SUPPLEMENTAL BRIEF FO [redacted]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1541

UNITED STATES OF AMERICA, Appellee,

v.

GUILLERMO NOVO SAMPOL, Appellant,

No. 79-1542

UNITED STATES OF AMERICA, Appellee,

v.

ALVIN ROSS DIAZ, Appellant,

No. 79-1808

UNITED STATES OF AMERICA, Appellee,

v.

IGNACIO NOVO SAMPOL, Appellant,

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES F.C. RUFF,
United States Attorney.

JOHN A. TERRY,
MICHAEL W. FARRELL,
DIANNE H. KELLY,
Assistant United States Attorneys.

Cr. No. 78-367

GOVERNMENT

No. 6

I N D E X

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1541

UNITED STATES OF AMERICA, Appellee,

v.

GUILLERMO NOVO SAMPOL, Appellant,

No. 79-1542

UNITED STATES OF AMERICA, Appellee,

v.

ALVIN ROSS DIAZ, Appellant,

No. 79-1808

UNITED STATES OF AMERICA, Appellee,

v.

IGNACIO NOVO SAMPOL, Appellant,

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR APPELLEE

Briefs were filed in the instant case by May 20, 1980, and oral argument was heard by a division of this Court on June 10, 1980. The Court has now directed that supplemental briefs be filed discussing the applicability of the Supreme Court's decision in United States v. Henry, 48 L.W. 4703 (S. Ct. June 16, 1980),

to the facts of this case. As will be demonstrated, Henry affords no basis for concluding that the testimony of either Sherman Kaminsky or Antonio Polytarides was improperly admitted.

I. Kaminsky's relationship to the Government and the sequence of events in this case distinguish it completely from the facts upon which the decision in Henry turned.

The Supreme Court in Henry held that the defendant's Sixth Amendment right to counsel had been violated when a paid Government informant was specifically instructed by an FBI agent to listen to any statements made by the defendant about his pending bank robbery charge. This was so even though the agent also told the informant Nichols not to question or initiate conversation with Henry about the robbery. In analyzing the case, the Supreme Court found several facts to be of particular significance. Nichols had been acting as a paid FBI informant for a year and was paid only when he supplied incriminating information to FBI agents. 48 L.W. at 4705 & n.7. The FBI agent who gave Nichols his instructions explicitly singled out Henry as the inmate in whom he had a particular interest and requested Nichols to obtain incriminating information from Henry. Id. at 4705 n.8, n.7. Nichols was not merely a passive listener, but rather ingratiated himself with Henry in order to stimulate conversation. Id. at 4706 & n.12. Upon these particular facts the Supreme Court

found that the Government agent had "deliberately elicited" incriminating statements from Henry in violation of Massiah v. United States, 377 U.S. 201 (1964), and the Sixth Amendment.

The facts in the case before this Court reveal an entirely different sequence of events and thus render it completely distinguishable from Henry. First, as we argued in our original brief and in oral argument, it would be irrational to conclude that Sherman Kaminsky was made an agent of the prosecution by the statements of a federal judge during a sentencing proceeding over which the Government had no control. The Assistant United States Attorney at that sentencing had no knowledge of or connection with the case against Alvin Ross. He disclaimed any intention on the part of the Government to enable Kaminsky to act as an informant in any matter other than the threats against a police officer and a federal judge about which Kaminsky had, unsolicited by the Government, already volunteered information. The concern in Massiah v. United States, supra, and subsequent cases has centered on attempts by law enforcement authorities to deliberately elicit incriminating statements from indicted defendants. Those decisions are designed to prevent overreaching by the prosecution, not by sentencing judges in cases entirely unconnected with the case at issue. This Court will find no decision which has ever held that a federal judge can transform a defendant into a Government agent for Massiah purposes by the imposition of conditions of probation dictated entirely by the judge. To so hold would violate the principle of separation of

powers and make the Government responsible, based on no conduct of its own, for any statement made by a sentencing judge which is designed to promote future righteous conduct by the man being sentenced. There is no support, either legal or rational, for such a position, and the decision in Henry did not create any.

Futhermore, unlike the situation in Henry, there was no agent of the Government even remotely aware of any conversation or proximity between Kaminsky and Ross until after Ross had made his incriminating admissions to Kaminsky. In Henry, the defendant's statements occurred after the FBI agent had instructed Nichols not to question but to be alert to any statements Henry made about his case. In the instant case, Ross' statements occurred before the Government gave Kaminsky similar instructions on October 17.

Kaminsky asked his attorney, William Aronwald, on August 11 to contact the CIA about plans which Ross was making to commit acts of international terrorism. Aronwald instead gave Kaminsky's notes to Assistant United States Attorney Schwartz in New York on August 17. These notes focused on future terrorist plans; Kaminsky at that point was concerned about preventing attacks on Russian ships in American harbors, not about the incriminating admissions which Ross had already made about his case (Tr. 3806, 3819). When he received the notes from Aronwald, Schwartz had no knowledge of Alvin Ross or his case and made no effort to encourage Kaminsky to gather further information. Schwartz

simply found out that an attorney in Washington was handling Ross' case and forwarded the notes to him on August 28. No further communication occurred until October 17, when Kaminsky went to Schwartz's office to talk about the threat to the police officer on which he had supplied information previously. Aronwald mentioned the information which Ross had revealed to Kaminsky about the Letelier case. Aronwald and Schwartz told Kaminsky not to question Ross or initiate any conversation with him, but just to listen if Ross wanted to talk (Tr. 3810-3812). At that time, on October 17, the status of Kaminsky became similar to the status of Nichols in Henry since Ross was specifically mentioned as an object of Government interest and Kaminsky was instructed on how to deal with him.[1/] No prior communication about Ross had been generated by the Government; Kaminsky until that time had no idea that the Government had any interest in Ross. In that respect, Kaminsky occupied a status similar to Joseph Sadler, another cellmate of the defendant in Henry whose testimony was not subject to challenge on Massiah grounds. Salder had no arrangement to monitor or report on conversations with Henry, but on advice of counsel, informed Government agents of his conversation with him. United States v. Henry, supra, 48 L.W. at 4704.

1/ Contrary to appellants' assertion, we have never argued that Ross engaged in all of his conversations with Kaminsky prior to June 14. June 14 is an irrelevant date. Kaminsky had no conversation with any member of the Government about Ross until October 17 and thus October 17 is the point at which he became a Government informant for Massiah purposes.

In addition to the important difference in the timing of the defendant's statements in Henry and the instant case, the relationship of Kaminsky with the Government was totally different from the relationship of Nichols with the FBI. Nichols was a paid informant who had a continuing contingent fee agreement with the FBI whereby he would be paid for any incriminating statements he supplied. This was a powerful incentive for Nichols to "ingratiate" himself with Henry and gain his confidence, as the Supreme Court concluded he had, particularly since the FBI agent "in his discussions with Nichols [had] singled out Henry as the inmate in whom the agent had a special interest." 48 L.W. at 4705 n.8. Kaminsky, on the other hand, had no such continuing arrangement with any segment of the prosecution. He had already received probation from his sentencing judge and had been told that the Government would make no efforts to help perpetuate the gathering of any further information. While Kaminsky may have felt that it would be to his advantage to pass along information about plans for future violent acts, the Government had disclaimed any intention or effort on its part to enable him to do so. The purpose of Massiah is not violated by an inmate who undertakes on his own initiative, without encouragement or sponsorship by the Government, the transmittal of information to which he is exposed. The Government had no arrangement with Kaminsky to report on any matters other than the threats to the judge and police officer and had already conferred its only benefit on Kaminsky, which was

to make his cooperation in those matters known to his sentencing judge. The relationship between Kaminsky and the Government was thus totally different from the status of Nichols vis-a-vis the FBI in Henry.

Finally, the Court in Henry emphasized that Nichols was not merely a passive listener but deliberately ingratiated himself with Henry in order to stimulate conversations. In the instant case, it is clear that association with Ross was something which Kaminsky did not encourage, but which he could not avoid, short of trying to hide when he saw him coming. As Kaminsky testified, "Mr. Ross will talk and talk and talk as long as you are able to listen. There were times that I literally had to run to get away from him, because I was working at the institution and had a job. For some reason Mr. Ross decided that he wanted to talk to me, and he talked continuously, sir." (Tr. 3808.) There was no indication whatever that Kaminsky was more than a passive listener to Ross' emotional tirades; in fact, Kaminsky often sought to avoid Ross in order to meet his own institutional responsibilities.

It is clear, then, that the Supreme Court's decision in Henry in no way affects the admission of Ross' statements in this case. Kaminsky had no ongoing arrangement with the Government to receive benefits for any information he supplied. The Government did not indicate until October 17, long after the incriminating conversations occurred, that it had any interest in obtaining information from Ross. Finally, Kaminsky did nothing

to ingratiate himself with Ross and frequently found Ross' insistence on talking to him to be irksome. He finally asked his attorney to contact the CIA (not the United States Attorney) because he believed Ross to be a dangerous man, fully capable of carrying out his plans to commit acts of international terrorism. All three of these factors constitute crucial distinctions from the situation in Henry. Whereas in that case the Supreme Court could reasonably find that a government agent had "deliberately elicited" incriminating statements from a defendant in violation of Massiah, the instant case reveals no such affirmative conduct by the Government either intended to or likely in effect to elicit incriminating information from Ross. Application of Massiah to this case would, in multiple respects, reduce that decision to an absurdity.

II. Assuming arguendo that Kaminsky's testimony was improperly admitted against Ross, the cases against Guillermo and Ignacio Novo would not be affected in any way.

Even if it were possible for this Court to find that Kaminsky's testimony was prohibited by the decision in Henry, the convictions of Guillermo and Ignacio Novo would be unaffected by such a conclusion. Kaminsky made no reference to either Guillermo or Ignacio during his testimony. The jury was instructed twice, once during direct examination and once after cross-examination, that they were not to consider Kaminsky's testimony as evidence

against Guillermo or Ignacio since Ross' statements were made after the termination of the conspiracy. Kaminsky's single reference to Ross' statement that he and other members of the CNM had been involved in the Letelier murder was not the type of statement from which the jury could only infer that the Novo brothers must have been the people to whom Ross had referred. Various members of the CNM had been mentioned throughout the trial, including the two members most directly involved in the murders who had not yet been apprehended and brought to trial. Furthermore, the jury was continuously reminded in instructions and argument that Ignacio was not charged with conspiracy or murder. Since Kaminsky made no mention of readily identifiable individuals and since the jury was repeatedly instructed that they could not consider his testimony against either of the Novo brothers, a determination that Kaminsky's testimony was inadmissible would leave untouched the convictions of Guillermo and Ignacio Novo.

III. The testimony by Antonio Polytarides about a single statement made by Guillermo Novo was not rendered inadmissible by the decision in Henry.

The status of Antonio Polytarides relative to the Government and to Guillermo Novo is also distinguishable from that of Nichols in Henry. Nichols was instructed to keep his ears open for any

statements which Henry might make about his pending case. Polytarides, on the other hand, was originally approached by other inmates who were interested in making arrangements to purchase weapons from him (Tr. 3934). He, like Kaminsky, was not placed at MCC for the purpose of gaining information, but rather for reasons related only to his own case. Polytarides requested to be sent back to his original place of incarceration after talking to Customs agent King about his own case; when he mentioned to King, however, that other inmates were interested in purchasing weapons from him, King persuaded him to follow through on those transactions for the purpose of making new cases (Tr. 3937). In sharp contrast to the facts in Henry, at no time did King indicate that he was interested in obtaining incriminating statements from any inmates about their pending cases. Conversations between Polytarides and Guillermo Novo arose only in the context of Novo's interest in purchasing weapons, not in the context of any interest by Polytarides in encouraging incriminating statements Novo might make about his case. Novo was not singled out in any way for any special attention until King asked Polytarides in July if he could find out anything about the location of the fugitives in Novo's case. When Polytarides mentioned the fugitives, Novo became suspicious and ceased all further contact with Polytarides in July, 1978 (Tr. 3939-3943). No further conversation occurred until December, when Novo heard that Polytarides had received parole. Novo then resumed negotiations,

entirely at his own initiative, for the purchase of machine guns. Polytarides had already received a favorable recommendation from Customs to his Parole Board. By December he had no continuing arrangement for any further benefits from any segment of the Government and certainly had no agreement to monitor incriminating statements about pending cases. At some time during this month Guillermo Novo, who was usually calm and relaxed, appeared very angry. When Polytarides asked what was wrong, purely out of personal curiosity about an unusual mood, Novo replied that he had been betrayed in his case but would pay someone back. Polytarides testified about that single statement at trial and received nothing from the Government in return for doing so. He was never encouraged, solicited or instructed to listen for incriminating statements about pending cases; his only function as an informant was to follow through with weapons negotiations initiated by other inmates. Those negotiations had nothing to do with any charges already filed against those inmates and were not the result of any Government interest in incriminating statements about pending cases. Thus Polytarides was acting in an entirely different capacity from Nichols in Henry, whose explicit mission was to monitor incriminating statements by the particular defendant Henry about the bank robbery in which he was already charged.

Even were the Court to conclude, against all reason, that the admission of Polytarides' testimony was error, the extremely limited nature of the testimony would render the error harmless

beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). The remark was susceptible of several different interpretations, only one of which could be inferred to be incriminating. Considering the extremely damaging evidence offered by Townley against Novo and the wealth of corroborating detail presented, the single item of somewhat ambiguous testimony by Polytarides cannot be said to have contributed to the verdict and was thus harmless beyond a reasonable doubt.

CONCLUSION

For these reasons, as well as for the reasons stated in our main brief, we respectfully submit that the judgment of the District Court as to all three appellants should be affirmed.

CHARLES F.C. RUFF,
United States Attorney.

JOHN A. TERRY,
MICHAEL W. FARRELL,
DIANNE H. KELLY,
Assistant United States Attorneys.