UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

10/23/78

UNITED STATES OF AMERICA :

v. : Criminal Case No. 78-0367

(#8) IGNACIO NOVO SAMPOL :

GOVERNMENT OPPOSITION TO
MOTION FOR SEVERANCE

Comes now the United States by and through its attorney, the United States Attorney for the District of Columbia, and in opposition to defendant Ignacio Novo's motion for severance states as follows:

The defendant is charged with two counts of false declarations before a grand jury (18 U.S.C. §1623) and one count of misprision of a felony (18 U.S.C. §4). The defendant claims that he will be prejudiced by a joint trial with Guillermo Novo and Alvin Ross and requests a severance pursuant to Rule 14, F.R.Cr.P. He correctly does not allege that his joinder was improper under F.R.Cr.P. 8(b), since the word "transaction" in Rule 8(b) is a flexible term which "comprehends a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." United States v. Park, 531 F.2d 754, 761 (5th Cir., 1976).

It is well settled that a motion for severance pursuant to Rule 14, F.R.Cr.P. is addressed to the sound discretion of the trial court and its ruling will not be reversed absent a showing of abuse of that discretion. Opper v. United States, 348 U.S. 84, 95 (1954); United States v. Peterson, 522 F.2d 661, 666 (D.C. Cir., 1975). The defendant's motion for severance relies principally on the authority of United States v. Mardian, 546 F.2d 973 (D.C. Cir., 1976). This reliance is misplaced since the facts of Mardian are substantially different than the facts of this case and the factors present in Mardian which mandated severance are not present in this case.

Mardian was charged with conspiracy, as were his codefendants, but the evidence of his participation in the conspiracy was substantially smaller than the evidence of the participation of his codefendants. The Court of Appeals recognized that a charge of conspiracy--which, unlike his codefendants, was the only charge against Mardian--allows the prosecution to take advantage of more liberalized rules of evidence and that these rules "may, and sometimes do, operate unfairly against an individual defendant ***." Mardian, supra at 977. The fear is that the evidence against one defendant for a particular crime will have a spillover effect - prejudicing another defendant charged with that same crime. That potential unfairness is inapplicable in this case. Since the defendant is not charged in the conspiracy count,[1/] the evidence of the conspiracy to commit murder is not admissible against him. The events leading to the charges against Mr. Novo did not occur until after the murders. Therefore, an instruction to the jury that it should not consider any evidence from the beginning of the conspiracy in July, 1976 until September 21, 1976, will be simple for the jury to comprehend and follow.[2/]

The defendant argues that he can easily be severed and a subsequent trial for him held without duplication of evidence. His facts fail him here. The first overt act involving any of these defendants is September 10, 1976. However, the evidence which will

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1/ The defendant alleges that he will be prejudiced because he is mentioned in a number of overt acts. This allegation is without merit. The conspiracy count simply alleges that Mr. Novo was a member of the Cuban Nationalist Movement and that he met with Mr. Townley on September 21, 1976, after the murder and was briefed on the facts surrounding the murder. These facts would obviously come out at any separate trial and it is a simple matter, as related above, for the court to instruct the jury that evidence concerning the conspiracy does not relate to the defendant.

2/ The Government will not use any coconspirator statements under the hearsay exception to the conspiracy rule against Mr. Novo. Thus, he will not be affected at all by the liberalized rules involving conspiracy charges.

be adduced to prove the Government's case begins at a time much earlier than this. Michael Townley did not simply contact Guillermo Novo, Alvin Ross, Virgilio Paz and Jose Dionisio Suarez on September 10, "out of the blue" and ask for assistance in murdering Orlando Letelier. Mr. Townley had a pre-existing relationship with these defendants as well as Ignacio Novo. The admission of the facts of this prior relationship is absolutely essential and totally relevant to the charges against all the defendants, including Ignacio Novo. For example, as the ninth count of the indictment alleges, Mr. Novo was asked the following questions and gave the following answers during his October 29, 1976 appearance before the grand jury.

> Q. Can you tell us whether you have heard of an organization known as DINA?
>
> A. Yes. I read it in the papers the other day, yes.
>
> Q. Do you personally know anybody who is in DINA?
>
> A. No, I do not.
>
> Q. Have you had any contact at all -- not necessarily having been there -- but any contact at all with any person who has either been in Chile or is presently in Chile during the past two years?
>
> A. Not that I know of.

The defendant is charged with giving false statements to the grand jury on these and other questions. The Government's evidence will show that Ignacio Novo knew Michael Townley, that he knew that Townley was a DINA agent and that he had had contact with Townley during the previous two years. Thus, the evidence against Ignacio Novo will precede the beginning of this conspiracy. Moreover, Mr. Novo's substantial actions subsequent to September 21, 1976, are relevant because of the misprision of the felony charge.

Severance of defendants jointly indicted is not often granted and the Court of Appeals did not find any abuse of the trial court's discretion in not ordering Mardian severed at the start of the trial. The Court of Appeals recognized:

> the "general rule" that defendants jointly indicted should be tried together. United States v. McDaniel, 176 U.S. App. D.C. 60, 62, 538 F.2d 408, 410 (1976); Brown v. United States, 126 U.S. App. D.C. 134, 139, 375 F.2d

> 310, 315, cert. denied, 388 U.S. 915, 87 S.Ct. 2133, 18 L.Ed.2d 1359 (1967). And there are indeed strong interests favoring joint trials, particularly the desire to conserve the time of courts, prosecutors, witnesses, and jurors. See United States v. Hines, 147 U.S. App. D.C. 249, 266, 455 F.2d 1334, cert. denied, 406 U.S. 969 & 975, 92 S.Ct. 2427, 32 L.Ed.2d 675 (1972). Mardian, supra at 979.

It was only after Mardian's principal attorney became ill and would be lost to Mardian for at least six weeks that the Court of Appeals indicated that the trial judge abused his discretion in refusing to grant a severance. At that point, two factors favored severance, which do not do so here. The Court noted that Mardian had an absolute right to his choice of retained counsel, which he would not have because of his attorney's illness.[3/] Secondly, in Mardian the Government did not oppose the motion for severance. The Court of Appeals stated:

> The second factor thus assumes the highest importance, for it demonstrates that severance would not have caused undue disruption: The Government did not oppose Mardian's motion. Although the prosecution took this position on personal grounds, its stance meant, at the very least, that the prosecution saw no significant problems if it had to try Mardian's case separately. Put another way, it saw no compelling interest in continued joinder.
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> Naturally, in passing on a motion for severance the court must consider not only the burdens on the prosecution, but also the burdens any new trial would place on the court, the witnesses, and a new jury panel. Mardian, supra at 980.

These factors do not exist in the Letelier case. A separate trial would cause a great deal of disruption and inconvenience. Although not charged in the conspiracy count, many of the major witnesses against Guillermo Novo and Alvin Ross would also have to testify against Ignacio Novo in order to prove the false declaration and misprision of a felony counts. Much of the evidence would be

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3/ The right to retained counsel of choice, as opposed to substitute counsel, was shown in People v. Manson, 132 Cal. Rptr. 265, 323-326 (1976), where defendant Van Houten's attorney disappeared during the trial. The Court of Appeals held that Van Houten's case should have been severed at that point because of the disappearance alone.

duplicative. It would not be a short trial. Some of the witnesses who will be testifying are in fear of their lives and it will be very difficult to get them to testify on more than one occasion, after their identities are revealed at the first trial. There is, therefore, a compelling interest in continued joinder. The Mardian court best summed up whether a defendant should be severed by the following statement:

> In such a situation, when the prosecution indicates that in its view a separate trial would cause no undue disruption, that prosecutorial judgment is a substantial factor that affects the balance between joinder and severance. In the particular circumstances of this case, Mardian's interest in being represented by counsel of his own choice, combined with the disproportion of the evidence to his potential prejudice, necessitated severance. (emphasis added). Mardian, supra at 981.

The Mardian Court noted three factors in granting Mardian a new trial:

1. No burden on prosecution, court, witnesses or jury panel;
2. Defendant did not have representation by counsel of his own choice;
3. Disproportionate weight of the evidence.

With respect to the first factor, in this case it would be a great burden on the prosecution to try the case a second time because of the problems with witnesses and, as indicated, a great deal of evidence would be duplicated. The Court can take notice of the fact that more than one trial may be required in any event because there presently are two fugitive defendants charged with the murder and there are three defendants in Chile who may be required to face trial in the United States. If the Court severs this case, it could not join it with any subsequent trial. The second factor concerns counsel of his own choice and this defendant clearly does have representation by counsel of his own choice.[4/] The third factor concerns possible disproportionate weight of the evidence. However, the fact that the defendant is not charged in the conspiracy count will permit

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4/ This was made abundantly clear by the defendant during the hearing held by this Court on August 25, 1978. (Tr. 29-32).

the Court to instruct the jury in simple terms as to what evidence is admissible against Ignacio Novo. The jury will thus have no difficulty in following the instruction and compartmentalizing the evidence. Thus, the fact that evidence of the murder will come in will not prejudice him.[5/]

The motion for severance is one which requires a balancing of interests on the part of the trial judge. It is for that reason that his discretionary judgment is not reversible, absent abuse. Exercising discretion always involves a balancing of interests. To show abuse, the discretion must clearly affect substantial rights of the accused. United States v. Jamar, 561 F.2d 1103, 1106 (4th Cir., 1977). The Government submits that the defendant will not be prejudiced by a joint trial and that the weight on the balancing scale in this case lies on the side mandating a joint trial. The Court always maintains the option of severing the defendant during the trial if the Court finds the balance shifts. United States v. Haggard, 369 F.2d 968, 974 (8th Cir.), cert. denied, 386 U.S. 1023 (1967).

The motion for severance should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Government Opposition to Motion for Severance was mailed, postage prepaid, to Jerry Feldman, Esquire, Goldberger, Feldman & Dubin, 401 Broadway, New York, New York 10013, this 16th day of October, 1978.

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5/ In any event, this evidence would be admissible at a separate trial to prove the charges against Novo.