10/23/78

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

v. : Criminal Case No. 78-0367

JUAN MANUEL CONTRERAS SEPULVEDA :
PEDRO ESPINOZA BRAVO
ARMANDO FERNANDEZ LARIOS :
GUILLERMO NOVO SAMPOL
ALVIN ROSS DIAZ :
VIRGILIO PAZ ROMERO
JOSE DIONISIO SUAREZ ESQUIVEL :
IGNACIO NOVO SAMPOL

GOVERNMENT'S ANSWER AND OPPOSITION TO DEFENDANTS' MOTIONS FOR DISCOVERY, INSPECTION AND BILL OF PARTICULARS

The United States of America, by its attorney, the United States Attorney for the District of Columbia, respectfully files the following answer in opposition to the motions for discovery, inspection and bill of particulars filed by the defendants.

The motions filed by the defendants seriously confuse the nature, extent and purpose of Rule 16 of the Federal Rules of Criminal Procedure (discovery), Rule 7(f) of the Federal Rules of Criminal Procedure (bill of particulars) and the doctrine enunciated in Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. The defendants completely misperceive the purpose of a bill of particulars, attempting to make it a discovery device; they try to distort Rule 16 into a legal crystal ball, hoping it will enable them to see the entirety of the Government's case; and they finally attempt to twist Brady into an adhesive that would hold their ill-conceived creation together. Since their motions are based on the erroneous premise that any discovery they are not entitled to under Rule 16 they can receive under Rule 7(f) and Brady, it is important at the outset for the Government to present in clear terms the nature, scope and purpose of Rule 16 (discovery), Rule 7(f) (bill of particulars) and Brady and to state specifically what these rules do not cover.

DISCOVERY (RULE 16)

Discovery under the Federal Rules of Criminal Procedure is governed by Rule 16. Defendants in criminal cases have no general constitutional right to discovery nor does the Due Process Clause

govern the nature or amount of discovery which must be provided. Weatherford v. Bursey, 429 U.S. 545 (1977); Wardius v. Oregon, 412 U.S. 470 (1973). Rather, discovery under the Federal Rules of Criminal Procedure is controlled by Rule 16. Rule 7(f) and the Brady Doctrine, as will be more fully explained below, are not discovery devices. The 1975 amendments to Rule 16 provide for greater discovery to the defense as well as the prosecution. Under the expanded and liberalized discovery provisions of Rule 16, defendants are entitled to discover four things: (1) statements of the defendant where the statement is (a) a written or recorded statement made by the defendant directly to the Government, (b) an oral statement made by the defendant "in response to interrogation by a person then known to the defendant to be a government agent," (c) the recorded testimony of the defendant before the grand jury; (2) the defendant's prior criminal record; (3) documents and tangible objects which are material to the preparation of the defense, or are intended for use by the Government as evidence in chief at the trial, or were obtained from or belong to the defendants; and (4) the results or reports of scientific tests or experiments which are material to the preparation of the defense or are intended for use by the Government as evidence in chief at the trial. Rule 16(a), Fed. R. Crim. P.

The Government has already advised counsel for the defendants that we will fully comply with the four areas which Rule 16 covers. Even at this early date, the Government has already supplied counsel for the defendants with a substantial amount of the discovery mandated by Rule 16 and we will continue to do so as we compile it.

Notwithstanding the limits of Rule 16, the defendants have made wide-sweeping requests for additional discovery, going far beyond that to which they are entitled under Rule 16 of the Federal Rules of Criminal Procedure as only recently amended by Congress. These requests in effect constitute a demand for an open-ended inspection and examination of the Government's investigative files. In most instances, the various "discovery" requests made by the defendants have not been supported by reference to specific cases or other authority. Courts have regularly condemned such sweeping

discovery motions as improper. E.g., United States v. Fioravanti, 412 F.2d 407, 410-412 (3rd Cir. 1969) cert. denied, 396 U.S. 837; United States v. Jordan, 399 F.2d 610, 615 (2nd Cir. 1968), cert. denied, 393 U.S. 1005; United States v. Leta, 60 F.R.D. 127, 129 (M.D. Pa. 1973); United States v. King, 49 F.R.D. 51, 53 (S.D.N.Y. 1970). Cf., United States v. Dolan, 113 F. Supp. 757 (D. Conn. 1953). In fact, only a precious few of the fifty-one areas of requested discovery outlined in the defendants' pleading conform at all to the requirements of Rule 16 (discovery). The defendants, for example, repeatedly ask in various forms throughout their motions for the names and addresses of Government witnesses and persons interviewed as well as any statements they may have given; in essence, the opportunity to see the whole of the Government's case. The defendants, however, have cited no authority in point which supports their right to rummage through the Government's files. Significantly, the Court of Appeals for this circuit has squarely rejected this kind of request. Xydas v. United States, 144 U.S. App. D.C. 184, 445 F.2d 660, cert. denied, 404 U.S. 826 (1971); United States v. Washington, 150 U.S. App. D.C. 68, 463 F.2d 904 (1972). Moreover, the Supreme Court recently repeated its position that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." United States v. Agurs, 96 S.Ct. 2392, 2400 (1976) citing Moore v. Illinois, 408 U.S. 786, 792 (1972).

It is, therefore, very clear that Rule 16 does not give the defense the right to discover all of the Government's evidence. It is also clear that Rule 16 does not give the defense the right to the names and addresses of Government witnesses or persons interviewed during the course of the investigation. Our own Court of Appeals in United States v. Bolden, 169 U.S. App. D.C. 60, 71, 514 F.2d 1301, 1312 (1975), spoke directly to this point:

> Since this was not a capital case at the time of trial [citation omitted], there was no government duty to disclose the witness list.

Even more recently, the Congress of the United States, in adopting the 1975 amendments to the Federal Rules of Criminal Procedure, specifically rejected the idea that the defense should be entitled to the names and addresses of the Government's witnesses even three days before trial. In the Conference Report, H.R. Rept. No. 94-414, 94th Congress, 1st Sess. at 12 (1975), the conferees stated:

> The House version of the bill provides that each party, the government and the defendant, may discover the names and addresses of the other party's witnesses three days before trial. The Senate version of the bill eliminates these provisions, thereby making the names and addresses of a party's witnesses nondiscoverable. The Senate version also makes a conforming change in Rule 16(d)(1). The Conference adopts the Senate version.
>
> A majority of the conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

The Supreme Court recently upheld this position in Weatherford v. Bursey, supra at 559-561. Other circuits have reached the same conclusion. See United States v. Addonizio, 451 F.2d 49, 62 (3rd Cir. 1971), cert. denied, 405 U.S. 936 (1972); United States v. Conder, 423 F.2d 904, 910 (6th Cir.), cert. denied, 400 U.S. 958 (1970); Carpenter v. United States, 463 F.2d 397, 402 (10th Cir. 1972). It would be especially harmful in the instant case for the Government to disclose the names and addresses of witnesses or persons interviewed by the Government. The defendants are charged with participation in a vicious and premeditated contract murder. Already the Government has found it necessary to place a number of witnesses in the Witness Protection Program. Additionally, a substantial number of witnesses have indicated to the Government their fear of physical retaliation if their status as witnesses were to become known.[1/]

1/ United States v. Moceri, 359 F. Supp. 431 (N.D. Ohio, 1973), relied on by defendants (Defendants' Memorandum in Support of Motion for Discovery and Inspection, page 16) specifically says it would be an abuse of discretion for a court to order disclosure of names of witnesses where coercion or harm would likely result. Id. at 435.

Contrary to the assertions of the defendants, Rule 16, as described above, does not make discoverable all statements by a defendant. Recently, our Court of Appeals in United States v. Pollack, 175 U.S. App. D.C. 227, 238-239, 534 F.2d 964, 975-976, cert. denied, 429 U.S. 924 (1976), made it clear that statements by a defendant to third persons (persons other than Government agents) are not discoverable.

> Finally, we hold that the district judge's denial of Sach's motion under Fed. R. Crim. P. 16(a) to inspect writings made by third persons that attributed inculpatory statements to Sachs was consistent with the logic of the rule and previous decisions. [citation omitted]. . . . The phrase "by the defendant" however, requires not that the statement at issue be attributed to the defendant although, as here, related by a government witness, but that the statement be obtained by the government directly from the defendant without the intervention of any third party. A contrary interpretation of the rule would present a conflict with 18 U.S.C. §3500 [Jencks Act].

Moreover, Rule 16(a)(1)(A) requires that the defendant's oral statement be disclosed only if it is "in response to interrogation by any person then known to the defendant to be a government agent."[2/] Notwithstanding the clear language of the case law and the Rule, the defendants have sought to discover statements they made to persons other than government agents. These requests are in direct contravention of the Jencks Act, which provides that the statements of government witnesses not be turned over to the defense until after

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2/ Not only is case law contrary to what the defendants claim, the cases cited by them do not stand for the position they suggest. Citing United States v. Lubomski, 277 F. Supp. 713 (N.D. Ill., 1967), they claim we must disclose all oral statements made by a defendant, including those summarized by another witness, video or audio taped or attributed to a defendant by a government witness at the grand jury. (Defendants' Memorandum in Support of Motion for Discovery and Inspection, page 8). To the contrary, Lubomski only says that the government must produce recorded conversations of the defendant and specifically rejects turning over grand jury transcripts. Id. at 719-720. Further, the defendants claim that the names of all persons to whom they made incriminating statements should be discoverable under Rule 16, since they are discoverable by a motion for particulars, citing Will v. United States, 389 U.S. 90 (1967). This is not the holding of Will. In that case the United States sought a Writ of Mandamus when the District Court, pursuant to a specific Bill of Particulars, ordered the Government to reveal the substance of defendant' conversation to government agents, not private parties. Id. at 92, n. 1. Additionally, the Supreme Court did not say the District Court was correct, but only that under the particular circumstances of that case, the extraordinary remedy of a Writ of Mandamus was not appropriate. Id.

the witnesses testified on direct examination. We will deal with some of the more specific discovery requests later in this response.[3/]

BILL OF PARTICULARS (RULE 7(f))[4/]

Before discussing what a bill of particulars is, it is important to state what it is not. "It is not the function of a bill of particulars to provide a detailed disclosure of the government's evidence in advance of trial." Overton v. United States, 403 F.2d 444, 446 (5th Cir. 1968). "Acquisition of evidentiary detail is not the function of a bill of particulars." Hemphill v. United States, 392 F.2d 45, 49 (8th Cir.), cert. denied, 393 F.2d 877 (1968). "The total items requested by all defendants go far beyond that to which they are entitled. To require the government to furnish the minutiae sought would be tantamount to a preview of its case in advance of trial and compel a disclosure of its evidence, including the names of witnesses." United States v. Kahaner, 203 F. Supp. 78, 84 (S.D.N.Y. 1962).

"The purpose of a bill of particulars is to inform the defendant of the nature of the charges against him to adequately prepare his defense, to avoid surprise during trial and to protect him against a second prosecution for an inadequately described offense . . . when the indictment itself is too vague and indefinite for such purposes." United States v. Addonizio, 451 F.2d 49, 63-64 (3rd Cir.), cert. denied, 405 U.S. 936 (1972) (emphasis added) (citations omitted); Accord Wyatt v. United States, 388 F.2d 395, 397 (10th Cir. 1968); and United States v. Haskins, 345 F.2d 111, 114 (6th Cir. 1965) (and cases cited therein).

3/ At page two of their Memorandum in Support of the Motion for Discovery and Inspection, the defendants incorrectly cite Giles v. Maryland, 373 U.S. 83 (1963), stating "that courts enforcing the mandate of Brady . . . . should seek to equate 'what the state knows at trial [with] knowledge held by the defense."' This quote is badly taken out of context. The full quote is "in the end, any allegation of suppression boils down to an assessment of what the state knows at trial in comparison to knowledge held by the defense." Giles v. Maryland, supra at 96.

4/ We note with some interest the defendants' request on page 1 of their motion for a bill of particulars for the date, time and place at which defendant Ignacio Novo joined the conspiracy. Of course, Ignacio Novo was not charged in the conspiracy count; however, if defendant Ignacio Novo ~~wishes to provide~~ the government with the information upon which he bases his request, we will thoroughly and appropriately consider the matter.

> A motion for a bill of particulars is addressed to the sound discretion of the trial court, and, absent a showing of abuse of discretion, the ruling of the trial court will not be disturbed on appeal [citations omitted]. Ordinarily, the function of a bill of particulars is not to provide 'detailed disclosure of the government's evidence in advance of trial' but to supply 'any essential detail which may have been omitted from the indictment.' [citations omitted]. The information sought by the defendants in their motion was the entire range of evidence on which the government relied, including the names of all witnesses to be used by the government. Denial of such a disclosure, 'whether requested by a motion for bill of particulars under Rule 7(f), or by motion for discovery under Rule 16(b), Federal Rules of Criminal Procedure,' will not be considered an abuse of discretion on appeal. [citation omitted]. United States v. Anderson, 481 F.2d 690-691 (4th Cir. 1973).

In the instant case, the indictment is extremely detailed and by no stretch of the imagination could it be described as "vague and indefinite" for the purpose of informing the defendants of the nature of the charges against them.

The indictment in this case spells out in tremendous detail the defendants' participation in the murders of Orlando Letelier and Ronni Moffitt. The indictment discloses the identity of each of the codefendants, the object of the conspiracy, the means used by the defendants to further the objects of the conspiracy and, finally, in forty-one(41) overt acts describes the step-by-step planning and execution of the crime. It is hard to imagine a more particularized indictment than the one returned in the instant case. Frankly, one of the reasons why the indictment was drafted so specifically was to avoid having to respond to an unreasonable motion for a bill of particulars like the ones filed by the defendants. Their request for numerous particulars is clearly contrary to the underlying function of a bill of particulars in light of the specificity of the indictment. E.g., United States v. Brown, 540 F.2d 364 (8th Cir. 1976); United States v. Bearden, 423 F.2d 805, 809 (9th Cir. 1970); Overton v. United States, supra; Hemphill v. United States, supra.

Moreover, this is not a complex case. It is not a multi-defendant mail fraud or anti-trust prosecution. It is a prosecution for a common law crime--murder. The fact that the indictment charges a conspiracy does not by some magic transform a rather straightforward case into a complicated and complex one. In fact, "in an indictment for conspiracy to commit a criminal offense, the elements of that offense need not be stated with the same particularity as would be required in an indictment for a violation of the substantive offense." United States v. Perez, 489 F.2d 51, 70 (1973), citing inter alia, Wong Tai v. United States, 273 U.S. 77 (1927). Neither does the rather international flavor of the defendants transpose the charges into a complex case. As page three of the instant indictment shows, (reciting the means used by the defendants to further the objects of the conspiracy) this case is simply a contract murder where members of one group, DINA, contracted with members of a second group, the Cuban Nationalist Movement, to murder Orlando Letelier.

In light of the detailed nature of the indictment, the non-complexity of the charges, and the extensive discovery which the Government is providing, there is no way the defense can fairly claim that it does not know the nature of the charges so as to avoid surprise at trial, to prepare the defense and to avoid double jeopardy. As stated above, these are the hornbook purposes of a bill of particulars. When these conditions are satisfied, as they are without any doubt in this case, the defendants are not entitled to a bill of particulars. United States v. Pollack, supra. The Pollack case involved a complicated mail fraud security scheme. Judge Gasch denied the defendant's motion for a bill of particulars on the ground that the indictment outlined the scheme and each defendant's role in that scheme in a manner sufficient to avoid surprise and permit the defendants to prepare a defense. The Court of Appeals for this circuit upheld Judge Gasch, stating:

> In these circumstances, appellants' demands for further particularization of overt acts, the circumstances surrounding the alleged acts, and attribution of the alleged misrepresentations may be construed as attempts to procure evidentiary material rejected within the discretion of the district judge. United States v. Pollack, supra, 175 U.S. App. D.C. at 233, 574 F.2d at 970.

As the defendants have recognized, a bill of particulars is not something they are entitled to as a matter of right, but rests within the sound discretion of the trial court. Wong Tai v. United States, supra. Yet here, the defendants' demands for particulars are so broad, including "every act performed, statement or utterance made or written, and every message or instruction received or meeting attended by [the defendants] as any part of or in furtherance of the alleged conspiracy or any overt act thereof" [Defendants' Motion for Bill of Particulars, page 1] that to grant the bill of particulars would provide the defense with every evidentiary detail of the Government's case--a result which is totally contrary to the purpose of a bill of particulars. The Supreme Court has specifically held that a motion for a bill of particulars seeking this detail--"which in effect sought a complete discovery of the government's case in reference to the overt acts"--is properly denied. Wong Tai v. United States, supra at 82. Such demands are customarily denied. E.g., United States v. Ford Motor Co., 24 F.R.D. 65, 70 (D.C.C. 1959) (Tamm, J.); Hickman v. United States, 406 F.2d 414, 415 (5th Cir.), cert. denied, 394 U.S. 960 (1969); Cook v. United States, 354 F.2d 529, 531 (9th Cir. 1965).

However, notwithstanding the fact that there is absolutely no justification for a bill of particulars in this case, the Government is prepared to the extent possible to detail for the defense the time, date and/or place of the overt acts set out in the indictment about which they have specifically inquired. This information will be set out further on in this pleading.

Finally, we wish to point out that the procedure we are following here was not only accepted by Judge Gasch and the Court of Appeals in the Pollack case, discussed above, but has been fairly routinely followed by federal judges in the Southern District of New York. For example, in United States v. Leighton, 265 F. Supp. 27, 35 (S.D.N.Y. 1967), after the government consented to supply the defense with the time and place where the alleged offense took place, the trial judge ruled as follows:

> Where the indictment as written contains all the particulars necessary to enable the defendant to understand the charges against him and to protect himself from double jeopardy, the court will not order the government to set forth any further particulars. The indictment in the instant case most particularly sets forth the nature of the charges by specifying the approximate date of the offense, the amount of the bribe, the duty performed by the revenue agent and the name and year of the income tax return involved. Any particulars sought herein by the defendants which have not been consented to by the government either seek a preview of the evidence or go to matters not within the indictment. As indicated, supra, these matters are not properly within the scope of a demand for a bill of particulars and, accordingly, both defendants' motions are granted only insofar as has been consented to by the government.

And, in United States v. Birrell, 263 F. Supp. 113, 115 (S.D.N.Y. 1967), the trial judge ruled as follows:

> The indictment herein is replete with factual details. Nevertheless, the government has consented to supply the defendant with a number of particulars, as specified by the government in its opposing affidavit (pp. 2-3) and in its opening memorandum of law (pp. 17-25).
>
> The motion is granted to the extent that the government has consented. It is denied in all other respects for the reasons that other particulars sought obviously constituted an unwarranted attempt to obtain evidentiary detail of the government's proof in advance of trial and of the theory of its case.

To the same effect are United States v. Diliberto, 264 F. Supp. 181 (S.D.N.Y. 1967); United States v. Roberts, 264 F. Supp. 622, 624 (S.D.N.Y. 1966).

Finally, the defense's attempt to justify their bill of particulars by claiming difficulty in preparing their case does not warrant the remedy they seek.

> Every denial of the defendant's request for a bill of particulars may in some measure make the preparation of his defense more onerous. But a demonstration of this generalized kind of prejudice is insufficient to override the broad discretionary powers vested in a district court with respect to such requests. If only a generalized showing of prejudice were sufficient, perhaps the defendant would always be entitled to a bill of particulars. Although the law of discovery in criminal cases has recently been liberalized, that development has yet to materialize. United States v. Wells, 387 F.2d 807, 808 (7th Cir. 1967); see also, United States v. Johnson, 504 F.2d 622 (7th Cir. 1974).

BRADY MATERIAL

Before turning to the specific discovery requests of the defendants, we want to respond to the defendants' broadside requests and total misapplication of the Brady Doctrine. It should first be pointed out that the Government is well aware of its continuing duty to disclose Brady material should it come to our attention. It is an obligation that we will honor without hesitation. At this point in our trial preparation, we are aware of no such material.

The memoranda filed by the defendants in support of their requests for all Brady material totally ignores the recent dispositive opinion of the Supreme Court defining the Brady rule. United States v. Agurs, supra. Brady requires the prosecution, upon specific request, to disclose to the defense favorable evidence that is "material either to guilt or punishment." Brady v. Maryland, supra at 87. Under Agurs, the same standard for determining materiality after trial applies to disclosure prior to trial. United States v. Agurs, supra, 96 S.Ct. at 2399. This standard of materiality is whether the evidence in question creates a reasonable doubt of the defendant's guilt. Id. at 2401-2402. The test is not "the impact of the undisclosed evidence on the defendant's ability to prepare for trial; rather than the materiality of the evidence to the issue of guilt or innocence." Id. at 2401, n. 20. Moreover, "(t)he 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." Id. at 2400. The Supreme Court also stated that general requests for "all Brady material" or for "anything exculpatory" "really gives the prosecutor no better notice than if no request is made." Id. at 2399.

The defendants, however, have made a number of requests for information that goes far beyond anything that Brady or Agurs ever contemplated. They state that "if the evidence may have any beneficial effect, its production is required under Brady" and

further state "moreover, under Brady, all forms of evidence which are favorable to an accused must be produced." (Defense Memorandum in Support of Motion for Discovery and Inspection, page 6). As pointed out above, this is clearly what Brady and Agurs do not say.[5/] The Government is not required to reveal all its evidence, however insignificant or irrelevant, to a defendant. United States v. Bowles, 159 U.S. App. D.C. 407, 488 F.2d 1307 (1973), cert. denied, 455 U.S. 991 (1974); Levin v. Katzenbach, 124 U.S. App. D.C. 158, 162, 363 F.2d 287, 291 (1973). Finally, a prosecutor's constitutional obligation to disclose information to the defense extends only to "material" evidence. Materiality has variously been described as tending to "[lead] the jury to entertain a reasonable doubt about the appellant's guilt," United States v. Lemonakis, 158 U.S. App. D.C. 162, 185, 485 F.2d 941, 964 (1973), cert. denied, 415 U.S. 989 (1974), and as being "of sufficient significance to result in the denial of a defendant's right to a fair trial." United States v. Agurs, supra at 2400. Clearly, to the extent that the defendants pervert Brady into a means of discovery, their requests are simply unfounded. As previously stated, "there is no general constitutional right to discovery in a criminal case, and Brady did not create one;"

5/ Two examples of the defendants' misperceptions of Brady and the cases they cite in support thereof should be pointed out. The defendants claim that Brady requires the disclosure of the criminal records of government's prospective witnesses, citing United States v. Seijo, 514 F.2d 1357 (2nd Cir. 1975), and any prior statements of government's prospective witnesses, citing United States v. Spelling, [sic], 506 F.2d 1323, 1333 (2nd Cir. 1974) (defendants' Memorandum in support of Motion for Discovery and Inspection, page 7). In Seijo, the government represented that its crucial witness had no prior record and that witness testified that he had no prior record. Later, it was discovered that the witness in fact had a prior conviction. The Second Circuit, of course, found that to be a Brady problem. The case had nothing to do with pretrial disclosure of criminal records. In United States v. Sperling, 506 F.2d 1323 (2nd Cir. 1974), cert. denied, 95 S.Ct. 1351 (1975), the Second Circuit found a problem with the government's failure to turn over as Jencks Act material a letter by a witness to the Assistant U.S. Attorney. As with Seijo, this did not involve pretrial disclosure but rather failure of in-trial disclosure of certain materials. In both of these cases, Michael Young, who signed the defendants' motion for discovery and inspection was listed as appearing on the briefs for appellants in those cases. Evidently, counsel has argued here the position he took on his briefs in those appeals, rather than the decisions handed down by the Second Circuit.

Weatherford v. Bursey, supra at 559. To the extent that these requests of the defendants ask for more than information that is favorable to the defendants and material to guilt or innocence, they are sweeping requests for a complete disclosure of the government's investigatory files and should be denied.

DEFENDANTS' REQUESTS FOR DISCOVERY UNDER RULE 16

We now turn to the specific discovery requests of the defendants. We would note that the defendants cite over fifty(50) areas of requested discovery in their motion. As the general discussion on discovery above shows, the majority of those requests are patently unfounded on their face and do not fall within the purview of Rule 16. In their points and authorities, the defendants limit their requests with points and authorities to fifteen(15) areas. It is those areas to which we will address ourselves.

1. Grand Jury Minutes of Witnesses.

Defendants have made sweeping requests for the grand jury minutes of the witnesses in the Government's case, failing to note that the cases upon which they rely are Jencks cases and not discovery cases. In Dennis v. United States, 384 U.S. 855 (1966), the Supreme Court reversed the defendant's conviction because the trial court would not allow defense counsel access to grand jury transcripts at trial even though the need for secrecy of those transcripts was considered minimal. The defendants also cite Allen v. United States, 390 F.2d 476 (D.C. Cir. 1968), in support of their request.[4/] Allen, however, provides them no comfort since, like Dennis, this case discusses disclosure after the witness has testified on direct.[5/]

4/ We would note that the quotation from Allen cited by defendant at page 12 of their pleading leaves out four significant sentences which clearly indicate that the court was discussing in-trial disclosure and not pretrial disclosure.

5/ Defendants also cite Cargill v. United States, 381 F.2d 849 (10th Cir. 1967), in support of their request for pretrial disclosure of grand jury transcripts. (Defendants' Memorandum in Support of Motion for Discovery and Inspection, page 12). Not only does Cargill base its discussion, like Allen and Dennis, on in-trial disclosure, but the Tenth Circuit specifically affirmed the District Court's refusal to permit pretrial disclosure. Id. at 853.

Clearly, to the extent that the defendants' request for grand jury transcripts constitutes a lefthanded method of determining the Government's witnesses, it is inpermissible for the reasons previously stated. The defense has pointed to no case which would require pretrial disclosure of grand jury witnesses and we have found none.

2. Statements of Coconspirators.

The defendants have asked for the statements of coconspirators and codefendants. These statements are not discoverable, unless, of course, each defendant is willing to show his own statement to his codefendant. Morgan v. United States, 380 F.2d 686, 698-699 (9th Cir. 1967); United States v. Gardner, 308 F. Supp. 425, 429 (S.D.N.Y. 1969); United States v. Ahmad, 53 F.R.D. 186 (M.D. Pa. 1971); United States v. Fassler, 46 F.R.D. 43 (S.D.N.Y. 1968).

To the extent that the defendants seek the statements of coconspirators who may not be codefendants, those statements would be governed either by Jencks or Brady. If the coconspirator were to be called as a witness, then the statements would clearly be covered by the Jencks Act and therefore are not discoverable until after the witness testifies on direct examination. If the individual is not called as a Government witness, the Government will disclose any statements made which constitute Brady material, although at the present time we know of no such instance.

3. Witness Statements to Other Governmental Bodies or Agencies

Making only the most generalized of requests, the defendants demand that the Government seek out any other statements of witnesses made to any other Governmental agency. This request includes any testimony before Congressional committees.

In United States v. Liddy, 177 U.S. App. D.C. 1, 542 F.2d 76 (1976), the defendant, under Jencks, Brady, the Fifth and Sixth Amendments, desired the transcripts of the executive session testimony in Congress of certain specified witnesses. The Court of Appeals said that regardless of the applicability of Jencks or the principles

of Brady, and despite a claim of deprivation of compulsory process under the Sixth Amendment, and assuming arguendo that the transcripts were improperly withheld through an invalid claim of privilege, failure to produce those transcripts was harmless beyond a reasonable doubt where the defendant advanced no reason why it would have aided the defense. See also, Calley v. Callaway, 519 F.2d 184, 220-224 (5th Cir. en banc 1975); United States v. Halderman, 181 U.S. App. D.C. 254, 559 F.2d 31 (1976), cert. denied, 97 S.Ct. 2641 (1977). Similarly, the defendants have neither pointed to any statements nor elucidated any reason why such statements, if they exist, would aid the defense.

4. Other Statements of Witnesses.

The defendants correctly state that statements by Government witnesses are discoverable as Jencks Act material. The defendants then assert that since these statements are material to the preparation of the defense, they are discoverable pretrial under Rule 16(a)(1)(C). The defendants, however, have cited nothing which would give rise to a basis of materiality and their claim is contrary to existing law. In United States v. Harris, supra, a burglary case, the court affirmed the denial of a pretrial motion to compel the Government to disclose prior to trial a statement by an alleged coconspirator who had turned state's evidence. Appellants claimed that they did not know prior to trial the specific substance of the testimony of a certain Government witness and that at trial there arose a conflict between that witness' testimony and that of another Government witness regarding the specific whereabouts of appellant during the burglary and that this conflict in testimony related to the credibility of the Government's witness. The court said:

> We conclude that the government was under no obligation under Brady . . . to disclose Johnson's [the government witness] statement prior to trial. Johnson's statement falls squarely within the Jencks Act, which requires that the government produce any statements taken pursuant to the Act, but only after the government witness has testified on direct examination. The defense is not automatically entitled under a Brady theory to disclosure of a Jencks Act statement prior to the direct testimony of the

> government's witness. 'The [Jencks] Act does not authorize fishing expeditions by the defendant ". . . and due process" does not require premature production at pretrial hearings . . . of statements ultimately subject to discovery under the Jencks Act.' [emphasis added] [citations omitted] Id. at 675-676.

While the discovery process should not be regarded as a poker game, neither is it a charitable giveaway and we perceive of no basis in fact or law for the discovery pretrial of this material.

5. Witness List.

As we have amply stated above, this broadside request has no support in either case law or the Federal Rules. (See Government's response, supra, at 3-4).[6/]

6. Statements and/or Identity of Non-Witnesses.

The defendants again claim that these statements would be within the ambit of Rule 16(a)(1)(C). Again, however, their request is flawed by the lack of any showing of materiality. And the prevailing case law is clear that the Government does not have to disclose all witnesses "who have knowledge of the case." United States v. Gonzalez, 466 F.2d 1286 (5th Cir. 1972). To the extent that these statements may contain Brady material, the Government will make the disclosure; otherwise, the request should be denied, since it is tantamount to opening up to the defense the Government's investigative files. Absent an interview of a witness turning up Brady material, prosecutors "are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses." In Re Imbler, 35 Cal. Rpt. 293, 301, 387 P.2d 6, 14 (1963), (Traynor, J.), quoted with approval, United States v. Agurs, supra at 2400.

6/ The defendants misperceive the purpose of Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966). The case states only that the prosecution may not direct a witness known to it not to discuss the case with the defense. It has nothing to do with a request of the defendant for names and addresses of all persons who have knowledge of events in an indictment nor does it suggest that one party must arrange for the other party to meet with and interview its witnesses.

7. Discrepancies in Testimony of Witnesses.

In asking for discrepancies or impeachment material in the testimony of witnesses, the defendants' request encounters a number of legal and factual problems. We would point out that, until a witness testifies at trial, there may not be in existence any discrepancies in the testimony of witnesses. Therefore, to a large extent, the defendants appear to be asking for something that does not now and may not ever exist. Additionally, the law does not require statements which are assertedly useful in impeaching a witness' credibility or his testimony to be made available to the defense. Moore v. Illinois, 408 U.S. 786 (1972); United States v. Harris, supra; C.f., United States v. Randolph, 456 F.2d 132 (3rd Cir. 1972); United States v. Bowles, 159 U.S. App. D.C. 407, 488 F.2d 1307 (1973).

8. Informer's Identity and Statements.

The defendants demand that "the government should reveal the identity of all informers, whether or not a particular informer is an expected witness, simply because each such individual possesses direct knowledge concerning conduct on the part of a defendant which the government will seek to establish in its case." (Defendants' Memorandum in Support of Motion for Discovery and Inspection, page 20). Again, the law provides the defense no support for their request. In Roviaro v. United States, 353 U.S. 53 (1957), the Court reversed the conviction of the defendant where the government refused and the trial court sustained the non-disclosure of the identity of an essential informant who was alleged in the indictment to be the individual to whom the defendant had sold heroin. In discussing the need to disclose at trial the identity of an integral witness, the Court said:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest and protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Id. at 62.

Decisions subsequent to Roviaro have increasingly emphasized the particular facts of Roviaro. See e.g., Alvarez v. United States, 525 F.2d 980, 982 (5th Cir. 1976) and cases cited therein. Where the informer's role was simply providing information, no disclosure is necessary. United States v. Morell, 524 F.2d 550 (2nd Cir. 1975). In fact, the prevailing law in the circuits favors non-disclosure. "The interests of law enforcement are served by protecting the identity of the informant except where a need is demonstrated for disclosure by the informant's own testimony, and not by the speculative claims of the defendant." United States v. Rawlinson, 487 F.2d 5, 7 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974); accord, United States v. Hurse, 453 F.2d 128, 130-131 (8th Cir. 1971); United States v. Lloyd, 400 F.2d 414, 416 (6th Cir. 1968); United States v. Jackson, 384 F.2d 825 (3rd Cir. 1967), cert. denied, 392 U.S. 934 (1968).

In sum, then, the law will neither recognize nor countenance the disclosure of the identity of informers simply on the whim of the defense. Rather, when the informant is integrally involved in the offense for which the defendants are charged and when the Government does not otherwise intend to produce or identify the informer, the court then may determine it to be appropriate to reveal the name sought. We do not anticipate these set of circumstances occurring in the instant case. Barring those circumstances, the defendants' sweeping request must be denied.

9. Electronic Surveillance.

The defendants have requested the disclosure of records pertaining to any electronic surveillance in which any defendant was overheard. The only appropriate means for making such a request is pursuant to 18 U.S. Code §3504.[7/]

7/ 18 U.S. Code §3504 provides as follows (Subsection a):

> In any trial, herein, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States--
>
> (1) Upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;
>
> 18 U.S. Code §3504 further defines unlawful act as to include electronic surveillance.

Recent case law suggests that an appropriate motion for disclosure of electronic surveillance must meet prima facie standards for the presence of electronic surveillance. United States v. Alter, 482 F.2d 1016 (9th Cir. 1973). The Ninth Circuit in Alter elaborated its test for sufficiency of allegations by requiring that a claim of electronic surveillance by the defense reveal, inter alia, the specific facts which reasonably led the affiant to believe that the named party had been subjected to electronic surveillance; the dates of such suspected surveillance; and a connection between the possible electronic surveillance and the present party and proceeding in which the party is involved. Only thereafter is the Government required to respond in kind. Id. at page 1025. Clearly, the Government must respond to a proper claim under 18 U.S. Code §3504;

> [h]owever, because responding to ill-founded claims of electronic surveillance would place an awesome burden on the government, a claim of governmental electronic surveillance of a party must be sufficiently concrete and specific before the government's affirmance or denial must meet the requirements of Alter, supra. Accordingly, a general claim requires only a response appropriate to such a claim. United States v. See, 505 F.2d 845, 856 (9th Cir. 1974), cert. denied, 95 S.Ct. 1428 (1975) [footnote omitted] [citation omitted].

In the spirit of obviating the need for the defense to respond with the specifics that they must to trigger the Government's specific response, we would note for both the court and the defense that the United States is aware of no electronic surveillance in which the defendants were overheard and, therefore, plans to rely on no electronic surveillance evidence in the trial of this matter.

10. Publicity Releases.

The defendants seek access to all press releases and similar publicity relating to the subject matter of the instant indictment and the individual defendants, which were released by any agency of the government either directly or indirectly. (Defendants' Memorandum in Support of Motion for Discovery and Inspection, pages 21-22). They base this request upon the incorrect premise that prejudicial pretrial publicity is a very real issue

in this case. In support of their proposition, they cite United States v. Leichtfuss, 331 F. Supp. 723 (N.D. Ill. 1971). We find it most unfortunate that their quote from Leichtfuss ends two sentences earlier than it should. While the court did indicate that in an appropriate case the defendants would be perhaps entitled to such information, the court ended its consideration of the matter by saying "[t]here is no representation, nor do I think there can be, that such a case is presently before the court. Accordingly, the motion is denied." Id. at 737. Similarly, as the Government's Response to the defendants' Motion for Change of Venue indicates, any publicity generated by events in the instant case does not appear to be prejudicial to these defendants. The only press release issued by the United States Attorney's Office for the District of Columbia in connection with the instant case was issued in conjunction with the return of the indictment in this matter on August 1, 1978, and is in full compliance with Disciplinary Rule 7-107 of the American Bar Association Code of Professional Responsibility. The United States will gladly make this release available to the defendants. We are unaware of any other press release which mentions these defendants.

12. Documents and Tangible Objects.[8/]

The defendants claim that "Rule 16(b) now authorizes the discovery of all books, papers, documents, and tangible objects which are material to the preparation of a defense." (Defendants' Memorandum in Support of Motion for Discovery and Inspection, page 22). Since Rule 16(b) of the Federal Rules of Criminal Procedure relates to disclosure of evidence by the defendant, i.e. reciprocal discovery (an issue which we will discuss further on), we assume that the defendants are referring to Rule 16(a)(1)(C) which states as follows:

8/ For the court's convenience, we numbered our responses to the defendants' discovery requests as the defendants numbered them. We note that there is no number 11 in their motion and, to be consistent with the numbering used by the defense, we have maintained the number 12 for documents and tangible objects.

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

As we have already advised defense counsel, the Government will disclose all documents, tangible objects and photographs which it intends to introduce in its case in chief, which are material to the preparation of the defense or which were obtained from or belong to the defendant. This agreement is expressly conditioned on the defense making reciprocal disclosure of any documents, tangible objects, and photographs in its possession which it intends to introduce as evidence in chief at trial. Rule 16(b)(1)(A) Fed. R. Crim. P.

13. Documents and Records of the CIA and Other Governmental Agencies.

As is their habit throughout, the defendants have once again cited no justification either factual or legal for this request. As we have previously indicated, there is no legal support to require the Government to produce such items. See United States v. Liddy, supra; United States v. Halderman, supra; Calley v. Callaway, supra.[9] Additionally, there is absolutely no evidence whatsoever that the Central Intelligence Agency had either advance knowledge of or participated in the Letelier assassination. While it may be a popular pastime and interesting cocktail party conversation to level unfounded charges at the Central Intelligence Agency, there is not the slightest scintilla of evidence to indicate CIA involvement or knowledge of this matter.[10]

9/ We arree with the observation of the Court of Appeals for this Circuit in Liddy, where the Court upheld the trial court's refusal to order the production of specifically identified testimony and documents from another arm of the Government--the Congress. "Appellant has not advanced any reasons--specific, general or speculative--that the testimony he sought would have aided his defense." 177 U.S. App. D.C. at 8, 542 F.2d at 84.

10/ See page 22.

14. Criminal Records of Government Witnesses.

The defendants incorrectly state that production of criminal records of Government witnesses is required "not only under Rule 16(b) but also by Brady." (Defendants' Memorandum in Support of Motion for Discovery and Inspection, page 24). As noted above, Rule 16(b) refers to reciprocal discovery; we assume that the defendants are referring to Rule 16(a)(1)(B) which states that, upon request, the Government shall furnish the defendant a copy of his prior criminal record. We fully intend to comply with that. The law is clear that the criminal records of Government's witnesses are simply not discoverable on a pretrial basis. United States v. Conder, supra at 911 (and cases cited therein). It would obviously be impossible to provide the defendants with copies of criminal records of Government's witnesses without revealing the identity of those witnesses. We have shown above that we are clearly not required to do so.

The Government has indicated to the defense that we will provide to them at the time a witness testifies at trial any impeachable convictions to the extent we know of them or have reason to suspect they might exist and can ascertain whether they do exist. More than likely, any impeachable conviction will be brought out by the Government during direct examination.

15. Names of Investigative Agents.

The defense here requests not only the discovery of the identity and title of all Government agents participating in the investigation, but copies of any and all statements or reports of

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10/ The defendants state in their motion that "the prosecutor has admitted that Townley had contact with the CIA at Langley." (Defendants' Memorandum in Support of Motion for Discovery and Inspection, page 23). This is simply not true. In response to a question by counsel for the defendants regarding Michael Townley's contacts with the CIA, the prosecutors informed counsel that a number of years ago, Townley had two unrelated contacts with the CIA in Florida. On one occasion in 1970 or 1971, Mr. Townley contacted the CIA to ask if they were interested in the fact that he would be traveling to Chile in the near future. While a representative took some general background information from Mr. Townley, no further action or contact occurred. Subsequently, in 1973, Mr. Townley contacted a representative of the CIA in Florida to state that he had just returned from Chile and asked if anyone would be interested in talking with him. Neither party got back in touch with the other. These two incidents represent the sum total of contacts between the CIA and Mr. Townley.

those individuals as well. These requests are overbroad and unreasonable. Neither is sanctioned by Rule 16, or any other rule or authority. Typically, the defense has offered no authority to support this request. If a law enforcement agent or officer is not called to testify in the case, and would not provide exculpatory information, his identity would be of no relevance. Those law enforcement officers who are called as witnesses, we presume, will be fully cross-examined by counsel for the defense and the defense will have access, under the Jencks Act, to their prior statements. As we have noted above, it is this type of unfounded, broadside request for disclosure that has been routinely denied.

16. Promises and Commitments to Government Witnesses.

The United States is well aware of its responsibilities under *Giglio* v. *United States*, 405 U.S. 150 (1972). However, *Giglio* does not relate to pretrial disclosure of such information, but rather withholding such information at trial. The Government will clearly make known to the defense, and most likely bring out on direct examination, any promises or commitments made to any government witnesses, consistent with *Giglio*.

We should point out that counsel for the defendants were present on August 11, 1978, when this court accepted the guilty plea of Michael Townley. As the court will recall, the promises and commitments made to Mr. Townley were inquired of by the court in great detail during that proceeding. If counsel's memory of that event fails, we are sure that a transcript will refresh their recollection. Commitments and promises made to other Government witnesses, if any, will be made known to counsel for the defendants at the time that those witnesses' Jencks material is provided.

DEFENDANTS' REQUEST FOR A BILL OF PARTICULARS UNDER RULE 7(f)

As we stated previously, the Government will state to the extent possible the time, date and/or place of the overt acts set out in the indictment about which the defense has specifically inquired. All the remaining requests are improper attempts to

obtain discovery of the Government's evidence and witnesses and is improper under a bill of particulars as noted above.

Overt Act 21 (*)

Time: Probably early afternoon
Date: September 10, 1976
Place: The Four Star Diner, Union City, New Jersey

Overt Act 22 (*)

Time: Evening hours
Date: September 13, 1976
Place: Chateau Renaissance Motel, North Bergen, New Jersey

Overt Act 23 (*)

Time: Late evening hours
Date: September 15, 1976
Place: A location on a street in Union City, New Jersey

Overt Act 33 (*)

Time: Morning hours
Date: September 19, 1976
Place: Newark Airport, Newark, New Jersey, and in restaurant and Ross' car

(*) HOWEVER, WITH SUCH A GOOD MEMORY FOR "DETAILS" MR TOWNLEY FORGOT!? WHEN WE MEET AT THE "BOTOOM OF THE BARREL" AND NOT AT ANY FUCKING CHATEAU RENOSS (**)

CONCLUSION

The Government will provide extensive discovery in this case in harmony with Rule 16 of the Federal Rules of Criminal Procedure and the cases construing it. However, we firmly reject the notion promoted by the defense that discovery is to be equated with total access to the Government's files. Although some informal efforts at discovery have taken place, no suitable disposition of some of the requests made by the defense have been effected. Hence, we have submitted this memorandum to the court to explain our position on all aspects of the defendants' discovery motion and motion for a bill of particulars. For the reasons specified herein, we respectfully submit that the defendants' Motion for Discovery, Inspection and Bill of Particulars should be denied, except insofar as consented to by the United States. Attached is an order which the Government requests the court to sign.

Respectfully submitted,

Earl J. Silbert esq.
EARL J. SILBERT
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(**) I have a witness

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Government's Answer and Opposition to Defendants' Motions for Discovery, Inspection and Bill of Particulars was mailed, postage prepaid, to Paul A. Goldberger, Esquire, Jerry Feldman, Esquire, and Lawrence A. Dubin, Esquire, GOLDBERGER, FELDMAN & DUBIN, 401 Broadway, New York, New York 10013, this 16th day of October, 1978.

E. Lawrence Barcella, Jr.
E. LAWRENCE BARCELLA, JR.
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

v. : Criminal Case No. 78-0367

JUAN MANUEL CONTRERAS SEPULVEDA :
PEDRO ESPINOZA BRAVO
ARMANDO FERNANDEZ LARIOS :
GUILLERMO NOVO SAMPOL
ALVIN ROSS DIAZ :
VIRGILIO PAZ ROMERO
JOSE DIONISIO SUAREZ ESQUIVEL :
IGNACIO NOVO SAMPOL

O R D E R

ter having come before the Court through motions for discovery, inspection and a bill of particulars filed by these defendants, and the Court having thoroughly considered these motions and their accompanying memoranda and the Government's answer and opposition to these motions, it is this ______ day of ____________, 1978,

ORDERED that the defendants' motions are denied, except insofar as consented to by the Government, and

IT IS FURTHER ORDERED that the defendants comply with the provisions of Rule 16 respecting reciprocal discovery.

____
BARRINGTON D. PARKER
United States District Judge