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UNITED STATES COURT OF APPELAS
FOR THE DISTRICT OF COLUMBIA
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UNITED STATES OF AMERICA,

Appellee,

-against-

79-1541
79-1542

GUILLERMO NOVO SAMPOL, et al.

Appellants.
----------x

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT BRIEF FOR APPELLANTS GUILLERMO NOVO SAMPOL and ALVIN ROSS DIAZ

Volume I

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QUESTIONS PRESENTED

1. Whether the evidence which the government presented at trial was legally insufficient to sustain appellant Ross's conviction of the crimes charged.

2. Whether appellants were deprived of their Sixth Amendment right of confrontation by the severe restrictions imposed on their examination of witnesses by the government and the Court.

3. Whether evidence of statements obtained surreptitiously by government informants after appellants had been arraigned violated appellants' right to counsel.

4. Whether the massive amounts of irrelevant evidence which were presented by the government solely to win the jurors' sympathy for the victims or prejudice them against the defense violated appellants' right to a fair trial.

5. Whether the extensive adverse publicity and the Washington-based prejudices relating to this case entitled appellants to have the case transferred to another, less inflamed jurisdiction.

6. Whether appellants were deprived of ligitimate discovery materials which were essential to their cross-examination of the government's witnesses and the presentation of their own defenses.

7. Whether the government was improperly permitted to present hearsay evidence through three FBI agent witnesses to bolster its principal witness's credibility.

8. Whether the government was improperly permitted to bolster its principal witness's credibility through a prior hearsay statement.

9. Whether the trial judge erred in finding that appellant Ross had abandoned certain items which the FBI seized, merely because he was behind in his rent.

10. Whether the evidence was insufficient to establish that appellants had had the requisite purpose and intent to kill Ronni Moffitt (Count IV).

11. Whether appellants' consecutive life sentences are unconstitutional.

STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the District of Columbia (The Honorable Barrington D. Parker), rendered March 23, 1979, convicting appellant Guillermo Novo Sampol and appellant Alvin Ross Diaz of conspiracy to kill Orlando Letelier (count 1), killing a foreign official in violation of 18 USC §§1111 and 1116 (count II), killing Orlando Letelier in violation of 22 D.C. Code §2401 (count III), killing Ronni Moffitt in violation of 22 D.C. Code §2401 (count IV), and destroying a vehicle used in interstate commerce by means of an explosive and thereby causing deaths in violation of 18 USC §844(i) (count V). Appellant Guillermo Novo was additionally convicted of two counts of making false declarations before a grand jury in vioation of 18 USC §1623 (counts VI and VII).

Both appellants were sentenced to life imprisonment on Counts I, II, III and V to run concurrently, and to life imprisonment on Count IV to run consecutively. Appellant Guillermo Novo was also sentenced to five years imprisonment on each of Counts VI and VII, those sentences to run concurrently with each other and with the sentences imposed on Counts I-III and V.

STATEMENT OF FACTS

A. The Pretrial Proceedings

Orlando Letelier and Ronni Moffitt were killed when a bomb exploded in their car while they were driving through Sheridan Circle on September 21, 1976. Massive news coverage attended that event, as well as the United States Attorney's investigation and the trial that followed. That coverage was largely confined to Washington, where reporters dwelt in lurid and sensationalistic fashion on the details of the bombing itself, and treated the crime as uniquely threatening both to the security and the dignity of Washington residents.[1]

Appellant Guillermo Novo Sampol (hereinafter "Novo")[2] and appellant Alvin Ross Diaz (hereinafter "Ross"), were indicted for the crimes listed in the preliminary statement on August 1, 1978. Appellant Ignacio Novo Sampol, Guillermo's brother, was also charged in that indictment, but only with two counts of perjury (counts VIII and IX) and misprison of a felony (count X).

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[1] Representative new articles are set forth in the appendix to appellants' memorandum in support of their change of venue motion, exhibit 21 to the record on appeal.

[2] For the remainder of this brief, appellant Guillermo Novo Sampol will be referred to as "Novo." Hos brother, appellant Ignacio Novo Sampol, will be referred to as "Ignacio Novo."

Three Chilean officials, Juan Manuel Contreras Sepulveda, Pedro Espinoza Bravo and Armando Fernandez Larios, were also charged in Counts I - V. The prosecutor's efforts over the next few months to convince Chile to extradite these men generated considerable publicity for the case, but were unsuccessful.

Two other men, Virgilio Paz Romero and Jose Dionisio Suarez Esquivel were also indicted on Counts I - V, but were not arrested, and consequently were not present at trial.[1]

As soon as appellants were indicted, the local news reporters immediately assumed their guilt in front page articles. Prior to and during the trial itself, the local press covered the proceedings in detail, providing the prospective jurors with extensive hearsay and other information which was not introduced, and could not properly have been introduced, as evidence at trial.

Appellants were arraigned on the indictment on August 11, 1979, at which time numerous references were made to the local publicity surrounding the case, (See transcript of August 11, 1978 at 21, 27 et seq.)[2] At that proceeding, the court

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[1]For the remainder of this brief, defendant Juan Manuel Contreras Sepulveda will be referred to as "Contreras"; defendant Pedro Espinoza Bravo as "Espinoza"; defendant Armando Fernandez Larios as "Fernandez"; defendant Virgilio Paz Romero as "Paz"; and defendant Jose Dionisio Suarez Esquivel as "Suarez".

[2]See appendix to Exhibit 21 of the record on appeal. References to the pages of the transcripts of pretrial proceedings will be made by noting the date of the proceeding and the page of the transcript. References to the trial transcript will be made by noting the page of that transcript.

also noted that it favored "open discovery" (Id. at 11), and the prosecutor assured the Court that the bulk of the discovery material provided for by Rule 16 of the Federal Rules of Criminal Procedure would be provided to the defense by August 25, 1978 (Id. at 41).

The prosecutor failed to keep that promise (see eg. transcript of August 25, 1978 at 90). Indeed, appellants' counsel never received certain discovery material which was crutial to their defense (See Point IV infra).

On September 11, 1978, appellants filed a motion for change of venue [1] as well as motions for discovery and a bill of particulars.[2]

The court heard argument on these motions at a pretrial conference on November 6, 1978. Following argument on the change of venue motion, in which counsel directed the court's attention to the extensive, sensationalistic publicity which the case was attracting, the court took that motion under advisement (transcript of November 6, 1978 at 9-38).

Most of the remainder of this conference concerned discovery (Id. at 93-187). The government still had not provided all of the Rule 16 material (Id. at 101). Defense counsel was particularly concerned about receiving discovery material relating to the government's principal witness, Michael Vernon Townley. Townley, the mastermind of the crimes charged, had

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[1] Exhibits 20 and 21 of the record on appeal.

[2] Exhibits 17 and 19 of the record on appeal.

admitted organizing the conspiracy to kill Letelier, and building and planting the bomb that accomplished that goal. The indictment and the information disclosed about the case indicated that at trial, he would testify that the appellants had joined that conspiracy and performed certain tasks which assisted him in committing this crime. Since he was to be the government's principal assuser, it was imperative that defense counsel be supplied with the material necessary to test his story on cross-examination. As soon as defense counsel asked for information concerning Townley's other assassinations, however, the trial judge refused to grant that request and indicated that he would curtail appellants' cross-examination on that issue (Id. at 114-116).

When defense counsel requested any information in the government's possession which might indicate that other persons had threatened Letelier's life, as probative of whether persons other than appellants might have committed the crimes charged, the court again indicated that defense counsel would be limited in pursuing this issue at trial (Id. at 117-118).

Defense counsel also repeated its request for all Central Intelligence Agency and FBI information on Townley, as probative of whether Townley was working for the government when he assassinated Letelier (Id. at 112, 169). This request was likewise eventually denied.

At the next pre-trial conference on December 13, 1978, the trial judge discussed the fact that he had received several

threats concerning his participation in this case (transcript of December 13, 1978 at 17-27).[1] The government stated for the record that there was no "Brady" material in this case (Id. at 31). Defense counsel requested the name of the Letelier maid who had reportedly seen four men in the vicinity of the Letelier home on the morning of the bombing. Although the judge ordered in camera disclosure of this information, it was never provided to the defense (Id. at 62-3).

When defense counsel renewed its request concerning FBI and CIA information on Townley and the appellants, the Court ordered the government to produce all of this information for in camera inspection (the government failed to do this until the last days of the defense case at trial, at which time the trial judge denied defense counsel's request for disclosure because it would take too long to have the material decalssified (see trial transcript at 4937).

Defense counsel also requested that the CIA and FBI be ordered to check their files for information concerning a Florida company called Audio Intelligence Development, Inc. The government's Rule 16 material indicated that Townley had stopped at this company after he left Washington, and that the company had given him an alibi for September 21, 1976. the day Letelier was killed. Appellants had independent information

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[1] Although the inference at this point was that appellants or their associates must have been responsible for these threats, it was later to turn out that Michael Townley, the government's principal witness was in all liklihood the guilty party. (See Point 2A3 supra).

indicating that this Company was connected with the Central Intelligence Agency, and that its president, John Holcome, was himself a CIA agent (Id. at 75-76). Nevertheless, the court denied defense counsel's request for a check of the agency files on this company and its president (Id. at 95).

The Court thereafter called an emergency conference on December 20, 1978 to record the fact that he had received a letter the previous day claiming that one of the defendants had made threats against the judge and the lawyers in this case. Defense counsel renewed its motion that the judge recuse himself; that motion was again denied (transcript of December 20, 1978 at 7).

B. Jury Selection

Jury selection began in this case on January 9, 1979, amid a continuing flurry of front page publicity about the case. Defense counsel renewed its motion for a change of venue, citing both the constant barrage of adverse publicity and the repeated threats to the judge and the attorneys as grounds (11). That motion was denied (13).

Defense counsel renewed its request for information on Townley in the possession of the government, particularly his debriefing statements and his statements to Chilean officials (27-35). No further production was forthcoming.

Prior to the commencement of the jury voir dire, defense counsel called the Court's attention to still more prejudicial publicity, as recently as the previous evening's news programs. This included coverage of increased security around the Courthouse and the threats discussed earlier. Moreover, the lead item on one television news program was a completely baseless story alleging that certain of the defendants had been involved in a plot to kidnap Ambassador George Landau (260-61).

This continuing publicity prompted the judge to call the entire jury's attention to the media reports in his opening remarks (266). A few minutes later, 89 of the prospective jurors indicated that they had read or heard something about the case (278-283). The court itself repeatedly conceded that there had been a "great deal of press coverage" (see eg. 407). Nevertheless, it denied appellants' motion for

change of venue and refused to excuse many of the jurors who had been affected by that coverage (283-733; 830-1009).

A jury was eventually selected (1009). The court noted that during trial, an objection by one defense counsel would be treated as an objection by all counsel (1021).

C. The Hearing on the Suppression motion

During jury selection, the trial court heard evidence on appellants' motion to suppress the evidence seized from an office at 4523 Bergenline Avenue, Union City, New Jersey, on March 6, 1978. According to Luis Vega, the manager of that building, his real estate company had rented the office in question to the C & P Novelty Company run by one Carlos P. Garcia in August, 1977 (754). Although Vega identified appellant Ross as Garcia, he later admitted that this was a misidentification encouraged by FBI agents (3034-3072). In fact, Ross was only an associate of Garcia's (3158-3161).

According to Vega, Garcia paid one month's security and also paid rent for the office in August, September and October, 1977, but failed to pay any rent thereafter (764-5). The government failed to produce any evidence that the C & P Novelty Company was ever legally evicted from that premises, however, and defense counsel was prevented from questioning the witness on that issue (807).

On February 28, 1978, FBI agents came to Vega, and questioned him about the C & P Novelty Company (766). After the FBI gave Vega a description of Ross, Vega picked Ross out from

a photo spread and identified him as Garcia (766-770; 784-85; 3058-3072).

Thereafter, on March 6, 1978, while Vega was cleaning out the premises in question in order to use it as his own office, he discovered certain items which appeared to him to be materials for making bombs (770). He contacted the FBI and when the agents arrived, he brought the agents into the office and showed them what he had found (777). The agents took certain items from the office that day (779-80), but insisted that they would have to get a search warrant before taking the rest (818-830). The witness admitted that nonne from C & P Novelty Company ever gave him permission to enter the office (803-807).

FBI agent Sikoral, also testified at the hearing. On September 21, 1977, he interviewed Ross, who told him that he was forming a business called C & P Novelty Company at the premises in question (1924). After talking to Vega on February 28, 1977, Sikoral again interviewed Ross, who told him that the C & P Novelty Company had gone bankrupt, and that Ross was in the process of forming another business to be run out of his home (1028). Sikoral also described the items seized from the office in question on March 6 (1030-1034), as well as a letter seized from Ross' apartment which said that he had abandoned that office on December 27, 1977 (1039-43). That letter was seized after the search in question, was unsigned and contained different handwritings in different paragraphs (1039-43). The government produced no evidence that appellant

Ross had written any portion of it. The items seized from the office included items with appellant Ross' name and initials on them, and items with appellant Novo's name on them (1144), as well as chemicals and electronic equipment.

At the conclusion of this testimony, the trial judge ruled that only appellant Ross had standing (1095) and then denied the motion to suppress on the ground that Ross had abandoned the items found in the office (1090-1096).

The court then swore in the jury and gave its opening statement (1103-1118).

The government sought in its opening statement (1119-1161) to convince the jury that Letelier was some sort of martyr, by improperly stressing his imprisonment in Chile (1121) as well as his politics (1123).

D. The Prosecution's Six Death Scene Witness

The fact that Orlando Letelier and Ronni Moffitt were killed when a bomb exploded in their car as they were driving through Sheridan Circle was not contested in this case. Indeed, appellants' counsel had offered to stipulate to these facts pretrial (referred to at 1273). Nevertheless, the government insisted on calling no less than six witnesses, beginning with the dead woman's husband, Michael Moffitt, to repeatedly describe, in graphically nauseating detail, the explosion and the resulting injuries and death (1197-1330). The particulars of these witnesses' testimony are set forth in Point IV , infra.

Appellants' repeated objections to this evidence were largely overruled (1217-18; 1236; 1272, 1273, 1976, 1288, 1296). They were finally given a standing objection to all of this evidence at 1324.

E. The three additional "mood-setting" witnesses

Over defense counsel's repeated objections, the government was permitted to call three other witnesses for the primary purpose of encouraging the jury to sympathize with the victims. Isabel Letelier, Orlando Letelier's widow, testified as to her husband's human rights activities and his temporary incarceration in Chile (1493-1515). She also testified that she had seen newspaper clippings from Chilean papers describing Letelier's lobbying activities in Washington (1515-1521, 1549-1551).

When defense counsel objected to this testimony on "best evidence" grounds, however, the government produced only one clipping from a Chilean paper, which was published after Letelier's death (1517-18).

Senator George McGovern testified as to his friendship and conversation with Letelier, saying that he had met Letelier at one Washington party, and that on another occasion, McGovern and his wife had gone to Letelier's home for a dinner party (1343-1361). He said that on those two occasions, Letelier had expressed his concern for human rights and for conditions in Chile. McGovern also testified that a year after his conversations with Letelier, he voted in the Senate to halt military aid

to Chile. McGovern insisted, however, that he would have voted this same way even if he had not had his conversation with Letelier (1348-51).

Ralus TerBeek, a member of the Dutch parliament, testified that Letelier spoke to hom four times in 1976 and that partly as a result of those conversations, TerBeek spoke to the members of the board of directors of a Dutch Company which was considering making a loan to Chile. Later, that Company decided not to make the loan. TerBeek testified, again without documentary support, that Letelier's lobbying activities in Holland were reported in The Dutch press (1361-1402).

F. The evidence of the issue of Appellants' guilt or innocence.

On January 17, 1979, the government finally began presenting evidence which was probative of the only contested issue at trial - whether appellants were guilty of the crimes charged. Their proof on this subject was presented primarily through the testimony of Michael Vernon Townley (1583-2670, 2735-2800).

Townley testified that he had been involved in anti-Allende activities in Chile in the early 1970's (1585). As a result, he was forced to leave Chile in 1973 because he was being sought by Allende forces. While in Miami, Townley contacted the CIA and offered to work for them in Chile. A CIA official visited Townley at his job, and later, Townley contacted the CIA again. He insisted, however, that nothing resulted from these three contacts (1586-90).

After returning to Chile, Townley met defendant Espinoza, then an officer in Chilean Military Intelligence, in 1974. By October, 1974, Townley was working full-time for DINA, the Chilean Intelligence Agency (1590-1592).

In 1975, Townley was instructed by Espinoza to go to Mexico City the following February and assassinate Carlos Altamirano and Volodia Teitelbaum, Chilean exile leaders, who would be attending a conference there. Defendant Contreras also spoke to Townley about this mission, giving him funds and instructing him to enlist members of the Cuban exile community in the United States to aid in carrying out this mission (1595-97).

In February, 1975, Townley travelled with his wife to New Jersey, where he met and described his mission to appellant Novo, defendant Suarez and one Hernando Santana. Townley requested the Cubans to assist him in securing explosives, detonating caps, blasting caps and detonating cord for the mission. In response, Townley claimed, someone who Townley couldn't recognize provided him with the requested items (1601-1610).

Townley, his wife and defendant Paz then flew to Mexico. They were unable to accomplish their mission, however, since the conference had already ended and the intended victims had departed (1605-1612).

In July of 1976, Townley was contacted by defendant Fernandez, a captain in the Chilean army, who arranged two meetings with defendant Espinoza. At those meetings, Townley agreed to go on a mission to the United States to assissinate Orlando Letelier (1622-28).

Originally, Fernandez and Townley were to enter the United States through Paraguay, using Paraguayan passports and visas. That plan failed, however, and the two returned to Santiago (1623-1633).

In September, Townley was again contacted by defendant Espinoza and told that the mission was still on. Defendant Fernandez was already in the United States doing "pre-intelligence." Townley was told to go to the United States and get the Cuban exiles in the Cuban National Movement (MNC) to help him in killing Letelier (1657-58).

Townley left Chile September 8, 1976 and flew to New York. There he met with Fernandez, who briefed him as to Letelier's home and work addresses, car, and license plate. Fernandez then returned to Chile while Townley went to defendant Paz's home in New Jersey. While he was out socializing with Paz and his wife that evening, Townley met appellant Ross. He did not discuss his mission with Ross.

The following day, Townley had lunch with appellant Novo, defendant Suarez and defendant Paz and described his mission to them. They insisted that he meet with other members of the MNC (1666).

That meeting took place the following day, September 11, 1976. Among those present were appellants Novo and Ross, as well as Paz and Suarez. Townley described his mission to them and asked for their assistance. According to Townley, no-one at the meeting gave him an affirmative response to his request (1672).

The following day, Townley met with Paz and appellant Novo. Novo allegedly told him that the MNC would take on the mission (1672). Later that week, Townley received electronic equipment from Paz and explosives from Suarez and Novo. Townley then drove to Washington with Paz and checked into a Holiday Inn. Suarez followed them there (1672-80). Neither appellant Ross nor appellant Nove went to Washington.

In Washington, Townley, with the aid of Paz, built the bomb. At midnight on September 18, they drove to Letelier's home and Townley attached it to Letelier's car while the other two waited (1683).

The following day, Townley flew back to Newark, New Jersey. He was picked up at the airport by appellant Ross, and driven to appellant Novo's apartment. On the way, Townley for the first time informed Ross of what had happened in Washington. Later that afternoon, Townley flew out of Kennedy airport in New York to Miami (1683-90).

Upon arriving there, Townley spoke on the phone with appellant Ignacio Novo, who was also in Miami (1692). The

following day, September 21, Townley went to Audio Intelligence Devices in Fort Lauderdale to pick up some electronic equipment. In a phone conversation later that day with Ignacio, Ignacio informed him that "something big" had happened in Washington. He then called Paz in New Jersey, who said he was upset and would talk later. When Townley talked to Paz later, Paz said that the bomb had not worked, and that he (Paz) had had to return on September 20, remove the bomb from Letelier's car, fix it and reinstall it (1696). The bomb had detonated, killing Letelier and Moffitt, on September 21. Later that day, Townley returned to Chile.

Later, Townley sent explosives to Paz to replace those he had used in making the bomb (1700). In January, 1978, appellant Novo called Townley and requested a loan of $25,000 for members of MNC to pay off debts and leave the United States because of problems created by the Letelier assassination (1712).

Defense counsel's cross-examination of Townley was severely restricted (See Point IIA , infra). Townley did admit making several earlier statements, one under oath, in which he denied any involvement in the Letelier assassination. Those were all lies, he insisted; his trial testimony was what he now claimed to be the truth (2056). Townley also claimed the Fifth Amendment on numerous occasions during his cross-examination, thereby prompting defense counsel to ask that direct testimony be stricken (See Point IIA2, infra).

Finally, Townley admitted on cross-examination that appellant Ross had done absolutely nothing to aid him in killing Letelier:

Q You came to get help from the Cubans, the anti-Castro Cubans, is that right?

A From the MNC specifically, sir.

Q And you say you met Alvin Ross, is that right?

A I met him in the Bottom of the Barrel that evening, yes,sir.

Q Tell me one thing, Mr. Townley, that Alvin Ross did to help you kill Orlando Letelier?

MR. PROPPER: Objection, your Honor.

THE COURT: Overruled.

THE WITNESS: Mr. Ross did nothing directly to help me kill or I have no idea what aid, if any, he gave to any other persons, to myself, directly, none that I know of.

BY MR. DUBIN:

Q And no idea about what else he may have done to anybody? You don't know anything that Alvin Ross did, isn't that right?

A No, sir, I do not. (2562)

Several witnesses were then called to corroborate various items of Townley's testimony. Fred Fukuchi, Townley's brother-in-law, testified that Townley had visited him on

September 19, 1976 and that their phone bill reflected collect calls from Townley to them from Union City, New Jersey (2674-81). Ernest Cheslow, an employee at Grand Central Radio Company in New York City, testified that he sold certain electronic equipment to people who looked like defendant Ross and one Jara (2682-2728). Robert Scherrer, an FBI agent, described a tour of Washington which Townley took him on in April, 1978, pointing out the locations of various events relating to the crimes charged. FBI agent Menapace, described a similar tour of New Jersey, (2959) and agent Wack, a similar tour of New York (3586). This tour testimony, all hearsay, is described in detail in Point VII, infra.

Jose Barral testified that Suarez and Ross came to his home in September of 1976. While there, Barral had a separate conversation with Suarez, during which Suarez asked if Barral could provide him with a blasting cap. Ross did not take part in that conversation. Later, Suarez returned alone and picked up the cap (2864-2897).

Witnesses Vega and Sikoral gave testimony at trial consistent with their testimony at the suppression hearing, except that Vega now admitted having incorrectly identified Ross as Garcia (3004-3216).

Ricardo Canete testified that beginning in June, 1977, he negotiated with appellant over the sale of certain forged documents and that once, during a discussion of bombs,

Ross had boasted that he had "made the Letelier bomb." (3276). This witness also testified that he had arranged for appellant Ross to purchase 40-50 pounds of marijuana (3295) and that he had taken a lie detector test at the government's request (3467). Defense counsel's motions for a mistrial or to have this witness' testimony stricken as a result of these statements were denied. Moreover, defense counsel was precluded from cross-examining this witness concerning the fact that he was a drug addict, and the fact that he consulted with beads, shells and spirits before making decisions concerning statements to the government in this case (3497-3514).

Sherman Kaminsky and Antonio Polytarides were government informants planted at the federal pre-trial detention center in New York to obtain incriminating statements from the detainees being held there. They were permitted, over strenuous objection from the defense, to testify as to incriminating statements which they had elicited from appellants Novo and Ross (4309-4483). This testimony is discussed in detail in Point III, infra.

At the conclusion of the government's case, the court denied all appellants' motions for a directed verdict of acquittal (4511-4547). Appellant Novo's motion for a severance based on the prejudicial spill-over from appellant Ross' post-conspiracy statements to Canete and Kaminsky was also denied (4548).

G. The Defense Case

The Defense called several witnesses, principally CIA officials, to establish that Townley had in fact been working for that agency when he committed the crimes charged. Their efforts on this issue were severely curtailed by the government and the trial court in two ways. First, they had been asking since their original discovery motion for the CIA files on Townley. Those files were apparently voluminous; it took the trial judge several hours to examine them. Moreover, the CIA officials offered to have certain portions "declassified"; nevertheless, the trial judge refused to order that this material be disclosed to the defense because it would take too long.(4933-37).

Defense counsel was also improperly curtailed in their examination of these witnesses. In particular, defense counsel was precluded from questioning concerning the CIA's motives for wanting Letelier killed and the fact that the CIA had participated in the overthrow and assassination of Letelier's previous political ally and employer, Salvador Allende (See eg. 5019). They were also restricted in inquiring into those CIA hiring practices and operations which would have indicated that Townley was likely to have been an agent (4721-22). Counsel were able to establish, however, that Townley had applied to the CIA, and had been granted operational status (4985), and that he had been seen in the vicinity of CIA offices and personnel in Santiago (4657-4690, 4715).

Defense counsel also introduced evidence indicating that the blasting cap which Barral gave to Suarez in 1976 was different from the one which Townley described using in the Letelier bomb (4692) and that Townley had not mentioned Ross as a participant in the September 11, 1976 meeting when he described the participants in that meeting to FBI agents (4948-79). Defense also presented proof indicating that the potassium permanganate found in the Bergenline Avenue office had not been used in the Letelier bomb (4692-98).

During the defense case, the defense received a tape of a phone conversation between Michael Townley and someone in Chile, in which Townley described discussions he had had about making threats to the trial judge in this case in order to get him off the case, and otherwise demonstrated his contempt for the proceedings. In a voir dire outside the presence of the jury, Townley admitted making the call. Although this evidence went directly to the question of Townley's trustworthiness as a witness, the court refused to allow defense counsel to question Townley concerning it in the presence of the jury (See Point IIA3, infra).

Following summations, the judge's charge, and deliberations, the jury returned a verdict finding all defendants guilty on all charges.

On March 23, 1979, appellants Novo and Ross were each sentenced to two life terms, to run consecutively.

Michael Vernon Townley was sentenced to ten years for his leadership role in the crimes charged, making him elligible for parole in 3-1/3 years

SUMMARY OF ARGUMENT

The events underlying the charges in this case occurred in September, 1976. Throughout the investigation and particularly during the months immediately preceding trial, massive publicity attended these porceedings. This publicity, largely confined to the Washington area, assumed appellants' guilt and infected the potential jurors with sensationalistic accounts of the crime and information concerning the case which were not admissible as evidence at trial. Large numbers of the voir dire panel admitted having been influenced by these accounts. Nevertheless, the trial judge denied appellants' requests to have the case transferred to a less inflamed jurisdiction (Point V).

Prior to and during trial, appellants were deprived of legitimate discovery material which was essential to enable them to cross-examine the government's witnesses and prepare their own defenses. As part of one of those defenses, appellants needed to show that Michael Vernon Townley, the government witness who had masterminded the Letelier assassination, had been working for the CIA rather than the Chilean government. Consequently, it was essential for the defense to be given access to any information in the government's possession which evidenced a relationship between Townley and that Agency. The CIA had a sizable file on Townley, which presumably included notes on Townley's admitted meetings with CIA officials.

Nevertheless, even after a CIA official had offered to try to have some of the material declassified, the trial judge refused appellants' request to see it. The judge also denied appellants' request for discovery of any information in the government's possession showing the relation between the CIA and an alleged CIA "front" organization which had established an alibi for Townley on the day of the Letelier assassination. Denial of this and other discovery requests greatly impeded appellants' ability to defend themselves at trial (Point VI).

Prior to trial, the court held a hearing on appellants' motion to suppress items seized by the FBI from an office on Bergenline Avenue in Union City, New Jersey on March 6, 1978. The agents had neither probable cause nor consent to enter those premises and seize the challenged items. Appellant had never been evicted from the premises or even served with any notice that the landlord intended to re-occupy it. The trial judge nevertheless upheld that seizure on the basis of abandonment merely because he was several months behind in his rent. (Point IX).

At the trial itself, the prosecution sought to overwhelm the jurors with evidence introduced solely to prejudice them against the appellants or inspire sympathy for the victims. Thus, although appellants offered to stipulate to the fact of the victims' death by bombing, the government insisted instead on calling no less than six "death scene" witnesses to describe repeatedly and in graphic detail the bombing and the deaths. The government called both of the victims' spouses

to the stand, although neither had anything to say on the question of whether appellants had committed this crime. The government also sought to enhance its case in the jury's eyes by calling a popular political figure, Senator George McGovern, to testify as to his friendship with the deceased man. The government's case also presented evidence associating appellants with guns and drugs, although neither had anything to do with the charges being tried (Point IV).

Since Michael Vernon Townley was the government's principal witness, and also a professional assassin and admitted participant in the crimes charged, it was imperative that defense counsel be afforded sufficient latitude in cross-examining him. To the contrary, defense counsel was severely restricted in questioning not only this accuser, but all of the government's witnesses. Counsel were improperly precluded from showing that the modus operandi which Townley had been forced to concoct in this case in order to incriminate appellants was materially different from his modus operandi in his previous assassinations; indeed, defense counsel was precluded from even showing that Townley had committed previous assassinations. Defense counsel was likewise improperly restricted in examining Townley concerning his claim that he worked for the Chilean Intelligance Agency rather than the CIA, and that he had shown his contempt for the proceedings in this case inter alia by discussing making threats to force the trial judge to recuse himself. Defense counsel was also prevented from showing the jury that another government witness's

testimony might be affected by the fact that he was a drug addict and that still another witness had been acting as a government informant when he elicited incriminating statements from one of the appellants (Point II).

Some of the most incriminating evidence in this case was the testimony of two inmates at the New York Metropolitan Correctional Center as to statements appellants had made to them while housed in that facility awaiting trial. These witnesses were government informants housed in that pre-trial detention facility, obtaining incriminating statements from the detainees. Since appellants had been arraigned, their Sixth Amendment right not to speak to such persons without counsel present, had attached. These statements were obtained in blatant violation of that right. (Point III).

The government also sought to bolster Townley's dubious credibility by having three FBI agents appear to corroborate his testimony by describing tours on which Townley had taken them of locations where incriminating events had supposedly taken place. This testimony was all inadmissible hearsay (Point VII).

The government was also permitted to introduce a prior statement by Townley which appeared to corroborate his trial testimony. Since that statement was given after Townley was extradited to this country to stand trial, and therefore after his motive to lie had arisen, it was not admissible under the prior consistent statement excpetion to the hearsay rules (Point VIII).

When all of the evidence was in, the government had failed to prove that appellant Ross had joined the alleged conspiracy or that he had done anything to aid Townley in killing Letelier. Rather, the most the prosecutor could say in summation was that this appellant had been present at certain peripheral events and had some knowledge of what was going on. This appellant was clearly not guilty of the crimes charged (Point I).

Similarly, the evidence as to both appellants on Count IV (killing Ronni Moffitt) was insufficient, since there was no evidence that either appellant had the requisite purpose or intent to kill this individual. Neither was even in Washington when the bomb exploded, and neither had any way of knowing that this woman would unexpectedly decide to ride to work with Letelier that morning (Point X).

Michael Vernon Townley, the man who conceived and executed the plot to kill Letelier, was sentenced to 10 years in prison. Appellants, who played at most a minor role in those events, were given consecutive life sentences. Those sentences violated appellants' Constitutional rights. (Point IX).

ARGUMENT

INTRODUCTORY STATEMENT

Notorious cases tend to make bad law. Abel v. United States, 362 U.S. 217, 248 (1960) (Brennan, dissenting). It is difficult to imagine a more notorious case than the present proceeding. An exiled Chilean ambassador was assassinated in the streets of Washington. The timing coincided with disclosures of our CIA's covert activities in over-throwing the Marxist regime which this ambassador had served. The present Chilean government extradited a professional assassin, Michael Townley, to serve as the prosecution's chief witness. Top Chilean officials were indicted for the crime. Members of a Cuban exile group were accused of lending assistance. The trial clearly caught the public's attention.

As a result of this notoriety, the prosecutor handling that trial developed a strong personal interest in its outcome. Almost from the beginning of the investigation, he was in the public limelight. Pretrial publicity, including a New York Times magazine article as well as numerous other publications, focused on his role in developing the case.[1] Shortly after the trial, he left the United States Attorney's office to join the litigation department of a prestigious Washington law firm. He is currently co-authoring a book on the investigation with Taylor Branch, the author of the New York Times

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[1] Appendix to Exh. 21 of the record on appeal at 025.

Magazine article. And now, Warner Bros. has announced that it is doing a major film of the investigation, and that the prosecutor, Eugene Propper, "will be the central figure." The producers of that film are reported to have "secured rights to the story from Eugene M. Propper" after reading the account in the New York Times Magazine (published six months before Mr. Propper went on trial in this case).[1]

1

New York Times, January 15, 1980, p. C-8

Warner to Film Letelier Killing

A film based on the 1976 Washington assassination of Orlando Letelier, the former Chilean Ambassador — and focusing on the three-year investigation of the murder — is being written for Warner Bros. and will be directed by Sydney Pollack, it was announced yesterday.

According to a spokesman, Dick Brooks, the catalysts for the film as well as for a book on the subject being written for Viking Press were the producers of the film, Iris Sawyer and Tony Kiser. After reading an account of the investigation in an article in The New York Times Magazine, Mr. Brooks said, they secured rights to the story from Eugene M. Propper, the prosecutor, who will be the central figure in the movie. Mr. Propper also will be writing the book, along with the author of the article, Taylor Branch.

The screenplay, financed by Warner's, will be written by David Rafiel, co-author of two films directed by Mr. Pollack, "Three Days of the Condor" (1976) and "Jeremiah Johnson" (1972). Mr. Pollack also directed "They Shoot Horses, Don't They?" (1969) and "The Electric Horseman," with Robert Redford and Jane Fonda.

Mr. Kiser said the film would use the actual names of persons involved and, with the possible exception of some "minor" details, would be completely factual. "It's going to show how Propper put together this extraordinary investigation which led him to the uppermost reaches of a foreign government," he said.

Mr. Letelier, a former foreign minister and a prominent critic of Chile's military regime, was killed when a bomb exploded in his car in downtown Washington. Michael V. Townley, an American agent for Chile's National Intelligence Directorate, later confessed to planting the device. On his testimony, three Chilean officers were indicted, but President Augusto Pinochet Ugarte refused to extradite them. In retaliation, the United States last month cut back diplomatic, military and economic relations with Chile.

The Supreme Court cautioned in Berger v. United States, 295 U.S. 78, 88 (1935) that an assistant United States Attorney is the representative of a sovereignty

> ...whose interest...in a criminal prosecution is not that it shall win a case, but that justice shall be done.

For the assistant United States Attorney in this case, however, conviction was clearly paramount. His financial and professional future depended on that outcome.

Consequently, no techniques were spared which would help to produce a conviction. This prosecutor entered into agreements with Chile and the government's chief witness, Michael Townley, which insured that that witness could not be properly cross-examined by the defense. Massive amounts of irrelevant evidence was introduced because of its sensationalistic value. Senator George McGovern, a political figure with established appeal for Washington D.C. residents and jurors, was presented as a government witness, even though his testimony was totally irrelevant to any issue in the case. Both of the victims' spouses were put on the stand for the clear purpose of evoking the sympathy of the jurors, even though neither of them could give any testimony which in any way implicated the defendants in the crime. Pertinent information was withheld from the defense. Extensive hearsay was presented improperly to bolster the questionable credibility of the government's principal witness.

As a result of these tactics, this homicide prosecution dragged on for six weeks of testimony - and news headlines.

As the large number of issues presented in this brief will establish, little regard was given for the legal propriety of this prosecution - only its outcome seemed important to those in charge.

POINT I

THE EVIDENCE AGAINST APPELLANT ROSS WAS INSUFFICIENT TO ESTABLISH THAT HE WAS GUILTY OF THE CRIMES CHARGED.

The government's principal evidence that appellant Ross had participated in the bombing deaths of Letelier and Moffitt was Ross's own boasting, to Ricardo Canete and Sherman Kaminsky, that he had taken part in that crime.[1] These men were not law enforcement officials; rather Canete was a fellow radical involved in various criminal enterprises, and Kaminsky, a convicted felon and fellow prisoner with Ross at the New York Metropolitan Correctional Center. Consequently, Ross's statements to these men did not have inherent reliability which an admission against penal interest would carry. To the contrary, the temptation for Ross to claim credit for a crime which he had not committed, in the hopes of enhancing his stature in the eyes of such felons, was all too understandable.[2]

The danger that such a claim of criminal involvement, particularly in a notorious and widely publicized crime, will turn out to be baseless self-puffery is one of the main reasons why the federal courts require that confessions be corroborated:

> In our country, the doubt persists that... the aberration or weakness of the accused... may tinge or warp the facts of the confession.
>
> Opper v. United States, 348 U.S. 84, 89-90 (1954)

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[1] Transcript at 3276 and 4350.

[2] According to Kaminsky, Ross was constantly trying to impress him (see eg. 3804-8; 3821; 4490).

See also Wong Sun v. United States, 371 U.S. 471, 488-89 (1963); Naples v. United States, 120 U.S. App. D.C. 123, 344 F.2d 508 (1964). And see U.S. ex rel. Irwin v. Gilligan, ___ U.S. ___ (1972?

The degree of corroboration which is necessary has been described in different terms by different courts. According to the Seventh Circuit, a conviction resting on a confession may not stand unless "the remaining evidence aliunde the admission is sufficient to sustain the conviction." United States v. Fearn, 589 F.2d 1316, 1321-22 (7th Cir. 1978). At the very least, the corroboration must be sufficient to enable the jury to conclude beyond a reasonable doubt that the confession is trustworthy. Smoot v. United States, 114 U.S. App. D.C. 154, 312 F.2d 881 (1962). In order to satisfy that burden, the prosecution must, at a minimum, prove that the crime which the defendant has admitted did in fact occur. See eg. United States v. Fearn, supra, 589 F.2d at 1322.

In the context of the present case, that burden was not satisfied by mere proof that Letelier and Moffitt had been killed. The government's own witness, Michael Townley, admitted doing that himself without any help from Ross. (2562, 2568).

Rather, in order to establish that Ross's statements were more than mere hyperbole, the government was obliged to present independent evidence showing 1) that Ross joined a conspiracy to kill Letelier and Moffitt (Count I), and 2) that Ross did some act which aided and abetted the conspirators in committing those

homicides (Counts II-V).

No such evidence exists in the record of this trial. The government itself conceded at the close of trial (5081-83) that in addition to Ross's statements, only four other items of evidence had been introduced concerning this appellant. At most, that evidence indicated that appellant Ross was associated with the principals in the case, and that he was present at certain peripheral events and had some knowledge of what was transpiring. It did not establish that he had joined the conspiracy or aided the principals in accomplishing their goals.

1. The first item of evidence concerning appellant Ross was Townley's testimony that Ross had been present at a meeting of Cuban exile group members in New Jersey on September 11, 1976 at which Townley had announced his intention to assassinate Letelier and requested the assistance of members of the Cuban exile community in accomplishing that goal (1668). Ross was merely present at that meeting; he did not actively participate in it. There was no evidence that he said or did anything while he was there. In fact, according to Townley, no one gave an affirmative response at that meeting to his request for assistance (1672).

Ross was apparently so insignificant that when Townley later listed the participants at that meeting for federal investigators, he failed to mention Ross (2553-4; 2763). Nor did Townley mention Ross when he was listing the participants at that meeting for the grand jury (2554-6; 2763). Townley

finally remembered at the trial of this appellant, that he had been there; even then, however, Townley's only description of Ross's role was "I have the recollection of Alvin Ross being present..." (1668).

2. Jose Barral testified that Ross came with Dionisio Suarez to Barral's home in September, 1976. While there, Suarez asked Barral for a blasting cap. However, Ross played no part in this exchange:

> Q: [on direct examination]: Did Alvin--was Alvin Ross with you or Dionisio Suarez at any time during the conversation?
>
> A: I have no recollection of that. He came with Dionisio, because if I remember correctly, he drove Dionisio to the house and that's about it. I know at no time he took part in the actual conversation in my opinion, wandering around, but I had no reason to talk to him about it, and if he would have come in directly and asked me for that, I wouldn't have even recognized him.
>
> (2894-5)
>
> A; I didn't speak to Ross at all.
>
> Q: Where was Ross when the conversation was going on?
>
> A: That's what I cannot recall. He came in. It is possible that he stepped into the house and talked to my family, to the children, you know. I cannot place Mr. Ross throughout the whole conversation being there standing. It would have been very upsetting to me if this had happened.
>
> (2921-22)
>
> A: I cannot place -- the conversation did not took [sic - take] place with Mr. Ross.
>
> (2923)

Suarez later returned alone and picked up the cap (2895).

3. Townley testified that when he flew back to Newark after completing his part in the crime by building a bomb and planting it in Letelier's car, appellant Ross picked him up at the airport and drove him to his apartment (1688). On the way, Townley informed Ross of what he had done in Washington. Townley's role in the conspiracy was over by this point; later that day he flew out of New York to Miami, on his way back to Chile (1690-91).

4. In February of 1978, over one and one-half years after the Letelier assassination, Federal agents discovered certain bomb-making materials in an office at 4523 Bergenline Avenue, Union City, New Jersey, rented to Carlos Garcia (3005-6). Appellant Ross had previously been associated with that office, having briefly tried to help Mr. Garcia start a novelty business there several months earlier (3159-60; 3050-53; 3063). Numerous other persons, including appellant Ross, fugitive defendant Virgil Paz, and lessee, Carlos Garcia, were also associated with those premises, however, (Gov't Exhs. 92, 93). The government produced no evidence to establish that Ross, rather than one of these other individuals, was responsible for leaving those bomb materials in that office. Indeed, there was not even any evidence that the bomb materials were there while Ross was using the office. Nor was there any proof that whoever possessed these materials, eighteen months after the Letelier bombing, was in any way involved in that crime.

Presence, even with knowledge, is not enough to establish a defendant's guilt:

> Mere association between the principal and those accused of aiding and abetting is not sufficient to establish guilt, Ramirez v. United States, 363 F.2d 33, 34 (9th Cir. 1966); United States v. Joiner, 429 F.2d 489, 493 (5th Cir. 1970); nor is mere presence at the scene and knowledge that a crime was to be committed sufficient to establish aiding and abetting. Ramirez v. United States, supra, United States v. Garguilo, 319 F.2d 249, 253 (2d Cir. 1962).
>
> Snyder v. United States, 448 F.2d 716, 718 (8th Cir. 1971)

See also United States v. Carter, 173 U.S. app. D.C. 54, 522 F.2d 666, 682 (1975); Bailey v. United States 135 U.S. App. D.C. 95, 416 F.2d 1110 (1969). Indeed, mere presence is not even considered evidence of guilt. Hicks v. United States, 150 U.S. 442, 447, 448 (1893); Snyder v. United States, supra, 448 F.2d at 719.

Consequently, a showing of mere presence and knowledge was not sufficient in this case to enable the jury to find beyond a reasonable doubt that Ross's subsequent self-aggrandizing claims were trustworthy.[1] The government failed to

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[1] Contrary to substantiating their truthfulness, both the content and the context of Ross's "confessions" establish that they were mere wishful thinking on Ross's part. Thus, in the midst of a discussion with Canete on bombs, in order to prove that he was some sort of expert on the subject, Ross insisted to Canete that "I made Letelier's bomb" (3276).. and that he had made it in Union City, New Jersey (3486). In reality, as Townley himself admitted on the stand, it was Townley who made the bomb together with Paz and Suarez. Moreover, they made it in Washington, not Union City, New Jersey. According to Townley, Ross was not even present, and did nothing to help make the bomb (2562-68). Similarly, Ross tried to impress Canete by telling him that he (Ross) had gone to Washington with Townley and the others, had stayed in a hotel in Arlington, Virginia, and had driven Townley and the others to Letelier's home to plant the bomb (3487-88). According to Townley, however, Ross had not gone to Washington and had not driven the car to Letelier's home (1672-83). Finally, Ross insisted that the bomb was installed in Letelier's car while that car was in a garage being repaired (3487-88). According to Townley, however, the bomb

present even a single item of evidence to establish that appellant Ross actually joined the conspiracy charged, or that he did anything to aid and abet the killing of Letelier and Moffitt.

To term the evidence against appellant Ross "insufficient" is really a misnomer. In truth, the record in this case establishes that this appellant did not commit the crimes of which he was convicted. The government's main witness, the mastermind of this assassination, provided conclusive proof of that fact:

> Q: Tell me one thing, Mr. Townley, that Alvin Ross did to help you kill Orlando Letelier?
>
> [Mr. Propper]: Objection, your Honor.
>
> [The Court]: Overruled.
>
> [The Witness]: Mr. Ross did nothing directly to help me kill or I have no idea what aid, if any, he gave to any other persons, to myself, directly, none that I know of.

By Mr. Dubin:

> Q: And no idea about what else he may have done to anybody? You don't know anything that Alvin Ross did, isn't that right?
>
> A; No, sir, I do not.

2562

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fn.1 cont'd

was planted in Letelier's car while it was parked in the driveway to Letelier's home (1683). Thus, Ross's "confession" to Canete was completely at variance with what actually happened; indeed, Canete himself did not even believe what Ross was saying - "...I did not believe Mr. Ross to be giving me what I considered accurate information." (3463, 3466)
Ross's statement to Kaminsky that "I was involved in the murder of Orlando Letelier" (4350) and that he had provided "two wires" which were used in manufacturing the bomb (4490) were claims which anyone could have made. Ross's "confessions" were thus nothing more than the fabrication of a braggart, a transparant attempt to capitalize on the few tidbits of information he had about the assassination, in order to finesse his observer status into a claim of actual participation.

Consequently, all that the prosecutor could say about this appellant in his summation was that Ross was present and "knew what was going on." (5169). And that is all that the evidence shows about this appellant. At most, appellant Ross was a passive observer who stood on the sidelines and watched the events in this case transpire - close to the action, but only as a spectator, not an actual participant. Afterwards, he capitalized on his promimity to those events by pretending to have played an actual role in them in order to impress first a fellow radical and then a fellow inmate. Such false bravado may well constitute the ultimate in bad judgment, but it certainly does not constitute guilt of the crimes charges. To punish an individual with consecutive life sentences for the conduct shown here is a gross miscarriage of justice.

POINT II

IMPROPER RESTRICTIONS ON THE CROSS-EXAMINATION OF THE GOVERNMENT'S WITNESSES, PARTICULAPLY ITS PRINCIPAL WITNESS, MICHAEL TOWNLEY, DENIED APPELLANTS THEIP CONSTITUTIONAL RIGHT OF CONFRONTATION.

An accused is constitutionally entitled to cross-examine the government's witnesses (see e.g. Douglas v. Alabama, 380 U.S. 415, 418 (1965). This right constitutes his principal safeguard against false accusations. When a prosecution witness falsely incriminates a defendant, defense counsel's opportunity to "delve into the witness' story" or to "discredit the witness" on cross-examination is the primary means by which that perjury is revealed to the jury. Davis v. Alaska, 415 U.S. 308, 316 (1974). Consequently, both this Court and the Supreme Court have repeatedly held that defendants are entitled to "broad latitude" in cross-examination, particularly of the government's principal witness. United States v. Leonard, 161 U.S. App. D.C. 36, 494 F.2d 955, 963 (D.C. Cir. 1974); see also Alford v. United States, 282 U.S. 687 (1931).

On no occasion is this right more important than when the government's case relies primarily on the testimony of a professional criminal, such as Michael Townley, who has turned government witness in order to minimize his own liability for the crimes he has committed. Such a witness has powerful motives to lie - ie. to "make" cases for the government or to shift blame for a particular crime away from himself. Moreover, his past criminal conduct may be such that he "would be less

likely than the average thrustworthy citizen to be truthful in his testimony." Davis v. Alaska, supra, 415 U.S. at 316.

Consequently, in most cases in which a prosecutor offers an habitual criminal a reduced plea in return for his testimony, the prosecutor requires that criminal to disclose all information about both the crimes charged and his past activities and other criminal conduct. Such disclosure is essential not only to the defendant's right of confrontation,[1] but also the prosecutor's duty to guard against perjury by his own witnesses[2] and the jury's duty to determine both the credibility of the witnesses and the facts of the case.

Indeed, it is difficult to comprehend how a prosecutor could expect even to reach a just plea bargain without knowing what other crimes the defendant had committed.

Contrary to providing for such disclosure in the present case, the United States Attorney's office chose instead to enter into a plea agreement with Townley which required him to disclose only that information which would support the prosecutor's theory of the case, while permitting him to withhold any information which might be beneficial to the defense. Then the prosecution compounded this impropriety by arranging for Chile, as Townley's employer and his country of residence, to restrict Townley's disclosures in the same fashion, authorizing him to disclose that information which aided the prosecutor,

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[1] Davis v. Alaska, supra

[2] Giglio v. United States, 405 U.S. 150, 153 (1972)

while forbidding him from disclosing any information which would aid the defense. The trial Court then gave its judicial sanction to the prosecutor's scheme by directing that cross-examination of this witness be conducted in conformity with the agreements which the United States Attorney's office had made with Townley and the government of Chile. As a result, defense counsel was precluded from cross-examining this witness on precisely those subjects which were most likely to expose his perjury.

Nor was Townley the only witness whose cross-examination was improperly curtailed. Rather, such restrictions were epidemic throughout the trial. In fact, defense counsel was frequently not even allowed to make a proffer at sidebar as to the basis for, or relevancy of, a proposed inquiry. These restrictions followed no logical or consistent theory as to the admissability of evidence; they seemed to depend less on relevancy than on the stature of the witness or the lateness of the hour when the question was asked. As a result of these improper limitations, the jury was deprived of vital information.

This restriction on cross-examination denied appellants their Sixth Amendment right "to be confronted with the witnesses" against them. It also deprived the jurors of the information they needed to make an informed judgment as to the credibility of the government's witnesses, particularly Townley. Since the credibility of those witnesses was the principal issue in this case, appellants are entitled to a new trial, this time with proper respect for their Constitutional right of cross-examination.

A. The denial of appellants' right to cross-examine Michael Vernon Townley.

1. Cross-examiniation as to Townley's "modus operandi," his motive to testify falsely, and his prior criminal activity.

The foundation of the government's case below was Michael Townley's testimony that appellants Guillermo Novo and Alvin Ross had aided him in assassinating Orlando Letelier. Appellants' principal defense to this charge was that they had not been involved in that crime; rather, Townley had carried out the assassination either alone or aided solely by Virgil Paz, one of the fugitive defendants.

Unbeknownst to the jury, this was not the first assassination which Townley had committed. In 1974, Townley assassinated Carlos Prats, an ex-Chilean General and leader of the Chilean exile movement, and Prats' wife in Argentina. In that assassination, as in the defense theory of the Letelier assassination, Townley assassinated a Chilean exile leader by building a bomb, planting it in the victim's car, and then detonating it be remote control, all without any aid from the appellants.

In 1975, Townley and Virgil Paz, a fugitive defendant in the present case, traveled to Europe and attempted to assassinate Bernardo Leighton, another Chilean exile leader, and his wife in Rome, Italy. In that attempted assassination, as in the defense theory of the Letelier assassination, Townley committed the crime with his long-time confederate, Virgil Paz, but again without any aid from the appellants.

Cross-examination of Townley concerning these assassination plots was therefore crutially important to the defense

in this case. First and foremost, these assassinations established that Townley's modus operandi in such crimes was significantly different from the mode of operation which he had found it necessary to concoct in his testimony in this case in order to incriminate the appellants.

Townley's claim that appellants were involved in the Letelier assassination was already suspect on its face, since by Townley's own testimony, appellants were not necessary to any phase of the crime. Townley himself made the bomb and planted it in Letelier's car, and Dionisio Suarez apparently detonated it. Neither of the appellants was even in Washington when the detonation occurred. One need not be an expert in criminology to realize that a criminal, particularly a professional like Townley, would be unlikely to increase his jeopardy by involving unnecessary amateurs in his criminal schemes, particularly highly visible political spokesmen.

If defense counsel had been permitted to cross-examine Townley concerning his modus operandi in these other plots, the jury would have received powerful proof that additional persons, such as appellants were in fact, unnecessary and consequently unlikely to be involved in such schemes. Without that cross-examination, Townley was able to minimize this flaw in his story by insisting that appellants performed certain minor functions; if that cross-examination had been allowed, on the other hand, the jury would have been hard pressed to ignore the simple, indisputable fact that Townley had carried out other, highly similar assassination plots without the aid of appellants or any other comparable individuals.

The trial court's ruling that defense counsel could not cross-examine Townley concerning the Prats and Leighton assassination plots was in clear violation of appellants' constitutional and statutory rights. In addition to appellants' constitutional right of cross-examination (U.S. Const., VI Amend.; Smith v. Illinois, 390 U.S. 129 (1968); Davis v. Alaska, 415 U.S. 308 (1974), the Federal Rules of Evidence specifically authorize cross-examination concerning a person's actions other than during the events charged, as probative of his modus operandi. Thus, Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is...admissible...as proof of...plan.

Rule 406 similarly states that:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

See generally, United States v. Parnell, 581 F.2d 1374, 1384 (10th Cir. 1978). Although these Rules are most commonly cited by the government to justify its introduction of evidence of prior acts of a defendant, they apply with equal force to the prior acts of any witness. Thus, in United States v. Callahan, 551 F.2d 733 (6th Cit. 1977), the Court held that the trial judge had violated these rules, as well as the defendant's Sixth Amendment right of confrontation, by refusing to allow defense counsel to cross-examine a government witness as to a routine practice of that witness which was inconsistent with his direct testimony. Appellants in this case were

equally prejudiced by being prevented from cross-examining Townley to show that his modus operandi in previous assassination plots was inconsistent with the one which he described in his direct testimony.

The trial court's ruling that defense counsel could not cross-examine Townley as to the Prats and Leighton assassination plots becomes even more clearly improper when considered in the light of the court's earlier ruling permitting the government not only to elicit direct testimony from Townley but also to present extrinsic evidence as to his other assassination activities when such evidence benefitted the government's case. Thus, Townley was permitted to testify at length, over defense objection, as to how appellants had allegedly participated with him in an unsuccessful attempt to assassinate Carlos Altamirano and Voladia Teitelbaum in Mexico in 1975 (1595-1611). As the prosecution itself admitted (1745), the primary value of this evidence to the government was to show a modus operandi for Townley in another assassination plot which was consistent with the modus operandi which he claimed to have followed in the Letelier assassination - to wit, one which involved the appellants. This then provided a basis for the government to urge upon the jury an inference that appellants' alleged participation with Townley in the Mexican plot made it more likely that they were also involved with him in the Letelier killing. The fact that the government had opened the door as to Townley's modus operandi in other assassinations by eliciting Townley's testimony as to his activities in Mexico thus provided the defense with an additional reason for cross-examining him as to

his activities in Argentina and Italy - to counteract the inference of a modus operandi involving appellants which the prosecution had created through the Mexico testimony.

The trial judge initially ruled that the government had opened the door to cross-examination concerning Argentina and Italy by eliciting Townley's direct testimony as to Mexico (1744 et seq.). Later he reversed himself, however, forbidding cross-examination as an exercise of his "discretion". (1813 et seq.). Unfortunately, the Court's first instincts were the legally correct ones. Both the Federal Rules of Evidence and the case law establish that defense counsel is entitled to cross-examine on any subject on which the government "opened the door" on direct examination. Thus, Rule 611(b) authorizes cross-examination on "the subject matter of direct examination and matters affecting the credibility of the witness." See eg. United States v. Callahan, 551 F.2d 733, 737 (6th Cir. 1977); see also United States v. Wolfson, 573 F.2d 216, 220-21 (5th Cir. 1978). In Ellis v. United States, 135 U.S. App. D.C. 35, 416 F.2d 791, 803-4 (D.C. Cir. 1969) this Court observed that the government may limit cross-examination by what it brings out on direct examination. The converse is likewise true; where the government has explored an area such as modus operandi on direct examination, it is estopped from objecting to defense counsel's efforts to contradict that evidence or its necessary implications to the jury on cross-examination.

On the issue of modus operandi, the present case is indistinguishable from United States v. Newman, 490 F.2d 139 (3d Cir. 1974). There, as here, the government had sought to portray an alliance between their principal witness and the

defendant in the commission of crimes like the one charged in the indictment.[1] In Newman, the crime was illegal wiretappings; here, it was assassinations (in Mexico and Washington). As in this case, defense counsel in Newman sought to cross-examine the government witness as to other occasions on which he had committed the same crime without the defendant's assistance, so as to establish that the witness "often acted independently." (Id. at 146). The Court of Appeals held that the trial court committed reversible error in refusing to strike that witness' direct testimony after he asserted a Fifth Amendment privilege in response to this cross-examination:

> More troublesome is [government witness] Nee's refusal to discuss prior wiretaps. Defense counsel indicated at trial, and re-affirms on appeal, that one of his purposes in asking about prior taps was to demonstrate that [defendant] Gaca did not participate in previous taps conducted by Nee...The witness's refusal to permit questioning on this topic should have led to a striking of the testimony regarding the partnership [between Nee and Gaca]. Failure to cause a partial striking constituted an unreasonable limitation of Gaca's Sixth Amendment rights, and is, therefore, error. Id., 490 F.2d at 145-6.

The Court's refusal to permit questioning as to Townley's prior assassinations should likewise have resulted, at a minimum, in the striking of his direct testimony concerning the assassinations he had allegedly committed or attempted to commit with appellants.

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[1] The assistant United States Attorney admitted at the proceedings below that he "put in the Mexico incident to show relationship among the co-conspirators...(1975).

Cross-examination as to Townley's assassination activities in Italy and Argentina was also important for another reason - to show the extent of the benefit which Townley derived from his plea agreement with the government. Contrary to requiring Townley to "come clean", that agreement required him to disclose only those crimes which he had committed inside the United States or against American citizens. Since the United States Attorney's office was well aware that, other than the Letelier assassination, Townley's only other crimes in those categories were limited to a few passport and visa violations, requiring that disclosure was not particularly onerous to Townley. By drafting the agreement in this fashion, however, the government conferred a major benefit on Townley, relieving him of any obligation to disclose the serious crimes which he had committed outside the United States - namely, the assassination of Prats and the attempted assassination of Leighton. By prohibiting cross-examination on those matters, the court prevented defense counsel from ever revealing to the jury that Townley was receiving this major benefit in return for incriminating the appellants. This area was obviously important to the jury since they asked about plea agreements during their deliberations (5585).

A defendant's right to cross-examine a government witness concerning the full range of benefits which he had received in return for his testimony is well-established. See eg. United States v. Leonard, 161 U.S. App. D.C. 36, 494 F.2d 955 963, (D.C. Cir. 1974). This right is particularly important when, as here, the witness is the primary accuser and also an

admitted participant in the crime charged:

> When the witness is the star witness, or was an accomplice or participant in the crime for which the defendant is being prosecuted, the importance of full cross-examination to disclose possible bias is necessarily increased.
>
> United States v. Barrentine, 591 F.2d 1069, 1081 (5th Cir. 1979)

See also United States v. Leonard, supra, 494 F.2d at 962-63; United States v. Dickens, 417 F.2d 958, 959 (8th Cir. 1969). By disallowing cross-examination into the fact that the government had excused Townley from disclosing certain serious crimes, the court below deprived appellants of this important right.

Townley was not the only party to benefit from the artful fashion in which this plea agreement was drafted. The government itself was the major beneficiary of its own machinations. When he drafted the plea agreement, the prosecutor was fully aware that the few infractions which Townley would be required to disclose under that agreement would not impeach his testimony in the present proceeding. It was Townley's foreign crimes, namely the Prats and Leighton assassinations schemes, and the distinctly different modus operandi which he employed in those crimes, which would have seriously undercut his testimony here. Consequently, by drafting a plea agreement which would allow Townley to keep those crimes "under wraps," the government was improperly shielding its key witness from damaging cross-examination.

The trial judge precluded cross-examination as to the Prats and Leighton assassinations as an exercise of his "dis-

cretion" to determine the "parameters of cross-examination" (1813). Ironically, the judge exercised his discretion based on his conclusion that this evidence would be cumulative, that defense counsel already had enough evidence on Townley's modus operandi in other assassination schemes from his direct testimony as to his activities in Mexico (1801-2). It is difficult to believe that the judge actually thought this to be the case; the whole thrust of defense counsel's argument was that Townley's story as to Mexico was clearly concocted to corroborate his testimony as to his modus operandi in the crime charged. In both instances, he claimed that appellants assisted him. Cross-examination as to Italy and Argentina was therefore necessary to show another modus operandi - one without appellants or comparable accomplices - so as to establish that the appellants were not part of Townley's assassination schemes. Contrary to the judge's reasoning, the direct testimony as to Mexico thus did not eliminate the need for cross-examination as to Italy and Argentina; rather, it made that cross-examination even more imperative.

During the colloquys at trial as to whether the defense would be permitted to cross-examine Townley concerning Prats and Leighton, the government advanced a second theory for forbidding such cross-examination - Townley's Fifth Amendment rights. The trial court did not rely on this theory in forbidding this area of cross-examination (see 1813 et seq.). Indeed, since Townley never personally asserted any Fifth Amendment claim to this area of cross-examination, the court

could not properly forbid cross-examination on that basis. Although such an assertion need not take place in front of the jury, the trial court must nevertheless ascertain from the witness, outside of the jury's presence, that he would indeed make such an assertion of privilege before examination may be prohibited on that basis. United States v. Mandujano, 425 U.S. 564, 574 (1976); Bowles v. United States, 142 U.S. App. D.C. 36, 439 F.2d 536, 541 (D.C. Cir. 1970) (privilege against self-incrimination must generally be claimed in order to be respected); United States v. Ginsburg, 96 F.2d 882 (7th Cir.) cert. denied, 305 U.S. 620 (1938) (court cannot invoke privilege against self-incrimination for witness).

Even if Townley had invoked his Fifth Amendment with regard to the Prats and Leighton matters, however, the court could not properly have prohibited such cross-examination on that basis. Townley could not be prosecuted in any court in this country for either of these crimes, and neither the Supreme Court nor any Circuit Court has ever held that the Fifth Amendment extends to cases where only foreign prosecution is possible. Rather, that issue was expressly left undecided in Zicarelli v. New Jersey State Com'n of Investigation, 406 U.S. 472, 478-81 (1972). The only Circuit Court decision to consider this issue held that the Fifth Amendment did not extend to foreign prosecutions:

> The Fifth Amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states but need not and should not be interpreted as applying to acts made criminal by laws of a foreign nation.
>
> In Re Parker 411 F.2d 1067, 1070 (10th Cir. 1969), cert. granted, judgment vacated as moot, sub nom. Parker v. United States, 397 U.S. 96 (1970)

Even if this Court were to conclude that the Fifth Amendment does protect against danger of foreign prosecution, however, that protection could be invoked only in those instances where the use of the witness's statements in foreign prosecution is shown to be a real danger, not merely a remote or speculative possibility. Zicarelli v. New Jersey State Com'n of Investigation, supra, 406 U.S. at 478. The burden of establishing that such a danger exists rests on the party asserting the privilege. United States v. Mandujano, supra, 425 U.S. at 575; Zicarelli v. New Jersey State Com'n of Investigation, supra, 406 U.S. at 478. The record below contains no evidence even suggesting that Townley might be prosecuted for either the Prats or Leighton affairs. Compare Zicarelli v. New Jersey State Com'n of Investigation, supra, 406 U.S. at 478-79.

Even if such a danger had been shown to exist, however, the trial judge could effectively have insured that Townley's testimony in this case would not be used to incriminate him in foreign prosecutions by closing the courtroom and sealing the transcript of this portion of Townley's testimony. Where such precautions are available, as for example in grand jury proceedings, every Circuit Court to consider the issue has held that a "real danger" of foreign prosecution does not exist and the witness must answer the questions. In Re Tierney, 465 F.2d 806, 811-12 (5th Cir. 1972); See also In Re Grand Jury Witness, 597 F.2d 1166 (9th Cir. 1979); In Re Postal, 559 F.2d 234 (5th Cir. 1977); In Re Long Visitor, 523 F.2d 443 (8th Cir. 1975); United States v. Armstrong, 476 F.2d 313, 314, (5th Cir. 1973); In Re Parker, 411 F.2d 1967, 1969-70

(10th Cir. 1969); In Re Weir, 377 F.S. 919, 924-25 (S.D. Cal. 1974); United States v. Doe, 361 F.S. 226 (E.D.Pa 1973).

For the reasons set forth in the preceding paragraphs, the trial judge could not properly have prohibited cross-examination about Prats and Leighton for the reason advanced by the government - Townley's Fifth Amendment rights. Even if Townley had had a valid Fifth Amendment privilege not to answer such questions, however, the court could not properly have allowed his direct testimony to stand while forbidding cross-examination on that basis. To do so would have violated appellants' equally important Sixth Amendment right to cross-examine this witness.

If a witness asserts a valid Fifth Amendment claim during cross-examination, his direct testimony is allowed to stand only when the subject as to which the privilege is claimed is merely collateral. See eg. United States v. Newman, 490 F.2d 139, 146 (3d Cir. 1974). The trial court in this case did not find, and could not properly have found, that the Prats and Leighton matters were merely collateral:

> If the purpose of cross-examination is to explore more than general credibility, the subject of inquiry if not collateral. United States v. Garrett, 542 F.2d 23, 26 (6th Cir. 1976)
>
> Dunbar v. Harris, ____F2d____ Dkt. No. 79-2081 (2d Cir. Dec. 21, 1979)

Moreover, it is important to recognize that

> there is a difference between general credibility and answers which might possibly establish untruthfulness with respect to the specific events of the crime charged.
>
> United States v. Garrett, supra, 542 F.2d at 26

See also United States v. Cardillo, 316 F.2d 606, 613 (2d Cir.), cert. denied, 375 U.S. 822 (1963).

The Prats and Leighton affairs concerned matters of substance - Townley's modus operandi and the benefits he was receiving for testifying for the government. Moreover, modus operandi was put into issue by the government when it introduced the Mexico testimony. Consequently, appellants' constitutional right to cross-examine on these issues could not be sacrificed to Townley's claim of privilege. United States v. Newman, supra, 490 F.2d at 145-45; See also United States v. Frank 520 F.2d 1287, 1292 (2d Cir. 1975), cert, denied, 423 U.S. 1087 (1976),

In such circumstances, when a defendant's cross-examination is restricted by the competing Fifth Amendment right of a witness, the trial court is obliged to strike the direct testimony of that witness or declare a mistrial.[1] Ellis v. United States, 135 U.S. App. D.C., 416 F.2d 791, 803 (D.C. Cir. 1969); see also United States v. Garrett, supra, 542 F.2d at 26; United States v. Frank, 520 F.2d 1287, 1292 (2d Cir. 1975), cert denied, 423 U.S. 1087 (1976); United States v. Newman, 490 F.2d 139, 146 (3d Cir. 1974).

Michael Townley was the principal witness for the prosecution in this case. As a professional assassin and admitted participant in the crimes charged, who was testifying for the government in order to lessen his own punishment, his testimony was particularly suspect. Cross-examination as to his modus operandi and his motives for testifying was

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[1] Throughout the trial, defense counsel repeatedly requested the trial judge to strike Townley's direct testimony or declare a mistrial because of the limitations on the cross-examination of this witness (see eg. 1854, 1897, 1962).

crutial to the defense. The trial court's imporper restrictions on those legitimate areas of cross-examination violated appellants' Sixth Amendment rights.[1]

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[1] In United States v. Dickens, supra, the court held that similar restrictions on cross-examination requires a new trial. To paraphrase the holding of that case:

> The testimony of [Townley] was extremely critical. It provided a direct link between the alleged offense and the appellant...[Townley] was an accomplice by his own admission. If the jury believed his testimony, the appellant's conviction was a certainty. Thus, of necessity, the appellant was forced to attack his varacity and credibility. In such a situation, the necessary scrutiny can only be effected by a searching and wide-ranging cross-examination. Gordon v. United States, 344 U.S. 414...(1953); District of Columbia v. Clawans, 300 U.S. 617...(1937) [other citations omitted] The right of a defendant to engage in such cross-examination is an essential requirement for a fair trial. Smith v. Illinois, 390 U.S. 129...(1968); Pointer v. Texas, 380 U.S. 400...(1965). While the scope and extent of the crossexamination is within the sound discretion of the trial court...wide latitude is crucial when the testimony of an accomplice is involved. Gordon v. United States, 344 U.S. 414...(1953).. cf. District of Columbia v. Clawans, supra. Id., 417 F.2d at 959-60.

2. Cross-examination as to whether Townley was a member of DINA.

Appellants' principal defense in this case was that they simply were not involved in the crime charged. Their second theory of defense was that Townley was an agent of the Central Intelligence Agency, which had sanctioned the Letelier assassination in the same fashion as it had sanctioned the overthrow and assassination of Letelier's former employer, Salvator Allende. This theory had considerable factual support, since Townley himself admitted having had several contacts with the CIA, and a CIA "front" organization in Florida had apparently attempted to create an alibi for Townley on the day of the Letelier assassination. Townley himself admitted meeting a CIA agent in Florida. Moreover, discovery material established that Townley had been interviewed by the CIA and had been given "operational status." As far as the government's claim that Townley was an agent of DINA, the Chilean Intelligence Agency, rather than the CIA, the CIA's own folder on Townley contained no indication that Townley had ever worked for DINA (5061). Moreover, there were articles in the Chilean press disclaiming that Townley had ever worked for DINA. Finally, he had been seen at the American Embassy in Chile, in the vicinity of the CIA offices located there (4657-4668).

The government put this matter into issue in its direct examination of Townley by having him testify that he was an agent of DINA. Consequently, it was imperative for the defense, on cross-examination, to show that Townley had not worked for DINA.

In preparation for this area of cross-examination, defense counsel had learned from sources in Chile, including a Chilean attorney and two former DINA agents, that membership in DINA was limited to Chilean citizens who were members of the Chilean military; alien civilians, such as Townley, were not eligible. Defense counsel had also gathered information about DINA's structure and operations which only a DINA agent would be likely to know.

As with the Prats and Leighton matters, however, the government worded its pre-trial agreements with Townley and the government of Chili in such a way as to protect this star witness from being undermined by this legitimate area of cross-examination. According to the assistant United States attorney, Chile had laws prohibiting persons from disclosing governmental "secrets" such as anything relating to DINA. Although the United States Attorney's office had gotten Chile to waive this law with regard to any testimony by Townley which might be beneficial to the prosecution, they had neglected to secure a similar waiver for testimony which was essential to the defense.

Consequently, although Townley testified at length about DINA on direct examination, he repeatedly asserted a Fifth Amendment right when questioned on that same subject on cross-examination. (see eg. 1844, 1887, 2064). In support of that assertion of privilege, the government argued that although the answers to most of those questions were not self-incriminating, Townley would, by the very act of answering, be

violating Chilean law (see eg. 1848, see also "government's supplemental memorandum" on the scope of cross-examination).

The trial court ruled that this was a valid assertion of Fifth Amendment privilege (1953); consequently, it ordered the defense not to question Townley concerning his alleged role as informant and technical advisor for DINA (2088-89). The court then went further, ordering the defense not to cross-examine Townley as to anything he did for DINA outside the United States (2090).[1]

This ruling prejudiced the defense in two ways. First, it prevented them from establishing that Townley was not a member of DINA. Secondly, it prevented them from showing the extent to which Townley had previously perjured himself in a sworn statement he had made to a Chilean official, in which he had denied any involvement in the Letelier assassination and also claimed this dual employment status with DINA (2056-2088). It was important for the defense to show the full extent and intricacy of Townley's lies in that earlier statement, so as to convince the jury that this witness was not trustworthy, even under oath. The judge's ruling prevented the defense from pursuing these legitimate goals.

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[1]The trial court refused even to hear defense counsel's proffer as to their basis for claiming that Townley was not a DINA agent (1962).

The trial court was in error in holding that Townley had a Fifth Amendment privilege as to these questions. The government did not contend that the content of Townley's answers to these questions would incriminate him; rather, it claimed that Townley would be violating Chilean law by the very act of answering.

The Fifth Amendment does not apply to such circumstances. That constitutional protection applies only to the use of testimony (Lefkowitz v. Turley, 414 U.S. 70, 78 (1973), not the fact of testifying. Kastigar v. United States, 406 U.S. 441, 453 (1972). Consequently, a witness must answer questions despite the fact that foreign law forbids him from doing so. As the Fifth Circuit held in rejecting a Fifth Amendment claim identical to the one advanced by the government in this case:

> The Fifth Amendment simply is not pertinent to the situation where a foreign state makes the act of testifying a criminal offense.
>
> ...this court simply cannot acquience in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states.
>
> In Re Grand Jury Proceedings, 532 F.2d 404, 406-7 (5th Cir. 1976)

Foreign relations law is in accord:

> A state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct.
>
> Restatement 2d. Foreign Relations Law of the United States, § 39.(1).

In the context of the present case, this rule means that the district court did not lose its authority to compel Townley's testimony merely because Chile had laws forbidding him from disclosing the desired information.

This issue has also arisen in the context of subpoenaes duces tecum compelling production in domestic courts of documents located in foreign lands. Compelling a witness to actually go to a foreign country and remove documents in violation of the laws of that country is clearly more hazardous than simply requiring him to give testimony which is prohibited by the laws of some foreign power. Nevertheless, both the United States Supreme Court and the Tenth Circuit have held that such foreign prohibitions do not invalidate the production order:

> We are not impressed by Andersen's contention that international comity prevents a domestic court from ordering action which violates foreign law. See Restatement, 2d, Foreign Relations Law of the United States, § 39.(1)...An anomalous situation with great potential effect would result from recognition of the right of every litigant to avoid discovery permitted by local law through the assertion of violation of foreign law. Foreign law may not control local law. It cannot invalidate an order which local law authorizes.
>
> Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 342 (10th Cir. 1976)

See also Societe International v. Rogers, 357 U.S. 197, 208 (1958).

Even if Townley had a legitimate Fifth Amendment claim with regard to these questions, however, the judge could not honor that claim and at the same time allow this witness' direct testimony to stand (see Point A, supra). Since the question of whether Townley was a DINA agent was a matter of substance which the government had put into issue in its direct case, Townley's assertion of privilege with regard to cross-examination on this issue required that the trial judge either declare a mistrial or strike his direct testimony. United States v. Ellis, supra, 416 F.2d at 803; United States v. Garrett, supra, 542 F.2d at 26; United States v. Frank, supra, 520 F.2d at 1292; United States v. Newman, supra, 490 F.2d at 146.

3. Denial of cross-examination as to Townley's untrustworthiness, as evidenced by the fact that he had discussed making threats to the trial judge.

A witness who demonstrates disdain for the judge and jury in a case is less likely to feel obliged to be truthful in his testimony to those individuals. Similarly, a witness who discusses with others the possibility of perverting the judicial process by threatening a judge, so as to force him to withdraw from a case, is more likely to testify falsely if it should serve his interests to do so. A jury is entitled to be apprised of such facts in determining the credibility of a witness.

The government's principal witness, Michael Townley did all of the things described above. Nevertheless, defense counsel were improperly denied any opportunity to examine him concerning this misconduct.

The government, in its continuing program to curry favor with this witness, gave him free run of the United States Attorney's office, and unsupervised use of the phones located therein (4852-55). This included allowing Townley to make long-distance phone calls over government phones, including personal calls to Chile. One such phone call, to a Gustavo Etchepare of Santiago, Chile, at 5 P.M. on January 30, 1979, during the third week of the trial, was recorded by Mr. Etchepare and later turned over to the defense.

The tape of this conversation raised serious

doubts as to Townley's credibility as a witness. First, he indicated his disdain for the jurybefore which he had just testified, and his belief that any "shit" would confuse them:

> ...the jury is so ignorant that one of the best defenses at this time is to throw more shit in and stir it up.
>
> (appendix at 2)

For the judge, Mr. Townley expressed utter contempt:

> ...they have a cretin for a judge, and on top of that the judge is ill-humored, and on top of that they have a judge who is badly educated.
>
> * * *
>
> (Question by Mr. Etchepare): Is Judge Parker a reasonable and pleasant man? (Answer by Townley): Are you kidding? He can go to hell.
>
> (appendix at 2-3)

Then Townley indicated his willingness to take action, even criminal actions, to subvert the judicial process in his favor:

> ...I offer right now to ask friends all over the world to call (Judge Parker) and threaten him and get him to withdraw from the case.
>
> (appendex at 3)

Apparently this was not a new thought for this witness. He next explained that he and some FBI agents, apparently those working with the prosecution in this case, had actually discussed arranging such threats:

> That was one of the things that was talked about confidentially with people from the FBI...how many friends we all had who could call...

make threatening phone calls to the judge to get him to withdraw from the case.

(appendix 3)

In a voir dire outside the presence of the jury, Townley admitted making this call (5072-5077).

The judge in this case actually was threatened several times (See eg. trial transcript at 11 et seq.). Through news coverage, the prospective jurors were apprised of those threats. Both judge and jury in all likelihood assumed that such threats were generated by the defendants or their associates. This tape indicated, however, that those threats may have come from the government's principal witness and the FBI agents working on this case.

At worst, this indicated the commission of a credibility - impeaching crime. Conspiracy to threaten a federal judge is a serious offense. 18 U.S.C. §1503; United States v. Margoles, 294 F.2d 371 (7th Cir.), cert. denied, 368 U.S. 930 (1961). At the very least, this taped conversation established this witness's contempt for the judicial process and his willingness to subvert it. The jury was clearly entitled to be apprised of this exchange in determining whether this witness had told them the truth. (Rule 609(b), Federal Rules of Evidence). The judge's refusal to

allow defense counsel to examine Townley on this subject was error.[1]

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1 Several colloquys were held on this issue at trial. 4245-1 - 4245-26; 4510-1 - 4510-4; 4843 - 4855; and 5071-1 - 5071-13. A voir dire was conducted outside the jury, at which Townley admitted making the phone call (5072-79). The judge denied appellants' application to examine Townley before the jury on this issue at 4945, and again at 5077-1 - 5077-4.

B. Denial of any cross-examination as to CIA involvement.

Defense counsel advised the jury in their opening statements that they would show that the CIA and not the Chilean government masterminded the Letelier assassination. The trial judge, however, decided not to allow the counsel to raise this legitimate defense:

> I'm not going to let you put the CIA on trial in this case... (5019)

In order to carry out this threat, the judge first issued a blanket ruling forbidding the defense from cross-examining any of the government's witnesses as to CIA involvement in the assassination (1262, 1474; see also 1233).

This ruling was particularly prejudicial to the defense since it left the prosecution free to elicit answers on direct examination of their witnesses which indicated that the CIA was not involved, while precluding the defense from asking questions on cross-examination to establish that it was involved. Thus, for example, immediately after the judge's ruling, the prosecution, in its direct examination of Senator McGovern, took advantage of the restriction which had just been imposed on the defense:

> [The Prosecution]: Senator, during either that conversation or the prior one you had with him, what if anything did Letelier ever say to you about the CIA, Central Intelligence Agency?
> [Senator McGovern]: Nothing that I can recall.
>
> (1348)

Nevertheless, when defense counsel attempted to question this same witness about possible CIA involvement in this case, they were forbidden from doing so, based on the judge's earlier ruling (1359-60).

Even if the defense had had no factual basis for this theory of defense, they would have been entitled to a reasonable amount of exploratory cross-examination on this issue. See eg. United States v. Fowler, 465 F.2d 664 (D.C.Cir. 1972); United States v. Alston, 460 F.2d 48 (5th Cir.), cert. denied, 409 U.S. 871 (1972). As explained in Point IB, supra, however, the defense did have a factual basis for such inquiry - Townley's admissions that he had had several contacts with the CIA and the fact that a CIA front organization had attempted to establish an alibi for Townley on the day of the Letelier assassination.

Consequently, the judge's prohibition of any cross-examination on this subject was error. A judge's discretion to limit cross-examination comes into play only after there has been sufficient cross-examination to satisfy a defendant's Sixth Amendment rights. See eg. United States v. Mayer, 556 F.2d 245 (5th Cir. 1977); cf. United States v. Vasilios, 598 F.2d 387 (5th Cir. 1979); United States ex rel. Carbone v.

Manson, 447 F.S. 611 (D.C. Conn. 1978). Foreclosing all cross-examination as to a legitimate area of inquiry is reversible error. Smith v. Illinois, 390 U.S. 129, 131 (1968); Alford v. United States, 282 U.S. 687, 694 (1931). This is particularly true where, as here, the area of inquiry pertains to who besides the defendants might have committed the crime charged; United States v. Miranda, 510 F.2d 385, 387 (9th Cir. 1975). In this regard, a defendant has a right to have all favorable evidence considered by the jury (Id.).

The trial court's reliance on Casey v. United States, 413 F.2d 1303 (5th Cir. 1969) as justifying such wholesale foreclosure was misplaced. That case only approved such a ruling where the defense was unable to show any factual basis whatsoever for its questions. Indeed, even in that case, the Court cautioned that the government's interest in avoiding such cross-examination would yield to the defendant's Sixth Amendment rights if the defendants could show any factual basis for the questions asked. Since such a showing was made in this case, the trial court erred in forbidding any cross-examination on this issue.

Nor was this error mitigated by the fact that defense counsel could recall the government's witnesses during the defense case to question them on this subject. As to the inadequacy of that procedure, this Court's observations concerning the denial of cross-examination which is implicit in the introduction of hearsay evidence are equally applicable

here:

> The drastic impairment of the right of cross-examination resulting from ...[this ruling] will be recognized by anyone familar with the psychology of a jury trial. [Evidence] would be introduced with appropriate fanfare...The opposing party might have plenty of data to shake this testimony on cross-examination, yet he would have to remain silent while a strong prima facie case is made against him...
>
> It is true that after the party who introduced such [evidence] has closed his case the opposing party would have a chance to rebut them. But the disadvantageous position in which the denial of his right of cross-examination would place him is obvious to any trial lawyer. A period of time has gone by; an impression on the jury has been made. ...and [the defendant] ...must offer him as his own witness a disadvantage only slightly limited by the fact that the trial court may in its discretion allow him to impeach his own witness. Only a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure.
>
> New York Life Insurance Company v. Taylor, 79 U.S. App. D.C. 66, 147 F.2d 297, 304-5 (D.C. Cir. 1945)

See also Lyles v. United States 103 U.S. App. D.C.22, 254 F.2d 725 (D.C. Cir. 1957); Phillips v. Neil, 452 F.2d 337, 348 (9th Cir. 1971); United States v. Check, 582 F.2d 668, 683 (2d Cir. 1978). The prejudice suffered by appellants in this case was equally "drastic." They had a constitutional right to cross-examine the government's witnesses on all issues relevant to this trial. The judge's order forbidding them from doing so was error.

Even when the defense called certain CIA officials as part of its own case, examination was improperly restricted. The defense called these witnesses for two reasons - 1) to bring out evidence indicating that Townley was a CIA agent, and 2) to establish that the CIA had a motive for ordering letelier's assassination.

As to the question of whether Townley was a CIA agent, the CIA's officials' position was that they had interviewed Townley and had in fact given him "operational status" but then had not actually used him because they "lost contact" with him. They bolstered this claim by pointing out that the folders on Townley in the CIA's central office contained no indication that he had ever served as a CIA agent. Defense counsel sought to attack this claim on three levels: 1) by making inquiry into the hiring practices of the CIA so as to establish that the CIA, in addition to hiring full time agents, also hired people on a "contract" basis, and that such hirings would not necessarily be reflected in the central office files; 2) that the CIA operations in Chile were such that it would have been impossible for them to "lose contact" with someone like Townley who was living openly in the capital city; and 3)that Townley had repeatedly been seen in the vicinity of the CIA's offices in Chile. Both the government and the court substantially and improperly curtailed fefense counsel's examination on these legitimate issues (4722 (CIA witnesses won't go into where offices are); 4741 (CIA witnesses won't confirm whether they

have an office in the vicinity where Townley was repeatedly seen in the American Embassy in Chile); 4740, 4979 (limitations on questions going to the credibility of CIA officials' claim that they "lost contact" with Townley)).

The Court likewise prevented defense counsel from presenting any evidence to show the CIA's motive for ordering Letelier's assassination. The CIA had invested immense amounts of time and money into bringing about the overthrow of the Chilean socialist regime and the assassination of its leader, Salvador Allende. Letelier was one of the principal leaders of an international movement working to return Chile to socialism, by revolution if necessary. Defense counsel was constantly prevented from placing these facts concerning CIA motive before the jury (See eg. 5019, 5027).

C. The denial of cross-examination as to whether a government witness was drug-addicted and whether the content of his testimony had been determined after consultation with shells, beads and spirits.

Government witness Canete testified that appellant Ross had made several incriminating admissions to him, including an admission that he (Ross) had assassinated Letelier. Canete also claimed that he provided Ross with false identification papers.

This was a witness whose testimony should have been scrutinized with care, if it was believed at all, by the jury. The witness's father had informed defense counsel that the witness was a drug addict. Nevertheless, when defense counsel requested permission to question this witness on that subject during a voir dire outside the presence of the jury, the jduge flatly refused, and directed counsel not to go into the matter on cross-examination (3514).

That ruling was clearly erroneous. The jury was entitled to know of this witness's addiction, since it went both to his trustworthiness and his ability to remember and relate facts:

> ...a judge may not absolutely foreclose all inquiry into an issue such as the narcotics use during trial of an important eyewitness and central participant in the transaction at issue. Once a proper foundation has been established, through, for example, a showing of reasonably contemperaneous drug use, the issue is open for inquiry. [citation omitted] The jury may not properly be deprived of this relevant evidence of possible inability to

recollect and relate. Wilson v. United States, 232 U.S. 563, 568 (1914); 3A Wigmore, Evidence, § 934 (Chadbourn Rev. 1970).

United States v. Banks, 520 F.2d 631 (7th Cir. 1975)

Thus, in Wilson v. United States, 232 U.S. 563, 568 (1914), the Supreme Court held it improper for a judge to limit cross-examination of a witness to ascertain the extent of her drug use at the time of trial and to explore the effect of that drug use on her testimonial power of recollection. See also United States v. Kearney, 136 U.S. App. D.C. 328, 420 F.2d 170, 174 (D.C. Cir. 1969); Rheaume v. Patterson, 289 F.2d 611, 614 (2nd Cir. 1961).

This witness's testimony was also suspect because he was a devotee of the Luceme, which consults with beads and shells, as well as spirits, before doing certain things. In a voir dire outside the presence of the jury, Canete admitted that he was a practicioner of this religion and that following his first meeting with an FBI agent concerning this case, he had "consulted" the Lucemi as to whether he should continue meeting with that agent (3511). Before defense counsel could pursue this voir dire any further, however, the judge abruptly cut it off, stating simply, "I will not permit you to [go] any further with it." The judge thereafter prohibited defense counsel from cross-examining Canete before the jury on this subject (3512). By doing so, the judge improperly prevented the defense from providing the jury with the information necessary fully and accurately to assess this witness's cre-

dibility and trustworthiness cf. United States v. Kearney, supra, 420 F.2d at 174; United States v. Davis, 486 F.2d 725, 726 (7th Cir. 1973).

D. The denial of cross-examination concerning government witness Vega's misidentification fo appellant Ross.

Government witness Luis Vega, the superintendent of a building located at 4523 Bergenline Avenue, Union City, New Jersey, testified to finding bomb materials, arms lists and other incriminating materials in an office which he claimed to have rented to appellant Ross. According to Vega, Ross rented the office using an alias - Carlos P. Garcia. Vega identified Ross as the lessee by choosing Ross' picture from a photographic spread after an FBI agent gave him a physical description of Ross as the party they wanted him to identify (3057-61). Vega admitted that he selected Ross's photo because it fit the agent's description. (3061-2).

Unfortunately, that agent, in his eagerness to make a case against appellant Ross, had induced this witness to identify the wrong person. Ross had not rented the office; rather, a person actually named Carlos P. Garcia had done so.

Defense counsel brought Mr. Garcia to the courthouse and had him wait outside the courtroom. They then advised the judge that they wished to have Mr. Garcia come into the courtroom so that they could ask Vega on cross-examination whether it was that man, rather than appellant Ross, who had rented the store. The judge first ordered a voir dire outside the presence of the jury on this identification. At that voir dire, Vega did indeed identify Garcia as the real lessee.

Inexplicably, the judge then prohibited defense counsel from having Vega repeat this identification of Garcia before

the jury during cross-examination. In fact, he ordered Mr. Garcia to stay outside the courtroom during the remainder of Vega's testimony. Defense counsel was limited to eliciting from Vega that he had misidentified Ross and that he had seen the real Mr. Garcia during the voir dire.

By restricting cross-examination in this fashion, the trial judge was able to minimize the impact of Vega's misidentification on the jury. Had the evidence with which defense counsel wished to confront the witness been a document or other tangible item, there can be no serious doubt that they would have been permitted to conduct that confrontation in front of the jury during cross-examination. They were equally entitled to confront this witness with a living person, in order graphically to reveal to the jury both the fact of the misidentification and the lengths to which the FBI agent had gone to induce that misidentification.

E. Conclusion

The restrictions on cross-examination discussed above are only symptomatic of a continuous regimen of similar restrictions imposed throughout the trial in what appears to have been a concerted e-fort to prevent the defense from mounting any significant challenge to the government's case. Only a reading of the entire trial transcript will reveal the full extent to which these improper restrictions denied appellants their constitutional right of confrontation. The following examples serve to further illustrate this impropriety. Despite the lengths to which the government went to show that the Chilean government had a motive for assassinating Letelier, defense counsel was forbidden from cross-examining Ms. Letelier as to whether anyone else might have had a motive for ordering that assassination (1474-84).

Defense counsel was precluded from determining whether Townley had received an additional benefit from the government in the form of attorney Glazer, a prominent (and in all likelihood an expensive) Washington lawyer (2006); whether the prosecutor had ever questioned him about his activities outside the United States (ie. the Prats and Leighton assassinations) (2041); or even whether the government had prepared his testimony (2189). Counsel was also improperly restricted in showing Townley's relationship with Virgil Paz, the fugitive defendant who the defense claimed was the only one to aid Townley in his assassinations (2168). They were also prevented from determining whether Townley might have testified a certain

way because he knew that someone else had also been subpoened to testify (2544). Finally, as the judge himself stated, they were "severely limited" on redirect examination of Townley; in fact, on the subject of Townley's plea agreement, they were limited in advance to only one question despite the fact that the government had pursued this subject at length on redirect (2786).

Cross-examination of Kaminsky was likewise improperly curtailed. Throughout his direct testimony, Kaminsky insisted that he was cooperating in this case as a good citizen, rather than an informant who desperately needed to provide information incriminating others in order to limit his own period of incarceration. The transcript of Kaminsky's own sentencing proceeding, however, clearly established that it was imperative for this witness to inform on others if he was to curry favor with his sentencing judge. In that proceeding, the judge made clear that he would give Kaminsky a substantial prison term in another upcoming sentencing proceeding unless Kaminsky provided substantial cooperation to the government in as many cases as possible. Kaminsky also clearly indicated that he would make every effort to comply with the judge's directive. When the defense counsel attempted to question Kaminsky of this crutial point, however, the trial judge so limited the questioning that very little of the import of that exchange was conveyed to the jury (4399-4483). Moreover, the judge refused to admit the transcript of Kaminsky's sentencing proceeding into evidence so that the jury could see for themselves

how strong were this witness's motives to provide information on anyone, regardless of its accuracy (4483), and how dishonest he had been on this issue in his testimony in this case.

In cross-examining Canete, defense was improperly limited in exploring his motives for cooperating with the government (3391), other criminal acts involving dishonesty (3393), the possibility that he was in jail when certain of his alleged meetings with the appellants occurred, (3363-65), or the fact that he had made a prior inconsistent statement (3565-67).

Indeed, counsel was even prevented from determining whether this witness could come up with a real source for the forged documents he claimed to have provided to appellants (3396). Defense questioning of other witnesses was likewise improperly restricted (see eg. 3834, 4721-22, 4722, 4733, 4736, 4835, 4968, 4979, 5019, 5027).

The credibility of the government's witnesses was the central issue for the jury to determine in this case. Cross-examination was defense counsel's primary means of attacking that credibility. Contrary to being afforded the broad latitude on cross-examination to which they were constitutionally entitled, however, appellants' were improperly limited or altogether precluded from questioning the government's witnesses on many of the most basic factual issues in the case. The prosecutor's actions in drafting agreements with Townley and Chile which would prevent effective cross-examination, and the

trial judge's actions in improperly restricting the cross-examination of this and the other witnesses were both error. Convictions obtained through such egregious violations of a defendant's Sixth Amendment rights cannot be permitted to stand. Appellants must be afforded a new trial.

POINT III

THE EVIDENCE OF INCRIMINATING ADMISSIONS, ELICITED FROM APPELLANTS SURREPTIOUSLY BY GOVERNMENT INFORMANTS AFTER APPELLANTS HAD BEEN ARRAIGNED, VIOLATED APPELLANTS' RIGHT TO COUNSEL

A defendant's own incriminating statement clearly constitutes the most devastating evidence which can be introduced against him in a criminal trial. At the trial in this case, the government was permitted, over objection by the defense, to introduce evidence of incriminating statements made by appellants Guillermo Novo and Alvin Ross while they were housed at the Metropolitan Correctional Center in New York City awaiting trial. These statements were obtained by two other inmates at MCC who had for some time been engaged as government informants, providing incriminating information to the government about pre-trial detainees at MCC. Indeed, just prior to meeting appellants, both of these informants had been instructed, one by a federal agent and the other by a federal judge and an assistant United States Attorney, to continue providing such information to the government as a prerequisite for sentencing or parole favors.

The statements which these informants sureptitiously gathered and forwarded to the government in this case were obtained after appellants had been arraigned and therefore after their right to counsel had attached. Consequently, appellants were entitled to have counsel present whenever they spoke to anyone working for the prosecutional arm of the government. Since appellants were unaware that these inmates

were secretly serving as informants appellants were deprived of the information necessary to make an intelligent decision as to whether to speak to such persons in the absence of counsel. Indeed, the government's actions in placing these active informants in a pre-trial institution seems to have been patently designed to violate the detainees' Sixth Amendment rights. Consequently, under Massiah v. United States, 377 U.S. 201 (1964) and its progeny, the statements obtained from appellants by these informants should have been suppressed.

A. The Informants

1. Kaminsky

Sherman Kaminsky had a history of convictions for racketeering and extortion committed all over the country. Prior to his arrest on his current charges, he had been a fugitive for twelve years (4382). At the time of his arrest, he was wanted for sentencing on guilty pleas he had previously entered in Illinois, New York, New Jersey and Pennsylvania (4382).

Mr. Kaminsky was brought to the Metropolitan Correctional Center in early 1978 to await sentencing on his New York and New Jersey federal convictions. Knowing that cooperation with the government would benefit him at that sentencing, Kaminsky began almost immediately to gather information about his fellow inmates at MCC and pass it on to the government, usually through his attorney.

First Kaminsky provided federal officials with information concerning another inmate's alleged plan to assassinate the federal judge who had sentenced him. When that inmate thereafter escaped from MCC, Kaminsky also provided information to the United States Attorney which aided in that inmate's recapture.

Next, Kaminsky provided federal officials with information concerning a different inmate's alleged plan to kill an undercover New York City police officer. That information was given to the Justice Department's Organized Crime Strike Force for the Eastern District of New York.

At his sentencing in the New York on June 14, 1978[1],

[1]The transcript of this proceeding is set forth in appellants' appendix, Volume II.

Kaminsky's informant activities were brought to the attention of the sentencing judge as Kaminsky's primary ground for requesting a lenient sentence (Kaminsky sentencing transcript at 2, 4-5, 5, 10, 14, 24, 31).[1] The judge imposed a five year sentence of incarceration on Kaminsky, but then suspended it for the express purpose of allowing Kaminsky to be at liberty so that he could continue to cooperate with the government (id. at 33-34). The judge also reminded Kaminsky that his sentencing in another case before this same judge had been postponed for six months. (Id. at 7, 35). The judge left no doubt that unless Kaminsky continued to act as an informant for the government, providing substantial information in as many cases as possible, he would receive a substantial prison sentence at that subsequent proceeding. Kaminsky made clear that he intended to cooperate with the government to the fullest possible extent:

The assistant United States Attorney likewise encouraged Kaminsky to cooperate in "other new fields...to the fullest extent he can under the circumstances he finds himself in." In response, Kaminsky repeatedly insisted that he would cooperate with the government in every way possible:

> [The Court]: Why do I bother with you altogether, then? Why don't I just throw the book at you and say you did a dirty, slimy, almost inhuman bit of deportment, you should pay, and I wish the law would enable me to multiply it by ten? Why do I

---

[1] Some of these references were excised from the transcript by trial Judge Parker before he would allow counsel on appeal to see the transcript.

bother with you altogether since I suspect you?

For the simple reason that there has been called to my attention by your lawyers and by the Government, in all fairness, that you have been cooperating.

* * * *

I come back to the only thing that makes me talk to you, spend my energy, exercise a sore throat.

Why do I do it? I say I do it only because I believe you can be cooperative with the authorities to the end that the community will be benefited by the help that you are in a position to give.

[The Defendant]: I can and I will, your Honor.

* * * *

[The Court]: And your lawyers are in pleading with me to give you a chance to make good and not put you in jail. Why am I considering doing it? Only because you may be of service to the national community. If I didn't think that you could render service and be helpful, and in that way possibly purge yourself, I wouldn't spend three minutes with you...

* * * *

I ask you very plainly: If I give you a chance to cooperate with the authorities, I don't care where the authorities are in America, in the United States of America--I don't care whether it's Alaska or whether it's New Jersey or Chicago--Hammock [another defendant] did it, and you know I clipped his sentence because he did it. But he proved it, and only after he proved it did I cut the sentence.

I ask you plainly. Don't kid yourself. Get this over with, Kaminsky. If there is nothing here for you, don't fool yourself. I will find out. Take your sentence. Have it over with. Don't bluff the judge.

When the judge says to you, "Kaminsky, do you think you can help the authorities?" don't brush me off or think you are satisfying me by saying yes. Don't say yes unless you know what you are talking about, because I will find out.

Now, what do you say?

[The Defendant]: ...in answer to your question, if the Government will enable me to help, if they will allow me to help, I will purge myself. I am limited in how I can help. I can do more; I have offered to do more. There isn't enough that I can do to satisfy what I have done. But I would give the government my full and total co-operation if they will just let me, if they will just give me an opportunity to really go and do the things that I know I can do. This is the opportunity I need.

* * * *

I can really give them service, really do things. I want to be able to do things. I told this to both my attorneys a long time ago...

I don't know how to describe it. But there are people that have confidence in me, they talk to me, and I could utilize these confidences if they would let me, and I have done the best that I could under the circumstances...

But I give you my word that the U.S. Government in any capacity has got my full and total cooperation. But to please give me an opportunity to let me use it, to let me show them.

[The Court]: All right. That is fair enough.

The Government is represented by Mr. Shwartz. Mr. Shwartz has heard what I have said.

This whole sentence about to be pronounced is predicated upon the one reason that this judge is doing anything other than committing this defendant to jail right today, and that is to hold him to account on his pledge to be of service to the authorities.

[Assistant U.S. Attorney Shwartz]: Mr. Bartels and Mr. Aronwald have already assured your Honor and my office that that sort of assistance can be expected. Any cooperation in terms of other new fields which I think we all hope may turn out to be fruitful...I am

going to suspend the operation of that sentence depending on how you come through, and you know what I mean by that expression.

* * * *

You are going to be on probation. You are going to have to prove to the judge that you really are what you say you are, that you really will perform what you pledge will be performed, that you recognize that is the only reason why the judge is allowing this kind of a sentence to come into existence.

But I must tell you, and you undoubtedly have guessed it already, that if you two-time me, Mister, the dirty, filthy, low-life behavior that you have committed in the past will come to plague you all over again, because I will treat you like vermin.

Do you get it?

[The Defendant]: Yes, sir.

[The Court]: To me a double-crosser is a low, contemptible rat.

Have I made myself clear?

[The Defendant]: Yes, sir.

[The Court]: You double-cross me, Mister, and no one yet has---

[The Defendant]: I won't, Judge.

[The Court]: Ask your lawyers. Let them check into it. Go on. Tell them to check into it.

Not a single human being has ever survived a double-cross of Cooper. And when I stick my neck out, you are going to double-cross me? What am I getting? A commission of what the hell you may empose? What do you think I am doing it for?

If you don't make good, I will throw you in can if it's the last act I do before I pass on. And if Mr. Bartels hasn't told you that

I am a tough bird when you double-cross me, he'd better bring you up to date.

[The Defendant]: He has.

[The Court]: He must have said some ugly things, and everything he said is true, even though I didn't hear him. And the more ugly he can paint it, the better it is with me.

The point is that this ugly judge has you in his grip.

* * * *

You might as well know. You surprise me by showing me you are what you are, I will back you up to the hilt. And, if you don't, I will back you into jail.

Can I talk plainer than that?

[The Defendant]: No, sir.

[The Court]: What do you want to say?

[The Defendant]: Judge Cooper, number one, I believe you. God knows, I believe every word that you are saying.

I will try my hardest.

* * * *

There is no limitation on what I can do or what I can attempt to do, but I know I can accomplish something. Your Honor, please believe me.

[The Court]: I want a report of your activity every month and I want it in affidavit form. That you have to submit to the probation office...

And I repeat that one of the main conditions of probation is your unstinted, unlimited, full cooperation with all the authorities, federal and state, anywhere in the United States of America.

Do you understand that?

[The Defendant]: Yes, sir.

* * * *

[The Court]: I repeat, the Court has been prompted to do this primarily -- I would say entirely -- other considerations are valuable, but they pale in significance compared with what I keep on repeating, and that is, the full cooperation by this

just hopeful, and I think all that your Honor can fairly expect of Mr. Kaninsky-- and all Mr. Kaminsky offers -- is that he cooperate to the fullest extent he can under the circumstances he finds himself in.

[The Court]: ...Mr. Kaminsky, if I find that you have nevertheless done all you can while in confinement and that the Government has not seen fit to have you at liberty so as to put you to the test of your cooperation on the outside, I certainly am not going to hold it against you so long as I am convinced that, while in confinement, you went all out.

Have I made myself clear?

[The Defendant]: Yes, sir.

* * * *

[The Court]: ...he can be of help, all of which leads me to say very candidly that I will give this defendant credit for whatever he does...

* * * *

[Defense Attorney]: Back in May when we had our last meeting, you instructed me to tell Mr. Kaminsky that if he did not cooperate or if he violated your Honor's terms as far as this monthly affidavit is concerned, that you would throw the book at him, not just on the underlying sentence but perhaps on a perjury charge, or whatever else you could. And I informed him of that and informed him that he would be in touch with us on a more than monthly basis.

[The Court]: More particularly, are you in a position to say to me on the record that if you go on being his counsel you will devote time and attention to the end that he make good what he has said on the record he plans to do?

[Mr. Bartels]: I will make that representation.

[The Court]: Do you?

[Mr. Aronwald]: Yes, your Honor.

* * * *

[The Court]: All right.

I am going to give you a chance to prove yourself. I intend to hand you a sentence and I am

defendant with the authorities.

(Kaminsky sentencing transcript at 10-37)

Since he was to be sentenced again in six months by the same judge, Kaminsky knew that it was imperative for him to provide more incriminating information to the government. Consequently, he began immediately to collect such information on other MCC inmates - including appellant Ross.

Kaminsky met appellant Ross at MCC at approximately the same time as the above-quoted sentencing proceeding - June, 1978 (3803). Both men were housed in the same unit and were therefore in daily contact for approximately the next half year. According to Kaminsky, he and Ross conversed on a wide variety of subjects, from Kaminsky's involvement in Hagannah, an Israeli military organization, to the American Central Intelligence Agency. Following these conversations, Kaminsky would return to his cell and make notes about the content of his conversations with Ross. As in his previous informant activities at MCC, Kaminsky then periodically delivered these notes to his attorney, Mr. Aronwald, and instructed him to turn this information over to the appropriate government agency, (3806). Over repeated objection by defense counsel, Kaminsky was permitted to describe at trial the information he had thus obtained from Ross.

According to that testimony, appellant Ross expressed an interest in developing a military organization for the Cuban National Movement, (4342). He also stated that the

Cuban National Movement and the Chilean government shared certain mutual interests, including anti-Castroism and anti-communism, and that both were opposed to the spread of those philosophies in South America. (4347). Kaminsky further claimed that Ross had told him that the Chilean Government could be helpful to the Cuban National Movement by providing them with money, a safe refuge, training, weapons, explosvies, and an exchange of agents (4349).

Kaminsky also testified that appellant Ross had identified Michael Townley, the government's chief witness in this case, as a "rat, and informer, a traitor." (4349) Ross was also alleged to have told Kaminsky that Townley was an agent of DINA, the Chilean secret police, and that Ross had dealt with him in this country (4349). When asked to be specific as to those dealings, Kaminsky testified that Ross had told him that:

> ....he [Ross] was involved in the murder of Orlando Letelier together with generals in DINA, Sepulveda, Michael Townley, and other members of the Cuban National Movement in this country.
>
> (4350)

According to Kaminsky, Ross told him that he attended a meeting with Townley at which Townley said that General Contrares, the head of DINA, wanted to see a "Marxist agent" assassinated because he was a "threat to DINA, who kept certain elements alive that were detrimental to DINA" (4372). For the Cuban National Movement to assist in this assassination, said Ross, would "help cement relations and agreements that had been made between DINA and the Cuban

National Movement." (4372)

Kaminsky further testified that Ross had told him that he "had contributed certain technical items and in particular, two wires that were used in manufacturing the bomb that was planted under Orlando Letelier's car that killed him." (4373) According to Kaminsky, Ross referred to Letelier as a "rotten Communist Marxist," and said that he was glad he was dead and "used a lot of 4-letter words in relation to Letelier." (4373)

Kaminsky also testified that Ross

> "dislikes every aspect of the Central Intelligence Agency for many reasons. No. 1, he blames them for the catastrophe that took place at the Bay of Pigs...He contends here that the CIA is a goofball organization... that messed up in the overthrow of Mr. Allende. He contends that they goofed up in Cambodia, that they goofed up in Vietnam." (4374-75)

Kaminsky also testified that Ross told him that

> "Alvin Ross is not a fool and I'm not going to pay for the murder of Orlando Letelier; that the CIA will be the scapegoat in this matter... people everywhere would gladly accept the fact that the CIA would be held responsible."
>
> (4375)

Kaminsky also testified that Ross told him that he was angry at DINA because he had expected money from them and never received any. (4380)

Mr. Kaminsky was rewarded for collecting this information on Mr. Ross, just as he had for his past informant activities, by having the United States Attorney for the District of

Columbia and the United States Attorney for the Northern District of Illinois recommend probation in his Illinois case (4384-85).

The prosecutor made extensive use of this testimony in his summation to the jury (5161, 5169, 5197, 5210).

2. Polytarides

In 1977, Antonio Polytarides was convicted in federal court of illegally selling weapons and other defense articles to the Iraqi government (4309). In December, 1977, while serving his sentence for that offense, he was transferred to the Metropolitan Correctional Center in New York City on a writ (4310). There, Polytarides was approached by several MCC inmates concerning possible weapons transactions (3934). Knowing that he would be up for parole consideration in the near future, and knowing that informing on these individuals to the federal government would enhance his chances for early parole release, Polytarides decided to discuss weapon sales with any interested inmates and then to provide information concerning these negotiations to federal officials. Consequently, following his first such negotiations (with inmates not associated with this case), Polytarides got in touch with agent King, the Customs agent who had been involved in Polytarides' criminal proceeding. Over the next year, Polytarides provided King with information on MCC inmates concerning weapons negotiations and other federal crimes on a regular basis. The proceedings for which Polytarides was brought to MCC were completed in March, 1978. Nevertheless, he was kept at that institution, which is primarily a temporary detention facility for persons awaiting trial, soley in order that he could continue to provide incriminating information on the detainees to agent King (3937-38).

While he was thus being kept at MCC so as to be in a position to meet and inform on the pre-trial defendants housed there, Polytarides was introduced, in June of 1978, to appellant Guillermo Novo (3940). From the outset, Polytarides began pumping appellant Novo for incriminating information. In fact, his first words to Novo were:

> I know who you are because Mr. Sotomeyer and Battle [other MCC inmates] told me that your group is the one that arranged it, arranged the Letelier bombing.
>
> (3941)

When Polytarides told agent King of his initial conversations with appellant Novo, King specifically instructed Polytarides to try to get more information from Novo by offering to assist the fugitives in that case in getting out of the country (3944).

Pursuant to these instructions, Polytarides told Novo that he could arrange safe passage out of the country for the two fugitives on a Greek tanker (3944). This attempt to secure information was so blatant, however, that Novo became suspicious that Polytarides might be an informant. He advised his attorney that Polytarides was pumping him for information (3530), and refused to have anything to do with Polytarides for several months.

Then, in December, 1978, Polytarides advised Novo that he had received a parole release date. This lulled Novo into believing that Polytarides could not be an informant because he appeared to have nothing further to gain by cooperating with the government. Thereafter, when Novo returned to the

unit one day in an obviously agitated state, Polytarides initiated a conversation with him by asking him what was wrong (4311). Appellant Novo responded by saying:

> Well, I have been betrayed by some persons in my case, but we will pay them back.
>
> (4311)

It was this statement which Polytarides was permitted to describe to the jury at the trial below (4312). He also testified that appellant Ross was present when appellant Novo made this statement (4312). The prosecutor argued to the jury in summation that this statement constituted significant proof of appellant Novo's guilt (5210).

B. The Constitutional Violation

The incriminating statements which these informants obtained from appellants should not have been admitted into evidence at the trial below. In Massiah v. United States, 377 U.S. 201 (1964), the Supreme Court held that once a defendant has been arraigned and his right to counsel has therefore attached, he has a constitutional right not to discuss his case with persons working for the government unless his counsel is present or he has knowingly waived his right to such counsel. When, as in Massiah and in this case, the person with whom a defendant speaks is surreptitiously acting as a government informant, the defendant is deprived of any knowledge of the listener's status and thus prevented from making a knowing decision whether to waive his right to counsel in speaking to that person. Consequently, the incriminating statements obtained in such fashion are inadmissible at trial.

The Circuits are presently in conflict as to whether Massiah applies to all conversations between defendants and undercover informants, or only to statments which are the product of interrogation. The Fourth Circuit recently ruled that Massiah applies to all such conversations. Henry v. United States, 590 F.2d 544 (4th Cir. 1978). In Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978), on the other hand, two Senior District Court Judges, sitting by designation, held, over the strong dissent of the only active Judge on the panel, that Massiah applied only to statements which were the product of interrogation.

This Court need not take sides in this controversy in order to decide the present case, however. The record in this case clearly establishes that both of the informants deliberately elicited incriminating statements from appellants for the specific purpose of forwarding those statements to the government.

Polytarides testified that he even went so far as to offer aid to the fugitives in this case in an effort to induce appellant Guillermo Novo to make incriminating disclosures. Moreover, the incriminating statement to which Polytarides testified was made by Novo in direct response to a question put to him by Polytarides.

It is likewise clear that Kaminsky was constantly seeking information to forward to the government so as to enhance his informant image with his sentencing judge. Thus, despite these witnesses' self-serving testimony that they had been instructed not to interrogate the individuals on whom they were gathering information, their exchanges with appellants can hardly be dismissed as idle conversation. Rather, these informants "deliberately and designedly set out to elicit information from [the defendant] just as surely as - and perhaps more effectively than - if he had formally interrogated him." Brewer v. Williams, 430 U.S. 387, 399. Such interchanges are "tantamount to interrogation," Id., 430 U.S. at 399, and therefore violative of appellants' Sixth Amendment rights (Id.).

Even if the statements challenged here were not the product of interrogation, however, they would still have to

be suppressed. Massiah and its progeny turn not on the fact of interrogation but rather on the fact that the defendant was placed in a situation where he engaged in conversation with a government informant without being advised of that individual's status. Indeed, in Massiah itself, there was no interrogation. Rather, the statements which were suppressed were made by the defendant during a normal conversation with one who, unbeknownst to him, was acting as a government agent. Thus, in describing the facts in that case, the Court never even suggested that interrogation had taken place:

> On the evening of November 19, 1959, Colson [the informant] and the petitioner held a lengthy conversation while sitting in Colson's automobile, parked on a New York Street...The petitioner made several incriminating statements during the course of this conversation.
>
> Massiah v. United States, supra, 377 U.S. at 202-03,

Any confusion on this point was subsequently eliminated by the Supreme Court in Beatty v. United States, 377 F.2d 181 (5th Cir. 1967), summarily reversed, 389 U.S. 45 (1967). There, the Court of Appeals had held Massiah inapplicable because there had been no interrogation; all aspects of the incriminating conversation between the defendant and the informant were initiated by the defendant himself. The Supreme Court's summary reversal of that holding clearly established that Massiah applies to all defendant-informant

communications, regardless of whether there was any actual interrogation.[1]

At the trial below, the government insisted that Brewer v. Williams, 430 U.S. 387 (1977) had sub silentio limited Massiah to interrogations. Such was clearly not the case, however. Brewer just happened to be a case involving actual interrogation. Consequently, the Court merely noted that Massiah applied to such circumstances, stating, "the clear rule of Massiah is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." Id. 430 U.S. at 401. This comment clearly did not limit Massiah to formal interrogations; rather, it merely acknowledged that Massiah applied inter alia to such situations. Moreover, the "interrogation" which occurred in Brewer was precisely what occurred in this case, namely a deliberate attempt to elicit incriminating information from the defendant under the guise of innocuous conversation. Id., 430 U.S. at 399.

This case is of course readily distinguishable from those in which a defendant makes incriminating statements

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[1] Massiah also clearly does not turn on whether there was electronic surveillance or other eavesdropping. "There is surely no difference, except one of reliability perhaps, between the radio transmitter used in Massiah and the planted cellmate used here." Wilson v. Henderson, 584 F.2d 1185, 1194 (2d Cir. 1978); United States v. Henry, supra.

to someone who is not then a government informant but who thereafter becomes one. See eg. United States v. Coppola, 526 F.2d 764 (10th Cir. 1975); United States ex rel. Milani v. Pate, 425 F.2d 6 (7th Cir. 1970); Paroutian v. United States, 370 F.2d 631 (2d Cir. 1967). As previously explained, both witnesses here were established government informants who had already cooperated in several other cased, and who were specifically instructed to gather incriminating information for the government on anyone they could. Their actions were thus clearly authorized and encouraged by the governemnt.

These informants were both housed in a facility used primarily for pre-trial detainees whose right to counsel had attached. Rather than separating these informants from such detainees, or at least advising the detainees that these were government informants so that the detainees could make an intelligent decision whether to waive their right to counsel in speaking to them, the government instead encouraged these informants surreptitiously to gather incriminating information on the men with whom they were confined. In so doing, the government acted in callous disregard of appellants' and the other detainees' Sixth Amendment rights. The evidence thus obtained was clearly violative of appellants' right to counsel. The district court erred in allowing it to be presented to the jury at the trial below.[1]

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[1]Colloquys and testimony pertaining to this issue occurred at 3530 - 3546; 3665 - 3721; 3760 - 3847; 3901 -3970; 4103 -4201; 4259 - 4548.