IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
-against-	Crim. Case No. 78-367
JUAN MANUEL CONTRERAS SEPULVEDA, et al.,	
Defendants.	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT IGNACIO NOVO
SAMPOL'S MOTION FOR A SEVERANCE

Every defendant in a criminal proceeding is entitled to an individual determination of his guilt or innocence based solely on the evidence which is relevant and admissible as to the crimes with which he has been charged. Cf. Bruton v. United States, 391 U.S. 123 (1968). Rule 14 of the Federal Rules of Criminal Procedure implements this principle by providing in relevant part that

> If it appears that a defendant . . . is prejudiced by a joinder of offenses or of defendants in an indictment . . . , the court may . . . grant a severance of defendants . . .

In determining whether a request for severance should be granted, this Court is obliged to weigh the factors of judicial economy which favor joinder against the factors, such as disproportionate evidence, disparate charges, and other potential prejudices, which militate in favor of separate trials. Defendant Ignacio Novo submits that the circumstances of this case strongly favor his request for severance. Indeed, as will be demonstrated in the following paragraphs, his reasons for seeking separate trial are more compelling in several respects that

the reasons cited in United States v. Mardian, 546 F.2d 973, 977-81 (D.C.Cir. 1976), one of the principal cases on this issue, in which this Circuit held that the district court had erred in failing to grant a severance.

1. The Difference in Charges

The focus of the indictment in this case was the bombing which killed Orlando Letelier and Ronni Moffitt on September 21, 1976. Thus, the first count charges seven of the eight defendants in this case with conspiracy to kill Letelier. Ignacio Sampol is the only defendant who is not named in that count. Nor is he named in four subsequent counts, which charge all of the other seven defendants with killing a foreign official (Count II), killing Letelier in violation of the D.C. Code (Count III), killing Moffitt in violation of the D.C. Code (Count IV), and destroying by explosion a vehicle used in interstate commerce, thereby causing death (Count V). Ignacio Novo Sampol is likewise not named in Counts VI and VII, which charge his brother, Guillermo Novo Sampol, with perjury.

Rather, Ignacio Novo is charged only in Counts VIII through X with two counts of perjury and one count of misprison of a felony. He is the sole defendant named in those counts.

The nature of these charges provides strong support for the application for severance. Most importantly, Ignacio Novo is not charged with any of the most serious offenses - those dealing with the murders of Letelier and Moffitt (Counts I-VI). Rather, he is charged only with failing to disclose to officials or the grand jury knowledge which he allegedly gained of those offenses after they had been committed.

It is also significant that Ignacio Novo is not charged, as are the other seven defendants, in the conspiracy count. As this Circuit recognized in United States v. Mardian, supra, in cases charging conspiracy, "the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes

do, operate unfairly against an individual defendant." Id., 546 F.2d at 977; see also Glasser v. United States, 315 U.S. 60, 76 (1942). This prejudice is particularly egregious where, as here, one defendant is not charged in the conspiracy count and would not be subject to the evidence admissible in conspiracy trials but for his joinder in a case in which other defendants are so charged.

This type of prejudice is further compounded in this case by the fact that Ignacio Novo is named several times in the conspiracy count (see Count I, paragraph 2(g) and overt acts 38 and 39), thereby creating the impression that he should have been charged with that crime. In these circumstances, the "dangers of tranference of guilt"* from the defendants actually charged with the conspiracy to Ignacio Novo are particularly serious, and will encourage the jury to convict this defendant of the crimes of which he is charged, regardless of the evidence as to those charges.

Finally, Ignacio Novo is the only defendant named in the counts in which he is charged. Consequently, severance would not require the duplication of evidence which might occur were defendants named in the same counts to be granted separate trials.

In United States v. Mardian, supra, this Circuit found the limited nature of the charges against Mardian, as opposed to his co-defendants, to be a factor highly favorable to his request for severance. Since, unlike Ignacio Novo, Mardian was at least named in the conspiracy count, and was charged in that count with the same crime as his co-defendants, the nature of the charges in the present case is even more conducive of severance that it was in Mardian.

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* United States v. Mardian, supra, 546 F.2d at 977; Kotteakos v. United States, 328 U.S. 750, 774 (1946); Blumenthal v. United States, 332 U.S. 439, 559-60 (1948).

2. The Disparity in Evidence

The nature of the charges, as well as the evidentiary disclosures by the prosecutor to date, also augurs a highly prejudicial disparity in the evidence which would be presented at a joint trial. As with the indictment, the focus of the evidence at trial will be the killings of Letelier and Moffitt. Such evidence will be irrelevant, but highly inflammatory, to Ignacio Novo, since he is not charged with playing any role in those killings. (United States v. Mardian, supra, 546 F.2d at 978).

This defendant will also be prejudiced by the time span of the evidence which would be admissible at a joint trial (United States v. Mardian, supra, 546 F.2d at 977-78). As the overt acts in Count I indicate, the preponderance of the evidence at trial will be concerned with the events leading up to the bombing on September 21, 1976. Ignacio Novo is not charged with, or alleged to have participated in, any of those events.

Finally, the evidence as to the alleged homicides will of necessity be more sensationalistic and inflammatory than the evidence of Ignacio Novo's alleged perjury and misprison. Consequently, a jury will be better able to fulfill its obligation dispassionately to weigh the relevant evidence against this defendant if that evidence is not overshadowed by proof of the killings.

3. The Publicity

As documented in the pending motion for a change of venue, the charges in this case relating to the deaths of Letelier and Moffitt are generating publicity which would not accompany a trial limited to Ignacio Novo's perjury and misprison charges. Moreover, the media is exploiting the fact that Ignacio Novo is joined in this trial to inundate the public and the potential jurors with allegations as to his leadership

in purportedly terrorist organizations and with information about prior charges which have been made against him (i.e., that he attempted to fire a bazooka at the United Nations). Regardless of what protections may be required to protect the other defendants against this publicity, it is quite apparent that the severance of Ignacio Novo would significantly increase his chances of receiving the fair trial by an impartial jury to which he is constitutionally entitled.

4. Ignacio Novo's relationship to Guillermo Novo

Although Ignacio Novo is not named in the homicide-related charges in this case, he would inevitably be closely identified in a joint trial with the evidence as to those charges by virtue of the fact that one of the defendants charged with those offenses is his brother. Given this fraternal relationship, the jury would be more willing to assume Ignacio's knowledge of his brother's alleged role in the bombing, thereby improperly imputing to him the knowledge which is requisite to his conviction on the perjury and misprison charges.

Moreover, Guillermo Novo is the only other defendant in this case charged with perjury. Joint trial would therefore increase the danger that any evidence of Guillermo Novo's knowledge and consequent guilt of perjury would improperly affect the jury's deliberations as to the similar charges against his brother.

Conclusion

Where, as here, defendants are indicted jointly on charges which include a claim of conspiracy among some of the defendants, the trial court is obliged to use "every safeguard to individualize each defendant in his relation to the mass." United States v. Mardian, supra, 546 F.2d at 977; See also Kotteakos v. United States, supra, 328 U.S. at 774. Disparity in proof makes that obligation particularly compelling since it increases the danger that the evidence of guilt as to some defendants will "rub off"

on others. United States v. Mardian, supra, 546 F.2d at 977; United States v. Kelly, 349 F.2d 720, 756-59 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966).

Perhaps the most important "safeguard" which may be employed to minimize the risk of such prejudices is severance. In the present proceeding, the differences in charges and proof, as well as the other prejudices which would arise from a joint trial, necessitate such relief.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, IGNACIO NOVO SAMPOL'S MOTION FOR SEVERANCE SHOULD BE GRANTED.

Respectfully submitted,

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UNITED STATES OF AMERICA, Plaintiff, -v.- JUAN MANUEL CONTRERAS SEPULVEDA, et al., Defendants.	Cr. No. 78-367

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR A CHANGE OF VENUE

A defendant in a criminal proceeding is constitutionally entitled to a fair trial by an impartial jury which has not been exposed to improper, inadmissible or inflammatory materials. United States Constitution, Amendment 6; see also Rule 21, Federal Rules of Criminal Procedure.

In the present proceeding, the focal point of the charges - the bombing death of a diplomat and a young woman on Washington's "Embassy Row" - is uniquely susceptible to local prejudice. The local press has exploited that fact, and has disseminated improper and prejudicial information about this case to the point where the defendants can no longer receive the fair trial to which they are entitled if the case is tried in this district. Consequently, the defendants request that their case be transferred to another, less inflamed jurisdiction.

THE PREJUDICE

The full implications of the prejudices attending this proceeding can only be determined from the Court's own knowledge of the extensive coverage which has accompanied every stage of the investigation since the death of Letelier several years ago. The

articles accompanying this application* are typical of the reporting which has taken place in the newspapers, on the television and in the periodicals. The excerpts cited below demonstrate the various forms of prejudice eminating from this coverage.

A. The sensationalism of the media coverage.

The media has reported in a particularly lurid fashion on the events underlying the charges in this case. For example, the Washington Post did not hesitate to take over the jury's function, insuring its readers that whoever planted the explosive which killed Letelier had the requisite intent to commit homicide:

> the bomb had been strapped with precision above the I-beam of the Chevelle's frame so the driver would be hit with the full force of the blast. The high power of the expertly constructed explosive was clearly intended to kill.**

As for the explosion itself, various writers seemed to be in competition as to who could write the most nauseating protrayal. Thus, Paul Anderson described the victims as "blown to oblivion."*** The Washington Post went furth, describing the bomb as

> an explosive whose blast left its intended victim so mangled that hardened investigators became sick at the scene of the crime.****

In another article, Post writers began:

> One of the first police officers to arrive at the scene of the explosion watched the debris still floating through the damp air to the ground like ash from a campfire . . .

and described how Ronni Moffit "died quickly of a severed artery."***** Similarly, the New York Times Sunday Magazine, widely read by District of Columbia residents, devoted a full story to the death, describing the victims thus:

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* For purposes of clarity, the newspaper articles attached to the motion for a change of venue have been reorganized and attached hereto as an appendix to this memorandum. References are to the numbered pages of the appendix.

** Washington Post article: The Letelier Case: Murder and Diplomacy; set forth in the appendix to this memorandum at 018.

*** Jack Anderson, "Slain Chilean tied to Havana," appendix at 008.

**** Washington Post, "The Witness," appendix at 039.

***** Washington Post, "The Letelier Case: Murder and Diplomacy" appendix at 018.

> Letelier's legs lay in the street nearby, his torso pinned in the wrechage. He died shortly after reaching the hospital. Ronni Moffitt, while not mutilated like Letelier, died a few minutes later, drowned in her own blood.*

B. Assuming the guilt of the defendants.

Upon learning that the defendants were suspects in this case, the media reporters immediately assumed their guilt. Frequently, these reporters sought to bolster this assumption by drawing strained analogies between the facts in this case and sensationalized accounts of the defendants' backgrounds. The Washington Post's article, "The Cubans - Men of Long-Held Political Passions" is demonstrative of this approach:

> They are veterans of a long, lost war, the five Cubans indicted yesterday in connection with the slaying of a former Chilean ambassador. Though some of them led outwardly calm, industrious lives, they were also familiar with the darkest sides of life in the Cuban communities of New Jersey and Miami.
>
> Amond the most radical, right-wing elements of those communities, conspiracy often blends with intense political hatreds, the intense desire to return to a Cuba purged of Castros revolution, and passions burn like fuses.
>
> It is also a world of secrecy from which there erupts occasional, sometimes spectacular, outbrusts of violence.
>
> Some of the first names to come to light in the investigation of Orlando Letelier's murder were those of the Novos - Ignacio Novo Sampol an unemployed shoe and auto salesman, and his younger brother Guillermo Novo Sampol. They were implicated by another Cuban exile leader who was being held in Venezuela at the time in connection with the bombing of a Cuban commercial airliner in which 73 persons died.
>
> The Novos were leaders of the militant Cuban Nationalist Movement based in Union City, N.J., and their names had long been familiar to the federal agents who keep an eye on the exiles' counter-revoltionary underworld.
>
> It was the Novo brothers who were charged in 1964 with firing a bazooka at the United Nations building while Cuban revolutionary Che Guevara was speaking there, though the charges later were dropped.
>
> Ten years later, Guillermo Novo was convicted of plotting to blow up a Cuban ship anshored in Montreal.
>
> By April of last year, another member of the Cugan Nationalist Movement was drawn into

* New York Times Sunday Magazine, "The Letelier Investigation," appendix at 025 et seq.

> the investigation. But, even though he was offered immunity for his testimony, 38-year-old salesman Jose Dionisio Suarez, Esquivel, of Elizabeth, N.J., refused to talk, and spent 11 months in jail.
>
> Both the Novos and Suarez testified under oath that they knew nothing of Letelier's murder.
>
> According to yesterday's indictment, however, Guillermo Novo, Suarez, and their compatriots, Virgilio Paz Romero and Alvin Ross Diaz met with DINA agent Michael Vernon Townley on Sept. 13, 1976, to plot the murder of Orlando Letelier.
>
> By Sept. 18 the same four members of the Cuban Nationalist Movement had helped Townley construct a bomb, according to the indictment.
>
> On Sept. 21, Letelier died when a bomb blast destroyed his car.*

Similarly, the New York Times Magazine article on the assassination included an inset, entitled "Legacy of Terror" which was headed with a photograph of defendant Ignacio Novo and others over the caption "Old boys in the Latin American terrorist network." The inset itself contained much of the same information set forth in the Washington Post article just described. The clear thrust of the article - that the defendants were in fact guilty of the killing of Letelier - is exemplified by the last two paragraphs:

> At Ignacio Novo's first congress of the Bay of Pigs Veterans' Association - attended by a complement of United States Congressmen and condidates - delegates voted to endorse the brigade's membership in CORU, Orlando Bosch's new terrorist consortium.
>
> Letelier was killed less than a month later.**

As in the above-quoted articles, much of the news coverage claims an ongoing relationship between Cuban exiles and Chilean Secret Police, and then deduces from that premise that the Cubans charged in this proceeding must have been involved in the killing of Letelier, a former Chilean ambassador who was critical of the present regime in that country. See e.g., The Washington

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* Appendix at 038.

** Appendix at 028.

Post, "Eight Indicted in Letelier Slaying;"* New York Times Sunday Magazine, "The Letelier Investigation."**

Reporters also sought to add the appearance of authority to their belief by citing to the opinions of "experts." Thus, for example, Paul Anderson reported that "Investigators are now convinced that DINA /the Chilean secret police/ hired ~~Cuban~~ killers to murder Letelier."*** In a subsequent article, Anderson further asserted that "Investigators tell us . . . two /DINA/ brigade leaders contacted among other a Cuban demolition expert, Guillermo Novo, in New Jersey."**** Similarly, the New York Times magazine article reported that "some experts" believe that Cuban exiles were responsible for "terrorist acts like the murder of Orlando Letelier. . . ."*****

C. Inadmissible evidence.

Most of the articles on this case contain information which would clearly be inadmissible at the trial below. Thus, for example, the Washington Post reported in one article that

> The investigation /into the Letelier killing/ quickly focused on the Cuban exile connection after ~~Venezuelan authorities~~ *informed the United States that Cuban exile leader Orlando Bosch - who was being held in that country for the bombing of a Cuban commercial airliner in which 73 person died - ~~had implicated~~ "~~the~~ Novo brothers" in the Letelier case.******

Unless Mr. Bosch is called ~~as a witness~~ at trial, this information constitutes inadmissible, and highly prejudicial, double hearsay.

Similarly, the articles have dwelt at length on allegations of prior criminal activity by the defendants, regardless of whether those allegations ~~ever~~ led to conviction, ~~or even~~ to formal ~~charges~~. Thus, the Washington Post has reported:

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* Appendix at 036.
** Appendix at 025.
*** Paul Anderson, "Foreign spies get CIA cooperation," appendix at 013.
**** Paul Anderson, "On the Trail of a Murderer," appendix at 014.
***** Appendix at 025.
****** Washington Post, "The Letelier Case: Murder and Diplomacy," appendix at 018.

*Actually was newspaper "La Nacional"

In 1964, /the Novo brothers/ fired a bazooka from across the East River toward the United Nations while Che Guevara was speaking there. They were arrested, but charges against them were dropped because they had not been properly informed of their rights.

Ignacio Novo also had been charged in the early 1970s in New Jersey with an explosives-related case, according to court records. And Guillermo Novo was on probation for a 1974 conviction in New Jersey in connection with a plot to blow up a Cuban ship and other property in Montreal.

The Cuban exile movement headed by the Novos, who had been living in this country for nearly two decades, was ~~considered extreme even by some~~ other militant anti-Castro Cubans, They eventually were "adopted" in a sense by the rightists in the Pinochet government in Chile, ~~according to some sources~~, at a time when anti-Castro forces here felt betrayed by the U.S. government's effort at rapprochement with the Fidel Castro government.

The government's Cuban exile informants were reluctant to appear before grand juries as witnesses. Police officers and FBI agents who had used them for years were reluctant to disclose even to other central investigators the names of person providing them with information in the Letelier case.

At the same time, in early 1977, U.S. investigators began checking the foreign travels of some of the persons whom they believed, based on information from the Cuban exile informants, to be centrally involved in the murder conspiracy. They also were planning ways to put pressure on some of those persons so they might be forced to cooperate.

In early March 1977, while most law enforcement people here were occupied with 12 Hanafi Muslims barricaded in three Washington buildings, Propper, Cornic, and Assistant U.S. Attorney E. Lawrence Barcella Jr. were in Venezuela meeting with that country's secret police.

There they learned that Guillermo Novo had traveled to Chile and Venezuela in late 1974, in apparent violation of his probation in the United States. ~~They determined to use that information~~ to try to put pressure on Guillermo Novo.

Then, in April 1977, they decided to grant immunity from prosecution to two Cuban exiles, Jose Dionisio Suarez Esquivel and Alvin Ross Diaz, if they would cooperate with investigators. Suarez refused to testfy to the grand jury, and was sentenced to jail for an 11-month contempt of court sentence with the vow that he would never talk. At a press conference at the time, Ignacio Novo and Ross accused the government of harassing Cuban exiles.

> In June 1977, prosecutors made their attempt to have Guillermo Novo's probation revoked. However, Novo failed to show up for that Trenton, N.J., hearing and became a fugitive for the next 11 months.
>
> Then prosecutors learned in the late fall of 1977 that two persons whom they believed could have been DINA agents had come into the United States on official Chilean passports and met with Cuban exiles shortly before Letelier's murder.*

These charges have been repeated so frequently that it is unlikely that any of the potential jurors in this district remain unexposed to them. See e.g., Washington Post, "Eight Indicted in Letelier Slaying"**; Washington Post, "The Cubans"***; Paul Anderson, "On the Trail of a Murderer".****

D. Washington prejudice.

Finally, it is clear that the events underlying the charges in this case are particularly distressing to residents of this district. The Washington Post has referred to the killing of Letelier as the "first diplomatic assassination here."[1] Almost every article makes reference to the fact that the bombing occurred "in the heart of Washington,"[2] on "tranquil,"[3] "tree-lined,"[4] "placid,"[5] "stately"[6] Sheridan Square the "Embassy Row"[7] of the nation's capitol. Moreover, the actions of the executive branch in recalling its ambassador to Chile as an expression of displeasure at the lack of cooperation by Chile in this investigation,[8] and the House of Representatives in voting at one point

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* Id., appendix at 018.
** Appendix at 036.
*** Appendix at 038.
**** Appendix at 014.

1. Washington Post, "Eight Indicted in Letelier Slaying," appendix at 035.
2. Washington Star, "Paraguayan Links Chile's DINA to Letelier Slaying," appendix at 023.
3. Jack Anderson, "Slain Chilean tied to Havana," appendix at 007.
4. Id.
5. Washington Post, "Eight Indicted in Letelier Slaying," appendix at 035.
6. Washington Post, "The Letelier Case: Murder and Diplomacy," apendix at 018.
7. Washington Post, "Envoy to Chile recalled over Letelier Probe," appendix at 061.
8. Id.

to impose an arms embargo on Chile until the three Chileans named in the indictment were extradited to stand trial in this country[9] both indicate of the importance given to this case in Washington.

The extent of coverage given to this case in the local press is both a cause and a product of the fact that Washingtonians feel particularly threatened by the Letelier killing. On the day of the indictment, the Washington Post alone ran four different articles on the case, including a front page headline and lead article.[10] This "saturation" coverage is certain to intensify immediately prior to and during the trial itself.

THE APPLICABLE STANDARDS

It is a fundamental precept of our legal system that the jury be impartial - "free of prejudice passion, excitement, and tyrannical power." Chambers v. Florida, 309 U.S. 227, 236-37 (1940). Of equal importance, their verdict must be "induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Patterson v. Colorado ex rel. Attorney General, 205 U.S. 454, 462 (1907).

Defendants herein submit that the nature of the charges in this case and the publicity to date create the clear likelihood that they will be deprived of these basic rights if their trial is held in this district. In this regard, it is important to note that the defendants are not obliged to prove actual bias in order to be entitled to the relief they seek. Rather, given the elusive nature of proof of bias, constitutional due process requires such relief whenever the case involves even "a probability that prejudice will result." Sheppard v. Maxwell, 384 U.S. 333, 352 (1966).

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9. Washington Post, "Halt in Arms for Chile is Passed and Reversed," appendix at 059.
10. Appendix at 035-039.

American Bar Association standards are in accord:

> because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required.
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> ABA, Minimum Standards for Criminal Justice, Sec. 3.2, p. 8.

These standards have been quoted as embodying a correct expression of applicable law. See, e.g., Silverthorne v. United States, 400 F.2d 627, 638-39 (9th Cir. 1968).

This rule is consistent with the principle that due process is violated whenever there is "the probability of unfairness." In re Murchison, 349 U.S. 133, 136 (1955). Moreover, the probability standard has been specifically applied to motions for transfer under Rule 21 of the Federal Rules of Criminal Procedure. As the Court said in United States v. Marcello, 280 F.Supp. 510, 513-14 (E.D.La., 1968):

> Succinctly, then, it is the well-grounded fear that the defendant will not receive a fair and impartial trial which warrants the application of the rule. Singer v. United States, 380 U.S. 24, 35, 85 S.Ct. 783, 13 L.Ed. 2d 630 (1965). As the Supreme Court recently stated in Sheppard v. Maxwell, supra, venue should be changed 'where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial.' (emphasis added) 384 U.S. at 363, 85 S.Ct. at 1522. The many cases which we have examined indicate that this is the federal practice. (Emphasis in the original).

See also: Irvin v. Dowd, 366 U.S. 717 (1961); Estes v. Texas, 381 U.S. 532 (1965); Shepherd v. Florida, 341 U.S. 50 (1951); Marshall v. United States, 360 U.S. 310 (1959); Rideau v. Louisiana, 373 U.S. 723 (1963); and Janko v. United States, 366 U.S. 716 (1961), (where, based on the facts set forth at 281 F.2d 156, the Solicitor General confessed error).

In determining whether a change of venue should be granted, this Court is obliged to consider a number of different factors:

> A study of the cases dealing with the problem of pre-trial publicity indicates that four main factors should be considered in deciding if relief of some kind should be granted at this stage of the proceedings. First, it is necessary that the publicity be recent, wide-spread and highly damaging to the defendants. Second, it is an important consideration whether the government was responsible for the publication of the objectionable material, or if it emanated from independent sources. This factor is especially significant in regard to the third factor, the inconvenience to the government and the administration of justice of a change of venue or continuance. The government can hardly be heard to complain of inconvenience if it was responsible for the dissemination of damaging material. In fact, governmental complicity was almost singularly dispositive in the leading case in which a trial judge's discretion was reversed, see Delaney v. United States, 1 Cir. 1952, 199 F.2d 107, though the publicity in that case was particularly virulent and was concentrated on the eve of trial. Last, it must be considered whether a substantially better panel can be sworn at another time or place.
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> United States v. Bonanno, 177 F.Supp. 106, 122 (S.D.N.Y. 1959) cited with approval by the Supreme Court in Irvin v. Dowd, supra, 366 U.S. at 727; Sheppard v. Maxwell, supra, 384 U.S. at 354.

Application of these criteria to the present case clearly establishes the defendants' entitlement to relief.

First, it is beyond serious dispute that the defendants herein have been subjected to "recent, widespread and highly damaging publicity." As explained in the foregoing paragraphs, the news coverage has largely assumed the defendants' guilt of the crimes charged, and has saturated the public with highly prejudicial information which would not be admissible in a court proceeding. In this regard, the Report of the American Bar Association's Committee on Minimum Standards relating to Fair Trial and Free Press is instructive:

> If public statements and reporting with respect to these matters assume the truth of what may be only a belief or a suspicion, they may destroy the reputation of one who is innocent and may seriously endanger the right to a fair trial in the event that formal charges are filed.
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> * * *
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> /D/uring the period prior to trial, public statements originating from officials, at-

> torneys, or the news media that assume the guilt of the person charged, that include inaccurate or inadmissible information, or that serve to inflame the community, may undermine the judicial process by making unobtainable a jury satisfying the requisite standard of impartiality.
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> Id. at 16-17.

Similarly, the language of the court in setting aside a conviction for prejudicial publicity in Delaney v. United States, 199 F.2d 107 (1st Cir. 1952) is equally applicable here:

> Some of the damaging evidence would not be admissible, since it related to conduct outside the scope of the charges; since it was not subject to defense cross-examination; and since it was not minimized by evidence offered by the accused.
>
> Id. at 113.

The second factor cited in Bonanno - whether the government is responsible for the publication of the objectionable material - must also weigh in defendants' favor. The news articles submitted in support of this application were clearly based in large part on information which could only have been supplied by the prosecutor's office. This is particularly true of those details of the investigation which would not be matters of public knowledge or available from any other source.

Moreover, the government must assume responsibility for the sensationalism added to this case by the prosecutor's decision to indict and seek to extradite the Chilean officials. Although the decision to proceed in that fashion may have been a perfectly proper exercise of prosecutorial discretion, it was, nonetheless, clearly forseeable that such actions would generate widespread publicity. In this regard, this case is again analogous to Delaney v. United States, supra. There, congressional hearings were the cause of the undesired publicity. In such a case, the court found, the publicity must be deemed to have been "instigated by the United States."

The Government, after imposing "this burden," is in a poor position to contest the defendant's application for relief from its consequences:

> We think that the United States is put to a choice in this matter: If the United

> States, through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a ~~person awaiting trial~~ on a pending indictment then the United States must accept the consequence that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed.
>
> Id., 199 F.2d at 114.

Turning to the third Bonanno factor, it is clear that the government would experience little difficulty if the proceedings in this case were transferred to another district. It appears from the information disclosed by the prosecution to date that most of their witnesses will have to be brought to this district from other parts of the country (or hemisphere) for trial. Indeed, of the ~~forty-one overt acts described in the indictment~~, at least ~~thirty took place outside~~ the ~~District~~ of ~~Columbia~~.* This being the case, it would be as easy for the government to transport ~~their witnesses to another district~~ as it would be ~~to bring them here~~.

The fourth factor cited in Bonanno - whether a substantially better panel could be sworn in a different district - also militates heavily in favor of a change of venue. As previously explained, the events underlying the charges in this case are regarded as uniquely threatening to the security and prestige of this district. Particularly when ~~fed~~, as here, ~~by sensationalistic coverage~~ accompanying every step of the investigation and legal proceedings, such local prejudices clearly pose a serious threat to the defendants' fair trial rights.

Based on the considerations set forth above, there is a substantial probability that prejudice will result if the defendants

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* Overt acts 1-13, 15 and 41 took place in South America; overt acts 16, 17, and 19 took place in New York; overt acts 20-23 and 33-35 took place in New Jersey; overt acts 38 and 39 took place in Florida; overt acts 18, 36, and 40 took place in combinations of places all outside the District of Columbia; and overt acts 14, 27 and 32 took place at undisclosed locations. Only overt acts 24-26, 28-31 and 37 took place, entirely or in part, in the District of Columbia.

are brought to trial in this district. Consequently, they are entitled to a change of venue. Lesser forms of relief, such as expanded voir dire and continuance, are simply not adequate to insure juror impartiality.

The overwhelming weight of recent authority warns of the dangers of the trial judge relying too heavily upon the (voir dire.) The ABA Standards quoted earlier in this memorandum, (subsection (d)) recommend strongly that the court should act to protect the defendant before trial, at the time when the motion for transfer is made. The Advisory Committee, in explaining the reasons for subsection (d), stated:

> Subsection (d) deals with the relationship between a motion for continuance or change of venue and the process of jury selection. It has in many jurisdictions been common practice for denial of such a motion to be sustained if a jury meeting prevailing standards could be obtained. There are two principal difficulties with this approach. First, many existing standards of acceptability tolerate considerable knowledge of the case and even an opinion on the merits on the part of the prospective juror. And even under a more restrictive standard, there will remain the problem of obtaining accurate answers on voir dire - is the juror consciously or subconsciously harboring prejudice against the accused resulting from widespread news coverage in the community? Thus if change of venue and continuance are to be of value, they should not turn on the resutls of the voir dire; rather they should constitutue independent remedies designed to assure fair trial when news coverage has raised substantial doubts about the effectiveness of the voir dire standing alone.
>
> The second difficulty is that when disposition of a motion for change of venue or continuance turns on the results of the voir dire, defense counsel may be placed in an extremely difficult position. Knowing conditions in the community he may be more inclined to accept a particular juror, even one who has expressed an opinion, than to take his chances with other, less desirable jurors who may be waiting in the wings. And yet to make an adequate record for appellate review, he must object as much as possible and use up his peremptory challenges as well. This dilemma seems both unnecessary and undesirable.

> The Committee therefore proposes in subsection (d) that when a motion for change of venue or continuance is made prior to the impaneling of the jury, it shall be disposed of before impaneling. And if it is renewed after impaneling, the fact that a jury meeting prevailing standards has been obtained shall not be regarded as determinative.
>
> (pp. 126-27).

As the Advisory Committee noted, in cases such as the present one, the voir dire may itself be unreliable and, in its exercise, create an unfair and undesirable dilemma.

The modern rule is well stated in United States v. Marcello, 280 F.Supp. 510, 514 (E.D.La., 1968), where the court noted that, "the efficacy of depending upon the voir dire to determine whether substantial prejudice exists has recently been seriously questioned." For other cases holding that change of venue rather than voir dire is dictated by substantial adverse pretrial publicity, see, e.g., the following: United States v. Rossiter, 25 F.R.D. 258 (P.R., 1960); United States v. Florio, 13 F.R.D. 296 (S.D.N.Y. 1952); United States v. Parr, 17 F.R.D. 512 (S.D.Tex. 1955). Cf. Broeder, Voir Dire Examinations: An Empirical Study, 38 So. Cal. L. Rev. 503 (1965). Furthermore, the Supreme Court has held that there is a denial of the very right to jury trial under the Sixth Amendment where a state statute prevents a change of venue in misdemeanor cases even though the palliatives of voir dire and continuances are available. Groppi v. Wisconsin, 400 U.S. 505 (1971).

Continuance is likewise inadequate to cure the problem in this case. The events underlying the charges are already several years old. Further delay would only make preparation of a defense more difficult. Cf. Barker v. Wingo, 407 U.S. 514 (1972). Moreover, even the passage of time would not reduce the reaction of the residents of this district to these charges, or the interest of the press in the trial proceedings, whenever they may occur.

Change of venue is therefore the preferred, and indeed the only appropriate, remedy in this case. Absent such relief, there is no feasible way for this Court to insure that these defendants will receive the fair trial by an impartial jury to which they are constitutionally entitled. The defendants therefore request that this Court enter an order directing that these proceedings be transferred to another district.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THIS COURT SHOULD GRANT DEFENDANTS' APLICATION FOR A CHANGE OF VENUE.

Respectfully submitted,

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