*, 737 So.2d 1119, 1119 (Fla. 2d DCA 1999) (citing *Rodriguez* for the proposition "that section 775.087(1) does not permit vicarious enhancement"); *Clark v. State*, 701 So.2d 912 (Fla. 4th DCA 1997) (same; citing to *Rodriguez*, and *Williams v. State*, 622 So.2d 456 (Fla.1993)); *Williams v. State*, 656 So.2d 574, 575 (Fla. 1st DCA 1995) (holding murder sentence cannot be enhanced under section 775.087(1) where the jury specifically found "a firearm not in [defendant's] physical possession was used" in the course of committing the murder); *Robins v. State*, 602 So.2d 1272 (Fla. 1992) (quashing affirmance of reclassification under section 775.087(1) based on co-defendant's wielding of gun during commission of kidnapping offense); *Willingham v. State*, 541 So.2d 1240 (Fla. 2d DCA 1989) (holding it error to reclassify a sentence for use of a weapon during the discrete act of sale of drugs based on vicarious possession, where the co-defendant possessed the firearm during the transaction). The cited cases demonstrate that, when no evidence is presented that a defendant personally carried, displayed, used, threatened to use, or attempted to use a weapon related to the commission of the charged crime, it is error for the trial court to enhance the defendant's sentence based on a co-defendant's use of a firearm.

4) Connolly's conviction as a principal pursuant to section 777.011, would have been legally permissible (if not time-barred), but reclassification of his conviction is not.

But for the expiration of the statute of limitation, Connolly could have been convicted of second-degree murder as a Principal in the first degree, pursuant to section 777.011, which provides,

> 777.011 Principal in first degree.—Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not

actually or constructively present at the commission of such offense.

But the Florida Supreme Court explicitly rejected the idea that a defendant could be subject to reclassification under subsection 775.087(1) as a principal. *Rodriguez*, 602 So.2d 1270. On the facts before us, the criminal offense referenced in section 777.011 is the criminal offense for which the State sought to convict Connolly in Count 1. That is to say, the State charged Connolly as a principal in Count 1 with the first-degree murder of Callahan by shooting him with a firearm, not any underlying conspiracy that may have precipitated the murder, i.e., the "act" of meeting with co-perpetrators weeks earlier.

a) The language in section 775.087(1), "during the commission of the offense," refers to the homicide, not the acts of conspiracy contributing to the homicide.

"Act" is defined in the standard jury instructions as including "a series of related actions arising from and performed pursuant to a single design or purpose." Fla. Std.Crim. Jury Inst. 7.4. The state argued, and the majority here concludes, that the meetings Connolly had with the co-conspirators three weeks before Callahan's murder comprised the "act" referred to in the jury instructions. The majority posits that the "act" of meeting with the co-conspirators was performed with "a single design or purpose," i.e., to kill Callahan.

Connolly's complicity in the murder, however, is limited to his role in the conspiratorial meetings, acts for which he was acquitted. The "acts" necessary to plan and accomplish the actual murder were performed by the co-perpetrators, not by Connolly.[24] The majority, however, ignores the conspiracy acquittal and judicially expands the definition of "act" by engrafting elements of the ongoing crime of conspiracy to the discrete crime of murder in order to justify reclassification based on the unrelated weapon. The majority's interpretation of "act" to encompass elements of the conspiracy conflates the two entirely separate statutory crimes of conspiracy and murder, and the evidence necessary to prove them. The majority's "plain reading" rationale introduces an unprecedented and unjust application of the definition of "act" in order to justify reclassification of the murder conviction based on Connolly's entirely unrelated and uncharged firearm.[25] This conclusion is not supported by precedent. *See Perkins v. State*, 576 So.2d 1310, 1312 (holding that, to the extent a statutory word or phrase is vague or ambiguous, the court is under an obligation to construe it in the manner most favorably to the accused). "Words and meanings beyond the literal language [of the statute] may not be entertained nor may vagueness become a reason for broad-

24. Martorano convinced Callahan that they needed to meet to discuss the recent killing of another business associate. Martorano picked Callahan up at the Ft. Lauderdale airport; Callahan got into the van's front seat while Martorano put his luggage in the back seat. Martorano then shot Callahan in the back of the head. Martorano and an associate then transferred the body to the trunk of Callahan's Cadillac, drove to Miami International Airport and left the car in the parking garage. They concocted a story about Callahan having a problem with a Cuban group in south Florida in order to deflect investigations away from Bulger and Flemmi in Boston.

25. Under the majority's rationale, a defendant who is not present during the commission of a felony but who "carries, displays," etc. a weapon or firearm (for example, a legally registered weapon worn or possessed by valid concealed weapons permit) unrelated to the felony itself, may be convicted as a principal and have his or her conviction reclassified based on that unrelated weapon. The policy implications of this holding are profound.

ening a penal statute." *Id.* at 1312; *see also Lemus v. State*, 33 So.3d 774, 776 (Fla. 4th DCA 2010) (rejecting, as contrary to both the plain meaning of the statute and the "rule of lenity," the State's overbroad interpretation of 775.087 that, as the defendant fired a revolver while earlier engaged in a standoff, the weapon was fired during the "criminal episode" of the subsequent assault for purposes of applying a mandatory minimum sentence under that statute); *Kasischke*, 991 So.2d at 814–15 (Fla.2008); *Lambert*, 545 So.2d at 841 (Fla.1989).

Even if one considered each of Connolly's meetings with the co-conspirators to be an "act," for purposes of convicting him of murder, the reclassification still will not stand because at each of those meetings or "acts" Connolly did not carry, display, use, threaten or attempt to use the firearm explicitly charged in Count 1, the murder weapon, Martorano's firearm. *Rodriguez*, 602 So.2d at 1272 ("When a defendant is charged with a felony involving the 'use' of a weapon, his or her sentence cannot be enhanced under section 775.087(1) without evidence establishing that the defendant had personal possession of **the** weapon **during the commission of** the felony.") [emphasis supplied].

5) **Connolly was acquitted of conspiracy, the only charge that would support reclassification for committing the offense "with a firearm."**

Had Connolly been convicted as charged in Count 2 of conspiracy to commit first-degree murder with a firearm, reclassification under section 775.087(1) would have been proper. There was competent and sufficient evidence presented at trial that Connolly met with the co-defendants over several weeks prior to the actual murder event. Evidence was presented at trial that Connolly was obligated to carry his FBI-issued firearm while on duty as an FBI agent, and that he was observed at various times wearing his firearm during those meetings with the co-defendants. The illegal nature of those transactions and Connolly's participation in those illegal meetings while carrying his service weapon formed the factual basis for charging Connolly with the ongoing crime of conspiracy to commit first-degree murder with a firearm. A co-defendant's possession of a weapon during an ongoing offense, such as trafficking or conspiracy, can be used to reclassify the sentence upon conviction as a principal. *See e.g., Smith v. State*, 438 So.2d 10 (Fla. 2d DCA 1983) (holding reclassification proper where evidence supported finding that one defendant had a firearm in the immediate area of the crime, and another defendant carried a firearm while in the discrete act of possessing marijuana); *Menendez v. State*, 521 So.2d 210, 212 (Fla. 1st DCA 1988) (finding competent substantial evidence that defendant carried or used a firearm during the course of the ongoing offense of cocaine trafficking sufficient to support reclassification pursuant to section 775.087(1); noting that crimes covered by section 775.087 require actual possession because they are generally of short duration *and the purpose served by the firearm requires physical possession of the weapon*) (emphasis supplied).

Such precedent is without application here, however, because Connolly was acquitted of the ongoing crime of conspiracy to commit murder, and the evidence supporting the "with a firearm" element of that charge cannot be transplanted to the separate and discrete charge of murder. The "with a firearm" elements of Count 1 and Count 2 refer to entirely different criminal acts with different statutory elements, and do not rely on evidence of possession or use of the same weapon. The "shooting ... JOHN B. CALLAHAN with a firearm" element of the first-degree

murder charge refers to the actual murder weapon. Whereas Connolly's possession of his service weapon would have correctly supported the "with a firearm" element of the conspiracy to commit murder charge set forth in Count 2 of the indictment. The two charges in this case and the evidence supporting them are *not* interchangeable. *See Brown v. State*, 130 Fla. 479, 178 So. 153 (1938) (holding that the commission of a substantive crime and a conspiracy to commit the substantive crime are separate and distinct offenses). As I have previously explained, Connolly's conviction cannot be reclassified based on Martorano's possession of the only weapon charged in Count 1. *See Willingham*, 541 So.2d at 1240 ("A plain reading of section 775.087(1) would be to require proof that Willingham actually carried or used a firearm during the course of the offense. Any other interpretation is not expressed clearly in the statute, and even if susceptible to such a construction, i.e., principal theory can be used to establish use of firearm, the construction more favorable to the defendant must be given effect."); *Menendez*, 521 So.2d at 215, n. 3; *cf. Glynn v. State*, 868 So.2d 1280 (Fla. 4th DCA 2004) (noting the difference between a continuous or ongoing criminal offense and one involving discrete acts, for sentencing purposes).

Furthermore, the conviction cannot be reclassified based upon Connolly's possession of his FBI-issued service weapon in Boston at the time of the murder in Florida. Of the reclassification cases I have examined in this appeal, those cases uniformly present facts showing the weapon used to reclassify the crime to a higher offense was both temporally and spatially related to the crime committed. The facts here are in stark contrast: Connolly was hundreds of miles away in Boston at the time the discrete act of murder occurred; he may or may not have "carried" his service weapon at the time of the murder. It is beyond question that Connolly's service weapon was neither available for use nor was it used in the murder; it had absolutely no spatial or temporal relationship to the discrete crime charged; it had no purpose related to the crime charged. *See Williams v. State*, 622 So.2d 456 (Fla. 1993) (finding it error to enhance defendant's sentence pursuant to sections 775.087(1)-(2), where facts showed the defendant was in Miami at the time the crimes in Pensacola were committed by his cohorts, thus the State consequently failed to show that the defendant had actual physical possession of a firearm during the commission of the crime); *Lemus*, 33 So.3d at 776. The "carrying" element present in Connolly's case was only applicable to a charge for which he has been acquitted. I can find no case law interpreting section 775.087(1) that would apply to the facts presented in this case, and find, however, much case law to go against the majority's contortion of the application of section 775.087(1) to fit these facts.

6) The jury verdict fails to support reclassification.

The State argues that the verdict did, in fact, find Connolly guilty of second degree murder "with a firearm," satisfying *State v. Overfelt*, 457 So.2d 1385 (1984). This argument fails because that phrase is a reference to the murder weapon, not Connolly's service weapon. The jury verdict does not find that Connolly actually carried, displayed, used, threatened, or attempted to use a second firearm (i.e., his service weapon) during the commission of the murder. The words, "with a firearm" in the verdict form are not decisive to reclassification because "with a firearm" merely duplicates the language of the indictment, and refers only to the manner in which Callahan was killed. *See Roberts v. State*, 923 So.2d 578 (Fla. 5th DCA 2006) ("The jury expressly found that Roberts carried, used, threatened to use, or at-

tempted to use a weapon in committing both crimes. This is exactly what is required for reclassification ... under section 775.087(1)"); *Streeter v. State*, 416 So.2d 1203, 1206 (Fla. 3d DCA 1982).

In this multiple defendant scenario, the jury verdict is fundamentally flawed because, 1) the indictment did not specifically charge Connolly, one of four equally charged co-defendants, with actually carrying, displaying, using, threatening, or attempting to use, a second firearm during the shooting of Callahan; 2) Connolly's service weapon was unrelated to the actual commission of the murder; 3) the "carried a firearm" aspect of Connolly's involvement with the co-defendants was only applicable to the ongoing criminal conspiracy alleged in Count 2, of which he was acquitted; and 4) the jury's verdict fails to specify that Connolly—among the four co-defendants—carried, displayed, used, or threatened to use a separate, uncharged, weapon during the act of second-degree murder. As noted in *Streeter*, 416 So.2d at 1206,

> If the State seeks to have a defendant's crime upwardly reclassified and his sentence thus enhanced because a weapon was used, it is incumbent upon it to see that the verdict forms pertaining to any count susceptible to reclassification under Section 775.087 contain the required additional finding that the defendant **committed the crime in a manner prohibited by the reclassification statute.**

(emphasis added). And, as the Florida Supreme Court held in *Overfelt*, 457 So.2d at 1385,

> Before a trial court may enhance a defendant's sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating.

This crime may have "involved a firearm," as *Overfelt* indicated, but it was not the firearm contemplated by either the verdict form or the State's theory of reclassification.

CONCLUSION

Under the factual and legal circumstances presented in this case, which all parties agree is a case of first impression, Connolly's conviction for second-degree murder with a firearm should not have been reclassified to a life felony in order to circumvent the statute of limitation on the underlying first-degree felony. Without the fundamentally erroneous reclassification, the first-degree felony of second-degree murder was time-barred. I strenuously dissent from the majority's new and unprecedented expansion of the application of section 775.087(1) to apply to a weapon not charged in the indictment or information, and spatially and temporally unrelated to the actual offense charged.

The majority has by its opinion so broadened the interpretation of section 775.087(1) in our district as to be in direct conflict with case authority from other Florida district courts of appeal and the Florida Supreme Court. Introducing this unprecedented and novel application of the statutory language of reclassification into Florida criminal jurisprudence will, quite predictably, confuse legal outcomes in criminal cases in Florida into the future.

Finally, I would certify the following question to the Florida Supreme Court as a matter of great public importance, in order to resolve the apparent conflict between the majority's interpretation of section 775.087(1) and the interpretation and application of that statute in the controlling authority of *State v. Rodriguez*, and related cases:

> Does section 775.087(1) allow reclassification of a conviction where "**during the**

commission of such a felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm" and that firearm or weapon is uncharged, and is unrelated to the commission of the crime and/or is spatially and temporally distant from the crime?

SHEPHERD and LAGOA, JJ., concur.

EMAS, J., concurs in result.

EMAS, J., concurring in part and dissenting in part.

I concur in Parts I through IV of the majority opinion. However, I do not agree with the analysis, or the result reached, in Part VI [26] and, therefore, dissent from that portion of the majority opinion. Because my analysis of the issue in Part VI is dispositive of this appeal,[27] I conclude that we must reverse with directions to vacate the judgment and sentence and enter a judgment of acquittal.

A. Introduction

The majority opinion frames the issue in Part VI as follows:

Reclassification of the second degree murder was lawful because the State presented evidence and the jury found that the defendant personally carried a firearm during his role as a "principal in the first degree" to second degree murder

However, in determining whether the second-degree murder offense in this case may lawfully be reclassified, the dispositive question is:

Did Connolly carry a firearm "during the commission of" the murder?

This question requires us to determine whether, under the language of the reclassification statute and in light of the evidence in this case, Connolly's second-degree murder as principal can properly be reclassified for carrying a firearm, where:

1. Connolly carried a firearm in Boston when he met with, and aided and abetted, others who actually committed the murder;
2. The murder was committed three weeks later in Miami; and
3. Connolly was neither actually nor constructively present when others committed the murder.

B. The Relevant Statutes

To answer the dispositive question, we must construe the relevant language of the reclassification statute, section 775.087(1), Florida Statutes (1981), and its interplay with the principal statute, section 777.011, Florida Statutes (1981).

The reclassification statute (section 775.087(1)) provides in pertinent part:

775.087. Possession or use of weapon; aggravated battery; felony reclassification; minimum sentence

(1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and ***during the commission of such felony*** the ***defendant carries,*** displays, uses, threatens to use, or at-

26. Because portions of the majority's analysis in Part V and Part VII are intertwined with its discussion and analysis in Part VI, I also dissent from the overlapping portions of Parts V and VII.

27. The issue of reclassification is dispositive because, without reclassification, the defendant's conviction as a principal to second-degree murder is a first-degree felony. At the time of this offense (1982), the statute of limitations for a first-degree felony was four years. *See* § 775.15(2)(a) Fla. Stat. (1982). The statute was subsequently amended and now provides that prosecution of a capital felony, a life felony or a "felony that resulted in death may be commenced at any time." *See* § 775.15(1), Fla. Stat. (2015).

tempts to use any weapon or ***firearm,*** or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows: (a) In the case of a felony of the first degree, to a life felony.
(Emphasis added.)

The principal statute (section 777.011) provides:

777.011. Principal in first degree [28]
Whoever commits any criminal offense against the state, whether felony or misdemeanor, or ***aids, abets, counsels, hires, or otherwise procures such offense to be committed,*** and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.
(Emphasis added.)

C. *The Question Presented: Did Connolly carry a firearm "during the commission of" the murder?*

The question for our determination: Does Connolly's carrying of a firearm at a meeting with co-defendants in Boston, during which he aided and abetted the murder committed by others three weeks later in Miami (while Connolly was in Boston), satisfy the statutory language authorizing reclassification of an offense when a defendant carries a firearm "during the commission of" the felony?

Under the majority's analysis, reclassification is authorized under the statute because:

- Connolly met with Bulger and Flemmi in Boston three weeks before the murder, which was committed in Miami;
- During the meeting, Connolly discussed, and helped to plan, the murder actually committed by Bulger and Flemmi (and Martorano) three weeks later in Miami;
- During this meeting with Bulger and Flemmi, Connolly carried a firearm; and
- Connolly's act of aiding and abetting constituted a part of the acts or series of acts of the second-degree murder, making Connolly guilty as an active co-perpetrator of, and not simply a principal to, the murder.

28. The common law provided for different classifications of perpetrators depending on their level of participation in the offense. At common law, there existed principals in the first degree (those who actually commit the offense); principals in the second degree (those who are present, aiding and abetting at the commission of the offense); accessories before the fact (those who, though absent at the time of the commission of the felony, did procure, counsel, command, and abet another to commit such felony); and accessories after the fact (those who, knowing a felony has been committed by another, thereafter receives or assists the felon). *See generally, Potts v. State,* 430 So.2d 900 (Fla.1982); *Blackburn v. State,* 314 So.2d 634 (Fla. 4th DCA 1975). In 1957, the Florida Legislature eliminated such distinctions (except for accessory after the fact, which still exists, *see* § 777.03, Fla. Stat. (1981); *Staten v. State,* 519 So.2d 622 (Fla.1988)). Under section 777.011, all participants who either commit the offense themselves, or who aid, abet counsel, hire or otherwise procure such offense to be committed by another, are all considered principals in the first degree and are equally criminally responsible for the acts of their co-principals. I do not dispute that Connolly is equally culpable, as a principal in the first degree, for the second-degree murder committed by the other co-principals. But that is decidedly not the issue here. Rather, the issue is whether that second-degree murder, for which Connolly is equally criminally culpable, can be reclassified to a life felony. This requires a separate determination of whether, under the facts of this case and the statutory language, Connolly carried a firearm "during the commission of" the second-degree murder.

Therefore, the majority concludes, Connolly carried a firearm "during the commission" of the second-degree murder. I do not agree that the act of Connolly—episodically remote in both place and time from the commission of the murder by others—took place "during the commission of" the murder, nor do I agree that the act of Connolly constitutes part of the "series of acts" as defined by the second-degree murder statute, such that Connolly can be deemed an active co-perpetrator of, as opposed to a principal to, the murder.

1. Under the plain language of the reclassification statute, the carrying of the firearm did not occur "during the commission of" the felony.

Because this is an issue of statutory construction, I begin by reviewing the statutory language; if the language is plain and unambiguous, it is unnecessary to resort to rules of statutory construction. *Daniels v. Fla. Dep't of Health*, 898 So.2d 61, 64 (Fla.2005). Further, even if I were to conclude that the relevant language is ambiguous and reasonably subject to differing constructions,[29] the rule of lenity requires that we construe it in favor of the defendant. § 775.021(1), Fla. Stat. (1981); *Houck v. State*, 634 So.2d 180, 182 (Fla. 5th DCA 1994); *Willingham v. State*, 541 So.2d 1240, 1242 (Fla. 2d DCA 1989).

I conclude that there is no ambiguity in the language of the reclassification statute and that, giving the words of the statute their plain and ordinary meaning, the offense in this case is not subject to reclassification. The statute does not define the phrase "during the commission of" the felony, nor is this phrase defined elsewhere in Florida's statutes.[30] However, a similar phrase—"in the course of committing" a felony—is used and defined in several other statutory provisions.[31]

For example, statutes proscribing the crimes of robbery, robbery by sudden snatching and carjacking each provide that the offense shall be classified as a higher-degree offense if "in the course of committing" the crime the offender carries a firearm or deadly weapon. *See* §§ 812.13(2)(a), 812.131(2)(a), 812.133(2)(a), Fla. Stat. (2015). Each of these statutes define the phrase "in the course of committing" uniformly:

> An act shall be deemed "in the course of committing the robbery" if it occurs in

29. A statutory provision is not ambiguous if it is " 'plain to anyone reading the Act' that the statute encompasses the conduct at issue." *Salinas v. U.S.*, 522 U.S. 52, 60, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997).

30. Other statutes utilize the phrase "during the commission of" the offense but similarly fail to include any definition. *See, e.g.*, § 775.087(2)(a), Fla. Stat. (2015) (providing mandatory minimum sentences for persons who commit certain designated offenses and who "during the commission of the offense" actually possess a firearm or destructive device); § 784.07(3), Fla. Stat. (2015) (providing mandatory minimum sentence for any person who commits battery on a law enforcement officer and possessed a firearm "during the commission of the offense"); § 794.0115, Fla. Stat. (2015) (providing mandatory minimum sentence if the offender "used or threatened to use a deadly weapon during the commission of" certain designated offenses); § 810.09, Fla. Stat. (2015) (classifying trespass as a third-degree felony if the offender "is armed with a firearm or other dangerous weapon during the commission of the offense"); § 843.08, Fla. Stat. (reclassifying false personation of a law enforcement officer to a second-degree felony if the person "falsely personates any such officer during the course of the commission of a felony").

31. Additionally, and as discussed *infra* at C.6, section 775.087(2)(a)2. (the 10/20/Life statute) uses a similar (but undefined) phrase in authorizing the imposition of minimum mandatory sentences where a firearm is discharged "during the course of the commission of" the felony.

an attempt to commit robbery or in flight after the attempt or commission.

§ 812.13(3)(a), Fla. Stat. (2015).

An act shall be deemed "in the course of committing a robbery by sudden snatching" if the act occurs in an attempt to commit robbery by sudden snatching or in fleeing after the attempt or commission.

§ 812.131(3)(a), Fla. Stat. (2015).

An act shall be deemed "in the course of committing the carjacking" if it occurs in an attempt to commit carjacking or in flight after the attempt or commission.

§ 812.133(3)(a), Fla. Stat. (2015).

As a final example, Chapter 810, Florida Statutes, proscribes the crime of burglary, and classifies a burglary as a higher-degree offense if "in the course of committing the offense" the offender is or becomes armed, or commits an assault or battery. *See* § 810.02(2)(a)-(b), Fla. Stat. (2015). The statutory definition of "in the course of committing" is identical to the corresponding provisions of the robbery and carjacking statutes:

An act is committed "in the course of committing" if it occurs in an attempt to commit the offense or in flight after the attempt or commission.

§ 810.011(4), Fla. Stat. (2015).

It is difficult to conceive how the phrase "during the commission of" a crime can be construed more broadly than the phrase "in the course of committing" a crime.[32] In fact, one might cogently argue that the undefined phrase "during the commission of" should be read more *narrowly* than the defined phrase "in the course of committing." However, even if we equate the two phrases and construe the phrase "during the commission of" the murder to mean "an act which occurs in an attempt to commit [murder] or in fleeing after the attempt or commission [of the murder,]" it is evident that Connolly's carrying of the firearm did not occur "during the commission of" the murder, and his conviction for second-degree murder cannot be reclassified.

It is important to note that the reclassification statute is not limited to situations in which a defendant *carries* a firearm during the commission of felony; there are several different acts which, if undertaken during the commission of the felony, will subject a defendant's offense to reclassification. Specifically, the statute authorizes reclassification of an offense for a defendant who:

1. "During the commission of" the felony:
   a. *Carries* any weapon or firearm;
   b. *Displays* any weapon or firearm;
   c. *Uses* any weapon or firearm;
   d. *Threatens to use* any weapon or firearm; or
   e. *Attempts to use* any weapon or firearm.
2. "During the commission of" the felony "*commits an aggravated battery.*"

See § 775.087(1), Fla. Stat. (1981).

Each of these acts forms an independent basis for reclassification and all are contained within the very same clause of the very same subsection of the reclassification statute. These words and phrases must be read together and construed in a man-

32. Even the majority agrees that the two phrases are synonymous, positing that the phrase "during the commission of" the crime should be defined as "at some time in the course of" the commission of the crime. *See* majority op. at 914. Unfortunately, the majority's analysis focuses on the words "at some time" (apparently equating it with an open-ended timeframe, untethered to time or place) and ignores the truly relevant portion: "in the course of," which connotes an episodic relationship between the carrying of the firearm and the commission of the crime.

ner to make them compatible and not contradictory, giving meaning to the entire statute and each word within it. *Fla. Dep't of Envtl. Protection v. ContractPoint Fla. Parks, LLC*, 986 So.2d 1260, 1265 (Fla.2008). There is nothing in the reclassification statute to indicate that the phrase "during the commission of" a crime includes a principal whose carrying of a firearm is temporally and spatially remote from the actual commission of the crime. The Florida Legislature could have expressly authorized reclassification of an offense for a defendant who carries (or displays, uses, threatens to use, or attempts to use) a firearm "during the commission of *or while aiding and abetting the commission of*" an offense. In fact, the Legislature did precisely that in enacting certain forfeiture legislation. *See e.g.*, § 932.701(2)(a), Fla. Stat. (2015)[33]; § 831.033, Fla. Stat. (2015).[34] Given the language employed in these statutes, it is evident that the Legislature recognizes the distinction between a firearm that is used "during the commission of" a felony and a firearm that is used "during the aiding and abetting in the commission of" a felony.

2. How could Connolly have carried a firearm "during the commission of" the murder if Connolly did not commit the murder and was not actually or constructively present when the murder was committed by others?

Given the plain language of the principal statute, it is clear that Connolly can be held equally culpable with his co-principals *for the second-degree murder*, because he intended that the murder be committed and he did some act to aid and abet other persons who actually committed the crime. The principal statute provides:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be

33. § 932.701 provides in pertinent part:

> (2) As used in the Florida Contraband Forfeiture Act:
>
> (a) "Contraband article" means:
>
> . . . .
>
> 5. Any personal property, including, but not limited to, any vessel, aircraft, item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, books, records, research, negotiable instruments, or currency, which was used or was attempted to be ***used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony,*** whether or not comprising an element of the felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.
>
> 6. Any real property, including any right, title, leasehold, or other interest in the whole of any lot or tract of land, which was used, is being used, or was attempted to be ***used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony,*** or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.
>
> . . . .
>
> 12. Any personal property, including, but not limited to, any vehicle, item, object, tool, device, weapon, machine, money, security, book, or record, that is used or attempted to be ***used as an instrumentality in the commission of, or in aiding and abetting in the commission of, a person's third or subsequent violation*** of s. 509.144, whether or not comprising an element of the offense.
>
> (Emphasis added.)

34. § 831.033(1)(b) provides for the forfeiture of certain counterfeit property:

> (b) Any personal property, including, but not limited to, any item, object, tool, machine, or vehicle of any kind, ***employed as an instrumentality in the commission of, or in aiding or abetting in the commission of, the crime of counterfeiting,*** as proscribed by ss. 831.03–831.034, and not otherwise included in paragraph (a), may be seized and is subject to forfeiture pursuant to ss. 932.701–932.704.

> charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.

§ 777.011, Fla. Stat. (1981). These requirements are echoed in the case law and in the standard jury instructions. *See Potts v. State*, 430 So.2d 900 (Fla.1982); *State v. Roby*, 246 So.2d 566 (Fla.1971); *Barron v. State*, 990 So.2d 1098 (Fla. 3d DCA 2007); Fla. Std. J. Inst. (Crim.) 3.5(a).[35]

Connolly's act of aiding and abetting makes him equally criminally responsible for the second-degree murder, and the principal statute expressly provides that Connolly need not have been actually or constructively present to be deemed equally culpable for the murder. But his culpability for the murder under the principal statute is far different from the question of whether his carrying of the firearm "during the commission of the felony" requires his actual or constructive presence. We must therefore separate the issue of presence for culpability as a principal from the issue of presence for reclassification purposes. Under the principal statute (§ 777.011), a person may be found guilty if he either:

> "commits any criminal offense;"
>
> or
>
> "aids, abets, counsels, hires, or otherwise procures such offense to be committed."

It is beyond peradventure that the State prosecuted this case not upon a theory that Connolly committed the murder himself, but rather that Connolly was equally criminally responsible *as if he committed the murder* because he aided, abetted, counseled, hired or otherwise procured such offense "to be committed" by others.[36] The clear language of the principal statute establishes that, under this theory, a principal is *not* one who himself "commits any criminal offense" but rather is one who "aids, abets, counsels, hires, or otherwise procures such offense to be committed" by another.

The trial court correctly instructed the jury that, in order to find Connolly guilty of murder under the principal theory, the State had to prove that he "had a conscious act that the criminal act be done" and he "did some act or said some word which was intended to and which did incite, cause, encourage, assist or advise ***the other person or persons to actually com-***

35. The standard jury instruction on principals, Fla. Std. J. Inst. (Crim.) 3.5(a), provides:

> If the defendant helped another person or persons [commit] [attempt to commit] a crime, the defendant is a principal and must be treated as if [he][she] had done all the things the other person or persons did if:
>
> 1. the defendant had a conscious intent that the criminal act be done and
>
> 2. the defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist, or advise ***the other person or persons to actually [commit] [attempt to commit] the crime.***
>
> To be a principal, the defendant does not have to be present when the crime is [committed] [or] [attempted].
>
> (Emphasis added.)

36. I discuss *infra,* at section C.6, the majority's characterization of Connolly as an active co-perpetrator of the murder itself, rather than one whose equal culpability is as a principal who aided and abetted those who actually committed the murder. However, it is worth noting here that at no time during the pretrial, trial or post-trial proceedings below, or on appeal, has the State ever taken the position that Connolly's culpability for the murder was as an active co-perpetrator who himself committed the murder. The State has always based its prosecution on a principal theory. The majority's opinion on rehearing en banc marks the birth of this "active co-perpetrator" theory and, given that no party has ever raised or argued such a theory, appears to be the result of an immaculate conception.

mit ... ***the crime.***" Fla. Std. J. Inst. (Crim.) 3.5(a) (emphasis added). Thus, Connolly's criminal responsibility for the murder was necessarily premised upon the fact that the crime was *actually committed by someone other than Connolly.*

It is in this context that we examine the reclassification statute. Before the crime of second-degree murder can be reclassified to a life felony, it must be established that Connolly carried a firearm "during the commission of" the murder. But how can one logically conclude that Connolly carried a firearm ***during the commission of the murder*** where: the murder was "actually committed" by others; Connolly was not present (actually or constructively) when the murder was actually committed by others; and Connolly's carrying of the firearm occurred three weeks before the actual commission of the murder by others?

The fact that Connolly was not actually or constructively present is concededly irrelevant to his *conviction* as a principal to second-degree murder. However, I conclude Connolly's second-degree murder conviction as a principal cannot be *reclassified* under section 775.087(1) because he did not carry use, display, threaten to use, or attempt to use any weapon or firearm while actually or constructively present during the commission of the offense.[37] Stated another way, I cannot agree that Connolly carried a firearm "during the commission of" the murder and therefore conclude that his conviction as principal to second-degree murder is not subject to reclassification.

3. The majority's construction of the reclassification statute would lead to absurd results.

Any reasonable and contextual reading of the statutory language leads inexorably to the conclusion that the acts committed by Connolly in this case do not fall within the ambit of the reclassification statute. However, even if one could conclude that the statutory language is ambiguous and subject to differing constructions, rules of statutory construction require that we construe the language in such a way as to avoid an absurd result. *Thompson v. State,* 695 So.2d 691 (Fla.1997). The majority's expansive construction of the phrase "during the commission of" would indeed lead to unreasonable and absurd results when applied to other circumstances.[38]

If, as the majority concludes, Connolly's actions as principal in the instant case fall within the ambit of the reclassification statute, so too would the actions of the hypothetical Principal in the following scenarios. Note that in each of these scenar-

37. This conclusion does not impact the reclassification or enhancement of accomplices or aiders and abettors who are armed and actually or constructively present during the actual commission of the offense. Application of the reclassification statute under such circumstances is well-established and is unaffected by my analysis. *See e.g., Junco v. State,* 510 So.2d 909 (Fla. 3d DCA 1987); *Gillis v. State,* 486 So.2d 706 (Fla. 5th DCA 1986); *Smith v. State,* 438 So.2d 10 (Fla. 2d DCA 1983).

38. The majority posits that the Legislature has expressed its intent that the maximum punishment be imposed for people who possess a firearm during the commission of criminal offenses, relying upon the legislative intent contained in section 27.366, Florida Statutes. *See* majority op. at 922–23. There are two flaws with this position: first, section 27.366 was enacted in 1999, eighteen years after John Callahan was murdered. Second, and as even the majority concedes, section 27.366, makes no reference whatsoever to the reclassification subsection (775.087(1)), limiting its expressed legislative intent to the minimum mandatory subsections of section 775.087 (§ 775.087(2) and (3)). As the majority asserts elsewhere in its opinion, we must presume that "the Legislature chose its words carefully when drafting" section 27.366.

ios (as in the instant case) the co-principal commits the murder three weeks later, and the Principal is not actually or constructively present at the murder:

- ***"Carries" or "uses" a weapon "during the commission of" the murder***

Principal and co-principal meet at a restaurant. Principal orders steak, and when the waiter brings the steak, Principal pulls a ten-inch hunting knife out of his pocket and uses it to cut his steak while encouraging co-principal to commit the murder. Under the statutory language as construed by the majority, Principal's conviction for second-degree murder may be reclassified because "during the commission of" the felony, Principal "carries" or "uses" a weapon (i.e., the hunting knife to cut his steak).

- ***"Threatens to use" a weapon "during the commission of" the murder***

During that same dinner, and while Principal is encouraging co-principal to commit the murder, Principal gets angry at one of the waiters, raises his hunting knife and yells at the waiter "I will cut you with this knife if you don't bring us some more bread." Under the statutory language as construed by the majority, Principal's conviction for the second-degree murder may be reclassified because "during the commission of" the felony, Principal "threatens to use" a weapon (though the threat is made three weeks before the murder is committed, and is directed not at the intended victim of or a bystander to the murder, but rather at the waiter).

- ***"Threatens to use" a firearm "during the commission of" the murder***

During that same dinner, and while Principal is encouraging co-principal to commit the murder, Principal says: "I've never owned a gun, but if you don't go and kill him, I'm going to go buy a gun and kill him myself." Under the statutory language as construed by the majority, Principal's conviction for second-degree murder may be reclassified because "during the commission of" the second-degree murder, Principal "threatens to use" a firearm (though the threat is made three weeks before the murder is committed, and is directed not at the intended victim or a bystander of the murder, but at the co-principal).

- ***"Commits an aggravated battery" "during the commission of" the murder***

During that same dinner, and while Principal is encouraging co-principal to commit the murder, Principal gets in a fight with the waiter and kicks the waiter in the head, causing permanent injury. Under the statutory language as construed by the majority, Principal's conviction for second-degree murder may be reclassified because "during the commission of" the second-degree murder, Principal "commits an aggravated battery."

- ***"Uses" a firearm "during the commission of" the murder***

Principal and co-principal hold their meeting at a gun range. Principal is taking target practice (using a gun provided by the range) while encouraging co-principal to commit the murder. Under the statutory language as construed by the majority, Principal's conviction for second-degree murder may be reclassified because "during the commission of" the second-degree murder, Principal "uses" a firearm. (Of note, under the majority's analysis, Principal would also be subject to a 20–year mandatory minimum under section 775.087(2)(a)2. (the "10/20/Life" statute) because "during the course of the commission of" the murder, Principal "discharged a firearm.")

- ***"Displays" a firearm "during the commission of" the murder***

Principal and co-principal hold their meeting at Principal's house. While encouraging co-principal to commit the murder, Principal shows off a Winchester rifle displayed above his fireplace. Co-principal admires it and Principal takes it out of the display case and lets co-principal hold it in his hands. Under the statute as construed by the majority, Principal's conviction for second-degree murder may be reclassified because "during the commission of" the second-degree murder, Principal "displays" a firearm.[39]

These scenarios expose the infirmity in the majority's construction of the reclassification statute. I conclude that there must be some episodic connection—a temporal and spatial relationship—between the act (carry, display, use, threaten to use, or attempt to use a firearm or weapon) and the commission of the underlying offense. Construing the phrase "during the commission of" the murder as the majority proposes would lead to absurd results such as those described above. A plain and common-sense reading of the reclassification compels the conclusion that Connolly did not carry a firearm "during the commission of" the murder.

4. The majority's analysis requires a conclusion that the commission of the second-degree murder "began" during the meeting in Boston.

While not directly addressing the issue, the majority's analysis implicitly requires us to answer this question as well: When did the commission of the second-degree murder ***begin*** ? According to the majority, the commission of the second-degree murder necessarily "began" in Boston during the meeting between Connolly and his cohorts. This must be the majority's conclusion, for it is the only way they can shoehorn their conclusion that Connolly's carrying of the firearm occurred "during the commission" of the murder. In other words, the majority asserts that Connolly's acts at that meeting constituted part of the actual commission of the second-degree murder (rather than acts of aiding and abetting making him equally responsible as a principal to the murder subsequently committed by others). The majority's assertion is flawed, however. While the *planning and preparation* for the murder certainly began at this meeting, the *commission of the murder* did not "begin" during this meeting. Connolly's acts at that meeting are not the commission of the second-degree murder, and therefore his carrying of the firearm during this meeting did not occur "during the commission of" the murder.

Perhaps the most effective way to analyze this aspect of the majority's position is by considering the following: If in fact this meeting marks the "beginning" of the *commission of* the murder, and had the murder not been consummated, then it must follow that Connolly could have been convicted of attempted second-degree murder based simply on his acts which took place at that meeting with his co-defendants. In other words if, as the majority asserts, Connolly's acts at that meeting (followed by the subsequent commission of the murder) means he is guilty as one who himself "committed the murder," then his acts at that meeting (followed by a failure to consummate the murder) would have supported his conviction for attempted second-degree murder.

By looking at it in this fashion, and analyzing relevant case law regarding criminal attempts, one can readily con-

39. Notably, co-principal's conviction may also be reclassified because "during the commission of" the second-degree murder, co-principal "carried" a firearm. This is so even if the actual murder was accomplished without anyone using or possessing a firearm.

clude that the majority's analysis is bereft of support. While Connolly's acts and meeting with his co-principals might well have supported a conviction for solicitation or conspiracy (*see* discussion *infra*), his acts and meeting with his co-principals surely could not support a conviction for attempted second-degree murder, because his acts consisted of mere planning and preparation.

An attempt to commit a crime requires proof of two elements: a specific intent to commit the crime, and an overt act, beyond mere preparation, done towards its commission, but falling short of consummation of the crime. *Gustine v. State*, 86 Fla. 24, 97 So. 207, 208 (1923); *State v. Coker*, 452 So.2d 1135 (Fla. 2d DCA 1984). There is little doubt that Connolly had the specific intent to commit the crime of murder. However, there is no evidence that he "did some act toward committing the crime of [murder] that went beyond just thinking or talking about it." Fla. Std. J. Inst. (Crim.) 5.1. Therefore, Connolly's intent that the murder take place, while clearly established, is insufficient to allow one to conclude that the commission of the crime had begun. There must be proof of an overt act beyond mere preparation:

> The intent to commit a crime standing alone does not amount to an attempt nor is preparation alone sufficient. The overt act must reach far enough towards the accomplishment of the desired result to amount to a commencement of the consummation. There must be some appreciable fragment of the crime committed and it must be in such progress that it would be consummated unless interrupted by circumstances independent of the will of the attempter.

Robinson v. State, 263 So.2d 595, 596–97 (Fla. 3d DCA 1972).

The meeting, held three weeks before the murder, consisted of planning and preparation, acts which are insufficient to establish the commencement of the crime:

> Preparation generally consists of devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after preparations are completed. 21 AM.JUR.2d Criminal Law § 159 (1981). The act must reach far enough toward accomplishing the desired result to amount to commencement of the consummation of the crime. Some appreciable fragment of the crime must be committed and it must proceed to the point that the crime would be consummated unless interrupted by a circumstance independent of the attemptor's will. *Robinson v. State*, 263 So.2d 595 (Fla. 3d DCA 1972); *Groneau v. State*, 201 So.2d 599 (Fla. 4th DCA), cert. denied, 207 So.2d 452 (Fla.1967). The act need not be, however, the ultimate, the last proximate, or the last possible act toward consummation of the crime. *State v. Thomas*, 438 S.W.2d 441 (Mo.1969).

Coker, 452 So.2d at 1136–37.[40]

In *Arias v. State*, 593 So.2d 260 (Fla. 3d DCA 1992), the defendant, a director of nursing, was charged with attempted first-degree murder. The State's evidence established that an infant was born with

40. It seems appropriate to note here that I do not ascribe to any "last act" theory which the majority appears to assign to my dissent. I do not contend that because Connolly was not present for, and did not carry the firearm during, the very final act of the murder (i.e., the shooting of the firearm by a co-defendant) that he cannot be reclassified. To the contrary, so long as it can be said that he carried a firearm "during the commission of" the murder, he is subject to reclassification, whether the carrying of the firearm occurred at the beginning of the commission of the murder, or at the end of the commission of the murder, or at any time in between.

severe birth defects and placed under the supervision of Arias and other nurses, who regularly administered pain-killing medication to ease the child's suffering. Arias contacted and met with Judy Felsenstein, a nurse under Arias' supervision. The two discussed a plot to kill the child by administering an overdose of pain medication. Arias later brought Etiole Means into the scheme. Means and Arias knew each other and had previously worked together. The three of them met and together discussed the details of their plan to kill the child. Arias told Felsenstein and Means that the child's grandfather was aware of the plan and had approved it. Means was required to apply for a temporary nursing position with Arias' company. After Means was hired for the position, Arias gave Means a bottle of medication which was to be administered to the child in a lethal dose. Ultimately, Means did not carry out the plot, and instead went to the police and confessed.

Arias was charged with and convicted of, *inter alia*, attempted first-degree murder. On appeal, Arias argued that the evidence was legally insufficient to support the attempted murder conviction. This Court agreed:

> In this case, the state presented evidence which showed that Arias met with Means and Felsenstein, discussed the murder plot, and then gave Means the bottle of Hycomine. The plot to kill the child went no further. The discussions occurred four days before the murder was to take place. Means testified that she had not decided to help Arias kill the child and Means never took any active steps toward completion of the crime. The evidence shows that the acts committed by Arias were only those of preparation to commit the crime and did not rise to the level of overt acts nearing consummation of the crime. Therefore, the evidence was not sufficient to sustain a verdict of attempted first degree murder. *See Robinson*; *see also Gervin v. State*, 212 Tenn. 653, 371 S.W.2d 449 (1963) (defendant's hiring and attempt to persuade person to commit murder amounted to mere preparation only and was not an attempt to commit first degree murder). The murder conviction is therefore reversed.

Id. at 263.

In the instant case, the "acts" engaged in by Connolly, at a meeting with his co-defendants three weeks before the murder, were not acts which "reach far enough toward accomplishing the desired result to amount to commencement of the consummation of the crime." *Coker*, 452 So.2d at 1136. The acts engaged in by Connolly fall far short of those found insufficient in *Arias*. Connolly's acts were simply preparatory, consisting of "devising or arranging the means or measures necessary for the commission of the offense." *Coker*, 452 So.2d at 1136. *See also Morehead v. State*, 556 So.2d 523, 525 (Fla. 5th DCA 1990) (defendant prisoner was convicted of attempted escape, upon State's evidence that defendant committed overt acts in furtherance of the crime by 1) intentionally cutting himself to obtain medical treatment at an off-site facility where he hoped his girlfriend would meet him and help him make good his escape; and 2) causing a confederate to introduce a gun onto the prison grounds for defendant's use to assist in his escape. Conviction reversed, holding "neither act amounted to an overt act beyond mere preparation.").

While the acts of Connolly were certainly sufficient to make him a principal to the murder subsequently committed by others, and thus equally responsible as if he had committed the murder himself, Connolly's acts most assuredly did not constitute the beginning of the commission of the second-degree murder, such that his carrying of a firearm could be said to have occurred

"during the commission of" the murder. The majority's conclusion to the contrary flies in the face of well-settled case law and implicitly recedes from this Court's decisions in *Arias* and *Robinson*.

5. Distinguishing aiding and abetting from solicitation, conspiracy and possessory offenses.

The majority analogizes this case, and the offense, to cases that either expressly or implicitly authorize reclassification for possession of a firearm during the commission of a criminal conspiracy or a possessory offense. Such an analogy is inapplicable for reasons that are further explained below.[41] But the one distinguishing feature that separates the offense at hand from all of the other "analogous" offenses relied upon by the majority is this: Connolly's act of aiding and abetting (i.e., the act during which he carried a firearm) was not charged as a separate and completed crime. Connolly's criminal culpability as a principal did not materialize until the murder was committed or attempted. *See* § 775.011, Fla. Stat. ("Whoever ... aids, abets, counsels, hires, or otherwise procures such offense to be committed, *and such offense is committed or is attempted to be committed,* is a principal in the first degree."). There is no longer a crime of "aiding and abetting," in the absence of an attempted or committed criminal offense. It is with this backdrop in mind that we review the application of the reclassification statute to other types or categories of offenses.

a. Distinguished from solicitation

Connolly's act in this case consisted of aiding and abetting the actual perpetrators of the murder. While this act could have subjected Connolly to prosecution for criminal solicitation, the State did not charge Connolly with such a crime. The crime of criminal solicitation requires proof that:

1. Defendant solicited another to commit an offense; and
2. During the solicitation, defendant commanded, encouraged, hired or requested another person to engage in specific conduct which would constitute the commission of the offense solicited or an attempt to commit the offense solicited.

See § 777.04(2), Fla. Stat. (1981). *See also* Fla. Std. J. Inst. (Crim.) 5.2. The solicited crime need not actually be committed, nor is it necessary that the defendant or the person solicited commit any act in furtherance of the offense solicited. *Id. See also State v. Waskin*, 481 So.2d 492 (Fla. 3d DCA 1985); *State v. Duque*, 472 So.2d 758 (Fla. 2d DCA 1985).[42] The crime of solicitation is complete when the defendant, with the intent that another person commit a crime, commands, encourages, hires or requests that person to commit a crime. *Waskin*, 481 So.2d at 493. Had the State charged Connolly with criminal solicitation, and had the jury found him guilty of said crime, Connolly's carrying of a firearm during the completed criminal offense of solicitation, would presumably have authorized reclassification under section 775.087(1), because Connolly himself committed the acts constituting the criminal offense of solicitation and committed those acts while carrying a firearm. The crime of solicitation would have been complete upon his act of soliciting another to commit

41. I also include a discussion of the crime of solicitation, as it helps to further demonstrate why the majority's analogy is misguided.

42. It is the additional requirement of an overt act in furtherance that distinguishes the offenses of solicitation and conspiracy from the offense of criminal attempt. *Waskin*, 481 So.2d at 494; *State v. Johnson*, 561 So.2d 1321 (Fla. 4th DCA 1990); *Hutchinson v. State*, 315 So.2d 546 (Fla. 2d DCA 1975).

the crime, coupled with his intent that the crime be committed. However, Connolly was neither charged with nor convicted of armed solicitation.

This distinction between armed solicitation and "armed aiding and abetting" (a non-crime) reveals the shortcomings in the majority's position. Under the armed solicitation, Connolly's guilt is *not* premised upon a principal theory. The offense of solicitation would have *actually been committed* by Connolly himself and the crime would have been *complete* at the moment he solicited another to commit the crime with the intent that such crime be committed. If Connolly was carrying a firearm during this act (an act committed by Connolly himself and constituting a completed crime), reclassification would be authorized.

By comparison, in the instant case no crime was committed or completed upon Connolly's act of aiding and abetting (while carrying a firearm) three weeks before the murder. Connolly's criminal culpability as a principal to murder did not even come into existence until the murder was actually committed by others three weeks later. Unlike criminal solicitation, Connolly's act in this case did not constitute a completed crime committed by Connolly himself. Therefore, Connolly's act of carrying a firearm while aiding and abetting three weeks before the actual commission of the murder by others cannot be said to have occurred "during the commission of" the murder.

b. Distinguished from conspiracy

Connolly was charged with (but acquitted of) conspiracy to commit murder. His criminal culpability under the conspiracy charge is premised upon his direct participation in committing the crime of conspiracy to commit murder. Conspiracy requires the following two elements be proven:

1. The defendant intended that the offense (which was the object of the conspiracy) be committed.
2. In order to carry out that intent, the defendant agreed, conspired, combined, or confederated with others to cause the object of conspiracy to be committed either by them, or one of them, or by some other person.

See § 777.04(3), Fla. Stat. (1981); Fla. Std. J. Inst. (Crim.) 5.3. It is not necessary that the defendant do any act in furtherance of the offense conspired. Fla. Std. J. Inst. (Crim.) 5.3. *See also State v. Burkett*, 344 So.2d 868 (Fla. 2d DCA 1977). The conspiracy is formed and a crime is "committed" and complete upon the occurrence of these two elements—the agreement coupled with the requisite intent. The completed crime of conspiracy is based upon the direct and active participation of the individual conspirators, and is implicitly not based on a principal theory.

Furthermore, even though a conspiracy crime may be complete upon the occurrence of the two elements described above, a conspiracy is also in the nature of a continuing offense, and "once the conspiracy is formed, a defendant who has joined a conspiracy continues to violate the law 'through every moment of [the conspiracy's] existence.'" *Smith v. United States*, — U.S. —, 133 S.Ct. 714, 719, 184 L.Ed.2d 570 (2013) (quoting *Hyde v. United States*, 225 U.S. 347, 369, 32 S.Ct. 793, 56 L.Ed. 1114 (1912)). Had the jury convicted Connolly of conspiracy to commit murder, the fact that Connolly carried a firearm at any point during his membership in the conspiracy would appear to subject the offense to reclassification, because Connolly himself committed those acts which constitute the completed (and continuing) crime of conspiracy, and did so while carrying a firearm. *See, e.g., Camp-*

bell v. State, 935 So.2d 614 (Fla. 3d DCA 2006); *Kennedy v. State*, 564 So.2d 1127, 1129 (Fla. 1st DCA 1990) (noting in *dicta* that co-conspirators who are armed while agreeing, conspiring, combining or confederating to cause the object of the conspiracy would be subject to reclassification).

c. Distinguished from possessory offenses

Narcotics possession, and other "possessory" crimes, are in the nature of a continuing offense. For example, so long as a defendant is and remains in possession of cocaine, he is committing a crime. If at any point he is simultaneously in possession of cocaine and a firearm, the possessory offense (assuming it falls within the category of applicable offenses under the statute) may properly be reclassified. *See, e.g., Menendez v. State*, 521 So.2d 210 (Fla. 1st DCA 1988); *Smith v. State*, 438 So.2d 10 (Fla. 2d DCA 1983).

Offenses which are continuing in nature are to be distinguished from discrete offenses which are complete upon the commission of the elements of the crime. Illustrative of this distinction is *Willingham v. State*, 541 So.2d 1240 (Fla. 2d DCA 1989). In that case, Willingham was charged with possession with intent to deliver cocaine and sale of cocaine. It was alleged that Willingham carried or used a firearm during the commission of these offenses. The evidence at trial established that Willingham and an accomplice sold cocaine to an undercover officer. The accomplice was in possession of a firearm during the transaction. After the sale was complete and the undercover officer began driving away, Willingham took the firearm from the accomplice and began shooting at the departing officer. Willingham was convicted of sale of cocaine with a firearm,[43] and the trial court reclassified Willingham's offense from a second-degree felony to a first-degree felony pursuant to section 775.087(1) on the basis that the defendant used a firearm "during the commission of" the offense of sale of cocaine. The Second District reversed, holding:

> In this instance, the sale of cocaine offense involved an exchange of the cocaine for money. This exchange, and therefore the offense, was completed before Willingham seized the gun and began shooting it. As such, it cannot be said that Willingham "carried or used" the gun *during* the commission of the sale offense.

Id. at 1242. The instant case presents the flip side of the same coin in *Willingham*. In that case, the defendant's conviction could not be reclassified because the firearm was possessed *after*, rather than during, the commission of the offense. Here, the defendant's conviction cannot be reclassified because the firearm was possessed *before*, rather than during, the commission of the offense.

6. Connolly was not a co-perpetrator of the actual murder, because his "act" as an aider and abettor was not imminently dangerous to another as required under the murder statute

In its final effort to support reclassification, the majority concludes that Connolly acted not merely as a principal but as an active co-perpetrator and that Connolly (as well as the co-defendants) *personally* "committed" the offense by aiding and abetting the eventual murder. This conclusion is unsupported by law and is not the theory or evidence upon which the State based its prosecution. Connolly was charged, prosecuted and convicted upon a theory (and upon evidence) that *he did not*

43. He was also convicted of possession with intent to deliver cocaine without a firearm, but that conviction is not relevant to this issue.

actually commit the murder but aided and abetted others who did commit the murder and was therefore guilty as a principal. Under this theory and evidence, Connolly was equally criminally responsible *as if* he committed the murder, because he acted to aid or abet those who actually committed the murder. A review of the State's opening statements and closing arguments, the transcripts of hearings on pre-trial and post-trial motions, and the State's briefs on appeal, reveals one common theme: the State's unwavering position that Connolly was not the person who committed the murder, but that he was equally culpable for the murder as a principal. The State has never advanced the "active co-perpetrator" theory embraced by the majority opinion.

Nevertheless, the majority opinion now characterizes Connolly's acts of aiding and abetting as part of a series of related acts that supports his conviction not merely as a principal responsible for the acts of others who committed the murder, but as an *active co-perpetrator of the murder itself.*[44] The majority's analysis, however, is flawed.

Certainly under the principal theory, the acts of others constitute the acts of Connolly and under that theory Connolly is equally criminally responsible for the acts of his co-defendants *as if* he had himself committed the murder. But it is just as clear that the "acts" constituting the crime of second-degree murder, as defined by the statute, the jury instructions, and the case law, were acts committed not by Connolly but by others. Connolly's own acts were not the acts of the murder such that he can be reclassified as an active co-perpetrator of the murder.

Second-degree murder is defined in section 782.04(2), Florida Statutes (1981) as follows:

> The unlawful killing of a human being, when perpetrated by ***any act imminently dangerous to another*** and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

As the trial court correctly instructed the jury in this case, the offense of second-degree murder required the State to es-

44. The majority misses the point in asserting that the actual perpetrators of the crime, and aiders and abettors to the crime, are all now treated as principals under the law and may be charged, convicted and punished as such. *See* majority op. at 913. I have no quarrel with this accurate statement of the law, nor do I suggest that Connolly, who aided and abetted the crime, is in any way less culpable of the second-degree murder than those who actually committed the murder. But the issue at hand is not Connolly's culpability for the second-degree murder; rather, it is whether his conviction for that charge, as a principal who aided and abetted (but who did not himself commit) the murder, can be reclassified to a higher degree because he carried a firearm during his remote act of aiding and abetting. It is in this context that there is a relevant purpose in distinguishing between principals whose culpability is direct (i.e., those who actually committed the crime) and principals whose culpability is indirect (i.e., those who aided and abetted the crime and are therefore equally criminally responsible for the acts of their co-principals).

Based upon the faulty premise that Connolly's act is the "act of murder" (rather than the remote act of aiding and abetting the murder subsequently committed by others), the majority contends, in essence, that Connolly's culpability as principal was as an active perpetrator of the murder, therefore allowing for its *ipso facto* (but nevertheless wayward) conclusion that Connolly's carrying of the firearm occurred "during the commission of" the murder.

tablish, inter alia, that "there was an unlawful killing of John Callahan by ***an act imminently dangerous to another*** and demonstrating a depraved mind without regard for human life." *See* Fla. Std. J. Inst. (Crim.) 7.4 (emphasis added). Importantly, that same jury instruction provides a definition of the underscored phrase:

> An act is "imminently dangerous to another and demonstrating a depraved mind" ***if it is an act or series of acts that*** . . . a person of ordinary judgment would know ***is reasonably certain to kill*** or do serious bodily injury to another. . . .

Fla. Std. J. Inst. (Crim.) 7.4. (Emphasis added.) *See also State v. Montgomery,* 39 So.3d 252, 255 (Fla.2010) (recognizing that the phrase "imminently dangerous to another and evincing a depraved mind" is an act or series of acts which "a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another") (citations omitted). *Coicou v. State,* 39 So.3d 237, 243 n. 4 (Fla.2010); *Pressley v. State,* 395 So.2d 1175, 1177 (Fla. 3d DCA 1981).

The majority incorrectly concludes that Connolly's act of aiding and abetting satisfied this definition, determining that Connolly, by his actions, was "signing a death warrant for" Callahan. *See* majority opinion at 915. However memorable or accurate this description may be, it falls short of what the law requires. Second-degree murder does not require merely that the act *led* to Callahan's death, or was *likely to result in* Callahan's death. Rather, second-degree murder requires that **the act itself** (or the series of acts) must be "reasonably certain ***to kill***. . . ." *Montgomery,* 39 So.3d at 255 (emphasis added). The distinction between these concepts is not merely semantic. It represents the difference between the act of Connolly (remotely aiding, abetting, and assisting his co-defendants in a manner that was reasonably certain to ***lead to Callahan's death***) and the act of Martorano (shooting Callahan in the back of the head with a firearm) that was reasonably certain ***to kill.***

In *Pressley,* for example, this court held that "a person of ordinary judgment would know that firing a loaded gun toward a group of people is *reasonably certain to kill* or do serious bodily injury to another." *Pressley,* 395 So.2d at 1177 (emphasis added). By contrast, the act of Connolly in aiding and abetting by meeting with and encouraging his co-defendants cannot satisfy this definition of an "act" which is "imminently dangerous to another" because his act self-evidently was not "reasonably ***certain to kill***" even if one could conclude that his act was reasonably certain to *lead to,* or *result in,* death. The statute requires an actual, active act that is "reasonably certain to kill" (or do serious bodily harm). *Montgomery,* 39 So.3d at 255; *Coicou,* 39 So.3d at 243 n. 4; *Pressley,* 395 So.2d at 1177. Common sense compels the conclusion that the act of Connolly in this case does not and cannot meet this definition. Despite the majority's valiant effort, Connolly's act in this case did not and cannot transform the State's theory from an aider and abettor/principal theory to an "active co-perpetrator of the murder" theory.

Relatedly, the majority seeks to characterize the second-degree murder as a "continuing" or "on-going offense" in an attempt to bridge the temporal and spatial divide and thereby satisfy the "during the commission of" language of the statute. *See* majority opinion at 919. This effort misses the mark, and would serve to transform the discrete offense of second-degree murder into a conspiracy offense or some other type of continuing offense. In support of this "continuing offense" theory, the majority relies upon *Junco v. State,* 510 So.2d 909 (Fla. 3d DCA 1987). How-

ever, this case does not support the majority's position. In *Junco*, the defendant (who was armed) and several co-defendants, (who were also armed) committed a robbery at a warehouse where marijuana was being stored. Two warehouse "guards" were killed in the course of the robbery, and another individual was injured. Junco left the scene prior to the shootings. Junco was convicted of two counts of second-degree murder with a firearm, attempted second-degree murder, robbery with a firearm, and trafficking in marijuana. The two murder convictions, and the attempted murder conviction, were reclassified under section 775.087(1), and the trial court also imposed four consecutive three-year minimum-mandatory sentences for the robbery, attempted murder, and two murder convictions (for possession of a firearm under 775.087(2)).

On appeal, and contrary to the majority's assertion (*see* majority opinion at 919), the defendant in *Junco* did *not* argue, and this court in *Junco* did *not* address, the propriety of the reclassification of the two murder and one attempted murder offenses.[45] Junco did raise, and this court did address, whether the trial court could properly impose consecutive minimum-mandatory sentences for the robbery (at which Junco was present and in which he participated) and for the two murders and the attempted murder committed by co-defendants soon after Junco left the scene of the crime.

Junco contended that these crimes comprised a single criminal episode, thus requiring that the minimum mandatory sentences be imposed concurrently.[46] The state argued that the robbery and the murders were separate and distinct offenses and therefore authorized consecutive minimum mandatory sentences.[47] *Junco* has nothing to do with whether the defendant possessed a firearm "during the commission of" the robbery or the murders. The issue was whether the crimes for which defendants were convicted were considered separate and distinct or a single criminal episode. This court held that, for purposes of imposing consecutive minimum mandatory sentences, the robbery and the murders, though they could be said to have occurred during a single criminal episode, were sufficiently separate in time so as to constitute two separate offenses. *Id.* at 913. *Junco* does not support the majority's conclusion that the facts in the instant case constitute a "single criminal episode." In *Junco*, the defendant went to a warehouse, armed with a firearm and accompanied by armed co-defendants, to commit a robbery. He participated actively in the robbery itself, and he fled the scene of the crime moments before his co-defendants murdered two people in the warehouse and attempted to murder a third person. This was a continuous, unbroken series of acts and events in which Junco was an active participant at a place and during the time the actual crimes were being committed. By contrast, the instant case involves a significant temporal break and spatial divide between Connolly's act as aider and abettor in Bos-

45. Junco did claim that the robbery was improperly reclassified and we held that the trial court properly reclassified this offense "because Junco did actually participate in the criminal offense while in the possession of a firearm. . . ." *Id.* at 913.

46. The defendant in *Junco* relied for its argument upon *Palmer v. State,* 438 So.2d 1 (Fla. 1983) and its progeny.

47. The State in *Junco* relied for its argument upon *State v. Enmund,* 476 So.2d 165 (Fla. 1985), *State v. Thomas,* 487 So.2d 1043 (Fla. 1986), and *Murray v. State,* 491 So.2d 1120 (Fla.1986).

ton and the actual commission of the murder three weeks later in Miami.[48]

Indeed, there are cases which address the relevance of spatial and temporal proximity in assessing whether the use of a firearm occurs "during the commission of" the offense. In *Lemus v. State*, 33 So.3d 774 (Fla. 4th DCA 2010), the defendant was convicted of, inter alia, two counts of aggravated assault (with a firearm) each committed on a different police deputy. The evidence at trial established the following:

- At about 8 a.m., police responded to an apartment after receiving a 911 call from defendant's father.
- Ten minutes after their arrival, police heard a gunshot and SWAT officers were called to the scene.
- Twenty to thirty minutes later, defendant came out of the apartment with a gun in his hand and, ignoring police commands to drop the gun, fired a shot into the ground and returned inside the apartment.
- At 9 a.m. SWAT officers heard more gunshots inside the apartment, and attempted to position themselves to see inside the apartment.
- Defendant's standoff with police continued until about 4 p.m., when defendant came out of the apartment, pointed his gun at Deputy Brady (but did not discharge the gun), and retreated inside the apartment (the first aggravated assault).
- A short while later, defendant again came out of the apartment, pointed his gun at Deputy Davis (but did not discharge the gun) and again retreated inside the apartment (the second aggravated assault).
- Defendant later emerged from the apartment a final time and was arrested without further incident.

Applying section 775.087(2)(a)2. (the "10/20/Life" statute),[49] the trial court imposed a twenty-year minimum mandatory sentence for each of the aggravated assault convictions, finding that "during the course of the commission of" the aggravated assaults, defendant discharged a firearm. The Fourth District reversed these minimum mandatory sentences. The court began by noting that the meaning of the term "during the course of the commission of the felony" is a question of statutory construction: "Principles of statutory construction require that the statute's words be afforded their plain meaning, and, if there is any ambiguity, such ambiguity must be resolved in favor of the defendant (the rule of lenity)." *Id.* at 775. (citations omitted). The court then held that, applying these principles of statutory construction, the evidence could not sup-

48. The majority also relies upon *Andrade v. State*, 564 So.2d 238 (Fla. 3d DCA 1990). In *Andrade*, the defendant was convicted of seven separate counts (three counts of attempted murder, and one count each of first-degree murder, armed robbery, conspiracy to traffic in cocaine, and resisting arrest with violence). Without any recitation of the underlying facts, or the course of events that led to the commission of these crimes, we held in *Andrade* that "the trial court did not, as urged, commit reversible error in enhancing the defendant's conviction on the three counts of attempted murder and in imposing three-year mandatory minimum sentences as to each of those convictions; this is so because the evidence establishes that the defendant possessed a firearm during the criminal episode in question." *Id.* at 239. *Andrade* does nothing to advance the majority's position.

49. Section 775.087(2)(a)2. provides in pertinent part that any person who is convicted of a qualifying offense (including an aggravated assault) "and during the course of the commission of the felony such person discharged a 'firearm'... shall be sentenced to a minimum term of imprisonment of 20 years."

port a finding that the defendant discharged a firearm "during the course of the commission of" the aggravated assaults:

> The aggravated assaults were committed when the defendant, using a gun, threatened and placed in fear Deputies Brady and Davis. See §§ 784.011(1) (defining crime of assault), 784.021 (defining crime of aggravated assault), 784.07(2)(c) (defining crime of aggravated assault on a law enforcement officer). The State argues that the phrase "during the course of" contained in section 775.087(2)(a)2. should be interpreted to mean any action occurring during the "temporal episode" surrounding the charged criminal offense. *The State thus maintains that since Lemus fired a revolver while earlier engaged in the standoff, the weapon was fired during the "criminal episode" of the aggravated assault offenses. We reject the State's broad interpretation of the statute as contrary to both the plain meaning of the statute and the "rule of lenity." The evidence at trial established that the defendant's discharge of the firearm, by firing a shot into the ground, took place some seven hours prior to his threatening Deputies Brady and Davis with a gun, i.e., the commission of the aggravated assaults.* Indeed, there was no evidence that either Deputy Brady or Deputy Davis actually saw, or was aware of, the defendant firing a shot into the ground. *Under the circumstances of this case, it cannot be said that the discharge of the firearm occurred "during the course of the commission" of either of the aggravated assault charges.*

Id. at 776 (emphasis added).

Although *Lemus* involved the imposition of a minimum mandatory sentence under the 10/20/Life statute, it is nevertheless instructive. *Lemus* construes operative statutory language ("during the course of the commission of the felony") that is very similar to that of the reclassification statute ("during the commission of" the felony). The *Lemus* court held that the act of the defendant in discharging the firearm several hours before committing the aggravated assaults (by threatening the deputies with the firearm) could not reasonably be said to have occurred during the course of the commission of the aggravated assaults. The decision in *Lemus* underscores the relevance of spatial and temporal proximity in assessing whether one's possession or use of a firearm occurred "during the commission of" the offense. In the case before us, it is clear that Connolly's carrying of the firearm was not related, in the episodic sense, to the commission of the murder.

The Fourth District later referenced and distinguished *Lemus* in a case in which the defendant discharged a firearm during a single continuous criminal episode. *See Chavers v. State*, 112 So.3d 594 (Fla. 4th DCA 2013). In doing so, the court in *Chavers* aptly described *Lemus* as involving "criminal episodes [which] were spatially and temporally distinct." *Id.* at 595. In the instant case, as in *Lemus*, the acts of Connolly and the actual commission of the murder were spatially and temporally distinct. In the instant case, as in *Lemus*, there is no single continuous criminal episode which would permit a conclusion that Connolly's carrying of a firearm occurred during the commission of the murder.

Finally, one cannot easily ignore this Court's decision in *Crimson v. State*, 390 So.2d 152 (Fla. 3d DCA 1980).[50] In that case, Crimson lent his firearm to several

50. Neither party cited to this case during the initial briefing or during the supplemental briefing on rehearing en banc.

other individuals, knowing that this firearm would be used by them in committing an armed robbery. Crimson was convicted of armed robbery as a principal (aiding and abetting the armed robbery by providing co-defendants with the firearm used in the crime). The trial court's sentence of Crimson included a three-year mandatory minimum term because Crimson was convicted of the robbery and had in his possession a firearm. *See* § 775.087(2), Fla. Stat. (1979).[51] On appeal, this court reversed the sentence, reasoning:

> The three culprits who were at the scene of the crime, who did not handle the gun, could not have been given a three-year minimum sentence upon conviction of armed robbery. Therefore, we find it was error to give the appellant a three-year minimum sentence upon conviction, when he was not present at the scene.

Although *Crimson* involved imposition of a mandatory minimum sentence (rather than reclassification) the same principles are present. In fact, *Crimson* provides an even more compelling set of facts, given that the defendant supplied his co-defendants with the very same firearm that was used in the armed robbery. However, this was not deemed sufficient to warrant imposition of the three-year minimum mandatory, where Crimson himself was not present at the scene and thus did not actually possess any firearm during the commission of the crime.

Implicit in this holding is a recognition that Crimson's possession of the firearm and lending it out, did not constitute the commencement of the armed robbery. Nor was Crimson's possession of the firearm connected episodically with the actual commission of the crime, and therefore could not serve as a basis for the enhanced sentence. Applying the logic and reasoning of *Crimson*, Connolly's act of aiding and abetting while carrying a firearm cannot support reclassification.

D. Conclusion

There can be little doubt that this is a hard case. But, as Justice John Harlan acknowledged more than a century ago, "it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law." *U.S. v. Clark*, 96 U.S. 37, 49, 24 L.Ed. 696 (1877) (Harlan, J., dissenting) (quoting Lord Campbell in *East India Co. v. Paul*, 7 Moo. 85, 111 (P.C. 1840)). The law is as clear as our duty to apply it. Connolly did not carry a firearm "during the commission of" the murder: His carrying of a firearm occurred during the episodically remote act of aiding and abetting a murder that was subsequently committed by others. While he is equally culpable as a principal for the second-degree murder committed by his co-principals, Connolly's conviction cannot be reclassified to a life felony, and remains a felony of the first degree. Because prosecution for this first-degree felony was not commenced within four years after it was committed,[52] the conviction, judgment and sentence for second-degree murder are barred by the expiration of the statute of limitations.

I conclude therefore that we must reverse with directions to vacate the judgment and sentence and enter a judgment of acquittal. For these reasons, I respectfully concur in part and dissent in part.

51. In 1979, section 775.087(2)(a), Florida Statutes, read in relevant part: Any person who is convicted of: ... robbery ... and who had in his possession a "firearm"... shall be sentenced to a minimum term of imprisonment of 3 calendar years.

52. *See* § 775.15(2)(a), Fla. Stat. (1981), which provided: "A prosecution for a felony of the first degree must be commenced within 4 years after it is committed."

SUAREZ, C.J., and SHEPHERD and LAGOA, JJ., join in the dissent only and concur that we must reverse with directions to vacate the judgment and sentence and enter a judgment of acquittal.

1

Dallas Y. GOODLOE, Petitioner,

v.

Julie L. JONES, etc., Respondent.

No. 15–1588.

District Court of Appeal of Florida, Third District.

July 29, 2015.

A Case of Original Jurisdiction—Habeas Corpus.

Dallas Y. Goodloe, in proper person.

Pamela Jo Bondi, Attorney General, and Douglas J. Glaid, Assistant Attorney General, for respondent.

Before SUAREZ, C.J., and ROTHENBERG and EMAS, JJ.

PER CURIAM.

Dallas Y. Goodloe petitions for a writ of habeas corpus in order to obtain credit for 364 days served prior to sentencing. The state has conceded that petitioner is entitled to be credited the time requested.

Based upon the state's proper concession, we grant the petition and remand this matter to the trial court for correction of Goodloe's sentence through the award of an additional credit of 364 days for time served.

Petition granted.

2

BASSAM TRADING COMPANY, LTD., Appellant/Cross–Appellee,

v.

WHEELED COACH INDUSTRIES, INC., Appellee/Cross–Appellant.

No. 5D14–1788.

District Court of Appeal of Florida, Fifth District.

July 31, 2015.

Rehearing Denied Sept. 1, 2015.

Appeal from the Circuit Court for Orange County, Lisa T. Munyon, Judge.

William V. Roppolo, of Baker & McKenzie LLP, Miami, and Michael A. Pollard and Kyle R. Olson, of Baker & McKenzie, Chicago, Illinois, for Appellant/Cross–Appellee.

Christopher N. Bellows, of Holland and Knight LLP, Miami, David A. Jones, of Holland and Knight LLP, Orlando, for Appellee/Cross–Appellant.

PER CURIAM.

Bassam Trading Company, Ltd. appeals the trial court's Final Order Enforcing Settlement Agreement ("Final Order"). It argues that the trial court erred in ruling that the parties agreed on an enforceable settlement agreement. As to this issue, we affirm without further discussion. Wheeled Coach Industries, Inc. has filed a cross-appeal claiming that the trial court erred in establishing October 21, 2014, as the effective date of the settlement agreement. We agree, reverse that part of the Final Order, and remand this case to the trial court to enter an Amended Final Order establishing November 14, 2013, as the effective date. This correction will ensure that the date of the settlement agreement and the release are the same.

POLITICS & POLICY

House anti-corruption and Supreme Court ethics vote helps restore U.S. credibility

The bill would require a code of conduct for justices, who are the only U.S. judges not governed by such a code.

— Justices John Roberts, Elena Kagan, Neil Gorsuch and Brett Kavanaugh attend the State of the Union address on Feb. 5, 2019. Alex Wong / Getty Images file

March 4, 2021, 4:34 AM EST

By Mark L. Wolf

Before the unsuccessful military coup to remove Recep Tayyip Erdoğan as president of Turkey in 2016, I was working with the leaders of the Turkish Justice Academy. They were honest, able judges who were inspired by the ability of judges in the United States to be impartial and independent of the president. Among other things, I was teaching about the importance of judicial proceedings' and records' being open to the media and the public, as they are in the United States as a way to hold judges accountable.

Confidence in the U.S. judiciary at home and abroad would be enhanced if the Supreme Court were, by statute, required to broadcast its proceedings.

The day after the attempted coup, Erdoğan had all of my Turkish colleagues, and almost 3,000 other judges and prosecutors, arrested off of lists prepared before the coup for allegedly being part of a terrorist network. My colleagues report that many judges died in prison, some by suicide. Others were jailed for several years, and some still are, as Erdoğan has solidified his control of the judiciary.

With honest, independent judges out of the way, Erdoğan proceeded to jail thousands of professors, journalists and politicians, as well. This followed a pattern. Three years earlier prosecutors brought corruption charges against members of Erdoğan's Cabinet and released a recording purported to reveal Erdoğan telling his son to get tens of millions in cash out of his house before it was searched. Erdoğan promptly removed the prosecutors.

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In essence, judges and prosecutors in Turkey have been persecuted for striving to be like judges and prosecutors in the United States, working independently as part of the system of checks and balances needed to protect against the abuse of power by elected officials, which is important to democracy. Their plight is a reminder of the historic importance of the United States as an inspiring model and of the countless people around the world who have the courage of our convictions.

Related

OPINION

Biden can't let Turkey's Erdoğan get away with his threats to Americans any longer

Persecuted judges in Turkey and elsewhere should be encouraged by the House of Representatives' vote Wednesday on sweeping legislation, known as H.R. 1, to diminish unethical conduct by elected officials, including the president and the vice president, and by Supreme Court justices as well. Among other things, the bill would require a code of conduct for justices, who are the only U.S. judges not governed by an ethical code.

As the Brennan Center for Justice has reported, "Over the last two decades, almost all members of the Supreme Court have been criticized for engaging in behaviors that are forbidden to other federal court judges." These include participating "in partisan convenings and fundraisers, accepting expensive gifts or travel, making partisan comments at public events or in the media, or failing to recuse themselves from cases involving apparent conflicts of interest, either personal or financial."

D.C. police on high alert after extremist threat against Democrats at Capitol

The legitimacy of the Supreme Court depends on public confidence that its decisions are principled, not political. Rightly or wrongly, that confidence has been eroded by decisions perceived to be partisan, as well as by the partisan rancor accompanying recent confirmation battles. A code of conduct for the justices would increase public confidence in their decisions.

In addition, as the United States regularly advocates for transparency as a check against misconduct and corruption, confidence in the U.S. judiciary at home and abroad would be enhanced if the Supreme Court were, by statute, required to broadcast its proceedings and allow the broadcasting of proceedings in the lower federal courts. Senators who have unsuccessfully introduced legislation to do so can now renew that effort when acting on H.R. 1.

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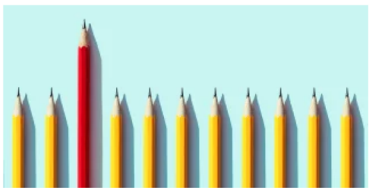

OPINION

We want to hear what you THINK. Please submit a letter to the editor.

However, if the United States is to remain an inspiring model of democracy, much more than improvements concerning the Supreme Court is necessary. The new legislation recognizes this, as it is intended to "strengthen ethics rules for public servants, and implement other anti-corruption measures for the purpose of fortifying our democracy." Those measures include requiring the president and the vice president to disclose their tax returns, prohibiting them from profiting from public expenditures and generally requiring that they adhere to the same ethical standards as all other government employees. H.R. 1 also includes measures to protect against foreign influence in U.S. elections.

However, the United States must do more than repair its democracy to restore its influence internationally. As Samantha Power, nominated by President Joe Biden to head the U.S. Agency for International Development, has rightly recognized, autocrats and populists are on the rise, and they are almost invariably corrupt. "Corruption is a key area of vulnerability for autocrats," Power has noted. There is a "desire of citizens around the world to see corruption and lawlessness investigated by independent bodies, a general principle they should know the United States stands behind."

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OPINION

Trump decimated the ranks of America's 'umpires.' We need to hire them back.

Recognizing this, President Biden is making promoting democracy and combating corruption pillars of his foreign policy. Among other things, he has pledged to convene a Summit for Democracy this year to galvanize commitments from other countries for "fighting corruption, defending against authoritarianism, and advancing human rights in their own nations and abroad."

Critics, however, contend that in view of the dysfunction of American democracy that culminated in the insurrection at the Capitol and the second impeachment of President Donald Trump, the United States no longer has the standing to lecture other countries. They argue that it would be counterproductive and, indeed, hypocritical for the president to invite countries such as Turkey, Hungary, Poland and the Philippines – "all U.S. allies or partners with leaders who have taken notable steps away from democracy." Thus, the critics assert, this is the wrong time for President Biden's summit.

Related

OPINION

Congress passes a bipartisan bill that actually fights corruption. How did that happen?

However, the events that have prompted this criticism actually make this the ideal time for the United States to host a summit. That summit should include democratic allies, such as Canada and the United Kingdom. If it is necessary to invite the leaders of Turkey and other increasingly

undemocratic countries, there should also be a seat at the table for citizens struggling for democracy there.

The summit should be one at which the United States seeks to learn as well as to lead. The challenges to democracy in this country today are familiar to many around the world. For example, as Yale professor Timothy Snyder explained in "On Tyranny," Ukraine in 2013 responded swiftly and effectively to a Russian disinformation campaign aimed at undermining its presidential election, while the United States was slow to recognize and try to rebut a comparable Russian effort in 2016. Snyder wisely concluded that, "since so much of what has happened [in the United States] is familiar to the rest of the world or from recent history, we must observe and listen."

Recommended

OPINION

'Alice, Darling' isn't your average thriller

OPINION

My new co-worker George Santos is a liar, a disgrace – and a danger to democracy

The United States can both listen and lead. The United States still has formidable independent media that expose corruption, as well as impartial judges who hold even presidents accountable. We often elect those who combat corruption to high office and elevate others to judgeships. (I myself was appointed a federal judge after being the chief federal prosecutor of public corruption in Massachusetts.) And, despite the insurrection at the Capitol, the world has again seen a peaceful transition of power that would be inconceivable in countries ruled by authoritarian kleptocrats.

Biden is making promoting democracy and combating corruption pillars of his foreign policy.

Among other things, he has pledged to convene a Summit for Democracy.

Nevertheless, the power of the United States' example is not enough. The United States should demonstrate its commitment to those people abroad who yearn to see autocratic kleptocrats held accountable. The United States should, for example, amend the Foreign Corrupt Practices Act to authorize the prosecution of kleptocrats who demand bribes, as well as the businesses that pay them. In addition, the United States should support the growing movement to create an International Anti-Corruption Court that has been catalyzed by Integrity Initiatives International, which I chair. The court would be a fair forum for prosecuting corrupt leaders who control the administration of justice in the countries they rule – a court of last resort similar to, but distinct from, the International Criminal Court.

Some Turkish judges have been released from prison and made dangerous escapes to other countries. They were dismayed by events in the United States after the 2020 presidential election. They are now encouraged by President Biden's pledge to promote democracy and combat corruption internationally and to convene a summit to prompt other countries to join us in that effort.

The United States has long inspired these judges and many others not because it is perfect, but because it has been properly perceived as striving to give integrity to its democratic principles. The United States now has the opportunity to give renewed integrity and energy to its never-ending quest to deserve and preserve its standing as the world's best hope. President Biden's initiatives have the potential to do that.

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ORAL TESTIMONY OF SENIOR JUDGE MARK L. WOLF
FOR THE MAY 17, 2023 HEARING OF THE SENATE COMMITTEE
ON THE JUDICIARY, SUBCOMMITTEE ON FEDERAL COURTS,
OVERSIGHT, AGENCY ACTION, AND FEDERAL RIGHTS
HEARING ON REVIEW OF FEDERAL JUDICIAL ETHICS PROCESSES
AT THE JUDICIAL CONFERENCE OF THE UNITED STATES

May 17, 2023

Thank you for requesting my testimony about how the Judicial Conference of the United States in the past discharged its responsibility under the 1978 Ethics in Government Act that applies to all federal judges, including Supreme Court Justices.

I am testifying as an individual, not as a representative of the Judicial Conference or the Federal judiciary. I would like to highlight some of my lengthy written testimony in a further effort to be helpful to you and to the Judicial Conference.

The Act codifies the belief that "sunlight is the best of disinfectants." Transparency of financial information of a Justice or judge and his immediate family encourages Justices and judges to decide cases impartially, as we are sworn to do, and encourages reasonable people to believe we are doing so.

The Act creates criminal and civil penalties for willfully falsifying information or willfully failing to file required information. In addition, 18 U.S.C. § 1001 makes it a crime punishable by up to 5-years' imprisonment to willfully falsify or conceal information.

The Act defines a specific and limited role for the Conference. It provides that:

> [T]he Judicial Conference shall refer to the Attorney General the name of any individual which [it] has reasonable cause to believe has willfully failed to file a report or has willfully falsified or willfully failed to file [required information].

"Reasonable cause" is analogous to probable cause. It is more than bare suspicion but less than by a preponderance of the evidence.

It is not the Conference's duty to determine whether a Justice or judge has violated the statute. The Conference is to decide whether there is reasonable cause to believe a willful violation occurred. If reasonable cause exists, the Conference must refer the Justice or judge involved to the Attorney General. This division of responsibilities is wise and important.

I was a Conference member in 2011 and 2012, thus, I shared responsibility for assuring the Act was properly implemented and enforced.

In 2011 the Conference received five letters, and the Supreme Court received one, in part alleging that from 2003 to 2009 Justice Clarence Thomas did not make the required disclosure that the Heritage foundation employed his wife. I believe for many years, he checked that her employment was "none." The Justice evidently knew of the requirement because he had previously disclosed his wife's employment, including in his early years as a Justice. Although the Act does not require disclosure of the amount of a spouse's compensation, the letters stated her compensation was substantial.

The first letter was sent in January 2011 and was referred to

the Conference's Committee on Financial Disclosure. Justice Thomas promptly amended his reports, stating that he misunderstood the Act's requirements, and that the errors were inadvertent. Nevertheless, the Conference still had the duty to decide if there was reasonable cause to believe his omissions were willful and, if so, refer him to the Attorney General.

Policy required that committees report to the Conference all their activities since the last bi-annual Conference meeting. This information ensured that each Conference member had the knowledge and ability to require discussion and possible decision by the full Conference. However, the Financial Disclosure Committee's reports for the March and September 2011 Conference meetings did not reference the issues concerning Justice Thomas or any related Committee activity.

The rest of the letters to the Conference amplified earlier allegations, questioned whether Justice Thomas' omissions actually were inadvertent, and raised other concerns, including allegations that Justice Thomas had failed to report travel on Harlan Crow's jet and yacht. Those letters were sent on or after the date of the September 13, 2011 Conference meeting.

In early 2012, I found some of the 2011 letters on the internet. I told Judge Thomas Hogan, Secretary to the Conference, that I was concerned that the other Conference members and I had

not been informed of the letters and their requests to refer Justice Thomas to the Attorney General. I suggested that the matter be discussed at the March 2012 meeting. He told me that he had referred the letters to the Financial Disclosure Committee and asked me to wait until the Committee Chair, Judge Joseph McKinley, responded to him.

Judge Hogan subsequently gave me Judge McKinley's February 23, 2012 response. I spoke with Judge McKinley and became concerned that, in 2011, the Committee may have done nothing after Justice Thomas amended his Reports and had not addressed the question of whether reasonable cause existed. Judge McKinley told me that the staff had not referenced the letters in the last three Committee reports because they regarded them as "routine." He also said, however, that this was the only time members of Congress or the public had ever requested a referral to the Attorney General.

There was also no reference to the letters in the Committee's Report for the September 2012 Conference meeting. Judge Hogan told me he had received an April 17, 2012 revised version of Judge McKinley's February response and he wrote to the letters' authors on April 30 to inform them that the Committee had decided against referral.

I asked Judge David Sentelle, Chair of the Conference Executive Committee, to put the matters concerning Justice Thomas

on the September 2012 Conference agenda. The Executive Committee denied my request. I then exercised my right to move the Committee Report to the Discussion Calendar.

I told Judge Hogan that I would send a memorandum to Conference members before the meeting explaining my concerns. He urged me not to include the two letters from Judge McKinley describing the Committee's actions. I acquiesced and did not attach them to my memorandum.

At the September 11, 2012 meeting, I moved to disapprove the Committee's Report and require revision of the prior three Reports. Chief Justice John Roberts allowed me to speak briefly about the deficient process and whether the Conference was properly performing its important but limited role of determining whether reasonable cause to refer to the Attorney General existed. I hoped to generate discussion. When I concluded, the Chief Justice immediately recognized Judge Sentelle. Judge Sentelle successfully moved that the issues be returned to the Committee for a report at a future meeting at which he knew I would not be present because my term as Conference member was ending.

It is unfortunately relevant to consider these events today. The Act only serves its vital purpose if the Conference understands and properly performs its role. I believe that in 2011 and 2012 it did not. First, despite Congress and the public raising serious

allegations, and the Conference referring them to the Committee, it appears that the Committee did little to nothing for at least a year. The Committee should have, at the very least, addressed the allegations at the March 2012 Conference meeting. Second, the Committee's process was opaque. In 2011 - likely through inaction - then in 2012 - by insistence - the Committee did not disclose to members of the Conference: the allegations; the actions, if any, it took; and the reasons for any decisions it made. Third, the statutory mandate for the Conference, and by delegation the Committee, was to determine whether there was reasonable cause to refer, not the ultimate merits of whether the Justice's violations were willful. However, in conversations, letters, and reports the Committee repeatedly framed its inquiry using the wrong standard. As I frequently tell my law clerks, if you address the wrong question you are likely to get the wrong answer.

Thank you.

United States Senate
WASHINGTON, DC 20510

April 21, 2023

The Honorable Roslynn R. Mauskopf
Director, Administrative Office of the United States Courts
Secretary, Judicial Conference of the United States
One Columbus Circle, NE
Washington, D.C. 20544

Dear Judge Mauskopf:

Thank you for your prompt and courteous replies to my letters dated April 10, 2023, and April 14, 2023.

In your reply to my letter dated April 10, 2023, you confirmed that the Judicial Conference's Committee on Financial Disclosure is charged with providing official answers and advice to members of the federal judiciary regarding their financial disclosure obligations under the Ethics in Government Act of 1978.[1] You declined to disclose whether Justice Thomas used this resource in seeking, as he stated, "guidance from [his] colleagues and others in the judiciary."[2]

In your reply to my letter with Ranking Member Johnson dated April 14, 2023, in your capacity as the Secretary of the Judicial Conference, you informed us that the question of referral to the Attorney General of Justice Thomas's disclosure failures under the Ethics in Government Act had been referred to the Committee on Financial Disclosure.[3] Given that the law states that the Judicial Conference "shall" make this referral if it has a "reasonable cause to believe" that an officer "has willfully failed to file information required to be reported,"[4] I hope that the Committee acts with due dispatch in deliberating and reporting its findings to the Judicial Conference.

In the interval, may I ask whether formal reports from this Committee (and other standing committees) to the Judicial Conference on particular matters such as these, once reported back to the Conference, are available to the public or to Congress via electronic search or upon request?

May I further inquire whether there has ever been a referral to the Attorney General by the Judicial Conference under 5 U.S.C. §13106(b), either as to a justice of the Supreme Court or as to any other member of the federal judiciary?

---

[1] Letter from Hon. Roslynn R. Mauskopf, Dir., Admin. Office of U.S. Courts, to Sen. Sheldon Whitehouse (Apr. 18, 2023).
[2] Joshua Kaplan, Justin Elliott, & Alex Mierjeski, *Clarence Thomas Defends Undisclosed "Family Trips" With GOP Megadonor. Here Are the Facts.*, ProPublica (Apr. 7, 2023), https://www.propublica.org/article/clarence-thomas-response-trips-legal-experts-harlan-crow.
[3] Letter from Hon. Roslynn R. Mauskopf, Sec'y, Jud. Conf. of U.S., to Sen. Sheldon Whitehouse (Apr. 18, 2023).
[4] 5 U.S.C. § 13106(b).

Finally, please provide any existing guidelines governing the Judicial Conference's procedures for the consideration of possible violations of the Ethics in Government Act and referrals to the Attorney General under that statute. Please include any guidelines governing the process by which: the Judicial Conference refers such matters to the Committee on Financial Disclosure, the Committee convenes to deliberate (including when such deliberation occurs), the reporting out of the Committee's findings and recommendations to the Judicial Conference, and any deliberation by the full Judicial Conference before deciding on the resolution of these matters.

Thank you for your courteous attention to these various matters.

Sincerely,

SHELDON WHITEHOUSE
Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

cc: Hon. Henry C. "Hank" Johnson, Jr.

SHELDON WHITEHOUSE
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April 27, 2023

The Honorable Roslynn R. Mauskopf
Director
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Dear Judge Mauskopf:

I write to follow up on my prior letter, dated April 21, 2023, requesting additional information about the procedures and rules related to the Committee on Financial Disclosure and Judicial Conference's consideration of potential disclosure violations under the Ethics in Government Act of 1978. That letter also urged the Committee and Judicial Conference to act with due dispatch in considering possible violations in recent years by Justice Thomas. As you may know, the undisclosed gifts, travel, and transactions that form the basis of the matter currently pending before the Committee are not the only financial disclosure omissions in Justice Thomas's history.

Nor is this the first time that the Judicial Conference has been asked to consider whether to refer Justice Thomas's financial disclosure omissions to the Attorney General under the Ethics in Government Act.

In 2011, the nonprofit group Common Cause uncovered via IRS filings that Justice Thomas had failed to disclose several years of income that his wife had received from the Heritage Foundation and Liberty Central.[1] On January 21, 2011, Common Cause reported these omissions to the Judicial Conference in a letter to one of your predecessors, Judge and then-Director James Duff.[2] That letter noted that the Ethics in Government Act directs the Judicial Conference to report to the Attorney General the name of any federal judge whom the Conference "has reasonable cause to believe has willfully falsified or willfully failed to file information to be reported."[3] The letter then requested "that the Judicial Conference make such a determination in the case of Justice Thomas, and if reasonable cause is found, to refer the matter to the Attorney General."[4]

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[1] Common Cause, Press Release, *What else haven't they told us?* (Jan. 21, 2011), *available at* https://web.archive.org/web/20111123131308/http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773613&ct=9042443.
[2] Letter from Bob Edgar & Arn H. Pearson to Hon. James C. Duff (Jan. 21, 2011), *available at* https://www.commoncause.org/resource/letter-to-james-duff-on-virginia-thomas-income/ [hereinafter January Common Cause Letter].
[3] *Id.*
[4] *Id.*

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The following Monday, it was reported that Justice Thomas had amended several of his prior reports to include previously undisclosed spousal income, which he said had been "inadvertently omitted due to a misunderstanding of the filing instructions."[5] Although Justice Thomas's amendments were not disclosed until Monday, January 24, 2011,[6] a review of his letters to the Committee on Financial Disclosure reveal that he had in fact requested such amendments on January 21[7]—the same day that Common Cause sent its letter to the Judicial Conference. However, there is no indication that Common Cause provided Justice Thomas advance notice of its letter, other than a press release from earlier the same day;[8] nor did the letter mention or allude to knowledge of Justice Thomas's amendments.[9] The letter also did not reference the other sources of spousal income that Justice Thomas had not disclosed but that he requested to be included in his amendments.[10]

Later that year, on June 18, 2011, in a precursor to the most recent reporting by ProPublica, the New York Times reported that Harlan Crow had:

> [D]one many favors for [Justice Thomas] and his wife, Virginia, helping finance a Savannah library project dedicated to Justice Thomas, presenting him with a Bible that belonged to Frederick Douglass and reportedly providing $500,000 for Ms. Thomas to start a Tea Party-related group. They have also spent time together at gatherings of prominent Republicans and businesspeople at Mr. Crow's Adirondacks estate and his camp in East Texas.[11]

The Times further reported that, "In addition to giving him the Douglass Bible, valued 10 years ago at $19,000, Mr. Crow has hosted the justice aboard his private jet and his 161-foot yacht, at the exclusive Bohemian Grove retreat in California and at his grand Adirondacks summer estate called Topridge."[12] Justice Thomas did not amend his financial disclosure reports to account for these gifts, nor did he or Mr. Crow respond to the Times's requests for comments about these gifts.[13]

Following this reporting, Common Cause and another nonprofit organization, Alliance For Justice, again wrote to the Judicial Conference urging it to refer Justice Thomas to the Attorney General for Justice Thomas's nondisclosure of his spouse's income.[14] Two weeks later, the

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[5] Jennifer Epstein, *Thomas revises disclosure forms*, Politico (Jan. 24, 2011), https://www.politico.com/story/2011/01/thomas-revises-disclosure-forms-048086.
[6] *See id.* ("Supreme Court Justice Clarence Thomas has amended 13 years' worth of disclosure reports to include details of wife Virginia Thomas's sources of income, documents released on Monday show.").
[7] Hon. Clarence Thomas Letter and Self Initiated Amendments to Committee on Financial Disclosure (Jan. 21, 2011), *available at* https://big.assets.huffingtonpost.com/amendments.pdf [hereinafter Thomas Letter].
[8] *See* Common Cause, *What else haven't they told us?*, *supra* note 1.
[9] *See* January Common Cause Letter, *supra* note 2.
[10] *See id.*
[11] Mike McIntire, *Friendship of Justice and Magnate Puts Focus on Ethics*, N.Y. Times (June 18, 2011), https://www.nytimes.com/2011/06/19/us/politics/19thomas.html.
[12] *Id.*
[13] *Id.*
[14] Letter from Bob Edgar & Nan Aron to Hon. James Duff (Sept. 13, 2011), *available at* https://web.archive.org/web/20130415123051/https:/www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773617&ct=11216445.

Judicial Conference replied that it was referring the matter—presumably including the matter of free private yacht and jet trips—to the Committee on Financial Disclosure.[15]

On September 29, 2011, several members of the House of Representatives sent a letter to the Judicial Conference also requesting that the Conference refer both the matter of Justice Thomas's spousal income omissions and his failure to disclose "use of a private yacht and airplane owned by Harlan Crow . . . as a gift or travel reimbursement on his federal disclosure forms as required by the Ethics in Government Act of 1978."[16] Common Cause, Alliance for Justice, and 53 members of the House of Representatives sent additional letters to the Judicial Conference and Chief Justice Roberts reiterating these requests.[17] These letters came after Common Cause and Alliance for Justice revealed on October 5, 2011, that Justice Thomas had for years correctly filled out the spousal income sections of his financial disclosure forms,[18] despite his claims of "misunderstanding . . . the filing instructions."[19]

To my knowledge, despite receiving multiple requests for the Judicial Conference to investigate these omissions related to spousal income and gifts from Mr. Crow, the Judicial Conference has never revealed to the public how it ultimately resolved these matters—including whether it or the Committee on Financial Disclosure ever undertook an investigation or referred the matters to the Department of Justice. In 2011, the Committee on Financial Disclosure submitted two reports to the Judicial Conference as part of the biannual Reports of the Proceedings of the Judicial Conference. Neither report referenced any consideration of these or any related matters.[20] Nor did the Committee's next report in March 2012.[21]

The only indication that the Committee or the Conference ever considered these matters is the following passage from the Committee's September 11, 2012, report to the Judicial Conference:

> **DISCHARGE OF STATUTORY DUTY UNDER 5 U.S.C. APP. § 104(B)**
> A Judicial Conference member sought to have the Conference discuss the issue of how the Conference discharges its statutory duty, under 5 U.S.C. app. § 104(b), to determine whether an individual has willfully failed to file a financial disclosure report or has willfully falsified or failed to include required information in such a

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[15] *See* Common Cause, Press Release, *Citing new evidence, Common Cause and Alliance for Justice urge formal investigation of Justice Thomas' disclosure failures*, Common Dreams (Oct. 5, 2011), https://www.commondreams.org/newswire/2011/10/05/citing-new-evidence-common-cause-and-alliance-justice-urge-formal-investigation.

[16] Letter from Rep. Louise Slaughter et al. to Hon. James C. Duff (Sept. 29, 2011), *available at* https://www.law360.com/articles/275091/attachments/0.

[17] Common Cause, "Supreme Conflict," https://www.commoncause.org/resource/supreme-conflict/; Letter from Rep. Louise M. Slaughter et al. to Hon. John Roberts (Nov. 18, 2011), *available at* https://lawprofessors.typepad.com/files/jud_conf_follow-up_letter_final_11.18.113.pdf.

[18] Stephanie Mencimer, *Chart of the Day: Clarence Thomas' Non-Disclosure Form*, Mother Jones (Oct. 5, 2011), https://www.motherjones.com/politics/2011/10/clarence-thomass-non-disclosure-form/.

[19] Thomas Letter, *supra* note 7.

[20] *Report of the Proceedings of the Judicial Conference of the United States* at 16, March 15 2011, *available at* https://www.uscourts.gov/sites/default/files/2011-03.pdf; *Report of the Proceedings of the Judicial Conference of the United States* at 24, September 13, 2011, *available at* https://www.uscourts.gov/sites/default/files/2011-09.pdf.

[21] *Report of the Proceedings of the Judicial Conference of the United States* at 16, March 13, 2012, *available at* https://www.uscourts.gov/sites/default/files/2012-03.pdf.

> report. On the Conference floor, the member moved to disapprove the most recent report of the Committee on Financial Disclosure and require the Committee to file amended reports that provide information about Committee actions taken pursuant to the authority delegated to it by the Conference to carry out duties under 5 U.S.C. app. § 104(b). The Judicial Conference decided to postpone consideration of the motion so that the Committee may first consider the matter and report back to the Conference.[22]

This passage seems to coincide with the precise issues raised by Justice Thomas's omissions and requests for the Judicial Conference to exercise its power of referral under the Ethics in Government Act. However, despite the promise that the Committee would "consider the matter and report back to the Conference,"[23] no such report was apparently ever issued.[24] Thus, it remains unclear the nature of the precise issue regarding the referenced statutory duties, the perceived inadequacy of "the most recent report of the Committee on Financial Disclosure," and how or whether the Committee and Judicial Conference ultimately resolved the issue.

In light of these outstanding questions, I respectfully request the following information and answers to the following questions.

1. Please provide any reports, either of the Committee on Financial Disclosure or the Judicial Conference, related to the matter referenced in the Committee on Financial Disclosure's report to the Judicial Conference as part of the September 11, 2012, Report on the Proceedings of the Judicial Conference.

2. If those reports do not exist, or are otherwise not wholly responsive to the outstanding questions discussed above, please provide the following information.

    a. What was the issue related to the Conference's duties under 5 U.S.C. § 13106(b) that the Judicial Conference member referenced in the September 11 report sought to discuss?

    b. What was the issue with the Committee on Financial Disclosure's "most recent report" that caused the Judicial Conference member to seek disapproval of such report?

    c. What "information about Committee actions taken pursuant to the authority delegated to it by the Conference to carry out duties under" 5 U.S.C. § 1306(b)

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[22] *Report of the Proceedings of the Judicial Conference of the United States* at 18, September 11, 2012, *available at* https://www.uscourts.gov/sites/default/files/2012-09.pdf.
[23] *Id.*
[24] *See, e.g.*, *Report of the Proceedings of the Judicial Conference of the United States* at 15-16, March 12, 2013, *available at* https://www.uscourts.gov/sites/default/files/2013-03.pdf; *Report of the Proceedings of the Judicial Conference of the United States* at 21, September 17, 2013, *available at* https://www.uscourts.gov/sites/default/files/2013-09.pdf; *Report of the Proceedings of the Judicial Conference of the United States* at 17, March 11, 2014, *available at* https://www.uscourts.gov/sites/default/files/2014-03.pdf; *Report of the Proceedings of the Judicial Conference of the United States* at 16-17, September 16, 2014, *available at* https://www.uscourts.gov/sites/default/files/2014-09_0.pdf.

did the Judicial Conference member seek to include in "amended reports" by the Committee?

d. Did the Committee "consider the matter" referenced in the report and "report back to the Conference?" If so, please summarize that consideration and report, and provide any documentation of such consideration and report. Did the Judicial Conference ever consider such report?

3. How did the Judicial Conference and Committee on Financial Disclosure resolve the requests it received throughout 2011 related to Justice Thomas's various disclosure omissions?

Thank you for your timely consideration of these matters.

Sincerely,

SHELDON WHITEHOUSE
Chair, Senate Judiciary Subcommittee on
Federal Courts, Oversight, Agency Action,
and Federal Rights

United States Senate
WASHINGTON, DC 20510

May 5, 2023

The Honorable Roslynn R. Mauskopf
Director, Administrative Office of the United States Courts
Secretary, Judicial Conference of the United States
One Columbus Circle NE
Washington, D.C. 20544

Dear Judge Mauskopf:

I write to follow up on my prior correspondence regarding Justice Thomas's recently reported financial disclosure omissions and the Judicial Conference's treatment of the omissions first reported in 2011. Yesterday, ProPublica reported that, in addition to previously reported gifts from Harlan Crow to Justice Thomas, Crow paid for multiple years of tuition for Justice Thomas's grandnephew to attend private boarding schools.[1] According to ProPublica, Justice Thomas became his grandnephew's legal guardian "around 1998."[2] As legal guardian, Justice Thomas was presumably responsible for these kinds of education expenses for his grandnephew, making a gift covering those expenses a gift to Justice Thomas. Regardless, legislative and executive branch guidance is clear that gifts given to an official's close relatives or household members are often considered gifts provided to that official.[3] These tuition payments from Crow therefore likely should have been considered reportable gifts to Justice Thomas under the Ethics in Government Act.

Justice Thomas appears to have himself considered these types of gifts reportable in the past. In 2002, Justice Thomas disclosed a $5,000 gift from a friend intended to "help defray the costs" of Thomas's grandnephew's education.[4] On his disclosure report, Justice Thomas described this payment as an "Education gift to" his grandnephew.[5] Thus, Justice Thomas appears to have considered this payment from a friend to cover his grandnephew's education expenses a

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[1] Joshua Kaplan, Justin Elliott, & Alex Mierjeski, *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition.*, PROPUBLICA (May 4, 2023), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus.
[2] *Id.*
[3] Senate Rule XXXV(2)(A) ("A gift to a family member of a Member . . ., or a gift to any other individual based on that individual's relationship with the Member . . ., shall be considered a gift to the Member . . . if it is given with the knowledge and acquiescence of the Member . . . and the Member . . . has reason to believe the gift was given because of the official position of the Member, officer, or employee."); House Rule 25, cl. 5(a)(2)(B)(i) ("[A] gift to a family member or another individual will be deemed to be a gift to the official when two circumstances are present: The gift was given with the knowledge and acquiescence of the Member or staff person; and [t]he Member or staff person has . . . reason to believe the gift was given because of his official position with the House."). 5 C.F.R. § 2365.203(f) (2016) (stating that an indirectly accepted gift includes a gift "[g]iven with the employee's knowledge and acquiescence to the employee's parent, sibling, spouse, child, dependent relative, or a member of the employee's household because of that person's relationship to the employee").
[4] Kaplan et al., *supra* note 1.
[5] *Id.*

reportable gift—either to Justice Thomas or to his grandnephew as a dependent child. At a minimum, Justice Thomas's omission of similar gifts from Crow is further evidence of an intent to omit years of lucrative and unusual gifts from Harlan Crow.

Reporting from yesterday by the Washington Post also revealed that Leonard Leo, deeply involved in right-wing influence over the Supreme Court, directed payments of at least $25,000 to a consulting firm run by Justice Thomas's spouse, Virginia Thomas.[6] Further investigation is needed into this matter, including whether the Thomases knew of this arrangement and whether the circumstances of this payment required disclosure separate from Mrs. Thomas's reported income.

On April 18, 2023, you informed me that the Judicial Conference had referred to the Committee on Financial Disclosure my request for the Judicial Conference to investigate for possible referral to the Attorney General Justice Thomas's undisclosed travel paid for by Harlan Crow, as well as the unreported real estate transaction between Justice Thomas and Crow.[7] I request that the Committee consider as part of its investigation the additional gifts of tuition payments from Crow to Justice Thomas, and the payments from Leo to Mrs. Thomas.

Moreover, I respectfully request that this long pattern of failing to make required disclosures—which continued even after the Justice was put on notice when similar non-disclosures (including gifts of yacht and private jet travel from Harlan Crow) were referred to the Committee on Financial Disclosure in 2011—be evaluated as evidence of "reasonable cause to believe" that Justice Thomas has "willfully failed to file information required to be reported."[8]

On April 21, 2023, and April 27, 2023, I also requested the Judicial Conference produce information related to the Committee on Financial Disclosure's general procedures for consideration of these matters, as well as specific information related to how the Committee disposed of similar requests under 5 U.S.C. § 13106(b) in 2011.[9] The mysterious disposition of the very similar non-disclosures back in 2011 is important to resolve and make transparent in light of present events.

When the issue is potentially unlawful conduct by a sitting Supreme Court justice, transparency is essential for accountability and to instill public confidence in the outcome. The Judicial Conference's process remains almost entirely opaque. The 2011 referral to the Committee on Financial Disclosure seems to have disappeared. The public does not even know which members of the Judicial Conference serve on the Committee on Financial Disclosure. Nor does the public know the rules governing that Committee's process for deliberating on these matters.

This is a difficult time for the judiciary, prompted by behavior at the Supreme Court no other court would countenance. I believe it would serve the public interest for the Judicial Conference

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[6] Emma Brown, Shawn Boburg, & Jonathan O'Connell, *Judicial activist directed fees to Clarence Thomas's wife, urged 'no mention of Ginni'*, Wash. Post (May 4, 2023), https://www.washingtonpost.com/investigations/2023/05/04/leonard-leo-clarence-ginni-thomas-conway/.

[7] Letter from Hon. Roslynn R. Mauskopf, Sec'y, Jud. Conf. of U.S., to Sen. Sheldon Whitehouse (Apr. 18, 2023).

[8] 5 U.S.C. § 13106(b).

[9] Letter from Sen. Sheldon Whitehouse to Hon. Roslynn R. Mauskopf (Apr. 21, 2023); Letter from Sen. Sheldon Whitehouse to Hon. Roslynn R. Mauskopf (Apr. 27, 2023).

to publish all rules governing the Judicial Conference's operations, as well as the membership of all Judicial Conference committees, and to report the outcome of the 2011 referral as to Mrs. Thomas's undisclosed income, and Justice Thomas's gifts of yacht and jet travel.

My Subcommittee is scheduling a related hearing on these topics in the coming weeks. I respectfully request that you answer the following questions below, and respond to the outstanding questions from my letters dated April 21, 2023, and April 27, 2023, no later than May 15, 2023.

1. Please provide the names of the current members of the Judicial Conference's Committee on Financial Disclosure.

2. Please provide the names of the members of the Judicial Conference's Committee on Financial Disclosure who served in the years 2011, 2012, and 2013.

3. When did the Judicial Conference first refer to the Committee on Financial Disclosure complaints received in 2011 requesting the Judicial Conference to investigate Justice Thomas's possible violations of the Ethics in Government Act?

4. Before receiving those complaints, did anyone from the Judicial Conference, Committee on Financial Disclosure, or Administrative Office of the United States Courts communicate with Justice Thomas or any other officials at the Supreme Court regarding the omissions that were the subject of those complaints? If so, who, and when?

5. When did the Committee on Financial Disclosure begin deliberating on those complaints? What steps were taken as part of those deliberations?

6. Did the Committee consider both Justice Thomas's omissions of spousal income, first reported by Common Cause on January 21, 2011, and Justice Thomas's undisclosed travel on Harlan Crow's private plane and yacht, first reported by the New York Times on June 18, 2011?

7. On what date did the Committee conclude its deliberations? To whom did the Committee communicate its conclusions? On what date did the Committee make such communications, and did the Committee include the rationale supporting those conclusions? If not, what is the status of the referral at this time? Why was no report made to the Judicial Conference?

8. When the Committee considered whether it was obligated to refer Justice Thomas to the Attorney General under 5 U.S.C. § 13106(b), what was the precise question that the Committee considered (did the Committee consider whether Justice Thomas had acted "willfully" or whether it had "reasonable cause" to believe he acted "willfully"), and how was it answered?

9. Please provide or describe all communications between the Committee on Financial Disclosure, the Judicial Conference, and any Supreme Court personnel relevant to this referral.

Sincerely,

SHELDON WHITEHOUSE
Chairman, Senate Judiciary Subcommittee on
Federal Courts, Oversight, Agency Action,
and Federal Rights

cc: The Honorable S. Thomas Anderson
The Honorable John Bailey
The Honorable Patricia D. Barksdale
The Honorable Mark Barnett
The Honorable David Jeremiah Barron
The Honorable James Emanuel Boasberg
The Honorable Margo K. Brodie
The Honorable Debra M. Brown
The Honorable Renee Marie Bumb
The Honorable Michael A. Chagares
The Honorable Scott Coogler
The Honorable Jon DeGuilio
The Honorable Aida M. Delgado-Colón
The Honorable Roger L. Gregory
The Honorable Jerome A. Holmes
The Honorable William Paul Johnson
The Honorable Leslie E. Kobayashi
The Honorable Debra Ann Livingston
The Honorable Margaret M. Mann
The Honorable Kimberly A. Moore
The Honorable Mary H. Murguia
The Honorable William H. Pryor, Jr.
The Honorable Priscilla Richman
The Honorable John G. Roberts, Jr.
The Honorable Lavenski R. Smith
The Honorable Srikanth Srinivasan
The Honorable Jeffrey S. Sutton
The Honorable Diane S. Sykes
The Honorable John R. Tunheim

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

May 15, 2023

Honorable Sheldon Whitehouse, Jr.
Chairman
Subcommittee on Federal Courts, Oversight,
Agency Action, and Federal Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I write in response to your letters of April 21, 2023, April 27, 2023, and May 5, 2023, inquiring about Judicial Conference of the United States (Conference) procedures for considering alleged violations of the Ethics in Government Act of 1978, 5 U.S.C. § 13106, by members of the federal Judiciary, as well as the Conference's consideration of certain such allegations from 2011. At the outset, please know that I have forwarded your letter of May 5, 2023, which includes additional allegations of errors or omissions, to the Conference's Committee on Financial Disclosure (Committee), which is responsible for implementing the disclosure provisions of the Ethics in Government Act and addressing allegations of errors or omissions in the filing of financial disclosure reports.

In addressing your requests, I provide information about the Committee and its processes, its reporting to the Conference, as well as the Committee's and the Conference's consideration of allegations raised in 2011 by members of Congress and public interest organizations with regard to certain of Associate Justice Clarence Thomas's financial disclosure reports.

The Judicial Conference and its Committee on Financial Disclosure

The Judicial Conference is the national policymaking body for the federal courts. 28 U.S.C. § 331. The Chief Justice is its presiding officer, and its 26 members include the chief judge of each regional judicial circuit, the chief judge of the Federal Circuit, a district judge from each regional judicial circuit, and the chief judge of the Court of International Trade. A bankruptcy judge and a magistrate judge are designated as Conference observers.[1] The Director of the Administrative Office of the United States Courts (AO) serves as Secretary to the Conference. The Conference operates through a network of committees created to address and

[1] The names of the 26 members and two observers are available on the U.S. Courts web page, at https://www.uscourts.gov/file/64110/download.

advise on a wide variety of subjects. The Conference's Committee on Financial Disclosure is one such committee, consisting of 16 judges from across the country. Its work is supported by a professional staff from the AO.[2]

As is the case with most committees, the Committee on Financial Disclosure holds standing meetings twice per year to consider committee business and convenes additional meetings as needed. The Committee provides reports to the Conference on actions it has taken, which the Conference typically reviews at its own semiannual sessions, traditionally convened in March and September. The Conference may elect to take up any matter addressed by a committee.

The Conference has delegated to the Committee its authority to act for the Conference with respect to the implementation of the financial disclosure provisions of the Ethics in Government Act, including reviewing financial disclosure reports and referring matters to the Attorney General. Allegations of financial disclosure errors or omissions submitted to the Conference are referred to the Committee for review and appropriate action.

Throughout each year, the Committee is responsible for reviewing over 4,000 financial disclosure reports. The current process for such reviews is as follows. Committee staff reviews the report filed, prepares a review packet, and forwards it to the Committee member responsible for reviewing the filer's report. If during the review of a report the reviewing judge believes that additional information is required to be submitted, the filer is sent a letter of inquiry and asked to provide additional information or to amend the report. *See* 5 U.S.C. § 13108(b). The filer will typically provide an amended report or an explanation. If the reviewing judge is satisfied with the response and/or the amendment, then the report is closed. This happens routinely. The Committee's focus is to ensure that reports are timely filed and comply with the statutory requirements for disclosure.

When a public written allegation of a willful error or omission in a filer's financial disclosure report is received by the Committee, it will invoke its review process as described above. Committee staff reviews the allegation, prepares a review packet, and forwards it to the Committee member responsible for reviewing the filer's report. If warranted the reviewing judge can approve a letter of inquiry asking the filer to clarify the purported discrepancy. After the reviewing judge considers all matters related to the allegation, the reviewing judge refers all allegations of willful errors or omissions to the Committee's Subcommittee on Compliance for review, whether or not the reviewing judge finds reasonable cause to believe the errors or omissions were willful. The Subcommittee will review the allegations and the reviewing judge's findings, and it will report and recommend to the full Committee whether to accept the preliminary determination of the reviewing judge. The Committee will also report to the Conference the number and nature of any written public allegations of willful misconduct received and the action taken with respect to such allegations.

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[2] Additional information is available on the U.S. Courts web page, at https://www.uscourts.gov/about-federal-courts/governance-judicial-conference.

If the Committee has reasonable cause to believe that a filer has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported, it refers the name of the filer to the Attorney General and notifies the judicial council of the filer's circuit of the referral. 5 U.S.C. § 13106(b). Since 1983, a referral to the Attorney General requires the affirmative vote of at least 10 members of the Committee in attendance at a duly noticed regular or specially held meeting of the Committee.[3] The Committee has in the past referred the names of individuals to the Attorney General for failure to file the required financial disclosure reports. It has not to date referred the name of a filer to the Attorney General for willfully falsifying or willfully failing to file information required to be reported.

The Committee's 2011 Review

In January 2011, and again in the fall of that year, the Conference received complaints from members of Congress and public interest organizations that alleged financial disclosure errors or omissions by Justice Thomas relating to the reporting of his spouse's source of income and gifts. As noted in the correspondence referring the January 2011 complaints to the Committee, the allegations relating to disclosure of the spouse's sources of income were brought to Justice Thomas's attention, and he immediately amended his reports. (Enclosures 1-2). The then-chair of the Committee, the Honorable Bobby R. Baldock, reviewed the January 2011 allegations and the amended reports and concluded that the reports were properly amended and that no further action was warranted. Under basic procedures adopted by the Committee in 1997 for resolving complaints received from members of the public alleging errors or omissions, which were in effect in 2011, if the reviewing judge did not find reasonable cause to believe an error or omission was willful, no further review was required. However, Judge Baldock took the extra step of reporting the matter to the Subcommittee on Compliance for its review, which concurred with his conclusion.

Additional complaints were received in the fall of 2011 and referred to the Committee. (Enclosures 3-10). The Honorable Joseph H. McKinley, Jr. had succeeded Judge Baldock as chair of the Committee and assumed the reviewing judge's responsibilities for Justice Thomas's reports. Again, as Judge Baldock did, Judge McKinley took additional steps beyond the procedures in effect at the time. The Subcommittee on Compliance was asked to review the issues, and the matter was discussed by the full Committee at its January 2012 meeting.[4]

In April 2012, the Committee reported on its actions in writing to the Honorable Thomas F. Hogan, the Director of the AO, in his capacity as Secretary to the Conference. Judge McKinley indicated based on his review of all documentation and the discussion by the Committee members that nothing had been presented to support a determination that Justice Thomas's failure to report the source of his spouse's income was willful, or that Justice Thomas willfully or improperly failed to disclose information concerning travel reimbursements. Judge Hogan, in turn, in letters dated April 30, 2012, informed the complainants of the Committee's

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[3] *Report of the Proceedings of the Judicial Conference of the United States*, (March 1983), at pp. 13-14, *at* https://www.uscourts.gov/file/1625/download.

[4] The Committee amended its procedures in 2013 consistent with the approaches taken by Judge McKinley and Judge Baldock, as discussed below.

determination. (Enclosures 11-12). Neither the AO nor the Committee received any additional inquiries after the Committee's action on this matter was reported to the Secretary to the Conference and communicated to those raising the allegations.

The Committee's Reports to the Judicial Conference

At its September 11, 2012, Conference session, a Conference member moved to disapprove the Committee's most recent report to the Conference and to require the Committee to file amended reports (during the relevant timeframe) that would provide information about Committee actions taken pursuant to its delegated authority under the Ethics in Government Act with respect to the 2011 allegations regarding Justices Thomas's financial disclosure reports. The Conference, after presentations by both the moving Conference member and the Committee chair, voted to postpone consideration of the motion to allow the Committee to first consider the member's concerns and report back to the Conference.

The Committee met in January 2013, invited the moving Conference member to share with the Committee the concerns he raised at the September 2012 Conference session, and discussed the issues at considerable length. The Committee detailed the results of its meeting in its report to the March 2013 session of the Judicial Conference. The portions of the Committee's report addressing this matter are provided in full. (Enclosure 13).

As noted in its report, the Committee found that it had exercised its authority in accordance with its previously established procedures for reviewing whether the allegations of omissions in the filer's report were the result of willful misconduct. In addition, the Committee found that it had fulfilled its duty to inform the Conference of its review by communicating its findings to the Secretary to the Conference in April 2012, and therefore, did not need to amend any of its prior reports. The Committee also provided a letter to the members of the Conference (and the moving member who had since completed his term) containing an explanation of the allegations made by the public interest organizations and members of Congress and the Committee's review of those allegations. None of the recipients raised any additional concerns at the March 2013 Conference session or at any other time. As such, the March 2013 Report of Proceedings of the Judicial Conference contains no reference to the matter.[5]

The Committee's Amendment to its Procedures

As also detailed in its March 2013 report to the Conference, the Committee amended its procedures, going forward, for reviewing public written allegations of willful errors or omissions. Consistent with the 2011 review, the Committee instituted as part of its regular process a requirement that such matters be considered by the Subcommittee on Compliance and reported to the full Committee even when the reviewing judge does not find reasonable cause to believe an error or omission was willful. In addition, the Committee reports to the Conference will include the number and nature of any written allegations of willful misconduct it receives

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[5] *Report of the Proceedings of the Judicial Conference of the United States* (March 2013), at https://www.uscourts.gov/file/2154/download.

from members of the public, and the action taken with respect to such allegations. These procedures are still in effect today.

Additional Information

As reflected in this letter, public written allegations of willful errors or omissions in the filing of financial disclosure reports have been and continue to be subjected to an established and deliberative review process. Committee and Conference members may express their views, make recommendations, and consider options as issues are weighed and information shared. As you can appreciate, the confidential exchange of views and information is invaluable, and confidentiality of such deliberations and communications must be maintained. Thus, to the extent any such information exists with respect to the matters discussed herein, we respectfully decline to provide it.

As a final item, I am providing Committee membership information, presently and from 2010 to 2013. (Enclosure 14).

If we may be of further assistance to you in this or any other matter, please do not hesitate to contact the Office of Legislative Affairs, at 202-502-1700

Sincerely,

Roslynn R. Mauskopf

Roslynn R. Mauskopf
Secretary

Enclosures

cc: Honorable John Kennedy
Honorable Darrell Issa
Honorable Henry C. "Hank" Johnson
Members of the Judicial Conference of the United States

List of Enclosures

1. January 21, 2011 letter from Alliance for Justice and Common Cause to AO Director James C. Duff
2. January 24, 2011 letter from AO Director James C. Duff to Common Cause
3. September 13, 2011 letter from Alliance for Justice and Common Cause to AO Director James C. Duff
4. September 26, 2011 letter from Acting AO Director Sayenga to the Alliance for Justice and Common Cause
5. September 29, 2011 letter from Honorable Louise Slaughter and additional Members of the House of Representatives to AO Director James C. Duff
6. October 14, 2011 letter from Acting AO Director Sayenga to Honorable Louise Slaughter and additional Members of the House of Representatives
7. October 5, 2011 letter from Alliance for Justice and Common Cause to AO Director James C. Duff
8. October 14, 2011 letter from Acting AO Director Sayenga to the Alliance for Justice and Common Cause
9. November 18, 2011 letter from Honorable Louise Slaughter and additional Members of the House of Representatives to Chief Justice Roberts
10. December 22, 2011 letter from Secretary Hogan to Honorable Louise Slaughter and additional Members of the House of Representatives
11. April 30, 2012 letter from Secretary Hogan to Honorable Louise Slaughter
12. April 30, 2012 letter from Secretary Hogan to the Alliance for Justice and Common Cause
13. Relevant portions of the Report of the Committee on Financial Disclosure to the March 2013 Session of the Judicial Conference
14. Members of the Committee on Financial Disclosure, May 2023 and October 1, 2010 through October 1, 2013

Enclosure 1

For the attention of James C. Duff
Nick Surgey
to:
wanda_martinson
01/21/2011 03:57 PM
Please respond to "Nick Surgey"
Show Details

[redacted]

COMMON CAUSE

January 21, 2011
James C. Duff
Secretary to the Judicial Conference of the United States
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, DC 20544

Dear Mr. Duff:

It has come to our attention that Justice Thomas has failed to disclose the non-investment income of his spouse, Virginia Thomas, for her employment at the Heritage Foundation in 2003-2007, and at Liberty Central in 2009.

According to the Heritage Foundation's Form 990s filed with the Internal Revenue Service, Ms. Thomas earned a salary in excess of $120,000 each year between 2003 and 2007. In 2009, Ms. Thomas became the founding CEO of a new 501(c)(4) organization, Liberty Central. The current CEO, Sarah Field, told the *New York Times* that Ms. Thomas was compensated for her work at Liberty Central at a salary set by the board.

Nonetheless, for each year from 2003 to 2009, Justice Thomas checked the box for "None" for "Spouse's Non-Investment Income" on his annual disclosure forms. (See attached table and links.)

The Ethics in Government Act of 1978 requires federal officials, including Supreme Court justices, to disclose their spouse's income. *See* 5 U.S.C. § 102(e)(1)(A). The statute requires the Judicial Conference to refer to the Attorney General the name of any federal judge that it "has reasonable cause to believe has...willfully falsified or willfully failed to file information to be reported." 5 U.S.C. § 104.

Common Cause respectfully requests that the Judicial Conference make such a determination in the case of Justice Thomas, and if reasonable cause is found, to refer the matter to the Attorney General. Without disclosure, the public and litigants appearing before the Court do not have adequate information to assess potential conflicts of interest, and disclosure is needed to promote the public's interest in open, honest and accountable government.

Thank you for your attention to this important matter.

Sincerely,

Bob Edgar
President and CEO

Ann H. Pearson, Esq.
Vice President for Programs

Supreme Court Justice Clarence Thomas's failure to disclose income of spouse

Year	Virginia Thomas's Salary	According to Justice Thomas's Disclosure*
2003	$ 121,291 from Heritage Foundation	Recorded as 'None'
2004	$131,316 from Heritage Foundation	Recorded as 'None'
2005	$144,245 from Heritage Foundation	Recorded as 'None'
2006	$144,193 from Heritage Foundation	Recorded as 'None'
2007	$145,544 from Heritage Foundation	Recorded as 'None'
2008	Not Known	Recorded as 'None'
2009	According to Sarah Field, current Liberty Central CEO and general counsel, Virginia Thomas received a Salary from Liberty Central as founding CEO. Amount received is unknown.	Recorded as 'None'

Enclosure 2

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

January 24, 2011

Mr. Bob Edgar
President and CEO
Arn H. Pearson, Esq.
Vice President for Programs
Common Cause
1133 19th Street, N.W., 9th Floor
Washington, D.C. 20036

Dear Messrs. Edgar and Pearson:

Thank you for your letter of January 21, 2011, which I received late Friday afternoon by email concerning Justice Clarence Thomas' Financial Disclosure Reports. We brought the matter to Justice Thomas' attention and he immediately amended his reports. I have forwarded your letter to the appropriate Judicial Conference committee.

Sincerely,

James C. Duff
Director

Enclosure 3

Common Cause Letters

September 13, 2011

James Duff
Director
Administrative Head of the United States Courts
One Columbus Circle NE
Washington, DC 20544

Dear Mr. Duff,

Common Cause and Alliance for Justice write jointly to request that you investigate whether Justice Clarence Thomas's apparent violations of the Ethics in Government Act necessitate referral to the Department of Justice under the Act. This issue was previously brought to the Judicial Conference's attention in a January 21, 2011, letter from Common Cause. Since then, new information has come to light that increases the need for Judicial Conference to resolve this issue.

Between 1997-2007, Justice Thomas checked the box “none” for spousal income on his annual financial disclosure forms, despite the fact that Virginia Thomas earned nearly $700,000 from the Heritage Foundation from 2003-2007 alone. Shortly after this failure was noted, Justice Thomas amended his forms and stated that he had misunderstood the reporting requirement.

More recently, a June 19, 2011, New York Times article raised questions as to whether Justice Clarence Thomas may have also failed to disclose or misreported travel reimbursements. The New York Times story indicates that Justice Thomas may have, on several occasions, benefitted from use of Harlan Crow’s jets to travel to speaking engagements and other events, yet on two of those occasions Justice Thomas’ forms indicate a different source of reimbursement, and on one occasion there is no reimbursement reported.

Section 104(b) of the Act requires the Judicial Conference to refer to the Attorney General any judge whom the Conference “has reasonable cause to believe has willfully falsified or willfully failed to file information required to be reported.”

We respectfully request that the Judicial Conference make a public determination as to whether Justice Thomas’ failure to report his wife’s income, and or failing to disclose travel reimbursements, give rise to “reasonable cause” under §104, and refer the matter to the Department of Justice if appropriate.

Sincerely,

Bob Edgar
President and CEO
Common Cause

Nan Aron
President
Alliance for Justice

Enclosure 4

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JILL C. SAYENGA
Acting Director

WASHINGTON, D.C. 20544

September 26, 2011

Ms. Nan Aron
President
Alliance for Justice
11 Dupont Circle, 2nd Floor
Washington, DC 20036

Mr. Bob Edgar
President and CEO
Common Cause
1133 19th Street, 9th Floor
Washington, DC 20036

Dear Ms. Aron and Mr. Edgar:

Thank you for your letter of September 13, 2011, to former Administrative Office Director James Duff concerning your request that the Judicial Conference make a public determination as to whether Justice Thomas' failure to report his wife's income and to disclose travel reimbursements gives rise to "reasonable cause" under section 104 of the Ethics in Government Act of 1978 (5 U.S.C. app. § 104) that would require referral of the matter to the Department of Justice. I have forwarded your letter to the Judicial Conference Committee on Financial Disclosure, which is responsible for implementing the disclosure provisions of the Ethics in Government Act and addressing allegations of errors or omissions in the filing of financial disclosure reports.

Sincerely,

Jill C. Sayenga
Acting Director

Congress of the United States
Washington, DC 20515

Enclosure 5

September 29, 2011

James C. Duff
Secretary to the Judicial Conference of the United States
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, DC 20544

Dear Mr. Duff:

Widespread reporting, including a recent report in *The New York Times* titled "Friendship of Justice and Magnate Puts Focus on Ethics," raise grave concerns about the failure of Justice Clarence Thomas to meet various disclosure requirements under the Ethics in Government Act of 1978. Based upon the multiple public reports, Justice Thomas's actions may constitute a willful failure to disclose, which would warrant a referral by the Judicial Conference to the Department of Justice, so that appropriate civil or criminal actions can be taken.

Due to the simplicity of the disclosure requirements, along with Justice Thomas's high level of legal training and experience, it is reasonable to infer that his failure to disclose his wife's income for two decades was willful, and the Judicial Conference has a non-discretionary duty to refer this case to the Department of Justice.

Throughout his entire tenure on the Supreme Court, Justice Thomas checked a box titled "none" on his annual financial disclosure forms, indicating that his wife had received no income, despite the fact that his wife had in fact earned nearly $700,000 from the Heritage Foundation from 2003-2007 alone.

Furthermore, an investigation conducted by *The New York Times* has revealed that Justice Thomas may have, on several occasions, benefited from use of a private yacht and airplane owned by Harlan Crowe, and again failed to disclose this travel as a gift or travel reimbursement on his federal disclosure forms as required by the Ethics in Government Act of 1978.

Justice Thomas's failure to disclose his wife's income for his entire tenure on the federal bench and indications that he may have failed to file additional disclosure regarding his travels require the Judicial Conference to refer this matter to the Department of Justice.

Section 104(b) of the Ethics Act requires the Judicial Conference to refer to the Attorney General of the United States any judge who the Conference "has reasonable cause to believe has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported." If the Judicial Conference finds reasonable cause to believe that Justice Thomas has "willfully falsified or willfully failed to file information to be reported," it must, pursuant to §104, refer the case to the Attorney General for further determination of possible criminal or civil legal sanctions.

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Particularly as questions surrounding the integrity and fairness of the Supreme Court continue to grow, it is vital that the Judicial Conference actively pursue any suspicious actions by Supreme Court Justices. While we continue to advocate for the creation of binding ethical standards for the Supreme Court, it is important the Judicial Conference exercise its current powers to ensure that Supreme Court Justices are held accountable to the current law.

As a result, we respectfully request that the Judicial Conference follow the law and refer the matter of Justice Thomas's non-compliance with the Ethics in Government Act to the Department of Justice. We eagerly await your reply.

Sincerely,

Louise M. Slaughter
Member of Congress

Earl Blumenauer
Member of Congress

John Conyers, Jr.
Member of Congress

Donna F. Edwards
Member of Congress

Keith Ellison
Member of Congress

Anna G. Eshoo
Member of Congress

Bob Filner
Member of Congress

John Garamendi
Member of Congress

Raúl M. Grijalva
Member of Congress

Mike Honda
Member of Congress

Jesse. L. Jackson, Jr.
Member of Congress

Gwen Moore
Member of Congress

Chris Murphy
Member of Congress

John V. Olver
Member of Congress

Ed Perlmutter
Member of Congress

Jan Schakowsky
Member of Congress

Jackie Speier
Member of Congress

Pete Stark
Member of Congress

Paul D. Tonko
Member of Congress

Peter Welch
Member of Congress

RECEIVED
EXECUTIVE
CORRESPONDENCE STAFF
2011 OCT -3 P 3:01
ADMINISTRATIVE OFFICE
OF THE
UNITED STATES COURTS
WASHINGTON, DC 20544

Enclosure 6

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JILL C. SAYENGA
Acting Director

WASHINGTON, D.C. 20544

October 14, 2011

Honorable Louise M. Slaughter
United States House of Representatives
Washington, DC 20515

Dear Representative Slaughter:

Thank you for your letter of September 29, 2011, to former Administrative Office Director James Duff concerning your request that the Judicial Conference make a determination as to whether Justice Clarence Thomas' actions with respect to his financial disclosure reports give rise to "reasonable cause" under section 104 of the Ethics in Government Act of 1978 (5 U.S.C. app. § 104) that would require referral of the matter to the Department of Justice. I have forwarded your letter to the Judicial Conference Committee on Financial Disclosure, which is responsible for implementing the disclosure provisions of the Ethics in Government Act and addressing allegations of errors or omissions in the filing of financial disclosure reports.

If we may be of additional assistance to you, please do not hesitate to contact our Office of Legislative Affairs at (202) 502-1700.

Sincerely,

Jill C. Sayenga
Acting Director

Identical letter sent to:

Honorable Earl Blumenauer
Honorable John Conyers, Jr.
Honorable Donna F. Edwards
Honorable Keith Ellison
Honorable Anna G. Eshoo
Honorable Bob Filner
Honorable John Garamendi
Honorable Raúl M. Grijalva
Honorable Mike Honda
Honorable Jesse L. Jackson, Jr.
Honorable Gwen Moore
Honorable Chris Murphy
Honorable John W. Olver
Honorable Ed Perlmutter
Honorable Jan Schakowsky
Honorable Jackie Speier
Honorable Pete Stark
Honorable Paul D. Tonko
Honorable Peter Welch

Enclosure 7

Alliance for Justice
11 Dupont Circle, 2nd Floor
Washington, DC 20036

Common Cause
1133 19th Street NW, 9th Floor
Washington, DC 20036

October 5, 2011
James Duff
Director
Administrative Head of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

George Reynolds
Counsel
Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, NE
Washington, DC 20544

Dear Mr. Duff and Mr. Reynolds

This letter is to follow-up on the Common Cause and Alliance for Justice letter dated September 13, 2011, requesting that the Judicial Conference take action on Justice Clarence Thomas's apparent violations of the Ethics in Government Act. The letter was forwarded to the Judicial Conference Committee on Financial Disclosure on September 26, 2011. Since then, new information has come to light that makes more clear and compelling the Judicial Conference's statutory obligation to refer the matter to the Department of Justice.

As we detailed in our previous letter, between 1997-2007 Justice Thomas checked the box "none" for spousal income on his annual financial disclosure forms, despite the fact that Virginia Thomas earned income from several organizations during this time period, including the Heritage Foundation. When the inaccurate disclosures were made public, the Justice amended his forms and stated that he had misunderstood the reporting requirement.

Since last we wrote, our organizations have learned that Justice Thomas correctly disclosed his wife's income for as many as *ten* years before he began to file inaccurate disclosure forms. Our newly discovered evidence shows that Justice Thomas properly filled out his forms and accurately disclosed his wife's income as early as 1987, while the Chair of the EEOC, continuing as a judge on the DC Circuit Court of Appeals, and for five years as a Justice on the Supreme

Court. These revelations call into question Justice Thomas' explanation that his omissions were due to a misunderstanding of the filing instructions.

Additionally, we have since learned that the amount earned by Virginia Thomas during the years that Justice Thomas failed to report her income exceeds $1.6 million. Both of these newly discovered facts increase the gravity of the situation and make more urgent the Judicial Conference's need to take action.

Section 104(b) of the Act requires the Judicial Conference to refer to the Attorney General any judge whom the Conference "has reasonable cause to believe has willfully falsified or willfully failed to file information required to be reported." Given that Justice Thomas correctly disclosed his wife's income for a decade while serving in three federal positions before beginning to report inaccurately in 1997, we believe that Justice Thomas' omissions meet that standard.

We respectfully request that the Judicial Conference make a timely and public determination that Justice Thomas' misreporting of his wife's income, gives rise to "reasonable cause" under §104, and refer the matter to the Department of Justice.

Sincerely,

Nan Aron
President
Alliance for Justice

Bob Edgar
President and CEO
Common Cause

Enclosure 8

FILE COPY

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JILL C. SAYENGA
Acting Director

WASHINGTON, D.C. 20544

October 14, 2011

Ms. Nan Aron
President
Alliance for Justice
11 Dupont Circle, 2nd Floor
Washington, DC 20036

Mr. Bob Edgar
President and CEO
Common Cause
1133 19th Street, NW, 9th Floor
Washington, DC 20036

Dear Ms. Aron and Mr. Edgar:

Thank you for your letter of October 5, 2011, to former Administrative Office of the U.S. Courts Director James Duff providing additional information concerning Justice Clarence Thomas' financial disclosure reports. I have forwarded your letter to the Judicial Conference Committee on Financial Disclosure, which is responsible for implementing the disclosure provisions of the Ethics in Government Act and addressing allegations of errors or omissions in the filing of financial disclosure reports.

Sincerely,

Jill C. Sayenga
Acting Director

Enclosure 9

Congress of the United States
Washington, DC 20515

November 18, 2011

Chief Justice John Roberts
Presiding Officer
Judicial Conference
One Columbus Circle, NE
Washington, D.C. 20036

Dear Mr. Chief Justice:

We write you today in your capacity as Presiding Officer of the Judicial Conference. We call your attention to the letter sent to the Conference by members of the House of Representatives on September 29, 2011, requesting an investigation of possible violations by Justice Clarence Thomas of the Ethics in Government Act of 1978.

Evidence that Justice Thomas failed for 13 years to accurately disclose his wife's employment has been submitted to the Conference and we believe the Conference is required by law to refer the matter to the Department of Justice for further investigation.

In January, Common Cause and Alliance for Justice alerted the Judicial Conference to Justice Thomas's repeated failure to make accurate financial disclosures as required under the Ethics Act. Justice Thomas then amended 21 years of his financial disclosure forms, explaining that he had, "misunderstood the reporting instructions."

Since we sent our September 29 letter, important new information concerning this matter has come to our attention. Disclosure forms obtained by Common Cause and Alliance for Justice show that Justice Thomas accurately filed his financial disclosure forms, including his wife's employment, for as many as 10 years beginning in 1987 when he was Chair of the Equal Employment Opportunity Commission.

Justice Thomas continued to file accurate disclosure forms concerning his wife's employment when he was a judge on the United States Court of Appeals for the District of Columbia. He also accurately filed his financial disclosure forms regarding his wife's employment for the first five years he was a Justice of the Supreme Court.

In 1997 however, Justice Thomas stopped disclosing his wife's employment on his annual form, instead marking the box labeled "NONE," to indicate his wife had no employment that year. Other public documents show that Justice Thomas's wife was employed in 1997 by the Office of the U.S. House Majority Leader.

Justice Thomas continued to omit his wife's employment from his disclosures for the next 12 years, marking the 'NONE' box on his annual forms. Other publicly available documents indicate that Justice Thomas's wife did have employment in every one of those twelve years.

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Her employers included the Office of the U.S. House Majority Leader, the Heritage Foundation and Hillsdale College.

Documents obtained by Common Cause and Alliance for Justice show that Justice Thomas's wife earned over $1.6 million from these sources. We understand that Justice Thomas is not required to disclose those earnings but we include the number here to show that his wife's earnings were very substantial and that their omission is unlikely to have been a mere oversight.

It is very difficult for Justice Thomas to make a credible argument that he understood the filing instructions for ten years but then misunderstood them for the next thirteen years.

Section 104(b) of the Ethics in Government Act of 1978 requires the Judicial Conference to refer to the Attorney General any judge whom the Conference "has reasonable cause to believe has willfully falsified or willfully failed to file information required to be reported."

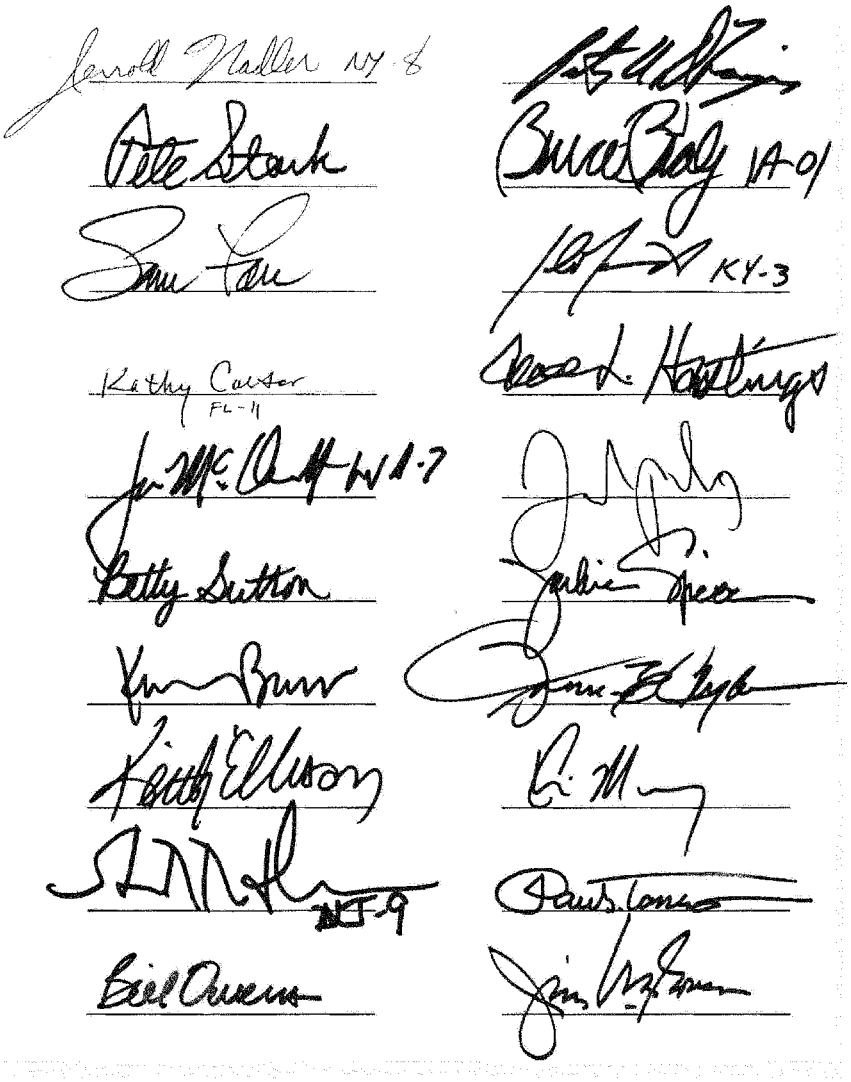
We believe these facts easily establish reasonable cause and therefore reiterate the request of September 29, 2011, and urge you to review these facts and make the appropriate referral to the Attorney General for further investigation.

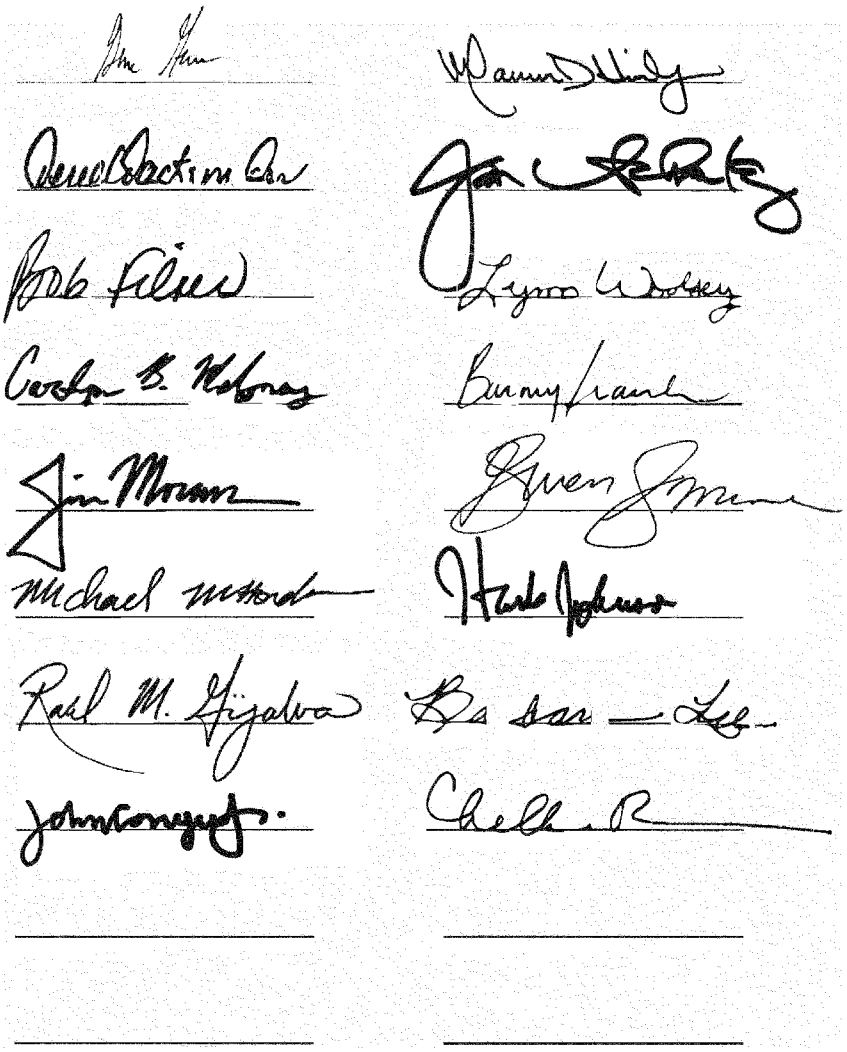
Sincerely,

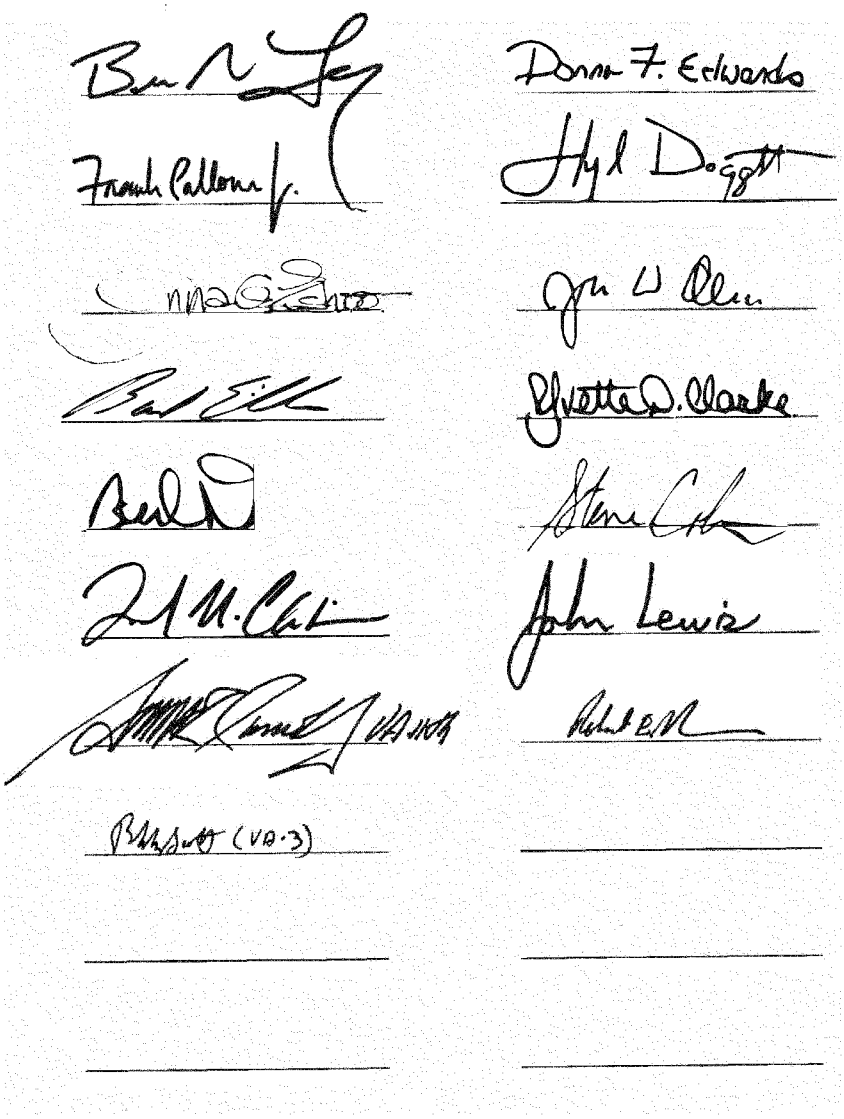
Louise M. Slaughter
Member of Congress

Earl Blumenauer
Member of Congress

Cc: Jill C. Sayenga


Jerrold Nadler NY-8
Pete Stark
Bruce Braley IA-01
KY-3
Kathy Castor
FL-11
NJ-9





Signed:

1. Robert Andrews, Member of Congress
2. Karen Bass, Member of Congress
3. Earl Blumenauer, Member of Congress
4. Bruce L. Braley, Member of Congress
5. Kathy Castor. Member of Congress
6. David N. Cicilline, Member of Congress
7. Yvette D. Clarke, Member of Congress
8. James E. Clyburn, Member of Congress
9. Steve Cohen, Member of Congress
10. Gerald E. Connolly, Member of Congress
11. John Conyers Jr., Member of Congress
12. Pater A. DeFazio. Member of Congress
13. Theodore E. Deutch, Member of Congress
14. Lloyd Doggett, Member of Congress
15. Donna F. Edwards, Member of Congress
16. Keith Ellison, Member of Congress
17. Anna G. Eshoo, Member of Congress
18. Sam Farr, Member of Congress
19. Bob Filner, Member of Congress
20. Barney Frank, Member of Congress
21. Gene Green, , Member of Congress
22. Raúl M. Grijalva, Member of Congress
23. Alcee L. Hastings, Member of Congress
24. Maurice D. Hinchey, Member of Congress
25. Michael M. Honda, Member of Congress
26. Jesse L. Jackson Jr., Member of Congress
27. Henry C. "Hank" Johnson Jr. , Member of Congress
28. Barbara Lee, Member of Congress
29. John Lewis, Member of Congress
30. Ben Ray Luján, Member of Congress
31. Carolyn B. Maloney, Member of Congress
32. Jim McDermott, Member of Congress
33. James P. McGovern, Member of Congress
34. Brad Miller, Member of Congress
35. Gwen Moore, Member of Congress
36. James P. Moran, Member of Congress
37. Christopher S. Murphy, Member of Congress
38. Jerrold Nadler, Member of Congress
39. John W. Olver, Member of Congress
40. William L. Owens, Member of Congress
41. Frank Pallone Jr., Member of Congress
42. Chellie Pingree, Member of Congress
43. Jared Polis, Member of Congress
44. Steven R. Rothman, Member of Congress
45. Janice D. Schakowsky, Member of Congress
46. Louise M. Slaughter, Member of Congress
47. Jackie Speier, Member of Congress
48. Fortney Pete Stark, Member of Congress
49. Betty Sutton, Member of Congress
50. Paul Tonko, Member of Congress
51. Lynn C. Woolsey, Member of Congress
52. John A. Yarmuth, Member of Congress

Enclosure 10

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

December 22, 2011

Honorable Louise M. Slaughter
United States House of Representatives
Washington, DC 20515

Dear Representative Slaughter:

I write in response to your letter of November 18, 2011, which has been referred to me in my capacity as Secretary of the Judicial Conference of the United States. I have forwarded your letter to the Judicial Conference Committee on Financial Disclosure, which is responsible for implementing the disclosure provisions of the Ethics in Government Act and addressing allegations of errors or omissions in the filing of financial disclosure reports.

If we may be of other assistance to you, please do not hesitate to contact our Office of Legislative Affairs at (202) 502-1700.

Sincerely,

Thomas F. Hogan
Secretary

Identical Letter Sent to: Honorable Earl Blumenauer

cc: Honorable Robert Andrews
Honorable Karen Bass
Honorable Bruce L. Braley
Honorable Kathy Castor
Honorable David N. Cicilline
Honorable Yvette D. Clarke
Honorable James E. Clyburn
Honorable Steve Cohen
Honorable Gerald E. Connolly
Honorable John Conyers Jr.
Honorable Peter A. DeFazio
Honorable Theodore E. Deutch
Honorable Lloyd Doggett
Honorable Donna F. Edwards
Honorable Keith Ellison
Honorable Anna G. Eshoo
Honorable Sam Farr
Honorable Bob Filner
Honorable Barney Frank
Honorable Gene Green
Honorable Raúl M. Grijalva
Honorable Alcee L. Hastings
Honorable Maurice D. Hinchey
Honorable Michael M. Honda
Honorable Jesse L. Jackson Jr.
Honorable Henry C. "Hank" Johnson Jr.
Honorable Barbara Lee
Honorable John Lewis
Honorable Ben Ray Luján
Honorable Carolyn B. Maloney
Honorable Jim McDermott
Honorable James P. McGovern
Honorable Brad Miller
Honorable Gwen Moore
Honorable James P. Moran
Honorable Christopher S. Murphy
Honorable Jerrold Nadler
Honorable John W. Olver
Honorable William L. Owens
Honorable Frank Pallone Jr.
Honorable Chellie Pingree
Honorable Jared Polis
Honorable Steven R. Rothman
Honorable Janice Schakowsky
Honorable Robert Scott
Honorable Jackie Speier
Honorable Fortney Pete Stark
Honorable Betty Sutton
Honorable Paul Tonko
Honorable Lynn C. Woolsey
Honorable John A. Yarmuth

Identical Letter Sent to: Honorable Earl Blumenauer

cc: Honorable Robert Andrews
Honorable Karen Bass
Honorable Bruce L. Braley
Honorable Kathy Castor
Honorable David N. Cicilline
Honorable Yvette D. Clarke
Honorable James E. Clyburn
Honorable Steve Cohen
Honorable Gerald E. Connolly
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Honorable John Garamendi
Honorable Gene Green
Honorable Raul M. Grijalva
Honorable Alcee L. Hastings
Honorable Maurice D. Hinchey
Honorable Michael M. Honda
Honorable Jesse L. Jackson Jr.
Honorable Henry C. "Hank" Johnson Jr.
Honorable Barbara Lee
Honorable John Lewis
Honorable Ben Ray Lujan
Honorable Carolyn B. Maloney
Honorable Jim McDermott
Honorable James P. McGovern
Honorable Brad Miller
Honorable Gwen Moore
Honorable James P. Moran
Honorable Christopher S. Murphy
Honorable Jerrold Nadler
Honorable John W. Olver
Honorable William L. Owens
Honorable Frank Pallone Jr.
Honorable Ed Perlmutter
Honorable Chellie Pingree
Honorable Jared Polis
Honorable Steven R. Rothman
Honorable Janice Schakowsky
Honorable Robert Scott
Honorable Jackie Speier
Honorable Fortney Pete Stark
Honorable Betty Sutton
Honorable Paul Tonko
Honorable Peter Welch
Honorable Lynn C. Woolsey
Honorable John A. Yarmuth

Enclosure 11

COPY

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

April 30, 2012

Honorable Louise M. Slaughter
United States House of Representatives
Washington, DC 20515

Dear Representative Slaughter:

I write in response to your September 29, 2011, letter to James Duff, former Director of the Administrative Office of the U.S. Courts, and your November 18, 2011, letter to Chief Justice John Roberts regarding Justice Clarence Thomas's financial disclosure report.

This matter has been reviewed by the Committee on Financial Disclosure of the Judicial Conference of the United States. It has concluded that nothing has been presented to support a determination that Justice Thomas's failure to report the source of his spouse's income was willful, or that Justice Thomas willfully or improperly failed to disclose information concerning travel reimbursements.

If we may be of any further assistance to you, please do not hesitate to contact our Office of Legislative Affairs at (202) 502-1700.

Sincerely,

Thomas F. Hogan

Thomas F. Hogan
Secretary

Enclosure 12

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

April 30, 2012

Ms. Nan Aron
President
Alliance for Justice
11 Dupont Circle, 2nd Floor
Washington, DC 20036

Mr. Bob Edgar
President and CEO
Common Cause
1133 19th Street, NW, 9th Floor
Washington, DC 20036

Dear Ms. Aron and Mr. Edgar:

I write in response to your October 5, 2011, letter to James Duff, former Director of the Administrative Office of the U.S. Courts, regarding Justice Clarence Thomas's financial disclosure reports.

This matter has been reviewed by the Committee on Financial Disclosure of the Judicial Conference of the United States. It has concluded that nothing has been presented to support a determination that Justice Thomas's failure to report the source of his spouse's income was willful, or that Justice Thomas willfully or improperly failed to disclose information concerning travel reimbursements.

Sincerely,

Thomas F. Hogan

Thomas F. Hogan
Secretary

Enclosure 13

Relevant Portions of the Report of the Committee on Financial Disclosure to the March 2013 Session of the Judicial Conference

REVIEW OF THE COMMITTEE'S SEPTEMBER 2012 REPORT

At the September 2012 meeting of the Judicial Conference, Judge Mark L. Wolf (D. Mass.) sought to have the Conference discuss how it discharges its statutory duty under 5 U.S.C. app. § 104(b) to determine whether an individual has willfully failed to file a financial disclosure report, or has willfully falsified or failed to include required information in a report. Judge Wolf moved to disapprove the most recent reports of the Committee on Financial Disclosure and require the Committee to file amended reports that provide information about actions it has taken with respect to particular filers pursuant to a delegation of Conference authority under 5 U.S.C. app. § 104(b).

The Judicial Conference deferred consideration of the motion to allow the Committee to first consider the matter and report back to the Conference. As a result, the Committee was asked to review whether its September 2012 report and earlier reports should provide information to the Conference about actions taken by the Committee with respect to any allegations of filer misconduct or filer failure to properly comply with the financial disclosure filing requirements of the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111).

The Committee discussed the issue at considerable length and provided the opportunity for Judge Wolf to address the Committee via teleconference and explain his concerns about both the Committee's report and its exercise of its delegated authority, specifically in relation to allegations of a filer's willful omission of information made by two public interest organizations and several members of Congress. The Committee found that it had exercised its authority in accordance with its previously established procedures for reviewing whether the allegations of omissions in the filer's report were the result of willful misconduct. The Committee concluded that it had fulfilled its duty to the Conference by communicating its findings to the Director of the AO, who serves as Secretary to the Conference, by letter dated April 8, 2012.

As a result, the Committee believes that it is not necessary to amend its September 2012 report to the Conference to include additional information on this particular matter, or amend its earlier reports to include additional information on the Committee's exercise of its delegated authority. Neither the AO nor the Committee has received any additional inquiries after the Committee's action on this matter was reported to the Director and communicated to the organizations and individuals making the allegations. The Committee, however, decided that it would be helpful to the members of the Conference to receive an explanation of the allegations

made by the public interest organizations and members of Congress and the Committee's review of those allegations. To that end, it determined that the Chair should forward a letter to Conference members further addressing this matter. In addition, the Committee agreed to amend its current procedures, as outlined below, to provide additional information to the Conference whenever allegations of willful misconduct are received from the public. As a result, the Committee believes that modification of the current delegation of authority to the Committee to implement the financial disclosure provisions of the Ethics in Government Act of 1978 is not necessary.

REVIEW OF COMMITTEE PROCEDURES FOR PROCESSING ALLEGATIONS OF WILLFUL MISCONDUCT

In March 1997, the Committee agreed on the basic procedures for processing allegations of errors or omissions in financial disclosure reports. Since adoption of these procedures, the Committee has received an average of one written public allegation of an error or omission every two to three years that has required a letter of inquiry requesting clarification from a filer of an item in a report. The Committee has not referred any filer to the Attorney General based on allegations that a report contained a willful error or omission. These procedures are basically the same as the procedures used to review a report, a response to a letter of inquiry, or a self-initiated amendment.

Under these procedures, when public correspondence is received alleging an error or omission in a filing, the staff reviews the allegation, prepares a review packet, and forwards it to the Committee member responsible for reviewing the filer's report. If warranted, the reviewing judge can approve a letter of inquiry asking the filer to clarify the purported discrepancy. If, after review of all matters associated with an allegation, the reviewing judge believes that the error or omission was willful, the reviewing judge will refer the matter to the chair of the

Committee's subcommittee on compliance. The subcommittee reviews the allegations and reports to the full Committee whether reasonable cause existed to believe that the filer has willfully falsified or willfully failed to file information required to be reported. Referral of the matter to the Attorney General in accordance with section 104(b) of Act requires a vote of the full Committee.

The Committee voted to modify this procedure to provide that all public written allegations of willful misconduct in the future will be forwarded to the subcommittee on compliance for review, whether or not willful misconduct is found by the reviewing judge.[1] The subcommittee will review the allegations and the reviewing judge's findings, and it will report and recommend to the full Committee whether to accept the preliminary determination of the reviewing judge. That review will become a part of that subcommittee's report to the full Committee at each Committee meeting. The Committee will report to the Conference the number and nature of any written public allegations of willful misconduct received and the action taken with respect to such allegations.

[1] For purposes of this procedure, a written allegation will be deemed "public" if it is initiated by and received from any source outside of the Committee on Financial Disclosure and its staff.

Enclosure 14

Judicial Conference Committee on Financial Disclosure

May 2023

Hon. David L. Bunning, Chair

Hon. Vincent L. Briccetti

Hon. Nannette Jolivette Brown

Hon. Raner Collins

Hon. William F. Jung

Hon. Sheryl H. Lipman

Hon. David C. Nye

Hon. Benita Y. Pearson

Hon. Gregory Alan Phillips

Hon. Mary Elizabeth Phillips

Hon. J. Nicholas Ranjan

Hon. David E. Rice

Hon. Steven C. Seeger

Hon. Alice Senechal

Hon. Kara F. Stoll

Hon. Lance E. Walker

Judicial Conference Committee on Financial Disclosure

October 1, 2012 – October 1, 2013

Hon. Joseph H. McKinley, Jr., Chair

Hon. Roger Benitez

Hon. J. Daniel Breen

Hon. Virginia M. Hernandez Covington

Hon. Michael James Davis

Hon. Mary Grace Diehl

Hon. Gary A. Fenner

Hon. Holly B. Fitzsimmons

Hon. Joseph M. Hood

Hon. Robert Clive Jones

Hon. Sim Lake III

Hon. Carlos F. Lucero

Hon. Thomas W. Phillips

Hon. Frederick J. Scullin, Jr.

Hon. Laurie Smith Camp

Hon. Anthony John Trenga

Judicial Conference Committee on Financial Disclosure

October 1, 2011 – October 1, 2012

Hon. Joseph H. McKinley, Jr., Chair

Hon. Roger Benitez

Hon. J. Daniel Breen

Hon. Virginia M. Hernandez Covington

Hon. Mary Grace Diehl

Hon. Gary A. Fenner

Hon. Holly B. Fitzsimmons

Hon. Emily C. Hewitt

Hon. Joseph M. Hood

Hon. Robert Clive Jones

Hon. Carlos F. Lucero

Hon. Thomas W. Phillips

Hon. Linda R. Reade

Hon. Frederick J. Scullin, Jr.

Hon. Laurie Smith Camp

Hon. Anthony John Trenga

Judicial Conference Committee on Financial Disclosure

October 1, 2010 – October 1, 2011

Hon. Bobby R. Baldock, Chair

Hon. J. Daniel Breen

Hon. Virginia M. Hernandez Covington

Hon. Gary A. Fenner

Hon. Holly B. Fitzsimmons

Hon. Jeremy D. Fogel

Hon. Arthur J. Gonzales

Hon. Emily C. Hewitt

Hon. Joseph M. Hood

Hon. Robert Clive Jones

Hon. Joseph H. McKinley, Jr.

Hon. Thomas W. Phillips

Hon. Linda R. Reade

Hon. Frederick J. Scullin, Jr.

Hon. Laurie Smith Camp

Hon. J.P. Stadtmueller

Statement of Alliance for Justice

U.S. Senate Judiciary Committee

Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

May 17, 2023

Alliance for Justice is a national association of more than 150 organizations, representing a broad array of groups committed to a vibrant, ambitious, and diverse democracy, one that represents and protects all people—not just an elite few. Since 1979, AFJ has advocated for a fair and independent justice system comprised of judges whose backgrounds and experiences are as diverse as the cases before them. We have been instrumental in the nomination and confirmation of hundreds of exceptional, fair-minded, and representative jurists.

It is the federal judiciary to which the Framers and now we, the people, have entrusted the critical tasks of defending the Constitution, providing institutional checks and balances, and helping people find justice. AFJ prioritizes evaluating judicial vacancies and shepherding the nominations of the distinguished lawyers and judges capable of and committed to this remarkable calling. Our goal and that of the partners who stand with us is to ensure our federal courts are led by highly qualified judges who will safeguard the rights of all, regardless of race, sex, gender, religion, political affiliation, national origin, and circumstance.

It is from this posture, informed by more than four decades of experience and the perspectives and conclusions of hundreds of experts, that we write to register our deep concern about the integrity and impartiality of the United States Supreme Court in this moment and to urge that the Supreme Court adopt a binding code of judicial conduct, like that which applies to all other federal courts, whether of its own volition or as required by legislation. And to be clear, this is but one element of urgently needed Supreme Court ethics reform legislation.

It's time to end the status quo of leaving the Supreme Court to regulate itself and condoning Congress's hands-off approach. What scant rules exist for justices, who are not bound by the Code of Conduct applied to all other federal judges, are a federal disclosure law passed after Watergate requiring justices and other officials to disclose the details of most real estate sales over $1,000 and the Ethics in Government Act. Neither has deterred or curtailed now decades-long instances of misconduct—most notably that of Justice Clarence Thomas, who has been on the Supreme Court since 1991.

For more than a decade, we recently learned, billionaire real estate developer and conservative mega-donor Harlan Crow has given Justice Clarence Thomas eye-wateringly expensive gifts and a yet-to-be-tallied series of all-expense paid trips aboard his private jets and yachts. Crow's generosity did not stop there: Crow also purchased real estate from Thomas at above-market prices. Not for the first time, Justice Thomas failed to disclose these gifts and transactions, which violate both disclosure requirements and the Ethics in Government Act.

Brought to a head by the ongoing revelations surrounding Justice Thomas's misconduct, the Court faces an ethical crisis unlike any in this country's history. In 2021, the Associated Press-NORC Center for Public Affairs Research's General Social Survey found that 26 percent of respondents reported a great deal of confidence in the Supreme Court, a startingly low figure already. That figure fell to 18 percent in the

2022 GSS poll—an all-time low in the history of the poll, first fielded in 1973. Broken out a different way, a staggering 82 percent of Americans had "only some" or "hardly any" confidence in the Court. Unless the Supreme Court or Congress takes meaningful action against Justice Thomas and works to restore the Court's integrity, preventing future misconduct, the public's loss of trust will accelerate.

Justice Thomas is the primary cause of the public's diminishing trust in the Court. The gravity of his misconduct has penetrated the public's awareness and captured national attention. A poll conducted by Economist/YouGov poll conducted from April 8 through 11 found that more than two-thirds of Americans had already learned of Justice Thomas's trips funded by Crow. Even before the full details of Crow and Justice Thomas's extensive entanglements emerged, a strong majority of Americans asked (58 percent) disapproved of Justice Thomas accepting luxury trips without disclosing them—including 42 percent who "strongly disapproved." In a April 24 poll by Public Policy Polling, nearly three in four voters felt that Justice Thomas should face serious repercussions for his actions.

The Supreme Court's decisions shape the lives of every American and, in cases of the greatest consequence, often turn on the vote of a single justice. Justice Thomas' unethical conduct has tainted the integrity of the entire institution.

Justice Thomas's unethical and illegal conduct is jeopardizing a pillar of our democracy.

The extent of Justice Thomas's knowing acceptance of gifts in excess of the baseline for disclosure is still to be determined, thanks to the varied and creative means that Crow used to renumerate Thomas—some more direct than others. The only consistency was Justice Thomas's failure to disclose the benefits he received from Crow, from luxury travel to real estate to tuition for his grandnephew.

A series of articles from ProPublica have revealed Crow is deeply involved in Justice Thomas's life. The justice and his wife took international cruises on Crow's superyacht, flew on Crow's private jet, and regularly vacationed at Crow's private resort in the Adirondacks. In one instance, Thomas flew on Crow's jet from Washington Dulles airport to New Haven, Connecticut, then flew back three hours later. Yet more egregious, Thomas accepted a direct financial transaction from Crow. In 2014, Crow bought real estate including Thomas's childhood home for $133,363. He then renovated the home and allowed Thomas's mother to continue living there free of cost. Moreover, Crow purchased the home next door and an adjacent empty lot with plans to create a museum in Justice Thomas's honor. Crow also sent Thomas's grandnephew, Mark Martin, his ward, to private schools. While Thomas disclosed other gifts that supported Martin's tuition, he excluded payments made by Crow.

Justice Thomas's response to ProPublica reporting was dismissive—and, ironically, easily rebutted. He claimed that the trips were "not reportable" and subject to the "personal hospitality" exception in Supreme Court ethics requirements. Noted ethics experts have explained that this is untrue: No exceptions apply to the real estate transactions. Similarly, with respect to the unreported gifts, Justice Thomas embraced an obvious conflict of interest: Crow has funded multiple groups that regularly litigate before the Supreme Court and even facilitated introductions to Thomas for said parties.

It is no surprise that Justice Thomas has dismissed even the most serious of ethical concerns—there is nothing new about his receptiveness to the far right. It has been more than a decade since Thomas was first publicly criticized for his relationship with Crow as a violation of his ethical obligations. Crow gifted Thomas a Bible that once belonged to the abolitionist Frederick Douglass, valued at $19,000, and a bust

of Abraham Lincoln worth $15,000. When the Los Angeles Times reported on the flow of gifts from Crow to Thomas, Thomas did not stop accepting gifts: He simply stopped disclosing them.

Around 2011, Justice Thomas and his wife, Virginia "Ginni" Thomas asked Crow to restore a Georgia cannery with sentimental and familial importance to the couple, which Crow did, at the cost of millions of dollars. What is more, unconcerned by journalists' investigations and discoveries, Crow donated more than $500,000 to Ginni Thomas' conservative "tea party" group, funding her $120,000 salary and cementing her place as a notable far-right political actor—another source of income Thomas has routinely failed to disclose or chosen not to disclose accurately.

Thomas is aware of his ethical obligations—he just does not care. Rather, he chooses to exploit the trust placed in the High Court by the Framers and by today's public. Most remarkable, perhaps, is that Thomas has grown bolder rather than more cautious with time, not even hiding his accessibility to well-funded would-be friends and their associates but simply ignoring the implications for trust not just in his rulings but in the Court and the rule of law.

In his fourth decade on the Court, Thomas is doubling down—not stepping back.

Justice Thomas's conduct is the most egregious known example of misconduct by a sitting justice. But other justices have also violated commonsense ethical standards.

In 2022, Alliance for Justice released *Accountable to None: The Urgent Need for Supreme Court Ethics Reforms*. That report catalogued dozens of additional allegations of extrajudicial and political misconduct by Supreme Court justices. Most recently, Justices Samuel Alito and Thomas were implicated in Operation Higher Court, a multimillion-dollar effort by evangelical leaders to influence the Court on areas related to LGBTQ+ rights, abortion rights, and religious freedom. Also notable: Justice Thomas failed to recuse himself in cases that directly implicated his wife's communications regarding potential involvement in the January 6th insurrection.

Over the past month, the media has reported that Justice Neil Gorsuch and Chief Justice Roberts may have committed ethical and reporting violations. Gorsuch sold a 40-acre property to Greenberg Traurig, a law firm with regular business before the Supreme Court. The Chief Justice's wife, Jane Roberts, has made nearly $10 million in her legal recruiting practice, indirectly putting the Chief Justice's position on the Court to work for the couple's personal benefit.

While troubling allegations, none of the other justices appears to have been the beneficiary of long-running largesse on the scale of Crow's gifts to Thomas. Moreover, none has blatantly flouted the federal requirement to report gifts to the same degree. As far as we know, Thomas is singular in his malfeasance as well as the disgrace and suspicion he has now brought upon the Court.

The Court cannot repair its relationship to the public so long as Justice Thomas presides.

In Federalist 78, Alexander Hamilton wrote, "The complete independence of the courts of justice is peculiarly essential in a limited Constitution." Without that independence, Hamilton explained, individual rights, the Constitution, and our faith in the rule of law are all threatened.

We now have good reason to believe that the Court's independence has been compromised. And not just by Justice Thomas. Senator Dick Durbin first sent a letter to Chief Justice John Roberts urging the Supreme Court to adopt an enforceable code of conduct more than a decade ago. Not only has the Chief

Justice made no effort to adopt a code of ethics, he responded to the history *Dobbs* leak with an investigation that amounted to nothing more than political theater, never placing a single justice under oath. Now, the Chief Justice has refused to appear before the Senate Judiciary to address the ethics crisis at the Court, claiming that to do so would break with precedent—a flat lie. Sitting justices testified before the Senate Judiciary Committee as recently as October 5, 2011.

Chief Justice Roberts's obstructionism compounds the ethical transgressions that he may have condoned contemporaneously, a strong possibility, and has defended retroactively by shielding the principal culprit at the Court. Justice Thomas has repeatedly ruled in favor of the rich and powerful. According to the Constitutional Accountability Center, Thomas has ruled in favor of the Chamber of Commerce in 72 percent of cases in which they are involved. In 2016, Thomas refused to recuse himself from *McDonnell v. United States,* the case in which justices examined the criminality of political leaders accepting gifts from conservative donors. Were it any other justice, the refusal to recuse might have been presumed a matter of careful judgment. With Thomas, however, no such presumption can be made., however, no such presumption can be made.

With the Court involved in a historically unprecedented ethical crisis, confidence in the Supreme Court at a low point, our democracy in peril, and the Court unwilling to police itself, Congress has the constitutional duty to act—it is not just the only body that can act on the Court but the very branch of government always intended to do so by the Constitution. It is not an option but a responsibility: Congress must restore faith in our system of government and all three of its branches.

Senators must pass Supreme Court ethics legislation to restore the legitimacy of the Court.

Americans deserve impartial justices who adhere to the rule of law. While all other federal judges are required to follow the Code of Conduct for United States Judges (the "Code") — a set of ethical guidelines codified and enforced by the U.S. Judicial Conference — the Supreme Court justices merely use the Code for "guidance" and "consult" one another as each sees personally fit.

Several pieces of legislation have been recently introduced that seek to bolster accountability and transparency and enhance public trust in our judiciary. We urge the Senate to pass Supreme Court ethics reform legislation, such as the Supreme Court Ethics, Recusal, and Transparency Act of 2023 (S.359); the Supreme Court Ethics Act of 2023 (S.325); Supreme Court Code of Conduct Act of 2023 (S.1290); the Judicial Ethics and Anti-Corruption Act of 2022 (S.4177); and/or the 21st Century Courts Act of 2022 (S.4010). Supreme Court ethics reform is essential to reestablishing respect for and the integrity of our federal judicial system and preserving our democracy.

If neither Chief Justice Roberts nor Congress acts to repair and reform the Supreme Court, the Judicial Conference, via the Department of Justice, must. In the absence of alternative action, as outlined by the Campaign Legal Center in its April 11, 2023, letter to Judicial Conference Secretary Roslynn R. Mauskopf, it is incumbent upon the Judicial Conference to refer Justice Thomas to the Attorney General under the Ethics in Government Act. Justice Thomas's—and, indeed, the Roberts Court's—willful rejection of ethical and legal requirements requires as much. The repercussions of allowing open and notorious corruption at the Supreme Court have implications for the courts below and our democracy itself.

Conclusion

The Senate has taken important, preliminary steps to investigate Justice Thomas's unethical and illegal conduct. However, much more is needed. Every day that Justice Thomas escapes accountability for his unethical behavior sends a message to the rest of the judiciary that such conduct is permissible and that perpetrators will enjoy impunity from enforcement. Thankfully, the Founders created a constitutional system that empowers the Executive and Legislative branches to check and balance the Judiciary, just as the Judiciary has the power to do the same.

This is the fight of our lifetime. Restoring balance to our courts has never been more important and, for some positive news, it has rarely been so attainable—provided we do the work. In addition to a legislative fix, now is the time to fill empty seats with judges whose lives prove their commitment to justice and whose integrity is unimpeachable.

United States Senate Committee on the Judiciary
Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights
224 Dirksen Senate Office Building
Washington, DC 20510

Comments for the record from the FFRF Action Fund on the hearing regarding the Review of Federal Judicial Ethics Processes at the Judicial Conference of the United States by the United States Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights to be held on Wednesday, May 17th at 2 pm ET:

The FFRF Action Fund appreciates the opportunity to provide comments on the hearing and **reiterates the urgent need for the Senate Judiciary Committee to mark up and pass the Supreme Court Ethics Recusal and Transparency Act (S. 359) (SCERT) out of committee**. This crucial legislation is indispensable for upholding the principle of the separation of state and church, ensuring equal access to the judicial system for non-believers, and restoring trust and confidence in the judiciary.

FFRF Action Fund is an affiliate of the Freedom From Religion Foundation, a national nonprofit organization with over 40,000 dues-paying members across the country. FFRF Action Fund works to ensure that our laws remain secular in order to protect the constitutional separation between state and church. We also represent the views of the religiously unaffiliated, who are now about a third of the adult population.

We desire, and deserve, a truly secular government — not one captured by Christian nationalists and religious extremists. We are alarmed that the current court is turning its back on decades of secular precedent in order to privilege religion. Our Constitution prohibits the government from establishing or promoting religion, but the courts have recently been packed with judges and justices who are not neutral, who are turning the "freedom of religion" into the "weaponizing of religion."

Separation of powers does not mean insulation of powers. It means checks and balances. When the Chief Justice declined to testify before the Senate Judiciary Committee on these very matters, he signaled that the current Supreme Court does not want to be checked. But if there is no check, there is no balance.

By passing SCERT, the Senate Judiciary Committee can take significant strides in preserving this vital separation, restoring checks and balances, promoting fairness, and ensuring that non-believers are not disadvantaged in the judicial system.

SCERT is a pivotal piece of legislation aimed at ensuring accountability and transparency within the Supreme Court. The Act holds members of the Supreme Court to the same disclosure standards as members of Congress. If those ethics rules are good enough for lawmakers, they're good enough for judges of the law.This provision serves to strengthen public trust and confidence in the judiciary, fostering a more transparent and accountable judicial system. This reform promotes equal access to justice for all, regardless of litigants' religious or non-religious beliefs.

In his speeches, Senator Whitehouse has drawn attention to the conservative capture of the courts, where powerful interest groups and dark money exert undue influence on the nomination and confirmation processes. This capture jeopardizes the integrity and impartiality of the judiciary, threatening the separation of state and church and the rights of non-believers. The Freedom From Religion Foundation agrees with this assessment in its report that outlines the right-wing take over of the courts and its impact on the separation of state and church. By passing SCERT, the Senate Judiciary Committee can take a stand against this capture and strengthen the court's independence. It would send a clear message that the court's decisions should be based on the Constitution and legal principles rather than the agendas of special interest groups.

In conclusion, the FFRF Action Fund urgently calls upon the Senate Judiciary Committee to prioritize and pass SCERT. By doing so, the committee would demonstrate its commitment to upholding the separation of state and church, protecting the rights of conscience of all Americans, including non-believers, and restoring trust and confidence in the judiciary. This critical legislation ensures equal access to justice, promotes transparency and accountability within the court, and safeguards the fundamental secular principles upon which our democracy is built. FFRF Action Fund strongly believes that by enacting this ethics reform, we can create a more inclusive and just judicial system that respects the rights and freedoms of all individuals, regardless of their religious or non-religious beliefs.

"Review of Federal Judicial Ethics Processes at the Judicial Conference of the United States"

Hearing Before the Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights of the Senate Committee on the Judiciary

May 17, 2023

Written Statement of Gabe Roth, Executive Director of Fix the Court

Chairman Whitehouse, Ranking Member Kennedy and members of the Subcommittee:

Thank you for the opportunity to provide a written statement.

Justice Thomas' failure to file accurate financial disclosure reports for more than half the time he's been a Supreme Court justice is disturbing. It's not as if he doesn't know the rules: the judiciary's Committee on Financial Disclosure publishes a 50- or 60-page instructions document each year[1] that includes examples of how to complete each section of the disclosure in order to comply with the disclosure law. And it's not as if he's on his own: judges and justices for the last 20-plus years have been able to avail themselves of filing help for which they can receive a four-figure reimbursement.[2]

Whether regarding Justice Thomas' unreported real estate transaction, his unreported gifts, the unreported tuition payments (which under the law were gifts to Thomas) or the unreported private plane flights that clearly fall outside the scope of "personal hospitality," we're far past the point of simply seeking a new round of financial disclosure edits and have reached the accountability phase.

But the question today is do the individuals charged with holding non-compliant jurists accountable under federal law have the gumption to do so? Who are these individuals, and what steps have they or their predecessors taken in this regard? Unsurprisingly, since it's the federal judiciary, the answers are more than a bit opaque.

Federal law gives the Judicial Conference the authority to "refer to the Attorney General the name of any individual […] believe[d to have…] willfully failed to file information required to be reported." That's a big deal. The Conference in turn has given — or appears to have given, since the regulations here are not public — the fact-finding authority to its Committee on Financial Disclosure, a body that oversees the process of filing disclosures to ensure that filers comply with the law.[3]

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[1] For several examples of the filing instructions, see "Financial Disclosure Tidbits," *Fix the Court*, April 21, 2023, available at https://fixthecourt.com/2023/04/financial-disclosure-tidbits.

[2] *Ibid.*

[3] This office, which has a full-time staff of maybe a half dozen, plus a few part-time staff, not only helps more than 1,300 Article III active and senior judges with annual reports: they help several dozen judicial nominees each year file disclosures and statements of net worth; and 1,900 judiciary employees file disclosures; and 900 bankruptcy and magistrate judges; and they also support the 16 judges on the Committee in answering questions from the more than 4,600 total filers on what information might be redacted. Then there are the laggards: last year, the judiciary reported five judicial officers and/or employees simply didn't file their 2020 reports. (See "Report of the Proceedings of the Judicial Conference of the United States," Sept. 20, 2022, available at https://www.uscourts.gov/sites/default/files/jcus_sep_2022_proceedings_0.pdf.) The judiciary has requested funding for another 10 positions (or five FTEs, so a mix of full time and part time) — the help can't come fast enough — for Committee staff in FY24; see "Summary of Fiscal Year 2024 Request," Administrative Office of the United States Courts (p. 23), available at https://www.uscourts.gov/sites/default/files/Section%2008%20Administrative%20Office%20of%20US%20Courts.pdf.

But there is no list of Committee members that the Committee has proactively published on the Internet or elsewhere. That it's essentially a secret as to who has the authority to do critical accountability work here is unbecoming of a modern democracy.

To find out who sits on the Committee at any given moment, you must write them a letter or formal email — and hope they respond. Last September, I wrote an email to request an old Justice Jackson disclosure report from her time as a lower court judge. The Committee responded a few weeks later by sending me her disclosure on a thumb drive[4] and — here's the key — they enclosed a letter that had on it the Committee letterhead, which included the 15 member-judges' names.

This spring I heard from a source that some of the Committee personnel had changed — one judge's term expired, and two new judges were added, presumably by Chief Justice Roberts, who possesses the authority to do this, or his advisers. Trying to confirm the new personnel in real time proved impossible, as there was no press release about the changes or website noting them. Then last week a reporter at *Insider* wrote to the Committee, and they responded on their new letterhead — confirmation of its 16 members, with the changes my source had mentioned.[5]

Now that we know who's on the Committee, what disciplinary actions, if any — whether referrals to the Attorney General, late fees or (for lower court judges) formal misconduct complaints — have they or their predecessors recommended over the years?

In an April 13 email, I asked the press officer of the Administrative Office of the U.S. Courts how many judges in the last decade have been referred to the Attorney General for failing to file a report, or for willfully falsifying their reports, or details therein. Curious to see if any penalty has been meted out for disclosure lapses, I also asked for the number of judges who were fined for late financial disclosure reports in the last five or 10 years.[6]

The response came on April 24: "[O]ur financial disclosure folks are really slammed [and] I haven't been able to find anyone with the bandwidth to do research on this." Not great.

It's possible that the 40,000 disclosures judicial officers have filed in the last four decades have been spotless. But it's also possible — and I know this Subcommittee is on the case — that it's a lack of will from the members of the Financial Disclosure Committee and the Judicial Conference (i.e., judges are loath to judge other judges) that explains a lack of disciplinary action.[7]

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[4] Thumb drives are considered advanced tech for the judiciary. From the time the Ethics in Government Act went into effect until the late 1990s, reports were not handed out to the press and public; instead, curious minds had to go to the Financial Disclosure Office or Supreme Court Press Office to view them. The judiciary started distributing them to the press by request in or around the year 2000 but only on paper — no digital copies — at a cost of $0.20 per page. Finally, in 2017 the judiciary handed out thumb drives, yet the files on there were TIFFs, which is a format that does not allow highlighting, copying text or search. In the last three years, the judiciary has finally moved to searchable PDFs.

[5] See Mattathias Schwartz, Jack Newsham, and Katherine Long, "Can an obscure council of judges solve the Supreme Court's Clarence Thomas problem?" *Insider*, May 12, 2023, available at https://www.businessinsider.com/judges-investigating-clarence-thomas-committee-financial-disclosure-2023-5.

[6] Last year, the judiciary reported that as of May 31, 2022, five judicial officers and/or employees simply had not filed their 2020 disclosures. See "Report of the Proceedings of the Judicial Conference of the United States," Sept. 20, 2022, available at https://www.uscourts.gov/sites/default/files/jcus_sep_2022_proceedings_0.pdf.

[7] In addition, Chief Justice Roberts noted in a May 1 letter to Judiciary Committee Chairman Durbin that he is "not aware of penalties that have been imposed on Justices for failure to abide by [the disclosure rules]," available at https://twitter.com/JudiciaryDems/status/1653119545157058560/photo/1.

Finally, let's imagine that as of today, May 17, Justice Thomas or any other judge or justice who's recently made one or many disclosure report errors has, in fact, fixed them. Where do the new ones go, and how does the public know that the amended reports are out there?

I emailed the Supreme Court PIO on April 28 and May 1 asking her to ask Justice Thomas to fix errors on two years' disclosures that, as of today, have not been reported on in the press. I have not yet received a response.

The last time I found some errors on justices' disclosures, I notified the Court PIO of all three of them — two omitted Justice Thomas trips and one omitted Justice Sotomayor trip — on March 20, 2020.

Justice Thomas fixed his report on May 14, 2020, and I was emailed his amended report on Apr. 12, 2022. Justice Sotomayor fixed her report on Apr. 2, 2021, and I was emailed her amended report on June 13, 2022.

This delay does not give me confidence that the judiciary is taking its disclosure requirements seriously.

So what can be done to instill confidence in the vital judicial financial disclosure process?

The simplest solution here — to fix the judiciary opacity, to ensure disclosures are filed correctly and that any amendments are filed timely, and to create a real process for accountability where scofflaws are punished under the Ethics in Government Act (i.e., large fines) — is to take the oversight and disciplinary process away from judges.

Whether it be an inspector general, an oversight board or other body that exists within the third branch but isn't simply judges judging other judges, the disclosure oversight authority should not exist in a climate that discourages judges from carrying out their oversight role for fear it might tarnish the public's view of their judicial brothers and sisters.

I don't know what, if anything, will help restore the public's waning faith in our government institutions. But ignoring obvious misdeeds, shrouding what little oversight exists in mystery and maintaining a structure that discourages real oversight, is not helping.

○