BRIEF FOR APPELLEE

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.

No. 79-1808

UNITED STATES OF AMERICA, Appellee,

v.

IGNACIO NOVO SAMPOL, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Cr. Nos. 78-367

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* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED*

In the opinion of appellee, the following issues are presented:

I. Whether the evidence was sufficient to sustain the conviction of appellant Ross, when he was present at the conspiracy meeting, accompanied Suarez to secure a blasting cap for Townley, had control over a room where a receipt for the detonating device and electric matches brought by Townley were found, and admitted his participation in the murder plot to two different Government witnesses.

II. Whether the trial court abused its discretion in limiting appellants' efforts to expand the scope of cross-examination of Michael Townley to include other alleged crimes when there was no solid proffer of fact and when the alleged crimes were relevant neither to Townley's credibility nor to any other issue in the case.

III. Whether the trial court abused its discretion in defining the limits of cross-examination when Townley had Fifth Amendment problems with only five questions during his entire cross-examination and ultimately refused to answer only one question which was improper on other grounds.

IV. Whether the trial court abused its discretion in refusing to recall Michael Townley for cross-examination before the jury on a telephone call he made to Chile when the tape had been forwarded by the Chilean attorney for a defendant not before the court, when the tape was totally unverified, and when subsequent investigation revealed it to have been fraudulently made.

V. Whether the trial court properly exercised its discretion to ensure a fair and orderly trial by excluding inadmissible hearsay and by requiring appellants to recall witnesses when they attempted to present an affirmative defense through cross-examination of Government witnesses.

VI. Whether the trial court abused its discretion in denying cross-examination of a Government witness about his religious beliefs when such inquiry is specifically prohibited by a federal rule, and in denying cross-examination about an alleged drug addiction on the basis of a totally inadequate factual proffer.

VII. Whether the trial court abused its discretion in refusing to allow the defense to conduct a physical demonstration during cross-examination of a Government witness when the defense failed to recall the witness, who was fully available, and failed to call in its own case the person alleged to be the real lessee of the premises in question.

VIII. Whether the trial court abused its discretion in controlling the scope of cross-examination in various other instances of trivial significance.

IX. Whether appellants' Sixth Amendment rights to counsel were violated by the admission of testimony by fellow inmates about statements made by appellants, when the inmates were not acting as Government agents in this case and did nothing to elicit any incriminating statements.

X. Whether the trial court erred in admitting relevant and admissible evidence introduced by the Government to prove DINA's motive in ordering the assassination of Letelier.

XI. Whether the trial court abused its discretion in admitting the testimony of four eyewitnesses to the murders and two medical examiners, when their testimony was relevant and necessary to prove the elements of the offense.

XII. Whether the court erred in admitting the arms list and brigade manual into evidence when they were corroborative of the testimony of witnesses, showed the relationship among the co-conspirators, demonstrated access to and knowledge of explosives on the part of appellants, and were not displayed to the jury.

XIII. Whether two spontaneous statements made by a Government witness on direct and cross-examination were reversible error when their impact was minimal not only in comparison to the crimes charged but also in the context of hundreds of pages of transcripted testimony by the witness.

XIV. Whether appellants were deprived of their right to a fair trial by the denial of their motion for change of venue when there was no inherent prejudice in the proceedings and when the record reveals that a fair and impartial jury was selected on the basis of an exensive and carefully conducted voir dire.

XV. Whether appellants were denied any discovery to which they were fairly entitled when the requested documents either did

not exist or fell under none of the mechanisms established for defense discovery.

XVI. Whether the trial court committed plain error in admitting testimony about tours with Townley during which he located places relevant to the crime, when there was no defense objection at trial and the testimony was offered for a valid non-hearsay purpose.

XVII. Whether the trial court erred in admitting a prior consistent statement by Townley, when he had been impeached by a prior inconsistent statement and when he made the prior consistent statement at a time when he had no motive to lie to the person to whom he gave the statement.

XVIII. Whether the trial court erred in admitting evidence found at 4523 Bergenline Avenue, when appellant Ross had abandoned the premises and the person who found the material was not acting as a Government agent.

XIX. Whether appellants Guillermo Novo and Ross were guilty of the first-degree murder of Ronni Moffitt under the doctrine of transferred intent, when Moffitt's death occurred as a result of the effort to kill Letelier, and also whether they were directly guilty when the evidence showed that their co-conspirator must have seen the occupants of the car prior to or at the time he detonated the bomb.

XX. Whether the sentences of appellants Guillermo Novo and Ross were unconstitutional when they were imposed according to applicable law.

XXI. Whether Ignacio Novo was deprived of a fair trial by the denial of his motion for severance when he was not implicated in any statement by non-testifying co-defendants, when the Government could have presented highly damaging evidence in a separate trial which it was precluded from presenting in the joint trial, and when the jury was continuously apprised through instructions, argument, and evidence that he was in a different status from that of his co-defendants.

XXII. Whether the evidence was sufficient to sustain Ignacio Novo's convictions on two counts of false declarations when there was ample evidence from which the jury could infer that he intentionally lied.

XXIII. Whether the evidence was sufficient to sustain Ignacio Novo's conviction of misprision, when he concealed his knowledge of the identity of the conspirators from an FBI agent who questioned him, secured false identification papers to aid Guillermo Novo in fleeing from authorities, and intentionally misled the grand jury during his testimony.

XXIV. Whether appellant Ignacio Novo was properly sentenced to consecutive terms of incarceration for his false declarations and misprision convictions, when the charge of false declarations is not a lesser included offense of misprision of a felony.

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* This case has not previously been before this Court.

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v.

ALVIN ROSS DIAZ, Appellant.

No. 79-1808

UNITED STATES OF AMERICA, Appellee,

v.

IGNACIO NOVO SAMPOL Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On August 1, 1978, appellants Guillermo Novo Sampol and Alvin Ross Diaz were indicted, along with Juan Manuel Contreras Sepulveda, Pedro Espinoza Bravo, Armando Fernandez Larios, Jose Dionisio

Suarez Esquivel, and Virgilio Paz Romero,[1/] for their participation in the September 1976 bombing murder of former Chilean Ambassador Orlando Letelier and an American associate, Ronni Moffitt. The seven men were charged with conspiracy to murder a foreign official (18 U.S.C. § 1117), murder of a foreign official (18 U.S.C. § 1111, 1116), first-degree murder of Orlando Letelier (22 D.C. Code § 2401), first-degree murder of Ronni Moffitt (22 D.C. Code § 2401), murder by use of explosives to blow up a vehicle engaged in interstate commerce (18 U.S.C. 844 (i)). Guillermo Novo was also charged with two counts of false declarations to the grand jury (18 U.S.C. § 1623). Appellant Ignacio Novo Sampol (hereafter referred to as Ignacio Novo) was charged with two counts of false declarations (18 U.S.C. § 1623) and one count of misprision of a felony (18 U.S.C. § 4). On January 8, 1979, when trial began before the Honorable Barrington D. Parker, Contreras, Espinoza, and Fernandez were still awaiting the outcome of extradition proceedings in Chile. Suarez and Paz had become fugitives and had not yet been apprehended. On February 14, at the conclusion of a lengthy trial, appellants Guillermo Novo, Alvin Ross, and Ignacio Novo were found guilty by a jury of all charges against them.

1/ For the purposes of this brief, Guillermo Novo Sampol will be referred to as "Novo", Alvin Ross Diaz as "Ross", Juan Manuel Contreras Sepulveda as "Contreras", Pedro Espinoza Bravo as "Espinoza", Armando Fernandez Larios as "Fernandez", Jose Dionisio Suarez Esquivel as "Suarez", and Virgilio Paz Romero as "Paz."

At sentencing on March 23, 1979, Guillermo Novo and Alvin Ross were sentenced to concurrent life sentences on Counts One, Two, Three and Five and to a consecutive life sentence on Count Four. Guillermo Novo was also sentenced to five years' incarceration on each of his two false declaration charges, to run concurrently with each other and with the life sentences on Counts One, Two, Three and Five. The judgment and commitment on Count Three was vacated on March 27 for both Guillermo Novo and Alvin Ross. Ignacio Novo was sentenced to five years' incarceration on each of his two false declaration charges, to run concurrently with each other, and to three years' incarceration on the misprision count, to run consecutively to the five-year sentences. These appeals followed.

The Government's Evidence

The chain of events which led to the bombing deaths of Orlando Letelier and Ronni Moffitt on September 21, 1976, at Sheridan Circle began years before with the arrival in a far-off country of a little-known man. Michael Vernon Townley, an American citizen, first became involved with the country of Chile when his father's occupation required a family move to Santiago in 1957. The family returned to the United States in 1967, but in 1971 Townley moved back to Chile to make it his permanent home (Tr. 1584-1585). Prior to his departure for Chile in late 1970, he called the public office of the Central Intelligence Agency (CIA) in Miami. A CIA employee came to his place of work and Townley informed the man that he was returning to Chile and would be glad

to supply the CIA with any information on conditions there in which the agency might be interested. Townley hoped that by establishing contact with the CIA he might be able to use the agency to benefit Chile (Tr. 1588-1589); however, he heard nothing further from the CIA after his initial conversation (Tr. 1590).

From 1970 to 1973 Townley became involved in activities opposing the government of Salvadore Allende and worked with a political group called Patria y Libertad, which ran an opposition radio station. In late March, 1973, he was forced to flee the country because police were seeking him in connection with his anti-Allende activities. He returned to Miami and worked in an automobile transmission shop until the Allende Government was overthrown in September, 1973 (Tr. 1585-1586). During his relatively brief stay in the United States, Townley again called the CIA office, this time at the request of people he had been working with in Chile who wanted CIA help in their opposition to Allende. He had had no contact with the agency from his initial contact in 1970 until his phone call in 1973. No further relationship developed with the CIA after the 1973 call and Townley returned to Chile shortly after Allende was ousted. He never did any work whatsoever for the CIA (Tr. 1586, 1589-1590).

Meanwhile, Orlando Letelier and his wife Isabel, both Chilean citizens, had come to the United States in 1960, when Letelier was hired as an economist by the Inter-American Development Bank. The Letelier family returned to Chile in 1970 when Salvadore Allende was elected President (Tr. 1494-1495). In 1971 Letelier was ap-

pointed ambassador to the United States from Chile and served in that capacity until May, 1973. He was recalled to Chile in 1973, when he was appointed Minister of Foreign Relations. Over the next few months he also served as Minister of the Interior and Minister of Defense (Tr. 1495-1496). When Allende was overthrown on September 11, 1973, Letelier was arrested and imprisoned at Dawson Island (Tr. 1497, 1499). Although no charges were ever placed against him, he was held in various prisons for a year. During this time Isabel Letelier appealed to many international organizations to help secure his release (Tr. 1501). He was finally released and expelled from Chile on September 11, 1974. In January, 1975, the Leteliers came to the United States where Letelier began to work at the Institute for Policy Studies and American University in Washington, D.C. (Tr. 1512-1513).

Soon after his arrival in the United States, Letelier began to speak out against the human rights violations which he had witnessed in Chile and to publicize the economic plight of the Chilean people. Among other criticisms, he deplored the bombings which had occurred, the closing of the Chilean Congress, and what he perceived to be the loss of democracy in his homeland (Tr. 1513-1514). During 1975 and early 1976, Letelier spoke at universities and international forums about his concern over human rights in Chile. His efforts included lobbying with various U.S. senators and congressmen in regard to American relations with Chile (Tr. 1514, 1516). Letelier spoke to Senator George McGovern

twice in 1975, emphasizing the serious human rights violations which the new Chilean Government was pursuing (Tr. 1344, 1347). Sensitized to the Chilean situation by his conversations with Letelier, McGovern supported a bill passed in June, 1976, which cut off military aid and reduced economic aid to Chile (Tr. 1349, 1351). Letelier was also working at this time with Dutch politicians to try to stop the floating of a $62 million loan to Chile by a group of Dutch businessmen. Ralus ter Beek, a member of the Dutch Parliament, spoke to Letelier several times in 1976 and helped stop the loan as a result of those conversations (Tr. 1365-1366). Considerable publicity was generated in Holland about Letelier's campaign to have the loan blocked (Tr. 1370-1371). Isabel Letelier began receiving from family and friends Chilean newspapers containing articles hostile to her husband which described his lobbying efforts (Tr. 1515, 1523).[2/]

While Orlando Letelier was engaged in becoming an enemy of the new Chilean Government, Michael Townley was equally busy in becoming its friend. The regime which generated outrage in Letelier inspired loyalty in Townley. In March or April, 1974, after his return to Chile and while Letelier was still imprisoned, Townley met a man named Pedro Espinoza. Espinoza's duties in

2/ The trial court excluded from evidence a political cartoon in a Chilean newspaper dated October 1, 1976, which Isabel Letelier had saved. The cartoon depicted a political association between Letelier and several prominent American legislators, including Senator McGovern (Tr. 1518).

military intelligence during the incumbency of the Allende Government had included efforts to track down Townley (Tr. 1590-1591). Townley developed a casual friendship with Espinoza, who eventually suggested that Townley might be useful to the Chilean intelligence service because of his knowledge of electronics, which he had learned as a hobby (Tr. 1586, 1592). Townley accordingly began to work for DINA, the Chilean intelligence agency, in late 1974, originally using the name Kenneth Enyart and later, Juan Andres Wilson (Tr. 1592-1593).

At around this time, Townley was in the office of a DINA official named Guttierrez when Guttierrez received a telephone call and noted on a piece of paper the names of three people -- Dr. Orlando Bosch, Guillermo Novo, and Dionisio Suarez -- who had entered Chile. Townley told Guittierrez that he thought it was unwise for DINA to have anything to do with Bosch, who was the only one he had heard of at the time (Tr. 1600).

Soon after he began working for DINA, Townley was ordered to come to the United States to buy electronic counterintelligence equipment which could detect hidden microphones and telephone taps. He visited several electronics firms in Florida, including Audio Intelligence Devices (AID), which sold surveillance equipment (Tr. 1592, 1594). The company required proper identification and maintained a check-in, check-out record system. Townley visited AID several times over the next two years, always using the name Kenneth Enyart (Tr. 1595).

In early 1975, Pedro Espinoza approached Townley about a mission in Mexico which DINA wanted him to undertake. Townley was then called to DINA headquarters, where Contreras, the head of DINA, gave him $25,000 and specific instructions for the Mexico mission (Tr. 1595-1596). Contreras was the only person in DINA with authority to approve a mission outside the country and the issuance of false documentation (Tr. 1697-1699). Contreras instructed Townley to go to the United States and solicit the help of the Cuban community in disrupting a meeting of Chilean exile leaders scheduled in Mexico City for February, 1975. The purpose of the mission was the assassination of two leftist Chilean exiles. Townley was selected for the assignment because he was familiar with the Cuban community in Miami and because he was an American and could enter Mexico freely. Since Chile and Mexico had severed diplomatic relations, a Chilean citizen could not enter Mexico easily (Tr. 1597-1598).

In early February, 1975, Townley came to the United States to try to contact Cuban groups (Tr. 1599). While in Miami, he bought from Silmar Electronics a paging device, which worked by transmitting a coded tone message which was then picked up by a specific receiver. He intended to modify the system so that it could detonate an explosive charge by remote control radio (Tr. 1610). The Cuban groups whom he was able to contact appeared to be too talkative and loose in security. Finally, a man named

Felipe Rivero suggested he talk to appellant Guillermo Novo, the head of the Cuban Nationalist Movement (CNM) in New Jersey. Townley remembered the name as being one of the people who had arrived with Orlando Bosch in Chile in late 1974 (Tr. 1599-1600).

Townley and his wife Mariana travelled to New Jersey and arranged a meeting with Novo (whom he identified in court, Tr. 1607-1608) at a restaurant. Novo brought Jose Dionisio Suarez with him. Townley hoped to establish his credentials as a DINA agent, but the two Cubans were very suspicious, fearing that he might be a CIA agent trying to penetrate their group. At the end of the discussion, Townley told them where he was staying so they could get in touch with him (Tr. 1601-1602). Early the next morning, Novo, Suarez, and a third man burst into the Townleys' motel room with guns, again voicing their suspicions that Townley was a CIA agent (Tr. 1604). While rummaging through the couple's belongings, Novo found identification in all three of the names Townley used -- Kenneth Enyart, Michael Townley, and Andres Wilson Silva. Trying to convince Novo of his DINA affiliation, Townley had him call the Chilean Embassy and speak to someone Townley knew there. Finally, after much discussion, Novo announced that he would have to accept Townley on faith until he had checked with his own Chilean contacts (Tr. 1604-1605). A couple of days later Novo related that he had confirmed that Townley was indeed a DINA agent (Tr. 1605). Townley explained to Novo

and Suarez that he needed a loan of explosives and the assistance of a member of the group in order to complete the Mexico mission (Tr. 1607). In the course of the conversation Novo made it clear that he was the head of the northern section of the CNM and was in charge of clandestine operations (Tr. 1614-1615). As a result of his request, Townley obtained from the CNM several sticks of plastic explosives, some detonating cord, and various blasting caps, which were all delivered in a paper bag by an unknown person to Townley's motel room (Tr. 1608). Novo and Suarez stipulated that the explosives were a loan and that Townley was obligated to replace whatever he received with similar materials (Tr. 1613).

After exchanging telephone numbers with Novo and receiving assurances from him that a CNM member would join them in a few days, the Townleys returned to Miami. Shortly afterward they met Virgilio Paz, the promised assistant, at the Miami airport (Tr. 1609, 1611). A few more days elapsed while they secured false papers in Miami, and then the three of them set out for Mexico. During the trip Townley showed Paz the paging device and explained how it could set off explosives. By the time they arrived in Mexico City, however, the meeting had already concluded and the assassination targets had left the city (Tr. 1611). Townley disposed of the explosives and radio equipment in Mexico City to avoid Customs inspection. Paz flew back to New Jersey and Townley eventually returned to Chile (Tr. 1612).

Through several Lan Chile Airline pilots and employees with whom he had established friendships, Townley sent the CNM replacement explosives and publicity material favorable to the Chilean Government. Townley addressed the packages to Guillermo Novo or Javier, the name used by Paz. A Lan Chile employee named Fernando Cruchaga at Kennedy Airport in New York would then call the CNM to have them pick up the packages (Tr. 1613, 1615-1616).

In November, 1975, Ernest Cheslow, a salesman at Grand Central Radio in New York, was approached by a customer who wanted to buy a Fanon and Courier paging system consisting of a transmitter, an encoder, and four receivers (Tr. 2685, 2689, 2713). Since Cheslow did not have the equipment in stock, the customer put down a deposit and Cheslow gave him a receipt (Tr. 2704, 2713). Later, the customer picked up the equipment and in discussing the sales tax, revealed that he was from New Jersey and was planning to send the equipment to Argentina (Tr. 2696). Cheslow identified Government Exhibits 71 and 73 as the store's copies of the sales invoice and Government Exhibit 72 as the customer copy (Tr. 2692, 2709). After the purchase he was shown photographs in an effort to identify the customer and picked out photos of Virgilio Paz and Alejandro Romeral; although he tried his best, he was not sure of the identifications (Tr. 2700, 2719). The following month after the Grand Central Radio purchase, Townley received a telephone call from Paz, who asked for information on how to modify Fanon and Courier paging devices like those they had taken to Mexico. Townley could not

give a clear explanation over the telephone, so he had Paz send him the devices in Chile (Tr. 1620). The equipment he received from Paz consisted of a Fanon and Courier transmitter, encoder, and several receivers, all identical to the items bought at Grand Central Radio (Tr. 1621, 2686-2689). Townley modified the receivers to enable them to activate a blasting cap and modified the transmitter to be able to operate on a twelve-volt automobile battery. He then sent the whole system back to Paz (Tr. 1621).

In June or July, 1976, Townley received a call from Armando Fernandez Larios, a captain in the Chilean Army. Fernandez told Townley that Pedro Espinoza, who was then operations director of DINA, wanted to speak to him. Espinoza and Townley had a meeting in which Espinoza asked if Townley would undertake a mission. Townley was reluctant because his wife was sick and due for an operation, but he indicated that he would follow an order. There was no discussion of the nature of the mission at that time (Tr. 1622-1623). A few weeks later Espinoza requested another meeting at which he outlined the details of the assignment. Townley was instructed to travel to Paraguay with Fernandez, who was also a DINA agent. Fernandez would obtain false Paraguayan documentation for both of them through a contact which had been made by Contreras.[3/]

3/ Government's Exhibit No. 91 was a cable dated July 18 from Contreras, the head of DINA, to Guanes, the head of Paraguayan intelligence, asking the Paraguayans to assist two Chilean army officers who were travelling to Paraguay (Tr. 2818, 2832, 4159-4162).

They were then to enter the United States with Paraguayan passports and arrange to kill Orlando Letelier. Townley was authorized to contact the CNM for support if necessary, but the killing was to be carried out by himself and Fernandez and should look like an accident if possible (Tr. 1624-1625).

Townley and Fernandez arrived in Paraguay in late July. They were informed by Paraguayan authorities that since Colonel Guanes, the head of Paraguayan intelligence, was not there, it might take several days for them to secure their documents. They told the Paraguayans that they were going to the United States to do electronic countersurveillance for Chilean businesses. They also used false names; Townley applied for his passport and visa in the name of Juan Williams Rose.[4/] The day they received their passports they met a Dr. Pappilardo, who was secretary to the President of Paraguay (Tr. 1626-1627). Pappilardo told them that if they needed help in the United States, they should contact his good friend, General Vernon Walters of the CIA, with whom he had just been working. Pappilardo gave them Walters' telephone number (Tr. 1628). After Townley and Fernandez signed their passports, the Paraguayans retained the documents for several days

4/ It was stipulated that Government's Exhibit No. 38 was a Paraguayan visa application to enter the United States in the name of Juan Williams Rose, kept as a record by the State Department in the normal course of business (Tr. 4024). Government's Exhibit No. 15 was the Paraguayan passport issued to Townley in the name of Juan Williams (Tr. 1859), while Government's Exhibit No. 16 was the Paraguayan passport issued to Fernandez in the name of Alejandro Romeral (Tr. 1860).

and finally gave them back with U.S. visas in them. By this time, however, Townley was becoming nervous because the process had taken so long and because he saw a surveillance report on himself and Fernandez on the desk of a Paraguayan Army Colonel. He feared that they had been exposed to the CIA. Fernandez telephoned DINA headquarters to report their anxieties and they were told to take their passports and return to Chile immediately. Plans for going on to the United States were cancelled (Tr. 1629-1630).

In late August or early September, Espinoza met again with Townley and told him that although the assassination of Letelier was still to be carried out, the manner of its execution was to be changed drastically. Fernandez had already left for the United States, using the name Faundez (Tr. 1664), to conduct surveillance on Letelier.[5/] Espinoza told Townley to contact the CNM and persuade them to carry out the mission for DINA. Townley had serious reservations about the plan because he had had numerous recent telephone conversations with appellant Guillermo Novo and Virgilio Paz about the expulsion by Chile of an anti-Castro Cuban named Rolando Otero, wanted in the United States for terrorist activities. Novo had told him that due to the CNM's anger over this action, they would have to take a strong public stand against the expulsion, although they would maintain contact on the intelligence level. Townley accordingly felt that it would be difficult

5/ Government's Exhibit No. 44 was a Chilean visa application to enter the United States in the name of Armando Faundez Lyon, kept as a record by the State Department in the normal course of business.

be difficult to obtain CNM cooperation at a time when they were still upset over the Otero matter (Tr. 1658-1659).[6/] However, after speaking to Espinoza, Townley made preparations to go to the United States, securing from DINA a passport and international driver's license in the name of Hans Petersen Silva[7/] (Tr. 1660). He left Chile on September 8, bringing with him ten electric matches[8/] as a present for the CNM and also to use in an explosive device if that method of assassination was chosen. When he arrived at Kennedy Airport on September 9,[9/] he saw Fernando Cruchaga of Lan Chile Airlines, who told him that someone was waiting to see him. Fernandez and a woman named Liliana Walker (Tr. 1664) had come to the airport to meet him; Fernandez quickly briefed Townley on the

6/ Special Agent Robert Scherrer of the FBI, assigned as legal attache in South America at the time, participated in the removal of Otero from Chile, after threatening DINA with diplomatic reprisals if they did not give him up (Tr. 2860-2861).

7/ Townley identified Government's Exhibit No. 17b as the international driver's license.

8/ Townley identified Government's Exhibit No. 36 as the electric matches he brought with him, noting that they exhibited the modification he had made in replacing their single strand wire with multistrand wire (Tr. 1870-1871). Stuart Case, an FBI explosives expert presented by the defense, testified that his examination of the matches in Exhibit No. 36 revealed that they had indeed been altered by a soldered connection not normally present on commercial matches. During a conversation with Case in the course of the investigation, Townley accurately described the alterations before Case showed him the matches (Tr. 4702-4703).

9/ It was stipulated that Government's Exhibit No. 55 was a copy of a flight manifest kept in the regular course of business by Lan Chile Airlines, listing Hans Petersen as a passenger on Flight 142 from Santiago to New York on September 9, 1976 (Tr. 4030).

information he had gathered during his surveillance of Letelier (Tr. 1662-1663). Townley called Virgilio Paz from the airport and they arranged to meet for dinner that evening (Tr. 1664). Fernandez and Walker prepared to take the next flight back to Chile[10/] and Townley rented a car in which he drove to Paz's house.[11/] He, Paz, and Paz's wife had dinner at the Bottom of the Barrel Restaurant in Union City. Townley made a collect call to his sister in Tarrytown to arrange a visit with her[12/] and then asked Paz to set up a meeting with Guillermo Novo. The next day he had lunch with Novo, Suarez, and Paz in Union City (Tr. 1665-1666). Townley outlined his mission and requested their help in the form of equipment and personnel. The Cubans, however, were more interested in discussing their concern about Otero's expulsion from Chile. They finally told him that the project would have to be discussed with other members of the group (Tr. 1666-1667).

On the night of September 10, Novo, Suarez, Paz, Alvin Ross,

10/ It was stipulated that Government's Exhibit No. 57 was a copy of a flight manifest kept in the regular course of business by Lan Chile Airlines, listing Armando Faundez and Liliana Walker as passengers on Flight 143 from New York to Santiago on September 9, 1976 (Tr. 4031).

11/ Townley identified Government's Exhibit No. 18 as the Avis rental agreement in the name of Hans Petersen Silva, which was stipulated to be a duplicate copy of Government's Exhibit No. 59 and was kept in the regular course of business by Avis Rent-A-Car (Tr. 1861, 4031-4033).

12/ Fred Fukuchi, Townley's brother-in-law, testified that he received a telephone bill for a collect call made on September 9, 1976, from telephone number 863-9719 (Tr. 2677). It was stipulated that that number was listed to the Bottom of the Barrel Restaurant in Union City, New Jersey (Tr. 4033).

and other members of the CNM met with Townley in his hotel room at the Chateau Renaissance.[13/] Again, much of the discussion focused on Rolando Otero. The CNM felt that Chile was asking a great deal from them, while they were getting very little in return (Tr. 1667-1668). According to Novo and Paz, Chile and the CNM shared a common political ideology, but they also wanted concrete help from Chile, such as recognition of a government in exile, sanctuary for fugitives, and participation in training programs. Townley received no response from the group that night, but the next day Novo told him that the CNM would cooperate in the murder (Tr. 1670-1672). Novo and Paz established two conditions for their cooperation -- that Townley would have to wait a few days because they were involved in something else and that Townley would have to be present during the mission so that the hand of DINA would clearly be involved in the killing (Tr. 1673).

Paz gave Townley the same Fanon and Courier paging system which Townley had modified in Chile and sent back to Paz. Novo and Suarez supplied TNT, a small amount of C-4 plastic explosives and some detonating cord. Townley and Paz left for Washington in Paz's Volvo in the early morning hours of September 16,[14/] expect-

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13/ Townley identified Government's Exhibit Nos. 19, 19a, and 19b as receipts from the Chateau Renaissance (Tr. 1862). It was stipulated that Government's Exhibit Nos. 60, 61, 62, and 63 were all guest registrations and bills in the name of Hans Petersen for September 9-11 and 13-14, made and kept by the Chateau Renaissance in the normal course of business.

14/ Footnote on next page.

ing another CNM member to join them later (Tr. 1674-1676). Townley brought with him only his Kenneth Enyart identification and left all other documents behind (Tr. 1677).

As soon as they arrived in the Washington area, they located Letelier's home and place of employment and then checked into the Holiday Inn at 15th and Rhode Island Avenue, N.W.[15/] Over the next two days Townley and Paz corroborated the surveillance information which Fernandez had supplied. Townley bought electronic components and tools at two different Radio Shacks and baking pans and friction tape at a Sears store (Tr. 1678).[16/] He was, however, still

14/ Townley identified Government's Exhibit No. 20 as a gas station receipt with a license plate number on it which was stipulated to be the tag number of Paz's Volvo (Tr. 1862, 4159). Townley also identified Government's Exhibit No. 21 as a receipt for a meal eaten on the New Jersey Turnpike, 21b as a toll receipt for the Delaware Turnpike, 21c as a toll receipt for the Delaware Memorial Bridge, 21d as a toll receipt from the J.F.K. Memorial Highway, and 21e as a toll receipt for the Baltimore Harbor Tunnel. All of these receipts were dated September 16, 1976 (Tr. 1862-1864).

15/ Townley identified Government's Exhibit Nos. 24 and 24a as Holiday Inn receipts for September 16, 17, and 18 in the name of K. Enyart (Tr. 1865). It was stipulated that Government Exhibit Nos. 66 and 84 were a guest registration and bill in the name of K. Enyart made and kept by the Holiday Inn in the regular course of business (Tr. 4039). These records reflected the number of guests to be two (Tr. 4040, 5124).

16/ Townley identified Government's Exhibit No. 22 as a receipt for breakfast for two from a restaurant on Wisconsin Avenue near the Sears store (Tr. 1864). He identified Government's Exhibit No. 23 as a receipt for dinner with Paz at Luigi's Restaurant (Tr. 1865). He also identified Government's Exhibit No. 26 as his receipt for the items purchased at Sears (Tr. 1866). It was stipulated that the serial numbers on the receipt were matched with a Sears catalogue to determine that the items purchased were aluminum baking pans (Tr. 4042-4043).

missing a blasting cap, which was essential to initiate the detonation of high explosives (Tr. 1682).

Meanwhile, back in New Jersey, Jose Barral, a long-time friend of the CNM, received a telephone call from appellant Guillermo Novo (whom he identified in court) (Tr. 2890).[17] Novo told him that a mutual friend was coming to see him on an important matter. A short while later, Suarez, whom Barral had known for years, arrived at his home with appellant Alvin Ross, whom Barral knew less well (but identified in court) (Tr. 2891-2892). Suarez said he needed a large blasting cap, which Barral interpreted to mean a No. 6, which would set off plastic explosives. Suarez indicated that he needed the cap immediately, but did not specify for what purpose (Tr. 2892-2893). Barral was not sure where Ross was during the conversation and could not recall whether he was present throughout the entire discussion (Tr. 2922-2923). Barral told Suarez that it would take a short while to get the cap, so Suarez left a telephone number where he could be reached (Tr. 2894). After Suarez and Ross had left, Barral obtained the blasting cap, called Suarez and shortly thereafter met Suarez in the street to give it to him.[18] Ross did not accompany Suarez the second time to pick up the

17/ It was stipulated that hotel records would show that a telephone call had been made on September 16 from K. Enyart's room at the Holiday Inn to Center Ford, which was stipulated to be Guillermo Novo's place of employment (Tr. 4040, 5124).

18/ Barral identified Government's Exhibit No. 78 as one of the two blasting caps he had in his possession when Suarez made his request. Exhibit No. 78 was the same as or similar to the one he gave Suarez (Tr. 2898). The one he retained, which became Exhibit No. 78, had two long yellow and orange leg wires.

cap (Tr. 2894-2895). The next bombing that Barral heard about, two to three days later, was the one which killed Letelier (Tr. 2896).

After a telephone call from Paz, Suarez arrived in Washington on Saturday morning, September 18 (Tr. 1679).[19/] He brought with him several blasting caps to supply the deficiency in Townley's equipment (Tr. 1682). When Suarez arrived, Paz and Townley checked out of the Holiday Inn and into the Regency Congress Motel on New York Avenue.[20/] Suarez checked into another motel down the street (Tr. 1680). Although explosives had been one of the possible methods they had been considering, they made the final decision to use a bomb that morning because both Suarez and Paz had employment problems. Suarez wanted to return to New Jersey soon because he was starting a new job that week and Paz also was eager to leave Washington as soon as possible (Tr. 1681). That afternoon they put the explosive device together in the Regency Congress room (Tr. 1682), using the Fanon and Courier paging system to build a remote control bomb. A person using the system, by depressing two keys in the proper sequence on the encoder, could transmit a tone com-

19/ It was stipulated that hotel records would show that a telephone call was made on September 17 from K. Enyart's room at the Holiday Inn to Center Ford, Guillermo Novo's place of employment.

20/ Townley identified Government's Exhibit No. 25 as a receipt from the Regency Congress, dated September 18 in the name of Ken Enyart (Tr. 1865). It was stipulated that Government's Exhibit No. 85 was a guest registration and bill in the name of Ken Enyart made and maintained by the Regency Congress in the regular course of business (Tr. 4040).

bination which would then be picked up by a receiver tuned to the transmitter's frequency. Townley had modified the receiver in Chile so that when it received the correct transmission, it would close a switch which would then activate the blasting cap (Tr. 1874-1876). Townley also included one of his electric matches in the bomb (Tr. 1871).

After building the bomb, Townley told Paz and Suarez that he wanted to get back to New Jersey and leave the country before the bomb was exploded, in accordance with the instructions he had received from Espinoza. At about midnight on September 18, they drove out to Letelier's home. On the way, Paz informed Townley that he would have to attach the bomb to Letelier's car himself (Tr. 1683) because the CNM wanted someone from DINA directly involved in the mission as a matter of faith (Tr. 1684). Paz and Suarez parked the car about a block from Letelier's home and Townley found Letelier's car in his driveway. He checked the license plate number and then slid underneath and taped the bomb to the cross-member under the driver's seat. Since he had very little light and was extremely cramped, he accidentally taped over the safety switch. He had set it in an armed position, but was afraid the pressure of the tape would move it back to a safe position (Tr. 1684-1686).

Townley then returned to Paz's car and the three of them drove back to the Regency Congress. Suarez picked Townley up early the next morning and took him to National Airport, where he boarded a flight for Newark. 21/ It was agreed that Suarez would telephone Guil-

21/ Footnote on next page.

lermo Novo to have someone pick him up when he landed. Before leaving, Townley described to Paz and Suarez the trouble he had encountered with the safety switch. He requested that Letelier be alone in the car when the bomb was exploded and suggested that it be done opposite a small park where there would be few people likely to be injured. However, both the discretion as to timing and the paging device itself were left in the hands of Paz and Suarez, as were the remainder of Townley's electric matches (Tr. 1686-1687).

When Townley arrived in Newark, appellant Alvin Ross was there to meet him and questioned him about what had occurred. Townley told him that the bomb had been attached to the car. They ate breakfast and then went to a small apartment in Union City, where Novo was waiting.[22] Townley briefed him on the details of the mission and then asked to borrow his car to visit his sister in Tarrytown (Tr. 1688). After a brief detour to an office building in Manhattan, which Novo wanted to visit, Townley drove up to his sister's home, where he stayed until late afternoon.[23] He then

21/ Townley identified Government's Exhibit No. 28 as an airline ticket folder and receipt in the name of K. Enyart, dated September 19, from Washington to Newark (Tr. 1867). It was stipulated that Government's Exhibit No. 87 was a copy of a flight manifest kept in the regular course of business by Eastern Airlines, listing K. Enyart as a passenger on Flight 518 from Washington to Newark on September 19, 1976.

22/ In a tour with FBI agents in 1978, Townley directed them to the building, which was located at 541 36th Street, Union City. He described a first-floor apartment which agents discovered was rented to Alvin Ross (Tr. 2964-2965).

23/ Footnote on next page.

drove back to New Jersey, picked up Novo, and they drove out to Kennedy Airport where Townley took a flight to Miami. Before leaving, Townley placed his immigration form I-94 in a stack of I-94's departing to Spain on Iberia Airlines. Thus, as far as the immigration people would know, Hans Petersen had gone to Spain on September 19 (Tr. 1690-1691). 24/

The next day, September 20, Orlando Letelier received a copy of the Official Gazette from Chile (Government's Exhibit No. 10), which contained a copy of a Chilean Government decree depriving him of his citizenship (Tr. 1524). Ronni Moffitt and her husband Michael, associates of Letelier at the Institute for Policy Studies, were scheduled to have dinner with the Leteliers that evening because Michael and Letelier were writing an essay together. Since the Moffitts' car had broken down, Letelier drove them to his home in his car (Tr. 1202-1204). The Moffitts stayed until around midnight, eating dinner, working on the essay and commiserating with Letelier on the loss of his citizenship. It was arranged that they would go home in Letelier's car and pick him up the next morning, September 21 (Tr. 1205).

On the morning of September 21, Townley, in Miami, was becoming nervous because nothing had happened in Washington. He called

23/ Fred Fuhuchi testified that his brother-in-law visited them for several hours in mid-September, 1976 (Tr. 2675).

24/ It was stipulated that Government's Exhibit No. 50 was an I-94 form in the name of Hans Petersen, which was kept by the Immigration and Naturalization Service in the regular course of business (Tr. 4027).

Paz's home in New Jersey and Paz said he had just gotten home at about 7:30 a.m. and did not want to talk. Townley hung up and went to visit Audio Intelligence Devices, where he had some electronic equipment on order. He spent several hours there, signing in and out as was required (Tr. 1692-1694).

While Townley was at AID, Ronni and Michael Moffitt drove to the Letelier home and waited until Letelier was ready to leave for work. The three of them set out for the Institute in Letelier's car, with Letelier driving, Ronni in the front passenger seat, and Michael in the back seat (Tr. 1206-1207). They drove down Massachusetts Avenue and suddenly, as the car entered Sheridan Circle, Michael heard a quick hissing sound and saw a flash of light at the front of the car. The car erupted in a deafening explosion, generating a terrible heat and smell (Tr. 1208). Onlookers saw a brilliant flash of light as the car rose into the air and came to rest in the circle between Massachusetts Avenue and 23rd Street (Tr. 1290, 1294). Michael was stunned, but managed to crawl out a back window. He noticed his wife stumbling out of the car toward the curb, but saw no sign of Letelier. He ran around the car and saw Letelier sitting in a large hole in the floor, facing the rear, with his head hanging back. He tried to respond to Michael's shouts and slaps, but could not speak. Michael reached into the car and tried to lift him out and then saw that the lower part of his body had been blown off. When he realized that there was nothing he could do for his friend, he looked for Ronni, whom he

had thought was all right, and saw her collapse on the lawn of one of the embassies. He ran to her and saw Dr. Dana Peterson trying to stop the blood coming out of Ronni's mouth (Tr. 1211, 1302). Eventually an ambulance arrived and took her away and he was driven to the hospital. A short time later hospital staff told him that his wife was dead (Tr. 1212-1213). Isabel Letelier was summoned to the hospital and was informed that her husband was also dead (Tr. 1526-1527). Subsequent tests of the paging system described by Townley revealed that the person who detonated the bomb could have been no more than one thousand feet away from Letelier's car at the time of the explosion (Tr. 3866). The medical examiners found that a piece of shrapnel had severed Ronni Moffitt's carotid artery and cut a hole in her windpipe; as a result, she breathed in her own blood and drowned in it (Tr. 1323). They also found that Orlando Letelier had bled to death as a consequence of the traumatic amputation of both legs (Tr. 1328). The mission of Michael Townley and members of the CNM had been accomplished with grisly success.

Late that same morning in Miami Townley called appellant Ignacio Novo, the brother of Guillermo Novo, in order to arrange a meeting. Ignacio (whom Townley identified in court, Tr. 1700) asked him if he had heard the news that something big had happened in Washington (Tr. 1693). The two had a late lunch or early dinner together and Townley described for Ignacio what he, Paz, and Suarez had done in Washington and how the mission had been conducted (Tr. 1695).

On the night of September 22 or in the early morning hours of September 23, Townley flew back to Santiago from Miami, using the name of Kenneth Enyart.[25/] He reported to Espinoza what had happened (Tr. 1696). Eventually he replaced the explosives which he had borrowed from the CNM by sending small quantities of explosives to Paz from time to time. He also sent money to reimburse Paz and Guillermo Novo for expenses they had incurred in assisting him in the assassination (Tr. 1701-1702).

On October 27, 1976, Guillermo Novo testified before the grand jury investigating the Letelier and Moffitt murders in which he had participated only the month before. While under oath, he told the grand jury that he had never heard of Letelier before he was killed, and had no idea why he was murdered or who was responsible for it. He also claimed that the CNM had never done anything related to Chile and that he knew no one who was a member of DINA (Tr. 4151-4154).

Ignacio Novo appeared before the grand jury on October 29, 1976. After taking the oath, he testified that he had never heard Letelier's name before he heard about the murders on the news and that he thought that Cuban communists had possibly carried out the assassination. He also claimed that he knew no one in DINA and had not had contact within the previous two years with anyone who

25/ It was stipulated that Government's Exhibit No. 88 was a copy of a flight manifest kept in the regular course of business by Lan Chile Airlines, listing Kenneth Enyart as a passenger on Flight 153 from Miami to Santiago on September 23, 1976 (Tr. 4043-4044).

had been in Chile or was presently in Chile (Tr. 4147-4150).

On October 21, 1976, a month after the murders, Special Agent Ovidio Cervantes of the FBI interviewed Ignacio Novo about the Letelier murder. In response to questioning, Novo revealed none of his knowledge about the identity of the participants. He did, however, claim to be the national coordinator for the CNM, identifying his brother Guillermo as the second national chief (Tr. 3742-3744).

Special Agent Larry Wack of the FBI was notified by the Secret Service in May, 1977, that they were working with a man in whom he might be interested. Wack met Ricardo Canete in the Secret Service office and learned that he was in touch with Ignacio Novo (Tr. 3590). Canete had been arrested on a counterfeiting charge and was working with Secret Service agents in return for their help on his case (Tr. 3376). He had been a founding member of the CNM and had known both Novo brothers (whom he identified in court) since 1960 (Tr. 3230-3032). Canete participated in the group until 1965 and then drifted away, although he still maintained haphazard contact with Ignacio (Tr. 3233-3234).

After his conversation with Wack, Canete called Ignacio at Center Ford, his place of business, and suggested a meeting, claiming that he might have some things of interest to Ignacio. At the meeting, Canete offered Ignacio various types of false identification and Ignacio replied that he might have a use for

them. He explained that the Government was trying to accuse the CNM of the Letelier murder. During the conversation Ignacio excused himself and said that he had to contact friends in DINA to see how things were going. He made a telephone call and then returned. Canete asked if the group could give him any help if he fell under suspicion and Ignacio assured him that they could send him to a farm in South America for awhile (Tr. 3235-3236).

A few days later Canete and Ignacio met again. Ignacio confirmed that he wanted to do business with respect to the documents and asked about types and prices. Ignacio asked the bartender for a sales check and wrote down on it the kinds of documents he wanted. Canete filled in the prices he would charge.[26/] When Canete said he could obtain a blank West German passport, Ignacio tried to think of a Germanic sounding name and finally decided on Frederick Pagan (Tr. 3238-3239). Canete contacted Ignacio when the documents were ready and they went to the Szechuan Taste restaurant, where they exchanged documents and money.[27/] Before giving the documents to Ignacio, Canete made copies of them, which he turned over to Wack.[28/]

26/ Canete identified Government's Exhibit No. 97 as the sales check, with Ignacio's writing on the left and his own writing on the right (Tr. 3239).

27/ Both Canete and Wack identified Government's Exhibit Nos. 100-100e as the surveillance photographs taken by Wack of Canete, Ignacio, and a woman friend of Ignacio's, going into the restaurant (Tr. 3258, 3592).

28/ Canete identified Government's Exhibit No. 99 as the original documents he gave to Ignacio (Tr. 3243). Both Canete and Wack identified Government's Exhibit No. 98 as the copies of those documents (Tr. 3242, 3591).

Canete met with Ignacio again in June, 1977, to give him the balance of the documents which had been ordered [29] (Tr. 3260). Ignacio requested still more documents and they arranged to meet again.

At the later meeting Ignacio asked for a New York driver's license and other identification in the name of Victor Triquero and a permanent and temporary license in the name of David Costa.[30] Ignacio explained that since he would soon be leaving for Miami and possibly South America, he wanted the documents as soon as possible. He gave Canete some money and instructed him to contact appellant Alvin Ross if he had any problems (Tr. 3268).

In late June or early July, Canete called Ross (whom he identified in court) to arrange a meeting with him. During their discussion in a bar, Canete told Ross he was worried that the FBI might pick him up and asked what the CNM could do for him. Ross said they had friends in the intelligence community in South America, where Canete could be placed temporarily on a farm (Tr. 3269-3270). A few days later Canete and Ross met again at Ross' place of employment, Ascione Motors. From there they drove to a restaurant

29/ Canete identified Government's Exhibit No. 103 as a forged Social Security card in the name of Pagan and Government's Exhibit No. 102 as an altered Panamanian passport, both of which he gave to Ignacio. Both Canete and Wack identified Government's Exhibit No. 101 as the Xerox copy given to Wack of the Panamanian passport (Tr. 3262, 3593).

30/ Canete identified Government's Exhibit Nos. 105 and 105a as the originals of the Triquero documents (Tr. 3265). He and Wack both identified Government's Exhibit Nos. 104 and 104A as the copies of those documents given to Wack (Tr. 3265, 3594). Canete identified Government's Exhibit No. 106 as the Costa temporary license (Tr. 3267).

in Ross' car. During the ride, Ross' briefcase was open on the seat and Canete saw two folders in it, one labelled "Orlando Letelier" and one labelled "Chile" (Tr. 3274). After eating dinner, Canete and Ross returned to Ascione Motors, where Canete used a typewriter to make up more false documents. While he worked, Canete bragged about his work, causing Ross to begin bragging about his specialty, which he described as making bombs. Ross said that the bomb he had made which had worked very well recently was the one which killed Letelier (Tr. 3275-3276). He also said that he had used an acid back-up in the bomb, that he had been "the wheel man," that the bomb had been attached to Letelier's car while it was in a garage for repairs, and that the group had stayed in a motel in Arlington, Virginia (Tr. 3276, 3463, 3486-3488). Canete did not entirely believe the narrative, but reported it to Wack anyway (Tr. 3463-3464). Ross also typed out on an Ascione Motors letterhead a further list of specific documents which he wanted from Canete; Canete gave the list to Wack.[31/] Shortly thereafter Canete began to feel nervous about the eventual possibility of having to testify against members of the CNM. Accordingly, he broke off contact with Wack and tried to disappear (Tr. 3423).

At about the same time, in August, 1977, a man named Carlos

31/ Canete identified Government's Exhibit No. 107 as the list typed by Ross. Canete and Wack both identified Government's Exhibit No. 108 as copies given to Wack of the documents typed by Canete and given to Ross (Tr. 3277-3278, 3595).

P. Garcia rented a room in the name of C and P Novelty Company at 4523 Bergenline Avenue, Union City. Luis Vega, the building superintendent, gave Garcia the key to the room and saw him around the building several times after that (Tr. 3005-3006). At the time Garcia moved into the room, it was totally empty; Vega had cleaned it out thoroughly (Tr. 3008). Shortly afterward, on September 21, Special Agent Richard Sikoral of the FBI spoke to Alvin Ross at his home at 541 36th Street. Ross told Sikoral that he was establishing a business called the C and P Novelty Company at 4523 Bergenline Avenue (Tr. 3158-3159). Garcia last paid the rent for the room on October 31. When no rent was paid for November or December, Vega put another lock on the door so Garcia could no longer gain entry (Tr. 3007, 3075). During this time Vega began to clean out the room with the intention of using it for his own office. He never saw Garcia again and no one ever approached him about paying the rent (Tr. 3007, 3012). On February 28, 1978, Sikoral went to 4523 Bergenline looking for Ross. He asked Vega who ran C and P Novelty and showed him some photographs, from which Vega picked a photograph of Alvin Ross (Tr. 3010-3011, 3161).[32/] Vega explained that the C and P room had been abandoned and that he was

32/ At trial, Vega identified as Carlos P. Garcia a man displayed to him by the defense during voir dire. On cross-examination, Vega said that he had recognized the real Garcia as the man he had seen while the jury was out of the room and that Ross was not Garcia (Tr. 3036, 3062-3063). Though made available by the Government, Vega was never recalled by the defense to make an identification before the jury nor was the man he identified ever called by the defense to testify.

cleaning it out. Sikoral asked him to call the FBI if he discovered anything which he thought they might find interesting (Tr. 3182). Sikoral then went to Ross' apartment and found him there. Ross said that his business, which he had been running with his partner, Carlos P. Garcia, had gone bankrupt and he was establishing another enterprise to be run out of his home. Ross declined to give any information about Garcia other than his name (Tr. 3160).

In March, while he was cleaning out the C and P room, Vega found some items which looked to him like bombing material. He called the FBI and Sikoral and another agent came to the room where Vega had laid out the found materials. Vega refused to take a receipt for the items because he was going to throw everything away anyway. The agents took custody of the materials, which included the electric matches identified by Townley as those he had altered and left with Paz and the Grand Central Radio receipt for the purchase of Fanon and Courier paging equipment identified by Ernest Cheslow as the customer copy. Also found were detonating cord, a bottle of potassium permanganate used in explosives, with Paz's fingerprints on it (Tr. 3885), Chilean newspaper articles, and letters from Guillermo Novo to President Pinochet of Chile, to Ronald McIntyre, attache at the Chilean Embassy, and to Sergio Crespo, Consul General for Chile.[33/] Finally, Sikoral recovered a

33/ The letter expressed the displeasure of the CNM over the Chilean expulsion of Rolando Otero. The Crespo letter, with Guillermo Novo's fingerprint on it, contained the following statement: "The Cuban Nationalist Movement has intrepidly defended the best interests of the Chilean nation by supporting in every way, public and private, worthy of comment and worthy of silence, the Government led by his Excellency, President Pinochet" (emphasis supplied) (Tr. 3889, 5186-5187).

list of weapons and explosives with initials of various CNM members opposite each item (Tr. 3163-3169). 34/

Meanwhile, in September 1977, Ricardo Canete was rearrested on another charge and resumed cooperation with Wack; an agreement was reached whereby he would not be prosecuted on the new charge if he provided truthful and accurate information to investigators. He would be prosecuted if the information were not truthful and accurate (Tr. 3300, 3426-3430).

In January, 1978, Michael Townley, in Chile, received a telephone call from Guillermo Novo requesting a loan of $25,000 for the people who had been involved in the Letelier mission. Alvin Ross also spoke to Townley and stridently demanded the money (Tr. 1717). Townley contacted Contreras to convey the request, but Contreras replied that since he was no longer the director of DINA, he had no access to funds. DINA had been replaced by an organization called CNI and Contreras had been replaced by another director (Tr. 1712-1714). Townley called Novo back and told him that it was impossible to obtain the money. They had one final conversation in which Novo reiterated the request and Townley repeated Contreras' response (Tr. 1718).

In March, 1978, a month or two after Townley's conversations with Novo and Ross, Canete was able to re-initiate contact

34/ Vega and Sikoral also testified to the above facts at the hearing to suppress evidence recovered from 4523 Bergenline Avenue.

with the CNM through a person who recommended that he contact Virgil Paz at Roy's Chevrolet. When he called Paz, Canete told him that he expected to be subpoenaed to the grand jury in the Letelier investigation (Tr. 3281). Canete met with Paz and Ross at the Bottom of the Barrel restaurant, where Canete said that the FBI was looking for him. He told them he was uncertain about what to do if subpoenaed to testify in the Letelier case. Paz replied, "Look, we did it. They know it. We know it. But let them prove it." Canete looked at Ross for confirmation and Ross nodded affirmatively (Tr. 3286). Canete understood from the revelation that Paz was telling him that it would be to his disadvantage to reveal anything if called to testify (Tr. 3492). Ross volunteered that the Government had even found some papers of his, but were too stupid to figure out what they had (Tr. 3286). In case Canete should need to get in touch with someone, Ross wrote his name, address, and telephone number on a matchbook cover which he gave to Canete.[35/]

Canete met Paz and Ross again at the Bottom of the Barrel about ten days later and they told him they needed passports very quickly.[36/] They were nervous and disappointed when he told them he would need four to six weeks to obtain them (Tr. 3289). Canete had other conversations during this period in which Ross said a

35/ Canete identified Government's Exhibit No. 109 as the matchbook cover given to him by Ross.

36/ Michael Townley arrived in the United States in the custody of FBI agents on April 8, 1978.

Mr. Propper was down in Chile but was not going to get what he wanted. Ross also complained that some people did not know the value of a man's work since they placed more value on $25,000 than they did on a person's work. If he had to, he said, he would lay it all the way into the hands of Contreras Sepulveda (Tr. 3295-3296).

Contreras and Townley, in fact, had been having their own problems down in Chile, where news of the United States investigation of the crime had sparked public speculation. Townley met with Contreras and Fernandez to construct a common story which they could tell if called to testify by the Chilean ad hoc investigator, General Orozco (Tr. 2057, 2133). On March 29, Townley appeared before Orozco and gave a statement in which he described his connection with the CNM and his trip to the United States, but omitted to mention anything about the planning and execution of the assassination plot (Tr. 2105).[37/] Some parts of the statement were completely true, some were completely false, and some

37/ This statement had not been turned over to the defense as Jencks material prior to trial because the Government had been informed by the Chilean military court that the statement was sealed and could not be made available to the prosecutor (Tr. 1742-1743). An unsigned, unverified copy of the statement mysteriously appeared in the hands of defense counsel halfway through the trial (Tr. 1650-1655), apparently obtained and forwarded by Miranda Carrington, Chilean counsel for Manuel Contreras (Tr. 1737). Defense counsel then received a signed copy over the weekend from Miranda Carrington after the court had expressed doubts about the authenticity of the first document. The Government was again told by Chilean authorities that it could not have the statement (Tr. 1941-1946).

were partially true, but incomplete (Tr. 2110). On April 7, Townley was expelled from Chile and arrived in the United States in the custody of FBI agents on April 8; a material witness warrant was served on him at that time (Tr. 1999). During the following week his sister and parents secured the services of Seymour Glanzer, Esquire, as his attorney and Glanzer entered into negotiations with the Government. General Orozco arrived from Chile, along with Major Pantoja of DINA, who released Townley from his vow of silence relative to DINA's participation in the Letelier assassination. Townley accordingly made a full and accurate verbal statement to Orozco as a continuation and modification of the statement he had given him three weeks earlier. On the advice of counsel, Townley, on April 17, entered into an agreement to cooperate fully with the United States Government. The statement which he had given orally to Orozco was then transcribed on April 18 for use in Orozco's secret investigation.[38/] The agreement with the United States required that Townley provide complete, accurate, and truthful information on all aspects of the Letelier investigation and all other crimes committed against American citizens or on American soil of which he had knowledge. In return, he would be allowed to plead guilty to conspiracy to murder a foreign offi-

38/ This transcription of the verbal statement, which had originally been denied to the prosecution by Chilean authorities, was turned over in mid-trial after the Government informed Chile that the March 29 statement had been publicly disclosed and made available to the defense. Both the original March statement and the April modification were admitted into evidence.

cial (18 U.S.C. § 1117) and would avoid prosecution on any additional charges related to his participation in the Letelier assassination. The Government would also, subject to judicial approval, agree to the imposition of a specific sentence of three and a half to ten years' incarceration and would recommend parole when he became eligible (Tr. 1879-1882).

Alvin Ross and Guillermo Novo were arrested in Miami on April 14. Recovered from Ross was a brown telephone and address book (Government's Exhibit No. 114) containing the name Andres Wilson and Townley's Chilean telephone number (Tr. 4048). Recovered from Novo were a black telephone and address book (Government's Exhibit No. 117) (Tr. 4049) and a driver's license and other identification cards in the name of Victor Triquero (Government's Exhibit Nos. 123-124-F) (Tr. 4156). Ignacio Novo was arrested on May 4 (Tr. 4049-4050).

A search warrant was executed for Ross' apartment at 541 36th Street, Union City, New Jersey, in late April, 1978. FBI agents recovered numerous identification documents in the name of Frederick Pagan, Victor Triquero, and David Costa (Government's Exhibit Nos. 99, 105-105-A, and 106), identified by Canete as among those he had given to Ignacio Novo (Tr. 3243, 3265, 3267). Also recovered were two black address books (Government's Exhibit Nos. 120, 121), a metal object on which Guillermo Novo's fingerprint was later found, and a Brigade 2506 manual with Alvin Ross' name on it[39/] (Government's Exhibit Nos. 124-124a) (Tr. 5120-5122).

39/ Footnote on next page.

All three appellants were arraigned on charges in the instant case on August 11, 1978. Guillermo Novo and Alvin Ross were detained at the Metropolitan Correctional Center (MCC) in New York. At about the same time Sherman Kaminsky was also incarcerated at the MCC (Tr. 3681). Kaminsky had pled guilty in several jurisdictions to charges of interstate racketeering in 1966 and had fled before sentencing to become a fugitive for twelve years (Tr. 4382). He was sentenced on one of those charges on June 14, 1978. The sentencing judge made it a condition of probation that Kaminsky continue to cooperate with the Government.[40/] Kaminsky understood the judge to mean continued cooperation in the investigation of threats to kill a police officer and a federal judge which he had reported to authorities when he heard about them (Tr. 3816). After his sentencing Kaminsky remained at MCC to await the outcome of his cases in other jurisdictions.

In May or June, 1978, Kaminsky met Alvin Ross (whom he identified in court, Tr. 4381), who had heard that Kaminsky had been a member of the Hagannah, an arm of the Israeli military. Ross talked about the Cuban Nationalist Movement and their aspirations to have a military organization like the Hagannah (Tr. 4341-4342). Over the next few months, Ross often approached

39/ The manual described techniques for surveillance and counter-surveillance, as well as materials and methods for manufacturing explosives.

40/ See Appellants' Brief I, Appendix Vol. II.

Kaminsky and talked to him about the congruity of interests and ideology between the CNM and Chile. Ross said that Chile could supply money, safe territory, an exchange of agents, and weapons and explosives. He also told Kaminsky that he had been involved in Letelier's murder, along with DINA, a traitor named Townley in DINA, someone named Sepulveda, and other members of the CNM (Tr. 4349-4350). He had attended a meeting at which Townley said that DINA and General Contreras wanted a Marxist agent assassinated. The agent was a threat to DINA and the CNM felt that their cooperation in the murder would help cement relations and agreements between themselves and DINA. Ross referred to Letelier as a rotten communist Marxist and said he had contributed two wires used in the bomb that killed him[41/] (Tr. 4371-4372). Ross also expressed anger at DINA for their failure to give him some money which he had requested (Tr. 4380). He told Kaminsky that he would not pay for Letelier's murder because people would believe anything of the CIA; the CIA would be the scapegoat (Tr. 4375).

During some of these conversations, Ross expressed his hatred of the CIA and revealed that the CNM was planning to blow up Russian ships in American harbors. Fearing that these plans could create an international incident, Kaminsky contacted his attorney, William Aronwald, Esquire, on August 11. He turned over to him some notes which he had made and asked him to notify the CIA because he felt

41/ The most conspicuous feature of a blasting cap (Government's Exhibit No. 78) is the two long colored leg wires protruding from the small cap.

that Ross was a dangerous man, capable of carrying out his plans (Tr. 3806, 3819). The notes which Kaminsky gave Aronwald made no mention of the Letelier assassination by name but indicated that Ross had said that a person blown up in Washington was a double agent of the CIA (Tr. 3681). Rather than passing the information to the CIA, Aronwald gave the notes on August 17 to Assistant United States Attorney Schwartz in the Southern District of New York. Schwartz at the time knew nothing about Ross or the case on which he was being held, but after learning who was handling Ross' case, called Eugene Propper and forwarded the notes to the District of Columbia U. S. Attorney's Office, which received them on August 28. No discussions with any segment of the Government about the Letelier case occurred until mid-October, when Kaminsky went to Schwartz's office to talk about the threat to the police officer on which he had supplied information previously. Aronwald then mentioned the information which Ross had revealed to Kaminsky about the Letelier case. After some discussion, Aronwald and Schwartz instructed Kaminsky not to discuss Ross' defense with him and not to initiate a conversation, but just to listen if Ross introduced the subject (Tr. 3810-3812). Kaminsky, in fact, had found it difficult to avoid conversations with Ross since Ross seemed to regard him as a confidante and continually sought him out to talk (Tr. 3808).

On October 31, Kaminsky and Aronwald met for the first time with Eugene Propper, one of the prosecutors in the Letelier case.

At that time Aronwald and Propper began to work out an agreement whereby Kaminsky would report what he heard and possibly testify for the Government. Both Propper and Aronwald warned Kaminsky not to discuss defense strategy or initiate conversations with Ross. Aronwald agreed to screen any notes taken by Kaminsky and delete any references to Ross' defense before passing them on to the Government (Tr. 3685-3686).[42/]

The written agreement between Kaminsky and the Government stipulated that if he testified truthfully, the Government would recommend a sentence of probation in the Illinois case which was still pending. The Government also required Kaminsky to make restitution in Illinois and agreed to provide protection for him and his family (Tr. 4384-4386).

Sherman Kaminsky was not the only inmate at MCC to be approached by one of the appellants. Antonio Polytarides had been convicted of illegal diversion of firearms in 1977 and was brought to MCC on a writ from Sandstone, Minnesota. The purpose of the writ was to allow him to assist Customs Agent Joseph King in King's investigation of other people involved in Polytarides' case (Tr. 3933-3937). When other inmates heard about the nature of his con-

42/ All the information contained in the two previous paragraphs was presented either by Sherman Kaminsky during voir dire or during Aronwald's representations to the court. No such evidence was presented to the jury. The court ruled that Kaminsky could testify to the jury only about conversations he had with Ross prior to October 31 (Tr. 4279). The conversations specifically related to Letelier, described above, occurred before October 31 and were presented to the jury.

viction, they began to approach him about arranging weapons transactions. A Cuban named Sotomeyer wanted to buy five machine guns for himself and five for the Cuban group responsible for the Letelier bombing. Polytarides called Agent King at the end of February or beginning of March and told him that he wanted to go back to Sandstone since his writ was satisfied. When King heard about the proposed weapons transactions, however, he told Polytarides he would speak for him to the parole board if Polytarides would go ahead with agreeing to supply weapons to those who approached him (Tr. 3935-3939). Around the end of May, an associate of Sotomeyer introduced Polytarides to Guillermo Novo. Polytarides told Novo he had been informed by Sotomeyer that his group had arranged the Letelier bombing; Novo replied that his group had indeed been responsible. Polytarides reported back to King on all the conversations he had with people wanting to buy weapons. King never asked him to try to find out anything about Novo's case; Polytarides' only role was to respond to requests for weapons and report to King on the progress of the deals (Tr. 3941-3942). Around the middle of July, King mentioned that there were two fugitives in Novo's case and asked if Polytarides could obtain any information concerning their whereabouts. Polytarides offered help to Novo in getting the fugitives out of the country, but Novo declined and broke off all further conversations with him (Tr. 3944). In December, 1978, Novo began to re-initiate contact with Polytarides when he learned that Polytarides had obtained parole. Novo wanted to buy

one hundred sixty machine guns, grenades, and plastic explosives (Tr. 3947-3948). During the period when these negotiations were occurring, Novo seemed very angry one day and Polytarides thought it strange because Novo was usually calm. He asked Novo what was wrong. Novo said that they had been betrayed by certain people in their case, but that they would pay them back (Tr. 4176). Alvin Ross was present during the conversation and nodded his head, but said nothing.[43/] The only benefit Polytarides received from the Government for testifying in the Letelier case was protection for him and his family (Tr. 4313).

After presenting all of its testimony, the Government moved most of its exhibits into evidence and rested its case.

The Defense Evidence

Isabel Letelier, called by the defense, testified that her family's mail from Chile often looked like it had been opened and that once a Metro schedule and a driver's license were delivered in transposed envelopes (Tr. 4635). She feared that DINA was being helped by the FBI or CIA in opening mail (Tr. 4637, 4656). Her husband feared being followed by DINA because he was told when released from prison in Chile that DINA had a very long arm (Tr. 4656).

43/ Most of the above facts were elicited during voir dire of Polytarides. The only testimony he presented before the jury was Novo's statement about having been betrayed; there was no testimony about the weapons transactions context in which his relationship with Novo developed.

Edward Cannell was a Marine guard stationed at the American Embassy in Santiago from 1970 to 1972 (Tr. 4658). He lived at the Marine House where embassy personnel and other Americans often socialized (Tr. 4660). He met Michael Townley at a discotheque in late 1970 or early 1971 and often saw him at social functions at the embassy (Tr. 4663-4664). Americans living in Santiago commonly gathered at the embassy because of the high political unrest in the country (Tr. 4670-4672). There was a top secret unit called Pol-R at the embassy but he never saw Townley enter that section (Tr. 4675).

Stuart Case, an explosives expert at the FBI, testified that Townley had described in detail the bomb used to kill Letelier. Townley said he had used one commercial blasting cap and one that he had made himself. He thought that the blasting cap leg wires were yellow and purple (Tr. 4693-4696). Case testified that blasting caps made by the same company often have different colored leg wires and that Townley correctly described the modifications he had made on the electric matches before Case ever showed them to him (Tr. 4700-4703).

George Landau, currently U.S. Ambassador to Chile, testified that he was ambassador to Paraguay from 1972 to 1977. In June, 1976, General Vernon Walters, Deputy Director of the CIA, came to Paraguay and met with Landau and a high official in the Paraguayan Government named Pappilardo (Tr. 4780-4782). In July, Pappilardo called Landau to tell him that Paraguay had received a high level

request from Chile. Chile had informed Paraguay that two army officers named Juan Williams Rose and Alejandro Romeral were being sent to the United States to investigate dummy Chilean corporations. To make them inconspicuous, Chile wanted Paraguay to issue them Paraguayan visas to enter the United States (Tr. 4782-4783). Normally, such visa requests would have been forwarded routinely to the American Consulate without any knowledge of the U.S. Ambassador. However, Pappilardo suggested that Landau contact Walters to let him know about the situaion; Pappilardo wanted to do Walters a favor by alerting the CIA about the Chilean request (Tr. 4785, 4792-4793). Landau was also informed by Pappilardo that he had given the two Chileans Walters' name and telephone number so Walters could monitor them (Tr. 4784). Suspicious of the Chileans' intentions, Landau obtained their Paraguayan passports and photographed them. He then forwarded the photographs to Walters by diplomatic pouch so Walters could decide whether to investigate them or deny them entry (Tr. 4785-4786). A message arrived that the photographs had been delivered to George Bush, the head of the CIA, since Walters was no longer with the agency. Landau then received a message from Walters explaining that he had left the agency, was unaware of any visit by Chileans, and that the CIA wanted no contact with them. He advised Landau to inform the State Department, which Landau immediately did (Tr. 4787, 4793). Landau then asked Pappilardo to get the Paraguayan passports back from the Chileans and informed him that the visas were revoked. When he received

the passports, the photographs had been removed (Tr. 4788-4789). Landau put the passports in his files and kept them until the names Williams and Romeral arose in the Letelier investigation. He then handed them over to the FBI (Tr. 4799).

Rene Rodriquez testified that he was sales manager for Jess Jones Volkswagen in New Jersey in September, 1976. Suarez started work there that month and stayed with the dealer a week or ten days (Tr. 4802-4807). Rodriquez did not remember if Suarez had arrived in the afternoon on his first day of work; he could not say whether he might have come in as late as 12:30 p.m. (Tr. 4814-4815).

Jorge Smith, the owner of a security equipment firm in Miami, testified that he met a man named Andres Wilson in October or November, 1974, when Wilson came to the store to buy counter-intelligence devices, especially debugging radio frequency equipment (Tr. 4857-4858). Before he sold the type of expensive debugging equipment Wilson wanted, Smith always asked whom the buyer represented (Tr. 4871). When he posed that question to Wilson, joking that he must be with the CIA, Wilson said he worked for DINA and showed him an identification card (Tr. 4858-4859).

Edgar Corley, a fingerprint expert at the FBI, testified that he never found a fingerprint of Alvin Ross on any of the items submitted to him (Tr. 4880). He also explained that a person does not leave a print every time he touches something and that some people never leave prints (Tr. 4886).

Gary Witt testified that he interviewed Isabel Letelier in his capacity as an FBI agent in September, 1976. She told him that she thought the CIA or FBI were cooperating with DINA in tampering with her mail, since DINA would not have had access to the United States mails without help (Tr. 4909, 4913).

L. Carter Cornick stated that as the principal FBI agent for the Letelier case, he testified at a removal hearing for appellant Ross in Newark on June 2, 1978 (Tr. 4948-4950). Cornick, who had participated in the debriefing of Townley, testified at the hearing that Townley told him that Ross had been present at the conspiracy meeting at the Chateau Renaissance (Tr. 4955). Townley had originally been unable to recall if Ross was at the meeting, but after speaking to his wife in late May, his recollection was refreshed. He then indicated during an informal discussion in the prosecutor's office that Ross had indeed been present. Cornick so testified at the removal hearing (Tr. 4958, 4969-4970).

Robert Gambino as Director of Security for the CIA, maintains files on people who are of potential or actual use to the agency (Tr. 4980-4982). The CIA has established public offices around the country where people can come who would like to work with the agency. If someone comes to a public office, the office obtains biographical information from the person and notifies Security to conduct a check. The division does a preliminary security check on anyone it might use in any capacity to insure that the person is honest and trustworthy (Tr. 4997-4998). Such a check consists

of a request for any information on the person from the files of various other agencies. If the check is negative, the Operations Division is notified that there is no security objection to further assessment of the person. If Operations then decides it wants to use the person in some way, Security is asked to do a more thorough investigation (Tr. 4985-4988). In December, 1970, Operations asked Security to do a name check of this type for Michael Townley. Since there was no record of his name at any of the agencies they checked, Security notified Operations that there was no security objection to further contact with Townley (Tr. 4985). A more thorough investigation was never requested and Security was informed in December, 1971, that there was no further interest in Townley (Tr. 4987-4988). If Operations had revived an interest in Townley after the 1971 cancellation, they would have been required to ask Security to do another preliminary check. No such request was made, indicating that the agency retained no further interest in Townley (Tr. 5001-5002).

Marvin Smith, also a CIA employee, is chief of the group that maintains the files of the Directorate of Operations (Tr. 5008). Those files revealed that Operations asked Security to make a preliminary check on Michael Townley so that Operations could make further contact and assess his possible usefulness. When Security indicated that they had no problem with further assessment, Operations asked their people in Miami to contact Townley. They reported that he had evidently returned to Chile (Tr. 5014-5016).

Agency employees in Chile searched for him but found that he was no longer at the address he had given (Tr. 5017). Their search was hampered by the secrecy with which it had to be conducted; notification of the American Embassy in Santiago that they were looking for Townley would have been a public revelation of their interest in him. When Operations was unable to find him in Chile or Miami, they notified Security that their interest had ended. Authority to contact him was then cancelled by Security in December, 1971. Had they wanted to contact him again, Operations would have been required to request a new preliminary check and approval from Security (Tr. 5048-5049), which they never did. The records also indicate that Townley contacted agency people in 1973 and again asked if they wanted to interview him. By that time, Operations was not interested because he had become a public figure in Chile through his anti-government activities. Newspaper articles and reports of radio broadcasts about him were put in his file, as well as a report from a State Department officer at the Santiago Embassy, where Townley had come in 1971 to reveal that he had contacts with various political groups, including Patria y Libertad (Tr. 5053, 5058).

After calling these witnesses and introducing various exhibits into evidence, the defense rested its case.

SUMMARY OF ARGUMENT

I. The evidence presented against appellant Alvin Ross was more than sufficient for the jury to have found him guilty beyond a reasonable doubt. Ross attended the conspiracy meeting at which Michael Townley requested the help of CNM members in assassinating Letelier. He accompanied Suarez a few days later when Suarez obtained a blasting cap needed by Townley for use in the bomb, and facilitated Townley's movements when Townley arrived in New Jersey after placing the bomb in Washington. Recovered from Ross' place of business were a receipt for the detonating equipment used in the bomb and some of the electric matches brought by Townley from Chile. Ross also admitted his complicity in the murders and conspiracy to two different Government witnesses.

II. The trial court properly exercised its discretion in limiting appellants' efforts to cross-examine Townley about other assassinations they alleged that he had committed. Appellants were totally unable to make a concrete factual proffer on which to base these allegations. Furthermore, Rule 608 (b), Fed. R. Evid., limits cross-examination of witnesses on other bad acts to acts relevant to credibility, which assassinations clearly were not. Proof of other assassinations allegedly committed by Townley had no relevance to any other issue in the case.

III. Cross-examination of Townley was not unduly restricted by his invocation of the Fifth Amendment since he asked to speak to

his counsel only five times during the exhaustive inquiry to which appellants subjected him. After consultation with counsel, he eventually answered every question but one which involved other bad acts excluded under Rule 608 (b). Appellants were thus able to explore every facet of his direct testimony and every issue relevant to his credibility.

IV. The trial court properly exercised its discretion in refusing to recall Michael Townley for cross-examination on a telephone call he made to Chile during the trial. Defense counsel were provided with a tape recording near the end of trial purporting to reveal a conversation between Townley and a friend in Chile. The recording had been supplied by the Chilean attorney for Juan Manuel Contreras, the lead defendant in the indictment, who was not subject to the authority of the court. The court's denial of cross-examination on the tape before the jury, based on its suspicion of the tape's authenticity, was supported by a subsequent investigation which indicated that the tape had been fraudulently obtained and altered.

V. The trial court committed no abuse of discretion in limiting appellants' attempts to elicit inadmissible hearsay and to present an affirmative defense through cross-examination of Government witnesses. The court had an obligation to ensure a fair and orderly trial which it fulfilled by requiring appellants to recall Government witnesses in their own case to present their affirmative defense that the CIA had ordered Letelier's assassination. The

court also properly refused to allow appellants to ask certain questions of witnesses who could not answer those questions on the basis of personal knowledge.

VI. The trial court properly exercised its discretion in refusing to permit appellants to cross-examine a Government witness about his religious beliefs. Such inquiry is specifically forbidden by Rule 610, Fed. R. Evid., which is based on a recognition of the great potential for prejudice inherent in such questioning. The court was equally within its discretion in forbidding cross-examination of the same witness about his alleged drug addiction when appellants were unable to make an adequate factual proffer.

VII. The trial court did not abuse its discretion in refusing to allow appellants to ask a Government witness to make a physical identification before the jury during cross-examination. Such an identification properly belonged in the defense presentation of their own case. Appellants then failed to recall the witness or to present the person whom they wanted identified as a witness in their own case.

VIII. The trial court committed no abuse of discretion in controlling the scope of cross-examination in other incidents objected to by appellants. Their complaints were either addressed in other sections of the brief or were too trivial and meritless to have constituted an abuse of discretion.

IX. Appellants' Sixth Amendment rights to counsel were not violated by testimony by fellow inmates about statements made to

them by appellants. Neither of the two Government witnesses who testified about such statements was acting as a Government informer in the case nor was either attempting to elicit incriminating admissions when appellants' statements were made. Thus their testimony was not excludable under the cases interpreting the nature and scope of the Sixth Amendment right to counsel.

X. The trial court committed no error in admitting relevant and proper testimony which established DINA's motives in ordering the assassination of Letelier. Three Government witnesses testified about Letelier's political beliefs and activities which brought him into opposition with the new Government of Chile. Evidence which is probative of the motive for commission of a crime is routinely held to be a relevant and admissible item of proof.

XI. The trial court exercised its discretion in a careful and appropriate manner in excluding death scene evidence which it felt to be prejudicial and in admitting testimony relevant to proof of the elements of the crimes charged. An offer to stipulate by a defendant cannot foreclose the Government from presenting evidence necessary to prove its case.

XII. The trial court committed no error in admitting the arms list and brigade manual since it properly found that the documents were more probative than prejudicial. The arms list, which contained the initials of three of the indicted defendants opposite a listing of weapons and explosives, tended to prove the association of the co-conspirators and their access to the materials with

which Townley testified they had provided him. The brigade manual was originally offered in restricted format since the Government only sought to introduce the portions describing components and construction of explosives. Appellants then offered the entire manual, including the parts to which it now objects. Even if admission of either of these items was error, such error could not have substantially swayed the verdict since the jury never saw either of them.

XIII. Two spontaneous statements by a Government witness were harmless error. A statement by a Government witness that he was attempting to purchase a large quantity of marijuana from appellant Ross during an incriminating conversation was no more than a passing remark which the court promptly instructed to jury to disregard and was of little prejudicial impact compared to the nature of the crimes charged in the indictment. Similarly, the same witness' statement about having taken a lie detector test occurred in the course of two hundred pages of transcripted cross-examination and again the jury was immediately told to ignore the remark. In such a context, neither of the comments by the witness could be said to have substantially affected the verdict.

XIV. The trial court committed no abuse of discretion in denying appellants' motion for a change of venue. The record reveals no inherently prejudicial atmosphere in the trial proceedings which would negate the necessity of making a particularized determination of the fairness of the jury selected. Examination of the voir dire

and jury selection process reveals that a fair and impartial jury rendered the verdict in this case.

XV. The trial court committed no error in its rulings on appellants' wide-ranging requests for discovery. The court examined in camera CIA records on contacts with Townley which had been requested by appellants. The court properly concluded that the records contained no information that fell under the rubric of Jencks statements, Brady material, or Rule 16 discovery. Appellants also asked for CIA records showing that Audio Intelligence Devices (AID) and its president, John Holcomb, were affiliated with the CIA. No such records existed because AID has never been affiliated with the CIA. The Government also does not have an obligation to conduct an investigation which a defendant can conduct for himself. There were no Jencks statements of any Government witnesses which were not provided to the defense. Appellants demonstrated no particularized need to justify requiring the Government to provide them with the grand jury testimony of a prospective defense witness.

XVI. The trial court did not commit plain error in admitting the testimony of three FBI agents who described the tours they had taken with Townley to locate various places relevant to the crime. Appellants did not object to the tour testimony itself at trial and thus did not properly preserve the issue for appellate review under any standard other than plain error. Moreover, the testimony was admitted for the valid non-hearsay purpose of corroborating that the locations were where and what Townley thought them to be.

XVII. The trial court committed no error in admitting Townley's prior consistent statement. The statement was consistent with his trial testimony, was offered to rebut an implication that his testimony was false, and was made at a time when Townley had no motive to lie to the person to whom he gave the statement.

XVIII. The evidence found at 4523 Bergenline Avenue was properly admitted since Ross had abandoned his proprietary interest in the premises. Furthermore, the building superintendent who found the material and gave it to FBI agents was acting on his own initiative in furtherance of his own interests and could not be classified as a Government agent for Fourth Amendment purposes.

XIX. Appellants Guillermo Novo and Alvin Ross were guilty of the first-degree murder of Ronni Moffitt on either of two theories. Since the doctrine of transferred intent has been incorporated into the law of the District of Columbia, proof that appellants participated in the premeditated, deliberate murder of Letelier constitutes proof that they are responsible for the derivative death of Ronni Moffitt. The evidence also showed that the person who detonated the bomb could have been no more than one thousand feet from Letelier's car, making it extremely likely that the person was aware of the presence of the Moffitts in the car. On either theory appellants Guillermo Novo and Ross are guilty of Moffitt's murder.

XX. Appellants Guillermo Novo and Ross were sentenced in accordance with applicable statutes. Absent some complaint other

than the severity of the sentences, there is no ground for appellate review.

XXI. Appellant Ignacio Novo was not deprived of a fair trial by the denial of his motion for severance. Testimony relating to statements by his co-defendants did not inculpate him in any of the crimes charged. Although he might have been able to offer some exculpatory evidence on the misprision count in a separate trial, the Government would have been able to present far more devastating testimony which it was precluded from offering in the joint trial. Ignacio Novo was not prejudiced by either confusion or disparity in the evidence since any possible confusion was completely clarified and there was no indication that the jury was unable to compartmentalize the evidence as to each appellant.

XXII. The evidence was sufficient to sustain Ignacio Novo's convictions on both counts of false declarations. The jury could draw reasonable inferences from the testimony of Townley and other circumstantial evidence to find Ignacio Novo guilty beyond a reasonable doubt of making false statements to the grand jury with the intent to lie.

XXIII. The evidence was sufficient to support Ignacio Novo's conviction for misprision of a felony. Testimony presented by the Government showed that Ignacio Novo had failed to reveal his knowledge of the crime when questioned about it by an FBI agent, had secured false documentation to aid Guillermo Novo in fleeing

from Letelier investigators, and had intentionally misled the grand jury when he appeared before it a month after the murders.

XXIV. Appellant Ignacio Novo was properly sentenced to consecutive sentences on the false declarations and misprision counts. Contrary to his assertion, false declarations is not a lesser included offense of misprision since the jury could have found that the statements to the grand jury were intentionally misleading even if not literally false as required for conviction on a charge of false declarations.

ARGUMENT

I. The evidence against appellant Ross was more than sufficient to sustain his conviction.
(Tr. 1667-1669, 1672, 1682, 1688, 1712, 1717, 1870-1873, 1875-1877, 2887-2892, 2894, 2922-2923, 2965, 3161-3165, 3286, 3296, 4371-4373, 4380, 4969-4970.)

Appellant Ross contends that the evidence against him was insufficient to sustain his conviction. In making such an assertion, Ross omits any reference to the general legal standard governing sufficiency of evidence in this jurisdiction. Application of this standard to the evidence against Ross reveals appellant's claim of insufficiency to be meritless.

In evaluating the sufficiency of evidence, this Court has consistently held that the Government need not provide evidence that compels a finding of guilt beyond a reasonable doubt; its burden is met when it has produced evidence, viewed in the light most favorable to the Government, from which a reasonable mind could fairly find guilt beyond a reasonable doubt. Full allowance must be given to the trier of facts to determine credibility, weigh the evidence, and draw justifiable inferences of fact from proven facts. Crawford v. United States, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947). "It is only when there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt that the judge may properly take the case from the jury." United States v.

Davis, 183 U.S. App. D.C. 162, 164, 562 F.2d 681, 683 (1977). In applying this standard, no legal distinction is made between direct and circumstantial evidence. United States v. Davis, supra; accord, United States v. Staten, 189 U.S. App. D.C. 100, 104, 581 F.2d 878, 882 (1978).

Ross claims that the only substantial evidence against him was the testimony of Sherman Kaminsky, a fellow prison inmate whom Ross regarded as a confidante, and Ricardo Canete, a fellow anti-Castro Cuban. In fact, other evidence presented through several witnesses combined with the testimony of Canete and Kaminsky to produce a coherent picture of Ross' participation in the assassination scheme and of the extent to which he aided and abetted its execution.[44/] Michael Townley testified that Alvin Ross was one of the CNM members present at the conspiracy meeting at the Chateau Renaissance at the time Townley requested CNM assistance in the murder (Tr. 1668). When Townley had first presented the plan to Guillermo Novo, Novo replied that the decision could only be made after Townley had made his request to other CNM leaders at a group meeting (Tr. 1667). The day after the meeting Townley was informed that the CNM would cooperate (Tr. 1672). Although Ross claims that Townley testified that Ross was merely present at the meeting and did not actively participate in it, Townley's recollection of the details of the meeting and of who said what to whom had faded

44/ Ross was charged both as a principal and as an aider and abettor. 22 D.C. Code § 105.

after two years and he was unable to chronicle the specific participation of any individual, recalling only the topics of general discussion (Tr. 1667-1669). Moreover, while appellant Ross asserts that Townley did not mention Ross' presence at the meeting until he "finally remembered at the trial" (Appellants' Brief I, p. 32)[45/] that he had been there, FBI Agent Cornick testified that in fact Townley had told him in May, eight months before the trial, that conversations with his wife had refreshed his recollection that Ross had attended the conspiracy meeting (Tr. 4969-4970). Townley's original statement to Orozco in Chile, introduced into evidence by the defense, also indicated that Ross had been a participant in the meeting. (See Defense Exhibit No. 2.)

Jose Barral, a friend of CNM members and testifying very reluctantly for the Government (Tr. 2887-2890), recalled receiving a telephone call from Guillermo Novo a few days before the Letelier assassination asking for Barral's assistance in an unspecified matter. Shortly afterward, Suarez and Ross arrived at Barral's home where Suarez, whom Barral had known for years, asked for a blasting cap (Tr. 2890-2892). Barral could not recall where Ross was during the discussion or whether he was present throughout the conversation (Tr. 2922-2923). Since Ross was not a friend of his, Barral paid less attention to him than to Suarez (Tr. 2894). Suarez and Ross left after making the request, Barral obtained the cap, and Suarez returned alone a short time later to pick it up.

45/ The joint brief of Guillermo Novo and Alvin Ross is designated as "Appellants' Brief I." The brief of Ignacio Novo is designated as "Appellants' Brief II."

Suarez then drove to Washington and gave Townley a vital missing ingredient -- a blasting cap to be used in the bomb (Tr. 1682).

Upon Townley's arrival in New Jersey from his placement of the bomb in Washington, Ross met him at the airport and asked him how the mission had gone. Townley explained how he had attached the bomb to the car. The two had breakfast together and Ross then drove Townley to Ross' apartment where Guillermo Novo was awaiting a report on the mission (Tr. 1688, 2965). At that point, Orlando Letelier still had two days left to live; the conspiracy was far from over and Ross was engaged in facilitating the movement of one of the chief assassins.

In March, 1978, FBI agents recovered a number of items from a room at 4523 Bergenline Avenue, Union City, which had been rented in August, 1977, and abandoned in November, 1977, by Ross and an associate, Carlos P. Garcia (Tr. 3161-3165). Appellants' characterization of these items as "bomb-making materials" (Appellants' Brief I, p. 33) fails to reveal their significance in the Letelier bombing. One of the items found was a receipt from Grand Central Radio for the purchase of a Fanon and Courier paging system identical to the one sent to Townley by Paz for modification and later given by Paz to Townley for use in the Letelier bomb (Tr. 1875-1877, 3165). Also found in the room were eight electric matches identified by Townley as among those which he had brought from Chile and left with Paz as a present; of the ten he originally brought, only one had been used in the bomb (Tr. 3164, 1870-1873). Shortly after these items were recovered, Ross

NOT TRUE, THE FBI CLAIM THEY FOUND THESE ITEMS IN FEB. 1978. F. VELASCO DE CANETA, ACCORDINGLY TO HIM — AFTER JULY 1977

told Ricardo Canete that there was no reason to worry, that the authorities even had some papers of his, but were too stupid to figure out what they had (Tr. 3286).

Appellant contends that Ross' statements to Canete and Kaminsky were simply the baseless self-puffery of a braggart. The fact that Ross evidently felt a need to enlarge his role in his bragging to Canete, however, certainly does not invalidate his admission that he assisted in carrying out the assassination plot. Indeed, after his arrest and detention on these charges, apparently thinking better of his previous bravado, Ross gave an accurate account to Kaminsky in complaining that he had made the relatively minor contribution of turning over "two wires" to be used in the bomb (Tr. 4373). Although appellant asserts that such a statement was a claim "which anyone could have made" (Appellants' Brief I, p. 35, footnote 1), "anyone" did not cooperate in the acquisition of the blasting cap used in the bomb -- a cap distinctively characterized by the protrusion of two long leg wires. "Anyone" also could not have described, as Ross did for Kaminsky, the meeting Ross attended at which Townley first requested help in killing the "Marxist agent" (Tr. 4371-4372). Ross also expressed anger to Kaminsky at DINA's failure to send him the money he expected (Tr. 4380); he told Canete that the Chileans placed more value on $25,000 than they did on the value of a man's work (Tr. 3296). Townley, of course, had testified that Ross had stridently demanded money when he and Guillermo Novo called Townley in 1978 to request

$25,000 from DINA (Tr. 1712, 1717).

Appellants are correct, of course, that mere presence and knowledge are insufficient for conviction, and that a conviction cannot be based solely on a confession without some independent proof that a crime in fact occurred. But these principles, discussed at length by appellants, are completely inapposite to the evidence in this case. Ross' conviction was based not solely on words from his own mouth, but on a combination of testimony by witnesses and exhibits that clearly provided a basis on which a reasonable mind could find guilt beyond a reasonable doubt. The fact that Ross was not a chief protagonist in the conspiracy does not relieve him of culpability for the contributions he made to the deaths of Orlando Letelier and Ronni Moffitt.

II. The trial court did not abuse its discretion in limiting appellants' efforts to expand the scope of cross-examination of Michael Townley to include other alleged crimes. (Tr. 1761, 1799-1800, 1802, 2010-2014, 2021-2036, 2040-2051.)

Appellants argue that the limitation by the trial court of their efforts to cross-examine Michael Townley on possible previous crimes constituted an impermissible denial of their right of cross-examination. An analysis of their claim reveals that they are advancing novel and specious legal theories to justify such cross-examination as a method of avoiding the requirements of the federal rule of evidence applicable to the issue. Neither the

facts of this case nor the law on this subject will support their position.

Appellants state as fact (and without transcript references) that Michael Townley assassinated Carlos Prats and his wife in 1974 and attempted to assassinate Bernardo Leighton and his wife in 1975. Preliminarily it should be noted that, among other things, the trial court was disturbed by appellants' inability to make a concrete proffer of fact on which to base any such suspicions (Tr. 1799). Appellants pointed out at trial that Townley's passport indicated that he had been in Argentina at the time Prats was assassinated by a car bomb (Tr. 1799-1800) and that he had been somewhere in Europe at the time of the machine gun attack on Leighton in Rome (Tr. 1802). Counsel for Guillermo Novo also stated that Novo told him that Townley had admitted the Prats killing to him (Tr. 1761). While a reasonable amount of exploratory questioning by the defense should be allowed, even if based only on slight suspicion, United States v. Fowler, 151 U.S. App. D.C. 79, 465 F.2d 664 (1972), a trial judge must be permitted to exercise discretion concerning the proper scope of cross-examination of a witness, especially when the allegations, as here, are of a highly inflammatory nature. Id. at 83, 465 F.2d at 668. The coincidence that Townley may have been in the general geographical region when an assassination took place does not supply an adequate factual basis for the claim that he committed it. Nor does a self-serving

and unsubstantiated statement by a defendant to his lawyer provide such a ground. To find that such a proffer is adequate would allow any defendant to claim that a Government witness made an admission which might subject him to cross-examination in excess of that normally permitted. Without requiring further substantiation, such a ruling would invite fabrication and leave the fate of a Government witness to be determined by the veracity of a defendant who is totally exempt from cross-examination. The asking of direct questions which incriminate or degrade a witness plants bias in the minds of jurors which subsequent testimony cannot entirely erase. United States v. Fowler, supra. While such a danger is obviously greatest where the defendant is the witness, the use of hearsay, suspicion, unverified sources, and unreliable innuendo suggests that a cross-examiner has concrete information about prior acts which he does not in fact possess. United States v. Cunningham, 529 F.2d 884 (6th Cir. 1976). Such a suggestion is improper regardless of the identity of the witness.

Even if the factual basis for cross-examination were found to be sufficient, however, the permissibility of exploration of prior assassinations would still be within the sound discretion of the trial judge. Indeed, this discretion was codified in Rule 608 (b), Federal Rules of Evidence, which prohibits the introduction of extrinsic evidence of specific conduct of a witness even for the purpose of supporting or attacking credibility. The rule provides

that inquiry can be made on cross-examination in the discretion of the trial court only if the conduct is probative of truthfulness or untruthfulness and if its prejudicial effect does not outweigh its probative value. Acts bearing on credibility have been construed strictly to include forgery, bribery, fraud, false swearing, false pretenses, and embezzlement; crimes involving force or intimidation have not been considered to be probative of veracity. 3 Weinstein & Berger, Weinstein's Evidence (1978), 608-28. In United States v. Young, 567 F.2d 799 (8th Cir. 1977), the trial court refused to allow the defendant to cross-examine a Government witness about her alleged offer to pay $10,000 to have her former husband killed. The Court of Appeals upheld the decision of the trial court, finding that such a question was not relevant to veracity and honesty as required by Rule 608 (b) and would have been highly prejudicial. In United States v. Hastings, 577 F.2d 38 (8th Cir. 1978), in which a Government witness who had been granted immunity after a guilty plea testified against the defendant, the Court upheld the trial court's ruling that any possible probative value as to truthfulness of the witness' involvement in armed robberies and narcotics transactions was outweighed by the prejudice generated by such an inquiry. Similarly, in United States v. Bynum, 566 F.2d 914 (5th Cir. 1978), the Court affirmed the trial court's exercise of discretion in holding that the cross-examination of a Government witness about his having held foster children against their will to work at his racetrack would have no

probative value as to his credibility. The Court in United States v. Calahane, 560 F.2d 601 (3rd Cir. 1977), also upheld the trial court in limiting the cross-examination of a Government witness about his previous bouncing of checks, reasoning that such an inquiry was not probative of the veracity of the witness. Thus those acts which do not specifically relate to a propensity for fabrication have been considered to be outside the scope of cross-examination allowed by Rule 608 (b).

In an attempt to circumvent the obvious and sound consequences of the application of Rule 608 (b) to this case, appellants rely on two facile and unprecedented legal theories. They first claim that under Rules 404 (b) and 406, Federal Rules of Evidence, evidence of Townley's alleged participation in the Prats and Leighton incidents was admissible to demonstrate his plan and routine habit. When one considers the definition of habit presented by legal commentators, the use of Rule 406 as a foundation for defense inquiry into other criminal acts of a Government witness borders on the ridiculous. McCormick describes habit as an often semi-automatic practice of meeting a particular kind of situation with a specific type of conduct, such as descending stairs two at a time or giving a hand signal for a left turn. McCormick, Evidence, § 162, p. 340. This Court, in Levin v. United States, 119 U.S. App. D.C. 156, 338 F.2d 265 (1965), upheld exclusion of testimony that the defendant had a "habit" of staying home to observe the Sabbath and so could not have been out committing the

crime charged. "It seems apparent to us that an individual's religious practices could not be the type of activities which would lend themselves to the characterization of 'invariable regularity.' Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value." Id. at 272 (citations omitted). Clearly, an alleged act of assassination is a volitional act which would not fall under the rubric of "invariable regularity."

Appellants' invocation of Rule 404 (b) and their analogy to the Government's Mexico evidence are also insupportable. Townley's testimony about the cooperation of CNM members Guillermo Novo, Suarez and Paz in his aborted assassination mission to Mexico was admissible for several specific purposes under Rule 404 (b), Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964), and the law of conspiracy. See United States v. Dansker, 537 F.2d 40 (3rd Cir. 1976); United States v. Smith, 504 F.2d 560 (5th Cir. 1974); United States v. Nahaladski, 481 F.2d 289 (5th Cir. 1973); United States v. Parker, 469 F.2d 884 (10th Cir. 1972). Townley's successful efforts to enlist the help of the CNM in the Letelier murder were based on a firmly established relationship which began with the Mexico mission and continued through and beyond the crimes charged in this case. The interest of Paz in the remote control paging device which Townley showed him on the Mexico trip caused Paz to buy similar equipment, which was later modified by Townley in Chile, sent back to the United States, and eventually

used in the Letelier bomb itself. The exchange of explosive materials which occurred between Townley and Novo and Paz as a result of the Mexico cooperation prepared the way for the loan of explosives for the Letelier mission. Novo was able to verify that Townley was indeed a DINA agent and a regular pattern of communication and cooperation was established which was beneficial to both parties. These continuing links established the motive for the CNM to cooperate in the Letelier assassination, they provided evidence of prior relationships relevant to the conspiracy charge, they were probative on the issue of appellants' intent when they associated with Townley, and they indicated a pattern of preparation which generated the particular feature of the Letelier murder: a remote control paging device which set off high explosives. The evidence was not offered, as appellants contend, for the general purpose of showing that Townley always acted in conjunction with appellants or that appellants were indispensable to the accomplishment of his purpose. The testimony was relevant and admissible only as to certain specific elements of the crimes charged.

Appellants, on the other hand, wished to cross-examine on other assassinations not to prove or disprove any specific element, but to prove general innocence, a purpose explicitly prohibited by the governing legal principles. Appellants claim they offered the evidence as proof of "plan," but their real argument is that their lack of participation in possible other assassinations shows generally that they did not participate in this one. Such

a basis for the exploration of other crimes is no more admissible in the negative sense than it is in the positive. Had the Government offered testimony about the Mexico mission on the basis that cooperation in one mission made it more likely that appellants were generally guilty of the crimes charged, the evidence would have been properly excluded. Drew v. United States, supra. It was just as properly excluded when appellants wanted to show through other crimes evidence that they were generally innocent. The Government made a detailed proffer that linked the Mexico and Letelier missions in several specific ways; appellants were unable to establish any link at all between the Prats and Leighton incidents and the Letelier murder. Prats was assassinated in September, 1974, months before Townley first met any members of the CNM; his unspecified alleged method of operation in that murder was therefore totally irrelevant to whether or not he solicited the help of appellants in other missions after he met them. The machine gun attack on Leighton in Rome in 1975 was similarly irrelevant since that incident bore no relation whatsoever to the method of operation in Letelier. The fact that Townley may have been capable of planning and executing different assassination plots in other parts of the world without the help of the CNM casts no light on the instant case.

Appellants argue that proof of modus operandi in other plots would prove that appellants were not necessary in this one (Appellants' Brief I, p. 41). Townley, however, never maintained that the

Cubans were necessary to carry out the technical aspects of the Letelier mission; he was instructed by his superiors to obtain their help in an effort to put as much distance as possible between Chile and the assassination. Evidence of the lack of participation by the CNM in other plots thus would have been irrelevant since the necessity of appellants' participation in the Letelier mission was not a disputed fact. The only case cited by appellants in support of their argument, United States v. Newman, 490 F.2d 139 (3rd Cir. 1974), involved the formation of a wiretapping business partnership between the defendant and the chief Government witness. The Court held that where a central element of the Government's case was an ongoing business partnership, it was plausible for the jury to infer that both partners would have participated in all wiretaps. Thus questions about prior wiretaps by the witness should have been allowed to show that he often acted independently. Townley, although outlining a pattern of continuing cooperation between DINA and the CNM, never claimed that they formed a continuing partnership for the purpose of committing numerous assassinations; he stated instead that DINA superiors instructed him to use the CNM in situations where it was expedient for him to do so. This case is thus distinguishable from Newman; and insofar as Newman could be generalized to include any situation where cooperation occurred, we submit that it was wrongly decided.

Appellants' second novel argument to justify questioning about Townley's alleged prior acts rests on the nature of the

plea agreement between Townley and the Government. Appellants claim that they were unable to cross-examine Townley about other assassinations because by the terms of the agreement, the "government was improperly shielding its key witness from damaging cross-examination" (Appellants' Brief I, at 47). In fact, appellants were prohibited from such cross-examination not because of the plea agreement, but because, despite desperate attempts to do so, they were unable to offer any viable legal theory which would circumvent the prohibitions of Rule 608 (b). Appellants suggest that by having demanded that Townley disclose all crimes in the United States or against United States citizens of which he had knowledge, the Government conferred a major benefit on its chief witness by not requiring that he disclose all information about all crimes anywhere in the world. The Government, of course, has no quarrel with the principle that a defendant is entitled to cross-examine a Government witness concerning the benefits he received through his agreement with the Government. In accordance with that principle, Townley was exhaustively cross-examined on every detail of his plea agreement and the benefits he received from testifying (Tr. 2010-2014, 2021-2036, 2040-2051). To argue, however, as appellants do, that anything not demanded by the Government becomes a benefit of the plea agreement to the witness is to stand that principle on its head; anything outside the agreement would become a part of the agreement by its very exclusion from the agreement. Acceptance of appellants' argument would

require the Government to elicit all incriminating information about any conceivable crime ever committed by the witness anywhere in the world in order to avoid having failure to disclose by the witness characterized as a benefit of the agreement into which the defense could inquire. Naturally, the reluctance of a witness to incriminate himself to the Government in possibly numerous other crimes would sharply reduce the number of plea agreements reached. Such a consequence would undoubtedly delight defendants everywhere, but would certainly not serve the interests of justice. The Government cannot be required to demand so much from witnesses that no agreements can ever be reached. By requiring the disclosure of all crimes involving American citizens or territory, the Government obtained far more from Michael Townley than it usually obtains from witnesses who testify on the basis of a plea agreement. Townley received no "benefit" by not being required to disclose any other crimes because the conferring of a benefit on a witness implies that the Government gives up in the agreement something which it could have obtained outside the agreement. Townley either had a Fifth Amendment privilege as to crimes in other countries[46/] or the United States Government had no jurisdiction to investigate the matters. Under either circumstance, the Government could not have compelled Townley to give such information; thus the Government gave up nothing and conferred no benefits.

46/ Footnote on next page.

The logical result of appellants' argument would establish two alternatives: either the Government would have to demand so much from witnesses that no one would be willing to testify, or the witnesses would be subject to extensive cross-examination on specific acts to demonstrate their bad character. The first result frustrates justice; the second result demolishes the federal rule governing the issue. The jury had ample evidence from which to make an evaluation of Townley's credibility. Thus it is obvi-

46/ The Government did not rely on a Fifth Amendment argument in the trial court and does not now so rely. Appellants have not seen fit to address the Government's main argument below, which was based on Rule 608 (b). Instead, they have devoted great attention to their assertion that Townley did not have a valid Fifth Amendment privilege. We submit that the Court is not required to reach this issue, since efforts to expand the scope of cross-examination were properly limited on other grounds. Appellants' argument is unsupported in any case since the question of whether a witness can assert a Fifth Amendment privilege based on a fear of foreign prosecution was expressly left open in Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 478-481 (1972). The Circuits which have held that no such privilege exists have considered only situations wherein the secrecy of grand jury proceedings provided an adequate safeguard for the witness. In re Federal Grand Jury Witness, 597 F.2d 1166 (9th Cir. 1979); In re Grand Jury Proceedings (United States v. Postal), 559 F.2d 234 (5th Cir. 1977); In re Long Visitor, 523 F.2d 443 (8th Cir. 1975); In re Parker, 411 F.2d 1067, 1069-1070 (10th Cir. 1969), vacated and remanded for dismissal as being moot, sub nom. Parker v. United States, 397 U.S. 96 (1970); cf. In re Cardassi, 351 F. Supp. 1080 (D.C. Conn. 1972). No court has considered the situation of testimony given in a public courtroom during a trial extensively covered by foreign press. Even were this Court to find it necessary to reach the Fifth Amendment issue, the questions relating to that issue were directed purely at collateral matters. Since questions about the Prats and Leighton incidents involved neither the events of the Letelier-Moffitt murders nor the content of Townley's direct testimony, Townley's direct testimony would have been allowed to stand even if he had claimed a valid Fifth Amendment privilege. Dunbar v. Harris, 612 F.2d 690 (2d Cir. 1979); United States v. Garrett, 542 F.2d 23 (6th Cir. 1976); United States v. Cardillo, 316 F.2d 606, 613 (2d Cir.), cert. denied, 375 U.S. 822 (1963).

ous that the true purpose of seeking to cross-examine Townley on the Prats and Leighton incidents was to portray him as so evil a character that the jury would be outraged that appellants were charged with life counts while Townley emerged with a lesser sentence. The consideration of punishment is, of course, a totally improper factor in a jury's determination of guilt or innocence. See District of Columbia Bar Ass'n, Criminal Jury Instructions for the District of Columbia, No. 2.71 (3d ed. 1978). This is exactly the type of emotional reaction that Rule 608 (b) was designed to prevent; the rulemakers and courts have labored hard to ensure that juries decide cases on the facts, free from passion or prejudice generated by either side.

III. Cross-examination of Michael Townley was not unfairly restricted when he refused to answer one question which had already been ruled improper by the court.
(Tr. 1162, 1844, 1854, 1887, 1956-1957, 1979, 2055-2065, 2092, 2094-2117, 2129-2138, 2151-2153, 2179, 2191-2193, 2196-2215, 2219-2224, 2233-2240, 2243-2246, 2381, 2404-2407, 2412-2420, 4245-4246, 4671-4672, 4984, 4987-4988, 4998, 5062.)

Appellants contend that limitation of questions regarding the internal workings of DINA was an improper restriction on their right to cross-examine Michael Townley. A thorough examination of the record reveals the poverty of this claim.

Preliminarily, it should be noted that appellants' description of their second theory of defense (Appellants' Brief I, p. 54) is inaccurate. Insofar as any theories of defense could be gleaned from counsels' statements and questions, they claimed not that Townley was not a member of DINA, but that he was a "mole" planted

in DINA by the CIA (Tr. 1162, 2381). The assertion in their brief that they needed to ask questions about the internal workings of DINA to prove that Townley was not a member is simply inaccurate; that theory of defense was never presented at trial and no evidence of any kind was ever produced to substantiate it. Several other inaccuracies appear in appellants' recitation of the facts, which appellee must correct for the Court (Appellants' Brief I, p. 54). Townley did indeed state that he contacted the public office of the CIA on two occasions to offer information on Chile. There was, however, no evidence whatsoever that any "CIA 'front' organization" ever attempted to establish an alibi for Townley. Appellants' assertion that Townley had been given "'operational status'" is evidently a deliberate misstatement of fact, since CIA employees whom the defense called as witnesses testified that the preliminary security approval which was granted only allowed the operational branch to assess Townley, not to use him (Tr. 4984, 4987-4988, 4998). The fact that the CIA had no information that Townley was a DINA agent meant nothing since the CIA witnesses testified that the agency is not aware of the identity of every agent in every intelligence service throughout the world (Tr. 5062). Townley's occasional presence at the American Embassy in Santiago did not make him a CIA agent any more than it made an agent of the hundreds of other Americans who frequented the Embassy for a variety of legitimate reasons, including businessmen and people who congregated there because of the constant political unrest (Tr. 4671-4672). Appellants' claim that they had sources in DINA who could

have contradicted Townley's claim of membership raises the question of why such people were not offered as witnesses. On this point, it is instructive to note that one of the "sources," a Chilean attorney, was the attorney of the lead defendant in the indictment, Juan Manuel Contreras (Tr. 4245-5-4525-6).

Appellants' description of the invocation of the Fifth Amendment by Townley is also misleading. During three days of intensive cross-examination and voir dire, Townley asked to speak to his counsel exactly five times (Tr. 1844, 1887, 2064, 2179, 2193). The first instance occurred when he was being questioned on voir dire (Tr. 1844) to determine the authenticity of an unsigned, unauthenticated statement which had been sent to defense counsel by Contreras' attorney. After denying that the proffered document was his statement, Townley refused to answer a question as to its contents. The trial court then decided that since the document had been neither authenticated nor translated into English, questioning on it would be suspended (Tr. 1854). When a second statement, properly signed by Townley, was then received by the defense, Townley identified it as his and was cross-examined about it virtually line by line (Tr. 2055-2065, 2094-2117, 2129-2138, 2151-2153, 2191-2193, 2198-2215, 2219-2224, 2233-2240, 2243-2246, 2404-2407, 2412-2420). In light of the extent of the cross-examination, it is ludicrously inaccurate for appellants to claim that they were precluded from showing the extent to which Townley perjured himself in the prior statement.

The second time Townley claimed a Fifth Amendment privilege occurred when he was asked where in DINA he had obtained the electric matches (Tr. 1887). After discussion with his counsel, Townley answered that question fully (Tr. 1979). Townley again asked to speak to his lawyer when asked whether he had stated that he performed the functions of informer and technical consultant for DINA; he was concerned that the existence of the prior statement outside the secret Chilean proceeding in which it was given was a violation of Chilean law. After consultation with his attorney, Townley again answered the question fully (Tr. 2092, 2094). Townley invoked his Fifth Amendment privilege on voir dire when asked about alleged missions in Europe which he conducted with Virgil Paz (Tr. 2179). Since the trial court had already ruled that such questions were improper under Rule 608 (b), the court upheld Townley's refusal to answer. At Tr. 2193 Townley again asked to speak to his counsel when asked a question about a remote control system used to defend the national territory of Chile. After consultation, Townley answered the question (Tr. 2196-2198).

Thus out of a total of approximately seven hundred pages of transcripted cross-examination, Townley had Fifth Amendment problems with only five questions and ultimately refused to answer only one, which had previously been ruled improper by the court. Although the court originally ruled that Townley had a privilege with respect to the source of the electric matches (Tr. 1956-1957), it then reversed itself and Townley indicated that he no longer

wished to claim the privilege. In speaking to defense counsel, the court explained the method by which any Fifth Amendment problems would be handled: ". . . I will rule on any other question on a question-by-question basis. I can't anticipate what you may ask. I can only respond when it's put"[47/] (Tr. 1957). Appellants' recital of the facts neglects to mention the outcome of the discussions of privilege and thus attempts to mislead the Court into believing that the record supports their argument. In fact, the record clearly reveals that Townley was exhaustively cross-examined on all facets of his testimony and that only one question was excluded on Fifth Amendment grounds, which had already been excluded under the federal rules.

IV. The trial court did not abuse its discretion in refusing to recall Michael Townley for cross-examination on a telephone call he made to Chile.
(Tr. 1962, 4245,4245-1-4256, 4948, 5072-5078.)

Appellants claim that the refusal of the trial court to recall Michael Townley for cross-examination on a recording of a telephone call he made to Chile significantly prejudiced their right of cross-examination. But the record on this point reveals no abuse of discretion by the court.

The recall of a witness for purposes of cross-examination is

47/ Appellants' assertion that the trial court refused to hear a factual proffer by defense counsel (Appellants' Brief I, p. 56) is a flagrant misrepresentation of the record (Tr. 1962).

a matter entirely within the province of the trial judge, who has broad discretion in the matter. United States v. James, 510 F.2d 546 (5th Cir. 1975); United States v. Soares, 456 F.2d 431 (10th Cir. 1972); Buder v. Bell, 306 F.2d 71 (6th Cir. 1962). During the last week of the trial, defense counsel informed the trial court that they had received from Sergio Miranda Carrington, Chilean attorney for Contreras, a tape recording of a telephone call purportedly made to Chile by Townley (Tr. 4245-1). Although Townley on voir dire acknowledged that he had made a phone call to a friend, Gustavo Etchepare, in Chile (Tr. 5072-5078), he never verified that the recording was an accurate representation of the conversation. Since defense counsel throughout the trial had received unverified "evidence" from Miranda Carrington attempting to discredit Townley, even they were skeptical of the authenticity of the recording (Tr. 4245-6). For this reason, the trial court concluded that although Townley could be questioned on voir dire as to whether he made a telephone call, he could not be questioned before the jury. "The difficulty with the whole matter is that it is totally unverified" (Tr. 4948). Indeed, the concern of the trial court was substantiated when the FBI submitted to the judge the results of its laboratory analysis of the tape on March 30, 1979. Aural examination of the tape revealed six areas where erasing, over-recording, and splicing had occurred. In addition, Gustavo Etchepare filed through Townley's lawyer, Seymour Glanzer, an affidavit denying that he had ever recorded a conversation with

Townley. The portion of the tape quoted in appellants' brief (Appellants' Brief I, p. 61) also was based on a transcript and translation made by the defense which was substantially different from the transcript and translation done by the FBI. A key sentence in the defense transcript was altered to put the paragraph about threats to the judge in an entirely different context. The FBI transcript, on the other hand, clearly reveals Townley's statements to have been a joke, albeit a childish and tasteless one. Townley categorically denied ever making any threats and stated that the tape recording was not an accurate representation of the conversation.[48/] Thus the trial court was entirely supported in its exercise of discretion by proof of the tape's lack of authenticity and fraudulent distortion of fact. To allow a witness to be impeached by fraudulent material provided by the attorney for the lead defendant who is subject neither to the personal jurisdiction of the court nor to the ethical requirements of the American Bar would subvert the entire process of fact-finding in criminal trials.

Even had the recording not been fraudulently obtained and altered, Townley's personal opinion of the trial judge would have been entirely irrelevant to his credibility as a witness. Even the altered tape contained no suggestion that Townley had been untruthful in his testimony or that he had solicited threats. Since there was no evidence probative of his truthfulness as a

48/ See Townley's sentencing transcript in Cr. Case No. 78-3, pp. 12-13.

witness presented by the tape, the trial court would have properly exercised its discretion had it excluded questions on the basis of Rule 608 (b) alone.

V. The trial court properly exercised its discretion to ensure a fair and orderly trial by excluding inadmissible hearsay and by requiring appellants to recall witnesses when they attempted to present an affirmative defense through cross-examination of Government witnesses.
(Tr. 1233, 1260-1263, 1353-1354, 1359-1360, 1474, 4744-4746, 4995, 5016, 5021, 5024-5025, 5030-5031, 5048.)

Appellants contend that the trial court prevented them from presenting any evidence to demonstrate a CIA motive for ordering Letelier's assassination. A review of the record and of governing legal principles indicates that this argument is without foundation.

Appellants' claim that the trial court issued a blanket order preventing them from raising a legitimate defense is a mischaracterization of the record, as revealed by their own transcript references. Although there was extensive discussion of appellants' efforts to present an affirmative defense through cross-examination of Government witnesses (Tr. 1233, 1474), it is clear that the trial court ruled on each effort as it arose in the context of each particular witness. For example, appellants attempted to question Michael Moffitt about whether Letelier had ever discussed CIA involvement in the overthrow of Chilean President Salvadore Allende. The court sustained a Government objection on the ground

that such an inquiry was far beyond the scope of direct examination, which had dealt only with the background of the Moffitts and the events immediately preceding the murders (Tr. 1260-1262). Appellants' reference to the examination of George McGovern as prejudicially limited is again a misrepresentation by omission. The Government asked one question of McGovern on direct as to whether Letelier had ever mentioned the CIA (Tr. 1359-1360). McGovern said "No." On cross-examination defense counsel asked two questions about whether Letelier had ever discussed the CIA's involvement in the overthrow of Allende. McGovern replied that he had not (Tr. 1353-1354). The limitation placed on defense counsel did not prohibit them from asking any questions on the subject; it only precluded them from going far beyond the scope of direct examination in order to try to present evidence of an affirmative defense about which no defense witness had yet testified (Tr. 1360). The court emphasized that there was no limitation on the defense if they wanted to recall a witness to present in their own case (Tr. 1263).

Such an exercise of the court's discretion is clearly permissible in order to ensure a fair and orderly trial. In United States v. Stamp, 147 U.S. App. D.C. 340, 458 F.2d 759 (1971), the trial court during extensive cross-examination cut off a particular inquiry as outside the scope of direct examination since there had been no mention on direct of those areas which the defense sought to explore. In considering the issue, the Court held that

the trial judge was properly within his discretion in refusing to permit the defense to cross-examine Government witnesses with respect to matters only relevant to an affirmative defense and not mentioned on direct. The proper course was to have the defense recall any Government witnesses helpful to its case.

Appellants argue that they should not have been required to recall witnesses since by that time the testimony on direct was firmly planted in the minds of the jury. This Court explicitly rejected such a "strike while the iron is hot" theory in Baker v. United States, 131 U.S. App. D.C. 7, 401 F.2d 958 (1968), upholding the trial court's discretion in requiring the defense to recall witnesses to present an affirmative defense. Rule 611 (b), Federal Rules of Evidence, codifies this approach in providing that cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of witnesses. The court has complete discretion in permitting or precluding inquiry into additional matters.

The cases cited by appellants in support of their argument are completely inapposite to the situation here. In New York Life Insurance Company v. Taylor, 79 U.S. App. D.C. 66, 147 F.2d 297, (1945), and subsequent cases cited by appellant, the issue was the admissibility of reports and statements made by third parties totally unavailable for cross-examination. Such evidence, of course, is a classic example of hearsay and bears no relation whatever to the question of how far outside the scope of direct

the defense can go in offering an affirmative defense. United States v. Miranda, 510 F.2d 385 (9th Cir. 1975), also cited by appellants, involved the exclusion of cross-examination on the number of people having access to an area from which the defendant allegedly stole funds. The trial court made its ruling not on the basis of orderly presentation of evidence, but on the basis that the questions were irrelevant and so could not be asked either on cross-examination or on recall of the witness. Since the case was based solely on circumstantial evidence and since the trial judge had committed a serious error on another issue, the Court found that the combination of factors required reversal. Again, the situation in that case bears no resemblance to the instant case, where there was direct testimony inculpating appellants and all witnesses were fully available for recall.

For reasons best known to appellants, they chose to recall only Isabel Letelier for presentation in their own case. It is instructive to note, however, that they were unable to proffer that the witnesses they sought to examine on either cross or direct examination had anything other than hearsay knowledge about CIA activities in Chile. Although appellants complain that the Government and court curtailed their examination of the CIA employees they called as witnesses, the record shows that these particular witnesses had no personal knowledge of the subjects on which the defense questioned them. Robert Gambino, director of security for the CIA, testified that he did not know if there were CIA agents in

Chile in the early 1970's because the operations division did not share any such information with him (Tr. 4995). Marvin Smith, chief of the group that maintains the files in the operations division, testified that he did not know where CIA employees in Santiago were located (Tr. 5031), that he did not know whether there was a field station from 1970 through 1972 (Tr. 5030), and that he did not know if CIA agents played a role in Chilean politics in 1973 (Tr. 5024). The fact that the CIA witnesses called by the defense had no personal knowledge of the questions they were asked does not mean that appellants were impermissibly limited in their questions; it means that the defense did not like the answers which the witnesses gave.

Appellants' attempts to introduce inadmissible hearsay were graphically illustrated by their repeated references to the Church Committee report on CIA activities; these references occurred both in front of the jury and at bench conferences (Tr. 4744-4746, 5021, 5025). As the Government pointed out below (Tr. 4744-4745), there would have been no hearsay objections if the defense had called as witnesses people who had testified before the Church Committee on the basis of personal knowledge. Significantly, the defense never called any witness who could establish even the most tenuous link between the CIA and the deaths of Letelier and Moffitt.

Aside from hearsay problems, appellants' claim that their factual proffer was sufficient under Casey v. United States, 413 F.2d 1303 (5th Cir. 1969), also fails to pass muster. In Casey

the Court approved the trial judge's limitation of cross-examination of Government witnesses where a CIA defense was raised and the defense was unable to proffer to the court any testimony indicating that the CIA had indeed been involved in the defendant's activities. The only testimony even related to the CIA in the instant case was Townley's description of his two contacts with the Miami public office of the CIA in 1970 and 1973; his description corresponded with the testimony of the two CIA employees who stated that the records indicated that although security had approved him for assessment for possible future use (Tr. 5016), operations had then been unable to find him and had cancelled interest in him in 1971 (Tr. 5048). Townley's contacts with the CIA were exhaustively explored through cross-examination of him and direct examination of Gambino and Smith. To argue that a denial of CIA involvment constitutes a proffer supporting involvement is to turn logic on its head. The defense was never able to offer any evidence at all that Townley's fleeting contact with a public office of the CIA was anything other than what he said it was. Furthermore, the assertion that a CIA front organization supplied him with an alibi is unsupported in the record and simply untrue.

Appellants assert that the court "prevented defense counsel from presenting any evidence to show the CIA's motive for ordering Letelier's assassination" (Appellants' Brief I, p. 69). In fact, the court prevented them from suggesting by inadmissible hearsay

and innuendo allegations which they were totally unable to prove through competent testimony. The court committed no abuse of discretion in limiting such improper efforts.

VI. The trial court did not abuse its discretion in denying cross-examination as to a Government witness's religious beliefs and alleged drug addiction.
(Tr. 3498, 3501, 3505, 3510-3511, 3514.)

Appellants argue that the trial court's refusal to permit them to cross-examine Ricardo Canete about his religious beliefs and alleged drug addiction was an improper limitation on their right of cross-examination. It is clear, however, that the court committed no abuse of discretion since the first line of inquiry was prohibited by federal rule and the second line was based on a totally insufficient factual proffer.

Both areas of inquiry were raised by Ignacio Novo's counsel, who proffered to the court, among other things, that he wanted to question Canete about visits to a psychiatrist to show that he was "crazy" (Tr. 3498) and about his several marriages to show that he was "immoral" (Tr. 3505). Counsel informed the court that Canete's family disapproved of him and thought that he was "crazy" and drug-addicted because he had "been from one trouble to another." In fact, "he has alienated his entire family because of his conduct. . ." (Tr. 3501). Thus counsel's proffer consisted of the personal opinion of Canete's family, who were upset because Canete had often had legal problems and because he

was testifying against other Cubans (Tr. 3501). Clearly, the personal opinion of a witness' family as to his general character is an improper basis for any cross-examination. No proffer whatsoever was made that Canete was drug-addicted either at the time of his meetings with Ross and Ignacio Novo or at the time of trial; the required foundation for asking questions about drug use was thus completely absent. In United States v. Leonard, 161 U.S. App. D.C. 36, 494 F.2d 955 (1974), the Court noted that where there was no finding that the witness was on drugs on the day of the offense, there was no evidentiary ground to sustain the contention that drugs interfered with the capacity of the witness to observe the events. A showing must also be made prior to cross-examination that the witness is using drugs at the time of trial if a cross-examiner wishes to test ability to recollect and relate. United States v. Banks, 520 F.2d 627 (7th Cir. 1975). Again, no such showing was ever made in the instant case. The trial judge indicated appropriate concern for this requirement in the following colloquy:

> MR. SUAREZ: I understand that this man is also drug addicted, and that's from his father.
>
> THE COURT: All right. If the quality of that proffer is no better than the quality of the other proffer, it's denied. (Tr. 3514.)

The court acted properly within the bounds of its discretion in denying permission to cross-examine based on such an inadequate factual proffer. Even in cases where the factual proffer was sufficient, courts have recognized that, "it is clear that a trial

judge must exercise discretion concerning the proper scope of cross-examination of a witness regarding his alleged use of narcotics, due to the highly inflammatory nature of such an allegation." United States v. Fowler, 151 U.S. App. D.C. 79, 83, 465 F.2d 664, 668 (1972).

The trial court was equally within its discretion in denying cross-examination of Canete about his religious beliefs. Canete testified on voir dire that he consulted the spirits of his religion before doing certain things, but that he had no religious beliefs which would invalidate the taking of the oath (Tr. 3510). After several more questions by counsel, the judge cut off further inquiry with the observation that he too sought spiritual guidance before doing certain things (Tr. 3510-3511). The court's action in this regard was not only justified, but was required by Rule 610, Federal Rules of Evidence, which provides that, "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced." The fact that Canete may have been an adherent of an unconventional religion does not in any way vitiate the prohibition of the federal rule. Legal commentators have reasoned that the danger of prejudice warrants foreclosing inquiries into religious beliefs. McCormick notes that "the disclosure of atheism or agnosticism, or of affiliation with some new, strange, or unpopular sect, will often in many communities be fraught with intense prejudice."

3 Weinstein & Berger, Weinstein's Evidence (1978), 610[01]. The trial court committed no abuse of discretion in requiring that the scope of cross-examination be governed by the Federal Rules of Evidence and supported by an adequate proffer of fact.

VII. The trial court did not abuse its discretion in refusing to allow the defense to conduct a physical demonstration during cross-examination of a Government witness.
(Tr. 3007, 3010-3012, 3029-3030, 3036-3037, 3062-3064, 3083, 3158-3162.)

Appellants contend that the refusal by the trial court to permit them to conduct a physical demonstration during cross-examination of a Government witness was an improper limitation on their right of cross-examination. This argument finds no support in the record.

On September 21, 1977, Richard Sikoral of the FBI had a conversation with Alvin Ross. Ross said that he was establishing a business called C and P Novelty Company at 4523 Bergenline Avenue, Union City, New Jersey (Tr. 3158-3159). In a later effort to find Ross and interview him, Sikoral went to 4523 Bergenline Avenue on February 28, 1978. He spoke to Luis Vega, the building superintendent and asked him if C and P Novelty Company was located in the building (Tr. 3010, 3161). When he affirmed that it was, Sikoral showed him some photographs to try to determine if Alvin Ross was likely to be found there. Vega picked out Ross' picture

as the man called Carlos P. Garcia, who had rented the room for C and P Novelty (Tr. 3010-3011).[49/] Vega told the agents that Garcia had failed to pay his rent and that he was cleaning out the C and P room so he could use it for his own office. Sikoral asked him to call the FBI if he found anything interesting during his cleaning efforts (Tr. 3007, 3012, 3162). After failing to find Ross at the C and P Office, Sikoral went to Ross' home and found him there. Ross explained that the business run by himself and his partner, Carlos P. Garcia, had gone bankrupt (Tr. 3160).

On March 6, 1978, Vega found some items in the office which looked like bomb materials, so he called the FBI. When they arrived, he gave them all the items, which otherwise he would have thrown away (Tr. 3029-3030).

After the direct examination of Vega was completed, the defense proffered that they had the real Carlos P. Garcia available. On voir dire Vega identified the man presented by the defense as the man who had rented the C and P office (Tr. 3036-3037). Although the defense wanted to conduct a physical identification of Garcia by Vega on cross-examination, the court ruled that such a demonstration would have to be conducted during the defense case. The court did allow the defense to ask Vega on cross-exam-

49/ Contrary to appellants' assertion, Sikoral was interested in an accurate identification, not in "making a case," when he showed the pictures to Vega; his only goal at that time was to locate Ross to interview him. No items had yet been found in the C and P office and Sikoral thus had no idea that a link between Ross and that office would contribute anything whatever to helping him "make a case" (Appellants' Brief I, p. 73) against Ross.

ination whether he had identified a person other than Ross as Carlos P. Garcia. Vega explained that the man he had seen outside the presence of the jury was definitely the Garcia with whom he had dealt; he did not recall whether he had seen Ross at 4523 Bergenline (Tr. 3062-3064).

As noted in a previous discussion, supra, pp. 74-80, the trial court has wide discretion in refusing to permit the presentation of an affirmative defense through cross-examination of Government witnesses. United States v. Stamp, supra; Baker v. United States, supra. In this situation, the jury was fully informed that Vega had been mistaken in his identification of Ross as Carlos P. Garcia. Furthermore, the Government made Vega fully available for the defense to recall in their own case (Tr. 3083). For tactical reasons best known to appellants, they failed either to recall Vega or to present the mysterious Garcia himself when they had the opportunity to do so. To argue that they were improperly prevented from doing on cross-examination what they deliberately chose not to do in their own case is disingenuous at best.

VIII. The trial court properly exercised its discretion in controlling the scope of cross-examination in various other incidents objected to by appellants.

(Tr. 1474-1484, 2006, 2041, 2053, 2142-2151, 2168, 2188-2189, 2520-2525, 2544, 2588-2598, 2786, 3363-3365, 3375-3391, 3393, 3396, 3467, 3474-3481, 3516, 3551, 3553, 3565-3567, 3834, 4386-4480, 4485-4499, 4634-4654, 4721-4722, 4733, 4736, 4835, 4968, 4979, 5019, 5027.)

In their "Conclusion" to Point II of their brief, appellants

complain, in a summary fashion and without legal authority, about twenty-three other instances of allegedly improper restrictions on cross-examination (Appellants' Brief I, pp. 75-78). Analysis of their transcript references reveals that several of these instances were raised under the heading of issues already discussed; the other claims of improper restriction are simply frivolous. Since appellants saw fit to deal with their numerous complaints in so cursory a manner, we will not belabor our analysis.

Appellants' transcript references -- Tr. 1474-1484, 2041, 2168, 4721-4722, 4736, 4979, 5019, and 5027 -- all fall into categories raised by appellants in other sections of their brief. Cross-examination of Isabel Letelier (Tr. 1474-1484) as to whom she thought had been opening her mail was limited on the basis of Casey v. United States, supra, United States v. Stamp, supra, and Baker v. United States, supra, all discussed in a previous section, supra, pp. 74-79. Appellants omit to mention that they recalled Isabel Letelier in their own case and examined her fully on this subject (Tr. 4634-4654).

The defense questioned Townley (Tr. 2041) on whether the Government had asked him about his activities outside the United States. Since questions about those alleged activities had already been excluded on Rule 608 (b) and Fifth Amendment grounds, the court sustained an objection. Defense counsel then stated that he was really asking if it was made clear to Townley that he would not have to talk about other activities; Townley replied "yes" (Tr. 2041).

The court also sustained an objection to detailed questions about Townley's activities with Paz in Europe (Tr. 2168); again because such questions had already been excluded on Rule 608 (b) and Fifth Amendment grounds.

At Tr. 4736 the defense requested that the CIA record of meetings with Townley be turned over to them. The court decided to look at the record in camera to determine if they contained discoverable material. A complaint about this decision falls not under the subject of limited cross-examination (since no limitation occurred), but under the topic of restricted discovery (Appellants' Brief I, pp. 157-169).

Appellants' references to Tr. 4721-4722, 4979, 5019, and 5027 were all addressed by themselves and the Government in a previous section (Appellants' Brief I, pp. 64-69; Government's Brief, pp. 74-80.

The claim that the trial court abused its discretion in the other instances cited by appellants is completely frivolous. Appellants assert that they were precluded from asking where Townley obtained his lawyer to show that the provision of a lawyer might have been a benefit of Townley's plea agreement. The court decided that, "in the absence of anything that you can demonstrate to the Court by way of a proffer, I will not allow you to ask the question." (Tr. 2006.) The defense could point to nothing which supported such a hypothesis. Appellants have again omitted to mention in their brief that they asked the question of Townley again several

minutes later, and that Townley stated that his parents had retained Seymour Glanzer, Esquire, for him because his sister had been impressed with him when he represented her at the grand jury (Tr. 2053).

Appellants' assertion that they were precluded from determining whether the Government prepared Townley's testimony borders on a deliberate misrepresentation to this Court. The defense in fact cross-examined Townley exhaustively on the subject (Tr. 2142-2151, 2188). The court instructed the jury on the proper light in which to regard this testimony, stating that no adverse inference should be drawn against either party because they have discussed the testimony of witnesses before trial (Tr. 2188-2189). Such an instruction constituted no limitation whatsoever on the defense's right to cross-examine on the issue.

The objection sustained by the court at Tr. 2544 was not directed to the issue of whether Townley was testifying a certain way because he did or did not know that Jorge Smith had been subpoenaed to testify; the objection was directed to the implication left by the defense question that if the Government did not call Smith, it was trying to hide something. Since there are many reasons why a party may choose not to call a witness it has subpoenaed, such an implication is clearly improper. The court committed no abuse of discretion in sustaining the objection.

At Tr. 2786 the court refused to allow defense counsel to ask more questions about the discussion between Townley and the court

at the time Townley pleaded guilty. Specifically counsel explained his intention: "[I] am going to ask him what your Honor meant by that question" (Tr. 2784). Since Townley could not competently testify about what the judge had meant and since the issue had been fully ventilated on cross and redirect examination (Tr. 2520-2525, 2588-2598), the court was well within its discretion in refusing to let the matter be endlessly pursued.

The limitation on the use of Sherman Kaminsky's sentencing transcript for cross-examination purposes was rendered absolutely necessary by the personal characterization of Kaminsky by the sentencing judge as a "slimy, inhuman creature" (Tr. 4436). Such references were replete throughout the transcript and would have seriously prejudiced the jury in its evaluation of Kaminsky's testimony. The court ruled that the pertinent part of the transcript, in which the judge made Kaminsky's continued cooperation a condition of his probation, could be used on cross-examination (Tr. 4449). Moreover, all of Kaminsky's motives for cooperating with the Government, including the conditions of his probation, were fully explored during the extensive cross-examination to which defense counsel subjected him (Tr. 4386-4480, 4485-4499).

Appellants also claim that they were improperly restricted in their cross-examination of Canete (Tr. 3363-3365, 3391, 3393, 3565-3567). At Tr. 3391 the court sustained an objection to a defense question as to whether the Treasury agents in Canete's counterfeiting case had told him they carried a great deal of

weight with his sentencing judge (Tr. 3391). Canete's cooperation in the counterfeiting case had no relation at all to his cooperation in this case; moreover, counsel had already questioned him extensively about his motives for cooperating with the Government (Tr. 3375-3391). The court also sustained an objection to a defense question at Tr. 3393 as to whether Canete had filed an income tax return declaring the money he had received from Wack for expenses. This was a totally improper question since it involved an interpretation of tax law by the witness and a matter of possible Fifth Amendment privilege. Appellants' argument that they were limited in exploring the possibility that Canete was incarcerated at the time of his meetings with appellants is equally meritless. The court allowed the defense to ask Canete the dates of his sentences in 1974 and 1975 (Tr. 3363-3365). Even those questions were irrelevant since Canete testified that he had not seen Guillermo Novo at all from 1965 to 1977 and had seen Ignacio approximately five times (Tr. 3363-3365, 3516). None of the conversations pertinent to this case which the Government elicited occurred before 1977; in fact, the murders themselves did not occur until 1976. Appellants' stated purpose for asking about 1974 and 1975 incarcerations was thus a transparent fiction. At Tr. 3565-3567, the court refused to permit defense counsel to re-open their cross-examination on the issue of whether Canete had told Agent Wack in a taped telephone call that Ross appeared very nervous one night. Canete had testified that Ross had seemed

a little excited but otherwise calm and relaxed (Tr. 3553). Although counsel had listened to the entire tape before cross-examining Canete, he had not been sure if there was a discrepancy (Tr. 3551). The court ruled that so minor a difference between the testimony and the tape did not warrant re-opening cross-examination, especially since counsel had already cross-examined Canete extensively about the telephone call (Tr. 3467, 3474-3481). The court also properly sustained objections on relevancy grounds at Tr. 3396 as to where Canete had obtained his own Social Security card and whether he knew it was a crime to forge Social Security cards; no question was asked about where he had obtained the documents he forged for appellants.

Appellants' other complaints about limited cross-examination are so inadequately raised in their brief (Appellants' Brief I, p. 77) that we consider it unnecessary to address them in detail. The instances cited are too trivial to have constituted an abuse of the trial court's discretion in controlling the scope of cross-examination (see Tr. 3834, 4722, 4733, 4835, 4968).

IX. Appellants' Sixth Amendment rights were not violated by testimony about statements made by them to fellow inmates. (Tr. 3681-3682, 3686, 3772, 3690-3691, 3693, 3707, 3768-3769, 3803-3808, 3812-3814, 3816-3819, 3832, 3838, 3901, 3934-3935, 3937-3942, 3944, 3947-3948, 3966, 4176, 4200-4201, 4279, 4342, 4382.)

Appellants argue that their Sixth Amendment right to counsel was violated by the testimony of two Government informants about

incriminating statements made to them by appellants. Their position is supported neither by the facts of the case nor by the law on this issue.

Sherman Kaminsky was placed in the Metropolitan Correctional Center (MCC) in New York in Spring, 1978, to await sentencing on charges to which he had pled guilty twelve years before. Contrary to appellants' assertion, he was not placed in the facility to gather information on pre-trial detainees, but rather because MCC is the institution in which most federal prisoners are routinely confined. Prior to sentencing in those cases he had fled the jurisdiction and had been a fugitive until arrested in 1978 (Tr. 4382). While incarcerated, Kaminsky was approached by Alvin Ross, housed on the same floor, who had heard that Kaminsky had been a member of the Israeli Hagannah and who wanted to discuss with Kaminsky the formation of para-military organizations (Tr. 4342). Over the next month or two, Ross initiated numerous conversations with Kaminsky and talked continually about a variety of subjects, including his involvement in the Letelier murder, the CIA as a scapegoat, CNM plans to blow up Russian ships in American harbors and attempts on the life of Fidel Castro (Tr. 3681, 3804-3808). Concerned that such plans could generate an international incident, Kaminsky gave the notes he had been taking to his attorney, William Aronwald, Esquire, asking him to notify the CIA (Tr. 3806). According to Aronwald, there was no mention by Kaminsky of the case in which Ross was charged (Tr. 3681). Kaminsky's sole reason

for requesting that his attorney transmit his notes to the CIA was his belief that Ross was a dangerous man capable of carrying out his plans (Tr. 3819). Aronwald, however, decided to give the notes to Assistant United States Attorney Schwartz in New York; Schwartz at that time knew nothing about Ross or the case in which he was charged (Tr. 3682).

On June 14, during the time when Ross was seeking out Kaminsky for conversation, Kaminsky appeared for sentencing on his case before Judge Irving Ben Cooper. Although Judge Cooper spoke in general terms about his requirement that Kaminsky continue cooperating with the Government as a condition of probation, both Aronwald and Kaminsky understood this requirement to refer to information about threats on the life of a federal judge and a police officer which Kaminsky had, unsolicited by the Government, previously reported to authorities (Tr. 3690-3691, 3707, 3816). Both of these investigations were still proceeding at the time of the sentencing (Tr. 3816, 3832); they related not to incriminating statements made by inmates about their pending cases, but to planned future murders by certain inmates and their associates (Tr. 3816).

Appellants' argument that the Government "instructed" Kaminsky at the sentencing to continue to provide information to the Government (Appellants' Brief I, p. 79) is based on the deceptive use in their brief of a lengthy quote from the transcript which deletes two entire pages, as well as other references which change the whole meaning of the quoted text (Appellants' Brief I, pp. 84-85;

cf. Appellants' Appendix, Vol. II, pp. 21-23). An accurate version of the transcript is worth quoting, since it reveals the extent to which appellants have misrepresented the record. The quotation on page 84 of Appellants' Brief I of the statement by Assistant United States Attorney Schwartz actually appears in the transcript as follows:

> MR. SCHWARTZ: As far as Mr. Kaminsky's ability to cooperate, (excised by district court) has previously advised me that he is hopeful of securing Mr. Kaminsky's testimony in some capacity, be it the grand jury or at a trial or sentencing hearing concerning individuals that Mr. Kaminsky has provided information about.
>
> 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 don't think that the U.S. Attorney's Office for this district can do anything to enable Mr. Kaminsky to do that.
>
> Whatever sentence Your Honor imposes is going to have to be taken in light of the outstanding charges in other districts, (excised by district court) and to the extent that Mr. Kaminsky is able to secure his liberty by the sentence Your Honor imposes and the other legal problems he has in other jurisdictions. I am just hopeful, and 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. (Appellants' App., Vol. II, pp. 22-23) (underlined portions indicate the portions deleted by appellants in the "quotation" presented in their brief, pp. 84-85).

Thus it is clear from the fully and accurately presented quotation that the Government had no agreement with Kaminsky about any other areas of cooperation and that in fact it would do nothing to help him in any such efforts. To argue from this discussion

that Kaminsky became a Government agent for any and all purposes at the time of his sentencing is pure sophistry. The Government at that point was totally unaware of any relationship between Kaminsky and Alvin Ross; Assistant U. S. Attorney Schwartz was not even aware of the existence of Ross, much less of the case in which he was charged (Tr. 3682, 3816-3817).

When Schwartz eventually discovered the nature of the charges against Ross, he realized that Kaminsky's notes on Ross's statements might be relevant to the case. Accordingly, he determined who was handling Ross' case in the District of Columbia and contacted one of the prosecutors, Eugene Propper, on August 25. Schwartz read Kaminsky's notes to Propper over the telephone and later sent him a copy by mail (Tr. 3768-3769). Nothing further occurred until October 11, when Kaminsky was in Schwartz' office to discuss the threat on the police officer's life, and Aronwald mentioned the conversations with Ross. Both Aronwald and Schwartz told Kaminsky not to discuss Ross' defense with him or initiate any conversations, but to listen if Ross wanted to talk (Tr. 3812). On October 31, Kaminsky and Aronwald met with Propper, who also emphasized that Kaminsky should never discuss Ross' defense with the Government, should never approach Ross, and should never initiate a conversation with him (Tr. 3813).[50/] In late January, a formal

50/ Contrary to appellants' characterization of this testimony by Kaminsky as "self-serving" (Appellants' Brief I, p. 96), his account was corroborated by both Aronwald and Propper (Tr. 3686, 3772). Aronwald and Propper also arranged for Aronwald to screen all of Kaminsky's notes and delete any reference to Ross' defense before sending them to the Government.

agreement was finally reached, whereby Kaminsky agreed to testify in return for the Government's recommendation that he be sentenced to time served and probation in his Chicago case (Tr. 3693). After extensive voir dire examination of Kaminsky on all these facts, the court ruled that Kaminsky would be permitted to testify about conversations with Ross which occurred prior to his October 31 discussion with the prosecutors in this case, at which point he arguably became a Government agent (Tr. 4279).

Appellants argue that all of Kaminsky's testimony should have been excluded under Massiah v. United States, 377 U.S. 201 (1964), which renders inadmissible testimony by a Government agent about a defendant's statements to him when the defendant has not waived his right to have counsel present. We agree that the current state of the law requires the exclusion of such testimony when it is the product of interrogation by a Government agent. The controversy then resolves itself into two pivotol questions: who is a government agent and what is "interrogation"?. The importance of the definition of "interrogation" is highlighted by the conclusion of the Supreme Court in Brewer v. Williams, 430 U.S. 387 (1977), that no Sixth Amendment right to counsel "would have come into play if there had been no interrogation." Id. at 400.

The threshold requirement, of course, for any invocation of Massiah is the status of the defendant's confidante as a Government agent. It may be true, as appellants argue, that Sherman

Kaminsky had a motive to fabricate information to impress his sentencing judge. Such a motive is relevant to his credibility, but not to the question of whether the Government recruited him to act as an informant.

There can be no argument about the admissibility of the testimony when the inmate was acting solely on his own at the time of the statements. In that situation, the inmate is in the same position as any other citizen to whom a defendant makes incriminating admissions. The Court in United States v. Coppola, 526 F.2d 764 (10th Cir. 1975), upheld admissibility where the statements were made to a fellow inmate in personal conversations and were voluntary and spontaneous. The statements were not the product of direct or indirect police interrogation and did not result from any efforts to bring about self-incrimination. In United States ex rel. Baldwin v. Yeager, 314 F. Supp. 10 (N.J. 1969), aff'med., 428 F.2d 182 (3rd Cir. 1970), the Court upheld the admissibility of defendant's statements where a fellow prisoner was apparently acting independently in gathering information before speaking to the prosecution. The Court held that there was no taint on the original conversations because the prisoner later made an agreement to testify for the Government. Similarly, in United States ex rel. Milani v. Pate, 425 F.2d 6 (7th Cir. 1970), the Court held that Massiah cannot be invoked to make inadmissible an indiscreet confession to a fellow inmate who at the time is not a Government agent. The Court in Paroutian v. United States, 370 F.2d

631 (2nd Cir. 1967), reached the same conclusion in upholding the admissibility of statements to a cell mate who then contacted the Government. The Court stated, "We are certain that in deciding Massiah, the Supreme Court did not intend to hold that all those to whom indicted persons make admissions become ipso facto Government agents and that nobody to whom defendants in criminal cases make incriminating statements can testify to those statements unless counsel was present when the statements were made." Id. at 632.

The record in the instant case clearly reveals that prior to October, 1978, Kaminsky was acting entirely on the basis of his own motives and not at the behest of any Government agency. He reported Ross' admissions to the Government and testified against him because "in my mentality, Alvin Ross Diaz stands for everything I dislike in a human being." (Tr. 3814.) Kaminsky did not discuss Ross with any member of the Government until October, long after Ross had made his admissions to which Kaminsky testified. Appellants claim that Kaminsky became a Government agent for all purposes at his sentencing on June 14. However, as discussed above, the Government had not requested that Kaminsky do anything other than follow up on the investigation of threats already underway; these situations had no relation to appellants or their case. Appellants have cited no legal authority whatever for their novel proposition that by imposing continued cooperation in specific situations as a condition of probation, in a proceeding over which

the Government has no control, a member of the federal judiciary can transform a defendant before him on sentencing into an agent of the Executive Branch. Since Massiah applies only to cases where the Government deliberately tries to elicit incriminating statements, the scenario posited by appellants is insupportable.

Even had Kaminsky been acting as a Government agent at the time of Ross' statements, and he was not, we submit that his conduct would not have constituted the "interrogation" which is necessary to trigger Massiah. Exhibiting concern for Ross' Sixth Amendment rights, after it learned of past conversations, the Government explicitly told Kaminsky never to approach or initiate a conversation with Ross. Indeed, as Kaminsky testified, "Mr. Ross will talk and talk and talk as long as you are able to listen. There were times that 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, sir" (Tr. 3808). Kaminsky followed instructions in not approaching Ross, but found it difficult to avoid him even had he wanted to (Tr. 3808).

Courts which have considered the definition of interrogation have generated considerable conflict among themselves. In Beatty v. United States, 377 F.2d 181 (5th Cir. 1967), summarily reversed, 389 U.S. 45 (1967), the Supreme Court found a violation of Massiah where a Government agent concealed himself in the trunk of a car to listen to a conversation between the defendant and an informer.

Although the defendant himself had initiated all aspects of that conversation, the Court apparently felt that the circumstances of the conversation were sufficiently similar to Massiah to warrant reversal. In Brewer v. Williams, 430 U.S. 387 (1977), the Supreme Court held that questions and statements to a deeply religious, emotionally unstable defendant about a murder victim's right to a Christian burial constituted surreptitious interrogation. The detective in that case admitted that he had deliberately set out in his statements and questions to elicit incriminating information just as surely as if he had conducted a formal interrogation. In United States v. Hearst, 563 F.2d 1331 (9th Cir. 1978), on the other hand, the Court upheld the admissibility of defendant's statements where jail officials had tape recorded a conversation between the defendant and a visitor. The Court found that there was no Massiah problem in the absence of any Government effort to elicit incriminating statements from the defendant. Where there was no formal or surreptitious Government interrogation, the Court found that the defendant's Sixth Amendment right to counsel was not violated.

In recent cases where a defendant's cell mate was already a Government informer at the time of the incriminating admissions, the Circuits have split in their decisions. In Henry v. United States, 590 F.2d 544 (4th Cir. 1978), certiorari granted, 100 S. Ct. 45 (1979), the Court held in a 2-1 decision that any conversations, no matter how unsolicited, between an informer cell

mate and a defendant were a form of Government interrogation. In that case, the informant was specifically warned not to initiate conversation or question the defendant about the pending charges. On the other hand, employing what the Government submits is the better reasoning, the Court in Wilson v. Henderson, 584 F.2d 1185 (2nd Cir. 1978), upheld the admissibility of statements made in virtually identical circumstances. The defendant's cell mate had agreed to act as a Government informant and had been specifically instructed not to inquire or question but to keep his ears open for any information that could lead to the apprehension of accomplices. After the informant was placed in the defendant's cell for that purpose, the defendant made incriminating statements to him. In upholding the admissibility of the statements, the Court reasoned that when a defendant makes an incriminating statement in a face-to-face encounter with an informant, he knowingly assumes the risk that his listener may repeat what he says to anyone, including the Government. Indeed, the Supreme Court expressed a similar conclusion in a Fourth Amendment context in Hoffa v. United States, 385 U.S. 293 (1966). The Court stated, "Neither this court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Id. at 302.

In the case before the Court, Kaminsky was never instructed by the Government to elicit any information relative to the charges

pending against appellants. The Government, conscious of its obligations under Massiah, specifically instructed Kaminsky never to initiate any contact or begin any conversation or ask any question designed to elicit incriminating information. On each and every occasion, Ross actively sought out Kaminsky, with whom he evidently felt some ideological affinity, however misplaced. To avoid contact with Ross was impossible for Kaminsky short of attempting to hide when he saw Ross coming. Obviously, the possibilities of avoidance in a prison setting were limited by the realities of the incarceration situation. Kaminsky's conduct can in no sense be characterized as interrogation under either Massiah or Brewer.

Appellants' argument that the testimony of Antonio Polytarides should have been excluded by Massiah is also meritless. Polytarides was brought to the Metropolitan Corrections Center in December, 1977, because the United States Customs Service wanted to question him about records they had seized in connection with the case in which he had been convicted; the case involved the illegal sale of machine guns (Tr. 3901, 3838). While incarcerated, Polytarides was approached by several other inmates who were interested in purchasing weapons from him. A Cuban named Sotomeyer wanted five machine guns for himself and five for the Cuban group responsible for the Letelier bombing (Tr. 3934-3935). In late February or early March Polytarides called Joseph King, a Customs Service agent, and asked to be sent back to his original place of incarceration. He told King that

inmates at MCC were trying to purchase machine guns from him. King instructed him to go ahead with arrangements on weapons purchases with anyone who approached him (Tr. 3937-3939). The only purpose of Polytarides' assocation with these other inmates was the possibility of making new cases; at no time were King or Polytarides interested in obtaining incriminating statements about the cases already pending against them. Polytarides reported his conversations to King only in the context of the weapons transactions (Tr. 3942).

At the end of May or beginning of June, Joseph Battle, who was associated with Sotomeyer, introduced Polytarides to Guillermo Novo, who was also eager to buy weapons. As a matter of normal security and to confirm the legitimacy of Novo's status, Polytarides greeted Novo with the remark that he knew who he was because Sotomeyer had mentioned that his group had arranged the Letelier bombing. Novo replied that his group had indeed been responsible (Tr. 3940-3941). Negotiations for the weapons transactions continued, with Polytarides reporting the progress of the deals to King. In the middle of July, King asked Polytarides to try to get information on the location of the two Cuban fugitives indicted in the case. Polytarides told Novo that he might be able to help the fugitives leave the country on a Greek tanker. Novo reacted with suspicion, said he was not interested, and broke off further contact with Polytarides (Tr. 3944). In August, King indicated to Polytarides that he would inform the Parole Board of his cooperation in the weapons transactions (Tr. 3966). Polytarides received

a January parole date in November and in early December Novo asked him about his parole situation. Polytarides said he had received his parole date and Novo seemed happy about it; he resumed negotiation, entirely on his own initiative, for one hundred sixty machine guns, twenty pounds of plastic explosives, and two hundred hand grenades (Tr. 3947-3948). One day Novo appeared very angry, which Polytarides thought strange because Novo was usually a calm, relaxed person. Polytarides asked what was wrong; Novo replied that they had been betrayed by certain people in his case, but that he would pay them back. Polytarides had already been granted parole at that time. He had no intention of trying to elicit any information from Novo by his question nor anything to gain by doing so. His only interest in Novo's mood was a personal reaction to his unusual demeanor (Tr. 4176).

At the end of extensive voir dire examination of Polytarides, the court ruled that all testimony by Polytarides would be excluded except the account of the last statement by Novo after Polytarides had been granted parole (Tr. 4200-4201). The context of this final conversation makes it clear that Polytarides was not acting as a Government agent eliciting incriminating statements, but as an ordinary citizen acting out of personal curiosity. He had not spoken to Novo since July, he had already received parole, and he had no intention of even trying to listen to any statements about his case which Novo might make. When Novo revived the weapons transaction, Polytarides went along with it, but there was no Gov-

ernment effort to garner incriminating admissions on any pending cases. For Massiah purposes, Polytarides was not acting as a Government agent at the time of the statement; his status thus falls under the rubric of United States v. Coppolo, supra; United States ex rel. Baldwin v. Yeager, supra; United States ex rel. Milani v. Pate, supra; and Paroutian v. United States, supra. It is also clear that he made no effort to re-establish contact with Novo, that Novo approached him on his own initiative when he learned that Polytarides had been granted parole, and that Polytarides did absolutely nothing to elicit incriminating statements. His testimony was therefore also admissible under the standards of Brewer v. Williams, supra and Wilson v. Henderson, supra, even if this Court should find that he was a Government agent for Massiah purposes at the time. Finally, even were the Court somehow to conclude that Polytarides could be characterized as a Government agent attempting to elicit incriminating statements, we submit that the admission of his testimony about a single remark by Novo was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). The remark was susceptible of several different interpretations, only one of which could be inferred to be incriminating. Given the extremely inculpatory testimony by Townley about Novo and the wealth of evidence in the case, this single item of somewhat ambiguous evidence cannot be said to have contributed to the verdict; it was thus harmless beyond a reasonable doubt.

X. Evidence introduced by the Government to prove DINA's motive in ordering the assassination of Letelier was both relevant and admissible.
(Tr. 1351-1352, 1363-1365, 1375, 1987.)

Appellants argue that the testimony of Government witnesses George McGovern, Ralus ter Beek, and Isabel Letelier was presented solely to "provide the basis for a lucrative movie" (Appellants' Brief I, p. 102) and to "evoke sympathy from the jury" (Appellants' Brief I, p. 125). In pursuing their unprofessional personal attack on the integrity of the prosecution, appellants have once again sought to divert attention from the obvious legal support for this testimony.

Evidence relevant to the issue of motive is universally accepted as competent, admissible testimony. United States v. Nolan, 551 F.2d 266, 273 (10th Cir. 1977); United States v. Falley, 489 F.2d 33, 39 (2d Cir. 1973). Indeed, even when the evidence demonstrates other criminal acts of the defendant, its probative value as to motive often outweighs its prejudicial impact. United States v. Lee, 166 U.S. App. D.C. 67, 509 F.2d 400 (1974); United States v. Parker, 549 F.2d 1217 (9th Cir. 1977); United States v. Johnson, 542 F.2d 230 (5th Cir. 1976); United States v. Mahler, 452 F.2d 547 (9th Cir. 1971), cert. denied, 405 U.S. 1069 (1972). George McGovern and Ralus ter Beek testified about Letelier's political activities in opposition to the military government of Chile. McGovern stated that because Letelier sensitized him on

the issue of human rights violations in Chile, he became more interested in the passage of a bill reducing American aid to that country (Tr. 1351-1352).[51/] Ralus ter Beek described Letelier's efforts in a campaign to stop a proposed loan to Chile by a group of Dutch businessmen; conversations between Letelier and ter Beek occurred in February, June, July, and August, 1976 (Tr. 1363-1365) and were widely publicized (Tr. 1370-1371). The decree revoking Letelier's citizenship which appeared in the Chilean Official Gazette a few days before his death was dated June, 1976 (see Government's Exhibit Nos. 10 and 10a). Obviously, by June, 1976, the Chilean Government decided that it had some reason to deprive Letelier of his nationality; appellants' argument that ter Beek's testimony was irrelevant because the final outcome of Letelier's efforts in Holland did not occur until after June can only be characterized as simple-minded.

Appellants' invocation of the best evidence rule (Rule 1002, Federal Rules of Evidence) in relation to ter Beek's testimony is also disingenuous. ter Beek testified on direct examination only that Letelier's campaign was "a matter of public knowledge"; he said nothing about Dutch newspaper articles until specifically asked on cross-examination whether he had seen any such articles

51/ Appellants' characterization of the testimony as hearsay (Appellants' Brief I, p. 105) reveals ignorance of the rules of evidence. Letelier's statements were admitted not to show that human rights violations occurred in Chile, but to show that he was engaged in efforts to influence American policy toward the Chilean Government.

(Tr. 1375). Appellants' assertion in their brief (Appellants' Brief I, p. 107-108 n.2) that the Government presented testimony about newspaper articles is absolutely false; appellants are attempting to mislead the Court by objecting now to evidence which they themselves elicited at trial.

Appellants also insist that the testimony of McGovern and ter Beek was inadmissible because the Government was unable to prove that officials in the Chilean Government considered these facts in ordering the assassination. Obviously, had the Government been privy to the private councils of the Chilean Government, the task of investigating and prosecuting this case would have been a good deal less difficult. Unfortunately, when intelligence agencies plan assassinations, they rarely publicize the motives for their decision. Consequently, motive must often be proved by inference from circumstantial evidence, which has the same probative value as direct testimony. Holland v. United States, 348 U.S. 121, 139-140 (1954); Robinson v. United States, 154 U.S. App. D.C. 265, 475 F.2d 376 (1973); United States v. Coombs, 150 U.S. App. D.C. 333, 464 F.2d 842, 843 (1972). The Government here provided more than enough evidence from which the jury could infer that DINA officials were aware of Letelier's political activities and made their decision on that basis; Townley himself characterized Letelier as a "soldier," carrying on a battle against the Government of Chile (Tr. 1987).

Appellants' objections to the testimony of Isabel Letelier are equally ill-founded. Her description of Letelier's background, imprisonment in Chile, and activities in opposition to the new Chilean Government provided an essential series of links in the chain of motive which led to DINA. Appellants' characterization of her testimony as hearsay is frivolous, as is their best evidence argument on the Chilean newspaper articles she had seen. She testified only that she had read articles critical of her husband's political activities; she gave no detailed description of the contents of the articles and was certainly not vouching for their truthfulness.

George McGovern, Ralus ter Beek, and Isabel Letelier all provided valuable pieces of evidence in the establishment of DINA's motive to order the death of Orlando Letelier. Appellants claimed that the CIA arranged the murder; the Government had to prove that DINA had the motive, the opportunity, and the method to recruit appellants in the assassination plot.[52/] Appellants' desperate desire to exclude any evidence which corroborated Michael Townley was not a legitimate basis on which to make a legal ruling. The trial court committed no abuse of discretion in rejecting their claims.

52/ Appellants apparently forget that they were charged with conspiracy.

XI. The trial court did not abuse its discretion in admitting the testimony of four eyewitnesses to the murders and two medical examiners.
(Tr. 1216-1218, 1236, 1238-1239, 1273-1275, 1277-1279, 1281-1282, 1295-1296, 1298-1300, 1308, 1314, 1312, 5546.)

In opening its case, the Government presented six witnesses, four persons at the scene of the explosion and the two medical examiners who performed autopsies on the victims. Together these witnesses portrayed for the jury the dramatic events which unfolded at Sheridan Circle on September 21, 1976, and the course of the deaths which resulted therefrom. Appellants complain that, in light of their willingness to stipulate to the fact that Orlando Letelier and Ronni Moffitt were killed when a bomb exploded in Letelier's car, the presentation of the death scene testimony by the Government was intended solely to inflame the jury. Therefore, they contend that the trial court erred in admitting the testimony of these witnesses, and that the consequent prejudice to their right to a fair trial necessitates reversal of their convictions.

We submit that their argument is totally without merit. The Government was clearly entitled to present evidence which tended to prove the elements of the offenses charged. Moreover, the trial court sharply restricted both the nature and scope of the proffered death scene evidence, thereby exercising its discretion to exclude evidence which it deemed prejudicial.

While, admittedly, evidence which has the effect of inspiring sympathy for the victim is prejudicial and inadmissible when otherwise irrelevant, United States v. Bell, 165 U.S. App. D.C. 146, 506 F.2d 207 (1974), this Court has recognized "the inevitability of some inflammatory material reaching the jury as the Government properly attempts to prove its case." United States v. Cockerham, 155 U.S. App. D.C. 97, 100, 476 F.2d 542, 545 (1973) (per curiam). The initial inquiry is whether the complained-of evidence is legally relevant and, therefore, admissible. Scales v. United States, 367 U.S. 203 (1961). "[I]f it was relevant to an element of the crime, then whether its asserted prejudicial effect so far outweighed its probative value as to require exclusion of the evidence, was a decision which vested in the sound discretion of the trial judge." Id. at 256 (no abuse of discretion in prosecution arising out of petitioner's association with Communist Party to admit pamphlet which contained a very gruesome description of alleged American activities in Korea, though likely to have effect on jury); accord, United States v. Cockerham, supra (no abuse of discretion to admit graphic description of murder of 7-year-old girl); United States v. Bruno Makes Room For Them, 496 F.2d 507 (8th Cir. 1974) (no abuse of discretion in prosecution for involuntary manslaughter to admit testimony as to extent of injuries of victim killed in auto accident).

Thus, evidence of victims' injuries is admissible where relevant, even though potentially shocking and graphic. In United

States v. Cockerham, supra, testimony was admitted to show that a seven-year-old girl died of exsanguination from a deep slash wound across the throat. She was also strangled and scalded, and suffered a blow to the back of the skull as well as injuries from a sexual assault. This Court upheld the trial court's admission of the evidence -- despite the defendant's willingness to stipulate -- since it went both to establishing the elements of the crime and to showing circumstantially that the defendant had committed the crime in a manner inconsistent with his defense of insanity.[53/] In United States v. Bruno Makes Room For Them, supra, the testimony as to the victim's injuries was deemed relevant to establishing the point of impact of the auto and its speed. See also United States v. Brooks, 146 U.S. App. D.C. 1, 3, 449 F.2d 1077, 1079 (1971) (evidence of single knife wound in victim's throat, from which her husband saw blood "gushing," tended to show premeditation); Hemphill v. United States, 131 U.S. App. D.C. 46, 402 F.2d 187 (1968) (evidence of bloody hammer assault of sleeping 10-year-old boy relevant to show premeditation). In United States v. Moton, 493 F.2d 30 (5th Cir. 1974) (per curiam), the Court upheld admission of a photo showing dismemberment of the victim caused by an explosive, finding it relevant since the punishment for malicious destruction of Government property by means of an explosive escalates with the degree of injury caused. See

53/ Appellants, in their characterization of this Court's holding in Cockerham as based solely on the ground that the evidence was inconsistent with an insanity defense, misread the case.

18 U.S.C. § 844 (f); cf. 18 U.S.C. § 844 (i), with which appellants herein were charged.

Moreover, such testimony is admissible despite a defendant's willingness to stipulate to the victim's injuries. As this Court has held, a defendant does not have the right to stipulate all facts of a crime the proof of which would tend to have an inflammatory impact. United States v. Cockerham, supra, 155 U.S. App. D.C. at 100, 476 F.2d at 545, and cases cited therein. See also United States v. James, 609 F.2d 36 (2d Cir. 1979) (the Government is not required to accept the defendant's offer to stipulate); United States v. Peltier, 585 F.2d 314 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979) (the Government is not bound by the defendant's offer to stipulate); United States v. Spletzer, 535 F.2d 950 (5th Cir. 1976) (a party may not preclude his adversary's proof by an offer to stipulate); United States v. Moton, supra, (the fact that dismemberment of the victim by an explosive has been admitted by the defense does not preclude admission of a photo to show the injury)[54/]; Pittman v. United States, 375 A.2d 16 (D.C. Ct. App. 1977) (the fact that defendant does not dispute where the murder occurred does not preclude admission of photos depicting the scene of the crime). "The reason for the rule is

54/ In addition, in Moton the victim's father was allowed to give a graphic description of the extent of his son's injuries, including a "gruesome description of burns." 493 F.2d at 32. The Court rejected the argument advanced by appellants herein that the evidence was intended solely to inflame the jury since the injuries were uncontroverted.

to permit a party 'to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.'" United States v. Peltier, supra, 585 F.2d at 324, quoting from Parr v. United States, 255 F.2d 86, 88 (5th Cir.), cert. denied, 358 U.S. 824 (1958).

In admitting this type of evidence, the trial court must weigh its probative value against its prejudicial impact, striking a balance in favor of admission where the evidence indicates a close relationship to the offense charged. See United States v. Day, 192 U.S. App. D.C. 252, 591 F.2d 861 (1978). The trial court's exercise of discretion will not be disturbed on appeal "save for grave abuse." United States v. Kim, 193 U.S. App. D.C. 370, 385, 595 F.2d 755, 770 (1979), quoting from United States v. Wright, 160 U.S. App. D.C. 57, 62, 485 F.2d 1181, 1186 (1973). While the trial court should consider a defendant's offer to stipulate as a factor in this analysis, United States v. Peltier, supra, 585 F.2d at 325, an important consideration relating to probative value is the prosecutorial need for the evidence. United States v. Spletzer, supra, 535 F.2d at 956.

In this case, appellants Guillermo Novo and Alvin Ross were charged with conspiracy to murder a foreign official[55/], murder of a

55/ 18 U.S.C. § 1117 provides:

> If two or more persons conspire to violate section 1111, 1114, or 1116 of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

foreign official,[56] first-degree murder of Orlando Letelier, first-degree murder of Ronnie Moffitt,[57] and murder by use of explosives to blow up a vehicle engaged in interstate commerce.[58] So, although

56/ 18 U.S.C. § 1116 provides, in pertinent part:

> (a) Whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title, except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life, and any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.

18 U.S.C. § 1111 provides, in pertinent part:

> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

57/ 22 D.C. Code § 2401 provides:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

58/ Footnote on next page.

appellants were apparently willing to stipulate to the fact of the victims' deaths by the explosion of Letelier's automobile,[59] the prosecutors were required to prove beyond a reasonable doubt that the deaths were the result of premeditation and deliberation. Hemphill v. United States, supra, 131 U.S. App. D.C. at 50, 402 F.2d at 191.[60] Those elements must be determined by the jury from the facts and circumstances surrounding the murder. Bostic v. United States, 68 U.S. App. D.C. 167, 94 F.2d 636 (1937), cert. denied, 303 U.S. 635 (1938); United States v. Brown, 518 F.2d 821 (7th Cir.), cert. denied, 423 U.S. 917 (1975), relying on Bostic v. United States, supra; United States v. Savage, 430 F. Supp. 1024

58/ 18 U.S.C. § 844 (i) provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

59/ "Such a stipulation, barren of any detail, would have robbed the government of most of the probative value" of the otherwise admissible evidence. United States v. Peltier, supra, 585 F.2d at 325.

60/ In instructing the jury that it must find beyond a reasonable doubt proof of malice, premeditation, and deliberation, the trial court reminded the jury of the testimony which it heard concerning the bomb explosion, the blowing up of the Letelier vehicle and the resulting deaths of Letelier and Moffitt (Tr. 5546).

(M.D. Pa.), aff'd, 566 F.2d 1170 (3d Cir.), cert. denied, 434 U.S. 1078 (1977).

Thus, it was entirely proper for the Government to produce witnesses who could each relate, from different perspectives, the sequence of events surrounding the explosion. "A prosecutor seeking a first degree murder conviction for premeditated murder has an obligation to bring forward evidence indicating not only intent to kill but also facts from which premeditation may be inferred." Hemphill v. United States, supra, 131 U.S. App. D.C. at 49, 402 F.2d at 190.[61/] The fact that cruelty or brutality is manifested in a killing will raise an inference of malice. United States v. Brown, supra.

Each witness called by the Government added a piece to the mosaic upon which appellants' convictions could be based. Michael Moffitt was, of course, the only eyewitness to the entire sequence of events. Though naturally the jury would be affected by his testimony, his narration of the facts was straightforward and the

61/ In Hemphill, this Court upheld the admission at trial of a great deal of testimony which tended to prove appellant guilty of "an intentional and brutal murder." 131 U.S. App. D.C. at 47, 402 F.2d at 188. There, a ten-year-old boy was killed while sleeping. "The lad, his bed, the walls, the floors, all were covered with blood. He had been hit repeatedly with a blunt instrument, and the blows to his head killed him." Id. at 48, 402 F.2d at 189. A police detective testified that when he arrived upon the scene, the boy's grandmother was "covered with blood from head to foot" and the youngster "was covered with blood. There was blood all over the bed, the walls, the floor, just all over the place." Id. at 54, 402 F.2d at 195 (dissenting opinion). Even this review of the evidence by Judge Tamm "omitted . . . most of the gory detail." Id.

witness maintained his composure (see Tr. 1217-1218). Detective Johnson was the police officer who responded to the scene, and thus his narration of what he observed there was entirely proper. Hemphill v. United States, supra (see supra note 61 at 117); Hackathorn v. United States, 422 S.W. 2d 920 (Tex. Crim. 1964), cert. denied, 381 U.S. 930 (1965) (admission of the testimony of a police officer as to the bloody condition of the victim's clothing was not error where he simply narrated the facts and did not display the clothing). The two civilian witnesses who testified briefly each provided a different perspective as to what took place. One had been driving behind the Letelier automobile and was the only witness presented at trial who actually viewed the explosion from outside the death car. The other, a physician who had been walking in the area, rendered assistance to Ronni Moffitt until the ambulance arrived. Cf. Pittman v. United States, supra (the trial court did not abuse its discretion in determining that photographs of a murder scene were more probative than prejudicial, since each photograph showed different angles and perspectives of the hallway where the murder occurred).

Finally, the two medical examiners who performed the autopsies on the victims provided clinical descriptions of the victims' injuries and their respective causes of death. A trial court has broad latitude of discretion with respect to admission of evidence of the results of an autopsy, State v. Pickering, 217 N.W.2d 877 (S.D. 1974), and such expert testimony is properly admitted in a

homicide prosecution. See United States v. Cockerham, supra, 155 U.S. App. D.C. at 100 n.4, 476 F.2d at 545 n.4; Murray v. United States, 53 App. D.C. 119, 288 F. 1008, cert. denied, 262 U.S. 757 (1923); United States v. Brady, 579 F.2d 1121 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979). In State v. Stewart, 225 Kan. 410, 591 P.2d 166 (1979), the court upheld the trial court's conclusion that the testimony in a first-degree murder trial of the pathologist who had performed the autopsy of the victim was relevant not only to show cause of death, but also to corroborate the violent and brutal nature of the attack, and to show premeditation. Similarly, the testimony of the medical examiners at appellants' trial was straightforward and tended to corroborate the elements of the crimes which the Government was required to prove.[62/]

Appellants' argument with respect to the death scene evidence is seriously undercut by the conscious restriction of the evidence by the trial court.[63/] See United States v. Kim, supra, 193 U.S. App. D.C. at 385 n.68, 595 F.2d at 755 n.68; Tr. 1281. In discussing appellants' offer to stipulate at trial, the following colloquy took place outside the hearing of the jury:

62/ We reject appellants' scurrilous contention that the prosecutor, in seeking a simple statement of the cause of Ronni Moffitt's death in terms that a lay juror could understand, was, as appellants argue, trying "to elicit a more sensationalistic, and obviously rehearsed, diagnosis of the cause of death" (Appellants' Brief I, p. 120). At trial, the court rejected a similar suggestion that a Government witness had been programmed to dramatize his testimony for the jury's benefit (Tr. 1282).

63/ Footnote on next page.

> [THE GOVERNMENT]: Obviously the defense would be willing to stipulate to substantial portions of the Government's case, those portions which may [sic] consider to be harmful to their case. That doesn't mean that it is appropriate that those parts of the evidence be excluded.
>
> THE COURT: The Court understands that.
>
> Each counsel has an assessment of his case, but the Court has the responsibility to see that unnecessary emotional matters are not presented to the jury, and I will be aware of it. (Tr. 1274-1275.)

Thus, the court questioned why the Government needed two civilian witnesses. Upon the Government's explanation that one witness had been driving in Sheridan Circle and the other had been walking, the trial court excluded the walker (Tr. 1296) and severely restricted the testimony of the driver (see Tr. 1216, 1236, 1238, 1295, 1296). The Government proffered two police witnesses (Tr. 1239, 1275, 1296), and only one was allowed to testify. The court viewed the photographs which the Government proffered to show the scene of the crime, excluding four out of the ten (Tr. 1277-1279). It further excluded the black-and-white photographs of the victims proffered by the Government in connection with the medical examiners' testimony (Tr. 1308, 1312). The court sharply restricted the testimony of the physician who ren-

63/ The Government, too, took steps throughout the trial to pare down the evidence it was prepared to produce (see Tr. 1281). It reduced the number of scene witnesses from an original 30 or 35 to the six who testified, plus two others cut by the court (Tr. 1238). The Government had over 75 photographs of the scene, which it cut down to ten, specifically leaving out any pictures showing parts of the body. Color photographs, or any others showing blood, were not proffered at trial (Tr. 1273, 1277-1278).

dered aid on the scene to Ronni Moffitt, specifically concluding that to allow her to go further would be prejudicial (Tr. 1298-1300). The court questioned admitting the autopsy testimony, concluding in favor of admission, but restricting its scope (Tr. 1314). It excluded from evidence the piece of shrapnel lodged in Ronni Moffitt's throat, which caused her death (Tr. 1312). We submit that the thoughtful evaluation of the proffered testimony by the trial court constituted an entirely appropriate and discriminatory exercise of its discretion.

XII. The admission into evidence of the arms list and brigade manual was based on a proper balancing of probative value and prejudicial impact and, in any case, was harmless error.
(Tr. 5110, 5200, 5583-5589, 5597.)

Appellants claim that the admission into evidence of the arms list and brigade manual presented by the Government was reversible error because neither item had any relevance to the issues in this case and both served to prejudice the jury. A review of the record reveals this argument to be meritless.

Contrary to appellants' assertion, the arms list contained mention not only of guns, but also of explosives, fuses, detonating cords, and electrical connections. (See Government's Exhibit Nos. 92-92d.) Opposite each item of equipment were initials under the headings of "Charged to" and "In possession of." The initials "A.R.," "V.P." and "G" appeared with great frequency and represented, as the Government stated in closing argument (Tr. 5200),

three of the indicted defendants: Alvin Ross, Virgilio Paz, and Guillermo Novo. This list with initials was relevant on several points. Michael Townley had testified that the function of CNM members, on both occasions when they cooperated with him, was to supply him with explosives, detonators, and personnel. The arms list clearly indicated that appellants either had possession of or access to the items with which Townley said they supplied him. Additionally, since Ross and Guillermo Novo were charged with conspiring with other defendants, the Government was required to prove the relationship among the co-conspirators. Finally, from the frequency with which the initials "C.P." appeared, the jury could infer that there was indeed a relationship among Alvin Ross, Carlos Pol Garcia, and the C and P Novelty office where the list was found.

Even had the probative value of the arms list not been so clear, there would have been little danger of prejudicing the jury since the jury never saw it. Aside from a brief, generalized mention by the prosecutor in closing argument (Tr. 5200), there was no discussion of the list in the jury's presence. The jury never asked to see any of the exhibits other than those they specifically requested shortly after they retired to deliberate. The arms list was not included in their request.[64/] Thus any possible error in the technical admission of the list was harmless since the jury could not have been substantially influenced by an ex-

64/ See Item 66 in record; Tr. 5583-5589, 5597.

hibit which was mentioned only briefly and which they never saw. Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Lee, 160 U.S. App. D.C. 118, 489 F.2d 1242, cert. denied, 423 U.S. 916 (1973).

The same can be said of the Brigade 2506 manual introduced into evidence by the Government. After the court's ruling that it would send to the jury only those exhibits which they specifically requested (Tr. 5583-5584), the jury asked only to see charts and agreements made with the Government by witnesses (Tr. 5585-5589). Thus appellants' complaint that the "revolutionary rhetoric" of the manual rendered it prejudicial is unsupported by the facts; the jury could not have been influenced by rhetoric which it neither saw nor heard.

The pages of the manual which the Government offered provided detailed instruction on the use and capabilities of several components of the Letelier bomb, including TNT, C-4 plastic explosives, and electrical detonating caps. No "revolutionary rhetoric" appeared on those pages at all. When the court indicated that it would admit those specific pages, the defense moved the admission of the entire manual (Tr. 5110), including those portions which it now labels as more prejudicial than probative. Although there was no assertion that Ross personally participated in the construction of the Letelier bomb, there was testimony from Jose Barral and Sherman Kaminsky that he helped to supply an essential electrical detonating cap and testimony from Kaminsky and Ricardo Canete

that he revealed considerable knowledge of bomb-making techniques. The fact that a detailed description of bomb manufacturing with Ross' name at the top was found in his apartment was surely corroborative of his efforts to secure components of the bomb and of his incriminating statements to Canete and Kaminsky.

The fact that the Government made only a brief mention of the manual in closing argument to rebut a lengthy argument by defense counsel on the absence of surveillance of Canete certainly did not generate reversible error. The court had put no restriction on the use of the manual when it granted the defense request to have the entire document admitted (Tr. 5110). Moreover, Government counsel chose to use in his summation one of the most innocuous parts of the pamphlet (Tr. 5200). Any error which might have occurred in the formal admission of the document was rendered harmless by the failure of the jury to see it, by the defense request to admit the entire manual, and by the Government's extremely circumspect use of its contents.

XIII. Two spontaneous statements made by a Government witness on direct and cross-examination were harmless error. (Tr. 3216-3227, 3295-3296, 3302-3306, 3348-3523.)

Appellants contend that the trial court's refusal to grant a mistrial based on two remarks by Government witness Ricardo Canete constitutes reversible error. In the context of the record, however, it is clear that any prejudice generated by

these statements was too slight to have been a factor in the jury's verdict.

During the course of seventy-five pages of transcripted direct testimony, Ricardo Canete mentioned that he was attempting to purchase forty or fifty pounds of marijuana from appellant Ross during a conversation in which Ross made certain incriminating statements (Tr. 3295-3296). The court promptly instructed the jury to disregard the remark and Canete continued with his testimony after being instructed by the Government to say nothing further about that.[65/] After the witness concluded his direct testimony, the Government explained that it had instructed Canete not to mention the proposed marijuana transaction, but that so much of Canete's testimony had been excluded that it was difficult for the witness to remember exactly what he could or could not discuss (Tr. 3302-3306). The court had excluded substantial portions of Canete's proposed testimony immediately prior to his taking the stand (Tr. 3216-3227). Appellants' argument that the Government deliberately sought to introduce irrelevant and inflammatory material is thus unsupported by the facts. Also inapposite is their citation of United States v. Falley, 489 F.2d 33 (2d Cir. 1973), in which the prosecution calculatedly exhibited in the courtroom a suitcase full of unrelated and offensive-smelling narcotics. Surely a witness' unsolicited passing remark which the jury was

65/ Contrary to appellant's assertion, this was not an effort by the prosecution to "corroborate" the testimony, but was a necessary instruction to prevent any further testimony on the subject.

immediately told to disregard does not fall into the same category.

Appellants have made no showing that Canete's comment was anything other than harmless error under the standard of Kotteakos v. United States, 328 U.S. 750 (1946). Viewed in the context of a six-week trial and Canete's own extensive testimony, the casual remark about a proposed marijuana transaction surely cannot be said to have substantially swayed the judgment. In evaluating whether an incident can be characterized as harmless error, the factors to consider are the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate its effect. Gaither v. United States, 134 U.S. App. D.C. 154, 413 F.2d 1061 (1969). While the case against Guillermo Novo was stronger than the case against Ross, there was more than enough evidence from which the jury could find Ross guilty without considering Canete's testimony. Additionally, as the Government pointed out below, the central issue concerning Ross was whether he had participated in a brutal assassination; the peripheral mention of a marijuana transaction could have generated only miniscule prejudice at most when compared to the heinous nature of the acts charged in the indictment. Finally, the court took immediate corrective action in admonishing the jury to ignore that part of the testimony. Under this combination of circumstances, it is clear that Canete's single remark about a marijuana transaction was harmless error and did not justify a mistrial.

Of similar significance was Canete's statement when under

intense pressure during cross-examination that he had taken a lie detector test on his report to Agent Wack of one conversation with Ross (Tr. 3467). Although Canete did not relate the results of the test, his mention of it was clearly a defensive reaction to cross-examination questions impugning his credibility and integrity. The Government had instructed the witness during pretrial preparation not to mention the lie detector test (Tr. 3472). Appellants now complain that the Government did not remind Canete during the lunch break that any such testimony was forbidden. They omit to mention, of course, that Canete was in the middle of cross-examination at that time and that the court had issued a sequestration order for all witnesses; in fact, appellants themselves invoked that order below in arguing that the Government should not be allowed to talk to its witness during cross-examination (Tr. 1909). By complying with the court's order, the Government was unable to remind its witnesses of anything once cross-examination had begun, even had it been able to guess what questions the defense would ask. The court took prompt corrective action in immediately instructing the jury to disregard Canete's statement and defense counsel's follow-up questions (Tr. 3473-3474). The remark was made at approximately the middle of almost two hundred pages of transcripted cross-examination which contained numerous objections, bench conferences, and comments from the court (Tr. 3348-3523). Certainly we do not argue that the Government had a right to introduce that statement. We do, however, sub-

mit that a single comment spontaneously made by a witness under intense and very lengthy cross-examination was harmless error under Kotteakos, supra, and Gaither, supra, and could best be analogized to the proverbial needle in the haystack. So minor an incident could have exerted no substantial impact on the judgment.

XIV. Appellants were not denied their rights to an impartial jury and a fair trial by the trial court's denial of their motion for change of venue.
(Tr. 2-3, 27-30, 49-52, 109, 253, 257-266, 278-286, 301-308, 317-323, 434-438, 677, 680, 743, 939, 942-1009, 1113-1114.)

Appellants contend that the publicity generated by this case was so prejudicial to them that they were denied their right to a fair trial by an impartial jury. The record, however, reveals the absence of any inherently prejudicial atmosphere and also reflects the selection of a fair and unbiased jury.

Contrary to the picture painted by appellants of continuous, inflammatory publicity, the attention given by the news media to the events of this case was confined to three widely separated periods of time: September, 1976, when the murders occurred; spring and summer, 1978, when Townley began cooperating with the Government and appellants were indicted; and the week before trial in January, 1979. Examination of the newspaper articles cited by appellants indicates that none was dated after August, 1978, five months before trial began. Moreover, the articles were purportedly

factual accounts devoid of the type of passion and hysteria about which courts have traditionally been concerned. In fact, of the ten articles referenced by appellants, only four mention Guillermo and Ignacio Novo and only three mention Ross; all were published no later than five months prior to trial.

Appellants' claim that prejudicial publicity was fueled by the United States Attorney's Office is also without foundation. They neglect to mention that it was the Government during a pre-trial hearing on August 11 which asked the court to issue an order prohibiting anyone from discussing the facts of the case. (See August 11, 1978, status hearing, a.m. session, Tr. 27-30, and p.m. session, Tr. 49-52). This request was generated by a news article prejudicial to the Government's case in which defense counsel were specifically quoted. The Government expressed the same concern several times during voir dire, asking the court to repeat its admonition to the jury (Tr. 434-435, 743). Another article prejudicial to the Government was also published during this period (Tr. 434-435). Thus it is clear that the publicity was, if anything, detrimental to all parties, that the Government made every effort to prevent the facts of the case from being disclosed, and that defense counsel were at least partially responsible for some of the reports (see also Tr. 2-3).

Appellants' argument that the Government deliberately generated publicity by indicting and seeking extradition of the Chilean defendants is patently absurd. The logic of that argument would

require the Government to avoid indicting anyone, no matter how culpable, who was a well-known public figure because the indictment would generate publicity. The result would be that the masterminds of crime could operate with impunity, while the lesser known participants would be forced to accept full blame. Surely appellants would not endorse such a consequence.[66/] The situation here, where the Government confined its efforts to judicial proceedings, is clearly distinguishable from Delaney v. United States, 199 F.2d 107 (1st Cir. 1952), where the Legislative Branch in the form of a Congressional commmittee held well-publicized hearings which prejudiced the defendant under indictment.

Appellants, in relying on United States v. Bonanno, 177 F. Supp. 106, 122 (S.D.N.Y. 1959), misapprehend the standards applicable to appellate review of the possible effects of pretrial publicity. The question at this point is not whether a change of venue would be preferable, but whether the trial was so tainted by inflammatory publicity that the trial court's exercise of its discretion denied appellants a fair trial. The Court in United States v. Marcello, 280 F. Supp. 510, 513 (E.D. La. 1968), cited by appellants, makes this distinction clear in reasoning that the standard for granting a change of venue motion under Rule 21 (a), Fed. R.

66/ Separate indictments would not mitigate the publicity problem since evidence against all defendants would be admissible in a conspiracy trial of each. It should also be noted that appellants, not the Government, made their own choice of well-known associates in the commission of this political crime and thereby helped create the very risk of publicity which they now deplore.

Crim. P., is not as stringent as the standard for reversal when the motion has been denied.

The threshold level of inquiry, as defined by the courts, is whether publicity has rendered the proceedings so inherently prejudicial to a defendant that he cannot receive a fair trial regardless of the care with which jury selection is conducted. With one exception, every case reversed by the Supreme Court on this ground involved the exposure of the jury to inflammatory publicity during the trial itself. Indeed, the trials in such cases resembled a three-ring circus more than a serious judicial proceeding. See Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Shepard v. Florida, 341 U.S. 50 (1951). In Marshall v. United States, 360 U.S. 310 (1959), seven of twelve jurors read a newspaper account of the defendant's other crimes during the course of the trial. The only case involving pretrial publicity in which the Supreme Court reversed, Rideau v. Louisiana, 373 U.S. 723 (1963), presented the spectacle of the defendant, without counsel, making a filmed, detailed confession to the sheriff, a confession which was televised on three consecutive days, with an audience of 86,000 in a community with a total population of 150,000. The Court held that this televised confession constituted a de facto trial of the defendant and thus was so inherently prejudicial that no particularized appellate examination of the voir dire was necessary.

Obviously, the publicity in the instant case is not even comparable to the situation in Rideau. The news reports which did

appear within a week of trial were factual accounts of the charges and of a threat made to the judge by unknown persons. Certainly no such de facto "trial" of appellants occurred as was the case in Rideau.

When prejudice rising to the level of that in Rideau is not present, the next stage of the analysis focuses on the conduct and result of the voir dire examination of jurors. The Supreme Court set out the standard for this inquiry in Irvin v. Dowd, 366 U.S. 717, 722-723 (1961):

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread, and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

The Court went on to reverse the conviction on the ground that 90% of the veniremen thought the defendant was guilty, 8 of the 12 impaneled jurors had a preconceived opinion of guilt and were familiar with the facts and circumstances of the case, including the attribution of other murders to the defendant, and some jury members revealed that they would need evidence to overcome their opinion of guilt.

This Court, in United States v. Haldeman, 181 U.S. App. D.C. 254, 559 F.2d 31 (1976) (en banc), cert. denied, 431 U.S. 933 (1977), adopted a similar approach in reaching its conclusion that the careful exploration of the pretrial publicity issue during voir dire assured the defendants a fair trial. Rejecting the position urged upon this Court by appellants in the instant case, the Court stated:

> Uncertainty could, of course, be avoided by using a per se rule based on the quantity of publicity. Such a rule, however, would be contrary to the law of this circuit, and far removed from the basic question of the fairness of a trial. Similarly, a rule that avoided uncertainty by requiring the trial court to grant a motion for continuance or change of venue whenever a minimal showing of the existence of pretrial publicity had been made would be both contrary to long accepted practice, see, e.g., Fed. R. Crim. P. 21 (a), and only remotely related to the underlying concern with obtaining an impartial jury. Id. at 286, n.38, 559 F.2d at 63, n.38 (citation omitted).

The Supreme Court confirmed the rejection of a per se rule in Dobbert v. Florida, 432 U.S. 282 (1977), wherein the Court emphatically stated:

> Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular the voir dire examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected. . . . Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at this trial. This we will not

> do in the absence of a "trial atmosphere . . . utterly corrupted by press coverage." Id. at 301-303 (citations omitted).

Appellants in the instant case have similarly directed this Court to no portion of the voir dire which reveals any unfairness in either the method or results of the jury selection process. Jury selection, with time out for a suppression motion hearing, is recorded in nine hundred pages of trial transcript (Tr. 109-1009). The trial court warned the veniremen that news reports contained inaccuracies and continually ordered them not to read, look at or listen to any reports of the proceedings (Tr. 253, 257-266, 743, 939, 1113-1114). Under questioning, 88 of the 166 prospective jurors claimed to have read or heard something about the case (Tr. 278-283). Of these 88, 32 had no recollection of the contents of the news reports (Tr. 283-286). The trial court questioned individually each of the remaining 56 who had some recollection of what they had heard or read. The questions included the source and recency of the information, the content of the reports, the existence of any opinions or impressions about the case, the existence of prejudice against appellants, and the ability to render a verdict based only on the evidence. Such a procedure was specifically approved by this Court in United States v. Caldwell, 178 U.S. App. D.C. 20, 32, 543 F.2d 1333, 1345 (1974), and United States v. Bryant, 153 U.S. App. D.C. 72, 77, 471 F.2d 1040, 1045 (1973).

Of the twelve jurors selected (Tr. 942-1009) who rendered the verdict, four had not heard of the case (Tr. 278-283). Four had

heard of it, but had no specific recollection of the facts and no opinion or impression about the guilt or innocence of appellants (Tr. 677, 680). The remaining four had some recollection of what they had read or heard; two had heard about a threat to the judge (Tr. 301-308, 317-320, 321-323, 436-438). Of these two, one indicated that he put very little faith in news reports because "reporters have a tendency to write what they want" (Tr. 320). The other one, although concerned about the judge's safety, had not formed any opinion for or against appellants and felt no fear as far as they were concerned. Although she could not definitely say that she could render an impartial decision, she could definitely follow the instructions of law given to her (Tr. 301-308). None of the jury panel indicated that they had formed any opinion whatsoever about the guilt or innocence of appellants or that they could not render a fair and impartial verdict. Thus the record illustrates the total absence of support for appellants' claim that the jurors must have been so prejudiced that they could not give appellants a fair trial.

The fact that the jury was sequestered (Tr. 109) also reduced the danger of any prejudicial taint. The Supreme Court in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 565 (1976), found that pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically to an unfair trial. Appellate courts must instead scrutinize the proceeding to determine what measures were taken to mitigate any adverse effects of publicity.

In this context, sequestration "enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths." Id. at 564. Additionally, of course, a jury is shielded from the impact of publicity generated during the course of the trial.

The detailed examination of the jury selection process necessary to evaluate appellants' claim completely refutes their assertion of prejudice. Jury selection was conducted with fairness, intelligence, and concern for appellants' right to a fair trial; the result was a group of people able to render a fair and impartial verdict.

XV. The trial court committed no error in its rulings on appellants' open-ended requests for discovery.
(Tr. 9, 2259-2260, 2262, 2904, 4368, 4733-4734, 4736-4737, 4834, 4932-4937, 4943, 4980-5002, 5008-5064.)

Appellants sought during various pretrial hearings and during the course of the trial to obtain discovery of massive amounts of information from Government files.[67] They now contend that, despite the voluminous amount of material given to them by the Government,[68] they were denied information vital to their cross-examination of Government witnesses and to the presentation of their defense.

67/ See Defendants' Motions for Discovery, Inspection, and Bill of Particulars; transcript of November 6, 1978, status hearing, pp. 93-186.

68/ The Government had turned over more than five hundred pages of material by December 13, 1978, and had offered to arrange for defense counsel to see the physical exhibits almost a month before trial. (Transcript of December 13, 1978, status hearing, p. 30).

The record demonstrates, however, that the trial court properly exercised its discretion in determining the scope of discovery and that appellants were denied nothing to which they were fairly entitled.

Appellants have, as usual, glossed over the facts and ignored the applicable legal standards in presenting their argument. It is well settled that defendants in criminal cases have no general constitutional right to discovery; the Due Process Clause governs neither the nature nor amount of discovery which must be provided. Weatherford v. Bursey, 429 U.S. 545 (1977). Rather, mechanisms for defense discovery of certain aspects of the Government's case are limited to three distinct areas: disclosure of exculpatory material under the doctrine of Brady v. Maryland, 373 U.S. 83 (1963); disclosure of prior statements of Government witnesses after their direct testimony under the Jencks Act (18 U.S.C. § 3500); and disclosure of certain specific materials under Rule 16, Fed. R. Crim. P.

The Supreme Court in Brady required the prosecution, upon request, to disclose to the defense favorable evidence that is "material either to guilt or punishment." Brady v. Maryland, supra at 87. The Court in United States v. Agurs, 427 U.S. 97 (1976), refined its decision in Brady by setting out standards of materiality to be used in the evaluation of Brady requests. When the defense has made a specific request for a particular item of exculpatory information, the item is material if the information might have

affected the outcome of the trial. When, however, the defense has made a general request for all Brady material, the Court will find error only if the omitted evidence creates a reasonable doubt that did not otherwise exist. Quoting with approval from In re Imbler, 60 Cal. 2d 554, 559, 387 P.2d 6, 11 (1963), the Court concluded that, "[representatives of the State] 'are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses.'" Agurs, supra at 109. Thus the Supreme Court has explicitly rejected the type of wholesale rummaging through Government files which appellants insist is their right under Brady.[69/]

The second mechanism provided for defense discovery is the requirement outlined in 18 U.S.C. § 3500 that the Government supply the defense with prior statements of Government witnesses after those witnesses have testified on direct examination. To be producible under Section 3500, a statement must be related to the subject matter of the direct testimony and must be signed, adopted or approved by the witness or be a subtantially verbatim, contem-

69/ Appellants also assert that because the Government represented at the November 6, 1978, status hearing that it had not yet discovered any Brady material, the prosecutors must have been lying to the court (Appellants' Brief I, p. 160). We reject completely this aspersion on the integrity of the prosecution; the record clearly indicates that the Government was entirely aware of its continuing obligations under Brady and made every effort to comply with those obligations (see transcript of November 6 status hearing, pp. 31-32). During the thorough review of its files outlined at that hearing, the Government never became aware of any information tending to exculpate appellants.

poraneously recorded recital of a statement. See 18 U.S.C. § 3500 (b), (e)(1), (e)(2); Goldberg v. United States, 425 U.S. 94 (1976); United States v. Friedman, 593 F.2d 109 (9th Cir. 1979); United States v. Harris, 542 F.2d 1283, 1292 (7th Cir. 1976); United States v. Owen, 492 F.2d 1100, 1110 (5th Cir. 1974). A trial court's determination of producibility under these standards will not be disturbed unless clearly erroneous. United States v. Cuesta, 597 F.2d 903 (5th Cir. 1979); United States v. Pennett, 496 F.2d 293 (10th Cir. 1974); Matthews v. United States, 407 F.2d 1371 (5th Cir. 1969); Hayes v. United States, 329 F.2d 209 (8th Cir. 1964).

Finally, under the expanded and liberalized discovery provisions of Rule 16, Fed. R. Crim. P., a defendant may discover material in four categories: (1) statements of the defendant to a grand jury or to a known Government agent; (2) the defendant's prior criminal record; (3) documents and tangible objects which are material to the preparation of the defense, or are intended for use by the Government as evidence in chief at the trial, or were obtained from or belong to a defendant; and (4) the results or reports of scientific tests or experiments which are material to the preparation of the defense or are intended for use by the Government as evidence in chief at the trial. Rule 16 (a), Fed. R. Crim. P. Administration of all Rule 16 discovery is committed to the sound discretion of the trial judge, whose decisions will only be reviewed for an abuse of that discretion. United States v. Adcock, 558 F.2d 397

(8th Cir. 1977); United States v. Evans, 542 F.2d 805 (10th Cir. 1976); United States v. Harris, supra.

The question, then, is whether any denial by the trial court of several files and records sought by appellants constituted a violation of Brady standards, a clearly erroneous decision under the Jencks Act, or an abuse of discretion under Rule 16. In this context, appellants complain that they were denied access to CIA files on Michael Townley, access to CIA files showing an affiliation between the CIA and Audio Intelligence Devices, access to changes in witnesses' stories, access to a prior statement made by Ricardo Canete, and access to the grand jury minutes of a potential defense witness.

A defense request to obtain all CIA files on Michael Townley was first made in a defense discovery motion in September, 1978, and was again raised at the November 6 status hearing, as well as during trial. The Government represented that in the early 1970's Townley had made two contacts with the CIA which were totally unrelated to the instant case. The Government also informed the court that a witness from the CIA would be glad to testify to those contacts. The court then required that an affidavit be submitted by a CIA representative who could summarize what the file revealed (Transcript of November 6 status hearing, pp. 120-121). Two affidavits, one by Marvin Smith and one by Robert Gambino, were duly filed with the court on December 13, 1978 (Transcript of December

13 status hearing, pp. 42-43, 60-61, 71-94); they summarized the contents of the file relating to contacts between Townley and the agency.[70/] Appellants renewed their motion for disclosure of the Townley file during the presentation of their own case on the ground that they needed the file to examine Smith and Gambino, whom they were calling as defense witnesses (Tr. 4733-4734). The court agreed to look at the file in camera to determine if any of it was producible on any theory. After the court had made its in camera inspection of the file, it ruled that there was no basis on which to allow the defense to obtain access to its contents[71/] (Tr. 4933).

The court, in reviewing the requested documents in camera, followed a universally approved procedure. Xydas v. United States, 144 U.S. App. D.C. 184, 445 F.2d 660 (1971); United States v. Medel, 592 F.2d 1305 (5th Cir. 1979); United States v. Friedman, supra; United States v. Arroyo-Angulo, 580 F.2d 1137 (2d Cir. 1978). In addition, it conducted this procedure in a thoughtful and careful manner.

> THE COURT: . . . I looked at the file very carefully. I looked at every piece of paper which in my judgment appeared relevant as well as those which I did not understand. I asked them [Gambino and Smith] to explain them to me. (Tr. 4932.)

70/ These affidavits were admitted as defense exhibits during trial.

71/ The court then placed the file under seal as part of the record for purposes of appellate review (Tr. 4834).

After this careful review, the court concluded that the file contained nothing exculpatory, that there were no discrepancies between the affidavits and the contents of the file, and that the file was not material to the preparation of the defense. In fact, the court characterized the file as "completely innocuous" (Tr. 4943) and told appellants that it did not support their theory of the case (Tr. 4933). Appellants' assertion that the judge realized that the defense might have some legitimate interest in the material is unsupported in the record. Although he asked if any part of the file could be declassified, it is obvious from the context that he was trying simply to avoid the creation of an appellate issue and to solve the problem of storage for the sealed material (see Tr. 4933-4937).

Since the requested file revealed nothing different from the affidavits and since none of the material was exculpatory anyway, denial of access to the file could not have affected the outcome of the trial in any way. Thus the trial court committed no error even under the specific request Brady standard enunciated in Agurs, supra. For the same reasons, the court also committed no abuse of discretion in denying the request in the context of its administration of Rule 16 discovery.

The situation in the instant case is similar to the facts in Xydas v. United States, supra. The defendant there sought discovery of the entire FBI file on his status as an FBI informer. The Government resisted disclosure on the ground that the documents

were "confidential intradepartmental memoranda, the disclosure of which would be detrimental to the FBI's law enforcement function by revealing information concerning the manner and procedures by which the FBI gathers and distributes criminal intelligence data." Id. at 187, 445 F.2d at 663. After reviewing the file in camera, the trial court ruled against disclosure, finding that the materials were neither exculpatory nor relevant to the indictment. The Government agreed to a stipulation which described the dates of the contacts, the general content of the information and the fact that the defendant was a confidential informant. This Court held that the trial court properly exercised its discretion under Rule 16 and that the material was not exculpatory. In rejecting defendant's claim that he had a right to look at anything which could be helpful to his defense, the Court said, "This, of course, is nothing more than a statement of a desire to go on a 'fishing expedition' in confidential government records in the hope that something 'helpful to the defense' might turn up. In such circumstances, privilege may properly be invoked by the Government to prevent such disclosure." Id. at 189 n.11, 445 F.2d at 665 n.11. Appellants here similarly wished to embark on a fishing expedition through files which contained no exculpatory material and had no arguable relevance to the charges beyond the information already set out in the affidavits. Both Smith and Gambino were extensively examined by appellants during the trial on the contents of their files (Tr, 4980-5002, 5008-5064), an opportunity even greater than

that afforded to the defendant in Xydas. The CIA also had a problem similar to that expressed by the FBI in Xydas, since disclosure of the form and methodology of the records could, in the wrong hands, impede the functioning of the agency and be substantially injurious to the necessary intelligence gathering ability of the United States Government (Tr. 4736-4737). Thus, under this Court's decision in Xydas, the trial court in the instant case followed the proper procedure, weighed the proper factors, and fulfilled its proper role in evaluating Brady and Rule 16 requests.

Appellants also claimed below that parts of the CIA file on Townley contained "Jencks statements" within the definition of 18 U.S.C. § 3500 described above. Review of the file in question reveals that it contains neither statements signed, approved or adopted by a Government witness nor contemporaneously recorded and substantially verbatim recitals of any statements by such a witness nor any statements having anything to do with this case; thus the file was not producible under the provisions of the Jencks Act.

Another discovery request made by appellants asked for the production of any CIA files showing an association between the CIA and the business enterprise known as Audio Intelligence Devices (AID). Appellants based this request on their erroneous belief, repeated frequently in their brief (Appellants' Brief I), that AID was a "front" or proprietary of the CIA and that its president, John Holcomb, was a CIA employee or contractor. Defense counsel had read a newspaper article mentioning a possible

connection between AID and the CIA, and Cubans in the Miami area were under the impression that the CIA was running AID (Transcript of December 13 status hearing, pp. 75-77). These speculations were apparently fueled by Holcomb himself for the purpose of generating business; appellants evidently fell victim to the ploy.[72] The CIA was unable to provide any files showing an affiliative relationship with Holcomb or AID for the simple reason that no such files existed. AID has never been a "front," proprietary, or any other type of sub-organization owing allegiance to the CIA;[73] thus the Government had no material which it could have turned over under any theory of discovery.

72/ In this connection, it is worth quoting a recent study of free-lance intelligence operators, which discusses Holcomb and AID as follows:

> Holcomb won't talk about any connections he may have to the CIA, but creates the impression that the ties are there, and binding. That Holcomb will not discuss his suspected ties to the CIA is often regarded as evidence that such ties exist. Yet there is no reason to believe that they do. Among free-lance spooks and their employers, it often happens that such relationships are deliberately intimated when, in fact, they don't exist. Many free-lance spooks have used their incidental or wholly imaginary ties to the CIA as a sort of cover. Not only does this increase their prestige and inflate the value of their alleged connections, but it lends an aura of special legitimacy to their otherwise questionable activities. Indeed, it's accurate to say that this particular form of mystification is epidemic within the community of adventurers and their hangers-on. This, then, is the proprietor of AID. Hougan, Spooks (New York: Bantam Books, 1979), pp. 47-48.

73/ Footnote on next page.

Appellants have also argued (Appellants' Brief I, p. 165) that the Government had a duty to inform them every time Michael Townley's recollection changed slightly during the course of pretrial preparation for his testimony. They cite no legal authority for this proposition since none exists. The Government made no notes of conversations with Townley other than those provided to the defense under 18 U.S.C. § 3500. There was nothing exculpatory in any of the occasional changes in recollection which Townley experienced; therefore, no duty under Brady arose. The process of pretrial preparation with Townley, as with most witnesses, generated in him a number of clarifications as he remembered and discussed events (Tr. 2262). The fact that the Government had not recorded these changes as they occurred was in fact helpful to the defense, since they were able to impeach Townley with the fact that certain aspects of his trial testimony did not appear in his prior Jencks statements (Tr. 2259-2260). Since there is no requirement that the Government record every pretrial conversa-

73/ The Government was not called upon to make this representation when the issue arose because the trial court ruled that appellants had sufficient information to make their own inquiry of John Holcomb and AID personnel about CIA connections. The judge's ruling was firmly rooted in this Court's decision in Xydas v. United States, supra, where the Court held that when a witness is fully available for interview by all parties, the Government is not required to work as investigators for the defense. Appellants in the instant case apparently failed to interview or attempt to glean from John Holcomb any information about alleged CIA connections. Since the Government had absolutely no knowledge of any such connection, it was not required under Xydas to ask the CIA to make a complete search of its files when the defense had not even bothered to interview the person who was most knowledgeable about his own associations.

tion with its witnesses for the purpose of generating impeachment material for the defense, appellants' complaint is frivolous.

Appellants also argue that the Government's statement that a number of witnesses were "backing off their testimony" means that there must have been Brady material which the Government failed to provide. In fact, because several prospective witnesses expressed fear for their lives because of threats, one or two experienced a loss of memory shortly before trial and were not called by the Government as a result (Tr. 2904). Their loss of memory was not written or recorded in any fashion and contained no exculpatory information. In any event, appellants received the list of prospective government witnesses on the first day of trial (Tr. 9), and with the exception of four witnesses with severe security problems who testified at trial, all witnesses were identified through their Jencks material provided at least a week before trial and were fully available for defense interview.

Appellants additionally complain that the Government did not provide them with a statement under 18 U.S.C. § 3500 made by Ricardo Canete at the time he took a lie detector test. The Government, it is true, did not supply such a statement, because no writing or recording of Canete's statement was ever made. The Government cannot produce as a Jencks statement a document which does not exist.

Finally, appellants insist, citing no relevant authority, that the trial court erred in refusing to order production of the

grand jury testimony of a potential defense witness. They appear to base this argument on some inchoate standard which has no statutory, legal, or rational support. Rule 16 (a)(3), Fed. R. Crim. P., denies discovery of grand jury minutes other than the defendant's own testimony and provides for possible disclosure only under the provisions of Rule 6 (e), Fed. R. Crim. P. Disclosure of grand jury testimony under Rule 6 (e) is permitted at the discretion of the court preliminarily to or in connection with a judicial proceeding. In such a situation, the "burden . . . is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of [grand jury] secrecy." Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959). The Court considered the issue again in Douglas Oil Co. v. Petrol Stops Northwest, 99 S. Ct. 1667 (1979), which involved the efforts of a civil litigant to obtain transcripts of grand jury proceedings. Defendants in that case had already obtained copies of grand jury transcripts during a criminal case against them. Their adversaries in the civil suit sought access to those transcripts for purposes of impeaching them. The Court observed that "the typical showing of particularized need arises when a litigant seeks to use 'the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like.' Such use is necessary to avoid misleading the trier of fact." Id. at 1674 n.12. The Court then concluded that the civil plaintiffs had a particularized need to impeach

their opponents which outweighed the interest in continued grand jury secrecy.

We have found no case decided by a federal court which has held that a trial court abused its discretion in denying disclosure to a criminal defendant of the grand jury testimony of his own potential witnesses. In fact, this Court upheld such a denial in Xydas v. United States, supra, where the witness was fully available to be interviewed and called by the defense. The Court found that the defense would have gained no more information from the grand jury minutes than from interviewing the witness.

In the instant case, Armando Lopez Estrada had apparently told defense counsel that he had testified at the grand jury in January, 1977, that he knew Michael Townley as Andres Wilson and that Wilson had admitted working for the CIA. Such a representation by Lopez Estrada was incredible on its face since the Government was not even aware of the existence of Michael Townley ("Andres Wilson") at the time of Lopez Estrada's grand jury appearance. When the Government informed defense counsel of this fact, counsel then argued that the discrepancy showed that they needed the transcript to refresh Lopez Estrada's recollection (Tr. 4903). Although the need to refresh a witness' recollection can constitute a "particularized need," see United States v. Proctor & Gamble, 356 U.S. 677, 683 (1958), such a need arises only after the witness has testified at trial and has indicated that his memory is exhausted. See id. There is no contention here that Lopez Estrada

was unable to remember the events to which he would presumably testify, only that he was unable to recall what he had said to the grand jury. Defense counsel candidly admitted that he feared Lopez Estrada was lying to him and that he really needed the transcript to avoid the possibility of sponsoring perjured testimony (Tr. 4368).

In addition, of course, access to his grand jury testimony would satisfy the witness' desire to review it so that he could avoid contradictory testimony at trial. Federal courts which have considered the issue have ruled either that such a desire does not constitute a "particularized need," United States v. Ball, 49 F.R.D. 153 (E.D. Wisc. 1969); United States v. Aeroquip Corporation, 41 F.R.D. 441 (E.D. Mich. 1966), or that a trial court does not abuse its discretion in denying such a claim. United States v. Ruggiero, 472 F.2d 599 (2d Cir.), cert. denied, 412 U.S. 939 (1973); United States v. Tierney, 424 F.2d 643 (9th Cir. 1970).

While defense counsel's desire to avoid sponsoring perjury is commendable, the Government informed him that Lopez Estrada had said nothing about Townley (Wilson) at the grand jury. Armed with this information, which was the only ostensible purpose of his wanting to see the transcript in the first place, defense counsel then made the tactical decision not to call Lopez Estrada as a witness. This decision was evidently made on the basis of counsel's judgment that Lopez Estrada was not telling the truth. Access to the grand jury testimony would not have aided this determination

in any way since counsel already knew that Lopez Estrada had not testified at the grand jury on the subject which he proposed to testify about at trial. Appellants were thus able to demonstrate no particularized need on the basis of which this Court could find an abuse of the trial judge's discretion under Rule 6(e).

XVI. The trial court properly admitted testimony describing Townley's prior identification of geographical locations about which he had testified.
(Tr. 2830, 2832-2837, 2960-2965, 3601.)

Appellants claim that testimony concerning tours with Michael Townley of locations relevant to the crime was inadmissible hearsay. However, since appellants did not object at the time of trial and since the testimony was limited to non-hearsay purposes, this argument is without merit.

Among the Government's witnesses were three F.B.I. agents who testified as to their roles in various phases of the investigation in this case. In the course of their wide-ranging testimony, all three agents described tours that each of them had taken with Michael Townley in which Townley pointed out various locations associated with the events surrounding the assassination. Agent Robert W. Scherrer toured Washington, D.C., with Townley on April 26, 1978. Townley directed the driver of the car in which they were riding to areas which he had mentioned to Scherrer in earlier

interviews, including the Sears, Roebuck store and the Radio Shack where he had purchased materials for use in constructing the bomb, Letelier's residence, places from which he had surveilled Letelier, and motels where he and his accomplices had stayed (Tr. 2832-2837). Agent Thomas C. Menapace took a similar tour with Townley on August 17, 1978, in the Newark, New Jersey, area. There Townley pointed out places he had discussed earlier with Menapace, including the location of the headquarters of the Cuban Nationalist Movement and what he believed to be the apartment of Guillermo Novo (Tr. 2960-2965).[74/] Finally, Agent Larry C. Wack briefly described a tour he had taken with Townley in the course of his investigation. This tour, in New York City on August 16, 1978, led Townley to identify a particular building at Kennedy Airport and an office building in downtown New York (Tr. 3598-3602).

Initially, we note that appellants did not object to the tour testimony at trial and thus have not properly preserved the issue for appeal. Although appellants assert the contrary in their brief, it is clear from the record that not only did they fail to object to the challenged testimony but in fact they affirmatively stated that they had no objection to it (see Tr. 2830, 2960-2961). The only objections by appellants occurred on three discrete occasions when each of the agents attempted to relate what Townley had said

74/ It was in fact the apartment of Alvin Ross (Tr. 2965), although Townley had seen Guillermo Novo getting dressed there on the morning of his return from Washington.

to him, while pointing out locations en route. Each time the court stopped the witness from inadvertently lapsing into hearsay testimony (see Tr. 2835, 2962-2963, 3601). Since counsel never objected to the actual description of the tours, a plain error standard applies, United States v. Fowler, ___ U.S. App. D.C. ___, 608 F.2d 2, 8 (1979), requiring appellants to show that any error affected their substantial rights.

Appellants are unable to make this showing because the testimony was admitted for a valid non-hearsay purpose. It was not admitted, as appellants contend, to prove that certain events actually took place at the locations, but rather to establish that these places were where and what Townley thought them to be. Such testimony by the agents is analogous to prior identification testimony which, of course, is admissible to corroborate a witness' in-court identification. Rule 801 (d)(1)(C), Fed. R. Evid.; Clemons v. United States, 133 U.S. App. D.C. 27, 39-40, 408 F.2d 1230, 1242-1243 (1968). The rationale of independent corroboration is equally forceful whether applied to witness identification of people or of places. In addition, any possible potential for prejudice is far less substantial when a witness simply identifies a motel than when he provides the powerfully incriminating evidence of identifying the defendant as the perpetrator of the crime.

It is thus clear that admission of the tour descriptions, especially in the absence of any objection to the testimony,

was a wholly proper form of independent corroboration of a witness who had already been subjected to exhaustive cross-examination. In any event, the tour testimony, even if somehow found to be improper, formed a minute portion of the entire trial and cannot be said to have substantially swayed the verdict.

XVII. The trial court committed no abuse of discretion in admitting Townley's prior consistent statement and in any case the admission, if error, was harmless.
(Tr. 1652, 1942-1944, 2055-2065, 2094-2117, 2129-2138, 2151-2153, 2191-2193, 2198-2215, 2219-2224, 2233-2240, 2243-2246, 2309-2317, 2404-2407, 2412-2420, 2616-2618, 2622, 2727-2732, 2736-2737, 2739, 2740-2743, 2757-2758, 5583-5589, 5597.)

Appellants argue that their conviction should be reversed because the trial court erred in admitting a prior consistent statement by Townley. It is clear, however, that the statement met the requirements for admissibility under Rule 801, Fed. R. Evid., and that the court committed no abuse of discretion in making such a finding. Even were the court's ruling found to be error, the fact that the jury was never apprised of the contents of the statement rendered it harmless.

Michael Townley arrived in the custody of F.B.I. agents in the United States in April, 1978. On April 17 he was visited at the Quantico Marine Detention Facility by General Orozco, Colonel Pantoja, and Major Vergara of the Chilean military and intelligence community (Tr. 2736-2737). Townley told Orozco in private conversation (Tr. 2740) the true facts of the Letelier assassin-

ation and it was agreed that Orozco would return the next day with Major Vergara to take down the statement in written form to be included in the secret summary Orozco was preparing as part of his secret military investigation of the Letelier case (Tr. 2058, 2738). Both Orozco and Pantoja advised Townley that he should tell the truth and that the Chilean Government wanted him to cooperate with the United States in bringing the entire matter to light (Tr. 2741-2742). The next day, April 18, Orozco and Vergara transcribed in written form the substance of the oral statement Townley had made to Orozco on April 17. No one was privy to that process other than Townley, Orozco, Pantoja and Vergara (Tr. 2742). The written statement amended the previous March 29 statement Townley had given to Orozco in Chile which had denied all knowledge of and participation in the Letelier/Moffitt killings (Tr. 2739). Subsequent to his oral statement to Orozco, but prior to its transcription in written form, Townley entered into an agreement to cooperate with the United States Government in its investigation and prosecution of this case (Tr. 2742-2743). No representative of the United States was ever shown or provided access to the written statement given by Townley to Orozco, which was intended solely for inclusion in the secret Chilean investigation (Tr. 2622).

At trial, Townley's first statement to Orozco on March 29, also given in secret and never made available to the United States (Tr. 1652), was forwarded to defense counsel by the Chilean attorney for Contreras (Tr. 1942-1944). Townley was extensively impeached with the contents of that prior inconsistent statement

(Tr. 2055-2065, 2094-2117, 2129-2138, 2151-2153, 2191-2193, 2198-2215, 2219-2224, 2233-2240, 2243-2246, 2404-2407, 2412-2420). He was also impeached with a prior inconsistent statement made to the Chilean press in March, 1978 (Tr. 2309-2317). After the Government learned that the defense had been provided with a copy of the secret March 29 statement to Orozco, considerable pressure was put on Chilean officials to release the April 17-18 statement. That statement was eventually forwarded to the Government and was admitted into evidence (Tr. 2616-2618, 2727-2732). The only questions asked of Townley concerning that statement elicited the general response that he had told the truth in giving it; the contents of the statement were never explored (Tr. 2757-2758).

Admissibility of the prior consistent statement of a witness is governed by the liberalized provisions of Rule 801 (d)(1)(B), Fed. R. Evid., which provides that a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and if the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. The determination of whether a prior statement meets these criteria is vested in the sound discretion of the trial court. United States v. Herring, 582 F.2d 535, 541 (10th Cir. 1978); United States v. Lewis, 406 F.2d 486 (7th Cir.), cert. denied, 394 U.S. 1013 (1969); Hanger v. United States, 398 F.2d 91 (8th Cir. 1968), cert. denied, 393 U.S. 1119 (1969).

Appellants have never argued that Townley's April 17-18 statement was not consistent with his trial testimony. They contend instead that the statement was inadmissible both because they had not accused Townley of recent fabrication or improper influence or motive and because the statement was made after Townley's motive to lie arose.

The contention that Townley was not claimed to have recently fabricated or to have testified because of improper influence or motive is patently absurd. The entire purpose of cross-examining him on his prior inconsistent statement was to demonstrate that his trial testimony was false. Courts have uniformly held that impeachment with a prior inconsistent statement satisfies the requirement that recent fabrication or improper motive be claimed. Copes v. United States, 120 U.S. App. D.C. 234, 345 F.2d 723 (1964); Applebaum v. American Export Isbrandtsen Lines, 472 F.2d 56 (2d Cir. 1972); Hanger v. United States, supra. Cross-examination which implies that the trial testimony is fabricated also satisfies the requirement, United States v. Herring, supra, especially when defense counsel explores possible agreements for leniency made with the Government by the witness. United States v. Rodriguez, 452 F.2d 1146 (9th Cir. 1972). There is no requirement that the prior consistent statement have been made before the prior inconsistent statement. Copes v. United States, supra; United States v. Lewis, supra; Hanger v. United States, supra, though several courts have held that the prior consistent state-

ment must pre-date a motive to falsify. United States v. Quinto, 582 F.2d 224 (2d Cir. 1978); Applebaum v. American Export Isbrandtsen Lines, supra; United States v. Lewis, supra. The concern of those Circuits requiring that the statement pre-date a motive to falsify has focused, as appellants correctly argue, on the possibility that the witness will attempt to create a self-serving record for use at trial. See Applebaum v. American Export Isbrandtsen Lines, supra, at 62.

Appellants argue that Townley's April 17-18 statement to Orozco was just such an attempt to create a self-serving record for use at trial. This argument, however, founders on its facts. While Townley, under appellants' theory, might have had a motive to lie to representatives of the United States on the basis of his proposed plea agreement with them, he had no such motives to lie to representatives of the Chilean Government which had just expelled him from his adopted country and which was offering him nothing in exchange for the true facts. If anything, Townley was risking extreme unpopularity with segments of the Chilean Government by admitting his DINA-directed complicity. Certainly he could expect to gain nothing from Chile by implicating members of an anti-Communist Cuban exile group. The record is clear that Townley gave his April 17-18 statement to Orozco in private (Tr. 2742), that the statement was intended solely for use in the secret Chilean investigation conducted by Orozco (Tr. 2058), and that Townley was in fact astonished by the public release during trial of any of the

statements he had given to Orozco, since such release by unauthorized persons was a violation of Chilean laws (Tr. 2137). Townley could not possibly have been trying to create a self-serving record for use at trial under such circumstances. Appellants totally fail to ask the crucial question: to whom did Townley have a motive to lie? In neglecting to ask and answer this question, appellants miss the point on which this Court's evaluation must turn. Since Townley had no motive to lie to the Chilean secret investigation at Quantico, his prior consistent statement was properly admitted. Indeed, since he had a greater motive to lie to Orozco on March 29, wishing to exculpate himself and being still bound by his duty of silence (Tr. 2057), admission of the later statement was essential to give the jury a fair opportunity to evaluate which statement contained the truth. Thus, it was potentially of "clear help to the factfinder in determining whether the witness [was] truthful." Coltrane v. United States, 135 U.S. App. D.C. 295, 304, 418 F.2d 1131, 1140 (1969). See also Applebaum v. American Export Isbrandtsen Lines, supra at 61-62; Hanger v. United States, supra at 104-105.

Even were admission of the prior consistent statement somehow found to be error, the error would not require reversal. Error is held to be harmless when there is no substantial likelihood of it having affected the outcome of the trial. The questions asked of Townley concerning the statement yielded only his general answer that he had related the true facts in the statement (Tr. 2757-2758).

There was absolutely no line-by-line examination of the type utilized by defense counsel in their exploration of the prior inconsistent statement (see Tr. cites at 156, supra). The Government gave the consistent statement only passing mention in its summation (Tr. 5205), and since the jury never asked to see the document, they were never exposed to its contents (see Item 66 in record; Tr. 5583-5589, 5597). Appellants' argument for reversal should thus be rejected on its merits, or alternatively, on the basis of harmless error.

XVIII. The evidence found by the building superintendent at 4523 Bergenline Avenue was properly admitted because appellant Ross had abandoned the premises.
(Tr. 754-755, 757-758, 761-762, 764, 777, 799-800, 813-814, 1024-1029, 1095-1096.)

Appellant Ross claims that his failure to pay the rent or make an appearance for four months at 4523 Bergenline Avenue did not constitute an abandonment of the room and that therefore the evidence found in that room should have been excluded. The facts, however, demonstrate that the room had been abandoned and that the items recovered were therefore properly admitted.

Luis Vega, the building superintendent at 4523 Bergenline Avenue, was in charge of maintaining the building and collecting the rents. In August, 1977, a company called C and P Novelty, apparently run by Carlos P. Garcia, rented a one-room office in the building (Tr. 754-755). Special Agent Richard Sikoral of the FBI spoke to Alvin Ross a short while later on September 21;

Ross told Sikoral that he was forming a business called C and P, located at 4523 Bergenline Avenue (Tr. 1024). From August through October, Vega saw Carlos P. Garcia in and around the building several times (Tr. 762). However, Garcia fell behind in his rent, making the payment for October on October 30 (Tr. 764). Vega told him that he had been instructed by the landlord to empty out the room if Garcia did not pay the November rent immediately. Garcia assured Vega that he would return the same day with the November rent, but he did not reappear and Vega never saw him again. No one ever appeared to claim the property in the office or to pay the rent after October 30 (Tr. 757, 800). On November 1 Vega locked the door; no one but Garcia could enter after that because Vega had the only extra key (Tr. 799, 813). In preparation for using the room as his own office from which to collect the rents, Vega began collecting the materials which he found in the room. He left for a three-week vacation in Puerto Rico in late December and returned in mid-January. Everything in the office was still exactly where he had left it. He then began moving his own possessions into the room (Tr. 813-814), putting aside the books and papers left by C and P (Tr. 758, 761).

On February 28, Richard Sikoral went to 4523 Bergenline Avenue in an effort to find Ross to interview him. Vega said there had been a C and P Company which had rented a room, but it had been evicted November 1 for non-payment of rent (Tr. 1024-1025, 1027). Vega picked a photograph of Ross out of a group of photographs and

identified him as Carlos P. Garcia (Tr. 1026). During the conversation, Vega said that he was cleaning out the C and P room to use as his own office. Sikoral asked him to call the FBI if he found anything he thought they might be interested in (Tr. 1029). Sikoral then went to Ross's home and found him there. Ross told him that C and P had gone bankrupt and that he was in the process of forming another business to be operated from his home (Tr. 1027-1028).

On March 6, Vega found some materials in the C and P room which looked like bomb components. He accordingly called the FBI and put all the items on a table in the room (Tr. 772, 1030). When Sikoral arrived, Vega gave him the items he had found and refused a receipt on the ground that he had been intending to throw everything away anyway (Tr. 777). These items, which included the Grand Central Radio receipt for the Fanon and Courier paging system, and eight of the nine electric matches given by Townley to Paz, were admitted into evidence at the trial after a motion to suppress had been denied (Tr. 1095-1096).

It is well settled that evidence can be seized without a warrant when the defendant had "so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." United States v. Jackson, 544 F.2d 407, 409 (9th Cir. 1976). In Abel v. United States, 362 U.S. 217 (1960), the Supreme Court treated as abandoned the contents of a hotel room after the occupant had vacated the room, turned in his key, and paid his bill. The hotel then regained its exclusive right of possession and consented to a search.

This Court in Parman v. United States, 130 U.S. App. D.C. 188, 399 F.2d 559, cert. denied, 89 S. Ct. 109 (1968), found no Fourth Amendment violation when a defendant whose apartment was searched without a warrant had fled Washington, assumed another name, and begun to live in another city. In Frank v. United States, 120 U.S. App. D.C. 392, 347 F.2d 486 (1965), the Court similarly upheld a search where a defendant had left a hotel room with a suitcase and the hotel had reclaimed its own possessory interest in the room.

Appellant appears to argue that only a formal eviction would have been sufficient to indicate that he intended to abandon the C and P office. Such a contention finds no support in the law. Since intent can rarely be proved by direct evidence, the fact-finder must scrutinize the attendant circumstances from which intent can be inferred. See District of Columbia Bar Ass'n, Criminal Jury Instructions for the District of Columbia, No. 3.02 (3d ed. 1978). In the instant case, the proprietors of C and P Novelty failed to pay the rent for four consecutive months prior to Vega's transmittal of the materials to the FBI. Garcia had been explicitly informed by Vega that he would empty out the room if the November rent were not paid immediately. No one ever appeared to pay the back rent or to claim the items in the office after October 30. On February 28, Ross told Sikoral that because of C and P's bankruptcy, he would be starting a new business to

be run out of his home; the clear implication was that the business at 4523 Bergenline Avenue had been abandoned. The combination of these circumstances yields the inescapable inference that the premises of C and P Novelty were intentionally abandoned because the proprietor lacked the money to maintain the business office. Luis Vega then took the opportunity to convert the room to his own uses and turned the items over to the FBI on his own initiative. No Fourth Amendment violation occurred because appellant Ross had relinquished his interest in the property and because Vega was not acting as an agent of the Government at the time of his transmittal of the evidence to the FBI; the motion to suppress this evidence was properly denied.

XIX. Appellants are equally guilty of the premeditated murder of Ronni Moffitt under the doctrine of transferred intent.
(Tr. 3866.)

Appellants contend that even if the evidence was sufficient to uphold their convictions for the murder of Orlando Letelier, their convictions for the first-degree murder of Ronni Moffit must be reversed because there was no evidence that they intended to kill her (Appellants' Brief I, pp. 189-190). Their argument is grounded on the obvious misapprehension that 22 D.C. Code § 2401 requires proof of a defendant's intent to kill a particular victim. This simply is not the law.

The doctrine of transferred intent, long known at common law[75] and recognized in the majority of American jurisdictions,[76] provides that one "who intends to kill one person but instead kills a bystander is deemed the author of whatever kind of homicide would have been committed had he killed the intended victim." 2 Wharton, Criminal Law § 144 at 197 (14th Ed.); 1 Warren, Homicide § 73; see also R. Perkins, Criminal Law 826 (2nd Ed. 1969). The doctrine was incorporated into the common law of Maryland in 1776, Gladden v. State, 273 Md. 383, 390, 330 A.2d 176, 180 (1974); cf. Morgan v. State, 234 Md. 273, 275-276, 199 A.2d 229, 230-231, cert. denied,

75/ The doctrine of transferred intent was recognized as early as 1576 in the case of Reg. v. Saunders, 2 Plowd. 473, 474a, 75 Eng. Rep. 706, 708 (1576):

> And therefore it is every man's business to foresee what wrong or mischief may happen from that which he does with an ill-intention, and it shall be no excuse for him to say that he intended to kill another, and not the person killed. (c) For if a man of malice pretense shoots an arrow at another with an intent to kill him, and a person to whom he bore no malice is killed by it, this shall be murder in him, for when he shot the arrow he intended to kill, and inasmuch as he directed his instrument of death at one, and thereby has killed another, it shall be the same offense in him as if he had killed the person he aimed at . . . so the end of the act, viz. the killing of another shall be in the same degree, and therefore it shall be murder, and not homicide only.

See also Rex v. Plummer, 1 Kelyng 109, 84 Eng. Rep. 1103, 1104-110 88 Eng. Rep. 1565 (1701); Hale, 1 Pleas of the Crown 466 (1736); 4 Blackstone, Commentaries 201 (Cooley Ed. 1884).

76/ See 40 Am Jur. 2d Homicide § 11, 302-303; 40 C.J.S. Homicide § 18, 864-865, 2 Whartons' Criminal Law § 144, 197-201.

379 U.S. 862 (1964), which was in turn made applicable to the District of Columbia under 49 D.C. Code § 301.[77] Linkins v. Protestant Episcopal Cathedral Foundation, 87 U.S. App. D.C. 351, 354, 187 F.2d 357, 360 (1951); Hamilton v. United States, 26 App. D.C. 382, 384-385 (1905); Hill v. United States, 22 App. D.C. 395, 401 (1903).[78] The continued vitality of the doctrine of transferred intent as applied to prosecutions under 22 D.C. Code § 2401 has been recently affirmed by the District of Columbia Court of Appeals in its well-reasoned opinion in O'Connor v. United States, 399 A.2d 21, 24-26 (D.C. Ct. App. 1979).[79]

77/ 49 D.C. Code § 301 provides in pertinent part:

> The common law, all British statutes in force in Maryland on February 27, 1801, shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of the 1901 Code.

78/ As this Court stated in Bishop v. United States, 71 App. D.C. 132, 107 F.2d 297, 302 (1939):

> Under the District of Columbia statute, a homicide committed purposely and with deliberate and premeditated malice is murder in the first-degree. A homicide committed with malice aforethought, without deliberation and premeditation, is murder in the second-degree. "Malice aforethought" may be shown expressly, or may be "implied" from the Commission of the act itself. Although distinction is made in the severity of punishment for the degrees of murder, the statute embodies the substance of murder as it was known to the Common Law. (Footnotes omitted) (emphasis added).

79/ Footnote on next page.

The evidence at trial demonstrated overwhelmingly that appellants were members of a conspiracy the object of which was the deliberate and premeditated murder of Orlando Letelier. Moreover, subsequent tests of the paging system described by Townley indicated that the person who detonated the bomb could have been no more than one thousand feet from Letelier's car at the time of the explosion (Tr. 3866). It was thus extremely likely that Suarez was fully aware of the presence of the Moffitts in the car. Therefore, by operation of the doctrine of transferred intent, or by circumstantial evidence of the facts known to Suarez, the participation of Guillermo Novo and Alvin Ross in the planning and execution of the conspiracy subjected them to criminal liability not only for their role in the murder of Letelier but for the derivative murder of Ronni Moffit as well.

XX. Appellants' sentences were legally imposed.

Appellants' contention that they should have received more lenient sentences (Appellants' Brief I, pp. 191-193) is utterly frivolous. Their sentences were within the limits permitted by

79/ The Supreme Court, as a matter of sound judicial policy, has accorded deference to decisions of the District of Columbia Court of Appeals construing statutes of only local applicability and on questions of common law particularly where, as here, there is no claim grounded in the Constitution. Whalen v. United States, No. 78-5471, slip op. 2-3 (April 16, 1980); Pernell v. Southall Realty, 416 U.S. 363, 366 (1974); Griffin v. United States, 336 U.S. 704, 717-718 (1949); Fisher v. United States, 328 U.S. 463, 476-477 (1946); District of Columbia v. Pace, 320 U.S. 698, 702 (1944); Del Vecchio v. Bowers, 296 U.S. 280, 285 (1935).

statute: 18 U.S.C. § 1117 (life imprisonment); 18 U.S.C. §§ 1111, 1116 (life imprisonment); 22 D.C. Code § 2401 (life imprisonment); 18 U.S.C. § 844 (i) (life imprisonment); 18 U.S.C. § 1623 (5 years' imprisonment, $10,000 fine or both); 18 U.S.C. § 4 (3 years' imprisonment, $500 fine or both). Absent some colorable complaint, other than their severity, since appellants' sentences were lawfully imposed, there is no ground for appellate review. Dorszynski v. United States, 357 U.S. 386, 393 (1958); Townsend v. Burke, 334 U.S. 736, 741 (1948); Blockberger v. United States, 284 U.S. 299, 305 (1932); United States v. Moore, 183 U.S. App. D.C. 461, 464, 564 F.2d 482, 485 (1977).

XXI. The trial court committed no abuse of discretion in denying appellant Ignacio Novo's motion for severance.
(Tr. 1106, 1108, 1133-1134, 1161, 1404-1405, 1417-1418, 1600, 1670-1671, 1715-1716, 2110-2112, 2496-2499, 2506-2510, 3107-3110, 3112-3114, 3216-3217, 3284, 3286, 4177, 4338, 4353, 4499, 5126-5127, 5132-5135, 5220, 5511, 5523, 5525, 5542, 5547, 5549, 5489.)

Appellant Ignacio Novo argues that the denial of his severance motion prejudiced his right to a fair trial because he was inculpated by statements of his non-testifying co-defendants, because he was precluded from offering exculpatory evidence, and because of the confusion and disparity in the weight of the evidence against him. A review of these claims, however, demonstrates

that the trial court committed no abuse of discretion in denying the motion.

Relying on Bruton v. United States, 391 U.S. 123 (1968), Ignacio Novo asserts that testimony about statements made by his co-defendants implicated him in the conspiracy and murders, with which he was not charged. He also contends that comments by the Government asked the jury to find him guilty of those uncharged crimes. Both arguments are based on a misapprehension of the facts as revealed in the record.

Preliminarily, it should be noted that both the court and the Government were careful to make continuously and abundantly clear to the jury that Ignacio Novo was charged only with false declarations and with misprision of a felony, not with any participation in the planning and execution of the murders (Tr. 1106, 1108, 1133-1134, 1161, 1715-1716, 5126-5127, 5132, 5220, 5511, 5523, 5525, 5542, 5547, 5549). The Government's presentation of its evidence never suggested in any fashion whatever that Ignacio Novo had any part in the murder plot; in fact, the evidence showed unequivocally that he did not. In light of the clear distinction, repeated in instructions, arguments, and evidence, between Ignacio Novo's acts and the acts of his co-defendants, testimony about his co-defendants' statements could in no way be said to constitute the type of "powerfully incriminating extrajudicial statements" which were "devastating to the defendant" in Bruton. Id. at 136.

The testimony by Ricardo Canete about the statements by Paz and Ross at the Bottom of the Barrel contained no reference to any other

individuals (Tr. 3284, 3286). Paz' statement that "we did it," made in the presence and with the affirmation of Alvin Ross, contained no implication that he was referring to anyone other than himself and Ross (Tr. 3286). The claim that he was specifically inculpating Ignacio Novo by such a statement stretches the Bruton principle to absurdity.

Of equally little merit is the argument that Sherman Kaminsky's testimony about Ross' statements somehow incriminated Ignacio Novo. The trial court instructed the jury twice, once during direct examination (Tr. 4353) and once after cross-examination (Tr. 4499), that they were not to consider Kaminsky's testimony as evidence against either Guillermo Novo or Ignacio Novo. Kaminsky's reference to "other members of the CNM" was not the type of statement from which the jury could only infer that the Novo brothers must have been the people to whom Ross had referred. Various members of the CNM had been mentioned in the testimony, including the two members most directly involved who had not been apprehended and brought to trial. Indeed, the deletion of all references to the CNM would have made nonsense of the evidence, since the Government's proof rested on the political links between two ideologically affiliated organizations. The entire motive for participation of CNM members in the murders was directed toward the attainment of political and organizational goals. Where mention of the name of the group was thus a necessary part of the evidence, the testimony did not refer to readily identifiable individuals, and the trial court gave two

limiting instructions, Kaminsky's summary of Ross' statements was not powerfully incriminating as to anyone but Ross.

Antonio Polytarides testified about one statement by Guillermo Novo which is also claimed to have been prejudicial to Ignacio Novo. Polytarides repeated Guillermo's comment that "We have been betrayed by certain persons in my case, but we will pay them back" (Tr. 4177). Appellant Ignacio Novo claims that no limiting instruction was given in regard to the testimony; he has apparently overlooked or chosen to ignore the specific instruction given by the court that the statement was not to be considered in relation to "the defendant Ignacio Novo in any respect" (Tr. 4338). In addition, although the statement by Guillermo arguably supported the Government's case, the defense was able to argue that the statement simply expressed bitterness at a friend who had made false accusations. The general use of the word "we" was also open to several different interpretations without pointing an accusatory finger at any particular person. The testimony of all three Government witnesses who related the statements by co-defendants was painted as incredible by the defense. Since the statements were of very questionable inculpatory import as to the defendants not specifically mentioned and since there was independent incriminating evidence against all defendants, the trial court's limiting instructions were sufficient to ensure a fair trial. United States v. Lemonakis, 158 U.S. App. D.C. 162, 172, 485 F.2d 941, 951 (1973). Ignacio

Novo was thus not entitled to a severance on the basis of any testimony about co-defendant statements which served to powerfully incriminate him under the standards of Bruton.

Ignacio Novo also claims that he was prejudiced by a denial of severance because the joinder prevented him from presenting exculpatory evidence on the misprision count which would have shown that he obtained false documentation to help Guillermo flee a probation violation warrant, not the Letelier investigation. Courts have considered a similar claim in cases where defendants have claimed that a severance would have made available to them the exculpatory testimony of their co-defendants. The factors to consider in evaluating such claims are, among others, the degree to which the hypothetical evidence would be exculpatory and the degree to which a testifying co-defendant could be impeached. United States v. Boscia, 573 F.2d 827 (3d Cir. 1978). In more general terms, a court must consider whether the weight of the evidence unavailable in a joint trial would be so likely to result in acquittal in a separate trial that the defendant was denied a fair trial by joinder. In this light, we must examine not only the evidence which Ignacio Novo would have been able to offer in a separate trial, but also the evidence which the Government could have presented in the absence of Ignacio's co-defendants.

It is true, as appellant asserts, that he might have been able to present in a separate trial evidence that he obtained the false documentation from Canete to help his brother flee an out-

standing probation violation warrant. Even were this testimony found to be credible, however, its weight would have been significantly reduced by the Government's ability to argue that since the probation violation warrant was based on Guillermo's 1974 trip to Chile, the Novo brothers were afraid that inquiry into the probation violation would reveal contacts with Chile which eventually led to the Letelier murder (Tr. 3112-3114). Even more importantly, the Government would have been able to present evidence excluded in the joint trial that Ignacio had told Canete that he needed the documentation for someone who "had left a body behind" (Tr. 3107-3110, 3216-3217). Such evidence, of course, would have had a devastating impact on Ignacio's claim of a more innocent purpose and would have negated any possible exculpatory impact afforded by evidence of Guillermo's probation violation based on his trip to Chile. Under these circumstances, Ignacio was subject to less damaging evidence against him in the joint trial than he would have been in a separate trial.

His final complaint about the denial of severance rests on the premise that there was so much confusion between him and his brother and so little evidence against him relative to the evidence against his co-defendants that he was prejudiced by a spill-over effect which denied him a fair trial. It is well settled that a defendant's claim that he would have had a better chance of acquittal in a separate trial does not establish a right to severance. United States v. Brooks, 185 U.S. App. D.C. 267, 567 F.2d 134 (1977);

United States v. Wilson, 140 U.S. App. D.C. 220, 228 n.15, 434 F.2d 494, 502 n.15 (1970); United States v. Rucker, 586 F.2d 899 (2d Cir. 1978). When there is a disparity in the evidence, the prime consideration is "whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants in the light of its volume and the limited admissibility." United States v. Gaines, 563 F.2d 1352, 1355 (9th Cir. 1977). Accord, United States v. McLaurin, 557 F.2d 1064, 1075 (5th Cir. 1977); United States v. Alpern, 564 F.2d 755 (7th Cir. 1977); United States v. Milham, 590 F.2d 717 (8th Cir. 1979).

Ignacio Novo correctly points out that although Rafael Rivas Vasquez testified about meeting Guillermo Novo in Caracas in 1974 when Guillermo was on his way to Chile, Rivas Vasquez mistakenly identified Ignacio in the courtroom as the man he had met (Tr. 1404-1405, 1417-1418). However, the misidentification was made clear to the jury through the testimony of Townley, who related that it was Guillermo who had visited Chile and Guillermo who had met with an unwelcome reception at the hands of Chilean officials (Tr. 1600, 2110-2112, 2496-2499, 2506-2510). In the context of Townley's explicit testimony, the jury could not have been confused as to the identity of the person who had visited Chile.

Appellant also asserts that Townley mentioned a phone call with Ignacio as one of the conversations which arranged the murders. That assertion reveals a misunderstanding of the evidence. Townley was asked what conversation prior to or at the conspiracy meeting

he had with CNM members relative to what the CNM wanted from its relationship with Chile or DINA (Tr. 1670). He mentioned that he had possibly had one telephone conversation with Ignacio Novo, in addition to numerous conversations with other CNM members (Tr. 1670-1671). Since a telephone conversation obviously did not occur at the conspiracy meeting, it was clear that it had occurred some time during the previous year since that was the only context in which the question was asked (Tr. 1711). Arrangements for the murder were not made until the conspiracy meeting; therefore, any prior telephone conversation with Ignacio could not have been related to the murder plot in any way. Appellant's statement that the court instructed the jury to consider the telephone call as evidence against Ignacio stretches interpretation of the record beyond its proper limits. The court originally instructed the jury to disregard Townley's testimony entirely in relation to Ignacio; such an instruction was clearly erroneous since the Government could not prove the charges against Ignacio without Townley's testimony about his meeting with Ignacio on the day of the crime, at which he described how the murder plan had been executed. When the Government pointed this out to the court, the court then gave a modified instruction that the jury could consider Townley's testimony, but only in relation to the misprision and false declaration charges against Ignacio (Tr. 1715-1716).

There arose no confusion in the course of the trial which was not clarified for the jury. The one or two instances in which con-

fusion could have arisen were trivial and were explained either by further instructions or by subsequent testimony. There is no indication that the jury was unable to compartmentalize the evidence against Ignacio, especially since it was continuously reminded that the charges and proof against him were separate and distinct in relation to his co-defendants. In both cases cited by appellants where disparity of the evidence required reversal, the court focused on the possibility that the liberal rules of evidence and wide latitude afforded the Government in conspiracy cases could operate unfairly against a defendant also charged with conspiracy. United States v. Mardian, 178 U.S. App. D.C. 207, 546 F.2d 973 (1976); United States v. Kelly, 349 F.2d 720 (2d Cir. 1965). In fact, in Mardian, only the combination of disproportionate evidence and the absence of Mardian's carefully selected counsel supplied a basis for reversal.

In the instant case, of course, Ignacio Novo was not charged with conspiracy and so was not subject to any liberalized rules of evidence. His right to an independent evaluation of guilt was protected by frequent jury instructions which emphasized his special status. He was represented throughout the trial by the counsel of his choice. Contrary to appellant's assertions, the Government at no time asked the jury to believe that Ignacio Novo was a participant in the murder conspiracy. Appellant's recitation of the facts (Appellants' Brief II, p. 20)[80/] reveals a misunderstanding of

80/ The brief of Ignacio Novo is designated as Appellants' Brief II.

the Government's closing argument. The "eight people" mentioned by the Government were listed as follows: Michael Townley, Guillermo Novo, Alvin Ross, three people in Chile, and two people who had not yet been apprehended. There was no implication whatever that Ignacio Novo was one of the conspirators (Tr. 5131). Additionally, the Government argued that the false declarations and misprision counts "set the stage" for an understanding by the jury of the nature of the prior conspiracy, since concealment of public, legitimate contacts with Chile was necessary to keep secret the clandestine relationship with DINA. Such a comment was a totally proper interpretation of the evidence relevant to the false declarations and misprision charges against Ignacio (see Tr. 5132-5135). In rebuttal argument, the Government argued not that Ignacio was part of the murder conspiracy, but that the people who committed the act of terrorism were assassins in the same league with Michael Townley (Tr. 5489). Appellants' attempt to lift isolated statements out of context is simply a camouflage to screen the painstaking efforts made by both the court and the Government to ensure that Ignacio Novo was fully afforded his right to a fair and impartial trial. The court committed no abuse of discretion in denying his motion for severance.

XXII. The evidence was sufficient to sustain appellant Ignacio Novo's convictions on both counts of false declarations. (Tr. 1617, 1695, 5184, 5540.)

Appellant Ignacio Novo argues that since his answers at the grand jury to questions posed by the prosecutor were never proved to be false, his convictions on two counts of false declarations cannot be sustained. Such a contention, in the context of the entire record in this case, is without foundation.

As discussed above, supra, pp. 50-51, it is well settled that the Government has met its burden of proof when it has produced evidence, viewed in the light most favorable to the Government, from which a reasonable mind could fairly find guilt beyond a reasonable doubt. Crawford v. United States, supra; Curley v. United States, supra. Ignacio Novo asserts that there was no evidence that he lied when he told the grand jury that he had not heard Letelier's name until he heard it in the news a couple of days after the murder and that he lied when he said that his personal opinion was that the Cuban Communists possibly had committed the murder to create problems. (See Indictment, Count Eight.) Initially, it should be noted that when a defendant is charged with several false statements in a single count, proof of only one specification is sufficient to support a guilty verdict. United States v. Abrams, 568 F.2d 411 (5th Cir. 1978); United States v. Bonacorsa, 528 F.2d 1218 (2d Cir. 1976).

Appellant correctly points out that the Government produced no evidence that Ignacio had heard Letelier's name before the murders. The evidence is crystal clear, however, that he did hear the name on the day of the murder, not only in the news media but also from Townley's description to him of how the murder plan had been executed (Tr. 1695). Since Ignacio's grand jury appearance occurred only a little more than a month after the murders, there was ample evidence from which the jury could infer that he remembered exactly when he had first heard the name and that he intended to lie to the grand jury.

Relying primarily on Bronston v. United States, 409 U.S. 352 (1973), and United States v. Wall, 371 F.2d 398 (6th Cir. 1967), appellant also argues that the expression of personal opinion quoted in Count Eight cannot form the basis for a false declaration conviction. We submit that Bronston and Wall are inapposite, since they considered only non-responsive answers, which, while misleading, were literally true. In the instant case, Ignacio's testimony that he believed that the Cuban Communists had committed the murders was literally false.

In analyzing how this expression of opinion can be said to be literally false, it is useful to consider the line of cases involving a witness' testimony that he cannot recollect a particular event. Courts have held that when a witness testifies that he does not remember or does not believe that an event occurred, it is for the jury to determine from circumstantial evidence whether

he actually believed or failed to remember as he testified or whether he lied in representing his state of mind. United States v. Chapin, 169 U.S. App. D.C. 303, 313, 515 F.2d 1274, 1284 (1975); United States v. Abrams, supra; United States v. Kelly, 540 F.2d 990 (9th Cir. 1976). Such a jury inference may be drawn from proof of objective falsity, proof of motive to lie, and from other facts tending to show that defendant's state of mind was not as he claimed. United States v. Chapin, supra.

Since juries routinely are called upon to evaluate the state of a defendant's mind when he represents that he holds a certain belief or memory, there is no bar to jury evaluation of state of mind when a defendant represents that he holds a particular opinion.[81/] The jury in this case, after weighing Townley's testimony about his description to Ignacio of the murder plan and execution, had ample evidence to determine whether Ignacio did in fact believe that the Cuban Communists had committed the murder. From the circumstantial evidence before them, they obviously found Ignacio's statement of belief at the grand jury incredible. Such a determination was an entirely proper exercise of the jury's function, based on evidence from which a reasonable mind could infer guilt.

81/ The only case cited by appellant which held that a statement of a belief did not support a conviction was the opinion of a district court judge sitting as factfinder in a bench trial. United States v. Esposito, 358 F. Supp. 1032, 1033 (N.D. Ill. 1973). There is no suggestion in the case that the question should not go to the factfinder; the judge on those facts was simply not convinced beyond a reasonable doubt of defendant's guilt.

Appellant also claims that the evidence was insufficient to prove the falsity of any of the statements in Count Nine of the indictment. The argument that the Government should have been more specific when it asked Ignacio Novo if he knew anyone in DINA is irrelevant to a claim of insufficient evidence. Courts have uniformly held that it is for the jury to decide what meaning the defendant gave to a question when he answered it; the fact that a question or answer could be interpreted in more than one way does not take the issue out of the jury's province. United States v. Chapin, supra; United States v. Slawik, 548 F.2d 75 (3d Cir. 1977); United States v. Bonacorsa, supra. In the context of Townley's entire description of the relationship between DINA and the CNM and his conversation with Ignacio about the murder, the jury had ample evidence from which to conclude that Ignacio understood the question in a normal way and answered it with intentional falsehood.

Equally mistaken is Ignacio's claim that the Government did not establish the falsehood of his statement that he had had no contact with anyone who had been in Chile in the past two years. Again, the conversation between Townley and Ignacio would have been totally incredible outside the framework of the trust which had built up between Townley as a member of the Chilean intelligence organization and members of the CNM who had similar political ideologies. Also, at the time of his arrest, Ignacio Novo was in possession of an address book containing the name "Andres Wilson" and

the telephone number of Townley's (Wilson's) home in Chile prior to 1977 (Tr. 1617, 5184). From these circumstances, the jury could certainly find, as they did, that Ignacio intentionally lied to the grand jury during his testimony a month after the murders.

Finally, appellant's complaint about the wording of the jury instructions on Counts Eight and Nine asks this Court to speculate about possible jury misunderstanding of the phrases used (Tr. 5557). Specifically, appellant fears that the jury may have thought that it could use evidence on one count to convict on the other count. Aside from the strained nature of this interpretation, the record is clear that the court instructed the jury to consider each count separately, weighing only the evidence applicable to that particular count (Tr. 5540). There is no indication that the jury was confused or misled in any way.

XXIII. The evidence was sufficient to sustain appellant Ignacio Novo's conviction on the misprision charge against him. (Tr. 3236, 3742-3743, 3745, 3750-3751, 3753.)

Appellant Ignacio Novo contends that the evidence was insufficient to sustain his conviction on the misprision charge against him. It is clear, however, that evidence of several acts committed by Ignacio combined to provide a sufficient basis on which the jury could find guilt.

On October 21, 1976, one month after the murders, but prior to Ignacio's grand jury appearance, Special Agent Ovidio Cervantes of

the FBI interviewed Ignacio in Miami (Tr. 3745). Cervantes asked whether Ignacio had been involved in the Letelier killings or whether he had knowledge that other members of the CNM had been involved (Tr. 3753). Ignacio responded by describing his own activities around the date of the murders, by stating that he had no knowledge of whether Guillermo Novo and Ross had been in Washington, and by outlining for the agent the goals and programs of the CNM (Tr. 3742-3743, 3750-3751). Although Cervantes had stated that the explicit purpose of his interview was to gather information on the identity of the Letelier/Moffitt killers (Tr. 3753), Ignacio Novo talked about everything but the personal knowledge he had gleaned from Townley on that subject only a month prior to the interview. Thus by failing to reveal his knowledge when specifically asked, he helped camouflage the identity of the killers and committed an affirmative act of concealment. See United States v. Pittman, 527 F.2d 444 (4th Cir. 1975), cert. denied, 424 U.S. 923 (1976).

The procurement of false documentation from Canete to aid Guillermo's flight from authorities also constituted an act of concealment supporting the misprision conviction. As pointed out supra, p. 173, even had evidence of Guillermo's probation violation been introduced, that proof would have led right back to the Letelier case, since the violation was based on Guillermo's visit to Chile in 1974, about which he had lied to the grand jury (see

Indictment, Count Seven). The discussion of documents with Canete also occurred in the context of Ignacio's explanation that the Government was "trying to lay the Letelier thing" on him, that he was in touch with DINA to see "how things are going," and that if Canete encountered trouble with the authorities as a result of his work for the group, the group could place him on a safe farm in South America (Tr. 3236). All of these factors supported the jury's inference that Ignacio was securing the documents to help conceal the identity and whereabouts of CNM members who had conspired with a DINA member to assassinate Letelier.

Finally, the jury could find from Ignacio Novo's statment to the grand jury that he was engaged in a deliberate attempt to mislead the grand jury and sidetrack the investigation, especially since he had been informed only a month before of the identity of the perpetrators of the murders which he was informed that the grand jury was investigating.

Thus the various acts and statements made by Ignacio Novo revealed a consistent pattern of efforts to conceal his knowledge and aid the conspirators which provided more than sufficient evidence from which the jury could conclude that he was guilty of misprision of a felony.

XXIV. Appellant Ignacio Novo was properly sentenced to consecutive sentences on the false declarations and misprision counts.

Appellant Ignacio Novo puts misplaced reliance in the doctrine of double jeopardy as a bar to his sentences on the false declarations counts which, while concurrent with each other, were made consecutive to his sentence on the misprision count. He bases his argument on the speculation that the jury may have discounted other proof of the misprision and based their conviction solely on evidence of the false declaration, thus making false declarations a lesser included offense of misprision. The standard for evaluating such a double jeopardy claim was enunciated in Blockburger v. United States, 284 U.S. 299 (1932), wherein the Supreme Court held that "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Id. at 304. In considering the validity of consecutive sentences imposed for a felony murder based on rape and for the rape itself, the Supreme Court has recently applied the Blockburger rule to void those cumulative sentences. Whalen v. United States, No. 78-5471 (48 L.W. 4406, April 16, 1980). The Court held that consecutive sentences could not be imposed because a conviction for killing in the course of a rape could not be obtained without proving every element of the underlying rape.

In the instant case, it is obvious that proof of misprision of a felony does not generally require proof of false declaration to a grand jury. The particular evidence in this case happened to include the fact that Ignacio Novo lied to the grand jury, but certainly the Government was not required to prove false declaration as an element of misprision, as it is required to prove an underlying felony as an element of felony murder. The jury could have found that Ignacio's statements to the grand jury, even if not literally false as required for a false declaration conviction under Bronston, supra, were so misleading as to constitute an affirmative concealment of his knowledge about the murders. Such a finding would clearly support a verdict of guilty on the misprision count even if every element of the false declaration counts had not been proved. Under the doctrine of Blockburger and Whalen, then, appellant Ignacio Novo was properly sentenced to consecutive terms for the misprision and false declaration counts.

CONCLUSION

WHEREFORE, we respectfully submit that the judgment of the District Court as to all appellants should be affirmed.

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