UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

WILLIAM R. HOGAN, JR., Appellant, v. DEPARTMENT OF JUSTICE, Agency.	)	DOCKET NUMBER CH-0752-96-0621-I-2 DATE: July 23, 1998

Shelly B. Kulwin, Esquire, Chicago, Illinois, for the appellant.

Thomas P. McGarry, Esquire, Hinshaw & Culbertson, Chicago, Illinois, for the appellant.

Lois Bonsal Osler, Esquire, and Richard R. Brown, Esquire, Washington, D.C., for the agency.

BEFORE

Howard J. Ansorge
Administrative Judge

INITIAL DECISION

INTRODUCTION

William R. Hogan, Jr., was employed by the Department of Justice as an Assistant United States Attorney for the Northern District of Illinois in Chicago, Illinois. The Department of Justice charged Mr. Hogan with work-related misconduct and removed him from employment effective April

12, 1996. Mr. Hogan's first timely appeal to the Merit Systems Protection Board (MSPB) was dismissed pursuant to a settlement agreement, under which the agency agreed to rescind the removal action, place Mr. Hogan on administrative leave, and reconsider the decision to remove him from employment. After reconsidering its decision, the agency again removed Mr. Hogan from employment effective November 22, 1996. On December 23, 1996, Mr. Hogan timely appealed to the Board. The Board has jurisdiction over his appeal. *See* 5 U.S.C.A. §§ 7701(a), 7511(a)(1)(A), 7512, and 7513(d) (West 1996).

A hearing was held in Chicago, Illinois, from October 27 through December 15, 1997. The hearing included sixteen full days of trial and one day of oral closing argument.

For the reasons set forth herein, the appellant's removal from employment is REVERSED.

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ANALYSIS AND FINDINGS

Background

This appeal arises out of a federal investigation and criminal prosecution of a Chicago street gang known as "El Rukn." The El Rukn street gang was a large, notorious, criminal enterprise that operated in the Chicago area (under various names) for over two decades. The gang's members engaged in many and varied criminal activities, including narcotics trafficking, extortion, and murder. Their criminal activities also included purchasing a light anti-tank weapon (LAW rocket) and agreeing to destroy buildings and other property at the behest of representatives of the Libyan government. According to a federal judge who presided over an El Rukn criminal trial in 1991, the leaders of the El Rukn street gang "may be the most infamous of organized criminals that Chicago has seen since the days of Al Capone."[1]

The government's investigation of the El Rukn street gang covered a period of years and involved many people from various local and federal law-enforcement agencies, including the U.S. Attorney's office, the Bureau of Alcohol, Tobacco, and Firearms (ATF), the Chicago Police Department, and, from time to time, the Federal Bureau of Investigation (FBI). While pursuing the El Rukn investigation, the officers and agents of these law-enforcement agencies

1. *See* Agency File at tab 4c-53, U.S. District Judge Marvin Aspen's September 20, 1993 Memorandum Opinion and Order.

operated under the umbrella of the Organized Crime Drug Enforcement Task Force (OCDETF). The appellant was Deputy Chief of the OCDETF task force in Chicago from January 1988 to 1992. In that capacity, he served as the lead prosecutor responsible for the El Rukn investigation and the ensuing criminal trials.

In order to ferret out criminal activity in the El Rukn gang, the OCDETF task force used various investigatory tools, including controlled narcotics buys and court-authorized telephone wiretaps. The wiretaps, which were employed for several years, captured hundreds of conversations. (The record indicates the wiretaps produced at least 1,500 separate cassette tape recordings. *See* Agency File at tab 5d-428.) Because the El Rukns used heavily coded language during their telephone conversations, the task force found it difficult to glean useful evidence from the wiretap recordings. In order to accurately transcribe and translate the wiretapped conversations, the task force needed the assistance of El Rukn gang members who were conversant in the code.

By early 1989, the task force had succeeded in gaining the cooperation of six high-ranking El Rukns.[2] In addition to helping the task force transcribe and translate the wiretapped conversations, the cooperating El Rukn gang

2. The six initial cooperating El Rukns included: Harry Evans, Henry Harris, Earl Hawkins, Eugene Hunter, Jackie Clay, and Derrick Kees. Ervin Lee began cooperating after his arrest in October 1989.

members agreed to fully cooperate in the investigation and to provide complete and truthful information detailing their personal criminal activity as well as that of other gang members. The cooperators also agreed to testify against other El Rukn gang members at trial.

During the entire time they cooperated with the OCDETF task force, the cooperating El Rukn gang members were incarcerated.[3] For the long periods when they were working directly with the task force, the cooperating El Rukn inmates were housed in the Metropolitan Correctional Center (MCC) in downtown Chicago. The MCC is a federal correctional facility located two blocks from other federal buildings that house the United States Courthouse, the U.S. Attorney's office, and the OCDETF task force office. While incarcerated at the MCC, the cooperating El Rukn gang members were housed in a segregation unit on the 6th floor of the MCC, where they were isolated from the rest of the prison population, which included a large number of El Rukn gang members about whom the cooperators were providing incriminating information and against whom the cooperators would eventually testify at trial. The government began to transfer some El Rukn cooperators to other prisons

3. Some El Rukn cooperators were serving criminal sentences prior to agreeing to cooperate: Derrick Kees was serving 55-years in a state penitentiary, and Earl Hawkins was sitting on death row in a state penitentiary. Other cooperating El Rukns were under arrest pending trial for murder, while still other cooperating El Rukns, pursuant to unusual voluntary agreements, were incarcerated without charges pending.

throughout the country after the El Rukn indictments were returned in October 1989. When the cooperators were summoned back to Chicago to prepare for and testify in the El Rukn criminal trials (the first of which commenced in April 1991), the cooperating El Rukn gang members were again housed in the MCC, where they remained for the greater part of 1991.

The cooperating El Rukn inmates involved in the facts of this appeal worked very closely with the OCDETF task force from 1988 to the end of 1991. The members of the task force spent months interviewing and debriefing the cooperating El Rukns to chronicle their criminal lives, which included acts stretching back more than 20 years. The task force members also searched for and reviewed hundreds of police files for information matching the criminal acts recounted by the cooperators. In addition, the job of transcribing and translating the wiretapped phone conversations was a laborious, time-consuming process that took many months. In order to facilitate their cooperation during the long and complex investigation of the El Rukn gang, the cooperators were frequently transported individually from the MCC to either the nearby OCDETF task force office or the U.S. Attorney's office. The cooperators were returned to the MCC by the end of each day.

During his tenure as Deputy Chief of the OCDETF task force, the appellant worked very closely with the cooperating El Rukn gang members. (By and large, the charges against the appellant arise from his interaction

with and responsibility for handling the cooperating El Rukn inmate witnesses.) The appellant testified he worked with the El Rukn cooperators for thousands of hours while drafting the confessions that he presented to the grand jury.[4] In addition to participating in the process of debriefing the El Rukn cooperators, the appellant also coordinated arrangements for the safety of the cooperators' families. (The government's agreement to protect the cooperators and their families from gang retaliation was a major factor in many cooperators' decisions to cooperate with the government.[5]) The appellant assisted in physically relocating some of the cooperators' family members and the appellant sponsored some cooperators' introduction into the federal witness protection program.[6] The appellant also worked with the El Rukn cooperators to locate fugitive gang members and to conduct further investigations of the El Rukn gang's ongoing criminal activity. In addition, the appellant worked closely with the cooperating El Rukn gang members while preparing them to testify at the criminal trials and presenting their testimony at those trials. The

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4. Harry Evans' written confession to the grand jury was 62 pages long; Henry Harris' grand jury confession was 48 pages long; and Earl Hawkins' confession was 36 pages long. (*See* Appellant's Exhibits 4B, 4C, & 4D.)

5. During prior criminal prosecutions of El Rukn gang members, the family members of cooperating witnesses had been shot.

6. Four of the seven cooperating El Rukn witnesses were eventually admitted into the federal Witness Protection Program: Henry Harris, Derrick Kees, Earl Hawkins, and Jackie Clay.

appellant testified that over a five-year period, the cooperating El Rukns were in his office for thousands of hours.

Assistant U.S. Attorney (AUSA) Theodore Poulos, who was the appellant's primary assistant in the El Rukn investigation and who had extensive involvement in the El Rukn investigation and prosecutions, testified that in order to produce the complex and incredibly detailed El Rukn indictments, and present the cooperators' stories at trial, he and the appellant had to become intimately familiar with the El Rukn cooperators' lives by working with them for countless hours in an intense setting for years. AUSA Poulos testified that he and the appellant worked virtually all day every day, seven days a week, from April 1991 to March 1992, averaging 16 hours per day.[7] (MSPB tr. at 2991.) The appellant testified that during the 16-month period that came to an end in December 1991, he took only two days off (including Saturdays and Sundays).

The information provided by the cooperating El Rukn inmates eventually led a federal grand jury to indict 65 top El Rukn gang leaders and associates. On October 26, 1989, the grand jury issued two indictments covering 38 and 27 defendants respectively. The indictments charged the El Rukns with violating the Racketeer Influenced and Corrupt Organizations (RICO) statute. The RICO charges were based

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7. Mr. Poulos testified that he personally took only three days off in 1991 -- Memorial Day, July 4th, and one day to attend his brother's wedding.

primarily on acts that included murders, murder conspiracies, narcotics trafficking, narcotics conspiracies, kidnapping, witness intimidation, and witness retaliation. Each indictment included allegations of criminal conduct spanning a period of over twenty years. The first indictment alone was 305 pages long, listed 175 counts, and detailed more than 250 factually separate criminal acts. (*See* Agency File at tab 4c-53, page 8 of Judge Aspen's Memorandum Opinion and Order.) The second indictment was similar in length and complexity. (*See* Agency File at tab 4b-167.)

Because of the unwieldy nature of the large indictments, the federal district court eventually severed the indictments (despite the government's strenuous objections). As a result, seven separate criminal trials were conducted by six different federal judges. A look at the El Rukn trial schedule reveals the enormous demands placed on the appellant's time. The first six El Rukn trials were conducted during a 35-week period from April 9, 1991 to December 10, 1991. Except for one 3-week respite (September 1 to 23, 1991), at least one El Rukn criminal trial was always in session during this 35-week period. Because the six trials covered a combined total of 60 weeks during the 35-week period, the trials overlapped to a very large extent. In fact, the first three trials ran simultaneously for one month from July 8 to August 9, 1991.

In addition to being in charge of the entire El Rukn prosecution, the appellant was also the government's lead trial attorney in four of the six trials. The appellant's four trials lasted a total of 23 weeks during the 35-week period. Because his four trials also overlapped to some extent, he was lead trial attorney in two simultaneous trials for 7½ weeks from July 8 to August 30, 1991 and for two weeks from October 17 to 31, 1991. Demands on the appellant's time did not diminish as each trial came to an end.[8] The appellant had to prepare the government's responses to an extensive number of motions filed after each trial, and he also had to prepare sentencing memos for each of the 56 defendants convicted during the El Rukn criminal trials.

The agency did not dispute that the appellant maintained an incredibly busy schedule and devoted enormous amounts of energy to the El Rukn investigation and criminal trials. In fact, Nancy Needles, the Executive Assistant to the U.S. Attorney, described the demands placed on the appellant during the El Rukn trials as "enormous," "unreasonable," and "insane." (MSPB tr. at 1296.)

The evidence introduced by the government during the El Rukn criminal trials included the testimony of the cooperating El Rukns as well as (by one estimate) more than

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8. The *Bingham* trial ended on August 9, 1991; *Andrews* on August 30, 1991; *Boyd* on September 1, 1991; *Burnside* on October 31, 1991; *Crowder* on November 9, 1991; and *Bates* on December 10, 1991.

2,000 pages from the transcripts of the wiretapped phone conversations. (*See* Agency File at tab 5e-1.) During the trials, the cooperating witnesses decoded the wiretapped conversations for the juries. According to U.S. District Judge Suzanne Conlon, who presided over one of the El Rukn trials (*U.S. v. Andrews*), the testimony of the cooperating El Rukn witnesses was corroborated by little independent evidence. Consequently, the credibility of the cooperating witnesses was a major issue in each trial.[9] As a result, defense lawyers spent days trying to impeach the testimony of the cooperating El Rukn witnesses.

The trials resulted in convictions for 56 El Rukn defendants (14 pled guilty and 42 went to verdict). Many of the convicted El Rukns were sentenced to life imprisonment. After their convictions, many of the defendants filed motions seeking new trials based on allegations of prosecutorial misconduct. Some of the trial judges denied the motions without a hearing. But three judges (James Holderman, Suzanne Conlon, and Marvin Aspen) conducted post-trial hearings to compile evidence to rule on the motions. During these post-trial hearings (which began in the Fall of 1992 and extended through the Summer of 1993), a number of allegations arose concerning the appellant's handling and supervision of the cooperating El Rukn

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9. Anton Valukas, then U.S. Attorney for the Northern District of Illinois, testified that the murder portions of the El Rukn prosecutions rested, to a large extent, on the testimony of the cooperating witnesses. (*See* MSPB tr. at 663.)

witnesses. (The appellant was not a party to the post-trial proceedings, and he did not serve as trial counsel for the government during the proceedings.)

At the conclusion of the post-trial hearings, Judges Holderman, Conlon, and Aspen each issued a separate "Memorandum Opinion and Order" granting new trials to a total of fifteen El Rukns who had been convicted of numerous crimes. (*See* Agency File at tabs 4c-51, 52 & 53.) The judges ordered new trials based on findings of prosecutorial misconduct for which they held the appellant primarily responsible. In their long and detailed written opinions, the three trial judges found the appellant responsible for prosecutorial misconduct that included (1) suppressing evidence of post-incarceration drug use by cooperating El Rukn inmate witnesses and (2) failing to disclose to the El Rukn defendants a wide array of information reflecting adversely on the reliability and biases of the cooperating El Rukn inmate witnesses. In addition to finding that the appellant suppressed evidence of the El Rukn cooperators' post-incarceration drug use, the federal judges concluded that the appellant failed to disclose other evidence, including: (a) disciplinary actions imposed by the prison against the cooperators as well as the non-enforcement of disciplinary measures against them; (b) the government's failure to routinely test the incarcerated cooperators for illicit drugs after October 1989; (c) the government's use of permissive and lax security measures, which gave the El Rukn cooperators access to internal prosecution memoranda as well as to drugs, sex, and unlimited free telephone calls;

and (d) the incarcerated cooperators' receipt of gifts such as cash, clothing, radios, food, cigarettes, and beer. (*See* Agency File at tabs 4c-51, 52 & 53.)

As a result of the allegations raised during the post-trial hearings, the Department of Justice's Office of Professional Responsibility (OPR) launched an investigation into the allegations of prosecutorial misconduct and the appellant's management of the El Rukn investigation. When OPR finished its investigation in January 1995, OPR's final report concluded that the appellant had exercised poor judgment over various aspects of the El Rukn prosecution and had engaged in professional misconduct, personal misconduct, poor performance, and mismanagement. (*See* Agency File at tab 4c-1.)

After reviewing the OPR report, the Department of Justice issued a notice, dated May 8, 1995, proposing the appellant's removal from employment. The proposal notice charged the appellant with the following misconduct:

> 1. Failure to investigate and disclose (either intentionally or negligently) the positive drug tests of El Rukn cooperating witnesses;
>
> 2. mismanagement and exercising extremely poor judgment handling cooperating witnesses;
>
> 3. failure to properly supervise a subordinate paralegal employee (Corinda Luchetta), allowing her to develop inappropriate personal relationships with cooperating witnesses; and
>
> 4. failure to maintain proper security of case-related documents.

(Agency File at tab 4c.)

The proposal notice alleges that the appellant's poor judgment and serious mismanagement of the El Rukn investigation contributed to a pervasive attitude that the facilities and personnel of the U.S. Attorney's office were to be used to keep the cooperating El Rukn witnesses "happy." (Agency File at tab 4c.) The proposal notice asserted that this attitude undermined the objectivity, professionalism, and caution with which prosecutors should handle cooperating witnesses. According to the proposal notice, the appellant abdicated his leadership responsibilities and violated professional standards of conduct during the El Rukn investigation and prosecution.

The appellant vigorously disputed all of the charges leveled against him.

Prosecutor's Obligation to Disclose Evidence Favorable to Defendant

The gravest charge leveled against the appellant in the notice of proposed removal is the first charge, which, in essence, accuses him of suppressing evidence by failing to disclose to El Rukn defendants information indicating that cooperating government witnesses tested positive for illicit drugs while incarcerated at the MCC. This charge strikes at a serious ethical obligation because Assistant U.S. Attorneys (AUSA's), like the appellant, wield a considerable amount of power in the criminal justice arena. As explained by David Margolis, the Assistant Deputy Attorney General of the United States and the agency's deciding official, AUSA's hold powerful positions because the government has a

monopoly over the facts developed during a criminal investigation and AUSA's can either make charging decisions on their own based on that evidence or they can strongly influence their superiors' charging decisions by the manner in which the AUSA's present their cases. (MSPB tr. at 1470-71.)

Mr. Margolis further explained that AUSA's cannot unilaterally hold information exclusively in the hands of the government because criminal prosecutions must be fair. As explained by Mr. Margolis, U.S. Attorneys and their assistants must be honorable and have the courage to disclose evidence that is favorable to a defendant even though such evidence may damage the prosecution's case or aid the accused. As the Supreme Court explained in *Berger v. United States*, 295 U.S. 78 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger, 295 U.S. at 88; *see also* ABA Standards for Criminal Justice § 3-1.1(c) (1980) ("The duty of the prosecutor is to seek justice, not merely to convict").

> [The United States Attorney] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. [The United States Attorney] may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods

> calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court stated that a U.S. Attorney's obligation to insure that justice is done in every criminal trial includes the duty to disclose to each defendant evidence that is favorable to the accused if such evidence is material to guilt or to punishment. *Brady*, 373 U.S. at 87. In accordance with this so-called "*Brady*" obligation, U.S. Attorneys must disclose to each defendant any exculpatory evidence. In fact, "elemental fairness" requires that United States Attorneys disclose exculpatory material even without a specific request from the accused.[10] *United States v. Agurs*, 427 U.S. 97, 110 (1976).

In *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court expanded the prosecutor's "*Brady*" obligation to include evidence that could be used to impeach the credibility of a government witness. *Giglio*, 405 U.S. at 154; *United States v. Bagley*, 473 U.S. 667, 676 (1985). In short, due process requires that prosecutors provide defendants all evidence in their possession that is favorable to the accused that is material either to guilt or

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10. "Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

to punishment. *Brady*, 373 U.S. at 88. Thus, impeachment evidence, as well as exculpatory evidence, falls within the ambit the prosecution's *Brady* obligation. *Giglio*, 405 U.S. at 154.

If the U.S. Attorney's office fails to disclose information subject to the *Brady* doctrine, a convicted defendant will be entitled to a new trial if the suppressed evidence was "material" to guilt or to punishment, i.e., if it is reasonably probable that disclosure of the evidence would have led to a different result. *Bagley*, 473 U.S. at 682. A "reasonable probability" is a probability sufficient to undermine the court's confidence in the outcome. *Id*.

The three judges who granted the convicted El Rukns' motions for new trials were particularly incensed that the appellant failed to disclose *Brady* material.[11] In the minds of these judges, as expressed in their written opinions, by far the most crucial *Brady* material suppressed by the appellant was information indicating that two cooperating El Rukn inmate witnesses tested positive for illicit drugs while they were incarcerated and cooperating with the government. The judges felt the appellant's failure to disclose this information deprived the El Rukn defendants of due process of law because the defendants were denied the opportunity to use this information (along with a variety of other benefits received by El Rukn cooperators but not

11. The phrase "*Brady* material" is commonly used to denote any evidence that must be disclosed pursuant to the Supreme Court's *Brady* and *Giglio* decisions.

disclosed by prosecutors) to attack the cooperating witnesses' credibility, which was a major issue in each trial. For example, Judge Holderman stated that an element vital to the credibility of the cooperating El Rukn witnesses was the argument that they had reformed themselves and ended their criminal behavior by cooperating with the government. (*See* Agency File at tab 4c-51, pp. 129-31.) Judge Holderman explained that defense counsel's cross-examination of the cooperating witnesses' extensive past acts of wrongdoing would have had substantially more impact had the government exposed the witnesses' continuing post-cooperation, post-plea, criminal conduct, as well as their receipt of other benefits while incarcerated.

Charge 1(A): **Intentional Failure to Disclose the Positive Drug Tests of El Rukn Cooperating Witnesses**

The agency charged the appellant with intentionally failing to disclose to the El Rukn defendants information showing that two of the cooperating El Rukn witnesses (Henry Harris and Harry Evans) tested positive for illegal drugs while incarcerated at the MCC. According to the proposal notice, Henry Harris tested positive for illegal drugs on May 11, 1989, and Harry Evans tested positive for illegal drugs on April 12, 1989. The proposal notice alleges that the appellant knew, or should have known, about the two positive drug tests and that the appellant failed to disclose the positive drug tests to the El Rukn defendants who were convicted in federal court.

During the post-trial hearings, the appellant testified under oath that he did not know (until after the El Rukn trials ended) that any cooperating El Rukn inmates tested positive for illegal drugs in 1989. According to the proposal notice, this denial of knowledge by the appellant was, at worst, perjurious and, at best, reflects the appellant's extreme negligence in handling discoverable information.

In MSPB proceedings, the agency has the burden of proving each charge by a preponderance of the evidence. *See* 5 C.F.R. § 1201.56(a) (1998). The preponderant evidence standard requires proof that a charge is more likely true than not true. *See* 5 C.F.R. § 1201.56(c)(2) (1998). In order to prove that the appellant intentionally failed to disclose the positive drug tests, the agency must first establish that the appellant actually knew about the positive drug tests at the relevant time when the drug tests should have been, but were not, disclosed, or that the appellant intentionally refused to look for the positive drug tests.

Rosenthal Memorandum & Positive Drug Tests

The central piece of evidence relating to the appellant's knowledge of the positive drug tests is a document that has come to be known as the "Rosenthal memorandum."[12] (*See* Agency File at tab 6a-20 or tab 5d-64.)

12. Although his name does not appear on the document, the Rosenthal memo was named after former AUSA Lawrence Rosenthal because, during the El Rukn post-trial hearings,

The Rosenthal memorandum, which was created by the MCC, lists 18 total drug tests administered to the six cooperating El Rukn gang members while they were confined in segregation on the 6th floor of the MCC. The drug tests were based on urine samples collected from the cooperating El Rukn inmates at various times from April 6 to October 17, 1989. The results of six of the tests (for which urine samples were collected from each cooperating El Rukn inmate on October 17, 1989) were not available when the memo was prepared on October 18, 1989. Consequently, the memo lists results from only 12 drug tests that were administered to the cooperators from April 6 through August 21, 1989. According to the memo, only two of these 12 tests revealed "unauthorized" positive results. (An "unauthorized" result means the positive finding was not attributable to prescribed medication.) Both "unauthorized" results were based on the detection of morphine, which is a metabolite of heroin, as well as codeine. (MSPB tr. at 2825.) These "unauthorized" positive results included the April 12, 1989 test of Harry Evans and the May 11, 1989 test of Henry Harris.[13] (*See* Agency File at tab 6a-20 or tab 5d-64.)

There is no dispute that Henry Harris' May 11, 1989 positive drug test was "unauthorized." But the other "unauthorized" positive test result listed in the Rosenthal

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he described the contents of the memo from memory before a copy of the memo was located after an exhaustive search of the El Rukn case file.

13. The Rosenthal memo also lists an "authorized" positive test for morphine for Harry Evans on May 10, 1989.

memo -- Harry Evans' drug test on April 12, 1989 -- was actually authorized, i.e., the result of prescribed medication. Evans' April 12, 1989 positive test result is covered by a May 1, 1989 memo prepared by Margarett Russell, a Physicians Assistant with the MCC.[14] Ms. Russell's memo states that Evans' positive urinalysis on April 12, 1989 was the result of codeine-based medication administered by the MCC "via pill line." (*See* Agency File at tab 5d-258; Appellant's Exhibit 10.) In other words, Evans' positive test resulted from prescribed medication. Two MCC employees who appeared at the MSPB hearing also testified that Evan's April 12, 1989 positive drug test result was authorized: Edward Russell, who was the MCC's Special Investigative Supervisor until September 1989 and coordinated the MCC's drug-testing program; and Lt. Charles Mildner, who was the MCC's Special Investigative Agent from April 1989 to January 1992 and oversaw the MCC's drug-testing program. (MSPB tr. at 561-66 & 651-52; *see also* Agency File at tab 4b-97, pp. 206-07 of Russell's October 15, 1992 post-trial testimony.) In addition, Cynthia Alston, M.D., an MCC physician who treated Evans, testified that Margarett Russell's May 1, 1989 memo shows that Evans' April 12, 1989 positive drug test resulted from prescribed medication, i.e., Tylenol #3 with codeine. (MSPB tr. at 2825.) Dr. Alston explained

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14. There is no evidence that this memo, which was routed to the attention of a Lt. Mayfield, was reviewed by the person who prepared the Rosenthal memo. And the record is bereft of any evidence explaining why the finding stated in Ms. Russell's May 1, 1989 memo was not included in the Rosenthal memo, which is dated October 18, 1989.

that a person taking medication (such as Tylenol #3) containing codeine would test positive for morphine because morphine is a metabolic breakdown product of codeine.[15] (MSPB tr. at 2825.) Finally, the report issued by the agency's Office of Professional Responsibility on January 13, 1995, concedes that Evans' April 12, 1989 positive drug test result was authorized. (*See* Agency File at tab 4c-1, pp. 60-61.)

In summary, the Rosenthal memo lists only one positive test result that is actually "unauthorized" -- Henry Harris' May 11, 1989 positive test for morphine. Nevertheless, if the appellant's knowledge of the positive drug tests was limited to the information contained in the Rosenthal memo, which listed both tests as "unauthorized", he would have been obligated to disclose both positive drug tests to the El Rukn defendants during their trials if the tests constituted *Brady* material.

The appellant claims he did not see the Rosenthal memo and did not learn of the cooperating El Rukn inmates' positive drug tests until after the El Rukn trials were completed.

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15. Two days after Harry Evans' April 12, 1989 positive drug test, he was hospitalized for 2½ weeks due to acute renal failure. Dr. Alston testified that renal failure occurs when the kidneys stop functioning and cease eliminating waste products from the body. (MSPB tr. at 2833.) Dr. Alston explained that morphine was excreted very slowly from Evans' body because of his renal failure. (MSPB tr. at 2833.)

Considerations Regarding Whether the Positive Tests Constitute *Brady* Material

If the appellant was not obligated to disclose the positive drug tests in question, his failure to disclose the tests would not constitute misconduct. Consequently, in order to hold the appellant responsible for failing to disclose the "unauthorized" positive drug tests listed in the Rosenthal memo, the agency must prove that the appellant was obligated to disclose the positive drug tests. Thus, the agency must prove that the positive drug tests constitute *Brady* material.

Collateral Estoppel Effect of Federal Judges' Post-Trial Rulings

Of course, the federal judges' decisions granting the El Rukn defendants' motions for new trials have already ruled on this issue. Their post-trial opinions concluded that the positive drug tests constituted *Brady* material and that the appellant was obligated to disclose the positive tests to the defendants. (*See* Agency File at tabs 4c-51, 4c-52, & 4c-53.) In fact, the judges' lengthy decisions (Judge Conlon 44 pages, Judge Holderman 137 pages, and Judge Aspen 181 pages) contain detailed analyses of the evidence and exhaustive discussions of the reasons for ruling that the appellant's failure to disclose the positive drug tests constituted prosecutorial misconduct. Nevertheless, the post-trial decisions do not preclude the Board from adjudicating the issues covered by those decisions. The doctrine of collateral estoppel, which can preclude relitigation of an issue, does not apply if the party

precluded from relitigating the issue was not fully represented in the prior action. *See, e.g., Peartree v. United States Postal Service*, 66 M.S.P.R. 332, 341 (1995); *Mycka v. Office of Personnel Management*, 56 M.S.P.R. 675, 678-79 (1993).

The record shows that the appellant was not fully represented during the post-trial hearings. Not only was he not a party to the matters litigated during the post-trial hearings, but also he did not participate in the post-trial hearings as a trial counsel for the government. His personal participation was limited to testifying during the post-trial hearings. Because he was not a party to the cases litigated during the post-trial hearings, the appellant was not given the opportunity to confront and cross-examine all of the witnesses who provided the evidence that formed the basis for the findings of prosecutorial misconduct. The record also shows that he was allowed to exercise little, if any, influence over the government's trial strategy during the post-trial hearings. In fact, Nancy Needles, the Executive Assistant United States Attorney for the Northern District of Illinois, testified that during the post-trial hearings, the government did not even try to disprove some of the allegations of misconduct leveled against the appellant. (MSPB tr. at 1339.) Moreover, at the MSPB hearing, former AUSA John Hartmann (a trial counsel for the government during the post-trial hearings) testified that the U.S. Attorney's office believed, for purposes of litigating the *Brady* issue raised during the post-trial hearings, that "it did not matter

really legally whether or not [the appellant] knew in particular about [the positive drug tests]." (MSPB tr. at 450.) Mr. Hartmann explained that knowledge of the Rosenthal memo's contents could be imputed to the U.S. Attorney's office once the memo was in the possession of AUSA Rosenthal, a fact the government did not dispute.[16] (MSPB tr. at 450.)

Because the appellant was not fully represented during the post-trial hearings, I find the federal judges' decisions do not collaterally estop the Board from determining whether the El Rukn cooperators' positive drug tests constituted *Brady* material that the appellant was obligated to disclose to the El Rukn defendants.[17]

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16. As the government argued in its post-trial briefs, because the prosecutor's office constitutes "an entity" under *Giglio*, 405 U.S. at 154, the knowledge possessed by one prosecutor in the office is attributable to all other prosecutors in the office for purposes of determining whether the government was aware of *Brady* material. (*See* (footnote 16 cont'd) Agency File at tab 4b-176, p. 9, n.3; Agency File at tab 4b-177, p. 3, n.1; Agency File at tab 4b-178, p. 8, n.5.)

17. In addition to the appellant's lack of full representation during the post-trial proceedings, there are other significant reasons for not applying collateral estoppel to the federal judges' post-trial rulings. For example, the post-trial proceedings implicated different public-policy considerations and a different burden of proof than applicable to this MSPB appeal. In essence, the post-trial hearings were convened to determine the Constitutional validity of the EL Rukns' criminal convictions, i.e., whether the suppression of *Brady/Giglio* material deprived El Rukn defendants of due process of law. To decide this issue, the federal district court had to determine if there was a reasonable probability that

Analysis

The determination of whether the cooperating El Rukn inmates' positive drug tests were subject to disclosure under the *Brady* doctrine depends on whether the positive

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disclosure of certain evidence would have led to a different jury verdict. *See United States v. Bagley*, 473 U.S. 667, 682 (1985). Thus, the underlying burden of proof was proof beyond a reasonable doubt, i.e., would disclosure of the positive drug tests (as well as other benefits accorded the cooperating witnesses) have led the jury to conclude that the government did not prove its case beyond a reasonable doubt.

The instant MSPB appeal involves a significantly different public policy consideration and burden of proof. In this appeal, a former employee is seeking reversal of an administrative action removing him from employment for misconduct. The agency must prove each charge of misconduct by a preponderance of the evidence (i.e., that each charge is more likely true than not true), and the agency must show that the appellant's removal from employment promotes the efficiency of the service. Moreover, proof of the first charge (failure to disclose evidence favorable to the El Rukn defendants) depends on the appellant's actual knowledge of facts indicating that cooperating El Rukn inmates were using illegal drugs while incarcerated. During the post-trial hearings, such facts could be imputed to the prosecution -- even in the absence of actual knowledge by the appellant -- for purposes of determining whether the (footnote 17 cont'd) prosecution failed to disclose *Brady* material. *See Giglio*, 405 U.S. at 154. The same imputation of knowledge cannot be used to support the agency's charge in this appeal.

Finally, the factual record developed during this MSPB proceeding appears to be substantially different from the record upon which the three judges based their post-trial rulings. (*See, e.g.*, footnote 18 on page 28 and footnote 50 on page 128 of this decision.)

drug tests could have been used to impeach the credibility of the cooperating El Rukn inmate witnesses. *See Giglio*, 405 U.S. at 154; *Bagley*, 473 U.S. at 676. There is a considerable body of law strongly indicating that the positive drug tests would not have been admissible into evidence because evidence of a witness's illegal drug use may so prejudice a jury that it will excessively discount the witness's testimony. *See, e.g., United States v. Robinson*, 956 F.2d 1388, 1397 (7th Cir. 1992), *cert. denied*, 506 U.S. 1020 (1992). Thus, as held by the U.S. Court of Appeals for the 7th Circuit, a trial court may bar cross-examination that delves into a witness's illegal drug use if such cross-examination is used for the sole purpose of making a general character attack. *Robinson*, 956 F.2d at 1397; *Jarrett v. United States*, 822 F.2d 1438, 1446 (7th Cir. 1987).

Cooperators' Ability to Recollect and Relate

A federal trial court may admit evidence of a witness's illegal drug use if such evidence relates to the witness's "inability to recollect and relate" when a witness's memory or mental capacity is legitimately at issue. *Robinson*, 956 F.2d at 1397; *United States v. Cameron*, 814 F.2d 403, 405 (7th Cir. 1987). Nevertheless, because of the extreme potential for unfair prejudice flowing from evidence of illegal drug use, cross-examination into such drug use is properly limited to *specific instances of drug use* during (1) relevant periods of trial or (2) the transaction charged in the incident. *United States v. Sellers*, 906 F.2d 597, 602 (11th Cir. 1990). In other words, use of illegal drugs

may be used to attack a witness's ability to recollect and relate if the drug use affected the witness's ability (1) to perceive the underlying events or (2) to testify lucidly at trial. *Sellers*, 906 F.2d at 602; *United States v. Sampol*, 636 F.2d 621, 667 (D.C. Cir. 1980). Indeed, the U.S. Court of Appeals for the 7th Circuit -- the very locus of the El Rukn criminal trials -- reached the same holding in *Jarrett*, 822 F.2d at 1446.

In the instant appeal, Harris' and Evans' positive drug tests occurred after the events that formed the basis for the El Rukn indictments and approximately two years prior to the trials in which Harris and Evans testified. In addition, the positive tests were followed by several negative drug tests. Because the El Rukn inmates' positive drug tests did not show that they were under the influence of illegal drugs either while testifying in court or while observing the events to which they testified, the agency has not shown that their positive drug tests were admissible to impeach the cooperating inmates' ability to recollect and relate.

Cooperators' Bias

In addition to challenging a witness's ability to recollect and relate, a witness's illegal drug use while cooperating with the government may be used during cross-examination to show the witness's bias. The bias theory is based on the presumption that witnesses are likely to tailor their testimony to the liking of the government in order to curry the favor of government attorneys as a means of

avoiding prosecution for their illegal conduct. *See United States v. Atherton*, 936 F.2d 728, 733 (2nd Cir. 1991), *cert. denied*, 112 S.Ct. 1187 (1992). But illegal drug use alone is not probative of bias. Courts usually require some showing that the government was aware of the witness's illegal conduct and refrained from prosecution or other discipline. *See, e.g., Atherton*, 936 F.2d at 733-34; *United States v. Noti*, 731 F.2d 610, 613 (9th Cir. 1984). Thus, simple illegal drug use does not establish a government witness's bias absent a showing that the government was aware of the witness's illegal drug use *and* refrained from prosecution or other discipline. *Atherton*, 936 F.2d at 733-34; *Noti*, 731 F.2d at 613.

The evidence in the instant appeal is insufficient to establish the elements necessary to utilize Evans' and Harris' positive drug tests during cross-examination for the purpose of arguing that their testimony was biased in favor of the government. First of all, Evans' positive test was "authorized" and, therefore, did not warrant disciplinary action. Second, as discussed on pages 75-79 of this decision, the evidence is insufficient to prove the appellant was aware that Harris' positive drug test was "unauthorized." Moreover, the record shows that Harris was disciplined for his positive drug test. On June 28, 1989, a disciplinary hearing officer imposed a 15-day disciplinary segregation penalty and loss of visiting privileges for six

months.[18] (*See* Agency File at tabs 5d-77, 5d-79; Appellant's Exhibit 12.)

In summary, the evidence shows Harris was disciplined for his positive drug test. Thus, the agency did not prove that the appellant (or any member of the prosecution team) refrained from disciplining Harris for his positive drug test. Because the agency did not prove that Harris was not disciplined for his positive test, the agency failed to prove all of the elements necessary to show that Harris' positive drug test could be used during cross-examination to argue that Harris was biased in favor of the government. Therefore, because the evidence shows that Evans' positive drug test was "authorized," I find the agency has not shown that the cooperating El Rukn inmates' positive drug tests were admissible to establish bias on their part, i.e., that

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18. The record developed during the post-trial hearings showed that Harris claimed he never served this disciplinary sanction and that Robert Hafer, the Executive Assistant to the MCC's Warden, had promised Harris he would remove from Harris' records all disciplinary reports and forms that would hinder Harris at parole time. (*See* Agency File at tab (footnote 18 cont'd) 4c-51, p. 71.) This is a representative example of the numerous ways in which the MSPB record differs from the record developed during the post-trial hearings. The MSPB record contains a copy of Mr. Hafer's August 18, 1993 affidavit in which Mr. Hafer denies taking any actions to modify Harris' disciplinary time and denies promising to remove disciplinary records from Harris' prison files. (Agency File at tab 5d-137, par. 4.) In addition, the MSPB record contains various copies of Harris' prison records (including disciplinary records, incident reports, and notices of disciplinary hearings) showing that the disciplinary actions have remained in Harris' prison records. (*See* Agency File at tabs 5d-77, 5d-78, 5d-79, 5d-80, 5d-82, & 5d-87.)

they may have tailored their testimony to the liking of the government in order to curry favor with government attorneys as a means of avoiding disciplinary action for illegal conduct. *See, e.g., Atherton*, 936 F.2d at 733-34; *Noti*, 731 F.2d at 613.

Cumulative Impeachment

Even assuming, for the sake of argument, that the agency has established that the positive drug tests were admissible for purposes of impeaching the cooperating witnesses, the agency has not shown a reasonable probability that this information would have affected the outcome of the trial. A prosecutor is only required to disclose evidence favorable to the defendant if the evidence might affect the outcome of the trial. *United States v. Dweck*, 913 F.2d 365, 371 (7th Cir. 1990). Evidence withheld by the prosecutor is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the jury would have reached a different verdict. *Dweck*, 913 F.2d at 371. The 7th Circuit has held that where impeachment evidence is merely cumulative, and thereby has no reasonable probability of affecting the result reached by the jury, failure to disclose such evidence does not violate a prosecutor's *Brady* obligation. *Dweck*, 913 F.2d at 371. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Dweck*, 913 F.2d at 371. But the "mere possibility" that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the Constitutional sense. *Dweck*, 913 F.2d at 371.

In the instant case, there was a substantial body of information (separate and apart from Evans' and Harris' positive drug tests) seriously impeaching Evans' and Harris' credibility. The additional information that was available to impeach Harris' credibility included:

> (1) **Murder/violence:** past criminal conduct, including efforts to murder a rival gang member, efforts to carry out two contract murders, and assisting a fellow drug dealer fleeing the scene of a double shooting;
>
> (2) **drug use:** extensive drug use (marijuana and cocaine in 1981) regularly snorting cocaine to test its potency in the mid-1980's, using cocaine with a female in 1985, and sampling cocaine from South Carolina in 1985 and 1986;
>
> (3) **drug dealing**: a virtual lifetime of drug dealing;
>
> (4) **lies/falsehoods**: numerous lies and acts of falsehood, including stealing money and drugs from El Rukns, attempting to deceive the FBI into believing he was cooperating, providing the FBI with false and misleading information, making false statements in a television interview, and (for $15,000) lying in a sworn statement to an attorney;
>
> (5) **inconsistencies**: omissions from and inconsistencies between his handwritten notes, his statements given to federal agents, and his testimony in a previous trial;
>
> (6) **self-interest**: an interest in testifying favorably for the government to "save [his] own hide," admitting he feared the electric chair and life imprisonment, and admitting he did not know a man alive who would not lie to save his life;
>
> (7) **deals**: benefits to be received for testifying (South Carolina agreed to drop a heroin charge and forego seeking the death penalty for murder), his federal plea agreement, and his understanding of the substantial penalties attached to the charges he faced and could have faced; and

> (8) **assistance to government**: his extensive efforts assisting the government through testimony in other trials, translating hundreds of conversations, and numerous meetings with law-enforcement agents.

(*See* Agency File at tab 4c-52, pp. 174-75; Appellant's Exhibit 4C, Harris' 48-page confession.)

Likewise, the record developed during the El Rukn criminal trials was littered with serious attacks on Evans' credibility, including:

> **(1) Murders:** involvement in nearly one dozen murders, murder attempts, and shootings, including:
>
> (a) the "tit-for-tat" murders of Bert Conner and Gregory Freeman;
>
> (b) the murders of two disloyal gang officers;
>
> (c) shooting a Waukegan pimp/drug dealer in a territorial dispute,
>
> (d) attempted murder of rival gang member Barnett Hall,
>
> (e) attempted murder of rival gang member Bruce Davis and his girlfriend,
>
> (f) attempted murder of rival gang member Duke Thomas,
>
> (g) attempted murder of the Ewing brothers,
>
> (h) attempts to locate and kill Theotis Clark (former El Rukn who joined a rival gang),
>
> (i) with others, taking unarmed hostages, robbing them, forcing them to jump from a 5th story window, and shooting at them as they fled (killing one), and
>
> (j) the so-called "Sengali massacre" in which Evans and others tried to kill 17 or 18 rival gang members in a yard after which they had a shoot-out with security guards;

(2) Other violent acts: numerous beatings, extortions, intimidations, home invasions, and robberies, including one that ended in a shoot-out with police;

(3) drug use: use of cocaine, marijuana, heroin, and other drugs from the early 1970's;

(4) drug dealing: 20 years of drug dealing, including the sale of heroin, cocaine, marijuana, cough syrup, and pills;

(5) lies/falsehoods: numerous falsehoods, including falsely pretending to cooperate with law-enforcement authorities in order to get close to and kill an El Rukn thought to be cooperating;

(6) inconsistencies: omissions from and inconsistencies within his grand jury testimony and testimony from a prior trial;

(7) self-interest: his interest in testifying favorably for the government and lying to help himself;

(8) deals: his cooperating efforts with the government and the terms of his federal plea agreement, wherein the State of Illinois agreed not to charge him with any crime (including 10 murders) mentioned in his proffer; and

(9) benefits: payments received for cooperating with the government, including

(a) $90 per month to his family,

(b) $60 per month to his prison commissary account, and

(c) payments for extensive medical treatments (including regular kidney dialysis).

(*See* Agency File at tab 4c-52, pp. 176-77; Appellant's Exhibit 4B, Evans' 62-page confession.)

Conclusion on Cumulative Impeachment

The Supreme Court has recognized that the significance of information that is possibly subject to disclosure under the *Brady* doctrine cannot be accurately determined until the record is complete. *See United States v. Agurs*, 427 U.S. 97, 108 (1976). Because the El Rukn trial record is now complete, the significance of Harris' and Evans' positive drug tests is now ascertainable. The record shows that Evans' April 12, 1989 positive drug test result was "authorized." Consequently, this test does not evidence illegal drug use and does not impeach Evans' credibility. As to Harris, the record now shows that his "unauthorized" positive drug test was disclosed to the jury during the seventh, and final, El Rukn trial, which was prosecuted by the appellant. This trial (*U.S. v. Franklin*), which was conducted in March and April 1992, involved six murders.

According to AUSA Ted Poulos, during the *Franklin* trial Harris was cross-examined about his May 11, 1989 positive drug test, which had been revealed in a memo produced during the *U.S. v. Andrews* El Rukn trial in August 1991. (*See* pages 75-76 of this decision.) AUSA Poulos testified that Harris admitted he had been disciplined for the positive drug test, but Harris asserted that the disciplinary action had been rescinded and removed from his record because the positive test was a mistake. Mr. Poulos testified that subsequent to Harris' testimony, the defense in *Franklin* subpoenaed drug testing records from the Bureau of Prisons. (MSPB tr. at 3064.) When the subpoenaed documents were produced, they showed that Harris tested positive for morphine on May 11, 1989, that Harris was disciplined for

this positive test (receiving a 15-day disciplinary segregation and loss of visiting privileges for 6 months), and that the disciplinary sanction was not rescinded or reversed. (Appellant's Exhibit 11.) Upon receiving this information, the appellant and Mr. Poulos stipulated for the court in *Franklin* that Harris tested positive for illegal drugs on May 11, 1989; that Harris was disciplined on June 28, 1989; and that Harris' disciplinary sanction for the positive drug test was not rescinded. (Appellant's Exhibit 12.) AUSA Poulos testified that the latter stipulation impeached Harris' prior testimony in the *Franklin* trial.

The appellant testified, without contradiction, that the *Franklin* jury was out three hours before returning guilty verdicts in the 6-murder trial that had taken six weeks. (MSPB tr. at 3253.)

In summary, the evidence shows that Harris' positive test for illegal drugs was disclosed to the jury in the *Franklin* trial. The evidence also shows that the *Franklin* jury was informed that Harris lied when claiming that his disciplinary action for the positive test had been rescinded because the test result was a mistake. Consequently, the guilty verdict in the *Franklin* trial shows that the jury did not believe that Harris' positive drug test (or Harris' false claim that the disciplinary action was rescinded) destroyed his credibility. Moreover, the negligible impact of both Harris' and Evans' positive drug tests is demonstrated by the jury verdicts returned when the El Rukn defendants were retried after their motions for new trials

were granted. Executive Assistant U.S. Attorney Nancy Needles testified that when the El Rukn defendants were retried, the government disclosed all of the additional information that the appellant allegedly suppressed, including a host of benefits the cooperators received while incarcerated. (MSPB tr. at 1339-40.) AUSA Needles testified that this information "had no impact" on the jury and the El Rukn defendants "were all convicted in record time." (MSPB tr. at 1340.)

Given Harris' long history of drug use and drug dealing and his lifetime of violent criminal behavior, I find the agency has not shown there was a reasonable probability that Harris' one isolated positive drug test (occurring 5 months prior to the El Rukn indictments and 2 years prior to the El Rukn trials and followed by three negative drug tests in 1989) would have affected the outcome of the El Rukn trials. Consequently, in light of the guilty verdicts in the *Franklin* trial, I find the record demonstrates that Harris' positive drug test was, at best, merely cumulative impeachment.

The record also shows that Evans' positive drug test of April 12, 1989 would have been merely cumulative impeachment. Evans' record of past bad acts was arguably even worse than Harris' past record. As shown on pages 30-32 above, Evans committed many more murders than Harris. Because Evans' past record was so much worse than Harris' past record and since Evans' drug-testing record was similar

to that of Harris,[19] I find the evidence in this appeal does not establish a reasonable probability that the jury would have reached a different verdict even if Evans' positive drug test of April 12, 1989 had been presented to the jury as an "unauthorized" result evidencing illegal drug use.

Where impeachment evidence is merely cumulative, and thereby has no reasonable probability of affecting the result reached by the jury, failure to disclose such evidence does not violate a prosecutor's *Brady* obligation. *United States v. Dweck*, 913 F.2d 365, 371 (7th Cir. 1990). Because the agency did not establish a reasonable probability that a jury would have reached a different verdict had either Harris' or Evans' positive drug test been disclosed, I conclude the agency failed to establish that the positive drug tests were *Brady* material that had to be disclosed to the defense. Therefore, even if the appellant were aware of the positive drug tests at issue, the agency has not shown that he violated his *Brady* obligation by failing to disclose the test results, as charged. Because the agency failed to show the appellant violated his *Brady* obligation, the agency has failed to prove that the appellant's failure to disclose the positive drug tests constitutes actionable misconduct. *See* 5 U.S.C.A. § 7513(a) (West 1996) (agency must prove that the disciplinary action was taken for a cause that promotes the efficiency of the

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19. Evans' positive drug test on April 12, 1989 occurred five months prior to the El Rukn indictments and two years prior to the El Rukn trials and was followed by three negative drug tests in 1989. (Agency File at tab 6a-20.)

service); *Hatfield v. Department of Interior*, 28 M.S.P.R. 673, 675 (1985) (articulated grounds for adverse personnel action must be related to either employee's ability to accomplish duties satisfactorily or another legitimate government interest).

Even assuming, for the sake of argument, that the positive drug tests at issue did constitute *Brady* material, the record is insufficient to prove either that the appellant was aware of the positive drug tests or that he was negligent in failing to discover and disclose the tests. In the interests of ultimate judicial economy, as well as to provide essential background for analysis of the other charges against the appellant, I will examine the evidence on the other elements of charge one.

Circumstantial Evidence of Appellant's Knowledge of the Positive Drug Tests

Oral Notification of Positive Drug Tests

The agency claims the appellant learned of the positive drug tests at least as early as October 1989 -- approximately 1½ years before the El Rukn criminal trials commenced -- when (1) news of the positive drug tests was orally relayed to him from the MCC's Warden and (2) the appellant received a copy of the Rosenthal memo listing "unauthorized" positive drug tests for cooperators Evans and Harris.

The agency's claim that the appellant knew about the positive drug tests in October 1989 is based almost exclusively on circumstantial evidence arising out of communications between the MCC's Warden and the U.S. Attorney's office. By mid-1989, MCC Warden Arthur Beeler was aware of illegal drug use on the MCC's 6th floor, where six El Rukn cooperators had been confined in segregation with several other non-El Rukn prisoners for a substantial portion of 1989.[20] In June 1989 -- within weeks after cooperators Evans and Harris tested positive for morphine -- Associate Warden Max Nuss sent Warden Beeler a memo requesting the construction of non-contact visiting areas on the 6th and 11th floors of the MCC. (*See* Agency File at tab 4c-43.) In his memo, Associate Warden Nuss listed several reasons for requesting construction of the non-contact visiting areas, including a recent increase in drug use, an assault on an attorney in the visiting area, the discovery of an inmate engaging in a sex act with a visitor, and the lack of sufficient guards to observe the entirety of all visits. (The memo did not identify the precise floor on which each incident occurred and did not specifically attribute any incident or drug use to cooperating El Rukn inmates.) In a July 1989 memo, Warden Beeler concurred in the Associate Warden's recommendation to build non-contact visiting areas on the 6th and 11th floors. (*See* Agency File at tab 4c-44.) According to Warden Beeler's memo,

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20. Harry Evans arrived at the MCC in August 1988, Henry Harris, Jackie Clay, and Earl Hawkins in April 1989, Derrick (footnote 20 cont'd) Kees in May 1989, and Eugene Hunter in June 1989. (*See* Agency File at tab 4b-58(iv).)

urinalyses had revealed the presence of illegal drugs in inmates on the 6th and 11th floors at the MCC. (Neither memo specifically stated that cooperating El Rukn inmates had tested positive for drugs.)

Warden Beeler's Meeting with FAUSA Raphaelson

Warden Beeler testified that he met with First Assistant U.S. Attorney (FAUSA) Ira Raphaelson on October 17, 1989.[21] (Mr. Raphaelson, one of two FAUSA's in Chicago at the time, was serving as the U.S. Attorney's liaison to the MCC.) At the MSPB hearing, Warden Beeler explained that he met with FAUSA Raphaelson because he was concerned that federal judges might react adversely to construction of the non-contact visiting areas and sanction the MCC if defense lawyers complained that the non-contact visiting areas restricted their ability to speak with and exchange papers with their inmate clients. (MSPB tr. at 18, 23.) According to Warden Beeler, during their October 17th meeting he advised FAUSA Raphaelson of the MCC's intent to build non-contact visiting areas to stop the flow of contraband.

In his testimony before the Board, Mr. Raphaelson confirmed meeting with Warden Beeler on October 17, 1989, and hearing Warden Beeler express a desire to build non-contact visiting areas due to security concerns that contraband was entering the MCC during contact visits with inmates. Mr. Raphaelson also confirmed that he knew the

21. This date is confirmed by Warden Beeler's diary. (Agency File at tab 5b-5, page 120.)

term "contraband" includes illegal drugs. FAUSA Raphaelson also testified that he and Warden Beeler had previously discussed the problem of inmates obtaining illegal drugs.[22] In his testimony during the post-trial hearings, Mr. Raphaelson recalled that he and the appellant discussed Warden Beeler's concerns about cooperating El Rukn inmates obtaining contraband during contact visits. (*See* Agency File at tab 4b-80, page 1232.)

On or about the date that Warden Beeler notified FAUSA Raphaelson of the MCC's proposal to build the non-contact visiting areas, MCC Technician William Fall was directed to prepare a memo listing the results of drug tests given to the cooperating El Rukn inmates housed on the 6th floor. (As Technician for the MCC's Special Investigative Supervisor (SIS), Mr. Fall's duties included monitoring the MCC's drug-testing program.) In response to the request, Mr. Fall created the Rosenthal memo, which is dated October 18, 1989. The memo does not bear Mr. Fall's name; the memo is directed to Warden Beeler and states that replies should be addressed to Lt. Charles Mildner, the MCC's SIS.

Warden Beeler does not recall directing anyone to prepare the Rosenthal memo, and FAUSA Raphaelson does not recall asking Warden Beeler for a document listing the results of inmates' drug tests. Nevertheless, the agency

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22. In fact, the record is replete with testimony showing that it was common knowledge among prosecutors and law-enforcement personnel that inmates generally can obtain illegal drugs in prison.

argues that because Warden Beeler testified he did not normally create such documents on his own initiative, Warden Beeler "must have" asked SIS Technician Fall to prepare the memo because the memo is dated one day after the October 17th meeting in which Warden Beeler told FAUSA Raphaelson about the MCC's proposal to build the non-contact visiting areas. The agency further argues that Mr. Raphaelson "must have" expressed interest in obtaining the drug test results for the cooperating El Rukns housed on the 6th floor because (1) Warden Beeler delivered the Rosenthal memo to Raphaelson's office on October 18, 1989, the day after they discussed the proposal to build the non-contact visiting areas, (2) all cooperating El Rukn inmates on the 6th floor were given drug tests on October 17th, the very day Beeler and Raphaelson discussed building the non-contact visiting areas, and (3) the El Rukn cooperators are the only inmates to whom the Rosenthal memo pertains (in fact, the memo is titled "URANALYSIS [sic] TEST RESULTS FOR THE SIX 'EL RUKN' INMATES HOUSED ON THE SIXTH FLOOR"). (*See* Agency File at tab 6a-20.)

The agency contends the evidence supports an inference that FAUSA Raphaelson subsequently told the appellant about Warden Beeler's concerns about drug use by El Rukn cooperators. The agency's first letter of decision succinctly sets forth the agency's argument:

> The close temporal connection between Warden Beeler's personal conversation with FAUSA Raphaelson about security on the sixth floor of the MCC, Raphaelson's conversation with [the appellant] later on October 17 relaying Beeler's concerns about "contraband," and the almost immediate preparation and delivery on October 18 of the Rosenthal Memorandum gives rise to a reasonable inference that Warden

> Beeler discussed El Rukn drug use with Raphaelson, who then requested that the Rosenthal Memorandum be prepared before discussing the matter with [the appellant]. Although neither [the appellant], Raphaelson, nor Beeler recall discussing the El Rukns specifically in any of these conversations, the circumstances suggest that these conversations did take place. If Beeler and Raphaelson did not discuss the El Rukns, why would Beeler, upon returning to the MCC, have his staff prepare a memorandum dealing solely with the El Rukn witnesses (who . . . represented only a portion of sixth floor inmates) and deliver it immediately to Raphaelson? Why also would FAUSA Raphaelson speak to [the appellant], the lead El Rukn prosecutor, about Warden Beeler's "security concerns?" It is simply illogical that Warden Beeler would have sent the Rosenthal Memorandum to FAUSA Raphaelson without first raising its contents [i.e., the El Rukns' positive drug tests] with him orally. And once apprised that El Rukn witnesses had tested positive, it is highly improbable that Raphaelson would fail to mention that fact during his subsequent conversation with [the appellant].

(*See* Agency File at tab 4a, page 6.)

Analysis of Beeler's Meeting with Raphaelson

There is no evidence indicating that the appellant ever saw the MCC memos listing reasons for building non-contact visiting areas on the 6th and 11th floors. Although these memos show that Warden Beeler was aware of recent positive drug tests on the 6th and 11th floors, the agency must prove that Warden Beeler's knowledge of positive drug tests was actually communicated to the appellant with sufficient clarity for the appellant to suspect that cooperating El Rukn inmates could be using illegal drugs. But there is no evidence showing that Warden Beeler directly communicated to the appellant information indicating that cooperating El

Rukn inmates had tested positive for illegal drugs. Rather, the agency relies on a series of inferences to prove that Warden Beeler told FAUSA Raphaelson about drug problems on the 6th floor and that Raphaelson likely relayed Warden Beeler's concerns to the appellant in a subsequent conversation. Thus, the agency's argument (that the appellant was orally advised of El Rukn positive drug tests) is based on circumstantial evidence. Although circumstantial evidence may be used to satisfy an agency's burden of proof, an inference allowable from such evidence depends on the strength of the circumstantial evidence. *See Creer v. U.S. Postal Service*, 62 M.S.P.R. 656, 659 (1994). As explained below, the circumstantial evidence is not sufficiently strong to support the inference the agency urges upon the Board.

Neither the appellant, FAUSA Raphaelson, nor Warden Beeler recall discussing the El Rukns specifically in any conversation that occurred in mid-October 1989. Moreover, the specific nature of Warden Beeler's October 17, 1989 discussion with FAUSA Raphaelson is open to conjecture. Warden Beeler's testimony describing the specific nature of his October 17th discussion with FAUSA Raphaelson is ambiguous. Under direct examination by the agency's attorney at the MSPB hearing, the following testimony was elicited from Warden Beeler:

> Question: Now would you please describe for the Board your conversation with Mr. Raphaelson about the 6th floor matter?

> Beeler: In my memory, going back to the conversation, we talked about putting the non-contact visiting room up. I remember talking in general regarding why we needed to do it, and the only specific comment that I remember during the conversation was [Mr. Raphaelson] saying, 'Do what you have to do, Art.'
>
> Question: Do you -- you mentioned that you remember why you had to [build the non-contact visiting rooms]. Could you just restate that?
>
> Beeler: To stop contraband from the institution.
>
> Question: In the conversation, did you discuss positive drug tests with Mr. Raphaelson?
>
> Beeler: I don't remember specifically, ma'am.
>
> Question: What was the princi[pal] focus of the conversation?
>
> Beeler: The focus was building of the non-contact visiting room, and the reasons why we had to build a non-contact visiting room, and to educate [Mr. Raphaelson] of why we were doing it and what our purpose [was], so, in fact, if something came up in court or through another avenue, that there was a -- that there was knowledge in the United States Attorney's office of what we were proceeding with.
>
> Question: Now, based on this conversation with Mr. Raphaelson, did you make him aware that the drug problem -- of the drug problems on the 6th and 11th floors?
>
> Beeler: I am sure I did, ma'am.

(MSPB tr. at 23.) During his cross examination several minutes later, Warden Beeler testified:

> I can't tell you what conversation took place other than to tell you that Ira said, 'Do what you have got to do, Art.'

(MSPB tr. at 75.)

A review of the above-quoted portions of Warden Beeler's testimony shows that he did not independently recall telling FAUSA Raphaelson about positive drug tests or drug problems on the 6th floor. Moreover, Warden Beeler's testimony -- that he advised FAUSA Raphaelson of drug problems on the 6th floor during their October 17, 1989 discussion -- was elicited by a leading question. The Board has frequently discounted the reliability of testimony that is elicited from a witness by means of a leading question posed by the representative of the party who called the witness. *See, e.g., Zeidat v. Department of Veterans Affairs*, 59 M.S.P.R. 106, 109 (1993); *Parsons v. Department of the Air Force*, 21 M.S.P.R. 438, 441-42 (1984); *Riethmaier v. Department of the Air Force*, 6 M.S.P.R. 73, 75 (1981). Accordingly, in light of Warden Beeler's professed lack of memory regarding the specific details of his October 17th discussion with FAUSA Raphaelson, I discount the reliability of Warden Beeler's assertion that he is "sure" he and Raphaelson discussed drug problems on the 6th and 11th floors of the MCC. At best, Warden Beeler's testimony at the MSPB hearing shows that he and Raphaelson may have discussed general "drug problems" and the availability of contraband on the 6th and 11th floors of the MCC, rather than actual positive drug tests by cooperating El Rukns inmates.

In addition to the ambiguous nature of Warden Beeler's testimony, FAUSA Raphaelson did not confirm that Warden Beeler mentioned positive drug tests on the 6th floor. Although Mr. Raphaelson recalled a discussion with Warden Beeler concerning the MCC's proposal to construct

non-contact visiting areas at the MCC due to security concerns for contraband passing during contact visits, FAUSA Raphaelson did not recall Warden Beeler specifically referring to the 6th floor or identifying any inmates (including El Rukn cooperators) during their conversation on October 17th. (MSPB tr. at 2067-68.) In fact, Mr. Raphaelson testified he was not informed in October 1989 that cooperating El Rukn inmates had tested positive for illegal drugs or used illegal drugs. In addition, Mr. Raphaelson testified he does not recall discussing drug use by El Rukn cooperators with anyone in October 1989. Mr. Raphaelson's inability to recall discussions in October 1989 concerning El Rukn cooperators' drug use weakens the strength of an inference that Warden Beeler told him about drug use by cooperating El Rukn inmates.

The strength of the inference -- that Warden Beeler told FAUSA Raphaelson about drug use by cooperating El Rukn inmates -- is also weakened by evidence showing that Warden Beeler was more concerned with the federal judiciary's potential adverse reaction to newly constructed non-contact visiting areas than he was with informing the U.S. Attorney's office that cooperating El Rukn inmates were testing positive for illegal drugs. As Warden Beeler explained while testifying at the MSPB hearing, the focus of his conversation with Mr. Raphaelson was the MCC's reasons for building the non-contact visiting rooms. (MSPB tr. at 18, 23.) And FAUSA Raphaelson testified that Warden Beeler was concerned with insuring that the U.S. Attorney's office would be prepared to defend the decision to build

non-contact visiting areas in the event prisoners or judges objected. (MSPB tr. at 2066-67, 2085.)

The two MCC memos listing the reasons for building the non-contact visiting rooms also indicate that Warden Beeler was not focused on illegal drug usage by El Rukn cooperators. The reasons listed in the memos do not reference illegal drug use by cooperating El Rukn inmates. (Agency File at tabs 4c-43 & 4c-44.) In fact, the memos make no references to cooperating El Rukn inmates. In addition, illegal drug use is just one of several reasons that the memos list for the construction project. The other reasons include physical assaults, sexual encounters, and the lack of a full-time guard to observe all visits. Moreover, the memos refer to building non-contact visiting areas on the 6th "and 11th floors" of the MCC. Thus, the new visiting areas were not limited to areas that housed only cooperating El Rukn inmates -- the 11th floor housed no El Rukn cooperators, and the 6th floor housed non-El Rukn inmates in addition to the El Rukn cooperators. Had the memos more precisely referenced the cooperating El Rukn inmates and indicated that they had tested positive for drugs, it would be easier to infer that Warden Beeler told FAUSA Raphaelson about drug use by cooperating El Rukn inmates during their October 17, 1989 discussion of the MCC's proposal to build non-contact visiting areas on the 6th and 11th floors of the MCC.

Conclusion: Beeler's Discussion with Raphaelson

In short, the evidence shows that Warden Beeler's concern about notifying the U.S. Attorney's office of the proposed construction of the non-contact visiting areas focused on insuring that the U.S. Attorney's office would be prepared to defend the MCC's decision to build the non-contact visiting areas in the event prisoners or judges objected. The evidence indicates that Warden Beeler was not primarily concerned with advising Mr. Raphaelson that 6th-floor inmates in general, or El Rukn cooperators in particular, had tested positive for drugs. Rather, drug use by inmates in general was one of several reasons for proposing construction of the non-contact visiting areas. Under the circumstances, given Warden Beeler's ambiguous testimony and FAUSA Raphaelson's inability to recall Warden Beeler specifically referencing positive drug tests by inmates on the MCC's 6th floor, I find the evidence does not adequately support an inference that Warden Beeler discussed El Rukn drug use with FAUSA Raphaelson during their discussion on October 17, 1989.

Raphaelson's Communication with Appellant

The testimony of neither FAUSA Raphaelson nor the appellant supports the agency's assertion that Mr. Raphaelson must have told the appellant of Warden Beeler's concerns about drug problems on the 6th floor. Even though the appellant and FAUSA Raphaelson met repeatedly during the week of October 19, 1989, because they were participating in plea negotiations with the cooperating El Rukn inmates, Mr. Raphaelson testified he has no specific recollection of a conversation with the appellant in which they discussed

narcotics use by El Rukns confined in the MCC. (*See* Agency File at tab 4b-80, pp. 1231-32 of Raphaelson's post-trial testimony.) And the appellant testified that Mr. Raphaelson did not mention positive drug tests by cooperating El Rukn inmates. (MSPB tr. at 3251.)

The strength of the inference the agency asks the Board to draw, i.e., that Mr. Raphaelson told the appellant of Warden Beeler's specific reasons for building non-contact visiting areas on the 6th and 11th floors, is also diminished by the fact that Mr. Raphaelson and the appellant had many urgent matters to discuss at the time. The plea negotiations in which they were involved were intense because plea agreements had to be executed before the El Rukn indictments could be returned; and the indictments were scheduled to be returned on Thursday October 19, 1989 -- just two days after Beeler and Raphaelson discussed building the non-contact visiting areas. In addition to his involvement in the plea negotiations, the appellant was coordinating a plan (to be executed immediately upon issuance of the indictments) to raid the El Rukn headquarters and arrest, arraign, and incarcerate approximately 50 of the defendants who would be covered by the indictments. To accomplish these objectives, the appellant had to coordinate the activities of many law-enforcement agents, arrange for extra U.S. Marshals, insure the MCC had space to accommodate the defendants, and insure that enough U.S. Magistrates were available to hold bond hearings for the El Rukns targeted for arrest. Moreover, issuance of the indictments was about to be

delayed, which necessitated rescheduling the logistical plans and accentuated concerns for maintaining the security of the planned raid and mass arrests because a large number of people knew the indictments and mass arrests were imminent. In short, the many pressing matters confronting the appellant and Mr. Raphaelson at the time weakens the inference that they discussed in any detail the specific reasons for Warden Beeler's proposal to build non-contact visiting areas on the 6th and 11th floors.

Conclusion: Oral Communication of Beeler's Concerns to Appellant

In summary, there is no evidence showing that Warden Beeler directly communicated to the appellant information indicating that cooperating El Rukn inmates had tested positive for illegal drugs. And the circumstantial evidence is open to too many other reasonable inferences to strongly support an inference that news of the positive drug tests was orally relayed from Warden Beeler through FAUSA Raphaelson to the appellant. For example, Warden Beeler's ambiguous testimony on this point was elicited by leading questions. In addition, the record shows that the topic Warden Beeler discussed with FAUSA Raphaelson was not directly focused on references to positive drug tests by cooperating El Rukn inmates. And Mr. Raphaelson does not recall being informed in October 1989 of drug use by cooperating El Rukn inmates. Given the fact that plea negotiations were transpiring at the time, Mr. Raphaelson likely would have remembered this information if Warden Beeler had told him that cooperating El Rukn inmates had

tested positive for illegal drugs. Moreover, Mr. Raphaelson likely would have relayed this information to others, such as U.S. Attorney Valukas, who also likely would have remembered receiving notice of the positive drug tests at the time. In fact, the agency makes a similar argument in the first letter of decision.

> . . . once apprised that El Rukn witnesses had tested positive, it is highly improbable that Raphaelson would fail to mention that fact during his subsequent conversation with [the appellant].

(*See* Agency File at tab 4a, page 6.) Because it is so unlikely that Mr. Raphaelson would forget the positive drug tests if had been advised of such information during the plea negotiations, Mr. Raphaelson's failure to recall the positive drug tests strongly indicates that he was not informed of the positive drug tests at that time and tends to show that he did not orally relay this information to the appellant in October 1989. For the foregoing reasons, I find that the circumstantial evidence does not establish that FAUSA Raphaelson more likely than not relayed to the appellant Warden Beeler's concern about a drug problem on the 6th floor where the El Rukn cooperating witnesses were being housed.

Written Notification of Positive Drug Tests

The agency further builds its circumstantial case -- that the appellant knew of the positive drug tests -- on evidence showing that Warden Beeler delivered the Rosenthal memo to FAUSA Raphaelson's office on October 18, 1989. The agency infers from this that FAUSA

Raphaelson forwarded the memo to the appellant. As noted earlier, the appellant denies seeing the Rosenthal memo in October 1989.

Rosenthal Memo Processed Through Raphaelson's Office

Warden Beeler testified that he personally delivered the Rosenthal memo to FAUSA Raphaelson's office on October 18, 1989.[23] The agency contends that upon his receipt of the memo, FAUSA Raphaelson almost immediately routed copies of the memo to both the appellant and AUSA Lawrence Rosenthal. Mr. Rosenthal was assigned to the criminal division, but he was not a member of the OCDETF task force. In October 1989, AUSA Rosenthal was working on a case against a Cook County Circuit Court Judge (Thomas Maloney) who was accused of accepting a bribe from the El Rukn street gang to fix a murder case in which El Rukns were defendants.

Warden Beeler testified that because Mr. Raphaelson was not in his office on October 18th, Warden Beeler left the memo with Mr. Raphaelson's secretary, Cindy Ward, telling her to "give it to Ira." Warden Beeler testified that he did not tell Ms. Ward to give the memo to anyone else.

There is virtually no dispute that Warden Beeler delivered the Rosenthal memo to FAUSA Raphaelson's

23. Warden Beeler's contemporaneous diary entry confirms this date. (*See* Agency File at tab 5b-5, pp. 120-21.)

office on October 18, 1989. Nevertheless, Mr. Raphaelson testified he does not recall seeing the Rosenthal memo. His secretary, Ms. Ward, does recall seeing the memo in October 1989, because the memo was "out of the ordinary." (MSPB tr. at 172.) But Ms. Ward testified she does not recall how she received the memo or what she did with the memo, including whether she made photocopies. (MSPB tr. at 172.) Ms. Ward further testified she would have had no idea to whom to route the memo and she does not recall Mr. Raphaelson identifying to whom she should send the memo. (MSPB tr. at 177-78.) In fact, Ms. Ward did not know the identity of any El Rukn cooperating witnesses nor did she know which AUSA's were assigned to the El Rukn investigation. In addition, there is no documentary evidence (such as a routing slip) indicating that the Rosenthal memo was sent to the appellant. In fact, the appellant's name does not even appear on the Rosenthal memo, which is addressed from MCC Lt. Charles Mildner to MCC Warden Beeler. Consequently, there is no direct evidence showing that the Rosenthal memo was forwarded to the appellant from Mr. Raphaelson's office.

Nevertheless, the agency argues that Ms. Ward's routine practice for processing mail supports an inference that the Rosenthal memo was forwarded to the appellant from Mr. Raphaelson's office. Ms. Ward testified she routinely gave all incoming mail to Mr. Raphaelson, who expeditiously reviewed it before telling Ms. Ward where to forward the

mail. Ms. Ward testified she did not forward Mr. Raphaelson's mail to anyone without his instructions.

The agency argues that the "most natural conclusion" to draw from Ms. Ward's routine practice is that she gave Mr. Raphaelson the memo and he told her to send copies of the Rosenthal memorandum to both the appellant and AUSA Rosenthal because, at the time, they were the only two AUSA's in charge of ongoing matters involving the cooperating El Rukn inmates. In fact, Mr. Raphaelson testified that had he seen the Rosenthal memo (which he does not recall), he would have directed it to the appellant. But, because Ms. Ward did not know who should get the memo, Mr. Raphaelson had to have actually seen and read the Rosenthal memo in order to give Ms. Ward the information necessary for her to forward the memo to the appellant. Consequently, the viability of the inference that Ms. Ward "must have" sent the Rosenthal memo to the appellant will be substantially weakened if the agency cannot prove that Mr. Raphaelson actually saw the Rosenthal memo.

Raphaelson's Recollection of Rosenthal Memo

Mr. Raphaelson testified he does not recall seeing the Rosenthal memo in 1989 and he does not recall discussing the Rosenthal memo with anyone in 1989. Mr. Raphaelson's inability to recollect seeing the memo is significant because, as discussed immediately below, the evidence indicates that Mr. Raphaelson likely would have remembered the Rosenthal memo had he seen it in October 1989.

On the date Warden Beeler delivered the Rosenthal memo to Mr. Raphaelson's office, Mr. Raphaelson's attention was focused on executing plea agreements with the cooperating El Rukn inmates. Because U.S. Attorney Anton Valukas had assigned Mr. Raphaelson to lead the plea negotiations for the U.S. Attorney's office, Mr. Raphaelson was in the midst of negotiating plea agreements with the very El Rukn cooperators who were listed in the Rosenthal memo as having tested positive for illegal drugs. In fact, Evans and Harris were actually physically present for plea negotiations in the U.S. Attorney's office on October 18 and 19, 1989. Moreover, the plea negotiations were intense because the grand jury indictments of the El Rukns were scheduled to be returned that very week and U.S. Attorney Valukas would not approve issuing the indictments if the cooperating El Rukn inmates did not first sign plea agreements. Consequently, Mr. Raphaelson would have likely noticed, and remembered, information showing positive drug tests by cooperating El Rukn inmates if such information had come to his attention at the time. In fact, Mr. Raphaelson testified that positive drug tests by cooperating witnesses would have raised a material issue that he would have discussed with U.S. Attorney Valukas during the plea negotiations. (MSPB tr. at 2091.) Yet, Mr. Raphaelson testified that during the two- to three-week period of intensive plea negotiations, he was not informed that any cooperating El Rukn inmates had tested positive for illegal drugs. (MSPB tr. at 2062-63.)

Mr. Raphaelson's testimony was corroborated by Mr. Valukas, who testified Mr. Raphaelson never mentioned that cooperating El Rukn inmates had tested positive for drugs. In fact, Mr. Valukas does not recall Mr. Raphaelson telling him about drug use by any MCC inmates. (MSPB tr. at 664.) If these matters had been discussed at the time, it is likely that Mr. Valukas would recall references to the positive drug tests.

Given the nature and extent of Mr. Raphaelson's involvement in the plea negotiations, if he had seen the Rosenthal memo in mid-October 1989, he more than likely would recall seeing the memo and discussing it during the plea negotiations. Thus, Mr. Raphaelson's inability to recall seeing the Rosenthal memo suggests that he did not see the memo in October 1989. In addition, Mr. Raphaelson's failure to mention the Rosenthal memo (or the positive drug test results listed therein) during the plea negotiations also suggests that he did not see the Rosenthal memo in October 1989.

The agency challenges Mr. Raphaelson's credibility and argues that Mr. Raphaelson may have wished to conceal the positive drug tests listed in the Rosenthal memo because he did not want to raise an issue that could derail the plea negotiations. I ascribe little weight to this argument. The evidence does not show that Mr. Raphaelson had any reason to conceal the positive drug tests. First of all, Mr. Raphaelson had minimal personal stake in the outcome of either the plea negotiations or the El Rukn investigation.

The appellant was in charge of the entire El Rukn investigation; Mr. Raphaelson was not even a member of the OCDETF task force. Mr. Raphaelson only became involved in the El Rukn plea negotiations at the behest of U.S. Attorney Valukas because Mr. Raphaelson was a former Assistant Cook County State's Attorney (and the State's Attorney was a party to the plea negotiations), he had experience negotiating plea agreements, and he was a senior member of the U.S. Attorney's office who understood Mr. Valukas' view on how to conduct the negotiations.[24] (MSPB tr. at 664-65.)

In addition to the fact that FAUSA Raphaelson had little demonstrable stake in the outcome of the plea negotiations or the El Rukn investigation, Mr. Raphaelson is, according to the agency, the person who asked the MCC to prepare the Rosenthal memo. If Raphaelson were trying to conceal the positive drug tests, (a) it is unlikely he would have asked Warden Beeler to prepare the Rosenthal memo, which documents the positive "unauthorized" test results, and (b) it is unlikely Mr. Raphaelson would have disseminated the memo to other AUSA's (such as Mr. Rosenthal). It is also unlikely that Mr. Raphaelson would have asked Warden Beeler to actually send the memo to the U.S. Attorney's office. All

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24. In addition, the appellant explained that the prosecution team decided to limit the appellant's involvement in the plea negotiations because his close working relationship with the cooperating inmates would be jeopardized by placing him in the position of delivering bad news about the length of the prison terms that the government was insisting upon including in their plea agreements. (MSPB tr. at 3237-38.)

such actions would have been incompatible with the goal of concealing the positive drug tests.

Under the circumstances, I find credible Mr. Raphaelson's testimony that he does not recall seeing the Rosenthal memo and he does not recall being otherwise informed in 1989 of positive drug tests by cooperating El Rukn inmates.

The agency argues that an inference that FAUSA Raphaelson saw the memo is supported by the fact that he made no follow-up contact with Warden Beeler after Beeler delivered the Rosenthal memo to Mr. Raphaelson's office. The agency argues that because Mr. Raphaelson "must have" asked Warden Beeler for the information contained in the memo, Mr. Raphaelson would have initiated a follow-up call to Warden Beeler if Mr. Raphaelson did not receive the memo.

Although the agency's argument has some merit, the argument depends on an inference that Mr. Raphaelson actually asked Warden Beeler for the information contained in the memo -- a fact that is not supported by any direct evidence. Indeed, the absence of any follow-up contact between Mr. Raphaelson and Warden Beeler supports an inference that Mr. Raphaelson never requested the information and never saw the memo. The memo contained information that raised questions to which Mr. Raphaelson would likely have sought answers. For example, the Rosenthal memo shows that when it was prepared on October 18th, the MCC had not yet received results from drug tests

that were administered to all cooperating El Rukn inmates on October 17th.[25] If, as the agency contends, FAUSA Raphaelson actually asked Warden Beeler for the drug-test results of cooperating El Rukn inmates (with whom Mr. Raphaelson was negotiating plea agreements at the time), it is probable that Mr. Raphaelson would have been interested in discovering the results of the drug tests conducted on the very date he allegedly asked for the information. Under these circumstances, the absence of any follow-up contact between Mr. Raphaelson and Warden Beeler (or any other MCC employee) makes it more probable that Mr. Raphaelson did not see the Rosenthal memo in 1989 and, in fact, did not even ask Warden Beeler for the information contained in the memo.

Erroneous Routing of Rosenthal Memo

The place in which the Rosenthal memo was finally discovered (some three years after Warden Beeler delivered it to Mr. Raphaelson's office) and the documents to which it was attached also indicate that Mr. Raphaelson neither saw the memo nor sent the memo to the appellant in October 1989. If Mr. Raphaelson had forwarded the Rosenthal memo to the appellant, a copy of the memo would likely have been found somewhere in the El Rukn case file.[26] But a thorough search

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25. All of the October 17, 1989 drug tests were negative.

26. It is unlikely the appellant destroyed the Rosenthal memo upon receipt because the appellant could not have known whether other copies of the memo were still floating around the MCC or the U.S. Attorney's office. Moreover, it would be illogical for the appellant to destroy the memo in order to conceal the positive drug tests from Mr. Raphaelson --

of the El Rukn case file failed to uncover a copy of the memo.

The U.S. Attorney's office maintained a huge file dedicated to the El Rukn investigation and prosecution. The documents contained in the El Rukn file filled enough boxes to fill an entire 9' by 9' room.[27] In October 1992, several months after the El Rukn trials ended, paralegal Kathleen Skagerberg was assigned the task of finding the Rosenthal memo. According to Ms. Skagerberg, she conducted a massive, time-consuming search during which she examined every El Rukn file and every document contained in every El Rukn file.[28] (*See* Appellant's Exhibit 27 & Agency File at tab 5d-366.) After days of searching, Ms. Skagerberg did not find the Rosenthal memo in any of the El Rukn file boxes. She then began searching other files and finally found the Rosenthal memo in AUSA Dean Polales' office on November 5, 1992. The memo was located in a file box related to the Albert Tocco prosecution, in a folder labeled "prison mail

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who, according to the agency, was the very person who sent the document to the appellant.

27. Corinda Luchetta testified that when she organized the El Rukn documents after the first six trials, she filled eleven 4-drawer filing cabinets and four 5-shelf floor-to-ceiling bookcases.

28. In her affidavit, Ms. Skagerberg explained that she undertook the search anticipating she might be called to testify in court and, therefore, wanted to insure she could state under oath with "total confidence" that she had examined every file to the best of her ability. (*See* Appellant's Exhibit 27.)

to Tocco." The Rosenthal memo was stapled to copies of a letter Mr. Tocco received from a former MCC prisoner who was then incarcerated in Terre Haute, Indiana. (Agency File at tab 5d-366.)

Lawrence Rosenthal was the AUSA assigned to the *Tocco* investigation in October 1989. (The appellant never worked on the Tocco case.) Mr. Rosenthal recalled seeing the Rosenthal memo in October 1989 and has always assumed that the documents were stapled together when he received them. (Agency File at tab 4b-31(iii).) But Mr. Rosenthal testified that the information contained in the Rosenthal memo did not pertain to any aspect of the *Tocco* investigation. And the Tocco letter bore no relevance to the El Rukn investigation or prosecution. In fact, Mr. Rosenthal stated he did not know why he received the Rosenthal memo. (*See* Agency File at tab 4b-31(iii).) The fact that Mr. Rosenthal did not know why he received the memo and the fact that the Rosenthal memo did not pertain to the *Tocco* case indicate that the memo was mistakenly routed to Mr. Rosenthal. In addition, it is reasonable to infer that Mr. Rosenthal received the Tocco documents and the Rosenthal memo as a single package because, when Ms. Skagerberg discovered the memo, it was stapled to the Tocco documents. Because these documents bore no relationship to each other, Mr. Rosenthal would have had no reason to keep them together other than the fact that he received them as a single package. In fact, Mr. Rosenthal stated that he believes he received the *Tocco* documents together with the Rosenthal memo. (Agency File at tab 4b-31(iii).) And if

the documents were together when Mr. Rosenthal received them, they probably became attached to each other before they were routed out of Mr. Raphaelson's office.

It is not unreasonable to infer that the Tocco documents and Rosenthal memo came together while being processed through FAUSA Raphaelson's office. Both the Rosenthal memo and the cover letter to the *Tocco* documents are dated October 18, 1989. According to Warden Beeler, he delivered the Rosenthal memo to FAUSA Raphaelson's office on October 18 and the *Tocco* letter documents to Raphaelson's office on October 19.[29] The agency contends it is highly unlikely the Tocco documents became attached to the Rosenthal memo in Mr. Raphaelson's office because the large number of documents that passed through the office would reduce the chances of the two documents coming into contact with each other. But there is little evidence to show the extent of the amount of mail that passed through Mr. Raphaelson's office. Ms. Ward merely testified that Mr. Raphaelson received a lot of correspondence. (MSPB tr. at 181.) Thus, when the *Tocco* documents were delivered to Mr. Raphaelson's office, they could have been placed on top of the Rosenthal memo and become attached to each other inadvertently. Moreover, contrary to the agency's argument, a high volume of mail makes it all the more likely that unrelated documents would be piled together in the same stacks; and all the more likely that a stapling error could be made, attaching the

29. Warden Beeler's contemporaneous diary entry confirms this date. (*See* Agency File at tab 5b-5, pp. 121-22.)

disparate documents. Moreover, this error could well have gone undetected given the swiftness with which Mr. Raphaelson reviewed his correspondence.

Ms. Ward's routine practice lends further strength to the inference that the Tocco documents and Rosenthal memo came together in FAUSA Raphaelson's office. Ms. Ward testified that when she sent more than one set of documents to a specific AUSA, she routinely placed each document in a separate inter-office envelope. Given this routine practice -- coupled with the fact that Mr. Rosenthal kept the *Tocco* documents stapled to the Rosenthal memo -- it is reasonable to infer that Mr. Rosenthal received these unrelated documents in the same inter-office envelope. And if Ms. Ward placed the *Tocco* documents and the Rosenthal memo into the same inter-office envelope, these documents very likely were attached to each other when Mr. Raphaelson reviewed his correspondence.

In fact, Mr. Raphaelson even speculated that if the Rosenthal memo had been attached to the Tocco documents, he very well could have overlooked the content of the Rosenthal memo, concluded that it was part of the *Tocco* documents, and directed Ms. Ward to send the entire package only to Mr. Rosenthal.

Conclusion: Circumstantial Evidence of Written Notification of Positive Drug Tests

In summary, the evidence indicating that the Rosenthal memo was erroneously sent to Mr. Rosenthal substantially

reduces the strength of the inference the agency bases on Ms. Ward's routine practice, i.e., that Mr. Raphaelson "must have" seen the Rosenthal memo and that he "must have" told Ms. Ward to send a copy of the memo to the appellant. Consequently, I ascribe little weight to the agency's contention that Mr. Raphaelson must have seen the Rosenthal memo. And if Mr. Raphaelson did not see the Rosenthal memo, he could not have told Ms. Ward to whom she should send the memo. In the absence of any such direction from Mr. Raphaelson, Ms. Ward would not know where to send the Rosenthal memo. Thus, Ms. Ward's routine practice does not provide strong support for inferring that she sent a copy of the Rosenthal memo to the appellant.

Other factors also support an inference that Mr. Raphaelson did not see the Rosenthal memo and did not forward the memo to the appellant. As discussed above, Mr. Raphaelson's failure to recall seeing the memo (or even discussing positive drug tests by El Rukn cooperators with anyone in October 1989) strongly indicates that he was not aware of positive drug tests. In addition, the lack of any follow-up communication between Mr. Raphaelson and Warden Beeler indicates that Mr. Raphaelson did not see the memo (or even request its preparation).

In summary, I conclude the circumstantial evidence is not sufficiently strong to support the inference the agency urges upon the Board, i.e., that the Rosenthal memo was forwarded from FAUSA Raphaelson's office to the appellant. *See Creer v. U.S. Postal Service*, 62 M.S.P.R. 656, 659

(1994) (inference allowable from circumstantial evidence depends on strength of the circumstantial evidence).

Appellant's Behavior After El Rukn Inmates Tested Positive

Miscellaneous Evidence Indicating Appellant Lacked Knowledge of Positive Drug Tests

The appellant denied seeing the Rosenthal memo prior to the conclusion of the El Rukn criminal trials, and the appellant claimed FAUSA Raphaelson never mentioned receiving a memo listing positive drug tests by cooperating El Rukn inmates. (MSPB tr. at 3251.) The appellant's denial is consistent with various aspects of the circumstantial evidence in this case. For example, AUSA Ted Poulos, who worked with the appellant virtually all day, every day for nearly two years testified he never heard the appellant mention the positive drug tests or express concern that drug use by cooperating witnesses could jeopardize the El Rukn prosecution. (MSPB tr. at 2885.) In addition, there is no documentary evidence (such as a routing slip) indicating that the Rosenthal memo was sent to the appellant. In fact, neither the appellant's name nor the name of any other employee in the U.S. Attorney's office appears on the Rosenthal memo. In addition, the appellant's secretary, Nancy Green, does not corroborate the agency's contention that the appellant received the Rosenthal memo. Ms. Green testified she did not see the Rosenthal memo before appearing at the MSPB hearing in late 1997. According to Ms. Green, she routinely opened the appellant's mail, looked through every page, and read all correspondence not marked personal and confidential. Ms. Green testified she would

have recalled the Rosenthal memo if she had seen it. Ms. Green's testimony is entitled to some weight because Ms. Ward, FAUSA Raphaelson's secretary, testified she remembered seeing the Rosenthal memo because it was "out of the ordinary." (MSPB tr. at 172.)

Moreover, to accept the agency's theory -- that the appellant received the Rosenthal memo but concealed the information contained therein -- we must accept the proposition that the appellant was trying to conceal the positive drug tests from FAUSA Raphaelson, who was spearheading plea negotiations for the U.S. Attorney's office and who also was the very person who (according to the agency) sent the memo to the appellant. The incongruous notion that one would attempt to conceal information from the very person who sent it further saps strength from the inference urged on the Board that the appellant received, but concealed, the Rosenthal memo. *See Hillen v. Department of Army*, 35 M.S.P.R. 453, 451 (1987).

Incentive to Conceal the Positive Drug Tests

The agency argues that the appellant's denial of receiving the Rosenthal memo in mid-October 1989 is not credible because he had a strong incentive to conceal the cooperators' positive drug tests in order to preserve the El Rukn indictments, which were scheduled to be returned in mid-October 1989. These extensively detailed and complex indictments were the culmination of years of work by the appellant and his colleagues on the OCDETF task force. But the return of the indictments hinged on the successful

negotiation of plea agreements with the cooperating El Rukn inmates because U.S. Attorney Valukas would not approve returning the indictments until the cooperating El Rukn inmates executed plea agreements.[30]

Fear of State's Attorney Spoiling Plea Agreements

The process of negotiating plea agreements with the cooperating El Rukn inmates was complicated by the fact that representatives of the Cook County State's Attorney's office were included in the negotiations. Mr. Valukas explained that he included the Cook County State's Attorney as a party to the plea negotiations because the plea agreements were going to extinguish a large number violent criminal acts (including many murders) that were chargeable as criminal offenses under state law. (MSPB tr. at 679.) Because these murders would be extinguished by the plea agreements, Mr. Valukas decided to give the State's Attorney "veto power" over the length of the prison terms that would be included in each cooperator's plea agreement.

The agency argues that the appellant was afraid to disclose the positive drug tests during plea negotiations because that information could have killed the chances of returning an indictment. The agency contends the appellant had a vested interest in saving the indictments because of

30. Mr. Valukas explained that executing plea agreements before indictments are returned prevents a cooperating witness from holding the U.S. Attorney hostage to new post-indictment demands in order to insure the witness' continued cooperation.

the enormous amount of effort he had devoted to the El Rukn investigation and the prospect that successful prosecution of such a major case would be a "career" achievement for him. According to the agency, the appellant believed the State's Attorney would use the positive drug tests to insist on stiffer prison terms than the cooperators would accept, which would prevent the parties from reaching plea agreements, which in turn would kill the indictments because of the U.S. Attorney's insistence on executing plea agreements before the indictments were returned. The agency argues that the State's Attorney wanted to derail the proposed El Rukn indictments because the State's Attorney was upset with the U.S. Attorney's office in general (for proposing a high-profile prosecution of the infamous El Rukn street gang based on murders that were chargeable under state law) and the appellant in particular (for previously disclosing evidence that led to the reversal of two murder convictions won by the State's Attorney's office).[31] In fact, representatives of the State's Attorney's office took a hard stance at the beginning of the plea negotiations, initially demanding that each cooperator agree to accept natural life in prison. After intense negotiations, the

31. While debriefing the cooperating El Rukn inmates during the investigation, two cooperators admitted committing a murder for which two other individuals (Robert Brown and Elton Houston) had been convicted and sentenced to 35 years in prison. (*See* Agency File at tab 5b-7.) These convictions were overturned after the appellant disclosed the cooperators' admissions. According to AUSA Ted Poulos, the State's Attorney's office carried a grudge against the appellant because it was embarrassed when the murder convictions it had won were overturned. (MSPB tr. at 2078.)

cooperators did execute plea agreements that included stiff prison terms, which the appellant later characterized as "Draconian."[32] (Agency File at tab 4b-56(iii), page 2.)

Although there is little dispute the appellant was an ambitious prosecutor and was reluctant to watch the El Rukn indictments slip away after years of hard work, the evidence indicates the appellant was not motivated to conceal the positive drug tests out of fear that the State's Attorney would insist on stiff prison terms during the plea negotiations. The evidence shows that, when determining the appropriate length of the prison terms upon which to insist, the State's Attorney was primarily interested in the murders committed by the El Rukn cooperators. FAUSA Raphaelson testified that when the State's Attorneys and AUSA's evaluated the prison terms to be included in the El Rukns' plea agreements, drug use was not a significant issue. According to Mr. Raphaelson, murders had a much more significant impact on the length of the prison terms. (MSPB tr. at 2126-27.) Mr. Raphaelson was corroborated by AUSA Ted Poulos, who was assisting the appellant in the El Rukn investigation. AUSA Poulos testified that the State's Attorney's representatives focused on the cooperators'

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32. The final plea agreements included the following prison terms: Henry Harris - a minimum of 20 years up to any term of years or life and $750,000 fine; Derrick Kees - 99 years on federal charges and 55 years on state charges; Harry (footnote 32 cont'd) Evans - 30 to 50 years; Earl Hawkins - 60 years (in addition to his prior death sentence); Eugene Hunter - 25 years to life; and Jackie Clay - 80 years to life. (*See* Agency File at tabs 5d-308, 5d-153, and 5d-61 at 6167, 6177, & 6190.)

violent criminal histories during the plea negotiations. (MSPB tr. at 2883-84.) According to Mr. Poulos, the cooperators' drug-dealing careers and personal drug use were not even mentioned during the plea negotiations. In addition to Mr. Poulos, Sergeant David O'Callaghan, a member of the OCDETF task force since 1988 and a Chicago Police Officer with thirty years of experience, testified that the murders to which the cooperating El Rukn inmates confessed were the focus of the plea negotiations in terms of the number of years of imprisonment that the parties would agree to include in the plea agreements.

FAUSA Raphaelson also testified that the positive drug tests ultimately would have had no impact on the plea agreements even if the tests had been known to the State's Attorney. (MSPB tr. at 2133.) Mr. Raphaelson's opinion is entitled to substantial weight because not only was he the lead AUSA assigned to head the plea negotiations, but also he was a former Cook County State's Attorney. Consequently, he is familiar with factors the State's Attorney would view as significant during plea negotiations. Moreover, Mr. Raphaelson's testimony was corroborated by AUSA Ted Poulos, who testified that, in his opinion, the State's Attorney's office would not have altered its plea-negotiation stance had it known of the positive drug tests. (MSPB tr. at 2883-84.)

The agency argues that the Board should ascribe little weight to the appellant's claim (that the positive drug

tests would not have impacted the plea negotiations) because the appellant did not support his argument with any evidence from representatives of the State's Attorney's office who participated in the plea negotiations. I find this argument unpersuasive. First of all, the agency has the burden of presenting sufficient evidence to convince the trier of fact that the substance of the charge is more likely true than not true. *See Jackson v. United States Postal Service*, 48 M.S.P.R. 472, 474-75 (1991). The appellant does not have the burden of disproving the charges against him. *See Gary v. Veterans Administration*, 19 M.S.P.R. 247, 250 (1984); *Powell v. Department of the Interior*, 2 M.S.P.R. 513, 516 (1980); *see also Bradley v. Department of Veterans Affairs*, No. CH-0752-97-0440-I-1, 1998 WL 162173, at 1 (M.S.P.B. Mar. 26, 1998) (appellant's failure to call a witness is irrelevant where witness's absence affects probative weight of agency's evidence).

The agency also sought to attack the credibility of the appellant and his witnesses by arguing that their testimony (that the positive drug tests would not have mattered during the plea negotiations) should not be believed because the appellant and his witnesses have an obvious incentive to make such a claim because they are trying to resurrect reputations that were damaged by the findings of the Department of Justice's Office of Professional Responsibility as well as by the publicity surrounding the judicial findings of prosecutorial misconduct.

Beyond propounding this bare theory, the agency produced no evidence to show that the appellant's witnesses were less than truthful. Under the circumstances, I find Poulos, Raphaelson, and O'Callaghan credible when they assert that the State's Attorney was primarily interested in the violent crimes committed by the cooperating El Rukn inmates. Moreover, their opinions are supported by objective evidence. The record shows that the State's Attorney was not a party to Harris' plea agreement -- even though Harris was admitting to a substantial amount of drug dealing. (*See* Agency File at tab 5d-308, Harris' plea agreement; Appellant's Exhibit 4C, Harris' 48-page admission; Agency File at tab 4b-167, Second Superseding Indictment.) Since the State's Attorney was not a party to Harris' plea agreement, the State's Attorney could hardly have used Harris' positive drug test as leverage to insist upon a stiff prison sentence in order to prevent the parties from executing a plea agreement.

Of the two cooperating El Rukn inmates who tested positive for drugs, the State's Attorney was a party only to Evans' plea agreement. In his grand jury statement, Evans admitted to a lifetime of drug dealing as well as involvement in one dozen murders. (*See* Appellant's Exhibit 4B, Evans' 62-page confession; *see also* Agency File at tab 4c-52, pp. 176.) Given Evans' long record of drug dealing and his admission to committing multiple murders, it is highly unlikely that one isolated "unauthorized" positive drug test (occurring some five months prior to the plea negotiations and followed by several negative drug tests,

which, incidentally, were listed in the Rosenthal memo) would be a key factor in determining the prison sentence to which the State's Attorney would agree.

In summary, the evidence shows that, in the eyes of the State's Attorney, the length of the prison terms rested on far graver considerations than the two, isolated positive drug tests listed in the Rosenthal memo. Consequently, I ascribe no weight to the agency's argument that the appellant had a strong motive to conceal the positive drug tests during the plea negotiations because of his strong desire to preserve the El Rukn indictments and his fear that the State's Attorney would use the positive drug tests to insist on long prison terms that the cooperating El Rukn inmates would find unacceptable.

Fear of Effect on Cooperator's Credibility

The agency also contends that the appellant had a strong motive to suppress the cooperating El Rukn inmates' positive drug tests because he was concerned that the U.S. Attorney would not approve returning the El Rukn indictments because the positive drug tests damaged the credibility of the cooperating witnesses. There is no dispute that the appellant believed the cooperating El Rukn inmates' continued cooperation was critical to the successful prosecution of the El Rukn defendants. (*See* Agency File at

tab 4b-56(iii), page 2 of appellant's July 9, 1990 memo to ATF Supervisory Criminal Inspector Arthur Ahrens.[33])

To support its argument -- that the appellant believed the positive drug tests damaged the credibility of the cooperating witnesses so badly that the U.S. Attorney might not approve returning the El Rukn indictments -- the agency cited post-trial hearing testimony in which the appellant explained why he could not have seen the Rosenthal memo in 1989:

> I spent all my time [in the days surrounding October 19 and 20, 1989] focused on the plea negotiations and discussions, and I'm saying that there's no way that if somebody had told me during that period of time that the people who I was devoting my entire attention to had come up dirty at the MCC I would have failed to catch it, notice it, bring it to the attention of Valukas, Ira Raphaelson, and the individual defense lawyers who were involved. It would have been like a red flag in front of a bull, and I would have done something or looked into it.
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> * * *
>
> It [i.e., the positive drug tests cited in the Rosenthal memo] could have impacted on our ability to return the indictment at all. If somebody had said to me that the MCC has made a determination that two of your major witnesses have been using drugs or have used drugs, I

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33. The appellant's memo addresses problems arising from the government's inability to meet its financial obligations to (footnote 33 cont'd) the cooperating El Rukns. In his memo, the appellant expresses frustration at the distraction caused by the El Rukn cooperators' constant complaints about lack of money for basic necessities and presents a fervent plea to eliminate the continuing bureaucratic delays in obtaining the small amount of money necessary to eliminate these distracting complaints.

> would question whether or not those persons were reliable, whether I could return such a huge indictment that was crafted in large part around their testimony, or their expected testimony. I would have certainly made inquiries of them and their counsel or the MCC as to what the situation was with respect to that. I would never have taken a chance in a million years of returning an indictment against, you know, sixty-plus El Rukns based on their testimony, with this knowledge, without having inquired further.

(Agency File at tab 4b-109, pp. 149-51.)

The agency contends that in this testimony, the appellant acknowledges the possibility that positive drug tests could have seriously damaged the credibility of cooperating El Rukn inmates Evans and Harris. But this quoted passage of the appellant's testimony must be viewed in the context of his immediately following explanation in response to further examination by the court:

> The Court: You considered the information in the Rosenthal memo to be material to determining whether an indictment ought to be returned?
>
> Hogan: No. I say that it would have been something that I would have explored pursuant to the -- my concerns about the reliability of those witnesses in that situation.
>
> The Court: So you would have been concerned about their reliability if you had known this information?
>
> Hogan: I would have been concerned about their health. I would not want to return an indictment of that nature with somebody who could die from an overdose. And, from a legal standpoint, their positive tests is something I would have explored.

(Agency File at tab 4b-109, page 152.)

Although the appellant's post-trial testimony shows he would have readily recognized the Rosenthal memo as worthy of his immediate attention in 1989, the totality of the appellant's testimony does not show (as the agency seeks to imply) that the appellant acknowledged the positive drug tests posed a fatal threat to the cooperating witnesses' credibility. The totality of the appellant's remarks show that he would have considered the information worthy of further exploration in relation to the cooperating witnesses' reliability. The testimony of several other witnesses who were involved in the El Rukn plea negotiations confirms that the positive drug tests would not have been considered a fatally serious blow to the credibility of the cooperating El Rukn inmates. Although Anton Valukas, the U.S. Attorney at the time, confirmed that the positive drug tests were an important matter that would have been worthy of discussion if known in October 1989, Mr. Valukas confirmed the appellant's contention that the positive drug tests would not, in the end, have affected the return of the indictment. In his sworn statement to the ARDC, Mr. Valukas stated:

> [I]f the El Rukns were in fact, you know, getting drugs in the MCC or something like that, you know, kind of a big so what? . . . If that really happened, why wouldn't you simply report? What's to hide? Here you have people who have a life that is so miserable to begin with, this isn't going to increase or decrease any aspect. I mean it's a nonevent.

(*See* Agency File at tab 5d-6, pp. 50-51.) And at the MSPB hearing, Mr. Valukas testified that the U.S. Attorney's office would not have simply abandoned a cooperating El Rukn

inmate as a prosecution witness on the basis of a positive drug test. (MSPB tr. at 678.) Rather, Mr. Valukas testified that evidence that a cooperating witness was using drugs in the MCC would have been considered "in terms of the deal" that would be included in the plea agreement. (MSPB tr. at 665, 678.)

In addition to Mr. Valukas' testimony, the testimony of three AUSA's shows that the positive drug tests were recognized to possess very limited impeachment value. AUSA Dean Polales testified that the positive drug tests would have had no effect on the credibility of the cooperating El Rukn inmates because there was so much other impeachment material with which to cross-examine Harris and Evans. (MSPB tr. at 1754.) In Mr. Polales opinion, the positive drug tests would not have made "a darn bit of difference with any jury." (MSPB tr. at 1754.) In addition to Mr. Polales, AUSA Ted Poulos testified that the positive drug tests "would barely have been a blip on the radar screen, in the grand scheme of things," and would not have impacted U.S. Attorney Valukas' view of whether to return the indictments. (MSPB tr. at 2882-84.) In Mr. Poulos' opinion, the positive drug tests (had they come up) would have had no impact on the indictments because the real focus of the cooperating witnesses' credibility problems was the fact they were life-long career criminals, hit-men, and drug dealers. (MSPB tr. at 2882-83.) And finally, former FAUSA Ira Raphaelson testified that because Harris and Evans were confessed multiple murderers and drug dealers, their

personal use of drugs would not have made them any more or less worthy of belief. (MSPB tr. at 2090-91.)

I ascribe substantial probative weight to the opinions expressed by AUSA Polales and former AUSA's Poulos and Raphaelson because their opinions are consistent with the testimony of Mr. Valukas and are supported by the nature and extent of Harris' and Evans' long record of bad acts. The impeachment value of Evans' and Harris' two positive drug tests pales in comparison to their past records, which include virtual lifetimes of drug dealing and other criminal activity of the most violent sort. (*See* pages 30-33 of this decision.) Moreover, the positive drug tests occurred five months before the plea negotiations; and the positive tests were followed by several negative tests, including tests administered on October 17, 1989, the very week the plea negotiations were being finalized.[34] Thus, the positive drug tests were isolated and remote in time from the date that the El Rukn indictments were scheduled to be returned. Moreover, Mr. Valukas, who was the U.S. Attorney responsible for returning the indictments, testified that the positive drug tests were a "nonevent." Thus, it is unlikely that he would have walked away from the El Rukn indictments out of concern for the credibility of the cooperating witnesses

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34. Harris' "unauthorized" positive test of May 11, 1989 was followed by three negative tests on June 21, July 20, and October 17, 1989. (*See* Agency File at tab 4b-152.) Evans' "unauthorized" positive drug test on April 12, 1989 (which (footnote 34 cont'd) later proved to be "authorized") was followed by four negative tests on May 10, July 20, August 21, and October 17, 1989. (*See* Agency File at tab 4b-152.)

simply because they had been implicated in further drug use while incarcerated and cooperating with the government. This conclusion is confirmed by the fact that the U.S. Attorney's office decided to continue to prosecute the El Rukn defendants even after their motions for new trials were granted and everyone was aware of the positive drug tests listed in the Rosenthal memo (as well as a host of previously undisclosed benefits that had allegedly been provided to the cooperating witnesses[35]). And even after the positive drug tests were disclosed, the El Rukn defendants were, in the words of AUSA Nancy Needles, the Executive Assistant to the U.S. Attorney, "all convicted in record time."[36] (MSPB tr. at 1340.)

Based on the record before the Board, I conclude that revelation of the positive drug tests to U.S. Attorney Valukas in October 1989 would not have jeopardized the return of the El Rukn indictments. Consequently, I find a preponderance of the evidence does not show the appellant,

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35. The alleged additional benefits included: (a) gifts of cash, clothing, and radios; (b) birthday parties; (c) allowing unsupervised contact visits that were not available inside the MCC; (d) unlimited free phones calls from the U.S. Attorney's office; and (e) a sexually explicit phone call between a cooperating El Rukn inmate and a paralegal who worked for the appellant. (*See* Agency File at tab 4c-53, pp. 89-108.)

36. The guilty verdicts in the *U.S. v. Franklin* also demonstrate that Harris' positive drug test (which was the only truly "unauthorized" result of the two drug tests at issue in this appeal) did not deter the jury from crediting Harris' testimony. (*See* discussion on pages 33-34 of this decision.)

had he been aware of the Rosenthal memo, would have believed the positive drug tests so damaged the credibility of the cooperating El Rukn inmates that U.S. Attorney Valukas would not approve returning the El Rukn indictments. Accordingly, I find insufficient support in this record for the agency's assertion that the Board should discredit the appellant's claim -- that he did not receive the Rosenthal memo and was not aware of the positive drug tests in October 1989 -- because he had a strong motive to conceal the positive drug tests in order to preserve the El Rukn indictments. Moreover, even if the appellant did have a motive to conceal the positive drug tests, the existence of a motive does not mean the appellant was aware of and concealed the positive drug tests.

Appellant's Handling of Trial Subpoenas

The appellant argues that his lack of awareness of the positive drug tests is reflected by the manner in which he responded to subpoenas issued during the El Rukn trials. For example, the subpoena issued by the court during the *U.S. v. Andrews* trial on August 9, 1991 was specifically directed at obtaining Bureau of Prison records relating to disciplinary matters of any kind for the cooperators and all dates and results of drug testing for the cooperators. (*See* Appellant's Exhibit 7.) The appellant testified that MCC Paralegal Charvella Christmas called him on August 13th to inform him that regulations covering inmates in the witness protection program made it difficult for the MCC to produce

records for some of the El Rukn cooperators. (MSPB tr. at 3416-17.) Ms. Christmas also told the appellant that when faced with this type of situation in the past, the MCC consulted attorneys with the Bureau of Prisons as well as the U.S. Attorney. The appellant testified that because he had never confronted this situation before and knew nothing about the regulations referenced by Ms. Christmas, he referred the matter to the Civil Division in the U.S. Attorney's office because he knew the Civil Division generally represented federal agencies. As a result, responsibility for responding to the *Andrews* subpoenas was assigned to Linda Wawzenski, an AUSA in the Civil Division.

Ms. Wawzenski testified that she handled the subpoenas independent of the appellant. According to Ms. Wawzenski, she does not recall discussing the issue of complying with the subpoenas with the appellant or any other member of the El Rukn trial team. In addition, both the appellant and AUSA Poulos (who was assisting the appellant as trial counsel during the *Andrews* trial) testified that they were in and out of the courtroom during AUSA Wawzenski's colloquies with the judge, electing to take smoke breaks when Ms. Wawzenski appeared in court to respond to the subpoenas.[37] (MSPB tr. at 3419.) In short, the record shows that the appellant did not interfere with either Ms. Wawzenski's or the MCC's attempts to comply with the *Andrews* subpoenas.

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37. As a result of the *Andrews* subpoenas, the MCC produced a copy of the August 15, 1991 Mildner memo, which is discussed below on page 75 and following.

The appellant testified that the subject of drug use by the cooperating El Rukn inmates was also raised during the *U.S. v. Franklin* trial in March 1992. According to the appellant, the MCC was not in compliance with a subpoena for records regarding urinalysis testing for Henry Harris. As a result, Robert Hafer, the Executive Assistant to the MCC's Warden was questioned by the judge about the availability of records from the MCC. The appellant testified that Mr. Hafer told the judge subpoenas for the records in question had to be directed to one of two offices in Washington, D.C., because Harris was in the witness protection program. (MSPB tr. at 3427.) Both the appellant and AUSA Poulos testified that at that point, the appellant volunteered to "cut through the red tape" and contact Paul Schultz, the Chief of the Bureau of Prison's Inmate Monitoring System in Washington, D.C. (MSPB tr. at 3064-65, 3427.) As a result of the appellant's efforts, the Bureau of Prisons FAXed Harris' records to Chicago within two days.[38] (MSPB tr. at 3065, 3427.)

In summary, the subpoenas described above were specifically directed at records documenting urinalysis testing of the cooperating El Rukn inmates. The appellant did not oppose these subpoenas. In fact, the record shows the appellant relinquished control over compliance with the *Andrews* subpoenas, which were independently handled by an

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38. These records contained Harris' disciplinary record for his positive drug test on May 11, 1989.

AUSA in the Civil Division of the U.S. Attorney's office. The record also shows that the appellant voluntarily cut through "red tape" during the *Franklin* trial to expedite production of Bureau of Prison documents that revealed Harris' May 11, 1989 positive drug test. The manner in which the appellant responded to these subpoenas indicates that he was not trying to conceal the positive drug tests.

Mildner Memo Listing Positive Drug Tests

The appellant claims he did not become aware that cooperating El Rukn inmates had tested positive for drugs until August 15, 1991, during proceedings in the third El Rukn trial, *U.S. v. Andrews*. But the appellant contends that MCC officials informed him at the time that the positive results were authorized.[39]

As the trial in *U.S. v. Andrews* was drawing to a close in August 1991, the positive drug test results for Harry Evans and Henry Harris came to light in a document that has now come to be known as the "Mildner memo." The Mildner memo, dated August 15, 1991, was prepared by Lt. Charles Mildner, who was the MCC's Special Investigative Agent (SIA), Criminal Investigator.[40] SIA Mildner prepared the

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39. The appellant claims he first learned that Harris' May 11, 1989 positive drug test was "unauthorized" in April 1992 during proceedings in *U.S. v. Franklin* (the last of the seven El Rukn criminal trials) when the Bureau of Prisons produced additional inmate records in response to a subpoena.

40. As SIA, Lt. Mildner was mainly responsible for conducting staff investigations and major inmate

memo in response to a subpoena ordering the production of documents covering the cooperating El Rukn inmates' disciplinary records and listing the results of all drug tests administered to them after January 1, 1989. (*See* Appellant's Exhibit 7.) The Mildner memo is similar to the Rosenthal memo in that it lists the results of drug tests administered to the cooperating El Rukn inmates and identifies the same positive test results listed in the Rosenthal memo. (*See* Agency File at tab 5d-65.) But the Mildner memo does not indicate whether the positive test results were "authorized" or "unauthorized." The Mildner memo merely shows that Harry Evans tested positive for "Codeine Morphine" on April 12 and May 10, 1989, and that Henry Harris tested positive for "Morphine" on May 11, 1989. (*See* Agency File at tab 5d-65.)

In claiming that he was informed that the positive test results were authorized, the appellant presented the following account of the pertinent facts. The appellant testified that when he first saw the Mildner memo on August 15, 1991 during the *Andrews* trial, he summoned Robert Hafer, the Executive Assistant to the MCC's Warden, to the courtroom. When Mr. Hafer arrived, they discussed the memo with AUSA's Ted Poulos and Pat King, who were co-counsels with the appellant in that trial. The appellant testified Mr. Hafer told them that the MCC disciplines inmates for positive drug test results if there are no medical reasons

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investigations, as well as gathering intelligence from the inmate population.

for the positive results. (MSPB tr. at 3423.) According to the appellant, Mr. Hafer stated that he did not recall any disciplinary hearings for Evans' and Harris' positive drug tests. In addition, Executive Assistant Hafer assured the appellant that Hafer would know whether Evans and Harris had been disciplined for positive drug tests because Hafer's duties at the MCC included arranging disciplinary hearings for inmates. (MSPB tr. at 3423-24.) Mr. Hafer further stated that the MCC had no disciplinary records based on Evans' and Harris' positive drug tests because the positive results were due to medication. (MSPB tr. at 3423-24.)

AUSA Pat King corroborated the appellant's testimony. During the post-trial hearings in October 1992, AUSA King testified that on August 15, 1991, MCC Executive Assistant Hafer and MCC Paralegal Charvella Christmas told him that the positive drug tests of Harris and Evans listed in the Mildner memo were caused by medication. (*See* Agency File at tab 4b-130, pp. 83-86.)

AUSA Ted Poulos also corroborated the appellant's account of Mr. Hafer's explanation for the positive drug tests listed in the Mildner memo. Mr. Poulos testified that when the Mildner memo was admitted into evidence without a witness during the *Andrews* trial, the appellant and Mr. Poulos met Executive Assistant Hafer outside the courtroom and discussed the Mildner memo. According to AUSA Poulos, Mr. Hafer explained that when an MCC inmate tests positive for drugs, the MCC first determines whether the result is due to authorized medication. If not, the MCC conducts a

disciplinary hearing. Mr. Poulos testified that Mr. Hafer said he was the only person who would do such a disciplinary hearing, and he did not conduct a disciplinary hearing on either Evans or Harris. AUSA Poulos testified that based on Mr. Hafer's explanations, he believed that Evans and Harris were not disciplined for the positive results of their drug tests because there were legitimate reasons for the positive results. (MSPB tr. at 3057.) AUSA Poulos further testified that when he asked Mr. Hafer to check the MCC's files, Mr. Hafer said the MCC did not have files for these witnesses. Mr. Poulos testified that immediately after their discussion, Mr. Hafer took the stand in the *Andrews* trial and gave the same explanation for Evans' and Harris' positive drug test results. (*See* Agency File at tab 4b-129; Agency File at tab 4b-138(ii), pp. 5764-66.)

Mr. Hafer corroborated the testimony of the appellant and AUSA's Poulos and King. In his August 18, 1993 affidavit, Mr. Hafer averred that he told Judge Conlon the MCC did not have disciplinary records for Harris' and Evans' positive drug tests. (*See* Agency File at tab 4b-24.) Mr. Hafer also admitted telling Judge Conlon that he was the unit manager and knew that Evans and Harris had not received disciplinary actions for their positive drug tests. (*See* Agency File at tab 4b-24.) Although Mr. Hafer's affidavit admits that his representations to Judge Conlon were false, Mr. Hafer denied that his "negligence to produce the requested documentation for Judge Conlon was 'tacitly' approved or requested" by the appellant. (*See* Agency File at tab 4b-24, page 2, par. 3.)

Because the appellant's account of his conversation with Mr. Hafer was corroborated by AUSA's Poulos and King, as well as by Mr. Hafer's affidavit, I find the appellant's account credible. *See Hillen*, 35 M.S.P.R. at 460.

Conclusion: Mildner Memo

Although the Mildner memo lists two positive drug tests for "Codeine Morphine" and one for "Morphine," the memo does not state that these positive results are unauthorized. In addition, the record shows that Robert Hafer told the appellant that Evans' and Harris' positive drug-test results must have been authorized. The appellant's reliance on Mr. Hafer's representation was reasonable given Mr. Hafer's position as Executive Assistant to the MCC's Warden and the fact that Hafer's statement was corroborated by the MCC's paralegal, Charvella Christmas. Therefore, because officials with the MCC advised the appellant that Harris' and Evans' positive drug test results were authorized, I conclude that the information listed in the August 1991 Mildner memo did not put the appellant on notice that the cooperating El Rukn inmates were engaging in the use of illicit drugs in the MCC.

Telephone Inquiry Regarding MCC Disciplinary Procedures

The agency contends that the appellant demonstrated his knowledge of the El Rukn cooperators' positive drug tests when he called the MCC in 1989 to inquire about disciplinary procedures the MCC follows when inmates test positive for

illegal drugs. The agency argued that both the timing and subject matter of the call are consistent with a desire to ascertain information about how the MCC would handle a positive drug test by an El Rukn cooperating witness -- a desire that presupposes knowledge or suspicion of a positive test result.

To prove the facts upon which this argument is based, the agency relies on statements given by Edward Russell, who was the MCC's Special Investigative Supervisor (SIS) in 1989. As SIS, Mr. Russell coordinated the MCC's drug-testing program and conducted investigations of MCC staff and inmates.

At the MSPB hearing, Mr. Russell testified that the appellant called to inquire about the MCC's urinalysis program and the disciplinary process employed when an inmate tests positive for drugs. According to Mr. Russell, the appellant did not ask about any specific inmate, but wanted to know whether an inmate's positive drug-test result would lead to disciplinary action. According to Mr. Russell, he told the appellant a positive test result for illicit drugs requires the filing of a "class 100" incident report, which must be resolved through a disciplinary hearing conducted by a disciplinary hearing officer.

The appellant testified he does not recall discussing MCC drug testing procedures with Mr. Russell in 1989. The appellant contends that the conversation to which Mr.

Russell refers occurred in 1987, some two years before the cooperating El Rukn inmates' positive drug tests.

Mr. Russell has given several different statements relating to the time period in which the phone conversation in question occurred. Two of his prior statements fit the agency's theory of the case. In a November 4, 1993 affidavit, Mr. Russell stated that his conversation with the appellant "may have occurred after the time that Evans and/or Harris informed [Russell] that they thought they were going to have a dirty urine [test] or did have a dirty urine [test]." (Agency File at tab 5d-193, page 2, par. 6.) This scenario places the conversation in the April/May 1989 time period. Five days after executing his affidavit, Mr. Russell was interviewed by the FBI. According to the FBI's written summary of the November 9, 1993 interview, Mr. Russell claimed to have received the call from the appellant sometime during the six-month period immediately preceding his September 1989 transfer out of the MCC. (*See* Agency File at tab 5d-340, page 5.)

Mr. Russell has given other statements that do not fit the agency's theory of the case and are inconsistent with Mr. Russell's November 1993 statements. For example, at the MSPB hearing Mr. Russell testified that his phone discussion with the appellant took place in 1988 or 1987. Mr. Russell explained that he is "pretty sure" the conversation occurred in 1987 because he associates the conversation with the trial of Jeff Fort, the founder and leader of the El Rukn street gang. (MSPB tr. at 554-55 & 571-72.) According to

Mr. Russell, Jeff Fort's 1987 trial was memorable because the charges focused on El Rukns purchasing missiles from Libya to bomb government buildings in Chicago. (MSPB tr. at 554-55 & 571-72.) In addition, Jeff Fort tested positive for drugs while incarcerated in 1987 and received a disciplinary detention. (MSPB tr. at 560.)

When Mr. Russell testified during the El Rukn post-trial hearings on October 15, 1992 (approximately one year prior to the above-described November 1993 statements), he stated that he never discussed Harris or Evans' positive drug test results with the appellant or any other person outside the Bureau of Prisons. (*See* Agency File at tab 4b-97, pp. 209-10.) And prior to testifying during the post-trial hearings in October 1992, Mr. Russell was interviewed by AUSA John Hartmann. During this pre-trial interview, Mr. Russell said he remembered dealing with the appellant by phone in 1989, but did not specifically recall the topic of their conversation. (MSPB tr. at 551-52 & Agency File at tab 4b-13.)

Conclusion: Telephone Call

Mr. Russell's statements about his phone call with the appellant are inconsistent. In November 1992, Mr. Russell said he did not recall the specifics of the conversation he claimed to have had with the appellant in 1989. One year later, in November 1993, Mr. Russell claimed that he remembered the specific topic of their conversation, telling the FBI that he and the appellant discussed the MCC's drug testing procedures during a phone call that "may have

occurred in April or May of 1989. But at the MSPB hearing in 1997, Mr. Russell testified that his most current recollection places his discussion with the appellant in 1987 during the Jeff Fort trial.

Mr. Russell's inconsistent statements raise a cloud of doubt over the truthfulness of all of his statements. *See Hillen v. Department of Army*, 35 M.S.P.R. 453, 459 (1987). Moreover, the agency did not submit any evidence (other than Mr. Russell's statements) to prove when the appellant and Mr. Russell discussed the MCC's drug-testing procedures. Therefore, because Mr. Russell's most recent recollection, stated under oath, places the conversation in 1987, I find that the agency did not prove that the phone conversation described by Mr. Russell "more likely than not" took place after the cooperating El Rukn inmates tested positive for illegal drugs in 1989. Thus, I conclude the agency failed to prove that Mr. Russell's phone conversation with the appellant supports an inference that the appellant knew about the positive drug tests prior to the end of the El Rukn criminal trials.

Conclusion: **Weight of Circumstantial Evidence**

In summary, there is no direct evidence showing that Warden Beeler directly communicated to the appellant information indicating that cooperating El Rukn inmates had tested positive for illegal drugs. In addition, former FAUSA Raphaelson does not confirm that he relayed such information from Warden Beeler to the appellant. Consequently, one must accept a series of inferences based on circumstantial evidence in order to conclude the appellant was aware of the El Rukn cooperators' positive drug tests. These inferences include:

1. Warden Beeler and FAUSA Raphaelson discussed drug use by cooperating El Rukn inmates in October 1989 when Beeler advised Raphaelson of the MCC's proposal to build non-contact visiting areas;

2. FAUSA Raphaelson subsequently told the appellant about Warden Beeler's comments about inmates obtaining contraband on the MCC's 6th floor;

3. FAUSA Raphaelson and the appellant discussed the fact that El Rukn cooperators on the 6th floor tested positive for illegal drugs;

4. FAUSA Raphaelson asked Warden Beeler to prepare the Rosenthal memo listing the results of drug tests administered to the cooperating El Rukn inmates at the MCC;

5. FAUSA Raphaelson saw and read the Rosenthal memo;

6. FAUSA Raphaelson told his secretary (Cindy Ward) to send the memo to the appellant;

7. Ms. Ward sent the memo to the appellant; and

8. FAUSA Raphaelson mentioned the positive drug tests (listed in the Rosenthal memo) to

the appellant during plea negotiations in October 1989.

As discussed in greater detail above, a close analysis of the underlying facts casts a substantial degree of doubt on the strength of each inference. For example, the circumstantial evidence supporting the inference that Warden Beeler told FAUSA Raphaelson about drug use by the cooperators' on the MCC's 6th floor when they met in October 1989 is weak because the evidence indicates Warden Beeler was more concerned with the federal judiciary's potential adverse reaction to newly constructed non-contact visiting areas than he was with informing the U.S. Attorney's office that cooperating El Rukn inmates were testing positive for illegal drugs. In fact, the memos listing the reasons for building the non-contact visiting areas do not even state that cooperating El Rukn inmates have tested positive for illegal drugs. In addition, there are a number of gaping holes in the circumstantial evidence supporting an inference that the Rosenthal memo was actually forwarded to the appellant from FAUSA Raphaelson's office. Much of the objective evidence strongly indicates that the Rosenthal memo was mistakenly routed to AUSA Rosenthal, which saps the strength from an inference that the appellant received the Rosenthal memo based on Ms. Ward's routine practice for routing mail. Moreover, former FAUSA Raphaelson does not recall seeing the Rosenthal memo in October 1989 nor does he recall any references to El Rukn cooperators' positive drug tests during the plea negotiations in October 1989. Mr. Raphaelson very likely would have remembered any references to such positive drug tests because, at that very time, he

was negotiating plea agreements with the two cooperating El Rukn inmates who tested positive.

In addition, the agency did not show that the appellant had a strong motive to conceal the positive drug tests in order to insure that U.S. Attorney Valukas gave his approval to going forward with the El Rukn indictments. Moreover, the agency did not establish that the appellant's knowledge of the Mildner memo in August 1991 put him on notice that the cooperating El Rukn inmates had received "unauthorized" positive drug test results. The record shows the appellant could reasonably rely on the assurance of the MCC Warden's Executive Assistant, Robert Hafer, that the positive drug tests resulted from authorized medication. Finally, the evidence does not prove that the appellant called MCC SIS Edward Russell in 1989 to inquire about disciplinary procedures for MCC inmates who test positive for illegal drugs.

In conclusion, a detailed analysis of the circumstantial evidence underlying the inferences the agency urges upon the Board shows the inferences lack sufficient reliability to conclude that the appellant more likely than not was aware of the positive drug test results cited in the Rosenthal memo prior to the end of the El Rukn trials.

Rosenthal Conversation

The agency relies on one piece of direct evidence that, if true, would provide sufficient basis to prove that the appellant more likely than not was aware of the contents of

the Rosenthal memo in October 1989. This evidence consists of AUSA Lawrence Rosenthal's testimony that he and the appellant discussed the information contained in the Rosenthal memo in October 1989. The agency's first letter of decision states that Mr. Rosenthal's testimony "provides the only direct evidence" of the appellant's knowledge of the positive drug tests and "is for that reason perhaps the central piece of evidence" in the entire matter. (Agency File at tab 4a, page 7.)

Mr. Rosenthal testified that he received the Rosenthal memo shortly after the memo was prepared on October 18, 1989, but he did not know who sent him the memo or why he received it. Mr. Rosenthal testified that he recognized one name listed in the memo, Earl Hawkins, a cooperating El Rukn inmate who was also a potential witness in a case Mr. Rosenthal was investigating.[41] Mr. Rosenthal also knew the appellant was the lead prosecutor for the El Rukn investigation, and Mr. Rosenthal knew the appellant had worked closely with the cooperating El Rukn inmates. Mr. Rosenthal explained that he decided to speak to the appellant after receiving the memo because Mr. Rosenthal wanted to assure himself he was not the only AUSA who received the memo and he wanted to assure himself he was not

41. Although Mr. Rosenthal was not a member of the OCDETF task force, he was investigating allegations that a Cook County Circuit Court Judge (Thomas Maloney) had accepted a bribe to fix a murder case in which El Rukns were defendants.

responsible for initiating any action that might be necessitated by the memo.

Mr. Rosenthal further testified that he also sought out the appellant to get his opinion on a trial-strategy issue posed by the positive drug tests listed in the memo. Mr. Rosenthal explained that he faced a similar issue in a criminal case he was preparing for trial. Mr. Rosenthal testified that an incarcerated government witness in the Albert Tocco prosecution had been caught smuggling illegal drugs into the MCC. (MSPB tr. at 216-17.) Because the witness had committed a crime (illegal drug possession) after agreeing to cooperate with the government and leave his life of crime, Mr. Rosenthal felt the government witness's drug possession could adversely impact the witness's credibility at trial. Mr. Rosenthal further explained he was concerned the witness could further damage his credibility by lying when confronted with evidence of the illegal drug possession. (MSPB tr. at 210, & 222-23.) Mr. Rosenthal believed that the cooperating El Rukn inmates' positive drug tests raised similar credibility issues, and Mr. Rosenthal wanted to speak with the appellant to learn how he intended to address the credibility issues at trial.

Mr. Rosenthal testified that he spoke to the appellant near the appellant's office very shortly after receiving the memo. According to Mr. Rosenthal, the appellant was enormously busy at the time and Mr. Rosenthal had to interrupt him. (MSPB tr. at 218, 220.) Mr. Rosenthal does not recall the exact words used during his ensuing

conversation with the appellant. Mr. Rosenthal recounted "the substance" of their conversation as follows. (MSPB tr. at 304.) According to Mr. Rosenthal, his first two questions to the appellant referred "in some way" to the cooperating El Rukn inmates' positive drug tests. (MSPB tr. at 221.) From the appellant's response to Mr. Rosenthal's initial questions, Mr. Rosenthal "received the impression" that the appellant was familiar with the positive drug tests referenced in the memo. (MSPB tr. at 221.) Mr. Rosenthal then asked the appellant why Mr. Rosenthal got the memo, and the appellant said he did not know. Mr. Rosenthal then offered his opinion that the information was a problem that had to be addressed, and Mr. Rosenthal asked the appellant how he intended to deal with it. When the appellant responded by stating he did not think it was a problem, Mr. Rosenthal persisted, asserting that it was a problem because the information would be disclosed to the defense. According to Mr. Rosenthal, the appellant replied by stating, in a more forceful and impatient tone of voice, it is not a problem. (MSPB tr. 219-20.) Mr. Rosenthal explained that the conversation ended after little more than one minute because the appellant, who was enormously busy, was conveying the impression he was quite impatient with Mr. Rosenthal and no longer wished to discuss the matter with him.

At the MSPB hearing, Mr. Rosenthal recalled having the "vivid impression" (based on either the appellant's words or Mr. Rosenthal's impression of his demeanor) that the appellant was telling Mr. Rosenthal:

> What do you expect me to do about this? These people are addicts. I don't control security at the [MCC]. Short of camping out there, there is nothing I can do about it. We will just have to muddle through. But that in the big picture, he didn't think it was a problem.

(MSPB tr. at 220.)

The appellant has denied having any such conversation with Mr. Rosenthal.

Analysis

If Mr. Rosenthal's account of the conversation is to be credited, the conversation indicates that the appellant was aware of the positive drug tests listed in the Rosenthal memo. The agency's deciding official credited Mr. Rosenthal's account of the conversation over the appellant's denial. Thus, the deciding official concluded that the appellant discussed the cooperating El Rukn inmates' positive drug tests with Mr. Rosenthal in October 1989. In deciding to credit Mr. Rosenthal's account of the conversation, the deciding official, who had never spoken to Mr. Rosenthal, gave "some weight" to the three federal judges' findings that Mr. Rosenthal was more credible than the appellant. (*See* Agency File at tab 5a, page 5.) After vigorous debate at the MSPB hearing (*see* MSPB tr. at 2776-86 & 2954-65), I decided to ascribe no weight to the federal judges' findings that Mr. Rosenthal was more credible than the appellant. I ruled that I would independently evaluate

the relative credibility of the appellant and Mr. Rosenthal.[42]

The appellant testified that he has no recollection of any conversation with Mr. Rosenthal in which they discussed

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42. The following considerations formed the basis for my ruling to accord no weight to the three judges' findings that Lawrence Rosenthal was more credible than the appellant. As explained on page 25, footnote 17, this decision, the evidence, issues, burdens of proof, and policy considerations involved in the post-trial hearings are significantly different from the MSPB appeal. Moreover, the appellant was not a party to the cases litigated during the post-trial hearings. In fact, he did not even serve as the government's trial counsel during the post-trial hearings. Consequently, the appellant did not have an opportunity to either confront or cross-examine Mr. Rosenthal. In addition, during the post-trial hearings, Mr. Rosenthal's credibility was not attacked with the same degree of vigor as it was during this MSPB proceeding. In fact, the government's post-trial briefs urged the court to ignore conflicts between the testimony of Mr. Rosenthal and the appellant. According to AUSA John Hartmann (a trial counsel for the government during the post-trial hearings), the U.S. Attorney's office believed, for purposes of litigating the *Brady* issue raised during the post-trial hearings, "it did not matter really legally whether or not [the appellant] knew in particular about [the positive drug tests]" because once the Rosenthal memo was in the possession of AUSA Rosenthal, knowledge of the memo's contents could be imputed to the U.S. Attorney's office. (MSPB tr. at 450.) As explained in the government's post-trial briefs, the Rosenthal/appellant credibility dispute was irrelevant to the El Rukn defendants' motions for new trials because, under *Giglio*, 405 U.S. at 154, the prosecutor's office constitutes "an entity" and the knowledge possessed by one prosecutor in the office is attributable to all other prosecutors in the office for purposes of determining whether the government was aware of *Brady* material. (*See* Agency File at tab 4b-176, p. 9, n.3; Agency File at tab 4b-177, p. 3, n.1; Agency File at tab 4b-178, p. 8, n.5.)

positive drug tests of cooperating El Rukn inmates. The agency urges the Board to discount the appellant's claim, arguing that he has a readily apparent motive to misrepresent the facts because he is defending himself against charges of misconduct and he is attempting to overturn the agency's decision to remove him from employment. The agency's argument is not persuasive. When an appellant challenges a disciplinary action, all testimony the appellant is likely to give during an MSPB hearing (other than admissions) can be characterized as self-serving. Consequently, the Board does not discredit an appellant's testimony merely because it may be self-serving. *See Nicolette v. Department of Justice*, 60 M.S.P.R. 244, 249 (1993). Accordingly, I must consider other pertinent portions of the record in determining whether to discredit the appellant's denial that the conversation occurred. Moreover, since the agency has the burden of proving the charges it has brought against the appellant, I must also decide whether to credit Mr. Rosenthal's account of his conversation with the appellant.

The agency contends that Mr. Rosenthal's testimony is credible because he had no discernible personal or professional interest in the outcome of the El Rukn investigation. The agency further notes that Mr. Rosenthal holds no personal grudge against the appellant and, indeed, has expressed his admiration and respect for the appellant's investigation and prosecution of the El Rukn street gang. The agency also argues that Mr. Rosenthal's credibility is

bolstered by the fact he gave an accurately detailed description of the Rosenthal memo at the first El Rukn post-trial hearing in October 1992, even though he had not seen the memo for three years. (A copy of the Rosenthal memo was discovered shortly after Mr. Rosenthal testified at the first post-trial hearing.) No doubt Mr. Rosenthal's accurate description of the memo exhibits a fine memory for documents and tends to prove that Mr. Rosenthal saw the memo in 1989.[43] Nevertheless, the critical issue is not whether Mr. Rosenthal received and read the memo in 1989; the critical issue is whether Mr. Rosenthal discussed the memo with the appellant.

The record indicates that Mr. Rosenthal's memory for conversations is not as acute as his memory for the content of documents. When he testified during the El Rukn post-trial hearings in November 1992, Mr. Rosenthal did not recall discussing the Rosenthal memo with any AUSA other than the appellant. (Agency File at tab 4c-10, page 51.) But Mr. Rosenthal's recollection in this regard proved to be inaccurate. When his memory was refreshed during his deposition in 1997, Mr. Rosenthal recalled discussing the Rosenthal memo with AUSA Dean Polales in October 1989 -- which was at approximately the same time as his purported conversation with the appellant. (MSPB tr. at 393.) Mr.

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43. Some record evidence indicates that Mr. Rosenthal has an extraordinary memory. For instance, Barry Elden, a supervisory attorney in the U.S. Attorney's office, (footnote 43 cont'd) testified that Mr. Rosenthal had a remarkable memory for case citations. In addition, Mr. Rosenthal was first in his Harvard law class.

Rosenthal described his discussion with Mr. Polales as an "academic debate" over whether the *Brady* doctrine required disclosure of the El Rukn cooperators' positive drug tests. AUSA Polales, who was Mr. Rosenthal's trial partner on the Albert Tocco prosecution, testified that Mr. Rosenthal said the appellant has a problem in the El Rukn case because cooperating witnesses have tested positive for illegal drugs. But Mr. Polales does not recall Mr. Rosenthal saying he had talked to the appellant about the positive drug tests. (MSPB tr. at 1725.)

During their debate, Mr. Rosenthal argued that the positive drug tests were discoverable by the defense, but Mr. Polales disagreed. AUSA Polales argued that mere drug use is not probative of truthfulness unless (1) a cooperating witness was under the influence of drugs when observing the events that are the subject of his testimony, (2) the witness was under the influence of drugs when testifying, or (3) the illegal drug use gives rise to an inference of bias by virtue of the prosecutor's failure to discipline or criminally charge the witness for the illegal drug use. (MSPB tr. at 1724; Agency File at tab 4b-38, summary of Polales' June 20, 1995 interview, the accuracy of which he affirmed at the MSPB hearing.) Mr. Rosenthal testified that notwithstanding Mr. Polales' argument, they both agreed they would disclose the positive drug test results to the defense. Nevertheless, Mr. Polales stated that the correct legal ruling would be that the positive

drug tests alone were "not *Brady*."[44] (MSPB tr. at 1724 & 1748 for Polales' testimony; MSPB tr. at 384, 391, & 392 for Rosenthal's testimony.)

As noted above, Mr. Rosenthal did not recall his "academic debate" with AUSA Polales until 1997, which was years after Mr. Rosenthal testified during the post-trial hearings. (MSPB tr. at pp. 394-95.) The fact that Mr. Rosenthal forgot about his conversation with AUSA Polales -- a conversation that by all accounts lasted longer than Mr. Rosenthal's purported conversation with the appellant and occurred during approximately the same period of time -- casts some doubt on the reliability of Mr. Rosenthal's memory for conversations.

The reliability of Mr. Rosenthal's account of his purported conversation with the appellant is also brought into question by comments Mr. Rosenthal made during a conversation with AUSA Michael Shepard in September 1992, which was shortly before Mr. Rosenthal's appearance at the post-trial hearings. Mr. Rosenthal was in Washington, D.C., on business in September 1992 and had dinner with AUSA Shepard, a former colleague from the U.S. Attorney's office in Chicago.[45] During their dinner conversation, Mr.

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44. Mr. Polales explained that prosecutors use the term "*Brady*" to refer to material that must be disclosed to the defense.

45. Mr. Rosenthal left the U.S. Attorney's office in January 1990 for a position as Assistant Corporation Counsel for the City of Chicago.

Rosenthal and Mr. Shepard discussed the allegations that were being made against the appellant during the El Rukn post-trial hearings, which were just getting under way in Chicago. While discussing this topic, Mr. Rosenthal said he recalled having a conversation with the appellant in which they discussed the El Rukns testing positive for drugs at the MCC. According to Mr. Rosenthal, AUSA Shepard pressed him for details of the conversation and told Mr. Rosenthal the conversation was very significant information in terms of the issues being litigated during the post-trial hearings. (MSPB tr. at 390.)

On the morning of September 18, 1992, the day after AUSA Shepard's dinner conversation with the appellant, Mr. Shepard summarized Mr. Rosenthal's remarks in an e-mail message sent to AUSA Barry Elden in the U.S. Attorney's office in Chicago. (AUSA Elden was the government's lead trial counsel during the post-trial hearings.) Mr. Shepard's e-mail message states:

> Last night I had dinner with Rosenthal . . . and he made a statement to me that I now share with you. In substance, [Rosenthal] stated that he recalled having a conversation with Hogan about the fact that the El Rukns were testing positive for drugs at the MCC. From the context it sounded like the conversation with Hogan occurred at the time the results were received, but I did not ask and [Rosenthal] did not identify when the conversation with Hogan took place. The subject of whether these test results were Brady material came up in the conversation with Hogan and Hogan said they were not Brady.

(Agency File at tab 5d-314.) AUSA Shepard admitted he has no current recollection of his dinner conversation with Mr. Rosenthal. But AUSA Shepard testified that his e-mail

message attempted to accurately capture Mr. Rosenthal's remarks from the previous evening. (MSPB tr. at 3342-43.)

Mr. Rosenthal could not recall telling Mr. Shepard during their dinner conversation that the appellant told him the test results were "not *Brady*." (MSPB tr. at 388-89.) At the MSPB hearing, Mr. Rosenthal testified he believes he attempted to speculate why the drug test results had not been disclosed and "may have said something along the lines of perhaps Mr. Hogan did not consider them *Brady*." (MSPB tr. at 388-89.) I find Mr. Rosenthal's explanation unpersuasive. First of all, Mr. Rosenthal's explanation shows he does not recall his entire dinner conversation with Mr. Shepard. Mr. Rosenthal's assertion that he "may have" made a comment to AUSA Shepard speculating about the appellant's thought processes demonstrates that Mr. Rosenthal does not have a clear memory of this particular oral conversation. Moreover, Mr. Rosenthal's testimony describing his remarks to Mr. Shepard is based on his memory of a conversation that occurred approximately five years prior to his testimony; whereas AUSA Shepard's e-mail message was completed within hours after the dinner conversation. I find AUSA Shepard's virtually contemporaneous account of Mr. Rosenthal's remarks reliable because (a) Mr. Rosenthal testified that AUSA Shepard pressed him for details of his conversation with the appellant and told Mr. Rosenthal the conversation constituted very significant information, and (b) AUSA Shepard testified that he attempted to accurately capture Mr. Rosenthal's remarks from the previous evening. (MSPB

tr. at 3342-43.) In addition, Mr. Rosenthal testified that Mr. Shepard made it clear he considered the information very significant, "pressed [Mr. Rosenthal] a little bit," wanted to be sure he understood what Mr. Rosenthal said, and wanted to make sure he got the information right before forwarding it to the U.S. Attorney's office. (MSPB tr. at 387-88.) Under the circumstances, there is little reason to doubt that Mr. Rosenthal told Mr. Shepard during their dinner conversation that the appellant said the test results were "not *Brady*."

Mr. Rosenthal's MSPB testimony is not consistent with the remarks captured by AUSA Shepard's e-mail message, which states Mr. Rosenthal said the appellant told him during their October 1989 conversation that the positive drug tests were "not Brady." (Agency File at tab 5d-314.) According to Mr. Rosenthal's MSPB testimony, he and the appellant did not discuss whether or not the positive drug tests were *Brady* material. At the MSPB hearing, Mr. Rosenthal testified that disclosure of the positive drug tests was not an issue that even crossed his mind during his conversation with the appellant, and he does not recall the appellant asserting that the drug test results were not *Brady* material. (MSPB tr. at 221-22, 378.) The inconsistency between Mr. Rosenthal's comments to AUSA Shepard (claiming the appellant said the tests were not *Brady* material) and Mr. Rosenthal's MSPB testimony (asserting that he and the appellant did not discuss whether the tests had to be disclosed) casts a further cloud over the reliability of Mr.

Rosenthal's account of his purported conversation with the appellant. *See Hillen*, 35 M.S.P.R. at 459.

In addition, the reliability of Mr. Rosenthal's memory is called into question by the fact that the e-mail message shows him attributing the "not *Brady*" remark to the appellant. During his MSPB testimony, Mr. Rosenthal attributed the "not *Brady*" remark to the opinion expressed by Mr. Polales during their "academic debate" over the *Brady* implications of the positive drug tests. (MSPB tr. at 1724 for Polales' testimony; MSPB tr. at 384, 391, & 392 for Rosenthal's testimony.) According to Mr. Rosenthal's MSPB testimony recounting his conversation with the appellant, they did not debate whether the drug tests were *Brady* material that had to be disclosed. (MSPB tr. at 221-22, 378.)

Because Mr. Rosenthal had forgotten about his "academic debate" with AUSA Polales by September 1992 when Mr. Rosenthal had the dinner discussion with AUSA Shepard, the evidence indicates that Mr. Rosenthal may have mistakenly attributed Mr. Polales' "not *Brady*" remark to the appellant. In short, the evidence indicates that Mr. Rosenthal may have confused the appellant for Mr. Polales when Mr. Rosenthal told AUSA Shepard that he had discussed the positive drug tests with the appellant. The probability that such confusion occurred is not unreasonable given the marked similarities between Mr. Rosenthal's "academic debate" with AUSA Polales and Mr. Rosenthal's purported conversation with the appellant: both conversations occurred at about the

same time and both conversations were initiated by Mr. Rosenthal because of his interest in issues raised by information contained in the Rosenthal memo.

Also detracting from the reliability of Mr. Rosenthal's account of his purported conversation with the appellant is the fact the conversation was not documented for the record. Moreover, there is no evidence that Mr. Rosenthal had any occasion to either recall or recount this conversation during the 3-year period between October 1989 and September 1992, when Mr. Rosenthal told AUSA Shepard about the conversation. This long delay before recounting such a brief conversation undermines the reliability of Mr. Rosenthal's memory, especially since Mr. Rosenthal admits that he had forgotten about a very similar discussion with AUSA Polales that occurred at about the same point in time. Moreover, the mere fact that Mr. Rosenthal forgot about his conversation with Mr. Polales (which, by all accounts, lasted longer than his conversation with the appellant) casts doubt on the reliability of Mr. Rosenthal's memory for conversations. In fact, Mr. Rosenthal admitted during his MSPB testimony that he has come to believe that human memory is "very fragile" and that there is "all sorts of room" in an individual's memory, including his own, for error. (MSPB tr. at 370.) Under the circumstances, I have serious reservations about crediting Mr. Rosenthal's claim that he discussed the positive drug tests with the appellant in October 1989.

Moreover, even if Mr. Rosenthal did have the conversation with the appellant as described in Mr. Rosenthal's testimony, his description of the manner in which he raised the positive drug tests is somewhat ambiguous. Mr. Rosenthal testified that he could not recall whether he referred to the Rosenthal memo or to the drug test results. (MSPB tr. at 221.) And Mr. Rosenthal merely "received the impression" the appellant knew about the positive drug tests. (MSPB tr. at 221.) Moreover, Mr. Rosenthal stated he did not have the memo in his hands when he spoke to the appellant.[46] Thus, even if the conversation occurred as described by Mr. Rosenthal, the appellant may not have understood the point of the conversation, especially in light of the extreme brevity of the conversation, which consisted of a few short sentences in less than a minute, and the fact that the appellant was apparently impatient with Mr. Rosenthal because he was

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46. Although Mr. Rosenthal testified at the MSPB hearing that he does not recall having the memo in his possession when he spoke to the appellant (MSPB tr. at 219), Mr. Rosenthal's prior statements more clearly indicate he did not have the memo in his hands when he allegedly spoke to the appellant in October 1989. During the post-trial hearing in front of Judge Conlon in October 1992, Mr. Rosenthal testified he did not show the memo to the appellant when they talked. (*See* Agency File at tab 4c-5, page 75.) During the post-trial hearing in front of Judge Holderman in November 1992, Mr. Rosenthal testified he was "fairly confident" he did not have the memo with him when he talked to the appellant. (*See* Agency File at tab 4c-10, page 49.) And in his February 3, 1993 FBI interview, Mr. Rosenthal stated he did not bring the memo with him when he

enormously busy and distracted by other matters given the stressful circumstances of preparing for trial in several difficult and complex cases. Under the circumstances, even if the conversation occurred as described by Mr. Rosenthal, I am unwilling to ascribe great probative weight to Mr. Rosenthal's assertion that the appellant demonstrated an awareness of the cooperating El Rukn inmates' positive drug tests during their discussion.

In his written and oral replies to the notice of proposed removal, the appellant submitted evidence attacking Mr. Rosenthal's credibility and the reliability of his memory. In the agency's letter of decision, the deciding official spent several paragraphs analyzing the persuasiveness of these attacks. Although the Federal Rules of Evidence (Rule 608(b)) proscribe the use of extrinsic evidence to prove specific instances of conduct of a witness for purposes of attacking the witness's credibility, the Board is not required to strictly adhere to the Federal Rules of Evidence. *See Behensky v. Department of Transportation*, 27 M.S.P.R. 690, 696 (1985), *aff'd sub nom. Brandis v. Department of Transportation*, 795 F.2d 1012 (Fed. Cir.) (Table), *cert. denied*, 479 U.S. 1006 (1986). Moreover, in *Hillen v. Department of Army*, 35 M.S.P.R. 453, 459 (1987), the Board stated that character evidence may be used to impeach a witness on the theory that certain characteristics render a person more prone to testify

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(footnote 46 cont'd) spoke to the appellant and never showed the memo to the appellant. (*See* Agency File at tab 5d-191, page 4.)

untruthfully. This form of impeachment may be established by the witness's prior misconduct or reputation, such as previous falsification or poor reputation for truthfulness. *Hillen*, 35 M.S.P.R. at 459.

Some high-ranking members of the U.S. Attorney's office expressed reservations about Mr. Rosenthal's credibility. For example, AUSA Joan Bainbridge-Safford, who has been an AUSA in Chicago since 1978 and the Deputy U.S. Attorney in Chicago since 1991, testified that she does not have a high opinion of Mr. Rosenthal's honesty because he tends to exaggerate and is not sufficiently careful with the facts. (MSPB tr. at 1906.) On the other hand, AUSA Bainbridge-Safford has a high opinion of the appellant and has never had any reason to doubt his word on any matter. (*See* Agency File at tab 4b-185, Bainbridge-Safford's August 9, 1995 letter to the ARDC.) AUSA Nancy Needles, the Executive Assistant to the U.S. Attorney and an AUSA for approximately 20 years, testified that she lacks faith in Mr. Rosenthal's judgment and credibility because of various incidents that occurred in the U.S. Attorney's office. (MSPB tr. at 1311-16, 1349-52.)

In addition to the testimony of AUSA's Bainbridge-Safford and Needles, the former U.S. Attorney for the Northern District of Illinois, Anton Valukas, testified that Mr. Rosenthal lied to him after revealing allegations of possible marijuana use by a supervisory AUSA (an affair that came to be known as the Doe/Roe matter). (MSPB tr. at 682-83, 685.) Mr. Valukas' opinion was corroborated by David

Stetler, who was Chief of Criminal Receiving in the Appellate Division of the U.S. Attorney's office before entering private practice in October 1988. Mr. Stetler was present when U.S. Attorney Valukas interviewed Mr. Rosenthal and others while gathering information about the Doe/Roe matter. Mr. Stetler testified that Mr. Rosenthal gave U.S. Attorney Valukas two completely different stories when describing his knowledge of the Doe/Roe allegations. (MSPB tr. at 1672, 1679.) In fact, Mr. Stetler testified that he did not document statements that Mr. Rosenthal made during his last meeting with U.S. Attorney Valukas concerning the Doe/Roe matter because such a memo would make Mr. Rosenthal "look so bad." (MSPB tr. at 1658.) In addition to Mr. Stetler, former FAUSA Ira Raphaelson testified that based on statements Mr. Rosenthal made after the Doe/Roe matter was resolved, Mr. Raphaelson concluded that Mr. Rosenthal had lied to U.S. Attorney Valukas. (MSPB tr. at 2119.) Moreover, even the agency's deciding official, Associate Deputy Attorney General David Margolis, stated in his April 10, 1996 letter of decision that Mr. Rosenthal "misrepresented" the Doe/Roe incident to the U.S. Attorney. (*See* Agency File at tab 4a, page 9.)

AUSA Needles, the Executive Assistant to the U.S. Attorney, testified that one reason she lacks faith in Mr. Rosenthal's credibility is his testimony during the MSPB hearing that his involvement in the Doe/Roe matter was not fatal to his career aspirations in the U.S. Attorney's office. Mr. Rosenthal had testified that his decision to leave the U.S. Attorney's office was not related to anyone

telling him he would not be promoted. (MSPB tr. at 268-74, 345-48.) In fact, Mr. Rosenthal testified that both U.S. Attorney Valukas and FAUSA Raphaelson tried to dissuade him from leaving the office. (MSPB tr. at 347-48.) According to AUSA Needles (and several other witnesses), it was common knowledge among supervisors in the U.S. Attorney's office that Mr. Rosenthal was advised he would never be considered for a supervisory position in the office because of the Doe/Roe matter. (*See, e.g.*, MSPB tr. at 1214.) Moreover, Mr. Valukas confirmed that Mr. Rosenthal's involvement in the Doe/Roe matter doomed his chances for promotion within the office. (MSPB tr. at 674.) And former-AUSA Stetler confirmed that U.S. Attorney Valukas said that Mr. Rosenthal would never be promoted as a result of his statements during the U.S. Attorney's inquiry into the Doe/Roe matter. (MSPB tr. at 1680.) In fact, former FAUSA Raphaelson testified that he specifically told Mr. Rosenthal before he left the U.S. Attorney's office that both Mr. Valukas and Mr. Raphaelson would inhibit Mr. Rosenthal's ability to be promoted. (MSPB tr. at 2071-72.) In summary, the testimony of Ms. Needles, Mr. Valukas, Mr. Raphaelson, and Mr. Stetler indicates that Mr. Rosenthal's testimony explaining his reasons for leaving the U.S. Attorney's office was less than complete and accurate. This lack of candor casts a further pall over the credibility of Mr. Rosenthal's testimony. *See Greer v. United States Postal Service*, 43 M.S.P.R. 180, 188 (1990) (Board's AJ may consider witness's credibility on one matter when assessing relative weight to accord witness's testimony on another matter).

Another member of the U.S. Attorney's office also recounted an incident about Mr. Rosenthal's credibility. This account is found in the written summary of AUSA Victoria Peters' June 21, 1995 interview with the appellant's attorney, the accuracy of which Ms. Peters affirmed during her MSPB testimony. (*See* Agency File at tab 4b-41.) AUSA Peters stated that Mr. Rosenthal "lied about his time" during a team run with other members of the U.S. Attorney's office in the "Corporate Challenge" athletic event. Ms. Peters explained that she and another female runner from the office finished the race at nearly the same time as Mr. Rosenthal, but he listed his time as substantially less than theirs. According to Ms. Peters, this incident was "so (like) Rosenthal." (*See* Agency File at tab 4b-41, page 6.)

The opinions of Mr. Rosenthal's former colleagues in the U.S. Attorney's office raise serious questions about his reliability. On the other hand, a variety of AUSA's vouched for the integrity of the appellant. For example, Ms. Needles, the Executive Assistant to the U.S. Attorney, explained that even though the appellant can be difficult and stubborn, she knows of no one in the U.S. Attorney's office who ever questioned his integrity. She bases her comments on conversations with other USAO employees whose opinions she trusts. In addition to AUSA's Nancy Needles and Joan Bainbridge-Safford, several other members and former members of the U.S. Attorney's office vouched for the credibility of the appellant. For example, U.S. Attorney Valukas testified that the appellant was truthful and had

never misled him. (MSPB tr. at 680-81.) Former AUSA Ted Poulos testified, "without equivocation," that the appellant is "an absolutely truthful person and wouldn't hide anything." (MSPB tr. at 3140.) Former FAUSA Thomas Durkin testified that the appellant has always been forthright and direct, and Mr. Durkin has a high opinion of the appellant's honesty and integrity. (MSPB tr. at 1593-94.) Finally, AUSA Ronald Safer testified that the appellant has the finest character for honesty and integrity and represents "everything that is the finest that our office has." (MSPB tr. at 2715, 2717.)

Conclusion: Rosenthal Conversation

In summary, serious questions have been raised about the reliability of Mr. Rosenthal's testimony. Not only have Mr. Rosenthal's former colleagues expressed concerns about his credibility, but also Mr. Rosenthal's accounts of his purported conversation with the appellant raise questions about the reliability of his testimony. For example, Mr. Rosenthal forgot about his contemporaneous debate with AUSA Polales during which they discussed the obligation to disclose the positive drug tests. In addition, the record indicates that when claiming that he discussed the positive drug tests with the appellant, Mr. Rosenthal may have confused the appellant with Mr. Polales. Moreover, Mr. Rosenthal's claim that he "received the impression" that the appellant knew about the positive drug tests is ambiguous. Consequently, I am reluctant to ascribe a great deal of probative weight to Mr. Rosenthal's uncorroborated account of an extremely brief, undocumented conversation that took

place nearly three years before Mr. Rosenthal had the occasion to recount the conversation. Moreover, it was three years before the appellant was confronted with Mr. Rosenthal's allegations and offered the opportunity to give his account of the conversation. Under the circumstances, I find the agency did not establish that Mr. Rosenthal's account of his purported conversation with the appellant is more likely true than not true. Therefore, I conclude that the agency did not prove that Mr. Rosenthal had a conversation with the appellant in October 1989 during which the appellant acknowledged an awareness of the cooperating El Rukn inmates' positive drug tests.

Conclusion: Intentional Failure to Disclose

As discussed earlier in this decision, the inferences that the agency seeks to draw from the circumstantial evidence are not sufficient to prove that the appellant, more likely than not, knew of the "unauthorized" positive drug tests by the cooperating El Rukn inmates prior to the end of the El Rukn trials. In addition, the agency failed to prove that Mr. Rosenthal had a conversation with the appellant during which he acknowledged an awareness of the positive drug tests. Because the agency failed to establish that the appellant knew of the positive drug tests, I find the agency did not prove the appellant intentionally failed to disclose the positive drug tests to the El Rukn defendants. Consequently, this portion of charge one is not sustained.

Charge 1(B): **Negligent Failure to Investigate and Disclose Positive Drug Tests**

Although the agency has not shown that the appellant actually knew about the positive drug tests, this failure of proof does not dispose of the first charge. The first charge has accused the appellant of failing (either intentionally or negligently) to conduct an investigation that would have uncovered the positive drug tests of the El Rukn cooperating witnesses. This aspect of charge one is also based on the prosecutor's *Brady* obligation to disclose exculpatory information. The *Brady* obligation includes an affirmative duty to conduct further inquiry if known facts prompt further investigation. *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992). Consequently, even though a prosecutor may not have actual knowledge of *Brady* or *Giglio* material, the prosecutor will be deemed to have violated his obligation to disclose favorable material to a defendant if the material was readily available to the prosecutor upon reasonable inquiry. *United States v. Perdomo*, 929 F.2d 967, 970-71 (3rd. Cir. 1991); *see also Agurs*, 427 U.S. at 103 (prosecutor is required to disclose *Brady* information he "should have known"). "It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused." ABA STANDARDS FOR CRIMINAL JUSTICE § 3-3.11(c) (1980).

Agency's Theory

The agency contends that prior to the conclusion of the first El Rukn criminal trial (which ended August 9, 1991) the appellant was aware of many signs indicating that the cooperating El Rukn witnesses were using illegal drugs while incarcerated at the MCC. The agency argues that the appellant's knowledge was sufficient to prompt further inquiry, which would have revealed the positive drug tests listed in the Rosenthal memo. According to the agency, the following factors should have led the appellant to suspect that cooperating El Rukn inmates were using illegal drugs: (a) the cooperators' long history of drug use, which was known to the appellant; (b) physical symptoms exhibited by cooperating El Rukn inmate Harry Evans, which led a paralegal assistant to suspect that Evans was using illegal drugs; (c) the appellant's knowledge of the paralegal's suspicion; (d) the appellant's knowledge that cooperating El Rukn inmates boasted of getting drugs and sex in the U.S. Attorney's office; (e) the appellant's knowledge that cooperating El Rukn inmate Derrick Kees claimed that cooperator Evans offered to sell him drugs; and (f) Lt. Charles Mildner's desire to test Evans for illegal drugs.

As will be discussed in greater detail below, a closer analysis of the facts shows that these factors are not as persuasive as they appear.

Appellant's Knowledge of Cooperators' Prior Drug Use

The appellant's mere knowledge that the cooperating El Rukn inmates had long histories of drug use was not sufficient, in and of itself, to prompt further inquiry into

whether the El Rukn cooperators were using illegal drugs while incarcerated. First of all, the El Rukn cooperators were incarcerated during the entire period of their cooperation with the government. And even though many witnesses testified that illegal drugs generally can be obtained by prison inmates, penal institutions are, nevertheless, primarily responsible for controlling drug use by inmates. In fact, the MCC employed a drug-testing program for that very purpose. Consequently, the appellant could be reasonably assured that the El Rukn cooperators' access to illicit drugs was extremely constrained while they were incarcerated in the MCC. Moreover, when the El Rukn cooperators were released from the MCC to work directly with the OCDETF task force, the cooperators were under constant guard by law-enforcement agents. Under the circumstances, I find that the appellant's mere knowledge of the El Rukn cooperators' prior drug use was not sufficient to prompt further inquiry into whether the cooperating El Rukn inmates were using illicit drugs while incarcerated.

The appellant's obligation to initiate further inquiry into the cooperators' possible drug use would have to arise from his knowledge of other circumstances indicating illegal drug use on their part. The evidence developed during the MSPB hearing casts considerable doubt on the agency's argument that other circumstances should have placed the appellant on such notice.

Even though the appellant admits he knew that many of the cooperating El Rukn inmates had long histories of

illegal drug use, the appellant testified he never suspected that a cooperating El Rukn inmate was under the influence of illicit drugs during the thousands of hours that he worked with them. The appellant also testified that the law-enforcement agents who worked with the El Rukn cooperators never told him they suspected the cooperators of using illegal drugs. The appellant's testimony was corroborated by numerous agents and police officers who worked with and observed the cooperating El Rukn inmates throughout the course of the El Rukn investigation as well as during the El Rukn criminal trials.

General Observations of Cooperating El Rukn Inmates by OCDETF Task Force Members

Nearly a dozen law-enforcement officers associated with the OCDETF task force testified that they never saw cooperating El Rukn inmates exhibit symptoms indicating they were under the influence of illegal drugs. These officers included three agents of the Bureau of Alcohol Tobacco and Firearms (ATF) and three Chicago Police Officers: ATF Special Agents Thomas O'Brien, Gene Wolfe, and William Bollenberg; and Chicago Police Officers David O'Callaghan, Daniel Brannigan, and James Fitzmaurice. These six officers worked exclusively for the OCDETF task force for years and, between them, essentially had daily contact with the cooperating El Rukn inmates during the entire time they cooperated with the government in the El Rukn investigation.

Senior Special Agent Thomas O'Brien had been an ATF agent for 23 years and had worked for the OCDETF task force

since 1983. Special Agent O'Brien testified that during his tenure with the OCDETF task force, he devoted all of his attention to the El Rukn investigation and generally observed the cooperating El Rukn inmates on a daily basis for hours at a time. Agent O'Brien also explained that because he was one of two lead ATF agents assigned to the task force, other agents would have told him if they saw El Rukn cooperators exhibit signs of illegal drug use. Special Agent O'Brien testified no one told him that cooperating El Rukn inmates exhibited symptoms of illegal drug use. Special Agent O'Brien further testified he never observed a cooperating El Rukn inmate act irrationally, and he never saw an El Rukn cooperator appear to be under the influence of illegal drugs.

Senior Special Agent Gene Wolfe had 25 years of experience with ATF and had worked on the OCDETF task force investigation of the El Rukn street gang since 1983. Special Agent Wolfe testified that he worked with the cooperating El Rukn inmates nearly every day from 1988 to 1992. In addition, Special Agent Wolfe was one of two lead ATF agents to whom other agents would have reported signs of illegal drug use by cooperating El Rukns. Agent Wolfe testified no one told him that cooperating El Rukn inmates exhibited signs of illegal drug use. Special Agent Wolfe further testified he never observed a cooperating El Rukn inmate exhibit signs of illegal drug use.

Senior Special Agent William Bollenberg had been an ATF agent for over twenty years. Special Agent Bollenberg

became the ATF Group Supervisor for the OCDETF task force in April 1991, when the El Rukn criminal trials were beginning. Special Agent Bollenberg testified that he devoted approximately eight hours a day to the El Rukn matter in 1991, during which he frequently saw the cooperating El Rukn inmates. Special Agent Bollenberg was also a case agent who sat with the prosecutors at counsel's table during the 5-week El Rukn trial that ended on October 31, 1991. Special Agent Bollenberg testified he never observed a cooperating El Rukn inmate exhibit signs of illegal drug use and no one ever told him that cooperating El Rukn inmates had exhibited signs of illegal drug use.

Sergeant David O'Callaghan was a Chicago Police Officer for thirty years, serving twenty of those years as a police detective. SGT O'Callaghan joined the OCDETF task force to assist in the El Rukn investigation in 1988, and he worked with the cooperating El Rukn inmates on a continuing and regular basis throughout the investigation. SGT O'Callaghan was also a case agent who sat at counsel's table with the prosecutors during the El Rukn criminal trials in 1991. SGT O'Callaghan testified that he never observed a cooperating El Rukn inmate in possession of illicit narcotics nor did he observe a cooperating El Rukn inmate exhibit signs of illegal drug use. SGT O'Callaghan further testified no one told him that cooperating El Rukn inmates exhibited signs of illegal drug use. In addition, SGT O'Callaghan testified he did not hear about the El Rukn cooperators' positive drug tests until August 1991 when the Mildner memo was submitted

in response to a subpoena in the midst of an El Rukn trial the appellant was prosecuting.

Sergeant Daniel Brannigan had been a Chicago Police Officer for 29 years and a police detective since 1974. SGT Brannigan spent a majority of his time with the Chicago Police Department investigating street gangs and organized crime. He began working with the OCDETF task force in 1983, where he devoted his time to the El Rukn investigation. SGT Brannigan testified that he worked directly with the cooperating El Rukn inmates thousands of times for long hours during the investigation. SGT Brannigan testified that none of the cooperating El Rukns appeared to be under the influence of illegal drugs at any time, and he never suspected them of using illegal drugs at the MCC. SGT Brannigan also testified that he did not receive any reports of El Rukn cooperators exhibiting symptoms of illegal drug use.

James Fitzmaurice has been a Chicago Police Officer for nearly 30 years and a Gang Specialist for 17 years. Officer Fitzmaurice had almost daily contact with the cooperating El Rukn inmates from 1989 to 1992, while he transported them to and from the MCC and guarded them in the U.S. Attorney’s office. While guarding the El Rukn cooperators, Officer Fitzmaurice stayed within five to ten feet of the cooperators at all times. Officer Fitzmaurice also testified that he saw El Rukn cooperator Henry Harris two or three times per week. Officer Fitzmaurice testified that none of the cooperating El Rukn inmates exhibited symptoms

indicating they were under the influence of illegal narcotics, and no one ever told him that El Rukn cooperators exhibited signs of illegal drug use.

The testimony of the six law-enforcement officers described above is entitled to substantial weight because they had ample opportunity to observe the cooperating El Rukn inmates at close range over a prolonged period of time. In fact, Special Agents O'Brien and Wolfe and Officer O'Callaghan each spent long hours interviewing the El Rukn cooperators in order to detail their lifetimes of criminal activity. Consequently, they had virtually the same opportunity as the appellant to observe the cooperating El Rukn inmates' behavior. The officers' opinions relating to the absence of drug-related symptoms are also entitled to significant weight given their years of experience dealing directly with users of illegal narcotics. For example, Special Agent Bollenberg's first ATF assignment brought him into daily contact with heroin addicts for four years.

The testimony of the six officers listed above is also credible because their testimony was consistent and essentially uncontradicted (except for Paralegal Assistant Tanya Van Blake's testimony about Harry Evans' physical symptoms[47]). *See Hillen*, 35 M.S.P.R. at 460. Moreover, an agency witness, Arthur Ahrens, essentially vouched for the integrity and professionalism of Special Agents O'Brien and

47. Ms. Van Blake's suspicions about Harry Evans' possible illegal drug use are discussed on pages 115-16 of this decision.

Wolfe and SGT O'Callaghan. Mr. Ahrens is an ATF Supervisory Criminal Investigator and was the ATF Group Supervisor on the OCDETF task force from April 1989 to April 1991. Mr. Ahrens testified that Special Agent O'Brien was a "near legend" as an ATF agent and that Special Agent Wolfe is a "top rate" agent who is completely honest. (MSPB tr. at 1410.) Mr. Ahrens also testified that SGT O'Callaghan's ability, integrity, and honesty were "top-rate" and that SGT O'Callaghan was one of the finest police officers with whom Mr. Ahrens has ever worked. (MSPB tr. at 1436.)

The testimony of the six officers was corroborated by several other law-enforcement officers who had lesser degrees of contact with the cooperating El Rukn inmates. One such officer is Jesus Gonzales, a Deputy U.S. Marshal with ten years of experience. In 1989, Deputy Gonzales was assigned to supervise a team of U.S. Marshals responsible for protecting cooperating El Rukn inmates Kees, Harris, Hawkins, and Clay, all of whom were in the federal Witness Protection Program. Deputy Gonzales was also in charge of security for these cooperating witnesses during four of the seven El Rukn criminal trials. Deputy Gonzales testified that no Deputy U.S. Marshal ever told him that a cooperating El Rukn witness exhibited signs of illegal drug use. Deputy Gonzales also transported cooperator Henry Harris to the strike force offices many times and spent many hours in a small room with Harris as he helped Paralegal Corinda Luchetta transcribe and translate Title III tapes (i.e., the wiretapped telephone conversations). According to Deputy

Gonzales, Harris never appeared to be under the influence of illegal drugs and no one relayed any such information to Deputy Gonzales.

Marvin Reno has been a Deputy U.S. Marshal for eleven years and has been an Inspector in the Witness Security (WITSEC) Division of the U.S. Marshal's Service for seven years. In 1991, Mr. Reno was frequently assigned to supervise teams of WITSEC Marshals who provided security for cooperating El Rukn inmate witnesses during the El Rukn criminal trials. Mr. Reno supervised these teams from March 1991 to the Summer of 1991 and again in November 1991. According to Deputy Reno, he guarded El Rukn cooperator Henry Harris on numerous occasions and saw no indication that Harris was under the influence of drugs. Deputy Reno further testified that no subordinate deputy marshals reported observing signs that cooperating El Rukn inmate witnesses were under the influence of illegal narcotics. Deputy Reno explained that his subordinates were responsible for notifying him if they observed cooperating El Rukn inmates exhibiting symptoms of illegal drug use.

Deputy U.S. Marshal Marguerite Gabele supervised the U.S. Marshal's lock-up facility in the U.S. Courthouse in Chicago from 1989 to 1992. Deputy Gabele testified that she was also involved in transporting the cooperators to the U.S. Attorney's office in 1989 and 1990. Deputy Gabele also saw the cooperating El Rukn inmate witnesses every day they appeared in the lock-up during the El Rukn criminal trials in 1991. Deputy Gabele testified that she never observed

any cooperators under the influence of illegal drugs, and no one reported any such information to her. Deputy Gabele further testified that illegal drugs were never found in the possession of El Rukn cooperators who were under her control.[48]

In addition to the law-enforcement officers discussed above, the Assistant U.S. Attorneys (AUSA's) who were members of the El Rukn trial team also testified that they did not see cooperating El Rukn inmate witnesses exhibit symptoms of illegal drug use. AUSA Theodore Poulos had an extensive degree of contact with the cooperating El Rukn inmates. In fact, Mr. Poulos' knowledge of and interaction with the El Rukn cooperating inmates was second only to the appellant's among personnel in the U.S. Attorney's office. AUSA Poulos began handling matters involving the El Rukn investigation in 1988 and eventually became deeply involved in the El Rukn investigation. Mr. Poulos explained that he and the appellant became intimately familiar with the El Rukn cooperators by working with them for countless hours for years in an intense setting. According to Mr. Poulos, he and the appellant worked virtually every day (including

48. Although the documentary record in this appeal contains many fragments of hearsay evidence indicating that the cooperating El Rukn inmates were observed in the possession of illegal narcotics, the agency did not see fit to present any testimony on this matter. Nor did the agency otherwise offer a reason for according weight to this hearsay evidence. Moreover, there is no evidence showing that a cooperating El Rukn inmate was ever caught possessing illegal narcotics. Consequently, I conclude that such hearsay evidence warrants no consideration.

Saturdays and Sundays) from April 1991 to March 1992, averaging 16 hours per day. In addition, Mr. Poulos was the prosecution's lead trial attorney in the two El Rukn trials for which the appellant was not lead trial counsel. Mr. Poulos was the lead prosecutor in the first El Rukn trial, which lasted 17½ weeks, and the fifth trial, which lasted 10 weeks. Consequently, Mr. Poulos had a substantial opportunity to directly observe and interact with the cooperating El Rukn inmates.

According to Mr. Poulos, from 1988 to 1991 no one on the prosecution team (including ATF agents, Chicago police officers, U.S. Marshals, and personnel from the U.S. Attorney's office) told him that cooperating El Rukn inmates were using illegal drugs or were suspected of using illegal drugs. (MSPB tr. 2946-47.) Mr. Poulos further testified that from 1988 to the end of the El Rukn criminal trials in March 1992, he did not see any documentation indicating that the cooperators had tested positive for illegal drugs, and no one told him that cooperating witnesses had tested positive for illegal drugs.

Mr. Poulos' testimony was corroborated by other AUSA's who served as trial counsel during the El Rukn criminal trials. Michael Pace was assigned to the El Rukn investigation in December 1990 and participated as a trial counsel during the first El Rukn trial (which began April 9, 1991 and lasted 17½ weeks) and the sixth El Rukn trial (which began October 17, 1991 and lasted three weeks). Mr. Pace testified that Henry Harris was on the stand for the

better part of one month during the first trial. Mr. Pace also regularly observed Harris in the U.S. Attorney's office as Harris was being prepared to testify and also observed Harris testify during the trials. AUSA Pace testified that he never believed that Harris or Evans were under the influence of illegal drugs, and no one indicated such to Mr. Pace.

AUSA Victoria Peters was trial counsel during the first El Rukn trial (which began April 9, 1991 and lasted 17½ weeks) and the fourth trial (which began September 23, 1991 and lasted five weeks). In her June 21, 1995 interview (the accuracy of which she affirmed under oath during the MSPB hearing), AUSA Peters stated that Evans never appeared to be under the influence of illegal drugs. (*See* Agency File at tab 4b-41.) Former AUSA John Hartmann was trial counsel during the second El Rukn trial (which began May 5, 1991 and lasted 17 weeks) and the fifth trial (which began October 1, 1991 and lasted ten weeks). Mr. Hartmann testified that he did not see any evidence of illegal drug use by the cooperating El Rukn inmate witnesses. According to Mr. Hartmann, cooperator Harris never appeared to be under the influence of illicit drugs. Finally, as discussed earlier in this decision, former FAUSA Ira Raphaelson worked closely with the cooperating El Rukn inmates during the plea negotiations in October 1989. Mr. Raphaelson testified that he did not perceive any cooperators to be under the influence of drugs.

In summary, numerous AUSA's and law-enforcement officers -- who had daily contact and interaction with the cooperating El Rukn inmates over an extended period of time -- testified that they never saw a cooperating El Rukn inmate under the influence of drugs and they never heard that an El Rukn cooperator exhibited signs of illegal drug use. Because these witnesses had essentially the same opportunity as the appellant to observe the cooperating El Rukn inmates, their testimony corroborates the appellant's assertion that the cooperating El Rukn inmates did not exhibit signs of illegal drug use.

Harry Evans' Physical Symptoms

The agency presented testimony from only one witness who claimed to have suspected that a cooperating El Rukn inmate was using illegal drugs. This witness is Paralegal Specialist Tanya Van Blake. She testified that she saw one cooperating El Rukn inmate -- Harry Evans -- exhibit physical symptoms that she believed to be the result of illegal drug use.

Tanya Van Blake was hired as a Paralegal Specialist by the U.S. Attorney's office in Chicago in July 1991. At that point, the first two El Rukn criminal cases were entering their third month of trial and the appellant was working 16-hour days, seven day a week. As a paralegal specialist, Ms. Van Blake worked under the supervision of Paralegal Corinda Luchetta, who was also assigned exclusively to the El Rukn trial team. Ms. Van Blake's duties included preparing evidence, copying documents for jury binders,

abstracting transcripts, and refining transcripts of taped telephone conversations. While performing her duties, she came into contact with some of the cooperating El Rukn inmates, working briefly with Henry Harris and Eugene Hunter while preparing transcripts of the Title III tapes. Ms. Van Blake testified that she also had the opportunity to observe and speak with several other cooperating El Rukn inmates, including Harry Evans, Jackie Clay, Ervin Lee, and Earl Hawkins.

Ms. Van Blake testified that in the Fall of 1991 she suspected that El Rukn cooperator Harry Evans was using illegal drugs because his eyes were dilated and he would "nod out" in the middle of conversations during pre-trial preparation. (MSPB tr. at 911.) Ms. Van Blake testified that Evans' symptoms made her suspect illegal drug use because his symptoms were similar to those she had previously observed in other individuals who had ingested alcohol, cocaine, and/or marijuana when she was in high school and college. Ms. Van Blake further testified that she was familiar with the symptoms of drug abuse because her ex-husband had developed a problem with cocaine, marijuana, and alcohol.

Ms. Van Blake admitted she did not communicate her suspicions about Evans' drug use directly to the appellant. According to Ms. Van Blake, the appellant was extremely busy, he did not speak to her, and he simply was not very approachable. Ms. Van Blake testified that during her tenure with the U.S. Attorney's office, the appellant was on

trial almost every day and spent most of his time in court or in his office working with witnesses. Ms. Van Blake testified that she relayed information to the appellant through her supervisor, Ms. Luchetta.

Ms. Van Blake testified that in late Fall 1991 she and Ms. Luchetta had three conversations during which Ms. Van Blake described her reasons for suspecting that Harry Evans was using illegal drugs. Ms. Luchetta expressed skepticism, telling Ms. Van Blake that her suspicions were "somewhat ridiculous" because Harry Evans was ill and required regular kidney dialysis treatments. (MSPB tr. at 914 & 1117-18.) (The record shows that Evans had required regular kidney dialysis treatments since he was hospitalized for acute renal failure in April 1989.) Nevertheless, Ms. Luchetta agreed to discuss Ms. Van Blake's concerns with the appellant. According to Ms. Van Blake, approximately two days later Ms. Luchetta stated that she had relayed Ms. Van Blake's concerns to the appellant, and Ms. Luchetta asked whether Ms. Van Blake had observed any El Rukn cooperator possess or consume drugs. When Ms. Van Blake replied in the negative, Ms. Luchetta told her to "leave it alone." (MSPB tr. at 915.) Although Ms. Van Blake shared her suspicions with two other clerical employees in the office, Ms. Van Blake never told any AUSA's that she suspected Harry Evans of illegal drug use.[49]

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49. There is no evidence indicating that the two clerical employees relayed this information to the appellant or any other member of the trial team.

In her testimony at the MSPB hearing, Ms. Luchetta admitted that Ms. Van Blake told her she suspected Harry Evans was using illegal drugs. But Ms. Luchetta did not confirm that she relayed Ms. Van Blake's concerns to the appellant. Ms. Luchetta testified that she simply told the appellant that Ms. Van Blake "had some concerns" she wanted to address with him. (MSPB tr. page 1119-20.) Ms. Luchetta testified that she did not tell the appellant "specifically what [Ms. Van Blake] saw." (MSPB tr. page 1119-20.) According to Ms. Luchetta, the appellant told her to send Ms. Van Blake in to see him, but the appellant and Ms. Van Blake never met to discuss Ms. Van Blake's suspicions about Harry Evans.

Ms. Luchetta appears to have given a prior inconsistent statement concerning the content of her conversation with the appellant. While testifying in front of Judge Holderman in December 1992, Ms. Luchetta stated she told the appellant that Ms. Van Blake "had some suspicions regarding Mr. Evans and drug use, and that she wanted to speak to him about them." (*See* Agency File at tab 4b-112, page 3784.) Ms. Luchetta further told Judge Holderman that she told the appellant Ms. Van Blake suspected Harry Evans was using drugs. (*See* Agency File at tab 4b-112, p. 3784.) But shortly after Ms. Luchetta testified for Judge Holderman, she appeared before Judge Conlon in December 1992 and testified "to the best of [her] recollection" that she told the appellant "Tanya Van Blake had some suspicions, but I did not articulate, my recollection is that I did not

articulate them to him." (MSPB tr. at 1190-91.) And in her sworn testimony before the Illinois Attorney Registration and Disciplinary Commission in January 1995, Ms. Luchetta stated:

> I mentioned to [the appellant] that [Ms. Van Blake] had something that she wanted to say to him. I've never been sure if I actually told him what it was or just that she was concerned over something she had seen Harry Evans do and she needed to talk to [the appellant]. I don't know how specific I was.

(*See* Agency File at tab 5d-2, page 337.)

For his part, the appellant testified that Ms. Luchetta did not tell him Ms. Van Blake suspected a cooperating El Rukn inmate of illegal drug use.

Conclusion: Luchetta's Communication with Appellant

The evidence is insufficient to prove that Ms. Luchetta specifically told the appellant that Ms. Van Blake suspected Harry Evans of using illegal drugs. The appellant has denied receiving notice of Ms. Van Blake's suspicions, and Ms. Luchetta's accounts of her conversation with the appellant have been inconsistent. These inconsistencies raise doubts as to the credibility of Ms. Luchetta's statements. *See Hillen*, 35 M.S.P.R. at 459. Moreover, Ms. Luchetta's most recent recollection (as related under oath during her MSPB testimony) is that she did not tell the appellant specifically why Ms. Van Blake wanted to speak with him. Under the circumstances, I find the agency did not establish that Ms. Luchetta told the appellant that Ms. Van Blake suspected Harry Evans of illegal drug use.

Other Employee's Observations of Evans' Physical Symptoms

Notwithstanding the agency's failure to prove the appellant was advised of Ms. Van Blake's suspicions, the following question remains: Were the physical symptoms that Harry Evans exhibited in 1991 (and upon which Ms. Van Blake based her suspicions) sufficient to make the appellant suspect that Evans was using illegal drugs?

The record shows that Harry Evans was in very poor health by 1991. AUSA Ted Poulos testified that Harry Evans' health had severely deteriorated in the sixteen months prior to trial. In fact, while Evans was incarcerated at the MCC, he was hospitalized for 2½ weeks in April 1989 due to acute renal failure, after which he required two to three kidney dialysis treatments per week. According to Mr. Poulos, Harry Evans had extensive and severe health problems and was "dying basically." (MSPB tr. at 485 & 491.) SGT Brannigan described Evans as a "300-pound physical wreck" who, at times, could barely walk. (MSPB tr. at 2539-40.)

Cynthia Alston, M.D., treated Harry Evans while he was incarcerated at the MCC. Dr. Alston testified that Evans was morbidly obese, suffered from diabetes, hypertension, hypertensive heart disease, and renal failure, the latter of which required hemodialysis treatments three times per week. But Dr. Alston testified that she never suspected Harry Evans of illegal drug use. Dr. Alston explained that the symptoms of renal failure, including drowsiness, memory loss, lack of concentration, itching, and dilated pupils,

are similar to the symptoms of illegal drug use. (MSPB tr. at page 2839.) Dr. Alston also testified that Evans took several drugs, many of which caused drowsiness, that would produce symptoms similar to illegal drug use. According to Dr. Alston, it is not unusual for someone in Evans' condition with renal failure to "nod off" from time to time. In fact, Dr. Alston testified that Evans could probably fall asleep while standing in front of someone. Dr. Alston further testified that even a person with medical training would have difficulty distinguishing between the symptoms of renal failure and illegal drug abuse in the absence of objective medical tests.

Dr. Alston's opinion is entitled to substantial weight because she is Board-Certified in internal medicine, she has an undergraduate degree in pharmacology, she has studied the reaction of drugs on the human system, and she was Evans' treating physician while he was incarcerated. On the other hand, Ms. Van Blake's expertise detecting illegal drug use in others is significantly more limited. Although the agency brought out the fact that Ms. Van Blake had been a sales representative for a pharmaceutical company and had received some training in drugs and drug effects, she admitted during cross-examination that she was not aware of any medications Harry Evans was taking at the time and she was not aware of the side effects of all drugs he was taking. Ms. Van Blake also admitted that she has neither the experience nor the ability to recognize symptoms of heroin use because she has never seen anyone whom she knew to have ingested heroin; Ms. Van Blake's husband was

addicted to cocaine, alcohol, and marijuana -- not heroin. Ms. Van Blake further testified that when her husband used cocaine, he became more active and talkative -- symptoms that are the opposite of the lethargic behavior she observed in Harry Evans.

In addition to Ms. Van Blake's comparative lack of expertise in diagnosing illegal drug use, the weight of her opinion that Harry Evans was using illegal drugs is diminished by the fact that she became a member of the El Rukn trial team very late in the process. Consequently, Ms. Van Blake did not have as much contact with the cooperating El Rukn inmates as the other members of the trial team and the OCDETF task force. When Ms. Van Blake commenced employment with the U.S. Attorney's office, the first two El Rukn trials were already two months old. By that point, many members of the OCDETF task force, including the appellant, had been working closely with the El Rukn cooperators for years, and the members of the task force knew that Evans suffered from renal failure as well as various other physical ailments. AUSA Poulos testified that Harry Evans' health deteriorated severely in the sixteen months before the El Rukn trials began. The appellant testified that by the time the trials began, Evans had to be wheeled in and out of the courtrooms. (MSPB tr. at 3410.)

The record shows that the members of the trial team attributed Evans' symptoms (which Ms. Van Blake found suspicious) to the ebb and flow of his condition during the intervals between his dialysis treatments. AUSA Michael

Pace, who spent considerable time with Evans in 1991 preparing him for trial, testified that Evans' renal failure caused him to be very tired at times. Mr. Pace further testified he never suspected that Evans was under the influence of illegal drugs, and no one indicated such to Mr. Pace. AUSA John Hartmann testified that Evans' condition would ebb and flow depending on how recently he had undergone dialysis treatment. AUSA Poulos testified that when he put Evans on the stand during the El Rukn trials, it was almost impossible to get anything accomplished with him on the 2nd or 3rd day after a dialysis treatment because Evans was very tired, very drowsy, very sleepy, nodded his head, spoke very slowly, and was unable to focus mentally. (MSPB tr. at 485-86.) According to AUSA Victoria Peters, Evans never appeared to be under the influence of drugs when she observed him during the El Rukn trials. (*See* Agency File at tab 4b-41.) Ms. Peters also testified that, for a diabetic, Evans had terrible eating habits, which worsened his physical condition.

Many of the law-enforcement officers who were familiar with Evans also testified that he became very slow and lethargic due to renal failure. These officers (including ATF Special Agents Thomas O'Brien, Gene Wolfe, and Thomas Murphy, as well as Chicago Police Sergeants David O'Callaghan and Daniel Brannigan) were all members of the OCDETF task force and had ample opportunity to observe Evans. These officers all testified that they never suspected Evans of using illegal drugs. In addition, Ms. Luchetta testified that after Ms. Van Blake aired her

suspicions about Evans physical symptoms, Ms. Luchetta consulted a nurse/friend, who stated that Evans' symptoms were consistent with a person receiving dialysis treatments.

The agency contends that a discussion between AUSA's John Hartmann, Ted Poulos, and the appellant during the fifth El Rukn trial in November 1991 shows they suspected Evans was using illegal drugs. To support this argument, the agency cites the FBI's written summary of a March 1993 interview with Ms. Luchetta during which she recounted portions of a discussion she overheard between AUSA's Hartmann and Poulos. According to the FBI's summary of Ms. Luchetta's interview, AUSA's Hartmann and Poulos were discussing Evans' physical appearance at the end of a day in which Evans had testified during an El Rukn trial. Mr. Hartmann said, "I don't care what [the appellant] says," if Evans is caught doing drugs, "I'll pull the plug on [Evans'] plea agreement and prosecute him." (*See* Agency File at tab 5d-345, page 2, par. 2.) Mr. Poulos replied "I'm with you." (*See* Agency File at tab 5d-345, page 2, par. 2.)

At the MSPB hearing, Ms. Luchetta testified she was not present during the entire conversation between AUSA's Hartmann and Poulos, explaining that she only heard pieces of their conversation because she walked in and out of the room while they spoke. (MSPB tr. at 1224.) Ms. Luchetta also testified that the FBI's written summaries of her interviews are filled with gross inaccuracies that would take hours to correct. (MSPB tr. at 1221-22.) According to Ms. Luchetta, AUSA's Poulos and Hartmann were hypothetically

discussing how they would have to prosecute Evans if he were on drugs. (MSPB tr. at 1224-25.)

The appellant acknowledged that AUSA's Poulos and Hartmann told him about Evans' poor physical appearance while testifying one day during an El Rukn trial in October 1991. But the appellant argues that the FBI summary misrepresents the tenor of the discussion between AUSA's Poulos and Hartmann. The appellant asserted that their discussion did not raise a concern that Evans was using illegal drugs because Evans had exhibited identical symptoms the previous week when the appellant had him on the stand in another El Rukn trial. (MSPB tr. at 3374.) According to the appellant, during his discussion with AUSA's Poulos and Hartmann they told him they decided to have Evans testify about his health problems in order to explain his physical demeanor to the jury. (MSPB tr. at 3372-75.) The appellant testified that during his discussion with AUSA's Poulos and Hartmann, he concluded that Evans' poor physical appearance during the trial was due to Evans' multiple medical problems. (MSPB tr. at 3373-74, 3488-89.)

The appellant's conclusion was corroborated by AUSA's Hartmann and Poulos. AUSA Hartmann testified that Evans looked "particularly bad or not well" on one occasion when he was testifying during an El Rukn trial in October or November 1991. (MSPB tr. at 440.) According to Mr. Hartmann, Evans appeared to be very, very tired and almost nodded off during the course of his testimony. Mr. Hartmann testified that at the end of the trial day, he discussed

Evans' physical appearance with AUSA Poulos and the appellant. AUSA Hartmann testified that during this discussion, he said "words to the effect of I don't know what [Evans'] problem is or what he's on, but he looked particularly bad today." (MSPB tr. at 441.) According to Mr. Hartmann, they discussed Evans' medical condition and medications, and the appellant attributed Evans' appearance to his medical condition. (MSPB tr. at 441 & 445.) Mr. Hartmann confirmed that AUSA Poulos received the court's permission to elicit testimony describing Evans' medical history in order to explain his physical appearance to the jury. (MSPB tr. 443-45.)

AUSA Poulos corroborated Mr. Hartmann's testimony. Mr. Poulos testified that when they discussed Evans' demeanor on the stand one day in late 1991, AUSA Hartmann said Evans looked like he was on drugs. (MSPB tr. at 3098.) Mr. Poulos testified they also discussed the situation with the appellant later in the day, explaining that they had received the court's permission to bring out Evans' medical history in order to explain his demeanor to the jury. (MSPB tr. at 488.) Mr. Poulos further testified that he, the appellant, and Hartmann also discussed the fact that Evans could not be using illegal drugs because of his severely deteriorated medical condition. (MSPB tr. at 490-91.) According to Mr. Poulos, he did not think Evans was on drugs because Mr. Poulos was convinced that Evans was on his death bed. (MSPB tr. at 522.) Mr. Poulos further testified he is confident he and AUSA Hartmann did not make the statements referenced in the summary of Ms. Luchetta's March 1993 FBI

interview. (MSPB tr. at 525.) According to AUSA Poulos, he, the appellant, and AUSA Hartmann agreed at the end of their discussion that Evans' physical appearance was due to his medical condition. (MSPB tr. at 523, 3098.)

Conclusion: Hartmann/Poulos Conversation

I find the FBI's written summary of Ms. Luchetta's March 1993 interview insufficient to prove that AUSA's Poulos and Hartmann believed that Evans' lethargic physical appearance while testifying in an El Rukn trial in late 1991 resulted from illegal drug use. The FBI summary is a hearsay document that has been contradicted by Ms. Luchetta's sworn testimony. In addition, Ms. Luchetta was not a party to the conversation and did not overhear the entire conversation because she walked in and out of the room. Consequently, the testimony of the participants in the conversation is entitled to more probative weight. The testimony of Hartmann, Poulos, and the appellant shows that they attributed Evans' lethargic physical appearance to his severely deteriorated medical condition. And, in fact, they requested and received the court's permission to present Evans' medical history to the jury in order to explain his physical appearance. The testimony of Hartmann, Poulos, and the appellant was consistent and credible. Consequently, I conclude that the FBI's summary of Ms. Luchetta's account of AUSA Hartmann's remark about Evans' looking like he was on drugs while testifying during an El Rukn trial in late 1991 does not show that either the appellant, Poulos, or Hartmann believed Evans was using illegal drugs.

Conclusion: Evans' Physical Symptoms

With regard to the question of whether the physical symptoms exhibited by Harry Evans were sufficient to make the appellant suspect Evans was using illegal drugs, the record shows Evans' physical condition severely deteriorated during the course of his cooperation in the El Rukn investigation. In fact, in the midst of his early incarceration at the MCC, Evans was hospitalized for renal failure for 2½ weeks in April 1989. In addition, Evans required kidney dialysis treatment two to three times per week by the time the El Rukn criminal trials were underway in the Summer of 1991 (when Ms. Van Blake was hired by the U.S. Attorney's office.) Moreover, Evans was a morbidly obese individual who also suffered from diabetes, hypertension, and hypertensive heart disease.

The evidence shows that all long-term members of the OCDETF task force and the El Rukn trial team knew Evans suffered from renal failure and required kidney dialysis treatments. The record also shows they attributed Evans' symptoms of lethargy (symptoms that Ms. Van Blake found suspicious) to the ebb and flow of Evans' condition during intervals between his dialysis treatments. Their opinion was corroborated by Dr. Cynthia Alston, who treated Evans for renal failure while he was incarcerated at the MCC, who testified she never suspected Evans was using illegal drugs. Only Paralegal Assistant Tanya Van Blake suspected Evans of using illegal drugs. And, as discussed above, her expertise in detecting illegal drug use, especially heroin use, is suspect. Moreover, her relative (in comparison to other

trial-team members) lack of familiarity with Evans' multiple and severe medical problems leads me to ascribe greater probative weight to the opinions of the other members of the El Rukn trial team as well as the members of the OCDETF task force.

The record shows that none of the other members of the task force or trial team (including experienced ATF agents, Chicago Police Officers, AUSA's, and U.S. Marshals) attributed Evans symptoms (which Ms. Van Blake found suspicious) to illegal drug use. Moreover, the record does not show that anyone reported to the appellant, prior to the end of the El Rukn trials, that Evans or any other cooperating El Rukn inmate had exhibited symptoms of illegal drug use. In fact, when the Mildner memo was produced in August 1991 showing positive drug tests for Harris and Evans, the MCC Warden's Executive Assistant, Robert Hafer, advised the appellant that the positive tests resulted from prescribed medication.

Because Harry Evans' severely debilitating and long-standing medical condition was well-known to all members of the trial team, it was reasonable for the trial-team members, including the appellant, to attribute Evans' physical symptoms to the effects of renal failure and the ebb and flow of his condition during intervals between his kidney dialysis treatments. Consequently, I find the evidence insufficient to prove that the physical symptoms exhibited by Harry Evans obligated the appellant to initiate

further inquiry to determine if Evans was using illegal drugs.

Moreover, even if the agency had established that Evans' physical symptoms should have aroused sufficient suspicion to obligate the appellant to initiate further inquiry to determine whether Evans was using drugs, the record shows that a complete review of Evans' MCC records would have revealed that Evans' positive drug test result for April 12, 1989 was "authorized." (*See* discussion on pages 21-22 of this decision.) Consequently, the positive drug test did not evidence illegal drug use and could not have been used to impeach Harry Evans' credibility. Therefore, the appellant would not have been obligated to disclose this drug test result. Hence, the appellant's failure to investigate and disclose this positive drug test did not violate the *Brady* doctrine and, therefore, does not constitute actionable misconduct.[50]

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50. Notwithstanding the severity of Harry Evans' renal failure, the federal judges found Evans' symptoms probative of illegal drug use when viewed "in the context" of the record developed during the post-trial hearings. The MSPB record frames a substantially different context than the record developed during the post-trial hearings. In fact, (footnote 50 cont'd) the list of factors that the judges found sufficient to show the appellant knew, or should have known, that cooperating El Rukn inmates were using illegal drugs included many factors that have not been established in this appeal. (*See, e.g.*, Agency File at tab 4c-52, pp. 110-11.) Illustrative examples of such factors include: (1) the MCC had a policy for notifying the U.S. Attorney's office of positive drug tests by cooperating witnesses; (2) on October 18, 1989, AUSA Rosenthal informed the appellant of the positive drug test results listed in the Rosenthal memo; (3) in June 1991, the appellant learned that

Cooperators' Boasting of Access to Drugs

The agency contends that the appellant should have suspected the cooperating El Rukn inmates were using illegal drugs because he had heard they boasted of obtaining sex and drugs in the U.S. Attorney's office. The factual underpinning for this element of the agency's argument is found in the FBI's written summary of a February 4, 1993 interview of ATF Special Agent Thomas O'Brien. According to this summary, in April 1991 Deputy U.S. Marshal Jerry Lyda told Special Agent O'Brien that cooperating El Rukn inmates were boasting about the availability of drugs and sex in the U.S. Attorney's office. (*See* Agency File at tab 5d-187.) The summary of Special Agent O'Brien's interview with the FBI states that Agent O'Brien relayed this information to the appellant.

At the MSPB hearing, Special Agent O'Brien confirmed the accuracy of the facts recited above. But he also testified

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Harris was disciplined for refusing to provide a urine sample on May 30, 1991; and (4) in the Fall of 1991, the appellant was informed that a paralegal assistant (Tanya Van Blake) suspected Evans was using illegal drugs. The MSPB record also frames a different context than the record developed during the post-trial hearings because the MSPB record shows (a) there was no substance to the cooperating El Rukn inmates' claims of obtaining sex and drugs in the U.S. Attorney's office, and (b) there was no substance to Kees' allegation that Evans' offered to obtain illegal drugs. The MSPB record also shows the appellant could rely on MCC Executive Assistant Warden Robert Hafer's explanation for the positive drug tests listed in the August 15, 1991 Mildner memo.

he knew the El Rukns' boasts were false. Agent O'Brien described the boasting as "jail talk" and "trash talk" designed to give other inmates the impression that the boasting inmate was receiving more favorable treatment than other inmates. Agent O'Brien further testified that after being advised of the boasts, he and other agents confronted El Rukn cooperator Harry Evans and told him they were fed up with the cooperators' games (which the agents described as "one-upmanship") and warned Evans that the cooperators would no longer be released to work with the OCDETF task force outside the MCC if such games did not end. Agent O'Brien testified that he did not hear other rumors of sex and drugs from the cooperators after he warned Evans to desist. Agent O'Brien further testified that he told the appellant the El Rukn cooperators' claims of obtaining sex and drugs in the U.S. Attorney's office were ridiculous and unfounded.

Deputy U.S. Marshal Lyda corroborated Special Agent O'Brien's testimony. At the MSPB hearing, Deputy Lyda testified that Agent O'Brien told him the rumors of El Rukn cooperators obtaining sex and drugs in the U.S. Attorney's office were not true.[51] (MSPB tr. at 2148.) Agent O'Brien's testimony was also consistent with the written summary of his interview with the FBI. (*See* Agency File at tab

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51. Deputy Lyda also testified that in 1990 and 1991, there were many false rumors to the effect that cooperating El Rukn inmates were receiving various favors, including conjugal visits, special food, trips to outside restaurants, and visits home. (MSPB tr. at 2147.)

5d-187.) Consequently, I find Mr. O’Brien’s testimony credible.

Conclusion: Boasting

Although the record shows the appellant had been informed that cooperating El Rukn inmates were boasting of obtaining drugs and sex in the U.S. Attorney's office, the evidence also shows that Agent O'Brien told the appellant these claims were ridiculous, unfounded rumors. The appellant could reasonably rely on Agent O'Brien's assurances because O'Brien was an ATF Senior Special Agent with 23 years of experience, and O'Brien had worked for the OCDETF task force since 1983. Moreover, the appellant testified (without contradiction) that Agent O'Brien is the individual the appellant would have asked to investigate rumors of drug use by cooperating inmates. Because the appellant could reasonably rely on Agent O'Brien's advice, it was not unreasonable for the appellant to ascribe no weight to rumors that cooperating El Rukn inmates were obtaining sex and drugs in the U.S. Attorney's office. Therefore, the appellant's knowledge of the El Rukns' boasting of obtaining drugs and sex in the U.S. Attorney's office was not sufficient cause to prompt him to initiate a further inquiry into possible illegal drug use by the cooperating El Rukn inmates.

Derrick Kees Claims Harry Evans' Offered Drugs

The agency also contends that the appellant should have suspected cooperating El Rukn inmates of illegal drug use because an MCC official (Lt. Charles Mildner) advised the appellant in May 1991 that cooperating El Rukn inmate Derrick Kees was claiming that El Rukn cooperator Harry

Evans offered Kees illegal drugs. The factual underpinning for this element of the agency's argument is found in the FBI's written summary of Lt. Mildner's July 7, 1993 interview. According to the FBI summary, Lt. Mildner told the appellant that Derrick Kees had accused Harry Evans of asking Kees if he wanted some drugs. (*See* Agency File at tab 4b-156(i).)

Lt. Mildner was a Special Investigative Assistant (SIA) at the MCC from April 1989 to January 1992. As SIA, Lt. Mildner conducted inmate investigations and oversaw the MCC's inmate drug-testing program. In May 1991, cooperating El Rukn inmate Derrick Kees came to Lt. Mildner complaining that Harry Evans was trying to set him up by offering him drugs. Lt. Mildner testified that he did not believe Kees because Kees was paranoid and very unstable. Lt. Mildner explained that Kees had complained of ghosts chasing him around his cell and Kees had just assaulted another inmate (Harris) with a mop handle while fighting over a chair in front of a television set. Lt. Mildner also testified that MCC guards found no contraband when they searched the cells of Evans and Kees after Kees accused Evans of offering to obtain drugs for Kees. (MSPB tr. at 646.) Lt. Mildner further testified that he did not file a report about Kees' allegations because Lt. Mildner did not believe him. (MSPB tr. at 646.) Lt. Mildner also stated he had no knowledge of any El Rukn cooperators using drugs at the MCC. (*See* Agency File at tab 4b-156(i), summary of Mildner's July 7, 1993 FBI interview.)

Lt. Mildner testified that after speaking to Kees, he called the appellant and told him Kees was unstable and paranoid, that Kees had assaulted another inmate, that Kees had alleged that Evans was trying to sell him drugs, and that Lt. Mildner did not believe the drug allegation. (MSPB tr. at 628 & 646-47.)

Conclusion: Kees

Even though Lt. Mildner told the appellant Kees was claiming that Evans had offered to obtain drugs for Kees, Lt. Mildner testified that he told the appellant he did not believe Kees. In fact, by failing to file a report with the Warden setting forth Kees' assertions about Evans' offer to obtain drugs for Kees, Lt. Mildner demonstrated his disbelief of Kees' allegations. Because Lt. Mildner was in charge of conducting inmate investigations and overseeing the MCC's drug-testing program, the appellant could reasonably rely on Lt. Mildner's statement that he did not believe Kees. Therefore, the appellant had reasonable grounds to discount Kees' allegations about Evans' offer to obtain drugs. Consequently, it was not unreasonable for the appellant to ascribe little weight to Kees' allegations. Therefore, the mere fact that Lt. Mildner relayed Kees' allegations to the appellant provided little substance upon which to base a further inquiry into whether the cooperating El Rukn inmates were using illegal drugs.

Henry Harris Disciplinary Hearing

The agency also argued that the appellant must have known of the El Rukn cooperators' illegal drug use because -- in the midst of testifying during an El Rukn trial -- El Rukn cooperator Henry Harris had a disciplinary hearing for refusing to give a urine sample for a drug test. The disciplinary hearing took place on June 27, 1991 in a jury room during a noon recess in Harris' testimony. The documentary evidence shows that the hearing officer penalized Harris with a 15-day disciplinary segregation order for refusing to give a urine sample for a drug test at the MCC on May 30, 1991. (*See* Agency File at tab 5d-87.)

The appellant claims he was not notified that Harris refused to provide a urine sample for a drug test in May 1991. The appellant also claims he did not know that Harris' disciplinary hearing was based on his refusal to provide a urine sample for a drug test. According to the appellant, he thought Harris' June 27, 1991 disciplinary hearing was related to a physical altercation with another cooperating El Rukn inmate, Derrick Kees.

The appellant testified that Lt. Charles Mildner (the MCC's Special Investigative Agent) informed him on May 5, 1991 that Kees and Harris had just engaged in a physical altercation over the right to use a chair in front of the television set at the MCC. During this altercation, Kees clubbed Harris in the head with a mop handle. Both the appellant and AUSA Ted Poulos testified that Harris had a large welt on his head when he appeared in the U.S. Attorney's office the next day. (MSPB tr. at 495 & 3386.)

In addition, Lt. Mildner testified he told the appellant that Harris and Kees were going to be disciplined for fighting. (MSPB tr. at 642.) When Harris had the disciplinary hearing approximately two months later during a break while testifying in the *U.S. v. Bingham* El Rukn trial, the appellant was on trial in another courtroom and the MCC had not given the trial team prior notice of the disciplinary hearing. (Deputy U.S. Marshal Jerry Lyda explained that Harris' disciplinary hearing was moved ahead to accommodate the hearing officer's desire to return to Kansas City.)

According to the appellant, AUSA Poulos told him after Harris' disciplinary hearing that MCC officials had inquired about Kees' assault on Harris. (MSPB tr. at 3385-86.) The appellant's testimony was corroborated by many other witnesses. AUSA Poulos testified he was not told that Harris had refused to take a drug test. (MSPB tr. at 526.) According to Mr. Poulos, in June 1991 Harris said he was disciplined because of the altercation with Kees; and the Deputy U.S. Marshals, who were present during the disciplinary hearing, did not tell Mr. Poulos the reason for the disciplinary hearing. (MSPB tr. at 526.) Mr. Poulos explained that he did not further inquire about the reasons for Harris' disciplinary hearing because he knew Kees recently struck Harris in the head with a mop handle. Mr. Poulos testified he told the appellant Harris had been disciplined for a fight, and no one mentioned anything different to the appellant. (MSPB tr. at 528.) Mr. Poulos further testified he first learned during the post-trial

hearings in 1992 that Harris had been disciplined for refusal to take a drug test.

The testimony of the appellant and Mr. Poulos was corroborated by AUSA Victoria Peters, who was a trial counsel for the prosecution during the first El Rukn trial in June 1991. In her June 21, 1995 interview (the accuracy of which she confirmed under oath at the MSPB hearing), Ms. Peters stated that when Harris' disciplinary hearing was held in June 1991, she heard that it was due to an assault between Harris and Kees.

Deputy Marshal Jerry Lyda was present in the jury room during Harris' disciplinary hearing in June 1991. Deputy Lyda (a Chief Inspector in the Witness Security Division) testified that he was not within "earshot" of the proceedings, but he later learned from MCC Executive Assistant Robert Hafer that the disciplinary hearing was the result of Kees assaulting Harris with a mop handle. According to Mr. Lyda, Mr. Hafer did not mention Harris's refusal to take a drug test.

Mr. Hafer also corroborated the appellant's testimony. According to the FBI's written summary of a January 20, 1993 interview, Mr. Hafer told the FBI that the appellant was not aware of Harris' disciplinary hearing until after the hearing. (Agency File at tab 5d-135, page 8.) Mr. Hafer also told the FBI that he and the appellant did not discuss the reason for the disciplinary hearing when the appellant called Hafer the following day to complain that the

disciplinary hearing greatly upset Harris because it took place in the middle of his testimony. (Agency File at tab 5d-135, page 8.)

The appellant's paralegal assistant Corinda Luchetta knew that Harris had refused to provide a urine sample for a drug test. Ms. Luchetta testified that Harris told her about his refusal the day after it occurred. Ms. Luchetta testified that at the end of May 1991, Harris told her he had refused to "pee in a bottle," he had been written up for it, and he knew there was nothing the U.S. Attorney's office could do to help him. (MSPB tr. 1110.)

According to Ms. Luchetta, Harris explained that he refused to provide the urine sample because he was tired, had just gotten back to his cell, and fallen asleep after a long day of working with her in the U.S. Attorney's office. Ms. Luchetta testified that she believed Harris' explanation and did not suspect he was using drugs because they had worked together for many hours that day on a "very demanding, very knit-picky" task, i.e., transcribing and translating the heavily coded, tape-recorded phone conversations. In Ms. Luchetta's opinion, Harris could not have accomplished this mentally demanding task, requiring a high degree of concentration, if he had been under the influence of illegal drugs. (MSPB tr. at 1114-15 & 1236.)

Ms. Luchetta further testified that she did not tell the appellant about Harris' refusal to provide the urine sample for the drug test. Ms. Luchetta explained that the

information "simply slipped [her] mind the minute [she] walked out the door" of her office after talking to Harris because she did not feel the information was significant and she and the appellant were very busy. (MSPB tr. at 1114 & 1236.) At the time, the trial team was in the midst of two simultaneous El Rukn trials involving 21 defendants. Ms. Luchetta further testified that she assumed that Harris' June 1991 disciplinary hearing related to his physical altercation with Kees. She claimed that she first learned the real reason for the disciplinary hearing during the post-trial hearings in October 1992 when she found the record of Harris' disciplinary hearing.

Conclusion: Harris Disciplinary Hearing

In summary, the agency presented no direct evidence showing the appellant was informed that Harris' June 1991 disciplinary hearing was based on his refusal to take a drug test. In fact, the record shows that neither the appellant nor any member of the El Rukn trial team received prior notice of Harris' disciplinary hearing, nor were they present at the disciplinary hearing. Moreover, the appellant was trying another case in another courtroom at the time. And even though Ms. Luchetta knew Harris had refused a drug test, she testified she did not relay this information to the appellant; and there is no evidence showing the appellant was otherwise aware of Harris' refusal. Moreover, several witnesses corroborated the appellant's claim that he was told Harris' disciplinary hearing was related to Derrick Kees' recent physical

altercation with Harris. In addition, none of the witnesses who testified at the MSPB hearing stated that Harris ever gave any indication that he was under the influence of illegal drugs.

Because the appellant was aware of Harris' recent physical altercation, and because Lt. Mildner had informed the appellant that Harris would be disciplined for the fight, it was reasonable for the appellant to conclude -- in the absence of notification that Harris had refused a drug test -- that Harris' disciplinary hearing arose from his physical altercation with Kees. Consequently, in the absence of any direct evidence showing that the appellant was informed that Harris' June 1991 disciplinary hearing was based on his refusal to provide a urine sample for a drug test, I conclude the agency did not prove by a preponderance of the evidence that the appellant knew, or should have known, that the subject of Harris' June 1991 disciplinary hearing was his refusal to provide a urine sample for a drug test. Consequently, the agency has not shown that Harris' disciplinary hearing should have placed the appellant on notice that Harris may have been using illegal drugs while incarcerated and cooperating with the government.

Lt. Mildner's Desire to Test Evans

The agency also argues that the appellant should have suspected the cooperating El Rukn inmates were using illegal drugs because Lt. Mildner wanted to test Evans for illegal drugs shortly after Kees claimed Evans had offered to obtain drugs for him. Lt. Mildner testified that he inquired about

subjecting Evans to further drugs tests at the time, but was informed that Evans could not provide urine samples because he was on dialysis and that a court order was necessary to take a blood sample from Evans.

The agency did not point to any evidence indicating the appellant was aware of Lt. Mildner's desire to test Evans for drugs. In the absence of such evidence, the agency cannot rely on Lt. Mildner's desire to give Evans a drug test in May 1991 as support for its argument that the appellant should have suspected the cooperating El Rukn inmates were using illegal drugs. Thus, Lt. Mildner's desire to test Evans does not show that the appellant was obligated to initiate further inquiry into potential drug use by the cooperating El Rukn inmates.

Mildner Memo

The agency also argues that the appellant should have suspected the cooperating El Rukn inmates were using illegal drugs because Harris' and Evans' positive drug tests were listed in the Mildner memo that was produced in the midst of the *Andrews* trial on August 15, 1991. This argument is unpersuasive. As discussed on pages 77 of this decision, when the Mildner memo was produced in August 1991, the MCC Warden's Executive Assistant, Robert Hafer, advised the appellant that the positive drug tests listed in the Mildner memo were authorized because they resulted from medication. Because the appellant was entitled to rely on the representations of Mr. Hafer, the MCC Warden's Executive Assistant, I conclude that the information contained in the Mildner memo did not put the appellant on notice that the cooperating El Rukn inmates were using illicit drugs in the MCC. Consequently, I find the Mildner memo is not a factor upon which the agency can rely to support its argument that the appellant was obligated to initiate further inquiry to determine whether the cooperating El Rukn inmates were using illicit drugs.

Conclusion: Negligent Failure to Investigate and Disclose

Before summarizing the conclusion to the first charge, I should note that the appellant is charged with negligent failure to investigate and disclose the positive drug tests for Harris (May 11, 1989) and Evans (April 12, 1989). The appellant has not been charged with negligent failure to investigate and disclose any other evidence indicating that

cooperating El Rukn inmates Harris and Evans may have engaged in illegal drug use while incarcerated at the MCC. Accordingly, this analysis focuses solely on whether the appellant negligently failed to investigate and disclose Harris' positive drug test of May 11, 1989 and Evans' positive drug test of April 12, 1989.

As discussed above, a prosecutor's "*Brady*" obligation to disclose evidence favorable to a defendant includes an affirmative duty to conduct further inquiry if known facts prompt further investigation. *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992). The prosecutor will be deemed to have violated this obligation if the evidence was readily available to the prosecutor upon reasonable inquiry. *United States v. Perdomo*, 929 F.2d 967, 970-71 (3rd. Cir. 1991); *see also Agurs*, 427 U.S. at 103 (prosecutor is required to disclose *Brady* information he "should have known").

In the instant appeal, the agency failed to prove that facts known to the appellant should have prompted further investigation on his part to determine whether the cooperating El Rukn inmates were using illegal drugs while incarcerated. Numerous AUSA's and law-enforcement agents and police officers -- who had daily contact and interaction with the cooperating El Rukn inmates over an extended period of time -- testified that they never saw a cooperating El Rukn inmate under the influence of drugs and they never heard that an El Rukn cooperator exhibited signs of illegal drug use. Because these witnesses had essentially the same

opportunity as the appellant to observe the cooperating El Rukn inmates, their testimony corroborates the appellant's assertion that he did not suspect cooperating El Rukn inmates of using illegal drugs while incarcerated.

Although the agency did present testimony from one witness (paralegal assistant Tanya Van Blake) who suspected drug use by one cooperating El Rukn inmate (Harry Evans), the evidence was insufficient to prove that Ms. Van Blake's suspicions were relayed to the appellant. In addition, the agency was unable to prove that Evans' symptoms, upon which Ms. Van Blake based her suspicions, should have aroused similar suspicions in the appellant. In fact, Dr. Cynthia Alston, who was one of Evans' treating physicians while he was incarcerated and who is well-qualified to detect drug abuse, testified that she did not suspect Evans of illegal drug use. Consequently, in light of the long-standing nature of Evans' debilitating medical condition and the fact his condition was well known to the OCDETF task force and El Rukn trial team, the evidence shows that the appellant (and all but one other member of the trial team, i.e., Ms. Van Blake) reasonably attributed Evans' symptoms to the effects of renal failure and Evans' need for frequent kidney dialysis treatments.

The record also shows the appellant did not have to ascribe any substance to the rumors that cooperating El Rukn inmates had access to illegal drugs. For example, ATF Senior Special Agent Thomas O'Brien advised the appellant that the El Rukn cooperators' claims of obtaining sex and

drugs in the U.S. Attorney's office were ridiculous and unfounded. In addition, Lt. Charles Mildner, who conducted inmate investigations and oversaw the MCC's inmate drug-testing program, told the appellant he did not believe Derrick Kees' claim that Harry Evans had offered to obtain drugs for Kees. The record further shows that the appellant reasonably relied on MCC Executive Assistant Robert Hafer's explanation in August 1991 that the positive drug tests listed in the Mildner memo were the result of authorized medication.

As a final matter, the agency has argued that the appellant should have suspected illegal drug use by cooperating El Rukn inmates because, shortly after Evans' lethargic physical appearance on the stand in late 1991, AUSA Poulos demonstrated a concern that Evans may have been obtaining drugs during contact visits with his mother. After the appellant and AUSA's Hartmann and Poulos discussed Evans' lethargic physical appearance while testifying during an El Rukn trial in October 1991, AUSA Poulos asked a guard to prohibit Evans from having any physical contact with his mother during a visit the following weekend in the U.S. Attorney's office. When Mr. Poulos later learned that a guard let Evans push his new shoe to his mother, who pushed it back to Evans, Mr. Poulos became angry, scolding Evans as well as the guard for allowing such contact. As a result, Evans became so upset that Mr. Poulos had to summon the appellant to calm him down. The agency argues that Mr. Poulos' request to bar physical contact during the visit and

his angry reaction to the contact shows that Poulos was aware of the possibility that Evans was using illegal drugs.

In confirming the basic facts recited above, Mr. Poulos testified that he was not concerned that Evans might be getting drugs from his mother. (MSPB tr. at 3102.) Mr. Poulos testified that in light of Evans' recent lethargic physical appearance, he believed it would be prudent to bar physical contact in order to avoid the appearance of impropriety and prevent a later claim that Evans had received contraband. (MSPB tr. at 3102-03.) Mr. Poulos further explained that he may have overreacted to the shoe contact between Evans and his mother because he was angry with Evans (whom Poulos found difficult to get along with) for not respecting Poulos' request to refrain from physical contact during the visit. (MSPB tr. at 3104.)

Although the shoe incident and Poulos' reaction are the best evidence presented by the agency regarding the appellant's obligation to investigate further, the appellant's own knowledge of Evans' debilitating physical condition and his awareness that Poulos had already taken very stringent measures to assure that even the appearance of Evans' possible drug possession was eliminated, left little further justification for action on the appellant's part this late in the trials. Moreover, even if the October 1991 shoe incident had raised sufficient suspicion to obligate further inquiry, a complete review of the MCC's records would have ultimately revealed that Evans' April 12, 1989 positive drug test was "authorized." (See discussion

on pages 21-22 of this decision.) Hence, the appellant's failure to investigate and disclose this positive drug test did not violate the *Brady* doctrine and, therefore, does not constitute actionable misconduct.

As to Henry Harris -- who is the only cooperating El Rukn inmate for whom the MCC's records showed a legitimate "unauthorized" positive drug-test result -- there is little if any evidence showing the appellant was aware of signs of illegal drug use by Harris. Not one witness (including Ms. Van Blake) testified that he or she observed Harris exhibit any symptoms indicating illegal drug use. In addition, the record does not establish that the appellant was aware of the disciplinary actions the MCC took against Harris for his positive drug test in May 1989 and for refusing to provide a urine sample for a drug test in May 1991. In short, the agency did not show the appellant had sufficient notice of illegal drug use on Harris' part to prompt further inquiry.

Moreover, even if agency had established that the appellant had enough reason to suspect Harris of illegal drug use to obligate the appellant to initiate further inquiry, the evidence does not show that Harris' May 11, 1989 positive drug test would have been "readily available" to the appellant had he conducted a "reasonable inquiry."[52]

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52. Even though a prosecutor may not have actual knowledge of *Brady* or *Giglio* material, the prosecutor will be deemed to have violated his obligation to disclose favorable material to a defendant if the material was "readily available" to the prosecutor upon "reasonable inquiry."

The record shows the MCC failed to produce evidence of Harris' "unauthorized" positive drug test in response to several subpoenas issued during the El Rukn criminal trials. And, as discussed in greater detail on page 74 of this decision, compliance with one of those subpoenas was independently handled by Linda Wawzenski, an AUSA in the Civil Division of the U.S. Attorney's office, who was working with the very same MCC employees upon whom the appellant would have relied if he investigated possible drug use by the cooperating El Rukn inmates. The record shows that AUSA Wawzenski was unable to uncover evidence showing that Henry Harris' May 11, 1989 positive drug test was "unauthorized." (And there is no evidence indicating that AUSA Wawzenski has been accused of negligence for failing to uncover the "unauthorized" nature of Harris' positive drug test.) In fact, the agency has stipulated that the MCC was negligent in responding to the federal courts' subpoenas seeking the results of urinalysis testing of the cooperating El Rukn inmates. Consequently, I find the agency has not shown that evidence of Harris' May 11, 1989 "unauthorized" positive drug test was "readily available" to the appellant upon "reasonable inquiry." Therefore, I conclude the agency has not shown that the appellant's failure to disclose Harris' positive drug test was the result of a negligent failure to investigate. *See Perdomo*, 929 F.2d at 970-71.

In summary, the agency failed to prove by a preponderance of the evidence (1) that the appellant knew of

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United States v. Perdomo, 929 F.2d 967, 970-71 (3rd. Cir. 1991).

the unauthorized positive drug tests prior to the end of the El Rukn criminal trials, (2) that the appellant intentionally failed to disclose the positive drug tests to the El Rukn defendants, or (3) that the appellant negligently failed to investigate and disclose the positive drug tests of Harris and Evans. Consequently, charge one is not sustained.

Charge 2: **Mismanagement and exercising extremely poor judgment handling cooperating witnesses**

The second charge against the appellant lists four specifications focusing on the manner in which he handled the cooperating El Rukn inmate witnesses. The proposal notice states: "You demonstrated a lack of leadership by abdicating [professional] standards of conduct in your demonstration of poor judgment and management of the El Rukn cooperating inmate witnesses" and investigative agents as well as employees of the U.S. Attorney's office. (Agency File at tab 4c, page 5.) The proposal notice alleges that the appellant's poor judgment and serious mismanagement of the El Rukn investigation contributed to a pervasive attitude that facilities and personnel of the U.S. Attorney's office should be used to keep the cooperating El Rukn witnesses "happy." (Agency File at tab 4c.) The proposal notice further asserted that this attitude undermined the objectivity, professionalism, and caution with which prosecutors should handle cooperating witnesses.

The agency's deciding official did not sustain the second specification of charge two, which accused the

appellant of approving unsupervised contact visits in the U.S. Attorney's office between cooperating El Rukn inmates and their girlfriends and family members. The agency's deciding official did not sustain this specification because the appellant was not primarily responsible for any security lapses that may have occurred during contact visits conducted outside the confines of the MCC. Consequently, the agency dropped its allegation that the appellant facilitated drug acquisition and/or conjugal visits for the cooperating El Rukn inmates in the U.S. Attorney's office.

The remaining three specifications of charge two include:

> **A.** attempting to facilitate personal communication between a cooperating El Rukn inmate and an employee of the U.S. Attorney's office;
>
> **B.** granting cooperating El Rukn inmates unrestricted and indiscriminate access to telephones in the U.S. Attorney's office; and
>
> **C.** directing a subordinate employee to purchase personal items (a radio and a coat) for a cooperating El Rukn inmate witness.

Charge 2, Specification A: **Attempting to Facilitate Communication Between a Cooperating Witness and an Employee of the U.S. Attorney's Office**

The proposal notice specifies that the appellant attempted to facilitate communication between cooperating El Rukn inmate Henry Harris and an employee of the U.S. Attorney's office, Shelvon Suggs, who was a Debt-Collection Clerk in the Financial Litigation Unit. According to the proposal notice, Harris noticed Ms. Suggs in 1991 while guards were escorting him through the Civil Division of the U.S. Attorney's office on his way to and from the appellant's office for trial preparation during the El Rukn criminal trials. The proposal notice alleges that Harris expressed an interest in Ms. Suggs and the appellant tried to facilitate communication between the two. More specifically, the proposal notice specifies that the appellant asked Ms. Suggs' supervisor, Ann Bissell, to intercede with Ms. Suggs to determine if she would take phone calls from Harris. (*See* Agency File at tab 4c.)

To support this specification, the agency presented testimony from Ann Bissell, a Debt-Collection Agent in the Financial Litigation Unit of the Civil Division and a 16-year employee of the U.S. Attorney's office. Ms. Bissell testified that the appellant came to her work station after 5:00 p.m. one evening in the Summer of 1991. Ms. Bissell could not recall the exact day or month of the conversation, estimating that it occurred sometime between June and September of 1991. (MSPB tr. at 781.) According to Ms. Bissell, the appellant described a female employee and asked whether she worked in Ms. Bissell's unit. Ms. Bissell testified that after she identified the employee as Shelvon Suggs, a debt-collection clerk in her unit, the appellant asked Ms. Bissell if Ms. Suggs would be willing to accept phone calls from a cooperating witness who had been passing through the office. (MSPB tr. at 766.) Ms. Bissell testified that she registered shock at the appellant's question and told him "absolutely not." (MSPB tr. at 766.) Although Ms. Bissell stated that this was the entire extent of their conversation, she insisted that the conversation lasted for ten to fifteen minutes. (MSPB tr. at 766-67, 781-85.)

Ms. Bissell further testified that approximately 45 minutes after her first conversation with the appellant, she encountered him again outside his office as she was delivering documents to another attorney. According to Ms. Bissell, the appellant was standing with a cluster of other people, who she assumes were U.S. Marshals. Ms. Bissell testified that when the appellant saw her, he turned to his

cooperating witness and said: "Henry, this is Ann Bissell who works with Shelvon Suggs, the girl we were talking about." (MSPB tr. at 768.) Harris then stuck out his hand to shake Ms. Bissell's hand, but she refused. Ms. Bissell further testified that during either the first or second interchange with the appellant, he stated that the cooperators "weren't such bad guys." (MSPB tr. at 767, 786.)

Ms. Bissell testified that the appellant's attempts to involve her with Harris upset her because Harris was a murderer and Ms. Bissell's sister had been murdered four years earlier. Ms. Bissell testified that she immediately reported the appellant's comments to her supervisor, Carol Davilo, who was an AUSA in the Civil Division. A few days later, Ms. Bissell also spoke to AUSA Thomas Walsh, Chief of the Civil Division, who told her the matter had been taken care of. (MSPB tr. at 773.)

AUSA Carol Davilo testified that she recalled speaking to Ms. Bissell in the late Summer of 1991 when Ms. Bissell was very upset. According to Ms. Davilo, Ms. Bissell was "aghast" because the appellant wanted to know if Ms. Bissell thought Ms. Suggs would accept phone calls from a cooperating witness. (MSPB tr. 818, 820.) After listening to Ms. Bissell's description of the appellant's conduct, AUSA Davilo took no further action. (MSPB tr. at 811, 824-27.) AUSA Davilo explained that she did not report the incident to other supervisors because Ms. Bissell assured Ms. Davilo she would not participate in conduct similar to

that suggested by the appellant. (MSPB tr. at 811.) AUSA Davilo further testified that she does not recall telling Chief Walsh about Ms. Bissell's complaints concerning the appellant's remarks to her. (MSPB tr. at 815, 825.)

Within days after her conversation with Ms. Bissell, an incident occurred that persuaded Ms. Davilo to complain about the cooperating El Rukn inmates' presence in the Civil Division of the U.S. Attorney's office. According to AUSA Davilo, approximately two nights after Ms. Bissell complained about the appellant's remarks, Ms. Davilo saw two guards (who may have been U.S. Marshals) standing with a prisoner who was speaking to Ms. Suggs and leering at her "like she was a piece of meat." (Agency File at tab 5d-51, summary of Bissell's July 23, 1993 FBI interview, page 2; MSPB tr. at 812-13.) The appellant was not a part of this group, and Ms. Davilo could not identify the prisoner. (MSPB tr. at 815, 828.) Ms. Davilo was infuriated because the guards appeared to be amused by the prisoner's antics, and she reported the "leering" incident to Civil Division Chief Tom Walsh. (MSPB tr. at 814-15.) Based on this complaint, the Marshals Service changed the route they used when escorting cooperating El Rukn inmates through the U.S. Attorney's office.

The appellant's account of his oral interchange with Ms. Bissell differs significantly from her account. (MSPB tr. at 3399-3406.) The appellant denies asking Ms. Bissell to intercede on Harris' behalf to facilitate communication with

Ms. Suggs. The appellant contends that Ms. Bissell misinterpreted his remarks.

In rendering his account of his conversation with Ms. Bissell, the appellant offered, as a matter of general background, a brief description of cooperating El Rukn Henry Harris. The appellant explained that Henry Harris was a "bizarre" character who was writing letters to numerous individuals, including Congressmen, soliciting support for the "Young Mustafas of America," which was an organization that Harris conceived and described as a "religious, grassroot, economic and social development organization." (*See* Agency File at tab 5d-163.)

According to the appellant, Harris was in the appellant's office one night during the Summer of 1991 after testifying in an El Rukn trial. There was a large number of people milling about in front of the appellant's office because Harris was guarded by a detail of WITSEC Marshals. The appellant testified that Harris mentioned having a verbal interchange with a female employee in the office, whom Harris described. (MSPB tr. at 3403.) According to the appellant, Harris also asked the appellant to get the employee's name so Harris could enlist her support for his Young Mustafas of America organization. The appellant testified that he chuckled and replied, facetiously, "Yeah sure, Henry, no problem." (MSPB tr. at 3402.) Deputy Marshal Marvin Reno, head of the WITSEC guard detail, asked the appellant if he was kidding, to which the appellant replied "Yeah, of course I am." (MSPB tr. at 3403.) Deputy

Reno confirmed the appellant's account of this interchange. (MSPB tr. at 1939-41.)

The appellant testified that shortly thereafter, the WITSEC Marshals began escorting Harris down the hall and back to the MCC, as the appellant followed them and the group continued to talk and laugh with Harris. The appellant testified that as Ms. Bissell came into the group, he said "Henry, here -- this is Ann Bissell, she works down the hall with this girl we were just talking about." (MSPB tr. at 3404.) At that point, Harris attempted to extend his hand to Ms. Bissell to say "pleased to meet you," but Harris could not extend his hand more than four inches because his arms were "belly-chained" at his waist. (MSPB tr. at 3404-05.) Ms. Bissell stepped back, and the Deputy Marshals and Harris continued walking out of the building.[53]

The appellant testified that as the Marshals escorted Harris away, Ms. Bissell turned to the appellant with a "quizzical puzzled look" and asked what that was all about. According to the appellant, he told Ms. Bissell that Harris was a government witness who had just asked the appellant to ascertain whether Harris could write a letter to a female employee who worked in Ms. Bissell's area. According to the appellant, Ms. Bissell stated the name of the clerk Harris

53. Although it was no doubt inappropriate to introduce a cooperating witness who was a murderer and street-gang member to an employee of the U.S. Attorney's office, the agency did not charge the appellant with misconduct for this behavior.

had described, and the appellant asked whether Ms. Bissell thought Ms. Suggs would allow herself to become involved in such activity. The appellant further testified that he advised Ms. Bissell to tell Ms. Suggs not to have passing contact with cooperating El Rukn inmates. (MSPB tr. 3405-06.) The appellant testified that he heard nothing more about this conversation until two years later when he was confronted with Ms. Bissell's allegations during his testimony at the post-trial hearings.

Analysis

The agency argues that the Board should credit Ms. Bissell's account of her conversation with the appellant because she is a 16-year employee of the U.S. Attorney's office and she has no reason to fabricate her allegations against the appellant. The agency further argues that Ms. Bissell's account of the conversation is reliable because her description of the conversation has never wavered.

Notwithstanding the agency's argument, there are questions about the reliability of Ms. Bissell's recollection because she adamantly maintains that her conversation with the appellant lasted for ten to fifteen minutes. (MSPB tr. at 766-67, 781-85.) Yet, the entire time consumed by the exchange of remarks that she recounts could not have lasted much longer than 45-seconds. (MSPB tr. at 783.) Because Ms. Bissell testified that the brief remarks she recounted constituted the entire extent of their conversation, (MSPB tr. at 784-85), the accuracy of her memory of the conversation is suspect. Moreover, the

understandable intensity of Ms. Bissell's emotional reaction to any reference to interacting with cooperating El Rukn inmates may have colored her understanding of the appellant's remarks about Harris. Nevertheless, the agency argues that Ms. Bissell's account is credible because it is corroborated by her contemporaneous complaint to her supervisor, AUSA Carol Davilo.

The agency's argument is not entirely persuasive because Ms. Davilo did not exactly corroborate Ms. Bissell's rendition of the appellant's remarks. Ms. Davilo testified that when Ms. Bissell came to her office to complain about the appellant's remarks, Ms. Bissell said the appellant had just asked if she thought Ms. Suggs would be willing to accept phone calls from a cooperating witness. (MSPB tr. at 808-09 & 820.) Ms. Davilo testified that she concluded the appellant was asking Ms. Bissell's opinion as to whether Ms. Suggs would accept phone calls. (MSPB tr. at 821.) Ms. Davilo testified it was not clear to her that the appellant "was soliciting Ms. Bissell to go to Suggs and ask her to be a party to it." (MSPB tr. at 821.) Thus, Ms. Davilo is not sure the appellant actually asked Ms. Bissell to intercede on behalf of the cooperating El Rukn inmate.

The record also shows that Ms. Davilo took no action to report the appellant's conduct at the time (or even two days later when she complained to Chief Walsh about the "leering" incident). Had AUSA Davilo believed the appellant actually asked Ms. Bissell to intercede in the manner alleged, AUSA Davilo would have practically been required to take further

action to address this act of serious misconduct. AUSA Davilo acknowledged the seriousness of the charge during her cross-examination. (MSPB tr. at 424-25.) In fact, the agency's deciding official, David Margolis, testified that the "Bissell incident" was "very serious" and, in fact, was the "second most serious charge" in the notice of proposed removal because the charge involved "absolutely outrageous and improper" conduct. (MSPB tr. at 1470-72, 1485-87.) Given the serious nature of the charged misconduct, Ms. Davilo's inaction after hearing Ms. Bissell's complaint indicates that the appellant did not actually ask Ms. Bissell to intercede on behalf of Harris.

In addition to AUSA Davilo's uncertainty about the import and intention of the appellant's question to Ms. Bissell, Civil Division Chief Walsh also concluded that the incident did not occur in the manner recounted by Ms. Bissell. In his July 5, 1995 interview with the appellant's attorney (the accuracy of which Mr. Walsh affirmed during his MSPB testimony), Mr. Walsh stated that the "Bissell incident" resulted from "miscommunications, misrecollections, or misunderstandings." (Agency File at tab 4b-52, page 3.) AUSA Walsh's opinion is entitled to a substantial amount of weight because he is a respected, long-time employee of the U.S. Attorney's office and he spoke to all of the key participants within days after the appellant spoke to Ms. Bissell.

The likelihood that Ms. Bissell may have misinterpreted the appellant's remarks is also demonstrated by the fact that Ms. Suggs misunderstood Ms. Bissell when she repeated the appellant's remarks to her. Ms. Bissell testified that she talked to Ms. Suggs within a few days after the incident. According to Ms. Bissell, she told Ms. Suggs that the appellant had asked Ms. Bissell if Ms. Suggs would accept phone calls from a cooperating El Rukn inmate. (MSPB tr. at 774.) Ms. Bissell testified that she merely related the incident to Ms. Suggs using the appellant's very words, without suggesting that Ms. Suggs do anything, one way or the other. (MSPB tr. at 792; Agency File at tab 5d-453, summary of Bissell's October 23, 1995 FBI interview.) Yet, notwithstanding the fact that Ms. Bissell did not intend to intercede on behalf of the El Rukn inmate, Ms. Suggs believed that Ms. Bissell was actually asking her to accept phone calls from the cooperating inmate. (MSPB tr. at 792.) The FBI's written summary of its August 3, 1993 interview with Ms. Suggs shows that she believed Ms. Bissell had asked her to accept phone calls from Harris. The summary indicates that Ms. Suggs told Ms. Bissell that Harris "absolutely could not have [Suggs' phone number] and that she did not appreciate being asked." (Agency File at tab 4c-29.)

In addition to the evidence indicating that there may have been some miscommunication between the appellant and Ms. Bissell, it is difficult to believe that the appellant (an experienced supervisory AUSA) would openly ask another supervisory employee of the U.S. Attorney's office to

participate in a scheme that was so patently wrong. Moreover, the type of misconduct alleged by Ms. Bissell is quite inconsistent with the appellant's prior actions. Even Ms. Bissell, who testified that she had come to know the appellant over the years, admitted that the appellant's request for her assistance came from "out of the blue." (MSPB tr. at 781.) In fact, some two years earlier, the appellant chastised another cooperating El Rukn inmate (Eugene Hunter) for writing a personal letter to the appellant's secretary, Nancy Green. Ms. Green testified that she received a personal letter from Hunter in the Summer of 1989 and brought it to the appellant's attention. According to Ms. Green, the appellant was "appalled" by Hunter's conduct and reprimanded Hunter, who then apologized to Ms. Green. (MSPB tr. at 1972-74; Agency File at tab 4b-54(ii).)

Conclusion: **Attempting to Facilitate Inappropriate Communication**

None of the participants prepared contemporaneous written documentation to memorialize this incident for the record. The incident described by Ms. Bissell occurred a full two years before the appellant was ever confronted with the allegations and asked to recount his version of their interchange. And it was six years before the witnesses appeared at the MSPB hearing to recount their versions of the incident. These long delays are significant in terms of the probative value of the witnesses' testimony because the conversation they describe was quite brief and occurred during a period when the appellant was exceptionally busy

prosecuting the El Rukn trials. In addition, the long delay in bringing these allegations to light appears to have prevented the parties from identifying other witnesses (such as members of the guard detail who were escorting Harris) who could describe the events on the night in question. In fact, Ms. Bissell could not even identify the exact month in which the conversation took place. Consequently, because the facts underlying the charge are so old, it is difficult to reconstruct the event in question. *Cf. Special Counsel v. Santella*, 65 M.S.P.R. 452, 465 (1994) (unreasonable delay in bringing adverse action may prejudiced the person against whom action taken); *Messersmith v. General Services Administration*, 9 M.S.P.R. 150, 155 (1981) (charge may be dismissed if agency's delay in proposing adverse action is unreasonable and prejudices employee's ability to defend himself).

In addition to the long delay in confronting the appellant with allegations of misconduct based on his conversation with Ms. Bissell, the record shows that the charge does not precisely conform to Ms. Bissell's account of the conversation. The agency has charged the appellant with attempting to facilitate inappropriate communication between El Rukn inmate Henry Harris and Debt-Collection Clerk Shelvon Suggs "by requesting that Ms. Bissell intercede with Ms. Suggs to determine if she would take phone calls from" Harris. (*See* Agency File at tab 4c, page 5 of notice of proposed removal.) But the record contains no evidence that Ms. Bissell ever stated that the appellant actually asked her to "intercede" with Ms. Suggs to obtain

her agreement to accept phone calls from Harris. Ms. Bissell has merely testified that the appellant asked her if she "thought" Ms. Suggs would accept phone calls from a cooperating El Rukn inmate. Because Ms. Bissell's account of the appellant's statement does not assert that the appellant actually asked for Ms. Bissell's assistance in facilitating communication between Harris and Ms. Suggs, the statement Ms. Bissell attributed to the appellant is subject to two differing interpretations.

Two other AUSA's who spoke to Ms. Bissell at the time of the incident found room to ascribe a benign interpretation to the remarks. According to AUSA Davilo, it was not clear to her, from Ms. Bissell's contemporaneous description, that the appellant "was soliciting Ms. Bissell to go to Suggs and ask her to be a party to it." (MSPB tr. at 821.) And Civil Division Chief Walsh stated that the "Bissell incident" resulted from miscommunications, misrecollections, or misunderstandings. (Agency File at tab 4b-52, page 3.) Their opinions are entitled to substantial weight because they are respected members of the U.S. Attorney's office and they spoke to Ms. Bissell on the night of the incident as well as a few days later. In short, the record leaves considerable room to doubt the charge that the appellant asked Ms. Bissell to intercede with Ms. Suggs to determine if she would take phone calls from Harris. Consequently, because Ms. Bissell has not testified that the appellant actually asked her to "intercede" with Ms. Suggs to obtain her agreement to accept phone calls from Harris, I find that a preponderance of the evidence does not establish the

charge that the appellant attempted to facilitate inappropriate communication between El Rukn inmate Henry Harris and debt-collection clerk Shelvon Suggs. Therefore, specification A of charge two is not sustained.

Charge 2, Specification B: **Granting El Rukn Cooperating Inmates Unrestricted and Indiscriminate Access to Telephones**

The second specification of the charge that the appellant mismanaged cooperating El Rukn inmate witnesses asserts that he gave them unrestricted and indiscriminate access to telephones in the U.S. Attorney's office. According to the proposal notice, the unrestricted and indiscriminate access was facilitated by personnel in the U.S. Attorney's office who, at the appellant's direction, forwarded telephone calls that cooperating El Rukn inmates placed from the MCC. The proposal notice asserted that the calls were forwarded to unknown third parties. The proposal notice further specified that the unrestricted and indiscriminate access to telephones was also facilitated by letting cooperating El Rukn inmates place telephone calls from inside the U.S. Attorney's office.

At the MSPB hearing, paralegal assistant Tanya Van Blake described the manner in which El Rukn cooperators were allowed to use telephone facilities available in the U.S. Attorney's office while she worked on the El Rukn case. Ms. Van Blake started working for the U.S. Attorney's office in July 1991 in the midst of the first six El Rukn criminal trials. Ms. Van Blake testified that both the appellant and Ms. Luchetta (Ms. Van Blake's immediate supervisor) told her

to forward calls received from cooperating El Rukn inmates. According to Ms. Van Blake, Ms. Luchetta said she could forward the El Rukn cooperators' phone calls from the MCC to their family members. Ms. Van Blake further testified that Ms. Luchetta said it was permissible to forward long-distance calls received from El Rukn cooperator Jackie Clay because his family was located in another state. Ms. Van Blake testified that she accepted collect telephone calls from El Rukn cooperators and forwarded those calls to third parties, such as the cooperators' mothers, brothers, and sisters. According to Ms. Van Blake, the cooperating El Rukn inmates generally called the same set of phone numbers. Ms. Van Blake stated that Ms. Luchetta also forwarded calls from the cooperators on a daily basis; and Ms. Van Blake saw the appellant occasionally forward calls from El Rukn cooperators. Ms. Van Blake estimated that each day she personally forwarded approximately 7 to 14 calls received from cooperating El Rukn inmates. She further estimated that she forwarded hundreds of such phone calls from August 1991 to November 1992.

In addition to forwarding calls, Ms. Van Blake testified that cooperating El Rukn inmates were allowed to use telephones in the U.S. Attorney's office to place outside calls whenever they wished. According to Ms. Van Blake, she even saw El Rukn cooperators go into empty offices in the U.S. Attorney's office to place phone calls. Ms. Van Blake testified that no one told her to listen to the calls placed by the cooperating El Rukn inmates, and she saw no other members of the prosecution team listening to the calls. She

further testified that no one kept records of the phone numbers that were called and no one kept a record of who received the calls.

Ms. Van Blake explained that she stopped giving the cooperating El Rukn inmates access to the office's phone system in November 1992 when she heard the practice criticized by a federal judge during the El Rukn post-trial hearings.

At the MSPB hearing, Ms. Luchetta confirmed that she told Ms. Van Blake to forward calls received from cooperating El Rukn inmates. Ms. Luchetta testified that the office received at least one or two collect phone calls per day from cooperating El Rukn inmates, and she routinely forwarded such calls to third parties. Ms. Luchetta also testified that she did not listen to the phone conversations after forwarding the calls.

The appellant does not dispute the fact that cooperating El Rukn inmates were allowed to make phone calls from the U.S. Attorney's office, and the appellant admits the U.S. Attorney's office forwarded calls that cooperating El Rukn inmates placed from inside the MCC. Nevertheless, the appellant denies the misconduct charge and contends that the cooperating El Rukn inmates' use of the telephone facilities available in the U.S. Attorney's office was neither unrestricted nor indiscriminate.

As explained by the appellant, cooperating El Rukn inmates were allowed to use the telephone facilities available in the U.S. Attorney's office as a tool to gather investigatory information, to maintain contact with their family members, and to track down fugitives. The appellant explained that continuing contact with family members was necessary because a primary reason for the El Rukn inmates' agreement to cooperate with the government was to insure the safety of their family members. The appellant testified that El Rukn cooperator Harry Evans also used the phones to assist the task force by obtaining information useful to the investigation. According to the appellant, Evans' use of the telephone was instrumental in setting up controlled drug buys that helped the task force collect evidence against active El Rukn gang members. The appellant also testified that the OCDETF task force apprehended several fugitive El Rukns with the help of information that Evans developed by using the telephone. The appellant further explained that cooperating El Rukn inmates were allowed to place calls from the U.S. Attorney's office when they spent the entire day working in the U.S. Attorney's office and were, therefore, unable to take advantage of their regular privilege of placing calls from inside the MCC.

The appellant's testimony was corroborated by many other witnesses, including: ATF Special Agents Gene Wolfe, Thomas O'Brien, William Bollenberg, and Thomas Murphy; AUSA's Ted Poulos, and Michael Pace; and Chicago Police Officers James Fitzmaurice and Daniel Brannigan. Their explanations for the El Rukn cooperators' frequent phone use was summarized

in Sergeant Brannigan's testimony. According to SGT Brannigan, the OCDETF task force members and the El Rukn cooperators were concerned with the safety of the cooperators' family members because the El Rukn street gang had a history of intimidating witnesses. SGT Brannigan explained that during prior criminal prosecutions of El Rukn gang members, the gang used "hit teams" to intimidate witnesses by beating, shooting, or killing witnesses and/or their relatives. SGT Brannigan also testified that wiretapped phone conversations caught the El Rukn gang's leader, Jeff Fort, ordering the death of a cooperating witness during a prior trial. SGT Brannigan further stated members of the El Rukn street gang intimidated the witness by walking into the courtroom, in the midst of the witness's testimony, escorting two of the witness's minor children. AUSA Ted Poulos confirmed that relatives of cooperating witnesses were shot during Jeff Fort's trial in 1987. SGT Brannigan further testified that the El Rukn cooperators' frequent phone use helped insure that witnesses were not shot, beaten, killed, or otherwise intimidated from testifying during the El Rukn criminal trials in 1991 and 1992.

Police SGT Brannigan also confirmed that cooperating El Rukn inmates used the phones to help gather investigatory information and to locate fugitives. In addition, AUSA Poulos testified that the task force actively used Harry Evans to investigate further crime and drug dealing while he was incarcerated. AUSA Michael Pace also testified that some of the cooperating El Rukn inmates and their family

members were participating in ongoing criminal investigations. SGT O'Callaghan testified that Evans used the phone to entice others in the street to reveal information that was useful to the task force so Evans could impress the sentencing judge with the level of his cooperation with the government. SGT O'Callaghan further testified that Evans facilitated controlled drug buys with his girlfriend by using the phone, and the task force apprehended criminals and collected evidence through the phone calls.

High ranking members of the U.S. Attorney's office and the OCDETF task force confirmed that the government received a benefit from granting the cooperating El Rukn inmates access to the telephones in the U.S. Attorney's office. These witnesses included FAUSA Gary Shapiro, who was Chief of the Organized Crime Division of the U.S. Attorney's office from 1990 to September 1992, and ATF Supervisory Criminal Investigator Arthur Ahrens, who was OCDETF Group Supervisor from April 1989 to April 1991. Even though Mr. Ahrens thought the family-safety issue was collateral, contending that the primary use of the phones was to keep the witnesses from feeling lonely, Mr. Ahrens admitted that the calls had value to the government and he testified that he would not have stopped the calls. In fact, Mr. Ahrens testified that his supervisor, Dan Hogate, the Special Agent in Charge of the ATF's Chicago office, was aware of the call forwarding and did nothing to stop it. Similarly, FAUSA Shapiro, who was Chief of the Organized Crime Division of the U.S. Attorney's office at the time, testified that he

also could have stopped the call forwarding at any time if he thought that it created the danger of criminal activity. Mr. Shapiro further testified that Thomas Durkin, the FAUSA at the time, was aware of the call forwarding and did nothing to stop it.

Finally, ATF Supervisory Agent Ahrens testified that he never thought the El Rukns' frequent phone use created a risk of the El Rukn cooperators committing crimes. ATF Agent Wolfe and SGT Brannigan, among others, also testified that they did not believe that the El Rukns' phone calls created the risk of further criminal activity. In fact, SGT Brannigan explained that forwarding the El Rukns' phone calls helped the task force keep closer tabs on their activities because, even if they had not been allowed to forward calls through the U.S. Attorney's office, the cooperating inmates could have placed their calls directly from the MCC.[54]

According to Mr. Ahrens, his only criticism of the phone calls was that they could have been handled in a more organized manner, noting that some cooperating inmates appeared to create a disruption by seemingly using the

54. To some extent, forwarding calls through the U.S. Attorney's office defeated the ability of the MCC recording equipment because the MCC's equipment could not identify the number to which a call was forwarded. But, the MCC still recorded the entirety of every call inmates placed from inside the MCC. And, presumably, the phone number to which the call was forwarded could be identified from the touch tones that would be audible on the tapes.

phones all day, every day. In response to this complaint, the appellant explained that the volume of calls was a function of the large number of cooperating witnesses. In addition, FAUSA Shapiro, among others, testified that the El Rukn case was a very unique investigation because of its extraordinarily massive size, number of defendants, and number of man hours devoted to the investigation by law-enforcement agents.

In summary, the record shows that there were legitimate reasons for granting the cooperating El Rukn inmates access to the telephone facilities in the U.S. Attorney's office. The record also shows that such phone access was implicitly sanctioned, if not authorized, by individuals with higher authority than the appellant.

Even though the evidence shows there were valid reasons for granting the cooperating El Rukn inmates access to the telephone facilities of the U.S. Attorney's office, the charge of misconduct leveled against the appellant does not focus on the mere fact that he let the cooperators use the phones. As stated in the notice of proposed removal, the appellant has been charged with giving the El Rukn cooperating witnesses unrestricted and indiscriminate access to telephones in the U.S. Attorney's office.

Many witnesses described limits that were placed on the cooperating El Rukn inmates' use of the telephone facilities available in the U.S. Attorney's office. These witnesses included: ATF Special Agents Gene Wolfe, William Bollenberg,

Thomas Murphy, and Thomas O'Brien; Chicago Police Officer James Fitzmaurice; Chicago Police Sergeants Daniel Brannigan and David O'Callaghan; and Deputy U.S. Marshal Marvin Reno. Their testimony established that cooperating El Rukn inmates gained access to the phones in the following manner: The cooperating El Rukn inmates had to ask permission to place phone calls from inside the U.S. Attorney's suite of offices; after the cooperators identified who they were calling, the agent or officer dialed the number and spoke to the person answering the phone before handing the receiver to the cooperating inmate; after the cooperators began to speak, an agent or officer would sit close enough to overhear the cooperator's end of the conversation or the agent or officer would periodically listen in on the conversation.

Many of the law-enforcement agents who frequently guarded the cooperating El Rukn inmates also described other restrictions that limited the cooperators' access to the telephones. Officer Fitzmaurice testified that he only let cooperating El Rukns place phone calls to family members. SGT Brannigan testified that he denied some of the El Rukn cooperators' requests to make outgoing calls from the U.S. Attorney's office. ATF Special Agent Wolfe testified that he only let cooperating El Rukn inmates place one call per day, and the calls lasted no longer than five minutes. Agent Wolfe also testified that he refused cooperators' requests to place phone calls if the cooperators were in the process of being transported back to the MCC. ATF Agent Bollenberg testified that there was always at least one

agent near the cooperators when they used the phone, and the cooperators were not allowed to whisper or speak in code during their phone conversations. Agent Bollenberg further testified that time considerations played a factor in deciding whether to grant a cooperator's request to place a phone call. ATF Agent O'Brien testified that he would make cooperators wait if he was too busy to grant their requests to place phone calls.

The above-described testimony was contradicted by paralegal assistant Tanya Van Blake, who initially testified that cooperating El Rukn inmates could place phone calls from the U.S. Attorney's office whenever they wished and that she saw El Rukn cooperators go into empty offices in the U.S. Attorney's office to place phone calls. But the strength of Ms. Van Blake's assertions was considerably weakened on cross-examination when she admitted she saw a witness go into an office out of a guard's sight only once or twice. She also admitted that the U.S. Marshals and ATF agents who were responsible for guarding the witnesses were at least "in the vicinity" when the El Rukn cooperators used the phones. Ms. Van Blake further admitted that 99% of the time there were more guards than El Rukn inmates in the U.S. Attorney's office, unless an inmate was in a confined area like the "war room." Ms. Van Blake further testified that when she did not hear a cooperating El Rukn inmate ask permission to use the phone, she did not know if anyone had previously given the inmate such permission. Thus, Ms. Van Blake's testimony is insufficient to discredit the testimony of the various law-enforcement agents who described the

restrictions they imposed on the cooperating El Rukn inmates' access to the telephones in the U.S. Attorney's office.

Conclusion: **Telephone Use**

The evidence clearly shows that the cooperators were frequently given access to the telephone facilities of the U.S. Attorney's office. But even though the number and frequency of the calls may have been unusual and disruptive, the agency has not shown that the cooperators had unrestricted and indiscriminate access to the telephone facilities of the U.S. Attorney's office. First of all, every call placed from the MCC, or any other federal correctional facility, is tape recorded. Thus, the calls that were forwarded through the U.S. Attorney's office were tape recorded, and signs posted at the phones in the MCC notified inmates that all calls were being tape recorded. In addition, there is ample testimony showing that other restrictions were placed on the El Rukn inmates' access to the telephone facilities of the U.S. Attorney's office. These restrictions limited the privacy of the phone conversations, the duration of the calls, and the persons to whom the calls could be placed. The calls appear to have been largely limited to family members of the cooperating El Rukn inmates. The evidence also shows that the cooperating El Rukn inmates generally had to ask permission to use the phones, and permission was not always granted. In addition, some agents limited the number of calls they permitted each day. Moreover, when permission was granted, the facilitator of the call dialed the number, spoke to the person receiving

or answering the call, and at least remained within earshot of the cooperator's side of the conversation. Finally, the cooperators were not allowed to whisper or use the El Rukn code during phone conversations.

In light of the restrictions placed on the El Rukn cooperators' use of the phones, I find the agency did not prove that the cooperating El Rukn inmates had "unrestricted and indiscriminate" access to telephones in the U.S. Attorney's office. Therefore, even though the record shows that the cooperating El Rukn inmates frequently placed calls from the U.S. Attorney's office and had calls forwarded to third parties through that office, the agency has not shown that the cooperating El Rukn inmates had "unrestricted and indiscriminate" access to telephones in the U.S. Attorney's office as charged.[55] Therefore, specification B of charge two is not sustained.

Charge 2, Specification C: **Directing Subordinate Employee to Purchase Radio and Coat for Cooperating El Rukn Inmate**

The third specification of charge two asserts that in early December 1991, the appellant directed his subordinate, paralegal Corinda Luchetta, to purchase two personal items (a jacket and a radio) for cooperating El Rukn inmate Earl Hawkins. The proposal notice explained that the appellant exhibited poor judgment or mismanagement because police

55. The agency did not charge the appellant with misconduct based on any alleged failure to disclose the phone calls as a benefit that the government conferred on the El Rukn cooperating witnesses.

personnel were available to handle Hawkins' request. The proposal notice explained that the appellant's behavior constituted misconduct because it contributed to a pervasive attitude that the personnel and facilities of the U.S. Attorney's office were to be used to keep the cooperating El Rukn inmate witnesses "happy." (*See* Agency File at tab 4c.) The proposal notice further stated that this attitude undermined the objectivity, professionalism, and caution the prosecution team should exhibit toward witnesses, especially cooperating inmate witnesses.

While incarcerated at a federal penitentiary outside of Illinois, El Rukn cooperator Earl Hawkins sent Corinda Luchetta a check for $150 for the purpose of buying him a jacket and a radio. Ms. Luchetta used Hawkins' money to purchase a blue-jeans jacket and a "boom box" radio. She mailed the items to Hawkins at the penitentiary. Her actions did not violate any Bureau of Prisons policy or regulation.

Ms. Luchetta testified that El Rukn cooperator Earl Hawkins called her in late Summer 1991 and asked if she would purchase a jacket and a "boom box" for him if he sent her the money. Although Ms. Luchetta agreed to Hawkins' request, she testified she did not think he would actually follow through. But around Halloween of 1991, Hawkins sent Ms. Luchetta a check for $150. Ms. Luchetta testified she became alarmed because Hawkins made the check payable to her, and it suddenly occurred to her that the payment might look like something other than what it was. (MSPB tr. at

1136.) After holding the check for several weeks, Ms. Luchetta finally told the appellant about it in December 1991. The appellant told her she could buy the items for Hawkins, but he directed her to document her activity for the record. Ms. Luchetta then purchased the items, mailed them to Hawkins at the correctional facility, and prepared a memo documenting her actions.

Ms. Luchetta's memo is not entirely consistent with her MSPB testimony. In her memo, she states she received the appellant's approval to purchase the items for Hawkins before he sent her the money. (*See* Agency File at tab 4c-41.) During her testimony at the MSPB hearing, Ms. Luchetta admitted her memo is inaccurate, explaining that she was trying to cover-up the fact she did not talk to the appellant before she received the check from Hawkins. (MSPB tr. at 1237-38, 1241-42.) The memo corroborates Ms. Luchetta's explanation because the memo bears obvious signs that she was fabricating facts to cover herself. For example, even though the memo is dated November 24, 1991, she states in the memo that she purchased the items for Hawkins "sometime **after** November 24, 1991." (*See* Agency File at tab 4c-41.) (emphasis added.) Nancy Needles also corroborated Ms. Luchetta's testimony. Ms. Needles, who is the Executive Assistant to the U.S. Attorney, testified that Ms. Luchetta told her she once received a check from a cooperating El Rukn inmate and held the check for a while before talking to the appellant. (MSPB tr. at 1291.) Because the inconsistencies in Ms. Luchetta's memo and Ms. Needles' testimony corroborate Ms. Luchetta's testimony, I

find credible her testimony describing the circumstances surrounding her purchase of the items for cooperator Hawkins.

The appellant's testimony was also consistent with Ms. Luchetta's testimony. The appellant testified Ms. Luchetta informed him around Thanksgiving 1991 that Hawkins had sent her a check to purchase a coat and a radio. According to the appellant, Ms. Luchetta asked if she could "run around the corner," purchase the items, and mail them to Hawkins. (MSPB tr. at 3448.) The appellant testified he gave Ms. Luchetta permission to do this, but he also warned her not do to it again. (MSPB tr. at 3448.) He also told Ms. Luchetta to document her actions by writing a memo for the file. The appellant added that incarcerated cooperating witnesses were allowed to have personal items such as coats and radios. The appellant further testified that it was the only such purchase made for the El Rukn cooperators. Nevertheless, the appellant admitted that, in hindsight, it probably would have been more appropriate to simply send the check back to Hawkins.

Conclusion: **Coat and Radio Purchase**

The charge in question accuses the appellant of "directing" Ms. Luchetta to make a personal purchase for a cooperating El Rukn witness. (*See* Agency File at tab 4c.) The evidence discussed above does not support this charge. The record shows that the appellant did not become involved in the incident until *after* Ms. Luchetta told the cooperating witness that she would purchase the personal

items for him and *after* Ms. Luchetta received the check from the cooperator. Only after holding onto the check for a period of weeks did Ms. Luchetta ask the appellant for advice on how to proceed. In response, the appellant said she could purchase the items, but she should document her actions for the record. The evidence shows that the items were purchased with funds provided by Hawkins; neither the appellant, Ms. Luchetta, nor any government entity furnished the funds to purchase the items.

The evidence shows that the appellant did not initiate Ms. Luchetta's involvement in purchasing the coat and radio for Hawkins. Rather, Ms. Luchetta had already agreed to Hawkins' request to purchase the items before she ever raised the issue with the appellant. Thus, under the facts established in the instant record, the appellant acquiesced to a course of conduct in which Ms. Luchetta had already agreed to participate. Although the appellant's acquiescence may technically constitute "directing" Ms. Luchetta to purchase items for a cooperating witness, under the circumstances described the agency has failed to establish that this could reasonably constitute actionable misconduct. The money for the purchase came from Hawkins' earnings from his prison job, and the agency has not shown that the assistance Ms. Luchetta gave Hunter was illegal or violated any regulation. In fact, the agency has acknowledged that the purchase itself was legal because the proposal notice states that the incident occurred "at a time when agent and police personnel were available to handle the request" to purchase the radio and coat. (Agency File at

tab 4c, p. 6.) Moreover, there is no evidence indicating the appellant exerted any influence over Ms. Luchetta when she initially agreed to purchase the items for Hunter. In addition, the appellant directed Ms. Luchetta to document the purchase for the record and warned her not do to it again. Under the circumstances, I find the agency failed to prove that the appellant's acquiescence in the purchase for Hunter constitutes "mismanagement . . . and extremely poor judgment" as charged. Consequently, specification C of charge two is not sustained. Therefore, charge two is not sustained.[56]

56. Although the proposal notice cited the purchase incident as an example of the appellant's "desire to keep inmate witnesses 'happy' and cooperative with the government," the agency has not explained why it is *per se* inappropriate for a prosecutor to foster a cooperative attitude among "cooperating" witnesses, so long as the prosecutor does not violate a law or regulation and eventually discloses to the defense the nature and extent of any benefit provided to cooperating witnesses. The agency did not charge the appellant with misconduct for failing to disclose Ms. Luchetta's role in purchasing the radio and coat for the cooperating El Rukn witness.

Charge 3: Failure to Properly Supervise Subordinate Paralegal Employee Corinda Luchetta

Charge three contains two specifications of alleged misconduct: (A) letting paralegal Corinda Luchetta develop an inappropriate personal relationship with a cooperating El Rukn inmate witness; and (B), after this personal relationship manifested itself in December 1991, failing to follow orders to (i) bar Ms. Luchetta from further contact with cooperating El Rukn inmates and (ii) phase her out of participation in the El Rukn investigation.

Charge 3, Specification A: Allowing Inappropriate Personal Relationship with El Rukn Inmate

The first specification of charge three asserts that through negligent supervision or willful ignorance, the appellant let paralegal Corinda Luchetta develop an inappropriate personal relationship with cooperating El Rukn inmate witness Eugene Hunter. This inappropriate personal relationship manifested itself in a sexually explicit phone conversation that occurred one night in early December 1991, shortly after the conclusion of the sixth El Rukn criminal trial. The phone conversation was tape recorded because Hunter placed the call from inside the MCC, which records all inmate telephone calls.

During their phone conversation, which lasted approximately 45 minutes, Ms. Luchetta and Hunter discussed various topics, including Ms. Luchetta’s personal love life, her attraction to the appellant, her sexual fascination with a certain cooperating El Rukn inmate, sexual fantasies, and

Hunter's veiled claim that he had been sexually gratified during the phone conversation. (*See* Agency Exhibit 45.) Shortly after discovering the tape recording of the Luchetta/Hunter sex conversation, the MCC searched other tape recordings and discovered a December 1991 phone conversation with El Rukn cooperator Ervin Lee during which Ms. Luchetta agreed to sneak a laxative to him inside the MCC. (Laxatives are contraband because they can be used to facilitate the emission of drugs contained in balloons inmates have swallowed.)

The appellant acknowledged that Ms. Luchetta's phone conversations were inappropriate and that employees of the U.S. Attorney's office should not have such personally familiar relationships with incarcerated government witnesses. But the appellant denies the charge that he was negligent or willfully ignorant in allowing an inappropriate personal relationship to develop between Ms. Luchetta and the cooperating El Rukn inmates.

Background

Ms. Luchetta was a 30-year old law student when the U.S. Attorney's Office hired her as a paralegal in June 1989. Although she became an attorney in November 1990, Ms. Luchetta kept her paralegal job because she wanted the experience of working on the El Rukn case until the trials ended. (She had also applied for a position as an Assistant U.S. Attorney in Chicago.) In January 1991, Ms. Luchetta became the paralegal for the OCDETF task force. Her duties

included organizing and indexing documents, filing police reports and grand-jury testimony, photocopying documents, and organizing the wiretapped phone conversations (known as "Title III" tapes). The appellant testified that Ms. Luchetta was extraordinarily well organized and "worked like a dog." Ms. Luchetta testified that she worked 14 to 18 hours a day, 7 days a week, from February through November of 1991, taking only three days off during this period.

In March 1991, Ms. Luchetta began working directly with the cooperating El Rukn inmates in the laborious process of transcribing and translating the Title III tapes. According to Ms. Luchetta, a large number of Title III tapes had to be handed over to the defendants, and the prosecution team was racing to finish transcribing and translating the Title III tapes because the trials were on the verge of beginning. Ms. Luchetta worked on the Title III tapes almost exclusively with cooperating El Rukn inmate Henry Harris, and to some extent with El Rukn cooperator Eugene Hunter. Ms. Luchetta testified that she generally worked with Harris from 8:30 a.m. to 5:30 or 7:30 p.m. every day, including weekends. They worked together in the "war room," which was a small, windowless room in the interior of the U.S. Attorney's suite of offices. The task of transcribing the tape-recorded conversations and translating the heavily-coded language into everyday English was a laborious process that required meticulous attention to detail.

Analysis

The appellant testified he told Ms. Luchetta that the cooperating El Rukn inmates were violent, dangerous people with whom she should not share details of her personal life. The appellant further testified he told Ms. Luchetta to maintain a professional working relationship with the cooperating El Rukn inmates, even if she did not like them. The appellant also explained that Ms. Luchetta was exposed to a tremendous amount of information revealing the violent criminal nature of the cooperating El Rukn inmates and the grizzly details of the numerous violent crimes they committed. The appellant explained that Ms. Luchetta read the cooperators' witness statements, the long prosecution memo detailing their criminal activity, and the detailed indictments. In addition, Ms. Luchetta was responsible for organizing the numerous crime-scene photos, which showed El Rukn victims lying in pools of blood.

AUSA Ted Poulos testified that Ms. Luchetta was fully cognizant of the need to be cautious with cooperating El Rukn inmates. According to Mr. Poulos, the appellant had warned his staff against getting too close to the cooperators because they could be manipulative. In addition, Chicago Police Sergeant David O'Callaghan testified he personally warned Ms. Luchetta, on more than one occasion, not to become too at ease with the cooperators and to keep them at arms' length because they were murderers. Ms. Luchetta confirmed that the appellant warned her against sharing personal information with cooperating El Rukn inmates. She also admitted that at least two law-enforcement agents gave her "explicit" and "vehement"

instructions on more than one occasion to avoid getting too close to the cooperators and to refrain from telling them anything of a personal nature. (MSPB tr. at 1175-76.)

The agency has not disputed the above-described testimony. Consequently, the evidence shows that Ms. Luchetta was warned about getting too close to the El Rukn cooperators. The evidence also shows that she was exposed to enough information about the details of the El Rukn cooperators' violent criminal lives to put her on notice that she should avoid developing personal relationships with them.

During the period of time during which Ms. Luchetta developed her personal relationships with the cooperating El Rukn inmates, the appellant was enormously busy prosecuting the El Rukn defendants. When Ms. Luchetta began working for the El Rukn trial team in January 1991, the appellant was devoting long hours to preparing for the El Rukn criminal trials, which began in early April 1991. During the 35-week period that extended from April 9 to December 10, 1991, at least one El Rukn trial was in session at all times, save for a three-week period in September. In addition to being in charge of the entire El Rukn prosecution, the appellant was lead trial counsel in four of the trials, which covered 20 defendants and lasted a total of 23 weeks. Ms. Luchetta's inappropriate telephone conversations with the cooperating El Rukn inmates occurred at the very end of this 35-week period. Thus, the evidence shows that during the very period that Ms. Luchetta was developing her

inappropriate personal relationships with cooperating El Rukn inmates, the appellant was either on trial or supervising trials virtually every work day.

Even though the appellant was in court a substantial period of the time in question, the evidence shows Ms. Luchetta was not left alone with the cooperating El Rukn inmates while they worked on the Title III tapes. The evidence shows that the cooperating El Rukn inmates were always guarded in the U.S. Attorney's office. Numerous law-enforcement agents who guarded the cooperators and participated in the El Rukn investigation testified that the cooperating witnesses were under constant surveillance by law-enforcement agents (*e.g.*, ATF agents, Chicago police officers, or U.S. Marshals) the entire time they were in the U.S. Attorney's Office working with Ms. Luchetta. Such testimony was provided by ATF Special Agents Gene Wolfe, Thomas O'Brien, Thomas Murphy, and William Bollenberg; Chicago Police Officers David O'Callaghan and James Fitzmaurice; Deputy U.S. Marshal Jerry Lyda, who was Chief Inspector in the Marshal's Service Witness Security Division in Chicago; and Deputy U.S. Marshal Jesus Gonzales. Many of these witnesses were long-standing members of the OCDETF task force and, therefore, had ample opportunity to observe the security procedures employed for the cooperating El Rukn inmates. For example, Deputy Gonzales was in charge of a team of WITSEC Marshals that guarded the cooperating El Rukn inmates in the U.S. Attorney's office and, as a result, spent many days with Harris as he worked with Ms. Luchetta.

The evidence also shows that Harris and Hunter (the two cooperators with whom Ms. Luchetta worked most closely) were in the federal Witness Protection Program and, therefore, were always escorted by a team of four WITSEC Marshals, who maintained, by all accounts, a very high level of security that included constantly maintaining close proximity to the cooperating witnesses and keeping them in their line of sight. In addition, the cooperating El Rukn inmates who were not in the Witness Protection Program were generally guarded by at least two ATF agents and/or Chicago police officers. And when Ms. Luchetta worked with a cooperating El Rukn inmate transcribing and translating Title III tapes in the "war room," a WITSEC Marshal or other law-enforcement agent always kept the cooperator in his line of sight by at least sitting in the doorway to the room. In addition, one or more Marshals or other law-enforcement agents were seated in the hallway immediately outside the room. Moreover, other attorneys and law-enforcement agents who were members of the El Rukn trial team worked very long hours during the time in question and were usually present in the office throughout Ms. Luchetta's work day.[57]

The AUSA's and law-enforcement agents who observed Ms. Luchetta work with the cooperating El Rukn inmates on a daily basis testified that Ms. Luchetta gave no indication that she was getting too personally involved with the cooperators or that she was even capable of participating in

57. Ms. Luchetta testified that all members of the trial team worked at least 12 hours per day, 6 to 7 days per week.

the above-described inappropriate telephone conversations. These witnesses also corroborated the appellant's testimony that no agents ever told him they observed signs that Ms. Luchetta was having a problem keeping personal matters under control with the cooperators. In fact, every witness who saw Ms. Luchetta work with the cooperating El Rukn inmates testified that they were "shocked" by her inappropriate telephone call with Hunter.

The agency did not present testimony from any witness who expressed a belief that the appellant should have suspected Ms. Luchetta of getting too close to the cooperating witnesses.

In her MSPB testimony, Ms. Luchetta stated that the appellant did nothing to encourage her to engage in the inappropriate telephone calls. In addition, AUSA Poulos and ATF Agent Thomas Murphy testified that the appellant did nothing to encourage the type of activity that led to the inappropriate telephone calls. In fact, the appellant testified that he once "chewed out" Ms. Luchetta and Harris because he heard them laughing together. (MSPB tr. at 3306.) According to the appellant, Ms. Luchetta explained that she and Harris were just taking a break and she promised it would never happen again. The appellant had also previously "chewed out" Hunter for trying to write personal letters to the appellant's secretary, Nancy Green.

Conclusion: **Personal Relationship**

The agency has charged that the appellant, through negligent supervision of Ms. Luchetta or willful ignorance of her interactions with cooperating inmates, let her develop inappropriate personal relationships with cooperating El Rukn inmates.

Negligence is failure to exercise reasonable care. In the record developed at the MSPB hearing, the agency did not prove the appellant failed to exercise reasonable care to insure that Ms. Luchetta did not develop inappropriate personal relationships with cooperating El Rukn inmates. From the outset, the appellant and other law-enforcement agents warned Ms. Luchetta to keep the cooperating El Rukn inmates at arms' length and not reveal personal details to them. In addition, Ms. Luchetta was exposed to a great deal of information (including graphic crime-scene photos) detailing the violent, criminal natures of the cooperating El Rukn inmates. This information, in addition to the specific warnings from trial-team members, should have been sufficient to put Ms. Luchetta, who was by that time a 31-year old attorney, on notice that it was highly inadvisable to develop personal relationships with El Rukn cooperators. The agency has not suggested what, if any, additional steps the appellant should have taken to avert the development of inappropriate personal relationships between Ms. Luchetta and the cooperating El Rukn inmates.

The agency also did not present any evidence indicating that Ms. Luchetta and the cooperating inmates openly manifested signs of growing personal affinity that would

have led a reasonable person to suspect that inappropriate personal relationships were developing. In fact, the evidence shows no one observed any signs indicating Ms. Luchetta was getting too close to the cooperating witnesses; and the agency presented no evidence showing that anyone warned the appellant that Ms. Luchetta was getting too close to the cooperating inmate witnesses. Moreover, the record shows that Ms. Luchetta's sexually explicit phone conversation with Hunter (and her conversation with Kees about the laxative) occurred in early December 1991, shortly after the end of the last of the first six El Rukn criminal trials. During that period, the appellant was frequently in trial and, for that reason, he was not personally able to constantly monitor Ms. Luchetta's continuing interactions with the cooperating El Rukn inmates. Although the appellant was only able to meet with Ms. Luchetta at periodic intervals during the day, he was reasonably assured that Ms. Luchetta was never left alone with the cooperating El Rukn inmates because law-enforcement agents were always present guarding the cooperators and keeping the cooperators under visual observation.

In conclusion, the agency did not produce evidence showing the appellant should have suspected that Ms. Luchetta was getting too close to the cooperating El Rukn inmates. And the agency has not suggested how the appellant could have maintained closer scrutiny of Ms. Luchetta's interactions with the cooperating El Rukn inmates. Consequently, I find the agency has not shown that the appellant was willfully ignorant of the developing personal

relationships between Ms. Luchetta and the cooperating El Rukn inmates. Moreover, the agency has not identified any additional reasonable steps the appellant could have taken to prevent Ms. Luchetta, who was a 31-year old attorney, from developing personal relationships with the cooperating El Rukn inmates. In fact, the agency's deciding official acknowledged in the first letter of decision that he could not say with certainty that the appellant could have prevented Ms. Luchetta's telephone conversation with Hunter. (Agency File at tab 4a, page 14.) Moreover, Ms. Luchetta took full personal responsibility for the inappropriate telephone calls. (MSPB tr. at 1181.) Consequently, I conclude the agency did not prove its charge that the appellant allowed Ms. Luchetta to develop inappropriate personal relationships with the cooperating El Rukn inmates as a result of either negligent supervision of Ms. Luchetta or willful ignorance of their personal interactions. Therefore, specification A of charge three is not sustained.

Charge 3, Specification B: **Failure to Phase Paralegal Corinda Luchetta Out of El Rukn Investigation**

The second specification of failing to properly supervise paralegal Corinda Luchetta is based on events that occurred after the U.S. Attorney's office learned of Ms. Luchetta's inappropriate phone conversations with the cooperating El Rukn inmates. As soon as tapes of these conversations came to light in December 1991, First Assistant U.S. Attorney (FAUSA) Thomas Durkin (the successor to Ira Raphaelson) ordered the appellant to bar Ms. Luchetta from further contact with the cooperating El Rukn inmate

witnesses and to wind down her activity in the investigation. Specification B of charge three alleges that despite FAUSA Durkin's orders, Ms. Luchetta remained actively involved in the El Rukn investigation through the Spring, Summer, and Fall of 1992 and had further contact with a cooperating El Rukn inmate.

Analysis

In mid-December 1991, after listening to the Luchetta/Hunter phone conversation, FAUSA Durkin told Ms. Luchetta to have no further contact with the cooperating El Rukn inmate witnesses and to wind down her involvement in the El Rukn investigation. Ms. Luchetta was also given three months to find employment outside the U.S. Attorney's office. Although this deadline was later extended to six months, Ms. Luchetta's employment with the U.S. Attorney's office was not severed until January 1993, approximately 13 months after the sex tape was discovered. The evidence indicates that Ms. Luchetta sorted, filed, indexed, and boxed the El Rukn evidence through the Spring, Summer, and Fall of 1992. (MSPB tr. at 717.) In addition, AUSA Barry Elden, Chief of Appeals in the Criminal Division of the U.S. Attorney's office, drafted Ms. Luchetta to work on the government's response to the El Rukns' post-trial motions (and appeals) because of her extensive knowledge of the huge documentary record in the case.

The appellant does not dispute he was aware of the restrictions FAUSA Durkin placed on Ms. Luchetta's continued involvement in the El Rukn investigation. In fact, the

appellant admitted Mr. Durkin initially told him that Ms. Luchetta could have no further contact with the cooperating El Rukn inmates. But the appellant claims he later succeeded in persuading FAUSA Durkin to ease the restrictions by arguing that Ms. Luchetta was needed to organize and file all of the documents used during the six recently completed trials.[58] (MSPB tr. at 3309-10.) According to the appellant, Mr. Durkin also told him that a new paralegal would be phased in to prepare for the 7th El Rukn trial in March 1992.

Shortly after FAUSA Durkin issued his directive to phase Ms. Luchetta out of the El Rukn investigation, the appellant went on vacation. When he returned from vacation on February 10, 1992, a new paralegal had not been assigned to the unit.[59] At that point, the appellant talked to FAUSA Durkin about the 7th and final El Rukn trial that was scheduled to begin in 2½ weeks. The appellant explained that the trial team had little substantive evidence ready to present against one of the two defendants in the case because the defendant had only recently been apprehended. The appellant also explained that the prosecution was faced with speedy-trial problems because the initial defendant had

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58. Mr. Durkin confirmed that Ms. Luchetta was allowed to continue working with El Rukn files, transcripts, and document preparation. (*See* Agency File at tab 4c-34, page 3.)

59. Another paralegal was not assigned to the OCDETF unit until December 1992, and Ms. Luchetta left the U.S. Attorney's office in January 1993.

been incarcerated for 2½ years. The appellant further explained that the trial team had to comb through several hundred Title III tapes to find evidence implicating the new defendant. The appellant testified it would have been very difficult to find someone other than Ms. Luchetta to perform this task in such a brief period of time because of her extensive knowledge of the evidence and her proficiency at transcribing and translating the heavily-coded language used in the tape recorded conversations.

The appellant testified he told FAUSA Durkin that the El Rukn trial team needed to transcribe and translate more Title III tapes and Ms. Luchetta was the only employee sufficiently familiar with the process. (MSPB tr. at 3312.) The appellant further testified he told Mr. Durkin that cooperating El Rukn inmate Henry Harris was going to have to return to prepare tapes and transcripts for the 7th El Rukn trial. The appellant testified that FAUSA Durkin said Ms. Luchetta could work on the case and work with Harris in the translation process.[60] (MSPB tr. at 3312-13.)

Mr. Durkin does not recall specifically granting the appellant permission to let Ms. Luchetta work directly with

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60. The appellant testified that Luchetta and Harris listened to “a couple” hundred cassette tapes in the 2½-week period prior to trial and transcribed and translated conversations involving the new defendant. According to the appellant, without Ms. Luchetta’s work, the prosecution would not have had half the evidence that it used against the new defendant and might not have been able to convict him.

cooperating El Rukn inmate witnesses. (*See* MSPB tr. at 1581; Agency File at tab 4b-48(iii).) But in an August 3, 1995 letter to the appellant, FAUSA Durkin confirmed that the appellant informed him Ms. Luchetta was needed to prepare transcripts of the Title III tapes for use during the 7th El Rukn trial. (*See* Agency File at tab 4b-48(iii).) Mr. Durkin's letter also states that even though he does not recall granting the appellant permission to let Ms. Luchetta work directly with cooperating El Rukn inmate witnesses, he and the appellant may have miscommunicated on whether Ms. Luchetta could work directly with Harris. (*See* Agency File at tab 4b-48(iii).) Asserting that he does not believe the appellant would intentionally disregard his orders, Mr. Durkin explained in his letter that by telling the appellant Ms. Luchetta could work on transcripts for the 7th El Rukn trial, the appellant may have believed Durkin gave Ms. Luchetta permission to work directly with Harris.

At the MSPB hearing, Mr. Durkin testified the appellant told him in February 1992 that the El Rukn trial team needed Ms. Luchetta's assistance to organize and transcribe tapes in preparation for the 7th El Rukn trial because there was a "crunch" involved in organizing the evidence. (MSPB tr. at 1581.) Mr. Durkin further testified that he approved the appellant's request. (MSPB tr. at 1581, 1589, 1590-91.) Although Mr. Durkin testified he did not think about whether Ms. Luchetta would be working with the El Rukn cooperators, Mr. Durkin explained that, if asked directly, he would have granted such a request because his main priority was insuring that the 7th trial would not be jeopardized by the

government's inability to prepare for trial. (MSPB tr. at 1591-92.) According to Mr. Durkin, if the government had not been prepared to go to trial, the prosecution could have been jeopardized because the judge might not have been inclined to grant a government request to continue the case since one of the defendants had been sitting in jail for a year. (MSPB tr. at 1590-92.)

After asking FAUSA Durkin for permission to let Ms. Luchetta work on preparations for the 7th El Rukn trial, Ms. Luchetta worked openly with Harris in an area through which other employees of the U.S. Attorney's office frequently traveled. The appellant testified that Mr. Durkin could walk down the hall in the U.S. Attorney's office and see Ms. Luchetta working with Harris.

Conclusion: Luchetta's Work on 7th El Rukn Trial

The evidence shows the appellant asked FAUSA Durkin for permission to let Ms. Luchetta transcribe and translate the Title III tapes. And the evidence shows FAUSA Durkin granted the appellant's request to let Ms. Luchetta transcribe and translate the Title III tapes. In light of Ms. Luchetta's extended past involvement in the Title III tape-transcription process, it was not unreasonable for the appellant to presume that Mr. Durkin knew Ms. Luchetta had to work directly with cooperating witnesses. Thus, it was also not unreasonable for the appellant interpret Mr. Durkin's approval (to let Ms. Luchetta transcribe and translate the Title III tapes) to include permission for Ms. Luchetta to work directly with El Rukn cooperators. In fact, former FAUSA Durkin acknowledged that the appellant may have drawn this conclusion from Mr. Durkin's response to the appellant's request for Ms. Luchetta's assistance. In addition, Mr. Durkin testified that because of the urgent necessity to prepare transcripts of the Title III tapes for use in the 7th El Rukn trial, he would have granted permission, if directly asked, to let Ms. Luchetta work with a cooperating El Rukn inmate. Moreover, after Mr. Durkin told the appellant Ms. Luchetta could work on transcribing and translating the Title III tapes for the 7th El Rukn trial, Ms. Luchetta worked openly with Harris in the U.S. Attorney's office for over two weeks. Since the record shows that Mr. Durkin had access to the open area in which Ms. Luchetta and Harris worked, it is apparent the appellant was not trying to hide the fact Ms. Luchetta was working directly with a cooperating El Rukn inmate. This implies

the appellant and FAUSA Durkin may well have had the miscommunication described by Mr. Durkin.

Because Mr. Durkin has acknowledged that the appellant may have misinterpreted the scope of the permission that Mr. Durkin extended to Ms. Luchetta's involvement in preparation for the 7th El Rukn trial, I find the agency has not established by a preponderance of the evidence that the appellant committed actionable misconduct by letting Ms. Luchetta work directly with Harris to prepare transcripts of the Title III tapes for the 7th El Rukn trial.

Luchetta's Trip to Sandstone

Ms. Luchetta also had contact with a cooperating El Rukn inmate in November 1992 when she traveled to the Sandstone Minnesota federal penitentiary. While she was in Sandstone, Ms. Luchetta worked with cooperator Henry Harris to prepare transcripts of Title III tapes for use in the upcoming trial of Judge Thomas Maloney, a Cook County Circuit Court Judge who had been accused of accepting a bribe to fix a murder trial involving members of the El Rukn street gang. The Judge Maloney trial was scheduled to begin in mid-January 1993.

AUSA Scott Mendelhoff was the appellant's trial partner in the Judge Maloney prosecution. Mr. Mendelhoff was responsible for getting the case ready for trial because the appellant was out of town during the Summer and Fall of 1992. (The appellant was in Los Angeles from June to November spearheading a project aimed at reducing the

influence of street gangs in Los Angeles.) Mr. Mendelhoff stated that as time passed, he was becoming increasingly concerned that the Judge Maloney case would not be ready for trial because the office was behind schedule transcribing and translating the Title III tapes. (*See* Agency File at tab 5d-396, Mendelhoff's sworn testimony before the Illinois Attorney Registration and Disciplinary Committee.) According to Mr. Mendelhoff, the appellant stated that if Ms. Luchetta worked with Harris for a set number of days, they could pull the Title III tapes together, get them organized, and complete the transcripts for release to the defendants. Mr. Mendelhoff also added that the appellant could not have authorized Ms. Luchetta's trip to Sandstone on his own.

There is documentary evidence showing that Ms. Luchetta's trip to Sandstone to work with Harris was approved by Daniel Gillogly, who was, at the time, the Chief of the OCDETF task force. Mr. Gillogly signed a "Request for and Authorization to Travel" authorizing Ms. Luchetta's trip to Sandstone as part of the drug task force to transcribe and translate Title III conversations with a witness in the Witness Security Program. (Appellant's Exhibit 28.) This authorization was also signed by Gary Shapiro, who was the Chief of the Criminal Division in the U.S. Attorney's office and who had been OCDETF Chief until September 1992.

The evidence shows that AUSA Gillogly was aware of Ms. Luchetta's restrictions when he signed the authorization for

her trip to Sandstone. At the MSPB hearing, Mr. Gillogly testified that either Executive Assistant U.S. Attorney Nancy Needles, Deputy U.S. Attorney Joan Bainbridge-Safford, or FAUSA Thomas Durkin informed Mr. Gillogly of the restrictions that had been imposed on Ms. Luchetta's participation in the El Rukn investigation. (MSPB tr. at 719-20.) Mr. Gillogly also confirmed that the appellant told him Ms. Luchetta should be sent to Sandstone because the Judge Maloney trial was nearing, the transcripts were not "trial-ready," and Harris would be sponsoring admission of the tapes. Mr. Gillogly further testified that Ms. Luchetta was sent to Sandstone to work directly with the El Rukn cooperator because she had "singular" knowledge of the heavily-code language used by the El Rukns during the wire-tapped phone conversations and she was the only person who could complete transcripts of the Title III tapes in the short time available. (MSPB tr. at 721, 724-25.) Mr. Gillogly acknowledged he was aware that Ms. Luchetta would be working directly with cooperating witnesses. (MSPB tr. at 721.) Mr. Gillogly testified that he authorized Ms. Luchetta's trip to Sandstone because he believed her trip was necessary. (MSPB tr. at 721, 742-43.) Mr. Gillogly added that it was reasonable for the appellant to assume Mr. Gillogly was aware of Ms. Luchetta's restrictions. (MSPB tr. at 761.)

Conclusion: Sandstone Trip

The agency has not shown that the appellant unilaterally sent Ms. Luchetta to Sandstone. At most, the evidence shows that while he was stationed in Los Angeles on detail, he

suggested that Ms. Luchetta go to Sandstone to work with Harris to get the transcripts of the Title III tapes ready for trial. The documentary evidence shows the appellant's superiors (OCDETF Chief Gillogly and Criminal Division Chief Shapiro) approved Ms. Luchetta's trip to Sandstone to work with an El Rukn cooperator. (*See* Appellant's Exhibit 28.) Because Mr. Gillogly had been informed of Ms. Luchetta's restrictions and was the appellant's superior in the OCDETF task force, Mr. Gillogly's approval of Ms. Luchetta's Sandstone trip shows the appellant cannot be held responsible for violating FAUSA Durkin's restrictions barring Ms. Luchetta from contact with cooperating El Rukn inmates. Furthermore, the appellant's suggestion came after Mr. Durkin had essentially sanctioned an analogous exigent use of Ms. Luchetta's expertise.

Conclusion: **Failure to Follow Order Limiting Luchetta's Involvement in El Rukn Investigation**

The record shows that FAUSA Durkin directed the appellant to phase Ms. Luchetta out of the El Rukn investigation. But there is no evidence that FAUSA Durkin set a deadline for severing Ms. Luchetta's involvement in the El Rukn investigation. Without a deadline, it is difficult to determine whether Ms. Luchetta's involvement in the investigation was winding down fast enough. Moreover, the agency has not shown that the appellant failed to take steps to reduce Ms. Luchetta's El Rukn duties after he was directed to phase her out of the investigation. After Mr. Durkin ordered the appellant to "phase out" Ms. Luchetta's involvement in the investigation, Ms. Luchetta initially

confined her activities to organizing the El Rukn evidence, indexing the documents and files, and placing the files in boxes. The agency has not shown how such activity compared to the duties Ms. Luchetta performed before Mr. Durkin's order was issued. Consequently, the agency has not shown that the appellant failed to reduce Ms. Luchetta's involvement in the El Rukn investigation. Moreover, AUSA Gillogly, the OCDETF Chief at the time, testified that Ms. Luchetta had been authorized to continue filing and indexing the El Rukn documents after her taped phone conversations with the cooperating witnesses had been revealed. (MSPB tr. at 745.)

In addition, the agency did not assign a paralegal to replace Ms. Luchetta until December 1992, one year after Mr. Durkin told the appellant to phase Ms. Luchetta out of the investigation. The agency has not shown that the appellant was responsible for hiring, or had the authority to hire, a paralegal to replace Ms. Luchetta. In fact, the appellant testified (without specific contradiction from the agency) that Mr. Durkin told him Thomas Scorza, the OCDETF Chief, was responsible for hiring a replacement for Luchetta. (MSPB tr. at 3310-11.) In addition, the appellant was away in Los Angeles for five months on an extended detail when AUSA Barry Elden drafted Ms. Luchetta to help respond to the El Rukns' post-trial motions. Since Mr. Elden held a higher supervisory position than the appellant (and was also apparently aware of Ms. Luchetta's restrictions), the appellant cannot be held responsible for Ms. Luchetta's participation in the projects headed by AUSA Elden.

Ms. Luchetta's only other involvement with the El Rukn case consisted of two contacts with Harris (in March 1992 and November 1992) to prepare transcripts of the Title III tapes for impending trials. As discussed above, in both instances Ms. Luchetta's support was required by exigent circumstances and her contact with Harris met with the approval of AUSA's who held positions higher in the chain of command than the appellant and who also were aware of Ms. Luchetta's restrictions for working with El Rukn cooperating witnesses. Therefore, I find that Ms. Luchetta's contacts with Harris in March and November of 1992 do not show that the appellant violated either FAUSA Durkin's restrictions barring Ms. Luchetta from contact with cooperating El Rukn inmates or Durkin's directions to phase out Ms. Luchetta's participation in the El Rukn investigation. Consequently, because the agency failed to show that the appellant failed to take steps to "phase out" Ms. Luchetta's involvement in the El Rukn prosecution, specification B of charge three is not sustained. Therefore, charge three is not sustained.

Charge 4: **Failure to Maintain Proper Security of Case-Related Documents**

The fourth charge listed in the notice of proposed removal accuses the appellant of negligence for failing to properly secure sensitive, case-related documents in his office. The proposal notice specifies that a cooperating El Rukn inmate stole confidential, case-related documents from the appellant's office after the appellant gave the cooperator unrestricted access to the office. In the second

letter of decision, Associate Deputy Attorney General Margolis conceded that this alleged misconduct was a minor violation meriting only the mildest discipline. Nevertheless, Mr. Margolis concluded that the incident showed the appellant fostered a permissive attitude toward cooperating El Rukn inmates in the U.S. Attorney's Office.

The documents in question are two memos created within the U.S. Attorney's Office in the Summer of 1989. The memos discussed the size and scope of the proposed El Rukn indictment and the difficulties that the district court and the U.S. Attorney's office would face prosecuting such a large indictment. The first document is a 2-page memo dated July 27, 1989, in which Thomas Scorza, the Chief of the Drug Enforcement Task Force, outlined some of the problems the government, the courts, and the defendants would face preparing for trial and prosecuting the "mammoth and unwieldy" indictments proposed by the appellant. (*See* Agency File at tab 4b-86(i).) The other memo is the appellant's August 7, 1989 response to the concerns raised by Mr. Scorza. (*See* Agency File at tab 4b-86(ii).)

The documents were removed from the appellant's office on September 22, 1989.[61] On that date, the appellant let defense attorney Michael Mann use his office for a brief meeting with cooperating El Rukn inmate Derrick Kees. Later that evening, cooperating El Rukn inmate Henry Harris called

61. This date is confirmed by Warden Beeler's September 22, 1989 memo. *See* Agency File at tab 4b-103(ii).

the appellant from the MCC and said that Kees had discovered prosecution documents in his court papers after returning from the U.S. Attorney's office. The appellant immediately notified the MCC, upon which notification guards searched the El Rukn cooperators' cells and confiscated the documents described above.

The appellant testified that when attorney Michael Mann met with cooperator Kees in the appellant's office, an agent remained in their line of sight just outside the door. The appellant speculated that Kees placed his own folder of documents on top of the appellant's documents and then picked up the appellant's documents when leaving the appellant's office. (The cooperating El Rukn inmates routinely carried large manila folders containing their grand-jury statements, their proposed plea drafts, and other relevant legal papers.)

The appellant testified that it was common practice to let defendants and their attorneys use AUSA's private offices for brief meetings because the U.S. Attorney's suite of offices lacked other suitable locations, such as conference rooms. The appellant further explained that he knew Michael Mann had an outstanding reputation for honesty and integrity. AUSA Poulos confirmed the appellant's opinion, and the agency introduced no evidence to the contrary. The appellant further testified that the documents in question did not contain information that could have jeopardized the El Rukn prosecution. He explained he used his credenza to secure "sensitive" documents, which the

appellant described as his personal notes of interviews with witnesses as well as documents relating to the security of cooperating witnesses' families. AUSA Poulos also testified that the documents taken from the appellant's office by cooperator Kees did not contain information that could endanger anyone, jeopardize the prosecution, or assist cooperating witnesses who might be tempted to tailor their testimony.

Several AUSA's (including some high-ranking AUSA's who were agency witnesses) confirmed the common practice regarding office use described by the appellant.[62] The agency's witnesses included Thomas Durkin, who was the First Assistant U.S. Attorney from 1991 to 1993, Joan Bainbridge-Safford, was co-First Assistant U.S. Attorney in 1989, and Gary Shapiro, who is the current First Assistant U.S. Attorney in Chicago. They testified it was common practice for prosecutors to briefly relinquish their offices for private meetings between defendants and their attorneys during plea negotiations because the U.S. Attorney's office did not have separate conference rooms at the time. In addition, Mr. Durkin explained that the practice was a benefit to prosecutors because plea negotiations could proceed efficiently without prolonged breaks that would otherwise be necessary to secure a meeting place outside the U.S. Attorney's office. The agency's witnesses further explained that AUSA's did not have to secure all documents

62. The appellant's description of the common practice was also corroborated by three of his witnesses: AUSA's Michael Pace, Victoria Peters, and Theodore Poulos.

before letting defense attorneys use their offices to meet with defendants; rather, AUSA's merely had to exercise prudence regarding the documents that were left exposed in their offices during the meetings. In short, AUSA's had to take reasonable precautions to insure that sensitive documents were secured prior to surrendering their offices for the private meetings between the defendants and their attorneys. In fact, FAUSA Bainbridge-Safford testified that, on occasion, she let defense attorneys and their clients meet in her office with the door closed.

Conclusion: **Document Security**

The uncontradicted evidence shows that the appellant followed generally accepted office practice by letting Derrick Kees and his attorney use the appellant's office for a private meeting. The evidence shows the appellant exercised due caution under the circumstances because Kees' attorney was known to be trustworthy and a law-enforcement agent kept Kees in his line of sight during the meeting through the open door to the appellant's office. Moreover, the evidence does not establish that the documents in question were "sensitive." A review of the documents shows that they do not contain any discussion of the evidence or specific facts that would be used to prove any criminal charges covered by the indictments. The testimonial evidence developed at the MSPB hearing shows the documents were not sensitive in terms of either jeopardizing the prosecution, releasing information that could expose others

to physical harm, or allowing the cooperating El Rukn inmates to tailor their testimony. In short, even though the agency may have been embarrassed that internal discussions of the feasibility of prosecuting such a large, complex indictment could fall into the hands of an incarcerated cooperating witness, the agency has not shown that the documents were sensitive. The agency has also not shown that the appellant engaged in an aberrant practice or failed to exercise due care to protect case-related documents. Consequently, I conclude that the agency did not sustain its burden of proving that the appellant failed to maintain proper security of case-related documents. Therefore, the charge is not sustained.

Final Conclusion

In conclusion, a thorough analysis of the record in this appeal reveals that the agency did not carry its burden of proving any of the charges listed in the notice of proposed removal. Because the agency did not prove any of the charges, I reverse the agency's action removing the appellant from employment.

DECISION

The agency's action is REVERSED.

ORDER

The agency is **ORDERED** to cancel the removal and to retroactively restore appellant effective November 22, 1996. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

The agency is also **ORDERED** to issue a check to appellant for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. Appellant is **ORDERED** to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, the agency is **ORDERED** to issue a check to appellant for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

The agency is further **ORDERED** to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its efforts to comply.

INTERIM RELIEF

If a petition for review is filed, I **ORDER** the agency to provide interim relief to appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective upon the issuance of this decision and will remain in effect

until the decision of the Board becomes final. If an agency files a petition or cross petition for review and fails to submit evidence that it has complied with the provisions of

5 C.F.R. § 1201.115(b)(1) or (2), the Board will dismiss the agency's petition for review.

FOR THE BOARD: _____
Howard J. Ansorge
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on August 27, 1998, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, FAXed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, FAXed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be

received by the court no later than 30 calendar days after the date this initial decision becomes final.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees and costs by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than 30 calendar days after the date of the agency's notification of compliance.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

DECISION CASE CITES LISTING

William Hogan, Jr., v. Department Of Justice

Docket No. CH-0752-96-0621-I-2

CASES

Behensky v. Department of Transportation, 27 M.S.P.R. 690 (1985), *aff'd sub nom. Brandis v. Department of Transportation*, 795 F.2d 1012 (Fed. Cir.) (Table), *cert. denied*, 479 U.S. 1006 (1986).....69

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