UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1541

UNITED STATES OF AMERICA, Appellee,

v.

GUILLERMO NOVO SAMPOL, Appellant.

No. 79-1542

UNITED STATES OF AMERICA, Appellee,

v.

ALVIN ROSS DIAZ, Appellant.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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I N D E X

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I. Concise Statement of Issue and Its Importance

This case arises from "one of the most monstrous international crimes in recent history," United States v. Sampol, No. 79-1541, slip op. at 113 (D.C. Cir. September 15, 1980), the assassination of former Chilean Ambassador Orlando Letelier and an associate, Ronni Moffit, on September 21, 1976. Its origin in an act of international terrorism implicating high officials of the Chilean government alone makes it a case of exceptional importance warranting en banc review by this Court. Moreover, the division reversed appellants' convictions on the basis of what we view as a misapplication of United States v. Henry, 100 S. Ct. 2183 (1980), and Massiah v. United States, 377 U.S. 201 (1964). It held that the admission at trial of statements made by appellant Ross to a fellow prison inmate, Sherman Kaminsky, violated Henry and Massiah

despite the absence of facts showing that Ross' admissions resulted from a "planned . . . interference" by prosecution officials with his right to the assistance of counsel. United States v. Henry, supra, 100 S. Ct. at 2189. The division found such a violation by wrongly imputing to the Government a sentencing judge's action in an unrelated case in inducing Kaminsky to provide information to the Government while in jail, and by disregarding uncontradicted evidence that Ross, not Kaminsky, initiated their relationship and conversations during which Ross incriminated himself. Thus the division ignores the "salutary purpose" of Massiah "of preventing police interference with the relationship" between a defendant and his attorney, id. at 2190 (Powell, J., concurring), and throws a cloud over virtually any receipt of information by the Government from prison inmates. Because of the extraordinary factual importance of this case and because the division has misapplied the teaching of Henry and Massiah, we respectfully submit that this case should be reheard by the Court en banc.

II. The Facts

On September 21, 1976, Orlando Letelier and Ronni Moffit were killed by the remote control detonation of a bomb attached to a car in which they were riding. The Government's theory, as the division noted, was that Chilean officials "plotted to murder Letelier in order to crush his outspoken opposition to the Chilean government." Slip op. at 4. The Chilean officials engaged the services of Michael Townley, a United States citizen employed by DINA, the intelligence agency of the Chilean government, and mem-

bers of the Cuban Nationalist Movement (CNM), an anti-Castro organization which included the appellants. The evidence at trial, which the division found fully sufficient to convict, slip op. at 109, showed that appellants Guillermo Novo Sampol (Novo) and Alvin Ross Diaz (Ross) conspired with Townley and others to assassinate Letelier and then murdered Letelier and Moffit.[1/]

A substantial part of the evidence against Ross consisted of statements he had made to Sherman Kaminsky, a fellow inmate at the Metropolitan Correctional Center in New York where Ross was held before and after his indictment on August 11, 1978.[2/] Kaminsky, a fugitive since his 1966 convictions for racketeering and extortion, had been arrested and brought to New York for sentencing. While at the Center he gave information to the authorities about threats by other inmates to the life of a judge and an undercover police officer and a planned escape from the Danbury Correctional Institution. At Kaminsky's sentencing on June 14, 1978, Assistant United States Attorney Schwartz of the United States Attorney's Office in New York pointed out Kaminsky's report of these crimes and said his cooperation was continuing.

1/ Townley pleaded guilty to conspiracy to murder a foreign official and testified for the Government at trial. Two defendants had become fugitives at the time of trial and three others were awaiting the outcome of extradition proceedings in Chile. Subsequently, extradition of these defendants was denied by Chilean authorities.

The remaining defendant, Ignacio Novo Sampol, was convicted of making false declarations to the grand jury and misprision of felony, but his convictions were reversed on the ground that he should have been severed from the other defendants. We do not seek further review of that portion of the division's opinion.

2/ Ross had been transferred to New York at the request of his attorneys to aid in the preparation of his defense (Tr. 3670).

Schwartz had no knowledge of the Letelier investigation, and Kaminsky had never spoken with Ross up to this point.

The district judge lectured Kaminsky at length, expressing contempt for his conduct and warning that he could redeem himself only by full-spirited "cooperation" with the Government. After Kaminsky assented, the judge asked the prosecutor's view about "urging such steps on the authorities as will enable this defendant to make good what he pledges he is prepared to do"; specifically, although other charges were pending against Kaminsky, the judge wondered if his liberty could be arranged since "I can't put him to the test and jail him; certainly not as of now." Schwartz replied that he had informed a federal prosecutor in Illinois, where one of Kaminsky's cases was pending, about "the ongoing nature of Mr. Kaminsky's assistance" and that another New York prosecutor hoped to secure Kaminsky's "testimony in some capacity" related to the matters already under investigation, but that "[a]ny cooperation in terms of other new fields which I think we all hope may turn out to be fruitful, I don't think that the U.S. Attorney's Office for this district can do anything to enable Mr. Kaminsky to do that." Schwartz concluded: "I think all that your Honor can fairly expect of Mr. Kaminsky -- and all Mr. Kaminsky offers -- is that he cooperate to the fullest extent he can under the circumstances he finds himself in." The judge sentenced Kaminsky on a portion of the charges before him, suspended the term of imprisonment, and deferred sentencing on the remaining charges for six months to "see how far he goes." Kaminsky was returned to the Correctional Center.

Shortly thereafter, according to Kaminsky, "Mr. Ross initiated a conversation with me. We'd seen each other prior to that, but there had been no conversation." Ross had heard that Kaminsky was an ex-member of Hagganah, an arm of the Israeli military, and talked to him about the CNM and their desire to have a military organization like Hagganah. Over the next two months, Ross repeatedly approached Kaminsky and engaged him in conversations. Kaminsky testified:

> I never initiated any conversation with Mr. Ross, but there is no need to initiate a conversation with Mr. Ross. Mr. Ross will talk and talk and talk as long as you are able to listen. There were times when I literally had to run to get away from him, because I was working at the institution and had a job. For some reason Mr. Ross decided that he wanted to talk to me, and he talked continuously . . . . (Tr. 3808.)

In their conversations during June and July, Ross talked of the similarity of interests and ideology between the CNM and Chile, saying that Chile could supply money, safe territory, an exchange of agents, and weapons and explosives. Ross told Kaminsky that "he was involved in the murder of Orlando Letelier" together with generals of DINA, Michael Townley, and other members of the CNM. Ross had attended a meeting at which Townley said that DINA and General Contreras, the head of DINA, wanted a Marxist agent assassinated who was a threat to DINA, and that cooperation of the CNM in the murder would help cement relations between the CNM and DINA. Ross admitted he had contributed two wires used in the bomb that killed Letelier. (The wires were an essential component of the blasting cap.)

In August 1978 Ross told Kaminsky that he had plans to blow up Russian ships in American harbors. Kaminsky made notes of this

conversation and gave them to his attorney, William Aronwald, with the request that Aronwald notify the CIA because he believed Ross was "a dangerous man."[3/] On August 17 Aronwald gave the notes to Schwartz, who, after learning that the Letelier case was being handled by Assistant United States Attorney Eugene Propper in Washington, D.C., sent Propper the notes on August 28. No discussion between Kaminsky and anyone from the Government about the Letelier case occurred until October, when Kaminsky met with Schwartz to talk about the threats to the police officer and the judge which he had previously reported. At that meeting Aronwald mentioned information which Ross had revealed to Kaminsky about the Letelier case. Aronwald and Schwartz told Kaminsky not to discuss Ross' defense with him and not to initiate any conversations. On October 31 Kaminsky and Aronwald met for the first time with Propper, and an agreement was proposed whereby Kaminsky would report what he heard and possibly testify for the Government. Propper and Aronwald again warned Kaminsky not to discuss defense strategy or initiate conversations with Ross.

At trial in January 1979, the district judge ruled that Kaminsky could testify about conversations with Ross transpiring before his October 31 discussion with Propper. The Government had previously represented that ninety-five percent of Kaminsky's testimony would pertain to conversations with Ross occurring even before Kaminsky contacted Aronwald in August (Tr. 3783, 3790). Kaminsky had told Propper that Ross' disclosures about DINA and

3/ The notes made no mention of the Letelier murder but indicated that Ross had said that a person blown up in Washington was a double agent of the CIA.

the Letelier murder occurred in June and July (Tr. 3777). Kaminsky's testimony makes clear that Ross' discussions about DINA and the CNM, his part in the Letelier murder, and the scapegoat role of the CIA all took place during the same period (Tr. 4307-4308, 4373-4375).

III. Reasons for Granting Rehearing En Banc

The division held that Ross' statements to Kaminsky were "deliberately elicited" by the Government in violation of United States v. Henry, supra, and that their admission in evidence required reversal of both appellants' convictions.[4/] Comparison of this case with Henry, however, demonstrates why the division's holding cannot be sustained.

In Henry, FBI agents "intentionally creat[ed] a situation likely to induce Henry," an indicted defendant, "to make incriminating statements without the assistance of counsel . . . ." United States v. Henry, supra, 100 S. Ct. at 2189. The interme-

4/ The majority held that the admission of a lone statement of appellant Novo to Antonio Polytarides, a fellow inmate in the Center, also violated Henry and required reversal of appellants' convictions. The statement, "I have been betrayed by some persons in my case, but we will pay them back," was made in mid-December 1978 to Polytarides who was reporting to Customs Agent King about attempted illegal gun purchases. The trial judge, after a lengthy voir dire, suppressed any testimony by Polytarides except that about the December statement, concluding, as to this statement, that whatever relationship had existed between Polytarides and Novo had long since "broken off" and had been "resurrected" solely by Novo. As we shall show, even if Novo's statement was erroneously admitted, a point we do not concede, its admission was patently harmless if Ross' statements were properly admitted.

The division rejected all other arguments made by Ross and Novo except as to the trial court's ruling prohibiting cross-examination of Townley about a telephone call he had made to Chile during the trial and its refusal to permit a physical demonstration of a misidentification by a government witness. The division expressly found the latter to be harmless error, and it is clear that the erroneous ruling as to cross-examination would not provide a sufficient independent basis for reversal.

diary, Nichols, had been a paid informant for more than a year and was housed in the same cellblock with Henry. Not only was "the FBI agent . . . aware that Nichols had access to Henry and would be able to engage him in conversations without arousing Henry's suspicion," id. at 2187, but "the agent in his discussions with Nichols singled out Henry as the inmate in whom the agent had a special interest" and "requested . . . that he obtain incriminating information from Henry." Id. at 2187 nn.8 & 9. The Supreme Court dismissed the Government's argument that the agents "did not intend that Nichols would take affirmative steps to secure incriminating information" and had "instructed Nichols not to question Henry about the robbery," concluding that they "must have known that such propinquity would lead to that result." Id. at 2187.[5/] In short, "Nichols was a government agent expressly commissioned to secure evidence," id. at 2188, and thus Henry, like Massiah, was a case in which "the 'constable' planned an impermissible interference with the right to the assistance of counsel." Id. at 2189.

The distinction immediately apparent between this case and Henry is that no prosecution official was aware of any conversation between Ross and Kaminsky, or even of the fact that they were confined together, until some time after Ross had made his incriminating statements to Kaminsky. Thus there was a complete absence of the kind of conscious targeting of Ross by government agents to cause him to incriminate himself which the Supreme Court con-

5/ Nichols, in fact, did not remain "a passive listener" but made "effort[s] to stimulate conversations about the crime charged." Id. at 2187 & n.9.

demned in Henry and Massiah. Prosecutor Schwartz, who had no connection at all with the Letelier case, did not even learn of Ross' existence until mid-August, after Kaminsky told his attorney of Ross' threats to blow up Russian ships. By that time Kaminsky had known Ross for nearly two months, and Ross had already told him of his role in the Letelier murder and his belief that the CIA would be portrayed as the scapegoat. Schwartz did not talk to Kaminsky and made no effort to encourage him to gather further information from Ross, but instead found out who was handling the Letelier case and sent Kaminsky's notes to Assistant United States Attorney Propper. Not until October, well after Ross had made his incriminating statements, was Kaminsky told by prosecutors to be alert for further admissions by Ross but not to initiate conversations with him -- conduct arguably resembling Henry. The trial court excluded any testimony based on conversations with Ross after October. On these facts, we submit, there was no "planned . . . interference" by law enforcement officers with Ross' right to the assistance of counsel. United States v. Henry, supra, 100 S. Ct. at 2189.

The division nevertheless found misconduct by the Government, essentially by holding that prosecutor Schwartz had ratified or "approv[ed]" the action of the district judge in New York in making Kaminsky's probation depend upon his cooperation with the Government while in jail. Slip op. at 23-24. The key event, for the division, was Kaminsky's sentencing on June 14 when "Kaminsky was accepted by the government as an informant at large whose reports

about any criminal activity would be gratefully received." Id. at 23 (emphasis added). The division thereby makes Henry controlling in this case because the Government did not somehow resist or disassociate itself from the coercive conduct of a district judge in another case. But to penalize the Government for being the recipient of information it has not been instrumental in generating is contrary to the purpose of Massiah, which is to deter "the overreaching of the prosecution." United States v. Ash, 413 U.S. 300, 312 (1973); see United States v. Henry, supra, 100 S. Ct. at 2190 (Powell, J., concurring). Conduct by a sentencing judge which the prosecutor could not have prevented had he wished cannot be equated with the "planned interference" with the assistance of counsel condemned by Massiah and Henry.

Moreover, the division's conclusion that the Government "approv[ed]" the judge's action, slip op. at 24, unfairly characterizes brief and ambiguous remarks by the prosecutor at the sentencing in responding to a judge who clearly desired no opposition to the course of "rehabilitation" he had set for Kaminsky. Schwartz's concluding statement that "I think all that your Honor can fairly expect of Mr. Kaminsky -- and all Mr. Kaminsky offers -- is that he cooperate to the fullest extent he can under the circumstances he finds himself in," reflects an effort to ameliorate the seemingly open-ended demand the judge was making of Kaminsky. Kaminsky had previously reported to the authorities threats to the life of a federal judge and a policeman and a planned escape from a federal prison -- that is, prospective crimes for which no one had been indicted. There is no reason to doubt that Schwartz considered Kaminsky's cooperation as a

witness in regard to those crimes as sufficient to merit leniency in his sentencing (see his reference to Kaminsky's hoped-for testimony "in some capacity . . . concerning individuals that Mr. Kaminsky has provided information about"). Schwartz had no contact with Kaminsky again until August, when Kaminsky told his lawyer of Ross' plans to blow up Russian ships and asked him to notify the CIA; the fact that Schwartz "displayed a lively interest" in this information, slip op. at 23, is hardly remarkable. When Schwartz summoned Kaminsky to his office in October for the first time since his sentencing, it was not to discuss Ross but instead the incipient crimes which Kaminsky had previously reported.

It is difficult to imagine a weaker basis on which to find participation by law enforcement officials in a "planned interference" with Ross' Sixth Amendment right, particularly since Ross was not even known to Schwartz until August. Contrary to its disclaimer, therefore, slip op. at 24, the division has uncritically extended Henry to the creation of an informant merely through the imposition of conditions of probation dictated entirely by a judge. Henry and Massiah are predicated upon interference with the right to counsel by agents of the executive branch of government; both assume that law enforcement officers have been the moving force behind the intrusion into the Sixth Amendment relationship. Although it may be of no moment to a defendant whether a judge or a prosecutor (or, indeed, a cellmate acting on his own initiative) has breached that relationship, Massiah imposes an exclusionary sanction to prevent overreaching by the accused's adversary -- the prosecution -- once an adversary relationship has commenced with the bringing of formal charges. See United States v. Ash, supra,

413 U.S. at 312; United States v. Henry, supra, 100 S. Ct. at 2190 (Powell, J., concurring). To extend that sanction to this case does not further that deterrent purpose; rather, it exacts a disproportionate penalty by excluding reliable evidence because of conduct by a judicial officer which appellate courts can regulate by other means.

Furthermore, regardless of who was responsible for enlisting Kaminsky to act as an informant, there is another important factual difference between this case and Henry. The division noted, but then ignored, Kaminsky's testimony on voir dire that he "never initiated any conversation with Mr. Ross," that Ross was a compulsive talker, that at times Kaminsky "literally had to run to get away from him," and that for some reason Ross "decided that he wanted to talk to me, and he talked continuously . . . ."[6/] This is a far cry from Henry, in which the Supreme Court's opinion turned centrally on the fact that Nichols had "stimulated" and "prompted" conversations with Henry. The Court emphasized that Nichols "was not a passive listener" and expressly reserved judgment "on the situation where an informant is placed in close proximity but makes no effort to stimulate conversations about the crime charged."[7/] Id. at 2187 & n.9. Kaminsky did not stimulate conversation with Ross; Ross initiated every conversation and regularly sought out Kaminsky to hear him. Even then, Kaminsky

6/ This testimony was uncontradicted by Ross, who could have rebutted it without fear of self-incrimination. Cf. Simmons v. United States, 390 U.S. 377 (1968).

7/ See also 100 S. Ct. at 2195 (Blackmun, J., dissenting)("All Members of the Court agree that Henry's statements were properly admitted if Nichols did not 'prompt' him").

told no one of his conversations with Ross until Ross mentioned his plan to blow up Russian ships, a threat which genuinely alarmed Kaminsky. Henry was "a close and difficult case on its facts because no evidentiary hearing [had] been held" on whether Nichols prompted Henry's disclosures. Id. at 2190 (Powell, J., concurring). In the present case, by contrast, the district judge held a lengthy hearing on the Massiah issue, and the evidence was uncontradicted that Kaminsky did not stimulate Ross' disclosures -- that Ross himself was the cause of his self-incrimination.[8/]

In sum, the absence of a design by Government officials to elicit admissions from Ross, the critical motivating role of a judge rather than prosecuting agents in whatever inducement may have occurred, and the stark contrast between Nichols and Ross, a compulsive talker who used his propinquity to Kaminsky to talk about DINA, the CNM, and his own exploits, all distinguish this case from Henry and require that the division's contrary conclusion be set aside. If that is not done, this case should at the very least be remanded to the trial court for a focused inquiry into whether Kaminsky in fact prompted or stimulated Ross' disclosures -- the decisive issue under Henry. Because Henry had not been decided at the time of this trial, the district judge made no findings concerning the respective roles of Ross and Kaminsky in initiating either their relationship generally

8/ Even after the prosecutors told Kaminsky in October to listen to Ross but not to initiate conversations, Kaminsky's role strikingly resembled that of the hypothetical informant in Henry on whose conduct the Supreme Court did not pass judgment. Assistant United States Attorney Propper summarized Kaminsky's instructions as follows: "Never get together with Mr. Ross. If he comes to you that's fine; never ask him about his case. Basically, you can be like a tape recorder that is on; if he comes to talk to you you can listen, but that's all." (Tr. 3776)(emphasis added).

or particular conversations. Kaminsky's unequivocal testimony that he initiated no conversations with Ross is at least prima facie[9/] evidence that this case falls outside the Henry paradigm.

The division also held that admission of appellant Novo's lone statement to Polytarides -- "I have been betrayed by some persons in my case, but we will pay them back" -- necessitated reversal of Ross' and Novo's convictions. If Ross' admissions were properly admitted, as we contend, then this holding too must be overturned. Michael Townley's testimony provided overwhelming evidence of Novo's guilt,[10/] and the division acknowledged the "strong corroboration" of Townley's credibility by Ross' admissions. Slip op. at 27. Thus even if Novo's statement to Polytarides was improperly admitted,[11/] the jury could not have been

9/ The division further committed serious error in concluding that admission of Ross' statements required reversal of appellant Novo's conviction. Sixth Amendment rights, like Fourth Amendment rights, are personal, and thus Novo cannot complain of a violation of Massiah as to Ross -- as the division elsewhere implicitly recognized. Slip op. at 46. The only issue involving the effect of Ross' statements upon Novo arises under Bruton v. United States, 391 U.S. 123 (1968), but Novo did not raise this issue on appeal and has therefore waived it. In any event, in view of the overwhelming evidence against Novo supplied by Townley and others, it cannot be said that Ross' statements -- which never explicitly referred to Novo -- were "powerfully incriminating" of Novo as required by Bruton, id. at 135-136, so that the instructions given by the trial court were inadequate to protect Novo against prejudice. See Parker v. Randolph, 442 U.S. 62 (1979).

10/ Novo did not challenge the sufficiency of the evidence on appeal; the testimony connecting him with the conspiracy and murder is detailed in our brief.

11/ We do not concede this point. The trial judge concluded that whatever informant role with respect to Novo had been undertaken by Polytarides at Agent King's request had been broken off in June or July 1978, some six months before Novo's disputed statement, and that the evidence showed "Novo . . . is the person who resurrected the broken-off relationship." The division's conclusion

(Footnote continued on next page)

influenced by Novo's single statement to Polytarides, the more so because the utterance was susceptible of several interpretations only one of which would be incriminating. Novo's conviction was assured if Townley was believed, and Ross was convicted by his own admissions corroborated by the testimony of Townley and Ricardo Canete together with circumstantial evidence.[12/] Neither was prejudiced by the admission of Novo's ambiguous statement.

CONCLUSION

WHEREFORE, appellee respectfully requests that this case be reheard by the Court en banc.

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11/ (Footnote continued from preceding page)

that Polytarides, despite notification of his parole, "was still an informant, taking advantage of Novo's trust and confidence," slip op. at 31, means that practically speaking an informant relationship with a defendant can never be dissolved.

12/ That evidence included bombing materials found in an office rented by Ross and a business partner but later abandoned.